Legalization of Medical and Recreational Marijuana at the State Level

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I. Introduction

Although the use of marijuana remains illegal under federal law, many states have legalized or decriminalized the use of marijuana in some form. Eight states, Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, and Washington, and the District of Columbia have legalized the recreational use of marijuana and twenty-nine states and the District of Columbia and Guam have legalized the use of medical marijuana. The legalization and decriminalization of marijuana presents new and unique challenges for employers. Employers must balance the need to provide a safe workplace with the rights of employees to use marijuana for medical and recreational purposes. Set forth below is a summary of the different federal and state laws concerning marijuana in the workplace and the effect those laws have on employer’s rights, obligations, and workplace policies.

II. Laws Dealing with Marijuana Use

a. General overview of the types of state statutes that are implicated by marijuana use
   i. Medical marijuana state laws

   In 1996, California voters passed Proposition 215, making the Golden State the first in the union to allow for the medical use of marijuana. Since then, twenty-eight more states, the District of Columbia and Guam have enacted similar laws. See State Medical Marijuana Laws, http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (Apr. 21, 2017). As of May 2017, total of 29 states, the District of Columbia and Guam now allow for comprehensive public medical marijuana and cannabis programs. Id.

   These state laws vary greatly in their criteria and implementation, and many states are experiencing vigorous internal debates about the safety, efficacy, and legality of their marijuana laws. Many local governments are even creating zoning and enforcement ordinances that prevent marijuana dispensaries from operating in their communities. Regulation of marijuana for purported medical use may also exist at the county and city level, in addition to state laws.

   ii. Recreational state laws

   In November 2012, Colorado and Washington became the first states to legalize, regulate, and tax small amounts of marijuana for nonmedicinal (so-called “recreational”) use by individuals over the age of twenty-one. As of 2017, Alaska, California, Colorado, the District of Columbia, Maine, Massachusetts, Nevada, Oregon, and Washington State have enacted laws that legalize marijuana use for recreational purposes. In these nine jurisdictions, an individual twenty-one years old or older can possess a limited amount of marijuana. For example, in Alaska, Colorado, Nevada, and Washington, an individual can possess up to one ounce of marijuana, in the District of Columbia, an individual can possess up to two ounces, and in Oregon an individual can possess up to eight ounces.

   Marijuana has become a lucrative business in the states that have legalized such use. In 2016, Colorado’s marijuana market sold over one billion dollars of legal marijuana. Huddleston, Tom, Colorado Topped $1 Billion in Legal Marijuana Sales in 2016, http://fortune.com/2016/12/13/colorado-billion-legal-marijuana-sales/ (Dec. 13, 2016). Given the significant revenue and jobs created by the industry, states with legal marijuana are likely to continue to support and fight for the industry despite the conflict with the federal law discussed below.
b. Intersection of state statutes with federal statutes

Congress enacted the Controlled Substances Act (CSA) as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. P.L. 91-513, 84 Stat. 1236 (1970). The purpose of the CSA is to regulate and facilitate the manufacture, distribution, and use of controlled substances for legitimate medical, scientific, research, and industrial purposes, and to prevent these substances from being diverted for illegal purposes. The CSA places various plants, drugs, and chemicals (such as narcotics, stimulants, depressants, hallucinogens, and anabolic steroids) into one of five schedules based on the substance's medical use, potential for abuse, and safety or dependence liability. 21 U.S.C. §§801 et seq.

Schedule I substances are deemed to have no currently accepted medical use in treatment and can only be used in very limited circumstances, whereas substances classified in Schedules II, III, IV, and V have recognized medical uses and may be manufactured, distributed, and used in accordance with the CSA. Marijuana has been listed as a Schedule I controlled substance. Therefore, the CSA prohibits the manufacture, distribution, dispensation and possession of marijuana even when state law authorizes its use to treat medical conditions.

Due to the number of states legalizing marijuana, the Department of Justice issued guidance to Federal prosecutors concerning marijuana enforcement under the CSA. The guidance states that the Department expects states that have legalized marijuana to establish strict regulatory schemes. See Guidance Regarding Marijuana Enforcement, https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf (Aug. 29, 2013). According to the press release issued with the guidance, the expectation is that these regulatory schemes “must be tough in practice, not just on paper, and include strong, state-based enforcement efforts, backed by adequate funding.” Justice Department Announces Update to Marijuana Enforcement Policy, https://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy (Aug. 29, 2013). The press release further states that based on assurances from states that they would impose appropriately strict regulatory systems, the Department is “deferring its right to challenge [state] legalization laws at this time.”

Since the issuance of the August 29, 2013 guidance, the Department has yet to interfere with states’ legalization of marijuana. Nonetheless, given the change in administration, it is unclear whether the Department will continue to abide by its statements in the press release and guidance. On April 5, 2017, Attorney General Jeff Sessions issued a memorandum concerning the Task Force on Crime Reduction and Public Safety. In that memorandum, Sessions stated that the Task Force will be reviewing “existing polices in the areas of charging, sentencing, and marijuana to ensure consistency with the Department’s overall strategy on reducing violent crime and with Administration goals and priorities.” See Update on the Task Force on Crime Reduction and Public Safety, https://www.justice.gov/opa/press-release/file/955476/download (Apr. 5, 2017) (emphasis added). The Task Force is expected to report back with initial recommendations concerning marijuana policy by July 29, 2017. As Sessions has not explicitly set forth his position on marijuana, there is some uncertainty as to whether the Task Force’s review will result in a change in policy concerning state legalization of marijuana.

c. Considerations for federal contractors

Some employers may face the loss of federal funding or could be subject to administrative fines if they do not maintain and enforce policies aimed at achieving a drug-free, safe workplace. The federal Drug-Free Workplace Act of 1988 (DFWA) imposes a drug-free workplace requirement on any entity that receives federal contracts with a value of more than $100,000.00 or that receives any federal grant. 41 U.S.C. §§701 et seq.; U.S. Dept. of Labor, Drug-Free Workplace Act of 1988 Requirements, available at http://www.dol.gov/elaws/asp/drugfree/screenr.htm (July 8, 2017).
DFWA requires these entities to make ongoing, good faith efforts to comply with the drug-free workplace requirement in order to qualify, and remain eligible, for federal funds. See U.S. Dept. of Labor, Drug-Free Workplace Act of 1988 Requirements for Individuals, available at http://www.dol.gov/elaws/asp/drugfree/req_ind.htm (July 8, 2017) (“Any individual who receives a contract or grant from the Federal government, regardless of dollar value, must agree not to engage in the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance in the performance of this contract/grant.”); and U.S. Dept. of Labor, Drug-Free Workplace Act of 1988 Requirements for Organizations, available at http://www.dol.gov/elaws/asp/drugfree/require.htm (July 8, 2017) (“All organizations covered by the Drug-Free Workplace Act of 1988 are required to provide a drug-free workplace by . . . [publishing] and [giving] a policy statement to all covered employees informing them that the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the covered workplace and specifying the actions that will be taken against employees who violate the policy). Employees who work for federal contractors and grantees could potentially be subject to employer discipline or even termination if they use marijuana while on the job or show up for work under the influence of marijuana, even if the marijuana use is permitted by state law, as such usage may create risks to others’ safety.

The Drug-Free Schools and Communities Act Amendment of 1989 renders any institution of higher education ineligible for federal funding if it fails to establish and implement a program to prevent the abuse of illicit drugs by students and employees on campus grounds.

Employers under the jurisdiction of the Occupational Safety and Health Administration have a general duty to provide to their employees a safe workplace under the Occupational Safety and Health Act. 29 U.S.C. §651 et seq. An employee who uses marijuana at work may be considered a workplace hazard if he or she poses a danger to other workers; employers thus risk administrative fines if they do not enforce policies that seek to avoid such a hazard.

d. Implications related to workers’ compensation

Language in Colorado law is similar to other states, including Michigan, Montana and Vermont, which provides there is nothing in the law that requires a government medical assistance program or private health insurer to reimburse a person for the costs associated with medical marijuana. “No governmental, private, or any other health insurance provider shall be required to be liable for any claim for reimbursement for the medical use of marijuana.” Colo. Const. Art XVIII §14(10)(a).

Washington law provides for insurers to enact coverage or non-coverage criteria for payment or nonpayment in its sole discretion. “Nothing in this chapter establishes a right of care as a covered benefit or requires any state purchased health care as defined by RCW 41.05.022 or other health carrier or health plan as defined in Title 48 RCW to be liable for any claim for reimbursement for the medical use of marijuana. Such entities may enact coverage or non-coverage criteria or related policies for payment or non-payment of medical marijuana in their sole discretion.” 17 Wash. Rev. Code §69.51A.060(2).

New Mexico law provides that the workers compensation system is required to pay for an employee’s medical marijuana in a workers’ compensation case. Vialpando v. Ben’s Auto Servs., 331 P.3d 975 (N.M. App. 2014).

e. Implications related to unemployment

States are divided on the issue whether or not an employee terminated for testing positive for marijuana in violation of the employer’s zero-tolerance drug policy when he has a valid and current medical marijuana card can collect unemployment benefits.
III. Marijuana Use by Employees

Although the conflict between state and federal law creates confusion for employers concerning the legality of marijuana use by employees, it has not stopped employees from using marijuana. According to the annual Quest Diagnostics Drug Testing Index, which was most recently updated on May 16, 2017, drug use in the American workforce has reached the highest positivity rate in twelve years. See Increases in Illicit Drugs, Including Cocaine, Drive Workforce Drug Positivity to Highest Rate in 12 Years, http://www.questdiagnostics.com/home/physicians/health-trends/drug-testing.html (May 16, 2017). According to the study, marijuana positivity in oral fluids testing, which detects recent drug use, has increased nearly seventy-five percent since 2013. Id. Additionally, marijuana positivity rates in Colorado and Washington, the first states to legalize recreational marijuana, outpaced the national average for the first time since legalization. Id. In Colorado, marijuana positivity increased eleven percent since 2015, and in Washington, marijuana positivity increased nine percent since 2015. Id. According to a 2016 Gallup poll, one in eight adults in the United States smokes marijuana. This is nearly double the percentage that reported such use in a 2013 Gallup survey.

Given the prevalence of marijuana use in our society, employers must establish clear policies and procedures for addressing marijuana use by employees. When employers have explicit drug policies, employees may still be terminated for violating those policies, even if marijuana is legal in their state. Despite the recent trend towards legalization, courts have consistently rejected claims by employees for wrongful discharge relating to marijuana use.

a. In Roe v. TeleTech Customer Care Mgmt. LLC, 257 P.3d 586, 589 (Wash. 2011), an employee was using medical marijuana to treat her migraines in compliance with the Washington State Medical Use Marijuana Act (MUMA). After she failed an initial drug screening, the employer terminated the employee for violating the employer’s drug policy. Id. Following her termination, the employee alleged that she had been wrongfully terminated in violation of public policy and the MUMA. Id. The Supreme Court of Washington held that the MUMA does not prohibit an employer from discharging an employee for authorized use of medical marijuana. Id. at 590. In so holding, the court found that the MUMA only provides an affirmative defense to state criminal prosecutions of medical marijuana users and does not require an employer to accommodate an employee's off-site use of medical marijuana. Id. The only reference to employment in the MUMA is an explicit statement against requiring employers to accommodate on-site medical marijuana use. See id. (“Nothing in [the MUMA] requires any accommodation of any on-site medical use of marijuana in any place of employment”). The court further held that an explicit statement against on-site accommodation does not mean an implicit obligation to accommodate off-site medical marijuana use. Id. at 591. Additionally, the court ruled that the MUMA does not demonstrate a clear public policy to allow an employee to bring a wrongful termination claim for using medical marijuana. Id. at 597.

b. In Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 431 (6th Cir. 2012), an employee was using medical marijuana to treat his sinus cancer and brain tumor in compliance with Michigan's Medical Marihuana Act (MMMA). The employee was injured on the job and was given a drug test in accordance with the employer's drug policy. Id. at 432. After failing the drug test, the employee showed his employer his medical marijuana registration card. Id. Despite his qualifying card, the employee was terminated for violating the employer's drug policy. Id. Under MMMA, “a qualifying patient…shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau.” Id. at 435. At issue was the meaning
of the term “business” under MMMA. Id. at 435. The district court found that the word “business” means the type of licensing board and does not govern private employment actions. Id. at 435-36. On appeal, the Sixth Circuit upheld the district court’s ruling that MMMA does not govern private employment actions and only gives medical marijuana users protections from state prosecutions. Id. at 435. In so holding, the court agreed with the district court’s finding that the “MMMA contains no language stating that it repeals the general rule of at-will employment in Michigan or that it otherwise limits the range of allowable private decisions by Michigan businesses.” Id.

c. In Coats v. Dish Network, LLC, 350 P.3d 849, 850 (Colo. 2015), the Colorado Supreme Court affirmed the Colorado Court of Appeals’ decision that an employee’s off-duty medical marijuana use was not a ‘lawful’ activity under Colorado’s ‘lawful activities statute, C.R.S. §24-44-402.5. In Coats, the employee filed a wrongful termination lawsuit alleging that his employer violated the “lawful activities statute,” which makes “it an unfair and discriminatory labor practice to discharge an employee based on the employee’s lawful outside-of-work activities.” Id. The employee was a quadriplegic, who was using medical marijuana off-duty in compliance with the Colorado medical marijuana statute. Id. He was terminated after failing a random drug test in violation of the employer’s drug policy. Id. At issue was whether the use of marijuana in compliance with Colorado’s medical marijuana statute, but in violation of federal law, was a “lawful” activity under Colorado’s lawful activities statute. Id. The court reasoned that an activity was “lawful” if it was permitted by both federal and state law. Id. at 852. Because marijuana was illegal under federal law pursuant to the federal Controlled Substances Act (CSA), the Court held that an employee’s off-duty marijuana use was not a “lawful activity” protected by Colorado’s lawful activities statute. Id. at 853.

Although all of the above courts rejected the employees’ claims for wrongful discharge, it is important to note that none of the legalizing statutes at issue in the above cases contained explicit protections for employees. The extent and scope of state legalizing statutes vary greatly. Some states have specifically provided legal protections for employees who use marijuana in accordance with state law. For example, the Arizona medical marijuana legalizing statute states, “[u]nless a failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon either: (1) the person’s status as a cardholder; or (2) a registered qualifying patient’s positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment.” Ariz. Rev. Stat. §36-2813(B).

Similarly, under Illinois law, an employer cannot penalize or refuse to employ an individual solely because of that individual’s status as medical marijuana cardholder unless failing to do so would cause the employer to lose a monetary or licensing-related benefit under federal law. 410 Ill. Comp. Stat. Ann. 130/40. Given the differences in state legalizing statutes, employers must ensure that their policies and practices comply with their state’s law and do not violate any protections afforded to employees.

IV. Marijuana and the ADA

As the majority of states now allow marijuana use in some form, questions have arisen concerning the manner in which the use of medical marijuana and recreational marijuana affect an employee’s rights and an employer’s responsibilities under the American with Disabilities Act and the Americans with Disabilities Act Amendment Act of 2008 (collectively the “ADA”).
The ADA protects employees from disability discrimination. See 42 U.S.C. §12112(a). Under the ADA, disability discrimination occurs when an employer or entity covered by the ADA treats a qualified individual with a disability, who is either an employee or job applicant, unfavorably due to his or her disability.

a. Definition of Disability
   i. Under the ADA, an employee can demonstrate that he or she has a disability by establishing that:
      • He or she has a physical or mental impairment that substantially limits one or more major life activity;
      • He or she has a record of such impairment; or
      • He or she is regarded as having such an impairment. See 42 U.S.C. §12102(1).

b. Physical or Mental Impairment
   i. Physical or mental impairment is defined by the regulations as:
      • “Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body system, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine;” or
      • “Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.” 29 C.F.R. §1630.2(h).
   ii. Despite the broad definition of impairment, not all impairments will qualify as disabilities under the ADA. 29 C.F.R. §1630.2(j)(ii). To qualify, the physical or mental impairment must substantially limit the person's ability to perform a major life activity as compared to the general population.
   iii. Examples of major life activities include: “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interactive with others, and working.” 29 C.F.R. §1630.2(i).
   iv. The term “substantially limits” is construed broadly in favor of protection or coverage under the ADA.

c. Reasonable Accommodation under the ADA
   i. Under the ADA, it is unlawful for an employer not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operations of its business.
   ii. Undue hardship means an action requiring significant difficulty or expense, when considered in light of the nature and costs of the accommodation needed, the overall size and financial resources of the employer, and the impact on the operations of the employer.
   iii. It should be noted that while the employer is required to accommodate employees or potential employees, the employer is not required to provide the exact accommodation that the employee or potential employee requests. Further, the employer is generally not
required to provide a reasonable accommodation unless the employee with the disability has requested an accommodation.

d. Marijuana Use and Reasonable Accommodation under the ADA

i. Under the ADA, the term “individual with a disability” does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use. 42 U.S.C. §12111(a).

ii. The term ‘illegal use of drugs’ is defined as the use of drugs that is unlawful under the federal Controlled Substances Act (CSA). 42 U.S.C. §12111(d)(1). Under the CSA, marijuana remains illegal.

iii. There are, however, exceptions to this prohibition, including drug use supervised by a licensed health care professional, and “other uses authorized by the [CSA] or other provisions of Federal law.” 42 U.S.C. §12111(d)(1).

iv. Accordingly, the question arises whether this exception applies to the use of medical marijuana under the supervision of a health care professional. At least one circuit has determined that it does not.

v. In *James v. City of Costa Mesa*, 700 F.3d. 394 (9th Cir. 2012), the Ninth Circuit concluded that doctor supervised marijuana use is an illegal use of drugs not covered by the ADA's supervised use exception. In that case, plaintiffs were severely disabled and obtained recommendations for medical marijuana as permitted by California law. *Id.* at 396. The plaintiffs obtained medical marijuana from dispensaries located in various cities; however, the cities were taking steps to close the dispensaries. *Id.* In an effort to prevent the shutdown of the dispensaries, plaintiffs brought claims alleging that the cities’ actions violated Title II of the ADA by denying them the benefit of public services. *Id.* The court rejected the argument that medical marijuana use falls within the exception for drug use supervised by a licensed health care professional. *Id.* at 402. The court noted that “to conclude that use of marijuana for medical purposes is not an illegal use of drugs under the ADA would undermine the CSA’s clear statement that marijuana is an unlawful controlled substance that has no currently accepted medical use in treatment in the United States.” *Id.* The court also rejected the argument that medical marijuana use falls within the exception for drug use authorized by other provisions of federal law. *Id.*

vi. Although the court in *James* ultimately determined that the plaintiffs’ medical marijuana use was not protected by the ADA, it specifically noted that it was not holding that “medical marijuana users are not protected by the ADA in any circumstance.” *Id.* at 397, n. 3. Instead, the court held “that the ADA does not protect medical marijuana users who claim to face discrimination on the basis of their marijuana use.” *Id.*

vii. Relying on the court's footnote in *James*, the court in *EEOC v. Pines of Clarkston*, 2015 WL 1951945, at *1 (E.D. Mich. April 29, 2015) denied an employer's motion for summary judgment and permitted the EEOC to proceed on a case for disability discrimination under the ADA on behalf of an epileptic nurse administrator who used medical marijuana to treat her epilepsy. In that case, the nurse was terminated after failing a pre-employment drug test. *Id.* Following her termination, she filed a claim alleging that the employer had terminated her because of her epilepsy not her medical marijuana use. *Id.* In denying the employer's motion, the court held that “[w]hile [the employer] is no doubt correct that discharge for
illegal drug use is a permissible non-discriminatory reason,” the nurse raised a genuine issue of material fact as to whether her epilepsy, not the drug test, was the actual reason for her termination. *Id.* at *5.

e. Drug-Free Workplace under the ADA

i. The ADA expressly allows employers to ensure that their workplaces are free from the illegal use of drugs and the use of alcohol by implementing the following measures:

- An employer may prohibit the illegal use of drugs and the use of alcohol at the workplace;
- An employer may require that employees shall not be under the influence of alcohol or engaging in the illegal use of drugs at work;
- An employer may require employees to behave in conformity with the Drug-Free Workplace Act of 1988;
- An employer may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification or job performance standards that are set for other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and
- Employers may require employees to follow rules set by federal agencies such as the Department of Defense and Transportation and the Nuclear Regulatory Commission pertaining to drug and alcohol use in the workplace, particularly for employees in “safety-sensitive” positions.

ii. The ADA also expressly provides that a drug test ‘shall not be considered a medical examination’ and permits employers to test job applicants or employees for illegal drugs and to make employment decisions based on those tests. 42 U.S.C. §12114(d).

f. Recent Case Law Concerning an Employer’s Duty to Provide a Reasonable Accommodation for Marijuana Users Under State Law

In *James*, the Ninth Circuit noted that for claims of discrimination brought under the ADA, federal, rather than state, law applies to the definition of illegal drug use. *James*, 700 F.3d at 397. This begs the question of whether state law concerning marijuana use applies to disability discrimination claims brought under state anti-discrimination statutes. Set forth below is a summary of recent decisions applying state law to disability discrimination claims involving employee use of marijuana. To date, courts across the country have consistently held that employers have no duty to provide a reasonable accommodation for an employee’s use of medical marijuana in accordance with state law. Notably, however, none of the states listed below have affirmative requirements mandating that an employer accommodate a medical marijuana user. The outcome may be different if a state statute provides for accommodation of employees who use medical marijuana.

i. In *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200, 203 (Cal. 2008), the employee was a qualified individual with a disability under the California Fair Employment and House Act (FEHA) and used medical marijuana pursuant to the Compassionate Use Act of 1996. The employee was terminated after failing a pre-employment drug test. *Id.* Following his termination, the employee brought a disability-based discrimination lawsuit, claiming the employer violated the FEHA by terminating him because of, and by failing to provide a reasonable accommodation for, his disability and in violation of public policy. *Id.* The California Supreme Court held that the employee failed to state a cause of action because the California’s medical marijuana law “merely exempted medical users and their primary
caregivers from criminal liability...Nothing in the text or history of the Compassionate Use Act suggests the voter intended the measure to address the respective rights and obligations of employers and employees.” *Id.* at 204. Moreover, medical marijuana remains illegal under federal law, and the FEHA does not require employers to accommodate the illegal use of drugs. *Id.* The court also rejected the employee's public policy argument finding that the Compassionate Use Act does not speak employment law nor does it establish a fundamental public policy requiring employers to accommodate marijuana users. *Id.* at 208.

ii. Similarly, in *Johnson v. Columbia Falls Aluminum Co., LLC*, 2009 WL 865308, at *1 (Mont. Mar. 31, 2009), the employee used medical marijuana in compliance with Montana's Medical Marijuana Act (MMA). As the result of his medical marijuana use, the employee failed a drug test and was terminated for violation of the employer's drug policy and the union's collective bargaining agreement. *Id.* At issue on appeal was whether the employer violated the Montana Human Rights Act (MHRA) and the ADA when it failed to accommodate the employee's medical marijuana use. *Id.* at *5. The Montana Supreme Court held that the MMA does not require an employer to accommodate a medical marijuana user and, thus, “a failure to accommodate use of medical marijuana does not violate the MHRA or the ADA since an employer is not required to accommodate an employee's use of medical marijuana.” *Id.*

iii. In *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 521 (Or. 2010), the employer sought review of Bureau of Labor and Industries' (BOLI) decision, which concluded that the employer engaged in disability discrimination when it terminated the employee for using medical marijuana in compliance with the Oregon Medical Marijuana Act (OMMA). The employee claimed that his former employer failed to accommodate his disability when he was discharged after informing his employer that he used medical marijuana. *Id.* at 520-21. The employer argued that the Oregon employment discrimination statute must be interpreted consistently with the ADA, which does not apply to individuals engaged in the illegal use of drugs. *Id.* at 521. At issue was whether the sections of OMMA, which authorizes medical marijuana use, was preempted by the federal CSA, which prohibits medical marijuana use. *Id.* at 520. The OMMA “authorizes persons holding a registry identification card to use marijuana for medical purposes . . . It also exempts those persons from state criminal liability for manufacturing, delivering, and possessing marijuana, provided certain conditions are met.” *Id.* at 519-20. The court held that the employer did not have a duty to accommodate the employee's medical marijuana use because federal law, which prohibits marijuana use, preempts the section of OMMA, which authorizes medical marijuana use. *Id.* at 529. In so holding, the court determined that a state law that authorizes the use of medical marijuana which federal law prohibits “stands as an obstacle” to the enforcement of the federal CSA, which prohibits marijuana use. *Id.* Consequently, a state law that conflicts with federal law is “without effect.” *Id.* Since the OMMA conflicted with the federal CSA, it was not enforceable when the employer terminated the employee. *Id.* Accordingly, no state law authorized the employee's use of medical marijuana. *Id.* Because the employee was engaged in the illegal use of drugs and the employer terminated him for that reason, the employee was not covered under Oregon's employment discrimination.

iv. In *Garcia v. Tractor Supply Co.*, 2016 WL 93717, at *2 (D. N.M. Jan. 7, 2016), the employee used medical marijuana in compliance with the New Mexico Medical Cannabis Program,
which is authorized by the Lynn and Erin Compassionate Use Act (CUA) to treat his HIV/AIDS, a serious medical condition under New Mexico Human Rights Act. \textit{Id.} During his job interview, the employee disclosed his participation in the cannabis program. \textit{Id.} The employee was hired, took a drug test, and was subsequently discharged on the basis of the positive drug test. \textit{Id.} Following his termination, the employee brought suit alleging his termination violated New Mexico’s Human Rights Act and that CUA requires an employer to accommodate his medical marijuana use. \textit{Id.} The court found that the CUA did not include an affirmative requirement that employer’s accommodate a drug that is still illegal under federal law. \textit{Id.} at *3. The employee also argued that because New Mexico’s Workers’ Compensation Act authorizes reimbursement for medical marijuana that New Mexico courts would find medical marijuana to be reasonable accommodation under New Mexico Human Rights Act, but the court found that “requiring an insurance carrier to reimburse medical treatments that have been approved by a physician in a regulated system, such as medical marijuana” is different from “requiring that a national employer permit and accommodate an individual’s marijuana use that is illegal under federal law.” \textit{Id.} The court found that public policy issues would force the employer to modify its drug-free policy in each state that has legalized marijuana. \textit{Id.} In conclusion, the court found that CUA and New Mexico Human Rights Act does not require the employer to accommodate a medical marijuana user. \textit{Id.}

\textbf{V. Conclusion}

Despite the fact that marijuana remains illegal under federal law, state legalization of marijuana does not appear to be a fleeting trend. Employees are using marijuana more than ever, and employers must address the issue. Implementation of explicit polices and procedures concerning marijuana use and drug testing can assist employers in ensuring a safe and productive workplace. Employers must, however, be aware of all state, local, and federal laws governing the use of marijuana and must ensure that their polices and procedures comply with the applicable laws.