BUSINESS INFORMATION GROUP

white paper

THE EVOLVING WORLD OF MEDICAL MARIJUANA AND EMPLOYMENT DRUG SCREENING

Navigating the fragmented legal landscape

Given the diverse and global nature of today's workforce, employers recognize the need to proactively detect and eliminate problematic behaviors before they cause disruptions or other serious issues in the workplace.

With an eye on maximizing employee and workplace safety and minimizing the risks associated with impaired human capital, companies have traditionally accepted a zero-tolerance drug-free workplace policy as the safest and most obvious solution. However, the recent surge in state laws allowing patients to legally access marijuana for medicinal purposes has resulted in a growing area of concern and uncertainty for human resources departments—determining whether a company can discharge an applicant or employee who tests positive for marijuana but provides the company with a valid medical marijuana prescription has become increasingly challenging for employers given the fragmented legal landscape.

First, it is important to recognize that there are no clear-cut answers on this issue given the changing nature of the law in this area. Nonetheless, given the current legal landscape, the answer to this question will depend on several factors, including whether the employer or position is federally regulated and whether the state has adopted a medical marijuana law that protects employees who lawfully use medical marijuana. The issue may be more straightforward when the position in question is subject to safety standards imposed by a federal regulation or when the state at issue does not have a medical marijuana program in place. The answer is also fairly straightforward when a state's medical marijuana statute explicitly states that employers have no duty to accommodate an applicant's or employee's use of medical marijuana. All of these situations generally

allow an employer to maintain a zero-tolerance drug-free workplace policy and terminate an applicant or employee who tests positive for marijuana, even when a valid prescription is produced.

However, some states have adopted medical marijuana laws that are either silent on an employer's obligations/employee's rights, or otherwise include broad anti-discrimination language that does not explicitly address the employment context. Employers operating in these states must review the statutory language and case law carefully to determine whether such laws require accommodations in the employment context.

Further, some states have laws that explicitly protect medical marijuana users through anti-discrimination or reasonable accommodation provisions addressed at employers. These laws may include language that prohibits employers from discriminating against applicants or employees based on their use of medical marijuana, or that requires employers to provide reasonable accommodations to medical marijuana users. Employers operating in these states need to be cautious with employment drug screening practices, ensuring that such practices are fully vetted on a regular basis by legal counsel. Furthermore, all employers must remain vigilant and attentive to developing case law surrounding this issue and potential legislative action in other states that may create similar protections for medical marijuana users.

FEDERAL CONTRACTORS AND FEDERALLY REGULATED POSITIONS

The Drug Free Workplace Act (DFWA) requires federal contractors to prohibit the "unlawful … use of a controlled substance" by employees in their workplace as a condition of employment.[1] These restrictions also apply to federal grant recipients.[2] However, the above language arguably does not expressly require employers to terminate employees who test positive for a controlled substance, such as marijuana.[3]

In *Noffsinger v. SSC Niantic Operating Co.*, a Connecticut federal district court held that the DFWA does not conflict with a Connecticut state law

1 *See* 41 U.S.C. Sec. 8102 (a).
2 *Id.* at Sec. 8103 (a).
3 Marijuana is currently listed as a Schedule I controlled substance under the Controlled Substances Act. *See* 21 U.S.C. Sec. 812 (b)(1).

prohibiting discrimination against medical marijuana users and concluded that the DFWA did not preempt the state law's protections afforded to medical marijuana users.[4] The court explained that the DFWA **does not** (1) require drug testing in the workplace; or (2) require employers to terminate employees for a positive drug test. The court noted the DFWA only requires a good faith effort to maintain a drug-free work environment, which may be achieved through a drug policy or an employee education program.

Thus, some federal courts may join with Connecticut and conclude that states are still able to enact laws that protect medical marijuana users without conflicting with federal law. In the aforementioned case, Connecticut's medical marijuana statute—The Palliative Use of Marijuana Act (PUMA)—expressly made it unlawful to refuse to hire or to discharge an employee solely because of the individual's status as a qualifying patient. **Therefore, federal contractors and grant recipients who seek to strictly enforce a drug-free work environment under the DFWA, making no exceptions for medical marijuana users, should carefully consider and review with counsel any applicable state laws that explicitly protect medical marijuana users.**

Some positions may be regulated by federal agencies and thus may be required to abide by the safety standards imposed by such agencies. These federal guidelines arguably do not allow regulated employees, such as those in safety-sensitive positions, to use marijuana even if it is pursuant to a valid prescription under state law. One example of this is the U.S. Department of Transportation (DOT)'s Drug and Alcohol Testing Regulation for safety-sensitive transportation employees—including pilots, school bus drivers, truck drivers, train engineers, subway operators, aircraft maintenance personnel, transit fire-armed security personnel, ship captains, and pipeline emergency response personnel, among others—which does not authorize "medical marijuana" under a state law to be a valid medical explanation for a transportation employee's positive drug test result.[5]

Thus, employers subject to federal regulations that require testing for marijuana use must also follow these requirements and may do so without violating state law.

4 *Noffsinger v. SSC Niantic Operating Co, LLC*, d/b/a Bride Brook Nursing & Rehab. Ctr Act., 273 F. Supp. 3d 326. (D. Conn. Sept. 5,2018).
5 DOT 'Medical' Marijuana Notice, U.S. DEPT. OF TRANSP. (Nov. 19, 2015), http://www.transportation.gov/odapc/medical-marijuana-notice

STATES WITHOUT MEDICAL MARIJUANA PROGRAMS

As previously mentioned, marijuana remains a Schedule I controlled substance that is illegal under federal law. Following from this, employers operating in states that have not legalized medical marijuana are likely free to strictly enforce zero-tolerance drug-free workplace policies, terminating any applicant or employee who tests positive for marijuana or any other prohibited substance under the federal Controlled Substances Act.

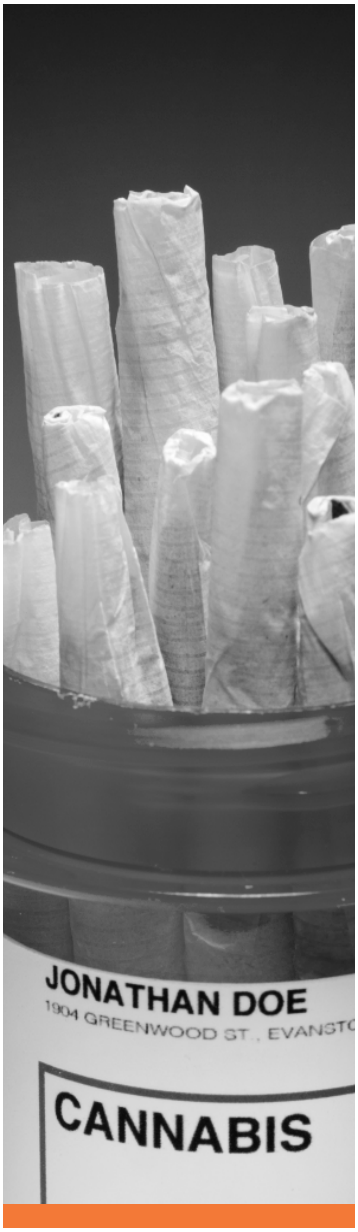
However, such decisions must be grounded strictly in the positive drug test, without any other contributing factors that could be considered discriminatory or are otherwise protected by federal law. In *James v. City of Costa Mesa,*[6] the Ninth Circuit Court of Appeals held that the Americans with Disabilities Act (ADA) does not cover medical marijuana use since marijuana is classified as a Schedule I controlled substance under federal law. Nonetheless, in the same opinion, the Ninth Circuit clarified that it was not ruling that medical marijuana users have no protection under the ADA in any circumstances, but only that the ADA does not protect medical marijuana users who claim to face discrimination on the basis of their marijuana use. The court clarified that a medical marijuana user may still be protected under the ADA if he or she has another condition that meets the ADA's definition of a disability.[7] The Equal Employment Opportunity Commission (EEOC) has recently used this holding to file a case arguing that an employer's stated reason for terminating an employee—because he tested positive for marijuana—was only pretext for the actual reason— because the employee suffers from epilepsy.[8]

STATES WITH MEDICAL MARIJUANA PROGRAMS

As previously noted, the question of whether an employer can discharge an employee for his or her off-duty use of medical marijuana becomes more difficult for employers in one of the 35 jurisdictions that have legalized medical marijuana.

Generally, few states remain that have laws allowing employers to implement a policy of discharging applicants or employees for testing positive for marijuana regardless of the circumstances. Some cases have analyzed states' statutory language and

6 700 F.3d 394 (9th Cir. 2012).
7 *Id.* at 397 n.3.
8 *See* EEOC v. The Pines of Clarkston, Inc., Civil Action No. 2:13- cv- 14076 (E.D. Mich. Feb. 6, 2015).



have upheld an employer's right to enforce a drug-free workplace policy and terminate an applicant or employee for a positive drug test even though the applicant or employee produced a valid medical marijuana prescription. However, it is important to note that these cases are generally concentrated in states with medical marijuana statutes that explicitly state that employers have no duty to accommodate medical marijuana users, are silent on the issue, or where courts refuse to interpret statutory anti-discrimination provisions broadly.

The employer's rights and responsibilities with respect to enforcing a drug-free workplace policy become more complicated when courts broadly interpret anti-discrimination language in state medical marijuana laws, finding an implicit protection for medical marijuana users in the employment context. Further, employers with zero-tolerance policies face the highest risk in states where medical marijuana statutes explicitly provide protection for medical marijuana users through anti-discrimination or reasonable accommodation provisions addressed at employers.

Thus, an employer's rights and obligations under state law likely turns on whether the state's law contains language that either explicitly or implicitly provides medical marijuana users with some sort of protection in the employment context. If the state's law contains no such language, then employers in that state may be free to strictly enforce drug-free workplace policies, making no exceptions for medical marijuana users. However, if the state's law does include language protecting medical marijuana users, then employers in that state will have to carefully review the statutory language and determine whether their employment drug testing policies are lawful under such laws.

1. STATES WHERE EMPLOYERS HAVE NO DUTY TO ACCOMMODATE MEDICAL MARIJUANA USE

Seven states—Alaska[9], Colorado[10], Georgia[11], Montana[12], Ohio[13],

9 Alaska Stat. § 17.37.030 (d).
10 Col. Const. Art. XVIII, § 14. (10) (b).
11 Ga. Code Ann. § 16-12-190; Ga. Code Ann. § 16-12-230 (states that an employer does not have to permit or accommodate the use or consumption of marijuana and is allowed to have and enforce a written zero tolerance policy prohibiting the on-duty, and off-duty, use of marijuana).
12 Mont. Code Ann. § 59-46-320 (5)(a).
13 Ohio Re. Code Ann § 3796.28 (A)

Oregon[14], and Washington[15]—have statutes that explicitly state that nothing in the law should be construed to require an employer to accommodate the medical use of marijuana in any workplace.

The language in these states' statutes is generally very broad and can be interpreted as allowing employers to enforce zero-tolerance drug-free workplace policies—i.e. allowing employers to terminate an applicant or employee who tests positive for marijuana, even if the marijuana use was pursuant to a valid prescription and outside of the workplace. This interpretation has been confirmed by state courts in Oregon, Montana, and Washington.

Washington's law states that an employer does not have to accommodate medical marijuana use if it establishes a drug-free workplace.[16]The Washington State Supreme Court confirmed this in 2011, when it held that the state's Medical Use of Marijuana Act (MUMA) does not provide a civil cause of action for wrongful termination based on an employee's authorized medical marijuana use.[17] This case involved an applicant who used medical marijuana outside of the workplace, and while the MUMA only states that the law does not "require any accommodation of any medical marijuana use in any place of employment," the court refused to read this language as requiring an employer to accommodate medical marijuana use outside the workplace, since no such requirement was explicitly stated.

A federal district court in Washington reiterated this position in *Swaw v. Safeway, Inc.,* holding that an employer can terminate an employee for using marijuana, even when the employee has a prescription and only used marijuana outside the workplace.[18] In this case, Safeway conducted a drug test after a workplace injury, which was consistent with its written policy. The employee tested positive for marijuana and explained that it was due to his use of medical marijuana outside of the workplace. Nonetheless, Safeway chose to terminate the employee in accordance with its drug-free workplace policy which prohibited employees from testing positive for a controlled substance on the job or on company premises. Safeway's policy defined "controlled substance" to include "all chemical substances or drugs listed in any controlled substances acts or regulations applicable under federal, state or local laws."

The employee filed a disability discrimination lawsuit against Safeway, arguing that Safeway wrongfully terminated him for using medical marijuana for a disability, but the Court dismissed these claims and held that Washington law does not impose a duty on

14 Or. Rev. Stat.§ 475.340
15 R.C.W. § 69.51A.060 (6)
16 Wash. Rev. Code Ann. Sec. 69.51A.060.
17 *Roe v. TeleTech Consumer Care Mgmt., LLC,* 257 P.3d 586 (Wash. June 9, 2011).
18 *Swaw v. Safeway, Inc.,* No. C15-939 (W.D. Wash. Nov. 20, 2015).

employers to accommodate medical marijuana in drug-free workplaces. The court noted that unlike alcohol, marijuana remains a controlled substance that is illegal under federal law, and because users of an illegal substance are not a protected class, the employee could not state a claim for employment discrimination on the basis of a disability. Notably, this decision came after MUMA was amended to add that "nothing in this chapter requires an accommodation for the medical use of cannabis if an employer has a drug-free work place."[19]

The Oregon Supreme Court[20] and Montana Supreme Court[21] have both also held that employers have no duty to accommodate an employee's use of medical marijuana. Oregon's law provides that "nothing in [the Oregon Medical Marijuana Act] shall be construed to require: … (2) An employer to accommodate the medical use of marijuana in any workplace."[22] The medical marijuana law in Montana similarly states that nothing in the law should be construed as requiring an employer to accommodate the use of medical marijuana, but goes even further by stating that nothing in the law should be construed to permit a cause of action against an employer for wrongful discharge or discrimination.[23]

Thus, employers in states with statutory language that explicitly provides that employers have no duty to accommodate medical marijuana users are likely safe to rely on such language when discharging applicants or employees for drug screens that come back positive for marijuana.

2. STATES WITH STATUTES THAT ARE SILENT ON OFF-DUTY MEDICAL MARIJUANA USE IN THE EMPLOYMENT CONTEXT

Twelve states and the District of Columbia[24] have statutes legalizing medical marijuana, but that are silent on the issue of whether an employer does or does not have an obligation to accommodate an employee's medical marijuana use. Notably, some of these laws include general anti-discrimination language that courts have broadly interpreted to apply in the employment context.

These states are California[25], Florida[26], Hawaii[27], Louisiana[28], Maryland[29], Massachusetts[30], Michigan[31], Missouri,[32] New Hampshire[33], North Dakota[34], Utah[35]and Vermont[36]. Some of these states may have

19 Wash. Rev. Code Ann. Sec 69.51A.060 (6).
20 *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. Apr. 15, 2010).
21 *Johnson v. Columbia Falls Aluminum*, 213 P.3d 789 (Mont. Mar. 31, 2009).
22 Or. Rev. Stat. Sec. 475.340.
23 Mont. Code Ann. § 50-46-320.
24 The relevant medical marijuana law can be found at D.C. Code §7-1671.02. The DC Department of Human Resources manual for its government employees states "the use of medical marijuana for a qualifying medical condition or to relieve side effects of a qualifying medical treatment, is to be treated as any other form of prescription medication as it relates to the District government's drug testing requirement." https://dchr.dc.gov/sites/default/files/dc/sites/dchr/publication/attachments/edpm_4_32_med_marijuana.pdf.
25 Calif. Health & Safety Code § 11362.785(a).
26 Fla. Stat. § 381.986 (15). Notably, while Florida's law does not go as far as providing employers with explicit protections, it does state that employers can continue to enforce drug-free workplace policies. "This section does not limit the ability of an employer to establish, continue, or enforce a drug-free workplace program or policy. This section does not require an employer to accommodate the medical use of marijuana in any workplace or any employee working while under the influence of marijuana. This section does not create a cause of action against an employer for wrongful discharge or discrimination."
27 Haw. Rev. Stat. § 329-122(c).
28 LA R.S. § 40:1046.
29 MD Code § 13-3301.
30 935 CMR 501.840.
31 Mich. Comp. Laws § 333.26424(c).
32 Missouri amended its Constitution, effective December 2018. Amendment 2 (ballot measure).
33 N.H. Rev. Stat. Ann. 126-W:3(III).
34 N.D.C.C. § 19-24.1-34.
35 Utah Code 26-61a-111.
36 Vt. Stat. Ann. tit. 18, § 4474c

language in their statutes that says employers have no duty to accommodate an employee's use of medical marijuana during work hours or on work premises, however, they do not specifically address the issue of whether an employer can discharge an applicant or employee for off-duty medical marijuana use. In the past, cases brought by plaintiffs under these statutes have generally upheld an employer's right to enforce drug-free workplace policies that make no exception for medical marijuana use. However, more recent cases are trending towards taking a closer look at the language in each statute and are interpreting such language broadly to provide users protection in the employment context, even if it is not explicitly provided for in the law.

For example, Massachusetts' medical marijuana law states that patients may not be denied "any right or privilege on the basis of their medical marijuana use." The Massachusetts Supreme Court interpreted the above language in *Barbuto v. Advantage Sales and Marketing LLC,*[37] and concluded that the broad anti-discrimination provisions in the state's medical marijuana law include the right to a reasonable accommodation by an employer. While the court held that an employer violates the statute's general anti-discrimination language when it fires an employee who fails a drug test due to medical marijuana use, it left open the possibility that accommodating such medical marijuana use could still pose an undue burden to employers in certain situations, such as when hiring for a safety sensitive position.

Alternatively, in *Casias v. Wal-Mart Stores, Inc.*,[38] the U.S. Court of Appeals for the Sixth Circuit was asked to consider whether language in the Michigan Medical Marijuana Act (MMMA) that prohibits "disciplinary action by a business or occupational or professional licensing board or bureau"[39] against a medical marijuana patient would be applicable in the employment context. Rather than reading the word "business" independently, the court interpreted it as a modifier and thus only applicable in the business licensing context. Based on this interpretation, the court concluded that the MMMA was silent on a patient's protections in a private employment context, and held that the applicant had no cause of action for wrongful discharge or violation of the MMMA when Wal-Mart terminated his employment due to a positive drug test for marijuana in accordance with its drug use policy. The court reached this conclusion even though the applicant alleged that he was lawfully prescribed medical marijuana for

37 *Barbuto v. Advantage Sales and Marketing LLC,* 78 N.E.3d (Mass 2017).
38 695 F.3d 428 (6th Cir. 2012).
39 Mich. Comp. Laws Sec. 333.26424(a).

treatment of head and neck pain related to sinus cancer and an inoperable brain tumor.

In a more recent case, *Eplee v. City of Lansing,*[40] a Michigan state appellate court assessed the same law and held that it did not provide a cause of action for an applicant whose conditional job offer from the City of Lansing was rescinded after he tested positive for marijuana during a mandatory pre-employment drug test. The court held the MMMA did not make medical marijuana users a protected class and did not "provide an independent right protecting the medical use of marijuana in all circumstances."

Similarly, California's law provides that "nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment. " While the law states that employers do not have to allow employees to use medical marijuana while at work, it is silent on the issue of whether an employer can terminate an employee for his or her off-duty use of medical marijuana. In light of this gap, the plaintiff in *Ross v. Raging Wire Telecommunications* brought an action alleging that an employer discriminated against him based on a disability and violated California public policy by terminating him for using medical marijuana as recommended by his doctor to treat chronic back pain. The California Supreme Court held that California law does not prohibit an employer from terminating or refusing to hire an individual who tests positive for marijuana, even if such use was lawful under California's Compassionate Use Act (CCUA). In reaching this conclusion, the court noted that the CCUA "do[es] not speak to employment law," but only to criminal liability, and that California's Fair Employment and Housing Act does not require employers to accommodate the use of drugs that are still illegal under federal law.

Some applicants and employees who have been terminated for their medical marijuana use have brought suits against employers under other theories, alleging claims such as disability discrimination like in the Raging Wire Telecommunications case above or violation of state laws that protect lawful "off-duty conduct," but such claims have failed to gain any traction thus far.

In *Coats v. Dish Network,* the Colorado Supreme Court rejected the argument that employers who terminate applicants or employees who test positive for marijuana are in violation of state "off-duty conduct" laws. The plaintiff's argument was based on a combination of Colorado's legalization of both medicinal and recreational marijuana and the state's lawful off-duty conduct statute that prohibits employers

40 2019 Mich. App. LEXIS 277 (Feb. 19, 2019).

from terminating employees for "engaging in any lawful activity off the premises of the employer during nonworking hours."[41]The Colorado Supreme Court agreed with the lower courts and held that because medical marijuana use continues to be unlawful under federal law, a Colorado employee who tests positive for marijuana in violation of an employer's drug policy cannot then seek protection under Colorado's lawful activities statute when his or her employment is terminated. In effect, court rulings around this issue have generally required an activity to be lawful under both state and federal law in order for it to be protected by "lawful off-duty conduct" laws.

Thus, given the varying conclusions reached by courts in these states, employers operating in states with medical marijuana laws that do not explicitly address whether an employer is obligated to provide reasonable accommodations for medical marijuana use should carefully review each state's statute to determine whether it implicitly requires reasonable accommodations for medical marijuana users in the employment context.

3. STATES THAT EXPLICITLY PROTECT MEDICAL MARIJUANA USERS THROUGH ANTI-DISCRIMINATION OR REASONABLE ACCOMMODATION PROVISIONS ADDRESSED AT EMPLOYERS

There are currently 15 states that include anti-discrimination provisions within their medical marijuana statutes: Arkansas[42], Arizona[43], Connecticut[44], Delaware[45], Illinois[46] Maine[47], Minnesota[48], Nevada[49], New Jersey[50], New Mexico[51], New York[52], Oklahoma[53], Pennsylvania[54], Rhode Island[55], and West Virginia[56].

The laws in these states generally include language that requires employers to make reasonable accommodations for medical marijuana users or that makes it unlawful for an employer to not hire or otherwise discriminate against an applicant or employee based on his or her use of medical marijuana. Employers operating in these states must

41 Colo. Rev. Stat. Ann. Sec. 24-34-402.5.
42 § 23 of Arkansas Constitution, Amendment 98.
43 Ariz. Rev. Stat. Ann. Sec. 36-2813.
44 C.G.S. § 21a-408p.
45 16 DE. Code § 4905A(a-b).
46 410 ILCS 130/40.
47 ME ST T. 22 § 2430-C (3) ("A school, employer or landlord may not refuse to enroll or employ or lease to or otherwise penalize a person solely for that person's status as a qualifying patient or a caregiver unless failing to do so would put the school, employer or landlord in violation of federal law or cause it to lose a federal contract or funding.").
48 Minn. Code Ann. § 152.32(3).
49 Nev. Rev. Stat. § 453A. 800 (3). *See Nellis v. Sunrise,* No. A-17-761981-C (applicants and employees in Nevada have a right to not be discriminated against for medical marijuana use).
50 N.J. Rev. Stat. § 24:6I-14.
51 In April 2019, a law was enacted in New Mexico that amends the Lynn and Erin Compassionate Use Act (N.M. Stat. § 26-2B-11(A)) and states that unless federal law or federal regulation requires an employer to take adverse action, it is unlawful for an employer to take adverse action against an applicant or an employee based on conduct allowed under the Lynn and Erin Compassionate Use Act. The law provides an exception for safety sensitive positions.
52 New York Public Health Law Title V-A §3369
53 63 O.S. § 427.7(H)(1)
54 35 P.S. § 10231.2103 states that "no employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical marijuana."; *See also Parrotta v. PECO Energy Co*, Case No. 2:18-cv-02842 (E.D. Pa., 2019) (holding that even though such protections exist, employees cannot self-treat with medical marijuana and receive the same protections as through certified to use medical marijuana).
55 R.I. Gen. Laws § 21-28.6-4 (c); *Callaghan v. Darlington Fabrics Corp.*, No. PC-2014-5680 (R.I. Super. Ct., May 23, 2017) (applicants and employees in Rhode Island have a right to not be discriminated against for medical marijuana use).
56 W. Va. Code. § 16A-15-4(b)(1).

be particularly vigilant and may need to modify their drug screening policies and practices in order to remain compliant with such laws. Some states, such as Oklahoma, New York, and Nevada, provide exceptions when an individual works in a safety sensitive position or if the individual is working while impaired and presents a safety concern. However, absent the very narrow exception, employers within these states are still required to accommodate medical marijuana users.

One recent example of this is Rhode Island's Hawkins-Slater Medical Marijuana Act, which makes it unlawful for an employer to refuse to employ or to otherwise penalize a person solely for his or her status as a medical marijuana cardholder.[57] The ACLU filed a lawsuit under this anti-discrimination provision, alleging that an employer unlawfully refused to hire an applicant based on her status as a medical marijuana patient.[58]The state court in this case agreed, finding that the employer acted unlawfully and violated the state's medical marijuana law when it refused to hire an applicant due to her use of medical marijuana.

A federal district court in Connecticut reached a similar conclusion in *Noffsinger v. SSC Niantic Operating Co, LLC,*[59] finding that an employer violated the state's medical marijuana law by refusing to hire a medical marijuana user who tested positive for cannabis, and further concluding that federal law did not preempt the state law protections afforded to medical marijuana users. Connecticut's medical marijuana statute—the Palliative Use of Marijuana Act (PUMA)—expressly makes it unlawful to refuse to hire or to discharge an employee solely because of the individual's status as a qualifying patient or for testing positive during a drug screen. Notably, the court distinguished this case from cases brought in other states that reached a different conclusion, concluding that those other states did not have a provision barring employment discrimination in their medical marijuana statutes. As previously mentioned, this court also noted that the Controlled Substances Act does not regulate the employment relationship and the American's with Disabilities Act does not regulate non-workplace activity.

Another example is New York's Compassionate Care Act (NYCCA), which specifically provides that certified patients shall not be subjected to

57 N.Y. Public Health Law Sec. 3369.
58 *Id.*
59 *Noffsinger v. SSC Niantic Operating Co., LLC.*, No. 3:16-cv-01938 (D. Conn., Aug. 8, 2017).

"disciplinary action by a business" solely based on their use of medical marijuana.[60] Additionally, the NYCCA includes a nondiscrimination provision, which states that being a certified medical marijuana patient is considered a "disability" under the New York State Human Rights Law (NYSHRL), and thus New York employers with four or more employees are prohibited from firing or refusing to hire an individual (or otherwise discriminating against an individual) based on the individual's status as a certified medical marijuana patient.[61] Following from this, New York employers with four or more employees are now likely required to provide reasonable accommodations for applicants or employees who are certified to use medical marijuana.

New Jersey recently amended its medical marijuana law, the Jake Honig Compassionate Use Medical Cannabis Act ("CUMMA"), to prohibit an employer from taking any adverse employment action against an employee or applicant based solely on the individual's status as a registered medical marijuana user.[62] In addition to prohibiting an employer from taking adverse action against an employee who is a registered qualifying patient, the law requires an employer to provide an applicant or employee the opportunity to give a legitimate medical explanation for a positive drug test. Despite the strong protections these statutes provide for applicants and employees who are medical marijuana users, these laws also generally provide that employers are not obligated to permit the use of medical marijuana on work premises or during work hours, and typically prohibit employees from performing their duties while under the influence of marijuana. Further, these laws typically include an exception that makes the law inapplicable to any employer who would be in violation of a federal law by complying with the state law or who would lose a federal contract or funding by complying with the state law.

Employers operating in states that include anti-discrimination or reasonable accommodation provisions within their medical marijuana statutes would be well-advised to review their drug-free workplace policies and drug screening practices with the assistance of legal counsel. Many recent cases out of these states have concluded that employers violate the explicit protections provided by state law when they refuse to hire or fail to accommodate medical marijuana users. Thus, it is important for employers to review the various state statutes and case law with legal counsel, and to develop a policy that ensures compliance.

60 R.I. Gen. Laws Sec. 21-28.6-4 (c).
61 *See Callaghan v. Darlington Fabrics Corp.*, No. PC-2014-5680 (R.I. Super Ct., May 23, 2017).
62 N.J.S.A. 24:6I-6

RECENT DEVELOPMENTS

Employers should also take note of other developing trends in some states and localities, such as Nevada and New York City, with respect to drug testing for marijuana specifically. Nevada's law goes into effect on January 1, 2020 and generally prohibits an employer from refusing to hire a prospective employee because a drug screen indicated the presence of marijuana. New York City's law goes into effect on May 10, 2020, and makes it an unlawful discriminatory practice for employers to require prospective employees "to submit to testing for the presence of any tetrahydrocannabinols or marijuana in such prospective employee's system as a condition of employment."[63]

Additionally, a growing concern with marijuana drug testing is that is it not able to determine whether the individual was impaired at the time of the testing (the marijuana use could have occurred days or even weeks before the drug test). Thus, a positive test for marijuana alone may not be enough to prove employee impairment at the time of the drug test in situations such as reasonable suspicion testing or when a state law only allows an employer to take an adverse employment action when the employee is impaired on the job.[64] A recently enacted law in Illinois, effective Jan. 1, 2020, legalizes recreational marijuana and effectively prohibits discrimination in the employment context based on "lawful use" of marijuana.[65] The law amends the Illinois Right to Privacy in the Workplace Act by defining "lawful products" to mean products that are legal under state law. As a result, under the Right to Privacy Act, unless an exception applies, Illinois employers are prohibited from discriminating against applicants and employees who use lawful products (e.g. marijuana) off the premises of the employer during non-working and non-call hours.

Further, employers should be careful not to consider an applicant or

63 Subdivision 31 of Section 8-107 of the New York City Administrative Code.
64 *Whitmire v. Wal-Mart Stores Inc.*, No. 3:17-cv-08108 (D. Ariz., Feb. 2019) ("without expert testimony establishing that plaintiff's drug screen shows marijuana metabolites or components in a sufficient concentration to cause impairment, [employer] is unable to prove that plaintiff's drug screen gave it a good faith basis to believe plaintiff was impaired at work.")
65 Illinois H.B. 1348.

employee's mere possession of a medical marijuana card as equivalent to a positive marijuana drug test or as proof that the individual uses marijuana. Recent case law suggests there must be concrete evidence, such as a positive drug test, before taking adverse action.[66]

In light of these trends, employers would be well-advised to consult with counsel regarding the ongoing use of marijuana drug testing for employment purposes and the interpretation of positive test results.

CONCLUSION

Based on the current state of the law, employers in most states would be well-advised to carefully review the language of each state's medical marijuana statute to determine whether they are required to accommodate medical marijuana users.

If an employer concludes that it is permitted to discharge any applicant or employee who tests positive for marijuana, it should ensure that it has a detailed zero-tolerance drug-free workplace policy in place that is applied evenly across the board and does not discriminate against any group of individuals. This policy should prohibit all unlawful drug use and should not be limited to drug use that occurs during work hours or on work premises. If an employer is going to discharge a medical marijuana user for testing positive, the employer should ensure that the adverse employment decision is strictly grounded in the positive drug test and not based on the underlying medical condition or another reason that may be unlawful under state or federal law.

Employers operating in one of the 15 states that explicitly protect medical marijuana users—Arkansas, Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island and West Virginia—should review their current drug testing policies in these states and determine whether any modifications are necessary. Employers operating in states that are silent on the issue, or that have general anti-discrimination language that has been broadly interpreted to apply in the employment context (such as in Massachusetts), should also engage in a similar review process.

All employers should continue to remain vigilant and attentive to developing case law surrounding this issue and keep an eye out for potential legislative action in other states that may create similar protections for medical marijuana users.

66 *Kamakeeaina v. Armstrong Produce, Ltd.*, 2019 U.S. Dist. LEXIS 50863 (9th Cir. March 22, 2019) (refusing to dismiss an applicant's disability discrimination claim after the applicant was terminated based solely on the fact that he possessed a medical marijuana card and the employer's mere assumption that the applicant was a current marijuana user and would fail a drug test as a result).