



# Medical Cannabis in the Workplace: What Protections Do Employees Have?

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In 1969, President Richard Nixon declared a “war on drugs.” Subsequently, Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970.<sup>1</sup> Title II of that Act, the Controlled Substances Act (CSA), makes it a federal crime to use, possess, or distribute marijuana, which is categorized as a Schedule I drug—a designation reserved for those drugs with the highest potential for abuse that lack any accepted medical use.<sup>2</sup>

Today, the medical benefits of cannabis have become more widely accepted within the medical community.<sup>3</sup> And state legislatures have enacted laws permitting the use of medical cannabis to treat designated health conditions. To date, approximately 30 states and the District of Columbia have passed legislation permitting the use of medical cannabis.<sup>4</sup> In light of this growing trend, employers have faced a legal dilemma: Must employers accommodate the use of medical cannabis where permitted by state law despite the federal prohibition on marijuana use under the CSA?

To make sense of recent court decisions that have weighed in on employee rights as well as employer obligations with respect to these

laws, it is important to focus on whether the specific law in question provides specific antidiscrimination protections to medical cannabis registry participants. The existence of such protections has practical implications regarding whether the employer must accommodate the employee’s known medical cannabis use.

## **Absent Federal Protections, Whether Medical Cannabis Use Must Be Accommodated Is a Matter of State Law**

The Americans With Disabilities Act (ADA) and its amendments do not prohibit discrimination based on an individual’s current illegal drug use nor do they require employers to make accommodations for current illegal drug users.<sup>5</sup> Per the ADA’s definition, illegal drugs include “the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act.”<sup>6</sup> As a Schedule I controlled substance, marijuana falls squarely within that definition.

Absent federal antidiscrimination protections for medical cannabis users, employees must rely on protections afforded to them under state law. But many of the early statutes legalizing medical cannabis did so without providing any explicit employment protections for medical cannabis users. For example, in *Curry v. Miller-Coors, Inc.*, an employee with hepatitis C used medical marijuana and subsequently failed his employer’s drug test.<sup>7</sup> Because Colorado’s Medical Cannabis Amendment<sup>8</sup> did not provide specific employment protections, the Colorado District Court held Colorado’s antidiscrim-

ination law does not extend so far as to shield a disabled employee from the implementation of his employer's standard policies against employee misconduct.<sup>9</sup> Similarly, in *Ross v. Ragingwire Telecommunications, Inc.*, the plaintiff suffered from back pain, used medical marijuana, failed a drug test, and was terminated.<sup>10</sup> The California Supreme Court held, "nothing in the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and obligations of employers and employees."<sup>11</sup>

Still other state statutes legalizing medical cannabis specifically exempt employers from their scope entirely. New Jersey's Compassionate Use Medical Marijuana Act (CUMMA) shields qualifying users of medical marijuana from civil penalties and other administrative actions, but "nothing in this act shall be construed to require ... an employer to accommodate the medical use of marijuana in any workplace."<sup>12</sup> Despite this exemption, the plaintiff in *Cotto v. Ardagh Glass Packing, Inc.* brought an action against his employer who put him on an indefinite suspension after testing positive for medical cannabis, arguing CUMMA and the New Jersey Law Against Discrimination compelled his employer to provide an accommodation.<sup>13</sup> The New Jersey District Court disagreed with the plaintiff, noting the plaintiff had not alleged he was discriminated against based on his disability (neck and back pain) but rather he alleged the discrimination was based on the employer failing to accommodate his medical marijuana use by waiving the drug test.<sup>14</sup> The court further noted, CUMMA "does not mandate employer acceptance—or, more particularly, to waive a drug test—of an employee's use of a substance that is illegal under federal law."<sup>15</sup> Because CUMMA provided no employment law protections but rather exempted employers from its coverage, the employer was justified in its refusal to accommodate.

In *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, the Oregon Supreme Court had an opportunity to address the issue of pre-emption, asking: Must state laws legalizing the use of medical cannabis yield to federal law?<sup>16</sup> In *Emerald Steel*, an employee was discharged after revealing his use of medical cannabis.<sup>17</sup> On behalf of the plaintiff, the Oregon Bureau of Labor alleged disability discrimination under Oregon law.<sup>18</sup> The employer argued that the plaintiff had engaged in "illegal drug use" and that the CSA pre-empted Oregon's Medical Marijuana Act to the extent the statute "affirmatively authorizes the use of medical marijuana."<sup>19</sup> The Oregon Supreme Court agreed that Oregon's Medical Marijuana Act was pre-empted by the CSA because "affirmatively authorizing a use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the [CSA]."<sup>20</sup> The court's ruling was limited in application because it dealt specifically with pre-emption of state legalization of medical cannabis—it did not address whether employment-based protections were pre-empted. Because Oregon's Medical Marijuana Act did not provide specific antidiscrimination protection for medical cannabis users, the court did not have the opportunity to address whether antidiscrimination protections provided to medical cannabis users conflict with the CSA.

### **A Growing Number of State Laws Prohibit Discrimination Against Medical Cannabis Users**

Following the ruling in *Emerald Steel*, courts and commentators alike suggested that a statute that clearly and explicitly provides employment protections for medical marijuana users could lead to a different result.<sup>21</sup> State legislatures have since passed legislation providing such protections to cannabis registry participants. Current-

ly, of the 30 states that have legalized medical cannabis, only 10 have enacted such legislation: Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Oklahoma, and Rhode Island.<sup>22</sup> As speculated, recent decisions have found that state laws authorizing the use of medical cannabis are not pre-empted by the CSA.

In *Noffsinger v. SSC Niantic Operating Co., LLC*, the District of Connecticut found that the CSA did not pre-empt a Connecticut statute that affirmatively authorizes the use of medical cannabis and explicitly bars employment discrimination for an employee's otherwise state-authorized use.<sup>23</sup> In reaching that conclusion, the court agreed with the plaintiff that the CSA does not regulate the employment relationship and found that the CSA does not make it illegal to employ a marijuana user, nor does it purport to regulate employment practices in any manner.<sup>24</sup> The court also concluded the CSA contains a provision that explicitly indicates Congress did not intend for the CSA to pre-empt state law "unless there is a positive conflict between that provision of this subchapter and that state law so that the two cannot consistently stand together."<sup>25</sup>

In *Barbuto v. Advantage Sales and Marketing, LLC*, the Massachusetts Supreme Judicial Court considered whether adverse action for the treatment of a disability with medical cannabis was considered disability discrimination.<sup>26</sup> Although the Massachusetts law legalizing medical cannabis did not specifically prohibit employment discrimination based on an employee's medical cannabis registry participation, it provides that patients shall not be denied "any right or privilege" on the basis of their medical marijuana use.<sup>27</sup> And Massachusetts's statute prohibiting handicap discrimination provides that it is an "unlawful practice ... for any employer ... to dismiss from employment or refuse to hire [any person] ... because of [the person's] handicap..., unless the employer can demonstrate that the accommodation ... would impose an undue hardship to the employer's business."<sup>28</sup> Because Massachusetts's antidiscrimination statutes are to be construed liberally for the accomplishment of their purposes,<sup>29</sup> the court reasoned: "Where a handicapped employee needs medication to alleviate or manage the medical condition that renders her handicapped, and the employer fires her because company policy prohibits the use of this medication, the law does not ignore the fact that the policy resulted in a person being denied employment because of her handicap."<sup>30</sup> The court further noted: "By the defendants' logic, a company that barred the use of insulin by its employees in accordance with a company policy would not be discriminating against diabetics because of their handicap, but would simply be implementing a company policy prohibiting the use of a medication."<sup>31</sup> The court concluded, "the termination of the employee for violating that policy effectively denies a handicapped employee the opportunity of a reasonable accommodation, and therefore is appropriately recognized as handicap discrimination."<sup>32</sup> In reaching this conclusion, the court acknowledged marijuana is a Schedule I controlled substance under the CSA, but noted, "To declare an accommodation for medical marijuana to be per se unreasonable out of respect for federal law would not be respectful of the recognition of Massachusetts voters, shared by the legislatures or voters in the vast majority of states, that marijuana has an accepted medical use for some patients suffering from debilitating medical conditions."<sup>33</sup>

Other court decisions have avoided the issue of pre-emption entirely, finding termination of the employee for medical cannabis use is properly viewed as a form of disability discrimination. For instance, in *Coles v. Harris Teeter LLC*, a former employee, who suffered

from glaucoma and had a valid medical marijuana prescription, brought an action against his employer for disability discrimination in violation of the District of Columbia Human Rights Act after he failed a drug test and was allegedly terminated for violating the employer's substance-abuse policy.<sup>34</sup> There, the court found, together with evidence of the employer's inconsistent enforcement of the policy, that there was enough evidence to "raise a plausible inference that Coles might have been terminated because of his disability."<sup>35</sup>

Finally, if an employer maintains a drug-free workplace policy in a state that provides specific protections for medical cannabis registry participants, the employer may also be required to determine whether waiver of the prohibition on cannabis use is a reasonable accommodation to the policy. Such was the ruling in *Barbuto*, where the court held that the employer had a duty to help the disabled employee devise an accommodation.<sup>36</sup> In *Barbuto* this included engaging in the interactive process to determine whether an alternative, equally effective treatment to medical cannabis was available to the employee such that the employer would not have to make an exception to the company's policy.

*Barbuto* and *Noffsinger* illustrate the need for employers to conduct a state-by-state assessment to determine whether they must accommodate an employee's use of medical cannabis. Some state statutes protect employees from discrimination based on their participation in a medical cannabis registration program and require an employer to determine whether an accommodation is possible. State specific antidiscrimination provisions, however, do not provide employees *carte blanche* to use cannabis. Rather, an employer may still consider whether an employee's medical cannabis use would pose an undue hardship on their business.

### An Employer May Still Show Accommodating Medical Cannabis Use Poses an Undue Burden

The two most common burdens that interfere with an employer's ability to accommodate medical cannabis are workplace safety and the existence of federal contracts. If an employee maintains a safety-sensitive position such as a crane operator, truck driver, or machinist, an employer likely won't have trouble showing that accommodating the employee's use of medical cannabis to treat an underlying condition places an undue burden on the business. And this remains true even where the employee's use of medical cannabis is during nonwork hours and the employee does not report to work under the influence.

Because the federal government still considers marijuana to be a Schedule I illegal drug, federal employees and contractors are subject to the Drug-Free Workplace Act, which provides that companies receiving a federal contract of \$100,000 or more or a federal grant of any size must maintain a drug-free workplace policy.<sup>37</sup> And contractors who work for the federal government must demonstrate employee compliance as a condition of continued employment. Failure to comply with the Drug-Free Workplace Act can result in the suspension of payment or the termination of a contract for default.

Before making employment decisions based on an employee's known medical cannabis use, employers—especially those with a national practice—would be wise to determine whether the employee's medical cannabis use must be accommodated. State-specific protections for medical cannabis registry participants may require the employer to accommodate the use of medical cannabis during nonwork hours. Where the employee is afforded antidiscrimination

protections under state law, the employer must determine whether accommodating the employee places an undue hardship on their business. Considerations include whether they hold federal contracts, whether the employee is in a safety sensitive position, and whether the employee has any medically effective alternative to treatment that would not violate the employer's workplace policy. ©



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### Endnotes

<sup>1</sup>Pub. L. No. 91-513, 84 Stat. 1236 (1970).

<sup>2</sup>Controlled Substances Act (CSA), 21 U.S.C. §§ 801 *et seq.*

<sup>3</sup>See *Selected Quotes from Endorsements and Statements of Support*, FOUND. OF CANNABIS UNIFIED STANDARDS, <https://www.focusstandards.org/medical-marijuana-statements-support> (last visited Oct. 3, 2018).

<sup>4</sup>See CONGRESSIONAL RESEARCH SERVICE, THE MARIJUANA POLICY GAP AND THE PATH FORWARD 7 (Mar. 10, 2017), <https://fas.org/sgp/crs/misc/R44782.pdf>; see also *State Medical Marijuana Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (last updated June 27, 2018) (last visited Oct. 3, 2018) (reporting that 31 states, the District of Columbia, Puerto Rico, and Guam allow for "comprehensive public medical marijuana and cannabis programs," while "15 states allow use of 'low THC, high cannabidiol' products for medical reasons in limited situations or as a legal defense").

<sup>5</sup>ADA II-2.3000—Drug addiction as an impairment.

<sup>6</sup>*Id.*

<sup>7</sup>*Curry v. MillerCoors Inc.*, No. 12-CV-02471-JLK, 2013 WL 4494307 (D. Colo. Aug. 21, 2013).

<sup>8</sup>Colo. Const. art. XVIII, § 14.

<sup>9</sup>*Curry*, 2013 WL 4494307 at \*1.

<sup>10</sup>*Ross v. Ragingwire Telecomm. Inc.*, 42 Cal.4th 920, 174 P.3d 200, 203 (2008).

<sup>11</sup>*Id.* at 203.

<sup>12</sup>N.J. Stat. Ann. § 24:6I-14.

<sup>13</sup>*Cotto v. Ardagh Glass Packing, Inc.*, No. CV 18-1037 (RBK/AMD), 2018 WL 3814278, at \*1 (D.N.J. Aug. 10, 2018).

<sup>14</sup>*Id.* at \*11-12.

<sup>15</sup>*Id.* at \*7.

<sup>16</sup>*Emerald Steel Fabricators Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010).

<sup>17</sup>*Id.* at 521.

<sup>18</sup>*Id.*

<sup>19</sup>*Id.* at 525-526.

<sup>20</sup>*Id.*

<sup>21</sup>See Kathleen Harvey, *Protecting Medical Marijuana Users in the Workplace*, 66 CASE W. RES. L. REV. 209, 222 (2015) (arguing that the CSA does not pre-empt provisions that provide explicit employment protections to medical marijuana patients); Taylor Oyaas, Note,

*Reefer Madness: How Tennessee Can Provide Cannabis Oil Patients Protection from Workplace Discrimination*, 47 U. MEM. L. REV. 935, 967 (2017) (arguing that Tennessee can and should avoid the problems faced by the plaintiff Emerald Steel by adopting explicit employment protections for medical marijuana users).

<sup>22</sup>See Ariz. Rev. Stat. § 36-2813; Conn. Gen. Stat. § 21a-408; Del. Code Ann. tit. 16, § 4905A; 410 Ill. Comp. Stat. 130/40; Me. Rev. Stat. tit. 22, § 2423-E; Minn. Stat. § 152.32(3)(c); Okla. Stat. § 424 tit. 63 sec. 6(B); Nev. Rev. Stat. § 453A.800; N.Y. Pub. Health Law § 3369; R.I. Gen. Laws § 21-28.6-4.

<sup>23</sup>*Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F. Supp. 3d 326 (D. Conn. 2017).

<sup>24</sup>*Id.*

<sup>25</sup>*Id.* (citing 21 U.S.C. § 903).

<sup>26</sup>See *Barbuto v. Advantage Sales & Mktg. LLC*, 78 N.E.3d 37, 47 (Mass. 2017).

<sup>27</sup>See Mass. Stat. 2012, ch. 369 § 4.

<sup>28</sup>Mass. G. L. ch. 151B, § 4 (16).

<sup>29</sup>See Mass. Stat. 2012, ch. 369; Mass. G. L. ch. 151B, § 9.

<sup>30</sup>*Barbuto*, 78 N.E. 3d at 47.

<sup>31</sup>*Id.*

<sup>32</sup>*Id.* (citing Cf. *School Comm. of Braintree v. Massachusetts Comm'n Against Discrimination*, 386 N.E.2d 1251 (Mass. 1979) (employment policy that prohibited teachers from using accrued sick leave for pregnancy-related disabilities that occur in extended maternity leaves was gender discrimination)).

<sup>33</sup>*Barbuto*, 78 N.E. 3d at 46.

<sup>34</sup>*Coles v. Harris Teeter LLC*, 217 F. Supp. 3d 185, 189 (D.D.C. 2016).

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>41 U.S.C. §§ 8101-8106 (2018).

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