

Medical Marijuana in the Workplace

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Executive Summary

Legal marijuana is increasingly present in modern America. Absent some exceptions, marijuana is prohibited under federal law and medical marijuana patients / employees are not protected under federal disability legislation. Besides states that have maintained marijuana possession and use as a criminal offense or have simply decriminalized the drug, states typically manage marijuana through recreational and medical marijuana legislation. Due to the muddled nature of medical marijuana in the workplace, this report restates state marijuana laws and provides, based

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on current legal information available, several medical marijuana reasonable accommodation policy suggestions⁴ for employers.

Legal Background

Cannabis, more commonly known as marijuana, is a psychoactive drug primarily used for medicinal or recreational uses. Marijuana is the dried flowers and leaves of the cannabis plant. Tetrahydrocannabinol (“THC”) is the principal psychoactive cannabinoid found in cannabis that makes a person “high” or “stoned.” Products derived from the non-psychoactive cannabinoid Cannabidiol (“CBD”), also found naturally in cannabis, are common.

Under federal law, marijuana is a Schedule I controlled substance.⁵ Schedule I substances are defined as having a high potential for abuse with no currently accepted medical use. Along with marijuana, Schedule I substances include heroin, LSD, ecstasy, and peyote.⁶ Regardless of marijuana’s Schedule I status, the United States Food and Drug Administration (FDA) has approved a purified form of CBD for the treatment of seizures associated with specific syndromes, as well as synthetic THC for therapeutic uses.⁷ Likewise, the Federal government recently enacted the Agriculture Improvement Act to exclude industrial hemp, a cannabis product, as a federally controlled substance.⁸

State marijuana laws vary from full legality to prohibition. Fourteen (14) states, the District of Columbia, and two United States territories have legalized recreational marijuana.⁹ Thirty-three

⁴ The suggested policy included in this document represents the informed opinion of the authors. It is not a legal opinion nor does it represent the official view of the Rocky Mountain ADA Center, the University of Northern Colorado, nor the University of Montana. Further, suggested policy does not represent the official view of the Federal agency that financed the development of this research report.

⁵ Controlled Substances Act of 1970, 21 U.S.C. § 812 (2018).

⁶ Compare to Schedule II substances (cocaine, methamphetamine, methadone, oxycodone, Adderall, and Ritalin) with a high potential for abuse, with use potentially leading to severe psychological or physical dependence; Schedule III substances (ketamine, anabolic steroids, testosterone, and Tylenol with Codeine) with a moderate to low potential for physical and psychological dependence; and Schedule IV substances (Xanax, Valium, Ambien) with a low potential for abuse and low risk of dependence. *Drug Scheduling*, United States Drug Enforcement Agency (April 26, 2020), <https://www.dea.gov/drug-scheduling>

⁷ *FDA and Cannabis: Research and Drug Approval Process*, FDA (Jan. 14, 2020), <https://www.fda.gov/news-events/public-health-focus/fda-and-cannabis-research-and-drug-approval-process>

⁸ Pub. L. No. 115-334, 132 Stat. 4490 (2018).

⁹ Including Colorado. *State Medical Marijuana Laws*, National Conference of State Legislatures (March 10, 2020), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>

(33) states, the District of Columbia, and three United States territories have legalized medical marijuana.¹⁰ Fourteen (14) states have legalized CBD products.¹¹ Twenty-six (26) states and the District of Columbia have decriminalized small amounts of marijuana,¹² while three (3) states prohibit marijuana for any use.¹³ In other words, decriminalized states have not legalized marijuana, but possession and use do not carry criminal penalties as would be the case in states that prohibit marijuana for any purpose.

Regardless of state legalization, the Americans with Disabilities Act of 1990 (ADA) does not provide protections for medical (or any other use) marijuana use.¹⁴

Methodology and Findings

In constructing this report, the Rural Institute for Inclusive Communities (RIIC) utilized WestLaw, a legal database, to identify state marijuana laws within Region VIII states, the region served by the Rocky Mountain ADA Center (i.e., Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming). South Dakota is not reflected in this report because marijuana remains fully illegal.

Next, the RIIC contacted state departments responsible for administering medical marijuana, targeting internal medical marijuana divisions if possible, to see if the department has issued policy guidance for employers. For example, the Director of the Division of Medical Marijuana at the North Dakota Department of Health was asked whether the department has issued guidance for employers interpreting the ADA and their state's medical marijuana laws. In the same vein, state departments whose operations may be implicated by medical marijuana were contacted, even though the department is not charged with administering or enforcing medical marijuana. For example, the Legal Department at the Montana Department of Labor responded to a similar question posed to the North Dakota Department of Health.

¹⁰ Including Colorado, Montana, North Dakota, and Utah. NCSL, *supra* note 5.

¹¹ Including Wyoming, but still prohibited generally. NCSL, *supra* note 5.

¹² Including North Dakota, N.D. Cent. Code § 19-03.1-22.3, 1-23 (2019).

¹³ Including South Dakota. S.D. Codified Laws § 22-42-6 (2020).

¹⁴ 42 U.S.C. § 12114(c), (d) (allowing employers to prohibit employees from using controlled substances at the workplace). *See also* James v. City of Costa Mesa, 700 F.3d 394 (9th Cir. 2012) (holding that prescribed marijuana use permitted by state law is an illegal use of drugs under the ADA). However, ADA protections do extend to persons engaged in drug rehabilitation. 42 U.S.C. § 12114(b).

Finally, due to lack of Federal guidance on the subject, the authors of this report make several policy suggestions that strive to balance the needs of employers and employees. These are based on labor and health law commentary from legal treatises, law journal articles and policy statements from public interest organizations. The policy suggestions attempt to outline “reasonable accommodation” considerations consistent with the purpose of the ADA¹⁵.

Recreational and Medical Marijuana in Colorado

Governed by its state constitution and statutory law, Colorado is one of the eleven states where marijuana is fully legalized and decriminalized within regulatory parameters.¹⁶ The Colorado Department of Revenue regulates marijuana. Under their rulemaking authority, the Department has not issued rules expressly addressing the ADA and/or disability discrimination.¹⁷ Employers are not required to permit or accommodate employees to use medical marijuana in the workplace, and policies restricting the use of marijuana by employees remain unaffected.¹⁸

Medical Marijuana in Montana

The 2019 Montana Medical Marijuana Act governs medical marijuana in Montana.¹⁹ Under the act, employers are not required to accommodate the lawful use of medical marijuana and may prohibit the use of marijuana for a debilitating medical condition.²⁰ Employers may take adverse actions against employees who test positive for marijuana.²¹ Most notably, employees do not have a cause of action against their employers for wrongful discharge or disability discrimination if they are terminated or denied employment due to medical marijuana use.²²

¹⁵ See Footnote 4 above.

¹⁶ Colo. Const., art. XVIII, §§ 14, 16; C.R.S.A. §§ 44-10-101 – 1401 (2020). Denver has incorporated the entire marijuana act into their city code. Revised Municipal Code of the City and County of Denver, Title I, Chap. 24, art. XII, § 24-504 (2020).

¹⁷ Email from the Colorado Department of Revenue to J. Thornton (April 28, 2020) (copy on file with Rural Institute).

¹⁸ C.R.S.A. § 44-10-104(5). *See also* Steele v. Stallion Rockies Ltd., 106 F.Supp.3d 1205, 1212 (D. Colo. 2015) (ADA does not extend to shield employees from implementation of employer’s standard policies against employee marijuana use).

¹⁹ Mont. Code Ann. §§ 50-46-301, -347 (2019).

²⁰ Mont. Code Ann. § 50-46-320(4)(b), (5)(a).

²¹ Mont. Code Ann. § 39-2-210. Employers may also take adverse action when use affects a person’s ability to perform employment responsibilities, employee safety, or conflicts with bona fide qualifications reasonably related to employment. Mont. Code Ann. § 39-2-313(3)(a).

²² Mont. Code Ann. § 50-46-320(5)(b).

The Montana Department of Public Health and Human Services is tasked with administering a state medical marijuana registry and managing licenses for marijuana production. The Department “has no additional guidance on this topic” and “cannot implement policy outside the specific rulemaking authority granted by statute.”²³ Further, the Montana Department of Labor & Industry has not provided policy guidance on medical marijuana because they do not administer or enforce the ADA.²⁴

Medical Marijuana in North Dakota

North Dakota governs medical marijuana under North Dakota Century Code §§ 19-24.1.01 – 24.1-40. Employers may discipline an employee for possessing or consuming “usable marijuana” in the workplace or for working while under the influence of marijuana.²⁵ The term “usable marijuana” means medical marijuana or marijuana flower consumed through combustion.²⁶ In other words, the term means smoked marijuana. The North Dakota Department of Labor and Human Rights, and the Department of Health have not issued any policy guidance on this subject matter.²⁷

Medical Marijuana in Utah

The 2018 Utah Medical Cannabis Act governs medical marijuana in Utah.²⁸ Under the act, medicinal cannabis is “considered the equivalent of the authorized use of any other medication used at the discretion of a physician; and does not constitute the use of an illicit substance.”²⁹ Unless federal law is implicated, government employers in Utah shall treat an employee’s use of medical marijuana just like any prescribed controlled substance.³⁰ Public employers may subject

²³ Email from Director of Department of Public Health and Human Services to J. Thornton (April 29, 2020) (copy on file with Rural Institute).

²⁴ Email from Department of Labor & Industry to J. Thornton (April 26, 2020) (copy on file with Rural Institute).

²⁵ N.D. Cent. Code § 19-24.1-34(2).

²⁶ N.D. Cent. Code § 19-24.1-01(39).

²⁷ Email from Department of Labor and Human Rights to J. Thornton (April 27, 2020) (copy on file with Rural Institute); Email from Division of Medical Marijuana, Department of Health to J. Thornton (April 27, 2020) (copy on file with Rural Institute).

²⁸ Utah Code §§ 26-61a-101 – 703 (2018).

²⁹ Utah Code § 26-61a-111(1).

³⁰ Utah Code § 26-61a-111(2).

an employee to adverse action if their medical marijuana use impairs or adversely effects their job performance.³¹

In the private realm, employers are not required to accommodate medical marijuana use for applicants and their employees.³² The Center for Medical Cannabis, a division of the Utah Department of Health, provided context for this rule, “private employers in Utah may establish their own policies regarding the use of medical cannabis, including implementing or maintaining a zero-tolerance policy. When the legislators described their reasoning behind this, it was stated that they did not wish to create a new protected class.”³³

CBD Marijuana in Wyoming

CBD marijuana is legal. “Hemp products” are explicitly exempt from provisions and penalties of Wyoming’s Controlled Substance Act.³⁴ “Hemp products” means a product made from marijuana that contains a THC concentration of 0.3% or less. The Wyoming Department of Workforce Services Labor Standards has not issued any guidance on this matter.³⁵

Best Practices for Medical Marijuana Use in the Workplace

Based on this review and the growing body of health law and policy research on this topic, medical marijuana workplace policies may prove helpful to ensure workplace and public safety, protect employee job security and privacy, and allow employer discretion in providing reasonable accommodations to employees who use medical marijuana. Any workplace policy related to marijuana use should affirm that the ADA does not apply to medical marijuana use, and its purpose.³⁶

³¹ Medical Cannabis Amendments, 2020 Utah Laws S.B. 121, § 26-61a-111(2)(a)(b). The corollary is true. Public employers cannot subject an employee to adverse action solely for the use of medical marijuana. Utah Admin. Code r. R477-14-2 (2019).

³² Medical Cannabis Amendments, 2020 Utah Laws S.B. 121, § 26-61a-111(4).

³³ Email from Center for Medical Cannabis, Utah Department of Health to J. Thornton (April 29, 2020) (copy on file with Rural Institute).

³⁴ Like the federal Agricultural Improvement Act of 2018, hemp is also excluded as an agricultural crop.

³⁵ Email from Lead Compliance Officer of the Wyoming Department of Workforce Services Labor Standards to J. Thornton (April 30, 2020) (copy on file with Rural Institute).

³⁶ See Stephen M. Scannell, Medical Marijuana and the ADA: Following the Path Blazed by State Courts to Extend Protection, 12 St. Louis University Journal of Health Law & Policy 391 (2019).

Subject to certain limitations related to workplace and public safety, employers may wish to accommodate employees who use medical marijuana. Employers may consider the following recommendations, when implementing such a policy. For example, employers can continue to follow their usual drug testing policy when they observe, or reasonably suspect, marijuana use during work hours and the employee is demonstrating inadequate work performance.³⁷ Drug testing can be justified when a connection can reasonably be articulated between work performance and the influence of marijuana's psychoactive properties on an individual. Education and training for employers may be necessary to allow them to distinguish impairment resulting from marijuana, as compared to other substances.

Applicant and employee drug testing is appropriate for potentially hazardous employment positions or industries, as well as defined by employer policy, state or federal law. These may include, but are not limited to, safety and security industries currently subjected to drug-testing requirements, such as transportation, defense, energy, or any positions involving a high degree of public trust,³⁸ or potentially hazardous employment positions including excavation, manufacturing, explosives, mining, or operating power-driven machinery.³⁹ Employees who use medical marijuana should not perform hazardous work duties while the psychoactive effects of marijuana could or might interfere with workplace and public safety. Employers could request that a qualified physician provide documentation that off-work marijuana use will not interfere with workplace and public safety. Employers may also consider excluding drug testing for all legal uses of marijuana, including medical marijuana and non-impairing marijuana substances like CBD.⁴⁰ This is especially pertinent for employers in CBD states (e.g., Wyoming).

Protecting employee privacy is a valid concern. While controversial, in order to protect individual privacy, an employee who tests positive for marijuana use in states with legalized medical marijuana or CBD may be using marijuana in a lawful manner. Employers can request

³⁷ This is in large part due to the fact that urine tests are not capable of determining when the drug was taken or distinguishing between intoxication, under-the-influence, or impairment. Kevin B. Zeese, *Drug Testing Legal Manual* § 3:26 (2d ed. 2019).

³⁸ *Considerations for Safety- and Security-sensitive Industries*, Substance Abuse and Mental Health Services Administration (April 16, 2020), <https://www.samhsa.gov/workplace/legal/federal-laws/safety-security-sensitive>

³⁹ *Hazardous Jobs*, United States Department of Labor (last accessed May 5, 2020), <https://www.dol.gov/general/topic/youthlabor/hazardousjobs#>

⁴⁰ Kevin B. Zeese, *Drug Testing Legal Manual* § 3:5 (2d ed. 2019).

medical documentation of prescribed medical marijuana, if the employee indicates marijuana use is medical in nature, in a manner that does not require the employee or applicant to disclose their disability. Employers should also be cognizant of inadvertently communicating disability information to other employees when providing a reasonable accommodation for medical marijuana use.