Compliance Overview

Overview

Under virtually every state law that legalizes marijuana use, employers have an explicit right to prohibit their employees from using or being under the influence of marijuana at work or during work hours. In addition, most of these laws do not place any restrictions on an employer's right to administer drug tests.

However, **the New York City (NYC) Council** has enacted a local law that prohibits employers in NYC from testing job applicants (other than applicants for certain safety-sensitive positions) for marijuana as a condition of employment. This local law went into effect on May 10, 2020. Similarly, a **District of Columbia law**, which has been in effect since July 22, 2015, prohibits employers from testing job applicants for marijuana before making a conditional offer of employment, unless otherwise required by law. In addition, **Nevada's** Lawful Product Use Law prohibits employers from failing or refusing to hire a job applicant solely because he or she tests positive for marijuana, subject to certain safety-based exceptions, effective on Jan. 1, 2020. **Montana** has also enacted similar changes, which go into effect on Jan. 1, 2022.

Nevertheless, employment disputes can arise when a state's marijuana law does not address whether employers may prohibit employees or applicants from engaging in off-duty marijuana use. The inconsistency between federal law and state marijuana laws also leads to questions regarding employers' obligations.

Federal and State Marijuana Laws

The federal Controlled Substances Act (CSA) classifies marijuana as a Schedule I substance, which means it is considered to have high potential for abuse and no currently accepted medical applications. All uses of Schedule I substances are illegal under the CSA. In addition, the federal Food, Drug and Cosmetic Act (FDCA) prohibits the use, dispensing and licensing of substances, such as marijuana, that have not been approved by the federal Food and Drug Administration.

Nevertheless, most states have passed laws legalizing certain uses of marijuana. These states generally fall into one of the following three categories:

• CBD-only – This category includes states that allow only tightly limited uses of a substance called cannabidiol (CBD), which is a derivative of marijuana that does not produce psychoactive effects in users and is usually administered in oil form. These states have not legalized the use of marijuana plants for any purpose and generally allow CBD use only for the treatment of one or more specified medical conditions, such as epilepsy in children. Because of these factors, employment-related issues rarely arise under these laws. The table below lists the states that fall into this category.

Alabama	Georgia	Iowa	Indiana
Kentucky	Louisiana	North Carolina	South Carolina
Tennessee	Texas	Wisconsin	Wyoming

• Medical-only – This category includes states that allow the use of marijuana plants for medical purposes but do not allow any recreational use. Out of the three types of state marijuana laws, medical marijuana laws generally underlie most employment-related disputes involving the drug. The table below lists the states that fall into the medical-only category.

Arizona	Delaware	Maryland	Montana
New Mexico	Ohio	Utah	Arkansas
Florida	Minnesota	Mississippi	Oklahoma
Pennsylvania	West Virginia	Connecticut	Hawaii
Missouri	New Hampshire	North Dakota	Rhode Island

• Recreational and medical – This category includes states that allow individuals who are age 21 or older to use marijuana plants for recreational purposes. Each of these states also has a separate law governing the use of marijuana for medical purposes. The table below lists the states that fall into this category.

Alaska	Colorado	Maine	Montana
New York	*South Dakota**	Arizona	District of Columbia
Massachusetts	New Jersey	Nevada	Vermont
California	Illinois	Michigan	New Mexico
Oregon	Virginia	Washington	

*South Dakota's Supreme Court struct down the state's legalization law on Nov 24, 2021

Court Decisions on Federal vs. State Marijuana Laws

At least two state supreme courts have held that, because all marijuana use is illegal under the CSA, federal law protects employers from lawsuits for taking an adverse employment action against an individual based on his or her marijuana use that is legal under state law. Specifically:

• In **Ross v. Raging Wire Telecommunications**, issued on Jan. 24, 2008, the California Supreme Court held that an employee did not have the right to sue his employer for terminating his employment based on off-duty medical marijuana use, which was legal under the California Compassionate Use Act (CUA). The court held that the state's Fair Employment and Housing Act, under which the employee brought a disability discrimination claim, does not require employers to accommodate the use of drugs that are illegal under federal law.

• In **Coats v. Dish Network**, issued on June 15, 2015, the Colorado Supreme Court held that an employee who uses marijuana in compliance with Colorado's medical marijuana law does not have the right to sue his or her employer under a separate state law that bars employers from terminating an employee based on his or her off-duty participation in lawful activities. The court's reasoning was that because the federal law prohibits all marijuana use in all states, the employee could not prove that his use of medical marijuana was lawful.

More recently, however, three other courts have held that federal laws do not protect employers from lawsuits for adverse employment actions based on legalized, off-duty marijuana use. Specifically:

• In **Chance v. Kraft Heinz Foods Co**., issued on Dec. 17, 2018, the **Delaware** Superior Court held that, under the **Delaware Medical Marijuana Act**, an authorized medical marijuana user could sue his former employer for firing him based on a positive post-accident drug test result for marijuana. Noting that the federal CSA "does not make it illegal to employ someone who uses marijuana, nor does it purport to regulate employment matters within this context," the court rejected the employer's argument that the CSA pre-empted the state law.

• In **Barbuto v. Advantage Sales and Marketing**, issued on July 17, 2017, the **Massachusetts** Supreme Judicial Court rejected an employer's argument that the federal CSA renders an employee's off-duty use of marijuana an "unreasonable" accommodation for her disability under the **Massachusetts Anti-discrimination Act (MADA).** Noting that the federal CSA does not put an employer at risk of prosecution for its employees' possession of marijuana, the court held that because the **Massachusetts Medical Marijuana Act** specifically allows employers to prohibit onsite marijuana use by employees, it "implicitly recognizes" that allowing off-site use "might be" a permissible accommodation for disability under the MADA.

• In **Noffsinger v. SSC Niantic Operating Co.**, issued on Aug. 8, 2017, the U.S. District Court for the District of **Connecticut** ruled that because the federal CSA and FDCA do not regulate employment relationships nor make it illegal to employ a marijuana user, neither of these federal laws invalidated an employee's right to sue her employer for terminating her employment based on her lawful use of marijuana. The court held that the **Connecticut Palliative Use of Marijuana Act** grants this right, because it specifically prohibits employers from taking any adverse employment action against an individual based on his or her status as a "qualifying patient" who is authorized to use medical marijuana.

Although courts in other states are not bound by any of these decisions, the opinions suggest that employers in states with legalized marijuana should take caution before relying **solely** on federal laws, such as the CSA, to justify adverse employment actions against an individual who tests positive for marijuana.

State Marijuana Laws That Address Off-duty Use

In some states, employers may find relatively clear guidance within the text of their applicable marijuana laws themselves. For example:

• **Arizona** and **Delaware's medical marijuana laws** specify that, unless compliance would result in a loss of any monetary- or licensing-related benefit under federal law or regulations, employers may not take any adverse employment action against an authorized medical marijuana user based on the fact that he or she tests positive for marijuana components or metabolites, unless the employer had reason to believe that the authorized marijuana user who tested positive had been using or was under the influence of marijuana at work (however, a separate Arizona law may protect an employer from litigation for excluding an authorized medical marijuana user from safety-sensitive positions, if it does so under a written drug testing plan that meets certain requirements);

• **New Mexico's medical marijuana law** was amended in April 2019 to include provisions virtually identical to those described above for Arizona and Delaware, but the amendments also specify that this protection does not apply to "an employee whose employer deems that the employee works in a safety-sensitive position." The amendments also specify that the medical marijuana law does not restrict an employer's ability to prohibit or take adverse action against an employee for the use of, or being impaired by, medical marijuana at work or during the hours of employment;

• **Arkansas' medical marijuana law** includes provisions virtually identical to those described above for Arizona and Delaware but also specifies that an employer may exclude an authorized medical marijuana user from safety-sensitive positions if it has a good faith belief that the individual currently uses marijuana; and

• **Florida** and **Ohio's medical marijuana laws** specify that employers have the right to establish and enforce zero-tolerance drug testing and drug use policies.

Please note that this list is not exhaustive. Employers should become familiar with their states' marijuana laws to determine whether they address employers' rights and obligations relating to workplace drug policies and off-duty marijuana use.

State Marijuana Laws That Do Not Address Off-duty Use

Among the states where the applicable marijuana law is silent about whether employers may take adverse actions against employees solely because they test positive for marijuana, at least two supreme courts have sided with employers in disputes involving this issue. In particular:

• In **Ross** (also discussed above), the **California** Supreme Court's decision in favor of the employer was, in part, based on the fact that the state's medical marijuana law (the CUA) only provides protection against criminal prosecution for marijuana use and does not address employment rights or obligations.

• In **Roe v. Teletech Customer Care Management**, issued on Jan. 18, 2011, the **Washington** Supreme Court addressed a claim under the **Washington State Medical Use of Marijuana Act** (MUMA). Like California's CUA, the MUMA is silent regarding whether qualified patients are protected from employment discrimination based on marijuana use. Because of this, the court held that the MUMA does not give employees a right to sue their employers for wrongful termination.

Nevertheless, another state court decision held in an employee's favor. Specifically:

• In **Wild v. Carriage Funeral Holdings**, issued on March 10, 2019, the Supreme Court of **New Jersey** allowed an employee to sue his former employer under the New Jersey Law Against Discrimination (NJLAD) for disability discrimination after he was fired based on his state authorized use of medical marijuana. According to the court, the fact that the **New Jersey Compassionate Use Medical Marijuana Act (CUMMA)** included no prohibition against employment discrimination based on off-duty use did **not** mean that employers are insulated from obligations imposed by other laws, such as the NJLAD. (**Note:** While this case was pending, New Jersey amended the CUMMA, effective July 2, 2019, to include a specific process employers must now follow after an employee or applicant tests positive for marijuana.)

Therefore, even if an applicable marijuana law does not explicitly address employment issues relating to off-duty marijuana use, employers should be aware that state marijuana laws, especially those governing medical use, may still affect their rights and obligations under other applicable laws.

Other State and Federal Laws

As illustrated by the **Massachusetts, Connecticut** and **New Jersey** cases discussed above, employers in some states with legalized marijuana may face lawsuits and potential liability under **state disability laws** for adverse actions taken against authorized, off-duty marijuana users. Therefore, in states where a marijuana law does **not** explicitly address workplace drug policies and off-duty use, employers should consider either accommodating a disabled employee's state-authorized, off-duty marijuana use or at least engaging in an interactive process with the employee to determine whether other reasonable accommodations may be suitable.

In addition, employers should become familiar with any applicable laws that specifically address workplace drug testing. For example, some states have **drug testing-specific laws** that require employers to have written policies and certain testing protocols in place before they may even conduct an employee drug test. Similarly, some **state workers' compensation laws** prohibit claim denials or adverse employment actions based solely on positive drug tests unless certain requirements are met.

Finally, regardless of whether a state marijuana law applies, certain employers may be subject to federal drug testing requirements. For example, federal contractors may be subject to the federal Drug-Free Workplace Act, and commercial transportation operators may be subject to U.S. Department of Transportation regulations. Employers should become familiar with all applicable laws and regulations to determine their obligations.

Cannabis Risk and Insurance Consultation

Looking for an expert in cannabis risk and insurance? VANCANN, a wholly owned division of VANTREO/Acrisure) delivers broad expertise in risk reduction and insurance protection specifically designed for medical and recreational cannabis operations in states permitting the sale and/or use of cannabis and cannabis products. Just let us know how we can be of assistance! Call or **Reply here.**