Drug Screening Compliance Update Summary

Federal Developments

Confidentiality and Release of Information Under the DOT Drug and Alcohol Testing Process
It is hard enough hiring a new driver and making sure that everything is in line with the expansive list of Federal Regulations and your company hiring requirements, but it is just as important that your safety department understand the issues regarding what is necessary to access driver "consumer reports." As we all know, a DOT drug test is often mandatory for transportation employees, across all modes of transportation. Typically, a new hire is asked if they have been drug tested in the past, if they have ever failed a drug test, and given a form to sign stating that it is okay for this new employer to request all their test results from other employers. At first blush, this seems quite harmless and definitely makes it a little easier on the paperwork load. However, a closer look at the law governing DOT drug and alcohol testing is pretty clear that a "blanket release" is prohibited. You must get the person's written consent to seek the information from other employers; this means you need "specific written consent." The person must list all previous and current employers within the relevant time period. The language on the release must be a specific release authorizing your company to receive testing information from a specific or current employer about that specific employee. For example, the release document should not have multiple employers listed, it should have one employer for one employee at a specific point in time. This consent cannot be part of another DOT requirement like a motor vehicle check or criminal background check. With the approach of the new Drug and Alcohol Clearinghouse, it is important to start examining your procedures and forms now. Remember, the Drug and Alcohol Clearinghouse will be an annual process and, unless the FMCSA changes its regulations, the waiver/release form must be signed each year
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Top 5 Tips for Conducting Pre-Employment Medical Exams
In a recently filed lawsuit, the U.S. Equal Employment Opportunity Commission contends that Consolidated Edison Co. ("Con Ed") violated the Americans with Disabilities Act ("ADA") and the Genetic Information Non-Discrimination Act of 2008 ("GINA") by its use of pre-employment medical examinations. According to the Complaint, Con Ed required applicants to submit to pre-employment medical examinations in which the company improperly sought disclosure of genetic information and used this information in deciding whether to hire certain applicants.
Employers should be aware of the following general requirements under the ADA and GINA:

- The ADA prohibits all disability-related inquiries and medical examination prior to a valid offer of employment
- If a valid conditional offer of employment has been issued, the ADA allows an employer to make disability-related inquires and conduct medical examinations as long as it does so for all entering employees in the same job category
- Once employment begins, the ADA only permits an employer to make disability-related inquiries and require medical examinations if they are job-related and consistent with business necessity
- GINA prohibits employers from requesting genetic information about applicants, such as family medical history, during the course of any pre-employment medical examination; and
- GINA prohibits employers from using genetic information in making employment decisions, such as hiring, firing, promotions and compensation

Employers found to have violated the ADA and/or GINA could be liable to aggrieved applicants and employees for back pay, compensation for economic losses, emotional pain and suffering, punitive damages, and attorneys' fees. Consequently, employers are encouraged to review their hiring procedures and contact counsel with any compliance question that may arise.
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DOT Amends Employee Drug Testing Requirements
The Department of Transportation (DOT) has published its long-awaited final rule amending its drug testing program for DOT-regulated employers. The new rule comes in the wake of the Department of Health and Human Services (HHS) revised "Mandatory Guidelines for Federal Workplace Drug Testing Programs" which became effective on October 1, 2017.

The new DOT rule makes the following significant changes:

- Adding four semi-synthetic opioids (hydrocodone, oxycodone, hydromorphone, and oxymorphone) to the drug testing panel, which is "intended to help address the nation-wide epidemic of opioid abuse" and create safer conditions for transportation industries and the public;
- Adding methylenedioxyamphetamine (MDA) as an initial test analyte because, in addition to being considered a drug of abuse, it is a metabolite of methylenedioxyethylamphetaime (MDEA) and methylenedioxymethamphetamine ("MDMA"), and such testing potentially acts as a deterrent;
- Removing testing for MDEA from the existing drug testing panel;
- Removing the requirement for employers and consortium/third party administrators (C/TPAs) to submit blind specimens in order to relieve unnecessary burdens on employers, C/TPAs, and other parties; and
- Adding three "fatal flaws" to the list of when a laboratory would reject a specimen and modifying the "shy bladder" process so that the collector will discard certain questionable specimens.

The new rule goes into effect on January 1, 2018. Employers who comply with DOT standards when drug testing should modify their drug testing policies accordingly. Employers that are not subject to DOT requirements but comply with the HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs also should consider whether to modify their drug testing policies to comply with the new rules and guidelines.
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https://www.federalregister.gov/documents/2017/01/23/2017-00979/mandatory-guidelines-for-federal-workplace-drug-testing-programs

Court Cases

Applicant Who Failed Pre-Employment Drug Test Could Not Show That Public Employer Violated Her Due Process Rights or Title VII
A federal district court recently dismissed a lawsuit in which a job applicant challenged a public employer's decision to withdraw an offer of employment after the individual tested positive for cocaine on a pre-employment drug test. *Turner v. Richmond Public Schools, et al.*, No. 3:16-cv-256 (E.D.VA., March 28, 2017). The federal action sought to recover damages for (1) the violation of Plaintiff's Due Process rights under the Fourteenth Amendment to the United States Constitution; and (2) disparate treatment based on race and gender in violations of Title VII. Plaintiff, an African American female, applied for a position as an Instructional Data Specialist with Defendant Richmond Public Schools. After receiving a conditional offer of employment, Plaintiff submitted a urine sample for drug and alcohol screening; the test returned positive for cocaine. Based on the test results, Richmond Public Schools rescinded Plaintiff's offer of employment. Plaintiff requested reconsideration of the decision based on her concerns with the drug test procedures, disparate treatment between Plaintiff and other employees who had tested positive for drugs, and the lack of due process afforded to Plaintiff. To state a viable due process claim, Plaintiff was required to show that she had a constitutionally protected liberty or property interest. Plaintiff ultimately failed to state sufficient facts reasonably to claim that she held any liberty or property interest at issue in the action. The District Court determined that the

conditional offer of employment could not support Plaintiff's claim of entitlement to employment because Plaintiff had no reasonable expectation of entitlement to the job at the time Richmond Public Schools rescinded the employment offer. Additionally, the District Court found that Plaintiff failed to state a claim under the "stigma-plus" standard, set forth by the U.S. Supreme Court in *Paul v. Davis*, 424 U.S. 693 (1976), necessary to establish a deprivation of liberty within the meaning of the Due Process Clause. The District Court explained that Plaintiff failed to identify any false statements made by Richmond Public Schools that placed a stigma on Plaintiff's reputation and that were made in conjunction with Richmond Public Schools' determination to rescind the employment offer. Similarly, the District Court determined that Plaintiff's complaint lacked specific factual allegations sufficient to state a claim for race or gender discrimination under Title VII. Plaintiff alleged that there were instances in which white male employees tested positive for drugs but were not terminated. The District Court distinguished Plaintiff's situation, however, from white male employees because Plaintiff was not yet an employee at the time of her drug test and, thus, could not compare herself to employees of Richmond Public Schools who may have tested positive for drugs. The District Court also found that Plaintiff failed to identify any facts indicating that she and her comparators dealt with the same supervisors, were subject to the same standards or performed the same functions for the employer. For the reasons stated, the District Court dismissed Plaintiff's action in its entirety. Notably, Plaintiff did not assert a claim that the drug test constituted an unlawful search and seizure in violation of the Fourth Amendment, which is the most common claim asserted against public employers in the drug testing context.
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Insurer on Hook for Employee's Drunk Driving, $1M Verdict
According to the U.S. Court of Appeals for the Eleventh Circuit, an employee involved in a car accident while under the influence did not exceed the scope of his permission to use the vehicle, leaving the employer's insurer on the hook for approximately $1 million in damages. Brian Hensley was permitted to drive a company car for both work and personal purposes. One night, after consuming four beers, he drove home and was involved in an accident that seriously injured Ulysses Anderson. Anderson sued Hensley's employer, which tendered the claim to Great American Alliance Insurance Company. A jury found Hensley liable and awarded Anderson roughly $1 million. The insurer then sought a declaratory judgment that Hensley had exceeded the scope of the permissive use granted by the employer because he drove while intoxicated. Despite the company's policy banning the consumption of alcoholic beverages on company property and prohibiting employees under the influence from working, the court found Hensley remained within the scope of the employer's permission. Even though he was intoxicated, Hensley was using the vehicle for an approved purpose, the panel wrote, and he was therefore an insured under the terms of the policy.
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Wal-Mart Manager Terminated for Alleged Drug Abuse Files ADA Disability Bias Claim
former Wal-Mart manager Kathryn Silva filed an ADA disability bias claim in the Middle District of Pennsylvania that alleged Wal-Mart terminated her because she refused to sign a "last chance agreement." The agreement required her to admit to substance abuse, undergo regular drug screening, and enroll in a substance abuse program. At the time, Silva was purportedly afflicted with several conditions, including arthritis, sciatica, scoliosis, anxiety, and high blood pressure. She alleged that her doctors prescribed her medications to treat these medical conditions and enable her to perform the essential functions of her job. She further alleged that Wal-Mart declined to confirm that her doctors had legally prescribed her medication to treat her medical conditions. Due to her medical conditions, Silva is likely a "qualified individual" with a disability under the Americans with Disabilities Act ("ADA")—an individual who, with reasonable accommodation, could perform the essential functions of the employment position that she held. See 42 U.S.C. 12111(8). ADA prohibits "covered entities"—generally employers with 15 or more employees—from discriminating against qualified individuals because of their disabilities. ADA does not, however, protect employees or applicants who are "currently engaging" in the illegal use of drugs. See 42 U.S.C. 12114(a). While it may seem obvious to employers that ADA does not prevent them from terminating substance abusers, they must be careful. ADA protects

qualified individuals with disabilities who are "erroneously regarded" as engaging in illegal drug use. On the facts of Silva's complaint alone, she appears to fit into this category. Thus, if true, Wal-Mart's decision to terminate her for refusing to sign the last chance agreement may be a costly one. This does not mean, however, that employers may not take steps necessary to ensure drug-free workplaces. The ADA permits testing for illegal drug use. A drug test is not considered a medical examination under the ADA. As a result, employers may conduct testing of applicants or employees and make employment decisions based on the results. Employers should be cautious, however, not to make employment decisions based on drug test results that an employee's medically necessary and legally prescribed drugs may have impacted. On the other hand, if the employer can demonstrate that the employee cannot perform the essential functions of the position when taking the medication, then the employer may take action. While a test for illegal drugs is not a medical examination under the ADA, a test for alcohol is. Thus, employers generally may not test job applicants for alcohol before offering them a position. With respect to current employees, employers may test them for alcohol if they have a reasonable belief that they are under the influence of alcohol at work. They may also test employees following a workplace accident. Finally, employers may maintain and enforce rules prohibiting employees from being under the influence of alcohol or illegal substances in the workplace. As a best practice, employers should implement policies that explain: when drug or alcohol testing may occur; how it will be administered; and that the results of the tests will be confidential. Employers should also check state and local laws regarding drug and alcohol testing.
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State Developments

Alabama
What Can Employers Do with Regard to Medical History and Drug Screening?
Medical history: There are no restrictions, subject to federal restrictions (the Americans with Disabilities Act).

Drug screening: Drug screening is authorized. There is a drug-free workplace law, but there is no specific regulation of drug testing in the workplace.
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Arizona
What Can Employers Do with Regard to Medical History and Drug Screening?
Medical history: Covered entities, including employers, employment agencies, labor organizations, and joint labor-management committees, cannot conduct a medical examination or ask a job applicant whether they are disabled (A.R.S. §§ 41-1461(3), 41-1466(A)). An employer may inquire as to the ability of an applicant to perform job-related functions. After an offer of employment has been made but before employment begins, an employer may condition the employment offer based on the employee passing a medical examination if all employees are required to undergo such an examination, regardless of disability. An employer cannot request an examination or inquire about whether one of its employees is disabled; however, an employer can make an inquiry or request an examination if it is shown to be job-related and consistent with business necessity (A.R.S. § 41-1466(C)). An employer may conduct voluntary medical exams of its employees as a part of an employee health program. The definition of a "medical exam" excludes a test to determine the illegal use of drugs (A.R.S. § 41-1466(F)).

Drug screening: Arizona law does not impose any restrictions on drug and alcohol testing of employees per se. If an employer conducts drug or alcohol testing in compliance with A.R.S. § 23-493 et seq., it will gain "safe harbor" protection against employee lawsuits arising from the tests or test results.

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California

The legalization of cannabis in California raises significant questions as to whether employers can enforce policies prohibiting cannabis use by employees. Recent California legislation provides employers with the right to do so, even if the employees' use occurs outside of work and does not impair performance. Generally, an employer's anti-cannabis policy should explain why the restriction promotes the legitimate business interests of the company. However, cannabis businesses must be careful when drafting such policies to comply with applicable regulations without self-imposing liability on the employer. California legalized the use of marijuana for medical purposes under the Compassionate Use Act of 1996. Health & Safety Code §11362.5. In November 2016, Californians passed Proposition 64, also known as the Adult Use of Marijuana Act (AUMA), a ballot measure allowing the possession and use of moderate amounts of marijuana for recreational purposes. In June 2017, California enacted the Medical and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA), which effectively repealed the Medical Marijuana Regulation and Safety Act. AUMA and MAUCRSA both favor employers to impose anti-marijuana policies. One of the enumerated purposes of Proposition 64 is to "allow public and private employers to enact and enforce workplace policies pertaining to marijuana." AUMA §3(r). MAUCRSA expressly states that the legalization of cannabis use does not (i) restrict the rights of employers to maintain a drug free workspace, (ii) require an employer to permit or accommodate cannabis use in the workplace, or (iii) affect the ability of employers to have policies prohibiting the use of cannabis by employees and prospective employees. See MAUCRSA §133, amending Health & Safety Code §11362.45. These statutes align with the position taken by the California Supreme Court. In *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, the court determined that employers have the right to undertake pre-employment drug testing "in light of the well-documented problems that are associated with the abuse of drugs and alcohol by employees—increased absenteeism, diminished productivity, greater health costs, increased safety problems and potential liability to third parties, and more frequent turnover." The ruling held that the California Fair Employment and Housing Act does not require employers to accommodate the use of illegal drugs. In 2008, the California Supreme Court considered whether an employer could fire an employee who failed a pre-employment drug test after he disclosed that, at his physician's recommendation, he was using medicinal marijuana for back spasms as a result of injuries suffered while serving in the Air Force. *Ross v. RagingWire Telecommunications, Inc.*, 42 Cal.4th 920 (2008). Four State Supreme Court justices sustained the dismissal of the complaint, finding that neither the Compassionate Use Act nor the accommodation requirements of the Fair Employment & Housing Act applied. But two dissenting justices noted that the majority opinion permits an employer to fire the employee for marijuana use, even when it occurs off-hours, does not affect the employee's performance, does not impair the employer's legitimate business interests, and provides effective relief for the employee's medical condition. In their view, an employer must demonstrate that doctor-approved use of medicinal marijuana off-duty and off-premises is likely to impair business operations in some way or offer an alternative reasonable accommodation. Otherwise, they found discharge to be disability discrimination prohibited by the Fair Employment and Housing Act. The dissenting position suggests that the court may eventually require employers to accommodate the use of medical marijuana unless such use affects the employee's performance or impairs the employer's legitimate business interests. This view may now be particularly sympathetic to the courts in light of the increased support for medical marijuana among the medical community and the general public in the past decade. Thus, despite the enactment of laws permitting the prohibition of marijuana use among employees, employers will generally be well suited to incorporate language into their policies expressing the rationale behind their prohibition. Employers in cannabis-related industries should carefully craft language in handbooks and drug-testing policies. To protect their own liability from the products they grow or sell, these practices should ensure that limitations on use and being under the influence at work do not, without more, suggest that marijuana-related consumption impairs productivity, affects safety, or promotes absenteeism. Additionally, policies and practices may not, under any circumstances, allow smoking marijuana anywhere where smoking of tobacco is otherwise prohibited. Most municipalities expressly prohibit the consumption of cannabis on the premises of cannabis businesses. For example, Los Angeles' proposed commercial cannabis regulations (summarized in a previous Tracking Cannabis post), which are currently subject to a public comment period ending on August 8, 2017, require businesses to monitor employee conduct to assure that employees do not consume cannabis on the premises and within the parking areas and require employers to post "No…Smoking of Cannabis" signs in and outside the business. In the meantime, California

employers in all industries may conduct pre-employment drug testing and refuse to employ individuals who test positive for marijuana use.
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DC Metro Area
The following briefly summarizes a nonprofit organization's obligations in the District of Columbia, Maryland, and Virginia regarding the accommodation of an employee's use of medical marijuana. As is typical of the region, the legal landscape shifts as you cross the Potomac River, and again as you cross Western Avenue.

- District of Columbia: The District of Columbia (DC) has legalized medical marijuana, but without any express provision protecting employees who use medical marijuana from "the denial of a right or privilege," or any other such similar language. In the private sector, there are not yet any reported judicial decisions about whether an employer, including a nonprofit, must permit or otherwise accommodate an employee's use of medical marijuana. In the public sector, the DC Department of Human Resources has issued guidance stating that a DC employee who has been "authorized by a licensed physician to use marijuana for medicinal purposes is permitted to do so in accordance with applicable laws, rules and regulations of their states of residence, provided such usage does not impair or otherwise impede his or her ability to safely carry out assigned duties and responsibilities." It remains to be seen whether courts will apply this approach to the private sector.
- Maryland: Maryland also legalized the use of medical marijuana, with the express protection that qualifying patients, providers, caregivers, and growers may not be "denied any right or privilege for the medical use of cannabis." Md. Code, Health-Gen §13-3313. How Maryland courts will interpret that clause remains to be seen. In the meantime, nonprofit employers should proceed with caution and consider engaging in an interactive process to attempt to accommodate an employee's use of medical marijuana.
- Virginia: Virginia has not legalized medical marijuana. While some Virginia lawmakers have proposed such bills in the General Assembly, to date, none has garnered enough support to become law.

The proximity of these three jurisdictions to each other raises interesting potential questions. For example: Imagine that a Maryland resident who has been prescribed medical marijuana crosses into Virginia every day to work, is terminated for failing a drug test, and brings suit. Can that Virginia nonprofit terminate the Maryland resident for marijuana use that occurred and is protected in Maryland? While it is not yet clear where DC metro-area nonprofit organizations will find a comfortable space between the rock (where accommodating medical marijuana is required) and the hard place (where marijuana use for any purpose is illegal), nonprofits should revisit their policies and consult with legal counsel.

Florida
Florida Preserves Employer Protections in Medical Marijuana Bill Voters in the November 8, 2016, general election in the state of Florida approved the Florida Medical Marijuana Legalization Initiative. On June 9, 2017, a bill was sent to Governor Rick Scott for his signature (SB 8-A). Scott said he "absolutely" intends to sign the medical marijuana bill passed by the state legislature. The bill will be effective upon Scott's signing the bill and will take effect upon becoming a law. The amendment states that laws must be in place by July 3, 2017 and enacted by October of 2017. Scott should be able to sign the bill ahead of the first deadline. While many aspects of the bill have been reported on, the most important section of the bill for Florida employers has received scant attention. Section 381.986 of the Florida Statutes has been amended to provide: 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. Marijuana, as defined in this section, is not reimbursable under chapter 440. Court challenges are likely, most certainly on the aspect of the legislation that precludes actual smoking of marijuana. It is unclear what the result of a court challenge would be on the section that excludes smoking. The constitutional amendment provides that "[n]othing in this section shall require any

accommodation of any on-site medical use of marijuana in any correctional institution or detention facility or place of education or employment, or of smoking medical marijuana in any public place." In any event, the legislation gives Florida employers some degree of protection if they do not want intoxicated employees on their worksites. This is also consistent with the federal Department of Transportation rule that medical review officers will not verify a drug test as negative based upon information that a physician recommended that the employee use medical marijuana. Under those rules, "[i]t remains unacceptable for any safety‐sensitive employee subject to drug testing under the Department of Transportation's drug testing regulations to use marijuana."
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Illinois
What Can Employers Do with Regard to Medical History and Drug Screening?
Medical history: The Genetic Information Privacy Act prohibits employers from seeking or using genetic information for personnel-related reasons. The Illinois law is similar to the federal Genetic Information Non-discrimination Act, except that the Genetic Information Privacy Act is more expansive and covers employers with at least one employee. Additionally, the AIDS Confidentiality Act provides that no person may order an HIV test without first obtaining the documented informed consent of the subject of the test or the subject's legally authorized representative.

Drug screening: Illinois has no statute relating to drug testing. However, the Illinois Human Rights Act explicitly states that it is not illegal for employers to require drug tests of employees who have or are in a drug rehabilitation program.
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Indiana
What Can Employers Do with Regard to Medical History and Drug Screening?
Medical history: Indiana has no specific statute restricting inquiries into medical history in the employment setting. Private employers can generally test job applicants and employees for drugs, alcohol, and other controlled substances in accordance with the requirements of the Americans with Disabilities Act and the Indiana Civil Rights Act.

Drug screening: Indiana has no specific statute restricting drug tests. Private employers can generally test job applicants and employees for drugs, alcohol, and other controlled substances in accordance with the requirements of the Americans with Disabilities Act and the Indiana Civil Rights Act.

Other: Employers may not require, as a condition of employment, that an employee or prospective employee refrain from using tobacco products outside the course of employment.
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Maine
Maine Delays Implementation of Certain Provisions of Recreational Marijuana Law. Last November, Maine was one of four states in which voters approved a new recreational marijuana law. Maine's law took effect on January 30, 2017; however, emergency legislation passed on January 27, 2017 delayed the implementation of certain provisions of the law. Specifically, the emergency legislation:

- Delayed the effective date of most of the provisions of the law (including the anti-discrimination provisions, discussed below) until February 1, 2018, so that the state licensing authority can establish and implement regulations concerning retail sales of marijuana;

- Clarified that possession of a usable amount of marijuana by a juvenile is a crime, unless the juvenile is authorized to possess medical marijuana; and,
- Prohibits possession of any edible retail marijuana products until February 1, 2018.

Maine's recreational marijuana law provides that employers are not required to permit or accommodate the use, consumption, possession, trade, display, transportation, sale, or growing or marijuana in the workplace, and also are permitted to enact and enforce workplace policies restricting the use of marijuana by employees and discipline employees who are under the influence of marijuana in the workplace. But the law prohibits employers from "refusing to employ a person solely because that person consumed marijuana outside the employer's property." This language is problematic for employers who conduct drug testing because a drug test does not reveal when or where someone used marijuana. It is impossible to learn from a drug test result whether marijuana was "consumed outside the employer's property" because marijuana can stay in the human body for days or even weeks. This language will make it difficult for Maine employers to conduct drug testing for marijuana, particularly in the pre-employment context. Even if a Maine employer suspects that an employee is "under the influence of marijuana in the workplace," the drug test result will not provide conclusive proof that the marijuana was consumed at work. The Maine legislature has formed a committee to consider implementation of the recreational marijuana law and it is hoped that the anti-discrimination language will be revised.
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The Portland Press Herald is reporting that Maine Department of Labor Director of Policy, Operations and Communications, Julie Rabinowitz, reported to a legislative panel yesterday that businesses with Maine-state drug testing policies should not test job applicants and workers for marijuana, because even if the tests came back positive, employers cannot fire the individual. Specifically, Section 2454(2) of the Marijuana Legalization Act provides: "This chapter may not be construed to require an employer to permit or accommodate the use, consumption, possession, trade, display, transportation, sale or growing of cannabis in the workplace. This chapter does not affect the ability of employers to enact and enforce workplace policies restricting the use of marijuana by employees or to discipline employees who are under the influence of marijuana in the workplace." Moreover, Section 2454(3) provides: "A school, employer or landlord may not refuse to enroll or employ or lease to or otherwise penalize a person 21 years of age or older solely for that person's consuming marijuana outside of the school's, employer's or landlord's property." These two provisions are what the DOL is relying upon to support the position that employers cannot take adverse action against an employee even if the employer has a state-sanctioned drug testing policy and that employee fails the drug test. Recently, the Massachusetts Supreme Court found language similar to that found in Section 2454(2) to implicitly require an employer to attempt to accommodate employees who had marijuana in their system while at work, but who did not use the marijuana at work. The additional hurdle that the Maine statute as a whole creates for employers is the fact that there currently are no scientifically proven ways to determine whether an employee is under the influence of marijuana. Accordingly, if an employer is relying upon a determination that an employee is "under the influence," it is recommended that a policy or practice be created as to what standard will be relied upon to make this determination. Until there is clarity in the legislation—or a court case that clarifies employers' responsibilities—we recommend employers contact counsel prior to taking any adverse action against an employee who tests positive for marijuana under a state-approved drug test.
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On November 8, 2016, Maine voters approved "Question 1—An Act to Legalize Marijuana" ("Act"), and joined a handful of other states, including California, to have legalized the recreational use, retail sale and taxation of marijuana. As approved, the Act would have allowed persons 21 years of age or older to use or possess up to 2½ ounces of marijuana, consume marijuana in nonpublic places (including a private residence), and grow, at the person's residence, up to 6 flowering marijuana plants (and up to 12 immature plants). The Act also would have legalized the

purchase of marijuana or marijuana seedlings or plants from retail marijuana stores and cultivation facilities. Importantly for employers, the Act was the first law of its kind in the nation establishing express anti-discrimination protections for recreational marijuana users.

The Act was to become fully effective on January 30, 2017. However, on January 27, 2017, the legislature approved a moratorium on implementing parts of the law regarding retail sales and taxation until at least February 2018, giving time to resolve issues and promulgate rules.

However, on November 3, 2017, Governor Paul R. LePage vetoed the Act. In a letter to the legislature, the Governor outlined various reasons for his decision, including conflict between state and federal law, the Act's failure to address compatibility issues with the state's existing medical marijuana program, the Act's bifurcated regulatory structure, and timelines the Governor viewed as unrealistic. On November 6, 2017, the Maine legislature sustained the Governor's veto. Although Maine employers may have a reprieve from a recreational marijuana law, Maine employers with workplace policies in other jurisdictions should consider making clear that as marijuana is still illegal under federal law, it is considered an illegal drug under the drug-free workplace policy, taking steps to minimize the risks of negligent actions and safety concerns that may be caused by marijuana use, and having conversations with drug testing vendors to determine how positive marijuana tests will be handled and reported where medical marijuana is approved. https://www.lexology.com/library/detail.aspx?g=1b3db8af-de34-419d-9c93-3144f4d66735&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=ACC+Newsstand+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2017-11-20&utm_term

Maine Employers Must Ignore Off-Work Marijuana Use, Cease Testing Applicants

On February 1, 2018, Maine became the first jurisdiction in the nation to protect workers from adverse employment action based on their use of marijuana and marijuana products, provided the use occurs away from the workplace. In preparation for this change, the Maine Department of Labor has removed marijuana from the list of drugs for which an employer may test in its "model" applicant drug-testing policy. Although wrangling between the state legislature and Governor Paul LePage has delayed the retail sale of marijuana, the remaining provisions of Maine's "Question 1—An Act to Legalize Marijuana" ("the Act"), are slated to move forward despite fears doing so will hurt business in the state. How Maine Came to Embrace Recreational Marijuana: On November 8, 2016, Maine voters approved the Act, permitting the recreational use, retail sale and taxation of marijuana. Although the law was originally scheduled to take effect on January 30, 2017, the Maine legislature imposed a moratorium on retail sales and taxation (as well as employment anti-discrimination provisions) in order to provide additional time to promulgate rules on marijuana sale and taxation, and to resolve other outstanding issues. The new effective date for those portions of the Act was pushed to February 1, 2018, although as described below, the state has yet to finalize rules that will permit the retail sale of marijuana and marijuana products. Significantly for employers, the employment anti-discrimination provisions of the Act are set to become effective February 1, 2018. The anti-discrimination provisions of the Act prohibit employers from refusing to employ or otherwise penalizing any person age 21 or older based on that person's "consuming marijuana outside the … employer's … property." However, regardless of where marijuana is consumed, the Act allows employers to prohibit the use and possession of marijuana and marijuana products "in the workplace" and to "discipline employees who are under the influence of marijuana in the workplace." According to a spokesperson from the Maine Department of Labor, who spoke to the legislature in July, a positive drug test alone will not suffice to demonstrate that a worker was "under the influence" of marijuana. Given the current posture of the law, from February 1, 2018 forward, employers with lawful workplace drug-testing policies implemented in accordance with Maine law will need to assess compliance approaches, risks and risk tolerance in connection with marijuana policy prohibitions, continued marijuana testing and adverse action, if any, based on verified confirmed positive marijuana test results. The law does not affect compliance with federally mandated testing for marijuana, such as testing under U.S. Department of Transportation regulations of certain commercial motor vehicle drivers or related prohibitions on marijuana use. It remains to be seen whether the non-discrimination provisions contained in the law will be enforced by the courts, especially given the conflict between federal and state law.3

More information, including links and updates on the most recent gubernatorial and legislative developments, can be found at the recreational marijuana web page established by the Maine legislature at http://legislature.maine.gov/9419.

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Massachusetts
When Massachusetts voters legalized the use of marijuana for medicinal purposes four years ago, the impact on most employers was limited to clarifying that "legal" marijuana use was still generally prohibited in the workplace. Now, Massachusetts has legalized limited use of recreational marijuana. Although the recreational marijuana use law also provides that employers may prohibit employees from reporting to work or performing work under the influence of marijuana, the new law is raising practical challenges for employers. Here are three ways that employers may consider changing what they have been doing:

- Pre-employment Drug Testing - Many employers require job candidates to successfully pass a drug test as a condition to receiving a job offer. Prior to the legalization of marijuana, a positive test for marijuana use by a job candidate was an indication of illegal drug use and clear grounds for rescinding an offer of employment. Since legalization of medical and recreational use, from a legal standpoint, rescinding a job offer based on testing positive for marijuana use is still generally permitted. From a practical standpoint, however, the rationale that marijuana use is illegal no longer exists and brings into question the rationale for drug testing for marijuana at all. For example, a job candidate may be prepared to have a clean drug test, but just after taking the drug test could engage in recreational marijuana use, thus defeating the purpose of the employer's knowing whether the candidate uses marijuana. Also, if the drug test is positive for marijuana use, employers may still be required to assess whether the marijuana use is supported by a medical prescription and, thus, requires the employer to engage in an interactive process to determine whether or not continued medical marijuana use is a reasonable accommodation that must be provided to the candidate.
- Identifying Marijuana Use at Work - The laws legalizing medical and recreational marijuana use in Massachusetts allows employers to prohibit the use of marijuana at the workplace. But, detecting its use may be challenging. With the advent of "vaping", where the smell of marijuana can be easily masked, it may not be clear at all whether an employee is under the influence of marijuana at work. Employers can drug test, but as is the case with pre-employment drug testing, the drug test may not accurately indicate whether the employee is currently impaired by marijuana use that occurred after work hours. Due to the limited value of drug testing in most cases, employers may consider drug-testing only where there is a reasonable basis to believe someone is impaired by the marijuana (or some other drug) or is a threat to the safety of the employee or others.

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State-registered medical cannabis patients may now sue a private employer for discrimination under Massachusetts' law if they are fired for their off-the-job marijuana use, according to landmark ruling issued July 17, 2017, by the Massachusetts Supreme Judicial Court. Citing the Massachusetts Medical Marijuana Act, the court states that patients shall not be denied "any right or privilege" due to marijuana use. The Massachusetts Medical Marijuana Act, passed in 2012, states that "qualifying patients" should not be punished under state law for medical use of marijuana. In *Barbuto v. Advantage Sales and Marketing LLC*, the plaintiff, Cristina Barbuto, accused the company of discrimination. She had accepted a position with Advantage Sales and Marketing in 2014. Barbuto suffers from Crohn's disease, a gastrointestinal condition that can cause weight loss. As a result of her condition, Barbuto has "little or no appetite," and struggles to maintain her weight, something made easier with marijuana use, according to court documents. After one day of promoting products in a supermarket, Barbuto was fired after she was informed by human resources that she did not pass the drug test and that the company follows federal, not state law. Advantage Sales and Marketing argued that Barbuto did not make her handicapped status clear and—even if it had been clear—she still would have been terminated as all employees are required to pass a drug test, but the court didn't agree. "One generally would

expect an employer not to interfere with the employee taking such medication, or to terminate her because she took it," the Massachusetts Supreme Judicial Court opined. "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." The court stated it is "not facially unreasonable" for employers to make exceptions to their substance abuse policies in instances where employees are using cannabis at home to treat a debilitating condition. "The fact that the employee's possession of medical marijuana is in violation of federal law does not make it per se unreasonable as an accommodation." The unanimous verdict reverses a lower court decision and is contrary to rulings in California, Colorado, Oregon and Washington. In each of those states, the supreme courts ruled that employees had no legal protections if they were fired without cause for their state-sanctioned use of medical cannabis. However, the medical marijuana laws of the following states do contain anti-discrimination or reasonable accommodation provisions: Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Pennsylvania and Rhode Island. In other states, the statute explicitly provides no protection or is silent. None of these laws require employers to allow workers to use marijuana during work. Workers can still be drug tested and fired for failing a drug test if it is not part of an approved treatment plan for a medical condition. Employers should be cautious when making any adverse decisions related to an employee's use of medical marijuana. Seek legal counsel from Squire Patton Boggs for the latest updates effecting your state.
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Michigan
Since 2008, when the Michigan Medical Marijuana Act (the "MMMA") went into effect, employers in Michigan have been presented with new and nuanced issues related to how the new marijuana law would impact employment-related decisions.

In this article we'll cover an issue that many employers have faced in the post-MMMA world: Can an employee with a medical marijuana card be fired for testing positive for marijuana and, if so, can the employee collect unemployment benefits?

Can an Employee with a Medical Marijuana Card be Fired for Failing a Drug Test?
The MMMA does not place any limits or restrictions on workplace drug testing. Therefore, regardless of whether an employee may lawfully use medical marijuana, they may be tested for drugs in accordance with established drug testing programs. This includes unionized employees, although drug testing is a mandatory subject of collective bargaining.

An employee who fails a drug test may be fired for violating a drug free workplace policy - again, regardless of whether they have a marijuana card or not. The MMMA does not regulate private employment nor protect against termination from private employment. It only provides a potential defense against criminal prosecution or some other adverse action by the state.

An employer terminating an employee for marijuana use must still proceed carefully. Just because its actions may not violate the MMMA, they may still give rise to, for example, a claim for discrimination or retaliation, or a claim for defamation if the reason for termination is publicized and the test result was a false positive.

Can a Terminated Employee with a Medical Marijuana Card Collect Unemployment Benefits?
An employee who possesses a valid marijuana card and is terminated solely for testing positive for marijuana may be able to collect unemployment benefits. The Michigan Court of Appeals considered this issue in the recent case of *Braska v. Challenge Manufacturing Co*. In this case, the court stated: "Claimants tested positive for marijuana and would ordinarily have been disqualified for unemployment benefits under MESA (Michigan Employment Security Act), however, because there was no evidence to suggest that the positive drug tests were caused by anything other than

claimants' use of medical marijuana in accordance with the terms of the MMMA (Michigan Medical Marijuana Act), the denial of the benefits constituted an improper penalty for the medical use of marijuana under the MMMA."
Thus, employees in Michigan who possess a medical marijuana card but are discharged for testing positive may be entitled to unemployment benefits.
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Minnesota
What Can Employers Do with Regard to Medical History and Drug Screening?
Medical history: Covered entities, including employers, labor organizations, and employment agencies, cannot conduct a medical exam or ask a job applicant questions about an employee's physical or mental impairments or health before making a job offer. Any post-offer inquiry or exam must screen for essential job-related capabilities only (Minn. Stat. § 363A.20, subd. 8).

Drug screening: Minnesota's Drug and Alcohol Testing in the Workplace Act is one of the most restrictive drug and alcohol testing statutes in the United States. Employers must have a policy that strictly complies with the act, and any testing must carefully follow the process outlined in the act or else the test will be invalid, and the employer may be liable for damages to an employee harmed by an unlawful test. An employee who has a first positive test must be given the chance to complete treatment. In addition, an employee may not be fired for a first positive test unless the employee refuses to seek treatment or fails to successfully complete a treatment program. Testing may be performed in the following circumstances:

- pre-employment testing for applicants;
- with reasonable suspicion;
- treatment program testing;
- routine physical exam testing; and
- random testing for safety-sensitive positions (Minn. Stat. § 181.950-.957).

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New Jersey
Since 2010, cannabis use has been limited to medicinal purposes under the New Jersey Compassionate Use Medical Marijuana Act (CUMMA), codified at N.J.S.A. 24:6I-1, et seq. Under CUMMA, employers must reconcile accommodating employee-alleged disability (that is treated by prescription marijuana) with the competing need to ensure a safe and unimpaired workforce. CUMMA does not prevent employers from disciplining or terminating impaired employees, as the law specifically prohibits anyone—even someone with a prescription—from operating any vehicle or stationary heavy equipment while under the influence of marijuana. N.J.S.A. 24:6I-8. Likewise, nothing in CUMMA requires any New Jersey employer to accommodate the medical use of marijuana in any workplace. N.J.S.A. 24:6I-14.

New Jersey Law in 2018
Anticipating a change in administrations, New Jersey's legislature introduced Bill S3195 in June 2017. If enacted, S3195 will legalize recreational marijuana use in New Jersey. Among other things, the bill will allow for the possession of up to one ounce of dried marijuana, 16 ounces of edible cannabis products, and 72 ounces of cannabis in liquid form. The sales tax on recreational purchases will start at seven percent in the first year, rising by five percent annually thereafter. Recreational marijuana would first be sold at the five existing medical marijuana dispensaries in New Jersey (in Bellmawr, Cranbury, Egg Harbor, Montclair, and Woodbridge), with other licensed locations to follow. S3195 mirrors CUMMA because it does not require any New Jersey employer to permit or accommodate marijuana use in the

workplace. Likewise, it does not affect the ability of employers to maintain zero-tolerance policies prohibiting marijuana use or intoxication by employees during work hours. S3195, however, differs from CUMMA in one significant respect: It creates a separate cause of action making it unlawful for employers to take "any adverse employment action" against an employee merely because that person uses marijuana. Refusing to hire, or firing, such employees are two actions prohibited by S3195. This baseline prohibition is softened by only two caveats. First, an employer may affirmatively assert the defense that it has "a rational basis" for the adverse employment action which is "reasonably related to the employment." This presumably includes safety-sensitive positions and instances in which the responsibilities of the current or prospective employee mandate the need for drug-free personnel. Second, employers will remain free to take adverse employment action against an employee if failure to do so places the employer in violation of federal law or causes it to lose a federal contract or funding.

Employers' Bottom Line

The new legal claim created by S3195 joins New Jersey's Law against Discrimination and Conscientious Employee Protection Act as yet another legal landmine facing New Jersey employers. Early indicators suggest S3195 will be fully implemented by the summer of 2018. In advance, hiring and disciplinary procedures and protocols should be updated to both maximize compliance with this new law and minimize management's potential liability.
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New Hampshire

What Can Employers Do with Regard to Medical History and Drug Screening?

Medical history: It is unlawful for any employer to require an applicant or employee to undergo genetic testing or to affect terms of employment based on genetic testing, except in very limited circumstances (RSA 141-H:3).

Drug screening: No state-specific laws restricting or regulating an employer's ability to impose pre-employment drug screens exist. However, one statute (RSA 151:41) requires healthcare facilities to have a written policy addressing drug testing and diversion prevention of controlled substances. Healthcare facilities include, without limitation, hospitals, doctors' offices, home healthcare providers, outpatient rehabilitation centers, ambulatory surgical centers, urgent care centers, nursing homes, assisted living facilities, adult day-care centers, and hospice care facilities. The policy, which applies to employees, contractors and agents who provide direct patient care, must include procedures for drug testing, including, at a minimum, testing where reasonable suspicion exists. While not specifically required, pre-employment drug testing should probably be a part of the drug-testing program. As of 2013, New Hampshire has a medical marijuana law (RSA Ch. 126-X). The law is completely effective now that special dispensaries have begun to open around the state to make prescription cannabis available to qualified patients. The statute states that the law is not to be construed to require "any accommodation of the therapeutic use of cannabis on the property or premises of any place of employment" (RSA 126-X:3, III (c)). Further, the law does not "limit an employer's ability to discipline an employee for ingesting cannabis in the workplace or for working while under the influence of cannabis" (id.). While these provisions are seen as helpful to employers' efforts to maintain a drug-free workplace, no case decisions or administrative guidance exists on whether the statute will limit an employer's rights to refuse employment or terminate the employment of qualified individuals who test positive on employer-mandated drug tests for marijuana, especially pre-employment drug screens.

Other: As of January 1, 2017, healthcare provider facilities licensed under New Hampshire law (RSA Chapter 151) are mandated to provide certain employment information regarding the misconduct and competency of an employee healthcare worker when requested by a prospective or current employer. If disclosure is done in good faith, the facility, as well as its employees and directors, will be immune from civil liability unless:

- the information disclosed was false; or
- the information was disclosed with the knowledge that it was false.

This new law applies to hospitals, long-term care facilities, ambulatory surgical centers, walk- clinics, home health agencies, hospice facilities, labs, health services offered by schools, and adult daycare services with medical services for three or more individuals.

If an employer intends to require a new employee to execute a non-compete agreement as a condition of employment, the employer must provide the new hire with a copy of the agreement before the individual's acceptance of the offer of employment. See the full text of the law below at section 7.3.1.
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North Carolina
What Can Employers Do with Regard to Medical History and Drug Screening?
Medical history: No state legislation restricting inquiries into medical history exists. However, employers should be aware that it is unlawful for any employer with 25 or more employees to require any applicant to pay the cost of a medical examination or the cost of providing any records required by the employer as a condition of hire (N.C. Gen. Stat. § 14-357.1). The North Carolina Department of Labor takes the position that such records are not just medical records, but also any required records including, but not limited to, criminal records. Any employer that violates this section may be fined. It is the North Carolina Department of Labor's position that Section 14-357.1 does not apply where the medical examination or records are required by law, rather than by the employer.

Drug screening: Employers are permitted to conduct drug screenings of prospective employees pursuant to, and in compliance with, the Controlled Substance Examination Regulation Act (N.C. Gen. Stat. § 95-230, et seq.) and the related regulations codified in 13 NCAC .0400, et seq., which include the following:

- At the time of providing a sample for testing, the prospective employee must be provided with written notice of his or her rights and responsibilities under the act.
- A preliminary screening procedure that uses a single-use test device may be used for prospective employees.
- Samples for prospective or current employees may be collected onsite or at an approved laboratory. If a screening test for a prospective employee produces a positive result, an approved laboratory shall confirm that result by a second examination of the sample, using gas chromatography with mass spectrometry or an equivalent scientifically accepted method, unless the prospective employee signs a written waiver at the time or after he or she receives the preliminary test result.
- Applicants and employees have a right to retest a confirmed positive sample at the same or another approved laboratory.
- A retest must be requested in writing, specifying to which approved laboratory the sample is to be sent.
- The applicant or employee is responsible for all reasonable expenses for chain of custody procedures, shipping, and retesting of positive samples related to this request.
- Employers are prohibited from imposing the costs of drug screening tests as a condition of hiring (N.C. Gen. Stat. § 14-357.1).

In addition, the Occupational Safety and Health Administration has issued a final rule which impacts drug testing in every state, and it is clear in the commentary to the final rule that blanket post-accident or injury testing is prohibited.
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Pennsylvania
The Pennsylvania Department of Health officially launched its medical marijuana patient and caregiver registry last week, allowing patients with specific medical conditions to sign up for a state-issued certification card. The medication is expected to be available in Pennsylvania to certified users by May 1, 2018. The Medical Marijuana Act (SB 3) went

into effect in 2016 and legalized medical marijuana for use by patients who suffer from qualifying conditions and who register with the state. Medical marijuana will only be available legally in certain forms and must be prescribed by a physician specifically licensed by the state. More than 100 physicians in Pennsylvania have been approved to participate in the medical marijuana program, and nearly 200 more are scheduled to take the required training.

The Medical Marijuana Act includes an employment non-discrimination provision preventing employers from taking adverse action against an individual solely on the basis of their status as a certified user of marijuana. However, it does not give employees the right to show up at work under the influence or otherwise fall below expected performance standards. Governing regulations hopefully will clarify employer obligations in this context. https://www.lexology.com/library/detail.aspx?g=0848376b-e039-4034-bb4f-075339ec851f&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=ACC+Newsstand+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2017-11-08&utm_term

Rhode Island
Employer's Refusal to Hire Medical Marijuana User Violates State Law, Rhode Island State Court Holds.
Employers cannot refuse to hire a medical marijuana cardholder, even if the individual admittedly would not pass the employer's pre-employment drug test required of all applicants, a Rhode Island state court has held under the state medical marijuana law. *Callaghan v. Darlington Fabrics Corp., et al.*, No. PC-2014-5680 (R.I. Super. Ct., May 23, 2017). The court granted summary judgment to the plaintiff-applicant. The plaintiff had applied for a paid internship with the employer and disclosed that she had a medical marijuana card and would not pass the employer's required pre-employment drug test. The employer's policy prohibited only the use of drugs on company property. It did not state that a positive drug test result would lead to withdrawal of a job offer. When she was not hired, the plaintiff sued the employer under the Rhode Island medical marijuana law, the Hawkins-Slater Act, as well as the state's disability discrimination statute, for refusing to hire her. The Hawkins-Slater Act provides, "No school, employer, or landlord may refuse to enroll, employ, or lease to, or otherwise penalize, a person solely for his or her status as a cardholder." The Act, however, also provides, "Nothing in this chapter shall be construed to require … [a]n employer to accommodate the medical use of marijuana in any workplace."

In a 32-page opinion that opened with a Beatles quote on getting high, the Rhode Island Superior Court granted summary judgment to the plaintiff. The court held the Act created an implied private right of action in large part because, without such an implied private right, the law's prohibition on refusing to employ an individual solely because of his or her status as a medical marijuana cardholder would be rendered meaningless. The court rejected the employer's argument that the law permitted a distinction between refusing to hire because of cardholder status (admittedly unlawful under the Act's plain language) and refusing to hire because of an inability to pass a mandatory pre-employment drug screen, urging the court to interpret the Act to prohibit employers from refusing to hire under both scenarios. Referencing the employer's own policy language, the court also rejected the argument that employers had no obligation to accommodate medical marijuana use under the Act on the premise that the Act distinguishes between the medical and nonmedical use of marijuana. While the court agreed that employers are not required to tolerate employees who report for work under the influence of marijuana, it held the Act expressly states that an employer may not refuse to employ a person due to his or her status as a medical marijuana cardholder. Therefore, the court ruled the employer violated the Act in refusing to hire the plaintiff even though she admittedly could not pass the pre-employment drug test. As to the applicant's disability discrimination claim under state law, the court rejected the employer's argument that, having no knowledge of the plaintiff's disability, it could not have discriminated against her. The court ruled that discrimination could be shown "against a class of disabled people—namely, those people with disabilities best treated by medical marijuana." It also concluded medical marijuana users are not precluded from bringing a state law disability discrimination claim, despite that: (1) the law disclaims protections to those who seek remedies based on his or her illegal drug use; and (2) marijuana remains illegal under federal law. Further, despite relevant case law from other states and the U.S. Supreme Court, the court also rejected the defendants' argument that federal law (i.e., the Controlled Substances Act) preempted state law. Unpersuaded by the fact that marijuana remains illegal under federal law at all times and for all purposes, the court held it was not "physically impossible" to comply with both federal and state laws. It stated that Rhode Island's law governs only marijuana use in the workplace and that "what an employee does on his or her off time does not impose any responsibility on the employer." The court also

emphasized the fact that Congress has passed spending bills in the past few years prohibiting the Department of Justice from using federal funds to prevent states from implementing their own laws with regard to medical marijuana. The complicated landscape for employers who conduct drug testing for marijuana is further complicated by Callaghan. An employee's off-duty use of marijuana may cause the employee to test positive on a workplace drug test because marijuana may stay in the fatty tissues of the body for weeks. While Callaghan certainly will be appealed, the ever-swirling debate surrounding marijuana and a growing sense, in some quarters, that marijuana use is acceptable (both recreationally and medically) highlight the need for employers—in Rhode Island and elsewhere—to consider the marijuana laws affecting their workplaces and how they will handle the question before an actual issue arises. http://www.lexology.com/library/detail.aspx?g=8410fb0a-54b2-49e6-b56a-81c714a29534&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=ACC+Newsstand+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2017-05-30&utm_term

Tennessee
What Can Employers Do with Regard to Medical History and Drug Screening?
Medical history: Although no specific prohibition exists in the Tennessee Disability Act, employers are likely prohibited from checking medical history before employment, as with the Americans with Disabilities Act.

Drug screening: Employers that comply with the Tennessee Drug-Free Workplace Program are eligible for several workers' compensation-related benefits. Private employers that wish to participate in the program must conduct:

- job applicant testing for drugs following a conditional offer of employment;
- reasonable suspicion testing of employees whose behavior indicates that they are using or have used drugs or alcohol in violation of the employer's policy;
- post-accident testing;
- follow-up drug testing after treatment for drug or alcohol-related problems; and
- routine fitness for duty testing of employees if such testing is required by the employer's written policy.

Testing of public employees is subject to state and federal constitutional limitations. Positive tests must be verified by a confirmation test and by a medical review officer before an employer may discharge, discipline, refuse to hire, discriminate against, or request or require rehabilitation of an applicant or employee (T.C.A. § 50-9-101, et seq.). https://www.lexology.com/library/detail.aspx?g=b3a75ee8-32bf-4da9-a9d8-4577bd429db0&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=ACC+Newsstand+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2017-08-03&utm_term

Texas
What Can Employers Do with Regard to Medical History and Drug Screening?
Medical history: Texas requirements are generally the same as those under federal law. The federal Americans with Disabilities Act and Genetic Information Non-discrimination Act may apply.

Drug screening: Texas requirements are generally the same as those under federal law. Private employers in Texas may adopt drug and alcohol testing policies for their workers. http://www.lexology.com/library/detail.aspx?g=c5376f2d-fd5a-426a-9c3e-1cb698935d95&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=ACC+Newsstand+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2017-08-02&utm_term

Vermont
Vermont's Crackdown on Drug Testing Underscores the Importance of Compliant, State-Specific Drug Testing Policies for Multistate Employers. Title 21, Chapter 5, Section 513 of the Vermont Statutes states: "An employer shall not request, require, or conduct random or company-wide drug tests except when such testing is required by federal law or regulation." Stated more plainly, Vermont prohibits random drug testing of employees. Vermont does allow for

employers to drug test job applicants after a conditional offer of employment has been made. The state also allows employers to drug test current employees if there is probable cause/reasonable suspicion. However, random testing is absolutely prohibited. This creates significant difficulty for Vermont employers that maintain operations in other states because most states do allow for random drug testing of employees. If an employer maintains a blanket multistate drug testing policy allowing for random testing, it may not realize it is violating Vermont law. To make things even more difficult on Vermont employers, if a current employee tests positive on a lawful drug test required because the employer had probable cause to believe the employee was using drugs, the employer may not terminate the employee's employment for failing the test. Instead, employers must maintain an Employee Assistance Program or a comparable rehabilitation program and must give the employee an opportunity to participate. The employee can only be discharged if he or she completes the program and then subsequently fails a post-program drug test. Now, you may be asking yourself, "Does Vermont care about these technical requirements?" The answer is an overwhelming "yes." In fact, Vermont takes drug testing so seriously that the Vermont Attorney General's Office's Employment Discrimination Complaint form has a specific box employees can check if their employers unlawfully required that they take a drug test or discriminated against them based on a drug test. In addition to possible employment disputes, the Vermont drug testing law provides for civil penalties of between $500 and $2,000 for each violation. Employers in Vermont should be aware of the state's strict drug testing laws and the aggressive enforcement of these laws. Employers maintaining operations in Vermont may want to review their drug test policies to ensure they are compliant under Vermont law.
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Vermont's Governor Signs Recreational Marijuana Law
Vermont's Governor Phil Scott signed a recreational marijuana law on January 22, 2018. The law is the first recreational marijuana law to be enacted by a state legislature without a ballot initiative. It will take effect on July 1, 2018.

The law eliminates all penalties for possession of one ounce or less of marijuana and permits a person who is 21 years of age or older to grow up to two mature and four immature marijuana plants. However, marijuana may not be consumed in a public place, such as streets, parks, public buildings, places of public accommodation and places where the use of tobacco products is prohibited. The law also does not protect individuals from prosecution for being under the influence while operating a motor vehicle or consuming marijuana while operating a motor vehicle.

The law does not create a retail marketplace for marijuana. Importantly for employers, the law provides that it shall not be construed to do any of the following:

- Require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace;
- Prevent an employer from adopting a policy that prohibits the use of marijuana in the workplace;
- Create a cause of action against an employer that discharges an employee for violating a policy that restricts or prohibits the use of marijuana by employees; or
- Prevent an employer from prohibiting or otherwise regulating the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana on the employer's premises.

The Governor's Marijuana Advisory Commission has been directed to report on adopting a comprehensive regulatory structure for legalizing and licensing the marijuana market on or before December 15, 2018, in order to revise drug laws that have a disparate impact on racial minorities, help prevent access to marijuana by youths, better control the safety and quality of marijuana being consumed by Vermonters, substantially reduce the illegal marijuana market, and use revenues to support substance use prevention and education and enforcement of impaired driving laws.
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Medical/Recreational Marijuana In the "Workplace"

Marijuana remains illegal under federal law. However, there are many states, and a few cities, which have legalized medical and recreational marijuana—creating challenges for employers, as these laws "sprout up" across the country. Also, prior to now, the caselaw was quite clear—an employer could discipline an employee for lawful use of marijuana. See *Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015). But the law appears to be changing, as recent cases indicate that courts are beginning to recognize that employees who are lawful users of marijuana are entitled to some protection. It is a trend that employers need to watch. A quick check of the states where recreational or medical marijuana is legal:

Medical—

Alaska	Illinois	New Mexico
Arizona	Maine	New York
Arkansas	Maryland	North Dakota
California	Massachusetts	Ohio
Colorado	Michigan	Oregon
Connecticut	Minnesota	Pennsylvania
Delaware	Montana	Rhode Island
District of Columbia	Nevada	Vermont
Florida	New Hampshire	Washington
Hawaii	New Jersey	West Virginia

The above list does not include states where the drug is approved for more limited uses and/or conditions. In addition, the 2017 November elections reflected victories for many pro-pot politicians and legislations, including in New Jersey and Virginia.

Recreational—

Alaska	Maine	Oregon
California	Massachusetts	Washington
Colorado	Nevada	

Massachusetts: July 2017

In *Barbuto v. Advantage Sales & Marketing, LLC*, the Supreme Judicial Court of Massachusetts examined the legal rights of those using medical marijuana, after an employee, terminated for a positive marijuana test sued her former employer. 477 Mass. 456 (2017). Plaintiff Barbuto, who suffered from Crohn's disease, was offered a position with Advantage. She informed a company representative that she would test positive for marijuana on the mandatory drug test, as she was prescribed medical marijuana. Following assurance that the marijuana use should not be a problem, Ms. Barbuto underwent the drug test and completed her first day of work. However, that evening, a Human Resources representative contacted Ms. Barbuto and terminated her for testing positive for marijuana, allegedly stating, "we follow federal law, not state law." Ms. Barbuto sued Advantage as well as the individual who terminated her employment.

A lower court granted a motion to dismiss on most claims. However, this was reversed on appeal, finding that Ms. Barbuto had a claim for handicap discrimination in violation of Massachusetts state law, as she was lawfully using medical marijuana. The employer advanced two arguments: Advantage argued that (1) the only accommodation Ms. Barbuto requested was illegal under federal law and thus "facially unreasonable" and (2) even if Ms. Barbuto was a

"qualified handicapped person," she was terminated because she failed to pass a drug test required to be passed by all employees, not because of her handicap. The appellate court rejected both arguments but was careful to note that allowing Ms. Barbuto's handicap discrimination claim to survive did not necessarily mean Ms. Barbuto would be able to successfully establish a claim. The court opined that at later phases of the case, the employer may be able to successfully show that Ms. Barbuto's use of medical marijuana constituted an undue hardship. Following the July 2017 decision, the case continues to move through Massachusetts's lower court system.

Connecticut: August 2017

The issue moved across state lines into Connecticut the following month, with a federal district court's August 8, 2017 decision in *Noffsinger v. SSC Niantic Operating Company LLC*. No. 3:16-CV-01938(JAM), 2017 WL 3401260 (D. Conn. Aug. 8, 2017). In Noffsinger, once again within the context of a motion to dismiss, the court addressed an issue of first impression and held that a plaintiff who uses marijuana for medicinal purposes in compliance with Connecticut law may maintain a cause of action against an employer who refuses to employ her as a result of this use.

The case arose when the plaintiff, Katelin Noffsinger, an individual who had been prescribed medical marijuana as a treatment for posttraumatic stress disorder, applied for and was hired as a director of recreational therapy for a long-term care facility. As part of the onboarding process, Ms. Noffsinger was required to take a drug test. She provided the employer with her medical marijuana registration certificate, and said she only used the drug when off-duty. However, the day before Ms. Noffsinger was scheduled to begin work, the company rescinded her job offer due to her positive drug test result.

Ms. Noffsinger sued, including claims of a violation of the Connecticut "Palliative Use of Marijuana Act" ("PUMA") and negligent infliction of emotional distress. The company moved to dismiss. In its decision denying the employer's motion with respect to the above claims, the federal court carefully considered PUMA, which provides explicit protection against employment discrimination based on use of medical marijuana. Specifically, PUMA provides that, "[n]o employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient…" Conn. Gen. Stat. Ann. § 21a-408p. The employer argued that PUMA was preempted by the Federal Controlled Substances Act, the Americans with Disabilities Act and the Federal Food, Drug, and Cosmetic Act. The court concluded that the state law was not preempted by any of the asserted federal laws and denied the company's motion to dismiss on the PUMA and negligent infliction of emotional distress claims. The case is currently being litigated in the District of Connecticut.

New York City: July 2017

Finally, the little green plant also hit the big apple this summer, within the context of an administrative hearing at the New York City Taxi and Limousine Commission. There, an Administrative Law Judge concluded that the Commission could not revoke a driver's TLC license after the driver tested positive for marijuana, due to his legal use of the drug in accordance with the New York State Compassionate Care Act. The ALJ reasoned that a finding of unfitness for a license based upon a "failed drug test as a result of illegal drug use" was not applicable to the driver's legal use. While not an employment case, such a decision may provide insight into where both the city and state of New York will go in the near future.

Practical Implications for Employers

Do the above decisions mean employees are free to "light up" in your workplace? No. Can employees come to work high? No. Many employers are confused about the legalization of marijuana, but it is a simple proposition: Employers should follow state law and treat an employee who is lawfully using marijuana the same way they would treat any employee's lawful use of another drug.

- If it is prescribed, employees still cannot use marijuana while on duty.
- If the employee is a recreational user, they also cannot use it at work or be allowed to work under the influence.

However, the decisions depict a trend of court acceptance of off-duty use of medical marijuana in accordance with state laws. Such decisions have important ramifications for employer drug-testing programs and policies—both of

applicants and employees. Before terminating an employee or rescinding a job offer based on a positive test, employers should carefully consider any relevant statutory language (e.g., does your state provide specific protection to employees like Connecticut's?) as well as recent case law. At the end of the day, an employer's ability to restrict off-duty use of marijuana may just be off-limits.
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Is Medical Marijuana Really Medicinal?
Despite the dearth of approved marijuana products, the term "medical marijuana" has become commonplace, and the term's prevalence continues to increase as more states legalize the use of the marijuana plant and its active derivatives for medical purposes, and marijuana dispensaries continue to expand throughout the United States. As of 2017, 29 states and the District of Columbia have approved the use of marijuana for medical purposes. (Despite state laws legalizing marijuana for medical and/or recreational use, marijuana remains a Schedule I controlled substance its distribution and use remain illegal under Federal law.) Studies on the potential of the marijuana plant or its extracts continue to expand and include, among others, treating pain, preventing seizures, and treating autoimmune disorders such as Crohn's disease. However, despite assertions of efficacy, the U.S. Food and Drug Administration (FDA) has not recognized or approved the marijuana plant as a medicine, and to date, the FDA has only approved three products—Marinol® and Syndrox®, which include the active ingredient, dronabinol, a synthetic delta-9-tetrahydrocannabinol ("THC"), to treat nausea associated with chemotherapy and loss of appetite in AIDS patients; and Cesamet®, which includes the active ingredient, nabilone, a synthetically derived compound with a structure similar to THC, to treat nausea and vomiting associated with chemotherapy. These drugs are available by prescription only. The FDA, an agency within the U.S. Department of Health and Human Services, is responsible for assuring the safety, effectiveness, and security of human and veterinary drugs, vaccines and other biological products for human use and medical devices. Before a drug can be tested in people, a drug company or sponsor performs laboratory and animal tests to discover how the drug works and whether it's likely to be safe and work well in humans. Drug companies seeking to commercialize a drug in the United States must provide the FDA with appropriate scientific evidence from clinical tests to prove a drug is safe and effective for its intended use. A team of physicians, statisticians, chemists, pharmacologists, and other scientists at FDA reviews the company's data and proposed labeling. If the independent and unbiased review establishes that a drug's health benefits outweigh its known risks, the drug may be approved for sale.
https://www.fda.gov/Drugs/DevelopmentApprovalProcess/

According to Section 321(g)(1)(B) of the Federal Food, Drug, and Cosmetic Act: The term "drug" means...(B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a component of any article specified in clause (A), (B), or (C). A food or dietary supplement...is not a drug solely because the label or the labeling contains such a claim. A food, dietary ingredient, or dietary supplement for which a truthful and not misleading statement is made...is not a drug under clause (C) solely because the label or the labeling contains such a statement. A drug is misbranded if the drug fails to bear adequate directions for its intended use(s). (See 21 U.S.C. § 352(f)(1)) "Adequate directions for use" means directions under which a layperson can use a drug safely and for the purposes for which it is intended. (See 21 C.F.R. § 201.5) Prescription drugs can only be used safely at the direction, and under the supervision, of a licensed practitioner. (See 21 U.S.C. § 353(b)(1)(A)) As part of the FDA's efforts to protect consumers from health fraud, the FDA from time to time issues warning letters to companies, for example, companies that are illegally selling products that claim to prevent, diagnose, treat, or cure a disease or disorder without scientific evidence to support these claims. Selling these unapproved products with unsubstantiated therapeutic claims is a violation of the Federal Food, Drug and Cosmetic Act. The FDA has grown increasingly concerned at the proliferation of "medical marijuana" companies claiming their products treat or cure serious diseases like cancer. On November 1, 2017, the FDA issued warning letters to four companies—Greenroads Health, Natural Alchemist, That's Natural! Marketing and Consulting, and Stanley Brothers Social Enterprises LLC—citing unsubstantiated claims related to more than 25 different products spanning multiple product webpages, online stores and social media websites. According to the FDA's warning letters, the companies made unfounded claims about their products' ability to limit, treat or cure cancer and other serious diseases.

Examples of claims made by these companies include:

- “Combats tumor and cancer cells;”
- “CBD makes cancer cells commit ‘suicide’ without killing other cells;”
- “CBD … [has] anti-proliferative properties that inhibit cell division and growth in certain types of cancer, not allowing the tumor to grow;” and
- “Non-psychoactive cannabinoids like CBD (cannabidiol) may be effective in treating tumors from cancer—including breast cancer.”

Unlike drugs approved by the FDA, the manufacture of the products identified in the recent warning letters has not been subject to FDA review as part of the drug approval process, and there has been no FDA evaluation of whether they work, what the proper dosage is, how they could interact with other drugs, or whether they have dangerous side effects or other safety concerns. The FDA has requested responses from the companies stating how the violations will be corrected. Failure to correct the violations promptly may result in legal action, including product seizure and injunction. While marketing in the marijuana industry is a necessary business objective similar to mainstream businesses, medical marijuana companies must be sure to adhere to appropriate FDA guidelines in describing applications of their products and not overreach in asserting efficacy to treat or prevent illness.
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International Developments

Non-medical Marijuana Use at Work in Canada
With the proposed Cannabis Act looking to legalize recreational marijuana in Canada in July of 2018, employers are wondering how the new legislation will affect their workplaces and how they can prepare for the potential multitude of issues that may in turn emerge as a result of this new legislation. Once passed, the Cannabis Act will permit Canadians who are 18 years or older to: a) possess up to thirty (30) grams of cannabis; b) share up to thirty (30) grams of cannabis with other adults; c) purchase dried or fresh cannabis from a provincially licensed retailer; d) grow up to four (4) cannabis plants; and e) make cannabis-infused food and drinks. Although the provisions of the Cannabis Act may be altered prior to July 2018, it is clear that employees across all types of industries will have access to marijuana, bringing with it concerns of how employers can appropriately address any potential risks and/or discipline should employees attend the workplace while under the influence of the drug. Employers can be assured that once recreational use of marijuana is legalized, non-medical use of marijuana can be treated similarly to most employers' current drug and alcohol policies (see our article, "Medical Marijuana Use in the Workplace" for more information). Employers will still be able to prohibit the use of marijuana during work hours, and to further prohibit attendance at work while impaired or under the influence of recreational marijuana. Any violation of the employer's workplace policies in this regard could result in discipline, up to and including termination.

Policies
The case law continues to evolve in regard to marijuana use in the workplace and will continue to evolve with the Cannabis Act coming into force in 2018. This will no doubt lead to further contentious issues between employers and employees, including elements of discipline, accommodation, and various other workplace policies.

Employers are encouraged to place a high priority on making changes to workplace policies which set out procedures for dealing with marijuana use in the workplace prior to any problem arising. The updated drug and alcohol policies should make specific mention of how non-medical marijuana use will be addressed in the workplace, and should include the following aspects:

- duty to disclose any use of marijuana in the workplace;
- consequences of noncompliance, including appropriate progressive disciplinary procedures;

- modifications to human rights and accommodation policies to specifically deal with issues relating to marijuana dependency;
- establishing a framework for testing for impairment, including triggering circumstances and testing methods; and
- proper training of management and supervisory staff on the application of all policies relating to medical and non-medical use of marijuana in the workplace.

Educating employees and management on the policy changes and how they are to be administered is also key. Further, to avoid restricting employment opportunities in a manner that contravenes the Code, employers need to ensure that any employment standards, policies or rules:

- are rationally connected to the performance of the job;
- are adopted in an honest and good faith belief that they are necessary to the fulfillment of a legitimate work-related purpose; and
- are reasonably necessary to accomplish the legitimate work-related purpose.

Drug Testing

Currently, testing for marijuana use is difficult as there is no medical test that accurately or reliably indicates the level of a person's impairment due to marijuana use. Unlike alcohol, marijuana can be detected in the bloodstream days after ingestion, and levels of THC (the active ingredient in marijuana) do not necessarily correspond with levels of impairment. Further, the Supreme Court of Canada has stated that employers are required to balance their interest in drug testing to ensure a safe work environment with employee privacy interests.

Courts have held that completely random drug testing of an employee is not permitted, however, if an employer has reasonable cause to believe an employee is under the influence of marijuana, the employer can insist on that employee submitting to a drug test. As indicated earlier, it is in an employer's best interest to have strong drug and alcohol policies in place prior to the Cannabis Act coming into force that include reasonable cause expectations and the resulting procedures. For example, whether a reasonable cause drug test is in order is entirely fact specific. The employer must show evidence of a reasonable belief that the employee had used marijuana. Such evidence would include physical evidence of the employee (bloodshot eyes, slowed reaction time) as well as situational evidence (smell of marijuana smoke, discarded marijuana paraphernalia near the incident scene). Outlining the expectations of reasonable belief to employees prior to the enactment of the Cannabis Act strengthens an employer's position if and when the time came to consider whether circumstances warrant requiring a drug test and/or implementing a form of discipline as a result of suspected impairment. Canadian case law also recognizes that an employee's refusal or failure to undergo an alcohol or drug test in the circumstances described above may properly be viewed as a serious violation of an employer's drug and alcohol policy and may itself be grounds for serious discipline. Notwithstanding these restrictions, the Supreme Court confirmed there are instances where random testing policies may be allowed, such as in workplaces that are safety sensitive and where there is a demonstrated problem of ongoing drug use in the workplace. Post-incident testing is also typically permitted in cases where a workplace incident or a "near-miss" has occurred and evidence to suggest that impairment may have been a factor exists. In these instances, the infringement on the employee's privacy rights is outweighed by the "gain" an employer may receive with respect to safety.

Similar to alcohol, testing for marijuana use may also be justified as part of a rehabilitation or return to work program of an employee who works in a safety sensitive position and has shown a pattern of behavior where use of marijuana is central to the problem.

In several cases, dismissal or discipline based solely on the testimony of witnesses present at the time, or the mere observing of marijuana use without corroborating physical evidence, has not been found to be compelling enough to satisfy arbitrators that the employer has established its case. The Supreme Court of Canada has stated that there is only one civil standard, and, in all cases, the evidence must be carefully scrutinized and must be sufficiently "clear, convincing and cogent" to establish the balance of probabilities test.

Be forewarned, however, that a refusal of a drug test or testing positive for marijuana use does not necessarily justify automatic termination of employment. The appropriate disciplinary action in these types of cases must be determined on a case by case basis, having regard to the relevant facts, as well as being cognizant of any just cause provisions of any applicable collective agreement or employment agreement between the parties. Employers with strong workplace policies and procedures, which take into account Human Rights legislation, the current Access to Cannabis for Medical Purposes Regulations and the proposed Cannabis Act, will be well-positioned to educate employees of their workplace responsibilities and expectations prior to the proposed Cannabis Act coming into force, and in turn, heading off potential issues which may have otherwise occurred.
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Miscellaneous

Retailers Can Maintain Drug Free Workplace Despite State Legalization of Marijuana
Many retailers wonder what effect, if any, legalization of recreational marijuana has on their ability to maintain a drug free workplace. Recreational marijuana has been legalized in Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon and Washington. Marijuana still remains an illegal Schedule I substance under the federal Controlled Substances Act, and therefore still subject to prosecution under federal law. Legalization of marijuana in the above states does not affect an employer's ability to enact and enforce workplace restrictions related to drug possession, use, impairment, and testing. For example, California's "Control, Regulate, and Tax Adult Use of Marijuana Act," commonly referred to as Proposition 64, contains express language specifying that it does not:

- affect the rights and obligations of public and private employers to maintain a drug and alcohol-free workplace;
- require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace;
- affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees; or
- prevent employers from complying with state or federal law. (Cal. Health & Safety Code § 11362.45.)

Employers also maintain the right to enforce workplace restrictions on medical marijuana. In 2008, the California Supreme Court held in *Ross v. RagingWire Telecommunications, Inc.* that an employer lawfully may enforce drug free workplace policies even if an employee uses the marijuana for medical purposes. Proposition 64, does not limit the scope of that California Supreme Court holding.

Given the potential for confusion, employers should remind employees of any drug free workplace policies that extend to marijuana, and inform them that, although recreational marijuana is no longer prohibited under state law, it is still prohibited in the workplace.
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