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MARIJUANA AND THE WORKPLACE: HOW HIGH ARE THE STAKES FOR EMPLOYEES?

*Jayden D Gray**

INTRODUCTION

For years now states across the country have been passing legislation legalizing the consumption of marijuana, both for medicinal and recreational purposes. Pursuant to the federal Controlled Substance Act, however, marijuana remains a Schedule I controlled substance. This means the possession and use of marijuana is considered illegal according to federal law. The inherent conflict between state and federal law has given rise to a number of legal issues. This paper will examine the legal complications of marijuana in the workplace. Specifically, it will discuss whether employees can “legally” use marijuana without the possibility of adverse employment ramifications. This paper will move forward as follows.

First, it will discuss Utah’s and other states’ efforts to legalize marijuana, and the federal laws in place that make marijuana federally illegal. It will also discuss the federal Americans with Disabilities Act and whether it protects an employee’s use of marijuana. Next, this paper will look at federal and state court precedent addressing whether employers have an obligation to accommodate an employee’s use of marijuana. Lastly, this paper will consider specific state laws that have been implemented to protect employees’ rights to lawfully use marijuana.

I. BACKGROUND

A. State Legalization of Marijuana

In recent years, Utah legislators have attempted to pass legislation that would “allow[] patients with certain ailments (such as cancer, AIDS, epilepsy and chronic pain) to use marijuana edibles, extracts and oils under the direction of a doctor.”¹ In 2015, Utah Senate Bill 259 was narrowly

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¹ Mark Green & Ben Winslow, *Medical Marijuana Bill Heading to Utah House After Passing 17-12 in Senate*, FOX 13 NEWS (Feb. 25, 2016, 3:05 PM), <http://fox13now.com/2016/02/25/medical-marijuana-bill-heading-to-utah-house-after-passing-17-12-in-senate/>.

defeated by a vote of 15 to 14.² In 2016, the Utah State Legislature considered two different medical marijuana bills: Utah Senate Bill 73 (“SB73”) and Utah Senate Bill 89 (“SB89”).³ While neither of these bills succeeded, SB73 came close by passing the Utah State Senate with a vote of 17-12.⁴ Later, however, SB73 was defeated by the health committee with a vote of 8-4 and failed to advance to the Utah House of Representatives.⁵ On the other hand, SB89 was “stopped dead” before it was even voted on “as legislative leaders realized there was no money to implement it.”⁶

Pursuant to the Drug Enforcement Administration (“DEA”), marijuana is a Schedule I drug “with no currently accepted medical use and a high potential for abuse.”⁷ As a Schedule I drug, marijuana is federally illegal under the Controlled Substance Act (“CSA”).⁸ Despite its federal prohibition, states continue to enact comprehensive medical marijuana statutes to locally legalize the use of the federally prohibited substance.⁹ Currently, twenty-eight states and the District of Columbia have legalized the use, possession, manufacture, and distribution of marijuana for medical purposes.¹⁰

² Philip Ross, *Utah Marijuana Legalization 2015: Governor Herbert ‘Open’ to Legalizing Medical Cannabis*, INT’L BUS. TIMES, (May 15, 2015, 2:18 PM), <http://www.ibtimes.com/utah-marijuana-legalization-2015-governor-herbert-open-legalizing-medical-cannabis-1924873>.

³ Ben Winslow, *Medical Marijuana Bills Move Forward in the Utah State Legislature*, FOX 13 NEWS (Feb. 4, 2016, 9:08 PM), <http://fox13now.com/2016/02/04/medical-marijuana-bills-move-forward-in-the-utah-state-legislature/>.

⁴ Green & Winslow, *supra* note 1.

⁵ Utah Medical Marijuana Bill SB73 Fails to Advance to the House, STANDARD EXAMINER, (Mar. 8, 2016, 7:19 AM), <http://www.standard.net/Government/2016/03/07/Utah-Senate-Bill-73-fails-to-advance-to-the-House>.

⁶ Robert Gehrke, *Money Runs Out for Utah Medical-Marijuana Bill; Ballot Initiative Looms*, SALT LAKE TRIB., <http://www.sltrib.com/news/3647166-155/money-runs-out-for-utah-medical-marijuana> (last updated Mar. 12, 2016 12:07 PM).

⁷ *Drug Scheduling*, UNITED STATES DRUG ENFORCEMENT ADMINISTRATION, <http://www.dea.gov/druginfo/ds.shtml> (last visited Jan. 7, 2017).

⁸ 21 U.S.C. §§ 801–971 (2012).

⁹ John DiNome, *Medical Marijuana and the Workplace: What Employers Need to Know Now*, FORBES (Dec. 2, 2014, 1:37 PM), <http://www.forbes.com/sites/theemploymentbeat/2014/12/02/medical-marijuana-and-the-workplace-what-employers-need-to-know-now/#7e388e2eb910>.

¹⁰ 28 Legal Medical Marijuana States and DC, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated Dec. 28, 2016, 11:36 AM).

In these states, individuals suffering from a serious or chronic medical condition can see a qualifying health care professional who can write a recommendation for medical marijuana.¹¹ A recommendation is different than a prescription and due to the federal government's classification of marijuana as a Schedule I drug, doctors are not permitted to prescribe marijuana.¹² In addition to states that have legalized marijuana for medicinal purposes, adult recreational consumption of marijuana is legal in four states, including the District of Columbia.¹³

B. The Federal Americans With Disabilities Act

The Americans with Disabilities Act¹⁴ (“ADA”) is a civil rights law that prohibits discrimination against individuals with disabilities.¹⁵ The purpose of the ADA is to ensure that people with disabilities have the same rights and opportunities as everyone else.¹⁶ To fall within the protections of the ADA, an individual must have a disability or have a relationship with an individual with a disability.¹⁷ As defined by the ADA, an individual with a disability is “a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment.”¹⁸ Employers are required to provide reasonable accommodations to disabled employees so that the employees can perform the essential duties of his job, as long as such accommodations do not impose an undue hardship on the employer.¹⁹

¹¹ *Beginner's Guide to Medical Marijuana*, UNITED PATIENTS GROUP, <http://www.unitedpatientsgroup.com/resources/beginners-guide> (last visited Jan. 7, 2017).

¹² *Id.*

¹³ Emily Gray, *At Least 20 States Could Vote on Marijuana Legalization in 2016*, SUN TIMES NETWORK (Feb. 19, 2016 7:50 AM), <http://national.suntimes.com/national-world-news/7/72/2621877/20-states-to-vote-on-marijuana-legalization-2016-elections> (Recreational marijuana is legalized in Alaska, Washington, Oregon, and Colorado).

¹⁴ 42 U.S.C. §§ 12101–12213 (2013).

¹⁵ *What is the Americans with Disabilities Act (ADA)?*, ADA NAT'L NETWORK, <https://adata.org/learn-about-ada> (The prohibitions against the discrimination of individuals with disabilities includes all areas of public life, such as jobs, schools, transportation, etc.) (last visited Jan. 7, 2017).

¹⁶ *Id.*

¹⁷ *A Guide to Disability Rights Laws*, United States Dep't of Just., C.R. Division, (July 2009), <http://www.ada.gov/cguide.htm#anchor62335>.

¹⁸ *Id.*

¹⁹ Francesca Liquori, *The Effects of Marijuana Legalization on Employment Law*, 1 NAT'L ATT'YS GEN. TRAINING & RES. INST. J. 4, 6 (2016), <http://www.naag.org/publications/nagri-journal/volume-1-number-2/the-effects-of-marijuana-legalization-on-employment-law.php> (citing 42 U.S.C. § 12111(10)).

II. MARIJUANA USE BY EMPLOYEES

The conflict between state and federal laws regarding the legality of marijuana has “created [a] myriad [of] complex legal issues for employers attempting to ensure compliance with both federal and state employment laws.”²⁰ An example of the struggle employers face is whether they have an obligation to accommodate a disabled employee’s use of medical marijuana.²¹ If so, must the employer waive its policies regarding drug testing and the use or possession of drugs in the workplace, or must they refrain from disciplining or terminating employees who use or possess marijuana in accordance with state law?²²

A. Federal Court Interpretations

In the ADA context, both state and federal courts have taken similar approaches when addressing marijuana use and state employment statutes. For example, the Ninth Circuit held that the ADA does not protect individuals who use medical marijuana, even if permitted under state law, because the act “expressly excludes from its definition of ‘qualified individual with a disability’ those individuals who currently engage in the illegal use of drugs.”²³ Moreover, because marijuana remains an illegal drug under the federal CSA, the ADA does not protect individuals who are using marijuana for medical purposes, even when such use is lawful under state law.²⁴

The Sixth Circuit similarly held that Michigan’s medical marijuana statute imposes no restriction on employers, neither by its express terms nor by implication.²⁵ In its decision, the court noted that Michigan’s law legalizing medicinal marijuana created no private cause of action for employees, but rather provided an affirmative defense against criminal

²⁰ Sarah C. Matt, *The Impact of Medical Marijuana in the Workplace*, AM. BAR ASS’N, (Aug. 13, 2014), <http://apps.americanbar.org/litigation/committees/employment/articles/summer2014-0814-impact-medical-marijuana-workplace.html>.

²¹ *Id.*

²² *Id.*

²³ Matt, *supra* note 20 (quoting *James v. City of Costa Mesa*, 700 F.3d 394, 397 (9th Cir. 2012)).

²⁴ *Id.*

²⁵ Paula Graves Ardelean, *What I Do On My Time is My Business! (Or is it?)*, AM. BAR ASS’N (Nov. 6, 2015), http://www.americanbar.org/content/dam/aba/events/labor_law/2015/november/annual/papers/174.authcheckdam.pdf (citing *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. 2012)).

prosecution under state law or other adverse state action.²⁶ Additionally, the court concluded that, if the Michigan legislature intended to prevent employers from terminating employees for marijuana use, it would have “expressly set forth this ‘far reaching revision’ in the statute.”²⁷

Additionally, in the Tenth Circuit, the United States District Court for the District of Colorado dismissed an employee’s claims filed under the Age Discrimination in Employment Act²⁸ (“ADEA”), ADA, and Colorado Anti-Discrimination Act²⁹ (“CADA”) for failure to state a claim.³⁰ In this case, a 47-year-old truck driver was terminated by his employer for off-the-job use of medicinal marijuana and subsequently filed a lawsuit against his employer.³¹ The plaintiff-employee was listed in the Colorado medical marijuana registry for treatment of his lumbar degenerative disc disease.³² The court held that the plaintiff-employee did not achieve protected status under anti-discrimination laws by virtue of his use of medical marijuana.³³ The court stated that the “anti-discrimination law did not extend so far as to shield a disabled employee from the implementation of his employer’s standard policies against employee misconduct.”³⁴ Analogous to the cases discussed above, marijuana’s status as a Schedule I drug under the federal CSA permitted the employer to take adverse employment action despite the fact that the plaintiff-employee was using a drug made legal by the State of Colorado.³⁵

B. State Court Interpretations

State courts have similarly ruled that the federal prohibition of marijuana eliminates an employer’s obligation to accommodate an employee’s medical marijuana use under the ADA or under state statutes modeled after the ADA.³⁶ In fact, “[t]he highest courts in California,

²⁶ *Id.* (citing *Casias*, 695 F.3d at 428).

²⁷ Liquori, *supra* note 19, at 8 (quoting Patricia Nemeth & Deborah Brouwer, *Survey Article: Employment and Labor Law*, 59 Wayne L. Rev. 951, 1005 (2014)).

²⁸ 29 U.S.C. §§ 621–34.

²⁹ Colo. Rev. Stat. § 24-34-402 (2012).

³⁰ *Steele v. Stallion Rockies Ltd.*, 106 F. Supp. 3d 1205, 1213 (D. Colo. 2015).

³¹ *Id.* at 1208.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 1212 (quotations omitted) (referring to 42 U.S.C. § 12102(1)(A); Colo. Rev. Stat. § 24-34-306).

³⁵ *Id.* at 1211–12. The court used the same analysis for the state CADA claim as was used for the federal ADA claim. *See id.* at 1209 n.2 (noting that CADA claims are “parallel” to ADA claims).

³⁶ Liquori, *supra* note 19, at 7; Nancy Delogu & Chris Leh, *Marijuana Laws Liberalized in*

Montana, Oregon, and Washington have ruled, in various contexts, that as long as federal law prohibits the use of marijuana for medical reasons, the states cannot actually legalize marijuana use and therefore cannot require employers to accommodate such use.”³⁷

1. California

In 1996, California became the first state to legalize the use of marijuana for medical purposes.³⁸ California’s Compassionate Use Act³⁹ (“CUA”) provided means of access to the drug and identified those eligible to obtain it.⁴⁰ The CUA, however, does not include language addressing the rights and duties of employers and employees.⁴¹ This relationship was called into question in *Ross v. RagingWire Telecommunications, Inc.*,⁴² where the California Supreme Court ruled that the CUA’s silence regarding the employment issue did not require employers to accommodate marijuana use by its employees.⁴³

The plaintiff in *Ross* was terminated after failing a drug test. He subsequently filed a lawsuit against his employer under California’s Fair Employment and Housing Act (“FEHA”).⁴⁴ The plaintiff argued that the CUA offers the same protections for an employee’s medical marijuana use as is afforded for legal prescription drug use and thereby requires employers to make reasonable accommodations.⁴⁵ The court disagreed and held that the FEHA does not require employers to accommodate the use of “illegal drugs.”⁴⁶ In its analysis, the court stated, “[n]o state law could completely

Colorado, Washington – But Effect on Workplace Policies Likely Small, LITTLER (Nov. 8, 2012), <https://www.littler.com/marijuana-laws-liberalized-colorado-washington-%E2%80%93-effect-workplace-policies-likely-small>.

³⁷ Delugo & Leh, *supra* note 36 (citing *Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200, 204 (Cal. 2008); *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus.*, 230 P.3d 518 (Ore. 2010); *Johnson v. Columbia Falls Aluminum Co.*, 213 P.3d 789 (Mont. 2009); and *Roe v. Teletch Customer Care Mgmt., Inc.*, 257 P.3d 586 (Wash. 2011)).

³⁸ CAL. HEALTH & SAFETY CODE § 11362.5 (West 2014); 28 Legal Medical Marijuana States and DC, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated Dec. 28, 2016, 11:36 AM).

³⁹ CAL. HEALTH & SAFETY CODE § 11362.5 (West 2014).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 174 P.3d 200 (Cal. 2008).

⁴³ *Id.* at 206–07.

⁴⁴ *Id.* at 203.

⁴⁵ *Id.*

⁴⁶ *Id.* at 204.

legalize marijuana for medical purposes because the drug remains illegal under federal law.”⁴⁷

The court’s interpretation of the CUA against federal law means, “an employer may require preemployment drug tests and take illegal drug use into consideration in making employment decisions.”⁴⁸ Put another way, despite California’s legalization of medical marijuana, the federal prohibition on marijuana granted California employers discretion on employment decisions. In fact, “[e]mployers can prohibit employees in California from possessing, using or being under the influence of marijuana at work, just as they can forbid them from being drunk on the job.”⁴⁹ In the absence of explicit language within the CUA, the *Ross* court deferred to federal law’s prohibition of marijuana, which means California employers can continue to enforce zero-tolerance drug policies regardless of marijuana’s legalization under state law.⁵⁰

2. Washington

The State of Washington legalized marijuana in 1998.⁵¹ Marijuana is legal for both medical and recreational purposes.⁵² In 2011, the Washington Supreme Court, in *Roe v. TeleTech Customer Management LLC*,⁵³ held that the state’s Medical Use of Marijuana Act (“MUMA”) does not create “a private cause of action for discharge of an employee who uses medical marijuana.”⁵⁴ In *Teletech*, the court ruled that despite Washington’s legalization of medical marijuana, MUMA does not impose obligations on an employer nor does it offer protections for employees against being discharged for “legal” marijuana use.⁵⁵

The plaintiff-employee in *Teletech* filed a wrongful termination

⁴⁷ *Id.*

⁴⁸ *Id.* at 203.

⁴⁹ Kathleen Pender, *Can Your Boss Stop You From Smoking Medical Marijuana at Work?*, SAN FRANCISCO CHRON. (Feb. 6, 2015), <http://www.sfchronicle.com/business/networth/article/Can-your-boss-stop-you-from-smoking-medical-6067585.php>.

⁵⁰ *Ross*, 174 P.3d at 204.

⁵¹ 28 Legal Medical Marijuana States and DC, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated Dec. 28, 2016, 11:36 AM).

⁵² *Id.*

⁵³ 257 P.3d 586 (Wash. 2011).

⁵⁴ *Id.* at 588.

⁵⁵ *Id.*

action after he was terminated for failing a drug test.⁵⁶ The plaintiff-employee argued that his termination violated MUMA and public policy.⁵⁷ The court disagreed and stated that when read in context, MUMA “does not confer any obligation on [employers]” to accommodate medical marijuana use.⁵⁸ Next, in addressing the public policy argument, the court held that MUMA did not support “such a broad public policy that would remove all impediments to authorized medical marijuana use or forbid an employer from discharging an employee because she uses medical marijuana.”⁵⁹ Finally, the court relied on federal law’s prohibition of marijuana in deciding that employers are under no obligation to accommodate an employee’s marijuana use.⁶⁰

3. Oregon

Similar to Washington, Oregon legalized marijuana in 1998 and consumption is permitted for both medical and recreational purposes.⁶¹ In *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*,⁶² the Oregon Supreme Court ruled that an employer is not required to accommodate an employee’s use of medical marijuana because marijuana is illegal under federal law.⁶³ In this case, plaintiff-employer sought review of a decision of the defendant Bureau of Labor and Industries, concluding that employer engaged in disability discrimination when it discharged employee for marijuana use.⁶⁴

Analogous to the decisions discussed above, the Oregon Supreme Court deferred to federal law’s prohibition of marijuana in permitting employers to take adverse employment action against employees lawfully using marijuana under state law.⁶⁵ The court held that the Oregon Medical Marijuana Act, affirmatively authorizing the use of medical marijuana, was preempted by the Federal Controlled Substances Act, which explicitly

⁵⁶ *Id.* at 589.

⁵⁷ *Id.*

⁵⁸ *Id.* at 591.

⁵⁹ *Id.* at 596.

⁶⁰ *Id.* at 597.

⁶¹ 28 Legal Medical Marijuana States and DC, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated Dec. 28, 2016, 11:36 AM).

⁶² 230 P.3d 518 (Ore. 2010).

⁶³ *Id.* at 524 n.7.

⁶⁴ *Id.* at 521.

⁶⁵ *Id.* at 524 n.7.

prohibited marijuana use without regard to medicinal purpose.⁶⁶

4. Montana

In 2004, Montana legalized marijuana for medical purposes.⁶⁷ Five years later, in 2009, an employee brought action against his employer after being terminated for failing a drug test and declining to sign a “last chance” agreement.⁶⁸ The State District Court of Montana denied plaintiff-employee’s motion to amend his complaint and granted employer’s motion to dismiss.⁶⁹ The Supreme Court of Montana affirmed the decision to dismiss the plaintiff’s claim and held that the Medical Marijuana Act (“MMA”) did not provide employee with a private cause of action against employer.⁷⁰ Additionally, the court ruled that the MMA “should not be construed to require employers to accommodate the use of medical marijuana.”⁷¹ Analogous to the decisions discussed above, the Montana Supreme Court relied on the federal law’s prohibition of marijuana and granted discretion to employers regarding its employees’ marijuana use.⁷²

C. States’ Lawful Products and Lawful Activities Statutes

A handful of states, including Colorado, Illinois, Minnesota, and Nevada, have enacted “lawful product” statutes “protect[ing] employees’ rights to engage in the use or non-use of a ‘lawful product’ or to participate in ‘lawful activities’ away from the workplace during non-working hours.”⁷³ There remains, however, an inherent ambiguity regarding whether “lawful product or activity” considers only those products or activities that must be legal under both state and federal law. The Supreme Court of Colorado addressed this issue in *Coates v. Dish Network, LLC*.⁷⁴ In this case, the court held that “an activity such as medical marijuana use that is unlawful under federal law is not a ‘lawful’ activity under” lawful activities statutes, and that an employee could be terminated for his use of medical marijuana in accordance with the Medical Marijuana Amendment

⁶⁶ *Id.* at 533–34.

⁶⁷ 28 Legal Medical Marijuana States and DC, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated Dec. 28, 2016, 11:36 AM).

⁶⁸ *Johnson v. Columbia Falls Aluminum Co.*, 2009 MT 108N, ¶ 2.

⁶⁹ *Id.* ¶ 3.

⁷⁰ *Id.* ¶ 7.

⁷¹ Ardelean, *supra* note 25 (citing *Johnson*, 2009 MT 108N).

⁷² *See Johnson*, 2009 MT 108N.

⁷³ Matt, *supra* note 20.

⁷⁴ 350 P.3d 849 (Colo. 2015).

of Colorado's state constitution.⁷⁵

III. STATE SPECIFIC PROTECTIONS

As discussed above, in states where marijuana legislation remains silent regarding employee protections, courts have generally determined that employers are not required to accommodate medical marijuana use under the ADA or under state statutes modeled after the ADA.⁷⁶ Employers in these states, however, must first determine whether their workplace is regulated by The Drug Free Workplace Act ("DFWA").⁷⁷ "The [DFWA] requires that all federal grant recipients and federal contractors adopt a zero tolerance policy at their workplaces and certify to the federal government that their workplaces are drug free."⁷⁸ In all other instances, when not being compelled by federal legislation, employers seem to have full discretion to take adverse employment action against employees who "legally"⁷⁹ use marijuana.⁸⁰ State legislation can, however, implement employee protections via anti-discrimination or reasonable accommodation provisions that supplement state statutes legalizing marijuana use.⁸¹

A. States' Anti-Discrimination and Reasonable Accommodations Provisions

Of all the states that have legalized marijuana, only eight states have implemented anti-discrimination or reasonable accommodation provisions addressed to employers.⁸² The states with such provisions include: Arizona, Connecticut, Delaware, Illinois, Maine, Nevada, New York, and Minnesota.⁸³ The language of these provisions includes explicit

⁷⁵ *Id.* at 851.

⁷⁶ Liquori, *supra* note 19, at 7.

⁷⁷ *Id.* at 4.

⁷⁸ *Id.*

⁷⁹ Legal at the state level.

⁸⁰ Nathaniel M. Glasser & Jonathan K. Hoerner, *Marijuana in the Workplace: The Growing Conflict Between Drug and Employment Laws*, NAT'L L. REV. (Oct. 29, 2015), <http://www.natlawreview.com/article/marijuana-workplace-growing-conflict-between-drug-and-employment-laws>.

⁸¹ Hunton & Williams LLP, *Anti-Discrimination Provisions in State Medical Marijuana Laws Raise Additional Considerations for Workplace Drug Testing*, HUNTON EMP. & LAB. L. PERSP. (Jan. 22, 2015), <http://www.huntonlaborblog.com/2015/01/articles/criminal-background-checks/antidiscrimination-provisions-in-state-medical-marijuana-laws-raise-additional-considerations-for-workplace-drug-testing/>.

⁸² *Id.*

⁸³ *Id.*

prohibitions on status-based discrimination.⁸⁴ Additionally, the anti-discrimination provisions prohibit employers from taking adverse employment actions “against employees solely on the basis of their participation in the state’s medical marijuana program, unless doing so would violate federal law or regulations, or cause an employer to lose a monetary or licensing-related benefit under federal law or regulations.”⁸⁵

1. Anti-Discrimination Provisions’ Protections of Failed Drug Tests

For example, in Arizona,⁸⁶ Minnesota,⁸⁷ and Delaware,⁸⁸ the anti-discrimination provisions that supplement the state’s respective marijuana laws protect employees by making it impermissible for employers to take any adverse employment action or refuse to hire an individual that tests positive for marijuana.⁸⁹ In instances where an employee fails a drug test, the employers have the responsibility to investigate whether (1) the employee is lawfully enrolled in the state’s medical marijuana program, (2) the amount of marijuana in the test is conducive with medicinal use, and (3) the medical marijuana user has a job-related reason why he cannot be hired or remain in his current position.⁹⁰

2. Reasonable Accommodation Provisions for Registered Medical Marijuana Users

In addition, states such as New York⁹¹ and Nevada⁹² have accommodation provisions that classify marijuana use as a disability.⁹³ Under New York law, an individual that is lawfully on the medical marijuana registration is deemed to be a “certified patient” and therefore is classified as an individual with a disability.⁹⁴ As such, employers must make reasonable accommodations—not for marijuana use—but for the underlying disability associated with the legal use of marijuana.⁹⁵

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ ARIZ. REV. STAT. ANN. § 36-2813(b) (2012).

⁸⁷ MINN. STAT. § 152.32(3)(c)(2) and (d) (2012).

⁸⁸ DEL. CODE ANN. tit.16, § 4905A(a)(3)(b) (2012).

⁸⁹ Hunton & Williams, *supra* note 81 (citing ARIZ. REV. STAT. ANN. § 36-2813(b); MINN. STAT. ANN. § 152.32(3)(c)(2) and (d); DEL. CODE ANN. tit. 16 § 4905A(a)(3)(b)).

⁹⁰ *Id.*

⁹¹ N.Y. PUB. HEALTH § 3369(2) (2012).

⁹² NEV. STAT. § 453A.800(3) (2012).

⁹³ Hunton & Williams LLP, *supra* note 81.

⁹⁴ *Id.* (citing N.Y. PUB. HEALTH § 3369(2)).

⁹⁵ *Id.* (citing N.Y. PUB. HEALTH § 3369(2)).

Moreover, Nevada’s accommodation provision requires an employer to make reasonable accommodations for the medical needs of an employee who uses medical marijuana.⁹⁶ Employers, however, do not have to make accommodations if such accommodations “pose a threat of harm or danger to persons or property, impose an undue hardship on the employer, or prohibit the employee from fulfilling his or her job responsibilities.”⁹⁷

3. Utah’s Antidiscrimination Provision

As discussed above, Utah has not passed legislation legalizing marijuana.⁹⁸ Additionally, Utah law has not defined a state-specific policy creating a private right of action for employees—disabled or not disabled—who are dismissed for using prescribed marijuana. In fact, the Utah Antidiscrimination Act (“UADA”) provides only an administrative remedy for violation of its provisions.⁹⁹ The administrative regulation, however, contains no language requiring employers to provide accommodation for prescribed drug use that would otherwise be illegal under federal law.¹⁰⁰ Therefore, if an employee in Utah seeks redress based on discrimination for his prescribed marijuana use, the employee would not have a valid administrative remedy or a private cause of action under Utah law.¹⁰¹

CONCLUSION

The state legalization of marijuana has generated an array of questions and challenges for industries such as law enforcement, banking, and even real estate.¹⁰² Moreover, it has created a considerable amount of tension between federal and state law.¹⁰³ Despite the legalization of marijuana in various states, employees are still in jeopardy of being fired for their “legal” marijuana use. Based on statutory interpretation, and federal and state court precedent, the federal ADA offers no protections to employees terminated for marijuana use due to the fact that marijuana remains a Schedule I controlled substance pursuant to the CSA. Few states have, however, implemented supplemental provisions to protect employees’ rights. In other words, employees run a “high” risk of adverse employment action if they use a controlled substance made legal by various states.

⁹⁶ *Id.* (citing Nev. Rev. Stat. § 453A.800(3) (2012)).

⁹⁷ *Id.* (citing NEV. STAT. § 453A.800(3) (2012)).

⁹⁸ *See supra* notes 1–6 and accompanying text.

⁹⁹ *Blauer v. Dep’t. of Workforce Servs.*, 331 P.3d 1, 3 (Utah 2014).

¹⁰⁰ UTAH ADMIN. CODE r. 606-1-1.

¹⁰¹ *See id.*

¹⁰² *Liquori*, *supra* note 19, at 4.

¹⁰³ *Id.*