THE LEGAL APPLICABILITY OF STATE MEDICAL MARIJUANA LAWS ON EMPLOYERS AND EMPLOYEES

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“[M]ore than half of the states in the country have enacted laws that somewhat or fully protect adults who use marijuana. With this political sea change have come new challenges, not just for dispensary owners and marijuana advocates, but for everyone who owns a business in those states.1

I. INTRODUCTION

In June 2014, Donna Smith, an ex-employee of Presbyterian Health Services in New Mexico, instituted a lawsuit against her former employer for terminating her employment after she failed a drug test.2 Smith, who has a state issued medical marijuana card, allowing her to use marijuana for medicinal purposes, claims that Presbyterian’s decision to terminate her violates the New Mexico Human Rights Act, which prevents discrimination against people with serious medical conditions.3 In response, Presbyterian claims that Smith’s termination was legal, as it was merely following federal guidelines to provide a drug free workplace and the use of medicinal marijuana is illegal under federal law.4

A few months earlier, in March 2014, Charlie Davis, a former procurement clerk, brought a similar lawsuit against his employer, the New Jersey Transit, after he was suspended and ordered into drug rehabilitation for testing positive for marijuana during a drug test.5 Davis suffers from renal...

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3 Eidelson, supra note 2.
4 Id.
failure and has severe nerve damage in his leg, causing him pain and making it difficult to sleep.\textsuperscript{6} To alleviate some of the pain associated with his medical condition, Davis was prescribed medical marijuana and is a registered medical marijuana patient under New Jersey law.\textsuperscript{7} Davis’ lawsuit, like Smith’s, is based on a claim that his employer’s actions violated state discrimination laws providing protection to employees with disabilities.\textsuperscript{8}

The lawsuits instituted by Smith and Davis are just two of the numerous lawsuits being brought by employees who claim that they are being discriminated against and wrongfully fired or suspended for testing positive for marijuana even though they are allowed under state law to use this drug for medicinal purposes.\textsuperscript{9} Consequently, the recent passage of laws in numerous states allowing the use of medical marijuana, at the very least, has resulted in employees instituting lawsuits challenging tangible adverse employment actions taken against them following a positive drug test. Further, employers are unwillingly being forced to defend these lawsuits.\textsuperscript{10}

Moreover, lawsuits, such as those instituted by Smith and Davis, raise questions about whether state medical marijuana laws are applicable to the workplace. In an attempt answer this question, the article will examine


\textsuperscript{7} Id.


\textsuperscript{9} See e.g., Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 203 (Cal. 2008) (holding that the employee could not state a cause of action under the California’s Fair Employment and Housing Act based on the employer’s refusal to accommodate the employee’s use of medical marijuana.); Emerald Steel Fabrication, Inc. v. Bureau of Labor Indus., 230 P.3d 518, 520 (Or. 2010) (confirming that employers are not obligated to accommodate the use of medical marijuana by disabled or other employees); Coates v. Dish Network, LLC., 303 P.3d 147, 149 (Colo. 2013) (holding that an employee’s off-the-job use of medical marijuana is not “lawful activity” for purposes of Colorado’s civil rights law precluding employers from discharging employees for “lawful activity”); Casias v. Walmart, 695 F.3d 428 (Mich. 2012) (holding that the employer did not violate the law by firing an employee, who had a legal right to use medical marijuana under Michigan law, for testing positive for marijuana during a drug test); Roe v. Teletech Customer Care Mgmt., LLC, 257 P.3d 586 (Wash. 2011) (holding that Washington’s medical marijuana statute did not provide employment protections to medical marijuana users or a civil cause of action against a private party but only afforded a defense to criminal prosecution for marijuana possession).

\textsuperscript{10} The discussion and scope of this article will only focus on employees who are sober at work and only use medical marijuana away from work while off-duty.
applications of state medical marijuana laws in various states and recent court decisions involving lawsuits instituted by employees who claim that their employers discriminated against them because of their legal right to use medical marijuana. Further, the article will explain the possible impact of these court decisions on the workplace. Finally, the article will provide general recommendations for employers potentially affected by state medical marijuana laws.

II. STATE MEDICAL MARIJUANA LAWS

Marijuana is classified as “a Schedule 1 substance under the Controlled Substances Act, where Schedule I substances are considered to have high potential for dependency and no accepted medical use, making distribution of marijuana a federal offense.”11 As a matter of fact, in the case of Gonzalez v. Raich, the U.S. Supreme Court rejected two California patients’ claims that their personal medical use and cultivation of marijuana should be exempted from federal law since the local cultivation and use of this drug does not affect interstate commerce.12 Instead, the Court held that the commerce clause does in fact give Congress authority to prohibit the local cultivation and use of marijuana even in those states where it is legal to use marijuana for medicinal purposes.13

Although marijuana use is illegal under federal law, there are twenty-three states and the District of Columbia that currently have laws legalizing marijuana for certain purposes.14 These twenty-three states are as follows:

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12 545 U.S. 1 (2005).
13 Id.; see also, Justice Department Announces Update to Marijuana Enforcement Policy, DEPARTMENT OF JUSTICE, August 29, 2013, http://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy, (Notably, in October 2009, the Obama Administration sent a memo to federal prosecutors encouraging them not to prosecute people who distribute marijuana for medical purposes in accordance with state law. Furthermore, in August 2013, the U.S. Department of Justice (“USDOJ”) announced an update to their marijuana enforcement policy, which indicated that even though marijuana remains illegal federally, the USDOJ expects states like Colorado and Washington to create “strong, state-based enforcement efforts…. and will defer the right to challenge their legalization laws at this time.”).
14 See State Medical Marijuana Laws, supra note 11 (“A total of 23 states and the District of Columbia now allow for comprehensive public medical marijuana and cannabis programs.”); see also, State Marijuana Laws Map, GOVERNING, http://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html (last visited on Sept. 9, 2014); 23 Legal Medical Marijuana States and DC Laws, Fees, and Possession Limits, PRO.CON,
Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont & Washington. However, only four of these states—Colorado, Washington, Oregon and Alaska—and the District of Columbia have actually legalized marijuana use for recreational purposes. The remaining of the twenty-three states have laws allowing marijuana use for medicinal purposes. In particular, the first state to legalize the use of medical marijuana was California, which passed the law in 1996. Approximately 18 years later, in May 2014, Minnesota became the twenty-


17 State Marijuana Laws Map, supra note 14.

second state to allow the use of marijuana for medicinal purposes. New York followed shortly behind Minnesota and became the twenty-third state to allow the use of medical marijuana when its Governor Andrew Cuomo signed into law legislation to this effect in July 2014.

A. The Use of Medical Marijuana

The definition of what constitutes medical marijuana can differ depending on state statutes. This definition can be more narrow or broader. For instance, even though the medical marijuana law in Minnesota does not take effect until July 2015, this state narrowly defines the substance that actually constitutes medical marijuana. In Minnesota, a qualifying individual is only allowed to use “liquid, pills, vapor with the use of liquid or oil (but which does not require the use of dried leaves or plant form), or any other method, excluding smoking use.” In other words, a qualifying individual in Minnesota is only protected if he or she uses nonsmokeable marijuana. Similarly, New York’s state statute is also narrow and qualifying individuals may not possess “whole-plant cannabis and only oils, pills, and/or extracts prepared from the plant” may be obtained. Unlike the statutes in Minnesota and New York, Arizona’s statute defines “medical marijuana” broader and “means all parts of any plant of the genus cannabis whether growing or not, and the seeds of such plant.” Other states, like

22 Id.
23 Id.
24 Id.
26 ARIZ. REV. STAT. § 36-2801 (2014); see also NEV. REV. STAT. § 453A.010 (2014) (Nevada’s medical marijuana statute defines “medical marijuana” as all parts of any plant of the genus...
Hawaii, only allow some parts of the marijuana plants to constitute medical marijuana. In Hawaii, “usable marijuana” means the dried leaves and flowers of the plant Cannabis family Moraceae, and any mixture of preparation thereof, that are appropriate for the medical use of marijuana,” but “does not include the seeds, stalks, and roots of the plant.”

The term “medical use” can have differing meanings under state statutes and can include things such as purchasing, possessing and transferring marijuana or even the production of marijuana. For example, Colorado’s medical marijuana statute includes the production of marijuana and defines the term “medical use” as “the acquisition, possession, production, use, or transportation of marijuana . . . .” Likewise, Nevada defines “medical use” to include: “[t]he possession, delivery, production or use of marijuana . . . .” On the other hand, Delaware’s medical marijuana statute does not include the production of marijuana and merely defines “medical use” as the “acquisition; administration; delivery; possession; transfer; transportation; or use of marijuana . . . .”

All of the states legalizing medical marijuana require a doctor’s recommendation or certification that the patient qualifies to use medical Cannabis, whether growing or not; . . . The seeds thereof . . . The resin extracted from any part of the plant; and . . . Every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin.”). CONNECTICUT’S MEDICAL MARIJUANA STATUTE defines “marijuana as “all parts of any plant, or species of the genus cannabis or any infra specific taxon thereof, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.”).

See e.g., HAW. REV. STAT. ANN. § 329-121 (2014); COLO. REV. STAT. § 25-1.5-106 (2014) (Colorado’s medical marijuana statute, which defines usable marijuana as "Usable form of marijuana" means the seeds, leaves, buds, and flowers of the plant (genus) cannabis, and any mixture or preparation thereof, which are appropriate for medical use as provided in this section, but excludes the plant's stalks, stems, and roots.").

See e.g., CONN. GEN. STAT. § 21a-240 (2014) (Connecticut’s medical marijuana statute defines “palliative use” as “the acquisition, distribution, transfer, possession, use or transportation of marijuana or paraphernalia relating to marijuana, including the transfer of marijuana and paraphernalia relating to marijuana from the patient’s primary caregiver to the qualifying patient, to alleviate a qualifying patient’s symptoms of a debilitating medical condition or the effects of such symptoms, but does not include any such use of marijuana by any person other than the qualifying patient.”); 410 ILL. COMP. STAT 130/1 (2014) ("Illinois' medical marijuana statute defines "medical use" as "the acquisition; administration; delivery; possession; transfer; transportation; or use of cannabis to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the patient's debilitating medical condition.").

See e.g., COLO. REV. STAT. § 25-1.5-106 (2014).

See e.g., NEV. REV. STAT. §§ 453A.120 (2014).

See e.g., DEL. CODE. ANN. tit. 16 § 4904A (2014).
marijuana for medicinal purposes. And, the majority of these states require a physician to certify that the patient has a “serious medical condition” or a condition that is specifically listed in the state’s medical marijuana statutes. For example, Illinois’ medical marijuana statute provides that a patient can qualify to use marijuana for medical purposes if he or she suffers from the following diseases: “Cancer, glaucoma, a positive status for HIV (human immunodeficiency virus), AIDS (acquired immunodeficiency syndrome), hepatitis C, ALS (amyotrophic lateral sclerosis), muscular dystrophy, Crohn's disease, agitation of Alzheimer's disease . . . .”

In addition to listing the specific qualifying illnesses, various state statutes also list specific symptoms experienced by the individual that can serve as a basis for qualifying these individuals for protection under the medical marijuana statutes. An example of this is Oregon’s statute which provides, in pertinent part, that individuals may qualify for protection under the law if they suffer from a medical condition that produces one or more of the following symptoms: “Cachexia; Severe pain; Severe nausea; Seizures, including but not limited to seizures caused by epilepsy; Persistent muscle spasms, including but not limited to spasms caused by multiple sclerosis; or agitation due to Alzheimer’s disease.”

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33 See, e.g., CONN. GEN. STAT. § 21a-240 (2014) (“Connecticut medical marijuana statute provides that “To qualify for the program, a patient must have a written certification from a physician and one of the following conditions: cancer, glaucoma, HIV/AIDS, Parkinson's disease, multiple sclerosis, spinal cord damage causing intractable spasticity, epilepsy, cachexia, wasting syndrome, Crohn's disease, PTSD, or a condition added by the Department of Consumer Protection.”) & House Bill 573 (284-66 House; 18-6 Senate) (New Hampshire 2013), available at http://www.gencourt.state.nh.us/legislation/2013/HB0573.html (“Written certification” means documentation of a qualifying medical condition by a provider pursuant to rules adopted by the department pursuant to RSA 541-A for the purpose of issuing registry identification cards, after having completed a full assessment of the patient’s medical history and current medical condition made in the course of a provider-patient relationship of at least 3 months in duration.”).


35 Other diseases protected under Illinois’ medical marijuana statute are multiple sclerosis, chronic pancreatitis, a spinal cord injury or disease, a traumatic brain injury or one or more injuries that significantly interferes with a patient's daily activities as documented by the patient's licensed medical practitioner. 410 ILL. COMP. STAT. 130/1 (2014).

36 See, e.g., HAW. REV. STAT. ANN. § 329-121 (2014) (“A chronic or debilitating disease or medical condition or its treatment that produces one or more of the following: (A) Cachexia or wasting syndrome; (B) Severe pain; (C) Severe nausea; (D) Seizures, including those characteristic of epilepsy; or (E) Severe and persistent muscle spasms, including those characteristic of multiple sclerosis or Crohn's disease . . . .”) & OR. REV. STAT. §§ 475.302-.346 (2014).

Examples of states that do not require a physician to certify that a patient has a serious medical condition are California and Massachusetts.\textsuperscript{38} Massachusetts’s statute encompasses any condition for which a physician determines that marijuana is required for treatment.\textsuperscript{39} Under California’s law, patients are merely required to receive a physician’s recommendation that the patient's health would benefit from the use of marijuana in the treatment of their illness.\textsuperscript{40}

**B. Protections and Limitations of State Medical Marijuana Laws**

Individuals who qualify for protection under state statutes typically have the benefit of protection from criminal prosecution for using marijuana for medical purposes in accordance with the provisions of these statutes.\textsuperscript{41} In order to receive protection under the states’ medical marijuana statutes most states require some type of registration process.\textsuperscript{42} As part of this registration process, states may require the patients to obtain a state identification card to qualify to use marijuana for medicinal purposes.\textsuperscript{43} For example, Alaska’s medical marijuana statute provides in pertinent part that “[t]he department shall create and maintain a confidential registry of patients who have applied for and are entitled to receive a registry identification card according to the criteria set out in this chapter.”\textsuperscript{44}

Despite any registration requirements that may exist, some states like Oregon, allow individuals who do not have a state registry identification card the ability to assert affirmative defenses to criminal prosecution for using

\begin{footnotes}
\item[40] \textsc{Cal. Health & Safety Code} § 11362.7 (2014).
\item[41] See supra note 15.
\item[42] See, e.g., \textsc{Alaska Stat.} §§ 17.37.10 (2014); \textsc{Nev. Rev. Stat.} §453A.140 (2014) “Registry identification card” means a document issued by the Division or its designee that identifies . . . A person who is exempt from state prosecution for engaging in the medical use of marijuana. . . . “Registry identification card” means a document indicating the date issued and expiration date by the department pursuant to RSA 126-W:4 that identifies an individual as a qualifying patient or a designated caregiver; House Bill 573 (284-66 House; 18-6 Senate) (New Hampshire 2013), available at http://www.gencourt.state.nh.us/legislation/2013/HB0573.html (“Registry identification card” means a document indicating the date issued and expiration date by the department pursuant to RSA 126-W:4 that identifies an individual as a qualifying patient or a designated caregiver.”).
\item[43] See id.
\item[44] \textsc{Alaska Stat.} §§ 17.37.10 (2014).
\end{footnotes}
medical marijuana. In fact, Oregon’s statute provides that “[i]t is not necessary for a person asserting an affirmative defense . . . to have received a registry identification card in order to assert the affirmative defense . . . .”

The specific activities that are protected under state medical marijuana statutes are usually included in the statutes. Illustrations of this can be seen in Nevada’s and New Mexico’s statutes which actually remove state-level criminal penalties for the use, possession and cultivation of medical marijuana. Other states, like Alaska and Delaware, however, do not allow qualifying individuals to engage in home cultivation. These states only allow the qualifying individuals to use and possess marijuana.

The majority of states limit the amount of marijuana that a qualifying individual may legally possess to be protected from criminal prosecution. For instance, in Nevada, a qualifying individual may only possess two and one-half ounces of medical marijuana at one time. Further, Delaware’s law only allows a qualifying individual to possess six ounces of medical marijuana.

Some state statutes—like Connecticut—require a qualifying individual to be at least 18 years old, while others—like Alaska—allow minors to qualify for protection under state medical marijuana statutes. Many states place

45 See, e.g., OR. REV. STAT. § 475.319 (2014) & WASH. REV. CODE ANN. § 69.51A.010 (2014) (Washington’s statute says that a person who has not registered with the state can still assert medical marijuana use as an affirmative defense if he provides valid documentation of his or her medical use of marijuana; complies with all of the terms and conditions of the state medical marijuana statute; has no more marijuana than set by state law; there is no probable cause to believe that the patient has committed a felony or is committing a misdemeanor in a peace officers presence and there are no outstanding warrants for the individuals arrests.”)
46 OR. REV. STAT. § 475.319 (2014).
47 See, e.g., COLO. REV. STAT. § 25-1.5-106 (2014) (Colorado also allows home cultivation and this state limits the amount of medical marijuana that can be possessed to no more than six marijuana plants.); NEV. REV. STAT. §§ 453A.200 (in Nevada, home cultivation of medical marijuana is allowed, but an individual is limited to twelve mature plants if he or she resides within 25-miles of an operating dispensary.) N.M. STAT. ANN. §§ 26-2B-3 to -5 (2014)
50 See id.
51 See, e.g., ME. REV. STAT. tit. 22 §§ 2383-B (YEAR) (Maine only allows a qualifying patient to possess two and one-half ounce of marijuana); MONT. CODE ANN. § 50-46-319 (YEAR) (In Montana, the limit is one ounce of marijuana.) & OR. REV. STAT. §§ 475.302 (YEAR) (In Oregon, the limit is twenty-four ounces of usable cannabis.).
54 See Alaska Sec. 17.37.010 (c) (3) ((3)) (“if the patient is a minor, a statement by the minor's parent or guardian that the patient's physician has explained the possible risks and benefits of medical use of marijuana and that the parent or guardian consents to serve as the primary caregiver for the patient and to control the acquisition, possession, dosage, and frequency of
restrictions on the locations where medical marijuana can be used. Examples of places where medical marijuana may be prohibited include health facilities, school grounds, public places or correctional facilities.\textsuperscript{55} Furthermore, most state medical marijuana statutes do not require employers to accommodate medical marijuana use in the workplace and employers are not required to accommodate impaired employees.\textsuperscript{56} For example, New Jersey’s medical marijuana statute provides that “[n]othing in this act shall be construed to require . . . an employer to accommodate the medical use of marijuana in any workplace.”\textsuperscript{57}

However, a handful of states statutes specifically provide that an employer cannot discriminate against any person because of their medical marijuana use.\textsuperscript{58} For example, Arizona’s medical marijuana statute provides:

Unless a failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person upon either:

1. The person’s status as a cardholder.
2. A registered qualifying patient’s positive drug test for marijuana component or metabolites, unless the patient used, possessed or was impaired by marijuana on the

\textsuperscript{55} See, e.g., St.2012, c.369 (Mass. 2012), https://malegislature.gov/Laws/SessionLaws/Acts/2012/Chapter369 (“Nothing in this law requires any accommodation of any on-site medical use of marijuana in any place of employment, school bus or on school grounds, in any youth center, in any correctional facility, or of smoking medical marijuana in any public place.”); MONT. CODE ANN. § 50-46-320 & 50-46-307 (2014) (“This part does not permit . . . the use of marijuana by a registered cardholder: (i) in a health care facility . . . .; (ii) in a school or a postsecondary school . . . .”); CAL. HEALTH & SAFETY. CODE, § 11362.7 (2014) (“(a) Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment or on the property or premises of any jail, correctional facility, or other type of penal institution in which prisoners reside or persons under arrest are detained.”).

\textsuperscript{56} See, e.g., WASH. REV. CODE. ANN. § 69.51A.010 (2014); N.J. STAT. ANN. §24:61-14 & CAL. HEALTH & SAFETY. CODE, § 11362.7 (2014).


premises of the place or employment or during hours of employment.59

States with statutes containing similar wording to that in Arizona’s statute--prohibiting employers from discriminating against employees who use medical marijuana--include: Delaware, Illinois, Connecticut, Minnesota, Rhode Island and Nevada.60 Interestingly, even those state statutes that specifically prohibit discrimination do provide circumstances where the employer is not required to accommodate medical marijuana use.51 For example, Delaware’s statute allows an employer to discriminate against an employee who is allowed to use marijuana for medical purposes where it would “cause the employer to lose a monetary or licensing related benefit under federal law or regulations.”62

III. THE APPLICABILITY OF STATE MEDICAL MARIJUANA LAWS TO THE WORKPLACE

The fact that a state’s statute does not specifically require an employer to accommodate an employee’s medical marijuana use in the workplace does not necessarily answer the question of whether an employer must honor an employee’s legal right to use medical marijuana if the employee was sober at work and used the drug while off-duty. In fact, employees, in those states where the medical marijuana statutes do not require employers to accommodate employee’s medical use of marijuana, have still brought lawsuits challenging the tangible actions taken by their employers following a positive drug test. In general, employees have based their lawsuits on the premise that their employers should have to honor their legal rights to use marijuana off-duty as long as they are sober during work hours.63

A. Allegations of Employers Violating State Discrimination Statutes

More specifically, employees who are terminated or suspended for testing positive for marijuana even though they have a legal right to use medical marijuana often times base their lawsuits on claims that their employers have violated state discrimination statutes protecting employees from: (1) discrimination because of a disability or (2) discrimination because

59 ARIZ. REV. STAT. § 36-2813 (2014).
60 See supra note 59.
62 DEL. CODE. ANN. tit. 16 § 4904 (2014).
63 See supra note 9.
the employee has engaged in a lawful activity while off-duty. Actually, at least three state courts have resolved the question of whether employers by taking adverse actions against employees who use marijuana for medicinal purposes while off-duty have violated state discrimination statutes. These state courts are located in California, Oregon and Colorado. Court holdings from all of these states will be discussed separately.


In *Ross v. RagingWire Telecommunications Inc.*, Gary Ross, an employee whose physician recommended pursuant to California’s medical marijuana statute that he uses marijuana to treat his chronic back pain, was terminated when he tested positive for marijuana during a pre-employment drug test required of new employees at the company. Because Ross suffers from strain and muscle spasms in his back, he is “a qualified individual” with a disability under California’s Fair Employment and Housing Act (FEHA), prohibiting, among other things, discrimination in employment because of a disability.

In his lawsuit against his former employer, Ross alleged that the company violated California’s FEHA by discharging him because of a disability and by failing to make reasonable accommodations for his disability. The court, in reviewing Ross’s claim, stated that no “state law could completely legalize marijuana for medical purposes because the drug

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65 See supra note 65.

66 See supra note 65; see also Washburn v. Columbia Forest Prods., Inc., 134 P.3d 161 (Or. 2006) (holding that a medical marijuana user who was fired for testing positive for marijuana was not disabled under the state’s nondiscrimination statutes and as a result, the employer was not required to make a disability-related accommodation for an employee who uses marijuana for medical purposes).


68 California’s Fair Employment and Housing Act “prohibits harassment and discrimination in employment because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, mental and physical disability, medical condition, age, pregnancy, denial of medical and family care leave, or pregnancy disability leave . . . and/or retaliation for protesting illegal discrimination related to one of these categories, or for reporting patient abuse in tax supported institutions.” California’s Fair Employment and Housing Act, California Department for Fair Employment and Housing, available at http://www.dfeh.ca.gov/Publications_FEHADescr.htm (last visited on Oct. 8, 2014).

69 Ross, 174 P.3d at 203.

70 Id. at 204.
remains illegal under federal law.” 71 Moreover, the court found that the FEHA “does not require employers to accommodate the use of illegal drugs.”72 In supporting this position, the court indicated that California’s medical marijuana statute “does not eliminate marijuana’s potential for abuse or the employer’s legitimate interest in whether an employee uses the drug.”73

The court also noted that the “operative provisions” of the state’s medical marijuana statute codified in Section 11362.5 of California’s Health and Safety Code did not speak to employment law, but mentioned protection from criminal prosecution.74 And, the court stated that employment law was not “mentioned in the findings and declarations” of the statute.75

Ross also claimed that Section 11362.785 of California’s Health and Safety Code, adopted in 2003, seven years after California’s medical marijuana statute was first enacted, provides a basis for his claim that his termination for testing positive for marijuana was discriminatory under FEHA.76 Section 11362.785 states that “[n]othing in this article shall require any accommodation of medical use of marijuana on the property or premises of any place of employment . . . or during the hours of employment . . .”77 Ross claimed that this provision means that employers are required to accommodate employees’ use of marijuana at home.78

The court’s response to Ross’s claim was that the provision stating that employers do not have to accommodate marijuana use during hours of employment or on work premises took effect over two years after RagingWire terminated Ross.79 Also, the court indicated that the statute can be given the literal effect of “negating any expectation that the immunity to criminal liability for possessing marijuana granted in the Compassionate Use Act gives medical users a civilly enforceable right to possess the drug at work or in custody.”80 Moreover, the court noted that through an *amici curiae* brief, several of the legislators who authored the bill adding Section 11362.785 stated that they did not believe that “employers generally are required to accommodate off-duty, off-premises medical cannabis use by their employees, absent an undue hardship.”81

71 Id.
72 Id.
73 Id. at 205.
74 Id.
75 Id.
76 Id. at 207.
77 Id.
78 Id.
79 Id.
80 Id.
81 Id.
Ultimately, the court in *Ross* concluded that nothing in the text or history of the California’s medical marijuana statute suggested that the statute was intended to address the respective rights and duties of employers and employees.82 Therefore, the court held that Ross could not state a cause of action under California’s FEHA based on the company’s refusal to accommodate his use of medical marijuana.83

2. Allegations of Disability Discrimination - The Case of *Emerald Steel Fabrication, Inc. v. Bureau of Labor Industries*

In the case of *Emerald Steel Fabrication, Inc. v. Bureau of Labor Industries*, the question that was presented to the Oregon Supreme Court was how Oregon’s medical marijuana statute and the federal law prohibiting any type of use of marijuana “intersect in the context of an employment discrimination claim.”84 In particular, the employer argued that since marijuana possession is illegal under federal law, Oregon’s state law does not require an employer to accommodate an employee’s use of medical marijuana to treat “a disabling medical condition.”85

The pertinent facts in the case were that in June 2002 the employee was issued a state registration identification card to allow him to use medical marijuana for medical purposes because he suffered from anxiety, panic attacks, nausea, vomiting and severe stomach cramps—symptoms which “substantially limited his ability to eat.”86 Thereafter, in January, 2003, the employer hired the employee on a temporary basis as a drill press operator.87 During his employment, the employee used marijuana one to three times per day while off-duty and away from work.88

Because the employee’s work was satisfactory, the employer considered hiring him on a permanent basis.89 As a result, the employee informed his supervisor that he had a registry card and that he used marijuana for medical purposes.90 One week later, the employee was terminated from the company.91 Thereafter, the employee filed a complaint against his employer with Oregon’s Bureau of Labor and Industries (“BOLI”), a state agency with the mission of protecting employment rights, advancing employment

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82 *Id.* at 205-08.
83 *Id.* at 208.
84 230 P.3d 518, 520 (2010).
85 *Id.*
86 *Id.*
87 *Id.*
88 *Id.*
89 *Id.*
90 *Id.* at 521.
91 *Id.*
opportunities, and protecting “access to housing and public accommodations free from discrimination.”\footnote{Id.; see also Bureau of Labor Industries, About Us, Or. Gov., http://www.oregon.gov/boli/Pages/about_us.aspx (last visited on Nov. 6, 2014).} In his complaint, the employee claimed that his employer discriminated against him in violation of Oregon Revised Statutes Section 659A. 112, which prohibits discrimination against an otherwise qualified person because of a disability.\footnote{Emerald Steel Fabricators, Inc., 230 P.3d at 521.; see also Or. Rev. Stat. § 659A (2014).} The BOLI filed formal charges against the employer alleging that the employer violated Section 659.112 and failed to make reasonable accommodations for the employee’s disability.\footnote{Emerald Steel Fabricators, Inc., 230 P.3d at 521.}

After hearing the parties’ evidence, an administrative law judge (“ALJ”), ruled that the employer failed to reasonably accommodate the employee’s disability and the BOLI issued a final order that adopted the ALJ’s findings.\footnote{Id. at 524.} On appeal, the employer argued that the protections of Section 659.112 of Oregon’s Revised Statutes (“ORS”) do not apply to any “employee who is currently engaging in the illegal use of drugs.”\footnote{Id.} In response, the BOLI first claimed that the employer failed to make a reasonable accommodation in violation of Section 659.112 because the employer did not engage in a “meaningful interactive process” with the employee in an attempt to arrive at a reasonable accommodation.\footnote{Id.} BOLI also claimed that the employee’s use of medical marijuana was entirely legal under state law and as a result, marijuana is not an “illegal use of drugs” within the meaning of ORS 659A.124, which provides that “the protections of ORS 659A.112 . . . do not apply to any job applicant or employee who is currently engaging in the illegal use of drugs if the employer takes action based on that conduct.”\footnote{Id. at 524-25; see also Or. Rev. Stat. § 659A.124 (2014), available at http://www.oregonlaws.org/ors/659A.124 (last visited on Nov. 6, 2014).} In essence, the BOLI’s argument is based on the “assumption that the phrase “illegal use of drugs” in ORS 659A.124 does not include uses that are “legal under state law even though those same uses are illegal as a matter of federal law.”\footnote{Emerald Steel Fabricators, Inc., 230 P.3d at 525.}

In examining BOLI’s arguments, the court began by focusing on ORS 659A. 122, which states:

> Illegal use of drugs" means any use of drugs, the possession or distribution of which is unlawful under state law or under the federal Controlled Substances Act, 21 U.S.C.A. 812, as amended,
but does not include the use of a drug taken under supervision of a licensed health care profession or other uses authorized under the Control Substances Act or under other provisions of state or federal law.100

In its analysis, the court indicated that since the first part of the statute’s definition of “illegal use of drugs,” covers all drugs whose use or possession is unlawful under state or federal law marijuana falls within the definition of an illegal drug.101

Under the second part of ORS 659A.122’s definition of “illegal drug use” there were two exclusions that the court found could possibly be applicable to the case: (1) the exclusion for “uses authorized under other provisions of state law” and (2) the exclusion for “the use of a drug taken under supervision of a licensed health care professional.”102 Regarding the first exclusion, the court began with the question of whether an employee’s use of medical marijuana is a “use authorized under other provisions of state law.” Here, the court concluded that, as a matter of statutory interpretation, an employee’s use of medical marijuana is an authorized use under state law since medical marijuana is legal under state law.103 As a result, the court determined, as a matter of statutory interpretation, the use of medical marijuana fell within one of the exclusions from the “illegal use of drugs” in ORS 659A.122(2).104

The employer, however, argued that the Supremacy Clause of the United States requires that the court interpret Oregon’s statutes consistently with the federal Controlled Substances Act, meaning that federal law preempts the state’s medical marijuana statute codified in ORS 475.306 such that an employee’s use of medical marijuana constitutes “illegal drug use” within the meaning of ORS 659A.124.105 Responding to the employer’s argument, the court stated that although ORS 475.306 affirmatively authorizes the use of medical marijuana, the Controlled Substances Act prohibits the use of marijuana without any concern as to whether it is used for medicinal purposes.106 Further, the court noted that authorizing a use that federal law prohibits “stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act.”107 Thus, the court determined that to the extent that ORS 475.306

100 Id. (citing OR. REV. STAT. § 659A.122) 2014).
101 Id. at 525.
102 Id.
103 Id.
104 Id.
105 Id. at 526.
106 Id. at 529.
“affirmatively authorizes the use of medical marijuana, federal law preempts that subsection, leaving it ‘without effect.”108

Since the court found that the state’s medical marijuana statute was without effect when the employer discharged the employee, it concluded that “no enforceable state law either authorized the employee’s use of marijuana or excluded its use from the ‘illegal use of drugs’ as that phrase is defined in ORS 659A.122(2) and used in ORS 659 A.124.109 As a result, the court held that “the BOLI could not rely on the exclusion in ORS 659A.122(2) for ‘uses authorized under other provisions of state law’ to conclude that medical marijuana use was not an illegal use of drugs within the meaning of ORS 659A.124.”110 Moreover, the court held that because the employee was engaged in the illegal use of drugs and the employer discharged him for that reason, the employee was not entitled to the protections of ORS 659.112, including an obligation for the employer to engage in “meaningful interactive discussions.”111 In reaching its conclusion on the case, the court, however, emphasized that it was not holding that the “Controlled Substances Act preempts provisions of the Oregon Medical Marijuana Act that exempt the possession manufacture, or distribution of medical marijuana from state criminal liability.”112

3. Allegations of Discrimination based on a “Lawful Activity” under State Law- The Case of Coates v. Dish Network, LLC.

Under Colorado’s Civil Rights Act, “[i]t shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee engaging in any lawful activity off the premises of the employer during nonworking hours.”113 In Coates v. Dish Network, LLC., an employee who was qualified to use marijuana for medical purposes claimed that his employer discriminated against him by terminating him for testing positive for marijuana although his off-duty use of marijuana was a lawful activity under state law.114 In other words, Coates claimed that his termination was discriminatory and violated the state’s civil rights statute because he was fired for engaging in the lawful activity of using marijuana for medical purposes while away from work and during nonwork hours.115

108 Id. at 529.
109 Id.
110 Id.
111 Id. at 536.
112 Id.
114 303 P.3d 147, 149 (2013).
115 Id.
The plaintiff, Brian Coates, in this case was a quadriplegic who was licensed by the state of Colorado to use medical marijuana. He alleged that he “used marijuana within the limits of the license, never used marijuana on defendant’s premises, and was never under the influence of marijuana at work.” Coates’s employer Dish Network fired him after he tested positive for marijuana because this violated the employer’s drug policy.

The Colorado Court of Appeals in Coates affirmed the trial court’s holding that medical marijuana use although legal in the state does not constitute “lawful activity” for purposes of the state’s civil rights statute. In reaching this holding, the court explained that at the time of Coates’ termination all marijuana use was prohibited by federal law and according to the court, the statutory term “lawful activity” refers both to federal and state law. In effect, the court found that “an activity that violates federal law but complies with state cannot be ‘lawful’ under the ordinary meaning of that term.”

A. Allegations of Employers Engaging in Wrongful Termination

Another basis of lawsuits instituted by employees who are terminated because of a positive drug test even though they are qualified under state law to use medical marijuana is a wrongful termination claim. One such case is Casias v. Walmart, in which Michigan’s medical marijuana statute was at issue. The state’s statute provides:

A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business

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116 Id.
117 Id.
118 Id.
119 Coates, 303 P.3d at 150.
120 Id.
121 Id. at 151.
122 See, e.g., Casias v. Walmart, 695 F.3d 428 (2012); Roe v. Teletech Customer Care Mgmt., LLC, 257 P.3d 586 (2011); Ross v. Ragingwire Telecomms., 174 P.3d 200, 208-09 (2008) (The plaintiff-employee claimed that his employer’s refusal to accommodate his use of marijuana stated a cause of action for wrongful termination in violation of public policy. On this claim, the court held that since California’s nothing in the text or history of the California’s medical marijuana state suggested that the statute was intended to address the respective rights and duties of employers and employees, it did not put the company on notice that employers would be required under the statute to accommodate the use of marijuana.).
123 695 F.3d 428 (2012).
or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act.124

Thus, the statute precludes a “civil penalty or “disciplinary action” by a “business or occupational or professional licensing board or bureau.”125

Arguably, it is unclear from merely reading Michigan’s statute whether the terms “civil penalty” or “disciplinary action” by a “business or occupational or professional licensing board or bureau” cover an employer. Nevertheless, this question was answered by the United States Court of Appeals for the Sixth Circuit in the Casias case. 126 In that case, the plaintiff, Joseph Casias, was an employee of Walmart in its Battle Creek, Michigan store from November 1, 2004 until November 24, 2009. 127 Casias was terminated from the company when he tested positive for marijuana in violation of the company’s drug use policy. 128

The specific facts of the case are that Casias was diagnosed with sinus cancer and an inoperable brain tumor at the age of 17. 129 During his employment at Walmart, he endured ongoing pain in his head and neck. 130 Casias’ oncologist recommended that he try marijuana to treat his medical condition. 131 On June 15, 2009, the Michigan Department of Community Health issued Casias a registry card and “in accordance with state law, he began using marijuana for pain management purposes.”132 Casias claimed that he followed state laws and never used marijuana while at work; nor did he come to work under the influence.133

In November 2009, Casias injured himself at work and as a result of this injury, he was given a standard drug test at the hospital. 134 Before the drug test was administered, Casias showed his registry card to the testing staff to indicate that he was a qualifying patient under Michigan’s medical marijuana law.135 Approximately, one week after the drug test was administered, Walmart informed Casias that he tested positive for marijuana.136 Thereafter, Casias met with his shift manager to show him his registry card and explain that he never smoked marijuana while at work and had never come to work

125 See id.
126 695 F.3d 428, 431 (2012).
127 Id.
128 Id.
129 Id.
130 Id.
131 Id.
132 Id.
133 Id.
134 Id. at 432.
135 Id.
136 Id.
under the influence of the drug. Despite his explanation during this meeting, Walmart fired Casias from the company the following week. Subsequently, Casias sued Walmart claiming that he was wrongfully terminated because his termination violated Michigan’s Medical Marijuana Act.

Specifically, Casias claimed that the “plain language and policy of the [state’s medical marijuana statute] protects patients against disciplinary action in a private employment setting for using marijuana in accordance with Michigan law.” The parties in the case argued on the use of the word “business” and “whether the word simply modifies the words ‘licensing board or bureau’ on in the alternative, whether ‘business’ should be read independently from ‘licensing board or bureau.’”

In reviewing the case, the district court concluded that Michigan’s medical marijuana statute did “not regulate private employment; rather the Act provides a potential defense to criminal prosecution or other adverse action by the state.” In particular, the court found that the state statute contained “no language stating that it repeals the general rule of at-will employment in Michigan or that it otherwise limits the range of allowable private decisions by Michigan businesses.”

The appellate court affirmed the district court’s conclusion by determining that Michigan’s medical marijuana statute did not “impose restrictions on private employers, such as Walmart.” Specifically, the court found that the term “business” in the state’s medical marijuana statute “is not a stand-alone term . . ., but rather the word ‘business’ describes or qualifies the type of ‘licensing board or bureau.’” The court also focused on the fact that statute “never expressly refers to employment, nor does it require or imply the inclusion of private employment in its discussion of occupational or professional licensing boards.” In essence, the appellate court held that the language of Michigan’s medical marijuana statute did not support Casias’ interpretation that it regulates private employment action. The court in Casias also noted that other state courts, like Montana, Washington and...

137 Id.
138 Id.
139 Id.
140 Id. at 435.
141 Id.
142 Id.
143 Id. (quoting Casias v. Walmart, 764 F.Supp.2d 914, 922-23 (2012)).
144 Id.
145 Id. at 436 (quoting MICH. COMP. LAWS § 333.26424(a) (2014)).
146 Id.
147 Id.
California, have found that their similar state marijuana laws do not regulate private employment actions.148

Notably, like Michigan’s statute, the medical marijuana statutes for Montana, New Jersey, Oregon, Illinois, Arizona, Maine, Michigan, and Rhode Island provide that medical marijuana users should not suffer any civil penalty or disciplinary action by a professional licensing board.149 This similarity may mean that the court’s holding in Casias could potentially impact future decision of courts in those jurisdictions that have not yet been presented with the issue of whether employers are required to honor employees’ legal rights to use medical marijuana. But, it should also be taken into consideration that since Illinois’, Arizona’s, and Rhode Island’s medical marijuana statutes have specific provisions prohibiting employers from discriminating against qualifying employees who are allowed under state law to use medical marijuana, it is very possible that courts in these states would not follow the Casias holding.150

Another case where an employee who had the legal right to use medical marijuana brought a wrongful termination claim after testing positive for marijuana was the case of Roe v. Teletech Customer Care Management, LLC.151 In Roe v. Teletech, the plaintiff suffered from debilitating migraine headaches and as a result, in June 2006 she received medical authorization under Washington law to use marijuana for medical purposes.152 Approximately four months later, on October 3, 2006, Teletech hired the plaintiff to work as a customer service consultant in its Bremerton facility.153 At that time, the plaintiff was provided with a copy of the company’s substance abuse policy for job applicants, which included the fact that “[a]ll applicants . . . to whom Teletech has given a conditional offer of employment are required to submit to a pre-employment drug test and must receive a negative result as a condition of employment.”154 After becoming aware of

151 257 P.3d 586.
152 Id.
153 Id. at 589.
154 Id.
this policy, the plaintiff informed Teletech that she had authorization under the law to use marijuana for medicinal purposes.\textsuperscript{155}

On October 5, 2006, the plaintiff took a drug test and five days later began working for Teletech on October 10, 2006.\textsuperscript{156} That same day, the plaintiff’s drug test came back positive for marijuana.\textsuperscript{157} The next week Teletech terminated the plaintiff based on the fact that she violated the company’s drug policy by testing positive for marijuana.\textsuperscript{158}

Currently, Washington’s medical marijuana statute provides that “[n]othing in this chapter requires an accommodation for the medical use of cannabis if an employer has a drug-free work place.”\textsuperscript{159} Although the statute was amended in 2007 to reflect the aforementioned language, the original language in Washington’s medical marijuana statute before the 2007 amendment governed \textit{Roe v Teletech}.\textsuperscript{160} This original language provided that: “[n]othing in this chapter requires any accommodation of any medical marijuana use in any place of employment, in any school bus or any school grounds, or in any youth center.”\textsuperscript{161} The plaintiff-employee argued that this language in the state’s medical marijuana statute “implicitly” required “an employer to accommodate an employee’s medical marijuana use outside the workplace.”\textsuperscript{162} The Washington Supreme Court concluded that nothing in the statute suggested the drafters or voters considered employment protections prior to the adoption of the statute.\textsuperscript{163} As a result, the court held that the state’s medical marijuana statute did not imply a civil remedy.

The plaintiff in \textit{Roe v Teletech} also claimed that the court should find that Washington’s medical marijuana statute as adopted in 1999 created an implied cause of action for wrongful discharge in violation of public policy when an employer refuses to accommodate an employee’s authorized use of marijuana for medical purposes.\textsuperscript{164} On this claim, the Washington Supreme Court held that the state’s medical marijuana statute does not prohibit an employer from terminating an employee for medical marijuana use, nor does it provide a civil remedy against the employer.\textsuperscript{165} Further, the court held that the state statute “does not proclaim a sufficient public policy to give rise to a

\textsuperscript{155} \textit{Id.}
\textsuperscript{156} \textit{Id.}
\textsuperscript{157} \textit{Id.}
\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{WASH. REV. CODE ANN. § 69.51A.060 (2014).}
\textsuperscript{160} \textit{See Roe v. Teletech, 257 P.3d at 590.}
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Id. (citing WASH. REV. CODE ANN. §(4) (1999)).}
\textsuperscript{163} \textit{Id. at 591.}
\textsuperscript{164} \textit{Id. at 594.}
\textsuperscript{165} \textit{Id. at 586.}
\textsuperscript{166} \textit{Id. at 597.}
tort action for wrongful termination for authorized use of medical marijuana.”166

IV. THE IMPACT OF STATE MEDICAL MARIJUANA LAWS ON THE WORKPLACE

Generally, in those instances where lawsuits have been instituted by employees who have been terminated for using marijuana for medical purposes, courts have concluded that the employer’s actions do not violate state discrimination statutes nor do they constitute wrongful termination claims. In other words, the courts have concluded that state medical marijuana laws are not applicable to the workplace and employers do not have to honor employees’ legal rights to use medical marijuana.

Arguments can be made in favor of these court decisions on the basis that denying employees the legal right to use medical marijuana will keep the workplace safe and free from the dangers posed by drug use of employees.167 Nonetheless, the fact that employers do not necessarily have to honor the employee’s legal right to use medical marijuana may mean that an employee has to choose between treating a medical condition from which he or she suffers and his or her employment. In the note titled A Cruel Choice: Patients Forced to Decide between Medical Marijuana and Employment, this position was described as “allowing a third party, the employer, to determine the medical decisions of an employee when those decisions are traditionally left for the patient and doctor to determine.”168

Further, Justice Kennard of the California Supreme Court in his concurrence and dissent in Ross v. RagingWire Telecommunications, Inc. described the choice of employees who use medical marijuana as providing:

[O]nly two options: continue receiving the benefits of marijuana use “in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or … other illness” . . . and become unemployed, giving up what may be their only source of income, or continue in their employment, discontinue marijuana

166 Id.
treatment, and try to endure their chronic pain or other condition for which marijuana may provide the only relief.\(^{169}\)

Thus, it can also be argued that allowing employers to discriminate against employees who are allowed to use medical marijuana places these employees in an unfair position.\(^{170}\) Additionally, any argument for requiring employers to honor employees’ legal rights to use medical marijuana is premised on the assumption that the employee is sober at work and is using marijuana off-duty and during non-work hours.\(^{171}\) And, it can be argued that employees are merely using the marijuana as any other person would use a prescribed medication. Furthermore, it is acknowledged that there are some safety-sensitive jobs—like flying a plane or operating a train—where a person who uses medical marijuana should be ineligible for employment to ensure the overall public safety of society.\(^{172}\)

Despite any arguments that can be made for requiring employers to honor employees’ legal rights to use medical marijuana, based on existing court decisions on the applicability of medical marijuana to the workplace, it appears that employers are in a better legal position than employees when employees are terminated or suspended for using medical marijuana.\(^{173}\) In essence, it appears that in general, employers have not been significantly affected by state laws legalizing medical marijuana.\(^{174}\) As a result, even with the recent emergence of an increase in the number of states legalizing medical marijuana, employers are still more often than not, allowed to


\(^{170}\) See generally, Tricia Cremo, As Legal Marijuana Use Blazes the Country, Political Stakes have Never Been Higher, THE LAMRON, Nov. 13, 2014, http://thelamron.com/2014/11/13/legal-marijuana-use-blazes-country-political-stakes-never-higher/; (“There has been significant controversy over employees being fired for failing work-administered drug tests in states where marijuana use is legal. Military personnel are prohibited from smoking marijuana in states where it is legalized and cadets are given frequent drug tests to enforce this. Neither of these groups should be punished for participating in a perfectly legal act.”).


\(^{172}\) See id.


suspend or fire employees for using medical marijuana while off-duty and during non-work hours.\textsuperscript{175}

It is important, however, to note that court decisions holding that employers may terminate or suspend employees for using medical marijuana away from work were not decided in any of the handful of states—like Arizona and Delaware—where the state medical marijuana statutes specifically prohibit an employer from discriminating against any person because of their medical marijuana use.\textsuperscript{176} Certainly, it would be interesting to see how a court in those jurisdictions would decide a lawsuit based on discrimination and wrongful termination claims brought by an employee who has a legal right to use medicinal marijuana.\textsuperscript{177}

What is more, although none of the cases that have been instituted by employees who have a legal right to use medical marijuana against their employers have involved claims under the Americans with Disability Act (“ADA”), which is a federal act prohibiting discrimination against people with disabilities in employment, public services, public accommodations, and telecommunications, employers who take adverse tangible employment actions against employees because of their legal rights to use medical marijuana should be aware of the fact that this may expose them to potential claims that they have violated the ADA.\textsuperscript{178}

\section*{V. Recommendations for Employers Potentially Affected by State Medical Marijuana Laws}

While employers appear to be in a better legal position than employees in those states that do not prevent employers from discriminating against

\begin{footnotesize}
\begin{itemize}
\item[175] See \textit{supra} note 9.
\item[177] See generally Eric Russell, \textit{Denied a Job, Medical Pot User Sues Maine Employer}, \textsc{Portland Press Herald}, Feb. 12, 2103, http://www.pressherald.com/2013/02/12/woman-who-failed-drug-test-because-of-medical-marijuana-sues-former-employer/, (“In a lawsuit that’s believed to be the first of its kind in Maine, a Pittsfield woman has sued a former employer for not rehiring her after she told the company that she uses marijuana for medical reasons.”).
\item[178] See generally James v. City of Costa Mesa, 684 F.3d 825 (2012) (holding that the Americans with Disabilities Act (“ADA”) does not bar discrimination based on marijuana use unless that use is authorized under federal law.); \textit{see also}, 42 U.S.C. § 12101 et seq.; Hickox, \textit{supra} note 150 at, 1017 (“The ADA could provide protection to a medical marijuana user.”); Lieberman & Solomon, \textit{supra} note 169 at, 640 (“[I]t becomes imperative to determine whether an employee who utilizes medical marijuana as a result of the employee's disability is engaging in the ‘illegal use of drugs.’ If the medical use of marijuana is not an "illegal use of drugs" and it is conduct that results from a disability, then the employer may be liable if he discriminates on the basis of its use.”).
\end{itemize}
\end{footnotesize}
employees for using medical marijuana, these employers should still take precautions to ensure that they are legally handling these cases. First, employers need to ensure that they have a medical marijuana policy for current employees and job applicants.\textsuperscript{179} If employers do not have policies to this effect, they must have legal counsel draft and implement such policies.\textsuperscript{180}

Even if employers currently have a medical marijuana policy for current employees and job applicants, these employers would be wise to review their policy to make sure that it accurately reflects the company’s stance on whether the company will honor employees’ and job applicant’s legal rights to use medical marijuana. For instance, if a company’s position is that it takes a zero tolerance approach for any type of marijuana use, including a medical use, the company’s policy may not clearly communicate this to employees if it merely states that the company “prohibits the use of illegally obtained drugs.”\textsuperscript{181} As worded, the policy may be interpreted to allow employees who have a legal right under state law to use medical marijuana since this drug is legally obtained as opposed to illegal obtained.\textsuperscript{182} Therefore, in order for an employer to clearly indicate that it has a zero tolerance approach for any type of marijuana use it may need to state in the policy that the company prohibits the use of any drug that is “illegal as a matter of federal, state or local law, including marijuana.”\textsuperscript{183}

If employers choose to allow employees to use medical marijuana off duty, they must do so after carefully considering “all the safety and business risks involved” and this policy must be implemented “in a manner in which the employer does not unnecessarily expose itself to potential claims for discrimination.”\textsuperscript{184} Also, employers who choose to honor employees’ legal rights to use medical marijuana should specifically enunciate the steps that employees must take in informing employers of their legal right to use the drug.

Moreover, employers are strongly urged to notify any job applicants when they apply for the job and also their current employees of its policy on


\textsuperscript{180} Id.

\textsuperscript{181} Id.

\textsuperscript{182} Id.

\textsuperscript{183} Id.

medical marijuana.\textsuperscript{185} It is also advisable for employers to have policies on medical marijuana and drug testing of employees and job applicants that are as detailed and specific as possible. An illustration of this is that employers may want to word their drug-testing policy to state that “any amount of marijuana in a person’s system violates the drug policy,” so that an employee will be unable to claim that the amount in his system is less than what “the state considers an impaired level in its Driving While Intoxicated law.”\textsuperscript{186} In effect, if a company provides clear direction from the beginning this may prevent “employees from ‘testing’ the policy by bringing suit.”\textsuperscript{187}

Employers must also make sure that they properly train their managers on the medical marijuana policy so that managers are aware of this policy and are able to answer questions about it.\textsuperscript{188} It is also extremely important that employers fairly and equally apply their medical marijuana policies to all employees and job applicants.\textsuperscript{189} And, prior to terminating or suspending employees who have a legal right to use medical marijuana, employers should seek the advice of counsel to make sure their actions are legal.

Also, in those states, like Arizona and Delaware, where the state’s medical marijuana statues prevent employers from discriminating against employees who use medical marijuana, employers should revise their substance abuse policies to make sure they conform to state law and ensure that employees who are qualified under state law to use medical marijuana are not disciplined solely on the basis of a failed drug test.\textsuperscript{190} Finally, given the recent movement toward the push for the legalizazion of marijuana, employers in other states where medical marijuana may not yet be legal should still stay abreast of any court and legislative developments in this area to ensure that they are adequately complying with the law.\textsuperscript{191}

\textsuperscript{185} Josephine Elizabeth Kenney, \textit{How State Medical Marijuana Laws Affect Workplace Drug Testing}, Occupational HEALTH & SAFETY APR.
\textsuperscript{186} \textit{Id.}
\textsuperscript{187} \textit{Legalized Marijuana and the Workplace: Preparing for the Trend}, BAKERHOSTETLER,
http://www.bakerlaw.com/alerts/legalized-marijuana-and-the-workplace-preparing-for-the-
trend-11-13-2012/ (last visited on Nov. 18, 2014).
\textsuperscript{188} Kenney, supra note 186.
\textsuperscript{189} See generally Renea Saade and Jessy Vasquez, \textit{Medical Marijuana Laws vs. the Drug-free Workplace: Can the Two Co-exist?}, SEATTLE BUSINESS,
http://seattlebusinessmag.com/business-corners/workplace/medical-marijuana-laws-vs-drug-
free-workplace-can-two-co-exist (last visited on Nov. 18, 2014).
\textsuperscript{190} See Employer Liability Under State Medical Marijuana Laws, Aug. 15, 2013,
\textsuperscript{191} Holli Hartman, \textit{Medical Marijuana at Work}, DRTODAY, Feb. 15, 2013,
VI. CONCLUSION

Recently, numerous states have enacted laws allowing qualifying individuals to use marijuana for medicinal purposes.192 While these laws may differ in terms of what “using marijuana for medicinal purposes” actually means, one frequent question that has been raised in relation to the adoption of these laws is whether employers are required to honor employees’ legal rights to use marijuana. As of yet, only a few courts have answered this question. Nevertheless, all of the courts that have answered this question have consistently held that medical marijuana laws are not applicable to the workplace and employers are not required to honor employees’ legal rights to use medical marijuana.193

192 See supra note 15.
193 See supra note 9.