Chapter U

New Marijuana Laws and Their Impact on Work: Take a Deep Breath, and Hold It – Updating the Buzz on this Hot Topic

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I. INTRODUCTION

The medical benefits of marijuana are not a new discovery. In the 19th century the United States Dispensatory classified marijuana as a "drug that has special value in some morbid conditions" and recognized its "intrinsic merit and safety." As recently as 1937, marijuana could be found in drug stores along with other common medications such as aspirin and Epsom salts.

In 1970 Congress passed the Controlled Substances Act (CSA)[1] and classified marijuana as a Schedule 1 drug, meaning that other than for specified research purposes, it was a federal crime to "manufacture, distribute, or dispense, or possess" marijuana in any form.[2] The CSA remains the law of the land but since at least 2009, the federal government has decided not to utilize the limited resources of the Department of Justice to enforce it against users of medical marijuana. In 2011 the Drug Enforcement Administration denied a petition to re-schedule marijuana, stating that there was no scientific or medical evidence to support it. During the past few years, more than twenty states have taken matters into their own hands, passing their own laws decriminalizing marijuana for medical purposes and in some cases, even for recreational use.

Although marijuana use in almost half the states in the nation may be legal from the perspective of state law, or at least not a state crime, it is still illegal under the federal law, albeit one which the government seems less and less inclined to enforce. This ambiguous legal scenario, quite predictably, has created questions for employers and employees which have not been considered from a public policy perspective or addressed in a systematic way. For now, at least, the courts have been left on their own as the only available forum where those questions can be raised.

The medical marijuana debate in the employment context involves several competing interests. On the one hand, research has shown that marijuana is greatly effective in combating the symptoms of a variety of debilitating diseases, such as

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1 21 U.S.C. § 811, *et seq*.

2 Schedule 1 dugs are defined as having "no currently accepted medical use in treatment" and a "high potential for abuse." *See generally* Marcoux, Larrat, and Vogenberg, *Medical Marijuana and Related Legal Aspects,* P.T 38 (10) Oct. 2013, 612-619.

cancer, multiple sclerosis, and orthopedic pain.[3] People with these types of disabilities can benefit greatly from the use of medical marijuana, which not only can help manage their symptoms but will allow them maintain their ability to stay gainfully employed and maintain their self-sufficiency. On the other hand, however, no one disputes that employers may have legitimate concerns about safety, productivity, and maintaining a drug free workplace. As more and more states adopt statutory protections for medical marijuana, many new questions have arisen for employers and employees alike, many of which have no clear answers at this point in time.

II. OVERVIEW OF STATE LAWS ON MARIJUANA USE, MEDICAL AND RECREATIONAL[4]

A. Medical Marijuana

In 1996, California voters approved the first medical marijuana law in the country. Today, 23 states and the District of Columbia) allow medical marijuana:

1. Alaska
2. Arizona
3. California
4. Colorado
5. Connecticut
6. Delaware

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[3] The research as to the medical benefits of marijuana is not unanimous. There are a number of studies indicating that both short and long-term use can have deleterious physiological effects, including, among other things, coordination impairments, impaired memory and judgment, cardiovascular and respiratory disorders similar to those caused by tobacco smoking. There are other studies contending that marijuana use can increase the likelihood of addiction to other substances and may be linked to certain forms of psychosis. Marcoux, Larrat, and Vogenberg, *supra*.

[4] The information for this state-by-state compilation of state marijuana laws relies heavily on two resources: (1) the Practical Law Company ("PLC") article, "State Medical and Recreational Marijuana Laws Chart: Overview," with embedded links to each state law, and (2) the National Conference of State Legislatures website, at http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx. The former requires s subscription to PLC, the latter does not.

7. District of Columbia
8. Florida
9. Hawaii
10. Illinois
11. Maine
12. Maryland
13. Massachusetts
14. Michigan
15. Minnesota
16. Montana
17. Nevada
18. New Jersey
19. New Mexico
20. New York
21. Oregon
22. Rhode Island
23. Vermont
24. Washington

In addition, medical marijuana is being proposed for adoption in _____ other states, including Pennsylvania.

Although the laws vary, and each state should be researched before advising, key provisions common to most state medical marijuana laws include:

- That the user have a debilitating medical condition for which medical marijuana will provide therapeutic or palliative benefits
- Medical certification by a physician of the need to use medical marijuana
- State registration as a medical marijuana user, usually involving the requirement that the person obtain a registration card
- A clear statement that employers are not required to accommodate medical marijuana use, possession or impairment in any place of employment
- Prohibition against employer discrimination on the basis of registered user status, but that prohibition is waived if the employer would lose financial or licensing benefits under federal law or regulations by declining to penalize the patient employee
- State laws often prohibit marijuana use in specified locations, such as schools

- State laws often make clear that being under the influence of marijuana while driving remains illegal

In the Mid-Atlantic region, Delaware, Maryland, New Jersey and New York all permit medical marijuana by statute. Pennsylvania has a bill making its way through the General Assembly, but as of the time of publication remains the only state in the Philadelphia region that does not permit medical marijuana. The Pennsylvania Senate passed the bill by a vote of 43-7 in September and referred it to the Judiciary Committee of the House of Representatives where it died in committee. A revised bill, SB 3, has been introduced in the current session. The list of qualifying conditions has been reduced from 45 to 10, eliminating maladies such as HIV/AIDS, chronic neuropathic pain, glaucoma, Crohn's disease and diabetes, and others. Under the terms of the amended bill, patients would be permitted to use extracted oil, edible products, ointments and tinctures of cannabis purchased from licensed dispensaries — but not to smoke it. Governor Wolf is reported to be in favor of the legislation and met recently with advocates seeking to expand the Bill's provisions to expand the list of covered conditions and to allow administration by vapor.

Each of the local states' laws is summarized below:

State	Medical Marijuana Usage Provisions	Employer Exemptions or Obligations
Delaware 16 Del. C. §§ 4901A to 4926A.	• Requires debilitating medical condition and registration cards • Patients cannot be arrested, prosecuted or denied a right or a privilege, including professional licensing, for using medical marijuana consistent with state law if the registered user does not possess more than six ounces of marijuana. • Employers cannot discriminate against employees or applicants on the sole basis of their status as qualifying patients • Employers cannot discriminate on the basis of	• The prohibition against employer discrimination is waived if the employer would lose financial or licensing benefits under federal law or regulations (16 Del. C. § 4905A(a)). • Employers cannot be penalized under state law for employing medical marijuana registration cardholders (16 Del. C. § 4905A(c)). • Employers are not required to accommodate medical marijuana use in any place of employment or to allow employees to work under the influence. • Employers cannot assume employees are under the influence merely because

State	Medical Marijuana Usage Provisions	Employer Exemptions or Obligations
	positive drug tests, unless the patient employees used, possessed or were impaired by marijuana on employer premises during work hours (16 Del. C. § 4903A(a)(3)).	marijuana is detected in a drug test. • Employers may discipline employees for ingesting marijuana at work or working under the influence (16 Del. C. § 4907A). • Marijuana use that constitutes negligence or professional malpractice can result in civil, criminal and other penalties (16 Del. C. § 4904A(1)).
Maryland Md. Code Ann., Health-Gen. § 13-3301 to 13-3311).	• Certified physicians may issue written certifications to patients suffering from certain chronic or debilitating diseases, or medical conditions that may be relieved by the medical use of marijuana. • Authorized growers and distributors at specified facilities. • State criminal law amended to limit and reduce liability and penalties associated with small amounts of marijuana	Maryland's law does not clearly state employer obligations and exemptions.
New Jersey N.J. Stat. Ann. §§ 24:6I-1 to 24:6I-16. N.J. Admin. Code §§ 8:64-1.1 - 8:64-13.11.	• Debilitating medical conditions and medical marijuana registration cards required. • Users cannot be arrested, prosecuted or subject to criminal penalties for using medical marijuana consistent with state law.	Employers are not required to accommodate medical marijuana use in the workplace.
New York	• Available to certified,	• New York recognizes certified

State	Medical Marijuana Usage Provisions	Employer Exemptions or Obligations
N.Y. Pub. Health Law, Section 1, Article 33, Title 5-A §§ 3360 to 3366	registered patients with a serious condition, as defined. • Medical marijuana must be kept in its original packaging except for the portion being consumed. • Smoking is not an acceptable means to consume medical marijuana in New York. • Medical marijuana cannot be smoked, consumed, vaporized or grown in a public place.	patients as having a "disability" under New York's Human Rights Law (N.Y. Exec. Law §§ 290 to 301) and may require reasonable accommodation, as with other recognized disabilities. • Employers may require that employees not be impaired when performing work. • Employers are not required to take any action that would violate federal law or cause the loss of a federal contract or funding.
Pennsylvania (SB 3-As Proposed)	**CHAPTER 9 PROTECTION, PROHIBITIONS, ENFORCEMENT AND PENALTIES** **Section 102: Definitions** "Qualified medical condition." Any of the following, including treatment: (1) Cancer. (2) Epilepsy and seizures. (3) Amyotrophic lateral sclerosis. (4) Cachexia/wasting syndrome. (5) Parkinson's disease. (6) Traumatic brain injury and postconcussion syndrome. (7) Multiple sclerosis. (8) Spinocerebellara Ataxia (SCA). (9) Posttraumatic stress disorder. (10) Severe fibromyalgia. (11) A condition authorized by the department under **Section 702. Expansion of medical**	**Section 901. Civil discrimination protection.** The following shall apply: (1) For the purposes of medical care, a patient's authorized use of medical cannabis under this act shall be considered the equivalent of the use of other medication under the direction of a health care practitioner. Medical cannabis, when used in accordance with this act, may not be considered an illicit substance or otherwise disqualify a patient from medical care. (2) An individual may not be penalized in any of the following ways due to the individual's use of medical cannabis under this act: ********** (5) An employer may not discriminate against an individual in the hiring or termination of benefits or otherwise penalize the individual for being a medical cannabis access cardholder. The following shall apply:

State	Medical Marijuana Usage Provisions	Employer Exemptions or Obligations
	conditions. (a) Petition.--Beginning in 2015, the board may accept petitions from a resident of this Commonwealth to add additional qualified medical conditions to those conditions for which a patient may receive medical cannabis.	(i) The employer may take an individual's status as a cardholder into account only if the employer can prove the employee is abusing or misusing the employee's medical cannabis on the premises of the place of employment during ordinary hours of employment or if failure to do so would cause an employer to lose a licensing benefit under Federal law or regulation. (ii) An individual's positive drug test for cannabis components or metabolites may not be considered by an employer unless the individual unlawfully used, possessed or was impaired by the medical cannabis while on the premises of the place of employment or during the hours of employment.

Despite the growth of state medical marijuana laws, the courts generally have upheld terminations of employees who have tested positive for marijuana, even if the result was due to certified off-duty use to treat a medical condition. Key examples include:

- The California Supreme Court held that it is not a violation of public policy or California's Fair Employment and Housing Act to terminate a patient employee due to testing positive for a chemical found in marijuana. *Ross v. Raging Wire Telecomm., Inc.*, 174 P.3d 200 (Cal. 2008); *see also Morrison v. State Pers. Bd.*, No. C069749 (Cal. Ct. App. June 13, 2013) (unpublished opinion available at 116 DLR A-7 (BNA) (June 17, 2013) (upholding termination of security guard who tested positive for medical marijuana, which violated employer's policy and federal law)).

- In Colorado, the state court of appeals rejected the plaintiff's argument that his employer had unlawfully terminated him for engaging in lawful off-duty conduct when the employer, Dish Network, fired him testing positive for marijuana, even though he was using it to treat a legitimate debilitating medical condition. The court noted that federal law made the conduct

unlawful, despite the contrary state law. *Coats v. Dish Network, L.L.C., Co.*, 303 P.3d 147 (Apr. 25, 2013) (cert granted); see also *Curry v. Miller Coors, Inc.*,12-cv-02471-JLK, 2013 WL 4494307 (D. Colo. Aug. 21, 2013) (similar holding).

- The U.S. Court of Appeals for the Sixth Circuit held that an employer did not violate Michigan Medical Marijuana Act, public policy or disability accommodation law when it discharged an employee who tested positive for drugs because of authorized medical marijuana use. *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. 2012). Distinguishing *Casias*, a Michigan state appellate court held that employees who carried registered medical marijuana identification cards and used marijuana in accordance with the Michigan Medical Marihuana Act (MMMA), but were terminated after testing positive for marijuana, were entitled to unemployment benefits. *Braska v. Challenge Mfg. Co.*, No. 313932, 2014 WL 5393501 (Mich. Ct. App., Oct. 23, 2014).

- The Montana Supreme Court held that an employer is not required to accommodate medical marijuana use under either state or federal law. *Johnson v. Columbia Falls mm Co.*, 213 P.3d 789 (Mont. 2009) (non-precedential and unpublished decision).

B. Recreational Marijuana Use – The New Frontier

Four states and the District of Columbia have passed laws authorizing recreational use of marijuana.

State	Individual Rights	Employer Exemptions or Obligations
Alaska Ballot Measure 2 approved Nov. 4, 2014, by 53% of voters	• Permits people age 21 and older to possess up to one ounce of marijuana and up to six plants. • Makes the manufacture, sale and possession of marijuana paraphernalia legal.	• Employers may prohibit marijuana use, transportation, possession, sale, growth, or transfer by employees.

State	Individual Rights	Employer Exemptions or Obligations
Colorado Amendment 64 to the Colorado Constitution	• Creates a system to regulate recreational use of marijuana similar to the regulation of alcohol use and sale. • Must be 21 or older • Sale of marijuana licensed.	• Employers may restrict marijuana use in the workplace. • Employers are not required to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of recreational marijuana in the workplace.
Oregon Approved by voters November 4, 2014; effective July 1, 2015	• Legalizes the possession, use and cultivation of limited amounts (up to 8 ounces and four plants) of marijuana by adults 21 and older. • Must be 21 or older • Licenses available to grow, produce and sell.	The law does not amend or affect any state or federal law regarding employment matters, or exempt an individual from federal law.
Washington Initiative Measure No. 502 (July 8, 2011) amended and added several Washington statutes, enumerated in the first paragraph of the initiative (Wash. Admin. Code 314-55-005 to 314-55-540).	• State liquor control board regulates and taxes marijuana. • Must be 21 years or older • Establishes limits for driving under the influence of marijuana. • Licensing rules apply.	The law provides little guidance for employers.

Voters in the District of Columbia also approved the legalization of marijuana in 2014, but the measure requires congressional and presidential approval, which is not expected in the near future.

In addition, 19 states and the District of Columbia have de-criminalized the possession of small amounts of marijuana for personal consumption. These states are Alaska (also legalized),

California, Colorado (also legalized), Connecticut, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Rhode Island, Vermont and Washington (also legalized), and the District of Columbia.

III. FEDERAL LAW ON MARIJUANA USE

A. Federal Law Continues to Criminalize Marijuana (Wink-Wink)

Marijuana is classified as a Schedule I substance under the Controlled Substances Act, 21 U.S.C. § 812(c)(c)(10) [sic]. As such, federal law treats marijuana as a substance considered to have a high potential for dependency and no accepted medical use, making the distribution and use of marijuana a federal offense.

In October of 2009, the Obama Administration directed federal prosecutors to not prosecute people who distribute or use medical marijuana in accordance with state law. *See* http://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states.

In August of 2013, in response to state laws in Colorado and Washington approving recreational marijuana use, the U.S. Department of Justice updated its marijuana enforcement policy. *See* http://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy. Although the DOJ stressed that marijuana remains illegal under federal law, the new policy made clear that the federal government would not be challenging state legalization laws "at this time," would not prioritize prosecution of individual personal use cases, and would expect states that legalized marijuana to strictly enforce their laws and regulate marijuana sale and use to protect against unlawful usage, criminal activity, and distribution outside of their states. The DOJ's eight priorities in marijuana prosecutions are: preventing distribution to minors, preventing involvement by criminal enterprises, preventing distribution to states where marijuana is unlawful, preventing state-authorized marijuana establishments from becoming a cover or pretext for illegal trafficking or other unlawful activity, preventing violence or the use of firearms in marijuana activities, preventing drugged driving, preventing the growing of marijuana on public lands, and prohibiting the possession or use of marijuana on federal property.

In contrast, the U.S. Department of Transportation has not deferred or changed its rules in any way with regard to its Drug and Alcohol Testing Regulation, 49 C.F.R. Part 40, requiring drug and alcohol testing of employees in

the federally regulated transportation industry. Part 40 prohibits the use of Schedule I drugs, including marijuana, for any reason. The DOT therefore continues to enforce its rules that disqualify any covered worker (most commonly, commercial truck drivers) who tests positive for marijuana, regardless of whether it was consumed in a jurisdiction where it was lawful under state recreational or medical use laws.

B. EEOC Continues to Abide by ADA Prohibition on Illegal Drug Use, While Testing the Waters with Litigation in Some Cases

The U.S. Equal Employment Opportunity Commission ("EEOC") has not published new guidance in light of medical marijuana laws. The EEOC continues to permit employers to discipline or discharge employees based on marijuana use, even medical marijuana use, based on the statutory language of the Americans with Disabilities Act ("ADA"), and the fact that marijuana remains unlawful under federal law.

In an informal EEOC opinion letter on September 9, 2013 (http://www.eeoc.gov/eeoc/foia/letters/2013/title_vii_ada_integrity_tests.html), the EEOC Office of Legal Counsel took the position that employers continue to be permitted to ask applicants and employees whether they are current users of marijuana, even though such questions would not be permitted for lawful drug use:

> . . . because the ADA does not protect individuals who are currently engaging in the illegal use of drugs, asking applicants about current illegal drug use [including marijuana] is not a disability-related inquiry. . . . However, questions about past addiction to illegal drugs or questions about whether an applicant has ever participated in a rehabilitation program are disability-related inquiries because past drug addiction generally is a disability.

Nevertheless, the EEOC has made clear that it will prosecute disability discrimination claims by employees who are alleged to have been terminated for using medical marijuana, if the evidence supports the conclusion that the real reason for the adverse action was a protected disability, and not the marijuana use. *See* Brief for Plaintiff, *EEOC v. The Pines of Clarkston, Inc*., Civil Action No. 2:13-cv-14076 (E.D. Mich. February 6, 2015), ECF No. 35, p. 16 (arguing that even though marijuana use is not protected, the employee's epilepsy is a disability

and the employee is protected from discrimination based on that disability, separate and apart from his marijuana use).

C. Emerging ADA Issues

So far only a handful of court cases have addressed the ways in which state laws approving medical marijuana might intersect with the Americans with Disabilities Act (ADA) and they have been resolved overwhelmingly in favor of employers.[5] The law in this area is still emerging, however, and it would be a mistake for employers to think that the ADA implications of "zero tolerance" policies have been fully addressed. Employers and employees alike face an uncertain legal landscape littered with unanswered questions as well as questions which have yet to be asked at all.

1. Does ADA Coverage Extend To People Who Use Marijuana For Medicinal Purposes Where It Is Legal Under State Law?

The ADA precludes discrimination against any person who has one or more impairments that substantially limit(s) one or more major life activities. It is a given that most people who use marijuana for medicinal purposes under state medical marijuana laws have a disability as defined by the ADA, that is, they have a physical or mental impairment that substantially affects one or more major life activities. 42 U.S.C. §12102 (1). Almost universally, medical marijuana laws provide access to the drug only to those with chronic or otherwise debilitating conditions. Since the ADA was amended in 2009, this is not a high threshold for plaintiffs to meet.

The courts which have ruled against ADA coverage in medical marijuana cases have relied on 42 U.S.C. §12114 (a), which excludes from the definition of "qualified individual with a disability" "any employee or applicant who is currently engaging in the illegal use of drugs, *when the covered entity acts on the basis of such use*." (Emphasis added).

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[5] 42 U.S.C. 12101, *et seq*.

The ADA defines "Illegal use of drugs" as-

> the "use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, ***or other uses*** authorized by the Controlled Substances Act or other provisions of Federal law.

42 U.S.C. 12111 (6)(A)(Emphasis Added).

The devil, as usual, is in the details. The placement of the word "or" lends enough ambiguity to support employer arguments that people using medical marijuana are not protected by the ADA at all, but also provides ammunition to employees who claim that the ADA provides them with statutory coverage or at the very least, does not, by its terms, preclude such coverage. The statutory language and the legislative history can be read to support this argument, as they both indicate that the drug-related qualification exclusion is designed to prevent current illegal users of drugs from using the fact of their drug use, by itself, to claim they are disabled under the Act. It is not at all clear that the ADA intends that people who are disabled under the Act for some other reason, for instance, cancer, MS, Parkinson's, must automatically lose that coverage because they are using marijuana or other drugs in a legal manner to treat those disabling conditions. Clearly, a person can be covered by the ADA for one reason but not another. Rendell at 327-8.[6] Thus, it is conceivable that an employee who uses medical marijuana may have condition that is protected under the ADA, even if their marijuana use to treat that condition is not protected.[7] That employee is not

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[6] The ban is not absolute, however. The ADA *does* protect people who are addicted to drugs if the person is no longer engaging in illegal use and is participating in a supervised rehabilitation program. The Legislative history clearly indicates that the definition of "illegal use of drugs" was designed to ensure that employers could discharge employees who were actually under the influence while at work but that they could not discharge employees who were recovering addicts but were, at the time of any personnel action, drug free. 42 U.S.C. §12114 (b)(1). H.R.REP. No. 101-596, at 62 (1990), U.S. Code Cong. & Admin. News 1990, pp. 565, 570-571 (Conf.Rep.)). *See also New Directions Treatment Services v. City of Reading*, 490 F.3d 293, 309 (3rd Cir. 2007).

[7] As the Equal Employment Opportunity Commission has explained, a person who alleges disability based on one of the excluded conditions [such as current use of

seeking "disability" status because of his or her drug use, nor have they any need to do so, because they are already covered.

So far, at least, no federal court has accepted this employee-friendly approach but it is still far too early for employers to assume, based on just a handful of cases, that an individual's use of medical marijuana to treat a covered disability will automatically divest them of the ADA's protection. In *Barber v. Gonzalez*, 2005 WL 1607189 (E.D. Wash. Jul. 1, 2005), the district court found that the second sentence of the drug-use exclusion does *not* except drugs taken under medical supervision unless it is *also* authorized by the CSA. In other words, the court essentially removed the statutory term "or" and gave it no meaning whatsoever. The second clause of the definition, the court said, merely "reiterated" the first. Thus, it concluded, the ADA must be read consistently with the CSA. This is a dubious application of the principles of statutory construction, as it renders the first clause "redundant or superfluous." *See* Rendell, Russell, *Medical Marijuana and the ADA: Removing Barriers to Employment for Disabled Individuals*, 22 Health Matrix: Journal of Law and Medicine at 315, 326. (2012). If the ADA intended simply to mirror the CSA, after all, there would have been no need for further explanation, much less an ambiguous one.[8] The Rendell article proposes that both sentences be read in tandem in a manner which gives meaning to both. Under this interpretation, the first clause provides that an employer will not face liability under the ADA if the employer takes adverse action based on drug usage made illegal by the CSA, but the second clause would provide an exception for 1) uses under licensed medical supervision, 2) uses authorized by the CSA, and 3) uses authorized by other federal laws. *Id.* at 326.

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illegal drugs or compulsive gambling, see 42 U.S.C. § 12211(b)(2),] is not an individual with a disability under the ADA. Note, however, that a person who has one of these conditions is an individual with a disability if (s)he has another condition that rises to the level of a disability. See House Education and Labor Report at 142. Thus, a compulsive gambler who has a heart impairment that substantially limits his/her major life activities is an individual with a disability. Although compulsive gambling is not a disability, the individual's heart impairment is a disability.

[8] This is the approach taken by Section 4 (p) of the Pennsylvania Human Relations Act, which defines "handicap or disability" as not including "current, illegal use of or addiction to a controlled substance, as defined in section 102 of the Controlled Substances Act.

James vs. the City of Costa Mesa, 684 F.3d 825 (9th Cir. 2012) was not an employment case but its analysis has been cited in a number of employment cases to support decisions favorable to employers.[9] In *James* the plaintiffs were seeking injunctive relief pursuant to Title III of the ADA against zoning ordinances which were being used to shut down the suppliers of medical marijuana, which was legal under state law in California. The court focused on the statutory term "***or other uses***" and concluded that the meaning of the first clause is dependent on the second, i.e., that the first clause describes one type of use authorized by CSA while the second clause describes all other acceptable uses under the CSA. According to the court in *James*, "Congress has made clear ... that the ADA defines 'illegal drug use' by reference to federal, rather than state, law, and federal law does not authorize the plaintiffs' medical marijuana use. We therefore necessarily conclude that the plaintiffs' medical marijuana use is not protected by the ADA."

Coats v. Dish Network, is not an ADA case but it focuses squarely on the dichotomy between the legality of marijuana use under competing state and federal laws. Mr. Coats was paralyzed in a car accident when he was a teenager and continues to experience chronic pain as a result of his injuries. He used marijuana with a legal prescription under Colorado law where marijuana is legal for both medical and non-legal purposes. He was fired from Dish Network call center in 2010 after testing positive for THC. He alleged that Dish Network violated Colorado's "off-duty conduct" law that prohibits an employer from firing an employee for "engaging in any lawful activity off the premises of the employer during non-working hours." He argued that he used medical marijuana on his own time (outside of work) and legally pursuant to a doctor's prescription. Indeed, the right to use marijuana for medical or non-medical purposes is enshrined in Colorado's constitution. Thus far, Coats' lawsuit has been struck down in district court, a decision that was upheld in the Colorado Court of Appeals. Arguments were held in the Colorado Supreme Court in September, 2014, but to date there is no decision.

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[9] The James court concluded that medical marijuana use does not fall within the ADA's supervised use exception because doctor-recommended marijuana use permitted by state law, but prohibited by federal law, is *ipso facto* an illegal use of drugs for purposes of the ADA. Rather, the Court's holding was simply that the ADA does not protect medical marijuana users who claim to face discrimination because of their marijuana use (but not for some other reason). See 42 U.S.C. § 12210(a) (the illegal drug use exclusion applies only "when the covered entity acts on the basis of such use"). *See* Walker, Alex, *Medical Marijuana in the Workplace*, http://www.modrall.com/Files/Docs/acw_article.pdf, Fall 2012.

The ADA's implications in the employment context has not been fully explored and employees have been making progress which must be noted with caution by any careful employer. In *EEOC v. The Pines of Clarkston, Inc*., Case No. 2:13cv14076, the focus turned to the meaning in the drug use exclusion "when the entity acts on the basis of such [illegal drug] use." This case is noteworthy for at least two reasons. First, it indicates that the EEOC is taking a careful look at how state medical marijuana laws are impacting people with disabilities in the workplace. On a more substantive level, regardless how the issue of statutory coverage is resolved when illegal drug use is involved, Plaintiffs may still have a legitimate claim when they can show that the real reason the employer targeted them for adverse action is not the drug use at all, but the underlying disability.

In *Pines*, the Plaintiff disclosed that she had epilepsy during pre-employment screening. On her on her second day of work, the employer fired her. It was not until it was sued in court, however, that it claimed that it actually fired her because she was using medical marijuana in violation of the company's no tolerance policy. The EEOC argued – successfully, so far – that the mere fact that the plaintiff uses medical marijuana cannot protect the employer's decision to terminate her, if that decision was made for an inappropriate reason – i.e., because she has epilepsy. The employer in *Pines* will need to convince a jury that its stated reason for discharge was not pretextual.[10]

2. If The ADA Does Apply What Is The Employer's Duty To Provide Accommodation?

An employer discriminates against a qualified individual with a disability when it fails to make reasonable accommodation that would not impose an undue hardship. 42 U.S.C. §12111 (a). If the ADA applies to medical marijuana users, what does the duty to accommodate require and what should the interactive process entail?

The best answer to this and most other questions under the ADA is "that depends. It depends on the circumstances and also on the nature of the employer. There is no current dispute that an employer may discipline or terminate an

[10] This does not necessarily mean, though, that an employer can terminate the individual's employment. Maine, for instance, precludes "discrimination" against any individual who uses marijuana pursuant to its state law off duty and in accordance with a prescription.

employee if not doing so would result in the violation of Federal contract or regulatory provisions or the loss of other funding. Regardless how the issues set forth above are ultimately resolved, employees who must submit to federal drug testing programs from the Department of Transportation, certain government contractors, and other agencies which provide safety-sensitive services under heavy federal regulation may not benefit from state medical marijuana laws because they would be pre-empted by federal statutes and regulations. Employees in these industries, at this point anyway, may not use any Schedule 1 drug, such as marijuana, even under the supervision of a physician, regardless of its legality under state law.

Ordinarily, questions of accommodation and undue burden are factual questions that must be determined through an interactive process designed to openly investigate and balance the facts in the individual case, including the nature and extent of the individual's disability and any functional limitations the individual has as well as the nature of the job and the feasibility of accommodation.[11] It is clear that the ADA sometimes requires that employers modify its "methods of administration," including neutral or generally applicable policies, in order to provide a reasonable accommodation for a particular disability. While there is no dispute that an employer would not be required to allow an employee to injest marijuana at work or come to work under the influence of marijuana, it might be required to modify its no-tolerance policies or provide exceptions for people who use marijuana to treat an ADA-qualifying disability. 42 U.S.C. §12112 (b)(3).[12]

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[11] "To determine the appropriate reasonable accommodation it may be necessary for [an employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3).

[12] An employer is allowed, maybe even required, to provide a safe workplace for all of its employees. If an employer can articulate a safety concern presented by marijuana use, it may be able to take action on that basis, rather than its drug policy. Employer may discipline employee for ingesting medical marijuana at work or for being impaired at work to the same extent it would discipline other employees who use controlled substances or alcohol at work. This can be tricky, though, as there is no dependable way to determine whether a person who tests positive for THC is actually impaired. Thus, if an employee taking medical marijuana off-duty tests positive and is discharged for that reason, there is a

Moreover, although the ADA allows employers to test for the use of illegal drug use, it prohibits employers from using tests, standards, or criteria that screen out or tend to screen out either a person with a disability or a class of individuals with disabilities. 42 U.S.C. §12112 (b)(6). *See e.g., Bates v. Dura Automotive Systems,* 650 F. Supp. 2d 754, 760-63 (M.D. Tenn. 2009)(testing for certain drugs which are used to treat serious physical and mental ailments "clearly tends to screen out" protected individuals with disabilities). As is usually the case under the ADA, the inflexible application of workplace policies without an individualized inquiry as to how it will impact a person with a disability is a bad idea. Blanket prohibitions of almost any kind are generally illegal under the ADA where they result in an adverse job action against a qualified person with a disability because of the disability.[13] The ADA requires employers to make individualized inquiries regarding the feasibility of a requested accommodation and whether an employee's disability, with or without accommodation, presents a direct threat. A blanket prohibition against on-the-job use of prescription medications violates this obligation.

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legitimate argument that he or she was terminated "because of" his or her disability.

[13] It is permissible to include prescription drugs in drug-free workplace policies and to require employees to disclose prescription drugs that may adversely affect judgment, coordination, or the ability to perform job duties. After disclosure, an employer must, on a case-by-case basis determine whether it can make a reasonable accommodation that will enable the individual to remain employed. After an employer learns that an employee is taking a prescription drug that may affect job performance, it should request a medical certification regarding the effect of the medication on the ability safely to perform essential job functions. That certification will enable the employer to engage the employee in the interactive process and making the individualized determination of whether a reasonable accommodation is even possible. Hyman, John, *Medical Marijuana and the Americans with Disabilities Act.* http://www.workforce.com/blogs/3-the-practical-employer/post/20141-medical-marijuana-and-the-americans-with-disabilities-act, 12/09/2013.

IV. ETHICAL ISSUES FOR LAWYERS ADVISING ON THE SALE AND USE OF MARIJUANA

Pennsylvania Rule of Professional Conduct 1.2(d) provides:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may disclose the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

For employment attorneys called on to advise employees about the use of marijuana (medically or otherwise), the continued criminalization of marijuana under federal law make this a difficult ethical issue. Legal ethics boards in six states that have legalized marijuana to some extent (Arizona, Colorado, Connecticut, Illinois, Maine and Nevada) have issued ethics opinions or guidance on the issue. Most of these have focused on whether a lawyer can assist a client in setting up a business to produce or distribute marijuana in accordance with a state law. See Seth A. Goldberg and Philip A. Lebowitz, *Advice on Medical Marijuana for Lawyers in Pennsylvania*, The Legal Intelligencer, Dec. 10, 2014. The ethics opinions have varied, making clear that an attorney certainly can advise clients on whether such conduct would be legal under state and federal law. But, for example, the Illinois State Bar Association warned Illinois lawyers that providing services beyond advice, such as drafting legal documents or negotiating contracts, could be a "means of assisting the client in establishing a medical marijuana business," which would be "assisting the client in conduct that violates federal criminal law."

Applying this analysis to the practice of employment law in Pennsylvania (where the Pennsylvania Bar Association's Legal Ethics and Professional Responsibility Committee has yet to issue an ethics opinion on the issue), one can imagine situations in which employment lawyers may be asked to advise clients about medical marijuana issues that could raise ethical concerns. For example, employees who use medical marijuana in New Jersey, Delaware or New York could ask their attorney to assist in negotiating "reasonable accommodations" with their employers for their continued use to treat a disabling condition. While the situation certainly sounds sympathetic and worthy of support, a lawyer who helps an employee obtain his or her employer's consent to use medical marijuana, could

be interpreted as "assist[ing] a client, in conduct that the lawyer knows is criminal" under federal law. Likewise, a management lawyer who helps a client hire employees for a medical marijuana business, and works up policies and contracts for same, arguably could be assisting that client in conduct known to be criminal.

At this early stage of this issue, there are no bright lines on what is ethically permissible in Pennsylvania other than to reiterate the Rule's safe harbor that "a lawyer may disclose the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." Anything beyond that is still in the danger zone, ethically, unless and until (1) federal marijuana law changes or (2) an ethics opinion is issued in Pennsylvania to provide guidance on the issue.

V. THE CRYSTAL BALL - OR LAVA LAMP: WHAT TO EXPECT IN THE FUTURE

All signs seem to point to a greater acceptance of medical marijuana and recreational marijuana use in the United States. For example, nearly 75 percent of Americans support legalizing medical marijuana, according to a 2010 survey by the Pew Research Center. In 2014, the New York Times editorial board went a step further, endorsing the end to the federal "prohibition" on the recreational use of marijuana.

Even in more conservative states, the push to legalize medical marijuana is tipping the scales such that within a year or two, a clear majority of states are expected to permit medical marijuana (proposals are pending in 11 states). And recreational use ballot measures are expected to continue, too. Nevadans are slated to vote on the issue in 2016, with the prospect of Las Vegas becoming the nation's new marijuana mecca.

And in March of 2015, Sens. Cory Booker (D-N.J.), Kirsten Gillibrand (D-N.Y.) and Rand Paul (R-Ky.) introduced a bill to end the federal prohibition on medical marijuana, and shift marijuana's classification from Schedule I and Schedule II under the Controlled Substances Act, which would allow it to be legally prescribed by licensed physicians. The bill would also clarify legal avenues for bankers to fund medical marijuana operations, and promote research and development of therapeutic medical uses of marijuana.

So what can employment lawyers expect on the issue:

- More states approving medical marijuana use.
- More states approving recreational marijuana use.
- Intransigence in Washington on federal law regarding the issue, with a small chance of congressional action on the bipartisan bill noted above.
- The need to provide employers and employees with guidance on the evolving laws, including updating employment rules and policies.
- More quandaries and discipline related to medical marijuana and recreational marijuana use, as more employees embrace their "states rights" and light up.
- More litigation of the issue, including claims of disability discrimination, disparate impact discrimination against minorities, and invasion of privacy relating to marijuana use.

VI. PRACTICE TIPS -- FOR EMPLOYERS AND EMPLOYEES

Given the rapid pace of development on these legal issues, employers are advised to consider the following actions:

- **Ensure policy prohibits use/possession at work**. Ensure that the company's drug and alcohol policy states expressly that employees may not use, sell, possess or be under the influence of marijuana (or other unlawful drugs) during work time or on company premises. These restrictions remain permissible in all 50 states.

- **Determine applicable state law**. Determine whether the employer currently has employees in states that have legalized recreational or medical marijuana use, and check the requirements of each law.

- **Recreational use policy**. For operations in states where recreational use is allowed, consider and adopt a policy that expressly addresses recreational marijuana use, and whether it is completely prohibited or permitted in limited circumstances. Keep in mind that even in states that have approved recreational use, the laws expressly provide that employers may prohibit marijuana use by employees. The policy should make clear if the company prohibits use by employees off-duty, who are visiting states where recreational use is legal.

- **Medical marijuana policy**. Determine the employer's position on whether medical marijuana will be permitted, when legally prescribed under state law. Although no state disability discrimination/failure to accommodate case based on medical marijuana use has yet to prevail in court, there is a "budding" risk that such claims will become common in the near future. An employer should articulate in advance its policy and rationale on the use of medical marijuana by employees. Ensure that the employer does not enforce any prohibition against marijuana use more stringently against medical marijuana users than those who are not disabled and test positive for marijuana, or those who test positive for other prohibited drugs.

- **Federal regulation review**. Review all of the employer's applicable federal laws, government contracts and licensing requirements relating to marijuana use, and ensure compliance, regardless of state laws. Many federal regulations expressly prohibit marijuana use by employees in certain occupations (including marijuana, which remains illegal under federal law). *See, e.g.*, Federal Motor Carrier Safety Administration guidance, stating that a driver cannot be qualified under FMCSA requirements if he is taking prescribed medical marijuana.

- **Check marijuana terminations for pretext**. Given the skepticism of plaintiffs' lawyers and the EEOC about employers who claim to be terminating an employee for using medical marijuana, employers and their counsel should ensure that the positive drug text is the real reason for the termination, consistent with established policy and practice. Beware of situations in which the facts suggest the underlying disability (or some other improper criteria) was a motivating factor, separate and apart from the marijuana test. The same applies with regard to terminations due to recreational marijuana use – be sure the employer consistently enforces an anti-drug policy and is not using marijuana as a pretext for unlawful discrimination or retaliation on some other basis.

Attachment: Selected Rules

Attachment
Discrimination Prohibited Under the ADA

42 U.S.C. 12112 (a)

(a) General rule – No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction
As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes—

(3) utilizing standards, criteria, or methods of administration (A) that have the effect of discrimination on the basis of disability; .....

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity;

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant

Qualified Individual with a Disability

42 U.S.C. §12102 (1)
The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment.

42 U.S.C. §12114
(a) Qualified individual with a disability
For purposes of this subchapter, a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered

entity acts on the basis of such use.

(b) Rules of construction
Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;
except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

Unlawful Use of Drugs as Defined by the ADA

42 U.S.C. §12111 (6)(A)

> the "use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, ***or*** other uses authorized by the Controlled Substances Act or other provisions of Federal law.

42 U.S.C. §12114 (c)
A covered entity—

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under chapter 81 of title 41;

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that—

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing

(1) In general
For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction
Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.