



State Marijuana Laws and Litigation Strategies for Employers



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Overview of Marijuana Legalization in the US

Status of legalization in US and review
of proposed legislation

As of October 16, 2018:

**31 states + D.C. & US territories have passed
Comprehensive “Medical marijuana” Laws**

Laws vary widely

**15 other states have passed low THC/High
CBD laws**

All passed since 2014 in mostly southern states after CNN documentary

**9 states + D.C. + 1 US territory have passed
recreational marijuana laws**

All except US territory also have comprehensive medical marijuana laws

**4 states
prohibit marijuana for all purposes**

(Idaho, Kansas, Nebraska, South Dakota)





State Medical Marijuana Laws



Alaska (1998)	Louisiana (2015)	New York (2014)
Arizona (2010)	Maine (1999)	North Dakota (2016)
Arkansas (2016)	Maryland (2014)	Ohio (2016)
California (1996)	Massachusetts (2012)	Oklahoma (2018)
Colorado (2000)	Michigan (2008)	Oregon (1998)
Connecticut (2012)	Minnesota (2014)	Pennsylvania (2016)
Delaware (2011)	Montana (2004)	Rhode Island (2006)
Florida (2016)	Nevada (2000)	Vermont (2004)
Hawaii (2000)	New Hampshire (2013)	Washington (1998)
Illinois (2013)	New Jersey (2010)	West Virginia (2017)
	New Mexico (2007)	Washington, D.C. (2010)



State Recreational Marijuana Laws



Alaska (2014)
California (2016)
Colorado (2012)
Maine(2016)
Massachusetts (2016)
Nevada(2016)
Oregon(2014)
Vermont(2018)
Washington(2012)
Washington, D.C.(2014)

All states also have comprehensive medical marijuana laws

Vermont: st state to pass by legislature; only state that does not allow sales (only home cultivation)



Low THC/High CBD Laws



State (Year)	THC/CBD levels allowed
Alabama (2014)	≤ 3% THC
Georgia (2015)	≤ 5% THC and equal or greater amount of CBD
Indiana (2017)	At least 5% CBD by weight, no more than .3% THC by weight
Iowa (2014)	≤ 3% THC
Kentucky (2014)	No definition
Mississippi (2014)	≤ .5% THC and more than of 15% CBD
Missouri (2014)	≤ .3% THC and at least 5% CBD by weight
North Carolina (2014)	< .9% THC by weight, at least 5% CBD by weight, no other psychoactive substance
South Carolina (2014)	.9% THC and > 15% CBD, or at least 98% CBD and not more than .90% THC by volume
Tennessee (2014)	≤ .9% THC
Texas (2015)	≤ .5% THC by weight and not less than 10% by weight CBD
Utah (2014)	< .3% THC by weight, at least 15% CBD by weight, and no other psychoactive substance
Virginia (2015)	At least 15% CBD but no more than 5% THC
Wisconsin (2013)	CBD must be in form without psychoactive effect; THC and CBD levels not defined
Wyoming (2015)	≤ .3% THC and at least 5% CBD by weight

Medical Marijuana

Passed Legislation

- Oklahoma (effective 7/26/18)
- West Virginia (2017)
- Utah (for terminally ill) (2018)

Introduced in at least 12 states

Nov. 2018 ballot initiatives

- Missouri (3 proposals)
- Utah (Proposition 2)

Recreational Marijuana

Passed Legislation

- Vermont (2018)
- Canada and 1 U.S. territory

Introduced in at least 20 states

- New Jersey, New York

Nov. 2018 ballot initiatives

- Michigan (Proposal 1)
- North Dakota (Measure 3)





Federal Marijuana Law & Policy



- Marijuana is still illegal under federal law
 - Classified as a Schedule I drug
 - DEA denied petition to reschedule in 2016; increased access for research
- Medical Marijuana is a legitimate medical explanation under U.S. DOT drug testing regulations
 - Notice reaffirming issue



June 25, 2018: FDA approved ^{1st} drug derived from marijuana plant (Epidiole) for 2 types of severe childhood epilepsy (< .1% THC)



Federal Marijuana Law & Policy



- January 2017: new administration
- February 2017: creation of Congressional Cannabis Caucus
- Attorney General Session on marijuana policy
 - Rescinded Obama era guidance
- Rohrabacher-Blumenauer amendment renewed through Dec. 7, 2018





More than a dozen bills introduced regarding marijuana

- Marijuana Justice Act
- The Marijuana Freedom and Opportunity Act
- Farm Bill
- STATES Act (S.B. 18725)
- Medical Cannabis Research Act of 2018 (H.R. 5634)
- The Fairness in Federal Drug Testing Under State Laws Act (HR 6589)
 - Would prohibit federal agencies from discriminating against workers solely based on status as marijuana consumer or testing positive for marijuana
 - Would exempt positions requiring top security clearances as well as positive probable cause drug tests





State Medical Marijuana Laws: Current Trends



- Providing Explicit Employment Protections
- Providing other protections (e.g., schools, custody, housing, medical care/organ transplants)
- Expansion of programs/removing barriers to patient access
 - Qualifying conditions
 - Physician requirements
- Limiting methods of Ingestion (i.e., prohibiting smoking)



State Recreational Marijuana Laws



- Impairment/driving under the influence (DUI)
 - Most states prohibit driving under the influence, but no guidance
 - Some states have “per se” limits of amount of THC in blood; no consensus on limits
- 8 states + D.C. explicitly provide NO employment protections
 - Explicit in law or in guidance
- 1 state may provide employment protections for diffuse (Maine)

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Employment Protections in Marijuana Legislation

Current status of protections in
marijuana legislation



Medical Marijuana Laws: Employment Considerations



State
handicap/
discrimination
laws

ADA

FMLA

Drug free
workplace
laws

Medical
marijuana
laws

lawful
activities/
“off-duty”
use laws

Un-
employment
Benefits

Workers’
comp



Medical Marijuana Laws: Employment Protection Overview



Generally 3 categories



Explicit Employment Protections (13 states)

Newer laws contain explicit employment protections in anti-discrimination provisions (e.g., prohibits adverse action based solely on cardholder status)

Protections vary

Explicit No Employment Protections (7 states)

Laws explicit no protections or silent/vague and state supreme court has found no duty to accommodate off-duty marijuana use

Still not insulated from all action and current trend is to add protections

Unclear/Possible Protections Under Other State Laws (11 states + D.C.)

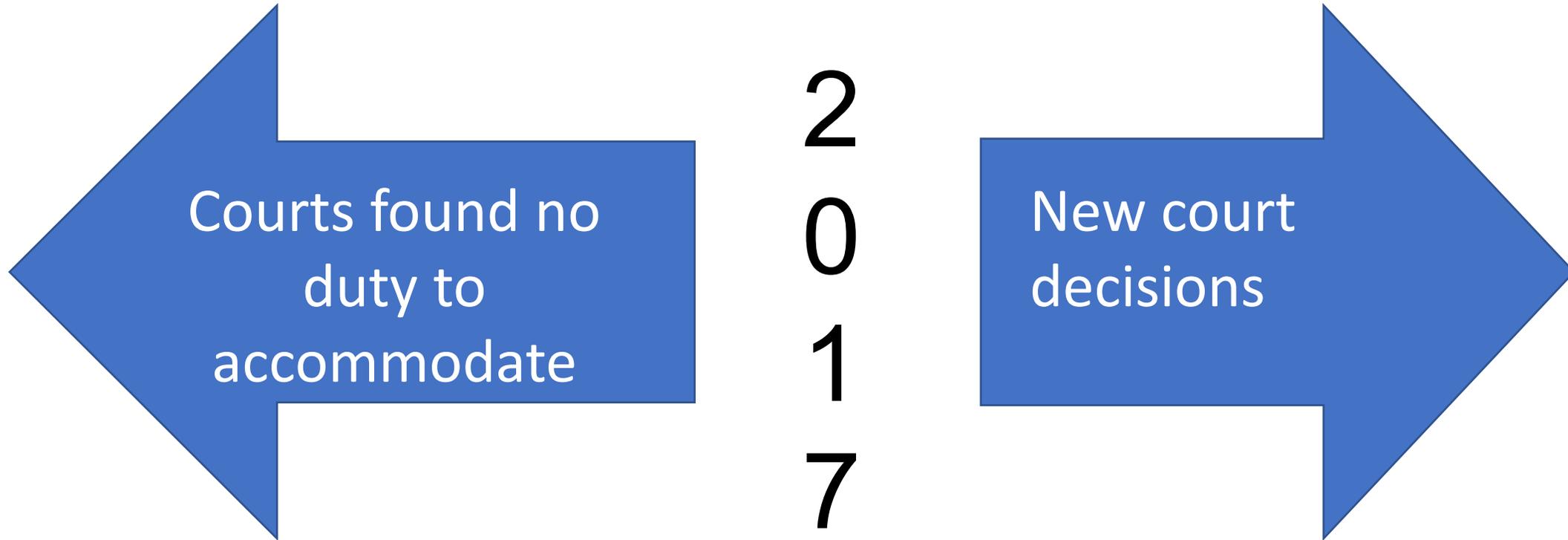
Laws silent/vague as to employment protections

1 state supreme court has found possible protection under other state laws (state disability discrimination statutes)

Some states have other case law and/or guidance from state agencies



Medical Marijuana Laws: Employment Protections court decisions





Medical Marijuana Laws: Employment Protections court decisions



Pre-2017 court decisions

- Courts found no duty to accommodate medical marijuana
- Decisions were based on state laws that did not contain explicit employment protections
- No court decisions construing explicit protections

2017-2018 court decisions

- 2 decisions in states w/explicit protections
 - Both found private right of action, no preemption
- 2 decisions in states w/unclear protections
 - Courts reached opposite conclusions
 - 1 state supreme court found possible protections under other state law
 - 1 federal court found no protection
- Other decisions



Medical Marijuana Laws: Employment Protection Pre-2017 Court decisions



California

Ross v. Ragingwire Telecomms
174 P.3d 200 (Cal. 2008)

(holding CA medical marijuana law does not require employer to accommodate use of medical marijuana and no cause of action under CA's discrimination statute or for wrongful termination in violation of public policy)

Colorado

Coats v. Dish Network
350 P.3d 849 (Colo. 2015)

(holding employees who engage in medical marijuana are not protected from wrongful discharge and no cause of action for wrongful discharge under CO's "lawful activities" statute because off-duty use not lawful activity since illegal under federal law)

Montana

Johnson v. Columbia Falls
120 (Mont. 2009) (unpub)

(holding MT's medical marijuana act didn't provide express or implied private right of action and doesn't require employers to accommodate medical use of marijuana; no violation of MT Human Rights Act)

Oregon

Emerald Steel Fabricators v. BOE
230 P.3d 518 (Or. 2010)

(holding federal law preempts Oregon medical marijuana law, therefore employee engaged in illegal use of drugs and employer not required to accommodate use of medical marijuana under state employment discrimination laws)

Washington

Roe v. Teletech
257 P.3d 586 (Wash. 2011)

(holding WA's medical marijuana act doesn't provide private cause of action against employer for discharging employee who uses medical marijuana nor does it "create a clear public policy that would support a claim for wrongful discharge")



Medical Marijuana Laws: Employment Protection & 2017-2018 court decisions



Connecticut

Noffsinger v. SSC Niantic Op. Co. No. 3:16cv-01938 (JAM) (D. Conn. 2017 & 2018)

Federal district court found anti-discrimination provision contained implied private right of action and not preempted by federal law (CSA, FDA, FDCA); granted summary judgment to employee

Rhode Island

Callaghan v. Darlington Fabrics Corp. PG2014-5680 (R.I. Super. May 2017)

Superior Ct. held anti-discrimination provision provides implied private right of action and could sue under RI Civil Rights Act for disability discrimination; found medical marijuana cardholder status signaled medical condition that caused her to be disabled

Massachusetts

Barbutov v. Advantage Sales & Mktg. 78 N.E.3d 37 (Ma. 2017)

Massachusetts Supreme Judicial Court held although medical marijuana act itself didn't provide explicit/implicit cause of action, employee may assert disability discrimination claim under MA law for failing to accommodate use of medical marijuana

The American Bar Association called these cases "an emerging trend in employment litigation" and cautioned employers to consider medical marijuana laws when analyzing drug use and testing policies



Medical Marijuana Laws: Employment Protection & 2017-2018 court decisions



New Jersey

*Cottov. Ardagh Glass Packaging, Inc.,
No. 181037 (RBK/AMD), 2018 U.S. Dist. LEXIS 135194 (D.N.J. Aug. 10, 2018)*

Federal district court dismissed claims; held neither CUMMA nor New Jersey Law Against Discrimination (NJLAD) requires an employer to waive drug test requirement as a condition of employment

Montana

*Carlson v. Charter Communs LLC
No. CV 18-6-H-SEH, 2017 U.S. Dist. LEXIS 128019, 2017 WL 3473316 (D. Mont. Aug. 11, 2017)*

Federal district court held that the plain language of Montana's Medical Marijuana Act barred an employee's claims for wrongful discharge and for employment discrimination under Montana's Wrongful Discharge from Employment Act and Human Rights Act



Medical Marijuana Laws: Employment Protections court decisions



Courts have interpreted almost identical provisions differently

Whether statutory provision re: no duty for “onsite” accommodations requires off-duty accommodations

Whether federal law preempts state medical marijuana law, thus no duty to accommodate

Whether Federal Drug-Free Workplace Act preempts state medical marijuana law when employer is federal contractor

↑ Silence=employer not required to accommodate off-duty use
(*Roe* WA 2011)

↑ State law preempted by federal law
(*Emerald Steel* OR 2010)

↑ State law pre-empted, no duty to accommodate
(*Carlson* D. MT. 2017)

↓ Silence=employer required to accommodate off-duty use
(*Callaghan* RI 2017; *Barbuto* MA 2017)

↓ State law not preempted by federal law
(*Callaghan* RI 2017; *Noffsinger* CT 2017-18; *Barbuto* MA 2017)

↓ State law not preempted, duty to accommodate
(*Noffsinger* CT 2017-18; *Barbuto* MA 2017)



Medical Marijuana Laws: Explicit Employment Protections



13 states

Laws and degree of protections vary

- Arizona (2010)
- Arkansas (2016)
- Connecticut (2012)
- Delaware (2011)
- Illinois (2013)
- Maine (1999)
- Minnesota (2014)
- Nevada (2000)
- New York (2014)
- Oklahoma (2018)
- Pennsylvania (2016)
- Rhode Island (2006)
- West Virginia (2017)

4 States have positive drug test language (AZ, DE, MN, OK)

E.g., employer may not discriminate based upon a “patient’s positive drug test for marijuana components or metabolites”

3 States include specified safety-sensitive positions that may not be performed with specified amount of active THC in blood (PA, WV)

THC Limits vary

- PA: 10 ng/mL THC in blood
- WV: 3 ng/mL THC in blood

2 states treat as disability (NV, NY)

Most states contain exceptions

E.g., Not required to accommodate use at the workplace during work hours or employee working under the influence

At least 1 pending laws (AZ)



Medical Marijuana Laws: Explicit Employment Protections in Oklahoma



- SQ 788: Passed 6/26/18; effective 7/26/18
- Open qualifying conditions
- Explicit employment protections ~~788~~ Sec. 6(B)
 - “Unless a failure to do so would cause an employer to imminently 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 based upon either:
 - The person’s status as a medical marijuana license holder; or
 - Employers may take action against a holder of a medical marijuana license holder if the holder uses or possesses marijuana while in the holder’s place of employment or during the hours of employment. Employers may not take action against the holder of a medical marijuana license solely based upon the status of an employee as a medical marijuana license holder or the results of a drug test showing positive for marijuana or its components.”



Medical Marijuana Laws: Explicit No Employment Protections



7 states

- California
- Colorado
- Florida (2016)
- Montana
- Ohio (2016)
- Oregon
- Washington

Laws explicitly provide No employment protection (FL, OH)
No court decisions yet

State supreme courts have found no protections/employer has no duty to accommodate off-duty use (CA, CO, MT, OR, WA)

But current trend is to add protections

Even under seemingly clear laws, still may be challenged in court, employer not insulated from actions

Current trend in all states is to add protections

At least 1 pending lawsuit (FL)



Medical Marijuana Laws: Explicit No Employment Protections



Florida

Amendment 2 (Nov. 8, 2016)

- Effective Jan. 2017; SB8A effective 6/23/17
- “Medical use” does not include use at place of employment unless permitted by employer
- Does not limit ability of employer “to establish, continue, or enforce a drug-free workplace program or policy”
- Does not require employer to accommodate medical use of marijuana in any workplace or employee working while under the influence of marijuana
- Does not create a cause of action against employer for wrongful discharge or discrimination (Fla. Stat. § 381.986(15))

Ohio

Signed by Gov. 6/8/16

- Effective 9/8/16
- Statute does not prohibit employer from establishing and enforcing a drug testing policy, drug-free workplace policy, or zero-tolerance drug policy
- Employer not required to permit/accommodate employee’s use, possession, distribution of medical marijuana
- Does not permit cause of action against employer for adverse action (O.R.C. § 3796.28(A))



Medical Marijuana Laws: Unclear/Possible Employment Protections



11 states + DC

- Alaska
- Hawaii
- Louisiana
- Maryland
- Massachusetts
- Michigan
- New Hampshire
- New Jersey
- New Mexico
- North Dakota (2016)
- Vermont
- Washington, D.C.

State laws do not affirmatively address employment;
may or may not provide protections

1 state supreme court has found possible protections under other state law (state disability discrimination law) (MA)

1 state has established working group to consider bill

Some states have other court decisions (federal court decisions) (MI, NJ, NM, DC)

Pending lawsuits in at least 3 states (MA, NJ, NM)

Some states have guidance documents for employers (NJ, VT)



Medical Marijuana Laws: Employment Protection 2018 proposed legislation



Current trend is to add explicit employment protections

States with Explicit Protections

Seeking to add positive drug test language

- **New York** (AB4560)
- **Rhode Island** (HB7899) committee recommended held for further study

States with No Explicit Protections

Seeking to add explicit protections

- Oregon
- Washington (HB 1094)
- **California** (failed)

States with Unclear/possible Protections

Seeking to add explicit protections

- Massachusetts
- New Jersey (A10/SB 10/A1838)
- **Hawaii** (failed but established working group to study)
- **Maryland** (failed)



Medical Marijuana Laws: Employment Protections pending lawsuits



Lawsuits to watch



States with Explicit Protections

Arizona

- Lawsuit pending in federal district court seeking protection under AZ's medical marijuana statute and alleging disability discrimination under both state and federal disability discrimination statutes

States with Explicit No Protections

Florida

- Lawsuit pending in state court alleging disability discrimination under Fl. Civil Rights Act Fl. Stat. 760.01

States with Unclear/Possible Protections

Massachusetts

New Jersey

New Mexico

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Litigations Strategies for marijuana in the workplace

Reducing litigation risk and handling
litigation



Common Questions



- Do I have to accommodate marijuana?
 - What laws apply?
- How do I handle marijuana positive drug test results?



Avoiding Litigation



- Know your workforce
 - Location
 - Position and safety issues
 - Multistate issues
- Know the law and your obligations
- Decide Policy
 - Be clear and consistent



What state law applies and do I have to accommodate medical marijuana? The ~~most~~ state issue

- Most state marijuana laws do not define employer or employee
- Follow the most restrictive state law, (the law most favorable to the employee)



When Applicant/Employee claims Medical Marijuana cardholder:

- Ensure process has a decision tree
- Documentation/Reporting
 - Laws do not entitle employer to determine reason for marijuana card
- Ensure medical information remains separate from disciplinary channels

All information should be kept confidential



Avoiding Litigation



When the bad thing happens or someone doesn't like the outcome

- Engage legal immediately
- Identify if there may be fault arising from your company
- Prepare to immediately resolve issue if you caused the loss
- Use the situation as a catalyst for process/production improvement



Handling Litigation When it Arises



- Provide all information you would otherwise have to give
- Cooperate on everything that does not harm your case
- Look for early resolution or disposition
- Fight like crazy on everything else!



CONTACT INFORMATION



Have additional questions?

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THANKS!

Any questions?