Abstract

The fight to legalize marijuana in the United States seemed to finally be a success after more than half of the states legalized marijuana for medicinal purposes or for both medicinal and recreational uses. Although marijuana is legal in many states, employees who legally use marijuana off the job and are not high during work hours can still be denied employment or terminated. These employees range from the casual marijuana user to the employee with disabilities who medically relies on marijuana. One problem with states’ legalization laws is that they are silent on the effect of legalization in the employment sector. Another problem is that the laws explicitly exclude employment and thus allow employers to decide whether to take adverse action against employees who legally use marijuana. Three employment-based arguments have challenged employers’ adverse actions, but all have failed in both state and federal court.

This article will explore these three employment-based challenges and explain why they were not successful. This article will also address the laws of ten states that do explicitly provide some employment protection and explain the four problems as to why these state laws are insufficient protection for legal marijuana users.

Keywords: ADA, Employment-At-Will, Lawful Off-Duty Conduct, Employment Law, Marijuana, Health Law, Preemption

I. Introduction

In 1996, California became the first state to legalize the medicinal use of marijuana, and since then, more states have followed suit and legalized medicinal marijuana.¹ Several
states have even legalized the recreational use of marijuana. Today, over half the states, DC, Guam, and Puerto Rico have legalized marijuana for either medicinal use only or both medicinal and recreational use. However, not only does the legalization of marijuana affect criminal law, it impacts the employment sector as well. With individuals in certain states now legally allowed to possess and use marijuana, what does that mean for employees who use marijuana and employers who aim to maintain a drug-free workplace? In most of these states’ marijuana laws, employment is not addressed. Thus, it is unclear how employers can maintain a drug-free workplace, and it is unclear when employees can be disciplined for their legal marijuana use. Ten states provide employment protection for individuals who legally use marijuana; however, when these laws are actually applied, these protections are impractical and unhelpful for employees and difficult for employers to follow.

This article will first address the current federal and state laws on the legalization of marijuana in Section II. Section III will explain the three legal employment challenges employees have tried to argue to contest their termination at work when testing positive for marijuana. Section IV will address the ten states’ marijuana laws that provide employment protection for employees who use marijuana. This section will also identify the issues in these state statutes and explain why such issues in reality do not protect employees and create confusion among employers. The article will then conclude and summarize the statutory problems.

II. The Current State of Marijuana at the Federal and State Level

The Controlled Substance Act (CSA) is the United States federal drug policy that regulates the illegal importation, manufacture, distribution, possession, and improper

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3 See National Conference of State Legislatures, supra note 1.

4 See generally Joseph H. Yastrow, A Survey of Medical Marijuana Laws Impacting the Workplace (Jan. 2015), https://www.americanbar.org/content/dam/aba/images/abanews/A%20Survey%20of%20Medical%20Marijuana%20Laws%20Impacting%20the%20Workplace.pdf (listing the states who have marijuana laws that address the effects of legalizing marijuana on the employment sector and omitting the states that do not mention anything about employment).
use of certain substances.\(^5\) The CSA establishes five schedules of controlled substances, and based on certain qualifications and findings, the CSA sorts the illegal substances into the appropriate schedule.\(^6\) The schedule in which a drug is classified will determine its appropriate use.\(^7\) Schedule 1 drugs are deemed to have a high potential for abuse, do not currently have an accepted medical use in the U.S., and lack an accepted safe use under medical supervision.\(^8\) Currently, marijuana is classified as a Schedule 1 drug.\(^9\) Therefore, using marijuana for medicinal or recreational purposes is illegal under federal law. Although marijuana is illegal federally under the CSA, many states have legalized marijuana for medicinal use or both medicinal and recreational use. Currently, there are 29 states, including Washington, DC, that have legalized marijuana in some way.\(^10\) Furthermore, twenty states and DC have legalized marijuana for medicinal uses only, while nine states have legalized marijuana for both medicinal and recreational purposes.\(^11\)

There is clearly conflict between the federal law of the CSA and the state laws legalizing marijuana; however, legalizing marijuana at the state level does not make it legal at the federal level.\(^12\) Thus, the federal government can still enforce the CSA.\(^13\) Whether or not the Department of Justice actually prosecutes individuals violating the CSA in states where marijuana is legal is another story. In August 2013, under the Obama Administration, the DOJ decided to scale back marijuana enforcement in states where marijuana is legal and focus on other marijuana-related priorities.\(^14\) The DOJ felt that the states in which marijuana


\(^{7}\) Id.

\(^{8}\) Id. at (b)(1)(a)-(c).

\(^{9}\) Id. at (c)(a)(10) (“Marihuana” is marijuana under the CSA).

\(^{10}\) See Robinson, Berke & Gould, supra note 2; see also National Conference of State Legislatures, supra note 1.

\(^{11}\) See Robinson, Berke & Gould, supra note 2; National Conference of State Legislatures, supra note 1.


\(^{13}\) Id.

\(^{14}\) See, Memorandum from James M. Cole, Guidance Regarding Marijuana Enforcement 1, 1-2 (Aug. 29, 2013) (The federal marijuana-related priorities the Department of Justice should focus on instead was: “preventing
was legalized had created an effective regulatory and enforcement system to control the “cultivation, distribution, sale, and possession of marijuana” that did not threaten federal priorities.\(^{15}\) However, currently under the Trump Administration, Attorney General Jeff Sessions rescinded the Obama Administration’s decision.\(^ {16}\) In Sessions’ memo, he stated that “marijuana is a dangerous drug and marijuana activity is a serious crime.”\(^ {17}\) Therefore, U.S. prosecutors should use their discretion in deciding which marijuana activities to prosecute by following the “well-established principles that govern all federal prosecutions.”\(^ {18}\) In other words, medicinal and recreational use of marijuana may be legal in certain states, but the federal government can still prosecute individuals under federal law.

### III. Employment Challenges in States Where Marijuana Is Legal

In states that have legalized marijuana, questions arise about the effects on employment, specifically on the employees’ rights who smoke marijuana legally and the employers’ rights to maintain a drug-free workplace. Some important questions that have arisen in litigation are: when can the employer terminate an employee for testing positive for marijuana; whether there is a difference if the employee is a medicinal or recreational smoker; whether the employer can choose not to hire applicants who test positive for marijuana in a pre-employment drug test; and whether the employee who smokes medicinally is entitled to an accommodation. Some states explicitly address in their laws the effects on employment

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15 Id. at 3.

16 See Memorandum from Jefferson B. Sessions, Marijuana Enforcement 1, 1 (Jan. 4, 2018).

17 Id.

18 Id.
from legalizing marijuana, while other states have not addressed employment at all.\textsuperscript{19} But, even in the states where employment is addressed, there have been three major employment arguments that try to challenge an employer’s adverse action against an employee resulting from the employee’s positive drug test.\textsuperscript{20} These three employment arguments have been challenged in a variety of states and some even in federal court; however, all cases have resulted in favoring the employer.\textsuperscript{21} In other words, employees who legally smoke marijuana do not have job protection under these three employment-based laws or doctrines: the Americans with Disability Act, the public policy exception to employment at-will, and lawful off-duty activities statutes.

1. The Americans with Disability Act Challenge

The Americans with Disability Act (ADA) prohibits employers from discriminating against “qualified”\textsuperscript{22} individuals on the basis of a disability in regards to “job application procedures, hiring, advancement, discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”\textsuperscript{23} If the individual is not “qualified,”\textsuperscript{24} then there is no discrimination on the employer’s part for not hiring or granting the employment term the individual sought. An individual with a disability is someone who has “a physical or mental impairment that substantially limits one or more major life activities, [has] a record of such an impairment, or [is] regarded as having such an impairment.”\textsuperscript{25} Employers are also required, if needed, to provide reasonable accommodations for that individual with a disability so the individual can perform the


\textsuperscript{20} Id. (If an employee works for the federal government, there is no employee protection for marijuana use because marijuana is illegal under federal law. Thus, in most of cases, the employee terminated for marijuana use worked for a private employer).

\textsuperscript{21} Id.

\textsuperscript{22} 42 U.S.C. § 12111(8) (2013) (An individual is “qualified” when, with or without a reasonable accommodation from the employer, the individual can still perform the essential functions of the job that he holds or desires).

\textsuperscript{23} § 12112(a) (2013).

\textsuperscript{24} Id.

\textsuperscript{25} § 12102(1)(a)-(c).
essential functions of the job.\textsuperscript{26} Failure of an employer to provide an accommodation will be considered an act of discrimination under the ADA.\textsuperscript{27} However, employers do not need to provide such an accommodation if doing so would be an undue hardship on the employer or even with the accommodation, the employee still cannot perform the essential functions of the job.\textsuperscript{28}

The ADA also addresses the illegal use of drugs and alcohol in the workplace.\textsuperscript{29} First, an individual is not “qualified” under the ADA if he engages in the illegal use of drugs.\textsuperscript{30} Therefore, an employer is not discriminating against an individual in any employment decision if such a decision is based on the individual’s use of illegal drugs.\textsuperscript{31} Second, the ADA allows employers to prohibit the illegal use of drugs and alcohol at the workplace and require that all employees shall not be under the influence of illegal drugs and alcohol at the

\textsuperscript{26}§ 12112(b)(5)(a) (The ADA also defines who is an “employer,” and thus subject to the ADA); § 12111(5)(A) (A reasonable accommodation could be “(a) making existing facilities used by employees readily accessible to and usable by individual with disabilities, or (b) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modified of equipment or devices, appropriate adjustment or modification of examination, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities,” § 12111(9)(a)-(b)).

\textsuperscript{27}§ 12112(b)(5)(a), supra note 26.

\textsuperscript{28}Id. (“Undue hardship” means that such accommodations would require significant difficulty or expense, §12111(10)(A); The ADA lists factors to consider when determining whether an accommodation would be an undue hardship on the employer: (i) the nature and cost of the accommodation needed; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and (iv) the type of operations of the covered entity, including the composition, structure, and functions of the workforce of such entity, the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity, § 12111(10)(B)(i)-(iv)).

\textsuperscript{29}§ 12114.

\textsuperscript{30}§ 12114(a).

\textsuperscript{31}An individual can still be qualified and protected under the ADA if he (1) successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has 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. Therefore, if an employer discriminates against an individual based on any of the three circumstances, the employer will be found in violation of the ADA (§ 12114(b)(1)-(3)).
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workplace. This means that if an employee is caught using illegal drugs or drinking alcohol at the workplace or is found under the influence during work hours, the employer has the right to discipline that employee. Finally, the ADA also allows employers to administer drugs tests and make employment decisions based on the test results. Generally, employers can conduct three types of drug tests: pre-employment drug tests, random drugs tests, and drug tests based on a reasonable suspicion that an employee is under the influence on the job.

The challenge employees have brought under the ADA is that the employer discriminates against a disabled individual when the employer terminates the employee for testing positive for marijuana because the employee is legally using medicinal marijuana for his qualified disability. In City of Costa Mesa, the 9th Circuit concluded that the ADA does not protect individuals who use marijuana for medicinal purposes because the ADA explicitly states that qualified individuals do not include individuals “engaging in the illegal use of drugs.” The 9th Circuit explained that because marijuana is illegal under federal law of the Controlled Substance Act, medicinal users, even in states where medicinal marijuana is legal, are not “qualified” individuals under the ADA. Therefore, claims under the ADA fail because medicinal marijuana users are not technically covered under the ADA.

A similar disability-based challenge has been brought under Oregon and California law.


See Hlavac & Easterly, supra note 33.

See James v. City of Costa Mesa, 700 F.3d 394, 396 (9th Cir. 2012); see also Matt, supra note 19.

See City of Costa Mesa, supra note 36 (The 9th Circuit looked to the plain text of the ADA and the legislative history and decided that when writing the ADA, Congress referenced federal law rather than state law and referenced the CSA when defining “illegal use of drugs. Therefore, whether a drug is illegal or not depends on what federal law states); see also 42 U.S.C. § 12114(a) (2013).

See, City of Costa Mesa, supra note 36 at 398.

See, Matt, supra note 19; Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 348 Or. 159, 162 (Or. 2010) (In Emerald Steel Fabricators, the temporary employee was required to take a pre-employment drug test in order to obtain permanent employment. The employee notified the employer that he would fail the drug test because
The Oregon and California Supreme Court addressed the same question as to whether employers can take adverse action against employees who participate in a state-authorized medical marijuana program, but also answered whether the employer is required to accommodate the employee’s medicinal marijuana use. In Emerald Steel Fabricators, Oregon’s state disability statute mirrored the ADA; thus, based on similar reasoning from the 9th Circuit’s interpretation of the ADA, the Oregon Supreme Court also ruled that because marijuana is illegal federally, the employer can take adverse action against medicinal marijuana users who test positive for marijuana. The Oregon Supreme Court also ruled that because marijuana is illegal federally, the employer was not required to accommodate the employee’s medicinal marijuana use. In Ross v. RagingWire, the California Supreme Court ruled that California’s Fair Employment and Housing Act (FEHA) only addressed the criminal aspect of legalizing marijuana, not the employment aspect. Because the FEHA did not address employment, employers are not required to accommodate a medicinal-marijuana user in the workplace.

These federal and state cases vary slightly, but the main argument is the same: the ADA or state-equivalent statutes do not protect medicinal marijuana users because the ADA or state-equivalent statute does not cover the illegal use of drugs, and marijuana is illegal at the federal level. The employee explained that he used marijuana for his illness and showed his medicinal marijuana registry identification card and his physician recommendation for marijuana to his employer. However, the employer still chose to terminate the employee; see also Ross v. RagingWire Telecommunications, Inc., 42 Cal. 4th 920, 924 (Cal. 2008) (In Ross v. RagingWire, the employee was required to take a pre-employment drug test. The employee suffered from strain and muscle spasms in his back due to an injury he suffered while serving in the US Air Force. The employee smoked medicinal marijuana to deal with the injury. Before taking the drug test, the employee gave his physician’s recommendation for marijuana to the employer (Id. at 925). The employee failed the drug test, and even with his physician recommendation, the employer terminated the employee (Id.)).

See, Francesca Liquori, The Effects of Marijuana Legalization on Employment Law, 1 NATIONAL ASSOCIATION OF ATTORNEYS GENERAL (2016), (accessed Mar. 5, 2018), http://www.naag.org/publications/nagtri-journal/volume-1-number-2/the-effects-of-marijuana-legalization-on-employment-law.php (Under the ADA, if the individual is not protected by the ADA, like the employee in City of Costa Mesa, then the employer is not required to provide an accommodation because the ADA does not apply).

See Emerald Steel Fabricators, Inc., supra note 39.

Id. at 161.


Id. at 920.
2. The Public Policy Exception to Employment At-Will

An employee at-will does not have an employment contract that defines the terms of his employment.45 Thus, an employee at-will may be hired or fired at any time for good cause, bad cause, or no cause at all.46 The employee at-will may also quit his job at any time for any reason.47 Although the employment relationship between the employer and employee at-will is a loose one, employees at-will are provided some protections from adverse employer action. Depending on state law, there are exceptions to the employment at-will doctrine in which an employer’s discharge of an employee would violate the doctrine.48 The most widely accepted exception among the states is the public policy exception.49

Under the public policy exception to the employment at-will doctrine, an employer’s discharge of an employee will be unlawful if the discharge is against a well-established state public policy.50 How public policy is defined will vary from state to state, but the employee must identify a well-established public policy and explain that his termination violates such policy.51 A state’s public policy could be found in the state’s constitution, statute, or administrative rule.52 For example, states have workers’ compensation laws that allow employees to file for compensation if they are injured on the job. The public policy derives from the state’s workers’ compensation law that gives injured employees the right to file for such benefits. If an employer terminates an employee for filing a workers’ compensation claim after getting injured on the job, the employer would have violated the public policy


46 Id.


48 Id. at 4.

49 Id. (Currently, 43 states recognize the public policy exception).

50 Id.

51 See Matt, supra note 19.

52 See Muhl, supra note 47 at 4 (Some states have also expanded the sources in which an individual may find a public policy other than a state’s constitution, statute, or administrative rule).
exception.\textsuperscript{53}

There are two cases arising out of Washington and Michigan that were brought under the public policy exception in which both employees were discharged due to testing positive for marijuana.\textsuperscript{54} In both cases, the discharged employees claimed that their termination was wrongful because it violated the public policy that was clearly established in the state law that legalized marijuana.\textsuperscript{55} In Roe v. Teletech Customer Care Mgmt, the employee, Roe, was offered a customer care position contingent on her drug test results.\textsuperscript{56} Although she was authorized by a physician to smoke medical marijuana for her migraines, nausea, blurred vision, and sensitivity to light, the employer still discharged her when she failed her drug test.\textsuperscript{57} The Washington Supreme Court favored the employer and held that Roe’s termination was not wrongful on two grounds.\textsuperscript{58} First, there was no evidence that Washington’s Medical Use of Marijuana Act (MUMA) provided employees protection for medicinal marijuana use or prohibited employers from terminating employees for such use.\textsuperscript{59} Second, the MUMA did not create a public policy that removed all the obstacles that arise with medicinal marijuana.\textsuperscript{60}

Because marijuana is illegal at the federal level, there can be no public policy that requires an employer to allow his employees to engage in illegal activity.\textsuperscript{61} Therefore, because the state law did not cover employment, and marijuana is still illegal under federal law, the public policy challenge did not prevail.

In Casias, the 6\textsuperscript{th} Circuit came to a similar decision about the employee’s public policy claim. The employee, Casias, worked at Wal-Mart and was registered for medicinal marijuana to cope with the pain stemming from his brain cancer and inoperable brain

\textsuperscript{53} Id.

\textsuperscript{54} See Matthew D. Macy, Employment Law and Medical Marijuana – An Uncertain Relationship, 41 Colo. Law. 57, 61 (2012).

\textsuperscript{55} See Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC, 171 Wash. 2d 736, 744 (Wash. 2011); see also Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 436-37 (6th Cir. 2012).

\textsuperscript{56} See Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC, supra note 55 at 743.

\textsuperscript{57} Id.

\textsuperscript{58} Id. at 754.

\textsuperscript{59} Id.

\textsuperscript{60} Id. at 757.

\textsuperscript{61} Id. at 759.
tumors. Casias tested positive for marijuana during a hospital-administered drug test, and Wal-Mart terminated him as a result. Like in Roe v. Teletech, the 6th Circuit affirmed the district court’s holding that the Michigan Medical Marijuana Act (MMMA) did not regulate employment and only addressed criminal prosecution. Because the MMMA did not address employment, Casias was not protected under that Michigan law.

Despite the fact that employees can point to a state statute that legalizes marijuana and claim it is a public policy because it is on the books, both a state and federal court have still ruled that such state marijuana laws did not address employment and do not create a public policy that employees can use for protection. Because most states’ marijuana legalization laws either do not address employment or explicitly exclude employment from the marijuana laws, employees in these states cannot rely on the public policy exception. In other words, a state’s marijuana legalization statute would need to cover and protect employment in order for an employee to have a claim that their termination for legally using marijuana is in violation of the state’s public policy. However, no claim has been made in those ten states that do provide employees some statutory protection for employees’ marijuana use.

3. Lawful Off-Duty Activities Statutes

A lawful off-duty activities statute is another method states use to protect employees because it generally prohibits employers from discriminating against employees for engaging in certain legal off-duty conduct. There are two types of state statutes related to an employee’s off-duty activity. The first type of statute addresses the use of lawful products, and the second type of statute addresses other lawful off-duty activity. As to what products

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62 See Casias, supra note 55 at 431.
63 Id. at 432.
64 Id. at 435.
65 Id. at 436.
66 See infra, Sec. IV.
69 Id.
or activities are protected depends on the state law. For example, there are statutes that prohibit employers from discriminating against employees who use tobacco products and statutes that prevent employers from disciplining employees based on their political activity and affiliation. As for statutory protections most relevant to marijuana use, eight states protect employees’ use of lawful products, and four states provide a broader protection for employees engaging in any lawful activity. In the marijuana context, the question becomes whether the lawful products or activities referred to in these statutes are required to be legal under state law only, or both state and federal law.

There has only been one case, Coats v. Dish Network, where an employee challenged his termination based on a state’s lawful activity statute. In Coats, employee Coats was a customer service representative for Dish Network. He is also a quadriplegic confined to a wheelchair and is a registered medicinal marijuana smoker. To deal with his muscle spasms, Coats smokes medicinal marijuana at home and during non-work hours. He also claims to have never smoked at the workplace nor been under the influence at work. One day at work, the employer conducted a random drug test, Coats tested positive for marijuana, and thus, he was terminated for violating the employer’s drug policy. Colorado is one of the four states with a lawful off-duty activity statute that protects employees in engaging in any

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70 See Can Lawful Use Laws, supra note 67; see also Discrimination Laws Regarding off-Duty Conduct, National Conference of State Legislatures (Oct. 2010) at 1.


72 See Discrimination Laws, supra note 70; Only half of the eight states that protect employees’ use of lawful products legalized marijuana for either medicinal and/or recreational use. All of the four states that protect any lawful off-duty activity have legalized marijuana for either medicinal and/or recreational use (Robinson, Berke & Gould, supra note 2).

73 See Matt, supra note 19.

74 Id.


76 Id.

77 Id.

78 See Matt, supra note 19.

79 See, Coats, supra note 75 at 850.
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lawful activity. Coats’ argument was that his termination violated Colorado’s lawful activity statute because using medicinal marijuana is legal under Colorado law. However, the Colorado Supreme Court favored the employer and held that “lawful” in the off-duty activity statute included activities that were lawful under both state and federal law. Although marijuana is legal under Colorado law, it is still illegal under the federal law of the CSA; therefore, using marijuana is not protected by Colorado’s lawful activity statute.

Although employees in other states could technically bring the same claim under their states’ lawful activities or lawful products statute, it is likely those claims will fail like in Coats v. Dish Network. The courts in the previously discussed cases with the ADA and public policy challenges considered other state courts’ decisions when adjudicating their own case. Consequently, it is likely that other states will defer to Coats v. Dish Network and favor the employer once again.

IV. Analysis of the States’ Laws that Provide Employees with Protection for Marijuana Use

The three employment challenges are all different legal arguments; however, every court favored the employer for two main reasons: (1) marijuana is illegal at the federal level, so federal law prevails, and (2) the relevant state law did not cover employment. Courts had an issue finding an employee’s termination wrongful because marijuana is illegal federally. Thus, it is likely that if marijuana is legalized at the federal level, it will be treated like any other legal drug in the employment sector. But until marijuana is legalized federally, the

80 Id. at 853.
81 Id. at 851.
82 Id. at 853.
83 Id.

84 See Macy, supra note 54 (explaining that the judge in Casias considered other cases in Washington, Montana, and California to support his ruling); see also City of Costa Mesa, supra note 36 at 412 (citing to Ross v. RagingWire when deciding whether medicinal marijuana users are protected under the ADA).
85 See Matt, supra note 19.
86 See, Hlavac & Easterly, supra note 33.
best states can do for marijuana users and have been doing is provide employment protection in their state laws.87

Currently, states vary as to whether they provide protection for employees who legally use marijuana. Some states’ marijuana laws are completely silent about employment.88 In such states, if an employee challenges his termination, it is likely the court would agree with the previously discussed cases because the state statute is silent on employment issues. In other words, if the state wanted to protect employees’ marijuana use, it would have done so. Other states have explicitly asserted that employees have no protection for their marijuana use, thereby allowing employers to terminate employees for such use.89 However, ten states provide some form of statutory protection for employees who use marijuana.90 Although the ten states give employees protection for their legal marijuana use, these statutes also have a few common issues that make their state law unhelpful for employees and confusing for employers with respect to how they should abide by the law. There are four problems these statutes create when applied to the workplace.91 The four problems are the statutes’ focus on status, the urine drug tests used by employers, whether accommodations are required, and the lack of protection for recreational users.


88 See generally Yastrow, supra note 4 (listing the states that provide employee protection for marijuana use, the states that do not provide protection, and omitting the states in which their marijuana statutes are silent about employment. Arkansas, Florida, North Dakota, Ohio, and West Virginia, are not listed).

89 See, e.g., CAL. HEALTH & SAFETY CODE §11262.5 (stating that “employers are not required to accommodate any marijuana use on the property or premises of any place of employment or during the hours of employment); D.C. CODE §7-1671.01 (stating that “the statute does not discuss employment-related issues dealing with medical marijuana use”); N.M. STAT. ANN. §26-2B-1-7 (stating that “participating in the Medical Cannabis Program does not relieve the qualified patient from… civil penalty for possession or use of marijuana in the qualified patient’s workplace); see also Yastrow, supra note 4 at 2; All the states discussed in the cases previously have explicitly asserted in their marijuana laws that an employee’s marijuana use is not protected.

90 Id. (The ten states that have provided some statutory protection for employees who use legally use marijuana are Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Pennsylvania, and Rhode Island, (Id. at 2-9)).

91 Not every state law of the ten states has the same issues. The statutory issues depended on what the state decided to protect in its law and the method in executing protection.
1. Focus on Status

The ten states’ marijuana statutes generally prohibit discrimination against an individual’s status as a medicinal marijuana user. These states have used similar language in their statutes to identify who is a medicinal marijuana user: “an employer may not penalize a person solely for his or her status as a registered qualifying patient or a registered designated caregiver.” Other statutes have identified a medicinal marijuana user as a “cardholder.” States require patients to register with their medicinal marijuana program in order to qualify as a legal medicinal user. Therefore, the main focus in this anti-discrimination statute is the individual’s “status” as a medicinal marijuana user which one gains by registering with the state.

The problem with focusing on an individual’s status as a medicinal marijuana user is that although the statute protects employees against status-based discrimination, it is unclear whether employers can take adverse action against an employee who tests positive for marijuana. For example, an employer will be in violation of the state’s anti-discrimination statute if he decides not to hire an applicant because the applicant is a cardholder. But will the same employer violate the statute if he decides to reject the applicant through a pre-employment drug test knowing the applicant will likely fail? Arguably, no. An individual’s “status” refers to one’s position in a given context like social standing or professional environment. An individual’s status as a “cardholder” or “qualifying patient” identifies the individual’s legal status – whether this individual can legally possess and use medicinal marijuana. When an employee tests positive for marijuana, and the employer decides to discipline that employee, the employee’s status is not at issue because the employer is making a decision based on the employee’s action of using marijuana not the employee’s

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92 Statutes have also addressed that there are some positions that are safety sensitive, and being a marijuana user may affect one’s ability to perform the job safely. Therefore, the employer may have valid reason not to assign that employee to a safety-sensitive position. See, e.g., Minn. Stat. Ann. § 152.23 (stating that operating vehicles or aircrafts under the influence of medicinal marijuana is not protected). States have also made clear in their laws that employers can still require employees not to use drugs and be under the influence at the workplace. See, e.g., Ariz. Rev. Stat. Ann. § 36-2814.


95 See National Conference of State Legislatures, supra note 1.

96 See Anti-Discrimination Provisions, supra note 87.
status in the legal context.

However, three states, Arizona, Delaware, and Minnesota, have identified this uncertainty by using different language. In these three states’ statutes, the employer cannot discriminate against an employee based upon the person’s status as a cardholder or “a registered qualifying patient’s positive drug test for marijuana.” In these states, the answer would be yes; an employer would be discriminating against a qualified patient if the former disciplines the employee based on his failed drug test. While these three states have clarified this question of whether status-based discrimination prevents adverse employer action taken in response to a failed drug test, the other seven states have not. Thus arguably, in these seven states, disciplining an employee for a failed drug test due to legal marijuana use does not violate the states’ status-based discrimination laws.

2. Drug Testing

All of the states with employment protections for medicinal marijuana users allow employers to maintain a drug-free workplace and conduct drug tests. These employer rights are explicitly stated in the Americans with Disabilities Act. This means employers can prohibit employees from using marijuana at the workplace or being under the influence on the job. If an employee is found using marijuana or is under the influence during work hours, the employer may take adverse actions against that employee. Employers often conduct drug tests to determine if an employee is under the influence of drugs or alcohol. To determine if an individual is under the influence of marijuana, the drug test will show whether or not there is THC present in the individual’s system. If THC is present, the

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98 See, e.g., Ariz. Rev. Stat. Ann. § 36-2814 (stating that an employer is not required to allow an employee to use marijuana or be under the influence of marijuana at the workplace).
99 42 U.S.C. § 12114(c), (d).
100 § 12114(c).
101 Id.
102 Id.; THC (Tetrahydrocannabinol) is one of the many chemical components in marijuana. See, Peter Grinspoon, Medical Marijuana Harvard Health Publishing (2018), (accessed Mar. 9, 2018), https://www.health.
employee will be considered under the influence of marijuana, and thus, subject to discipline by the employer. The problem with using urine drug tests to determine if an employee is high on the job is that there is no state-established THC level that indicates an individual is actually under the influence at the time of the testing. For determining whether an individual is under the influence of alcohol, states have established a Blood Alcohol Concentration (BAC) level that establishes the legal limit of intoxication. If the results of an alcohol test show that the individual has met the state-established BAC, that individual will be found legally under the influence of alcohol. Drug testing for marijuana has no such standard. THC can stay in one’s system several days after the individual uses marijuana and is no longer high. Even though an employee’s drug tests results may show the presence of THC, the presence of THC does not automatically mean that the employee was using marijuana or under the influence at work.

As previously mentioned, Arizona, Delaware, and Minnesota have stated in their marijuana laws that employees cannot be disciplined based solely on a positive drug test for marijuana. If an employee tests positive for marijuana, these three states require employers to engage in a fact-specific inquiry with the employee to determine whether the employee

[104] See Wagner, supra note 102.
[105] Id.; see also Kate Martin, When a Weed-Friendly World Collides with your Job Application, THE OLYMPIAN (Oct. 22, 2016) at 1 (stating that when an individual tests positive for marijuana does not prove that the person was high at the time of the testing).
[107] Id.
[110] SeeMartin, supra note 105.
was actually under the influence during work hours. The employer should inquire into whether the employee is lawfully enrolled in the state’s medical marijuana program, whether the amount of THC found in the employee’s system is consistent with his use, and whether the employee could not be hired into or not remain in the job position. Illinois also requires employers to give the employee, who tests positive for marijuana, the opportunity to contest the employer’s disciplinary decision. Although these states try to give some statutory guidance to employers as to how to deal with an employee’s positive drug test, this fact-specific inquiry still does not help employers determine whether the employee was actually under the influence during work. First, even if the amount of THC in the employee’s system was consistent with his medicinal marijuana prescription, employers still do not know whether that level is sufficient to indicate that the employee was under the influence at the time of the drug test. It is possible that the employee used medicinal marijuana over the weekend and came to work with residual THC in his system, but is no longer high. However, it is also possible that the employee used a dose of medicinal marijuana that is according to his prescription right before coming into work, which results in the employee being high at work. Second, even if the employer engages in a fact-specific inquiry as to whether the employee was high on the job, there is nothing in the statutes that requires the employer to believe the employee and not discipline that employee for the positive drug test. The employer is only required to engage in the inquiry about the positive drug test results with the employee. Therefore, the employer can still decide to rely on the positive drug test results and discipline the employee as a result. Until states establish a THC level that indicates an individual is under the influence of marijuana, it will remain unclear when an employee can be disciplined for a positive drug test of marijuana.

3. Accommodations

The states have created an anti-discrimination statute for individuals who use medicinal

\[112\] See Anti-Discrimination Provisions, supra note 87.
\[113\] Id.
\[115\] See Wagner, supra note 102.
Dazed Smokers, Confused Employment: Why State Employment Laws for Legal Marijuana Users Fail to Protect Employees

marijuana.116 Most individuals use medicinal marijuana for pain control stemming from their illness or disability.117 Sometimes an individual’s illness or disability is covered under the ADA; thus, their impairment substantially limits them in one or more major life activities.118 The problem with most of these state marijuana laws is that while they prohibit discrimination on the basis of one’s status as a cardholder, they do not require employers to provide reasonable accommodations for employees who need medicinal marijuana for their impairments. The states are recognizing that these individuals need medicinal marijuana for health reasons but refuse to give full protection to these individuals by also providing accommodations. Most of the state laws are either silent about whether an employer is required to provide a reasonable accommodation119 or they explicitly state that employers are not required to provide any accommodation for an employee’s medicinal marijuana use.120

The state statutes need a reasonable accommodation requirement in order to enforce their general prohibition of discrimination against medicinal marijuana users. Similar to the state statutes, the ADA prohibits discrimination against individuals with disabilities.121 Although the ADA focuses on the individual’s disability, and the state statutes are focused on the individual’s treatment that addresses his impairment (medical marijuana), both statutes are similar because the individuals involved have a health issue. However, the ADA also requires employers to provide a reasonable accommodation for employees if it is needed to perform the essential functions of the job.122 The reasonable accommodation requirement is another way for the ADA to prevent disability-based discrimination by ensuring the individuals with

116 See Section IV A.

117 See Grinspoon, supra note 103.

118 42 U.S.C. § 12112(a) (2013); In the previously discussed cases, some plaintiffs’ had disabilities that would be covered under the ADA. The reason they would not be protected by the ADA was because the plaintiffs used an illegal drug to deal with their disability, and the illegal use of drugs is not protected activity under the ADA. See, e.g., Coats, supra note 75 at 850 (recognizing that the employee was a quadriplegic in a wheelchair who used medicinal marijuana for his painful muscle spasms).


120 Id. (Maine, Pennsylvania, and Rhode Island explicitly stated in their marijuana laws that an employer does not have to accommodate an employee’s medical use of marijuana).

121 § 12112(a) (2013).

122 § 12112(b)(5)(a).
a disability have the “rights and privileges in employment equal to those of nondisabled employees.”123 In many jobs, an individual with disabilities can perform the essential functions of the position but just needs an accommodation to do so.124 Requiring employers to provide accommodations allows more individuals with disabilities to enter and remain in the workforce because they will be able to work. If more individuals with disabilities are able to enter and remain in the workforce, the ADA is meeting its goal of preventing disability-based discrimination.125 Without this requirement, employers will be able to claim that an applicant is unqualified for a position because his disability prevents him from performing the job.126 In other words, it is not enough for the ADA to say discrimination based on an individual’s disability is illegal. The ADA must also use this accommodation requirement to enforce its law.

Because these states’ marijuana statutes do not have the reasonable accommodation requirement, these state laws are partially unenforceable. First, individuals may not even apply to a job knowing they may need an accommodation for their medicinal marijuana use. If an employee cannot perform the essential functions of the job without an accommodation from the employer, and the employer is not required to provide an accommodation, then the employee is considered unqualified for the position.127 Thus, an individual who needs an accommodation and who knows employers are not required to provide accommodations will likely be discouraged from applying for the job in the first place. Second, if a cardholder is in a state that prohibits discrimination of one’s cardholder status, he will be discriminated against if he requests an accommodation for use of medicinal marijuana because employers are not required


124 Id.

125 § 12101(b)(1) (stating that one of the purposes of the ADA is to eliminate discrimination against individuals with disabilities).

126 See The ADA: Questions and Answers, supra note 123; An employer firing or choosing not to hire an individual who cannot perform the essential functions of the job is a legitimate employment and not deemed discrimination. See The ADA: Your Responsibilities as an Employer; (accessed Mar. 13, 2018), https://www1.eeoc.gov/eeoc/publications/ada17.cfm?renderforprint=1 (The employee must be able to perform the essential functions of the job with or without a reasonable accommodation).

127 See The ADA: Your Responsibilities as an Employer; supra note 126 (As previously stated, the employee must be able to perform the essential functions of the job with or without a reasonable accommodation in order to be considered qualified for the position).
to accommodate them for such use. Take for example a case in which there are two employees with cancer\textsuperscript{128} who need to leave work early every so often for doctor’s appointments. The accommodation in this situation is allowing the employee to leave a couple hours early at the end of the week. Arguably, this is a reasonable accommodation that does not put an undue burden on the employer.\textsuperscript{129} The difference between the two employees is that one doctor’s appointment is about the employee’s medicinal marijuana that he uses for the side effects of chemotherapy, and the other employee’s doctor’s appointment is a general checkup for post-cancer treatment. Although the requested accommodation is exactly the same, the employee who uses medicinal marijuana will be discriminated against and denied an accommodation, but the other employee will be granted the same accommodation. For the employee with the general checkups, the ADA’s goal of preventing disability-based discrimination is met. But in regard to the employee using medicinal marijuana, the state’s marijuana law that aims to protect cardholders has failed. On paper, medicinal marijuana users cannot be discriminated against, but in practice, they still can experience discrimination when they are denied an accommodation that results in termination for not being able to perform the job.

While eight states either deny accommodations or are silent on the matter, Nevada and New York are the only states that explicitly require employers to accommodate an employee’s medicinal use of marijuana.\textsuperscript{130} In Nevada, the employer must “attempt to accommodate” the employee who uses medicinal marijuana if the employee is a valid cardholder.\textsuperscript{131} In New York, such a requirement was not added to the marijuana law specifically, but is stated in the New York Practice Series of Employment Law.\textsuperscript{132} The section


\textsuperscript{131} Nev. Rev. Stat. Ann. § 453A.800 (An employer in Nevada does not have to accommodate an employee’s medicinal marijuana use if doing so would (a) pose a threat of harm or danger to persons or property or impose an undue hardship on the employer, or (b) prohibit the employee from fulfilling any and all of his or her responsibilities).

\textsuperscript{132} § 3:95.50. Use of marijuana in relation to a disability, supra note 130.
explains that the use of medicinal marijuana by an employee enacts protections under the NY Human Rights Law.\textsuperscript{133} Under the NY Human Rights Law, employers are required to provide reasonable accommodations to employees with disabilities.\textsuperscript{134} Thus, New York views individuals who use medicinal marijuana as individuals with disabilities.\textsuperscript{135}

A problem with Nevada and New York’s accommodation requirements is an issue for the employer – how does an employer accommodate an employee’s medicinal marijuana use?\textsuperscript{136} It is unclear in these statutes whether they follow the ADA’s standard for reasonable accommodation or whether reasonable accommodations for medicinal marijuana users require a different standard.\textsuperscript{137} For example, Nevada’s statute states that an employer must “attempt” to accommodate an employee.\textsuperscript{138} “Attempt” is language not used in the ADA. Under the ADA, employers are “required” to provide a reasonable accommodation unless doing so would be an undue burden on the employer.\textsuperscript{139} The ADA also lists what accommodations may be reasonable;\textsuperscript{140} however, neither Nevada nor New York has such a list. Because it is unclear what standard Nevada and New York follow, it is also unclear whether the listed accommodations in the ADA could apply to the Nevada and New York medicinal marijuana users.

Finally, while Nevada and New York provide the additional protection of a reasonable accommodation like the ADA, it is possible that these statutes will run into trouble if challenged in court.\textsuperscript{141} As previously explained, in the cases dealing with employees’

\begin{flushleft}
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} See, Anthony L. Hall, \textit{Marijuana and the Workplace}, HOLLAND AND HART (April, 21, 2017) at 24.
\textsuperscript{137} See, Edwin A. Keller, Jr. & Robert P. Spretnak, Section of Nevada, \textit{SECTION OF LABOR AND EMPLOYMENT LAW} (Mar. 2016) at 17. As previously explained, the ADA does not protect individuals’ illegal use of drugs; thus, the ADA does not cover medicinal marijuana, see, \textit{Costa Mesa}, supra note 36.
\textsuperscript{138} Id. at 7.
\textsuperscript{139} § 12112(b)(5)(a).
\textsuperscript{140} § 12111(9)(a)-(b).
\textsuperscript{141} See Keller, Jr. & Spretnak, supra note 137 at 17; see also Hall, supra note 136 at 23 (looking to other cases in other states dealing with employees and medicinal marijuana and noting that Nevada’s law is contrary to those case’s holdings).
\end{flushleft}
medicinal marijuana use, different jurisdictions have referenced one another in their decision-making, and the ADA challenges have failed. If the accommodation aspect to the Nevada and New York laws were challenged, it would not be surprising if the courts followed suit with other jurisdictions and favored the employer by invaliding the statutes.\textsuperscript{142}

4. No Protection for Recreational Users

The ten states that provide some protection for employees who use medicinal marijuana do not extend any protection to recreational users. First, the states’ statutes identify the individuals who are protected from discrimination as qualifying patients, qualifying caregivers, or cardholders.\textsuperscript{143} Recreational marijuana users are never mentioned. Second, nine of the ten states have legalized marijuana for medicinal use only. Thus, the recreational use of marijuana is still illegal in these nine states.\textsuperscript{144} Nevada is the only state out of the ten states that has legalized marijuana for both medicinal and recreational use.\textsuperscript{145} However, as previously mentioned, Nevada’s statute specifically only protects employees who use marijuana for medicinal purposes.\textsuperscript{146} Therefore, medicinal marijuana users are the only individuals who have some form of employment protection, and recreational users are out of luck.

V. Conclusion

The legalization of marijuana by some states has several consequences in the workplace for both employees and employers. Some states have excluded employment from their marijuana laws, some states’ laws never mention employment, and ten states have provided some employment protection for medicinal marijuana users. Although employees have

\textsuperscript{142} See Keller, Jr. & Spretak, supra note 137 at 17 (stating that although Nevada wants employers to provide reasonable accommodations for employees who use medicinal marijuana, the Nevada marijuana law is still preempted by the federal law and the state knows of the failed ADA challenges relating to medicinal marijuana).

\textsuperscript{143} See generally Yastrow, supra note 4 (highlighting in states’ marijuana laws who is protected and how).

\textsuperscript{144} See Robinson, Berke & Gould, supra note 2.

\textsuperscript{145} Id.

\textsuperscript{146} Nevada’s marijuana statute states that employers need to attempt to provide reasonable accommodation for employees’ medicinal marijuana use. The statute never mentions employees who use marijuana for recreational purposes (\textsc{Nev. Rev. Stat. Ann.} § 453A.800).
challenged their termination with thoughtful and excellent employment arguments, the courts favor the employer, basing their holdings on federal preemption and state statutes that excluded or were silent on employment. Employees who use marijuana are left with two options: legalize marijuana at the federal level or have states provide employment protection. While the former could be a possibility in the future, some states have tried to deal with this employment issue now by adding employment protection to their laws. However, while the employment protection for medicinal marijuana users looks good on paper, in practice, both employees and employers run into problems. There are four major statutory issues in these ten states: the difference between status as a cardholder and actually testing positive for marijuana, the adequacy of urine drug tests, whether accommodations need to be given to medicinal marijuana users, and if so, what kind, and the lack of protection for recreational marijuana users. As a result, employees who use medicinal marijuana do not have as much employment protection as it seems, and employers are unsure how to maintain a drug-free workplace with some employees who can use a federally illegal drug.

If and until the federal government legalizes medicinal and/or recreational marijuana, there are some measures states could take to ensure more employment protection for employees who legally use marijuana. First, states would need to establish a THC level that would clearly deem one legally high, similar to the BAC level for alcohol consumption. This would also require employers, in states where marijuana is legal, to get the appropriate drug tests where such a level could be determined. Second, states would need to clear up their marijuana laws. States could clarify their laws by outlawing discrimination based on one’s status as a cardholder and one’s failed drug test that is attributed to marijuana use, as long as the THC level was not above the legal limit and the employee was not high on the job. Although such measures would only protect medicinal marijuana users and not recreational users, at least this protection is clearer as to who is protected and how such employees would be protected.

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