

Emerging Issues With Marijuana Legalization

Faye Caldwell

Email: fcaldwell@caldwelleverson.com



2777 Allen Parkway, Suite 950
Houston, Texas 77019
tel: (713) 654-3000
fax: (713) 654-3002
www.caldwelleverson.com

Disclaimer: no Legal advice or attorney-client relationship

This presentation has been prepared by Caldwell Everson, PLLC for informational purposes only. The information presented does not constitute legal advice and is not to be acted on as such. This information is not intended to create, and receipt of it does not establish an attorney-client relationship. By participating in this presentation you are not and do not become a client of Caldwell Everson PLLC. Any information contained herein is not intended as a substitute for legal counsel. You should not rely upon any information contained in this presentation without seeking legal advice from an attorney of your choice and who practices law in your state.

As of November 29, 2018:

33 states + D.C. + 2 U.S. territories (Guam, PR) have passed Comprehensive “Medical marijuana” Laws

Laws vary widely

13 other states have passed low THC/High CBD laws

All passed since 2014 in mostly southern states after CNN documentary
Some states with comprehensive medical marijuana laws also have CBD laws

10 states + D.C. + 1 U.S. territory (CNMI) have passed recreational marijuana laws

All except US territory also had comprehensive medical marijuana laws

4 states prohibit marijuana for all purposes

(Idaho, Kansas, Nebraska, South Dakota)



State Medical Marijuana Laws

33 states + D.C.

Alaska (1998)

Arizona (2010)

Arkansas (2016)

California (1996)

Colorado (2000)

Connecticut (2012)

Delaware (2011)

Florida (2016)

Hawaii (2000)

Illinois (2013)

Louisiana (2015)

Maine (1999)

Maryland (2014)

Massachusetts (2012)

Michigan (2008)

Minnesota (2014)

Missouri (2018)

Montana (2004)

Nevada (2000)

New Hampshire (2013)

New Jersey (2010)

New Mexico (2007)

New York (2014)

North Dakota (2016)

Ohio (2016)

Oklahoma (2018)

Oregon (1998)

Pennsylvania (2016)

Rhode Island (2006)

Utah (2018)

Vermont (2004)

Washington (1998)

West Virginia (2017)

Washington, D.C. (2010)



State Recreational Marijuana Laws

10 states + D.C.

Alaska (2014)

California (2016)

Colorado (2012)

Maine (2016)

Massachusetts (2016)

Michigan (2018)

Nevada (2016)

Oregon (2014)

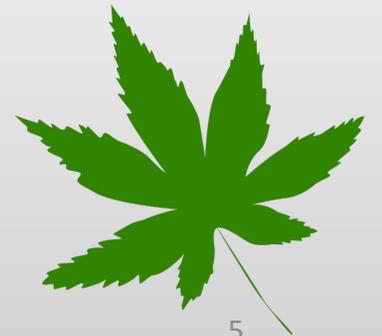
Vermont (2018)

Washington (2012)

Washington, D.C. (2014)

All states also have comprehensive medical marijuana laws

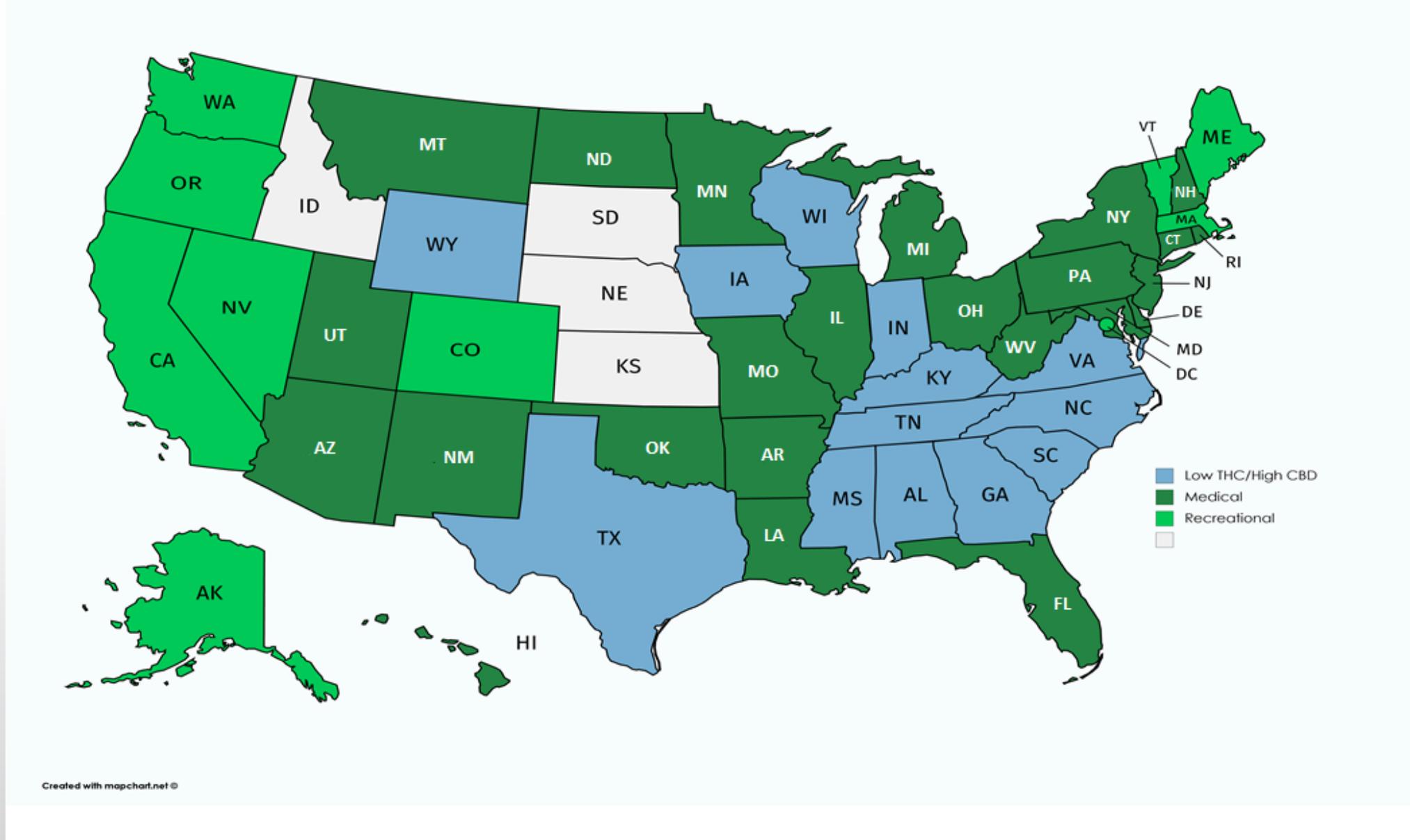
Vermont: 1st state to pass by legislature; only state that does not allow sales (only home cultivation)



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
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 lea 98% CBD and not more than .90% THC by volume
Tennessee (2014)	≤ .9% THC
Texas (2015)	≤ .5% THC by weight and no less than 10% by weight CBD
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

Recreational, Medical, and Low THC/High CBD Marijuana Laws



2018 Marijuana Legislation

Medical Marijuana

Passed: 3 states (by voter initiatives)

- Oklahoma (passed 6/26/18)
- Missouri (passed 11/6/18)
- Utah (passed 11/6/18)
 - Compromise legislation in progress
 - Legislature also passed for terminally ill

Introduced: in at least 12 states

Recreational Marijuana

Passed: 2 states, 1 U.S. territory, Canada

- Vermont (passed 01/2018)
 - 1st state to pass by legislature
- Michigan (voter initiative 11/6/18)
- Northern Mariana Islands
- Canada (sales began Oct. 2018)

Introduced: in at least 20 states

- New Jersey, New York

Federal Marijuana Law & Policy

Overview



- Marijuana is still illegal under federal law (Schedule I drug)
 - 2016 DEA denied petition to reschedule; agreed to increase access for research
 - Aug. 2018: DEA announced proposal to significantly increase amount permitted for research in 2019
- Medical Marijuana is NOT 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 (Epidiolex) for 2 types of severe childhood epilepsy (< .1% THC)

- Sept. 2018: DEA reclassified as Schedule 5 drug

Federal Marijuana Law & Policy

Jan. 2017: new administration

Feb. 2017: creation of 1st Congressional Cannabis Caucus

Attorney General Sessions anti-marijuana policy

- Jan. 4, 2018: Sessions Memo- rescinded Cole Memo (anti-enforcement policy)

Sept. 28, 2018: Rohrabacher-Blumenauer renewed through Dec. 7, 2018

- 1st time approved as amendment rather than as appropriations rider

Nov. 7, 2018: Sessions resigns

More than a dozen bills introduced regarding marijuana

Federal Marijuana Law & Policy

Examples of Proposed Legislation

- 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

Anti-discrimination provisions;
Positive drug test language

Providing other protections

E.g., schools, custody, housing,
medical care

Program expansion:
increasing access and
easing restrictions

Qualifying Conditions

- Total Physician based recommendations
- Adding PTSD, chronic pain, Autism, Tourette's, alternative to opioid use and/or abuse

Physician/Provider requirements

Other program requirements

State Recreational Marijuana Laws

Overview

All states with recreational cannabis laws also have comprehensive medical marijuana laws

- Requirements different (*e.g.*, possession limits, potency, taxes, etc.)
- **Vermont:** only state passed by legislature; sales not permitted

Impairment/driving under the influence

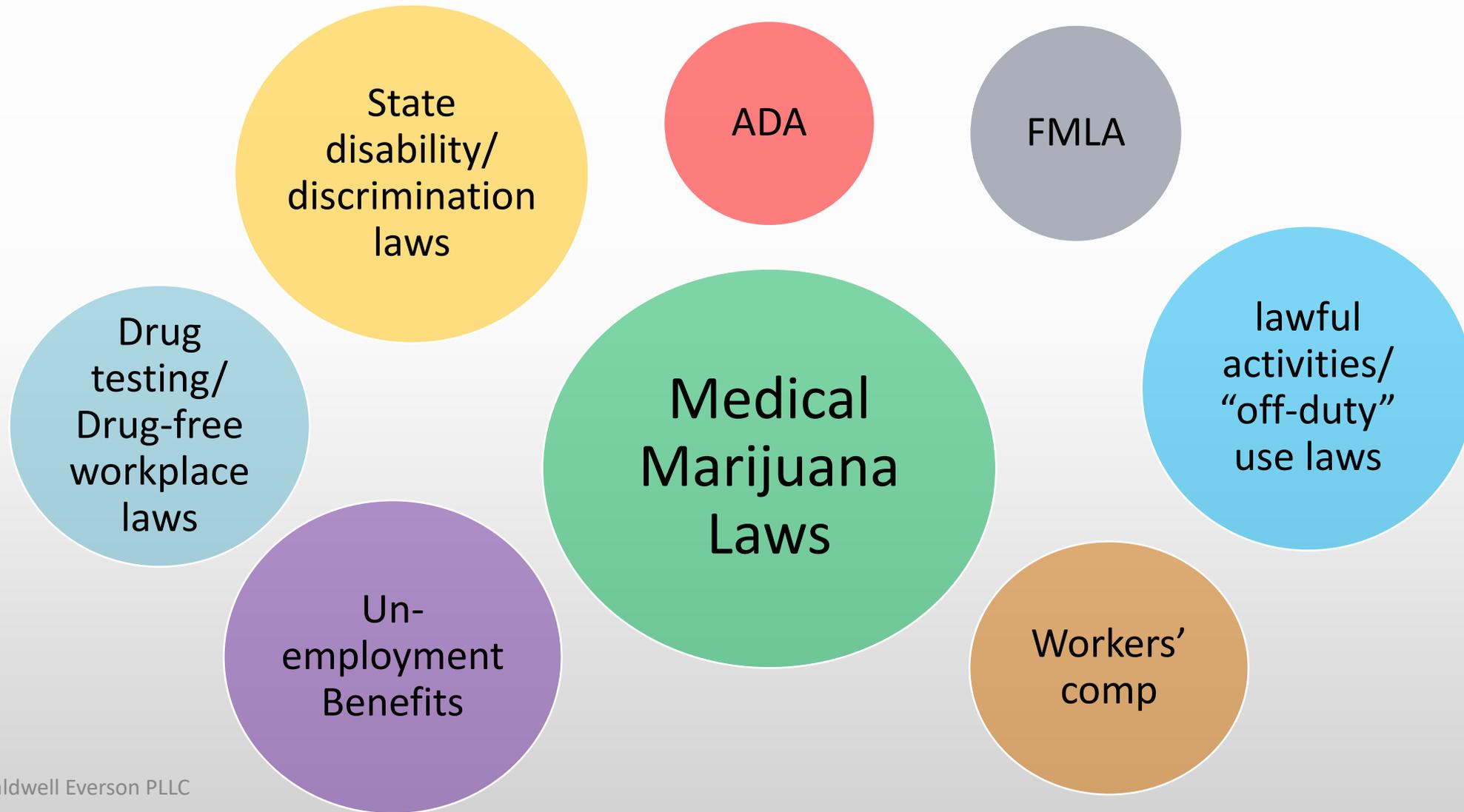
- Most states prohibit, but no guidance
- Some states have “per se” limits of THC in blood; no consensus on limits

Current trend is explicitly providing NO employment protections

- 1 state may provide employment protections for off-duty use ([Maine](#))

Medical Marijuana Laws

Employment Considerations



Employment Protections

Generally 3 Categories



1

Explicit
statutory
employment
protections
(13 States)

- Newer laws (10 since 2010) have anti-discrimination provisions
- Laws vary and extent of protections not entirely clear

2

No
employment
protections
(7 States)

- Laws explicit and/or silent/vague and state supreme court has found no protection
- Not insulated from all action and current trend is to add protection

3

Unclear OR
possible
protections
under other
state laws
(13 states + D.C.)

- Laws silent/vague and no state supreme court decision or court has found possible protection under other state law (*i.e.*, disability discrimination law)
- Some states have other case law or state issued guidance

Employment Protections

Explicit Protections

13 states; language and degree of protection varies

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)

Positive Drug Test Language

- 4 states have positive drug test language (*e.g.*, employer may not discriminate based upon a “patient’s positive drug test for marijuana components or metabolites”)
 - **AZ, DE, MN, OK**
- 2018 Proposed legislation to add (**NY, RI**)

Disability

- Some states treat as disability **NV, NY**

Safety-Sensitive Positions

- 2 states include safety-sensitive positions that may not be performed with specified amount of active THC in blood; limits vary
 - **PA:** 10 ng/mL
 - **WV:** 3 ng/mL

Definition of Employer

- Most states do not define employer, but some do **AR, CT**

Exceptions

- Most laws contain exceptions (*e.g.*, not required to accommodate use at workplace, working under influence)

Employment Protections

Explicitly NO Protections

7 States; language varies

California (1996)
Colorado (2000)
Florida (2016)
Montana (2004)
Ohio (2016)
Oregon (1998)
Washington (1998)

State Supreme Court Decisions

- 5 states' supreme courts have found no duty to accommodate off-duty medical marijuana use (laws were silent/vague on off-duty use)
 - **CA, CO, MT, OR, WA**
- Employer not insulated from actions; still may be challenged in court (Fed. Cases in **CA, MT, WA**)

Statute

- 2 states passed in 2016 appear to provide explicitly no employment protections; no court decisions yet
 - **FL, OH**
- pending case in **FL**
- **OH** has strongest language and guidance

Legislation

- Even in these states, proposed legislation seeking to add explicit employment protections **CA, OR, WA**

Employment Protections

Unclear/Possible protections under other state laws

13 States + D.C.; do not affirmatively address employment/vague

Alaska (1998)
Hawaii (2000)
Louisiana (2015)
Maryland (2014)
Massachusetts (2012)
Michigan (2008)
Missouri (2018)
New Hampshire (2013)
New Jersey (2010)
New Mexico (2007)
North Dakota (2016)
Utah (2018)
Vermont (2004)
Washington, D.C. (2010)

State Supreme Court decision

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

Other Court Decisions

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

State Issued Guidance

- Some states have other state issued guidance documents **NJ, VT**

Pending Lawsuits

- Pending lawsuits in at least 3 states **MA, NJ, NM**

2018 legislation

- Proposed legislation to add explicit protections **NJ, MD, HI**
- 1 state has established a working group to consider employment protections **HI**

Employment Protections

2017-2018 Proposed Legislation

Proposed legislation to have/add explicit employment protections

States with proposed medical marijuana legislation

- *E.g.*, **IN, KY, WI**

Amendments to existing marijuana and/or discrimination laws

- States with **NO** employment protections (*E.g.*, **CA, OR, WA**)
- States with unclear protections (*E.g.*, **HI, MD, MA, NJ**)
- States with explicit protections seeking to add positive drug test language (*E.g.*, **RI, NY**)

Employment Protections

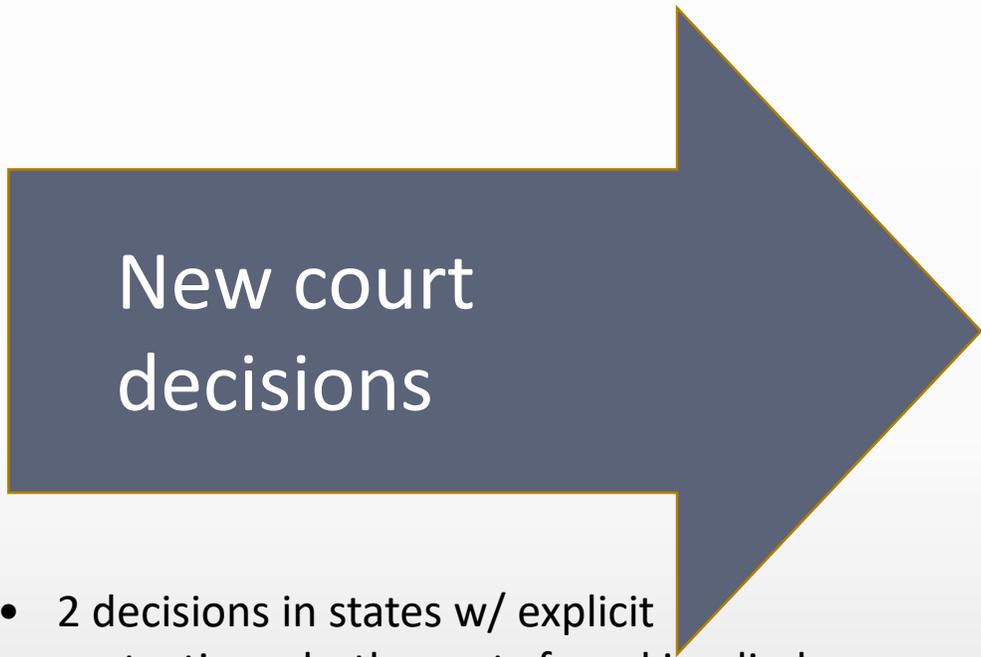
Court Decisions



Courts found no duty to accommodate medical marijuana

- Decisions were based on state laws that did not contain explicit protections Laws
- No court decisions construing explicit protections

2
0
1
7



New court decisions

- 2 decisions in states w/ explicit protections; both courts found implied rights of action; rejected preemption
- 2 court decisions in states with unclear protections; courts reached opposite results
- Other decisions

Employment Protections

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 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*, 1009 Mont. LEXIS 120 (Mont. 2009) (unpub)**

(holding MT's medical marijuana act didn't provide 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 v. BOLI*, 230 P.3d 518 (Or. 2010)**

(holding federal law preempts OR 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. Teletch*, 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")

Employment Protections

2017-2018 Court Decisions

Connecticut

***Noffsinger v. SSC Niantic Op. Co.*, No. 3:16-cv-01938 (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.*, PC-2014-5680 (R.I. Super. May 2017)**

Superior court 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

***Barbuto 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

Employment Protections

2017-2018 Court Decisions

New Jersey

Cotto v. Ardagh Glass Packing, Inc., No. 18-1037 (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., No. CV 16-86-H-SHE (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

9th Circuit affirmed dismissal, 2018 U.S. App. LEXIS 32696 (9th Cir. Nov. 19, 2018)

Employment Protections

Court Decisions

Courts have interpreted similar provisions differently

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

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

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

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

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

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

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

State law pre-empted, no
duty to accommodate
**(Carlson- D. MT. 2017, aff'd
on other grounds 2018 U.S.
App. LEXIS 32696 (9th Cir.
Nov. 9, 2016))***

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

Employment Protections

Pending Lawsuits

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



Medical Marijuana Program Expansion

New Jersey

- March 2018: executive order to expand access
 - Since expansion, ~100 new patients added/day
- Proposed reforms
 - Eliminates physician registry requirements
 - Removes limits on amounts dispensed
 - Expands access to forms

New York

- Aug. 17, 2018: doubled licensees; approved new products
- Expanded licensed providers
- Expanded qualifying conditions

Pennsylvania

- April 2018
- expanded to include plant material (smoking illegal)
- Expanded conditions
- Program for med schools to be involved in research
- Thomas Jefferson University launching 1st university based, graduate-level certificate programs in medical marijuana education

Medical Marijuana Qualifying Conditions

Total Physician Based Recommendations

States seeking to eliminate specified list of conditions

- 2018 Passed legislation
 - Maine
 - Missouri (catchall)
 - Oklahoma
 - Virginia (CBD law)
- 2018 Proposed legislation
 - New Jersey
 - New York
 - Pennsylvania

Expansion of Qualifying Conditions

Connecticut

- Added 8 conditions for adults

Louisiana

- Added at least 5 conditions

Michigan

- Added 11 conditions (considered 22)

New Jersey

- Added 6 conditions

Pennsylvania

- Added 4 conditions

Medical Marijuana Qualifying Conditions

2017-2018 Common Conditions

Chronic, intractable pain

GA (CBD), IL, LA, MI, MO, NH, NY,
CT*, NJ*

PTSD

CO, IL, LA, MO*, MN, NH, NJ,
NY, UT, VT

Migraines

CT, NJ

Autism/Autism spectrum disorder

LA, MI, MN, UT

Arthritis

CT, HI, MI

Anxiety

NJ

Tourette's

MI, MO, NJ

Obstructive sleep apnea

MN

Lupus

HI

Medical Marijuana

Qualifying Conditions

Included as alternative/substitute for prescription opioids and/or for opioid abuse and addiction treatment

- **2018 Passed legislation**

- Illinois
- Pennsylvania
- New Jersey
- New York
- Utah*

- **2018 Proposed**

- Colorado

- ***Failed/vetoed in:***

- Connecticut
- Hawaii (opioid addiction)
- Maine
- Maryland
- New Mexico
- New Hampshire (2017)

Medical Marijuana

Increasing access

Many states are revising provider requirements to expand patient access to medical marijuana

Expanding

- **who may recommend/certify**
 - *E.g., HI:* APRN
 - *E.g., NY:* Nurse practitioners and physician assistants
- **who may administer**
 - *E.g., MA:* Nurse practitioners, treating elderly in nursing homes, hospices

Easing

- **physician requirements** (*i.e.*, physician opt-out from registry)
- *E.g., NJ, PA*

Medical Marijuana

Increasing access

Other ways states are increasing access

- Where, who, and how to obtain
 - *E.g., NH:* “support person” may now obtain from dispensary
 - *E.g., NY:* Increases in # of licenses
- Reducing fees
- Increasing length of certifications
- Telehealth

Example: Hawaii 2018 amendments to medical marijuana law

- Allows 3-year certifications (instead of annual)
- Permits Telehealth after initial in-person visit
- Recognizes out-of-state reciprocity
- Increases THC limit in certain manufactured marijuana products

Impairment and the Law

Some state laws (marijuana/DUI laws) relate to impairment for marijuana

Some states have “per se” limits; no consensus on limit

- **5 ng/mL THC in blood (CO, MT, WA)**
- **2 ng/mL THC in blood (OH, NV)**
- **1 ng/mL THC in blood (PA)**

Recent legislation contains per se limits for certain safety sensitive positions

- **10 ng/mL THC in blood (PA)**
- **3 ng/mL THC in blood (WV)**

Faye Caldwell

Caldwell Everson PLLC

Email: fcaldwell@caldwelleverson.com

Phone: (713) 654-3000

Website: <http://caldwelleverson.com/> 

