

Emerging Issues With Marijuana Legalization

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As of June 5, 2019:

**33 states + D.C. + 3 U.S. territories have passed
Comprehensive “Medical marijuana” Laws**

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

**1 state has only industrial hemp
law**

(Nebraska)

**11 states + D.C. + 2 U.S. territories (CNMI &
Guam) have passed recreational marijuana**

All except CNMI also had comprehensive medical marijuana laws



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

11 states + D.C.

Alaska (2014)

California (2016)

Colorado (2012)

Illinois (2019)*

Maine (2016)

Massachusetts (2016)

Michigan (2018)

Nevada (2016)

Oregon (2014)

Vermont (2018)

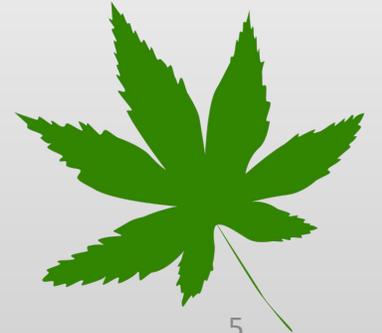
Washington (2012)

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)

*Illinois- waiting Governor's signature



Low THC/High CBD Laws

State (Year)	THC/CBD levels allowed
Alabama (2014)	$\leq 3\%$ THC
Georgia (2015)	$\leq 5\%$ by weight of THC
Indiana (2017)	No more than .3% THC by weight
Iowa (2014)	$\leq 3\%$ THC
Kansas (2019)	THC $\leq 5\%$ of the CBD concentration
Kentucky (2014)	No definition
Mississippi (2014)	20:1 CBD:THC and ≥ 50 mg/mL CBD and not more than 2.5 mg/mL THC
North Carolina (2014)	$< .9\%$ THC by weight, at least 5% CBD by weight, no other psychoactive substance
South Carolina (2014)	At least 98% CBD and not more than .90% THC by volume
Tennessee (2014)	$< .9\%$ THC or $< .6\%$ THC and part of clinical research study
Texas (2015)	$\leq .5\%$ THC by weight and not 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)	$\leq .3\%$ THC and at least 5% CBD by weight

2018-2019 Marijuana Legislation

Medical Marijuana

Passed: 3 states, 1 U.S. territory

- Oklahoma (passed 6/26/18)
- Missouri (passed 11/6/18)
- Utah (passed 11/6/18)
 - Legislature also passed for terminally ill
- U.S. Virgin Islands (Jan. 2019)

Introduced: in at least 12 states

Recreational Marijuana

Passed: 3 states, 2 U.S. territories, Canada

- Vermont (passed 01/2018)
- Michigan (passed 11/6/18)
- Illinois (passed June 2019)
- Northern Mariana Islands/Guam
- Canada (sales began Oct. 2018)

Introduced: in at least 20 states

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 and Trends

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

- Requirements different (*e.g.*, possession limits, potency, taxes, etc.)

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

Employment Protections

- 1 state has explicit employment protections (**IL**) and 2 states may provide employment protections for off-duty use (**ME, NV**)

Recreational Marijuana Laws

2019 Passed Legislation: Illinois

- HB 1438: Passed May 31, 2019; awaiting Governor's signature
 - Provides employment protections for off-duty use
 - Includes signs of impairment
 - Provides definitions of “workplace” and “on-call”

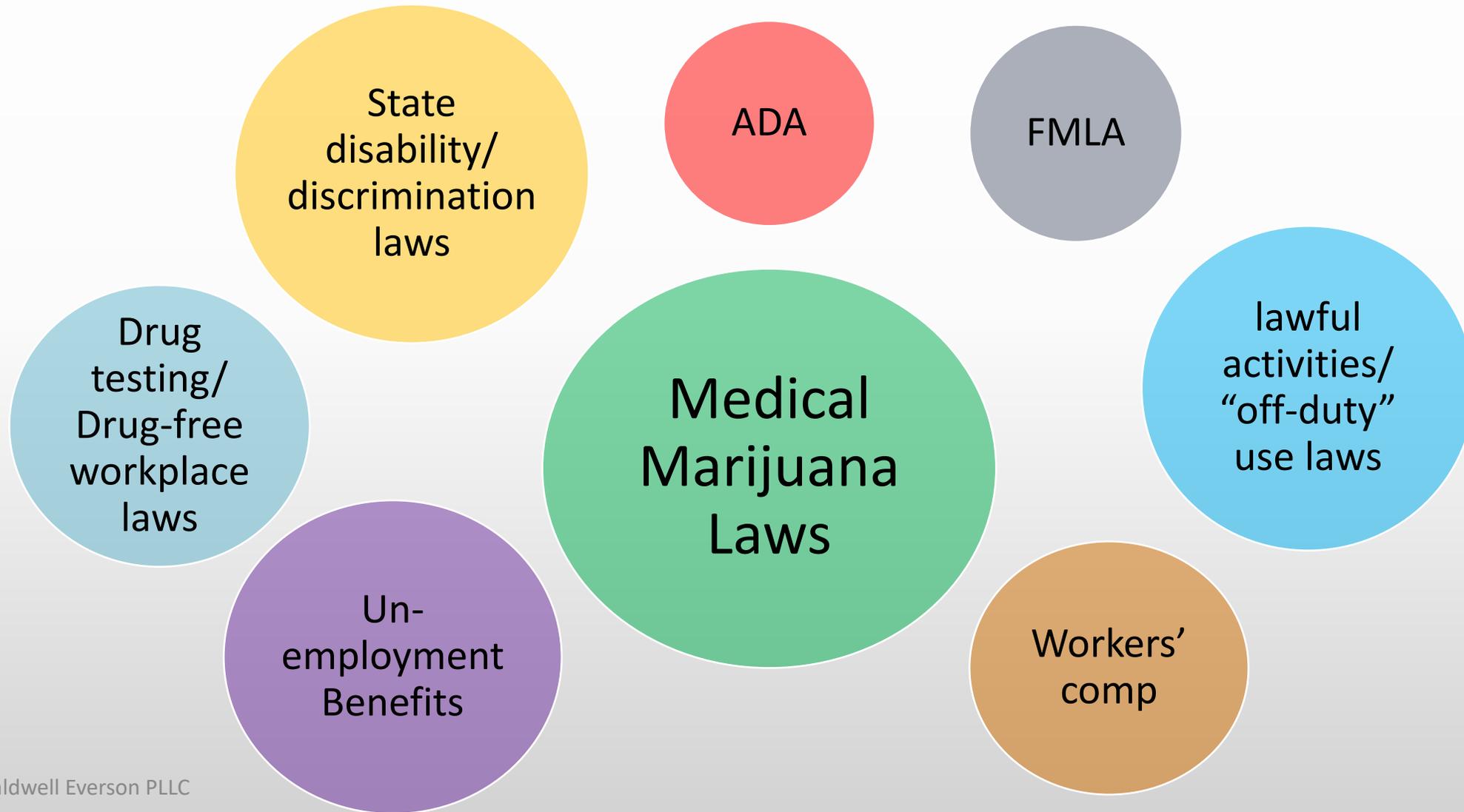
Recreational Marijuana Laws

2019 Passed Legislation: Nevada

- AB 132- revised employment practices; passed, awaiting Governor's signature
 - Makes it unlawful employment practice for employer to fail or refuse to hire prospective employee because they submitted to a screening test and results indicate the presence of marijuana
 - Exceptions- does not apply to:
 - Firefighters; Emergency medical technicians;
 - positions that require operation of motor vehicle and for which federal or state law requires the employee to submit to screening tests; or
 - Positions that "in the determination of the employer, could adversely affect the safety of others"
 - If within 30 days, applicant may submit independent test
- Nevada also has off-duty use statute (NRS § 613.333)

Medical Marijuana Laws

Employment Considerations



Employment Protections

Generally 3 Categories for Medical Marijuana



1

States
Providing
Employment
Protections
(15 States)

--Newer laws (10 since 2010)
have anti-discrimination
provisions

--Laws vary and extent of
protections not entirely clear

2

States that have
made positive
statements that
NO employment
protections exist
(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
(11 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 14

Employment Protections

States Providing Employment Protections

15 states; language and degree of protection varies

Arizona (2010)
Arkansas (2016)
Connecticut (2012)
Delaware (2011)
Illinois (2013)
Maine (1999)
Massachusetts (2012)
Minnesota (2014)
Nevada (2000)
New Mexico (2007)
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**

State Supreme Court Decision

- 1 state supreme court has found possible protections under other state law **MA**

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)

Medical Marijuana Laws

Explicit Employment Protections-Oklahoma

- **SQ 788 (effective 7/26/2018)**
 - Explicit employment protections, including positive drug test
 - “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.”
- **Unity Bill (passed/signed Mar. 2019; effective Aug. 2019)**
 - Added exception for safety-sensitive positions
 - Provides non-exhaustive list of safety-sensitive positions
 - “Positive test for marijuana components or metabolites” means result at or above DOT cut-off levels or OK law regarding being under the influence, whichever is lower

Employment Protections

2019 Passed Legislation

- New Mexico
 - April 2019: Amended statute to provide employment protections
 - Makes it unlawful to take adverse employment action against an applicant or employee based on conduct allowed under medical marijuana law
 - Does not restrict employer's ability to prohibit/take adverse action for use of or being impaired by marijuana on premises or during hours of employment
 - Does not apply to employees employed in safety sensitive positions
 - "Safety-sensitive position" means "a position in which performance by a person under the influence of drugs or alcohol would constitute an immediate or direct threat of injury or death to that person or another" (section 3, § 26-2B-3(7))

Employment Protections

2019 Passed Legislation

- New York City Council: INT No. 1445-2019 INT 1445- Prohibition of drug testing for pre-employment hiring procedures
 - Effective May 10, 2020
 - Amends the administrative code of the city of New York
 - “Employment; pre-employment drug testing policy. (a) Prohibition. Except as otherwise provided by law, it shall be an unlawful discriminatory practice for an employer, labor organization, employment agency, or agent thereof to require a prospective employee to submit to testing for the presence of any tetrahydrocannabinols or marijuana in such prospective employee’s system as a condition of employment.”
 - Includes exceptions for persons applying to work in specified positions
 - Examples: Police officers or peace officers, any position requiring commercial driver’s license, any position requiring supervision or care of children

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 (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 **MT, OR, WA**

Employment Protections

Unclear/Possible protections under other state laws

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

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

State Court Decisions

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

Other Court Decisions

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

State Issued Guidance

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

2019 legislation

- Proposed legislation to add explicit protections **HI, MD, NJ**

Employment Protections

2018-2019 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.*, **OR, WA**)
- States with unclear protections (*E.g.*, **HI, MD, NJ**)
- States with 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

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Courts finding duty
to accommodate

--Decisions in states w/ explicit protections; courts find implied rights of action; reject preemption arguments

--Court decisions in states with unclear protections; courts reach different 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. 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")

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

2018-2019 Court Decisions

Arizona

Whitmire v. Wal-Mart Stores,
2019 U.S. Dist. LEXIS 20049
(D. Ariz. Feb. 7, 2019)

Federal court found anti-discrimination provision contained implied private right of action and rejected defense under drug testing statute because absent other evidence of impairment, need expert testimony to establish levels of metabolites in drug test sufficient to cause impairment

Delaware

Chance v. Kraft Heinz Foods Co.,
2018 Del. Super. LEXIS 1773 (DE Super. Ct. Dec. 17, 2018)

Superior court held anti-discrimination provision provides implied private right of action and rejected preemption argument; dismissed claims for disability discrimination under federal and state law

New Jersey

Wild v. Carriage Funeral Holdings, Inc.,
Docket No. A-3072-17T3 (NJ App. Mar. 27, 2019)

New Jersey Appellate court held although medical marijuana act didn't provide explicit/implicit cause of action, employee may assert disability discrimination claim under NJ'S Law Against Discrimination for failing to accommodate use of medical marijuana

Employment Protections

2018-2019 Court Decisions

New Jersey

***Cotto v. Ardagh Glass Packing*, No. 18-1037, 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 the plain language of MT's Medical Marijuana Act barred employee's claims for wrongful discharge and for employment discrimination under Montana's Wrongful Discharge from Employment Act and Human Rights Act

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

Michigan

***Eplee v. City of Lansing*, No. CV 16-86-H-SHE (Mich. App. Feb. 19, 2019)**

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

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

Arizona

Connecticut

Delaware

Florida

New Jersey



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)
- 2019 Proposed legislation
 - New Jersey
 - New York
 - Pennsylvania
 - New Hampshire
 - New Mexico

Expansion of Qualifying Conditions

2019 Proposed legislation

- Arkansas
 - Proposed more than 40 conditions
- Hawaii
 - Severe autism, anxiety, and opioid dependence and addiction
- Montana
 - Anxiety disorders
- New Hampshire
 - To add anxiety, insomnia, Lyme disease
- North Dakota
 - Proposed 13 conditions

Medical Marijuana Qualifying Conditions

2017-2019 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**

CO, 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

- **2018-2019 Passed legislation**

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

- **2019 Proposed**

- Hawaii
- Maryland
- New Hampshire
- New Mexico
- North Dakota
- Ohio
- Rhode Island

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*)

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