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Marijuana Use by Employees: Drug-Free Policies And The Changing Legal Landscape

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**MARIJUANA USE BY EMPLOYEES: DRUG-FREE
POLICIES AND THE CHANGING
LEGAL LANDSCAPE**

*Kerry Cork**

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INTRODUCTION

As the number of U.S. states legalizing recreational and medical marijuana¹ continues to increase, local communities in these jurisdictions are struggling with many complex regulatory issues, including safe use in different environments, such as the workplace.² Because the marijuana industry is hyper-localized and urban communities are typically more populous and engage more of the workforce than suburban or rural communities, evolving laws and practices regarding marijuana and the workplace have a direct impact on urban employment.³ This Essay explores how communities and businesses in different states have adapted their employment laws and policies in response to the shifting cultural acceptance of medical marijuana and — more recently — recreational marijuana use. The first part begins by describing general federal and state legislation that regulates drug use in the workforce, including laws that protect the rights of both employers and employees. The second part then examines several workplace marijuana policies adopted by states, localities, and employers, and representative judicial decisions, many of which reflect a growing tolerance toward marijuana use by both job applicants and employees.

I. BACKGROUND

To date, 33 states, the District of Columbia, and four U.S. territories have legalized marijuana for medical use, and 11 states, D.C., and two U.S. territories have legalized it for adult recreational use.⁴ At the time of this printing, marijuana remains classified as a Schedule 1 controlled substance under federal law, which means it has no currently accepted medical use in the United States and has a high potential for abuse.⁵ Although scientific

1. Throughout this Essay, the term “marijuana” is used instead of “cannabis” and “recreational marijuana” rather than “adult use” or “retail marijuana.”

2. See, e.g., John Carnevale et al., *A Practical Framework for Regulating For-Profit Recreational Marijuana in US States: Lessons from Colorado and Washington*, 42 INT’L J. DRUG POL’Y 71 (2017) (identifying many regulatory obstacles faced by jurisdictions considering the legalization of marijuana).

3. See INT’L CITY/CNTY. MGMT. ASS’N, LOCAL IMPACTS OF COMMERCIAL CANNABIS (2018), https://icma.org/sites/default/files/Local%20Impacts%20of%20Commercial%20Cannabis%20Final%20Report_0.pdf [<https://perma.cc/UXE5-JA2F>].

4. See Michael Hartman, *Cannabis Overview: Legalization*, NAT’L CONF. ST. LEGISALUTRES (July 6, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> [perma.cc/PK6V-Z5Z7]; see also *State Policy*, MARIJUANA POL’Y PROJECT, <https://www.mpp.org/states> [<https://perma.cc/AL8L-6735>] (last visited Feb. 4, 2022).

5. *Drug Scheduling*, U.S. DRUG ENF’T ADMIN., <https://www.dea.gov/drug-information/drug-scheduling> [<https://perma.cc/QS6J-ZTFW>] (last visited Jan. 26, 2022).

studies on the health risks of marijuana consumption are limited, research has shown that the combustion or vaporization of marijuana produces carcinogens, irritants, and toxins, including many of the fine inhalable particulates and chemicals found in tobacco smoke.⁶ These chemicals can cause respiratory symptoms, such as coughing, phlegm, and wheezing, and can exacerbate health problems, especially for people with respiratory conditions, such as asthma, bronchitis, and chronic obstructive pulmonary disease.⁷ Also, as discussed later and with particular import for the workforce, marijuana use can impair fine motor skills and critical thinking, particularly in the operation of motor vehicles and machinery.⁸ Nevertheless, marijuana remains the most commonly used addictive drug in the United States after tobacco and alcohol.⁹

All states — including those that legalize recreational marijuana — prohibit the smoking of marijuana in public areas, such as restaurants, bars, and non-hospitality workplaces.¹⁰ Often, smoke-free laws contain provisions that define “tobacco product” to include e-cigarettes and similar devices and also define “smoking” to include the vaping of marijuana.¹¹ At

6. See, e.g., Hannah Holitzki et al., *Health Effects of Exposure to Second- and Third-Hand Cannabis Smoke: A Systematic Review*, 5 CANADIAN MED. ASS’N J. OPEN E814 (2017).

7. See NAT’L INST. DRUG ABUSE, WHAT ARE THE EFFECTS OF SECONDHAND EXPOSURE TO MARIJUANA SMOKE? (2020), <https://nida.nih.gov/publications/research-reports/marijuana/what-are-effects-secondhand-exposure-to-marijuana-smoke> [<https://perma.cc/HRS5-FQCR>]. Also, secondhand smoke exposure and particulate inhalation increases the risk of coronary heart disease and stroke. See, e.g., Joaquin Barnoya & Stanton Glantz, *Cardiovascular Effects of Secondhand Smoke: Nearly as Large as Smoking*, 111 CIRCULATION 2684 (2005); Angela Malek et al., *Secondhand Smoke Exposure and Stroke: The Reasons for Geographic and Racial Differences in Stroke (REGARDS) Study*, 49 AM J. PREVENTATIVE MED. e89 (2015).

8. See NAT’L INST. ON DRUG ABUSE, MARIJUANA RESEARCH REPORT: DOES MARIJUANA USE IMPAIR DRIVING?, <https://www.drugabuse.gov/publications/research-reports/marijuana/does-marijuana-use-affect-driving> [<https://perma.cc/FA84-WWJB>] (last visited Oct. 29, 2021).

9. See SUBSTANCE ABUSE CTR. FOR BEHAV. HEALTH STAT. & QUALITY, RESULTS FROM THE 2018 NATIONAL SURVEY ON DRUG USE AND HEALTH: DETAILED TABLES (2019), <https://www.samhsa.gov/data/report/2018-nsduh-detailed-tables> [<https://perma.cc/PR46-3TTU>].

10. See *Map of Marijuana Legality by State*, DISA GLOB. SOLS., <https://disa.com/map-of-marijuana-legality-by-state> [<https://perma.cc/972T-TY8K>] (last visited Feb. 21, 2022) (containing links to all state laws legalizing marijuana).

11. See, for example, MINN. STAT. § 144.413(4) (2022), where “smoking is defined as “inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, pipe, or any other lighted or heated product containing, made, or derived from nicotine, tobacco, marijuana, or other plant, whether natural or synthetic, that is intended for inhalation. Smoking includes carrying or using an activated electronic delivery device, as defined in section 609.685.” (emphasis added). See generally *U.S. E-Cigarette Regulation — 50-State Review*, PUBLIC HEALTH L. CTR. (Dec. 15, 2021), <https://www.publichealthlawcenter.org/resources/us-e-cigarette-regulations-50-state-review> [<https://perma.cc/B2NE-7XRZ>].

the same time, the growing popularity of marijuana use has led at least six states and close to 60 localities to adopt exemptions from clean indoor air laws that permit the use of marijuana in indoor public settings such as licensed marijuana dispensaries, cannabis lounges, cafes, clubs, coffeehouses, “marijuana hospitality establishments,” and other “social consumption” venues.¹² Some jurisdictions also allow organizations to obtain temporary licenses or permits for events such as festivals, cannabis cooking and painting classes, and cannabis tasting tours.¹³ In addition to patrons, these establishments and venues all have employees, many of whom are likely to be exposed to marijuana smoke on the job.

However, retail and hospitality establishments are not the only work settings where marijuana use has become an issue. The treatment of marijuana in the workplace has become an ongoing concern for employers across the United States.

II. EMPLOYMENT DRUG LAWS AND POLICIES

As jurisdictions continue to loosen restrictions on where marijuana can be consumed, laws and workplace policies regarding marijuana use by employees and job applicants have evolved.

A. Federal Level

Because marijuana remains an illegal drug under federal law, federal job applicants, employees, and contractors have traditionally been prohibited from using marijuana on and off the job.¹⁴ The federal workforce contains slightly more than 9 million workers — almost 6% of the total U.S. workforce of 156.92 million.¹⁵ Federal employees include uniformed military service members, postal workers, legislative and judicial staff, and employees at agencies, such as the U.S. Department of Transportation and the U.S. Department of Labor.¹⁶ The workforce also includes civilian employees that work in every state, providing services related to healthcare; education; housing; disaster management; securing the nation’s

12. See Thomas L. Roterling, Lauren K. Lempert & Stanton A. Glantz, *Emerging Indoor Air Laws for Onsite Cannabis Consumption Businesses in the U.S.*, 61 AM. J. PREVENTATIVE MED. 267, 267 (2021).

13. See Kerry Cork, *Recreational Marijuana, Tobacco, & the Shifting Prerogatives of Use*, 45 S. ILL. U. L.J. 45, 52 (2020).

14. See 41 U.S.C. §§ 8102(a), 8103(a).

15. See Fiona Hill, *Public Service and the Federal Government*, BROOKINGS INST. (May 27, 2020), <https://www.brookings.edu/policy2020/votervital/public-service-and-the-federal-government> [<https://perma.cc/WN9Q-FY95>].

16. See *id.*

borders; coastlines; and waterways; forecasting the weather; protecting and ensuring the nation's food supply; and maintaining national parks.¹⁷

1. Drug-Free Workplace Act

Under the 1988 federal Drug-Free Workplace Act, employers are required to make “a good faith effort . . . to maintain a drug-free workplace” and to prohibit employees from using controlled substances in the work environment.¹⁸ In 2015, the U.S. Office of Personnel Management (OPM) sent a memo to all federal agency heads reminding them that marijuana remained an illegal substance under federal law.¹⁹ The memo cited the 1986 Executive Order for a Drug-free Federal Workplace²⁰ and stated that (1) all federal employees must refrain from the use of marijuana, whether on or off duty; (2) marijuana use is contrary to the efficiency of federal services; and (3) those who use marijuana — or any drugs currently illegal under federal law — are unsuitable for federal employment.²¹

Over the following years, as social acceptance of marijuana has grown in the face of increased state legalization, some federal workplace drug policies have relaxed. For example, in February 2021, the OPM issued new guidance for federal agencies, stating that past use or possession of marijuana should not automatically disqualify federal job applicants and that federal agencies should find a nexus between the employee's possession or use of marijuana and its impact on the integrity or efficiency of the government.²²

17. *See id.*

18. 41 U.S.C. §§ 8102(a), 8103(a).

19. *See* Memorandum from Katherine Archuleta, Dir., U.S. Off. of Pers. Mgmt., to Heads of Exec. Dep'ts & Agencies (May 26, 2015), <https://www.chcoc.gov/content/federal-laws-and-policies-prohibiting-marijuana-use> [<https://perma.cc/Z8AM-F9FC>].

20. Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (Sept. 15, 1986), <https://www.archives.gov/federal-register/codification/executive-order/12564.html> [<https://perma.cc/TJC6-TGU5>].

21. *See* Memorandum from Katherine Archuleta, *supra* note 19.

22. Memorandum from Kathleen M. McGettigan, Acting Dir., U.S. Off. of Pers. Mgmt., to Heads of Exec. Dep'ts & Agencies (Feb. 2021), https://www.chcoc.gov/sites/default/files/Memo_Assessing%20Suitability%20on%20Basis%20of%20Marijuana%20Use_0.pdf [<https://perma.cc/Y3PG-AAZQ>]. Legislators considering federal legalization of marijuana wrestle with many regulatory issues, including current and past marijuana use by federal employees. For instance, a draft of a 2021 bill, the Cannabis Administration and Opportunity Act, proposes that federal agencies would be prohibited from using past or present cannabis use as a basis for denying or rescinding a security clearance. *See* SENATOR CORY BOOKER, SENATOR RON WYDEN & SENATOR CHUCK SCHUMER, CANNABIS ADMINISTRATION AND OPPORTUNITY ACT: DISCUSSION DRAFT (2021), <https://www.democratsenate.gov/imo/media/doc/CAOA%20Detailed%20Summary%20-.pdf> [<https://perma.cc/N3NJ-JRBL>]; *see also* Scott Bixby, Asawin Suebsaeng & Adam

The OPM stated that in determining the suitability or fitness of an applicant or employee who uses or used marijuana, the individual's conduct should be evaluated on a case-by-case basis by taking into account (1) the nature of the position for which the person is applying or in which the person is employed; (2) the nature and seriousness of the conduct; (3) the circumstances surrounding the conduct; (4) the recency of the conduct; (5) the person's age at the time of the conduct; (6) contributing societal conditions; and (7) the absence or presence of rehabilitation or efforts toward rehabilitation.²³ The OPM emphasized that employees struggling with substance abuse issues should seek counseling and rehabilitation, and that discipline is not required for employees who seek such services and refrain from using illegal drugs in the future.²⁴

In addition to federal employees and employers, many federal contractors and all federal grantees are required by law to establish and maintain a drug-free workplace policy.²⁵ Federal contract workers include clerical, custodial, and cafeteria staff for all government agencies and federal grant recipients include law enforcement, entities within state and local governments, educational institutions,²⁶ and research labs, as well as nonprofit organizations and small businesses.²⁷ Under the Drug-Free Workplace Law, the use, distribution, and possession of drugs are also prohibited on all federal contracting worksites.²⁸

Rawnsley, *Biden White House Sandbags Staffers, Sidelines Dozens for Pot Use*, DAILY BEAST (Mar. 9, 2021, 11:44 AM), <https://www.thedailybeast.com/biden-white-house-sandbags-staffers-sidelines-dozens-for-pot-use>. The OPM stated that its:

[S]uitability regulations regarding illegal drug use do not permit agencies to automatically find individuals unsuitable for federal service on the basis of marijuana use prior to appointment. Even where an individual has illegally used marijuana without evidence of substantial rehabilitation, agencies cannot find an individual unsuitable unless there is a nexus between the conduct and the "integrity or . . . efficiency of the service."

Memorandum from Kathleen M. McGettigan, *supra*, at 22.

23. See Memorandum from Kathleen M. McGettigan, *supra* note 22, at 2; see also 5 C.F.R. § 731.202 (2008).

24. See Memorandum from Kathleen M. McGettigan, *supra* note 22, at 2. See generally 41 U.S.C. § 8102.

25. 41 U.S.C. § 8102(a)(1)(B) (i.e., a drug-free workplace policy is required for any organization that receives a federal contract of \$100,000 or more and any organization receiving a federal grant of any size).

26. This also applies to several types of employers including teachers, principals, support staff, and other school employees, since federal dollars account for 8% to 10% of most school district operating budgets. See Laura Camera, *Teaching to the Drug Test*, U.S. NEWS & WORLD REP. (Feb. 8, 2019, 6:00 AM), <https://www.usnews.com/news/the-report/articles/2019-02-08/teachers-caught-in-the-crosshairs-of-marijuana-laws-and-school-drug-free-policies> [<https://perma.cc/E8VU-KVTY>].

27. See Hill, *supra* note 15, at 2.

28. See 41 U.S.C. § 8102(a)(1)(A).

Failure to make a “good faith effort” to comply with the requirements of the federal Drug-Free Workplace Act may result in various penalties, such as suspension or termination of contracts or grants and administrative fines.²⁹ Although some federal employers, contractors, and job positions require drug testing by regulation, the Drug-Free Workplace Act does not require drug testing.³⁰ Moreover, federal contractors are not prohibited from employing an individual who uses marijuana outside of the workplace unless specifically mandated.

2. Occupational Health and Safety Act

Another federal policy regulating employee use of marijuana is the 1970 Occupational Safety and Health Act (OSHA), which requires that employers provide a safe workplace in compliance with federal protective safety and health standards.³¹ As part of OSHA’s General Duty Clause, employers must keep their workplaces free of “recognized hazards that are causing or are likely to cause death or serious physical harm” to their employees.³² Because employers have a legal obligation to protect workers from direct threats to safety under OSHA, their tolerance of an employee that uses a federally illegal drug, even for medical purposes, may be seen as creating an impermissibly harmful environment under current federal law.

In addition, employees who work in *safety-sensitive positions* and use marijuana on the job could pose a hazardous risk to themselves or others in the work environment.³³ These positions, for example, may entail the handling, packaging, processing, storage, disposal, or transport of hazardous material, or the operation of a motor vehicle, other type of vehicle, equipment, machinery, or power tools — all of which require skill and concentration.³⁴ Studies have shown that marijuana use can slow reaction time, impair judgment of distance, and decrease coordination and psychomotor behavior, which can diminish one’s ability to drive or perform safety-sensitive tasks effectively.³⁵

29. *See id.* § 8102(a)(1)(G).

30. *See generally id.* § 8102.

31. *See* Occupational Safety and Health Act, 29 U.S.C. § 651–678.

32. *See id.* § 654.

33. *See Considerations for Safety- and Security-Sensitive Industries*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (June 24, 2020), <https://www.samhsa.gov/workplace/legal/federal-laws/safety-security-sensitive> [<https://perma.cc/RU6Y-7HGQ>].

34. *See id.* (including links to federal industries with safety-sensitive positions).

35. *See, e.g., Drugged Driving DrugFacts*, NAT’L INST. ON DRUG ABUSE (Dec. 2019), <https://nida.nih.gov/download/935/drugged-driving-drugfacts.pdf?v=96e43a024e0cb0956f4398b5a9ad75bc> [<https://perma.cc/Q6HQ-2YVU>].

3. Other Federal Agency Requirements

Federal agencies for industries that hold public safety and national security roles also have established drug-testing requirements. For instance, all federal employees involved in “law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust” are subject to mandatory drug testing.³⁶

Moreover, agencies such as the U.S. Department of Transportation,³⁷ the Department of Defense,³⁸ and the Nuclear Regulatory Commission³⁹ must all comply with established drug-testing requirements. These agencies employ millions of workers in states across the nation, and despite state laws legalizing marijuana, employees in these federal safety- and security-sensitive industries are all subject to the federal drug-free workplace mandate.⁴⁰ Also, many federal employers require supervisors to be trained in identifying the signs and symptoms of drug and alcohol use and abuse.⁴¹ Depending on the workplace and the circumstances, employees who test positive for marijuana or other illegal substances may be referred to employee assistance programs, into treatment, or for disciplinary action.⁴²

36. Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (Sept. 15, 1986).

37. See Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, 105 Stat. 917; see also Jim L. Swart, *DOT Office of Drug and Alcohol Policy and Compliance Notice*, U.S. DEP’T TRANSP. (Dec. 3, 2012), <https://www.transportation.gov/sites/dot.gov/files/docs/odapc-notice-recreational-mj.pdf> [<https://perma.cc/F4TJ-MX2D>] (“We have had several inquiries about whether these state initiatives will have an impact upon the Department of Transportation’s longstanding regulation about the use of marijuana by safety-sensitive transportation employees — pilots, school bus drivers, truck drivers, train engineers, subway operators, aircraft maintenance personnel, transit fire-armed security personnel, ship captains, and pipeline emergency response personnel, among others. We want to make it perfectly clear that the state initiatives will have no bearing on the Department of Transportation’s regulated drug testing program. The Department of Transportation’s Drug and Alcohol Testing Regulation — 49 C.F.R Part 40 — does not authorize the use of Schedule I drugs, including marijuana, for any reason.”).

38. See U.S. DEP’T OF DEF., INSTRUCTION 1010.16, TECHNICAL PROCEDURES FOR THE MILITARY PERSONNEL DRUG ABUSE TESTING PROGRAM (2020), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/101016p.pdf?ver=yNtAyTrYnY-8wMCQDa9vpw%3D%3D> [<https://perma.cc/3US2-PTEX>].

39. 10 C.F.R § 26.31 (2009).

40. See *Considerations for Safety- and Security-Sensitive Industries*, *supra* note 33.

41. See *Drug-Free Workplace Programs*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (June 10, 2021), <https://www.samhsa.gov/workplace/toolkit> [<https://perma.cc/4NC2-P7FG>].

42. See generally *id.*

4. Other Relevant Federal Protections

Finally, several federal statutes protect the civil rights of U.S. employees regarding the screening, testing, investigating, disciplining, and similar regulatory restrictions of employee drug use. Lawsuits related to employee drug use are often based on claims involving these federal protections. For example, the Americans with Disabilities Act (ADA) of 1990 prohibits all U.S. employers with more than 15 employees from discriminating against qualified job applicants and employees because of a physical disability.⁴³ This category includes recovering alcoholics and drug users who have sought treatment for their addiction.⁴⁴ The ADA requires “reasonable accommodation” of workers with disabilities, some of whom may use medical marijuana for therapeutic purposes.⁴⁵ Case law regarding federal disability and discrimination claims by employees who are medical marijuana users continues to evolve.

Other major federal laws and regulations that protect employees regarding substance use include the Civil Rights Act of 1964,⁴⁶ the Family and Medical Leave Act of 1993,⁴⁷ and the National Labor Relations Act of 1935.⁴⁸ Employers considering drug testing policies should be aware of these civil rights protections for employees and consult legal experts about state and federal law and possible intersections.⁴⁹

B. State and Local Levels

Many state and local jurisdictions, as well as U.S. territories, also have laws that can affect workplace policies regarding employee use of marijuana. In some instances, state legislation legalizing medical or recreational marijuana contains workplace protections. In other instances, employee marijuana use is addressed in local or employer-specific policies.

43. See 42 U.S.C. § 12111–12.

44. See *Technical Assistance Manual for Title 1 of the Americans with Disabilities Act (ADA)*, JOB ACCOMMODATION NETWORK, <https://askjan.org/publications/ada-specific/Technical-Assistance-Manual-for-Title-I-of-the-ADA.cfm> [https://perma.cc/Z7BZ-JBW5] (last visited Feb. 21, 2022).

45. See 42 U.S.C. § 12112.

46. See Pub. L. No. 88-352, 78 Stat. 241.

47. 29 U.S.C. §§ 2601–54.

48. *Id.* §§ 151–69.

49. See *generally Federal Laws and Regulations, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN.* (Aug. 4, 2020), <https://www.samhsa.gov/workplace/legal/federal-laws> [https://perma.cc/MG9N-H2C9].

1. State and Local Disability and Discrimination Legislation

In the past, states generally allowed employers to enforce zero-tolerance drug-free workplace policies by screening job applicants for drugs, conducting random employee drug testing, and disciplining or firing employees for marijuana use.⁵⁰ Over the last several years, many state and local employers have become more tolerant of employee off-duty use of medical marijuana and even, to a lesser extent, recreational marijuana.

For instance, at least 20 states have passed disability and anti-discrimination workplace legislation protecting the rights of employees who use *medical marijuana*.⁵¹ These laws generally state that employers, with few exceptions, may allow an employee with a disability to use medical marijuana outside the workplace as long as the employee does not report to work under the influence or otherwise create a direct threat to others.⁵²

Also, a growing number of jurisdictions have adopted a more tolerant stance toward job applicants and employees regarding *recreational marijuana* use. For example, Montana, Nevada, New York, New Jersey, and Connecticut, and the cities of Atlanta, New York City, Philadelphia, Washington, D.C., and Richmond, Virginia, have all passed laws protecting the employment rights of recreational marijuana users.⁵³ State and city laws relating to marijuana use can vary in their protections. New York State's law, for instance, prohibits employers in New York State from discriminating against any employee or applicant using cannabis off-site or

50. See, e.g., Nick Fox, *Is It Time to Reconsider Zero Tolerance Drug Testing?*, LABORER'S HEALTH & SAFETY FUND N. AM. (Feb. 2021), <https://www.lhsfna.org/index.cfm/lifelines/february-2021/is-it-time-to-reconsider-zero-tolerance-drug-testing> [<https://perma.cc/9W4U-GTG7>].

51. See, e.g., *State Laws Protecting Marijuana Users' Employment Rights*, CAL. NORML [hereinafter CAL. NORML], <https://www.canorml.org/employment/state-laws-protecting-medical-marijuana-patients-employment-rights> [<https://perma.cc/K49Q-U4ES>] (last visited Feb. 21, 2022) (states that prohibit employers from discriminating against employees on the basis of medical marijuana use include Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Vermont, Virginia, and West Virginia).

52. See *id.* State disability and discrimination laws would not apply to state employers in safety-sensitive industries and similar employers. Also, note that even though the ADA does not require that employers (including state and local governments) accommodate employees with a disability by allowing them to use medical marijuana, the ADA does not prohibit use in the workplace either. Under Title II of the ADA, all state and local governments (regardless of size) and all departments, agencies, special purpose districts, and other instrumentalities of these governments must provide people with disabilities an equal opportunity to benefit from all their programs, services, and activities. 42 U.S.C. § 12132.

53. See CAL. NORML, *supra* note 51.

off-premises, with certain exceptions.⁵⁴ New York City's Ordinance prohibits employers or their agents from requiring a job applicant to submit to a marijuana drug test as a condition of employment, with the exception of certain safety-sensitive positions or situations.⁵⁵

2. State Workers Compensation Laws

Nearly all states require employers to carry workers' compensation insurance, and each state has its own workers' compensation insurance program requirements and penalties. Several states, such as Alabama, Georgia, and New York, offer employers with drug-free workplace programs a discount on their workers' compensation insurance premiums.⁵⁶ Other states, such as Michigan, deny workers' compensation benefits to workers whose injuries are determined to be the result of substance use.⁵⁷ Finally, some states, such as Wisconsin, reduce workers' compensation indemnity benefits if an employee is injured in the workplace while intoxicated under any controlled substances, including marijuana.⁵⁸ As states continue to legalize marijuana and expand the types of medical conditions treatable by medical marijuana, employers will need to stay abreast of ever-changing work compensation rules, including coverage of medical marijuana to treat work-related injuries.⁵⁹

54. See N.Y. Marijuana Regulation and Tax Act, S. Res. 854-A, 244th Leg. (N.Y. 2021). The law states that

[A]n employer shall not be in violation of this section where the employer takes action based on the belief either that: (i) the employer's actions were required by statute, regulation, ordinance or other governmental mandate, (ii) the employer's actions were permissible pursuant to an established substance abuse or alcohol program or workplace policy, professional contract or collective bargaining agreement, or (iii) the individual's actions were deemed by an employer or previous employer to be illegal or to constitute habitually poor performance, incompetency or misconduct.

N.Y. LAB. LAW § 201-d (McKinney 2021).

55. See N.Y.C., N.Y. ADM. CODE § 8-107 (2019).

56. See *Does a Drug Free Workplace Lower Your Work Comp Premium?*, WORK COMPLAB, <https://workcomplab.com/cost/drug-free-lower-premium> [https://perma.cc/L8FN-EKGZ] (last visited Jan. 31, 2022).

57. See Michigan Regulation & Taxing of Marijuana Act, MICH. COMP. LAWS §§ 333.27951–333.27967 (2018).

58. See, e.g., Jodi Mathy, *How Medical Marijuana Insurance Issues Affect Your Work Comp Policies*, HNI RISK ADVISORS, <https://www.hni.com/blog/bid/91413/how-medical-marijuana-insurance-issues-affect-your-work-comp-policies> [https://perma.cc/FEL7-2BQ8] (last visited Jan. 30, 2022).

59. See *id.*

3. State Unemployment Insurance Laws

Each state administers its own separate unemployment insurance program but follows guidelines established by federal law.⁶⁰ Some states limit or deny unemployment benefits to employees who are fired because they fail a workplace drug test.⁶¹ As discussed later, workplace policies regarding drug tests for marijuana are changing — particularly regarding off-duty use in states where the drug is legal — and positive drug tests for marijuana may not automatically mean that an employee is ineligible for unemployment benefits.⁶²

4. Other Significant State Laws

In addition to federal and state employment and civil rights laws and regulations, employers considering workplace policies on marijuana use need to be aware of other state requirements. For instance, in all states but Montana,⁶³ employment relationships are presumed to be “at will.”⁶⁴ This means that employers can terminate an employee at any time for any reason, except an illegal one, without incurring liability, and employees may leave a job at any time for any reason with no adverse legal consequences.⁶⁵

Many states have passed statutory exceptions to the at-will presumption. These statutes protect employees against adverse employment actions, such as whistleblowing and certain off-duty activities, like the use of legal products. For example, 29 states and the District of Columbia have laws in effect elevating smokers to a protected class by preventing employers from discriminating against job applicants and employees for using tobacco

60. See generally U.S. DEP’T OF LAB., UNEMPLOYMENT INSURANCE (2022) https://oui.doleta.gov/unemploy/docs/factsheet/UI_Program_FactSheet.pdf [<https://perma.cc/DGH2-74NQ>].

61. See *Unemployment Compensation (UC): Issues Related to Drug Testing*, EVERYCRSREPORT.COM, <https://www.everycrsreport.com/reports/R45889.html> [<https://perma.cc/HET7-YGPS>] (last visited Feb. 23, 2022); see also *State-By-State Workplace Drug Testing Laws*, ACLU, <https://www.aclu.org/other/state-state-workplace-drug-testing-laws> [<https://perma.cc/YRR3-AXSS>] (last visited Jan. 30, 2022).

62. See, e.g., Ben Adlin, *Off-the-Job Marijuana Use Shouldn’t Make People Ineligible for Unemployment, Michigan AG Says*, MARIJUANA MOMENT (Aug. 10, 2021), <https://www.marijuanamoment.net/off-the-job-marijuana-use-shouldnt-make-people-ineligible-for-unemployment-michigan-ag-says> [<https://perma.cc/C7N8-JT2J>].

63. Montana’s Wrongful Discharge from Employment Act of 1987 statutorily modifies the “at-will” rule by creating a cause of action for employees who believe that they were terminated without good cause. See MONT. CODE ANN. §§ 39-2-901 to 39-2-915 (2022).

64. See *At-Will Employment — Overview*, NAT’L CONF. ST. LEGISATURES (Apr. 15, 2008), <https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx> [<https://perma.cc/GQ4D-RUBE>].

65. See *id.*

products off-duty.⁶⁶ These so-called “smoker protection laws” are largely intended to ensure that employers do not consider in their hiring decisions — or take adverse actions against employees because of — the lawful off-duty conduct, use, or activities of applicants or employees.⁶⁷ Although the legal actions in question have commonly applied to the use of commercial tobacco products, this statutory protection could conceivably include the use of marijuana in states where it is legal.⁶⁸ In Illinois, for example, marijuana is designated a “lawful product” under state law, and thus presumably its use could form the grounds for workplace discrimination or discipline under the state’s Right to Privacy in the Workplace Act.⁶⁹

III. WORKPLACE MARIJUANA POLICIES

Many states and U.S. territories have laws and regulations specifying that certain employers, such as state or local contractors, develop drug-free workplace policies.⁷⁰ States vary in the way they treat marijuana in the workplace, with some laws requiring that employers provide reasonable accommodations for employees who are qualified medical marijuana users.⁷¹ Other states require drug testing for both medical and recreational use by applicants and employees in the workplace and off-duty.⁷²

A. Reasonable Accommodation

Jurisdictions are divided on whether and when employers are required to allow or accommodate employee use of marijuana if the employee has a disability under state law.⁷³ States that permit employers to take adverse actions against employees, including firing them, for using marijuana regardless of their disabilities include California, Colorado, Florida,

66. See *State “Smoker Protection” Laws*, AM. LUNG ASS’N (Feb. 2, 2022), <https://www.lung.org/policy-advocacy/tobacco/slati/appendix-f> [<https://perma.cc/8BKQ-QS2K>].

67. See HUDSON B. KINGSTON, PUB. HEALTH L. CTR., *THERE IS NO CONSTITUTIONAL RIGHT TO SMOKE OR TOKE* 1, 17 (2019), <https://www.publichealthlawcenter.org/sites/default/files/resources/No-Constitutional-Right-Smoke-Toke-2019.pdf> [<https://perma.cc/K48R-HC4G>].

68. See *id.* at n.103 (theorizing that Nevada’s and Colorado’s smoker protection laws that apply to “lawful” offsite use of any product could include marijuana).

69. Illinois Cannabis Regulation and Tax Act, 410 ILL. COMP. STAT. 705/1–7 (2019).

70. See *State and Local Laws and Regulations*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (Apr. 16, 2020), <https://www.samhsa.gov/workplace/legal/state-laws> [<https://perma.cc/LN6K-4E4Y>].

71. See *id.*; see also *Medical and Recreational Marijuana State Law Survey*, LEXISNEXIS (Jan. 7, 2022), <https://plus.lexis.com/api/permalink/1c4fad12-f9c0-439a-8d36-4bb59cb54876/?context=1530671> [<https://perma.cc/8SPN-V3M8>].

72. See *Medical and Recreational Marijuana State Law Survey*, *supra* note 71.

73. See *id.*

Georgia, Mississippi, Montana, Ohio, Oregon, and Washington.⁷⁴ On the other hand, states that require employers to accommodate the medical marijuana use of employees based on their status as qualified, registered, or certified medical marijuana users include Arizona, Arkansas, Connecticut, Delaware, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oklahoma, Pennsylvania, Rhode Island, and West Virginia.⁷⁵ These laws are constantly changing.

Although marijuana use is currently not covered by the federal ADA, a growing number of employees have sued employers on state disability discrimination grounds when the employer refuses to accommodate their lawfully authorized use of marijuana for medical purposes. In 2019, for example, a New Jersey Appellate Court ruled that even though the state's medical marijuana act did not provide an explicit or implicit cause of action, an employee can assert a disability discrimination claim under New Jersey's Law Against Discrimination for the employer's failure to accommodate the employee's lawful use of medical marijuana.⁷⁶ Such a ruling may be increasingly common as states continue to expand the number and types of qualifying conditions for medical marijuana use and more employees assert their rights to use a legally, medically authorized product.

B. Drug Testing

Drug testing is often used to enforce workplace drug policies. States allow employers to set up their own workplace policies regarding drug testing, as long as they are in compliance with state and federal law.⁷⁷ With the increased legalization of medical and recreational marijuana, some employers find it challenging to maintain a marijuana-free workforce. Workplace drug policies continue to evolve as social acceptance of marijuana use rises and employer concerns about their legal responsibilities and liability increase. Nevertheless, many employers still maintain workplace policies that require drug testing by job applicants and employees.

According to the federal government, the most common reasons employers set up drug testing programs are to comply with federal

74. See John E. Thomas, Jr. et al., *New Laws and the 2021 Cannabis Effect on Employers*, MCGUIREWOODS LLP (June 24, 2021), <https://www.mcguirewoods.com/client-resources/Alerts/2021/4/new-laws-and-the-2021-cannabis-effect-on-employers> [<https://perma.cc/V3B7-TPTA>].

75. See *id.*

76. *Wild v. Carriage Funeral Holdings, Inc.*, 205 A.3d 1144, 1146–47 (N.J. Super. Ct. App. Div. 2019).

77. See *State-By-State Workplace Drug Testing Laws*, *supra* note 61.

regulations and customer, contract, or insurance carrier requirements; to reinforce an organization's "no drug use" position; to identify employees with substance use disorders and refer them for assistance; to establish grounds for discipline or firing; to improve safety; to deter recreational drug use that could lead to addiction; and to reduce the costs of drug misuse in the workplace.⁷⁸ While these remain significant rationales for drug testing programs, the prevalence and growing acceptance of marijuana in society has caused many states, localities, and employers to revisit their drug-testing programs and often loosen their workplace requirements regarding marijuana use. The following subsections explore the shifting landscape of employment law and marijuana, starting with the overall challenge of determining THC impairment. The last two subsections describe thorny legal issues that employers may face when screening job applicants and drug-testing employees — both on- and off-duty — for marijuana use.

1. Difficulties in Testing for THC

Marijuana is the most commonly detected drug in workforce drug testing.⁷⁹ However, unlike testing for drugs such as cocaine, opiates, amphetamines, and alcohol, marijuana testing presents unique challenges for both employer and employee.

For instance, marijuana drug tests are designed to identify the amount of THC a person has consumed — not the user's level of impairment.⁸⁰ Because of the way a user's body metabolizes THC, these tests often have limited usefulness in determining a person's THC intoxication.⁸¹ THC can be detected in blood for up to 36 hours or urine for days or even months after THC intoxication has ended.⁸² A blood test, for example, can detect

78. See *Plan and Implement a Program*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (Apr. 16, 2020), <https://www.samhsa.gov/workplace/toolkit/plan-implement-program> [https://perma.cc/L5Z4-4BU6].

79. See *Marijuana Workforce Drug Test Positivity Continues Double-Digit Increases to Keep Overall Drug Positivity at Historically High Levels, Finds Latest Quest Diagnostics Drug Testing Index Analysis*, QUEST DIAGNOSTICS (May 26, 2021), <https://newsroom.questdiagnostics.com/2021-05-26-Marijuana-Workforce-Drug-Test-Positivity-Continues-Double-Digit-Increases-to-Keep-Overall-Drug-Positivity-Rates-at-Historically-High-Levels,-Finds-Latest-Quest-Diagnostics-Drug-Testing-Index-TM-Analysis> [https://perma.cc/8LVQ-ELSR].

80. See Zawn Villines, *How Long Can You Detect Marijuana in the Body?*, MED. NEWS TODAY (Jan. 29, 2012), <https://www.medicalnewstoday.com/articles/324315> [https://perma.cc/UA4Y-A2VZ].

81. See *id.*

82. See Dan Wagener, *How Long Does Pot Stay in Your System?*, AM. ADDICTION CTRS. (Jan. 7, 2022), <https://americanaddictioncenters.org/marijuana-rehab/how-long-system-body> [https://perma.cc/KM4G-7MQ4].

THC up to 36 hours after use; a saliva test, up to 48 hours after use; a urine test, up to 30 days after use; and a hair test, up to 90 days after use.⁸³ Moreover, the effects of THC are both cumulative and relative: determining impairment depends on a user's tolerance, individual metabolism, test sensitivity, amount of THC consumed, hydration, mode of consumption — smoking, vaping, consuming edibles, or using a skin patch, concurrent medication use, and other factors.⁸⁴

The challenge in determining impairment can be seen in the different state laws prohibiting driving with a detectable level of marijuana (i.e., THC) in a driver's bodily fluids. While a national level of impairment for drunk driving is .08 g/mL blood alcohol concentration, no equivalent national level for THC exists.⁸⁵ As a result, states have been left on their own to determine a THC threshold for driving.⁸⁶ Eleven states have zero-tolerance laws, meaning driving is illegal with any measurable amount of THC present in the driver's bodily fluids.⁸⁷ Five states that legalize recreational marijuana have specific per se limits for driving under the influence, ranging from one nanogram to five nanograms of detectable THC.⁸⁸ One state, Colorado, has a reasonable inference law,⁸⁹ which allows drivers with THC identified at levels of five nanograms/milliliters or higher to introduce a defense to show they were not impaired.⁹⁰

2. Job Applicant Drug Screening

In the past, employers with drug-free workplace policies often conditioned employment upon a job applicant's negative drug test. Given the rise in states with legal, medical marijuana users and the rise in social

83. *See id.*

84. *See generally* Villines, *supra* note 80.

85. *See Drugged Driving / Marijuana-Impaired Driving*, NAT'L CONF. ST. LEGISLATURES (Sept. 23, 2021), <https://www.ncsl.org/research/transportation/drugged-driving-overview.aspx> [<https://perma.cc/U9Q7-AXHG>].

86. *See, e.g., State Drugged Driving Laws*, NORML, <https://norml.org/laws/drugged-driving> [<https://perma.cc/7VK5-KU8J>] (last visited Feb. 4, 2022); *see also Marijuana Drug-Impaired Driving Laws*, GOVERNORS HIGHWAY SAFETY ASS'N, <https://www.ghsa.org/state-laws/issues/drug%20impaired%20driving> [<https://perma.cc/KK2H-QWG9>] (last visited Feb. 4, 2022).

87. *See Drugged Driving / Marijuana-Impaired Driving*, *supra* note 85 (explaining that a twelfth state, South Dakota, has a zero-tolerance law for drivers younger than 21, who cannot legally purchase or consume marijuana in the state).

88. *See id.* The states in question are Illinois, Montana, Nevada, Ohio, and Washington. *See id.*

89. *See id.*

90. *See* KERRY WHITE, COLO. LEGIS. COUNCIL STAFF, NO. 16-01, DRIVING UNDER THE INFLUENCE OF DRUGS OR ALCOHOL (2016).

acceptance of marijuana, many jurisdictions and employers today are eliminating pre-employment drug screening for marijuana.⁹¹

On January 1, 2020, Nevada became the first state to prohibit employers from refusing to hire applicants based on their failure to pass a pre-employment drug screening test.⁹² Under this law, employees also have the right to challenge the results of an initial drug screening test if employers require one within the first 30 days of hire.⁹³ Other states, cities, and employers have followed suit. In 2020, New York City prohibited employers from testing applicants specifically for marijuana as an employment condition, except for jobs in healthcare, construction, or childcare, based on safety concerns.⁹⁴ And most recently, employers across the country, including Amazon — the second-largest private employer in the United States — have broadcast their refusal to screen for marijuana use among job applications.⁹⁵ This loosening of drug-free requirements is also coming when the post-COVID-19 labor shortage has resulted in hiring incentives, wage raises, college scholarships, and even gifts to attract job applicants.⁹⁶

Legal Challenges. Courts are increasingly finding in favor of job applicants in cases where a positive test for marijuana, typically medical marijuana, results in a candidate's not being offered a job.⁹⁷ For example, a federal court in 2018 held that refusing to hire a Connecticut qualified medical marijuana user because she tested positive on a pre-employment drug test violates the state's medical marijuana law, and it granted her

91. See Brian Cheung, *Labor Shortage Accelerates Shift Away from Drug Testing for New Hires*, YAHOO! NEWS (July 8, 2021), <https://news.yahoo.com/labor-shortage-accelerates-shift-away-from-drug-testing-for-new-hires-103958320.html> [<https://perma.cc/QVC4-2AYU>].

92. See NEV. REV. STAT. § 613.132 (2020).

93. See *id.* Employers could still reject applicants for positive marijuana drug test results if such use put safety of others at risk (e.g., EMT staff, firefighters, those who drive vehicles, those applying for work regulated by federal programs that require drug testing). See *id.* § 613.132(2).

94. See N.Y.C., N.Y. ADMIN. CODE § 8-107 (2019).

95. See, e.g., Spencer Soper, *Amazon's Answer to Delivery Driver Shortage: Recruit Pot Smokers*, BLOOMBERG (Sept. 1, 2021, 10:00 AM), <https://www.bloomberg.com/news/articles/2021-09-01/amazon-s-answer-to-delivery-driver-shortage-recruit-pot-smokers> [<https://perma.cc/J75W-JLUW>] (reporting Amazon's statements that not screening for marijuana "can boost the number of job applicants by as much as 400% . . . [while] screening for marijuana cuts the prospective worker pool by up to 30%").

96. See Rachel Scully, *Amazon Advises Against Marijuana Screening in Bid to Recruit Drivers: Report*, HILL (Sept. 1, 2021, 3:23 PM), <https://thehill.com/homenews/news/570409-amazon-advising-delivery-van-operators-to-stress-lack-of-marijuana-screening-in> [<https://perma.cc/VJ74-6V9Y>].

97. See Robert Kline, *Courts Are Siding with Employees Who Use Medical Marijuana*, NAT'L L. REV. (June 19, 2019), <https://www.natlawreview.com/article/courts-are-siding-employees-who-use-medical-marijuana> [<https://perma.cc/3J9C-6FBW>].

summary judgment on the employment discrimination claim.⁹⁸ Also, the Rhode Island Superior Court found that an applicant was discriminated against when she was not hired as a paid intern because she admitted she was a registered-medical-marijuana user who used the drug for migraines.⁹⁹

Still, courts remain divided. For instance, the Michigan Court of Appeals recently found for the employer in a case where a fabrics corporation rescinded a conditional offer of employment when a job applicant tested positive on a marijuana test.¹⁰⁰ The court stated that Michigan's medical marijuana law does not create independent affirmative rights that protect the medical use of marijuana in all circumstances or create a "protected class for users of medical marijuana."¹⁰¹ In other words, the legal right to use medical marijuana in Michigan does not override an employer's right to decide whether or not to hire an applicant or to fire an "at-will" employee.

3. Employee Drug Testing

States allow employers with drug-free workplace policies to conduct drug testing at different times for various reasons — e.g., annual physical exams, post-accident, post-treatment¹⁰² — at random, or for probable cause or reasonable suspicion. If drug testing is conducted as part of a workplace policy, employees have the right to be notified that their jobs require their participation in these tests.¹⁰³ Employers should also take care to specify drug testing as part of their written drug-free workplace policy.¹⁰⁴

Employment laws vary widely by state, with some providing greater rights to employers than to prospective or current employees. Some states, such as Louisiana, allow employers to test for drugs broadly in both the public and private sectors.¹⁰⁵ Other states, such as Maine, restrict who can

98. *See* *Noffsinger v. SSC Niantic Operating Co.*, 338 F. Supp. 3d 78, 84 (D. Conn. 2018).

99. *See* *Callaghan v. Darlington Fabrics Corp.*, No. PC-2014-5680, 2017 WL 2321181, at *3 (R.I. Super. Ct. May 23, 2017).

100. *See* *Eplee v. City of Lansing*, 935 N.W.2d 104 (Mich. Ct. App. 2019).

101. *Id.* at 116.

102. Drug tests conducted after an employee has completed drug treatment help ensure an employee is successfully rehabilitated.

103. *See, e.g.*, Lisa Guerin, *Laws on Employee Drug Testing*, NOLO, <https://www.nolo.com/legal-encyclopedia/free-books/employee-rights-book/chapter5-3.html> [<https://perma.cc/CA4Y-GRCV>] (last visited Jan. 30, 2022).

104. *See* *Drug-Free Workplace Programs*, *supra* note 41.

105. *See, e.g.*, *Louisiana State Drug Testing Laws*, NAT'L DRUG SCREENING, INC., <https://www.nationaldrugscreening.com/us-state-laws/louisiana> [<https://perma.cc/K2Y5-PN YL>] (last visited Jan. 30, 2022).

be tested and how they can be tested and provide rehabilitation and disciplinary options for those with a positive test.¹⁰⁶

Reasonable Suspicion/Probable Cause. States use similar criteria in drug testing for reasonable suspicion, also described as probable cause or for-cause. These tests may be triggered by workplace accidents, injuries, incidents, or behavior that give rise to suspicions that the employee's performance may be impacted by the use of marijuana or another drug. Marijuana users can experience and display many different effects, depending on the individual. Some of the most common physiological, psychological, and behavioral marijuana effects described in the scientific literature include disinhibition, relaxation, increased sociability, enhanced appetite, short-term memory impairment, merriment, time distortions, impaired judgment, reduced coordination, and ataxia, which can lead to an increased risk-taking behavior and impaired driving ability.¹⁰⁷

Many state laws do not specify symptoms of marijuana impairment that employers may use as a basis for reasonable suspicion or probable cause, although general symptoms of drug impairment or intoxication are typically identified in workplace drug policies.¹⁰⁸ Illinois, however, is one state that clearly describes employer guidelines for detecting possible marijuana use in the workplace:

An employer may consider an employee to be impaired or under the influence of cannabis if the employer has a good faith belief that an employee manifests specific, articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position, including symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, or negligence or carelessness in operating equipment or machinery; disregard for the safety of the employee or others, or involvement in any accident that results in serious damage to equipment

106. See, e.g., ME. STAT. tit. 26, § 683 (2021); see also *Guide for Employers: Marijuana and Other Substances of Use in the Workplace*, ME. DEP'T LAB., https://www.maine.gov/labor/labor_laws/publications/2018/MDOL_Guide_to_marijuana_in_the_workplace_March_2018.pdf [<https://perma.cc/7WUX-W973>] (last visited Feb. 21, 2022).

107. See, e.g., *Drug Fact Sheet: Marijuana/Cannabis*, U.S. DRUG ENF'T ADMIN., https://www.dea.gov/sites/default/files/2020-06/Marijuana-Cannabis-2020_0.pdf [<https://perma.cc/SN39-CASU>] (last visited Feb. 21, 2022). The DEA also lists other effects of marijuana, such as initial dizziness, nausea, tachycardia, facial flushing, dry mouth, and tremor; happiness and even exhilaration at high doses; relaxation and talkativeness; enhanced sensory perception; heightened imagination leading to a subjective sense of increased creativity; time distortions; emotional lability, incongruity of affect, dysphoria, disorganized thinking, inability to converse logically, agitation, paranoia, confusion, restlessness, anxiety, drowsiness, and panic. See *id.*

108. See *What Might Be Considered Reasonable Suspicion for Drug Testing?*, SOC'Y FOR HUM. RES. MGMT., [<https://perma.cc/8M66-9L22>] (last visited Jan. 30, 2022).

or property; disruption of a production or manufacturing process; or carelessness that results in any injury to the employee or others.¹⁰⁹

Employers who suspect that an employee's performance is impaired due to marijuana use need to document objective facts that would suggest to a reasonable person that the worker is under the influence in violation of company policy.¹¹⁰

States also vary in how employers are allowed to treat employees who receive a positive test for marijuana. New Jersey's law, for example, includes particularly expansive protections for all employees who use medical marijuana.¹¹¹ The statute prevents employers from taking adverse action against an employee who uses marijuana or who has tested positive for marijuana.¹¹² The law also describes circumstances under which an employer may drug test an employee and requires, among other things, that the test include "a physical evaluation in order to determine an employee's state of impairment" performed by a Cannabis Regulatory Commission-certified individual.¹¹³

Legal Challenges. Despite many enhanced protections for employee marijuana use, employers continue to terminate employees for testing positive for marijuana even when they are registered-medical-marijuana users. In 2015, for example, the Colorado Supreme Court ruled against a registered-medical-marijuana user who was a quadriplegic.¹¹⁴ The employee argued he was wrongfully terminated from his job after testing positive for the drug.¹¹⁵ In a split decision, the court found that because marijuana was illegal under federal law, and federal law preempts state law, marijuana use was not a lawful activity under the state's "lawful activities" statute.¹¹⁶

Still, recent decisions in federal and state courts suggest that while the first wave of litigation related to marijuana use and the workplace tended to favor employers, the tide may be turning.¹¹⁷ In Arizona, for example, a

109. 410 ILL. COMP. STAT. 705/10-50(d) (2019) ("If an employer elects to discipline an employee on the basis that the employee is under the influence or impaired by cannabis, the employer must afford the employee a reasonable opportunity to contest the basis of the determination.").

110. See *What Might Be Considered Reasonable Suspicion for Drug Testing?*, *supra* note 108.

111. See New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act, Assemb. B. 21, 2021 Leg. (N.J. 2021).

112. N.J. STAT. ANN. § 24:6I-52 (West 2021)

113. Assemb. B. 21 § 46.

114. *Coats v. Dish Network, LLC*, 350 P.3d 849, 850 (Colo. 2015).

115. See *id.*

116. See *id.* at 853.

117. See *Kline*, *supra* note 97.

Walmart employee who was a registered-medical-marijuana user took a drug test triggered by an on-the-job injury and tested positive for THC.¹¹⁸ The drug test took place two days after the injury, but Walmart still fired the employee, claiming the test result indicated she was under the influence of marijuana when she was injured during her shift.¹¹⁹ The employee sued Walmart, arguing that her termination violated the Arizona Medical Marijuana Act, and the court agreed, finding she had been wrongly terminated.¹²⁰ Moreover, in Delaware, a court ruled that a medical marijuana user may sue his former employer after a positive post-accident drug test result for marijuana led to his termination.¹²¹

Off-Duty Use. Much employment litigation over marijuana drug testing to date has involved employees who are registered or otherwise qualified medical marijuana users. A related employment area that is changing in response to the increase in legalized recreational marijuana is an employee's legal right to use recreational marijuana off-duty.¹²² It is often hard to disentangle pre-employment and workplace drug screening from an employee's right to use marijuana outside the workplace — particularly in states where the use of recreational marijuana is legal.¹²³ Although no state specifically protects employee recreational marijuana use at work, some employers are not testing for marijuana use or are only disciplining employees for failed drug tests when their performance or productivity has been impacted.¹²⁴

Yet another dilemma in today's workplace is how to conduct workplace drug tests in a remote work environment when both "work hours" and "work premises" have been redefined. Recently, several businesses have offered different virtual drug-testing approaches, such as telehealth collections, which can be done through videoconferencing platforms like

118. *See* Whitmire v. Wal-Mart Stores, Inc., 359 F. Supp. 3d 761, 769 (D. Ariz. 2019).

119. *See id.* at 771.

120. *See id.*

121. *See* Chance v. Kraft Heinz Foods Co., No. K18C-01-056 NEP, 2018 WL 6655670, at *11, *13 (Del. Super. Ct. Dec. 17, 2018).

122. *See* Sachi Barreiro, *State Laws on Off-Duty Marijuana Use*, NOLO, <https://www.nolo.com/legal-encyclopedia/state-laws-on-off-duty-marijuana-use.html> [<https://perma.cc/T946-NBYK>] (last visited Sept. 6, 2021).

123. *See* Camera, *supra* note 26 (describing an El Paso science teacher who traveled to Colorado in 2017 on winter break, where she consumed a small amount of recreational marijuana, returned to Texas, tested positive at her school for THC, and was about to be suspended for two years by school officials before she resigned and sued the education agency. In 2018, an administrative judge sided with the teacher, stating her action was akin to someone gambling at a casino in Nevada and returning to Texas, where gambling is illegal).

124. *See* Barreiro, *supra* note 122.

Zoom or via an app and using oral-fluid testing.¹²⁵ No state laws currently prohibit telehealth collections, but local statutes could limit how collections are performed or what specimens are used.¹²⁶

IV. IMPACT OF EMPLOYMENT POLICIES ON URBAN POPULATIONS

Every state that has legalized medical or recreational marijuana must grapple with a host of complex, interrelated regulatory issues. These issues include economic, public health, criminal justice, manufacturing, agricultural, health care, and insurance systems — as well as social equity concerns — all implicating the workforce. Employment policies regarding marijuana, in concert with federal, state, and local laws, are influenced by social and political attitudes toward marijuana use, as well as changing federal, state, and local law.

Urban areas are not singularly impacted by workplace policies on employee use of marijuana since these policies apply in work settings throughout the United States — from small Mom and Pop grocery stores, restaurants, and retail establishments to public schools, federal contractors, and large private industries. Urban communities, however, may be *disproportionately impacted* by marijuana drug use policies since the workforce is larger and marijuana dispensaries, medical cannabis provisioning centers, marijuana retailers, and social use venues are more common in municipalities than in the suburbs or rural communities.¹²⁷ Urban areas thus offer employees more opportunities to access and use medical or recreational marijuana and provide employers more reason to develop workplace policies regarding the use of marijuana by job applicants and employees.

For example, in an urban metropolis such as New York City, approximately 325,000 employees hold jobs in hundreds of fields — such as public transportation, health care, education, law enforcement, retail, construction, finance, and advertising — reflecting a diverse mix of public

125. See Roy Maurer, *Creative Approaches to Drug-Testing Remote Workers Will Persist*, SOC'Y FOR HUM. RES. MGMT. (May 21, 2021), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/creative-approaches-drug-testing-remote-workers-telehealth.aspx> [https://perma.cc/DN92-2FFH].

126. See *id.*

127. See Chris Roberts, 'Urban-Rural Divide' in the U.S. Figures Strongly in Marijuana Legalization, CANNABIS NOW (Sept. 19, 2018), <https://cannabisnow.com/urban-rural-divide-in-the-u-s-figures-strongly-in-marijuana-legalization/> [https://perma.cc/K7KG-9BY3]. See generally Kim Parker et al., *What Unites and Divides Urban, Suburban and Rural Communities*, PEW RSCH. CTR. (May 22, 2018), <https://www.pewresearch.org/social-trends/2018/05/22/what-unites-and-divides-urban-suburban-and-rural-communities/> [https://perma.cc/5WVL-55XN].

and private businesses.¹²⁸ Even if it were possible to ascertain the number of New York City employees who use recreational and medical marijuana, it would be impossible to determine accurately the percentage of City employees that would test positive for THC on any given day, let alone the impact on the workforce. For precautionary purposes, some occupations — such as public transportation employees — may be tested more often than others, and populations that tend to gravitate to certain occupations may find themselves subject more frequently to adverse employment actions, such as termination, for testing positive on workplace marijuana tests.¹²⁹ More research is needed to understand the effect of employee marijuana use at work and the most legally responsible and equitable workplace policies that can address this issue.

What is clear is that, even as the use of commercial tobacco products has been increasingly stigmatized in recent years and banned from public places, workplaces, and many multi-unit residences,¹³⁰ the United States has seen a growing acceptance and even normalization of medical and to a large extent recreational marijuana — particularly in states where it has been legalized. That this social tolerance of marijuana use has begun to be reflected in workplace drug policies through relaxed job applicant screening and drug testing is not surprising. What is surprising is the pace at which societal attitudes toward marijuana are upending the employment law landscape while the federal status of marijuana as an illegal drug remains static.

CONCLUSION

All states that legalize marijuana revisit their regulations periodically and revise, for example, the way the overall system is administered, how the marijuana is taxed, where the marijuana is grown, manufactured, sold,

128. See *Find a Job in New York City Government*, N.Y.C., <https://www1.nyc.gov/jobs/index.page> [<https://perma.cc/5JRN-DL44>] (last visited Feb. 4, 2022); see also *May 2020 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates*, U.S. BUREAU LAB. STAT. (Mar. 31, 2021), https://www.bls.gov/oes/current/oes_35620.htm [<https://perma.cc/9URX-3KGC>]; *Most Common Jobs in New York City*, STACKER, <https://stacker.com/stories/6636/most-common-jobs-new-york-city> [<https://perma.cc/J95D-BAHZ>] (last visited Feb. 21, 2022).

129. See, e.g., Ryan Grey, *Marijuana Use Dominates Positive Drug Testing Rates of Commercial Drivers*, SCH. TRANSP. NEWS (Nov. 17, 2020), <https://stnonline.com/news/marijuana-use-dominates-positive-drug-testing-rates-of-commercial-drivers/> [<https://perma.cc/2EN2-DQVL>]; *Considerations for Safety- and Security-Sensitive Industries*, *supra* note 33. But see Jeremy Vedder, *New York Taxi Drivers Will No Longer Be Tested for Weed*, HIGH YIELDS (May 5, 2021), <https://highyields.com/new-york-taxi-drivers-will-no-longer-be-tested-for-weed> [<https://perma.cc/6BD7-CV2H>].

130. See, e.g., *Lists and Maps*, AM. NONSMOKERS' RTS. FOUND., <https://no-smoke.org/materials-services/lists-maps> [<https://perma.cc/QA3Q-NVYJ>] (last visited Feb. 4, 2022).

and used, and by whom. Localities also make periodic decisions on implementing the state law, whether they allow or refuse to allow licensed marijuana retailers, dispensaries, or social use venues in their jurisdictions, and related matters. Constantly evolving laws and policies regarding medical and recreational marijuana use are partly driven by social and cultural shifts and recent case law. As a result, this is a busy and challenging time for U.S. employers and an uncertain time for employees, who may be unclear about when, where, or whether they can use a state-designated “lawful product” without jeopardizing their job. Employers need to keep up to date on changes in federal, state, and local legislation that could affect their legal responsibilities and requirements regarding employee marijuana use; revise and update their workplace drug policies regularly; and consult, as needed, with employment attorneys familiar with the laws of their jurisdiction and the changing legal landscape of marijuana use.