



# Reefer Madness: Medical Marijuana and the Public Workplace

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## AGENDA

- ▶ Overview of Medical Marijuana in America
- ▶ Amendment II and Implementing Legislation
- ▶ Medical Marijuana in the Workplace
  - ▶ Accommodation Issues
  - ▶ Impact on Employment Laws
- ▶ Medical Marijuana and Labor Arbitration
- ▶ Review of Drug Testing Restrictions
- ▶ Q&A

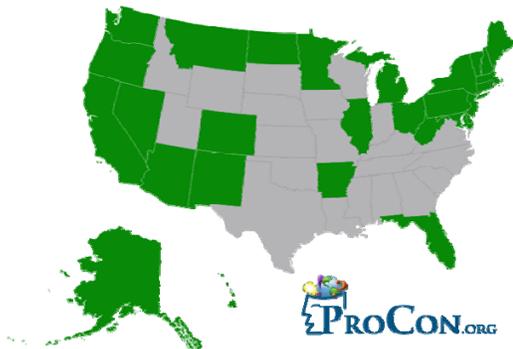
## But we might as well get this out of the way...

Extract.com's 20 Best Nicknames for Marijuana (*Or, how to know when your employee is secretly talking about drugs*)

- |                                      |                                   |
|--------------------------------------|-----------------------------------|
| 1) <u>Dro</u>                        | 11) <u>Square Mackerel</u>        |
| 2) <u>Alice B. Toklas</u>            | 12) <u>Juan Valdez</u>            |
| 3) <u>Loud</u>                       | 13) <u>Left-handed cigarettes</u> |
| 4) <u>Ganja</u>                      | 14) <u>Giggle smoke</u>           |
| 5) <u>Wacky tobaccy</u>              | 15) <u>Chocolope</u>              |
| 6) <u>Art Supplies</u>               | 16) <u>Schwag</u>                 |
| 7) <u>Coliflor tostao</u>            | 17) <u>Devil's lettuce</u>        |
| 8) <u>Bubonic chronic</u>            | 18) <u>Cabbage Patch</u>          |
| 9) <u>Kine bud (also 'kind bud')</u> | 19) <u>Skywalker OG</u>           |
| 10) <u>Sticky icky</u>               | 20) <u>That yum-yum</u>           |

## MEDICAL MARIJUANA IN THE UNITED STATES

29 LEGAL MEDICAL MARIJUANA STATES AND DC



<http://medicalmarijuana.procon.org/files/1-medical-marijuana-images/29-medical-marijuana-states-map.png>

Since the beginning of 2016, Arkansas, Florida, North Dakota, Ohio, Pennsylvania, and West Virginia have all passed laws or constitutional amendments to legalize marijuana in some form, aligning with what is now a majority of States that have done so.

The trend began with California in 1996, and that state has been somewhat of a training ground for marijuana laws in the 20 years since.

## FEDERAL LAW AND MARIJUANA

- ▶ Importantly, and as we all know, marijuana is still illegal pursuant to federal law.
- ▶ Controlled Substances Act. 21 U.S.C. § 801 et seq.
  - ▶ Schedule 1 drugs under the CSA:
    - ▶ Opiates
    - ▶ Opium derivatives
    - ▶ Cannabimimetic agents (synthetic marijuana)
    - ▶ Hallucinogens
      - ▶ 21 U.S.C. § 812(c)(10): Marijuana



<https://medicalexecutivepost.com/2013/05/02/why-president-nixon-signed-the-controlled-substances-act-in-1970/>

## THE DEPARTMENT OF JUSTICE AND MEDICAL MARIJUANA

- ▶ Under President Obama, the DOJ explicitly chose not to enforce federal law that criminalizes marijuana use against “individuals whose actions are in clear and unambiguous compliance with existing state laws permitting the medical use of marijuana.” The prosecution of such individuals was “unlikely to be an efficient use of limited federal resources.”
  - ▶ But the DOJ’s decision not to prosecute state law-abiding medical marijuana users has had no effect on an employer’s rights: The Oregon Supreme Court held that “[a]bsent express preemption, a particular policy choice by the federal government does not alone establish an implied intent to preempt contrary state law.”
- ▶ But...

## MARIJUANA & THE TRUMP ADMINISTRATION

- "In terms of marijuana and legalization, I think that should be a state issue, state-by-state. ... Marijuana is such a big thing. I think medical should happen – right? Don't we agree? I think so. And then I really believe we should leave it up to the states."  
(to the *Washington Post*)
- "[I]n favor of medical marijuana 100%."  
(to *Bill O'Reilly*)
- But on April 7, Attorney General Jeff Sessions announced a task force within the Justice Department that will "undertake a review of existing policies in the areas of charging, sentencing, and marijuana to ensure consistency with the Department's overall strategy on reducing violent crime and with Administration goals and priorities."



<http://www.businessinsider.com/where-donald-trump-stands-on-weed-legalization-2016-11>

## AMENDMENT II: HOW WE GOT HERE

- ▶ Florida's Amendment II passed last November with more than 71% of the vote, allowing medical marijuana use by people with any of the enumerated conditions or other debilitating medical conditions.
- ▶ Amendment II is an extension of Florida's "Charlotte's Web" law, which allows physicians to prescribe to people with epilepsy, cancer, and afflictions causing "seizures or severe and persistent muscle spasms" a low-THC strain of marijuana.
  - ▶ THC is the chemical that causes the psychoactive effects - the "high" - of marijuana



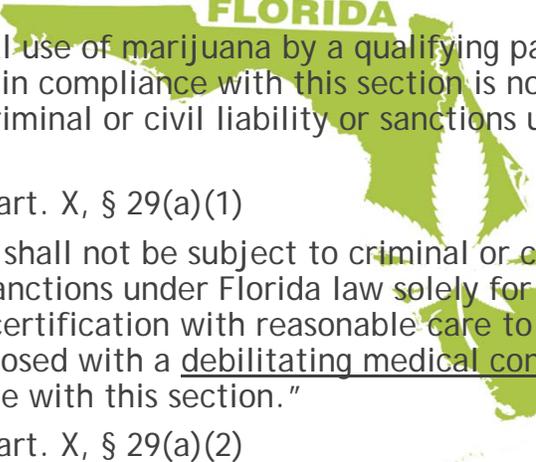
<http://www.healthnutnews.com/breaking-medical-marijuana-sells-victory-florida/>

## AMENDMENT II: IMPLEMENTATION

- ▶ In the wake of Amendment 2 came many unanswered questions with respect to its implementation
  - ▶ Who would qualify to use marijuana medicinally?
  - ▶ How much THC would medical marijuana be allowed to contain?
  - ▶ How might local ordinances affect marijuana distribution?
  - ▶ Would Amendment II conform to the 90-day wait period requirement installed by the state's "Charlotte's Web" law?
  - ▶ How would Amendment II affect employers?

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## FLA. CONST. ART. X, § 29

- 
- ▶ "The medical use of marijuana by a qualifying patient or caregiver in compliance with this section is not subject to criminal or civil liability or sanctions under Florida law."
 

Fla. Const. art. X, § 29(a)(1)
  - ▶ "A physician shall not be subject to criminal or civil liability or sanctions under Florida law solely for issuing a physician certification with reasonable care to a person diagnosed with a debilitating medical condition in compliance with this section."
 

Fla. Const. art. X, § 29(a)(2)

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## CONDITIONS ENUMERATED IN AMENDMENT II

- ▶ Cancer
- ▶ Epilepsy
- ▶ Glaucoma
- ▶ HIV
- ▶ AIDS

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## CONDITIONS ENUMERATED IN AMENDMENT II

- ▶ Post-traumatic stress disorder
- ▶ ALS
- ▶ Crohn's disease
- ▶ Parkinson's disease
- ▶ Multiple sclerosis
- ▶ "[O]ther debilitating medical conditions of the same kind or class or comparable to those enumerated, and for which a physician believes that the medical use of marijuana would likely outweigh the potential health risks for a patient."

Fla. Const. art. X, § 29(b)(1)

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## CRITICAL QUESTIONS REMAINED UNANSWERED

- ▶ 1. How would Florida define “debilitating medical condition”?
- ▶ 2. Would “debilitating medical condition” be interpreted as a catch-all, which would lead to a very broad basis on which physicians may prescribe medical marijuana?

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## CRITICAL QUESTIONS REMAINED UNANSWERED

- ▶ Other state medical marijuana laws include similar language.
  - ▶ Colorado defines “debilitating medical condition” as any disease or condition that produces conditions such as cachexia; severe pain; severe nausea; seizures, including those that are characteristic of epilepsy; or persistent muscle spasms, including those that are characteristic of multiple sclerosis. Colo. Const. art. XVIII, § 14
  - ▶ Washington: “[D]iseases, including anorexia, which result in nausea, vomiting, wasting, appetite loss, cramping, seizures, muscle spasms, or spasticity, when these symptoms are unrelieved by standard treatments or medications.” Wash. Code § 69.51A.010 (24)(f)

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## “DEBILITATING MEDICAL CONDITION”



<https://www.theweedblog.com/a-15-percent-medical-marijuana-sales-tax-proposed-in-california/>

- ▶ California uses “serious medical condition,” the interpretation of which has allowed for perhaps the most expansive range of conditions of all medical marijuana laws. Cal. Health & Safety Code § 11362.7 (Includes medical marijuana coverage for people afflicted by migraines, arthritis, muscle spasms, anxiety, alcohol abuse, insomnia, impotence, panic disorders, sleep apnea, herpes, stuttering, etc.)

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## AMENDMENT II & THE FLA. LEGISLATURE

- ▶ On June 9, 2017, both houses of the Florida Legislature passed Senate Bill 8A, implementing medical marijuana.
  - ▶ Signed into law by Governor Rick Scott on June 23, 2017, amending Fla. Stat. § 381.986
- ▶ Key provisions
  - ▶ No smoking - law expressly provides that “[p]ossession, use, or administration of marijuana in a form for smoking” does not constitute “Medical use”
    - ▶ Lawsuit has already been filed challenging smoking ban

## AMENDMENT II & THE FLA. LEGISLATURE

- ▶ No limit on how much THC medical marijuana may contain
  - ▶ “Marijuana” = “all parts of any plant of the genus *Cannabis*”, regardless of THC content
  - ▶ “Low-THC cannabis” = “a plant of the genus *Cannabis*” containing 0.8% or less of THC
  - ▶ Use of “Low-THC cannabis” might be permissible “medical use” in situations where use of “marijuana” would not be (e.g., on public transportation)

## AMENDMENT II & THE FLA. LEGISLATURE

- ▶ Qualifying medical conditions under Florida Statute 381.986(2) include those specifically enumerated in Amendment II, as well as: 1) conditions of the “same kind or class” or comparable to those conditions; 2) a terminal condition diagnosed by a physician other than the qualified physician issuing the certification; and 3) chronic nonmalignant pain either caused by a qualifying condition or originating from a qualifying condition and persisting beyond the usual course of that condition
  - ▶ No definition of “debilitating medical condition” in Ch. 381.986(1)
  - ▶ As a result, the class of qualifying conditions remains relatively narrow

## AMENDMENT II & THE FLA. LEGISLATURE

- ▶ Initial cap of 25 dispensaries per vendor
- ▶ No 90-day wait period; patient can obtain a medical marijuana certification during her first visit to a physician
- ▶ Identification Cards must be renewed annually
- ▶ Also added public records exemption regarding the marijuana use registry

## DEPARTMENT OF HEALTH REGULATIONS

- ▶ On July 3, 2017, the DOH's Office of Medical Marijuana Use filed Regulation 1-1.01, implementing the amendments to § 381.986
- ▶ Key Provisions
  - ▶ "Qualifying debilitating medical condition" has the same definition as "qualifying medical condition" has in § 381.986(2)
  - ▶ All medical marijuana treatment centers, qualifying patients, qualifying physicians, and caregivers must be registered in Florida's online Compassionate Use registry.
  - ▶ All qualifying patients and caregivers must have a valid Compassionate Use Registry card in order to obtain medical marijuana or a medical marijuana delivery device.

## LOCAL ORDINANCES

- ▶ Fla. Stat. 381.986(11) preempts regulation of cultivation, processing and delivery of marijuana by treatment centers except as provided in that section.
- ▶ § 381.986(11)(b) provides that counties and municipalities may ban the establishment of dispensaries within their boundaries.
  - ▶ However, if dispensaries are NOT banned, the county or municipality may not impose a cap on the number of dispensaries allowed.
  - ▶ Counties and municipalities have very limited freedom to determine the criteria for the location of dispensaries
    - ▶ Generally speaking, criteria for location of dispensaries cannot be more restrictive than criteria for the location of pharmacies



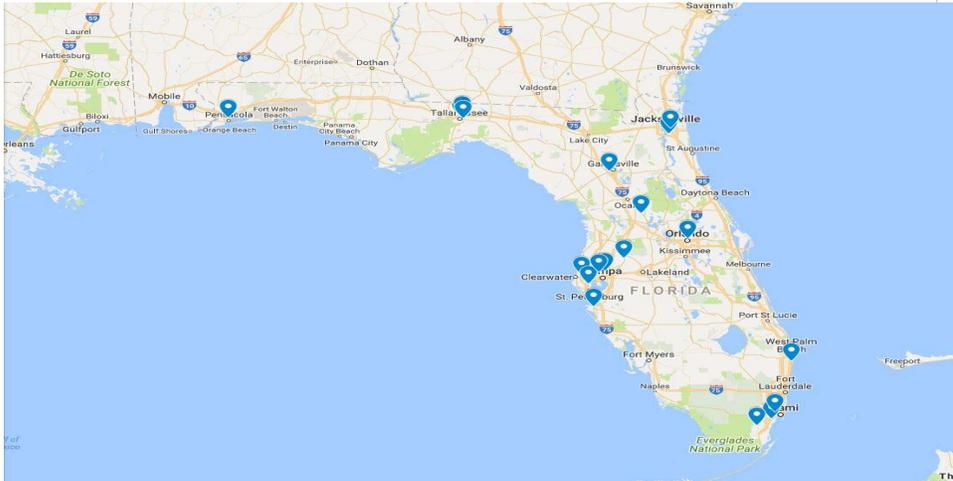
## LOCAL ORDINANCES

- ▶ Early reaction from local governments
  - ▶ Representative example: the City of Sarasota passed a temporary ban on dispensaries, effective July 17, 2017
    - ▶ The new law made it impossible for the city to execute its initial plan of confining dispensaries to "office areas"
  - ▶ "Although we are supportive of medical-marijuana dispensaries, the state has essentially taken away our ability to regulate this land use in our city." - City of Orlando spokeswoman Cassandra Lafser



## DISPENSARIES IN FLORIDA

- ▶ There are 12 approved medical marijuana treatment centers in Florida with a total of 19 locations



## MEDICAL MARIJUANA USE REGISTRY

- ▶ Law Enforcement can obtain access to the Medical Marijuana Use Registry, which is a database of ordering physicians, qualified patients, and their orders.
- ▶ Physicians also have access to this registry to ensure that multiple physicians are not providing the same prescription for one patient.
- ▶ As of August 2017, 27,000 patients are listed on the registry.

## MEDICAL MARIJUANA USE REGISTRY

- ▶ The typical visit costs \$200 to \$300.
- ▶ One doctor, who is a medical director of one of the centers, reported that he personally treats 2,000 medical-cannabis patients.
- ▶ Another clinic director, who started with one clinic in California in 2015, reported that she intends to open 25 clinics in Florida by June 2018.

## HOW DO MEDICAL MARIJUANA LAWS AFFECT THE WORKPLACE?

- ▶ State laws that provide for the legalization of medical marijuana could have an effect on the application of federal law
  - ▶ The Americans with Disabilities Act
  - ▶ The Family and Medical Leave Act
  - ▶ Drug-free Workplace Laws

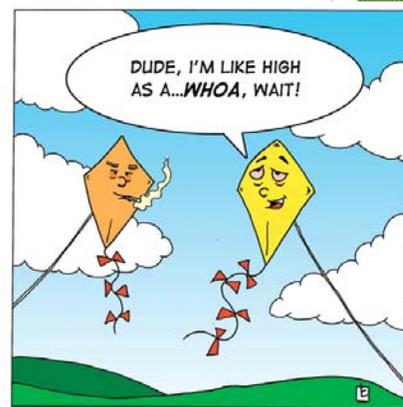
## HOW DO MEDICAL MARIJUANA LAWS AFFECT THE WORKPLACE?

- ▶ The enactment of Amendment II might also affect the application of certain state laws
  - ▶ “Lawful Activities” laws that prohibit employers from taking adverse action against employees for participating in lawful activities
    - ▶ Florida does not have a “Lawful Activities” law, but some local entities within the state do
  - ▶ Workers’ Compensation Laws
  - ▶ Unemployment compensation
    - ▶ No decisions from Florida Reemployment Assistance Appeals Commission . . . yet
    - ▶ In 2014, Michigan Court of Appeals held that medical marijuana users are entitled to unemployment benefits so long as there is no evidence that they were impaired on the job. Braska v. Challenge Manufacturing Company, 861 N.W.2d 289, 291 (Mich. Ct. App. 2014).

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## “ILLEGAL DRUGS” UNDER THE ADA

- ▶ Under the ADA, an employer must provide a reasonable accommodation to a qualified individual with a disability. 42 U.S.C. § 12102
  - ▶ An employee “who is currently engaging in the illegal use of drugs” is not a qualified individual. 42 U.S.C. § 12111(8)

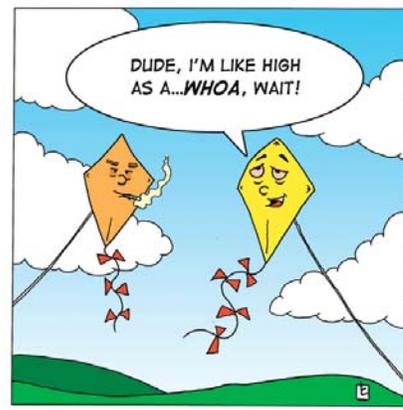


<http://spudcomics.com/tag/marijuana/>

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## “ILLEGAL DRUGS” UNDER THE ADA

- ▶ The ADA provides that “illegal drugs,” for purposes of determining whether the user of which is a qualified individual, is defined not by state law, but rather by the federal Controlled Substances Act. 21 U.S.C. § 801 et seq.
  - ▶ As we recall, marijuana is a Schedule I hallucinogen under the CSA.
  - ▶ “Illegal drugs” defined with reference to CSA, not to state law.



<http://spudcomics.com/tag/marijuana/>

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## AMENDMENT II & THE ADA

- ▶ With regard to the accommodation requirement, state medical marijuana laws generally fit into three categories:

Type of Med. Mar. Law	States with this Type of Med. Mar. Law
States whose laws affirmatively provide that an employer has <b>no duty to accommodate</b>	Washington, Oregon, Michigan, Montana, Colorado, and now Florida
States whose laws are <b>silent on accommodation</b>	California, Maryland, Massachusetts, New Mexico
States whose laws <b>expressly require accommodation</b> (under state employment/human-rights laws)	New York, Arizona, Minnesota, Illinois, Delaware, Maine, Nevada, Connecticut

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## “NO DUTY TO ACCOMMODATE”

- ▶ Example: Oregon’s Medical Marijuana Act
  - ▶ Or. Stat. § 475B.413: Nothing in ORS 475B.400 to 475B.525 requires:
    - ▶ (2) An employer to accommodate the medical use of marijuana in the workplace.
- ▶ But even these seemingly clear laws, which expressly state an employer has no duty to accommodate medical marijuana usage, have resulted in litigation regarding their scope.

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## “NO DUTY TO ACCOMMODATE”

- ▶ Is there a duty to accommodate an employee who uses medical marijuana *outside* the workplace?
  - ▶ Courts in Oregon, Montana, Washington, and Rhode Island have addressed this issue with varying results.

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## Emerald Steel v. Bureau of Labor, 230 P.3d 518 (Or. Sup. Ct. 2010) (en banc)

- ▶ No duty: Marijuana's legality under state law is irrelevant, because the CSA preempts Oregon law, and medical marijuana is a Schedule I drug. Marijuana is illegal at the federal level, therefore an employer has no duty to accommodate an employee whose medical marijuana usage is legal at the state level.

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## Emerald Steel v. Bureau of Labor, 230 P.3d 518 (Or. Sup. Ct. 2010) (en banc)

- ▶ Facts:
  - ▶ Temporary employee used medical marijuana to treat anxiety and panic attacks
  - ▶ Told supervisor about his marijuana use in anticipation of potential drug testing as a permanent employee
  - ▶ One week later, supervisor discharged employee without discussion of potential alternative treatments for his condition
  - ▶ Employee then filed complaint with state Bureau of Labor and Industries, invoking ORS 659A.112 (Oregon's state counterpart to the ADA)

Emerald Steel v. Bureau of Labor, 230  
P.3d 518 (Or. Sup. Ct. 2010) (en banc)

- ▶ Holding: no duty to accommodate employee.
  - ▶ Even though medical marijuana use permitted under state law, the CSA and ADA's prohibition of illegal drug use preempts state law
  - ▶ Therefore, no duty to accommodate or engage in interactive process with employee using medical marijuana, regardless of legality at state level

Carlson v. Charter Communications, LLC,  
2017 WL 3473316 (D. Mont. Aug. 11, 2017).

- ▶ Employee claimed that he only used medical marijuana outside of work.
- ▶ The court reiterated that there is no duty to accommodate in Montana and there is no claim for wrongful discharge under the act.
- ▶ It dismissed his wrongful termination claim.

## Carlson v. Charter Communications, LLC, 2017 WL 3473316 (D. Mont. Aug. 11, 2017).

- ▶ The court also held that the federal Drug-Free Workplace Act preempted the Montana Medical Marijuana Act when the employer was a federal contractor and required to comply with the act.
  - ▶ It rejected the plaintiff's argument that there was no conflict because he hypothetically could comply with both act by using marijuana outside of work.
  - ▶ It concluded that possession of marijuana was plainly prohibited by the federal act and that state act permitted possession at any time or place.

## "No Duty to Accommodate"

- ▶ Wash. Code § 69.51A.060: "Nothing in this chapter requires any accommodation of any on-site medical use of marijuana in any place of employment ... ."
- ▶ 21 R.I. Gen. Laws. Ann. § 21-28.6-7: "Nothing in this chapter shall be construed to require . . . An employer to accommodate the medical use of marijuana in any workplace."
- ▶ Similar language but different results

## Roe v. TeleTech Customer Care Mgmt., 257 P.3d 586 (Wash. 2011)

- ▶ When Washington first passed Medical Use of Marijuana Act in 1998, it provided that nothing in the Act required accommodation of marijuana use in any place of employment; in 2007, amended so that nothing in the Act required accommodation for on-site medical use in any place of employment.
- ▶ Facts of Roe:
  - ▶ Employee took medical marijuana four times a day to treat migraines
  - ▶ Informed employer
  - ▶ Terminated after testing positive
  - ▶ Sued for wrongful termination in violation of state public policy allowing use of medical marijuana



<https://www.theweedblog.com/asa-reacts-to-medical-marijuana-employment-discrimination-in-washington-state/>

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## Roe v. TeleTech Customer Care Mgmt., 257 P.3d 586 (Wash. 2011)

- ▶ Interpreting Washington's "on-site" accommodation provision, the Wash. Supreme Court rejected plaintiff's argument that the inclusion of "on-site" signals the implicit requirement that the law requires "off-site" use of medical marijuana.
  - ▶ "This statutory silence supports the conclusion that [the law] does not require employers to accommodate off-site medical marijuana use."
- ▶ In coming to this conclusion, the court noted that, if a medical marijuana law truly intended to create a duty to accommodate off-site marijuana use, it would include exceptions for certain occupations or permissible levels of impairment in order to proactively defend against on-the-job impairment.



<https://www.theweedblog.com/asa-reacts-to-medical-marijuana-employment-discrimination-in-washington-state/>

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## Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680 (R.I. Super. Ct. May 23, 2017)

- ▶ Facts of Callaghan:
  - ▶ Plaintiff was a medical marijuana user and cardholder
  - ▶ Plaintiff informed Defendant of these facts while interviewing for an internship
  - ▶ Defendant did not hire Plaintiff because she was currently using marijuana, would continue to use marijuana if Defendant employed her, and would not be able to pass a mandatory pre-employment drug test
  - ▶ Plaintiff sued for employment discrimination in violation of state medical marijuana statute

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## Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680 (R.I. Super. Ct. May 23, 2017)

- ▶ In finding that state medical marijuana statute created a private right of action, the court found it “crucial” that legislature was silent as to an employer’s duty to accommodate use of medical marijuana outside of the workplace.
- ▶ “The natural conclusion [to be drawn from the statutory silence] is that the General Assembly contemplated that the statute would, in some way, require employers to accommodate the medical use of marijuana outside the workplace.”

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## Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680 (R.I. Super. Ct. May 23, 2017)

- ▶ Important Florida note: Unlike Rhode Island's medical marijuana law, Fla. Stat. § 381.986(15) expressly provides that it "does not create a cause of action against an employer for wrongful discharge or discrimination."

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## ACCOMMODATION OF DISPENSING

- ▶ Can you fire an employee for dispensing marijuana at work?
- ▶ Yes, according to a district court in Michigan

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Henry v. Outback Steakhouse of Florida, LLC,  
2017 WL 1382292 (E.D. Mich. Apr. 18, 2017)

▶ Facts:

- ▶ Plaintiff, a server, was terminated for dispensing illegal drugs at work.
- ▶ Plaintiff was also a licensed marijuana caregiver and one of her patients was a coworker.
  - ▶ She was licensed to grow and supply marijuana to four patients.

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Henry v. Outback Steakhouse of Florida, LLC,  
2017 WL 1382292 (E.D. Mich. Apr. 18, 2017)

- ▶ Several coworkers reported that Plaintiff sold drugs at the restaurant, and Plaintiff admitted that she sold medical marijuana to a coworker.
- ▶ Plaintiff sued alleging age discrimination.
  
- ▶ The court granted summary judgment in favor of the employer, finding drug activity was a legitimate business reason for terminating the employee and there was no evidence of pretext.

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## Henry v. Outback Steakhouse of Florida, LLC 2017 WL 1382292 (E.D. Mich. Apr. 18, 2017)

- ▶ The court noted that the employer's handbook had a provision prohibiting the illegal use, sale, or possession of controlled substances while on the job or on Company property.
- ▶ It noted that marijuana remains illegal under federal law and concluded that "state medical-marijuana laws do not, and cannot, supersede federal laws that criminalize the possession of marijuana."
- ▶ The fact that her coworker was a patient does not excuse her conduct and protect her from termination.

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## ACCOMMODATION STATES

- ▶ States whose medical marijuana laws specifically require an employer to provide medical marijuana accommodations under state human rights/employment laws.
  - ▶ Provides a non-ADA avenue for disability discrimination.
- ▶ N.Y. Health Law, Title V-A 3369(2). Non-discrimination. Being a certified [medical marijuana] patient shall be deemed to be having a disability.



[https://www.cartoonstock.com/directory/m/medical\\_marijuana.asp](https://www.cartoonstock.com/directory/m/medical_marijuana.asp)

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## ACCOMMODATION STATES

- ▶ C.T. Palliative Use of Marijuana Act prohibits discrimination against patients and caregivers.
  - ▶ Noffsinger v. SSC Niantic Operating Co., 2017 WL 3401260 (D. Conn. Aug. 8, 2017).
  - ▶ A district court concluded that PUMA was not preempted by federal law, including CSA, ADA, or FDA
    - ▶ Court noted that there would be no claim under the ADA for the adverse action based on marijuana use as it is illegal under federal law.
  - ▶ The employer, a nursing home, is subject to federal regulations that require it to comply with all federal, state, and local laws.



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## ACCOMMODATION STATES

- ▶ PUMA provides an exemption when the refusal to hire is required by federal law or to obtain federal funding.
- ▶ The court held that it was not a violation of federal law to hire a marijuana user and therefore the employer did not fall within this exception.
- ▶ It also recognized, as a matter of first impression, a private right of action under PUMA for an adverse employment action.



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## ACCOMMODATION STATES

- ▶ Accommodations may be made by giving the employee medical breaks or modified work schedules.
- ▶ These accommodations may be denied through the standard defenses of undue hardship, reasonability, or direct threat.
  - Direct threat: No employer liability when an employee's impairment causes a direct threat that cannot be eliminated by a reasonable accommodation.



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## DEFENSE TO FAILURE TO ACCOMMODATE: DIRECT THREAT

- ▶ Medical marijuana impairment may be a significant risk to the health or safety of others, but especially so in positions that require transportation or physical activity.
  - ▶ Omnibus Transportation Employee Testing Act of 1991 requires drug testing of all employees performing "safety-sensitive transportation", including those whose duties require having a CDL.
  - ▶ DOT Regulations: Provide for who is subject to testing, under what circumstances, and the procedures for conducting testing.

## SILENT ON ACCOMMODATION

- ▶ Some state medical marijuana laws do not speak to whether an employer has a duty to accommodate.
- ▶ Example: California's Compassionate Use Act. No express imposition of the duty; no express rebuke of the duty. Cal. Health & Safety Code § 11362.5
  - ▶ A California court held that the CUA's silence on the issue did not imply a duty to accommodate; the only right implied by the law is the right to obtain and use marijuana for medical purposes.

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## SILENT ON ACCOMMODATION

- ▶ Nevada: With limited exceptions, requires employers engage in an interactive process with medical marijuana users, but expressly provides that employers are not required to allow medical marijuana use in the workplace. NRS 453A.800
  - ▶ Does not provide for private right of action

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## SILENT ON ACCOMMODATION

- ▶ Massachusetts Act for the Humanitarian Medical Use of Marijuana: no anti-discrimination provision, job protection or private right of action by employees against employers
  - ▶ Cristina Barbuto v. Advantage Sales and Marketing, LLC, 78 N.E.2d 37 (Mass. Sup. Ct. July 17, 2017).

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## SILENT ON ACCOMMODATION

- ▶ The plaintiff in this case was terminated after a positive drug test result.
  - ▶ She disclosed the use of medical marijuana before the test was taken.
  - ▶ She informed her employer that she did not use marijuana daily or before or at work.
  - ▶ She used it 2-3 times a week after work.
  - ▶ After the positive drug test result, the employer informed her that she was terminated because it follows federal law, not state law.

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## SILENT ON ACCOMMODATION

- ▶ The court held that an employee may proceed with a claim of disability discrimination when she has been terminated as a result of the use of medical marijuana.
  - ▶ Specifically, it found that a failure of the interactive process allowed the claim to proceed.
- ▶ It noted that an employer can have a policy prohibiting the use of a specific medication even if lawfully prescribed.

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## SILENT ON ACCOMMODATION

- ▶ The employer then has to engage in the interactive process when an employee seeks an accommodation of this policy to determine whether there are equally effective medical alternative or other accommodations that would not violate this policy.
- ▶ If there is no other effective alternative, then the employer bears the burden of proving that it would cause an undue hardship to make an exception to its policy.

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## SILENT ON ACCOMMODATION

- ▶ The court noted that the issue of undue hardship is not considered on a motion to dismiss.
- ▶ It concluded that it was not a per se unreasonable accommodation request to create an exception to this policy, even though marijuana is illegal under federal law.

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## SILENT ON ACCOMMODATION

- ▶ “Where, in the opinion of the employee's physician, medical marijuana is the most effective medication for the employee's debilitating medical condition, and where any alternative medication whose use would be permitted by the employer's drug policy would be less effective, an exception to an employer's drug policy to permit its use is a facially reasonable accommodation.”

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## SILENT ON ACCOMMODATION

- ▶ While there is no anti-discrimination provision, the court noted that the law protects a patient from any civil penalty or from being penalized in any manner or denied any right or privilege under the law.
  - ▶ According to the court: By denying the accommodation request, the employee was denied the right or privilege to use medical marijuana.

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## SILENT ON ACCOMMODATION

- ▶ The law provides that employers are not required to accommodate on-site use, but it was silent on off-site use.
  - ▶ The court found an implicit requirement from this silence.
- ▶ The employee did not have a claim under the medical marijuana statute.
  - ▶ There was no private right of action under this statute.
  - ▶ The claim, if it exist, is one under the disability discrimination law.

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## AMENDMENT II & ACCOMMODATION

- ▶ Fla. Const. art X, § 29(c)(6): Nothing in this section shall require any accommodation of any on-site medical use of marijuana in any correctional institution or detention facility or place of education or employment, or of smoking medical marijuana in any public place.
- ▶ Fla. Stat. § 381.986(15): This section does not require an employer to accommodate the medical use of marijuana in any workplace or any employee working while under the influence of marijuana.

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## FAMILY MEDICAL LEAVE ACT: THE BASICS



- ▶ FMLA allows qualifying employees to take unpaid, protected leave for specified medical reasons, up to 12 weeks. 29 U.S.C. § 2612(a)(1)
- ▶ Medical reasons: Employee is unable to work due to a serious health condition, or time is needed for planned medical treatment of that serious health condition. 29 U.S.C. § 2612(a)(1)(D)

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## FAMILY MEDICAL LEAVE ACT: THE BASICS

- “Serious health condition”: “an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider.” 29 U.S.C. § 2611(a-b)
- Leave may be taken either through:
  - Reduced leave schedule; or
  - Intermittently. 29 U.S.C. § 2612(b)(1)

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## FMLA CONCERNS

- ▶ Medical marijuana issues in conflict with the FMLA have been sparsely litigated, and courts in states with medical marijuana laws have given us little guidance on the following issues:
  - ▶ Must an employer provide FMLA leave for employees who use medical marijuana legally under state law?
  - ▶ Is an employer liable for taking an adverse action against an employee who used medical marijuana while out on FMLA leave, in conflict with a workplace policy against drug use?

66

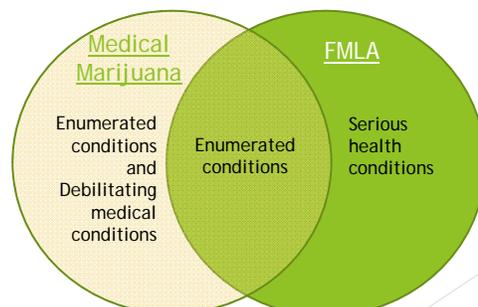
## FMLA CONCERNS

- ▶ Does an employer need to provide intermittent FMLA leave for marijuana use?
- ▶ How may an employer protect against marijuana impairment that a marijuana-using FMLA employee consumes as part of his/her treatment?
- ▶ Can/should an employer conduct a fitness-for-duty exam upon an employee's return from FMLA leave in order to determine whether marijuana was used, and if so, whether the employee is impaired by the marijuana?

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## FMLA AND MEDICAL MARIJUANA

- ▶ Is there an overlap between conditions which qualify as serious health conditions under the FMLA *and* conditions qualifying for the prescription of medical marijuana under Amendment II and Florida Statute 381.986(2)?
  - ▶ The answer depends on Florida's interpretation of "qualifying medical condition."
- ▶ In California, simple stress may qualify someone for medical marijuana; but under the FMLA, simple stress is not a serious health condition.



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## FMLA AND MEDICAL MARIJUANA

- ▶ It is very likely that all enumerated conditions in Amendment II overlap with the FMLA's definition of serious health condition. But the jury is still out as to whether all "qualifying health conditions" will constitute "serious health conditions."

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## INTERPLAY BETWEEN THE FMLA AND THE ADA

- ▶ Should an employee's eligibility for FMLA indicate to the employer that an accommodation may be contemplated under the ADA (or a state-law equivalent)?
  - ▶ Any qualifying ADA disability should also qualify as a serious health condition under the FMLA.
  - ▶ However, not all serious health conditions qualify as a disability under the ADA.
- ▶ Note that the Florida Civil Rights Act does not expressly require an employer to accommodate an employee who uses medical marijuana.



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## DRUG-FREE WORKPLACE POLICIES

- ▶ The federal Drug-Free Workplace Act requires federal contractors and grantees to keep the workplace free of illegal drugs.
  - ▶ “Illegal drugs” is defined by the CSA, which classifies marijuana as a Schedule I substance. 41 U.S.C. § 8101(a)(2)
  - ▶ The preemption doctrine, just as it does in ADA reasonable accommodation disputes, likely allows an employer to terminate an employee who lawfully uses marijuana under state law, but nonetheless violates the Drug Free Workplace Act via the CSA’s definition of “illegal drugs.”



<http://www.riskmanagementmonitor.com/drug-free-workplace-in-the-age-of-marijuana/>

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## DRUG-FREE WORKPLACE POLICIES

- ▶ Interestingly, nothing in the Act provides that employers are required to drug test employees, but there is also nothing in the Act prohibiting testing
- ▶ Employer policies may interact with medical marijuana similarly:
  - ▶ Washington’s Roe court: The state marijuana law does not protect an employee who uses medical marijuana from termination for violation of the company drug policy; the law “only provides an affirmative defense to the drug crime.”



<http://www.riskmanagementmonitor.com/drug-free-workplace-in-the-age-of-marijuana/>

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## FLORIDA DRUG-FREE WORKPLACE ACT

- ▶ Florida Statute 381.986(15) provides: “This section does not limit the ability of an employer to establish, continue or enforce a drug-free workplace program or policy.”
- ▶ “Employer” is not defined in Florida Statute 381.986(1) Definitions.
- ▶ The Medical Review Officer may render a positive test as negative if the employee provides an explanation that shows that the drug that caused the positive result was taken as a prescription medication.
- ▶ Provides a premium credit for workers’ compensation
- ▶ No reimbursement for medical marijuana under chapter 440

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## CHANGING ATTITUDES TOWARD MARIJUANA

- ▶ 61 percent of Americans think marijuana use should be legal
  - ▶ 27 percent in 1979
- ▶ 51% of Republican voters now support legalization (Gallup)
- ▶ Half of all users have a household income of \$75,000 or higher
  - ▶ Over half have completed some college
  - ▶ 74% are employed
- ▶ Half of all Americans have *tried* (smoked) marijuana.
  - ▶ 18.9 million Americans used marijuana in the prior month, according to a 2012 National Survey on Drug Use and Health.



<http://cdn.ebaumsworld.com/thumbs/picture/2183/42/94517642.jpg>

## MEDICAL MARIJUANA AND ARBITRATION

- ▶ It has been raised in several arbitrations.
- ▶ In re Wellington Indus., Inc. and UAW Local 174, 136 LA 1024 (Arb. McDonald 2016) (Michigan).
  - ▶ An employee in safety sensitive position for 24 years was involved in an accident and sent for a drug test, which was positive for marijuana use.
    - ▶ The employee previously had signed a last chance agreement 10 years earlier for marijuana use.
    - ▶ The employee claimed that he did not take marijuana at work, but used it while he was at home.

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## MEDICAL MARIJUANA AND ARBITRATION

- ▶ The medical review officer testified that the test results shows that the grievant was a frequent user of marijuana, which the grievant did not dispute.
- ▶ The MRO also testified an individual may be impaired even if he is not "feeling high."
- ▶ The CBA contained a drug-free workplace policy, which include the right of the employer to send an employee for drug testing.
- ▶ The policy was consistently enforced to ensure a safe drug-free environment, including terminating employees who test positive for marijuana, cocaine, or other illegal drugs.
- ▶ The company refused to accept medical marijuana cards as a basis for invalidating a positive drug test for marijuana.

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## MEDICAL MARIJUANA AND ARBITRATION

- ▶ The employer relied on the case law in Michigan providing that the medical marijuana card was not a defense to a positive drug test result.
  - ▶ See Casias v. Wal-Mart Stores, 764 F. Supp. 2d 914, aff'd, 695 F.3d 428 (6<sup>th</sup> Cir. 2012).
- ▶ The arbitrator denied the grievance and upheld the termination because:
  - ▶ The employer consistently held that a medical marijuana card is not a defense
  - ▶ This position was consistent with the case law
  - ▶ The circumstantial evidence, including the mistake made by the employee that led to the accident and his THC level, supported the conclusion that he was impaired at work.

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## MEDICAL MARIJUANA AND ARBITRATION

- ▶ In re Lane County, Oregon and AFSCME, Council 75, 136 LA 585 (Arb. Jacobs 2016) (Oregon)
  - ▶ The County had a drug-free workplace policy
  - ▶ At training on the drug-free workplace policy, the employee showed up late, grabbed a large handful of candy, and smelled of marijuana.
    - ▶ The arbitrator found that there was no evidence that the employee was tardy due to drug use.
    - ▶ The arbitrator also found that there was no evidence that the employee was impaired during the training.

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## MEDICAL MARIJUANA AND ARBITRATION

- ▶ The employee was sent for a drug test, which tested positive for marijuana at a level that met the definition of “under the influence” in the County’s policy.
- ▶ The employee admitted that he regularly smoked marijuana for a medical condition, but asserted that he smoked marijuana at night and not while he was at work.
  - ▶ He admitted that he smoked it the night before the training and was wearing the same jacket that he wore to the training, which emanated the odor of marijuana.
- ▶ The arbitrator sustained the grievance and reinstated the employee with full back pay.

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## MEDICAL MARIJUANA AND ARBITRATION

- ▶ He found that the policy mentioned the use of medical marijuana and required that the supervisor consult HR if medical marijuana is involved.
- ▶ He also found that the policy created an exception for drugs taken under the supervision of a health provider, which the arbitrator interpreted to implicitly include marijuana.
- ▶ He found that, because the grievant was using marijuana as provided by his doctor and the policy did not require a formal prescription, it fit within this exception in the drug-free workplace policy.

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## MEDICAL MARIJUANA AND ARBITRATION

- ▶ The arbitrator concluded that it would have been a different result if there had been evidence of impairment.
- ▶ The employer relied on the case law providing that it is not required to accommodate medical marijuana use and the fact that medical marijuana is still illegal under federal law and cannot be prescribed.
  - ▶ But the arbitrator rejected these arguments based on his interpretation of the language in the drug-free workplace policy.
- ▶ The arbitrator also distinguished cases where the drug-free workplace policy is in the CBA and the parties agree that being under the influence is a disciplinable matter.

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## MEDICAL MARIJUANA AND ARBITRATION

- ▶ In re Employer and the UAW, 2012 LA Supp. 149225 (Arb. Brodsky 2012) (Illinois).
  - ▶ An employee was sent for a drug test when he was acting erratically at work.
  - ▶ The test was positive for marijuana.
  - ▶ After his discharge, the employee presented a medical marijuana card.
  - ▶ He claimed to have been using medical marijuana after work for years.

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## MEDICAL MARIJUANA AND ARBITRATION

- ▶ The arbitrator denied the grievance and upheld the termination:
  - ▶ Even if the grievant has the ability to legally purchase and possess marijuana, it does not give him permission to report to work under its influence.

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## MEDICAL MARIJUANA AND ARBITRATION

- ▶ In re Teamsters Local and Employer, 2012 LA Supp. 148941 (Arb. Lillie 2012) (Michigan)
  - ▶ A school custodian was sent for a drug test after he was found in a custodial closet, smelling of marijuana, with red eyes, and “not acting right.”
  - ▶ The grievant tested positive for marijuana and was terminated.
  - ▶ He argued that, due to his medical condition, he was eligible for a medical marijuana card and obtained a medical certification for the medicinal use of marijuana.

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## MEDICAL MARIJUANA AND ARBITRATION

- ▶ The employer did not have a drug-free workplace policy.
- ▶ The arbitrator denied the grievance and upheld the termination:
  - ▶ He found that there is no written rule required to prohibit employees from being under the influence of drugs, particularly illegal drugs, at work.

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## MEDICAL MARIJUANA AND ARBITRATION

- ▶ It is reasonable to expect that school employees will not come to work under the influence of marijuana.
- ▶ Even if the grievant was eligible for a medical marijuana card, it was undisputed that he purchased marijuana illegally from a friend and had regular contact with a drug dealer.
- ▶ Although the drug test did not reveal when the grievant consumed marijuana, other circumstantial evidence established that he was under the influence at work.
- ▶ Specifically, the arbitrator noted: "The District cannot allow its employees to be known illegal drug users."

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## MEDICAL MARIJUANA AND ARBITRATION

- ▶ In re County of Solano and SEIU, 128 LA 1703 (Arb. Staudohar 2011) (California)
  - ▶ A deputy probation officer (14-year employee) was terminated for lying about personal marijuana use.
    - ▶ The officer was seen purchasing marijuana, which she denied.
    - ▶ Several months later, coworkers detected the odor of marijuana on the grievant; the grievant denied use.

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## MEDICAL MARIJUANA AND ARBITRATION

- ▶ Then a coworker reported that she observed the grievant use marijuana three times in social setting.
- ▶ The grievant finally admitted to using marijuana regularly outside of work.
- ▶ She obtained a medical marijuana card after her discharge.
- ▶ The employer had a drug-free workplace policy, but it applied to on-duty drug use, not off-the-job conduct.

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## MEDICAL MARIJUANA AND ARBITRATION

- ▶ The arbitrator sustained the grievance, finding that there was no just cause because there was no nexus between her drug use and her job performance.
  - ▶ He found that she exercised poor judgment in using marijuana in public, but that there was an insufficient nexus to her job.
- ▶ The arbitrator reinstated the employee without back pay after she completed a drug treatment program.

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## MEDICAL MARIJUANA AND ARBITRATION

- ▶ In re Trust and Grievant, 2010 LA Supp. 161857 (Arb. Cavanaugh 2010).
  - ▶ The employee admitted to using medical marijuana and tested positive for marijuana.
  - ▶ The CBA authorized the use of drugs that were lawfully obtained and properly used.
  - ▶ The parties had agreed to a policy prohibiting the use of marijuana even if permitted under state law.

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## MEDICAL MARIJUANA AND ARBITRATION

- ▶ The arbitrator concluded that the policy was not inconsistent with the CBA because medical marijuana was not lawful under federal law.
  - ▶ Thus, he found that marijuana cannot be lawfully obtained and properly used.
- ▶ He denied the grievance and upheld the termination.

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## MEDICAL MARIJUANA AND ARBITRATION

- ▶ In re Monterey County and SEIU, 123 LA 677 (Arb. Staudohar 2007).
  - ▶ While an employee (an office assistant) was on long-term medical leave, a supervisor found marijuana in the employee's locked desk along with a medical marijuana card.

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## MEDICAL MARIJUANA AND ARBITRATION

- ▶ The arbitrator sustained the grievance and reinstated the employee with back pay.
  - ▶ While it was quite likely that the marijuana belonged to the employee, an admitted marijuana user, and possession was a violation of the drug-free workplace policy, the arbitrator sustained the grievance because the grievant had a viable defense to any criminal prosecution.
- ▶ Specifically, the arbitrator noted: “[T]he fact that the Grievant provided a ‘viable defense’ of medical usage means that there is no violation.”

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## THE MOST IMPORTANT SECTION OF THIS PRESENTATION



(Just Kidding)

<http://maryjanesdiary.com/how-to-pass-drug-test/>

## DRUG TESTING FOR MARIJUANA

- ▶ Urine test typically does not detect the psychoactive component in marijuana, THC (delta-9-tetrahydroin cannabinol), but the non-psychoactive marijuana metabolite THC-COOH, which can linger in the body for days and weeks.
- ▶ Thus, the test cannot pinpoint when the employee used marijuana.
- ▶ Generally, the more frequent the usage, the more likely it will yield a positive test. THC is stored in fat, so frequent exercise may impact how long it stays in the system.



<https://www.leafly.com/news/science-tech/the-ultimate-dollar-store-deal-how-accurate-is-a-1-marijuana-drug>

## DRUG TESTING FOR MARIJUANA

- ▶ Hair testing may be regarded as unreliable, but can potentially detect marijuana use dating back 90 days (using standard 1 ½ long hair)
- ▶ Saliva testing: not as accurate as urine testing. Tests only for THC, and designed to detect only very recent use (within past 24-72 hours)
- ▶ Blood testing: Rarely administered, but very accurate for first few hours post-consumption (and up to 7 days after for frequent users)



<https://www.leafly.com/news/science-tech/the-ultimate-dollar-store-deal-how-accurate-is-a-1-marijuana-drug>

## DRUG TESTING FOR MARIJUANA

- ▶ Remember the Fourth Amendment/Public Employer Responsibilities!
  - ▶ Test conducted by governmental entities implicate reasonable search and seizure concerns
  - ▶ Suspicion-less random drug testing for all state employees is unconstitutional. AFSCME v. Scott (11<sup>th</sup> Cir. 2013).
  - ▶ Blanket re-employment drug testing for all applicants for city employment without showing of special need or that employment is safety sensitive is unconstitutional. Voss v. City of Key West, (S.D. Fla. 2014).



<https://www.leafly.com/news/science-tech/the-ultimate-dollar-store-deal-how-accurate-is-a-1-marijuana-drug>

## CONCLUSION

### What do we know?

- ▶ Courts presented with medical marijuana/employment issues have—so far—generally been employer-friendly
- ▶ State medical marijuana laws are often construed as affording protection only against criminal liability
- ▶ No Florida court has held that an employer must accommodate a medical marijuana user under the ADA
- ▶ Marijuana's classification as a Schedule I substance under the CSA preempts state law with regard to employment issues
- ▶ Employers have been permitted to terminate employees who violate drug-free workplace policies despite medical marijuana's state legality

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## CONCLUSION

### What we don't know

- ▶ How broadly/narrowly will Florida courts define medical conditions "of the same kind or class as or comparable to" the specific conditions listed in Amendment II?
- ▶ Will Florida allow medical marijuana use as a "prescription" exception for drug-free workplace drug tests?
- ▶ Does an employer have to provide intermittent FMLA leave for medical marijuana use?
- ▶ Will unions seek to bargain with employers over medical marijuana use?

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