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The Uncomfortable Incorporation of Marijuana Legalization in Workplace Policies

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I. INTRODUCTION

If the number of words assigned by a culture to the relevance of a topic is taken as a legitimate indication of the topic's importance, marijuana would occupy a significant, although perhaps with tongue in cheek, sometimes hazy place in the culture of the United States. Marijuana, alternately known as grass, bud, cannabis, pot, ganga, Mary Jane, Maui Wauie or any of at least 320 terms for it or its strains, without including at least an additional 297 terms associated with combinations of marijuana with other drugs or marijuana practices,[1] is entrenched as a current news item in American society. In the last several years the legalization of the use of marijuana, both for medical reasons as well as recreation, has become a staple topic de jour. Irrespective of one's opinion of the wisdom of legalization, it seems safe to say that the issue of the legalization of marijuana is reaching a tipping point with currently twenty-three states and the District of Columbia having approved some form of non-regulation or decriminalization of marijuana.[2] The purpose of this paper is not to attempt to evaluate the merits of legalization, but rather to consider some implications of the current status of legalization from the perspective of employment law, human resources management, and the prohibition of the diversion of marijuana to minors.

II. LEGAL IMPLICATIONS

One answer within the marijuana debate seems well settled: the possession, sale, distribution, and cultivation of marijuana remains illegal as it is a Schedule One controlled substance under the federal Controlled Substances Act (hereinafter CSA).[3] That being said, the illegality from a federal enforcement standpoint has been, at best, muddied by the unusual stance of the United States Attorney General's office that it will not commonly pursue CSA charges based on marijuana use so long as applicable state marijuana restrictions generally prevent:

- distribution to minors,
- revenue profiting criminal enterprises and gangs,
- diversion of marijuana to other states,
- acting as a pretext for other illegal activity,
- violence and firearm use in cultivation or distribution of marijuana,

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[1] *See Marijuana Street Terms*, HAWAI'I AIDS EDUCATION AND TRAINING CENTER, JOHN A. BURNS SCHOOL OF MEDICINE, DEPARTMENT OF MEDICINE, http://www.hawaii.edu/hivandaids/links_marijuanaaltname.htm (last visited July 3, 2015).

[2] As interpreted in this article, the number of states supporting marijuana legalization is confined to those approving the use of the marijuana plant, materials, or extracts, either through smoke or ingestion. The number of states stated does not include those which have approved low THC or cannabidiol products, generally without psychoactive effects.

[3] 21 U.S.C. §§801-971.

- drugged driving or other adverse public health consequences,
- cultivation on public lands, and possession on federal property.[4]

Political considerations and suspicions aside, the stated reason for the disinclination of the Attorney General's office to enforce a viable federal law is the promotion of the efficient use of prosecutorial resources.[5] In defense of the hands-off policy, it is widely recognized that federal enforcement of marijuana prohibition accounts for only approximately one percent[6] of all marijuana related arrests, clearly indicating that state level actions are by far the more energetic of the two.

At the end of 2014 the Department of Justice (referred to hereinafter as DOJ) was at last given some additional direction from Congress confirming the DOJ's hands-off policy when, in the Consolidated and Further Continuing Appropriations Act, 2015, Congress limited the use of appropriated funds by the DOJ.[7] Specifically, Congress directed that none of the funds authorized by the Appropriations Act could be used with regard to states currently experimenting with medical marijuana programs "to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana"[8] or to contravene the "''Legitimacy of Industrial Hemp Research'' of the Agricultural Act of 2014[9]."[10] Although the '*prevention"* phrasing of the Appropriations Act could be more explicitly defined, it is fair to say that the desired result is to discourage the Office of the United States Attorney General, or its components, from pursuing actions against specific state approved entities engaged in appropriate medical marijuana distribution or possession.

A. FEDERAL PREEMPTION?

When addressing the current status of the state legalization of marijuana in the employment arena, the intertwined issue of federal preemption of all marijuana possession and distribution is a necessary point of discussion. Absent the federal statute, the states would be free to regulate marijuana as each sees fit. Since that is not the case, however, the degree of preemption by the federal statute over state control has left the states, and the public, in a quandary as to the placement of an imagined federal line in the sand.

As noted above, marijuana is currently characterized as a Schedule One controlled substance, which under the terms of the CSA identifies marijuana as a:

(A) drug or other substance that has a high potential for abuse.

(B) drug or other substance that has no currently accepted medical use in treatment in the United States.

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[4] *See* Memorandum from James M. Cole, Deputy Att'y Gen., to all United States Attorneys, "Guidance Regarding Marijuana Enforcement," (August 29, 2013), http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf (last visited 4/7/2015).

[5] *Id.*

[6] *See* Robert A. Mikos , *Preemption Under The Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5 (2013) (citing, Bureau of Just. Stat., U.S. Dep't of Just., Drugs and Crime Facts, http://bjs.gov/content/dcf/enforce.cfm).

[7] Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No: 113-235, §538.

[8] *Id.*

[9] Agricultural Act of 2014, Pub. L. 113–79 §7606 (codified as 7 U.S.C. §5940).

[10] Consolidated and Further Continuing Appropriations Act, 2015 §539.

(C) drug lacking accepted safety for use of the drug or other substance under medical supervision.[11]

Given a characterization of *lacking any accepted medical use*, federal law generally precludes cultivation, distribution and possession; and even prescribing a Schedule One substance would expose a physician to a risk of losing prescription privileges.[12] Understandably there is significant disagreement between the respective camps as to *acceptable use*. Marijuana proponents have consistently voiced the benefits of the substance for afflictions such as glaucoma, cancer, HIV/AIDS, seizures, and severe pain. Such medical conditions are often specifically detailed within state statutes, where such statutes have been enacted, as reasons for the granting of marijuana usage licenses.[13] The Food and Drug Administration (hereinafter FDA), which is chiefly responsible for providing recommendations as to drug classifications, has historically stated that there are insufficient studies to verify safety and recognized medical benefit.[14] However, indications of a reversal of perceptions on marijuana use have been appearing within the higher bastions of the federal government. Evidencing such changing position is, as noted previously, Congress's recent disallowance of expenditures of appropriated funds by the DOJ which would prevent the implementation of medical marijuana programs.[15] The new Surgeon General of the United States, Dr. Vivek Murthy, was recently reported to have said on the television program CBS This Morning that ""We have some preliminary data showing that for certain medical conditions and symptoms, that marijuana can be helpful," Murthy told CBS. "I think that we have to use that data to drive policymaking.""[16] A later clarification statement from the Department of Health and Human Services on behalf of the Surgeon General, tempering the seeming endorsement, stated: "While clinical trials for certain components of marijuana appear promising for some medical conditions, neither the FDA nor the Institute of Medicine have found smoked marijuana to meet the standards for safe and effective medicine for any condition to date."[17] And although by no means endorsing the legalization of marijuana, President Barak Obama has made the observation, with the recognition that he has used marijuana in the past, that he "[did not] think it is more dangerous than alcohol."[18] Moreover, new federal legislation has been proposed. One such bill that has been proposed, with bipartisan support, is the "Compassionate Access, Research

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[11] 21 U.S.C. §812(b)(1) (2015).

[12] *Id.* at §824.

[13] *See, e.g.*, CONN. GEN. STAT.§§ 21a-408 – 21a-408q (2014); CAL. HEALTH & SAFETY CODE § 11362.5 (2014); and OR. REV. STAT.§ 475.300 (2014).

[14] *See* U.S. Food and Drug Administration inter-agency memo, April 20, 2006, *Inter-Agency Advisory Regarding Claims That Smoked Marijuana Is a Medicine*, http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2006/ucm108643.htm (last visited March, 24, 2015).

[15] Consolidated and Further Continuing Appropriations Act, 2015 §538.

[16] Tom Huddleston, Jr., U.S. *Surgeon General warms to medical marijuana,* FORTUNE (February 4, 2015, 7:21 PM EDT), http://fortune.com/2015/02/04/surgeon-general-medical-marijuana/.

[17] Matt Ferner, *U.S. Surgeon General Vivek Murthy Says Marijuana 'Can Be Helpful' For Some Medical Conditions*, THE HUFFINGTON POST (updated February 4, 2015, 9:59 PM) http://www.huffingtonpost.com/2015/02/04/vivek-murthy-marijuana_n_6614226.html (last visited July 3, 2015).

[18] David Remnick, *Going the Distance*, THE NEW YORKER MAGAZINE, Jan 27, 2014, http://www.newyorker.com/magazine/2014/01/27/going-the-distance-2 (last visited April. 7, 2015).

Expansion and Respect States Act."[19] The proposed federal legislation would, if enacted, reclassify marijuana as a class II drug, thereby allowing physicians to prescribe it for medical purposes and presumably largely remove many of the issues with regard to medical marijuana and the ancillary employment questions, such as those arising under the Americans with Disabilities Act.

1. Reasonably Well Settled Principles

As a predicate matter, the CSA does not prohibit states from enacting laws which involve the same subject matter as the CSA.

No provision of [the CSA] shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law . . . unless there is a *positive conflict* (between that provision of this subchapter and that State law so that the two cannot consistently stand together. [20]

The result: there is no absolute preemption of state control or management of marijuana. Absent *positive conflict* such that *the two cannot consistently stand together*, state laws are valid and coexist with the CSA.

Nor does the federal government generally have the option of coercing states to enforce federal law, or requiring they enact state laws as may be desired by federal authorities. The coercion prohibition, or *anti-commandeering* concept, underlies the decision of the Supreme Court majority in *New York vs. United States*.[21] The *New York* case revolved around the constitutionality of the Low-Level Waste Policy Amendments Act[22] which set forth a system for the development of a system of radioactive disposal sites by states and provided for state compacts for site sharing. All states were to have made arrangements for radioactive waste disposal under the statutory framework by 1993 or they would lose incentives, or face penalties. The relevant issue before the Court was whether the incentives/penalties were in excess of the grant of powers to the federal government, and an infringement on states retained rights under the Tenth Amendment.[23] The court recognized that incentives to comply with federal wishes were commonly appropriate,[24] but of the three *incentives* before the Court, the Court determined that the third, a federally imposed shift of ownership of the radioactive waste from the producers to a non-conforming state including a shift to the state of liabilities which otherwise might be placed upon the waste generator, was in excess of federal power. The distinction between direct federal regulation of individuals by federal power was distinguished from regulation of the state itself: "We have always understood that even when Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[25] The Court observed that requiring a state to choose between either accepting ownership of, and liability for, radioactive waste or regulating according to Congressional wishes would "'commandeer' state governments into the service of federal regulatory purposes, and would . . .

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[19] A Bill To Extend The Principle Of Federalism To State Drug Policy, Provide Access To Medical Marijuana, And Enable Research Into The Medicinal Properties Of Marijuana, S.683, 114th Cong. (2015).

[20] Controlled Substances Act, §708, codified at 21 U.S.C. §903 (emphasis added).

[21] New York vs. United States, 505 U.S. 144 (1992).

[22] Low-Level Waste Policy Amendments Act of 1985, Pub.L. 99-240, 99 Stat. 1842, codified in 42 U.S.C. § 2021b *et seq*.

[23] U.S. CONST. amend X.

[24] New York vs. United States, 505 U.S. 144, 166 (1992).

[25] *Id.*

be inconsistent with the Constitution's division of authority . . . ."[26] Assuming the federal government wished the states to enforce the CSA on its behalf, under the Court's reasoning, it may provide incentives, but cannot co-opt state law enforcement to assist, nor require the states to adopt legislation which would require state enforcement.[27] The result has been that, with federal enforcement of the CSA as to marijuana largely abandoned, a number of states have chosen to *decriminalize* or substantially reduce penalties, principally for medical use, for marijuana possession, distribution, and cultivation.

In a specific treatment of the constitutionality of the CSA's supremacy over a conflicting state medical marijuana statute, the Supreme Court in *Gonzales v. Raich*[28] found the CSA to be valid under the commerce clause[29] and the attendant Necessary and Proper Clause.[30] The Gonzales case involved a suit by local users and growers (Raich and Monson, respondents in the Supreme Court) of medical marijuana, acting under the California Compassionate Use Act,[31] asserting that the CSA was not applicable to their activities as being beyond the reach of the Commerce Clause. Attempting to distinguish their position from that found in *Wickard v. Filburn*,[32] respondents proposed that their purely personal cultivation was materially different from the inherently commercial aspect of *Wickard.* The respondents relied heavily on *U.S v. Lopez*[33] wherein the Supreme Court abrogated the Gun Free School Zones Act,[34] finding that the *Lopez* activity was purely local and had no economic involvement, and therefore was not subject to Commerce Clause supremacy. The court in *Raich*, however, held in favor of the United States, and thus the validity of the CSA as to intrastate activities. In so finding, the Court determined that if Congress has a rational basis for enacting *comprehensive legislation* to regulate an interstate market, the legislation is within the authority of Congress, even though the regulation "ensnares some purely intrastate activity."[35]

2. The Unsettled Aspect of Permissive State Marijuana Laws.

In their simplest form, the state laws decriminalizing marijuana possession fall squarely within the anti-commandeering concept. States have not been, and cannot be, commanded to enforce the federal Controlled Substances Act. Moreover, the CSA itself approves joint jurisdiction with state law except when there is "positive conflict between [state law and the CSA] such that the two cannot consistently stand together."[36] The result of the federal abdication of enforcement of marijuana restrictions under the CSA has been legislation by a number of states to either remove sanctions from marijuana possession, particularly as to regulated medical use, or

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[26] *Id* at 175.

[27] Note that by "force" the authors intend a legally enforceable compulsion by the federal government, as opposed to allowable incentives extended by the federal government, or the withholding of a benefit or programs to the state.

[28] Gonzales v. Raich, 545 U.S. 1 (2005) (6-3 decision).

[29] U.S. CONST. art. 1, § 8, cl.3.

[30] *Id.* at cl. 18.

[31] Cal. Health & Safety Code Ann. § 11362.5 (West 2014).

[32] Wickard v. Filburn, 317 U.S. 111 (1942).

[33] U.S. v. Lopez, 514 U.S. 549 (1995).

[34] 18 U. S. C. § 922(q)(I)(A).

[35] Gonzales v. Raich, 545 U.S. 1, 22 (2005).

[36] Controlled Substances Act, §708, codified at 21 U.S.C. §903.

have changed the characterization to a civil penalty, with less punitive effects than criminal violations. In appreciation of commentary that these sorts of enactments by the states run afoul of the positive conflict preemption of the CSA, a method for evaluation has been proposed by Professor Robert Mikos in his *state of nature framework*.[37]

In the state of nature, many forces shape human behavior: endowments, preferences, norms, and so on. Critically, however, government has no distinct influence on behavior. Government departs from the state of nature when it engages in some action, broadly defined, that makes a given behavior occur more or less frequently than it would if we were to consider only the private and social forces shaping that behavior.[38]

Absent any state law relating to marijuana, only the state of nature would exist vis-à-vis state influence. Where the federal government has intervened by stipulating the states may not positively conflict with the CSA, and the CSA essentially incorporates a total prohibition of marijuana possession, cultivation and distribution, Professor Mikos postulates that mere regulation would not necessarily be preempted.[39] A sufficient departure from the state of nature would occur, though, when a state begins to assist in the prohibited conduct, thereby participating in making the behavior more frequent. Treatment of state laws requiring employer acceptance of marijuana usage, without offending the CSA as suffering preemption is unclear.[40] Governmental sanctions upon employers contesting state based marijuana acceptance mandates would seem to exceed the private and social forces contemplated in Professor Miko's state of nature framework.

A corresponding thesis would be to view the absolute prohibition of the CSA as the ultimate in regulation. Conduct which facilitates violation of that prohibition would be in positive conflict. Conduct which instead is simply a subset of regulation, but otherwise does not foster a departure from the state of nature, would arguably not be in positive conflict. Otherwise viewed, at one end of the spectrum the states are free to completely refuse to regulate marijuana issues. The anti-commandeering rule would generally forbid the federal government from requiring legislation. At the other end of the spectrum is the position of the CSA that marijuana activities are generally absolutely prohibited. To the extent that a state simply regulates by proscribing activities unless certain conditions are met, there is no conflict. Registering medical marijuana permittees, establishing the incidents necessary to obtain permits, zoning marijuana related businesses, and licensing and inspecting vendors and dispensaries are all subsets of regulation that do not encourage usage; usage is prohibited, as under the CSA, unless a condition is satisfied. All such state actions are merely located somewhere along the continuum between no restriction and complete restriction.

When, however, the state becomes complicit in a prohibited activity by assistance or encouragement, when the state deviates from merely regulating the proscribed activity, positive conflict should be seen to occur. State actions such as establishing state supported marijuana farms

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[37] Robert Mikos, *On the Limits of Supremacy: Medical Marijuana And The States' Overlooked Power To Legalize Federal Crime*, 62 VAND. L. REV. 1421(2009); *see also* Robert Mikos, *On the Liimits of Federal Supremacy When States Relax (or Abandon) Marijuana Bans*, CATO INST. POLICY ANALYSIS NO. 714 (2012).

[38] Mikos, *On the Limits of Supremacy: Medical Marijuana And The States' Overlooked Power To Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1448(2009).

[39] *See* Robert Mikos, *On the Liimits of Federal Supremacy When States Relax (or Abandon) Marijuana Bans*, CATO INST. POLICY ANALYSIS NO. 714 pp13-17.

(2012).

[40] *Id.* at 15-16.

or dispensaries could be in direct conflict. Any state engaging in such collusion should be in direct violation of the CSA. Agriculture extension assistance in cultivation would likely be a positive conflict since it would provide a state benefit to those engaging in federally prohibited actions. Likewise, disciplining employers who choose to adhere to federal law would seem to be outside of mere regulation, and instead conflict with the perceived federal policy that marijuana usage is forbidden and receives no protection.

B. STATES EXPERIMENTING WITH LEGALIZATION

At the date of writing of this article, twenty-three states and the District of Columbia have adopted marijuana plant, as compared to extracts, permissive legislation in some form. The degree of acceptance varies from that of very restricted use for study purposes to that of approval for recreational use. The majority of the states' permitted uses have been to allow marijuana use and distribution for medical purposes. In spite of the states sanctioning the use of marijuana, however, uncertainty persists in the employment setting. The enabling statutes involvement with employee protection fall into several categories:

1. employees are protected for marijuana use, including on-site at the workplace, with employment disability accommodations attendant;
2. employees are protected from employer discipline or penalty for off-worksite use;
3. the statute allows discipline for on-worksite use or impairment, but is silent on off worksite use; and,
4. the statute allows employer discretion in assessing any penalty or discipline irrespective of location of use or impairment.

The fourth category obviously poses no impediment to employer treatment of marijuana use, except to the degree public policy might intervene.[41] To date, the cases have fallen into the first three categories, with results roundly favoring employers.

Given the short period of time the states have been permitting greater access to marijuana, it is not surprising that case law involving employer conflicts is not abundant. One of the earlier cases, although noted not precedential but still instructive, is the 2009 Montana case of *Johnson v. Columbia Falls Aluminum Company*.[42] Johnson, an employee of Columbia Falls Aluminum Company, was under physician supervision for the treatment of pain by use of marijuana. Johnson did not use marijuana at the worksite, he purchased the marijuana with his own funds, and prior to his dismissal received satisfactory evaluations. Johnson did not report the marijuana use to Columbia Falls, however, until an evaluative drug test reported positive for marijuana. The collective bargaining agreement permitted an employee to be disciplined for a positive drug test result for marijuana. Among other grounds, all of which failed, Johnson predicated the suit upon violation of the Americans with Disabilities Act, and the Montana Medical Marijuana Act. In its abbreviated decision, the Montana Supreme Court found that the Montana Medical Marijuana Act did not require employer accommodation of medical marijuana in the workplace, and thus Johnson's claim failed both as to the Montana statute and the ADA.

Ross v. Raging Wire Telecommunications[43] was also one of the earlier cases to test the use of marijuana in opposition to employer restrictions. As is a relatively common fact pattern, the employee, Ross, was using medical marijuana off of the worksite and under physician supervision. Upon applying for a job, and receiving conditional employment status with the defendant, Ross

[41] *But see* Roe v. Teletech, 257 P.3d. 586, 595-596 (Wash. 2011).

[42] Johnson v. Columbia Falls Aluminum Co., 350 Mont. 562, 213 P.3d 789 (MT. 2009).

[43] Ross v. Raging Wire Telecommunications, 174 P.3d 200 (Cal. 2008).

underwent a required drug test. The resulting positive test result culminated in suspension and then termination of Ross from employment with Raging Wire. Suit was brought asserting violation of the California Fair Employment and Housing Act[44] by virtue of discrimination in employment due to disability and failure to provide accommodation. In opposition to arguments from Ross that the intent of the medical marijuana legislation was to exempt employees from employer discipline for an employee's off-site use, the California Supreme Court found that the California Compassionate Use Act[45] only provided relief from criminal charges,[46] and that the use of marijuana remained illegal under federal law.[47] Reasoning that the statutory exception "[n]othing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment . . . ."[48] is meaningless without a corresponding general duty to allow off-site use, the employee argued for a finding of a general obligation of accommodation for off-site use. Absent an express provision imposing a general obligation, however, the Court was unwilling to impose such a restriction on employers.

The specific preemption language of the CSA which becomes effective upon positive conflict leaves wide latitude for interpretation. Explicit treatment of such preemption theory in relation to marijuana was addressed by the Supreme Court of Oregon in 2010.[49] An employer, Emerald Steel, sought review of an administrative decision by the Oregon Bureau of Labor and Industries that the employer had engaged in prohibited disability discrimination. The employee, who brought the initial complaint was an authorized medical marijuana user under Oregon law. The employee used marijuana in accordance with his state registration and only during non-work hours. Although several additional issues were treated, of most interest in *Emerald Steel* is its consideration of Emerald Steel's assertion that the Oregon Medical Marijuana[50] law was preempted by the CSA due to the Supremacy Clause[51] of the Constitution. Addressing the positive conflict language of the CSA, the court applied two alternative tests to establish conflict: 1) when it is impossible for a private party to comply with both state and federal requirements, or 2) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[52] The Emerald Steel court found no impossibility, and therefore no conflict, under the first prong of its test. As to the second prong though, the Oregon Supreme Court determined that

Affirmatively authorizing a use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances

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[44] California Fair Employment and Housing Act, codified in Cal. Gov. Code §12920-12921.

[45] Cal. Health and Safety Code §11362.5. See also Cal. Health and Safety Code §11362.7-11362.83)

[46] Raging Wire. 174 P.3d at 206

[47] *Id.* at 204.

[48] Cal. Health and Safety Code §11362.785(a).

[49] Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries, 230 P.3d 518 (Or. 2010).

[50] *See* OR. REV. STAT. §§475.300 – 475.346 (2014).

[51] U.S. CONST. art. 6, cl. 2.

[52] Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries, 230 P.3d at 528 (quoting Freightliner Corp. v. Myrick, 514 U.S. 280 (1995)).

Act. . . . [a]nd to the extent that [Oregon law] affirmatively authorizes the use of medical marijuana, federal law preempts that [law] leaving it "without effect."[53]

Contrary to the *Emerald Steel* case, the Michigan Supreme Court in *Ter Beek v. City of Wyoming*[54] found that there was no positive conflict between the Michigan Medical Marijuana Act[55] and the CSA, and that the Michigan act was not preempted by the CSA. Although not an employer related case but rather a city zoning issue, preemption under the positive conflict language was directly considered. The *Ter Beek* court, as in *Emerald Steel*, used the same two prong test and found no impossibility.[56] Differing from *Emerald Steel*, however, the *Ter Beek* court found that the Michigan statute did not "frustrate or impede the federal mandate"[57] because Michigan law did not attempt to limit the CSA sanctions, but only granted state immunity.[58]

Ancillary to the claims of protection flowing from the marijuana statutes themselves are claims of protection derived from those laws generally known as lawful activities statutes. Often aimed at protecting employees from employer interference with employees' off-duty activities, such as use of alcohol and tobacco, these statutes prohibit employers from engaging in discipline or punitive actions based on such off-duty conduct. In *Coats v. Dish Network*,[59] a suit wherein a prospective (not officially released for publication and subject to change or withdrawal) Colorado Supreme Court opinion was just made available, protection of off-duty use of marijuana under Colorado's lawful activities statute[60] has been (preliminary opinion) determined. As has generally been the case, the aggrieved employee, in this instance suffering from quadriplegia, was a verified medical marijuana user whose employment was terminated for having tested positive for marijuana. The employee, Coats, alleged that he never was impaired at work and never used marijuana on the employer's, Dish Network, premises. At issue is whether or not the statute's restriction against employee termination "due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours"[61] applies to medical marijuana use allowed under state law, but illegal under federal law. The Colorado Supreme Court, affirming the court of appeals determination,[62] confirmed that the use of marijuana is illegal under federal law, and found no legislative intent to exempt violations of federal law under the statute.[63] Without specific language, or other overt legislative indicia, isolating the meaning of the word *legal* to that of state law, was determined by the court in Coats to be too narrow: "[W]e find nothing to indicate that the General Assembly intended to extend section 24–34–402.5's protection for "lawful"

[53] *Id.* at 529.

[54] Ter Beek v. City of Wyoming, 846 N.W. 2d 531 (Mich. 2014).

[55] MICH. COMP. LAWS §§ 333.26421 – 333.26430 (2014).

[56]Ter Beek at 537 (Mich. 2014).

[57] *Id.* at 540.

[58] *Id.*

[59] Coats v. Dish Network, L.L.C., --- P.3d ----, 2015 WL 3744265 (Colo.), 2015 CO 44.

[60] COLO. REV. STAT. §24-34-402.5.

[61] *Id.*

[62] Coats v. Dish Network, L.L.C., 303 P.3d 147 (Colo. App., Div. A, 2013).

[63] Coats v. Dish Network, L.L.C., --- P.3d ----, 2015 WL 3744265 (Colo.), 2015 CO 44 at ¶20.

activities to activities that are unlawful under federal law."[64] Interpreting *legal* to include federal law as well, the court found in favor of the employer.

This article is not intended to discuss in depth the state statutory framework of marijuana authorization laws. The following table, however, presents ~~as~~ a summary of state treatment as to employer restrictions.[65] Note that with regard to employer restrictions many states are listed as limited. The determination of employers' limitation is based on both explicit statutory language and the attendant possibility that an implied off-duty restriction on employers could be interpreted by other courts, as was asserted by the employee in the *Ross*[66] case. In addition to the states detailed in the table below, a number of additional states have adopted legislation which would allow federally prohibited actions for the purpose of experimentation and research, the use of low THC products, and extracted oils and cannabidiol, as contrasted to stereotypical marijuana smoking and ingestion.[67]

Consolidated Table – State Marijuana Allowance for Medical and Recreational Use[68]

State	Employer may restrict[69]	Specific Conditions	Use: Medical, Recreational
Alaska	Yes	Yes	Medical; Recreational.
Arizona	Limited– impaired; on premises	Yes	Medical
California	Yes-(Ross v. RagingWire[70]); Limited- CAL. HEALTH & SAFETY§ 11362.785	No	Medical
Colorado	Yes-Coats v. Dish Network;[71] Limited-Colo. Const. Art. XVIII, § 14.(10) (b).	Yes -med	Medical; Recreational

[64] *Id.*

[65] For those interested in more detailed information about specific state laws, the authors would suggest several on-line resources. Useful sites are The National Conference on State Legislatures, http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx; Governing the States and Localities, http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html; Office of National Drug Control Policy, https://www.whitehouse.gov/ondcp/state-laws-related-to-marijuana ; and Marijuana Policy Project, http://www.mpp.org/states/ ;

[66] Ross v. RagingWire Telecommunications, 174 P.3d 200 (Cal. 2008).

[67] Alabama, Florida, Georgia, Iowa, Kentucky, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, and Wisconsin have legislated allowances for purposes related to study, clinical trials research, and investigation, or limited to low THC products or cannabidiol without psychoactive effects.

[68] The table was derived generally from the National Conference on State Legislatures, State Medical Marijuana Laws, available at http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx, with updated information and treatment of employer restrictions.

[69] "Yes" indicates no apparent limitation on employers to regulate on or off duty. "Limited" references a modified employer right, generally limited to on duty, on premises, and intoxication restrictions. Limited also recognizes a possible judicial inference of limitation of the sort rejected in Ross v. RagingWire Telecommunications.

[70] Ross v. RagingWire Telecommunications, 174 P.3d 200 (Cal. 2008).

[71] Coats v. Dish Network, L.L.C., --- P.3d ----, 2015 WL 3744265 (Colo. 2015), 2015 CO 44 (note that currently the Colorado Supreme Court decision is listed as not being released for publication and is subject to change or withdrawal).

State	Employer may restrict[69]	Specific Conditions	Use: Medical, Recreational
Connecticut	Limited- Conn. Gen. Stat. § 21a-408p (2013)	Yes	Medical
Delaware	Limited- loss of federal funds,[72] workplace.[73]	Yes	Medical
District of Columbia	Yes- Ballot Initiative 71, to be codified as D.C. Code §48-904.01(a)(4) &(6).	Yes - med	Medical- D.C. Code § 7-1671.02. Recreational- Initiative 71, effective Feb. 26, 2015 (note there is continuing conflict in Congress over allowance)
Hawaii	Limited – in workplace	Yes	Medical
Illinois	Limited – workplace; zero tolerance allowed if applied in non-discriminatory manner.[74]	Yes	Medical
Maine	Limited – if use would cause loss of federal funding; if all smoking prohibited on premises.[75]	Yes	Medical
Maryland	Yes	Yes	Medical
Massachusetts	Limited - workplace[76]	Yes	Medical
Michigan	Limited- workplace[77]	Yes	Medical
Minnesota	Limited- loss of federal benefit, workplace use, or impairment.[78]	Yes	Medical
Montana	Limited[79]	Yes	Medical
Nevada	Limited – workplace; otherwise employer must attempt reasonable accommodations[80]	Yes	Medical
New Hampshire	Limited- Workplace and impaired,[81]otherwise silent	Yes	Medical

[72] DEL. CODE. ANN. tit. 16 § 4905(a)(3) (West 2014).

[73] *Id.* at §4907(a)(2)-(3).

[74] 410 ILL COMP. STAT.130 /50 (2014).

[75] ME. REV. STAT. tit. 22, §2 (2014).

[76] MASS. GEN. LAWS ch. 94(C) App. § 1-7 (2014). Note that the statute is silent on use beyond the workplace.

[77] MICH. COMP. LAWS ANN.§333.26427(c)(2) (West 2015).

[78] MINN. STAT. §151.32(3)(C) (2014).

[79] The Montana Medical Marijuana Act generally does not impose obligations on employers; *see* MONT. CODE ANN. §50-46-30(4)(b) & (5) (West, 2014). *But see* MONT. CODE ANN. §39-2-313 (West 2014) which prohibits discrimination for off-duty use of lawful products.

[80] NEV. REV. STAT. §453A.800 (West 2014).

[81] N.H. REV. STAT. ANN. § 126-X:3(II)&(III)(c) (2014).

State	Employer may restrict[69]	Specific Conditions	Use: Medical, Recreational
New Jersey	Limited- workplace,[82] otherwise silent.	Yes	Medical
New Mexico	Limited- workplace[83]	Yes	Medical
New York	Limited- consumption in public place,[84]loss of federal funding or impaired,[85] Considered disabled.[86]	Yes	Medical
Oregon	Yes	Yes	Medical; Recreational Measure 91 (2014); Effective July 1, 2015.
Rhode Island	Limited- impaired with negligence, accommodation in workplace[87]	Yes	Medical
Vermont	Yes	Yes	Medical
Washington	Yes- workplace; drug-free workplace policy[88]	Yes	Medical; Recreational Initiative 502 (2012) WAC Marijuana rules: Chapter 314-55 WAC

III. Diversion to Minors - Will The Department of Justice Have Renewed Interest?

The Justice Department indicated in 2013 it is unlikely it will enforce the Controlled Substance Act of 1970 insofar as it might apply to marijuana in states that have passed legislation allowing for either medical marijuana or recreational marijuana use.[89] However, the non-enforcement is contingent on the states giving law enforcement priorities to eight different areas as generally discussed previously. Of those exceptions, the one posing a glaring danger to non-involvement by the federal government is that of the prevention of diversion and distribution of marijuana, be it medical marijuana or legalized marijuana, to minors. Should a finding by the DOJ of diversion occur, presumably it could serve to derail the states' marijuana experiments if federal enforcement was again instituted. Economic analysis can assist by shedding light on the economic likelihood of this priority being partially or fully realized.

The first line of reasoning is based on indirect evidence. If greater availability of marijuana through the introduction of medical marijuana leads to greater consumption of marijuana, then the risk of diversion to minors increases. One study compared marijuana usage in 2004 between states

[82] N.J. Stat. Ann. § 24:6I-14 (West 2015).

[83] N.M. Stat. Ann. § 26-2F-5(3)(c) (West 2014).

[84] N.Y. Pub. Health L § 3362(2)(a).

[85] N.Y. Pub. Health L. § 3369(2).

[86] New York classifies certified marijuana patients as having a disability under the New York Human Rights Law and subject to accommodations; *see, id.* at § 3369(2).

[87] R.I. Gen. Laws §21-28.6-7(a) & (b) (West 2014).

[88] Wash. Rev. Code § 69.51A.060(4) & (6) (2014).

[89] To date of writing of this article, the jurisdictions of Alaska, the District of Columbia, Colorado, Oregon and Washington have legislation approving marijuana for non-medical, or recreational use.

with medical marijuana laws (MML) and those without such legislation.[90] The study found the prevalence of marijuana use in general was 7.13% in states with medical marijuana laws versus 3.57% in states without medical marijuana laws.[91] The rate of abuse and dependence was reported to be 2.61% in states with medical marijuana and 1.27% in those without such laws.[92] The authors advance several arguments as to their findings. Two of them are particularly relevant to the issue at hand. First, passage of medical marijuana laws could change community attitudes on both medical and non-medical uses through reducing community disapproval and lessening perceived riskiness of use.[93] This could be important with respect to consumption by minors. Parents might experience the change in attitudes and feel less need to monitor the behavior of their minor children. The other potential explanation, which is not mutually exclusive with the idea of changing attitudes, involves commercial availability.[94] Medical marijuana will require commercialization and promotion, thus increasing the availability and visibility of marijuana in general. The greater legal availability may lead to diversion to the illicit market for the recreational use of marijuana.

In addition to the connection between medical marijuana laws and greater consumption of marijuana generally, the correlation between the legality of medical marijuana and consumption by adolescents has received particular attention. One study showed higher marijuana usage and a lower perceived risk of marijuana consumption in states with medical marijuana laws.[95] Specifically, the rate of marijuana usage among 12-17 year olds was 8.68% in the 16 states which passed medical marijuana laws by 2011 compared to a rate of 6.94% in the 34 states without medical marijuana laws. Note these levels of adolescent usage are noticeably higher than the levels discussed above for all age groups. The authors advance three separate, but not mutually exclusive, explanations.[96] One, states with higher rates of usage and lower perceptions of risk may be more likely to pass MML. Two, as noted earlier, MML may lower the perception of riskiness and decrease the disapproval of marijuana usage. Three, unobserved factors may drive both implementation of medical marijuana laws and the higher levels of usage. The authors indicate their current research cannot disentangle which of these three explanations (or some combination) dominates. In a more sophisticated empirical analysis using additional data, the relationship between higher levels of marijuana use and the presence of medical marijuana laws is replicated.[97] For marijuana usage, the presence of medical marijuana law results in ~~a~~ higher usage rates, ranging from a low of 2.2 to a high of 4.7 percentage points. Additionally, the perception of the riskiness of marijuana consumption was 5.2 to 7.6 percentage points lower in states allowing medical

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[90] Magdalena Cerda, et. al., *Medical marijuana laws in 50 states: Investigating the relationship between legalization of medical marijuana and marijuana use, abuse and dependence*, 120 DRUG AND ALCOHOL DEPENDENCE at 22 (2012).

[91] *Id*. at 24.

[92] *Id*.

[93] *Id*. at 25.

[94] *Id*.

[95] Melanie Wall, et. al., *Adolescent Marijuana Use from 2002 to 2008: Higher in States with Medical Marijuana Laws, Cause Still Unclear*, 21 no. 9 ANNALS OF EPIDEMIOLOGY at 714 (2011).

[96] *Id*. at 715-716.

[97] Sam Harper, et. al., *Do Medical Marijuana Laws Increase Marijuana Use? Replication Study and Extension*, 22 no. 3 ANNALS OF EPIDEMIOLOGY at 207 (2012).

marijuana[98]. The authors are able to supply limited evidence to support the third explanation advanced above, that unobserved factors result in both higher levels of marijuana usage and the likelihood of passage of MML.[99] All of the above analysis suggests that, for adolescents, the adoption of medical marijuana laws increases the consumption and lessens the perceived riskiness attached to marijuana. Given demand for marijuana is higher in states with MML, the likelihood of diversion of medical marijuana into the illicit marketplace seems a significant concern. Supporting this idea, a survey of 393 adolescents aged 13 to 19 found that 55% believed passage of a medical marijuana referendum in their state would mean it would be easier for teens to smoke marijuana recreationally.[100] The extent to which the diversion to adolescents jeopardizes the ability of the state to meet the priority for non-enforcement, specified by the DOJ, calls into serious question the long term viability of state allowances.

To shed more direct light on the hypotheses of diversion of medical marijuana, another study examined experiences expressed by adolescents in a substance abuse treatment program.[101] The study analyzed the responses to a questionnaire ancillary to eighty admissions to an urban, outpatient adolescent treatment program in Denver, Colorado. Half of the studied program's referrals generally came from the juvenile justice system, while the other half came from primary care, school or self-referral. Of the group, 77.5% were male, and the group's age range was fifteen to nineteen years old, with a mean age of sixteen and one-half years. All respondents reported lifetime histories of marijuana use. The most common frequency of per month usage of marijuana in the past year was 20 times or more per month (69.2% of participants).[102] None of the participants reported having a license for medical marijuana.[103] Of the 80 adolescents referred to the outpatient program, almost one-half (48.8%) reported obtaining, at some point, marijuana from someone with a medical marijuana license or permit.[104] Compared with those individuals who did not obtain any marijuana from someone with a medical license, those who did have access to a licensee reported significantly greater availability of marijuana, less peer disapproval of regular marijuana use, and more frequent marijuana use.[105] Finally, an analysis of revenue issues related to the legalization of marijuana in Colorado estimates that there are 149,000 marijuana users under the age of 21.[106] These users almost uniformly obtain their marijuana outside the regulated market, i.e., the black market (wholly illegal production) or the grey market (diversions of medical marijuana).[107]

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[98] *Id*. at 210.

[99] *Id*. at 211.

[100] Richard Schartz, et. al., *Medical Marijuana: A Survey of Teenagers and Their Parents*, 42 no.6 CLINICAL PEDIATRICS at 550 (2003).

[101] Christian Thurstone, et. al., *Medical marijuana diversion and associated problems in adolescent substance treatment*, 118 DRUG AND ALCOHOL DEPENDENCE at 489 (2011).

[102] *Id*. at 490.

[103] *Id*.

[104] *Id*. at 491.

[105] *Id*.

[106] The Marijuana Policy Group, *Market Size and Demand for Marijuana in Colorado*, July 9, 2014 at 26, available at https://www.colorado.gov/pacific/sites/default/files/Market%20Size%20and%20Demand%20Study%2C%20July%209%2C%202014%5B1%5D.pdf (last visited July 3, 2015).

[107] *Id*.

The indicated conclusion, based on the bulk of current research, is that the existence of medical marijuana influences greater consumption of marijuana and less perceived risk from its use, particularly with respect to adolescents.[108] It would seem that states with either legalized sales of marijuana and/or medical marijuana need to allocate appropriate resources to limit diversions to minors and trigger the DOJ to stop non-enforcement.

IV. Employer Considerations

A. Marijuana at Work

A 2013 survey report by the U.S. Department of Health and Human Services indicated that approximately 19.8 million individuals in the U.S. over the age of 12 used marijuana in the month prior to the survey, and that daily use had increased to 8.1 million persons in 2013.[109] The highest rate of use was among those individuals 18-25 at 19.1 percent [110] and declined to 5.6% after age 25.[111] Within these statistics are numerous individuals who are currently working or are looking for work. As the legalization of marijuana continues to change, it is important that businesses adhere to the laws, respect employees' rights, and at the same time find and keep the best employees.

In the creation and enforcement of policies relating to drug use, the size of the organization does matter. According to the Small Business Administration,[112] a small business, depending on the industry, can be thought of as having up to 1,500 employees (certain manufacturing), with multi-million dollar annual receipts. These small businesses range from single person service firms to small manufacturers and face a unique set of issues associated with the use of medical and recreational marijuana. Medium and larger private businesses will more likely engage in multi-state commerce and/or conduct business with the federal government. The policies on the use of marijuana are more straightforward in these businesses than in the smaller enterprises.

B. Small Business

Any business with 1,500 employees, even though classified as small by the SBA, is large enough that it will likely have a human resources department/manager and would have developed a set of policies and procedures dealing with workplace behavior. For the purposes of this paper the authors will break down small businesses into the very small business with approximately one to 100 employees and is the traditional small business. One to 100 person companies may be representative of a locally owned and operated restaurant, the traditional mom and pop retail store, many types of service companies (auto repair for example), and small manufacturing companies. These companies are typically labor intensive, with little capital and often depend on low wage employees to achieve profitability. However, this group would not include many franchised

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[108] *But see*, Kevin Hill, *Medical marijuana does not increase adolescent marijuana use*; THE LANCET PSYCHIATRY, June 15, 2015, available at http://www.thelancet.com/journals/lanpsy/article/PIIS2215-0366(15)00267-9/fulltext .

[109] Substance Abuse and Mental Health Services Administration. *Results from the 2013 National Survey on Drug Use and Health: summary of national findings.* Rockville, MD: Substance Abuse and Mental Health Services Administration; 2014. HHS Publication No. (SMA) 14-4887. NSDUH Series H-49, available at http://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.pdf (July 3, 2015)

[110] *Id.* at 2.

[111] *Id. at 24*

[112] *See*, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes*, U.S. Small Business Administration, https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf (last visited April 7, 2015).

businesses (such as franchised fast food) which may have a set of policies imposed by the franchisor or corporate office.

The very small business with a limited number of employees may or may not have any policies regarding employee behavior and the use of marijuana. In fact, the owner may engage in the use of marijuana regardless of whether the owner is domestic to a state where marijuana is legal. In states where the usage is legal, employers may do so with relative impunity. However, being constantly impaired is typically not a recommended business strategy. Regardless of the owner's philosophy on the use of marijuana, and even in states where it is legal, it is generally not required that business must keep an employee that uses marijuana,[113] notwithstanding if the use is for medical reasons.

As the number of employees in a very small business grows, the owner will of necessity become more aware of the legal and liability issues involved with the use of marijuana, irrespective of the legality. The restaurant owner may not care if the dishwasher occasionally smokes a legal (or illegal) joint during the employee's non-work hours. However, the owner's concern should increase if that employee also drives the catering van. If a drug test is performed following an automobile collision and the presence of THC (the active ingredient in marijuana) is detected, the owner may very well be subjected to enhanced liability.[114] The same could be said for any employee that is required to obtain a work-related license or permit, or is operating machinery. Even though the employee may not be impaired at the time of an infraction, THC remains in the body for days or weeks after marijuana consumption,[115] possibly creating the perception of impairment.

These very small business owners have several alternatives for consideration:

1. Do nothing. Under this decision the owner assumes nothing will happen that involves either himself/herself or the employees using marijuana and assumes all liability. Although a seemingly risky strategy, it is still true that most individuals do not use marijuana on a daily or monthly basis. Figures from the 2013 National Survey on Drug Use and Health[116] indicate that while approximately 9 percent of the workforce use illicit drugs (including marijuana), this means that 90% do not. In comparison, it is more likely that an employee will have alcohol abuse problems, as some 15% of the workforce population reported using alcohol either before or during working hours.[117]
2. Establish a no tolerance policy without testing. This policy becomes, in effect, a "don't ask – don't tell" unenforced policy. Testing, while not expensive, is a cost the business

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[113] Joanne Deschenaux, *Marijuana Use and Workplace Drug Policies*, SHRM SOC'Y FOR HUM. RESOURCE MGMT., http://www.shrm.org/legalissues/stateandlocalresources/pages/marijuana-use-workplace-drug-policies.aspx (last visited April 7, 2015).

[114] Mike Antich, *New Liability Exposure: Employee Drivers Using Medical Marijuana*, AUTOMOTIVE FLEET, June 29, 2012, http://www.automotive-fleet.com/blog/market-trends/story/2012/06/new-liability-exposure-employee-drivers-using-medical-marijuana.aspx (last visited April 7, 2015).

[115] Deschenaux, *supra* note 113 at 1.

[116] *Supra*, note 109 at 28.

[117] Michael R. Frone, *Prevalence and distribution of alcohol use in the workplace: a U.S. national survey.* J STUD. ON ALCOHOL 2006;vol. 67(1): at 151.

owner may not want to incur. Additionally the testing of employees opens up an entirely new set of issues associated with employee privacy and ADA rules.[118]

3. Establish a no, or zero, tolerance policy with testing and enforcement. This is undoubtedly the most conservative and recommended policy. However, should the state enforce statutes requiring marijuana accommodation, such a policy may be found to be discriminatory. As an alternative to the no tolerance policy, a fail and rehabilitation policy could also be implemented. This type of policy would need legal review dependent on the laws of the state in which the business operates.

Once a small business grows to sufficient size it is likely a human resources department will be established. Although there are not any standard answers as to how many employees an enterprise should have before establishing an HR department, it is generally considered appropriate if the business cannot hire the right talent in a timely manner, has growing legal issues such a harassment claims, has policies that do not support growth, or has excessive spending on outside HR related resources.[119] Upon growing large enough to establish a Human Resource Department a more formalized approach to marijuana at the workplace can be established, even if the company is classified as a small business.

C. OTHER SMALL, MEDIUM AND LARGE PRIVATE ENTERPRISES

The introduction of an HR department into the organization will hopefully bring an increased level of professionalism and expertise when dealing with the issues associated with the use of marijuana. An HR department will need to consider all of the implications of marijuana use, and may need to consider both multistate and federal legislation. As noted by Calvasina,

[I]t is estimated that a majority of employers have developed policies and procedures designed to create and maintain "drug free workplaces". While most private sector employers are "not required to test for illicit drug use" estimates are that a clear majority of employers are screening job applicants for illicit drug use and a majority also test current employees as key aspects of their efforts.[120]

These larger firms may also employ experts in the HR department, but will additionally rely on outside expertise in actual testing, and will consult with legal experts in the field of federal and state laws regarding the use of marijuana.

However, Calvasina[121] notes that even in a state that has a ten year history of medical marijuana, employers remain concerned with the inconsistent enforcement of state and federal statutes, and some continue to have difficulty complying with both federal and state laws. To help clarify the regulations and provide some general guidance, a number of authors[122] have presented

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[118] Department of Labor, Drug Free Workplace Advisor, ADA & Rehabilitation Act. http://www.dol.gov/elaws/asp/drugfree/drugs/ada.asp (last visited April 7, 2015).

[119] Beth Sussman, *Dear Anxious to Grow*, WORKFORCE, http://www.workforce.com/articles/how-big-should-we-be-before-hiring-an-hr-manager, 2/15/2015.

[120] G. Calvasina, *Human resource management policy and practice issues and medical marijuana,* JOURNAL OF MGMT. AND MKTG. RESEARCH,(6).1, 2011.

[121] *Id* at 4.

[122] J. Deschenaux, *Do marijuana laws leave drug policies up in smoke?,* HRMAGAZINE, 59(5), 15 (2014); T. Lytle, *Marijuana maelstrom,* HRMAGAZINE, 59(6), 42-46,48 (2014); T. Lytle, *What do State Marijuana Laws Mean for Employer's Drug Policies?,* SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT, June 2014, available at http://www.shrm.org/publications/hrmagazine/editorialcontent/2014/0614/pages/0614-marijuana-laws.aspx.

suggestions as to the types of considerations an HR department should deliberate upon when implementing marijuana policies.

An organization that is establishing, or that already has an established HR department, might well consider the Model Plan for a Comprehensive Drug-Free Workforce Program developed by the U.S. Department of Health and Human Services.[123] This plan suggest a generalized five element program consisting of:

> *1. The development of, or careful review of, the written policies and procedures on workplace behavior including the use and testing for both illegal and prescription drugs.*[124] Policies need to be consistent with current state and federal laws and flexible enough to accommodate likely changes as new states legalize medical and/or recreational marijuana use.[125]
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> *2. Training of supervisors to recognize potential drug abuse and the proper procedures to follow.* As an example Gunsch[126] describes a drug training program for supervisors implemented by Motorola that incorporates the reasons for the policy, details of the drug testing program, the supervisor's role, setting up communications between supervisors and employees, and suggestions for handling concerns and questions. Because of the close working relationship, the supervisor is in a key position to communicate with employees and to influence employee behavior. Additionally, from the CEO down, everyone has a supervisor regardless of their position in the organization, thus helping insure communications and policy enforcement.
>
> *3. The education of employees on company policies and procedures. This education will actually begin prior to employment with the pre-employment interview and drug testing.* Policy education will continue through on-the-job-training and subsequent contact with an employee's immediate supervisor. Education will also occur employee to employee. If there is a company policy, even though not enforced, that information will continue to be communicated informally through the grapevine.
>
> *4. Availability of employee assistance programs.* It is not necessary that every organization have a fully funded employee assistance program, but organizations can assure information is widely disseminated concerning community, state and federal programs such as those offered by the Office of National Drug Control Policy, the Department of Education, the Department of Health and Human Services, and the Department of Justice.
>
> *5. Identification of illegal drug users.* If the organization uses drug testing, then drug testing and tolerance policies need to be carefully reviewed and communicated. Employees need to know and understand the policies and the consequences of violating policies, and

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[123] *Model Plan for a Comprehensive Drug-Free Workplace Program,* U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, 1994: http://www.samhsa.gov/workplace/workplace-programs

[124] *Id* at 7.

[125] Doing so is both logical and strategic and most authors writing on the topic seem to agree. *See* Calvasina, Deschenaux; A. Komoroski, Wiwi and N. Crifo, *The Unintended Impact of New Jersey's New Medical Marijuana Law on the Workplace*, EMPLOYEE RELATIONS LAW JOURNAL, Vol. 36, No. 1, Summer 2010 pp.33-36; H. Hartman*, Legalized Marijuana and the Workplace: Preparing for the Trend*, EMP. RELATIONS L. J., Vol. 38, No. 4, Spring 2013 pp. 72-75.

[126] Dawn Gunsch, *Training prepares workers for drug testing*, PERS. J., 72.5 (May 1993): 52.

understand that the policies will be applied evenly and fairly.[127] Testing with a zero tolerance policy would mean that anyone testing positive for THC would be equivalently disciplined, with the possibility of immediate termination.

An employer also needs to be concerned with the rights of employees and should be vigilant in recognizing and protecting those rights. It would be incumbent upon the employer to follow the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration guidelines with respect to workplace testing as well as the Health Insurance Portability and Accountability Act restricting the dissemination of health related data.[128]

Yet the employer also has rights. The American with Disabilities Act permits employers to prohibit the use of illegal drugs in the workplace, even if the employee falls under the ADA qualifying guidelines. This continues to generally hold true even in states with legal use of medical marijuana.[129] Therefore, if an ADA qualified employee having a state medical marijuana permit tests positive for THC in violation of company policy, assuming no violation of state law, the employment may be terminated regardless of job performance. However, employers may be prohibited by law from disclosing to shop supervisors the results or the reason for termination.

Some are now beginning to question the absolute zero tolerance policy and the use of testing. While the test may show the presence of THC, the tests do not reliably determine if the employee is impaired or is using at the workplace.[130] Both pre-employment and random tests may show the use of marijuana, but neither shows the ability of the individual to perform a job at a given time. However, as mentioned earlier, positions that require federal or state license may require testing and strong policies.

Communications may be one of the keys to have a successful marijuana policy implementation, regardless of the content of the policy. Clearly stated and communicated statements of corporate philosophy on the use of drugs, as well as the policies and procedures will make clear the behaviors expected of all employees and may dissuade employees from using proscribed drugs.[131] This requires not only having the policy stated in the employee handbook, but also widely disseminated throughout the organization. If the business is to use drug testing and has or will have drug policies, that information should be included on everything from pre-employment forms to flyers on bulletin boards. In addition to communicating and training, the company should verify that interviewers, supervisors and executives know and understand company policies and that the policies will be enforced evenly.

In states where recreational marijuana is legal such as Colorado, Washington and Alaska, all levels of misinformed employees, including high valued employees and executives attending pot parties, and testing positive, may face immediate termination. In many instances it is the

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[127] J. Deschenaux, *Do Marijuana Laws Leave Drug Policies Up in Smoke?* HRMAGAZINE, Vol 59 (5) page 15, (2014).

[128] Calvasina, *supra note 120,* at 5-6.

[129] Calvasina, *supra note 120,* at 4.

[130] Deschenaux *supra* note 127 at 15; G. Tron, *Pot is Increasingly Legal. Employers Need to Stop Screening for It.* WASHINGTON POST, retrieved from http://www.washingtonpost.com/posteverything/wp/2015/02/26/pot-is-increasingly-legal-employers-need-to-stop-screening-for-it/.

[131] Almost every author stressed the importance of good communications for successful implementation of a drug policy, see Descheanux *supra* note 127 at 15; Calvasina *supra* note 120 at 6; Komoroski *supra* note 125 at 36; and Hartman *supra* note 125 at 74.

employee that is confused as to what is legal. As Bowman[132] notes, in states where marijuana is legal there has been a sharp rise in drug testing related firings, higher turnover and rejected applicants. Much of this seems to be the result of confusion on the part of the residents as to what is considered legal.

In these legal use states an employer may choose to accommodate either, or both, recreational and medical marijuana users.[133] However, they are not immune to liability issues. Allowing employees to use marijuana on the job, or allowing employees to report to work under the influence could lead to employer liability for accidents and negligent hiring claims.[134]

One might think that local, state and federal public institutions would perhaps have the most straight forward approach to the use of marijuana. All of the agencies depend, to some extent, on federal monies and must follow federal policies. As noted in the previous section on marijuana laws, marijuana is classified as a Schedule 1 narcotic and is illegal to grow, own, possess, or use. However, the enforcement of marijuana use by the federal government is focused more on large scale operations, the prevention of minors from acquiring marijuana and illegal use of funds acquired in the growing and distribution of marijuana.[135] The enforcement of individuals possessing and using is relegated to local enforcement agencies and the use of testing is determined by the individual agency. Additionally, penalties for using marijuana may include termination, but may also include other remedies such as rehabilitation.[136] This may allow local and state agencies some flexibility in designing policies and procedures regarding the use of, and testing for, marijuana. Yet the possibility of losing federal funds may well spur such agencies to comply with the federal mandates of their respective lead agencies.

V. CONCLUSION

Until such time as the federal government chooses to either enforce, amend, or abandon its marijuana restrictions, employers will likely have little guidance. In those states such as Oregon where the state supreme court has or will authoritatively address the issue of preemption, particularly as to marijuana in the employment setting, employers can make decisions with some assurance of being correct. In other marijuana friendly jurisdictions, employers very well may discipline employees for marijuana use only at their peril until further guidance. Aside from lawful activity laws, recreational use by employees has little protection. The hazard for employers is that derived from medical marijuana usage, especially in relation to disability related discrimination. Thus far the courts have generally favored the employer position, but that may not continue.

As a prognostication of the expected short to mid-term outcome: marijuana will be federally re-categorized as a lower, probably class II, controlled substance. Such a bill, among

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[132] L. Bowman, *Legally high, legally fired for pot use*, SCRIPPS NEWS, http://www.theindychannel.com/news/legally-high-legally-fired-for-pot-use.

[133] For an example in which a 20 person advertising agency allows employees to use marijuana off the job see Tron, *supra* note 130.

[134] Hartman *supra* note 125 at 74.

[135] Memorandum from James M. Cole, Deputy Att'y Gen., to all United States Attorneys, "Guidance Regarding Marijuana Enforcement," (August 29, 2013), http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf (last visited 4/7/2015).

[136] E. Katz, *You Can Smoke Pot in Colorado Unless You're a Federal Employee*, GOVERNMENT EXECUTIVE, March 13, 2014, http://www.govexec.com/management/2014/03/you-can-smoke-pot-colorado-unless-youre-federal-employee/80467/.

others is pending during the current legislative session.[137] With the nationwide push and acceptance of marijuana as a valid medicinal remedy, congressional attitudes are likely to adjust. A re-categorization to schedule II, especially with sufficient guidance as to proper treatment, would bring medical marijuana use under the Americans with Disabilities Act[138] as well as remove some questions of preemption under states' medical marijuana laws. Note, however, that a simple re-classification of marijuana to a schedule two controlled substance will not solve questions relating to permissive non-medical use. Employers should already have systems and policies in place to address accommodation of medication usage in the workplace. We can only hope that such legislation will have sufficient specificity to address preemption, or the lack thereof, of recreational use and the impact of lawful activities statutes.

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[137] A Bill To Extend The Principle Of Federalism To State Drug Policy, Provide Access To Medical Marijuana, And Enable Research Into The Medicinal Properties Of Marijuana, S.683, 114th Cong. (2015).

[138] 42 U.S.C. §§12101-12213 (West 2014).