

CLEARING THE HAZE: HOW STATE MARIJUANA LAWS IMPACT LEAVE AND DISABILITY

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INTRODUCTION

Currently, more than half of U.S. states, along with Washington, D.C., have legalized medical marijuana. “Medical marijuana” refers to possessing, cultivating, and/or using marijuana or its components to treat a disease or symptom(s). Those who use medical marijuana are often suffering from chronic pain, nausea, seizures, or other symptoms caused by certain diseases, such as HIV or AIDS, epilepsy, cancer, multiple sclerosis and other autoimmune disorders, and Parkinson's disease. This paper will address considerations for employers concerning medical marijuana when creating and administering disability plans, as well as workplace accommodation and return-to-work policies.



Source: <http://www.ncsl.org/bookstore/state-legislatures-magazine/marijuana-deep-dive.aspx>

BACKGROUND OF STATE MEDICAL MARIJUANA LAWS

In states where medical marijuana is legal, the laws essentially decriminalize usage of marijuana for medical purposes; some state laws both decriminalize marijuana use **and** provide employment protections for users. Certain states limit the conditions for which medical marijuana may be used and/or the amount of marijuana a patient can grow, possess, or use. Some of the laws require users to register with state agencies and possess medical marijuana identification cards. Because medical marijuana use is no longer a criminal act under those state laws, patients whose providers recommend medical marijuana for certain illnesses and chronic conditions are exempt from criminal prosecution. Therefore, when creating and administering disability plans and workplace accommodation and return-to-work policies, employers must consider how to handle employees who legally use medical marijuana.

The chart below lists states and the District of Columbia, that have legalized marijuana, either for recreational use, for medical purposes only, or for both, and outlines which states provide employment protection.

State	Medical	Recreational	Employment Accommodation	Drug Testing Accommodation	May Not Discriminate Against Registered Cardholder Status
AK	Yes	No	No	No	Yes
AR	Yes	No	No	No	Yes
AZ	Yes	No	No	Yes	Yes
CA	Yes	Yes	No	No	No
CO	Yes	Yes	No	No	No
CT	Yes	No	No	No	Yes
DC	Yes	Yes	No	No	No
DE	Yes	No	No	Yes	Yes
FL	Yes	No	No	No	No
HI	Yes	Yes	No	No	No
IL	Yes	No	No	No	Yes
LA	Yes	No	No	No	No
MA	Yes	Yes	No	No	No
MD	Yes	No	No	No	No
ME	Yes	Yes	No	No	Yes
MI	Yes	No	No	No	No
MN	Yes	No	No	Yes	Yes
MT	Yes	No	No	No	No
ND	Yes	No	No	No	No
NH	Yes	No	No	No	No
NJ	Yes	No	No	No	No
NM	Yes	No	No	No	No
NV	Yes	Yes	Yes	No	Yes
NY	Yes	No	No	No	Yes
OH	Yes	No	No	No	No
OR	Yes	Yes	No	No	No
PA	Yes	No	No	No	Yes
RI	Yes	No	No	No	Yes
VT	Yes	No	No	No	No
WA	Yes	Yes	No	No	No

FEDERAL GOVERNMENT'S POSITION ON MEDICAL MARIJUANA

While states are passing medical marijuana laws at a fast clip, marijuana use for any purpose is still banned under the federal Controlled Substances Act. Marijuana remains a Schedule 1 controlled substance, alongside cocaine and heroin, which means these drugs are defined as having no medical use and the potential for abuse.¹ In addition, federal funding is not available to study these drugs' potential medical benefits.

Although marijuana remains classified as a Schedule 1 controlled substance, the U.S. Department of Justice (DOJ) recognizes that it is legal in some states and has recommended adjustments as to how the federal law is enforced. In October 2009 the DOJ sent a memo to U.S. attorneys encouraging them not to prosecute people who distribute medical marijuana in accordance with state law.² In August 2013, the DOJ announced an update to their marijuana enforcement policy as a result of Colorado and Washington's newly-passed recreational marijuana laws, deferring the federal right, "at this time," to challenge the states' medical and recreational marijuana laws, recognizing that states will create strong, state-based enforcement.³ It remains to be seen if the DOJ will change its position under the Trump administration.

Employers and employees covered by federal drug testing programs are prohibited from using marijuana at any time for any reason. This includes:

- **Department of Transportation (DOT) Regulations:** DOT regulations require drug testing for licensing requirements and the DOT's guidance surrounding DOT Drug and Alcohol Testing regulations state that marijuana use is not acceptable for any safety-sensitive employee subject to DOT's regulations⁴. Categories of employees who are subject to these regulations include, but are not limited to, pilots, bus and truck drivers, locomotive engineers, subway operators, aircraft maintenance personnel, transit fire-armed security personnel, and ship captains.⁵
- **Occupational Safety and Health Act (OSHA):** OSHA requires a general duty to provide a safe work environment. Under Occupational Safety and Health Administration rules, employers have a federal mandate to address impaired workers who contribute to unsafe work environments.⁶ Because of this mandate, employers typically have written policies regarding substance use and impairment, including guidelines for workplace drug testing and fitness-for-duty evaluations.⁷
- **Drug-Free Workplace Act of 1988:** The Drug-Free Workplace Act applies to federal contractors or grantees and requires drug-free workplaces as a condition of receiving the federal funds. To qualify and remain eligible for the federal funds, these entities are required to make continuous good faith efforts to comply with drug-free workplace requirements. In addition to drug testing, the Act requires employees to abide by the employer's policies and notify an employer within 5 calendar days if the employee is convicted of a criminal drug violation.⁸
- **Americans with Disabilities Act (ADA):** The ADA does not require accommodation of medical marijuana use. More will be discussed on this topic in the Return to Work section below.

So, how does an employer manage its conflicting obligations when medical marijuana is prohibited under the federal laws that govern the workplace, but states are allowing the usage? One thing is certain: no state or federal law allows an employee to use, consume, be under the influence of, or be impaired by medical marijuana while on the job. This paper does not cover workplace drug testing policies and procedures, but it does cover how an employer should consider medical marijuana treatment under employer disability plans and return-to-work and accommodation policies.

MEDICAL MARIJUANA USE AS TREATMENT UNDER AN EMPLOYER-PROVIDED DISABILITY PLAN

Employers must be aware that, due to the majority of states allowing medical marijuana use, employees receiving short-term disability (STD) or long-term disability (LTD) benefits may be using medical marijuana for treatment. This is particularly true for employees with:

- chronic conditions where standard treatments have failed; or
- conditions associated with long-term pain.

Keep in mind, however, that health insurance companies are not required to cover medical marijuana. A self-administering employer or a disability plan administrator's case manager may become aware of medical marijuana treatment either because the employee offers the information or because the medical records mention the treatment.

Considerations for disability plan administration: Medical marijuana is uncharted territory for disability plan case managers. Because of the federal ban on the drug, medical research and assistive guidelines for disease and symptom treatment are unavailable. However, case managers should treat medical marijuana as they do any treatment of choice, including prescribed narcotic therapy. Accordingly, case managers need to consider the following:

- A. Whether medical marijuana use is an approved or acceptable treatment under the STD or LTD plan. Typically, disability plans do not dictate treatment. A case manager should assess marijuana use like it would any other drug usage to determine the drug's impacts on the patients' recovery, symptoms, and treatment. If the employee's provider recommends and the condition warrants medical marijuana treatment, the plan administrator should not interfere.
- B. Is the participant using medical marijuana under a provider's care for the condition? State medical marijuana programs require a provider to recommend⁹ medical marijuana, but many patients receive the recommendation or referral from a provider other than the one who is treating the condition for which they are receiving disability benefits. Consider the dispensary that has a provider onsite or nearby, and whether the shop's provider is really also the plan participant's oncologist or surgeon. A case manager needs to:
 1. Know the disability plan's definition of a qualified provider. The case manager should verify that the participant's treating provider is the one recommending medical marijuana.
 2. Once it's confirmed that the treating provider is recommending the medical marijuana, the case manager should determine if it is for treatment or pain management and how that fits under the STD or LTD disability plan requirements – just as the case manager would for any other medication recommended or prescribed by the treating provider.
- C. Finally, case managers need to consider how medical marijuana impacts recovery and return-to-work, and whether there is the potential for ongoing use after the employee returns to work. For example, medical marijuana use has the potential to become an addiction that could end up being a co-morbid condition in a particular disability claim, requiring substance abuse intervention and treatment. This is similar to a person treating a disability with a prescription opioid drug. Further considerations regarding return-to-work are discussed later in this paper.

CONSIDERATIONS FOR YOUR DISABILITY PLAN OR POLICY

When considering company policies and plans, focus should remain on promoting a safe, healthy, and productive workforce and workplace. To this end, the more specific the plan or policy, the easier it will be for both the employee/plan participant and the plan administrator to understand expectations and intent.

Allowing or Excluding Use: Typically, disability plans do not limit or dictate treatment. While the lack of medical evidence surrounding medical marijuana's efficacy could support an employer or plan administrator's argument that the participant is not undergoing "effective treatment", this should not be viewed any differently than a participant who enters a clinical trial for a new drug to treat his or her condition. Plans specifically should avoid preventing medical marijuana for several reasons, including the fact that state law may override plan language.

Interaction with Workers' Compensation: When creating a disability plan or policy, consider workers' compensation and whether the plan or policy would provide disability benefits in various scenarios that may arise under workers' compensation insurance concurrency, including:

- denial or reduced benefits in workers' compensation coverage when the injured employee was deemed under the influence and/or tested positive for marijuana on the date of the accident; or
- denial in workers' compensation coverage if the workers' compensation insurance won't cover medical marijuana for treatment of a workers' compensation injury.

Appropriate Treatment: Expect plan administrators to treat a referral for medical marijuana use as treatment like any other prescription to medication; plan administrators should not be expected to know the ins and outs of each state's laws for referring a patient for medical marijuana treatment. Most states' medical marijuana laws only allow use for certain diagnosed medical conditions, such as cancer, Crohn's disease, multiple sclerosis, or imminent terminal illness.

Employers should expect an administrator to handle provider-recommended medical marijuana like any other prescribed treatment. The administrator should defer to the employee's provider and assume the provider recommended medical marijuana is in compliance with state law. This is especially true when, unlike other treatment recommendations, the plan administrator currently cannot consult treatment guidelines and drug formularies for medical marijuana, as none is currently available given the inability to conduct research on the drug.

RETURN-TO-WORK

Clear Policy

In most states, an employer can enforce a drug-free workplace. This means they can drug test upon return to work for fitness-for-duty requirements, or randomly once the employee is back to work. An employer in these states may also require that the employee not use marijuana off duty and not be under the influence at work. Maine¹⁰ is the only state that prohibits employers from taking adverse employment action against an employee who used marijuana off-site. Enforcing drug-free workplaces can make returning to work with a part-time or light-duty transition difficult if the employee still needs the medical marijuana to treat the disability when not at work.

Employers should ensure that drug-testing policies appropriately cover employees returning from STD, LTD, workers' comp, FMLA, or similar leaves of absence and situations where a returning employee was being treated with medical marijuana. This is especially important for safety-sensitive positions and federal contractors in order to set expectations and remain compliant with federal law. Employers should take pains to detail expectations regarding returning to work on a part-time or light-duty transition.

EMPLOYER TIPS

- **Be clear about drug testing requirements for return-to-work at the outset of the absence, in the fitness-for-duty requirements, and job descriptions. This will help not only for medical marijuana, but other pharmaceutical drugs such as opioids.**
- **Implement a drug-testing policy that specifically addresses medical marijuana within your state. In many states, noted below, an employer cannot terminate based on status or a positive test, but can still prohibit use and possession at the workplace and prohibit impairment at work.**

Courts Support Employers' Drug-Free Workplaces

Many state medical marijuana laws offer little to no guidance about whether an employer must allow an employee to use medical marijuana while off duty, nor do they contemplate workplace drug testing. In fact, Maine¹¹ is the only state to specifically prohibit an employer from taking adverse employment action for off-duty use. None of the state medical marijuana laws requires employers to accommodate marijuana use or impairment while on duty.¹² Litigation of the state laws that have made it through the court systems has resulted in favorable outcomes for employers. These cases illustrate the tension between the rights of disabled employees to treat their medical conditions and the rights of employers to ensure a safe workplace for employees and customers. Below is a summary of current case law, all of which support employers' positions regarding medical marijuana:

California:

- An employee was fired after a pre-employment drug test required of all new employees revealed marijuana use. The court held that an employer's requirement of a pre-employment drug test, and subsequent discharge of the employee after a positive test, did not violate the state's anti-

discrimination statute, California's Fair Employment and Housing Act (FEHA), or public policy, because the state medical marijuana statute did not require employer accommodations.¹³

- In 2011, an employee received a recommendation for medical marijuana to treat chronic anxiety, but never disclosed this to his employer. In 2012, the employer updated its employment policies to include an exception to its drug testing and substance abuse policy, stating that employees in certain states, including California, who had a valid medical marijuana recommendation, would not be discriminated against. After a work place injury in 2014, the employee's post-accident drug test indicated positive marijuana use and he was terminated. In the resulting court case, the court dismissed the employee's disability claims under FEHA, because neither the FEHA nor the state medical marijuana law provides employment protections for medical marijuana use. The court did allow the employee's claim of breach of implied contract to proceed, based on the employer's policy of not discriminating against medical marijuana users. This case remains one to watch for employers who have stated policies permitting employee's medical marijuana use.¹⁴

Colorado:

- In a much-watched case, an employer terminated a paraplegic veteran employee with medical authorization to treat his symptoms with marijuana, after the employee failed a random drug test. The employee brought suit under Colorado's lawful off-duty activities law, but the Colorado Supreme Court concluded that this law didn't protect him because marijuana use violates federal law.¹⁵ This case may be persuasive in the future for other states that have similar off-duty lawful conduct or activities laws, such as Illinois.
- In another case where an employee with a state license to use medical marijuana was fired for a positive drug test, the employee alleged he never used it on the employer's premises and was not under the influence at work. The court dismissed the employee's wrongful discharge claim, stating that a positive test for marijuana, even from medical use, is a legitimate basis for termination under Colorado law. Like the preceding case, the employee tried to argue that his marijuana use was covered under Colorado's lawful off-duty activities law, but the court said the use wasn't lawful under federal law, and the state law's lawful off-duty activities statutes require the activity to be lawful under both state and federal law.¹⁶

Michigan: An employee who had cancer and a lawful medical marijuana card failed a drug test and was fired. The employee sued, but the court ruled in the employer's favor maintaining that the state medical marijuana law does not regulate private employment, but only provides a defense to criminal prosecution or "other adverse action by the state."¹⁷

Montana: Due to pain from work injuries, an employee began medical marijuana treatment supervised by his doctor but did not inform his employer that he was using medical marijuana. The employee submitted to a fitness-for-duty evaluation based on a report of medication changes and, at that time, tested positive for marijuana use. The employer then suspended the employee and gave him a 'last chance' offer where he could return to work so long as he did not test positive for marijuana. When the employee did not sign the agreement, he was terminated. The court found in the employer's favor, ruling that the state's medical marijuana law cannot be construed to require employers to accommodate the medical use of marijuana in any workplace.¹⁸

New Jersey: An employee who was a medical marijuana cardholder, upon being hired by a temporary staffing agency, informed the agency of his cardholder status and was initially employed without incident. However, the staffing agency later terminated the employee when he received a work assignment requiring a drug test, which he failed. In the pending federal court case, the employee alleges that he is disabled under the New Jersey Law Against Discrimination (NJLAD), and that the staffing agency failed to accommodate his medical marijuana use.

In a pending Motion to Dismiss, the staffing agency argued that marijuana use cannot be a reasonable accommodation because it is illegal under federal law, and that a positive drug test is good cause for discharge. The employee argues that the NJLAD should be broadly construed to protect disabled individuals, including medical marijuana users. The court has not yet ruled on the motion.¹⁹

Washington: An employer rescinded its conditional employment offer because a prospective employee failed a drug test. The prospective employee, an apparent medical marijuana patient, filed a wrongful termination complaint against the employer. The court held that Washington Medical Use of Marijuana Act (MUMA) “does not prohibit an employer from discharging an employee for medical marijuana use, nor does it provide a civil remedy against the employer.”²⁰

WORKPLACE ACCOMMODATION AND MEDICAL MARIJUANA USE – THE NEXT “TELECOMMUTING ACCOMMODATION?”

Federal Workplace Laws: ADA and FMLA

The Americans with Disabilities Act, as amended (ADA or ADAAA), and similar state laws, require an employer to reasonably accommodate a disabled employee in order to enable that employee to perform the essential job functions, absent an undue hardship. However, the ADA does not require an accommodation for use of drugs banned by federal law.²¹ Specifically, a person currently using illegal (under federal law) drugs, such as marijuana, is not a qualified individual with a disability.

Employers must keep in mind that medical marijuana use will largely not impact federal Family and Medical Leave Act (FMLA) considerations. Under the FMLA, because it is not a workplace accommodation law, if the employee has a serious health condition and needs time off for that condition, it is irrelevant whether the employee uses medical marijuana during the leave. If the condition requires time off to use medical marijuana per state law, employers should consider that the absence may be covered under the FMLA, depending on the condition.

If an employee seeks substance abuse treatment or changes from medical marijuana treatment to another medication that is legal under both state and federal law, an employer’s ADA and FMLA obligations could trigger. For instance, the FMLA allows leave for substance abuse treatment and the ADA may require accommodation for the side effects of the new medication.

ACCOMMODATION ANALYSIS CHECKLIST

When an employer does accommodate off-duty medical marijuana use, they should treat the accommodation like any other, particularly another accommodation for use of medication. An employer is always able to prohibit an employee from working while impaired by any medication or substance, regardless of its legal status, such as alcohol, pain killers, or marijuana.

Employers need to consider the employee's request for an accommodation for his or her medical marijuana usage as knowledge of an ADA disability and possible FMLA serious health condition; the employer is now on notice that the employee potentially has a serious health condition under the FMLA and/or disability under the ADA and state laws. The accommodation analysis should include examining the type of position to which the employee is returning and:

- whether the employee can do the job while taking the medication
- is there a danger presented if the employee is taking the medication? What symptoms might occur that could possibly create a hazard?
- ask the employee about side effects, and request that the employee's provider note the side effects on an accommodation request form
- request proof that the employee is a participant in a recognized medical marijuana program
- when analyzing undue hardship, consider whether the employee is returning to a job that is subject to federal regulations or is a safety-sensitive position
- consider offering leave as an accommodation or FMLA leave if the use is temporary
- make sure the employer's liability and workers' compensation insurance stance on medical marijuana is understood. If the employee is accommodated when not required by law, and there is an accident, will insurance cover the employer and/or the employee?
- adhere to confidentiality of medical records laws

State Laws Requiring Accommodation

It's clear that state medical marijuana laws vary as to how employment matters are addressed; for states whose laws do require accommodation for medical marijuana users, what accommodations are necessary?

Ten states require accommodations for registered medical marijuana users in that an employer cannot take an adverse action against an employee simply because of the employee's participation in a medical marijuana program. Maine's²² law requires employer to accommodate off-site marijuana use, meaning an employer cannot refuse to hire or take an adverse employment action for such use.

A. Accommodate Both Status as a Registered Medical Marijuana User and Drug Test

Arizona²³, Delaware²⁴, Minnesota²⁵: An employer cannot take adverse action against the employee because of his or her status as a medical marijuana cardholder or because of a positive drug test, unless the employee used, possessed, or was impaired by marijuana at the worksite or during hours of employment.

In these states with a heightened medical marijuana accommodation law, an employee's accommodation request analysis should also include the following fact-specific inquiry:

- Is the employee lawfully enrolled in the state medical marijuana program?
- Is the employee's level of cannabis from the drug test low enough to indicate off-duty use or is it consistent with at-work impairment?
- Is there a job-related reason to terminate or not hire based on the drug test?
- What other accommodation, other than medical marijuana, might enable the employee to perform the essential job functions?

B. Accommodate Only Status as a Registered Medical Marijuana User

Connecticut²⁶, Illinois²⁷, Maine²⁸, Pennsylvania²⁹, Rhode Island³⁰: An employer cannot take adverse action for an employee's status as a qualifying patient or registered card holder. An employer does not have to accommodate a positive drug test. So, how can an employer balance not discriminating against an employee who is a qualifying medical marijuana card holder, and an employer's right to enforce a drug test policy? Keep in mind that the employee's status as a qualifying patient is protected, so an employer can't refuse to hire or promote simply because of the status – an employee may be a qualifying patient or registered cardholder but not a current user of medical marijuana. However, an employee's failed drug test is not protected.

New York³¹: Under New York medical marijuana law, a certified patient is deemed as having a disability under the NYSHRL (State Human Rights Law). As such, the employer must accommodate an underlying disability, and the employee cannot be denied any right or privilege due to their status as a certified patient or for off-duty use.

Nevada³²: An employer must attempt to make reasonable accommodations for medical needs of an employee who engages in the use of medical marijuana. The employers' accommodation efforts should be such that there is no threat of harm in the workplace and the accommodation does not prevent the employee from fulfilling job duties.

Similar to the states with a heightened accommodation obligation noted above, before taking any action on a failed drug test or denying an accommodation request, a fact-specific inquiry into a possible accommodation is warranted:

- Is the employee a qualifying patient or a registered card holder?
- What are the employee's job duties and document how is drug testing necessary for that job?
- Is there a job-related reason to not accommodate or take employment action?

EMPLOYER TIP

Educate your workforce -- both employees and supervisors. Medical and recreational marijuana laws are quickly passing and making headlines. Make sure employees know your drug testing policy and benefits plans. For employers who do not drug test or accommodate medical marijuana use, or who tolerate medical marijuana use regardless of state law requirements, make sure your supervisors know that an employee who claims to use medical marijuana might trigger an employer's obligation under the ADA and FMLA.

SEEK GUIDANCE

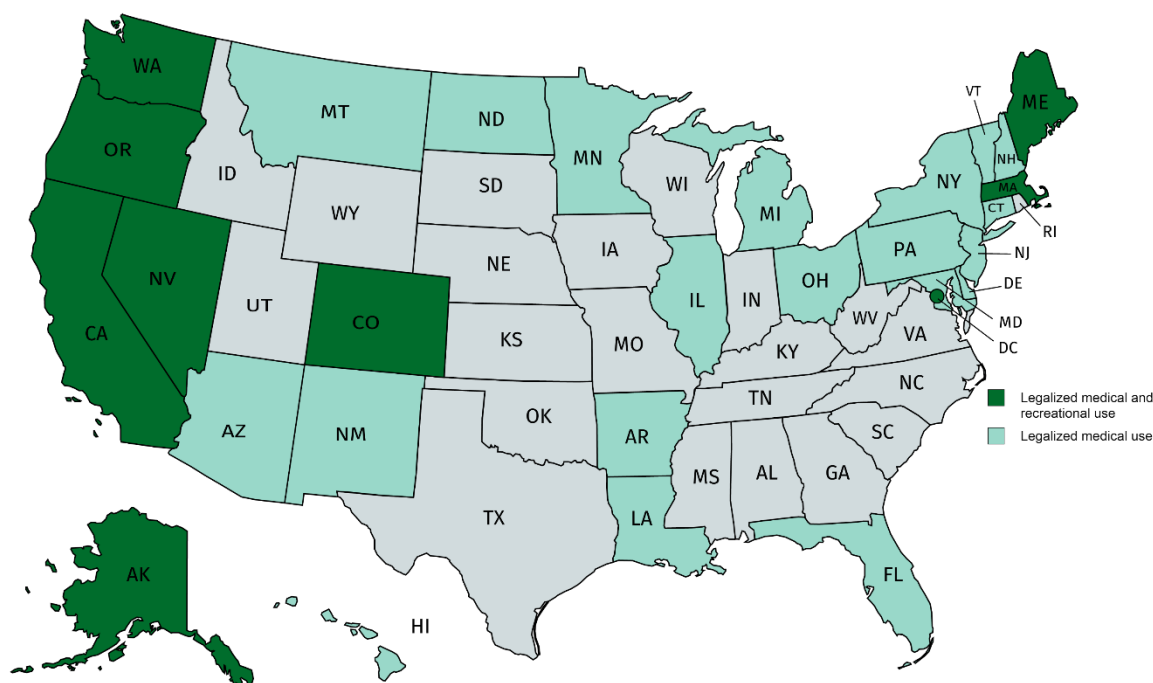
Employers and disability plan administrators are not expected to be experts on medical treatment, let alone the state-permitted, federally-prohibited medical marijuana legislation. Savvy employers and administrators use guidelines for such analysis. The American College of Occupational and Environmental Medicine (ACOEM) and American Association of Occupational Health Nurses (AAOHN) have developed guidance to assist in identifying and addressing medical marijuana impairment issues and prevention of injuries, which can be particularly useful in both return-to-work and workplace accommodation analyses.³³

ACOEM suggests the following:

- include a medical review officer (MRO) and other occupational health professionals, along with legal counsel, in discussions about company policy or individual use of marijuana;
- develop specific guidelines regarding testing for post-accident and possible impairment assessments and explain the guidelines to employees;
- consider using blood tests for these assessments. Employees should understand how results could impact their employment status based on their employer's policy and tolerance for marijuana and other drug use;
- most workers' compensation statutes provide reduced benefits when a worker is under the influence of alcohol or illegal drugs. Proof of use and/or impairment may be necessary in these cases;
- the occupational health professional responsible for providing a medical evaluation of employees' fitness for duty should establish and consistently apply clear guidelines on the situations for which use of medical marijuana would be considered. It is advisable for medical evaluations to include:
 - documentation of state registration for medical marijuana;
 - the schedule of use relative to working hours;
 - form of marijuana used (e.g., smoked plant material, edible cannabis product, low THC/CBD product);
 - the need for any accommodations given the employees' job duties; and
 - anticipated duration of use.
- the occupational health provider should work with site management to assess risk based on the safety-sensitive nature of the job; and
- consider workplace safety in the context of the underlying medical condition for which marijuana has been recommended.

THE FUTURE OF MEDICAL MARIJUANA

As this map illustrates, the majority of states have passed medical marijuana laws and many states have also legalized recreational use.



Expect state laws to go further in the coming years. For example, in New Jersey, where medical marijuana is already legal, a bill was introduced in February 2016 that would protect employees for off-duty use of medical marijuana. The bill would prohibit employers from firing employees for medical marijuana use unless the employer can prove that the lawful use of marijuana has impaired the employee's ability to perform his or her job responsibilities. Employers would have to allow employees an opportunity to present a legitimate medical explanation for any positive test result.

Congress has several pending bills that would remove marijuana from Schedule 1 status.³⁴ On June 14, 2014, Douglas Throckmorton, Deputy Director for Regulatory Programs at the FDA, stated that the FDA is conducting an analysis, at the request of the Drug Enforcement Administration (DEA), on whether the U.S. should downgrade the classification of marijuana.³⁵ However in August 2016, the DEA reaffirmed its prior position and turned down requests to remove marijuana from Schedule I status.³⁶ Regardless of its current status, the DEA declared in August 2016 that the federal government has authorized research to determine potential medical benefits of marijuana use.³⁷ But, the DEA still claims to be enforcing the federal ban on its use. It is unclear if the

DEA will change its position under the Trump administration and this topic was not highlighted on the campaign trail during the 2016 presidential election.

Time will tell whether the federal government will catch up with the majority of U.S. states in the decriminalization of marijuana; regardless, it's clear that medical marijuana use is here to stay. It's important for employers and disability plan administrators to monitor federal research outcomes, as well as state and federal legislation, to ensure that their disability plans and workplace policies are up to date.

Even with consistent monitoring, it's understandable that the wide variation in state laws and their disparity with federal legislation continue to challenge employers and disability plan administrators. To help bridge this gap, ReedGroup has performed analyses of the existing and pending legislation and developed the consideration checklists and employer tips outlined above. While we wait for state and federal guidance to become clearer, employers and disability plan administrators can use the information contained in this paper to help ensure their disability plans and workplace policies are both effective and compliant.

¹ 21 U.S.C. § 812(c).

² *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, Att'y Gen. Memo (October 19, 2009) (available at: <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>).

³ *Justice Department Announces Update to Marijuana Enforcement Policy* (2013), <http://www.justice.gov/opa/pr/2013/August/13-opa-974.html> (last visited September 23, 2016); *Guidance Regarding Marijuana Enforcement*, Att'y Gen. Memo (August 29, 2013) (available at: <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>).

⁴ 49 CFR §40.151(e).

⁵ 49 C.F.R. § 40.1.

⁶ 29 C.F.R. § 1903.

⁷ 41 U.S.C.A. § 8101.

⁸ US Department of Labor, Office of the Assistance Secretary for Policy, *Drug-Free Workplace Policy Boulder Section 7, Drug Testing*. DOL elaws-Drug-Free Workplace Advisor, Available at www.dol.gov/elaws/asp/drugfree/drugs/screen92.asp (accessed September 23, 2016).

⁹ Because of the federal law ban on marijuana for any purpose, including medical, it is illegal to "prescribe" marijuana, so physicians either "recommend" or "refer" patients for medical marijuana use.

¹⁰ 7 MRSA c. 417 et seq.

¹¹ 7 MRSA c. 417 et seq.

¹² Refer to the state law chart regarding states that specify requirements around drug testing or non-discrimination for medical marijuana card holders.

¹³ *Ross v. RagingWire Telecommunications, Inc.*, 42 Cal. 4th 920, 930 (2008).

¹⁴ *Shepherd v. Kohl's Department Stores, Inc.*, No. 1:14-cv-01901-DAD-BAM, (E.D. CA).

¹⁵ *Coates v. Dish Network, LLC*, 350 P.3d 849, 851 (Colo. 2015).

¹⁶ *Curry v. MillerCoors, Inc.*, No. 12-cv-02471-JLK, 2013 WL 4494307 (D. Colo. Aug. 21, 2013).

¹⁷ *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 435 (6th Cir. 2012).

¹⁸ *Johnson v. Columbia Falls Aluminum Co., LLC*, 2009 MT 108N, 350 Mont. 562, 213 P.3d 789.

¹⁹ *Barrett v. Robert Half Corp.* et al, 2:15-CV-06245.

²⁰ *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 171 Wash.2d 736, 760 (2011).

²¹ 42 U.S.C.A. § 12114.

²² 7 MRSA c. 417 et seq.

²³ A.R.S. § 36-2813.

²⁴ 16 Del.C. § 4905A.

²⁵ Minn. Stat. §§ 152.32(3)(c)(2), (d).

²⁶ C.G.S.A. § 21a-408p.

²⁷ 410 Ill. Comp. Stat. Ann. 130/50.

²⁸ 22 M.R.S.A. § 2423-E.

²⁹ Pa. Stat. Ann. § 10231.101 (West).

³⁰ 21 R.I. Gen. Laws Ann. § 21-28.6-4 (West).

³¹ N.Y. Pub. Health Law § 3369 (McKinney).

³² N.R.S. 453A.800.

³³ ACOEM Guidelines, American College of Occupational and Environmental Medicine (ACOEM), *Marijuana in the Workplace: Guidance for Occupational Health Professionals and Employers*, 57 JOEM 4, (2015).

³⁴ 2015 U.S. H.R. 1013; 2015 U.S. S. 2237; 2015 U.S. H.R. 3746 (deregulation in states that have legalized marijuana); 2015 U.S. H.R. 1940 (amends the Controlled Substances Act to provide that provisions of such Act related to marijuana do not apply to those acting in compliance with certain state laws).

³⁵ Anna Edney, *Marijuana Considered for Looser Restrictions by U.S. FDA*, Bloomberg, June 20, 2014.

³⁶ Lenny Bernstein, *U.S. Affirms Its Prohibition on Medical Marijuana*, Wash. Post, August 11, 2016.

³⁷ Evan Halper, *DEA Ends Its Monopoly on Marijuana Growing for Medical Research*, L.A. Times, August 11, 2016.