

2015

Protecting Medical Marijuana Users in the Workplace

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Kathleen Harvey, *Protecting Medical Marijuana Users in the Workplace*, 66 Case W. Res. L. Rev. 209 (2015)

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PROTECTING MEDICAL MARIJUANA USERS IN THE WORKPLACE

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INTRODUCTION

Despite the fact that some states have legalized medical marijuana, disabled employees are being fired for using it. Gary Ross, disabled from injuries suffered while he served in the United States Air Force, began using medical marijuana after traditional medications failed to alleviate his pain.¹ Joseph Casias used medical marijuana to alleviate pain caused by sinus cancer and an inoperable brain tumor.² Brandon Coats, a quadriplegic, used medical marijuana to control painful muscle spasms

1. Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 203 (Cal. 2008).
2. Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 431 (6th Cir. 2012).

caused by his paralysis.³ All of these employees were fired when their employers found out that they used marijuana.⁴

How can someone be fired for using a drug that is authorized by state law? Normally, the federal Americans with Disabilities Act (ADA) would protect disabled persons that use legally prescribed drugs from employment discrimination that stems from that drug use. But the ADA does not protect users of illegal drugs, and marijuana is illegal under federal law.⁵ Thus, the ADA does not protect disabled medical marijuana users when they are fired for violating workplace drug testing policies.

Medical marijuana users have tried suing their employers under the theory that state medical marijuana laws protect employees from the consequences of violating drug-free workplace policies.⁶ But, in the absence of explicit statutory language granting employment protection to medical marijuana users, the courts refuse to rule in favor of the employees. Court decisions favoring employers place a substantial burden on medical marijuana patients—choosing between “giving up what may be their only source of income, or . . . discontinu[ing] marijuana treatment, and try[ing] to endure their chronic pain or other condition for which marijuana may provide the only relief.”⁷ A clearly drafted statutory provision that prevents employers from using medical marijuana users’ drug use as a reason to terminate them will alleviate the burden that employees currently bear.

Part I of this Note gives a brief history of marijuana regulation in the United States. Part II describes how drug testing works and why employers do it. And it presents some of the issues that the federal prohibition poses for employers and employees. Part III analyzes state court opinions that have addressed the question of whether employers may fire employees for off-site medical marijuana use that does not

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3. Opening Brief at 18, *Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015), (No. 2013SC000394).
 4. *Ross*, 174 P.3d at 203; *Casias*, 695 F.3d at 432; *Coats v. Dish Network, LLC*, 303 P.3d 147, 149 (Colo. App. 2013), *aff’d*, 350 P.3d 849 (Colo. 2015).
 5. See 42 U.S.C. § 12210(a) (2012) (“For purposes of this chapter, the term ‘individual with a disability’ does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.”); 42 U.S.C. § 12111(6) (2012) (defining “illegal use of drugs” as a use of a Schedule I-V controlled substance unless the substance is “taken under supervision by a licensed health care professional” or otherwise authorized by federal law); see also Russell Rendall, *Medical Marijuana and the ADA: Removing Barriers to Employment for Disabled Individuals*, 22 HEALTH MATRIX 315, 324–325 (2012) (describing two federal court decisions that held that medical marijuana is illegal for the purposes of the ADA).
 6. See, e.g., *Ross*, 174 P.3d at 204; *Casias*, 695 F.3d at 432.
 7. *Ross*, 174 P.3d at 211 (Kennard, J., concurring and dissenting).

impair work performance. Every court thus far has ruled in favor of the employer, but some of the opinions and dissents acknowledge that the legislatures could amend their states' statutes to include employment protections for medical marijuana users. Part IV analyzes the strengths and weaknesses of the state medical marijuana laws that include some form of employment protection. Finally, Part V proposes statutory language that could be included in state medical marijuana laws to protect employees from termination simply because of their authorized use of marijuana.

I. MARIJUANA REGULATION SINCE THE 1970S

Marijuana is illegal under federal law.⁸ But its legal status in the states is rapidly changing. Twenty-three states, as well as the District of Columbia, currently allow medical marijuana.⁹ Four states and D.C. also allow marijuana for recreational use.¹⁰ The change in state laws reflects the public's changing opinion on marijuana.¹¹ Federal law, however, remains unchanged. The federal Controlled Substances Act (CSA) classifies marijuana as a Schedule I substance, meaning that marijuana has no medicinal value and high potential for abuse.¹²

Because the drafters of the CSA had limited knowledge of marijuana, they created the National Commission on Marihuana and Drug Abuse (Commission) to study marijuana and submit a report to Congress with its findings and recommendations.¹³ Congress mandated that the Commission research (1) the prevalence of marijuana use in the United States, (2) "the efficacy of existing marihuana laws," (3) the physiological and psychological long-term effects of marijuana, (4) the

8. 21 U.S.C. §§ 812(c)(c)(10), 841(a) (2012).

9. The states are Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. *State Medical Marijuana Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES (Sept. 14, 2015), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/2AMD-9U6A>].

10. The states are Alaska, Colorado, Oregon, and Washington. *Id.*

11. A Pew Research Center survey conducted October 15–20, 2014, reported that 52% of Americans support legalizing marijuana and only 45% oppose. *Slim Majority Supports Marijuana Legalization*, PEW RESEARCH CTR. (Oct. 23, 2014), <http://www.people-press.org/2014/10/23/as-midterms-near-gop-leads-on-key-issues-democrats-have-a-more-positive-image/slim-majority-supports-marijuana-legalization/> [<https://perma.cc/R9ZK-S4BE>].

12. 21 U.S.C. § 812(b)(1)(A)–(B) (2012).

13. Establishment of Commission on Marihuana and Drug Abuse, Pub. L. No. 91-513, § 601(e), 84 Stat. 1280, 1281 (1970).

relationship between marijuana use and aggression and crime, (5) “the relationship between marijuana and the use of other drugs,” and (6) “the international control of marijuana.”¹⁴

The Commission released its report, *Marihuana: A Signal of Misunderstanding* (Report), in 1972.¹⁵ After conducting over fifty projects,¹⁶ the Commission rejected the federal government’s total prohibition policy on marijuana.¹⁷ The Report stated that “[t]his policy grew out of a distorted and greatly exaggerated concept of the drug’s ordinary effects upon the individual and the society.”¹⁸ The Report recommended instead a policy of decriminalization pending more research on marijuana.¹⁹ Congress did not listen to the Commission’s recommendations and has kept marijuana as a Schedule I substance.

Despite the Commission’s recommendation to continue researching marijuana, those who wish to do so face significant obstacles in the United States.²⁰ The only federally legal source for researchers to obtain marijuana is a twelve-acre plot at the University of Mississippi, controlled by the National Institute on Drug Abuse.²¹ To access this marijuana, researchers must gain approval from a number of federal administrative agencies.²² Between 1999 and June 2015, only sixteen independently funded studies obtained marijuana through this process.²³

14. *Id.* § 601(d)(1)(A)–(F), 84 Stat. at 1281.

15. NAT’L COMM’N ON MARIHUANA AND DRUG ABUSE, *MARIHUANA: A SIGNAL OF MISUNDERSTANDING* (1972) [hereinafter Report].

16. *Id.* at 2.

17. *Id.* at 175.

18. *Id.* at 162.

19. *Id.* at 189. *See also* GERALD F. UELMEN & ALEX KREIT, *DRUG ABUSE AND THE LAW SOURCEBOOK* § 3:73, Westlaw (database updated Nov. 2014) (explaining that the Commission “unanimously recommended a social policy of marijuana discouragement: specifically not legalization, as with the alcohol or tobacco models, but also no imprisonment for possession of marijuana for personal use (i.e., ‘decriminalization’)”).

20. Report, *supra* note 15, at 219; UELMEN & KREIT, *supra* note 19, at § 1:27.

21. *Id.* *See also* David Kelly, *Colorado Seeks Permission to Grow Pot at State Universities*, L.A. TIMES, Jan. 25, 2015, <http://www.latimes.com/nation/la-na-pot-research-20150125-story.html> [<https://perma.cc/P5Y2-FTUF>].

22. *FDA and Marijuana*, FOOD AND DRUG ADMIN., <http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm421163.htm> [<http://perma.cc/VB54-CSMD>] (last updated Mar. 3, 2015).

23. *Independently Funded Studies Receiving Research Grade Marijuana*, NAT’L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/drugs-abuse/marijuana/independently-funded-studies-receiving-research-grade-marijuana-1999-to-present> [<http://perma.cc/6327-2UZ8>] (last updated July 2015).

This process is “complicated” and does not fulfill the demand for medical marijuana research.²⁴

Along with research from other countries and analysis of self-reported data, the results of the FDA-approved clinical marijuana studies, suggest that marijuana does have a medicinal value, despite its Schedule I classification. The research suggests that marijuana can benefit persons suffering from a myriad of conditions, including chronic pain,²⁵ epilepsy,²⁶ spasticity,²⁷ and cancer.²⁸ While the growing body of research on marijuana’s beneficial therapeutic uses has not swayed the FDA or DEA to reschedule marijuana, it has swayed voters and

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24. A policy paper released by the American College of Physicians states that “[u]nfortunately, research expansion has been hindered by a complicated federal approval process, limited availability of research-grade marijuana, and the debate over legalization.” TIA TAYLOR, AM. COLL. OF PHYSICIANS, SUPPORTING RESEARCH INTO THE THERAPEUTIC ROLE OF MARIJUANA 1 (2008). Similarly, the American Medical Association’s policy statement on medical marijuana encourages further research on marijuana’s therapeutic effects. *H-95.952 Cannabis for Medicinal Use*, AM. MED. ASS’N, <https://www.ama-assn.org/ssl3/ecom/PolicyFinder/Form.pl?site=www.ama-assn.org&uri=/resources/html/PolicyFinder/policyfiles/HnE/H-95.952.HTM> [<https://perma.cc/3RQS-K6VT>] (last visited Sept. 28, 2015).
 25. See Mary E. Lynch & Fiona Campbell, *Cannabinoids for Treatment of Chronic Non-Cancer Pain; A Systematic Review of Randomized Trials*, 72 BRIT. J. CLINICAL PHARMACOLOGY 735, 742 (2011) (conducting a review of eighteen randomized control trials that tested the efficacy of marijuana as treatment for chronic pain and finding that marijuana is a “modestly effective and safe treatment option for chronic non-cancer (predominantly neuropathic) pain”).
 26. See Brenda E. Porter & Catherine Jacobson, *Report of a Parent Survey of Cannabidiol-Enriched Cannabis Use in Pediatric Treatment-Resistant Epilepsy*, 29 EPILEPSY & BEHAV. 574, 575 (2013) (finding that parents that treat their children’s epilepsy with certain strains of marijuana report a “high rate of success in reducing seizure frequency with this treatment”); Jack Healy, *Families See Colorado as New Frontier on Medical Marijuana*, N.Y. TIMES, Dec. 5, 2013, http://www.nytimes.com/2013/12/06/us/families-see-colorado-as-new-frontier-on-medical-marijuana.html?_r=0 [<https://perma.cc/ZCW8-P5J9>] (describing how families are moving to Colorado to treat their children’s seizures with marijuana).
 27. See Jody Corey-Bloom et al., *Smoked Cannabis for Spasticity in Multiple Sclerosis: A Randomized, Placebo-Controlled Trial*, 184 CANADIAN MED. ASS’N J. 1143, 1145 (2012) (administering marijuana to patients with multiple sclerosis and spasticity resulted in a “clinically meaningful” reduction in pain).
 28. Clinical (human) trials on marijuana and cancer show that marijuana can help with nausea, appetite stimulation, pain relief, anxiety, and sleep. See *Cannabis and Cannabinoids*, NAT’L CANCER INST. <http://www.cancer.gov/about-cancer/treatment/cam/patient/cannabis-pdq#section/all> [<https://perma.cc/P2GN-B45W>] (last updated July 16, 2015). Pre-clinical (laboratory or animal) studies show that marijuana might also promote antitumor activity. *Id.*

legislators in twenty-three states to make marijuana available for medical use.²⁹

Federal enforcement of the CSA in the twenty-three states that have legalized medical marijuana is weak. In 2009 Deputy Attorney General David Ogden released a memo addressed to federal prosecutors saying that prosecution of seriously ill individuals using marijuana in compliance with state law was an inefficient use of federal resources.³⁰ Deputy Attorney James Cole reaffirmed the Ogden Memo in 2011.³¹ In 2013, Cole issued another memo offering more guidance to federal prosecutors on how to treat state law-compliant medical marijuana users.³² In the Memo, Cole outlined the following eight enforcement priorities: (1) keeping marijuana away from minors, (2) preventing criminal enterprises from profiting from medical marijuana, (3) restricting marijuana diversion from one state to another, (4) ensuring that legal marijuana activity is not a pretext for illegal activity, (5) preventing violence and gun activity in marijuana growing, (6) preventing drugged driving and other adverse public health consequences, (7) protecting federal land, and (8) keeping marijuana off of federal property.³³ Outside of these eight priorities, the Department of Justice “has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws.”³⁴

In December 2014, Congress passed an omnibus spending bill that prohibited use of federal funds to interfere with state medical marijuana laws.³⁵ That meant that for the 2015 fiscal year the Department of

29. *State Medical Marijuana Laws*, NAT’L CONFERENCE OF STATE LEGISLATURES (Sept. 14, 2015), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/2AMD-9U6A>].

30. Memorandum from David W. Ogden, Deputy Att’y Gen., to Selected United States Att’ys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), <http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf> [<http://perma.cc/67YQ-LWZG>] [hereinafter Ogden Memo].

31. Memorandum from James M. Cole, Deputy Att’y Gen., to United States Att’ys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use, (June 29, 2011), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf> [<http://perma.cc/PKN9-DYCS>] [hereinafter Cole Memo 2011].

32. Memorandum from James M. Cole, Deputy Att’y Gen., to United States Att’ys, Guidance Regarding Marijuana Enforcement, (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<http://perma.cc/NBT6-CC85>] [hereinafter Cole Memo 2013].

33. *Id.*

34. *Id.*

35. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014).

Justice will be unable to use any funds to prevent states “from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”³⁶ This, in addition to the Ogden and Cole memos, sends the message that Congress does not think that the CSA should be enforced against medical marijuana users.

While the current federal policy towards medical marijuana is non-enforcement, marijuana remains illegal under the CSA. Enforcement policies are subject to change with administrations, so, until the CSA is amended, the federal government will retain the power to prosecute violations of the CSA. As long as marijuana remains on Schedule I, employers can argue that their drug-free workplace policies, likely containing blanket prohibitions on illegal drugs, apply to medical marijuana users.

II. WORKPLACE DRUG TESTING

Despite the quasi-legal status of marijuana, employers can still fire medical marijuana users for positive drug tests. One of the strongest criticisms against drug testing raised by medical marijuana users is that urine tests, the most common form of drug tests, are not an indication of marijuana impairment.³⁷ A few hours after marijuana is ingested, marijuana’s primary psychoactive ingredient, delta-9-tetrahydrocannabinol (THC),³⁸ metabolizes into a non-psychoactive metabolite, THC-COOH.³⁹ Although the effects of the THC only last a few hours, detectable levels of THC-COOH can remain in a marijuana user’s system for over a month.⁴⁰ This means that medical marijuana users can fail drug tests even if they use marijuana off-site and the THC is not active in their systems at work.⁴¹

The statute presented in this Note is not meant to prevent employers from conducting drug tests of employees. Rather, its goal is to protect employees from being punished for using a drug that may be the best form of relief available for their conditions. The fact that drug

36. *Id.*

37. See Stacy A. Hickox, *Drug Testing of Medical Marijuana Users in the Workplace: An Inaccurate Test of Impairment*, 29 HOFSTRA LAB. & EMP. L.J. 273, 299 (2012).

38. See Robert S. Goodwin et al., *Urinary Elimination of 11-Nor-9-Carboxy- Δ^9 -tetrahydrocannabinol in Cannabis Users During Continuously Monitored Abstinence*, 32 J. ANALYTICAL TOXICOLOGY 562, 562 (2008).

39. *People v. Feezel*, 783 N.W.2d 67, 83 (Mich. 2010) (“[THC-COOH] is a metabolite—a natural byproduct that is created when a person’s body breaks down THC.”).

40. See, e.g., Goodwin, *supra* note 38, at 567; Hickox, *supra* note 37, at 288.

41. See Stacy A. Hickox, *Clearing the Smoke on Medical Marijuana Users in the Workplace*, 29 QUINNIPIAC L. REV. 1001, 1009 (2011).

tests are a poor indicator of marijuana impairment strengthens the argument that employers should not use positive drug tests to discriminate against medical marijuana users. Medical marijuana users require protection because “[t]he imbalance of economic power gives employers the ability to control more than is rightfully theirs.”⁴² The statute in this Note attempts to correct that imbalance. Writing a fair statute, however, requires an understanding of employers’ reasons for drug testing employees. This section discusses employers’ reasons for drug testing and explains how the proposed statute addresses those reasons.

Compliance with state and federal law is one reason that employers drug test. For example, the federal Drug Free Workplace Act (DFWA) imposes certain conditions on the receipt of federal contracts worth more than \$100,000 or federal grants of any value.⁴³ Recipients must promote a drug-free workplace, which includes informing employees that use of controlled substances, even if legal under state law, will result in actions taken against the employee.⁴⁴ If an employer fails to impose sanctions on employees that use controlled substances illicitly, or if an employer fails to take any of the other required statutory measures to promote a drug-free workplace, it can lose its federal grant or contract.⁴⁵ The DFWA does not explicitly require drug testing. Nevertheless, an employer could not knowingly employ a medical marijuana user under the DFWA because employees are prohibited from “engaging in the unlawful . . . use of a controlled substance,” and marijuana is an unlawful controlled substance.⁴⁶

Employers of commercial motor vehicle operators must also drug test employees to screen for controlled substances and alcohol.⁴⁷ The tests must be conducted before employment, at random, under reasonable suspicion, and after accidents.⁴⁸ The Department of Transportation does not make an exception to this policy for medical marijuana users.⁴⁹ Similarly, the Federal Railroad Administration requires employers to

42. Lewis L. Maltby & Bernard J. Dushman, *Whose Life Is It Anyway—Employer Control of Off-Duty Behavior*, 13 ST. LOUIS U. PUB. L. REV. 645, 659 (1994).

43. 41 U.S.C. §§ 8102(a)(1), 8103(a)(1) (2012).

44. 41 U.S.C. §§ 8102–8103 (2012).

45. *Id.*

46. 41 U.S.C. § 8101(a)(5)(B) (2012).

47. 49 U.S.C. § 31306(b) (2012).

48. *Id.*

49. See DOT ‘Medical’ Marijuana Notice, U.S. Dep’t of Transp. (Feb. 13, 2015), <http://www.transportation.gov/odapc/medical-marijuana-notice> [<https://perma.cc/K38N-83XW>].

drug test train and signal employees.⁵⁰ Schedule I substances are completely prohibited.⁵¹ Schedule II-V substances may be used if the employee's treating physician prescribed them at an authorized level "consistent with the safe performance of the employee's duties."⁵² The physician must be informed of certain relevant information, such as the employee's medical history, work duties, and other treating sources.⁵³ The employee must use the prescription in accordance with the dosage prescribed.⁵⁴

Some state laws also require drug testing as a condition of employment for certain employees, such as school bus drivers⁵⁵ and state contractors.⁵⁶ Other state laws incentivize employers to drug test employees by offering benefits to those that implement drug-free workplace policies. For example, Ohio offers workers' compensation premium rebates to employers that comply with the state's drug-free safety program, which requires drug testing employees.⁵⁷

Even when the law does not require employers to drug test employees, some choose to do so anyway. Some legal scholars have noted that employers are concerned about the effect marijuana use has on workplace safety, employee performance, and absenteeism.⁵⁸ Quest Diagnostics, a major drug testing provider to the government and private sector, conducted approximately 6.6 million urine drug tests for

50. 49 C.F.R. § 219.601 (2014).

51. 49 C.F.R. § 219.102 (2014) ("No employee who performs covered service may use a controlled substance at any time, whether on duty or off duty, except as permitted by § 219.103.").

52. 49 C.F.R. § 219.103 (2014).

53. 49 C.F.R. § 219.103(a)(1), (3) (2014).

54. 49 C.F.R. § 219.103(a)(2) (2014).

55. See ALASKA STAT. § 14.09.025 (2014) (requiring random drug testing of school bus drivers); ARIZ. REV. STAT. ANN. § 15-513 (2014) (requiring drug testing of school transportation authorities if there is "probable cause that the employee's job performance has been impaired by the use of alcohol or a drug").

56. See LA. REV. STAT. ANN. § 49:1021(B) (Supp. 2015) (requiring the commissioner of administration to "establish and administer a program for random drug testing for all persons who receive anything of economic value or receive funding from the state").

57. OHIO ADMIN. CODE 4123-17-58 (Supp. 2014).

58. See James M. Shore, *Medical Marijuana and Zero Tolerance Drug Testing Policies*, EMP. BENEFIT PLAN REV., May 2011, at 6, 7; Deborah J. La Fetra, *Medical Marijuana and the Limits of the Compassionate Use Act*: Ross v. RagingWire Telecommunications, 12 CHAP. L. REV. 71, 73-74 (2008).

employers in 2014.⁵⁹ The fact that one company has conducted so many tests indicates that drug testing is a prevalent employment issue.

The statutory language presented in this Note prohibits an employer from discriminating against a medical marijuana user based on a positive drug test, but exempts employers that are subject to the DFWA or mandatory drug testing laws. This protects employers seeking to comply with the law. The statute in this Note also exempts medical marijuana users from protection if their marijuana use poses a threat of harm to the workplace or interferes with their ability to perform essential job duties. This protects employers seeking to discipline employees for poor performance. Both of these exemptions alleviate the concerns that employers have about employing marijuana users. Employers can still maintain their drug-free workplace policies for recreational marijuana users and users of other illicit drugs. Medical marijuana users are protected because employers cannot use positive drug tests, which do not even indicate impairment, as evidence that the users cannot adequately perform their jobs.

III. COURT RESPONSES TO CONFLICTING FEDERAL AND STATE MARIJUANA LAWS

Some medical marijuana users have sought relief from the courts after being fired for positive drug tests. The courts' responses have largely denied such relief. In every case, the employee (or prospective employee) used medical marijuana off-site and was not impaired at work. Nevertheless, in every case the courts upheld the employers' right to terminate their employees for marijuana use. The courts have ruled in favor of the employers for two general reasons: (1) federal law preempted any state law purporting to legalize marijuana use⁶⁰ or (2) the state medical marijuana statute did not address employment, and thus did not remove an employer's power to fire employees for using marijuana.⁶¹

59. *Illicit Drug Positivity Rate Increases Sharply in Workplace Testing, Finds Quest Diagnostics Drug Testing Index Analysis*, QUEST DIAGNOSTICS (June 9, 2015), <http://www.questdiagnostics.com/home/physicians/health-trends/drug-testing.html> [<https://perma.cc/L3XP-BGWQ>]. For an archived list of Quest's drug testing reports, see *Drug Testing Index Archives*, QUEST DIAGNOSTICS, <http://www.questdiagnostics.com/home/physicians/health-trends/drug-testing/archives.html> [<https://perma.cc/9ERP-PSJD>] (last visited Sept. 29, 2015).

60. *See Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 536 (Or. 2010).

61. *See, e.g., Roe v. Teletech Customer Care Mgmt. LLC*, 257 P.3d 586, 590 (Wash. 2011); *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200 (Cal. 2008).

A. *The Risk of Federal Preemption*

If state medical marijuana laws are preempted by the CSA, then they cannot protect medical marijuana users because they will be “without effect.”⁶² In the CSA, Congress expressly stated that it did not intend to “occupy the field in which [the CSA] operates.”⁶³ This means that states may create their own drug laws. If, however, there is a “positive conflict” between the CSA and state law “so that the two cannot consistently stand together,” then the CSA will preempt the state law.⁶⁴ Conflict preemption exists in two situations: (1) when it is physically impossible to comply with both federal and state law and (2) when state law “stands as an obstacle” to Congress’s purpose.⁶⁵

1. State Courts Have Come to Different Decisions about Whether Federal Law Preempts State Medical Marijuana Laws

While courts agree that medical marijuana laws do not make compliance with the CSA impossible,⁶⁶ they have come to differing conclusions about whether medical marijuana laws are an obstacle to the accomplishment of the CSA’s purpose.⁶⁷ To analyze this issue courts use “two cornerstones of . . . pre-emption jurisprudence.”⁶⁸ First is Congressional purpose.⁶⁹ The CSA’s two main purposes, as identified by the Supreme Court, are combatting drug abuse and controlling drug traffic-

62. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (“The Supremacy Clause provides that ‘[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’ It is basic to this constitutional command that all conflicting state provisions be without effect.”) (internal citation omitted).

63. 21 U.S.C. § 903 (2012).

64. *Id.*

65. *See, e.g., Emerald Steel*, 230 P.3d at 528 (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)); *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012).

66. Medical marijuana laws only authorize marijuana use, they do not require it. It is not impossible to comply with federal law and medical marijuana laws because a person can choose to refrain from marijuana use. *See, e.g., Emerald Steel*, 230 P.3d at 528.

67. *Compare Emerald Steel*, 230 P.3d 518 (holding that the Oregon Medical Marijuana Act did not fail under an impossibility preemption analysis but did fail under an obstacle preemption analysis), *with White Mountain Health Ctr. Inc. v. Cnty. of Maricopa*, No. CV 2012-053585, 2012 WL 6656902 (Ariz. Sup. Ct. Dec. 3 2012) (holding that Arizona’s medical marijuana act was not preempted by the CSA).

68. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

69. *Id.*

king.⁷⁰ The second cornerstone is “the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”⁷¹ Drug policy has traditionally been a police power of the state,⁷² so medical marijuana laws should be granted the presumption of validity.⁷³

In *Emerald Steel v. Bureau of Labor and Industries*,⁷⁴ the Oregon Supreme Court held that the CSA intended to accomplish its objectives through a blanket prohibition on marijuana.⁷⁵ It does not matter if a person purports to be using marijuana for medical purposes because “by classifying marijuana as a Schedule I drug, Congress has expressed its judgment that marijuana has no recognized medical use.”⁷⁶ Thus, a state law that authorizes marijuana use, for any reason, is an obstacle to Congress achieving its goals in implementing the CSA.⁷⁷ The dissent did not think that Oregon’s medical marijuana law would contravene the purpose of the CSA, especially in light of the federal government’s pronouncement in the Ogden memo.⁷⁸ The Ogden memo stated that the federal government would “not enforce the [CSA] against ‘individuals whose actions are in clear and unambiguous compliance with existing state laws permitting the medical use of marijuana.’”⁷⁹ Therefore, the dissent argued, it is not the “clear and manifest purpose of Congress”⁸⁰ to preempt state medical marijuana laws.⁸¹

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70. *Gonzales v. Raich*, 545 U.S. 1, 12 (2005); *see also* TODD GARVEY & BRIAN T. YEH, CONG. RESEARCH SERV., R43034, STATE LEGALIZATION OF RECREATIONAL MARIJUANA: SELECTED LEGAL ISSUES 11 (2014) (noting that the Supreme Court discussed the CSA’s purpose in *Gonzales*).
 71. *Wyeth*, 555 U.S. at 565 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).
 72. Cole Memo 2013, *supra* note 32 (“[T]he federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws.”).
 73. *See* GARVEY & YEH, *supra* note 70 at 11-12.
 74. 230 P.3d 518 (Or. 2010).
 75. *Id.* at 529.
 76. *Id.*
 77. *Id.*
 78. *Id.* at 543 (Walters, J., dissenting) (citing Memorandum from David W. Ogden, Deputy Att’y Gen., to Selected United States Att’ys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), <http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>).
 79. *Id.* (Walters, J., dissenting).
 80. *Wyeth v. Levine* 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).
 81. *Emerald Steel*, 230 P.3d at 543 (Walters, J., dissenting).

In concluding that the Arizona Medical Marijuana Act (AMMA) was not preempted by the CSA, an Arizona trial judge noted that the Oregon Supreme Court “stands virtually alone when it suggested that almost any State statute that affirmatively authorizes federally conflicting conduct is preempted.”⁸² The Arizona judge argued that AMMA actually “further[ed] the CSA’s objectives.”⁸³ AMMA’s strict regulatory regime ensured that marijuana was only used for medicinal purposes.⁸⁴ Arizona’s other drug abuse prevention laws remained intact.⁸⁵ AMMA also created a registry of persons authorized to grow, sell, and use medical marijuana.⁸⁶ The registry makes people easy targets for federal prosecutors, furthering the CSA’s goal of combatting drug trafficking.⁸⁷

This Note argues that the *Emerald Steel* dissent and Arizona judge present the stronger arguments. If Congress wished to enforce the CSA against medical marijuana growers, sellers, and users it could easily do so. But it has not. In fact, since those decisions, the Department of Justice has released two more memos reinforcing its position that it will not use the CSA to prosecute people who are complying with state medical marijuana laws.⁸⁸ And, at least for the 2015 fiscal year, enforcement of the CSA against medical marijuana users will be nonexistent because Congress has deauthorized the use of federal funds for that purpose.⁸⁹ These developments strengthen the argument that Congress does not have a clear intention to preempt medical marijuana laws with the CSA.

2. Federal Law Should Not Preempt a State’s Attempt to Provide
Employment Rights to Its Medical Marijuana Patients

A statute that accommodates employees that use medical marijuana but includes exemptions to ensure that employers do not violate federal law, should not be preempted by the CSA. The statute presented in this Note passes the tests for both impossibility and obstacle preemption. It will not be impossible for employers to comply with this statute because it specifically exempts employers from

82. *White Mountain Health Ctr. Inc. v. Cnty. of Maricopa*, No. CV 2012-053585, 2012 WL 6656902, at *8 (Ariz. Sup. Ct. Dec. 3, 2012).

83. *Id.* at *6.

84. *Id.*

85. *Id.* at *7.

86. *Id.* at *2.

87. *Id.* at *8.

88. Cole Memo 2011, *supra* note 31; Cole Memo 2013, *supra* note 32.

89. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217.

accommodating medical marijuana users when doing so would cause the employer to violate a federal law or lose federal benefits.

The statute in this Note also does not stand as an obstacle to Congress's objectives in passing the CSA. The statute presented in this Note is distinguishable from the statute at issue in *Emerald Steel*, which was unenforceable on obstacle preemption grounds. In *Emerald Steel*, the Oregon Supreme Court held that the provision of Oregon's medical marijuana act that authorized *use* of medical marijuana was preempted.⁹⁰ The statute in this Note authorizes *employment* of medical marijuana users. It is already unclear whether Congress intended the CSA preempt medical marijuana use. Congressional intent regarding employment of medical marijuana users is even less clear and certainly not clear enough to supersede the traditional state powers to craft drug policy.

The *Emerald Steel* decision was an outlier. Almost every case regarding termination of medical marijuana users for a positive drug test was decided on nonpreemption grounds. The courts in the cases decided on nonpreemption grounds made suggestions about what an appropriate employee protection statute would look like if the legislature were to amend its state's medical marijuana laws. This suggests that those courts would enforce a properly drafted statute that protects medical marijuana users. It is unlikely the statute proposed in this Note would be preempted.

*B. Even If Not Preempted, State Medical Marijuana Statutes
Fail to Adequately Protect Employees*

Even if not preempted, courts have consistently ruled that medical marijuana laws do not create implied causes of action for employees fired after positive drug tests.⁹¹ This means that, for the purposes of workplace drug tests, licensed medical marijuana users are treated no differently than illegal drug users. There is, however, language in both

90. *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 536 (Or. 2010).

91. *See, e.g., Casias v. Wal-Mart Stores, Inc.*, 764 F. Supp. 2d 914, 924 (W.D. Mich. 2011) ("Michigan voters could not have intended to enact private employment regulation implicitly, through a negative inference, when the rights of employees are never mentioned anywhere else in the statute."), *aff'd*, 695 F.3d 428 (6th Cir. 2012); *Roe v. Teletech Customer Care Mgmt. LLC*, 257 P.3d 586, 591–92 (Wash. 2011) ("The language of [Washington's medical marijuana law] is unambiguous—it does not regulate the conduct of a private employer or protect an employee from being discharged because of authorized medical marijuana use."). Only a few states' medical marijuana statutes directly address the rights of employees. A medical marijuana user has yet to challenge an employer in those states, so the efficacy of their statutes remains unproven. *See infra* Part IV for a discussion of these states' statutes.

the majority opinions and dissents that shows that courts would honor employment rights for medical marijuana users if those rights were expressly written into the medical marijuana law. The courts reveal, through the opinions and dicta, what it would take for them to rule in favor of the employees. This Note applies these lessons in drafting the statute presented herein.

State courts are hesitant to create employment rights for medical marijuana users for two primary reasons. First, doing so would violate the will of the voters or legislatures that passed the laws. Under the courts' reasoning, if the voters or legislatures had wanted employment protections for medical marijuana users, they would have included them in the statutes authorizing marijuana use.⁹² Second, courts fear the negative consequences that judicially created employment rights would have on employers. For example, forcing employers to violate the DFWA.⁹³

While court decisions thus far have been unfavorable for employees that use medical marijuana, the courts have not foreclosed the possibility that the laws could be amended to include employment protections. The California Supreme Court said that, although marijuana is illegal under federal law, voters "were free to disagree with Congress's assessment of marijuana."⁹⁴ It went on to say that a medical marijuana law with employment protections should provide notice to employers that they must accommodate marijuana use.⁹⁵ The Washington Supreme Court suggested that "any statute creating employment protections for authorized medical marijuana users might include exceptions for certain occupations or permissible levels of impairment on the job."⁹⁶

The current case law demonstrates that courts will not find an implied cause of action for wrongful termination in an ambiguous medical marijuana statute. Many state statutes could benefit from clearer language addressing employment law. Some state statutes only provide protection from arrest for authorized medical marijuana use.⁹⁷ Others

92. *Roe*, 257 P.3d at 594 ("[T]here is no evidence voters intended [Washington's medical marijuana law] to provide employment protections or to prohibit an employer from discharging an employee for medical marijuana use."); *Casias*, 764 F. Supp. 2d at 926 ("If the voters of Michigan meant to enact such sweeping legislation, they had to do so explicitly.").

93. *Ross v. RagingWire Telecomms., Inc.*, 33 Cal. Rptr. 3d 803, 811 n.5 (Cal. Ct. App. 2005), *aff'd*, 174 P.3d 200 (Cal. 2008).

94. *Ross*, 174 P.3d at 205.

95. *Id.* at 208–209.

96. *Roe*, 257 P.3d at 593.

97. MD. CODE ANN., HEALTH–GEN. § 13-3313(a) (West Supp. 2014); MASS GEN. LAWS ANN. ch. 94C, § 1-4 (West Supp. 2014); MICH. COMP. LAWS ANN. § 333.26424(a) (West. Supp. 2015); MONT. CODE ANN. § 50-46-

do not prevent arrest but merely provide an affirmative defense to prosecution.⁹⁸ Many also state that nothing in the statute will “require any employer to accommodate the medical use of marijuana in any work place.”⁹⁹ Based on how courts have interpreted statutes devoid of employment provisions, employees would likely fail if they brought wrongful termination suits in these states. These decisions underscore the need for legislative action to protect medical marijuana users.

IV. SOME STATE MEDICAL MARIJUANA STATUTES DO INCLUDE EMPLOYMENT PROVISIONS

The state medical marijuana statutes examined in this section have provisions explicitly addressing employment. But the employment provisions have yet to be tested in court. The language in these provisions provides ideas and guidance to those who wish to amend their states’ medical marijuana laws to include employment protections.

Rhode Island and Connecticut explicitly prohibit employers from refusing to employ, or otherwise penalizing, employees solely for their status as medical marijuana cardholders.¹⁰⁰ Of the laws that address employment, these are the least protective. They only protect the fact that a person holds a medical marijuana card, not the fact that a person may be using marijuana. If an employer in Rhode Island or Connecticut fired an employee for a positive drug test the employee would find no protection in the state’s law.¹⁰¹

319(2) (2013); N.J. STAT. ANN. § 24:6I-2(e) (West Supp. 2015); N.M. STAT. ANN. § 26-2B-4(A) (West 2014); N.Y. PUB. HEALTH LAW § 3369 (McKinney 2014); VT. STAT. ANN. tit. 18, § 4474b(a) (2013); WASH. REV. CODE ANN. § 69.51A.040 (West 2014).

98. ALASKA STAT. § 17.37.030(a) (2012); COLO. CONST. art. XVIII, § 14(2)(a)(III); HAW. REV. STAT. § 329-125(a) (West 2014); OR. REV. STAT. ANN. § 475.319(1) (West Supp. 2014); D.C. CODE § 7-1671.08(c) (2012).

99. COLO. CONST. art. XVII, § 14(10)(b). *See also* HAW. REV. STAT. § 329-122(c)(2)(B) (West 2014); MASS. GEN. LAWS ANN. ch. 94C, § 1-7(D) (West Supp. 2015); MICH. COMP. LAWS ANN. § 333.26427(c)(2) (West Supp. 2015); N.J. STAT. ANN. § 24-6I-14 (West Supp. 2015); N.M. STAT. ANN. § 26-2B-5 (West 2014); OR. REV. STAT. ANN. § 475.340(2) (West 2014); VT. STAT. ANN. tit. 18, § 4474c(a)(1)(B) (West 2014); WASH. REV. CODE ANN. § 69.51A.060(4) (West 2014).

100. 21 R.I. GEN. LAWS ANN. § 21-28.6-4(c) (West 2014); CONN. GEN. STAT. ANN. § 21a-408p(b)(3) (West 2015).

101. On November 12, 2014, the ACLU announced that it had filed a complaint on behalf of a student who was denied employment because of her status as a medical marijuana cardholder in Rhode Island, so that statute may be tested soon. *ACLU Files Suit Over Medical Marijuana Discrimination*, ACLU (Nov. 12, 2014), <https://www.aclu.org/criminal-law-reform/aclu-files-suit-over-medical-marijuana-discrimination> [<https://perma.cc/XVZ9-Q44C>]. In August 2015, a Superior Court judge in Rhode Island denied the defendant

Like Rhode Island and Connecticut, Illinois and Maine also prohibit employers from refusing to employ, or otherwise penalizing, a person based on his or her status as a cardholder, but these states add additional protections for employers.¹⁰² For example, if accommodating a person's cardholder status would "put the . . . employer . . . in violation of federal law or . . . cause it to lose a monetary or licensing-related benefit under federal law," the employer is excused from the prohibition.¹⁰³ Furthermore, Illinois explicitly allows employers to enforce zero-tolerance or drug-free workplace policies "provided [that] the policy is applied in a nondiscriminatory manner."¹⁰⁴ This means that employers are free to discipline medical marijuana users for positive drug tests as long as they also discipline other drug users in a similar manner.

Arizona, Delaware, and Minnesota have similar employment provisions, and these provisions provide the strongest protections for employees (relative to other medical marijuana statutes).¹⁰⁵ In addition to prohibiting employers from discriminating against an employee for his or her status as a cardholder, these states also prohibit employers from discriminating against employees that test positive for marijuana in a drug test.¹⁰⁶ These provisions are subject to a few exceptions. First, each of the three statutes includes an exception for employers that would risk violating federal law or losing federal contracting money if they accommodate medical marijuana users.¹⁰⁷ Second, if an employee uses or is impaired by marijuana while at the workplace they cannot seek protection under these statutes.¹⁰⁸

employer's motion to dismiss. Katie Mulvaney, *Judge Refuses to Dismiss Medical Marijuana User's Case Against RI Firm*, PROVIDENCE J. (Aug. 11, 2015), <http://www.providencejournal.com/article/20150811/NEWS/150819900> [<http://perma.cc/A463-55YR>].

102. ME. REV. STAT. ANN. tit. 22, § 2423-E (West 2014); 410 ILL. COMP. STAT. ANN. 130/40(a)(1) (West Supp. 2015).

103. 410 ILL. COMP. STAT. ANN. 130/40(a)(1) (West Supp. 2015).

104. 410 ILL. COMP. STAT. ANN. 130/50(b)-(c) (West Supp. 2015).

105. ARIZ. REV. STAT. ANN. § 36-2813(B) (2014); DEL. CODE ANN. tit. 16, § 4905A(a)(3) (Supp. 2012); MINN. STAT. ANN. § 152.32(3)(c) (West 2014).

106. ARIZ. REV. STAT. ANN. § 36-2813(B)(2) (2014); DEL. CODE ANN. tit. 16, § 4905A(a)(3)(b) (Supp. 2014); MINN. STAT. ANN. § 152.32(3)(c)(2) (West Supp. 2015).

107. ARIZ. REV. STAT. ANN. § 36-2813(B) (2014); DEL. CODE ANN. tit. 16, § 4905A(a)(3) (Supp. 2014); MINN. STAT. ANN. § 152.32(3)(c) (West Supp. 2015).

108. ARIZ. REV. STAT. ANN. § 36-2813(B)(2) (2014); DEL. CODE ANN. tit. 16, § 4905A(a)(3)(b) (Supp. 2014); MINN. STAT. ANN. § 152.32(3)(c)(2) (West Supp. 2015).

New York is unique in that its medical marijuana statute does not expressly create employment rights for medical marijuana users, but rather it protects employees indirectly by specifying that users are considered disabled for the purposes of the state's disability discrimination law.¹⁰⁹ As with many other medical marijuana law employment provisions, there are exceptions allowing employers to enforce policies that prohibit employees from working while impaired.¹¹⁰ Employers are also exempt if compliance would cause them to violate federal law or risk forfeiting a federal contract or funding.¹¹¹

A recurring theme throughout the employment discrimination provisions in state medical marijuana laws is that employees cannot be "impaired" at work.¹¹² Impairment is a broad term. For example, in Arizona, symptoms that indicate drug impairment include the following:

[T]he employee's speech, walking, standing, physical dexterity, agility, coordination, actions, movement, demeanor, appearance, clothing, odor, irrational or unusual behavior, negligence or carelessness in operating equipment, machinery or production or manufacturing processes, disregard for the safety of the employee or others, involvement in an accident that results in serious damage to equipment, machinery or property, disruption of a production or manufacturing process, any injury to the employee or others or other symptoms causing a reasonable suspicion of the use of drugs or alcohol."¹¹³

Illinois' impairment definition uses similar language.¹¹⁴ This type of "essentially tautological definition provides relatively little practical guidance for employers facing difficult decisions concerning the

109. N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2014).

110. *Id.*

111. *Id.*

112. *See, e.g.*, N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2014); ARIZ. REV. STAT. ANN. § 36-2813(B)(2) (2014); DEL. CODE ANN. tit. 16, § 4905A(a)(3)(b) (Supp. 2014); MINN. STAT. ANN. § 152.32(3)(c)(2) (West Supp. 2015).

113. ARIZ. REV. STAT. ANN. § 23-493(7) (2015).

114. Illinois' definition of impairment includes "specific, articulable symptoms while working that decrease or lessen [the employee's] performance . . . including symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior." 410 Ill. Comp. Stat. Ann. 130/50(f) (West Supp. 2015).

employment of medical marijuana users.”¹¹⁵ Also, while the statute names symptoms that are indicative of drug use, some symptoms (like appearance and odor) do not necessarily indicate impairment.

Finally, Nevada’s statute requires that employers “make reasonable accommodations” for employees that use medical marijuana as long as the accommodations would not (1) “[p]ose a threat of harm or danger to persons or property,” (2) “impose an undue hardship on the employer,” or (3) “[p]rohibit the employee from fulfilling any and all of his or her job responsibilities.”¹¹⁶ This is unique in two ways. First, it does not include the problematic impairment language included in the other states’ medical marijuana statutes. Rather, its narrower language requires employers to show that the employee poses a threat to the work place. An employer is justified in firing an employee that poses such a threat. Under the statutes that use the term “impairment,” an employer may be permitted to fire an employee that simply shows the physical signs of impairment (like smell or red eyes) without having to show that the employee’s marijuana use poses some threat to the work place.

Second, Nevada’s statute does not specifically mention federal contracting or compliance with federal drug-free workplace laws, covering those concerns instead under the “undue hardship” provision. The problem with this provision is similar to the problem with the impairment provision—its broad language invites litigation. Because the statutes do not clarify what an “undue hardship” is, the term will have to be clarified in court if litigation ever arises. Clearer language will reduce litigation costs by making it clear to employees when their employers have the right to fire them.

V. STATUTE RECOMMENDATION

The statute presented in this Part addresses the rights of medical marijuana cardholders. For the purposes of this statute, as well as many states’ medical marijuana statutes, a “cardholder” is a qualifying patient or a designated caregiver who has been issued a valid registry identification card by the state to possess, use, or cultivate marijuana.¹¹⁷ Patients are authorized to use marijuana. Caregivers are not authorized to use marijuana, but they are authorized to possess it for patients.

115. Michael D. Moberly & Charitie L. Hartsig, *Smoke—And Mirrors? Employers and the Arizona Medical Marijuana Act*, ARIZ. ATT’Y, July/Aug. 2011, at 30.

116. Nev. Rev. Stat ANN. § 453A.800(3) (West 2014).

117. See, e.g., 21 R.I. Gen. Laws Ann. § 21-28.6-3 (West 2014); Del. Code Ann. tit. 16, § 4902A(1) (West Supp. 2014) (both defining a cardholder as a qualifying patient or designated caregiver with a valid registry identification card). See also Ariz. Rev. Stat. Ann. § 36-2801 (2014) (including nonprofit medical marijuana dispensary agent in the definition of “cardholder”).

Because patients are the people actually using marijuana, their rights are addressed more thoroughly in this statute.

A. Statute Language

Based on the recommendations in the case law and the provisions in other states' statutes, I propose that the following language be added to medical marijuana statutes:

§ X. Employment Protections for Medical Marijuana Cardholders.

(a) Unless failure to do so would cause an employer to lose a monetary or licensing-related benefit under federal law or regulations, an employer shall not discriminate against a person in hiring, termination, or any condition of employment, or otherwise penalize a person, based upon either of the following:

(1) That person's status as a cardholder; or

(2) A patient's medical use of marijuana, unless the patient ingested or possessed marijuana on the premises of the workplace or during work hours, without the written permission of that patient's employer.

(b) Section (a) of this provision shall not protect a patient whose medical use of marijuana either:

(1) Poses an actual threat of harm or danger to persons or property; or

(2) Makes the patient incapable of performing essential job duties.

(c) Employers shall be exempt from Section (a) to the extent required to comply with state drug testing laws or regulations.

(d) Employers not exempt from Section (a) shall not be denied any benefit for employing the persons identified in Sections (a)(1) and (a)(2).

B. Statute Analysis

This statutory language combines the best features of existing medical marijuana statute employment provisions. It also takes into account the lessons from state courts on what makes an appropriate statute. It explicitly puts employers on notice that they cannot fire employees just for using medical marijuana. And it puts employees on notice that they can be fired if their medical marijuana use negatively affects their performance or puts the workplace in danger. This section discusses the purpose and effect of each part of the statute and how the statute improves upon existing law.

1. Section (a)—Who and What is Protected by this Statute

Section (a) of this statute describes who is protected by the statute and what activity constitutes employment discrimination against them. The statute begins with a clause that exempts employers that would violate federal laws like the DWFA if they employed medical marijuana users. Most states with employment provisions in their medical marijuana statutes have a similar provision. This language protects employers and helps the statute withstand a preemption challenge. If the law required employers to violate federal law, it would be without effect under an impossibility preemption analysis.

The statute then describes what constitutes employment discrimination under this provision. Employers can not consider a person's cardholder status or medical marijuana use when making decisions about hiring, termination, or any other condition of employment (like salary or benefits). "[O]r otherwise penalize a person" is a catchall phrase, found in many states' employment provisions. It ensures that patients and caregivers are fully protected from any kind of discrimination.

Medical marijuana cardholders are protected in two specific ways by the statute. First, a cardholder's status is fully protected by the statute by Section (a)(1). That means that an employer cannot fire someone simply because that person is licensed under a state medical marijuana law. Unlike a positive drug test, being a cardholder does not necessarily indicate marijuana use. Allowing employers to fire people solely for their status as cardholders would be baseless and unfair. Licensed patients, growers, sellers, caregivers, and other cardholders all benefit from Section (a)(1).

Section (a)(2) protects an employee's medical use of marijuana. But an employee's use of marijuana is only protected if two conditions are met: (1) the employee is a patient, and (2) the employee does not possess or ingest marijuana at the place of employment or during work hours without written permission. This section requires an employee to be a patient because patients are the only types of cardholders that are authorized to use marijuana.

Section (a)(2) also specifically says that employees cannot "ingest" marijuana at work. Although some statutes say that an employee may not "use" or "smoke" medical marijuana while at work, those words are inadequate. "Use" is too broad of a term. In *Coats v. Dish Network, LLC*,¹¹⁸ the employer argued that the word "use" included situations in which the employee, Brandon Coats, consumed marijuana off-duty and off-premises.¹¹⁹ The employer cited Coats' opening brief, which stated

118. 350 P.3d 849 (Colo. 2015).

119. Answer Brief at 6, *Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015) (No. 11-CV-1464).

that Coats’s medical marijuana use “decreased painful muscle spasms, allowing Coats to work.”¹²⁰ Because “he was using [medical marijuana] to control his symptoms at work, he was ‘medically using’ marijuana on-duty, on-premises.”¹²¹ If a court accepted that argument, an employee would not be protected by a statute that barred “use” of marijuana at work. “Smoke” has a different problem—it is too narrow of a word. Marijuana can be vaporized, eaten, used as a tincture, or ingested in other ways. Thus, this statute uses the word “ingest,” which the Merriam-Webster dictionary defines as “to take (something, such as food) into your body.”¹²² This word is broad enough (unlike the word “smoke”) to encompass all forms of marijuana consumption, yet narrow enough (unlike the word “use”) to require that the employee actually take the marijuana in the work place or during work hours.

Provisions allowing employers to bar use of marijuana in the workplace are standard in state medical marijuana laws. This statute adds special language that allows employees to use marijuana with the employer’s permission. Requiring the employee to obtain written permission protects both employers and employees by creating documentation of any permission the employee receives. If the employee is later terminated for using or possessing marijuana at work, the documentation, or lack thereof, could be dispositive for the case.

2. Section (b)—When Medical Marijuana Use Is Not Protected by this Statute

Section (b) addresses employers’ interests in workplace safety and employee performance. It allows employers to achieve the same goals as drug testing—keeping dangerous and incapable employees out of the workplace. But it also protects medical marijuana users from being fired when their marijuana use has no negative effect on their job. Although many states exempt employees that are “impaired” at work from protection, this statute uses narrower language. The narrower language allows the statute to reduce the risk that an employee will be fired for an arbitrary reason while still accomplishing the ultimate purpose of impairment language—keeping negative effects of drug use out of the workplace.

Section (b)(1) treats medical use of marijuana like prescription drug use. Even though their drugs are legal under both state and federal law, prescription drug users can face discipline if their drug use threatens the workplace. For example, railroad employees can only use

120. *Id.* (quoting Opening Brief at 51, *Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015) (No. 11-CV-1464)).

121. *Id.*

122. *Dictionary—Ingest*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/ingest> [<http://perma.cc/CGP5-C2Q4>] (last visited Oct. 1, 2015).

prescription drugs if they can do so in a way that is “consistent with the safe performance” of their employment duties.¹²³ Similarly, the ADA permits employers to fire employees whose prescription drug use poses a “direct threat to the health or safety of other individuals in the workplace.”¹²⁴ Section (b)(2) precludes employees from using marijuana use as an excuse for failing to perform up to standards. Its language is also similar to that of the ADA: The ADA requires a claimant to be able to perform “essential functions of the employment position that such individual holds or desires.”¹²⁵

While employers use generalizations about marijuana to justify workplace drug policies, marijuana’s effects vary widely based on factors such as the user’s tolerance, dosage, type of marijuana used, and method of ingestion.¹²⁶ Sections (b)(1) and (b)(2) protect medical marijuana users from these generalizations by ensuring them the right to an individualized assessment.¹²⁷

An employer could not cite to Section (b) as a reason to not hire an applicant. Before employment, a medical marijuana user has yet to threaten the workplace or perform poorly. In many states, employers can fire medical marijuana users because the employers fear the effects that marijuana *might* have on the user. This statute requires that the marijuana *actually* have an effect. Mere knowledge that an employee uses medical marijuana is not a sufficient reason for termination.

3. Section (c)—Respecting State Drug Testing Laws

Section (c) ensures that this provision does not displace state drug testing laws. Like the federal government, states also mandate drug testing for certain employees. For example, Connecticut requires drug testing of school bus drivers and other employees that serve in “high-risk or safety-sensitive” occupations.¹²⁸ If a state adopts the statute proposed in this Note, then it should amend Section (c) to expressly state which state drug testing laws supersede this statute. This would put employers and employees on notice about how to comply with this statute.

Section (c) allows employers to violate Section (a) (which prohibits employers from taking adverse action against medical marijuana users) when employers must comply with state drug testing laws. If it did not,

123. 49 C.F.R. § 219.103 (2014).

124. 42 U.S.C. § 12113(b) (2012).

125. 42 U.S.C. § 12111(8) (2012).

126. Report, *supra* note 15, at 61–63.

127. See Hickox, *supra* note 41, at 1045 (“Under the ADA, the employer’s proof that an individual poses a ‘direct threat’ must be based on an ‘individualized assessment of the individual’s present ability to safely perform the essential functions of the job.’”).

128. CONN. GEN. STAT. ANN. § 31-51x (West Supp. 2015).

then employers face an impossible choice when their employees used medical marijuana—fire the employee and risk violating this statute or adhere to this statute and violate state law.

4. Section (d)—Additional Protection for Employers

Section (d) protects employers from medical marijuana related discrimination. It ensures that compliance with this statute, which restricts the situations in which an employer may fire or otherwise discipline medical marijuana users, will not cause the employer any detriment. States and insurance companies may attempt to encourage zero-tolerance workplace drug policies by offering benefits to employers that enforce them. With Section (d), an employer could not be denied any benefit for refusing to take adverse action against an employee (assuming the employer adhered to the other conditions attached to the benefits).

CONCLUSION

The terminated medical marijuana users mentioned at the beginning of this Note—Gary Ross, Joseph Casias, Brandon Coats—could have vindicated their rights in court if their states' medical marijuana laws had contained the statutory language proposed in this Note. Unfortunately many states' medical marijuana laws still lack employment provisions. This Note recommends that states adopt the proposed statutory language into their medical marijuana laws.

The CSA's classification of marijuana as a Schedule I substance has been attacked since its inception. The National Commission on Marihuana and Drug Abuse, whose creation was mandated by the CSA, was the first to disagree with the classification. In 1972, the Commission found that “[m]arihuana’s relative potential for harm to the vast majority of individual users and its actual impact on society does not justify a social policy designed to seek out and firmly punish those who use it.”¹²⁹ Since then, even more research has shown that marijuana should not be classified as a Schedule I substance.

Almost twenty years have passed since California enacted the nation's first medical marijuana law.¹³⁰ In that time, twenty-two other states and Washington, D.C. have also enacted medical marijuana laws.¹³¹ Enforcement of the CSA against medical marijuana users is weak. The Department of Justice has released several memos stating

129. Report, *supra* note 15, at 163.

130. California voters passed the state's medical marijuana law in 1996. *State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 11, 2015), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<http://perma.cc/SQQ4-ACU3>].

131. *Id.*

that it will not target state law-compliant medical marijuana users. Also, Congress's spending bill for the 2015 fiscal year prohibits the Department of Justice from interfering with state medical marijuana laws.¹³² Non-enforcement of the CSA lends strength to the argument that the CSA would not preempt a state statute protecting medical marijuana users' employment rights. Also, unlike the statute preempted in *Emerald Steel*, this statute would not be preempted because it only authorizes employment of medical marijuana users, not use of marijuana.¹³³

The conflict between state and federal marijuana laws causes confusion for employers, who are unsure whether state medical marijuana laws supersede their power to enforce drug-free workplace policies against employees.¹³⁴ Courts consistently rule in favor of employers when medical marijuana users challenge drug-free workplace policies, but they have not foreclosed the possibility that state medical marijuana laws could protect employees. Nevertheless, without explicit statutory guidance, the courts will not recognize these rights. A state's medical marijuana statute should clearly address the scope of accommodation that employers must provide to medical marijuana users.

With this provision in their states' medical marijuana laws, courts could not dismiss an employee's complaint for failure to state a claim on the grounds that the language of the medical marijuana law "does not regulate the conduct of a private employer or protect an employee from being discharged because of authorized medical marijuana use."¹³⁵ This provision puts both employers and employees on notice about the scope of an employer's duty to accommodate medical marijuana use.

The statute in this Note protects medical marijuana users but not recreational marijuana users (even if they are using the drug in compliance with state law). The reason for this distinction is that medical users rely on marijuana to alleviate symptoms of disabilities. Current law forces medical users to choose between pain relief and

132. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014).

133. *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010). For a discussion of the *Emerald Steel* obstacle preemption analysis, see *supra* Part III.A.i.

134. "[M]any employers lack a clear understanding of how to treat medical marijuana users." Hickox, *supra* note 41, at 1004 (2011) (surveying employers about why they drug test and the consequences for positive drug tests).

135. *Roe v. Teletech Customer Care Mgmt. LLC*, 257 P.3d 586, 591-92 (Wash. 2011). See also *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200, 207 (Cal. 2008) (holding that "given the controversy that would inevitably have attended a legislative proposal to require employers to accommodate marijuana use, we do not believe that [California's medical marijuana law] can reasonably be understood as adopting such a requirement silently and without debate.").

employment. Recreational users, on the other hand, do not have to make that choice. The statute in this Note does as much as possible to eliminate the risk that medical marijuana users will face that choice.

States have finally given people suffering from illness and disability access to a drug that can help them feel better—marijuana. But some risk their jobs if they use it, even if that use is off-site and does not affect the workplace. The ideas in this Note could be used to expand the rights of medical marijuana users in the fields of housing, education, parenting, and other areas. The courts have made it clear that state medical marijuana laws need to provide these rights explicitly.

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