

A New Frontier: The Evolving Legal and Policy Landscape of Medical Cannabis in Maryland

The Future of Medical Cannabis Enforcement

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Next year marks the 30th anniversary of the Americans with Disabilities Act (ADA) and the 55th anniversary of the Maryland Fair Employment Practices Act (FEPA). As most employment attorneys will tell you, these laws clearly have high-minded policy objectives but are not always clear about how they are to be implemented.

One of the most rapidly developing and evolving areas of how to apply these laws involves medical marijuana use by employees. How have the federal government, Maryland, and other states balanced the competing interests between workplace safety and employee privacy on this issue? Where do recent trends suggest the future is headed? These materials offer a snapshot of where things stand and where they might be going.

The ADA and Other Federal Law Enforcement

At the federal level, marijuana use, even for medical purposes, remains unlawful. The Americans with Disabilities Act, as amended (ADA), does not protect an individual who is “currently engaging in the illegal use of drugs” from adverse employment action on the basis of such drug use. 42 U.S.C. § 12114(a); *see* 29 C.F.R. § 1630.3(a). The ADA defines “illegal use of drugs” as the use of any drug of which “possession or distribution . . . is unlawful under the Controlled Substances Act [CSA].” 42 U.S.C. § 12114(a); *see* 29 C.F.R. § 1630.3(a).

Since the CSA’s 1970 enactment during the Nixon Administration, marijuana has been listed and criminalized as a Schedule I drug and labeled as a “hallucinogenic substance[.]” *See* 21 U.S.C. § 802(16) (defining “marihuana”); *id.* §§ 812(b)(1), 812(c) sched. I(c)(10). This classification results from the congressional determination that marijuana “has a high potential for abuse” and “has no currently accepted medical use in treatment in the United States,” and that “[t]here is a lack of accepted safety for use of [marijuana] under medical supervision.” 21 U.S.C. § 812(b)(1); *see Gonzales v. Raich*, 545 U.S. 1, 27 (2005).

Because possession of marijuana remains unlawful under the CSA, courts have uniformly concluded that “medical marijuana use is not protected by the ADA.” *James v. City of Costa Mesa*, 700 F.3d 394, 397 (9th Cir. 2012); *see id.* at 397 n.3 (“[T]he ADA does not protect medical marijuana users who claim to face discrimination *on the basis of their marijuana use.*”) (emphasis added); *accord Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F. Supp. 3d 326, 338 (D. Conn. 2017); *United States v. Taylor*, 2014 U.S. Dist. LEXIS 136669, at *24 (W.D. Mich. Sept. 8, 2014) (“[F]ederal prohibitions against marijuana continue to apply the same to Colorado as it does to Texas; to Washington as it does Michigan.”). In other words, though the

underlying health condition(s) for which an individual is using medical marijuana may constitute a disability, employers are permitted to take action against the individual because of their medical marijuana use without violating the ADA.

The current administration supports this absolute federal prohibition against marijuana. In 2018, the Department of Justice rescinded all prior guidance suggesting anything other than vigilant enforcement of criminal laws prohibiting marijuana. *See* Jefferson B. Sessions, III, Memorandum for All United States Attorneys, “Marijuana Enforcement” (Jan. 4, 2018), available at <https://www.justice.gov/opa/press-release/file/1022196/download>.

That does not, however, end the question at hand. Instead, existing laws present a thorny federal preemption issue. The CSA – which, again, is incorporated by reference into the ADA – contains a limited preemption clause:

No provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903. In other words, where this federal law conflicts with State medical marijuana laws, the CSA trumps the state law. But when do these laws conflict?

On one hand, laws that “merely provide limited state-law immunity from prosecution if individuals choose to engage in state-law compliant medical marijuana use” generally “do *not* conflict with the CSA[.]” *Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225, 1229-30 (D.N.M. 2016) (emphasis added) (citing, e.g., *Ter Beek v. City of Wyo.*, 846 N.W.2d 531 (Mich. 2014), and *Qualified Patients Ass’n v. City of Anaheim*, 115 Cal. Rptr. 3d 89 (Cal. Ct. App. 2010)); *see also Bourgoin v. Twin Rivers Paper Co.*, 187 A.3d 10, 19 (Me. 2018).

On the other hand, laws that affirmatively mandate that employers “treat an employee’s medical use of marijuana as a reasonable workplace accommodation” are frequently found to conflict with—and be preempted by—the CSA. *Bourgoin*, 187 A.3d at 19-20 (citing *Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225, 1229-30 (D.N.M. 2016), and *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 536 (Or. 2010)).

State Medical Marijuana Laws

Presently, Maryland and 33 other states, plus the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands, have medical marijuana and/or cannabis laws in effect. *See* National Conference of State Legislatures (NCSL), *State Medical Marijuana Laws*, <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (last updated Mar. 5, 2019). A chart summarizing the varying approaches taken by almost all of these states to date is attached as an appendix.

The Maryland Fair Employment Practices Act (FEPA), aka Title 20

Maryland's Fair Employment Practices Act (FEPA), Title 20 of the State Government Article, is similar to its federal counterpart. FEPA prohibits employers with 15 or more employees from "fail[ing] or refus[ing] to hire, discharg[ing], or otherwise discriminat[ing] against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment because of the individual's . . . disability unrelated in nature and extent so as to reasonably preclude the performance of the employment." Md. Code, State Gov't ("SG") § 20-606(a)(1); *see* 42 U.S.C. § 12112(a) (prohibiting disability-based discrimination under ADA). Likewise, FEPA defines a "disability" as "a physical disability, infirmity, malformation, or disfigurement that is caused by bodily injury, birth defect, or illness, including epilepsy;" or "a mental impairment or deficiency;" "a record of having" such an impairment; or "being regarded as having" such an impairment. SG § 20-601(b)(1); *see* 42 U.S.C. § 12102(1) (ADA-covered disability is "a physical or mental impairment that substantially limits one or more major life activities of an individual," or a record of having or being regarded as having such an impairment).

Unlike the ADA, though, neither FEPA nor applicable regulations address the issue of whether drug use is permitted. The Maryland Attorney General has opined, however, that drug addiction is not intended to be a covered disability. *See* 63 Op. Att'y Gen. 408 (1978).

Appropriately, Maryland courts "look to federal decisions interpreting the ADA for guidance" in interpreting state and local laws. *Ridgely v. Montgomery Cty.*, 164 Md. App. 214, 232, *cert. denied*, 390 Md. 286 (2005); *see Peninsula Reg'l Med. Ctr. v. Adkins*, 448 Md. 197, 219 (2016) (collecting cases). Nevertheless, courts do not "use case law construing *federal* statutes as a 'surrogate for analysis' of the meaning of *Maryland* law." *Adkins*, 448 Md. at 219 (emphasis added).

Importantly, employers also may not "fail or refuse to make a reasonable accommodation for the known disability of an otherwise qualified employee." SG § 20-606(a)(4). "Under Maryland law, to establish a *prima facie* case for a failure to accommodate claim, 'an employee must show: (1) that he or she was an individual with a disability; (2) that the employer had notice of his or her disability; (3) that with reasonable accommodation, he or she could perform the essential functions of the position . . . ; and (4) that the employer failed to make such accommodations.'" *Courtney-Pope v. Bd. of Educ.*, 304 F. Supp. 3d 480, 487 (D. Md. 2018) (citation omitted).

A "reasonable accommodation" is intended to allow the employee to perform the essential functions of his or her job. Of relevance to medical marijuana users, reasonable accommodations may include "modified work schedules" and, more generally, "[m]aking reasonable modifications in the [employer]'s rules, policies, and practices if the modification may enable an applicant or employee with a disability to perform the essential functions of the job[.]" COMAR 14.03.02.05(B)(4), (11).

That said, employers need not make a particular accommodation if they can demonstrate that doing so "would impose undue hardship on the operation of its business or program."

COMAR 14.03.02.05(A). This is not a trivial showing, and requires that the employer consider, among other things, “the nature and cost of the accommodation needed” relative to the size and resources of the employer; “[t]he effect of the accommodation on other employees’ performance”; and legitimate safety concerns. COMAR 14.03.02.06(B). Importantly, safety concerns and requirements “shall be based on actual information or data, not speculation, conjecture, stereotypes, or generalizations about individuals with disabilities.” COMAR 14.03.02.06(C).

Employers will also not be found liable under FEPA if they show that the individual’s disability would “create a future hazard to health or safety.” COMAR 14.03.02.08(B). To establish this “future hazard” defense, the employer must show that:

- (a) It conducted an individualized assessment of the individual’s ability to perform the essential functions of the job in question; and
- (b) To a reasonable probability, the individual’s disability, even with reasonable accommodation, would render the individual unable to perform the duties of the position in question without endangering the health or safety of the individual with a disability or others.

COMAR 14.03.02.08(B)(2). The “future hazard” defense is closely analogous to the ADA’s “direct threat” defense. *See* 29 C.F.R. 1630.2(r) (requiring employer to make individualized assessment of risk to health or safety of individual, or others, based on “(1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm”).

The Natalie M. LaPrade Medical Cannabis Commission Act

In 2013, Maryland enacted the Natalie M. LaPrade Medical Cannabis Commission Act (the “MMCCA”). *See* Md. Code, Health-General (“HG”) §§ 13-3301 *et seq.* (For those who were wondering, the Act takes its name from the mother of Delegate Cheryl Glenn, who was one of its leading sponsors and who believed that medical marijuana would have eased Ms. LaPrade’s pain in the later stages of her life. *See* <https://mmcc.maryland.gov/Pages/Natalie-M-LaPrade-Bio.aspx>).

Bluntly, it is not difficult to obtain an ID card for medical marijuana. Under the MMCCA, any “qualifying patient” who registers with, and provides appropriate health care provider certification to, the Maryland Medical Cannabis Commission (the “Commission”) may purchase an ID card for \$50 that allows the patient to lawfully purchase marijuana from a licensed dispensary. Current regulations explain that medical conditions for which marijuana use may be advisable include: glaucoma; post-traumatic stress disorder (PTSD); “a chronic or debilitating disease or medical condition” for which the patient is admitted into hospice or receives palliative care and/or that causes anorexia, severe nausea, seizures, or other symptoms; or any other severe condition “for which other medical treatments have been ineffective” and for which the symptoms “reasonably can be expected to be relieved by the medical use of cannabis.” COMAR 10.62.03.01(B). As of roughly a year ago, more than 17,000 Marylanders have already

registered for medical marijuana. *See Sarah Meehan, FAQ: What you need to know about medical marijuana in Maryland*, Baltimore Sun (Mar. 20, 2018), available at <https://www.baltimoresun.com/health/marijuana/bs-md-medical-marijuana-faq-20171207-story.html>.

The MMCCA does not directly address the issue of employment. Rather, the General Assembly has stated that qualifying patients who use or possess medical cannabis in compliance with the MMCCA “may *not* be subject to arrest, prosecution, or any civil or administrative penalty, including a civil penalty or disciplinary action by a professional licensing board, or be denied any right or privilege” based on such use or possession. HG § 13-3313(a) (emphasis added). That said, the MMCCA “does not prevent the imposition of [such] penalties” for, among other things, “smoking marijuana or cannabis in any public place;” doing so on private property that “(1) is rented from a landlord; and (2) is subject to a policy that prohibits the smoking of marijuana or cannabis on the property;” and/or “undertaking any task under the influence of marijuana or cannabis, when doing so would constitute negligence or professional malpractice.” HG §§ 13-3314(a)(1), (3), (5)(i). The law also does not affirmatively require employers to accommodate medical marijuana use.

No court has yet had to wrestle with the intersection of federal and Maryland law on medical marijuana, or with the intersection between FEPA and the MMCCA. The Commission, for its part, has taken the view that, “Maryland law does not prevent an employer from testing for use of cannabis (for any reason) or taking action against an employee who tests positive for use of cannabis (for any reason).” Natalie M. LaPrade Maryland Medical Cannabis Commission, Patient FAQ (“My employer tests for drug use including cannabis. Can they test me if I am a medical cannabis patient? Can they fire me if I use medical cannabis?”), available at https://mmcc.maryland.gov/Pages/patients_faq.aspx. Though guidance about edibles (*i.e.*, food or drink products containing marijuana extracts) would undoubtedly be helpful, the Commission does not yet currently have plans to address that issue. *See id.* (“When will edibles and/or additional conditions be added to the regulations?”).

Conclusion

Though federal law unflinchingly permits employers to take actions against employees who test positive for marijuana, or who are otherwise found to be using or under the influence of marijuana in the workplace, state medical marijuana laws are not so simple. In the absence of further guidance from the General Assembly or the Maryland Medical Cannabis Commission on the subject, the best practical advice is for employers to handle medical marijuana use by employees similarly to how they would treat any other employee who claims to be using medication pursuant to a lawful prescription. Employers may appropriately ask to see the employee’s marijuana ID card to confirm that the employee is complying with the MMCCA. Employers may also appropriately drug test employees based on a reasonable suspicion and may proactively take steps to promote a safe and healthy workplace. Ultimately, employers’ energies are often best focused on ensuring that their employees are capably performing their job duties.

Appendix 1. State Medical Marijuana Law Summary (as of May 10, 2019)

Issue	State
<p>Explicit anti-discrimination protection based on individual’s status as qualifying patient or caregiver, and/or positive drug test for cannabis or metabolites</p>	<ul style="list-style-type: none"> • Arizona – Ariz. Rev. Stat. § 36-2813(B); <i>see Whitmire v. Wal-Mart Stores, Inc.</i>, 359 F. Supp. 3d 761 (D. Ariz. 2019) • Arkansas – Ark. Const. amend. 98, § 3(f)(3)(A) • Connecticut – Conn. Gen. Stat. § 21a-408p(b)(3); <i>see Noffsinger v. SSC Niantic Operating Co., LLC</i>, 338 F. Supp. 3d 78 (D. Conn. 2018) • Delaware – 16 Del. C. § 4905A • Maine – 22 Me. Rev. Stat. § 2430-C(3) • Massachusetts – Mass. Gen. Laws Ch. 151B, § 4(16); <i>see Barbuto v. Advantage Sales and Marketing, LLC</i>, 477 Mass. 456 (Mass. 2017) • Minnesota – Minn. Stat. § 152.32(3)(c) • New York – N.Y. Pub. Health § 3369(2) • Oklahoma – 63 Okl. St. § 425(B) • Pennsylvania – 35 P.S. § 10231.2103(b)(1) • Rhode Island – R.I. Gen. Laws § 21-28.6-4(d) • West Virginia – W. Va. Code § 16A-15-4(1)
<p>Does not apply to employment/does not require employers to accommodate marijuana use</p>	<ul style="list-style-type: none"> • Alaska – Alaska Stat. § 17.37.040(d)(1) • California – Cal. Health & Safety Code § 11362.785 • Florida – Fla. Const. Art. X, § 29(c)(6) • Hawaii – Haw. Rev. Stat. § 329-122(e)(2)(B) (not permitted in the workplace) • Michigan – Mich. Comp. Law Serv. § 333.26427(c)(2); <i>see also Casias v. Wal-Mart Stores, Inc.</i>, 695 F.3d 428, 435-36 (6th Cir. 2012) (“right or privilege” protections then in effect did not regulate private employment) • Montana – MCA § 50-46-320(4); <i>see Johnson v. Columbia Falls Aluminum Co., LLC</i>, 350 Mont. 562 (Mont. Mar. 31, 2009) • Nevada – Nev. Rev. Stat. § 453A.800 • New Hampshire – Rev. Stat. § 126-X:3(III)(c) • New Jersey – N.J. Stat. § 24:6I-14; <i>see Cotto v. Ardagh Glass Packing, Inc.</i>, 2018 U.S. Dist. LEXIS 135194 (D.N.J. Aug. 10, 2018). <i>But see Wild v. Carriage Funeral Holdings, Inc.</i>, 2019 N.J. Super. LEXIS 37 (N.J. App. Div. Mar. 27, 2019). • New Mexico - N.M. Stat. § 26-2B-5(A)(3)(c) • North Dakota – N.D. Cent. Code § 19-24.1-34(2) (not permitted in the workplace) • Ohio – Ohio Rev. Code § 3796.28(A) • Oklahoma – 63 Okl. St. § 425(B) (not permitted in the workplace) • Oregon – Ore. Rev. Stat. § 475.340

	<ul style="list-style-type: none"> • Pennsylvania – 35 P.S. § 10231.2103(b)(2) (not permitted in the workplace) • Rhode Island – R.I. Gen. Laws § 21-28.6-7(b) (not permitted in the workplace) • Vermont – 18 V.S.A. § 4230a(e)(1) • Washington – Rev. Code Wash. § 69.51A.060(4); <i>see Roe v. TeleTech Customer Care Mgmt.</i>, 216 P.3d 1055, 1060-61 (Wash. 2009) • West Virginia – W. Va. Code § 16A-15-4(2) (not permitted in the workplace)
Explicitly does not permit employment discrimination claim	<ul style="list-style-type: none"> • Montana – MCA § 50-46-320(5) • Vermont – 18 V.S.A. § 4230a(e)(3)
Silent on employment	<ul style="list-style-type: none"> • District of Columbia – D.C. Code §§ 7-1671.01 <i>et seq.</i>; <i>see Coles v. Harris Teeter, LLC</i>, 217 F. Supp. 3d 185, 188 (D.D.C. 2016) • Louisiana – La. R. S. § 40:1046 • Maryland – Health-General §§ 13-3313, 13-3314