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Part #2: State Protections

As of present, medical marijuana use is legal in 38 states and the District of Columbia. While some states have more robust protections for medical marijuana patients, others are more conservative and do not expressly have anti-discrimination provisions in their laws. Further, some states focus on discrimination laws for qualifying medical marijuana patients/cardholders while others focus on off-duty marijuana use, regarding regardless of medical cardholder status. Let's look at Alabama's approach to medical marijuana (as I am sure most of our readers operate in this state) and compare it to other states with stricter discrimination provisions.

Alabama's Medical Marijuana Law

Alabama passed the Alabama Medical Cannabis Act in 2021. *See* Ala Code § 20-2A-1 et seq. This law legalized the use of medical marijuana for patients with qualifying conditions, including chronic pain, nausea from chemotherapy, and certain types of epilepsy, among others. While the law provides medical marijuana access and use, it does not explicitly protect patients from workplace discrimination. Employers in Alabama generally can still fire or refuse to hire an individual who tests positive for marijuana, even if they are a registered medical marijuana patient if consistent with company policy or past practice. This makes Alabama's protections relatively weak compared to states with more comprehensive safeguards for patients (as you can see below).

Let's compare varying state laws and protections to highlight key aspects that employers should be aware of. Specifically, we'll focus on the states of California, Michigan, New York, and Nevada (as these states have some of the most expansive marijuana regulations).

California

To no one's surprise, California was the first state to enact legislation legitimizing medical marijuana use with its Compassionate Use Act of 1996. Since then, the state has developed additional laws that provide strong protections for patients. California's Fair Employment and Housing Act (CFEHA) prohibits employers from discriminating against employees who are medical marijuana patients, provided that they are not under the influence at work. Specifically, a rather new amendment to the law states:

> [I]t is unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalizing a person, if the discrimination is based upon any of the following:

> (1) The person's use of cannabis off the job and away from the workplace. This paragraph does not prohibit an employer from discriminating in hiring, or any term or condition of employment, or otherwise penalize a person based on scientifically valid preemployment drug screening conducted through methods that do not screen for nonpsychoactive cannabis metabolites.
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> (2) An employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.

California Code §§ 12952-54.

California's focus on nonpsychoactive cannabis metabolites ("nonpsychoactive" means that these metabolites do not cause mind-altering effects and have no indication of "current" impairment) is aimed to prevent discrimination against employees who may test positive for marijuana metabolites but are not actually impaired at work. Employers in California are allowed to prohibit marijuana use during work hours or while on the job, and they can implement policies to ensure a drug-free workplace. Employers are not required, however, to accommodate an employee's disability by allowing marijuana use on the job. Employees have a private right of action if they believe their employer has discriminated against them.

Michigan

Michigan's Medical Marijuana Act and offers medical marijuana registration cards for patients with "debilitating medical conditions." MCL §333.26423. Similar to California, Michigan law offers protections for medical marijuana patients in the workplace but extends those protections to registered cardholders, not necessarily all medical marijuana users. Michigan's Medical Marijuana Act "does not authorize a person to . . . undertake any task under the influence of marijuana, if doing so would constitute negligence or professional malpractice." MCL §333.26427(b)(1). The Act further states that an employer is not required "to accommodate the ingestion of marijuana in any workplace or any employee working while under the influence of marijuana." MCL §333.26427(c)(2). Another difference in Michigan's law (compared to California's) is that it does not have defined drug testing procedures/guidelines for private employers regarding marijuana use among job applicants or employees. The Michigan Civil Service Commission, however, voted to remove marijuana testing from state preemployment drug testing protocols (except those jobs that are deemed sensitive or safety related), effective October 2024. One challenge Michigan employers face is what constitutes "under the influence." This is not defined under the current law. *See* Michigan Regulation and Taxation of Marijuana Act, MCL §§333.27951 to 333.27967.

New York

New York's laws legalize the recreational use of marijuana for adults aged 21 and older and extend workplace protections to employees. Employers may not refuse to hire or employ, discharge from employment, or otherwise discriminate against an individual because of their legal use of marijuana outside of the workplace or outside of "working hours" N.Y. Lab. Law §201-d(2). The law defines "working hours" as "all time, including paid and unpaid breaks and meal periods, that the employee is suffered, permitted or expected to be engaged in work, and all time the employee is actually engaged in work." (a similar legal provision protects all off-duty and off-premises "legal use of consumable products.").

Wait: Does this mean an New York employer can't take action against an employee who gets stoned right before work?

Fortunately, the law gives New York employers a few loopholes to address active impairment and where the employer is compelled to take otherwise prohibited action by federal or state law, regulation, ordinance, mandate, or pursuant to a federal contract. You should read the impairment exception for yourself to get a sense for you narrow and nuanced it is:

> …[A]n employer shall not be in violation where the employer takes action related to the use of cannabis based on the following:
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> …
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> (ii) the employee is impaired by the use of cannabis, meaning the employee manifests specific articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position, or such specific articulable symptoms interfere with an employer's obligation to provide a safe and healthy work place, free from recognized hazards, as required by state and federal occupational safety and health law;
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> …

N.Y. Lab. Law §201-d.

New York employers should also be mindful of New York's express mandate to provide accommodation for medical marijuana users: Employees who use medical cannabis must also be afforded the same rights, procedures, and protections available to injured workers under the workers' compensation law, when such injured workers are prescribed medications that prohibit, restrict, or require modification of their duties. N.Y. Cannabis Law §42(6).

Nevada

Nevada also offers broad protections for registered medical marijuana patients. Unlike many state laws that do not explicitly require accommodations for medical marijuana users, Nevada law specifies that: "[T]he employer must attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of cannabis if the employee holds a valid registry identification card, provided that such reasonable accommodation would not: (a) [p]ose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or (b) [p]rohibit the employee from fulfilling any and all of his or her job responsibilities. *See* NRS 678C.005 to 678C.860.

Key takeaways for employers to consider:

***Know Your State Laws*:** Each state has its own medical marijuana regulations, and employers must comply with both state and local laws. It's important to familiarize yourself with the specific protections offered to medical marijuana users (or cardholders) in your state/locality and how they may impact your policies or employment decisions.

***Drug-Free Workplace Policies*:** While medical marijuana use may be legal in most states, employers are still generally permitted to maintain drug-free workplace policies. These policies, however, must be carefully crafted to ensure they don't inadvertently discriminate against medical marijuana users/cardholders as required under applicable state law. Employers should ensure they clearly define expectations for impairment, safety concerns, job performance – and most importantly, do not overstep on the requirements/restrictions of the respective state law.

***Drug Testing Policies*:** A major shortcoming of drug testing is that a positive test result generally only indicates prior use, and not present impairment. For marijuana, the time of detection after use in urine tests is 2 weeks or more, which is not particularly helpful when you're not allowed to make employment decisions for use only. (The person who develops a reliable test for marijuana impairment similar to blood alcohol testing will likely be a billionaire within a year). Employers in jurisdictions that limit their ability to test or act on proof of use alone should consider implementing policies that distinguish between marijuana use and actual impairment on the job, or adding a general safe harbor that the company will respond to results in accordance with all applicable laws.

***Reasonable Accommodation*:** Employers may be required to accommodate medical marijuana use in certain states, while in others, they may be prohibited from taking action against employees who use marijuana or other cannabis products recreationally outside of work. A reasonable accommodation may include adjusting work schedules, modified job duties, or other workplace adjustments. But remember, reasonable accommodations should not be an undue hardship to the employer and should not compromise safety standards or the employee's ability to perform their job. This is a case-by-case analysis and will heavily depend on applicable state law.

***Employee Education and Communication*:** It's important to communicate your policies clearly to all employees (everyone needs to be on the same page). This includes educating supervisors, managers, and human resource professionals about how to address medical marijuana use and impairment in the workplace. Regular training and clear communication about expectations will help reduce confusion and avoid potential legal ramifications.

Conclusion

While many states have legalized marijuana in some form, whether for medical or recreational use, workplace protections and regulations surrounding eligibility, drug testing, accommodation requirements, and more are still evolving. States like California, Nevada, and New York have made more pro-employee advances by requiring employers to prove impairment during work hours, rather than relying solely on a positive test result for marijuana metabolites. Nevada also explicitly mandates that employers must "attempt" to accommodate medical marijuana use for registered cardholders. Some states also provide private rights of action, allowing employees to file claims for discrimination. Although such protections are not explicitly outlined in Alabama (or other southeastern states), it remains important to stay informed as these laws and claims continue to develop.

The best practice, especially if your company operates in a state with expansive marijuana laws, is to contact legal counsel for assistance.

If you have any questions or would like additional information, please contact McKenzie Meade at 205-323-9279 or mmeade@lehrmiddlebrooks.com.