I. Agenda
   A. Overview: Medical Cannabis
   B. Medical Cannabis Use Is Now Gaining Broad Acceptance and Support Within the Medical Community
   C. Pennsylvania's Medical Marijuana Act: Background
   D. State Versus Federal Law
   E. Pennsylvania's Medical Marijuana Act: Specific Questions for Employers
   F. General Guidance for Employers with Operations in Multiple States

II. Overview: Medical Cannabis
   A. History of cannabis use:
      • Documented use in China as early as 2700 BCE
      • India, Africa & the Roman Empire for >2000 years
      • 1200 BCE: Egyptians use cannabis as anti-inflammatory, for glaucoma treatment
      • 1000 BCE: India uses cannabis for Anesthetic
      • 600 BCE: Greece uses cannabis for anti-inflammatory, earache & edema
      • 1 CE: Chinese recommend cannabis for >100 conditions
      • 79 CE: Pliny the Elder writes about medical cannabis
II. Overview: Medical Cannabis (cont.)

- 800 CE: Cannabis continues to be used medicinally; labeled by some as “lethal poison.”
- 1538 CE: Hemp used by English scientists
- 1621-1652 CE: English scholars recommend cannabis as treatment for depression, inflammation, & joint pain
- 1799 CE: Napoleon brings Marijuana to France from Egypt
- 1840: Cannabis used in UK by Queen Victoria for menstrual cramps; becomes regularly used in Western medicine
- 1611 CE: Jamestown settlers introduce cannabis to North America
- 1745 CE: George Washington grows hemp, diary states he is interested in cannabis as medicine

- 1774 CE: Thomas Jefferson grows hemp
- The United States included cannabis in its pharmacopeia from 1850-1941
- At one time, it was one of the most frequently prescribed medications by US physicians
- By 1936: Cannabis is regulated in all 48 states.

B. Modern history of medical cannabis in the United States.

- 1936: The film Reefer Madness was released, demonizing cannabis as a highly addictive drug that caused mental disorder and violence.
- 1937: The uses of cannabis for medicinal and recreational purposes were effectively taxed out of existence in the USA by the Marijuana Tax Act.
- 1970: US introduced the Controlled Substance Act that lists cannabis as having “no accepted medical use and a high potential for abuse.”
- 1996: California legalized medical cannabis by introducing the Compassionate Use Act.
II. Overview: Medical Cannabis (cont.)

C. In 1996, California legalized medical cannabis by introducing the Compassionate Use Act.
D. Since then, twenty-seven states plus the District of Columbia have either approved medical cannabis or are expected to do so soon.
E. Clinical trials have shown that medical marijuana has been found effective in treating the symptoms associated with: cancer, glaucoma, HIV/AIDS, Parkinson’s, multiple sclerosis, epilepsy, Crohn’s disease, and post-traumatic stress syndrome.

- Nausea, vomiting, loss of appetite from chemotherapy; neuropathic pain.


- Neuropathic pain. See Ronald J. Ellis, MD, PhD, Aug. 2008; “Smoked Medicinal Cannabis for Neuropathic Pain in HIV: A Randomized, Crossover Clinical Trial.”


- Spasticity. See Peter Flachenecker, MD, June 2014; “Long-Term Effectiveness and Safety of Nabilomis [Tetrahydrocannabinol/Cannabidiol Oromucosal Spray] in Clinical Practice,”


### III. Medical Cannabis Use is Now Gaining Broad Acceptance and Support Within the Medical Community

| A. American Public Health Association, 1995 (supports medical cannabis use) |
| B. The Institute of Medicine, 1999 (“The accumulated data indicate a potential therapeutic value for cannabinoid drugs.”) |
| C. American College of Physicians, 2008 (“Preclinical, clinical and anecdotal reports suggest numerous potential medical uses for marijuana.”) |
| D. The American Medical Association, 2009 (Further study is necessary to make judgment; urged removal of Schedule I status) |
| E. American Association of Family Physicians, 2016 (Supports medical cannabis use) |

F. Since 2008, the American Nursing Association has supported:
- The education of registered nurses and other health care practitioners regarding appropriate evidence-based therapeutic use of marijuana including those non-smoked forms of delta-9-tetrahydrocannabinol (THC) that have proven to be therapeutically efficacious
- Protection from criminal or civil penalties for patients using medical marijuana as permitted under state law
- Exemption from criminal prosecution, civil liability, or professional sanctioning, such as loss of licensure or credentialing, for health care practitioners who prescribe, dispense or administer medical marijuana in accordance with state law.
- Reclassification of marijuana’s status from a Schedule I controlled substance into a less restrictive category
- Confirmation of the therapeutic efficacy of medical marijuana,

### IV. Pennsylvania’s Medical Marijuana Act: Background

A. On April 17, 2017, Governor Wolf signed SB3 (the Pennsylvania’s Medical Marijuana Act) legalizing medical cannabis for seventeen approved conditions.

B. The Act defines a “serious medical condition” as any one of the following:
- Amyotrophic Lateral Sclerosis
- Autism
- Cancer
- Crohn’s Disease
- Damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity
- Epilepsy
- Glioma
IV. Pennsylvania’s Medical Marijuana Act: Background (cont.)

- HIV (Human Immunodeficiency Virus) / AIDS (Acquired Immunodeficiency Syndrome).
- Huntington’s Disease.
- Inflammatory Bowel Disease.
- Intractable Seizures.
- Multiple Sclerosis.
- Neuropathies.
- Parkinson’s Disease.
- Post-traumatic Stress Disorder.
- Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain in which conventional therapeutic intervention and opiate therapy is contraindicated or ineffective.
- Sickle Cell Anemia.

C. Certification versus prescriptions:
- Physicians certify patients.
- Cannabis is recommended, but not prescribed.
- Certification: a form issued by practitioner confirming patient has one or more approved medical conditions.
- The certifying practitioner must be registered with and approved by the Department of Health.

D. The practitioner registry: The registry is publicly available on the internet and lists all approved practitioners.

E. The first medical marijuana dispensaries opened the week of February 12, 2018.

V. State versus Federal Law

A. Do State Laws allowing for the use of Medical Marijuana protect individuals against federal prosecution?
- No.
- The U.S. Department of Justice (DOJ) has the authority to enforce civil and criminal federal laws relating to marijuana possession and use, regardless of state law.
- Growing, distributing, and/or possessing marijuana in any capacity, except through a federally-approved research program, is a violation of federal law, and no state or local law provides a legal defense to a violation of federal law.
V. State versus Federal Law (cont.)

B. Prior Federal Guidance from the Department of Justice

- On August 20, 2013, the Department of Justice released a memorandum titled: Guidance Regarding Marijuana Enforcement.
- The memo explained the priorities of federal authorities regarding marijuana possession and use, including state medical marijuana programs.
- The memo specifically stated “the existence of a strong and effective state regulatory system, and an operation's compliance with such a system, may allay the threat that an operation's size poses to federal enforcement interests.”
- In sum, the August 20, 2013 Memo sought to make clear that the Department of Justice had deemphasized the investigation and prosecution of individuals using or possessing marijuana in States authorizing and regulating its use.

VI. Pennsylvania’s Medical Marijuana Act:
Impact on Employers

A. Can an employer decide not to hire an employee based on a positive pre-employment test for marijuana if they are a medical marijuana user?

- No.
- Specifically, 35 Pa. Stat. Ann. § 10231.2103 provides: “No employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical marijuana.”
VI. Pennsylvania’s Medical Marijuana Act: Impact on Employers (cont.)

• While not a Pennsylvania case, Noffsinger v. SSC Niantic Operating Co., 2017 WL 3401260, at *2 (D. Conn. Aug. 8, 2017) is instructive due to the similarities in the statutory language to the Connecticut statute. In Noffsinger, a prospective employee, who was diagnosed with posttraumatic stress disorder and was a qualifying patient under Connecticut’s Palliative Use of Marijuana Act (PUMA), brought an employment discrimination action, alleging denial of employment based on positive cannabis results during a pre-employment screening test. PUMA, distinct from some other states’ medical marijuana laws, provides that “[n]o employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person’s or employee’s status as a qualifying patient.” Id. The employer moved to dismiss for failure to state a claim, arguing that PUMA was preempted by the CSA, the Americans with Disabilities Act, and the Food, Drug, and Cosmetic Act. The court found that PUMA was not preempted by federal law and that a plaintiff who used marijuana for medicinal purposes in compliance with Connecticut law may maintain a cause of action against an employer who refuses to employ her for this reason.

B. Can a current employee who tests positive for marijuana be terminated?
• Unclear.
• Despite the language above, the law does not address whether an employer is seeking to enforce an antidrug policy or there is an undue burden or another reason for termination (thus the termination is not “solely” because of the employee’s use of medical marijuana).
• To be safe, employers should not automatically terminate a medical marijuana user on the basis of a positive drug test due to the possible separate need to accommodate off-site/non-work hours use pursuant to a state disability discrimination law.

C. Are there any express exceptions for specific positions?
• Yes, pursuant to 35 Pa. Stat. Ann. § 10231.510, there are express exemptions for specific positions.
  - An employee may not operate or be in physical control of any of the following while under the influence with a blood content of more than 10 nanograms of active tetrahydrocannabinol per milliliter of blood in serum: (i) Chemicals which require a permit issued by the Federal Government or a state government or an agency of the Federal Government or a state government; (ii) High-voltage electricity or any other public utility.
  - An employee may not perform any employment duties at heights or in confined spaces, including, but not limited to, mining while under the influence of medical marijuana.

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VI. Pennsylvania’s Medical Marijuana Act: Impact on Employers (cont.)

- An employee may be prohibited by an employer from performing any task which the employer deems life-threatening, to either the employee or any of the employees of the employer, while under the influence of medical marijuana. The prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient;

- A patient may be prohibited by an employer from performing any duty which could result in a public health or safety risk while under the influence of medical marijuana. The prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient.

D. Does the statute require employers to make accommodations at work for the use of medical marijuana on an employer’s property or premises?

- No.

E. Does the statute prevent an employer from being able to discipline an employee for being under the influence of marijuana at work or working under the influence of medical marijuana?

- Most likely not.
  - The statute provides: “This act shall in no way limit an employer’s ability to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee’s conduct falls below the standard of care normally accepted for that position.” 35 Pa. Stat. Ann. § 10231.2103 (b)(2) (emphasis added).
  - The highlighted language however leaves the door open that an employee could argue that despite being under the influence of marijuana at work, the employee’s performance was acceptable.

F. Does the statute provide any express exemption for engaging in the interactive process generally required by the ADA and state disability and discrimination laws?

- No.
VI. Pennsylvania’s Medical Marijuana Act: Impact on Employers (cont.)

- Under Pennsylvania law, “[n]o employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee’s compensation, terms, conditions, location or privileges solely on the basis of such employee’s status as an individual who is certified to use medical marijuana.” 35 Pa. Stat. Ann. § 10231.2103.
- While the law does not address the interactive process, to be safe, we recommend engaging in the interactive process (similar to the process regarding other forms of medication for a disability).

VII. General Guidance for Employers with Operations in Multiple States

A. What if an employer is unsure that an employee is a registered medical marijuana user?
   - The HR manager involved can request documentation to verify that the individual who tests positive for marijuana, or who is disclosing and requesting approval of marijuana use, is a qualified user under the relevant state statute.
   - If the employee has not complied with the requirements of the applicable state law, there may be no protection available to the employee who uses medical marijuana. See e.g. Lambdin v. Marriott Resorts Hosp. Corp., No. CV 16-00004 HG-KJM, 2017 WL 4079718, at *8 (D. Haw. Sept. 14, 2017). In Lambdin, the court dismissed the plaintiff’s claims against his former employer related to his termination after a failed drug, in part, because the plaintiff was not registered with the state and “Hawaii law requires that medical marijuana users register with the state. Haw. Rev. Stat. § 329-123.”

B. Does an employer have to accommodate employees who use medical marijuana while in the office?
   - Almost certainly not.
VII. General Guidance for Employers with Operations in Multiple States (cont.)

- Nearly every state's medical marijuana law carves out an exemption providing that an employer does not have to tolerate the on-site use of medical marijuana. For example, the Pennsylvania statute provides “Nothing in this act shall require an employer to make any accommodation of the use of medical marijuana on the property or premises of any place of employment.” 35 Pa. Stat. Ann. § 10231.203 (b)(2).

- Even where the statute is silent on other exemptions, many of the states also allow an employer to discipline, up to and including termination, anyone under the influence of (or impaired by) medical marijuana, without mentioning on-site or off-site consumption of the drug. See Garcia v. Tractor Supply Co., 154 F.Supp.3d 1215, 1220 (D. N.M. 2016) (“The fact that the state may exempt medical marijuana users from the reach of the state criminal law does not mean that the state can affirmatively require employers to accommodate what federal law specifically prohibits”).

Potential Exceptions:
- The law in Maryland however is not as clear in this regard and leaves this question open by omission. The Maryland law identifies several locations in which the smoking of medical marijuana is not permitted (i.e., in a motor vehicle, in any public space, and in private space leased from a landlord and subject to a non-smoking policy), but it does not identify a place of employment as an exception. Therefore, it is possible that a court could narrowly construe these exceptions and not permit an employer's drug-free policy as it relates to medical marijuana usage in Maryland. That being said, we view that outcome as very unlikely.

C. Can employer terminate an employee who uses medical marijuana in violation of a drug-free policy?
- Almost certainly yes for use at work, as discussed above. But an employer's ability to terminate a qualified user for off-site medical marijuana use depends on the jurisdiction.
- States such as California, Georgia, Michigan, Montana, New Mexico and Ohio permit an employer to terminate a current employee who tests positive for medical marijuana.
- Other states - such as Alaska, Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Maine, Minnesota, North Dakota, Oregon and the District of Columbia - only permit such a termination if the employee used or was under the influence of medical marijuana while at work, or if his or her medical marijuana consumption resulted in negligence.
VII. General Guidance for Employers with Operations in Multiple States (cont.)

- As discussed above, the Pennsylvania statute provides: “This act shall in no way limit an employer’s ability to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee’s conduct falls below the standard of care normally accepted for that position.”


- Another bucket of state laws is silent on the issue, including Iowa, Maryland, New Hampshire, Vermont, and Washington. So while there is ambiguity, an employer in such a state likely has more latitude in enforcing its drug-free policies, and it should consider what other business or safety justifications would support terminating the medical marijuana use in addition to the consistent enforcement of the company’s anti-drug policy.

- Accordingly, managers should be instructed on properly documenting the employee’s performance and/or any indication of impairment. The safest course in those states, however, would be to engage in an interactive process with the medical marijuana user in order to evaluate whether the at-home use can be accommodated, as with any other disability and medical treatment.

D. Do state medical marijuana laws exempt the employer from engaging in the interactive process required under state antidiscrimination laws prior to taking adverse action against a medical marijuana user?

- While some states’ laws expressly acknowledge that an employer does not have to accommodate medical marijuana use - such as Georgia and Ohio - the majority of the state laws are silent on the issue, providing an employer with no guidance as to how those new laws intersect with existing state and federal disability laws.

- Additionally, the language in many states’ statutes only speaks to an employer’s ability to refuse accommodations for on-site usage of medical marijuana, which creates the implication that the employer’s obligations might be different when the qualified user’s consumption is exclusively off-site.
VII. General Guidance for Employers with Operations in Multiple States (cont.)

• In such instances, in an abundance of caution, the employer should engage in the interactive process under state disability discrimination laws to determine if the medical marijuana use creates an undue burden, or if alternative reasonable accommodations exist.
• Moreover, employers should be aware of the minority of states that – either by statute or case law – expressly require an employer to engage in the interactive process before terminating a medical marijuana user.
• In Nevada, while an employer is not required "to modify the job or working conditions of a person who engages in the medical use of marijuana that are based upon the reasonable business purposes of the employer[, . . . ] the employer must attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of marijuana if the employee holds a valid registry card," provided the use would not create danger or harm, prevent the employee from fulfilling his or her job responsibilities, or impose an undue hardship on the employer. Nev. Rev. Stat. Ann. § 453A.800.

VII. General Guidance for Employers with Operations in Multiple States (cont.)

• Additionally, Arizona law advises that an employer may not "discriminate" against a medical marijuana user, which implies that any adverse action against a medical marijuana user would be subject to the same tests as an individual terminated as a result of a disability.
• The Massachusetts Supreme Judicial Court denied an employer's motion to dismiss an employee's claim brought pursuant to Massachusetts disability law concerning his termination as a result of his medical marijuana use. The court held that an employer must engage in the interactive process where a qualified medical marijuana user requests to use medical marijuana as a reasonable accommodation. Barbuto v. Advantage Sales & Mktg., LLC, No. SJC-12226, 2017 WL 3015716 (Mass. 2017).

VII. General Guidance for Employers with Operations in Multiple States (cont.)

• Given that the language of many other state statutes is written similarly to these states’ laws, it is possible that when other courts are presented with such a question they, too, will infer that the interactive process should apply. This is an area of law that is rapidly evolving and new developments occur in various states on a monthly basis as medical marijuana use increases.

E. Are there any exceptions where an employer does not have to tolerate medical marijuana use because the employee's position requires a heightened level of safety?
• Generally, yes.
• The medical marijuana laws generally carve out exceptions for positions where the consumption of medical marijuana could impair an individual's ability to perform his or her job safely.
VII. General Guidance for Employers with Operations in Multiple States (cont.)

• Most state laws contain language providing that the protections of the law do not apply to individuals operating, navigating, driving, or in control of any motor vehicle, aircraft, or boat, while under the influence of medical marijuana, or whose activities would constitute malpractice or negligence if performed under the influence of medical marijuana.

• These states include Arizona, Arkansas, California, Delaware, Florida, Illinois, Maine, Maryland, Michigan, Minnesota, Montana, Nevada, and the District of Columbia.

• As discussed above, the Pennsylvania statute provides that individuals who work with chemicals that require a permit issued by a federal or state agency or work with high-voltage or any other public utility cannot have more than 10 nanograms of tetrahydrocannabinol per milliliter of blood in serum. 35 Pa. Stat. Ann. § 10231.510 (1).

• The Pennsylvania statute further provides that employees cannot perform job duties that involve confined spaces (such as mining), other life-threatening tasks, or perform duties that could result in public health or public safety risks. 35 Pa. Stat. Ann. § 10231.510 (2).

• Additionally, other state laws go further and provide that any use that creates a safety risk to the employee, the workplace, or others need not be accommodated. These states include Colorado, Massachusetts, Vermont, and West Virginia.

• But there exists little caselaw on these issues and thus minimal guidance on how these laws will be applied. For instance, it is unclear whether a court would agree that driving a company car or delivery vehicle in the morning could present a safety risk if the employee had used medical marijuana late the prior evening and perhaps could remain somewhat under the influence in the morning.

F. Is an employer required to tolerate medical marijuana use when it conflicts with the employer’s obligations pursuant to federal contracts?

• A variety of state laws support this defense, but it MAY not to be a particularly strong defense.

• Many of the laws expressly state that federal law will preempt state rules or that medical marijuana use need not be accommodated if it would disrupt a federal contract. For example, the laws in Arizona, Connecticut, Delaware, Illinois, Minnesota, New York, Pennsylvania, West Virginia, and the District of Columbia expressly carve out exceptions where the employer is obligated to enforce a drug-free policy as a result of federal contracts, grants, or licensing, or where tolerating the use would put the employer in violation of federal law.
VII. General Guidance for Employers with Operations in Multiple States (cont.)

- Where state statutes suggest that an employer need not deviate from a drug-free workplace policy required by a federal contract, such a policy likely does not speak to entirely ensuring the absence of off-site use during non-working hours.
- For the remaining states, caselaw supports the proposition that federal law (such as the Controlled Substances Act or the Department of Transportation regulations) prohibiting the possession or distribution of marijuana used for medicinal purposes preempts any conflicting state law.
- The Supreme Court has held that Congress’s authority under the Commerce Clause empowers it to prohibit the distribution and possession of medical marijuana, even if the prohibited activity is not also illegal under state law. Gonzales v. Raich, 545 U.S. 1 (2005). Accordingly, “federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician.” Highland Park Patient Collective, Inc. v. U.S. Dep’t. of Justice, No. 12-09958-RGK, 2013 WL 12142958, at *4 (C.D. Cal. Mar. 20, 2013).
- In Carlson v. Charter Communications, LLC, 2017 WL 3473316 (D. Mont. Aug. 11, 2017), Charter Communications, which was a federal contractor at the time, required to abide by the federal Drug-Free Workplace Act, subsequently fired an employee for using medical marijuana outside of work. The Carlson court found that the CSA preempted Montana’s medical marijuana law and dismissed the employee’s wrongful termination claim.
- In short, that a state authorizes the use of medical marijuana within its borders does not alter the fact that the possession and distribution of marijuana for medical purposes violates federal law.
THANK YOU

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