

# MARIJUANA UPDATE FOR HEALTHCARE EMPLOYERS

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February 13, 2019



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# OVERVIEW

- ▶ NYS Compassionate Care Act
- ▶ Medical Marijuana Case law
- ▶ Recreational Use: Impact on Employers



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# NEW YORK COMPASSIONATE CARE ACT

- Public Health Law Art. 33: Medical Use of Marijuana
- Signed into law July 5, 2014; law took effect in January, 2016
- Originally, much more restrictive than many state medical marijuana laws (narrow list of “serious conditions” could be certified for medicinal marijuana use which was later expanded to include PTSD, opioid replacement, chronic pain)
- Contains a non-discrimination provision (AZ, IL, DE, ME, NV, MN, RI, CT)



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# NEW YORK COMPASSIONATE CARE ACT

- Public Health Law § 3369: anyone who is a certified medical marijuana patient is deemed to have a disability under the New York State Human Rights Law (“NYSHRL”).
- Certified patients shall not be denied any right or privilege based on their legal marijuana use.
- New York employers are required to engage in the interactive process required by the NYSHRL to determine what reasonable accommodations may be necessary to accommodate an employee who is a certified medical marijuana patient.
- Employers are also therefore prohibited from discriminating against certified medical marijuana patients with regards to employment.



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# NEW YORK COMPASSIONATE CARE ACT

Limitations on non-discrimination:

- Does not bar employer enforcement of a policy prohibiting employee from performing his/her duties while impaired by a controlled substance.
- Does not require any person/entity to do any act that would put the person or entity in violation of federal law or cause it to lose federal funding.

Note: NYCCA does not give anyone, even certified medical marijuana patients, the right to smoke marijuana in a public place or be impaired at work.



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# MEDICAL MARIJUANA CASE LAW: OVERVIEW OF ISSUES

- Does federal Controlled Substances Act preempt state marijuana laws?
  - Early decisions: Yes. Recent decisions: No.
- Does the ADA protect employees who legal use marijuana under state law?
  - Early decisions: Yes. Recent decisions: No.
- Does an employer have a duty to accommodate an employee's legal medical marijuana use?
- Are employees protected from adverse employment actions because of their legal medical marijuana use?



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# MEDICAL MARIJUANA CASE LAW: PRO-EMPLOYEE

Noffsinger v. SSC Niantic Operating Co., LLC (Connecticut, 8/8/17)

Employer with zero-tolerance drug policy rescinded offer of employment following failed drug test by individual due to medical marijuana use.

Held: Employer unlawfully discriminated against employee in violation of state law.

Defenses rejected by the Court:

- Employer is subject to Drug Free Workplace Act, which barred employer from hiring employee.
- Federal FCA barred employer from employee because employment of marijuana user in violation of federal law would amount to defrauding the government.
- State law prohibits discrimination based on person's status as a cardholder, not on use of marijuana outside working hours.



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# RECREATIONAL USE – IMPACT ON EMPLOYERS

- Impact will depend on how the law legalizing recreational marijuana is written:
- Likely will not restrict a private employer's right to enforce a zero-tolerance drug and alcohol policy
- Employers will likely still be able to prohibit recreational use in the workplace or on employer's property
- Employers will still be able to prohibit employees from coming to work under the influence of marijuana.
- Employers will still be able to continue to drug test for marijuana and may choose to refuse to hire, discipline, or discharge a person who tests positive for recreational marijuana



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# RECREATIONAL USE – IMPACT ON EMPLOYERS

## EMPLOYERS, BEWARE:

- Future legislation legalizing recreational use of marijuana in NYS may include protection of off-duty use of recreational marijuana

Several states have “Lawful Off-Duty Activities” laws (CO, CA, WA, MO)

- These laws prevent employers from discharging employees engaged in any lawful activity outside of work.
- So far, courts have held that these laws do not protect off-duty marijuana use because it is illegal under federal law
- **Exception:** Maine legislation specifically protects off-duty recreational use of marijuana.

# RECREATIONAL USE – IMPACT ON EMPLOYERS

Pre-employment drug testing:

- Impossible to know when marijuana was ingested
- Do you want to limit your successful candidates to only those who have no trace of marijuana in their systems at the time of the drug test?



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# RECREATIONAL USE – IMPACT ON EMPLOYERS

## Mandatory drug testing:

- If required pursuant to a commercial driver's license program required by the federal DOT or similar licensing authority, the testing should continue as usual and marijuana use should be tested. Marijuana use is still illegal under federal law.

## Random drug testing

- Recommended for safety-sensitive positions that have a causal nexus between the safety-sensitive nature of the position and the need to random drug test.
- Safety-sensitive: any position designated in writing by the employer as a safety sensitive position in which a person performing the position while under the influence of marijuana may constitute a threat to health or safety.



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# RECREATIONAL USE – IMPACT ON EMPLOYERS

Reasonable suspicion drug testing:

- You may require an employee to submit to a drug test if you have reasonable suspicion to conclude that an employee is presently under the influence of drugs.
- Is your staff trained in identification of the common indicia of behavior and appearance that lead to reasonable suspicion?
- When you believe an employee is working under the influence, testing for marijuana along with all the other drugs is still logical and justified.
- You may wish to create clarity about drug policies by expressly stating in your employee handbook that possession of alcohol or drugs in the workplace is prohibited and may result in termination.



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# Questions?

Call or e-mail anytime!

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