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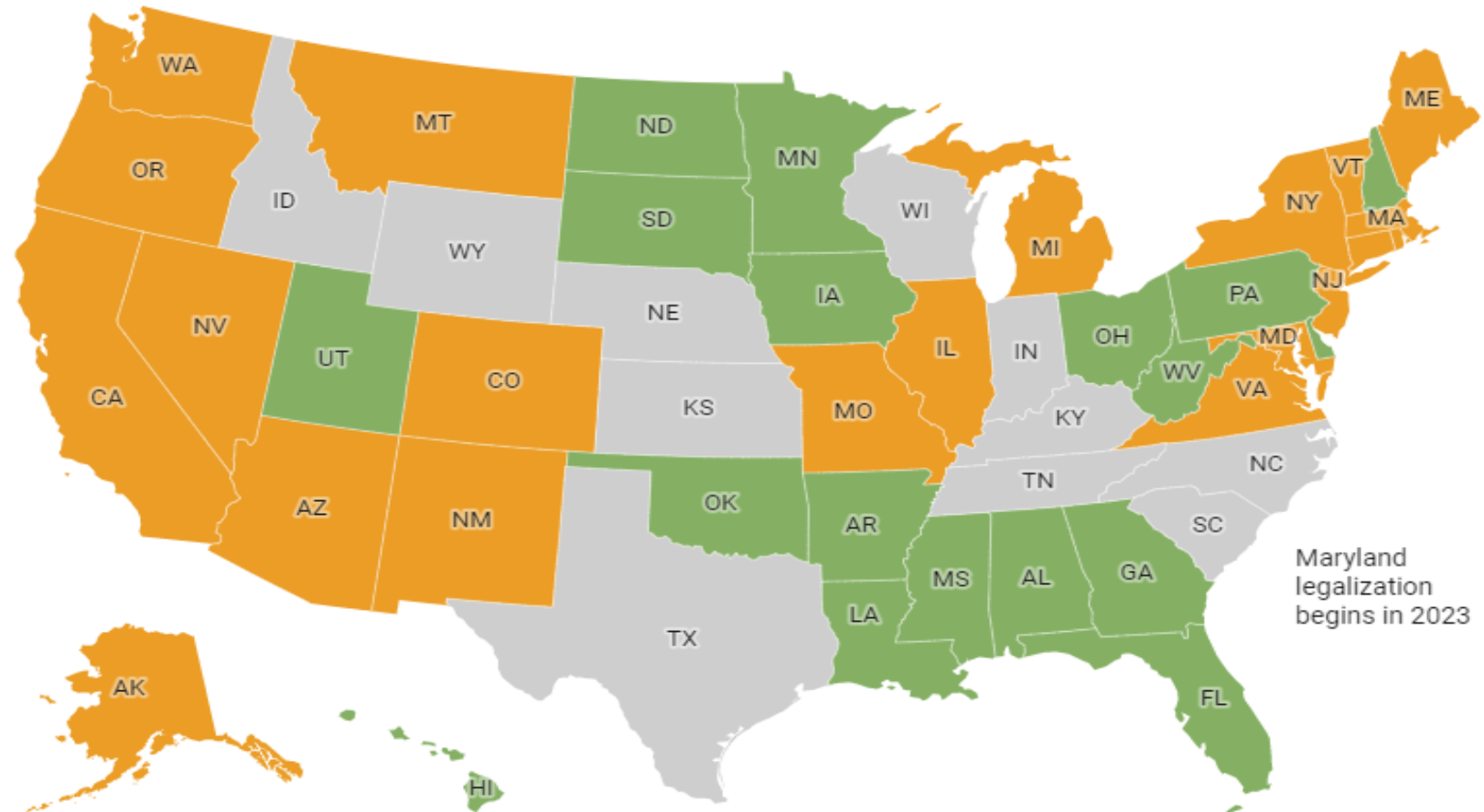
# Workplace Considerations Arising from States Legalizing Adult Use Cannabis

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// *Always exceed expectations through teamwork and excellent client service.*

# Where marijuana is legal in the United States



Maryland legalization begins in 2023

## Legalized states

■ Recreational/Medical
 ■ Medical
 ■ None

*Rules vary in each jurisdiction, check state and local laws. CBD only states not included.*

<https://mjbizdaily.com/map-of-us-marijuana-legalization-by-state/>

# Amendment 2 – Passed Nov. 6, 2018



**VOTE  
YES ON 2**

Paid for by New Approach Missouri, Paul Boco, Treasurer

# Amendment 2 Re: Employment

- Legalized marijuana for patient cardholders
- As of June 2019, Missourians could apply for patient cards
- Included the following language re: employers:

***(1) Nothing in this section permits a person to:***

*(d) Bring a claim against any employer, former employer, or prospective employer for wrongful discharge, discrimination, or any similar cause of action or remedy, based on the employer, former employer, or prospective employer prohibiting the employee, former employee, or prospective employee from being under the influence of marijuana while at work or disciplining the employee or former employee, up to and including termination from employment, for working or attempting to work while under the influence of marijuana.*

Mo. Const. art. XIV, § 1(7)(1)(d)

# Translation

- **Employees cannot sue an employer for:**
  - Having policies prohibiting employees with patient cards from being “under the influence” of marijuana while at work
  - Terminating or otherwise disciplining employees who are found to be working, or attempting to work, while under the influence of marijuana
- **Arguably, this implicitly authorizes an employee to sue if disciplined for anything else “marijuana-related,” e.g., having a patient card**
- **To date, no Missouri appellate decisions interpreting this language**

# Amendment 3 – Passed Nov. 8, 2022



# Amendment 3 Employment - §1

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

*(a) The person's status as a qualifying patient or primary caregiver who has a valid identification card, including the person's legal use of a lawful marijuana product off the employer's premises during nonworking hours, unless the person was under the influence of medical marijuana on the premises of the place of employment or during the hours of employment; or*

*(b) A positive drug test for marijuana components or metabolites of a person who has a valid qualifying patient identification card, unless the person used, possessed, or was under the influence of medical marijuana on the premises of the place of employment or during the hours of employment.*

Mo. Const. art. XIV, § 1(7)(15)

# Amendment 3 Employment - §1 (cont.)

*Nothing in this subdivision shall apply to an employee in a position in which legal use of a lawful marijuana product affects in any manner a person's ability to perform job-related employment responsibilities or the safety of others, or conflicts with a bona fide occupational qualification that is reasonably related to the person's employment.*

Mo. Const. art. XIV, § 1(7)(15)



# Translation

- **No discriminating against employees in any way for:**
  - (1) Having a patient card
  - (2) Consuming marijuana outside the workplace
  - (3) Testing positive for marijuana components or metabolites
- **Exceptions:**
  - (1) If not discriminating would result in the loss of monetary or licensing-related benefits under federal law, e.g., a federal contract
  - (2) Being under the influence on the work site or during work hours
  - (3) Positions in which the employee's legal use of marijuana "**affects *in any manner* a person's ability to perform job-related employment responsibilities or the safety of others, or conflicts with a bona fide occupational qualification that is reasonably related to the person's employment**"

# Amendment 3 Employment - §2

*(3) This section does not require an employer to permit or accommodate conduct otherwise allowed by this section in any workplace or on the employer's property. This section does not prohibit an employer from disciplining an employee for working while under the influence of marijuana. This section does not prevent an employer from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment because that person was working while under the influence of marijuana.*

Mo. Const. art. XIV, § 2(3)(3)

# Translation

- **Employers can prohibit:**
  - (1) Marijuana use in any workplace or on employer property
  - (2) Employees from working while under the influence
- **Employers can refuse to hire...“because that person was working while under the influence of marijuana”**
  - Nothing limits this to rehiring a former employee, so arguably permits refusing to hire an employee who was proven to have worked *for another employer* while under the influence

# National Trends

- **When a state legalizes marijuana by constitutional amendment, the amendment frequently contains employee protections**
- **But multiple states have adopted statutory protections for employees who choose to consume while off-duty**
  - Examples include Connecticut, New Jersey, Montana and New York

# Connecticut

- Prohibits disciplining or refusing to hire employees for off-duty recreational marijuana use, but no protection for employees being under the influence at work
- Additional exemptions:
  - For certain *employers*, e.g., construction companies
  - For certain *positions*, e.g., those requiring a CDL
- And *any employer* can prohibit off-duty consumption (zero tolerance), but only after adopting clear policies and communicating them to all employees and pre-hire candidates

# New York

- Recognizes marijuana as a lawful consumable product
- No discrimination against employees for engaging in legal activities while off-duty, unless employer must have a zero tolerance policy:
  - To comply with state or federal law
  - To maintain a federal contract or federal funding
- No protection for employees working or being in the workplace while under the influence, but this must be evidenced by “specific articulable symptoms of cannabis impairment” that decrease performance or compromise workplace safety
  - Difficult standard to apply and prove
  - Neither the smell of marijuana or a positive test result can be used to establish this
- NY Dept. of Labor issued guidance prohibiting employers from subjecting *most* employees to drug testing
  - The exception is where federal or state law requires drug testing of employees or for a specific position, e.g., drivers of commercial motor vehicles
- Other states have banned considering positive marijuana test results in employment or discipline decisions, but NY is the first to prohibit subjecting employees to testing

# Marijuana Drug Tests Are Almost Useless

- *Currently, no test exists to determine if a person is “under the influence of marijuana”*
- Marijuana drug tests can only confirm the presence of certain components or metabolites that indicate the test subject consumed marijuana at some point in the past
- A person may test “positive” for as many as 35 days after consuming, depending on multiple factors, including
  - How frequently the person consumed
  - How much the person consumed
  - The person’s amount of body fat
  - The sensitivity of the drug test

# More Employee Protections Are Coming...

## ■ California

- Effective Jan. 1, 2024
- Two cannabis-related categories that also will be protected from discrimination:
  - discrimination based on cannabis use “off the job and away from the workplace”; and
  - discrimination based on the results of an employer-required drug test finding a person to have “nonpsychoactive cannabis metabolites” in the person’s “hair, blood, urine, or other bodily fluids.”

## ■ Washington

- Bill currently being discussed in state legislature.



# *But, Not in Nevada (yet)!*

- ***Ceballos v. NP Palace, LLC*, 514 P.3d 1074 (Nev. Aug. 11, 2022)**
  - *See also, Freeman Expositions, LLC v. Eighth Judicial District Court in and for the County of Clark*, 520 P.3d 803 (Nev. Dec. 1, 2022)
- Plaintiff suffered a workplace injury, then tested positive for marijuana on a post-accident drug screen. The employer terminated his employment.
- Plaintiff sued alleging his discharge violated NRS § 613.333, Nevada’s “lawful off-duty conduct” law.
  - An employer may not discharge an employee “because the employee engages in the lawful use in [Nevada] of any product outside the premises of the employer during the employee’s nonworking hours, if that use does not adversely affect the employee’s ability to perform his or her job or the safety of other employees.”
- The Nevada Supreme Court found that § 613.333 contemplates the use of a product that is “lawful under both state and federal law, not just lawful under Nevada law.” Because marijuana remains illegal under federal law, Plaintiff could not rely on § 613.333.
- **NOTE:** However, in *Freeman*, Court held that Nevada law requiring an employer to attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of cannabis provides an implied right of private action!

# Practical Tips for (Most) Employers

- A one-size-fits-all approach may not be possible unless employers are willing to take the most liberal approach.
- Take measures not to discriminate against employees or applicants who have valid medical marijuana cards, such as not having blanket “no hire” policies and not automatically screening out applicants who test positive for marijuana on a pre-hire drug test.
- To the extent employers use drug tests that include screening for marijuana, employers should afford the applicant or employee an opportunity to explain any positive marijuana result prior to taking an adverse action on the basis of the test result alone.
- Consider ceasing any pre-hire inquiries about most past marijuana convictions, particularly to the extent any such records still appear on a criminal background check report.

# Practical Tips for (Most) Employers

- **Clearly identify safety-sensitive positions and be prepared to justify the designation if challenged.**
  - Consider the “direct threat” standard under the ADA as a guidepost.
- **Consistent application and enforcement of policies is key to avoiding discrimination claims on other, non-marijuana bases.**
- **When taking action based on evidence of impairment, preparing and preserving good, objective, timely documentation is always recommended.**



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