



# EMPLOYMENT & Labor Law

## Weed & Work: As Legalization Spreads, So Does Uncertainty Over Employers' Duty to Accommodate Marijuana Use

When it comes to marijuana, the legal landscape is changing rapidly. Ten states, including California, have legalized recreational use. In more than twenty other states, some form of medical marijuana is legal. Employers, particularly those with multi-state operations, need to stay vigilant as state laws change in this arena. To be clear, no state prohibits employers from discharging an employee who is under the influence of marijuana while working. However, there is an emerging trend of states prohibiting discrimination against employees who require the use of marijuana (during off hours) to alleviate symptoms due to a disability or medical condition.

The trend is catching on the East Coast, where a New Jersey court recently held that an employee who was fired for failing a drug test due to his use of medical marijuana could bring a claim for disability discrimination and failure to accommodate. The reasoning of that case, and similar cases in Connecticut and Massachusetts, is that employers are required to provide reasonable accommodations to employees with disabilities, and allowing an employee an exemption to a "clean" drug-testing requirement may qualify as a reasonable accommodation, particularly if the use of the drug does not affect the employee's work.

As of yet, California law does not require employers to provide an accommodation due to the use of medical marijuana, under the California Supreme Court's 2008 decision in *Ross v. Ragingwire*. There, the court reasoned that because the purpose of the law allowing medical marijuana was to provide immunity from criminal prosecution for medical marijuana cardholders, it has no effect on employers' obligations under California's separate scheme of employment laws. Going on three years since recreational marijuana was legalized in California, *Ross* remains the law of the land. Courts in Oregon and Washington came to the same conclusion in decisions dated 2010 and 2011, respectively, which still stand



States with legal medical and recreational marijuana (10 plus DC)

States with legal Medical Marijuana only (33 plus DC)



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today. Meanwhile neighboring states Nevada and Arizona recently passed legislation specifically prohibiting discrimination against employees based on their status as medical marijuana cardholders, and starting in 2020, Nevada employers cannot refuse to hire any employee based on a positive marijuana drug test, regardless of whether the use is medical or recreational.

Whether the recent trend toward requiring accommodations for medical marijuana users will bring a change to the laws in California remains to be seen. Last year, the Assembly failed to pass a bill that would prohibit discrimination

against users of medical marijuana, and no such bill passed the 2019 legislative session. Nevertheless, California employers should track the issue closely, and those with operations in multiple states should revise their drug testing policies and procedures to comply with those state laws that require some accommodation for medical marijuana.

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