A Hazy Situation—Marijuana and the Workplace: Current Law and Challenges Facing Today's Employers

*Arthur P. Murphy, Kier B. Wachterhauser & Sarah A. Catignani**

The proliferation of state laws legalizing the use of marijuana has the potential to create a bit of a hangover for employers. To date, twenty-four states[1] and the District of Columbia have legalized or decriminalized the use of medical marijuana, while two states—Colorado and Washington—have legalized the recreational use of marijuana. Other states are expected to pass or consider similar laws moving forward.[2] Complicating this web of state law marijuana regulation is the fact that marijuana remains a controlled substance under federal law, illegal under the Controlled Substance Act,[3] state laws to the contrary notwithstanding.

Courts are already applying and interpreting these laws in the employment setting. Issues that may arise include the application of zero-tolerance drug testing policies for marijuana in states authorizing the use of medical marijuana; providing reasonable accommodations to employees lawfully using medical marijuana to treat a protected disability; addressing employees under the influence of, or possessing, marijuana while at work; and associational discrimination claims arising out of the use of marijuana by someone with whom an employee regularly 'associates' or cares for. Moreover, for employers who operate in multiple states, a one-size-fits-all approach is generally not appropriate, as state laws vary dramatically. This article will summarize the current state of the evolving law in this area and address some of the more common situations that may arise for employers as they navigate this tricky area.

I. FEDERAL LAW AND THE CONTROLLED SUBSTANCES ACT

Marijuana remains a Schedule I controlled substance under the Controlled Substances Act. Although an October 19, 2009 Department of Justice (DOJ) Memorandum[4] signaled the Obama Administration's intent not to prosecute the use of medical marijuana when used pursuant to state law, medical marijuana remains illegal under federal law. This point bears repeating as it factors into much of the analysis below. Marijuana—whether for medical or recreational purposes, and whether used in accordance with state law or not—is illegal under federal law.[5] The current DOJ position notwithstanding, Drug Enforcement Agency (DEA) officials recently investigated the homes and offices of Massachusetts physicians linked to proposed medical

* *ARTHUR P. MURPHY is the Managing Partner of Murphy, Hesse, Toomey & Lehane, LLP, a law firm in Massachusetts specializing in representing management in labor and employment matters. KIER B. WACHTERHAUSER and SARAH A. CATIGNANI are associate attorneys at the firm and specialize in labor and employment law. Portions of this article were adapted from presentations given by the firm in the spring and summer of 2014.*

marijuana dispensaries (which are lawful pursuant to Massachusetts law[6]) and demanded they sever all ties to marijuana companies under the threat of relinquishing their federal licenses to dispense other medications.[7] Similarly, the DEA has also conducted raids on marijuana dispensaries in Colorado.[8] To address these actions by the DEA, the House of Representatives voted, in May 2014, to amend DEA appropriations so as to prohibit the DEA from spending funds to arrest state-licensed medical marijuana patients, among other things.[9] The amendment will now go to the Senate, where it will likely face significant opposition. Despite all this confusion regarding enforcement at the federal level, several state and federal courts, when evaluating adverse job actions due to marijuana usage, have uniformly upheld the terminations because marijuana remains an illegal drug under federal law.[10]

II. DRUG TESTING POLICIES

A. Drug Testing Generally

Many employers in a variety of industries utilize pre-employment, random, post-accident, re-employment and other forms of drug testing to ensure a safe and effective workforce. At the federal level, the Americans with Disabilities Act (ADA)[11] dictates the scope and timing of drug testing by employers.[12] In the pre-employment context, before a conditional job offer is made, the ADA permits an employer to require an employee to take a drug test so long as the test is limited only to discover the presence of illegal drugs. After a conditional job offer is made, an employer may test for both legal and illegal drugs.[13] As discussed above, marijuana is still an illegal drug under federal law, and in fact remains an illegal drug in most situations in most states, even in those states where medical marijuana statutes exist. In addition to federal law, employers must be aware of the various state laws that limit or restrict employers in how, when, and for what they test their employees. These laws may specifically regulate drug testing,[14] or may more generally place restrictions on an employer's invasion of an employee's privacy.[15] Public, and in some states private, employers must also be cautious of constitutional limitations on drug testing.[16]

Given this backdrop of laws and regulations, imposing a drug testing policy on any workplace is a decision that should be made carefully, with an understanding of all applicable state and federal laws. This is especially true for union-organized workplaces, as drug testing is considered a mandatory subject of bargaining.

B. "Zero Tolerance" Policies

Employers who choose to drug test generally do, and should, maintain policies regarding what drugs, if any, will be permitted in drug test results, and the level and type of discipline that will be imposed for violations of this policy. To avoid any confusion or complications, many employers will choose to have so-called "zero tolerance" policies, meaning that there is no tolerance or leniency for employees whose drug test shows a positive result for any drug illegal under state or federal law.[17] Although these types of policies provide for the most predictability and clarity regarding drug testing, they can also present a potential problem in the area of medical marijuana.

C. Testing Positive for Marijuana on the Work Site

Because marijuana remains an illegal drug under federal law, many employers, including those in states where recreational marijuana use has been legalized,[18] will terminate employees who test positive for marijuana regardless of whether the employee informs the employer of a valid prescription for medical marijuana. This, however, may invite a lawsuit where

an employee claims to be using marijuana legally under state law.[19] So far, these terminations have been consistently upheld by courts, even in the states where the use of marijuana is permitted and the employee was using marijuana lawfully under the relevant state law.

In one of the more notable and earliest cases, the Sixth Circuit upheld Walmart's termination of an employee in Michigan who tested positive for marijuana after an on-the-job accident.[20] Walmart maintained a mandatory post-accident drug testing policy and a zero tolerance drug policy.[21] Upon notice of his failed drug test, the employee presented Walmart with his medical marijuana registration card issued pursuant to Michigan law and explained that he used the drug off-site to treat his sinus cancer and inoperable brain tumor.[22] Walmart terminated the employee in accordance with its drug policy.[23] The employee brought suit alleging that this termination violated the Michigan Medical Marijuana Act.[24] The employee reasoned that the Act's protections for medical marijuana users extended to protections from discrimination by private employers.[25] The Sixth Circuit disagreed, finding instead that private employers were not regulated by the Act and, further, that the Act only gave medical marijuana users protections from state actions, and did not grant them a private right of action regarding their medicinal marijuana use.[26]

Similarly, Colorado courts recently rejected a claim for unlawful termination for marijuana use.[27] The employee in this case was a registered medical marijuana patient who was terminated when he tested positive for marijuana, which was a violation of his employer's policy.[28] The employee has claimed, and thus far the courts in Colorado have disagreed with him, that the Colorado laws, which, arguably, provide the broadest protections for medical marijuana users, prohibit his termination.[29] The Colorado Lawful Activities Statute specifically prohibits employers from discharging employees for "engaging in any lawful activity off the premises of the employer during nonworking hours."[30] The employee in this case argued that this protection barred his termination because using medical marijuana (and marijuana generally) were lawful activities under Colorado law.[31] The Colorado Appeals Court, however, reasoned that because the use of marijuana is legal only under state law and not federal law, the activity was not "lawful" and, therefore, the employee could be discharged for it. Colorado's Supreme Court has agreed to hear the case.[32]

This case, followed previous cases in the Colorado state courts that have distinguished between the use of medical marijuana and other prescription drugs, finding that the use of medical marijuana during off-duty hours was not equivalent to the use of other prescription drugs while off-duty and, therefore, a positive drug test for marijuana justifies a termination if it is the employer's policy to terminate employment for illegal drug use.[33]

These decisions are representative of the national trend of treating the use of medical marijuana similarly to the use of other illegal drugs in the employment setting.[34] While we are still awaiting decisions in many states that have passed medical marijuana laws and, of course, each state's statute is different in the protections that it provides medical marijuana users, the courts so far have been consistent in allowing employers to terminate employees who violate their drug policies, despite state laws allowing marijuana use.

Employers are well advised, however, that this is a new area of law and most state courts and federal jurisdictions have not yet had the opportunity to address the application of drug testing policies in the context of state marijuana laws. Different state laws (or attitudes about

marijuana, for that matter) may create liability in some cases. For example, a New Jersey court will soon decide its first case concerning a medical marijuana termination.[35] In this case a New Jersey Transit employee had a valid prescription for medical marijuana to address intense nerve pain.[36] While undergoing a physical fitness test for a new position, he tested positive for marijuana and was terminated, even after showing his prescription and offering to work a position with fewer safety implications.[37] The employer defended its decision pointing to its policy to adhere to federal Department of Transportation guidelines, which include a zero tolerance policy, specifically citing a ban on medical marijuana.[38] This case will be the New Jersey courts' first opportunity to construe the limits and privileges associated with their state medical marijuana law.

D. Arbitrators and Positive Marijuana Drug Tests

In addition, we note that employers who operate in a union environment face additional considerations. Unlike a judge, an arbitrator's authority stems from the collective bargaining agreement between the parties, and an arbitrator's decision on a just cause termination case is based upon that agreement and possibly past practices. Arbitrators tend to be more lenient in evaluating just cause terminations for drug use.[39] For example, in one case, the grievant was a registered medical marijuana patient who had tested positive for marijuana during a baseline drug testing required by the employer's policy.[40] The employee was suspended and required to complete substance abuse counseling. The arbitrator chose not to uphold the discipline finding that because the employee's off-duty marijuana use was at least "quasi-legal" under state law, the drug test result was not sufficient to establish just cause. In this decision, as with most labor arbitration decisions, the arbitrator looked to the nexus between the employee's off-duty conduct and the employer's business interest for testing for such drug use (*i.e.*, impairment on the job). This balancing test regularly tips in favor of the employee, unless the off-duty conduct has clear safety or other negative implications for the job site.

Of course, the language of each specific collective bargaining agreement will vary, as will drug policies and discipline procedures. Still, it is safe to say that arbitrators will be making their own independent evaluations of fairness and equity in situations where an employee is terminated pursuant to a drug use policy, but where the employee claims he is using marijuana off-site and during off duty hours for medical purposes pursuant to state law.

E. Advice for Employers

In sum, the case law to date provides at least some guidance for employers and points, generally, to an employer-friendly position to the enforcement of drug/drug testing policies. As the law develops, or as attitudes change, employers may need to adapt their policies and practices accordingly.

Employers and their HR teams should take the time now to evaluate how they will address medical marijuana in their workplace in light of recent laws. Unfortunately, this is still largely unchartered territory. Employers who choose a more permissive approach and decide to accommodate medical marijuana users—in some cases—may face inquiries from the federal government as to their role in facilitating the use of an illegal drug. An employer's choice to take the less permissive approach and impose discipline for marijuana use may very well be consistent with federal law, and how courts have so far interpreted employers' rights. Nevertheless, employers are in the unfortunate situation of having to address and apply this contradictory

legal scheme. Litigation is always possible and will certainly continue to develop across the country in the near future. That being said, updating policies now to address medical marijuana and disclosing them to employees early can only help prevent surprises in the workplace. Transparency and consistency provides some of the best protection from possible litigation.

III. PROVIDING REASONABLE ACCOMMODATIONS

A. Obligations under the ADA

Most employers are aware of their obligations to provide "reasonable accommodations" to qualified individuals with disabilities pursuant to federal law, specifically the Americans with Disability Act, and similar laws in many states. In general, employers have an obligation to provide reasonable accommodations to qualified individuals to allow them to perform the essential functions of the job if such accommodation would not constitute an "undue hardship" for the employer. Examples of reasonable accommodations include modifications to the job application process, modifications to the work environment, or to the manner or circumstances under which the position is customarily performed, and modification of work or break schedules.[41] For instance, an employee with diabetes might request a modification to his break schedule to allow the injection of insulin at designated times in the course of a day. In most cases, if a request is not an "undue hardship" as that term is defined by law for the particular employer, the employer would have to provide an accommodation to the employee.

B. The Need to Accommodate Medical Marijuana

The question arises in states that allow the use of medical marijuana: is allowing the otherwise lawful (pursuant to state law, at any rate) use of medical marijuana a reasonable accommodation under disability discrimination law? To alter our insulin example, must an employer alter a break schedule to allow the use of marijuana in the workplace as a reasonable accommodation? Or, must an employer alter its drug policies to allow the use of marijuana inside (or outside of, for that matter) the workplace as a reasonable accommodation pursuant to disability discrimination law?

As it relates to the on-site use of marijuana, many states specifically address the issue in the statute itself. For example, the Massachusetts medical marijuana statute provides that an employer is not required to provide "any accommodation of any on-site medical use of marijuana in any place of employment . . ."[42] Other states have similar provisions.[43] Accordingly, in these states, it is clear that an employer is not required to allow an employee to use medical marijuana in a place of employment as a reasonable accommodation. However, even in states that specifically address the provision of accommodations in the statute itself, questions still remain. For instance, assuming the employer otherwise maintains a zero-tolerance drug use policy and tests its employees in accordance with law, must the same Massachusetts employer grant, as a reasonable accommodation, a request for an exception to the company's standard drug testing policies that prohibit the use of marijuana outside the workplace—assuming, the employee is not under the influence of the drug at work and can still otherwise perform the essential functions of the job. At first blush, the answer might seem obvious. As discussed above, courts have so far found that employers have no obligation to alter their drug policies to create an exception for medical marijuana. Nevertheless, courts have only recently begun to address this issue in the context of disability discrimination law specifically. And because medical marijuana laws directly relate to disabilities and

the treatment thereof, we expect a substantial amount of litigation to develop in the area of disability discrimination law.

The ADA itself does provide at least some guidance in this area. The ADA explicitly excludes the use of "illegal" drugs from its coverage—which would include medical marijuana, as medical marijuana remains illegal under federal law.[44] Accordingly, the ADA does not prohibit an employer from terminating an employee or taking some other form of adverse action on the basis of the "illegal" use of drugs. To be clear, the ADA would generally prohibit the termination of an employee for the use of other types of prescribed medication—lawfully prescribed and used pain medication, for instance—which does not interfere with the employee's ability to safely perform the essential functions of the job. Accordingly, there may be a strong argument that refusing to provide accommodations related to the use of medical marijuana would not violate the ADA. Indeed, courts that have begun to address these issues so far appear to follow this line of reasoning.

In 2010, for instance, the Oregon Supreme Court addressed a situation in which an employer discharged an employee for medical marijuana use.[45] Finding that the employee was discharged because of his illegal—under federal law—use of marijuana, the Oregon Supreme Court found that "because employee was currently engaged in the illegal use of drugs and employer discharged him for that reason, the protections of the [Oregon disability discrimination law] . . . do not apply."[46] Similarly in California, the Ninth Circuit ruled in 2012 that an employee's "medical marijuana use is not protected by the ADA" as medical marijuana—even if authorized under state law—is illegal pursuant to federal law.[47] Still, federal courts and most state courts have not addressed *accommodations* under the ADA or state discrimination laws specifically. And, while courts so far have consistently found medical marijuana to be an illegal drug, thus suggesting a defense may be available to employers who reject reasonable accommodations to use medical marijuana, employers still must tread lightly in this quickly evolving area of law.

C. Advice for Employers

First, employers need to consult carefully the relevant state law for language addressing the issue of accommodation as it relates to medical marijuana. State laws differ and employers operating in multiple states must be particularly cautious here, adopting policies and legal strategies to the specific state marijuana law in question. Some state laws specifically prohibit employers from discriminating against employees for lawfully using marijuana under state law.[48] Nevada, to provide another example of specific language, provides that an employer is not required to allow the use of medical marijuana in the workplace, but also explicitly requires an employer to make reasonable accommodations for the "medical needs" of an employee who validly uses medical marijuana in Nevada.[49] Moreover, many states maintain disability discrimination laws similar to the ADA and enforce these laws through state agencies or commissions. Thus, even if a defense exists under the ADA on the grounds of the illegality of marijuana under federal law, employers may still face investigations or complaints from state agencies enforcing state discrimination law if they fail to provide reasonable accommodations, possible preemption by federal law notwithstanding.

Second, employers need to understand that under federal disability discrimination law (and many state disability discrimination laws), employers are generally required to engage in an "interactive process" to determine whether a reasonable accommodation is available. Employers are not generally

excused from this requirement, or the more general requirement to consider and provide reasonable accommodation absent undue hardship to qualified disabled employees, even if they may lawfully reject an employee's initial request for an accommodation to use medical marijuana. Indeed, the point of the interactive process is to determine what, if any, accommodation is possible and appropriate.[50] Thus—to use Massachusetts as an illustration again—if an employer lawfully rejects an accommodation request to alter an employee's break schedule to allow the employee to use marijuana at specific times during the day on work premises, the employer may still be obligated to engage in a dialogue with that employee to determine if a different accommodation may be sufficient to allow the employee to perform the essential functions of his job. For example, it may be possible for the employee to work a part time schedule, or perhaps minor alterations to the physical working environment would allow an employee to better manage pain at work.[51]

Employers will face difficult choices when presented with a request for a reasonable accommodation to use marijuana or to otherwise be excepted from drug-related policies. As discussed, it is important for HR professionals to stay on top of what will likely be a fast evolving area of law, and consult with legal counsel where appropriate to ensure they are protected in this complicated area.

IV. ASSOCIATIONAL DISCRIMINATION CLAIMS

As a final note, we briefly summarize an area of discrimination law that has been growing recently and may present additional challenges for employers in the context of medical marijuana laws. This expanding body of law focuses not on the employee's protected category—*e.g.* race, disability, gender, etc.—but upon a person's association with someone in a protected category. While these claims may be established in regard to any protected category, for the purposes of this discussion, the focus will be on associational discrimination claims based upon a disability. For example, employers may have employees who report to work possessing marijuana for someone with a disability for whom they provide care, smelling of marijuana because someone for whom they provide care is using medicinal marijuana, or even under the influence of marijuana themselves from, for instance, being in a room with a person for whom they care who is smoking medicinal marijuana to treat a protected disability. In these situations, employers need to be cautious about potential claims of associational discrimination.[52]

The Americans with Disabilities Act (ADA) expressly prohibits associational discrimination.[53] Associational discrimination cases under federal law have generally been brought three categories: (1) "expense"—meaning, for example, that an employee is discriminated against based upon the increased cost of their family member's disability to the company health insurance plan; (2) "disability by association"—meaning, for example, that an employee is discriminated against because of concerns that they also might be infected or afflicted with the disability of the person they associate with; and (3) "distraction"—which would encompass discrimination based upon the assumption than an employee will be inattentive to their work or absent from work due to the disability of the person they associate with.[54]

There does not appear to be the same obligation pursuant to the ADA, however, to offer employees who associate with disabled individuals the same reasonable accommodation protections as an employer would need to offer a disabled employee directly.[55] Therefore, under current ADA case law, as well as under certain state

medical marijuana laws, there is no obligation to accommodate an employee's need to possess marijuana on site to care for a family member. Still, associational discrimination claims are possible where an employer takes an adverse action against an employee for some conduct that can be traced to his or her association with a disabled individual.

To successfully articulate an associational discrimination claim under the ADA, an employee must establish essentially the same basic facts as a person claiming disability discrimination, namely: (1) that the employee was "qualified" for the job at the time of the adverse action; (2) that there was an adverse job action; (3) that the employer knew of the employee's association with a disabled person; and (4) that there is at least a reasonable inference that the disability of the associated person was a determining factor in the employer's decision to impose an adverse job action.[56] Accordingly, at least on its face, an employee terminated for smelling like marijuana may have a claim of associational discrimination if he can establish he was terminated because of his association with the disabled individual who was using medicinal marijuana and not for some other lawful reason.[57] This situation could fit under the "disability by association" category as an employer may unfairly assume that a caregiving employee to a medical marijuana user is also a medical marijuana user him/herself. Another potential scenario may be an "expense" claim. While some states include express carveouts for insurance coverage in their medical marijuana statutes,[58] there could be a potential associational discrimination claim that an employee experiences an adverse job action because of his family member's use of medical marijuana, which could increase insurance costs for the employer.

While associational discrimination claims have not yet been tested in the context of medicinal marijuana use, employers are well advised to be cautious here and recognize that discrimination law protections extend beyond the protected category of an employee him or herself.

CONCLUSION

In sum, employers and HR professionals must carefully monitor both legislation and case law as it continues to develop in this area. While federal and state courts that have addressed medical marijuana in the workplace to date have provided employers substantial latitude in enforcing existing policies and prohibiting marijuana use of its employees—state laws to the contrary notwithstanding—this is a fast developing area of law. As more states adopt medical marijuana laws and as attitudes change, the law will develop too. One thing is certain, this is an area where litigation will occur. Planning ahead is critical to remaining in front of the curve. Adapting policies now and crafting plans for addressing medical marijuana in the workplace will, at a minimum, ensure fair and consistent treatment of employees and provide your workforce with a greater level of predictability in this changing environment.

NOTES:

[1]Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida (effective January 1, 2015), Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, Nevada, New Jersey, New Mexico, NewYork, Oregon, Rhode Island, Vermont, Washington.

[2]As of the date of this Article, the authors are aware of two additional states with medical marijuana bills pending: Ohio and Pennsylvania.

[3]21 U.S.C. § 801, et seq.

[4]Memorandum from David W. Ogden, Deputy Attorney General to Selected United States Attorneys, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, October 19, 2009.

[5]The 2005 Supreme Court case of *Gonzalez v Raich* broadly reinforced the right of the federal government to regulate and enforce the Controlled Substances Act, even in the face of state laws authorizing the use of medical marijuana. 545 U.S. 1 (2005)

[6]An Act for the Humanitarian Medical Use of Marijuana, M.G.L. 94C

App. § 1-1, et seq.

[7]Kay Lazar & Sheeley Murphy, Lawmakers Slam DEA for Targeting Mass. Doctors, The Boston Globe, June 11, 2014.

[8]Jeremy Meyer, & John Ingold, Feds raid Denver-area Marijuana Dispensaries, grow operations, 2 homes, The Denver Post, November 21, 2013.

[9]Ryan J. Reilly & Matt Ferner, *House Blocks DEA from Targeting Medical Marijuana*, The Huffington Post, May 30, 2014, http://www.huffingtonpost.com/2014/05/30/dea-medical-marijuana-house-vote_n_5414679.html (last accessed July 6, 2014).

[10]See Coats v. Dish Network, LLC, 303 P.3d 147 (Colo. App. 2013) *cert. granted*, No. 13SC394, 2014 WL 279960 (Colo. Jan. 27, 2014).

[11]42 U.S.C. § 12101 et seq.

[12]See 42 U.S.C. § 12112(d)

[13]Testing for the presence of alcohol would qualify as a "medical examination" under the ADA and is limited to testing after a conditional job offer and only to situations where the testing is job-related (drivers, for example) and consistent with business necessity. See EEOC, "Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)" www.eeoc.gov/policy/docs/guidance-inquiries.html (last accessed July 6, 2014)

[14]*See, e.g.*, Iowa Code, Section 730.5; N.C. Gen. Stat. § 95-230. We note, too, that even in states where a statute does not specifically regulate employment drug testing, case law in the local jurisdiction may.

[15]For example, Massachusetts provides broad privacy rights which extend to employees, pursuant to the state's privacy statute, M.G.L. c. 214, § 1B.

[16]*See* U.S Constitution, Fourth Amendment. The California constitution, for example, also explicitly provides a right to privacy, which in California extends to both public and private workplaces. *See* California Constitution, Article 1, Section 1.

[17]Some employers, pursuant to federal or state law, may be mandated to maintain a zero-tolerance policy. *See e.g.,* Drug Free Workplace Act, 41 U.S.C. §§ 8101, et seq.

[18]*See Coats*, 303 P.3d at 150–152; Beinor v. Indus. Claim Appeals Office, 262 P.3d 970 (Colo. App. 2011); Curry v. MillerCoors, Inc., No. 12-cv-02471-JLK, 2013 WL 4494307 (D.Colo. Aug. 21, 2013).

[19]Although this article focuses on the use of *medicinal* marijuana, employers would face the same choice as it relates to recreational use of marijuana in states where recreational use is allowed or decriminalized. In these states, too, of course, marijuana is still illegal under federal law.

[20]Casias v. Wal-Mart Stores, Inc., 695 F.3d 428 (6th Cir. 2012).

[21]Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 432 (6th Cir. 2012).

[22]Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 432 (6th Cir. 2012).

[23]Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 432 (6th Cir. 2012).

[24]Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 432 (6th Cir. 2012).

[25]Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 435 (6th Cir. 2012).

[26]Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 435–437 (6th Cir. 2012).

[27]Coats v. Dish Network, LLC, 303 P.3d 147, 150–152, (Colo. App. 2013) *cert. granted*, No. 13SC394, 2014 WL 279960 (Colo. Jan. 27, 2014).

[28]Coats v. Dish Network, LLC, 303 P.3d 147, 149, (Colo. App. 2013) *cert. granted*, No. 13SC394, 2014 WL 279960 (Colo. Jan. 27, 2014).

[29]Coats v. Dish Network, LLC, 303 P.3d 147, 149, (Colo. App. 2013) *cert. granted*, No. 13SC394, 2014 WL 279960 (Colo. Jan. 27, 2014).

[30]Coats v. Dish Network, LLC, 303 P.3d 147, 150, (Colo. App. 2013) *cert. granted*, No. 13SC394, 2014 WL 279960 (Colo. Jan. 27, 2014).

[31]Coats v. Dish Network, LLC, 303 P.3d 147, 150, (Colo. App. 2013) *cert. granted*, No. 13SC394, 2014 WL 279960 (Colo. Jan. 27, 2014).

[32]Coats v. Dish Network, LLC, 303 P.3d 147, 150-152, (Colo. App. 2013) *cert. granted*, No. 13SC394, 2014 WL 279960 (Colo. Jan. 27, 2014).

[33]Beinor v. Indus. Claim Appeals Office, 262 P.3d 970, 798 (Colo. App. 2011).

[34]See Jones v. City of Costa Mesa, 700 F.3d 394 (9th Cir. 2012) *cert. denied*; Curry v. MillerCoors, Inc., No. 12-cv-02471-JLK, 2013 WL 4494307 (D.Colo. Aug. 21, 2013); Freightliner, LLC v. Teamsters Local 305, 336 F.Supp.2d 1118 (D.Or. 2004); Roe v. TeleTech Customer Care Mgmt. (Colo) LLC, 257 P.3d 586 (Wash. 2011); Ross v. RagingWire Telecomms. Inc., 174 P.3d 200 (Cal. 2008).

[35]See http://www.nj.com/politics/index.ssf/2014/04/nj_transit_sued_for_suspending_employee_in_medical_marijuana_program.html (last accessed July 6, 2014).

[36]See http://www.nj.com/politics/index.ssf/2014/04/nj_transit_sued_for_suspending_employee_in_medical_marijuana_program.html (last accessed July 6, 2014).

[37]See http://www.nj.com/politics/index.ssf/2014/04/nj_transit_sued_for_suspending_employee_in_medical_marijuana_program.html (last accessed July 6, 2014).

[38]49 CFR Part 40, at 40.151(e) ("You must not verify a test negative based on information that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act. (e.g., under a state law that purports to authorize such recommendations, such as the "medical marijuana" laws that some states have adopted.)").

[39]See *Freightliner, LLC*, 336 F.Supp. 2d at 1123–25; *Seafreeze Cold Storage & Teamsters Local 117* (2011) (Cavanaugh, Arb.) (unpublished); In re MONTEREY COUNTY Calif. and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 817, 123 Lab. Arb. Rep. (BNA) 677, 123 LA (BNA) 677, 2007 WL 1064181 (Lab. Arb. 2007).

[40]*Seafreeze Cold Storage & Teamsters Local 117* (2011) (Cavanaugh, Arb.) (unpublished)

[41]*See, e.g.*, 29 C.F.R. § 1630.2

[42]M.G.L. 94C App. § 1-1, et seq.

[43]Many states have similar provisions. See, for example, Mich. Comp. Laws Ann. §§ 333.26421, et seq; N.H. Stat. § 126-X:2, 126-X:3; N.J. Stat. Ann. § 24:6I-1, et seq.; Or. Rev. Stat. Ann. §§ 475.319, 475.340.

[44]*See* 42 U.S.C. § 12114; *see also, e.g.*, See Jones v. City of Costa Mesa, 700 F.3d 394, 404 (9th Cir.

2012); *Curry*, No. 12-CV-02471-JLK at *2–3.

[45]*See* Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries, 230 P.3d 518 (Or. 2010).

[46]*See* Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries, 230 P.3d 518, 536 (Or. 2010).

[47]*City of Costa Mesa*, 700 F.3d at 397.

[48]*See* Conn. Gen. Stat. Ann. § 21a-408 et seq.; Me. Rev. Stat. tit. 22, §§ 2383-B, 2423-A, 2423-E; R.I. Gen. Laws Ann. §§ 21-28.6-4, 21-28.6-7.

[49]Nev. Rev. Stat. Ann. §§ 453A.800.

[50]*See generally* EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, *available at* http://www.eeoc.gov/policy/docs/accommodation.html#N__109__ (last accessed July 6, 2014).

[51]Facts will determine what is appropriate in each case, of course, and we strongly recommend consulting legal counsel in these situations.

[52]Moreover, several of the state medical marijuana laws provide for similar protections for caregivers of medical marijuana patients. *See e.g.,* Conn. Gen. Stat. Ann. § 21a-408, et seq.; 410 Ill. Comp. Stat. § 130/25, et seq.; Me. Rev. Stat. tit. 22 § 2383-B, 2423-A, 2423-E; N.H. Stat. §§ 126-X:2, 126-X:3; N.J. Stat. Ann. § 24:6I-1, et seq.; R.I. Gen. Laws. Ann. §§ 21-28.6-4, 21-28.6-7.

[53]See 42 U.S.C. § 12112(b)(4) (2006).

[54]See Larimer v. Int'l Bus. Machines Corp., 370 F.3d 698, 700 (7th Cir. 2004).

[55]See 29 C.F.R. Pt. 1630, App. (§ 1630.8); Magnus v. St. Mark United Methodist Church, 688 F.3d 331, 336 (7th Cir. 2012); Larimer v. Int'l Bus. Mach. Corp., 370 F.3d 698, 700 (7th Cir. 2004). Remember, however, there may be obligations under the Family and Medical Leave Act to allow employees to take leave, either extended or intermittent, to care for an ill or disabled family member in certain circumstances.

[56]See Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1085 (10th Cir. 1997).

[57]Of course, bringing a claim and prevailing on a claim are two different things. Facts will control in establishing a claim and the legitimacy of a defense on the basis of the illegality of marijuana at the federal level has yet to be tested in the associational discrimination context.

[58]See e.g., M.G.L. 94C App. § 1-1, et seq.