Workshop A:
Medical and Recreational Marijuana in the Workplace or as a Business

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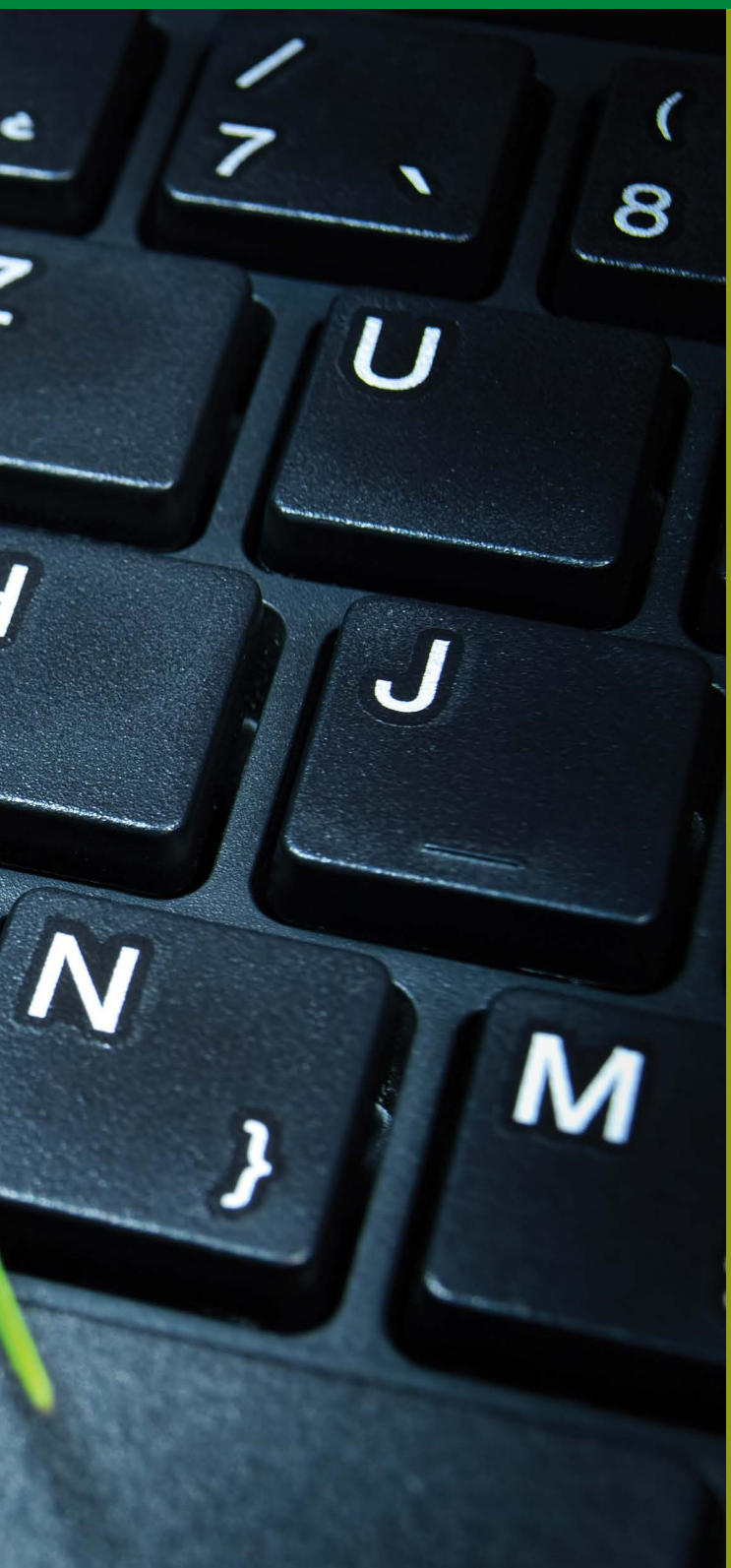
Medical Marijuana

A Current Look at Cannabis Law

By Sara E. Payne and Geoffrey A. Mort

in the Workplace:



Twenty-nine states, including New York, plus the District of Columbia, have legalized medical marijuana.[1] Because marijuana remains an illegal substance under federal law, its legal use under state law raises a number of issues. These issues are playing out with increasing frequency in courts across the country.

In New York, the Compassionate Care Act (CCA) was signed into law on July 5, 2014.[2] In brief, the CCA authorizes the manufacture, sale, and use of medical marijuana within the state, and directs the state's Department of Health to promulgate regulations implementing and governing the program. The first marijuana dispensaries permitted under the CCA opened in January 2016, at which time New Yorkers with certain enumerated medical conditions could become "certified" and legally purchase and use medical marijuana.[3]

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Though medical marijuana has been legal in some states for more than 20 years, case law in the employment context has been slow to develop. While there is no case law in New York to date, a number of cases arising under other state medical marijuana laws are illustrative for employers and employees. Existing decisions generally address the tension between federal and state law as an overarching theme, and the most common legal questions include: (1) whether the Controlled Substances Act (CSA) preempts state marijuana laws; (2) whether the Americans with Disabilities Act (ADA) protects employees who legally use marijuana under state law; (3) whether an employer has a duty to accommodate an employee's legal marijuana use; and (4) whether employees are protected against adverse employment actions because of their legal marijuana use. In this respect, a significant majority of cases decided by both state and federal courts arise in the context of employee drug testing.

Generally speaking, drug testing cases tend to involve reasonably similar fact patterns: an employee has a serious medical condition which, under the supervision of a health care professional, is treated with medical marijuana pursuant to a duly enacted state law. When such an employee is drug tested by his or her employer, the test is invariably positive for cannabis. Commonly, the employee voluntarily disclosed his or her status as a medical marijuana user prior to drug testing and mistakenly believes that compliance with the state marijuana law will protect them against adverse employment action based on a positive drug test. These cases commonly hold that state marijuana laws are preempted by the CSA, that an employee's use of marijuana is not protected under the ADA, and that an employers' zero-tolerance (or similar) drug policy is an acceptable basis upon which to terminate a medical marijuana user's employment, rescind a job offer, or refuse to hire a candidate. However, state legislation respecting employee rights is evolving, and a few recent decisions deviate from the judicial trend favoring employers. Together, these developments may represent a new trend favoring employees and emphasizing states' rights to legislate marijuana use.

FEDERAL PREEMPTION

Employers commonly rely on federal preemption as a defense in cases involving alleged wrongful termination (or rescission of an offer or refusal to hire) based on an employee's legal marijuana use. In cases where an employer relies on a preemption defense, it typically asserts that the Supremacy Clause of the U.S. Constitution requires that state statutes, such as medical marijuana laws, be interpreted consistently with federal law – usually the CSA.[4] The preemption doctrine, as applied to state medical marijuana laws, was discussed at length in *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industry.*[5] In *Emerald Steel,* the Oregon Supreme Court articulated that the key question under a preemption analysis is whether a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[6] Because the intent of the CSA, in the court's view, is to criminalize and prohibit all use of "Schedule I" drugs, of which marijuana is one, Oregon's medical marijuana law stands as an obstacle to the CSA, and is therefore preempted by the CSA. In other words, the court reasoned, Congress "has the authority under the Supremacy Clause to preempt state laws that affirmatively authorize the use of medical marijuana."[7]

The 2015 Colorado case *Coats v. Dish Network*[8] so vividly captures the paradoxes, emotions, and core issues involved in the intersection of legal medical marijuana use and employment law that it merits discussion. Mr. Coats was a quadriplegic who had been confined to a wheelchair since youth. He held a valid registration card under Colorado's medical marijuana statute and used marijuana at home in the evening to help him to sleep so he could work during the day at defendant's telephone customer service call center. He alleged he was never impaired at work and never used marijuana in the workplace; in fact, Mr. Coats was considered a model employee. After three years of employment with defendant, defendant performed drug tests on all of its employees. Mr. Coats tested positive for marijuana and, as a result, his employment was terminated. He then sued Dish Network, alleging that his discharge violated Colorado's Lawful Activities Statute,[9] which prohibits discrimination against an employee for engaging in a lawful activity during nonworking hours. Mr. Coats's lawyers argued that because Colorado law permits the use of medical marijuana, Mr. Coats's use of the drug was a lawful activity. Both the trial court and the Colorado Court of Appeals found in favor of defendant, and Mr. Coats appealed to the Colorado Supreme Court. At issue was whether the use of medical marijuana was a lawful activity or not. Colorado's high court held that it was not because, notwithstanding state law, marijuana use is prohibited by the CSA.

The *Coats* case attracted national attention and is perhaps the most widely known case involving medical marijuana, drug testing, and employment law. Mr. Coats's lawyers described the case as involving a perfect storm of facts, upon which if Mr. Coats could not prevail, it would leave serious doubt as to who could.[10] The facts of the case were indeed wrenching, and the outcome was particularly noteworthy because Colorado's medical marijuana law is widely considered to be one of the strongest in the country, as it is codified as an amendment to the State Constitution. The law does not, however, contain an express prohibition against employment discrimination.

In the wake of *Coats*, a federal district court in the Second Circuit addressed a similar issue under Connecticut's

medical marijuana law which may have far-reaching implications. In *Noffsinger v. SSC Niantic Operating Co. LLC,*[11] the court directly addressed whether "federal law precludes the enforcement of a Connecticut law [prohibiting] employers from firing or refusing to hire someone who uses marijuana for medical purposes."[12]

The plaintiff in *Noffsinger* used a synthetic FDA-approved form of cannabis at night to treat post-traumatic stress disorder. After she was offered a job by defendant, her pre-employment drug test was positive for cannabis, and her job offer was rescinded. Ms. Noffsinger thereafter commenced an action alleging, *inter alia*, a violation of the anti-discrimination provision contained in Connecticut's medical marijuana law. Specifically, plaintiff argued that defendant's refusal to hire her violated Connecticut's Palliative Use of Marijuana Act, or PUMA, which prohibits employment discrimination against those who legally used marijuana. Defendant argued that PUMA was preempted by three federal laws and, primarily, the CSA. The court concluded that the CSA is not in direct conflict with PUMA and ruled in favor of plaintiff.[13] Grounding its analysis in obstacle preemption, the court reasoned:

> The mere fact of tension between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power. Rather, obstacle preemption precludes only those state laws that create an actual conflict with an overriding federal purpose and objective (internal citations omitted). [The CSA] does not make it illegal to employ a marijuana user. Nor does it purport to regulate employment practices in any manner. It also contains a provision that explicitly indicates that Congress did not intend for [the CSA] to preempt state law unless there is a positive conflict between [it] and [ ] state law so that the two cannot consistently stand together.[14]

In its analysis, the court observed that there were no prior decisions interpreting PUMA and pointedly distinguished prior decisions addressing federal preemption of state medical marijuana laws, including *Emerald Steel Fabricators* and *Coats.* In noting that the above-referenced decisions and others "h[ad] come out in favor of employers, [the foregoing cases did] not concern[ ] statutes with specific anti-discrimination provisions,"[15] and "a statute that clearly and explicitly provide[s] employment protections for medical marijuana could lead to a different result"[16] from cases upholding adverse employment actions.

The court thus distinguished between plaintiff's underlying disability and the treatment for that disability (i.e., medical marijuana), finding that discrimination based on one's choice of treatment is entirely lawful.

DISABILITY DISCRIMINATION AND STATUTORY PROTECTIONS

State anti-discrimination statutes prohibit, as a rule, employment discrimination against disabled persons. Because most individuals enrolled in medical marijuana programs satisfy the definition of "disabled" under state law and the ADA, medical marijuana users who have been discharged as a result of a failed drug test often argue that their termination constitutes disability discrimination and/or that a waiver from a zero-tolerance drug policy permitting the employee to continue using medical marijuana would have been a reasonable accommodation that the employer failed to provide. As a matter of course, courts historically rejected these arguments.

For example, in *Shepherd v. Kohl's Dep't Stores,*[17] the court pointed out that "there is no evidence . . . plaintiff was fired because of his [disability] and not because of the manner in which he chose to treat that condition." The court thus distinguished between plaintiff's underlying disability and the treatment for that disability (i.e., medical marijuana), finding that discrimination based on one's choice of treatment is entirely lawful.

In *Ross v. RagingWire Telecommunications, Inc.,*[18] the California Supreme Court used similar reasoning. There, plaintiff, like the plaintiff in *Shepherd* and other cases, asserted he was disabled and that because he used medical marijuana to treat the symptoms of his underlying condition, his discharge constituted disability discrimination. The *Ross* court noted that marijuana use under any circumstances brought the plaintiff "into conflict with defendant's employment policies,"[19] which the court observed were in accord with federal law. Thus, the court held that California's medical marijuana law "does not require employers to accommodate the use of illegal drugs."[20] The court's reliance on the preemptive nature of the CSA in *Shepherd* and *Ross* is common across cases alleging discrimination under the ADA. However, discrimination claims brought under state law have been more successful.

In *Barbuto v. Advantage Sales and Marketing, LLC,*[21] plaintiff was offered a position with defendant and, after accepting the offer, submitted to defendant's mandatory drug testing. Prior to the drug test, plaintiff advised defendant that she would test positive for marijuana, explaining that she suffered from Crohn's Disease which she managed with medical marijuana as a legal participant in the Massachusetts medical marijuana program.

Nevertheless, plaintiff's employment was terminated based on a positive drug test. Here, the court focused on a provision in the Massachusetts medical marijuana law that provides "[a]ny person meeting the requirements under this law shall not be penalized in any manner, or denied any right or privilege" because of their medical marijuana use.[22] Plaintiff subsequently commenced an action for, *inter alia*, handicap discrimination under Massachusetts law.

Here, the court held that even if the employer "had a drug policy prohibiting the use of [marijuana], even where lawfully prescribed by a physician, the employer would have a duty to engage in an interactive process with the employee to determine whether there were equally effective medical alternatives [to marijuana] whose use would not be in violation of its policy."[23] Thus, concluded the *Barbuto* court, failing a drug test is not a valid basis for terminating a legal medical marijuana user unless the employer unsuccessfully sought to obtain agreement with the employee on an accommodation other than marijuana. The court further found that, even though use and possession of marijuana violates federal law, that fact alone does not make legal medical use under state law a per se unreasonable accommodation. This decision is particularly noteworthy in two respects.

First, the court declined to infer a private cause of action under the medical marijuana law because it did not contain express employment protections. However, the court used language from the medical marijuana law together with the handicap discrimination law to find that plaintiff adequately stated a claim for handicap discrimination.

Second, the court's analysis with respect to defendant's refusal to permit plaintiff's use of medical marijuana as a reasonable accommodation is worthy of comment. Defendant argued that plaintiff was terminated not because of her handicap, but because of her marijuana use. The court found the foregoing argument unpersuasive, stating:

> By the defendant's logic, a company that barred the use of insulin by its employees in accordance with a company policy would not be discriminating against diabetics because of their handicap, but would simply be implementing a company policy prohibiting the use of a medication. Where, as here, the company's policy prohibiting any use of marijuana is applied against a handicapped employee who is being treated with marijuana by a licensed physician for her medical condition, the termination of the employee for violating that policy effectively denies a handicapped employee the opportunity of a reasonable accommodation, and therefore is appropriately recognized as handicap discrimination.[24]

Based on this reasoning, the *Barbuto* court found that plaintiff's use of medical marijuana was not facially unreasonable as an accommodation. Defendant was thus obligated to engage in the interactive process, but thereafter could present evidence demonstrating the requested accommodation would cause it to suffer an undue hardship.

As is relevant in New York, the CCA includes anti-discrimination language very similar to the Massachusetts language. Particularly, the CCA provides that certified patients "shall not be [ ] denied any right or privilege" based on their legal marijuana use. Further, "being a certified patient shall be deemed [as] having a disability" under the human rights law, civil rights law, penal law and criminal procedure law,[25] and anti-discrimination laws prohibit employers from discriminating against disabled persons. Consequently, a New York court may accept the *Barbuto* analysis and permit a plaintiff's handicap discrimination claim arising from a medical marijuana user's failed drug test to proceed to trial. A different outcome would likely result absent the CCA's anti-discrimination language. To that end, courts across the country routinely uphold adverse employment actions against medical marijuana users where the state law does not set forth analogous anti-discrimination protection.

For example, the court in *Roe v. TeleTech Customer Care Mgmt. LLC*[26] held that Washington's Medical Use of Marijuana Act (MUMA) did provide a private right of action for an employee discharged as a result of legal medical marijuana use. There, Washington's high court rejected the argument that a public policy forbidding adverse employment actions based on legal marijuana use should be inferred from MUMA in the absence of express employment protection. The Sixth Circuit's reasoning and holding in *Casius v. Walmart Stores, Inc.*[27] was similar. There, the court held that the Michigan statute's language did not "impose restrictions on private employers"[28] that would prevent them from discharging medical marijuana users, so plaintiff's discharge was not unlawful.

WRONGFUL TERMINATION AND PUBLIC POLICY

In states with wrongful termination statutes, medical marijuana users against whom adverse employment has been taken commonly argue their dismissal was wrongful because their conduct was permitted by state law. The court in *Ross, supra,* observed that California's wrongful termination law set forth an exception to the employment at will doctrine by providing "an employer may not discharge an employee for a reason that violates a fundamental public policy of the state."[29] However, plaintiff's reliance on public policy proved fatal, as the court concluded that California's Compassionate Use Act "simply does not speak to employment law,"[30] and therefore no public policy rendered plaintiff's dismissal wrongful.

The plaintiff in *Roe, supra,* ran afoul of the same reasoning. The *Roe* court held that because no clear public policy existed disallowing the termination of marijuana card holders who fail drug tests, the employee had no cause of action for wrongful discharge. In this respect, few medical marijuana statutes contain sufficiently strong language to support a claim that public policy protects legal medical marijuana users from adverse employment action, and as a result, challenges for wrongful discharge on public policy grounds have largely failed.

UNEMPLOYMENT BENEFITS

Another issue that sometimes arises with respect to medical marijuana is whether registered employees fired after failing workplace drug tests are eligible for unemployment benefits. A Michigan appellate court discussed this question at length in *Braska v. Challenge Mfg. Co.*[31] Although Michigan's unemployment insurance law disqualifies an individual who tests positive for drugs from receiving benefits, Michigan's medical marijuana law provides that a person possessing a medical marijuana registry identification card "shall not be subject to . . . penalty in any manner . . . for the medical use of marijuana."[32]

Courts across the country routinely uphold adverse employment actions against medical marijuana users where the state law does not set forth analogous anti-discrimination protection.

Here, the court found that denial of unemployment benefits did constitute a "penalty" and rejected the state's argument that denial of benefits was the result of failing a drug test, not using medical marijuana. The plaintiffs' use of medical marijuana, reasoned the court, "and their subsequent positive drug tests are inexplicably intertwined."[33] Of course, employees in states that permit medical marijuana, but do not have a statute with the protections of Michigan's law, might well face not only dismissal, but a loss of unemployment benefits. New York's medical marijuana statute, however, does contain language similar to Michigan's.

NEW YORK PRECEDENT

While New York courts have not weighed in on these issues yet, one administrative decision is on point. In *Taxi & Limousine Comm'n v. W.R.*,[34] a fitness proceeding alleging respondent's unfitness was commenced against a taxi licensee who "failed" an annual drug test. Under the relevant regulations, a failed drug test is one that is the "result of illegal drug use." Here, respondent held a valid New York medical marijuana certification card. Typically, when a taxi licensee tests positive for a controlled substance, the result is reversed if the licensee presents a

valid prescription and the results of the positive drug test are consistent with use of the substance as prescribed.

The Taxi & Limousine Commission argued that marijuana should be treated differently from other controlled substances because the service it uses to review positive drug tests and prescriptions only recognizes medical marijuana prescriptions in Arizona. The administrative law judge (ALJ) disagreed with this reasoning and found that respondent's drug test was not "failed" because the positive result did not arise from "illegal drug use" since respondent held a medical marijuana certification. In concluding a finding of unfitness was improper, the ALJ cited the legislature's intent that medical marijuana patients be deemed to have a disability and may not be penalized in "any" manner or denied any right or privilege solely because of their certified use of marijuana.

Taxi & Limousine Comm'n, *Barbuto* and *Noffsinger* suggest that New York courts are likely to find that legal medical marijuana users have some employment protections as disabled persons, that employers are obligated to engage in the interactive process with them, and that continued medical marijuana use may be a reasonable accommodation.

As the medical marijuana program established by the CCA grows and becomes more established, New York will undoubtedly encounter the same legal issues that other states with such programs have. When it does, New York courts – in grappling with preemption and other issues raised by legalized marijuana – will at least have the advantage of several decades of case law from California, Colorado, and elsewhere to provide them with guidance as they seek to balance our state's medical marijuana statute against the CSA and employer fears regarding employee drug use.

1. For the purposes of this article, we are only addressing employment law issues relating to *medical* marijuana. This article does not address employment law issues arising from the recreational use of marijuana, which is now legal in nine states.
2. N.Y. Pub. Health Law § 3360, *et seq.*
3. 10 N.Y.C.R.R. §§ 1004.2; 1004.3.
4. *See, e.g., Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) (holding pre-emptive intent may be inferred if there is an actual conflict between state and federal law).
5. 230 P.3d 518 (Ore. 2010).
6. *Id.* at 528.
7. *Id.* at 530.
8. 350 P.3d 849 (Colo. 2015).
9. Many states have such laws; in New York, the statute is referred to as the "Legal Activities Law."
10. Press Release, The Evans Law Firm, *Brandon Coats v. Dish Network LLC* (June 19, 2015), http://the evans law firm.com/about us/our-cases-in-the-news/Coats-v-DISH-Colorado.aspx.
11. 273 F. Supp. 3d 326 (D. Conn. 2017).
12. *Id.* at 330.
13. *Id.* at 334.
14. *Id.*
15. *Id.* at 335.
16. *Id.* at 335.
17. 2016 U.S. Dist. LEXIS 101279, *19 (E.D. Cal. 2016).
18. 174 P.3d 200 (Cal. 2008).
19. *Id.* at 204.
20. *Id.*
21. 78 N.E.3d 37 (Mass. 2017).
22. ALM GL ch. 94I.
23. *Id.* at 44.
24. Barbuto at 467–68; similar reasoning was used in *EEOC v. Pines of Clarkston*, 2015 U.S. Dist. LEXIS 55926 (E.D. Mich. 2015) and *Coles v. Harris Teeter*, LLC, 217 F. Supp. 3d 185 (D.D.C. 2016), which both involved plaintiffs' legal medical marijuana use under state law and terminations after failed workplace drug tests. Both employee-plaintiffs alleged that they were discriminated against because of their disabilities (epilepsy and glaucoma, respectively), not because of positive drug test, and each defeated motions to dismiss and for summary judgment by producing evidence that their dismissal were motivated by their disability. For example, the plaintiff in *Coles* alleged that his employer had not fired another employee who tested positive on several workplace drug tests.
25. N.Y. Pub. Health Law § 3369(2).
26. 257 P. 3d 586 (Wn. 2011).
27. 695 F.3d 428 (6th Cir. 2012).
28. *Id.* at 435.
29. *Id.* at 208.
30. *Id.*
31. 861 N.W.2d 289 (Mich. Court of Appeals 2014).
32. *Id.* at 299.
33. *Id.* at 300.
34. OATH Index No. 2503/17 (July 2017).

GUEST COLUMN

Border Patrol

Risks of the U.S. Commercial Cannabis Industry for Non–U.S. Citizens

Patricia L. Gannon and Marcela Bermudez

Editor's Note: CBP issued an updated statement (https://www.cbp.gov/newsroom/speeches-and-statements/cbp-statement-canadas-legalization-marijuana-and-crossing-border) on Oct. 9 announcing that Canadian cannabis workers will be allowed to cross the U.S. border as long as the reason of their trip is not cannabis-related. Anyone who admits to consuming cannabis in Canada, or who is looking to participate in the U.S. cannabis industry while not a U.S. citizen, can still be turned away and/or banned from entering the country.

With the growing trend toward legalization, cannabis presents a new and fresh business avenue. Although the blossoming industry seems enticing for potential investors and employees, non-U.S. citizens may want to resist the temptation to join the U.S. industry, even while residing in states which have legalized the drug, as participation could postpone entry to the country—possibly forever (http://www.cannabisbusinesstimes.com/article/canada-us-border-cannabis-employees-business-executives-lifetime-ban/).

The legal environment surrounding cannabis in the U.S. proves confusing for both citizens and non-citizens. That's because three different primary sources of law play into this situation: the Controlled Substances Act (CSA) in federal criminal cases, the Immigration and Nationality Act (INA) for federal civil cases, and state legalization statutes and regulations.

Scheduling Error

The majority of states allow for limited use of medical marijuana under certain circumstances. The CSA, meanwhile, counterintuitively categorizes marijuana as a Schedule I drug, placing it alongside heroin, LSD, ecstasy and peyote in a category of drugs with no accepted medical uses.

For immigration, the consequences of this classification are severe. The Schedule I designation makes it a federal offense to possess, gift, sell, cultivate, import or export cannabis. This includes any activity, commercial or otherwise, involving any part or derivative of the plant. One does not need to be on federal property or travel between states

to be guilty of a federal drug crime. The U.S. Supreme Court has held that even growing or using marijuana at home for medical purposes, in accordance with state law, is regulated by the CSA.

While the INA provides a petty offense exception for possession of 30 grams or less, any other cannabis offense could result in up to 10 years in prison and possible deportation. Memos and appropriation riders (Cole Memo, Rohrabacher-Blumenauer Amendment) have prevented more domestic law enforcement activity by the U.S. Department of Justice (DOJ) toward conduct lawful under recreational and medical state marijuana laws. Since 2014, Congress has passed appropriations riders that bar the DOJ from using federal funds to bring criminal prosecutions based on conduct that is permitted by state medical marijuana laws. This funding prohibition effectively bars federal prosecution in medical marijuana cases. However, Attorney General Jeff Sessions would like this rider to end.

In 2013, the DOJ issued memoranda that requested that U.S. Attorneys refrain from prosecuting conduct that was lawful under state recreational laws as well. Sessions has since rescinded these memos. The U.S. Attorney General has granted each U.S. Attorney the freedom to prosecute marijuana use, even where permitted under state laws.

Visa Not Accepted

In addition to the CSA, the INA also restricts non-U.S. citizens' ability to use and possess marijuana while in the U.S. The Department of Homeland Security (DHS) oversees immigration in the U.S. This includes the U.S. Customs and Border Protection (CBP), which operates the borders; U.S. Citizenship and Immigration Services (USCIS), which manages immigration benefits such as immigrant and non-immigrant petition and naturalization applications; and U.S. Immigration and Customs Enforcement (ICE), which enforces immigration law within the U.S., including deportation actions, raids and other investigations.

Numerous U.S. visas allow foreigners to come to the country for business and tourism, including:

- the E treaty trader or investor visas for certain non-U.S. citizens who want to trade or invest in a business,
- the EB-5, which provides a means for eligible immigrant investors to become "green card holders" after investing $1 million dollars,
- the L intracompany transfer,
- the H-1B specialty occupation,
- an extraordinary ability visa in science or business (O-1).
- For non-agricultural temporary workers, the H-2B visa is also a possibility.

All these visa options are off the table for non-U.S. citizens who are entering the U.S. to engage in cannabis-related activity, regardless of the legality of cannabis in the state they are visiting because of cannabis's CSA classification.

CBP is a foreigner's first encounter with DHS when seeking entry to the U.S. CBP has broad authority to seize and search electronic devices of anyone seeking entry to the U.S. It reported searching 30,200 devices at the U.S. border in 2017 alone (a 60-percent increase compared to 2016). Twenty percent of those searches were on devices owned by non-U.S. citizens. As a result of these electronic searches, non-U.S. citizens could be deemed inadmissible simply by communicating (via

email, Facebook, texts, etc.) a desire to consume cannabis or otherwise participate in the cannabis industry while in the U.S. The Constitution may not prove a viable argument at the border. Although the Constitution protects all people, the plenary power doctrine of the federal government has broad powers to adopt what would appear to be unconstitutional policies, whether that be the right to free speech or the right to unreasonable search and seizures. But due in large part to the plenary power doctrine, the executive branch of the U.S. can determine many polices and protective measures regarding control at U.S. borders and national security. The federal courts may interpret this differently in the future, but as of now, non-U.S. citizens should be prepared at the border.

CBP's broad authority to search phones and other electronic devices at the border can cause serious immigration issues. For example, a Chilean woman recently flew to the U.S. to visit her long-time boyfriend, a trip she has made numerous times in the past. At Los Angeles International Airport (LAX), CBP officers stopped and searched her, including her phone, where they discovered photos of a Colorado dispensary. Officers asked if she tried cannabis while on her previous visit to Colorado, and she replied, "Yes, it's legal there." With that moment of honesty, the woman was sent on a plane back to Chile and received a lifetime ban from entry to the U.S.

IN A Lot of Trouble

The INA lays out a complex system of laws regarding inadmissibility and deportability. INA set forth grounds for deportation and possible waivers or defenses to charges of deportation. Certain charges depend on an individual's status in the U.S. (i.e., immigrant or non-immigrant, legal or illegal). The INA refuses to admit anyone with a conviction for a violation (or a conspiracy or attempted violation) of any law or regulation related to a controlled substance, as defined in the CSA. Additionally, the INA broadly defines "conviction" as formal judgment of guilt of an alien entered by a court or, if adjudication has been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* (Latin for "no contest") or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered that some form of punishment, penalty or restraint on the alien's liberty be imposed.

Even if a conviction is pardoned or expunged, it can still be used for inadmissibility findings and deportation if officers discover the arrest through interviews, questionnaires or other means. Federal law defines what may be expunged in an immigration context, often allowing immigration officers to see otherwise "sealed" records.

In addition, lawful permanent residents are deportable if convicted of an aggravated felony at any time after entry. Aggravated felonies include specific classes of convictions in the INA, which may or may not be felonies under other state or federal laws. Illicit trafficking in a controlled substance is per se an aggravated felony, and any non-citizen working in a dispensary or cultivation business would fall under that definition.

Additionally, a non-U.S. citizen may be barred from U.S. entry merely if the government has reason to believe (based on reasonable, substantial and probative evidence) that the individual is connected to illicit trafficking in any controlled substance. Recently, at the 2018 AILA

Annual Conference on Immigration Law in San Francisco, a foreign national relayed what happened to him at the border. He works in security protection and advises many clients, including cannabis companies, on security issues. Due to some of the materials on his social media, the CBP officer was concerned that he was here to counsel and advise cannabis companies in the U.S. on how to strategically and efficiently guard their merchandise. Ultimately, he was allowed in for five days because he had tickets and hotel reservations to Disney and was with his family. Nevertheless, one must be very careful as aiding and abetting an illegal activity is taken seriously. Even services that are not directly related to cannabis production and appear to be peripheral may be subject to scrutiny.

Canada's legalization of recreational cannabis threatens to create even more headaches for those wishing to enter the U.S., either as tourists or on a more permanent basis. Given that CBP officers need only a "reason to believe" that an individual will violate U.S. law to deny entry (potentially with a lifetime ban), admitting to using cannabis, even legally in Canada, could be enough to lead border patrol officers to "reasonably believe" that the individual seeking entry will violate the law by using cannabis while in the U.S. This applies even more so to individuals involved in cannabis businesses, as CBP officers may assume that the potential entrant plans to further their business endeavor in the U.S.

Finally, immigration law requires "good moral character" to obtain many immigration benefits including becoming a naturalized citizen. A conviction or an admission of facts, which constitute the essential elements of a crime involving moral turpitude (which includes crimes involving intent to steal or defraud, sex offenses and trafficking of a controlled substance), legally prevents an individual from showing "good moral character." Furthermore, a conviction of a crime involving moral turpitude within five years automatically subjects a person to deportation and a ban from entering the U.S. for at least 10 years.

So long as there is a commercial element, participating in the cannabis industry remains a serious crime in immigration law—even if the sale occurred in a context in which the non-U.S. citizen reasonably believed his or her actions to be lawful (i.e., a successful Colorado dispensary owned and operated by a non-U.S. citizen).

Shimon Abta provides a final cautionary tale. Abta legally resided in the U.S. with his new wife on a B-1 visa (temporary business visitor). When he applied to become a permanent resident (with a green card), the USCIS discovered Abta had a medical marijuana card from Nevada and worked in the cannabis industry in Israel as an agronomist. Applying federal law, the USCIS threatened Abta with felony trafficking charges and forced him to leave the country, despite Abta's clearly lawful intent. To this day, Abta has been unable to return to the U.S.

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