Hastings Law Journal

Volume 73 | Issue 5 Article 13

7-2022

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Kevin Murphy

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KEVIN MURPHY[†]

California law allows an employer to refuse to hire an applicant or discharge an employee for consuming medical cannabis in order to treat a serious medical condition, even if an individual consumes cannabis at home during non-working hours.

For example, in 2001, employer RagingWire Telecommunications fired its newly hired employee—Gary Ross, a United States Veteran who sustained injuries while serving his country—for using medical cannabis at home during non-working hours to relieve the pain those injuries caused. Mr. Ross challenged his termination, and the California Supreme Court sided with RagingWire, finding that California's Compassionate Use Act did not protect medical cannabis patients from termination by their employers.

In contrast to California's lack of protection for medical cannabis patients, sixteen states provide some form of statutory protection for individuals like Mr. Ross. In order to protect employees, the California Legislature must enact legislation prohibiting employers from discriminating against qualified patients under California's Compassionate Use Act.

Enacting legislation to protect medical cannabis patients will restore California's place as a leader in the cannabis arena. More importantly, it will protect medical cannabis patients like Mr. Ross, who—without such legislation—will continue to have to make the impossible choice of choosing between treating their disabilities and keeping their job.

[†] J.D. Candidate 2022, University of California, Hastings College of the Law; Senior Production Editor, *Hastings Law Journal*. Thank you to Professor Steven Bonorris and Matthew Waldron for their guidance, support, and helpful comments. Further thanks to the Notes and Production staff of *Hastings Law Journal* for all of their hard work.

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INTRODUCTION

Sixteen states provide some form of statutory employment protection for individuals who use cannabis as a part of their state's medical cannabis program.[1] Despite being the first state to legalize medical cannabis and the sixth state to legalize recreational cannabis, California does not provide any form of employment protection for medical cannabis users.[2] California law allows an employer to refuse to hire an applicant or terminate an employee for consuming medical cannabis in order to treat a serious medical condition, even if an individual consumes cannabis during non-working hours.[3] To afford employment protection to medical cannabis patients, California must—for the first time in the cannabis context—be a follower and not a leader. The California Legislature must enact legislation prohibiting employers from discriminating against qualified patients under California's Compassionate Use Act. In doing so, the Legislature should adopt language that strikes a balance between employer and employee interests.

This Note will address the current gap in California medical cannabis legislation and the need for a legislative solution that will protect medical cannabis patients while addressing employer concerns. Part I will briefly discuss the history of cannabis regulation under federal and state law as well as the interaction between federal and state law,[4] starting first with the original federal prohibition of cannabis and ending with California's passage of Proposition 64, which decriminalized recreational cannabis use.[5] Part II will examine the intersection of medical cannabis and employment law, specifically detailing employers' and employees' interests and various states' successful and unsuccessful efforts to protect medical cannabis users from workplace

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1. ARIZ. REV. STAT. ANN. § 36-2813; ARK. CONST. amend. XCVIII § 3; CONN. GEN. STAT. ANN. § 21a-408p; DEL. CODE ANN. tit. 16 § 4905A; 410 ILL. COMP. STAT. ANN. 130/40; ME. REV. STAT. ANN. tit. 22, § 2430-C; MINN. STAT. ANN. § 152.32; NEV. REV. STAT. ANN. § 678C.850; NJ ST 24:6I-6.1; N.M. STAT. ANN. § 26-2B-9; N.Y. PUB. HEALTH LAW. § 3369; OKLA. STAT. ANN. tit. 63, § 427.8; 35 PA. STAT. ANN. § 10231.2103; 21 R.I. GEN. LAWS ANN. § 21-28.6-4; S.D. § 34-20G-22; W. VA. CODE ANN. § 16A-15-4.

2. *See State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last visited July 1, 2022); Thomas Fuller, *Recreational Pot is Officially Legal in California*, N.Y. TIMES (Jan. 1, 2018), https://www.nytimes.com/2018/01/01/us/legal-pot-california.html ("California is the sixth state to introduce the sale of recreational marijuana, after Colorado, Washington, Oregon, Alaska and Nevada.").

3. *See* Ross v. RagingWire Telecomm., Inc., 174 P.3d 200, 203 (Cal. 2008) ("Under California law, an employer may require preemployment drug tests and take illegal drug use into consideration in making employment decisions."); CAL. HEALTH & SAFETY CODE § 11362.45 ("Section 11362.1 does not amend, repeal, affect, restrict, or preempt: (f) The rights and obligations of public and private employers to maintain a drug and alcohol free workplace . . . or *affect the ability of employers to have policies prohibiting the use of cannabis by employees and prospective employees*, or prevent employers from complying with state or federal law.") (emphasis added); Loder v. City of Glendale, 927 P.2d 1200, 1222 (Cal. 1997) (holding that drug testing of all job applications is permissible); Smith v. Fresno Irrigation Dist., 84 Cal. Rptr. 2d 775, 778 (Cal. Ct. App. 1999) (stating that drug testing of an existing employee is permissible if there is individualized suspicion of drug use or if the employee is in a safety sensitive position).

4. *See infra* Part I.

5. *See id.*

discrimination.[6] Part III suggests a framework California should adopt, being mindful of the lessons learned from the multiple unsuccessful attempts by the Legislature to provide protection for employees.[7] This Note then briefly concludes.[8]

I. BACKGROUND

The history of cannabis regulation has gone from little to no federal oversight,[9] to a complete ban,[10] to state-level legalization for medical use in a majority of states,[11] and finally to the federal government signaling that it too may be willing to rethink its ban on cannabis use, with the recent passage of the "Marijuana Opportunity, Reinvestment and Expungement (MORE) Act" in the House of Representatives.[12] However, because it is still illegal under federal law, states' legalization of cannabis for medical or recreational use has created preemption issues regarding the interaction of federal and state law.[13] This Part will discuss the history of cannabis regulation, modern trends towards decriminalization, state law, and preemption.

A. ORIGIN AND HISTORY OF CANNABIS PROHIBITION

Until the late 1930s, the growth and use of cannabis were legal under federal law.[14] Then, in 1937, Congress passed the Marihuana Tax Act ("MTA"), which effectively criminalized cannabis.[15] The history of Congress's enactment of the MTA is littered with racism and xenophobia, as evidenced by the name of the MTA itself.[16] For much of American history, the drug "cannabis" was not referred to as "marijuana."[17] Then, during the Mexican Revolution, numerous individuals from Mexico immigrated to the United States and brought with them cannabis, which they referred to as "marihuana."[18] As a tool to stoke xenophobic

6. *See infra* Part II.

7. *See infra* Part III.

8. *See infra* Part IV.

9. *See* LISA N. SACCO, DRUG ENFORCEMENT IN THE UNITED STATES: HISTORY, POLICY, AND TRENDS 3 (2014).

10. *See* 21 U.S.C. § 841.

11. *See State Medical Marijuana Laws*, *supra* note 2.

12. *See* Marijuana Opportunity Reinvestment and Expungement (MORE) Act of 2019, S. 2227, 116th Cong. (2019), https://www.govtrack.us/congress/bills/116/s2227/text/is [hereinafter MORE Act of 2019, S. 2227]; Catie Edmondson, *House Passes Landmark Bill Decriminalizing Marijuana*, N.Y. TIMES (Dec. 4, 2020), https://www.nytimes.com/2020/12/04/us/politics/house-marijuana.html.

13. *See* Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 6–7 (2013).

14. *See* SACCO, *supra* note 9, at 3.

15. *Id.* at 4; *Marijuana Timeline*, FRONTLINE, https://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html (last visited July 1, 2022) ("The statute effectively criminalized marijuana, restricting possession of the drug to individuals who paid an excise tax for certain authorized medical and industrial uses.").

16. *See generally* Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 797–800 (2019).

17. *Id.* at 797.

18. *Id.*

sentiments and to marginalize Mexican immigrants, anti-cannabis advocates opted for the term "marihuana" over "cannabis" when describing why the drug should be criminalized.[19] Referring to cannabis as "marihuana" "helped to portray [it] as something external, something that is invading the U.S . . . knowing that it sounds Hispanic, [that] it sounds foreign."[20] Additionally, in the lead up to the MTA's passage, the main proponent of the bill and the Commissioner of the Federal Bureau of Narcotics, Henry Anslinger, used overtly racist language to encourage the drug's criminalization, claiming that "[m]ost marijuana smokers are Negroes, Hispanics, Filipinos and entertainers," and that cannabis was the "most violence-causing drug in the history of mankind."[21] Because of Anslinger's comments, Congress enacted the MTA.[22]

Thirty years after the MTA'a enactment, the Supreme Court effectively declared the it unconstitutional in *Leary v. United States*.[23] In response to *Leary* and as a part of President Nixon's "War on Drugs," Congress passed the Controlled Substances Act ("CSA").[24] Although it has well-known medicinal value,[25] the CSA classifies cannabis as a Schedule I drug, meaning that it has "a high potential for abuse," "no currently accepted medical use," and "a lack of accepted safety for use . . . under medical supervision."[26] As a result, it is a federal crime to "possess,"[27] "manufacture, distribute, or dispense" cannabis.[28]

Like the MTA, the passage of the CSA and the listing of cannabis as a Schedule I drug was not without criticism or controversy. A commission formed by President Nixon in 1969 concluded that cannabis "was not as dangerous as perceived, and recommended decriminalization."[29] Against the report's recommendation, Nixon advocated for criminalization.[30] Furthermore, John Ehrlichman, President Nixon's assistant for domestic affairs, stated in 1994 that

19. *See* Alfonso Serrano, *Weed All About It: The Origins of the Word 'Marijuana*,*'* ALJAZEERA AM. (Dec. 14, 2013, 2:59 PM), http://america.aljazeera.com/articles/2013/12/14/weed-all-about-ittheoriginsofthewordamarijuanaaintheus.html.

20. *Id.*

21. *Id.*

22. Vitiello, *supra* note 16, at 800.

23. 395 U.S. 6, 12 (1969).

24. SACCO, *supra* note 9, at 5; Controlled Substances Act, 21 U.S.C. § 801.

25. NAT'L ACAD. OF SCIS., ENG'G & MEDICINE, THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS FOR RESEARCH 13 (2017) [hereinafter THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS].

26. 21 U.S.C. § 812; Matthew A. Christianson, *A Great Schism: Social Norms and Marijuana Prohibition*, 4 HARV. L. & POL'Y REV. 229, 233–34 (2010).

27. 21 U.S.C. § 844.

28. *Id.* § 841.

29. *See* Robert Solomon, *Racism and Its Effect on Cannabis Research*, 5 CANNABIS & CANNABINOID RSCH. 2, 3 (2020).

30. *Transcript of the President's News Conference on Foreign and Domestic Matters*, N.Y. TIMES (Mar. 25, 1972), https://www.nytimes.com/1972/03/25/archives/transcript-of-the-presidents-news-conference-on-foreign-and.html?searchResultPosition=9 ("I read it and reading it did not change my mind. I oppose the legalization of marijuana and that includes it sale, its possession, and its use.").

the Nixon administration used the criminalization of cannabis as a tool to arrest anti-war and Black Americans.[31] Nonetheless, cannabis has remained a Schedule I drug since the CSA's enactment.[32]

B. MODERN TRENDS

Cannabis's continued placement as a Schedule I drug should not be interpreted as a proposition that the federal government's attitude towards cannabis has remained the same since the CSA's enactment. Pro-cannabis policies are increasingly politically popular.[33] For example, current federal law "expressly allows for the distribution of hemp-derived CBD products that contain 0.3% tetrahydrocannabinol (THC) or less to be sold."[34] Additionally, there have been signs indicating that both the executive and legislative branches support removing cannabis from the list of Schedule I drugs, or at the very least, are willing to tolerate states' recreational and medical cannabis laws.[35] For example, in 2009, David Ogden—Deputy Attorney General at the Department of Justice ("DOJ")—sent a memorandum to United States Attorneys directing them to focus their prosecutorial efforts on "traffickers of illegal drugs" and "commercial enterprises that unlawfully market and sell marijuana" and not on individuals who are in compliance with their state's medical cannabis laws.[36] As a follow up to the Ogden memorandum, Deputy Attorney General James Cole sent a memorandum in 2013 addressing how federal prosecutors should respond to multiple states legalizing recreational cannabis.[37] The Cole memorandum reaffirmed the theme of the Ogden memorandum, reiterating that prosecutors should use their federal resources for the "most significant threats," such as

31. *See* Dan Baum, *Legalize It All*, HARPER'S MAG. (April 2016), https://harpers.org/archive/2016/04/legalize-it-all/; *John D. Ehrlichman*, BRITANNICA, https://www.britannica.com/biography/John-D-Ehrlichman (last visited July 1, 2022).

32. Catherine Saint Louis, *D.E.A. Keeps Marijuana on List of Dangerous Drugs, Frustrating Advocates*, N.Y. TIMES (Aug. 11, 2016), https://www.nytimes.com/2016/08/12/health/dea-keeps-marijuana-on-list-of-dangerous-drugs-frustrating-advocates.html?searchResultPosition=5.

33. *See* Eileen Sullivan, *Trump Says He's Likely to Back Marijuana Bill, in Apparent Break with Sessions*, N.Y. TIMES (June 8, 2018), https://www.nytimes.com/2018/06/08/us/politics/trump-marijuana-bill-states.html; Isabella Kwai, *U.N. Reclassifies Cannabis as Less Dangerous Drug*, N.Y. TIMES (Dec. 2, 2020), https://www.nytimes.com/2020/12/02/world/europe/cannabis-united-nations-drug-policy.html (stating that with the approval of the United States and 26 other counties, the U.N. removed "cannabis for medical purposes from a category of the world's most dangerous drugs").

34. Tonya M. Esposito, Renee B. Appel & Jonathan Juie, *CBD is Everywhere – But Where Does the FDA Stand?*, SEYFARTH (Aug. 8, 2019), https://laborandemploymentlawcounsel.com/2019/08/cbd-is-everywhere-but-where-does-the-fda-stand/.

35. *See* Kyle Jaeger, *House Postpones Vote on Bill to Federally Legalize Marijuana Until After Election*, MARIJUANA MOMENT (Sept. 17, 2020), https://www.marijuanamoment.net/house-postpones-vote-on-bill-to-federally-legalize-marijuana-until-after-election/; Sullivan, *supra* note 33.

36. Memorandum from David W. Ogden, Deputy Att'y Gen., to Selected United States Attorneys (Oct. 19, 2009), https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states.

37. *See* Memorandum from James M. Cole, Deputy Att'y Gen., to All United States Attorneys (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

revenue tied to cannabis sales that benefit "criminal enterprises, gangs, and cartels" and not on individuals consuming recreational cannabis.[38]

However, in a 2018 memorandum, Attorney General Jeff Sessions rescinded both the Cole and Ogden memoranda.[39] Sessions sought to restore enforcement of the CSA as it related to cannabis.[40] Although Sessions' memorandum struck fear in the cannabis community, it did not make any meaningful change and, oddly, may have helped cannabis advocates.[41] Since the memorandum was sent, federal prosecutors have essentially continued to treat cannabis as prescribed in the Cole and Ogden memoranda, using their federal resources for only the most serious threats and not interfering with state-run medical cannabis programs.[42] Moreover, both Democrats and Republicans opposed the Sessions memorandum.[43] In fact, the Sessions memorandum sparked the introduction of a bipartisan bill by Senators Cory Gardner and Elizabeth Warren that sought to bar the federal government from interfering with state cannabis laws.[44]

Congress, for its part, has also shown support for cannabis legalization.[45] In 2013, Congress approved the Rohrabacher-Farr amendment.[46] That amendment prevents the DOJ from using federal money to prosecute individuals who use medical cannabis in compliance with their state's laws.[47] The amendment is still in effect as of the writing of this paper.[48]

Perhaps the most promising congressional action thus far was the House of Representative's passing the MORE Act in December 2020 with bipartisan support. [49] The Act would have completely removed cannabis from the CSA.[50] Though a promising sign, the bill did not advance in the Senate. But the Act was

38. *Id.*

39. *See* Memorandum from Jefferson B. Sessions, III, Att'y Gen., to All United States Attorneys (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download.

40. *See id*.

41. Kyle Jaeger, *One Year After Jeff Sessions Rescinded a Federal Marijuana Memo, the Sky Hasn't Fallen*, MARIJUANA MOMENT (Jan. 4, 2019), https://www.marijuanamoment.net/one-year-after-jeff-sessions-rescinded-a-federal-marijuana-memo-the-sky-hasnt-fallen/.

42. *Id.*

43. *See id.*

44. *See* Sullivan, *supra* note 33.

45. *Interpreting the Renewed Rohrabacher-Farr Amendment: A Loophole for Enforcement?*, THOMPSON COBURN LLP: BLOG (May 31, 2017), https://www.thompsoncoburn.com/insights/blogs/tracking-cannabis/post/2017-05-31/interpreting-the-renewed-rohrabacher-farr-amendment-a-loophole-for-enforcement.

46. *See id.*

47. *See id.*; *see also* Zachary S. Roman, *Tenth Circuit Decision Clears the Way for Further Judicial Consideration of Application of Recently Reenacted Rohrabacher-Farr Amendment*, REED SMITH (Dec. 27, 2019), https://www.reedsmith.com/en/perspectives/2019/12/tenth-circuit-decision-clears-the-way-for-further-judicial-consideration (citing United States v. McIntosh, 833 F.3d 1163, 1177 (9th Cir. 2016)).

48. *See* Roman, *supra* note 47.

49. *See* Edmondson, *supra* note 12.

50. *See* MORE Act of 2019, S. 2227, *supra* note 12.

reintroduced in May 2021, passed by the House on April 1, 2022, and currently awaits a vote in the Senate.[51]

C. STATE LAW

The recent change in tone from the federal government regarding cannabis was likely due to the dramatic increase in state medical and recreational cannabis legalization over the last twenty-five years.[52] Spurred by evidence of cannabis's medicinal value, such as its ability to relieve chronic pain,[53] thirty-seven states and four territories currently permit cannabis for medical use.[54] In addition, eighteen states have legalized cannabis for recreational use.[55] As stated previously, California was the first state to enact a medical cannabis program in 1996 and one of the first to legalize recreational use.[56] Because this Note focuses on the intersection of medical cannabis and employment law in California, discussion in this section will be limited to California's legal framework of medical cannabis. Please note that, although there are many similarities between medical cannabis laws amongst states, the details of each state's laws vary. For example, Minnesota limits the ingestion of medical cannabis to liquid or pill form, while California allows medical users to smoke cannabis.[57] What follows is a general discussion of the current law in California and its interaction with federal law.

In 1996, California voters approved Proposition 215, also known as the Compassionate Use Act ("CUA").[58] CUA permitted "qualified patients"[59] with a "serious medical condition"[60] to possess and consume medical cannabis after

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51. *History-Making Legislation to Repeal Marijuana Prohibition Reintroduced*, NORML (May 28, 2021), https://norml.org/blog/2021/05/28/history-making-legislation-to-repeal-marijuana-prohibition-reintroduced/; Marijuana Opportunity Reinvestment and Expungement (MORE) Act, H.R. 3617, 117th Cong. (2021) CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/3617/all-actions (last visited July 1, 2022).

52. *See State Medical Marijuana Laws*, *supra* note 2.

53. *See* THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS, *supra* note 25, at 85 ("In adults with chronic pain, patients who were treated with cannabis or cannabinoids are more likely to experience a clinically significant reduction in pain symptoms.").

54. *See State Medical Marijuana Laws*, *supra* note 2.

55. *See id*.

56. *See id.*; Fuller, *supra* note 2.

57. *Compare* MINN. STAT. § 152.22 ("Medical cannabis . . . [must] be delivered in the form of: (1) liquid . . . or (5) any other method, *excluding smoking*, approved by the commissioner.") (emphasis added), *with* CAL. HEALTH & SAFETY CODE § 11362.1 (stating that it "shall be lawful under state and local law" to "smoke or ingest cannabis or cannabis products").

58. *See* BILL JONES, STATEMENT OF VOTE: NOVEMBER 5, 1996, at 42 (1996), https://elections.cdn.sos.ca.gov/sov/1996-general/sov-complete.pdf; CAL. HEALTH & SAFETY CODE §§ 11362.1–11362.9.

59. CAL. HEALTH & SAFETY CODE § 11362.7 ("Qualified patient means a person who is entitled to the protections of Section 1132.6, but who does not have an identification card issued pursuant to this article.").

60. *Id.* ("Serious medical condition means all of the following medical conditions: (1) Acquired immune deficiency syndrome (AIDS); (2) Anorexia; (3) Arthritis; (4) Cachexia; (5) Cancer; (6) Chronic Pain; (7) Glaucoma; (8) Migraine; (9) Persistent muscle spasms, including, but not limited to, spasms associated with multiple sclerosis; (10) Seizures, including, but not limited to, seizures associated with epilepsy; (11) Severe

receiving a physician's recommendation.[61] Additionally, CUA established an identification card system where qualified patients can apply and receive a medical cannabis identification card.[62] The card "is used to help law enforcement identify the cardholder as being able to legally possess certain amounts of medical marijuana under specific conditions."[63] However, CUA does not require qualified patients to obtain the card in order to receive medical cannabis.[64] In fact, qualified patients are incentivized to not apply for an identification card because they must pay a fee and renew the card annually.[65] Because of this, the true number of California medical cannabis users is unknown.[66] In the fiscal year 2019–2020, the California Department of Public Health stated that California counties issued only 3,335 identification cards, down from a high of 12,659 cards issued in 2012.[67] However, the estimated number of medical cannabis patients is much higher, as current estimates are that between 915,000 and 1.2 million Californians currently consume medical cannabis.[68]

In 2016, twenty years after the passage of the CUA, California voters again voted to expand access to cannabis by approving Proposition 64.[69] Proposition 64 makes it lawful for persons twenty-one years of age or older to "possess, process, transport, purchase . . . smoke or ingest cannabis or cannabis products."[70] Importantly, for purposes of this paper, Proposition 64 explicitly does not "affect the ability of employers to have policies prohibiting the use of cannabis by employees and prospective employees."[71]

D. INTERACTION BETWEEN STATE MEDICAL CANNABIS LAWS AND FEDERAL LAW

Before turning to the issues raised in the employment arena as a result of states legalizing medical cannabis, a brief discussion of the interaction between

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nausea; (12) Any other chronic or persistent medical symptom that either: (A) Substantially limits the ability of the person to conduct one or more major life activities as defined in the federal Americans with Disabilities Act of 1990 . . . (B) if not alleviated, may cause serious harm to the patient's safety or physical or mental health.").

61. CAL. HEALTH & SAFETY CODE §§ 11362.1–11362.9.

62. *See id.*

63. *See Medical Marijuana Identification Card: Frequently Asked Questions (FAQs)*, CAL. DEP'T OF PUB. HEALTH, https://www.cdph.ca.gov/Programs/CHSI/Pages/MMICP-FAQs.aspx (last visited July 1, 2022).

64. CAL. HEALTH & SAFETY CODE §§ 11362.1–11362.9.

65. *See id.* Applicants do not, however, have to pay sales and use tax when making retail purchases of medical cannabis. *See Medical Marijuana Identification Card: Frequently Asked Questions (FAQs)*, *supra* note 63.

66. *Number of Legal Medical Marijuana Patients*, PROCON (May 17, 2018), https://medicalmarijuana.procon.org/number-of-legal-medical-marijuana-patients/.

67. *Patient, Primary Caregiver, Medi-Cal and CMSP Card Data*, CAL. DEP'T OF PUB. HEALTH, https://www.cdph.ca.gov/Programs/CHSI/Pages/MMP-Card-Data.aspx (last visited July 1, 2022).

68. *See Number of Legal Medical Marijuana Patients*, *supra* note 66.

69. *See* ALEX PADILLA, STATEMENT OF VOTE: NOVEMBER 8, 2016 GENERAL ELECTION 12 (2016), https://elections.cdn.sos.ca.gov/sov/2016-general/sov/2016-complete-sov.pdf.

70. CAL. HEALTH & SAFETY CODE §§ 11362.1–11362.9

71. *Id.*

state law and federal law is warranted because any legislature enacting protections for cannabis users must be mindful that cannabis is still illegal under federal law.[72] For the most part, state cannabis laws and federal laws have been able to coexist.[73]

Starting with the CSA, under the Supremacy Clause of the Constitution, courts can void state medical cannabis laws if the CSA preempts those laws; however, most courts have found that the CSA does not preempt a state's medical cannabis law.[74] A preemption issue arises anytime Congress and the states pass laws that govern the same activity.[75] Article VI of the Constitution contains the Supremacy Clause.[76] That clause "provides that the Constitution, and laws and treaties made pursuant to it, are the supreme law of the land."[77] Thus, when state law conflicts with federal law, federal law displaces state law.[78] Generally, there are two broad types of preemption: express and implied preemption.[79] Under express preemption, Congress explicitly states its intention as to whether the federal law at issue preempts state law.[80] In contrast, under implied preemption, courts infer federal preemption based on Congress's actions that it intended to preempt state law even though it did not expressly state it.[81] Implied preemption comes in three forms: (1) field preemption, where "preemption will be found if there is a clear congressional intent to have federal law occupy a particular area of law";[82] (2) conflict preemption, where a federal and state law "are mutually exclusive," such that "a person cannot comply with both";[83] and (3) obstacle preemption, where "a state or local law is deemed to impede the achievement of a federal objective."[84] The CSA includes an express preemption clause.[85] It says,

> [n]o provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates,

72. *See* 21 U.S.C. § 812.

73. *See* Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 106–07, 110–11 (2015).

74. *See id.* at 110; Qualified Patients Ass'n v. City of Anaheim, 115 Cal. Rptr. 3d 89, 105 (Cal. Ct. App. 2010) ("[B]ecause the CUA and the MMPA do not mandate conduct that federal law prohibits, nor pose an obstacle to federal enforcement of federal law, the enactments' decriminalization provisions are not preempted by federal law."). *But see* Emerald Steel Fabricators, Inc. v. Bureau of Lab. and Indus., 230 P.3d 518, 529 (Or. 2010) (holding that the CSA preempted Oregon's medical cannabis law that authorized the use of cannabis because "affirmatively authorizing a use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act").

75. *See* Chemerinsky et al., *supra* note 73, at 111.

76. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 452 (5th ed. 2017).

77. *Id.*

78. *See id.*

79. *See id.*

80. *See id.* at 454.

81. Mikos, *supra* note 13, at 9–10.

82. CHEMERINSKY, *supra* note 76, at 467.

83. *Id.* at 461.

84. *Id.* at 462.

85. *See* 21 U.S.C. § 903.

> including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.[86]

In interpreting the above provision under an express preemption analysis, it is possible to comply with both the CSA and a state's medical or recreational cannabis law.[87] As one commentator stated, "[o]nly if a state law required a citizen to possess, manufacture, or distribute marijuana in violation of federal law would it be impossible for a citizen to comply with both state and federal law."[88] For example, because California's Compassionate Use Act does not require qualified patients to possess cannabis, it is not preempted by the CSA.[89] Nonetheless, courts have also interpreted the CSA's preemption provision to have the same meaning as the doctrines of conflict and obstacle preemption, meaning "state law is preempted by the CSA if it makes compliance with federal law impossible or if it undermines the full achievement of Congress's objectives."[90] Still, even under the conflict and obstacle preemption doctrines, the CSA has not preempted most state cannabis laws, including California's Compassionate Use Act.[91] Furthermore, in a preview of the discussion that will follow on the intersection of medical cannabis laws and employment law, courts have found that the CSA does not preempt state employment laws protecting medical cannabis users.[92]

Aside from the CSA, two additional federal laws have the potential to conflict with state medical cannabis laws: The Drug Free Workplace Act ("DFWA") and the Department of Transportation ("DOT") regulations on illegal drug use.[93] Under the DFWA, employers with government contracts over $250,000 must comply with its provisions, which include maintaining a drug-free workplace.[94] However, the DFWA does "not require drug testing or require

86. *Id.*

87. *See* Chemerinsky et al., *supra* note 73, at 106.

88. *Id.*

89. *See id.*; CAL. HEALTH & SAFETY CODE § 11362.765.

90. Mikos, *supra* note 13, at 14.

91. *See* Chemerinsky et al., *supra* note 73, at 107, 110–11; Qualified Patients Ass'n v. City of Anaheim, 115 Cal. Rptr. 3d 89, 105 (Cal. Ct. App. 2010); *see also* Gonzales v. Raich, 545 U.S. 1, 9 (2005) (holding that regulation of intrastate cannabis cultivation was a "valid exercise of federal power," but not addressing whether the CSA preempted the CUA). *But see* Emerald Steel Fabricators, Inc. v. Bureau of Lab. and Indus., 230 P.3d 518, 529 (Or. 2010).

92. *See* Noffsinger v. SSC Niantic Operating Co., 273 F. Supp. 3d 326, 334 (D. Conn. 2017) (stating that the CSA does not regulate employment practices in any manner).

93. *See* 41 U.S.C. §§ 8101–8106; 49 C.F.R. § 40.23.

94. These provisions include (1) "publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance [such as cannabis] is prohibited in the person's workplace," (2) "establishing a drug-free awareness," (3) notifying an employee that as a condition of employment, the employee must "notify the employer of any criminal drug statute conviction for a violation occurring in the workplace," (4) "imposing a sanction on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by any employee who is convicted" of a

that an employer take any disciplinary action against an employee who tests positive for illegal drugs."[95] Furthermore, because the DFWA's jurisdiction resides only in the workplace, "[a]n employer could still obtain drug-free workplace certification even if it retains employees who test positive on a drug test but do not use or possess drugs at work."[96] Thus, a statute protecting medical cannabis users would violate the DFWA only if it allowed users to possess or ingest cannabis in the workplace.[97] Because most state statutes protecting medical cannabis users do not allow possession or ingestion in the workplace, the DFWA and state law rarely conflict.[98]

The DOT regulates workers such as truck drivers, pilots, flight attendants, air traffic controllers, school bus drivers, and ship captains.[99] DOT regulations state that if an employee has a positive drug test result for cannabis, they "must immediately [be] remove[d] . . . from performing safety-sensitive functions."[100] To avoid conflicting with DOT regulations, almost all state laws protecting medical cannabis users from termination of employment contain a provision that exempts DOT regulated employers from abiding by the state law.[101]

II. MEDICAL CANNABIS AND EMPLOYMENT LAW

In response to numerous states legalizing medical cannabis, individuals registered under their state's medical cannabis program ("patient-employees") have struggled to reconcile their right to use medical cannabis to treat their disabilities with their employers' policies against cannabis use.[102] On one hand, there are the interests of patient-employees who need to use cannabis to treat their disabilities.[103] On the other hand, there are the interests of employers who

criminal drug offense occurring in the workplace, and (5) "making a good faith effort to continue to maintain a drug-free workplace through implementation" of these provisions. *See* 41 U.S.C. §§ 8101–8106.

95. *See* Stacy Hickox, *It's Time to Rein in Employer Drug Testing*, 11 HARV. L. & POL'Y REV. 419, 433 (2017).

96. *Id.*

97. *See id.*

98. *See, e.g.*, Noffsinger v. SSC Niantic Operating Co., 338 F. Supp. 3d 78, 84 (D. Conn. 2018) (holding that the DFWA did not conflict with Connecticut's medical cannabis statute because the DFWA does not require drug testing, nor does it prohibit federal contractors from employing someone who uses illegal drugs outside the workplace).

99. Jim L. Swart, *DOT "Medical Marijuana" Notice*, U.S. DEP'T OF TRANSP. (Nov. 19, 2019), https://www.transportation.gov/odapc/medical-marijuana-notice. Employers and employees can determine if they are subject to DOT regulations by using this website: https://www.transportation.gov/odapc/am-i-covered#no-back.

100. 49 C.F.R. § 40.23.

101. *See, e.g.*, DEL. CODE ANN. tit. 16, § 4905A.

102. *See, e.g.*, Coats v. Dish Network LLC, 350 P.3d 849, 850, 852–53 (Colo. 2015) (holding that a quadriplegic employee's use of medical cannabis outside of working hours and in compliance with Colorado's Medical Marijuana Amendment, was "unlawful under federal law," and thus termination by his employer for using medical cannabis was not in violation of Colorado's Lawful Activities Statute).

103. *See, e.g.*, Ross v. RagingWire Telecomm., Inc., 174 P.3d 200, 203 (Cal. 2008) (stating that the plaintiff, who suffered injuries while serving in the United States Air Force, began to use cannabis to treat his pain because he could not "obtain relief from pain through other medications").

want to avoid employing an individual who may be impaired on the job.[104] These competing interests often arise in three key areas: civil liability, impairment, and drug testing. This Part will first discuss those key issues because they affect every state that has legalized medical cannabis. Then, discussion will focus on some of the legal challenges patient-employees have exercised in California, specifically focusing on the seminal California Supreme Court case, *Ross v. RagingWire Telecommunications Inc.*,[105] before finally turning to an examination of states that have enacted employment-protection laws that prohibit employers from terminating patient-employees based on their status as medical cannabis patients.

A. CIVIL LIABILITY, IMPAIRMENT, AND DRUG TESTING

On-the-job impairment, employee drug testing, and civil liability concerns affect almost all employers and patient-employees.[106] In states that do not provide statutory protection for patient-employees, employer termination policies for medical cannabis use are often overinclusive—negatively impacting patient-employees who are not impaired on the job and who do not increase the likelihood that an employer will face civil liability.[107]

Like any other potentially mind-altering substance, such as alcohol, cannabis raises the concern that patient-employees using cannabis will lead to civil liability resulting from on-the-job injuries and accidents.[108] In addition, employers are concerned about absenteeism and a lack of productivity from employees that use medical cannabis.[109] Unlike alcohol, there currently is no test that can reliably measure whether or not a patient-employee is impaired on the job due to cannabis.[110] Quest Diagnostics, one of the leading drug testing

104. *See* 41 U.S.C. §§ 8101–8106; Hickox, *supra* note 95, at 427 (stating that employers drug test to "protect the safety of employees and the general public, and to reduce costs associated with absenteeism, medical claims, and reduced productivity associated with drug use").

105. 174 P.3d 200 (Cal. 2008).

106. *See Policies for Marijuana Use in the Workplace*, SHRM (Dec. 14, 2015), https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/policies-for-marijuana-use-in-the-workplace.aspx (stating that only sixteen to twenty percent of surveyed organizations "do not conduct drug testing" for cannabis use for "any of their employees").

107. *See* Hickox, *supra* note 95, at 421.

108. *See id.* at 422; George Fitting, *Careless Conflicts: Medical Marijuana Implication for Employer Liability in the Wake of* Vialpando v. Ben's Automotive Services, 102 IOWA L. REV. 259, 270 (2016) (stating that employers could be liable for injuries caused by their employees under the tort theories of respondeat superior and negligent hiring); Megan Gates, *The Science Behind Marijuana Testing at Work*, SHRM (Feb. 5, 2020), https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/the-science-behind-marijuana-testing-at-work.aspx (stating that "the ability to process information, make a quick decision and act accordingly can be affected when under the influence of marijuana" and "in some cases cause catastrophic, unintended effects"); Stephanie Spiers, *Will the Smoke Blow Over: Employers' Concerns as States Expand Protections for Medical Marijuana Users*, 36 HOFSTRA LAB. & EMP. L.J. 481, 514–15 (2019) ("Considering the different methods for which marijuana can be administered in conjunction with the concentration levels of THC, a major concern for employers is the duration of an employee's impairment or 'high'").

109. *See* Hickox, *supra* note 95, at 422.

110. *See Frequently Asked Questions: Marijuana*, QUEST DIAGNOSTICS, https://www.questdiagnostics.com/dms/Documents/Employer-Solutions/Brochures/marijuana-FAQ/Quest%20Marijuana%20FAQ.pdf

providers for employers, states—in regard to cannabis testing—that "while employment policies often prohibit employees from using drugs or being impaired at the worksite or during work hours, there is currently no drug workforce test . . . that can inform an employer as to whether an employee is impaired."[111] This presents several problems. Without the ability to definitively determine impairment, an employer is left with less-than-satisfactory options to judge whether an employee was impaired or not.[112]

Unsurprisingly, many employers, in an effort to minimize risk, opt for a zero-tolerance policy,[113] meaning that any positive test for cannabis can result in automatic termination of the patient-employee.[114] This approach is likely overinclusive because depending on a variety of factors, such as whether a patient-employee is a frequent or infrequent cannabis user, a positive drug test could indicate cannabis use that occurred between one and thirty days prior to the drug test.[115] More importantly, a positive drug test does not indicate whether the patient-employee was ever impaired, let alone impaired on the job.[116]

This problem is best exemplified by the Colorado Supreme Court case *Coats v. Dish Network, LLC*.[117] In that case, defendant Dish Network fired plaintiff Brandon Coats after Mr. Coats tested positive for cannabis.[118] Mr. Coats, a quadriplegic with limited use of his hands, had been working for Dish for three-years as a "telephone customer service representative" before his termination.[119] Due to his "paralyzed condition," Mr. Coats experiences "involuntary muscle movements, or spasms, which are both painful and embarrassing."[120] Finding that no other medication quelled his muscle spasms, Mr. Coats turned to medical cannabis for relief.[121] The cannabis dramatically decreased his muscle spasms and improved his quality of life.[122] Despite consuming medical cannabis "at home, after work, and in accordance with his [cannabis] license and Colorado state law," Dish terminated Mr. Coats after his

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[https://web.archive.org/web/20200320054025/https://www.questdiagnostics.com/dms/Documents/Employer-Solutions/Brochures/marijuana-FAQ/Quest%20Marijuana%20FAQ.pdf] (last visited July 1, 2022).

111. *Id.*

112. *See* Gates, *supra* note 108 ("What you need to remember is it doesn't matter if it's urine, oral fluid or hair testing—it just reflects use . . . [i]t doesn't inform you whether someone was impaired or what their usage patterns are.").

113. *See Policies for Marijuana Use in the Workplace*, *supra* note 106 ("The majority of HR professional indicated their organizations have a zero-tolerance policy (i.e., use is not permitted for any reason) (73%–82%).").

114. *See* Laura P. Johnson, *Drug Testing: Is Zero Tolerance Still the Best Policy?*, ALLEN & GOOCH (May 15, 2019), https://www.allengooch.com/employee-drug-screen/.

115. *See* Hickox, *supra* note 95, at 421; QUEST DIAGNOSTICS, THE NEW AGE OF MARIJUANA 11 (2019).

116. *See Frequently Asked Questions: Marijuana*, *supra* note 110.

117. *See* Coats v. Dish Network, LLC, 350 P.3d 849 (Colo. 2015).

118. *See id.* at 850–51.

119. Brief for Petitioner at 18, Coats v. Dish Network, LLC, 350 P.3d 849 (Colo. 2015), 2014 WL 3738680, at *18–20.

120. *Id.*

121. *Id.*

122. *Id.*

positive drug test in conformity with its drug-free workplace policy.[123] Mr. Coats subsequently sued Dish, and the Colorado Supreme Court found that his termination was lawful.[124]

Instead of focusing on the court's legal reasoning, the more important takeaway from this case, for this Note's purposes, is that it exemplifies how an employer's zero-tolerance drug policy can be overinclusive and harm individuals like Mr. Coats, who allegedly "was a productive employee" who "received satisfactory performance reviews" and was never suspected "of being impaired or under the influence at work."[125] Additionally, the problem exemplified by the *Coats* decision will likely become more prevalent as more states legalize medical and recreational cannabis.[126] Since 2015, positive cannabis drug tests in the U.S. workforce have increased by almost thirty percent.[127]

Without any protections in place, a positive drug test, in most cases, gives an employer the right to terminate an employee like Mr. Coats—even if that employee was not actually impaired on the job.[128] In response to this dilemma, employees have used several different legal methods to challenge their employers' adverse action.[129] Ultimately, as the next section will detail by looking through the lens of *Ross v. RagingWire Telecommunications Inc.*,[130] seeking judicial intervention has been largely unsuccessful in California and other states that do not provide express statutory protection for patient-employees.[131]

B. THE NEED FOR STATUTORY PROTECTIONS IS CONSISTENTLY EVIDENCED BY CASE LAW

Ross was one of the first cases that addressed how a state's medical cannabis statute affects employment law. It also demonstrated that courts will almost always uphold an employer's termination of a patient-employee based

123. Coats v. Dish Network, LLC, 350 P.3d 849, 850 (Colo. 2015); Connor P. Burns, *I Was Gonna Get a Job, but Then I Got High: An Examination of Cannabis and Employment in the Post-Barbuto Regime*, 99 B.U. L. REV. 643, 662 (2019) ("As Brandon Coats put it, 'I was under the impression that we had passed a law, and we had made it legal.'").

124. *Coats*, 350 P.3d at 851.

125. Brief for Petitioner at 19, Coats v. Dish Network, LLC, 350 P.3d 849 (Colo. 2015), 2014 WL 3738680, at *18–20; *see* Hickox, *supra* note 95, at 421.

126. *See Workforce Drug Testing Positivity Climbed to Highest Rate in 16 Years, New Quest Diagnostics Drug Testing Index Analysis Finds*, QUEST DIAGNOSTICS (Aug. 25, 2020), https://newsroom.questdiagnostics.com/2020-08-25-Workforce-Drug-Testing-Positivity-Climbed-to-Highest-Rate-in-16-Years-New-Quest-Diagnostics-Drug-Testing-Index-TM-Analysis-Finds.

127. *See id.*

128. *See, e.g.*, *Coats*, 350 P.3d, at 851.

129. *See infra* Part II(B).

130. 174 P.3d 200 (Cal. 2008).

131. *See* Emerald Steel Fabricators, Inc. v. Bureau of Lab. and Indus., 230 P.3d 518, 536 (Or. 2010); Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC, 257 P.3d 586, 597 (Wash. 2011); Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 431 (6th Cir. 2012); Garcia v. Tractor Supply Company, 154 F. Supp. 3d 1225, 1230 (D.N.M. 2016); Coles v. Harris Teeter, LLC, 217 F. Supp. 3d 185, 188–89 (D.D.C. 2016).

on the employee's status as a medical cannabis patient or a positive drug test, unless the state provides express statutory protections for patient-employees.[132] In *Ross*, plaintiff Gary Ross was a medical cannabis user under California's Compassionate Use Act.[133] Mr. Ross used medical cannabis to treat back injuries "that he sustained while serving in the United States Air Force."[134] As a part of his job offer, defendant RagingWire required that Mr. Ross take a drug test.[135] Mr. Ross informed both the clinic that administered the test and RagingWire that he used medical cannabis to treat his back injuries.[136] Despite the advanced warning, upon receipt of his positive test, RagingWire fired Mr. Ross.[137] Mr. Ross sued RagingWire, arguing that it violated California's Fair Employment and Housing Act ("FEHA") and that his termination was in violation of public policy.[138]

Before turning to the California Supreme Court's ruling, a brief primer on FEHA is necessary to understand the reasoning behind the court's decision. The California Legislature modeled FEHA after the Americans with Disabilities Act ("ADA"). However, under California law, the ADA "provides a floor of protection," and FEHA affords "additional protections."[139] FEHA generally makes it unlawful to discriminate against an employee or job applicant based on the employee or job applicant's physical disability, mental disability, or medical condition."[140] However, an employer can refuse to hire or discharge an employee if the employee "is unable to perform the employee's essential duties even with reasonable accommodation," due to their medical condition, or

132. Ross v. RagingWire Telecomm., Inc., 174 P.3d 200, 203 (Cal. 2008). It should be noted that two states have found for patient-employees even where state law did not provide express statutory protection for medical cannabis users. In *Barbuto v. Advantage Sales and Mktg., LLC,* 78 N.E. 3d 37, 40–41, 45, 48 (Mass. 2017), the Massachusetts Supreme Court held that a patient-employee, whose employer fired her for testing positive for cannabis, could bring a cause of action under Massachusetts's version of the ADA because the "use and possession of medically prescribed marijuana by a qualifying patient is as lawful as the use and possession of any other prescribed medication." The court relied on a provision of Massachusetts's cannabis law that stated, "patients shall not be denied 'any right or privilege' on the basis of their medical marijuana use." *Id.* at 45. California's Compassionate Use Act does not contain a similar provision; thus, the court noted is why the outcome in *Barbuto* differed from *Ross*. *Id.* at 45 n.7 ("The language of the Massachusetts medical marijuana act distinguishes this case from [*Ross v. RagingWire* because] [t]he California medical marijuana law at issue . . . did not contain language protecting medical marijuana uses from the denial of any right or privilege."). Similarly, in *Wild v. Carriage Funeral Holdings, Inc.*, 241 N.J. 285, 287 (2020), the New Jersey Supreme Court affirmed the decision of a lower court that found a patient-employee could allege a claim under New Jersey's Law Against Discrimination for failure to accommodate plaintiff's disability even though accommodation would include use of medical cannabis during non-working hours. The usefulness of the *Barbuto* and *Wild* holdings is limited as it relates to this paper because the *Ross* decision foreclosed similar relief under FEHA.

133. *Ross*, 174 P.3d at 202.

134. *Id.* at 203.

135. *Id.*

136. *See id.*

137. *See id.*

138. *See id.*

139. CAL. GOV'T CODE § 12926.1.

140. *Id.* § 12940.

physical or mental disabilities.[141] The ADA and FEHA treat legal and illegal drugs differently. Regarding legally prescribed drugs, an employer can discharge an employee only if the prescribed medication "either prevents the employee from performing the essential job functions of their position or creates a *direct threat* to the health or safety of the employee or others."[142] A direct threat is a term of art in the ADA and FEHA.[143] ADA regulations define it as a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."[144] On the other hand, the ADA and FEHA do not protect illegal drug use, and thus, an employer can refuse to hire a job applicant or discharge an employee based on such use.[145]

Mr. Ross argued that, under FEHA, RagingWire had a duty "to accommodate his use of marijuana" at home, just as an employer had a duty to accommodate an employee's use of a prescription drug.[146] Mr. Ross claimed that California's Compassionate Use Act essentially made cannabis a prescription drug; therefore, it fell under FEHA's protection.[147] Thus, Mr. Ross argued RagingWire could terminate him only if it could show that his use of cannabis either prevented him "from performing [his] essential job functions" or created "a direct threat to the health or safety" of others.[148]

The California Supreme Court rejected Mr. Ross's argument, stating that the Compassionate Use Act did not give cannabis the "same status as any legal prescription drug."[149] The court further held that "nothing in the text or history of the Compassionate Use Act" suggested that it addressed "the respective rights and obligations of employers and employees."[150] Therefore, Mr. Ross could not allege a claim under FEHA.[151] Similarly, the court rejected Mr. Ross's claim that his termination was in violation of "public policies supported by the Compassionate Use Act" and FEHA.[152] The court stated that "nothing in the [Compassionate Use Act's] text or history" indicated that it established a "fundamental public policy requiring employers to accommodate" cannabis use by employees.[153]

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141. *See id.*

142. BURKE DUNPHY & MADELINE MILLER, NEWEST DEVELOPMENTS IN WORKPLACE DRUG AND ALCOHOL LAWS 18–19 (2019), https://sloansakai.com/wp-content/uploads/2021/06/10-2019-AC-Dunphy-Miller-Newest-Developments-in-Workplace-Drug-and-Alcohol-Law.pdf (emphasis added).

143. *See* 29 C.F.R. § 1630.2.

144. *See id.*

145. *See* DUNPHY & MILLER, *supra* note 142, at 18.

146. Ross v. RagingWire Telecomm., Inc., 174 P.3d 200, 204 (Cal. 2008).

147. *See id.*

148. *See id.*; DUNPHY & MILLER, *supra* note 142, 18–19.

149. *Ross*, 174 P.3d at 204.

150. *Id.*

151. *See id.* at 204, 208.

152. *See id.* at 208.

153. *See id*; *see also* Shepherd v. Kohl's Dep't Stores, Inc., No. 1:14-cv-01901-DAD-BAM, 2016 WL 4126705, at *1–4 (E.D. Cal. Aug. 2, 2016) (similarly holding that a medical cannabis user, whose employer fired

The *Ross* decision mirrored the outcome that many patient-employees faced in states that did not provide express statutory protection for medical cannabis patients.[154] For example, in *Roe v. Teletech Customer Care Management (Colorado) LLC*,[155] the plaintiff—a Washington resident who used medical cannabis to treat her "debilitating migraine headaches that caused chronic pain" and found that medical cannabis allowed her "to care for her children and to work"—sued her employer after it fired her for testing positive for cannabis.[156] The plaintiff in *Teletech* alleged her termination violated Washington's medical cannabis law.[157] The Washington Supreme Court rejected the plaintiff's argument, stating "there is no evidence voters intended [Washington's medical cannabis law] to provide employment protections or to prohibit an employer from discharging an employee for medical marijuana use."[158] Similarly, the Sixth Circuit held that Michigan's Medical Marijuana Act did not regulate private employment.[159] Following the trend, in *Garcia v. Tractor Supply Co.*,[160] the United States District Court of New Mexico held, relying on *Ross*, that an employee could not bring a cause of action under New Mexico's medical cannabis law and its Human Rights Act because "medical marijuana is not an accommodation that must be provided for by the employer."[161]

Each of these states had one thing in common: none provided express statutory protection for patient-employees.[162] In contrast to those states, sixteen other states have provided express statutory employment protection for patient-employees.[163] For the most part, patient-employees in these states have been able to successfully allege causes of action against their employers after their employers fired them due to their medical cannabis use or status as medical

him based on a positive drug test, could not bring a FEHA or "wrongful termination in violation of public policy" claim).

154. *See* Roe v. Teletech Customer Care Mgmt. (Colo.) LLC, 257 P.3d 586, 594 (Wash. 2011); Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 431 (6th Cir. 2012); Coles v. Harris Teeter, LLC, 217 F. Supp. 3d 185, 188 (D.D.C. 2016); Garcia v. Tractor Supply Co., 154 F. Supp. 3d 1225, 1228–29 (D.N.M. 2016). Additionally, the Ninth Circuit held in *James v. City of Costa Mesa* that "medical marijuana use is not protected by the ADA." 700 F.3d 394, 397 (9th Cir. 2012).

155. 257 P.3d 586 (Wash. 2011) (en banc).

156. *See id.* at 588–89.

157. *See id.* at 589.

158. *See id.* at 594.

159. *See* Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 431 (6th Cir. 2012).

160. 154 F. Supp. 3d 1225 (D.N.M. 2016).

161. *See id.* at 1228–29.

162. *See* Emerald Steel Fabricators, Inc. v. Bureau of Lab. and Indus., 230 P.3d 518, 536 (Or. 2010); Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC, 257 P.3d 586, 597 (Wash. 2011); Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 431 (6th Cir. 2012); Garcia v. Tractor Supply Co., 154 F. Supp. 3d 1225, 1230 (D.N.M. 2016); Coles v. Harris Teeter, LLC, 217 F. Supp. 3d 185, 188–89 (D.D.C. 2016).

163. *See supra* note 1 and accompanying text.

cannabis patients.[164] The next section will focus on a few of these states, showing how the statutory scheme used by these states protects patient-employees while also still protecting employer interests.

C. STATES THAT PROVIDE EXPRESS STATUTORY PROTECTION FOR MEDICAL CANNABIS USERS

The sixteen states that provide some form of employment protection have done so in different ways.[165] Some states have enacted stand-alone provisions within their respective medical cannabis statutes,[166] while others have incorporated protection into their existing disability law framework.[167] This section will analyze how the states that provide the strongest protections for patient-employees—Delaware and New York—have attempted to balance patient-employee and employer interests. Additionally, discussion will focus on Arizona, Connecticut, Rhode Island, and Oklahoma, which exhibit how broad exceptions to a statute allow courts to have more discretion, which, in turn, could lead to the swallowing of the statute's intended protections.[168]

1. Delaware

Delaware's employee-protection statute states that an employer "may not discriminate against a person in hiring, termination or . . . otherwise penalize a person . . . based upon the person's status as a [registered medical cannabis patient] . . . or . . . the person's positive drug test for [cannabis]."[169] However, these protections do not apply if (1) "the patient used, possessed or was *impaired* by" cannabis at work or (2) a failure to discriminate "would cause an employer" to lose federal funding or licensing.[170] The term "impaired" may prove to be problematic because currently there is no drug test that can accurately measure whether an individual was impaired by cannabis.[171] Critically, however, the statute appears to modify or further define the term "impaired" when it states that "a registered qualifying patient shall not be considered to be *under the influence of* marijuana solely because of the presence of metabolites or components of marijuana."[172] Although "under the influence of" and "impairment" are not exactly the same, they are used synonymously in other contexts, such as in Arizona's employee-protection statute (which is almost

164. *See, e.g.*, Whitmire v. Wal-Mart Stores, Inc., 359 F. Supp. 3d 761, 781 (D. Ariz. 2019) ("Following *Noffsinger* and *Chance*, the Court concludes that there is an implied private cause of action for violations of [Arizona's Medical Marijuana Act].").

165. *Compare* DEL. CODE ANN. tit. 16 §§ 4905A, 4907A, *with* N.Y. PUB. HEALTH LAW. § 3369(2).

166. *See, e.g.*, DEL. CODE ANN. tit. 16 § 4905A.

167. *See* N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2018).

168. Please note that state statutes that afford protection to patient-employees will generally be referred to as "employee-protection statutes."

169. DEL. CODE ANN. tit. 16 § 4905A (2021).

170. *Id.*

171. *See Frequently Asked Questions: Marijuana*, *supra* note 110.

172. DEL. CODE ANN. tit. 16, § 4907A (2021) (emphasis added).

exactly the same as Delaware's) and in dictionaries.[173] Accepting that the term "impaired" and the phrase "under the influence of" are synonymous, the statute prohibits an employer from proving an employee was impaired based solely on a positive drug test.[174] Thus, an employer must produce other evidence to show impairment, which further protects patient-employees.[175] Furthermore, Delaware's statute would likely have protected the patient-employees in *Ross*, *Teletech*, and *Coats* from termination because the employers in those cases terminated their patient-employees either on the basis of a positive drug test or their status as medical cannabis patients.[176]

Delaware's employee protection statute also addresses employer interests.[177] The statute permits an employer to discharge an employee who "was impaired" by cannabis while at work.[178] Although employers will probably not be able to rely on a positive drug test to prove impairment, employers can opt for other methods to prove that an employee was impaired in conjunction with a positive drug test.[179] One such method is "impairment testing" or "fit for duty testing."[180] These methods "focus on detecting impaired performance rather than on identifying the specific causes of the impairment."[181] An employer can test for impairment through direct observation of an employee, such as by noticing "changes to an employee's . . . Speech, . . .Actions, Movement . . . [or] Appearance."[182] Additionally, impairment testing can be completed through

173. *See* ARIZ. REV. STAT. ANN. § 36-2814 (2015) ("[A] registered qualifying patient shall not be considered to be *under the influence of marijuana* solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause *impairment*.") (emphasis added); *Driving Under The Influence*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The offense of operating a motor vehicle in a physically or mentally *impaired* condition, esp. after consuming alcohol or drugs.") (emphasis added); *Under The Influence*, DICTIONARY.COM, https://www.dictionary.com/browse/under—the—influence (last visited July 1, 2022) (defining "under the influence" as "*impaired* functioning") (emphasis added); *see also* Timothy Holly, *Analysis: Marijuana Rulings Tilt Toward Employee Rights Over Employers*, DEL. BUS. TIMES (Apr. 30, 2019), https://delawarebusinesstimes.com/news/marijuana-rulings-favor-employees/ (stating a proposed Delaware bill to legalize recreational cannabis defined "under the influence" as an "individual [who] is less able than the individual would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in exercising the responsibilities of their job").

174. *See* DEL. CODE ANN. tit. 16, §§ 4905A, 4907A (2021).

175. *See id.* §§ 4905A, 4907A (2021). The statute does not specify what other evidence an employer should use to evidence impairment.

176. *See* DEL. CODE ANN. tit. 16 §§ 4905A, 4907A (2021); Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 203 (Cal. 2008); Roe v. Teletech Customer Care Mgmt. (Colo.) LLC, 257 P.3d 586, 588–89 (Wash. 2011); Coats v. Dish Network, LLC, 350 P.3d 849, 850-51 (Colo. 2015).

177. *See* DEL. CODE ANN. tit. 16 § 4905A (2021).

178. *Id.*

179. *See* Stacy A. Hickox, *Drug Testing of Medical Marijuana Users in the Workplace: An Inaccurate Test of Impairment*, 29 HOFSTRA LAB. & EMP. L.J. 273, 304–05 (2012).

180. *See id.*; Gerard H. Seijts & Grace O'Farrell, *Urine Collection Jars Versus Video Games: Perceptions of Three Stakeholder Groups Toward Drug and Impairment Testing Programs*, 35 J. DRUG ISSUES 885, 891–92 (2005).

181. Seijts & Farrell, *supra* note 180, at 891.

182. PENELOPE J. PHILLIPS, EMPLOYER'S GUIDE TO DRUG TESTING IN MINNESOTA 63 (Sept. 4, 2019), https://www.felhaber.com/wp-content/uploads/Employers-Guide-to-Drug-Testing.pdf.

objective computerized tests.[183] One such test is the DRUID App, developed by Michael Milburn, a psychologist at the University of Massachusetts Boston.[184] The app has "users perform four tasks which test their reaction time, decision-making ability, hand-eye coordination, time estimation, and balance."[185] Other similar tests include having "an employee keep a cursor on track during a computer simulation."[186] Although objective computerized tests present their own issues (such as when and how often does an employer have the right to subject an employee to such a test), using a combination of resources will likely provide a clearer answer as to whether a patient-employee is impaired. Furthermore, using a combination of resources to test for impairment better balances patient-employee and employer interests, reducing employers' overreliance on workplace drug tests.

2. New York

As compared to Delaware, New York took a different approach to protect patient-employees. Nonetheless, New York's employee-protection statute adequately addresses patient-employee and employer interests.[187]

New York incorporated its employee-protection statute into its disability discrimination law by stating "[b]eing a certified patient shall be deemed to be having a 'disability' under [the New York Human Rights Law].[188] The New York Human Rights Law states that it is "an unlawful discriminatory practice" for an employer to "refuse to hire . . . or to discharge from employment . . . or to discriminate against" an employee because of the employee's disability.[189] Thus, an employer cannot "refuse to hire," "discharge from employment," or "discriminate against" a patient-employee based on their status as a medical cannabis user.[190] Furthermore, because patient-employees are deemed to have a disability, an employer must provide a reasonable accommodation.[191] New York law defines a reasonable accommodation as "one which permits an employee with a disability to perform in a reasonable manner the activities involved in the job and does not impose an undue hardship on the employer's business."[192] The employee-protection statute contains two exceptions: (1) an employer can

183. *See* Hickox, *supra* note 179, at 305; Michael Milburn & William DeJong, *A Paradigm Shift in Impairment Testing for Cannabis: The DRUID App*, MED. CANNABIS NETWORK (Feb. 7, 2020), https://www.healtheuropa.eu/a-paradigm-shift-in-impairment-testing-for-cannabis-the-druid-app/94154/.

184. Linda Johnson, *How to Test Employees for Cannabis Impairment*, CANADIAN OCCUPATIONAL SAFETY (Dec. 13, 2018), https://www.thesafetymag.com/ca/topics/technology/how-to-test-employees-for-cannabis-impairment/186973.

185. Milburn & DeJong, *supra* note 183.

186. Hickox, *supra* note 179, at 305.

187. *See* N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2018).

188. *Id.*

189. N.Y. EXEC. LAW § 296(1)(a) (McKinney 2021).

190. N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2018); N.Y. EXEC. LAW § 296(1)(a) (McKinney 2021).

191. N.Y. EXEC. LAW § 296(1)(a) (McKinney 2021).

192. Vangas v. Montefiore Med. Ctr., 823 F.3d 174, 180 (2d Cir. 2016) (emphasis added).

prohibit a patient-employee "from performing his employment duties" while impaired; and (2) the statute does not require any employer "to do any act that would put the [employer] in violation of federal law or cause it to lose federal funding."[193]

New York's approach addresses patient-employee interests by preventing employers from discharging or refusing to hire medical cannabis users.[194] Employers can reasonably accommodate patient-employees by allowing them to consume cannabis outside of work hours.[195] Despite these benefits, the statute allows an employer to prohibit a patient-employee "from performing his employment duties" while impaired, and it does not prohibit an employer from using a positive drug test to demonstrate impairment.[196] However, the statute also does not expressly permit an employer to discharge a patient-employee for being impaired. Rather, it only states that an employer can prohibit the patient-employee from *performing* his/her duties while impaired.[197] Thus, the scope of the statute's protections for patient-employees is somewhat unclear, although still far superior when compared to states such as California.[198]

The law also addresses employer interests. As stated above, the statute allows employers to prohibit patient-employees from working while impaired, which lessens the likelihood of civil liability caused by impaired patient-employees.[199] However, like Delaware, the statute does not define how an employer should detect that an employee is impaired.[200] Further clarification on how to detect impairment would benefit employers and patient-employees. Nonetheless, New York's approach appears to work in practice. Con-Edison, one of the world's largest energy companies,[201] recently stated in litigation that it accommodates or has accommodated at least forty-two employees who are medical cannabis users.[202] Moreover, it "has never terminated or disciplined any of these employees because of their status as a medical marijuana patient [or] their intent to become a patient."[203] An additional benefit to employers (and courts) is the placement of the employee-protection statute within the New York Human Rights Law.[204] Unlike newly enacted statutory language that can lead to

193. N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2018).

194. *See* N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2018); N.Y. EXEC. LAW § 296(1)(a) (McKinney 2021).

195. *See* N.Y. EXEC. LAW § 296(1)(a) (McKinney 2021). Nevada's employee-protection statute also requires employers to reasonably accommodate patient-employees. *See* NEV. REV. STAT. § 678C.850 (2020).

196. *See* N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2018).

197. *See id.*

198. *Compare id.*, *with* CAL. HEALTH & SAFETY CODE § 11362.45 (West 2017).

199. *See* N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2018).

200. *See id.*; DEL. CODE ANN. tit. 16 § 4905A (2021).

201. *See About Con Edison*, CONEDISON, https://www.coned.com/en/about-us/company-information (last visited July 1, 2022).

202. *See* Memorandum of L. in Support of Defendant's Motion for Summary Judgment, Gordon v. Consol. Edison, Inc., 190 A.D.3d 639 (N.Y. Sup. Ct. Apr. 21, 2020) (No. 152614/2017), 2019 WL 8631146.

203. *Id.*

204. N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2018); N.Y. EXEC. LAW § 296(1)(a) (McKinney 2021).

confusing interpretations, employers are familiar with the New York Human Rights law. Thus, the placement of the employee-protection statute within the New York Human Rights law likely reduced uncertainty for employers.

3. Arizona, Rhode Island, Connecticut, and Oklahoma

At first glance, Arizona, Rhode Island, Connecticut, and Oklahoma's employee-protection statutes appear to provide adequate protection for patient-employees on par with Delaware and New York.[205] In fact, like Delaware and New York, courts in Arizona and Rhode Island have recognized an implied private right of action in their respective medical cannabis statutes—something that California, Michigan, and Washington courts refused to recognize.[206] Furthermore, in 2018, a patient-employee in Connecticut won a motion for summary judgment against her employer after they fired her based on her status as a medical cannabis patient under Connecticut law.[207] Despite their relative success in protecting patient-employees, when examined closer, each of these states' statutes contain gaps and exceptions that could allow an employer to unreasonably discriminate against patient-employees.[208]

For example, Arizona's employee-protection statute contains nearly the exact same language as Delaware's statute.[209] Both statutes allow an employer to terminate a patient-employee that was impaired on the job.[210] However, where Delaware's statute states that an employer cannot prove an employee was impaired based solely on a positive drug test, Arizona's statute states that an employer can prove impairment based on a positive drug test when "the presence of metabolites or components of marijuana" in the drug test appear in a sufficient concentration to cause impairment.[211] As stated previously, there is no test that can currently measure impairment by cannabis based on the level of metabolites

205. *See* ARIZ. REV. STAT. ANN. §§ 36-2813–2814 (2015); OKLA. STAT. tit. 63 § 427.8 (2019); CONN. GEN. STAT. § 21a-408p (2021); 21 R.I. GEN. LAWS § 21-28.6-4 (2019).

206. Whitmire v. Wal-Mart Stores Inc., 359 F. Supp. 3d 761, 781 (D. Ariz. 2019) ("Following *Noffsinger* and *Chance*, the Court concludes that there is an implied private cause of action for violations of [Arizona's Medical Marijuana Act]."); Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680, 2017 WL 2321181, at *8 (R.I. Super. May 23, 2017) ("Given . . . the context of the provision—an anti-discrimination statute—this Court finds that there is an implied private right of action for violations of [Rhode Island's medical cannabis statute]."); Roe v. Teletech Customer Care Mgmt. (Colo.) LLC, 257 P.3d 586, 594 (Wash. 2011); Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 431 (6th Cir. 2012); Garcia v. Tractor Supply Co., 154 F. Supp. 3d 1225, 1228–29 (D.N.M. 2016); Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 204, 208 (Cal. 2008).

207. Noffsinger v. SSC Niantic Operating Co., 338 F. Supp. 3d 78, 86 (D. Conn. 2018).

208. *See* ARIZ. REV. STAT. ANN. §§ 36-2813–2814 (2015); OKLA. STAT. tit. 63, § 427.8 (2019); CONN. GEN. STAT. § 21a-408p (2021); 21 R.I. GEN. LAWS § 21-28.6-4 (2019); N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2018); DEL. CODE ANN. tit. 16 § 4905A (2021).

209. *See* ARIZ. REV. STAT. ANN. §§ 36-2813–2814 (2015); DEL. CODE ANN. tit. 16 §§ 4905A, 4907A (2021).

210. *See* ARIZ. REV. STAT. ANN. §§ 36-2813–2814 (2015); DEL. CODE ANN. tit. 16 §§ 4905A, 4907A (2021).

211. *See* ARIZ. REV. STAT. ANN. §§ 36-2813–2814 (2015); DEL. CODE ANN. tit. 16 §§ 4905A, 4907A (2021).

and components present in an individual's drug test.[212] Thus, Arizona's employee-protection statute leaves uncertain what level of cannabis components in a patient-employee's test indicates impairment and, more importantly, likely still allows an employer to discriminate against an employee based on a positive drug test that may or may not indicate a patient-employee was actually impaired.[213] Thus, as compared to Delaware, Arizona's employee-protection statute provides less protection for patient-employees.[214]

Rhode Island and Connecticut's employee-protection statutes suffer from similar flaws.[215] Those statutes do not protect patient-employees from termination based on the failure of a drug test.[216] Both statutes allow an employer to fire a patient-employee if the employee was "under the influence of" cannabis at the workplace.[217] Thus, theoretically, an employer could use a positive drug test as proof that a patient-employee was "under the influence of" cannabis at the workplace and therefore terminate them.[218] This is problematic because, as discussed previously, a positive drug test for cannabis is not an indication that the employee was ever impaired at work.[219]

Similarly, Oklahoma's employee-protection statute, on its face, looks promising for patient-employees.[220] It prohibits employers from "refus[ing] to hire, discipline, discharge, or otherwise penalize an applicant or employee" based on their "status as a medical marijuana licensee" or "on the basis of a positive test for marijuana components or metabolites."[221] However, these protections do not apply if "the licensee possesses, consumes, or is under the influence" of cannabis at work or the employee's position "is one involving *safety-sensitive functions*."[222] The statute broadly defines "safety-sensitive" as "any job that includes tasks or duties that the employer reasonably believes could affect the safety and health of the employee performing the task or others."[223] Depending on how broadly a court is willing to read the statute's language, a job not normally thought of as safety-sensitive could qualify.[224] For example, while all courts would likely agree that an employee who operates heavy machinery is a position "involving safety-sensitive functions," what about a grocery store clerk who restocks shelves with heavy food products or a gas station attendant

212. *See Frequently Asked Questions: Marijuana*, *supra* note 110.

213. *See id.*; Whitmire v. Wal-Mart Stores Inc., 359 F. Supp. 3d 761, 789 (D. Ariz. 2019).

214. *See Whitmire*, 359 F. Supp. 3d at 789; DEL. CODE ANN. tit. 16 §§ 4905A, 4907A (2021).

215. *See* CONN. GEN. STAT. § 21a-408p (2021); 21 R.I. GEN. LAWS § 21-28.6-4 (2019).

216. *See* CONN. GEN. STAT. § 21a-408p (2021); 21 R.I. GEN. LAWS § 21-28.6-4 (2019).

217. CONN. GEN. STAT. § 21a-408p (2021); 21 R.I. GEN. LAWS § 21-28.6-4 (2019).

218. *See* CONN. GEN. STAT. § 21a-408p (2021); 21 R.I. GEN. LAWS § 21-28.6-4 (2019); Kathleen Harvey, *Protecting Medical Marijuana Users in the Workplace*, 66 CASE W. RSRV. L. REV. 209, 224 (2015).

219. *See Frequently Asked Questions: Marijuana*, *supra* note 110.

220. *See* OKLA. STAT. tit. 63 § 427.8 (2019).

221. *See id.*

222. *See id.* (emphasis added).

223. *Id.*

224. *See* Brennan T. Barger, *Into the Weeds of the Newest Field in Employment Law: The Oklahoma Medical Marijuana Act,* 72 OKLA. L. REV. 373, 379–80 (2020).

who may occasionally have to refill a customer's propane tank?[225] These hypotheticals illustrate the elasticity of Oklahoma's definition of "safety-sensitive functions" that likely will create a headache for courts to interpret.[226]

In sum, states have approached the protection of patient-employees in a variety of ways, each with benefits and drawbacks. The next section will discuss what approach California should take.

III. HOW CALIFORNIA SHOULD PROTECT MEDICAL CANNABIS USERS

Since the California Supreme Court's decision in *Ross*, the California Legislature has attempted but ultimately failed to enact employment protections for patient-employees.[227] Based on the approaches taken by Delaware and New York, this Part will advocate for adopting a similar approach—keeping in mind California's past failures to enact employment protections, employers' interests, and the lessons learned from states like Arizona, Rhode Island, Connecticut, and Oklahoma.

Past attempts by the California Legislature to enact an employee-protection statute mirrored both Delaware and New York's approach.[228] In 2008, shortly after the *Ross* decision, Assemblymember Mark Leno introduced AB 2279, which—like Delaware's employee-protection statute—would have made it "unlawful for an employer to discriminate" against a patient-employee based on the patient-employee's status as a medical cannabis user or a "positive drug test," provided that the patient-employee did not use cannabis on work premises or during the hours of employment.[229] However, the bill also contained an exception that likely would have swallowed the bill's intended protections. The exception, referred to as the "savings clause," stated that "[n]othing in this section shall prohibit an employer from terminating the employment of . . . an employee who is impaired" at work.[230] The bill did not define impairment, nor did it prohibit an employer from using a positive drug test to prove impairment.[231] Thus, despite prohibiting discharge on the basis of a drug test, the savings clause would have potentially allowed an employer to terminate a patient-employee by using a positive drug test as evidence that an employee was impaired at work.[232] For example, assume a patient-employee was a construction worker who caused an accident that injured a fellow construction worker. After the accident, the patient-employee tested positive for cannabis. Under AB 2279,

225. *See id.*

226. *See id.*; OKLA. STAT. tit. 63 § 427.8 (2019).

227. *See* Assemb. B. 2279, 2007-08 Leg., Reg. Sess. (Cal. 2008); Assemb. B. 2069, 2017-18 Leg., Reg. Sess. (Cal. 2018); Assemb. B. 2355, 2019-20 Leg., Reg. Sess. (Cal. 2020).

228. *Compare* Assemb. B. 2279, *supra* note 227, *and* Assemb. B. 2069, *supra* note 227, *and* Assemb. B. 2355, *supra* note 227, *with* N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2018), *and* DEL. CODE ANN. tit. 16 §§ 4905A, 4907A (2021).

229. *See* Assemb. B. 2279, *supra* note 227.

230. *See id.*

231. *See id.*

232. *See id.*

the employer could not fire the employee based solely on the positive drug test.[233] However, nothing in AB 2279 would prevent the employer from terminating the patient-employee by using the positive drug test as evidence that the employee was impaired on the job.[234] Thus, the statute failed to adequately protect patient-employees because it did not prohibit an employer from using a positive drug test to prove impairment.[235]

AB 2355, introduced by Assemblymember Rob Bonta, was akin to New York's employee-protection statute. However, it likely provided less protection for patient-employees.[236] The bill would have incorporated protections for patient-employees into the framework of FEHA—requiring employers to provide a "reasonable accommodation" to patient-employees.[237] The bill's legislative intent section expressly denounced workplace drug tests by stating, "[c]urrent workplace drug testing technology, such as urine testing, discriminates against medical cannabis use that has occurred days or weeks previously because it detects cannabis metabolites, not the compounds, like THC, that have a psychoactive effect."[238] The bill also permitted employers to utilize impairment testing.[239] Both the denunciation of workplace drug tests and the encouragement of impairment testing would have helped address patient-employee interests. However, the text of the statute permitted an employer to terminate a patient-employee if the employee was impaired on the job, and it did not prohibit an employer from using a positive drug test to prove impairment.[240] Thus, AB 2355 provided less protection for patient-employees when compared to Delaware's and New York's employee protection statutes.[241]

Although both AB 2279 and AB 2355 were a step in the right direction, they would not have afforded patient-employees the same level of protection as patients in New York or Delaware. Thus, in order to enact legislation that adequately protects patient-employees and recognizes employer concerns, the California Legislature should enact legislation that includes the following components:

- The Legislature should state that all patient-employees have a "disability" as the term is defined in FEHA. Therefore, like New York, California employers would have to provide a reasonable accommodation to patient-employees and could not refuse to hire job applicants on the basis of a

233. *See id.*

234. *See id.*

235. *See id.*

236. *Compare* Assemb. B. 2355, *supra* note 227, *with* N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2018). Assemblymember Bonta also introduced AB 2355 which was similar to AB 2069 but provided an exception that would have allowed an employer to use a positive drug test to evidence that an employee was impaired on the job. *See* Assemb. B. 2069, *supra* note 227.

237. *See* Assemb. B. 2355, *supra* note 227.

238. *See id.*

239. *See id.*

240. *See id.*

241. *See id.*

positive drug test or their status as a medical cannabis patient. Like any other employee that uses prescription drugs, employers can discharge patient-employees if the patient-employee's use of medical cannabis "either prevents [them] from performing the essential job functions of their position or creates a direct threat to the health or safety of . . . others."[242]

- To address employer concerns, the statute should also contain two exceptions. First, the statute should not require employers to abide by it if doing so would place them in violation of federal law or would cause them to lose federal funding. Second, the statute should permit employers to discipline or discharge a patient-employee if the employee possesses, uses, or is impaired by cannabis while at work or during working hours. However, the statute must expressly state that an employer cannot prove impairment solely on the basis of a positive drug test. In other words, an employer must present evidence other than a positive drug test, to prove that a patient was impaired. Although allowing an employer to discharge an employee based on possession, use, or impairment weakens the protections afforded to patient-employees, doing so is politically necessary. As evidenced by both AB 2279 and AB 2355, an employee-protection statute that protects a patient-employee to the same degree as an employee using prescription drugs—meaning an employer could only discharge a patient-employee if their cannabis use either prevented them from performing their job duties or created a direct threat to the health and safety of others—likely would not be enacted by the Legislature. Thus, the possession, use, and impairment exception is necessary for political viability.
- To further ease concerns of employers who may be wary of a bill that prohibits the use of a positive drug test to prove impairment, the Legislature should explore options to limit an employer's exposure to civil liability caused by patient-employees. One option could be to bar the use of a patient-employee's positive drug test against an employer. For example, if a patient-employee caused a workplace accident that injured a third-party and the third-party later sued the employer for negligence under the doctrine of respondeat superior,[243] the Legislature could bar the third-party from using a patient-employee's positive drug test as evidence that the employer was negligent.
- The legislation should limit the term "cannabis" to psychoactive cannabis products that could cause an individual to become impaired. Because non-psychoactive cannabis products, like CBD, cannot cause a patient-

242. DUNPHY & MILLER, *supra* note 142, at 18–19.

243. *See* Brown v. USA Taekwondo, 253 Cal. Rptr. 3d 708, 736 (Cal. Ct. App. 2019) ("Under the respondeat superior doctrine, 'an employer may be held vicariously liable for torts committed by an employee within the scope of employment.'") (citations omitted).

employee to become impaired,[244] employers likely would not be concerned about their use in the workplace. Thus, banning the use of non-psychoactive cannabis products in the workplace would not serve employer interests and would unfairly prejudice patient-employees. Therefore, non-psychoactive cannabis products such as CBD lotions and oils should not be prohibited unless doing so would cause an employer to violate federal law or lose federal funding.

- Lastly, the Legislature should designate a legislative task force to further tackle complicated details, such as what sorts of evidence of impairment employers may use, how to further limit employer liability, and which cannabis products should be considered non-psychoactive.

This approach is the best approach for California for several reasons. First, it incorporates the best aspects of both Delaware's and New York's employee-protection statutes. Incorporating the statute into FEHA's framework provides clarity and certainty for employers, courts, and attorneys who are familiar with FEHA's procedures and legal standards. Furthermore, this approach prevents employers from using only a positive drug test to show impairment—avoiding the loopholes present in AB 2279 and AB 2355.[245] Second, it effectively overturns *Ross*, requiring employers to reasonably accommodate patient-employees and permitting patient-employees to assert a cause of action under FEHA.[246] Third, it considers employer interests. Employers will be able to avoid conflict with federal law and minimize the risk of workplace accidents and injuries by having the power to discharge an impaired patient-employee. Fourth, this approach has been proven to work in practice, as shown by Con-Edison's accommodation of more than forty patient-employees in New York.[247] Lastly, and most importantly, it protects patient-employees like Brandon Coats and Garry Ross, who were put in the impossible position of choosing between treating their disabilities or keeping their jobs.[248]

CONCLUSION

As the law currently stands in California, an employer can refuse to hire an applicant or discharge an employee for consuming medical cannabis in order to treat a serious medical condition, even if an individual consumes cannabis at home during non-working hours.[249] As exemplified by the sixteen states that

244. *See* Kathleen Doheny, *Study: CBD from Marijuana Doesn't Impair Driving*, WEBMD (Dec. 2, 2020), https://www.webmd.com/mental-health/addiction/news/20201202/study-cbd-from-marjiuana-doesnt-impair-driving.

245. *See* Assemb. B. 2279, *supra* note 227; Assemb. B. 2355, *supra* note 227.

246. *See* Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 204, 208 (Cal. 2008).

247. *See* Memorandum of L. in Support of Defendant's Motion for Summary Judgment, Gordon v. Consol. Edison, Inc., 190 A.D.3d 639 (N.Y. Sup. Ct. Apr. 21, 2020) (No. 152614/2017), 2019 WL 8631146.

248. *See Ross*, 174 P.3d at 202; Coats v. Dish Network, LLC, 350 P.3d 849, 850 (Colo. 2015).

249. *See Ross*, 174 P.3d at 203 ("Under California law, an employer may require preemployment drug tests and take illegal drug use into consideration in making employment decisions."); CAL. HEALTH & SAFETY CODE § 11362.45 (West 2017) ("Section 11362.1 does not amend, repeal, affect, restrict, or preempt: (f) The rights

provide employment protection for patient-employees,[250] California's approach is outdated. To remedy this problem, the Legislature must enact legislation protecting patient-employees while still recognizing employer interests. To do so, the Legislature should follow the approach advocated for in this Note. If the Legislature follows this approach, California will be able to reclaim its spot as a leader in the cannabis arena, and, more importantly, it will prevent employers from unfairly discriminating against medical cannabis patients.

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and obligations of public and private employers to maintain a drug and alcohol free workplace . . . or *affect the ability of employers to have policies prohibiting the use of cannabis by employees and prospective employees*, or prevent employers from complying with state or federal law.") (emphasis added).

250. ARIZ. REV. STAT. ANN. § 36-2813 (2015); ARK. CONST. amend. XCVIII § 3; CONN. GEN. STAT. § 21a-408p (2021); DEL. CODE ANN. tit. 16 § 4905A (2021); 410 ILL. COMP. STAT. 130/40 (2019); ME. REV. STAT. tit. 22 § 2430-C (2018); MINN. STAT. § 152.32 (2021); NEV. REV. STAT. § 678C.850 (2020); N.J. REV. STAT. 24:6I-6.1 (2019); N.M. STAT. ANN. § 26-2B-9 (2019); N.Y. PUB. HEALTH LAW § 3369 (McKinney 2018); OKLA. STAT. tit. 63 § 427.8 (2019); 35 PA. CONS. STAT. § 10231.2103 (2016); 21 R.I. GEN. LAWS § 21-28.6-4 (2019); S.D. § 34-20G-22 (2020); W. VA. CODE § 16A-15-4 (2017).

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