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What healthcare organizations can do to stay compliant in the era of marijuana legalization

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In 1996, California was the first state to legalize medical use of marijuana by enacting the Compassionate Use Act,[1] which was designed to provide certain legal protections to patients, caregivers, and physicians. Under the Compassionate Use Act, physicians who prescribe or recommend the use of smoked marijuana for medical reasons, individuals who use marijuana for medical reasons, and caregivers who assist those patients when using cannabis for medical reasons are exempt from criminal prosecution. Since the passage of the Compassionate Use Act, all but four states in the US have passed similar legislation[2] and some have adopted more expansive laws legalizing marijuana for recreational use, including Alaska, California, Colorado, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, Washington, and the District of Columbia.[3] Most other states allow some form of marijuana, CBD (cannabidiol, "the non-psychoactive component of the cannabis plant"[4]), and/or low-THC (tetrahydrocannabinol, "the psychoactive component in cannabis" responsible for most of marijuana's psychological effects) products for medical use, with the exception of Kansas, which only allows "CBD products with 0% THC"[5]; Idaho, which has limited-access marijuana product laws;[6] and Nebraska and South Dakota, which "have limited, trial programs that are not open to the public."

Even though the legalization of medical marijuana was meant (in part) to protect physicians from prosecution, this wave of legalization has left healthcare employers with many unanswered questions surrounding what their rights are with respect to THC testing, as well as the kinds of workplace policies employers can have regarding the use of marijuana. The answers to these questions may vary depending on the situation and the state at issue, among other reasons. Nevertheless, below, we provide some guidance regarding an employer's rights and responsibilities in relation to marijuana testing.

How can healthcare employers regulate the use of marijuana in the workplace?

The answer to this question is somewhat complicated and requires further explanation regarding an employer's obligations under the Americans with Disabilities Act (ADA)[7] and related state analogs. Under the ADA and related state anti-discrimination laws, employers are required to (1) engage in the interactive process with employees suffering from a disabling condition to identify a reasonable accommodation upon being notified that an employee suffers from a condition requiring some form of accommodation and (2) provide a reasonable accommodation to the employee suffering from a disabling condition when doing so will aid the employee in performing their essential job functions.

Marijuana is an illegal drug under federal law

The ADA is designed to protect employees from disability discrimination. There are myriad medical conditions that qualify as a disability under the ADA for which doctors have started prescribing marijuana as the

recommended treatment. These conditions include cancer, AIDS, post-traumatic stress disorder, Parkinson's disease, and many others where a jury will certainly have sympathy for the employee. Despite this, it is important to remember that marijuana is still considered an illegal substance under the federal Controlled Substances Act of 1970.[8] ("The Controlled Substances Act (CSA) places all substances which were in some manner regulated under existing federal law into one of five schedules. This placement is based upon the substance's medical use, potential for abuse, and safety or dependence liability."[9]) Under the CSA, cannabis containing more than 0.3% THC[10] is classified as a Schedule I controlled substance (like heroin) because it has no "accepted medical use" and because it poses a high risk for abuse and physical and psychological dependence.[11]

The ADA has a carve-out for drugs that are illegal under federal law. In *James v. City of Costa Mesa*, 700 F.3d 394, 397 (9th Cir. 2012), the United States Court of Appeals for the Ninth Circuit upheld and highlighted this carveout by holding that medical marijuana use did *not* come within the ADA exception for drug use "authorized by…other provisions of Federal law." For healthcare employers, this means that under federal law, while an employer is required to engage in the interactive process and to accommodate an employee who suffers from a disabling condition, the employer need *not* accommodate the use of medical marijuana to treat that underlying condition.