

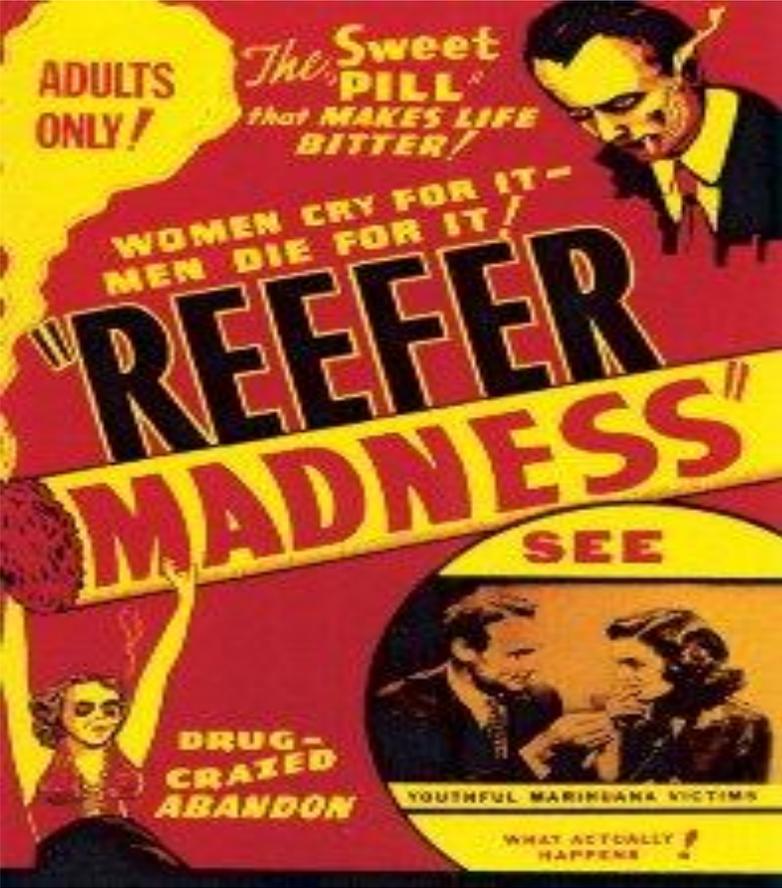


**Buchanan
Ingersoll &
Rooney** PC

Medical Marijuana in the Healthcare Workplace

Jill M. Lashay, Esq., Shareholder | Rafael M. Villalobos, Jr., Shareholder

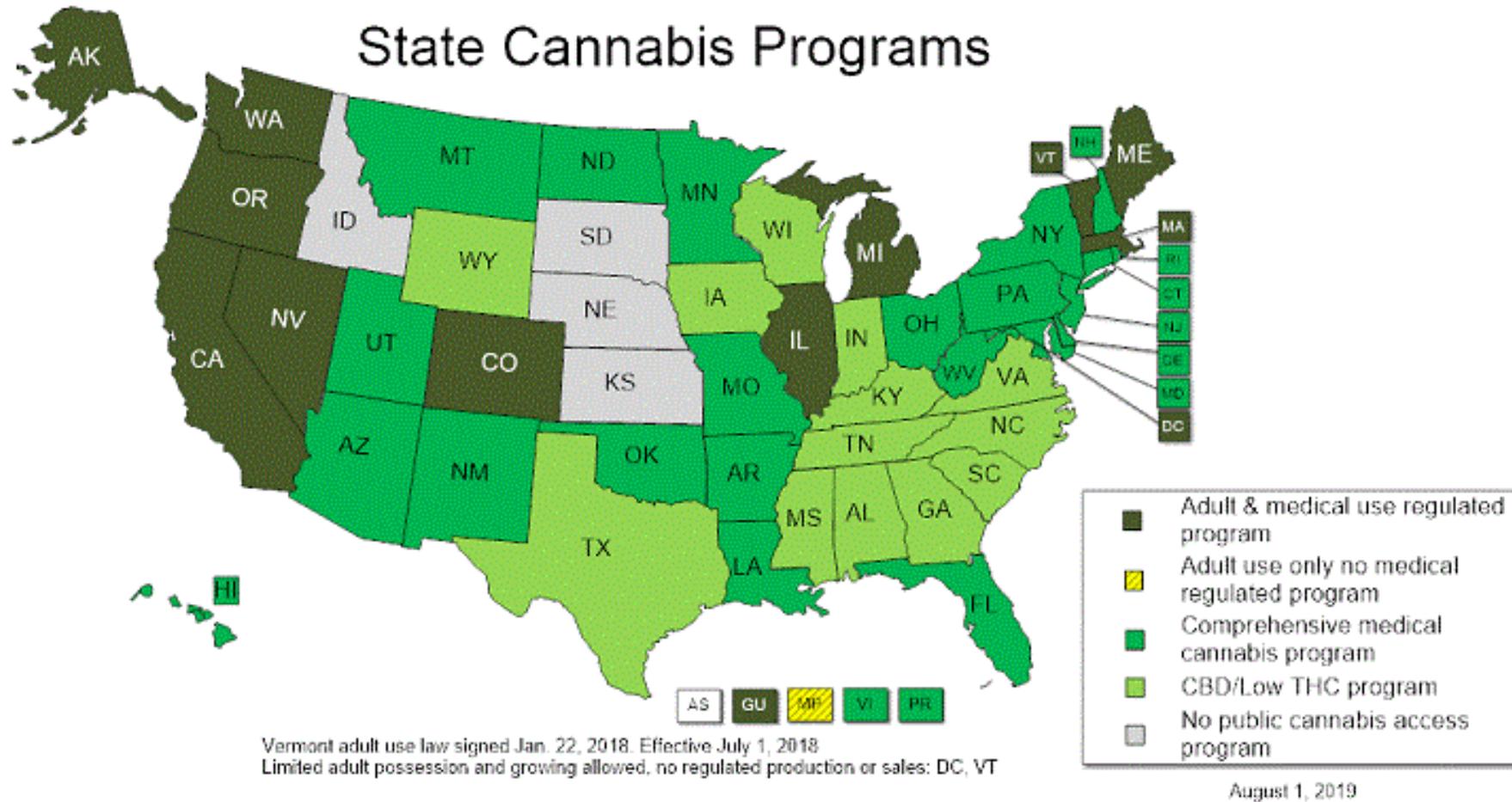
History of Marijuana in U.S.



THEN



History of Marijuana in U.S. - Now



Pennsylvania Medical Marijuana Act

- Pennsylvania Medical Marijuana Act (MMA), 35 P.S. § 10231.101 et seq.
 - Effective May 17, 2016.
 - Allows certain individuals to use, possess and distribute marijuana for medical purposes.
 - Outlines limitations which may be imposed on employees working “under the influence of medical marijuana” and prohibits employers from discriminating against an employee **solely** because the employee “is certified to use medical marijuana.”
 - The MMA is nuanced and contains ambiguities that can only be resolved by regulation, legislative refinement and/or court interpretation.

Debilitating Conditions Which Qualify In Pennsylvania

- Amyotrophic lateral sclerosis
- Anxiety
- Autism
- Cancer, including remission therapy
- Parkinson's disease
- Post-traumatic stress disorder
- Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain
- Sickle cell anemia
- Terminal illness
- Crohn's disease
- Damage to the nervous tissue of the central nervous system (brain-spinal cord) with objective neurological indication of intractable spasticity, and other associated neuropathies
- Dyskinetic and spastic movement disorders
- Epilepsy
- Glaucoma
- HIV/AIDS
- Huntington's disease
- Inflammatory bowel disease
- Intractable seizures
- Multiple sclerosis
- Neurodegenerative diseases
- Neuropathies
- Tourette's Syndrome
- Opioid use disorder for which conventional therapeutic interventions are contraindicated or ineffective, or for which adjunctive therapy is indicated in combination with primary therapeutic interventions

Dispensing Medical Marijuana In Pennsylvania

- Pill
- Oils
- Topical Forms (*i.e.*, gels, creams, ointments)
- Form medically appropriate for administration by vaporization or nebulization
- Tinctures
- Liquid
- Edibles **ONLY** when made by the patient.
- Dry leaf/flower
 - Patients who purchase dry leaf are advised to keep it in the original container, and carry their state-issued medical marijuana card showing they are allowed to buy and use it.



New Jersey Compassionate Use MMA

- N.J. Stat. § 24:6I-1 *et seq.* - originally effective Oct. 1, 2010
- Allows qualified patients to seek registration to use medical marijuana.
- Just a few months ago, New Jersey expanded employment protections by amending the Act.
 - Unlawful for employer to take any adverse employment action against employee based solely on the employee's status as user of medical marijuana.
 - If an employer has a drug testing policy and an employee/applicant tests positive for marijuana, employer must offer opportunity for employee/applicant to present a medical explanation.
- Employer still able to take adverse employment action against employee for possessing or using intoxicating substances while on the job.

Qualifying Conditions - New Jersey

- Amyotrophic Lateral Sclerosis (ALS)
- Cancer (includes associated chronic pain and/or severe nausea)
- Crohn's disease
- Glaucoma
- HIV/AIDS (includes associated chronic pain and/or severe nausea)
- Inflammatory bowel disease (IBD)
- Multiple Sclerosis
- Muscular Dystrophy
- Post-Traumatic Stress Disorder
- Seizure and/or spasticity disorders
- Any terminal illness if a doctor has determined the patient will die within a year.

Delaware Medical Marijuana Act

- Del. Code Ann. tit. 16, § 4901A *et seq.* - effective July 1, 2011
- Allows patients with debilitating medical conditions to seek registration to use medical marijuana.
- Act offers employment protections as well:
 - An employer generally may not discriminate against an individual in hiring, termination, or any term/condition of employment if based upon a person's status as a user of medical marijuana.
 - Additionally, an employer generally may not discriminate based upon a positive drug test for marijuana if the user is a registered qualifying patient and the individual did not use or possess marijuana, and was otherwise not impaired by marijuana, while on the job.

Qualifying Conditions - Delaware

- Alzheimer's disease
- Amyotrophic Lateral Sclerosis
- Cachexia
- Cancer
- Chronic pain
- Intractable epilepsy
- HIV/AIDS
- Nausea
- Post-Traumatic Stress Disorder (PTSD)
- Seizures
- Severe and persistent muscle spasms



What is Medical Marijuana?

Defining Medical Marijuana

- Medical marijuana uses plants from the *Cannabis* genus and the chemicals contained in them to treat diseases or conditions.
- The marijuana plant contains many different chemicals called “cannabinoids.” Each one has a different effect on the body.
- Delta-9-tetrahydrocannabinol (THC) and cannabidiol (CBD) are the main chemicals used in medicine.
- The strain and form of medical marijuana a doctor recommends will depend on the patient’s medical needs and personal preference.

Three types of strains:

Sativa (Durban Poison, Green Crack, Sour Diesel, Strawberry Cough, Chernobyl)

Indica (Hindu Kush, Master Kush, Grand Daddy Purple, LA Confidential, Northern Lights)

Hybrid (Blue Dream, Lemon Kush, Tahoe OG, Skywalker, Super Silver Haze)

Defining Medical Marijuana

- Tetrahydrocannabinol (THC)
 - Psychoactive effects
 - More is found in the Sativa Cannabis
- Cannabidiol (CBD)
 - No psychoactive effects
 - More is found in the Indica Cannabis



Federally Approved Cannabinoids

- The FDA has approved two man-made cannabinoid medicines to treat nausea and vomiting from chemotherapy:
 - Dronabinol (Marinol, Syndros)
 - Nabilone (Cesamet)
- The cannabidiol Epidiolex (mostly CBD) was approved in 2018 for treating seizures associated with two rare and severe forms of epilepsy, Lennox-Gastaut syndrome and Dravet syndrome.





Impact of Medical Marijuana On Employers

Federal v. State Law Conflicts

- State medical marijuana laws directly conflict with the federal Controlled Substance Act (CSA).
- CSA identifies marijuana as an unlawful Schedule 1 controlled substance.
- The U.S. Supreme Court has held that there is no exception to the CSA's prohibitions on manufacturing and distributing marijuana for medical necessity.
 - States do not have the authority to legalize what Congress has deemed unlawful.

Federal v. State Law Conflicts (cont.)

- The FDA has not recognized or approved the marijuana plant as medicine.
- Department of Justice still views it as unlawful.
 - However, President Trump has, at times during 2018, signaled that he is willing to support a move toward the legalization of medical marijuana, which would be a departure from the position of his former attorney general, Jeff Sessions.
- In February 2019, President Trump signed a federal spending bill into law that contains a rider preventing the Justice Department from interfering in state medical marijuana laws.
 - However, the President went out of his way during the signing to make clear that he reserves the right to ignore the cannabis provision in the spending bill.

Federal v. State Law Conflicts

- U.S. Department of Transportation Drug & Alcohol Testing Regulations
 - Federally mandated drug-free workplace programs (e.g., US DOT programs) require employers to report positive marijuana test results, regardless of whether an employee's use of marijuana is for medicinal purposes.
- Drug-Free Workplace Act of 1988
- Family and Medical Leave Act (FMLA)
- Americans With Disabilities Act (ADA)
 - Because medical marijuana remains illegal under federal law, employers are not required to accommodate its use under the ADA.
 - But, what about the Pennsylvania Human Relations Act?

Drug-Free Workplace Act of 1988

- Drug-Free Workplace Act (DFWA) requires recipients of federal funds to maintain a drug-free workplace
- Many opine that DFWA might serve as a defense to a claim brought by a medical marijuana patient for alleged violations of PA MMA.
- **BE CAREFUL**: Two recent federal court decisions have held that the DFWA does not preempt state laws regulating the medical or recreational use of marijuana.
 - While one case (Carlson) found in favor of the employer, and the other (Noffsinger) in favor of the employee, both decisions have emphasized that state law protections for users of medical marijuana are not preempted by the DFWA.

DFWA May Not Preempt State Marijuana Laws

- U.S. District Court in Connecticut became the first federal court to rule that **federal law DOES NOT preempt a state law** that expressly prohibits employers from firing or refusing to hire someone who uses marijuana for medical purposes. See *Noffsinger v. SSC Niantic Operating Company* (October, 2018).
 - Employee was given a conditional job offer as a recreational therapist and, the day before her scheduled start date, her offer was rescinded after she tested positive for medical marijuana.
 - In denying the employer's request to dismiss, the federal court ruled that the state statute authorizing the use of medical marijuana was not preempted by the three federal statutes that generally appear front and center in these cases – the CSA, the ADA, and the Food, Drug and Cosmetics Act.

DFWA May Not Preempt State Marijuana Laws

- U.S. District Judge in *Noffsinger* rejected the employer's claim that, as a federal contractor, it was barred from hiring someone who uses marijuana outside the workplace.
- **Noffsinger case is important.**
 - It's the first case of its kind to determine that marijuana's illegality under federal law does not bar an employment claim based on state law.
 - Like Connecticut's law, Pennsylvania's MMA prohibits discrimination against employees and applicants "solely on the basis of such employee's status as an individual who is certified to use medical marijuana."
 - Thus, all employers, including federal contractors, need to be aware of state laws governing the use of marijuana for recreational or medical purposes.
 - Depending on the language of the particular state statute at issue, an employer may face liability for taking an adverse action against an employee or applicant who tests positive for marijuana.

DFWA May Not Preempt State Marijuana Laws (cont.)

- The U.S. District Court dismissed a lawsuit brought by an employee who alleged discrimination under the Montana Medical Marijuana Act because he was discharged for testing positive for marijuana use. *See Carlson v. Charter Communication, LLC (November 2018)*.
 - The plaintiff, a medical marijuana cardholder under Montana state law, tested positive for THC (a cannabinoid) after an accident in a company-owned vehicle.
 - His employer, a federal contractor required to comply with the DFWA, terminated his employment because the positive test result violated its employment policy.
 - The District Court of Montana held that the employer was within its rights to discharge the plaintiff because:
 - (1) the DFWA preempts the MMA on the issue of whether a federal contractor can employ a medical marijuana user; and
 - (2) the MMA does not provide employment protections to medical marijuana cardholders.

DFWA May Not Preempt State Marijuana Laws (cont.)

- The Ninth Circuit disagreed - looking at the specific language of the Montana statute – to hold that it does not preclude federal contractors from complying with the DFWA; thus, there is no conflict with the federal law.
- **Carlson case is important.** It emphasized that state law protections for users of medical marijuana are not preempted by the DFWA.

So what does it all mean?

- For Employers
 - Covered by Feds?
 - No change
 - Something that has been automatically disqualifying, still is
 - Employer still has no choice on how to treat +MJ UDS
 - Not covered by Feds
 - Big change
 - Something that has been automatically disqualifying may still be, or may no longer be
 - Now it's up to employer on how to navigate federal and state laws

Americans with Disabilities Act (ADA): Does it apply?

- Federal ADA law states:
 - A qualified individual with a disability shall **not include** any employee or applicant who is currently engaging in the illegal use of drugs.
 - Marijuana remains illegal under federal law.

BUT...

- Pennsylvania Human Relations Act requires employers in Pennsylvania to refrain from discrimination against persons with disabilities and to engage in interactive process to discuss accommodation of the underlying medical condition/disability.
 - “It is the public policy of this Commonwealth to foster the employment of all individuals in accordance with their fullest capacities, regardless of their . . . handicap or disability . . . and to safeguard their right to obtain and hold employment without . . . discrimination.”
 - Also appears that public policy of Pennsylvania is to allow for treatment of qualifying disabilities with medical marijuana.

Initial Court Decisions Found For Employers

- *Roe v. Teletech Customer Care Mgmt. (2011)*, the Washington Court of Appeals found that Washington's law does not prohibit an employer from firing an employee for using medical marijuana as authorized by a physician because the state law does not expressly require employers to accommodate on-the-job or off-duty medical marijuana use.
- *Johnson v. Columbia Falls Aluminum Co. (2009)*, the Montana Supreme Court ruled that an employer need not accommodate medical marijuana use.
- *Ross v. Raging Wire Telecommunications, Inc. (2008)*, the California Supreme Court refused to require employers to accommodate marijuana use.
 - Saying the statute did not give marijuana the same status as legal prescription drugs.
 - Observing the drug's illegal status under federal law, the court held that the state's disability-discrimination statute did not require employers to accommodate illegal drug use.

The Trend Now Is Favoring Employees

- *Barbuto v. Advantage Sales and Marketing LLC (2017)*, the Supreme Judicial Court of Massachusetts broke from the line of precedent among state and federal courts to allow a medical marijuana user with a valid state law prescription to pursue a claim for disability discrimination under state law after she was terminated for a positive drug test.
- The Court denied the employer's request to dismiss the claim and found:
 - A positive drug test of a medically prescribed drug, including marijuana, doesn't relieve the employer of its obligation to engage in the interactive process;
 - Exemption from the drug policy isn't necessarily an unreasonable accommodation for a medically prescribed drug, including marijuana; and
 - Employers cannot simply rely on violation of the company's drug policy to support a termination when a valid prescription for medical marijuana is at issue.

The Trend Is Favoring Employees

- In *Whitmire v. Wal-Mart Stores, Inc.* (February, 2018), a federal Judge in Arizona found that Walmart discriminated against a worker when it fired her, a medical marijuana cardholder (smokes marijuana before bed to help with shoulder pain), solely due to a positive drug test.
- Judge ruled that firing the employee was unjustified, based on the company's idea that marijuana metabolites in her urine meant she was impaired at work.
- Judge wrote that Walmart failed to prove the employee was impaired at work, and he allowed the discrimination claim to proceed under the state's Medical Marijuana Act.
- NOTE: Arizona law is similar to Pennsylvania - employers cannot discriminate against certified medical marijuana users unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment. Neither law addresses whether employers must accommodate use of the drug.

Trend Toward Accommodation

- Assuming employers need to accommodate underlying medical conditions by accommodating the use of medical marijuana in some respect -- at least as to State law -- how should employers accommodate?
 - If an employee has a valid medical marijuana card and occupies a safety-sensitive position, employers should engage in the interactive process to determine if an accommodation other than permitting the use of medical marijuana is available.
 - Leave
 - Change in schedule
 - Remote work arrangements
 - Reallocation of job duties
 - **Be careful!** Employers may face liability if they force an interactive process on all employees with a medical marijuana card – could be viewed as disability discrimination.
 - **Be careful!** Employers may face an uphill battle if they attempt to classify too many positions as “safety sensitive.” The Pennsylvania MMA does not identify healthcare professionals as safety sensitive positions.

Possible Exception to Making An Accommodation

- The “direct threat” defense – under the ADA/PHRA – affords an employer with a limited defense to liability, permitting legal termination of an employee from his/her position (or at least deeming him/her unqualified) where the disability poses “a direct threat to the health or safety of other individuals in the workplace.”
 - The phrase “direct threat” is defined 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.”
- An employer is required to conduct an individualized assessment of present ability to safely perform the essential functions of the job, taking into consideration the duration of the risk and the nature, severity, likelihood and imminence of any potential harm.
- Determination must be objectively reasonable and supported by medical evidence; honest, good faith belief that an employee poses a safety threat is generally not enough to avoid liability for terminating that worker.

What We Know for Sure - PA Medical Marijuana Law

- Employment protections for those who are certified to use medical marijuana are written directly into the PA Statute.
 - *No employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding his/her compensation, terms, conditions, location or privileges **solely** on the basis of such employee's status as an individual who is certified to use medical marijuana.*



What We Know for Sure - Pennsylvania

- Employers are not required to:
 - permit employees to work **under the influence** when to do so would pose a risk of harm;
 - accommodate use of medical marijuana on the premises;
 - withhold discipline where an employee is **under the influence** in the workplace or performs negligently as a result of being **under the influence**; or
 - take any act that would constitute a violation of federal law.
- **Be careful!**
 - We still do not have a definition of “under the influence.”
 - Recent cases suggest that a reliance solely on compliance with federal law may not be successful.

What We Know for Sure – New Jersey and Delaware

New Jersey:

- Unlawful for employer to take any adverse employment action against employee based solely on the employee's status as user of medical marijuana.
- If an employer has a drug testing policy and an employee/applicant tests positive for marijuana, employer must offer opportunity for employee/applicant to present a medical explanation.

Delaware:

- An employer generally may not discriminate against an individual in hiring, termination, or any term/condition of employment if based upon a person's status as a user of medical marijuana.
- Additionally, an employer generally may not discriminate based upon a positive drug test for marijuana if the user is a registered qualifying patient and the individual did not use or possess marijuana, and was otherwise not impaired by marijuana, while on the job.

Testing For Medical Marijuana

- Common testing methods
 - Urine
 - Detects only *inactive* THC-COOH metabolite
 - May reflect use from days or weeks prior
 - Blood
 - Detects *active* THC

Challenges With Drug Testing Generally

- The science used to test for marijuana has been slow to catch up with increased legalization.
- There is no test for current marijuana “inebriation.”
- An employee may test positive for marijuana even if he/she used the drug days before their shift began and were not actually impaired on the job.
- This creates a significant challenge for employers who wish to discipline employees who are believed to be impaired on the job.
- Even if an employee tests positive, it could be difficult to show that an employee was “under the influence” while working.
 - Look for signs of unusual behavior – strange speech, slow moments, red eyes, etc.

Challenges With Drug Testing Generally

- What About Zero-Tolerance Policies?
 - Although some states (Colorado, Michigan, Oregon, Washington, New Mexico) have upheld zero-tolerance policies on the grounds that marijuana use remains illegal under Federal law...
 - **Be aware** that cannabis patients in Massachusetts, Rhode Island and Connecticut won lawsuits against companies in 2017 that rescinded job offers or fired workers because of positive tests for cannabis.
 - Pennsylvania, New Jersey and Delaware employers should not ignore these cases.

Challenges With Drug Testing Generally

- These 2017 cases are significant to employers because the medical marijuana statutes in Rhode Island, Massachusetts, Pennsylvania and New Jersey all prohibit discrimination by employers against medical marijuana cardholders.
- The Rhode Island and Massachusetts decisions provide insight into the following questions:
 - If an employee with a medical marijuana card fails a company drug test, can the employer discipline the employee under its drug policies?
 - Would that discipline constitute unlawful discrimination or retaliation against a medical marijuana cardholder?
- Maine, Nevada, Arizona, Minnesota, New York and Delaware have also limited an employer's ability to penalize applicants and employees who are authorized to use medical marijuana.

PRACTICAL CHALLENGES FOR HEALTHCARE EMPLOYERS...

***DELICATE BALANCE OF
POTENTIAL LIABILITIES***

What Should Be Done Now?

- Employers may need to update policies to:
 - Ensure they are clear that testing positive for an illegal drug – *including medical marijuana* – is a policy violation, and the employer reserves the right to take adverse action based upon test results (to the fullest extent under the law).
 - Ensure that justifications and safety-sensitive positions, including any task that may be deemed life threatening, are fully explained.
 - Ensure test identifies *active* THC.
 - Comply with the discipline and non-discrimination provisions of Pennsylvania, New Jersey and Delaware laws.

Questions? Thank you!



Jill M. Lashay, Esq.
Shareholder
(717) 237-4856
Jill.Lashay@bipc.com



Rafael M. Villalobos, Jr.
Counsel
(215) 665-3807
Rafael.Villalobos@bipc.com