AMERICAN INNS of COURT®

MARIJUANA LAWS

WEED IN THE WORKPLACE PRESENTATION

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BY

ANNE G. BIBEAU, ESQUIRE
VANDEVENTER BLACK LLP

Virginia Workers' Compensation American Inns of Court

Post Office Box 28 Salem, VA 24153

VANDEVENTER BLACK LLP
ATTORNEYS AT LAW

Anne G. Bibeau

757.446.8517

abibeau@vanblacklaw.com

LinkedIn

Office Location: Norfolk, VA

Practice Areas

- Alternative Dispute Resolution
- Appellate Law
- Cannabis Law
- Commercial Litigation
- Cybersecurity & Data Privacy
- International Trade & Regulation
- Labor & Employment
- Litigation
- OSHA & VOSH Regulatory Compliance
- Tax

Education

- B.A., College of William & Mary
- J.D., Marshall-Wythe School of Law, College of William & Mary

Jurisdiction Licensed

- Virginia
- District of Columbia

Courts & Administrative Bodies

- U.S. District Court for E.D. Va., W.D. Va., D.C., Neb., Wisc.
- U.S. Bankruptcy Court for E.D. Va.
- U.S. Court of Appeals for 4th, 5th, 9th, 10th, and Fed. Circuits
- U.S. Supreme Court
- U.S. Tax Court

Professional & Community Activities

- Norfolk & Portsmouth Bar Association
- I'Anson-Hoffman Inn of Court
- Hampton Roads Society for Human Resource Management, Past President
- Virginia Restaurant, Lodging & Travel Association
- Eastern Shore Chapel, Parish Chancellor
- Episcopal Diocese of Southern Virginia, Vice Chancellor
- American Arbitration Association – Panel Member, Employment Law Arbitration
- American Bar Association, Forum on Construction Law
- Virginia State Bar, District Committee on Attorney Discipline
- City of Norfolk Grievance Panel
- Propeller Club Port of Norfolk, Board of Governors

Notable Accomplishments

- Martindale-Hubbell® AV Preeminent® Peer Review Rating
- LEAD Hampton Roads, Class of 2012
  Thomson Reuters, "Virginia Super Lawyers" (2010-12)
- Virginia Business, "Legal Elite"– Labor/Employment (2010, 2013-present)
- Listed in The Best Lawyers in America®, Employment Law-Management (2018-present)

- Coastal Virginia Magazine, "Top Lawyers" – Civil Litigation (2017-present) Labor & Employment (2019-present)
- Virginia Business, "Legal Elite" (2009-present)
- Thomson Reuters, Virginia "Super Lawyers" (2019); Rising Star" (2010-2012)
- "Virginia Living's Women in the Law" (2017-present)
- Virginia Lawyers Weekly, "Influential Women of Law," Class of 2020
- Virginia Lawyers Weekly "Virginia's Go To Lawyer," Employment Law (2021)

Attorney Bio

Anne Graham Bibeau is the firm's Labor & Employment and Cannabis Law Practice Group Manager. She focuses her practice on labor and employment law, alternative dispute resolution, commercial litigation, tax litigation, and the emerging cannabis industry. She advises clients on the Fair Labor Standards Act (FLSA), discrimination and harassment, the Family and Medical Leave Act (FMLA), disability law, labor relations, employment agreements, and other labor and employment matters, and conducts workplace investigations. She is an experienced litigator. She also serves as an arbitrator and mediator and is an American Arbitration Association (AAA) Employment Law Arbitrator. Anne regularly represents clients in various industries, including federal contractors, construction, maritime, and higher education.

ALTERNATIVE DISPUTE RESOLUTION

As an advocate, Anne represents clients in arbitrations and mediations involving employment, labor, and commercial disputes. She also serves as a neutral in arbitrations and mediations in employment, commercial, and consumer cases. She is on the AAA's Employment Law Panel as an arbitrator.

EXPERIENCED LITIGATOR

Anne frequently appears in federal and state courts representing clients in employment, labor, commercial, tax, and other disputes. Prior to joining Vandeventer Black, Anne was a trial attorney with the U.S. Department of Justice, Tax Division, where she litigated civil tax cases nationwide.

PREVENTATIVE APPROACH TO EMPLOYMENT LAW

Anne has been advising clients on labor and employment law matters for more than twenty years. She works closely with clients to guide employment decisions to minimize risk. She drafts employment agreements, including agreements for executives,

noncompete agreements, arbitration agreements, and severance agreements. She advises clients on managing employee leave issues under the Americans with Disabilities Act (ADA) and FMLA. She assists clients in properly classifying independent contractors and FLSA exempt employees and other wage and hour issues.

Even with the most careful preparation, workplace claims will arise from time to time. Anne is skilled in litigation in federal and state court and an experienced advocate in arbitrations. She routinely represents clients in Title VII, ADA, Age Discrimination in Employment Act (ADEA), and other employment law cases, including FLSA collective actions. She advocates for clients before the Equal Employment Opportunity Commission (EEOC), the Department of Labor (DOL), the Virginia Employment Commission (VEC), the Occupational Safety and Health Administration (OSHA), Virginia Occupational Safety and Health (VOSH), and other administrative agencies.She routinely represents clients in Title VII, ADA, Age Discrimination in Employment Act (ADEA), and other employment law cases, including FLSA collective actions. She advocates for clients before the Equal Employment Opportunity Commission (EEOC), the Department of Labor (DOL), the Virginia Employment Commission (VEC), the Occupational Safety and Health Administration (OSHA), Virginia Occupational Safety and Health (VOSH), and other administrative agencies.

Early in her career, Anne worked for the U.S. Postal Service Law Department, where she litigated labor and employment law cases, handled labor disputes, and trained and advised management on preventative human resources strategies.

FEDERAL CONTRACTOR COMPLIANCE

Anne drafts affirmative action plans (AAPs) and guides clients in Office of Federal Contract Compliance Programs (OFCCP) compliance. She is well-versed in the Service Contract Act (SCA) and Davis Bacon Act (DBA) rules regarding employee wages. She represents clients in DOL and OFCCP audits.

LABOR LAW

Anne represents management in union avoidance, union elections, collective bargaining, and unfair labor practice charges. She also advocates for management in labor arbitrations and before the National Labor Relations Board (NLRB).

KNOWLEDGEABLE ON DEVELOPING CANNABIS LAW

Anne advises businesses on the rapidly changing laws and regulations regarding the

Anne advises businesses on the rapidly changing laws and regulations regarding the nascent cannabis industry in Virginia. Together with Jonathan Gallo, she heads up the firm's Cannabis practice.

BACK HOME

Anne grew up in Virginia Beach and received both her undergraduate and law degrees from the College of William & Mary. After ten years working in big cities (Washington and New York), in 2007 she returned to the beach and joined Vandeventer Black, where she had clerked as a law student.

Representative Matters

- Won a jury trial in a multi-party suit involving claims of business conspiracy, tortious interference with contract, and other business torts
- Won a jury trial in a tax refund suit involving the trust fund recovery penalty
- Won a jury trial in a tax refund suit involving a federal excise tax
- Won summary judgment in insurance coverage case
- Won summary judgment in an estate tax case
- Won demurrer in a multi-party suit involving business tort claims between multiple federal contractors
- Won an arbitration involving age and disability discrimination claims
- Won an arbitration involving education disability discrimination claims
- Won several labor arbitrations involving employee discharges

News

Vandeventer Black Attorneys Recognized as 2022 Top Lawyers of Coastal Virginia

01/01/2022 / Firm News

Attorneys from the Norfolk-based business and litigation law firm, Vandeventer Black, have been recognized as Top Lawyers of Coastal Virginia for 2022. This distinction is a peer-rated nomination given to those lawyers who exemplify excellence in their specialty. "We feel very proud of our legal team accomplishments for the high ...

29 Vandeventer Black Attorneys Listed as 2021 Legal Elite

11/23/2021 / Firm News

Twenty-nine Vandeventer Black attorneys have been recognized as 'Legal Elite' for 2021

by Virginia Business magazine. The magazine partners with the Virginia Bar Association to grant this award to attorneys nominated by their peers for this recognition every year. The selected attorneys are: Christopher Ambrosio, Business Law Anne G. Bibeau, ...

28 Vandeventer Black LLP lawyers named to 2022 Best Lawyers® list

08/19/2021 / Firm News

Vandeventer Black LLP is pleased to announce that 28 lawyers were included in the 2022 Edition of The Best Lawyers in America. The Best Lawyers in America lists are divided by geographic region and practice areas. Attorneys are reviewed by their peers based on professional expertise and undergo an authentication process. "We would ...

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Articles

New Federal Law Ends Mandatory Arbitration of Sexual Harassment and Assault Claims

03/09/2022 / Alternative Dispute Resolution

On March 3, 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, limiting the use of mandatory employment arbitration agreements. Until now, under the Federal Arbitration Act, employers, by use of valid arbitration agreements, could require employees to submit most ...

New Certification Requirement for Federal Contractors

01/11/2022 / Government Contracts, Labor & Employment

Beginning this year, federal supply and service contractors and subcontractors will be required to certify that they have developed and maintained an affirmative action program (AAP) for each establishment. Previously, while most federal contractors have been required to have an AAP, they did not have to show that they met ...

Federal Contractors Now Restricted in Questioning Applicants about Their Criminal Records

01/04/2022 / Labor & Employment

Hidden deep within the National Defense Authorization Act for Fiscal 2020 is a "ban the box" provision that restricts federal contractors' inquiries into their applicants' criminal histories. This new provision, which went into effect on December 20, 2021, prohibits federal contractors from requesting "the disclosure of criminal history record information ...

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757.446.8600

WEED IN THE WORKPLACE

By Anne G. Bibeau, Esq.
Vandeventer Black LLP

March 16, 2022

I. Virginia Law

A. Medical Cannabis

Virginia took its first step into the cannabis world in 2015 when it passed a law allowing the use and possession of CBD oil or THC-A oil to treat intractable epilepsy. Va. Code § 54.1-3442.7. Later, the use of such oils was expanded to any diagnosed condition upon a written certification from a physician, nurse practitioner, or physician assistant. *Id.*; *see also* Va. Code § 54.1-3442.5. Virginia authorized the establishment of five pharmaceutical processors to produce and dispense these oils, one per Health Service Area. Va. Code § 54.1-3442.6(B). The five pharmaceutical processors are each licensed to operate a vertically integrated facility where they grow, extract, dispense, and deliver medical cannabis oils. Va. Code § 54.1-3442.6. The licensed pharmaceutical processors are:

- Health Service Area I (Staunton) – Vacant
- Health Service Area II (Manassas) – Dalisto, LLC
- Health Service Area III (Abingdon) – Dharma Pharmaceuticals
- Health Service Area IV (Richmond) – Green Leaf Medical of Virginia, Inc.
- Health Service Area V (Portsmouth) – Columbia Care Eastern Virginia, LLC

Initially, patients and others legally authorized to possess cannabis oil could still be charged with possession of marijuana, but had available an affirmative defense that such possession was permitted. Va. Code § 18.2-250.1. Subsequently, Virginia amended the law to prohibit prosecution for possession of marijuana or THC when the possession occurs pursuant to a valid prescription. Va. Code § 18.2-251.1

In 2021, Virginia amended the law to allow the pharmaceutical processors to produce and sell cannabis products other than cannabis oils. Va. Code § 54.1-3408.3

B. Recreational Cannabis

In 2020, Virginia decriminalized simple possession of marijuana, creating a nominal civil penalty for simple possession. Va. Code §§ 18.2-248.1, 250.1. Then, in 2021, Virginia opened the door to recreational marijuana by repealing the civil penalty. Va. Code § 18.2-250.1. Now, Virginia provides a rebuttable presumption that a person who possesses no more than one ounce possesses it for personal use, which is legal. Va. Code § 18.2-248.1.

Recreational marijuana, with numerous restrictions, is currently legal in Virginia, pursuant to House Bill 2312, which was passed in 2021.

A person age 21 and older may lawfully possess "on his person or in any public place not more than one ounce of marijuana or an equivalent amount of marijuana product as determined by regulation promulgated by the Board." Va. Code § 4.1-1100. Adult sharing is permitted (provided it does not exceed one ounce or an equivalent amount of marijuana products), but "adult sharing" does not include instances in which (i) marijuana is given away contemporaneously with another reciprocal transaction between the same parties; (ii) a gift of marijuana is offered or advertised in conjunction with an offer for the sale of goods or services; or (iii) a gift of marijuana is contingent upon a separate reciprocal transaction for goods or services. Va. Code § 4.1-1101.1.

No person shall consume marijuana or a marijuana product or offer marijuana or a marijuana product to another, whether accepted or not, at or in any public place. Va. Code § 4.1-1108. "Public place" is defined as any place, building, or conveyance to which the public has, or is permitted to have, access, including restaurants, soda fountains, hotel dining areas, lobbies and corridors of hotels, and any park, place of public resort or amusement, highway, street, lane, or sidewalk adjoining any highway, street, or lane. Va. Code § 4.1-600.

The law permits a person age 21 or older to cultivate up to four marijuana plans for personal use at their residence, provided that the household has no more than four marijuana plants, the plants are not visible from a public way (without the use of aircraft, binoculars or other optical aids), the owner takes precautions to prevent the unauthorized access by anyone younger than 21, and each plant has a tag listing the owner's name, driver's license or identification number, and a notation that the plant is grown for personal use as authorized under Va. Code § 4.1-1101. Va. Code § 4.1-1101(A)-(B).

HB2312 also sets forth a plan to create and regulate a legal market for the cultivation, distribution, and retail sale of marijuana for recreational use. The legislation respects the current regulatory scheme for medical marijuana but creates an entirely new licensing and regulatory scheme for recreational sales. As enacted, sales of marijuana cannot begin before January 1, 2024. The provisions of HB2312 relating to the retail market must be reenacted by the General Assembly in 2022 in order to become effective. In the meantime, a new, independent regulatory agency, the Virginia Cannabis Control Authority ("VCCA"), has been established to regulate the marijuana industry. Legislation as enacted envisions the licensing architecture to be in place through regulations promulgated by the Cannabis Control Authority no later than July 1, 2023, with the Authority authorized to accept applications beginning that date and legal sales beginning January 1, 2024. So far, the VCCA has not issued any proposed regulations. There is also a Cannabis Oversight Commission created to oversee legislation's implementation. HB2312 provides a licensing structure for cultivators, wholesalers, manufacturers, retail sales, and testing. The number of licenses that can be issued are limited as follows:

- Retail marijuana stores - 400
- Marijuana wholesalers - 25

- Marijuana manufacturing facilities - 60
- Marijuana cultivation facilities - 450

Va. Code § 4.1-606(C)(1).

Virginia will impose a 21% excise tax on the sale of retail marijuana and marijuana products. Va. Code § 4.1-1003(A). This is in addition to the existing 5.3% sales tax; further, localities can impose an additional 3% local tax on retailers by ordinance. *Id.*; Va. Code § 4.1-1004. Estimates are $31-$52 million in new state revenue in the first year (2024) and $154-$257 million by 2028.

C. Virginia Legal Ethics

In 2021, Virginia Rule of Professional 1.2 was amended to address the dilemma attorneys face in advising clients about marijuana under Virginia law while it remains illegal under federal law. Under subsection (c), the following provision was added:

> (c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may
>
> * * *
>
> (3) counsel or assist a client regarding conduct expressly permitted by state or other applicable law that conflicts with federal law, provided that the lawyer counsels the client about the potential legal consequence of the client's proposed course of conduct under applicable federal law.

Va. R. Professional Conduct 1.2(c). As explained in the commentary,

> Paragraph (c)(3) addresses the dilemma facing a lawyer whose client wishes to engage in conduct that is permitted by applicable state or other law but is prohibited by federal law. The conflict between state and federal law makes it particularly important to allow a lawyer to provide legal advice and assistance to a client seeking to engage in conduct permitted by state law. In providing such advice and assistance, a lawyer shall also advise the client about related federal law and policy. Paragraph (c)(3) applies, but is not limited in its application, to any conflict between state and federal marijuana laws.

Va. R. Professional Conduct 1.2 cmt. 13.

II. Federal Law

A. Controlled Substances Act

Marijuana is still illegal under federal law. The Controlled Substances Act of 1970 regulates the manufacture, importation, possession, use, and distribution of certain substances. 21 U.S.C. §§ 801, *et seq*. The Act places all regulated substances into one of five schedules based on the substance's accepted medical use, potential for abuse, and safety and potential for addiction.

Marijuana is currently classified under Schedule I, meaning that it "has a high potential for abuse," has "no currently accepted medical use in treatment in the United States," and there is a "lack of accepted safety for use of the drug … under medical supervision." 21 U.S.C. § 812(b)(1). In addition to marijuana, Schedule I includes heroin, LSD, and several other drugs.

B. Consequences of Contradictory Federal and State Laws

1. Cole memos

Since the Obama administration, the federal government has taken a "hands off" approach to marijuana enforcement in states that have legalized marijuana, with a few limited exceptions. This policy began with a 2013 memorandum by then-Deputy Attorney General James Cole, generally known as the Cole Memo, which provided that in states where marijuana is legal, the Justice Department would not enforce the Controlled Substances Act against marijuana except to prevent: the distribution of marijuana to minors, marijuana revenue from going to criminal enterprises, the diversion of marijuana from states where it is legal to states where it is not, state-authorized marijuana activity from being used as a cover for other illegal activity, violence and the use of firearms in the cultivation and distribution of marijuana, drugged driving, marijuana cultivation on public lands, and marijuana possession on public property.

Under the Trump Administration, then-Attorney General Jeff Sessions revoked the Cole Memo and announced a "return to the rule of law." Not much changed in federal enforcement, however. The legalization of marijuana has spread to other states, while the federal government continues to take a disinterested approach.

2. Banking issues

Financial transactions involving marijuana-related businesses, even if the business is fully compliant with applicable state legislation, can lead to federal criminal prosecution under the Bank Secrecy Act ("BSA"), 31 U.S.C. § 5311, *et seq.*, and various anti-money laundering laws. As a result, banks may be hesitant to work with cannabis-related businesses. The U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN"), however, issued guidance to financial institutions in 2014 on how banks may provide services to marijuana-related businesses consistent with their BSA obligations, with the goal to "enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses." Because of the FinCEN guidance, it seems unlikely that marijuana-industry clients would have any effect on a law firm's banking. New guidance says that banks can separate out hemp from marijuana.

The FinCEN Guidance instructs financial institutions to file suspicious activity reports ("SARs") relating to marijuana-related activity as follows:

- a "Marijuana Priority" SAR in a circumstance where the transaction involves marijuana-related activity that "violates state law" (or implicates one of the now-defunct Cole Memorandum priorities); and

- a "Marijuana Limited" SAR in a circumstance where "a financial institution provid[es] services to a marijuana-related business that it reasonably believes" does not violate state law (or implicate one of the now-defunct Cole Memo priorities for federal prosecutors concerning marijuana enforcement);
- a "Marijuana Termination" SAR in a circumstance where a financial institution has elected to terminate a relationship with a marijuana-related business "in order to maintain an effective anti-money laundering compliance program."

Indirect Marijuana Businesses ("IMBs") are ineligible for SBA loans. An IMB is a business that "derived any of its gross revenue for the previous year (or, if a start-up, projects to derive any of its gross revenue for the next year) from sales to Direct Marijuana Businesses ["DMB"] of products or services that could reasonably be determined to aid in the use, growth, enhancement or other development of marijuana." IMBs include "businesses that advise or counsel [DMBs] on the specific legal, financial/accounting, policy, regulatory or other issues associated with stablishing, promoting, or operating a [DMB]."

3. Bankruptcy Protection

Bankruptcy protection is not available to businesses or individuals that derive income, even indirectly, from the marijuana industry. *See In re Arenas*, 535 B.R. 845 (10th Cir. BAP 2015) (holding that debtors, a Colorado couple, were ineligible for bankruptcy protection because they used one property to grow marijuana and leased a second property to a marijuana dispensary); *In re Johnson*, 532 B.R. 53 (Bankr. W.D. Mich. 2015) (holding that a debtor was ineligible for bankruptcy protection because some of his income was from growing marijuana, even though most of his income was social security benefits)). In 2019, the U.S. Trustee moved to dismiss an Oregon woman's bankruptcy petition because she was an employee of GreenForce Staffing, a staffing agency serving the marijuana industry; her income, therefore, was derived—however indirectly—from an illegal activity. *In re Holly Christine Adair*, Case No. 19-30181-tmb13 (D. Or. Bankr.). The debtor voluntarily dismissed the case in response.

III. Employment Considerations

A. Background Checks

Virginia employers are prohibited from requiring applicants/employees to disclose simple possession charges, arrests, and convictions. Va. Code §§ 18.2-248.1, 250.1.

B. ADA

The Americans with Disabilities Act, 42 U.S.C. §§ 12131, *et seq*., prohibits employment decisions based on disability if the individual is qualified to perform the essential functions of the job and requires employers to provide reasonable accommodations to employee's/applicant's disabilities, unless such accommodations create an undue burden for the employer. The law provides an exception for where the disabled individual poses a direct threat to the health or safety of himself or others that cannot be eliminated by reasonable accommodation. *See Champ v. Balt. Cty*., 884 F. Supp. 991, 997-98 (D. Md. 1995). Employers are required to engage with disabled applicants and employees in an interactive process to identify the individual's precise limitations and potential accommodations. *Haneke v. Mid-Atlantic Capital Mgmt*., 131 F. App'x

399, 400 (4th Cir. 2005). The Virginia Human Rights Act imposes similar requirements for on employers. Va. Code § 2.2-3905.1.

Under the ADA, anyone who is "currently engaging" in the illegal use of drugs is not a "qualified individual with a disability." 42 U.S.C. § 12114(a). The term "qualified individual," however, does include those who have been successfully rehabilitated and are no longer engaged in the illegal use of drugs; are currently participating in a rehabilitation program and are no longer engaging in the illegal use of drugs; and are regarded, erroneously, as illegally using drugs. 42 U.S.C. § 12114(b).

There is no ADA protection or accommodation for the use of marijuana or other federally illegal drug. An employee or applicant using marijuana for a medical reason, however, may be entitled to an accommodation under the ADA for the underlying medical condition.

The following are representative cases demonstrating how courts have approached the issue of marijuana in the workplace:

***James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012)**
Plaintiffs sued two California cities that had closed medical marijuana facilities, claiming that the cities violated ADA's Title II, which prohibits states/localities from discrimination on the basis of disability in the provision of public services. The Ninth Circuit held that marijuana use under a doctor's supervision in accordance with state law is not protected under the ADA because the ADA excludes illegal drug users from its definition of qualified individuals with a disability. The ADA does not protect individuals who claim to face discrimination on the basis of marijuana use.

***EEOC v. Pines of Clarkston*, No. 13-CV-14076, 2015 U.S. Dist. LEXIS 55926 (E.D. Mich. Apr. 29, 2015)**
Employee was hired for a nursing job and was required to take a drug test. As she used medical marijuana for her epilepsy (legal under state law), she failed the drug test and was fired. The employee and EEOC sued the employer, alleging disability discrimination under the ADA. The employer argued that it fired Holden because she failed the drug test. The court held that discharge for marijuana use is a permissible nondiscriminatory reason. The court nonetheless denied the employer summary judgment because there was a factual issue as to whether the employee was terminated because of her marijuana use (for which there would be no ADA protection) or her epilepsy.

***Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F. Supp. 3d 326 (D. Conn. 2017).**
In her job interview, plaintiff disclosed that she had PTSD and took medical marijuana, as permitted under Connecticut law. Connecticut law bars employers from firing or refusing to hire someone for use of medical marijuana in compliance with Connecticut law. After receiving a job offer, the plaintiff took and failed a drug test based on THC. The employer then rescinded her job offer. Plaintiff brought suit under Connecticut law. Defendant moved for summary judgment on the basis that the ADA precluded enforcement of the Connecticut law. In denying the defendant's motion, the court held that the ADA allows employers to prohibit the use of illegal drugs at the workplace but does not expressly allow an employer to prohibit drug use outside the

workplace. The court Although the ADA does not protect marijuana users on the basis of their marijuana use, Connecticut law CT law does.

In a separate opinion, *Noffsinger v. SSC Niantic Operating Co., LLC*, 338 F. Supp. 3d 78 (D. Conn. 2018), the court also rejected the employer's argument that as a federal contractor, it was bound by the Drug Free Workplace Act ("DFWA") to terminate an applicant who tested positive for THC. The court explained that the DFWA

> does not require drug testing. . . . Nor does the DFWA prohibit federal contractors from employing someone who uses illegal drugs outside of the workplace, much less an employee who uses medical marijuana outside the workplace in accordance with a program approved by state law. That defendant has chosen to utilize a zero-tolerance drug testing policy in order to maintain a drug free work environment does not mean that this policy was actually 'required by federal law or required to obtain federal funding.'

***Whitmire v. Wal-Mart Stores Inc.*, 359 F. Supp. 3d 761 (D. Ariz. 2019)**
The Arizona Medical Marijuana Act ("AMMA") prohibits employment discrimination based on registered qualifying patient's positive drug test for marijuana, unless the employee used, possess, or was impaired by marijuana at worksite or during work hours. The plaintiff in this case had an AZ medical marijuana card and smoked medical marijuana as sleep aid and for chronic pain due to arthritis. She claimed she never brought it to work and was never impaired during work hours. In a post-accident drug test, she tested positive for marijuana metabolites at quantitative value of >1000 ng/ml. The employer determined that the test results indicated she was impaired during her shift and terminated her employment for violation of drug policy. Employee filed suit alleging wrongful termination in violation of AMMA. The court denied the employer's motion for summary judgment in part on the basis that the employer needed to present expert witness to testify as to whether the amount of marijuana metabolites indicates impairment.

***Coats v. Dish Network, LLC*, 2015 CO 44, 350 P.3d 849**
Colorado's Medical Marijuana Amendment permits medical marijuana use. In addition, Colorado has a law making it an unfair and discriminatory labor practice to discharge an employee based on employee's "lawful" outside-of-work activities. C.R.S. § 24-34-402.5. The plaintiff claimed that his employer fired him for using medical marijuana at home, during non-work time, and that such use is "lawful" and therefore protected by Colorado law. The court rejected this argument, holding that medical marijuana use is not a "lawful" activity under C.R.S. § 24-34-402.5 because it is illegal under federal law.

***Barbuto v. Advantage Sales & Mktg., LLC*, 148 F. Supp. 3d 145 (D. Mass. 2015)**
The Massachusetts Medical Marijuana Act decriminalizes medical marijuana but does not provide employment protection. The employee, who took medical marijuana for Crohn's disease, accepted a job offer contingent upon passing a drug test. She told her new employer that she would test positive for marijuana, but the supervisor said it would be OK. She failed the drug test and was terminated. The employer argued that it was following federal law prohibiting marijuana. The court held that because the employee had a disability, under Massachusetts law

the employer had a duty to engage in the interactive process to determine if there was a reasonable accommodation to help her perform the job. The court implied that an employer should determine whether a medical marijuana user could treat his or her medical condition with a different medicine instead of medical marijuana.

***Callaghan v. Darlington Fabrics Corp.*, No. PC-2014-5680, 2017 R.I. Super. LEXIS 88 (Super. Ct. May 23, 2017)**

Employer rejected a job applicant who was a registered medical marijuana user based on pre-employment drug test. RI law prohibits employment discrimination on the basis of status as a medical marijuana cardholder. The court evaluated whether the RI law was preempted by the federal Controlled Substances Act and determined that it was not, largely based on the federal government's lackadaisical approach to enforcement in states that have legalized marijuana. The court noted that Congress has passed spending amendments "preventing the funds appropriated … to [DOJ] to be used to prevent … states … 'from implementing their own laws that authorize'" medical marijuana. Because RI law was not preempted, the court held that the employer illegally discriminated against plaintiff by failing to accommodate her medical marijuana use.

***Cotto v. Ardagh Glass Packing, Inc.*, No. 18-1037 (RBK/AMD), 2018 U.S. Dist. LEXIS 135194 (D.N.J. Aug. 10, 2018)**

The NJ Compassionate Use Medical Marijuana Act decriminalized medical marijuana. Employee, a forklift operator, was required to take a post-accident drug test. He told his employer that he could not pass because he takes several medically-prescribed drugs, including medical marijuana. The employer placed him on indefinite suspension, explaining that he could not work again unless he tested negative for marijuana. The employee filed suit claiming disability discrimination under NJ's disability discrimination law. He argued that he could perform the job and should not be required to take a drug test for marijuana. The court granted the employer's motion to dismiss on the basis that New Jersey law does not require private employers to waive drug tests for users of medical marijuana.

In reaction to this decision, New Jersey passed a law the following year to extend workplace protections to employees and healthcare practitioners engaging in activities authorized by New Jersey's Compassionate Use Medical Cannabis Act. As amended, the law prohibits employers from taking any "adverse employment action" against a medical marijuana user "based solely on the employee's status" as a registrant under the Act. If an employee has a valid prescription for marijuana, CBD, etc., then the employer cannot discriminate against the employee for use of those substances.

C. Virginia's Limited Employment Protection

Virginia has created a narrow employment protection for users of medical cannabis oil. Under Va. Code § 40.1-27.4, employers are prohibited from discharging, disciplining, or discriminating against an employee for the employee's lawful use of cannabis oil pursuant to a valid written certification issued by a practitioner for the treatment or to eliminate the symptoms of the employee's diagnosed condition or disease pursuant to Va. Code § 54.1-3408.3. Employers, however, may take an adverse employment action if the employee is impaired at work. Also, employers may "prohibit possession during work hours." Further, the law provides that

employers are not required to take any action that would cause the employer to be in violation of federal law or that would result in the loss of a federal contract or federal funding. Further, defense industrial base sector employer or prospective employer is not required to hire or retain anyone who test positive for THC in excess of 50 ng/ml for a urine test or 10 pg/mg for a hair test. Va. Code § 40.1-27.4(C).

D. Unique Employment Situations

1. DOT regulations

49 C.F.R. § 382.213 - No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any drug or substance identified as a Schedule I drug. No employer having actual knowledge that a driver has used a controlled substance shall permit the driver to perform or continue to perform a safety-sensitive function. 49 C.F.R. § 382.215 - No employer having knowledge that a driver has tested positive or has adulterated or substituted a test specimen for controlled substances shall permit the driver to perform or continue to perform safety-sensitive functions.

2. MSHA

30 C.F.R. § 56/57.20001 prohibits intoxicating beverages and narcotics in or around mines and prohibits persons under the influence of alcohol or narcotics on the job. MSHA interprets this regulation to apply to marijuana.

***East Tennessee Zinc* (FMSHRC 2009) -** Operator cited for violation of 30 C.F.R. § 57.20001 when marijuana blunts discovered during inspection. FMSHRC vacated citation because operator did not "permit" marijuana on property.

***Weathers Crushing, Inc.* (FMSHRC 2000)** - Workplace fatality. Deceased worker had marijuana and pipe in his pocket and tested positive for benzodiazepines and cannabinoids. Citation for violation of 30 C.F.R. § 57.20001. There was no evidence that the operator knew about the marijuana. "The Mine Act imposes strict liability on mine operators for violation of standards, irrespective of fault."