Careless Conflicts: Medical Marijuana Implications for Employer Liability in the Wake of *Vialpando v. Ben's Automotive Services*

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ABSTRACT: There are 25 states and the District of Columbia that have legalized medical marijuana, but the federal government still lists the drug as a Schedule I controlled substance under the Controlled Substances Act. This conflict between state and federal law raises significant liability issues for employers whose employees obtain a medical marijuana prescription. Although state and federal courts have traditionally permitted employers to terminate employees for medical marijuana use, and did not require employers to pay for medical marijuana through workers' compensation or private health insurance plans, some recent cases suggest a trend in the opposite direction. This Note explores employer medical marijuana liability concerns, and argues for an amendment to the Controlled Substances Act that either: (1) reclassifies marijuana as Schedule II or lower; or (2) exempts medical marijuana states, combined with state-level legislation providing explicit accommodation exemptions for employers, or a federal liability shield modeled after the Protection of Lawful Commerce in Arms Act, to give employers protection while respecting the medical needs of their employees.

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I. INTRODUCTION

Cannabis was once a staple of the American economy, when hemp was prized for its myriad commercial applications.[1] After the Industrial Revolution introduced new technologies that reduced hemp's usefulness, people began to value the medicinal properties of marijuana instead. Until the 20th century, cannabis was legal at both the state and federal levels.[2]

However, rampant narcotics addiction to other drugs like cocaine and heroin (then marketed as medicines), coupled with a rising prohibitionist movement, caused the public to lump cannabis in with these other substances and criminalize cannabis possession and distribution.[3]

State and federal marijuana laws were complementary until 1996, when California became the first state to legalize medical marijuana, prompting 22 other states and the District of Columbia to do the same over the next several years.[4] Since the federal government did not change its position, this created a conflict between state and federal law.[5] Under the Supremacy Clause of the Constitution, federal law controls where state law and federal law conflict.[6] States cannot forbid federal prosecutions of their citizens with medical marijuana prescriptions under federal law, but they can eliminate state prosecutions of those citizens under state law.

Employers face significant liability issues if they retain employees who have obtained a medical marijuana prescription in states where it is legal to do so.[7] Examples of this liability include loss of federal contracts, vicarious and negligent retention and hiring liability, violation of federal law or public policy, and workplace safety violations.[8] Until recently, state courts have uniformly permitted employers to refuse to pay for medical marijuana under workman's compensation or employee insurance plans, and to terminate employees who fail a drug test for marijuana regardless of whether they have a prescription.[9] Recent cases in Michigan and New Mexico broke away from traditional judicial deference to employer discretion on the issue, and have highlighted employers' dilemma.[10]

This Note argues that shielding employers from this liability without ignoring the needs of medical marijuana patients will require significant state and federal legislative reforms. Part II briefly introduces marijuana regulation, tracing its development from legal use in the 19th century to the

1. *See infra* Part II.A.
2. *See infra* Part II.A.
3. *See infra* Part II.A.2.
4. *See infra* Part II.A.3.ii.
5. *See infra* Part II.A.3.
6. *See* U.S. CONST. art. VI, cl. 2.
7. *See infra* Part II.B.
8. *See infra* Part II.B.
9. *See infra* Part III.A.2.
10. *See infra* Part III.A.3.

present conflict between state and federal law, and explores the theories of liability under which employers could be charged. Part III explains how recent case law has elevated the need for a solution to this problem, and Part IV analyzes four potential solutions. Part V advocates for either changing marijuana's classification under the CSA or a combination of state and federal legislation to shield employers from liability if they retain employees who use medical marijuana.

II. CANNABIS REGULATION IN THE UNITED STATES AND ITS RELATIONSHIP TO EMPLOYER LIABILITY

This Part examines the legal status of cannabis in the United States from pre-criminalization to 2015. It discusses uncertainty about employer liability issues that arose when some states legalized medical marijuana, but Congress did not change marijuana's classification as a Schedule I controlled substance. An understanding of the historical context from which current legislation has emerged is essential to an informed analysis of the larger problem that this Note considers.

A. THE REGULATORY FRAMEWORK OF CANNABIS IN THE UNITED STATES

State and federal cannabis laws currently conflict on the issue of cannabis regulation, but cannabis was not a criminalized substance at either level in the United States until the 20th century.[11] In fact, hemp[12] was once widely used as a commercial fiber, and played an integral role in American history.[13] As a result of rising prohibitionist sentiments, and a vigorous campaign that culminated in the Controlled Substances Act of 1970, Congress criminalized cannabis nationwide and state legislatures followed suit.[14] However, California became the first state to legalize medical marijuana in 1996, marking the start

11. *See* Mark Eddy, *Overview: U.S. Federal Policy on Marijuana*, *in* DRUG LEGALIZATION 138 (Noël Merino ed., 2011).

12. Hemp is a variety of the cannabis plant that generally has a tetrahydrocannabinol ("THC") concentration of 0.3% or less, while marijuana is a variety that generally has a concentration of 5%–20%. Doug Fine, Opinion, *A Tip for American Farmers: Grow Hemp, Make Money*, L.A. TIMES (June 25, 2014, 7:17 PM), http://www.latimes.com/opinion/op-ed/la-oe-fine-hemp-marijuana-legalize-20140626-story.html. THC is the main psychoactive component of cannabis that creates an altered mental state in users. *Id.* "Under current U.S. drug policy all cannabis varieties, including industrial hemp, are considered Schedule I controlled substances . . . ." RENÉE JOHNSON, CONG. RESEARCH SERV., HEMP AS AN AGRICULTURAL COMMODITY 2 (2015) (citing 21 U.S.C. § 801 (2012)); 21 C.F.R. § 1308.11 (2014). Classification of a substance as Schedule I means that the federal government recognizes it to have no medical benefit or legitimate application. *See infra* Part II.A.2.

13. *See, e.g.*, Fine, *supra* note 12 ("Thomas Jefferson drafted the Declaration of Independence on hemp paper . . . .").

14. RUDOLPH J. GERBER, LEGALIZING MARIJUANA: DRUG POLICY REFORM AND PROHIBITION POLITICS 2–14 (2004).

of a continuing trend away from state-level criminalization as other states followed suit, though its status under federal law remains unchanged.[15]

1. The Transition from Hemp Cultivation to Marijuana Cultivation

The inhabitants of Western Europe have valued hemp as a textile crop since at least the Iron Age (800 BCE).[16] Its strength and resistance to saltwater made it essential for the ropes and riggings of ships, and European governments contracted some of the first colonizers of North America—including the settlers at Jamestown and the Puritans—to cultivate it.[17] Hemp was a significant cash crop in the early United States, and was the nation's third-largest crop by the mid-19th century.[18] Slaves introduced West African varieties of cannabis with more psychoactive properties to South America when the Portuguese forcibly transported them to Brazil in the 1500s, and the practice of smoking marijuana gradually spread north through Mexico.[19] American inventions like the cotton gin and the steam ship eventually "eclipsed the urgency for hemp fiber" which prompted a shift away from the use of the hemp variety of cannabis for industrial purposes and towards the use of the marijuana variety as a curative.[20]

2. The Shift from Regulation to Criminalization

Prior to the 20th century, the federal government largely left drug regulation to the states.[21] Drugs like opium and cocaine were widely used in medicines, and cannabis was used to treat everything from venereal disease to menstrual cramps.[22] Accordingly, 19th-century state regulations took the form of medical sale-of-poison laws that "require[ed] labeling, frequently enumerated a poison schedule, detailed special care to be taken in dispensing poisons, and, toward the end of the period, required a poison register to be kept . . . ."[23] These measures were aimed at pharmacists, and were meant to function as safety precautions and quality control.[24] However, public frustration with the relative ineffectiveness of these laws eventually culminated

15. Clayton Mosher & Scott Akins, *Medical Marijuana*, *in* SCIENCE AND POLITICS: AN A-TO-Z GUIDE TO ISSUES AND CONTROVERSIES 344, 346 (Brent S. Steel ed., 2014).

16. ELIZABETH J.W. BARBER, PREHISTORIC TEXTILES 18 (1991) ("[T]extile use of *Cannabis sativa* does not surface for certain in the West until relatively late, namely the Iron Age."); MARTIN A. LEE, SMOKE SIGNALS: A SOCIAL HISTORY OF MARIJUANA—MEDICAL, RECREATIONAL, AND SCIENTIFIC 20 ("[T]he variety of hemp that grew best in Europe's cooler climes didn't deliver much by way of euphoria.").

17. LEE, *supra* note 16, at 16.

18. *Id.* at 19.

19. *Id.* at 15.

20. *Id.* at 19.

21. GLENN SONNEDECKER, KREMERS & URDANG'S HISTORY OF PHARMACY 220 (4th ed. 1976).

22. LEE, *supra* note 16, at 26.

23. SONNEDECKER, *supra* note 21, at 216.

24. *See id.*

in the Pure Food and Drug Act of 1906, which set national minimum purity levels for drugs and required labeling of their active ingredients.[25]

The free availability of narcotics[26] like opium, cocaine, morphine, and heroin (after its invention in 1898)[27] unfortunately resulted in a high incidence of addiction, and by the turn of the 20th century at least 1% of the American population was addicted to narcotics.[28] Recognizing a need for action, Congress passed the Harrison Narcotics Tax Act ("Harrison Act") in 1914, which required those who dealt in narcotics to register, pay an occupational tax, and "file returns setting forth in detail their use of the drugs."[29] While the scope of the Act did not encompass cannabis, it did have a significant impact on the general public's perception of drugs: "by imposing a stamp of illegitimacy on most narcotics use, [the Act] fostered an image previously associated primarily with opium—that of the degenerate dope fiend with immoral proclivities."[30]

In the wake of the Harrison Act, states began enacting their own legislation restricting or banning the use of drugs.[31] In addition to prohibiting narcotics, a large number of states specifically outlawed the sale, cultivation, or possession of marijuana, so that by 1931 it was restricted or outlawed in 22 states.[32] The inclusion of cannabis in these laws was "essentially [a] kneejerk response[] uninformed by scientific study or public debate and colored instead by racial bias and sensationalistic myths."[33] Cannabis was primarily used by Mexican immigrants at that time, and racial prejudice, coupled with a fear that the drug "would be utilized as a substitute for narcotics and alcohol

25. *Id.* at 220.

26. For the purposes of this Note, "narcotic" encompasses opiates, cocaine, and derivatives thereof as defined by the Controlled Substances Act, and should not be understood to refer to marijuana (though the act criminalizes marijuana). *See* 21 U.S.C. § 802(17) (2012) (providing the definition of the term "narcotic drug"). The term "drug" encompasses both narcotics and marijuana. *See* 21 U.S.C. § 802(12) (2012).

27. JANA BURSON, PAIN PILL ADDICTION: A PRESCRIPTION FOR HOPE 54 (2010) ("Heroin, first invented by the Bayer Company, was released in 1898 as a cough suppressant.").

28. Richard J. Bonnie & Charles H. Whitebread II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 981–82 (1970).

29. *Id.* at 987.

30. *Id.*

31. *Id.* at 989 ("[T]here was an immediate need for complementary residual state legislation in order to deal effectively with the drug problem.").

32. *Id.* at 1010.

33. *Id.*; *see also* ROBERT DEITCH, HEMP: AMERICAN HISTORY REVISITED158 (2003) ("Not surprisingly, the first anti-marijuana laws coincided with the massive migration of Hispanics into the United States because of the Mexican Revolutionary War. . . . Before Alcohol Prohibition, marijuana was only illegal in a few Southern and Western states; that was purely intended to discourage settlement of black or Latino populations."); RANDALL KENNEDY, RACE, CRIME, AND THE LAW 366 (1998) ("[F]ear and hatred of blacks was part of what led to the criminalization of marijuana, cocaine, and heroin, drugs that were said to incite the dangerous instincts of African-Americans.").

then prohibited by national policy," were driving factors behind state prohibitions.[34]

In 1932, the National Conference of Commissioners on Uniform State Laws developed the Uniform Narcotic Drugs Act with an optional provision allowing states to list marijuana as a "narcotic drug[]," at their discretion.[35] All but four states adopted the law, with the remaining four passing "very similar laws."[36] However, this did not go far enough for prohibitionists who sought a uniform ban.[37] Harry J. Aslinger, the first commissioner of the Federal Bureau of Narcotics ("FBN")—the agency then tasked with enforcing federal drug laws—was one of the most vocal critics of cannabis and ran a "propaganda campaign" against it throughout the 1930s.[38] This resulted in the passage of the Marihuana Tax Act of 1937, after which the FBN quickly "issued regulations in the spirit of the Harrison Act regulations."[39] By the end of that year, "marijuana had joined heroin, cocaine, morphine and opium in state and federal codes as a prohibited substance."[40] In 1941, marijuana prosecutions comprised 39.8% of all federal drug prosecutions, and during the 1950s they comprised over half.[41]

The Supreme Court upheld a constitutional challenge to the Marihuana Tax Act in 1969, after Timothy Leary was intercepted entering Texas from Mexico in possession of marijuana.[42] Since complying with the Marihuana Tax Act required declaring possession of the drug upon entry to the United States so that a drug tax could be assessed, which would have exposed Leary to state criminal charges because Texas had outlawed marijuana possession, the Court held that the right against self-incrimination was a complete defense.[43] Partly in response to this ruling, Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970—also known as the Controlled

34. Bonnie & Whitebread, *supra* note 28, at 1012.

35. *Id.* at 1033. While the word "narcotic" has since acquired a legal definition that excludes marijuana, the optional provision of this Act offers insight into legislators' mindsets towards the drug. *See supra* note 26.

36. HOWARD PADWA & JACOB CUNNINGHAM, ADDICTION: A REFERENCE ENCYCLOPEDIA 282 (2010). The purpose of the law was to "harmoniz[e] state drug laws so that they buttressed the Harrison Act, and giv[e] states a share of the responsibility for enforcing the nation's drug laws." *Id.*

37. GERBER, *supra* note 14, at 4 ("Early in his career with the bureau, Anslinger sought to make marijuana illegal under uniform state laws.").

38. KENNETH J. MEIER, THE POLITICS OF SIN: DRUGS, ALCOHOL, AND PUBLIC POLICY 35 (1994).

39. *Id.* at 37.

40. Bonnie & Whitebread, *supra* note 28, at 1168.

41. MEIER, *supra* note 38, at 37.

42. *See generally* Leary v. United States, 395 U.S. 6 (1969). Leary (1920–1996) was an influential American writer, psychiatrist, and Harvard University professor, and is perhaps best remembered for conducting controversial experiments with university students on the effects of psychedelic drugs like psilocybin and lysergic acid through the Harvard Psychedelic Project. *See* ROBERT GREENFIELD, TIMOTHY LEARY: A BIOGRAPHY 115–24 (2006) (providing an introduction to Leary's experiments).

43. *Leary*, 395 U.S. at 29.

Substances Act ("CSA")—which repealed the Harrison Act and the Marihuana Tax Act and listed marijuana "as a Schedule 1 controlled substance, meaning that it has no currently accepted medical use, a high potential for abuse, and is unsafe even if used under a doctor's supervision."[44] This criminalized the use, possession, cultivation, sale, and transfer of marijuana and "effectively abolished" the drug's "medicinal value."[45] Each state separately "prohibited the possession and use of marijuana" in accordance with federal law, until California passed the first statute authorizing the possession and use of medical marijuana in 1996.[46]

3. Shifting Views and the Conflict Between State and Federal Law

At the state level, changing attitudes and recognition of research demonstrating the medical properties of marijuana caused states to pass laws legalizing medical marijuana "in direct conflict with federal law."[47] Under federal law, marijuana is still a Schedule I controlled substance, but under these states' laws, it has been legalized for medical use.[48] This classification "presents a troubling paradox for patients, caregivers, and physicians: if they use, procure, or recommend marijuana for medical purposes in compliance with state law, they are guilty of a federal crime."[49]

i. Continued Federal Prohibition

Marijuana remains a Schedule I controlled substance under the CSA, which means that the federal government does not recognize that the drug has any medicinal value. There is no way to cultivate, possess, transport, or use cannabis—even with a doctor's prescription, unlike many opiates that state and federal drug laws were originally meant to address—without violating federal law.[50] While the FBN—the agency that issued and enforced the first federal marijuana regulations—no longer exists, "[s]everal federal agencies play key roles in implementing domestic enforcement activities."[51] Under the

44. WENDY CHAPKIS & RICHARD J. WEBB, DYING TO GET HIGH: MARIJUANA AS MEDICINE 29 (2008).

45. *Id.*

46. LARRY D. BARNETT, EXPLAINING LAW: MACROSOCIOLOGICAL THEORY AND EMPIRICAL EVIDENCE 282 (2015).

47. ALISON MACK & JANET JOY, MARIJUANA AS MEDICINE? THE SCIENCE BEYOND THE CONTROVERSY 164 (2001).

48. *See supra* Part II.A.2.

49. MACK & JOY, *supra* note 47, at 163.

50. Karen O'Keefe, *State Medical Marijuana Implementation and Federal Policy*, 16 J. HEALTH CARE L. & POL'Y 39, 40 (2013). The lone exception from this prohibition is for "research that has a 'legitimate medical or scientific' purpose and that has been sanctioned by the federal government." BARNETT, *supra* note 46, at 282 (citing O'Keefe, *supra* note 50, at 39 n.3); *see also* 21 U.S.C. § 823(f) (2012).

51. CELINDA FRANCO, FEDERAL DOMESTIC ILLEGAL DRUG ENFORCEMENT EFFORTS: ARE THEY WORKING? 3 (2009).

umbrella of the Department of Justice ("DOJ"), numerous agencies play a role in enforcing federal drug laws, but the Drug Enforcement Agency ("DEA") "is the only federal agency whose sole mission is to enforce [them]."[52]

ii. Legalization at the State Level

Despite a lack of recognition at the federal level, a significant amount of research suggests that marijuana has legitimate medical applications.[53] A change in public sentiment towards acknowledging these applications over the last two decades has driven a wave of state-level medical marijuana legalization.[54] California led the movement by passing the Compassionate Use Act of 1996, becoming the first state to legalize the use of marijuana for medical purposes.[55] Since then, the trend towards legalization has snowballed, with 25 states and the District of Columbia following suit.[56] These state laws

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52. *Id.* Other agencies and internal DOJ divisions that play a role in federal drug law enforcement include the Federal Bureau of Investigation, the Executive Office for U.S. Attorneys, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the U.S. Marshals Service, the Organized Crime Drug Enforcement Task Force, and the National Drug Intelligence Center. *Id.* at 3–4. Additional agencies and internal divisions under the umbrella of the Department of Homeland Security also play an enforcement role and include the U.S. Customs and Border Protection, U.S. Coast Guard, Immigration and Customs Enforcement, and the Office of Counternarcotics Enforcement. *Id.*

53. Nat'l Org. for the Reform of Marijuana Laws ("NORML"), *Marijuana Should Be Legalized for Medical Use*, *in* DRUG LEGALIZATION 166, 166–67 (Noël Merino ed., 2011). Some medical applications include neuropathic pain relief for those suffering from conditions like "nausea, spasticity, glaucoma, and movement disorders," as well as appetite stimulation for those suffering from conditions like "HIV, the AIDS wasting syndrome, or dementia." *Id.*

54. *See id.* at 170 ("A March 2001 Pew Research Center Poll reported that 73 percent of Americans supported making marijuana legally available for doctors to prescribe, as did a 1999 Gallup poll.").

55. CAL. HEALTH & SAFETY CODE §§ 11362.5–11362.83 (1996).

56. *25 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, PROCON.ORG (last updated June 28, 2016, 10:44 AM), http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881. Besides California, the jurisdictions and authorizing statutes or constitutional amendments include: Colorado (COLO. CONST., art. XVIII, § 14 (2013)); Alaska (ALASKA STAT. ANN. §§ 17.37.010–37.80 (West 2015)); Arizona (ARIZ. REV. STAT. ANN. §§ 36-2801–2819 (2015)); Connecticut (CONN. GEN. STAT. § 21a-408–414 (2012)); Delaware (DEL. CODE ANN. tit. 16, §§ 4901a–4928a (West 2015)); Washington D.C. (D.C. Code Ann. §§ 7-1671.01–1671.13 (West 2015)); Hawaii (HAW. REV. STAT. ANN. §§ 329d-1–d-27 (West 2015)); Illinois (410 ILL. COMP. STAT. ANN. § 130/1–999 (West 2015)); Maine (ME. REV. STAT. ANN. tit. 22, §§ 2421–2430-B (2015)); Maryland (MD. CODE ANN. 62 §§ 10.62.01–10.62.01 (West 2015)); Massachusetts (MASS. GEN. LAWS ANN. ch. 94C app., §§ 1-1–1-17 (West 2006 & Supp. 2014)); Michigan (MICH. COMP. LAWS ANN. §§ 333.26421–333.26430 (West 2001 & Supp. 2014)); Minnesota (MINN. STAT. ANN. §§ 152.21–152.37 (West 2015)); Montana (MONT. CODE ANN. §§ 50-46-301–344 (West 2015)); Nevada (NEV. REV. STAT. ANN. §§ 453a.010–453a.810 (West 2015)); New Hampshire (N.H. REV. STAT. ANN. §§ 126-X:1–X:11 (2015)); New Jersey (N.J. STAT. ANN. §§ 24:61-1–61-16 (West 2015)); New Mexico (N.M. STAT. ANN. § 26-2b-1–2b-7 (West 2015)); New York (N.Y. PUB. HEALTH L. §§ 3360–3369(e) (McKinney 2015)); Ohio (OHIO REV. CODE ANN. § 3796 (West 2016)); Oregon (OR. REV. STAT. ANN. §§ 475.300–475.346 (West 2015)); Rhode Island (21 R.I. GEN. LAWS §§ 21-28.6-1–6-13 (West 2015)); Vermont (VT. STAT. ANN. tit. 18, §§ 4472–4474m (West 2015)); Washington (WASH. REV. CODE ANN. §§ 69.51a.005–51a.903 (West 2015); and S.B. 3, 200th Reg. Sess. (Pa. 2015). Alaska, Oregon,

demonstrate that "these states have found that marijuana provides a legitimate therapeutic remedy."[57]

The conflict between state and federal law does not arise from an issue of preemption, but from opposing positions expressed in overlapping laws.[58] As critic Mark Eddy observed:

> States can statutorily create a medical use exception for botanical cannabis and its derivatives under their own, state-level controlled substance laws. At the same time, federal agents can investigate, arrest, and prosecute medical marijuana patients, caregivers, and providers in accordance with the federal Controlled Substances Act, even in those states where medical marijuana programs operate in accordance with state law.[59]

A California district court made this concept abundantly clear in *United States v. Cannabis Cultivators Club*, when the federal government sued six California medical marijuana dispensaries under the CSA to permanently enjoin them from growing and selling marijuana two years after the state passed its Compassionate Use Act.[60] State-level legalization prohibits prosecutions of medical marijuana users under state law, but has no legal effect on the same prosecutions under federal law.[61] This presents a debacle for employers when state courts require them to accommodate employees with medical marijuana prescriptions in accordance with state medical marijuana laws, notwithstanding the continued prohibition under federal law.[62]

B. THE REGULATORY FRAMEWORK GOVERNING EMPLOYERS

Regardless of any conflict between state and federal law on the issue of medical marijuana, employers whose employees use marijuana are exposed to a range of financial risk and legal liability. "Impaired workers open employers to significant liability" in a variety of legal contexts, including loss

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Colorado, and Washington State have legalized marijuana for purely recreational use, but this Note contemplates only the implications of medical marijuana for employer liability. VASU K. BROWN, BUDTENDER MEDICAL CANNABIS CERTIFICATION PROGRAM 29 (2015).

57. Elizabeth Rodd, Note, *Light, Smoke, and Fire: How State Law Can Provide Medical Marijuana Users Protection from Workplace Discrimination*, 55 B.C. L. REV. 1759, 1766 (2014).

58. Eddy, *supra* note 11, at 141.

59. *Id.*

60. United States v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086, 1092–93 (N.D. Cal. 1998).

61. *See id.* at 1094 ("The Supremacy Clause of Article VI of the United States Constitution mandates that federal law supersede state law where there is an outright conflict between such laws.").

62. *See infra* Part III.A.

of federal contracts,[63] potential violations of Occupational Safety and Health Administration ("OSHA") regulations,[64] liability under the theory of negligent hiring and retention—"commonly used when companies hire or retain workers who commit criminal acts and harm co-workers or customers"[65]—and even criminal liability if employers are required to "pay[] for the treatment[, which] arguably violates federal law, or at least federal public policy."[66]

1. Financial Risk from Loss of Federal Contracts

The Drug-Free Workplace Act of 1988 ("DFWA") requires employers that have received federal contracts or grants valued over $100,000 "to certify to the federal agency involved that it will provide a drug-free workplace."[67] Failure to comply with the DFWA can result in significant economic penalties, including: (1) suspension of "payments for contract or grant activities;" (2) suspension or termination of the grant or contract; and (3) prohibition from receipt of future federal grants or contracts for up to five years.[68] Under the DFWA, employers who have been awarded federal contracts of significant value "must continue to ensure [that] all illegal drugs, including marijuana, are prohibited from the workplace and employees who use marijuana, even for a medical reason, are subject to discipline or termination if they use marijuana while on the job or show up for work under the influence of marijuana."[69] In *University of Hawai'i Professional Assembly v. Tomasu*, the Hawaii Supreme Court held that the DFWA requires employers not only to have a policy against employee drug use, but to actually implement it by taking affirmative disciplinary action against any employee who fails a drug test.[70] The DFWA offers no exceptions for employers bound by state law.

63. *See* RICHARD MCKENZIE NEAL, THE PATH TO ADDICTION. . . "AND OTHER TROUBLES WE ARE BORN TO KNOW" 287 (2008).

64. Jay S. Becker & Saranne E. Weimer, *Legalization of Marijuana Raises Significant Questions and Issues for Employers*, N.J. LAW. 51, 53 (Dec. 2014), http://www.ghclaw.com/news/2014_NJ Lawyer_JSB_SEW.pdf.

65. Wilford H. Stone, *Law Column: Marijuana in Your Workplace*, GAZETTE (June 13, 2015, 6:00 PM), http://www.thegazette.com/subject/news/business/column-and-advice/law-column-marijuana-in-your-workplace-20150613.

66. Becker & Weimer, *supra* note 64, at 53.

67. George J. Tichy II, *The Drug-Free Workplace Act of 1988*, 34 CATH. LAW. 363, 365 (1991).

68. *Drug-Free Workplace Advisor: Drug-Free Workplace Act of 1988 Penalties*, U.S. DEPT. OF LABOR, http://webapps.dol.gov/elaws/asp/drugfree/penalties.htm (last visited Aug. 21, 2016).

69. Becker & Weimer, *supra* note 64, at 52.

70. Univ. of Haw. Prof'l Assembly v. Tomasu, 900 P.2d 161, 169–70 (Haw. 1995) ("[M]ere promulgation of a policy that proclaims compliance with a federal statute will not constitute compliance with that statute . . . . [T]he DFWA inherently mandates implementation . . . .").

2. Federal Occupational Safety and Health Act Workplace Liability

The Occupational Safety and Health Act of 1970 ("OSH Act") requires an employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[71] Depending on circumstances, employer tolerance of an employee known to use a federally illegal drug, even for medical purposes, may create an impermissibly harmful environment under current federal law.[72] While the Occupational Safety and Health Administration ("OSH Admin.") has not promulgated a standard specifically requiring a drug-free workplace, the general duty clause of "the OSH Act[] may be applicable where a particular hazard is not addressed by any OSH [Admin.] standard."[73] The four elements required to invoke this clause are: (1) employer failure to prevent a workplace hazard; (2) recognition of the hazard by either the employer or its industry; (3) death or serious harm caused by the hazard; (4) a reasonable way to mitigate or prevent the hazard existed.[74] The penalties for a violation of the general duty clause range from $5,000 to $70,000 in fines, and up to a year in prison if the hazard causes an employee's death.[75]

The OSH Admin. has also indicated its preference for a drug-free workplace, and its position that employee drug-use can constitute a workplace safety hazard, in an agreement among the Mine Safety and Health Administration, the Office of the Assistant Secretary for Policy's Working Partners for an Alcohol- and Drug-Free Workplace Program, and 14 labor unions to provide industries with "resources that will help them understand the benefits of drug-free workplace programs and protect employees' health and safety."[76] This agreement "particularly focuse[d] on educating workers on safety and productivity hazards created by the abuse of alcohol and other drugs in the workplace."[77]

3. Federal Criminal Accomplice Liability

Since the purchase of marijuana remains illegal under federal law, employers could theoretically be subject to federal accomplice liability if state courts or legislatures require them to pay for medical marijuana under their

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71. 29 U.S.C. § 654(a)(1) (2012).

72. Letter from John B. Miles, Jr., Director, Directorate of Enforcement Programs, to Patrick J. Robinson, Safety Coordinator, Starline Manufacturing Co., Inc., U.S. DEPT. OF LABOR (May 2, 1998), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22577 (last visited Aug. 21, 2016) [hereinafter Miles Letter].

73. *Id.*; *see also* 29 U.S.C. § 654(a)(1) (2012).

74. Miles Letter, *supra* note 72.

75. *See generally* 29 U.S.C. § 666 (2012).

76. Occupational Health & Safety Admin., *Drug Free Workplace Alliance*, U.S. DEPT. OF LABOR (Oct. 12, 2008), https://www.osha.gov/dcsp/alliances/drug_free/drug_free.html.

77. *Id.*

employees' private health insurance plans, or through workers' compensation. The United States Code stipulates that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal" and that "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."[78] Federal courts have expressed the view that even minor involvement in a drug transaction can be enough to convict on the theory of accomplice liability.[79]

4. Civil Liability for Employees' Actions

Impaired employees can expose employers to significant tort liability, regardless of whether they are acting within the scope of their employment.[80] Should an employee under the influence of marijuana injure another person or damage that person's property, the aggrieved party could sue the employer for damages under the common-law actions of negligent hiring and retention, and respondeat superior; "[b]oth the doctrines of 'negligent hiring' and 'respondeat superior' have been used to hold employers liable in situations where their employees, because of intoxication or drug use, have injured or assaulted others."[81] Negligent hiring and retention is a more recent common-law evolution that expands employer liability beyond traditional respondeat superior liability.[82]

First, employers are vicariously liable for the actions of their employees under the theory of respondeat superior.[83] This liability is generally circumscribed by the scope-of-employment test, which "require[s] that, in order to hold the employer liable for an employee's violent intentional tort or crime, the employee be acting, at least in part, with the motivation to be

78. 18 U.S.C. § 2(a)–(b) (2012).

79. *See* United States v. White, 688 F. Supp. 1293, 1297 (N.D. Ind. 1988) ("[T]here need not be a great deal of participation by a defendant in order for that defendant to be convicted of aiding and abetting a drug sale. All that need be shown is that the defendant acted with criminal intent and design to assist the perpetrators.").

80. *See, e.g.*, Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 311 (Tex. 1984) (holding that an employer has a duty to exercise reasonable prudence to prevent an employee from "causing an unreasonable risk of harm to others" after the employer permitted a visibly intoxicated employee to drive home, resulting in a fatal automobile accident).

81. Elliot S. Kaplan et al., *Drug and Alcohol Testing in the Workplace: The Employers' Perspective*, 14 WM. MITCHELL L. REV. 365, 374–75 (1988).

82. *See* Nesheba M. Kittling, NEGLIGENT HIRING AND NEGLIGENT RETENTION: A STATE BY STATE ANALYSIS 3 (Nov. 6, 2010), http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/annualconference/087.authcheckdam.pdf ("The tort claims of negligent hiring and negligent retention are rooted in common law and are generally permitted where an employee's tortious conduct cannot result in any violation under the theory of respondeat superior.").

83. Laura L. Hirschfeld, *Legal Drugs? Not Without Legal Reform: The Impact of Drug Legalization on Employers Under Current Theories of Enterprise Liability*, 7 Cornell J.L. & Pub. Pol'y 757, 780 (1998).

about the employer's business."[84] One of the most common types of case in which an employer is found to be vicariously liable for an injury caused by his or her employee is when the employee becomes intoxicated at a holiday party or business-related event and then causes a car accident on the drive home.[85] Since marijuana use would also impair an employee who attempted to drive, it is likely that courts would hold employers vicariously liable for accidents caused by employees driving to or from work or any other business-related event while under the influence of marijuana. Further, while marijuana is usually considered to produce a relaxed mental state, some studies have suggested that, at least for some individuals, it has the opposite effect and can actually increase aggressive tendencies.[86] This means that employees not only could face vicarious liability for vehicle or heavy machinery accidents caused by employees impaired by marijuana, but also for potential assaults or batteries resulting from increased aggression.

Second, while vicarious liability is limited by the scope-of-employment test, the tort of negligent retention and hiring is an exception to this rule.[87] Although it is a more recent common-law development than vicarious liability, most states "recognize the tort of negligent hiring."[88] "Under this theory, employers have a duty to exercise reasonable care in view of all the circumstances in hiring individuals who, because of the employment, may pose a threat of injury to members of the public.'"[89] While the elements of this tort vary by state, they generally require the petitioner to prove that: (1) the employer owed him or her a duty of care; (2) the duty was breached by the employer's hiring and retention of an incompetent employee; (3) the

84. *Id.* at 797.

85. *See e.g.*, Wadley v. Aspillaga, 163 F. Supp. 2d 1, 7 (D.D.C. 2001) (holding that an employer was vicariously liable for an accident caused by an independent contractor who became intoxicated at a company party); Carroll Air Sys., Inc. v. Greenbaum, 629 So.2d 914, 916 (Fla. Dist. Ct. App. 1993) (holding that an employer was vicariously liable for a death caused by an intoxicated employee driving back from a dinner dance related to a business conference); Gariup Constr. Co., Inc. v. Foster, 519 N.E.2d 1224, 1229 (Ind. 1988) (holding that an employer was vicariously liable for an accident caused by an employee who became intoxicated at a company party).

86. *See, e.g.*, Alfred S. Friedman et al., *Violent Behavior as Related to Use of Marijuana and Other Drugs*, 20 J. ADDICTIVE DISEASES 49, 49 (2001) ("Greater frequency of use of marijuana was found unexpectedly to be associated with greater likelihood to commit weapons offenses . . . [and] was also found associated with commission of Attempted Homicide/Reckless Endangerment offenses."); Karin Monshouwer et al., *Cannabis Use and Mental Health in Secondary School Children*, 188 BRIT. J. PSYCHIATRY 148, 148 (2006) ("After adjusting for cofounding factors, cannabis use was linked to externalising problems (delinquent and aggressive behaviour) . . . .").

87. *See, e.g.*, Watson v. City of Hialeah, 552 So.2d 1146, 1148 (Fla. Dist. Ct. App 1989) ("By its very nature, an action for negligent retention involves acts which are *not* within the course and scope of employment and allows recovery even when an employer is not vicariously liable under the doctrine of respondeat superior.").

88. Janet Swerdlow, Note, *Negligent Referral: A Potential Theory for Employer Liability*, 64 S. CAL. L. REV. 1645, 1646 (1991) (citation omitted).

89. *Id.* (citing Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 911 (Minn. 1983)).

breach proximately caused damages to the petitioner.[90] The rationale behind this "action is to prevent an employer from avoiding liability for the misconduct of an employee committed outside the scope of employment, when the employer should not have hired or maintained the employee because of his or her tendencies."[91] Courts analyze this type of negligence by determining "whether the employer reasonably investigated the employee's background before hiring the employee."[92]

III. THE EXIGENT NEED FOR REFORM

Employers have generally been able to minimize their liability risks because state courts have traditionally required them to follow federal law over state law, and because the Obama Administration imposed enforcement restrictions on the DOJ. However, the inadequacy of these shields is highlighted by three outstanding concerns: (1) statutory conflict and recent court decisions indicating a trend away from federal law prioritization; (2) where federal prioritization remains, the perverse imposition upon employees who use medical marijuana of the choice between employment and medical treatment; and (3) the inherent unreliability of an administration's temporary enforcement posture. These concerns rest on questions such as whether employees may be terminated for failing drug tests, whether an employer may be obligated to pay for a medical marijuana prescription through workers' compensation, and whether employers must provide an accommodation under state analogues to the Americans with Disabilities Act ("ADA").[93]

A. NEW DEVELOPMENTS MANDATING COMPLIANCE WITH STATE MARIJUANA LAWS

The states that have legalized medical marijuana have largely avoided creating a direct statutory conflict with federal law: although they have legalized activity that remains criminal under federal law, they have not statutorily required anyone to engage in that activity. However, eight states verge on creating this conflict by requiring employers to provide a reasonable accommodation for employees with medical marijuana prescriptions under state disability statutes. While this is certainly cause for concern, the most pressing issue employers face is new developments in New Mexico and Michigan that suggest a trend away from judicial prioritization of federal law. If the trend continues, it will leave employers with few defenses when

90. Louis Buddy Yosha & Lance D. Cline, *Negligent Hiring and Retention of an Employee, in* 29 AM. JUR. TRIALS 267 § 5 (2015).

91. Brownfield v. City of Yakima, 316 P.3d 520, 535 (Wash. Ct. App. 2014).

92. Swerdlow, *supra* note 88, at 1646 (citing Cathie A. Shattuck, *The Tort of Negligent Hiring and the Use of Selection Devices: The Employee's Right of Privacy and the Employer's Need to Know*, 11 INDUS. REL. L.J. 2, 2–3 (1989)).

93. Becker & Weimer, *supra* note 64, at 52.

employees challenge their decisions regarding medical marijuana use in court.

1. Accommodations Required Under State Disability Acts

The ADA and corresponding laws at the state level impose a duty on employers to provide a reasonable accommodation to employees with medical disabilities.[94] Because the CSA recognizes no medical benefit from marijuana, employers are not required to accommodate medical marijuana patients under the ADA.[95]

However, "[j]ust because employers are not required by federal law to provide a medicinal marijuana usage accommodation, [this] does not mean the employee is not entitled to an accommodation under state law."[96] In the states without provisions explicitly requiring such an accommodation, state courts have so far declined to find one.[97] On the other hand, eight states do explicitly require an accommodation, which means that employers that provide this accommodation are exposed to any or all of the types of liability previously discussed.[98]

2. Reliance on Judicial Prioritization of Federal Law

Until recently, court decisions were uniformly supportive of employers' decisions to terminate employees for using medical marijuana.[99] In *Ross v. RagingWire Telecommunications, Inc.*, the plaintiff sued his former employer for

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94. 42 U.S.C. §§ 12101–12117 (2012).

95. Becker & Weimer, *supra* note 64, at 52.

96. *Id.*

97. *See, e.g.*, Ross v. RagingWire Telecomm., Inc., 174 P.3d 200, 204 (Cal. 2008) (holding that California's Fair Employment and Housing Act "does not require employers to accommodate the use of [federally] illegal drugs"); Johnson v. Columbia Falls Aluminum Co., No. DA 08-0358, 2009 WL 865308, at *4 (Mont. 2009) (holding that Montana's Human Rights Act required no accommodation for medical marijuana use); Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518, 536 (Or. 2010) (holding that state law did not require an accommodation for an employee's use of marijuana because federal law preempted it).

98. *See supra* Part II.B; *see also* ARIZ. REV. STAT. ANN. § 36-2813(B) (2014); CONN. GEN. STAT. 420f § 21a-408p(b)(3) (2013); 16 DEL. CODE § 4905A(a)(3)(a) (2015); 410 ILL. COMP. STAT. ANN. § 130/40(a)(1) (2013); ME. STAT. tit. 22, § 2423-E(2) (2011); MINN. STAT. § 152.32(3)(c) (2014); NEV. REV. STAT. § 453A.800(2) (2013); Hunton & Williams LLP, *Anti-Discrimination Provisions in State Medical Marijuana Laws Raise Additional Considerations for Workplace Drug Testing*, HUNTON EMP. & LABOR L. PERSP. (Jan. 22, 2015), http://www.huntonlaborblog.com/2015/01/articles/criminal-background-checks/antidiscrimination-provisions-in-state-medical-marijuana-laws-raise-additional-considerations-for-workplace-drug-testing.

99. *See, e.g.*, *Columbia Falls Aluminum Co.*, 2009 WL 865308, at *4 (holding that Montana's Human Rights Act required no accommodation for medical marijuana use); *Emerald Steel Fabricators, Inc.*, 230 P.3d at 536 (holding that Oregon's state law did not require an accommodation for an employee's use of marijuana because federal law preempted it); Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC, 257 P.3d 586, 597 (Wash. 2011) (holding that Washington state's Medical Use of Marijuana Act did not prevent an employer from rescinding a job offer after the prospective employee failed a drug test).

violating the California Fair Employment and Housing Act ("FEHA") by firing him after he failed a drug test.[100] The California Supreme Court held that the medical marijuana law was a defense against criminal prosecution that had no bearing on the relationship between employer and employee.[101] The Sixth Circuit denied a similar wrongful discharge claim in Michigan, holding that the Michigan Medical Marihuana Act ("MMMA") "does not impose restrictions on private employers . . . ."[102] Most recently, the Colorado Supreme Court held that termination for marijuana use did not violate the state's "lawful activities statute," which precluded termination for engaging in lawful activities during employees' free time, because "an activity such as medical marijuana use that is unlawful under federal law is not a 'lawful' activity under [the statute]."[103] Thus, as long as employers choose to comply with federal law over state law, state courts have ruled in their favor, thereby immunizing them from the liability that would arise if they chose to comply with state law instead.

It is important to note that this issue must be viewed from both sides: where employers rationally act in their best interests to shield themselves from liability, employees must choose between employment and the potential medical benefits of a prescription.[104] The "careless conflict of laws" leaves both parties searching for a solution.[105]

3. A Trend Away from Federal Prioritization

Recent case law developments have accentuated the uncertain position employers occupy in the absence of legislative reform at the state or federal level. A case in Michigan and a line of cases in New Mexico concerning employee challenges to employer decisions based on their medical marijuana use have rejected the employers' federal-law defenses and allowed the employees to prevail under state-law arguments.

This trend began with a landmark case in New Mexico, in which an employee filed suit after his employer failed to pay for his medical marijuana, pursuant to New Mexico's Workers' Compensation Act ("WCA").[106] The issue was whether the WCA required the employer to pay for the employee's

100. *RagingWire Telecomms. Inc.*, 174 P.3d at 385.

101. *Id.* at 387. The court held that "[n]o state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law" and that "[n]othing in the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and obligations of . . . employees." *Id.*

102. Casias v. Wal–Mart Stores, Inc., 695 F.3d 428, 435 (6th Cir. 2012).

103. Coats v. Dish Network, LLC, 350 P.3d 849, 851 (Colo. 2015) (citation omitted).

104. Rodd, *supra* note 57, at 1793–94.

105. Silvia Irimescu, Note, *Marijuana Legalization: How Government Stagnation Hinders Legal Evolution and Harms a Nation*, 50 GONZ. L. REV. 241, 283 (2015).

106. Vialpando v. Ben's Auto. Servs., 331 P.3d 975, 978 (N.M. Ct. App. 2014).

medical marijuana through workman's compensation.[107] For the first time, a court of appeals held that the drug was "reasonable and necessary for the worker's treatment" and therefore covered by the WCA.[108] The employer argued that covering the costs of the plaintiff's medical marijuana would constitute a federal crime.[109] The court dismissed this argument with the cursory assertion that "[The] [e]mployer does not cite to any federal statute it would be forced to violate, and we will not search for such a statute."[110] In rejecting the defendant's second argument that enforcing the law would violate federal public policy, the court noted that the DOJ had indicated that it would "generally defer to state and local authorities."[111]

The court affirmed its decision on two subsequent occasions. In *Maez v. Riley Industrial*, it held that medical marijuana was reasonable and necessary care under the WSA even though the plaintiff's doctor claimed to have certified him to the program without recommending the drug in any way.[112] This time, the employer did not attempt to argue that it would be a violation of federal law to cover medical marijuana.[113] Finally, in *Lewis v. American General Media*, the court reiterated its position.[114] Although it recognized a conflict between New Mexico's medical marijuana law and federal law,[115] the court relied on its reasoning in *Vialpando* and again held that the employer would not violate federal law by complying with its order.[116]

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107. *Id.*

108. *Id.* at 978. The court explained that while marijuana is not a prescription drug, but rather a controlled substance, the WSA "includes non-prescription drugs and other products and further includes providers other than licensed pharmacists and health care providers." *Id.* at 978. According to the court, even if the WSA only did cover prescription drugs, medical marijuana "requires the functional equivalent of a prescription—certification to the program." *Id.* at 979.

109. *Id.* at 980 ("[B]ecause marijuana remains a controlled substance under federal law, the order to reimburse Worker for money spent purchasing a course of medical marijuana 'essentially requires' Employer to commit a federal crime." (citation omitted)).

110. *Id.*

111. *Id.* However, the court acknowledged that "the Department of Justice affirmed that marijuana remains illegal under the CSA and that federal prosecutors will continue to aggressively enforce the statute." *Id.* The basis of its analysis, then, rests on the agency's present expression of its general inclination—an unsteady foundation in which employers can hardly find comfort. *See id.*

112. Maez v. Riley Indus., 347 P.3d 732, 737 (N.M. Ct. App. 2015). "In this regard, Dr. Reeve testified that Worker had tested positive for marijuana, that patients use marijuana either one way or the other[,] and that he will sign for patients if requested." *Id.* at 736. He further stated that he was "not recommending or distributing or in any way advocating for the use of medical cannabis." *Id.*

113. *See id.*

114. Lewis v. Am. Gen. Media, 355 P.3d 850, 855 (N.M. Ct. App. 2015).

115. *Id.* at 857 ("We agree with Employer that the Controlled Substances Act (CSA) . . . conflicts with the Compassionate Use Act in that the CSA does not except marijuana used for medical purposes from its prohibition of possession or distribution of even small amounts of marijuana.").

116. *Id.* at 858 ("However, Employer's argument raises only speculation in view of existing Department of Justice and federal policy."). The court was silent on the question of whether its ruling would stand in the face of a dispositional shift within the DOJ—such as one resulting from a change in administration. *See id.*

Stanley v. County of Bernalillo Commissioners will determine whether an employer in New Mexico can terminate an employee for using medical marijuana.[117] It is currently pending on removal from federal to state court. The employee in that case has sued his employer on the grounds that his termination violated New Mexico's Human Rights Act.[118] Given the New Mexico judiciary's previous disposition towards employee rights on the subject of medical marijuana, a ruling in favor of the employee in this case is not out of the question.

In Michigan, a state court recently required an employer to pay its former employees unemployment compensation after the employer terminated them for failing a drug test for marijuana.[119] The court declined to follow the Sixth Circuit's interpretation of the same state law[120] in *Casias v. Wal–Mart Stores*, in which the federal court held that the Michigan Medical Marihuana Act ("MMMA") does not regulate private employers.[121] The state court instead held that denying the benefits would violate the MMMA.[122]

B. THE HARMFUL EFFECTS OF PROTECTIONIST EMPLOYER ACTION

Even if the courts indefinitely prioritized federal law in employee challenges to employer medical marijuana decisions, the situation would remain untenable because employees who could benefit medical marijuana prescriptions still have to choose between that medical marijuana or not risking their employment. As the cases in Part II.A.2–3 indicate, employers navigating the current legal landscape often decide to terminate employees for medical marijuana use in order to shield themselves from potential liability in the absence of any legislative reforms offering alternative protections.[123] The result of this employer behavior is that "[t]he current status of the law does not balance the competing interests of employees and employers, and it forces medical marijuana patients to make the impossible choice between employment and medical treatment."[124]

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117. Stanley v. Cty. of Bernalillo Comm'rs, No. CIV 14–0550, 2015 WL 4997159, at *1 (D. N.M. July 31, 2015).

118. *Id.*

119. Braska v. Challenge Mfg. Co., 861 N.W.2d 289, 291–94 (Mich. Ct. App. 2014).

120. *Id.* at 301 ("The *Casias* decision is not binding precedent on this Court.").

121. Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 437 (6th Cir. 2012) ("Such a broad extension of Michigan law would be at odds with the reasonable expectation that such a far-reaching revision of Michigan law would be expressly enacted. . . . The MMMA does not include any such language nor does it confer this responsibility upon private employers.").

122. *Braska*, 861 N.W.2d at 302–03 ("[H]owever, because there was no evidence to suggest that the positive drug tests were caused by anything other than claimants' use of medical marijuana in accordance with the terms of the MMMA, the denial of the benefits constituted an improper penalty for the medical use of marijuana under the MMMA . . . .").

123. *See supra* Part II.A.1.

124. Rodd, *supra* note 57, at 1785–86.

When employers fire employees for using medical marijuana legally under state law, employers violate their state's public policy. From the employees' perspective, medical marijuana statutes are an exercise of state police power "to define criminal law and to protect the health, safety, and welfare of their citizens."[125] The statutes share a common purpose: to provide citizens suffering from medical conditions—that marijuana could ease, alleviate, or improve—with the legal option to seek relief from this treatment method.[126] There are an estimated 2,604,079[127] medical marijuana patients in the United States, out of a total population of approximately 324,000,000.[128] A 2015 survey of California medical marijuana patients found that an astonishing 92% reported that medical marijuana had "alleviated symptoms of their serious medical conditions, including chronic pain, arthritis, migraine, and cancer."[129] These statistics demonstrate that state medical marijuana legislation aimed to protect citizen health and welfare affects a significant portion of the population, and that the affected population considers marijuana to be an effective medical treatment.

From the employers' perspective, there is a significant incentive to terminate employees who are also medical marijuana patients in the absence of meaningful liability protection.[130] As explained in Part III.A.3, even this option—a drastic catch-all erring on the side of precaution—may become unavailable at least in New Mexico, although the majority of states with

125. Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting).

126. Rodd, *supra* note 57, at 1767 ("[S]tate legislatures justify medical marijuana laws based on findings that medical marijuana can be used to provide relief for conditions such as cachexia, cancer, glaucoma, AIDS, nausea, post-traumatic stress syndrome, severe pain, seizures, persistent muscle spasms, and multiple sclerosis.") (citing *Oregon Medical Marijuana Program Statistics*, OR. HEALTH AUTH., https://public.health.oregon.gov/DiseasesConditions/ChronicDisease/MedicalMarijuanaProgram/Pages/data.aspx (last updated July 1, 2016)).

127. *Number of Legal Medical Marijuana Patients (as of March 1, 2016)*, PROCON (Mar. 3, 2016, 11:32 AM), http://medicalmarijuana.procon.org/view.resource.php?resourceID=005889.

128. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, http://www.census.gov/popclock (last visited Aug. 21, 2016).

129. Christopher Ingraham, *92% of Patients Say Medical Marijuana Works*, WASH. POST (Oct. 1, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/10/01/92-of-patients-say-medical-marijuana-works.

130. *See* ANGELA BROWNE MILLER, WORKING DAZED: WHY DRUGS PERVADE THE WORKPLACE AND WHAT CAN BE DONE ABOUT IT 159 (2013) ("One of the most basic policy questions that employers either ask or attempt to ask . . . is: Is the drug problem the employer's problem or does it belong to the society? If the problem, at least in part, is the employer's problem, does that employer's involvement end as employees leave the workplace parking lot at the end of the workday? . . . [T]hey are actually asking, *where does the problem begin and end?* and *where does the employer's liability begin and end?*"); *see also generally* Brian S. Finkle, *Foreword*, in ON-SITE DRUG TESTING vii, vii (Amanda J. Jenkins & Bruce A. Goldberger eds. 2002) ("[New drug testing methods were] catalyzed by the requirements of workplace drug testing and other drugs-of-abuse testing programs. These programs are now a minor national industry in the United States . . . and cover . . . the general employed population, which is monitored for illegal drug use and numbers in the millions.").

medical marijuana laws have yet to rule on it.[131] Scholars tend to view the issue solely from the perspective of employee rights, and prescribe solutions that largely ignore employer liability concerns.[132] Because of these concerns, under the current legal framework, the most rational course of action for many employers is to terminate—which means that they are put in a position where the only way to avoid potential exposure to liability is to contravene the intentions of the state legislature and disregard the health and welfare interests of their own employees.[133] Forcing employers to accommodate medical marijuana patients by court order or state legislation would leave the employers' needs[134] unresolved, but risk-avoiding termination flouts state and employee interests;[135] the present situation, then, is untenable.

C. *JUDICIAL RELIANCE ON EXECUTIVE DISPOSITION AND DISCRETION*

Under the Obama Administration, the federal government has generally not aggressively enforced the CSA in states that have passed laws authorizing the use of medical marijuana.[136] From a political perspective, agents of the executive branch "have broad discretion in spending the funds they've been allocated. If they disagree with legislation or simply don't consider it a high priority, these agents can effectively scuttle it by refusing to enforce it—openly

131. *See supra* Part III.A.3.

132. *See, e.g.*, Rodd, *supra* note 57, at 1794 (arguing that "courts should dismiss employers' arguments that federal law precludes states from applying state discrimination laws" and that "state legislatures ought to amend their current medical marijuana statutes to afford statutory employment discrimination protection to qualified patients" while considering employer liability dispensed with if statutes merely prohibit medical marijuana use during employment hours); *see also* Russell Rendall, Note, *Medical Marijuana and the ADA: Removing Barriers to Employment for Disabled Individuals*, 22 HEALTH MATRIX: J. L.-MED. 315, 335 (2012) (arguing that employers should bear the burden of proof that a medical marijuana accommodation "will constitute an undue hardship" or that denial of accommodation "is consistent with business necessity" without addressing employer liability).

133. *See* Lindsey M. Tucker, Note, *High Stakes: How to Define "Disability" in Medical Marijuana States in Light of the Americans with Disabilities Act, Canadian Law, and the Impact on Employers*, 21 IND. INT'L & COMP. L. REV. 359, 378 (2011) ("Requiring employers to accommodate an employee's use of medical marijuana complicates the drug-free workplace goal of an employer and compromises an employer's federal benefits.").

134. *See id.* ("There is a range of public policy reasons behind supporting drug-free workplaces, including . . . employer liability due to acts of an impaired worker . . . .") (citing Deborah J. La Fetra, *Medical Marijuana and the Limits of the Compassionate Use Act:* Ross v. RagingWire Telecommunications, 12 CHAP. L. REV. 71, 73–74 (2008)).

135. *See, e.g.*, Rodd, *supra* note 57, at 1793 (arguing that termination of medical marijuana patients constitutes workplace disability discrimination.).

136. *See* Matt Ferner, *Obama Signals Support for Changing Course in Federal War on Medical Marijuana*, HUFFINGTON POST (Apr. 17, 2015, 5:30 PM), http://www.huffingtonpost.com/2015/04/17/obama-medical-marijuana_n_7088594.html (quoting President Obama's statement that "I'm on record as saying that not only do I think carefully prescribed medical use of marijuana may in fact be appropriate and we should follow the science as opposed to ideology on this issue, but I'm also on record as saying that the more we treat some of these issues related to drug abuse from a public health model and not just from an incarceration model, the better off we're going to be.").

or sub silentio."[137] However, any perceived protection arising from administrative disposition and prosecutorial discretion is unlikely to offer meaningful reassurance to employers because there is no guarantee that such disposition will carry over to subsequent administrations.[138] Further, employers must confront the possibility that the current administration might not act coherently or consistently because of the risks posed by: (1) ambiguous and unreliable declarations of policy; and (2) the fickle nature of administrative posturing.

1. Ambiguous and Unreliable Declarations of Policy

Marijuana enforcement policy articulated by the DOJ under the Obama Administration is too ambiguous for employers to rely on safely, and cannot provide long-term guarantees even if it were straightforward because administrations change; "[t]he fact that the federal government has not taken a hardline stance in opposing the state's legalization efforts does not mean employers can ignore obligations they may have under federal law."[139]

Vialpando highlights the uncertainty arising from the DOJ's ambiguous declarations of public policy. The New Mexico state court relied in part on memoranda issued by the DOJ when it rejected the employer's argument that paying for its employee's medical marijuana would violate federal public policy.[140] However, the policy expressed in those memoranda is hardly clear, making it far from certain that a federal court would reach the same conclusion.

In 2009, Attorney General Eric Holder announced guidelines for federal prosecutors through a memorandum from Deputy Attorney General David W. Ogden that advised against devoting resources against medical marijuana users in compliance with state law.[141] Two years later, Deputy Attorney

137. Robert A. Mikos, *Medical Marijuana and the Political Safeguards of Federalism*, 89 DENV. U. L. REV. 997, 1004 (2012).

138. For instance, the views expressed by the Obama Administration stand in contrast to those of the preceding Bush Administration. In 2005, the Supreme Court held that the Commerce Clause permitted Congress to regulate personal intrastate medical marijuana under the CSA. Gonzales v. Raich, 545 U.S. 1, 33 (2005). "The Bush administration, which has been emphasizing marijuana enforcement in its anti-drug strategy, hailed the ruling. 'Today's decision marks the end of medical marijuana as a political issue,' said John P. Walters, President Bush's director of national drug control policy." Charles Lane, *A Defeat for Users of Medical Marijuana*, WASH. POST (June 7, 2005), http://www.washingtonpost.com/wpdyn/content/article/2005/06/06/AR2005060600564.html.

139. Becker & Weimer, *supra* note 64, at 52.

140. Vialpando v. Ben's Auto. Servs., 331 P.3d 975, 980 (N.M. Ct. App. 2014). The court glibly rejected the employer's argument that paying for the medical marijuana would cause it to commit a federal crime because the employer failed to identify which statute it would violate. *Id.*; *see also supra* Part III.A.2.

141. *Memorandum for Selected United State Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, U.S. DEPT. OF JUSTICE (Oct. 19, 2009), http://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-

General James M. Cole issued another memorandum with language that backed away from Ogden:

> Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. . . .The Department of Justice is tasked with enforcing existing federal criminal laws in all states, and enforcement of the CSA has long been and remains a core priority.[142]

In 2013, Cole issued a second memorandum identifying eight marijuana enforcement priorities on which the DOJ should focus its resources.[143] The priorities "encompass[] a variety of conduct that may merit civil or criminal enforcement of the CSA."[144]

The *Vialpando* court quoted these priorities to support its holding.[145] But one of the priorities, "[p]reventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use,"[146] prima facie calls into question many of the forms of liability addressed above, including vicarious liability[147] and OSHA safe workplace requirements.[148] In *Purton v. Marriott International, Inc.*, a California court held that an employer could be held vicariously liable for a drunk driving death caused by an employee who became intoxicated at a party hosted by the company before driving home, even though the drive home was outside the scope of employment.[149] This rationale could easily be extended to a drugged-driving

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and-prosecutions-states ("As a general matter, [the Department] should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.").

142. Memorandum from James M. Cole, Deputy Att'y Gen., to U.S. Att'ys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use 2 (June 29, 2011), http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf.

143. Memorandum from James M. Cole Deputy Attorney General, to U.S. Att'ys, Guidance Regarding Marijuana Enforcement 2–3 (Aug. 29, 2013), http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

144. *Id.* at 2 n.1.

145. Vialpando, 331 P.3d at 980.

146. *Id.* at 980 n.1.

147. *Id.*; *see also supra* Part II.B.4.

148. *See supra* Part II.B.2.

149. Purton v. Marriott Int'l, Inc., 159 Cal. Rptr. 3d 912, 918 (Cal. App. Ct. 2013) ("It is irrelevant that foreseeable effects of the employee's negligent conduct occurred at a time the employee was no longer acting within the scope of his or her employment. Here, there is sufficient evidence in the record to support a finding that [the employee] breached a duty of due care owed to the public by becoming intoxicated at the party.").

death resulting from the company-purchased medical marijuana that the *Vialpando* court required.[150]

2. The Fickle Nature of Administrative Posturing

The dangers of judicial reliance on federal disposition to issue-binding impositions on employers are further highlighted by the fact that President Obama's expressions of deference towards state medical marijuana laws have not necessarily translated into federal practice.[151] A 2013 report found that under the Obama Administration, "[o]ver 335 defendants have been charged with federal crimes related to medical marijuana in states with medical marijuana laws."[152] This is an 80% increase in prosecutions from the Bush Administration.[153] Another report issued in the same year found a $300 million expenditure by the Obama Administration on marijuana enforcement within medical marijuana states, representing a $100 million increase in four-and-a-half years over the Bush administration's expenditure for eight years.[154]

IV. THE CASE FOR REMEDIES AT THE STATE AND FEDERAL LEVELS

Employers currently occupy a precarious legal position concerning their rights and duties to employees with medical marijuana prescriptions, which has been illuminated by recent developments in New Mexico and Michigan case law.[155] A combination of legislative reform at both the state and federal level stands the best chance of effectively minimizing employer liability while respecting the medical needs of employees. Some of the most promising measures include: (1) federal executive reduction of the classification of marijuana under the CSA from Schedule I to Schedule II, or lower; (2) an amendment to the CSA that explicitly exempts states with medical marijuana laws; (3) state provision of reasonable grounds for exemption from accommodation; and (4) a federal independent liability shield.

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150. *Vialpando*, 331 P.3d at 980.

151. Jacob Sullum, *Anti-Pot Republicans Forsake Federalism in Medical Marijuana Vote*, FORBES (May 30, 2014, 11:07 AM), http://www.forbes.com/sites/jacobsullum/2014/05/30/anti-pot-republicans-forsake-federalism-in-medical-marijuana-vote ("Obama was sincere in saying state-legal patients and providers should be left alone but did not care enough about the issue to override resistance from the DEA and federal prosecutors (some of whom are more hostile to marijuana than others) . . . . Obama seems like a feckless and halfhearted supporter of marijuana federalism . . . .").

152. *US Court Records Show Nearly 500 Years in Prison Time for Medical Marijuana Offenses*, CAL. NORML (June 13, 2013), http://www.canorml.org/costs/Nearly_500_Years_Prison_Time_for_Medical_Marijuana_Offenses.

153. Jacob Sullum, *Judging from Prosecutions, Obama Is 80 Percent Worse than Bush on Medical Marijuana*, HIT & RUN BLOG (June 14, 2013, 12:14 PM), https://reason.com/blog/2013/06/14/obama-is-80-percent-worse-than-bush-on-m.

154. PEACE FOR PATIENTS, WHAT'S THE CO$T?: THE FEDERAL WAR ON PATIENTS 3 (2013), http://american-safe-access.s3.amazonaws.com/documents/WhatsTheCost.pdf.

155. *See supra* Part III.A.3.

A. MARIJUANA SHOULD BE RECLASSIFIED UNDER THE CSA FROM SCHEDULE I TO SCHEDULE II OR LOWER

One of the simplest solutions to the problem of employer liability would be for the Attorney General to reclassify marijuana as a Schedule II drug under the CSA, which would mean that the federal government considers it to "have a high potential for abuse, but also have some currently accepted, but severely restricted, medical uses."[156] While Schedule I includes substances like "heroin, lysergic acid diethylamide (LSD), ecstasy, GHB (gamma-hydroxybutyric acid), and peyote," Schedule II includes substances like "meperidine (Demerol), oxycodone (OxyContin), fentanyl, Dexedrine, Adderall, and Ritalin."[157] One benefit of this option is political expediency: "[t]he U.S. Attorney General has the authority to add or transfer a drug between the schedules if the drug meets the requirements of the target schedule," so that the reclassification would not necessarily require an act of Congress.[158] The immediate effect of such a reclassification would be that, should courts continue to require employers to pay for medical marijuana under workers' compensation—as they have begun to do in the *Vialpando* line of cases—there would no longer be a question of whether this would require the employer to violate federal law or federal public policy.[159] Instead, employers could simply treat marijuana "like other prescription drugs."[160]

1. Political Will for Reclassification

Reclassification is an attractive solution because it enjoys significant political support, especially arising in the past four years. In 2011, Lincoln Chafee, who was governor of Rhode Island at that time, and Christine Gregoire, who was governor of Washington, formally petitioned for a reclassification of marijuana as a Schedule II drug.[161] Applying an extensive eight-factor analysis, the petition concluded that "[c]urrent federal rules preclude the adoption of reasonable and workable frameworks for providing access to patients while maintaining the ability of law enforcement agencies to address non-medical/illegal distribution and use of cannabis. The situation

156. Joseph P. Bono, *Criminalistics—Introduction to Controlled Substances*, *in* DRUG ABUSE HANDBOOK 1, 4 (Steven B. Karch ed. 1998).

157. JANE RICE, PRINCIPLES OF PHARMACOLOGY FOR MEDICAL ASSISTING 79 TBL.7-2 (2016).

158. Annaliese Smith, Comment, *Marijuana as a Schedule I Substance: Political Ploy or Accepted Science?*, 40 SANTA CLARA L. REV. 1137, 1148 (2000); *see also* 21 U.S.C. § 811 (2012) (setting out the Attorney General's classification authority).

159. *See supra* Part III.A.3.

160. *The Cannabis Conundrum: Insights for Employers When Workers Have a 'Doctor's Note,'* CORP. L. ADVISORY, http://www.lexisnexis.com/communities/corporatecounselnewsletter/b/newsletter/archive/2014/09/02/the-cannabis-conundrum-insights-for-employers-when-workers-have-a-doctor-s-note.aspx (last visited Aug. 21, 2016).

161. Memorandum from Lincoln D. Chafee, Governor of R.I., and Christine O. Gregoire, Governor of Wash., to Michele Leonhart, Administrator of the Drug Enforcement Admin. (Nov. 30, 2011), http://www.governor.wa.gov/priorities/healthcare/petition/combined_document.pdf.

has become untenable. The solution lies with the federal government."[162] This petition "is still pending."[163] Hillary Clinton, who is currently a candidate in the 2016 Democratic presidential primary race,[164] recently voiced her support for removing marijuana from its Schedule I classification, joining former rivals Bernie Sanders and Martin O'Malley.[165]

In February of 2013, Rep. Earl Blumenauer introduced a bill to the House of Representatives that would reduce the classification of marijuana from Schedule I to Schedule III.[166] This bill would "allow[] states to confidently regulate this important industry and would conform to the wishes of the vast majority of voters."[167] It was referred to the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations in April two months after its introduction, where it continues to languish.[168]

2. Employers Would Retain Discretion to Terminate Where Reasonable

Since Schedule II is the second-most restrictive drug category, reclassification would most likely still afford employers the right to terminate, precluding other types of liability—such as vicarious or negligent retention and hiring liability—while simultaneously acknowledging employee needs.[169] "It is certainly possible that courts may rule that marijuana should be treated like Methadone, a Schedule II drug used to treat opiate addiction," which would balance employers' interests against the needs of their employees more fairly.[170] Employers considering termination of employees with legal methadone prescriptions are not required to accommodate their

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162. *Id.* at 43.

163. O'Keefe, *supra* note 50, at 42. The DEA denied another petition in 2011, and again declined to reschedule marijuana in 2016. *See* Hilary Bricken, *DEA Says 'No' to Rescheduling Marijuana*, ABOVE LAW (Aug. 11, 2016, 4:20 PM), http://abovethelaw.com/2016/08/dea-says-no-to-rescheduling-marijuana. However, this remains a political decision that is ripe for reconsideration.

164. *Poll Chart: 2016 National Democratic Primary*, HUFFPOST POLLSTER, http://elections.huffingtonpost.com/pollster/2016-national-democratic-primary (last visited Aug. 21, 2016).

165. Abby Phillip, *Clinton Joins Democratic Rivals in Backing Change to Marijuana Classification*, WASH. POST (Nov. 7, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/11/07/clinton-supports-removing-marijuana-from-schedule-1-list-joining-democratic-rivals.

166. States' Medical Marijuana Patient Protection Act, H.R. 689, 113th Cong. (2013).

167. O'Keefe, *supra* note 50, at 58.

168. States' Medical Marijuana Patient Protection Act, H.R. 689, 113th Cong. (2013).

169. *See* Jackson Lewis P.C., *Will Oregon Employers Soon Need to Accommodate Medicinal Marijuana Use?*, PAC. N.W. EMP'R 3, 3 (2015), https://www.jacksonlewis.com/media/pnc/8/media.2818.pdf ("If marijuana is removed from Schedule I, employers may be obligated to engage in an individualized interactive dialogue with disabled employees to assess the reasonableness of medical marijuana use."); *cf.* Clipse v. Comm. Driver Servs., Inc., 358 P.3d 464, 473–74 (Wash. Ct. App. 2015) (holding that a prospective employee had a valid claim against his prospective employer because the employer refused to hire him as a result of prejudice against his methadone prescription).

170. Jackson Lewis P.C., *supra* note 169, at 3.

prescription, but the drug's Schedule II classification means that they are required to first "conduct[] an individualized assessment to determine whether the employee or applicant can perform the essential functions of the job while using Methadone or presents a direct threat to the employee or others."[171]

Courts have even permitted termination for abuse of lower-schedule (below Schedule II), legally prescribed drugs. In *Shirley v. Precision Castparts Corp.*, the Fifth Circuit upheld a state court's ruling that an employer was permitted to terminate an employee for abusing his legal Vicodin prescription and failing to complete a treatment program, which violated the employer's drug-free policy.[172] At that time, Vicodin was a Schedule III drug, though the DEA recently reclassified it as Schedule II.[173] Similarly, in *Schummer v. Black Bear Distribution, LLC*, a district court held that an employer could terminate an employee for performance issues stemming from abuse of his legal Klonopin prescription.[174] Klonopin is a Schedule IV drug.[175]

B. A CSA EXEMPTION FOR STATES WOULD ELIMINATE LEGAL CONFLICT

Exempting states with medical marijuana laws from CSA provisions on marijuana could provide an alternative means of resolution that would respect ideological differences on the issue. An exemption would preserve the status quo in states that have not passed medical marijuana laws, but give employers within the states that have already done so some assurance that their actions do not violate federal law if they choose or are legally required to retain employees with medical marijuana prescriptions, or to pay for those prescriptions through workers' compensation or health insurance plans.

In March of 2015, Senators Rand Paul, Cory Booker, and Kirsten Gillibrand introduced a bipartisan bill to the Senate seeking this type of an exemption.[176] One of the bill's major goals "is to allow for patients, doctors and businesses to participate in their states' medical marijuana programs without fear of being prosecuted by the federal government, which continues to ban the substance in all forms."[177] The future of this bill is uncertain; it was

171. *Id.* at 3.

172. Shirley v. Precision Castparts Corp., 726 F.3d 675, 683 (5th Cir. 2013).

173. Thomas Sullivan, *DEA Places Heavy Restrictions on Vicodin and Other Hydrocodone Combination Drugs; Gives Stakeholders 45 Days to Adjust*, POL. & MED. (Sept. 9, 2014, 5:30 AM), http://www.policymed.com/2014/09/deaheavyrestrictionsonvicodin.html.

174. Schummer v. Black Bear Distrib., LLC, 965 F. Supp. 2d 493, 498–502 (D.N.J. 2013).

175. *Controlled Substance Schedules*, U.S. DEPT. JUSTICE, U.S. DEPT. JUST. & DRUG ENFORCEMENT ADMIN. OFFICE OF DIVERSION CONTROL, http://www.deadiversion.usdoj.gov/schedules (last visited Aug. 21, 2016).

176. Compassionate Access, Research Expansion, and Respect States Act of 2015, S. 683, 114th Cong. (2015); Matt Ferner, *Senate Bill Would Effectively End the Federal War on Medical Marijuana*, HUFFINGTON POST (Mar. 10, 2015, 1:37 PM), http://www.huffingtonpost.com/2015/03/10/end-federal-war-on-medical-marijuana_n_6836482.html.

177. Ferner, *supra* note 176.

referred to the Committee on the Judiciary after the second reading, where it has remained ever since.[178] However, it represents a compromise that would respect the position of those in states that have declined to legalize medical marijuana by leaving the federal criminalization scheme intact, while removing uncertainties for employers operating in states that have done so.

C. STATE LEGAL EXEMPTIONS WOULD SHIELD EMPLOYERS

Some states have contemplated employer liability in their medical marijuana statutes. These laws can serve as models for the vast majority of states that have so far failed to do so. They offer employers protections through explicit exemptions that would be extremely difficult for courts to ignore or interpret against them.

1. Arizona and Delaware's Exemption from Reasonable Accommodation

Eight states require employers to provide a reasonable accommodation for employees with medical marijuana prescriptions under state law, despite the inapplicability of the federal ADA.[179] Both Arizona and Delaware "explicitly bar an employer from discriminating against an employee who is a registered and qualified patient but fails a drug test due to marijuana usage."[180] However, they also provide an exemption for employers under certain circumstances. Arizona's statute bars an employer from discrimination "[u]nless a failure to do so would cause an employer to lose a monetary or licensing-related benefit under federal law or regulations . . . ."[181] Delaware's statute provides the same exemption verbatim.[182]

This exemption protects employers from risking the loss of federal contracts[183] as a result of compliance with state law, because it allows employers who would lose federal contacts to avoid providing the accommodation. Because of the very real possibility that a state court could require an accommodation under state law even where no statute explicitly requires one,[184] employers would greatly benefit from a similar provision enacted by every state that permits medical marijuana, regardless of their accommodation statutes.

178. Compassionate Access, Research Expansion, and Respect States Act of 2015, S. 683, 114th Cong. (2015).

179. *See supra* Pt. III.A.1.

180. Becker & Weimer, *supra* note 64, at 52 (citing ARIZ. REV. STAT. ANN. § 36-2813 (2014)); *see also* DEL. CODE ANN. tit. 16, § 4905A (2015)).

181. ARIZ. REV. STAT. ANN. § 36-2813(B) (2014).

182. DEL. CODE ANN. tit. 16, § 4905A(a)(3)(2011).

183. *See supra* Part II.B.1.

184. *See supra* Part III.A.3.

2. Minnesota's Exemption for Impairment on the Job

Minnesota prohibits employer discrimination based on "a patient's positive drug test for cannabis components or metabolites," but provides an explicit exemption: "unless the patient used, possessed, or was impaired by medical cannabis on the premises of the place of employment or during the hours of employment."[185] This exemption significantly reduces the risk of vicarious or negligent retention[186] liability by making it clear that a reasonable accommodation does not sanction employee impairment on the job.

The main problem with this exemption is that it could be difficult for employers to tell whether employees are under the influence of marijuana at work, since detectable amounts of marijuana can remain within an employee's system for anywhere from 4 to 67 days in extreme cases[187], while the actual psychological effects last a maximum of 24 hours,[188] rendering a traditional drug test useless for determining current impairment. Police in most states solve this problem in the context of determining whether someone is driving under the influence of marijuana by "rely[ing] on specially-trained law enforcement officers called drug recognition experts ("DRE")."[189] DREs use a 12-step test that includes things like eye examinations, "divided attention psychophysical tests," pulse checks, and "dark room" pupil examinations.[190] Employers could use similar methods, simply adding on-site DRE impairment testing to their current drug-testing procedures.

3. Nevada's Threat of Harm Exemption

Nevada requires employers to "attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of marijuana," but provides an explicit exemption from this requirement if that accommodation would "(a) [p]ose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or (b) [p]rohibit the employee from fulfilling any and all of his or her job responsibilities."[191] Like the state statutes discussed previously in this section, an exemption of this nature recognizes and addresses employer liability

185. MINN. STAT. ANN. § 152.32(3)(c)(2) (2015).

186. *See supra* Part II.B.4.

187. *How Long Does THC Stay in Your System?*, LEAF SCI. (Apr. 22, 2014), http://www.leafscience.com/2014/04/22/how-long-thc-stay-system.

188. *How Long Does Marijuana Last?*, ADDICTION BLOG (July 19, 2014), http://drug.addictionblog.org/how-long-does-marijuana-last.

189. Bill Kelly, *There Is No "Marijuana Breathalyzer" So How Can Police Tell If a Driver Is High?*, NET (June 25, 2014, 6:30 AM), http://netnebraska.org/article/news/922891/there-no-marijuana-breathalyzer-so-how-can-police-tell-if-driver-high.

190. *Drug Recognition Experts (DRE)*, INT'L DRUG EVALUATION & CLASSIFICATION PROGRAM, http://www.decp.org/experts/12steps.htm (last visited Aug 21, 2016).

191. NEV. REV. STAT. ANN. § 453A.800(3)(a) (2015).

concerns and provides a helpful model for other states to follow. Here, the employer would be protected from respondeat superior and negligent hiring and retention liability, where the Arizona and Delaware exemptions addressed the issue of loss of federal contracts.

4. Federal Passage of an Independent Liability Shield

In 2005, Congress demonstrated that it has the power to pass legislation providing a blanket liability shield to commercial enterprises in both state and federal courts when it passed the Protection of Lawful Commerce in Arms Act ("PLCAA").[192] The PLCAA was written to protect firearms manufacturers and sellers from civil lawsuits seeking damages for harm caused by third-party use of their products.[193] It is astonishingly terse, achieving its purpose by simply stating that "[a] qualified civil liability action may not be brought in any Federal or State court" and defining "qualified civil liability action" as "a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller" of firearms.[194]

Similar legislation could expressly exempt employers with employees who have medical marijuana prescriptions from all of the liability to which they are currently exposed as a result. The federal government could keep marijuana illegal under the CSA if it chose to, while resolving the legal quagmire employers face in light of state statutory conflict and adverse state court rulings. Such a law would also allow employers to make more reasoned, individualized decisions about their employees with medical marijuana prescriptions by removing the specter of legal liability.

V. CONCLUSION

In the face of legislative intransigence, the conflict between state and federal medical marijuana law needlessly exposes employers to a range of legal liability. As a recent line of cases have demonstrated, relying on judicial deference or an administration's temporary expression of public policy is untenable. Federal and state governments should act to remedy the situation. Congress or the DEA should reclassify marijuana as a lower schedule under the CSA, or Congress should amend the CSA to exclude states with their own medical marijuana programs. Alternatively, states should provide explicit exemptions to protect employer interests under state laws, or Congress should provide employers with a federal liability shield.

192. 15 U.S.C. §§ 7901–7903 (2012).
193. *Id.* § 7901(3)–(8).
194. *Id.* §§ 7902(a), 7903(4)–(5).