THE HAZY EMPLOYMENT PROTECTIONS FOR MEDICAL MARIJUANA USERS IN THE PENNSYLVANIA MEDICAL MARIJUANA ACT

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INTRODUCTION

"The federal government’s current approach [of prohibiting marijuana possession] is a half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana."2 Over the past decade, a trend emerged within the United States as states have legalized medicinal and/or recreational marijuana.3 Cannabis is considered to have the highest number of users in the United States of any illicit drug, making it “the most popular illicit drug” in the nation.4 Rigid drug laws, the stigma around marijuana, and pre-employment drug testing in place from the “War on Drugs” period is “the last dying smell from the Nixon Administration.”5 Despite this trend, there is significant tension between federal

1 In Pot We Trust (Showtime television broadcast, July 9, 2007) (quoting British polemicist Christopher Hitchens who postulated that policy makers in Washington do not agree with medical marijuana regulation, but continue to vote for regulation because they “believe” that everyone wants medical marijuana regulation to “go on,” although most people do not).

2 Standing Akimbo, LLC v. United States through I.R.S., 955 F.3d 1146 (10th Cir. 2020), cert. denied, 141 S. Ct. 2236, 2236–37 (2021) (No. 20-645) 2021 WL 2637846, rel’g denied, 142 S.Ct. 919 (2021) (No. 20-645) 2021 WL 3711643. Justice Thomas emphasizes that the past “16 years” of federal policies on selling and cultivating marijuana are inconsistent, making it unnecessary to nationally prohibit marijuana use. Id.


5 See In Pot We Trust, supra note 1 (examining four chronically ill patients prescribed medical marijuana for treatment); see also Kimberly A. Houscr & Janine Hiller, Medical Marijuana Registrants: A Painful Choice?, 57 AM. BUS. L.J. 827, 852–33 (2021) (explaining how the landscape of marijuana regulation in 1970 that imposed criminal penalties on marijuana possession and use was not based on science, but rather racism, and the Department of Justice has consistently objected to modifying the rigid class
prohibition and state legalization of medical marijuana, as employers look to federal law to discharge workers legally using marijuana under state law.\(^6\) As a result, employees and employers struggle to reconcile how state and federal marijuana legislation protect employers while protecting the needs of employees with medical marijuana cards.\(^7\)

In 2016, Pennsylvania enacted the Pennsylvania Medical Marijuana Act ("MMA")\(^8\) legalizing the possession, use, and sale of medical marijuana.\(^9\) Section 2103(b) of the MMA protects Pennsylvania employees prescribed medical marijuana against adverse employment discrimination due to their at-home cannabis use.\(^10\) Because federal law neither addresses employment protections for medical marijuana patients, nor approves medical marijuana use as a disability, Pennsylvania medical marijuana users look to the MMA for protection.\(^11\) The MMA is frequently litigated, because many employers and employees fail to understand the scope of the employment protections on medical marijuana users.\(^12\)

Conversely, Pennsylvania’s neighbor, New Jersey, recently legalized recreational marijuana in the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act ("NJ CREAMMA").\(^13\) The NJ CREAMMA includes extensive and defined employment protections for

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\(^7\) Adam J. Agostini, Marijuana Legalization and Employer-Employee Rights: An All-Time High for Non-Uniformity, 35 ABA J. LAB. & EMPL. L. 183, 184 (2020) (addressing how state marijuana legislation and policies have led to employment-related inconsistencies and ambiguities). Employment-related inconsistencies include off-duty marijuana use, hiring and firing actions, accommodating marijuana use, and anti-discrimination exemptions. Id. at 184-85.


\(^9\) 35 PA. CONS. STAT §§ 10231.102(3)(o)-(ai) (2021) (outlining the intent of the General Assembly in enacting the Medical Marijuana Act to “[p]rovide a program of access to medical marijuana . . . to “[p]rovide a safe and effective method of delivery of medical marijuana to patients,” and to “[p]romote high quality research into effectiveness and utility of marijuana.”); see also id. § 10231.103 (defining “certified medical use”; see also Prohibition on Testing for Marijuana As A Condition For Employment, Bill No. 200625, § 9–4700 (Apr. 28, 2021) (outlining Philadelphia’s new legislation prohibiting pre-employment testing).

\(^10\) See § 10231.2103(b).


\(^13\) New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act, N.J. STAT. ANN. § 2464a-31, at *1 (West 2021) (hereinafter N.J CREAMMA) (regulating activities related to recreational cannabis use). The N.J CREAMMA expands the “Cannabis Regulatory Commission” which oversees New Jersey’s state medical cannabis program and adds to the “Jake Horgan Compassionate Use Act.” Id. at *2.

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marijuana users. The differences between Pennsylvania’s MMA and the NJ CREAMMA are distinctive, and the latter is a better standard for protecting employee’s medical marijuana use. Although federal and state courts in Pennsylvania recently held that employees have an implied right of action under the MMA, the MMA fails to explain how employers should include a drug testing process, identify an employee’s marijuana impairment, and explain the adequate relief employees can receive under the MMA. Ultimately, the MMA should amend the extent of exceptions to the MMA and include a clear drug-testing procedure to provide clarity to employers and employees.

Part I of this comment begins by providing an overview of federal laws and legal history surrounding marijuana. This section addresses the approaches federal and state courts in Pennsylvania have recently taken in addressing medical marijuana, disability discrimination, and adverse employment discrimination. Part I concludes by exploring persuasive authority from New Jersey courts, specifically decisions addressing medical marijuana and disability discrimination claims in adverse employment actions. Part II discusses recent Pennsylvania caselaw arising from employment discrimination claims under the MMA. Part III critiques the holdings from recent Pennsylvania caselaw, highlights the inadequacies of the MMA, and recommends amendments to the MMA influenced by the NJ CREAMMA. Part IV concludes by explaining the impact of improving the MMA, followed by the impact of medical marijuana legalization on the field of employment law.

I. ROLLING IT OUT: CONTEMPORARY FEDERAL AND STATE LEGISLATION OF MEDICAL MARIJUANA

As of May 2021, thirty-six states and four territories allow marijuana use as a form of medical treatment. Medical marijuana is commonly prescribed to alleviate symptoms of the patient’s condition, not treat the patient’s condition. However, medical marijuana patients risk being fired by

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14 Id. at *1–2 (asserting the purpose of the NJ CREAMMA, which “concerns the development, regulation, and enforcement of activities associated with the personal use of products that contain useable cannabis or cannabis resin . . . ”).

15 See infra notes 178–195 (predicting the MMA could improve by including medical marijuana and employment protections similar to the NJ CREAMMA).

16 See 1 Hudnell, 537 F. Supp. 3d at 861 (predicting the Pennsylvania Supreme Court would hold the MMA includes an implied private right of action); accord Palmer v. Scranton Quincy Clin. Co., LLC., No. 498 MDA 2020, 2021 Pa. Super. LEXIS 504, at *18 (overruling the defendant’s demurrer that an employee does not have an implied private right of action under the MMA).

17 See Judge Stephanie Dornitrovich, State Courts Coping with Medical Marijuana Legislation: Discerning Strife or Harmony?, 60 Judges’ J. 30, 32 (2021) (arguing that inadequately written medical marijuana legislation in Pennsylvania and New Jersey has led to many cases entering the courts).

18 See infra Section II.C and notes 180–202 for recommendations to improving the MMA for employers and employees.


20 See Agostini, supra note 7, at 183 (explaining that medical marijuana has been embraced as a legalized treatment of chronic illnesses since California endorsed medicinal marijuana through state legislation in 1996); The Mayo Clinic website includes medical marijuana information in the “Healthy Lifestyle” section. See Mayo Clinic Staff, Medical Marijuana, Mayo Clinic Healthy Lifestyle (Nov. 29, 2019) https://perma.cc/VX9N-K9ZK (explaining using medical marijuana and symptoms surround such use on their website, suggesting their recognition of marijuana as a form of treatment).
their employers for using medical marijuana.\textsuperscript{21} Courts have examined how state medical marijuana legislation applies within a variety of state and federal legal situations due to recurring situations of employment conflict and medical marijuana use.\textsuperscript{22}

The Eastern District Court of Pennsylvania, Superior Court of Pennsylvania, and Commonwealth Court of Pennsylvania indicate that Pennsylvania’s Medical Marijuana Act ("MMA") provides employees a private right of action for discrimination and wrongful discharge based on their medically certified marijuana use.\textsuperscript{23} Under such reasoning, it could be inferred that medical marijuana users are a protected class.\textsuperscript{24} Section A examines the federal legislative history regulating marijuana use and the limited Supreme Court caselaw addressing medical marijuana use. Section B examines state regulation of Marijuana, and discusses the Pennsylvania MMA, recent Pennsylvania caselaw interpreting the MMA, the NJ CREAMMA, and a recent legal challenge to the NJ CREAMMA.

\textit{A. Federal Legislative History Regulating Marijuana Use}

It is necessary to address the federal landscape involving marijuana to understand how the Pennsylvania Medical Marijuana Act fits into the complexity of national drug regulations.\textsuperscript{25} The Controlled Substances Act ("CSA"), the Food, Drug, and Cosmetics Act ("FDCA"), and the Americans with Disabilities Act ("ADA") limit the protections medical marijuana users have under federal law.\textsuperscript{26}

\textbf{1. The Controlled Substances Act ("CSA")}

Congress enacted the Controlled Substances Act ("CSA")\textsuperscript{27} in 1970 to regulate the manufacturing and distribution of controlled substances, drugs, and chemicals in the United States.\textsuperscript{28}

\textsuperscript{21} See e.g. infra note 127.
\textsuperscript{22} See Domitrovich, supra note 17, at 32 (using recent Pennsylvania and New Jersey cases to argue that more cases will flow through courts as judges interpret medical marijuana laws).
\textsuperscript{24} See Joshua Weinsfeld, Medical Marijuana Patients: Discrimination & the Search for Employment Protections, 27 CARDozo J. EQUAL. RTS. & SOC. JUST. 375, 401–02 (2021) (explaining how medical marijuana patients are not a constitutionally protected class under the Fourteenth Amendment and extending analysis to state medical marijuana provisions). But see Denise Elliott, Medical Marijuana Mariages: (Two Years Later), MCNEES PA. LAB. & EMP. BLOG (Feb. 10, 2020), https://perma.cc/NK6H-F8TF (suggesting that medical marijuana users are a protected class).
\textsuperscript{25} See Weinsfeld, supra note 24, at 380–82 (outlining a broad overview of the relationship of medical marijuana and the CSA, ADA, and state laws).
\textsuperscript{26} For further discussion of the Controlled Substances Act, see infra Section I.A.1. For further discussion of the Food, Drug, and Cosmetics Act, see infra Section I.A.2. For further discussion of the Americans with Disabilities Act, see infra Section I.A.3.
\textsuperscript{28} See Gonzales v. Raich, 545 U.S. 1, 10 (2005) (describing the “war on drugs”); The War on Drugs was intended to regulate illegal drug markets and strengthen the enforcement of illegal drug trafficking. Id.; see also The War on Drugs, BRITANNICA (July 23, 2020), https://perma.cc/Q29N-WMKA (accounting the effort spearheaded by President Richard Nixon who declared drug abuse to be “public enemy number one . . .”). The War on Drugs led to an increase in incarcerations for nonviolent drug
The CSA is the backbone of federal drug policy and categorizes various controlled substances into a five-tier framework of “schedules,” each schedule defined by the level of “abuse” of the substance. Marijuana is considered a Schedule I narcotic under the CSA, making it a controlled substance with no “currently accepted medical use in the United States.” In Schedules II-V, Congress delineates controlled substances recognized as having a currently accepted medical use in the United States. Marijuana is not one of them. Since marijuana is labeled as a Schedule I narcotic, the federal government does not legally recognize the medical benefits of marijuana, thus impacting medical marijuana patients and their ability to receive proper care.

Regardless of a state’s legal marijuana status, it is federally prohibited to possess or distribute any form of marijuana in the United States. State laws legalizing marijuana do not conflict with federal laws, but the CSA preempts state law if compliance with neither can be fully executed.

See 21 U.S.C. § 812(1)-(5) (outlining the schedules based on the drug’s “potential for abuse.”). Chemical substances that are not listed in one of the five schedules in the CSA “[m]ay not be considered to be a controlled substance.” Id § 802(45)(B) (defining “schedule listed controlled substance”). See 21 U.S.C. § 802 (defining a “controlled substance” as a drug or substance included in one of the five schedules); see also id. § 812(b)(1)(A)-(C) (defining a Schedule I drug); see also 21 U.S.C. § 822(b). Schedule I drugs are known to “have (1) a high potential for abuse, (2) no currently accepted medical use, and (3) an absence of safe use of the drug under medical supervision.” Id. Schedule I is the most restrictive class of controlled substances. 21 U.S.C. § 841. The CSA permits regulated marijuana cultivation for “research purposes and other illicit purposes.” See Controls to Enhance the Cultivation of Marijuana for Research in the United States, 85 Fed. Reg. 82,333, 82,334 (Dec. 18, 2020) (codified at 21 CFR parts 1301 and 1318) (amending prior regulations to facilitate improvements for manufacturing and distributing marijuana with the hope of improving marijuana research).

See 21 U.S.C. § 812 (listing medical drugs like Fentanyl as Schedule II, Amphetamines as Schedule III, Anabolic Steroids as Schedule IV, and limited quantities of narcotics as Schedule V, and others). Schedule I substances include drugs such as heroin, nicotine, marijuana, methamphetamine, amongst others. Id. See id. (listing marijuana as a Schedule I substance); see also 21 U.S.C. § 802(16) (defining marijuana as all parts of the cannabis sativa L. plant and all compounds derived from the plant).

See FDA and Cannabis Research and Drug Approval Process, U.S. FOOD & DRUG ADMIN. (last updated Feb. 24, 2023), https://perma.cc/DYF8-STFC (explaining that the FDA supports certain studies of cannabis, but that there is no approved medical use of marijuana in the United States).

See 21 U.S.C. § 841(a)(1) (“It shall be unlawful for any person knowingly or intentionally—to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ”). Because marijuana is a controlled substance, it is unlawful to possess marijuana. Id.

See 21 U.S.C. § 903 (outlining the preemption language in the CSA). “[A]ny State law on the same subject matter which would otherwise be within the authority of the state, unless there is a positive conflict between that provision . . . and that State law so that the two cannot consistently stand together.” Id; see also Worthy & Kulkarni, supra note 6, at 399-400 (2021) (arguing that health plans or workers compensation plans covering non-FDA approved cannabis products will be preempted by federal laws when the state law conflicts with the federal law); U.S. CONST. art. VI, Cl. 2. (explaining that pursuant to the Supremacy Clause of the United States Constitution, when a law conflicts between federal and state law, the federal law supersedes state law).
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2. Food, Drug, and Cosmetics Act ("FDCA")

The Federal Food, Drug, and Cosmetic Act of 1938 allows the Food and Drug Administration (FDA) to regulate food, drugs, medical devices, and cosmetics. Cannabis products must receive FDA approval prior to being marketed or sold as a new drug. Many cannabis-related products are marketed as treating a variety of medical conditions, but marijuana has not been approved for "therapeutic use" under the FDCA, making some non-FDA-approved marijuana products illegal under the FDCA. It is illegal to market CBD and THC products as dietary supplements for interstate commerce in the absence of FDA approval and clinical research, regardless of whether the products are hemp-derived. However, many state laws permit the distribution, possession, and sale non-FDA-approved marijuana products.

3. Americans with Disabilities Act ("ADA")

The Americans with Disabilities Act of 1990 (ADA) prohibits discrimination against individuals with disabilities. The ADA ensures "that people with disabilities have the same rights and opportunities as everyone else." The ADA does not outline any conditions constituting disabilities, instead defining a disability as "a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such impairment, or a person who is perceived by others as having such an impairment."

37 21 U.S.C. § 393(b)(2) (addressing the FDA's drug-renewal process ensuring the safety, quality, and effectiveness of drugs).
38 See FDA and Cannabis: Research and Drug Approval Process, U.S. FOOD AND DRUG ADMIN., https://perma.cc/Z6HG-99X9 (Oct. 1, 2020) (explaining that the FDA has not approved the marketing of cannabis for medical use). The FDA claims that unapproved cannabis and cannabis-related products have consequences and significant safety risks. Id. (noting that the FDA has not reviewed data that suggest non-approved cannabis products are safe for therapeutic use).
39 See 21 U.S.C. § 331(a)–(b) (prohibiting "introducing, adulterating, or misbranding any drugs placed in interstate commerce"); see also Press Release, FDA, Statement from FDA Commissioner Scott Gottlieb, M.D. on signing the Agriculture Improvement Act and the Agency's Regulation of Products Containing Cannabis and Cannabis-Derived Compounds (Dec. 20, 2018), https://perma.cc/BK2L-2V96Q (commenting on how it is unlawful to introduce CBD or THC products into the food supply or as dietary supplements because they must be properly regulated by the FDA).
40See Federal Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD), U.S. FOOD & DRUG ADMIN. (Jan. 22, 2021), https://perma.cc/26FT-2MZX (noting the FDA does not recognize the safety of CBD and that some companies market CBD products violating the FDCA).
42See generally id.; see also Americans with Disabilities Act, U.S. DEPT. OF LABOR, https://perma.cc/V7K4-PDQK (last visited Apr. 3, 2023) ("[P]rohibiting] discrimination against individuals with disabilities in all areas of public life.").
43See What is the Americans with Disabilities Act (ADA)?, ADA NAT'L NETWORK, https://perma.cc/3PFT-VIXU (last visited Aug. 29, 2021) (detailing that the ADA "guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, state and local government services, and telecommunications").
4442 U.S.C. § 12102(1)(A)(C) ("The term 'disability' means, with respect to an individual—a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment . . . ").
The ADA does not protect illegal drug use because a “qualified individual with a disability shall not include any employee or applicant who is currently engaging in illegal drugs, when the covered entity acts on the basis of such use.” Therefore, any person using medical or recreational marijuana is excluded from reasonable accommodations under the ADA. The ADA also notes that an employer may prohibit employees from using illegal drugs in the workplace. As the ADA does not protect medical marijuana use, the majority of states do not classify medical marijuana use as a disability. Nevertheless, the Supreme Court has yet to address whether the ADA dismisses an action under state law claiming discrimination based on medical marijuana use.

4. Supreme Court Precedent: Gonzales v. Raich

In 2005, the Supreme Court held in Gonzales v. Raich that any marijuana use, both recreational and medical, is illegal. The Supreme Court explained that Congress lawfully exercised the commerce
power in enacting the CSA. Specifically, pursuant to the Supremacy Clause, federal prohibition of marijuana prevails over state-legalized medical marijuana. Thus, Congress has the constitutional power to prohibit using and manufacturing marijuana, regardless of whether the state law authorizes medical marijuana use. Recently, Judge Clarence Thomas indicated that “federal policies of the past [sixteen] years have greatly undermined [Raich’s] reasoning.” He contends that because the federal government both forbids and tolerates using medical marijuana, it is understandable why citizens think the federal government no longer absolutely bans marijuana.

B. Into the Weeds: State Regulation of Marijuana

While marijuana remains illegal under federal law, many states have legalized recreational marijuana, allowed the use of non-FDA approved marijuana products, and enacted specific medical marijuana legislation. Courts have struggled to reconcile federal and state regulation of marijuana, specifically addressing what protections are—and should be—available to medical marijuana users in the workplace and the scope of employment discrimination claims for marijuana users.

52 See id. at 26–29 (concluding that non-economic intrastate activity in the intrastate market can be regulated by the federal government because it impacts the larger regulatory scheme of controlled substances). The Court suggested similarities between the respondents and farmer in Wickard because both were “cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market.” Id. at 18 (describing that the illegal market in Raich is the illegal cultivation of marijuana); see also Wickard v. Filburn, 317 U.S. 111, 127–128 (1942) (establishing Congress can regulate “purely intrastate activity” that is not commercial if the production of that activity impacts the interstate market of the activity).

53 See id. at 29 (explaining that cultivating and possessing marijuana is not an activity “beyond congressional reach” because when state and federal laws conflict, federal laws prevail); see also U.S. CONST. art. VI cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

54 See id. at 29 (emphasizing that no matter how “legitimate or dire” the necessity of possessing and cultivating medical marijuana, federal prohibition prevails).


56 See Standing Akimbo, 141 S.Ct. at 2236–38 (acknowledging the mixed signals of the federal policy). In 2009, Congress allowed Washington, D.C. to decriminalize medical marijuana use. Id. at 2237. In 2015 and every fiscal year following, Congress has prohibited the Department of Justice from “spending funds to prevent states’ implementation of their own medical marijuana laws.” Id. (quoting United States v. McIntosh, 833 F.3d 1163, 1168 (9th Cir. 2016) (preventing the Department of Justice from spending money to enforce the Controlled Substances Act by prosecuting individuals complying with state marijuana laws)). Justice Thomas’ statement has no precedential value, but implies the Supreme Court’s perspective on federally prohibiting marijuana. See Annika Kim Constantino, Supreme Court Justice Clarence Thomas Says Federal Marijuana Laws May Be Outdated, CNBC (Jun. 28, 2021, 2:56 PM), https://www.cnbc.com/2021/06/28/justice-clarence-thomas-says-federal-marijuana-laws-may-be-outdated.html (predicting that Justice Thomas’ statement will influence arguments that federal prohibitions against marijuana are “unfair”).

57 See Agostini, supra note 69, at 184 (“While there appears to be a consistent and ongoing trend among states with regards to the general endorsement of marijuana use, there is a significant lack of consistency in how states have decided to regulate such use.”).

58 Id. at 186 (noting that the “stagnant” atmosphere of cannabis legalization has led to inconsistent state laws). Federal and state inconsistencies in regulating marijuana creates ambiguities of employee drug screenings, marijuana workplace accommodations, and employment protections related to off-duty marijuana use. Id. at 187 (arguing that a uniform marijuana legislation in the nation is not just feasible, but practical).
This section examines compares the employment protections related to marijuana in Pennsylvania and New Jersey, revealing an interesting duality despite the states’ geographical proximity. The divergence in employment protections between these two states highlights the significance of exploring their respective legislation. New Jersey offers some of the most comprehensive safeguards against employment discrimination for medical marijuana usage in the nation. By choosing New Jersey as a point of comparison to Pennsylvania’s current laws, the inadequacy of Pennsylvania’s employment protections for medical marijuana users becomes evident. Further, I chose to juxtapose New Jersey and Pennsylvania regulatory laws because they are neighbors, and many residents of New Jersey commute to Pennsylvania for work and may be surprised to learn of Pennsylvania’s contrasting employment regulations for medical marijuana.

The section proceeds in three subparts. Subpart 1 sets the stage by introducing the relationship between federal and state regulation of marijuana, providing a general background on the preemption doctrine. Subpart 2 discusses the landscape of medical marijuana regulation in Pennsylvania, followed by Subpart 3, which discusses the corresponding landscape in New Jersey.

1. A Primer on the Preemption Doctrine

When state law and federal law conflict, federal law preempts state law pursuant to the Supremacy Clause of the U.S. Constitution. The preemption doctrine makes state legalization of medical marijuana difficult to square with federal illegalization of marijuana use. Specifically, when determining whether state laws regulating controlled substances are preempted, the analysis begins with the Federal Controlled Substances Act anti-preemption provision. At its broadest, the CSA preempts state regulations of controlled substances when there is a conflict between state law and a provision of the CSA so the two “cannot consistently stand together.” Specifically, the CSA preempts state laws when: (1) conflict exists between the CSA and the state law; and, (2) compliance with the requirements of both the CSA and the state law is impossible.

When the CSA outlaws marijuana use and states legalize marijuana, whether recreationally or medically, there are looming preemption concerns due to the disjunction in marijuana legality. Yet, when the CSA was enacted, Congress failed to consider that only fifty years later, the majority of states would have legalized marijuana in one form or another. Accordingly, the federal government has increasingly respected state policies legalizing marijuana by taking a fairly “non-enforcement” approach. As Justice Thomas explained in critiquing Ratzl's application, some state courts are also

59 U.S. CONST. art. VI, cl. 2.
60 See Matthew A. Melone, Federal Marijuana Policy: Homage to Federalism in Form; Potemkin Federalism in Substance, 65 WAYNE L. REV. 215, 217 (2018) (explaining how federal marijuana regulation and state legalization of marijuana is a "strained federalism").
61 See 21 U.S.C.A. § 903 ("No provision shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision . . . and that State law so that the two cannot consistently stand together.")
62 See Kevin D. Cotton, Annotation, Preemption of State Regulation of Controlled Substances by Federal Controlled Substances Act, 60 A.L.R.6TH 175 (2010), at 2.
63 See Worthy & Kulkani, supra note 6, at 399–400 (outlining Federal Preemption and the CSA).
64 See generally Melone, supra note 60, at 259–260 (characterizing the federal government's approach to marijuana is
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taking this "non-enforcement" approach. Nevertheless, the application of the Supremacy Clause within the marijuana space is an all-present doctrine in analyzing federal and state laws, despite the federal government's general "hands off approach" to medical marijuana use and employment decisions. Thus, examining the state regulations of medical marijuana in Pennsylvania and New Jersey illuminate two differing methods of regulating medical marijuana.

2. Pennsylvania

As of December 2020, more than one-half million patients and caregivers are registered under Pennsylvania's Medical Marijuana Program (the "Program"). The MMA legalizes medical marijuana use for patients registered under the Program, but recent holdings have exposed the limitations of the MMA and significant loopholes the MMA has in addressing the employee-employer relationship.

a. The Pennsylvania Medical Marijuana Act

In April 2016, the Pennsylvania General Assembly enacted the Pennsylvania Medical Marijuana Act (MMA or PAMMA) that legalizes marijuana for medical use. The MMA claims that "scientific evidence suggests that medical marijuana is one potential therapy that may mitigate suffering in some patients and also enhance quality of life." The MMA initially listed a limited group of "serious medical conditions" eligible for medical marijuana, but it has expanded over time.

a. The Pennsylvania Medical Marijuana Act

In April 2016, the Pennsylvania General Assembly enacted the Pennsylvania Medical Marijuana Act (MMA or PAMMA) that legalizes marijuana for medical use. The MMA claims that "scientific evidence suggests that medical marijuana is one potential therapy that may mitigate suffering in some patients and also enhance quality of life." The MMA initially listed a limited group of "serious medical conditions" eligible for medical marijuana, but it has expanded over time.

65 See Standing Akimbo, LLC v. United States through I.R.S., 955 F.3d 1146, 1158 (10th Cir. 2020), cert. denied sub nom. (discussing Gonzales v. Raich and its application, specifically that although the CSA outlines marijuana, the federal government has tolerated its use).

66 Id.


68 See infra discussion and cases cited Section III.B for a narrative and critical analysis of these court decisions in Pennsylvania.

69 35 PA. CONS. STAT § 10231.102(1) ("Scientific evidence suggests that medical marijuana is one potential therapy that may mitigate suffering in some patients and also enhance quality of life.").

70 Id. The MMA also outlines approved forms of dispensing medical marijuana, to which "smoking or ingesting marijuana is not an approved form." 35 PA. CONS. STAT. §§ 10231.303(b)(2)–(3) (2021) (listing the ways medical marijuana may be dispensed to the "patient or caregiver," specifically in either pill, oil, topical, vaporization, tincture, or liquid form, but not in dry leaf plant form).

71 35 PA. CONS. STAT. § 10231.103. The MMA includes qualified medical conditions such as Cancer, including remission therapy; human immunodeficiency virus or syndrome; amyotrophic lateral sclerosis; Parkinson's disease; multiple sclerosis; damage to the nervous tissue of the central nervous system; epilepsy; inflammatory bowel disease, neuropathies; Huntington's disease; Crohn's disease; Post-traumatic stress disorder; intractable seizures; glaucoma; sickle cell anemia; chronic pain; Autism; and other conditions.

Id. In the 2021 update to the legislation, Cancer remission therapy, damage to nervous tissue of the brain, and neuropathies associated with nervous tissue damage were added to the qualified conditions. Id; also MARIJUANA POLICY PROJECT, SUMMARY OF PENNSYLVANIA'S MEDICAL MARIJUANA ACT, (June 2021), https://perma.cc/XV29-C3TZ (outlining the updates to the Pennsylvania Medical Marijuana Act as amended by HB 1024).

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Under the MMA, employers cannot refuse to hire, fire, or retaliate against employees certified to use medical marijuana. \(^{72}\) Employers are not required to accommodate medical marijuana use in the workplace. \(^{73}\) Likewise, the MMA does not require an employer to “commit an act that would put the employer . . . in violation of Federal law.” \(^{74}\) Under Section 2103(b)(2), employers may discipline employees “under the influence of medical marijuana in the workplace,” if the employee’s conduct “falls below the standard of care normally accepted for that position.” \(^{75}\) However, the MMA does not define “standard of care,” thus leaving it open to the employer to determine the employee’s state of conduct. \(^{76}\)

Employees using medical marijuana may be restricted from certain work-related activities. \(^{77}\) Section 510 prohibits medical marijuana patients from performing duties at “heights or in confined spaces” while under the influence of medical marijuana, or tasks the employer deems “life-threatening” to anyone under the influence of medical marijuana. \(^{78}\) Furthermore, employers are allowed to prohibit employees from performing duties that “could result in a public health or safety risk while under the influence of medical marijuana.” \(^{79}\)

Pennsylvania includes other laws protecting a person using medical marijuana, such as the Pennsylvania Human Relations Act (“PHRA”). \(^{80}\) The PHRA makes it illegal for private employers and employment agencies to discriminate against persons with disabilities. \(^{81}\) However, the MMA does not amend the PHRA. \(^{82}\) As the MMA does not amend pre-existing legislation in Pennsylvania addressing

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\(^{72}\) See 35 Pa. Cons. Stat. § 10231.2103(b)(1) (“No employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee’s compensation, terms, conditions, location, or privileges solely on the basis of such employee’s status as an individual who is certified to use medical marijuana.”).

\(^{73}\) See 35 Pa. Cons. Stat. § 10231.2103(b)(2) (stating that employers may discipline employees for being under the influence of medical marijuana in the workplace or working while under the influence of medical marijuana).


\(^{76}\) See id. (failing to determine the “standard of care normally accepted” for the job); see also Leah DiMatteo, Medical Marijuana in the Workplace: Information and Guidance for Employers in Pennsylvania, The Philadelphia Lawyer 20, 21 (2020) (suggesting that without a definition of “standard of care” employers will have trouble proving violation of proper workplace conduct).


\(^{78}\) 35 Pa. Cons. Stat. § 10231.510(2)–(3) (describing mining activities and “life-threatening tasks”). The employer must determine what is life-threatening if the MMA fails to define this term. Id.

\(^{79}\) 35 Pa. Cons. Stat. § 10231.510(4) (referring employers from liability as “[t]he prohibition shall not be deemed an adverse employment decision even if the prohibition result in financial harm for the patient.”).


\(^{81}\) See 43 Pa. Cons. Stat. § 955(a). To state a claim for discrimination under the PHRA, an individual must show that (1) they have a disability defined by the PHRA; (2) they are qualified to perform the job with or without reasonable accommodation; and (3) they suffered adverse employment discrimination. See Hudnell v. Thomas Jefferson Univ. Hosp., Inc., 537 F. Supp. 3d 852, 861 (E.D. Pa. 2020). The PHRA is considered “the same as the ADA in relevant respects and Pennsylvania courts . . . generally interpret the PHRA in accord with its federal counterparts.” Id. (citing Rinshimer v. Consol, Inc., 292 F.3d 375, 382 (3d Cir. 2002). Cf. Rinshimer, 292 F.3d at 375, 378 (noting that an employer’s awareness of an employee’s sickness does not require an employer to regard the employee as disabled under the ADA).

marijuana use or employment, various Pennsylvania courts have had to address employment issues raised in the context of the MMA.83

b. Recent Legal Decisions in Pennsylvania

In September 2020, the U.S. District Court for the Eastern District of Pennsylvania in Hudnell v. Thomas Jefferson University Hospitals Inc.84 declared that a medical marijuana user can bring a cause of action against his or her employer for discrimination under Section 2103(b)(1) of the Pennsylvania Medical Marijuana Act.85 There, the plaintiff in Hudnell was certified to use medical marijuana to alleviate her back pain.86 When Hudnell returned to the office after working from home, the defendant hospital required a drug test, which Hudnell failed.87 While Hudnell produced her marijuana card at the time of testing, her medical marijuana certification was expired and the renewal process was incomplete.88 Hudnell was subsequently terminated and sued her employer for discrimination under Title VII, and for discrimination and retaliation under the PHRA, the Philadelphia Fair Practices Ordinance ("PFPO"), and the MMA.89 Specific to the MMA claim, the court held that Hudnell alleged insufficient facts and was not entitled to relief.90

The matter of first impression opened the door for employers to be responsible for failing to accommodate an employee's medical marijuana use.91 In August 2021, in Palmiter v. Commonwealth Hospital Systems, Inc.,92 the Superior Court of Pennsylvania asserted that an employee medical-marijuana user may bring a private cause of action under the MMA for wrongful termination.93 Despite failing to

84 Hudnell, 537 F. Supp. 3d at 852.
85 See id. at 860-61 (assuming that the Pennsylvania Supreme Court would find an implied private right of action for employees under the MMA).
86 Id. at 856 (noting that the employer required plaintiff to take a drug test because she was on leave from work for over 90 days).
87 Id. (describing how Hudnell provided the nurse administering her drug test copies of her prescription and medical marijuana card).
88 Id. (addressing how the Human Resources office told Plaintiff that she was fired because she did not have a valid medical marijuana card at the time of her drug test and that it was irrelevant that she was in the process of being recertified).
89 Id. at 855, 858 (listing Plaintiff's counts I, III, and VIII of discrimination and retaliation under the PHRA, counts II and IV of discrimination and retaliation under the PFPO, and count V, discrimination under the MMA).
90 Id. at 861 (accounting "[Hudnell] legally purchased and used medical marijuana, disclosed her status as a cardholder, failed a drug test at work and then was fired the same day she recertified her medical marijuana card.").
91 Id. at 859-61 (explaining a private remedy is implied in the MMA); see also Domitrovich, supra note 17, at 31 ("This Hudnell case is predicted to hold employers responsible for bearing the risk of liability under the PAMMA in certain circumstances.").
93 See id. at *1; see also Palmiter v. Commonwealth Health Sys., Inc., No. 19-CV-1315, 2021 WL 3507795, at *1 (Pa. Sup.
recover under the PHRA for retaliation, disability discrimination, or failure-to-accommodate, the court held the plaintiff could sue her employer under the MMA.94

In Harrisburg Area Community College v. Pennsylvania Human Relations Commission,95 a student claimed her medical marijuana use was a disability exempting her from mandated drug-testing.96 The court stated the MMA does not accommodate post-secondary students using medical marijuana and that accommodating the plaintiff’s medical marijuana use is prohibited under the PHRA and PFEOA.97

3. New Jersey

The legislation and caselaw regarding medical marijuana and employment discrimination in New Jersey provides insight into how Pennsylvania should amend the MMA.98

a. New Jersey Cannabis Regulatory, Enforcement, Assistance, and Marketplace Modernization Act

In February 2021, New Jersey Governor Phil Murphy signed the NJ CREAMMA (“the Act”), amending the New Jersey Constitution and legalizing persons twenty-one years and older using and purchasing recreational marijuana.99 The NJ CREAMMA expands upon prior legislation permitting medical marijuana use.100 Notably, the Act includes express employment protections for persons using cannabis as permitted under the regulation.101 Unless the employer is subject to a federal drug testing requirement, employers are virtually prohibited from refusing to hire, improperly terminating, or

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94 See Palmiter, 2019 WL 6248350, *1, *4-9 (holding the plaintiff had an implied private right of action under the MMA); see also infra Section II.B (discussing the reasoning of the various Palmiter decisions).
96 See Harrisburg Area Cmty. Coll., 245 A.3d at 285-96 (noting the plaintiff took medical marijuana for her disabilities of Post-Traumatic Stress Disorder and Irritable Bowel Syndrome).
97 Id. at 292-94 (“the MMA neither references PHRA nor PFEOA, nor provides any language that addresses the usage of medical marijuana by students.”).
98 See Domitrovich, supra note 17, at 32 (alluding to issues with Pennsylvania and New Jersey medical marijuana legislation).
100 See Jake Honig Compassionate Use Medical Cannabis Act, N.J. STAT. ANN. § 24:61-1 (West 2019) [hereinafter Jake Honig Act]. The bill expanded the State’s Medical Cannabis Program and includes specific requirements for employers—including employment protections for medical marijuana patients. Id. at § 24:61-3.1 (prohibiting employers from taking adverse employment action against registered medical marijuana users); see also Hager v. M&K Construction, 247 A.3d. 864, 886 (N.J. 2021) (holding that the Honig Act was not preempted by the CSA and employers may have to reimburse workers compensation claims involving medical marijuana treatment). The Jake Honig Act was not superseded with the passage of the NJ CREAMMA, as employers are still required to “provide written notice of the right to explain” to applicants and employees testing positive for medical marijuana.” Jake Honig Act, § 24:61-6.1(b)(1) (West 2019).
101 See NJ CREAMMA, N.J. STAT. ANN. § 24:61-31 (West 2021) (“The bill prohibits employers from taking any adverse employment action against an employee based on the employee’s status as a registry identification cardholder.”).

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discriminating against an individual if the individual tests positive for marijuana. Additionally, the Act addresses periods of “reasonable suspicion” when employers may drug test employees, such as after a workplace accident or if the employee has observable signs of intoxication. The NJ CREAMMA addresses a specific procedure employers must follow when drug testing employees, including an evaluation by a “certified Workplace Impairment Recognition Expert” specializing in investigating employee conduct.

b. Recent Court Decision in New Jersey

In enacting the NJ CREAMMA, the legislature deleted an original provision “obligating employers to accommodate an employee’s use of medical marijuana,” due to the Supreme Court of New Jersey’s holding in Wild v. Carriage Funeral Holdings, Inc. There, the Court addressed the issue of employees unlawfully terminated for prescribed medical marijuana use. The Court explained that although the Jake Honig Act did not require an employer to accommodate medical marijuana in the workplace, medical marijuana users could assert a claim for disability discrimination and failure to accommodate against their employers under the New Jersey Law Against Discrimination (“LAD”). The New Jersey Supreme Court holding, although prior to the passage of CREAMMA, reasoned that because the plaintiff was permitted to use medical marijuana under the Compassionate Use Act, the Compassionate Use Act must be “harmonized” with the LAD which addresses disability discrimination claims.

II. INTO THE WEEDS: A NARRATIVE ANALYSIS OF PENNSYLVANIA CASELAW

102 Id. at *17 (stating that some federal employers, such as DOT-regulated employers, are allowed to conduct drug tests); see also Alonzo Martinez, The Garden State Gets Greener – New Jersey Legalizes Recreational Marijuana, FORBES (Mar. 18, 2021, 8:00 AM), https://perma.cc/7U68-AQY4 (discussing the many protections for employees under CREAMMA).

103 See NJ CREAMMA, N.J. STAT. ANN. § 24:61-31 at *17 (West 2021) (indicating that employers are allowed to conduct marijuana drug tests for post-offer pre-employment, if the employer reasonably suspects the employee used marijuana at work or is presently impaired, at random, or after a workplace accident); see also Jake Honig Act, § 24:6-1.1(b)(1) (West 1999) (allowing the applicant or employee to “present a legitimate medical explanation” for the positive drug test).

104 See NJ CREAMMA, N.J. STAT. ANN. § 24-61-31, at *17 (West 2021) (requiring the drug test have a physical and scientific evaluation).


106 See Wild, 205 A.3d 1144, 1148–49 (outlining how the plaintiff was prescribed medical marijuana as part of his treatment plan for cancer).

107 Id. at 1149 (explaining that the employer claimed plaintiff was “not terminated because of his drug use, but because he failed to disclose his use of medication.”). However, after plaintiff was fired, his mother was told plaintiff was fired for being a drug addict. Id. at 1150. Plaintiff would go on to claim that his employer unlawfully terminated him under LAD. Id.

108 Quoting Wild, 227 A.3d at 1208 (adding to the Appellate Division’s holding and further explaining the Compassionate Use Act’s impact on plaintiff’s employment rights).
ARISING FROM EMPLOYMENT DISCRIMINATION CLAIMS UNDER THE MMA

The MMA declines to explicitly state express employment protections for medical marijuana users. This section explores the cases of three Pennsylvania employees, who brought separate claims for adverse employment discrimination under the MMA. All three courts noted the MMA includes an implied private right of action; however, the holdings stop short of explaining the extent of protections for employees under the MMA.

A. Hudnell v. Thomas Jefferson University Hospitals, Inc.

In Hudnell v. Thomas Jefferson University Hospitals, Inc., the Eastern District of PA examined plaintiff employee Hudnell’s claims of discrimination and retaliation under the PHRA and the PFPO, discrimination under Title VII, and discrimination under the MMA. Most notably, the Court addressed an issue of first impression by determining whether the MMA implies a right of action for employment discrimination under Section 2103(b)(1). The court began its analysis of the MMA by citing four courts’ holdings addressing implied private rights of action in medical marijuana acts.

In its analysis, the court “predicted” how the Pennsylvania Supreme Court would rule on an issue of Pennsylvania Law. In applying a three-part test to determine whether the Section 2103(b)(1) implied a private right of action, the court began with the second of the three factors, which emphasizes the text and context of the statute. First, the court explained that the legislature “crafted Section

109 See 35 PA. CONS. STAT. § 10231.2103(b) (including some protections for employees using medical marijuana, but nothing in the act states remedies or ways the employee can sue employers).


111 See Hudnell, 537 F. Supp. 3d at 858–63 (addressing the plaintiff’s claims under the PHRA, PFPO, Title VII, and the MMA); see also Hudnell v. Thomas Jefferson Univ. Hosps., Inc., No. 20 CV 01621, 2021 WL 63252, at *2–3 (E.D. Pa. Jan. 7, 2021) (examining the defendant’s motion to dismiss plaintiff’s claims under the PHRA).

112 See Hudnell, 537 F. Supp. 3d at 859–861 (explaining the defendant’s argument that because the MMA does not explicitly include an implied private right of action, Hudnell could not make a claim under the MMA). Id. at 861. Additionally, Jefferson argued the MMA did not apply because Hudnell failed to have a valid marijuana card when drug tested. Id. See also 35 Pa.C.S. § 10231.2103(b)(1) (restricting employers from discharging employees solely based on the employee’s medical marijuana use).


114 Hudnell, 537 F. Supp. 3d at 860 (emphasizing the authority of Pennsylvania Supreme Court holdings when addressing questions of Pennsylvania law).

Id. (explaining the legislative intent as the most important inquiry, stating “the text and context of the statute implicitly suggest legislative intent to create a private right of action”). The three factors to determine whether a state statute implies a private right of action are:

[First, is the plaintiff “one of the class for whose especial benefit the statute was enacted”—that is, does the statute create... a
right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?


See Hudnell, 537 F. Supp. 3d at 861.

There is no mistaking the General Assembly's intent to protect employees from discrimination in Section 2103(b)(1). That clear intent distinguishes this case from Estate of Witthoeft, where the Pennsylvania Supreme Court declined to find an implied right of action because the legislature did not create the Motor Vehicle Code provision at issue for the special benefit of the injured plaintiff.

Id. (citing Estate of Witthoeft v. Kiskadden, 733 A.2d 623, 627 (Pa. 1999)). See also Section 10231.2104 (explaining actions specific agencies can take in governing use and possession of medical marijuana).

See Hudnell, 537 F. Supp. 3d at 861 (explaining that although there is "seemingly broad grant of authority" for agencies to enforce civil penalties through Section 1308(b), Section 2103(b)(1) fails to delegate enforcing the MMA); see also 35 PA. CONS. STAT § 10231.1308(b) ("In addition to any other remedy available to the department, the department may assess a civil penalty...")

See Hudnell, 537 F.Supp.3d at 861; see also Palmiter v. Commonwealth Health Sys., Inc., No. 19 CV 1315, 2019 WL 6248350 at *13 (Pa. C.P. Lackawanna Cnty. Nov. 10, 2019) (stating that if the MMA did not provide a right of action, "the mandate contained in Section 2103(b)(1) will ring hollow."); Aaron Schabelnurt, Comment, Implying a Private Right of Action for Employment Discrimination under the Pennsylvania Medical Marijuana Act, 30 WIDENER CONS. L. REV. 363, 396 (2021) (arguing that the MMA includes an implied private right of action).

Hudnell, 537 F.Supp.3d at 861 (applying the first Cort factor to support how the legislature specifically created Section 2103(b)(1) to benefit medical marijuana card holders and prevent employers from making adverse employment actions).

Id (explaining the third Cort factor regarding the "purposes of the legislative scheme").

Id. (listing the facts that the plaintiff "legally purchased and used medical marijuana, disclosed her status as a cardholder, failed a drug test at work and then was fired the same day she recertified her medical marijuana card.").

Id at 861 (stating the Court suggested the "Pennsylvania Supreme Court would find that the General Assembly..."
The court also examined the employee's claims of discrimination and retaliation under the PHRA and the PFPO. The court denied Hudnell's claims of discrimination and retaliation for these counts. Notably, the basis for this denial was that the plaintiff had failed to exhaust administrative remedies; the basis was not that she had failed to assert a valid disability under the PHRA.

B. Palmiter v. Commonwealth Health Sys., Inc.

In an issue of first impression, the Superior Court of Pennsylvania held that the MMA allowed an employee to sue an employer for wrongful discharge due to the employee's status as a medical marijuana user. This case was Palmiter v. Commonwealth Health Systems, where the court emphasized that the Pennsylvania General Assembly intended Section 2103(b) of the MMA in order to create an implied private right of action for employees prescribed medical marijuana.

This plaintiff asserted two actions in two separate lawsuits against defendant-employers. First, the plaintiff alleged wrongful discharge in violation of the MMA due to her legal status as a prescribed medical marijuana user. In the second action, plaintiff claimed disability discrimination, failure to provide a reasonable accommodation, and employment retaliation violating the PHRA. In plaintiff's first lawsuit, the court recognized that the MMA includes an implied right of action for employment discrimination under the MMA.

In the group of claims in the second suit, Palmiter argued that her medical marijuana use qualified as a "disability" under the PHRA. The court asserted that the plaintiff's claim was

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124 Id. at 858.
125 Id. at 858–859.
126 Hudnell v. Thomas Jefferson University Hospitals, Inc., 2021 WL 63252, at *2 (distinguishing Palmiter v. Commonwealth Health Sys., Inc. because there, the plaintiff argued her medical marijuana use was a disability, whereas Hudnell argued her back injuries were her disability).
127 See Palmiter, 2019 WL 6248350 at *2–3 (explaining Plaintiff stated a claim for violation of public policy, supported by her citing the MMA).
129 See Palmiter, 2019 WL 6248350 at *2–3.
130 Id. at *1 (discussing wrongful termination under the MMA). The plaintiff filed a second action that her medical marijuana use qualified as a disability under the PHRA. Palmiter v. Commonwealth Health Systems, Inc., No. 20 CV 2544, 2020 WL 6686549, at *1 (Pa. Com. Pl. Nov. 10, 2020) (addressing the plaintiff's second action of claims of disability discrimination, failure to provide reasonable accommodation, and retaliation under the PHRA).
131 See Palmiter, 2019 WL 6248350 at *1 (discussing wrongful termination under the MMA).
132 See Palmiter, 2020 WL 6686549 at *4 (examining whether the plaintiff can demonstrate medical marijuana use is a disability under the PHRA).
133 See Palmiter, 2019 WL 624850 at *10–15 (recognizing plaintiff's implied right of action for unlawful termination under the MMA).
134 See Palmiter, 2020 WL 6686549 at *4 (noting that the plaintiff "does not contend her medical conditions of chronic pain, chronic migraines, and persistent fatigue constitute disabilities. Instead, she asserts her prescribed use of medical marijuana
insufficient because the MMA does not alter the PHRA which excludes marijuana use from its definition of “disability.” In defining “disability,” the PHRA states that a person with a disability who is “impaired” does not include impairment from controlled substances defined in the CSA. Thus, any person with a disability who uses medical marijuana is not protected under the PHRA. As the plaintiff failed to prove she had a qualified disability under the PHRA, the court rejected her employment discrimination claim under the PHRA.

C. Harrisburg Area Community College v. Pa. Human Relations Commission

In Harrisburg, a nursing student alleged that a community college failed to accommodate the nurse’s lawful use of medical marijuana under the Medical Marijuana Act. On a motion to dismiss, the Commonwealth Court declared the community college was not required to accommodate the student’s medical marijuana use. There, the court examined whether the anti-discrimination provisions of the PHRA and Pennsylvania Fair Educational Opportunities Act (“PFEOA”) allowed accommodating the employee’s medical marijuana use.

The court’s holding was “based firmly” on the ground that the MMA does not require the accommodation of medical marijuana on an employer’s premises. In addressing the MMA, the court suggests that the court believed the MMA includes a right of action. Furthermore, the court emphasized that the MMA does not require accommodating medical marijuana use by post-secondary students or in school environments. Although the PHRC would have wanted the court to “rewrite the MMA” to include certain protections, the General Assembly chose to address marijuana use of pre-school, primary and secondary students, but exclude post-secondary students from protection under

Id. at *8 (noting that the MMA “makes no reference whatsoever to the PHRA or its incorporation of the federal CSA’s classification of marijuana as an “illegal” controlled substance).

136 See 43 Pa. Cons. Stat. § 954(p.1)(3) (stating that impairment “does not include current, or addition to a controlled substance as defined in section 102 of the Controlled Substances Act”); see Controlled Substances Act, 21 U.S.C. § 812(c) (listing marijuana as an illegal controlled substance); see e.g. Palmer v. Commonwealth Health Sys., Inc., No. 20 CV 2544, 2020 WL 6686549, at *4 (Pa. C.P. Lackawanna Nov. 10, 2020) (explaining that drugs with high potential of abuse, specifically Schedule I drugs, are excluded from disability protection under the PHRA).

137 Id. at *8 (holding that medical marijuana under the MMA is not a protected disability under the PHRA).

138 Id. at *8–9 (following rules of statutory construction that because the PHRA was not amended by the MMA, that medical marijuana is not a protected disability under the PHRA).


140 Id. at 298 (holding the employee’s claim was legally insufficient, thus reversing the defendant’s interlocutory order and granting the plaintiff’s motion to dismiss).

141 Id. at 288–91 (deferring to statutory interpretation in examining the various of provisions mentioned within the MMA).

142 Id. at 295 (“the MMA does not require the accommodation of medical marijuana on an employer’s premises”)

143 Id. at 288 (noting the intent of the General Assembly in enacting the MMA).

144 Id. at 296 (explaining how the MMA does not even mention post-secondary students).
the MMA.\textsuperscript{145}

Second, in addressing whether the MMA amends the anti-discrimination provisions of the PHRA and PFEOA, the court deferred to the statutory intent.\textsuperscript{146} The court stated that there is a strong presumption that neither acts are repealed, because the “abstention on behalf of the Legislature evinces its intent that current users of illegal drugs not be subject to protection with regard to their illegal use of drugs.”\textsuperscript{147} Furthermore, the court noted that the General Assembly intended the MMA to be a “temporary” program “pending federal approval,” proof the legislature recognized the Federal CSA.\textsuperscript{148} The court explained that the PHRA and the PFRA adopted the Federal CSA’s definition of controlled substances which prohibits the use of Schedule I drugs.\textsuperscript{149} Therefore, because medical marijuana is not a disability and individuals using illegally controlled substances are exempt from disability protection under the PHRA and PFEOA, the plaintiff’s use of medical marijuana was excluded from any disability protection.\textsuperscript{150} As such, the community college was not required to accommodate the student’s medical marijuana use.\textsuperscript{151}

III. DAZED AND CONFUSED: A CRITICAL ANALYSIS OF HOW THE MMA LEAVES EMPLOYEES AND EMPLOYERS HIGH AND DRY

The lack of descriptive protections for workplace rights in the MMA leaves employers and employees stranded to navigate medical marijuana and employment.\textsuperscript{152} This section begins by looking at the court’s interpretation of the MMA and implied private right of action in Hudnell. Next, this section explains how the holdings of Hudnell, Palmiter, and Harrisburg allude to ambiguities in the MMA, specifically, to the MMA’s failure to accommodate the student’s medical marijuana use.

\textsuperscript{145} Harrisburg Area Cmty. Coll. v. Pa. Human Rels. Comm’n, 245 A.3d 283, 292 (Pa. Commw. Ct. May 11, 2020) (“[t]he legislature also could have included an anti-discrimination statement for post-secondary students within the MMA along the lines that it provided for employees, but it chose not to do so.”); see also 35 P.S. § 10.231.2104 (addressing how the Department of Education will promulgate regulations regarding possession of medical marijuana on preschool, primary school, and secondary school grounds, and by employees working on those school grounds).

\textsuperscript{146} Id. at 294 (“[W]hen a statute purports to be a revision of all statutes upon a particular subject or to establish a uniform and mandatory system covering a class of subjects, a later statute shall not be construed to supply or repeal an earlier statute unless the two statutes are irreconcilable.”).

\textsuperscript{147} Id. at 297 (“[t]he Legislature could have amended the language of PHRA and PFEOA to require accommodation of medical marijuana use but chose not to do so.”); accord Borough of Emmaus v. Pa. Lab. Rel. Bd., 156 A.3d 384, 398 n.9 (Pa. Cmwlth. 2017) (stating “implied repeals are not favored by law”).

\textsuperscript{148} Harrisburg Area Cmty. Coll., 245 A.3d 283, 295 (stating that “[b]ecause the General Assembly intended that the program be temporary pending Federal approval, the legislature recognized the Federal CSA, and any other federal prohibition against the use of medical marijuana.”).

\textsuperscript{149} Id. at 296–97 (acknowledging that both statutes exclude disability discrimination protections because the Pennsylvania legislature defines controlled substances in accordance with the CSA, where marijuana is a Schedule 1 substance).

\textsuperscript{150} Id. at 287 (conceding that the PHRA and PFEOA require reasonable accommodations for persons with qualified disabilities).

\textsuperscript{151} See id. (adding that an earlier version of the MMA protected students, but the protections of students was not contained in the enacted version of the MMA).

\textsuperscript{152} See Domincrovich, supra note 17, at 32–33 (suggesting that courts, in addition to employers and employees, will continue to struggle with interpreting medical marijuana legislation because the MMA is inadequately written).
requirements and a commission to evaluate workplace impairment to protect employers and employees.

A. The Smoke Has Cleared: Section 2103(b) Includes an Implied Right of Action

The courts in Hudnell, Palmiter, and Harrisburg properly indicate that section 2103(b)(1) includes an implied private action for medical marijuana patients against an employer. As an initial matter, excluding a private right of action does not indicate medical marijuana patients are not provided an implied right of action. Even though the statute does not expressly provide relief, it is common practice that if the statute commands protection of a certain class, the right to recover under the Act is often enough to justify implying a private right of action.154

The Hudnell court properly interpreted Section 2103(b)(1) in accordance with the Palmiter court’s finding a year earlier that the MMA includes an implied private right of action.155 In examining whether the employment discrimination provision implies a private right of action, the Eastern District of Pennsylvania properly applied the test derived from Cort v. Ash.156 First, the MMA is enacted to benefit medical marijuana patients.157 Second, although it is arguable that because the General Assembly failed to include any language indicating a private right of action to those violating a provision it intended to deny a private right of action against employers,158 there is no evidence the General Assembly intended to deny an implied private right of action under Section 2103(b)(1).159 Further, the purpose of the MMA would simply be futile without providing relief for medical marijuana users.160

Third, an implied private right of action for medical marijuana patients under the MMA would be


154 See Scheibelhut, supra note 119, at 591 (explaining that as Section 2103(b)(1) prohibits an employer from hiring or firing an employee based on the employee's medical marijuana use, it would be assumed an employee could bring an action under the MMA).

155 See Scheibelhut, supra note 119, at 365 (citing JACOB A. STEIN & GLENN A. MITCHELL, ADMINISTRATIVE LAW, § 50A.01 (2020); see also Texas & Pac. Ry. Co. v. Rigby, 241 U.S. 3, 39-40 (1916) (using the intention of the statute to hold there was an implied private right of action in the statute)). There, Justice Pitney applied the maxim of Ubi jus ibi remedium by stating that "'wherever the law gives a right, it also gives a remedy.'" Id. at 40; Ubi jus ibi remedium, Ballentine's Law Dictionary (3d ed. 2010). Thus, if the Act provides protection for individuals, there is an implied remedy for violation of the Act. Rigby, 241 U.S. at 40.


157 See supra Section II.A and notes Error! Bookmark not defined.—126 (explaining the court’s application of the three-pronged implied right of action test in Hudnell).

158 See 35 PA. CONS. STAT. § 10231.101(3) (stating the intent of the General Assembly to provide medical marijuana patients access to medical marijuana).

159 See id. (explaining that the Statutory Construction Act will require courts to liberally construe the MMA in discerning legislative intent).

160 See id. at 392 (asserting that not including an implied private right of action is not deny a private right of action).

See id. at 393-94 (suggesting that allowing medical marijuana patients to file private actions against employers for discrimination would support the purpose of the statute).
consistent with the legislative purpose of the statute and employees can state claims under the MMA.\textsuperscript{161}

By deferring to statutory interpretation, the Pennsylvania General Assembly intended to protect medical marijuana patients,\textsuperscript{162} as the MMA is an anti-discrimination provision that would have no effect without a private right of action.\textsuperscript{163} Nevertheless, to prevent employers from arguing against the implied private right of action and make it easier for employees to claim relief under the MMA, it would benefit employees if the General Assembly amends the MMA to include an express enforcement mechanism.\textsuperscript{164}

B. Weeding Out State Laws: The MMA Should Amend the PHRA

The reasonings in Hudnell, Palmer, and Harrisburg identify another issue with the MMA: Section 2103(b) fails to address the PHRA, which provides employees with reasonable accommodations and private rights of actions against employers for disability discrimination.\textsuperscript{165} While an employee has a private right of action under the MMA, regardless of whether the employee has a PHRA claim, an employee may raise a PHRA claim that will continue to confuse employers.\textsuperscript{166}

Although the plaintiffs in Palmer and Harrisburg improperly sought accommodation under the PHRA by claiming medical marijuana use was a disability, their claims illuminate problems with the MMA.\textsuperscript{167} The court in Palmer properly followed precedent from Harrisburg in emphasizing statutory construction in regards to the PHRA.\textsuperscript{168} Conversely, the plaintiff in Hudnell obtained relief under the PHRA because she sought accommodation for her disability, rather than asserting that medical marijuana use was a disability.\textsuperscript{169} The reasonings imply that the PHRA protects medical marijuana

\textsuperscript{161} See Hudnell v. Thomas Jefferson Univ. Hosp., Inc., 537 F. Supp. 3d 852, 860 (E.D. Pa. 2020) ("the text and context of the statute implicitly suggest legislative intent to create a private right of action."); see also Scheiselhut, supra note 119, at 395 (concluding that analysis of the MMA suggests Pennsylvania courts will find that Section 2103(b) includes an implied private right of action).

\textsuperscript{162} See Scheiselhut, supra note 119, at 392–93 (explaining that the maxim of expression unius est exclusio alterius does not always apply because the statute should be construed to promote justice for medical marijuana patients). There is an argument that because the MMA includes civil penalties for violating the statute, the language stating an implied private right of action is purposely excluded. Id. at 392. However, there is no evidence the General Assembly intended not to allow for an implied private right of action. Id. at 393.

\textsuperscript{163} See id. at 394 ("Allowing medical marijuana patients to file a private action against employers who have violated the antidiscrimination provision of the MMA would likewise bolster the underlying purpose, which is to protect medical marijuana patients from discriminatory practices by employers.").

\textsuperscript{164} See id. at 394–95 (suggesting that there is possibility that if the Supreme Court follows a standard different from the Corp test that the MMA may not include an implied right for discrimination).

\textsuperscript{165} Denise Elliott & Ursula Silvering, Are Medical Marijuana Users Protected by the Pennsylvania Human Relations Act?, MCNEES: PA. LAB. & EMP. BLOG (Mar. 3, 2021), https://perma.cc/HV63-E678 (explaining that employers have to be vigilant of the various reasons an employee may use medical marijuana and the various requests for accommodations as the rights of employers using medical marijuana is "unsettled").

\textsuperscript{166} Id. (detailing that PHRA protections are based on the accommodations requested by the medical marijuana user).

\textsuperscript{167} Id. (explaining that medical marijuana is not a disability and that the PHRA does not protect medical marijuana use).

\textsuperscript{168} Id. (finding that the MMA does not reference the PHRA or the effect the MMA has on discrimination in the PHRA).

patients from discrimination due to the specific disability accommodation requested, but that medical marijuana use does not constitute a disability.\footnote{See Elliott & Silverling, supra note 177 (explaining that claims under the MMA do not mean individuals have claims under the PHRA, and PHRA claims are separate on the employer's MMA reasoning).} The fact that "it depends" whether medical marijuana users are protected by the PHRA illuminates specific issues with the MMA, itself.\footnote{Id (answering that the caselaw suggests that "it depends" whether the PHRA protects medical marijuana users from discrimination).}

Even if an employee had a disability under the PHRA, separate from the medical marijuana use, an employer may argue it is not required to accommodate the disability due to the employee's off-the-job marijuana use.\footnote{See e.g., Hudnell, 537 F. Supp. 3d 852, 856 (E.D. Pa. 2020) (outlining the Defendant's argument about the PHRA).} The PHRA follows the CSA in classifying marijuana as a Schedule I substance, excluding from protection persons who use medical marijuana yet have a disability.\footnote{See Pennsylvania Human Relations Act, 43 Pa. CONS. STAT. § 954 (explaining how the PHRA follows the CSA schedules for drugs which allows employers not to make reasonable accommodations for medical marijuana users).} Likewise, the ADA does not protect individuals using marijuana for medical purposes, even when the use is legal under state law.\footnote{See PHRA, 43 Pa. CONS. STAT. § 10231.303 ("[n]otwithstanding any provision of law to the contrary, use or possession of medical marijuana as set forth in this act is lawful."); see also Harrisburg Area Comm'n, 245 A.3d 283, 298 (Pa. Commw. Ct. May 11, 2020) (nothing how the PHRA does not require the employer to accommodate medical marijuana use).} This shortcoming further complicates both an employee's MMA claim and ability to join a PHRA claim.\footnote{See Pa. CONS. STAT. § 2103(b)(1) (2021) ("[n]o employer shall discriminate or retaliate against an employee, or otherwise discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee" based on the employees medical marijuana use).}

Thus, if an employee sues an employer under the PHRA, an employer could follow the court's reasoning in Palmiter and Hudnell and claim that employers do not have to make reasonable accommodations for an employee's off-the-job medical marijuana use because the MMA fails to amend the PHRA and medical marijuana use is not considered a disability.\footnote{See Pennsylvania Human Relations Act, 43 Pa. CONS. STAT. § 954 (explaining how the PHRA follows the CSA schedules for drugs which allows employers not to make reasonable accommodations for medical marijuana users).} Since the Commonwealth Court in Harrisburg asserted there was no duty under the "public accommodations" provision of the PHRA to accommodate off-premises medical marijuana use, the employer may not need to accommodate the employee's off-duty medical marijuana use;\footnote{See § 5:140. Failure to reasonably accommodate to discrimination—Reasonable accommodation and employees who use marijuana as medicine. 1 EMPLOYEE MEDICAL LEAVE, BENEFITS AND DISABILITIES LAWS (Aug. 2022) (addressing that medical marijuana users who claim illness or disability under state law may not be protected under federal law).} the employer may argue that the MMA only restricts employers' ability to hire, discriminate, and terminate employees based on their medical marijuana use.\footnote{See Palmiter v. Commonwealth Health Sys., Inc., No. 19 CV 1315, 2019 WL 6248350, at *8 (Pa. Com. Pl. Lackawanna Cnty. Nov. 22, 2019) (stating that accommodating medical marijuana is not a disability as the CSA lists marijuana as a Schedule I controlled substance); see also Hudnell, 537 F. Supp. 3d 852, 857 (E.D. Pa. 2020) (explaining that the plaintiff failed to exhaust remedies for the discrimination claim).} Thus, an employee has a greater chance of success under the MMA because of its implied private right of action.\footnote{See Palmiter, 2019 WL 6248350, at *8 ("it must be presumed that if the Legislature had intended for the MMA to alter the PHRA's definition of a 'disability, it would have done so expressly") (internal citations omitted).}
If the Pennsylvania Supreme Court follows a less forgiving standard in determining whether the MMA contains an implied private right of action, then the court may find that the implied private right for discrimination under the MMA conflicts with the same action in the PHRA. Because the PHRA allows an employee to sue an employer for disability discrimination, an employer could argue that the antidiscrimination law limits this action. Ultimately, the Pennsylvania Supreme Court will have to address whether the MMA includes an implied private right of action and the specific guidelines and limitations on the action.

The overlap of the statutes creates a problem for employees who wish to sue employers for discrimination because the PHRA determines how remedies are awarded to employees who have experienced discrimination. To fulfill the intent of the MMA, the General Assembly should consider amending the MMA to prevent employers from using the PHRA as exempting MMA compliance.

C. The Grass is Greener on the Other Side: Blazing Changes to the MMA Based on the NJ CREAMMA

The MMA provides limited direction for employees and employers about medical marijuana protections. Specifically, the MMA fails to provide employers with guidance for determining when someone is intoxicated on the job. State courts continue to interpret medical marijuana legislation due to the ambiguous and inadequate legislation. In order to avoid discrimination claims due to confusion surrounding employer and employee requirements, legislators could reshape the MMA, and look to the New Jersey CREAMMA for insight, particularly on standards for employers to use when drug-test employees.

180 See Scheibelhut, supra note 119, at 395 (“The Pennsylvania Supreme Court...might hold that finding an implied right for discrimination under the MMA conflicts with Pennsylvania’s Human Relations Act.”); see supra notes 75–78 (explaining the Pennsylvania Human Relations Act).

181 See Scheibelhut, supra note 119, at 395 (citing a case from a Massachusetts court reasoning that finding an implied private right of action in both the state’s disability discrimination law and Medical Marijuana Act would lead to confusion).

182 See id. at 395–96 (suggesting that the Pennsylvania Supreme Court will likely conclude that the MMA does not conflict with the PHRA because that PHRA specifically addresses antidiscrimination and antidiscrimination laws likely contain specific limitations).

183 Pennsylvania Human Relations Act, 43 PA. CONS. STAT. § 955 (2020) (listing the unlawful discriminatory practices by employers, employment agencies, and labor organizations).

184 See Elliott & Silverling, supra note 165 (addressing concerns regarding for when an employee can raise claims under the PHRA and relief the employee is entitled to under the PHRA).


186 Id. (explaining there is no straightforward way to outline in the MMA how to determine someone’s drug intoxication at work).

187 See Demitrovich, supra note 17, at 32 (suggesting that New Jersey and Pennsylvania courts will continue to hear discrimination claims due to confusion surrounding employer and employee requirements under medical marijuana discrimination laws).

188 See NJ CREAMMA, N.J. STAT. ANN. § 24:61-31(3) (2021) (outlining scientific requirements for employment drug tests). The NJ CREAMMA also addresses the physical examination conducted by the commission-certified WIRE experts. Id (amending the requirements of a certified WIRE for conducting physical drug tests).
HAZY EMPLOYMENT PROTECTIONS FOR MEDICAL MARIJUANA USERS

1. First Step to Improving the MMA: Outlining a Drug Testing Process

The absence of a drug-testing requirement in the MMA opens employers up to the possibility of being held liable for discrimination against employees whom they know have medical marijuana cards, even when that employee’s conduct falls below the standard of care accepted for that position. It is arguable that “[i]n our time, the symbol of state intrusion into the private life is the mandatory urine test.” Thus, the General Assembly should amend the MMA and follow the drug testing procedures outlined in the NJ CREAMMA.

The MMA prohibits neither workplace drug testing nor an employer disciplining an employee who is impaired in the workplace. By contrast, the NJ CREAMMA provides that an employer cannot drug test an employee just because the employee is a medical marijuana user, rather, the employer must be “reasonably suspicious” that the user is under the influence of marijuana while in the workplace. Moreover, New Jersey’s pro-employee standard requires a physical evaluation and a scientifically objective method which does not conflate being under the influence of marijuana with being impaired by that influence.

The MMA should include a “good-faith” belief standard like the NJ CREAMMA to address the issues that arise when employers use testing to determine an employee’s workplace impairment. The MMA states that a person with more than “10 nanograms of active tetrahydrocannabinol per milliliter of blood” is under the influence, but fails to include any additional testing requirements. If an employer drug tests an employee out of concern for the employee’s workplace conduct, the employee may try to claim discrimination based on their lawfully prescribed status as a medical marijuana user. Including a standard like the NJ CREAMMA would protect employers and employees from these tensions.

189 See Saul Ewing Arnstein & Lehr LLP, Changing Laws, Attitudes, Pushing Employers to Explore Alternatives to Drug Tests, 30 No. 2 PA. EMP. L. LETTER 7 at 1 (Nov. 2019) (explaining the problems with employment-related drug testing and variety of employment tests).

190 See Christopher Hitchens, Love, Poverty, and War: Journals and Essays 66 (Nation Books, 2004) (asserting that the War on Drugs extends to state sponsored campaigns spearheaded by the controlling ruling class, but that these campaigns are a “strange way of pursuing that goal”).

191 See Weinsenfeld, supra note 24, at 404 (arguing that because federal and state law do not provide reactive solutions to employment discrimination for medical marijuana patients in general, drug testing procedures should be amended to provide a proactive solution for medical marijuana patients).

192 See Medical Marijuana Act, 35 PA. CON. STAT. § 10231.2103 (b)(1) (2021) (“No employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee’s compensation, terms, conditions, location or privileges solely on the basis of such employee’s status as an individual who is certified to use medical marijuana.”).

193 See NJ CREAMMA, N.J. STAT. ANN. § 24:61-31(3) (2021) (suggesting how the employer must have suggested the employee was impaired following a specific event).

194 See id. (explaining that the physician evaluation addresses the worker’s level of impairment from using marijuana following standards from the Workplace Impairment Recognition Program (WIRE)).

195 See generally Medical Marijuana Act, 35 PA. CON. STAT. § 10231.101 (2021) (failing to address drug testing for medical marijuana generally and regarding employment).


197 See DiMatteo, supra note 76, at 22 (suggesting that employers should not drug test current employers “without good reason”).
2. Second Step to Improving the MMA: Including Workplace Impairment Experts

The NJ CREAMMA limits an employer’s ability to use drug testing for marijuana unjustly by employing a third-party Workplace Impairment Recognition Expert (WIRE).\(^{198}\) The Pennsylvania General Assembly should include a similar procedure, because an unbiased evaluator can identify the employee’s impairment and therefore protect the employee from unfair drug testing. Without such a procedure, employers likely do not have proper procedures for drug-testing impaired employees.\(^{199}\)

Including a third-party expert employed by the state protects employers from unintended discrimination suits alleging profiling of employees known to use medical marijuana.\(^{200}\) Furthermore, allowing for a third-party expert alleviates harms employees may face when they test positive for medical marijuana, especially if they test positive for off-the-job use.\(^{201}\) While the MMA is considered “temporary” until the legalization of recreational marijuana at the state and local level, clarifying a workplace drug-testing requirement will help employers recognize impaired behavior, identify patterns of performance issues, and communicate to employees the protections for employment-related testing.\(^{202}\)

IV. DEALING A NEW STANDARD: THE POSITIVE IMPACT OF EXPANDING THE MMA TO INCLUDE MORE PROTECTIONS FOR EMPLOYERS AND EMPLOYEES

Recent caselaw in Pennsylvania demonstrates that the MMA includes an implied private right of action.\(^{203}\) Employers have a duty to accommodate employees’ off-duty medical marijuana use and carefully evaluate whether the accommodation is reasonable.\(^{204}\) Broadly, federal and state laws fail to explain adequate protections for employees using medical marijuana and how employers should engage in a process with employees who use medical marijuana to protect themselves from unreasonable accommodation or discrimination claims.\(^{205}\) Perhaps it is unlikely that the federal government will

\(^{198}\) See NJ CREAMMA, N.J. STAT. ANN. § 24:61-52(2)(a) (2021) (detailing that WIRE experts are trained to detect and identify an employee’s use of cannabis items or other intoxicating substances and assist in the investigation of workplace accidents).


\(^{200}\) See Martinez, supra note 102 (postulating that the New Jersey Cannabis Regulatory Commission would provide employer with clarity on maintaining the state’s recreational marijuana program). By applying this suggestion to Pennsylvania, the employer would be able to assess workplace drug programs without fear of possibly adversely impacting a worker’s employment. Id.

\(^{201}\) See Weinsenfeld, supra note 24, at 405-06. The testing center and employer are “granted more discretion” in these situations. Id. (addressing states where medical marijuana and recreational marijuana is legal, suggesting that many of these states use third-party drug testing facilities to determine the employee’s marijuana use).

\(^{202}\) Saul Fowing Arnstein & Lehr LLP, supra note 189, at 2 (addressing drug testing problems and recommending alternatives to traditional drug tests to Pennsylvania employers).

\(^{203}\) See infra Section III.A; see also Domitrovich, supra note 17, at 31 (“Hudnell v. Thomas Jefferson Univ. Hosps. Inc. is predicted to hold employers responsible for bearing the risk of liability . . . ”).

\(^{204}\) See DiMatteo, supra note 76, at 21.

\(^{205}\) See Lisa Nagle-Piazza, How Will Evolving Marijuana Laws Impact the Workplace in 2021?, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Mar. 16, 2021), https://perma.cc/T9MN-ZWU9 (reporting that most states legalizing recreational marijuana do not contain employment protections for recreational users, rather, such state laws prohibit employment
address avenues of amending federal drug laws or removing marijuana from a list of controlled substances, thus leaving it up to states.

Philadelphia Mayor Jim Kenney has been a proponent of legislation prohibiting certain employers in the city of Philadelphia from conducting pre-employment drug testing. On January 1, 2022, legislation took effect in Philadelphia that significantly impacted employers' pre-employment vetting processes. Each time there is a new legislative change regarding medical marijuana, employers must scramble to ensure their policies adept to the new legislation. The bill fails to address what positions are considered "safety sensitive," creating a loophole that could potentially diminish the effectiveness of the legislation. However, the Philadelphia legislation mirrors similar municipal laws in other studies, and is supported by a November 2020 study determining there is no relation between work-related injury at at-home cannabis use. Ultimately, the legislation signals a significant change from the rigid drug prevention policies in Philadelphia to this "new reality" of not punishing employees who consume cannabis during their private, off-duty hours.

There is a complicated tension between medical marijuana and employment, and efforts to legalize marijuana must begin at the state and local level. While some may wait for the Biden Administration to legalize marijuana, such legalization is significantly unlikely with the pushback from Congress in descheduling marijuana and removing criminal sanctions. Such uncertainty proves that discrimination against medical marijuana users.


See Hetrick, supra note 206. See also Prohibition on Testing for Marijuana As a Condition For Employment, Phila. Code § 9-5000 et. seq. (explaining that shall be an unlawful employment practice for an employer, labor organization, employment agency or agent thereof to require prospective employees to be tested for marijuana as a condition of employment.).

See § 9-4702(1) ("[I]t shall be an unlawful employment practice for an employer, labor organization, employment agency or agent thereof to require a prospective employee to submit to testing for the presence of cannabis in such prospective employee’s system as a condition of employment.").

See § 9-4702(2)- (3) (listing exceptions to the prohibition of Section 9-4702(1), but not defining what it means to "significantly impact the health or safety of other employees or members of the public" aside from law enforcement provisions or provisions requiring drivers licenses or "supervising children and caring for medical, disabled, or vulnerable individuals.").

See Zhang et al., Cannabis Use and Work-Related Injuries: A Cross-Sectional Analysis, 70 OCCUPATIONAL MED. 570, 570 (2020) (analyzing 136,536 work participants and the connection between workplace injury and cannabis use, concluding there is no association between private cannabis use and workplace injuries); see also Earlenbaugh, Study Finds Cannabis Use Is Not Tied to Increased Risk of Workplace Injury, FORBUS (Nov. 2, 2020, 3:33 PM), https://perma.cc/7XX3-5VQK (disproving that cannabis use leads to increased workplace accidents and injuries by emphasizing how a recent study from Toronto supports findings from prior studies finding no association between cannabis use and workplace injury).

See Philadelphia: Mayor Signs Law Prohibiting Pre-Employment Drug Screening for Cannabis, NORML, (May 3, 2021), https://perma.cc/V488-7NS2 ("It is time for workplace policies to adapt to this new reality and to cease punishing employees for activities they engage in during their off-hours that pose no workplace safety threat.").

See Nagle-Piazza, supra note 205 (suggesting that evolving state marijuana laws will require employers to revise drug-testing and accommodation policies for medical marijuana users).

Id. (commenting that the Biden Administration claims to support marijuana legalization, yet efforts to legalize...
legalizing cannabis use will continue to occur at the state level, in turn influencing the field of employment law.\textsuperscript{214}

As states continue to legalize medical and recreational marijuana use, employers with companies across various states will have to continually update their workplace policies and drug testing procedures pursuant to state action.\textsuperscript{215} Pennsylvania employers are constantly at risk for unintentionally discriminating against employees because the MMA fails to outline a clear drug-testing procedure for employers.\textsuperscript{216} Medical marijuana is a significant issue in the Pennsylvania court system and cases regarding employment discrimination and marijuana use will continue to enter the courts.\textsuperscript{217} Despite the General Assembly's claims that "it is only a matter of time until recreational marijuana is legalized in Pennsylvania," amending the MMA is a necessary measure to include more protections for employers and employees amidst an unclear and evolving area of law.\textsuperscript{218}

\textsuperscript{214} Id. ("Employers can expect to see speedier actions at the state level. Even states that have already legalized medical marijuana use are expanding their laws to cover more reasons for use and ways to use cannabis.").

\textsuperscript{215} Id. ("As more states legalize marijuana use, companies with operations across multiple states will be forced to re-evaluate their workplace policies, as well as whether it is practical to continue spending resources on drug testing."). \textit{See also} Weinsenfeld, supra note 24, at 405 (suggesting that amending drug testing procedures in Pennsylvania would impact medical marijuana patients by either requiring employees to disclose medical marijuana use or the employer assuming the employee does not use medical marijuana).

\textsuperscript{216} \textit{See} Weinsenfeld, supra note 24, at 407 (concluding that federal and state laws inadequately provide employment protections for medical marijuana use against employment discrimination, complicating the employee and employer relationship in addition to protections in the federal space).

\textsuperscript{217} \textit{See} Domitrovich, supra note 21, at 32 ("Due to inadequately written legislation, many more cases will be percolating through the courts as judges continue to interpret medical marijuana legislation discerning harmony in the law or confronting strife.").

\textsuperscript{218} \textit{See} Medical Marijuana Act, 35 PA. CONS. STAT. § 10231.102(4) (stating the temporary measure of the MMA).