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THE STATE-LEGAL CANNABIS INDUSTRY has emerged rapidly despite continuing federal illegality, raising many important legal issues. In particular, employees who use cannabis in accordance with state law are often faced with "zero-tolerance" drug policies in the workplace that were adopted in response to the federal government's aggressive "war on drugs."[1] States that have legalized cannabis must address whether this change affects an employer's right to take actions against applicants and employees who use state-legal cannabis outside of the workplace.

Policing the use of intoxicants in workplaces reaches back to the temperance movement, when employers began to demand that immigrant workers, primarily German and Irish, not drink alcohol with their meals.[2] In a similar vein, doctors and pharmacists used cannabis for a variety of ailments before legislatures began to ban the drug in the early twentieth century, when it became associated with use by Mexican economic immigrants.[3] More recently, federal and state legislatures have required drug testing for certain safety-sensitive occupations and have adopted general "drug-free workplace" policies that require companies with government contracts to have a workplace free of illegal drugs.[4] This has led many private employers to volunta-

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1. Wikipedia provides a succinct overview of the American government's war on drugs. *War on Drugs*, Wikipedia, https://en.wikipedia.org/wiki/War_on_drugs [https://perma.cc/EYU7-6Z5H].

2. Paul E. Reckner & Stephen A. Brighton, *"Free from All Vicious Habits": Archaeological Perspectives on Class Conflict and the Rhetoric of Temperance*, 33 Hist. Archaeology 63, 65 (1999).

3. Francis J. Mootz III, *Ethical Cannabis Lawyering in California*, 9 St. Mary's J. on Legal Malpractice & Ethics 2, 12 (2018).

4. The Omnibus Transportation Employee Testing Act of 1991 requires Department of Transportation ("DOT") agencies to implement drug and alcohol testing of safety-sensitive transportation employees. *See* 49 U.S.C. § 5331 (2012). The Code of Federal Regulations provides rules for how to conduct testing and how to return employees to safety-sensitive duties after they violate a DOT drug and alcohol regulation. 49 C.F.R. §§ 40.1–40.413 (2018). The Drug-Free Workplace Act of 1988 requires organizations doing

rily adopt workplace policies designed to preclude employees from using cannabis.[5]

Ostensibly, employers are motivated to adopt these policies by data-driven efficiency and safety concerns, but it is more accurate to say employers desire "reputable" prospective employees and are motivated by a general desire to exert control over their workers.[6] With the expansion of state-legal cannabis, however, an increasing number of employers are reconsidering their workplace drug policies with regard to off-site cannabis use in order to have a sufficient pool from which to hire.[7]

In this Article, we first address the baseline question of whether employers must accommodate state-legal cannabis use by employees outside of the workplace, or whether employers may continue to enforce a zero-tolerance policy for any cannabis use by their employees.

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business with the federal government to undertake comprehensive steps to ensure that the workplace is free of drugs, although it does not mandate drug testing of employees. *See* 41 U.S.C. §§ 8101–8106 (2018).

5. Many covered employers respond by refusing to hire candidates who test positive for cannabis use, even if there is no evidence that they have brought cannabis into the workplace or have been under the influence while at work. Although many employers subject applicants and employees to drug testing, the problem of workers under the influence in the workplace is relatively small. *See* Stacy Hickox, *It's Time to Rein in Employer Drug Testing*, 11 HARV. L. & POL'Y REV. 419, 422 (2017) ("[T]he rate of illicit drug use among full time employees is only about 9% . . . ."). Given the inability of blood tests to determine with specificity when a person was impaired by cannabis, and the increasingly prevalent cannabis use for medical reasons, many have called for employers to focus on performance rather than private cannabis use. *See id.* at 462 ("Drug testing is a common tool used by employers to screen applicants and identify risky employees, but it lacks the accuracy and reliability to predict future performance or identify risks to safety. Focus on performance rather than reliance on drug testing in both selection and retention of employees will provide more accurate information to employers while protecting the interests of those who may test positive based on their use of a prescribed medication or medical marijuana.").

6. *Id.* at 423 ("Expansion of drug testing while drug use among employees remains low suggests that employers are relying on drug testing as a relatively easy way of 'distinguishing the reputable from the disreputable,' particularly in larger organizations. Drug testing may be seen as a way to address immorality and restore the image of an employer's control, or even a broader form of social control. Hence, employers rely on testing to deter drug and alcohol use among their employees, or to discourage drug users from applying. However, comparisons of drug use in companies that do or do not test have not established a lower usage rate among testing employers, and industries with higher rates of testing also have higher rates of drug usage.") (footnotes omitted).

7. *See* Margot Roosevelt, *In the Age of Legal Marijuana, Many Employers Drop "Zero Tolerance" Drug Tests*, L.A. TIMES (Apr. 12, 2019, 7:00 AM), https://www.latimes.com/business/la-fi-marijuana-drug-test-hiring-20190412-story.html [https://perma.cc/K6J4-HPKX]; Steve Bates, *Rethinking Zero Tolerance on Drugs in the Workplace*, SHRM (Dec. 5, 2017), https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/rethinking-zero-tolerance-drugs-workplace.aspx [https://perma.cc/3YNE-G3DL].

California recently decided this question in favor of employers as part of the legislation permitting state-legal cannabis.[8] This tracks an earlier decision by the California Supreme Court that allowed employers to discriminate on the basis of cannabis use despite California's legalization of medical cannabis.[9] In contrast, other states have recognized some degree of employee protection for off-site use, adopting a more balanced approach that takes the needs of employees into consideration.

We then analyze the availability of unemployment insurance benefits for an employee who is fired for violating a workplace drug policy by using state-legal cannabis.[10] Some states have considered this an instance of "misconduct" that disqualifies a worker from receiving benefits. Although California law is far more protective of employees, there is not yet a definitive legal resolution of the question.

Finally, we analyze when workers' compensation benefits may be denied if the injured employee has used state-legal cannabis. California law is uncertain at the moment, and so we delve particularly deep into the approaches taken by other states. Resolution of this question may have substantial ramifications for workers who use state-legal cannabis and are injured on the job, even if cannabis intoxication is not proved to be the direct cause of the injury.

I. California Employers Do Not Have to Accommodate Employee Use of State-Legal Cannabis

As a general rule, employees work "at will," meaning they can be terminated for any or no reason, just as the employee may quit for any or no reason.[11] If an employer has a zero-tolerance drug policy, then it would be free to fire an employee for using cannabis, even if the employee does so on her own time and is not under the influence at work.[12]

8. *See* CAL. HEALTH & SAFETY CODE § 11362.45 (2017).

9. Ross v. RagingWire Telecomms., Inc., 174 P.3d 200 (Cal. 2008).

10. We use the term "state-legal cannabis" to refer to any use that is legal under the employee's state laws. Every state has different nuances regarding which uses of cannabis are permitted. State-legal cannabis ranges from very narrowly drafted statutes that permit use for specified medical conditions to states that permit recreational cannabis use.

11. CAL. LAB. CODE § 2922 (West 2019).

12. See Curry v. MillerCoors, Inc., No. 12-cv-02471-JLK, 2013 WL 4494307, at *6 (D. Colo. Aug. 21, 2013). Many states have statutory protections that prohibit employers from terminating employees who engage in "lawful activities" on their own time. Because cannabis remains illegal under federal law, courts do not consider the use of medical cannabis in full conformity with state law to be a "lawful activity." Thus, when an employee with a serious illness was fired solely because he used medical cannabis on his own time, even

California was the first state to legalize medical cannabis, and the courts were quickly confronted by claims from employees arguing that employers should not be able to make employment decisions based on medical cannabis use if there was no impact on performance in the workplace.[13] The California Supreme Court rejected these claims and preserved the employer's prerogative:

> In conclusion, given the Compassionate Use Act's modest objectives and the manner in which it was presented to the voters for adoption, we have no reason to conclude the voters intended to speak so broadly, and in a context so far removed from the criminal law, as to require employers to accommodate marijuana use.[14]

When California legalized cannabis for adult use in 2018, the legislation specifically reserved the right of employers to refuse to hire or retain employees who use cannabis outside the workplace and in accordance with state law.[15] Thus, a California employee has no "right" to consume state-legal cannabis, and employers are free to discipline employees for such use without having to demonstrate their cannabis use has a negative impact on their performance in the workplace.

In states where the cannabis statutes do not specifically address employment rights, the majority of courts have adopted the California approach and rejected claims by medical cannabis users, defaulting to the position that cannabis use deserves no protection in the workplace without some kind of affirmative legislative action.[16] This general rule

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though he was never under the influence in the workplace, the court held that he could not recover damages under Colorado's "lawful activities" statute. *See* Coats v. Dish Network, LLC, 303 P.3d 147, 149 (Colo. App. 2013).

13. *Ross*, 174 P.3d.

14. *Id.* at 206–07.

15. California law provides that cannabis legalization

> does not amend, repeal, affect, restrict, or preempt . . . the rights and obligations of public and private employers to maintain a drug and alcohol free workplace or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of cannabis in the workplace, or affect the ability of employers to have policies prohibiting the use of cannabis by employees and prospective employees, or prevent employers from complying with state or federal law.

CAL. HEALTH & SAFETY CODE § 11362.45(f) (2017).

16. Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 436 (6th Cir. 2012) (finding that the Michigan medical cannabis statute does not prevent employers from firing employees who use medical cannabis); James v. City of Costa Mesa, 684 F.3d 825, 833 (9th Cir. 2012) (finding that a suit under the Americans with Disabilities Act ("ADA") against localities not permitting medical cannabis must fail because the ADA does not protect cannabis use); Lambdin v. Marriott Resorts Hosp. Corp., No. 16-00004 HG-KJM, 2017 WL 4079718, at *10 (D. Haw. Sept. 14, 2017); Coles v. Harris Teeter, LLC, 217 F. Supp. 3d 185, 188 (D.D.C. 2016) (explaining that the statute "legalized the use of marijuana for certain medical purposes, but did not otherwise explicitly mandate that employers must tolerate that use");

is illustrated in a recent New Jersey case.[17] After an employee hit his head on the jobsite, he refused to take a mandatory post-accident drug test because he was using Percocet and medical cannabis to ease the pain of a previous neck and back injury.[18] The employee offered to wean himself off Percocet, a powerful prescription drug, but the employer expressed more concern about his cannabis use.[19] The employee sued, claiming that his indefinite suspension for failing to take the drug test amounted to disability discrimination, and the employer removed the case to federal court.[20] The district court recognized that discriminating against a form of medical treatment can amount to disability discrimination—for example, discriminating against an employee for using a wheelchair—but nevertheless found that the employer may distinguish between use of a legal drug, such as Percocet, and use of a (federally) illegal drug, such as cannabis.[21] The court predicted that New Jersey state courts would follow the majority rule, noting that unless "expressly provided for by statute, most courts have concluded that the decriminalization of medical marijuana does not shield employees from adverse employment actions."[22] The import is clear: Cannabis use may be treated as a bar to employment even if it is a legal product under state law.

In contrast, several states have expressly provided employees with protection under state anti-discrimination laws for cannabis use that is fully compliant with state law. Courts in these states have accordingly recognized that employers must reasonably accommodate employees who use cannabis on their own time.[23] Some states have read their

Garcia v. Tractor Supply Co., 154 F. Supp. 3d 1225, 1229 (D.N.M. 2016) (finding that federal law preempts the claim that the employer must accommodate cannabis use under the disability statute); Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC, 257 P.3d 586, 591–92 (Wash. 2011); Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518, 535 (Or. 2010) (holding that the state disability statute exemption for using "illegal" drugs applied to cannabis); Johnson v. Columbia Falls Aluminum Co. LLC, 213 P.3d 789 (Mont. 2009).

17. Cotto v. Ardagh Glass Packing, Inc., No. 18-1037 (RBK/AMD), 2018 WL 3814278, at *1 (D.N.J. Aug. 10, 2018).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at *4–5.

22. *Id.* at *7.

23. *See, e.g.*, Noffsinger v. SSC Niantic Operating Co., LLC, 273 F. Supp. 3d 326, 330, 334 (D. Conn. 2017) (holding that the express anti-discrimination element of the medical cannabis statute that applies to schools, landlords, and employers is not preempted by federal law); Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680, 2017 WL 2321181, at *30–31 (R.I. Super. Ct. May 23, 2017) (holding that the anti-discrimination-in-employment provision under the state's medical cannabis statute is not preempted by federal law);

state's anti-discrimination provisions broadly to encompass cannabis use even in the absence of an express provision in the state's cannabis laws to this effect. For example, an employee was fired for using medical cannabis to treat Crohn's disease but was permitted to recover under the Massachusetts anti-discrimination statute based on the general provision in the state's medical cannabis act that no person shall be denied any right or privilege based on state-legal cannabis use.[24] The court did not recognize a general "right" for employees to use cannabis, but rather found that medical cannabis use triggers an employer's obligation to make reasonable accommodations under the state's general handicapped discrimination act.[25] The court explained:

> Where no equally effective alternative exists, the employer bears the burden of proving that the employee's use of the medication would cause an undue hardship to the employer's business in order to justify the employer's refusal to make an exception to the drug policy reasonably to accommodate the medical needs of the handicapped employee.[26]

This marks the most liberal approach to interpreting employee rights under anti-discrimination statutes with regard to cannabis use.

Nevada has recently gone further by enacting a statute that appears to ban pre-employment screening for cannabis use.[27] By prohibiting testing all applicants, the statute extends protections beyond the subset of applicants who use cannabis medicinally. However, the statute includes extremely broad exceptions. Candidates applying to be firefighters, emergency medical technicians, operators of a vehicle required by law to be tested for drug use, or any position that "in the determination of the employer, could adversely affect the safety of

Barrett v. Robert Half Corp., No. 15-6245, 2017 WL 4475980, at *1–2 (D.N.J. Feb. 21, 2017) (dismissing complaint without prejudice to permit the plaintiff to replead expressly that he requested accommodation for cannabis use to address severe back pain due to herniated discs).

24. Barbuto v. Advantage Sales & Mktg., LLC, 78 N.E.3d 37, 45 (Mass. 2017). However, because the medical cannabis statute did not expressly protect users against adverse actions by employers and other parties, the court held that there was no implied right of action under the act itself. *Id.* at 49–50 (distinguishing the statutes in Rhode Island and Maine that expressly prevent employers from penalizing a person for using cannabis as a qualifying patient); *see also* MASS. GEN. LAWS ch. 94I § 2 (2017).

25. *Barbuto*, 78 N.E.3d at 45; *see also* MASS. GEN. LAWS ch. 151B, § 4(16) (2016).

26. *Barbuto*, 78 N.E.3d at 45. The court observed that there would be a potential undue hardship if the employee's cannabis use would violate the employer's legal or contractual obligations, as might be the case if the employer is subject to a drug-free workplace requirement. *Id.*

27. Assemb. B. No. 132, 80th Sess. (Nev. 2019).

others"[28] are exempted. Moreover, the protections do not apply to the extent "that they are inconsistent or otherwise in conflict with the provisions of an employment contract or collective bargaining agreement."[29] It is clear that these exceptions can easily subvert the rule, and one might expect employers to use these broad exceptions to protect their freedom to refuse to hire workers who use state-legal cannabis. Nevertheless, the Nevada statute is an important first step beyond protecting only individuals who can claim a health-related disability as justification for using cannabis. Because the California legislature has expressly provided that employers may use state-legal cannabis use as a basis for adverse employment actions, accommodating cannabis use to any extent would require the legislature to amend the law.[30]

Against this background regarding the general ability of employers to make employment decisions on the basis of cannabis use, we now consider two important social insurance programs designed to protect employees. First, we analyze whether an employee will be permitted to receive benefits under the state's unemployment insurance program if she was fired for using cannabis on her own time in accordance with state law. Second, we address the implications of state-legal cannabis use for an employee seeking to recover for a workplace injury under the state's workers' compensation program.

II. Unemployment Compensation Insurance

The Social Security Act of 1935 authorized unemployment compensation programs to address the great hardship suffered by millions of workers fired during the Great Depression.[31] The federal law set the baseline and left the details and administration to individual states.[32] This social insurance initiative provides replacement income on a temporary basis after an employee becomes unemployed, thereby serving several important purposes.[33] The principal purpose of the program is to mitigate the economic distress an employee faces

28. *Id.* § 2(2).

29. Id. § 4(a).

30. There appears to be no interest in the legislature revisiting the question of accommodating the off-site use of medical marijuana. The California legislature recently enacted AB 851, which makes it illegal to seek to subvert the accuracy of a drug test administered by employers and others by using drug masking devices, including synthetic urine. *See* Assemb. B. No. 851, Reg. Sess. (Cal. 2019).

31. Social Security Act of 1935, 42 U.S.C. §§ 501–504 (2012).

32. *See* 76 AM. JUR. 2D *Unemployment Compensation* § 6 (2019).

33. *See generally* Daniel N. Price, *Unemployment Insurance, Then and Now: 1935–85*, 48 SOC. SECURITY BULL., Oct. 1985, at 22, 24.

after losing a job.[34] Additionally, unemployment insurance reduces the potential for a cumulative effect on large scale unemployment in a community by ensuring that laid off employees can continue to shop for necessities.[35] Finally, the program provides a disincentive to firing workers because premiums are determined in part by the employer's experience rating.[36]

When an employee is terminated for cannabis use, these fundamental principles conflict. On one hand, we want to mitigate the individual and social harm caused by the loss of income. On the other hand, we do not want to unfairly charge an employer for firing an employee for misconduct. As with many social insurance programs in the United States, eligibility is often keyed to the idea of a "deserving" recipient.[37] For example, an employee fired for misconduct is not eligible for benefits because it is believed their termination of employment, to some extent, is deserved.[38] It should therefore come as no surprise that a number of unemployment compensation programs deny benefits for workers who are fired after testing positive for cannabis use.[39] As discussed above, a majority of states permit employers to make employment decisions based on cannabis use even when it is state-legal. The fired employee's lack of eligibility for unemployment compensation is an additional significant consequence for the employee that compounds the injury of losing her job.

These issues have not yet been resolved in California. California's unemployment compensation program is protective of fired employees, but it has not yet been expressly interpreted to provide compensation for an employee terminated due to cannabis use. The statute provides that an "individual is disqualified from unemployment compensation benefits if the director finds that he or she . . . has been discharged for misconduct connected with his or her most recent work," but it also provides that there is a rebuttable presumption that the employee has been "discharged for reasons other than miscon-

34. *See id.* at 24.

35. *Id.*

36. *See generally id.* at 23–24, 30. Experience rating bases premiums, in part, on the number of claims filed against the employer.

37. *Id.* at 29–30.

38. *Id.* at 30.

39. *See generally* Gavin L. Phillips, Annotation, *Employee's Use of Drugs or Narcotics, or Related Problems, as Affecting Eligibility for Unemployment Compensation*, 78 A.L.R. 4TH 180 §§ 3–9 (1990) (discussing scenarios in which employee drug use either on or off the job site premises affected recovery of unemployment compensation).

duct in connection with his or her work."[40] It is a timeworn principle that the "unemployment insurance laws are remedial and therefore must be liberally construed where benefits determinations are concerned."[41] Employers who maintain a zero-tolerance drug policy may argue that violating the policy alone constitutes sufficient "misconduct" to deprive the fired employee of benefits. Alternatively, the employer might argue that the federally criminal nature of cannabis use renders it misconduct for purposes of benefit eligibility. We examine these claims in turn.

It would appear obvious that an employer could fire a worker for intoxication that caused workplace problems, such as absenteeism, as a form of misconduct for unemployment insurance purposes. However, in the 1970s the California Court of Appeal determined that an alcoholic is not engaging in misconduct if the intoxication-induced behavior is the product of an irresistible compulsion to drink.[42] In response, the legislature amended the unemployment compensation statute to expressly address the situation where an employee is terminated for use of intoxicants that affects workplace performance, providing that alcoholism was not a disability exception to the misconduct standard under certain conditions.[43] Consequently, a court found that an employee, who engaged in misconduct by refus-

40. CAL. UNEMP. INS. CODE §1256 (West 2011). *See* Paratransit, Inc. v. Unemployment Ins. Appeals Bd., 327 P.3d 840 (Cal. 2014). This presumption applies at each stage of the proceedings, from the determination of initial eligibility through court determination. Kelley v. Unemployment Ins. Appeals Bd., 167 Cal. Rptr. 3d 802, 807 (Cal. Ct. App. 2014).

41. Messenger Courier Ass'n of the Ams. v. Cal. Unemployment Ins. Appeals Bd., 96 Cal. Rptr. 3d 797, 809–10 (Cal. Ct. App. 2009).

42. Jacobs v. Unemployment Ins. Appeals Bd., 102 Cal. Rptr. 364, 366 (Cal. Ct. App. 1972). The court based its decision on the voluntariness presumed by the disqualification for "misconduct":

> Misconduct as a disqualifying factor for unemployment insurance has been judicially defined as "conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, . . . [but not] mere inefficiency, and unsatisfactory conduct . . . inadvertencies or ordinary negligence . . . ."

Id. (quoting Lacy v. Cal. Unemployment Ins. Appeals Bd., 96 Cal. Rptr. 566, 568 (Cal. Ct. App. 1971)).

43. The provision, which was first adopted in 1983 and subsequently amended, provides in full:

> An individual is disqualified for unemployment compensation benefits if either of the following occur:
>
> The director finds that he or she was discharged from his or her most recent work for chronic absenteeism due to intoxication or reporting to work while intoxicated or using intoxicants on the job, or gross neglect of duty while intoxi-

ing to take a drug test when the employer had strong safety concerns regarding work on an offshore oil drilling rig, was legally bound by a zero-tolerance drug policy under its contract.[44] The statute does not address off-site use of legal substances that do not have an effect on the workplace, but this would violate an employer's zero-tolerance policy. An employee is likely to regard her cannabis use as private legal behavior that is not a form of misconduct for statutory purposes, even if the employer is permitted to fire her for such use. In contrast, an employer is likely to regard a willful violation of permissible workplace rules as nothing other than misconduct that should disqualify the employee from unemployment benefits. Other states have adjudicated these issues and come to conflicting results.

The rationale for interpreting the law to provide benefits to an employee terminated for state-legal cannabis use is illustrated in the consideration of three consolidated appeals by the Michigan Court of Appeals.[45] The court began by noting the conflict between the unemployment compensation program and the protections afforded by the medical cannabis law.[46] On one hand, an employee is disqualified from receiving unemployment compensation benefits if he tests positive for drug use, and Michigan's medical cannabis statute makes clear that employers are neither required to accommodate cannabis use in the workplace, nor to tolerate employees working while under the in-

cated, when any of these incidents is caused by an irresistible compulsion to use or consume intoxicants, including alcoholic beverages.

He or she otherwise left his or her most recent employment for reasons caused by an irresistible compulsion to use or consume intoxicants, including alcoholic beverages.

An individual disqualified under this section, under a determination transmitted to him or her by the department, is ineligible to receive unemployment compensation benefits under this part for the week in which the separation occurs, and continuing until he or she has performed service in bona fide employment for which remuneration is received equal to or in excess of five times his or her weekly benefit amount, or until a physician or authorized treatment program administrator certifies that the individual has entered into and is continuing in, or has completed, a treatment program for his or her condition and is able to return to employment.

The department shall advise each individual disqualified under this section of the benefits available under [provisions relating to disability], and, if assistance in locating an appropriate treatment program is requested, refer the individual to the appropriate county drug or alcohol program administrator.

CAL. UNEMP. INS. CODE § 1256.4 (West 2006).

44. Am. Fed'n of Labor v. Unemployment Ins. Appeals Bd., 28 Cal. Rptr. 2d 210 (Cal. Ct. App. 1994).

45. Braska v. Challenge Mfg. Co., 861 N.W.2d 289, 291–302 (Mich. Ct. App. 2014).

46. *Id.* at 299–300.

fluence of cannabis.[47] On the other hand, the medical cannabis statute provides that registered patients will not be subject to "penalty in any manner," and nothing in the law relieves the employer of having to accommodate medical use off site.[48] The court stated that the "issue is whether, by denying unemployment benefits . . . a state actor . . . imposed a penalty on claimants that ran afoul of the [medical cannabis statute's] broad immunity clause."[49] Given the broad protection against any manner of criminal and civil penalties, the court concluded that an employee cannot be disqualified for benefits solely because he engages in off-site medical cannabis use.[50]

In contrast, other states have determined that cannabis use can disqualify an employee from eligibility for unemployment compensation benefits. For example, the Colorado Court of Appeals held that a worker may be denied unemployment compensation when he was terminated for violating the employer's zero-tolerance drug policy.[51] The worker cleaned streets with a broom and dustpan and used medical cannabis outside the workplace to treat severe headaches.[52] Because cannabis is not "prescribed," it did not fall within the "medically prescribed controlled substance" exception to the statutory disqualification for benefits for drug use.[53] Noting that the constitutional amendment legalizing medical cannabis merely protects citizens from criminal charges, and that the amendment specifically provides that employers are not obligated to accommodate medical cannabis use in the workplace, the court determined that termination for cannabis use did not qualify the employee for benefits.[54] The dissenting judge argued that off-site use is protected by the state constitution, and the state could not deny unemployment compensation in an effort to deter the employee from exercising "his constitutional right to use medical marijuana."[55]

Although California has not yet settled this issue, employee advocates will argue that the broad remedial purpose of the unemployment insurance program should sustain the presumption of eligibility

47. *Id.* at 296–97.
48. *Id.* at 298–301.
49. *Id.* at 301.
50. *Id.* at 302. The court distinguished the *Beinor* case, which considered a constitutional amendment that merely insulated medical cannabis users from criminal prosecution. *Id.*
51. Beinor v. Indus. Claim Appeals Office, 262 P.3d 970, 974–75 (Colo. App. 2011).
52. *Id.* at 972.
53. *Id.* at 974–75.
54. *Id.* at 975–77.
55. *Id.* at 982 (Gabriel, J., dissenting).

when the employee's state-legal cannabis use has no effect in the workplace. An employer has the right to fire an at-will employee for any or no reason at all, but eligibility for unemployment benefits presents an entirely different question relating to social policy. To enhance their position, employers will likely argue that cannabis use is "illegal" behavior under federal law, and thus the activity necessarily must be regarded as misconduct for purposes of unemployment compensation.

The California Court of Appeal has adopted a narrow approach to the general question of whether federally illegal activity off duty is considered misconduct if it does not injure the employer's interests. Referring to regulations, the court reasoned:

> As appellant indicates, an employee's participation in illegal or criminal actions while away from the place of employment usually is not connected with the work and is not misconduct. For example, a janitor who is arrested and convicted of drunk driving while off duty and thereafter discharged is not discharged for misconduct because his off-duty acts did not tend to substantially injure the employer's interests. When the off-the-job activity of an employee does not injure or tend to injure the employer's interest, the employer cannot reasonably impose its standards of behavior on an employee during off-duty time. However, there are situations in which the employer is injured or tends to be injured by an employee's off-duty conduct which usually involves illegal or criminal activity.
>
> If the off-duty criminal activity undermines the employer's reputation and the public's trust and confidence in the employer, the conduct is work connected. Although there is a dearth of California published cases discussing when illegal off-the-job conduct becomes work connected, there are decisions from other jurisdictions on this topic. These cases are of questionable aid here since many of them rely on their own statutes or are fact specific. Nonetheless, they suggest that off-duty drug or alcohol use with no on-the-job impairment is not work connected unless the employee works in a safety-sensitive position or the employee's position is such that his conduct will undermine public trust and damage the employer's reputation or the drug test is part of a federally imposed safety program.[56]

Although not quoted by the court, a specific section of the regulations relating to illegal conduct provides:

> Criminal acts or other violations of law are not necessarily misconduct. For example, an individual's criminal act outside of working hours and away from the employer's premises usually would have

56. Am. Fed'n of Labor v. Unemployment Ins. Appeals Bd., 28 Cal. Rptr. 2d 210, 214–15 (Cal. Ct. App. 1994) (citations omitted).

> no connection with the work and would not be misconduct under Section 1256 of the code.[57]

Although criminal activity off site is not considered misconduct *per se* for purposes of the unemployment compensation program, an employer subject to federal rules or regulations relating to a drug-free workplace could certainly establish that its interests were injured. An employer that has voluntarily adopted its own zero-tolerance policy has a much less persuasive argument for an effect on the workplace.

Although California has not yet expressly addressed whether off-site, state-legal cannabis use can disqualify an employee from receiving unemployment compensation benefits, the liberal structure of its statutory definition of eligibility supports the ability of former employees to seek benefits.[58] On the other hand, by willfully violating the employer's anti-drug policy expressly permitted by the cannabis statutes and then seeking benefits, the employee is imposing a cost on the employer in the form of increased insurance premiums. Definitive resolution will require litigation or legislation.

III. Workers' Compensation Insurance

Every state has a workers' compensation statutory scheme that pays benefits to workers who suffer injury arising out of, and in the course of, their employment. Workers' compensation statutes were enacted as a grand bargain in response to the problems faced by employees who suffered workplace injury without an easy and available remedy and the risks that employers faced under general tort law for negligence that led to an employee's injury.[59] Employers generally contract with an insurance company to cover this mandatory obligation. The insurance premiums are set, in part, based on the employer's loss experience,[60] and so it is in the employer's interest to contest claims that are not within the statutory terms of the insurance.

California law expressly provides that an employee is eligible to recover workers' compensation benefits "[w]here the injury is not caused by the intoxication, by alcohol or the unlawful use of a con-

57. Cal. Code Regs. tit. 22, § 1256–43(b) (2006) (citations omitted).

58. *See* Cal. Unemp. Ins. Code § 1256 (West 2011).

59. *See* Christopher F. Baum, *Uncovering the Roots: A Brief Discussion of the History, Policy and Purposes of Delaware's Workers' Compensation Act*, 16 Del. L. Rev. 1, 1–3 (2016).

60. *How Is Your Workers' Comp Rate Calculated?*, PrimePay (June 6, 2018), https://primepay.com/blog/how-your-workers-comp-rate-calculated [https://perma.cc/9VCZ-MC45].

trolled substance."[61] In other words, benefits will be denied if the workplace injury is "caused" by cannabis use. However, the employer bears the burden of proof that the employee's intoxication caused the injury.[62] The fact that the employee was intoxicated at the time of the injury, standing alone, is insufficient grounds to deny benefits.

It bears emphasis that establishing cannabis "intoxication" is very difficult. Unlike alcohol intoxication, there is no reliable test of the physical effects of cannabis. Depending on the frequency and regularity of use, THC metabolites can remain in a person's system for longer than a month after use, and therefore a blood test that indicates the presence of metabolites does not establish when a person was under the influence.[63] As a consequence, an employer bearing the burden of proof will have a difficult time seeking to contest a workers compensation claim by an employee who uses cannabis.

Consider a case in which the appeals board found that a positive drug test alone was insufficient to establish an intoxication defense to a workers' compensation claim.[64] The employee was severely injured and left paraplegic.[65] Although the hospital records indicated a "presumptive positive" blood test for the presence of drugs, the employer was unable to establish the volume screened in the blood and provided no proof that intoxication was the actual cause of the accident.[66] Because the employer could not meet its burden of proof, the employee was entitled to compensation for his workplace injury.[67]

This is not to say that an employer can never meet its burden. Consider a case in which a truck driver was killed in a single vehicle accident. The employer established that the driver had a blood alco-

61. CAL. LAB. CODE § 3600(4) (West 2012). "Controlled substance" includes cannabis. *Accord* CAL. HEALTH & SAFETY CODE § 11007 (West 2017). *See also* CAL. HEALTH & SAFETY CODE § 11054(d)(13) (West 2017) (defining "controlled substance" to include Schedule 1 drugs, which include cannabis).

62. CAL. LAB. CODE § 5705(b) (West 2012).

63. Stacy A. Hickox, *Drug Testing of Medical Marijuana Users in the Workplace: An Inaccurate Test of Impairment*, 29 HOFSTRA LAB. & EMP. L.J. 273, 274 (2012).

64. Beyette's Tree Care v. WCAB (Johnson), 76 Cal. Comp. Cases 1323 (Nov. 17, 2011).

65. *Id.*

66. *Id.*

67. In *another case*, the appeals board similarly found that a positive drug test by itself is insufficient to establish that the applicant was intoxicated or that, if the applicant was intoxicated, such intoxication was the cause of the injury. Vasquez v. Del Monte Foods, 2012 Cal. Wrk. Comp. P.D. LEXIS 542, at *3 (Nov. 2, 2012). The employer failed to meet its burden when it could not offer evidence that showed the employee was acting in an intoxicated manner prior to the injury or produce any evidence that the intoxication caused the injury. *Id.* at *4.

hol level of 0.27 at the time of death, the "jake brake" was not engaged, there were no product defects with the truck that could have caused the accident, and the physical evidence of the accident was consistent with a person driving under the influence.[68] Expert testimony established that the decedent's judgment and motor skills would have been significantly impaired due to the blood alcohol level and that the sole cause of the accident was alcohol intoxication.[69] The appeals board affirmed the finding that the employer met its burden of proving that the accident was caused by intoxication.[70]

California has interpreted the intoxication exclusion narrowly, but other states take a more aggressive approach when an injured worker tests positive for drugs. For example, in one case an employee climbed onto a tree that had been cut and dropped into a creek before it could be dragged ashore for trimming to permit its safe removal and suffered an injury when he subsequently fell off the tree.[71] A mandatory post-accident drug test revealed 111 nanograms of cannabinoids, which exceeded the threshold limit of 100 nanograms.[72] The employee claimed that he was exposed to passive cannabis smoke that resulted in the low reading, and that he was not under the influence at the time the accident occurred.[73] The statute states no compensation shall be paid "if the intoxication of the employee was the proximate cause of the injury"; therefore, the drug test did not give rise to a presumption of intoxication.[74] However, the court ruled that benefits were properly denied based on the combination of the drug test, an expert's testimony that cannabinoid levels would not be above the threshold limit solely due to passive exposure, the claimant's previous conviction of two cannabis-related offenses, and the claimant's habit of spending break times by himself down the creek.[75] Given the inability of cannabinoid metabolites to establish intoxication at a particular point in time, it appears that the court employed a de facto presumption that drug use was the cause of the accident.

68. Eastridge v. WCAB, 1995 Cal. Wrk. Comp. LEXIS 3749, at *2–5 (Cal. Ct. App. Jan. 19, 1995).

69. *Id.* at *4–5.

70. *Id.* at *10–11.

71. Edwards v. World Wide Pers. Servs., Inc., 843 So. 2d 730, 732 (Miss. Ct. App. 2002).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 733–34.

In an even sharper contrast to California's laws, workers' compensation programs in some states expressly establish a presumption that an injured worker who tests positive for illegal drugs was injured as a result of the use of such drugs, subject to the employee rebutting the presumption by proving that the illegal drugs use did not proximately cause the loss.[76] Shifting the burden of proof to the employee to rebut the statutory presumption creates a very difficult obstacle to recovery given the difficulties of proving cannabis intoxication. A recent case demonstrates the power of a statutory presumption that cannabis was the cause of the accident when an injured worker tests positive for cannabinoid metabolites.[77] A hospital employee fell and dislocated her shoulder, but the insurance carrier denied coverage for her injury on the ground that she had failed to overcome the statutory presumption of intoxication triggered by the presence of cannabis metabolites in her body on the day of the accident.[78] The claimant called two experts who testified that the presence of metabolites does not prove impairment, but, in the face of the presumption, this testimony was insufficient because the experts could not establish from the drug test that she *was not* impaired.[79] The court rejected the dissenting judge's reasoning that the presumption should not arise without some showing of impairment, and that the presence of metabolites, as opposed to the drug itself, did not indicate impairment.[80] The majority indicated that the claimant would have had to submit evidence that her

76. One might assume that the legality of the drug is irrelevant to the question of whether the claimant's injury arose out of intoxication, but courts have acknowledged the public policy against the use of illegal drugs in the workplace while respecting the need for employees to use prescription drugs that may also contribute to an injury. Another court held that there was a rational basis to distinguish illegal drugs from prescription drugs, which have dosages, limits on the duration of use, and limitations on activities permitted while taking the drugs. Kendrix v. Hollingsworth Concrete Prods., Inc., 53 S.E.2d 270, 271 (Ga. 2001). The court also acknowledged that public policy favored eliminating the use of illegal drugs. *Id.* ("We further conclude that distinguishing between legal and illegal drug use bears a direct and real relationship to the legitimate government objective of promoting a safe work place. The presumption . . . furthers the state's legitimate goal of reducing workplace accidents and increasing productivity by discouraging illegal drug use.").

77. Brinson v. Hosp. Housekeeping Servs., LLC, 263 So. 3d 106, 107 (Fla. Dist. Ct. App. 2018).

78. *Id.* at 108–09.

79. *Id.*

80. *Id.* at 109–14. *See also* Graham v. Turnage Emp't Grp., 960 S.W.2d 453, 455 (Ark. Ct. App. 1998). The court deferred to a denial of benefits based on the presence of metabolites that the expert admitted could be consistent with the claimant not being impaired at the time, and rejected the claimant's testimony that he had not ingested cannabis for more than two weeks. *Id.* The dissent argued that there was "no proof that marijuana metabolites *are* marijuana, or that marijuana metabolites are even a drug, let alone an 'illegal drug.'" *Id.* at 458 (Griffen, J., dissenting). Judge Griffen reasoned:

past cannabis use was not affecting her at the time of the accident, effectively requiring her to prove a negative.[81]

Some cases appear to interpret the presumption of intoxication to mean that the claimant is denied benefits if he was under the influence at the time of the accident, even if the accident did not result from the intoxication. In one case, an employee was electrocuted while clearing downed trees when a nearby power line was suddenly energized.[82] The court denied benefits based on the presence of metabolites in the claimant, cannabis and related paraphernalia on his person, and an expert opinion that the claimant was under the influence at the time of the accident.[83] These facts triggered the presumption, and the court upheld the Commission's finding that cannabis use rendered the claimant less "nimble" than the other workers who ran away from the energized line.[84] While facially reasonable, the dissenting judge emphasized that the circumstances of the accident effectively rebutted causation established solely by the statutory presumption.[85] The power line fell directly onto the claimant after suddenly becoming energized.[86] It was only after striking him, hitting the wet ground, and "sparking" that the crew recognized the danger.[87] No matter how intoxicated the worker may have been at the

> The General Assembly knew the difference between a drug and a by-product produced after a drug has been metabolized. The General Assembly made the rebuttable presumption dependent upon proof by a preponderance of the evidence that an illegal drug, and nothing less, was present in connection with an injury for which workers' compensation benefits are sought . . . . If an injury must be substantially occasioned "by the use of illegal drugs" in order to disqualify a worker from receiving workers' compensation benefits, it makes no sense to deny benefits based on that defense when the parties who assert the defense are unable to prove that "illegal drugs" are present, let alone that they substantially occasioned the injury.

Id. at 459.

81. *See* Brinson, 263 So. 3d at 108. The dissenting judge emphasized that the claimant—

> like similarly situated injured employees with inactive metabolites in their system—could not have done anything more than she did to rebut the statutory presumption . . . . Beyond no evidence of impairment or recent drug use and no suspicion of either, [the claimant] presented unrebutted and supportive expert medical testimony that was fully consistent with the medical literature on marijuana detection and impairment.

Id. at 112–113 (Makar, J., dissenting).

82. Wood v. W. Tree Serv., 14 S.W.3d 883, 884 (Ark. Ct. App. 2000).

83. *Id.* at 885–86.

84. *Id.* at 886–87.

85. *Id.* at 887.

86. *Id.*

87. *Id.* at 886.

time, cannabis would not appear to have been the proximate cause of the fatal injury.

Despite the power of the statutory presumption, employees have been able to prevail when courts have refused to conflate evidence of past cannabis use with proof of incapacity at the time of the accident. One case involved an orderly who injured his back while attempting to rescue a struggling quadriplegic who slipped out of his whirlpool chair.[88] After testing positive for cannabis use, the orderly testified that he stopped using cannabis before starting the job, and he was not under the influence at the time of the accident, although he had been exposed to passive smoke.[89] The court upheld the finding that the claimant had rebutted the presumption:

> In finding that Kennedy rebutted the presumption of intoxication, the workers' compensation judge held that this was not the sort of accident which was caused by intoxication. He stated that the accident was caused by Lee flailing around in the chair, which was confirmed [by coworkers] . . . . After reviewing the record, we cannot say that the workers' compensation judge erred in finding that Kennedy rebutted the presumption of intoxication.[90]

Similar cases suggest that not all courts interpret the statutory presumption as nearly impossible to rebut.[91]

Finally, even in states with a strong statutory presumption, there may be procedural requirements regarding drug tests that may provide some relief to a claimant who tests positive for cannabis metabolites. In one case, the statutory presumption was particularly strong:

> If *any* amount of marijuana . . . is in the employee's blood *within eight hours* of the time of the alleged accident, as shown by chemical analysis of the employee's blood, urine, breath, or other bodily substance, there shall be a *rebuttable presumption* that the accident and injury or death were *caused* by the ingestion of marijuana.[92]

The claimant worked at a loading dock where he helped trucks back into bays.[93] While sweeping a bay, the claimant was struck by a truck backing up without a warning beeper and crushed against the loading dock.[94] There was conflicting evidence whether the sound of the backing truck without a beeper could be heard above the din of

88. Kennedy v. Camellia Garden Manor, 838 So. 2d 99, 100 (La. Ct. App. 2003).

89. *Id.* at 104.

90. *Id.*

91. *See, e.g.*, Hogg v. Okla. Cty. Juvenile Bureau, 292 P.3d 29, 35 (Okla. 2012).

92. Lingo v. Early Cty. Gin, Inc., 816 S.E.2d 54, 57 (Ga. Ct. App. 2018) (emphasis added).

93. *Id.* at 56.

94. *Id.*

the loading dock.[95] A lab technician was sent to the hospital to gather a urine sample from the injured employee who was in emergency surgery.[96] A nurse emerged from the operating room with a sample that tested positive for cannabis, but there was no indication of who obtained the sample or the procedures used to do so.[97] Because the employer could not demonstrate that it adhered to the statutory requirements for obtaining the sample for a drug test, the court held that the statutory presumption that cannabis use caused the accident was not triggered, and the case was remanded.[98]

It is clear that it would be extremely difficult to overcome the statutory presumption in this case in the absence of the drug testing procedure issue. The claimant's expert testified that "only a blood plasma test accurately reveals the extent to which marijuana is currently affecting cognition" because the metabolites in the urine sample could persist for weeks after ingestion.[99] The claimant admitted smoking cannabis but testified that he was never under the influence on the job, and no cannabis or related paraphernalia was found on his person after the accident.[100] Most courts would find this evidence insufficient to prove that cannabis was *not* the cause of the accident.

These cases illustrate the conundrum raised if an employee uses state-legal cannabis but then confronts a presumption in the workers' compensation program that denies benefits on that basis alone without affirmative proof that intoxication proximately caused the accident. Because employers are legally able to insist on a drug-free workplace, and in some instances are compelled by federal rules to do so, workers' compensation programs that express disapproval of employee cannabis use are not particularly surprising.[101] As the cases above demonstrate, courts vary in their interpretation of the strength

95. *Id.*

96. *Id.* at 57.

97. *Id.*

98. *Id.* at 58–59. The court emphasized the remedial nature of workers' compensation laws and the need to follow the procedural requirements for drug testing strictly before denying benefits to an injured worker. *Id.* This amounts to the court elevating the public policy of compensating a severely injured worker above the competing public policy of presuming drug users to be at fault in workplace accidents.

99. *Id.* at 57.

100. *Id.* A co-employee testified for the employer that he regularly smoked cannabis with the claimant at the job site and that they had smoked prior to the accident, but the ALJ found the testimony to have "significant discrepancies" and deemed him to lack credibility. *Id.*

101. Jay M. Zitter, Annotation, *Propriety of Employer's Discharge of or Failure to Hire Employee Due to Employee's Use of Medical Marijuana*, 57 A.L.R. 6th 285, 285, 300–05 (2010). *See also* 41 U.S.C. §§ 8101–8106 (2018) (providing an example of federal law that requires organiza-

of the statutory presumption. There will likely be pressure on legislatures and courts to ease the conflict with the state's cannabis laws. The situation is different in California, which presumes that intoxication did not cause the injury and places the burden of proof on the employer.[102] To date, courts do not appear to be subverting this rule by enforcing a *de facto* presumption in response to a positive drug test for past cannabis use.

An even more intriguing question arises when the injured employee seeks to receive reimbursement for the cost of medical cannabis used to treat a workplace injury. Under California law, any medical treatment that is reasonably required to cure, relieve, or treat a workplace injury is compensable under the workers' compensation program.[103] State law specifically provides that doctors may provide patients with a recommendation to use medical cannabis for treatment of conditions.[104] One might assume that an employee with a doctor's recommendation to use cannabis to treat a workplace injury should be able to recover the costs through the workers' compensation program. However, at this time there is no definitive regulation or case law in California to support that assumption.

Other states have addressed this issue in a myriad of ways. In some instances, employers have successfully argued that requiring them to reimburse an injured employee for purchases of medical cannabis amounts to making them complicit in illegal behavior under federal law. In one case, the opioids prescribed for the injured worker's chronic back pain caused side effects, and so the worker switched to medical cannabis on his doctor's recommendation.[105] The hearing officer ordered the employer, Twin Rivers, to pay for the cannabis treatment, but Twin Rivers argued that the federal Controlled Substances Act preempted any obligation under state law to reimburse the injured worker.[106] The court noted that Twin Rivers would be exposed to criminal charges for aiding and abetting a violation of the Controlled Substances Act.[107] The court concluded that "a per-

tions doing business with the federal government to undertake comprehensive steps to ensure that the workplace is free of drugs).

102. CAL. LAB. CODE § 3600(4) (West 2012); CAL. LAB. CODE § 5705(b) (West 1993).

103. CAL. LAB. CODE § 4600(a) (West 2015).

104. CAL. HEALTH & SAFETY CODE § 11362.712 (West 2016).

105. Bourgoin v. Twin Rivers Paper Co., LLC, 187 A.3d 10, 13 (Me. 2018).

106. *Id.*

107. *Id.* at 19. The court explained:

> Were Twin Rivers to comply with the hearing officer's order and knowingly reimburse Bourgoin for the cost of the medical marijuana as permitted by the [state medical cannabis law], Twin Rivers would necessarily engage in conduct made

son's right to use medical marijuana cannot be converted into a sword that would require another party, such as Twin Rivers, to engage in conduct that would violate the Controlled Substances Act."[108] The court considered it irrelevant that there was a low probability that the federal government would actually bring charges in this case.[109]

Two members of the court dissented vigorously. Justice Jabar contested the analysis that merely reimbursing a person for the cost of medical cannabis amounted to having the requisite *mens rea* for aiding and abetting the federal crime of purchasing the cannabis.[110] Additionally, cannabis use was deemed "reasonable and proper" by the treating physicians and proved to be effective in addressing the chronic pain.[111] Justice Alexander highlighted the latter point expressed by Justice Jabar:

> [In] the extensive discussion of the law of preemption, we must not lose sight of the injured worker whom this opinion is really about.
>
> Gaetan Bourgoin has endured chronic, disabling pain from a workplace injury that he sustained three decades ago. The result of the Court's opinion today is to deprive Bourgoin of reimbursement for medication that has finally given him relief from his chronic pain, and to perhaps force him to return to the use of opioids and other drugs that failed to relieve his pain and may have placed Bourgoin's life at risk.[112]

The opinions in this recent case succinctly illustrate the dilemma of addressing reimbursement for state-legal cannabis costs under workers' compensation programs.

> criminal by the Controlled Substances Act because Twin Rivers would be aiding and abetting Bourgoin—in his purchase, possession, and use of marijuana—by acting with knowledge that it was subsidizing Bourgoin's purchase of marijuana.

Id.

108. *Id.* at 20.

109. *Id.* at 21–22. Congress has withheld funding to the Justice Department to prosecute cannabis crimes against individuals acting in full compliance with state-legal medical cannabis programs under what is known as the Rhorabacher-Farr amendment. *See id.* at 28 n.12 (Jabar, J., dissenting).

110. *Id.* at 25–27 (Jabar, J, dissenting). *See also* Transcript of Oral Argument at 11, McNeary v. Freehold Twp., No. 2008-8094 (N.J. Workmen's Comp. Div. June 28, 2018) ("Certainly I [the judge] do not understand how a carrier, who will never possess, never distribute, never intend to distribute these products . . . is in any way complicit with the distribution of illicit narcotics."). One commentator, discussing *McNeary*, explained that "[t]he court further reasoned that ordering payment for medical marijuana would not require an insurer to violate federal law because the insurer would not be required to possess or distribute marijuana" and noted the benefits of cannabis when compared to opioid drugs. Leah R. Bartlome, *Insurance for the Marijuana Industry*, 314 N.J. LAW. 38, 40 (2018).

111. *Bourgoin*, 187 A.3d at 31.

112. *Id.* at 32 (Alexander, J., dissenting).

In contrast, the New Mexico Court of Appeals has fully embraced the availability of medical cannabis as a treatment for workplace injuries under its workers' compensation program. In 2014, the court held that the state's workers' compensation act, properly interpreted, permits reimbursement of medical cannabis to treat workplace injuries.[113] The case involved a worker who had undergone numerous surgeries to address a lower back injury that caused intense pain unmanageable by narcotics, leading the workers' compensation judge to approve cannabis use.[114] The employer argued that cannabis is not a "prescription drug," nor is it dispensed by a "health care provider," as required under the workers' compensation program requirements. However, the court read the statute consistent with the state's medical cannabis act to find that cannabis could be a "service" for which reimbursement is provided under the program.[115] The court upheld the clear public policy favoring medical cannabis under state law and expressly declined "to reverse the order on the basis of federal law or public policy."[116]

The following year, the court addressed whether a claimant demonstrated that cannabis use was "reasonable and necessary" after the workers' compensation judge ruled against the claimant.[117] After the claimant was prescribed multiple pain killers and spinal injections, which unsuccessfully addressed his back pain, he began using cannabis on his own.[118] His doctor urged him to obtain a license to use cannabis because he could no longer prescribe narcotics without such authorization, although the doctor made clear that he was not advocating cannabis use.[119] Within this context, the employer argued that the cannabis use was "tolerated" rather than "reasonable and necessary" medical treatment, but the court found sufficient evidence to overturn the initial ruling by the workers' compensation judge: "The facts that Dr. Reeve did not initiate or recommend to Worker such care are not dispositive. Regardless of whether he took such action or was merely 'passive' as Employer contends, Dr. Reeve adopted a treatment plan that called for medical marijuana."[120] The court further concluded that the claimant did not refuse reasonable and necessary

113. Vialpando v. Ben's Auto. Servs., 331 P.3d 975, 976 (N.M. Ct. App. 2014).
114. *Id.* at 976–77.
115. *Id.* at 978–79.
116. *Id.* at 980.
117. Maez v. Riley Indus., 347 P.3d 732, 733 (N.M. Ct. App. 2015).
118. *Id.* at 734.
119. *Id.*
120. *Id.* at 737–38.

treatment with painkillers because the evidence showed that this treatment had failed.[121]

When courts permit workers' compensation carriers to reimburse the cost of cannabis, difficult questions arise due to the lack of reliable data regarding dosage and effectiveness. For example, in a recent case a court had to determine whether the claimant was entitled to reimbursement for the use of "prodigious amounts" of cannabis in the first six months of treatment and $21,000 worth of cannabis in the first year.[122] The employer argued that this amounted to "drug abuse, pure and simple" and refused to reimburse this amount.[123] On the other hand, the claimant had suffered a serious back injury that required three surgeries and left him in pain.[124] He argued that it took some amount of experimentation with different ratios of THC and CBD content to find the optimum treatment, and he moderated his use after determining the right mix.[125] The court upheld the order to reimburse the claimant, finding that the need to experiment with dosages was unavoidable:

> It may well be that as the science of medical marijuana develops, there will develop a more precise dosage and modality for specific symptoms that would permit a more limited range of prescribed dosages. But given the novelty of medical marijuana and the statutorily authorized dosage parameters set by the General Assembly, the Court cannot conclude that the Board abused its discretion in requiring the employer to reimburse the claimant for his experimentation phase of this new treatment.[126]

Similar issues will continue to arise, given what the court terms the "novelty" of cannabis.

In the past several years, the advent of state-legal cannabis has raised difficult legal questions under workers' compensation programs with regard to the claimant's qualification to receive benefits and whether cannabis may be a covered treatment. These emerging

121. *Id.* at 735–36, 738. A short time later, the court reaffirmed the holding in *Vialpando*. After the treating physician recommended cannabis when numerous pain drugs had failed, the court approved the expenses as reasonable and necessary. "In view of the equivocal federal policy and the clear New Mexico policy as expressed in the Compassionate Use Act, we decline to reverse the [workers' compensation judge's] amended compensation order." Lewis v. Am. Gen. Media, 355 P.3d 850, 858 (N.M. Ct. App. 2015). *See also* Appeal of Parraggio, 205 A.3d 1099 (N.H. 2019) (adopting the rationale in *Lewis*).

122. Giles & Ransome v. Kalix, No. N17A-10-001 CEB, 2018 WL 4922911, at *2 (Del. Super. Ct. Oct. 9, 2018).

123. *Id.*

124. *Id.* at *1.

125. *Id.* at *2.

126. *Id.* at *4.

issues reflect the conflict between public policy favoring coverage for workplace injuries and (federal) public policy disfavoring cannabis use. As with many areas of law, state-legal cannabis creates new conflicts and interpretive problems in employment law.

IV. Conclusion

A person may now use cannabis in a number of states without consequences under state law. At the same time, in most states that same person may be fired by her employer for using cannabis. State-legal cannabis programs champion the freedom of individuals to decide whether to use cannabis, but state employment laws often give the employer an effective veto over this decision. In this Article we have highlighted some of the most pressing issues that exhibit this contradiction. We conclude that California should embrace a legislative solution that requires employers to accommodate employee cannabis use, subject to the legitimate interests of the employer (including the obligations that the employer may have under federal law to maintain a drug-free workplace). Without a legislative solution, difficult issues will continue to emerge. For example, an employee seeking worker's compensation benefits in the form of reimbursement for medical cannabis would be subject to the rejoinder that she could be legally fired for such use. Similarly, an employee fired for state-legal cannabis use may find that her ability to receive unemployment insurance payments is subject to question. It is time for a comprehensive legislative solution to avoid years of litigation that benefit neither employer nor employee.