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Missing the Forest for the Weeds: Filling the Holes in Louisiana's Medical Marijuana Statutes to Protect Employees

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INTRODUCTION

Imagine: a woman named Anne has been suffering from Crohn's disease for several years.¹ Her symptoms, including extreme abdominal pain and burning ulcers, make daily life difficult.² She tries several types of medication without success until her doctor recommends³ that she use medical marijuana—a practice the Louisiana Legislature recently made legal.⁴ Anne finds that the use of medical marijuana significantly relieves her symptoms.

Anne goes to work and informs the Human Resources department that she has begun to use medical marijuana per her doctor's recommendation. She assures the Human Resources representative that she will not use medical marijuana on company property or while on the job and that she will not be impaired during the workday. The Human Resources representative tells Anne that since state law sanctions her marijuana use she will not face any repercussions.⁵ Within a few days, however, Anne's employer forces her to take a drug test pursuant to the company's random drug testing policy. Upon testing positive for marijuana use, Anne is terminated.⁶

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1. Anne is a fictional person introduced to relay a real shortcoming in Louisiana law.

2. *See generally Crohn's Disease*, MAYO CLINIC (Aug. 7, 2017), <https://www.mayoclinic.org/diseases-conditions/crohns-disease/symptoms-causes/syc-20353304> [<https://perma.cc/YA2M-36AZ>].

3. *See* LA. REV. STAT. § 40:1046 (2018). Louisiana's medical marijuana statutes use the term "recommend" rather than "prescribe" in order to protect doctors from violating the Controlled Substances Act, which forbids medical professionals from prescribing marijuana. 21 U.S.C. § 812(c)(10) (2012); *see also* James Gill, *Lawmakers Play Word Games on Medical Marijuana*, ADVOCATE (June 8, 2016, 5:13 PM), https://www.theadvocate.com/new_orleans/opinion/james_gill/article_3db8e178-7713-53ee-9453-dc15762924fc.html [<https://perma.cc/CF85-AXCC>].

4. LA. REV. STAT. § 40:1046 (creating a method by which doctors are able to recommend medical marijuana to patients suffering from any of the debilitating illnesses specifically listed in the statute).

5. *See id.* § 40:966(I) (providing exemptions for arrest and prosecution to persons lawfully in possession of medical marijuana); *see also id.* § 40:1046A(2)(a) (providing a plan for the production, cultivation, and distribution of medical marijuana and listing Crohn's disease as a debilitating medical condition which medical marijuana can be recommended to treat).

6. *See id.* §§ 40:1001–05 (allowing employers to conduct random drug testing of employees as a condition of their employment).

Following her termination, Anne discusses possible legal recourse with her lawyer for discrimination under the Americans with Disabilities Act of 1990 (“ADA”).⁷ The attorney informs Anne that the ADA provides no remedy because it specifically exempts individuals “currently engaging in the illegal use of drugs.”⁸ The use of marijuana is illegal under the federal Controlled Substances Act (“CSA”) even though Louisiana law allows for its medical use.⁹ Louisiana law allows a doctor to recommend medical marijuana to a patient for certain severe, debilitating medical conditions¹⁰ and allows a patient to use medical marijuana without fear of criminal prosecution,¹¹ but the law does nothing to protect workers from discrimination based on their use of a state-sanctioned medicine.¹² Anne’s attorney tells her the harsh reality she faces: the ADA does not protect her from discrimination based on her use of marijuana, and Louisiana law offers no solution either. Upon discovery of her lack of legal recourse, Anne is faced with her reality: no job and slim prospects for future employment unless she stops using medical marijuana to manage her painful condition.

Although Anne’s situation is presently hypothetical, various Louisiana citizens will find themselves in her shoes if the legislature does not fill the existing gaps in Louisiana’s medical marijuana statutes.¹³ Louisiana is currently laying the groundwork for legal production and distribution of marijuana, and the producers that state legislators selected expect eligible patients to have access to the medicine in early 2019.¹⁴ The lack of

7. 42 U.S.C. §§ 12111–17.

8. *Id.* § 12114.

9. *Id.*; *see also* LA. REV. STAT. § 40:966(I) (providing exemptions for arrest and prosecution to persons lawfully in possession of medical marijuana); *see also* 21 U.S.C. § 812(c)(10) (designating the statutorily defined “marihuana” as a Schedule I controlled substance).

10. LA. REV. STAT. § 40:1046 (listing “cancer, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, cachexia or wasting syndrome, seizure disorders, epilepsy, spasticity, Crohn’s disease, muscular dystrophy, or multiple sclerosis” as the qualifying debilitating medical conditions medical marijuana can be recommended to treat).

11. *See id.* § 40:966 (providing exemptions for arrest and prosecution to persons lawfully possessing medical marijuana).

12. *See id.*; *see also id.* § 40:1046 (lacking any protection against employment discrimination on the basis of medical marijuana use).

13. *Id.*

14. *See* Stephanie Riegel, *Medical marijuana behind schedule, again, but program making progress*, GREATER BATON ROUGE BUS. REP. (Aug. 29, 2018), <https://www.businessreport.com/article/medical-marijuana-behind-schedule-pro>

employment protections is a gap in the statutory scheme that lawmakers must correct to ensure that no Louisiana citizen has to face an impossible choice between health and employment.

Marijuana is a drug with a reputation because of its long illegality and psychoactive nature, and some argue that lawmakers should not grant legal protections to individuals who use the substance.¹⁵ The decriminalization of medical marijuana in Louisiana faced criticism, with skeptics claiming that de facto legalization of marijuana in any context encourages substance abuse.¹⁶ Others object to decriminalization because of the lack of research on marijuana's efficacy as a therapeutic treatment and accuse the Louisiana Legislature of moving too fast when it decriminalized use of the plant for medical purposes.¹⁷ Substantial research has demonstrated, however, that marijuana can improve the symptoms of individuals suffering from illnesses such as cancer and Crohn's disease.¹⁸ The research

gram-making-progress [<https://perma.cc/HFZ2-F6D3>] (discussing delays in the production and distribution of the first crop of medical marijuana and its expected availability in early 2019).

15. See The Controlled Substances Act of 1970, 21 U.S.C. § 812 (2012); see also Robert L. DuPont, *Marijuana Has Proven to Be a Gateway Drug*, N.Y. TIMES (Apr. 26, 2016, 3:22 AM), <https://www.nytimes.com/roomfordebate/2016/04/26/is-marijuana-a-gateway-drug/marijuana-has-proven-to-be-a-gateway-drug> [<https://perma.cc/8L75-ZE3U>].

16. See, e.g., Dean Robinson & A. Kennison Roy, *'Medical' marijuana bill will do more harm than good, professionals argue in guest column*, ADVOCATE (May 10, 2016, 5:20 PM), https://www.theadvocate.com/baton_rouge/opinion/our_views/article_53552655-0124-5afe-8700-c0e1a23ab3ce.html [<https://perma.cc/A3QD-ZNNT>]; Ken Roy, Letter to the Editor, *Jindal should veto medical marijuana bill*, ADVOCATE (June 16, 2016, 2:02 PM), https://www.theadvocate.com/baton_rouge/opinion/letters/article_054147fd-cb46-53f9-a199-2fc0cb1c11ef.html [<https://perma.cc/CV2E-MQAM>]; Mike Stone & Michael A. Ranatza, Opinion, *Louisiana Sheriffs' Association leaders: Balance needed on medical marijuana*, ADVOCATE (May 8, 2016, 11:36 AM), https://www.theadvocate.com/baton_rouge/opinion/our_views/article_3f4a5486-9285-5f4b-9095-28f2f25d6173.html [<https://perma.cc/8VMP-CLHB>].

17. See, e.g., Robinson & Roy, *supra* note 16; Roy, *supra* note 16; Stone & Ranatza, *supra* note 16.

18. See Mary E. Lynch & Fiona Campbell, *Cannabinoids for Treatment of Chronic Non-Cancer Pain; A Systematic Review of Randomized Trials*, 72 BRIT. J. CLINICAL PHARMACOLOGY 735, 742 (2011) (finding that marijuana is a “modestly effective and safe treatment option for chronic non-cancer (predominantly neuropathic) pain”); see also Brenda E. Porter & Catherine Jacobson, *Report of a Parent Survey of Cannabidiol-Enriched Cannabis Use in Pediatric Treatment-Resistant Epilepsy*, 29 EPILEPSY & BEHAV. 574, 575 (2013) (finding that parents using marijuana to treat children's epilepsy report a “high

demonstrating medical marijuana's benefits, as well as Louisiana citizens' personal testimony that medical marijuana alleviated symptoms, led Louisiana to decriminalize the substance for medical use.¹⁹ If Louisiana is willing to allow the use of marijuana therapeutically, it should not force citizens to choose between health and the ability to earn a living.

This Comment recommends that the Louisiana Legislature fill the current gaps in medical marijuana legislation before marijuana is recommended for medical use in this state.²⁰ The solution lies in amending Louisiana Revised Statutes § 40:1046 to include anti-discrimination protection from adverse employment action, as Connecticut, Arizona, and several other states have done in connection with the legalization of medical marijuana.²¹ The new anti-discrimination provision should create a private cause of action for employees to sue their employers in the event that the employees are wrongfully terminated for their legal use of medical marijuana.²²

Part I of this Comment discusses the current status of marijuana legislation in the United States at both the federal and state levels. It provides a background on the tension between the federal CSA and state decriminalization efforts. Part II focuses on state medical marijuana statutes in the context of employment law, including significant court decisions either upholding or dismissing statutory protections from wrongful termination for marijuana use. Part III examines the current state of Louisiana's medical marijuana statutes and analyzes their inability to

rate of success in reducing seizure frequency with this treatment"); *see also* Jody Corey-Bloom et al., *Smoked Cannabis for Spasticity in Multiple Sclerosis: A Randomized, Placebo-Controlled Trial*, 184 CANADIAN MED. ASS'N J. 1143, 1145 (2012) (administering marijuana to patients with multiple sclerosis and spasticity resulted in a "clinically meaningful" reduction in pain).

19. *See* The Advertiser, Editorial, *Medical marijuana bill deserves support*, ADVERTISER (May 26, 2015, 2:18 PM), <http://www.theadvertiser.com/story/opinion/2015/05/26/medical-marijuana-bill-deserves-support/27971151/> [<https://perma.cc/AYQ9-H77M>]; Ken Stickney, *How Louisiana's medical marijuana bill has evolved*, ADVERTISER (May 9, 2015, 11:06 PM); Kris Wartelle, *Mother's dying wish to legalize medical marijuana granted*, ADVERTISER (June 11, 2015, 3:30 PM) <http://www.theadvertiser.com/story/news/2015/06/11/womans-dying-wish-legalize-medical-marijuana-granted/71074362/> [<https://perma.cc/A597-85TL>].

20. *See* Riegel, *supra* note 14.

21. *See* CONN. GEN. STAT. § 21a-408p(b) (2018); ARIZ. REV. STAT. § 36-2813 (2018); DEL. CODE ANN. tit. 16, § 4905A (2018); 410 ILL. COMP. STAT. 130/40 (2018); ME. REV. STAT. tit. 22, § 2423-E (2018); NEV. REV. STAT. § 453A.800 (2018); N.Y. PUB. HEALTH LAW § 3369 (2018); MINN. STAT. § 152.32; R.I. GEN. LAWS § 21-28.6-4 (2018).

22. *See generally* Noffsinger v. SSC Niantic Operating Co. LLC, 273 F. Supp. 2d 326 (D. Conn. 2017).

protect Louisiana employees who use medical marijuana pursuant to a doctor's recommendation. Part IV proposes solutions, the best solution being a statutory provision creating a cause of action for employees to sue for wrongful termination under the statutes decriminalizing medical marijuana. This Comment concludes by emphasizing the need for Louisiana lawmakers to show foresight by protecting citizens whose state-sanctioned medical marijuana use may threaten their livelihoods.

I. REGULATION OF MARIJUANA POSSESSION AND USE AT THE FEDERAL AND STATE LEVELS

Marijuana and all of its components and derivatives have been illegal under federal law since 1970.²³ Thirty-three states, however, have decriminalized the possession and use of marijuana for medical purposes.²⁴ The wholesale forbiddance of marijuana under federal law and the contrasting state law legalization of marijuana for particular purposes, namely medicinal use, have led to tension in the law. Questions regarding preemption and principles of federalism are central to marijuana legislation, as the answers to those questions determine whether states have the power to decriminalize medical marijuana or offer employment protection to marijuana users.²⁵

A. Federal Prohibition of Marijuana

The CSA categorizes controlled substances into one of five Schedules based on the substance's potential for abuse and potential medical uses.²⁶ The most severe classification under the CSA is Schedule I, since substances categorized as Schedule I drugs are those that Congress finds have the highest risk of abuse and no recognized medical use.²⁷ In 1970, Congress designated marijuana and all of its components as Schedule I

23. See 21 U.S.C. § 812(c)(10) (2012).

24. *State Medical Marijuana Laws*, NAT'L CONF. ST. LEGISLATURES (Nov. 8, 2018), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/X6HG-PUM6>].

25. See Lea Brilmayer, *A General Theory of Preemption: With Comments on Statement Decriminalization of Marijuana*, 58 B.C. L. REV. 895 (2017); see also Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015).

26. 21 U.S.C. § 812.

27. *Id.* § 812(b)(1).

controlled substances under the CSA.²⁸ This classification placed marijuana in the same category as heroin, cocaine, and lysergic acid diethylamide.²⁹ Marijuana's classification as a Schedule I substance makes its cultivation, possession, and use for any purpose illegal under federal law.³⁰ The penalties for violating the CSA's prohibition of marijuana are significant, and the legality of the marijuana cultivation or possession under state law has no bearing on the federal law's treatment of violators.³¹ First-time possessors of marijuana face up to a year in prison and a \$1,000 fine, but even a small producer of marijuana plants faces up to five years in prison and a fine of up to \$250,000.³² The CSA's plain language would punish state-sanctioned users and producers of medical marijuana just as harshly as users and drug dealers whose activities are entirely illicit.³³

Contemporaries have questioned marijuana's classification as a Schedule I substance since the passage of the CSA because of the drug's potential medical benefits.³⁴ Within two years of the CSA's passage, a commission Congress created to research marijuana recommended the rescheduling and decriminalization of marijuana for medical research purposes.³⁵ Later clinical studies in which the Food and Drug Administration approved of marijuana have proven what the commission found to be true at the outset of the CSA's existence: marijuana has possible medical value and therefore should not be a Schedule I substance under the CSA.³⁶ Studies demonstrating potential medical purposes for marijuana have had no effect on federal law.³⁷ The federal government has not entirely ignored such medical studies, however, as the majority of state

28. *See id.* § 802(16) (defining marijuana as "all parts of the plant *Cannabis sativa L.*"); *see also id.* § 812(c)(10) (designating the statutorily defined "marijuana" as a Schedule I controlled substance).

29. *See id.* § 812.

30. *Id.* § 844(a).

31. *See id.* § 841 (giving the penalty guidelines for various types of CSA violations involving marijuana).

32. *See id.* (giving the penalties for a first-time possessor and a cultivator with less than 50 plants).

33. *See id.* (setting penalty guidelines with no distinctions for violators acting in accord with state law).

34. NAT'L COMM'N ON MARIJUANA AND DRUG ABUSE, MARIJUANA: A SIGNAL OF MISUNDERSTANDING (1972).

35. *Id.*

36. *See supra* note 18.

37. 21 U.S.C. § 844(a).

governments have taken notice and started to decriminalize the use of medical marijuana.³⁸

B. State Decriminalization of Marijuana for Medical Purposes

Although federal law recognizes no medical use for marijuana, the majority of states have created statutory schemes allowing access to marijuana or some of its derivatives—like cannabinoids and cannabis oil—for medical purposes.³⁹ Despite lingering concerns about the potentially harmful effects of marijuana, state legislatures justify medical marijuana laws based on findings that patients can use medical marijuana to provide relief for conditions such as cachexia, cancer, glaucoma, AIDS, nausea, post-traumatic stress syndrome, severe pain, seizures, persistent muscle spasms, and multiple sclerosis.⁴⁰ Marijuana is generally used to relieve pain, combat malnutrition and loss of appetite, and reduce muscular spasms or seizures.⁴¹

All states with medical marijuana programs protect residents who qualify for treatment with medical marijuana from state criminal prosecution.⁴² Some states, such as Massachusetts and Michigan, grant even broader protections to protect medical marijuana patients from being denied any right or privilege based on their use of medical marijuana.⁴³

38. See *State Medical Marijuana Laws*, *supra* note 24 (listing 33 states which allow for public medical marijuana programs and 18 states which allow use of low THC, high cannabidiol products for medical reasons).

39. *Id.*

40. See *Oregon Medical Marijuana Program Statistics*, OR. HEALTH AUTH., <http://www.oregon.gov/oha/PH/DISEASES/CONDITIONS/CHRONIC/DISEASE/MEDICALMARIJUANAPROGRAM/Documents/OMMP%20Statistic%20Snapshot%20-%202004-2017.pdf> [<https://perma.cc/ED87-LZVR>] (last updated Apr. 2017) (listing above diseases as covered under Oregon state medical marijuana law); see also LA. REV. STAT. § 40:1046 (2018) (listing above diseases as debilitating medical conditions eligible for treatment with recommended medical marijuana).

41. See *supra* note 18.

42. MARIJUANA POLICY PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS (2015), <https://www.scribd.com/document/264980279/State-by-State-Laws-Report-2015> [<https://perma.cc/ATF4-2BCV>].

43. MASS. GEN. LAWS ch. 94C app., § 1-4 (West 2006 & Supp. 2014); MICH. COMP. LAWS ANN. § 333.26424 (West 2001 & Supp. 2017); see also ALASKA STAT. § 17.37.030 (2012); CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(B) (West 2007 & Supp. 2016); MONT. CODE ANN. § 50-46-319 (2016); N.J. STAT. ANN. § 24:61-2 (West 2007 & Supp. 2017); N.M. STAT. ANN. § 26-2B-4 (2007 & Supp. 2017); OR. REV. STAT. § 475.300 (2016); R.I. GEN. LAWS § 21-28.6-4

Nine states explicitly protect medical marijuana users from employment discrimination based on a positive drug test.⁴⁴ A stark contrast exists between the planes of federal and state law on this issue, however, because although medical marijuana use is legal under the laws of the individual states that have provided for such use, it remains illegal under the CSA.⁴⁵

C. Disparity in Federal and State Law Governing Marijuana Use

The federal government has recognized the disparity between state law's allowance of medical marijuana use and federal law's wholesale ban on marijuana, and it has taken steps to address the differences. Both the executive and legislative branches have attempted to bridge the divide between the CSA and state decriminalization efforts. The goal of these steps is to permit the states the ability to regulate marijuana but maintain that the federal government, through the CSA, has the final say on the legality of any marijuana use. In 2017, the change in administration upended the status quo, bringing into question whether the federal government's next move will be to enforce the CSA in spite of state decriminalization efforts.⁴⁶

1. Executive Agency Actions

During the Obama Administration and up until January 2018, executive agencies dealt with the tension between state and federal law by directing federal prosecutors to follow a policy of non-interference with state programs that allowed for the regulated use of marijuana.⁴⁷ This

(2002 & Supp. 2013); WASH. REV. CODE § 69.5 1A.040 (West 2007 & Supp. 2017); *see also* MARIJUANA POLICY PROJECT, *supra* note 42.

44. *See supra* note 21.

45. *See* 21 U.S.C. § 812 (2012).

46. In 2017, Donald J. Trump was inaugurated as President of the United States and began shifting the policies of the Executive Branch to the right through his appointments. The most significant administrative change was the appointment of Jefferson Beauregard Sessions, a stringent opponent of marijuana legalization, as Attorney General. *See* Memorandum from Jefferson B. Sessions, III, U.S. Attorney General, to All U.S. Attorneys (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/6LYE-N8EV>] [hereinafter "Sessions Memo"] (rescinding previous nationwide guidance specific to marijuana enforcement, including the Ogden and Cole Memoranda).

47. *See* Memorandum from David W. Ogden, Deputy Attorney General, to Selected U.S. Attorneys (Oct. 19, 2009), <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf> [<https://perma.cc/R4GM-DDRM>] [hereinafter "Ogden Memo"] (establishing guidelines on investigations and

policy was set forth in guidance documents and generally recommended that federal prosecutors not disrupt state medical marijuana regulation by single-mindedly enforcing CSA prohibitions.⁴⁸

In 2009, Deputy Attorney General David Ogden released a memo (“Ogden Memo”) discouraging federal prosecution of individuals using marijuana for medical purposes in accordance with state law, reasoning that such prosecutions would be a waste of federal resources.⁴⁹ Although the CSA entirely prohibits the cultivation and possession of marijuana, the Ogden Memo stated that federal prosecutors should focus on illegal drug trafficking networks rather than organizations acting in compliance with state laws.⁵⁰

In 2011, Deputy Attorney General James Cole reaffirmed the policy stated in the Ogden Memo.⁵¹ Cole then directed prosecutors to take an even more deferential stance to the states in 2013, issuing his own memo (“Cole Memo”) guiding U.S. Attorneys by stating that the Department of Justice (“DOJ”) would not prioritize enforcement of federal marijuana laws in states with laws allowing use of marijuana, so long as the states possess “strong and effective regulatory and enforcement systems.”⁵² The Ogden Memo emphasized that state decriminalization could not prevent federal enforcement of the CSA, sending contradictory messages of restraint and readiness regarding state-sanctioned marijuana production.⁵³ The Cole Memo guided federal prosecutors towards further reliance on state regulation of medical marijuana, suggesting that federal prosecution would be appropriate only where local authorities were not applying state

prosecutions in states authorizing the medical use of marijuana); *see also* Memorandum from James M. Cole, Deputy U.S. Attorney General, to All U.S. Attorneys (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/63SW-753T>] [hereinafter “Cole 2013 Memo”] (setting forth guidance regarding marijuana enforcement).

48. *Supra* note 47.

49. *See* Ogden Memo, *supra* note 47.

50. *See id.* (listing indicia such as unlawful use of firearms, violence, and financial activities inconsistent with state law as signs that federal prosecutors may want to investigate and prosecute a particular case involving marijuana).

51. Memorandum from James M. Cole, Deputy U.S. Attorney General, to U.S. Attorneys (June 29, 2011), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf> [<https://perma.cc/94SF-N4SC>].

52. *See* Cole 2013 Memo, *supra* note 47.

53. *See* Ogden Memo, *supra* note 47 (stating that prosecutors are not precluded from investigating and prosecuting actions undertaken in compliance with state law).

regulations.⁵⁴ The memoranda from Ogden and Cole suggested federal prosecutors should not interfere with state marijuana decriminalization and regulation, but maintained prosecutors' power to enforce the CSA regardless of state law.⁵⁵

The policy of non-interference stated in the Ogden and Cole Memos was not legislation, however, executive guidance documents are subject to change. The early days of January 2018 brought such a change, as Attorney General Jeff Sessions rescinded all previous guidance documents regarding the enforcement of marijuana's CSA prohibition.⁵⁶ The actual effects of this change remain unknown at this point, although the question remains whether Attorney General Sessions's memo rescinding the Obama-era stance of noninterference will have any major impact in the near future.⁵⁷ Further, Sessions's resignation from office adds further uncertainty as any new Attorney General might make further changes to DOJ policy. Although the rescission of the Ogden and Cole Memos pulls back from a message of deference to state regulation, thereby giving federal prosecutors more freedom to pursue violators of the CSA and remain in line with the DOJ, it is unlikely that the government would target organizations and individuals acting within state medical marijuana guidelines because Attorney General Session's memo did not explicitly encourage such targeting of state-compliant organizations.⁵⁸ Thus, while the Ogden and Cole Memos are no longer guiding forces, the common sense rationale behind them continues: namely, that DOJ funds are better spent pursuing illicit drug trafficking connected to violence rather than organized groups acting according to state regulations.

Sessions's memo, still in effect unless and until the next Attorney General rescinds it, supports the belief that the rescission of earlier guidance documents will not greatly impact the prosecutorial discretion that has been exercised regarding medical marijuana, as the memo instructs federal prosecutors to follow the principles set forth in the *U.S.*

54. See Cole 2013 Memo, *supra* note 47.

55. See *id.*; see also Ogden Memo, *supra* note 47.

56. See Sessions Memo, *supra* note 46.

57. See Thomas Fuller, *California Defiant in face of Federal Move to Get Tough on Marijuana*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/us/california-defiant-in-face-of-federal-move-to-get-tough-on-marijuana.html?mtref=query.nytimes.com> [<https://perma.cc/XEB4-KEHL>]; see also The New York Times Editorial Board, Editorial, *Jeff Session's Endless War on Marijuana*, N.Y. TIMES (Jan. 7, 2018), <https://www.nytimes.com/2018/01/07/opinion/jeff-sessionss-war-marijuana.html> [<https://perma.cc/X3Q4-5L77>].

58. See Sessions Memo, *supra* note 46.

Attorneys' Manual.⁵⁹ Whether such a prosecution would be an effective and efficient use of resources is among the principles the government uses when determining whether to prosecute a case.⁶⁰ How the DOJ will proceed from this point, however, is not clear.

2. Congressional Budget Modifications

In addition to executive action, Congress has also taken steps to ensure that federal agents respect state programs decriminalizing marijuana.⁶¹ In 2014, the government included a provision preventing the DOJ from using funds to interfere with state medical marijuana programs in the Congressional budget.⁶² Congress passed this provision every subsequent year as well.⁶³ The lack of funds available to federal prosecutors because of this budgetary restriction has led to the dismissal of at least one case.⁶⁴

The tension between the federal CSA and the state medical marijuana decriminalization efforts persists.⁶⁵ The legislative budgetary restrictions remain in place as of now, since Congress included this provision in the most recent spending bill in March 2018.⁶⁶ The rescission of the Cole and

59. *Id.*

60. U.S. DEP'T OF JUST., U.S. ATTORNEYS' MANUAL § 9:27.000 (Jan. 2017), <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution> [<https://perma.cc/VER3-C9YQ>] (“[The principles] contribute to more effective management of the government’s limited prosecutorial resources.”).

61. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014) (prohibiting the DOJ from interfering with “[s]tate laws that authorize the use, distribution, possession, or cultivation of medical marijuana”).

62. *Id.*

63. Joel Rubin, *The feds seized guns, gold, and 320 pot plants. So why did a judge rule they can't pursue marijuana charges*, L.A. TIMES (Aug. 14, 2017, 4:00 AM), <http://www.latimes.com/local/california/la-me-medical-marijuana-court-20170813-story.html> [<https://perma.cc/R37F-5LCR>]; *but see also* Janet Burns, *Sessions to Congress: Please Forego Federal Law Protecting Medical Marijuana States*, FORBES (Jun. 13, 2017, 9:25 AM), <https://www.forbes.com/sites/janetwburns/2017/06/13/sessions-to-congress-please-forgo-federal-law-protecting-medical-marijuana-states/#29812e32727b> [<https://perma.cc/9VZP-QD32>].

64. *See* Rubin, *supra* note 63.

65. *See* 42 U.S.C. § 12114 (2012); *see also* *State Medical Marijuana Laws*, *supra* note 24.

66. Tom Angell, *Congress Protects Medical Marijuana From Jeff Sessions in New Federal Spending Bill*, FORBES (Mar. 21, 2018, 8:02 PM), <https://www.forbes.com/sites/tomangell/2018/03/21/congress-protects-medical-marijuana-from-jeff-sessions-in-new-federal-spending-bill/#1082b6653575> [<https://perma.cc/B959-N78H>].

Ogden Memos seems to demonstrate the change in the DOJ's perception of state decriminalization, intensifying the uneasiness that defines the coexistence of federal and state marijuana laws. Despite marijuana's federal illegality, analysis of preemption doctrine and state legislative power demonstrates that states have the power to decriminalize the use of medical marijuana, and further, the ability to provide valid employment protections for state citizens wrongfully terminated because of marijuana use.

II. THE CONFLICT OF FEDERAL AND STATE MARIJUANA LAW IN EMPLOYMENT LAW

The simultaneous wholesale prohibition of marijuana under federal law and decriminalization under state law creates significant conflict in all areas of the law, including employment law. The illegality of marijuana under the CSA prevents medical marijuana users from protection under the ADA, the federal statute protecting individuals with disabilities from discrimination.⁶⁷ The ADA does not cover individuals engaged in the use of illegal drugs, and marijuana's status as a Schedule I substance under the CSA places it within that exception.⁶⁸

The ADA provides the most significant means of legal recourse available to disabled individuals who encounter discrimination at work because of their disabilities.⁶⁹ If a person can perform the required tasks of a job with a reasonable accommodation for his disability and that reasonable accommodation does not cause undue hardship to the employer, the ADA forbids discrimination against that person on the basis of his disability.⁷⁰ The statutes that comprise the ADA prohibit not only discrimination based on a disability itself, but also forbids refusal to make reasonable accommodations for the worker's disability.⁷¹ This broad proscription of discriminatory practices provides protection from discrimination-based adverse employment actions for employees who

67. 42 U.S.C. § 12114.

68. *Id.*; see also Taylor Oyaas, *Reefer Madness: How Tennessee Can Provide Cannabis Oil Patients Protection from Workplace Discrimination*, U. MEM. L. REV. 935, 942–43 (2017) (describing the impossibility of employee protection for use of medical marijuana under the ADA due to marijuana's Schedule I status under the CSA).

69. 42 U.S.C. § 12114; see also Oyaas, *supra* note 68.

70. 42 U.S.C. § 12112.

71. *Id.*

have a disability, creating a cause of action for those whose disabilities have not been reasonably accommodated.⁷²

To make a *prima facie* case under the ADA, however, a claimant must be a qualified individual, and the ADA specifically excludes employees who use illegal substances under the CSA from the definition of a qualified individual.⁷³ Accordingly, the ADA is useless for employees who are terminated based on their use of medical marijuana, since those individuals are not qualified to sue under the statute.⁷⁴

Any recourse available to such employees therefore, can only exist within state law.⁷⁵ Until recently, states' attempts to provide employment protection to medical marijuana users were routinely held to be invalid in state courts. The primary rationales for these holdings were based on a preemption theory or on statutory construction.⁷⁶

A. *The Lone Finding of Preemption: Emerald Steel*

The United States Constitution states that federal law is the “supreme Law of the Land.”⁷⁷ If a federal law conflicts with a state law, the federal law preempts the conflicting state law and renders it invalid.⁷⁸ Whether the CSA conflicts with and preempts state decriminalization laws is a central and unanswered question.⁷⁹ If the CSA preempts state statutes decriminalizing medical marijuana, the state laws and protections they provide would be without effect and prosecution for medical marijuana use would be entirely at the whim of the federal government.⁸⁰ The CSA's prohibition of marijuana as a Schedule I substance seems to stand in direct conflict with state laws decriminalizing the drug, but the language of the

72. *Id.*

73. *Id.*

74. *Id.*

75. *See Oyaas, supra* note 68, at 935, 943.

76. *See Coats v. Dish Network, L.L.C.*, 350 P.3d 849 (Colo. 2015) (holding that the CSA's prohibition on marijuana rendered it an unlawful activity outside of the scope of state protections for employees prescribed medical marijuana); *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010) (holding that the CSA preempted Oregon's Medical Marijuana Act which protected employees against discrimination for their legal marijuana use outside of work).

77. U.S. CONST. art. VI, cl. 2.

78. *Id.*

79. *See Chemerinsky et al., supra* note 25, at 102–09.

80. *See* U.S. CONST. art. VI, cl. 2 (stating that laws of the United States made in pursuance of the Constitution “shall be the supreme Law of the Land”); *see also Chemerinsky et al., supra* note 25, at 74.

CSA itself demonstrates no direct conflict exists when states decriminalize marijuana.⁸¹

Four types of preemption exist: express; field; conflict; and obstacle.⁸² Express preemption only exists when Congress includes an explicit provision in the federal statute stating an intention to preempt any state or local laws.⁸³ Field preemption is when the statute or statutory scheme clearly states Congress intended to “occupy the field” and leave no room for state or local legislatures to craft laws within that area.⁸⁴ Neither of these forms of preemption applies in the context of marijuana regulation.⁸⁵ The CSA has no explicit preemption clause, demonstrating that express preemption does not affect marijuana regulation.⁸⁶

The CSA does, however, have an explicit provision that states that it is not meant to “occupy the field” of drug legislation.⁸⁷ That provision instead says that the CSA does not preempt any state law unless “there is a positive conflict” between the two, such that they cannot exist simultaneously.⁸⁸ This “positive conflict” language demonstrates that the CSA can only overrule state law regarding decriminalization of marijuana through the theories of either conflict or obstacle preemption.

Direct conflict preemption only occurs if it is impossible to obey both federal and state laws at the same time.⁸⁹ This standard is very narrow, and one can meet it only when a state law requires an act contrary to a federal law.⁹⁰ Neither decriminalization of medical marijuana nor employment protections for medical marijuana users under state law would conflict with the CSA directly, since such provisions do not *require* possession, use, or distribution of marijuana, but only allow it.⁹¹ Therefore, obstacle preemption is the only type of preemption that could potentially apply.

81. 21 U.S.C. §§ 801, 903 (2012).

82. *See Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

83. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

84. *See Crosby*, 530 U.S. at 372 (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989)).

85. *See* 21 U.S.C. §§ 801–971 (demonstrating a lack of any express preemption provision within the CSA); *see also id.* § 903 (explicitly stating that the CSA is not meant to “occupy the field . . . to the exclusion of any State law on the same subject matter”).

86. *See id.* §§ 801–971.

87. *Id.* § 903.

88. *Id.*

89. *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

90. *See Chemerinsky et al.*, *supra* note 25, at 106.

91. *See id.*; *see also* LA. REV. STAT. § 40:966(I) (2018) (providing exemptions for arrest and prosecution to persons lawfully in possession of medical marijuana, but not requiring such possession).

Obstacle preemption applies if the state law at issue is inconsistent with the purposes and objectives of federal law.⁹²

Only one court has found a state law regulating medical marijuana to be preempted by the CSA using an obstacle preemption analysis.⁹³ In *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industry*, a temporary employee used medical marijuana daily to treat his anxiety and nausea, a permitted “debilitating medical condition” under the Oregon Medical Marijuana Act.⁹⁴ When the opportunity to become a permanent employee arose, the employee informed his supervisor of his medical marijuana use and provided his registry card to show that Oregon state law sanctioned his use.⁹⁵ The employer promptly terminated the employee, and the employee filed a complaint for discrimination against the employer.⁹⁶ The Supreme Court of Oregon found that the state law did not just decriminalize the use of medical marijuana, but affirmatively authorized its use.⁹⁷ The state law therefore stood as an obstacle to the enforcement of the CSA, such that the CSA preempted the state law.⁹⁸

Emerald Steel is the only decision in which a state supreme court found that the CSA preempts state laws providing protection for medical marijuana users, and several contemporaries have criticized the decision.⁹⁹ Obstacle preemption carries a strong presumption against preemption if the federal law lies within an area the state traditionally governs.¹⁰⁰ This presumption against obstacle preemption should have led the Oregon Supreme Court to find that the CSA did not preempt the state law protecting medical marijuana users, as evidenced by other courts’ determinations that obstacle preemption does not apply to state laws regulating medical marijuana.¹⁰¹ The decision in *Emerald Steel* is an anomaly, and other courts

92. See Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5, 23 (2013).

93. *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010).

94. *Id.* at 520; see also OR. REV. STAT. ANN. § 475B.415 (West).

95. *Emerald Steel*, 230 P.3d at 520.

96. *Id.*

97. *Id.*

98. *Id.* at 525.

99. See Oyaas, *supra* note 68, at 952–56; Elizabeth Rodd, *Light, Smoke, and Fire: How State Law Can Provide Medical Marijuana Users Protection from Workplace Discrimination*, 55 B.C. L. REV. 1759, 1782 (2014).

100. See *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); see also Oyaas, *supra* note 68, at 952–56; see also Chemerinsky et al., *supra* note 25, at 107–08.

101. *White Mountain Health Ctr. Inc. v. Cty. of Maricopa*, No. 2012-053585, 2012 WL 6656902, at *8 (Ariz. Super. Ct. Dec. 3, 2012) (applying an obstacle preemption analysis to determine the CSA does not preempt Arizona’s Medical

should find state laws that provide employment protection for medical marijuana users valid and find that the CSA does not preempt them.¹⁰²

B. The Significance of Statutory Language: Coats

Although preemption does not preclude states from protecting medical marijuana users from employment discrimination, several cases have shown that state courts may strike down ambiguous statutes providing medical marijuana users protection.¹⁰³ The tension between the CSA and state medical marijuana statutes is the cause of the ambiguity problem; this tension renders the word “lawful” ambiguous in state medical marijuana statutes.¹⁰⁴ For example, in *Coats v. Dish Network, L.L.C.*, an employer terminated an employee who used medical marijuana at home during nonworking hours.¹⁰⁵ The employee sought a claim for wrongful termination, alleging that the reason for his termination was his use of medical marijuana, a use in accord with the state law of Colorado.¹⁰⁶ Colorado’s wrongful termination statute forbade employers from terminating employees for engaging in any “lawful activity” outside of work.¹⁰⁷

The employee in *Coats* argued that the word “lawful” in the context of the statute meant lawful in accordance with Colorado state law.¹⁰⁸ The Colorado Supreme Court determined instead that “lawful” meant an activity that complies with both state and federal law.¹⁰⁹ Because marijuana use remains illegal under federal law, the Colorado Supreme Court found that employees’ wrongful termination protection could not extend to individuals using medical marijuana.¹¹⁰ An employee could only have a claim for wrongful termination if the activity for which he was

Marijuana Act); *Kirby v. Cty. of Fresno*, 195 Cal. Rptr. 3d 815, 831–32 (Ct. App. 2015) (holding that the CSA did not preempt California’s statutory limitation on marijuana arrests under the Compassionate Use Act and Medical Marijuana Program Act).

102. See Oyaas, *supra* note 68, at 952–56, see also Chemerinsky et al., *supra* note 25, at 107–08; see also Rodd, *supra* note 99, at 1782; see also Brilmayer, *supra* note 25, at 895.

103. See, e.g., *Coats v. Dish Network, L.L.C.*, 350 P.3d 849 (Colo. 2015); *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200, 202–03 (Cal. 2008).

104. *Coats*, 350 P.3d at 849.

105. *Id.*

106. *Id.*

107. COLO. REV. STAT. § 24-34-402.5(1) (2012).

108. *Coats*, 350 P.3d at 850.

109. *Id.* at 852 (quoting *People v. Schuett*, 833 P.2d 44, 47 (Colo. 1992)).

110. *Id.* at 849.

terminated was lawful under both state and federal law.¹¹¹ Statutory construction of the word “lawful” created a bar for employees seeking protection under Colorado statutes for their medical marijuana use.¹¹² *Coats* and similar jurisprudence show that the tension between federal and state law regarding marijuana regulation requires precise statutory language in order to survive judicial scrutiny and successfully provide employment protections for medical marijuana users.

Prior to 2017, no court found a claim enforceable for employer discrimination based on an employee’s use of state-sanctioned medical marijuana.¹¹³ In the summer of 2017, however, two state court decisions allowed claims for wrongful termination and discrimination to proceed.¹¹⁴ These two cases, *Barbuto v. Advantage Sales* and *Noffsinger v. SSC Niantic Operating Company, L.L.C.*, upheld two different types of statutory protection for medical marijuana users, demonstrating viable paths for protecting medical marijuana users from employment discrimination.¹¹⁵ The first of these cases, *Barbuto*, found that the Massachusetts medical marijuana laws did not themselves create a cause of action for discrimination, but did provide a claim under a state handicap discrimination law.¹¹⁶

C. The Use of Broad Protection of Rights as a Bridge: Barbuto

In July of 2017, the Massachusetts Supreme Court became the first state supreme court to find that a claim for employment discrimination based on an individual’s state-sanctioned use of medical marijuana could move forward.¹¹⁷ The statute at issue stated “[a]ny person [qualifying for use of medical marijuana] shall not be penalized under Massachusetts law

111. *Id.*

112. *Id.*

113. *See, e.g., id.*; *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010); *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200, 202–03 (Cal. 2008).

114. *See Barbuto v. Advantage Sale & Mktg., LLC*, 78 N.E.3d 37 (Mass. 2017) (holding that, while the Massachusetts Medical Marijuana Act did not create its own private cause of action, that statute’s language forbidding “penaliz[ation] under Massachusetts law . . . or deni[al] [of] any right or privilege” for qualified use of medical marijuana did support a claim for handicap discrimination under Massachusetts law); *see also Noffsinger v. SSC Niantic Operating Co.*, 273 F. Supp. 3d 326 (D. Conn. 2017) (holding that Connecticut’s Palliative Use of Marijuana Act created an implied private right of action through its anti-discrimination employment provision).

115. *See Barbuto*, 78 N.E.3d at 37; *see also Noffsinger*, 2017 WL 3401260.

116. *See Barbuto*, 78 N.E.3d at 37.

117. *Id.*

in any manner, or denied any right or privilege, for such actions.”¹¹⁸ In *Barbuto v. Advantage Sales*, the Massachusetts Supreme Court found this broad provision of the Massachusetts Medical Marijuana Act to allow an individual to maintain a claim of handicap discrimination under another state statute.¹¹⁹ The Court refused to find that marijuana’s illegality under the CSA made its medical use a per se unreasonable accommodation under the state handicap statute.¹²⁰

The Massachusetts Supreme Court did not find that the medical marijuana statutes themselves created a private cause of action.¹²¹ Instead, a state anti-handicap discrimination law preserved the plaintiff’s claim.¹²² The medical marijuana statute, by not hinging employment discrimination on the legality of the substance, avoided any possible ambiguity that might derail the purpose of the law.¹²³ The Massachusetts Legislature crafted a statute that protected medical marijuana users from civil penalty, creating state-level protections that would not be invalidated because of the CSA’s prohibition of marijuana. Although the medical marijuana statute was insufficient on its own to create a cause of action for the affected employee, it served as a bridge to other anti-discrimination statutes.¹²⁴ Unlike the Massachusetts statute, the Connecticut federal district court found the Connecticut provision at issue in *Noffsinger* to create its own cause of action and serve as an independent vehicle for anti-discrimination protections.¹²⁵

118. MASS. GEN. LAWS ANN. ch. 151B, § 4(16) (2018).

119. See 2012 MASS. ACTS 369 (declaring that “[a] qualifying patient . . . shall not be subject to civil penalty, for the medical use of marijuana”); see also MASS. GEN. LAWS ANN. ch. 151B, § 4(16) (forbidding an employer to discriminate against an employee based on their handicap).

120. *Barbuto*, 78 N.E.3d at 46 (stating “[t]o declare an accommodation for medical marijuana to be per se unreasonable out of respect for Federal law would not be respectful of the recognition of Massachusetts voters . . . that marijuana has an accepted medical use”).

121. *Barbuto*, 78 N.E.3d 37.

122. *Id.* at 47–48.

123. 2012 MASS. ACTS 369.

124. *Barbuto*, 78 N.E.3d at 47–48.

125. *Noffsinger v. SSC Niantic Operating Co.*, 273 F. Supp. 3d 326 (D. Conn. 2017) (holding that Conn. Gen. Stat. § 21a-408p(b) created a private cause of action for employees to sue under for discrimination by employers based on their use of medical marijuana).

D. The Creation of Private Rights of Action: Noffsinger

In contrast to *Barbuto*, the United States District Court for the District of Connecticut found that a specific anti-discrimination provision included in the Connecticut Palliative Use of Marijuana Act provided a private cause of action for employees terminated for the use of medical marijuana.¹²⁶ The statute says in pertinent part, “No employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person’s or employee’s status as a qualifying patient.”¹²⁷ The district court found that the CSA did not preempt the provision, since no tension between the two laws rose to the level of conflict required for obstacle preemption.¹²⁸ The CSA does not explicitly prohibit employers from hiring applicants that may be using illegal substances, meaning that the Connecticut statute was no obstacle to the CSA and therefore was not preempted.¹²⁹ Additionally, the federal court found that the provision of Connecticut law did not authorize use of illegal substances in the workplace, preventing ADA preemption.¹³⁰

Coming fast on the heels of *Barbuto*, *Noffsinger* was another case in which a federal court recognized that states were able to protect employees using medical marijuana without the CSA preempting protection.¹³¹ Further, the statute in *Noffsinger* did not need another statute to function as an employment protection.¹³² The Connecticut Legislature had successfully written a law that filled the gap in employment protection the ADA’s exclusion of CSA Schedule I substances caused, and created a means of suing an employer for discriminatory actions based on an employee’s legitimate use of medical marijuana.¹³³ The Connecticut federal court determined that the inclusion of a specific anti-discrimination provision created an implied private cause of action under the medical marijuana statute itself.¹³⁴ Louisiana, unlike Massachusetts and Connecticut, has no statute that could serve as a means of protecting citizens that use medical

126. *Id.*

127. CONN. GEN. STAT. § 21a-408p(b) (2018).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Noffsinger v. SSC Niantic Operating Co.*, 273 F. Supp. 3d 326 (D. Conn. 2017) (holding that Conn. Gen. Stat. § 21a-408p(b) created a private cause of action for employees to sue under for discrimination by employers based on their use of medical marijuana).

133. CONN. GEN. STAT. § 21a-408p(b).

134. *Id.*

marijuana. This is a gap in the law that the Louisiana Legislature must fill to allow citizens access to the healthcare they need.¹³⁵

III. LOUISIANA'S INCOMPLETE MEDICAL MARIJUANA STATUTES

Louisiana's program for medical marijuana access exists through two statutes: Louisiana Revised Statutes § 40:966, which exempts participants in the medical marijuana program from criminal prosecution; and Louisiana Revised Statutes § 40:1046, which establishes the means of production, recommendation, and distribution of medical marijuana for citizens with a qualifying debilitating disease.¹³⁶ Unlike Massachusetts's medical marijuana statutes, Louisiana's two statutes do not include a provision ensuring that any qualified user of medical marijuana "shall not be penalized under [Louisiana] law in any manner, or denied any right or privilege, for [such use of medical marijuana]."¹³⁷ The Louisiana statutes also do not provide an explicit employment anti-discrimination provision like the one in Connecticut's medical marijuana statute.¹³⁸

The two statutes that comprise Louisiana's medical marijuana program lack any form of protection for employees eligible to use medical marijuana.¹³⁹ Without modification, an individual suffering from one of the debilitating diseases that qualifies her for medical marijuana use will have a serious decision to make. She can seek effective medication for his illness by fulfilling a recommendation for medical marijuana, but in so doing risk losing her job. Alternatively, she can continue to suffer in order to maintain gainful employment. To protect Louisiana citizens from being forced to choose between their health and their livelihood, the Louisiana Legislature must modify the current medical marijuana statutes to include an anti-discrimination provision.

IV. FINDING A WAY THROUGH THE WEEDS

If the United States Congress would recognize the medical uses of marijuana and reschedule it under the CSA, Louisiana's government would not need to act. Federal anti-discrimination protections under the ADA would become available to employees whose doctors recommend

135. See LA. REV. STAT. §§ 40:966, 40:1046 (2018).

136. *Id.*

137. MASS. GEN. LAWS ANN. ch. 94C App., §§ 1–4 (West) (2018).

138. See CONN. GEN. STAT. § 21a-408p(b).

139. LA. REV. STAT. §§ 40:966(I), 40:1046A(2)(a).

medical marijuana, rendering the need for state law protections moot.¹⁴⁰ Such Congressional action seems unlikely considering the current political climate and lack of bipartisan cooperation.¹⁴¹ The response to former Attorney General Jeff Session's rescission of the Ogden and Cole memos may signify changing times, especially because 33 states have legalized marijuana.¹⁴² Barring a surprising Congressional effort to amend the CSA, the onus falls on Louisiana to craft legislation creating statutory protections for employees using medical marijuana.

A. Louisiana Should Adopt an Explicit Employment Anti-Discrimination Provision

With the CSA as it currently stands, only state law can protect employees who suffer debilitating conditions that entitle them to use medical marijuana under Louisiana law. To fill the current gap in its medical marijuana statutes, Louisiana should look to states with employment protections for medical marijuana users that have survived judicial scrutiny.

Barbuto and *Noffsinger* evidence that the CSA will not necessarily preempt medical marijuana statutes designed to protect employees from wrongful termination and discrimination based on their marijuana use.¹⁴³ In *Barbuto*, the Massachusetts Supreme Court found that a Massachusetts provision forbidding the imposition of civil penalties because of a citizen's medical marijuana use could act as a bridge to other anti-discrimination statutes.¹⁴⁴ The court invoked a state handicap law to effectuate employment protection, marking the Massachusetts statutory scheme as

140. See 42 U.S.C. § 12114 (2012). If the federal government rescheduled marijuana under the CSA it would no longer be an illegal drug, allowing users of medical marijuana to fall within the definition of qualified disabled employee under the ADA. Additionally, Louisiana doctors would be able to accurately term their actions as "prescribing" marijuana rather than "recommending" it. See *supra* note 3.

141. See Jennifer Steinhauer, *With Few Wins in Congress Republicans Agree on Need to Agree*, N.Y. TIMES (Aug. 4, 2017), <https://www.nytimes.com/2017/08/04/us/politics/congress-republican-agree-unity.html> [<https://perma.cc/TD38-G3W9>]; see also The New York Times Editorial Board, Editorial, *Canada, but Not Jeff Sessions, Moves Boldly on Marijuana*, N.Y. TIMES (Apr. 15, 2017), <https://www.nytimes.com/2017/04/15/opinion/sunday/canada-but-not-jeff-sessions-move-s-boldly-on-marijuana.html> [<https://perma.cc/M7HB-F2RN>].

142. See The New York Times Editorial Board, *supra* note 57 (noting the negative responses of Republican and Democrat leaders on Capitol Hill).

143. See *Barbuto v. Advantage Sale & Mktg., LLC*, 78 N.E.3d 37 (2017); *Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F. Supp. 3d 326 (D. Conn. 2017).

144. *Barbuto*, 78 N.E.3d 37.

functional, but not ideal.¹⁴⁵ In contrast, Connecticut's Palliative Use of Marijuana Act includes an express employment anti-discrimination provision, creating a private cause of action for employees who have been victims of discrimination.¹⁴⁶ A similarly explicit anti-discrimination provision is the best solution to fill Louisiana's current gap in medical marijuana legislation, as it would create a clear and unambiguous means of suing for employment discrimination under state law.

B. A Model Statutory Provision that Balances Employee and Employer Needs

The model provision below is based on Connecticut law and incorporates protection from discrimination into Louisiana Revised Statutes § 40:1046. It uses the definitions already found in the Louisiana medical marijuana statutes to create a clear and unambiguous protection from employment discrimination on the basis of medical marijuana use.¹⁴⁷

No employer may refuse to hire a person or may discharge, penalize, or threaten an employee solely on the basis of such person's or employee's status as a patient suffering from a debilitating medical condition as defined in §1046(A)(2)(a) and recommended medical marijuana as defined in §1046(A)(3).

Nothing in this subdivision shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours.

An explicit employment anti-discrimination provision, such as the one above, will eliminate any federal law interference, creating a means of suing for discrimination beyond any claims of CSA preemption.¹⁴⁸ Although the broad protection of the Massachusetts Medical Marijuana Act also resulted in a possible solution to the lack of employment protection for medical marijuana users, it did not create a cause of action *within* the medical marijuana statutes, but instead created a right to sue under the state's anti-handicap discrimination statutes.¹⁴⁹ A broad statement that citizens' rights

145. See MASS. GEN. LAWS ANN. ch. 151B, § 4(16) (2018); 2012 MASS. ACTS 369 (2018).

146. See CONN. GEN. STAT. § 21a-408p(b) (2018).

147. LA. REV. STAT. § 40:1046 (2018).

148. See *Noffsinger*, 273 F. Supp. 3d 326.

149. See *Barbuto*, 78 N.E.3d at 41.

will not be abridged because of medical marijuana use could create a loophole for employers to argue that the ADA applies and renders any attempted protection null because of marijuana's illegality under the CSA, thereby making it an ineffective solution to the problem in Louisiana law.¹⁵⁰ Louisiana should therefore include an anti-discrimination provision, similar to that of Connecticut, in Louisiana's medical marijuana statutes. Such a provision will create an unambiguous means of employment protection that will exist wholly within state law and that the CSA will not affect. Such a provision might also face some opposition from employers around the state, who fear a parade of impaired workers that they are prevented from replacing with more conscientious staff.

Louisiana employers might oppose such an anti-discrimination provision in the belief that it would allow workers to come to work incapacitated. If Louisiana were to adopt the Connecticut medical marijuana anti-discrimination provision as its model, however, these fears would be unfounded.¹⁵¹ The protections granted to employees would not force employers to accept lackluster or unprofessional work behavior from individuals.¹⁵² Employees would not be allowed to abuse the protected use of medical marijuana; instead, the state would strike a balance between necessary protections for employees and freedom to conduct business for employers.¹⁵³

CONCLUSION

Louisiana's provisions governing the regulation of medical marijuana have yet to go into effect, but the state is steadily progressing towards the implementation of a statutory medical marijuana program.¹⁵⁴ Although

150. See *Coats v. Dish Network, L.L.C.*, 350 P.3d 849 (Colo. 2015).

151. CONN. GEN. STAT. § 21a-408p(b)(3) (stating that employers will still have the right to punish or terminate employees who use medical marijuana while at work and on the clock).

152. *Id.*

153. The explicit anti-discrimination provision would function in the same way as a claim under the ADA, and this provision would not be a guarantee of employment. Instead, it would be held to the same standard as a claim under the ADA, with an emphasis on the reasonableness of the employee's behavior and the employer's reasons for termination.

154. See LA. REV. STAT. § 40:966(I) (2018); *id.* § 40:1046A(2)(a). See also Mark Ballard, *LSU Board moves forward on medical marijuana contract; CEO: 'We are not a pot company'*, ADVOCATE (June 22, 2017, 12:05 PM), https://www.theadvocate.com/baton_rouge/news/education/article_063b2546-576d-11e7-b089-c76fc00501d6.html [<https://perma.cc/3WA7-UWH5>]; see also Ted Griggs, *Ready, set, grow: Southern University picks medical marijuana business vendor*, ADVOCATE (Sept. 22, 2017, 1:15 PM), <https://www.theadvocate.com/>

gaps in the statutory scheme currently exist, the Louisiana Legislature can fill these holes and protect employees with debilitating medical conditions from discrimination.¹⁵⁵ Marijuana is entirely illicit under federal law, but an anti-discrimination provision modeled off of the version in the Connecticut Palliative Use of Marijuana Act would achieve the goal of protecting employees from discrimination and avoiding federal preemption.¹⁵⁶

The provision would create a private state law cause of action under which employees could sue for protection against discrimination.¹⁵⁷ The provision would simultaneously preserve the right of employers to discipline workers who come to the workplace intoxicated, no matter their status as medical marijuana patients.¹⁵⁸ Earlier employee attempts to seek protection from employment discrimination under state medical marijuana decriminalization laws have failed because of either statutory construction or preemption. The federal court's upholding of the Connecticut provision, however, demonstrates its viability as a means of protecting those workers who would otherwise have to choose between their health and their jobs.¹⁵⁹

The Louisiana Legislature has taken a huge step forward by legalizing medical marijuana, and it is a step that will improve the lives of suffering citizens. But the Legislature must now look forward and fill the remaining gaps in citizen protections before the medical marijuana program is fully implemented, in order to give the most complete benefit to Louisiana's citizens. Louisiana should learn from its sister states and draft legislation to protect individuals who use medical marijuana for relief from symptoms of chronic illnesses. Citizens should not have to weigh their health and well-being against their hopes of gainful employment.

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baton_rouge/news/business/article_c6f33628-9f8b-11e7-9c73-0fff56cf41d9.html [https://perma.cc/5N8C-7CJS].

155. See discussion *supra* Part IV.

156. See CONN. GEN. STAT. § 21a-408p(b)(3); see also *Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F. Supp. 3d 326 (D. Conn. 2017).

157. See *Noffsinger*, 273 F. Supp. 326 (finding that the employment anti-discrimination provision created a private cause of action under Connecticut law).

158. See discussion *supra* Part IV.B; see also CONN. GEN. STAT. § 21a-408p(b)(3).

159. See, e.g., *Coats v. Dish Network, L.L.C.*, 350 P.3d 849 (Colo. 2015); *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010); *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200, 202–03 (Cal. 2008).

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