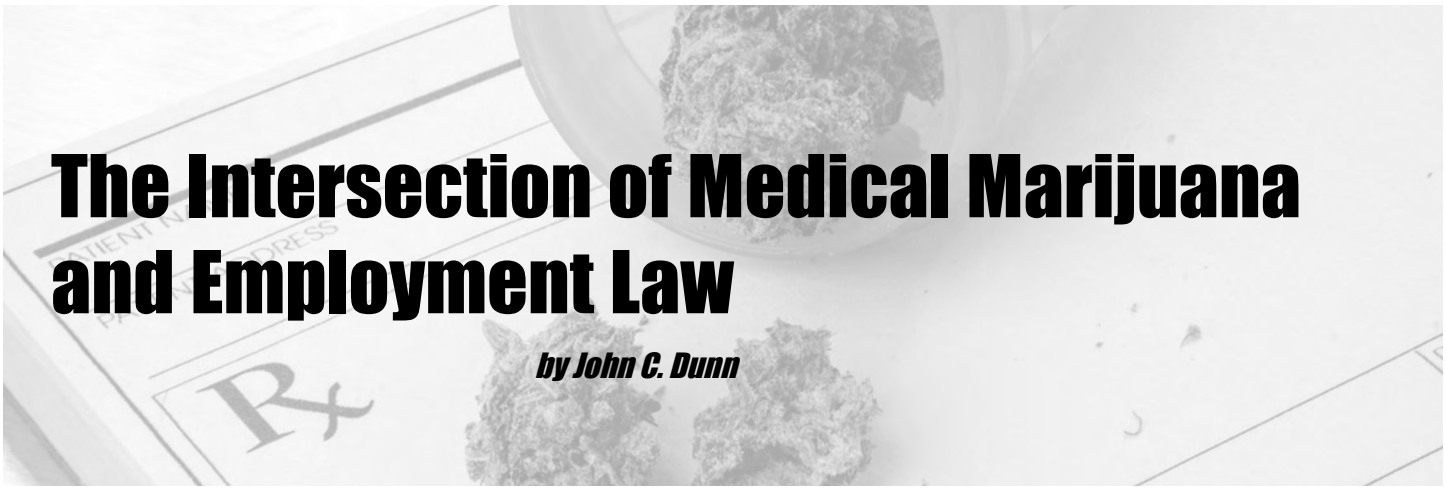

The Intersection of Medical Marijuana and Employment Law

by John C. Dunn

Introduction

As the number of states that have legalized the use of medical marijuana expands, employers are having to grapple with how they will address the questions that are likely to arise from the potential medical and/or recreational drug use by their employees. To complicate matters, medical marijuana is commonly used to treat conditions or impairments that may qualify as a disability under applicable state or federal employment anti-discrimination statutes. In the event such a situation arises, it is crucial for employers and their counsel to have a thorough understanding of both the employee's and employer's rights, duties, and obligations under the different statutory schemes used in the various state medical marijuana laws. This article will provide an overview of these statutory schemes and emphasize the key provisions within those statutes, as well as a focused discussion on the extent to which medical marijuana users are entitled to employment protections under the different approaches taken by states with respect to this question.

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A Brief History of Marijuana Regulation

At least since the passage of the Uniform Narcotic Drug Act in 1932 and the Marihuana Tax Act in 1937, the federal government has attempted to closely regulate the sale and use of marijuana, whether for medical purposes or otherwise.[1] Marijuana regulation at this time was not limited to the federal government and by 1937 every state had enacted some form of legislation seeking to regulate marijuana.[2] The current federal prohibition on marijuana was ushered in by the passage of the Controlled Substances Act[3] (the "CSA") in 1970. There was no significant movement towards legalization until November 6, 1996, when voters in California cast their ballots in favor of Proposition 215, which made California the first state to formally legalize the use of medical marijuana for the general public since the 1930s.[4]

There are currently thirty-one states, in addition to the District of Columbia, Guam and Puerto Rico, that have a comprehensive legal structure for public use of medical marijuana.[5] There are an additional fifteen states that permit, or provide a legal defense for, the use of "low THC" products for medical purposes in limited circumstances. The number of states and territories that allow for medical marijuana use by the general public is also likely to increase in the near future. On November 6, 2018, both Utah and Missouri will vote on whether to legalize medical marijuana and Michigan and North Dakota will decide the same with respect to recreational use. It is also expected that the legislatures in New Jersey and New York will consider recreational use laws next year.[6] Moreover, the Commonwealth of the Northern Mariana Islands, a U.S.

Territory, just legalized both recreational and medical marijuana on September 21, 2018.[7]

In spite of all of the action by U.S. states and territories, marijuana continues to be illegal under federal law as a Schedule I drug under the CSA.[8] The enforcement of this prohibition by federal authorities in the states that had legalized marijuana saw a brief respite during the Obama administration,[9] but this relaxed approach was replaced by a policy of strict enforcement by current Attorney General Jeff Sessions and the Department of Justice under the Trump administration.[10]

Despite the mixed signals coming from the Executive Branch, Congress has continued to introduce legislation that would legalize marijuana in varying degrees.[11] To date, these legislative efforts have had little success in moving the needle towards legalization. Notwithstanding the lack of success, certain members of Congress have expressed confidence in their ability to pass some form of legislation in the next few years to legalize marijuana.[12] This optimistic view got a small shot in the arm when President Trump stated his support for the bi-partisan legislation titled Strengthening the Tenth Amendment Through Entrusting States ("STATES") Act, introduced by Senators Elizabeth Warren (D-MA) and Cory Gardner (R-CO).[13] Subject to a few specific limitations, the STATES Act would leave the legality of marijuana up to the states to decide, in that it would create a carve-out from the CSA for those states that have legalized marijuana.

Medical Marijuana and Employment Law

Within the thirty-one states that allow the use of medical marijuana, there are three basic approaches to the interaction between medical marijuana use and employment. Until recently, the near consensus conclusion among courts has been that individuals were not entitled to employment protections with respect to their use of medical marijuana and employers were free to enforce a zero-tolerance drug testing policy. Medical marijuana users' lack of success has not been for a lack of effort or creativity. Plaintiffs have brought claims under a variety of causes of action and have utilized numerous different theories to challenge that position. Similarly, courts have rejected employment-related claims by medical marijuana users on a number of grounds from the lack of a private right of action to the fact that marijuana remains illegal under federal law.

As the prevalence of medical marijuana has increased, there has been an emergence of employment protections for medical marijuana users. To be clear, the availability of employment protections is a minority approach under the current laws, but apparent increase in acceptance of medical marijuana may signal a shift in this area. As noted above, there are three general categories for the various approaches states have taken with respect to the employment implications of an employee's use of medical marijuana, each of which is addressed below.

States where an employer has an express duty to accommodate.

Currently, there are ten states that have passed medical marijuana statutes with some form of employment protection for medical marijuana users.[14] For example, under the Delaware Medical Marijuana Act, "an employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person" based on that person's status as a medical marijuana cardholder or a "positive drug test for marijuana components or metabolites . . . ."[15] The majority of the statutes within this category allow an employer to take action against an employee who is under the influence or in possession of marijuana while on the employer's property or during work time. Similarly, many statutes contain a carve-out from the employment protections for employers who can prove that if the employer had not taken the challenged adverse action, the employee's status as a medical marijuana user would cause the employer to be in violation of federal law or to lose a federal monetary benefit.[16]

Due to the fact that these statutes are all relatively recent (over half of the laws have been passed since the start of 2013), there are only a small number of reported cases interpreting the employment protections provided under these statutes. Thankfully, one of these cases, *Noffsinger v. SSC Niantic Operating Co. LLC*,[17] provides a thorough analysis of many of the legal questions that are likely to arise in cases brought under statutes within this category, including issues related to the interplay of employment protections under state law and the criminality of marijuana under federal law. The case arose when SSC Niantic Operating Company, LLC d/b/a Bride Brook Nursing & Rehabilitation Center ("Bride Brook") rescinded a job offer it had made to Katelin Noffsinger "because she [ ] tested positive for cannabis."[18] Ms. Noffsinger filed suit against Bride Brook, alleging that it violated the employment protections set forth in Connecticut's Palliative Use of Marijuana Act ("PUMA") by rescinding her job offer on the basis of her status as a "qualifying patient" under PUMA.[19]

Bride Brook moved to dismiss Ms. Noffsinger's PUMA claims. Bride Brook argued that as a nursing facility, it "is subject to federal regulations that require compliance with federal, state, and local laws generally" and therefore, its refusal to hire Ms. Noffsinger was "required by federal law or required to obtain federal funding." Alternatively, Bride Brook argued that PUMA's employment protections were preempted by various federal laws.[20] In rejecting these arguments, the court emphasized that "the act of merely hiring a medical marijuana user does not itself constitute a violation of . . . any [ ] federal, state, or local law," and as such, Bride Brook had "not established the sort of 'positive conflict'" necessary to find conflict preemption.[21] Ultimately, the court denied Bride Brook's motion to dismiss and in a later opinion granted summary

judgment in favor of Ms. Noffsinger on her PUMA claim.[22]

The Superior Court of Rhode Island reached the same conclusion in a case involving very similar facts and a similar statutory provision.[23] Notably, the Rhode Island court also concluded that by its inclusion of the provision that "an employer [is not required] to accommodate the medical use of marijuana in the workplace," the Rhode Island "General Assembly contemplated that the statute would, in some way, require employers to accommodate the medical use of marijuana *outside* the workplace."[24] These cases show that employers' in these states (and other states within this category) should be prepared to accommodate the use of medical marijuana by an employee or have a legitimate and defensible basis for refusing to do so.

States where an employer has no duty to accommodate.

The medical marijuana laws in several states expressly provide that they do not govern, nor offer any additional protection, with respect to medical marijuana users in the employment context.[25] In these states, an employer is free to terminate, demote, or otherwise discipline an employee because of his or her use of medical marijuana or status as a participant in the state's medical marijuana program. For example, Ohio's medical marijuana law states that employers are free to refuse to hire, discharge, discipline, or otherwise take adverse actions against applicants or employees because of the person's use of medical marijuana.[26] Other laws in this category make it clear that they do "not limit the ability of an employer to establish, continue, or enforce a drug-free workplace program or policy."[27] Some states have taken the additional step of stating that the law "does not create a cause of action against an employer for wrongful discharge or discrimination."[28] In other words, the medical marijuana laws in these states have no application to the employment relationship. The Supreme Court of Montana described the approach of the statutes in this category as follows:

> [Montana's Medical Marijuana Act (the "MMA")] is essentially a "decriminalization" statute that protects qualifying patients, caregivers and physicians from criminal and civil penalties for using, assisting the use of, or recommending the use of medical marijuana. However, the MMA does not provide an employee with an express or implied private right of action against an employer. The MMA specifically provides that it cannot be construed to require employers "to accommodate the medical use of marijuana in any workplace."[29]

Ultimately, states in this category have decided to expressly provide employers with the right to terminate individuals for

their use of medical marijuana.

States where an employer's duty to accommodate off-duty use is open for interpretation.

The most common approach states have taken is to avoid answering the question of whether people may be punished by their employer for purely off-duty use of medical marijuana.[30] The majority of the laws in this category address one specific situation within the employment context, by stating something to the effect that employers are not required to offer an "accommodation of medicinal use of cannabis on the property or premises of a place of employment or during the hours of employment."[31] This statement obviously leaves open the question of whether an employee is entitled to a reasonable accommodation with respect to his or her purely off-duty use of medical marijuana. In cases brought under these statutes, the majority of courts have reached the conclusion that employers have no duty to accommodate an employee's use of medical marijuana regardless of whether such use is off-duty, at home, and only on the weekends. In explaining their reasoning, many of the courts have stressed the fact that marijuana remains illegal under federal law and therefore, an employer may refuse to accommodate a violation of federal law (at least without a clear directive under state law to the contrary).

An illustrative case for this type of approach is *Ross v. RagingWire Telecommunications, Inc.*,[32] in which the California Supreme Court rejected Gary Ross' assertion that the California Compassionate Use Act[33] (the "CCUA") required employers to accommodate employees' off-duty use of marijuana. Ross was terminated from his employment after he failed a drug test. The essence of Ross' argument was that under the CCUA, medical marijuana held the same status as a prescription medication with respect to an employer's obligation to offer a reasonable accommodation.

The court wholly disagreed with Ross' assertions. The court noted that nothing in the background and history of Proposition 215 (the ballot initiative through which the CCUA was approved) indicated that voters intended to grant employment protections to medical marijuana users. In support of its reasoning, the court stated that the Act "does not eliminate marijuana's potential for abuse or the employer's legitimate interest in whether an employee uses the drug."[34] The court further emphasized the view that marijuana "lack[ed] any 'currently accepted medical use in treatment in the United States' . . . ."[35] Ultimately, the court dismissed Ross' claim because no "state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law . . . ."[36]

As noted above, courts that have addressed claims under similar statutes have generally reached the same conclusion as the *Ross* court, however, the Supreme Judicial Court of Massachusetts took an entirely different approach in *Barbuto v. Advantage Sales & Marketing, LLC*.[37] In that case, the court focused on language in the Massachusetts medical marijuana act that protects individuals from being "penalized under Massachusetts law in any manner, or denied any right or privilege . . ." due to their use of marijuana under the statute.[38] The court concluded that Ms. Barbuto, who used medical marijuana to treat Crohn's disease, had a "right or privilege" to a reasonable accommodation of her "handicap" under Massachusetts' "handicap discrimination law."[39]

Contrary to the majority of cases involving almost the same argument and similar statutory provisions, the *Barbuto* court used a broad reading of the terms "right or privilege" to find that an employee's use of medical marijuana was protected by a generally applicable anti-discrimination statute that is entirely separate and independent from the medical marijuana law. Another noteworthy point from this case was the court's view that under Massachusetts law, "medically prescribed marijuana by a qualifying patient is as lawful as the use and possession of any other prescribed medication."[40] Again, this was an argument that had been flatly rejected by a number of courts in other jurisdictions. In any event, given the fact that most of the jurisdictions with statutes that fall under this category have addressed and rejected the same arguments, it is unlikely that the *Barbuto* case will cause a significant shift in courts' interpretations of these statutes.

Potential Developments in the Future

Given the current trend, it is safe to assume that the legalization of marijuana, both for medical and recreational use, will continue to expand on the state level. With that said, the most significant impact on employers' duty to accommodate would come from the passage of the STATES Act or some form of similar federal legislation. Notably, the growing movement of states authorizing both recreational and medical marijuana has slightly altered federal lawmakers' perception on marijuana legislation, changing it from a "law and order" issue to one of economic growth and federal regulation.[41] The reason being, as long as federal law contains a blanket prohibition on marijuana, businesses that are authorized to operate in the marijuana industry under applicable state law face numerous obstacles when it comes to banking and finance (which in some instances forces these businesses to operate essentially on a cash-only basis) due to marijuana's illegal status under federal law.[42]

In the event the STATES Act, or legislation similar to it, is somehow successful in Congress, there would likely be a significant spike in the number of states where employers would be obligated to accommodate off-duty use of medical marijuana. The reason the duty to accommodate would likely increase is because many of the cases involving statutes that do not expressly address the question of off-duty use were decided with the court placing a strong emphasis on the fact that

marijuana remained illegal under federal law. If, however, marijuana was no longer illegal under federal law, employees would have a significantly stronger argument that they are entitled to protection from an adverse employment action that is motivated by their use of medical marijuana, whether such protection arises from the state disability discrimination law, a lawful activity statute, or the medical marijuana statute itself.

Conclusion

The persistent expansion of legalized marijuana for both medical and recreational purposes is forcing many employers to consider questions related to marijuana use by employees. Although Nebraska has not legalized marijuana in any form or for any purpose, attorneys should be prepared to begin fielding questions from clients operating in other states regarding medical marijuana and whether they are required to accommodate the use of medical marijuana by their employees.

Endnotes

1 *See* Richard J. Bonnie & Charles H. Whitebread II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1010 (1970).

2 *Id*. at 1035.

3 21 U.S.C. § 801.

4 *See* Cal. Health & Safety Code § 11362.5. Prior to California's approval of Proposition 215, medical marijuana had been decriminalized in several states in the 1970s.

5 Nat'l Conference of State Legislators, *State Medical Marijuana Laws* (last visited 09/30/2018), http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.

6 *Id*.

7 German Lopez, *Republicans in a U.S. territory just legalized marijuana*, VOX.COM (Sept. 21, 2018), https://www.vox.com/policy-and-politics/2018/9/21/17886612/northern-mariana-islands-marijuana-legalization.

8 *See* 21 U.S.C. § 812.

9 *See* Brady Dennis, *Obama administration will not block state marijuana laws if distribution is regulated*, THE WASHINGTON POST, (Aug. 29, 2013), https://www.washingtonpost.com/national/health-science/obama-administration-will-not-preempt-state-marijuana-laws--for-now/2013/08/29/b725bfd8-10bd-11e3-8cdd-bcdc09410972_story.html?utm_term=.0c9adffd5774.

10 *See* Matt Zapatosky, Sari Horwitz, & Joel Achenbach, *Use of legalized marijuana threatened as Sessions rescinds Obama-era directive that eased federal enforcement*, THE WASHINGTON POST, (Jan. 4, 2018) https://www.washingtonpost.com/

world/national-security/sessions-is-rescinding-obama-era-directive-for-feds-to-back-off-marijuana-enforcement-in-states-with-legal-pot/2018/01/04/b1a42746-f157-11e7-b3bf-ab90a706e175_story.html?utm_term=.cf920c0fba34.

[11] *See* H.R. 1013, 114th Cong. (2015) (Regulate Marijuana Like Alcohol Act); S. 2237, 114th Cong. (2015) (the Ending Federal Marijuana Prohibition Act of 2015); H.R. 1227, 115th Cong. (2017) (Ending Federal Marijuana Prohibition Act of 2017); S. 3032, 115th Cong. (2018) (Strengthening the Tenth Amendment Through Entrusting States Act or the STATES Act).

[12] Alexandra Oliveira & Alison Spann, *Republican lawmakers optimistic about passing cannabis legislation*, THE HILL (last visited 09/30/2018), https://thehill.com/video/lawmaker-interviews/371854-republican-lawmakers-optimistic-about-passing-cannabis-legislation (Representative Matt Gaetz (R-Fla.) "told The Hill he's 'extremely optimistic' that his legislation will pass this year.").

[13] *See* Evan Halper, *Trump says he is likely to support ending blanket federal ban on marijuana*, L.A. TIMES, (June 8, 2018), http://www.latimes.com/politics/la-na-pol-trump-marijuana-20180608-story.html.

[14] As of October 1, 2018, the following states have medical marijuana laws that expressly provide for some level of employment protection for authorized users: Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Oklahoma, and Rhode Island. See Ariz. Rev. Stat. Ann. § 36–2813; Del. Code Ann. tit. 16, § 4905A; 410 Ill. Comp. Stat. 130/40; Me. Rev. Stat. tit. 22, § 2423–E; Minn. Stat. § 152.32; Nev. Stat. § 453A.800; N.Y. Pub. Health Law § 3369(2); Okla. Stat. tit. 63, § 420; R.I. Gen. Laws § 21–28.6–4. New York's statute is unique in that it protects medical marijuana users by stating that "a certified patient shall be deemed to [ ] hav[e] a 'disability' under article fifteen of the executive law (human rights law) [and] section forty-c of the civil rights law." N.Y. Pub. Health Law § 3369(2).

[15] Del. Code Ann. tit. 16, § 4905A(a)(3).

[16] *Id*.

[17] 273 F. Supp. 3d 326 (2017).

[18] *Noffsinger v. SSC Niantic Operating Co.*, LLC, 273 F. Supp. 3d 326, 332 (2017). Ms. Noffsinger's positive drug test was caused by her consumption of a pill containing synthetic marijuana (similar to Marinol) at night to reduce the symptoms of her post-traumatic stress disorder.

[19] *Id*.

[20] It is also important to note that the court also found an implied private right of action in PUMA's anti-discrimination provisions. The court reasoned that the legislature had intended to provide for a private right of action, because without one, PUMA's anti-discrimination provisions "would have no practical effect, because the law does not provide for any other enforcement mechanism." *Id*. at 340.

[21] *Id*. at 336, 341.

[22] *Noffsinger v. SSC Niantic Operating Co.*, LLC, No. 3:16-CV-01938, 2018 WL 4224075 (D. Conn. Sept. 5, 2018). In its opposition to summary judgment, Bride Brook argued that its decision was required by the federal Drug Free Workplace Act (the "DFWA") and the False Claims Act. The court rejected these arguments, noting that the "DFWA does not require drug testing . . . [n]or does the DFWA prohibit federal contractors from employing someone who uses illegal drugs outside of the workplace . . . ." Id. at *3. For the same reason, "it would not constitute fraud on the federal government for defendant to hire plaintiff." *Id*. at *4.

[23] *See Callaghan v. Darlington Fabrics Corp.*, No. PC-2014-5680, 2017 WL 2321181, at *1, *10 (R.I. Super. May 23, 2017) (noting that courts "will undoubtedly face an onslaught of litigation concerning the lawful use of marijuana" and concluding that the defendant violated Rhode Island's medical marijuana law when it denied the platiniff "employment based on the fact that she could not pass the drug screening.").

[24] *Id*. at *7 (emphasis in original).

[25] Florida, Georgia, Montana, Ohio and Washington. See Fla. Stat. § 381.986(15); Ga. Code Ann. § 16-12-191(f); Mont. Code Ann. § 50-46-320; Ohio Rev. Code Ann. § 3796.28; Wash. Rev. Code § 69.51A.060(7).

[26] Ohio Rev. Code Ann. § 3796.28.

[27] Fla. Stat. § 381.986(15). *See also* Ga. Code Ann. § 16-12-191(f).

[28] Fla. Stat. § 381.986(15).

[29] *Johnson v. Columbia Falls Aluminum Co., LLC*, 2009 MT 108N, ¶ 5, 350 Mont. 562, 213 P.3d 789 (2009) (internal citations omitted).

[30] Alaska, California, Colorado, Hawaii, Maryland, Michigan, New Hampshire, New Jersey, North Dakota, Oregon, and Vermont. See Alaska Stat. § 17.37.040; Cal. Health & Safety Code § 11362.785(a); Colo. Const. art. XVIII, § 14(10)(b); Haw. Rev. Stat. § 329-122(e)(2)(B); Md. Code Ann., Health-Gen. § 13-3313; Mich. Comp. Laws § 333.26427(c)(2); N.H. Rev. Stat. Ann. § 126-X:3(III)(c); N.J. Stat. Ann. § 24:6I-14; N.D. Cent. Code § 19-24.1-34(2); Or. Rev. Stat. § 475B.794(2); Vt. Stat. Ann. tit. 18, § 4474c(a)(1)(B).

[31] Cal. Health & Safety Code § 11362.785(a).

[32] 174 P.3d 200 (Cal. 2008).

[33] Cal. Health & Safety Code § 11362.5.

[34] *Ross v. RagingWire Telecomms.*, Inc., 42 Cal. 4th 920, 927, 174 P.3d 200, 205 (2008).

[35] *Id*.

[36] *Id*. at 926, 174 P.3d at 204.

[37] 477 Mass. 456, 78 N.E.3d 37 (2017).

[38] Mass. Gen. Laws Ann. ch. 94C App., § 1-4. Please note that the version of the statute interpreted by the Barbuto court is scheduled to be replaced by 2017 Mass. Legis. Serv. Ch. 57 (H.B. 3818) upon the earlier occurrence of the execution of a transfer agreement between the Department of Public Health and the Cannabis Control Commission or December 31, 2018.

[39] *Barbuto v. Advantage Sales & Mktg., LL*C, 477 Mass. 456, 464, 78 N.E.3d 37, 45, n. 7 (2017).

[40] *Id*. at 464, 78 N.E.3d at 45; Ross, 42 Cal. 4th at 927, 174 P.3d at 205.

[41] Senator Gardner noted that one of the primary goals of the STATES Act would be to remove federal "interfere[nce] in any states' legal marijuana industry" and Senator Warren argued that "[o]utdated federal marijuana laws have . . . hindered economic growth . . . ." *See* Press Release, Senators Elizabeth Warren & Cory Gardner (June 7, 2018), https://www.gardner.senate.gov/newsroom/press-releases/gardner-warren-joyce-and-blumenauer-unveil-bicameral-bipartisan-legislation-to-protect-state-marijuana-policies.

[42] *See* Aaron Klein, *Report: Banking regulations create mess for marijuana industry, banks, and law enforcement*, Brookings Center on Regulation and Markets, (April 23, 2018), https://www.brookings.edu/research/banking-regulations-create-mess-for-marijuana-industry-banks-and-law-enforcement/ ("Banks are allowed to work with marijuana businesses, as long as they file reports and comply with a heavy set of regulations. Treasury Department guidance states that banks are still required to file suspicious activity reports even in states where marijuana-related activity has been legalized.").