

Puff, Puff, Pass:

A Legal, Business and Political Perspective on the Law of Medical and Recreational Marijuana Production and Use

Presenters

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Overview

Americans' attitudes are changing – at least in some respects – towards medical and recreational marijuana use. In turn, these changes are quickly leading to a diverse legal patchwork of legalization and regulation of the “gateway” drug, and lax enforcement of Federal law enforcement in states that permit sale and use. While many remain resistant to these changes, some state legislatures now see legalization as the antidote to bloated budgets and broken pension systems. Employers, educators, law enforcement and businesses should be prepared to respond to these changes as the legal environment changes.

The shift in perspectives on the law of marijuana use will be a focal point of this workshop, and will help to highlight the future of legalization and regulation of the drug. Presenters will review existing state and federal law to provide an overview of the legal landscape. From these basic tenants, the presenters will each analyze the effect of these laws, and of changing public attitudes, on how employers, educators, and law enforcement can – and must – adapt. The focus will be on how employers and educators may implement effective policies and procedures, and how to avoid potential pitfalls, particularly in light of conflicting obligations under federal and state disability-related laws. The presenters will also address the evolving policy agenda in the states and at the Federal level. Politics is a large part of the debate driving new marijuana laws and policies. The discussion will address the variety of political viewpoints, and the influences of outside interest groups and the business community.

- I. Overview
 - a. A generational perspective on medical and recreational marijuana use
 - b. State law and case law interpretations of the same
 - c. Practical implications of the evolving legal and regulatory landscape
 - d. The evolving policy agenda
- II. Origins of “Reefer Madness”
 - a. Marijuana Tax Act of 1937
 - i. Required growers, buyers, and users of marijuana to register and file certain reports along with paying a tax
 - b. Reefer Madness film (1938)
 - i. Portrayed the dangers of marijuana use
 - ii. Used to support anti-marijuana message



- III. States legalize medical marijuana
 - a. Currently, 20 states and the District of Columbia have passed laws dealing with medical marijuana
 - b. Laws vary by state, including the protection provided by state
 - c. Likely will be more states addressing the issue following the recent trends including the legalization of recreational pot in Colorado and Washington, and new referenda in Florida
 - d. Recent developments
 - i. Minnesota has legalized medical marijuana in pill or liquid form for patients who suffer from severe or fatal illnesses
 - ii. Washington DC has decriminalized marijuana possession of less than one ounce
 - iii. Florida allowed limited use of medical marijuana
- IV. Statistics on use of medical marijuana
 - a. Not all states require registration
 - i. California registration is voluntary
 - b. Through Fiscal Year 2013/2014, California's voluntary Medical Marijuana Program has issued approximately 71,000 ID cards to medical marijuana patients
 - c. As of October 2013, approximately 58,000 patients and 29,000 caregivers are part of the Oregon Medical Marijuana Program
 - d. As of December 2013, approximately 120,000 active registered qualified patients and 27,000 caregivers are part of the Michigan Medical Marijuana Program
 - e. Who is using?
 - i. Age distribution: majority of patients are under the age of 40
 - 1. CA: 72% are between 17 and 40
 - 2. CO: 61% are male and an average of age of 39; 31% are female and have an average age of 40
 - 3. NV: 53% are under 44
 - 4. *The age distribution of medical marijuana use is similar to that of recreational users
- V. States with medical marijuana laws
 - a. Alaska, California, Nevada, Oregon, Washington, Arizona, New Mexico, Colorado, Illinois, Michigan, Maine, New Jersey, Connecticut, Delaware, Hawaii, Massachusetts, Montana, New Hampshire, Rhode Island, Vermont
 - b. Most recently: Florida
 - i. The Compassionate Medical Cannabis Act allows a non-euphoric strain of marijuana to be used for the treatment of epilepsy, cancer and amyotrophic sclerosis (ALS)
 - ii. Received bipartisan support
- VI. Michigan Medical Marijuana Act (MMMA)
 - a. *Casias v. Wal-Mart Stores, Inc.*, 764 F. Supp. 2d 914 (W.D. Mich. 2011)
 - i. Prior to this ruling, assumed MMMA applied to private employers
 - ii. However, judge concluded that MMMA does not regulate private employment
 - iii. Judge interpreted the language of the statute as not intending to impact private employment
 - iv. MMMA meant to act as a potential defense to criminal prosecution or action by the state
 - v. Language in MMMA appeared to apply to disciplinary actions taken by private employers
 - 1. Prohibits "civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marijuana in accordance with this act"
 - vi. Judge determined that "business" modifies "licensing board or bureau" and does not stand alone
 - vii. Nothing in the MMMA that demonstrates an intent to change at-will employment in Michigan



- viii. Additional language appeared to support application to private employment
 - ix. Nothing requires “an employer to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana”
 - x. Judge refused to apply a negative inference to this provision
- b. *Casias v. Wal-Mart Stores, Inc.* affirmed the ruling of the District Court
 - i. MMA does not regulate private employment
 - ii. Thus, no protection from discharge despite being a registered user
- VII. *Roe v. TeleTech Customer Care Management (Colo.) LLC*, 257 P.3d 586 (2011)
 - a. Washington Supreme Court concluded that the “[Medical Use of Marijuana Act] does not prohibit an employer from discharging an employee for medical marijuana use, nor does it provide a civil remedy against the employer
 - b. Court rejected claim for wrongful termination in violation of public policy
 - c. Act provides, “nothing in this chapter requires any accommodation of any on-site medical marijuana use in any place of employment”
 - d. No protection even for use outside of workplace
- VIII. Washington and Colorado
 - a. On November 6, 2012, voters in both states voted to legalize recreational use of marijuana (Amendment 64 in CO and Initiative 502 in WA)
 - b. Impact on employers is not immediately known and guidance from the courts will likely take time
 - c. Colorado began allowing the sale of recreational marijuana in January 2014
 - d. Amendment 64 specifically provides the following guidance for employers
 - i. “Nothing in this section is intended to require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees”
- IX. Oregon Medical Marijuana Act (OMMA)
 - a. *Emerald Street Fabricators, Inc. v. Bureau of Labor and Indus.*, 348 Ore. 159 (2010)
 - b. Oregon Supreme Court concluded that employers are not required to accommodate employees who are using medical marijuana under the OMMA
 - c. Federal law preempts the OMMA
 - d. Employer at issue discharged the employee for engaging in illegal drug use and thus, OMMA did not apply
 - e. Court specifically noted that Washington and California do not require accommodation of off-duty use of medical marijuana
 - f. No need for employers to engage in the interactive process regarding use of medical marijuana
- X. California Compassionate Use Act of 1996 (CUA)
 - a. *Ross v. Raging Wire Telecommunications, Inc.*, 42 Cal. 4th 920 (2008)
 - i. California Supreme Court concluded that the operative provisions of the CUA do not speak to employment law
 - ii. No duty to accommodate marijuana use even if at home
 - iii. Regardless of no impact on job duties or performance
 - iv. Failed to state a claim under the CA Fair Employment and Housing Act for disability discrimination
 - v. CA employers have the right to enforce pre-employment drug screen programs without exceptions for drugs taken for legitimate medical reasons
 - vi. Likely would be expanded outside of pre-employment drug screening



- XI. Colorado Constitution, Article XVIII
 - a. *Coats v. Dish Network*, 303 P.3d 147 (2013)
 - i. Colorado Court of Appeals analyzed the relationship between Colorado’s medical marijuana law and Colorado’s Lawful Activities Statute
 - ii. The Lawful Activities Statute prohibits employers from taking adverse employment actions against employees who engage in lawful activities outside of work
 - iii. The Court concluded that since marijuana use remains unlawful under federal law (for medical purposes or otherwise), off duty medical marijuana use is not protected as “lawful activity” under Colorado’s Lawful Activities Statute
 - iv. Thus, employer lawfully discharged former employee for off duty use of medical marijuana
 - v. Case provides guidance for employers in other states dealing with similar lifestyle laws and medical marijuana (i.e. Illinois)
- XII. Rhode Island, Maine, Delaware & Connecticut
 - a. Rhode Island, Maine, Delaware, and Connecticut prohibit discrimination against those complying with state medical marijuana laws
 - b. Rhode Island’s Medical Marijuana Act provides “no school, employer, or landlord may refuse to enroll, employ or lease to or otherwise penalize a person solely for his or her status as a cardholder”
 - c. Maine’s Medical Marijuana Act provides “a school, employer or landlord may not refuse to enroll or employ or lease to or otherwise penalize a person solely for that person’s status as a registered patient or a registered primary caregiver unless failing to do so would put the school, employer or landlord in violation of federal law or cause it to lose a federal contract or funding”
 - d. Delaware’s Medical Marijuana Act provides that: “unless a failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or federal regulations, an employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon either of the following:
 - i. A.) the person’s status as a cardholder; or
 - ii. B.) A registered qualifying patient’s positive drug test for marijuana components or metabolites, unless the patient used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment”
 - e. Nothing in the Delaware Act requires “an employer to allow the ingestion of marijuana in any workplace or to allow any employee to work while under the influence of marijuana, except that a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana”
 - f. Connecticut Medical Marijuana Law Provides:
 - i. “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 or primary caregiver under sections 21a-408 to 21a-408n, inclusive”
 - ii. “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”
- XIII. Marijuana and federal law
 - a. Marijuana remains on Schedule I of the Controlled Substances Act (CSA)
 - b. *Gonzalez v. Raich*, 545 U.S. 1 (2005)
 - i. Possession of marijuana is illegal under the CSA even if for medical purposes
 - ii. Rejected claim that California’s CUA protected individuals from application of the CSA under federal law



- c. Drug-Free Workplace Act
 - i. Employers that are federal contractors or grantees are required to adhere to this Act
 - ii. Use or possession of marijuana is specifically prohibited by the Act
 - iii. Requires good faith effort to maintain a drug-free workplace
 - iv. Requirements of Act “co-exist” with state and local laws
- d. In 2009, 2011, and 2013, DOJ issued guidelines to prosecutors in states with medical marijuana laws
 - i. Enforcement priorities include
 - 1. Preventing distribution to minors
 - 2. Preventing revenue from going to criminal enterprises
 - 3. Preventing distribution to states where medical marijuana is still illegal
 - 4. Preventing drug driving
- e. Department of Transportation
 - i. Issued notice in response to DOJ Guidelines
 - 1. “The Department of Transportation’s Drug and Alcohol Testing Regulation – 49 CFR Part 40, at Section 40.151 - does not authorize ‘medical marijuana’ under a state law to be a valid medical explanation for a transportation employee’s positive drug test result.”
- f. Drug Enforcement Agency (DEA)
 - i. In April 2013, the DEA updated its own position on marijuana
 - ii. Smoked marijuana is not medicine
 - iii. Marijuana is dangerous to users and non-users
 - iv. Despite the DOJ’s guidelines from 2009, 2011, and 2013, the federal government has not relaxed its policy on “medical marijuana”

PRACTICAL IMPLICATIONS OF MEDICAL AND RECREATIONAL USE

- XIV. Practical implications – employment
 - a. Drug testing in the workplace
 - b. Accommodation under the Americans with Disabilities Act (ADA), impact on the Family Medical Leave Act (FMLA), Discipline and Safety
 - c. Consideration in states where medical or recreational marijuana use is prohibited
- XV. Drug testing and positive test results
 - a. Many employers maintain drug testing policies for job applicants and/or following workplace injuries
 - b. Concern arises when applicant/employee tests positive based on legal use of medical marijuana
 - i. Is the applicant/employee protected?
 - 1. In the majority of cases, the answer is “no”
 - c. As noted previously, most states do not require accommodation of use of medical marijuana, even if off-duty (however, see Delaware law)
 - d. Additionally, employers may want to consider whether drug testing is really necessary for particular positions
 - i. Does the position deal with safety (i.e. hi-lo driver v. receptionist)
 - ii. How reliable is your test (blood v. urinalysis)?
 - e. Most available testing can only say that marijuana was used in the past, not whether the applicant/employee is currently under the influence



- f. Employers not required to allow employees to work “under the influence” (even in Delaware)
 - i. However, unlike with alcohol, harder to determine what it means to be “under the influence”
 - 1. Is someone who smoked pot two weeks ago “under the influence” today?
 - g. Drug testing policies, like other policies, must be uniformly applied
 - i. Must have safeguards in place to prevent false positive tests
 - ii. Must still follow any applicable state laws regarding drug testing (i.e. Iowa, Florida, and Minnesota have detailed state laws dealing with employer drug testing)
- XVI. Accommodation under the ADA
 - a. Medical marijuana is intended to alleviate the symptoms of some underlying medical condition (i.e. glaucoma, cancer, HIV)
 - b. Use of “medical” marijuana raises potential concerns under the ADA
 - i. The ADA requires covered employers to engage in the interactive process regarding employee disabilities
 - 1. Interactive process requires an individualized analysis of the essential functions of the specific job and the employee’s specific restrictions
 - ii. While most states are not going to require the employer to accommodate the use of medical marijuana, there still may be a duty to accommodate the underlying medical condition
 - 1. For example, an employee that is going through chemotherapy and is using medical marijuana to help with a loss of appetite likely would not be protected from zero tolerance drug policy
 - 2. However, employer would still need to engage in the interactive process to determine if a reasonable accommodation is needed for the underlying cancer treatments (i.e. time off for seeking treatment)
 - c. Even under the ADA, an individual who is “currently engaging” in illegal drug use is not protected
 - i. While state law may have legalized the use of medical marijuana, federal law still considers the use of marijuana illegal, regardless of the reason for use
 - ii. No need to accommodate if use causes a direct threat to the health or safety of other individuals in the workplace
 - 1. Must be a high probability of substantial harm
- XVII. State disability laws
 - a. In addition to the ADA, some states have their own disability laws that need to be considered regarding whether they are applicable to the use of medical marijuana
 - b. For example, some state laws provide additional protections for prescription drugs
- XVIII. Impact on FMLA
 - a. FMLA provides unpaid leave to deal with a serious health condition
 - i. What if employee wants to take FMLA to smoke pot in order to relieve symptoms of HIV?
 - b. FMLA analysis should be focused on the serious health condition, not the treatment
- XIX. Discipline decisions
 - a. Make sure employment policies are clear and enforced
 - b. Off-duty v. on the job conduct
 - i. Various states treat an employer’s ability to punish for off-duty conduct differently
 - ii. Some states like Colorado have “lifestyle laws” that prohibit employers from taking disciplinary action based on lawful conduct outside of the workplace
 - c. Union vs. non-union environment
 - i. Arbitrators often view off-duty misconduct differently than on-the-job misconduct



- ii. Whether there is an impact on work performance based on off-duty medical marijuana use will likely be important
 - iii. Analyze language in the applicable collective bargaining agreement
 - d. Importance of documentation
 - i. Regardless of the reason for the discipline, still important to document decisions
 - ii. Decisions should be made for legitimate, non-discriminatory reasons
 - iii. Decisions should be consistent
- XX. Safety concerns
 - a. Occupational Safety and Health Act (OSHA) requires employers to provide a safe workplace
 - b. Certain jobs are going to be more safety sensitive than others (i.e. hi-lo drivers v. receptionist)
 - c. Potential liability issues for allowing employees to be under the influence at work even if for medical purposes
- XXI. Considerations for states prohibiting discrimination for medical marijuana
 - a. Make sure drug testing policies are narrowly tailored to the specific law of that state (i.e. carry out use of medical marijuana in compliance with state law if necessary)
 - b. Consider asking employers to provide documentation of authorized use prior to any drug test
 - c. Focus on employee's conduct at work
 - d. Seek legal counsel before taking action
- XXII. Changes likely coming
 - a. As more and more states consider the legalization of medical marijuana and/or recreational marijuana, there will be additional statutes or modifications to current statutes to consider
 - b. Employers should be sure to keep an eye on any new laws regarding medical marijuana as well as any new case law interpreting same
- XXIII. Practical implications – education
 - a. Public v. private schools
 - i. Employers and educators are under no obligation to accommodate medical marijuana use despite state legalization laws
 - 1. Ex: Northwest Suburban High School in Chicago banned medical marijuana on school property despite state law legalizing medical marijuana
 - a. Students, staff and visitors are banned from possessing marijuana or being under the influence of the drug on school property
 - b. Ban applies to chronically ill students and staff who are legally prescribed marijuana
 - ii. Drug-Free Workplace Act of 1988 (DFWA)
 - 1. Requires that institutions receiving federal contracts in excess of \$100,000, or receiving any federal grant establish a policy prohibiting the manufacture, use and distribution of controlled substances in the workplace
 - 2. An institution's failure to demonstrate its ongoing good-faith efforts to maintain a drug-free workplace can disqualify that institution from obtaining future government funding
 - a. Federal student aid concerns
 - i. Public universities that allow students to smoke medical marijuana are at risk of losing Title IV federal funding
 - ii. Colleges that receive federal aid have a duty to disclose criminal activity committed by its students
 - iii. Students arrested for possession/use of marijuana are at risk of losing any federal funding they receive for their education



3. Ex: Harvard University continues to prohibit marijuana on campus despite legalization of marijuana in Massachusetts
 - a. Director of Harvard University Health Services Paul Barreira has stated that he will not make any changes to the policy until state law has been outlined
 - i. Not motivated out of disagreement with the law, but rather by a concern that any Harvard student convicted of drug crimes can lose their federal aid eligibility
 - ii. At Harvard, more than \$15 million in federal aid is given to students each year
 - b. Any broad change in a school's policy on marijuana could jeopardize federal funding to the university itself as well as individual students
- iii. No universities in Massachusetts have altered their drug policies after medical marijuana became legal. Even leading schools in the most progressive states regarding legalization have not modified their policies to allow for its use on campus
 1. University of California-Berkeley and the University of Colorado-Boulder
- b. Recreational use v. medical use
 - i. In CO and WA, you must be at least 21 years old to purchase recreational marijuana ("retail" marijuana)
 - ii. Medical marijuana use distributions by age and sex mimic that of recreational use (most prevalent use is by males under 40)
 1. Is this because men under 40 tend to prefer using marijuana more than other groups? Or are men under 40 more likely to work jobs that result in chronic pain which is alleviated by marijuana?
 - iii. Recreational legalization has greater federalism concerns as compared to medical use
 1. Federal government more accepting of medical marijuana use than recreational
 2. Preemption concerns: the Supreme Court has stated that the regulation of marijuana is a permissible congressional action under the Commerce Clause
 - a. Will Congress preempt the field of marijuana regulation by requiring state and local laws to mimic the CSA?
 - iv. CO has chosen to tax recreational marijuana differently than medical marijuana
 1. 25% state tax on retail marijuana in addition to regular sales tax
 2. Most of this revenue has been dedicated to building new public schools in CO
- c. Rehabilitation Act Considerations
 - i. "The Rehabilitation Act prohibits discrimination on the basis of disability in programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors. The standards for determining employment discrimination under the Rehabilitation Act are the same as those used in title I of the ADA."
 - ii. Section 504 prohibits discrimination on the basis of disability and requires reasonable accommodation
- d. *James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012)
 - i. After the city of Costa Mesa passed an ordinance outlawing marijuana dispensaries, two severely disabled residents who were prescribed medical marijuana for pain management brought suit under Title II of the ADA
 - ii. Title II prohibits discrimination in the provision of public services



- iii. Because marijuana is still considered an “illegal drug use” under federal law, the ADA did not protect the plaintiffs
 - iv. *Reemphasized that medical marijuana use is not considered a disability under the ADA
 - 1. Doctor-supervised use is still considered an illegal use of drugs
- XXIV. Practical implications – law enforcement
 - a. Despite the growing acceptance of marijuana for both medical and recreational purposes, the government’s stance on marijuana has been left largely unchanged
 - i. Marijuana still considered a Class I drug along with heroin and methamphetamine by the CSA
 - ii. Every sale of marijuana in every state (even where it has been legalized) remains a federal crime
 - iii. Marijuana considered to have “no currently accepted medical value in treatment in the United States” by the FDA
 - b. In CO, you cannot consume marijuana in any form in a public place (and even on private, non-residential property that is in public view) or take it across state lines
 - i. However, you can grow up to 6 plants in your home if they are locked and enclosed
 - c. DUI
 - i. In CO, you can be arrested for DUI if the active THC content of blood is over 5 nanograms
 - ii. Compliance issues: Why 5 nanograms? How is a user supposed to know whether the THC content of their blood is over 5 nanograms? How much use over what length of time will lead to 5 nanograms in the blood?
 - d. Problems of overlapping jurisdictions re: regulation of marijuana
 - i. Federal v. state enforcement
 - 1. Technically, sellers and purchasers of recreational marijuana in a state where it is legal are violating federal law by simply following state law
 - a. Leads to potential for an entire growing economic industry to be based on illegal transactions
 - 2. However, DOJ has said it will not challenge states legalizing marijuana
 - a. Federal law enforcement plans to focus on “significant drug traffickers”
 - e. Medical necessity defense
 - i. Decided on a case-by-case basis
 - ii. Harm to individual from denying marijuana use must outweigh the “evil” of breaking the applicable marijuana law
 - iii. Varies by state, but usually requires that there be no legal alternative
 - 1. Means that the defense may not be available in states where medical marijuana can be obtained legally

THE EVOLVING POLICY AGENDA

- XXV. Practical implications – ethical complications for lawyers: changing legal landscape regarding marijuana has various implications for attorneys
 - a. Personally
 - i. Is an attorney’s use of marijuana unethical?
 - 1. ABA Model Rule 8.4(b) states that it is professional misconduct for a lawyer to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects”
 - 2. ABA Rule 1.2(d) states that “a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent”



- ii. In CO, the Office of Attorney Regulation Counsel has stated that a lawyer's personal use of marijuana does not violate the ABA rule as long as it does not impact the ability to diligently represent the client
- iii. Rules are less certain in other states
 - 1. Does marijuana use reflect poorly on a lawyer's honesty, trustworthiness or fitness?
 - 2. Even if the attorney uses marijuana legally, does he/she violate ethical obligations to follow federal law?
 - 3. With the ethical requirements surrounding marijuana use uncertain, will lawyers be reluctant to provide much-needed legal advice in this growing area?
 - 4. Shouldn't ethical rules serve as a source of guidance rather than a source of confusion?
- b. Professionally
 - i. Lawyers will need to play a major role in the growth of marijuana-related businesses
 - 1. Clients have a need for attorneys to advise them on the state of the law in this area for a variety of purposes
 - a. Establishing medical marijuana dispensaries
 - b. Obtaining necessary licensing and registrations
 - c. Representing governmental entities to draft rules and regulations relating to legalization
 - 2. Primary problem is conflict between state and federal law
 - a. Federal law still criminalizes the cultivation, sale, distribution, and use of marijuana for virtually any purpose (CSA)
 - b. Is the attorney required to advise based on state or federal law?
 - c. DOJ has announced that it will defer to state laws as long as marijuana sales do not conflict with federal enforcement efforts
 - ii. Emphasis on state law
 - 1. Federal law has no authority over professional discipline
 - 2. Public policy best served by allowing lawyers to ethically provide a complete range of legal advice regarding marijuana so that citizens can comply with state laws
- c. Current trend is that lawyers are ethically bound to follow state law but must also offer information to clients on federal law and policy
 - i. Example: State Bar of Arizona's Rules of Professional Conduct Committee has stated that lawyers may assist clients on marijuana-related issues subject to requirements
 - 1. Any action taken by the lawyer must be expressly permitted by the state law
 - 2. Lawyer must advise clients of federal law implications
 - ii. Example: The Colorado Office of Attorney Regulation Council has stated that it "assumes that the lawyer and client comply with *Colorado* law"
 - 1. CO Supreme Court revision to CO Rules of Professional Conduct permits lawyers to advise marijuana businesses, but states that lawyers should also advise clients on relevant federal law
 - 2. Similar revisions proposed in Nevada and Washington
- d. Examples permissible & impermissible representation in Colorado
 - i. Permissible representation
 - 1. Advising a client regarding the consequences of their past conduct regarding marijuana
 - 2. Counseling a client regarding the creation and application of zoning and other legislation relating to marijuana



3. Advocating for changes in marijuana law
 4. Advising a client about the consequences of marijuana use in a parental rights dispute
 - ii. Impermissible representation
 1. Assisting clients in structuring or implementing transactions which by themselves violate federal law
 - a. Draft contracts to facilitate the purchase and sale of marijuana where it is illegal
 2. Representing a lessor in a transaction if the lawyer knows the client's intended use of the property will be to violate federal law
- XXVI. The evolving policy agenda
- a. Policies and politics – the federal government's stance on marijuana has been inconsistent in the past few years
 - i. Federal policies have a direct, pervasive impact on marijuana's position in our culture
 1. After the Obama Administration stated that it would not arrest individuals who complied with state law authorizing marijuana use, Colorado experienced an 871% increase in medical marijuana registrants.
 2. However, the Obama Administration's acceptance of marijuana has been limited. The president has stated that he would not approve of "mom and pop stores" selling marijuana or individuals "growing their own."
 - ii. Obama administration continues to uphold FBI hiring policy disqualifying anyone who has used pot in the past three years from working at the agency
 1. Both the CIA and the UK's National Cyber Crime Unit only require that applicants have not used drugs in the 12 months prior to application
 2. The FBI's strict marijuana policy has made it difficult for the agency to hire much-needed cybercrime experts to combat foreign spy hacking
 3. FBI Director James B. Comey said at the White Collar Crime institute's 2014 meeting, "I have to hire a great work force to compete with those cyber criminals and some of those kids want to smoke weed on the way to the interview." He also told an attendee that his marijuana-using friend "should go ahead and apply" at the FBI.
 - a. After coming under scrutiny for these remarks, Comey told the Senate that, "I did not say that I'm going to change the ban. I said I have to grapple with the change in my workforce."
 - b. Changing workforce: the top computer programmers, encryption experts, and hackers tend to be young.
 - i. Because it is become increasingly common for young people to use marijuana, hiring requirements like the FBI's will inevitably need to be adjusted.
 - iii. Other federal policies that are unfavorable to medical marijuana use
 1. IRS has announced that medical marijuana dispensaries may not deduct their business expenses in the same way as other businesses
 2. Bureau of Alcohol, Tobacco, and Firearms prohibits marijuana patients from obtaining firearms under federal law
 - iv. However, with the legalization of medical marijuana, dispensaries have become a growing and competitive business
 1. Los Angeles area experienced a 22,000% increase in its number of dispensaries between 2005 and 2008



2. Marketing for dispensaries hopes to increase its patient base by emphasizing marijuana's beneficial effects on common non-life threatening issues like insomnia, anxiety, and carpal tunnel syndrome
 - a. Unlike most other drugs, medical marijuana has the potential to greatly expand its patient base in the near future
- b. Changing Perspectives in America (United States of Amerijuana)
 - i. Support for legalization is not limited to one political group as even high profile conservatives such as the Koch brothers have come out in support of legalization.
 - ii. Marijuana's reputation of being a legitimate medical treatment is becoming more widespread
 1. It has become a medical specialty and prescriptions for it are readily available
 - a. CA's CUA and CO's legalization law both include "catch-all clauses" which give the prescribing physician a lot of discretion as to whether to recommend medical marijuana
 - i. CA's catchall legalizes marijuana for "any other illness for which marijuana provides relief"

EMERGING INDUSTRIES AND ECONOMIC GROWTH

- XXVII. Increases in state revenue
 - a. Legalization would save taxpayers an estimated \$10 billion on policing/enforcement
 - b. National market for legal marijuana is estimated to reach \$8-\$10 billion over the next five years
 - c. Colorado – the laboratory of state regulation
 - i. CO is the first state to treat marijuana like alcohol (effective January 1, 2014)
 - ii. Sales of medical marijuana in CO were \$329 million in 2013
 - iii. CO anticipates combined sales (medical and recreational) to reach \$1 billion in 2014
 - iv. Retail marijuana has a 25% state tax, as well as the usual sales tax, making it one of the most heavily taxed products in CO
 - v. During the first two months of 2014, CO made more than \$6 million in tax revenue from marijuana sales
- XXVIII. Growth of a new "green" industry
 - a. Legalization and social acceptance has created the opportunity for exponential economic growth in the cannabis industry
 - b. Patchwork of regulations creates significant barriers to entry and complexities for companies seeking to establish a national platform
 - c. Legalization has allowed for highly competitive and lucrative direct and ancillary industries to develop
 - i. Revenue from this expansion spills over into other industries, such as tourism and professional services (legal, accounting, advertising, etc.) and leads to job growth and increased tax revenue
 1. Colorado Supreme Court has cleared the way for members of the Bar to service the industry without fear of sanction
 2. Colorado statutory law provides for the enforcement of contracts related to legal marijuana industry
 - d. Examples of marijuana-based ancillary businesses
 - i. Entrepreneurs have been taken advantage of the unique opportunity to engage in the emerging marketplace



1. Specific examples
 - a. Real estate ownership and development (cultivation and dispensary facilities) – ex: Advanced Cannabis Solutions
 - b. Edible manufacturers i.e. Dixie Elixirs
 - c. Pot Tourism i.e. 420 Tours
 - d. Greenhouse companies i.e. Nexus
 - e. Marijuana universities i.e. Oaksterdam
 - f. Specialized equipment and supply manufacturers and distributors i.e. GrowLife
 - g. Conferences / angel investor networks i.e. AreView
 - h. Private equity groups i.e. Privateer
2. Surge of publicly traded companies
- e. Case Study: “MJardin Premium Cannabis: A Colorado-based professional operating company dedicated to the cultivation of premium cannabis”
 - i. Example of an emerging marijuana industry
 - ii. Founded by Adam Denmark Cohen
 - iii. MJardin provides turnkey cultivation management services and intellectual property related to the science of premium cannabis to licensed medical marijuana companies located across the United States
 - iv. The rapid expansion of the medical marijuana industry has led to a dearth of experienced cultivators capable of leading large-scale professional operations in a highly regulated and complex environment.
 - v. As new states introduce medical cannabis, potential licensees in those markets are seeking experienced cultivation partners to assist them with the licensing, design, and operation of cultivation facilities and the production of exceptional cannabis
 - vi. Future focus on intellectual property and ancillary business divisions
 - vii. MJardin contrasted with typical private equity (flipping the 80/20 model)
- XXIX. Take away points
 - a. There is typically no duty to accommodate use of medical marijuana
 - i. Employers and educators can still prevent employees and students from using legally prescribed medical marijuana
 - b. Policies should specifically prohibit use of medical marijuana while at work or under the influence
 - c. New court opinions will provide additional guidance regarding application of state laws
 - d. As with all employment decisions, need to be consistent
 - e. Evaluate whether your policies are necessary
 - f. Expect growth in marijuana related industries and a related increase in revenues in states where it has been legalized

