

# Employment Rights for Cannabis Consumers

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# Current California Law Does Not Protect Employment Rights of Medical or Recreational Cannabis Consumers

- The California Supreme Court ruled in *Ross v. RagingWire* (2008) that employees can be terminated for off-the-job medical cannabis use, despite Prop. 215, which legalized medical marijuana in 1996.
- In response to the *RagingWire* case, California legislature passed AB 2279 (Leno, 2008) to protect employment rights for medical marijuana users, but the bill was vetoed by Gov. Schwarzenegger.
- Prop. 64, passed by CA voters in 2016 to legalize adult use of cannabis, did not protect employment rights of recreational or medical cannabis users.
- AB 2069 (Bonta, 2018) would have amended CA's Fair Employment and Housing Act (FEHA) to require employers to make "reasonable accommodation" for employees who use medical cannabis, in the way they do for prescription drugs.



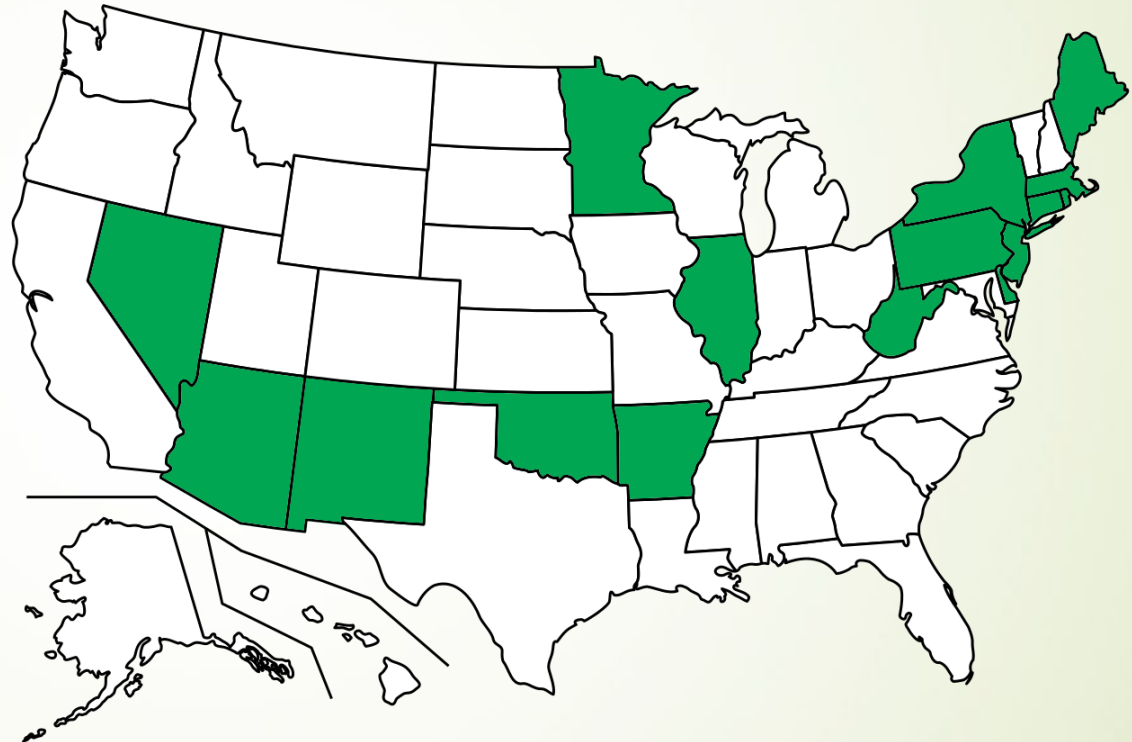
## Cal NORML Survey Results

Of over 500 respondents who answered Cal NORML's online survey in the past two years:

- Nearly 20% said they had been denied employment because they tested positive for medical cannabis, with another 7% answering "maybe/unsure."
- Over 9% said they had been terminated from a job because they tested positive for medical cannabis (another 4.4% were unsure).
- 47% were afraid of losing an employment opportunity due to using medical cannabis.
- 40% had stopped using medical cannabis because of drug testing by their employer or doctor.
- 23% had increased their use of opioid or other medications because of drug testing for cannabis (another 6% were unsure).

# Sixteen States + DC Now Protect Medical Marijuana Users' Employment Rights

- ▶ Arizona
- ▶ Arkansas
- ▶ Connecticut
- ▶ Delaware
- ▶ DC (2019)
- ▶ Illinois
- ▶ Maine\*
- ▶ Massachusetts
- ▶ Minnesota
- ▶ Nevada\*
- ▶ New Jersey (2019)
- ▶ New Mexico (2019)
- ▶ New York
- ▶ Oklahoma (2019)
- ▶ Pennsylvania
- ▶ Rhode Island
- ▶ West Virginia



\*also protects recreational users



## Six State Courts Have Protected Medical Cannabis Users Workers' Rights

- ▶ 2017: **Connecticut**, *Noffsinger v. SSC Niantic Operating Company, LLC* – “A plaintiff who uses marijuana for medicinal purposes in compliance with Connecticut law may maintain a cause of action against an employer who refuses to employ her for this reason.”
- ▶ 2017: **Massachusetts**, *Barbuto v. Advantage Sales and Marketing LLC* – Employee may sue an employer for being fired for their off-the-job cannabis use without discussing a “reasonable accommodation” with the employee.
- ▶ 2018: **Rhode Island**, *Callaghan v. Darlington Fabrics and the Moore Company* – A medical cannabis patient cannot be denied employment over his/her failure to pass a pre-employment drug screen
- ▶ 2018: **Delaware**, *Chance v. Kraft Heinz Foods Co.* - A terminated employee can proceed with his lawsuit, alleging that his employer terminated him for being a medical marijuana cardholder.
- ▶ 2019: **Arizona**, *Whitmire v. Walmart Stores Incorporated* – An employee may not be terminated solely for testing positive for carboxy-THC
- ▶ 2019: **New Jersey**, *Wild v. Carriage Funeral Holdings LLC* – Employers may not discriminate against patients who consume medical cannabis while away from the job

# Workers' Compensation and Cannabis

- ▶ Other states are protecting workers' compensation rights
  - ▶ 2019: **Oklahoma**, *Rose v. Berry Plastics Corp* appellate court held that THC in a workers' blood after a workplace accident did not automatically mean the worker was intoxicated and denied workers comp benefits.
  - ▶ 2019: **New Hampshire** Supreme Court ruled that a labor appeals board incorrectly decided that workers' compensation insurance can't reimburse employees for medical cannabis costs, leaving the issue open. *Appeal of Andrew Panaggio, March 7, 2019.*
  - ▶ A **New Jersey** administrative law judge ordered an insurance company to pay for medical marijuana for an injured worker, Andrew Watson, who suffers from lingering neuropathic pain in his left hand after an accident while using a power saw at an 84 Lumber outlet. *January 2019.*
- ▶ Many studies have shown cannabis to be effective for pain, and allows patients to reduce their use of opiates. Yet CA's 2016 MTUS Chronic Pain Medical Treatment Guidelines do not allow cannabis as a chronic pain treatment for employees receiving worker's compensation.



# New Protections for Recreational Cannabis Users in State and City Laws

- ▶ **Maine** (2018): provisions included in 2016 voter initiative: “An employers may not refuse to employ or otherwise penalize a person solely for that person consuming marijuana outside of the employer’s property.”
- ▶ **New York City** (2019): Bill No. 1445 states “[I]t shall be an unlawful discriminatory practice for an employer ... to require a prospective employee to submit to testing for the presence of any tetrahydrocannabinols or marijuana in such prospective employee’s system as a condition of employment.”
- ▶ **Nevada** (2019): AB 132 makes it “unlawful for any employer in [Nevada] to fail or refuse to hire a prospective employee because the prospective employee submitted to a screening test and the results of the screening test indicate the presence of marijuana.”
- ▶ **California Labor Code** Sec. 96(k) allows employee claims for “discharge from employment for lawful conduct occurring during nonworking hours away from the employer’s premises.”

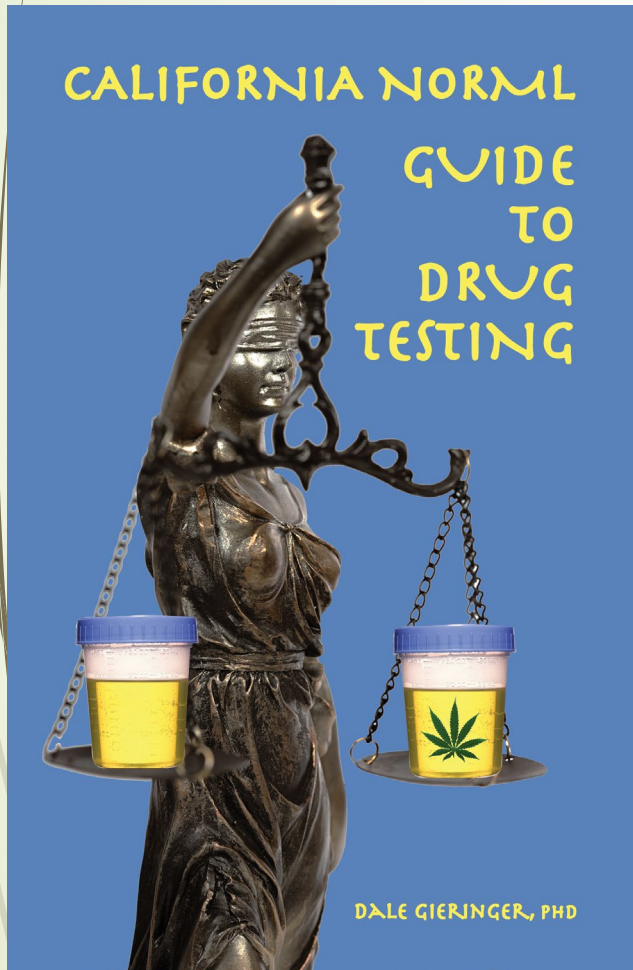


## Federal law and drug testing / drug-free workplace requirements

- Federal law mandates random drug screening, with no exceptions for marijuana, for commercial drivers (e.g. truck and school bus drivers), airline pilots and employees, railroad transit and pipeline workers, etc.
- Certain federal grantees are required to maintain a drug-free workplace. They are not required to drug test, only to inform employees of their policy of not allowing drug use on the job.
- All state laws, including proposed employment rights laws in California, exempt employers subject to federal mandates.



# Urine drug testing isn't effective or useful



- Urine tests only pick up inactive metabolites of THC. Science has shown no relationship between urine metabolite levels and impairment or workplace safety or productivity.
- Urine tests can detect marijuana use days or even weeks beforehand, in effect spying on an employee after hours.
- Studies indicate that the great majority of drug-positive workers are just as reliable as others.

# Workplace Fatalities per 100,000 by State in 2017

Source: U.S. Bureau of Labor Statistics - <https://www.bls.gov/news.release/cfoi.t05.htm>

Rhode Island	1.6	Oregon	3.2	Tennessee	4.4
New Hampshire	1.6	Massachusetts	3.2	Indiana	4.5
New Jersey	1.6	Florida	3.3	New Mexico	4.7
Connecticut	1.9	Ohio	3.3	Iowa	4.7
California	2.2	Dist. of Columbia	3.4	Idaho	4.8
Hawaii	2.2	Michigan	3.4	Kansas	5.2
Nevada	2.4	Minnesota	3.5	Oklahoma	5.5
Delaware	2.4	New York	3.5	Arkansas	6.1
Washington	2.5	Wisconsin	3.5	Mississippi	6.2
Maine	2.7	Nebraska	3.6	Louisiana	6.3
Colorado	2.8	Kentucky	3.8	Montana	6.9
Illinois	2.8	North Carolina	3.9	Vermont	7.0
Utah	2.9	Georgia	4.1	South Dakota	7.3
Virginia	2.9	South Carolina	4.2	West Virginia	7.4
Arizona	3.0	Alabama	4.3	Wyoming	7.7
Pennsylvania	3.0	Texas	4.3	North Dakota	10.1
Maryland	3.0	Missouri	4.4	Alaska	10.2

Color Key to State Laws:

Legal Adult Use

Medical With Dispensaries

Medical - Lacking Dispensaries

All Illegal

**US Total**

**3.5**



## Alternatives to urine drug testing

- ▶ Performance testing – computer- or phone-based graphical cognitive alertness test lasting 60 to 90 seconds that workers complete at the start of their shifts and/or before performing a critical task.
  - ▶ Detects impairment due to cannabis, prescription drugs, fatigue, stress, etc.
  - ▶ Has been shown in workplaces to increase productivity, reduce turnover, and lower costs of drug testing and workers' compensation insurance claims.
- ▶ Oral Swab/ breathalyzer – still in development but may soon be able to detect use within a small window of a few hours

# Recommendations to Protect Californians' Employment Rights and Workplace Safety



- Re-introduce and pass a bill to amend FEHA, granting medical cannabis patients the same rights to “reasonable accommodation” as those taking prescription drugs.

- Fix Worker’s Compensation laws and regulations to allow cannabis for chronic pain treatment, and if possible compensate patients for costs of medical cannabis.
- Ban urine testing (or testing for inactive metabolites) for cannabis in random or pre-employment drug screens in public and private sectors, except as required by federal law. Encourage and develop performance testing and/or oral swab or breath testing as alternatives for safety-sensitive positions.

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