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Examining the National Patchwork of Marijuana Laws

A detailed dive into cannabis legislation across the country.

By **Brian Allen** | June 22, 2022



([//images.law.com/contrib/content/uploads/sites/423/2021/04/Cannabis-Article-202104201642.jpg](https://images.law.com/contrib/content/uploads/sites/423/2021/04/Cannabis-Article-202104201642.jpg)) Pictured: a cannabis leaf in front of a sunset gradient from blue to orange.

A couple of years ago, I was flying out of Minneapolis in late May. The sun was just rising and casting light over the ground below. As the sun rose higher, a beautiful patchwork of farmland was revealed across the Midwest. Some fields were in the early stages of plowing and presented a rich brown hue. Other fields were dressed in ochre stubble from last year's crop, while others displayed various stages of new growth cast in multiple shades of green. It was awe-inspiring and a reflection of what we are as a country, 50 states, Washington, DC, and several territories, creating a patchwork of people, cultures, social customs, and laws.

One of the beauties of our republic is the opportunities for states to forge their own paths and find solutions unique to their citizens. It creates, in a sense, over 50 laboratories of innovation. That has been true with the recent patchwork of state laws related to the legalization of marijuana.

Modern marijuana legalization began in California when voters there passed Proposition 215 in 1996, allowing for medical marijuana use. Since then, 36 other states, four territories and the District of Columbia have followed suit, while 19 states, two territories and the District of Columbia have legalized recreational marijuana. Rhode Island became the 19th state to legalize recreational marijuana on May 25, 2022, when Governor McKee signed S 2430 into law. Ten other states have passed laws allowing low/no THC cannabis products for sale in their states. Today, only three states have no legalized form of marijuana.

Current ballot initiative efforts, however, show the list of states where marijuana is permitted will likely grow after the 2022 general election.

- Groups in Arkansas are seeking to put forward a ballot initiative legalizing possession of up to four ounces of marijuana for recreational use by adults aged 21 or older.
- Maryland lawmakers approved legislation that would put the question of recreational use legalization before voters in November.
- Missouri has a citizens' initiative moving forward to allow recreational use. The Missouri legislature is considering House Joint Resolution 83 which would put the question of recreational marijuana before voters. Lawmakers have until May 30 to act on it.
- Volunteers in Nebraska are actively gathering signatures to get medical marijuana on the ballot.
- Groups in Ohio, Oklahoma and South Dakota are also pushing to allow voters to decide on recreational marijuana.

Still, state medical marijuana laws are not created equal. Most have guardrails around conditions that can be treated with medical marijuana. For example, the Utah statute lists 15 specific diagnoses and allows the Compassionate Use Board to approve other conditions on a case-by-case basis. California's Compassionate Use Act allows for medical marijuana use for cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. New Mexico has 28 qualifying conditions, but patients can petition the medical advisory board for an exception if their condition is not listed. New York allows practitioners to recommend medical marijuana for any condition they're qualified to treat and determine if the patient will benefit from it.

Recreational marijuana laws are just as varied. Colorado allows adults, 21 years of age or older to possess one ounce or less of marijuana. Washington allows adults 21 or older to have up to one ounce of usable cannabis, 16 ounces of edibles in solid form or 72 ounces in liquid form, or 7 grams of marijuana concentrates. Oregonians may possess two ounces in a public place or up to eight ounces in a non-public area.

Marijuana legalization has forced lawmakers to wrestle with other issues around its use. A big question for employers is whether they have to accommodate its use in the workplace. In Pennsylvania, employers may not discriminate against employees simply because they are medical marijuana users, but employers are not

required to accommodate its use in the workplace. Utah passed a pair of laws, SB40 and SB46, in their 2022 General Session, designed to protect public employees from retaliatory action if they are medical cannabis users, while at the same time restating the right of private employers to determine whether or not they accommodate use or change drug-free workplace policies. Nevada passed a law requiring employers to make reasonable accommodations for medical cannabis users but does not require employers to allow for use in the workplace. Every state law allows for employers to restrict medical marijuana use in instances where there are federal contracts or federal laws in place that would preclude the use of marijuana.

For employers, workers' compensation insurers and auto insurers, another emerging concern is claim reimbursement. Here again, is a patchwork of laws and court opinions that differ from state to state. Based on research conducted by the Mitchell Pharmacy Solutions team in April 2022, 12 states have a clear exemption from medical marijuana reimbursement for both auto and workers' compensation insurers. Five states have a clear exemption for workers' compensation claims but are silent on auto claims., while 18 states and the District of Columbia are silent on the issue for both workers' comp and auto. However, eight of those states have had civil adjudications of the reimbursement issue and rulings have been rendered. In New York, the Workers' Compensation Board has indicated willingness to order reimbursement if prior authorization process was properly followed and its use was medically necessary. In Maryland, the Commission has quietly ordered reimbursement in a handful of situations.

Courts in New Mexico have ordered reimbursement in workers' compensation cases, and the state remains the only one with a medical marijuana fee schedule for workers' compensation claims. In the Appeal of Panaggio, the New Hampshire Supreme Court ruled that employers and workers' compensation insurers should pay when treatment is medically necessary. The Connecticut Workers' Compensation Commission ruled, in *Petrini v Marcus Dairy*, that insurers should reimburse for medical marijuana. The Maine Supreme Court found, in *Burgoin v Twin Rivers Paper* that insurers cannot be compelled to pay for medical marijuana since the Federal Controlled Substance Act (CSA) would preclude payment. The Massachusetts Supreme Court found similarly in *Wright v Pioneer Valley*, affirming a Department of Industrial Accidents ruling. Of particular interest are a pair of cases out of Minnesota, *Musta v Mendota Heights Dental* and *Bierbach v Digger's Polaris*. In these cases, the Minnesota Supreme Court ruled that the CSA prohibited payment of medical marijuana by insurers or employers. The plaintiffs appealed the Minnesota Supreme Court rulings to the U.S. Supreme Court. The Court has not yet decided whether to take up the appeal reached out to the Biden Administration for their view on the cases and the Administration responded noting that the issue is not ripe since the judgments rendered in the two cases are a straightforward application of federal law and its preemption and there isn't sufficient conflict among the states to warrant intervention by the court. On June 21, 2022, the US Supreme Court denied certiorari on the two cases, leaving the current medley of state law and state court decisions in place.

This dizzying patchwork of laws and court rulings makes managing marijuana a huge task for risk managers, who should become familiar with the decisions and regulations of states where they have employees. The laws and rules are changing frequently as new information and situations arise. It is important to have a system in place to help keep up with that evolution.

Drug-free workplace policies should be clearly written and clearly communicated.

Accommodation policies for medical marijuana, if any, should also be carefully articulated to keep from running afoul of state and federal laws. For workers' compensation and auto insurance claims, keep an eye on the courts and legislatures. Court rulings are not consistent from state to state and, sooner or later, the U.S. Supreme Court will weigh in. Laws are also changing. This year, New Jersey and New York are considering bills to require workers' compensation and auto insurers to reimburse for medical marijuana.

Ultimately, Congress will have to step in to fix the conflict between state and federal law. When that happens, the current patchwork of laws and rules will be unraveled, and states will implement updated legislation to adapt to the new federal law. Until then, stay vigilant and stay informed. The patchwork will always be there, but over time, risk managers can expect the states to move to some level of uniformity to make it easier for our highly transient populace to comply with the state marijuana laws.

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