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## Into the Weeds of the Newest Field in Employment Law: The Oklahoma Medical Marijuana Act

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## COMMENTS

### Into the Weeds of the Newest Field in Employment Law: The Oklahoma Medical Marijuana Act

#### *I. Introduction*

In 2018, Oklahoma became the thirtieth state in the country to legalize marijuana for either medicinal or recreational use.<sup>1</sup> By June of 2019, thirty-three states had implemented widely varying legislation allowing for legal use of marijuana.<sup>2</sup> Public opinion across the country is following the trend of legalization among the states, with a majority of Americans supporting the legalization of marijuana.<sup>3</sup> This trend of legalization has developed in a relatively short period of time, leaving courts, lawyers, and the individuals subject to these laws with the novel task of interpreting state marijuana laws and their relationship with conflicting federal and state laws.

Employment law is one area of conflict with state marijuana laws that has emerged during this trend of legalization, and this conflict is likely to invite unique legal issues in Oklahoma. Part III of this Comment reviews provisions of the Oklahoma Medical Marijuana Act (OMMA) that relate to employment law, noting that Oklahoma has one of the most permissive and employee-friendly marijuana laws in the country, but with a few key exceptions. Part III also explores potential conflicts with the Oklahoma

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1. See Christopher Ingraham, *Oklahoma Voters Just Approved One of the Most Progressive Medical Marijuana Bills in the Country*, WASH. POST (June 27, 2018), [https://www.washingtonpost.com/news/wonk/wp/2018/06/27/oklahoma-voters-just-approved-one-of-the-most-progressive-medical-marijuana-bills-in-the-country/?utm\\_term=.ad1249e40f7f](https://www.washingtonpost.com/news/wonk/wp/2018/06/27/oklahoma-voters-just-approved-one-of-the-most-progressive-medical-marijuana-bills-in-the-country/?utm_term=.ad1249e40f7f).

2. *State Marijuana Laws in 2019 Map*, GOVERNING, <http://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html> (last updated June 25, 2019); *State Medical Marijuana Laws*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (last updated Sept. 27, 2019).

3. Hannah Hartig & A.W. Geiger, *About Six-in-Ten Americans Support Marijuana Legalization*, PEW RES. CTR. (Oct. 8, 2018), <http://www.pewresearch.org/fact-tank/2018/10/08/americans-support-marijuana-legalization/> (stating that 62% of Americans say that marijuana should be legalized); Justin McCarthy, *Record-High Support for Legalizing Marijuana Use in U.S.*, GALLUP (Oct. 25, 2017), <https://news.gallup.com/poll/221018/record-high-support-legalizing-marijuana.aspx> (finding that 64% of Americans say marijuana use should be legal); Douglas Schwartz, *U.S. Voter Support for Marijuana Hits New High; Quinnipiac University National Poll Finds; 76 Percent Say Their Finances Are Excellent or Good*, QUINNIPIAC UNIV. POLL (Apr. 20, 2017), <https://poll.qu.edu/national/release-detail?ReleaseID=2453>.

Drug Testing Act,<sup>4</sup> and how other states have handled drug testing limitations for employers.<sup>5</sup> Additionally, in Part IV, this Comment analyzes conflicts between the OMMA and federal laws such as the Drug-Free Workplace Act (DFWA) and the Americans with Disabilities Act (ADA).

As a final matter, Part V offers solutions to provide clarity in the uncertain field of marijuana law. The most simple and effective solution would be to amend the Controlled Substances Act and either remove marijuana as a controlled substance, or reclassify it under Schedule II. In the meantime, this Comment recommends that Oklahoma employers update their drug testing policies to comply with the OMMA's License Holder Protections. The OMMA is new and changing often, and this creates a wealth of uncertainty. Through examining the limited case law on the subject, this Comment will offer predictions and suggestions about these identified employment law conflicts in Oklahoma.

## II. Background

In June 2018, the Oklahoma Medical Marijuana Act (OMMA) passed with 56.86% approval in the state's midterm primary election.<sup>6</sup> Within five months, Utah and Missouri voters approved medical marijuana measures, and Michigan voters legalized recreational use of marijuana.<sup>7</sup> By June of 2019, thirty-three states, Puerto Rico, Guam, and the District of Columbia had legalized marijuana.<sup>8</sup> Unsurprisingly, these state marijuana laws vary greatly in their scope and permissibility, providing a perfect example of state sovereignty and the concept of states as laboratories for new legislation. Virtually all of these state marijuana initiatives conflict with federal law in some manner and sometimes state law as well.<sup>9</sup>

The trend of legalization is still relatively new, and more states are joining each year. Since 2014, twenty-two states have either passed legislation allowing medical or recreational use, or expanded prior

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4. *See infra* Section III.D.

5. *See infra* Section III.E.

6. *Oklahoma State Question 788, Medical Marijuana Legalization Initiative (June 2018)*, BALLOTEDIA, [https://ballotpedia.org/Oklahoma\\_State\\_Question\\_788,\\_Medical\\_Marijuana\\_Legalization\\_Initiative\\_\(June\\_2018\)](https://ballotpedia.org/Oklahoma_State_Question_788,_Medical_Marijuana_Legalization_Initiative_(June_2018)) (last visited Oct. 2, 2019).

7. German Lopez, *Marijuana Legalization had a Pretty Good Election Night*, VOX (Nov. 7, 2018, 2:49 PM EDT), <https://www.vox.com/policy-and-politics/2018/11/7/18072036/midterm-election-marijuana-legalization-ballot-initiatives-results>.

8. *State Marijuana Laws in 2019 Map*, *supra* note 2; *State Medical Marijuana Laws*, *supra* note 2.

9. *See infra* Parts IV and V.

legislation related to marijuana.<sup>10</sup> Interestingly, these medical marijuana initiatives have nearly always been through grassroots efforts like petitions or ballot measures rather than through state legislatures. Among states that have legalized marijuana, Vermont is the first—and only so far—to do so through the legislature rather than by ballot measure.<sup>11</sup> Vermont notwithstanding, the passage of thirty-two ballot measures across the country reflects a growing consensus among Americans that marijuana use should be legal, at least for medicinal purposes.

Public opinion polling is consistent with this recent movement toward legalization. According to recent surveys, at least 60% of Americans believe that marijuana use should be legal.<sup>12</sup> Medical marijuana draws even more public approval, with more than 80% of Americans supporting its legalization.<sup>13</sup> In addition to the broad public approval, bipartisan surveys show that members of both major political parties favor legalization.<sup>14</sup> One poll found that no political group surveyed supports enforcement of federal anti-marijuana laws in states that have legalized it, and all groups supported removing marijuana from Schedule I of the Controlled Substances Act.<sup>15</sup> The marijuana industry is commonly referred to as one of the fastest growing industries in the United States,<sup>16</sup> with more than six billion dollars in legal sales in 2016.<sup>17</sup> The industry has also experienced prodigious job growth over the last few years,<sup>18</sup> making it an attractive market for many people seeking employment.

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10. *State Medical Marijuana Laws*, *supra* note 2.

11. *State Marijuana Laws in 2019 Map*, *supra* note 2.

12. *See supra* note 3 and accompanying text.

13. Press Release, Marist Coll. Inst. for Pub. Op., Yahoo News/Marist Poll: Weed & the American Family 3 (Apr. 17, 2017), [http://maristpoll.marist.edu/wp-content/misc/Yahoo%20News/20170417\\_Summary%20Yahoo%20News-Marist%20Poll\\_Weed%20and%20The%20American%20Family.pdf](http://maristpoll.marist.edu/wp-content/misc/Yahoo%20News/20170417_Summary%20Yahoo%20News-Marist%20Poll_Weed%20and%20The%20American%20Family.pdf).

14. *See Schwartz*, *supra* note 3.

15. *Id.*

16. Kelsey Oliver, *North American Green Rush: One of the Fastest-Growing Industries*, IBISWORLD (Mar. 27, 2018), <https://www.ibisworld.com/media/2018/03/27/north-american-green-rush-one-of-the-fastest-growing-industries/>.

17. Aaron Smith, *10 Things to Know About Legal Pot*, CNN MONEY (May 26, 2017, 12:01 PM ET), <https://money.cnn.com/2017/04/19/news/legal-marijuana-420/index.html>.

18. Tom Angell, *Marijuana Is the Fastest-Growing Job Category, Top Recruiting CEO Says*, FORBES (Apr. 9, 2018, 11:46 AM), <https://www.forbes.com/sites/tomangell/2018/04/09/marijuana-is-the-fastest-growing-job-category-top-recruiting-ceo-says/#13219f136687> (summarizing statements from ZipRecruiter CEO Ian Siegel that job listings for marijuana have grown 445%).

While recent trends in marijuana legalization are favorable to individuals seeking employment in the field, this pattern is less desirable for employers in general. State marijuana laws, like Oklahoma's, often conflict with federal and even state employment law provisions. Employers are accordingly left in a haze of confusion as they struggle to drug test current and prospective employees, maintain a drug-free workplace, and accommodate employees' medical conditions. With little case law on the subject, and none in Oklahoma, courts must grapple with the text of the OMMA alongside limited persuasive authority when attempting to reconcile these conflicts.

### *III. The Oklahoma Medical Marijuana Act*

Some have characterized the OMMA as one of the most permissive medical marijuana policies in the country.<sup>19</sup> At the time of its passage, the OMMA was one of two medical marijuana statutes in the country that did not specify "qualifying conditions"—a list of medical conditions with which a physician must have previously diagnosed a patient to get a medical license.<sup>20</sup> In 2018, legislators in Maine reformed their medical marijuana statutes to remove the list of qualifying conditions,<sup>21</sup> thus broadening the availability of medical marijuana in a way that imitates Oklahoma's current framework.

The OMMA allows license holders to possess eight ounces of marijuana flower at home, three ounces on their person, six mature plants, six seedlings, one ounce of marijuana concentrate, and seventy-two ounces of edible marijuana.<sup>22</sup> These allowances are comparably high in the scheme of state marijuana laws.<sup>23</sup> Additionally, unlike Maine, Minnesota, and New Hampshire, Oklahoma does not limit the number of dispensaries that can operate in the state.<sup>24</sup> Overall, Oklahoma's permissive medical marijuana

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19. See Ryan Gentzler, *How Does SQ 788 Compare to Other States' Medical Marijuana Laws?*, OKLA. POL'Y INST. (Sept. 20, 2017; updated May 2, 2019), <https://okpolicy.org/sq-788-compare-states-medical-marijuana-laws/> (stating that State Question 788 is "on the permissive side"); Ingraham, *supra* note 1.

20. Gentzler, *supra* note 19.

21. Irwin Gratz, *Changes to Maine's Medical Marijuana Rules Take Effect*, MAINE PUB. (Dec. 14, 2018), <http://www.mainepublic.org/post/changes-maines-medical-marijuana-rules-take-effect>.

22. 63 OKLA. STAT. § 420 (Westlaw through Sept. 1, 2019 of the 1st Reg. Sess. of the 57th Legis.) (effective Aug. 30, 2019).

23. Gentzler, *supra* note 19.

24. *Id.*

laws most closely resemble California's before its voters passed a recreational marijuana framework. As discussed later in this Comment, the employment law provisions of the OMMA are most similar to those in Arizona, Delaware, and Minnesota.<sup>25</sup>

#### *A. Drug Testing Provisions*

As originally approved, the OMMA was extremely favorable to employees with a medical license. Under the OMMA's original "License Holder Protections," employers could "not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person" based upon the employee's status as a medical marijuana license holder, or based upon a positive drug test for marijuana.<sup>26</sup> Under the original language of the OMMA, employers in Oklahoma could not terminate, refuse to hire, or penalize an employee based solely on their status as a medical marijuana license holder, or because of a positive marijuana drug test.

The OMMA's "Unity Bill" amendment from March of 2019 contains very similar language, providing that "[n]o employer may refuse to hire, discipline, discharge or otherwise penalize an applicant or employee solely on the basis of" either the "applicant's or employee's status as a medical marijuana licensee" or "on the basis of a positive test for marijuana components or metabolites."<sup>27</sup> This alone is very protective to employees with medical marijuana licenses and could be deeply problematic for employers. However, several exceptions to these employee protections help balance the competing interests of employers. Section III.B describes three very important exceptions to the License Holder Protections that come from the original OMMA. Section III.C explains the March 2019 amendment, and its broad exception that substantially limits the original License Holder Protections. Each of these exceptions will be crucial for employers making drug testing decisions.

#### *B. Original Exceptions*

The original language of the OMMA contains several key exceptions that have essentially remained in effect under the March 2019 amendment. First, the OMMA provides an express exception to the drug testing limitations described above where an employer is required to drug test by

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25. See *infra* notes 68–71 and accompanying text.

26. 63 OKLA. STAT. § 425 (Supp. 2018).

27. Medical Marijuana and Patient Protection Act, 2019 Okla. Sess. Laws ch. 11, § 8 (H.B. 2612) (codified at 63 OKLA. STAT. § 427.8).

federal law or must do so to obtain federal funding.<sup>28</sup> In addition, the License Holder Protections do not apply if the applicant or employee does not have a valid medical marijuana license.<sup>29</sup> The third exception to the drug testing limitations arises where an employee “possesses marijuana while in his or her place of employment or during the hours of employment.”<sup>30</sup>

The first two exceptions are relatively easy for employers to follow, but the exception concerning possession, consumption, or being under the influence is more ambiguous and could invite litigation. The federal law exception is relatively clear because employers are likely to be aware that they have federal contracts or licenses that require them to drug test and act pursuant to that particular federal law. The second exception is also clear to apply because it turns on the simple fact of whether the employee holds a valid medical license, which can be verified by the Oklahoma Medical Marijuana Authority. By contrast, the “possession, consumption, or under the influence” exception is much more difficult to follow because there is no standard method of determining whether someone is under the influence of marijuana at a particular time.<sup>31</sup> This ambiguity is likely to invite litigation if a licensed marijuana user is terminated for being under the influence while at work, so employers must act with caution in taking action based on this exception alone. However, the March 2019 amendment to the OMMA provides much greater protection for employers seeking to drug test for marijuana.

### *C. The “Unity Bill” and Its Broad Exception*

In March of 2019, Governor Stitt signed the Oklahoma Medical Marijuana and Patient Protection Act (commonly referred to as the “Unity Bill”) into law.<sup>32</sup> The Unity Bill is a product of a bipartisan medical marijuana working group that passed quickly through the Oklahoma Legislature.<sup>33</sup> Going into effect on August 30, 2019,<sup>34</sup> the Unity Bill

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28. See 63 OKLA. STAT. § 425(A) (Westlaw through Sept. 1, 2019 of the 1st Reg. Sess. of the 57th Legis.) (effective Aug. 30, 2019).

29. *Id.* (noting an employer cannot discriminate based on the employee’s “status as a medical marijuana license holder”).

30. *Id.* § 425(B)(2).

31. Lauren Turner, *Unity Bill Hits a High Note with Legislators and Advocates*, OKLA. POL’Y INST. (Mar. 21, 2019), <https://okpolicy.org/unity-bill-hits-a-high-note-with-legislators-and-advocates/>.

32. *Id.*

33. *Id.*

34. See *supra* note 28.

updates and adds to the OMMA in a manner that even marijuana advocates agreed was necessary regarding testing, packaging, labeling, audit provisions, inventory tracking requirements, and some additional protections for individuals with medical marijuana licenses.<sup>35</sup> However, the Unity Bill has also drawn some criticism and at least one lawsuit related to the “safety-sensitive” exception that applies to the original License Holder Protections and drug testing limitations described above.<sup>36</sup>

The Unity Bill amends the License Holder Protections and drug testing limitations found in the OMMA to create a broad exception for employment positions “involving safety-sensitive job duties.”<sup>37</sup> The new law defines “safety-sensitive” very broadly, creating an expansive exception to the original License Holder Protections. According to the Unity Bill, a “safety-sensitive” position includes “any job that includes tasks or duties that the employer reasonably believes could affect the safety and health of the employee performing the task or others including, but not limited to, any of the following:” (1) handling, packaging, processing, storing, disposing of, or transporting hazardous materials; (2) operating any vehicle, piece of equipment or machinery, or power tool; (3) repairing, maintaining or monitoring the performance or operation of any equipment, machinery or manufacturing process, the malfunction or disruption of which could result in injury or property damage; (4) performing firefighting duties; (5) operating, maintaining or overseeing critical services and infrastructure including, but not limited to, electric, gas, and water utilities, power generation or distribution; (6) extracting, compressing, processing, manufacturing, handling, packaging, storing, disposing, treating, or transporting potentially volatile, flammable, combustible materials, elements, chemicals or any other highly regulated component; (7) dispensing pharmaceuticals; (8) carrying a firearm; or (9) conducting direct patient care or direct child care.<sup>38</sup>

Based on this language, it is easy to see that the Unity Bill’s “safety-sensitive” exception could be applied broadly to defend employers from claims based on the License Holder Protections. It would be hard to imagine a job that would not fall within one of the express exceptions or the

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35. *Id.*

36. See Nuria Martinez-Keel, *Former Health Department Attorney Files Lawsuit Against Unity Bill*, OKLAHOMAN (Mar. 20, 2019, 1:34 AM), <https://oklahoman.com/article/5626344/former-health-department-attorney-files-lawsuit-against-unity-bill>.

37. 63 OKLA. STAT. § 427.8(H)(2)(c) (Westlaw through Sept. 1, 2019 of the 1st Reg. Sess. of the 57th Legis.).

38. *Id.* § 427.8(K)(1).

reasonable belief that the job could affect the safety and health of the employee or others. Further, even though this provision lists specific exceptions, it is clearly not limited to those expressly stated. Therefore, this exception could be much larger than it appears, depending on how broadly a court is willing to interpret “tasks or duties that the employer reasonably believes could affect the safety and health of the employee performing the task or others.”<sup>39</sup>

*D. The Oklahoma Standards for Workplace and Alcohol Testing Act*

The Oklahoma Standards for Workplace Drug and Alcohol Testing Act (ODTA) provides one potential source of conflict for the employment section of the OMMA. Attorneys in Oklahoma have been discussing this potential conflict since the OMMA’s passage during the summer of 2018.<sup>40</sup> In contrast to the employee-friendly provisions of the OMMA described above, the ODTA is “one of the most employer-friendly workplace drug testing laws in the United States.”<sup>41</sup> The ODTA provides rules for all Oklahoma employers that implement drug or alcohol testing policies, except for those employers testing pursuant to federal law or regulation.<sup>42</sup> The ODTA broadly permits employers to conduct drug testing under any of the following circumstances: (1) applicant, transfer, or reassignment testing; (2) for-cause testing, based on a reasonable belief that an employee is under the influence; (3) post-accident testing when an employee is injured at work; (4) random testing; (5) scheduled, fitness-for-duty, return from leave and other periodic testing; and (6) post-rehabilitation testing.<sup>43</sup> After drug testing, the ODTA states that an “employer may take disciplinary action, up to and including discharge, against an employee . . . who tests positive for the presence of drugs or alcohol.”<sup>44</sup> The Act defines a “drug” to include “cannabinoids,”<sup>45</sup> which means that under the ODTA, an employer may discharge an employee who tests positive for marijuana.

The relationship between the ODTA and the OMMA is likely to induce unique legal issues. As noted above, the ODTA allows employers to drug

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39. *Id.*

40. Victor F. Albert, Justin P. Grose & Lauren C. Oldham, *Oklahoma’s New Medical Marijuana Law and Your Workplace*, OGLETREE DEAKINS (Aug. 21, 2018), <https://ogletree.com/shared-content/content/blog/2018/august/oklahomas-new-medical-marijuana-law-and-your-workplace>.

41. *Id.*

42. 40 OKLA. STAT. § 553 (2011).

43. *Id.* § 554.

44. *Id.* § 562(B).

45. *Id.* § 552(6).

test and discharge employees for a positive marijuana drug test,<sup>46</sup> while the OMMA precludes an employer from taking action against a license holder under identical circumstances.<sup>47</sup> The Unity Bill provides some clarity on this conflict, but there could still be room for ambiguity.

Under the Unity Bill, the remedies for an applicant or employee who suffers a willful violation of the OMMA are those provided in the ODTA.<sup>48</sup> The requirements of the ODTA referenced by the OMMA create some additional hurdles for licensed employees to sue for violations of the OMMA. The referenced section of the ODTA provides for a private right of action within one year of a “willful violation.”<sup>49</sup> The ODTA clarifies that a willful violation requires “proof by the preponderance of the evidence that the employer had a specific intent to violate the act.”<sup>50</sup> This presumably means that an employee suing for a violation of the OMMA has the burden to prove that the employer intended to violate the provisions of the OMMA, which could obviously be very difficult to do. However, assuming an employee can meet this burden, the ODTA’s remedies include lost wages, liquidated damages, reasonable costs, and attorney fees.<sup>51</sup>

The Unity Bill also says that nothing in the OMMA shall “[p]revent an employer from having written policies regarding drug testing and impairment in accordance with the Oklahoma Standards for Workplace Drug and Alcohol Testing Act.”<sup>52</sup> The issue with this language is that the ODTA authorizes an employer to take disciplinary action against an employee without any limitation for employees with valid medical marijuana licenses, while the OMMA prohibits an employer from disciplining a licensed employee in a non-safety-sensitive position under the same circumstances.

One possible interpretation of the language in the Unity Bill regarding the ODTA is that where these statutes conflict, the ODTA controls because the License Holder Protections would not be in accordance with section 562(B) of the ODTA. This would essentially eliminate the License Holder Protections as long as the employer has a written policy that complies with the ODTA. In contrast, this section of the Unity Bill could also be interpreted more narrowly to mean that employers can have written drug

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46. *Id.* § 562(B).

47. 63 OKLA. STAT. § 425(B) (Supp. 2018).

48. *Id.* § 427.8(J).

49. 40 OKLA. STAT. § 563(a).

50. *Id.*

51. *Id.* § 563(b).

52. 63 OKLA. STAT. § 427.8(I)(3).

testing policies consistent with the ODTA, but that this ability to adopt ODTA compliant policies does not abrogate the License Holder Protections where they do apply. Stated differently, an employer could have a written drug testing policy pursuant to the ODTA, but that employer could not discipline a licensed, non-safety-sensitive employee protected by the OMMA. This seems to be the more logical outcome that also gives effect to both statutes.

It is difficult to predict how the differences between the employee-friendly OMMA and the employer-friendly ODTA are likely to play out, even after the passage of the Unity Bill. To make matters more confusing, there is hardly any case law from other jurisdictions dealing with this particular type of conflict. Absent further clarity by the Oklahoma Legislature, courts will likely have to turn to canons of statutory interpretation and persuasive authority from states with different marijuana laws to reconcile this issue. One possible interpretation would be that the License Holder Protections of the OMMA would constitute an exception to, or possibly even override the disciplinary provisions of the ODTA. Under the “mere surplusage” method of statutory interpretation, courts should not construe statutory language as to render it meaningless, and should give effect to all of a statute’s provisions if possible.<sup>53</sup> A court applying this method of interpretation would be hesitant to resolve this conflict in a way that would completely override the OMMA’s License Holder Protections and render them mere surplusage.

Alternatively, courts may decide to give greater deference to laws like the OMMA enacted by the people through ballot measures, rather than those like the ODTA enacted by the legislature.<sup>54</sup> In *Whitmire v. Wal-Mart*

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53. See, e.g., *Navajo Nation v. Dalley*, 896 F.3d 1196, 1215 (10th Cir. 2018), *cert. denied sub nom. McNeal v. Navajo Nation*, 139 S. Ct. 1600 (2019) (noting that “[t]he canon against surplusage indicates that we generally must give effect to all statutory provisions, so that no part will be inoperative or superfluous—each phrase must have distinct meaning”) (quoting *Chevron Mining Inc. v. United States*, 863 F.3d 1261, 1283 n.15 (10th Cir. 2017)); *United States v. Thum*, 749 F.3d 1143, 1147 (9th Cir. 2014) (“It is axiomatic that ‘a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.’”) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)); *Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002) (refusing to “ratify an interpretation that abrogates the enacted statutory text absent an extraordinarily convincing justification”) (quoting *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001)).

54. The ODTA was initiated and enacted by the Oklahoma Legislature. See H.B. 2033, 53d Leg., 1st Sess. (Okla. 2011), [http://www.oklegislature.gov/cf\\_pdf/2011-12%20ENR/hb/hb2033%20enr.pdf](http://www.oklegislature.gov/cf_pdf/2011-12%20ENR/hb/hb2033%20enr.pdf).

*Stores*, an Arizona court relied on this principle to resolve a conflict between Arizona’s drug testing and medical marijuana laws after an employee was terminated due to a positive drug test.<sup>55</sup> The employee brought an action against Wal-Mart under the Arizona Medical Marijuana Act (AMMA), which has drug testing limitations very similar to those in the OMMA.<sup>56</sup> The employee claimed that the AMMA prohibited Wal-Mart from considering an employee to be “under the influence” solely because of a positive drug test for marijuana.<sup>57</sup> Wal-Mart answered that Arizona’s Drug Testing of Employees Act (DTEA) exempted it from liability for actions based on the employer’s good faith belief that the employee was impaired, which *may be* based on the results of a drug test.<sup>58</sup> In addressing this conflict, the court stated that “the conflict between the AMMA and the DTEA—the former being enacted by ballot initiative and the latter by the Arizona Legislature—must be resolved in favor of rendering the conflicting portions of the DTEA unconstitutional.”<sup>59</sup>

*Whitmire* is currently the only case dealing with a conflict between a state marijuana law and state drug testing law, and, unfortunately, its guidance for Oklahoma is very limited. The court in *Whitmire* ultimately resolved the conflict in favor of the AMMA by applying a rule from the Arizona Constitution that requires deference to legislation enacted by ballot initiative rather than the legislature.<sup>60</sup> Oklahoma’s constitution contains no such provision. Consequently, OMMA’s origins in the ballot box rather than the legislature would not necessarily be a deciding factor for an Oklahoma court.

This conflict between the OMMA and the ODTA creates an immediate need for a legislative solution, but in the meantime, employers must be aware of the litigation such a conflict may promote. One legislative solution would be to remove “cannabinoids” from the definition of “drug” in the ODTA. However, this alteration may be more than the OMMA’s employee protections necessitate, as those protections only apply to licensed medical marijuana patients. Entirely removing marijuana from the ODTA would leave employers with no statutory authority to drug test employees using

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55. *Whitmire v. Wal-Mart Stores Inc.*, No. CV-17-08108-PCT-JAT, 2018 WL 6110937, at \*1 (D. Ariz. Nov. 21, 2018).

56. *See id.* Compare ARIZ. REV. STAT. § 36-2813 (West 2018), with 63 OKLA. STAT. § 425 (Supp. 2018).

57. *Whitmire*, 2018 WL 6110937, at \*1.

58. *Id.*

59. *Id.*

60. *Id.* at \*1 n.2.

marijuana without a license to do so. One favorable compromise would be to create an exception to the ODTA for employees in non-safety-sensitive positions with valid licenses under the OMMA. This approach would not leave employers unable to drug test because they would still be able to utilize the original exceptions and the broad “safety-sensitive” exception from the Unity Bill.

Until the Oklahoma Legislature or the courts resolve this issue, employers need to be aware that while the ODTA allows them to drug test and discharge employees for a positive marijuana drug test, the OMMA strictly prohibits this dismissal where the employee or prospective employee in a non-safety-sensitive position holds a valid medical marijuana license.<sup>61</sup> If an employer terminates or refuses to hire a licensed medical marijuana patient for a non-safety-sensitive position, there is a serious risk of litigation. Some courts find that discrimination protections like the License Holder Protections in the OMMA create a private right of action for the employee, even where the private right is not explicit.<sup>62</sup> Employers should update their drug testing policies to decrease the risk of costly litigation, even if they can argue that their actions are lawful under the ODTA.

#### *E. Comparison of the OMMA to Medical Marijuana Laws in Other States*

Among states with medical marijuana, at least ten provide drug testing protections for employees with some form of medical card or license.<sup>63</sup> These states include: Arizona, Delaware, Connecticut, Illinois, Maine, Minnesota, Nevada, New York, Pennsylvania, and Rhode Island.<sup>64</sup> Medical marijuana patient protections vary greatly for employees in these states.<sup>65</sup> Employee protections in Arizona,<sup>66</sup> Delaware,<sup>67</sup> Nevada,<sup>68</sup> and Minnesota<sup>69</sup>

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61. 63 OKLA. STAT. § 425(B) (Supp. 2018).

62. See *Noffsinger v. SSC Niantic Operating Co.*, 338 F. Supp. 3d 78, 81 (D. Conn. 2018). The Unity Bill clarified that employees aggrieved by a violation of the OMMA may bring a private right of action within one year of a willful violation. See 63 OKLA. STAT. § 427.8(J); see also 40 OKLA. STAT. § 563.

63. See *infra* note 64.

64. See ARIZ. REV. STAT. § 36-2813(B) (West 2018); CONN. GEN. STAT. ANN. § 21a-408p(b)(3) (West 2019); DEL. CODE ANN. tit. 16, § 4905A(a)(3) (West 2018); 410 ILL. COMP. STAT. ANN. 130/40(a)(1) (West 2019); MINN. STAT. ANN. § 152.32(3)(c) (West 2019); A.B. 132, 2019 Leg., 80th Sess. (Nev. 2019); N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2019); 35 PA. STAT. AND CONS. STAT. ANN. § 10231.2103(b) (West 2019); 21 R.I. GEN. LAWS ANN. § 21-28.6-4(d) (West 2019).

65. Compare ARIZ. REV. STAT. § 36-2813, with NEV. REV. STAT. ANN. § 453A.800(3).

66. ARIZ. REV. STAT. § 36-2813.

are the most similar to those in the OMMA. These states' statutes currently provide the strongest protections for employees with valid medical licenses. Other states, such as Connecticut,<sup>70</sup> New York,<sup>71</sup> Illinois,<sup>72</sup> Maine,<sup>73</sup> and Rhode Island,<sup>74</sup> provide moderate protections for employees with medical licenses, but are less protective than the OMMA.

The employee protections found in Arizona, Delaware, and Minnesota mirror much of the original language of the OMMA.<sup>75</sup> These state statutes directly prohibit employers from discriminating in their hiring or termination practices and from imposing conditions of employment based on an individual's status as a licensed medical marijuana patient.<sup>76</sup> As with Oklahoma, statutes in Arizona, Delaware, and Minnesota also prohibit adverse employment consequences based on a licensed medical marijuana patient failing a drug test for marijuana use.<sup>77</sup> These states also have similar exceptions that allow an employer to take action if the employee uses,

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67. DEL. CODE ANN. tit. 16, § 4905A(a)(3).

68. A.B. 132, 2019 Leg., 80th Sess. (Nev. 2019). Nevada's new statute, set to take effect in January of 2020, contains exceptions much like those found in the Unity Bill.

69. MINN. STAT. ANN. § 152.32(3)(c).

70. CONN. GEN. STAT. ANN. § 21a-408p(b)(3) (West 2019).

71. N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2019) (stating that a certified patient qualifies for disability protections under New York law).

72. 410 ILL. COMP. STAT. ANN. 130/40(a)(1) (West 2019) (stating that no employer may "penalize[] a person solely for his or her status as a registered qualifying patient" except where failing to do so would cause the employer to be "in violation of federal law or unless failing to do so would cause it to lose a monetary or licensing-related benefit under federal law or rules").

73. ME. REV. STAT. ANN. tit. 22, § 2430-C(3) (2018) ("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 qualifying patient or a 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.").

74. 21 R.I. GEN. LAWS ANN. § 21-28.6-4(d) (2018) ("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.").

75. See ARIZ. REV. STAT. § 36-2813(B) (West 2018); DEL. CODE ANN. tit. 16, § 4905A(a)(3) (West 2018); MINN. STAT. ANN. § 152.32(3)(c) (West 2019).

76. ARIZ. REV. STAT. § 36-2813(B); DEL. CODE ANN. tit. 16, § 4905A(a)(3); MINN. STAT. ANN. § 152.32(3)(c); 63 OKLA. STAT. § 425(B) (Westlaw through Sept. 1, 2019 of the 1st Reg. Sess. of the 57th Legis.) (effective Aug. 30, 2019).

77. ARIZ. REV. STAT. § 36-2813(B); DEL. CODE ANN. tit. 16, § 4905A(a)(3); MINN. STAT. ANN. § 152.32(3)(c); 63 OKLA. STAT. § 425(B).

possesses, or comes to work under the influence of marijuana.<sup>78</sup> Finally, each of these medical marijuana statutes provide that the protections do not apply if they would cause an employer to lose a financial or licensing benefit arising under federal law or regulations.<sup>79</sup> These states show that the employee-friendly provisions of OMMA are not unprecedented. Despite these similarities, the case law in these states offers little guidance because courts rarely interpret the employment law provisions found in these statutes, and because the Unity Bill adds a broad “safety-sensitive” exception that these other statutes lack.<sup>80</sup>

Connecticut and Oklahoma have very similar provisions governing employer actions related to medical marijuana. Connecticut’s “Palliative Use of Marijuana” Act (PUMA) took effect in October of 2012.<sup>81</sup> PUMA’s language covering employees does not mirror the OMMA as directly as those in Arizona, Delaware, and Minnesota, but the substance is essentially the same.<sup>82</sup> In Connecticut, an employer may not “refuse to hire a person or . . . discharge, penalize or threaten an employee solely on the basis of such person’s or employee’s status as a qualifying patient.”<sup>83</sup> As with Oklahoma, employers in Connecticut may “prohibit the use of intoxicating substances during work hours” and “discipline an employee for being under the influence of intoxicating substances during work hours.”<sup>84</sup> Finally, like Oklahoma, Connecticut provides an exception for employers that must comply with federal law or those who operate by federal funding.<sup>85</sup>

However, unlike medical marijuana laws in Oklahoma, Arizona, Delaware, and Minnesota, the relevant provision in PUMA does not provide an express prohibition against adverse employment consequences

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78. ARIZ. REV. STAT. § 36-2813(B)(2); DEL. CODE ANN. tit. 16, § 4905A(a)(3)(b); MINN. STAT. ANN. § 152.32(3)(c)(2); 63 OKLA. STAT. § 425(B)(2).

79. ARIZ. REV. STAT. § 36-2813(B); DEL. CODE ANN. tit. 16, § 4905A(a)(3); MINN. STAT. ANN. § 152.32(3)(c); 63 OKLA. STAT. § 425(B).

80. At this point, Nevada is the only state with exceptions to employee protections for marijuana use that are similar to the Unity Bill. *See* A.B. 132, 2019 Leg., 80th Sess. (Nev. 2019) (providing exceptions that allow for adverse employment consequences for activities that “could adversely affect the safety of others”).

81. CONN. GEN. STAT. ANN. § 21a-408p (West 2019).

82. *Compare* 63 OKLA. STAT. § 425, *with* CONN. GEN. STAT. ANN. § 21a-408p.

83. CONN. GEN. STAT. ANN. § 21a-408p(b)(3).

84. *Id.*

85. *Id.* § 21a-408p(b).

because of a failed drug test.<sup>86</sup> In this sense, PUMA is more similar to Pennsylvania's Medical Marijuana Act, which also provides a general prohibition of adverse employment action against a licensed medical marijuana patient but does not contain express drug testing provisions.<sup>87</sup> In the case below, this difference did not affect the outcome when a licensed employee challenged an adverse employment action because of a positive marijuana drug test.

In 2018, an applicant in Connecticut became one of the first to succeed in a lawsuit under a medical marijuana statute's discrimination protections. In that case, Katelin Noffsinger brought an action under section 21a-408p of PUMA after SCC Niantic refused to hire her because of a positive drug test.<sup>88</sup> Noffsinger had become a qualified medical marijuana patient when her doctor recommended marijuana to treat post-traumatic stress disorder (PTSD).<sup>89</sup> After she accepted a job offer, but before her drug screening, Noffsinger disclosed her PTSD diagnosis and participation in Connecticut's medical marijuana program.<sup>90</sup> The company rescinded Noffsinger's job offer after her drug test revealed the presence of THC.<sup>91</sup>

In ruling on both parties' motions for summary judgment, the court began by noting its previous ruling that PUMA created a private right of action and that federal law did not preempt the anti-discrimination provision.<sup>92</sup> Next, the court granted Noffsinger's motion for summary judgment for her discrimination claim under PUMA.<sup>93</sup> The court found that there was no dispute as to the fact that the company rescinded the job offer because of Noffsinger's status as a medical marijuana patient, and that this violated the discrimination provisions of PUMA.<sup>94</sup>

*Noffsinger* has some important implications for the future of the OMMA. First, the case is an example of a federal court recognizing the validity of state marijuana laws, despite marijuana's status as a Controlled Substance under federal law. The *Noffsinger* court went beyond merely recognizing PUMA's validity, finding that the statute implied a private right of action.

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86. *Id.* § 21a-408p(b)(3); *see also* ARIZ. REV. STAT. § 36-2813(B) (West 2018); DEL. CODE ANN. tit. 16, § 4905A(a)(3) (West 2018); 35 PA. STAT. AND CONS. STAT. ANN. § 10231.2103(b) (West 2019).

87. 35 PA. STAT. AND CONS. STAT. ANN. § 10231.2103(b)(1).

88. *Noffsinger v. SSC Niantic Operating Co.*, 338 F. Supp. 3d 78, 83 (D. Conn. 2018).

89. *Id.* at 82.

90. *Id.*

91. *Id.* at 83.

92. *Id.* at 81.

93. *Id.* at 86.

94. *Id.*

Additionally, the case provides an example of how litigation under discrimination protections like the OMMA's License Holder Protections might play out. Courts faced with a lawsuit under the OMMA's License Holder Protections are likely to turn to *Noffsinger* for guidance because of the similarities between PUMA and the OMMA.

In contrast to the cases in states with license holder protections like Oklahoma, employers in states without statutory drug-testing limitations can still fire employees for a positive drug test. In *Roe v. TeleTech Customer Care Management*, a licensed medical marijuana patient brought a wrongful termination claim after the company refused to hire her due to a positive drug test for marijuana.<sup>95</sup> The Supreme Court of Washington held that the state's medical marijuana law "does not regulate the conduct of a private employer or protect an employee from being discharged because of authorized medical marijuana use."<sup>96</sup> Similarly, in *Cotto v. Ardagh Glass Packing, Inc.*, the federal district court held that "New Jersey law does not require private employers to waive drug tests for users of medical marijuana."<sup>97</sup> These cases clarify that courts will likely rule in favor of employers who fire employees for positive drug tests—even those with valid medical marijuana licenses—absent express license holder protections like those in the OMMA.

#### IV. Federal Law

States' marijuana laws often invite complex issues related to conflict of law with federal statutes.<sup>98</sup> Though the Controlled Substances Act likely preempts many of these state laws, the preemption analysis is more complicated than one might assume. The OMMA contains extremely permissive language and provides strong protections against employment discrimination for patients with valid medical marijuana licenses.<sup>99</sup> These protections may conflict with federal employment law provisions, like the Drug-Free Workplace Act and the Americans with Disabilities Act. This section explores the potential for conflict between the OMMA and these federal laws.

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95. 257 P.3d 586, 589 (Wash. 2011) (en banc).

96. *Id.* at 591–92.

97. No. 18-1037(RBK/AMD), 2018 WL 3814278, at \*9 (D.N.J. Aug. 10, 2018).

98. *See infra* Section IV.B (discussing federal preemption).

99. *See supra* notes 22–24.

*A. The General Conflict Between State Marijuana Laws and the Controlled Substances Act*

Though a majority of states have legalized access to some form of marijuana, federal law still prohibits the possession, sale, or production of Schedule I Controlled Substances.<sup>100</sup> According to the Controlled Substances Act (CSA), Schedule I drugs have “a high potential for abuse”<sup>101</sup> and “no currently accepted medical use.”<sup>102</sup> Other Schedule I drugs in this category include heroin and LSD,<sup>103</sup> while the lower-tier Schedule II classification includes highly dangerous drugs like cocaine, Fentanyl, Methamphetamine, and Oxycodone.<sup>104</sup> Despite the federal government’s classification of marijuana as a Schedule I drug with “no currently accepted medical use,” a majority of states have medical marijuana laws listing specific conditions for which doctors may recommend marijuana as a treatment. This difference between the federal and state laws on marijuana invites interesting legal questions related to the Commerce Clause, federalism, and preemption.

State marijuana laws test the delicate balance between Congress’s authority under the Commerce Clause and the police power of the states. In *Gonzales v. Raich*, the Supreme Court held that Congress derives its authority to regulate marijuana from the Commerce Clause.<sup>105</sup> This power persists even as applied to purely intrastate cultivation and possession of medical marijuana because such activities substantially affect interstate commerce.<sup>106</sup> The Court’s decision to uphold the CSA under the Commerce Clause highlights the doctrine’s broad reach and reflects the Court’s willingness to uphold the CSA’s current ban on marijuana. *Raich* makes any direct challenge to the CSA very difficult and strongly affirms Congress’s authority to regulate marijuana. However, this is not to suggest that the federal government has exclusive power to regulate marijuana.

The Tenth Amendment reserves certain powers to the states,<sup>107</sup> and courts have interpreted it as a potential limit on congressional power.<sup>108</sup>

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100. 21 U.S.C. § 812(c)(10) (2012) (classifying “marihuana” as a Schedule I Controlled Substance).

101. *Id.* § 812(b)(1)(A).

102. *Id.* § 812(b)(1)(B).

103. *Id.* § 812(a)–(c).

104. *Id.* § 812(b)(1)–(2).

105. 545 U.S. 1, 22 (2005).

106. *Id.* at 32.

107. U.S. CONST. amend. X.

Police powers, generally vested in the states,<sup>109</sup> arguably reserve the power to regulate marijuana at the state level. Justice Thomas made this argument in his dissent in *Raich*.<sup>110</sup> Moreover, the CSA recognizes state police powers to regulate marijuana, explaining that the CSA shall not operate “to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State.”<sup>111</sup> Nevertheless, no court has reached this conclusion based on the Tenth Amendment when enforcing state marijuana laws. Instead, the doctrine of preemption has more commonly decided the issue of which level of government possesses the authority to regulate marijuana.<sup>112</sup>

### *B. Preemption and Medical Marijuana*

Generally, under the doctrine of preemption, federal law supersedes conflicting state law.<sup>113</sup> This authority derives from the Supremacy Clause,<sup>114</sup> but its application to various state marijuana laws is not always straightforward.<sup>115</sup> Federal law preempts state law through either express or implied preemption.<sup>116</sup> Where federal law does not expressly preempt state law, implied preemption may nevertheless exist when there is a “clear congressional intent to preempt state or local law.”<sup>117</sup> The United States Supreme Court has established (at least) two categories of implied preemption: field preemption (where federal laws are designed to regulate the subject exclusively), and conflict preemption (where it is impossible to

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108. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 327 (Richard A. Epstein et al. eds., 5th ed. 2015).

109. *United States v. Kebodeaux*, 570 U.S. 387, 407 (2013) (Thomas, J., dissenting) (discussing the “general police power vested in the States”); *United States v. Morrison*, 529 U.S. 598, 618 (2000) (noting that the “Founders denied the National Government and reposed [the police power] in the States”); *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring) (discussing the “reserved police powers of the States”).

110. *Raich*, 545 U.S. at 66 (Thomas, J., dissenting) (“Here, Congress has encroached on States’ traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens.”).

111. 21 U.S.C. § 903 (2012).

112. *See infra* Section IV.B.

113. CHEMERINSKY, *supra* note 108, at 412.

114. *Id.* (citing *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992)).

115. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (discussing the different types of preemption and stating that “[i]n the final analysis, there can be no one crystal clear distinctly marked formula”).

116. CHEMERINSKY, *supra* note 108, at 412.

117. *Id.*

comply with both federal and state regulations—meaning that there is a positive conflict such that the two laws cannot stand together).<sup>118</sup> These principles have been applied in cases concerning conflict between state marijuana laws and federal employment law.

The Controlled Substances Act provides some guidance regarding preemption of state marijuana laws. As noted above, § 903 of the CSA states the following:

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.<sup>119</sup>

Regarding field preemption, this language likely negates any claim of congressional intent to occupy the field of marijuana regulation exclusively. However, as the number of states with marijuana laws continues to grow, courts may have to interpret this provision to determine whether a state marijuana law conflicts with the CSA.<sup>120</sup>

The conflict preemption analysis in state marijuana law cases will likely vary as much as the marijuana laws themselves. For example, among the seventeen remaining states without legalized marijuana, fifteen have decriminalized possession of the drug.<sup>121</sup> Decriminalization often leaves marijuana classified as an illegal substance but lessens criminal penalties for possession. In other states, decriminalization manifests as a policy decision not to prosecute possession of marijuana.<sup>122</sup> Decriminalization laws seem less likely to implicate conflict preemption because they are consistent with the CSA insofar as they keep marijuana illegal, and because this type of policy discretion likely falls within the police powers of the

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118. *See Gade*, 505 U.S. at 98.

119. 21 U.S.C. § 903 (2012).

120. Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 13 (2013) (“Indeed, a large number of courts has already weighed in on the issue.”).

121. German Lopez, *15 States Have Decriminalized – but Not Legalized – Marijuana*, VOX (July 10, 2019, 5:34 PM EDT), <https://www.vox.com/identities/2018/8/20/17938358/marijuana-legalization-decriminalization-states-map>.

122. Mikos, *supra* note 120, at 19.

individual states. One appellate court in California agreed with this proposition, finding that the CSA did not preempt the state's policy of decriminalizing marijuana.<sup>123</sup>

In contrast to decriminalization, medical marijuana laws are much more likely to be preempted because they contradict the CSA's ban on marijuana and its language that marijuana has no accepted medical use.<sup>124</sup> Many courts have operated under the assumption that any conflict between the CSA and a state marijuana law renders the state law preempted,<sup>125</sup> but they often do so narrowly by invalidating just one particular provision of a given state's marijuana law rather than the entire section. For example, the Supreme Judicial Court of Maine narrowly limited its holding to one specific provision when it held that the CSA preempts part of the state's medical marijuana law.<sup>126</sup> Similarly, though less narrowly, the Supreme Court of Oregon held that the CSA preempts the provision of the state's marijuana law that generally authorizes medical marijuana use, although the court noted that the CSA did not preempt the entire law.<sup>127</sup> Finally, a Minnesota state court held that the CSA preempted the appellant's proposed city charter amendment that would establish marijuana distribution centers for medical marijuana patients.<sup>128</sup> Under this approach, the CSA would preempt many provisions of the OMMA's provisions—particularly those that authorize the possession, growth, and distribution of marijuana.

However, not all courts subscribe to the theory that Congress intended for the CSA to preempt all state marijuana laws. For example, the Supreme Court of Michigan found that the CSA did not preempt a particular provision of the state's medical marijuana law.<sup>129</sup> The court held that it is possible to comply with both the CSA and section 4(a) of the Michigan Medical Marihuana Act (MMMA), which immunizes registered patients

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123. *Qualified Patients Ass'n v. City of Anaheim*, 115 Cal. Rptr. 3d 89, 105 (Ct. App. 2010).

124. *See* 21 U.S.C. § 812(c)(10) (2012) (classifying "marihuana" as a Schedule I Controlled Substance); *see also supra* notes 98–101.

125. Mikos, *supra* note 120, at 13–14.

126. *Bourgoin v. Twin Rivers Paper Co.*, 2018 ME 77, ¶ 1, 187 A.3d 10, 12 (dealing with an appeal from an order requiring an employer to subsidize an employee's acquisition of medical marijuana).

127. *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 536 (Or. 2010) (en banc).

128. *Haumant v. Griffin*, 699 N.W.2d 774, 781–82 (Minn. Ct. App. 2005) ("Appellant's proposed charter amendment would be deemed preempted by Minnesota and federal laws.").

129. *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 536 (Mich. 2014).

from any penalty related to medical use of marijuana.<sup>130</sup> The court reasoned that the MMMA does not require anyone to violate the CSA by growing or possessing marijuana, and it does not “prohibit punishment of that offense under federal law.”<sup>131</sup> Instead, according to the court, the MMMA merely provides registered patients with a limited state-law immunity from punishment.<sup>132</sup> In contrast to the cases above, this decision is one example of how a court may find that a medical marijuana law is not preempted under conflict preemption, even when preemption appears likely at first glance.

### *C. Conflict with Federal Employment Law*

In the context of employment law, the Drug-Free Workplace Act (DFWA) and the Americans with Disabilities Act (ADA) potentially conflict with the OMMA. These federal laws are not the *only* employment law conflicts that may arise with state marijuana laws, but they are the main subjects of concern for this Comment. It is likely that the OMMA can coexist with the DFWA, but it is unclear whether the same will be true of the ADA.

#### *1. The Drug-Free Workplace Act*

One potential source of conflict for the OMMA is the federal Drug-Free Workplace Act, which enumerates specific requirements for recipients of federal contracts and federal grants.<sup>133</sup> Under the DFWA, an employer is not eligible to contract with a federal agency unless the employer agrees to provide a drug-free workplace by following guidelines to: (1) provide notice that drug use, possession, and distribution is prohibited; (2) establish a drug free awareness program; (3) require employees to provide notice to the employer and the government agency of any criminal drug conviction occurring in the workplace; (4) impose sanctions on convicted employees or require participation in a substance abuse or rehabilitation program; and (5) otherwise make a good-faith effort to continue to maintain a drug-free workplace.<sup>134</sup> If an employer fails to meet these requirements, the agency

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130. *Id.* at 541 (“[I]t is not impossible to comply with both the CSA’s federal prohibition of marijuana and § 4(a)’s limited state-law immunity for certain medical marijuana use, and § 4(a) does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the CSA.”).

131. *Id.* at 537.

132. *Id.*

133. *See generally* 41 U.S.C. §§ 8101–8106 (2012).

134. *Id.* § 8102(a)(1).

may suspend or terminate the contract.<sup>135</sup> Likewise, the DFWA provides these same requirements for federal grant recipients.<sup>136</sup>

The OMMA can likely coexist with the DFWA. The OMMA's language indicates that its drafters contemplated this conflict and sought to avoid it. The License Holder Protections apply "unless a failure to do so would cause an employer to imminently lose a monetary or licensing related benefit under federal law or regulations."<sup>137</sup> This language was altered in the Unity Bill<sup>138</sup> but likely leads to the same result. Additionally, another exception from the License Holder Protections states that "[e]mployers may take action against a . . . medical marijuana license holder if the holder uses or possesses marijuana while in the holder's place of employment or during the hours of employment,"<sup>139</sup> which is exactly what the DWFA prohibits.

The case of *Noffsinger v. SSC Niantic Operating Co.* is a perfect example of how a state marijuana law can coexist with the DFWA. There, the company argued that the DFWA precluded it from hiring Noffsinger (a licensed medical marijuana patient) because it had adopted its substance abuse policy in order to comply with the DFWA.<sup>140</sup> The court disagreed, noting that the DFWA does not *require* drug testing.<sup>141</sup> The court further reasoned that the DFWA does not prohibit federal contractors from employing someone who uses illegal drugs outside of the workplace, much less an employee who uses medical marijuana outside the workplace in accordance with a program approved by state law.<sup>142</sup> Finally, the court stated that the company's choice to utilize a zero tolerance drug testing policy in order to maintain a drug free work environment "does not mean that this policy was actually 'required by federal law or required to obtain federal funding.'"<sup>143</sup>

The dissenting opinion in *Ross v. RagingWire Telecommunications, Inc.* also follows this line of reasoning, as it stated that "drug-free workplace laws are not concerned with employees' possession or use of drugs like marijuana away from the jobsite, and nothing in those laws would prevent

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135. *Id.* § 8102(b)(1).

136. *Id.* § 8103.

137. 63 OKLA. STAT. § 425(B) (Westlaw through Sept. 1, 2019 of the 1st Reg. Sess. of the 57th Legis.) (effective Aug. 30, 2019).

138. *Id.* § 427.8(H) ("Unless otherwise required by federal law or required to obtain federal funding.").

139. *Id.* § 425(B)(2).

140. 338 F. Supp. 3d 78, 82–84 (D. Conn. 2018).

141. *Id.* at 84.

142. *Id.*

143. *Id.*

an employer that knowingly accepted an employee's use of marijuana as a medical treatment at the employee's home from obtaining drug-free workplace certification.”<sup>144</sup> This argument was not addressed in the majority opinion because the court held that the California medical marijuana law did not contain any employment law provisions, and, therefore, it did not require employers to accommodate medical marijuana use.<sup>145</sup> However, this reasoning is an example of how the DFWA and state marijuana laws can coexist, even in the absence of an exception for employers with federal contracts or licenses.

However, employees bringing wrongful discharge claims in other jurisdictions may not be successful where the state's medical marijuana statute does not provide an exception for employers with federal contracts or licenses. In *Carlson v. Charter Communications*, a district court held that conflict preemption warranted dismissal of Carlson's claim where the employer was a contractor under the DFWA and Montana's medical marijuana law permitted possession of marijuana without restriction as to time or place.<sup>146</sup> Carlson argued that he had never used or been under the influence of marijuana while at work.<sup>147</sup> The court reasoned that this assertion, even if true, was irrelevant to its conflict preemption analysis because the language of the state's medical marijuana statute directly conflicted with the DFWA by allowing possession without restriction in the workplace.<sup>148</sup> This decision illustrates that the DFWA is more likely to preempt state marijuana laws that do not provide exceptions for federal contracts or prohibit marijuana use in the workplace.

Cases from these other jurisdictions support the conclusion that the OMMA can coexist with the DFWA. The reasoning from *Noffsinger* and from the dissent in *Ross* are particularly appropriate in the context of the OMMA because the statute already contains an express exception for employers with federal contracts or licenses.<sup>149</sup> Moreover, the OMMA contains the restriction on use in the workplace that was lacking in California's medical marijuana law in *Carlson*, because the OMMA allows for adverse employment action where an employee possesses, uses, or is

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144. 174 P.3d 200, 213 (Cal. 2008) (Kennard, J., concurring and dissenting).

145. *Id.* at 207.

146. No. CV 16-86-H-SEH, 2017 WL 3473316, at \*2 (D. Mont. Aug. 11, 2017).

147. *Id.*

148. *Id.* at \*2–3.

149. 63 OKLA. STAT. §§ 425(B), 427.8(H) (Westlaw through Sept. 1, 2019 of the 1st Reg. Sess. of the 57th Legis.) (effective Aug. 30, 2019).

under the influence of marijuana while at work.<sup>150</sup> While the OMMA is likely compatible with the DFWA, it may create other employment law issues regarding disabilities and accommodating those conditions.

*2. The Americans with Disabilities Act and Similar State Law Disability Accommodations*

The Americans with Disabilities Act (ADA) is much more likely to conflict with the OMMA. Employees in medical marijuana states who are terminated for positive marijuana drug tests often seek relief under the ADA or similar state law disability statutes.<sup>151</sup> The conflict between state marijuana laws and the ADA arises under § 12114, which states that “a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.”<sup>152</sup> Under the ADA, illegal drugs include any drug that is unlawful under the Controlled Substances Act.<sup>153</sup> The ADA also specifies that employers have the authority to ban the use of drugs or alcohol by all employees.<sup>154</sup> Under the ADA, employers “may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace.”<sup>155</sup> While parts of the OMMA align with ADA requirements, remaining conflicts may invite litigation.

Conflict between the ADA and state marijuana laws has already led to litigation in other jurisdictions. In *James v. City of Costa Mesa*, the Ninth Circuit held that the “the ADA does not protect against discrimination on the basis of marijuana use, even medical marijuana use supervised by a doctor in accordance with state law.”<sup>156</sup> That case did not concern employment law; rather the issue was whether the ADA’s prohibition of discrimination in public services precludes a city from shutting down the collectives at which the plaintiffs had been purchasing marijuana to treat

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150. *Id.* §§ 425(B)(2), 427.8(H)(2)(B).

151. *See, e.g.*, *Noffsinger v. SSC Niantic Operating Co.*, 273 F. Supp. 3d 326 (D. Conn. 2017); *Johnson v. Colum. Falls Aluminum Co.*, 2009 MT 108N, ¶ 3, 213 P.3d 789 (unpublished table decision) (bringing a claim under the ADA); *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200, 203 (Cal. 2008) (brining wrongful termination claim due to disability under the California Fair Employment and Housing Act).

152. 42 U.S.C. § 12114(a) (2012).

153. *Id.* § 12111(6)(A).

154. *Id.* § 12114(c)(1).

155. *Id.* § 12114(c)(2).

156. 700 F.3d 394, 397 (9th Cir. 2012).

their illnesses.<sup>157</sup> The court in that case emphasized that “the ADA defines ‘illegal drug use’ by reference to federal, rather than state, law, and federal law does not authorize the plaintiffs’ medical marijuana use.”<sup>158</sup> While this case did not concern the ADA’s employment law provisions, the ADA’s “illegal drug use” exception would likely be treated the same because it invokes the same classification of illegal drugs.

Another area of marijuana-related employment litigation concerns the issue of whether an employer must accommodate an employee’s use of medical marijuana where it is used to treat a statutorily recognized disability. Again, the outcomes of these cases vary greatly depending on a particular state’s marijuana law, but many courts are unlikely to require an employer to accommodate medical marijuana use absent a statutory mandate to the contrary. For example, in *Johnson v. Columbia Falls Aluminum Co.*, the Supreme Court of Montana ruled that an employer did not have to accommodate marijuana use because the state’s medical marijuana act clearly stated that an employer does not have to do so.<sup>159</sup> Likewise, in *Garcia v. Tractor Supply Co.*, a district court held that an employer did not have to accommodate the employee’s medical marijuana use on these same grounds.<sup>160</sup> These cases show that courts are unlikely to require accommodation of marijuana use where a state law does not require employers to do so. However, where state marijuana laws are more favorable toward employees, the decision may be more complicated.

Courts are generally reluctant to require that an employer directly accommodate an employee’s use of medical marijuana while it remains illegal under federal law. In *Bourgoin v. Twin Rivers Paper Co.*, Bourgoin successfully petitioned Maine’s Worker’s Compensation Board for an order that required his former employer to pay for his medical marijuana, which he had received a certification to use after a work-related injury.<sup>161</sup> The state’s highest court found that the employer did not have to pay for the Bourgoin’s medical marijuana because ordering an employer to do so would create a positive conflict with the CSA, thus triggering conflict preemption.<sup>162</sup> This conflict preemption line of reasoning is consistent with the preemption cases discussed above. This reasoning would likely apply in any case where an employer is ordered to fund a current or former

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157. *See id.* at 396.

158. *Id.* at 397.

159. 2009 MT 108N, ¶ 11, 213 P.3d 789 (unpublished decision).

160. 154 F. Supp. 3d 1225, 1229–30 (D.N.M. 2016).

161. 2018 ME 77, ¶ 1, 187 A.3d 10, 12.

162. *Id.* ¶ 29, 187 A.3d at 22.

employee's medical marijuana costs, even if it is related to an injury on the job.<sup>163</sup>

Although courts have not been requiring employers to pay for the use of medical marijuana, employers still must accommodate the underlying disability. In *Coles v. Harris Teeter, LLC*, Coles was terminated due to a drug test that tested positive for marijuana, which he was taking as prescribed by his doctor for glaucoma.<sup>164</sup> Coles brought an action against his former employer under D.C.'s employment discrimination statute, claiming that the employer fired him because of his glaucoma disability and because he had engaged in medical marijuana treatment prescribed by his physician.<sup>165</sup> The court denied the employer's motion to dismiss this claim, finding that Coles "might have been terminated because of his disability, rather than his positive drug screen."<sup>166</sup> This case is a perfect example of an employment discrimination claim that arose due to a drug test for marijuana, and how employers still cannot discriminate against the underlying disability that marijuana is being used to treat.

Another example of why employers must accommodate the underlying disability being treated by medical marijuana is found in *Barbuto v. Advantage Sales and Marketing, LLC*.<sup>167</sup> In that case, Christina Barbuto had been using medical marijuana to treat Crohn's disease after receiving a written certification by her doctor as authorized under the Massachusetts Medical Marijuana Act (MMMA).<sup>168</sup> After being terminated by Advantage Sales and Marketing (ASM) for a positive drug test, Barbuto brought claims under the MMMA (for denial of the "right or privilege" to lawfully use marijuana as a registered patient), and under the Massachusetts handicap discrimination statute.<sup>169</sup> On the MMMA claim, the court held that the MMMA did not create a private right of action because it conflicted with the state handicap statute, which provided the more appropriate remedy.<sup>170</sup> However, the court held that Barbuto's Crohn's disease did qualify her as a

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163. The Unity Bill added much needed clarity on this issue, providing that nothing in the OMMA shall "[r]equire an employer, a government medical assistance program, private health insurer, worker's compensation carrier or self-insured employer providing worker's compensation benefits to reimburse a person for costs associated with the use of medical marijuana." 63 OKLA. STAT. § 427.8(I)(2).

164. 217 F. Supp. 3d 185, 187 (D.D.C. 2016).

165. *Id.* at 188.

166. *Id.* at 189.

167. 78 N.E.3d 37 (Mass. 2017).

168. *Id.* at 41.

169. *Id.*

170. *Id.* at 49–50.

“handicap person” under the handicap discrimination statute, and that Barbuto had sufficiently stated a claim on that ground to survive a motion to dismiss.<sup>171</sup> Moreover, the court held that Barbuto’s continued use of medical marijuana was “not facially unreasonable as an accommodation for her handicap,” and that ASM failed to participate in an “interactive process” with Barbuto to determine whether there was a reasonable accommodation for her handicap.<sup>172</sup> The court reserved the issue of whether this accommodation would impose an undue hardship on the employer for trial.<sup>173</sup>

These cases show that courts have rarely ordered an employer to accommodate an employee’s use of marijuana. Courts are unlikely to require that an employer accommodate medical marijuana use where that particular state’s medical marijuana laws do not expressly require accommodation. However, some courts (like the one in *Barbuto*) may require employers to accommodate medical marijuana use based on handicap discrimination or disability statutes, even where state medical marijuana law provides no remedy. Moreover, none of these cases arose in a state with employee protections like those in Oklahoma. The Unity Bill clarified that the OMMA does not require an employer to provide worker’s compensation benefits to reimburse an employee’s medical marijuana use. However, the law is still unclear regarding the extent to which Oklahoma employers will need to accommodate marijuana use for recognized disabilities.<sup>174</sup> Employers must remain cognizant that they can still be found liable for employment discrimination claims based on an underlying disability, and that medical marijuana will likely bring more of these issues to the surface.

#### *V. Potential Solution and Advice for Employers*

Each year, the list of states with legal marijuana continues to grow. This being the case, conflict with federal law is certain to happen as long as marijuana remains classified as a Schedule I substance. However, the OMMA’s exception for employers with federal contracts or licenses (that aligns with DFWA requirements) is a perfect example of how states with medical marijuana can significantly limit conflict with federal law. The case of *Noffsinger v. SSC Niantic Operating Co.* and the dissent’s reasoning

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171. *Id.* at 48.

172. *Id.*

173. *Id.*

174. 63 OKLA. STAT. § 427.8(I)(2).

in *Ross v. RagingWire Telecommunications* show how a court might find no conflict between a state marijuana law and the DFWA,<sup>175</sup> even where the state law does not contain an exception for federal contracts or licenses. However, the decision in *Carlson v. Charter Communications* is a perfect example of why the exception for federal contracts or licenses found in the OMMA is critical to its ability to coexist with the DFWA.<sup>176</sup>

Conflict between the ADA and the OMMA is much more complex and difficult to predict. This Comment cites seven cases reaching vastly different outcomes when deciding claims based on the ADA or state law disability statutes in the context of medical marijuana.<sup>177</sup> The simplest way to remedy such a complex issue between state marijuana laws and federal law like the ADA would be to amend the Controlled Substances Act to remove marijuana, or move the drug's classification to Schedule II. Justice Stevens' majority opinion in *Gonzales v. Raich* mentioned the need for a legislative solution in 2005, stating that "perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress."<sup>178</sup>

Schedule II is probably the most appropriate classification for marijuana at this time. According to the Controlled Substances Act, a Schedule II drug still "has a high potential for abuse," but the drug "has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions."<sup>179</sup> This reclassification would alleviate much of the conflict with state marijuana laws, as the majority of these state laws authorize medicinal (rather than recreational) use, and most of them contain a list of medical conditions for which doctors may recommend marijuana as a treatment.<sup>180</sup> A Schedule II classification would recognize marijuana's currently accepted medical use across the country, and remedy much of the conflict between state marijuana laws and various federal laws. For example, reclassifying marijuana as a Schedule II drug could eliminate much of the conflict with the ADA because the ADA

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175. See *Noffsinger v. SSC Niantic Operating Co.*, 338 F. Supp. 3d 78 (D. Conn. 2018); *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200 (Cal. 2000).

176. No. CV 16-86-H-SEH, 2017 WL 3473316, at \*2 (holding that the Montana Medical Marijuana Act (MMA) was preempted by the DFWA because the language of the MMA allowed possession without restriction in the workplace).

177. See *supra* Section IV.C.2.

178. 545 U.S. 1, 33 (2005).

179. 21 U.S.C. § 812(b)(2)(A)–(B) (2012).

180. Gentzler, *supra* note 19; see also *State Medical Marijuana Laws*, *supra* note 2.

defines an “illegal drug” as any drug that is unlawful under the Controlled Substances Act,<sup>181</sup> and a Schedule II classification recognizes the lawful use of certain drugs.<sup>182</sup> Reclassifying marijuana under Schedule II is much less complicated than changing each state’s medical marijuana law to deal with federal conflicts.

In addition to being the simplest solution, reclassifying marijuana under the CSA is also favored among both political parties. One survey indicates that an overwhelming majority of Americans would be in favor of amending the CSA, with 76% of voters supporting the reduction of marijuana from its classification under Schedule I.<sup>183</sup> This survey also found that both political parties supported the reduction of marijuana from Schedule I, which indicates that a Schedule II classification should have bipartisan support.<sup>184</sup> Reclassification of marijuana to Schedule II under the CSA is favored by a majority of Americans across political lines, and it would also resolve many of the conflicts with federal employment law like the ADA.

This reclassification is likely to happen, but until then, employers and employees must deal with the uncertainty of new state marijuana laws and their conflict with federal law. Employers in Oklahoma risk costly litigation under the OMMA’s License Holder Protections if they refuse to hire, discharge, or otherwise discipline employees with valid medical marijuana licenses in non-safety-sensitive positions. The case of *Noffsinger v. SSC Niantic Operating Co.* is one example of this kind of claim being successful,<sup>185</sup> even where a state’s discrimination provisions were less protective than the License Holder Protections in the OMMA.

Employers in Oklahoma that do not fall within one of the statutory exceptions should consider implementing a policy that only allows for adverse employment consequences where the applicant or employee lacks a valid medical marijuana license. Of course, those employers with safety-sensitive positions could still enforce strict policies against marijuana use, as authorized under the Unity Bill.<sup>186</sup> Even though employers will not have to fund injured employees’ medical marijuana treatment,<sup>187</sup> these employers

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181. See 42 U.S.C. § 1211(6)(A).

182. See 21 U.S.C. § 812(b)(2)(A)–(B).

183. Schwartz, *supra* note 3.

184. *Id.*

185. 338 F. Supp. 3d 78, 84 (D. Conn. 2018).

186. See generally 63 OKLA. STAT. § 427.8 (Westlaw through Sept. 1, 2019 of the 1st Reg. Sess. of the 57th Legis.).

187. See *supra* note 163.

must remain aware of their obligations to accommodate employees' underlying disabilities. Updating drug testing policies to discontinue adverse employment consequences against applicants or employees with medical marijuana licenses would lessen the risk and cost of litigation for employers operating under the uncertainty of the OMMA's License Holder Protections where none of the exceptions apply.

### *VI. Conclusion*

Employers, employees, and courts across the country will increasingly face confusion and litigation as states continue to pass marijuana legislation. The OMMA's License Holder Protections provide substantial protections for employees with valid medical marijuana licenses. While the OMMA's language is clearer than many other state marijuana laws, lawsuits brought by licensed employees or applicants are still likely to happen. The easiest solution to these conflicts occurring across the country would be to amend the Controlled Substances Act to remove marijuana or reclassify the drug under Schedule II. Until this happens, employers that do not fall within the exceptions to the License Holder Protections should update their drug testing policies to discontinue the practice of terminating employees with valid medical marijuana licenses solely for a positive drug test. Though the OMMA creates uncertainty, those employers that update their drug testing policies are much less likely to face litigation.

The OMMA is just one example of the growing pains associated with the trend of legal marijuana. As the states continue to pass legalization measures, pressure to amend federal law increases. A congressional solution is likely to be implemented in the near future, but until then, state legislatures will continue to modify marijuana laws to comply with federal law as much as possible. The Unity Bill of 2019 is just one example of how state marijuana laws can be improved to provide a workable solution for everyone in light of the increasing trend of legalization.

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