

**MARY JANE ON CAMPUS?  
EMPLOYEE AND STUDENT USE  
OF MEDICAL MARIJUANA**

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**APPLICABLE LAWS**

- Controlled Substances Act (“CSA”), 21 U.S.C. § 811
- Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. § 5331
- Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. § 12101
- New Mexico Human Rights Act (“NMHRA”), NMSA 1978, § 28-1-1 (2000)
- Lynn and Erin Compassionate Use Act (“CUA”), NMSA 1978, § 26-2B-1 (2007)
- Board Policies
- Case Law

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**CONTROLLED SUBSTANCES ACT**

- There are five schedules of controlled substances.
- Marijuana is classified as a Schedule I drug.
  - Schedule I drugs are drugs that:
    - Have “a high potential for abuse.”
    - Have “no currently accepted medical use in treatment in the United States.”
    - Lack an “accepted safety for use of the drug or other substance under medical supervision.”

21 U.S.C. § 812(b)(1).

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**U.S. v. OAKLAND CANNABIS BUYERS' CO-OP 532  
U.S. 483 (2001)**

- "The Controlled Substances Act...prohibits the manufacture and distribution of various drugs, including marijuana."
- Under this decision, the Supreme Court of the United States held that the manufacture and distribution of medical marijuana is illegal under federal law, even if it is permitted by the states.
- There is no exception for "medical necessity."

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**ENFORCEMENT BY THE DEPARTMENT OF JUSTICE**

- In 2009, in a memorandum to federal prosecutors in states that allow use of marijuana for medical purposes, the DOJ said that prosecuting medical marijuana patients who are acting in "clear and unambiguous compliance" with state law is not an effective use of federal resources.
  - This includes "those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana..."
- However, it is not clear what the new administration's policy will be.

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**NEW MEXICO'S LYNN AND ERIN COMPASSIONATE  
USE ACT**

- Exempts a "qualified patient" and "primary caregiver" from arrest, prosecution or penalty under State law for use of medical marijuana consistent with State regulations "for alleviating symptoms caused by debilitating medical conditions and their medical treatments." NMSA 1978, § 26-2B-2 (2007).
- "'Qualified patient', means a resident of New Mexico who has been diagnosed by a practitioner as having a debilitating medical condition and has received written certification and a registry identification card issued pursuant to the ... Act." NMSA 1978, § 26-2B-3(G) (2007).
- The "primary caregiver" is a New Mexico resident designated by the patient's practitioner to "manage the well-being" of the patient. NMSA 1978, § 26-2B-2(F) (2007).

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**WHAT IS CONSIDERED A “DEBILITATING MEDICAL CONDITION”**

- ❑ Cancer, glaucoma, multiple sclerosis, damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity, epilepsy, positive status for human immunodeficiency virus or acquired immune deficiency syndrome, admitted into hospice care in accordance with rules promulgated by the department, and any other medical condition as approved by the Department of Health. NMSA 1978, § 26-2B-3(B) (2007).

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**NEW MEXICO DEPARTMENT OF HEALTH APPROVED CONDITIONS**

- ❑ Severe chronic pain, painful peripheral neuropathy, intractable nausea/vomiting, severe anorexia/cachexia, Hepatitis C infection currently receiving antiviral treatment, Crohn’s disease, post-traumatic stress disorder (PTSD), inflammatory autoimmune-mediated arthritis, amyotrophic lateral sclerosis (Lou Gehrig’s disease), inclusion body myositis, spasmodic torticollis (cervical dystonia), Parkinson’s disease, Huntington’s disease, ulcerative colitis, and such other conditions as the secretary may approve. 7.34.3.8(B) NMAC.

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**MEDICAL MARIJUANA PROHIBITED AT SCHOOL**

- ❑ Under the Compassionate Use Act, “[p]articipation in a medical use of cannabis program by a qualified patient or primary caregiver does not relieve the qualified patient or primary caregiver from:  
(1) criminal prosecution or civil penalties for activities not authorized in the Lynn and Erin Compassionate Use Act; ...  
(3) criminal prosecution or civil penalty for possession or use of cannabis  
(a) in a school bus or public vehicle;  
(b) on school grounds or property...”

NMSA 1978, § 26-2B-5(A) (2007).

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**MEDICAL MARIJUANA PROHIBITED WHILE OPERATING A VEHICLE**

- It is “unlawful for a person who is under the influence of any drug to a degree that renders the person incapable of safely driving a vehicle to drive a vehicle within this state.” NMSA 1978, § 66-8-102(B) (2016).
- Under the Compassionate Use Act, violators are not exempt from liability or criminal prosecution. See NMSA 1978, § 26-2B-5(A)(2) (2007).

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**Student Use**

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**USE BY MINORS**

- The Compassionate Use Act allows a minor to use medical cannabis with parental consent and certification of patient eligibility from his or her practitioner.
- Parental consent must be in writing, and the parent (or legal representative) must agree to:
  - serve as the minor’s primary caregiver; and
  - control the acquisition of the cannabis, dosage, and the frequency of the use of cannabis and cannabis-derived products.

7.34.3.10(E) NMAC.

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### ADDITIONAL RELEVANT FEDERAL LAWS

- Under Title IV (21<sup>st</sup> Century Schools) of the Every Student Succeeds Act (ESSA), schools are required to develop and implement programs that “foster safe, healthy, supportive, and drug-free environments that support student academic achievement.” 20 U.S.C. § 7118(2).
- Under the Individuals with Disabilities Education Act (IDEA), a student can be removed to an Interim Alternative Educational Setting if he/she “knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function” even when the behavior is a manifestation of the student’s disability. 20 U.S.C. § 1415(k)(1)(G)(ii).
- Under Section 504 of the Rehabilitation Act, there is no protection for current drug use. 29 U.S.C. § 705(20)(C)(i) and (iv).

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### ADDITIONAL RELEVANT STATE LAWS

- “Activities subject to local board regulation within legal limits include, but are not limited to...use of controlled substances, alcohol and tobacco in the public schools.” 6.11.2.9(B)(4) NMAC.

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### RELEVANT NMSBA POLICIES

- “The nonmedical use, possession, distribution, delivery or sale of drugs or counterfeit substances on school property or at school events is prohibited.”
- Nonmedical means “a purpose other than the prevention, treatment, or cure of an illness or disabling condition’ consistent with accepted practices of the medical profession.”
- “For the purposes of this policy, ‘drugs’ shall include...[c]ontrolled substances prohibited by law...”

Drug and Alcohol Use by Students, JICH.

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## POLICY ISSUES

Consider a policy that specifically addresses medical marijuana use by students:

- Acknowledges that the use of medical marijuana is still prohibited by federal law;
- Clarifying that your current Board policy prohibiting the use and possession of marijuana includes "qualified students";
- Prohibiting school personnel from storing, assisting with its administration, or permitting its possession or use of prescription cannabis on school grounds or property or in a school bus; and
- Address what to do about students who are under the influence due to permissible off-campus use.
  - Is this permitted by the Act?
  - What about if the student become disruptive?
  - What a class involves operation of heavy machinery?
  - How will searched be handled?

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## POLICY ISSUES (CONTINUED)

- Address known risks such as students driving to school under the influence.
  - The Compassionate Use Act does not protect individuals from "liability for damages or criminal prosecution arising out of the operation of a vehicle while under the influence of cannabis." NMSA 1978, § 26-2B-5(A)(2).
  - A student driving under the influence presents a risk of injury to other students and staff, as well as to him/herself.

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## Employee Use

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**MEDICAL MARIJUANA AND THE AMERICANS WITH DISABILITIES ACT**

- The Americans with Disabilities Act (ADA) is a federal law.
- “[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.” 42 U.S.C. § 12114(a).
- The term illegal use of drugs is defined as the Controlled Substances Act defines it. 42 U.S.C. § 12111(6)(A).

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**MEDICAL MARIJUANA, THE ADA, AND SAFETY SENSITIVE POSITIONS**

- ADA does not prohibit the Department of Transportation (DOT) from testing employees in “safety-sensitive duties for the illegal use of drugs...and...remov[ing] such person who tests positive for illegal use of drugs.” 42 U.S.C. § 12114(e).
  - For example, bus drivers.
- DOT, which regulates bus drivers, requires testing at both pre-employment and throughout the employment process under the Omnibus Transportation Employee Testing Act.
  - See 49 C.F.R. §§ 382.301-382.311 (2013).
- DOT did not follow the 2009 policy adopted by the Obama Administration’s Department of Justice.

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**GARCIA V. TRACTOR SUPPLY CO. 154 F.SUPP.3D 1225 (D.N.M. 2016)**

- The CUA explicitly states “arrest, prosecution or penalty in any manner for the possession of or the medical use of cannabis if the quantity of cannabis does not exceed an adequate supply [emphasis added].” NMSA 1978, § 26-2B-4(A) (2007).
- Plaintiff suffered from HIV/AIDS and was a valid participant in the New Mexico Medical Cannabis Program.
- He was hired by the employer, but failed pre-employment drug test.
  - The Plaintiff “had tested positive for cannabis metabolites.”
- Plaintiff is discharged and filed a lawsuit under the CUA and the New Mexico Human Rights Act.
- NMHRA is a state law that prevents discrimination for, among other things, serious medical conditions, including HIV/AIDS.

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**GARCIA V. TRACTOR SUPPLY CO. (CONTINUED)**

- Court held that CUA does not provide a cause of action to sue an employer.
- The Plaintiff argued “the CUA makes medical marijuana an accommodation promoted by the public policy of New Mexico, and therefore, medical marijuana is an accommodation that must be provided for by the employer under the New Mexico Human Rights Act.”

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**GARCIA V. TRACTOR SUPPLY CO. (CONTINUED)**

- The court held that the CSA, federal law, preempted the Plaintiffs claim under the CUA and NMHRA, two state laws.
- The court held that “[s]tate medical marijuana laws that provide limited state-law immunity may not conflict with the CSA. But here, [the Plaintiff] does not merely seek state-law immunity for his marijuana use. Rather, he seeks the state to affirmatively require [the employer] to accommodate his marijuana use.”
- The employer did not have to accommodate the Plaintiffs “illegal drug use” because it would require the employer “to permit the very conduct the CSA proscribes.”

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**EMPLOYERS**

- Do not have to accommodate medical marijuana use under the ADA or state law.
- Can still drug test (and discharge) an employee in a safety sensitive position who uses medical marijuana.
- Cannot be sued under the NMHRA/CUA for discharging an employee who fails a drug test as long as that discharge is for the use of medical marijuana and not the underlying medical condition.

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**RELEVANT NMSBA POLICIES**

- ❑ “No employee shall violate the law or District policy in the manufacture, distribution, dispensing, possession, or use, on or in the workplace...any narcotic drug, hallucinogenic drug, amphetamine, barbiturate, marijuana, or any other controlled substance, as defined in Schedules I through V of section 202 of the Controlled Substances Act...” Drug Free Workplace, GBEC.

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**RELEVANT NMSBA POLICIES**

- ❑ “Under this policy, any employee of the District (other than a transportation employee) must submit to drug and alcohol testing if the employee’s supervisor has reason to believe that the employee’s job performance has been impaired by use of alcohol or a drug.”  
Drug and Alcohol Testing of Employees, GBPD.

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**POLICY ISSUES**

Consider a policy that specifically addresses medical marijuana use by employees:

- ❑ Since there is no protection under State law for possession or use of cannabis on school grounds or property or in a school bus or public vehicle, consider clarifying that other Board policies apply to a qualified patient even with a valid prescription.
- ❑ Since most schools boards have policies prohibiting employees from being under the influence of illegal drugs, address what to do about employees who are under the influence due to permissible off-campus use.

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*The information in this presentation was prepared by Walsh Gallegos Treviño Russo & Kyle P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.*



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