



**Complex Problems. Simple Solutions.**

*OD Comply: Marijuana*

**New Mexico**

Sample State Summary

### **Medical Marijuana**

#### **General**

##### **Summary:**

New Mexico has legalized marijuana for medical purposes. New Mexico's medical marijuana law is called the Lynn and Erin Compassionate Use Act (the "**Medical Act**"). *New Mexico Statutes § 26-2B-1 through New Mexico Statutes § 26-2B-10*. The **Medical Act** allows individuals with certain qualifying medical conditions and physician authorization to apply for an approved state medical marijuana patient identification card.

The **Medical Act** does not contain any express employment protections for medical marijuana cardholders or caregivers. New Mexico employers can continue to prohibit the on-site use, possession, and distribution of marijuana in the workplace, regardless of marijuana's legal status for medical purposes. Aside from the **Medical Act**, there also are New Mexico court decisions discussing disability discrimination within the medical marijuana context and the applicability of disability discrimination laws to medical marijuana cardholders.

#### **Qualifying Medical Conditions**

(1) Cancer; (2) Glaucoma; (3) Multiple sclerosis; (4) Damage to the spinal nervous tissue of the spinal cord, with objective neurological indication of irretractable spasticity; (5) Seizure disorder; (6) Epilepsy; (7) Positive HIV status; (8) AIDS; (9) Amyotrophic lateral sclerosis (Lou Gehrig's disease); (10) Crohn's disease; (11) Hepatitis C; (12) Huntington's disease; (13) Inclusion body myositis; (14) Inflammatory autoimmune-mediated arthritis; (15) Irretractable vomiting or nausea; (16) Obstructive sleep apnea; (17) Painful peripheral neuropathy; (18) Parkinson's disease; (19) Post-traumatic stress disorder; (20) Severe chronic pain; (21) Severe anorexia or cachexia; (22) Spasmodic torticollis; (23) Ulcerative colitis; (24) Any other medical condition, treatment, or disease approved by the state department of health. *New Mexico Statutes § 26-2B-3(J)*.

### Restrictions on Types of Medical Marijuana

There are no restrictions on the types (e.g., smokable form, plants, edibles, oils, lotions, patches, etc.) of medical marijuana allowed under the **Medical Act**.

### Caregivers

The **Medical Act** allows for caregivers (to individuals authorized for medical marijuana use) to register for approved state medical marijuana identification cards.

### Reciprocity

New Mexico will recognize out-of-state medical marijuana cardholders. *New Mexico Statutes § 26-2B-3(W)*.

### Unemployment Compensation Benefits

The **Medical Act** does not address the impact that an adverse employment action taken against a medical marijuana cardholder or caregiver may have on an individual's eligibility for unemployment compensation benefits.

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### Express Employment Protections for Medical Marijuana Cardholders or Caregivers

Yes. *New Mexico Statutes § 26-2B-9(A)*.

### Summary

The **Medical Act** contains express protections for employees and applicants for employment who are medical marijuana cardholders or caregivers. *New Mexico Statutes § 26-2B-9(A)* (“Unless a failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or federal regulations, it is unlawful to take an adverse employment action against an applicant or an employee based on conduct allowed under” the **Medical Act**).

The **Medical Act** does not expressly recognize a private cause of action for a medical marijuana cardholder to allege a violation of the **Medical Act's** employment protections provision. However, the inclusion of **Medical Act's** employment protections provision likely creates the inference that a private cause of action exists and courts likely would interpret the **Medical Act** as containing an inferred private cause of action.

Notably, the **Medical Act's** employment protections provision was added to the **Medical Act** in 2019. Prior to its addition, the U.S. District Court for the District of New Mexico declined to recognize a private cause of action within the **Medical Act**. See *Stanley v. County of Bernalillo*, No. A-1-CA-36835, 2019 WL 6728849 (N.M. Court of Appeals Nov. 26, 2019) (holding that pre-2019 version of **Medical Act** did not provide employment protections); *Garcia v. Tractor Supply*, 154 F. Supp. 3d 1225 (D.N.M. 2016) (holding the pre-2019 version of **Medical Act** did not

mandate that employers must accommodate medical marijuana use). However, courts likely would no longer interpret the **Medical Act** as the *Stanley* and *Garcia* courts did.

The **Medical Act** expressly states that the **Medical Act** does not: (1) restrict the ability of employers to prohibit or take adverse employment action against an employee for the use of marijuana in the workplace or during work hours, or (2) restrict the ability of employers to prohibit or take adverse employment action against an employee for being impaired by marijuana in the workplace or during work hours. *New Mexico Statutes § 26-2B-9(B)*.

### Exceptions

The **Medical Act** provides for exceptions to the **Medical Act's** employment protections provision: "Unless a failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or federal regulations." *New Mexico Statutes § 26-2B-9(A)*. The **Medical Act** also expressly states that the employment protections provision is not applicable to an employee that the employer deems to be in a safety-sensitive position. *New Mexico Statutes § 26-2B-9(B)(2)*.

Based on this broad language, the **Medical Act** appears to create a significant amount of employer discretion to identify and define what is considered to be "safety-sensitive."

The term "safety-sensitive" is defined in the **Medical Act** as meaning "a position in which performance by a person under the influence of drugs or alcohol would constitute an immediate or direct threat of injury or death to that person or another." *New Mexico Statutes § 26-2B-3(Y)*.

The first exception – acts resulting in a loss of a monetary or licensing benefit under federal law or regulation – is limited. Employers should not rely on marijuana's illegal status under federal law as a basis not to comply with state marijuana legalization laws. State courts have repeatedly declined to rely on marijuana's illegal status under federal law to preempt state marijuana legalization laws.

However, a New Mexico court has held that the federal Controlled Substances Act and marijuana's illegal status preempted interpretation of the **Medical Act** as requiring an employer to accommodate illegal drug use. *See Garcia v. Tractor Supply*, 154 F. Supp. 3d 1225 (D.N.M. 2016) ("To affirmatively require Tractor Supply to accommodate Mr. Garcia's illegal drug use would mandate Tractor Supply to permit the very conduct the Controlled Substances Act proscribes."). It is unclear whether New Mexico courts would follow the *Garcia* court following the 2019 amendment to the **Medical Act** to include express employment protections. With the addition of express employment protections, courts likely would no longer interpret the **Medical Act** as the *Garcia* court did in 2016.

Government contractors should also recognize that, generally, federal contracts simply require compliance with the federal Drug Free Workplace Act of 1988 (DFWA). The DFWA only requires that government contractors make a "good faith effort" to maintain a drug-free workplace. While the DFWA prohibits employees from using or possessing controlled substances *in the workplace* (as opposed to off-duty use), the DFWA does not require drug testing, nor does it require employers to take adverse action against individuals for a positive drug test. Thus, government

contractors should carefully review their federal contracts to determine whether more specific language exists rather than mere compliance with the DFWA.

However, the exception addressing compliance with federal law likely does extend to federally-regulated job positions that require marijuana testing such as those governed by the US Department of Transportation (DOT) or the Federal Aviation Administration (FAA).

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### **Disability Discrimination Requirements/Employee Protections**

New Mexico has a state disability discrimination law (encompassed within the New Mexico Human Rights Act) applicable to both public and private employers with 4 or more employees. *New Mexico Statutes § 28-1-1 through 28-1-15*. Disability discrimination claims against public and private employers in New Mexico may be brought under the state disability discrimination law in state court and/or under the Americans with Disabilities Act of 1990 (ADA) in federal court.

The U.S. District Court for the District of New Mexico has previously determined that under the particular facts of one case, the New Mexico Human Rights Act's disability discrimination provision did not require an employer to accommodate the use of medical marijuana or prohibit an employer from taking adverse action against a medical marijuana cardholder in the event of a positive marijuana test. *See Garcia v. Tractor Supply*, 154 F. Supp. 3d 1225 (D.N.M. 2016).

***Subscriber Note:*** We include this section in the ***OD Comply: Marijuana*** materials because a medical marijuana cardholder cannot obtain authorization to receive a medical marijuana card unless he or she has some underlying medical condition sufficient to qualify for authorization. As a result, any medical marijuana cardholder likely would be considered disabled based on his or her underlying medical condition, even though medical marijuana use is not itself a disability. Therefore, regardless of whether a state medical marijuana law contains express employment protections (see “Express Employment Protections for Medical Marijuana Cardholders or Caregivers” section just above), medical marijuana cardholders may be able to assert a separate claim under state or federal disability discrimination laws. Note this is not true for (only) a recreational marijuana user, so there is no corresponding section in the Recreational Marijuana category.

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## Recreational Marijuana

### General

New Mexico has legalized marijuana for recreational (i.e., non-medical) use. New Mexico's recreational marijuana law is called the Cannabis Regulation Act (the "**Recreational Act**"). *Citation Pending, Recreational Act § 1 through 42*. The **Recreational Act** does not contain any express employment protections for recreational marijuana users.

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### Express Employment Protections for Recreational Marijuana Users

No

### Summary

The **Recreational Act** does not contain any express employment protections for recreational marijuana users. New Mexico employers can continue to prohibit the on-site use, possession, and distribution of marijuana in the workplace, regardless of marijuana's legal status for recreational purposes.

The **Recreational Act** expressly states that the **Recreational Act** does not: (1) restrict the ability of employers to prohibit or take adverse employment action against a recreational marijuana user based on impairment in the workplace or during work hours, (2) restrict the ability of employers to prohibit or take adverse employment action against a recreational marijuana user based

possession or use of marijuana in the workplace or during work hours, (3) require employers to commit any act that would cause the employer to violate federal law or regulations, (4) require employers to commit any act that would result in the loss of a federal contract or federal funding, or (5) restrict the ability of employers to adopt zero-tolerance drug policies that would allow adverse employment action against recreational marijuana users based on a positive marijuana test. *Citation Pending, Recreational Act § 34(A)*.

The third and fourth provisions – acts resulting in a violation of federal law or a loss of a federal contract or funding, and compliance with federal rules and regulations – are limited. Employers should not rely on marijuana's illegal status under federal law as a basis not to comply with state marijuana legalization laws. State courts have repeatedly declined to rely on marijuana's illegal status under federal law to preempt state marijuana legalization laws. Government contractors should also recognize that, generally, federal contracts simply require compliance with the federal Drug Free Workplace Act of 1988 (DFWA). The DFWA only requires that government contractors make a "good faith effort" to maintain a drug-free workplace. While the DFWA prohibits employees from using or possessing controlled substances *in the workplace* (as opposed to off-duty use), the DFWA does not require drug testing, nor does it require employers to take adverse action against individuals for a positive drug test. Thus, government contractors should

carefully review their federal contracts to determine whether more specific language exists rather than mere compliance with the DFWA.

However, the exception addressing compliance with federal law likely does extend to federally-regulated job positions that require marijuana testing such as those governed by the US Department of Transportation (DOT) or the Federal Aviation Administration (FAA).

Exceptions

N/A

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**Drug Testing Laws – Marijuana Testing**

Summary

There are no New Mexico state drug testing laws that prohibit or restrict testing for marijuana.

Exceptions

N/A

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