

**Cannabis Law and
Insurance-Related
Issues in 2023:
An Update for
Washington
and Oregon
Employers**

Disclaimer

The views expressed by the participants in this program are not those of the participants' employers, their clients, or any other organization. The opinions expressed do not constitute legal advice, or risk management advice. The views discussed are for educational purposes only and are provided only for use during this session.



Raymond A. Mascia Jr., Esq.
Shareholder
Anderson Kill P.C.
(212) 278-1359
rmascia@andersonkill.com

Raymond A. Mascia Jr. is a shareholder in Anderson Kill's New York office and Co-Chair of the firm's Financial Services group. Ray represents corporate and governmental policyholders in all types of insurance recovery matters, including matters involving D&O coverage, professional liability coverage, general liability coverage, environmental and asbestos claims, commercial crime insurance, and first-party property and business interruption losses arising from natural disasters and other perils.

In 2020, Law360 recognized Ray as a Rising Star in the practice area of Insurance, selecting Ray as 1 of 176 attorneys nationwide. The award recognizes those “attorneys under 40 whose legal accomplishments transcend their age.” In addition, The Legal 500 USA recognized Ray as a Next Generation Partner in 2020 and as a Rising Star in 2019 while ranking Anderson Kill's Insurance Recovery Group as one of the nation's top practices in the category of Insurance: Advice to Policyholders.



Carrie DiCanio, Esq.
Managing Shareholder
(Denver Office)
Anderson Kill P.C.
(303) 353-0066
cdicanio@andersonkill.com

Carrie Maylor DiCanio is the managing shareholder of Anderson Kill's Denver office and a shareholder in the firm's New York office. Carrie is a member of the firm's insurance recovery, commercial litigation and COVID Task groups, and co-chair of Anderson Kill's Women's Network. Carrie was selected as one of forty nationwide winners, and the sole policyholder attorney, of the Business Insurance 2018 Break Out Award. The award recognizes the next generation of leaders in insurance. Also in 2018, Law360 named Carrie a Rising Star in Insurance. Benchmark Litigation selected Carrie for inclusion in Benchmark's 40 & Under Hot List in 2018, 2019 and 2020.

Carrie has recovered valuable insurance proceeds for corporate policyholders in litigation throughout the United States and advised clients extensively on pre-litigation insurance matters. Carrie has litigated and arbitrated claims involving a range of insurance policies, including representations and warranties, D&O, E&O, CGL, EPL, environmental, cyber, and property. Carrie's non-insurance litigation work focuses on antitrust and securities.

Agenda

- Laws Related to Marijuana and the Workplace
- Employer Ability to Prohibit, Test for, and Terminate Employees for Marijuana Use
- Crafting a Company Policy on Marijuana Use
- Workers' Compensation Insurance
- Employment Practices Liability Insurance
- Directors & Officers Liability Insurance

Laws Related to Marijuana and the Workplace

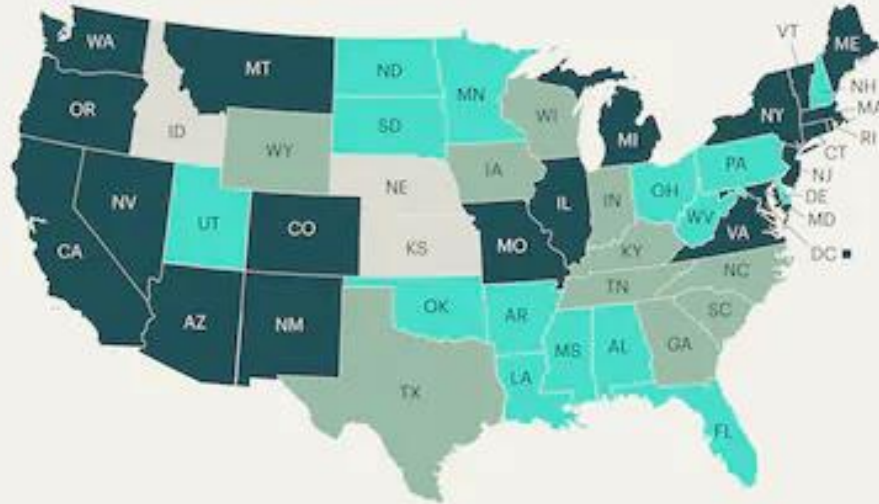
Federal Controlled Substance Act	<ul style="list-style-type: none">• Regulates the manufacture, possession, use and distribution.• Classification by Schedule• Schedule I: High potential for abuse and no accepted medical use
Oregon Medical Marijuana Act (OMMA) - 1998	<ul style="list-style-type: none">• Patients with qualifying debilitating conditions can apply for license.• Exemptions from criminal prosecutions but does not address whether employer can terminate employees.
Oregon Recreational Marijuana Law (Measure 91) - 2014	<ul style="list-style-type: none">• Must be over 21 years of age to use/possess marijuana• Possession in public up to 1 oz. of useable marijuana• Possession in home (outside of public view) up to 8 oz. and 4 plants, per household• Use not permitted in a public place
Washington Medical Marijuana Laws	<ul style="list-style-type: none">• 1979 – Washington Supreme Court recognizes a legal defense for medical cannabis use.• 1998 – Initiative 692 decriminalizes cannabis and establishes a medical marijuana program• 2015 – Cannabis Patient Protection Act
Washington Recreational Marijuana Law (I-502) -2012	<ul style="list-style-type: none">• Must be over 21 years of age to use/possess marijuana• Possession of up to 1 oz. of useable marijuana• Public use and display of marijuana is not permitted• Home cultivation is not permitted

Laws Related to Marijuana and the Workplace

Legal Medical and Recreational Marijuana in the US

Last updated February 2023

- Legal recreational and medical use
- Legal medical use only
- CBD/LOW THC allowed
- No legal recreational and medical use



Credit: The National Conference of State Legislatures (NCSL)

Employer Ability to Prohibit, Test for, and Terminate Employees for Marijuana Use

Oregon

- No duty to accommodate medical marijuana use. (*Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 348 Or. 159 (2010)).
- May terminate employee for marijuana use. Or. Rev. Stat. § 659A.124.
- May refuse to hire employees if they fail a pre-employment drug screening test.
- May conduct random testing.

Employer Ability to Prohibit, Test for, and Terminate Employees for Marijuana Use

Washington – NEW LAW – SB 5123

- Effective January 1, 2024
- Prohibits most Washington employers from discriminating against qualified job applicants during the initial hiring process, if the basis for discrimination is either:
 1. Use of cannabis outside of the workplace; or
 2. Drug screening test that determines the applicant has nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.

Employer Ability to Prohibit, Test for, and Terminate Employees for Marijuana Use

Washington – NEW LAW – SB 5123

Exempt Positions:

1. Position requiring a federal government background investigation or security clearance;
2. Washington law enforcement agencies; fire departments, fire protection districts, or regional fire protection service authorities;
3. First responders, including 911 dispatchers with public or private emergency communication systems or positions responsible for emergency medical services;
4. Corrections officer with a jail, detention facility, or the department of corrections, including any position directly responsible for the custody, safety, and security of persons confined in those facilities;
5. Airline or aerospace industries; or
6. “Safety sensitive“ positions when impairment while working presents a substantial risk of death.

Employer Ability to Prohibit, Test for, and Terminate Employees for Marijuana Use

Washington – NEW LAW – SB 5123

What is unaffected? Employers still may:

1. Base hiring decisions on tests for drugs other than cannabis.
2. Maintain a drug- and alcohol-free workplace.
3. Test for controlled substances and alcohol during employment.
4. “[Medical Use of Marijuana Act] does not provide a private cause of action for discharge of an employee who uses medical marijuana, either expressly or impliedly, nor does MUMA create a clear public policy that would support a claim for wrongful discharge in violation of such a policy.” (*Roe v. TeleTech Customer Care Management (Colorado) LLC*, 171 Wash. 2d 736, 742 (2011)).

Crafting a Company Policy on Marijuana Use

1. Policy Statement
 - Zero-Tolerance
 - Medical Marijuana Use
 - Recreational Use
 - Which Policy Makes the Most Sense?
2. Prohibited conduct and consequences for violations
3. Procedures and basis for drug testing

Workers' Compensation Insurance

- Workers' compensation insurance generally is exclusive remedy for employee injuries sustained during the scope of employment.
- Two issues related to marijuana:
 1. Does workers' compensation cover a workplace accident in which the injured employee tests positive for marijuana?
 2. Does workers' compensation cover medical marijuana expenses incurred by an injured employee?

Workers' Compensation Insurance

Does workers' compensation cover a workplace accident in which the injured employee tests positive for marijuana?

Oregon

- Injury is compensable unless...

“[T]he major contributing cause ... is demonstrated to be by a preponderance of the evidence the injured worker's consumption of ... cannabis or the unlawful consumption of any controlled substance” Or. Rev. Stat. § 656.005(7)(b)(C).

Washington

- Injury is compensable unless ...

It occurred while the employee was not acting within the “course of employment.” Wash. Rev. Code § 51.08.013.

“Intoxication removes an employee from the course of employment if the employee becomes so intoxicated that he has abandoned his employment.” (Orris v. Lingley, 172 Wash. App. 61, 67 (Ct. App. 2012)).

Workers' Compensation Insurance

Does workers' compensation cover medical marijuana expenses?

Oregon

- Neither forbids nor require medical marijuana reimbursement.
- Under Oregon's Workers' Compensation law, insurance companies are required to process compensable medical services for payment, which include "drugs" and "medicine."
- Services deemed excessive, inappropriate or ineffectual are precluded from coverage as a compensable medical service. Or. Rev. Stat. § 656.327(1)(a)

Washington

- State administrative rule governing workers' compensation bars reimbursement for marijuana because the drug is not FDA-approved. Wash. Admin. Code § 296-20-03010.

Guidance from Other States

- *Vialpando v. Ben's Auto. Servs.*, 331 P.3d 975 (N.M. Ct. App. 2014)
 - Employee claimed medical marijuana was medical treatment under workers' compensation.
 - Under NM law, employer must provide “reasonable and necessary health care services.”
 - Court held medical marijuana was a “reasonable and necessary health care service” under workers' compensation.

Workers' Compensation Insurance

U.S. States Categorized by Cannabis Reimbursement Status

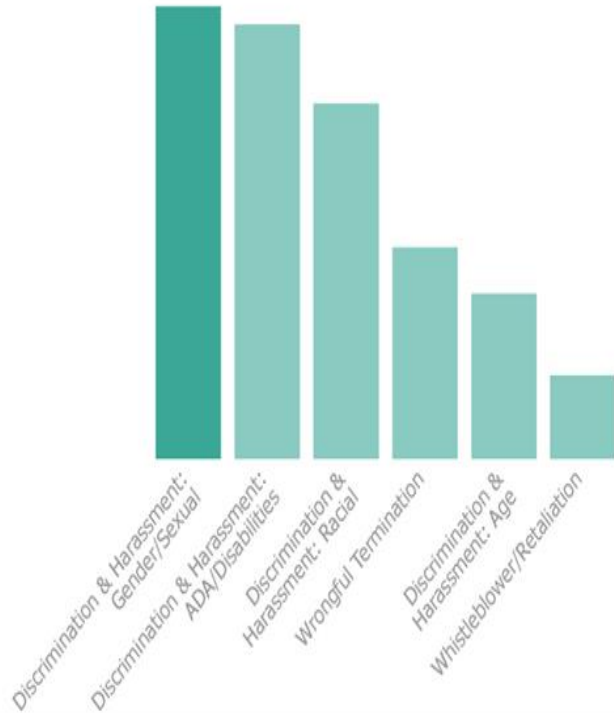
Expressly Allowed	Connecticut, Minnesota, New Hampshire, New Jersey, New Mexico, New York
Expressly Prohibited	Maine, Massachusetts, Florida, North Dakota, Ohio, Washington
Not Required	Arizona, Arkansas, California, Colorado, Delaware, Illinois, Louisiana, Michigan, Montana, Nevada, Oregon, Pennsylvania, Utah, Vermont
Silent	Alaska, Hawaii, Maryland, Mississippi, Missouri, Oklahoma, Rhode Island, South Dakota, Virginia, West Virginia

Potential Legal Claims Facing Employers

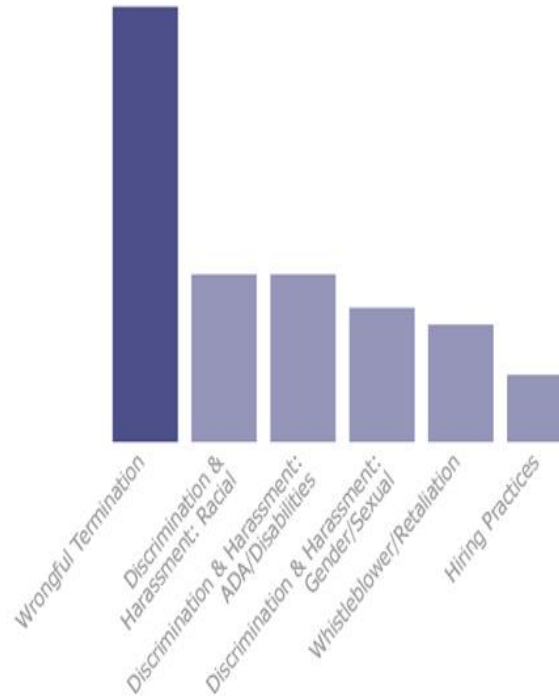
- Wrongful Termination
- Disability Discrimination
- Other Discrimination (e.g., race, age, or gender)
- Whistleblower/Retaliation
- Hiring Practices
- Invasion of privacy
- Defamation
- Directors and Officers Liability (e.g., shareholder claim alleging failure of oversight related to lack of or inadequate marijuana use policy)

Trends for Marijuana-Related Employment Claims

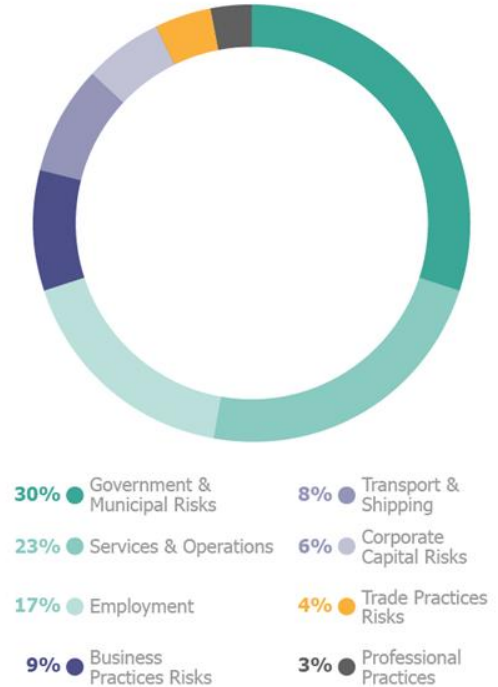
Most Frequent EPL Losses



Most Frequent Marijuana-related EPL Losses



Types of Marijuana-related Losses at Nonmarijuana Companies



Employment Practices Liability Insurance

General Scope of Coverage: Protects against claims arising from employment scenarios, including:

- Discrimination (race, age, gender, national origin)
- Sexual Harassment
- Wrongful Termination
- Retaliation
- Breach of employment contract
- Whistleblower retaliatory measures
- Defamation
- Failure to promote, negligent evaluation
- Wrongful termination, wrongful discipline
- Workplace torts

Policy Language - Indemnification

“The Underwriter shall pay on behalf of the **Insureds** all **Loss** for which the **Insureds** become legally obligated to pay on account of any **Claim** by or on behalf of a past, present or prospective **Employee** of the **Company** for a **Wrongful Employment Act** taking place before or during the **Policy Period** if such **Claim** is first made against the **Insureds** . . . during the **Policy Period**”

Policy Language - Defense

“The Underwriter shall have the right and duty to defend **Claims** against the Insureds, even if the allegations in the **Claim** are groundless, false or fraudulent.”

“The Underwriter’s duty to defend any **Claim** . . . ends when the Limit of Liability applicable to such **Claim** or to the **Policy Period** in which such **Claim** is first made has been exhausted.”

Trigger of Coverage

- “Claim” triggers an EPLI policy, i.e., when to give notice
- Typical definition of “claim”:
 1. “written demand for monetary or non-monetary relief (including request to toll statute of limitations)”
 2. “a civil, administrative or arbitration proceeding for monetary or non-monetary relief which is commenced by:
 - a. service of a complaint or similar pleading; or
 - b. receipt or filing of a notice of charge”

When to Give Notice

- “Claims-made” coverage: insurance applies to claims first made during the policy period and reported as soon as practicable thereafter
- “Claims-made and reported” coverage: insurance applies to claims first made during the policy period and reported within the policy period or a fixed reporting period
- **WHEN IN DOUBT, GIVE NOTICE!!!**

Beware of Exclusions and Endorsements

- Punitive Damages and Multiple Damage Awards
- Intentional Acts Exclusion
- Statutory Benefits Exclusions (ERISA, COBRA, OSHA, Workers Compensation)
- ADA Exclusion
- Contractual Liability Exclusion
- Criminal, Fraudulent or Malicious Acts
- Class Actions



**Thank
you.**



Raymond A. Mascia Jr., Esq.
Shareholder
New York Office
Anderson Kill P.C.
(212) 278-1359
rmascia@andersonkill.com



Carrie DiCano, Esq.
Managing Shareholder
Denver Office
Anderson Kill P.C.
(303) 353-0066
cdicano@andersonkill.com