2024

Drug Testing and Cannabis Impairment in the Workplace: Exploring Employment Protections for Recreational Cannabis Users in the United States

Dana Lechleiter

Table of Contents

I. Introduction

Despite generations of campaigns endorsing America's "War on Drugs"[1] and telling kids to "Just Say No,"[2] medicinal and recreational cannabis have started to become accepted, and in some areas welcomed, additions to the legal vices that Americans can enjoy.[3] As of May 2023, twenty-one states, Washington D.C., and Guam have legalized recreational cannabis for those over the age of twenty-one.[4] Despite each jurisdiction's extensive regulations standardizing the sale and

---

[1] The United States' War on Drugs began in the 1970s after Richard Nixon "dramatically increased the size and presence of federal drug control agencies, and pushed through measures such as mandatory sentencing and no-knock warrants." *A History of the Drug War*, DRUG POL'Y ALL., https://drugpolicy.org/issues/brief-history-drug-war (last visited Mar. 29, 2023). In total, the War on Drugs has "used trillions of American taxpayer dollars, militarized American law enforcement agencies (federal, state, and local), claimed an untold number of lives, railroaded people's futures (especially among Black, Latino, and Native populations), and concentrated the effort in the country's most diverse and poorest neighborhoods." John Hudak, *Biden should end America's longest war: The War on Drugs*, BROOKINGS INST.: HOW WE RISE (Sept. 24, 2021), https://www.brookings.edu/blog/how-we-rise/2021/09/24/biden-should-end-americas-longest-war-the-war-on-drugs/.

[2] The "Just Say No" campaign was initiated by Former First Lady Nancy Reagan in the early 1980s. Paul Singer, *Nancy Reagan's 'Just Say No' effort was pop culture icon*, USA TODAY: NEWS (Mar. 6, 2016, 1:36 PM), https://www.usatoday.com/story/news/nation/2016/03/06/reagans-just-say-no-effort-pop-culture-icon/81405996/. Despite the First Lady's countless public appearances with prominent world leaders and television guest spots encouraging children to say no to drugs and alcohol, subsequent studies have shown that "students need a much more nuanced education on social interactions and that students in 'Just Say No'-style programs were as likely to use drugs as students who were not." *Id.*

[3] According to a 2022 Gallup poll, roughly 68% of Americans support the legalization of cannabis in the United States. Jeffrey M. Jones, *Marijuana Views Linked to Ideology, Religiosity, Age*, GALLUP: POLITICS (Nov. 15, 2022), https://news.gallup.com/poll/405086/marijuana-views-linked-ideology-religiosity-age.aspx.

[4] Recreational use of cannabis has been legalized in Alaska, California, Nevada, Oregon, Washington, Montana, Arizona, Colorado, New Mexico, Missouri, Illinois, Maryland, New Jersey, New York, Connecticut, Massachusetts, Vermont, Rhode Island, Virginia, and Maine. Allen Smith, *2023 Trends: Legalization of Recreational Marijuana and Therapeutic Psychedelics*, SOC'Y FOR HUM. RES. MGMT.: EMP. L. (Dec. 16, 2022), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/legalization-of-recreational-marijuana-and-therapeutic-psychedelics.aspx. Note, despite the article being entitled *2023 Trends: Legalization of Recreational Marijuana and Therapeutic Psychedelics*, it was written in December 2022.

use of recreational cannabis, there are still many questions about the effects that legalization will have on the workplace.[5]

In most jurisdictions that have passed such regulations, legislatures have opted to leave workplace parameters to the state's employers, allowing them to assess what approach best suits their company.[6] Under such regimes, an employer could continue to legally drug test employees and take adverse employment action against those who test positive for cannabis, despite such acticity being legal on the state level. However, a growing minority of jurisdictions, including New York; New Jersey; Maine; Rhode Island; Washington, D.C.; Connecticut; California; Illinois; and Montana, have instituted protections for employees who ingest legal cannabis while off-duty and test positive during an employer-initiated drug test.

This paper will analyze the status of employment protections for recreational cannabis users and consider whether scientific and technological advancements in impairment-assessing equipment could assist state legislatures and employers in maintaining a drug-free workplace. Although some states decided not to define cannabis impairment in their statutes, the inclusion of a statutory definition to accompany the recreational cannabis employment protections will likely prove more effective in helping employers implement said protections and safeguard employees'

---

[5] The primary concern for most employers is the potential safety risks that cannabis legalization could bring. A National Institute on Drug Abuse study "found 55% more industrial accidents, 85% more injuries, and 75% greater absenteeism among employees who tests positive for marijuana compare to those who tested negative." John Howard et al., *Cannabis and Work: Implications, Impairment, and the Need for Further Research*, CTR. FOR DISEASE CONTROL AND PREVENTION: NSIOH SCI. BLOG (June 15, 2020), https://blogs.cdc.gov/niosh-science-blog/2020/06/15/cannabis-and-work/.

[6] For example, in 2017, Massachusetts implemented regulations that do "not require an employer to permit or accommodate [recreational cannabis use] in the workplace and shall not affect the authority of employers to enact and enforce workplace policies restricting the consumptions of marijuana by employees." Mass. Gen. Laws. ch. 94G, § 2(e) (2023). !

statutory right to ingest recreational cannabis while off-duty. In addition, a two-step approach, which both establishes impairment and verifies that a person has cannabis in their system through a THC test, would be more efficient in determining which employees are impaired in the workplace. This approach lowers the risk of false allegations resulting in adverse employment actions against employees who are using recreational cannabis during their personal time. In addition, the use of impairment technology could prove a huge asset to employers who want to maintain a safe, drug-free workplace and employees who could be falsely accused of using cannabis while on duty.

The first part of this paper will outline the current state of cannabis impairment testing in the United States, including the history of drug testing, the various type of drug tests that are currently available, when said tests are permissible in the workplace, and the legal limits currently placed on drug testing by the court system. The second part of this paper will describe the various statutory frameworks that have been implemented in jurisdictions that have codified employee protections for recreational cannabis users, primarily focusing on Connecticut; Illinois; New Jersey; New York; and Washington, D.C.[7] The third part of this paper will provide an overview of how some state courts have ruled on employment protections for recreational cannabis users. The following part of this paper will outline a selection of scientific and technological advancements in the cannabis-impairment field.

The final part of this paper will contain three sections. The first will analyze the potential legal impediments that these employment protection statutes may face in state courts. The second will provide recommendations as to which statutory framework would most effectively provide

[7] The statutory frameworks of these states will be the primary focus of the section because the state legislatures codified a statutory definition of "impairment" by cannabis, which provides greater guidance to employers and employees attempting to conform to state law.

employment protections that would both protect employees from adverse employment actions due to legal cannabis use and protect employers from the risks associated with employee impairment in the workplace. The final section will explore whether the various scientific and technological advancements in the impairment field could be effectively used in a jurisdiction that provides employment protections for recreational cannabis users.

II. The Current State of Cannabis Impairment Testing in the United States

Modern drug testing rose to prominence in the late 1980s when President Ronald Reagan signed an executive order that required federal employees and some federal contractors to submit to mandatory drug testing.[8] Congress subsequently passed the Drug-Free Workplace Act of 1988, requiring federal workers and contractors to maintain a drug-free workplace and submit to drug testing requirements.[9] As the War on Drugs raged on through the 1990s, the government and private employers alike continued to institute zero-tolerance drug policies in the workplace.[10] By 1996, an estimated 81% of American employers tested their employees for drugs.[11] The rate of drug testing began to decline in the 2000s, with roughly 62% of employers continuing to drug test in the United States in 2004.[12] As more states began legalizing medicinal and recreational cannabis,

[8] Joe Pinsker, *The Pointlessness of the Workplace Drug Test*, THE ATL.: BUS. (June 4, 2015), https://www.theatlantic.com/business/archive/2015/06/drug-testing-effectiveness/394850/.
[9] 41 U.S.C. § 701.
[10] Lydia DePillis, *Companies drug test a lot less than they used to – because it doesn't really work*, WASH. POST: ECON. POL'Y (Mar. 10, 2015, 2:48 PM), https://www.washingtonpost.com/news/wonk/wp/2015/03/10/companies-drug-test-a-lot-less-than-they-used-to-because-it-doesnt-really-work/.
[11] *Id.*
[12] *Id.*

the issues surrounding drug testing in the workplace began to resurface, reigniting employers' fears of employee impairment on duty.[13]

Generally, an employer can require an employee to consent to a drug test as a pre-employment measure, following a workplace accident, at random per an established policy, or when there is reasonable suspicion of intoxication at work.[14] Pre-employment testing is the most common form of drug testing and allows companies to cut ties with potential employees before they begin their position.[15] Most states allow for pre-employment drug testing, as long as there is adequate notice.[16] Random testing is thought to be especially helpful when a company or specific department specializes in potentially dangerous work or activities and safety is a significant concern.[17] Random drug testing is thought to act as a deterrent, as no employee knows when or if they will be chosen for testing.[18] Employers can also request that employees submit to a post-accident drug test following a workplace incident to assess whether drug-related impairment may have been a contributing factor.[19] This is a standard practice to help ensure safety standards and avoid workplace injuries.[20] Finally, employees are often subject to drug testing when they appear

[13] Abby Warren & Emily Zaklukiewicz, *What is the current state of drug testing programs in today's workplaces?*, INDUS. SAFETY & HYGIENE NEWS (May 6, 2021), https://www.ishn.com/articles/112958-what-is-the-current-state-of-drug-testing-programs-in-todays-workplaces.
[14] Lisa Nagele-Piazza, *Workplace Drug Testing: Weighing the Pros and Cons*, SOC'Y FOR HUM. RES. MGMT.: STATE & LOC. UPDATES (Jan. 21, 2020), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/the-pros-and-cons-of-workplace-drug-testing.aspx.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*

to be under the influence at work, exhibiting symptoms such as slurred speech and uncoordinated movements.[21]

Despite the general acceptance of drug testing, there are some e traditional legal limitations on drug testing policies in the workplace that provide some protection to public and private sector employees. The Supreme Court has held that, under the Fourth Amendment, collection of biological samples for testing purposes constitutes a search of public employees, as such testing could reveal a great deal of private information about the employee and potentially violate their privacy.[22] Whether or not such a search is unlawful requires a balancing of the "intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[23] Such intrusion traditionally requires a showing of probable cause, but if the government's interest vastly outweighs the invasion of the individual's privacy, the Supreme Court has held that probable cause may be waived.[24] If the government can show a strong safety or security interest that is supported by a mandatory drug testing policy, lower courts have traditionally upheld the policies, despite the employees' Fourth Amendment rights.[25]

Although private-sector employees are not protected by the Fourth Amendment in the workplace, said employees can bring suit for intrusion upon seclusion as a public policy tort, should they feel they were improperly drug tested by an employer. To establish an intrusion upon

---

[21] *Id.*
[22] Skinner v. Ry. Lab. Exec. Ass'n, 489 U.S. 602, 617 (1989).
[23] Delaware v. Prouse, 440 U.S. 648, 654 (1979).
[24] *See Skinner*, 489 U.S. at 624 (holding that the Federal Railroad Administration's policies mandating drug testing of railroad employees involved in major train incidents and authorizing drug testing for employees who violated certain safety rules were not an unreasonable invasion of privacy because the FRA's "important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion").
[25] TIMOTHY P. GLYNN et al., EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS 370 (4th ed. 2019).

seclusion claim, an employee must show "(1) an intentional intrusion (2) into an area of solitude or seclusion (3) that would be highly offensive to the reasonable person."[26] Courts have rested this intrusion analysis on "whether the intrusion was into an area… in which the employee has a reasonable expectation of privacy."[27] This standard is usually satisfied in drug testing contexts because courts have found that a person has a reasonable expectation of privacy in their own body.[28] The offensiveness of the intrusion is measured by "whether it is justified by a legitimate employer interest and appropriately tailored to serving that interest."[29] The outcome of these claims usually "depends on the leeway courts are willing to give employers' articulated ends and the means for achieving them."[30]

When testing for cannabis, employers traditionally have used urine, hair, or oral fluid tests to measure the level of delta-9-tetrahydrocannabinol, commonly known as THC, in the body.[31] This approach, however, is not necessarily indicative of cannabis impairment; THC can remain in a person's system for days or weeks after ingestion, depending on the amount consumed and the regularity with which a person ingests it.[32] Each type of drug test has a different detection window.[33] The detection window can also be affected by how a person ingests a substance, whether orally, intravenously, or otherwise.[34] A breath, blood, or oral fluid test can result in

[26] *Id.* at 344.
[27] *Id.*
[28] *Id.*
[29] *Id.* at 345.
[30] *Id.*
[31] Scott E. Hadland & Sharon Levy, *Objective Testing: Urine and Other Drug Tests*, 25 CHILD AND ADOLESCENT PSYCHIATRIC CLINICS OF N. AMERICA 549 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4920965/.
[32] Howard et. al., *supra* note 5.
[33] Hadland & Levy, *supra* note 22.
[34] *Id.*

detection for minutes or hours after consumption.[35] A urine test, however, could find traces of substances anywhere from a few minutes to weeks or months after said substance is ingested.[36] Sweat tests can detect recent use or allow for cumulative testing of days or weeks with a sweat patch, as long as the patch remains on the person's body the entirety of the time.[37]

These approaches, unfortunately, do not provide an accurate measure of an employee's impairment because there is "little evidence" connecting a specific THC level to any degree of impairment.[38] A 2021 study by National Institute of Justice-supported researchers from RTI International found that "although THC has been proven to affect areas of the brain that control movement, balance, coordination, memory, and judgment, … THC levels in biofluids were not reliable indicators of marijuana intoxication for their study participants."[39] Cannabis impairment testing does not rest on the level of THC in a person's system, but rather "evaluates a worker's real-time cognitive function and motor skills to determine if there is evidence that the worker may be impaired, regardless of the source of impairment."[40] In fact, the National Institute for Occupational Safety & Health have theorized that "impairment testing may provide more immediate, actionable, accurate, and comprehensive information, allowing employers to be more proactive in minimizing risks in the workplace while maintaining more privacy and fairness for workers."[41]

---

[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Field Sobriety Tests and THC Levels Unreliable Indicators of Marijuana Intoxication*, NATIONAL INSTITUTE OF JUSTICE (Apr. 5, 2021), https://nij.ojp.gov/topics/articles/field-sobriety-tests-and-thc-levels-unreliable-indicators-marijuana-intoxication.
[39] *Id.*
[40] Howard et. al, *supra* note 5.
[41] *Id.*

The current reliance on drug testing that measures THC levels leaves both employees and employers at a disadvantage. An employee who tests positive for cannabis in a jurisdiction that has legalized cannabis use without employee protections could be subject to disciplinary sanctions or even termination, despite taking part in a legal activity outside of the workplace.[42] Employers in recreationally legal states also grapple with the pitfalls of current cannabis testing, especially when they suspect an employee is impaired or using cannabis at work. These employers have no concrete way of proving an employee is impaired at the time that suspicion arises, outside of documenting symptoms of the employee's intoxication and testing them to see if there are any drugs present in their system.[43]

The lack of a cohesive and universally accepted impairment-testing procedure has led a majority of these state legislatures to defer to employers when deciding whether to penalize employees who test positive for cannabis, even if their actions were otherwise legal.[44] However, the minority of state legislatures who have taken on this sizable task have adopted varied approaches to attempt to protect an employer's right to maintain a drug-free workplace and an employee's right to participate in legal activities while off-duty.

---

[42] *See* Ross v. RagingWire Telecomm., 174 P.3d 200, 204 (Cal. 2008) (holding that a medicinal cannabis user's lawful use of cannabis was not protected from employment sanctions after testing positive for cannabis on a routine drug test as California's medicinal cannabis legislation could not "completely legalize marijuana for medical purposes because the drug remains illegal under federal law").

[43] Mike Ramsey, *New recreational cannabis laws could make it harder for employers to fire impaired workers*, AM. BAR ASS'N: LAB. & EMP. (Feb. 1, 2023), https://www.americanbar.org/groups/journal/articles/2023/new-recreational-cannabis-laws-could-make-it-harder-for-employers-to-fire-impairedworkers/?abajoin=true.

[44] Kerry Cork, *Marijuana Use by Employees: Drug-Free Policies and the Changing Legal Landscape*, 49 FORDHAM URB. L. J. 593, 605 (2022).

III. Current State Approaches to Assessing Employee Impairment Under Recreational Cannabis Employee Protection Statutes

Of the twenty-three states and territories that have passed recreational cannabis legislation, New York; New Jersey; Connecticut; Rhode Island; Washington, D.C.; California; Illinois; and Montana have passed statutes protecting employees' rights to use recreational cannabis while off-duty. Although they all share a common goal of protecting both employers and employees alike, each state has adopted a unique approach to addressing the concerns that recreational cannabis brings to the workplace. Maine, Rhode Island, Montana, and California chose not to implement a particular standard for determining cannabis impairment in their statutes. Instead, these jurisdictions focused on the protections in place for employees and specified that an employer can take adverse action against an employee if they are found to be intoxicated on duty.[45] Connecticut; Illinois; New Jersey; New York; and Washington, D.C., however, opted to define impairment and, in some cases, outline new regulations to assess impairment in the workplace.

A. New Jersey's Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act

Acknowledging that there is currently no foolproof method to assess cannabis impairment, New Jersey's statutory framework integrated both traditional testing methods with a new impairment certification procedure, called Workplace Impairment Recognition Experts ("WIREs"). Under the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act ("NJ CREAMMA"), an employer cannot take adverse action

[45] Though these states did implement protections for employee use of recreational cannabis while off-duty, they did not include an articulable standard or definition of what constitutes impairment by cannabis, leaving employers with an unknown threshold to show an employee is impaired in the workplace.

against an employee solely because they test positive for cannabis.[46] The statute does, however, allow an employer to "revise their employee prohibitions consistent with federal law, rules, and regulations," should it be likely that they would be subject to a "provable adverse impact" due to a federal contract.[47] Employers may continue to implement reasonable suspicion or random drug testing policies.[48]

If someone is suspected of being impaired at work, however, a physical examination would also take place by someone with a WIRE certification to assess the employee's impairment.[49] The New Jersey Cannabis Regulatory Commission ("NJ-CRC") was tasked with creating a WIRE certification that would certify "full- or part-time employees, or others contracted to perform services on behalf of an employer based on education and training in detecting and identifying an employee's usage of, or impairment from, a cannabis item or other intoxicating substance, and for assisting in the investigation of workplace accidents."[50] The NJ-CRC will also "prescribe minimum curriculum courses of study for the certifications, as well as standards for the commission's approval and continuation of approval of non-profit and for-profit programs, organizations, or schools and their instructors to offer courses of study, and may include the use of a Police Training Commission approved school."[51] CREAMMA further allows that "any person who demonstrates to the commission's satisfaction that the person has successfully completed a Drug Recognition Expert program provided by a Police Training Commission approved school, or

---

[46] N.J. STAT. ANN. § 24:6I-52a(1) (2021). !
[47] *See id.* § b(1)(b).
[48] *See id.* § a(1).
[49] *Id.*
[50] Mem. From Jeff Brown, N.J. Cannabis Regul. Comm'n Executive Director on N.J. CANNABIS REGUL. COMM'N GUIDANCE ON "WORKPLACE IMPAIRMENT" (Sept. 9, 2022), at 1, https://www.nj.gov/cannabis/documents/businesses/Business%20Resources/Workplace%20Impairment%20Guidance%20922.pdf.
[51] N.J. STAT. ANN. § 24:6I-52a(2)(a) (2021).

another program or course conducted by any federal, State, or other public or private agency" that features similar requirements to the WIRE certification may be issued said credentials, subject to NJ-CRC's approval.[52]

Although the WIRE certification requirements have yet to be established, the NJ-CRC issued preliminary guidance to direct employers until such standards are approved.[53] For an employer to demonstrate physical signs of impairment to support adverse employment against an employee, NJ-CRC provided a standard "Reasonable Suspicion Observation Report," which "documents the behavior, physical signs, and evidence of being under the influence during an employee's prescribed work hours."[54] The Commission also allowed for the use of a "cognitive impairment test, a scientifically valid, objective, consistently repeatable, standardized automated test of an employee's impairment, and/or an ocular scan, as physical signs or evidence to establish reasonable suspicion of cannabis use or impairment at work."[55] The guidelines stress, once again, that testing positive for cannabis alone is not sufficient to support adverse employment action, but "combined with evidence-based documentation of physical signs or other evidence of impairment during an employee's prescribed work hours may be sufficient to support an adverse employment action."[56]

B. Connecticut's Responsible and Equitable Regulation of Adult-Use Cannabis Act

Connecticut's legislature prioritized the preferences of employers, allowing them to continue drug testing and take adverse employment actions against employees that are consistent with an established workplace policy. In 2021, the Connecticut State Legislature enacted the

[52] *See id.* § a(2)(b).
[53] Brown, *supra* at note 50 at 1-2.
[54] *Id.* at 2
[55] *Id.*
[56] *Id*.

Responsible and Equitable Regulation of Adult-Use Cannabis Act ("RERAUC"), legalizing the use of recreational cannabis.[57] Though the majority of this legislation went into effect on July 1, 2021, the provisions protecting the employment of recreational cannabis users did not take effect until July 1, 2022.[58] Under this statute, employers cannot take adverse employment actions against their employees.[59] However, employers could implement workplace policies prohibiting cannabis possession, use, or consumption by employees, except for qualifying medical cannabis patients.[60] The statute specifies that the employer should "make any such policy available to each prospective employee at the time the employer makes an offer or conditional offer of employment to the prospective employee."[61] In addition, the statute exempts large portions of the workforce from these protections, including the mining industry; utilities industries; construction industry; manufacturing industry; transportation or delivery industries; health care or social services organizations; justice, public order, and safety activities organizations; and national security and international affairs organizations.[62] An employee outside of the exempted industries can still face adverse employment actions if they test positive as part of an established drug testing policy.[63]

If an employer does not have a workplace policy prohibiting cannabis use in place, employers may take adverse action against an employee if there is reasonable suspicion that the employee ingested cannabis or the employee is exhibiting specific symptoms of impairment while

---

[57] CONN. GEN. STAT. § 21a-422p (2023).
[58] *Can my employer prohibit me from consuming cannabis products outside of work?*, Connecticut's Official State Website (July 13, 2021), https://portal.ct.gov/cannabis/Knowledge-Base/Articles/Consuming-cannabis-outside-of-work?language=en_US.
[59] *Id.*
[60] CONN. GEN. STAT. § 21a-422p(b)(1)(A)-(B) (2023).
[61] *Id.*
[62] CONN. GEN. STAT. § 21a-422o (3)(A)-(I) (2023).
[63] CONN. GEN. STAT. § 21a-422p (b)(1) (2023).

on duty.[64] The employer may reasonably suspect the employee is impaired if the employee displays symptoms of cannabis use while working that negatively affect the employee's job performance, including, but not limited to,

> symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior or negligence or carelessness in operating equipment or machinery; disregard for the safety of the employee or others, or involvement in any accident that results in serious damage to equipment or property; disruption of a production or manufacturing process; or carelessness that results in any injury to the employee or others.[65]

C. New York's Marijuana Regulation and Taxation Act

New York's state legislature adopted an approach essentially eradicating traditional drug testing methods through their recreational cannabis statutes. The passage of the Marijuana Regulation and Taxation Act ("MRTA") in 2021 amended N.Y. Lab. § 201-d to protect employees who consume recreational cannabis legally outside of the workplace from adverse employment action.[66] Although the legislature reserved exemptions for mandatory testing requirements under a state or federal law or a preexisting workplace policy, the state legislature has largely prohibited employers from testing any employees for cannabis.[67] Instead of using drug testing to assess whether an employee has cannabis in their system, employers can only take adverse action against an employee if said employee shows visible signs of impairment while on duty.[68] The statute defines impairment as the "employee manifest[ing] specific articulable symptoms of impairment that: [d]ecrease or lessen the performance of their duties or tasks [or] [i]nterfere with an employer's

---

[64] *See id.* § (c)(2)(A)-(B).
[65] *See id. §* (c).
[66] N.Y. LAB. §201-d (2)(b)-(c).
[67] *Adult Use Cannabis and the Workplace New York Labor Law 201-D*, N.Y. DEP.'T OF LAB. 1, 1 (Oct. 21, 2021) https://dol.ny.gov/system/files/documents/2021/10/p420-cannabisfaq-10-08-21.pdf.
[68] N.Y. LAB. § 201-d (4-a)(ii).

obligation to provide a safe and healthy workplace, free from recognized hazards, as required by state and federal occupational safety and health laws."[69]

Guidelines released by the Department of Labor to assist employers in implementing this legislation define articulable symptoms of impairment as "objectively observable indications that the employee's performance of the duties…of their position are decreased or lessened."[70] However, not all typical symptoms would be accepted under the statute's guidelines, which specify that "observable signs of use that do not indicate impairment on their own cannot be cited as an articulable symptom of impairment."[71] The symptoms must indicate that an employee's ability to perform their job was lessened, not just that they could have ingested cannabis.[72] For this reason, having a noticeable odor of cannabis is not evidence of symptoms of impairment, nor is testing positive for cannabis on a drug test.[73]

D. Illinois's Cannabis Regulation and Tax Act

The Illinois state legislature's approach to employee protections for recreational cannabis users focuses heavily on maintaining the rights of employers to govern their workplaces as they see fit. In 2019, recreational cannabis was identified as a "lawful product" under the Cannabis Regulation and Tax Act ("CRTA"), a term that lawmakers specified applies to products that were legal under state law.[74] The statute specifies that it is unlawful for an employer "to refuse to hire or to discharge any individual, or otherwise disadvantage any individual…because the individual uses lawful products off the premises of the employer during nonworking and non-call hours."[75]

---

[69] *Adult Use Cannabis*, *supra* note 67, at 3.
[70] *Id.* at 2.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] 820 ILL. COMP. STAT. 55/5 (a) (2023).
[75] *Id.*

Under the CRTA, employers can discipline employees that appear to be impaired at work and defines impairment by the following standard:

> An employer may consider an employee to be impaired or under the influence of cannabis if the employer has a good faith belief that an employee manifests specific, articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position, including symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, or negligence or carelessness in operating equipment or machinery; disregard for the safety of the employee or others, or involvement in any accident that results in serious damage to equipment or property; disruption of a production or manufacturing process; or carelessness that results in any injury to the employee or others. If an employer elects to discipline an employee on the basis that the employee is under the influence or impaired by cannabis, the employer must afford the employee a reasonable opportunity to contest the basis of the determination. [76]

However, the CRTA also permits employers to adopt reasonable drug testing policies, as long as said policies are applied in a non-discriminatory manner.[77] If an employer adopts a workplace policy that prohibits the use of cannabis, said employer could take adverse employment action against the employee without repercussions.[78] Unlike many of its statutory counterparts, the CRTA allows for pre-employment drug testing, which is subject to the same reasonable and non-discriminatory standard as employee drug testing.[79] The statute contains an exemption for "any employer that is a non-profit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public."[80] The CRTA does not "interfere with any federal, State, or local restriction on employment…or impact an employer's

[76] 410 ILL. COMP. STAT. 705/10-50 (d) (2023).
[77] *See id.* § 10-50 (a).
[78] *Id.*
[79] *See id.* § 10-50 (e)(1).
[80] 820 ILL. COMP. STAT. 55/5 (b) (2023).

ability to comply with federal or State law or cause it to lose a federal or State contract or funding."[81]

The CRTA explicitly disclaims multiple causes of action against employers.[82] An employee cannot sue for "actions taken pursuant to an employer's reasonable workplace drug policy," even if the employee was terminated for failing a drug test; "actions based on the employer's good faith belief that an employee used or possessed cannabis in the employer's workplace;" "actions, including discipline or termination of employment, based on the employer's good faith belief that an employee was impaired [in the workplace] as a result of the use of cannabis;" or "injury, loss, or liability to a third party if the employer neither knew nor had reason to know that the employee was impaired."[83]

E. Washington, D.C.'s Cannabis Employment Protections Amendment Act of 2022

In 2022, the Council of the District of Columbia passed the Cannabis Employment Protections Act of 2022 ("CEPAA"), which made it unlawful for an employer to refuse to hire, terminate, or otherwise adversely affect the employment of someone for using cannabis, either recreationally or medicinally, while they are off-duty.[84] Although the Mayor has approved the act as well, CEPAA is subject to congressional approval and will not go into effect until 365 days after the Mayor approved the act, July 13, 2023, or "until their fiscal effect is included in an approved budget plan."[85]

---

[81] 410 ILL. COMP. STAT. 705/10-50 (g) (2023).
[82] *See id.* § 10-50 (e).
[83] *See id.* § 10-50 (e)(1)-(4).
[84] D.C. CODE § 32–951.02 (a)(1)-(2) (2023).
[85] Tony W. Torain et al., *District of Columbia Provides Employment Protections for Off-Duty Cannabis Use*, 12 NAT'L L. REV. (July 21, 2022), https://www.natlawreview.com/article/district-columbia-provides-employment-protections-duty-cannabis-use.

Under this act, an employer cannot take adverse action against an employee based on their use of recreational cannabis or for testing positive for cannabis "on an employer-required or requested drug test without additional factors indicating impairment.[86] CEPAA carved out some exceptions under which an employer can take adverse action against an employee, including when an employee's role is a safety-sensitive position; when the employer's actions are required under federal law or contract; and when an employee is accused of having, selling, or being impaired by cannabis in the workplace.[87] An employee is said to be impaired at work if they demonstrate specific symptoms that "substantially decrease or lessen the employee's performance of the duties or tasks of the employee's jobs position, or such specific articulable symptoms interfere with an employer's obligation to provide a safe and healthy workplace as required by District or federal occupational safety and health law."[88] Employers are allowed to adopt a reasonable employment policy that allows for post-accident drug testing, prohibitions of cannabis in the workplace, and disciplinary action for those impaired at work.[89]

Under CEPAA, an employee has two options for redress if they feel their employer is not adequately complying with the employment protections provided. The employee can either file a complaint with the Office of Human Rights ("OHR") or file a private cause of action in court, provided said employee exhausted all available administrative remedies through the OHR.[90] The statute describes, in detail, the administrative complaint adjudication procedure that the OHR would oversee, including everything from the first steps after filing the initial complaint to the

[86] D.C. CODE § 32–951.02 (a)(1)-(3) (2023).
[87] *See id.* § (b)(1)-(4).
[88] *See id.* § (b)(4).
[89] D.C. CODE § 32–951.03 (2)(A)-(D) (2023).
[90] D.C. CODE § 32–951.05 (a) (2023).

appeals and judicial review process.[91] This comprehensive overview also dictates the possible penalties an employer could face if they are found to have violated CEPAA.[92] Once the employee exhausts all of the OHR's administrative remedies, the employee is free to file a private cause of action.[93]

IV. State Court Treatment of Employment Protections for Recreational Cannabis Users

Although there has been some limited adjudication on the local level, most of the statutes granting employment protections to recreational cannabis users have yet to face an appellate or state supreme court review.[94] It is uncertain whether state appellate courts will uphold these

[91] *See id.* § (b)(1)-(6). Upon receiving the complaint from an employee, the OHR first review it for jurisdiction and to confirm that a claim was properly stated. *See id.* § (b)(1). OHR then sets a schedule for mediation "within 45 days of docketing the complaint," which all parties must participate in in good faith. *See id.* § (b)(2). "Once a case is docketed, OHR may request information both parties, including a response to the complaint from the respondent and a rebuttal statement from the complainant." *See id.* § (b)(3). Should these initial measures fail to bring both parties to an agreement, "OHR will serve a notice on the parties scheduling a public fact-finding hearing before a hearing examiner." *See id.* § (b)(4)(A). "Following this fact-finding hearing, the hearing examiner shall submit a proposed decision and order accompanied by findings of fact and conclusion of law to the [OHR] Director." *See id.* § (b)(4)(C). Finally, "[t]he Director of OHR…shall issue a final determination and order based on the recommendations or proposed decision or order of the hearing examiner *See id.* § (b)(5). The non-prevailing party can appeal the case to the OHR if they submit a request within fifteen days or "seek judicial review of the final determination and order by a court of competent jurisdiction." *See id.* § (b)(6)(A)-(B).

[92] An employer that employs one to thirty people could face a fine of up to $1,000 per violation. D.C. CODE § 32–951.05 (d)(1)(A) (2023). An employer that employs thirty-one to ninety-nine employs could face a fine of up to $2,500 per violation. *See id.* § (d)(1)(B). An employer that employs one-hundred people or more could face a fine of up to $5,000 per violation. *See id.* § (d)(1)(C). Further, an employer could face double the civil penalty if they had previously violated the state. § 32–951.05 (d)(2). An employer could be held responsible for paying the employee's lost wages, funding further training for the employee to undo any adverse repercussions the employee suffered due to the employer's actions, or even covering any reasonable attorney's fees resulting from the complaint. *See id.* § (d)(3)-(5).

[93] D.C. CODE § 32–951.06 (a) (2023).

[94] *See In re* Christopher Carralero, OAL Dkt. No. CSR 04770-22, 2022 N.J. Agen LEXIS 809 at *24 (N.J. Off. of Admin. Law Oct. 31, 2022) (holding that New Jersey police officer who was

employee protections given the status of cannabis on the federal level. Although the federal government – or at least the current administration -- has largely deemphasized its enforcement of marijuana-based legal violations,[95] cannabis remains an illegal Schedule I narcotic under the Controlled Substances Act.[96] Despite the passage of state legislation legalizing recreational cannabis, a state court could hold that the employee protections in such state statutes cannot coexist with the federal government's continued classification of cannabis as a Schedule I narcotic.[97]

In 2022, the Supreme Court of Nevada became the first state supreme court to rule on the validity of employee protections for recreational cannabis use while off-duty.[98] Following the decriminalization of adult recreational cannabis use by voter initiative in 2017,[99] many believed

---

discharged from the police force after testing positive for cannabis during a random drug test should be reinstated due to the employee protection set forth in CREAMMA*); see also In re* Dep't of Corr., Tennille Pitts, NYC Civ. Serv. Comm'n Case No. 2022-0148, 2021 NY Oath LEXIS 407 at *59 (N.Y. Off. of Admin. Trials & Hr'gs Sept. 9, 2022) (holding that a New York Corrections Officer who tested positive for cannabis on a random drug test and charged with conduct unbecoming of an officer was properly charged because the Department's Random Drug Testing Directive was valid under New York's recreational cannabis statutes).

[95] On October 6, 2022, President Biden announced that he would be issuing "a pardon of all prior Federal offenses of simple possession of marijuana;" "urging all Governors to do the same with regard to state offenses;" and "asking the Secretary of Health and Human Service and the Attorney General to initiate the administrative process to review expeditiously how marijuana is scheduled under federal law." Press Release, The White House, Statement from President Biden on Marijuana Reform, (Oct. 6, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/.

[96] Congressional Research Service, *Recent Developments in Marijuana Law* (LSB10859), Prepared by Joanna R. Lampe, Dec. 6, 2022, https://crsreports.congress.gov/product/pdf/LSB/LSB10859

[97] *See example* Coats v. Dish Network, LLC, 350 P.3d 849, 852-53 (Colo. 2015) (holding plaintiff's "use of medical marijuana was unlawful under federal law and thus not protected" by Colorado state legislation making it unlawful for an employer to terminate an employee for engaging in unlawful activity); *see also* Gonzales v. Raich, 545 U.S. 1, 29 (2005) (holding that the "Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail," including in situations involving state regulation of cannabis).

[98] Ceballos v. NP Palace, LLC, 514 P.3d 1074, 1074 (Nev. 2022).

[99] NEV. REV. STAT. § 678D.200 (2023).

that N.R.S. 613.333, a statute originally enacted in 1991, provided protections to employees who legally consumed recreational cannabis while off-duty.[100] Under N.R.S. 613.333, the Nevada state legislature made it an unlawful employment practice to "discharge or otherwise discriminate against any employee concerning the employee's compensation, terms, conditions or privileges of employment, because the employee engages in the lawful use in this state of any product outside the premises of the employer during the employee's nonworking hours. . . ."[101] The statute created a private right of action for employees who were terminated for engaging in lawful activities while off-duty, which, many believed, included the use of recreational cannabis.[102]

These employment protections for recreational cannabis users were subject to litigation after a slip-and-fall accident occurred in a Las Vegas casino in 2020. In *Ceballos*, the plaintiff, Mr. Ceballos, was a table games dealer at Palace Station for over a year.[103] During his tenure at the casino, Ceballos had no performance or disciplinary issues.[104] After slipping and falling onsite during his shift, Ceballos was required to take a drug test before returning to work.[105] Unfortunately for Mr. Ceballos, he tested positive for cannabis.[106] Ceballos contended that he was not impaired during his shift, nor had he ever used cannabis in the workplace.[107] Shortly thereafter, he was terminated from his position at Palace Station and ultimately filed suit, claiming that he

[100] NEV. REV. STAT. § 613.333 (2023).
[101] *See id.* § (1)(b).
[102] *See id.* § (2).
[103] *Ceballos*, 514 P.3d at 1076.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*

was wrongfully terminated for his lawful use of cannabis outside the workplace.[108] The district court dismissed his complaint for failure to state a claim.[109]

On appeal, the Nevada Supreme Court acknowledged that Ceballos's actions qualified as legal under state law.[110] However, Ceballos's cannabis possession and use remained illegal under the federal Controlled Substances Act.[111] The issue before the court became whether NRS 613.333's language "lawful use in this state" meant lawful under state law or generally lawful.[112] The Nevada Supreme Court held that "the phrase 'lawful … in this state' [was] general and encompasse[d] state and federal law applicable to conduct occurring within the state."[113] In essence, cannabis use, even in states that have legalized such actions, was not a legal activity because it remained illegal under federal law. Furthermore, the court concluded that "had the Legislature meant to require employers to accommodate employees using recreational marijuana outside the workplace but who thereafter test positive at work, it would have done so."[114] The court ultimately affirmed the lower court's dismissal of Ceballos's complaint.[115]

Despite the decision in *Ceballos*, lower courts in other jurisdictions have initially upheld employment protections for recreational cannabis users. In *In the Matter of Christopher Carralero, Town of West New York*, plaintiff, a police officer, was terminated from the West New York, New Jersey police department after testing positive for THC on a random drug urine screening in April 2022.[116] Carralero sued the department, arguing that his termination violated the

[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.* at 1077.
[114] *Id.* at 1078.
[115] *Id.* at 1079.
[116] *Carralero*, at *1-2.

employee protections set out in CREAMMA.[117] Although CREAMMA made it illegal for employers to take adverse action against employees, there was some uncertainty as to whether the statute would apply to off-duty police officers.[118] A week after Carralero submitted to the random drug screening, the New Jersey Attorney General's office issued a memorandum that specified that "law enforcement agencies may not take any adverse action against any officers because they do or do not use cannabis off-duty."[119] The court concluded that it was "the clear intention of the Attorney General that even law enforcement agencies must focus under CREAMMA on workplace or on-duty impairment."[120] The court ultimately granted Carralero's request for summary judgment and ordered that he be reinstated to the police department with back pay.[121]

In *In re Department of Corrections,* the New York City office of Administrative Trials & Hearings oversaw the employee disciplinary proceedings of Captain Pitts, who was charged with conduct unbecoming of an officer and of a nature to bring discredit to the Department after testing positive for cannabis in her system, among other offenses.[122] During her hearing, Pitts claimed that she ingested a tea that contained hemp, which caused her positive drug test.[123] Pitts argued that the positive drug test could not "result in discipline because the use of hemp is not prohibited by law and that recreational marijuana use was legalized in New York State on March 31, 2021."[124] Pitts further contended that the MRTA amendments to N.Y. Lab. § 201-d providing employee

[117] *Id.* at *3.
[118] *Id.* at *9-*10.
[119] *Id.* at *9.
[120] *Id.* at *21.
[121] *Id.* at *24.
[122] *Pitts* at *1.
[123] *Id.* at *45.
[124] *Id.* at *56

protections for off-duty cannabis use protected her from adverse employment action, as there was no evidence that she was impaired at work.[125]

The court disagreed, however, pointing out that N.Y. Lab. § 201-d (4) provided that "an employer shall not be in violation of this section where the employer takes action based on the belief either that . . . the employer's actions were permissible pursuant to an established substance abuse or alcohol program or workplace policy, professional contract or collective bargaining agreement . . ."[126] The court reasoned that the Department's Random Drug Testing Directive was acceptable under the MRTA because the random testing policy was an established substance abuse or workplace policy under the statutory language.[127] Although the testing itself was legal, the court ultimately held that Pitts's positive random drug test alone did not merit termination, as there was no evidence that Pitts was ever intoxicated while on duty and she had taken and passed numerous random drug tests during her tenure with the department.[128] The court further reasoned that "to seek termination [on these grounds], where there is no evidence that the respondent knowingly ingested marijuana, seems inconsistent with MRTA's purpose of addressing the collateral employment consequences of marijuana use on an otherwise law-abiding citizen."[129] Pitts was ultimately terminated by the department for other policy violations outside of the positive cannabis test.[130]

---

[125] *Id.* at *56-*57.
[126] N.Y. LAB. §201-d(4).
[127] *Pitts*, at *58.
[128] *Id.* at *70.
[129] *Id.*
[130] *Id.* at *76.

V. Proposed Scientific and Technological Solutions for Assessing Cannabis Impairment in the Workplace

For years, scientists have been attempting to develop a cost-efficient and accurate method of assessing cannabis impairment, but to no avail. The lack of a clear test has remained an impediment to legalization on the state and federal levels.[131] Now that recreational legalization has begun to spread throughout the United States, calls for an impairment test are becoming more and more urgent, especially for employers who are worried about employees coming to work intoxicated.[132] Scientific institutions and technology companies alike have attempted to answer this call in recent years, endeavoring to produce the breakthrough needed to assess whether or not a person is under the influence of cannabis.

Although scientists have yet to discover a guaranteed method of assessing cannabis impairment, there have been some advancements in recent years focusing on brain imaging. In January 2022, researchers at Massachusetts General Hospital published a study in the journal Neuropsychopharmacology, outlining their use of functional near-infrared spectroscopy ("fNIRS") to identify those who were impaired by THC. The lead author of the article, Harvard Medical School associate professor Jodi Gilman, described the goal of the study as determining "if cannabis impairment could be detected from activity of the brain on an individual level."[133]

Gilman acknowledged that THC levels in the blood do not properly indicate whether a person is impaired, as some people can have a high level of THC in their system without suffering

---

[131] Tiffany Kary, *U.S. Grapples With How to Gauge Just How High Cannabis Users Are*, BLOOMBERG: NEWSL. (Jan. 24, 2022), https://www.bloomberg.com/news/newsletters/2022-01-24/marijuana-impairment-levels-targeted-with-new-tests.
[132] Ramsey, *supra* note 34.
[133] *Study identifies potential test for cannabis impairment*, THE HARVARD GAZETTE: HEALTH & MED. (Jan. 11, 2022), https://news.harvard.edu/gazette/story/2022/01/research-describes-brain-based-method-for-identifying-cannabis-impairment/.

impairment and levels can remain in a person's system for weeks after last use.[134] In this study, "participants who reported intoxication after being given oral THC show[ed] an increase oxygenated hemoglobin concentration (HbO) – a type of neutral activity signature from the prefrontal cortex region of the brain – compare to those who reported low or no intoxication."[135] The fNIRS equipment allowed doctors to use brain imagining to see when a brain showed signs of impairment.[136] This method of assessing impairment was found to be roughly 76 percent accurate.[137]

In the tech sector, several companies are attempting to fill the void of impairment assessment through a variety of different products and approaches. One company, Gaize, has developed technology that integrates modern equipment with established law enforcement methods for testing whether a person is under the influence of a variety of substances, including cannabis. The company asserts that its technology combines artificial intelligence ("AI") and virtual reality ("VR") headsets with Drug Recognition Expert ("DRE") eye testing methods used by law enforcement across the country.[138] The headset takes six minutes to evaluate a person's level of impairment.[139]

Throughout the testing process, the headset "records eye movement data, pupil size, and accelerometer and gyroscope data 90 times per second."[140] This data is "then analyzed by statistical and machine learning models which have been trained using known impaired and known sober

---

[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] Executive Summary, *Gaize, Inc.*, at 1 (Jan. 2023) (on file with author).
[139] *Detect Impairment in your Workforce. Instantly.*, GAIZE, INC., https://www.gaize.ai/workforce (last visited Apr. 19, 2023).
[140] Executive Summary, *supra* note 138, at 2.

individuals."[141] These models then "identify the micromovements of the eye that are indicative or impairment and report that test to the test administrator."[142] These eye movements are recorded and sent to the user's phone after the test is completed, including a report detailing whether or not the user is impaired and by what substances.[143]

The headset currently tests for impairment due to cannabis, alcohol, central nervous system depressants, central nervous system stimulants, dissociative anesthetics, and narcotic analgesics.[144] The testing process is noninvasive and does not require any type of sample from the user.[145] Gaize argues that their approach to impairment testing "removes human error and subjectivity from the equation, which is extremely important for test accuracy and success in prosecution."[146] In theory, the recorded videos of eye movement "can be evaluated by expert witnesses to validate the determination of impairment with the video viewable by judges and juries," though such evidence has yet to be used in court.[147]

Impairment Science, Inc., launched the Druid app in 2018, which "requires users to perform four game-like tasks that measure reaction time, decision-making accuracy, hand-eye

[141] *Id*. To create these learning models, Gaize completed "the world's largest cannabis impairment clinical trial," which collected over 500 million unique datapoints from 350 participants. *Science*, GAIZE, INC., https://www.gaize.ai/science (last visited Apr. 19, 2023). These datapoints were used to create "the world largest dataset for cannabis impaired eye movement," which is used by the VR headsets to assess a user's impairment level. *Id.*
[142] Executive Summary, *supra* note 138, at 2.
[143] Video Interview with Brenda McClain, Former Account Executive, GAIZE, INC. (Apr. 12, 2023).
[144] E-mail from J.R. Plate, Director of Sales, GAIZE, INC. (May 1, 2023, 13:09 EST) (on file with author).
[145] Executive Summary, *supra* note 138, at 2.
[146] *Id.*
[147] Executive Summary, *supra* note 138, at 2; E-mail from Brenda McClain, Former Account Executive, Gaize, Inc., to author (March 29, 2023, 15:14 EST) (on file with author).

coordination, time estimation, balance, and the ability to perform divided-attention tasks."[148] These tests were designed to "assess a person's level of cognitive and motor impairment due to any cause or combination of causes." Impairment Science, Inc. provides customers with two versions of the app: Druid, which allows people to assess their level of impairment, and Druid Enterprise, which combines the Druid impairment test with administrative management tools that "allows managers to view their employees' scores individuals or collectively by age range, gender, or workgroup."[149]

If an employer is using Druid Enterprise, the scores of employees "can be displayed over time for a specific date or range of dates."[150] Such graphical displays can "draw attention to higher scores that may indicate impairment." Those who are using the app must complete between one and three practice assessments to establish a baseline score so the app has a "reliable comparison point against which to assess whether any current score deviates from 'normal.'"[151] The company suggests that employees required to undergo Druid impairment testing should be supervised, as there are currently no anti-cheating features built into the app.[152] In addition, Druid does not detect or identify the specific cause of the impairment; it merely detects that a person is impaired.[153]

Multiple companies have attempted to break into the cannabis impairment market by developing the device that the public desperately wants: a THC breathalyzer. Hound Labs released

---

[148] Michael Milburn & William DeJong, *Stop Drug Testing Start Impairment Testing*, IMPAIRMENT SCIENCE, INC., at 2, https://www.impairmentscience.com/_files/ugd/c3133b_a15004e0131e4819a0c93bc562c765cd.pdf (last visited on Mar. 28, 2023).
[149] *Id.* at 3.
[150] *Id.*
[151] *Frequently Asked Questions*, IMPAIRMENT SCIENCE, INC., https://www.impairmentscience.com/faqs (last visited Apr. 20, 2023).
[152] *Id.*
[153] According to Impairment Science, testing positive for impairment "could be from any cause, including drugs, fatigue, illness, chronic condition, severe emotional stress, legal or illegal drugs, or alcohol." *Id.*

its version of the THC breathalyzer, aimed at both law enforcement and workplace impairment needs.[154] The Hound Cannabis Breathalyzer implements "new technology to create a tool with the ultra-sensitivity required for THC measurement in breath."[155] The breathalyzer's "systems specifically target active THC…and isolate detection to use that has occurred within approximately three hours of the test."[156]

During testing, the user "breathes into a disposable mouthpiece attached to a handheld cartridge. The single-use cartridge automatically captures a breath sample needed for testing."[157] Hound Labs offers two different systems for processing their test results: Collect + Send or On-Demand. Collect + Send results "are processed at a Hound Labs partner laboratory using ultra-sensitive Liquid Chromatography Mass Spectroscopy (LC-MS) testing."[158] The On-Demand results would be available within minutes and then verified by a partner lab to confirm.[159]

Hound Labs also launched the Retriever database, which is an online portal that allows customers to view results directly from the labs testing the samples.[160] Hound Labs claims that even if a subject ingests cannabis using an edible or topical form, "a breath sample may indicate a non-negative result if the donor has consumed THC at a high enough quantity."[161] Hound Labs

---

[154] *Hound Cannabis Breathalyzer*, HOUND LABS, https://houndlabs.com/product-overview/ (last visited Apr. 27, 2023).
[155] *THC Measurement*, HOUND LABS, https://houndlabs.com/product-research/ (last visited Apr. 27, 2023).
[156] *Frequently Asked Questions*, HOUND LABS, https://houndlabs.com/hound-labs-faq/ (last visited Apr. 27, 2023).
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*

does, however, acknowledge that their breathalyzer does not measure impairment and is only "intended to detect recent cannabis use."[162]

Although these are just a small sampling of the wide range of scientific and technological developments that are currently being offered in the impairment market, these approaches show how diverse the various attempts at filling the impairment-testing void have become. There is currently no widely accepted way of conclusively measuring cannabis impairment, but the continued endeavors of the tech and scientific communities continue to push the boundaries of how we assess impairment in the workplace.

VI. Analysis

A. The Potential Impact of *Ceballos* on Other State Courts Adjudicating Employment Protections for Recreational Cannabis Users

In 2022, the Nevada Supreme Court ruled in *Ceballos* that employees were not protected under state law from adverse employment action for lawfully using recreational cannabis while off-duty.[163] Although the findings of the Nevada Supreme Court in *Ceballos* may seem foreboding for employee protections for recreational cannabis users, the significant differences between Nevada's statutory framework and those of the other jurisdictions would likely lead to a different outcome in other state courts. Unlike Nevada, which did not include any employment protections for recreational cannabis users in its statutory framework, every other jurisdiction has included explicit protections for this group within its recreational cannabis statutes. In *Ceballos*, N.R.S. 613.333 was enacted decades before recreational cannabis was legalized and there is no evidence

[162] *Hound Cannabis Breathalyzer: Collect + Send*, HOUND LABS, https://houndlabs.com/wp-content/uploads/2023/03/230316_HCB_Collect_Send_Product_8.5x11in_UTM_F.pdf (last visited Apr. 19, 2023).
[163] *Ceballos*, 514 P.3d at 1078.

that legislators had cannabis in mind when they were envisioning the scope of the employee protections. In their opinion, the Nevada Supreme Court acknowledged that it took into consideration the Legislature's intent for employee protections, recognizing that certain protections for medicinal cannabis users exist in the employment context.[164] This acquiescence could provide cover for other state courts that face the question of recreational cannabis users' protections under these statutes.

Although these employment protections have only been addressed in a small number of lower state courts, said courts have thus far upheld the state legislature's intent in their jurisdictions. In these other jurisdictions, the recreational cannabis employee protection statutes at issue were specifically adopted by these governing bodies to apply to this subset of cannabis users. In *Carralero*, the lower court reversed a police officer's dismissal from the police department due to a positive THC result on a random drug test.[165] This finding is indicative of the state court's willingness to defer to and uphold the intent of the state legislatures and to follow guidance from the states on how to approach recreational cannabis cases in the workplace. Though resulting in a different outcome, the Administrative Court in *Pitts* upheld a Corrections Officer's dismissal after holding that the random drug testing that the officer was subjected to was legal under the current statutory framework in New York, which allows for pre-existing workplace drug testing policies.[166] Although this outcome was not welcomed by the employee, the *Pitts* decision shows that statutory frameworks, including the heavily employee-favored approach of New York, can have enough flexibility to both protect employees from unfair adverse employment action and allow employers to act when needed.

---

[164] *Id*.
[165] *Carralero*, at *24.
[166] *Pitts*, at *56-57.

B. Advantages and Drawbacks of Statutory Frameworks Protecting Recreational Cannabis Users in the Workplace

Protecting recreational cannabis users from adverse employment action is a recent development in the legalization discussion. No one jurisdiction necessarily knows the best way to structure such a framework to benefit both employers and employees. While some jurisdictions chose to provide greater protection for employers or employees, others tried to find a balance that attempts to weigh the rights of both groups while maintaining safety in the workplace. There is, however, a great deal to learn from current frameworks in place and an opportunity to improve such protections in the future.

The decision of Maine, Rhode Island, Montana, and California to omit a definition for impairment may prove challenging for the state legislature, the courts, and each jurisdiction's constituents in the long run. As previously discussed, there is no ironclad way to assess impairment at present.[167] However, placing the burden on employers to interpret what constitutes impairment in the workplace may prove shortsighted and potentially harmful to both employers and employees alike. Without any governmental guidance as to when a person should be classified as impaired, the immediate burden of deciding what behaviors or symptoms establish impairment falls to employers and, in many cases, their lawyers. Implementation of such policy will likely become varied from company to company, leaving employees subject to the interpretations of their employers, rather than what was intended by the state legislature. Given the immense impact these interpretations could have, such decisions will likely result in suits filed in state court attempting to resolve these discrepancies.

[167] *See Field Sobriety Tests and THC Levels Unreliable Indicators of Marijuana Intoxication*, supra note 29.

Should an employer's interpretation result in unwarranted adverse employment action against an employee, the employee's recourse would likely be filing suit. When legislation does not provide a clear statutory definition for a particular term, a state court would likely "give [such terms] their usual and accepted meanings, as long as these meanings are consistent with the statutory purpose... [The courts] derive the words' usual and accepted meanings from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions."[168] Even if the state courts adopt an impairment definition or standard that they believe reflects the general meaning or accepted standards of cannabis impairment, the decision to leave this vital standard in the hands of the judicial system could end up harming both employers and employees alike.

Though New York, New Jersey, Connecticut, Illinois, and Washington, D.C. chose to codify a definition for cannabis impairment, the varying policies that each state has adopted pose their own risks and benefits to both employers and employees. In New York, the state legislature outlawed all drug testing of employees, unless mandated by state or federal law.[169] For an employer to take adverse action against an employee for being impaired while on duty, they would have to show "objectively observable indications that the employee's performance of the duties…of their position are decreased or lessened."[170] This standard could prove difficult for employers to meet because, even if an employee is performing at a lower level than expected, they could argue that their performance was lowered due to other factors, not cannabis impairment. Employers would not be able to refute such claims by requiring a drug test, that would, at minimum, show whether the employee had THC in their system. On the other hand, the broad language of the statutory

[168] Williams v. Bd. of Appeals of Norwell, 194 N.E.3d 168, 176 (Mass. 2022).
[169] *Adult Use Cannabis*, *supra* note 67, at 3.
[170] *Id.* at 2.

definition could give employers greater coverage for such adverse employment actions because employers could cite a wide range of behaviors that they believe amount to a decreased or lessened performance of duties and would not run afoul of the statutory framework.

New York's policy would provide additional protection for employees, as they would no longer be subject to drug testing of any kind unless their position is subject to mandatory testing regulations under state or federal law or an "established substance abuse or alcohol program or workplace policy, professional contract or collective bargaining agreement."[171] Employees would, therefore, enjoy far greater protection from employer overreach and discriminatory drug testing policies. There is the possibility, however, that the vague language of the impairment definition provided in the statute could lead to employers claiming impairment when an employee is not performing in a manner that the employer expects.

The Connecticut state legislature took a markedly different approach to employee protections for recreational cannabis users, including a broad range of industry exceptions in the legislation and allowing employers to maintain their workplace drug testing policies. Connecticut's approach is employer-focused and prioritizes the concerns of those running the business, rather than the employees. Connecticut's statute implementing employee protections provides employers with an easy opt-out; an employer can implement a workplace policy if that policy is made "available to each prospective employee at the time the employer makes an offer or conditional offer of employment to the prospective employee."[172] Although Connecticut exempted medicinal-cannabis users from such policies, the language of the statute eliminates the protections for recreational-cannabis users should an employer decide that they do not want to provide said

[171] N.Y. LAB. §201-d (4).
[172] CONN. GEN. STAT. § 21a-422p(b)(1) (2023).

protections. This would leave significant numbers of employees vulnerable to continued adverse employment actions based on their use of recreational cannabis, which is antithetical to the perceived intent of the legislation.

Connecticut, also, included vast industry-specific exemptions in their statutory framework.[173] Although there are undoubtedly valid safety concerns in each of these industries, the blanket exemptions cover every employee, including those who work safely in offices every day and do not perform any safety-sensitive tasks in the course of their employment. This means that a vast number of employees that do not pose a safety risk through their use of off-duty recreational cannabis are de facto left unprotected by this legislation, which is, once again, directly at odds with what this law was meant to accomplish. Although Connecticut was one of the first jurisdictions to enact recreational cannabis employment protections, the legislature's deference to employer policies and the vast exemptions that were implemented in the statute could potentially leave many employees in Connecticut at the mercy of their employer's workplace policy.

The Illinois state legislature also took a more employer-centric approach to employment protection for recreational cannabis users, allowing employers to enact drug-testing policies in the workplace and insulating their liability by expressly prohibiting multiple causes of action for employees. In Illinois, employers can implement zero-tolerance or drug-free workplace policies that, if violated, could result in the termination of an employee.[174] In addition, the statute explicitly constrains the potential cause of actions that an employee can pursue against an employer, including filing suit against an employer after being terminated for failing a workplace-policy-sanctioned drug test.[175] The statute also lowers the burden on employers to show that an employee

[173] *See* discussion *supra* Part III.B.
[174] 410 ILL. COMP. STAT. 705/10-50 (a) (2023).
[175] *See id.* § (e)(1).

is impaired, requiring only a "good faith belief that an employee manifests specific, articulable symptoms while working that decrease or lessen the employee's performance."[176] The design of this statute leaves employees largely unprotected and with little to no means of holding an employer accountable for false accusations of impairment. Much like Connecticut's statute, an employer can evade compliance simply by instituting a workplace policy, which goes against the very intent of the statute. Though employers should be able to manage their own workplaces to maximize productivity and safety, the lack of employment protections in Illinois's employment protections statute will likely leave recreational cannabis users with little more protection than they had previously.

New Jersey took a middle-ground approach that documents an employee's impairment symptoms by a WIRE-certified professional and then confirms an employee's recent cannabis use through traditional THC testing. The state's approach to employee protections for recreational cannabis users protects both the employees, who cannot be discharged without proof of impairment,[177] and employers, who can use THC testing to confirm that a person has recently used cannabis to combat possible excuses for on-duty impairment.[178] Requiring this additional step beyond confirming THC presence in an employee's system allows employees to refute the accusation of on-duty cannabis impairment with their own evidence or explanation of said behavior, such as exhaustion or an emotional issue. New Jersey's statutory framework, therefore, allows both sides to make present arguments as to the impairment of an employee and does not solely rest on a THC test that does not verify anything except whether the employee ingested cannabis at some point in the last several months.

---

[176] *See id.* § (d).
[177] Mem. From Jeff Brown, *supra* note 50, at 1-2.
[178] *See* discussion *supra* Part III.A.

New Jersey also WIRE certification will train professionals to recognize workplace impairment. Once the requirements of this certification are released, WIRE-certified employees and specialists will presumably be able to assist with all impairment inquiries and provide suitable evidence of impairment to support adverse employment action against an employee. Although this new certification could prove to be an invaluable tool for employers, the obvious issue with the WIRE certification is the fact that the parameters for a WIRE certification have yet to be announced, despite NJ CREAMMA being passed in February 2021. Neither employers nor employees benefit from a certification that exists in name only.

New Jersey did, however, make a wise choice in issuing guidelines to direct employers while they await further instructions for the WIRE certification. Until the WIRE certification requirements are announced, employers are encouraged to have an employee or third-party provider complete "reasonable suspicion observation reports" to gather evidence of impairment.[179] The NJ-CRC also allowed employers to "use a cognitive impairment test, a scientifically valid, objective, consistently repeatable, standardized automated test of an employee's impairment, and/or an ocular scan, as physical signs or evidence to establish reasonable suspicion of cannabis use or impairment at work."[180] The committee's decision to acknowledge the use of impairment-assessing technology or testing will be a significant asset to employers and employees alike. Typical drug recognition expert techniques to assess impairment are beneficial and continue to be used by law enforcement agencies, but such techniques are susceptible to the subconscious biases of the person implementing the techniques and assessing a person's responses. The use of such technology in New Jersey workplaces would ease the weight placed on employers to definitively

[179] *Id.*
[180] Mem. From Jeff Brown, *supra* note 50 at 2.

show impairment and protect employees from being improperly accused of impairment in the workplace.

Washington, D.C.'s Council, also, opted for a statutory framework that attempted to balance employer rights with employee protections. Under the statute, an employer can institute workplace policy that requires post-accident and reasonable suspicion drug-testing procedures, as well as mandatory drug testing of employees in safety-sensitive positions.[181] However, "the presence of [THC] in the [employee's] bodily fluids in an employer-required or requested drug test without additional factors indicating impairment" is not sufficient grounds to take adverse employment action against an employee.[182] This framework allows employers to maintain a drug-free workplace and utilize THC testing to ensure safety in the workplace is prioritized, while still protecting employees from being adversely affected by a test that merely shows that they ingested THC at some point in recent history.

The D.C. Council's inclusion of an OHR complaint system to hold employers accountable for violating these employment protections will help streamline an employee's ability to gain redress, should they feel their employer is violating the statute. This system will allow such complaints to be heard in a dedicated forum, separate from the congested legal system, and hopefully result in more prompt relief to these employment issues. In addition to this administrative system, the D.C. Council made clear that the employment protection statutes did not eliminate any common law or statutory causes of action that an employee could file against an employer for discriminatory action, nor provide safe harbor for an employer from suit under the statute.[183] The explicit reinforcement of these causes of action allows employees who feel that they

[181] D.C. CODE § 32–951.03 (A) (2023).
[182] D.C. CODE § 32–951.02 (a)(3) (2023).
[183] D.C. CODE § 32–951.03 (3)-(5) (2023).

have been the victim of adverse employment action without due cause to file suit against the employer, allowing employees to seek further remedies with the help of the judicial system. These provisions ensure that an employee can take an employer to court, should they see fit. This will likely cause some apprehension from employers, but the flexibility that the statute provides said employers to manage their workplaces under their drug-free workplace policy would likely outweigh such hesitations.

Overall, implementing a two-step policy that requires both a positive THC test and an assessment documenting specific evidence of impairment in the workplace would be the most efficient method for jurisdictions crafting employment protection for recreational cannabis users. This approach, like New Jersey's statutory framework, allows employers to do a complete and thorough investigation that evaluates both behavioral abnormalities and confirms that the employee has THC in their system, insulating themselves from potential suit should they choose to take adverse employment action against the employee. This policy also protects employees from being unfairly accused of cannabis impairment in the workplace, allowing them to refute impairment accusations and provide evidence explaining their behavior. Although THC testing does not point to an individual's impairment level, it does confirm whether an employee has recently used cannabis, which is valuable for employers to contextualize the circumstances around the impairment accusation and helps hold employees accountable should they deny having ingested cannabis recently.

Jurisdictions crafting employment protections for recreational users would also benefit from the inclusion of some sort of administrative hearing process, like the OHR hearings established in Washington, D.C. Such hearings would streamline the complaint process without adding to the already overwhelming caseload that every jurisdiction's courts are experiencing.

Employees would be able to file a complaint and quickly settle the matter with the help of a designated administrative body, while still maintaining the option of filing a private cause of action. The key to structuring these employment protections is enforcement. If the state cannot enforce the employment protections and ensure that the employers are respecting the rights of their employees, there must be a system in place that holds the employers accountable, should they fail.

Although employers should be able to craft their own workplace drug policies, such policies cannot be able to circumvent the entire statutory framework that the jurisdiction is crafting. A government cannot function if its citizens can ignore the rule of law. An employer knows what a company needs to remain competitive and productive, but bending the rights of its employees cannot be the way they do it. Instead, an employer should be able to adopt policies that allow for post-accident and reasonable suspicion drug testing to ensure the safety of its employees but draw the line at random drug testing or pre-employment testing policies that could result in adverse employment actions against employees whose actions are strictly legal under state law.

C. The Potential Impact of Scientific and Technological Advances

As additional states continue to legalize medicinal and recreational cannabis, the pressure on cannabis impairment companies to create a product that could fill the current void for a conclusive test mounts.[184] Although there are numerous products for employers to choose from, not all the emerging scientific and technological advances will prove compatible with the statutory frameworks that jurisdictions have put in place to protect off-duty recreational cannabis users.

Furthermore, although some products may be compatible with statutory frameworks, not all impairment testing methods are currently fit for mass production. For example, Dr. Gilman's

[184] Amanda Hoover, *Tech companies are racing to crack the code of marijuana testing*, MORNING BREW, https://www.morningbrew.com/daily/stories/2022/07/07/companies-race-to-solve-marijuana-testing.

use of fNIRS brain imaging to assess impairment inspired a great deal of excitement and opened the minds of many to the possibility of a concrete indicator of cannabis impairment. Gilman's peer-reviewed study showed that the fNIRS technology could predict cannabis impairment with 76% accuracy, which is "better than the 68% accuracy of field tests that employ traditional law enforcement protocols such as walking a straight line and examining a subject's pupils."[185] However, a test that is currently only effective three out of every four times does not hold the level of precision that state legislatures, courts, and employers are looking for to conclusively show that an employee is impaired at work. Further, Dr. Gilman's study "relie[d] on an imaging device from NirX Medical Technologies, which still costs around $40,000," a far too hefty price tag for the average business.[186] Brain imaging may be the answer to this impairment problem in the future, but it is currently out of the reach of everyday employers.

Although Hound Labs' Breathalyzer may appear attractive to employers who have long relied on alcohol breathalyzers to assess alcohol impairment in employees, the use of such a device may not be compatible with current statutory frameworks in jurisdictions that have implemented employment protections for recreational cannabis users. Unfortunately, it is well-established that, unlike a person's blood alcohol content, the amount of THC in a person's system is not indicative of their level of impairment.[187] Hound Labs' breathalyzer, though an adequate measure of whether a person recently ingested cannabis, does not measure a person's impairment.[188] Therefore, using a cannabis breathalyzer alone in states like New York and New Jersey that require specific evidence of impairment would not be sufficient to take adverse employment action against an

[185] Kary, *supra* note 131.
[186] *Id.*
[187] *Field Sobriety Tests and THC Levels Unreliable Indicators of Marijuana Intoxication*, supra note 29.
[188] *Hound Cannabis Breathalyzer: Collect + Send*, *supra* note 162.

employee. Instead, additional evidence would have to be provided so that an employer could reach the impairment threshold to take adverse employment action against an employee. In other employee-protection jurisdictions that allow for reasonable drug testing policies, like Connecticut and Illinois, Hound Labs' THC Breathalyzer could be used to test employees for recent THC use. However, the "On-Demand" test result option is not currently available to Hound Labs customers, so employers would have to wait until their "Collect + Send" results could be processed by one of the company's affiliate labs and returned to the employer.[189] Although Hound Labs' breathalyzer could be an asset to employers who are still authorized to test their employees for the presence of THC in their system, the device's inability to assess an employee's impairment level would leave employers in employment-protection jurisdictions in a similar predicament to the one they are already facing.

Impairment Science's Druid app takes a completely different approach to workplace impairment, using four game-like assessments to determine whether an employee is impaired while at work.[190] Although Druid could be an easy and accessible solution to potential issues of impairment in the workplace, the app does have its drawbacks. The first issue that employers may face with Druid is the fact that the app does not currently have any built-in anti-cheating fixtures, which means the impairment testing must be completed under employer supervision.[191] Not only does this raise concerns about employees cheating the system, but it also creates an additional task for company supervisors, taking time away from their responsibilities in the workplace and potentially monopolizing a significant part of everyone's work day. If a supervisor must oversee

[189] *Frequently Asked Questions*, *supra* note 156.
[190] Milburn & DeJong, *supra* note 148 at 2.
[191] *Frequently Asked Questions*, *supra* note 151.

the impairment testing of every employee before the start of their shift, that could drain significant resources from the company, including manpower and time spent away from doing one's job.

In addition, an employee must go through Druid's assessment roughly four times to assess a baseline of "normal" behavior. Once this baseline is established, an employee could then complete the assessment before every shift or after an accident to confirm whether they were impaired at that time. This could be problematic if a new employee is suspected of being impaired at work and has not established their Druid baseline. The fact that a baseline must be established, however, does make it harder for an employee to "cheat" on Druid's assessments. If an employee attempted to increase their baseline score to cover up an impairment reading, they would have to "make nearly identical adjustments to one or more of their actions almost every time they took the test and in such a consistent way that their baseline score would remain uniformly elevated above their natural baseline."[192] Since it is unlikely that any person would have the foresight to incrementally alter their impairment level, this could ease some concerns that stem from the use of Druid in the workplace.

Although Druid can accurately assess impairment, the app does not tell the user what is impairing the person being assessed. The app does not detect the presence of cannabis in a person's system, but rather simply "detects impairment from any cause, including from drugs, alcohol, fatigue, illness, injury, chronic condition, or severe emotional stress."[193] In a state like New York, which expressly prevents employers from drug testing their employees, a positive impairment assessment for someone who is ill, exhausted, or emotionally distraught could result in adverse employment action being taken against the employee erroneously. These concerns are diminished

[192] *Id.*
[193] *Id.*

in some of the other jurisdictions that allow, or in some cases require, a traditional drug test to verify THC in an employee's system, like New Jersey, Illinois, Connecticut, and Washington, D.C. THC testing helps protect some employees from false accusations, but others who have previously used recreational cannabis off-duty and tests positive for impairment based on exhaustion or illness may fall victim to false accusations, unable to corroborate their version of events. Druid could be a considerable asset to employers in employment protection jurisdictions. However, the app's inability to decisively say whether an employee is impaired due to cannabis use could leave employees at a considerable disadvantage when attempting to prove that they were not impaired by cannabis while on duty.

Gaize's headset combines modern technology with recognized law enforcement testing methods to help employers accurately assess whether an employee is impaired while on duty. The AI technology within the headset uses over 500 million unique data points from 350 clinical trial participants to assess cannabis-impaired eye movement, all while meeting DRE eye testing standards used by law enforcement.[194] The DRE eye testing methods are recognized by local, state, and federal law enforcement organizations as a reliable method for "detecting and identifying persons under the influence of drugs and in identifying the category or categories of drugs causing the impairment."[195] Gaize's approach to impairment assessment removes the human element of DRE testing, which theoretically eliminates a test administrator's biases from affecting the outcome of the assessment.[196] There is, however, no way to completely remove bias from AI, as "human beings choose the data that algorithms use, and also decide how the results of those

[194] *Science*, *supra* note 141.
[195] *What They Do*, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, https://www.theiacp.org/what-they-do (last visited Apr. 27, 2023).
[196] Executive Summary, *supra* note 138, at 2.

algorithms will be applied."[197] Despite this risk of bias, Gaize could prove attractive to New Jersey employers, who are authorized to "use a cognitive impairment test, a scientifically valid, objective, consistently repeatable, standardized automated test of an employee's impairment, and/or an ocular scan, as physical signs or evidence to establish reasonable suspicion of cannabis use or impairment at work."[198]

In addition, the DRE testing technology within the headset can assess which specific drug is impairing an employee. Gaize's headset is currently capable of assessing impairment due to cannabis, alcohol, central nervous system depressants, central nervous system stimulants, dissociative anesthetics, and narcotic analgesics.[199] This would provide employers with a greater sense of certainty that an employee is impaired due to cannabis or some other impairing substance, while also protecting employees who are falsely accused of substance impairment in the workplace. Although not every jurisdiction requires this level of certainty to take adverse employment action against an employee, employers in every jurisdiction would benefit from knowing exactly what is affecting their employee's performance. There is no baseline needed for the headset to get an accurate measure of an employee's impairment and the entire process takes only six minutes to complete.[200] Gaize's non-invasive testing method would not run afoul of New York's no-drug-testing policy because the headset is not measuring THC levels, but rather is assessing the user's eye movements based on hundreds of millions of data points that were designed based on established law enforcement processes.

---

[197] Bernard Marr, *The Problem With Biased AIs (and How To Make AI Better)*, FORBES: ENTERPRISE TECH (Sept. 30, 2022, 1:40 AM), https://www.forbes.com/sites/bernardmarr/2022/09/30/the-problem-with-biased-ais-and-how-to-make-ai-better/?sh=257864674770.
[198] Mem. From Jeff Brown, *supra* note 50, at 2.
[199] E-mail from J.R. Plate, *supra* note 144.
[200] Executive Summary, *supra* note 138, at 1-2.

Although there is no foolproof method of assessing impairment, Gaize's headset technology and DRE testing methods would most likely withstand scrutiny under the current employment protection statutes in place. Gaize's technology is quick, efficient, and based on accepted law enforcement models assessing drug impairment. Unlike the Druid app, the AI models can differentiate between various types of drugs, including cannabis, which would help employers gain definitive evidence of impairment and protect employees from false accusations. Gaize's headset allows employers to protect their employees' safety in the workplace and ensures employees' ability to use recreational cannabis off-duty without fearing repercussions, should they be subjected to a random drug test.

Thus, while technology has not necessarily caught up with society's needs just yet, innovations in testing for cannabis impairment — and, in particular, Gaize's headset — offer some promise of solving the puzzle. Should such technology become more widely accepted, additional state legislatures may become more comfortable with implementing employment protections for recreational cannabis users into their statutory frameworks legalizing recreational cannabis. These various technological advances both allow employees to exercise their statutory rights under state law, while ensuring an employer's ability to maintain safety standards in the workplace remains intact, for both the well-being of the employees and the interests of the employers.

VII. Conclusion

As the number of states legalizing recreational cannabis grows, employers and employees alike continue to navigate what these considerable changes mean for the workplace. The growing minority of jurisdictions that have instituted protections for employees who ingest legal cannabis while off-duty are pioneers in this area, composing legislation without any guidance or model statutes. Although there is no way to accurately predict how state courts would rule on this issue,

the statutes could likely withstand judicial scrutiny, based on the legislative intent of the state legislatures to protect this subset of people and the lower state courts' willingness to uphold the statutes so far.

Although each legislature formulated a statute that it felt best served its constituency, the statutory frameworks that imposed regulations that required both a positive THC test and a strong evidentiary showing of impairment while on duty appeared to best protect the rights of both employers and employees. Gathering evidence of impairment allows employers to conduct a thorough investigation into an employee's actions or behaviors and ensure that an employee has the opportunity to refute such accusations. Using a drug test to confirm THC in the blood system lessens the likelihood that an employee is being falsely accused of being impaired on duty. In addition, including an administrative process where employees can report employers that are failing to implement the employment protections would help quickly adjudicate these issues and relieve some of the pressure on each jurisdiction's overwhelmed judicial systems.

Technological and scientific advances in the cannabis impairment field are pivotal to the future of recreational cannabis use. Though employers cannot currently test for cannabis impairment accurately and in real-time, the use of impairment-assessing technology could significantly lessen the burden on employers to show that an employee is impaired on duty and ease the stress of employees who could be falsely accused, as well. Gaize's VR headset, which integrates AI technology and DRE eye testing methods, allows employers to assess an employee's impairment non-invasively. The headset can measure the exact movements of an employee's eyes and use DRE methods to assess whether an employee is impaired and by what substance. This technology would likely be welcomed in most jurisdictions, as DRE eye testing methods have been accepted nationally as a viable way for assessing impairment. Until scientists discover an infallible

method to assess cannabis impairment, the use of technological solutions, like Gaize's headset, will help employers maintain a safe workplace, while allowing employees the freedom to use recreational cannabis outside of the workplace.