

# COMMITTEE NEWS

## Cannabis Law and Policy

### Employers: Clock Is Ticking To Update Marijuana Policies

With an increasing number of states passing laws protecting employees who utilize marijuana, employers throughout the country are presently tasked with redesigning their marijuana-related policies and practices to avoid the (significantly increased) risk of suffering discrimination, retaliation, and other costly claims. With many relevant state laws going into effect throughout the next twelve months, the clock is ticking.

For many companies in the United States, this will be their first direct interaction with state-specific marijuana laws. Employers are confused by conflicts among applicable state and federal laws – as well as the patchwork of state-specific laws which govern marijuana-related conduct in states with regulated markets – and are often unsure how to proceed. Indeed, the task of overhauling a company's marijuana-related policies and practices is no small task. Decades-old wisdom and standard operations regarding adverse actions must be reevaluated in light of these new laws, or employers risk being held liable for discrimination or retaliation, which

[Read more on page 12](#)



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## Chair Message

Lisa Jill Dickinson is a sole practitioner in Spokane, Washington and Northern Idaho, along with serving as a Tribal Court Appellate Justice for the Nez Perce and Coeur d'Alene Tribes, and an Administrative Law Judge Pro Tem for the State of Washington. She can be reached at [lisa@dickinsonlawfirm.com](mailto:lisa@dickinsonlawfirm.com).

We are almost to summertime – a fresh ABA year starts in August! We have accomplished quite a bit this year and have started new initiatives and recruited new members to TIPS. For those of you who are newer, or haven't participated in awhile, please contact us to jump right in! We just returned from our in-person NYC meeting and had a successful membership social with a few new faces!

Our new podcast channel is featured online and we welcome any content, long or short:

[americanbar.org/groups/tort\\_trial\\_insurance\\_practice/committees/cannabis\\_law\\_and\\_policy/cannabis-podcasts/](https://americanbar.org/groups/tort_trial_insurance_practice/committees/cannabis_law_and_policy/cannabis-podcasts/)

We also have videos up on the TIPS YouTube channel at the bottom (we have committee videos up!)

<https://www.youtube.com/@AmericanBarTIPS>

Please send podcast submissions or video submissions to me for uploading, or if you would like to be interviewed by someone for a podcast/video (other than yourself), please contact [lisa@pittman.legal](mailto:lisa@pittman.legal).

We also welcome any submissions to this newsletter! We strive for articles around 1500 words with no footnotes (although exceptions are sometimes made) or a member or student spotlight to introduce yourself to us.

We also underutilize our ABA Communities page, where you can post content, request referrals, and network with others. If you log in to the ABA Website and click on "Member Directory" at the top of the page it will take you to Communities, where you can click on "Groups" at the top of your page and then view your committees. If you have trouble accessing this or changing your settings (you can choose immediate, daily, weekly digests), please contact our tech guru, Jason Billups at [Jason.billups@americanbar.org](mailto:Jason.billups@americanbar.org).

TIPS would not be TIPS without its members. You ask, why is the Cannabis Law and Policy Committee of the ABA housed in TIPS? Because they were innovative enough to let us start the group, and have supported us with our endeavors, bringing resolutions to the House of Delegates (the ABA Policymaking Body) and allowing us to comment on proposed Model Rule changes to our ethics rules that may affect us.



**Lisa Dickinson**

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We like hearing from you. What is going on in your state? Can other members help you brainstorm to make cannabis legal in your state, or help to change an ethics rule clarifying the legality of rendering advice?

In addition to our main CLE events (Spring, joint standalones) we offer less formal Lunch and Learn events, or a short 5-10 minute presentation/speaker at our monthly meetings if you would like to speak. Please submit any ideas to me or to our CLE Vice Chair! We also hold monthly Zoom meetings generally the 2<sup>nd</sup> Thursday of each month at Noon Pacific Time.

Thank you for being a member, and I hope that you become more involved in CLPC and in TIPS. Plus, we're going to the Bahamas for our Fall Leadership Meeting (Oct 11-14), so now's a great time to get involved! Don't hesitate to ask me how to get more involved in CLPC and in TIPS – it's great for networking, learning and furthering your professional career! ➤

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## Cannabis Law and Policy

website

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## How I Put On A Yellowstone Trial and Won!

The lawsuit was over an alleged breach of contract. My client was sued, not because there was a valid contract where one party owed the other something, but because of a personal vendetta arising out of events at the Texas Legislature in 2021, to which my client was only tangentially involved, thus bringing in all of the intrigue and power struggles of a leading Western drama to what would otherwise be a dull case decided by a judge alone. But I insisted on a jury trial so my client's peers could consider the circumstances of the alleged contract and the character of the parties. Jury trials are a dying art and more attorneys should be willing to leverage their power. I called numerous witnesses, and their emotional investment to supporting my client made it a charged trial fueled by principle. The Contract 101 issues were: (1) whether there was a valid contract, and (2) if so, who breached it first?

Plaintiff was in the consumable hemp product business and had extra jars he wanted to get rid of. He asked my client, also in the business, if he would take the jars off his hands. My client is a genial and helpful guy, and he agreed to help get rid of them. He bought two large batches of the jars. On the second batch, Plaintiff slipped in some notes onto a one-page invoice he sent through DocuSign (received by my client in the field on an iPhone 4) that made it appear my client had agreed to future payment terms for additional jar purchases. He also "set up" my client pretty well with a series of leading texts that made it look like he agreed to the future terms.

In reality, my client just offered to help, as in, to see if he could use the jars or find others to buy them. It turned out, though, that the jars were not as represented and my client was forced to spend significant time and money to sterilize the jars, only to then discover they were too heavy to send through the mail anyway. Plaintiff only disclosed the problems with the jars ("a funky film from China") after my client purchased and took them. My client later returned the unused jars but the Plaintiff refused the shipment, preferring instead to go to trial in an attempt to make my client buy around \$9,000 worth of jars, plus a unilateral assertion of almost \$3,000 in storage fees.

Plaintiff was represented for free by his mother's attorney, which made the case all the more challenging. The mother's attorney refused to settle or walk away, and as we last hung up, he quipped, "Let's have fun with this!" advising me of her instruction "to appeal this all the way to the Supreme Court" if he lost.

My challenge was to overcome Plaintiff's showing of a rudimentary contract, to get the jury to see the jars were defective, to get the jury to understand that delivering

[Read more on page 17](#)



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## ABA TIPS Cannabis Law and Policy Committee Student Spotlight: Jamese Hawkins



Jamese Hawkins

### Name and Law School

Jamese Hawkins, University of the District of Columbia David A. Clarke School of Law, J.D. Candidate May 2023

### Practice area of interest

Cannabis law with additional interests in business law, compliance, and public policy.

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### Extracurricular Activities/Interests

In March 2022, I founded the UDC Business Law Society at my law school where I serve as President. I came to law school because I want to help entrepreneurs build and protect their businesses. UDC Law primarily focuses on social justice and public interest law, so I started UDC Business Law Society as a way to bridge the gap between business law and social justice by providing law students with access to a network of attorneys and other professionals in business-related fields.

I am also very interested in cannabis law, and my ultimate goal is to start my own vertically integrated cannabis business. Last year, I had the opportunity to work at Lantern, an e-commerce cannabis delivery company. As a Law Clerk at Lantern, I worked on a wide range of projects, from transactional and regulatory work to drafting public comments on state cannabis regulations in Colorado, Michigan, New Jersey, and New York. I am passionate about promoting social equity in the cannabis industry, and one of my most noteworthy projects at Lantern was providing educational training and business startup support to over 100 entrepreneurs through the New York Cannabis Project. The New York Cannabis Project is a cannabis business incubator launched by Lantern to help New Yorkers from the communities hardest hit by the War on Drugs start successful businesses in the cannabis industry.

After my internship at Lantern, I joined Navy Federal Credit Union as a Compliance and Policy Intern to learn more about compliance in the financial services industry. Banks and credit unions must comply with federal regulations, and cannabis is still illegal on the federal level, so the process of lending to cannabis businesses is risky and complicated. Compliance and financial services are integral parts of



the cannabis industry, so it is important for me to know the governing laws and regulations to ensure my future clients are compliant and protected. The cannabis industry is rapidly evolving in the United States, and I look forward to the future as more states legalize cannabis for medical and adult use.

### *How long have you been a TIPS member and TIPS involvement*

In January 2022, I became a member of TIPS after attending my first Cannabis Law and Policy Committee meeting. The members of CLPC were very welcoming, and CLPC Chair Lisa Dickinson invited me to attend the Business Litigation Committee CLE in Atlanta where I learned about various aspects of business litigation, including cannabis law, mediation strategies, and defending trade secrets. At that moment, I knew TIPS was an organization that I needed to be a part of.

In August 2022, I was appointed to several leadership positions in TIPS, including the Law Student Liaison of the Committee on Membership, Law Student Vice-Chair of the Cannabis Law and Policy Committee, and Law Student Vice Chair of the Committee on Outreach to Law Students. Serving as a leader in TIPS has allowed me to attend several meetings in person, including the TIPS Fall Meeting in Phoenix, Arizona where the Cannabis Law and Policy Committee received the “Most Innovative” award for our work and publications on cannabis nursing, anti-trust litigation, state cannabis laws, and other cannabis law and policy matters. Attending TIPS in-person meetings has allowed me to learn about developing issues in various areas of law and build meaningful relationships with law students and attorneys from all over the country.

As a first-generation law student, navigating law school and finding my place in the legal industry has been challenging. However, serving as a leader in TIPS has been one of the most rewarding experiences of my law school journey, as I truly feel like I am a part of a supportive family.

TIPS is a great organization where law students and young lawyers can learn and grow, no matter your subject matter interests. I look forward to remaining an active member of TIPS as I transition from law student to attorney and carry out my mission to promote justice and diversity within the legal industry. ➤



## Economic Woes In Cannabis

As the current state of the American economy is one that many of our most esteemed economists would consider to be a “recession”, industries across the United States are being affected. One such industry being drastically impacted by the sunken state of the economy is the American cannabis industry. Even though it’s not fully legal in all 50 states and it’ll likely be several more years before federal cannabis reform passes according to the most optimistic predictions, the soon-to-be 21 states and counting have all been impacted by the recession in their own financial and employment-related ways.

In general, a recession on scale with what the US is currently experiencing is entirely new territory to the American cannabis industry. The last large recession, which became colloquially known as The Great Recession, happened in 2008 which was a full four years before Washington and Colorado voted to legalize. As the recreational cannabis industry had yet to exist in 2008, this recession is the first of its kind for the American cannabis industry to bear witness to.

For states on the West Coast and Pacific Northwest, the states that turned cannabis into the power crop that it is today, there are a variety of recession-caused economic issues that are impacting cannabis businesses across those regions.

In the very first state that legalized cannabis, Washington has seen a tremendous drop in their total retail sales. This past December, Channel 5 in Seattle reported that in just Pierce County alone, [total cannabis sales had seen a 12 percent drop in 2022 compared to sales the previous year](#), when much of the country was still dealing with the immediate aftermath of a global pandemic. Across the entire Evergreen State, cannabis sales have dropped an approximate total of eight percent, equaling about \$120 million in retail sales. Due to the scale and complexity of the American economy, there’s many economic factors that result in a recession and the ensuing drop in the employment rate.

However when speaking of the current state of the Washington cannabis industry and the sharp decrease in retail sales, one must consider the extremely high tax rate for cannabis sales in Washington. While Nevada for instance has a tax rate of 25 percent on retail cannabis, Washington’s tax rate is at an astonishing 37 percent. This tax rate alone would likely keep financially strapped cannabis consumers from being able to afford purchases at licensed dispensaries and may have to procure their cannabis from sources that aren’t taxed.

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## Weeding Out: Drug Testing Woes

With marijuana now more culturally accepted and states pushing for its legalization, employers may feel a bit dazed about workplace drug testing. Drug testing has historically been determinative of employment decisions, either as a pre-requisite for obtaining employment or a condition of continued employment. But with the legalization of marijuana, are drug tests a thing of the stone age?

There is no one-strain-fits-all approach to drug testing. Drug testing may be a thing of the past for some employers, while, for others, foregoing drug screening is impractical. Some employers may adopt a hybrid approach where testing for marijuana and its derivatives may no longer make sense, but testing for other illicit substances may still be necessary. Yet another approach is foregoing applicant or random drug testing but maintaining a post-accident testing program.

Whatever the approach, employers should consider the pros and cons and legal implications for revising its drug testing policies or programs. As part of this analysis, here are a few things employers may wish to consider when resolving the burning question of what to do about drug testing:

### Check state and local laws.

Under Federal law, there is little restriction on drug-testing workers for marijuana as the drug is still federally classified as an illegal substance. However, some states, parishes, counties, and cities permitting the use of marijuana now have laws regulating marijuana drug-testing. Thus, the answer to whether a drug testing program is still right for your workplace may be embedded in a local ordinance or state statute.

In some jurisdictions (like Alabama, Florida, and Mississippi) although the use of medical and/or recreational marijuana may be lawful under state law, employers may still ban the use of marijuana by implementing and enforcing zero-tolerance drug policies and programs. These laws provide that employers are not required to accommodate or allow marijuana use. Generally then, an employer's decision to deny employment or take an adverse employment action against an employee may be justified by a positive marijuana drug test.

Yet, other jurisdictions (like Connecticut, District of Columbia, and Nevada) restrict an employers' right to test for marijuana or prohibit discrimination against employees who use marijuana in accordance with state laws. Prior to the enactment of these restrictive laws, employers could reasonably rely on a positive drug test to prove



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impairment and justify adverse employment actions regardless of whether marijuana was used at work or off-duty. Now, however, in some jurisdictions a positive drug test alone generally does not provide a valid reason to discharge an employee or otherwise deny any term or condition of employment. Justifying an adverse employment action based on marijuana use may, therefore, require employers to prove impairment, use or possession of marijuana while at work.

Some laws (like California's law which takes effect in January 2024) may also restrict employers' right to test for marijuana by limiting drug testing to certain components of marijuana. For example, testing for tetrahydrocannabinol, or THC, which is a psychoactive component of cannabis, may be permitted while screening for non-psychoactive components of cannabis, such as cannabidiol, or CBD, may be unlawful.

Still, some state laws are silent as to drug testing restrictions or obligations imposed on employers. For example, Louisiana imposes restrictions on public employers, but those restrictions do not apply to private employers.

To comply with state and local laws, employers may need to roll out revised drug testing policies and programs tailored to the specific requirements of the law in the jurisdiction in which it operates. Multi-state employers should craft policies that comply with the individual laws in each state and locale in which they operate.

## Consider your industry.

Even if state or local laws do not restrict employers' right to drug test employees, industry regulations may impose such restrictions. In some cases, industry regulations may provide stricter requirements than state or local laws. Thus, many state and local laws provide exemptions for employees that must comply with more stringent requirements.

Covered employers in trucking, railroad, aviation, pipeline, public transit, ships/vessels and other transportation-related industries must comply with the Omnibus Transportation Employee Testing Act. The Act was passed by Congress in 1991 to enhance safety standards of transportation industries by employing alcohol and drug testing programs to eliminate the abuse of alcohol and use of illegal drugs — including marijuana — whether on duty or off duty, by employees in safety-sensitive transportation positions. The U.S. Department of Transportation (DOT) oversees mandatory random drug testing and pre-employment screening for employees in transportation-related industries. DOT regulations include procedures for collecting and testing specimens, reporting test results, and returning employees to safety-sensitive duties after a drug or alcohol violation.



Covered employers in the transportation industry must adopt policies and programs that comply with DOT mandates.

## Consider the duty to provide a safe work environment.

Under the Occupational Safety and Health Act of 1970, covered employers have a duty to provide a safe working environment. Drug testing employees is one way that employers can promote a safe work environment and eliminate workplace hazards caused by drug-impaired workers at work. Yet, because no drug test is available to accurately test for marijuana impairment, some employers no longer see the benefit of screening for it.

With or without drug tests, employers can still promote workplace safety by implementing a zero-tolerance drug policy that mandates sobriety at work and outlines consequences of possessing, using or being under the influence of marijuana while on-the-job. However, if choosing to forego drug-testing altogether, employers should first analyze any exposure that may result from not drug-testing employees.

## Consider whether your drug testing policy is discriminatory.

Another reason to revise existing drug testing policies is to avoid liability resulting from a discriminatory policy.

The use or design of a drug testing program to intentionally discriminate against employees on the basis of protected characteristics, such as race, color, sex, national origin, religion, disability, or age (40 or older), is an unlawful employment practice under Federal anti-discrimination laws. Even if discrimination is not intentional, drug testing programs may also violate Federal anti-discrimination laws if the programs disproportionately exclude individuals of a protected class.

Examples of unlawful drug testing practices could include testing only applicants of a certain race; using selection procedures that screen out a certain group; or using different cut off scores for different groups.

To avoid unlawful employment practices, employers enforcing drug-free workplaces should administer tests and other selection procedures without regard to an applicant or employee's protected characteristics and ensure that drug tests and selection procedures are job related.



## Consider the tight labor market.

With the widespread use of medical and recreational marijuana, it may be difficult to recruit individuals who can pass a pre-employment drug test or to retain employees if implementing random drug testing programs. Recent trends of “quiet quitting” and the Great Resignation may have employers that are desperate for workers abandoning strict drug testing policies or letting marijuana specific testing go up in smoke.

While foregoing drug-testing may appease applicants and current employees, it may also expose employers to liability and require employers to defend against negligent hiring, training, supervision, or retention claims. For example, an employer may be liable if an intoxicated employee injures another employee or customer and the employer knew or should have known of the employee’s intoxication while at work.

## Bottom Line

It is not surprising that employers are left dazed and confused by the numerous factors employers must consider when drafting, implementing and enforcing drug testing policies. Seeking the advice of legal counsel may eliminate the strains of policy implementation and make the roll out of new or revised policies easier. ➤

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can result in the award of substantial damages to a victim in the form of future wages, emotional distress, statutory penalties, attorney's fees, and more.

Regardless of a company's individual stance regarding employee off-duty marijuana use, well-advised employers are wise to proceed cautiously when taking adverse actions against employees based on their off-duty conduct in states where relevant laws have recently gone into effect and which will go into effect throughout the coming months (see, California, New York, Washington D.C., New Jersey, Louisiana, Puerto Rico, and more).

## Changing Landscape: Marijuana-Related Employment Laws & Policies

Historically, the use of medical marijuana (which has been permitted for decades in some states) is not protected under the Americans with Disabilities Act (ADA). As a result, even in states which permit marijuana for medical use, employers may, without fear of violating federal discrimination laws, terminate – or take other adverse employment actions against – employees who use medical marijuana as prescribed by their doctor.

Naturally, both employers and lawmakers in states with legal recreational marijuana markets began considering expanding these workplace protections to employees who legally utilize marijuana outside of the medical patient context. (Indeed, Louisiana is also currently discussing and drafting legislation that expands these protections to private-sector workers who use medical marijuana.)

As of January 2023, several states have passed, and many states are considering passing relevant laws which expand protections available to employees who would otherwise face adverse employment actions based on their off-duty medical and recreational use of marijuana. At least two of these laws have already gone into effect, and still, more will go into effect over the coming months. The relevant laws vary widely – ranging from amendments to protected classes in existing laws (New York, Puerto Rico) to entirely new laws (California, Washington D.C.) and present new challenges to companies and lawmakers which have the potential to remain unresolved without additional research and technological developments.

In line with the changes noted above, a trend that is currently gaining momentum throughout the country is the passing of “ban-the-box” laws, which generally prohibit an employer from asking about a prospective employee's marijuana-related criminal history on an employment application. For example, Virginia passed a law that became effective on July 1, 2020, that prohibits employers from requiring job applicants to disclose information concerning any arrest, criminal charge, or



conviction for simple possession of marijuana. However, to date, a majority of states have not yet passed such “ban the box” laws, and still other states maintain contradictory policies in this regard; for example, Michigan, which has a robust legal recreational marijuana market, still permits employers to refuse to hire employees based on their marijuana-related criminal history (and despite the fact that certain marijuana-related misdemeanors are expungable in Michigan).

It should also be noted that while off-duty medical and recreational use of marijuana by employees is not protected under the ADA, federal courts will still enforce other federal discrimination statutes related to the employment of employees in the cannabis industry, including Title VII of the Civil Rights Act of 1954, which protects employees against discrimination based on specific characteristics, and the Fair Labor Standards Act. The Occupational Safety and Health Administration (OSHA) has also recently taken an active role in regulating workplace safety in the cannabis industry.

In response to this lack of federal protection from discrimination, some states have passed laws protecting medical cannabis patients from the consequences of failing employment drug screenings. For example, last June (2022), Louisiana Governor John Bel Edwards signed into law a prohibition on state employers from “subject[ing] an employee or prospective employee to negative employment consequences” if the state employee (with certain job-safety-related exceptions) tests positive for THC as long as they are a registered medical cannabis patient who utilizes marijuana consistent with a marijuana prescription from a licensed physician.

## Changing Landscape: Private Marijuana-Related Employment Practices

The majority of relevant corporate policy reform in this space is driven by compliance with these new state laws. However, some major employers in the U.S. have recently found their previous policies prohibiting previous or off-duty marijuana use inappropriately or disproportionately barred qualified applicants from employment and have reformed their employment practices related to off-duty marijuana use voluntarily and without any arm-twisting resulting from the threat of enforcement action.

Indeed, June 2021 brought a major policy change to Amazon's hiring and firing policies and practices. The company, which is the second largest employer in the Fortune 500 as of 2022 with more than 1.6 million employees, announced it will exclude marijuana from its pre-employment drug screening program for unregulated positions (that is, positions not regulated by the Department of Transportation.) Amazon also announced it would reinstate employment eligibility for former



employees and applicants who were previously terminated or deferred during random or pre-employment marijuana screenings, respectively. However, Amazon was clear that the company's zero-tolerance policy for impairment while working had not changed, including that the company will continue to test for all drugs and alcohol after any accidents or other incidents.

Amazon's home state of Washington was among the first in the country to legalize marijuana for recreational use in 2012, and the company's east coast headquarters is located in Virginia, where marijuana-permissive laws were set to take effect just one month after Amazon's announcement. Amazon's statement cited equity-based reasoning for the dramatic change:

"Pre-employment marijuana testing has disproportionately affected communities of color by stalling job placement and, by extension, economic growth."

Outside of the private employment context, the Air Force, Air Force Reserve, National Guard, and Space Force followed suit in September 2022, announcing a temporary policy change allowing a second chance to applicants who previously tested positive for (delta-9) THC during their entrance physical and were excluded from enlisting on this basis. Previously, a positive result on the initial test meant a permanent bar from entry. The new temporary program offers prospective applicants the opportunity to retake the drug screening test after 90 days if they are granted a waiver. Being granted a waiver requires applicants to meet all other qualification standards, including but not limited to possessing a high school diploma, scoring at least 50 points on the Armed Forces Qualification Test, having no felony or misdemeanor convictions, and being otherwise physically, psychologically, and medically qualified for service. Once admitted, however, the enlistee must adhere to the military's total ban on drug use. Indeed, even medical use is not permitted by active military members. This temporary policy change will be effective for two years and, without any extension, will end in September 2024.

The policy's about-face marks an attempt to rethink an aspect of the Air Force's stringent ban on marijuana use as the service struggles to meet its recruiting goals. This shift mirrors policy changes implemented by other branches of the military in the recent past, which aim to counter the fact that more than half of all new military recruits between 2021 and 2022 came from states where medical marijuana is legal. The increased availability of legal marijuana has resulted in a steady rise in the number of applicants with (delta-9) THC in their system in recent years, from 165 THC-positive applicants in 2020 to 226 in 2021 and 290 in 2022.



## Complex Compliance Considerations & Call to Action

Regardless of an employer's preferences with respect to their employees' off-duty marijuana use, these new relevant laws present novel questions and challenges for all employers; employers throughout the country should already be reevaluating their policies and practices surrounding their employee's off-duty marijuana use and be prepared to make rapid and significant changes.

Complying with these new laws is no small feat: the task requires not only an appreciation for the interaction of relevant state and federal laws but also a comprehensive understanding of the patchwork of state-specific laws governing marijuana-related conduct in states with regulated markets, both medical and recreational. Further, those advising companies on these complex issues must also be equipped to extrapolate policies and guidance applicable to other employment issues to these interactions with marijuana. Examples include whether or not an employee's home office constitutes a "workplace" where an employer can dictate an employee's marijuana use and what "specific and articulable symptoms of impairment" an employer is legally required to observe or demonstrate related to job performance prior to taking adverse action against an employee based on his or her marijuana use.

## Expanded Workplace Protections are Expected

There is no dispute that the commercial cannabis industry is still in its infancy. This fact, combined with the ever-present conflict between state and federal laws, the historical stigma associated with marijuana, and the current market competition for workers, means that there will likely be continued changes and developments affecting the methods by which employers may address employees' off-duty marijuana use, if the employer desires to do so, in the future. While such uncertainty will likely persist for years to come, what is clear is that off-duty and off-site marijuana use by employees must now be acknowledged by employers to enable them to reevaluate their existing policies regarding this conduct and amend them to comply with these new laws. ➤



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*How... Continued from page 4*

defective goods is a breach of contract and implied and express warranties, and to recover a lot of attorneys' fees for all the court appearances and discovery battles Plaintiff imposed on us throughout the pendency of the case. My strategy was to make this interesting, present the human element and let the jury evaluate the parties. I banked that in such a situation, the jury would side with my client.

Although I insisted on a jury trial, I underestimated the interest that the jurors would have in this case. When I arrived for trial, I could see that there was a whole new dynamic at the courthouse. The halls were filled with prospective jurors. This was one of the first jury trials after pandemic court closures, and the first time in the court's history that all the jurors showed up. And they all wanted to be part of it!

It was because of the Johnny Depp trial. After weeks of that sensational trial, televised on split screens and led by the fearless Camille Vasquez, who performed at the highest level of excellence and spunk, the jurors were here for that kind of action. Usually, people either actively try to get out of it or try to disappear during voir dire (jury selection). But everyone eagerly raised their hands and promised they could be unbiased – even about cannabis. Several volunteered to explain the difference between hemp and marijuana for me, raising their hands in “Me! Me! Me!” fashion. Those that didn't make it on the jury seemed disappointed, and some even stayed behind just to watch. This is all unheard of! Jurors will sleep in front of you to let you know the disdain they have for the waste of their time. But during this trial, everyone took avid notes, smiled frequently, and asked many questions during deliberations to get it right.

So, take note, this story is really about the new era of trials – no more C-Span! I knew they wanted a show and I was determined to give them one.

I was dressed as Beth Dutton, in an ultra-feminine dress with ruffles around the slightest bit of top boob, and wearing my favorite fringed cowboy boots that swished with every step in the courtroom. I used limp plumper and while I didn't have a cigarette, I was smoking! I was feisty, unapologetic, and I took no prisoners.

My client is a rancher. He asked me how he should dress, and I said, “like a dressed up rancher.” Which meant his cleanest dirty shirt. He showed up in a faded print shirt, gigantic square toed boots, and the dirtiest, most beat up cowboy hat I've ever seen. He is from West Texas and has the perfect and most polite Texas drawl you can imagine. He was Rip Wheeler and Tyler Sheridan in one. He garnered two compliments on his hat by passersby in the Courthouse, and it was something else to watch him remove it in respect in the Courtroom.



The Plaintiff was Jamie Dutton. He was sinister and smug, revealed himself to be a crybaby, and was an even worse actress on the stand than Amber Heard. His strategy was legal entrapment and trickery to suit his own personal aggrandizement.

Plaintiff's attorney was the Market Equities lawyer. They were both wearing 3 piece pin stripe suits and shiny shoes. This was Western Travis County. Market Equities lawyer objected during my opening and closing, which you just don't do unless it's something egregious. He objected to a business records affidavit, making me have to call a live custodian of records just to get undisputed documents admitted into evidence. He still objected to every exhibit I tried to enter, interrupted me constantly, and, in poor taste, tried to condescend Rip on cross-examination, going so far as to accuse him in a deep bellowing voice: "So you think you are above the laws of the State of Texas?" Rip gave him a dead stare right in the eye like he was about to draw at the OK corral. His body tensed and lunged forward in the witness stand, in an intense showdown of Texan morals causing great suspense.

I strategically avoided objecting to Market Equities' antics. Frankly, I found it unnecessary. I hoped the jury would see that I did not need to interrupt him or prevent anything from getting in, as well as my confidence in the story I was telling supported by the evidence I was presenting.

The judge was brunette lawyer Sarah Atwood. She was helping Jamie every step of the way in a relentless plot to kill my case. She ruled against me every time, sometimes even *sua sponte* (on her own without objection from a party). She would tell my witnesses to hurry up and cut short their testimony, and she made inappropriate comments to the jury like, "I know how I would rule on this, but you guys can decide what you want," and irresponsible stuff like that. She sustained most of Market Equities' objections and tried to eliminate a lot of my proposed jury charges and instructions. She was nonplussed and dismissive with everything I tried to say in response to objections. Sometimes it's good when this happens. The side who gets all the rulings in their favor has very few bases for appeal.

The cute dirty blond goateed bailiff in a livestock agent bullet proof vest, that sheepishly smiled at me with every exhibit I handed him, he was Kayce.

A witness I called to testify about a detail in a case was a seasoned chef. He was also a cowboy. He was Gator. The judge tried to strike him, saying that despite being a life-long and degreed chef who has studied fermentation in Italy, he couldn't testify as to whether a jar would be sanitary enough for food as an expert. I replied I was asking him based on his extensive personal knowledge. She said, "nope, you need an expert for that and he's not the right type of expert." Fine. But the jury already heard enough. Gator's testimony about the condition of the jars, and the time and



expense it took to sanitize them at his commercial facility, was an essential element to show Jamie breached the warranty of merchantability and specific purpose, thus breaching the alleged contract first and relieving Rip from buying more useless jars.

I called Rip's ex-girlfriend, a young lobbyist with long flowing blond hair, a prairie dress, and a soft East Texas accent. I called her to narrate the history between Jamie, Jamie's family, and Rip, which involved land grabs and power struggles at the Capitol. The jury was really taken by her testimony, which was eloquent and fascinatingly spoke of working for Senators on big issues at the State Capitol. I wanted to get an affidavit she had prepared into evidence – something we crafted specifically for this moment, containing all the details we wanted the jury to know but could not work in through oral testimony. Over the Judge's opposition, I got her affidavit in. It was a telenovela by itself and contained very damning statements about Jamie. I can't believe the other side wanted the affidavit to come in too. When Market Equities contested the Judge's attempted exclusion of the affidavit, he said, "we have no objections. Let them read it!" And you can too, attached to this story – it has been public record since July 2022 when I tried to get the case dismissed. The beautiful witness was Elsa, and she strode out of court as if upon a palomino, and with a departing smile, she was lightning with the yellow hair, leaving her narrated words behind her in the affidavit for the jury.

I called my client's CPA, who was a ringer for Senator Huntington, proper and authoritative on the outside, but with a smile and a tattoo that showed she's likely to get rowdy with the Governor on the inside. She was my avenue to get all the other exhibits in and to further demonstrate Rip's credibility.

It had all the makings of the show that stars with "Y" including drama, revenge, vendettas, politics, and romance, including salacious content exposing Jamie for who he really was with a trail of regretful texts screenshotted by Elsa. I held Jamie hostage with those texts and employed every trial trick known to me. Nothing was off limits.

Market Equities gave his closing and remarked that he charged Jamie "zero dollars" for "the pleasure" of representing his client's son in this case. In my closing, I made use of the court's flip chart, again over Judge Atwood's objection. I gave a quick lesson on the elements of breach of contract, pointing to the missing requirement of a "meeting of the minds." I then flipped the page to go over damages. I started with Jamie's damages and whittled them down to nearly nothing based on the testimony. I drew a huge "0" for attorney's fees. I listed out all of Rip's damages, and then his attorney's fees for defending himself. Despite the Judge interfering in my closing and trying to limit the amount of damages I wrote up for Rip, the jury got the picture. As I concluded, I gave the jury the option of awarding both parties nothing, leaving

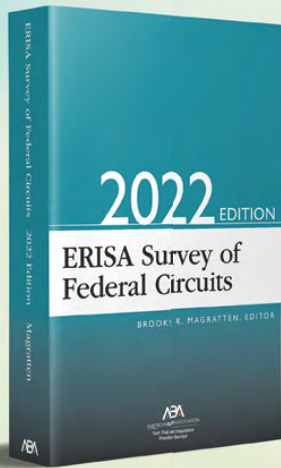


it to psychology. I never told the jury what they had to find, but I provided them all the pieces to put together themselves so they would feel more invested in their own conclusions. I used various types of evidence and presentation styles, both electronic, and the plain old flip chart, which I always think is a compelling tool. I purposely left the chart out open to the page showing the staggering amount of Rip's attorneys' fees while the judge read their instructions.

The jury was prepared to issue a Johnny Depp style reward! They returned a take nothing verdict for Jamie ("zero dollars!"), and the maximum amount allowed by the Court for Rip, sending the strongest message a jury could possibly send to the parties in this case. After Judge Atwood read the verdict, she left the bench grumbling, and with no compliments to counsel. The way she handled the case made victory in spite of it all the sweeter. Juries are unpredictable and you never know what will happen or what facts they will focus on, and sometimes it seems like justice is rarely served, but in this case, everything came together like it was orchestrated by Tyler Sheridan himself, and the truth prevailed.

A jury trial is one of the most exhilarating professional experiences, despite it being a lot of stress and months of (or years of) hard work. I am glad that post Depp, juries see the work that goes into it, and that they take their responsibility very seriously. The secret is to tell them a great story, give them people and things they can relate to, and to guide them in answering the jury charge, which yes, is the first thing you should prepare and focus the narrative on in any lawsuit. If the narrative has been well developed, you can then focus on the theater of its live presentation! ➤

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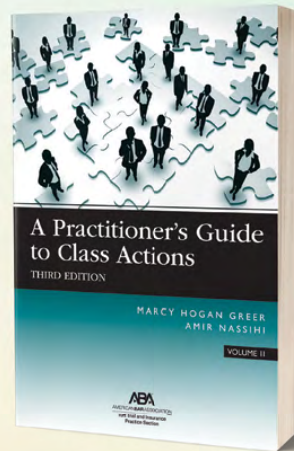
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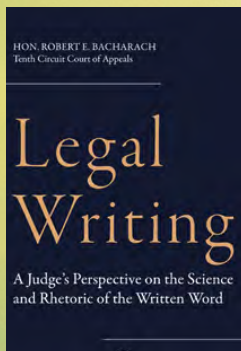
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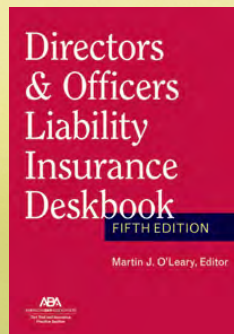
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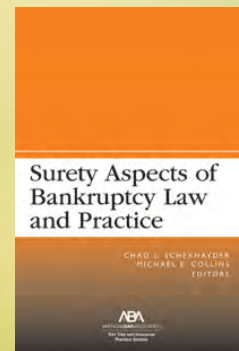
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### *Economic Woes... Continued from page 7*

With Washington's southern neighbor, Oregon is facing a very similar situation in terms of their economic situation in regards to the cannabis industry. Not only are sales similarly down in the state when compared to Washington, the price per gram of cannabis is also exponentially lower than that of the neighboring states, at only [\\$4 according to the Oregon Liquor and Cannabis Commission](#). This oversupply status of cannabis products and lack of demand in Oregon cannabis has resulted in almost impossibly low prices yet not enough customers to buy all the products. In a legislative report from the OLCC in 2022, the regulators summarized the current state of affairs for Oregon cannabis as being caused by ***“declining wholesale and retail prices for usable marijuana are due to large stocks of usable marijuana inventory leftover from previous years, which is likely to continue to put downward pressure on prices.”***

Even in the arguable mecca of cannabis, California hasn't been safe from the economic downturn that is gravely impacting the American cannabis industry across the Legal States. For the first year since adult-use cannabis sales started in 2018, [cannabis sales in The Golden State have dropped by nearly eight percent](#). As the size of the Californian cannabis economy is massive with \$5.7 billion being sold in 2021, this eight percent drop resulted in a sales drop of an astronomical \$473 million. Because sales are down such a considerable percentage and there's significant competition from illegal markets and delivery services, this will result in an approximate drop of 23 percent in California tax revenue from cannabis.

Even strangely enough, cannabis-ancillary companies located on the West Coast that work primarily with cannabis cultivators and retailers yet don't directly handle any product themselves are even being impacted by the current recession. The cannabis-based technology firm Dutchie implemented [two different rounds of widespread layoffs in 2022](#). One round resulted in eight percent of the Dutchie workforce losing their jobs while a second wave of layoffs occurred in November.

WM Technology, the company that runs the wildly popular cannabis news and shopping site WeedMaps, has experienced significant layoffs of their own at even higher rates than their competitors. The Irvine, California-based company laid off a whole quarter of their workforce [in November which amounted to about 175 employees in total](#). Although serving as WeedMaps' unofficial direct competitor, Seattle-based Leafly laid off about 21 percent of its workforce in October, an almost similar percentage to WM Technology. Even companies as distantly ancillary-related to the cannabis industry as the Denver-based compliance software company Akerna experienced their own wave of layoffs, as they cut nearly 60 jobs last year.



In severe cases, some of American cannabis' most established multi-state operators are going beyond only laying off dozens of employees in waves and instead shutting down entire cultivation facilities. Such as Curaleaf Holdings, who not [only laid off a total of 270 jobs but also closed their Sacramento cultivation facility](#).

There may be possible remedies to these economic downfalls in the future, such as Nevada and Colorado opening cannabis consumption lounges and several of the Legal States implementing social equity programs which will hopefully result in revenue and employment opportunities. However, for an industry still very much in its infancy and one that won't be federally legal for quite a few more years, the economic roadblocks and stagnations will continue to occur until large-scale reforms are enacted to address and remedy these issues. ➤

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October 5-6, 2023	<b>Fidelity &amp; Surety Law Fall Conference</b> Contact: Janet Hummons – 312/988-5656 Theresa Beckom – 312/988-5672	<b>Revere Hotel</b> Boston, MA
October 11-14, 2023	<b>TIPS Fall Leadership Meeting</b> Contact: Janet Hummons – 312/988-5656 Theresa Beckom – 312/988-5672	<b>Grand Hyatt Baha Mar</b> Nassau, The Bahamas
October 26-27, 2023	<b>Aviation Litigation Conference</b> Contact: Theresa Beckom – 312/988-5672 Cameron Witbeck – 312/988-5668	<b>Ritz-Carlton Pentagon City</b> Arlington, VA
January 24-26, 2024	<b>Fidelity &amp; Surety Law Midwinter Conference</b> Contact: Janet Hummons – 312/988-5656 Theresa Beckom – 312/988-5672	<b>The Roosevelt New Orleans</b> New Orleans, LA
January 31-February 5, 2024	<b>ABA Midyear Meeting</b> Contact: Janet Hummons – 312/988-5656 Theresa Beckom – 312/988-5672	<b>Omni/Marriott</b> Louisville, KY
February 1, 2024	<b>BLC Conference</b> Contact: Theresa Beckom – 312/988-5672	TBD
February 22-24, 2024	<b>Insurance Coverage Litigation Conference</b> Contact: Janet Hummons – 312/988-5656 Theresa Beckom – 312/988-5672	<b>Estancia La Jolla Hotel</b> La Jolla, CA
March 2024	<b>Cyber Security Conference</b> Contact: Theresa Beckom – 312/988-5672	TBD
March 2024	<b>Workers Compensation Conference</b> Contact: Janet Hummons – 312/988-5656	TBD
April 10-12, 2024	<b>Motor Vehicle Product Liability Conference</b> Contact: Janet Hummons – 312/988-5656 Theresa Beckom – 312/988-5672	<b>Omni Scottsdale Montelucia</b> Scottsdale, AZ