Managing Employees in a Divided Nation

By Tom Calendar, Ilene W. Berman, Scott M. Porter and Sedric D. Bailey

30-SECOND SUMMARY Despite the conflicting legal landscape, the overwhelming majority of Fortune 100 companies have adopted policies that prohibit discrimination against lesbian, gay, bisexual and transgender (LGBT) employees and provide benefits to same-sex partners. These companies have positioned themselves well for the most recent changes in the law and those that are likely to come. The growing trend to legalize marijuana for medical and recreational use has not had the same impact on workplace policies. The safety, well-being and productivity of workers continue to trump an individual employee's legal right to use this popular drug. In addition, employers across the United States have been confronted with a growing concern over violence and access to weapons in the workplace. Counsel should review current employment policies addressing weapons in the workplace.

US citizens live in a nation divided. These divisions manifest themselves most obviously in the political process. And the political divisions often result in very different legal landscapes depending on where in the country one lives. This is especially true in the employment context, where laws related to the treatment of lesbian, gay, bisexual and transgender (LGBT) employees, laws related to the use of marijuana, and laws related to the right to bring firearms into the workplace, vary widely from state to state. With so many companies employing people in multiple states in various parts of the country, employers must grapple with how to effectively manage a multi-state workforce, while staying compliant with all applicable laws.

Gender identity and sexual orientation

How employers have responded to the evolution of societal views concerning LGBT Americans, and the resulting increase in legal protection for LGBT workers, is illustrative of how employers must grapple with the changing and divergent legal landscape across the country. Federal law has long prohibited discrimination in employment on the basis of race, color, religion, sex, national origin, age and physical or mental disability. Until recently, however, there has been no prohibition at the federal level against discrimination on the basis of sexual orientation (whether someone is homosexual, heterosexual or bisexual) or gender identity (the gender-related identity, appearance, mannerisms or other gender-related characteristics of an individual, with or without regard to the person's designated sex at birth). However, many states and local governments do have laws prohibiting discrimination on the basis of sexual orientation and/or gender identity. In fact, 21 states and nearly 200 cities currently prohibit discrimination on the basis of sexual orientation and gender identity. For example, Atlanta, Ga., where Turner Broadcasting is headquartered, prohibits discrimination on the basis of gender identity and sexual orientation. The state of Georgia, however, has no such prohibitions.

In fact, some of the more conservative parts of the country, such as Georgia, have actually seen a decrease in legal recognition and/or protection for the LGBT community. Election year 2004 saw Georgia and a whole host of other states pass constitutional amendments defining marriage as between one man and one woman. Other states have followed suit in the years since. Some states even prohibit any legal recognition whatsoever of same-sex relationships, leading some companies to question whether providing certain benefits to same-sex domestic partners, such as health care, would run afoul of state law or state insurance requirements.

Meanwhile, as of today, 17 states and the District of Columbia actually recognize same-sex marriage, and four additional states recognize some sort of civil union between same-sex couples.

In a landmark decision in June 2013, the Supreme Court overturned Section 3 of the federal Defense of Marriage Act (DOMA), which defined marriage as only between "one man and one woman" for purposes of federal tax and benefits laws. Because of Section 3 of DOMA, same-sex couples were denied the marital exemption to federal estate tax and other benefits of federal law, even in states that allowed same-sex marriages. The Supreme Court ruled that Section 3 violated the equal protection clause of the US Constitution. In response to the Supreme Court decision, both the Department of Labor (DOL) and Internal Revenue Service (IRS) issued guidance that has important implications for employers across the country.

The DOL issued guidance stating that same-sex marriages would be recognized under the Family and Medical Leave Act (FMLA) but only if the employee lives in a state that recognizes same-sex marriage.[1]

The IRS, on the other hand, issued guidance stating that same-sex marriages will be recognized for federal tax law purposes so long as the marriage was performed in a state that legally recognizes same-sex marriage, regardless of whether the couple currently resides in a state that recognizes the marriage.[2]

There are other examples of Federal law trending toward the protection of LGBT workers' rights. In recent years, the EEOC and several federal courts, including the usually conservative Fifth and Eleventh Circuits, have found that federal law prohibiting sex discrimination also prohibits discrimination based on gender stereotyping, thereby ruling in favor of LGBT employees claiming discrimination. In 2011, the Eleventh Circuit Court of Appeals affirmed a victory for a transgender woman who sued her former employer, the Georgia state legislature, for violating the Equal Protection Clause of the United States Constitution when it fired her for undergoing a gender transition (*Glenn v. Brumby*, 11th Cir. 2011). The question before the Eleventh Circuit was "whether discriminating against someone on the basis of his or her gender nonconformity constitutes

Tom Calender is assistant general counsel at Turner Broadcasting System, Inc. (Turner). He is responsible for management and oversight of Turner's employment matters, and oversees a team of in-house employment attorneys and staff.

Ilene W. Berman is chair of the Employment, Labor & Immigration practice group at Taylor English Duma LLP in Atlanta, Ga. She is dedicated to counseling and defending private employers in employment law matters. *iberman@taylorenglish.com*

Scott M. Porter is a member of the Employment, Labor & Immigration practice group at Taylor English Duma LLP in Atlanta, Ga. He primarily focuses on labor and employment counseling, and the negotiating and drafting of employment and severance agreements. *sporter@taylorenglish.com*

Sedric D. Bailey is a 2013 graduate of William & Mary Law School and a member of the Employment, Labor & Immigration and Litigation & Dispute Resolution practice groups at Taylor English Duma LLP in Atlanta, Ga. *sbailey@taylorenglish.com*

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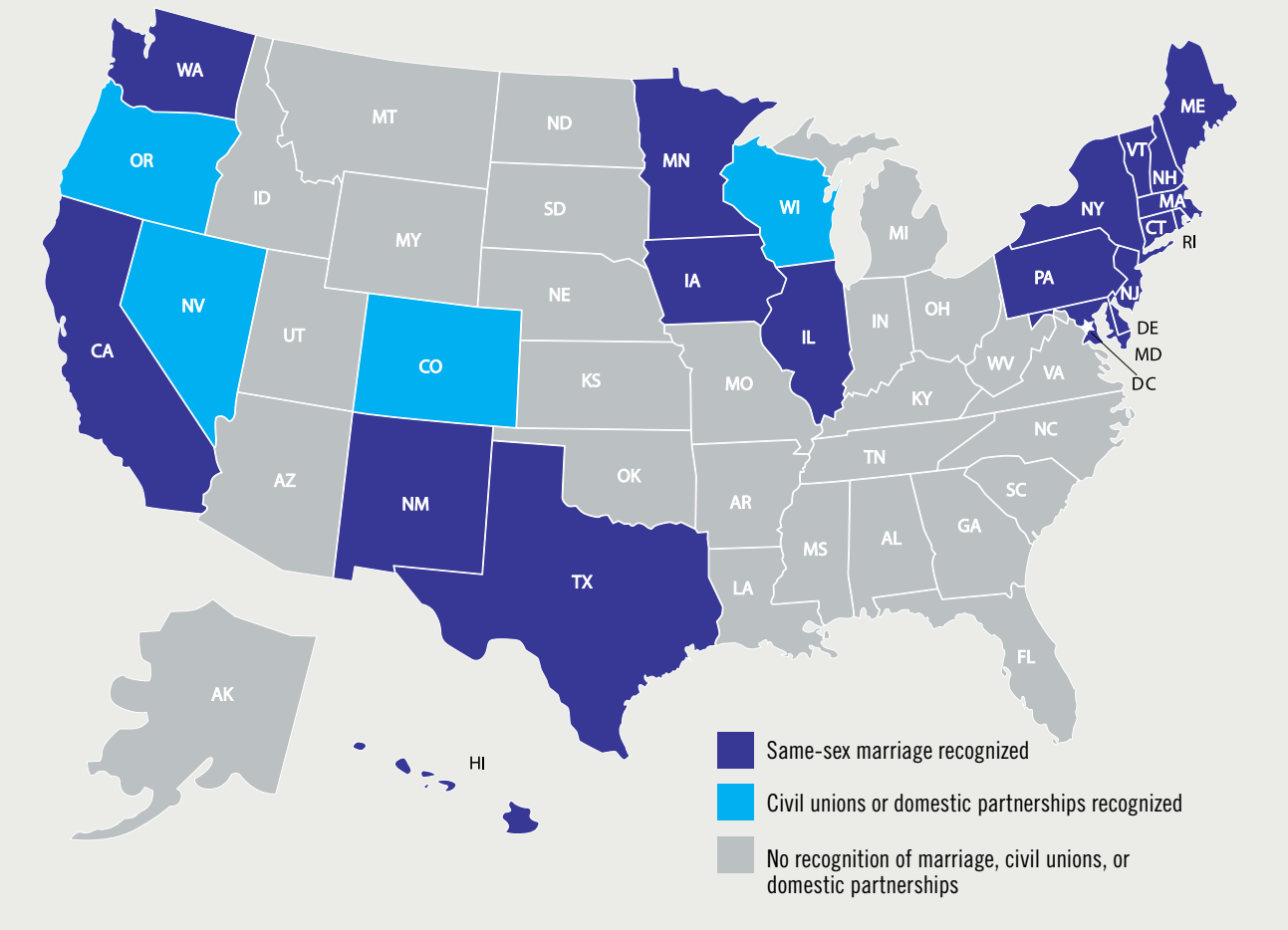

sex-based discrimination under the equal protection clause?" The court concluded: "We hold that it does." In September 2013, the Fifth Circuit became one of a growing number of courts to find that gender-stereotyping is a form of discrimination under Title VII (*Equal Emp't Opportunity Comm'n v. Boh Brothers Constr. Co., L.L.C.*, 5th Cir. 2013). In other words, Title VII prohibits discrimination/harassment based on the fact that an individual fails to conform to traditional gender stereotypes. Further, in *Macy v. Eric Holder*, Agency No. ATF-2011- 00751, 2012 WL 1435995, the EEOC held that a complaint of discrimination based on an applicant's status as a transgender female is fully contained within the Title VII protections against sex discrimination. These decisions are consistent with decisions of the First, Sixth and Ninth Circuits as well.

Handling the divergent legal landscape on a national level – Practical advice for employers

Despite the conflicting legal landscape, the majority of Fortune 500 companies have adopted policies that prohibit discrimination against LGBT employees and provide benefits to same-sex partners that are equal to those of opposite-sex married couples, for all of their employees regardless of the state in which they live. The 2013 survey of Fortune 500 companies conducted by the Human Rights Campaign (HRC), a pro-LGBT organization, found that 88 percent of Fortune 500 companies prohibit discrimination on the basis of sexual orientation, and 57 percent prohibit discrimination on the basis of gender identity for all of their employees, regardless of what state in which the employees live. In addition, 62 percent of Fortune 500 companies offer equivalent medical benefits between spouses and domestic partners. HRC reports that 25 percent of Fortune 500 companies offer transgender-inclusive healthcare benefits, including surgical procedures. Turner's approach is reflective of these statistics. "It's important to Turner that all of our employees have the same access and opportunities, regardless of an employee's sexual orientation, gender identity or gender expression," Calender notes. Turner prohibits discrimination on the basis of sexual orientation, gender identity or gender expression; offers health insurance coverage to an employee's spouse or domestic partner, including same-sex domestic partners; and includes transgender-related healthcare benefits in its health insurance plans, regardless of the state in which the employee lives. (See sidebar.)

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States	Year Passed	Statutory Citations
1. Alaska	1998	Alaska Statute Title 17 Chapter 37
2. Arizona	2010	Ariz. Rev. Stat. Ann. §§ 36-2801-36-2819
3. California	1996	California Compassionate Use Act 1996, Cal. Health & Saf. Code, § 11362.5 (1996) (codifying voter initiative Prop. 215). Health & Safety §11000, et seq.; 11357, et seq.; §11362.5. See more at: *http://statelaws.findlaw.com/california-law/california-marijuana-laws.html#sthash.LeNvFqpI.dpuf*
4. Colorado	2000	Colo. Rev. Stat. §§ 12-43.3-101 to 12-43.3-106, 18-18-406.3 and 25-1.5-106
5. Connecticut	2012	Public Act 12-55
6. DC	2010	DC Law 13-315; 57 DCR 3360
7. Delaware	2011	Del. Code Ann. Title 16, §§ 4901A to 4926A
8. Hawaii	2000	Haw. Rev. Stat. §§ 329-121 to 329-128
9. Illinois	2013	Compassionate Use of Medical Cannabis Pilot Program Act, 410 ILCS 130/1, et. seq
10. Maine	1999	Me. Rev. Stat. Ann. § 1102
11. Massachusetts	2012	Mass. Regs. Code tit. 105,§ 725.001-725.800
12. Michigan	2008	Mich. Comp. Laws §§ 333.26421 to 333.26430
13. Montana	2004	Mont. Code Ann. §50-46-301 to 50-46-344
14. Nevada	2000	Nev. Const. art 4, § 38 Nev. Rew. Stat. §§ 453A.010-453.810 Nev. Admin. Code §§ 010-453A.240
15. New Hampshire	2013	N.H. House Bill 573
16. New Jersey	2010	N.J. Stat. Ann.§§ 24:61-1 to 24:61-16 24:21-1, et seq.; 2C:35-2, et seq
17. New Mexico	2007	N.M. Stat. Ann. §§ 26-2B-1 to 26-2A-7
18. Oregon	1998	Or. Rev Stat. §§ 475.300 to 475.346
19. Rhode Island	2006	R.I. Gen. Laws §§ 21-28.6-1 to 21-28.6-13
20. Vermont	2004	Vt. Stat. Ann. Tit. 18 §§ 4471 to 44741
21. Washington	1998	Wash. Rev Code §§ 69.51A.010 to 69.51A.903

Why would these companies decide to offer greater protection than what is legally required? Why did these companies decide to take a position on a hot-button issue that falls squarely in the middle of the nation's larger culture wars? Perhaps the companies that decided to recognize same-sex relationships and provide equal benefits to their LGBT employees were reacting to changing societal views about LGBT people, or the demands and expectations of a younger workforce, or the desire to effectively recruit and retain LGBT candidates. Regardless of their reasoning, companies that recognize same-sex relationships and provide equal benefits to their LGBT employees have positioned themselves well for the most recent changes in the law and the changes that are likely to come.

An alternative approach for employers with employees in multiple states is to provide only the protections and benefits required by state and local law. This approach is risky from a recruiting and retention standpoint, as LGBT workers have come to expect an LGBT-inclusive workplace. Moreover, as a practical matter, employers taking the "only provide what is required" approach must keep a very close eye on the ever-changing legal landscape for LGBT employees, and constantly adapt their practices and policies as the law changes at a fairly rapid pace.

For example, 10 new states recognized same-sex marriages since November 2012. As a result, employers are now required to provide same-sex FMLA benefits to employees residing in those states, and employers are required to recognize for tax purposes same-sex marriages performed in those states, regardless of where the employee lives. Understandably, many employers have decided that it is clear where the law is heading and are positioning themselves ahead of the change that appears inevitable.

Marijuana – A drug-free workplace prevails

With the rapidly growing trend to legalize medical marijuana usage, and the slower but equally impressive movement to legalize marijuana for pure recreational purposes, one would think that employers will have to look long and hard at their drug-free workplace policies and revise them to stay current with this changing area of the law. The reality is, however, that the safety, well-being and productivity of workers continue to trump an individual employee's legal right to use this popular drug in the workplace.

Current legal landscape

As of November 2013, 20 states and the District of Columbia have enacted laws authorizing individuals with qualifying medical conditions to legally use marijuana. Following the 2012 elections, Colorado and Washington state decriminalized recreational use of marijuana through

successful ballot initiatives. But most of these laws do not address marijuana usage in the employment context, and consequently, employees who claim their legal rights to consume marijuana have been violated when an employer has taken adverse employment action against them have gone to court to try to define how far these progressive laws will go. Currently, courts confronted with deciding the boundaries of state laws permitting the recreational and medicinal use of marijuana on an employer's workplace policies, hiring practices and disciplinary procedures have ruled in favor of the employer. The challenges have varied, ranging from whether an employer can refuse to hire an applicant or discipline an employee with a medical marijuana prescription who tests positive on a drug test (*Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. 2012); *Curry v. MillerCoors, Inc.*, 2013 U.S. Dist. LEXIS 118730 (D. Col. August 21, 2013)) to whether the Americans with Disabilities Act protects medical marijuana users from discrimination (*James v. City of Costa Mesa*, 684 F.3d 825 (9th Cir. 2012)).

An alternative approach for employers with employees in multiple states is to provide only the protections and benefits required by state and local law. This approach is risky from a recruiting and retention standpoint, as LGBT workers have come to expect an LGBT-inclusive workplace.

For the most part, where state law permitting medicinal and/or recreational marijuana is silent on the employer's rights and obligations toward marijuana users, the courts have upheld an employer's application of its drug-free workplace policy. Employers in Oregon, Montana, California, Washington and, most recently, Colorado have successfully argued that they have the right to lawfully refuse to hire an applicant or discipline an employee with a medical marijuana prescription who tests positive on a drug test. The rationale from the highest courts in California, Washington and Oregon is straightforward: Without an affirmative legislative requirement that an employer must accommodate marijuana use by employees, no such duty exists, and no separate cause of action to sue the employer on that basis is available.[3]

No state law prohibits an employer from disciplining employees who report to work under the influence of or impaired by marijuana.

In Colorado, a court dismissed a wrongful discharge claim of an employee who was fired for testing positive for marijuana, even though he had a lawful prescription for medical use, had never used marijuana on the employer's premises and was not under the influence at work.[4] The court found that under Colorado law, despite the medical and recreational marijuana statutes, a positive test for marijuana is a legitimate basis for discharge. The employee's wrongful discharge claim also did not pass muster under Colorado's "lawful activities" statute that prohibits discrimination based on lawful off-duty conduct since the statutory term of "lawful" includes both state and federal laws. Federal law still prohibits marijuana use, and accordingly, a Colorado employer may take adverse action against an employee for lawfully using marijuana off company premises and after work hours.

In the minority of states that have passed medical marijuana statutes that directly address issues of employment — such as Arizona, Connecticut, Rhode Island, Delaware, Hawaii and Maine — employees have gained some protections (albeit limited) against being singled out because of their lawful use of marijuana. While most states permit an employer to disqualify an applicant who tests positive for marijuana, Arizona and Delaware prohibit it, unless the employer would lose a federal license or revenue by hiring a marijuana user.[5] Under certain circumstances, the same prohibition against taking disciplinary action against a current employee merely because she tests positive for marijuana exists in Arizona and Delaware.

Arizona, Delaware, Connecticut, Maine, Rhode Island and Michigan also forbid an employer from refusing to hire an otherwise qualified applicant based upon his status as a registered medicinal marijuana cardholder.

Even where medical marijuana statutes directly address issues of employment, an employer's legitimate safety concerns presented by the use of marijuana outweigh an employee's individual right to lawfully use the drug. No state law prohibits an employer from disciplining employees who report to work under the influence of or impaired by marijuana. Similarly, employers in every state where marijuana usage is legal in some fashion may prohibit employees from using marijuana during working hours or on work premises. It should follow that an employer's prohibitions against the use of company equipment, such as company vehicles, outside of working hours while under the influence of marijuana would be equally upheld. It is also clear across the nation that employers may prohibit employees from bringing or possessing marijuana at the worksite, with the exception of Connecticut and Hawaii, where the respective statues do not specifically address this issue.

Implications of lawful usage of marijuana on the Americans with Disabilities Act and other federal laws

Despite the recent wave of legalization of medical marijuana over the past several years, there has been limited case law addressing medical marijuana and the ADA. Only one federal Court of Appeals has squarely dealt with whether the Act protects individuals who claim discrimination based on their lawful medical use of marijuana, although the case was outside of the employment context. In *James v. City of Costa Mesa*, 700 F.3rd 394 (9th Cir. 2012), the plaintiffs suffered severe disabilities and, based on doctors' recommendations, were using marijuana to treat their pain. The city of Costa Mesa, Calif., passed an ordinance that banned medical marijuana dispensaries within the city limits. The plaintiffs brought suit, alleging that the city ordinances violate Title II of the ADA. The district court denied injunctive relief, holding that the provision of Title II of the ADA, which "prohibits discrimination in the provision of public service," does not protect discrimination on the basis of marijuana use. The plaintiffs asserted that a plain reading of Title II creates an exception, protecting "professionally supervised drug use carried out under any legal authority." The Court of Appeals for the Ninth Circuit rejected the argument and affirmed the lower court's holding. The Court held that because the ADA includes marijuana use under its illegal drug exclusion, medical marijuana use, even if it is permitted by state law and/or authorized by a medical professional, is not protected by Title II of the ADA.

In the employment context, the Ninth Circuit's holding is equally applicable. As such, the use of medical marijuana should not be protected under the ADA and does not require reasonable accommodation. The underlying condition for which the employee is being treated, however, may still be a covered disability. Employers should engage in the interactive process with employees who are users of medical marijuana to determine whether a reasonable accommodation may be required.

In other areas within the ADA's reach, such as medical exams and inquiries regarding medicinal marijuana, the law has yet to be challenged.[6] It is also unclear whether federal law will ever expand to gain acceptance of medicinal marijuana use as permissible off-duty conduct protected by federal disability law. It remains to be seen whether an employer will ever be prohibited from relying on an employee's

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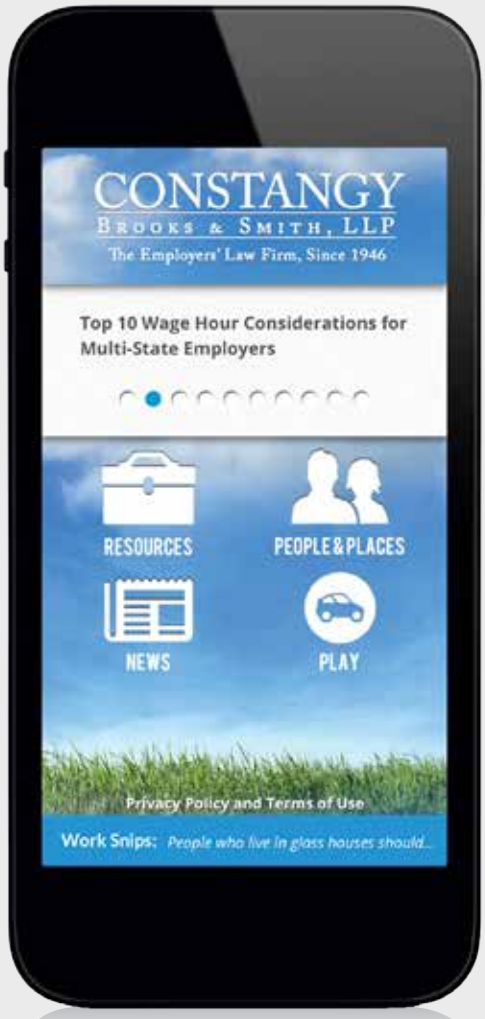

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Paramount in this evolving area of the law is and will likely continue to be an employer's goal of maintaining a safe and productive workforce.

lawful use of marijuana that does not affect job performance as a basis for disciplinary action.

Employers who are covered federal contractors or federal grantees are subject to the federal Drug-Free Workplace Act of 1988, which requires employers to prohibit the use of marijuana as a condition of participation. Companies subject to this Act are not excused from compliance in states where medical marijuana usage is permissible. The laws in Arizona, Washington and Delaware include an explicit exception for adherence to the Drug-Free Workplace Act.

Likewise, employers subject to federal drug testing regulations by the US Department of Transportation must prohibit the use of marijuana (regardless of its legality) for any employee holding "any safety-sensitive" position.[7] The legalization of medical marijuana on the state level also does not affect federal Department of Defense contractors or businesses regulated by the Federal Aviation Administration who are still required to test certain workers for the presence of controlled substances and take specific actions in response to a positive drug test.

Practical advice for handling compliant drug-free workplace policies on a national level

For employers operating in the 20 states and the District of Columbia that now permit the use of marijuana for medicinal purposes (and in Washington and Colorado, which allow for legal recreational use), a drug-free workplace policy drafted just a few years ago should be evaluated and written to comport with this ever-changing legal landscape.

Paramount in this evolving area of the law is and will likely continue to be an employer's goal of maintaining a safe and productive workforce. To that end, consider these points when assessing your company's current policy:

- Specifically prohibit the use of marijuana while at work and working under the influence of marijuana. Because marijuana's active ingredient, THC, can remain in the system days after off-duty use, you may want to define "working under the influence" to prohibit "under any influence of marijuana or any detectable level of any controlled substance."
- Consider modifying those policies that permit the use of "legally prescribed" drugs to state that "the use of a drug that can be legally prescribed under both federal

Tennessee — Safe Commute Act

ENACTED: March 14, 2013
EFFECTIVE DATE: July 1, 2013
SUMMARY: The law makes it legal for individuals with handgun permits to store firearms and ammunition in their own motor vehicle as long as it is parked in a location "where it is permitted to be."

The law exempts businesses, public or private employers, or owners, managers or possessors of property from liability in a civil action for damages arising out of another's actions involving a firearm or ammunition transported or stored under the law.

The law says that when the owner is not in the vehicle, the firearm must be locked within the trunk, glove box, interior of the vehicle or within a container that is "securely affixed" to the vehicle.

Alabama — Guns in the Parking Lot Act

ENACTED: May 22, 2013
EFFECTIVE DATE: August 1, 2013
SUMMARY: The law allows employees to store firearms kept in privately owned vehicles that are parked in employer parking lots.

The law applies to all lawfully-owned firearms — not just those owned under concealed weapons permits.

The law provides that employers may not be liable for damage caused from the use of a firearm stored in accordance with the Act.

Illinois — Illinois Firearm Concealed Carry Act

ENACTED: July 9, 2013
EFFECTIVE DATE: July 9, 2013[11]
SUMMARY: Concealed weapons permit holders can carry a firearm anywhere that isn't prohibited by law, including inside the vast majority of private workplaces.

Employers may ban firearms in the workplace by placing signage that specifically prohibits firearms on the premises. The sign must meet stringent regulations according to its size, location and verbiage.

Employers cannot prohibit an employee from storing a firearm in his vehicle on the employer's premises so long as the employee has a lawful permit and the firearm is stored in a concealed case within a locked vehicle or locked container out of plain view.

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Statistics show that homicides are nearly five times more likely to occur on premises where firearms are allowed than where firearms are banned.

and state law does not violate the company's policy." Employers who operate in locales where medicinal marijuana is permissible and conduct business in other states where it is prohibited may want to also include a statement that while the use of marijuana may be permissible for medicinal purposes under state or local law, it remains illegal under federal law and is considered an illegal drug under the company's drug-free workplace policy.

- Add a disclaimer to a nationally-applied drug-free policy stating that it shall not be construed to prohibit conduct allowed under state or federal law regarding off-duty conduct or to discriminate against an individual for engaging in such conduct.
- Review current practices and policies regarding drug testing.

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ACC Docket
Gender Identity and Expression in the Workplace (Jul. 2011). *www.acc.com/docket/gender_jul11*

Presentation
Employment Law Update (Oct. 2013). *www.acc.com/employ-law_oct13*

Form & Policy
State Drug Testing Laws (Aug. 2012). *www.acc.com/form/drug-test_aug12*

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Consult with legal counsel and state law before taking disciplinary action against employees working in states where medical marijuana is lawful. If you have federal contracts or are otherwise subject to federal regulations regarding drug tests, however, those state laws should not limit an employer's right to rely on positive drug tests.

- Train and educate your managers and supervisors on the parameters of your updated policy and how to deal with questions from employees regarding their use of medical marijuana. Also, all supervisory personnel should be trained on how to recognize signs of impairment, whether due to marijuana use, alcohol or other controlled substances.

Guns in the workplace

Aside from gender identity, sexual orientation and medical marijuana issues, employers across the country have been confronted with a growing concern over violence and access to firearms in the workplace. According to the Bureau of Labor Statistics, over 20 percent of all violent crimes occur in the workplace, and nearly 500 workplace homicides occur each year.[8] More specifically, firearms caused nearly 80 percent of those homicides.[9] Despite these alarming figures, employers may very well be more frightened by the recent influx of legislation passed on guns in the workplace. Rightly or wrongly, state legislatures across the country have begun passing laws to ensure that bringing a firearm onto an employer's premises is a legally protected right.

As of the writing of this article, 23 states have enacted laws that prohibit employers from banning firearms in the workplace, causing a tug-of-war between many employers and gun rights advocates.[10] For national employers with offices spread out across the country, nuanced and often conflicting state laws can make the issue even more difficult to navigate.

The legislation

These workplace weapons laws, or "parking lot laws" as they're commonly referred, limit an employer's ability to restrict employees from bringing guns to work. Because there is no federal law addressing firearms in the workplace, legislation has been passed on a state-by-state basis, with the plurality of states allowing workers to bring firearms to work so long as the weapon is locked and stored in the employee's vehicle.

Although the first parking lot law was enacted nearly a decade ago in Oklahoma, three states — Tennessee, Alabama and Illinois — have enacted laws in the past year that allow employees and others to carry firearms onto an employer's premises.

The most recent legislation has not been well received by many employers in the affected states. Corporations like FedEx, Volkswagen and ConocoPhillips, which are all headquartered in states affected by new parking lot laws, have voiced their oppositions to the newly enacted laws. Mike Hogan, vice president of US security for FedEx, views the issue as a property matter: "Much like a private homeowner is able to tell his guests whether they can bring a gun into his yard, FedEx should have the right to decide what it will and will not allow on its private property." Many other interested parties have argued the issue on different legal grounds.[12]

Two sides of the argument

On the one hand, some businesses argue that they have a right to maintain a safe workplace and regulate their employees' conduct on private property. Human resources professionals fear that permitting firearms on an employer's premises will increase the odds that irritated and angry employees could make the workplace

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unsafe. Statistics show that homicides are nearly five times more likely to occur on premises where firearms are allowed than where firearms are banned.[13] Thus, those in charge of employee safety are very apprehensive about the inherent dangers of parking lot laws. In March 2012, Reid Albert, a member of Volkswagen's security operations team, voiced his concerns to Tennessee's Senate Commerce Committee before the state enacted its version of a parking lot law by stating that: "Gun violence in the workplace is a real and ever-present threat. A law which prevents an employer from addressing the situation hinders my ability to protect the lives of all employees at Volkswagen Chattanooga."[14]

On the other hand, those in favor of these new laws counter their opposition's arguments by stating that worker safety will actually be increased as workers will be able to more fully protect themselves at their workplaces and during their commutes. Parking lot law supporters, including the National Rifle Association (NRA) and second amendment supporters, argue that many employees are susceptible to violent crimes on the way to and from work, and should thus be allowed to carry firearms onto an employer's premises in the name of self defense. Chris Cox, chief lobbyist at the NRA, has stated, "workers, like the single mother with an abusive ex, who comply with these rigid policies are forced to decide between their paychecks and their safety." Other supporters of these laws, such as Wayne LaPierre, CEO of the NRA, have classified this argument as a second amendment right to bear arms. "In effect, this is a wrecking ball for the Second Amendment. It's also a blueprint for totally eviscerating and nullifying right-to-carry legislation."

Employers' challenges

Regardless of where you may come out on the legislation, the fact remains that employers will be required to digest and respond to these newly enacted laws. Employers must decide between compliance, which could increase their legal risks, and non-compliance, which could lead to civil or criminal penalties. If employers choose to comply with the law, this may require that they recognize high-risk situations that could lead to violence without infringing on employees' rights to privacy and property. Many employers fear a situation where a disgruntled employee with easy access to a firearm does not have enough time to cool down after an altercation (e.g., a termination) at the workplace. Indeed, this fear has come to fruition in the recent past. In early 2013 in Phoenix, Ariz., an employment dispute ended violently when an employer's independent contractor abruptly left a meeting, retreated to his car to retrieve a firearm, and killed two employees.[15] Speaking to this exact issue, Mike Hogan of FedEx warned that workplace weapons bans are needed to provide "an opportunity for the employee to cool off before they take an irrational action in response to something that happens at work."[16] Although some states protect employers against liability to third parties through immunity clauses,[17] in other states, employers must seriously consider whether non-compliance with a newly enacted parking lot law will be more effective for its business.[18] Several states' laws, such as those in Kentucky and North Dakota, specifically address fines and penalties of non-compliance. This may include civil damages to an employee if an employer fires, disciplines, demotes or punishes an employee who exercises his option to carry a firearm in his vehicle. This may also include injunctive relief against an employer that violates the law. Because no two employers are exactly alike, each employer must decide for itself which route — compliance or non-compliance — works best under their state's specific parking lot laws.

Best practices – How national employers should handle these challenges?

- Review current employment policies addressing weapons in the workplace.
- Implement and maintain a workplace violence policy that clearly lays out prohibited activities.
- Redefine "workplace" to distinguish between activities permitted or prohibited inside office building and in spaces such as parking lots.
- Train supervisors to ensure that there is no discrimination against employees who exercise right to transport and store firearms on employers' premises.
- Consider instituting an employee concealed firearms registration process, if permissible by state law.
- Your human resources and legal teams should remain mindful when implementing and enforcing any anti-violence policy of potential legal challenges that could be brought by an employee or a third-party victim. **ACC**

NOTES

1 *www.dol.gov/whd/regs/compliance/whdfs28f.htm.*

2 Department of Treasury press release re: IRS ruling: *www.treasury.gov/press-center/press-releases/Pages/jl2153.aspx.*

3 *Ross v. RagingWire Telecomms., Inc.,* 174 P.3d 200 (Cal. 2008); *Roe v. TeleTech Customer Care Mgmt. LLC,* 171 Wash. 2d 736, 257 P.3d 586 (2011); *Johnson v. Columbia Falls Aluminum Co.,* 213 P.3d 789 (Mont. 2009); *Emerald Steel Fabricators, Inc. v. BOLI,* 230 P.3d 518 (Or. 2010).

4 *Curry v. MillerCoors, Inc.,* 2013 U.S. Dist. LEXIS 118730 (D. Col. August 21, 2013).

5 Ariz. Rev. Stat. § 36-2813 (2012); 16 Del. Code § 4905A (2012).

6 It is well settled that drug testing to determine the illegal use of drugs is not a medical examination under the ADA. See, e.g., EEOC Guidance: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under Americans With Disabilities Act (ADA) (2000) ("There are a number of procedures and tests that employers may require that are not considered medical examinations, including: blood and urine tests to determine the current illegal use of drugs; physical agility and physical fitness tests; and polygraph examinations.").

7 49 C.F.R. § 40.25. The DOT issues notices confirming its position prohibiting medical marijuana use, both before and after changes in Washington and Colorado's marijuana laws.

8 *www.bls.gov/news.release/pdf/cfoi.pdf; www.nbcnews.com/business/guns-workplace-safety-issue-or-nightmare-8C11457700; www.bls.gov/news.release/pdf/cfoi.pdf.*

9 *www.nbcnews.com/business/guns-workplace-safety-issue-or-nightmare-8C11457700.*

10 AL, AK, AR, FL, GA, ID, IL, IN, KS, KY, LA, ME, MN, MO*, MS, NC*, NE, ND, OK, TN, TX, UT, WI. In MO and NC, only state (as opposed to private) employers are affected.

11 Even though the law's effective date is technically July 9, 2013, an individual must first apply for a concealed weapons permit to be able to carry a firearm onto an employer's premises. The Illinois State Police have 180 days to make applications available to the public and 90 days thereafter to process applications. Illinois residents will most likely receive concealed weapons permits for the first time in early 2014.

12 *http://online.wsj.com/news/articles/SB10001424052702303983904579095532026750354.*

13 Dana Loomis, Stephen W. Marshall and Myduc Ta, "Employer Policies Toward Guns and the Risk of Homicide in the Workplace," *American Journal of Public Heath*, 2005 May, 95(5): 830-832; *http://online.wsj.com/news/articles/SB10001424052702303983904579095532026750354.*

14 *www.timesfreepress.com/news/2012/mar/06/gun-bills-draw-opposition-volkswagen-tennessee-sen/; www.bloomberg.com/news/2012-12-12/guns-to-work-laws-spread-in-u-s-as-business-fights-group.html.*

15 *www.usatoday.com/story/news/nation/2013/01/30/arizona-shooting/1877525/; http://articles.chicagotribune.com/2013-01-31/news/sns-rt-us-usa-phoenix-shootingbre90u0zq-20130131_1_apparent-suicide-apparent-self-inflicted-gunshot-wound-mesa-police.*

16 *http://online.wsj.com/news/articles/SB10001424052702303983904579095532026750354.*

17 See, e.g., *N.D. Cent. Code § 62.1-02-13(3) (2011) and La. Stat. Ann § 32.292.1(B)(2011)).*

18 In Tennessee, for example, its statute does not provide for immunity. Tenn. Code Ann. § 39-17-1359(d) (2012).