

# COMPLIANCE BULLETIN

## HIGHLIGHTS

- A federal court has ruled that federal drug laws do not preempt a state marijuana law.
- Connecticut employers are required to allow off-duty medical marijuana use.
- The state's medical marijuana law allows lawsuits for employment discrimination.

## IMPORTANT DATES

### August 8, 2017

A U.S. District Court for the District of Connecticut issued its decision in *Noffsinger v. SSC Niantic Operating Co.*

## Federal Court Rules State Medical Marijuana Law Protects Off-duty Use

### OVERVIEW

The U.S. District Court for the District of Connecticut has ruled that rescinding an applicant's job offer or terminating an employee for off-duty medical marijuana use violates the individual's rights under Connecticut's medical marijuana law.

The court also held that individuals may sue employers under the Connecticut law, which expressly protects medical marijuana users from adverse employment actions based on medical marijuana use. The court issued its ruling in [\*Noffsinger v. SSC Niantic Operating Co.\*](#) on Aug. 8, 2017.

### ACTION STEPS

This decision means that Connecticut employers may not enforce zero-tolerance marijuana policies against employees or applicants who use medical marijuana outside of work hours.

Connecticut employers should adjust their marijuana policies to comply with the court's decision. Employers in other states should become familiar with their state's marijuana and employment discrimination laws to ensure compliance.

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## Noffsinger v. SSC Niantic Operating Co.

In its decision in [Noffsinger v. SSC Niantic Operating Co.](#), the U.S. District Court for the District of Connecticut ruled that Connecticut's medical marijuana law allows individuals to sue employers for rescinding a job offer or terminating their employment based on their use of medical marijuana.

The case began in 2016, when Katelin Noffsinger accepted a position with Bride Brook, a nursing facility owned by the defendant in the case. Before submitting a urine sample to comply with Bride Brook's mandatory drug testing policy, Noffsinger informed a Bride Brook supervisor that she would test positive for marijuana because her doctor had prescribed the drug to treat her post-traumatic stress disorder. She showed the supervisor her state-issued certificate allowing her to use marijuana, explained that she only used the drug before bed and offered to provide additional medical documentation. The supervisor declined the documentation offer, continued processing Noffsinger's pre-employment documents and gave Noffsinger a packet of documents to complete and bring back when she returned for orientation.

The day before Noffsinger was scheduled to begin the job, Bride Brook's drug testing company called to inform Noffsinger that her drug test was positive for marijuana. Noffsinger immediately called the Bride Brook supervisor to inform her about the test results. Later that day, the supervisor called back and said the job offer was rescinded because Noffsinger tested positive for marijuana.

Claiming that the rescission violated her rights under the Connecticut [Palliative Use of Medical Marijuana Act](#), Noffsinger filed a lawsuit against Bride Brook in a state court. The case was subsequently removed to the federal court at Bride Brook's request.

### Connecticut Palliative Use of Medical Marijuana Act (PUMA)

The PUMA, enacted in 2012, permits the use of medical marijuana by registered, [qualifying patients](#) who have certain debilitating medical conditions. The PUMA specifically prohibits employers from taking any adverse employment action against an individual based on his or her status as a qualifying patient. Although the PUMA specifies that it does not restrict an employer's ability to prohibit medical marijuana use during work hours or to discipline an employee for being under the influence of marijuana during work hours, the law is silent about medical marijuana use **outside** of work hours.

The main issue in *Noffsinger v. SSC Niantic Operating Co.*, was whether Noffsinger has the right to sue Bride Brook for employment discrimination under the PUMA. Bride Brook argued that Noffsinger's claim should be dismissed because three federal laws invalidate, or pre-empt, the PUMA. Specifically, Bride Brook argued that the PUMA is pre-empted by the Controlled Substances Act, the Americans with Disabilities Act, and the Food, Drug and Cosmetic Act. The court disagreed, holding that none of these federal laws prevents individuals from suing employers for employment discrimination under the PUMA.

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## The Controlled Substances Act (CSA)

The CSA is a federal law that prohibits all marijuana use. The PUMA presents an obstacle to the purpose of the CSA by allowing medical marijuana use. The PUMA and prevents individuals from suing employers for discrimination based on medical marijuana use. Noting that the CSA does not regulate employment relationships and does not make it illegal to employ a marijuana user, the court held that the PUMA's anti-employment discrimination provision does not conflict with, nor stand as an obstacle to, the CSA and is therefore not pre-empted.

## The Food, Drug and Cosmetic Act (FDCA)

The FDCA is a federal law that prohibits the use, dispensing or licensing of substances that have not been approved by the federal Food and Drug Administration (such as medical marijuana). Bride Brook argued that the FDCA pre-empts the PUMA because it allows activities that the FDCA specifically prohibits. Like the CSA, however, the FDCA does not regulate employment. Noting this, along with the fact that the PUMA's prohibition against employment discrimination was the only provision at issue in Noffsinger's case, the court ruled that the FDCA does not pre-empt the PUMA.

## The Americans with Disabilities Act (ADA)

The ADA is a federal law that prohibits employers from discriminating against individuals based on disability. Bride Brook argued that the ADA pre-empts the PUMA because it does not extend its protections to individuals who use illicit drugs or alcohol. Calling this argument "somewhat counterintuitive," the court noted that while the ADA allows employers to prohibit illicit drug or alcohol use at the workplace, it does **not** give employers permission to prohibit employees from using drugs **outside** of the workplace. According to the court, this "is a powerful indication that the ADA was not meant to regulate non-workplace activity, much less to preclude the states from doing so."

The court also rejected Bride Brook's arguments that the PUMA is pre-empted by the ADA's provisions that allow employers to conduct drug tests and to hold drug users and non-drug users to the same employment qualification standards. Although these arguments presented a convincing case that Noffsinger could not seek relief under the ADA, the court said, the issue was whether the ADA precludes Connecticut from granting relief to individuals, not whether Noffsinger could bring an ADA claim. Finding that Bride Brook did not show any conflict between the ADA and the PUMA, the court held that the ADA does not pre-empt the state law.

After concluding that no federal law pre-empts the PUMA, the court considered whether the PUMA grants individuals a right to sue employers even though it does not expressly state a private right of action. Because the PUMA does not provide any other enforcement mechanism, the court said, the law would have no practical effect unless it implied a right of action. In addition, the legislative history behind the law includes evidence that state legislators actually expected the PUMA's anti-employment discrimination provision to be enforceable in the courts. Therefore, the court ruled, the PUMA implicitly allows lawsuits against employers.

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Next, the court considered Bride Brook's argument that it is exempt from the PUMA as a federal contractor because the PUMA allows employment discrimination that is "required by federal law or required to obtain federal funding." Stating that this argument "borders on the absurd," the court held that, since "the act of merely hiring a medical marijuana user does not itself constitute a violation of the CSA or any other federal, state or local law," Bride Brook is not exempt from the PUMA.

Finally, Bride Brook argued that the PUMA violates the Equal Protection Clause of the U.S. Constitution by requiring employers to treat medical marijuana users differently than other similarly situated employees, such as recreational marijuana users. The court deemed this argument "frivolous" and held that the PUMA does not violate the Equal Protection Clause.

## Impact on Employers

The court's decision means that employers in Connecticut may not enforce a zero-tolerance marijuana policy against an employee or applicant who is registered under the PUMA and uses doctor-prescribed medical marijuana outside of work hours. The ruling is similar to a recent [decision](#) issued by the Massachusetts Supreme Judicial Court, which held that employers in that state may be sued for discrimination based on disability if they fire an employee because of his or her off-duty medical marijuana use in compliance with Massachusetts' medical marijuana law. Both of these decisions differ from rulings issued by other state courts, which have held that employers can have zero-tolerance drug use policies despite state laws that allow medical marijuana use in those states. Thus, employers in other states that have legalized medical marijuana should:

- ✓ Review their state's medical marijuana law to determine whether it prohibits employers from discriminating against individuals who qualify to use medical marijuana;
- ✓ Review their state's disability discrimination laws to determine their responsibilities relating to a disabled employee who uses medical marijuana; and
- ✓ Review their state's other employment laws to determine the circumstances under which an employee's off-duty use of medical marijuana may be protected activity.