INTRODUCTION:

A number of states have effectively legalized the growing and use of marijuana for medical purposes, and many others are actively considering such measures [1]. Notwithstanding this trend towards legalization at the state level, growing and using marijuana remains a crime under federal law. As a result, college and university officials are often left questioning how these state medical marijuana laws will affect campus life, research, and operations. This NACUANOTE explores such questions, specifically with respect to the possession, use, and institutional research of marijuana.

DISCUSSION:

Federal Law versus Federal Practice

At the federal level, the Controlled Substances Act (“CSA”) criminalizes the growing and use of marijuana, with a limited exception for Food and Drug Administration-approved research [2]. In Gonzales v. Raich, the U.S. Supreme Court held that the CSA – as an exercise of Congress’s plenary commerce power – prevailed over California’s medical marijuana law based on the Supremacy Clause of the U.S. Constitution [3]. As a result, it is well settled that federal law enforcement agencies can prosecute users and growers of medical marijuana, despite state law to the contrary.

During the George W. Bush administration, federal law enforcement actively prosecuted cases against medical marijuana users in accordance with Gonzales. However, the Obama administration has taken a different approach, suggesting in a memorandum to United States Attorneys that limited federal resources should not be spent prosecuting those whose actions are in clear and unambiguous compliance with state medical marijuana laws [4]. Despite this shift in enforcement policy, the memorandum does not “legalize” or “decriminalize” medical or any other marijuana use. To the contrary, it clearly reaffirms that the CSA is the law of the land. Thus, federal law enforcement officials remain fully authorized to enforce the CSA’s prohibitions against the use and growth of medical marijuana, and indeed have continued to do so on a case-by-case basis [5].

Marijuana on Campus

Employee Use of Medical Marijuana in the Workplace

Many of the state laws that have legalized medical marijuana expressly provide that employers do not have to accommodate an employee’s use of medical marijuana [6]. But even where the state law
is not as explicit, federal law renders such use in the workplace illegal.

In addition to being a federal offense under the CSA, the use of medical marijuana in the workplace is restricted by federal laws such as the Drug-Free Workplace Act of 1988 (“DFWA”) [7]. The DFWA requires that institutions receiving federal contracts in excess of $100,000, or receiving any federal grant, establish a policy prohibiting the manufacture, use and distribution of controlled substances in the workplace. An institution’s failure to demonstrate its ongoing good-faith efforts to maintain a drug-free workplace can disqualify that institution from obtaining future government funding.

The Occupational Safety and Health Act (“OSHA”) also imposes a general responsibility on employers to maintain a safe workplace [8]. Permitting employees who are under the influence of marijuana to operate machinery or work with potentially hazardous materials or substances could create serious risks in the workplace and violate OSHA requirements.

**Employee Use of Medical Marijuana while Off-Duty**

Although marijuana use remains a federal crime, state-level acceptance of marijuana as a medical treatment has led some employees to claim that they cannot be fired for their off-duty marijuana use, or that such use should be protected as a reasonable accommodation under the Americans with Disabilities Act (“ADA”), the Rehabilitation Act, or similar state laws.

The federal law claims have been easily rejected, as both the ADA and the Rehabilitation Act explicitly exclude illegal drug use from their protections [9]. State law claims have required deeper analysis, but have thus far been consistently dismissed. In rejecting one such claim, the California Supreme Court held that California’s Fair Employment and Housing Act “does not require employers to accommodate the use of illegal drugs,” and noted that “no state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law. . . . even for medical users. [10]” The Court of Appeals of Washington reviewed a similar claim and upheld the termination of an employee for his off-duty use of medical marijuana, finding that “the voters did not intend to impose any duty on private employers to accommodate employee use of medical marijuana. [11]” The Oregon Supreme Court upheld the firing of another medical marijuana user, noting that “to the extent that [Oregon’s Medical Marijuana Act] affirmatively authorizes the use of medical marijuana, federal law preempts that subsection, leaving it ‘without effect.’ [12]”

Some states have “Lawful Off-Duty Activities” statutes, which prohibit termination of an employee for engaging in lawful activity off the premises of the employer during non-working hours, subject to certain limited exceptions [13]. While it has not yet been litigated, the cases noted above would suggest that state courts are unlikely to consider medical marijuana use to be a “lawful off-duty activity,” even if it has been decriminalized by state law.

**Off-Duty Use: The Arizona Question**

Conscious of the growing body of case law upholding an employer’s right to fire employees for their off-duty use of medical marijuana, the drafters of Arizona’s medical marijuana ballot initiative included a provision explicitly prohibiting employers from firing an employee based upon either (1) the employee’s status as a medical marijuana card holder; or (2) the employee’s positive drug test for marijuana (unless the employee used, possessed, or was impaired by marijuana during work hours or on the work premises) [14]. The initiative – which voters narrowly approved in November 2010 – is the first to include such specific protection for employees and it will no doubt lead to legal challenges [15]. While this provision escapes the Washington Court of Appeals’ rationale that “the voters did not intend to impose any duty on private employers to accommodate employee use of medical marijuana,” Arizona courts could still find, as did the California and Oregon Supreme Courts, that federal law preempts any conflicting state law regarding marijuana. Institutions in states with medical marijuana laws should thus become familiar with the specific provisions of those laws, and
would be well served to monitor the developments in Arizona and other states with such laws.

**Student Use of Medical Marijuana**

Much of the discussion above with respect to employees is applicable to student use of medical marijuana as well. As marijuana continues to be illegal under federal law, institutions are not obligated to accommodate users of medical marijuana in their residence halls, on campus or otherwise. The biggest challenge will likely continue to be battling student perception that medical marijuana is somehow legal [16].

Schools will need to make clear statements about their policy on medical marijuana on campus. Students need to understand that even in states where marijuana can be used for medical purposes under state law, such use still constitutes a violation of federal law and may result in federal prosecution. Moreover, students should be aware that marijuana use may have an adverse impact on future employment, as many employers require drug testing [17]. A conviction can also limit their ability to obtain federal financial aid [18].

**Research Exception**

As noted above, there exists a limited research exception to the CSA’s prohibition against the growing and use of marijuana. This exception permits researchers and analytical labs to grow and study Schedule I drugs such as marijuana, provided they register with, and are approved by, the Drug Enforcement Agency (“DEA”) – a branch of the U.S. Department of Justice. As of May 2010, there were 119 researchers registered with the DEA to perform studies with marijuana and its derivatives. Eighteen of those researchers are approved to conduct research with smoked marijuana on human subjects [19].

The United States is also a party to the Single Convention on Narcotic Drugs, an international drug control treaty, pursuant to which signatories must establish a national agency to control the cultivation and distribution of marijuana if they wish to cultivate it for research purposes [20]. In the United States, all marijuana to be used for research must be legally obtained through the Department of Health and Human Services’ National Institute on Drug Abuse (“NIDA”). NIDA bids out the contract to produce research marijuana every five years, and since 1968, has awarded the contract to the University of Mississippi, National Center for Natural Products Research (the “National Center”) [21]. Thus, all research marijuana must be obtained through the National Center, and the National Center, in turn, ships marijuana to researchers only after NIDA approval. In short, while use of marijuana for research purposes is permitted, doing so without DEA approval, or obtaining that marijuana from a source other than the National Center, would violate federal law.

**Hemp versus Marijuana**

Finally, while the focus of this NACUANOTE is on marijuana, questions have surfaced on many campuses about the legality of hemp. Hemp fiber has a long history of industrial use and is widely cultivated outside the U.S. However, hemp and marijuana are both genetic variants of the same *Cannabis sativa L.* species. Although hemp contains only trace amounts of the main hallucinogen found in marijuana, the CSA nonetheless defines the entire species as a Schedule I controlled substance. Thus, cultivation of hemp is regulated in the same way as marijuana, and requires a permit from the DEA [22]. These permits have rarely been issued, and include highly burdensome security measures required for crop production [23]. Legal challenges to DEA regulation of hemp in the First and Eighth Circuits have been decided in favor of the government based on the plain definitional language of the CSA [24]. However, hemp stalks, fibers, oils, sterilized seeds, and similar derivatives are specifically exempted from the CSA and do not need to be controlled or regulated [25].
CONCLUSION:

Despite the trend towards decriminalization of medical marijuana at the state level, the possession, use, and production of marijuana remains illegal at the federal level—even for medical use. College and university policies should therefore reaffirm that use and possession of marijuana is prohibited on campus unless proper authorization has been obtained from the DEA for approved research purposes.

FOOTNOTES:

FN1. States that have effectively legalized medical marijuana use as of publication: Alaska, Arizona, California, Colorado, the District of Columbia, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington. Note that some states have affirmatively legalized marijuana for medical purposes, while others have merely “decriminalized” it or provided a defense to criminal prosecution for it. Many other states have currently pending legislation or ballot initiatives to legalize medical marijuana. See http://medicalmarijuana.procon.org for a summary of each state’s law, as passed or proposed.

FN2. The CSA, enacted in 1970 as part of the Comprehensive Drug Abuse Prevention and Control Act, 84 Stat. 1242-1284, created a comprehensive framework for regulating the production, distribution, and possession of five “schedules” of controlled substances. Congress found that most of those substances—those listed in Schedules II through V—“have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.” See 21 U.S.C. § 801(1). By contrast, Congress determined that Schedule I drugs, including marijuana, have a high potential for abuse, and lack any accepted medical use or safety for use in medically supervised treatment. See 21 U.S.C. § 812(b)(1). By classifying marijuana as a Schedule I drug, Congress made the manufacture, distribution, or possession of marijuana a criminal offense. See 21 U.S.C. §§841(a)(1), 844(a). As noted, there exists a limited exception for Food and Drug Administration-approved research. See 21 U.S.C. § 823(f); United States v. Oakland Cannabis Buyers’ Cooperative, 532 U.S. 483, 490 (2001).


FN4. See David W. Ogden, Deputy Attorney General, Memorandum for Selected United States Attorneys re: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana, Oct. 19, 2009. Relevant portions of the letter are as follows:

The Department of Justice is committed to the enforcement of the Controlled Substances Act in all States. Congress has determined that marijuana is a dangerous drug, and the illegal distribution and sale of marijuana is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. One timely example underscores the importance of our efforts to prosecute significant marijuana traffickers: marijuana distribution in the United States remains the single largest source of revenue for the Mexican cartels.

The Department is also committed to making efficient and rational use of its limited
investigative and prosecutorial resources. In general, United States Attorneys are vested with “plenary authority with regard to federal criminal matters” within their districts . . . This authority should, of course, be exercised consistent with Department priorities and guidance . . .

As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.


FN8. 29 U.S.C. § 651 et seq.

FN9. ADA: “[T]he term ‘qualified individual with a disability’ shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.” 42 U.S.C. § 12114(a); Rehabilitation Act: “[T]he term ‘individual with a disability’ does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.” 29 U.S.C. § 701(a).


FN14. See *Proposed Arizona Medical Marijuana Act*, at 36-2813, full text of ballot initiative.


FN16. Note comments by Susan Mottet, committee counsel for D.C. Councilmember David Catania, with respect to the proposed enactment of medical marijuana legislation in Washington, D.C.:

"I would imagine universities would allow students to also [smoke medical marijuana] on campus somewhere because laws and policies can’t say you can use some medications and not other medications. At the same time, they are going to be wary about allowing students to smoke marijuana in a dorm room with a roommate,” Mottet said. “I imagine they will have to revisit their policies that relate to that. They would probably require that any student that uses medical marijuana on campus would need to show the school their registration card so that the school can know ahead of time who is authorized or not. I don’t think it would inspire any school to say, ‘Anyone can smoke
marijuana.’”


**FN17.** Many laws, including the Omnibus Transportation Employee Testing Act of 1991 and the U.S. Department of Defense’s Rules and Regulations for Federal Contractors, also require employee drug testing, and thus foreclose employment opportunities to student job-seekers who use medical marijuana.


**FN21.** In 2001, University of Massachusetts researcher, Lyle Cracker, sought DEA approval to grow marijuana for research purposes. After protracted proceedings in which an Administrative Law Judge approved his request, the DEA rejected the ALJ’s findings and refused to approve Cracker’s growing of marijuana for research purposes. The DEA found that the National Center source was sufficient for all marijuana researchers and no additional sources were needed. See 74 Fed. Reg. 9,2101 (Jan. 14, 2009).


**FN23.** *Id.* at 247.

**FN24.** See *United States v. White Plume*, 447 F.3d 1067 (8th Cir. 2006); *N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1 (1st Cir. 2000).


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**RESOURCES:**

- Provision of Marijuana and Other Compounds For Scientific Research - Recommendations of The National Institute on Drug Abuse National Advisory Council
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