

The Legalization of Marijuana: Tax Issues and Costs to Employers

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This paper examines the implications of the changing legal environment relating to marijuana, specifically, tax-related issues and potential costs to employers with the resulting management issues. Tax issues such as unique sales and excise taxes on legalized marijuana, and proposed changes in the tax law in response to the legal changes regarding marijuana are discussed as well. The potential, hidden costs to employers are discussed such as the increased difficulty of maintaining a drug-free workplace, the increased cost of on-the-job accidents, and the cost of lost productivity; all of which lead to increased potential problems with management.

INTRODUCTION

The changes regarding marijuana and how it is viewed can cause whiplash. For years, society treated marijuana as a drug and people were put in prison for using it. Then, states began legalizing marijuana for medical reasons. And now, some states have even legalized marijuana for recreational use. After our recent elections, which added Michigan to the states allowing marijuana for recreational use and Missouri and Utah legalizing medical marijuana, we now have ten states allowing recreational marijuana use (plus, the District of Columbia), and an additional twenty-three states allowing marijuana for medical purposes only (“State Laws,” n.d.). Because the states that permit marijuana for recreational use also legalized medicinal marijuana, the number of states allowing medicinal marijuana use is actually thirty-three (“State Laws,” n.d.). This was unfathomable even twenty years ago—within the span of a generation.

As would be expected with such an extreme change in such a relatively short period, there is controversy. According to the federal government, marijuana is still considered a Schedule I narcotic. Therefore, companies operating in the marijuana industry are operating in a murky legal environment that is still subject to great change.

This shift in our societal attitudes towards marijuana leads to interesting questions and even confusion regarding taxes and costs to employers. In this paper, we discuss the current tax statutes and regulations related to the marijuana industry and then discuss potential additional costs and management issues employers could face. For instance, what deductions are available to wholesalers and retailers in the

marijuana industry? Which tax strategies are available to them to decrease taxable income? If you operate in different states, how are your taxes different from other states in the marijuana industry? Finally, we discuss potential changes to the classification of marijuana and the impact that will have on taxes.

We next discuss how these changes in societal attitudes and laws related to marijuana could present hidden costs to employers with the resulting management issues. As with most changes, there could be unforeseen consequences. Marijuana legalization is touted as an economic boon for states and cities. We believe, however, that there could be negative consequences and hidden costs for companies operating in this new industry. These costs relate to identifying and hiring capable employees, maintaining a drug-free workplace, productivity, absenteeism, workplace accidents, and litigation.

Finally, our conclusion points out issues that could still arise in this new, unsettled industry. The new marijuana laws reflect a major societal change and therefore have and will engender important legal and financial changes—some we are only just beginning to see.

FINANCIAL ISSUES

With a huge societal shift, decriminalizing marijuana has, as to be expected, led to financial and tax issues. Below, we discuss the primary financial and tax issues that can already be seen, although other issues may arise with the passage of time as society becomes more comfortable with these new laws.

The financial issues we examine involves both tax issues and costs to employers. The most prevalent tax issues are that marijuana sales are taxed at different rates and at different levels, marijuana sales are taxed higher than for other products, and the tax treatment is different for medical marijuana, recreational marijuana, and for related products. Additionally, some states assess a special purpose tax in addition to sales tax.

Also, there are additional tax issues because marijuana is an illegal controlled substance under federal law. The Internal Revenue Service (I.R.S.) taxes marijuana sales as illegal drug trafficking, thus, §280E of the I.R.S. Code does not allow sellers to deduct business expenses. For these same reasons, it is difficult to pay employees because sellers cannot do federal withholding, partly because banks are reluctant to serve the industry (Schain, 2018). Thus, sellers have more regulations to follow and tax liability is higher in this industry.

Finally, we examine employer costs such as: Does using marijuana increase health care costs for companies in states where recreational marijuana use is legal? And, are the cash-management problems sellers experience exacerbated by the fact that banks are reluctant to serve this industry? Unfortunately, increased costs will be passed on to the consumer and could decrease profits and possibly, lead to a loss of productivity and/or opportunity cost to companies.

TAX ISSUES

In 1966, the U.S. Supreme Court observed that:

“...the federal income tax is a tax on net income, not a sanction against wrong-doing. That principle has been firmly embedded in the tax statute from the beginning. One familiar facet of the principle is the truism that the statute does not concern itself with the lawfulness of the income that it taxes” (*Commissioner of Internal Revenue*, 1966, p. 691).

Thus, the federal government is focused on collecting taxes on income, and not on how that income was made. Accordingly, as in any business activity, an illegal business has been allowed a deduction from income for expenses that are ordinary, necessary, and reasonable (IRC §162). This is illustrated by the “honest drug dealer” case. In 1981, Tax Court considered the case of Jeffrey Edmondson (Jeffery Edmondson, 1981). Mr. Edmondson was self-employed in the business of selling amphetamines, cocaine, and marijuana (Jeffery Edmondson, 1981, p. 1534). Mr. Edmondson received the drugs on consignment

and paid for the drugs after they were sold (Jeffery Edmondson, 1981, p. 1534). He had no beginning inventory, and had an ending inventory of eight ounces of cocaine (Jeffery Edmondson, 1981, p. 1534). Mr. Edmondson kept no records, but he reconstructed transactions in order to file a tax return in response to a jeopardy assessment made by the I.R.S. and claimed cost of goods sold of \$105,300 (Jeffery Edmondson, 1981, p. 1534). He also claimed expenses for packaging, telephone, office in the home, travel and entertainment (Jeffery Edmondson, 1981, p. 1534).

Although Tax Court disallowed the travel expenses due to a lack of required documentation, the court did allow Mr. Edmondson's business expenses and his cost of goods sold of \$105,300 (Jeffery Edmondson, 1981, p. 1535). The Court stated, "The nature of petitioner's role in the drug market, together with his appearance of candor at trial, cause us to believe that he was honest, forthright, and candid in his reconstruction of the income and expenses from his illegal activities in the taxable year 1974" (Jeffery Edmondson, 1981, p. 1535).

This case of the "honest" drug dealer apparently prompted new legislation. The Senate Explanation of the 82 Tax Equity and Fiscal Responsibility Act, referring to a recent U.S. Tax Court case stated:

"There is a sharply defined public policy against drug dealing to allow drug dealers the benefit of business expense deductions at the same time that the U.S. and its citizens are losing billions of dollars per year to such person is not completed by the fact that such deductions are allowed to other, legal enterprises. Such deductions must be disallowed on public policy grounds. All deductions and credits for amounts paid or incurred in the illegal trafficking in drugs listed in the Controlled Substances Act are disallowed. To preclude possible challenges on constitutional grounds, the adjustment to gross receipts with respect to effective cost of goods sold is not affected by this provision of the bill" (Tax Equity and Fiscal Responsibility Act, 1982).

Accordingly, §280E Expenditures in connection with the illegal sale of drugs was incorporated in the Internal Revenue Code. That provision states:

"No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted" (IRC §280E).

Even though many states now permit marijuana use, marijuana remains a Schedule I drug at the federal level (Greiman and Ramirez, 2015). Therefore, courts have held that §280E prohibits the deduction of operating expenses by marijuana-related businesses even though they are operating legally under state law (Olive, 2012). The Internal Revenue Service has continued, on examination, the policy of disallowing deductions for legal marijuana businesses. In Alterman, the Tax Court disallowed expenses other than cost of goods sold for a Colorado medical marijuana dispensary (Alterman, 2018). In that case, the Tax Court also sustained penalties for substantial understatement of tax.

In Loughman, another Colorado-based marijuana dispensary, the deduction for wages paid to the officers of an S corporation engaged in selling medical marijuana was disallowed (Loughman, 2018). The taxpayers had reported the wages as income on their personal tax returns. The corporation had deducted the wages, reducing the S corporation income reported by the taxpayers. The court disallowed the wage deduction, increasing the pass-through income and the taxable income of the shareholders (Loughman, 2018).

Cost of Goods Sold

Prior to 1986, cost consisted of all costs and expenses incurred in acquiring possession of goods which usually consisted of the invoice price of goods and all applicable transportation costs, handling costs, and costs incurred in acquiring possession of the goods (Gertzman, 2017). After 1986, Internal Revenue Code (I.R.C.) §263A required retailers to include indirect costs for off-site storage or warehousing, purchasing, handling, processing, assembly, and repackaging, with general and administrative costs allowed to inventories and cost of goods sold (Gertzman, 2017). This accounting was not required by small retailers (sales of less than \$25 million), however, small retailers should not be precluded from using this accounting method. Those considered manufacturers are subject to more complex rules which require material, labor, and indirect production costs to be allocated to inventory and accordingly, cost of goods sold (Gertzman, 2017).

Irrespective of these 1986 changes, in January of 2015, the I.R.S. announced that inventory-costing regulations apply as they existed when §280E was enacted (Chief Counsel Advice, 2015, 201504011). Commentators have observed that the application of the Chief Counsel's Advice would not change the inclusion of costs (or lack thereof) in Cost of Goods Sold because §263A is merely a timing provision. It does not change what expenses are deductible, only when they are deductible (Sanders and Gill, 2015). The Chief Counsel Advice indicates:

“A marijuana reseller using an inventory method would have capitalized the invoice price of the marijuana purchased, less trade or other discounts, plus transportation or other necessary charges incurred in acquiring possession of the marijuana. Similarly, a marijuana producer using an inventory method would have capitalized direct material cost (marijuana seeds or plants), direct labor costs (e.g., planting; cultivating; harvesting; sorting), Category 1 indirect costs (§1.471-11(c)(2)(i)), and possibly Category 3 indirect costs (§1.471-11-(c)(2)(iii))” (Chief Counsel Advice, 2015, 201504011).

This would allow growers, to the extent costs are incident to and necessary for production, to include:

- a. Repair expenses
- b. Maintenance
- c. Utilities, such as heat, power and light
- d. Rent
- e. Indirect labor and production supervisory wages
- f. Indirect material and supplies
- g. Tools and equipment not capitalized
- h. Costs of quality control and inspection (Reg. §1.471-11(c)(2)(i)).

Again, this reflects inventory costing regulations as they existed in 1982 when the law was enacted.

Separate Trade or Business Activities

Apparently, some in the marijuana business have attempted to justify deduction of expenses by establishing other businesses. Real property may be owned by a separate entity which leases the property to the marijuana-related business. This theoretically would allow the deduction of real estate taxes, repairs, and depreciation. The separate entity approach may be questionable, however, as the regulations indicate that a characterization that is artificial or unreasonable will not be recognized (Reg. §1.183-1(d)(1)).

One case may provide guidance on the structure of separate business entities. In *Californians Helping to Alleviate Medical Problems*, the taxpayer successfully argued there were two trades of business activities (*Californians Helping to Alleviate Medical Problems, Inc.*, 2007, p. 180). The taxpayer successfully argued that its primary trade or business was the provision of caregiving services, and its secondary trade or business was the supplying of medical marijuana to its members (*Californians Helping to Alleviate Medical Problems, Inc.*, 2007, p. 180). Tax Court concluded, “We hold that section 280E does not preclude petitioner from deducting expenses attributable to a trade or business other than that of

illegal trafficking in controlled substances simply because the petitioner also is involved in the trafficking in a controlled substance” (Californians Helping to Alleviate Medical Problems, Inc., 2007, p. 182).

Other Taxes

In addition to income tax, self-employed sellers of illegal drugs are subject to self-employment tax (Chiang, 2015). Additionally, states legalizing marijuana have also imposed unique excise and sales taxes on marijuana wholesalers and retailers. For example, Washington enacted excise taxes on marijuana producers, processors, and retailers at twenty-five percent of the selling price on each wholesale sale through the Washington Revised Code at §69.503535. The Internal Revenue Service has held that a taxpayer who has paid the marijuana excise tax should treat the expenditure as a reduction in the amount realized on the sale of the property rather than an inventoriable cost of the property or a deduction from gross income (Chief Counsel Advice, 2015, 201531016). Colorado, in addition to the 2.9 percent state sales tax, imposes an eight percent retail marijuana sales tax on retail marijuana and marijuana products.

Proposed Changes in Tax Law

Recently, several bills have been introduced in Congress to provide relief for marijuana retailers and producers. One proposal would remove marijuana products from the schedule of controlled substances (H.R. 1841 115th Congress; H.R. 2020 115th Congress). This would then allow the deduction of all ordinary and necessary business expenses. Another proposal would exempt marijuana from the Controlled Substance Act if the producer or manufacturer is in compliance with applicable state laws (H.R. 1824 115th Congress).

Perhaps the most interesting proposal is to add a scheme of excise taxes on the sale of marijuana products. Under this proposal, an initial ten percent excise tax would be imposed and after a five-year period, that excise tax would increase to twenty-five percent (H.R. 1823 115th Congress). This would introduce a scheme of taxation similar to taxing alcohol.

COSTS AND MANAGEMENT ISSUES FOR EMPLOYERS

As discussed above, with the changes in societal attitudes towards marijuana, an increasing number of states are allowing marijuana use for medicinal reasons and even recreationally. An advantage of these changes, as argued by supporters, is the increased economic activity which medical and legal recreational marijuana use provide. For example, Colorado had over \$1 billion in legal marijuana sales in only ten months of 2016 (Huddleston, 2016). This has a tangible and significant impact not only on the state of Colorado, but also on the cities and localities that are involved in the sale of legal marijuana.

There are, however, costs associated with this increased acceptance of marijuana across the United States; particularly in states with more liberal medical marijuana laws or legal recreational marijuana use. These hidden costs can be burdensome for companies and especially for small companies. These companies have two options: decrease their income through higher expenses, or increase the price of their products to compensate for the increase in costs. These hidden costs can be costly not only for the companies that incur them, but also for consumers who purchase the products or service.

One of these costs, and a cost that might not be anticipated, is the cost of pre-employment testing for marijuana and other drugs. In 2011, 29% of companies reported having no pre-employment drug screenings, compared to 21% in 2010 (Fortner, Martin, Esen and Shelton, 2011). This decrease could be occurring because of the costs of testing employees and the increase in costs when tests return positive for marijuana. For instance, ARCpoint Labs owner Terry Johnson stated that the cost of drug testing increases seven to ten times the initial cost when a lab confirms a positive marijuana screening (Bowman, 2014). Johnson also states that these costs, which are typically passed on to consumers, drive company decisions about whether to ignore or eliminate testing for marijuana. The removal of marijuana testing could increase costs as studies show that employees at jobs without pre-employment drug screening are almost twice as likely to self-report marijuana use in the last 30 days (9.7%) compared to employees at jobs with pre-employment screening (5.2%) (Lytle, 2014). This suggests that costs could be more

significant in companies that do not require pre-employment drug screening. And along with these costs, employers must decide how to manage their companies in this environment: what impact will this have on management regarding hiring, firing and other staffing issues?

One cost that companies could incur relates to identifying and hiring capable employees. For instance, positive oral fluid tests for illicit drugs, including marijuana, for the general U.S. workforce increased 47% over the last three years from 6.7% in 2013 to 9.1% in 2015 (Stimson, 2016). With the changing landscape regarding marijuana laws, this increase illustrates a pattern likely to continue. Interestingly, in Colorado and Washington, the number of positive marijuana tests were significantly higher. For instance, reported positive marijuana tests were up 20% from 2012-2013 (Coltrain, 2014). And, positive marijuana tests more than tripled in Washington (Box, 2015). Also, employers reported more workplace incidents where marijuana use was a factor (Coltrain, 2014).

There is ample anecdotal evidence that the increase in positive marijuana tests are costing employers more money to identify and hire qualified candidates. Companies are reporting that positive marijuana tests have doubled since marijuana became legal in Colorado and Washington. For example, West Sound Workforce, a staffing service, reported that since Washington legalized recreational marijuana use, their positive tests for marijuana have tripled (Box, 2015). This has caused the company to bring in larger pools of potential candidates and spend more time screening. The owner of West Sound Workforce estimates that each of her four full-time recruiters works an extra 100 hours a year because of the increase in positive marijuana tests (Bowman, 2014). This example suggests a number of cost issues. First, companies using staffing agencies may have to pay higher fees to find the same level of employee they found earlier. Second, the cost of maintaining a drug-free workplace is becoming more costly in a marijuana-friendly social environment. Finally, the costs to maintain a drug-free environment increases when there are more positive marijuana tests because testing becomes more expensive. Again, along with these costs, employers must decide how to manage their companies in this environment: what impact will this have on management regarding hiring?

The increasing use (and acceptance) of marijuana can also create other costs. One cost is lost productivity due to increased absenteeism. Studies show that those who test positive for marijuana have absenteeism rates that are 75% higher than employees who test negative for marijuana (Rusche and Sabet 2014). There are also numerous studies that suggest that marijuana use can significantly decrease productivity (Rusche and Sabet 2014). Companies must then balance the litigation risk from firing an under-performing individual with legal access to medical marijuana versus the costs of lost productivity. Another potential issue, as critics of legalized marijuana raise, is whether the U.S. will have a sufficient workforce if the usage rate of marijuana (and other drugs) continues to rise. And this leads to management issues regarding firing employees—how does this impact employment termination?

Another liability issue is that marijuana use increases workplace accidents. Employees who test positive for marijuana have 85% more injuries on the job and 55% more accidents than those who test negative for marijuana (Rusche and Sabet 2014). Accidents are of course a risk for all employees, and they could have a major impact on costs. More accidents could cause companies to have to pay higher amounts for insurance. And, if accidents become too prevalent, companies may have issues getting insurance at all.

Another major cost issue for companies in states with legal access to medical and recreational marijuana is litigation costs. Although the laws covering this topic are currently in flux, there are already court cases being decided on the issue. For instance, in 2017, three cases ruled in favor of employees, not employers, which should be noted as a disturbing trend for employers (Pitzen, 2018). Additionally, an article from 2017 estimates that the cost of litigation averages roughly \$125,000 for a settlement and \$200,000 for a judgment (Baker, 2017). Thus, companies, especially small companies, could have difficulty surviving in a litigious environment with regard to medical and recreational marijuana use because multiple lawsuits could put a small company out of business. And does this potential for liability impact how a company manages their workforce?

In summary, companies operating in states where marijuana use is legal, either medicinal, recreational, or both, are facing increasing costs. Some of these costs include the cost or removal of pre-

employment drug testing, identifying and hiring capable employees, maintaining a drug-free workplace, lost productivity and increased absenteeism, workplace accidents and the costs of litigation. All of these have the potential to increase employer costs and also the potential to increase management issues, and could significantly impact the bottom line of a company or the wallets of consumers. Either way, the changing attitudes towards marijuana will have a significant impact on companies--we just have to wait and see whether it is positive or negative.

CONCLUSION

Overall, there are many questions related to how the shifting attitudes towards marijuana will impact tax issues. Now, marijuana producers and distributors are disallowed from deducting trade or business expenses but are allowed to deduct cost of goods sold in order to decrease taxable income. The disallowance of trade and business expenses has led some in the marijuana industry to establish additional legal businesses in order to receive the benefit of additional deductions. Also, there are differing state laws regarding excise and sales taxes on marijuana wholesalers and retailers, as well as self-employment taxes that make navigating the new marijuana environment more difficult. Proposed changes, however, in whether marijuana should be classified as a controlled substance and whether there could be loop holes for those who strictly abide by state laws, could ease some of the tax burden currently carried by marijuana wholesalers and retailers.

As with all changes, there can be unintended consequences. With the changing marijuana landscape, one of those unintended consequences could be the impact of increasing costs on employers. Costs such as identifying, hiring, and retaining capable employees while maintaining a drug-free environment are increasing in time and money as more people are able to use marijuana legally—at least according to the law of many states. Other potential costs relate to lost productivity, increased absenteeism, workplace accidents, and litigation costs. Research has shown that marijuana use increases the costs related to all of these and as more people are permitted to legally use marijuana, it is only logical to assume that these costs will rise as well. These costs could also all lead to issues in management: how do you staff your company in this environment? How does potential liability impact management of a company? These costs and potential management problems will need to be addressed by employers.

Although we of course do not have all of the answers, we feel this paper provides an overview of the current status of legal marijuana and the cost and tax issues that have arisen from the growth of the marijuana industry. There are other issues, however, that could arise in these areas that were not examined in the paper.

One area of future research could focus on employment law. There are many questions regarding how legal marijuana will impact the employer-employee relationship. For instance, how will legal marijuana impact the Americans with Disabilities Act Amendments Act of 2008? Will legal marijuana change OSHA standards or reporting given that research has shown that marijuana use increases workplace accidents? Will employers be able to terminate an employee for a failed drug test when the employee has a medical marijuana license? How will medical and recreational marijuana use interact with the Drug Free Workplace Act of 1998? All of these are important issues that could be analyzed in future research.

There are also additional financial and accounting issues that need to be addressed. One major issue facing marijuana manufacturers, distributors, and sellers now is the lack of financial institutions that will accept the business of a marijuana company. Marijuana industry participants are forced to devise creative ways of managing, storing, and converting cash without the use of traditional banking. And this leads to another issue: banking. There are a select few credit unions, specifically in Colorado, that accept marijuana industry clients. An issue that arises, in addition to the risk on the banks, is how auditors will verify and provide assurance for banks that accept marijuana industry clients. And lastly, there are certain provisions in the federal tax law that provide incentives for companies to issue GAAP (generally accepted accounting principles) financial statements, which then allows companies to include more costs in their cost of goods sold.

All of these issues illustrate the complex problems faced by the marijuana industry. Future research can highlight these issues and provide guidance for entities directly and indirectly involved in the marijuana industry.

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APPENDIX

MARIJUANA LAWS

After our most recent elections in 2018, we now have twenty-three states allowing marijuana to be used for medicinal purposes: Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Illinois, Louisiana, Maryland, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Utah, and West Virginia (“State Laws,” n.d.). As would be expected, the list of states where marijuana is permitted for recreational use is smaller: Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, Washington, and the District of Columbia (“State Laws,” n.d.). Because the states that permit marijuana for recreational use also legalized medicinal marijuana, the number of states allowing medicinal marijuana use is actually thirty-three (“State Laws,” n.d.).

Even though the above states allow legal marijuana use, the verbiage of the relevant laws vary from state-to-state in some details, and are similar or even identical in other details. Regarding the laws allowing marijuana for medical issues, approved conditions are most commonly listed as cancer, HIV/AIDS, glaucoma, multiple sclerosis, and Crohn’s disease (“State Laws,” n.d.). All states have a registry in place with varying fees for registration, with mandatory registration required except for California, Maine and Washington (voluntary registration) (“State Laws,” n.d.). Most states do not accept other states’ registry cards with the exception of Arizona, Arkansas, Maine, Michigan, Nevada, New Hampshire, Ohio, and Rhode Island (“State Laws,” n.d.).

Even though thirty states allow medical marijuana use, there are varying patient possession limits with a range of one ounce to twenty-four ounces, with a stipulation stating that the patient is allowed to possess a specified amount of “usable” marijuana also being included in some states (“State Laws,” n.d.). States also differ on whether or not they allow home cultivation with some states allowing it and some not, and they are also inconsistent on state-licensed dispensaries with some having such and others not (“State Laws,” n.d.).

As already stated, even though the trend in the states seems to be to legalize marijuana, our federal laws have kept marijuana use illegal. The federal government covers marijuana under the Controlled Substances Act (Controlled Substances Act, 2015). Under federal law, marijuana is a Schedule 1 drug which means it “has a high potential for abuse,” “has no currently accepted medical use in treatment in the United States,” with “a lack of accepted safety for use of the drug or other substance under medical supervision” (Controlled Substances Act, 2012). Interestingly, heroin is also a Schedule 1 drug while cocaine is a Schedule 2 drug (Controlled Substances Act, 2012). The reason for these classifications has less to do with the drugs themselves and the potential dangerousness of the drugs, but more with the medical value attached to the drugs (Controlled Substances Act, 2012). This can lead to what might seem to be strange outcomes—where you have marijuana listed with heroin, rather than heroin and cocaine grouped together.

Two important cases involving marijuana and federal law are Gonzales v. Raich and United States v. McIntosh (*Gonzales v. Raich*, 2005; *United States v. McIntosh*, 2016). In Gonzales, California women with serious medical conditions used medical marijuana in the state pursuant to The Compassionate Use Act of 1996 which allowed marijuana to be used for medical reasons if a patient was very ill (*Gonzales*, 2005, pp. 6, 7). These women filed an action that asked that the federal Controlled Substances Act not be enforced against them regarding their marijuana use (*Gonzales*, 2005, pp. 7, 8). The Court stated that the question is not whether enforcement of the Controlled Substances Act is reasonable, but whether Congress may “regulate interstate markets for medicinal substances” including markets “supplied with drugs produced and consumed locally” (*Gonzales*, 2005, p. 9). The Court then held that the law is firmly established and that the Controlled Substances Act “is a valid exercise of federal power” even under this fact pattern (*Gonzales*, 2005, p. 9). What this case means for our current legal climate, is that even in states where marijuana use is legal, whether for medicinal purposes only or recreational and medicinal purposes, federal law makes that use illegal. And, under the Controlled Substances Act, the power of the

Commerce Clause, and the Gonzales holding, people using marijuana in those states may still be prosecuted for their marijuana use.

United States v. McIntosh involved a congressional appropriations rider within the Consolidated and Further Continuing Appropriations Act which “prohibits the United States Department of Justice from spending funds to prevent states’ implementation of their own medical marijuana laws” (*United States*, 2016, p. 1168). The court appropriately summarized the problem we are currently facing with the differences in state and federal law involving marijuana: “The CSA [Controlled Substances Act] prohibits the use, distribution, possession, or cultivation of any marijuana. The State Medical Marijuana Laws are those state laws that authorize the use, distribution, possession, or cultivation of medical marijuana. Thus, the CSA prohibits what the State Medical Marijuana Laws permit” (*United States*, 2016, p. 1176). The court then concluded that the rider “prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws” (*United States*, 2016, p. 1177). This case does not solve the problems we continue to face, however, regarding marijuana being treated differently at the state versus the federal level, but it does give us some guidance. What this tells us is that people, who are engaging in conduct permitted by state medical marijuana laws, while fully complying with those laws, may be protected somewhat from federal prosecution due to the restrictive nature of this rider. People who are not strictly complying with the state laws regarding marijuana, however, may be prosecuted because their conduct is “unauthorized.” This thus gives us some future guidance, but problems and questions still remain because state law and federal law, in some cases, remain in conflict regarding marijuana and its use.