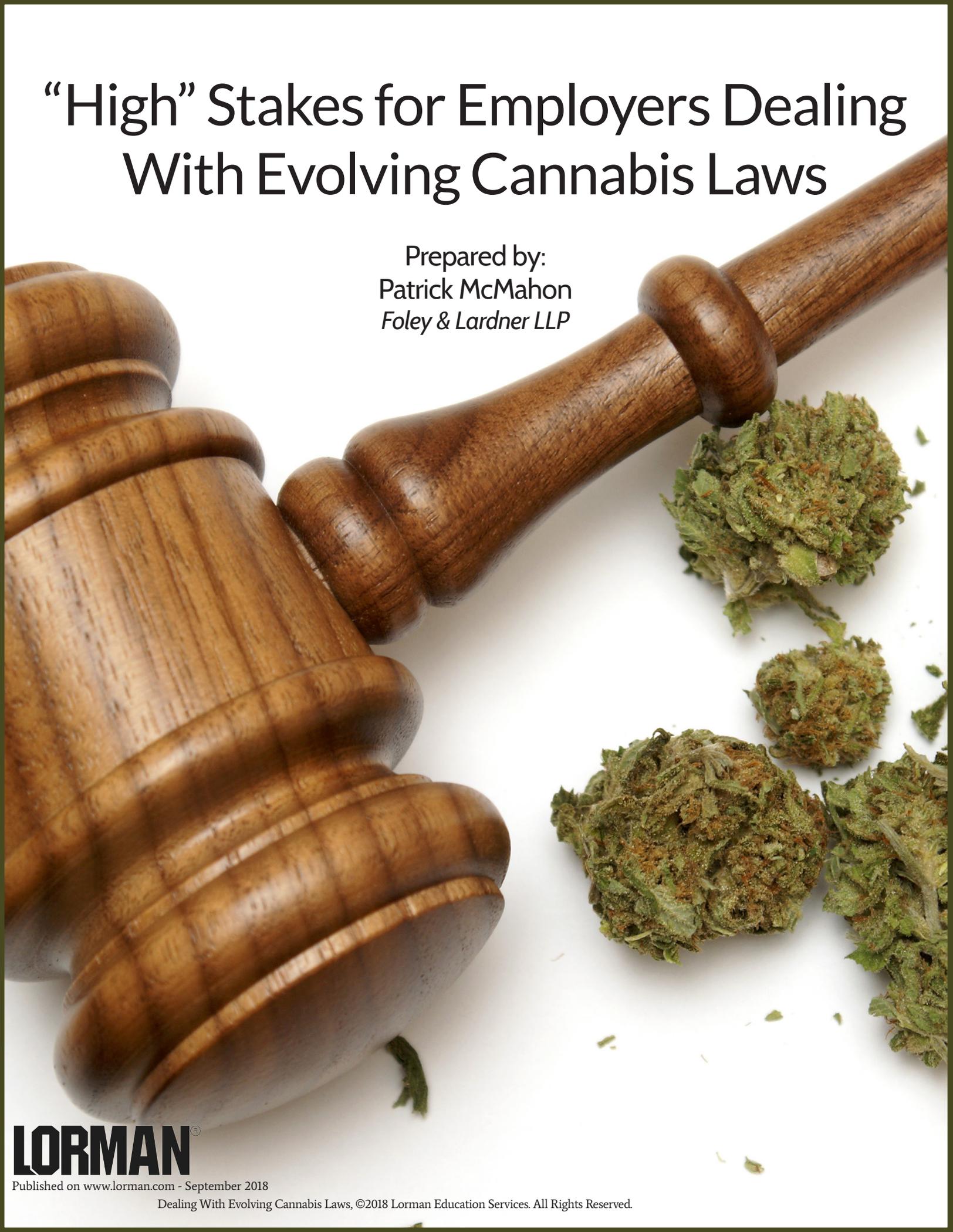


“High” Stakes for Employers Dealing With Evolving Cannabis Laws

Prepared by:
Patrick McMahon
Foley & Lardner LLP

A wooden gavel with a fluted head and a smooth handle is positioned diagonally across the frame. To the right of the gavel, several pieces of dried cannabis buds are scattered on a white surface. The buds are green and brown, with some trichomes visible. The background is plain white.

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“High” Stakes for Employers Dealing With Evolving Cannabis Laws

Written by PATRICK MCMAHON - 5/29/18

The evolving legalization of marijuana for both medical and recreational uses continues to cause workplace issues for employers. Nine states and the District of Columbia have legalized recreational marijuana, and 32 states have legalized medical marijuana under varying circumstances. In addition, three more states have 2018 ballot initiatives considering either recreational or medical marijuana uses. Employers need to consider their position as the pendulum continues to swing towards marijuana legalization in various forms.

One aspect that is particularly troublesome is that if employers choose to adopt or maintain a zero-tolerance policy, they may face a shrinking pool of potential employees. For the three states that legalized recreational marijuana in 2017 — Nevada, Massachusetts, and California — saw increases of 43 percent, 14 percent, and 11 percent, respectively, for positive workplace marijuana testing. For some employers, screening for marijuana (among other drugs) is a requirement under federal law based on the services their company provides (e.g., medical personnel and airline pilots). But on the flip side, employers that choose to remove marijuana testing entirely risk serious workplace safety

concerns for employees who may show up to work under the influence. With no accepted scientific way to test if an employee is currently under the influence of marijuana, these hazardous conditions can create all types of liability for the employer, depending on the employee's specific job.

For those employers that have historically adopted a zero-tolerance policy for marijuana, they may soon find that these policies are discriminatory in some states. For example, this year, a Minnesota job applicant filed a federal class action alleging violation of the Minnesota Human Rights Act because of a company's refusal to hire marijuana users, including medical marijuana users. This mirrors a legal theory we previously saw under Massachusetts law and may lead to similar claims under the federal Americans with Disabilities Act.

Marijuana costs can have an even more direct impact on employers' pocketbooks in the form of workers' compensation. Just this month, a New Jersey administrative law judge found that an employer must pay for its injured employee's medical marijuana, which he was prescribed after suffering a hand injury at work. And this weed is not cheap — one ounce of New Jersey's medical cannabis can run anywhere from \$425 to \$520 an ounce. A similar outcome was reached in Delaware when its Industrial Accident Board found an employer liable for \$22,000 in medical marijuana dispensary costs. That cost covered only one year of the employee's prescription.

Recreational and medical marijuana legalization is not going away. In fact, the issues surrounding both are only going to increase as more states adopt similar laws in response to what appears to be a national movement towards legalization. As we have seen, a zero-tolerance approach may not always be the answer and may give rise to liability of its own. There is no one-size-fits-all answer for employers as marijuana policies will largely depend on the services the employer provides. Employers should continuously consult with their attorneys to make sure they account for this changing landscape, especially those that have employees throughout the country.

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