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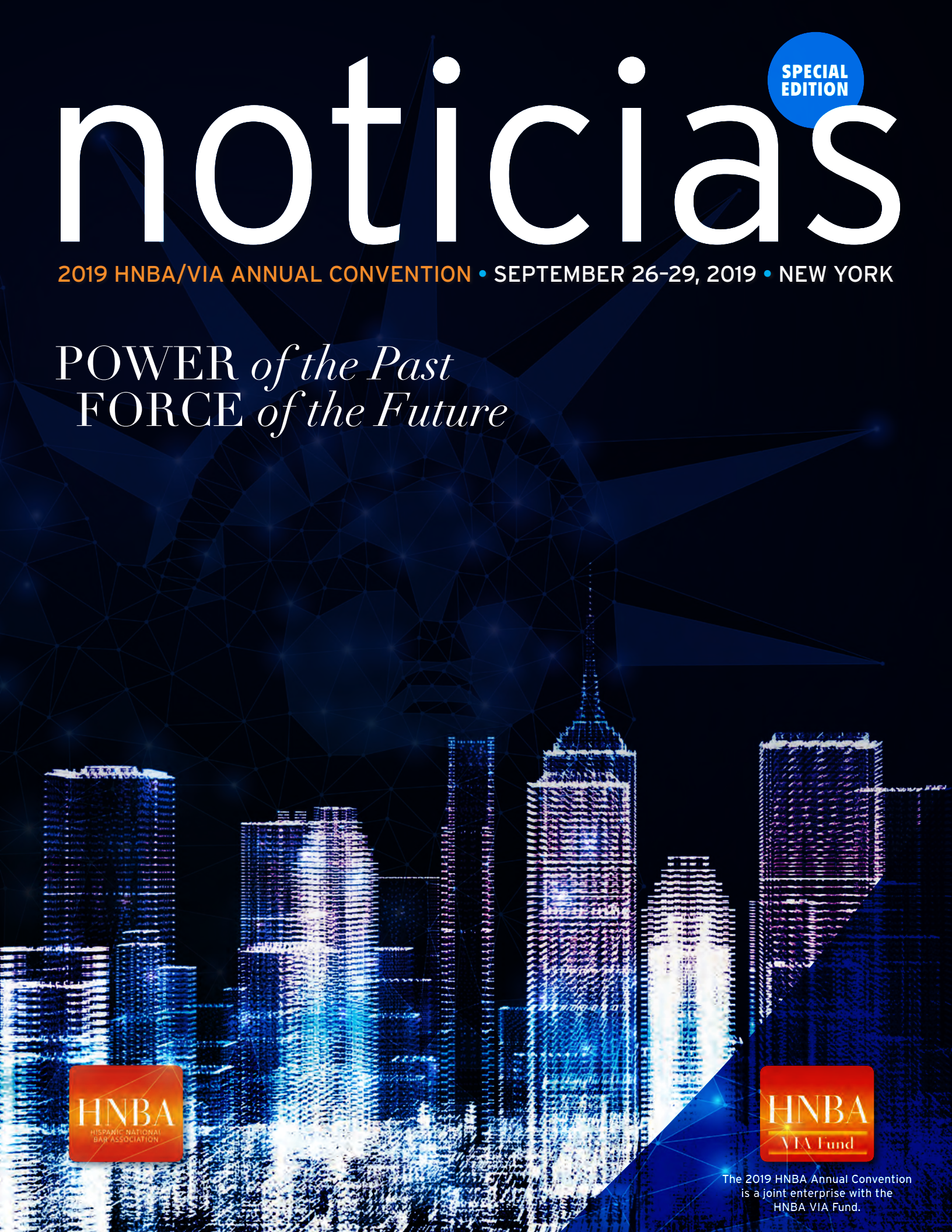

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WORKER USE *of* MEDICAL MARIJUANA POSES CHALLENGES *for* EMPLOYERS

By Joseph L. Linares

The past decade has seen most states enact legislation permitting the medicinal use of marijuana. Indeed, over forty states and the District of Columbia, permit some form of medical access to marijuana or its extracts. While legalization of its use is spreading, marijuana remains illegal under federal law whether used for medical or recreational purposes. This disconnect between federal and state marijuana policy poses challenges. One such challenge is the state-permitted use of medical marijuana by employees, which a handful of state courts have addressed, shedding light on how other courts may respond.

Although the overwhelming majority of states have a medical marijuana program, only nine states (Connecticut, Delaware, Rhode Island, Arizona, Illinois, Maine, Nevada, New York, and Minnesota) currently have statutory provisions explicitly barring employers from firing or refusing to hire an employee who lawfully uses medical marijuana under state law. The application of such a protection was recently addressed by the U.S. District Court for the District of Connecticut, whose holding in *Noffsinger v. SSC Niantic Operating Co.*, 338 F. Supp. 3d 78 (D. Conn. 2018), may serve as persuasive authority to other states. In *Noffsinger,* plaintiff Katelin Noffsinger, accepted a job offer to work for the defendant, SSC Niantic Operating Company, LLC, which operated a nursing home and rehabilitation center. The offer, however, was conditioned on Ms. Noffsinger passing a drug test. Ms. Noffsinger disclosed to her employer that she was a registered patient permitted to receive medical marijuana under Connecticut law to treat her ailments, including post-traumatic stress disorder resulting from a 2012 car accident. Importantly, Ms. Noffsinger only took her medical marijuana pills at night, before bed, and not before or during work hours. After Ms. Noffsinger's drug test came back positive for tetrahydrocannabinol (or "THC"), the psychoactive chemical component of marijuana, her employer rescinded the job offer.

Ms. Noffsinger brought a claim for employment discrimination pursuant to Connecticut's anti-discrimination provision, which bars an employer from refusing to hire a person or taking adverse action against an employee solely because of their status as a qualifying medical marijuana patient. The employer, a federal contractor, reasoned that it was concerned it could be cut off from federal contracts if it employed a known marijuana user in violation of the Federal Drug Free Workplace Act, which many federal contractors rely on for policies on drug testing. The District of Connecticut granted summary judgment in favor of Ms. Noffsinger, holding that federal law does not actually require drug testing and does not prohibit federal contractors from employing people who use medical marijuana outside the workplace in accordance with state law. A contrary ruling,

the court reasoned, would "make[] no sense and [] render the statute's protection against PUMA-based discrimination a nullity."

Similarly, in 2017, Massachusetts' Supreme Judicial Court, permitted plaintiff Christina Barbuto to pursue a claim for handicap discrimination in violation of Massachusetts state law after she was fired because of a positive drug test for marijuana. *Barbuto v. Advantage Sales and Marketing, LLC,* 78 N.E.3d 37 (Mass. 2017). During the hiring process, Ms. Barbuto disclosed that she was a qualified recipient of medical marijuana under Massachusetts law and that she used marijuana two to three times a week at home, in the evenings, to treat symptoms of Crohn's disease and irritable bowel syndrome. Her employer moved to dismiss the complaint arguing that she was not a "qualified handicapped person" because the only accommodation sought, the continued use of medical marijuana, is a federal crime. Massachusetts' high court permitted Ms. Barbuto's claim to proceed, holding that the prohibition of marijuana use under federal law did not jeopardize the employer, who had a duty to, at a minimum, investigate other accommodations to permit Ms. Barbuto's continued employment (other than permitting Ms. Barbuto's marijuana use).

Further, in a Rhode Island case, *Callaghan v. Darlington Fabrics Corp.*, C.A. No. PC-2014-5680, 2017 R.I. Super. LEXIS 88 at *4 (Sup. Ct. May 23, 2017), plaintiff Christine Callaghan, then a master's student at the University of Rhode Island and a qualified medical marijuana user under Rhode Island law, did not qualify for employment because "she was currently using marijuana, would not stop using marijuana while employed by the Company, and could not pass the required pre-employment drug test, and thus could not comply with the Corporation's drug-free workplace policy." Ms. Callaghan sought a declaration that the "failure to hire a prospective employee based on his or her status as a medical marijuana card holder and user is a violation of" Rhode Island law. *Id.* Like Connecticut, the Superior Court of Rhode Island granted Ms. Callaghan summary judgment and, in doing so, determined that its medical marijuana law provides a private right of action for individuals discriminated against because of their status as medical marijuana patients. *Id*

More recently, however, the *Michigan Court of Appeals in Eplee v. City of Lansing*, No. 342404, 2019 Mich. App. LEXIS 277 (Ct. App. Feb. 19, 2019), went the other way and ruled in favor of the defendant, the Lansing Board of Water and Light, which rescinded plaintiff Angela Eplee's employment offer after she tested positive for marijuana. Ms. Epleem was a qualified patient under Michigan law and alleged that rescinding her employment offer violated state law. The Michigan Court of Appeals, however, disagreed and granted the defendant's motion for summary disposition holding that while Michigan law protects qualified patients from "arrest, prosecution, or penalty in any manner" or "den[ying] any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marijuana in accordance with this act," the harm Ms. Eplee "suffered was the loss of an employment opportunity in which she held absolutely no right or property interest." 2019 Mich. App. LEXIS 277 at *25.

With regard to states with medical marijuana programs, the current disconnect between federal and state marijuana policies creates a gray area for employers testing prospective and current employees for marijuana use when statutory provisions are silent on the rights of employers and employees regarding adverse action for legal marijuana use. The limited state court decisions on the issue, however, are illustrative of important employer considerations including, whether the employee's marijuana use is on-site, affects the employee's ability to perform the essential functions of their position, or implicates safety concerns, as well as the medical condition for which the employee has been prescribed marijuana. Whereas, historically, a positive drug test for marijuana would justify adverse action, employers in medical marijuana states now have more to consider.

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