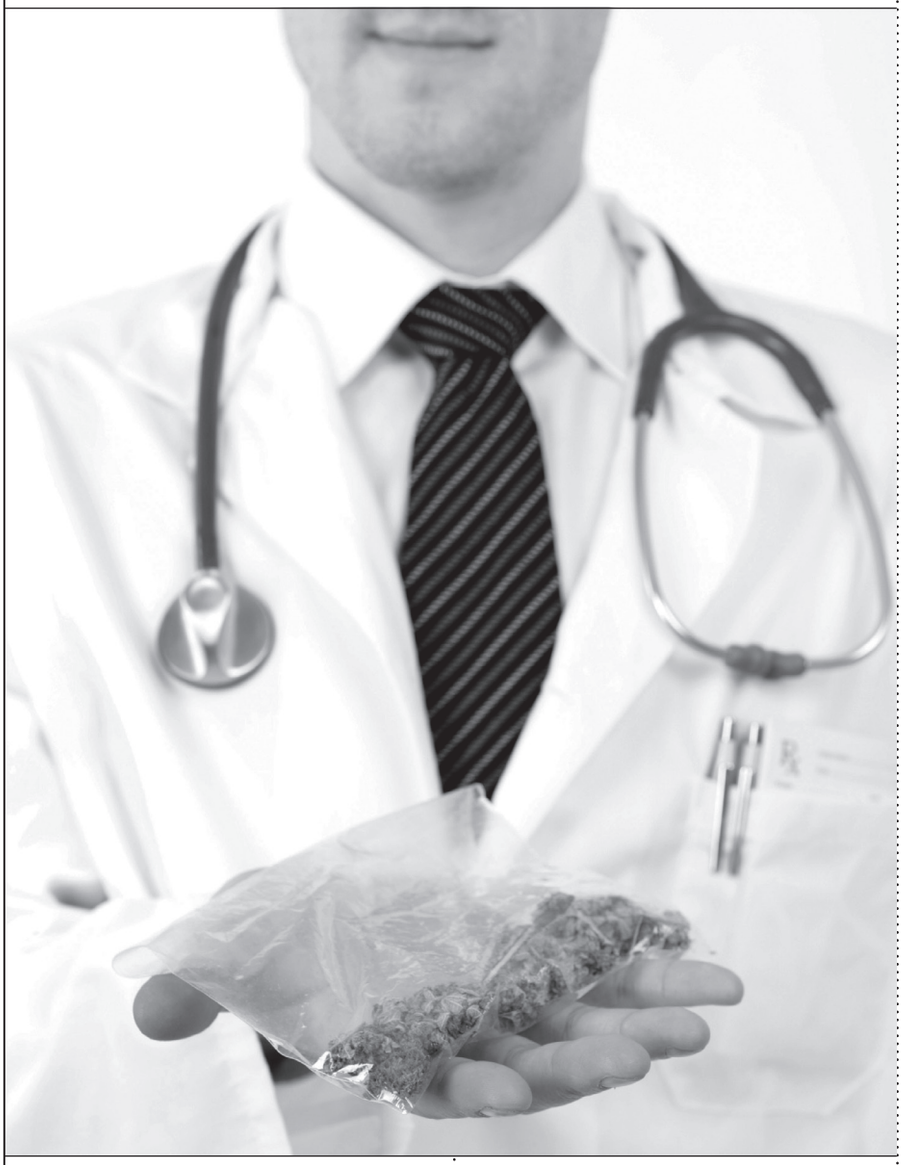
Reefer Madness: Municipal Regulation of Medical Marijuana

by Dwight H. Merriam



I remember watching the movie *Reefer Madness*[1] as a pre-teen and finding it both laughable and a little scary. It starts with this introduction:

> The motion picture you are about to witness may startle you. It would not have been possible, otherwise, to sufficiently emphasize the frightful toll of the new drug menace which is destroying the youth of America in alarmingly increasing numbers. Marihuana is that drug—a violent narcotic—an unspeakable scourge—the Real Public Enemy Number One! Its first effect is sudden, violent, uncontrollable laughter, then come dangerous hallucinations—space expands, time slows down, almost stands still... fixed ideas come next, conjuring up monstrous extravagances—followed by emotional disturbances, the total inability to direct thoughts, the loss of all power to resist physical emotions, leading finally to acts of shocking violence ...ending often in incurable insanity.
>
> In picturing its soul-destroying effects no attempt was made to equivocate. The scenes and incidents, while fictionalized for the purposes of this story, are based upon actual research into the results of Marihuana addiction. If their stark reality will make you think, will make you aware that something must be done to wipe out this ghastly menace, then the picture will not have failed in its purpose. Because the dread Marihuana may be reaching forth next for your son or daughter...or yours...or YOURS![2]

The acceptance of marijuana as a relatively harmless recreational intoxicant emerged in the 1960s, and brings to mind the movie *Easy Rider* and the memorable tune:

> Don't bogart that joint, my friend
> Pass it over to me.
> Don't bogart that joint, my friend
> Pass it over to me.
>
> Roll another one
> Just like the other one.
> This one's burnt to the end
> Come on and be a friend.[3]

Many state and local governments no longer can "bogart that joint," as the legalization of marijuana for medical uses now forces governments to plan for and regulate these uses.

Hemp History and Prohibitions

Marijuana, the hemp plant, was cultivated and woven into fabric around 7000-8000 BC, and used as food in China around 600 BC. By 2727 BC, its use as a medicine is documented in China, where the plant was cultivated on a large scale for food and fiber.[4] Emperor Shen Neng of China prescribed marijuana tea for the treatment of gout, rheumatism, malaria, and poor memory.[5] Blame our problems on Christopher Columbus, who reportedly brought plants to the

New World in 1492.[6] Thomas Jefferson grew hemp and drafted the Declaration of Independence on hemp paper.[7] Even George Washington grew hemp.[8] Marijuana became illegal in California in 1913 with the banning of preparations of hemp and "loco weed." Other states passed prohibitions: Utah (1915), Texas (1919), Louisiana (1924) and New York (1927). Britain banned the recreational use of marijuana in 1924.[9]

Federal restrictions on marijuana started with the Marijuana Stamp Act of 1937, which made it illegal to possess marijuana without a special tax stamp (cost: $1.00). The Stamp Act effectively made the cultivation, use, and sale of marijuana illegal when the Treasury Department decided not to issue the applicable tax stamps. The Harrison Narcotic Act of 1951, known as the Boggs Act, increased mandatory drug sentences, and in 1956, President Eisenhower signed into law the Narcotic Control Act, which equated marijuana with heroin for sentencing purposes.[10]

From Intoxicant to Medicine[11]

Marijuana began to emerge as an intoxicant drug of choice in the United States in the 1960s. The first Gallup Poll on drug use, in 1969, found that only four percent of the adult population said they had tried marijuana.[12] (It's not clear if former President William Jefferson Clinton is included in that percentage.[13]) In just four years, that percentage tripled to 12%, and doubled again three years later.[14]

The same time that marijuana's use as an intoxicant spread, there was renewed interest in its medical applications. In 2005, the U.S. Supreme Court, in *Raich v. Gonzales*, had before it this question: "Whether the power vested in Congress by Article I, § 8, of the Constitution '[t]o make all Laws which shall be necessary and proper for carrying into Execution' its authority to 'regulate Commerce with foreign Nations, and among the several States' includes the power to prohibit the local cultivation and use of marijuana in compliance with California law."[15] The Court answered in the affirmative, and people in California, among the nine states at the time with compassionate use laws allowing the cultivation, use, and possession of marijuana for medical purposes, were subject to federal prosecution.[16]

There are many claimed medical uses for marijuana. A table from the State of Oregon's Medical Marijuana Program,[17] as of January 1, 2011, lists conditions and the number of patients registered for each one (a patient may have more than one condition):

Agitation related to Alzheimer's disease	<50
Cachexia	857
Cancer	1,566
Glaucoma	534
HIV+/AIDS	654
Nausea	5,049
Severe Pain	34,303
Seizures (including, but not limited to, epilepsy)	974
Persistent muscle spasms, including, but not limited to, those caused by multiple sclerosis	8,225

To date, 15 states[18] and the District of Colombia have legalized the cultivation, dispensing, or use of marijuana for medical purposes.[19] Even if your state is not among these, advocates may succeed in legalizing marijuana for medical purposes. The trend appears to favor increased medical legalization, although there have been efforts to repeal the legalization of medical marijuana. A recent poll in Connecticut found that voters support (79 to 17 percent) allowing adults to use marijuana if it is prescribed by a doctor for medical reasons; they also support (65 to 32 percent) decriminalizing the possession of a small amount of marijuana.[20]

What are the principal issues for municipal lawyers in planning for, and regulating, the cultivation, dispensing and use of medical marijuana? Fortunately, unlike the regulatory turmoil over signs, religious uses, and even adult entertainment, there is no fundamental right or suspect classification at stake, so your regulations need only have a rational relationship to a permissible governmental objective.[21]

A Big Note of Caution

Lest you forget, it is still a federal crime to cultivate, possess, or use marijuana.[22] This causes all kinds of problems at the state and local level. For example, military personnel who live in states where it is legal and are prescribed marijuana for medical conditions are still subject to prosecution. The operator of a perfectly legal medical marijuana dispensary in a city which allows such use, in a state which expressly permits the use, may nonetheless be in breach of a lease provision prohibiting illegal activity on the premises, which may, in turn, subject the landlord to foreclosure by a lender.

In October 2009, Attorney General Holder announced the Obama Administration's exceedingly mellow policy on medical marijuana: the Department of Justice (DOJ) would simply stop enforcing the federal marijuana ban against persons who comply with state medical marijuana laws.[23] Professor Robert A. Mikos of Vanderbilt Law School recently published an article assessing the DOJ's new approach.[24] He notes the significance of the medical marijuana issue in both criminal law and federalism circles, and provides the first in-depth analysis of the changes wrought by the DOJ's new Non-Enforcement Policy (NEP). He suggests that early enthusiasm for the NEP is misguided and that, on closer inspection, the NEP represents, at most, a very modest change in federal policy.

First, he says the NEP won't necessarily stop federal agents from pursuing criminal prosecutions of marijuana dispensaries because—get this—the non-enforcement policy itself is not enforce-

continued on page 8



Dwight H. Merriam of Robinson & Cole LLP received IMLA's Outstanding Associate Member Award in 2010. He is a Fellow and Past President of the American Institute of Certified Planners, Chair of the ABA's Section of State and Local Government Law, a Fellow of the American Bar Foundation, and a member of the American College of Real Estate Lawyers. He teaches land use law at the Vermont Law School and has published six books and 200 articles. His recent works include co-authoring *The Takings Issue* (1999) and being the co-editor of *Eminent Domain Use and Abuse: Kelo in Context* (2006). Dwight received his J.D. from Yale.

able: it doesn't create any legal rights a court could invoke to dismiss a criminal case. The DOJ itself will have a difficult time ensuring that federal prosecutors comply with the agency's stated policy. Second, even assuming the NEP would block criminal prosecutions, federal law could still obstruct state medical marijuana programs through a wide range of civil and private sanctions on medical marijuana users and their suppliers. The problem is the NEP *doesn't repeal* the federal ban on marijuana. (Case in point: on March 14, 2011, federal agents with guns drawn raided at least ten medical marijuana operations in Montana, putting workers on the ground and handcuffing them. The officers had warrants under seal.[25]) Technically, marijuana remains illegal under federal law, and the possession, cultivation, or distribution of the drug triggers a host of civil sanctions not addressed by the NEP. For example, the Department of Housing and Urban Development can deny federal housing subsidies to medical marijuana users, and pharmaceutical companies could potentially bring civil Racketeer Influenced and Corrupt Organizations Act actions against marijuana dispensaries.

The federal ban arguably preempts states from shielding marijuana users and dispensaries from sanctions imposed by private parties. For example, employers can likely skirt liability under state law for discriminating against employees who use marijuana for medical purposes. The notorious case of a Wal-Mart employee, dying of cancer and taking prescribed marijuana, illustrates the problem: Wal-Mart fired the man for violating the company's zero-tolerance drug policy, and the court dismissed his claim against the employer.[26]
This is a legal mare's nest and will continue to be so. Be mindful of the federal overlay and the fact that the NEP leaves the private sector, and state and local governments, open to criminal and civil liability, regardless of what the state and local law may provide.

It's About the Enablers

The regulation of medical marijuana is statutory, so you have to give your state enabling law a close look. (You will likely be surprised at the degree of variation among the states.) Some enabling laws are highly detailed, like California's, which in 1996 was the first law passed (later amended in 2004). As they have learned in California, it matters how the enabling law was enacted. The possession limits in the 2004 amendments were successfully challenged as violative of the California Constitution because the original voter-approved Prop. 215, the enabling law, could only be amended by the voters.[27] This raises some tough issues respecting fine-tuning legislation when operating experience points to a need for change.

Somewhere down the continuum of state enabling laws is Hawaii. Its law is a short eleven pages, enacted in 2000. As the state's medical marijuana application information says, the enabling statute basically decriminalizes possession and "does not authorize the distribution of marijuana (Dispensaries) other than the transfer from a qualifying patient's primary caregiver to the qualifying patient."[28] Maine's law may have been the shortest ever at its inception,[29] but it was revamped in 2009 through a ballot initiative.

Based on state law, you'll need to stake out the four corners of your right to regulate. (The Iowa Board of Pharmacy was asked to adopt rules relating to the medical use of marijuana pursuant to its grant of rulemaking authority, and determined that the proposed subject matter was not one that the Board was authorized by statute to address.[30]) If your state law could be improved, talk to your legislators and ask them to help.

While some states are looking to legalize marijuana for medical and even recreational use, others may be considering going the other way. Montana had been considering a repeal of its medical marijuana law but, on March 14, the Montana State Judiciary Committee voted to kill off a measure which had passed the Montana House.[31] As Judge Gideon J. Tucker said in 1866, "No man's life, liberty, or property is safe while the legislature is in session," and apparently, in Montana, neither is a person's ganja.[32] The word in Montana is the repeal could be introduced as a "blast" motion; if approved, it would go straight to the Senate floor. More recently, medical marijuana supporters in the state were reportedly lobbying the governor to veto the bill and seeking a voter initiative to block stricter regulations.[33]

Other states, such as Washington, are working to refine their enabling laws.[34] New Jersey, more than a year after the enactment of its Compassionate Use Act, has yet to promulgate regulations implementing the law.[35] In sum, tread carefully, as this is a lubricious legislative landscape.

The Line Between Licensing and Zoning

Zoning is about land use; licensing is about regulating business and other non-land-impacting activities. Local medical marijuana programs sometimes blur the line. In Maine, the state law limits a user's or caregiver's cultivation to six live plants.[36] This is not a zoning issue, and if local regulation is even needed (it may not be, as the state law is probably self-executing), it should be by a general ordinance. No states prohibit a distancing requirement, so if you want to avoid concentrations of dispensaries or collectives, you might require that they be located a specified distance (e.g., at least 1,000 feet) from each other. This is a zoning matter.

Adopt a Strong Purpose Section and Detailed Findings. Don't scrimp here: lay out what the state law requires and allows, and describe what you wish to accomplish with the regulations. The City of Clare, Michigan (reciting the studies and experience elsewhere) has some compelling findings about the blighting and secondary effects of marijuana operations, including:

> The experience in the State of California, a state that approved the medical use of marijuana more than a decade ago, is that concentrations of marijuana

distribution activity lead to the following significant and serious secondary effects:
California law enforcement reported in 2009 (White Paper), that nonresidents in pursuit of marijuana, and out of area criminals in search of prey, are commonly encountered just outside marijuana dispensaries, as well as drug-related offenses in the vicinity—like resales of products just obtained inside—since these marijuana centers regularly attract marijuana growers, drug users, and drug traffickers. Sharing just-purchased marijuana outside dispensaries also regularly takes place. There have been increased incidents of crime, including murder and armed robbery.[37]

Secondary effects are the results of certain uses. The effects with medical marijuana dispensaries, as identified by the California Police Chiefs Association, include: attacks on and murders of dispensary operators to get the large amounts of cash kept onsite, drug dealing, sales to minors, loitering, traffic congestion, increased noise, robberies of customers, firearms on the properties and use by perpetrators, unhealthful mold from large indoor grow-operations, money-laundering, and the list goes on.[38] You probably do not have the time or money to replicate the California study or any other, but you can cite it and, by doing so, might just save the day if your regulations are challenged.

Define Everything You Can. This is new territory, so err on the side of more definitions. Spend the time needed to draw hard lines where you can. (The City Council in Peoria City, Arizona recently spent an hour and a half just discussing the definition of what it meant to be out in public when it came to smoking marijuana.[39])

What types of marijuana can be cultivated, kept and sold (probably not hashish, right)? What about derivatives and combined products (remember Alice B. Toklas brownies[40])? What is a collective? What is a dispensary? If you use separation requirements, what counts as a school, a park, a playground, and a place where children gather?

Identify Locations. State where marijuana uses (collectives, dispensaries, and cultivation) can and cannot be located. Decide whether these uses are appropriate for a "home occupation" use. Consider exemptions for small quantities grown and used by individuals, and limit, perhaps, the floor area that can be devoted to cultivation so that large grow-operations are prevented. Maricopa, Arizona asked its citizens for their input on extensive changes to the City's home-occupation definition to address medical marijuana. Here is the draft, with the new language in italics:

Lest you forget, it is still a federal crime to cultivate, possess, or use marijuana. This causes all kinds of problems at the state and local level.

Sec. 433 HOME OCCUPATION: An activity carried on by the occupant of a dwelling as a secondary use, including professional and semi-professional offices, when conducted and entered from within the dwelling, in connection with which there is no public display of stock-in-trade upon the premises, not more than one non-resident of the premises is employed and not more than one-fourth of the floor area of one story of the main building or a detached home workshop of not more than 200 square feet in area is used for such home occupation; and provided that the residential character of the dwelling is not changed by the use and that such occupation does not cause any sustained or unpleasant or unusual noises or vibrations, or noxious fumes or odors, or cause any parking or traffic congestion in the immediate neighborhood. *Medical marijuana dispensaries, or cultivation, or marijuana infusion is strictly prohibited under a home occupation business. In addition, the following guidelines must be adhered to:...*[41]

Distancing Requirements. Generally, distancing or separation requirements for marijuana cultivation and dispensing seem to mimic those imposed on adult entertainment uses. Enabling legislation in some states requires such restrictions, and these requirements can be helpful in avoiding the concentration of uses and adverse impacts on sensitive areas. Lists and a map of available sites can prevent misunderstandings.

Cap the Number of Facilities. Boulder, Colorado has more marijuana dispensaries than Starbucks coffeehouses and liquor stores combined. Los Angeles caps the number of allowed marijuana dispensaries at 70, and allocates these for each of its 35 planning areas. Service levels based on the number of residents range from one per 35,000 residents (San Francisco) to 57,000 (Los Angeles) to 105,000 (Oakland).

Prohibit Nonconforming Uses from Continuing. Many local regulations do not allow nonconforming medical marijuana uses to continue indefinitely. Some require an immediate shut-down, while others allow an extension of time to comply. Los Angeles had 800 to 1,000 when it capped the number, but allowed the 137 that opened after a moratorium was declared late in 2007 to continue.

Other Aspects to Consider. Can users consume the marijuana onsite? Can children enter? Will there be a requirement for the operator to provide security, to prevent crime? What about signage, hours of operation, size, location (inside, or outside only) and screening of the growing area? Will there be a limit on the number of plants?[42]

Conclusion

Without question, cannabis has proven palliative effects, and can extend the lifespan and improve the quality of life for many patients. The challenge for municipal lawyers is to provide, in states that have legalized the cultivation, dispensing, possession, and use of the

cont'd. on page 36

Reefer Madness

cont'd. from page 9

drug, for these new uses in ways that meet the needs of the patients, while avoiding a blighting impact on communities and the promotion of use as a recreational intoxicant when the public finds that unacceptable. That safe passage, that middle ground between accessibility and restraint, will be hard to find, but the experience of other communities provides us with something of a lodestar.

Notes

1. Reefer Madness (Motion Picture Ventures, 1936). This 68-minute film is worth a look because it represents what many people believed at the time. The film is available for free online viewing; see http://video.google.com/videoplay?docid=-7685192415707087423#.
2. *Id. See* http://drugpolicycentral.com/bot/pg/propaganda/reefer_madness_movie_script.htm#INTRO
3. Easy Rider (Columbia Pictures Corp., 1969). Here's a slide show with the song, http://www.youtube.com/watch?v=EvGJvzwKqg0. See if you can watch and listen without singing along.
4. National Commission on *Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding, History of the Intoxicant Use* (1972), available at http://www.druglibrary.org/schaffer/library/studies/nc/nc1b.htm.
5. Patrick Stack with Claire Suddath, *A Brief History of Medical Marijuana*, TIME, Oct. 21, 2009 at http://www.time.com/time/health/article/0,8599,1931247,00.html (last visited May 09, 2011).
6. Ernest L. Abel, *Marijuana: The First Twelve Thousand Years: Cannabis Comes to the New World* (1980) at http://www.druglibrary.org/Schaffer/hemp/history/first12000/4.htm (last visited May 09, 2011).
7. North American Industrial Hemp Council, *Hemp Facts* (Oct. 1997) at http://www.naihc.org/hemp_information/hemp_facts.html#history (last visited May 09, 2011).
8. *Id.* He was distilling whiskey at the same time.
9. ProCon.org, *15 Legal Medical Marijuana States and DC, Laws, Fees, and Possession Limits* at http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (last visited May 09, 2011).
10. For the details of regulatory history, see *Gonzales v. Raich*, 545 U.S. 1, 10-16 (2005).
11. *See generally*, Drug Policy Alliance, *Myths and Facts About Marijuana*, at http://www.drugpolicy.org/marijuana/factsmyths (last visited May 09, 2011).
12. Jennifer Robinson, *Decades of Drug Use: Data From the '60s and '70s*, Gallup, Inc., July 2, 2002 at http://www.gallup.com/poll/6331/decades-drug-use-data-from-60s-70s.aspx (last visited May 09, 2011).
13. He admitted that when he was in England, he "experimented with marijuana a time or two, and didn't like it. I didn't inhale and I didn't try it again." *Clinton Tried Marijuana as a Student, He Says*, The New York Times, Mar. 30, 1992 at http://www.nytimes.com/1992/03/30/0news/30iht-bill_1.html (last visited May 09, 2011).
14. *Decades of Drug Use: Data From the '60s and '70s, supra* note 12.
15. 545 U.S. 1 (2005).
16. *Id.* at 32-33.
17. *Oregon Medical Marijuana Program Statistics*, Oregon Health Authority, Jan. 01, 2011 at http://public.health.oregon.gov/DiseasesConditions/ChronicDisease/MedicalMarijuanaProgram/Pages/data.aspx (last visited May 09, 2011).
18. Alaska, Arizona, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.
19. *15 Legal Medical Marijuana States and DC, Laws, Fees, and Possession Limits, supra* note 9, contains a useful chart. A good place to start your research is Patricia E. Salkin & Zachery Kansler, *Medical Marijuana Meets Zoning: Can You Grow, Smoke and Sell that Here?* Albany Law School Research Paper No. 33, 62 Plan. & Envtl. L. 3 (Aug. 2010).
20. Quinnipiac University, *Death Penalty Support at New High in Connecticut, Quinnipiac University Poll Finds; Voters High On Medical Marijuana, Sunday Liquor Sales* (Mar. 10, 2011) at http://www.quinnipiac.edu/x1296.xml?ReleaseID=1566 (last visited May 09, 2011). Support is over 70 percent among every group in the survey.
21. *See, e.g.*, U.S. v. Rodriguez-Camacho, 468 F.2d 1220, 1222 (9th Cir. 1972) (it was sufficient to support statute proscribing possession of a controlled substance, including marijuana, that Congress had rational basis for making its findings).
22. Controlled Substances Act, 21 U.S.C. §§ 841(a)(1), 844(a) (West 2011).
23. Memorandum from David W. Ogden, Deputy Att'y Gen., to Selected U.S. Att'ys (Oct. 19, 2009), available at http://blogs.usdoj.gov/blog/archives/192.
24. Robert A. *Mikos, A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 201 Stan. L. & Pol'y Rev. 101 (2011). This paragraph in the text is quoted in part and paraphrased in part from the abstract of this article posted on SSRN.
25. *Feds raid Montana medical marijuana businesses*, Bozeman Daily Chronicle, Mar. 14, 2011, at http://tinyurl.com/3qr3g87 (last visited May 09, 2011).
26. Casias v. Wal-Mart Stores, Inc., No. 1:10–CV–781, 2011 WL 487591 (W.D. Mich. Feb. 11, 2011).
27. People v. Kelly, 47 Cal. 4th 1008, 222 P.3d 186 (Cal. 2010).
28. Hawaii Narcotics Enforcement Division, *Patient Information for the Authorized Medical Use of Marijuana*, at http://tinyurl.com/3kv3kdw (last visited May 09, 2011).
29. Me. Rev. Stat. Ann. tit. 22, §2383-B (West 2011).
30. Order, Petition requesting medical marijuana rulemaking, Case No. 2010-91 (Sept. 28, 2010).
31. *Montana Medical Marijuana Repeal Bill Dead in Committee*, KECI, March 14, 2011, at http://www.nbcmontana.com/news/27190813/detail.html (last visited May 09, 2011).
32. The "Marijuana Dictionary" lists 420 slang words for marijuana; see http://www.marijuanadictionary.com.
33. Stephen Dockery, *Marijuana industry looks to stop strict MT reform*, Forbes.com, May 09, 2011 at http://tinyurl.com/44xtjw2 (last visited May 12, 2011).
34. *State House takes up medical marijuana law*, Kitsap Sun, Mar. 14, 2011, at http://www.kitsapsun.com/news/2011/mar/14/state-house-takes-up-medical-marijuana-law (last visited May 09, 2011).
35. Nicole DiMaria, *The New Jersey Compassionate Use Medical Marijuana Act - Questions Abound*, Garden State FOCUS (May/June 2010) at http://tinyurl.com/3jnnaby; the draft regulations are

available at http://www.state.nj.us/health/documents/medical_marijuana_proposal.pdf.
36. Me. Rev. Stat. Ann. tit. 22 §558-C (West 2011).
37. Ken Hibl, *Agenda Report re: Ordinance 2010-009*, City of Clare, MI (Nov. 10, 2010) at http://tinyurl.com/3av4u93 (last visited May 09, 2011), citing *White Paper on Marijuana Dispensaries*, California Police Chiefs Association's Task Force on Marijuana Dispensaries, 2009.
38. *White Paper*, *supra* note 37, available at http://tinyurl.com/42u74qh (last visited May 09, 2011).
39. Sonu Munshi, *Peoria City Council approves medical-marijuana regulations*, The Arizona Republic, Feb. 17, 2011.
40. A recipe for marijuana-laced brownies appears in the Alice B. Toklas Cook Book (1954).
41. On April 5, 2011, the City Council approved Text Amendment (TXT10-04) Medical Marijuana Ordinance, including changes to the home occupation provision.
42. The City of Los Angeles has a highly detailed ordinance which may prompt your thinking on what to include—see Article 5.1, Medical Marijuana Collective, at http://tinyurl.com/2dvuvv (last visited May 09, 2011). ML

USERRA

cont'd. from page 13

26. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284 (1946).
27. 38 U.S.C. § 4302 (West 2011).
28. 20 C.F.R.§ 1002.7 (2005).
29. Thirty-seven states have enacted laws mandating military leave for local government employees.
30. For example, Kansas mandates 12 days of annual leave; West Virginia mandates 30 days of annual leave.
31. Arkansas, Florida, Georgia, North Dakota, Pennsylvania, South Carolina, Tennessee, and West Virginia mandate some form of paid military leave for municipal employees in *addition* to regular annual leave.
32. Connecticut, Delaware, Illinois, Nebraska, and Ohio mandate additional compensation ("gap" pay) for municipal employees who incur a loss of income based upon military service.
33. "The current reliance on the reserve components as an operational force, however, is something entirely new, unforeseen, and unplanned." *Operational Force Report*, *supra* note 10 at 51.
34. *Id.* at 1.
35. In FY 2001, the National Guard and Reserve performed 12.7 million man-days of service; in FY 2006, the number had increased to 61.3 million man-days.
36. *Operational Force Report*, *supra* note 10 at 5.
37. *Id.* at 67.
38. *Id.* at 5.
39. U.S. Dept. of Defense, *Quadrennial Defense Review Report* (Feb. 6, 2006), iv, available at http://www.defense.gov/qdr/report/report20060203.pdf (last visited May 09, 2011).
40. *Id.*
41. *New World Coming: American Security in the 21st Century: Major Themes and Implications*, The Phase I Report on the Emerging Global Security Environment (U.S. Commission on National Security/21st Century, 1999), 3,4.
42. In my home state of Arkansas, police officers are required to take 12 weeks (480 hours) of training to meet certification requirements.
43. 38 U.S.C. § 4312 (West 2011).
44. Nichols v. Dep't of Veterans Affairs, 11 F.3d 160 (Fed. Cir. 1993).
45. An audit of the 2008 fiscal year of the City of North Little Rock, Arkansas showed outlays exceeding $48,000 for *additional* military leave of mobilized employees.
46. Ohio has developed an interesting statute that provides up to $500 of monthly gap compensation for mobilized municipal employees, unless the municipality affirmatively opts to pay a greater amount. Ohio Rev. Code Ann. § 5923.05 (West 2011).
47. In my military experience, I have crossed paths with many professionals and executives who choose to serve in lower enlisted ranks because of the camaraderie of friends and their personal commitment to assume more dangerous missions. While I have always respected their dedication, their choice could result in excessive liability for gap compensation, absent limitations.
48. The mission statement of the United States Department of Veterans Affairs quotes a phrase from the closing paragraph of President Abraham Lincoln's second inaugural address: "With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, *to care for him who shall have borne the battle and for his widow and his orphan*, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations."
49. It should be mentioned that the wars in Iraq and Afghanistan are distinctive in that they are the only wars conducted in history while federal taxes were *reduced*.
50. S. 568, 112th Cong. (1st Sess. 2011).
51. *Id.* at § 2(a) (proposed sec. 2401(a)(2)).
52. *Id.* at § 2(a) (proposed sec. 2401(b)(3)).
53. Funding for S. 568 is capped at $5,000,000. *Id.* at § 2(a) (proposed sec. 401(e)). Further, the title of S. 568 identifies it as a pilot program.
54. Noting the military advantage of employing National Guard and Reserve servicemembers with civilian skills, the Commission on the National Guard and Reserves stated, "... [t]he complementary value of their military and civilian skills ... add significant value to the nation ... Reservists are city planners, power plant operators, waterworks directors, computer specialists, fire chiefs, and police chiefs." *Operational Force Report, supra* note 10 at 70. ML

Federal

cont'd. from page 18

heart palpitations. She reports a family history of heart problems. Mom died at age 43. Placed on aspirin regime."). Employers should preempt overly detailed doctor's notes and include the "safe harbor" language in their employee handbook. The language should be included in any section that covers sick leave, FMLA, fitness-for-duty, light duty, short-

cont'd. on page 38