



# 11th Hour CLE

2018 Video Replay Series

## Session 2

Thursday, December 27, 2018





**11<sup>th</sup> Hour CLE**  
**2018 Video Replay Series**

**Session 2**  
**December 27, 2018**

<b>1 p.m.</b>	<b>Current Issues In Employment Law</b> Stephen E. Imm, Esq., <i>Finney Law Firm, LLC</i>	<b>TAB A</b>
<b>2 p.m.</b>	<b>Immigration 101</b> Jennifer M. Snead, Esq., <i>Taft Stettinius &amp; Hollister LLP</i>	<b>TAB B</b>
<b>3 p.m.</b>	<b>Break</b>	
<b>3:15 p.m.</b>	<b>Medical Marijuana</b> Brian Higgins, Esq., <i>Frost Brown Todd, LLC</i>	<b>TAB C</b>
<b>4:15 p.m.</b>	<b>Adjourn</b>	

# TAB A



# Stephen E. Imm

Mr. Imm is a Cincinnati native, and has been in private practice since 1987. He began his career with the Cincinnati firm of Taft, Stettinius & Hollister. Before joining our firm, Steve was a Partner at Katz, Greenberger & Norton in Cincinnati, where he was in charge of the firm's [labor and employment law practice](#), among other things.

Steve is an experienced trial lawyer who has conducted more than 60 jury trials in numerous State and Federal Courts. He has also won several cases at the highest appellate levels that have helped to shape the current state of employment law and landlord/tenant law. In *Sabo v. Schott*, for instance, Steve argued successfully before the Ohio Supreme Court that employees in Ohio should not be subject to employment termination for giving truthful sworn testimony, even if their testimony is adverse to their employers. This ruling significantly expanded the “public policy” exception to Ohio’s employment-at-will doctrine.

In *CMHA v. Morgan*, Steve again successfully argued before the Ohio Supreme Court, this time vindicating the rights of Ohio property owners to promptly re-take possession of rental properties from tenants who had violated their rental agreements.

Steve lives in the Mt. Washington section of Cincinnati, and has three children.

## **Areas of Concentration**

Labor and Employment Law  
Civil Litigation  
Landlord/Tenant Law  
Employment Discrimination & Harassment

## **Education**

University of Cincinnati, B.A. Summa Cum Laude, 1984  
Georgetown Law School, J.D. 1987

## **Admitted to Practice**

State of Ohio  
United States District Court, Southern District of Ohio  
United States Sixth Circuit Court of Appeals

## **Memberships, Honors and Community Involvement**

Phi Beta Kappa  
Adjunct Professor, University of Cincinnati, 1997 – 2003  
Federal Bar Association  
Ohio Employment Lawyers Association  
Cincinnati Employment Lawyers Association  
Ohio State Bar Association  
Cincinnati Bar Association



**THE WEINSTEIN EFFECT:**

**WHAT BUSINESSES AND EMPLOYEES CAN  
LEARN FROM HOLLYWOOD'S SEXUAL  
HARASSMENT PROBLEM**

FINNEY LAW FIRM

*Making a difference.*

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# Sexual Harassment

A Brief History in Pictures

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*Williams v. Saxbe (1976)*

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*Meritor Savings Bank v. Vinson (1986)*

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## October 15, 2017: A Movement is Born

- Within a week, #MeToo was in 1.7 million tweets
- 85 countries had at least 1,000 #MeToo tweets
- Facebook had more than 12 million posts/comments/reactions regarding #MeToo in less than 24 hours, by 4.7 million users
- 45% of Facebook users in the United States had a friend who posted #MeToo

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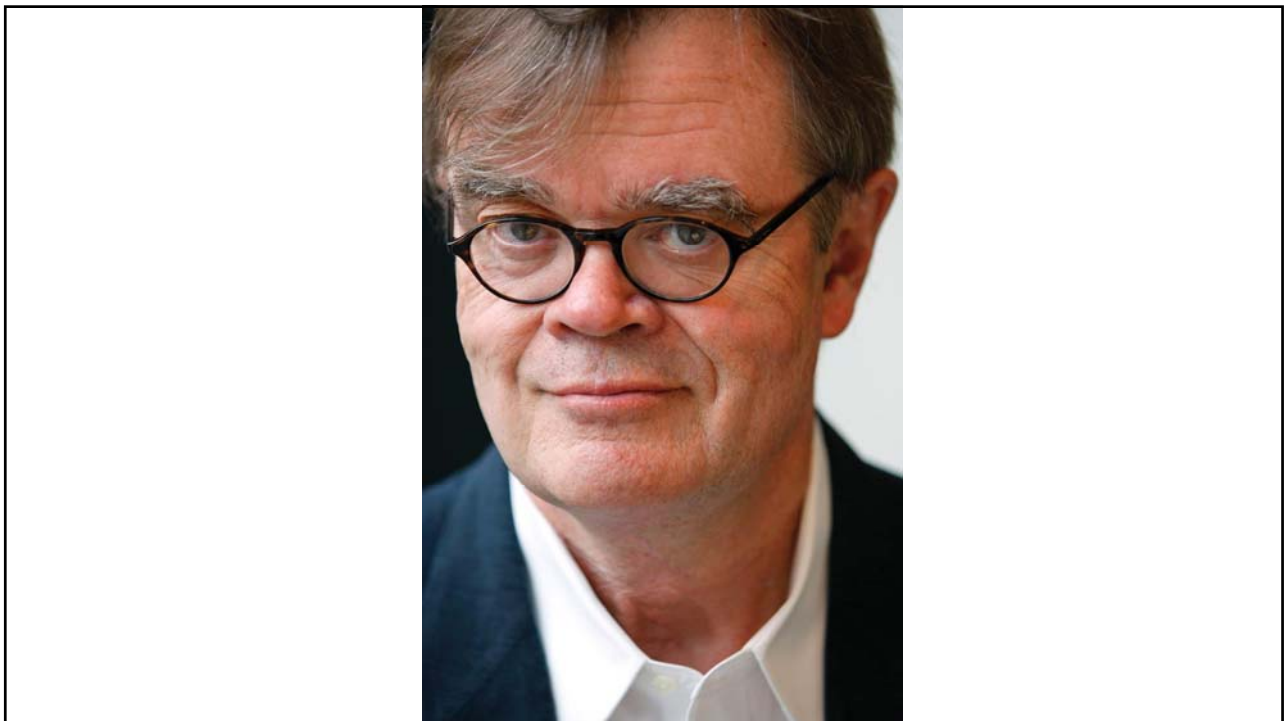
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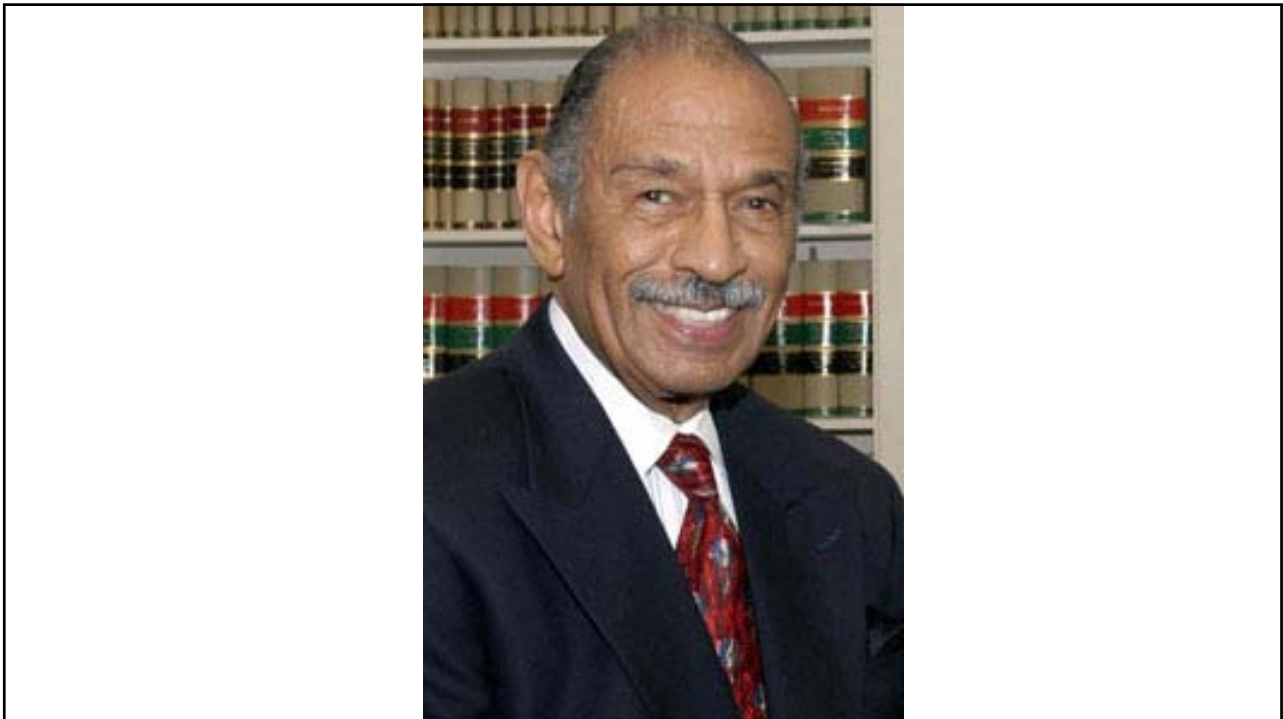
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## **Lessons of Harvey Weinstein and the #MeToo Movement**

- Sexual harassment is NOT a relic of the "Mad Men" era
- Historically, sexual harassment has been significantly under-reported
- Sexual harassment can be committed by ANYONE
- More than anything else, sexual harassment is about POWER

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## **Some Less Well Known Facts About Sexual Harassment**

- Sexual harassment can be committed by persons of either gender
- Sexual harassment does not depend on sexual orientation
- Employers can be liable for harassment committed against one of its employees by someone who is NOT an employee
- Employers can be liable for harassment committed away from the workplace, and outside of business hours

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## What IS Sexual Harassment?

Common Understanding vs. Legal Definition

“Hey, that’s sexual harassment!”

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## Sexual Harassment: Legal Definition

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, or
- Submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or
- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

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## Types of Sexual Harassment

- Quid pro Quo
- Hostile Work Environment

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## Conduct is **NOT** Sexual Harassment if:

- In a hostile work environment case, the conduct is not “severe or pervasive”
- The conduct is not “unwelcome”

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## **When is Conduct Sufficiently “Severe or Pervasive” to Constitute Sexual Harassment?**

- Title VII is not a "civility code"
- Conduct must be severe OR pervasive
- The more severe the conduct, the less it takes to create a hostile environment
- Physical vs. verbal conduct

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## **Difficulties in Determining Whether Conduct is “Unwelcome”**

- The power dynamic inherent in many workplace relationships
- Human beings are imperfect judges of how their conduct is perceived by others
- "I thought we were friends"

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## When is an Employer Liable for Sexual Harassment Committed by its Employee?

- Is the harasser a "supervisor"?
- Did the harassment result in a "tangible employment action" (e.g. discharge, demotion, decision affecting pay or advancement)?

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## Harassment Committed by "Supervisor"

- Who is a "supervisor"?
- Employer is liable for harassment committed by a supervisor unless:
  - No tangible employment action was taken against the employee, and
  - The employer can prove the Faragher/ Ellerth affirmative defense

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## **The Faragher/ Ellerth Affirmative Defense**

- The employer exercised reasonable care to prevent and promptly correct harassing behavior; and
- The employee unreasonably failed to take advantage of the preventative and/or corrective opportunities provided by the employer

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## **Minimum Steps Employer Must Take to be Able to Assert the Affirmative Defense**

- Communicate a clear and effective sexual harassment policy to all employees
  - Anti-retaliation provision
  - “Qualified” assurance of confidentiality
  - Clear reporting procedure
- Promptly, fairly, and thoroughly investigate all complaints
- Take effective remedial action when warranted
- How to address false allegations?

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## Harassment Committed by a Co-worker

- Employer is liable only if:
  - It knew *or should have known* harassment was occurring, and
  - It failed to take prompt and appropriate corrective action
  
- What is “appropriate corrective action”?

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## How to Make Sure Your or Your Client's Organization is NOT in the Next Sexual Harassment Headline

- "Do the right thing“
  - BECAUSE it's the right thing
- Create a culture of appropriate workplace interaction
  - No "locker room talk" in the workplace
- Create a culture that encourages the reporting of harassment
  - Zero tolerance for retaliation
- Training on how to spot and report harassment
- “Harassment audits”

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# TAB B



# Jennifer M. Snead

ASSOCIATE / CINCINNATI

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Jennifer focuses her practice on U.S. immigration law. Her experience includes advising clients on a variety of immigration matters in an array of industries, including temporary visas, permanent residence and U.S. citizenship. She has participated in panel presentations for immigration practitioners and has led U.S. immigration presentations at business conferences and universities. Prior to joining Taft, Jennifer practiced U.S. immigration law in New York and London.

Jennifer is a member of the American Immigration Lawyers Association (AILA), Ohio and Rome District-EMEA chapters. She served on several AILA Rome District-EMEA chapter committees, and was named a "Committee Member of the Year" for her services to the chapter. She has been accepted into ArtsWave's BOARDway Bound program, which prepares business professionals for board service with arts organizations.

Jennifer received her J.D. from Fordham University School of Law, where she was business editor of the *Fordham Intellectual Property, Media & Entertainment Law Journal*. She received her B.S., *cum laude*, from The Ohio State University, Fisher College of Business.

## Professional Affiliations

- American Immigration Lawyers Association Ohio and Rome District - EMEA chapters
- Cincinnati Bar Association Member

## Community Involvement

- ArtsWave BOARDway Bound Program, 2017
- Contemporary Dance Theater  
Board Member



## Practices

Immigration and Citizenship

## Industries

Health Care and Life Sciences  
Industrial Manufacturing  
Insurance  
Media and Entertainment  
Technology  
Construction  
Energy and Regulated Industries  
Gaming  
Nonprofit and Tax-Exempt  
Organizations

## Education

Fordham University School of Law  
(2009)  
The Ohio State University, Fisher  
College of Business (2003)

## Admissions

State - Ohio  
State - New York

# Immigration 101

Jennifer Snead

June 20, 2018

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## Immigration Statuses

- Nonimmigrants
- Immigrants
- Citizens

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## Nonimmigrant Status

- Government agencies
  - Department of Homeland Security
    - U.S Citizenship and Immigration Services (USCIS)
    - Customs and Border Protection (CBP)
    - Immigration and Customs Enforcement (ICE)
  - Department of State
    - U.S. consular posts abroad

## Example Application Process



## Visa Waiver Program

- Electronic System for Travel Authorization (ESTA)
- Business or Tourism
- 90 days

## Permissible Activities for Visitors

- Tourism
- Medical treatment
- Short course of study
- Amateur entertainers and athletes
- Commercial transactions
- Negotiate business contracts
- Consult with business associates
- Litigate
- Participate in conventions, conferences or seminars
- Independent research

## Temporary Work Categories

- H-1B – Specialty occupations
- L-1 – Intracompany transferees
- E-2 – Investors
- TN – Mexican and Canadian professionals
- O-1 – Individuals with extraordinary ability
- H-2A – Temporary agricultural workers
- H-2B – Other temporary workers

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## F-1 Students

- Designated School Official (DSO)
- On-campus employment
- Practical Training
  - Curricular Practical Training
  - Optional Practical Training

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## Admission to the U.S.

- Entry documents
  - Lawful record of admission (I-94)
  - Entry stamp
- Admission errors

## Immigrants

- May work and reside permanently in the U.S.
- Not U.S. citizens but may be eligible for citizenship
- Categories include:
  - Family-based
  - Employment-based
  - Investment
  - Diversity Visa Lottery
  - Refugee/Asylee
- Must maintain residence in U.S.

# Green Card



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# Immigrant Visa



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## U.S. Citizenship

- May be acquired
  - At birth
    - Birth in the U.S.
    - Birth abroad to a U.S. citizen parent
  - Through naturalization
- Benefits
  - Voting
  - Jury duty
  - U.S. passport
  - Apply for federal jobs
  - Keep your residency

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## Naturalization Ceremony



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## Immigration Complications

- Changes in relationships
  - Divorce
  - Remarriage
  - Child aging out
- Changes in employment
  - Different employer
  - Different position
  - Different location

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## Immigration Complications

- Inadmissibility and deportability
  - Illegal activities
    - Crimes involving moral turpitude
    - Violations of controlled substance laws
    - DUIs
  - Material misrepresentation
- Unlawful presence
- Maintenance of status

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## Hot Topics – The Visa Bulletin

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
F1	08APR11	08APR11	08APR11	01JUN97	22MAR06
F2A	08JUN16	08JUN16	08JUN16	08MAY16	08JUN16
F2B	22JUN11	22JUN11	22JUN11	15FEB97	15JAN07
F3	15MAR06	15MAR06	15MAR06	01OCT95	08APR95
F4	22OCT04	22OCT04	15MAR04	08JAN98	22FEB95

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## Hot Topics – The Visa Bulletin

Employment-based	All Chargeability Areas Except Those Listed	CHINA-mainland born	EL SALVADOR GUATEMALA HONDURAS	INDIA	MEXICO	PHILIPPINES	VIETNAM
1st	C	01JAN12	C	01JAN12	C	C	C
2nd	C	01SEP14	C	26DEC08	C	C	C
3rd	C	01JUN15	C	01MAY08	C	01JAN17	C
Other Workers	C	01MAY07	C	01MAY08	C	01JAN17	C
4th	C	C	15DEC15	C	22OCT16	C	C
Certain Religious Workers	C	C	15DEC15	C	22OCT16	C	C
5th Non-Regional Center (C5 and T5)	C	01AUG14	C	C	C	C	01AUG14
5th Regional Center (I5 and R5)	C	01AUG14	C	C	C	C	01AUG14

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## Hot Topics - DACA

- Deferred Action for Childhood Arrivals
- Benefits
  - Parole
  - Employment authorization
  - Travel document
- Ruling against program rescission on April 24, 2018 – DHS has 90 days to provide justification for termination

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## Hot Topics - Travel Ban

- Travel Ban 3.0
  - Iran, Libya, North Korea, Somalia, Syria, Venezuela, Yemen
  - Exemptions
  - Waivers
- *Trump v. Hawaii* – SCOTUS heard final oral arguments on April 25, 2018

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## Hot Topics – Travel Ban

Country	Nonimmigrant Visas	Immigrant and Diversity Visas
Iran	No nonimmigrant visas except F, M, and J visas	No immigrant or diversity visas
Libya	No B-1, B-2, and B-1/B-2 visas	No immigrant or diversity visas
North Korea	No nonimmigrant visas	No immigrant or diversity visas
Somalia		No immigrant or diversity visas
Syria	No nonimmigrant visas	No immigrant or diversity visas
Venezuela	No B-1, B-2 or B-1/B-2 visas of any kind for officials of the following government agencies Ministry of Interior, Justice, and Peace; the Administrative Service of Identification, Migration, and Immigration; the Corps of Scientific Investigations, Judicial and Criminal, the Bolivarian Intelligence Service; and the People's Power Ministry of Foreign Affairs, and their immediate family members.	
Yemen	No B-1, B-2, and B-1/B-2 visas	No immigrant or diversity visas

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## Hot Topics - BAHA

- Buy American and Hire American Executive Order
- USCIS initiatives
  - Focus on H-1Bs
- Department of State initiatives
  - Updates to Foreign Affairs Manual
- Department of Justice
  - Memorandum of Understanding with USCIS

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## Hot Topics – ICE

- ICE raids
- I-9 audits
  - Increase in audits
  - ICE seeking higher penalties

## Hot Topics

- TN profession of Economist
- Change in accumulation of unlawful presence for nonimmigrants admitted for D/S
- Longer processing times
- USCIS scrutinizing wage surveys
- USCIS interviews for employment-based adjustment applications

## What's to Come?

- NAFTA?
- Changes to the H-1B program
- Elimination of immigrant categories for certain family members
- Heightened scrutiny
- Increased audits

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## Questions?



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# TAB C



# Brian F. Higgins

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## Associate

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### Assistant

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### PRACTICE AREAS

Business Succession Planning  
Contract Negotiation, Preparation,  
and Review  
Corporate Governance  
Corporate/Business  
Health Law  
Hospital and Health Care Finance  
Mergers and Acquisitions, Joint  
Ventures and Direct Investment  
Regulated Business

### CONCENTRATIONS

Health Care

### INDUSTRIES

Health Care

### BAR MEMBERSHIPS

Ohio, 2016

### CLERKSHIPS

New York State Supreme Court,  
Judge John Curran

### EDUCATION

University of Cincinnati, College of  
Law, J.D., 2015

Brian is an associate in Frost Brown Todd's regulated business group. His focus on the health care industry provides him an opportunity to advise business and health care entities in corporate matters, formation and structuring, contract negotiation, and regulatory compliance. Prior to joining the firm, Brian completed a corporate law fellowship working as corporate counsel to Medpace, Inc., a clinical research organization focused on the development of pharmaceuticals and medical devices. Brian developed an interest in the health care industry after serving as a Legal Intern to The Christ Hospital's legal department.

Brian graduated from the University of Cincinnati's College of Law where he was a member of the Moot Court Honor Board and an Associate Editor on the Immigration and Nationality Law Review. He finished his first year of law school at Northern Kentucky University's Chase College of Law and finished in the top 10% of his class.

## Experience

Brian has formed fully-operational international subsidiary companies in countries all over the world. He has assisted biotechnology start-up companies draft their operating agreements while maintaining all of their corporate governance documents and contracts. Brian has regularly negotiated consulting agreements for doctors and medical writers, and confidentiality agreements to protect pharmaceutical assets. Brian has developed knowledge on Ohio's medical marijuana law and provides updates on the regulations potentially impacting physicians and patients. In addition, he produces advisories related to Ohio's industry regulations for medical marijuana cultivators, processors, and dispensaries.

# Brian F. Higgins

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- Dean's List - Spring 2014, Fall 2014, Spring 2015
- Moot Court Honor Board Member
- Associate Editor of the Immigration and Nationality Law Review

Denison University, B.A., Spanish, 2009

- Dean's List Fall 2006, Spring 2007, Spring 2008
- National Spanish Honor Society Inductee (Sigma Delta Pi)

## Memberships & Affiliations

Ohio State Bar Association

## Recent Blog Posts

Ohio Physician's Guide to Cannabis Compliance 2.0: Budding Issues for Ohio's Medical Marijuana Physicians

CMS Removes Gag From Mouths of Pharmacists, as Ohio and Other States Follow Suit.

CMS Pushes Home Health Agencies into the Choice Demonstration

Grandma Wants Special Brownies? Ohio Nursing Facilities Prepare for Medical Marijuana

Ohio Physician Alert: Application Available to Become Certified to Recommend Medical Marijuana

Ohio Hospitals: Are You Ready for Medical Marijuana?

Green Grass in the Bluegrass: Kentucky's Medical Marijuana Law

Dramatic Shift in Federal Enforcement Priorities Related to Legalized Marijuana Use

Last-Minute Tips for Ohio's Medical Marijuana Processor Applicants

CMS' Cuts to the 340B Drug Payment Program Cause Hospital Up roar

## FBT Publications

May 4, 2017

The Green Rush is on: Don't be left out!

*Legal Update*

March 20, 2017

Ohio Cultivates Marijuana Dispensary Rules as White House Sends Smoke Signals of Approval

*Legal Update*

March 7, 2017

Huge Payday for Insurance Company under the Affordable Care Act's Exchanges

*Legal Update*

January 31, 2017

Ohio Releases Proposed Rules for Medical Marijuana Processors

*Legal Update*

# Brian F. Higgins

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January 23, 2017

High Street Releases Proposed Rules for Ohio's Medical Marijuana Cultivators

*Legal Update*

December 20, 2016

Highlights of Medical Marijuana Proposed Rules for Ohio Dispensaries and Physicians

*Legal Update*

December 20, 2016

What will Happen to the Affordable Care Act Under a Trump Administration? (Part 1)

*Legal Update*

October 3, 2016

Ohio's Medical Marijuana Law

*Legal Update*

## News

March 16, 2018

Is home delivery for medical marijuana coming to Kentucky?

*WCPO*

Volume 4, 1st Quarter, 2018

Ohio Hospitals: Are you ready for medical cannabis?

*Canna Healthcare Magazine*

March 5, 2018

Will Ohio's medical pot program go up in smoke?

*WCPO, Channel 9*

December 22, 2016

How HHS Secretary Nominee Price's plan could change ACA forever

*Employee Benefit Adviser*

## FBT Events

February 10, 2017

Affordable Care Act Forum

November 15, 2016

VonLehman Construction Insights 2016

## Press Releases

August 26, 2016

Brian Higgins Joins Frost Brown Todd's Health Law Practice in Cincinnati



# Brian F. Higgins

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## Non-FBT Publications And Events

Published book review (2013) in the Immigration and Nationality Law Review's national publication about Ediberto Roman's book titled "Those Damned Immigrants: America's Hysteria over Undocumented Immigrants."

Ohio Hospital Association Annual Conference, "Medical Marijuana and The Opioid Crisis: Risk Management for Hospitals" - June 2018



## Ohio's Medical Marijuana Law

*Cincinnati Bar Association - Brown Bag Series*

Brian Higgins, Esq.  
October 3, 2018

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## Brian Higgins – Frost Brown Todd



- 1) Healthcare/Corporate Law Attorney
  - a. Stark law
  - b. Anti-kickback statute
  - c. Medicare and Medicaid fraud and abuse (overpayments, appeals)
  - d. HIPAA and state privacy laws
  - e. Medical marijuana law
  - f. Healthcare corporate transactions
  
- 2) Past Healthcare Law Experience
  - a. The Christ Hospital (legal intern)
  - b. Medpace, Inc. (corporate attorney)



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## Frost Brown Todd Healthcare Team



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## Medical marijuana law experience

- 1) How did it all start?
  - a) Cutting-edge firm
  - b) Knew questions were coming
- 2) Types of experience:
  - a) Advised on Certificate to Recommend
  - b) Developed policies and procedures for providers
  - c) Drafted informed consent forms
  - d) Drafted waivers of liability
  - e) Advised regarding Medicare/Medicaid, Anti-kickback issues
- 3) Ohio Hospital Association, Dennison Keller law office, Cincinnati Bar Association




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## Health Law Matters

Relevant Legal Perspectives for the Health Care Industry



- 1) [“Ohio Physician's Guide to Cannabis Compliance 2.0: Budding Issues for Ohio's Medical Marijuana Physicians”](#)
- 2) [“Grandma Wants Special Brownies? Ohio Nursing Facilities Prepare for Medical Marijuana”](#)
- 3) [“Ohio Physician Alert: Application Available to Become Certified to Recommend Medical Marijuana”](#)
- 4) [“Ohio Hospitals: Are You Ready for Medical Marijuana?”](#)
- 5) [“Dramatic Shift in Federal Enforcement Priorities Related to Legalized Marijuana Use”](#)



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## What will you learn today?

- 1) How Ohio's medical marijuana program will work.
- 2) How federal law impacts Ohio's medical marijuana law.
- 3) What lawyers should know about advising clients in connection with medical marijuana issues.
- 4) Whether lawyers can use medical marijuana.





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## Ohio's medical marijuana program



- 1) Supposed to begin September 2018  
→ ???
- 2) 29<sup>th</sup> State plus D.C. to legalize medical marijuana
- 3) Patient estimates of 200,000+ (*source: Ohio Medical Marijuana Control Program*)
- 4) O.R.C § 3796 et. seq.

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## Ohio's medical marijuana program (continued)



- 1) Cultivators/processors/laboratories/  
dispensaries all awarded licenses
- 2) 293 physicians certified to recommend.
  - 200,000 patients / 293 physicians =  
Roughly 682 patients per physician???

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## Ohio's medical marijuana law, generally

- 1) Authorizes the recommendation, cultivation, processing, sale, and use of marijuana for medical purposes. **O.R.C § 3796 et. seq.**
- 2) "Financial institutions" protected from state criminal law liability if serving compliant licensee. **O.R.C § 3796.27**
- 3) Prohibits the disqualification of a patient from medical care or transplant list. **O.R.C § 3796.24**



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## Ohio's medical marijuana law, generally (continued)

- 4) Professional "immunization" from disciplinary action for engaging in professional or occupational activities related to medical marijuana. **O.R.C. § 3796.24**
- 5) Patient/caregiver not subject to arrest/criminal prosecution for medical marijuana related conduct. **O.R.C. § 3796.22-23**
- 6) 21 qualifying medical conditions to get a recommendation **O.R.C. § 3796.01**



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### Qualifying medical conditions:

- AIDs, Alzheimer's disease, Amyotrophic lateral sclerosis; Cancer; Chronic traumatic encephalopathy; Crohn's disease; Epilepsy or another seizure disorder; Fibromyalgia; Glaucoma; Hepatitis C; Inflammatory bowel disease; Multiple sclerosis; Pain that is either of the following: (i) Chronic and severe; (ii) Intractable; Parkinson's disease; positive status for HIV; Post-traumatic stress disorder; Sickle cell anemia; Spinal cord disease or injury; Tourette's syndrome; Traumatic brain injury; and Ulcerative colitis.

**O.R.C § 3796.02**

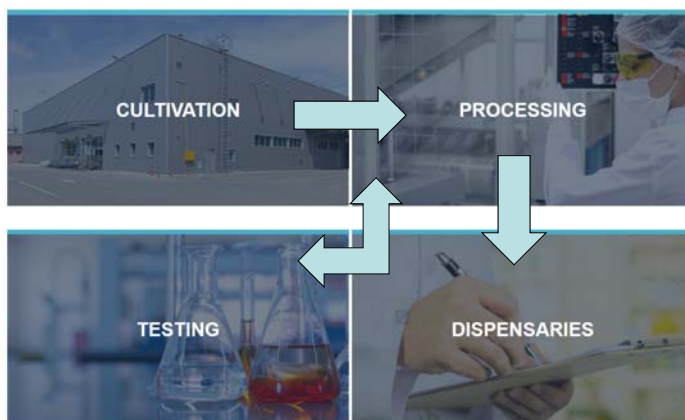


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### The program's components

Applicant Difficulties (10/40)



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## The program's components (continued)

1. Cultivators (24)
2. Processors (10/40)
3. Testing Laboratories (5/?)
4. Dispensaries (60/60)



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## How will a patient get medical marijuana?

- 1) Schedule appointment;
- 2) Be evaluated by physician with certificate to recommend;
- 3) Be diagnosed with qualifying medical condition;
- 4) Have physician register patient; and
- 5) Purchase product at dispensary.



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## The in-person evaluation

- 1) Physician must:
  - a. assess medical history, Rx history, and SUD history;
  - a. review current medications for interactions;
  - b. perform physical examination; and
  - c. either:
    - i. diagnose patient with qualifying medical condition; or
    - ii. obtain medical records to confirm prior diagnosis of qualifying medical condition.



**O.A.C. § 4731-32-03**

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## The in-person evaluation (continued)

- 1) If qualifying medical condition diagnosed (or confirmed), then physician must:
  - a. develop treatment;
  - b. review OARRS report (review for indicators of possible abuse or diversion);
  - c. explain risks and benefits of treatment;
  - d. obtain the patient's consent prior to completing a recommendation; and
  - e. determine whether patient needs a "caregiver".

**O.A.C. § 4731-32-03**

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## What is a “caregiver”?

- 1) Authorized to purchase, possess, and administer medical marijuana.
- 2) Must be 21 years old.
- 3) Magic number is 2.
- 4) Future watch: look at Colorado.



**O.A.C. § 3796:7-2-02**

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## Hospice caregivers

- 1) Two-patient limitation does not apply if patient’s care is being provided in a Hospice program and approval is given from the State Board of Pharmacy. **O.A.C § 3796:7-2-02.**
- 2) In other words, this will allow an individual to serve as a caregiver to multiple Hospice program patients.

**O.A.C § 3796:7-2-02, 03.**

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## Forms of medical marijuana available:

- 1) Oils;
- 2) tinctures;
- 3) plant material;
- 4) edibles; and
- 5) patches.



**O.R.C § 3796.01(A)(6)(a)-(v)**



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## Methods of administration

- 1) No smoking/combustion.
- 2) Vaporization permitted.
- 3) Ingestion.
- 4) Topical.



**O.R.C § 3796.06**



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But what about federal law?



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## The Federal Controlled Substances Act

- 1) Designates marijuana as Schedule I controlled substance (along with LSD, heroin).
  - a. High potential for abuse.
  - b. No currently accepted medical use in treatment.
  - c. There is a lack of accepted safety for use of the drug under medical supervision.



***21 U.S.C. ch. 13 § 801 et. seq.***

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## What does the Federal Controlled Substances Act prohibit?



- 1) Pretty much everything that Ohio's medical marijuana law allows.
- 2) Prohibits possessing, prescribing, distributing, dispensing, and administering marijuana.
- 3) Prohibits conspiring to violate, and aiding and abetting the violation of, the CSA.
- 4) Anyone who leases, rents or controls a place where medical marijuana is used can be subject to criminal prosecution, and the forfeiture of assets, such as real property and leasehold interests.

**21 U.S.C. ch. 13 § 801 et. seq.**



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## Legal implications for a client's violations of the CSA

- 1) Imprisonment and fines.
- 2) Loss of federal benefits, contracts, licensure, grants and payment.
- 3) Loss of Federal tax exemption.
- 4) Loss of industry accreditations.



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## Federal enforcement actions against patients/doctors/healthcare providers for violating the CSA

- 1) 30 jurisdictions with medical marijuana – no examples?
- 2) Massachusetts doctors crossed line.

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## Why has federal law enforcement been so limited?

- 1) The Rohrabacher Amendment
- 2) Prescription v. Recommendation



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## Restraints on Federal law enforcement - The Rohrabacher Amendment

- 1) Biggest restraint.
- 2) Included in federal government's spending bill.
- 3) Prohibits DOJ from using federal funds to interfere with those strictly complying with a state's medical marijuana law.
- 4) Must be extended September 30, 2019.



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## Restraints on Federal law enforcement – “Prescription” v. “Recommendation”

- 1) Ohio physicians will not “prescribe” medical marijuana, they will “recommend” it.
- 2) Mirrors *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) decision.
  - a. Federal government cannot prosecute physicians or revoke a DEA license for a recommendation.
  - b. First amendment right.
  - c. Recommendation may not lead to marijuana usage.



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## State and federal law takeaways



- 1) Even though Ohio law makes medical marijuana legal, federal law reigns supreme and still designates marijuana as illegal.
- 2) However, the federal government's enforcement of marijuana laws has been limited due to various restraints.
- 3) This does not mean such enforcement will remain limited, though. "It depends."
- 4) August 14, 2018 proposed rule – DEA increases amount of "marihuana" grown for federal research by 4,063 pounds. Will expand number of federally licensed marijuana producers.

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## Important marijuana-related rulings

- 1) Despite the state legalization of medical marijuana, the federal government has the right to regulate and criminalize the sale and utilization of marijuana. *Gonzalez v. Raich*, 545 U.S. 1 (2005)(holding that Congress did not exceed its authority under the Commerce Clause insofar as the marijuana prohibition applied to personal utilization of marijuana for medical purposes).
- 2) Inability to deduct business expenses for federal tax purposes. *Olive v. Commissioner of Internal Revenue*, 792 F.3d 1146 (9<sup>th</sup> Cir. 2015)(dispensary precluded from deductions because business consisted of trafficking controlled substance).

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## Important marijuana-related rulings (continued)

- 3) Inability to seek federal bankruptcy protection. *In re Arenas*, 535 B.R. 845 (B.A.P. 10<sup>th</sup> Cir. 2015) (while debtors have not engaged in “evil” conduct, they cannot obtain bankruptcy relief because their marijuana business was a federal crime).
- 4) Forfeiture of assets. *In re Rent-Rite Super Kegs West Ltd.*, 484 B.R. 799 (Bankr. D. Colo. 2012) (debtor and mortgage lender forced to forfeit warehouse property because debtor rented warehouse to marijuana cultivator in violation of CSA which prohibits renting property for manufacturing controlled substance).



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## Important marijuana-related rulings (continued)

- 5) RICO claims successfully brought against cultivators. *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, R.I.C.O. Bus. Disp. Guide (CCH) P 12898, 97 Fed. R. Serv. 3d 1641 (10<sup>th</sup> Cir. 2017) (finding that property owners adequately alleged that the adjacent marijuana growers were engaged in racketeering activity and that their pattern of illegal acts was the direct cause of injuries to their property).



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## What should lawyers know when advising clients on medical marijuana issues?

- 1) Ethical Rule 1.2
- 2) Engagement letter protections



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## Ethical Rule 1.2 Amended



- 1) A lawyer cannot assist a client who engages or seeks to engage in conduct the lawyer knows to be illegal. Prof. Cond. R. 1.2(d).
- 2) Nor can a lawyer recommend to a client the means by which an illegal act may be committed. Prof. Cond. R. 1.2(d), cmt. [9].
- 3) Initial reaction to lawyer's ability to advise clients on Ohio's medical marijuana law by Ohio Supreme Court was very narrow! *Ethical Implications for Lawyers under Ohio's Medical Marijuana Law*, Opinion 2016-6 (Issued August 5, 2016).

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## Ethical Rule 1.2 Amended (continued)

- 1) The following would have resulted in rule violations and potential disciplinary actions:
  - a. Assisting with marijuana license applications.
  - b. Negotiations with regulated individuals and businesses.
  - c. Representation of clients before state regulatory boards responsible for the regulation of medical marijuana.
  - d. Drafting and negotiating of contracts with vendors for resources or supplies.
  - e. Drafting of lease agreements for property to be used in the cultivation, processing, or sale of medical marijuana, commercial paper, tax, zoning, corporate entity formation, and statutory agent services.



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## Ethical Rule 1.2 Amended (continued)

- 1) Upon further review, OSC amends professional rule 1.2.
  - (d)(1) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent **[but.....]**
  - (d)(2) A lawyer may counsel or assist a client regarding conduct expressly permitted under Sub. H.B. 523 of the 131 General Assembly authorizing the use of marijuana for medical purposes and any state statutes, rules, orders, or other provisions implementing the act. In these circumstances, the lawyer shall advise the client regarding related federal law.



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## Ethical Rule 1.2 Amended (continued)



- 1) Bottom line: Lawyer must advise clients of related federal law if the lawyer is going to assist or counsel clients with respect to Ohio's medical marijuana law.
- 2) Suggestion – the special marijuana engagement letter (I am sure your firm's malpractice carrier would encourage this).
- 3) Spell out the following:
  - a. Marijuana, whether medicinal or recreational, is illegal federally despite Ohio's state law authorizing its use for medical purposes.
  - b. Penalties associated with CSA violations.
  - c. Important rulings.

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## Lawyer's Use of Medical Marijuana



- 1) Obviously, federal law concerns.
- 2) Prof. Cond. R. 8.4(b) (commission of an illegal act that reflects adversely on the lawyer's honesty or trustworthiness).
  - a. Case-by-case determination.
  - b. Single CSA violation = not enough.
  - c. Other misconduct related to the illegal act would need to be present to trigger a violation of Prof. Cond. R. 8.4(b).

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## Lawyer's Use of Medical Marijuana (continued)



- 3) Prof. Cond. R. 8.4(h) (conduct that adversely reflects on the lawyer's fitness to practice law).
  - Must be clear and convincing evidence that the lawyer has engaged in misconduct that adversely reflects on the lawyer's fitness to practice law. *Disciplinary Counsel v. Bowling*, 2010-Ohio-5040 (magistrate charged, but not convicted, for marijuana possession under state law violated Prof.Cond.R. 8.4(h)).



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## Lawyer's Participation in a Medical Marijuana Enterprise



- 1) Still, federal law concerns.
- 2) Medical marijuana enterprise may implicate Prof. Cond. R. 8.4 (b), and Prof. Cond. R. 8.4(h), or both.
- 3) Likewise, personally investing or lending money to a medical marijuana enterprise, subjects the lawyer to the same criminal and professional liabilities as having an ownership interest in a medical marijuana enterprise.



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## Concluding thoughts

- 1) Medical marijuana is here – get the right information.
- 2) If advising a client, make sure you protect yourself and arm the client with all possible outcomes.
- 3) If you become involved with medical marijuana (investor/patient), know the law.



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## Any questions?



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