

# 50 States vs. You – How Do You Win?

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# Applicable State Laws

## Numerous State laws govern or impact workplace drug testing programs

### ❖ Marijuana Laws

### ❖ Mandatory Drug Testing Laws

- Must comply with statutory/regulatory requirements
- Some are industry specific (i.e., public employees, Miners, etc.)

### ❖ Voluntary Drug Testing laws

- Compliance not mandatory but employer that complies with requirements entitled to certain legal benefits (E.g., Arizona, Mississippi, West Virginia)

### ❖ Mandatory Laboratory laws

- Laws apply to laboratories performing workplace drug testing

### ❖ Voluntary Workers' Compensation Premium Discount Laws

- Voluntary but compliance entitles to discount on workers' compensation insurance; often detailed requirements

### ❖ Workers' Compensation and/or Unemployment Benefits Reduction or Denial

### ❖ Other Employment Laws (discrimination laws, off-duty use laws)

# State Laws

## State laws are complex, inconsistent, and constantly changing

- Collection requirements vary widely
  - Some laws have detailed collection requirements and procedures, while others do not
  - Some states adopt collection procedures of DOT/HHS
- Legal obligations will vary depending on the type of testing, even within the state
  - *E.g.*, Kansas has mandatory laboratory testing law and voluntary workers' comp premium discount; one addresses collection while the other does not
    - Mandatory laboratory law (KAR 28-33-12): no mention of collection
    - Voluntary worker's comp law: must be collected by or under supervision of a licensed health care provider for test results to be admissible as evidence of impairment; split specimen required (44-501(b)(3))
- Participants must be aware of these different schemes

# Other Legal Issues – OSHA Post Accident

- Oct. 11, 2018: OSHA issues its “Clarification of OSHA’s Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing under 29 C.F.R. § 1904.25(b)(1)(iv)”
  - OSHA issued its new Standard Interpretation Memo “to clarify the Department’s position that [the anti-retaliation rule] does not prohibit . . . post-incident drug testing”
  - States it “believes that many employers who . . . conduct post-incident drug testing do so to promote workplace safety and health.”
  - explains that “evidence that the employer consistently enforces legitimate work rules (whether or not an injury or illness is reported) would demonstrate that the employer is serious about creating a culture of safety, not just the appearance of reducing rates.”
  - clarifies that actions taken pursuant to a post-incident drug testing policy are retaliatory and unlawful only “if the employer took the action to penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health.”
  - Supersedes all previous guidance to the extent they are inconsistent with new Interpretation

# OSHA Post-Accident Drug Testing

- Jan. 25, 2019: OSHA issued Final Rule rescinding part of electronic recordkeeping requirements- in preamble, statements re: post-incident drug testing
  - “In response to concerns about the application of the 2016 final rule to employee drug testing and incident based incentive programs, OSHA notes that the employee protection provisions promulgated by that final rule and codified at 29 CFR 1904.35 neither ban drug testing employees involved in workplace injury or illnesses, nor prohibit incident-based incentive programs. Rather, § 1904.35(b)(1)(iv) merely prohibits employers from implementing these programs to penalize workers “for reporting a work related injury or illness.”
  - Cites to new November 2018 Standard Interpretation and states “That memorandum—which referred to the 2016 final rule and its preamble— reiterated the rule’s limited scope and expressed how it “does not prohibit workplace safety incentive programs or post-incident drug testing.” “To the extent the 2016 preamble suggested otherwise, it has been superseded.”

# OSHA Post-Accident Drug Testing

- May 2019: U.S. Department of Labor long term regulatory agenda
  - OSHA announced rulemaking for “Drug Testing Program and Safety Incentives Rule.”

# Trends: Drug Test Cheating Laws

## State laws making adulteration/substitution a crime

- Some state drug testing statutes criminalize attempts to adulterate or substitute a specimen
  - *E.g.*, Nebraska (mandatory drug testing law): attempting to adulterate or substitute a urine specimen is a class I misdemeanor (Ne. Stat. 48-1908, 48-1909)
- At least 20 states have anti-drug test cheating laws
  - Laws criminalize attempts to interfere with a drug and/or alcohol test
  - Laws vary widely; may have severe penalties



# Trends: Drug Test Cheating Laws

## State are making adulteration/substitution a crime

- Some state laws only make it illegal to sell synthetic urine (*e.g.*, [IN](#))
- Some state laws criminalize the use of drug-free urine (not adulterants) (*e.g.*, [PA](#), [VA](#))
- Some state laws are comprehensive (*e.g.*, [AR](#), [NC](#), [SC](#)) and generally prohibit:
  - Selling, giving away, distributing, or marketing urine intended to defraud a drug test;
  - Attempting to defeating a drug test by spiking or substituting a specimen
  - Adulterating a specimen
  - Possessing or selling adulterants

# EEOC crackdown on prescription drug policies

- EEOC has settled several lawsuits against employers arising from workplace drug testing policies.
  - Disregarding legitimate medical explanation for non-negative results
  - Failing to engage in individualized assessment to determine what effect, if any, medication had on the employee's ability to perform his job duties

As of June 5, 2019:

**33 states + D.C. + 3 U.S. territories have passed Comprehensive “Medical marijuana” Laws**

**14 other states have passed low THC/High CBD laws**

**1 state has only industrial hemp law**

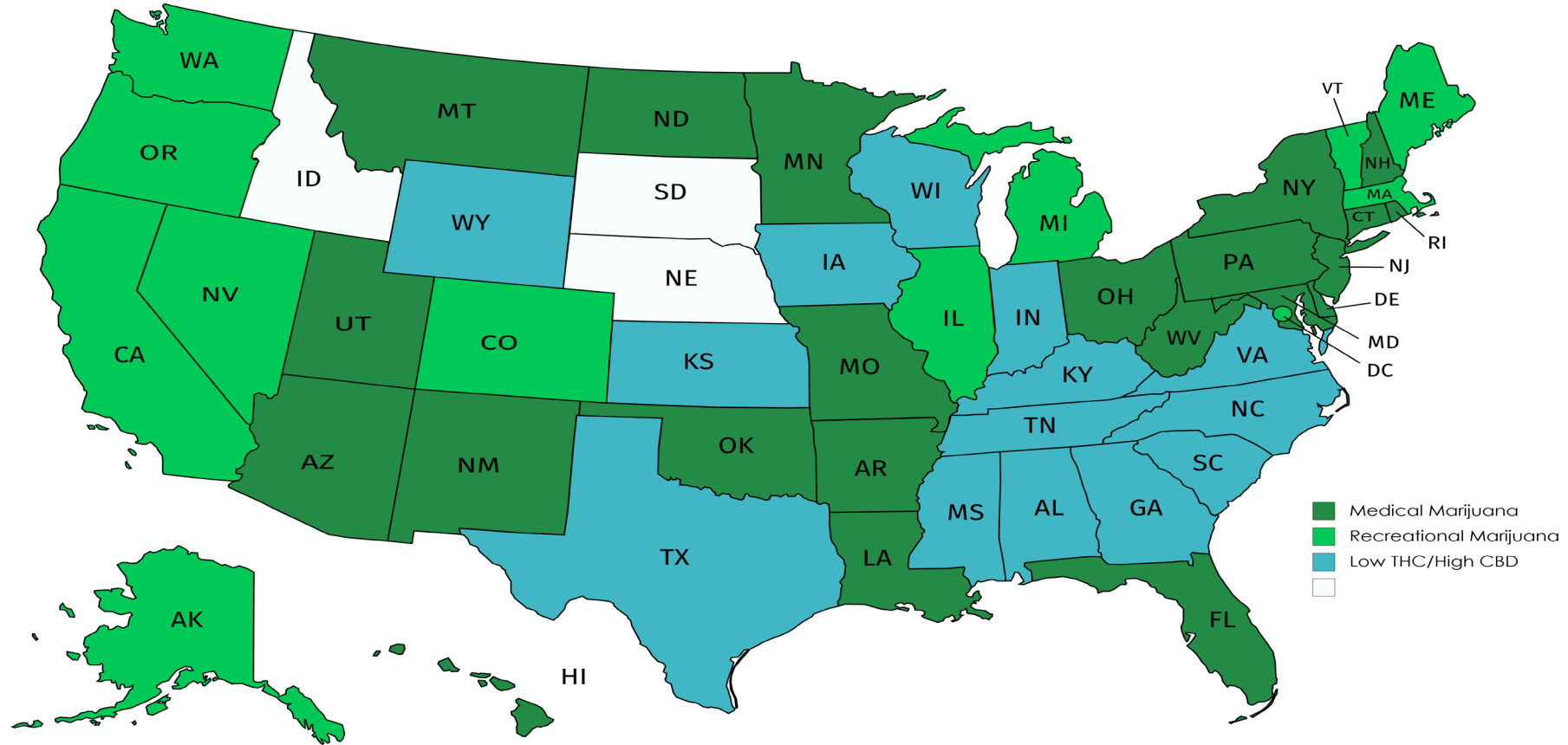
(Nebraska)

**11 states + D.C. + 2 U.S. territories (CNMI & Guam) have passed recreational marijuana**

All except CNMI also had comprehensive medical marijuana laws



# Recreational, Medical, and Low THC/High CBD Marijuana Laws



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# 2018-2019 Marijuana Legislation

## Medical Marijuana

**Passed:** 3 states, 1 U.S. territory

- Oklahoma (passed 6/26/18)
- Missouri (passed 11/6/18)
- Utah (passed 11/6/18)
  - Legislature also passed for terminally ill
- U.S. Virgin Islands (Jan. 2019)

**Introduced:** in at least 12 states

## Recreational Marijuana

**Passed:** 3 states, 2 U.S. territories, Canada

- Vermont (passed 01/2018)
- Michigan (passed 11/6/18)
- Illinois (passed June 2019)
- Northern Mariana Islands/Guam
- Canada (sales began Oct. 2018)

**Introduced:** in at least 20 states

# Medical vs. Recreational Marijuana

## Why Does it Matter?

Possession Limits – NV medical 2.5 times more than recreational

Taxes/Costs – CO recreational retail marijuana and excise taxes

Potency – CO recreational edibles limited to 100mg THC

Employment and Other Protections – NV (medical only)

# Federal Marijuana Law & Policy Overview



- Marijuana is still illegal under federal law (Schedule I drug)
  - 2016 DEA denied petition to reschedule; agreed to increase access for research
  - Aug. 2018: DEA announced proposal to significantly increase amount permitted for research in 2019
- Medical Marijuana is NOT a legitimate medical explanation under U.S. DOT drug testing regulations
  - Notice reaffirming issue
- 2018 Farm Bill

# Federal Marijuana Law & Policy

Nov. 7, 2018: Attorney General Sessions resigns

December 2018: 2018 Farm Bill passed/signed into law

In 2018 more marijuana related bills introduced than ever before

January 2019: New Attorney General

- Pledged during confirmation hearing that he does not intend to “go after” marijuana businesses operating under state laws

February 2019: medical marijuana program protections renewed until Sept. 30, 2019



# Federal Marijuana Law & Policy

## Recent Developments

- June 25, 2018: FDA approved 1<sup>st</sup> drug derived from marijuana plant (Epidiolex) for 2 types of severe childhood epilepsy (< .1% THC)
  - Sept. 2018: DEA reclassified as Schedule 5 drug
- Aug. 2018: DEA proposal to increase amount of cannabis to be grown for research in 2019
- More than a dozen bills introduced regarding marijuana
  - *E.g., The Fairness in Federal Drug Testing Under State Laws Act*
    - Would prohibit federal agencies from discriminating against workers solely based on status as marijuana consumer or testing positive for marijuana
    - Would exempt positions requiring top security clearances as well as positive probable cause drug tests

# FDA Public Hearing

- FDA held a public hearing on cannabis on May 31, 2019
  - Primarily to address how products like CBD oil are marketed
  - But also to begin to provide “clarity on how our authorities apply to such products, [and] what pathways are available to market such products lawfully under these authorities”

# State Medical Marijuana Laws

33 states + D.C.

Alaska (1998)

Arizona (2010)

Arkansas (2016)

California (1996)

Colorado (2000)

Connecticut (2012)

Delaware (2011)

Florida (2016)

Hawaii (2000)

Illinois (2013)

Louisiana (2015)

Maine (1999)

Maryland (2014)

Massachusetts (2012)

Michigan (2008)

Minnesota (2014)

**Missouri (2018)**

Montana (2004)

Nevada (2000)

New Hampshire (2013)

New Jersey (2010)

New Mexico (2007)

New York (2014)

North Dakota (2016)

Ohio (2016)

**Oklahoma (2018)**

Oregon (1998)

Pennsylvania (2016)

Rhode Island (2006)

**Utah (2018)**

Vermont (2004)

Washington (1998)

West Virginia (2017)

Washington, D.C. (2010)



# State Medical Marijuana Laws

## Current Trends

Providing explicit employment protections

Anti-discrimination provisions;  
Positive drug test language

Providing other protections

*E.g.*, schools, custody, housing,  
medical care

Program expansion:  
increasing access and  
easing restrictions

### **Qualifying Conditions**

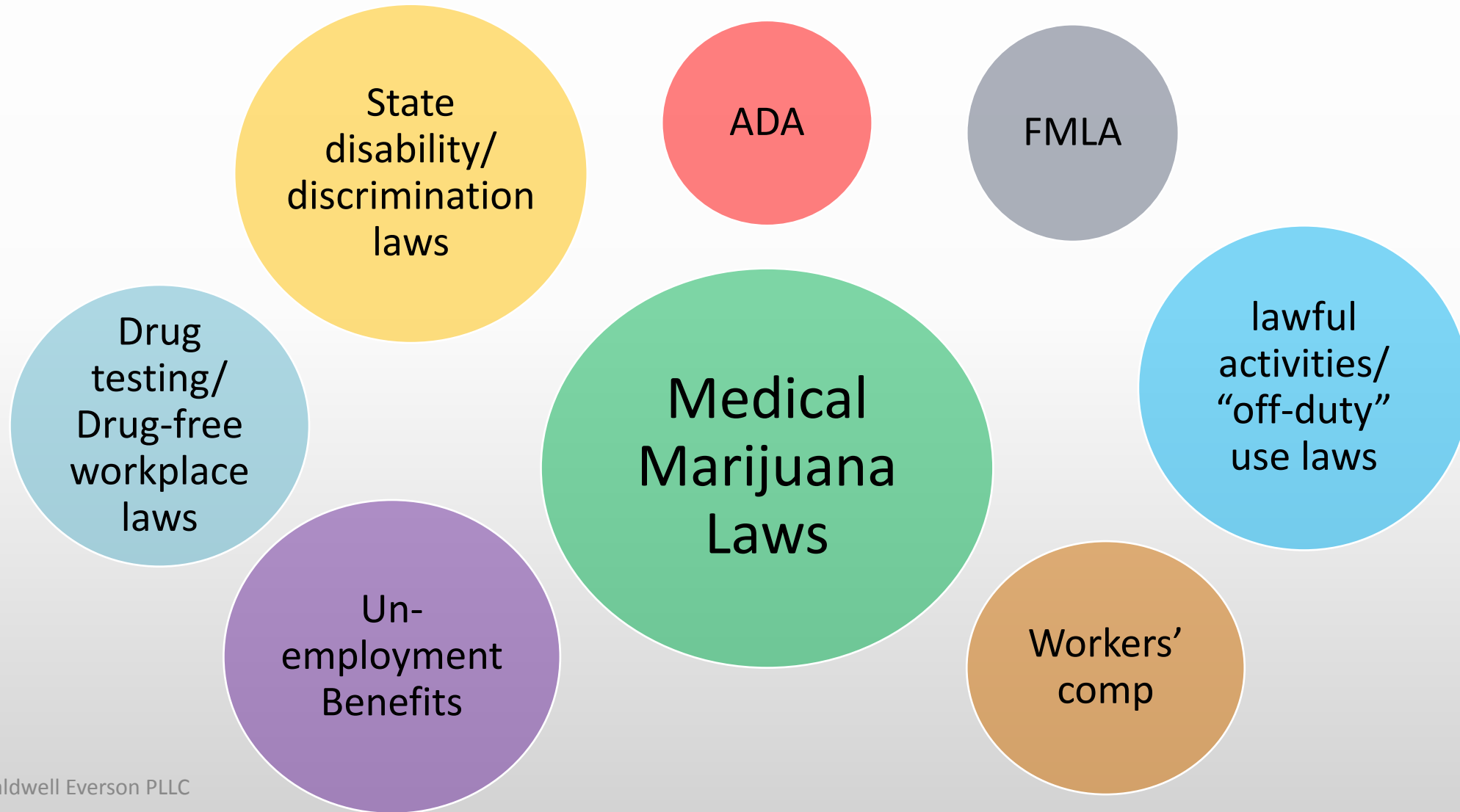
- Total Physician based recommendations
- Adding PTSD, chronic pain, Autism, Tourette's, alternative to opioid use and/or abuse

### **Physician/Provider requirements**

### **Other program requirements**

# Medical Marijuana Laws

## Employment Considerations



# Employment Protections

Generally 3 Categories



1

States  
Providing  
Employment  
Protections  
(15 States)

--Newer laws (10 since 2010)  
have anti-discrimination  
provisions

--Laws vary and extent of  
protections not entirely clear

2

States that have  
made positive  
statements that  
NO employment  
protections exist  
(7 States)

--Laws explicit and/or silent/  
vague and state supreme court  
has found no protection

--Not insulated from all action  
and current trend is to add  
protection

3

Unclear OR  
possible  
protections under  
other state laws  
(11 states + D.C.)

--Laws silent/vague and no state  
supreme court decision or court  
has found possible protection  
under other state law (*i.e.*,  
disability discrimination law)

--Some states have other case  
law or state issued guidance 22

# Employment Protections

## States Providing Employment Protections

15 states; language and degree of protection varies

Arizona (2010)  
Arkansas (2016)  
Connecticut (2012)  
Delaware (2011)  
Illinois (2013)  
Maine (1999)  
Massachusetts (2012)  
Minnesota (2014)  
Nevada (2000)  
**New Mexico** (2007)  
New York (2014)  
**Oklahoma (2018)**  
Pennsylvania (2016)  
Rhode Island (2006)  
West Virginia (2017)

### Positive Drug Test Language

- 4 states have positive drug test language (*e.g.*, employer may not discriminate based upon a “patient’s positive drug test for marijuana components or metabolites”) **AZ, DE, MN, OK**

### State Supreme Court Decision

- 1 state supreme court has found possible protections under other state law **MA**

### Disability

- Some states treat as disability **NV, NY**

### Safety-Sensitive Positions

- 2 states include safety-sensitive positions that may not be performed with specified amount of active THC in blood; limits vary
  - PA:** 10 ng/mL
  - WV:** 3 ng/mL

### Definition of Employer

- Most states do not define employer, but some do **AR, CT**

### Exceptions

- Most laws contain exceptions (*e.g.*, not required to accommodate use at workplace, working under influence)

# Medical Marijuana Laws

## Oklahoma

- **SQ 788 (effective 7/26/2018)**
  - Explicit employment protections, including positive drug test
    - “Employers may not take action against the holder of a medical marijuana license solely based upon the status of an employee as a medical marijuana license holder or the results of a drug test showing positive for marijuana or its components.”
- **Unity Bill (passed/signed Mar. 2019; effective Aug. 2019)**
  - Added exception for safety-sensitive positions
    - Provides non-exhaustive list of safety-sensitive positions
  - “Positive test for marijuana components or metabolites” means result at or above DOT cut-off levels or OK law regarding being under the influence, whichever is lower



# Medical Marijuana Laws

## New Mexico

- April 2019: Amended statute to provide employment protections
  - Makes it unlawful to take adverse employment action against an applicant or employee based on conduct allowed under medical marijuana law
    - Does not restrict employer's ability to prohibit/take adverse action for use of or being impaired by marijuana on premises or during hours of employment
    - Does not apply to employees employed in safety sensitive positions
      - "Safety-sensitive position" means "a position in which performance by a person under the influence of drugs or alcohol would constitute an immediate or direct threat of injury or death to that person or another" (section 3, § 26-2B-3(7))

# New York City

- New York City Council: INT No. 1445-2019 INT 1445- Prohibition of drug testing for pre-employment hiring procedures
  - Effective May 10, 2020
  - Amends the administrative code of the city of New York
    - “Employment; pre-employment drug testing policy. (a) Prohibition. Except as otherwise provided by law, it shall be an unlawful discriminatory practice for an employer, labor organization, employment agency, or agent thereof to require a prospective employee to submit to testing for the presence of any tetrahydrocannabinols or marijuana in such prospective employee’s system as a condition of employment.”
    - Includes exceptions for persons applying to work in specified positions
      - Examples: Police officers or peace officers, any position requiring commercial driver’s license, any position requiring supervision or care of children

# Employment Protections

## Explicitly NO Protections

7 States; language varies

California (1996)  
Colorado (2000)  
**Florida (2016)**  
Montana (2004)  
**Ohio (2016)**  
Oregon (1998)  
Washington (1998)

### State Supreme Court Decisions

- 5 states' supreme courts have found no duty to accommodate off-duty medical marijuana use (laws were silent/vague on off-duty use)
  - **CA, CO, MT, OR, WA**
- --Employer not insulated from actions; still may be challenged in court (cases in **CA, MT, WA**)

### Statute

- 2 states passed in 2016 appear to provide explicitly no employment protections; no court decisions yet
  - **FL, OH**
- --pending case in **FL**
- --**OH** has strongest language and guidance

### Legislation

- Even in these states, proposed legislation seeking to add explicit employment protections **MT, OR, WA**

# Employment Protections

## Unclear/Possible protections under other state laws

11 States + D.C.; do not affirmatively address employment/vague

Alaska (1998)  
Hawaii (2000)  
Louisiana (2015)  
Maryland (2014)  
Michigan (2008)  
**Missouri (2018)**  
New Hampshire (2013)  
New Jersey (2010)  
North Dakota (2016)  
**Utah (2018)**  
Vermont (2004)  
Washington, D.C. (2010)

### State Court Decisions

- 1 state appellate court **(NJ)** has found possible protections under other state law (state disability discrimination law)

### Other Court Decisions

- Some states have other court decisions (federal court decisions)
  - **MI, NJ, DC**


### State Issued Guidance

- Some states have other state issued guidance documents **VT**

### 2019 legislation

- Proposed legislation to add explicit protections **HI, MD, NJ**

# Employment Protections Court Decisions



Courts found no duty  
to accommodate  
medical marijuana

--Decisions were based on state laws that did not contain explicit protections Laws

--No court decisions construing explicit protections

2  
0  
1  
7



Courts finding duty  
to accommodate

--Decisions in states w/ explicit protections; courts find implied rights of action; reject preemption arguments

--Court decisions in states with unclear protections; courts reach different results

--Other decisions

# Employment Protections

## Pre-2017 Court Decisions

### California

***Ross v. Ragingwire Telecomms*, 174 P.3d 200 (Cal. 2008)**

(holding CA medical marijuana law does not require employer to accommodate use of medical marijuana and no cause of action under CA's discrimination statute or for wrongful termination in violation of public policy)

### Colorado

***Coats v. Dish Network*, 350 P.3d 849 (Colo. 2015)**

(holding no cause of action for wrongful discharge under CO's "lawful activities" statute because off-duty use not lawful activity since illegal under federal law)

### Montana

***Johnson v. Columbia Falls*, 1009 Mont. LEXIS 120 (Mont. 2009) (unpub)**

(holding MT's medical marijuana act didn't provide private right of action and doesn't require employers to accommodate medical use of marijuana; no violation of MT Human Rights Act)

### Oregon

***Emerald Steel v. BOLI*, 230 P.3d 518 (Or. 2010)**

(holding federal law preempts OR medical marijuana law, therefore employee engaged in illegal use of drugs and employer not required to accommodate use of medical marijuana under state employment discrimination laws)

### Washington

***Roe v. Teletch*, 257 P.3d 586 (Wash. 2011)**

(holding WA's medical marijuana act doesn't provide private cause of action against employer for discharging employee who uses medical marijuana nor does it "create a clear public policy that would support a claim for wrongful discharge")

# Employment Protections

## 2017-2018 Court Decisions

### Connecticut

***Noffsinger v. SSC Niantic Op. Co.*, No. 3:16-cv-01938 (D. Conn. 2017 & 2018)**

Federal district court found anti-discrimination provision contained implied private right of action and not preempted by federal law (CSA, FDA, FDCA); granted summary judgment to employee

### Rhode Island

***Callaghan v. Darlington Fabrics Corp.*, PC-2014-5680 (R.I. Super. May 2017)**

Superior court held anti-discrimination provision provides implied private right of action and could sue under RI Civil Rights Act for disability discrimination; found medical marijuana cardholder status signaled medical condition that caused her to be disabled

### Massachusetts

***Barbuto v. Advantage Sales & Mktg.*, 78 N.E.3d 37 (Ma. 2017)**

Massachusetts Supreme Judicial Court held although medical marijuana act itself didn't provide explicit/implicit cause of action, employee may assert disability discrimination claim under MA law for failing to accommodate use of medical marijuana

# Employment Protections

## 2018-2019 Court Decisions

### Arizona

***Whitmire v. Wal-Mart Stores,***  
**2019 U.S. Dist. LEXIS 20049**  
**(D. Ariz. Feb. 7, 2019)**

Federal court found anti-discrimination provision contained implied private right of action and rejected defense under drug testing statute because absent other evidence of impairment, need expert testimony to establish levels of metabolites in drug test sufficient to cause impairment

### Delaware

***Chance v. Kraft Heinz Foods Co.,***  
**2018 Del. Super. LEXIS 1773 (DE Super. Ct. Dec. 17, 2018)**

Superior court held anti-discrimination provision provides implied private right of action and rejected preemption argument; dismissed claims for disability discrimination under federal and state law

### New Jersey

***Wild v. Carriage Funeral Holdings, Inc.,***  
**Docket No. A-3072-17T3 (NJ App. Mar. 27, 2019)**

New Jersey Appellate court held although medical marijuana act didn't provide explicit/implicit cause of action, employee may assert disability discrimination claim under NJ'S Law Against Discrimination for failing to accommodate use of medical marijuana



# Employment Protections

## 2018-2019 Court Decisions

### New Jersey

***Cotto v. Ardagh Glass Packing*, No. 18-1037, 2018 U.S. Dist. LEXIS 135194 (D.N.J. Aug. 10, 2018)**

Federal district court dismissed claims; held neither CUMMA nor New Jersey Law Against Discrimination (NJLAD) requires an employer to waive drug test requirement as a condition of employment

### Montana

***Carlson v. Charter Communs.*, No. CV 16-86-H-SHE (D. Mont. Aug. 11, 2017)**

Federal district court held the plain language of MT's Medical Marijuana Act barred employee's claims for wrongful discharge and for employment discrimination under Montana's Wrongful Discharge from Employment Act and Human Rights Act

**9<sup>th</sup> Circuit aff'd dismissal, 2018 U.S. App. LEXIS 32696 (9th Cir. Nov. 19, 2018)**

### Michigan

***Eplee v. City of Lansing*, No. CV 16-86-H-SHE (Mich. App. Feb. 19, 2019)**

Federal district court held the plain language of MT's Medical Marijuana Act barred employee's claims for wrongful discharge and for employment discrimination under Montana's Wrongful Discharge from Employment Act and Human Rights Act

# Employment Protections

## Court Decisions

Courts have interpreted similar provisions differently

Whether statutory provision re:  
no duty for “onsite”  
accommodations requires off-  
duty accommodations

Silence=employer not  
required to  
accommodate off-  
duty use  
(*Roe- WA 2011*)

Silence=employer  
required to  
accommodate off-  
duty use  
(*Callaghan-RI 2017*;  
*Barbuto- MA 2017*)

Whether federal law preempts  
state medical marijuana law,  
thus no duty to accommodate

State law  
preempted by  
federal law  
(*Emerald Steel-  
OR 2010*)

State law not  
preempted by federal  
law  
(*Callaghan-RI 2017*;  
*Noffsinger- CT 2017-  
18*; *Barbuto-MA 2017*)

Whether Federal Drug-Free Workplace  
Act preempts state medical marijuana  
law when employer is federal  
contractor

State law pre-empted, no  
duty to accommodate  
(*Carlson- D. MT. 2017, aff'd  
on other grounds 2018 U.S.  
App. LEXIS 32696 (9th Cir.  
Nov. 9, 2016)*)\*

State law not preempted,  
duty to accommodate  
(*Noffsinger-D.CT 2017-18*;  
*Barbuto-MA 2017*)

# Employment Protections

## Pending Lawsuits

Arizona

Connecticut

Delaware

Florida

New Jersey



# Employment Protections

## 2018-2019 Proposed Legislation

Proposed legislation to have/add employment protections

### Amendments to existing marijuana and/or discrimination laws

- States with NO employment protections (*E.g.*, **MT, OR, WA**)
- States with unclear/possible protections (*E.g.*, **HI, MD, NJ**)
- States with employment protections seeking to add positive drug test language (*E.g.*, **NY, RI**)

# Medical Marijuana Qualifying Conditions

## Total Physician Based Recommendations

States seeking to eliminate  
specified list of conditions

- 2018 Passed legislation
  - Maine
  - Missouri (catchall)
  - Oklahoma
  - Virginia (CBD law)

## Expansion of Qualifying Conditions

Connecticut

- Added 8 conditions for adults

Louisiana

- Added at least 5 conditions

Michigan

- Added 11 conditions (considered 22)

New Jersey

- Added 6 conditions

Pennsylvania

- Added 4 conditions

# Medical Marijuana Qualifying Conditions

## 2017-2019 Common Conditions

**Chronic, intractable  
pain**

GA (CBD), IL, LA, MI, MO, NH, NY,  
CT\*, NJ\*

**PTSD**

CO, IL, LA, MO\*, MN, NH, NJ,  
NY, UT, VT

**Migraines**

CT, NJ

**Autism/Autism  
spectrum disorder**

CO, LA, MI, MN, UT

**Arthritis**

CT, HI, MI

**Anxiety**

NJ

**Tourette's**

MI, MO, NJ

**Obstructive sleep  
apnea**

MN

**Lupus**

HI

# Medical Marijuana

## Qualifying Conditions

Included as alternative/substitute for prescription opioids and/or for opioid abuse and addiction treatment

- **2018-2019 Passed legislation**

- Colorado
- Illinois
- Pennsylvania
- New Jersey
- New Mexico
- New York
- Utah\*

- **2019 Proposed**

- Hawaii
- Maryland
- New Hampshire
- North Dakota
- Ohio
- Rhode Island

# Medical Marijuana

## Increasing access

Many states are revising provider requirements to expand patient access to medical marijuana

### Expanding

- **who may recommend/certify**
  - *E.g., HI:* APRN
  - *E.g., NY:* Nurse practitioners and physician assistants
- **who may administer**
  - *E.g., MA:* Nurse practitioners, treating elderly in nursing homes, hospices

### Easing

- **physician requirements** (*i.e.*, physician opt-out from registry)
- *E.g., NJ, PA*



# Impairment and the Law

Some state laws (marijuana/DUI laws) relate to impairment for marijuana

Some states have “per se” limits; no consensus on limit

- **5 ng/mL THC in blood (CO, MT, WA)**
- **2 ng/mL THC in blood (OH, NV)**
- **1 ng/mL THC in blood (PA)**

Recent legislation contains per se limits for certain safety sensitive positions

- **10 ng/mL THC in blood (PA)**
- **3 ng/mL THC in blood (WV)**

# State Recreational Marijuana Laws

11 states + D.C.

Alaska (2014)

California (2016)

Colorado (2012)

**Illinois (2019)**

Maine (2016)

Massachusetts (2016)

**Michigan (2018)**

Nevada (2016)

Oregon (2014)

**Vermont (2018)**

Washington (2012)

Washington, D.C. (2014)



# State Recreational Marijuana Laws

## Overview and Trends

All states with recreational cannabis laws also have comprehensive medical marijuana laws

- Requirements different (*e.g.*, possession limits, potency, taxes, etc.)

Impairment/driving under the influence

- Most states prohibit, but no guidance
- Some states have “per se” limits of THC in blood; no consensus on limits

Employment Protections

- 1 state has explicit employment protections (**IL**) and 2 states may provide employment protections for off-duty use (**ME, NV**)

# Recreational Marijuana Laws

## Illinois

- HB 1438: Passed May 31, 2019; awaiting Governor's signature
  - Provides employment protections for off-duty use
    - Includes signs of impairment
    - Provides definitions of “workplace” and “on-call”

# Recreational Marijuana Laws

## Nevada

- AB 132- revised employment practices; passed, awaiting Governor's signature
  - Makes it unlawful employment practice for employer to fail or refuse to hire prospective employee because they submitted to a screening test and results indicate the presence of marijuana
    - Exceptions- does not apply to:
      - Firefighters; Emergency medical technicians;
      - positions that require operation of motor vehicle and for which federal or state law requires the employee to submit to screening tests; or
      - Positions that “in the determination of the employer, could adversely affect the safety of others”
    - If within 30 days, applicant may submit independent test
- Nevada also has off-duty use statute (NRS § 613.333)

# Hemp vs. Cannabis

Are they the same?

## What is Cannabis?

- Cannabis is a family of plants including Cannabis sativa and Cannabis indica.

## What is Hemp?

- Hemp means the plant Cannabis sativa L and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 % on a dry weight basis (2018 Farm Bill)

# Hemp CBD Oil v. Marijuana CBD Oil

- No standard difference
  - Hemp CBD typically contains a higher CBD to THC ratio than marijuana CBD, with <.3% THC

# 2018 Farm Bill

- Regulations are to be issued in 2019
- Office of General Counsel guidance issued May 28, 2019
  - As of Dec. 20, 2018, hemp removed from Schedule I of the CSA
  - Hemp is legal today if produced in accordance with 2014 Farm Bill
  - States can enact more stringent provisions than Federal law, including prohibiting the growing of hemp in that state
  - States cannot prohibit interstate transportation of hemp lawfully produced in other state or under federal license



# State Low THC/High CBD Laws

State laws vary widely or are unclear

<b>State (Year)</b>	<b>THC/CBD levels allowed</b>
<b>Georgia (2015)</b>	≤ 5% THC and equal or greater amount of CBD
<b>Texas (2015)</b>	≤ .5% THC by weight and not less than 10% by weight CBD
<b>Virginia (2015)</b>	At least 15% CBD but no more than 5% THC

# Low THC/High CBD Laws

## Overview

Laws passed in mostly southern states since 2014 after CNN documentary *Weed*

- Some states with comprehensive medical marijuana laws also have low THC/high CBD laws *E.g.*, **FL, MO, UT**

## 2018 low THC/High CBD laws: legislation and expansion

- **Indiana:** legalized sale and use of CBD oil (THC .3% or less) (Senate Enrolled Act 52)
- **Virginia:** expanded to physician based recommendations (HB 1251, SB 726)
- **Georgia:** expanded qualifying conditions-added PTSD and intractable pain (HB 65)

# CBD

## Current Trends and Issues

No consensus on THC-CBD ratio

Quality of Product

- **Case Example:** *Horn v. Medical Marijuana, Inc. et al.*, Case 1:15-cv-00701-FPG-MJR (W.D.N.Y. filed 8/6/15)

Test Results

# CBD

## Can Consumption of CBD Oil Cause Positive THC Test Result?

Quality of Product

Contamination

Other possibilities

# Litigation Strategies for Marijuana

## Common Questions

- Do I have to accommodate marijuana?
  - What laws apply?
- How do I handle marijuana positive test results?

# Litigation Strategies for Marijuana

## Avoiding Litigation

- Know your workforce
  - Location
  - Position and safety issues
  - Multi-state issues
- Know the law and your obligations
- Decide policy
  - Be clear and consistent

# Litigation Strategies for Marijuana

## Avoiding Litigation

- What state law applies and do I have to accommodate medical marijuana? The multi-state issue
  - Most state medical marijuana laws do not define employer or employee
  - Follow the most restrictive state law (*i.e.*, the most favorable to the employee)

# Litigation Strategies for Marijuana

## Avoiding Litigation

- When Applicant/Employee claims medical marijuana cardholder:
  - Ensure process has a decision tree
  - Documentation/reporting
    - Laws do not entitle employer to determine reason for marijuana card
  - Ensure medical information remains separate from disciplinary channels

All information should be kept confidential



# Litigation Strategies for Marijuana

## Avoiding Litigation

- When the bad thing happens or someone does not like the outcome
  - Engage legal immediately
  - Identify if there may be fault arising from your company
  - Prepare to immediately resolve issue if you caused the loss
  - Use the situation as a catalyst for process/production improvement

# Questions?



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