

Medical and Recreational Marijuana in the Workplace

RPM



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Presented by



KEVIN GRIFFITH

Shareholder

Littler | Columbus

(614) 463-4210

Kgriffith@littler.com

Agenda

- Current patchwork of state legalized marijuana laws
- Federal law and marijuana
- Examples of state legalized marijuana laws—PA, OH, CT, AZ
- “Accommodating” legalized marijuana users?
- Proving marijuana impairment—Arizona’s approach
- What to do about recreational marijuana...
- Legalized marijuana policy development



Littler's Executive Employer Survey 2019

- “Legalization of marijuana” was the second-most commonly cited issue making employers nervous about compliance on this survey of over 1,300 executives, in-house counsel, and human resources representatives
- Despite this, 51% had not updated policies or taken other measures to address marijuana in the workplace
- 6% had dropped some marijuana testing
- 5% had increased their marijuana testing

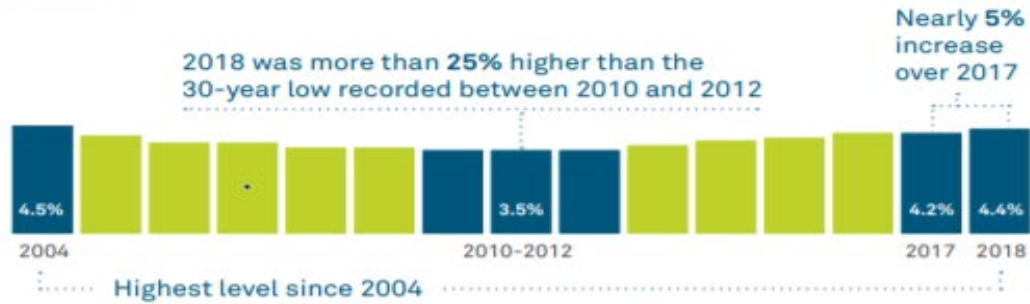


2019 Quest Diagnostics Drug Testing Index

Based on the analysis of nearly 9 million workforce urine drug tests performed between January and December 2018

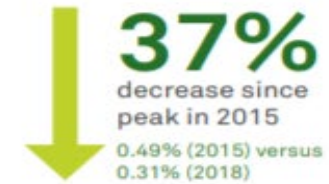


Drug test positivity increased in the combined U.S. workforce.



Positivity for opiates (mostly codeine and morphine) showed the largest drop in three years.

General U.S. workforce



Marijuana positivity continues to increase.

General U.S. workforce

More than 7% increase over 2017



More than 16% increase over 2014

Federally mandated, safety-sensitive workforce

Nearly 5% increase over 2017

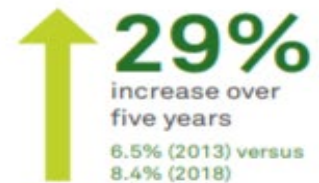


Almost 24% increase over 2014



Since 2011, the post-accident positivity rate increased annually.

General U.S. workforce





Overview of State Marijuana Laws

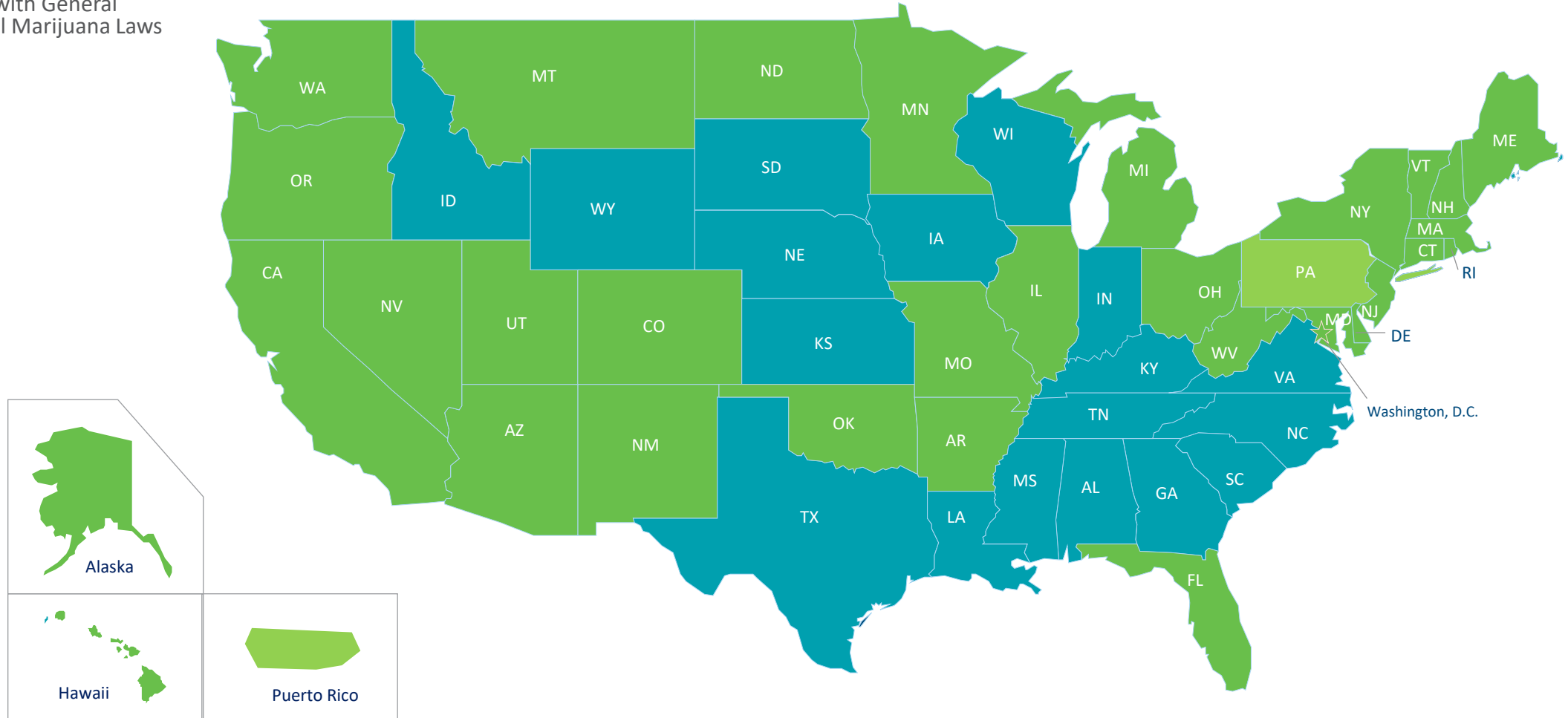
Medical Marijuana: Suddenly Everywhere

- 33 states have adopted general medical marijuana laws (up from 29 in 2019).
- Most include no employment protections . . .
- But, increasingly, state legislators are seeking to protect medical marijuana users from adverse employment action.



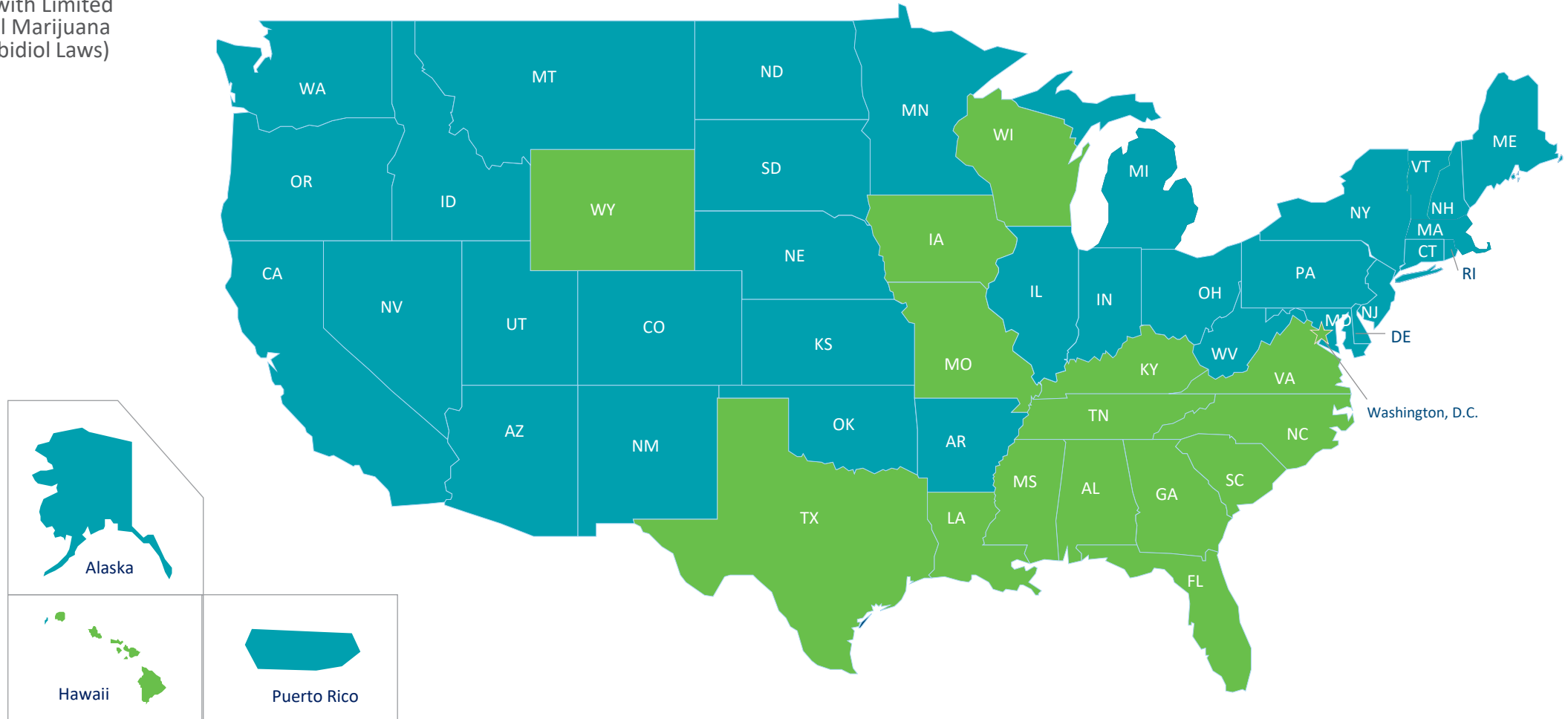
General Medical Marijuana Laws

 States with General Medical Marijuana Laws



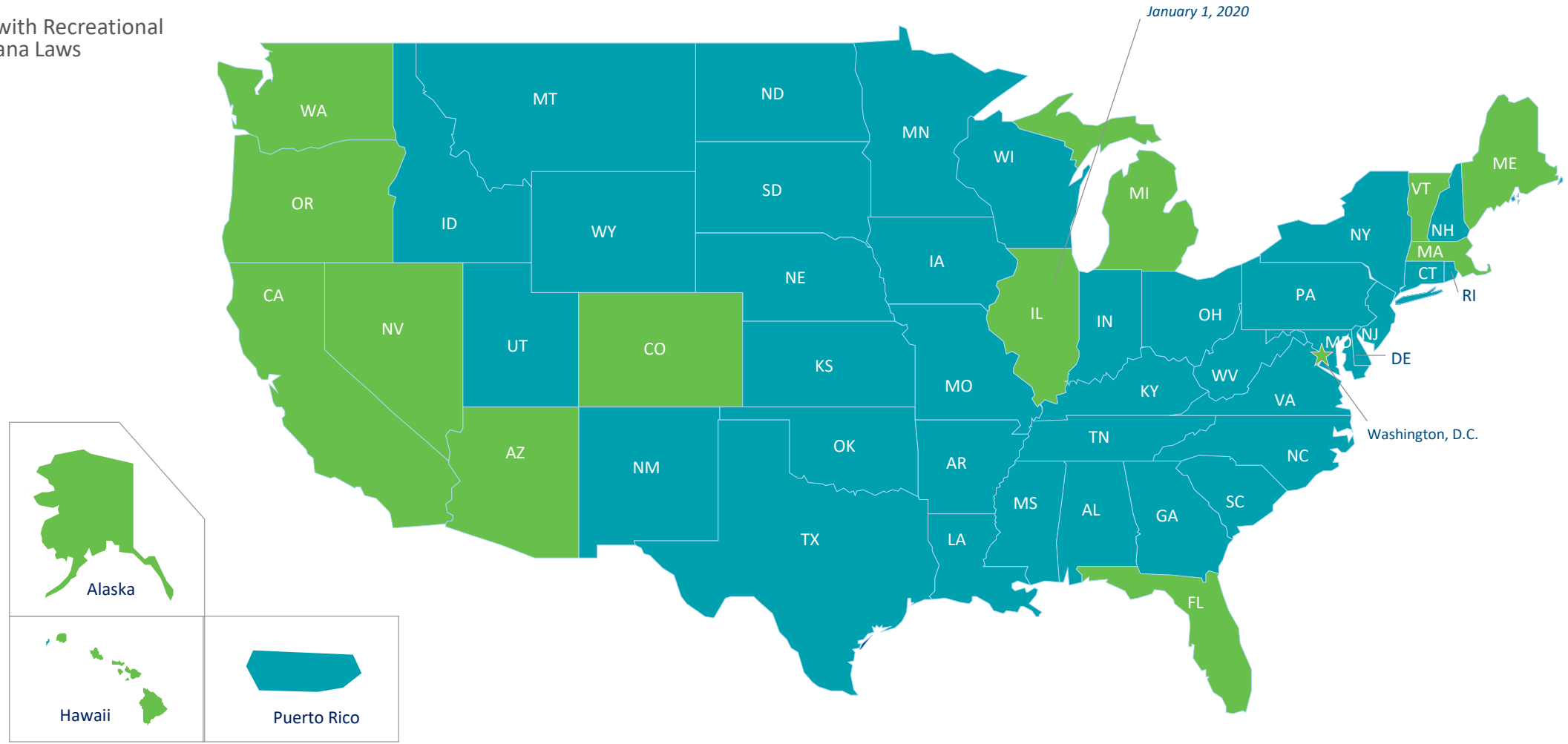
Limited Medical Marijuana Laws (Cannabidiol Laws)

States with Limited Medical Marijuana (Cannabidiol Laws)



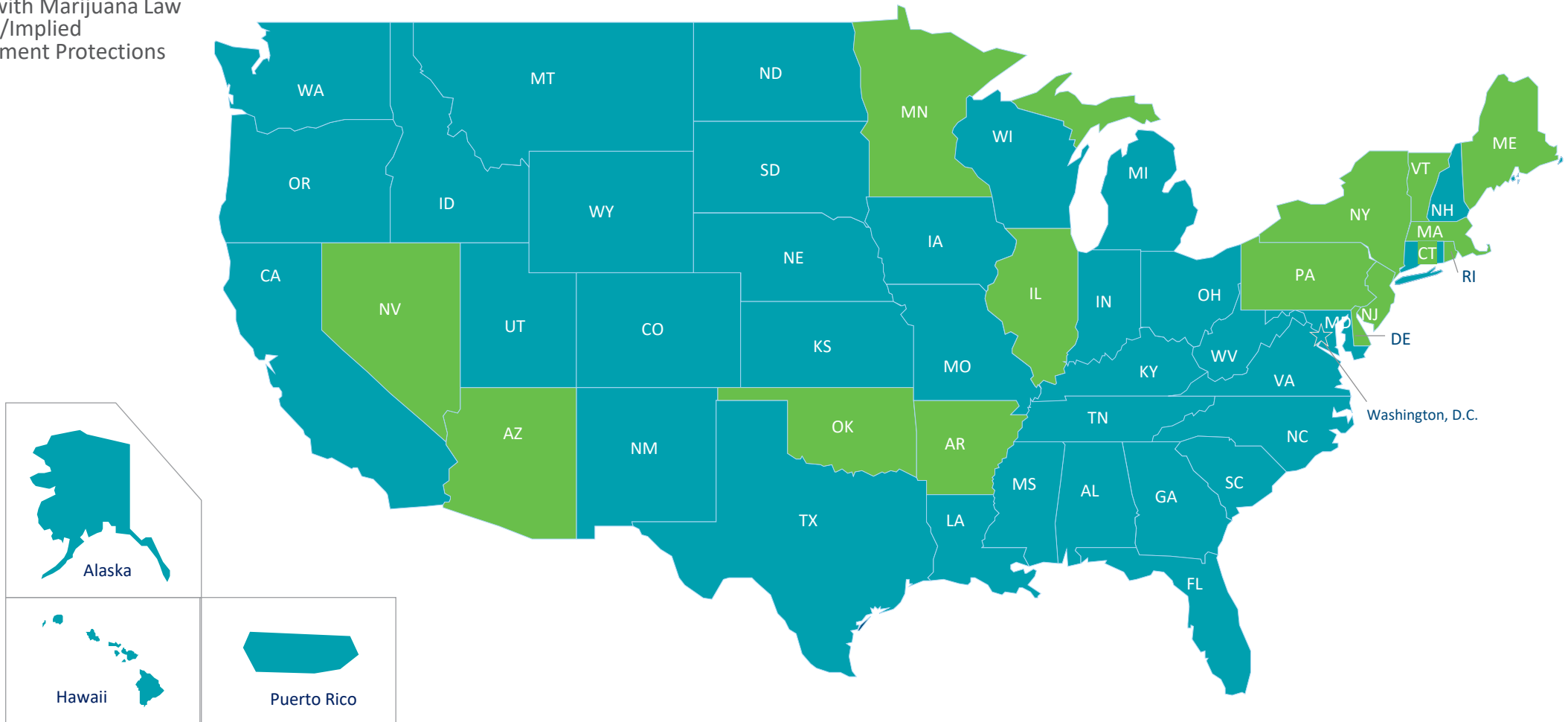
Recreational Marijuana Laws

States with Recreational Marijuana Laws



States With Marijuana Law Express/Implied Employment Protections

States with Marijuana Law Express/Implied Employment Protections



Example protection law: Pennsylvania

- Employer cannot discharge, refuse to hire or take other adverse action solely on the basis of an individual's **status** as a certified medical marijuana user
- BUT—the employer does not need to permit a medical marijuana user to use or be under the influence on its premises
- AND—the employer need not do anything that causes the employer to violate federal law

States Not Protecting Workers Using Medical (or Recreational) Marijuana

- California
- Colorado
- Florida
- Michigan
- Montana
- New Jersey—**about to change...**
- Ohio
- Vermont
- Washington



Example of non-protection law: Ohio

- Employer **can** discharge, refuse to hire or take other adverse action solely on the basis of an individual's status as a certified medical or recreational marijuana user
- Employer **can** discharge, refuse to hire or take other adverse action solely on the basis of an individual's positive drug test for marijuana
- Employer has **civil immunity** from lawsuits based on adverse employment action taken due to medical marijuana use



Federal Law and Marijuana

But, Wait...

- Isn't the use, possession and sale of marijuana still illegal under federal law?



Yep!

- Since 1970 – and currently – marijuana has been classified as a Schedule I controlled substance under the federal Controlled Substance Act
- 21 U.S.C. Section 812(b)(1)(A)-(C) is still on the books



Still a FEDERAL Crime!

- Possessing, transporting, selling, and manufacturing marijuana are all still federal crimes
- **The entire new U.S. weed industry violates federal criminal law!**



Federal Preemption?

- Since marijuana is still a Schedule 1 “narcotic” under the federal Controlled Substances Act (CSA), how can states enact laws that allow citizens to violate the CSA?
- Obama/Holder – “hands-off” enforcement approach.
- Trump/Barr – indicated intent to revisit this policy...did not
- Biden – likely a similar hands-off approach



Federal Preemption?

- California, Colorado, Montana, Oregon, and Washington have state supreme court decisions holding the states' medical marijuana laws offer no employment protection because the state laws making marijuana use lawful is inconsistent with federal law.
- In Arizona, *Reed-Kaliher v. Hoggatt*, 235 Ariz. 361 (Ct. App. 2014), implies that federal law does not preempt the AMMA.
 - The state could not revoke probation granted a state criminal defendant with a medical marijuana card when the terms of his state-granted probation precluded him from engaging in illegal conduct including marijuana use. The court concluded that AMMA creates a state statutory immunity that protects a cardholder from penalty for proper use of marijuana under the AMMA.
 - Because the case did not present a federal/state conflict as to marijuana laws, the court found that the fact that marijuana remains illegal under federal law did not preempt the state's authority to enforce the AMMA.

Case Study: Connecticut's Medical Marijuana Statute

“Unless required by federal law or required to obtain federal funding, an employer cannot refuse to hire a person or discharge, penalize or threaten an employee solely on the basis of the individual’s status as a qualifying patient or primary caregiver.”

Conn. Gen. Stat. § 21a.408p.

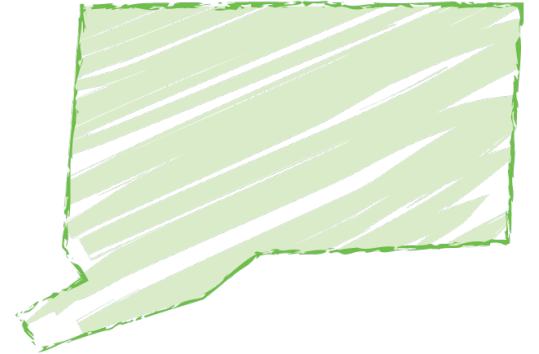
An employer can:

- 1) Prohibit the use of intoxicating substances during work hours;
- 2) Discipline an employee for being under the influence of intoxicating substances during work hours.

Conn. Gen. Stat. § 21a.408p.

Connecticut Medical Marijuana Law -- Noffsinger

- Applicant discloses medical marijuana use to treat PTSD and fails pre-hire drug test; her offer of employment is rescinded. She sued, alleging violation of Connecticut's medical marijuana law (PUMA).
- Employer seeks to dismiss claim, arguing that state law is preempted by federal law: the Controlled Substances Act, the Americans with Disabilities Act, the Food, Drug, & Cosmetic Act, and the federal Drug-Free Workplace Act
- Employer further argues: we did not act on basis of her status as a PUMA patient, but because she tested positive for marijuana!



Connecticut Employers & Medical Marijuana -- *Noffsinger*

Court:

- Controlled Substances Act, Food, Drug & Cosmetics Act, do not regulate employment practices
- Drug-Free Workplace Act does not require drug testing; requires that the employer discipline workers who use or possess illegal drugs at work
- ADA permits employers to prohibit illegal drug use at work; it does not permit employers to use a negative drug test as a universal qualification standard



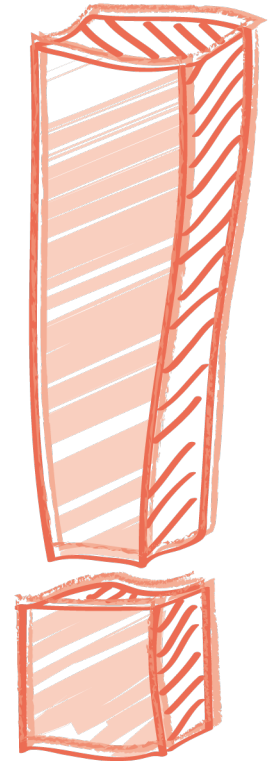
Connecticut Medical Marijuana Law -- *Noffsinger*

Court:

- Action based on a positive workplace drug test for marijuana constitutes status-based discrimination when an employer knows the result was caused by marijuana use. Lawful under Connecticut law.
- Summary judgment to plaintiff!
- ***Federal*** court found that ***federal*** law does not prohibit employment of illegal drug users.

Take-away: Zero-tolerance policies premised on federal law are under attack

Take-away: Employers may need to tolerate/excuse positive drug tests for covered workers despite zero tolerance policies



Federal Law & Marijuana – Government-Mandated Testing

U.S. Department of Transportation Regulations

- Cover 8 million+ private sector workers in transportation work
- Prohibit drug abuse and alcohol misuse
- Require drug & alcohol testing
- **Marijuana use of any kind prohibited for regulated workers (recreational or medical)**

Other Mandated Testing (e.g., DOD, DOE and NRC)





Arizona Medical Marijuana Act

Introduction to Arizona's Medical Marijuana Law

- In November 2010, Arizona voters passed Proposition 203, the Arizona Medical Marijuana Act. The Act is codified as A.R.S. § 36-2801 *et seq.*, as well as in other sections.



Arizona - Prop 203

- Legalized marijuana for medicinal purposes
 - Permits a qualifying patient with a debilitating medical condition to obtain marijuana from a medical marijuana dispensary and use it to treat and alleviate the condition



Medical Marijuana

- Non-discrimination provisions of the AZ Medical Marijuana Act
 - Cannot discriminate based on **status** as medical marijuana cardholders.
 - Cannot discriminate based on registered qualifying patient's **positive drug test**.

A.R.S. § 36-2813.



Medical Marijuana

- Two exceptions to the non-discrimination provisions of the AZ Medical Marijuana Act:
 - loss of monetary or licensing-related benefit under federal law.
 - use, possession, or impairment at work or during work hours.

A.R.S. § 36-2813(B).



Medical Marijuana and Employee Discipline



- AMMA does not require an employer to allow the use of marijuana at work or any employee to work while impaired.
- *But, a registered qualifying patient “shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in *insufficient concentration* to cause impairment.”

A.R.S. § 36-2814(A)(3) (emphasis added).

Arizona Medical Marijuana Act: Key Points

- An employer may discipline an employee for using marijuana in the workplace or working while under the influence of marijuana.
- Without the ability to use the positive test results as the sole evidentiary basis, there must be other evidence of impairment.



Employee Remedies

- AMMA does not expressly provide a private cause of action.
- In *Whitmire v. Walmart* (2019), AZ federal court ruled the AMMA provides an implied private cause of action. Also held the statutory amendments are constitutional and allow ER to use “good faith” belief of impairment.
- Look at the Employment Protection Act (A.R.S. §23-1501):
 - An employee has a claim against an employer for wrongful termination if the termination is in violation of an Arizona statute.



Arizona Drug Testing Of Employees Act—Civil Immunity

- The Arizona Drug Testing of Employees Act (DTEA), A.R.S. §23-493, gives employers the right to drug test employees and, **if the employer follows the law’s requirements, prohibits employees from suing employers for an adverse action taken** “in good faith based on the results of a positive drug test, where test is a part of a bona fide, written testing program that is job-related and consistent with business need.”



2011 Amendments to Arizona's Drug Testing Statute

- “Impairment”
 - Specifically identifies **behaviors** that indicate impairment.
 - “...symptoms of the employee's speech, walking, standing, physical dexterity, agility, coordination, actions, movement, demeanor, appearance, clothing, odor, irrational or unusual behavior, negligence or carelessness in operating equipment, machinery or production or manufacturing processes, disregard for the safety of the employee or others, involvement in an accident that results in serious damage to equipment, machinery or property, disruption of a production or manufacturing process, any injury to the employee or others or other symptoms causing a reasonable suspicion of the use of drugs or alcohol.”
 - Employers have discretion to identify any sign that causes a reasonable suspicion of an employee's use of drugs or alcohol.



2011 Amendments to Arizona's Drug Testing Statute



- “Safety-Sensitive Position”
 - any job designated by an employer as a safety-sensitive position.
 - any job that includes tasks or duties that the employer in good faith believes could affect the safety or health of the employee performing the task or others.

2011 Amendments to Arizona's Drug Testing Statute



- “Safety-Sensitive Position”
 - Operating a motor vehicle, other vehicle, equipment, machinery, or power tools;
 - Repairing, maintaining, or monitoring the performance or operation of any equipment, machinery, or manufacturing process, the malfunction or disruption of which could result in property damage;
 - Performing duties in the residential or commercial premises of a customer, supplier or vendor;
 - Preparing or handling food or medicine;
 - Working in any occupation regulated pursuant to Title 32 of the Arizona Revised Statutes (which includes over forty occupations ranging from architects to massage therapists).

A.R.S. § 23-493(9).

Drug Testing of Employees Act—Immunity has a “Price”...

Employers must “opt in” to the protections of the Drug Testing of Employees Act and have a compliant testing policy...





“Accommodating” Marijuana Users

What About the ADA?



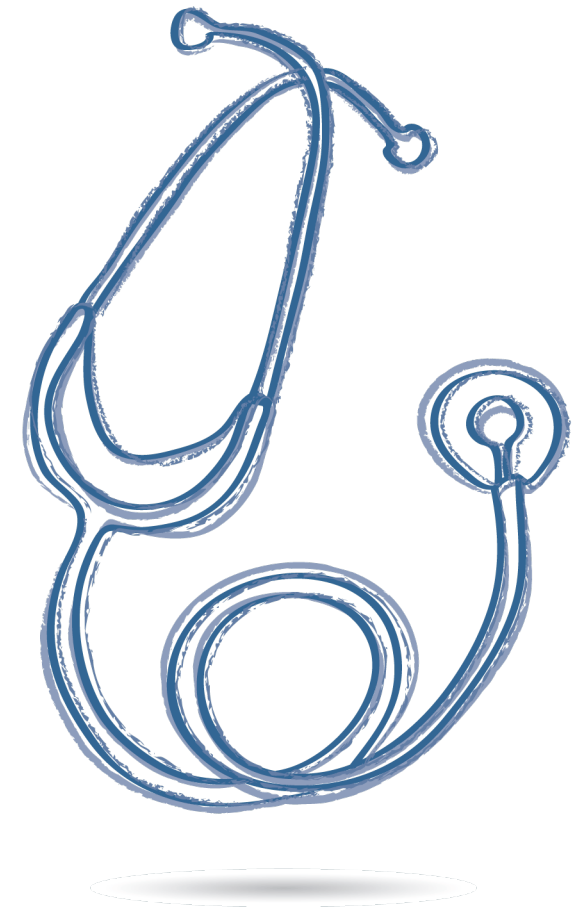
- Prohibits employers from refusing to hire or taking adverse employment action against a qualified individual with a disability (QUID).

Requires employers to provide reasonable accommodations to QUIDs so they can perform their jobs.

So, is using medical marijuana a required reasonable accommodation?

Marijuana Addiction - Disability and Leave Law Issues

- Americans With Disabilities Act and State Discrimination Laws
 - Current illegal drug use not protected under ADA
 - Marijuana addiction may constitute “disability” under ADA and comparable state laws – but typically only if individual is not currently abusing the drug
 - Limited safe harbor under ADA for employees participating in or who have successfully completed rehabilitation
- Family and Medical Leave Act
 - Leave for substance abuse rehabilitation or treatment is for a “serious health condition” under FMLA
 - Absences caused by substance abuse (e.g., taking substance in excess of recommended dosage) not protected



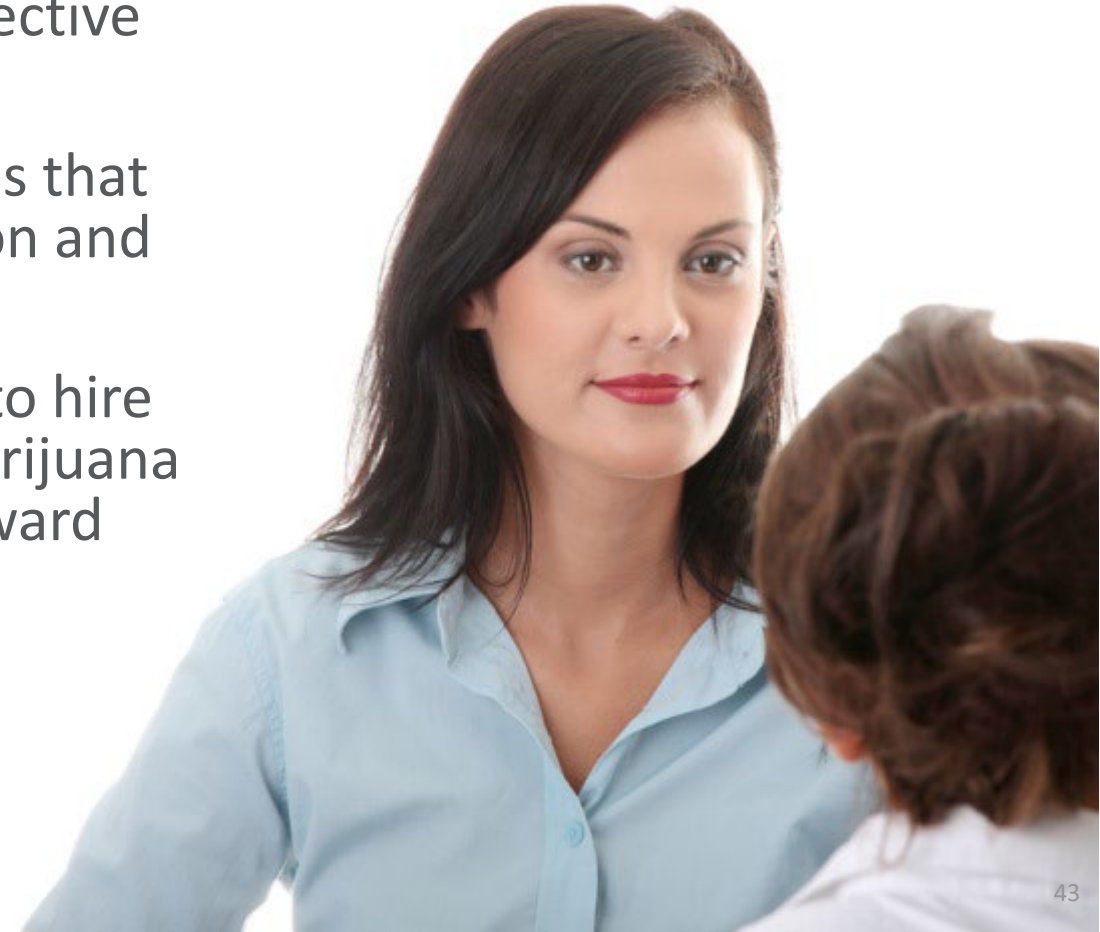
Possible “Accommodations” for medical marijuana users

- Medical opinion on direct threat/fitness for duty in certain positions?
- Instructions directing medical marijuana patients not to work while impaired?
- Instructions directing medical marijuana patients not to perform certain tasks?
- Clarify no marijuana products permitted on site or used during work.
- Reassignment to alternative position (such as no driving)?
- Change to job duties?
- Leave of absence?
- Risk analysis: Safety-sensitive positions and the potential for catastrophic loss.

Hypothetical

- Employer receives an application for employment from a candidate who will work remotely as a salesperson, driving his or her own vehicle to meet with prospective and existing customers.
- During the interview process, the applicant reveals that she uses medical marijuana for a medical condition and will likely fail the pre-hire drug test.
- The employer likes this candidate and would like to hire her. Human Resources is concerned about the marijuana use, but the operations people want to move forward and bring her onboard.

Must the company hire her?



Evaluating & Managing Risk

- In Arizona, an employer has an obligation to consider this applicant in the hiring process.
- Things to Evaluate:
 - How can we tell if she is using marijuana in accordance with state law?
 - ADA - what sorts of accommodations will the company consider, if any, if she's hired?
 - Can we require her to stay home if she is impaired?
 - How will we know if she is impaired?
 - What about her driving responsibilities?
 - Is hiring her required?



Management Strategies/Dialogue & Possible Accommodations

- Acknowledgment Forms
 - Verifying lawful MMJ use
 - Securing assurances – no on duty use, possession, impairment
- Safety-Sensitive Work - Fit for Duty/Medical Examinations
 - Drug other than federally illegal/non-impairing drug work as accommodation (e.g., marinol)?
 - Marijuana abstinence prior to inception of safety-sensitive work?
 - Undue risk of harm/safety assessments
 - Other work limits (e.g., instructions not to perform certain tasks under the influence of MMJ?)
 - Is use temporary?
- Leaves of Absence?
- Reassignment to alternative work?



Proving Marijuana Impairment--?

Weed: How Much is Too Much?

- THC is the impairing substance
- THC content in 1990: 3% – 6 %
- Average THC content in Colorado in 2016: 24% – 26%
- Marijuana “edibles” have range of potency – serving size may be tiny.
- Distilled marijuana oils and “dabbing” –90% THC or more?
- Recognizing impairment is very difficult



Testing for Marijuana Use & Impairment

No national consensus on what level of THC constitutes impairment, or even what test is preferred (e.g., urine versus oral fluids/saliva)

Absent MJ THC level impairment consensus, acting on test result alone in any state that requires a showing of impairment for employment action will be subject to challenges

Should You Ignore Positive Marijuana Test Results (if you continue to test)?

No!

- DOT-regulated workforce: can't!
- What about litigation: negligent hire, negligent retention, punitive damages claims?
- OSHA 101: providing a safe workplace
- Jury decision as to whether you are responsible
- What about negative publicity?





Recreational Marijuana

Example of Allowed Recreational Marijuana Use--Arizona

- Prop 207 (2020)
 - Legalizes possession and use of marijuana by adults age 21 and over for recreational or non-medicinal use
 - The initiative passed with roughly a 20% margin
 - Lawmakers have **until April 5, 2021**, to promulgate implementing regulations
 - “Does not allow driving . . . while impaired to even the slightest degree by marijuana”



Recreational Marijuana in Arizona

- Prop 207 (2020) – Effect on Employment
 - “Does not restrict the rights of employers to maintain a drug-and-alcohol-free workplace or affect the ability of employers to have workplace policies restricting the use of marijuana by employees or prospective employees.”
 - An employer is not required “to allow or accommodate the use, consumption, possession, transfer, display, transportation, sales or cultivation of marijuana in a place of employment.”
 - Does not restrict employer’s right to “prohibit or regulate conduct otherwise allowed by [Arizona law] when such conduct occurs on or in their properties.”

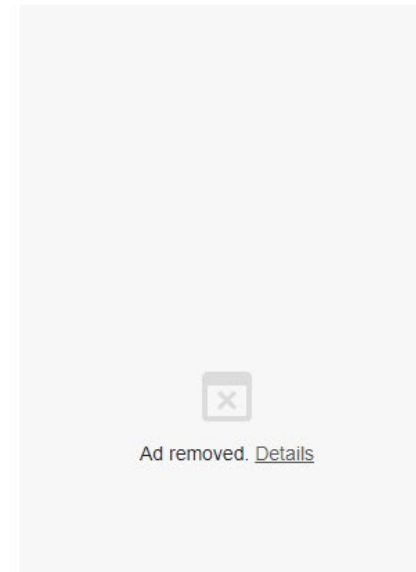
But Remember.....

    **PCSO: It is still illegal for people to drive around with hundreds of pounds of pot in their car**

By Kenneth Wong | Published 46 mins ago | Cannabis | FOX 10 Phoenix



(Photo Courtesy: Pinal County Sheriff's Office)





Marijuana Policy Development

Policy Development

Will you continue to test for marijuana? If so, in what circumstances?

How will marijuana test results be reported by your testing laboratory or Medical Review Officer?

Prohibitions on use/possession and impairment in the workplace continue to be lawful

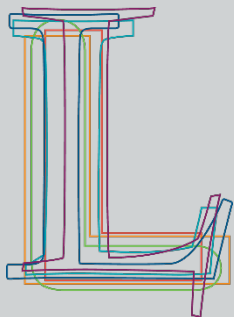
Stricter scrutiny for safety sensitive positions

Confirm no tolerance for marijuana use for DOT positions and other positions subject to government mandated testing

Reserve rights “to fullest extent permitted by law,” including action based on positive test results

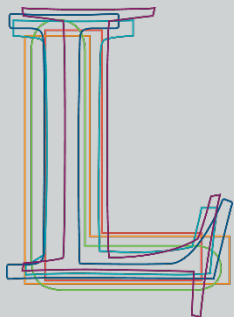
Consider a medication reporting provision if safety is implicated

Business considerations: employer culture, applicant pool impact, adverse media tolerance, safety



Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.



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