

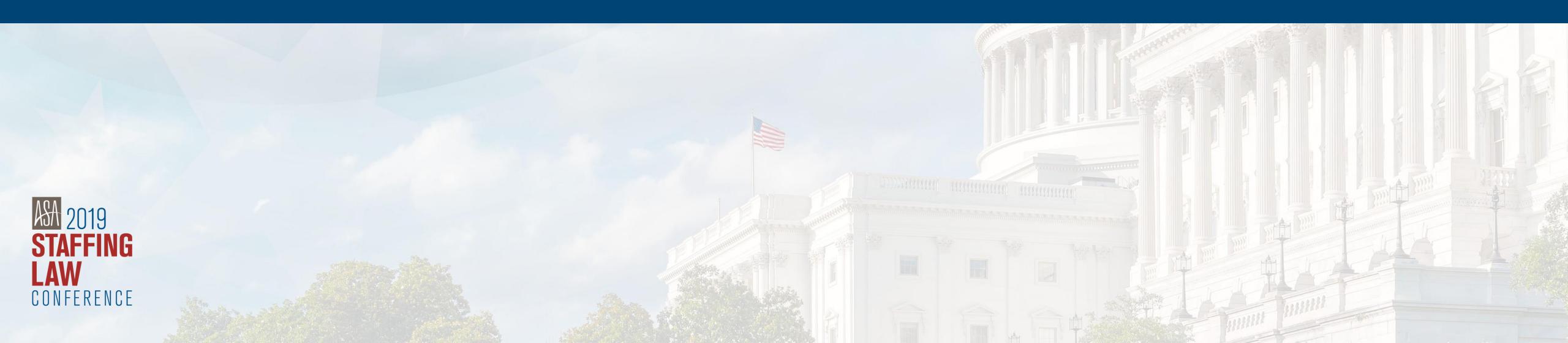
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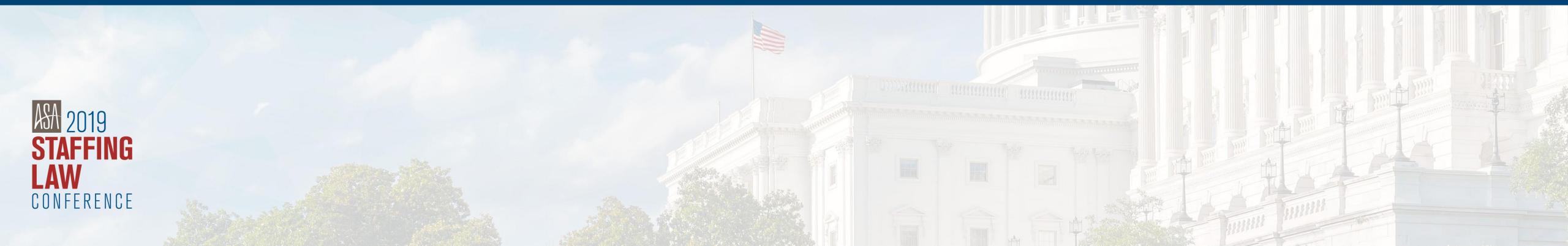


GIVE AND TOKE: A CONVERSATION ABOUT MARIJUANA AND THE WORKPLACE



Give and Toke: A Conversation About Marijuana and the Workplace

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Today's Agenda

- Overview of state and federal laws regarding medical and recreational marijuana use
- Conflicts between state and federal law regarding marijuana in the workplace and developing case law
- Marijuana use, from an insurance perspective
- OSHA regulations and safety considerations

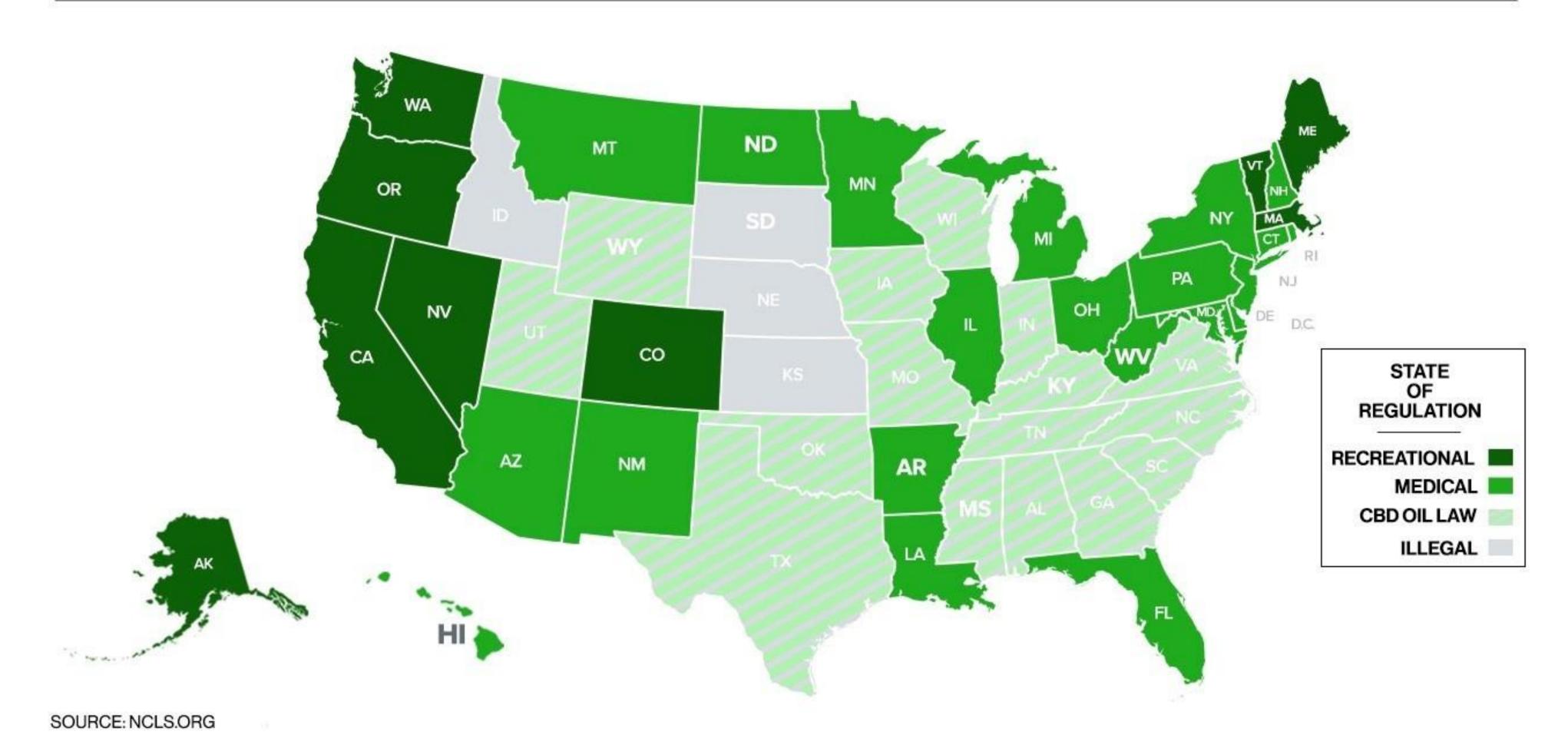


Introduction

- A growing number of states are legalizing medical marijuana and prohibiting discrimination against employees who use marijuana for disabilities or medical conditions
- Marijuana use remains illegal under federal law
- Litigation is growing, with the trend supporting employees who use marijuana for medical reasons
- Until the U.S. Supreme Court rules or federal law changes (both of which seem unlikely soon), employers are in a precarious space with no clear guidance



WHERE MARIJUANA IS LEGAL IN THE USA





Federal Laws Governing Marijuana Use

- Controlled Substances Act (21 U.S.C. 801 et. seq.)
 - Marijuana is classified as Schedule 1 substance under the CSA and thus illegal to possess or use under federal law
 - High potential for abuse
 - No currently accepted medical use for treatment
 - Treated same as heroin, LSD, ecstasy

BUT

- 2016—DEA denied attempt to reschedule but agreed to increase access for research
- June 2018—FDA approved first drug derived from marijuana (Epidiloex) for two types of severe childhood epilepsy (.01% THC)
- August 2018—DEA announced drugs, including CBD with THC content below .01%, are not considered Schedule 5 drugs as long as FDA approved



 December 2018—Agriculture Improvement Act of 2018 (2018 Farm Bill) removed hemp from CSA and amended definition of hemp to include "all derivatives, extract, cannabinoids"

Marijuana and Federal Employment Laws

- Americans With Disabilities Act
 - "[A] qualified individual with a disability <u>shall not include</u> any employee or applicant who is currently <u>engaging in the illegal use of drugs when covered</u> entity acts on the basis of such use." 42 U.S.C. § 12114
 - "Illegal drug" = "the use of drugs, possession, or distribution of which is unlawful under the Controlled Substances Act" 42 U.S.C. § 12111(6)(A)
 - ADA does not require employers to accommodate use of marijuana, even if lawfully prescribed
 - Accommodation obligation may exist for underlying medical condition, regardless of the use of marijuana for treatment



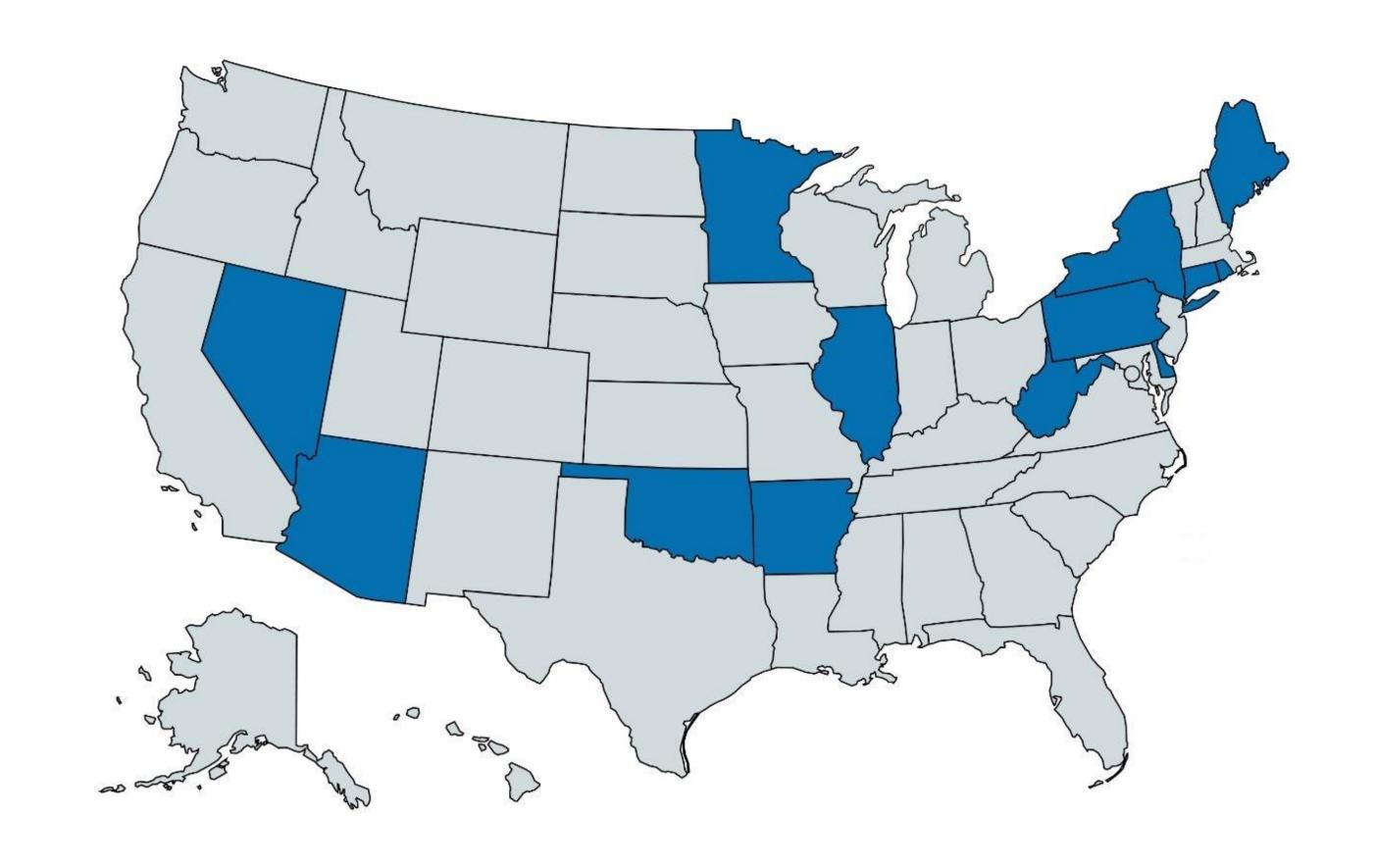
Marijuana and Federal Employment Laws

- Family and Medical Leave Act
 - Up to 12 weeks of unpaid leave for a serious health condition or to care for a qualifying family member
 - FMLA permits employees to take leave on an intermittent basis or to work a reduced schedule under certain circumstances
 - What about employees who use marijuana during FMLA time as treatment for a medical condition?



Some States Have Passed Medical Marijuana Laws Expressly Prohibiting Employment Discrimination

- 1. Arkansas
- 2. Arizona
- 3. Connecticut
- 4. Delaware
- 5. Illinois
- 6. Maine
- 7. Minnesota
- 8. Nevada
- 9. New York
- 10. Oklahoma
- 11. Pennsylvania
- 12. Rhode Island
- 13. West Virginia





State Employment Protections for Medical Marijuana

- Explicit antidiscrimination statutes with varying protections (13 states: AZ, AR, CT, DE, IL, ME, MN, NV, NY, OK, PA, RI, WV)
 - Many state an employer is prohibited from taking adverse action based on status of being card-carrying medical marijuana user
 - Four states (AZ, DE, MN, OK) have specific language prohibiting discrimination based on positive drug test for marijuana
 - See also: Maine (2018)—protecting employees and applicants from adverse employment action based on off-duty marijuana use, <u>including recreational</u> use; employers can no longer test applicants for marijuana



State Employment Protections for Medical Marijuana

- Possible protection from adverse employment action (13 states and Washington, DC: AK, HI, LA, MD, MA, MI, MO, NH, NJ, NM, ND, UT, VT)
 - Some protection under state disability discrimination law (state supreme court—MA)
 - Employee-friendly court decisions interpreting state law (DC, MI, NJ, NM)
 - Proposed legislation to provide antidiscrimination language (HI, MD, NJ, NY)



State Employment Protections for Medical Marijuana

- No employment protections (seven states: CA, CO, FL, MT, OH, OR, WA)
 - No protection from adverse employment action based on off-duty marijuana use (express statutory language; FL and OH)
 - No duty to accommodate off-duty use (state supreme court decisions in CA, CO, MT, OR, WA)



Pro-Employer Decisions: Early Trend

- Largely from states with marijuana laws that do not ban discrimination
- Federal pre-emption
- State laws only decriminalize use and do not require employers to tolerate it
- Certain medical marijuana laws lack a private right of action
- Discrimination on the basis of marijuana use is not disability discrimination under ADA
- Accommodating marijuana use is not "reasonable" or imposes "undue hardship"





Pro-Employer Decisions: Early Trend

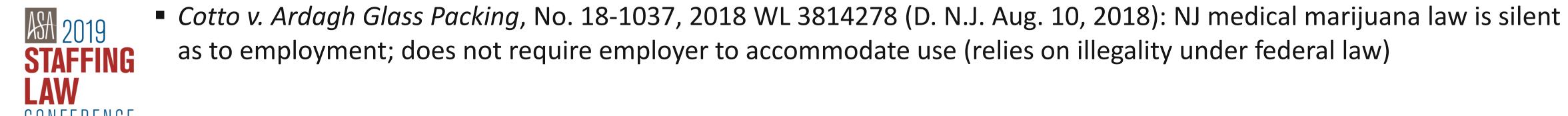
- Ross v. Ragingwire Telecommunications Inc., 174 P.3d 200 (Cal. 2008): CA FEHA does not require accommodation of medical marijuana; CA medical marijuana law says nothing about employment and only decriminalizes use under state law
- Johnson v. Columbia Falls Aluminum Co. LLC, 213 P.3d 789 (Mont. 2009): Employers have no duty under federal or MT disability discrimination law to accommodate medical marijuana use that would otherwise be legal under state law
- Emerald Steele Fabricators Inc. v. Bureau of Labor & Industries, 230 P.3d 518 (Or. 2010): OR medical marijuana statute is conflict pre-empted by CSA
- Roe v. Teletech Customer Care Mgmt., 257 P. 3d 586 (Wash. 2011): Not reasonable accommodation for employer to violate—or to allow employee to violate—federal law; medical marijuana statute does not provide a private right of action
- Casias v. Wal-Mart Stores Inc., 695 F.3d 428 (6th Cir. 2012): MI medical marijuana law does not restrict employer's right
 to discipline for use because law says nothing about employment and only decriminalizes use under state law
- Curry v. MillerCoors Inc., No. 12-cv-02471-JLK, 2013 WL 2292307 (D. Colo. Aug. 21, 2013): "Though [complainant] may never have used medical marijuana absent his disability, [respondent] did not unlawfully terminate him 'because of' his disability'"



 Coats v. Dish Network, 350 P.3d 849 (Colo. 2015): CO off-duty lawful conduct statute does not protect medical marijuana use because it remains illegal under federal law

Pro-Employer Decisions: Early Trend

- Swaw v. Safeway Inc., No. C15-939MJP, 2015 WL 7431106 (W.D. Wash. 2015): WA law does not require employer to accommodate medical marijuana use if it has a drug-free workplace, even if used off site
- Steele v. Stallion Rockies Ltd., 14-cv-02376-CMA-BNB, 2015 WL 3396417 (D. Colo. May 26, 2015): Dismissing discrimination claim of terminated employee because "antidiscrimination law does not extend so far as to shield a disabled employee from the implementation for his employer's standard policies against misconduct"
- Garcia v. Tractor Supply Co., 154 F. Supp. 3d 1225 (D. N.M. 2016): NM medical marijuana law combined with state antidiscrimination statute does not give employee a cause of action; NM medical marijuana law says nothing about employment and only decriminalizes use under state law, such that an employer is not required to accommodate use
- Shepherd v. Kohl's Dep't Stores Inc., No. 1:14-cv-0190-DAD-BAM, 2016 WL 4126705 (E.D. Cal. Aug. 2, 2016): Employer has no duty to engage in interactive process if the only demand for accommodation is medical marijuana use in violation of employer policy; granting summary judgment against California disability discrimination claim because there is no evidence "that plaintiff was fired because of his anxiety and not because of the manner in which he chose to treat that condition" via medical marijuana
- Carlson v. Charter Comms., No. CV 16-86, 2017 WL 3473316 (D. Mont. 2017): MT medical marijuana statute is preempted by CSA





Pro-Employee Decisions: Recent Trend

- Particularly addressing marijuana laws with express statutory employment protections
- Marijuana just like any lawful prescription
- Employees who use may be qualified disabled individuals, and impossible to separate disability from treatment
- Interactive process required
- Undue hardship defense still available
- Private right of action implied





Pro-Employee Decisions: Recent Trend

- Barbuto v. Advantage Sales & Marketing, 78 N.E.3d 37 (MA 2017): Denying motion to dismiss and holding that employer could be liable under the Massachusetts antidiscrimination statute for disability discrimination by declining employment based on an individual's off-duty medical marijuana use; tolerating off-duty medical marijuana use may be a "reasonable accommodation" of a disability under the Massachusetts antidiscrimination statute
- Callaghan v. Darlington Fabrics Corp., PC-2014-5680 (R.I. Super. Ct. May 23, 2017): RI medical marijuana act created implied private right of action under RI Civil Rights Act and employer violated RI's medical marijuana statute and RICRA when it refused to hire the plaintiff even though she admittedly could not pass the pre-employment drug test; granted summary judgment to plaintiff applicant
- Noffsinger v. SSC Niantic Operating Co., No. 3:16-cv-01938, 2018 U.S. Dist. LEXIS 150453 (D. Conn. Sept. 5, 2018): Granting summary judgment to job applicant on her claim that the federal contractor violated antidiscrimination provisions of CT's medical marijuana law when it rescinded her job offer after she tested positive for marijuana in a pre-employment drug test; held that DFWA does not require drug testing and does not regulate employees who use illegal drugs outside of work while off-duty
 - Whitmire v. Wal-Mart Stores Inc., 2019 WL 479842 (D. Ariz. Feb. 7, 2019): Employee had private right of action under AMMA and employer violated AMMA's discrimination provision when it terminated an employee for a positive drug test that did not prove actual impairment during working hours; Wal-Mart relied upon a drug test that only proved recent use; granted summary judgment for the employee



Where Will Future Litigation Go?

- Current U.S. Supreme Court is conservative
- Might rule in favor of federal pre-emption due to antidrug, pro-employer leaning
- But could consider pre-emption federal overreach and punt to states
- If trend continues, more employee-friendly decisions are anticipated
- Trend has been for more states to pass medical marijuana laws
- More states may also enact or add explicit employment protections for users



What's an Employer to Do?

- Notwithstanding these state medical marijuana laws, employers are not required to tolerate marijuana use at work or while working
- Employers not required to tolerate any impairment at work or while working
- Many employers will continue to reject medical marijuana use in reliance on federal illegality, particularly federal contractors and those with safety-sensitive positions
- Others—in response to wave of state marijuana antidiscrimination laws, lawsuits, and rulings—are opting for either
 - Case-by-case, reasonable accommodation analysis with interactive process
 - Ceasing testing for marijuana entirely (e.g., Maine)



The OSHA Buzz: Cannabis Employer Obligations Vary

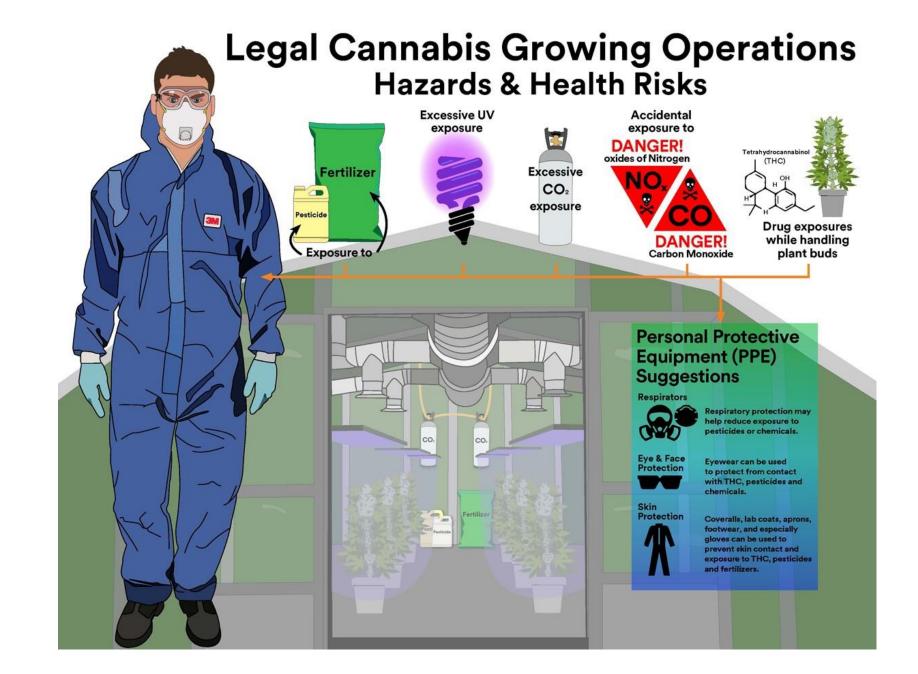
- U.S. Department of Labor—The Occupational Safety and Health Act of 1970
- U.S. Occupational Safety and Health Administration
- U.S. National Institute for Occupational Safety and Health





Who's Regulating Cannabis? OSHA, NIOSH, States?

- OSHA (federal): General Duty Clause—Section 5 (a)(1)—provide a safe work environment, broad standards
- NIOSH: Recommends healthy work conditions, no enforcement
- State OSHA Plans: Aggressive? Standards? Regulations? Guidelines?





Certain States Inhale Deeply

As California goes, so goes the nation



Cal OSHA Cannabis Mandate:

"Employers who cultivate, manufacture, distribute, sell, and test marijuana products must take steps to protect their employees from all health and safety hazards associated with their work per Cal OSHA standards."



Cal OSHA Has Regulations Applicable to All Aspects of the Industry

- Electrical hazards
- Exposures to airborne contaminants
- Flammable liquids and gases
- Hazard communication
- Hazardous energy—lockout/tagout
- Heat illness prevention
- Injury and illness prevention program
- Machine hazards

- Personal protective equipment
- Point of operation hazards
- Pressure vessels
- Prohibition of smoking in the workplace
- Repetitive motion injuries
- Sanitation and pest control
- Slips, trips, falls, and use of ladder



Most States Apply Federal OSHA Standards or 'Guidelines'

- Colorado: Federal OSHA controls..."Guide to Worker Safety and Health in the Marijuana Industry"
- Vermont: Federal OSHA standards, some general state exposure limits
- Massachusetts: Cannabis Control Commission...guidance, recommendations
- Maine: Registered dispensary may be subject to inspection by the local fire department, building inspector, or code enforcement officer





Temporary Workers Ideal for Cannabis Industry

- Adaptable to seasonal changes
- Reduction in benefits
- Also on OSHA's radar



OSHA Temporary Worker Initiative

- "Temporary workers" are workers hired and paid by a staffing agency and supplied to a host employer to perform work on a temporary basis
- OSHA considers staffing agency and host employer to be "joint employers"
- "Staffing agencies have a duty to inquire into the conditions of their workers' assigned workplaces"
- "Staffing agencies need not become experts on specific workplace hazards, but they should determine what conditions exist at their client (host) agencies, what hazards may be encountered, and how best to ensure protection for the temporary workers"
- "Inquire and verify"



California—Only State (So Far) to Tie Licensing to OSHA Regulations

- The Control, Regulate, and Tax Adult Use of Marijuana Act of 2016 requires all cannabis license applicants to complete a Cal OSHA 30-hour safety class
- Something for staffing agency to confirm during initial client contact?





Known Cultivator and Agricultural Hazards

- Respiratory, eye, and dermal exposures to 8-9-tetrahydrocannabinol (THC) while handling plant buds
- Pesticides and fertilizers exposure
- Excessive ultraviolet (UV) exposure from grow lamps
- Disproportionate carbon dioxide (CO2) exposure in greenhouses
- Accidental carbon monoxide (CO) and oxides of nitrogen (NOx) exposure
- Burns and shock from improper wiring of grow lamps and other equipment, including butane extraction
- Cuts, nicks, scrapes from harvesting the buds, flowers, and other elements of the plant
- Pinches, carpal tunnel, and repetitive stress during harvesting
- Mold exposure and improper ventilation
- Heat stress from working in outdoor facilities, especially greenhouses





Known Processor and Handler Hazards

- Mechanical and chemical injuries during extraction
- Edible cooking injuries
- Cuts and amputations from knives and slicers
- Burns
- Electrical risks
- Exposure to cleaners and sanitizers
- Slips, trips, and falls





Retailers—Hazards in Store Settings

- Ergonomics—sprains and strains due to lifting and stocking products
- Workplace violence; robberies—no specific OSHA standards for workplace violence
- Slips, trips, and falls





Getting Serious: Cal OSHA Cites Cannabis Manufacturer After Explosion

- 2018—worker burned using propane to extract oil from cannabis leaves indoors
- Employer failed to test the atmosphere for flammable gases or vapors
- 10 violations
- No emergency action plan
- No hazard communication program
- \$50,470 in fines
- Highly publicized for maximum impact



Employers Ask

- Do OSHA's whistleblower protections under 29 CFR 1904.35 prohibit drug testing?
 Not always.
 - Section 1904.35(b)(1)(iv)—permissible to test employees who report workrelated injuries or illnesses if objectively reasonable basis for testing
 - Permissible to drug test under a state workers' compensation law





Employers Ask

- What drug testing practices pass the OSHA sniff test?
 - Reasonableness standard
 - 1. Drug use suspected as cause
 - 2. Other involved employees tested
 - 3. Drug test effective to assess "impairment"
 - 4. Testing for root cause analysis, not discipline
 - 5. Drug use and injury compatible (repetitive strain)

ADA laws control pre-employment drug tests

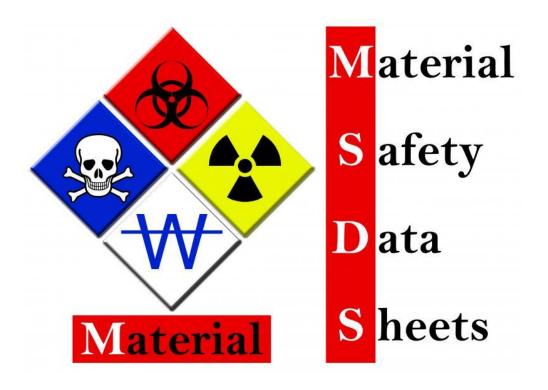


Employers Ask

Who must provide hazard communication training? Client or staffing agency?

- OSHA: Shared responsibility
 - Staffing agency: Must train about hazardous chemicals in the work area, cover categories of flammability, carcinogenicity; 29 CFR 1910.1200 (h)(1)
 - Client: Specify qualifications for employees, train on specific chemicals or personal protective equipment and the Safety Data Sheet guidelines





Employers Ask

Who must furnish personal protective equipment? Client? Staffing agency?

- Federal OSHA: Joint obligation to provide PPE at no cost; 29 CFR 1910
- Cal OSHA: No Title 8 standard requires employer to pay; Bendix Forest Products Corp
 v. OSHA (1979) 25 Cal.3rd 465; rule not yet final
- Exceptions: Employee has PPE; steel-toed shoes or steel-toed boots; prescription safety eyewear; everyday clothing, such as long-sleeve shirts, long pants, street shoes, and normal work boots; or ordinary weather protection





OSHA's Enforcement Focus on Staffing Agencies

- 1. Staffing agency's actual or constructive knowledge of the work site's hazards (exercise of reasonable diligence)
- 2. Staffing contract terms—defined responsibilities for training or PPE
- 3. Level of staffing agency contact with temporary workers
- 4. System to address complaints or concerns



How Staffing Agencies Can Avoid OSHA Violations

- Establish clear job descriptions and limitations
- Identify key hazards and protections
- Review and update a checklist to address foreseeable safety and health concerns at client workplaces
- Use checklist for initial and periodic safety and health inspections
- Require signoffs by workers on their site-specific training





Questions?





Two Issues

- Impact on marijuana in the workplace
- Growth of placements in the cannabis industry

They are intertwined—the more the drug becomes legal, the more people will use it; the more people use it, the more you will find it in your workplace



Two Issues

More than a quarter of Americans now live in areas that allow some form of legal cannabis for either medical or recreational use. Legal marijuana is becoming big business.

Retail sales

2016—more than \$6.5 billion

2017—almost \$10 billion

2018—\$13.5 billion

2021—estimated to be near \$17 billion

2025—estimated to be near \$25 billion

According to Marijuana Business Daily



- Marijuana in the workplace
- According to ZipRecruiter.com co-founder and chief executive officer Ian Siegel, marijuana is the fastest-growing job category in the U.S.
- "445% job growth in job listings in the category year over year"



- More American workers are testing positive for drugs than they have in the past 12 years, according to a recent study conducted by Quest Diagnostics
- Overall, marijuana positivity continued its five-year upward trajectory

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LAW

- Marijuana positivity increased 4% in the general U.S. workforce, and nearly 8% in the safety-sensitive workforce
- Increases in marijuana positivity in the **general U.S. workforce** were most striking in states that have enacted recreational use statutes since 2016: Nevada (43%), Massachusetts (14%), California (11%)
- These three states also saw significant increases in marijuana positivity in **federally** mandated safety-sensitive workers: Nevada (39%), California (20%), and Massachusetts (11%) [Federally mandated safety-sensitive workers include pilots; rail, bus, and truck drivers; and workers in nuclear power plants; for whom routine drug testing is required by the U.S. Department of Transportation]

In the past 12 years, primary drugs being identified in drug screens are marijuana, cocaine, and methamphetamine

- 61% of drug failures were for marijuana
- Positive marijuana tests increased 75% from 2013 to 2016 (urine and hair testing)



- With staffing companies already struggling to find capable employees to place, the need for bodies is even more dramatic. Drug screen failures have increased by 10– 15% in states where marijuana is legal. Many staffing companies are choosing to take marijuana off the drug screens because they cannot fill all the job requests since there are so many fails.
- Unfortunately, this leads many companies to hire just a "warm body." Therefore, the quality of hire is called into question. That desperation leads to poor judgment and safety issues, resulting in higher amounts of claims.



Zero Tolerance

- Recreational use can still result in disqualification of a candidate. Authorized medical use, however, calls into play disability statutes and the issue of reasonable accommodations. You must be careful here with regard to placement and hiring.
- Most companies not subject to statutory zero-tolerance policies are free to adopt such policies and, in fact, many industry sectors do adopt zero-tolerance policies driven mainly by workplace safety concerns.



Calculating Risk

- It is illegal in all states (each state has different levels of impairment) to drive under the influence, therefore 5–10 nanograms—depending on blood or saliva testing—could mean DUI
- Yet people will allow workers to perform hazardous job functions with the same levels in their system or roll the dice with no testing at all



What Are Staffing Companies to Do?

The best practice is to develop a drug policy to address the issue; it must

- 1. Create awareness
- 2. Educate both candidates and employees about the legal landscape and the applicable drug screening policies and procedures
- 3. List acceptable activities, screening procedures, and enforcement provisions

Finally, the policy should be communicated regularly to candidates, employees, and—yes, to clients as well



Issue Two

Placements to Marijuana Industry—Growers and Distributors

- Different states, different laws; staffing firms and brokers must be aware
 of individual state and federal restrictions
- Workers' compensation excluding coverage for claims arising from these industries
- Exclusions—existing or to come—potential coverage gap



Too Many Questions and Too Little Information

We have had many questions and there is little information provided to evaluate

- With any new service or industry we encounter for our staffing program, we analyze as much data as is available to identify areas of concern to develop overview, guidelines, etc.—unfortunately, there is not a lot of reliable statistical data
- As you can see by the prior slides, you have many conflicting opinions and case law presenting support for both sides of the issue



Potential Exposures

Potential exposures, which are just starting to be identified for the client, include

- Lack of focus
- Distraction
- Driving accidents
- Poor productivity
- Absenteeism

- Not caring about job or circumstances
- Lack of empathy
- Perception (side-to-side and depth)

Therefore, the PL, GL, EPLI, product liability, property, crime, and WC are an issue



Only Handful of Carriers Are Writing the Client Companies

- Most major carriers are taking wait-and-see attitude
 - 1. Federal vs. state issues, illegal Schedule 1 substance under federal law, banking issues, data support
 - 2. The majority of those writing are offering limited coverage—some limits as low as \$250,000-\$500,000 (well below what is needed) regardless of size of grower, etc.
 - 3. Some are giving higher limits but reduced coverage; many cannabis companies are choosing not to obtain the proper coverage—especially the smaller companies
- Currently, a handful of carriers writing insurance for growers and distributors
 - 1. Cannasure, Admiral, Golden Bear
 - 2. Excess and surplus insurance carriers reluctant to write U.S. exposure due to law
 - 3. Will entertain Canadian risks on individual basis
 - 4. WC—some PEOs



What Does This Mean for Staffing Firms?

There are many new ventures—staffing firms are creating separate companies to house the exposures of this industry

- Limited, if any, staffing experience in this industry
- No information on client companies and their protocols, or on what insurance they have
- Identify the staffing workers as administrative (sales—i.e., budtender)
- Most brokers are not prepared to provide answers or proper class codes



New Regulation

With new regulation, will employee positions in demand develop into a new "professional" class—i.e., budtenders, trimmers, growers?

- Licensing and education requirements—budtenders example—most experience required is personal knowledge of the product
- Edibles—a lot of background is needed here
 - Recalls
 - Improper labeling



Contracts

Inadequate client company insurance results in major liability for the staffing firm

- All client operations have coverage issues; therefore, signing a lopsided contract or not checking your client's coverage and limits could leave you assuming much of the risk
- Be the expert yourself; employ a strong drug policy
- Have your attorney review your contacts, employee handbook, etc.



Conclusion

This is happening; the world is changing. If you are going after this potentially \$25 billion market, you can't be expected to know it all.

Use your attorney, insurance carrier, and broker and build a program that protects you and your company.

