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# Getting to Know You: Why Are Background Checks and Drug Tests So Hard?

#ASAstaffinglaw





# Getting to Know You: Why Are Background Checks and Drug Tests So Hard?

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# Disclaimer

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**The material discussed during this session should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions.**





# Background Checks

- Fair Credit Reporting Act
- Disclosure and authorization challenges and lawsuits
- Unique issues relating to staffing companies
- Personal identifiers being restricted from courts



# Employer Responsibilities Under the FCRA

- Permissible purpose
- Disclosure and written authorization
- Two-step adverse action requirements
- Follow all EEO laws/guidance
- Certification to the consumer reporting agency





# Do Your Clients Require Certain Checks?



**Do you have staffing clients requiring certain checks be conducted before placement?**

When poll is active, respond at [pollev.com/asaasa640](https://pollev.com/asaasa640)

Text **ASAASA640** to **22333** once to join

# Do Your Clients Require Certain Checks?

Yes

No





# Disclosure and Authorizations

- FCRA requires that disclosures be in a standalone document, consisting “solely” of the disclosure
- Written authorization must be obtained prior to ordering the report
- Statute indicates that disclosure and authorization **can** be together
- Increased litigation alleging “extraneous” information in the disclosure violates standalone requirement



# Disclosure and Authorizations

## Continued litigation on a nationwide class-action basis

- Anything “extraneous” will likely be challenged
- References to “inspection of files” or “notice and scope” may be problematic
- “Throughout” employment may be extraneous
- Reference to permissible purpose (e.g., “employment purpose”) is okay
- Employers **can** provide the document at the same time as hiring documents
- Authorization does not need to be separate
- State law information cannot be included
- New **good** case law for employers and motion for summary judgment rulings





# Adverse Action

- Two-step Adverse action required for employers
- Pre-adverse action
  - Notification to dispute
  - Summary of rights
  - State/local law requirements (i.e., reason for decision in Illinois; San Francisco; Seattle; Prince George’s County, MD; Chicago; New York City Fair Chance; Los Angeles Fair Chance; and many others)
- Waiting period (reasonable period; state and local requirements)
- Adverse action



# Common Pitfalls

- Adverse action challenges when recruiters call before adverse action is delivered
- Failure to send two letters
- Is rejection of one position “adverse”? (Hint: likely yes)
- Auto-rejection letters on applicant tracking systems
- *Manuel v. Wells Fargo* decision
  - Whether an ineligible grade in a CRA system is an adverse decision is a question of fact for a jury
  - If only communication could be a problem
  - Consider changing labels





# Sharing of Reports

- Risky under FCRA
- Some clients may request or require actual report
- Check disclosure and authorization forms for actual consent
- Ensure candidate consents to report's disclosure to client
- Must have **before** you conduct the check and disclose to client

## Example:

- **The information gathered by the company and any consumer reports and/or investigative consumer reports may also be communicated to other companies where you may be eligible to be staffed or employed based on your qualifications.**



# Sharing Reports—Risk of Being a CRA

- Risk of being deemed a consumer reporting agency
- Don't add commentary if sending report (*Adams v. National Engineering case*)

## Example:

- Attached is a consumer report that was prepared by [Insert CRA]. Please note that Staffing Company had no involvement in the preparation of this report and is passing this on to you merely as an administrative service.





# FCRA Damages

- **Negligent violations**
  - ✓ Actual damages (back pay sometimes compensatory)
  - ✓ Attorney's fees
- **Willful violations**
  - ✓ Actual damages and attorney's fees -or-
  - ✓ Statutory penalties and attorney's fees: \$100 to \$1,000 per violation –and-
  - ✓ Punitive damages
- **Statute of limitations** is earlier of two years from “knew or should have known” or five years from report



# Restrictions to Court Information

- **Court restricting access to certain information**
  - ✓ LA County specific restrictions of only month and year DOB or DL
  - ✓ Michigan restricting access only to minimal information and not full DOB
    - Requires “consent” from consumer to access certain information
- Proposed legislation:
  - ✓ **CA SB 809—BANNING employment screening unless a legal requirement to do so. Hearing held in April. Call your legislators.**
  - ✓ CA SB 460—potentially banning tenant screening unless a legal requirement (dropped in 2023 but will be back 2024).
  - ✓ CA SB 647—restore access to DOB.





# How to Deal With Data Restriction Issues

- **Call/write your legislators and get involved**
  - ✓ Don't run searches in these counties?
  - ✓ Get self-disclosed information from candidate
  - ✓ Consider additional certification if checks are “unperformable” or not completed
  - ✓ Tell the candidate that there may be additional searches not able to be performed
  - ✓ Have candidate provide certified “no record” from court
  - ✓ Risk of negligent hiring or retention
  - ✓ Understand what you are getting and what you are not





# Are Your Clients Going “Green”?



**Do you have staffing clients requesting removal of THC/marijuana from pre-employment drug screening for their temporary employee candidates?**

*(for non-safety-sensitive roles, of course)*





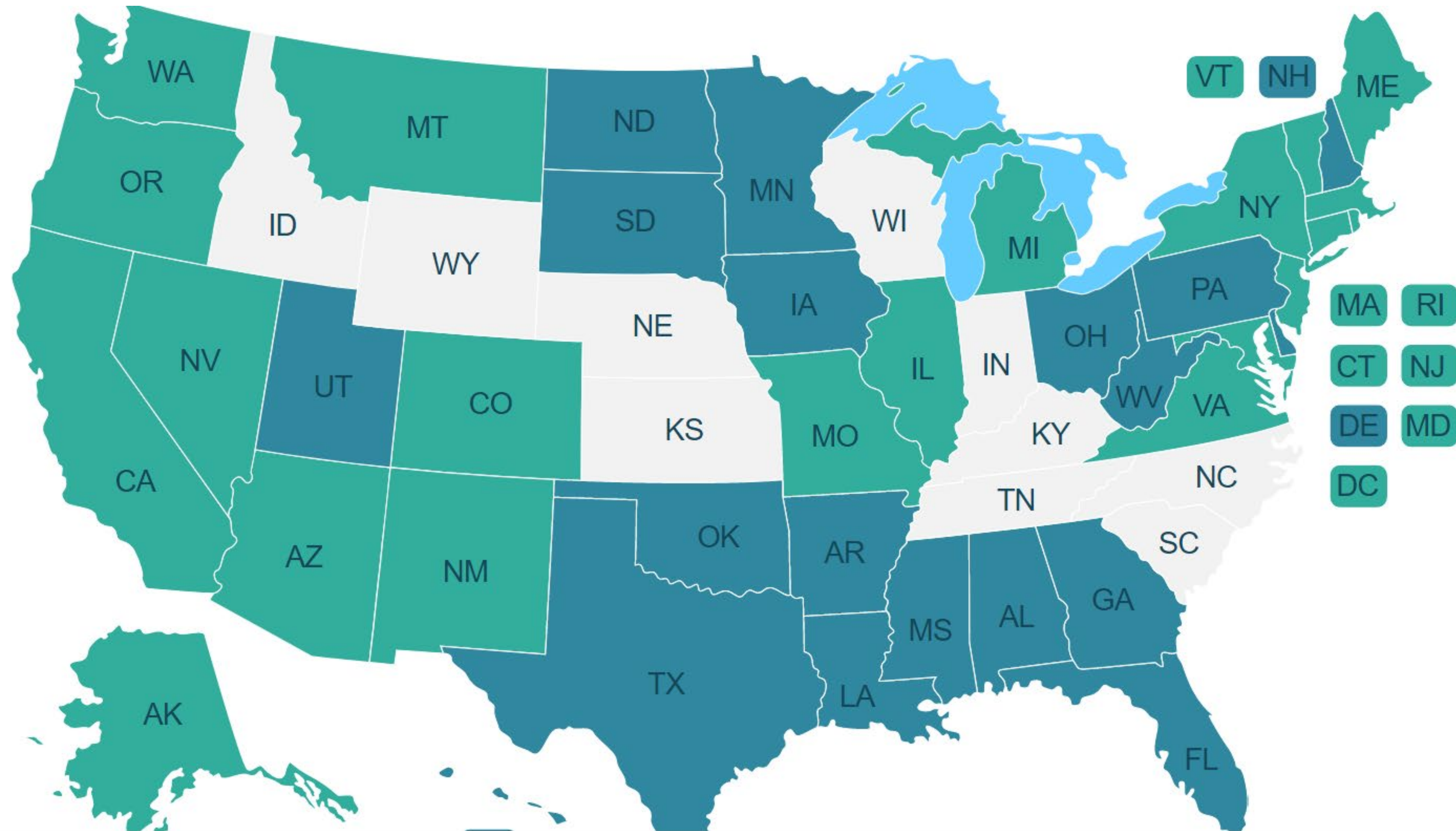
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# Are Your Clients Going "Green"?

Yes

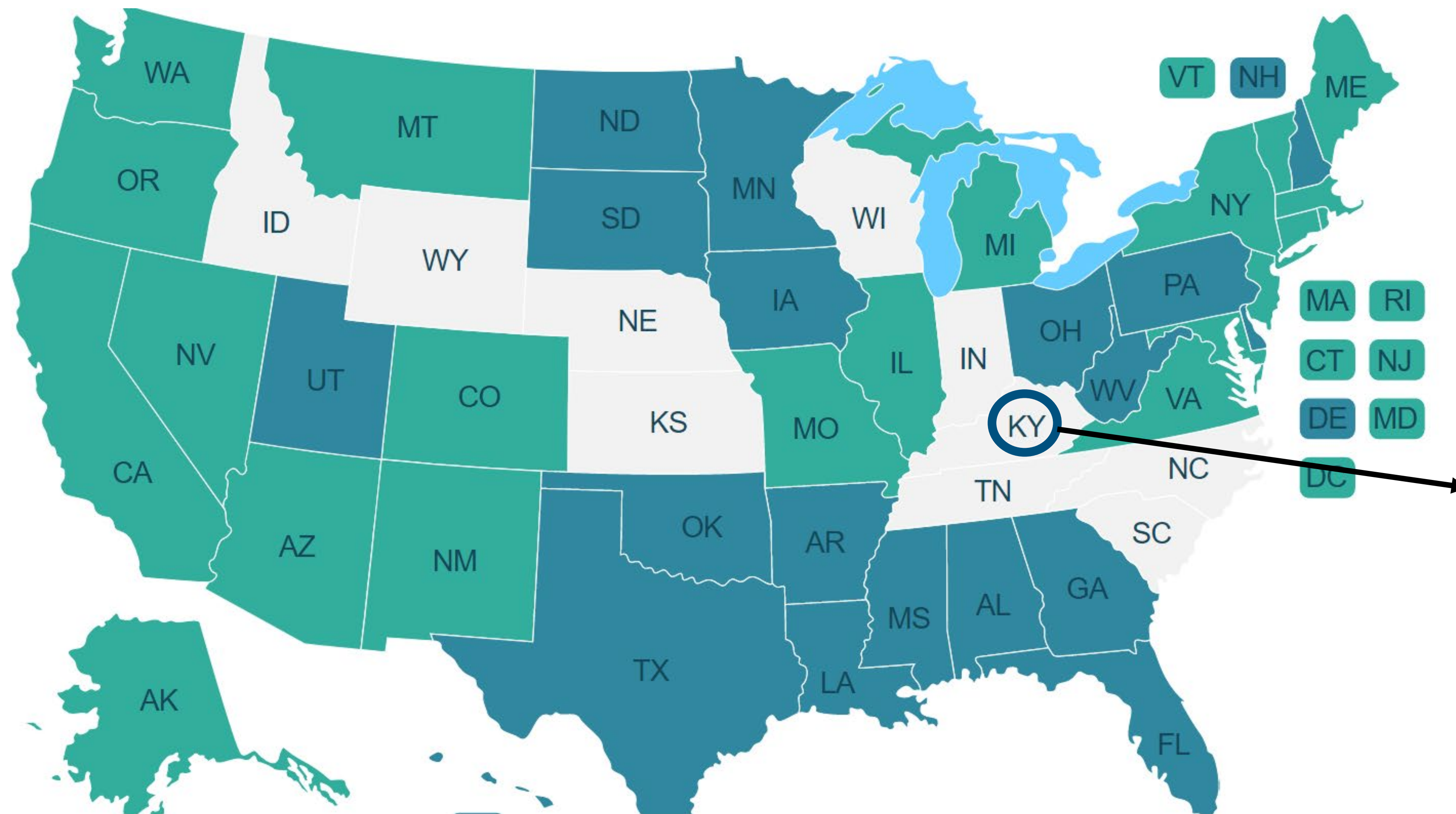
No



# STATE OF LEGALIZATION

- Medical & recreational
- Medical only
- Illegal





# STATE OF LEGALIZATION

***March 2023: Kentucky becomes 38th state to legalize medical marijuana; operational by January 2025***





## Recreational Use on the Ballot in 2022

- ✗ Arkansas
- ✓ Maryland
- ✓ Missouri
- ✗ North Dakota
- ✗ South Dakota

## Watch in 2023

Minnesota  
Ohio  
Pennsylvania





# So Much Confusion: Federal Law or State Law?



**FEDERAL LAW:** Marijuana is illegal as of today under the federal Controlled Substances Act as a Schedule I substance.

Not only impacting employers, also challenging for banks and financial institutions, transportation industry (U.S. Department of Transportation-regulated) at the federal level





# Does an Employer Have to Accommodate?

**Under the influence at  
work or use at work**

**Medical marijuana  
card holder**

**Recreational  
off-the-clock use**





# Employer Drug Testing Programs

**Pre-employment**

**Reasonable suspicion of impairment**

**Random testing**

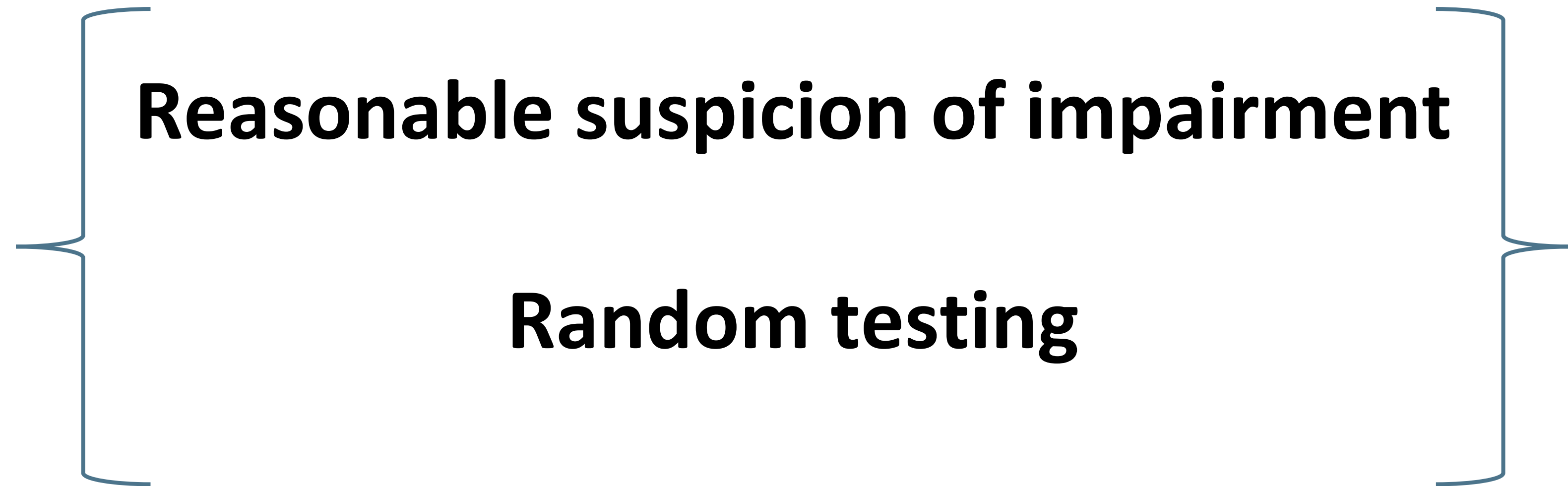


# Employer Drug Testing Programs

Pre-employment

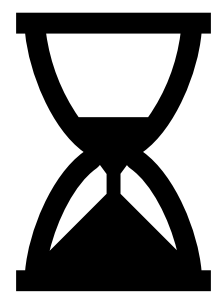
**Reasonable suspicion of impairment**

**Random testing**



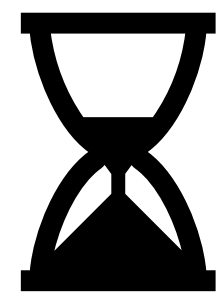


# THC Testing Is Complicated



URINE

**30** days



SALIVA

**1** day



HAIR

**90** days



BLOOD

**14** days

THC DETECTION WINDOWS

# THC Testing Is Complicated

## ADDITIONAL INFLUENCES AND FACTORS



AGE

BMI

BODY MASS INDEX



FOOD / FLUIDS INTAKE



LIVER FUNCTION



METABOLIC RATE



SEX



AMOUNT TAKEN



FREQUENCY OF USE





# TIME TO REVIEW

## INTERNAL DATA

**Are most of your drug screen disqualifications for a particular substance?**

**Do you place workers in safety-sensitive positions?**



## POLICIES AND SOPs

**Are your internal policies creating more problems than they are solving?**

**Have you updated policies and SOPs to accommodate new state laws?**



## LAWS AND COMPLIANCE

**IT IS EASIER TO KEEP UP THAN CATCH UP.**