# CANNABIS, DRUG TESTING & WORKPLACE SAFETY

ADELE L. ABRAMS, ESQ., ASP, CMSP

LAW OFFICE OF ADELE L. ABRAMS PC

WWW.SAFETY-LAW.COM

301-595-3520 OFFICE

301-613-7498 MOBILE

LAW OFFICE OF
ADELE L. ABRAMS P.C.

# INTERSECTION OF SAFETY & HR LAWS

- Employers have legal obligation to protect workers from direct threats to safety under OSH Act – new penalties can reach $161K per affected worker
  - OSHA can also take enforcement action arising from impairment on the job OR related to workplace violence incidents if foreseeable under GDC (Sec. 5(a)(1)!
- MSHA prohibits possession of, or being under influence of alcohol or narcotics at metal/nonmetal mines including contractors
  - Potential $88K for supervisors with knowledge & $323K fine against employers (includes contractors)
- Both agencies' anti-retaliation laws (MSHA – Sec 105C; OSHA Sec 11C & 29 CFR 1904.36) protect workers from being drug tested as a deterrent to reporting injuries or in retaliation for filing OHS complaints

# LOTS OF NEW CANNABIS LAWS!

In 2023 … dozens of new marijuana laws took effect around the country, and more Americans now live in a jurisdiction where adult recreational use is legal than do not!

- In Maryland, cannabis possession, personal cultivation, and retail sales are now legal
- In Connecticut, adults may now cultivate marijuana at home for personal use
- In Virginia and Nevada, multiple medical cannabis program improvements were implemented
- In New Hampshire, out-of-state patients are now able to access state-licensed medical dispensaries
- In California and Louisiana, efforts to expunge thousands of prior cannabis offenses are underway
- In Maine, legislation limiting the ability for those on probation to be drug tested for cannabis has become law
- Delaware, Ohio and Minnesota legalized adult-use marijuana and Kentucky legalized medical cannabis
- **US Virgin Islands legalized cannabis too!**

# 2024 CANNABIS SCORECARD

- 42 states (plus DC and all US territories) have legalized medical cannabis – latest are AL, MS and KY!
- 23 states (plus DC, Guam and CNMI) have now legalized recreational MJ
- 24 states have enacted marijuana expungement laws -- vacating 1.7 million criminal records
- 10 states (plus DC) now have laws prohibiting employers from either firing or refusing to hire employees who use cannabis off-duty
- NORML has updated interactive site to check state/local cannabis laws (including employment protections): https://norml.org/laws/
  - Example: In 7/23 - Michigan Civil Service Commission voted unanimously to adopt new rules ending the practice of pre-employment marijuana screening for most state workers (law enforcement excluded) and those denied b/c of failed tests can now reapply

# FEDERAL CANNABIS UPDATE

- Federal cannabis decriminalization likely – Biden has called for declassification as CDS & pardoned federal prisoners convicted of cannabis possession – **DEA reclassification is expected to occur in 2024**
- Federal legalization will negate current ADA case law that does not protect medical users because it is "illegal" under federal law
- Veterans Equal Access Act, or H.R. 2431 was reintroduced in 4/23 and has 21 BIPARTISAN co-sponsors!
    - The legislation expands and facilitates medical cannabis access to military veterans suffering from chronic pain, PTSD, and other serious medical conditions by allowing physicians affiliated with the Department of Veterans Affairs to recommend cannabis in compliance with state laws.
- 1/24 – federal FDA/NIDA released 250 page report: "Marijuana is neither as risky nor as prone to abuse as other tightly controlled substances and has potential medical benefits"
- The review also said there is some "scientific support" for therapeutic uses of marijuana, including treatment of anorexia, pain, and nausea and vomiting related to chemotherapy.
- FDA/NIDA recommended that the Drug Enforcement Administration make marijuana a Schedule III drug, alongside drugs such as ketamine and testosterone, which are available by prescription.

# OSHA POLICY ON DRUG TESTS

- Trump OSHA issued "clarifying" policy on 10/11/2018: https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11
  - **Biden administration affirmed the 2018 policy in its 2022 whistleblower handbook rev:**
  - Random drug testing.
  - Drug testing unrelated to the reporting of a work-related injury or illness.
  - Drug testing under a state workers' compensation law.
  - Drug testing under other federal law, such as DOT regs for CDL
  - Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees
  - ***If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries, and DOCUMENT!***

# MARYLAND & LEGAL RECREATIONAL CANNABIS

- As of **July 1, 2023**, adults 21 or older can possess and consume up to 1.5 oz of cannabis flower, 12 grams of concentrated cannabis, or a total amount of cannabis products that does not exceed 750 mg THC. This amount is known as the "personal use amount."
  - MD House voted 3/10/23 for a measure that would create a legal framework and tax structure to enable recreational marijuana to be sold in medical cannabis stores as soon as July 1 – Senate has separate bill under consideration.
- Passage of the ballot referendum in 11/22 also:
  - Establishes a process for expunging all cases in which possession of less than 10 grams of cannabis is the only charge, along with additional expungement provisions
  - Increases the amount of cannabis a person may possess that is subject to a civil fine rather than criminal penalty from 10 grams to 2.5 ounces (effective **January 1, 2023**)
  - Requires data collection and studies on cannabis use, impaired driving, and other health and safety issues
  - Establishes a new Cannabis Public Health Advisory Council, which must study and make recommendations regarding cannabis regulation to the General Assembly

➢ **It remains illegal to transport cannabis across state lines.**

➢ **Cannabis possession remains unlawful on federal land (including federal buildings, national parks, military bases, etc.), even within states that have legalized it.**

# MARYLAND: CANNABIS AND EMPLOYMENT

- MD Cannabis Reform Act does not address cannabis use or impairment in the workplace.
- Employees and applicants remain subject to existing laws and workplace policies on substance or cannabis use
- The legislation does not address the use of employer drug screening of employees or prospective employees – but laws are in place requiring tests that allow "split samples" to permit the individual to get sample retested (at their expense) – potential issue with oral tests
- The recreational cannabis law establishes some rules with a workplace connection:
  - Cannabis or hemp products must be added to the existing ban on smoking in any indoor place of employment under the Clean Air Act.
  - Employees who make complaints to or participate in Clean Air Act proceedings before the State are protected from adverse employment action.
- All individuals may not smoke cannabis, and *drivers may not consume cannabis,* in a vehicle on any public road.
  - To the extent that employees drive as part of their job responsibilities, this would apply to them (in addition to the fact that they should not be using recreational cannabis on the job
  - ✓ Expect the MD General Assembly will consider legislation to provide workplace protections for cannabis users, so stay tuned!

# PENNSYLVANIA RECREATIONAL CANNABIS ACTION

- 2023 Senate Bill 846 would legalize the adult use of marijuana, permitting those ages 21 and older to possess and purchase up to 30 grams of cannabis.
- The bill would also allow registered medical marijuana patients to home cultivate their own cannabis. (Home cultivation for adult use purposes would remain prohibited.)
- The bill would establish the Cannabis Regulatory Control Board and the Cannabis Business Development Fund, creating regulations for cannabis businesses, including licensing, advertising, and distribution.
- SB 846 also contains provisions facilitating the expungement of past marijuana convictions and ensuring social equity for future cannabis-related businesses.

# PA MMA PROVISIONS FOR EMPLOYERS/WORKERS

- PA Medical Marijuana Act (MMA - Act 16) protects registered patients from unfair discrimination in the workplace without requiring employers to violate federal law but prohibits patients from participating in certain high-risk activities while using medical marijuana and allows employers to ensure a safe workplace.
- Employers may not discriminate against patients for their *status* as registered patients.
- **Patients who have more than 10 nanograms* per milliliter of THC in their blood in serum may not operate or be in physical control of 1) chemicals that require a federal or state permit or 2) a high-voltage electricity or other public utility.**
- Employers **do not** have to "make any accommodation of the use of medical marijuana on the property or premises of any place of employment."
- Employers **may** discipline employees for "being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for that position."
- Employers **do not** have to take any action violating federal law.
- Employers **may** prohibit patients who are employees from performing **mining** or any other "employment duties at heights or in confined spaces" while under the influence of marijuana.
- Employers may prohibit patients who are employees from performing any task which the employer deems life-threatening to the employee or other employees while under the influence of marijuana. In addition, "[t]he prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient."

➢ Senate Bill 835 (just passed 10-1, along with House bill) removes the list of specific qualifying conditions so that a doctor may recommend medical cannabis to any patient at his/her discretion.

# MEDICAL CANNABIS IN VIRGINIA & EMPLOYMENT

- 2021 Bill removes criminal penalties for individuals but there is no employment protection for recreational cannabis users
- **Medical** cannabis users **are protected** from being discharged, disciplined or discriminated against for lawful use of cannabis based on valid written certification – as of 7/1/2021
  - If worker has medical cannabis card and drug test comes back positive, employer may not terminate or discipline SOLELY on basis of positive test!
- Does not force employers to change current drug testing policies or any specific rules on use by employees – right to establish such rules is part of the written or implied employment contract
- Provides safe harbor for employers to drug test workers in certain regulated jobs regardless of signs of impairment or certification to use medical cannabis
- Does not require an employer to commit any act that would cause employers to violate federal law or result in the loss of a federal contract or federal funding
- Does not require any defense industrial base sector employer to hire or retain anyone who tests positive for THC in excess of **50 ng**

➢ New law provides a complete bar to recovery for workplace injury when it results from intoxication (includes use of drugs or alcohol) if the intoxication causes or contributes to the injury

# NEW CALIFORNIA CANNABIS LAWS COMING 2024!

- A new CA law that protects employment rights of cannabis consumers took effect on January 1, 2024
- The law will ban most California employers from discriminating against workers or job applicants based on drug testing for inactive cannabis metabolites—in particular, urine tests, which can detect a worker's cannabis use days or weeks before they show up for work and have no correlation with on-the-job impairment.
    - The California Chamber of Commerce requested delaying implementation of the bill for one year, in order to give employers time to phase out urine testing in favor of more scientifically accurate methods like performance testing or oral swabs.

# DRUGGED DRIVING LAWS

- Every state criminalizes driving under the influence of a controlled substance -- 14 states have amended their longstanding, effect-based DUI drug laws to per se or zero tolerant per se statutes for cannabis
- Some jurisdictions also impose additional ***per se*** laws, and in their strictest form, these laws forbid drivers from operating a motor vehicle if they have a detectable level of an illicit drug or drug metabolite present in their bodily fluids above a specific, state-imposed threshold
  - Metabolites are compounds produced from chemical changes of a drug in the body, but not necessarily psychoactive themselves

➢ Further information is being developed about cannabinoids and their impact on psychomotor performance.

# KEY LEGAL DECISIONS – MEDICAL CANNABIS

- *Noffsinger v. SSC Niantic Operating Co., LLC, d/b/a Bride Brook Nursing & Rehab. Ctr.,* (D. Conn. 9/5/18).
  - Federal court held: refusing to hire a MMJ user because she tested positive on a pre-employment drug test violates Connecticut's medical marijuana law, and granted SJ to applicant
  - Court declined to award attorneys' fees or punitive damages, and dismissed her claim for NIED
  - Court rejected "federal pre-emption" argument and held Federal Controlled Substances Act doesn't regulate employment, so not illegal to employ a marijuana user
- *Coats v. DISH Network, Colo. Ct. of Appeals (2015).*
  - Reinforced right to terminate "positive" employee who held MMJ card, even in absence of evidence of impairment on the job.
    - Basis was the fact that MMJ is still technically "Illegal" under federal law … if congressional bill passes, this decision could be invalid.
- *Casias v. Wal-Mart Stores, Inc. (*6th Circuit, 2012)
  - Court held *Casias* had no claim of wrongful discharge as Michigan's Medical Marijuana law did not regulate private industry. The law only provides protection from criminal prosecution
  - BUT … Walmart just lost major case in AZ because state MMJ did have employment protections!

# ACLU MMJ CASE

- *ACLU v. Darlington Fabrics,* held applicant was discriminated against for refusal to hire due to admission of MMJ use for migraines
- Candidate had disclosed use and promised not to come to work under influence but was told she would not be hired because of current use of MMJ.
- She was NOT alleging discrimination under federal ADA, but under RI MMJ Act, which prohibits employment discrimination based on individual's status as MMJ cardholder.
  - Employer lost on Summary Judgment
- States with similar protections: AZ, CT, DE, IL, VA, ME, MN, NV and NY
  - Arizona and Delaware laws are similar to RI and seek to prevent discrimination in "*hiring, termination, or any term or condition of employment, or otherwise penaliz[ing] a person…status as a cardholder*" or due to positive drug test for marijuana.

# PENNSYLVANIA: WORKER'S COMP REIMBURSEMENT

- In March 2023, PA Court held employer violated PA's Workers' Compensation Act (WCA) by refusing to reimburse an employee for out-of-pocket medical marijuana expenses related to a workplace injury.
  - *Fegley v. Firestone Tire & Rubber (Workers' Comp. Appeal Bd.)*, 2023 Pa. Commw. LEXIS 26 (Commw. Ct. Mar. 17, 2023).
- Claimant was injured during his employment and received medical treatment based on those injuries. He was prescribed narcotics for pain relief for 30 years.
- His doctor later recommended that he use medical marijuana to treat his pain rather than take narcotics.
- A Utilization Review determined the Claimant's medical marijuana treatment was reasonable and necessary. Still, the Workers' Compensation Judge denied Claimant's petition to be reimbursed for his medical marijuana treatment. Claimant appealed to the Workers' Compensation Board and then to a state court.
- PA court drew the distinction between "coverage" and "reimbursement" for medical marijuana expenses. Although the state Medical Marijuana Act (MMA) states that insurance carriers are not required to provide "coverage" for medical marijuana, "coverage" is **not** the same as "reimbursement" for medical expenses that are reasonable and necessary under the WCA.

✓ MMA prohibits medical marijuana patients from being denied any rights or privileges because of their lawful use of medical marijuana.

# MEDICAL CANNABIS & WORKER'S COMP

- 30 states have NOT yet determined a binding position on reimbursement for use of cannabis under worker's compensation programs
- The following states hold that employers must reimburse workers who are legal medical cannabis patients :
  - Arizona
  - Connecticut
  - Hawaii
  - Minnesota
  - New Hampshire
  - New Jersey
  - New Mexico
  - New York
  - Pennsylvania
  - Rhode Island
  - Vermont

- State laws in flux:
  - Delaware
  - Maryland

- California, Oregon & Nevada neither require nor bar reimbursement
- The following states prohibit employers from reimbursing workers:
  - Florida
  - Maine
  - Massachusetts
  - North Dakota
  - Ohio
  - Washington

# DEVELOPING PREVENTION PROGRAMS

There are five basic components of substance abuse prevention programs:

1. A written policy
2. Supervisor training
3. Employee education
4. Employee assistance
5. Drug and alcohol testing

# DRUG FREE WORKPLACE POLICY

- Should include:
  - Rationale
  - Prohibited behaviors - – is focus “impairment” or “positive test”?
  - Substances covered
  - Employees affected
  - Consequences of policy violation
  - Enforcement means
  - Availability of assistance
  - ➢ Very important that programs at union operations be developed in conjunction with union agreement to avoid CBA violations or claims of Sec. 8(a)(1) violations (changes in terms and conditions of employments unilaterally by employer)

# REASONABLE SUSPICION TESTING

- Allowed in all states BUT there may be specific provisions (particularly in state medical cannabis laws) that govern – also watch for municipal laws that may limit testing, especially in non-safety-sensitive positions
- Reasonable suspicion testing is also covered extensively in DOT rules and regulations, which require that determinations to conduct reasonable suspicion testing be based on *specific contemporaneous articulable observations of employee conduct, behavior, appearance or body odors*
- Private employers with non-DOT employees are also free to perform reasonable suspicion testing, subject to applicable state laws.
- Observations made of the employee exhibiting signs of impairment must be articulable and documented by a supervisor who has participated in training on the signs and symptoms of alcohol misuse and drug abuse and the requirements for reasonable suspicion testing
  - In the case of reasonable suspicion **alcohol** testing, the observations of employee behavior, conduct, or appearance must be made just before, during, or just after performing safety-sensitive duties.
  - Unlike reasonable suspicion alcohol testing, a reasonable suspicion **drug test** determination may be made at any time the supervisor observes employee behavior or appearance indicating possible use of controlled substances.

# WHAT IS IMPAIRMENT???

- Many employers use 20 ng for MJ (SAMHSA recommends 50 ng) but low test cutoffs can capture CBD-only products (which can contain up to .3% THC legally)
- Colorado, Washington and other states where now legal will need to address through DUI laws … 5 ng level *per se* in WA; "permissible inference" in CO at 5 ng
- DOT has zero tolerance for CDL drivers, pilots and train engineers
- Growing field of forensics to determine if workplace accident victims were impaired – consequences for worker's compensation, OSHA/MSHA liability, affirmative defenses in wrongful death and personal injury cases of contractors injured OTJ

# ILLINOIS "COMPASSIONATE CARE" LAW & IMPAIRMENT

- Illinois cannabis law says: Employer may consider patient to be impaired when he or she manifests specific, articulable symptoms while working that decrease or lessen his or her performance of the duties or tasks of the employee's job position, including:
  - *symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, negligence or carelessness in operating equipment or machinery, disregard for the safety of the employee or others, or involvement in an accident that results in serious damage to equipment or property, or careless that results in any injury to the employee or others."*
- If employer elects to discipline a patient, it must afford the employee a reasonable opportunity to contest the basis of the determination.

# CBD ISSUES

- Legally sold in all 50 states and on the internet
- No FDA approval nor testing of products (outside of legal dispensaries)
- Researchers at University of Miami assessed 516 CBD products, 121 of which were intended for oral consumption, and found:
  - 42 percent of products tested positive for the presence of lead,
  - 37 percent were positive for mercury,
  - 28 percent were positive for arsenic, and
  - 8 percent were positive for cadmium
  - Heavy metal contamination was also identified in unregulated delta-8 THC vape pens
- CBD does NOT cause impairment … but it CAN contain up to .3% THC legally … and use can trigger positive cannabis drug test

# CBD & WORKPLACE DRUG TESTING

- CBD issues emerging – legal in all states but can contain 0.3% THC
  - DOD issued warning to servicemembers that CBD use is prohibited
  - Federal Ct in Indiana dismissed employee lawsuit after he tested positive for THC due to alleged CBD use and claimed that his termination was discriminatory on the basis of a disability. *Rocchio v. E&B Paving, LLC, and Int'l Union of Operating Engineers Local 103*, Case No. 1:20-cv-00417 (3/31/22)
  - DOT and CBD: "*It remains unacceptable for any safety-sensitive employee subject to the Department of Transportation's drug testing regulations to use marijuana. Since the use of CBD products could lead to a positive drug test result, Department of Transportation-regulated safety-sensitive employees should exercise caution when considering whether to use CBD products*."
  - MINER recently lost his work papers due to testing positive for CBD (WV State Supreme Ct ruling)

# ADA & REASONABLE ACCOMMODATION

- Currently, no protection under federal ADA for medical cannabis users (but could be for caregivers) – and if DEA schedule changes to allow "prescription," all case law becomes moot
- Increasingly, states provide safety net for medical cannabis users under state versions of ADA, or prevent discrimination based on the status as a cannabis card holder – or for failing a drug test!
- Most states allow employers to discipline workers who are impaired at work, even if used legally or off-duty, but ascertaining "impairment" is the challenge
- Some new defenses arising based on use of cannabis products that are not impairing (CBD, high terp/low THC content) – Cannabis terpenes' effects vary, some sedate, some energize or can improve focus in those with neurodivergence or help hypervigilance and PTSD to allow patients to work more safely
- Those using cannabis products that do not result in impairment may be able to claim disability discrimination.

# ADA DIRECT THREAT TO SAFETY: FACTORS

- *Bragdon v. Abbott* (S. Ct. 1998) – A "good faith belief" that a risk is significant is not enough to meet the standard. The determination of "significant risk" must be based on medical or other objective or scientific belief.
- In determining whether an individual would pose a direct threat, the factors to be considered include:
  - The duration of the risk
  - The nature and severity of the potential harm
  - The likelihood that the potential harm will occur
  - The imminence of the potential harm

# DOCUMENT ADA ACCOMMODATION EFFORTS

- Make sure to engage in interactive process with employee concerning reasonable accommodations that may be options to address EE's disability needs in order to perform essential job functions
- Make sure to have WRITTEN job descriptions that delineate what each position's "essential job functions" actually are and which positions are classified as "safety sensitive"
- If the disability posing threat to safety cannot be mitigated:
  - Document the accommodations ER has considered
  - Explain why they did not sufficiently minimize the risk of direct threat to safety
  - Make sure your determination is based on objective criteria, nonbiased decision maker, and (where applicable) sound medical judgment.

# SUPERVISOR TRAINING: BEST LINE OF DEFENSE

- Supervisors' role: recognition (reasonable suspicion training), documentation, confrontation, referral, follow-up (not diagnosis or counseling)
- Supervisors need to be informed on how to identify an addiction-related problem in advance of a catastrophic event, as well as how to get help for addicted workers.
- Workers who are suspected of being "under the influence" should be taken to a private area, and a second supervisor or witness should be present to document any action or statements.
- Senior management must be notified of these events.
- It may be necessary to suspend a worker until an investigation can take place and/or until the worker completes treatment or is evaluated by the company EAP.

# THINGS TO DO NOW

- Check your current drug testing program against new OSHA e-Recordkeeping rule and applicable state law(s) for your company and watch for more changes in 2024
- Consider shift to “Fit for Duty” style testing such as Druid or Sobereye, rather than testing specific substances (covers fatigue, stress, shift work factors) EXCEPT DOT and critical safety sensitive positions – and check your job descriptions to flag SSP
- Make sure you are conforming with requirements that might apply under rules for government contractors, DOT and requirements under the ADA
- Make sure that in a union environment, any policy is negotiated as part of the CBA as drug testing can be a “term and condition of employment” under the NLRA
- Make sure supervisors are trained on identifying impairment
- Make sure all employees are treated fairly and do not treat injured workers in a disparate manner

# Questions?

Adele L. Abrams, Esq., ASP, CMSP

301-613-7498 mobile

301-595-3520 office

www.safety-law.com

safetylawyer@gmail.com