



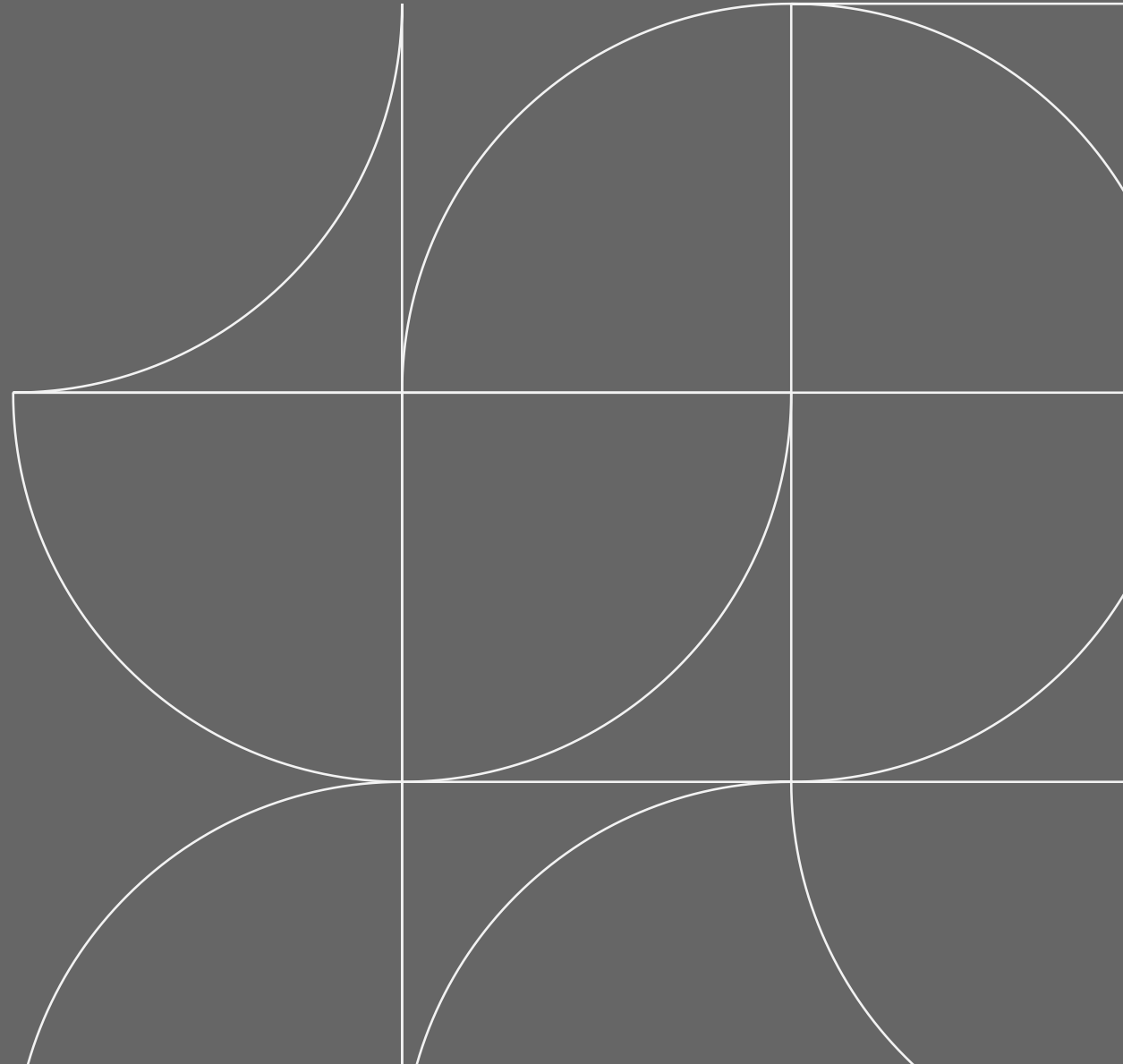
High Times in New Jersey, New York and Beyond

Considerations for Employers

April 8, 2021

Seyfarth Shaw LLP

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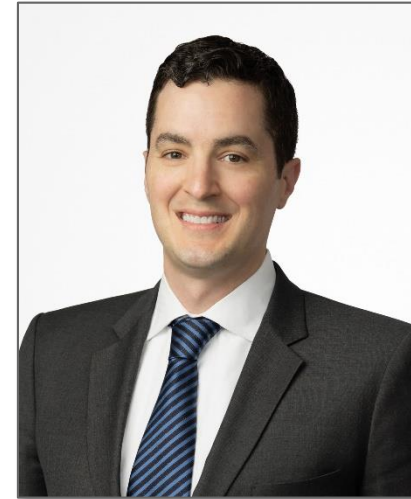
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Agenda

- 01** The State of the Union
- 02** New Jersey's Recreational Cannabis Law
- 03** New York's Recreational Cannabis Law
- 04** Safety Considerations in NJ, NY and Elsewhere
- 05** Other Considerations
- 06** Closing Thoughts



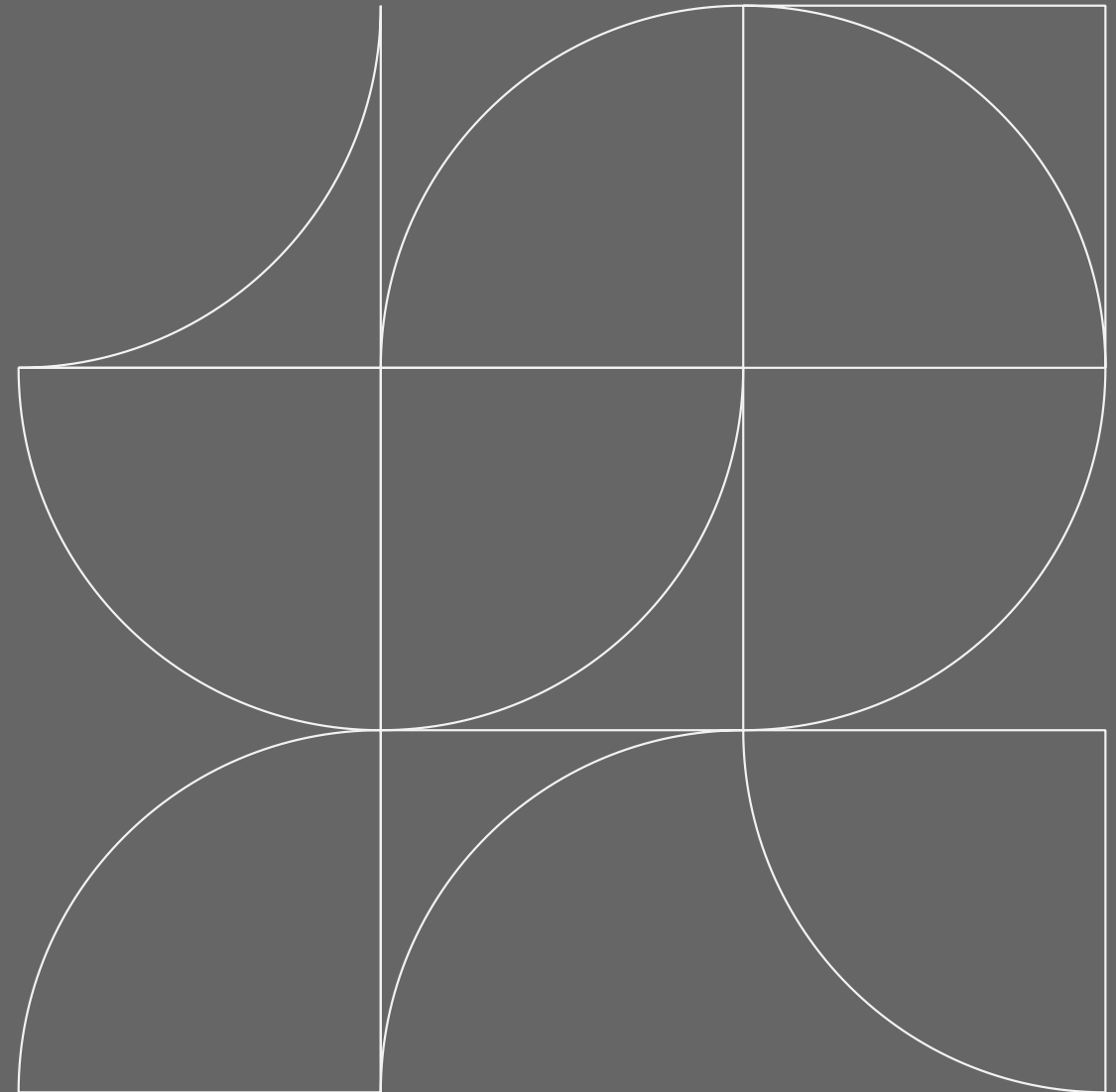
The Blunt Truth Blog

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Seyfarth Shaw's The Blunt Truth (TBT) address' the legal and practical implications of cannabis laws across the US and their impacts on the business community. Whether you are a C-suite executive, in-house counsel, HR executive or lending institution, TBT aims to be a go-to source for updates, reports and analysis on the changes in cannabis laws and regulations and how they impact your business.

The State of the Union



Federal Law

- Cannabis remains illegal under federal law.
 - Controlled Substances Act
- States continue to pass laws purporting to legalize cannabis (e.g., medical, recreational or decriminalization)
 - Some laws have express or implied employee protections.
 - Litigation is growing, with trend supporting employees who use cannabis for medical reasons.
- Until/unless SCOTUS rules or federal law changes, employers are in a precarious space.

Why States Are Taking Action

- States have expressed a number of views regarding marijuana that are in tension with the CSA.
- Medical/scientific opinion has changed – to a certain degree.
- Cannabis seems to be a legitimate treatment for various health conditions.
 - Epilepsy; anxiety; depression; pain management.
- Some view cannabis as being like other medications (e.g., Insulin, Percocet).
- Cultural shift.
 - More Americans support legalization.



Jurisdictions Authorizing Medical Use

- Alaska
- **Arizona**
- **Arkansas**
- California
- Colorado
- **Connecticut**
- **Delaware**
- District of Columbia
- Florida
- Guam
- Hawaii
- **Illinois**
- Louisiana
- **Maine**
- Maryland
- **Massachusetts**
- Michigan
- Minnesota
- Mississippi
- Missouri
- Montana
- **Nevada**
- New Hampshire
- **New Jersey**
- **New Mexico**
- **New York**
- North Dakota
- Ohio
- **Oklahoma**
- Oregon
- Pennsylvania
- Puerto Rico
- **Rhode Island**
- **South Dakota**
- Utah
- Vermont
- Washington
- **West Virginia**

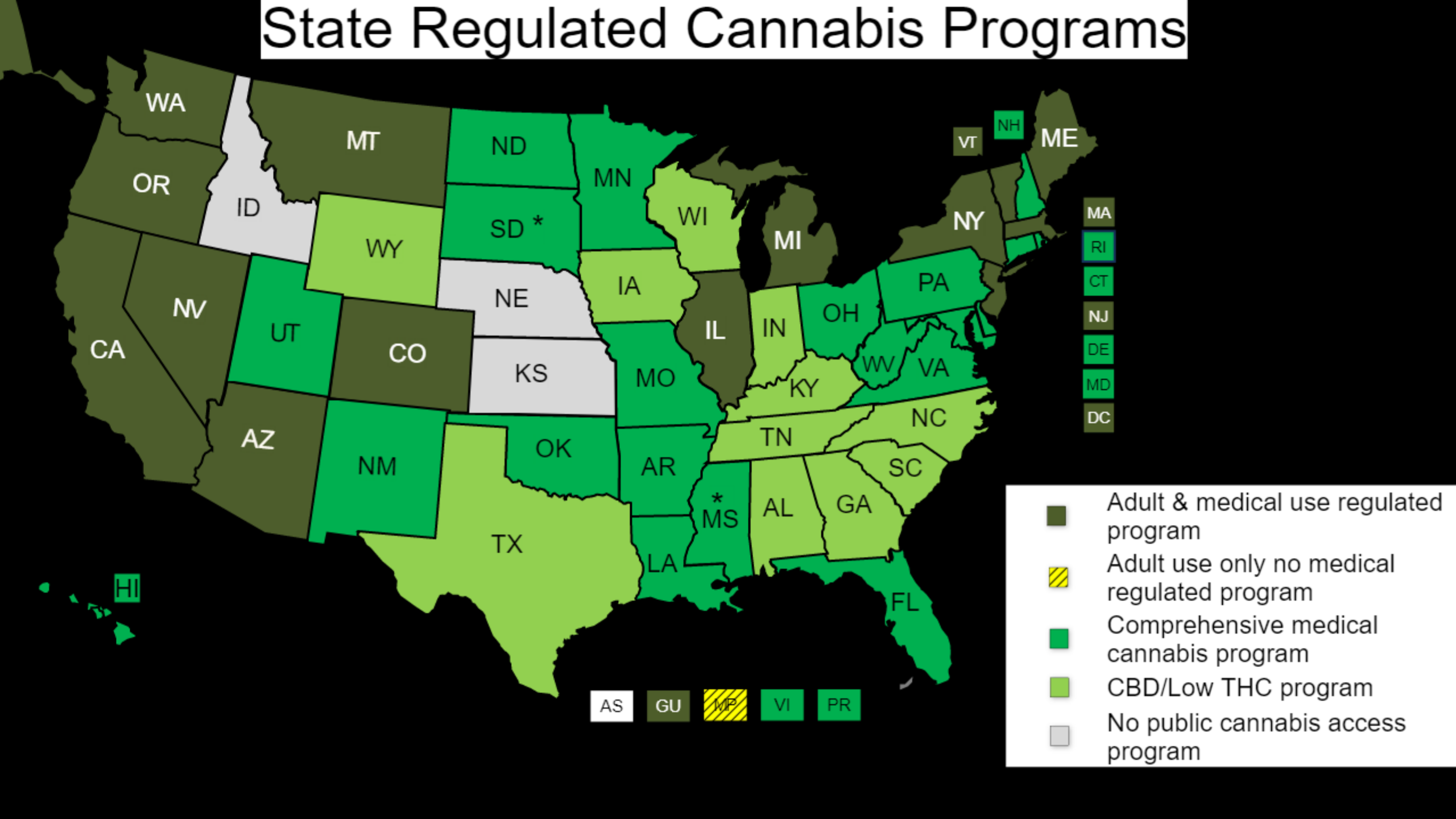
Bold and underlined states have employment protections (per statute or case law).

Recreational Law

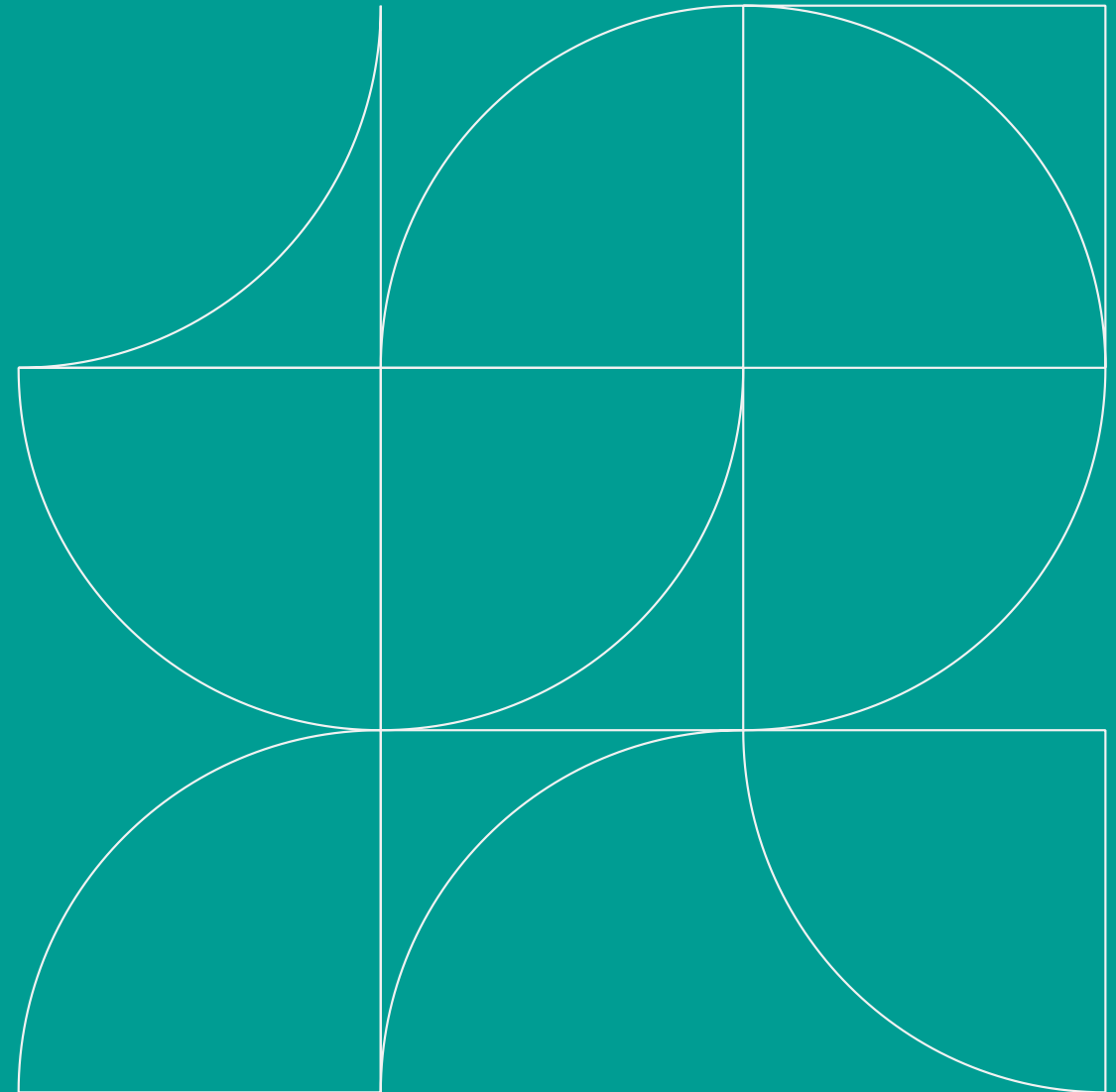
- Alaska
- Arizona
- California
- Colorado
- District of Columbia
- Guam
- Illinois
- Maine
- Massachusetts
- Michigan
- Montana
- Nevada
- New Jersey
- New York
- Northern Mariana Islands
- Oregon
- South Dakota
- Vermont
- Washington



State Regulated Cannabis Programs



New Jersey's Recreational Cannabis Law



New Jersey

- History:
 - Jan. 2010 – Then outgoing Gov. Jon Corzine signed the Compassionate Use Medical Marijuana Act
 - Limited to: cancer, glaucoma, multiple sclerosis, HIV/AIDS, seizure disorder, amyotrophic lateral sclerosis (also known as Lou Gherig’s disease), severe muscle spasms, muscular dystrophy, inflammatory bowel disease, Crohn’s disease and any terminal illness if a doctor has determined the patient will die within a year
 - 2010 – 2018 – Gov. Chris Christie opposed legalizing cannabis – called cannabis advocates “crazy liberals” who want to “poison our children”
 - 2012 – Registry opened
 - 2016 – 12,500 registrants



New Jersey

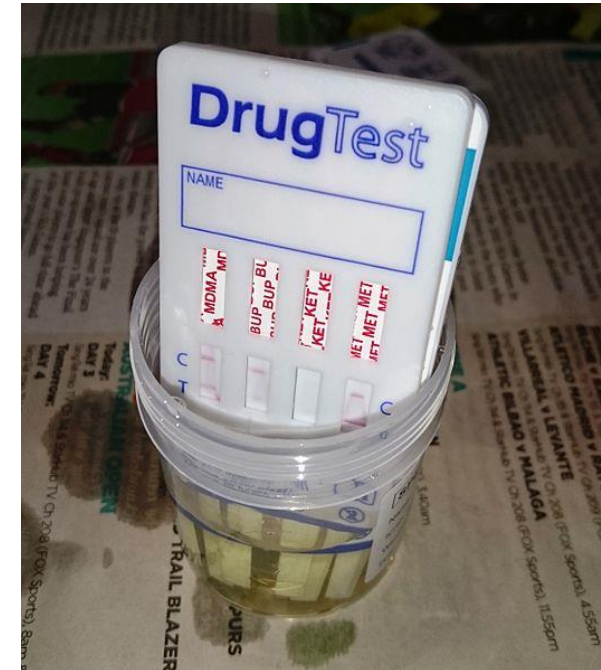
- 2019 – Jake Honig Compassionate Use Medical Cannabis Act -- reformed New Jersey's Medicinal Marijuana Program and expand patient access to medical cannabis
 - “Cannabis” vs. “Marijuana”
- 2020 – NJ Voters voted to amend the constitution to legalize cannabis
- Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization (“CREAMM”) Act – passed Feb. 22, 2021
 - One of three laws passed as part of the legalization of recreational cannabis
 - CREAMM Act: legalizing and regulating cannabis use and possession for adults 21 years and older
 - Decriminalizing marijuana and hashish possession (A1897)
 - Clarifying marijuana and cannabis use and possession penalties for individuals younger than 21 years old (S3454)

NJ CREAMM Act

- **Employers may still prohibit cannabis and impairment in the workplace**
 - CAN have a “drug and alcohol free” workplace and can prohibit intoxication at work
 - Not required to accommodate the use, possession, sale, or transfer of cannabis or hashish in the workplace
- **Employment discrimination on the basis of cannabis use is prohibited**
 - CANNOT refuse to hire or employ an individual who uses cannabis, unless prohibited by federal contracting requirements or if it would jeopardize federal funding
 - CANNOT take any adverse action against employee or applicant **solely** because they use cannabis or based on a positive test result for cannabis metabolites

NJ CREAMM Act – Drug Testing

- CAN still conduct drug testing for cannabis
 - Pre-employment
 - Random
 - Post-accident
 - Reasonable suspicion of use while at work
 - “Observable signs of intoxication”
- 2 components to test:
 - Scientifically reliable objective testing method (blood, urine, saliva)
 - Physical examination by WIRE
- WIRE = Workplace Impairment Recognition Expert
 - Commission to create training & certification, in consultation with State Police
 - Trained to detect and identify if an employee uses or is impaired from cannabis or other intoxicating substance
 - Meant to assist with investigation of workplace accidents
 - Can be full time or part time position



NJ CREAMM Act

- **Drug testing limitations**
 - Drug test cannot be the sole basis for revocation or job offer or other adverse employment action
 - BUT – can use the results of a failed drug test and WIRE assessment when determining appropriate employment action (incl. termination)
 - Interplay with Jake Honig Compassionate Use Medical Cannabis Act
 - Upon a positive test, requires:
 - Giving the applicant written notice of the opportunity to present a “legitimate medical explanation, including authorization for medical cannabis issued by a health care practitioner, proof of registration as a medical cannabis user, or both
 - Employee gets *3 working days* to explain the positive test result or request a retest of the original sample (at the employee’s expense).



NJ CREAMM Act

Additional Considerations

- No exemption for “safety-sensitive” positions
- Coordination with workplace safety rules
- Effective date of the law is unclear
 - Requirements do not become operative/enforceable until Cannabis Regulatory Commission adopts rules and regulations
 - CRC must issue new rules and regs within 180 days of enactment (8/23/21) or 45 days after appointment of five members to the CRC, whichever is later
- No express private right of action for employees



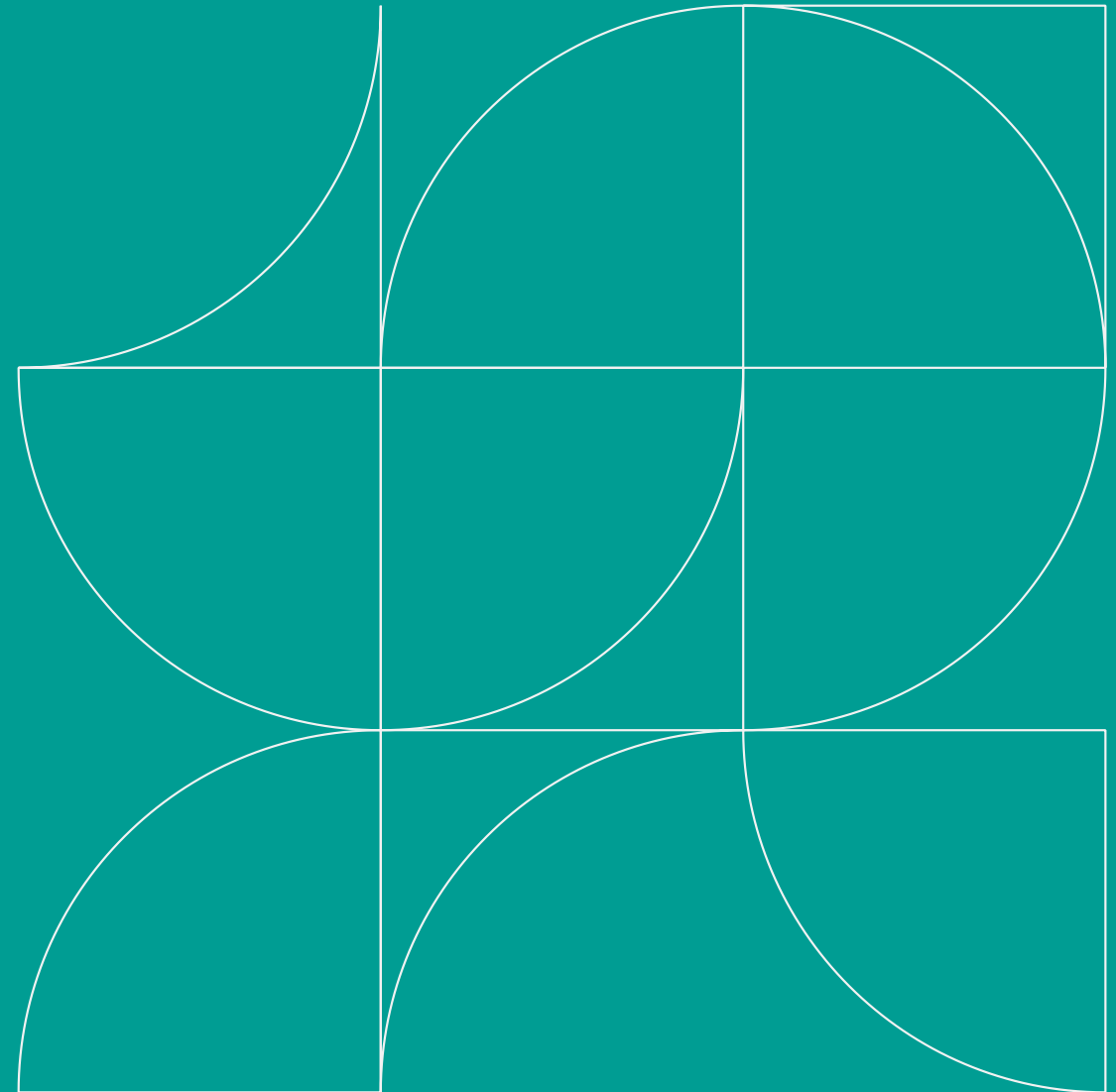
Pre-Employment Inquiries into Criminal History

- CANNOT inquire about or base an employment decision on an arrest, charge, or conviction of certain offenses involving marijuana and hashish
- Penalties for violation:
 - \$1,000 for the first violation, \$5,000 for the second violation, and \$10,000 for each violation after that
- No private right of action

NJ – Post-legalization

- Clean-up amendment proposed on March 9, 2021 (no movement as of 4/7/21)
 - Would make WIRE optional
 - Exception for high-risk construction sites and critical infrastructure facilities, transportation jobs that fall under federal requirements, law enforcement officers who carry firearms and those subject to the Railway Labor Act
- Mixed reaction from communities
 - Some embracing legalized cannabis & new business opportunities
 - Some rejecting dispensary businesses

New York's Recreational Cannabis Law



New York

- History:
 - prior to 2015 – New York City mayors Giuliani and De Blasio made various efforts aimed at limiting low-level marijuana arrests
 - 2015 – Gov. Andrew Cuomo passed medical marijuana law
 - Ultimately, 5 marijuana licenses were granted, each being allowed to operate 4 dispensaries
 - 2020 – Pressure because of New Jersey’s vote to legalize
 - March 30, 2021, Gov. Andrew Cuomo signed “The Marijuana Regulation and Taxation Act,” legalizing the sale and use of cannabis for adults 21 and older



NY Cannabis Law

- **Employers may still prohibit cannabis and impairment in the workplace**
 - CAN have a “drug and alcohol free” workplace and can prohibit intoxication at work
 - Not required to accommodate the use, possession, sale, or transfer of cannabis or hashish in the workplace
- **Employment discrimination on the basis of cannabis use is prohibited**
 - CANNOT refuse to hire, terminate, or otherwise discriminate against an individual based on the legal use of cannabis – amendment to law that prohibits discrimination based on lawful off-duty activities
 - CANNOT discharge or discriminate against an employee for the use of cannabis immediately before a work shift

NY Cannabis Law

- **Limited exceptions:**
 - CAN take adverse employment action if:
 - Required by Federal or State law
 - Employee is impaired – manifests “specific articulable symptoms” while working that decrease the employee’s performance, or interferes with the employer’s obligation to provide a safe and healthy workplace, free from recognized hazards, as required by state and federal occupational safety laws
 - Employer would otherwise be in violation of federal law, or lose a federal contract or federal funding

NY - Drug Testing

- **NY State: CAN still conduct drug testing for cannabis**
 - No restriction on pre-employment, random, post-accident, reasonable suspicion
 - Could implicate anti-discrimination laws
- **New York City**
 - As of 2020, pre-employment drug testing for marijuana is prohibited
 - List of exceptions – where you CAN test –
 - DOT; federal contracts or grants; required by federal or state law for “purposes of safety or security”; certain construction sites; supervising or caring for children, medical patients, and certain “vulnerable” persons
 - Testing of current employees still allowed



NY Cannabis Law

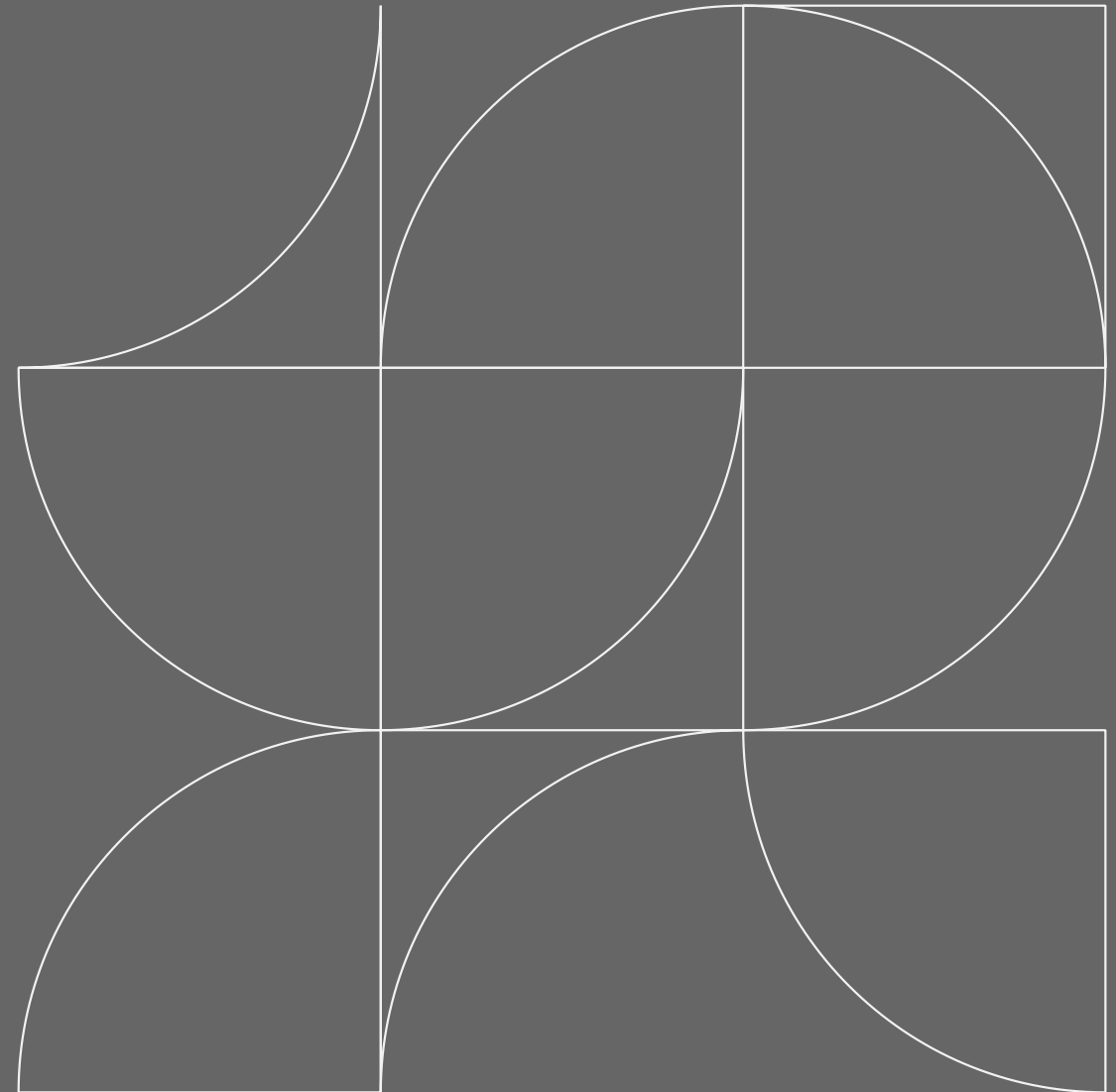
Additional Considerations

- Coordination with workplace safety rules
- Effective date of the law is unclear
 - Anti-discrimination provisions appear to be effective immediately
- No express private right of action for employees

NY – Post-legalization

- Similar to NJ -- mixed reaction from communities
 - Some embracing legalized cannabis & new business opportunities
 - Some rejecting dispensary businesses
 - Ironically, Town of Amsterdam (NW of Schenectady)

Addressing Safety Concerns from Marijuana in the New Regulatory Environment

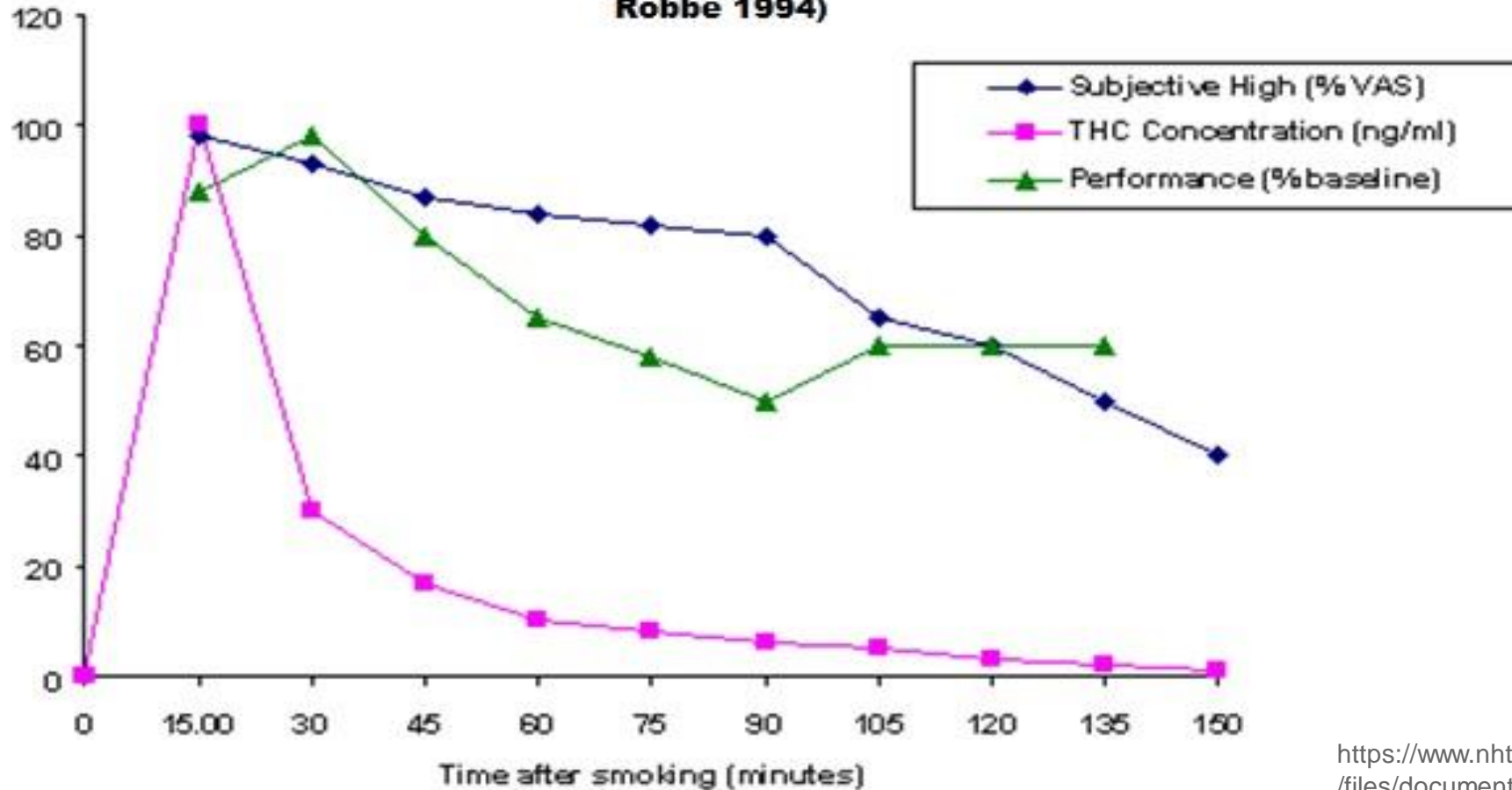


Understanding Drug Testing

- Tetrahydrocannabinol (THC) metabolites (psychoactive chemical in cannabis)
- Procedure of drug testing
 - Initial test
 - Confirmation cut-off
 - THC Metabolite Levels Available in ng/mL
 - Medical Review Officer (MRO)
- Can drug test prove marijuana impairment?
- Can an employee fail drug tests due to incidental, non-material contact with marijuana?

Understanding Drug Testing

Time Course of Standardized THC Concentration in Plasma, Performance Deficit and Subjective High after Smoking Marijuana (Adapted from Berghaus et al. 1998, Sticht and Käferstein 1998 and Robbe 1994)



<https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812440-marijuana-impaired-driving-report-to-congress.pdf>

Problems Caused in the Workplace By Marijuana

- Accidents/Injuries
 - To himself/herself
 - To other employees
 - To members of the public
- Lack of Performance
 - Reduced or poor output
 - Increased workload on others
- Theft
- Increased liability to the Company
- Workplace violence



Why Should a Company Test Its Applicants and Employees for Marijuana?

- To comply with federal and state laws and regulations:
 - DOT
 - OSHA
 - State Statutes (“Safe Place to Work”)
- To take advantage of state laws that provide:
 - a Workers’ Compensation premium reduction to an employer that complies with its provisions
 - protection from liability in connection with an employer’s administration of its policy



Why an Employer Should Test for Marijuana?

- To provide a safe, healthful and productive work environment for its employees, and to protect members of the public from hazards that may arise as its employees work on the employer's premises, in the field, or on premises other than those owned by the employer:
 - Society/community standards
 - Workplace violence
 - Industry standards
 - Employer culture
 - In response to an incident or a pattern of alcohol misuse or illegal drug use by employees
- Contractual obligation



Safety Sensitive Jobs

- OSHA – duty to maintain a safe workplace.
- Many job duties are “safety sensitive”, e.g., operating forklifts, working around conveyors, material handling equipment, operating saws or other energized equipment, use of hazardous materials.
- Marijuana, alcohol, and other drug usage can impair employee cognitive awareness of hazards, affect coordination, employee compliance with safety and health policies and procedures.
- National Safety Council recommends a zero tolerance policy for marijuana employees working in safety-sensitive positions.

How Do NY and NJ Laws Protect Employee and Third Party Safety?

- NJ
 - Medical marijuana card is a defense to positive drug test.
 - CANNOT take any adverse action against employee **solely** based on a positive test result
- NY
 - Cannot take adverse action based on legal use before job shift



Types of Drug and Alcohol Testing

- Pre-employment testing:
 - Generally, pre-employment drug testing of applicants is lawful. In those states in which such testing is regulated, it is typically limited to those applicants who have been made conditional offers of employment.
 - With respect to pre-employment alcohol testing, there are practical and legal (under the Americans with Disabilities Act and some state laws) reasons against conducting such testing.
 - NJ – Essentially permits medical users to use medical authorization as a carte blanche
 - Failed drug test cannot be sole basis for revocation of job offer.
 - NY - Cannot refuse to hire based on the legal use of cannabis.



Types of Drug and Alcohol Testing

- Reasonable cause testing:
 - Employers who have reasonable suspicion, based on specific, contemporaneous objective and articulable facts concerning an employee's appearance, behavior, speech or body odors, that an employee is using alcohol and/or drugs or is under the influence of alcohol and/or drugs, may require the employee to submit to drug and/or alcohol testing.

- NJ – need confirmation from WIRE



Types of Drug and Alcohol Testing

- Reasonable Suspicion Procedures
 - Drug and/or alcohol test determinations must be based on clear observations of the employee behavior, appearance, speech or body odor associated with drug or alcohol use
 - Signs - Employee displays pattern of abnormal or erratic behavior, direct observation of drug use, presence of the physical symptoms of drug use, information provided by a reliable and credible source (be careful of hearsay)
 - Document, Document, Document
 - Document behavior ASAP after observed behavior, include all circumstances, information and facts concerning job performance or erratic behavior to support decision with dates and times and action taken
 - You should have the employee tested within two hours of the observation due to the half-life of alcohol in the employees system

Types of Drug and Alcohol Testing

- Recognizing Signs and Symptoms
 - Physical signs (Appearance)
 - Deterioration of physical appearance and grooming, wearing sunglasses at work, difficulty focusing; glazed eyes, flushed skin, red eyes, runny nose, chronic nasal problems, watery eyes, slurred speech, lethargy, drowsiness, excessive perspiration and body odor
 - Behavior Characteristics
 - Unexpected mood swings, Increased intolerance, Overly defensive, Unexpected crying/breaking down, Change in friends at work, Unusual temper outbursts, Withdrawal from responsibility, general changes in overall attitude, Association with known substance abuser, Stealing from employer or co-workers, & Loss of memory
 - Work Performance
 - Absenteeism - Unauthorized leave, Excessive sick leave/tardiness, Repeated absences that follow a pattern, & Leaving work early (especially on Mondays & Fridays)
 - “On the Job” Absenteeism - Frequent absences from work station in excess of job requirements, long coffee/smoke breaks, & gets sick while at work
 - Performance Indicators - Missing deadlines, careless errors and bad judgment, incomplete work assignments, erratic performance, & complaints from clients, peers

Types of Drug and Alcohol Testing

- Reasonable Suspicion Traps
 - Caretaker tendency
 - Fear of being wrong
 - Don't rock the boat
 - Lack of confidence
 - Hope it goes away
 - Physical intimidation
 - New supervisor with long term employees
 - Legal concerns
 - Enabling - Action that you take that protects the employee from the consequences of his/her actions and actually helps the employee to NOT deal with the problem

Types of Drug and Alcohol Testing

- Random Testing:
 - Random testing (periodic, suspicion-less testing in which employees are selected without advance notice).
 - Employees can be subject to random drug and/or alcohol testing under some policies.
 - Policy usually defines percentage of
 - workforce subject random testing
 - during defined period of time and
 - selection process (all employees
 - subject to selection)
 - NJ: essentially gutted because drug test cannot be the sole basis for adverse employment action



Types of Drug and Alcohol Testing

- Return-to-duty, rehabilitation, and follow-up testing:
 - Generally, an employee can be subjected to return-to-duty, rehabilitation, and follow-up testing after he/she tested positive and remains employed by an employer.
 - Most common if employee previously violated a policy.



Post-Accident Testing

- OSHA's 2018 Clarification
- Most instances of workplace drug testing are permissible, including:
 - Random testing;
 - Testing unrelated to the reporting of a work-related injury or illness;
 - Testing under a state workers' compensation law;
 - Testing under other federal law
 - Testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees.
 - Test all employees whose conduct could have contributed to the incident, not just employees who reported injuries
 - Note - failed test would not be sole basis for adverse employment action when combined with safety rule violation.

Typical Limitations on Marijuana, Drugs, and Alcohol

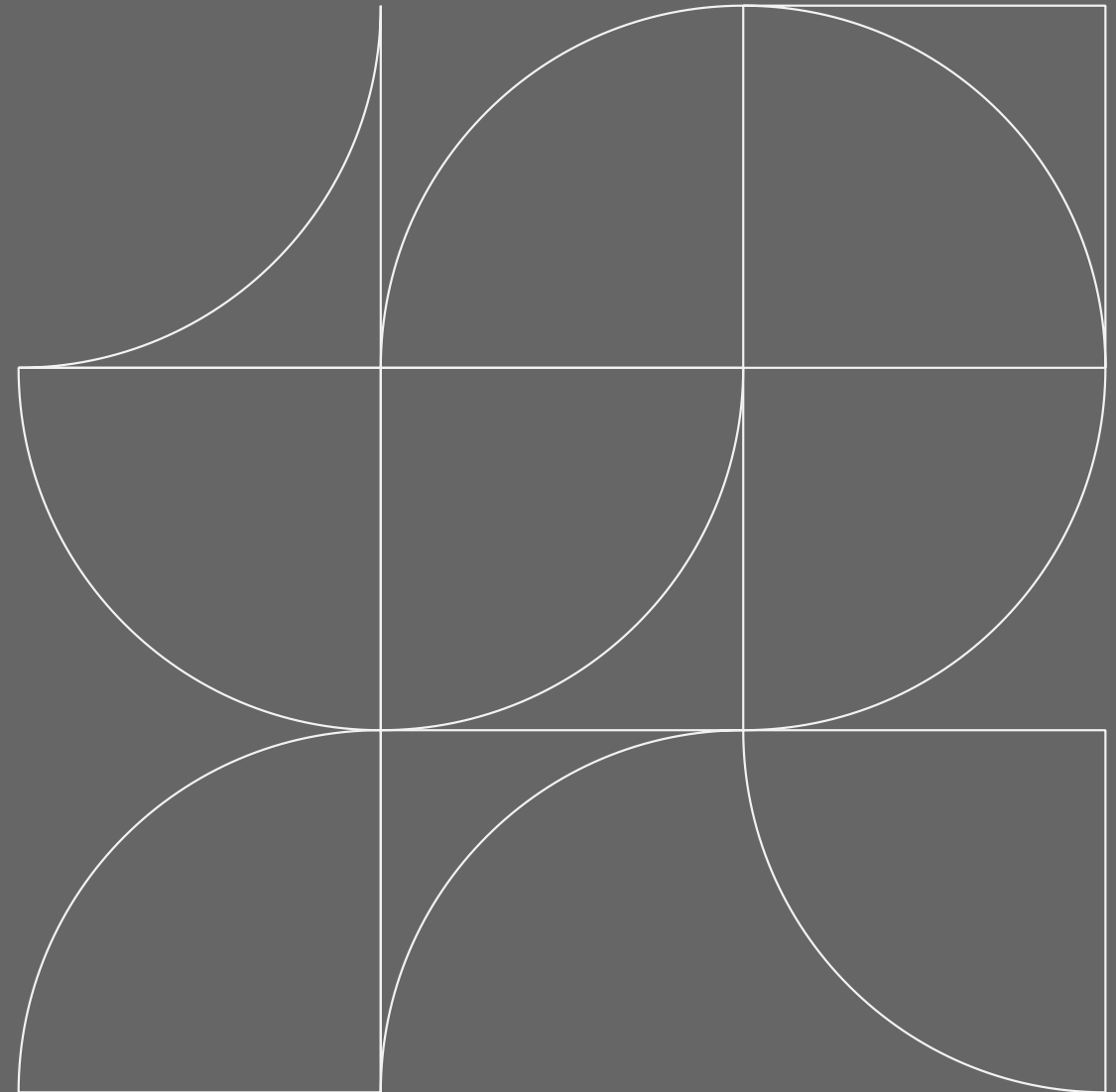
- No use on-site or on duty
- No possession on-site or on duty
- No impairment on site or on duty
- Employer need not tolerate use, if doing so would violate federal law or cause employer to lose a monetary or licensing-related benefit under federal law
- Important Note – How is “Illegal Drug” Defined in Your Drug and Alcohol Policy?



How Employers Are Approaching The Issue

- Some continue to reject alcohol, drug, and marijuana use in reliance on federal illegality, particularly federal contractors/grantees and those with safety-sensitive/dangerous positions
- Pre-employment and return-to-duty testing on case by case basis
- Post-accident testing following of all whose impairment could have contributed
- Post-accident testing extended to near misses
- Medical Marijuana -- Case-by-case, reasonable accommodation analysis, with interactive process
- Ceasing testing for marijuana entirely
- Alcohol and cannabis bar at the workplace

Other Considerations



Federal Mandates

- DOT-regulated positions
 - Employers cannot ignore a positive test even for medical use.
 - 2009 Notice:
 - Medical Review Officers will not verify a drug test as negative based upon information that a physician recommended that the employee use “medical marijuana.” Please note that marijuana remains a drug listed in Schedule I of the Controlled Substances Act. It remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation’s drug testing regulations to use marijuana.
- Drug Free Workplace Act
 - Says nothing about testing.

CBD

- A product in need of oversight.
 - “THC Free” or “Pure CBD.”
 - Yet, workers still testing positive for THC.
 - Trucker suing a CBD manufacturer for false/deceptive advertising.
 - Recent DOT bulletin.
- Virginia
 - First state to pass a law providing employment protections to CBD users



Can Employers Still Test for Cannabis?

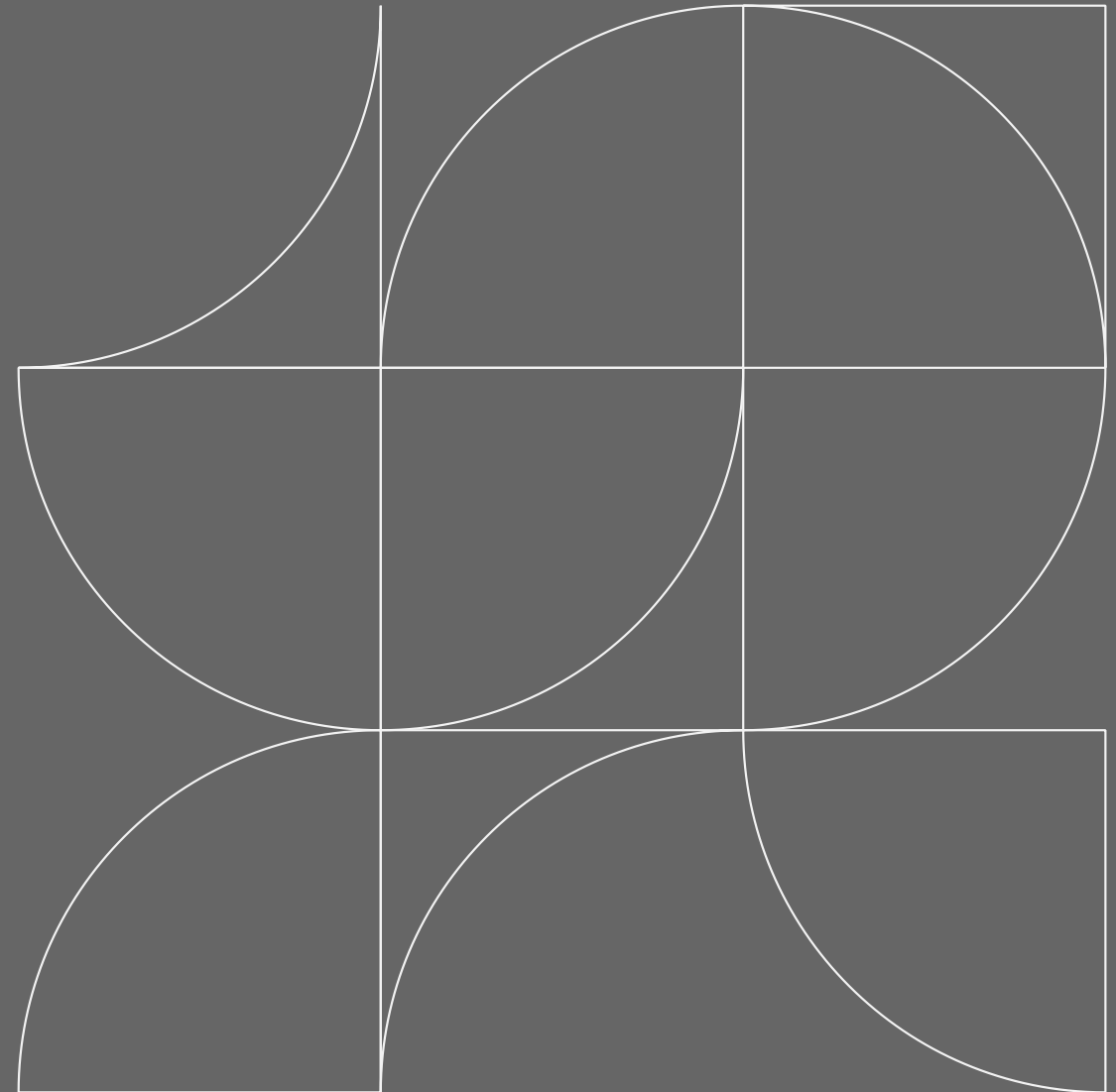
- Generally yes, **but**:
 - New York City (bar pre-employment testing; exceptions).
 - Nevada (cannot rely on a positive cannabis result; exceptions).
- Keep in mind state drug and alcohol testing statutes and any policy requirements:
 - Heavily regulated in some states (e.g., Boulder, San Francisco, Iowa, Minnesota).
 - Maine: has the state approved your policy?
 - Some based on case law (e.g., California, Massachusetts, New Jersey and West Virginia).

Duty to Accommodate?

- No duty under the Americans with Disabilities Act
- State legislatures and courts going the opposite way
- Lessons learned from state court decisions:
 - *Barbuto v. Advantage Sales and Marketing* (MA)
 - *Noffsinger v. SSC Niantic Operating Co., LLC* (CT)
 - *Wild v. Carriage Funeral Holdings, Inc.* (NJ)
- What might it look like?
 - Request information from their provider
 - Interactive dialogue
 - Reasonable accommodation?



Closing Thoughts



Final Thoughts

- Consider the state in which the applicant will work or the employee does.
 - Know the protections that apply to workers and employers.
 - Duty to engage in an interactive dialogue?
 - Mitigate risk of a disability discrimination claim.
 - Consider culture and goals.
 - Safety-sensitive versus non-safety-sensitive jobs.
 - What's at risk?
 - Diminished applicant pool.
- Review your drug testing policies to make sure employees understand your views about cannabis and CBD.

**thank
you**