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Marijuana Laws Spread Like a Weed in 2021

A Year in Review

Tuesday, February 15, 2022

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Today's Agenda

- 01** The State of the Union
- 02** What Happened in 2021
- 03** To Test or Not to Test:
That is the Question
- 04** Other Considerations
- 05** Closing Thoughts
- 06** Q&A

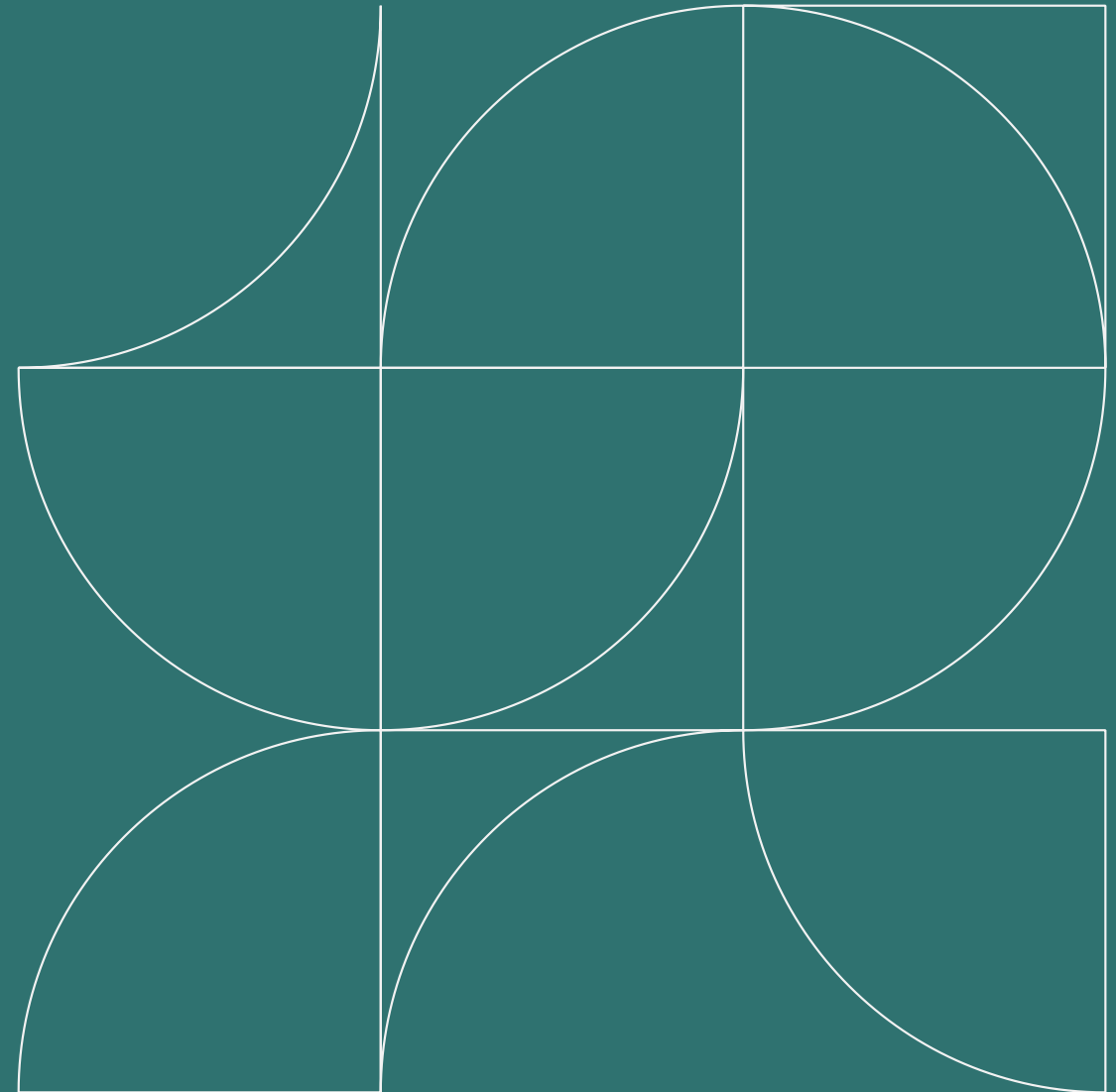


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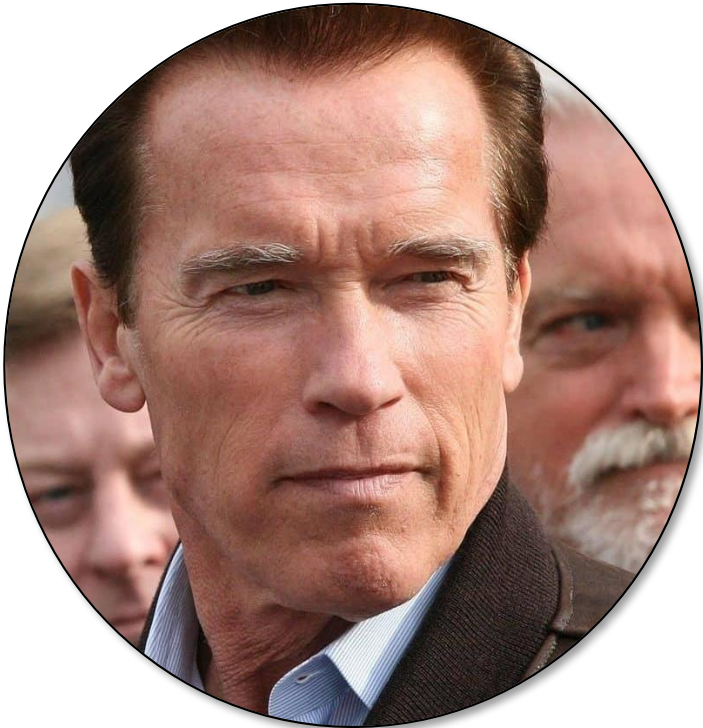
The State of the Union



“I smoke the marijuana – I always inhale.”

“Look, when I was a kid, I inhaled. Frequently. That was the point.”

“...marijuana, pot, grass – whatever you want to call it – is probably the most dangerous drug in the United States.”





Poll 1

Does your company test for marijuana?

– Yes

– No

Federal v. State 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
- Medical and scientific opinion has changed
- Cultural shift
- Difficult to navigate depending on geographic footprint

Jurisdictions Authorizing Medical Use

- Alabama
- 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
- Virginia
- Washington
- West Virginia

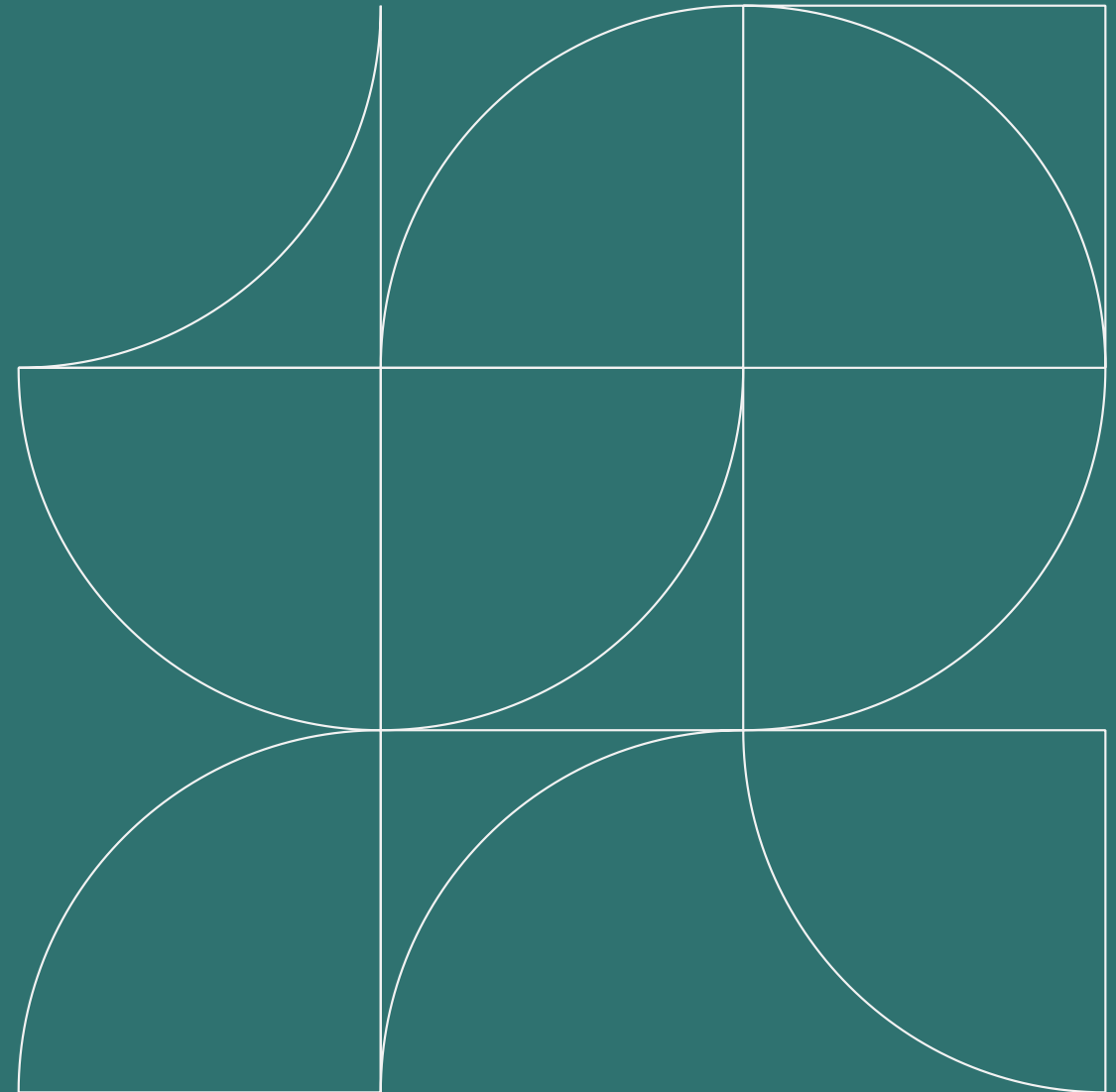
Bold and underlined states have employment protections (per statute or case law)

Recreational Law

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



What Happened in 2021?



New Jersey

- Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization (“CREAMM”) Act – passed Feb. 22, 2021
- What employers **CAN** do
 - Prohibit marijuana use or possession or impairment in workplace
 - Require applicants and employees to submit to drug tests
- What employers **CANNOT** do
 - refuse to hire or employ an individual who uses marijuana, unless prohibited by federal contracting requirements or if it would jeopardize federal funding
 - take any adverse action against someone based solely on a positive test result for marijuana
- No exemptions for safety sensitive roles
 - Note DOT requirements

New Jersey Drug Testing

- Can still conduct drug tests
- However -
 - Effectively bans pre-employment
 - Defensible if based on reasonable suspicion
- Two components to a marijuana test
 - Scientifically reliable objective testing method (blood, urine, saliva)
 - Physical examination by 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



New York

- 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
- Amended off duty products law
 - **CANNOT** refuse to hire, terminate, or otherwise discriminate against an individual based on the legal use of marijuana
- Employers may still prohibit marijuana 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 marijuana or hashish in the workplace
- Limited exceptions
- Department of Labor says **NO PRE-EMPLOYMENT MARIJUANA TESTING**
 - Reasonable suspicion

Connecticut

- Recreational use allowed for individuals 21 and older
- Employment provisions effective July 1, 2022
- Employers can still maintain a drug-free workplace
 - With a compliant policy distributed in advance, employers can take action based on positive marijuana test results
 - Numerous exemptions



Virginia and New Mexico

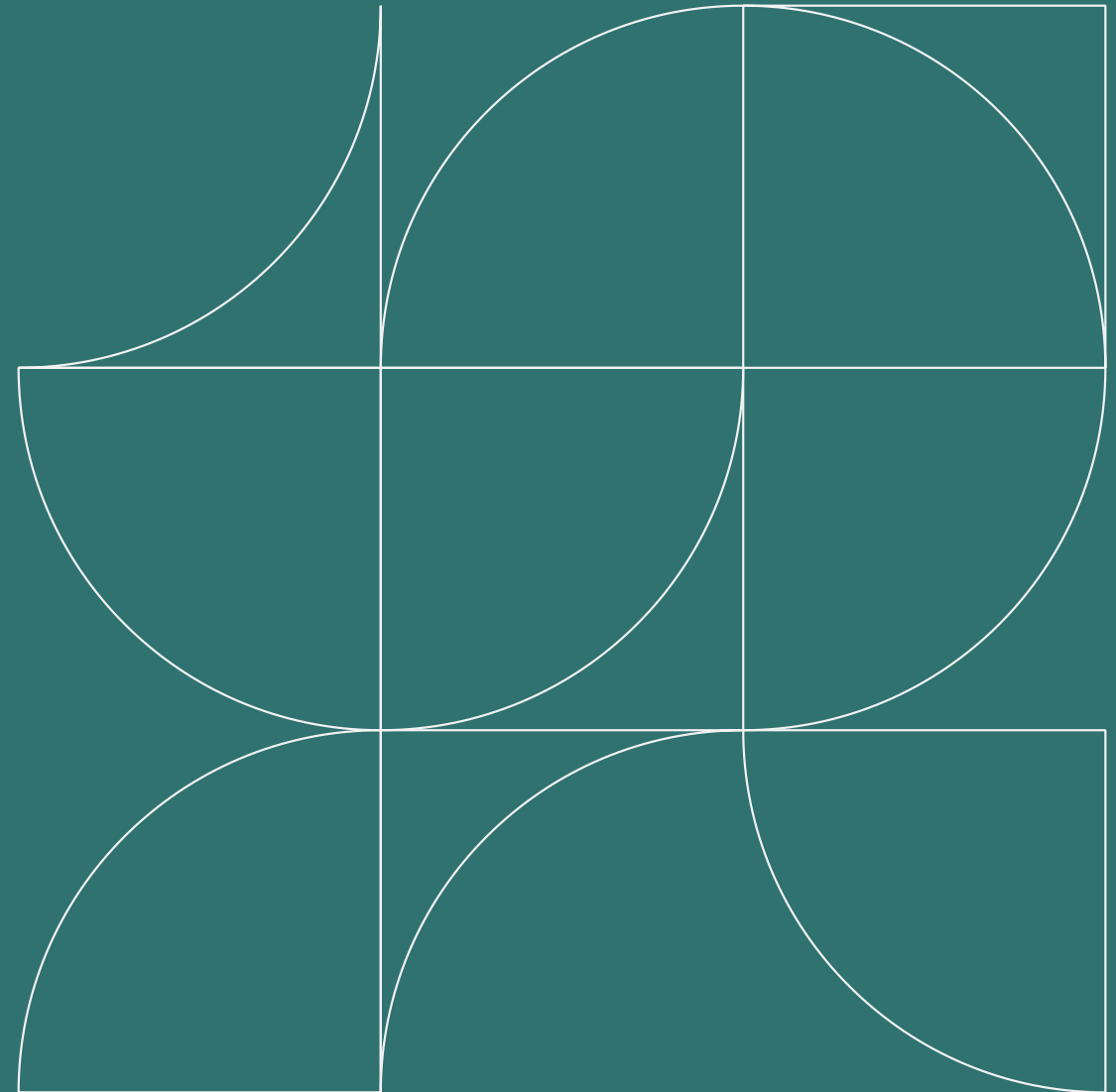
- Virginia Recreational Marijuana
 - Effective July 1, 2021, individuals over the age of 21 can lawfully possess up to an ounce of marijuana in Virginia
- Virginia Cannabis Oil
 - First state to provide employment protections to cannabis oil users
 - Effective July 1, 2021
 - Exceptions for certain regulated employers
- New Mexico Recreational Marijuana
 - Effective June 2021
 - While no employment protections, the state medical marijuana law does provide employment protections to medical users

Philadelphia

- Effective January 1, 2022
- Follows the lead of New York City
- Prohibits employers from requiring prospective employees to undergo testing for the presence of marijuana as a condition of employment
- Limited exceptions
 - The City will issue rules to clarify the definition of “safety sensitive”



To Test or Not to Test: That is the Question





Poll 2

Is your company considering eliminating marijuana testing?

- No
- Yes, but only for pre-employment
- Yes, but only for non-safety sensitive roles
- Yes, for everyone

What Does a Positive Test Result Tell You?

- Doesn't (yet) prove impairment
- Lingers in the system
- Can you even test?
 - New York
 - New Jersey
 - New York City and Philadelphia
 - Nevada
- Develop and administer a strong reasonable suspicion program



Reasonable Suspicion Procedures

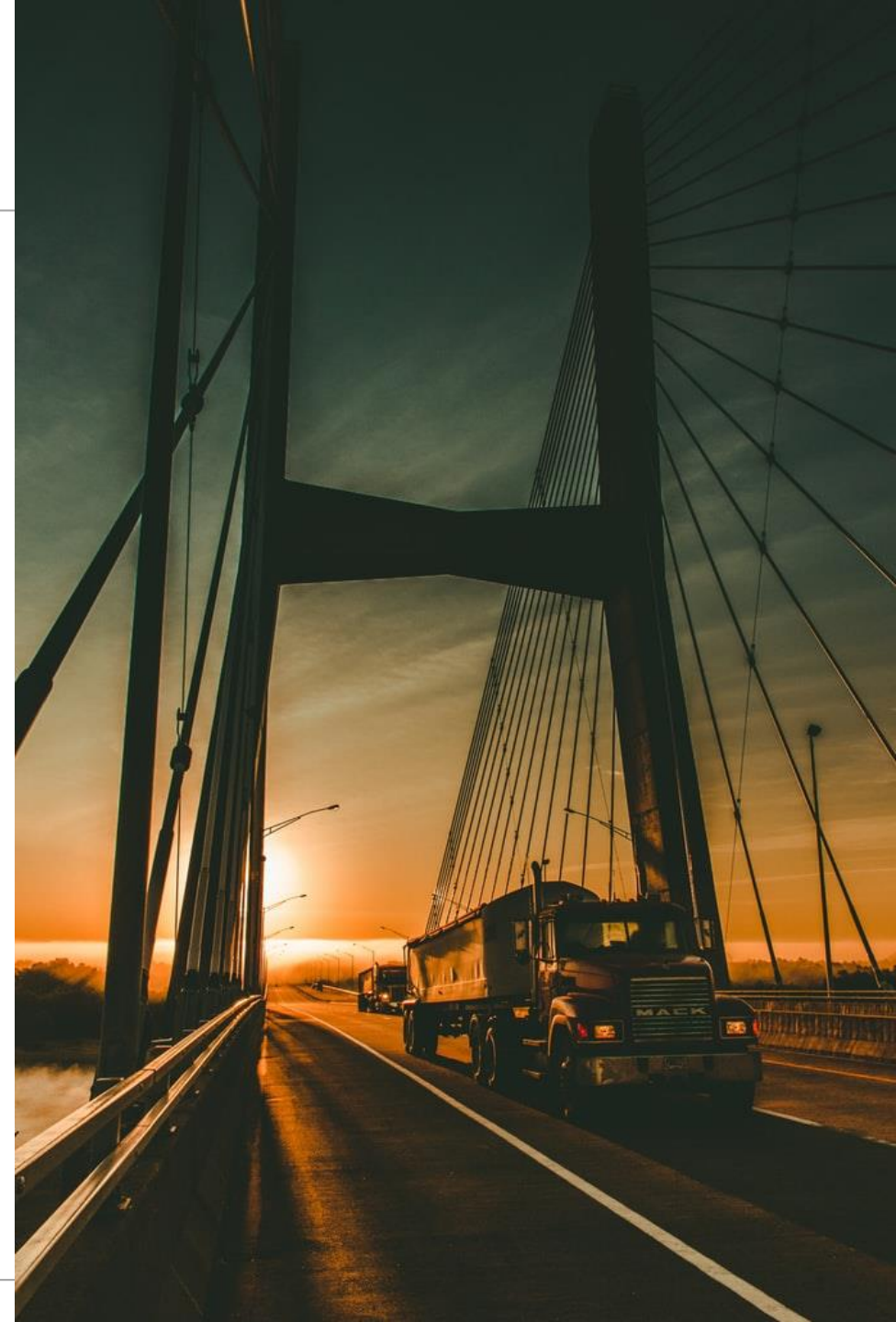
- Train your managers and supervisors
- Clear observations of the employee behavior, appearance, speech or body odor associated with drug or alcohol use
 - Employee displays pattern of abnormal or erratic behavior, direct observation of drug use, presence of the physical symptoms of drug use, information provided by a [reliable](#) and [credible](#) source (be careful of hearsay)
 - What if the employee is caught using or possessing at work?
- 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 as soon as possible (e.g., same day)

Recognizing the Signs

- 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

Are You Required to Test?

- 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



Safety

- NIDA – 14 million active drug addicts employed at any given time
- Problems caused by marijuana in the workplace
 - Accidents/injuries
 - Performance issues
 - Theft
 - Increased liability to the company
- OSHA
 - General duty clause
- National Safety Council recommends “zero tolerance”
- Safety sensitive jobs
 - Operating forklifts; driving; conveyors; cranes; etc.
 - Note states with no exception for safety sensitive jobs (e.g., NY, NJ)

Culture

- Gallup poll shows that **68%** of Americans support marijuana legalization
- Job market considerations



Duty to Accommodate?

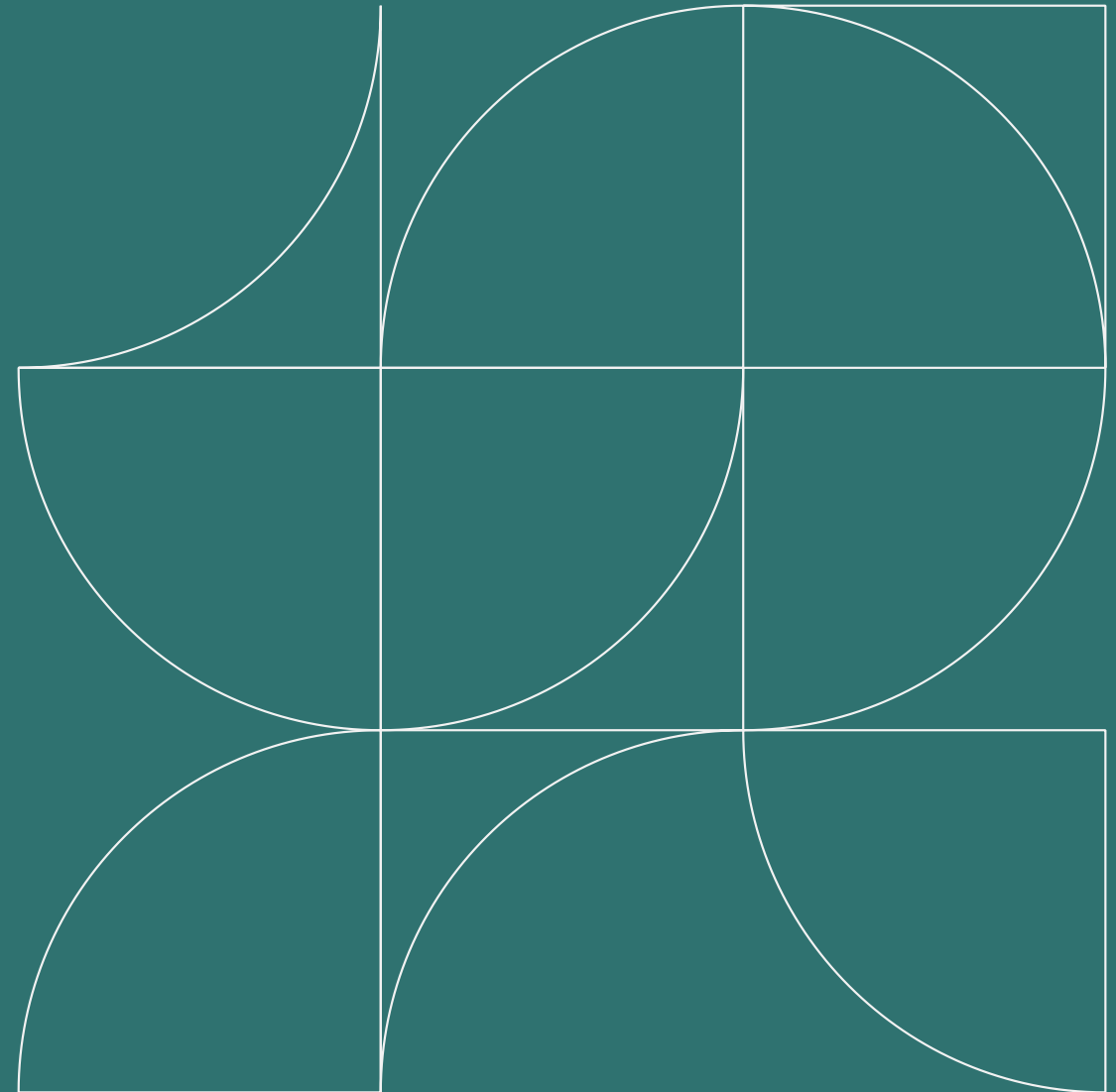
- No duty under the Americans with Disabilities Act
 - But consider the disability
- State legislatures and courts going the opposite way
- Lessons learned from state court decisions:
 - *Barbuto v. Advantage Sales and Marketing* (MA)
 - *Noffsinger v. SSC Niantic Operating Co., LLC* (CT)
 - *Wild v. Carriage Funeral Holdings, Inc.* (NJ)
- What might it look like?
 - Request information from their provider
 - Provide job description
 - Interactive dialogue
 - Reasonable accommodation?
 - Usually will want the employer to bend its drug policy as an accommodation



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 of employees whose impairment could have contributed
 - Post-accident testing extended to near misses (risky in some jurisdictions)
- Medical marijuana
 - Case-by-case, reasonable accommodation analysis, with interactive process
- Ceasing testing for marijuana entirely

Other Considerations



CBD

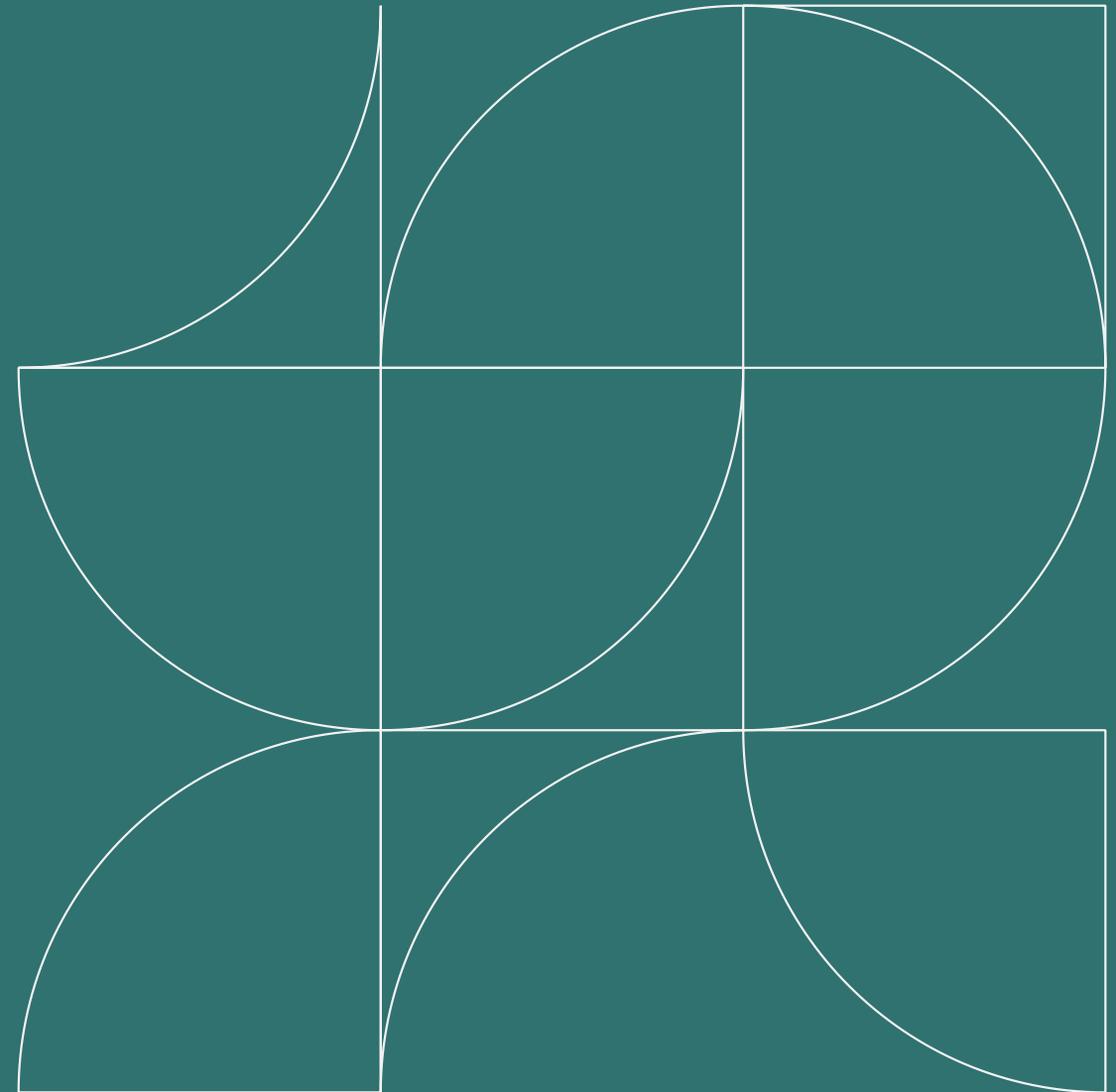
- A product in need of oversight
 - “THC Free” or “Pure CBD”
 - Yet, workers still testing positive for THC
 - Trucker suing a CBD manufacturer for false/deceptive advertising
 - Recent DOT bulletin
- Virginia
 - First state to pass a law providing employment protections to CBD users



Drug and Alcohol Testing Policies

- 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 policy requirements based on case law (e.g., California, Massachusetts, New Jersey and West Virginia)
 - Have a clear definition of “illegal drugs”
 - California
 - Authorization for the release of medical information

Closing Thoughts





Final Thoughts

- Gather relevant stakeholders
 - Goals; culture; safety; hiring pool
- Consider the state in which the applicant will work or the employee does
 - Know the protections that apply to workers and employers
 - Can you even test?
 - Duty to engage in an interactive dialogue?
 - Mitigate risk of a disability discrimination claim
- Review drug testing policies to make sure employees understand the employer's views about marijuana and CBD



Q&A

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thank you