



2019 Update on Drug-Free Workplace Law for New Jersey Employers

Nancy N. Delogu, Esq.

April 9, 2019

www.littler.com

Littler[®]

Presented by



NANCY DELOGU

Shareholder

Washington, D.C.

ndelogu@littler.com

202.414.6863

Drug-Free Workplace Update

Agenda



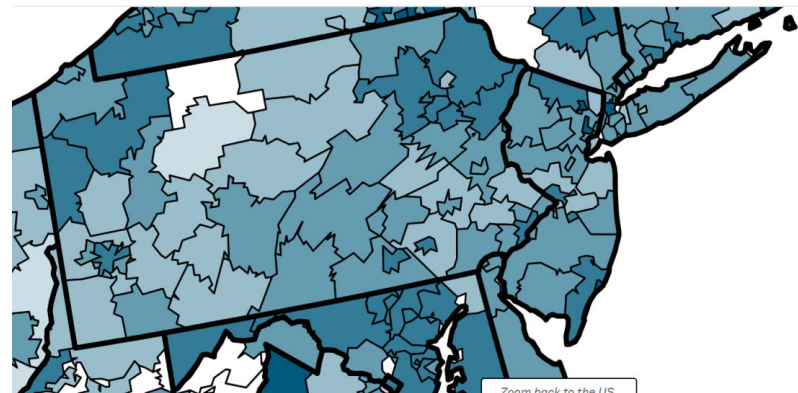
- Update on Workplace Substance Abuse
- Opioid Abuse & Workplace Safety
- Marijuana Law
- Reasonable Accommodation of Medical Marijuana Users
- New Jersey Marijuana Legalization Efforts

Substance Abuse & Work

- Drug use in the United States at a 12-year high, according to Quest Diagnostics
 - ↑ Methamphetamine abuse
 - ↑ Opioid abuse
 - ↑ Marijuana & marijuana products
- Over 28 million Americans admitted using illegal drugs in past month; during the same period, 16 million admitted “heavy” alcohol use – National Survey on Drug Use and Health, SAMHSA (September 2017)

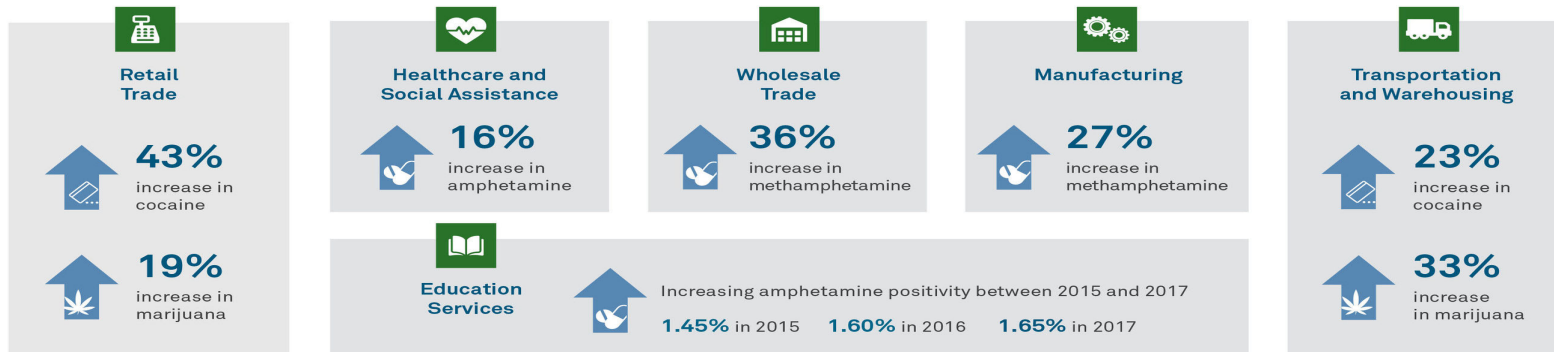
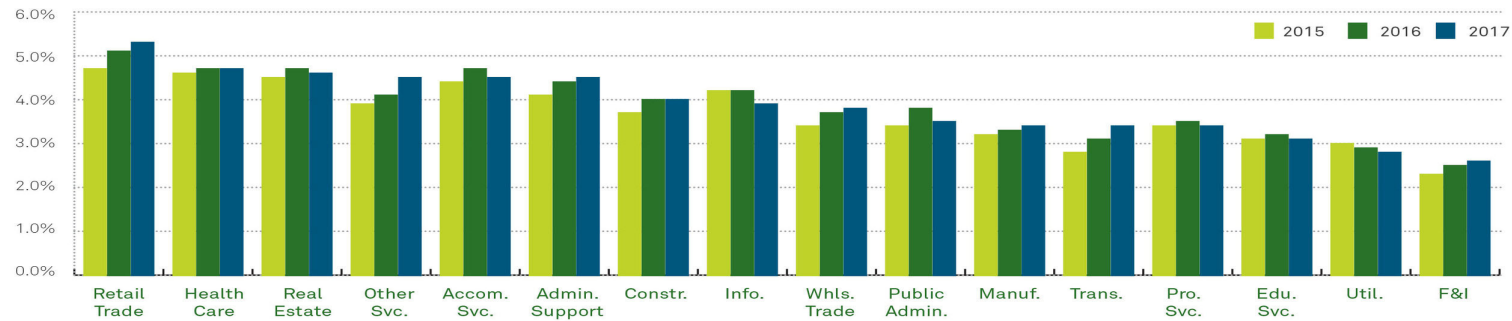
Drug Testing Index™: Positivity rate for marijuana in 2017

This interactive map shows urine drug test positivity by 3-digit zip code in the United States. The Quest Diagnostics Drug Testing Index™ is a comprehensive analysis of workforce drug use trends.



Quest Diagnostics Drug Testing Index

Drug positivity rates by industry sector



Percentages reflect increases between 2015 and 2017. Percent increases have been rounded to the nearest whole number. Classifications are based on the North American Industry Classification System (NAICS). Sixteen of the 20 industry sectors were included in the DTI analysis; four classifications were excluded from the analysis due to insufficient testing volume.



Key Takeaways

- ❖ More than 70% of employers have been impacted by prescription drugs.
- ❖ 19% feel extremely prepared to deal with prescription drug misuse.
- ❖ 76% are not offering training on how to identify signs of misuse.
- ❖ 81% lack a comprehensive drug-free workplace policy.
- ❖ 41% of those who drug test all employees are not testing for synthetic opioids.
- ❖ Encouragingly, 70% would like to help employees return to work following appropriate treatment.



Opiate Abuse & Workplace Safety



A national survey on drug use and health conducted in 2015 by the Substance Abuse and Mental Health Services Administration revealed that 75% of adults ages 18 to 64 with substance misuse disorders are active in the workforce. If that statistic alone is not alarming enough for employers, a recent study found that there has been a steady decline in the U.S. labor force since 2007 especially among prime age working males. The study found that nearly half of this demographic group were not actively in the workforce as a result of taking ongoing long-term opioid pain medication.”

A. Krueger, (2017). “Where Have All the Workers Gone? An Inquiry into the Decline of the U.S. Labor Force Participation Rate.” Retrieved February 19, 2018 -www.brookings.edu/content/uploads/2017/09/1_krueger.pdf

Addiction Enters the Workplace

- Labor pool shortage
- Prescription abuse detection hard, strikes successful employees
- Attendance issues (employees/family members)
- Increased errors, including safety errors

How the Prescription Drug Crisis Is Impacting American Employers (2017)

Addiction Impacts the Workplace

- Opioids key factor in “prime age” workers’ inability/unwillingness to work, according to Goldman Sachs Opioids Report (David Mericle, Sr. U.S. Economist)
- The United States consumes 80% of the world's supply of prescription opioid analgesics (POAs), and opioid prescriptions have climbed by 300% since 1991
- Drug addiction cause of stagnant U.S. labor markets, according to the Federal Reserve

Opioid Crisis Impacts Workplaces

- January 2018: Federally-mandated transportation testing includes testing for opioids:
 - Hydrocodone
 - Hydromorphone
 - Oxycodone
 - Oxymorphone
- Health plan limits on prescribing: be careful!
- "There's a person dying of an opioid overdose every 12 and a half minutes. Four out of five people who use heroin started with a prescription opioid."— U.S. Surgeon General Jerome Adams



Opioids & Workplace Responses

The National Institute for Occupational Safety and Health (NIOSH)

Workplace Safety & Health Topics

Workplace Safety & Health Topics

Opioids in the Workplace

NIOSH's Framework

Data

Field Investigations

Research

Resources

Follow NIOSH

Facebook

Promoting productive workplaces through safety and health research

NIOSH

Opioids in the Workplace

NIOSH Confronts the Opioid Crisis

The effects of opioid use and misuse are not isolated to work or home environments, and the potential for addiction may be preceded by injuries that happen in the workplace, with the consequences affecting both an individual's working life as well as their home life.

By using [Total Worker Health®](#) principles, NIOSH is developing solutions to help workers and employers facing this epidemic in their communities. [Learn more](#) about the specific steps NIOSH is taking to approach this challenge.

Find Help and Treatment for Opioid Abuse



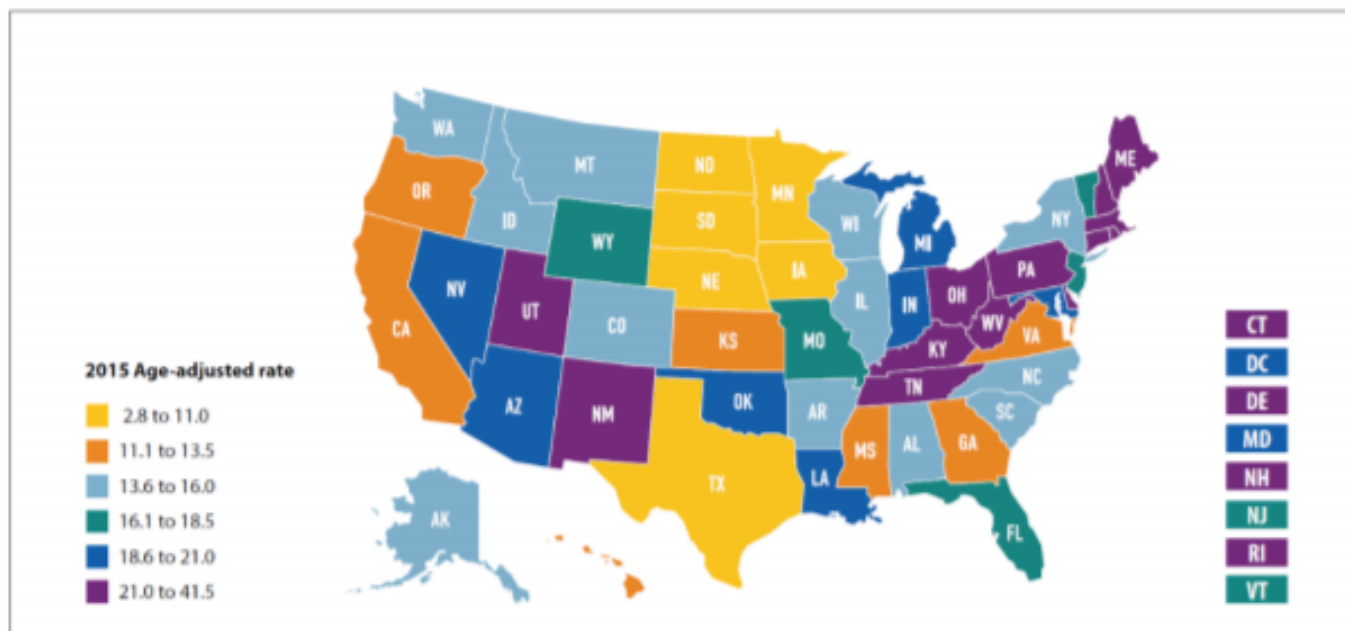
New Naloxone Resource for Workplaces

NIOSH Guidance on Workplace Impacts of Opioid Abuse



Drug Overdoses in Work-Aged Population

Figure 1: Age-adjusted rates of drug overdose deaths by state — United States, 2015



Source: National Vital Statistics System, Mortality File, CDC WONDER.

NIOSH Information on Opioid Abuse

- **95%** – In 2017, 95% of the 70,067 US drug overdose deaths occurred among the working age population, persons aged 15-64 years. It is unknown how many were employed at the time of their death.¹
- **4.3%** – According to the National Survey of Drug Use and Health (NSDUH), an estimated 4.3% of respondents age 18 years or older reported illicit opioid use in the past year. An estimated 66.7% of these self-reported illicit opioid users were employed full- or part-time.²
- **25%** – The Bureau of Labor Statistics (BLS) reported that overdose deaths at work from non-medical use of drugs or alcohol increased by at least 25% annually between 2013 and 2017. The 272 workplace overdose deaths reported in 2017 accounted for 5.3% of occupational injury deaths that year, as compared to 1.8% in 2013. It is unknown how many of these deaths were caused by opioids specifically.³
- **14.8 days** – Workers with a current substance use disorder miss an average of 14.8 days per year, while the subset with a pain medication use disorder miss an average of 29 days per year. This is in contrast to an average of 10.5 days for most employees, and an average 9.5 days for workers in recovery from a substance use disorder.⁴

NIOSH Information on Opioid Abuse & the Workplace

- In 2016, 44% of all workers' compensation claims with prescriptions had at least one prescription for opioids based on data from 40 states. While still high, this figure has declined from 55% since 2012.⁵
- A recent NIOSH-funded study by the Workers' Compensation Research Institute (WCRI) found significantly different opioid dispensing rates within the workers' compensation system based on several factors:¹²
 - Industry in which the injured worker is employed
 - Mining and construction had the highest opioid dispensing rates, followed by Agriculture, Forestry, and Fishing and Public Safety
- Company size (based on payroll)
 - Smaller companies had higher opioid dispensing rates than larger companies
- Injured worker age
 - Older workers had higher opioid dispensing rates than younger workers
- County-level factors (in which the injured workers resides)
 - Rural areas had higher opioid dispensing rates than urban areas
 - Areas with low rates of health insurance had higher rates for opioids prescribing than areas with high rates of health insurance
- Injury type
 - Fractures and carpal tunnel syndrome had the highest opioid dispensing rates, followed by neurologic spine pain

Should You Carry Naloxone?



"For a heart attack, we train employees how to do CPR until the paramedics arrive. Why is that not the case with naloxone and Narcan?" – U.S. Surgeon General Jerome Adams, April 18, 2018

- State laws often contain “good Samaritan” provisions
- Must contact emergency services after administration
- Is it right for your workplace?

Marijuana as Treatment

- Currently, up to 90% of patients in state-level medical cannabis registries list chronic pain as their qualifying condition for the medical program.
- In humans, subanalgesic doses of THC and morphine are equally unsuccessful at reducing the sensory or affective components of pain; however, when the same doses of THC and morphine are coadministered, they produce a significant reduction in the affective component of pain.
- Conclusion: marijuana products, coupled with opioids, may be more effective and less dangerous treatment for chronic pain than opioids alone
- WHAT ABOUT THE WORKPLACE?



Marijuana Law

Federal Law & Marijuana

Controlled Substances Act

- Schedule I of the Controlled Substances Act: little or no medicinal value and a high likelihood of abuse
- Requests for reclassification denied by DEA 8/17
- Studies by NIDA show some possible medicinal effects, but significant short- and long-term health concerns remain poorly understood

- ***U.S. v. Oakland Cannabis Buyers' Cooperative*** (2001)
- ***Gonzales v. Raich*** (2005)
- ***Americans for Safe Access v. Drug Enforcement Agency*** (D.C. Cir. 2013)



Federal Law & Marijuana

Drug-Free Workplace Act

- Requires federal contractors to promote a drug-free workplace
 - Only contracts for services, not goods
 - Only contracts above the simplified acquisition threshold (currently, \$250,000)
 - Subcontractors not covered
 - Grants in any amount
- Does not require any drug testing, only policy, education
- Must promptly report to contracting officer individuals who are convicted of criminal offenses involving drugs while working on federal contracts



Federal Law & Marijuana

Americans with Disabilities Act and Illegal Drugs:

- Individuals engaging in the current illegal use of drugs are not considered disabled for that reason; it is not discrimination to take adverse action on the basis of illegal drug use
- “Illegal use of drugs” means use that is unlawful under the Controlled Substances Act, but excludes from this definition the use of drugs taken under supervision of a health care professional

- There are lawfully prescribed medications that contain THC
- To date, courts in agreement that employers may take adverse action on the basis of marijuana use, regardless of whether such use is pursuant to physician guidance or state medical marijuana program

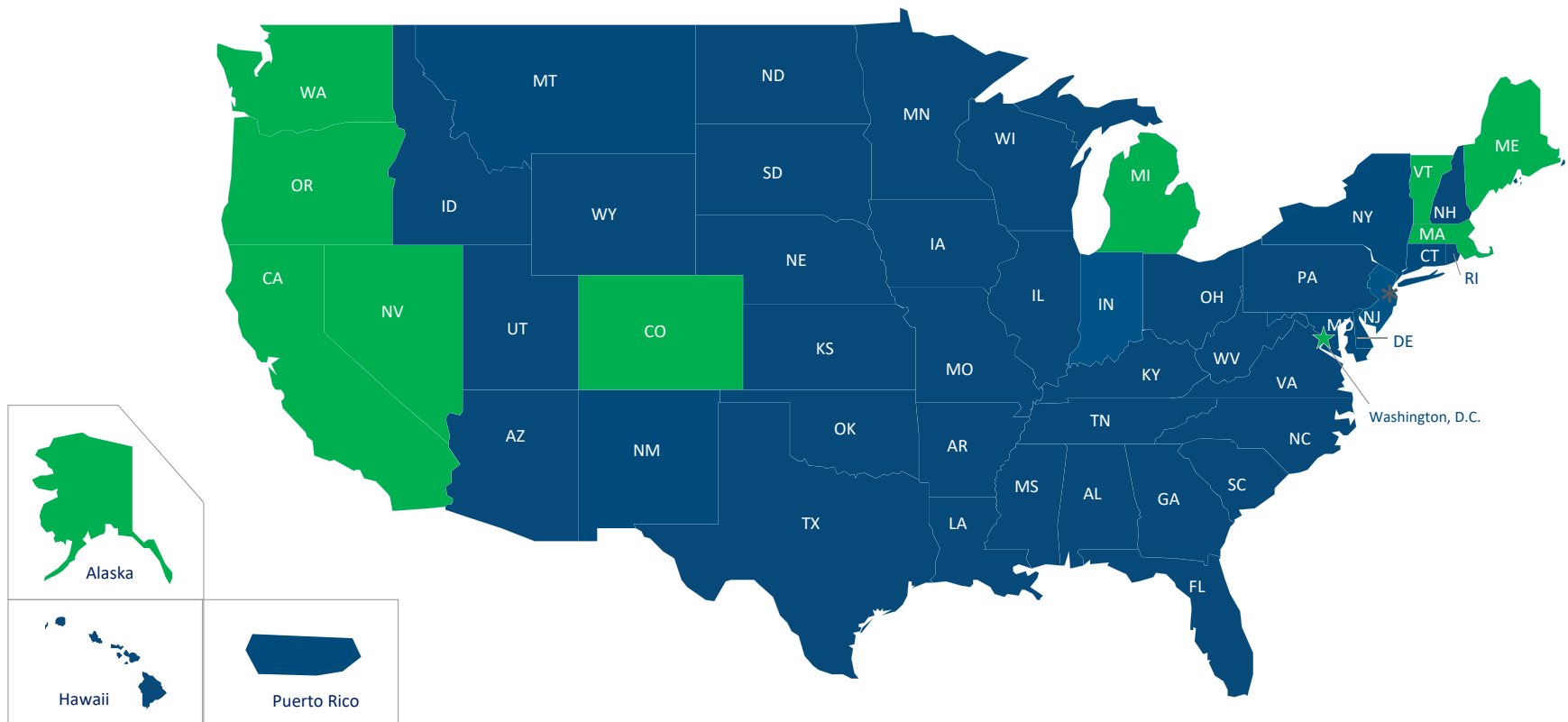
Note: if individual who abuses illegal drugs is not terminated, obligation to accommodate underlying disability continues –

Federal Law & Marijuana

U.S. Department of Transportation Regulations

- Cover 8 million+ private sector workers in transportation work
- Prohibit drug abuse and alcohol misuse
- Require drug & alcohol testing
- Marijuana use of any kind prohibited for regulated workers. Yes, this includes CBD products

Recreational Marijuana Laws



Marijuana Legalization Case Study: California, 2018

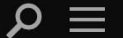
- Around \$2.5 billion of legal cannabis was sold in California in 2018, half a billion dollars less than in 2017 when only medical marijuana was legal, according to GreenEdge, a sales tracking company.
- The most recent official estimates of California's cannabis production, contained in a report published a year ago by the California Department of Food and Agriculture, showed the state producing as much as 15.5 million pounds of cannabis and consuming just 2.5 million pounds.
- 85 to 90 percent of the cannabis that California produced was exported
- Gov. Jerry Brown, who left office January 7, told The New York Times, "I have not counted on any revenue from marijuana. Who's counting on the marijuana revenue? People said that to make it more plausible for voters."



Health » Food | Fitness | Wellness | Parenting | Live Longer

Live TV

U.S. Edition +



Cannabis-related ER visits in Colorado jump threefold after legalization, study says

By Denise Powell, CNN

🕒 Updated 2:12 AM ET, Tue March 26, 2019





What About CBD?

Is it “Marijuana” – If Not, Not Illegal



- *Cannabis sativa* is an illegal drug, placed on Schedule I of the Controlled Substances Act
- December 2018: Farm Bill re-defines industrial hemp to include *cannabis sativa* provided that the plant contains less than .3% THC (tetrahydrocannabinoid)
- Does this mean that CBD oil is now legal?

Federal Law: Agricultural Hemp

- No explicit rule making CBD products manufactured from hemp lawful – and existing regulation states that it is not
- More lawful CBD products made from hemp may become lawful
- CBD products can be made from marijuana (i.e., cannabis plants with more than .3% THC)
- Difficult or impossible for average user to know whether product contains THC: NORML advises against ingesting if you must pass a drug test
- CBD derived from hemp that's marketed to the general public is "sketchy at best" says Dan Linn, executive director of the Illinois chapter of the National Organization for the Reform of Marijuana Laws (NORML), a nonprofit group that opposes pot prohibition. "There is no testing or quality controls," Linn says, "which are ultimately why I feel they are no different than snake-oil products."
- A 2016 study published in the Journal of Regulatory Science tested 23 products with "hemp oil and/or cannabinoid label claims" purchased on the Internet. Of these, 18 tested positive for the presence of at least one cannabinoid compound. But three contained less than 0.01 percent of a cannabinoid, and four products labeled as CBD "were found not to contain any CBD," according to the study.

Is CBD Legal Under Federal Law?

- YES, if one of these DEA-approved drugs:
 - Epidiolex (CBD anti-seizure medication)
 - Marinol (dronabinol, synthetic THC)
 - Cesamet (nabilone)
 - Syndros (dronabinol oral solution)
- Available by prescription only
 - Why we use MROs in the testing process
 - Will be reported as “negative” with a prescription
- Will you test positive?





State Medical Marijuana Initiatives

No Protections for Medical Marijuana Users at Work

- **California**
- **Colorado**
- **Michigan**
- **Montana**
- **Oregon**
- **Washington**
 - Reviewing courts in these states (or federal courts evaluating state law) have decided that the laws in these states do not provide employment law protection.
- In each case, federal / state law conflict controlled the outcome...until
- **Massachusetts goes the other way**

NORML-led efforts to revisit or change law underway at the legislative level



Statutory Protections for Workers Using Medical Marijuana

- Arkansas
- Arizona
- Connecticut
- Delaware
- Illinois
- Maine
- Minnesota
- Nevada
- New Mexico
- New York
- Oklahoma
- Pennsylvania
- Rhode Island
- West Virginia (2019)



Confidential

Wait – Can they Do That?

- Is state law in conflict with federal law?
- Is state law preempted by federal law?
- How can a state require modification to a federal scheme?
- Can my employment be affected if I use marijuana while visiting a place where marijuana is legal for recreational use??
- How do I comply with both state and federal law?



Connecticut's Medical Marijuana Statute

- “Unless required by federal law or required to obtain federal funding, an employer cannot refuse to hire a person or discharge, penalize or threaten an employee solely on the basis of the individual’s status as a qualifying patient or primary caregiver.” Conn. Gen. Stat. § 21a.408p.
- An employer can: 1) prohibit the use of intoxicating substances during work hours; 2) discipline an employee for being under the influence of intoxicating substances during work hours. Conn. Gen. Stat. § 21a.408p.

Connecticut Medical Marijuana Law -- *Noffsingher*

- Applicant discloses medical marijuana use to treat PTSD and fails pre-hire drug test; her offer of employment is rescinded. She sued, alleging violation of Connecticut's medical marijuana law (PUMA).
- Employer seeks to dismiss claim, arguing that state law is preempted by federal law: the Controlled Substances Act, the Americans with Disabilities Act, the Food, Drug, & Cosmetic Act, and the federal Drug-Free Workplace Act
- Employer further argues: we did not act on basis of her status as a PUMA patient, but because she tested positive for marijuana!

Connecticut Employers & Medical Marijuana -- *Noffsinger*

Court:

- CSA, FDCA do not regulate employment practices
- DFWA does not require drug testing; requires employer discipline workers who use or possess illegal drugs *at work*
- ADA permits employers to prohibit illegal drug use at work; it does not permit employers to use a negative drug test as a universal qualification standard

Connecticut Medical Marijuana Law -- *Noffsinger*

Court:

- Action based on a positive workplace drug test for marijuana constitutes status-based discrimination when an employer knows the result was caused by marijuana use lawful under Connecticut law.
- Summary judgment to plaintiff!

Take-away:

Zero-tolerance policies premised on federal law are under attack

Connecticut Employers & Medical Marijuana

Take-away:

Employers may need to tolerate/excuse positive drug tests for covered workers despite zero tolerance policies

Rhode Island Medical Marijuana Law -- *Callaghan*

- Rhode Island's medical marijuana law prohibits employers from refusing to employ "a person solely for his or her status as a cardholder." An employer declined to hire as an intern an applicant who disclosed her status as a medical marijuana patient, on grounds that she admitted she would not be able to pass the pre-hire drug test. She sued, alleging violation of state law.
- The defendant argued that it did not refuse to hire the plaintiff because of her status as a medical marijuana cardholder, but because of her admitted inability to pass the mandatory pre-employment drug test. The defendant further argued that the Medical Marijuana Act should not be interpreted to require employers to accommodate medical marijuana use, citing that their manufacturing facility contained dangerous equipment and employees under the influence of marijuana might jeopardize workplace safety.

Rhode Island Medical Marijuana Law -- *Callaghan*

The Superior Court rejected both arguments.

- The court read §21-28.6-4(d) in conjunction with §21-28.6-4(a), which provides, “[a] qualifying patient cardholder who has in his or her possession a registry identification card shall not be . . . denied any right or privilege . . . for the medical use of marijuana.” According to the court, “[t]he statutory scheme is premised on the idea that ‘State law should make a distinction between the medical and nonmedical use of marijuana.’” The court emphasized the fact that if the statute was not interpreted in this broad manner, then medical marijuana users would not be protected because they could be screened out by a facially neutral drug test, which a nonmedical user could pass by refraining from using marijuana just long enough to pass.
- The defendant’s workplace safety argument also failed, as the court pointed to the language in the statute that explicitly states the Medical Marijuana Act shall not permit “[a]ny person to undertake any task under the influence of marijuana, when doing so would constitute negligence or professional malpractice.” R.I. Gen. Laws § 21-28.6-7(a)(1).
- According to the court, “[i]f an employee came to work under the influence, and unable to perform his or her duties in a competent manner, the employer would thus not have to tolerate such behavior.” The court granted the plaintiff’s motion for summary judgment, concluding that the defendant violated the Medical Marijuana Act by denying the plaintiff an employment opportunity based on the fact that she would not be able to pass a drug screening.

New Jersey CUMMA

- An employer is not required to accommodate the medical use of marijuana in any workplace. N.J. Stat. Ann. § 24:6I-14.
- The medical marijuana laws do not permit:
 - Operating, navigating, or being in actual physical control of any vehicle, aircraft, railroad train, stationary heavy equipment, or vessel while under the influence of marijuana.
 - Smoking marijuana in a private vehicle unless the vehicle is not in operation.

N.J. Stat. Ann. § 24:6I-8.

NJ Law Against Discrimination Protections?

- Funeral director terminated because he tested positive for marijuana; he claimed he was authorized to use marijuana medically under the NJ Compassionate Use of Medical Marijuana Act (CUMMA)
- Trial court dismissed his claim, noting that CUMMA does not contain any employment law protections, and that the New Jersey Law Against Discrimination (LAD) permits employers to terminate workers who fail drug tests
- March 2019: New Jersey App. Div. court reinstates the LAD claim, stating: “the Compassionate Use Act’s refusal to require an employment accommodation for a user does not mean that the Compassionate Use Act has immunized employers from obligations already imposed elsewhere,” - citing the LAD
- Noting that the requested accommodation was permission to use marijuana off work and outside working hours, the court ruled that the case could proceed.

NJ Law Against Discrimination Protections?

- What about *Vargo v. National Exchange Carriers Association*? In 2005, same court found an employer does not violate the LAD when it perceives an employee to be an illegal drug user after the employee failed a drug test.
- Decisions similar to *Vargo* make it clear that in New Jersey does not violate the LAD when it takes adverse employment action against an individual on the basis of his or her illegal drug use.
- “That decision has no bearing on the impact of a failed drug test caused by the legal use of medical marijuana.”

Wild v. Carriage Funeral Holdings, Inc., No. A-3072-17T3 (N.J. App. Div. March 27, 2019)



Marijuana Legalization in New Jersey

New Jersey Efforts to Legalize Marijuana

- Recreational marijuana bill SB 2703 introduced, amended, replaced, debated -- ?
- Medical marijuana bill expanding medical marijuana program
- Governor has recently expanded covered conditions under state medical marijuana program

SENATE JUDICIARY COMMITTEE

STATEMENT TO

SENATE COMMITTEE SUBSTITUTE FOR
SENATE, No. 2703

STATE OF NEW JERSEY

DATED: MARCH 18, 2019

The Senate Judiciary Committee reports favorably a Senate Committee Substitute for Senate Bill No. 2703.

This substitute bill, titled the “New Jersey Cannabis Regulatory and Expungement Aid Modernization Act,” primarily concerns the development, regulation, and enforcement of activities associated with

Employment Protections In NJ Draft Recreational Marijuana Bill

31. (New section) Employers, Driving, Minors and Control of Property.

a. No employer shall refuse to hire or employ any person or shall discharge from employment or take any adverse action against any employee with respect to compensation, terms, conditions, or other privileges of employment because that person does or does not smoke or use cannabis items, unless the employer has a rational basis for doing so which is reasonably related to the employment, including the responsibilities of the employee or prospective employee.

What is a “rational basis”?

Employment Protections In NJ Draft Recreational Marijuana Bill

b. Nothing in [] (this bill):

(1) Requires an employer to amend or repeal, or affect, restrict or preempt the rights and obligations of employers to maintain a drug and alcohol free workplace or require an employer to permit or accommodate the use, consumption, being under the influence, possession, transfer, display, transportation, sale, or growth of cannabis or cannabis items in the workplace, or to affect the ability of employers to have policies prohibiting cannabis use or intoxication by employees during work hours.

...

Employment Protections In NJ Draft Recreational Marijuana Bill

32. (New section)

a. An employer shall not be permitted to consider when making an employment decision, require any applicant to disclose or reveal, or take any adverse action against any applicant for employment on the basis of, any arrest, charge, conviction, or adjudication of delinquency, for unlawful distribution of, or possessing or having under control with intent to distribute, marijuana or hashish in violation of paragraph (11) of subsection b. of N.J.S.2C:35-5, or a lesser amount of marijuana or hashish in violation of paragraph (12) of subsection b. of that section, or a violation of either of those paragraphs and a violation of subsection a. of section 1 of P.L.1987, c.101 (C.2C:35-7) or subsection a. of section 1 of P.L.1997, c.327 (C.2C:35-7.1) for distributing, or possessing or having under control with intent to distribute, on or within 1,000 feet of any school property, or on or within 500 feet of the real property comprising a public housing facility, public park, or public building, or for obtaining, possessing, using, being under the influence of, or failing to make lawful disposition of marijuana or hashish in violation of paragraph (3) or (4) of subsection a., or subsection b., or subsection c. of N.J.S.2C:35-10, or for a violation of any of those provisions and a violation of N.J.S.2C:36-2 for using or possessing with intent to use drug paraphernalia with the marijuana or hashish, or an arrest, charge, conviction, or adjudication of delinquency under the laws of another state or of the United States of a crime or offense which, if committed in this State, would be a violation of any of the aforementioned crimes or offenses, regardless of when any such arrest, charge, conviction, or adjudication of delinquency occurred, unless the employment sought or being considered is for a position in law enforcement, corrections, the judiciary, homeland security, or emergency management

Employment Protections In NJ Draft Recreational Marijuana Bill

b. Any employer who commits an act in violation of this section shall be liable for a civil penalty in an amount not to exceed \$1,000 for the first violation, \$5,000 for the second violation, and \$10,000 for each subsequent violation, which shall be collectible by the Commissioner of Labor and Workforce Development in a summary proceeding pursuant to the “Penalty Enforcement Law of 1999,” P.L.1999, c.274 (C.2A:58-10 et seq.). The penalties set forth in this subsection shall be the sole remedy provided for violations of this section.

New Jersey Marijuana Legalization and Employment

- If SB 2703 is enacted as drafted, it will be the *first* jurisdiction to explicitly protect individuals who use marijuana from adverse employment action taken on the basis of such use
- *More* generous than laws protecting off-work use of alcohol, since all such laws permit employers to prohibit coming to work with alcohol in one's system
- Tests measure presence of THC in a specimen submitted, not impairment... the same is true of alcohol tests
- Laws which lack clarity and certainty are a compliance challenge ~ especially when out of state behaviors are considered

New Jersey Legalization Efforts

- Governor now asks the legislature to vote in May
- Most pundits believe New Jersey will eventually legalize marijuana for recreational use
- Implications not at all certain, including for workplace
- Voice your support or concerns to your legislator

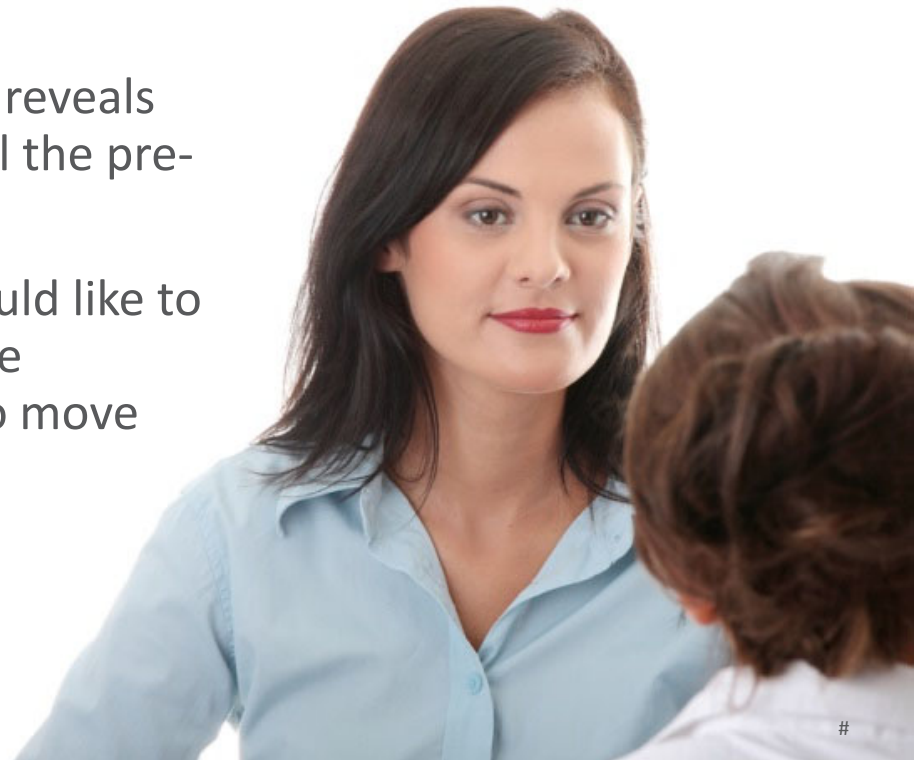




Accommodating the *Medical* Marijuana User

Applicant Claims Lawful Marijuana Use

- You receive an application for employment from a candidate who will work for a client that holds a federal contract
- During course of interview process, the applicant reveals that she uses medical marijuana and will likely fail the pre-hire drug test
- Your operations team likes this candidate and would like to hire her. Human Resources is concerned about the marijuana use, but the operations people want to move quickly to bring her on board
- Her pre-hire drug test is reported positive



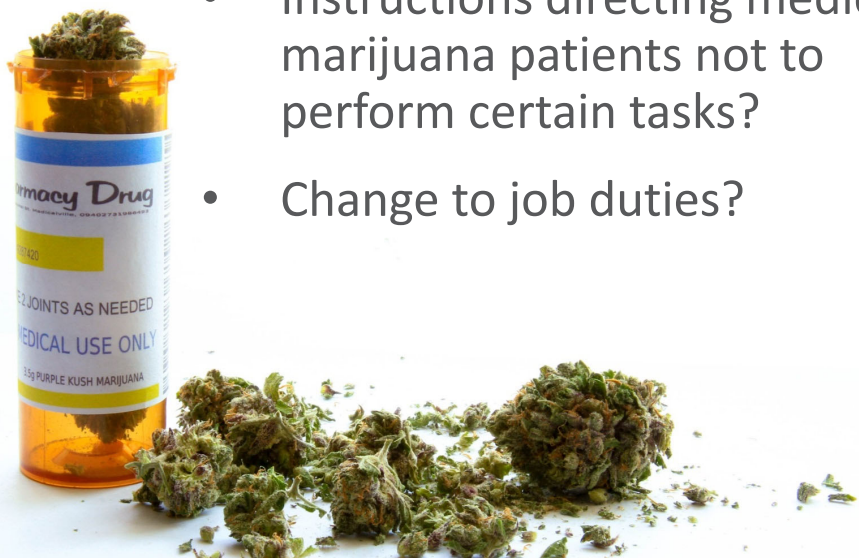
Evaluating & Managing Risk

- Is this a jurisdiction where we have some obligation to consider hiring her?
- How can we tell if she is using marijuana in accordance with state law?
- What sorts of accommodations will she need if hired?
- Can we require her to stay home if she is impaired?
- How will she get to monthly off-site meetings??
- How will we know if she is impaired?
- How do we manage customer?



Possible Accommodations

- Marinol or low THC product?
- Instructions directing medical marijuana patients not to work while impaired?
- Instructions directing medical marijuana patients not to perform certain tasks?
- Change to job duties?
- Reassignment to alternative position?
- Medical opinion on direct threat / fitness for duty in certain positions?
- Leave of Absence?
- Risk analysis, safety-sensitive positions and the potential for catastrophic harm
- Clarify no marijuana products permitted on site or used during work



Documentation Tips

- Medical information is always confidential under ADA even if marijuana use/users not protected under law
- Documentation of medical condition and interactive process must be kept separately, securely, and shared only on a need-to-know basis
- Review certifications and update periodically
- Follow through changes in role/assignment
- Document perceived impairment, safety concerns. Do not hesitate to act when safety is at issue



Weed: How Much is Too Much?

- THC is the impairing substance
- THC content in 1990: 3 – 6 %
- Average THC content in Colorado in 2016: 24 – 26%
- Marijuana “edibles” have range of potency – serving size may be tiny. Can you eat just one square of chocolate? One-sixth of a cookie?
- Distilled marijuana oils and “dabbing” –90% THC or more?
- Recognizing impairment is very difficult



Short Term / Long Term Effects

- When smoked, THC quickly passes from the lungs into the bloodstream
- Bodies absorb THC more slowly when it is eaten – effects felt after 30 minutes to 1 hour
- In addition to feeling of “high”, short-term effects include:
 - altered senses (for example, seeing brighter colors)
 - altered sense of time
 - changes in mood
 - impaired body movement
 - difficulty with thinking and problem-solving
 - impaired memory
- 1 in 10 become addicted (1 in 6 if starting as a teen)
- Reduced memory, learning & attention – effects persist long-term, at least for some users
- Poorer cognitive & executive functioning, especially if starting as a teen
- Less “gray matter” in brain areas with most receptors
- Longitudinal studies underway

Source: National Institute on Drug Abuse

What Do Drug Tests Detect?

- Blood tests are impractical
- Detection Windows: Urine, oral fluids, and hair

Detection Window	Urine (Lab-based)	Urine (instant)	Oral Fluids	Hair
Amphetamines	24-72 hours	24-72 hours		24-36 hours 1-3 months
Cocaine/Metabolite	24-72 hours	24-72 hours		24-36 hours 1-3 months
Opiates	24-72 hours	24-72 hours		24-36 hours 1-3 months
PCP	Occasional use: 1 to 5 days; Habitual/chronic use: up to 30 days	Occasional use: 1 to 5 days; Habitual/chronic use: up to 30 days		24-36 hours 1-3 months
THC/Metabolite	Occasional use: 1 to 3 days; Habitual/chronic use: up to 30 days	Infrequent use: 1 to 3 days; Habitual/chronic use: up to 30 days		< 24 hours 1-3 months
<i>Source: Quest Diagnostics</i>				

Should You Ignore Positive Marijuana Results?

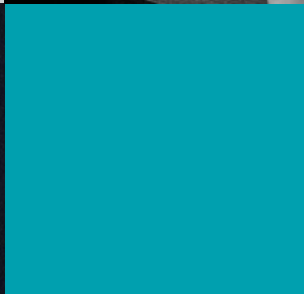
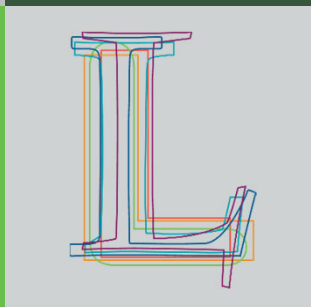
No!

- Regulated workforce: can't!
- What about litigation: negligent hire, negligent retention, punitive damages claims?
- OSHA 101: providing a safe workplace
- What about negative publicity?
- Jury decision as to whether you are responsible



Whatever You Do!

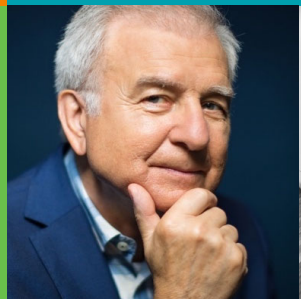
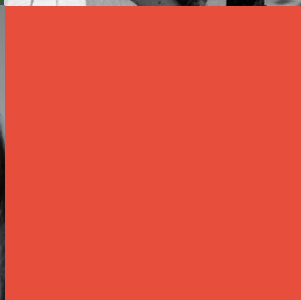
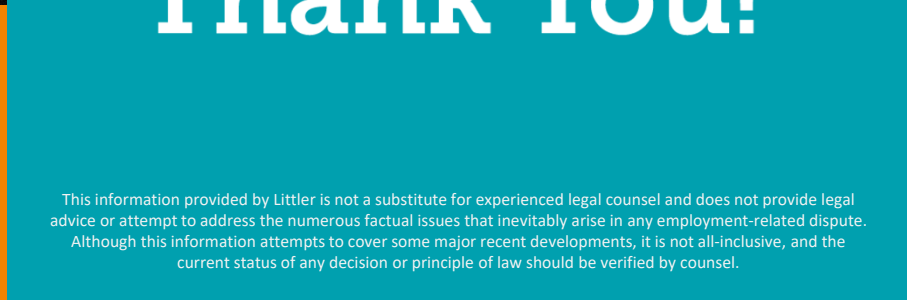
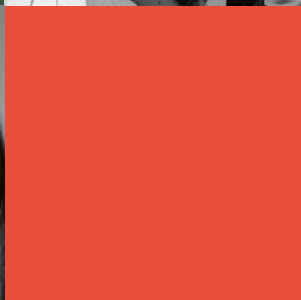
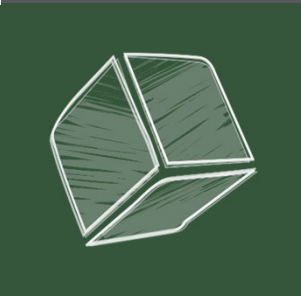
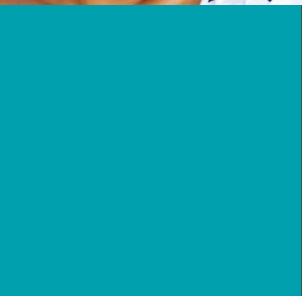
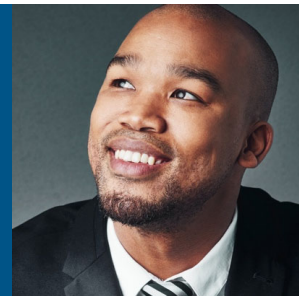
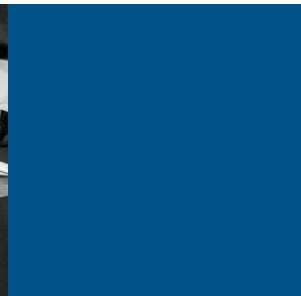
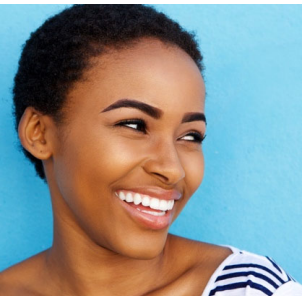
- Stay on top of changes in the law of the jurisdictions relevant to you
- Stay flexible
- Individualized accommodations mean different outcomes for different individuals filling different roles
- Don't shy away from reacting to perceived impairment
- Train your workers on your policy
- Prioritize safety



Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.





This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.

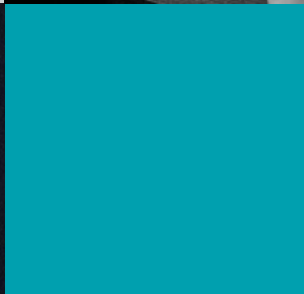
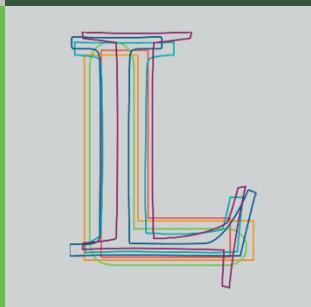


Littler®

Presented by



“



Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.



