

EMPLOYERS AND LAWYERS,

WORKING TOGETHER



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Legalized Recreational Cannabis is Here. *What Now?*

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Agenda



- Medical and Recreational Marijuana Laws
- Illinois' New Recreational Marijuana Law
 - Amended Right to Privacy in the Workplace Act
 - How do we protect our workplace *and* comply with the law(s)?
- What Can We Learn from Court Decisions?
- Key Takeaways
- Best Practices

Prescription Drug Use: A National Epidemic

- Bureau of Labor Statistics – overdoses from non-medical use of drugs or alcohol while on the job increased from 165 in 2015 to 217 in 2016
- CDC – more people die every year from prescription painkillers than from heroin and cocaine combined
- Significant because Illinois' marijuana laws are intended to reduce opioid addiction



Marijuana Safety Concerns

- Chronic use → apathy, reduced cognitive function, plus diminished attention, learning and motor skills (even when not acutely intoxicated).
- Even “occasional use of marijuana by non-addicted individuals increases the odds of becoming involved in a car accident by more than two fold.”
 - Lab simulations: single-dose significantly increased lane weaving, impaired abilities to visually track other cars, reduced reaction times, and interfered with their ability to divide attention (e.g., **drive and change the radio station at the same time**).”

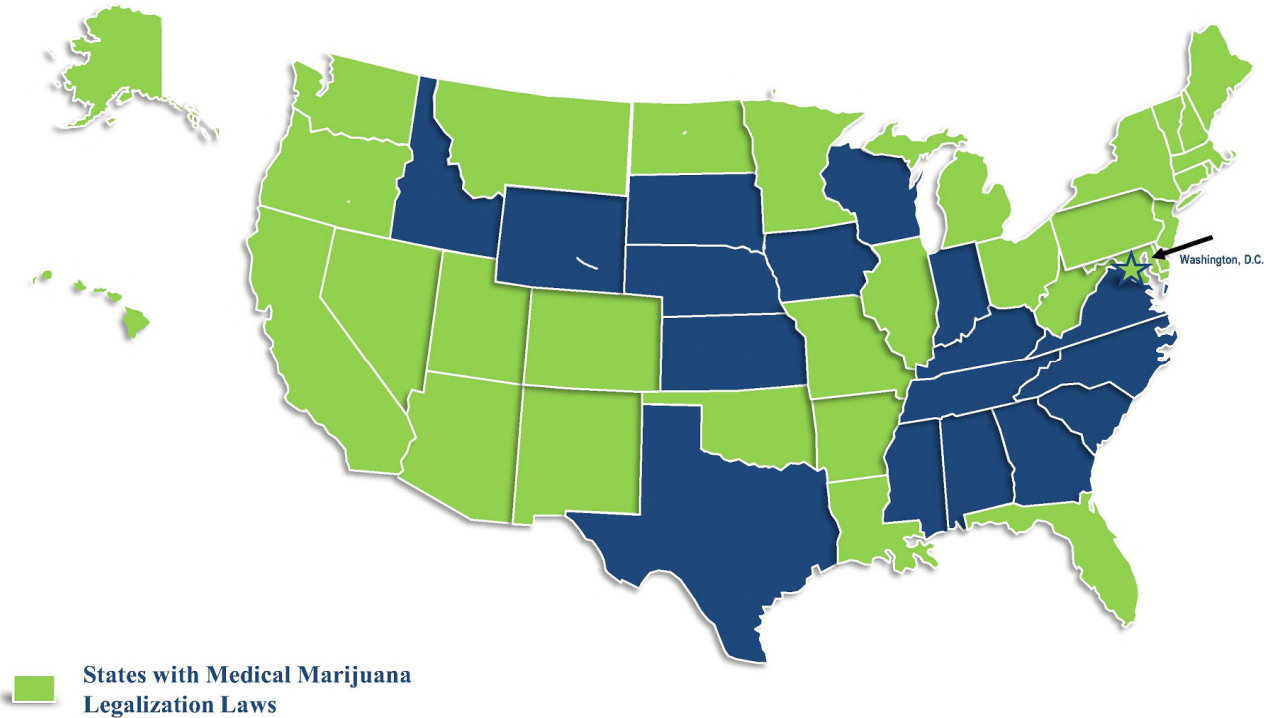
Safety + OSHA

OSHA General Duty Clause Violation:

- 1) Employer failed to keep its workplace free of a hazard;
- 2) Hazard was “recognized” either by the cited employer individually or by the employer’s industry generally;
- 3) Recognized hazard was causing or was likely to cause death or serious physical harm; and
- 4) There was a feasible means available that would eliminate or materially reduce the hazard.

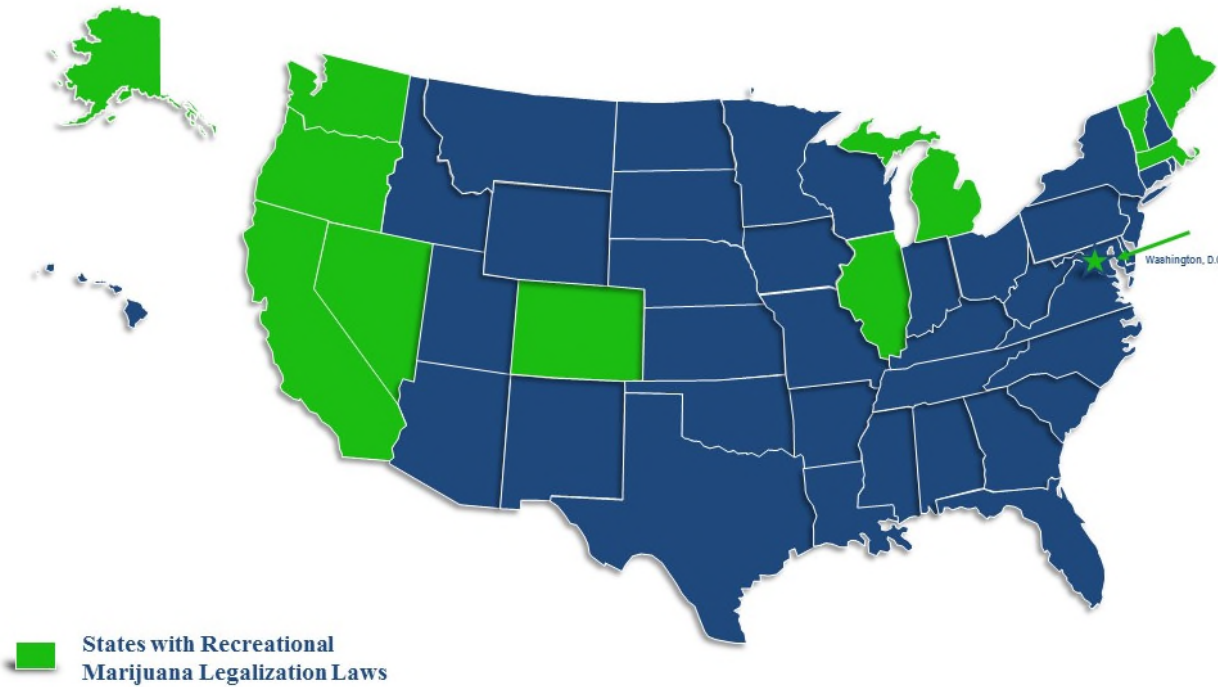
Marijuana – By the Numbers

States with Legal Medicinal Marijuana



Marijuana – By the Numbers

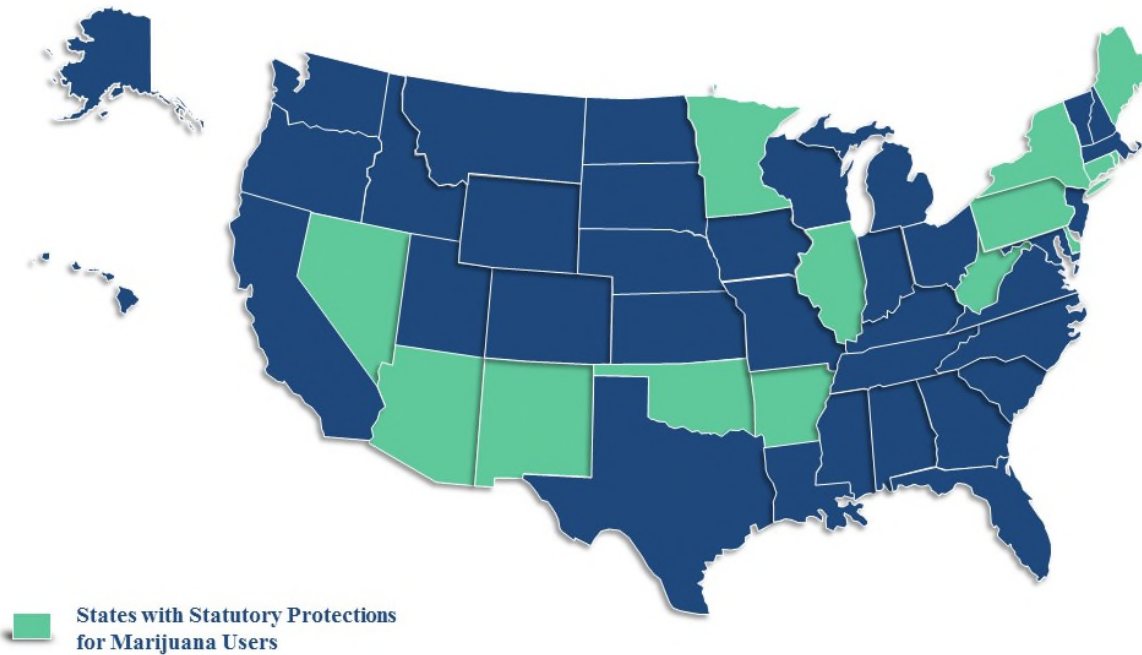
States with Legal Recreational Marijuana



Marijuana Statutes and Job Protections

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STATES WITH STATUTORY PROTECTIONS FOR MEDICAL MARIJUANA USERS



Illinois Law

Illinois Human Rights Act

- May prohibit illegal drug or alcohol use at work
- May prohibit working under influence of alcohol or illegal drugs
- May hold alcoholic or drug users to same qualification standards, job performance, and behavior
- May test employees and applicants for illegal use of drugs and make employment decisions based on results

Illinois' *Medical* Marijuana Law



- Medical Marijuana legal since 2014
- Law amended in 2018 to make it easier on medical users
- May not penalize based solely on medical marijuana card
- Permits reasonable regulations -- consumption, storage, and timekeeping
- Permits drug testing, zero tolerance, drug free workplace
- Permits disciplining cardholder for violating such policies
- If believe an employee is impaired, must afford a reasonable opportunity to contest

Illinois' New *Recreational* Marijuana Law

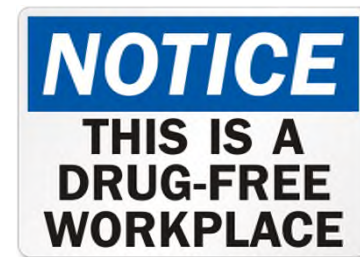
- Passed May 29, 2019; Effective January 1, 2020
- Legalizes recreational marijuana
- Strongest job protections in the USA for recreational users



Illinois' New *Recreational* Marijuana Law

■ Employers may still:

- Prohibit using or possessing while working, on premises, or on call
- Discipline or fire employees for violating company drug policy
 - ... if employer has “good faith belief” employee is under influence
- Drug-Test applicants and employees



Illinois' New *Recreational* Marijuana Law

- But employees have job protections
 - Employer must show “good faith” belief employee was under the influence while performing job duties, at work, or on-call
 - Employer must allow employee to contest the basis for the employer’s determination that employee was under the influence

So... What do we do now?

- What about testing?
- What does existing case law tell us?
- What are employers doing in other states where recreational use is legal?

Pre-Hire Screening/Testing

- Pre-offer: Questions about legal drug use/current medications are impermissible
- Post-offer:
 - Uniformly implemented testing for ILLEGAL drugs is fine
 - After a drug test, employers may ask about current legal drug use that may explain a positive drug test
 - ***Should Illinois employers still do pre-employment testing for marijuana?***

Drug Testing Current Employees

- Reasonable Suspicion Testing
- Random Testing
 - Safety-sensitive positions
- Post-Accident Testing
 - Where drug use likely contributed



Drug Testing Current Employees


A test may not accurately reveal whether someone is under the influence of marijuana.
So what if a recreational user tests positive?

- Illinois Vehicle Code provides guidance: If THC exceeds certain levels, *presume* person is under the influence
- Remember: must afford employee a reasonable opportunity to contest determination

So far ... no case law on firing employees for recreational marijuana use in states where recreational marijuana is legal



Brief History of Reported *Medical* Marijuana Court Decisions

- Employer-friendly decisions (CO, MI, WA, CA, NM, ME, NJ, and MT) 
- Most held state medical marijuana statutes, absent express anti-discrimination provisions, do not provide for claims for adverse employment actions
- Some cases addressed disability claims and requests for accommodation under the ADA

Brief History of Reported *Medical* Marijuana Court Decisions

- *Ross v. RagingWire Telecommunications and Shepherd v. Kohl's Department Stores (California)*
- *Coats v. Dish Network (Colorado)*
- *Savage v. Maine Pretrial Services (Maine)*
- *Casias v. Wal-Mart Stores (Michigan)*
- *Johnson v. Columbia Falls Aluminum (Montana)*
- *Garcia v. Tractor Supply (New Mexico)*
- *Roe v. Teletech Customer Care Mgmt. and Swaw v. Safeway (Washington)*
- *Wild v. Carriage Services (New Jersey)*



Brief History of Reported *Medical* Marijuana Court Decisions

- Employee-friendly decisions in states where medical marijuana statutes contain anti-discrimination provisions
 - *Whitmire v. Wal-Mart* (Arizona)
 - *Callaghan v. Darlington Fabrics* (Rhode Island)
 - *Chance v. Kraft Heinz Foods* (Delaware)
 - *Noffsinger v. SSC Niantic Operating Co.* (Connecticut)



Key Takeaways



Key Takeaways – Vintage News

- Employers are not required to accommodate intoxication, use, or possession in the workplace
- Employers will have strongest arguments with applicants/employees in safety-sensitive positions



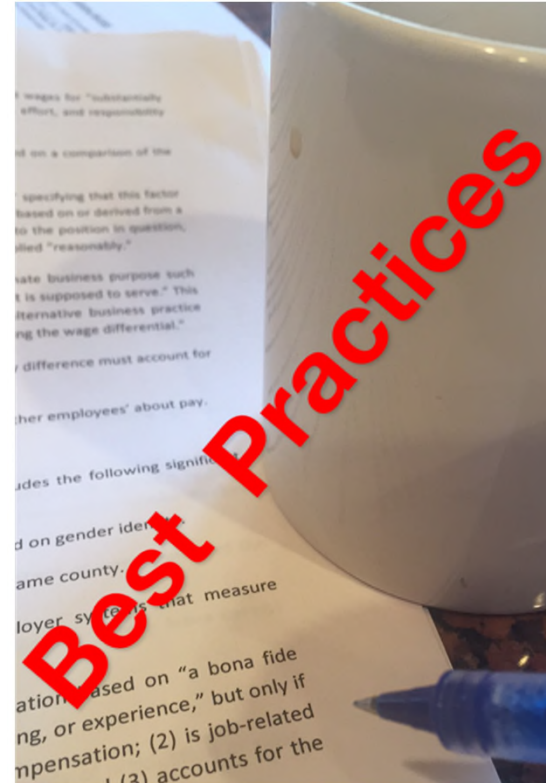


Key Takeaways – New News



- Specific protections under state medical marijuana laws

Best Practices



Best Practices

- Define and identify safety-sensitive jobs
- Decide when, if EVER, to do post-offer, pre-employment testing for marijuana in Illinois

Best Practices

- Revisit policies
 - Eliminate blanket prohibitions on prescribed medication
 - Include language on abuse of prescription drugs
 - Include reasonable accommodation language

Best Practices

- Train supervisors to spot signs of intoxication and address prescription drug/medical marijuana issues lawfully
- Filter decisions through HR and legal

A photograph of the Chicago skyline, featuring prominent skyscrapers like the Willis Tower, viewed from across a body of water under a cloudy sky. The image is framed by a dark, geometric pattern on the left and right sides.

Thank you!