

# Marijuana in the Transportation Workplace

Marijuana Use  
and  
Workplace Drug Policies



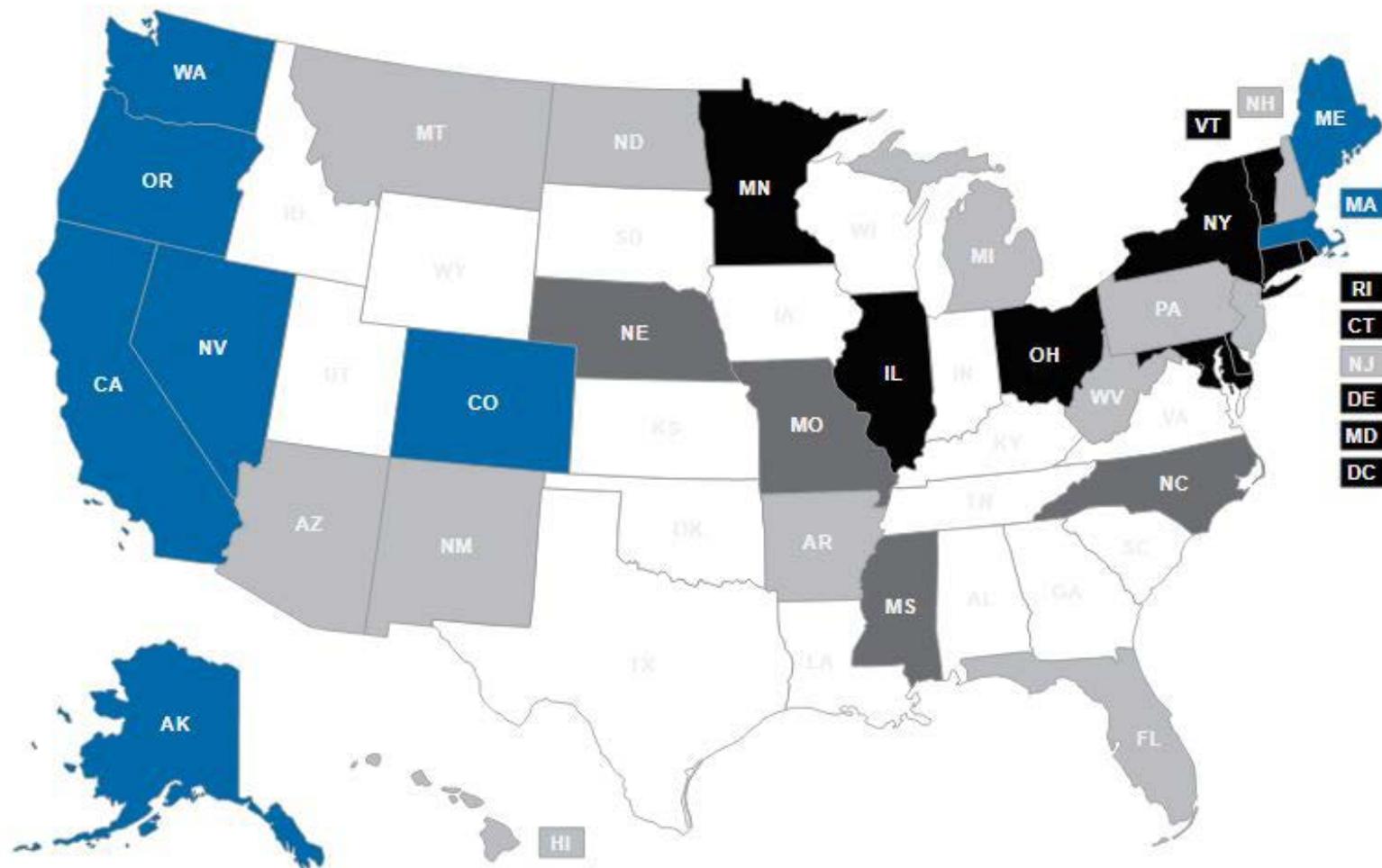
# A Growing Business Problem

29

Twenty-nine states, plus the District of Columbia, have decriminalized possession of marijuana—either generally, or for medical use.

Eight states (WA, OR, CA, NV, AK, ME, & MA) now allow recreational use; meanwhile medical marijuana allowance is mushrooming

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- States with medical marijuana laws
- States that have removed jail time for possessing small amounts of marijuana
- States that have both a medical marijuana law and have removed jail time for possessing small amounts of marijuana
- Marijuana is legal for adults and is taxed and regulated similarly to alcohol; state also has a medical marijuana law

\*Per Marijuana Policy Project, July 2017

# The ADA and Medical Marijuana

- Marijuana use is not protected as a “reasonable accommodation” for an employee under the ADA.
- Most state courts have generally ruled that employers are not legally required to accommodate marijuana use, whether by a potential or current employee.
  - In most instances, an employer’s “drug free workplace” rules supercedes medical use of marijuana

# Employer Protections

- In most instances, employers in the 29 states with decriminalized cannabis use, can terminate applicants and employees who test positive for medical marijuana use.
  - Exceptions: Arizona, Delaware, and Minnesota
- ARIZONA
  - Certain to very narrow exceptions, the Arizona Medical Marijuana Act (“AMMA”) **prohibits** employers from **discriminating** against individuals who are authorized to use medical marijuana.
  - The AMMA protects authorized medical marijuana users who test positive for use of the drug from **adverse employment action**-solely based on positive test results.

# Testing for Drugs



- There is no federal law that regulates drug testing in the private sector
- Except for certain government contractors and certain workers in the transportation industry
- However, “reasonable suspicion” of impairment based on appearance or behavior is just about universally accepted, meaning the employer has some reason to require an employee to undergo a drug screen.



# The DOT Rules

- As a motor carrier employer, you are responsible for meeting all applicable requirements and proceedings under Part 40 – Procedures for Transportation Workplace Drug and Alcohol Testing Programs.
- One thing is for certain, transportation workers deemed to be employed in safety sensitive functions may not use or possess marijuana at work; or be under the influence of marijuana.
- DOT tests must be completely separate from non-DOT tests in all respects

# Definitions

- **Safety-sensitive functions:** Generally, all CDL drivers who operate commercial motor vehicles on public roads are performing safety-sensitive functions and are subject to DOT drug and alcohol testing. 49 CFR 382.109 preempts all state law.
- **Designated Employer Representative:** an employee authorized by the employer to take immediate action to remove employees from safety-sensitive duties, and make decisions in the testing and evaluation process.
- **Drugs:** The drugs for which tests are required under 49 CFR Part 40 of the Federal Motor Carrier Safety Regulations are marijuana, cocaine, amphetamines, phencyclidine (PCP), and opiates. If a test is returned as verified positive, the employee must be removed from performing safety-sensitive functions.

# The Statutory Law

- **49 CFR 382.603** is the applicable regulation requiring supervisors of commercial motor vehicle drivers who operate vehicles that require a commercial driver license to take **60 minutes** of training on the symptoms of alcohol abuse and another **60 minutes** of training on the symptoms of controlled substances use (**120 minutes** in total).
  - The purpose of this training is to teach supervisors to identify circumstances and indicators that may create reasonable suspicion that a driver is using or under the influence of alcohol or drugs, supporting referral of an employee for testing.
- The employer's determination that reasonable suspicion exists to require the driver to undergo an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver.

# The Statutory Law

No driver shall refuse to submit to a pre-employment controlled substance test required under §382.301, a post-accident alcohol or controlled substance test required under §382.303, a random alcohol or controlled substances test required under §382.305, a reasonable suspicion alcohol or controlled substance test required under §382.307, a return-to-duty alcohol or controlled substances test required under §382.309, or a follow-up alcohol or controlled substance test required under §382.311.

No employer shall permit a driver who refuses to submit to such tests to perform or continue to perform safety-sensitive functions.

# Key Points to Take Away



# Medical Marijuana Laws Present Unique Challenges to Employers

- Almost all states will soon have similar laws as to medical marijuana usage, and generally no employee can be fired just for having medical authorization to use marijuana.
- The ADA prevents employers from asking about it because that would presume the employer is asking about an underlying disability.
- Legitimate medical use: Majority of 60 peer-reviewed studies find marijuana helpful as palliative care in debilitating diseases or for those with chronic pain.

# Suggestions to Employers

- Re-write your employee handbook
- Be vigilant and drug test with legitimate reasonable suspicion
- Review your states' laws regarding Marijuana use and possession
- Safety-sensitive work, such as in the transportation allows the employer to discipline / terminate employees with medical marijuana prescriptions **if** intoxicated on duty.
- Regardless of the industry, no employee with a medical marijuana card may use, possess, or be impaired at work.

# Medical Marijuana Laws Present Unique Challenges to Employers

*This is a Sticky Legal Area!*

## Concerns Employers Should Have:

- Legal risks of negligent hiring or negligent retention claim brought by third persons
- Claims by your medical card employee for discrimination if all employees are not treated the same