

# SC SHRM CONFERENCE

## STORMY WATERS AHEAD: MEDICAL MARIJUANA IN THE WORKPLACE

NEXT CHALLENGE. NEXT LEVEL.

NEXSEN | PRUET

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# HYPOTHETICAL

- ▶ Sandra is the general manager of a hotel in Myrtle Beach, South Carolina. While on vacation in Aspen, Colorado with a few of her friends from college, Sandra uses marijuana. Recreational use of marijuana is legal in Colorado.
- ▶ After returning from Colorado, Sandra is subject to a random drug test by the hotel and fails it.
- ▶ What do you do?

# HYPOTHETICAL

- ▶ Sandra is involved in an unfortunate accident on vacation, breaking her leg. She elects to have surgery in Colorado and submits appropriate FMLA paperwork for her leave, which is approved. A doctor in Colorado prescribes her medical marijuana for her pain.
- ▶ Does your answer change if she fails a drug test in SC under these circumstances?
- ▶ What if Sandra is suffering from anxiety and the medication is prescribed as treatment? Does your answer change?
- ▶ What if Sandra disputes the results of the drug test?

# OVERVIEW

- ▶ Defining the Subject Matter
- ▶ Federal Marijuana Laws
- ▶ Marijuana Laws Nationwide
- ▶ Marijuana Laws in South Carolina
- ▶ Drug Testing Laws in South Carolina
- ▶ Implications of Marijuana Use at Work
- ▶ Balancing Factors
- ▶ Trend Among Other States



# DEFINING THE SUBJECT MATTER

- ▶ What are Cannabinoids?
- ▶ What is THC?
- ▶ What is CBD?



# DEFINING THE SUBJECT MATTER CONT.

- ▶ What Constitutes Medical Marijuana Use?
- ▶ What Constitutes Recreational Marijuana Use?



# FEDERAL MARIJUANA LAWS

## MEDICINAL AND RECREATIONAL USE

- ▶ Marijuana remains classified as a Schedule I substance.
- ▶ In 2009, the Obama Administration issued a memorandum encouraging federal prosecutors to refrain from prosecuting individuals who distributed marijuana for medical purposes in accordance with state law.
- ▶ In 2013, USDOJ released a statement claiming it would “defer the right to challenge legalization laws” to the states who have legalized marijuana.
- ▶ In 2018, Attorney General Sessions rescinded the 2009 memorandum.

# FEDERAL MARIJUANA LAWS CONT.

## CBD

- ▶ The DEA released a statement in May of 2018 declaring that "Products and materials that are made from the cannabis plant and which fall outside the CSA definition of marijuana are not controlled under the CSA."
- ▶ Agricultural Improvement Act of 2018





# MARIJUANA LAWS NATIONWIDE

- ▶ Medical Marijuana
  - ▶ Legalized in 33 States and the District of Columbia
  - ▶ Prescription from Licensed Physician Required
  - ▶ State Requirements and Regulations Vary



# MARIJUANA LAWS NATIONWIDE CONT.

- ▶ Recreational Marijuana
  - ▶ Legal in 11 States
  - ▶ Several Other States are Pursuing Full Legalization
  - ▶ No Prescription Requirement
    - ▶ 21 Years of Age or Older

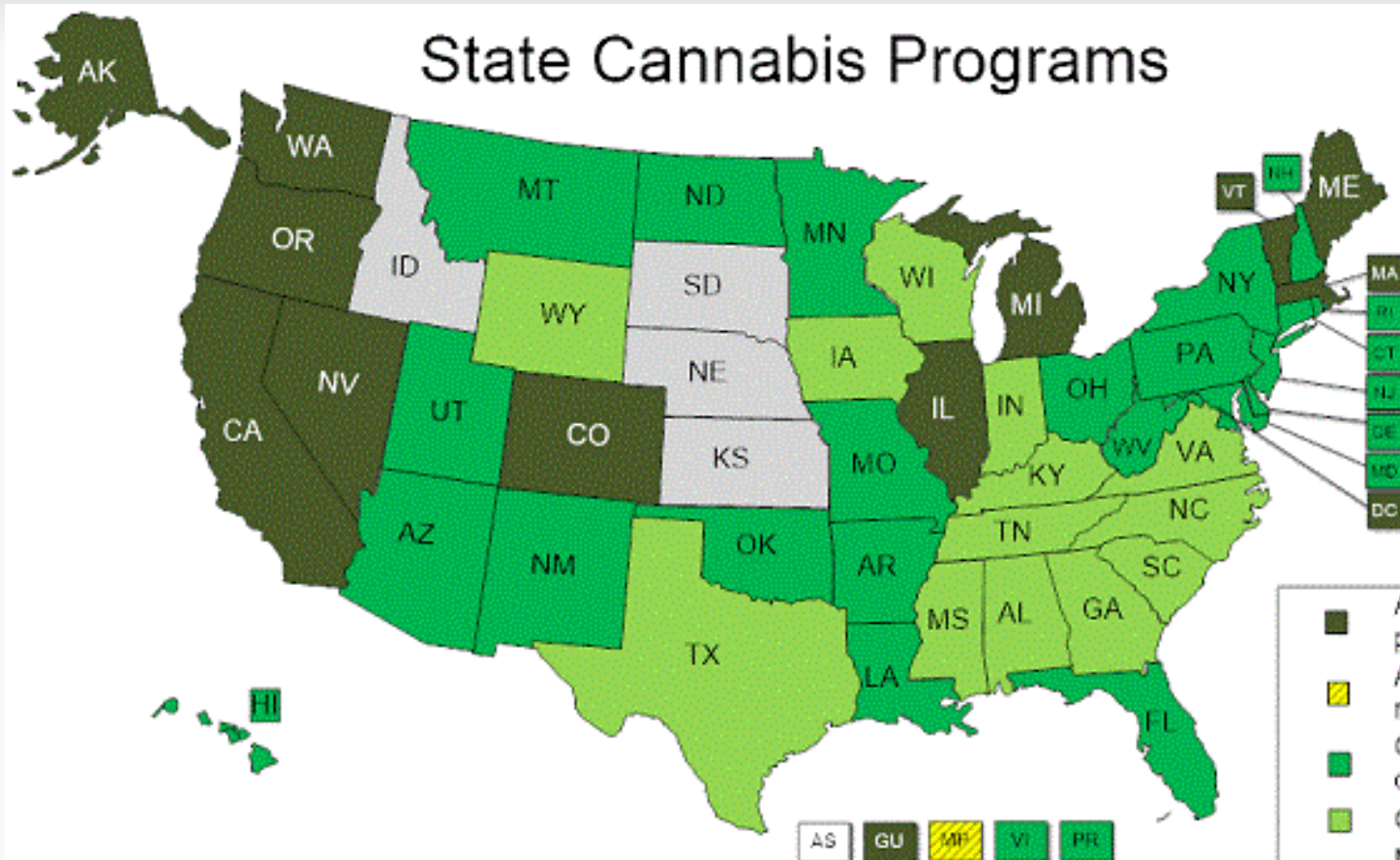


# MARIJUANA LAWS NATIONWIDE CONT.

- ▶ CBD/Low THC
- ▶ Generally
  - ▶ CBD From Hemp is Legal in Nearly Every State
  - ▶ CBD From Marijuana is Legal in States that have Legalized Marijuana in Another Form



# State Cannabis Programs



- Adult & medical use regulated program
- Adult use only no medical regulated program
- Comprehensive medical cannabis program
- CBD/Low THC program
- No public cannabis access program

Vermont adult use law signed Jan. 22, 2018. Effective July 1, 2018  
 Limited adult possession and growing allowed, no regulated production or sales: DC, VT

August 1, 2019

# MARIJUANA LAWS IN SOUTH CAROLINA

- ▶ Medical Marijuana
  - ▶ Currently Illegal
  - ▶ Law Makers are Seeking to Legalize Marijuana for Medical Purposes
    - ▶ Compassionate Care Act
    - ▶ Major Push Back to the Bill



# MARIJUANA LAWS IN SOUTH CAROLINA CONT.

- ▶ Recreational Marijuana
  - ▶ Currently Illegal
  - ▶ No Indication of Full Legalization
- ▶ CBD/Low THC
  - ▶ Legal in SC
  - ▶ Some qualifications



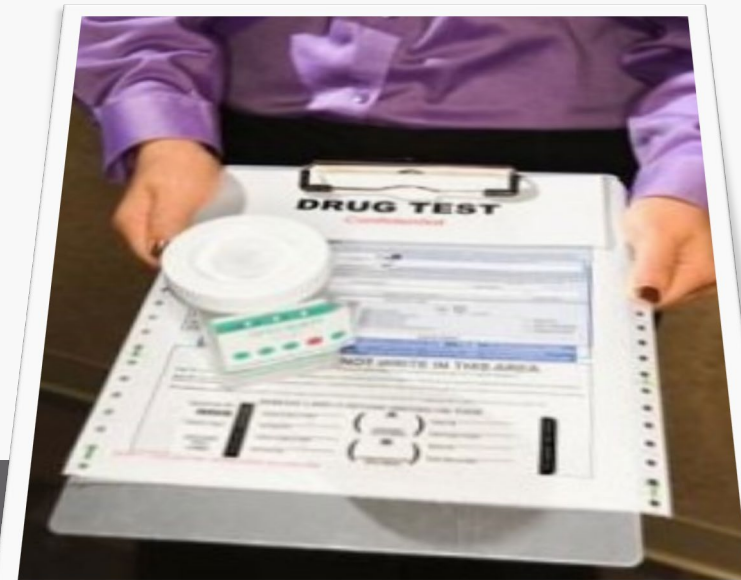
# HYPOTHETICAL

- ▶ Frank is a long-term employee. He tests positive for marijuana after a random drug test. He denies any marijuana use but tells you he used CBD oil that he bought in SC the week before.
- ▶ Can you terminate him?
- ▶ Should you?
- ▶ What do you do?



# DRUG TESTING LAWS IN SOUTH CAROLINA

- ▶ Currently, South Carolina has not enacted any general employment drug testing laws.
- ▶ SC Commercial Driver's License Drug Testing Act
- ▶ Workers' Compensation Premium Discount
  - ▶ 5% Discount on Workers' Compensation Rates
- ▶ Different laws in other states





# DRUG TESTING POLICY LAWS

- ▶ Marijuana is a Schedule I controlled substance under federal and South Carolina state law, meaning possession, cultivation, distribution, purchase and sale of marijuana remain illegal. 21 U.S.C. § 812(c)(10); S.C. Code Ann. § 44-53-190(D)(11).
- ▶ Drug testing in the workplace is lawful and constitutional. The SC General Assembly has passed several statutes permitting random drug testing to further the public policy of a drug-free work environment. S.C. Code Ann. § 38-73-500.
- ▶ S.C. Code Ann. § 41-1-15 authorizes the establishment of drug prevention programs in the workplace which include drug testing; employers must notify employees of the program at time it is established or at time of hiring.

# IMPLICATIONS OF MEDICAL MARIJUANA IN THE WORKPLACE

- ▶ Hiring Employees
- ▶ Firing Employees
- ▶ Health Issues
  - ▶ Substance Abuse
  - ▶ Safety
    - ▶ Nature of the Job
    - ▶ OSHA Requirements



# DRUG TESTING POLICY LAWS

## ▶ Hiring and Firing Issues

- ▶ Employers may terminate an employee for a positive drug test in South Carolina.
- ▶ *Noffsinger v. SSC Niantic Operating Co.*, No. 3:15-cv-01938(JAM), 2017 WL 3401260 (D. Conn. Aug. 8, 2017)
  - ▶ Connecticut law that prohibits employers from firing or refusing to hire someone who uses marijuana for medical purposes was not preempted by federal law.
  - ▶ A plaintiff who uses marijuana for medicinal purposes in compliance with Connecticut law may maintain a cause of action against an employer who refuses to employ her for this reason
- ▶ Nevada: Employers cannot deny job to applicants who fail test for marijuana.
- ▶ Where the employee legally used the drug in another state, the employer's right to terminate will often depend on the wording of the employer's policy.

# DRUG TESTING POLICY LAWS

- ▶ For employees who dispute test results, policy terms may dictate outcome.
- ▶ Negligence claims
  - ▶ *Shaw v. Psychomedics Corp.*, 826 S.E.2d 281 (S.C. 2019).
    - ▶ Recent case decided by the Supreme Court of South Carolina, holding that a drug testing lab can be sued for negligence in South Carolina if it mishandles an employee's drug test
    - ▶ Concluded that the drug testing lab owed a duty of care to employees who are required by their employer to participate in a drug test
  - ▶ Reminders for employers:
    - ▶ Employers should carefully select drug testing labs and consider requiring the labs to indemnify the employer against the lab's negligence.
    - ▶ Drug testing labs might seek to shift blame to the on-site person who initially obtained the sample (e.g. hair, urine) for testing. Or, the employee could name that person as another defendant in the lawsuit.

# AMERICANS WITH DISABILITIES ACT

- ▶ **Background** – ADA excludes from its list of qualified individuals with a disability, “any employee or applicant who is currently engaging in the illegal use of drugs when the covered entity acts on the basis of such use.”
- ▶ **Reasonable Accommodations** – include modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position
- ▶ **Interactive Dialogue/Process** – requires employers to make a good-faith effort to engage with disabled employees in order to identify any reasonable accommodation that may allow the employee to perform the essential functions of the position
- ▶ **Is medical marijuana or exception to policy a reasonable accommodation?** It depends on the state.

# AMERICANS WITH DISABILITIES ACT

- ▶ The ADA expressly permits employers to ensure that their workplaces are free from the illegal use of drugs
  - ▶ The term “illegal use of drugs” does not include the use of a drug taken under circumstances authorized by law. *James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012).
- ▶ The ADA also expressly permits employers to test employees or job applicants for the illegal use of drugs and to make employment decisions based on those test results.
  - ▶ See discussion above for recent state laws.
  - ▶ Although the ADA does not protect medical marijuana users who claim to face discrimination on the basis of their marijuana use, an employee who uses marijuana for medicinal purposes may still be considered disabled under the ADA.

# AMERICANS WITH DISABILITIES ACT

## HOW STATES DIFFER

- ▶ **Colorado** – medical and recreational use is legal in the state, but at-will employees discharged for positive drug-test are without recourse in the courts
- ▶ **Connecticut/Rhode Island** – courts in both states have recently decided employers cannot discriminate against provisions of each states' medical marijuana statute
- ▶ **Maine** – became the first state in which workers are expressly protected from adverse employment actions based upon off-hours marijuana use (2018)
- ▶ **Nebraska** – federal court applying state law held “it simply is not possible to conclude that creating an exception for medical marijuana in State law would be a ‘reasonable accommodation’ under the ADA.”
- ▶ **Nevada** – bars employers from rejecting job applicants over a drug test that reveals marijuana use
- ▶ **South Carolina** – federal district court in SC has interpreted the ADA literally, “current drug use is not a protected disability.”

# AMERICANS WITH DISABILITIES ACT

## REASONABLE ACCOMMODATION

- ▶ Until recently, courts across the country had consistently held that employers are not required to provide a reasonable accommodation for an employee's use of marijuana.
  - ▶ *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200 (Cal. 2008)
  - ▶ *Johnson v. Columbia Falls Aluminum Co., LLC*, 2009 WL 865308 (Mont. Mar. 31, 2009)
  - ▶ *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010).
  - ▶ *Garcia v. Tractor Supply Co.*, 154 F.Upp.3d 1225 (D.N.M. 2016)
- ▶ But see, *Barbuto v. Advantage Sales and Marketing, LLC*, 78 N.E.3d 37 (Mass. 2017)
  - ▶ Court noted that allowing for the use of medical marijuana could potentially be a reasonable accommodation for an employee's disability if the employee had been legally prescribed marijuana



# RECIPROCITY WITH OTHER STATES

- ▶ Several States have proposed Reciprocity Bills
  - ▶ Traveling with Marijuana
    - ▶ States Where Marijuana is Illegal
  - ▶ Relocating to a Different State



# BALANCING FACTORS

- ▶ Workers' Compensation Incentives
- ▶ OSHA Issues
  - ▶ General Duty Clause
- ▶ Lower Unemployment Rates
  - ▶ 3.6% Unemployment Rate
- ▶ Job Market in Relation to Other States



# HYPOTHETICAL

- ▶ Kamryn works for a company that has thousands of employees nationwide. She currently lives and works in Colorado, and has a prescription for medical marijuana. Kamryn's fiancé (Nick) has a job offer in South Carolina so she would like to transfer to the SC branch.
- ▶ Will the state of South Carolina allow her to continue using medical marijuana?
- ▶ If the Colorado branch allows her to use medical marijuana and the South Carolina branch forbids it, who would prevail?

# HYPOTHETICAL

- ▶ Mary Jane has always lived in California but would like to move to South Carolina to pursue a different career. She is aware of the marijuana laws in SC, so she quits using it 60 days before moving. After accepting a job offer and moving across the country, Mary Jane is asked to take a hair follicle test at her orientation on the first day. Since this test detects marijuana for up to 90 days after usage, she tests positive.
  - ▶ Can the SC company fire Mary Jane?
  - ▶ Should Mary Jane be fired?

# QUESTIONS?

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