

Workplace Policies and Procedures in the Era of Legalized Marijuana

William J. Judge, JD, LL.M.

July 2019



Because our time is short, let's focus on:

9:30 – 12:00 is the scheduled seminar

- 9:30 – 10:30: National landscape of marijuana
- 9:30 – 9:45: Quick break
- 9:45 – 11:15: Minnesota state-specific law
- 11:15 – 12:00: Developing defensible drug/alcohol programs to meet these challenges



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Overview of Drug Testing Industry

- **Over 40 Years of Workplace Drug and Alcohol Testing.**
- **Approximately 45 million tests done each year.**
- **Evolving Issues Present More Complicated Issues For Management Each Year.**

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It's become a complex world



1. Americans with Disabilities Act (ADA)
2. Occupational Safety & Health Administration (OSHA)
3. National Labor Relations Board (NLRB)

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Caution! Actions Without Information



May Cost You.

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Cost of Non-Compliance

Ranging between

\$30,000

&

\$2 million

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Medical Marijuana



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Federal Position

**Marijuana is still a
Schedule I Drug**

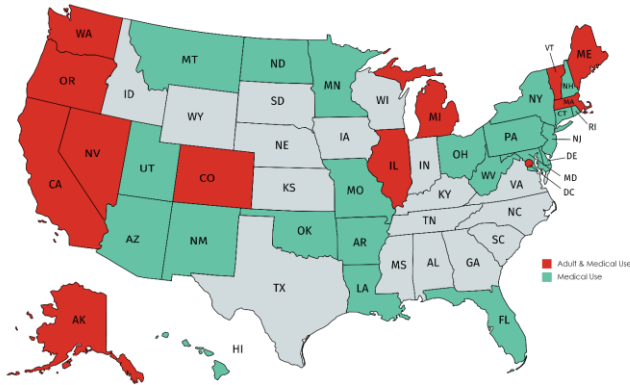


1. Congress: Budget Limits on DOJ/DEA action
2. Native American Guidelines
3. Directive re: "hands off" approach (STATES Act)
4. Department of Transportation (DOT)
5. Federal Contractors must follow federal law.

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As it Stands Today



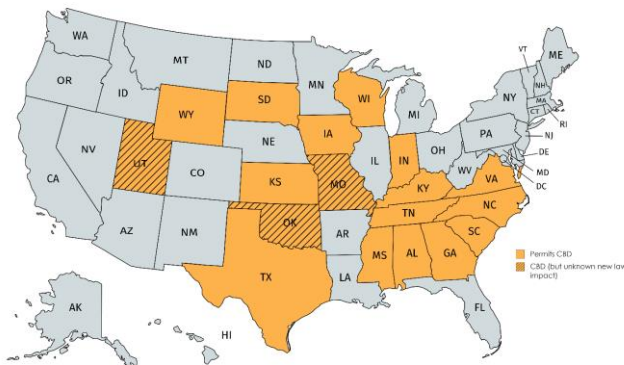
- **33** states and Washington, DC authorize medical use of marijuana.
- **11** states and Washington, DC authorize personal-adult and medical use for any over 21.

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These 18 States Authorize the Use of CBD



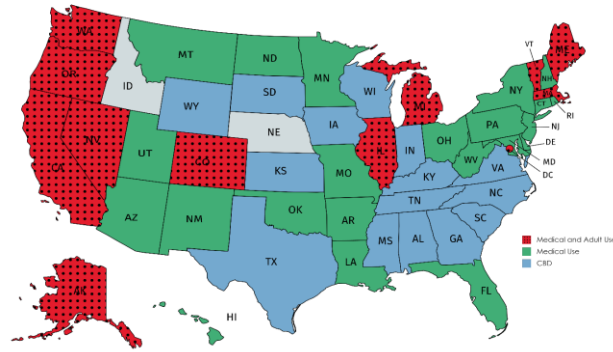
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The Complete Picture

33 states & Washington, DC authorize the **medical use of marijuana**; **11** States allow **Medical and Adult-Personal Use of marijuana** & **18** states allow the **medical use of CBD (Non-Hemp)**



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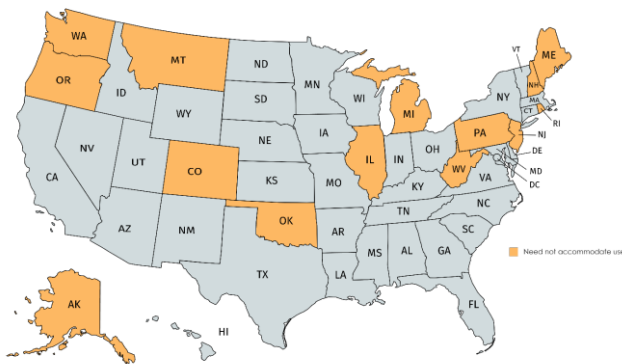
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Need Not Accommodate

These 14 states laws specify that employers need not accommodate use or an employee being under the influence of marijuana *at work*.

The language of some states varies, such as Illinois, Ohio, and Pennsylvania and are more protective of employers.

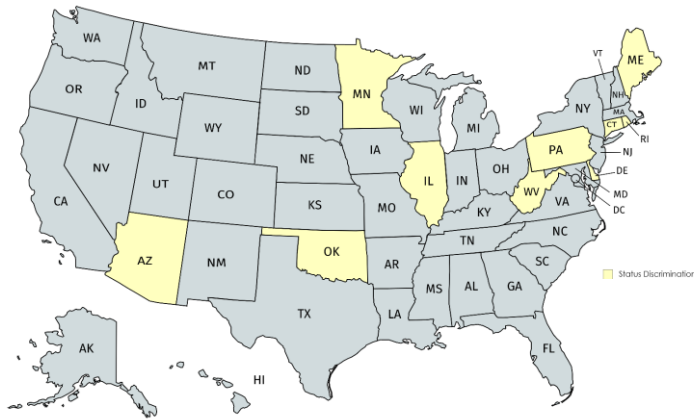
But, **Massachusetts**, **Nevada**, and **New York** require employers to at least determine if the employees medical issues can be accommodated.



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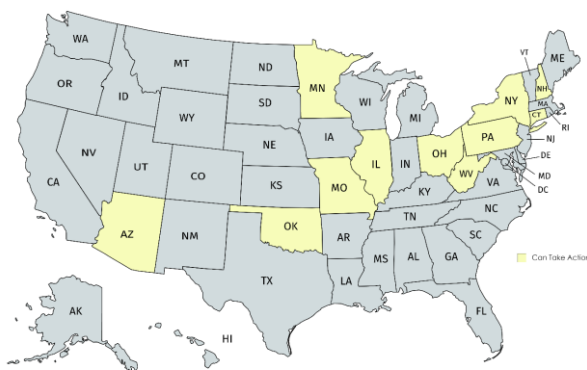
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10 state laws . . .

Provide that an employer may not discriminate against an individual due to that individual's **STATUS** as a qualified medical marijuana patient.

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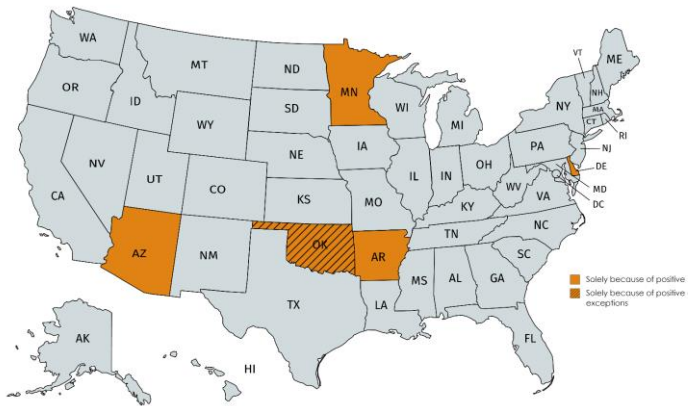
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Employer Can Take Action if . . .

In these **11** states an employer is specifically authorized the take action if an employee if found to be **using** or **under the influence** of marijuana on duty.

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5 states ...

Employer can discipline for being under the influence.

But a **positive test alone is not proof** of being under the influence.

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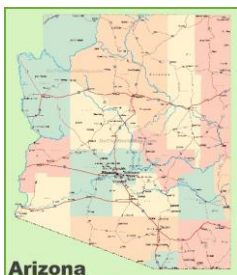
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Recent Key Court Cases

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Arizona
Medical THC – Test Alone Not Enough



CONNECTICUT
State Law Preempts Federal



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Legal Updates: Hot off the press

- **New York City** - New law (Intro. No. 1445-A) prohibits pre-employment testing for marijuana, effective 5/10/2020.
- **Nevada** – New law (Assembly Bill 132) makes NV the first state to prohibit pre-employment testing for marijuana, effective 1/1/2020.
- **Illinois** – The 11th state to legalize the adult personal use of marijuana, effective 1/1/2020. Language of the law brings some confusion for employers.
- **New Jersey** – Amended Medical Marijuana Law, limits employers.

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State Laws Differ

1. Marijuana,
2. Smokeless,
3. CBD

don't be confused

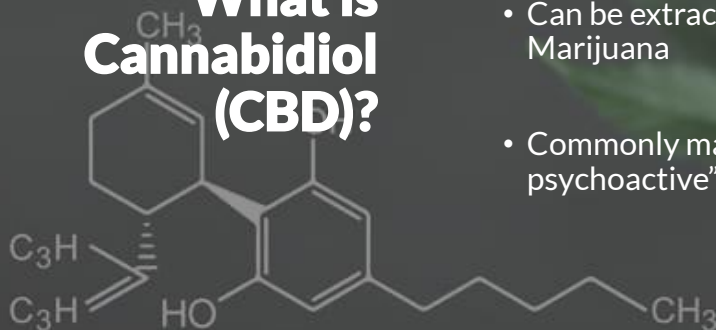


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CBD

What is Cannabidiol (CBD)?



- One of the many compounds found in a cannabis plant.
- Can be extracted from both Hemp and Marijuana
- Commonly marketed as “non-psychoactive” like THC (marijuana).

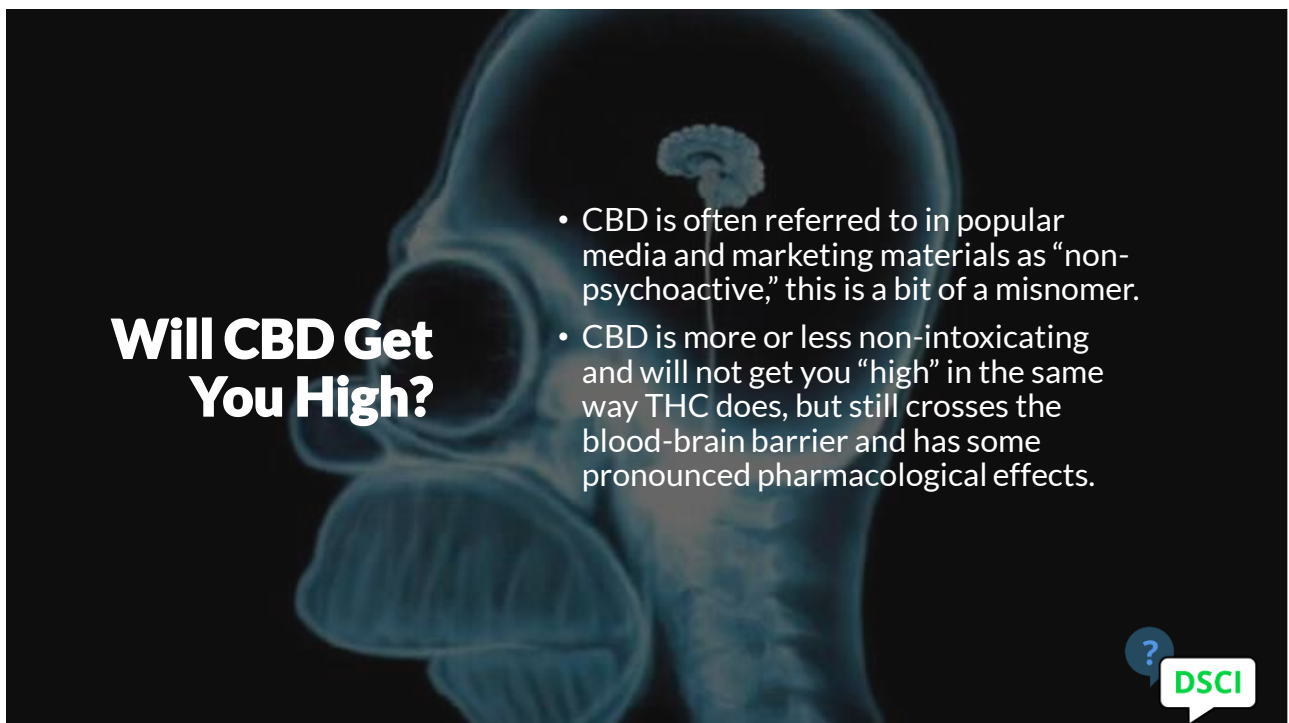
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DSCI



What is Cannabidiol (CBD)?

Found in many types of products from concentrated oils, topicals, balms, capsules, wax, sprays & edibles and pet products.



Will CBD Get You High?

- CBD is often referred to in popular media and marketing materials as “non-psychoactive,” this is a bit of a misnomer.
- CBD is more or less non-intoxicating and will not get you “high” in the same way THC does, but still crosses the blood-brain barrier and has some pronounced pharmacological effects.

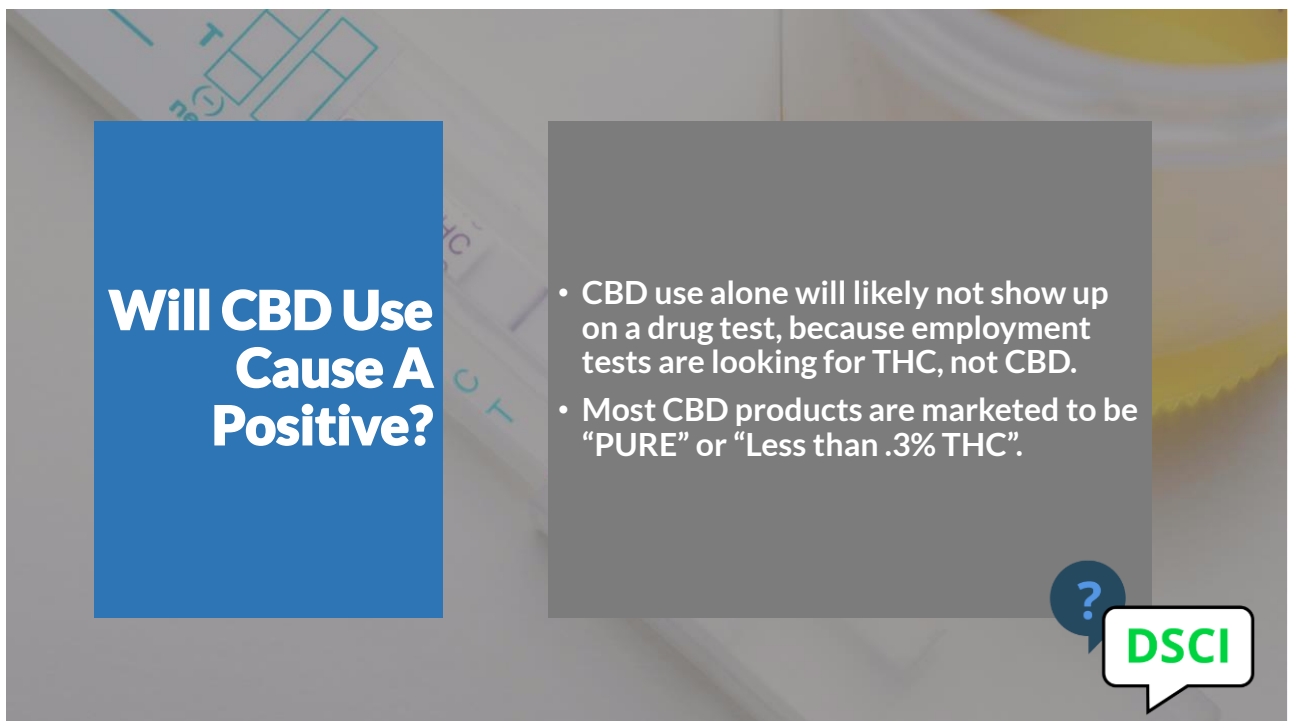
DSCI



Will CBD Get You High?



- Yes ... If you buy from an unauthorized source.
- Why?
 - No control over its production
 - No testing for THC levels

Oh ... And it's ILLEGAL!



Will CBD Use Cause A Positive?

- CBD use alone will likely not show up on a drug test, because employment tests are looking for THC, not CBD.
- Most CBD products are marketed to be "PURE" or "Less than .3% THC".



History of HEMP

1937 - The Marijuana Tax Act – placed heavy tax on cannabis sales including hemp

1942 - Department of Agriculture issues “**Hemp for Victory**” film.

1970 - Controlled Substances Act added all parts of the cannabis plant to the CSA including hemp.

2014 - Farm Bill approved

2018 (June) - Food and Drug Administration (FDA) announced approval of marijuana-derived CBD (Epidiolex)

2018 (September) – Drug Enforcement Agency (DEA) announces Epidiolex is Schedule V drug. (0.1% THC);

2018 - Farm Bill adopted. Removes hemp from the Controlled Substances Act (CSA).

Is CBD legal? Maybe ... But!

The “Farm Bill” -- Signed December 20, 2018

- Removed hemp (industrial hemp) from the CSA;
- Allows the US Dept. of Agriculture to regulate the crop like any other crop;
- Allows hemp production in all 50 states;
- Allows hemp-derived CBD to be marketed in inter-state commerce.
- Designates the states and Tribal Authorities as primary regulatory authority;

FDA Statement -- December 20, 2018

- Role didn’t change – still regulated products containing cannabis
- Role is to protect the public and provide “regulatory pathways” for food, drug and cosmetic products
- Requires any cannabis product (hemp-derived or otherwise) claiming therapeutic benefits or disease claims to be approved before marketed.
- Illegal to market food containing CBD as an active ingredient since the FDA has already approved such a product that went through the rigorous FDA approval process.

All states are obligated to refrain from passing laws that directly conflict with FDA regulations.

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DEPARTMENT OF HEALTH
AND HUMAN SERVICES
FOOD AND DRUG ADMINISTRATION
SILVER SPRING, MD 20993



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
BUREAU OF CONSUMER
PROTECTION
WASHINGTON, D.C. 20580

WARNING LETTER

**VIA OVERNIGHT DELIVERY
RETURN RECEIPT REQUESTED**

March 28, 2019

CJ Montgomery
Nutra Pure LLC
500 Broadway Street, Suite 480
Vancouver, WA 98660

RE: 567714

Dear Mr. Montgomery:

https://www.fda.gov/CE/Enforcement/Actions/Warning_Letters/ucm634776.htm 16

4/5/2019 Warning Letters - Nutra Pure LLC 3/28/19


This is to advise you that the U.S. Food and Drug Administration (FDA) reviewed your website at the internet address <https://www.cbdpure.com/> in February 2019 and has determined that you take orders there for the products "Hemp Oil" (100mg, 300mg, and 600mg) and "CBD Softgels" which you promote as products containing cannabidiol (CBD). The claims on your website establish that the products are drugs under section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act (FD&C Act), 21 U.S.C. 321(g)(1), because they are intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease and/or because they are intended to affect the structure or any function of the body. As explained further below, introducing or delivering these products for introduction into interstate commerce for such uses violates the FD&C Act. You can find the FD&C Act and FDA regulations through links on FDA's home page at www.fda.gov (<http://www.fda.gov>). In addition, the Federal Trade Commission (FTC) has reviewed your website for potential violations of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. 45(a) and 52.

Although you market "Hemp Oil" and "CBD Softgels" as dietary supplements, FDA has concluded based on available evidence that CBD products are excluded from the dietary supplement definition under sections 201(ff)(3)(B)(i) and (ii) of the FD&C Act, 21 U.S.C. 321(ff)(3)(B)(i) and (ii). Under those provisions, if an article (such as CBD) is an active ingredient in a drug product that has been approved under section 505 of the FD&C Act, 21 U.S.C. 355, or has been authorized for investigation as a new drug for which substantial clinical investigations have been instituted and for which the existence


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DEPARTMENT OF HEALTH
AND HUMAN SERVICES
FOOD AND DRUG ADMINISTRATION
SILVER SPRING, MD 20993



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
BUREAU OF CONSUMER
PROTECTION
WASHINGTON, D.C. 20580

WARNING LETTER

**VIA OVERNIGHT DELIVERY
RETURN RECEIPT REQUESTED**

March 28, 2019

PofNetwork Holdings, Inc.
Attn: Mr. Gary Blum, President
3531 Griffin Road
Fort Lauderdale, FL 33312

RE: 564030

Dear Mr. Blum:

https://www.fda.gov/CE/Enforcement/Actions/Warning_Letters/ucm634730.htm 16

4/5/2019 Warning Letters - PofNetwork Holdings, Inc. 3/28/19

This is to advise you that the U.S. Food and Drug Administration (FDA) reviewed your website at the internet address www.diamondcbd.com in September 2018 and has determined that you take orders there for various products you claim to contain cannabidiol (CBD), including "Liquid Gold Gummies (Sweet Mix)," "Liquid Gold Gummies (Sour Mix)" and "Blue CBD Crystals Isolate 1500mg." The claims on your website establish that these products are drugs under section 201(g)(1)(B) of the Federal Food, Drug, and Cosmetic Act (the Act) [21 U.S.C. § 321(g)(1)(B)] because they are intended for use in the cure, mitigation, treatment, or prevention of disease. As explained further below, introducing or delivering these products for introduction into interstate commerce for such uses violates the Act. You can find the Act and FDA regulations through links on FDA's home page at www.fda.gov (<http://www.fda.gov>). In addition, the Federal Trade Commission has reviewed your website for potential violations of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

Examples of some of the claims observed on your website that provide evidence that your products are intended for use as drugs include the following:

On the webpage titled "WHAT IS CBD?":

- * A 2015 study found that CBD may be neuroprotective [sic] in adult and neonatal ischemia, brain trauma, Alzheimer's disease, Parkinson's disease,

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Bizarre World of CBD State Laws (Pre-Farm Bill Examples)

State	Allowed?	Details
Alabama	No	All CBD is illegal except Epidiolex
Arizona	No	State law enforcement has interpreted medical marijuana law to exclude all extracts including CBD
California	Yes	But only if derived from marijuana, NOT hemp.
Colorado	Yes	HB 19-1295 permits hemp-derived foods.
Illinois	Yes	2018 bill signed legalizing industrial hemp.
Iowa	Yes	But only if purchased through one of five state run stores.
Kansas	Yes	But "zero" THC allowed.
Missouri	?	Under review.
Ohio	Yes	But, only on the exempt part of the plant if sold through the state medical marijuana program.
Washington	Yes	So long as it is less than 0.3% THC.



Take 5

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A Look at Specific State Laws

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Minnesota Medical Marijuana



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Minnesota Law

Minnesota Medical Marijuana Law	
Statutory Language	Key Points
<p>The law states: S.F. No. 2470 (2014)</p> <p>152.22 DEFINITIONS</p> <p>* * *</p> <p>Subd. 6. Medical cannabis. "Medical cannabis" means any species of the genus cannabis plant, or any mixture or preparation of them, including whole plant extracts and resins, and is delivered in the form of:</p> <p>(1) liquid, including, but not limited to, oil;</p> <p>(2) pill;</p> <p>(3) vaporized delivery method with use of liquid or oil but which does not require the use of dried leaves or plant form; or</p> <p>(4) any other method, excluding smoking, approved by the commissioner</p>	<ul style="list-style-type: none"> • No Smoking

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Minnesota Law

Minnesota Medical Marijuana Law	
Statutory Language	Key Points
<p>The law states: S.F. No. 2470 (2014)</p> <p>152.23 LIMITATIONS.</p> <p>(a) Nothing in sections . . . permits any person to engage in and does not prevent the imposition of any civil, criminal, or other penalties for:</p> <p>(1) undertaking any task under the influence of medical cannabis that would constitute negligence or professional malpractice;</p> <p>(2) possessing or engaging in the use of medical cannabis:</p> <p>* * *</p> <p>(iii) in any public place, including any indoor or outdoor area used by or open to the general public or a place of employment as defined [by law] and</p> <p>* * *</p> <p>(4) operating, navigating, or being in actual physical control of any motor vehicle, aircraft, train, or motorboat, or working on transportation property, equipment, or facilities while under the influence of medical cannabis.</p>	<p>Nothing in the law permits . . .</p> <ul style="list-style-type: none"> • Undertaking any task <i>under the influence</i> of marijuana. • Possessing or using marijuana in any place of employment. • Operating vehicle or equipment <i>under the influence</i>.

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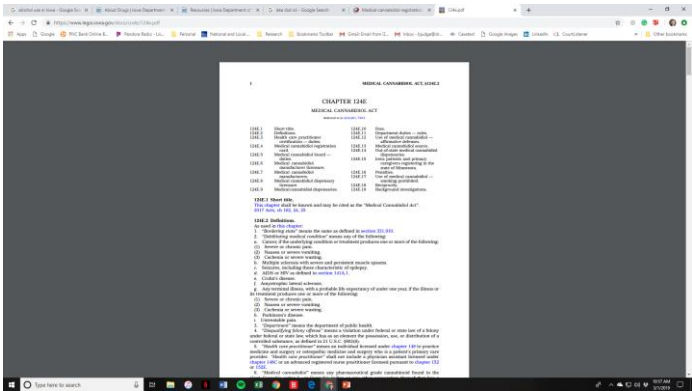
Minnesota Law

Minnesota Medical Marijuana Law	
Statutory Language	Key Points
<p>The law states: S.F. No. 2470 (2014)</p> <p>Subd. 3. Discrimination prohibited. * * *</p> <p>(c) Unless a failure to do so would violate federal law or regulations or cause an employer to lose a monetary or licensing-related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon either of the following: (1) the person's status as a patient enrolled in the registry program under sections 152.22 to 152.37; or (2) a patient's positive drug test for cannabis components or metabolites, unless the patient used, possessed, or was impaired by medical cannabis on the premises of the place of employment or during the hours of employment. (d) An employee who is required to undergo employer drug testing pursuant to section 181.953 may present verification of enrollment in the patient registry as part of the employee's explanation under section 181.953, subdivision 6. * * *</p> <p>Note: Employment Discipline – Possible Limits It is unknown at this point how Section 12, Subd. 3 (c) will impact employer actions, specifically employer discipline. While it is true that Minnesota law, Sec. 181.953, Subd. 10 (b), limits employer action upon a "first" positive drug test, the question is whether this would even be considered a positive test for purposes of Sec. 181.953, Subd. 10 (b) or would it completely excuse the positive result?</p>	<h2>Discrimination</h2> <ul style="list-style-type: none"> At risk for monetary loss under federal law, regulation or loss of monetary or licensing benefit . . . May not discriminate in hiring, termination, or any term or condition of employment . . . <p>If based on</p> <ul style="list-style-type: none"> Patients status as an enrolled medical marijuana patient, Patients positive drug test unless . . . <ul style="list-style-type: none"> patient used, possessed, or was otherwise impaired by medical cannabis on the premises of the place of employment or during work time.

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Iowa Code
Ch. 124E

2017



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Qualifying Conditions

To qualify must be able to prove permanent Iowa residency and provide physician certification of one of the following conditions:

- **Cancer** – if the illness or its treatment produces one or more of the following: severe or chronic pain, nausea or severe vomiting, cachexia or severe wasting.
- **Seizures**
- **Crohn's** disease
- **Untreatable pain** - any pain whose cause cannot be removed and, according to generally accepted medical practice, the full range of pain management modalities appropriate for the patient has been used without adequate result or with intolerable side effects.
- **Multiple Sclerosis** with severe and persistent muscle spasms
- **AIDS or HIV** (as defined in Iowa Code, section 141A.1)
- Amyotrophic lateral sclerosis (**ALS**)
- **Parkinson's** disease
- **Any terminal illness** with a probable life expectancy of under one year – if the illness or its treatment produces one or more of the following: severe or chronic pain, nausea or severe vomiting, cachexia or severe wasting
- **Ulcerative colitis**
- Severe, **pediatric autism** with aggressive or self-injurious behaviors (effective 4/2/19)

Allowable Forms of Medical Cannabidiol in Iowa

- **Oral forms** - tablets, capsules, liquids, tinctures and sublingual forms
- **Topical forms** - gels, ointments, creams, lotions and transdermal patches
- **Nebulizable** inhaled forms
- **Suppositories** - rectal and vaginal
- **Vaporization** (effective 5/15/19)

Dispensary Locations

Medical Cannabidiol will be available at five dispensaries across the state on **December 1, 2018**. The locations include:

- **MedPharm Iowa** – 5700 Sunnybrook Drive, Sioux City, IA 51106
- **Have A Heart Compassionate Care** – 3615 9th Avenue, Council Bluffs, IA 51501
- **MedPharm Iowa** – 7229 Apple Valley Drive, Windsor Heights, IA 50324
- **Iowa Cannabis Company** – 1955 La Porte Road, Waterloo, IA 50702
- **Have A Heart Compassionate Care** – 2222 E. 53rd Street, **Davenport, IA** 52807

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Illinois Medical Marijuana (410 ILCS 130/40)



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Illinois Law

Illinois Medical Marijuana Law	
Statutory Language	Key Points
<p>The law prohibits discrimination because of ones status as a medical marijuana patient :</p> <p>(410 ILCS 130/40)</p> <p>Sec. 40. Discrimination prohibited.</p> <p>(a)(1) No school, employer, or landlord may refuse to enroll or lease to, or otherwise penalize, a person solely for his or her status as a registered qualifying patient or a registered designated caregiver, unless failing to do so would put the school, employer, or landlord in violation of federal law or unless failing to do so would cause it to lose a monetary or licensing-related benefit under federal law or rules. * * *</p>	<ul style="list-style-type: none"> • Discrimination Clause • Status alone – can't discriminate • Unless doing so violates federal law or jeopardizes financial status or licensing under federal law.

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Illinois Law

Illinois Medical Marijuana Law	
Statutory Language	Key Points
<p>Sec. 50. Employment; employer liability.</p> <p>(a) Nothing in this Act shall prohibit an employer from adopting reasonable regulations concerning the consumption, storage, or timekeeping requirements for qualifying patients related to the use of medical cannabis.</p> <p>(b) Nothing in this Act shall prohibit an employer from enforcing a policy concerning drug testing, zero-tolerance, or a drug free workplace provided the policy is applied in a nondiscriminatory manner.</p> <p>(c) Nothing in this Act shall limit an employer from disciplining a registered qualifying patient for violating a workplace drug policy.</p> <p>(d) Nothing in this Act shall limit an employer's ability to discipline an employee for failing a drug test if failing to do so would put the employer in violation of federal law or cause it to lose a federal contract or funding.</p> <p>(e) Nothing in this Act shall be construed to create a defense for a third party who fails a drug test.</p>	<ul style="list-style-type: none"> • Employer can adopt rules re medical use of marijuana • Employer can have "zero tolerance" policy. • Employer can discipline medical marijuana patient who violates employer's policy. • Employer can discipline medical marijuana patient for testing positive on a drug test per federal rules (e.g. DOT). • Employee has no defense under the law.

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Illinois Law

Illinois Medical Marijuana Law	
Statutory Language	Key Points
<p>Sec. 50. Employment; employer liability.</p> <p>(f) An employer may consider a registered qualifying patient to be impaired when he or she manifests specific, articulable symptoms while working that decrease or lessen his or her performance of the duties or tasks of the employee's job position, including symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, negligence or carelessness in operating equipment or machinery, disregard for the safety of the employee or others, or involvement in an accident that results in serious damage to equipment or property, disruption of a production or manufacturing process, or carelessness that results in any injury to the employee or others. If an employer elects to discipline a qualifying patient under this subsection, it must afford the employee a reasonable opportunity to contest the basis of the determination.</p>	<ul style="list-style-type: none"> • Employer may consider medical marijuana patient "impaired" if demonstrating behavioral symptoms. • An accident = impairment resulting in: <ul style="list-style-type: none"> -- serious damage to equip. or property -- disruption of mfg./production -- carelessness resulting in injury • Employer must afford the employee an opportunity to contest the basis of the discipline.

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Illinois Law

Illinois Medical Marijuana Law	
Statutory Language	Key Points
<p>Sec. 50. Employment; employer liability.</p> <p>(g) Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for: (1) actions based on the employer's good faith belief that a registered qualifying patient used or possessed cannabis while on the employer's premises or during the hours of employment; (2) actions based on the employer's good faith belief that a registered qualifying patient was impaired while working on the employer's premises during the hours of employment; (3) injury or loss to a third party if the employer neither knew nor had reason to know that the employee was impaired.</p> <p>(h) Nothing in this Act shall be construed to interfere with any federal restrictions on employment including but not limited to the United States Department of Transportation regulation 49 CFR 40.151(e).</p>	<ul style="list-style-type: none"> • No cause of action created based on . . . 1. Good faith belief that med. marijuana patient used or possessed at work. 2. Good faith belief the med. Marijuana patient was impaired <i>on premises during work hours</i>. 3. Injury or loss to a third party if employer neither knew nor had reason to know the employee was impaired. • Nothing in this law interferes with employer obligations under federal law (e.g. DOT)

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Illinois Adult Personal Use of Marijuana

HB 1438

Cannabis Legalization Equity Act.

Article 10.

Section 10-50. Employment; employer liability.

(a) **Nothing in this Act shall prohibit an employer from adopting reasonable zero tolerance or drug free workplace policies**, or employment policies concerning drug testing, smoking, consumption, storage, or use of cannabis **in the workplace** or while on call provided that the policy is applied in a nondiscriminatory manner.

(b) Nothing in this Act shall require an employer to permit an employee to be **under the influence** of or use cannabis in the employer's workplace or while performing the employee's job duties or while on call.

(c) **Nothing in this Act shall limit or prevent an employer from disciplining** an employee or **terminating** employment of an employee for violating an employer's employment policies or workplace drug policy.

(d) An employer may consider an employee to be impaired or under the influence of cannabis if the employer has a good faith belief that an employee manifests specific, articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position, including symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, or negligence or carelessness in operating equipment or machinery; disregard for the safety of the employee or others, or involvement in any accident that results in serious damage to equipment or property; disruption of a production or manufacturing process; or carelessness that results in any injury to the employee or others. If an employer elects to discipline an employee on the basis that the employee is under the influence or impaired by cannabis, the employer must afford the employee a reasonable opportunity to contest the basis of the determination.

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Illinois Adult Personal Use of Marijuana

HB 1438

Cannabis Legalization Equity Act.

Article 10.

(e) **Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for:**

(1) **actions, including but not limited to subjecting an employee or applicant to reasonable drug and alcohol testing under the employer's workplace drug policy, including an employee's refusal to be tested or to termination of employment, based on the employer's good faith belief that an employee used or possessed cannabis in the employer's workplace or while performing the employee's job duties or while on call in violation of the employer's employment policies;**

(2) **actions, including discipline or termination of employment, based on the employer's good faith belief that an employee was impaired as a result of the use of cannabis, or under the influence of cannabis, while at the employer's workplace or while performing the employee's job duties or while on call in violation of the employer's workplace drug policy; or**

(3) **injury, loss, or liability to a third party if the employer neither knew nor had reason to know that the employee was impaired.**

(f) Nothing in this Act shall be construed to enhance or diminish protections afforded by any other law, including but not limited to the Compassionate Use of Medical Cannabis Pilot Program Act or the Opioid Alternative Pilot Program.

(g) Nothing in this Act shall be construed to interfere with any federal, State, or local restrictions on employment including, but not limited to, the United States Department of Transportation regulation 49 CFR 40.151(e) or impact an employer's ability to comply with federal or State law or cause it to lose a federal or State contract or funding.

(h) As used in this Section, **"workplace" means** the employer's premises, including any building, real property, and parking area under the control of the employer or area used by an employee while in performance of the employee's job duties, and vehicles, whether leased, rented, or owned.

Workplace" may be further defined by the employer's written employment policy, provided that the policy is consistent with this Section.

(i) For purposes of this Section, an employee is deemed **"on call"** when such employee is scheduled with at least 24 hours' notice by his or her employer to be on standby or otherwise responsible for performing tasks related to his or her employment either at the employer's premises or other previously designated location by his or her employer or supervisor to perform a work-related task.

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HB 1438

Cannabis Legalization Equity Act.

Section 900-50. The Right to Privacy in the Workplace Act is amended by changing Section 5 as follows:

(820 ILCS 55/5) (from Ch. 48, par. 2855)

Sec. 5. Discrimination for use of lawful products prohibited.

(a) Except as otherwise specifically provided by law, including Section 10-50 of the Cannabis Regulation and Tax Act, and except as provided in subsections (b) and (c) of this Section, it shall be unlawful for an employer to refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the individual uses lawful products off the premises of the employer during nonworking and non-call hours. As used in this Section, "lawful products" means products that are legal under state law. For purposes of this Section, an employee is deemed on-call when the employee is scheduled with at least 24 hours' notice by his or her employer to be on standby or otherwise responsible for performing tasks related to his or her employment either at the employer's premises or other previously designated location by his or her employer or supervisor to perform a work-related task. ~~hours~~.

(b) This Section does not apply to any employer that is a non-profit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public. This Section does not apply to the use of those lawful products which impairs an employee's ability to perform the employee's assigned duties.

(c) It is not a violation of this Section for an employer to offer, impose or have in effect a health, disability or life insurance policy that makes distinctions between employees for the type of coverage or the price of coverage based upon the employees' use of lawful products provided that:

- (1) differential premium rates charged employees reflect a differential cost to the employer; and
- (2) employers provide employees with a statement delineating the differential rates used by insurance carriers.

(Source: P.A. 87-807.)

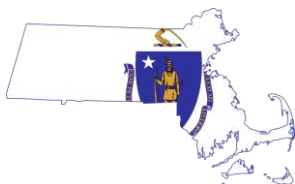
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State Human Rights Laws Further Complicate The Issue

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State Human Rights Laws – An Example

Barbuto v. Advantage Sales and Marketing, LLC, and another, SJ-12226, 477 Mass. 456, 78 N.E.3d 37 (7-17-17) the Court relied on state law to find that the employer discriminated against the employee who was also a medical marijuana patient.

The Court rejected ASM's argument that, because the use of marijuana is a crime under federal law, any accommodation would be unreasonable.

The Court equated medical marijuana to any other prescribed drug and said: The Court said, a "qualifying patient who has been terminated from her employment because she tested positive for marijuana as a result of her *lawful* medical use of marijuana has a civil remedy against her employer" and "may seek a remedy through claims of handicap discrimination in violation of state prohibited practices law. (G. L. c. 151B §4(16)).

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The Prescription (Opioid) Drug Epidemic

How Do You Deal With It At Work?

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CDC – Latest Numbers

Drug overdose deaths and opioid-involved deaths continue to increase in the United States. The majority of drug overdose deaths (**more than six out of ten**) involve an opioid.

- Since 1999, the number of **overdose deaths** involving opioids (including prescription opioids and heroin) **quadrupled**.
- **115 Americans die every day** from an opioid overdose.
- Since 1999, the amount of **prescription** opioids sold in the U.S. **nearly quadrupled**,
- Deaths from prescription opioids—drugs like oxycodone, hydrocodone, and methadone—have **more than quadrupled** since 1999.

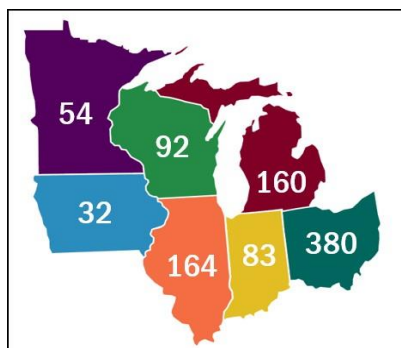


<https://www.cdc.gov/drugoverdose/epidemic/index.html>

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Prescriptions @ Work in the Midwest



Source: The Midwest Policy Institute:
<https://midwestepi.files.wordpress.com/2018/02/opioids-and-construction-final2.pdf>

Nearly 1,000 **construction workers** across the Midwest **died** from an opioid overdose in 2015

Construction Worker Deaths by State from Opioid Overdoses, 2015



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Prescriptions @ Work in The Midwest

The opioid epidemic **cost** the Midwest's construction industry an estimated **\$5.2 billion** in 2015.

Illinois \$867 million;
Indiana \$450 million;
Iowa \$168 million;
Michigan \$858 million;

Minnesota \$292 million;
Ohio \$2 billion; and
Wisconsin \$524 million.

Source: The Midwest Policy Institute:
<https://midwestepi.files.wordpress.com/2018/02/opioids-and-construction-final2.pdf>

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PAIN
IN
AMERICA

- **178 million US adults** reported chronic pain unrelated to cancer. (**41%** increase since 1998).
- **68 million US adults** (little more than one-third) with pain reported interference with normal work activities (job or home).
- The **use of opioids** specifically for **pain management increased** from 11.8 percent of those with a painful health condition (**14.5 million adults**) in combined years 1997/1998 to 16.2 percent (**30.6 million adults**) in 2013/2014. Across years, increased levels of pain-related interference were associated with **higher opioid use**.
- The use of weak opioids (such as codeine) for pain decreased during the study period, while **the use of strong opioids** (such as morphine or oxycodone) **increased substantially**.
- Across years, compared to people with minimal pain-related interference, **those with severe pain-related interference were more likely to use strong opioids**, to report four or more opioid prescriptions, and to have six or more ambulatory office visits for their pain.

<https://ncch.nih.gov/research/results/spotlight/non-cancer-pain-management>

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Roadblocks To Employer Action



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ADA AMERICANS WITH DISABILITIES ACT



How the ADA limits Employer drug testing programs:

1. What substances are tested;
 - Legal vs. illegal drugs
2. Requirement that employees **report medications** they are taking.
 - safety vs. non-safety positions

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The ADA

42 U.S.C. § 12114

(a) Qualified individual with a disability

For purposes of this subchapter, a qualified individual with a disability **shall not include** 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.

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The ADA

42 U.S.C. § 12114

(b) Rules of construction: Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who—

- (1) has **successfully completed a supervised drug rehabilitation program** and is **no longer engaging in the illegal use of drugs**, or has otherwise been rehabilitated successfully and is **no longer engaging in such use**;
- (2) is **participating in a supervised rehabilitation program** and is **no longer engaging in such use**; or
- (3) is **erroneously regarded as engaging in such use**, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

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The ADA

42 U.S.C. §12114(d)(1) provides:

(d) **Drug testing**

(1) In general

For purposes of this subchapter, a test to determine the **illegal** use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

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The ADA

**Federal Drug Testing Programs
such as DOT
Are excluded from ADA coverage**

42 U.S.C. § 12114

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The ADA

Can You Require Employees to Report Medications They are Taking?

8. May an employer ask **all employees what prescription medications** they are taking?

Generally, no. Asking **all** employees about their use of prescription medications is not job-related and consistent with business necessity. **In limited circumstances**, however, certain employers may be able to demonstrate that it *is* job-related and consistent with business necessity to require employees in **positions affecting public safety** to report when they are taking medication that may affect their ability to perform essential functions.

<https://www.eeoc.gov/policy/docs/guidance-inquiries.html>

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The States



How State Laws Can Differ from the ADA:

1. Typically state disability laws apply to more employers – e.g. *Washington Law Against Disabilities* applies to entities with **8** or more persons employed. (ADA applies to entities with 15 or more).
2. Applies to any person acting in the interest of an employer, directly or indirectly.
3. State laws are to be more liberally construed.

RCW T. 49, Ch. 49.60

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The
States

Washington

Stewart

v.

Snohomish County PUD No. 1

\$1.8 Million

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The
States

Washington

Clipse

v.

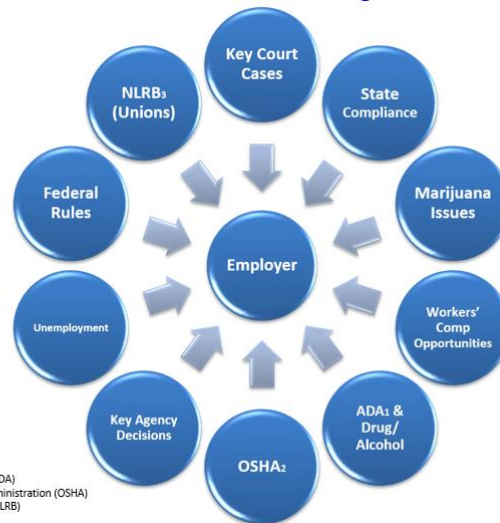
Commercial Drivers Services, Inc

\$85,000

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It's become a complex world



1. Americans with Disabilities Act (ADA)
2. Occupational Safety & Health Administration (OSHA)
3. National Labor Relations Board (NLRB)

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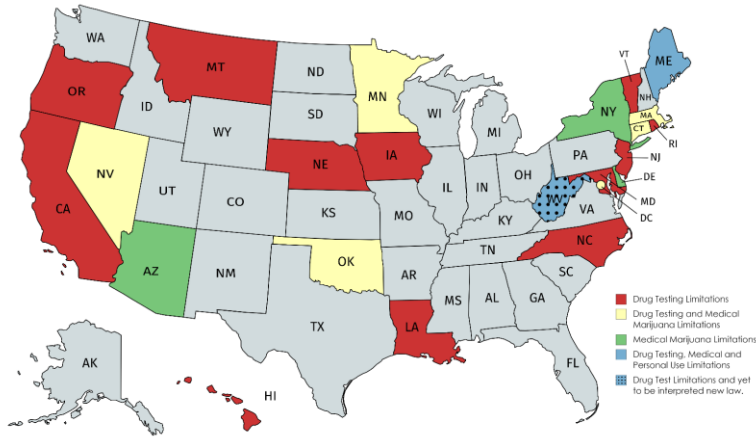
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State Law Compliance



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Mandatory States

There are **22** states with rules that **MUST** be followed if a private employer wishes to conduct drug testing.

Note: 3 states are mandatory due to medical marijuana rules and 5 due to both medical marijuana and drug testing rules.

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Minnesota Drug and Alcohol Testing in the Workplace Act (Minn. Stat. §§ 181.950 - 957)



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Key Points

- Enacted in 1987 making it among the oldest such laws in the country.
- Must Follow the Rules ("Mandatory").
- Not Required to Test.

Policy Rules:

- Must have a written policy.
- Must provide written notice to applicants (post-offer) and employees.
- Must **post notice** that policy has been adopted.
- Must make policy available for inspection during normal business hours.
- Policy Content:
 - Who
 - When
 - Consequences
 - Refusal
 - Retest
 - Other Appeal Process

Must have an Acknowledgement Form
(sec. 181.193, subd 6.)



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Key Points

When

- **Job Applicant:** Post-Offer, all applicants, must inform the reason for the test (e.g. It's Company Policy).
- **Routine Physical:** Only once per year, must give 2-weeks' written notice
- **Random: Safety-sensitive ONLY.** (or Professional Athlete under CBA).
- **Reasonable Suspicion:** if employer has reasonable suspicion that . . .
 - Employee is under the influence;
 - Employee has violated a written work rule (like drug testing policy);
 - Has sustained an **injury**;
 - Has caused a work-related accident;
- **During and after treatment** (if referred by Employer);
- **Follow up** to treatment (2 years max).



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Key Points

Testing Rules

- Must use qualified lab. (SAMHSA, CAP, NY Dept of Health)
- Alcohol tests must be by **blood**. (Use NY Dept Health or CAP)(sec. 181.953)
- Must confirm initial screen results.
- Lab must report results in writing within 3 days of obtaining them in the lab.
- Lab must keep all samples for at least 6 months.



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Key Points

Re-Testing Rules

- Within **3 working days** must give written notice of test results (Employee and Applicant)
- Must give written notice of the right to explain a positive and right to request a retest (at employee or applicant expense).
- Within **3 working days** of notice of positive Employee or applicant may submit additional information to explain result.
- Within **5 working days** the employee or applicant shall notify in writing intent to retest.
- Within 3 working days employer must notify original lab.
- Retest Lab must use **original confirmatory cutoff levels**.



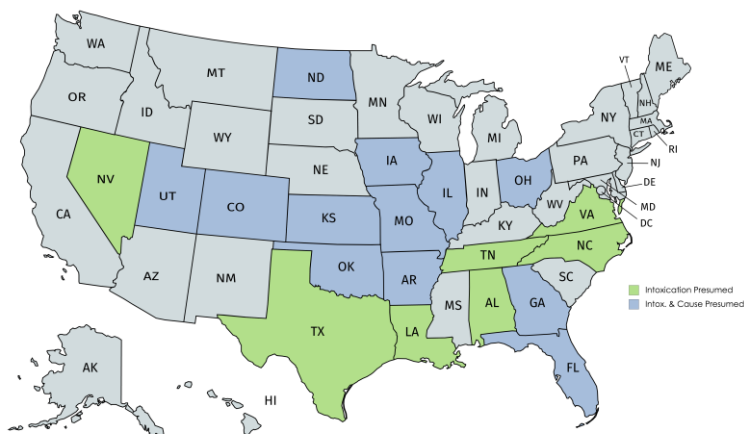
Key Points

Discipline

- Can't fire an employee for **first time** positive *unless*,
 - Employee offered an opportunity (at own expense) to participate in treatment/counseling/ etc.
 - Employee **refused** or **failed** to successfully complete or has **positive** result after completion of treatment.
 - May suspend safety-sensitive employee while awaiting test results.

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Workers Compensation Claim Defense



19
States Have a
Rebuttable
Presumption
Of
Intoxication

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Policy is one thing . . .

*“The paper means nothing
If it doesn’t come to life through
proper procedures.”*

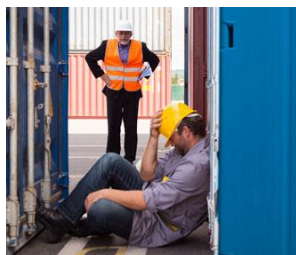
Procedures are another

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Reasonable Suspicion

What Is It?



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The Issue

Individual Privacy vs Employer Responsibility

The word “**privacy**” does not appear in the US Constitution.

It does in the California Constitution

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A Drug Test is a Search

Skinner v Railway Labor Executives' Assoc., 489 US 602 (1989)

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Legal Search



Terry V Ohio

392 U.S. 1, 88 S.C.
(1968)



“ . . . in justifying the particular intrusion the police officer must be able to point to **specific and articulable facts** which, taken together with rational inferences from those facts, reasonably warrant that intrusion. . . [must be subject to] neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. . . judged against an objective standard: would the facts available . . . at the moment of the seizure or the search ‘warrant **a man of reasonable caution** in the belief’ that the action taken was appropriate? . . . Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than **inarticulate hunches**, a result this Court has consistently refused to sanction.

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BALANCE

Employer Responsibility

vs.

Employee Right to Privacy

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Reasonable Suspicion means

PROOF

Proof of what?

Start With A Hunch

**Now Compare to Other Levels of
Proof**

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Reasonable Suspicion means

PROOF

Proof of what?

J
A
I
L

B
R
D

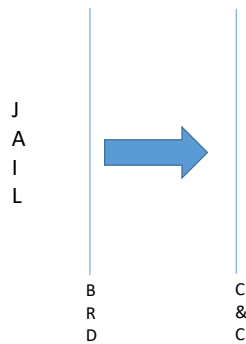
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Reasonable Suspicion means

PROOF

Proof of what?



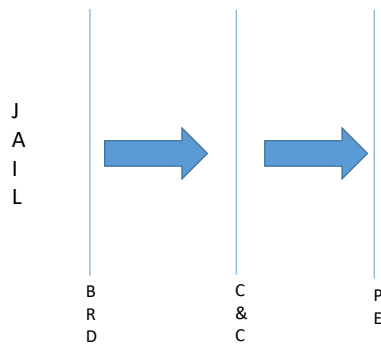
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Reasonable Suspicion means

PROOF

Proof of what?



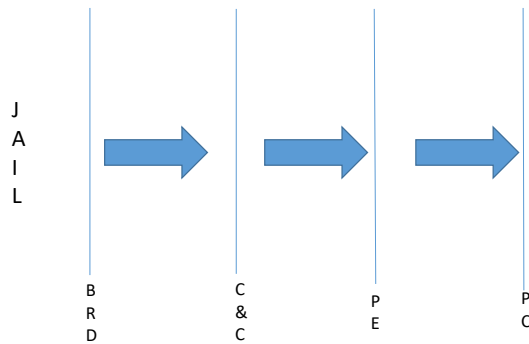
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Reasonable Suspicion means

PROOF

Proof of what?



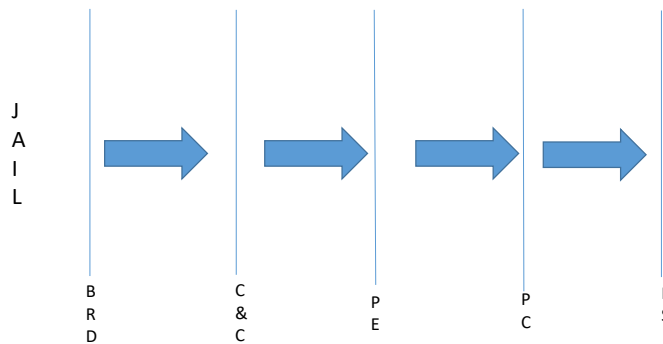
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Reasonable Suspicion means

PROOF

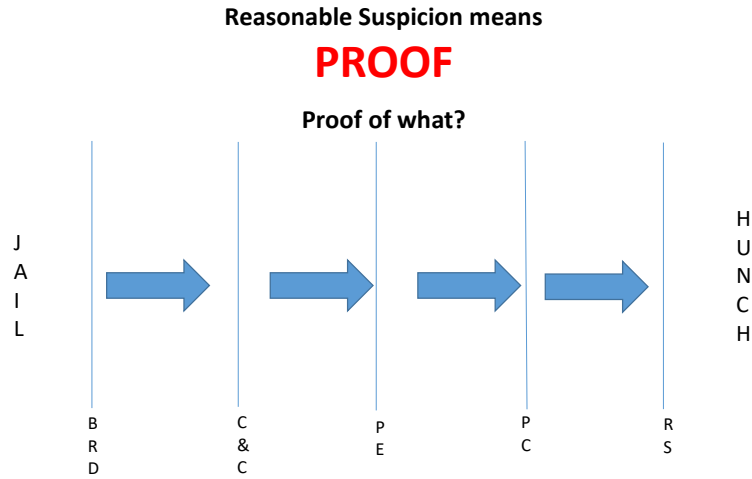
Proof of what?



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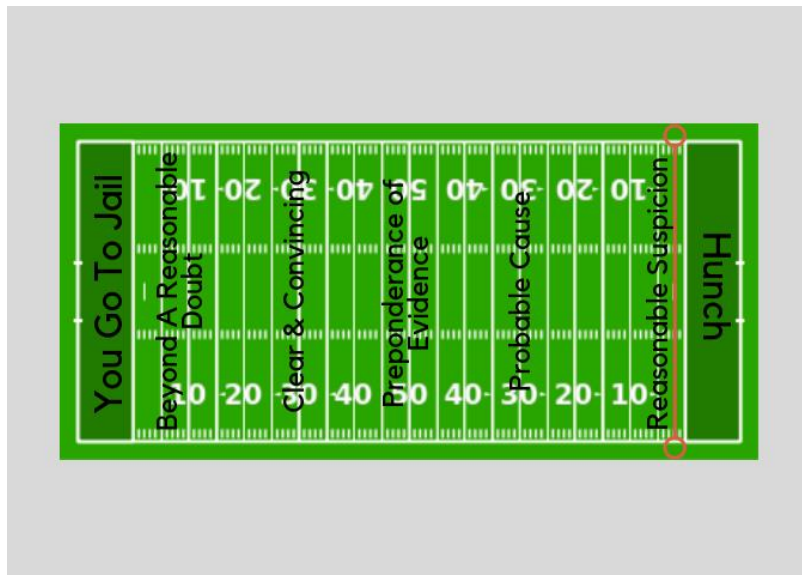
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So, What Does All That Mean?



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Where do you start?



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Your Role



Somebody tell me what to do!

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Questions?

Just Ask!

Bill Judge

866-775-3724

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