

2023 Cannabis in the Workplace Update

Presented by:

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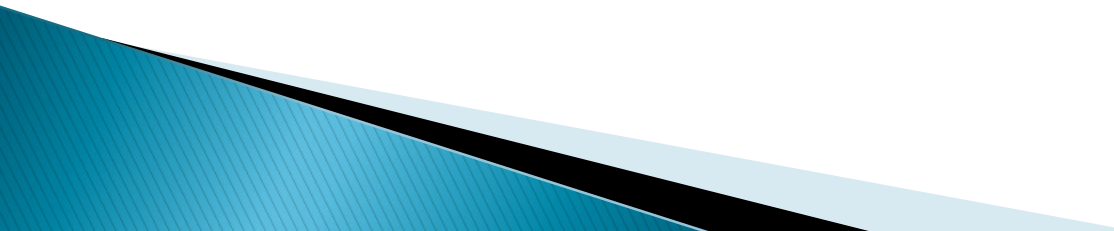
Today's Program

Review/Update:

Recreational Marijuana
in the Workplace



Prohibitions

- ▶ Employers are prohibited from taking into account whether or not a person uses cannabis items.
 - ▶ Employers cannot:
 - Refuse to hire or employ an individual;
 - Discharge or forced retirement
 - Discriminate against an individual in:
 - Compensation; or,
 - Terms, conditions, or privileges of employment.
 - Differential treatment
- 

Drug Testing

- ▶ NJ Legalization Bill allows:
 - Screening of applicants
 - Regular screening of current employees to determine use during work hours.
 - Test shall include:
 - *Scientifically reliable objective testing methods* and procedures (blood, urine, or saliva)
 - *and a physical evaluation* in order to determine an employee's state of impairment.
 - Employer may use the results to decide employment action/disciplinary action.

Should you test?

- ▶ Pre-employment?
- ▶ CHOICE: DREs and/or fudge-it
- ▶ Get DREs in place –
- ▶ Start with DREs/waiver
 - ID others for training
- ▶ If positive result, remember obligation to notify and allow for response
 - Checking for medical use
- ▶ Is testing tied to a legitimate business justification
 - “Medical inquiry” – nexus is required by EEOC

Drug Testing– Post Legalization

- ▶ Different policies for different types of jobs/testing:
 1. CDL/Federal Exemptions
 2. Safety Sensitive
 3. All others
- ▶ 1 ONLY: random testing
- ▶ 1–3: Pre–employment & reasonable suspicion
 - Eliminate THC from pre–employment for 2 & 3?
- ▶ 1–3 post accident if under employer investigation.

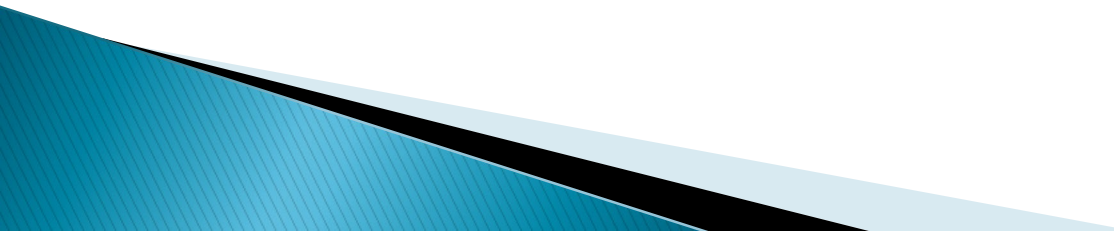
Reasonable Suspicion: Physical Evaluation

- ▶ Conducted by an individual with the necessary certification to opine on the employee's state of impairment, or lack thereof, related to the usage of a cannabis.
 - Certified Workplace Impairment Recognition Expert

WIRE & CRC “Guidance”

- ▶ Sample form – not cannabis specific
- ▶ “Evidence-based” protocols
 - Observed behaviors and physical signs
- ▶ “Skip” the WIRE
 - Interim Staff Member
 - “Sufficiently trained” – reasonable suspicion
 - Part of Standard Operating procedure
 - Manager or supervisor + interim


Train: Interim, Supervisors, Managers

- ▶ Observable signs the employee is:
 - Incapable of performing essential functions
 - Unsafe
 - ▶ ***Use (updated) job functions***
 - ▶ Create a record
 - ▶ Uniform application
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Drug Testing Police

- ▶ AG Guidelines
- ▶ State Lab

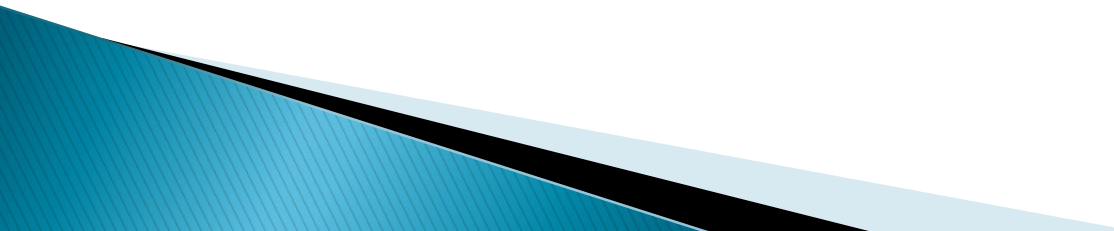
Drug Testing: Negotiations

- ▶ Define and specify discipline:
 - Tampering
 - Refusals
 - ▶ Use of information post-test as evidence to support the demand for the test
 - ▶ Notification
 - ▶ Chain of custody
 - ▶ Confidentiality and accuracy (split samples/retest)
 - ▶ Discipline/rehab
 - ▶ Frequency of random testing
 - ▶ Number of employees to be randomly testing
 - ▶ Pre-testing video recording
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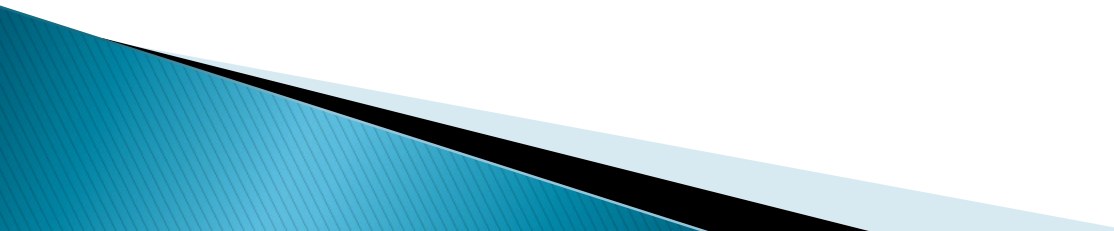
Establishing a Discrimination Claim

- ▶ Plaintiff must establish:
 - Member of a protected class
 - Was qualified for the job at issue
 - Suffered an adverse employment action (such as demotion, termination, reduction in hours, hostile environment, etc.) because s/he is a member of a protected class.
- ▶ Burden then shifts to the employer:
 - Employer took action due to legitimate and non-discriminatory reasons. If it does that, then the burden returns to the plaintiff

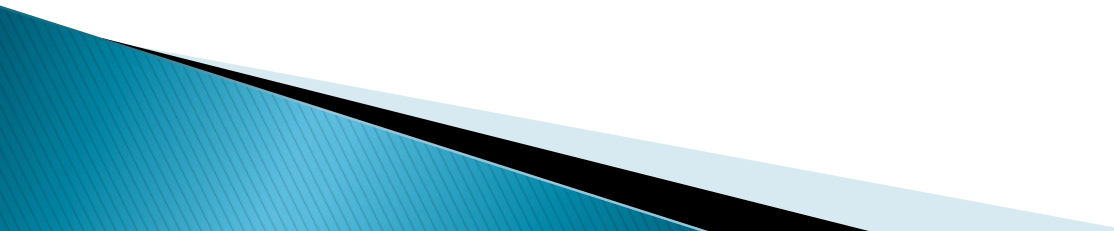
Harassment? Really?

- ▶ Stoner
 - ▶ Burnout
 - ▶ Addict
 - ▶ Dopehead
 - ▶ Pothead
 - ▶ Doper
 - ▶ Druggie/druggy
 - ▶ Fiend
- 

Recreational/Medical Marijuana

- ▶ Can discipline/terminate for:
 - possession or use of intoxicating substances during work hours or on the premises of the workplace outside of work hours;
 - Not required to permit impairment at work as RA
 - ▶ Employer not required to commit any act that would cause
 - violation of federal law
 - loss of a licensing-related benefit pursuant to federal law
 - loss of a federal contract or federal funding
- 

Legitimate Issues, Concerns & Suggested Solutions

- ▶ Tensions between Federal and State laws
 - Not legal under Federal law
 - Drug Free Workplace Act
 - FMLA/ADA and NJLAD
 - PEOSH/OSHA
 - Drug Testing Issues
 - ▶ State: medical vs. recreational marijuana
- 

FMLA/ADA

- ▶ Marijuana is not deemed addictive – ?
- ▶ Absence/treatment for medical (?) or recreational use – not in itself a covered event
 - FMLA serious health condition
 - ADA impairment of major life activity
 - Employers may prohibit illegal use of drugs and alcohol in the workplace (no fed exception for medical marijuana; no RA issue under State law)
 - Current illegal users (not addict), no protection
 - NJLAD?
- ▶ Careful: underlying impairment prompting use of medical marijuana can trigger coverage/protection

PEOSH/OSHA

- ▶ State law adopts Federal counterpart
- ▶ OSHA: Employer must provide a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm
 - reasonably safe and free from known hazards
- ▶ For State purposes:
 - Training in observation
 - Policies and application
 - Workplace Impairment Recognition Expert
 - Document your compliance efforts

Drug Free Workplace Act (Federal)

- ▶ Eligibility for federal contracts or grants requires employer certification
 - Use or possession – specifically prohibited
 - No medicinal exception
 - Specified requirements to ensure a workplace free of illegal drugs
 - Establish a drug-free awareness program
 - Require employees to report criminal convictions for drug related offenses
 - Must impose penalty or require satisfactory participation in EAP

NJ Statute

- ▶ If any of the provisions result in a provable adverse impact on an employer subject to the requirements of a federal contract, then the employer may revise their employee prohibitions consistent with federal law, rules, and regulations;
- ▶ Proof is highly unlikely

THANK YOU!

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Counselors at Law

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*Practical Advice, Independent Investigations,
Grievance & Interest Arbitrations,
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