



EMPLOYERS AND LAWYERS,

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# What You Need to Know About Employment Drug Testing

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# Agenda

- Prescription Drugs Use and Addiction
- Medical Marijuana Laws
- Key Takeaways and 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



# Prescription Drug Abuse

- Misuse of prescription drugs means taking:
  - Medication in a manner or dose other than prescribed
  - Someone else's prescription, even if for a legitimate medical complaint
  - Medication to get high
- Commonly misused medications:
  - Opioids—usually prescribed to treat pain
  - Central Nervous System (CNS) Depressants—used to treat anxiety and sleep
  - Stimulants—most often prescribed to treat attention deficit hyperactivity disorder (ADHD)

# **PRESCRIPTION DRUGS USE AND ADDICTION**



# ADA Coverage of Illegal Drugs

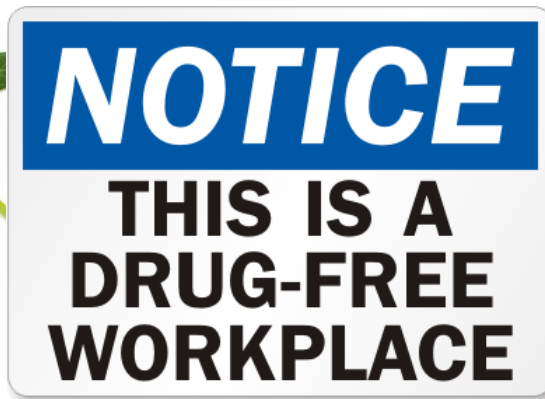
- Current use of illegal drugs is not protected – inquiring about illegal drug use is not prohibited
- Past illegal drug addiction or in rehab for illegal drug use may be a disability – inquiries about past illegal drug use are disability-related

# ADA Coverage of Prescription Drug Use

- Prescription drug *use* is not a disability
- Prescription drug *addiction* may constitute a disability
- Prescription drugs are often used to treat conditions that qualify as disability



# Marijuana in the Workplace



# DOJ Position on Federal Marijuana Law

- Jan. 4, 2018 – Attorney General Jeff Sessions issued memorandum emphasizing that marijuana is an unlawful substance under federal law
- This conflicts with several state laws that decriminalize marijuana use.

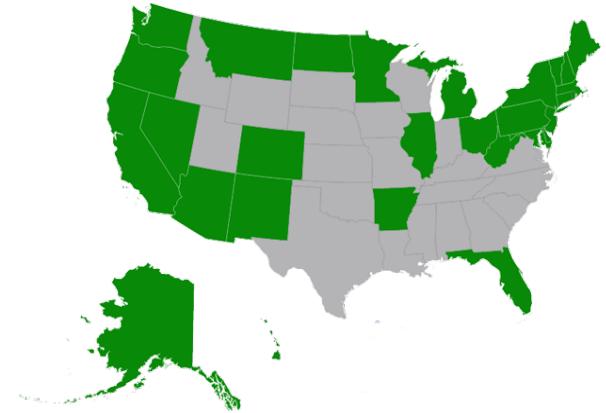
# Federal Drug-Free Workplace Act

- Applies to certain federal contract/grant recipients
  - Does not require drug testing in the workplace
  - Does not require employers to fire employees for positive test
  - **Requires continuous good faith efforts to maintain drug-free workplace**

# Medical Marijuana – By the Numbers

- **Medical Use Legal In:** Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, **Illinois**, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Washington D.C., and West Virginia
- **Recreational Use legal In:** Alaska, California, Colorado, DC, Maine, Massachusetts, Nevada, Oregon, Vermont, Washington

29 LEGAL MEDICAL MARIJUANA STATES AND DC



# Medical Marijuana Statutes and Job Protections

- 12 states have job protections for medical marijuana users: Arkansas, Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Pennsylvania, Rhode Island, and Vermont



# Disability-Related Inquiries

- Generally, employers should not ask employee:
  - whether currently taking prescription drugs
  - whether has taken prescription drugs in the past
- Generally, employers should not monitor prescription drug use



# Disability-Related Inquiries

- Must be “job-related and consistent with business necessity”
- Must show reasonable belief, based on objective evidence, that:
  - Ability to perform essential job functions will be impaired; or
  - An employee will pose a direct threat

# Disability-Related Inquiries

- Direct threat means significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation
- Affects public safety and nature of medication affects ability to perform essential functions of the job



# Disability-Related Inquiries and Medical Exams

- Different rules for different stages of relationship
  - Pre-offer
  - Post-offer
  - Current employee
- Testing for illegal drugs not a medical examination

# Pre-Hire Screening

- Pre-offer: Questions about legal drug use/current medications are impermissible
- Post-offer:
  - Uniformly implemented
  - After a drug test, employers may ask about current legal drug use that may explain a positive drug test

# Drug Testing Current Employees

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



# Drug Testing Current Employees

## ■ Post-Accident Testing

- Not automatic -- reasonable basis for believing that drug use could have contributed to injury
- Need to apply consistent, objective criteria – i.e., fatality or injury requiring ambulance; damage to property above set dollar amount; police citation issued

# ADA – Applicants/Employees Testing Positive

- Engage in individualized assessment and interactive process for prescription drug use
- Modified work schedule/leave of absence may be appropriate accommodation for prescription drug and alcohol abuse, and for past drug addiction

# FMLA – Employees Testing Positive

- Substance abuse may be a serious health condition
  - Leave permitted for treatment
  - Leave not permitted for use
- Treatment for substance abuse does not prevent an adverse employment action
  - IF policy is applied in nondiscriminatory manner

# Scenario #1 - Pre-Hire Drug Test

- Applicant for cashier position at casino had drug test showing hydrocodone
- Hydrocodone prescribed to treat disability -- back and neck impairment
- Can the employer rescind the offer?

## Scenario #2 -- Drug Rehab and Prescription

- Applicant was recovering drug addict enrolled in supervised medication-assisted treatment program
- Disclosed taking medically prescribed suboxone (used to treat opioid dependence) during post-offer physical
- Can the employer rescind the offer?

# Scenario #3 -- Prescription Drug Use

- Plaintiff requested FMLA for stress and anxiety
- Applied for STD and disclosed treatment for opiate withdrawal
- Employer required plaintiff to participate in its substance abuse treatment program
- Can the employer require random drug tests and disclosure of all prescription drugs?

# Scenario #4 – Post-accident Pot Positive

- Employee prescribed medical marijuana but not a registered cardholder
- Post-accident drug test positive for marijuana
- Employee argued not under the influence at time of accident because marijuana stays in body for days
- Can the employer fire the employee?

# Key Takeaways and Best Practices



# Key Takeaways

- Employers are not required to accommodate intoxication, use, or possession in the workplace
- Legal marijuana/prescription drug use may or may not be a reasonable accommodation
- Duty to provide safe workplace is paramount

# Best Practices

- Clear, consistently-applied drug policies
  - Uniformly applied to avoid discrimination
  - No blanket prohibition of prescribed opioids or marijuana
  - When/how drug tests will be used
  - Opportunity for medical review or interactive dialogue regarding accommodations

# Best Practices

- Define and identify safety-sensitive jobs
- Train supervisors to spot signs of intoxication and addressing prescription drug/medical marijuana issues lawfully
- Filter decisions through HR and legal

# Questions?

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