



Clearing the Legal Haze

Marijuana and Its Impact on Your Workplace

Presented By: Eric Janson



This program has been approved for 1 (HR (General) recertification credit hours toward PHR, SPHR and GPHR recertification through the HR Certification Institute.



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Welcome Eric Janson



The Blunt Truth

www.blunttruthlaw.com

Seyfarth Shaw
Cannabis Practice
Group's legal blog
chronicling the
evolution and
implementation of
marijuana laws in
the United States



Today's Agenda

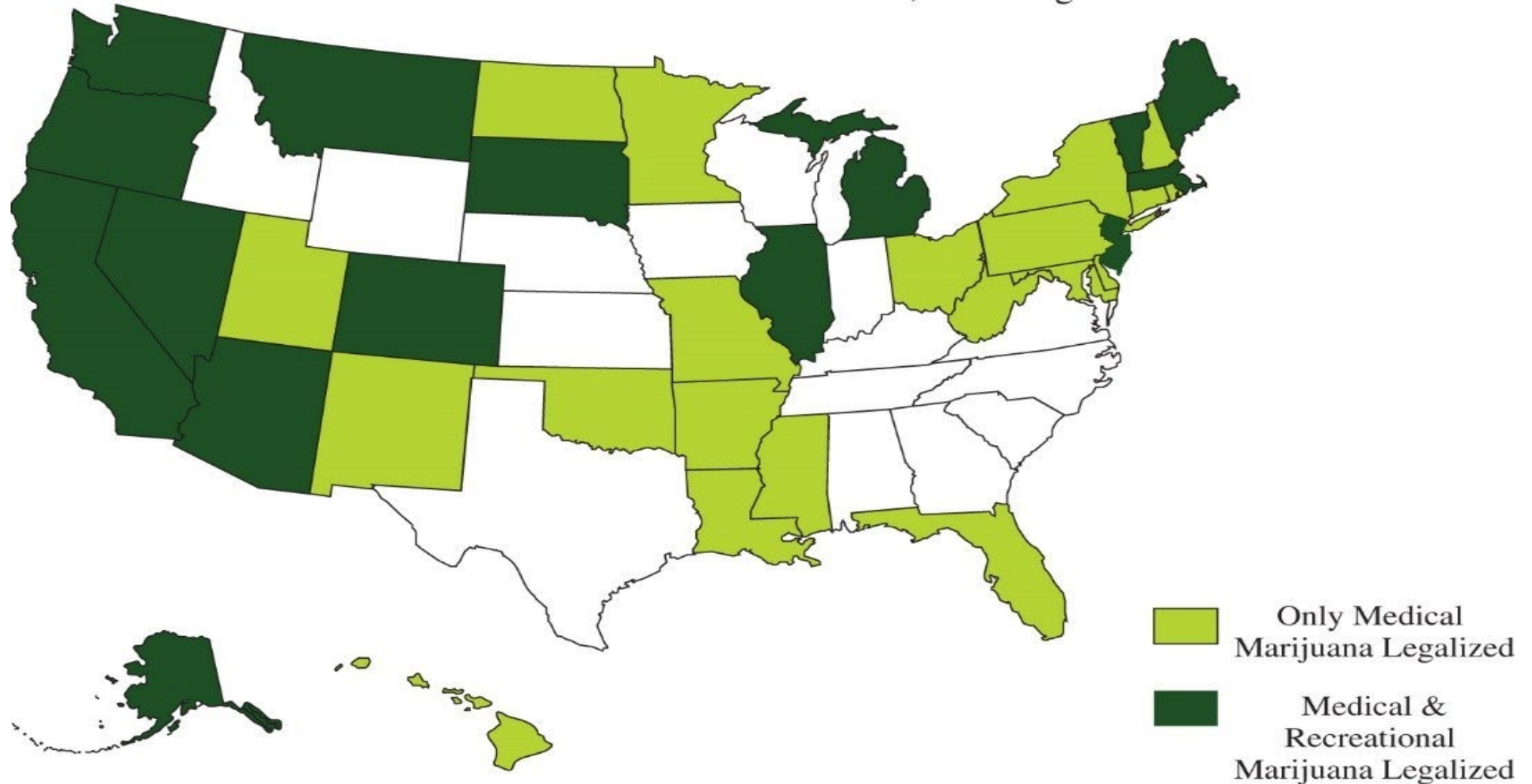
- 01** Overview of State and Federal Laws Regarding Medical and Adult Use of Marijuana
- 02** Conflicts Between State and Federal Laws
- 03** Recent Trends and Ways to Approach from Policy Perspective
- 04** Common Issues with Marijuana Both Before and During Employment
- 05** Q&A

Introduction

- A growing number of states are legalizing adult use and medical marijuana and prohibiting discrimination against employees who use marijuana for disabilities/medical conditions
- However, marijuana remains illegal under federal law
- Litigation is growing, with trend supporting employees who use marijuana for medical reasons
- Until SCOTUS rules or federal law changes (the latter which may be possible under Biden administration), employers are in a precarious space with no clear guidance.

Map of Legalized Marijuana States

20 Medical Marijuana Only States,
16 Medical and Recreational States, Including D.C.



Recent Ballot Initiatives & Federal Legislation

- **November 2020 Ballot Initiatives** -- AZ, NJ, MT (adult use); SD (adult and medical); MS (medical)
 - See also: Oregon (psilocybin mushrooms; decriminalizing small amounts of other drugs) and District of Columbia (psilocybin mushrooms)
- **Marijuana Opportunity Reinvestment and Expungement Act (MORE Act)**
 - Removes marijuana from the list of scheduled substances under the Controlled Substances Act and eliminates criminal penalties for an individual who manufactures, distributes, or possesses marijuana.
- **Respect States' and Citizens' Rights Act**
 - To amend the CSA so federal law does not preempt state law
- **Secure and Fair Enforcement Banking Act (SAFE Act)**
 - To allow federally overseen banks to serve cannabis-related businesses that comply with the laws in the states where they operate

Federal Laws Governing Marijuana

- Controlled Substances Act (“CSA”) (21 U.S.C. 801 *et. seq.*)
 - Marijuana is classified as Schedule I substance under the CSA and thus illegal to possess or use under federal law.
 - High Potential for Abuse
 - No Currently Accepted Medical Use for Treatment
 - Treated Same as Heroin, LSD, Ecstasy
- 2016 DEA denied attempt to re-schedule but agreed to increase access for research.
- June 2018 – FDA approved 1st drug derived from marijuana (Epidiloex) for 2 types of severe childhood epilepsy (.01% THC); classified as Schedule V narcotic by DEA.
- August 2018 – DEA announced drugs, including CBD with THC content below .01% are not considered Schedule 5 drugs as long as FDA approved.
- December 2018 – Agriculture Improvement Act of 2018 (“2018 Farm Bill”) – removed hemp from CSA and amended definition of hemp to include “all derivatives, extract, cannabinoids”
- April 2020 – DEA removes Epidiloex from Schedule V of CSA and becomes first marijuana-based medication that is not a controlled substance.

Marijuana and Federal Employment Laws

- **Americans with Disabilities Act (ADA)**

- “[a] qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs when covered entity acts on the basis of such use.” 42 U.S.C. § 12114
- “Illegal drug” = “the use of drugs, possession, or distribution of which is unlawful under the Controlled Substances Act...” 42 U.S.C. § 12111(6)(A)
- ADA does not require employers to accommodate use of marijuana, even if lawfully prescribed
- Accommodation obligation may exist for underlying medical condition, regardless of use of marijuana for treatment.
- ***What about applicants who disclose medical marijuana use for their treatment of a disability?***

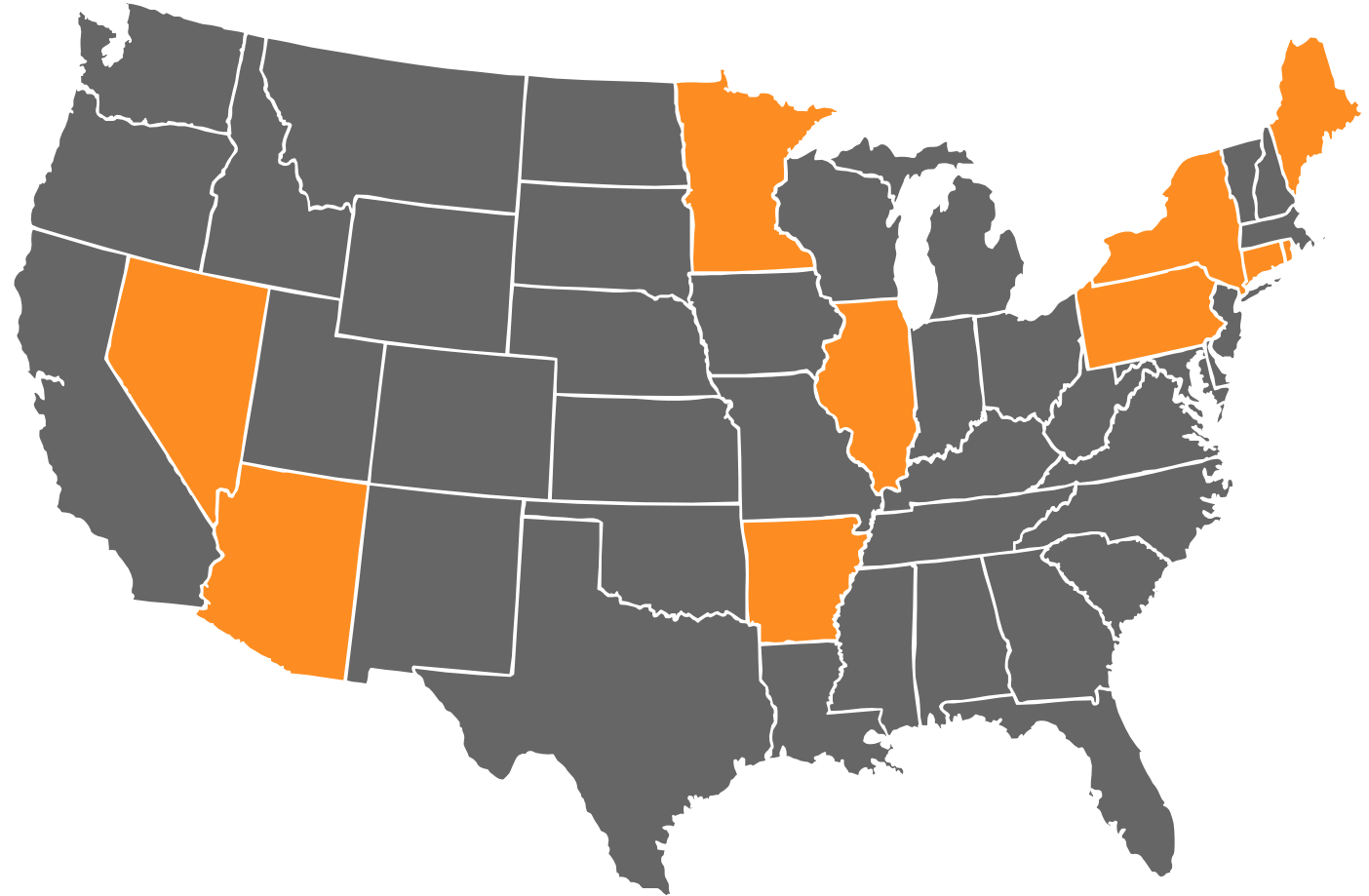
Marijuana and Federal Employment Laws

- **Family Medical Leave Act (FMLA)**

- Up to 12 weeks of unpaid leave for their own serious health condition or to care for a qualifying family member.
- FMLA permits employees to take leave on an intermittent basis or to work a reduced schedule under certain circumstances
- ***What about employees who use marijuana during FMLA time as treatment for medical condition?***

Some States Have Passed Medical Marijuana Laws Expressly Prohibiting Employment Discrimination

1. Arkansas
2. Arizona
3. Connecticut
4. Delaware
5. Illinois
6. Maine
7. Massachusetts
8. Minnesota
9. Missouri
10. Nevada
11. New Jersey
12. New Mexico
13. New York
14. Oklahoma
15. Pennsylvania
16. Rhode Island
17. Vermont
18. West Virginia



Recent Legal Trends

- Early cases – Pro-Employer – heavy reliance of federal law/preemption; federal employment laws rely on definition of “illegal drug” under CSA; courts found state laws only decriminalize use and do not require employers to tolerate it
- Recent Trend – Pro-Employee – courts largely relying on state anti-discrimination laws and requiring interactive process/potential accommodation absent “undue hardship:
 - Ex : *Wild v. Carriage Funeral Holdings, Inc.*, 2020 WL 1144882 (N.J. March 10, 2020): NJ Supreme Court held employee can sue under the New Jersey Law Against Discrimination (“NJLAD”) if the employee is terminated due to lawful use of medical marijuana outside of the workplace and during non-working hours

What's An Employer To Do?

Zero Tolerance Policies

- Carries least legal risk -- reliance of federal illegality; particularly for federal contractors and those in safety-sensitive positions but legal landscape is shifting pro-employee.
- Easy to apply policy
- Potential conflict with state disability statutes (reasonable accommodation) many states have explicit anti-discrimination laws for lawful MJ cardholders

Cease Marijuana Testing

- Considerable legal risk due to injuries, accidents, loss of federal contracts/licenses
- Largely removes risk of employment claims
- Client/public perception – are you tolerant of illegal drug use?
- Possible conflict with staffing agreement requirements with client

Case by Case Approach

- Reduced legal risk of employment claims
- Increased legal risk of injury/accident claims
- Increased burden and costs by engaging in interactive process



What An Employer Is Always Permitted To Do

Notwithstanding the myriad of state medical MJ laws, employers are:

- NEVER required to tolerate *possession* at work.
- NEVER required to allow *use at work or while working*.
- NEVER required to tolerate any type *impairment* at work or while working.

Common Issues: Pre-Employment

- What happens if an applicant informs you during the interview process that they have a medical MJ card?
- What questions am I permitted ask when presented with a medical MJ card?
- Are we still allowed to drug test applicants for MJ as part of application process in states where MJ is legal for adult use and/or medical use?
- Are we permitted to exclude MJ from our drug testing panel in an effort to assist recruiting/filling of jobs?

Common Issues: During Employment

- If an employee presents me with a medical MJ card and discloses that they use for their medical condition/disability, what should I do next?
- What if they simply indicate that they use MJ for non-medical reasons off-hours?
- Is there anything prohibiting drug testing for marijuana after an employee has been hired?
- Is there any reason why we should consider prohibiting the use of CBD products (gummies, oils/balms, additives)?

Questions & Answers





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