

In the Weeds: Navigating Legal Marijuana in Missouri Workplaces



Presented by:

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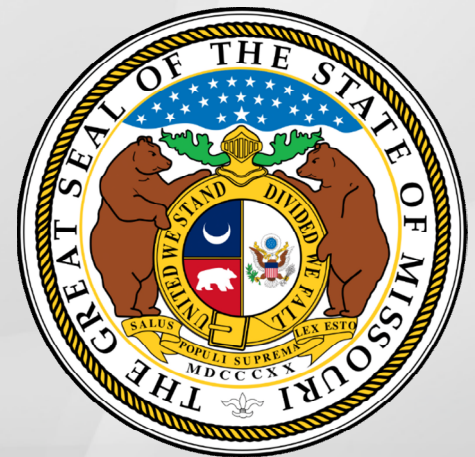
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WHAT WE WILL COVER

- What is Amendment 2?
- Common Employer Questions:
 - Do I have to let my employees work while high?
 - Can I drug test applicants and employees?
 - Is there a way to test employees for marijuana “impairment” or “influence”?
- Is Medical Marijuana use a reasonable accommodation in Missouri?
- Proactive Tips.

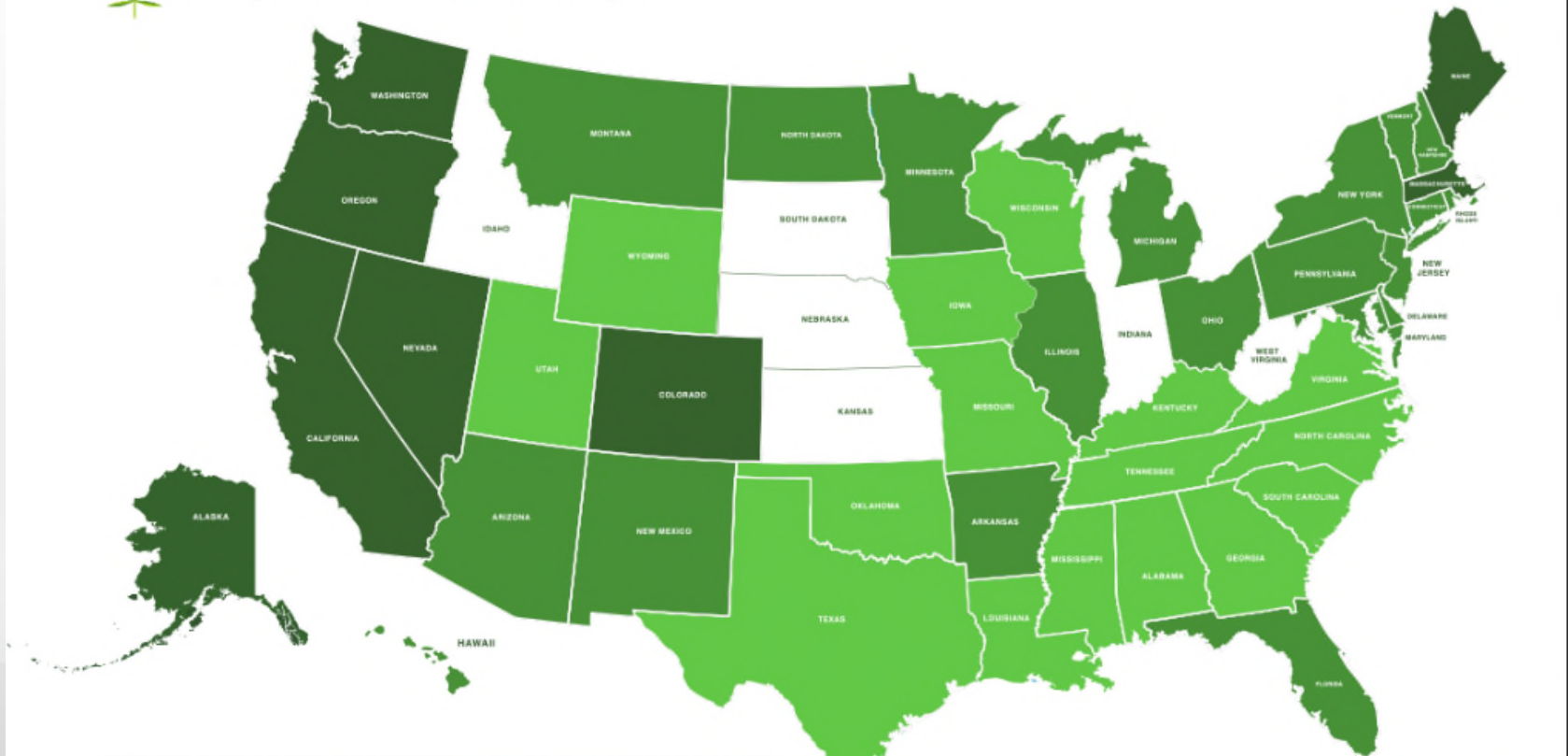
WHAT IS AMENDMENT 2?

- One of three medical marijuana measures appearing on Missouri's November 6, 2018 ballot.
- Adds an article to the Missouri Constitution legalizing medical use of marijuana.
 - Qualifying patients.
 - Allows qualifying people to grow their own plants.
- Makes Missouri one of 33 states in the country to legalize marijuana to some degree.





Marijuana Laws Differ State by State



- MEDICINAL & RECREATIONAL LAWS
- COMPREHENSIVE MEDICAL MARIJUANA LAWS
- LIMITED MEDICINAL MARIJUANA LAWS
LOW TETRAHYDROCANNABINOL (THC), HIGH CANNABIDIOL (CBD)
- NO MARIJUANA ACCESS

REFERENCES
 1. <http://www.acluf.org/assault/health/2010-medical-marijuana-law.asp>
 2. <http://www.acluf.org/bokunoy/11-10-legislation-regulate-marijuana-sup-d-04.asp>
STATE LAWS STATUS CURRENT AS OF DECEMBER 20, 2011. LOCAL GOVERNMENT WEBSITES HAVE ADDITIONAL INFORMATION ON THE LAWS REGARDING MEDICINAL AND RECREATIONAL MARIJUANA ON A STATE-BY-STATE BASIS.

WHAT IS AMENDMENT 2?

- **Amendment 2 vs. Federal Law.**
 - Amendment 2 does NOT change federal law.
 - Controlled Substances Act - continues to classify marijuana as illegal – even if it is used for medical reasons.



WHAT IS AMENDMENT 2?

- **New Missouri Law:**

- Missouri Department of Health and Senior Services will issue ID cards for Qualified Patients.
- Qualifying Patients can grow up to 6 plants.
- Purchase at least 4 ounces of cannabis from dispensaries on a monthly basis.
- Can possess ~ 60 day supply.
- Primary caregivers can possess more.



WHAT IS AMENDMENT 2?

- **Medical Conditions listed in Amendment 2:**
 - Qualifying medical conditions include specific conditions or symptoms related to, or side-effects from:
 - Cancer, epilepsy, glaucoma, HIV, intractable migraines unresponsive to other treatment, and any terminal illness;
 - Chronic medical conditions and psychiatric disorders such as Crohn's disease, autism, Alzheimer's disease, and post-traumatic stress disorder, to name a few.
 - Or in the professional judgment of physician, if a patient has a debilitating or other medical condition.





SUPER BRIEF HISTORY:

~November 5, 2018





SUPER BRIEF HISTORY:

November 6, 2018

Election results

Missouri Amendment 2		
Result	Votes	Percentage
✔ Yes	1,583,227	65.59%
No	830,631	34.41%

Missouri Amendment 2



Election date
November 6, 2018

Topic
Marijuana

Status
✔ *Approved*

Type
Constitutional amendment

Origin
Citizens

SUPER BRIEF HISTORY:

November 13, 2018

Jackson County Prosecutor Jean Peters Baker says her office **will not prosecute most** marijuana possession cases.

Peters said voters spoke loudly on the issue, noting three out of four Jackson County residents approved the measure. She says the office has also noted changing attitudes toward marijuana from juries.

The exceptions will include:

- Selling or distributing marijuana without proper authority.
- Possession of items associated with illegal sales, such as individual packaged bags of the drug.
- When large amounts of cash or firearms are found in conjunction with drug cases.
- Will prosecute cases involving drugged driving.
- Will prosecute when marijuana results in a child being harmed.



SUPER BRIEF HISTORY:

November 6, 2018 – present

What your employees think:





SUPER BRIEF HISTORY:

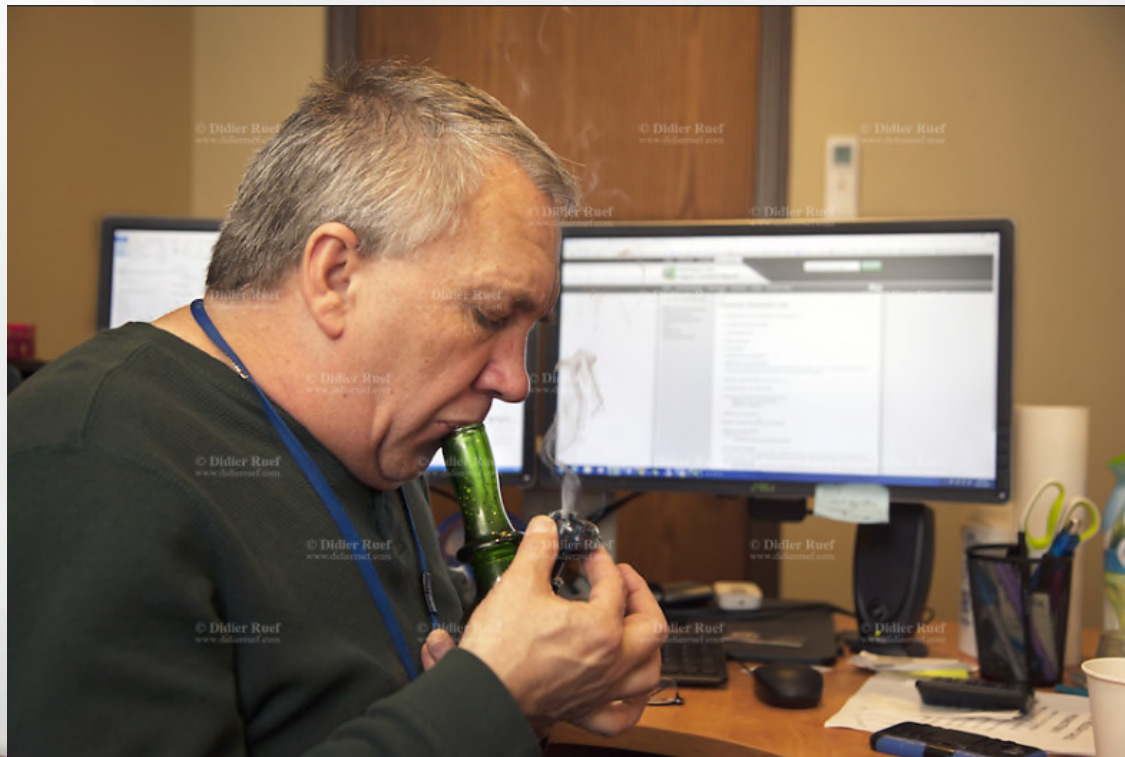
November 6, 2018 – present

What EMPLOYERS think:



EMPLOYER QUESTIONS:

Can employees consume marijuana at work?



EMPLOYER QUESTIONS:

Can employees consume marijuana at work?

- No.
- Amendment 2 prohibits public use of marijuana.
- What does your policy language say?
 - Consider adjusting policy language prohibiting smoking ingesting, or consuming marijuana in any form (vapor, edible, oil, etc.)



EMPLOYER QUESTIONS:

Do I have to let my employees work while high?

- No.
- Employers may still enforce drug-free workplace policies prohibiting employees from working under the influence of marijuana.

7. Additional Provisions

(1) Nothing in this section permits a person to:

- (a) Consume marijuana for medical use in a jail or correctional facility;
- (b) Undertake any task under the influence of marijuana when doing so would constitute negligence or professional malpractice; or
- (c) Operate, navigate, or be in actual physical control of any dangerous device or motor vehicle, aircraft or motorboat while under the influence of marijuana; or
- (d) Bring a claim against any employer, former employer, or prospective employer for wrongful discharge, discrimination, or any similar cause of action or remedy, based on the employer, former employer, or prospective employer prohibiting the employee, former employee, or prospective employee from being under the influence of marijuana while at work or disciplining the employee or former employee, up to and including termination from employment, for working or attempting to work while under the influence of marijuana.

EMPLOYER QUESTIONS:

Can I still drug test applicants and employees?

- Yes.
- New law does not prevent employers from drug testing.
- Continue to follow your drug testing policy and practice.
- What about safety-sensitive positions?
- May be required – DOT regulations.



- *“nothing in [the law] permits a person to operate, navigate, or be in actual physical control of any dangerous device or motor vehicle, aircraft or motorboat while under the influence of marijuana.”*

EMPLOYER QUESTIONS:

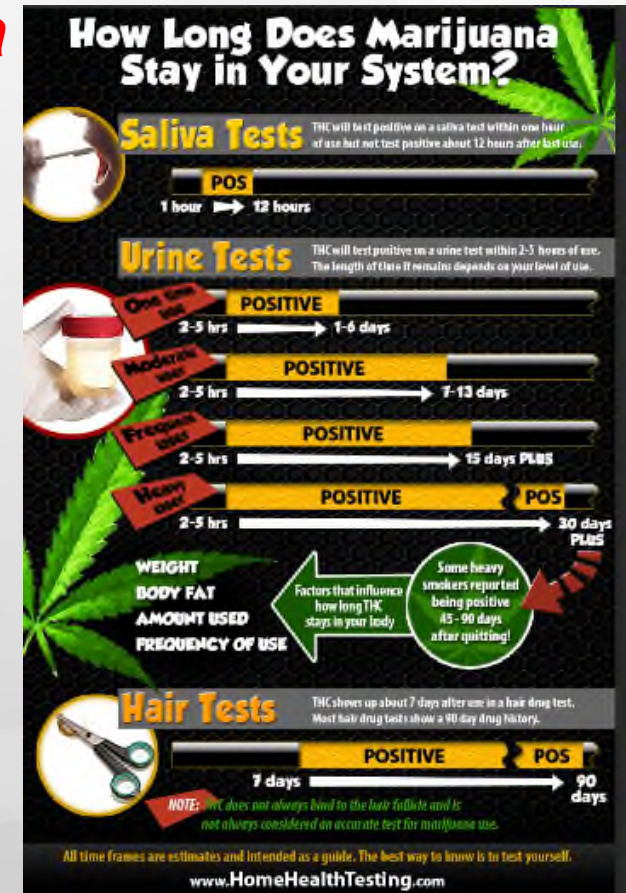
*Is there a way to test for marijuana
“impairment” or “influence”?*



EMPLOYER QUESTIONS:

Is there a way to test for marijuana “impairment” or “influence”?

- Maybe.
- Employee may test positive but not be “impaired” if they consumed marijuana days or weeks before.
- Much different from testing for alcohol “impairment”.
- Can still test and discipline workers who have THC in their system.
- Train managers to spot signs of marijuana impairment.



EMPLOYER QUESTIONS:

Is medical marijuana use a reasonable accommodation in Missouri?

- Too soon to tell.
- Amendment 2 does not address this issue.
- Lessons from other states...



EMPLOYER QUESTIONS:

Is medical marijuana use a reasonable accommodation in Missouri?

- Drug **addiction** is a **disability** under the Americans with Disabilities Act (ADA).
 - ADA protects rehabilitated (non-using) drug addicts.
 - ADA does not protect current illegal use of drugs.
- Leave for rehab may be reasonable accommodation.
 - If requested before a policy violation.
 - Must engage in “**interactive process**.”



EMPLOYER QUESTIONS:

Is medical marijuana use a reasonable accommodation in Missouri?

- **What is current use?**
- EEOC: Means “recently enough” to justify employer’s belief that drug use is an ongoing problem.
- Courts: Not limited to “the day of” or even within a matter of days or weeks before the event (e.g., accident or rule violation).
 - Intended to mean recently enough to indicate **actively engaged** in illegal drug use.



EMPLOYER QUESTIONS:

Is medical marijuana use a reasonable accommodation in Missouri?

- Family Medical Leave Act (FMLA).
- Drug addiction is a “serious health condition.”
- May use FMLA leave to participate in a substance abuse program.
 - But not to recover from the side effects of substance abuse (e.g., a hangover or drug-induced incapacity).
 - FMLA is not a shield if the employee has already violated policy.



Accommodating Medical Marijuana

- Employers won decisions in:

- California (2008);
- Oregon (2010);
- Washington (2011);
- Montana (2012);
- Colorado (2015); and
- New Mexico (2016)

do not have to accommodate medical marijuana use.

- **BUT...**

- Some states are giving medical marijuana users more protection.



Accommodating Medical Marijuana

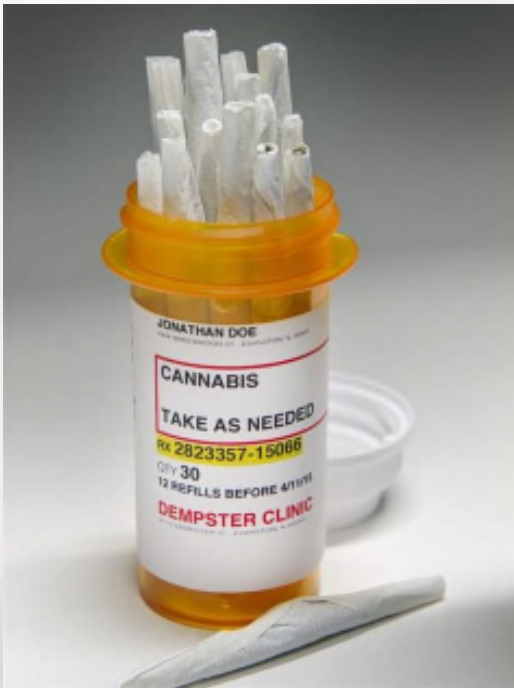
Barbuto v. Advantage Sales & Marketing, LLC (Mass. July 17, 2017)

- The Court held that a sales and marketing firm **discriminated against an employee of its Massachusetts operation who used medical marijuana to treat Crohn's disease when it fired her for failing a drug test.**
 - “Employers can’t use blanket anti-marijuana policies to dismiss workers whose doctors have prescribed the drug to treat their illnesses.”
 - The burden shifts to the employer to show that employee’s “***use of medical marijuana is not a reasonable accommodation*** because it would cause an undue hardship to the employer’s business.”
 - An employer may still refuse to accommodate, but employer **must prove the undue hardship.**



Accommodating Medical Marijuana

Noffsinger v. SSC Niantic Operating Co., No. 3:16-cv-01938 (D.Conn. Aug. 8, 2017)



- Applicant specifically informed the company that she was using medical marijuana to treat PTSD when she applied for job and took drug test.
- Complaint alleged that the company made representations to applicant throughout the application process to make her believe she had a secure job offer and then waited to rescind her job offer until one day before she was scheduled to begin work (and after she had already left her prior job), causing plaintiff to experience severe emotional distress, including anxiety, sleeplessness, and loss of appetite.
- Court found that applicant had viable claim for negligent infliction of emotional distress and possibility to collect damages for emotional distress.

Accommodating Medical Marijuana

Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680 (R.I Super. Ct. Providence County, May 23, 2017)

- The Court held that Section 21-28.6-4(d) prohibited employers from refusing to employ “a person solely for his or her status as a cardholder.”
- Plaintiff informed Defendants that she would comply with all state medical marijuana laws and was a registered cardholder.
- Defendants did not contest that they denied employment based on the fact that she could not pass the drug screen.
- Court **granted summary judgment** to Plaintiff finding company violated law by refusing to accommodate medical marijuana cardholder status.





DRUG TESTING MARIJUANA:

Do you test or not?

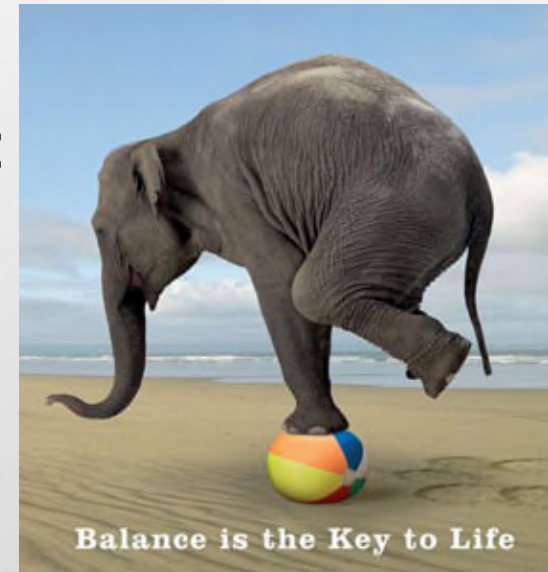


DRUG TESTING MARIJUANA:

Do you test or not?

Adopt an Effective Drug Testing Policy.

- “Effective” means it balances your interests in:
 - Minimizing drug-related problems; AND
 - Maintaining a safe, adequate workforce.
- Focus on prevention, rather than punishment.
 - Don’t scare away potential applicants.
 - Test only as necessary to protect safety and productivity.
 - Encourage early intervention.
 - Leave room for management discretion.



DRUG TESTING MARIJUANA: *Do you test or not?*

Be Honest With Yourself.

- You won't have many workplace drug problems if you test all applicants, refuse to hire anyone who fails a drug test, and terminate every current employee who fails a test.
 - Probably will have trouble finding and keeping employees.
 - Might have trouble with anti-discrimination laws, federal contracts, union labor agreements, etc.
- How much testing do you really need?



DRUG TESTING MARIJUANA:

Do you test or not?

- Is policing morality more important than running your business?
- Require only as much testing as you really need.
 - Do you need to know whether the person you're considering hiring as grocery bagger has smoked a joint in the past month?
 - Maybe you don't need to test for jobs that are not safety sensitive, don't involve access to cash or drugs, etc.
 - Reasonable suspicion is useful for most jobs, but pre-hire and random testing may not be necessary.

DRUG TESTING MARIJUANA: *Do you test or not?*

ADA and Drug Testing Policies



- Post-offer/pre-employment medical examinations and inquiries are permitted.
- After person starts work, medical examinations and inquiries must be job-related and consistent with business necessity.
 - *E.g.*, evidence of a job performance or safety problem; required by other federal laws; to determine current fitness to perform a particular job; voluntary examination as part of an employee health program.

DRUG TESTING MARIJUANA:

Do you test or not?

Plan for test failures.

- What will you do if a key employee fails or a whole group fails?
- What if your “superstar” fails, and so does the person who just complained of harassment?
- Back-fill plan? Consistent enforcement? Discrimination?



DRUG TESTING MARIJUANA: *Do you test or not?*



What about ZERO TOLERANCE?

Zero tolerance should not mean “zero thinking.”

- Termination for every infraction, big or small, is not “effective.”
- Leaves no room for employer’s discretion.

DRUG TESTING MARIJUANA: *Do you test or not?*

SCENARIO:

All four members of your QC department were randomly selected for drug testing today.

All four employees failed.

Your zero tolerance drug testing policy says everyone who fails a drug test will immediately be terminated.

But, you can't run your production line without QC.

Ignore your own policy?

Apply your policy and shut down?

This policy is not effective!



DRUG TESTING MARIJUANA:

Do you test or not?

SCENARIO:

The QC department employees' test results:



Two tested positive for marijuana.

One tested positive for Methadone.

One tested positive for heroin, and appeared high.

If the policy had left room for discretion, you could:

Give the marijuana smokers a last chance agreement.

Suspend the Methadone user, pending proof of prescription.

Terminate the heroin user.

DRUG TESTING POLICY: *Effective Written Policy*

Drug Testing Policy Should Address:

- Expectations and behaviors that violate the policy.
- Who, when, and why you'll test.
- Substances tested for.
- Inspection issues.
- Consequences of a positive test.
- Consequences of refusal to test.
- Benefits of early intervention.



DRUG TESTING POLICY: *Effective Written Policy*

- Most employers test in one or more of these circumstances:
 - Post-offer/Pre-employment.
 - Reasonable suspicion.
 - Random.
 - Post-accident.
 - Fitness for duty/return to work.
 - Periodic.



DRUG TESTING POLICY: *Effective Written Policy*

Consequences of Policy Violations

- Notice improves deterrence.
- Announce potential consequences:
 - Discipline or termination.
 - Last chance agreement, mandatory drug rehabilitation program, follow-up testing.
- Be reasonably specific, but leave room for employer discretion.



DRUG TESTING POLICY: *Effective Written Policy*



Consequences of Policy Violations

- Policy should make clear:
 - Must fully cooperate in testing process.
 - Must not attempt to delay, interfere with, or defeat testing process;
 - Must complete all required forms; and
 - Must comply with collection and testing personnel's instructions.
 - Must authorize lab to release results to employer.
 - Anything less will result in same or harsher consequences as a positive test result.

DRUG TESTING POLICY: *Effective Written Policy*

LAST CHANCE AGREEMENTS

- Potential alternative to termination.
- Avoids firing a “good” employee.
- Possible conditions of continued employment:
 - Entering and completing a rehab program;
 - Periodic and/or random drug testing for one or two years after;
and
 - Immediate termination for any violation of LCA or violating any significant company policy.
- Leave room for employer’s discretion.



Other Marijuana Issues

- Acknowledge times have changed.
- How to handle inquiries from employees:
 - It's still an illegal drug under federal law.
 - Missouri employers can still test for it, and take adverse employment action.
 - Train managers – what to do if an employee reports medical marijuana use.
- What if you want to have a more relaxed standard?
 - Consider safety-sensitive positions and federal obligations (e.g., DOT regulations and federal contracts) before relaxing standards.



PROACTIVE TIPS:

Next Steps for Missouri Employers

1. Revise employee handbooks and drug-testing policies;
2. Determine applicable DOT regulations;
3. Review any federal government contracts;
4. Train managers to identify marijuana impairment;
5. Train managers for conversations with employees regarding medical marijuana; and
6. Carefully consider medical marijuana-related accommodation requests.

Final Questions



The logo for Fisher Phillips, featuring the company name in white text on a red, stylized banner.

**Fisher
Phillips**

Thank You



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ON THE FRONT LINES OF WORKPLACE LAWSM