

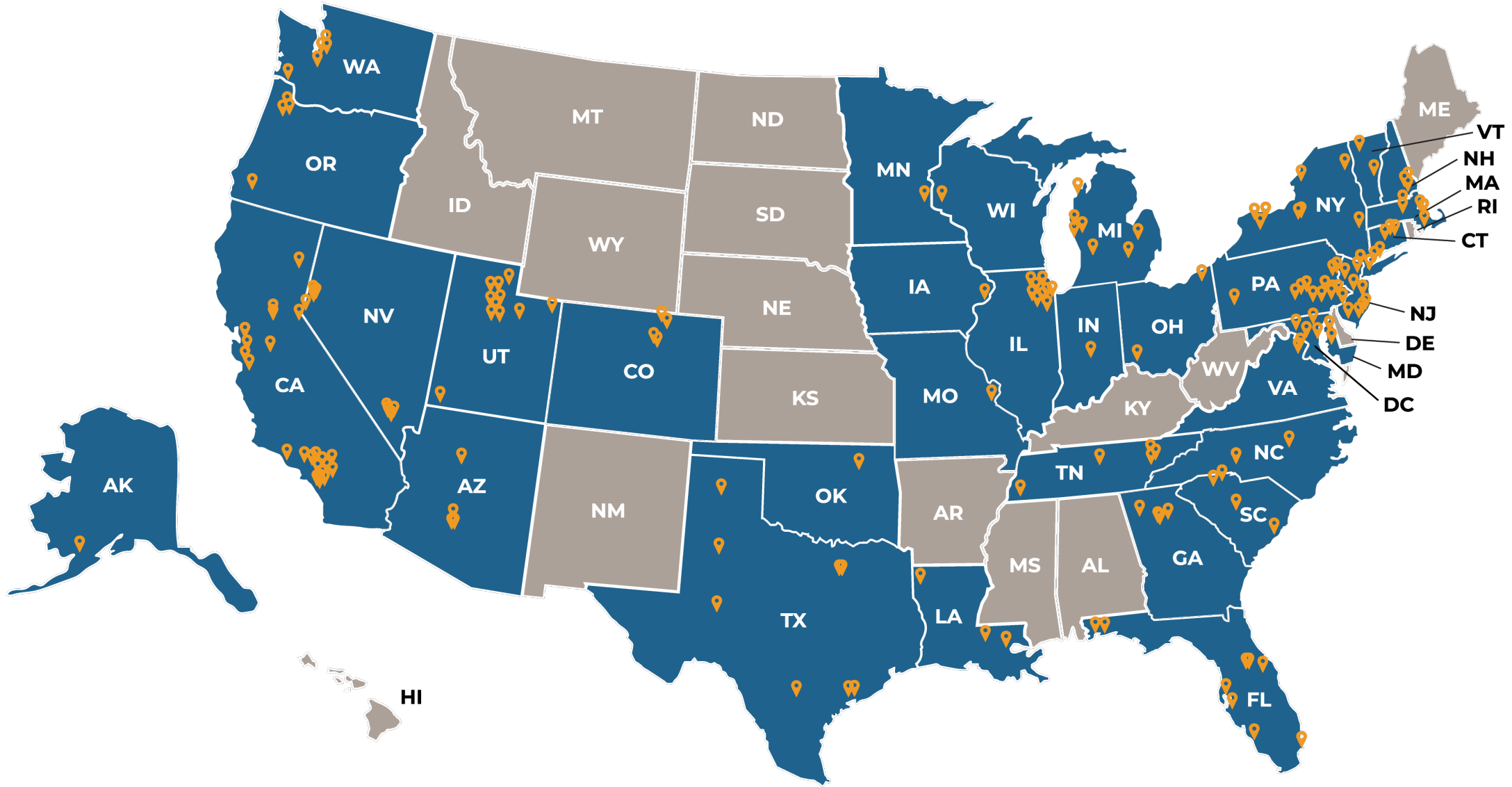
A background image showing two people, a woman and a man, smiling and looking at each other. The image is overlaid with a teal and blue geometric pattern of overlapping triangles.

Welcome to Our Webinar Series:  
Cannabis is Now Legal in Maryland: What Happens Next?

Doug Desmarais, Esq. | *Smith & Downey*

August 15, 2023

# Welcome to clients & friends of our Alera Mid-Atlantic Region Partner Firms!



During the Webinar if You  
Have Any Questions, Please  
Feel Free to:

- Enter questions via the “Chat” feature in the Zoom meeting

Have Questions?

# Reminders

Complete our 2-minute post webinar [SURVEY](#). All completed surveys will be entered to win a \$100 Goldbelly Gift Card!



# Upcoming Events

## **4 Practices That Can Make or Break Your Enrollment Communications**

August 17th, 2 PM - 3 PM EST

## **Quarterly Compliance Update**

September 12th, 2 PM - 3 PM EST

## **Streamlining Open Enrollment**

September 21st, 2 PM - 3 PM EST

## **HR Roundtable - Dominate the New World of Work: Build High-Performing Teams in Hybrid Environments**

September 26th, 8:30 AM - 10:30 AM EST

# Join Us at Our 2023 Employee Wellbeing Fair

- Open to all employees
- Experts will share key insights on trending topics in the wellbeing space
  - Topics covered: physical, mental, social, and financial health & wellbeing
- When: September 14<sup>th</sup>, 11 am - 4:15 pm EST
- Click [Here to Register!](#)



Welcome

Doug Desmarais, Esq., *Smith & Downey*

# Marijuana in the Workplace

August 15, 2023

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# Disclaimer

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Note that this presentation is intended as a general discussion of the law and is not intended as legal advice for any particular situation.

# Fast Facts

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- Marijuana is the most commonly used federally illegal drug in the U.S. (*CDC.gov*)
  - 46% of U.S. adults report that they have used marijuana at least once in their lifetime (*2021 National Survey on Drug Use and Health*)
  - app. 48.2 million Americans used at least once in 2019 (*CDC.gov*)
- Medical marijuana is legal in 38 states + D.C.
- Recreational marijuana is legal in 23 states + D.C.

# Fast Facts, Cont.

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- According to Columbia University, legalization of marijuana led to rise in cannabis use, although the study showed that cannabis use disorder rates generally remained the same
- THC, the psychoactive component of marijuana, is detectable for up to:
  - 90 days in hair
  - 1 day to 1 month or longer in urine (depending on individual use)
  - 24 hours in saliva
  - 12 hours in blood

*(American Addiction Centers)*

# In Maryland...

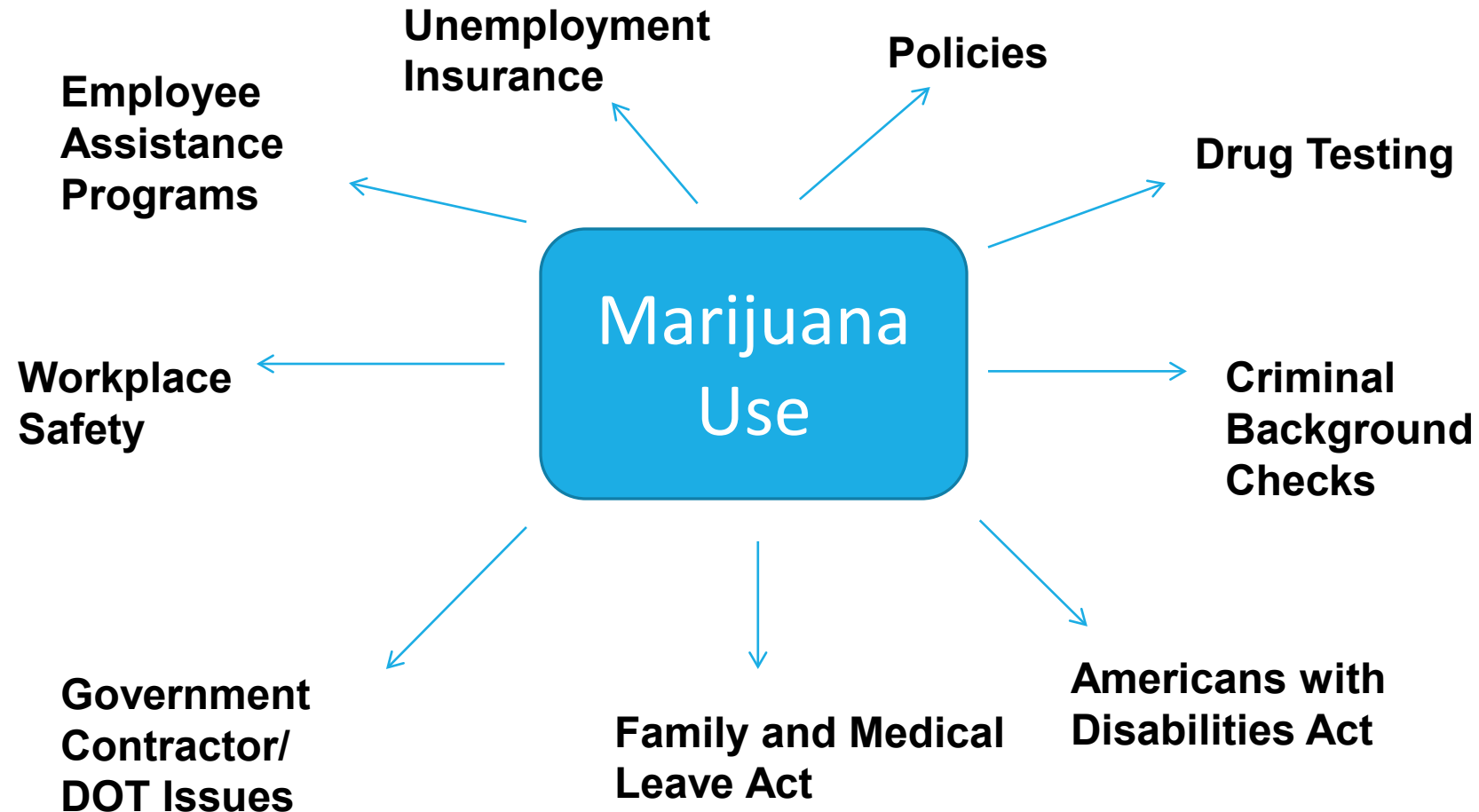
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TRUE  
 FALSE

- Medical marijuana is legal?
- Recreational marijuana is legal?
- Employers have to accommodate employees who use medical marijuana?
- Employers can ask about marijuana convictions in a job interview?

# Marijuana in the Workplace

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# Medical Marijuana in Maryland

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## Background:

- Law passed in 2013, Overhauled in 2014; first dispensary licensed 2017

## Patient Access:

- Certifying physicians/providers register and are approved by State Commission
- Licensed dispensaries distribute medical marijuana; limited licensed cultivators
- “Qualified patients” may possess up to a “30-day supply” – no more than 4 oz dried
- Shields qualifying patients from “arrest, prosecution, or any civil or administrative penalty” associated with compliant use\*
  - *\*Has no impact on federal law*

## Approved Diagnoses:

- List of approved medical conditions; plus a “catch-all”

# Do we have to accommodate medical marijuana use?

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- Qualifying patient may not be “denied any right or privilege” because of compliant medical marijuana use

**BUT...**

- Maryland Commission website – law does not prevent employers from testing for cannabis or taking any action against employee who tests positive (for any reason) – see [https://mmcc.maryland.gov/Pages/patients\\_faq.aspx](https://mmcc.maryland.gov/Pages/patients_faq.aspx)
- **Untested in Maryland courts!**
  - Whatever your approach, be consistent!

# Medical Marijuana in Surrounding States

	Washington, D.C.	Virginia	Pennsylvania
<b>Allowed?</b>	Yes	Yes	Yes
<b>Have to accommodate use?</b>	Yes (see next slide)	Cannot take adverse action against EE for lawful use of medical marijuana	Cannot take adverse action against EE for lawful use of medical marijuana
<b>Qualifying Conditions</b>	Persons at least 21 years of age may self-certify their application in lieu of producing referral from healthcare provider	Any diagnosed condition or disease determined by qualifying healthcare provider to benefit from such use	Long list of specific qualifying conditions – see <a href="https://www.pa.gov/guides/pennsylvania-medical-marijuana-program/#HowtoGetMedicalMarijuana">https://www.pa.gov/guides/pennsylvania-medical-marijuana-program/#HowtoGetMedicalMarijuana</a>



# Washington, D.C. – Cannabis Employment Protections Amendment Act of 2022

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- **Cannot take adverse action against employees for:**
  - (1) legal use of cannabis (off-duty);
  - (2) status as medical marijuana program patient; or
  - (3) having presence of cannabinoid metabolites in system without additional factors indicating impairment
- **Must treat medical marijuana same as any other prescribed medication – unless:**
  - (1) employee in “safety-sensitive position” (as defined by law) or
  - (2) it would place employer in position of violating federal law, regulation, contract, or funding agreement
- **Went into effect on **July 13, 2023****

# What about accommodations under the ADA?

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- Under ADA (federal law), courts follow federal view, which treats marijuana as illegal drug
- ADA protects people in recovery – no longer engaging in illegal use of drugs
- Does not require accommodation of ongoing use of illegal drugs
- **BUT** proceed cautiously – potential duty to consider alternative accommodations based on underlying disability
- *Eccleston v. City of Waterbury* (D. Conn. March 22, 2021)

# Substance Use and the Americans with Disabilities Act

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## Drug Addiction

- **Current** use of illegal drugs is not a protected disability

## Alcoholism

- Current alcoholism **is** a protected disability
- May hold alcoholic EEs to the same standards and work conduct rules as other EEs

## ADA Interactive Process

- Reasonable accommodation: Modified work schedule to attend AA meeting vs. NO right to modified work schedule because hung over

# Substance Use and the Americans with Disabilities Act

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## Prescription Drug Use

- Do not ask all job applicants/employees about prescription use! Inquiries must be **job related & consistent with business necessity**
- Focus on whether prescription medication impairs EE's ability to perform the essential functions of the job safely or in an acceptable manner
- Blanket prohibition against on-the-job use of prescription medication violates requirement to provide individualized accommodations

# How would you respond?

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- Zach works in Maryland. He asks to speak with HR about an accommodation request:

“I have chronic pain and I just got a medical marijuana card. I will never use at work or report to work intoxicated, but I’d like to take some time off when my condition flares up to treat the pain.”

# How would you respond?

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1. **What does your policy say?** Do you allow employees to use medical marijuana off-site and during non-working hours?
2. **Move into interactive dialogue mode!**
  - *Don't shut down the conversation, even if your policy prohibits off-duty use of marijuana*
  - *May also be an FMLA event!*
3. **Dig deeper to understand what Zach is actually requesting.**

# Recreational Marijuana in Maryland

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- November 2022 – Maryland voters approved ballot measure to legalize recreational marijuana
- **As of July 1, 2023** – recreational use permitted (**ages 21+**)
  - Up to 1.5 oz. cannabis or up to 12 grams “concentrated” cannabis (e.g., vape products)
  - Any cannabis product containing up to 750 milligrams THC (e.g., edibles)
  - Possession more than 1.5 oz, up to 2.5 oz. = civil offense
- Can grow up to 2 plants/household – must be out of view and secured to not accessible by individuals under age 21

# The first 30 Days . . .

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**\*\*\*\$87 Million Dollars\*\*\***

- Flower, including bud and pre-rolled joints: \$52.6 million.
- Concentrates, including vape products, were the next most popular cannabis product, followed by edibles.



# Recreational Marijuana in Maryland, Cont.

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- Smoking in public prohibited – civil offense - \$50 fine for first offense
- Licensed onsite consumption establishments will be allowed to operate where individuals can smoke outdoors on the premises (indoor smoking is prohibited at on-site consumption facilities)
- Smoking while driving (including passengers while car is in use) remains illegal
- State will set up highly-regulated cultivation and distribution system – **can only buy marijuana legally through this system**

# Recreational Marijuana in Maryland, Cont.

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- Can share cannabis with other adults without payment or trade
- Be Aware: Transfer in excess of personal use amount or exchange of money may qualify as possession with intent to distribute, which may be criminally charged w/ penalties of 3 years imprisonment and/or \$5,000 fine

# Recreational Marijuana in Maryland, Cont.

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- Expungements and Records

- Dep't of Public Safety has until July 1, 2024 to expunge all cases in which possession of cannabis the only charge in the case and the charge was issued before July 1, 2023
- Law prohibits Maryland Judiciary Case Search database from displaying case records where simple marijuana possession (small amount) was the only charge

# Recreational Marijuana in Maryland, Cont.

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- Maryland lawmakers set up Cannabis Referendum and Legalization workgroup
- Recognized limits of drug testing – difficult to determine impairment level from THC levels. Lawmakers considering better roadside testing
- Legislature may revise drug testing laws in the future to protect employees who test positive for cannabis but are not impaired at work

# What does this mean for employers?

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- Currently, Maryland law does not directly address employee use of recreational marijuana - **Can continue to prohibit use/impairment on job AND off-duty use (even if legal)**
- Cannabis or hemp products must be added to the existing ban on smoking in any indoor place of employment under the Clean Air Act - **Revise no smoking policies**
- Use of marijuana in vehicles continues to be illegal— **This includes passengers! Revise employee driving policies**

# Recreational Marijuana in Surrounding States

	Washington, D.C.	Virginia	Pennsylvania
<b>Allowed?</b>	Yes	Yes	No
<b>Parameters</b>	Adults 21+ may possess not more than 2 oz of cannabis; may grow up to 6 plants, no more than 3 of which are mature NO use in public	Adults 21+ may possess not more than 1 oz of cannabis ; may grow up to 4 plants per household NO use in public	*But on July 6, 2023, bipartisan legislatures introduced bill to legalize small amounts for adults age 21+
<b>Important Considerations</b>	“Adult sharing” without remuneration is legal; “selling” is illegal – but new law effective March 2023 broadens retail abilities  Neither driver nor passenger may use while vehicle in use	“Adult sharing” without remuneration is legal; “selling” is illegal (including “gifting” by business)  Neither driver nor passenger may use while vehicle in use	Similar bill was co-sponsored in 2021 and failed to pass, but sponsors believe “the time has come” and referenced changes in neighboring states like MD

# Best Practices for Drug Policies

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- **Explain expectations** regarding marijuana use during non-working hours, outside of the workplace
  - Different standards medical marijuana vs. recreational?
  - Different standards for different employees (e.g., subject to DOT regs?)
- **Describe potential consequences for positive test & refusal to submit to testing**
- **Drug “use” vs. “impairment”** – THC levels for regular vs. casual user

# Drug Testing in Maryland: Special Rules for Job Applicants

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- **Can't test before conditional offer of employment!**
- **Preliminary screening procedure:**
  - Uses single test device that can be administered at worksite
  - Meets federal FDA requirements for commercial distribution
  - Meets generally accepted cutoff levels
- **Required retesting** for positive results
- **Provisional employment** pending test results
- **Required training** – privacy and integrity



# Drug Testing: Random v. Reasonable Suspicion

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Random = Truly random

## Reasonable Suspicion

- Objective and reasonable suspicion that employee is intoxicated or has ingested drugs while working
- Work-related accident or injury – *only if some reason to suspect drugs/alcohol might have played role!*
- Importance of documentation

# Drug Testing in Maryland: Procedures

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Must be performed by **State-certified lab**

- No breathalyzer tests!
- No hair samples!

**Provide notice** of name and address of testing lab at time of test, upon request

*\*Procedures outline in Md. Code Health Gen. § 17-214*

# Drug Testing in Maryland: Procedures, Cont.

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Post-test notice to employee after confirmation of positive drug test **must include:**

- Lab report
- Written policy on drugs/alcohol
- Written notice of intent to take negative employment action
- Provision in the law that permits an employee to request independent testing of the same sample

Verification of test results – **SAME SAMPLE!**

Consequences for refusal to submit to testing

# Prescription Drugs

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- **Confidentiality:** Testing lab may not disclose info. regarding EE use of: (1) **legal non-prescription drugs** (excluding alcohol); or (2) **medically prescribed drugs**, unless EE unable to demonstrate lawfully prescribed
- ERs may have zero-tolerance policy prohibiting EEs from reporting to work impaired (even if caused by a prescription drug)
- May not terminate EE for prescription drug use without evidence of **actual impairment**

# Unique Considerations for Drug Testing

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## HEALTH CARE FACILITIES AND HIPAA

- Increased risk of converting information to PHI

## UNIONIZED WORKFORCE

Drug testing = mandatory  
subject of bargaining

Unionized employee may  
have right to consult union  
rep. before taking drug test

# Criminal Background Checks

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**EEOC:** All criminal background checks must be “*job-related* for the position in question and *consistent with business necessity*”

## **Ban-the-Box Laws:**

- Maryland
- Plus certain counties have unique requirements:
  - Baltimore City
  - Montgomery County
  - Prince George’s County
- Washington, D.C.

# Family and Medical Leave Act

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- “**Serious health condition**” under the FMLA may include substance abuse
- May take leave under FMLA for substance abuse treatment referred by or administered by health care provider
- Qualified treatment may include stay in rehab facility
- DOL Rule – **Need for established policy for discipline based on substance abuse**

# Government Contractor Issues, Cont.

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Drug-Free Workplace Act of 1988 requires covered federal contractors to:

- **Publish and provide** drug-free workplace policy statement;
- **Notify employees** that as a condition of employment must comply with drug-free workplace policy and must notify employer of conviction of workplace drug crime
- **Establish a drug-free awareness program**
- **Impose penalty on** – or require satisfactory participation in drug rehab program by – any employee who is convicted of workplace drug crime



# If we're subject to DFWA do we have to...

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Drug test?

- **No!**

Fire an employee who uses marijuana outside of work?

- **No!**

Fire an employee who uses marijuana at work?

- **Not necessarily!**

# Department of Transportation

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- DOT has strict mandatory drug testing program for safety-sensitive transportation employees
- **Does not** authorize medical marijuana under state law as valid medical explanation for positive drug test!

# Workplace Safety

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## Occupational Safety and Health Act (“OSHA”) and Maryland OSHA (“MOSHA”):

- General duty to provide safe work environment

## Dram Shop Laws:

- Under MD law, ERs generally not responsible for actions of EEs who leave work intoxicated
- But proceed cautiously!

## Workers’ Compensation:

- General disqualification for injury caused by EE’s own improper drug use or intoxication
- Injury caused by another person’s use of marijuana likely covered

# Employee Assistance Programs

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## What are the legal concerns?

- **ADA** - Mandatory referral could give rise to ADA claims (e.g., perceived disability)
- **EEOC** – ER may not force EE with disability to choose between EAP participation or discipline in situations where other EEs would not be disciplined
- **Other Legal Concerns**
  - ERISA
  - HIPAA
  - Affordable Care Act

# Unemployment Insurance

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## On-the-Job Drug/Alcohol Abuse:

- Employees fired for drug/alcohol abuse on the job have engaged in misconduct

## Examples:

- Claimant drove the employer's truck while under the influence of alcohol. This was gross misconduct. *Howard v. Ray Sears and Son*, 517-SE-87.
- Claimant took and gave another employee controlled dangerous substances while on dinner break. Both reported back to work, and other employee behaved in crazed manner. This was gross misconduct. *Hadaway v. Convention Complex*, 98-BR-88.

# Unemployment Insurance, Cont.

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## Drug Abuse/Alcoholism as Diseases:

- Maryland DLLR takes position that drug abuse and alcoholism are diseases
- Where alcoholism results in “irresistible compulsion to drink,” resulting absenteeism and performance problems not misconduct for UI purposes
- Does not excuse conduct where employee refused chance to get treatment, deliberately failed to complete treatment, and/or has not shown urge to drink is irresistible compulsion

# Unemployment Insurance, Cont.

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**Refusal to Submit to Drug Testing may be grounds for gross misconduct**

- But ER must follow all legal drug testing procedures

**Example:** Claimant appeared impaired, smelled of marijuana, and refused drug test against ER's policy, direct order, and warnings. Claimant could have taken drug test in private. Claimant's actions were gross misconduct. *Conney v. Fort Howard Cup Corporation*, 552-BH-88.

# Questions on Marijuana/ Drug Testing Issues?

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# Your Presenter

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