Cannabis Products & Employment: Do you Even Drug Test Bro?

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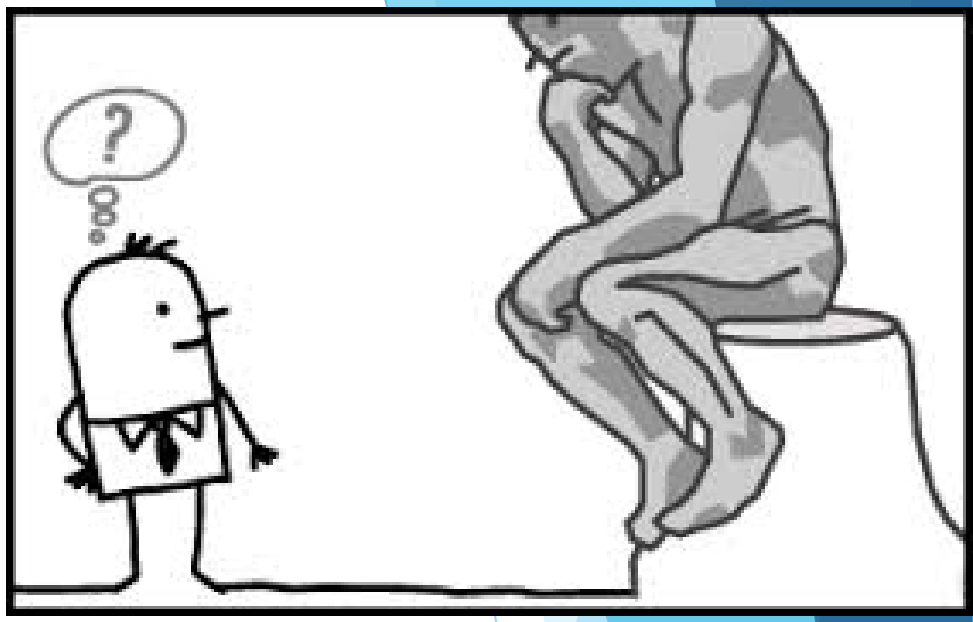
Employer's Trick Bag

How or if to address off-duty use after your state legalizes marijuana for medicinal or recreational use

Drug testing does reveal the presence or absence of marijuana metabolites (specifically for THC) but does not indicate whether an employee is impaired

Safety-sensitive employees using unregulated hemp products may inadvertently ingest THC at intoxicating levels and fail drug tests

Employees may have legal protections against adverse employment actions related to legal use of legal products



WHAT IS CBD?

- CBD IS CANNABIDIOL, WHICH IS ONE OF 87 CHEMICALS, CALLED CANNABINOIDS, FOUND IN THE CANNABIS PLANT
- IT IS FOUND IN BOTH HEMP AND MARIJUANA
- CBD PRODUCTS DERIVED FROM INDUSTRIAL HEMP ARE LEGAL IF THE THC CONTENT IS BELOW 0.3%
- INDUSTRIAL HEMP ARE GENERALLY TESTED PRIOR TO REFINEMENT TO DETERMINE WHETHER THE HEMP IS BELOW 0.3% THC
- A 2017 STUDY FROM THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION FOUND THAT 21.43% OF THE SAMPLED CBD PRODUCTS FOUND ONLINE CONTAINED THC LEVELS HIGH ENOUGH TO CAUSE INTOXICATION RESULTING IN A POSITIVE DRUG TEST
- THIS MEANS THAT THERE ARE ILLEGAL PRODUCTS AVAILABLE FOR PURCHASE

TETRAHYDROCANNABINOL (THC)

- THC IS TETRAHYDROCANNABINOL, WHICH IS ANOTHER ONE OF 87 CHEMICALS FOUND IN THE CANNABIS PLANT, CALLED A CANNABINOID, WITH PSYCHOACTIVE PROPERTIES
- IS FOUND IN MARIJUANA AND HEMP PLANTS
- COMMON MISCONCEPTION THAT CBD PRODUCTS DO NOT CONTAIN THC, WHICH HAS CAUSED A SIGNIFICANT NUMBER OF EMPLOYEES ACROSS THE COUNTRY TO LOSE THEIR JOBS

- Important to know whether cannabidiol in your state can come from any source
- In Kentucky and many states with an industrial hemp program, cannabidiol products may only come from hemp
- Do you know whether your state tests any products for THC content?

HEMP AND THE LAW

What is the deal with hemp products?

- LEGAL
  - CBD Products derived from legally compliant hemp
  - Epidiolex, which is a federally regulated prescription medication for seizures

- ILLEGAL
  - Any hemp product containing more than .3% THC

Why can untested products be sold on the marked?

- There is no way to know whether CBD oil or other refined products contain THC absent expensive testing
- Some labs are as inexpensive as $100/sample and this is on the open market, not government testing facilities
- Equipment to test THC levels may cost around $600,000
- Consider how expensive that is to regulate every CBD product sold in the United States









Legal vs. Illegal
CAN YOU TELL THE DIFFERENCE?









Off-Duty Use

- Status of the law
- Status of the employee
- Source of Information



Legal Protections for Employees

- You need to know whether your medicinal or recreational marijuana statute contains a private right of action
- Cannot have a zero tolerance policy for marijuana for all employees if it does
- Only when an employer can lose monetary or licensing-related federal benefit can an employer prohibit an applicant or employee from medical marijuana use
- No state allows employees to use or be impaired by marijuana at work or on the employer's premises
- Most states excepts safety-sensitive positions from the zero tolerance
- Check your Human Rights Statute too!!

Federal Preemption

- Circuit Split as to whether courts recognize the Controlled Substances Act as preempting any compassionate use act requiring employers to violate federal law, aka allow marijuana use
- Some circuits recognize marijuana use as covered under a state's human rights act
- Question is whether it is a reasonable accommodation for an employee to use medicinal marijuana?



But you Said…



- Does your legalization statute provide a private cause of action and some employee protections
- Is it reasonable to require an employer to accommodate an act prohibited under federal law

Americans with Disabilities Act

- Addiction and alcoholism is considered a disability as they are a “mental impairment that substantially limits one or more of the major life activities;”
- Important to guard against verbiage that would imply the employer regards an employee as having addiction or alcoholism
- If an employee tells you they are an addict or an alcoholic, it is important to walk through the ADA analysis
- Remember that it is no longer required for the employee to use triggering language to request an accommodation

Union Shop?

- Collective bargaining presents different issues
  - Are there additional rights in the agreement for medical marijuana card holders?
  - Can you terminate for first offense?
  - Must you offer EAP or a SAP program then return to work?
  - When your contract is up, should you bone up after your state legalizes medicinal or recreational marijuana?

Safety Sensitive Employees

- A position in which performance by a person under the influence of drugs or alcohol would constitute an immediate or direct threat of injury or death to that person or another
  - Heavy equipment operators and mechanics
  - Law Enforcement, Paramedics, EMTs, Fire, Prison Guards
  - Persons with supervision and care of children, medical patients or vulnerable persons
  - Civilians in correction facilities
  - CDL Holders
  - Personnel driving city cars with some safety sensitive component
  - Police dispatchers
  - NOT ALL EMPLOYEES OF THE CITY

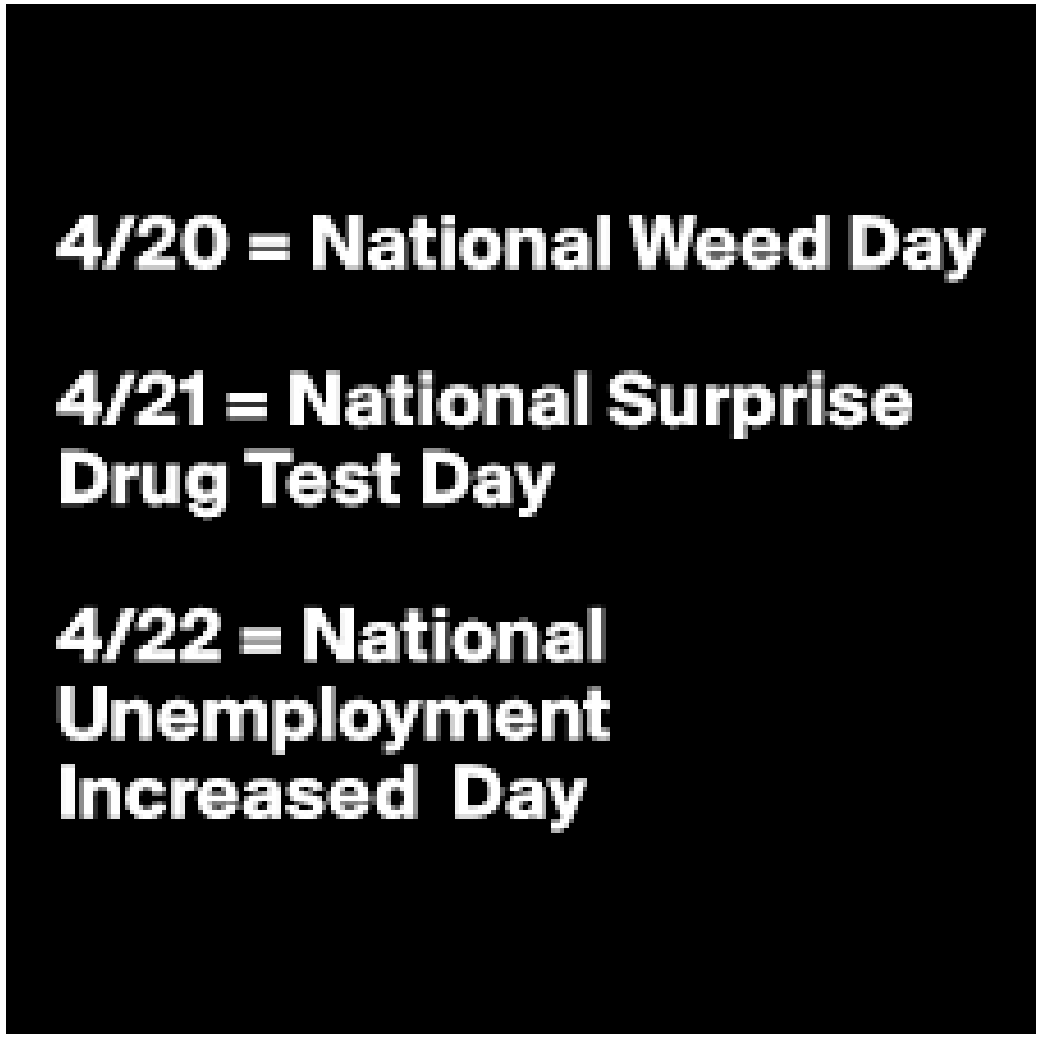
Spicoli has applied to the city's police department, which is subject to a collective bargaining agreement. He flies through all testing, interviews, and initial requirements. He is extended an offer of employment that clearly states that all offers are subject to a clean background investigation and drug test. Spicoli tests positive for marijuana but swears that he only uses it to surf tasty waves and they should hire him because danger is his business.

1. What should the city do?
2. Does this change if Spicolli has a medical marijuana card?
3. What if Spicolli applied for a job as a police clerk or a receptionist?

Question 1

Drug Tests

- Pre-employment
- Random
- Reasonable Suspicion
- Post Accident



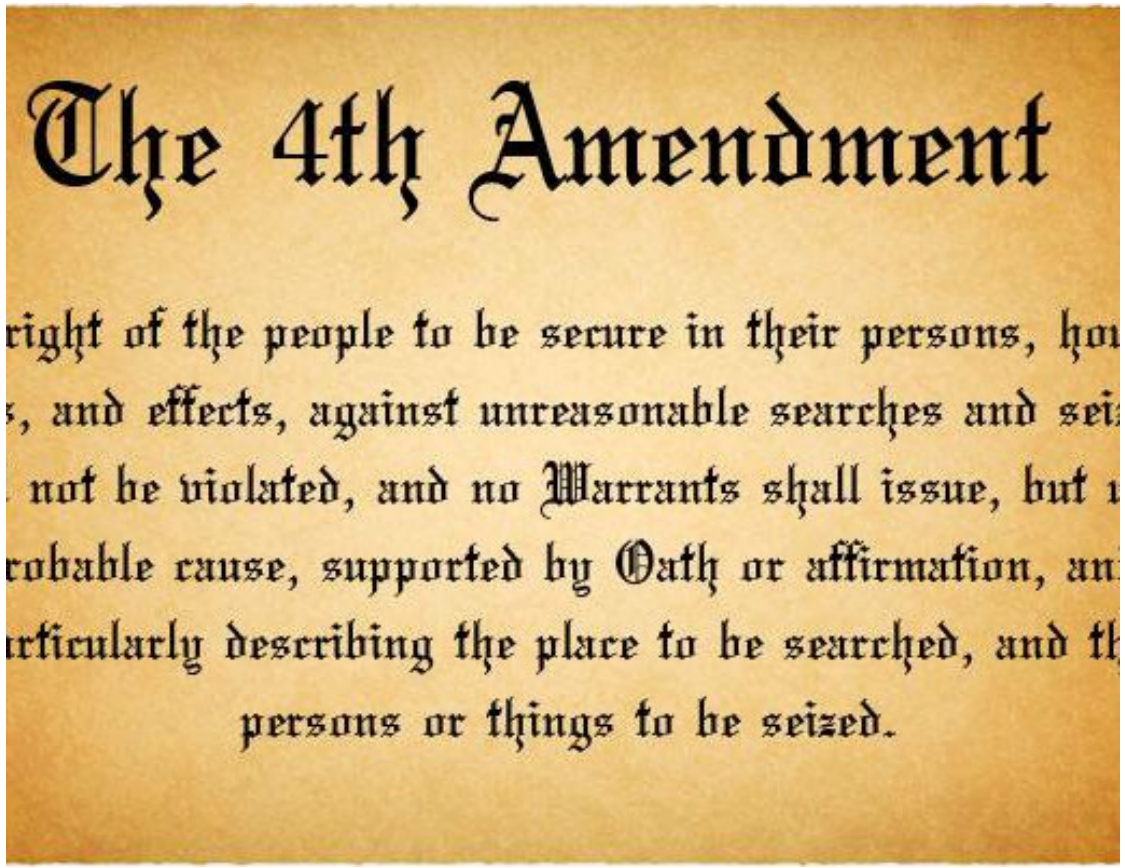
RANDOM TESTING

- **CITIES CAN ONLY PERFORM RANDOM DRUG TESTING ON EMPLOYEES IN FEDERALLY REGULATED OR SAFETY SENSITIVE POSTIONS.**

Definition: safety-sensitive job

A job in which impairment caused by drug or alcohol usage would threaten the health or safety of any person





RANDOM TEST – safety sensitive

- Public Sector v. Private Sector
- Fourth Amendment Violation
  - Requiring all employees to submit to random drug testing would likely constitute an unlawful search and seizure, which would violate the Fourth Amendment.



Random Testing

- Once employee is informed they must report immediately to the testing facility
- Equal chance to be drawn and can be drawn more than once in a year
- Someone should accompany the employee to the

Towelie is a medical technician in a municipal hospital. One Monday morning, Towelie is notified that he has been selected for that month's random drug test. (pursuant to a properly adopted policy and signed notice/consent form in HR file) As soon as he is notified, and a couple hours before he is expected to take the test, Towelie goes to HR and tells them that he will likely test positive for marijuana since he has a medical marijuana card for Chron's disease and was actually smoking it on Saturday night. He is adamant, though, that he is not currently under the influence.

1. Can the city randomly drug test Towelie?
2. If the city disciplines Towelie, can Towelie successfully sue?
3. Does this change if the hospital were private?

Question 2



Reasonable Suspicion Testing

- Applicable to all employees
- Based on a belief that an employee is using or has used drugs or alcohol in violation of the policy

Reasonable Suspicion Testing



- Is not an accusation of drug or alcohol abuse
- Does not diagnose abuse or addiction

Reasonable Suspicion Testing

- Supervisor's role is to:
  - identify the specific observations of employee behavior and appearance
  - confront the employee concerning the requirement to undergo the test
  - fully explain the consequences of the employee's refusal to comply

Articulating Suspicion

- Supervisors should be trained to identify signs of all types of impairment
- Marijuana impairment can include:
  - Slow and/or slurred speech
  - Decrease in physical dexterity
  - Decreased agility or coordination
  - Irrational or unusual behavior
  - Negligence or carelessness in operating equipment or machinery
  - Disregard for the safety of people in the workplace
  - Involvement in an action resulting in serious damage to property
  - Unusually disheveled appearance
  - Odor of marijuana



Patsie Party is a 25-year-old administrative assistant. She has worked for the city for 7 months in the clerk's office. She has a medical marijuana card for PTSD. Patsie has received several counseling reports for minor job performance problems. She "socializes on the job", frequently takes long breaks, and only seems to call in sick on Mondays.
She has a reputation among co-workers as a party girl and frequently tells barroom jokes. Her supervisor reports that she came to work smelling of marijuana, slurring her words, and kept staring off into space.

Question 3

1. Can the city randomly drug test Patsie?
2. Does the city have enough observations to support a reasonable test determination?
3. Why drug test if she has a medical marijuana card?
4. Does it matter if Patsie is intoxicated?

Jim Beam is a 28-year-old CDL mechanic. He has worked for the city for 3 years, but his supervisor is new and has only been supervising him for about 6 weeks. The supervisor reports that as he was making his "rounds", he noticed Jim dropping tools, laughing, and listening to Grateful Dead.
The supervisor checked the records on the CDL vehicle and noted that this maintenance job is behind schedule. The supervisor indicates that he approached Jim and ask him how it's going. Jim's eyes are red and tearing and he’s moving really slowly. He doesn't respond to the supervisor’s greeting. When the supervisor spoke again, this time asking if there are any problems, Jim starts giggling and walks to the vending machine.

1. What do you instruct the supervisor to do next?
2. What additional observations of behavior and appearance do you note?
3. Is a reasonable suspicion test warranted?

Question 4

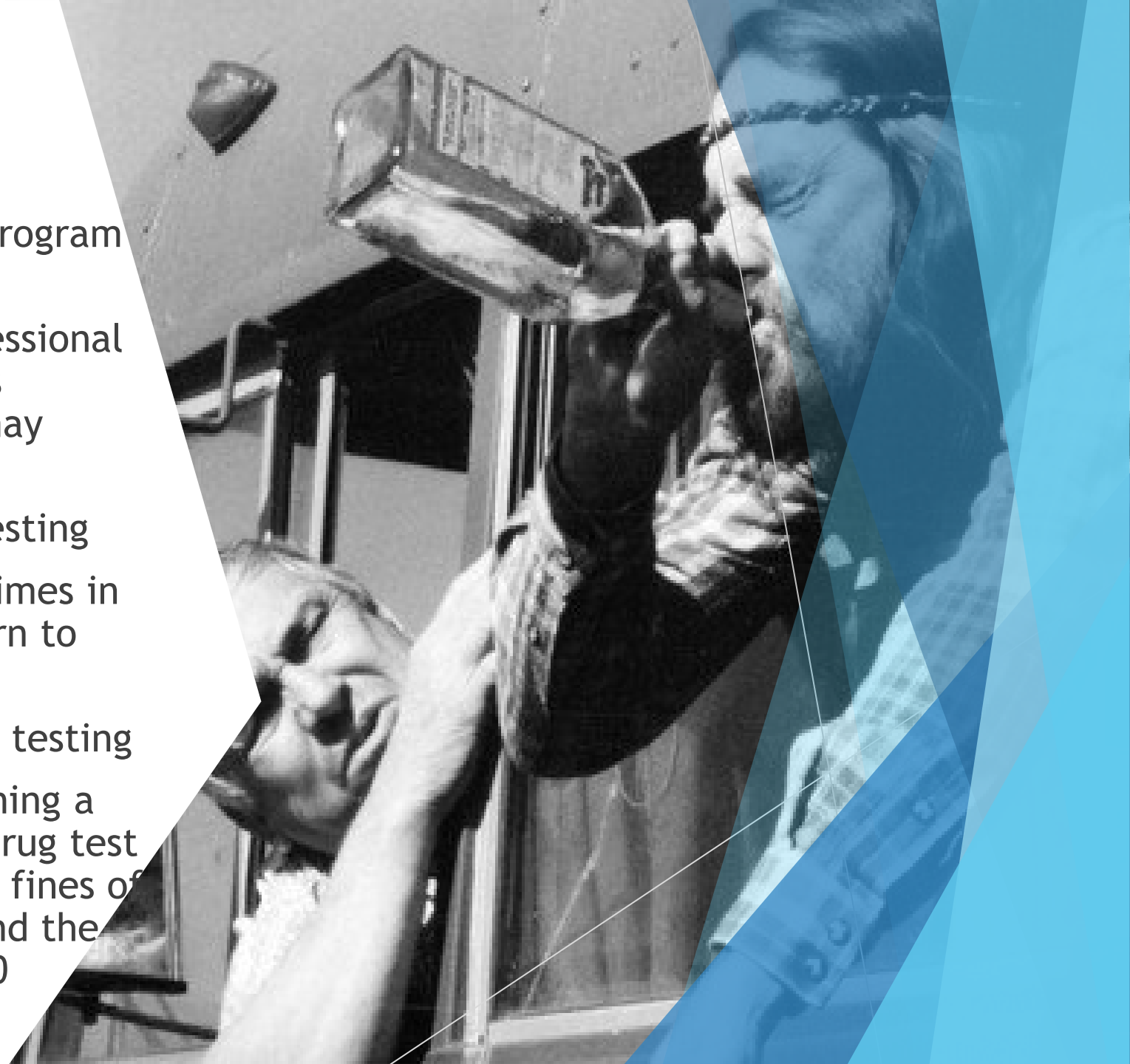
DOT Employees



- Subject to all testing, including mandatory random testing
- Zero tolerance!!!!!!
- Urine and may have “oral” test approved at a future date
- Employers may not disregard a verified positive DOT test
- Employees cannot “rebut” the test with one of their own
- Must use a medical review officer
- Remove immediately from safety sensitive functions

Return to Duty Process

- Employee must complete a SAP program
- This means meeting with a DOT authorized substance abuse professional and completing any requirements suggested before the employer may return the employee to work
- SAP will recommend continued testing
- Unannounced for no less than 6 times in the 12 months following the return to service
- May prescribe up to 60 months of testing
- Violating the protocols and returning a DOT employee that has failed a drug test to work subjects the employer to fines of up to $10,000 for each offense and the employee to fines of up to $2,500



Upton O. Goode is a sanitation worker who drives the sanitation truck W-F. He is selected for a random drug test, drives straight to the testing site and continues working with no problems. Mr. Goode fails his drug test. He is horrified. He tells you that he does not smoke pot and has been using this CBD oil that says it's THC free and he got it from Amazon.

1. Can the city randomly drug test Mr. Goode?
2. Can the city forgive Mr. Goode since he didn't really smoke pot but just used CBD?
3. What does the city have to do next?

Question 5

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