# Marijuana, CBD, and Delta-8: Employer Drug Testing State Law Considerations

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- The cannabis plant has 87 different chemicals called cannabinoids.
- Cannabidiol, found in the cannabis plant, is a useful drug to many people but it is currently unregulated.
- THC is tetrahydrocannabinol, which frequently shows up in CBD oil at levels high enough to test positive on drug tests.
- Delta-8 is another chemical found in the cannabis plant, it has intoxicating effects and is likely to show up on a drug test as THC.

# CBD, THC, Delta-8, WTH????????















Legal vs. Illegal
CAN YOU TELL THE DIFFERENCE?











# State Law

Legal Recreational

Legal Medical Decriminalized Recreational

Recreational Decriminalized

Legal Medical (Some CBD and THC only)

Katie Bar the Door

# Drug Testing Concerns

Can you perform pre-employment drug tests?

What about post-accident?

Are you required to provide medical accommodation?

Can you have a zero tolerance policy?

Does your state provide a private right of action to employees?

What can you do if an employee exhibits an impaired condition at work?

CDL employees??????????????????

How does legalization of cannabis impact the privacy laws?

# Current Status

No state can adopt laws that supersede the federal requirements for drug testing CDL, gas pipeline, transit workers, etc.

States allow employers to prohibit on-duty use but vary as to whether testing can be used as a basis.

Even in states that allow employer drug testing, some states require accommodation for medical marijuana use, although not required under the ADA.

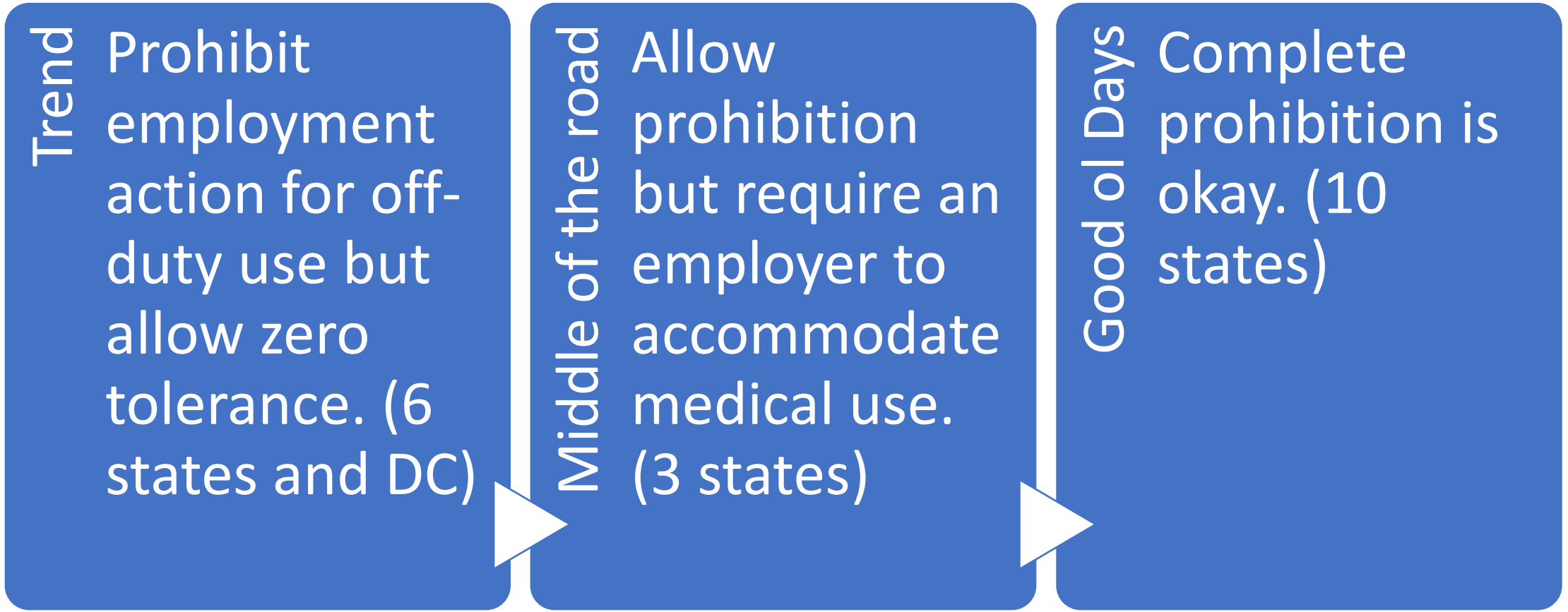
# Americans with Disabilities Act

- 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.
- A current user is not covered but there is no clearly defined definition and must be considered on a case by case basis.
- Remember that it is no longer required for the employee to use triggering language to request an accommodation.

# Trending in Legalized States

- New York: No drug testing for cannabis but employers can prohibit use on the job if they can prove impairment through behavior.
- California: Effective January 1, 2024 employers cannot rely on tests that measure only cannabis metabolites but instead must use tests that indicate active THC or “impairment tests” that measure employees against baseline performance to determine impairment.
- Illinois: Cannot discriminate against employees for legal off-duty use. Must substantiate the suspicion of on-duty use by behavior.
- Nevada: Cannot refuse to hire based on failed marijuana test with exceptions for certain safety sensitive.
- New Mexico: Employers prohibited from refusing to hire, discharging or taking adverse action against employees validly using medical marijuana unless safety-sensitive position.

# Legalized State Approach



# Something Doesn't Add Up

NY state prohibits testing for THC on panel.




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# 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 is your contract up and should you bone up after legalization?

# Drug Tests

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

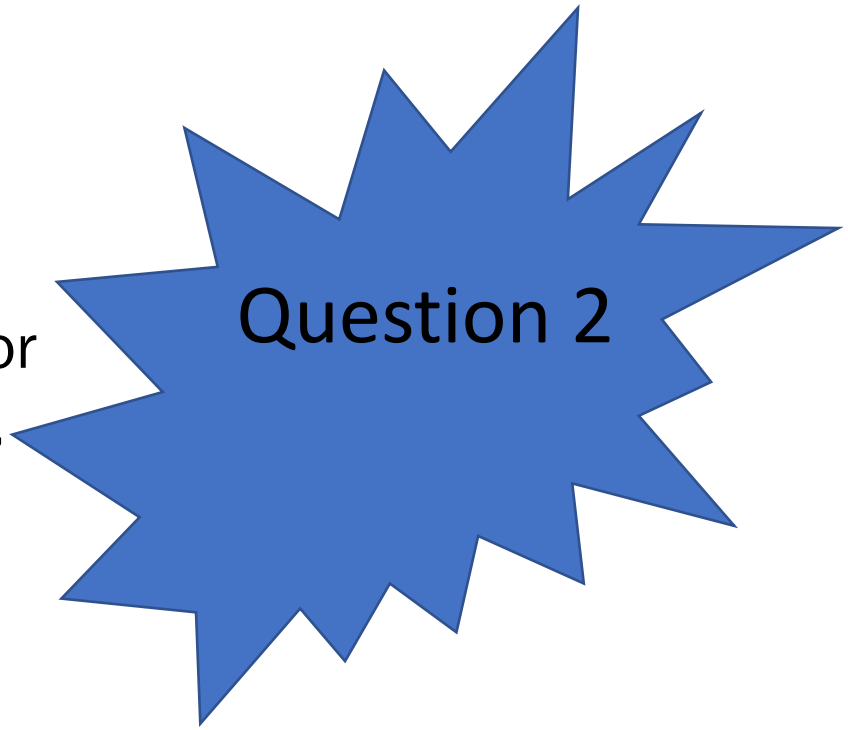


Towelie is a medical technician in a municipal hospital. One Monday morning, Towelie is notified that he has been selected for that month's random drug test. (pursuant to a properly adopted policy and signed notice/consent form in HR file) As soon as he is notified, and a couple hours before he is expected 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.



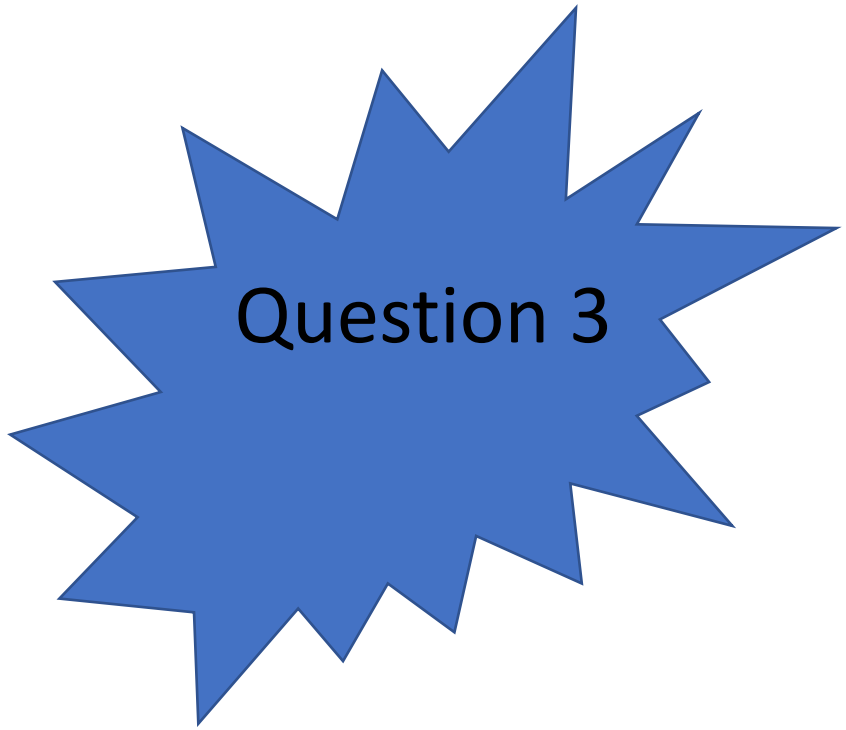

1. Can the city randomly drug test Towelie?
2. If the city disciplines Towelie, can Towelie successfully sue?
3. Does this change if the hospital were private?

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.




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?

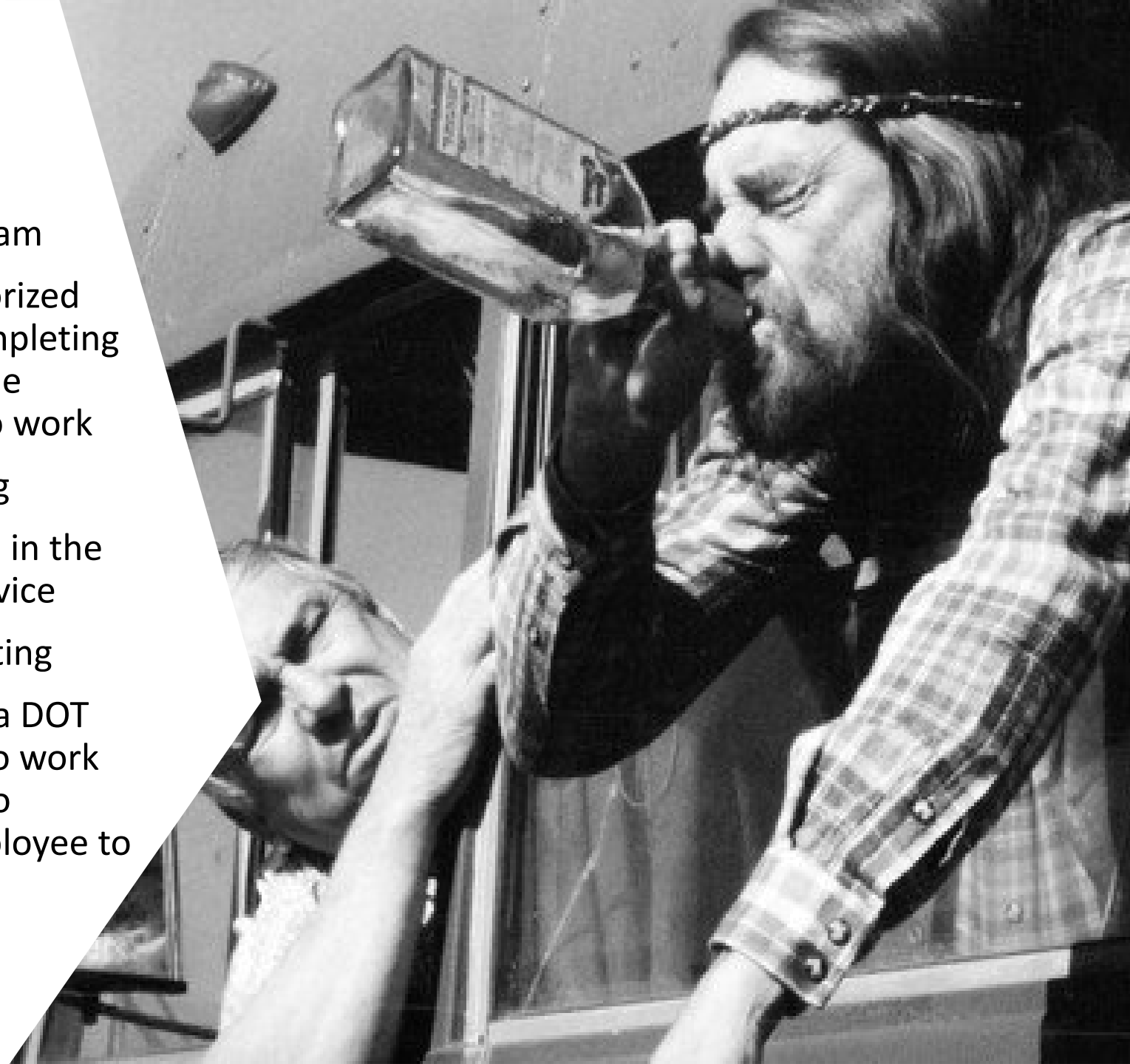
# DOT Employees

- 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



# Resources

- https://www.eeoc.gov/laws/guidance/applying-performance-and-conduct-standards-employees-disabilities#alcohol
- https://askjan.org/disabilities/Alcoholism.cfm#spy-scroll-heading-8
- https://www.usccr.gov/files/pubs/ada/ch4.htm
- https://www.transportation.gov/odapc
- https://www.samhsa.gov/workplace/employer-resources/federal-laws

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