

USAGE GUIDELINES OF MARIJUANA WITHIN THE AIRPORT WORKFORCE

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Usage Guidelines of Marijuana within the Airport Workforce - Legal Perspective -

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STATUS OF MARIJUANA LAWS

WHERE ARE WE?

State:

- Recreational 11 states and D.C.
- Medical 33 states and D.C.
- CBD/low-THC products 13 states.

Federal:

- National Legislation Introduced.

Internationally:

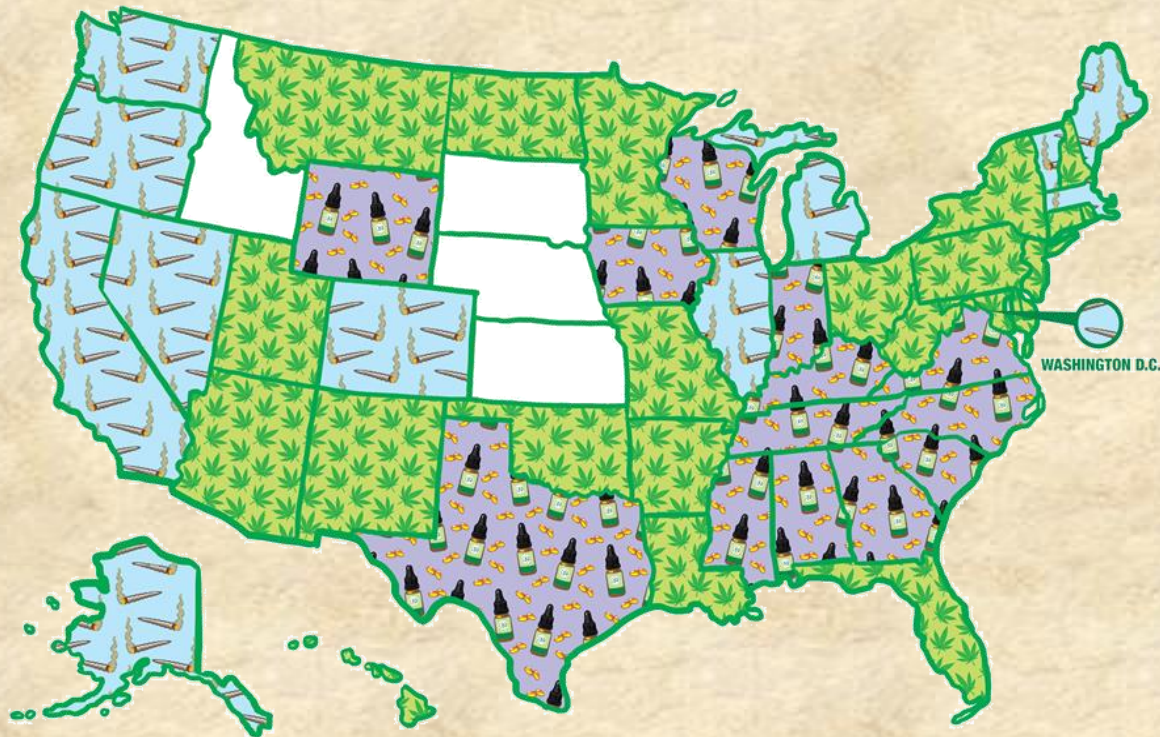
- Canada Legalized recreational for country in 2018.
- Mexico close to passing adult use marijuana for country.









STATUS OF MARIJUANA LAWS WHERE ARE WE?

MARIJUANA LAWS, STATE BY STATE



-  States that allow recreational and medical marijuana use
-  States with comprehensive medical marijuana programs
-  States that allow CBD or low-THC products
-  States with no public cannabis access program

As of August 15, 2019.

Source: National Conference of State Legislatures.

Credit: HR Magazine



STATUS OF MARIJUANA LAWS

WHERE ARE WE?

Growing Usage/Acceptance

- 13% of American's "regularly" or "occasionally" smoke or use marijuana.
- 24% of adults 18-29 years old.
- Percentage of usage declines with age.
- 59% are in favor of legalization.
- 61% believe states should decide.
- 33% believe federal government should decide.



Credit: Dave Chan for The New York Times



STATUS OF MARIJUANA LAWS WHERE ARE WE?

Federal Legislation

- Currently Schedule I drug under Controlled Substances Act of 1970 (use, sale, possession over 0.3% THC illegal).
- Bill introduced to remove marijuana from Schedule I (MORE Act).
- Bill passed House Judiciary Committee on November 20, 2019. Next full House for vote then to Senate for vote.

Law would:

- Allow states to enact own polices/incentives to clear criminal records.
- 5% tax to provide job training/legal assistance to those hit hardest by war on drugs.



AIRPORT EMPLOYEES – MARIJUANA USE (MEDICAL)

Hypothetical Scenario

Jim, who is in a non-safety sensitive job position, is observed by his supervisor, Tom, to be acting “strangely”, **Jim** stares out into space, slowly responds when answering questions and smells of **marijuana**.

Tom sends **Jim** for a drug test.

Jim tests positive for **marijuana**.

Jim has a medical **marijuana** card, what does the Airport do?



AIRPORT EMPLOYEES – MARIJUANA USE (MEDICAL)

Americans with Disabilities Act (ADA)

Is the Airport required to accommodate Jim's medical **marijuana** use under the ADA?



No. The ADA does not protect illegal drug use. No accommodation required. (See *James v. City of Costa Mesa*, 700 F.3D 394 (CA9, 2012); *Kamakeeaina v. Armstrong Produce*, 2019 WL 13200232 (USDC Hawaii, 2019).



AIRPORT EMPLOYEES – MARIJUANA USE (MEDICAL)

State Law

Is the Airport required to accommodate Jim's medical **marijuana** use under state law?



Credit: Paula Friedrich/WBEZ

It depends on the state. However the emerging law is that more states are requiring accommodation.

Even in states prohibiting discrimination because of medical **marijuana** use and requiring accommodation – employers can still discipline/fire if employee is “under the influence” / “impaired”.

However, can't discipline/fire simply because employee tested positive for **marijuana** use.



AIRPORT EMPLOYEES – MARIJUANA USE (MEDICAL)

States prohibiting discrimination requiring accommodation for medical marijuana card holders:

Alaska	Connecticut	Maine	Pennsylvania
Arkansas	Delaware	Minnesota	West Virginia
Arizona	Illinois*	New York	

*Applies to recreational use also. Employers need a “good faith belief that the employee manifests specific articulable symptoms while working that decrease or lessen the employee’s performance.” (eff 1/20/20 – timing of consumption critical).

Sample language:

Unless a failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposition any term of condition of employment or otherwise penalize a person based upon ... [a] registered qualifying patient’s positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment. Arizona Medical Marijuana Act, A.R.S. § 36-2813 (B).



AIRPORT EMPLOYEES – MARIJUANA USE (MEDICAL)

States without discrimination protection for medical **marijuana** card holders:

California
Colorado

Michigan
Montana

Washington

Sample language:

A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner; or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of **marihuana** in accordance with this act... Michigan Medical **Marihuana** Act, MCL 333.26424.



AIRPORT EMPLOYEES – MARIJUANA Use (MEDICAL)

Emerging Case Law / Statutory Language Early cases did not require accommodation for medical marijuana use but more recent cases do. (state statute dependent).

Earlier Cases

Employer not required to accommodate employee's use of cannabis as medical treatment under Oregon law. *Washburn v. Columbia Forest Products, Inc.*, **119 P.3d 224 (Or. 2005)**.

Firing of employee in Washington for medical marijuana use upheld as employer was not required to accommodate on-duty or off-duty use. *Roe v. TeleTech Customer Care Mgt*, **152 Wash App 388, 216 P.3d 1055 (2009)**.

No employer accommodation required for medical marijuana use in Montana or in California. See *Johnson v. Columbia Falls Aluminum Co.*, **350 Mont 562., 2009 WL 865308 (Mont.2009)**; (*Ross v. Raging Wire Telecommunications, Inc.*, **70 Cal Rptr 3d, 174 P.3d 200 (2008)**).



AIRPORT EMPLOYEES – MARIJUANA Use (MEDICAL)

Recent Cases

Massachusetts Supreme Court holds employer accommodation may be required for employee using medical marijuana for Crohn's disease; if reasonable to permit off duty use and marijuana is most effective treatment. *Barbuto v. Advantage Sales and Marketing, LLC*, 148 F. Supp. 3d 145, (D Mass Dec 4, 2015); See also, *Chance v. Kraft Heinz Foods Co.*, 2018 WL 6655670 (Del Super Ct Dec 17, 2018).

Employer illegally discriminated against applicant who was registered medical marijuana user because she failed pre-employment drug test – accommodation required. *Callaghan v. Darlington Fabrics*, 2017 WL 2321181 (RI Super May 23, 2017); See also, *Noffsinger v. SSC Niantic Operating Co, LLC*, 273 F Supp 3d 326 (D Conn 2017).

Unemployment benefits cannot be denied to former employee who was terminated for medical marijuana usage. (*Braska v. Challenge Mfg. Co.*, 307 Mich App 340 (2014); *Beinor v. Industrial Claims Appeal*, 262 P.3d 970 (Colo, 2011).



AIRPORT EMPLOYEES – MARIJUANA Use (RECREATIONAL)

What if **Jim** says that he tested positive for usage because he smoked marijuana at a party 2 weeks ago?



Credit: Getty Images



RECREATIONAL MARIJUANA

Legally terminating **Jim** would depend on the timing and potentially other surrounding facts.

Home Depot employee is drug tested after she drops a pallet on her foot. She fails drug test due to recreational **marijuana** use, (legal in her state). She sues for invasion of privacy and retaliation.

Invasion of privacy claim fails because employee failed to establish clear public policy allowing her to base a wrongful discharge claim on her “purely private conduct.” No public policy in Washington for terminating employee for recreational **marijuana** use.

Employee can sue for retaliation where she filed a safety complaint with the state agency regarding over stacked pallets. She was terminated 4 days after the drug test results and 2 days after she filed the complaint.



Brown v. Home Depot, No. C14-0896 RSM, 2015 WL 9839773 (W.D. Wash. Feb. 5, 2015).



AIRPORT EMPLOYEES – CBD PRODUCT USE

What if **Jim** is shocked that he tested positive for **marijuana**, mentioning the only remote contact he has had with **marijuana** is the CBD oil he has been using on his sore knee?



Credit: Getty Images



AIRPORT EMPLOYEES – CBD PRODUCT USE

- CBD (non-intoxicating) products (CBD oil, beverages, skin care products, vaping, pill, diet supplements) not regulated by FDA. Supposed to have less than 0.3% THC (intoxicating) concentration.
- Employees may be ingesting CBD derived from **marijuana** unknowingly.
- Employees unaware that chronic use of CBD can result in increase level of THC in body.





WHAT TO DO?

Drug Testing Policies

- Clearly written what drugs are prohibited? Positions? Allowable in what time period for ingesting pre test?
- Fairly and consistently applied?
- Consideration of Last Chance Agreements?
- Not used in a retaliatory manner?
- Are revisions to handbook necessary?
- Prohibition of innocent ingestion defense.





WHAT TO DO?

Behavioral Tests

- More importance placed on these tests.
- 2 management employees (no bias).
- Documentation before drug test (physical/mental manifestations).

Training of Management

- Who is responsible for identifying suspected marijuana use?
- Policy being enforce fairly/consistently?

Education of employees

- Tests administered in timely manner to avoid litigation/retaliation claims?
- What would be considered a violation of policy?



THANK YOU

Usage Guidelines of **Marijuana**
within the Airport Workforce
- Legal Perspective –

Thank you for attending!

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Cannabis in Canada

Halifax Stanfield International Airport



HalifaxStanfield

CANNABIS IN CANADA

- Cannabis has been accessible for medical use with authorization since 2001
- It became legal nationally for recreational use on October 17, 2018 (fresh, dried, oil, seeds, plants)
- Edibles became legal in October, 2019
- Criminal law amended to add significant penalties for providing to youths/driving under the influence
- Each province can set its own regulations regarding retail sale/locations of permitted use and can add additional restrictions



CANNABIS LAWS

- Can possess up to 30 grams of legal dried cannabis or equivalent in non-dried form
- Can grow up to 4 plants per household for personal use
- Edibles: Limit of 10 mg THC per package
- Extract (ingesting): Limit of 10 mg THC per unit (e.g. capsule)/ 1000 mg THC per package
- Extract (inhaling) and topical: 1000 mg THC per package
- Plain packaging, limits on additives (e.g. caffeine, sugar)



CANNABIS LAWS

- It is illegal to take cannabis across the border, either entering or leaving
- Oral fluid drug screening is permitted to test for impaired drivers
- Prohibited levels while driving or within 2 hours of having driven:
 - > 2 ng but < 5 ng/ml of THC (fine only)
 - ≥ 5 ng/ml THC (fine/imprisonment)
 - ≥ 2.5 ng/ml THC and 50 mg/100 ml alcohol combined (fine/imprisonment)
- No specific changes made to aviation regulations



HIAA RESPONSE TO LEGALIZATION

- Impact analysis performed for each department
- Position statements created for each functional area
- Multi-stakeholder committee met regularly to discuss issues, approaches, implementation (HIAA, Transport Canada, local police and RCMP, Canadian and US border services, CATSA)
- Lawyers from Canadian Tier 1 airports discussed monthly
- Communication plan developed



AREAS FOR CONSIDERATION

- Employee policies/drug and alcohol policies
- Consultation/cooperation with regulatory agencies – Transport Canada, RCMP, local police, CBSA, USCBP, CATSA
- Disposal boxes?
- Airside Traffic Directives
- Smoking – permit cannabis in smoking areas? Create separate cannabis smoking areas?
- Tenants/other stakeholders
- Communications – internally and with public
- Airport experience (e.g. sales)





DISPOSAL BOXES



POSITION STATEMENT – HUMAN RESOURCES

HIAA Employees:

- No possession on airport property
- No cannabis use 24 hours before duty/standby
- No cannabis use 24 hours after accident or until tested
- No cannabis use at corporate functions
- No benefit plan coverage for medical marijuana



POSITION STATEMENT – HUMAN RESOURCES

- Employees in safety sensitive positions must disclose all therapeutic drug use, including cannabis
- Must be fit for duty; HIAA will accommodate to point of undue hardship
- Drug testing following any significant incident OR significant near miss OR reasonable suspicion
- Drug and Alcohol Policy is breached if testing shows saliva concentration of ≥ 2 ng/ml of cannabis



POSITION STATEMENT - OPERATIONS

- No cannabis smoking permitted on airport property
- No cannabis possession permitted by anyone airside
- No cannabis possession groundside by HIAA employees. Non-HIAA employers to set own policy
- No cannabis permitted in HIAA vehicles
- No cannabis consumption in Air Terminal Building



SMOKING



IMPACT OF LEGALIZATION

- No noticeable increase in impaired employees
- One contractor issue - banned from property
- Some challenges by PAX to smoking policy but accepted HIAA's explanation
- Disposal Box: Initially some use; now rarely used



IMPACT OF CANNABIS LEGALIZATION



British Columbia

'Don't take a chance, dump your stash,' says lawyer after Air Canada flight diverted to U.S.



One passenger wondered aloud about the consequences for anyone carrying cannabis products

[Meera Bains](#) · CBC News · Posted: Nov 07, 2019 2:00 AM PT | Last Updated: November 7





USAGE GUIDELINES OF MARIJUANA WITHIN THE AIRPORT WORKFORCE

GALE LAROCHE, VP & CHIEF ADMINISTRATIVE OFFICER, NASHVILLE INTERNATIONAL AIRPORT





ABOUT BNA

- 18 Million+ Passengers Annually (and Rising)
- 48,000+ Passengers Per Day
- 7 Consecutive Years of Record-Breaking Growth
- 618 Daily Flights
- 15 Airlines
- 75 Nonstop Destinations
- 330+ Employees (MNA)

Total Economic Impact

BNA produced more than **\$7 billion** in total economic impact in 2018—doubling the total economic impact reported in the 2012 study.



2012



2018



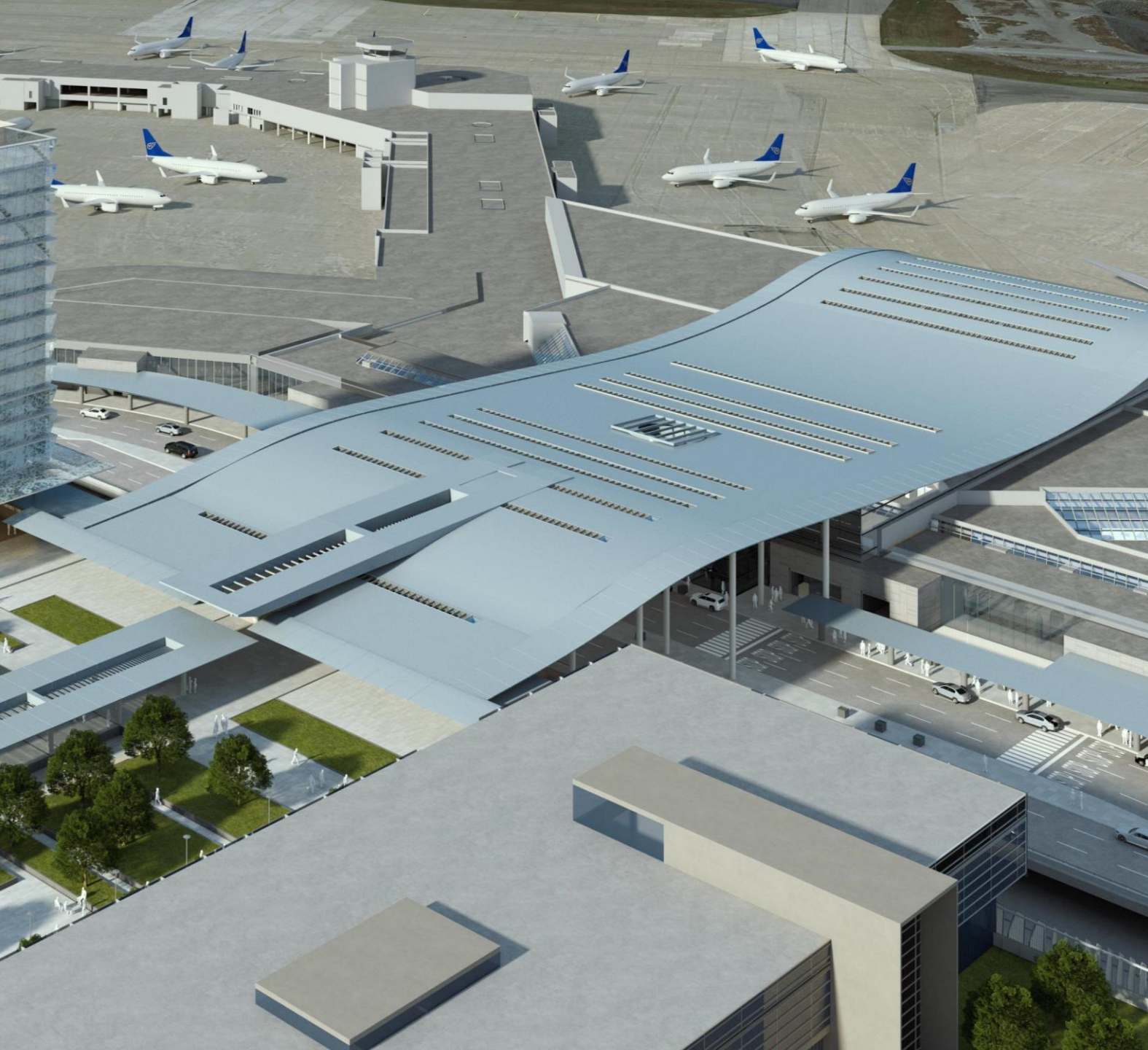
Impact Includes:

-  Revenue generated by on-airport jobs
-  Revenue generated by airport-related businesses
-  Spending by on-airport and airport-related businesses
-  Business revenue and local purchases of visitor industry



BNA VISION

- Dynamic Growth and Renovation Plan for Nashville International Airport (BNA)
- \$1 Billion+ Investment
- Launched in July 2016
- Anticipated Completion: 2024



BNA VISION

- Projects Include:
 - New Parking Garages
 - New Concourse D
 - New International Arrivals Facility
 - Terminal Lobby Renovation
 - Hotel
 - Terminal Access Roadway Improvements

WORKSHOP SESSION:

Usage Guidelines of Marijuana
Within the Airport Workforce

CURRENT MARIJUANA LAWS IN TENNESSEE

- Marijuana use **is not legal**
- **High CBD and low-THC cannabis oil** is an exception for seizure patients
- **Possession is a misdemeanor** and punishable by one year in jail and up to a \$2,500 fine
- In 2016, ordinances for the cities of **Memphis** and **Nashville** were enacted to allow an officer to charge someone with a **civil infraction** for possessing **small amounts** of marijuana



MUST APPLICANTS AND EMPLOYEES IN TENNESSEE BE REQUIRED TO TAKE A DRUG TEST?

- YES.
- An employer:
 - ☐ **May require** an applicant to take a drug test as a condition of employment
 - ☐ **May decide** not to hire an applicant who refused to take a drug test
 - ☐ **May decide** not to hire an applicant who fails any part of a drug test



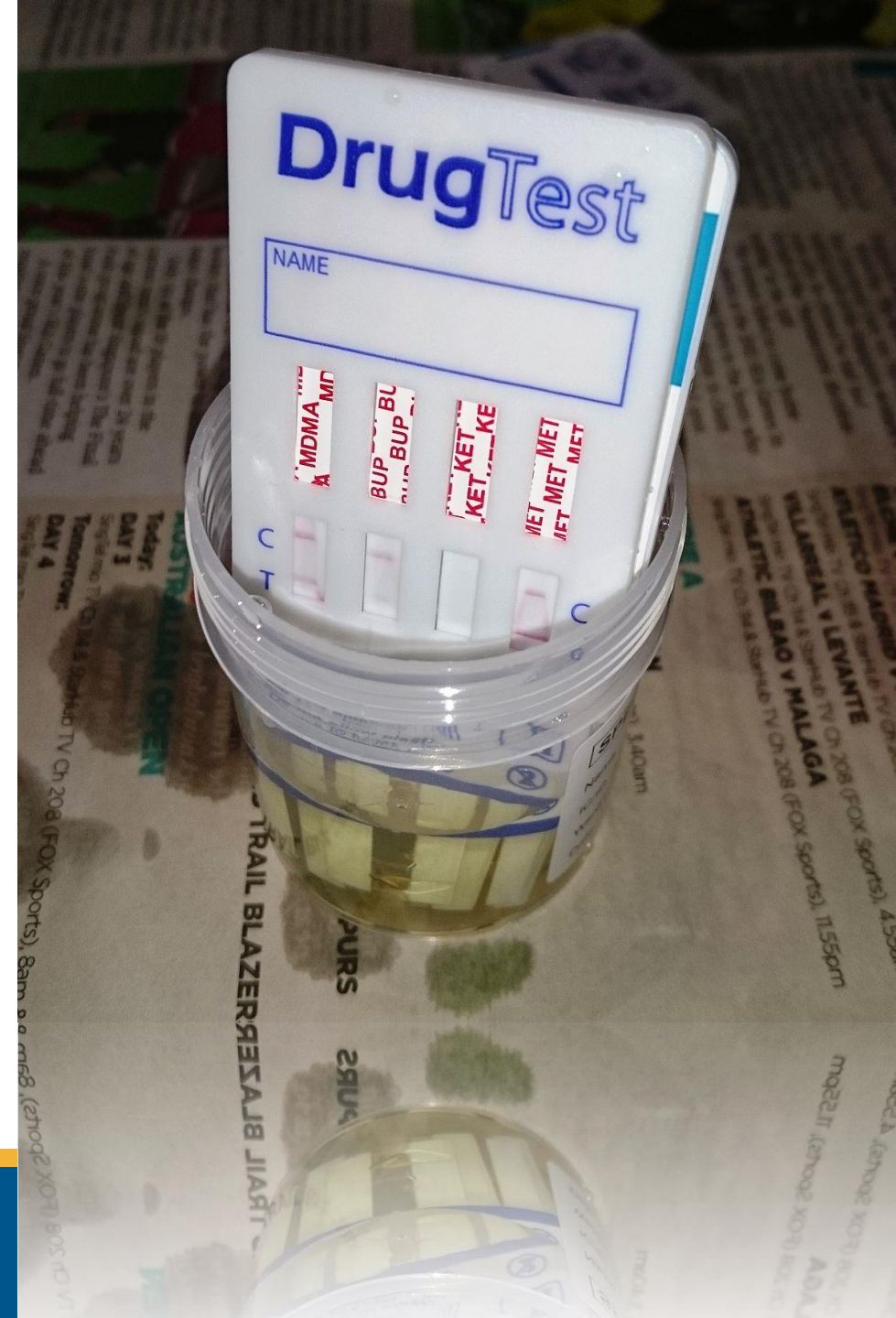
MUST APPLICANTS AND EMPLOYEES IN TENNESSEE BE REQUIRED TO TAKE A DRUG TEST?

- YES.
- An employer:
 - ☐ **Can drug-test employees** any time, any place or utilize any test, as long as they follow Tennessee drug-testing laws



IS RANDOM DRUG TESTING ALLOWED IN TENNESSEE?

- YES.
- An employer can perform random drug testing consistent with business necessity:
 - ☐ To maintain **productivity, safety, quality, or security** for all employees
 - ☐ As part of an **accident investigation** or an **investigation of possible employee impairment**
 - ☐ Or “**reasonable suspicion**” of drug use



THE DRUG-FREE WORKPLACE ACT

- Tennessee employers participate in the program to:
 - ❑ **Receive premium discounts** on workers' compensation programs
 - ❑ **Gain a shift in the burden of proof** when an employee's injury or death is shown to have been caused by intoxication or illegal drug use
 - ❑ **Deem an employee discharge or discipline** for a policy violation as "with cause," which offers the employer certain protections

LAW



IF YOUR STATE HAS LEGALIZED MARIJUANA

- Generally, **accommodation of cannabis use** is **not required** of employers and **does not** have the same status as prescription drugs
- Employees in **certain safety-sensitive jobs** have exemptions from legalization
- As always, make sure that you have **clearly written and communicated policies** that cover substance use in the workplace

Recreational marijuana is legal in Michigan and will soon be legal in Illinois. Here's what to know

GRACE HAUCK | USA TODAY | 10:14 am EST
December 1, 2019



IF YOUR STATE HAS LEGALIZED MARIJUANA

- Ensure that your **drug and alcohol policies are reasonable** in nature concerning drug testing, smoking, consumption, storage, or use of cannabis in the workplace when employees are “on call”
- Make sure managers are **familiar with the policies and know how to recognize impairment** on the job



QUESTIONS & DISCUSSION
