



ATTORNEYS AT LAW

EMPLOYER'S GUIDE TO DRUG TESTING IN MINNESOTA

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PENELOPE J. PHILLIPS

(612) 373-8428
pphillips@felhaber.com



TODAY'S AGENDA

1. Overview of Minnesota DATWA
2. Marijuana: Medical and Recreation Use
3. Testing Demanded by Customers
4. Critical Drug Testing Issues for Employers



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OVERVIEW OF MINNESOTA'S DRUG TESTING LAW (DATWA)



MINNESOTA'S DRUG AND ALCOHOL TESTING IN THE WORKPLACE ACT (DATWA)

Who is Covered under Minn. Stat. 181.950-.957:

- The law applies to all employers.
- It covers all employees, including independent contractors.
- Job applicants are also protected.
 - A job applicant is defined as any person who has applied for work with an employer and anyone who has a job offer contingent upon passing a drug or alcohol test.



DATWA

Employers' Requirements:

- Testing can only be done under an employer's written policy, which must include:
 - Who is subject to testing under the policy and when testing is required;
 - The disciplinary consequences of a positive test result;
 - The employee's right to refuse testing and the consequences of refusal; and
 - The employee's right to explain a positive result and to take a re-test.

DATWA

Employers' Requirements (Cont'd):

- Prior to testing, the employer must provide the written testing policy and a form to acknowledge receipt of the policy to the affected employee.
- Notice of the policy must be posted in an "appropriate and conspicuous" location. The notice must state that employees can inspect the policy during regular work hours.



DATWA

Employers' Requirements (Cont'd):

- An employer must use an accredited or licensed testing laboratory to conduct the testing.
- The laboratory may notify an employer only that the sample contains evidence of drugs or alcohol, and is prohibited from disclosing any other information.
- The test results, with few exceptions, are confidential information which the employer may not disclose without the employee's written consent.



DATWA

When is Drug and Alcohol Testing Allowed?

- Job Applicant Testing
 - After an employee has received a conditional job offer, the employer may require or ask that the applicant undergo testing.
 - This applies only if all applicants who receive conditional job offers for the same position are required or asked to undergo testing.



DATWA

When is Drug and Alcohol Testing Allowed (Cont'd)?

- **Routine Physical Examination Testing**
 - An employer may require employees to take a test as part of a routine physical examination.
 - The physical and drug test can only be required once annually.
 - The employee must be given at least two weeks' written notice of the testing requirement.



DATWA

When is Drug and Alcohol Testing Allowed (Cont'd)?

- Random Testing
 - An employer may require random drug testing only if:
 - An employee is in a “safety-sensitive” position, defined by statute as a job in which an impairment caused by drug or alcohol usage would threaten the safety or health of any person; or
 - The employee is a professional athlete and the testing is conducted in accordance with a collective bargaining agreement.



DATWA

When is Drug and Alcohol Testing Allowed (Cont'd)?

- Reasonable Suspicion Testing
- An employer may require testing if there is a “reasonable suspicion” that the employee:
 - Is under the influence of drugs or alcohol;
 - Has violated written work rules regarding drugs or alcohol; or
 - Has caused a personal injury or a work-related accident, or was involved in operating machinery involved in a work-related accident.

DATWA

When is Drug and Alcohol Testing Allowed (Cont'd)?

- **Treatment Program Testing**
 - An employer may require an employee to undergo testing if the employee (1) has been referred by the employer for chemical dependency treatment or evaluation; or (2) is participating in a treatment program under an employee benefit plan.
 - In such cases, the employee may be required to undergo drug or alcohol testing without prior notice during the evaluation or treatment period and for up to two years after treatment.



DATWA

Employers' Limitations:

- Employees who fail a drug or alcohol test are entitled to significant protections even after testing positive.
- The employer must give written notice of a test result to an employee within three work days of the employer's receipt of the result.
- After an initial positive screen, the employee must be notified of the right to explain the result, and to disclose any medications taken that could affect the reliability of the result.



DATWA

Employers' Limitations (Cont'd):

- The laboratory must conduct a confirmatory test on all samples that produce an initial positive test result.
- An employer may not discipline an employee based on a positive result that has not been confirmed by the second test.
- Similarly, an employer may not withdraw an offer of employment to an applicant based on a positive result that has not been confirmed by a second test.
- Purpose: Protect employees against false positive tests.



DATWA

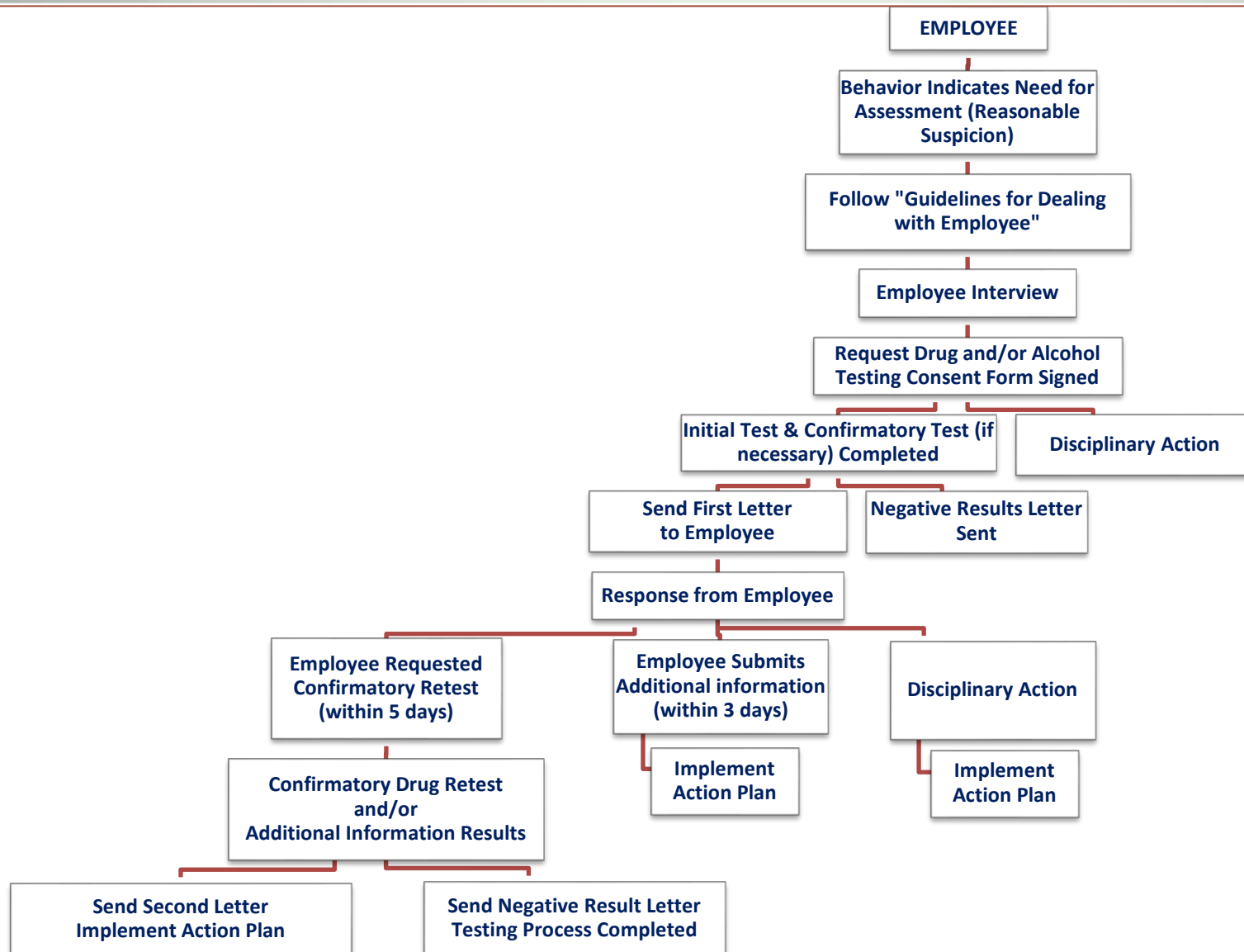
Employers' Limitations (Cont'd):

- Upon a positive confirmation test, the employee or applicant may request a retest at their own expense.
- If an initial test result is positive and the confirmatory test has not yet been done, an employer may suspend an employee pending the results only if the employer reasonably believes the suspension is necessary to protect the employee, coworkers, or the public.
- If the confirmatory test or a retest is negative, the employee must be reinstated with back pay.

DATWA

Employers' Limitations (Cont'd):

- After a confirmatory test result comes back positive, an employer may not discharge an employee unless the employer has first offered the employee the opportunity to participate, at the employee's own expense or under the employee's benefit plan, in a drug or alcohol treatment or counseling program, and the employee refuses to participate in the program or fails to complete it successfully.





DATWA

Statutory Violations: Remedies

- An employer or laboratory that violates the statute is liable to the employee for damages.
- Reasonable attorney fees may be awarded if the employer knowingly or recklessly violated the law.
- The employee may be entitled to an injunction ordering an employer or laboratory not to commit any act in violation of the statute.
- The employee may be entitled to other equitable relief, including reinstatement with back pay.



DATWA

Statute of Limitations for Claims:

- An employee has six years to bring a claim of wrongful termination under DATWA.



DATWA

Supervisor's Checklist for Making Reasonable Cause Determination

- Employee's name_____
- Department_____
- Date(s)_____

Knowing the Signs

- The indicators listed below are "warning signs" of drug and/or alcohol abuse and may be observed by supervisors:



DATWA

Moods:

- Depressed
- Anxious
- Irritable
- Suspicious
- Complains about others
- Emotional unsteadiness (e.g., outbursts of crying)
- Mood changes after lunch or break

DATWA

Actions:

- Withdrawn or improperly talkative
- Spends excessive amount of time on the telephone
- Argumentative
- Has exaggerated sense of self-importance
- Displays violent behavior
- Avoids talking with supervisor regarding work issues

DATWA

Absenteeism:

- Acceleration of absenteeism and tardiness, especially Mondays, Fridays, before and after holidays
- Frequent unreported absences, later explained as "emergencies"
- Unusually high incidence of colds, flus, upset stomach, headaches
- Frequent use of unscheduled vacation time
- Leaving work area more than necessary (e.g., frequent trips to water fountain and bathroom)
- Unexplained disappearances from the job with difficulty in locating employee
- Requesting to leave work early for various reasons

DATWA

Accidents:

- Taking of needless risks
- Disregard for safety of others
- Higher than average accident rate on and off the job



PHYSICAL SIGNS AND SYMPTOMS

- **Alcohol**—impaired muscle control, smell of alcohol, slurred speech
- **Illegal drugs**—dilated or constricted pupils, agitated or “ramped up,” fatigue
- **Prescription medications**
 - **Painkillers**—low blood pressure, confusion, sweating, poor coordination
 - **Sedatives/Anti-anxiety medications**—Confusion, drowsiness, poor judgment, rapid involuntary eye movement, dizziness
 - **Stimulants**—agitation, irritability, high blood pressure, irregular heart beat, impulsiveness, weight loss



DATWA

Work Patterns:

- Inconsistency in quality of work
- High and low periods of productivity
- Poor judgment/more mistakes than usual and general carelessness
- Lapses in concentration
- Difficulty in recalling instructions
- Difficulty in remembering own mistakes
- Using more time to complete work/missing deadlines
- Increased difficulty in handling complex situations



DATWA

Relationship to Others on the Job:

- Overreaction to real or imagined criticism (paranoid)
- Avoiding and withdrawing from peers
- Complaints from co-workers
- Borrowing money from fellow employees
- Persistent job transfer requests
- Complaints of problems at home such as separation, divorce and child discipline problems



DATWA

Observing and Documenting Current Indicators

- Patterns of any of the above conduct or combinations of conduct may occur but must be accompanied by indicators of impairment in order to establish "reasonable cause." Please check all indicators listed below that are **currently** present:



DATWA

☐ Constricted pupils
☐ Dilated pupils
☐ Scratching
☐ Red or watering eyes
☐ Involuntary eye movements
☐ Sniffles
☐ Excessively active
☐ Nausea or vomiting
☐ Flushed skin
☐ Sweating
☐ Yawning
☐ Twitching
☐ Violent behavior

☐ Drowsiness
☐ Odor of alcohol
☐ Nasal secretion
☐ Dizziness
☐ Muscular incoordination
☐ Unconsciousness
☐ Inability to verbalize
☐ Irritable
☐ Argumentative
☐ Difficulty concentrating
☐ Slurred speech
☐ Bizarre behavior
☐ Needle marks

☐ Possession of paraphernalia (such as syringe, bent spoon, metal bottle cap, medicine dropper, glassine bag, paint can, glue tube, nitrite bulb, or aerosol can)

☐ Possession of substance that appears to possibly be a drug or alcohol

☐ Other _____



DATWA

Determining Reasonable Cause

- If you are able to document one or more of the indicators above, ask yourself these questions to establish reasonable cause:

☐ Y N

- ☐ ☐ Has some form of impairment been shown in the employee's appearance, actions or work performance?
- ☐ ☐ Does the impairment result from the possible use of drugs or alcohol?
- ☐ ☐ Are the facts reliable? Did you witness the situation personally, or are you sure that the witness(es) are reliable and have provided firsthand information?



DATWA

Determining Reasonable Cause (Con't.)

- [] [] Are the facts capable of explanation?
- [] [] Are the facts capable of documentation?
- [] [] Is the impairment current, today, now?
- Do NOT proceed with reasonable cause testing unless all of the above questions are answered with a YES.



DATWA

Taking Action

____ Reasonable cause established

____ Reasonable cause NOT established

Prepared by:

Supervisor's/Manager's

Signature: _____



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MARIJUANA: MEDICAL AND RECREATION USE



MINNESOTA MARIJUANA LAW

AN OVERVIEW OF THE LAW

- Minnesota's Medical Cannabis law allows for the use and possession of marijuana for medical purposes.
- Law passed in 2014.



MARIJUANA: WHAT DOES IT DO?

- There are five major cannabinoids in the plant.
- The best-known, THC, is the only one that delivers the “high”. It is a muscle relaxant that helps lower blood pressure and stimulates the appetite.
- Another compound, CBD, is good at relieving pain, nausea and convulsions. Similarly, the other three main cannabinoids are each better at treating certain other symptoms.
- <http://www.unitedpatientsgroup.com/resources/how-medical-marijuana-works>



MEDICAL MARIJUANA OVERVIEW

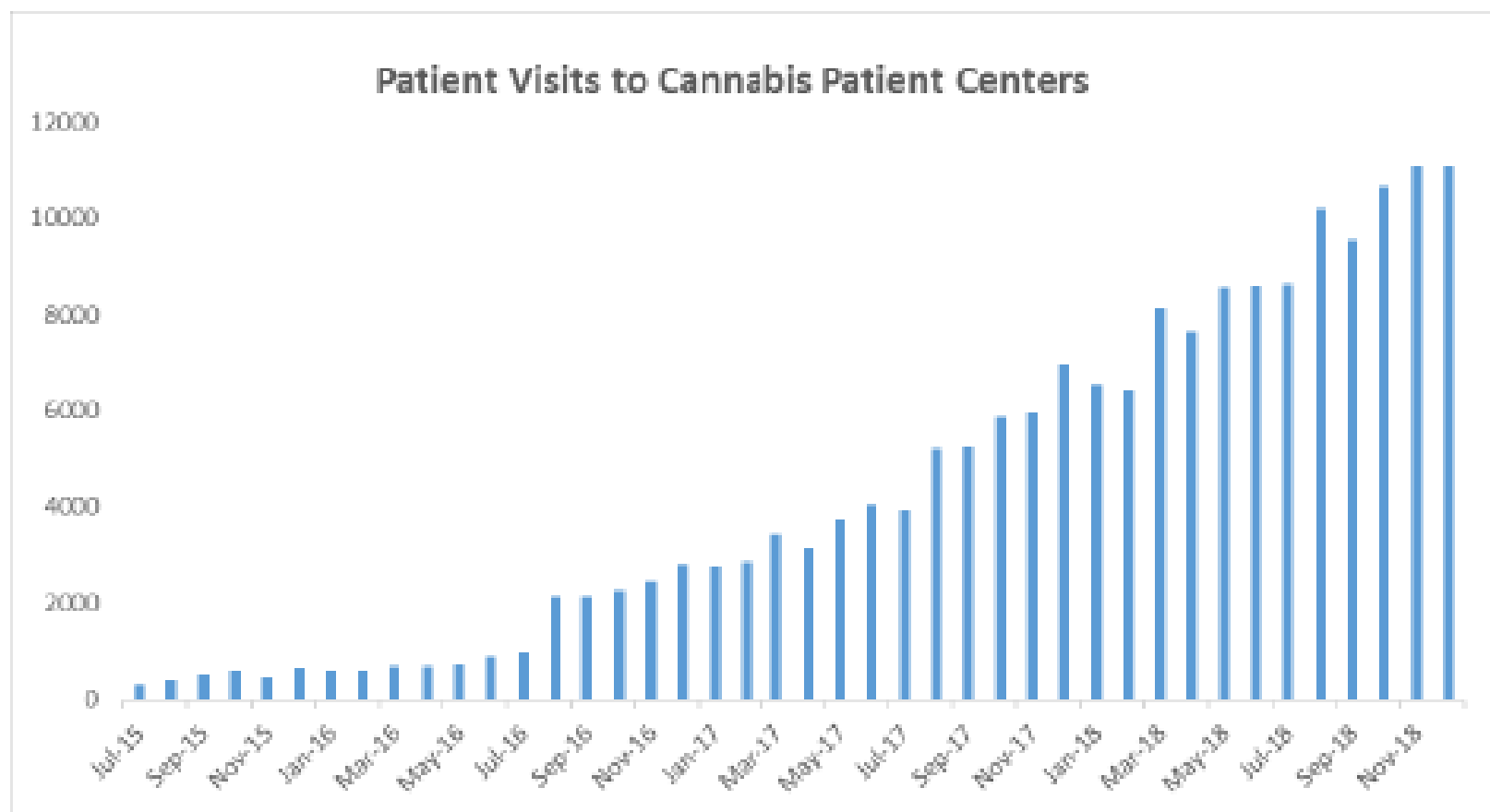
- Patients seeking medical marijuana must go through Minnesota Registry Program.
- Only legal to distribute and consume medical marijuana in pill, vapor, and liquid form.
- Smoking marijuana is unlawful.
- Cannot use marijuana in public places or at work.



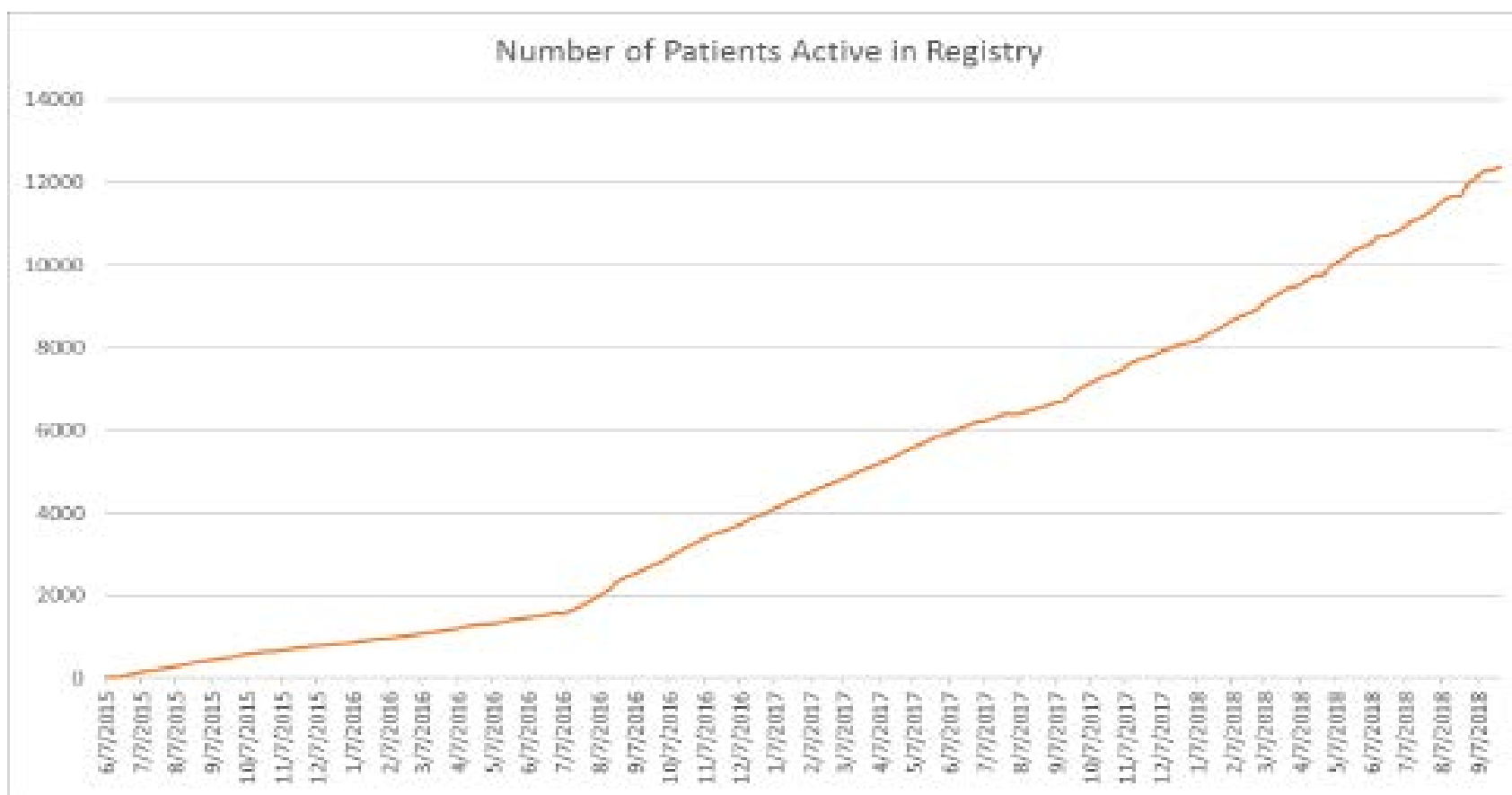
HOW POPULAR IS MEDICAL MARIJUANA?

- A January 2019 report says the Office of Medical Cannabis has enrolled 14,481 patients (up from 8,129 as of December 2017).

HOW POPULAR IS MEDICAL MARIJUANA?



HOW POPULAR IS MEDICAL MARIJUANA?



QUALIFICATION

- Minnesota's Medical Cannabis Program is one of the most restrictive.
- Health care practitioners must register in the Minnesota Medical Cannabis Registry in order to prescribe.
- A patient must be diagnosed with a qualifying condition and then apply to be enrolled in the Patient Registry Program.



QUALIFICATION (CONT'D)

- Once approved for the registry, the patient will receive a registry card that allows them to receive marijuana from a dispensary/clinic.
- Marijuana cannot be “prescribed” by physicians or other health care professionals because it is not approved by the FDA.
- Doctors certify patient as having a qualifying condition and then pharmacists working in clinics dispense.



QUALIFYING CONDITIONS

- Marijuana can only be used for the following qualifying conditions:
 - Cancer
 - Glaucoma
 - HIV/AIDS
 - Tourette's syndrome
 - Epilepsy
 - Autism
 - Obstructive sleep apnea
 - Amyotrophic Lateral Sclerosis (ALS)
 - Crohn's disease
 - "Severe and persistent muscle spasms"
 - Terminal illness with a probable life expectancy of under a year
 - Intractable pain
 - PTSD



QUALIFYING CONDITIONS, CONT'D

- Intractable pain is defined as "a condition in which the case of the pain cannot be removed or otherwise treated with the consent of the patient and in which, in the generally accepted course of medical practice, no relief or cure of the cause of the pain is possible, or none has been found after reasonable efforts."



QUALIFYING CONDITIONS, CONT'D

- Intractable pain makes up 64% of all patient certifications
- PTSD (16%)
- Severe/persistent muscle spasms (13%)
- Cancer (9%)

According to MN Dep't of Health January 2019 update



EMPLOYEE PROTECTIONS

- Minnesota's Medical Cannabis law prohibits discrimination based on:
 - The person's status as a patient enrolled in the registry program;
 - The patient's positive drug test for cannabis components or metabolites, **unless** the patient used, possessed, or was impaired by medical cannabis on the premises of the place of employment or during hours of employment.



EMPLOYMENT PROTECTIONS

- Nothing in Minnesota's Medical Cannabis law allows an employee to use, possess, or be impaired by medical cannabis while on duty.
- In fact, all use of medical cannabis must occur during non-working hours and in such a manner that does not result in impairment at a future time on the job.
- So, employers should consider including a provision in their policy that prohibits the use of, possession of, and impairment by marijuana on company premises and during work hours.



RECREATIONAL MARIJUANA

- In Minnesota, recreational use is still illegal.
 - In August 2019, Gov. Walz ordered state agencies to begin preparing for legalization. But, no vote scheduled on legislation.
- Legal in 11 states.
- Very likely that more states will legalize marijuana in the near future.



RECREATIONAL MARIJUANA

- State recreational use laws include employer protections.
- Example: IL law (effective 1/1/2020) legalizes marijuana, but protects employers by:
 - Allowing “reasonable” zero tolerance policies
 - Allowing employer to prohibit use, possession, and impairment
 - Allowing employer to discipline employee if employer has “good faith belief” employee is impaired



RECREATIONAL MARIJUANA

- Unless and until recreational marijuana is legalized at federal level, it will be a state-by-state issue.
- Therefore, employer protections will depend heavily on the language of the state statute.
- Employers will face same problems with detecting impairment, but could face additional problems in determining whether use was legal because recreational users may not have prescription or other proof of legal use.



MINNESOTA LAWFUL CONSUMABLE PRODUCTS ACT (MLCPA)

- The MLCPA prohibits discrimination against applicant or employee because they have engaged in lawful off-premises use of consumable products during nonworking hours.
- Likely includes medical marijuana use.
- But, because Minnesota's medical marijuana law already prohibits discrimination based on status as registered user (except for workplace possession, use, or impairment), MLCPA's protections may be redundant.
- MLCPA may protect recreational use when such use is legalized in Minnesota.

DRUG TESTING: WHICH LAWS APPLY?

- Drug Free Workplace Act
- DATWA



THE DRUG FREE WORKPLACE ACT

- The Drug-Free Workplace Act applies to employers who receive a federal contract of at least \$100,000.
- Subject employers must comply with statutory requirements to maintain drug-free workplaces.
- Under this statute, marijuana use or possession is prohibited.
- State laws do not excuse companies subject to the Drug-Free Workplace Act.



THE DRUG FREE WORKPLACE ACT

- The U.S. Department of Transportation has regulations governing safety-sensitive jobs which do not authorize medical marijuana as a valid medical explanation for a positive drug test, even if the person lives in a state where it is lawful.
- It is unlawful for any safety-sensitive employee subject to drug testing under the DOT's drug testing regulations to use medical marijuana.
- State jobs that require a commercial license subject to federal DOT regulations are subject to the federal laws on marijuana and employers may discriminate against employees or applicants on the Medical Marijuana registry.



DATWA

- If employees not subject to federal law testing, employers can only test in compliance with DATWA.
- Employer must have written drug testing policy that follows DATWA.



CRITICAL ISSUE: IMPAIRMENT

- Unlike alcohol, is very difficult to identify whether an individual who tests positive for marijuana is “impaired.”
- Marijuana stored in fat cells, and can often remain in body (and lead to positive test) for several weeks.



REASONABLE SUSPICION PROCESS

1. Observe—What do you see, smell, hear?
2. Confirm—Have peer(s) also observe employee
3. Document—Use objective language
4. Confront and Converse—Be direct but supportive
5. Testing—Know your organization's guidelines
6. Services and Treatment



CONFRONTING THE EMPLOYEE

- Collect all information
- Get confirmation whenever possible
- Use only objective data
- Consult with HR and/or EAP
- Speak to employee in private
- Be specific—state your concerns and why
- Be prepared for emotional response
- Explain expectations and/or consequences
- Do not allow employee to leave premises on their own
- Document the meeting



TESTING

- Move quickly to test once decision is made
- Consider testing regardless of admission
- Be clear regarding what substances you are testing for
- Make sure testing sites are accredited and known to staff
- Clearly document refusal to test in policy and in documentation
- Staff need to transport/accompany to facility
- Assure ride home from facility



DRUG TESTING FOR MARIJUANA

The four most common methods of testing for marijuana are:

- **Blood tests:** Cannot identify impairment.
- **Urine tests:** Cannot identify impairment due to length of time between ingestion and excretion.
- **Hair tests:** Cannot accurately measure impairment because marijuana residue does not appear in the hair until days after first use.
- **Saliva tests:** Relatively new and less reliable test.



DRUG TESTING FOR MARIJUANA

- Saliva testing is legally questionable for non-DOT testing in Minnesota, because a saliva test does not utilize the services of a certified laboratory. So really, Minnesota employers have three options for marijuana drug testing.
 - Blood test; urine test; hair test.



DRUG TESTING FOR MARIJUANA

- Blood or saliva tests are not reliable indicators of impairment because cannabinoids remain in the body for up to thirty days but impairment only lasts a few hours.
- Oftentimes, field sobriety tests typically administered by law enforcement during traffic stops are difficult to administer and document in a workplace environment, especially when dealing with disabled individuals.

DRUG TESTING FOR MARIJUANA

- Minnesota has no definition of impairment. However, Arizona defines drug impairment as noticeable changes to an employee's:
 - Speech, Walking, Standing, Physical dexterity, Agility, Coordination, Actions, Movement, Demeanor, Appearance, Clothing, Odor
- Arizona also includes irrational or unusual behavior, negligence or carelessness, and/or a disregard for the safety of others as indicators that an individual is impaired by drugs.



TRACE AMOUNTS AND DETECTION LEVELS

- In most states, there are no legal definitions of intoxication levels for drug use. Some states have imposed legal limits for THC blood levels.
- Detection levels are a moving target.
- Laboratories set a threshold level for a positive drug test.



DRUG TESTING FOR MARIJUANA

- Isn't a positive test sufficient proof of impairment?
 - Minnesota courts have not ruled on this issue.
 - But, other courts have held that a positive test, without more, is insufficient to prove that an employee who legally used medicinal marijuana was under the influence at work. *Whitmire v. Wal-Mart Stores Inc.*, 359 F. Supp. 3d 761 (D. Ariz. 2019).



DRUG TESTING FOR MARIJUANA

- Therefore, it is extremely important to have clear policies in place and to document everything used to support a reasonable suspicion that an employee was impaired by marijuana while at work in order to reduce the legal risks involved with taking adverse action against an employee for suspected impairment while at work.



PRESUMPTION OF LAWFUL USE

- Minnesota Cannabis Act includes presumption that applicant or employee enrolled in registry is engaged in authorized use.
- Employee may be required to prove legal use by showing prescription of registry card.
- Employer may rebut the presumption by evidence that conduct related to use of medical cannabis was not for the purpose of treating or alleviating the patient's qualifying medical condition or symptoms associated with the patient's qualifying medical condition.

TAKEAWAYS

1. There is no clear or reliable way to determine current impairment.
2. Prior to requesting a drug test, employers should observe and document behaviors that indicate a “reasonable suspicion” that the employee is impaired.
3. If the employee tests positive, employer may ask to see patient registry card.
4. Employers who choose to drug test for marijuana must follow Minnesota DATWA.

TAKEAWAYS

- Minnesota's Medical Cannabis Law has some of the strongest employment protections in the nation.
 - Employers cannot discriminate because someone is enrolled on the registry or because registered patient tests positive for marijuana.
 - Employees can provide proof of their enrollment in the registry to explain a positive marijuana test.
- Employers can still drug test for marijuana and discipline employees who possess or are impaired by marijuana.
 - Minnesota Drug and Alcohol Testing in the Workplace Act (DATWA) still applies.
 - Remember, proving marijuana impairment via a drug test is difficult and you may need behavioral observations to support the drug test result.

MARIJUANA OTHER STATES

Nevada

- Became the first state to ban pre-employment testing for marijuana.
- Effective Jan. 1, 2020, it is “unlawful for any employer in [Nevada] to fail or refuse to hire a prospective employee because the prospective employee submitted to a screening test and the results of the screening test indicate the presence of marijuana.”
- Exceptions for certain jobs (firefighter, paramedic) and conflicting federal law (e.g., DOT regulations).

MARIJUANA OTHER STATES

New York City

- Passed a city ordinance banning pre-employment testing for THC.
- Effective May 10, 2020, “[e]xcept as otherwise provided by law, it shall be an unlawful discriminatory practice for an employer, labor organization, employment agency, or agent thereof to require a prospective employee to submit to testing for the presence of any tetrahydrocannabinols or marijuana in such prospective employee’s system as a condition of employment.”
- Exceptions for certain jobs (firefighter, paramedic) and conflicting federal law (e.g., DOT regulations).



AMERICANS WITH DISABILITIES ACT

Alcoholism as a Disability:

- Alcoholism may qualify as a disability if it “substantially limits one or more major life activities.”
- A person who currently uses alcohol may be protected.
- An alcoholic is viewed as a person with a disability and protected by the ADA if he or she is qualified to perform the essential functions of the job.
- An employer may be required to provide an accommodation to an alcoholic.



AMERICANS WITH DISABILITIES ACT

Drug Addiction as a Disability:

- A past addiction to illegal drugs or controlled substances is a covered disability under the ADA
- Individuals who are addicted to drugs, have a history of addiction, or who are regarded as being addicted have an impairment under the law.
- To qualify as disabled, the employee's addiction would have to pose a substantial limitation on one or more major life activities – and he or she cannot currently be using illegal drugs.



AMERICANS WITH DISABILITIES ACT

Drug Addiction as a Disability:

- Casual drug use is not a disability under the ADA.
- Individuals who currently engage in illegal drug use are specifically excluded from the ADA's protection.
- Employees are protected, however, if they:
 - Successfully completed rehab and are no longer using;
 - Are participating in supervised rehab and are no longer using; or
 - Are erroneously regarded as using illegal drugs.

AMERICANS WITH DISABILITIES ACT

Accommodating Alcoholism or Addiction Disability:

- Engage in “interactive process” with employee and consider each case individually.
- Remember that employee need not use “magic words,” like disability or accommodation, to trigger employer’s obligations.
- But identifying need for accommodation generally is employee’s responsibility.



AMERICANS WITH DISABILITIES ACT

Accommodating the Disability (Cont'd):

- Reasonable accommodations may include:
 - Time off or leave for treatment, counseling, AA meetings, etc.
 - Granting leave beyond the 12 weeks required under the FMLA.
 - Modifications to work schedule.
 - Ability to make personal calls (e.g., to AA sponsor or health care provider) during work day.



MEDICAL MARIJUANA AS A REASONABLE ACCOMMODATION

- Courts have found that the ADA does **not** require employers to allow medical marijuana use as a reasonable accommodation.
- The ADA specifically excludes individuals engaging in “illegal” drug use from the definition of a qualified individual.
- Even if prescribed, marijuana remains illegal under federal law.
- The ADA’s definition of illegal drugs includes prescribed marijuana.



MEDICAL MARIJUANA AS A REASONABLE ACCOMMODATION

- Ross v. Raging Wire Telecommunications, Inc., 42 Cal. 4th 920 (2008)
 - California resident, Gary Ross, suffered from muscle spasms in his back as a result of his time in the U.S. Air Force. California state law considered him to be a person with a disability. He began using medical marijuana as part of a physician's recommendation.
 - He was offered a job and as part of the hiring process took a post-offer drug test. After a positive result for THC he was suspended and terminated. He sued claiming failure to make a reasonable accommodation.
 - The California Supreme Court found that he did not have a cause of action because the Compassionate Use Act did not give marijuana the same status as a lawful prescription drug. As long as marijuana remained unlawful under federal law, employers do not have to accommodate.



MEDICAL MARIJUANA AS A REASONABLE ACCOMMODATION

- Garcia v. Tractor Supply Co., 154 F. Supp. 3d 1225, 1226 (D.N.M. 2016)
 - Federal judge rejected disability claims of a tractor supply company employee who had HIV/AIDS.
 - The judge considered decisions out of California and Colorado and found that the state's medical marijuana law did not have any affirmative language requiring the accommodation of registered medical marijuana users.
 - The judge also found that reading the state's human rights law in tandem with the state's compassionate use law as imposing such a duty would conflict with the federal Controlled Substances Act, which makes marijuana use illegal.

MEDICAL MARIJUANA AS A REASONABLE ACCOMMODATION

- Main takeaway from these cases:
 - ADA does not require accommodation of medical marijuana.
 - Absent express employment protections in state statutes for marijuana users, state laws decriminalizing marijuana use do not require workplace accommodations under state or federal disability laws.



MEDICAL MARIJUANA AND THE ADA

- Certain drug policies could violate the ADA.
- Both the ADA and Minnesota law consider the use of certain “qualification standards, employment tests or other selection criteria” that screen out disabled persons as discriminatory.
- Screening employees for medical marijuana could also screen for disabilities and violate the ADA.



MEDICAL MARIJUANA AND THE ADA

- In *EEOC v. Pines of Clarkston*, 2015 U.S. Dist. LEXIS 55926 (E.D. Mich. Apr. 29, 2015), an assisted living facility refused to employ a nursing administrator after she tested positive for marijuana prescribed to treat epilepsy.
- The employer in this case had not made it clear to the candidate that the reason employment was refused was the drug test and made comments about the candidate's ability to perform the job due to her epilepsy.



EEOC v. PINES OF CLARKSTON

- The employer comments raised the question of whether the candidate was rejected because of the positive drug test or for the disability that required marijuana for treatment. The Judge denied the employer's motion to dismiss finding the use of marijuana is not itself a disability, but using positive drug tests to screen out disabled job applicants violates the ADA and most state disability laws. There was sufficient evidence to move forward on the theory that the test was used to screen out disabled applicants.



THE AMERICANS WITH DISABILITIES ACT

- **Bottom line:** The ADA **does not** require employers to accommodate medical marijuana use at the workplace.
- However, employers are not immune from state law liability even though they may not be liable under the ADA.
- While not illegal under ADA, failing to accommodate may violate Minnesota's medical marijuana law by "discriminating" against patient status.



AMERICANS WITH DISABILITIES ACT

EEOC's Pre-Employment Guidance:

- The ADA has no impact on the use of drug testing.
- It does not violate the ADA to ask whether the applicant has ever used illegal drugs or alcohol or been arrested for such use.
- The questions cannot be likely to elicit information about a disability.



AMERICANS WITH DISABILITIES ACT

EEOC's Pre-Employment Guidance (Cont'd):

- These types of questions are permissible:
 - "Have you ever used illegal drugs?"
 - "When is the last time you used illegal drugs?"
 - "Have you used illegal drugs in the last six months?"
 - "Do you drink alcohol?"
 - "Have you ever been arrested for driving under the influence?"



AMERICANS WITH DISABILITIES ACT

EEOC's Pre-Employment Guidance (Cont'd):

- These types of questions are not permissible because they address how often the substance use occurred:
 - How often did you use illegal drugs in the past?
 - Have you ever been addicted to drugs?
 - Have you ever been treated for drug addiction?
 - "How much alcohol do you drink or how often?"
 - "Have you participated in an alcohol rehabilitation program?"

AMERICANS WITH DISABILITIES ACT

EEOC's Pre-Employment Guidance (Cont'd):

- Just because you can inquire about substance use does not mean you should.
- Policies that screen out applicants because of a history of addiction or treatment for addiction must be **job-related** and consistent with a **business necessity**.



AMERICANS WITH DISABILITIES ACT

EEOC's Pre-Employment Guidance (Cont'd):

- **For example:** If safety is the justification for such a screening policy, the employer must be able to show that individuals excluded because of a history of drug addiction or treatment would pose a direct threat -- i.e., a significant risk of substantial harm -- to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.



WHAT IS A MEDICAL EXAMINATION?

- The ADA prohibits “medical examinations” to determine whether an applicant or employee has a disability.
- Medical exams include tests or procedures that seek information about an individual’s disability.
 - Includes tests to determine presence of legal drugs.
 - Under MN law, this may include medical marijuana.
 - Does not include tests to determine the presence of illegal drugs.

MINNESOTA HUMAN RIGHTS ACT

MHRA Overview:

- The MHRA, like the ADA, prohibits discrimination on the basis of disability.
- The MHRA's coverage of individuals with disabilities is generally very similar to the ADA.
 - Generally, individuals with alcohol or drug addiction may be considered to have a disability and are protected.



MARIJUANA UNDER THE MHRA

- The MHRA does not require employers to permit impairment **at work** or the use or possession of marijuana **at work**.
- Critical issue is determining what constitutes “impairment.”
- Must document facts to show impairment (or possession/use at work) to support right to discipline employee.



MEDICAL MARIJUANA AS A REASONABLE ACCOMMODATION

- No one has challenged whether or not this includes the duty to allow an employee's use of medical marijuana as part of an accommodation.
- It is unclear whether employers in Minnesota run the risk of violating the MHRA by failing to accommodate an employee's lawful medical marijuana use.



MEDICAL MARIJUANA AS A REASONABLE ACCOMMODATION

- While failing to accommodate medical marijuana use may not violate the ADA or MHRA, failing to accommodate such use may violate the Minnesota medical marijuana law itself.
- This is because failing to do so may “discriminate” against the patient based on status as registered user.
 - Minn. Stat. § 152.32, subd. 3.



MEDICAL MARIJUANA AS A REASONABLE ACCOMMODATION

- Remember:
 - Employers must accommodate the underlying condition for which the medical marijuana was prescribed, even if not required to allow medical marijuana use.



BEST PRACTICES

- Do not ask applicants or employees to disclose whether they are medical marijuana patients.
- If you learn an employee or applicant is a registered patient, do not take adverse action based on this fact alone. Gather evidence to support workplace impairment, use, or possession.
- Workplace policies should be clear about these procedures, and the penalties for violating these procedures.



FAMILY MEDICAL LEAVE ACT

Substance Abuse as a Serious Health Condition:

- The FMLA does not specifically address whether substance abuse or alcoholism constitute a “serious health condition.”
- However, the Department of Labor regulations interpreting the FMLA provide that FMLA leave may be taken for treatment of substance abuse.
 - This treatment must come from a health care provider or by a provider of health care services on referral from a health care provider.



FAMILY MEDICAL LEAVE ACT

Substance Abuse as a Serious Health Condition:

- In contrast, absence from work because of an employee's substance use or abuse, rather than for treatment, is not protected by the FMLA.
- **Also note:** if the employer has an established policy, applied in a non-discriminatory manner, that provides under certain circumstances an employee may be terminated for substance abuse, then the employee may be terminated regardless of whether he or she is presently taking FMLA leave.



MEDICAL MARIJUANA AND THE FMLA

- Do workers have rights under the FMLA for medical marijuana use? Perhaps.
 - If they have a qualifying condition and take FMLA leave, they can lawfully use medical marijuana during the time off, even though that time off is covered by a federal law.
- What happens if medical marijuana is part of ongoing treatment?
 - An employee may be able to take FMLA leave to use medical marijuana. For example, if they are instructed to take it in the afternoon to treat symptoms, they could take unpaid FMLA leave (if they meet all other requirements) for an afternoon and use medical marijuana.
- Remember: if the employer has legitimate concerns, they can inquire further.



ATTORNEYS AT LAW



TESTING DEMANDED BY CUSTOMERS



CUSTOMER-DEMANDED TESTING

- DATWA provides that “[a]n employer may not request or require an employee or job applicant to undergo drug and alcohol testing except as authorized in [Minn. Stat. § 181.951].”
- Yet, DATWA provides for only 5 types of drug testing:
 - (1) Job applicant testing
 - (2) Routine physical examination testing
 - (3) Random testing
 - (4) Reasonable suspicion testing
 - (5) Treatment program testing



CUSTOMER-DEMANDED TESTING

- How to test when current employees are required to be tested in order to work for a customer or on customer property?
- Remember, DATWA also requires that: (1) the testing policy be in writing, (2) the laboratory be certified, and (3) testing not be done on a “arbitrary and capricious basis.”



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CRITICAL ISSUES FOR MINNESOTA EMPLOYERS



HOW TO HANDLE AN EMPLOYEE'S DWI

- Do not take disciplinary action based on the DWI/DUI itself
- Instead, take disciplinary action based upon violation of employer's applicable attendance policies.
 - For example, violation of no call, no show provision.



TREATMENT PROGRAM TESTING VS. ASSESSMENT TESTING

- Treatment Program Testing:
 - Prior notice is not required.
 - Employers can require employees who are currently participating in a drug or alcohol treatment program under an employee benefit plan or pursuant to a referral by the employer to undergo drug or alcohol testing.
 - This continues for up to two years following an employee's completion of a drug or alcohol treatment program.
- Minn. Stat. 181.951, subd. 6.



ASSESSMENT VS. TREATMENT PROGRAM TESTING

- An employer may condition an employee's continued employment or return to work on an Employee Assistance Program ("EAP") assessment.
 - Employers may offer an employee with a substance abuse problem the opportunity to participate in a treatment or rehabilitation prior to taking disciplinary action.
 - Participation may involve testing



ROLE OF EAP

- Chemical dependency evaluation may be offered through EAP
- Family services and resources
- Consult with an EAP counselor regarding best practices
- Release of information needed
- Assistance with managing case and treatment, and employee returning to work
- Supervisor training around the topic



LAST CHANCE AGREEMENTS

- Written return to work agreement
- Agreement should outline:
 - employee's responsibility to stay substance-free;
 - employee's responsibility comply with any treatment program requirements; and
 - Consequences for employee's failure to comply with the terms of the agreement (usually termination).



BEST PRACTICES

- Implement and enforce a policy prohibiting alcohol use or drug use or possession at work.
- Prohibit “impairment” at work.
- Outline process for testing, including employee rights.
- Train supervisors to recognize and respond to signs of drug or alcohol use.
- Do not discharge employee for positive test resulting from lawful off-premises medical marijuana use.



POLICY BEST PRACTICES (WHAT TO INCLUDE)

- Define what is prohibited
- Requiring employees to notify of prescription med use if could lead to impairment
- Who is subject to testing
- What you are testing for and how
- Requirement of clean test prior to returning to work
- Circumstances regarding when testing will occur
- Explanation of how testing will be shared and with who
- Consequences of test refusal
- Right to search company and/or employee property



QUESTIONS?

Thank you.