

# MARIJUANA IN THE WORKPLACE: IMPLICATIONS OF LEGALIZATION

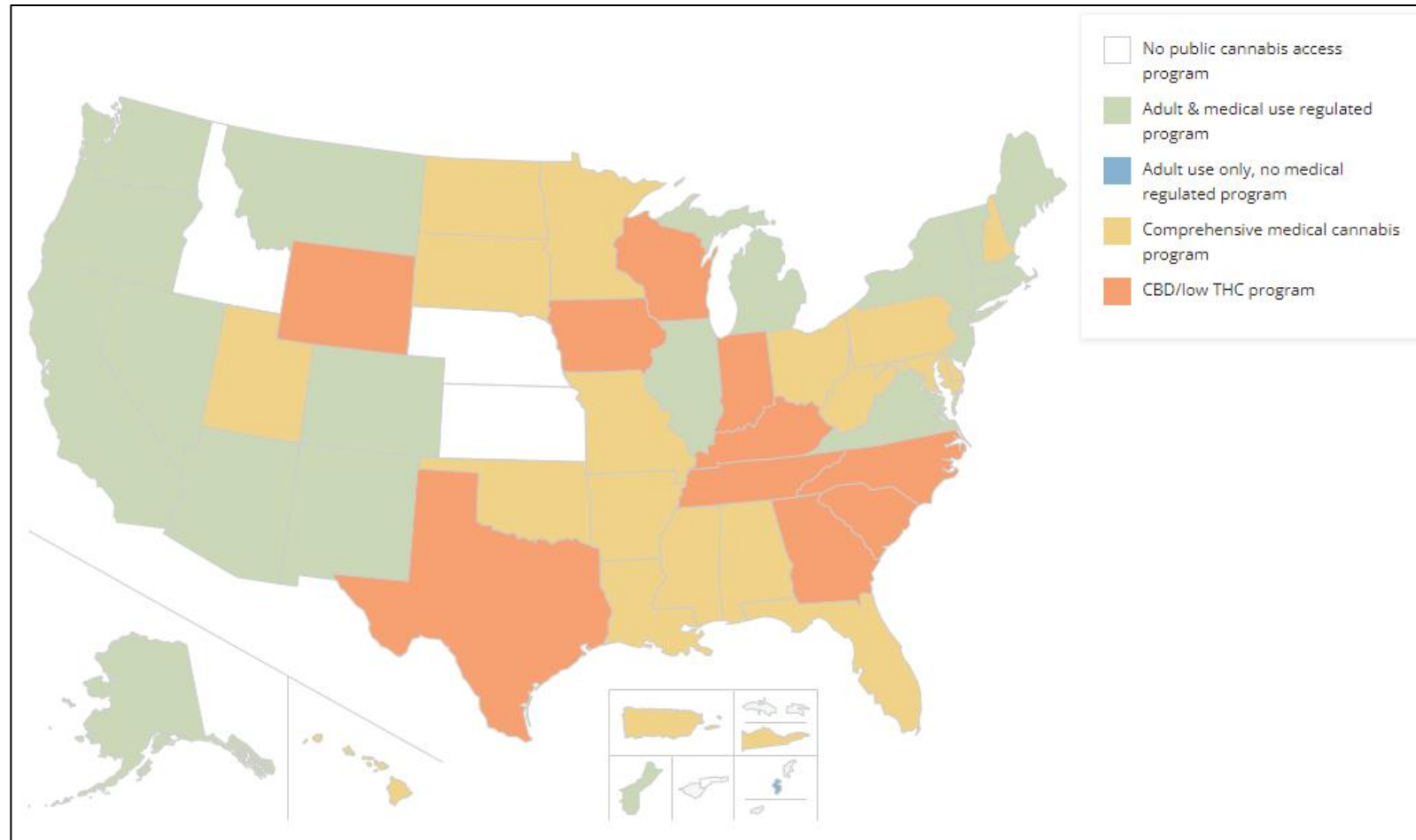
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# Recreational Marijuana Legalization



- Effective: August 1, 2023.
- Minnesota becomes the 23rd state to legalize recreational marijuana use.
- Adults 21 years of age and older can purchase up to
  - ▣ 2 ounces of cannabis flower to possess or transport in public;
  - ▣ 2 pounds of cannabis flower to possess at home;
  - ▣ 8 grams of concentrate; and
  - ▣ 800 milligrams of edible products at a time.
- May grow up to 8 plants at home, though only four plants can be mature at a time.
- Records for misdemeanor convictions for marijuana will be expunged automatically, though the process will take up to a year.
  - ▣ A committee will be established to consider expunging felony level offenses.

# Which States Have Legalized Marijuana?



Source: National Conference of State Legislatures

# Recreational Marijuana & Collision Claim Frequencies



- Colorado – first state to approve recreational marijuana with sales commencing in January 2014.
  - ▣ Collision claims were 12.5 percent higher than nearby states
- Washington – 2<sup>nd</sup> state to approve recreational marijuana with sales commencing in July 2014
  - ▣ Collision claims were 9.7 percent higher than nearby states
- Oregon – 3<sup>rd</sup> state to approve recreational marijuana with sales starting in October 2015.
  - ▣ No significant difference in claims (i.e., less than 1%)
- Overall legalization of retail sales was associated with a 6.0% increase in collision claim frequency in those state that legalized marijuana.

**Source: Highway Loss Data Institute, Bulletin, Vol. 35, No. 8 April 2018**

# Minnesota's Marijuana Laws

# Medical Cannabis Program

- Since 2015, Minnesota's Medical Cannabis Program has provided medical cannabis to individuals certified by a participating healthcare provider as having one of several listed conditions:
  - ▣ Cancer, Alzheimer's disease, MS, ALS, Autism Spectrum Disorder, and a variety of other conditions qualify.
  - ▣ Effective Aug. 1, 2023, OCD and IBS are added to list of qualifying conditions for medical cannabis.
- Employees with these conditions may also qualify for reasonable accommodations under the Americans with Disabilities Act (ADA) and state and local disability employment laws.

# Consuming Legal Substances

- Minnesota's Medical Cannabis Program has been open since 2015.
  - ▣ 837 people were enrolled for medical cannabis in 2015.
  - ▣ As of 2022 (Q4), 39,577 Minnesotans have enrolled for medical cannabis.
- THC-containing edibles, within quantity and concentration limits, have been legally available for purchase for 21-and-older in Minnesota since 2022.
  - ▣ Many liquor stores now stock legal THC gummies.

# MN Legalized “Edible Cannabinoid Products”

- As of July 1, 2022, Minnesotans ages 21 and older can now purchase edibles and beverages containing THC.
- ▣ Products limited to 5 mg of THC per serving and 50 mg per package.
- ▣ The THC must be derived from hemp, not marijuana.
- ▣ The two most common types of THC used in producing these products are delta-8 and delta-9.





# Legalization of Recreational Marijuana

# Legalizing Recreational Use of Marijuana

- 319 page bill becomes law.
  - ▣ Allows for “quality control” – employees of licensed cannabis business may sample cannabis up to three times in a 24-hour period, but may not interact with customers for 3 hours afterwards.
  - ▣ Marijuana sellers must enter into a “labor peace agreement” with a union; employees may not report to work under the influence
  - ▣ Adds legally possessed cannabis to Minnesota’s lawful consumer products statute (more on that in a moment).
- State legislation doesn’t alter existing federal laws on marijuana.

# Amendments to Minnesota's Drug And Alcohol Testing in the Workplace Act (DATWA)

# Minnesota Drug Testing Statute

- Under Minnesota law, employers can only drug test employees pursuant to a written drug testing policy, containing at minimum the following provisions:
  - ▣ the employees or job applicants subject to testing under the policy;
  - ▣ the circumstances under which drug or alcohol testing may be requested or required;
  - ▣ the right of an employee or job applicant to refuse to undergo drug and alcohol testing and the consequences of refusal;
  - ▣ any disciplinary or other adverse personnel action that may be taken based on a confirmatory test verifying a positive test result on an initial screening test;
  - ▣ the right of an employee or job applicant to explain a positive test result on a confirmatory test or request and pay for a confirmatory retest; and
  - ▣ any other appeal procedures available.

# Minnesota Drug Testing Statute

- An employer must provide an employee or job applicant with written notice of its drug testing policy before any drug testing may take place.
- An employer must also post notice of its drug testing policy in, “an appropriate and conspicuous location on the employer’s premises.”
  - ▣ The notice must also inform employees and job applicants that copies of the policy are available for inspection during regular business hours.
- Prior to requesting the drug test, the employer must obtain a signed form from the employee or job applicant acknowledging they have seen the employer’s drug testing policy.

# Drug Testing Policy Provisions

- The policy should include a section prohibiting drug use and activities.
  - Prohibited use and activities should include consumption, possession, use, or solicitation of an:
    - Illegal controlled substance, or
    - A legal substance being used or possessed illegally.
- **Subject to the new law**, include a statement about the consequences of a refusal to submit to testing as required under the policy.
  - For example: *An employee's refusal to submit to testing shall constitute a violation of this Alcohol and Controlled Substances Policy and shall be treated as a resignation of employment.*

# Drug Testing Policy Provisions

- The policy should identify of the types of drug tests employees may be subjected to, including:
  - Pre-Employment Testing
    - All applicants must undergo a drug test for controlled substances **after** a conditional offer of employment has been made, but prior to the commencement of work.
    - Specify, that an employment offer is conditioned on the employee:
      - Submitting to the test, and
      - Taking and passing the test.

# Drug Testing Policy Provisions *Cont...*

## □ Post-Accident Testing\*

- An employee may be subjected to a post-accident drug test if he/she is involved in a work-related accident, regardless of fault, involving a:
  - Serious personal injury,
  - Significant property damage,
  - Serious moving violation, or
  - Serious safety violation rule.

\*In 2017, OSHA limited post-accident testing without an individual inquiry. This was later lifted under the Trump Administration.



# Drug Testing Policy Provisions *Cont...*

## □ Random Testing

- Applicable to all employees performing safety-sensitive functions.
  - All employees will have an equal chance of being selected each time.
  - The policy should define safety sensitive function.
    - For example: *Safety-sensitive refers to those duties, positions and/or functions performed by Employees wherein impairment caused by drug or alcohol use would threaten the safety and/or health of any person.*
- Explicitly state under random testing that testing may occur unannounced, at anytime.
- Additionally, the policy should include language informing employees, that those selected must report to the testing site immediately, upon selection and notification.

# Drug Testing Policy Provisions *Cont...*

## □ Reasonable Suspicion Testing

- An employer may conduct a drug test, upon reasonable suspicion that an employee is under the influence of drugs, or upon violation of the Company's drug policy while the employee is working, on the employer's premises, or operating company property.
- Employee will not be allowed to perform any work duties until obtaining a negative result.
  - An employer may consider placing the employee on non-disciplinary suspension with pay while awaiting the verified post-accident test results.
- An employee suspected of drug use must report to the testing site immediately upon notification.
  - The policy should include information regarding how the employee will be transported to the site.
    - For example: *The Company will secure transportation for the employee to and from the test site.*

# Drug Testing Policy Provisions *Cont...*

## □ Return-to-Duty Testing

- The policy should include a clause stating the company is not obligated to reinstate or rehire any employee who commits conduct in violation of the policy or state law.
- Prior to returning to work, the company may require any employee who violated the drug policy to submit to testing.
- The employer may also require the employee to sign a “last chance agreement,” acknowledging that any behavior in violation of the policy will result in immediate discharge.
- A return-to-duty test may be administered after the Substance Abuse Profession determines the employee has complied with prescribed education/treatment.

# Drug Testing Policy Provisions *Cont...*

## □ Follow-Up Testing

- The policy should include clause limiting the employer's obligation to reinstate or rehire an employee who tested positive for drugs.
- Employees who previously tested positive for a controlled substance or refused to submit to testing may be subjected to follow-up tests.
- The company may impose unannounced follow up controlled substances tests for up to two years following the completion of an employee's rehabilitation program.

# Drug Testing Policy Provisions *Cont...*

- The policy should outline the procedures an employer will use to conduct a drug test.
  - Minnesota law requires the following procedures:
    - a strict chain-of-custody procedure to ensure that the employee's specimen is not tampered with;
    - the use of a state certified laboratory;
    - the confirmation of an initial positive drug screen by a second analysis; and,
    - the confirmation of an initial positive alcohol screen by a second analysis.
  - The policy should specify which drugs will be tested for.
    - The most common include, **marijuana**, cocaine, ecstasy, heroin, opioids, amphetamines, and phencyclidine.

# Drug Testing Policy Provisions *Cont...*

- Notice of results must be provided within three working days to the applicant or employee, including a right to request a copy of the test result and if a positive test, the right to:
  - ▣ submit any information they believe will serve to explain the positive result or the reliability thereof that (within three working days of notification);
  - ▣ request a confirmatory retest of the original sample; or,
  - ▣ request a copy of the test result report.
  
- If the employee or applicant tests positive for drugs an employer may:
  - ▣ Withdraw an applicant's conditional offer.
  - ▣ Discharge or take other adverse employment actions, such as placing an employee on unpaid leave, **subject to limitations on the first positive test.**

# Drug Testing Policy Provisions *Cont...*

## ■ Limitations:

- Under Minnesota law, an employee cannot be discharged for his/her first positive drug test result unless the employee has been given a chance to participate in a rehabilitation program and has refused or failed to successfully complete the program.
  - Employees will bear the costs, unless such services (and without additional cost to the company) covered by existing insurance programs.

# Drug Testing Policy Provisions *Cont...*

## □ Confidentiality Provision

- Employers should keep an employee's positive test result private because the test may show other information protected under law, such as:
  - The presence of a drug that can be legally prescribed under both federal and state law,
  - An employee's disability, or
  - Other medical information.
- Employers should keep an employee's drug test results separate from the employee's personnel file to ensure confidentiality.



# Recreational Marijuana Legalization – Drug Testing

- The law amends the existing drug and alcohol testing statutes:
  - The definition of “Drug” is changed. It specifically removes marijuana and marijuana products.
  - The definition of “Drug and Alcohol Testing” no longer includes cannabis or cannabis testing, unless stated otherwise.

# Pre-Employment Drug Testing

- ❑ Employers are prohibited from requiring a job applicant to undergo cannabis testing for the sole purpose of determining the presence or absence of cannabis as a condition of employment, unless required by state or federal law.
- ❑ Unless required by state or federal law, an employer cannot refuse to hire a job applicant solely because applicant takes a cannabis test or a drug and alcohol test and the results indicate the presence of cannabis.
- ❑ An employer cannot require applicants or employees to undergo cannabis on an arbitrary or capricious basis.

# Reasonable Suspicion Testing

- An employer may request or require an employee to undergo cannabis testing and drug and alcohol testing if the employer has reasonable suspicion that the employee is:
  - Under the influence of drugs or alcohol;
  - Has violated the employer's written work rules prohibits the use, possession, sale or transfer of drugs, alcohol or cannabis while working;
  - Has sustained a personal injury or caused another to sustain a personal injury; or
  - Has cause a work-related accident or was operating or helping to operate machinery, equipment, or vehicles involved in a work-related accident

# Positions Not Subject to New Limitations on Drug Testing

- For the following positions, cannabis and its metabolites are considered a drug and subject to drug and alcohol testing provisions (i.e., pre-employment, random, post-accident, reasonable suspicion):
  - Safety Sensitive Persons;
  - Peace Officers and firefighters;
  - Position requiring face-to-face care, training, education, supervision, counseling, consultation or medical assistance to:
    - Children, vulnerable adults, and patients who receive health care services;
  - Positions requiring CDLs or requiring an employee to operate a motor vehicle for which state or federal law requires drug or alcohol testing;
  - A position of employment funded by a federal grant; or
  - Any other position for which state or federal law requires testing.

# Employer Work Rules

- Unless otherwise provided by state or federal law, an employer is not required to permit cannabis use, possession, impairment, sale, or transfer while an employee is working, on company properties, or using an employer's vehicle, machinery, or equipment.
- ▣ Employers may enact and enforce written rules prohibiting cannabis use, possession, impairment, sale, or transfer while an employee is working, on company properties, or using an employer's vehicle, machinery, or equipment.

# Federal Laws Affecting Drug Testing

# State and Federal Law Restrictions Remain In Place

- The amendments to the drug testing statutes (DATWA) do not apply to employees and job applicants where the specific work performed requires those employees or job applicants to be tested for cannabis pursuant to:
  - ▣ Federal regulations that specifically preempt state regulation of cannabis testing with respect to those employees and job applicants;
  - ▣ Federal regulations or requirements necessary to operate fully regulated facilities;
  - ▣ Federal contracts where cannabis testing is conducted for security, safety, or protection of sensitive proprietary data; or
  - ▣ State agency rules that adopt federal regulations applicable to the interstate component of a federally regulated industry, and the adoption of those rules is for the purpose of conforming the non-federally regulated intrastate component of the industry to identical regulation.

# FHWA Drug and Alcohol Testing Rules

- ❑ The FHWA rules remain intact.
- ❑ Employers can terminate employees for violating the DOT drug and alcohol testing rules
- ❑ 49 C.F.R. Sec. 392.4 prohibits drivers from being on duty and possessing, be under the influence of, or use, marijuana.



# Lawful Products Statute

# Lawful Consumable Products Statute

- Minnesota law prevents employers from discharging/disciplining employees for using “lawful consumable products” (Minn. Stat. § 181.938, subd. 2).
  - ▣ Defined as “[P]roducts whose use or enjoyment is lawful and which are consumed during use or enjoyment, and includes food, alcoholic or nonalcoholic beverages, tobacco, cannabis flower, cannabis products, lower-potency hemp edibles and hemp-derived consumer products.”
- There are exceptions if the employer’s restriction:
  - ▣ Relates to a bona fide job requirement and is reasonably related to employment activities or responsibilities of employee or group of employees; or
  - ▣ Is necessary to avoid a conflict of interest with responsibilities owed by employee to employer.

# Lawful Consumable Products Statute

- Consequences of violating the Lawful Consumable Products statute:
  - ▣ Lawsuits
    - Wages and benefits lost by the individual because of the violation
    - Attorney Fees and Costs

# CLOSING REMARKS

# QUESTIONS?

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# THANK YOU!