

# Medical Marijuana Today

CNA Webinar

June 9, 2016

**Faye Caldwell**

[fcaldwell@caldwelleverson.com](mailto:fcaldwell@caldwelleverson.com)

The statements, analyses and opinions expressed in this presentation are those of the respective author and do not necessarily reflect those of any third parties including the CNA companies. CNA is a registered trademark of CNA Financial Corporation.



# Marijuana Laws

- Constantly changing
- Inconsistent
- Impacts:
  - Company drug testing policies
  - How drug testing programs are administered
  - How results are handled



# Questions To Be Examined

- Can I still test for marijuana?
- What are the benefits of testing?
- How do I develop and manage a drug testing program considering medical marijuana?
- How do I handle positive medical marijuana test results?
- What actions can I take?
- Other concerns?

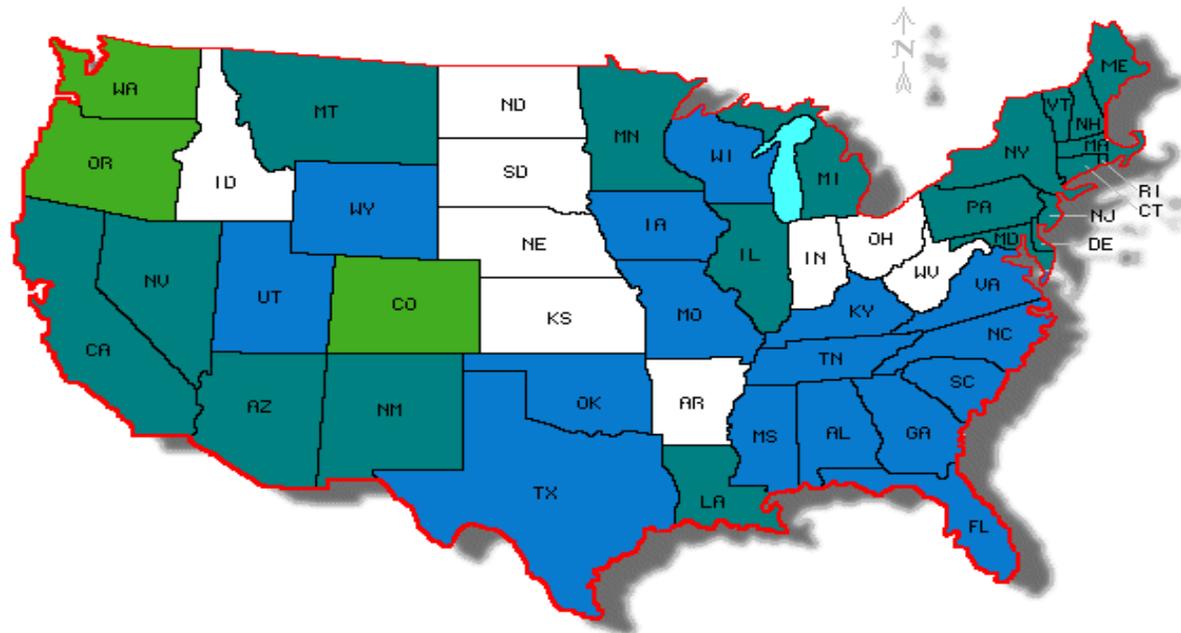
# Marijuana Today: State Laws

- 4 States have recreational marijuana
  - All recreational states also have medical marijuana
- 25 states, D.C., and 2 U.S. territories (Guam and Puerto Rico) have comprehensive medical marijuana laws
- Additional 16 states have low THC/high CBD laws

**Total of 41 states + D.C. + 2 U.S. territories have some form of legally recognized marijuana for medicinal purposes**

# Marijuana Today: Medical, Recreational, & CBD States

- - Medical
- - Medical & Recreational
- - CBD Only



Source: diymaps.net (c)

# Marijuana Legislation Trends

- Introduction of marijuana legislation in 2016
  - Recreational Legislation: at least 18 states
  - Medical Legislation: at least 19 states
- Medical Marijuana State Law Trends
  - Providing Explicit Employee Protections
  - Limiting Methods of Ingestion
  - Including PTSD as a Qualifying Condition
  - Passing High CBD/Low THC Laws



# Marijuana Today: Federal Law- Still Prohibited

- While states are passing laws allowing medical and recreational marijuana:
  - Marijuana is still illegal under federal law
  - Marijuana is still classified as Schedule I drug by the DEA
- Medical marijuana is not a legitimate medical explanation under Department of Transportation (DOT) drug testing regulations
  - February 2013 DOT Notice re-affirming issue

# Medical Marijuana: Federal Law

## Is There a Shift in Stance?

- 2013 DOJ Memo: Guidance on marijuana enforcement
  - DOJ will not intervene with state medical marijuana laws if states have legalized and implemented effective regulatory measures
- 2014: Medical Marijuana Protection Provision in Spending Bill
  - Prohibits DOJ/DEA from using funds or resources to prevent states from implementing their State laws that authorize medical marijuana
  - Defunds raids in states where medical marijuana legal
    - Previous amendments on issue were blocked on House floor for more than 10 years
  - Renewed by House vote on 6/3/15
- July 28, 2015: new leader of DEA Chuck Rosenberg: “heroin is probably more dangerous than marijuana;” agents not prioritizing enforcement

# Medical Marijuana: Federal Law Is There a Shift in Stance?

- **May 2015: First time a Senate committee voted in favor of pro-marijuana amendment offered in chamber**
  - Allows VA to recommend marijuana (now included in CARERS Act)
- **June 2015: DEA de-funding renewed by House for Second Time**
  - Also now includes CBD states
  - DEA budget cut by \$23 million
- **June 2015: Federal Budget plan on D.C. Recreational Initiative 71**
  - Federal budget would prohibit legal sales in DC until 2017 but did not roll back the Initiative
- **July 2015: First time Senate Panel voted in favor of recreational marijuana in banking**
  - Appropriations committee voted 16-14 on amendment to open access to federal banking system for marijuana businesses
    - Blocks use of any federal funds to enforce federal rules

# Medical Marijuana: Federal Law Is There a Shift in Stance?

- February 2015: Surgeon General
  - “We have some preliminary data showing that, for certain medical conditions and symptoms, that marijuana can be helpful.”
- Publications by government citing studies with positive effects
  - NIDA: Recognizes Effectiveness in killing certain cancer cells
  - NIDA: Recognizes Effectiveness of CBD
- The American Medical Association, The Institute of Medicine, the American College of Physicians, and others support re-scheduling to allow research

# Medical Marijuana: Federal Law

## Is There a Shift in Stance?

- Increased research
  - Increased growth of plants for federal research
- June 2015: Eliminated additional requirement of Public Health Service review for non-federal research
- First approved research study on PTSD
- CARERS Act: protects access in states with medical marijuana, re-classifies marijuana as schedule II drug, removes CBD (<.3% THC) from federal drug schedules
- April 2016: DEA is considering whether to re-classify marijuana (decision expected this summer)

# Recreational Marijuana Laws: Employment Protections

4 states all have comprehensive medical marijuana laws

Currently no explicit provisions requiring accommodation of recreational use in workplace

## COLORADO

- No explicit employment protections

## ALASKA

- Explicitly provides no employment protections (sec. 17.38.120): “Nothing in this chapter is intended to require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees.”

## OREGON

- Silent on employment protections but Guidance in Oregon OLCC FAQ Sheet: Measure does not affect existing employment law and “employers who require drug testing can continue to do so”

## WASHINGTON

- Silent on employment protections but Guidance in Washington State Liquor and Cannabis FAQ: “It is our understanding that employers may still conduct drug testing at their discretion.”

# Recreational v. Medical Marijuana: Why Does It Matter?

- Different purposes
  - Alleviate pain and reduce symptoms v. getting psychoactive effect
  - Separate dispensaries and different governing oversight agencies (DOH vs. alcohol and tobacco)
- Access to and Possession Amounts
  - Medical marijuana requires physician's recommendation and qualifying condition
- Different regulators
- Employment and other Civil Protections
  - MRO and reporting results
  - Off duty laws
- Taxes/Costs

# Medical Marijuana Laws: State Law Inconsistencies

- Medical marijuana programs vary from state to state in almost every aspect
  - Possession Limits
  - Distribution
  - Methods of ingestion
  - Requirements for qualifications to possess medical marijuana card
    - Standards for physician evaluations
    - Qualifying Conditions
  - Patient/caregiver registry/cards
  - Civil Protections and Employment Protections
    - Degree of protections

# Medical Marijuana Laws: Inconsistent Qualifying Conditions

- Left to legislatures to determine
  - FDA has not recognized or approved marijuana as medicine
- Composition of Marijuana varies substantially in levels of THC/CBD
- Most Common conditions: cancer, glaucoma, HIV/AIDS, Crohn's disease, ALS, chronic pain
  - Illinois: 33 conditions
  - New Mexico: 19 conditions
  - Louisiana: 3 conditions
  - Massachusetts: Includes “and other conditions as determined in writing by a qualifying patient’s physician”
  - California: No specified Conditions
- Current trend: adding PTSD as a qualifying condition

# State Law Trends: Low THC/High CBD Laws

- THC: Tetrahydrocannabinol
  - Psychoactive
- CBD: cannabidiol
  - Non-psychoactive
  - Common medical benefits
    - Anticonvulsant, anti-inflammatory, antipsychotic/ anxiolytic/anti-depressant, anti-cancer (combats tumor and cancer cells), anti-oxidant

# Low THC/High CBD Laws: Overview

- All laws passed since 2014, in mostly southern states and most named after children
  - Movement started in 2013 after CNN aired Dr. Sanjay Gupta's documentary, *Weed*, with stories of children with severe epilepsy and claimed "Charlotte's Web Oil" strain high in CBD and low in THC reduces intractable seizures
  - States with comprehensive medical marijuana amending laws (e.g., Delaware)
- Varying levels of permitted THC
  - Laws contain mandatory THC/CBD ratio but no consensus on ratio
  - Legislated usage/amount unusual for medical conditions
- Varying qualifying conditions
- CBD still illegal under federal law and not approved by FDA



# CBD Laws: THC/CBD Levels

STATE (YEAR)	THC/CBD Levels Allowed
Alabama (2014)	≤ 3% THC
Florida (2014)	.8% or less THC and more than 10% CBD by weight
Georgia (2015)	≤ 5% THC and equal or greater amount of CBD
Iowa (2014)	≤ 3% THC
Kentucky (2014)	No definition
Mississippi (2014)	≤ .5% THC and more than 15% CBD
Missouri (2014)	≤ .3% THC by weight, at least 5% CBD by weight, and no other psychoactive substance
North Carolina (2014)	< .3% THC by weight, at least 10% CBD by weight, and no other psychoactive substance
Oklahoma (2015)	≤ .3% THC in liquid form
South Carolina (2014)	At least 98% CBD and not more than .90% THC by volume
Tennessee (2014)	≤ .9% THC
Texas (2015)	≤ .5% THC by weight and not less than 10% by weight CBD
Utah (2014)	< .3% THC by weight, at least 15% CBD by weight, and no other psychoactive substance
Virginia (2015)	At least 15% CBD but no more than 5% THC
Wisconsin (2013)	CBD must be in form without psychoactive effect; THC and CBD levels not defined
Wyoming (2015)	< .3% THC and at least 5% CBD by weight

# Medical Marijuana Laws: Current Trends

- Current trend is in providing explicit employee protections
- Employment protections vary; employer may have a duty to accommodate
  - Some states have explicit protections against discrimination
  - Courts that have addressed employment protections generally find no protections but those cases have been in states with no explicit protections and based on classification of marijuana as illegal under federal law
- Currently, there are no restrictions on testing for marijuana
- NO law requires accommodating on-duty drug use in the workplace
- NO law prohibits action if employee working under the influence of marijuana

# Medical Marijuana Laws: Employee Protections

## Biggest Issue for Most Employers

### 1. States Explicitly Finding No Employee Protection

- Case law has found no employee protection

### 2. States with Explicit Employee Protection

- Newer laws provide specific protections for employees for various reasons related to medical marijuana
- States still prohibit use at job site or while working.

### 3. States with Potential Employee Protection

- Vague laws could potentially be interpreted to provide employee protection.
- Broad “Off-Duty Use” laws or pending cases

### 4. States with Likely No Employee Protection

- Law appears to only provide criminal protections
- Departments of Health have weighed in on issue of no protection



# States with No Employee Protection

- California
- Colorado
- Michigan
- Montana
- Oregon
- Washington



Each state has case law that explicitly found no employee protection under each states' respective medical marijuana act.

But statutes do not provide explicit employment protections

# States with No Employee Protection: California

- California Compassionate Use Act of 1996:
- Only provides Criminal Protections
- No Employment Protections
  - Employer not required to accommodate by statute
  - California Supreme Court found Act provided no protection
    - *Ross v. Ragingwire Telecommunications, Inc.*, 174 P.3d 200 (Cal. 2008)



# States with No Employee Protection: Colorado

- Colorado Medical Marijuana Statute
- No Employment Protections
  - Act itself provides no protections
  - Colorado has legal off duty use statute providing discriminatory/unfair employment practice to terminate employment of employee engaging in lawful activity off premises during non working hours
  - Colorado Supreme Court- employee's off-duty marijuana use not "lawful activity" protected by statute because illegal under Federal law
    - *Coats v. Dish Network, LLC*, (Colo 2015)
- Recreational Marijuana Law
  - No explicit employment protections
  - DUI per se limit in blood: more than 5ng/mL of THC



# States with No Employee Protection: Michigan

- Michigan Medical Marijuana Act
- Has registry system
  - Permits out of state card holders
- No Employment Protections
  - Western District of Michigan found Act did not regulate private employment despite language
    - *Casias v. Wal-Mart Stores, Inc.*, 764 F. Supp. 2d 914, 922 (W.D. Mich. 2011), affirmed by 6<sup>th</sup> Circuit
  - No state law decision but no disapproval of *Casias*
- Impairment and DUIS
  - *People v. Koon*, 494 Mich. 1, 3 (Mich. 2013): found act allows person to drive with indications of marijuana in system but not otherwise under influence
  - Under influence not defined



# States with No Employee Protection: Montana

- Montana Medical Marijuana Act
- No Employment Protections
  - Statute revised 2011: Act does not provide cause of action for wrongful discharge or discrimination
  - Supreme Court of Montana upheld discharge of employee for positive marijuana test
    - *Johnson v. Columbia Falls Aluminum Co.*, 350 Mont. 562 (2009) (unpublished)
- Broad Off Duty Use Statute
- Under the Influence
  - DUI: 5 ng/ml delta-9-THC in blood



# States with No Employee Protection: Oregon



- Oregon Medical Marijuana Act
- Has registry card system
- No Employment Protections
  - Statute does not require an employer to accommodate medical marijuana use in the workplace.
  - Oregon Supreme Court explicitly found Act provided no protection to employees.
    - *Emerald Steel Fabricators, Inc., v. Bureau of Labor and Indus.*, 230 P.3d 518 (Or. 2010)
- Recreational Marijuana
  - Silent on Employment protections
    - Guidance from Oregon OLCC FAQ: measure does not affect existing employment law and “employers who require drug testing can continue to do so”
  - DUI: no per se limits

# States with No Employee Protection: Washington

- Washington State Medical Use of Marijuana Act
- No patient registry system
- Protections for Criminal and Civil Consequences
  - Qualifying patient or designated provider
- No Employment Protections
  - Washington Supreme Court explicitly found Act provided no protection to employees.
    - *Roe v. Teletech Customer Care Mgmt., LLC*, 257 P.3d 586 (Wash. 2011)
- Recreational marijuana (I-502)
  - Silent on employment protections
    - Guidance from Washington State Liquor and Cannabis FAQ: “It is our understanding that employers may still conduct drug testing at their discretion”
  - DUI per se limit in blood above 5ng/mL of THC



# States with Explicit Employee Protections

- Arizona
- Connecticut
- Delaware
- Illinois
- Maine
- Minnesota
- Nevada
- New York
- Pennsylvania
- Rhode Island



Statutes have explicit language (anti-discrimination or reasonable accommodation provisions) providing varying levels of protection



# States with Explicit Employee Protections

- Anti-discrimination provisions prohibit adverse action against employees based solely on participation in medical marijuana program (users/caregivers)
- Some statutes: positive drug test cannot automatically be grounds for refusal to hire or other adverse employment action
  - Arizona
  - Delaware
  - Minnesota
- Some provisions include explicit disability accommodation language
  - Nevada
  - New York
- Several states require a showing of impairment before taking adverse employment action
- None have been tested in court yet

# States with Explicit Employee Protections: Arizona

- Registry Card System
  - Includes verification system for employers to use
- Prohibits discrimination in hiring, termination, or imposing any term or condition of employment or other penalty based upon:
  - Person's status as a cardholder or
  - Patient's positive drug test for marijuana
    - **Except:** if patient used, possessed, or was impaired by marijuana on premises or during work hours
- Cardholder may not use, possess, be impaired in workplace or during hours of employment
- Not prohibited from disciplining employee for ingesting in workplace or working under the influence
  - Not considered “under the influence” solely because of the presence of metabolites/components that appear in insufficient concentration to cause impairment (A.R.S. § 36-2814 (2015))

# States with Explicit Employee Protections: Connecticut

- Prohibits refusing to hire, discharging, penalizing, or threatening employee solely on basis of person's status as qualifying patient or primary caregiver
- Does not restrict employer's ability to:
  - Prohibit use of intoxicating substances during work hours; or
  - Discipline employee for being under the influence during work hours



CONNECTICUT

# States with Explicit Employee Protections: Delaware

- Registry card system for patients and Caregivers
- Prohibits discriminating against person in hiring, termination, any term or condition of employment or other penalty based upon:
  - Person's status as a cardholder or
  - Patient's positive drug test for marijuana
    - **Except:** if patient used, possessed, or was impaired by marijuana on premises or during work hours
- Nothing prohibits disciplining employee for ingesting marijuana in workplace or working under the influence
- Impairment Guidelines
  - DUI: Registered qualifying patient not considered under the influence solely because of presence of metabolites or components of marijuana



# States with Explicit Employee Protections: Illinois

- Prohibits penalizing a person solely for their status as registered qualifying patient or caregiver
- Does NOT prohibit employer from:
  - Enforcing drug testing policy, zero-tolerance policy, or a drug free workplace if policy applied in nondiscriminatory manner
  - Adopting reasonable regulations for consumption, storage, or time keeping for patients related to use of medical marijuana
  - Disciplining employee for violating workplace drug policy
- Impairment Guidelines
  - Provides description of when employee considered impaired
  - Employers can take actions based on “good faith” beliefs about employee impairment but must give employee reasonable opportunity to contest basis

# States with Explicit Employee Protections: Maine

- Prohibits refusing to employ or penalizing person solely for person's status as a qualifying patient or primary caregiver
- Not required to accommodate ingestion in any workplace or any employee working under influence



# States with Explicit Employee Protections: Minnesota

- Prohibits discriminating against person in hiring, termination, any term or condition of employment or other penalty based upon:
  - Person's status as a patient or
  - Patient's positive drug test for marijuana
    - **Except:** if patient used, possessed, or was impaired by marijuana on premises or during work hours
- If employee/applicant tests positive for drugs, employees may present verification of enrollment in patient registry as part of explanation for the results prior to any adverse employment action



MINNESOTA

# States with Explicit Employee Protections: Nevada

- Previous law provided only criminal protection
- Effective April 1, 2014: Employer must attempt to make reasonable accommodations for employee with valid registry identification card if reasonable accommodation would not:
  - Pose threat of harm/danger to persons or property or impose undue hardship on employer OR
  - Prohibit employee from fulfilling any/all of their job responsibilities
- **Exceptions**
  - Does not require allowing use in workplace
  - Does not require job modification/working condition based on reasonable business purposes of employer



NEVADA

# States with Explicit Employee Protections: New York

- Certified patients and designated caregivers shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau solely for certified medical use or for any other action/conduct in accordance with act
- Being certified patient deemed to be having a “disability” under the executive (human rights) law and civil rights law
- Employer may enforce policy of prohibiting employee from performing employment duties while impaired by controlled substance

# States with Explicit Employee Protections: Pennsylvania

- May not discharge, threaten, refuse to hire, otherwise discriminate or retaliate against employee regarding employee's compensation, terms, conditions, location or privileges solely on basis of employee's status as certified to use medical marijuana
- NOT required to accommodate use on property/premises of place of employment
- May discipline employee under the influence in workplace or for working under the influence when employee's conduct falls below standard of care normally accepted for that position
  - Does not define under the influence or standard of care
  - Silent on whether can rely on positive test for adverse action alone or as evidence of impairment- appears to require contemporaneous documentation of characteristics of physical impairment for adverse action
- Includes specific identification for some types of safety sensitive functions that cannot be performed with blood content more than 10 ng/mL of active THC in blood

# States with Explicit Employee Protections: Rhode Island

- Registry card system for patients, caregivers, dispensary workers
- Prohibits refusing to employ or penalizing person solely for their status as a cardholder
- Not required to accommodate medical use in the workplace
- Patient not considered under the influence solely for having marijuana metabolites in system



# States Likely Providing No Employee Protections

- Alaska
- Hawaii
- Maryland
- Massachusetts
- New Hampshire
- New Jersey
- New Mexico
- Vermont
- Washington, D.C.



These States' Medical Marijuana Laws are silent as to employee protections and generally only provide criminal protections

The State Departments of Health also provide no guidance on employee protections

# States Likely Providing No Employee Protections

- Alaska

- Has registry card system
- Not required to permit use in workplace
- Alaska DOH silent on issue
- Recreational Marijuana
  - Explicitly provides no employment protections
  - No DUI per se limits

- Hawaii

- Similar to Alaska
- No mention of employment protections
- DOH FAQ on employment drug testing: prohibits use in workplace but silent on employer's rights and duties
- 2015/2016 introduced legislation: seeking to add employment protections

# States Likely Providing No Employee Protections

- Maryland

- DOH FAQ: “Maryland law does not prevent an employer from testing for use of cannabis (for any reason) or taking action against an employee who tests positive for use of cannabis (for any reason).”

- Massachusetts

- Not required to accommodate use of medical marijuana in place of employment

- New Hampshire

- No protections from arrest or prosecution for the possession of or being under the influence while in place of employment without written permission of employer
- Does not require accommodation of the therapeutic use of cannabis on property/premises of place of employment.
- Does not limit employer’s ability to discipline employee for using cannabis in workplace or for working while under the influence

# States Likely Providing No Employee Protections

## New Mexico

- Provides criminal protections but silent on employment protections
- DOH FAQ: statute does not provide employment related protections
- *Garcia v. Tractor Supply*, No. 15-cv-00735 (D. N.M. Jan. 7, 2016): employer no duty to accommodate and no violation of New Mexico law or public policy for termination based on failed test



# States Likely Providing No Employee Protections

- Vermont
  - Provides limited criminal protections
- Washington, D.C.
  - Provides limited criminal protections for patients
  - 2014: law limiting employers from drug testing until conditional offer of employment

# Marijuana Laws and Unemployment Benefits

- Michigan

- Appellate court held employee who holds state medical marijuana card not disqualified from receiving unemployment benefits after employee terminated for receiving marijuana positive test result (*Braska v. Challenge Mfg.*, 307 Mich. App. 340 (2014))

- Illinois

- Appellate court found employee’s admission of off-duty marijuana use not “misconduct” sufficient to deny unemployment benefits even if it was sufficient for discharge (*Eastham v. Housing Authority of Jefferson County*, No. 09-MR-57 (Ill. App. Ct. 5th Dist. Dec. 2, 2014))



# Marijuana Laws and Workers' Compensation

- New Mexico

- Workers' comp case required employer and insurance company to pay for patient's medical marijuana for back pain (*Vialpando v. Ben's Automotive Servs et al.*, No. 32,920 (N.M. Ct. App., May 19, 2014))

- Arizona

- In 2015, legislature amended law to remove requirement that workers' comp carriers and self-insurers reimburse patients for medical marijuana



# Medical Marijuana: Can I Still Test for Marijuana?

- No prohibition on testing for marijuana when drug testing is allowed.

# Medical Marijuana: Benefits of Testing

- Creates a safer workplace.
- Most people do not have a medical marijuana card.
- Most people do not live in a state with explicit employee protections.

# Medical Marijuana: How to Develop and Manage Drug Testing Program

- Decide how you want to handle medical marijuana in your company policy
  - Research state and local laws
  - Never have to allow marijuana use at the work site or impairment on the job
- Do you want to accommodate medical marijuana?
- Have a written policy

# Medical Marijuana: Drug Testing Policies

- Be Explicit:
  - Who is subject to testing?
  - How will it be administered?
  - Consequences of positive results- specifically address how marijuana usage will be handled
  - Be clear and transparent
- How to test?
  - Urine, hair, oral fluid?
  - Check state and local workplace drug testing laws
- Inform employees of policy and reason for policy
- Apply consistent treatment

# How to Handle Positive Medical Marijuana Test Results

- Even if employee claims medical marijuana status, MRO will report as positive for marijuana/THC
- MRO will generally tell employer that employee claims medical marijuana cardholder status
  - MRO has no way to verify cardholder status
- Employer verifies employee's cardholder status
  - View Card
  - Laws do not entitle employer to determine reason for marijuana card

# Medical Marijuana: What Actions Can You Take?

- Follow the law for where the employee is working/resides
- Follow company policy

# Medical Marijuana: Other Concerns

- Information regarding medical marijuana cardholder status should be treated confidentially

# Questions?



**Faye Caldwell**

Attorney at Law

[fcaldwell@caldwelleverson.com](mailto:fcaldwell@caldwelleverson.com)



2777 Allen Parkway, Suite 950

Houston, Texas 77019

tel: (713) 654-3000

fax: (713) 654-3002

[www.caldwelleverson.com](http://www.caldwelleverson.com)