

MANAGING GENDER TRANSITIONS IN THE WORKPLACE



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The Changing Landscape

- EEOC charges alleging LGBT-based discrimination = 1,811 in 2018, up from 1,762 in prior year
- Monetary awards in EEOC matters involving LGBT-related claims were at least \$6.1 million in 2018, up almost \$1 million from 2017
- At least 22 states offer explicit protections for LGBT workers
- About 90% of Fortune 500 companies have policies that prohibit sexual orientation discrimination, 83% prohibit gender identity discrimination



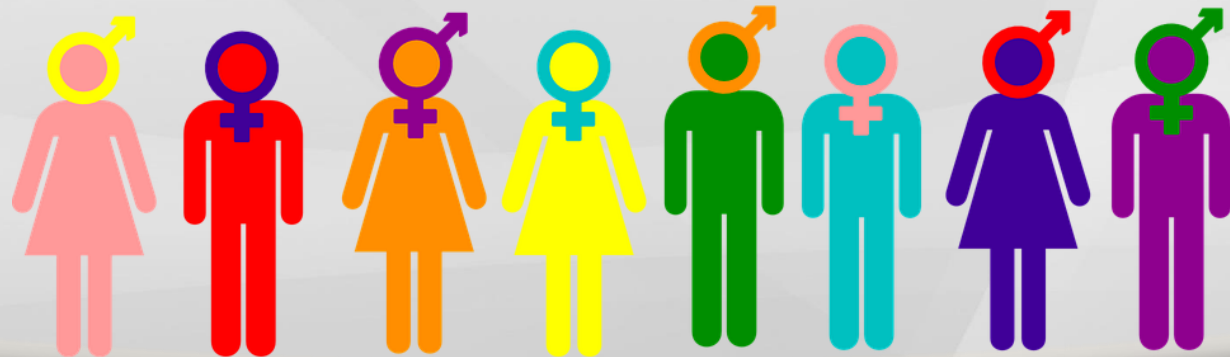
Evolving Views

- Public sentiment concerning LGBT issues has evolved rapidly
- Congress has not passed sexual orientation/gender identity protections in employment
- Congressional inaction has left administrative agencies, states, municipalities and courts to fill in the gaps
- The U.S. Supreme Court struck down all state bans on same sex marriage and legalized same-sex marriage in 2015



Let's Start with the Definitions

- **Sex** = Biological sex at birth (male or female)
- **Gender** = One's internal sense of being a man or a woman; a person's sexual identity as a social or cultural construct, as evidenced by behavior and mode of dress
- **Gender identity** = a person's internal sense of being male, female, some combination of male and female, or neither male or female



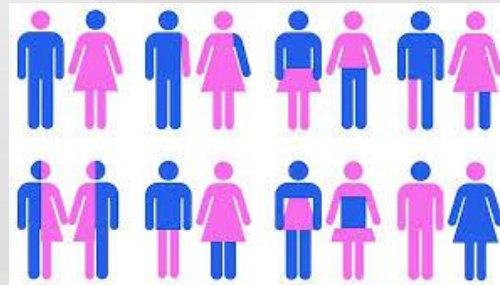
More Definitions

- **Transgender** - American Psychological Association (APA) says that "transgender is an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth."
- **Gender Expression** - refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice or body characteristics.



Definitions con't

- **“Gender identity discrimination”** means treating someone differently (segregating them, denying them benefits) based on the fact that the person identifies with a gender that is different than their biological gender.



Application of Title VII to LGBT Employees Historically

- Title VII prohibits discrimination “because of sex” – “sex” traditionally interpreted to be referring to physical and biological differences between men and women
- No explicit protections for sexual orientation or gender identity
- Traditional view: discrimination based on gender identity and/or sexual orientation is not covered by the sex discrimination prohibition of Title VII

Price Waterhouse v. Hopkins

- 1989 Supreme Court decision holding that Ann Hopkins had a claim for sex discrimination after she was passed over for promotion because of her looks and behavior, which was not traditionally feminine
- Discriminating against an employee because her actions do not conform to her gender is prohibited under Title VII



Application of Title VII to LGBT Employees

- **EEOC:** Title VII prohibits discrimination and harassment on the basis of gender identity and sexual orientation
- **DOJ:** In 2014, adopted the position that Title VII protects transgender employees
- **Courts:** Increasingly interpreting “because of sex” broadly to include gender identity, not yet as inclined to extend protections for sexual orientation (often using Price Waterhouse reasoning)



Changes Under the Trump Administration

- In October 2017, Attorney General Jeff Sessions reversed the federal government's position under Title VII:

“Title VII’s prohibition on sex discrimination encompasses men and women but does not encompass discrimination based on gender identity *per se*, including transgender status.”

The Current Supreme Court Term: The Big Three

- Altitude Express v. Zarda and Bostock v. Clayton Co., Georgia – whether Title VII includes protections from discrimination based on sexual orientation
- R.G. & G.R. Harris Funeral Homes Inc. v. EEOC – whether Title VII protects transgender workers
- On August 16, 2019, the Department of Justice filed a brief in Harris Funeral Homes arguing that federal law “does not prohibit discrimination against transgender persons based on their transgender status.”



Americans with Disabilities Act (ADA)

- ADA excludes transsexualism, transvestism, and gender identity disorders not resulting from physical impairment in its definition of disability
- Not required to accommodate if condition not a disability impairment
- Dysphoria – anxiety associated with the confusion on gender identity – may raise accommodation issues



What about state and local laws?

- Lots of action at the state and local level around the country
- Maryland prohibits discrimination against employees based on sexual orientation and gender identity (15 or more employees)
- Montgomery County MD – same (1 or more EEs)
- DC – prohibits discrimination against employees based on sexual orientation, gender identity or expression, and personal appearance (1 or more EEs)
- VA and Fairfax County – N/A

So, What Do You Do?

When faced with a request to accommodate a transgender employee, what are the options for approaching the issue?



A Positive Approach

- Integrating transgender employees into the workplace is good for business
- Advantages:
 - Attract and retain the people most qualified for particular jobs.
 - Become more productive, innovative and creative - can draw from a broad range of talented people.
 - Treat all workers fairly and judge them on their abilities, not on their gender identity or expression.
 - Demonstrate compliance with federal, state, local and global employment laws.
 - Fulfill diversity and inclusion initiatives.

How to Handle Workplace Transition Issues

- General principles:
 - No two transitions are alike – steps in transition, how transitioning, timing, what employee wants to share and wants employer to share
 - How employer addresses will vary - organizational culture, workforce composition, the type of work, the physical layout of the workplace, and the amount of interaction the transgender employee has with peers, superiors, subordinates, vendors and customers
 - Tailored approach in each case



If You Choose to Accommodate

- Even if you may not be legally required to do so in some jurisdictions, many employers have chosen to accommodate
- In that case, make clear that you are undertaking the accommodation voluntarily and that if it does not work out, the parties may have to revisit the situation



Specific Steps in the Process

- Create a sample transition plan that can be reviewed and adapted for each transition situation that arises
- Review and update policies as needed – go beyond non-discrimination policy to managing gender transition – review dress code, appearance, anti-bullying, and anti-harassment
- Point of contact: HR, working with manager
- Open communication with the employee is key!
- Consider with the employee what s/he wants to communicate with coworkers
- Follow through and follow up
- Consider sensitivity and diversity training



TYPICAL SCENARIOS

- Persons who want to dress in the gender with which they identify
- Persons who want to use the restroom of the gender with which they identify
- Persons who want to be called by the name or pronoun of their self-identification



HYPOTHESIS

- Aimee is a transgender woman who was born male. During the course of most of her employment with ABC Funeral Home, she presented as a man. ABC requires its public-facing male employees to wear suits and ties and public-facing female employees to wear skirts and business jackets. Aimee informs ABC that she has a “gender identity disorder,” intends to have sex reassignment surgery, and plans to transition to female. She explains that she first needs to live as a woman for one year, and she plans to dress in appropriate female business attire at work during that time. ABC fires her, claiming that the public would not be accepting of Aimee’s transition and citing owner’s free exercise of religion. Aimee’s files suit for sex discrimination under Title VII.
- Win or lose?

Employees Dressing the Part

- Employers have the right to enforce policies relating to employees' physical appearance and attire:
 - Safety, professionalism/public image, productivity
- May be required to allow employees to dress consistent with gender identity
- Do not require adherence to male/female dress code
- Avoid gender stereotyping
- Best practice is to accommodate



Restrooms: Potential Issues to Consider

- What restroom will the individual use?
 - In the cases that have reached the courts, the courts have held that the individual should be permitted to use the restroom associated with the gender with which they identify
- Does the company have any gender neutral restrooms?
 - How many? How convenient?
- Are there any other alternative restroom options?
- Key: equal access and treatment

Restroom Takeaways for Employees

- Check for local laws and regulations
- OSHA requires employers to provide “meaningful” access to workplace restrooms, including for transgender employees
 - “A Guide to Restroom Access to Transgender Workers” recommends allowing transitioning employees to use the restroom of their choice
- DC Municipal regulation 4-801 and 4-802
- Do not require transgender employees to use certain restrooms
 - Allow employee to choose based on gender identity
 - Suggest other, more private facilities if available
- Consider unisex/gender neutral designation



Other Issues to Consider

- Confidentiality Issues

- Employees are entitled to confidentiality and privacy to the extent they request it
- In some cases, there may be a medical diagnosis
- Need to understand employee desires regarding disclosure
- Do not disclose the employee's status without consent



HYPOTHESIS

- Milo worked as a software engineer for a large employer, NG. When initially hired, Milo was known as Doug and presented as male. Milo decided to transition, approached her manager at NG, explained her plan, and asked for assistance. With Milo's consent, her managers met with her coworkers, explained the transitioning and Milo's preference to be referred to as "she" and "her," and instructed coworkers to treat Milo with respect. One coworker later told Milo that she "hated" transgender people, some repeatedly failed to refer to her as "she" and "her," and one coworker complained that he had to "walk on eggshells" around Milo. Milo complained but the conduct (particularly the refusal, mistaken or otherwise, by coworkers to refer to her with feminine pronouns) continued. Milo filed a hostile work environment claim in court under Title VII against her employer.
- How is the case decided?

Best Practices

- **Awareness:** Be aware of applicable state and local non-discrimination laws
- **Compliance:** Ensure policies comply with all state and local laws and company non-discrimination objectives
- **Consistency:** Ensure all hiring and employment decisions are based solely on merit and not on discriminatory preconceived notions and gender stereotypes
- **Communicate:** Make a plan!



Best Practices

- **Investigate:** be alert to bullying and other unprofessional conduct, and discipline where necessary
- **Educate:** train employees on policies and place appropriate emphasis on inclusive culture
- **Accommodate (where possible):** goodwill (even if not legally required) can go a long way



ARE THE EMPEROR'S NEW CLOTHES NOW ACCEPTABLE WORKPLACE ATTIRE?

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**DRESS
CODE
STRICTLY
ENFORCED**

**No Shirt
No Shoes
No Service**



STRICTLY PROHIBITED

Excessively Baggy Clothing
(Pants must be worn at the waist, no shorts below the knee)

Offensive, Vulgar, or Inappropriate Attire

Athletic Attire (Sweats or gym clothes)

Jerseys (Except on Ravens/Orioles Game Days)

Brimless Headgear (bandanas, beanies, etc.)

Backwards or Sideways Hats (Must be worn forward)

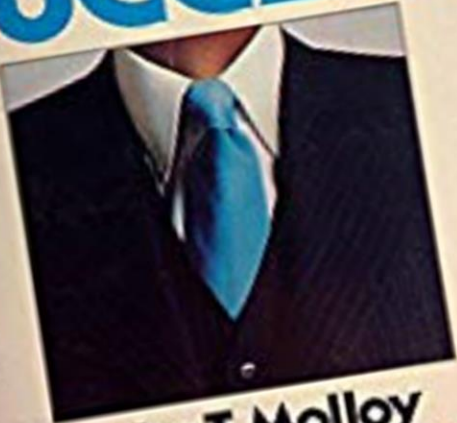
Work and Construction Boots

Sunglasses After Dark

Children & Young Adults under 21 after 10pm

The #1 book to make you look like
a million so you can make a million

DRESS FOR SUCCESS



John T. Molloy
"America's first wardrobe engineer."

DANGER

CONSTRUCTION AREA
HARD HATS AND
SAFETY GLASSES
REQUIRED BEYOND

**NO SHIRT
NO SHOES
NO PROBLEM**

Dressing For the Occasion



Restricting Employee Dress or Appearance

- Employees have no “right” to dress or look as they please at work.
- Employers may establish dress and appearance standards for reasonable business purposes, including:
 - To identify employees to the public (e.g. uniforms);
 - To prevent or minimize danger to employees or the public (e.g. ban on loose fitting clothing around machinery or other equipment);
 - To maintain a business image or professional working environment (e.g. business attire, grooming policies)
- Employers may also apply different requirements to men and women if the burdens on each gender are equal.
 - Requirements must be reasonable and not burdensome.

Right to Set Dress and Appearance Standards Not Unlimited...

- Let's start with federal law. Employers must be mindful of potential issues and conflict with federal anti-discrimination laws.
 - Title VII
 - Prohibits discrimination as to an employee's "...compensation, terms, conditions, or privilege of employment, because of such individual's *race, color, religion, sex, or national origin.*"
 - ADA
 - Prohibits discrimination "...against a qualified individual on the basis of *disability* in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."
- Like what?

Hats and Other Headgear?

- May employers have dress and appearance standards prohibiting hats, caps, baseball hats, brimless headgear, or any headgear generally?
 - Yes, but...
- What about a yarmulke?
- What about a hijab, turban or other religious headscarf/covering?
- Even where there's a ubiquitous and neutral "Look Policy" (e.g. Abercrombie & Fitch, Hooters), outright prohibition impacting everyone always will likely run afoul of Title VII.
 - EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015) - failure to hire employee as sales floor "Model" because she wore hijab inconsistent with company-wide "Look Policy" amounted to religious discrimination



**I Don't
Have To
Shave!**

Beards and Grooming?

- May employers impose grooming standards requiring men to be clean shaven or have only neatly-trimmed beards?
 - Yes, but...
- What about impact on Sikh men?
 - In 2013, Lexus dealership in New Jersey settled for \$50,000 with the EEOC based on claims it enforced its dress policy unlawfully when it refused to hire Sikh applicant who refused to comply with request to shave beard.
- What about impact on African-American men?
 - Pseudofolliculitis barbae - condition that makes shaving painful.
 - Also accepted by the EEOC and some courts as a disability under the ADA.
- But what about standards related to legitimate safety or operational concerns (e.g. respirators/masks)?
 - Accommodation requests (religion and disability) that impose an undue hardship need not be provided.

**I Promise I
Don't Scare
People**



Tattoos?

- May employers impose a no-tattoo policy?
 - Yes, in fact...
- Most common policy requires covering up visible tattoos while at work.
 - And nature/subject matter of tattoos may require employer to take action (e.g. prevent/avoid potential hostile work environment claims)
- But...
- What about religious tattoos?
 - In 2005, Red Robin settled for \$150,000 with the EEOC after firing employee for violation of its no tattoo policy after he tattooed religious inscriptions around his wrist in accordance with Kemetic religion.
- What about cultural tattoos (e.g. Māori)?



**It's Just A
Nose Ring!**

Body Piercings?

- May employers impose policies prohibiting piercings?
 - Yes, cases generally hold that it's acceptable for employers to conclude that piercings other than on ears conflict with company's branding, image, values, mission, etc.
- But...
- What about religious practices involving nose and ear piercings?
 - But, what about legitimate safety/operational concerns? (e.g. getting caught in machinery)

What About Hair and Non-Conforming Style of Dress?

- May employers impose policies about hair styles or gender-based professional attire?
 - Yes, especially if based on a legitimate safety/operational/business concerns, but...
- Employment decisions based on type of hair, even though not specifically protected by Title VII, may amount to race discrimination.
 - Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164 (7th Cir. 1976), finding supervisor's statement that employee "could never represent Blue Cross with her Afro" easily established claim of race discrimination.
- Courts applying Title VII, however, have largely settled on the so-called "immutable" vs. "artificial" hairstyle distinction, prohibiting discrimination against the former and allowing against the latter.
 - EEOC v. Catastrophe Mgmt. Sols., 876 F.3d 1273 (11th Cir. 2017), finding race-neutral grooming policy banning dreadlocks-without more-does not constitute race discrimination because dreadlocks are not an immutable characteristic of black individuals.

Hair and Non-Conforming Style of Dress, cont'd.

- However, focus on “immutable” vs. “artificial” likely misses the mark, as hair style may often be a proxy for race-based discrimination:
 - Black women’s hair found 3.4 times more likely to be perceived as “unprofessional” than white women’s hair.
 - Black women are 1.5 times more likely than white women to be sent home from the workplace because of their hair.
 - At least two studies confirmed bias toward black women’s hair.

Hair and Non-Conforming Style of Dress, cont'd.

- And while employers may maintain different attire standards for men and women (if reasonable), what about sex-specific or “gender appropriate” dress codes and their impact on transgender or non-binary individuals?
- An answer to that (federal-level) question is being played out, in part, in R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599 (2019) (and two related cases), which is before the Supreme Court on the question of whether Title VII prohibits discrimination against transgender people.
 - A funeral home fired an employee after she informed her supervisor that she planned to ditch the suit and tie for a skirt in jacket (per the dress code) after she decided to live in alignment with her identity despite presenting as a man for six years.
 - The appellate court reversed the lower court and granted summary judgment to the EEOC based on unlawful sex stereotyping and accepted that discrimination based on sex may include discrimination on the basis of transgender status and transitioning identity.

States Quicker to React to Issues Disputed Under Title VII

- Finding protections afforded under Title VII and related federal statutes for nuanced and complex issues were lacking and inconsistent, states and local jurisdictions have tackled social issues through their own anti-discrimination laws, including with regard to hair styles.
- In June and July, 2019, California and New York amended their anti-discrimination laws' definition of "race."
 - "Race" now "inclusive of traits historically associated with race, including but not limited to hair texture and protective hairstyles."
 - "Protective hairstyles" includes, but is not limited to, "such hairstyles as braids, locks, and twists."

Maryland and D.C. Prohibit Sex-Specific Dress Codes

- In addition, numerous states, including Maryland and the District of Columbia, have explicitly included protections based on personal appearance and/or gender identity or expression.
 - D.C. Code Ann. § 2-1402.11 prohibits discrimination based upon “the actual or perceived ... personal appearance, gender identity or expression ... of any individual”
 - “Gender identity” defined as “gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual’s assigned sex at birth.”
 - “Personal appearance” defined as “outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to, hair style and beards.”
 - Definition does not relate to dress and appearance policies provided policies are uniformly applied for a reasonable business purpose, or if necessary for health, welfare or safety of any individual.
 - Md. Code Ann., State Gov’t § 20-606 prohibits discrimination based on an individual’s “gender identity”
 - “Gender identity” defined the same as D.C. law.

Virginia Provides Same Protections as Title VII

- Virginia follows and affords effectively the same protections as Title VII and other federal laws—“race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability.”

Other Issues to Consider...

- Are there any concerns if:
 - An employer institutes a “Casual Dress” policy, but prohibits excessively baggy clothing?
 - An employer permits appropriate hats and headgear at work, but specifically prohibits backward or sideways hats?
 - An employer institutes a “No Accessory” policy, prohibiting bags or backpacks at the workplace?
 - What if it cites concerns about theft or workplace violence?

In the Weeds: Marijuana in the Workplace



Presented by:
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What Would You Do?

- All four members of your QC department were tested for drugs today.
 - All four failed.
- *“We have **zero tolerance** for drugs. If you fail a drug test you will immediately be terminated!”*
- What would you do?
 - Fire everyone and halt production?
 - Ignore your own rule?

Is this an effective drug policy?

WHERE ARE WE GOING TODAY?

- Evolving legal and cultural landscape
- Competing business interests
- Circumstances of testing
- Developing effective policies



THE LEGAL AND CULTURAL LANDSCAPE

- Legal medical and recreational marijuana is more common
- Increased use of CBD
- Recent trend to restrict employer action based on drug tests



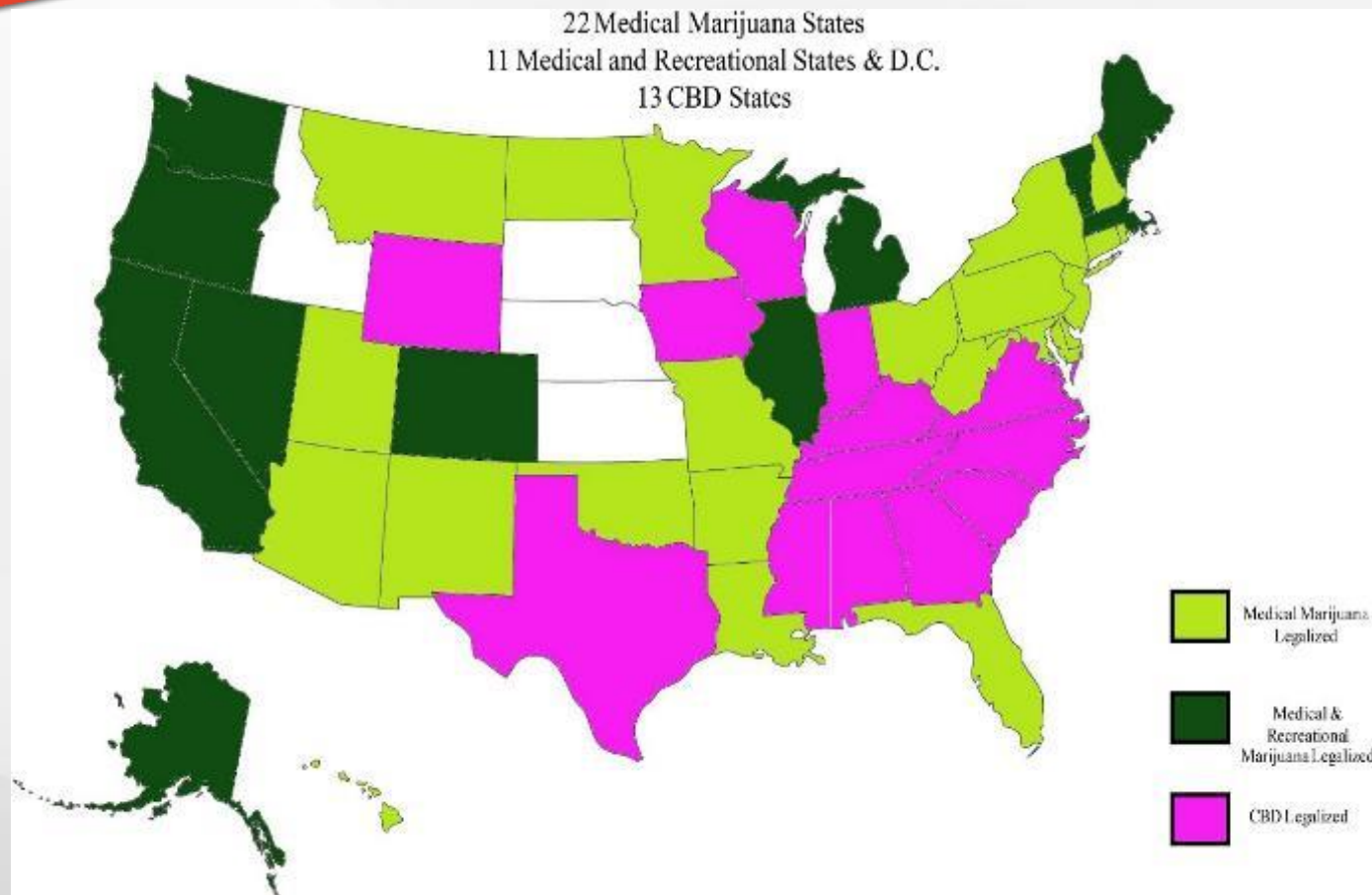
Medical and Recreational Marijuana

Medically legal in 33 states and D.C.

Legal for recreation in 11 of these.

CBD now expressly legal in 13 states.

Illegal under federal law.



What about CBD?

- Cannabidiol = “CBD”
- CBD is legal in 13 states
- CBD derived from industrial hemp, which contains less than 0.3% concentration of THC, the psychoactive compound in marijuana/cannabis, is legal under federal law.
- Will an employee fail a drug test if he or she used CBD?
 - Depends on type of test and amount of THC in the product



Most Marijuana Laws

- Pertain only to marijuana/cannabis.
 - Aimed at de-criminalization.
 - Do not address other drugs.
- Allow employers to maintain traditional policies:
 - No possession or use in the workplace;
 - Can't work under the influence;
 - May test under the usual circumstances;
 - May take action based on a positive test.

Implications For DMV Employers

- No immediate *required* changes for DMV employers.
 - DC's statute (D.C. Code 48-904.01) does not affect the ability of employers to establish and enforce policies restricting the use of marijuana by employees.
 - Maryland's statute (Md. Code Ann. Health-Gen. 13-3301 – 13-3316) does not include specific language relating to employers, but qualifying patients may not be subject to civil or administrative penalty, including by a professional licensing board, or "be denied any right or privilege" for medical use of or possession of medical cannabis.
 - Virginia has not legalized medical or recreational marijuana.
- Smart to edit policies to prepare for potential changes.
- Multi-state employers should consider language that allows them to maintain compliance as conditions evolve.

Can Employers Test for Marijuana Use?

- Some laws and agencies require drug testing in private employment.
 - DOT
 - Federal Drug Free Workplace Act (federal contracts/grants).
- No federal or DMV law prohibits drug testing in private employment.
- Some jurisdictions limit testing and test-based employment actions, **but only regarding marijuana.**
- Labor agreements may also be relevant.
- Employees have certain ADA and FMLA rights.

Some States Limit Time/Use of Testing

- ME: pre-hire testing policies require State approval
 - Cannot test until applicant is given a copy of the policy and a conditional job offer.
- NV: can't reject applicant based on a positive pre-employment test result (eff. 1/1/20).
- IL: can't refuse to hire based on use, or take adverse employment action for off duty use, of a "lawful" product (including cannabis, as of 1/1/20).

Some States Limit Time/Use of Testing

- IL: can't take any adverse employment action for off duty use, of a "lawful" product (including cannabis).
 - May prohibit workplace use and possession.
 - May take adverse action if employee is under the influence of cannabis.
 - Positive test result does not prove under the influence.
- VT: can test for the presence of alcohol or drugs at nontherapeutic levels (i.e., levels likely to cause impairment); NO adverse action allowed at lower levels.

Some States Limit Time/Use of Testing

- CA: Drug testing during employment typically limited to reasonable suspicion testing, except for certain safety sensitive positions.
 - San Francisco ordinance (SF Police Code 3300A.5) prohibits random drug testing.
- NYC: Effective May 10, 2020, employers in NYC may not test applicants for marijuana or THC (except certain law enforcement, DOT, construction, safety sensitive positions).

Dealing With Testing Restrictions



- Most tests are “panels.”
 - If you test for multiple drugs, but state or local law prohibits decisions based on marijuana tests, instruct lab to redact marijuana results.
- If you can’t make decisions based on marijuana test results:
 - Redact in all but reasonable suspicion and post-accident testing;
 - In RS and PA cases, determine in good faith whether employee is under the influence of “drugs,” then send for testing and use results to support or reconsider your belief.

Can I test for marijuana “impairment” or “under the influence”?

Yes, but testing can’t prove it.

- Employee who used marijuana days or weeks before may test “positive” for its presence,
- But not be impaired/under the influence.
- Train managers to recognize symptoms of marijuana (and other drug) impairment.
 - Documented symptoms can be sufficient basis for a “good faith belief.”



Other Laws: Medical Marijuana and the ADA

- ADA does not protect current addiction or illegal use of drugs.
- Former drug addicts who are not currently using may be protected as “disabled.”
- Former casual users are not protected.
- Courts have varied on how to deal with medical marijuana use.
 - CA in 2008: Employer did not need to accommodate use of medical marijuana, which remained illegal under federal law, even if legal in CA. Also permissible for employer to refuse to employ or accommodate medical marijuana user.
 - MA in 2017: Burden shifts to the employer to show that employee’s “***use of medical marijuana is not a reasonable accommodation*** because it would cause an undue hardship to the employer’s business.”

Other Laws: Medical Marijuana and the FMLA

- Drug or alcohol addiction can be an FMLA “serious health condition.”
- Time off for substance abuse treatment often qualifies for FMLA leave.
 - But not to recover from the side effects of substance abuse (such as a hangover or drug-induced incapacity).

COMPETING BUSINESS INTERESTS

Interest 1: Hiring and retention.

- Strong economy makes hiring/retention difficult.
- Changing attitudes make it harder to find “clean” candidates.

Interest 2: Safety, productivity, legal compliance, discipline.

- “Zero tolerance” drug policy promotes these interests, but disserves Interest 1.

*An **effective** drug policy serves both interests.*

Your Goal

- A drug and alcohol policy that:
 - Complies with all applicable laws
 - Minimizes drug & alcohol issues critical to your business
 - Does not unduly burden your business
 - Leaves room for flexibility (discretion)
 - Can adapt to changing laws

CIRCUMSTANCES OF TESTING

- Most employers test in one or more of these circumstances:
 - Post-offer/Pre-employment;
 - Reasonable suspicion;
 - Random;
 - Post-accident;
 - Fitness for duty/return to work;
 - Periodic.



Post-Offer, Pre-Employment Testing

- Check your jurisdictions for any limitations on testing
- Thinks about whether test is necessary for the position
- Don't invite discrimination claims:
 - Test, or don't test, everyone who is offered the job position
 - Apply the same standards to everyone tested for that position
 - Protect confidentiality of test results
- Tailored testing policies may increase the number of applicants (and help retain employees).

Random Drug Testing

- Should actually be “random”
 - NOT an excuse to “catch” a particular person
 - Names generated via computer algorithm
 - Some people may be tested several times; others may never be tested
- But not mindlessly random; leave room for discretion



“Reasonable Suspicion” Testing

- Good faith belief, based on reliable information or evidence, the employee is impaired or has otherwise violated company policy.
 - Credible third party (e.g., co-worker or supervisor).
 - ***To be reliable and credible, supervisors should be trained!***
- Be consistent, to avoid creating the impression of discrimination.
- A reasonable suspicion checklist and procedure helps ensure uniform, reliable enforcement.

Symptoms of Impairment; Bases for Good Faith Belief



- Bloodshot or watery eyes
- Slurred speech, unsteady walking or unusual clumsiness
- Drowsiness, sleeping or lethargy
- Possession of drugs or drug paraphernalia
- Odor of marijuana or alcohol
- Unusually poor, careless, or unacceptable performance
- Erratic or unusual behavior
- Irritability or unpredictable responses to ordinary situations

Post-Accident Testing

- DOT may require post-accident testing.
- OSHA does not specifically require drug testing.
 - May be necessary under general duty clause.
 - Disfavored “blanket” post-accident testing policies.
 - OSHA *interpretation*: may test if there was a “reasonable possibility” drugs or alcohol caused or contributed to the injury or illness.
 - **UNREASONABLE** – after a bee sting, repetitive strain injury, etc.
 - **REASONABLE** – after a forklift accident.



Periodic Drug Testing

- A discrete group of employees is tested at recurring intervals.
- Can be helpful when:
 - There are rumors or concerns that a particular group is using drugs, but not enough evidence for reasonable suspicion to test any particular person; or
 - Jobs are particularly safety sensitive.
- Be careful not to select a group that is predominately of a particular race, color, sex, etc.

Crafting a Policy in this Landscape

- Focus on your goals/needs.
- Consider including:
 - Testing
 - Range of discipline
 - Alternatives to discipline.
- Consider training managers.



Notice of Expectations

- Prohibit (at & during work):
 - Use/Consumption
 - Possession
 - Sale
 - Distribution
 - Manufacture
 - Paraphernalia
- When and how testing is conducted.
- Company's right to search—no expectation of privacy.



To Test or Not To Test...

- Testing policy should:
 - Reduce drug-related problems; and
 - Promote hiring, safety, etc.
- Focus on prevention, rather than punishment:
 - Don't scare away potential applicants.
 - Test only when and as truly necessary.
 - Encourage requests for “help.”
- Leave yourself room to maneuver.



Can Zero Tolerance Policies Be Effective?

- All four members of your QC department were tested for drug testing today.
 - All four failed.
- *We have **zero tolerance** for drugs. If you fail a drug test you will immediately be terminated!”*
- You don't want to:
 - Fire everyone and halt production; or
 - Ignore your own rule and appear hypocritical?

What could you do?

Zero “Tolerance” vs. Zero “Thinking”

SCENARIO:

All four members of a department are tested, and all fail.

Smart

- Two tested positive for marijuana
- One tested positive for Methadone
- One tested positive for heroin, and appeared high

If the policy leaves room for discretion, you could:

- Give the marijuana smokers a last chance agreement
- Suspend the Methadone user, pending proof of prescription
- Terminate the heroin user



Smart Zero Tolerance Policies

Zero tolerance should NOT mean “zero thinking.”

- Termination for every infraction, big or small, is not “effective.”
- Leaves no room for employer’s discretion.
- Make sure your policy leaves room for discretion.



Other Scenarios

- Employee reports to work with bloodshot eyes, smelling of weed, and giggles throughout a meeting.
- *What should you do?*
- Employee reports that she saw a co-worker in the parking lot vaping just before work and that this same co-worker had posted on Facebook that she was high all weekend.
- *What should you do?*
- Applicant says she uses medical marijuana to control anxiety and needs to smoke before her interview.
- *What should you do?*

Consequences and Alternatives

- Determine the range of consequences for violations.
- Consider offering potential alternatives to termination.
 - Entering and completing a rehab program;
 - Some period of random testing thereafter;
 - Immediate termination for any violation of LCA or violating any significant company policy.
- Reminder: Leave room for employer's discretion!
 - "Except where prohibited by state or local law, employees who test positive for drugs or alcohol may be disciplined or terminated from employment."



Training and Follow Through

- Supervisors must understand legal and policy responsibilities.
 - Reasonable suspicion training is critical.
- Implementation is not the final step.
 - Watch for new developments in the law.
 - Learn from experiences.
 - Make additional policy changes when necessary.
- Don't be the "Test Case."

Recap

- Aggressive drug policies can make it harder to hire or retain employees.
- To be competitive, don't be overly aggressive.
- Model your policy to serve your competing interests.
 - Test only to the extent you must.
 - Let prospective applicants know whether you test.
 - Train supervisors to identify impairment without testing.
 - Consider alternatives to harsh consequences.
- Leave room for discretion.
- Be consistent.

Questions?



Thank You!



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