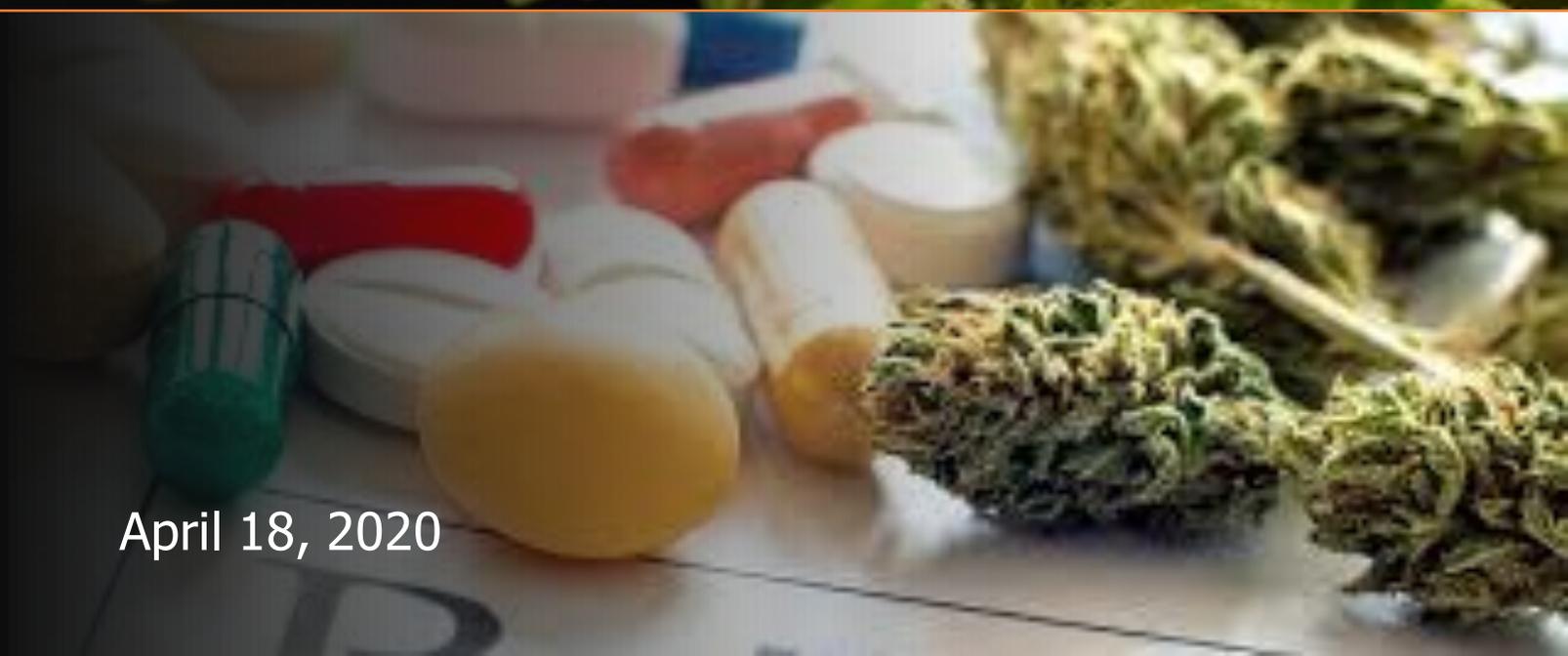


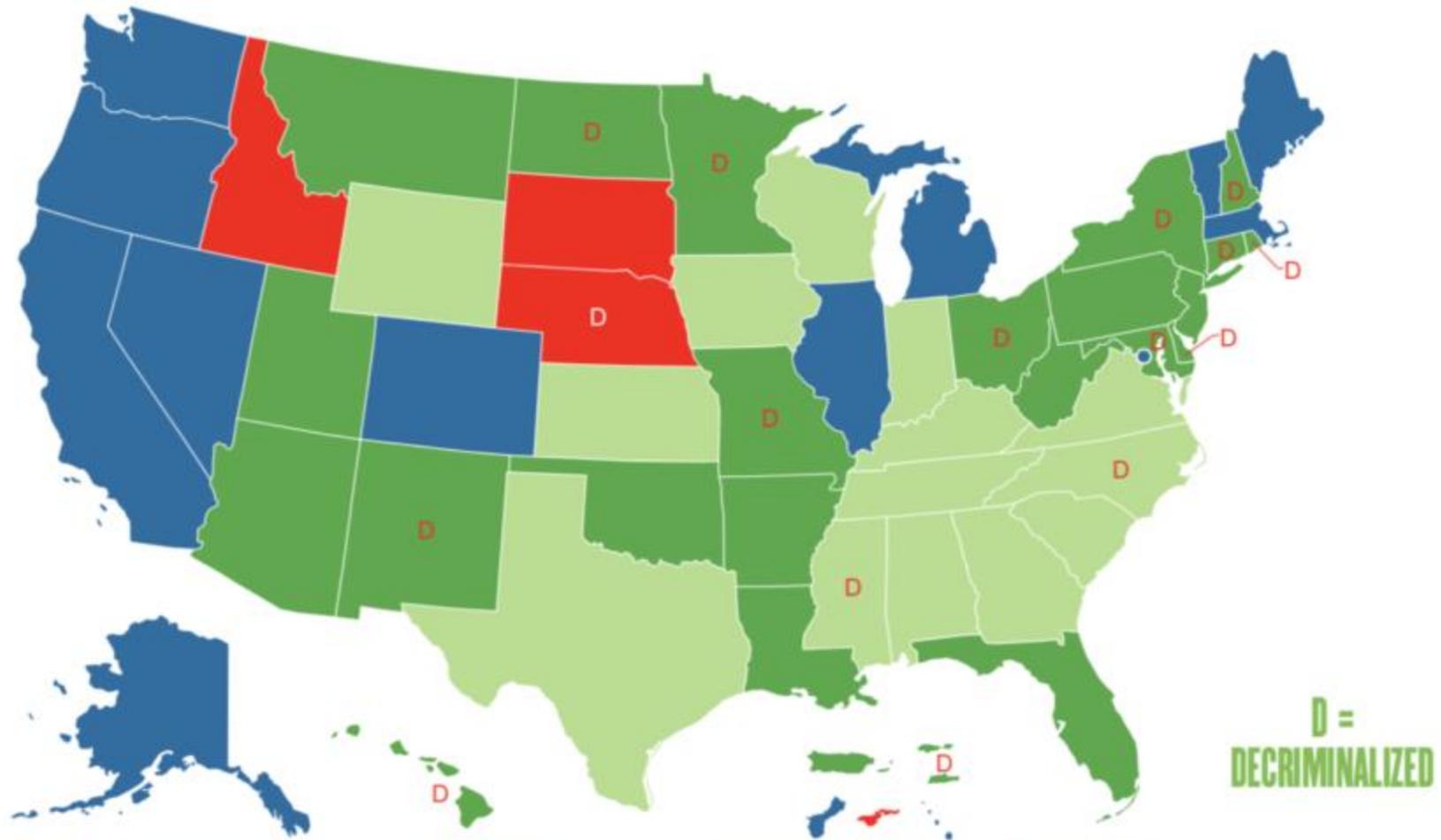
# Marijuana & the Workplace Today



Amy Cann, SHRM-SCP, SMS  
Managing Partner  
HR ROI Consulting, LLC

April 18, 2020





LEGAL



LEGAL FOR  
MEDICAL USE

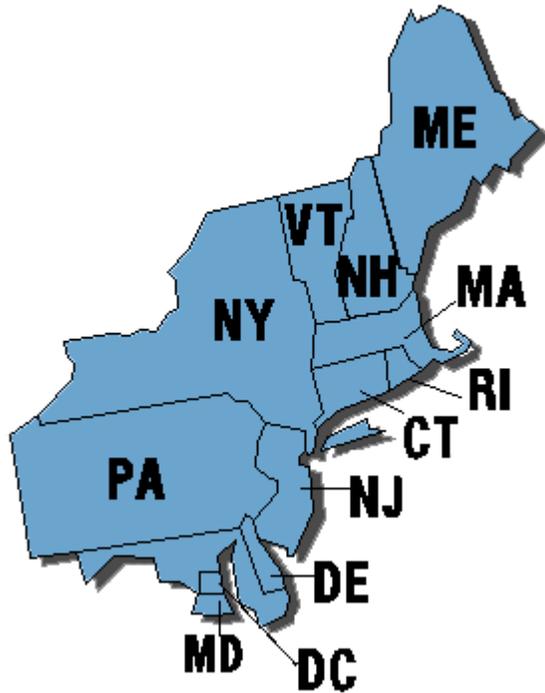


LEGAL FOR  
MEDICAL USE,  
LIMITED THC CONTENT



PROHIBITED  
FOR ANY USE

# New Hampshire



## Legislation

- Therapeutic purposes only, no disability discrimination
- Although, there are rumors from NH Human Rights Commission

## Court – NH Supreme Court

- 2019 WL 1067945 (N.H. Mar. 7, 2019)
  - Employee's use of medical marijuana is reasonable, medically necessary, and causally related to his work injury, and we hold that the board erred when it determined that the insurance carrier is prohibited from reimbursing for the cost of purchasing medical marijuana.”

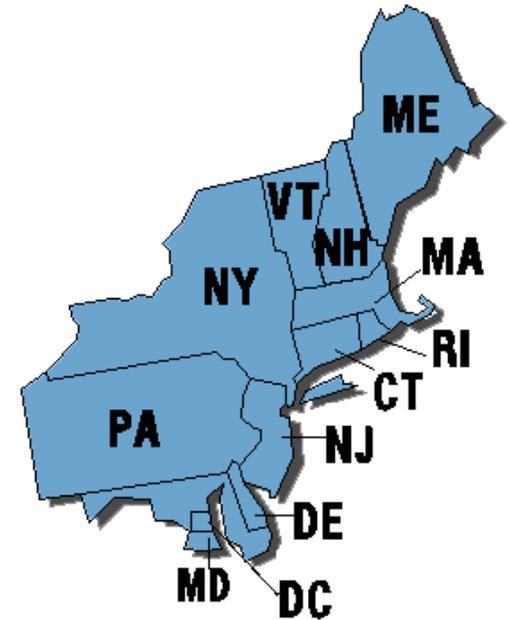
# Massachusetts

- ❑ Legislation

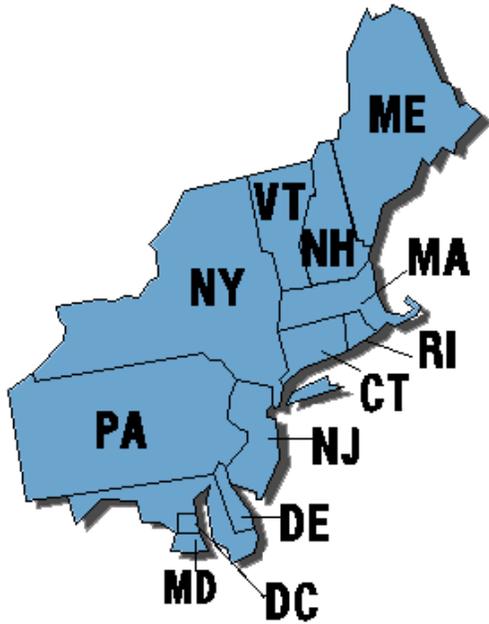
- ❑ Recreational & therapeutic purposes
- ❑ Drug testing policy may be allowed in safety sensitive roles

- ❑ Courts – MA Supreme Court

- ❑ *Barbuto v. Advantage Sales Marketing, LLC*, 477 Mass. 456, 78 N.E.3d 37 (2017).  
Employer not to interfere with disabled employee's medication, but if the employer has a drug policy prohibiting the use of such medication, employer has a duty to engage in an interactive process & bears the burden of proving that the employee's use of the medication would cause an undue hardship to justify the employer's refusal to make an exception to the drug



# Maine



## Legislation

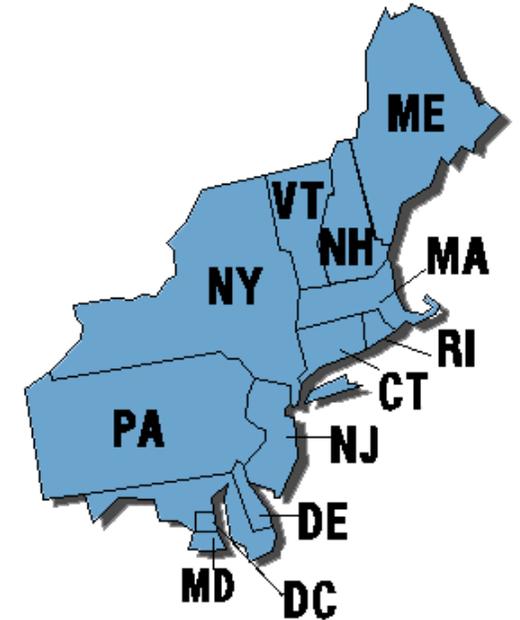
- Recreational & therapeutic purposes
- Strict testing requirements, including employee collaboration, ME DOL approval, and SAP programs

## Courts – ME Supreme Court

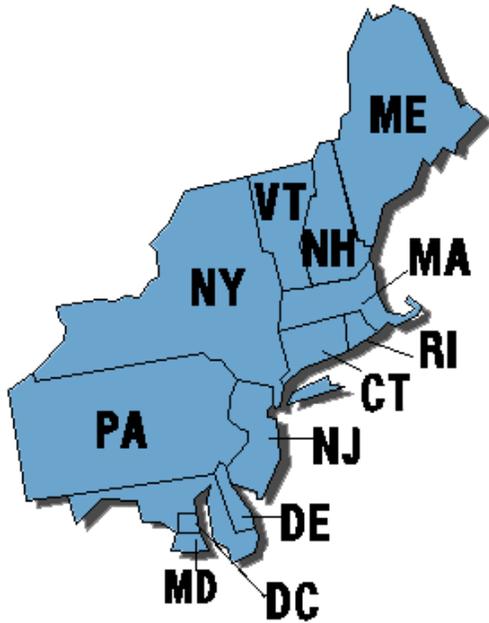
- Bourgoin v. Twin Rivers Paper Co., LLC*, 2018 ME 77, ¶ 1, 187 A.3d 10 If the employer were to comply with the administrative order of the Workers' Compensation Board by subsidizing employee's use of medical **marijuana** as permitted by the Maine Medical Use of **Marijuana** Act, employer would be engaging in conduct that met the elements of criminal aiding and abetting under federal law.

# Vermont

- ❑ Legislation
  - ❑ Recreational & therapeutic purposes
  - ❑ Employer can fire an employee for violating a policy that restricts or prohibits the use of marijuana by employees
  
- ❑ Courts – Nothing yet related to disability nor drug testing!



# Rhode Island



- Legislation
  - Therapeutic purposes only
  - No medical accommodation requirement in the workplace
  - No school, employer, or landlord may refuse to enroll, employ, or lease to, or otherwise penalize, a person solely for his or her status as a cardholder.
  
- Courts – RI Superior Court
  - Callaghan v. Darlington Fabrics Corp., 2017 WL 2321181
    - Defendants' decision not to hire Plaintiff was based solely on her use of marijuana, not her underlying disability.

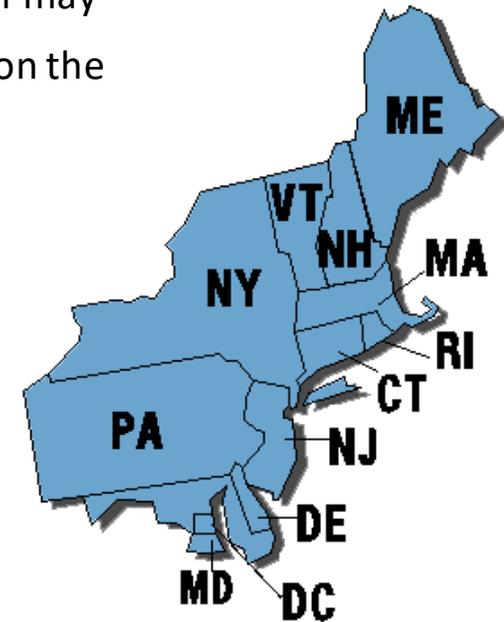
# Connecticut

## ❑ Legislation

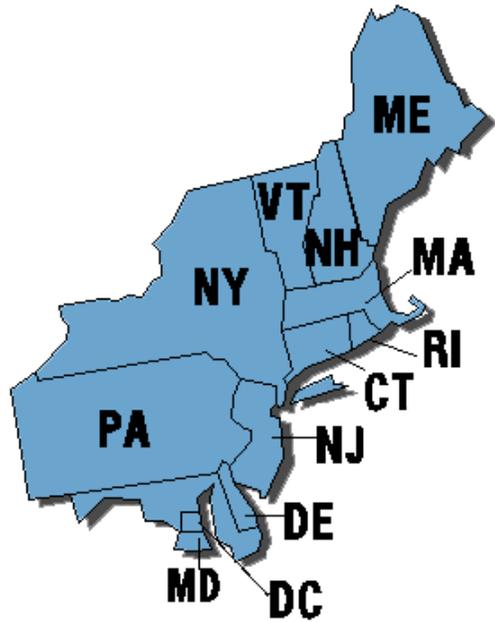
- ❑ Therapeutic purposes only, no disability discrimination
- ❑ Unless required by federal law or required to obtain federal funding, no employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient
- ❑ Pre-employment drug-testing restrictions apply with notice

## ❑ Courts – US District Court of District of CT

- ❑ *Noffsinger v. SSC Niantic Operating Co.*, 273 F. Supp. 3d 326 (D. Conn. 2017). Connecticut law that prohibits employers from firing or refusing to hire someone who uses marijuana for medicinal purposes.



# Pennsylvania

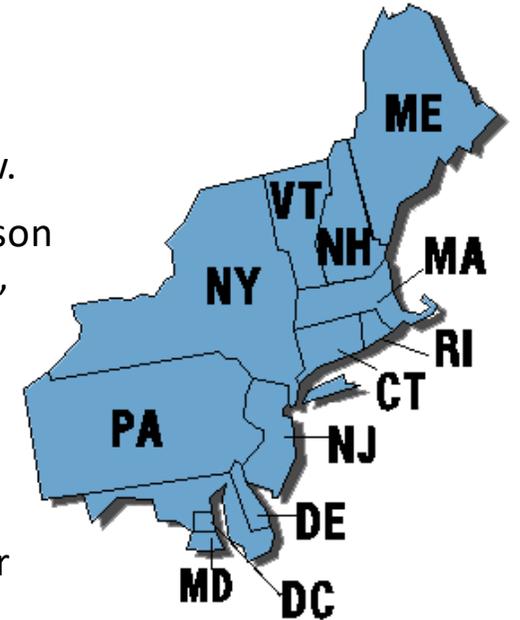


- ❑ Legislation
  - ❑ Therapeutic purposes only
  - ❑ No employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical marijuana.
  - ❑ Nothing in this act shall require an employer to make any accommodation of the use of medical marijuana on the property or premises of any place of employment.
  
- ❑ Courts – US District Court for District of Eastern PA
  - ❑ *Parrotta v. PECO Energy Co.*, 363 F. Supp. 3d 577, 588 (E.D. Pa. 2019). Company had policy of terminating all exempt workers for positive tests. In each case, the employee admitted to using marijuana. In a fact-finding, Mr. Parrotta disclosed a medical reason related to his foot, which the court did not find sufficient for consideration for an exemption by this employer

# New York

## ❑ Legislation

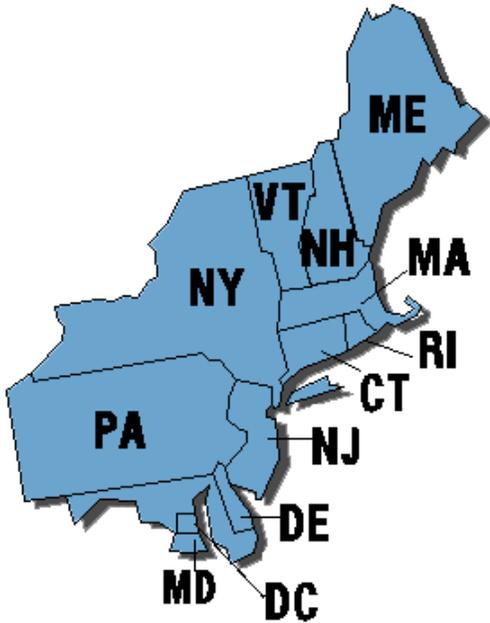
- ❑ Therapeutic purposes only
- ❑ “Being a certified patient shall be deemed to be having a "disability" under article fifteen of the executive law (human rights law), section forty-c of the civil rights law.
- ❑ This law shall not require any person or entity to do any act that would put the person or entity in violation of federal law or cause it to lose a federal contract or funding.”



## ❑ Courts – Supreme Court of NY:

- ❑ *Gordon v. Consol. Edison, Inc.*, 2018 NY Slip Op 31071(U), ¶ 6 (Sup. Ct.), Plaintiff (a Senior Financial Analyst) tested positive during random drug screen, she argued she had a **marijuana** registry card prior to the time she was terminated, and her employer may have discriminated against plaintiff based on her disability and its failure to accommodate her. Case was ordered to preliminary conference (may have settled).

# New Jersey



- ❑ Legislation
  - ❑ Therapeutic purposes only
  - ❑ Nothing in this act shall be construed to require a government medical assistance program or private health insurer to reimburse a person for costs associated with medical marijuana

- ❑ Courts – United States District Court of District of NJ
  - ❑ *Cotto v. Ardagh Glass Packing, Inc.*, No. 1:18-cv-01037 (D.N.J. Aug. 10, 2018) “Now this matter comes before the Court on Ardagh Glass’s Motion to Dismiss (ECF No. 6) As we find that neither the New Jersey Law against Discrimination nor the New Jersey Compassionate Use Medical Marijuana Act require an employer to waive a drug test as a condition of employment for federally-prohibited substance.

# Delaware

## ❑ Legislation

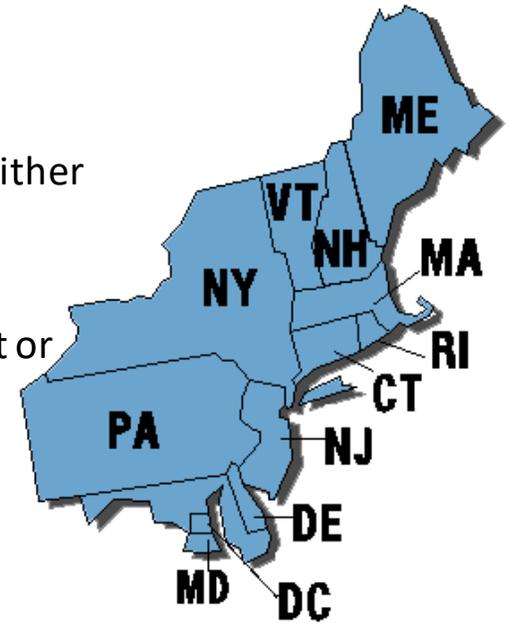
- ❑ Therapeutic purposes only

- ❑ Unless a failure to do so would cause the employer to lose a monetary benefit under federal law/regulations, may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon either of the following:

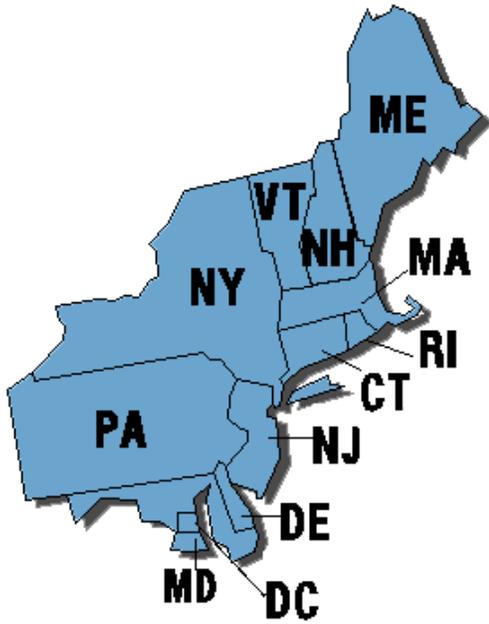
- ❑ Status as a cardholder; or positive drug test for marijuana unless the patient used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment.

- ❑ Courts – Delaware Supreme Court

- ❑ *Chance v. Kraft Heinz Foods Co.*, No. CV K18C-01-056 NEP, (Del. Super. Ct. Dec. 17, 2018) The DMMA merely prohibits them from discriminating based upon medical marijuana use alone. It does not provide a broad protection in all instances.



# Maryland

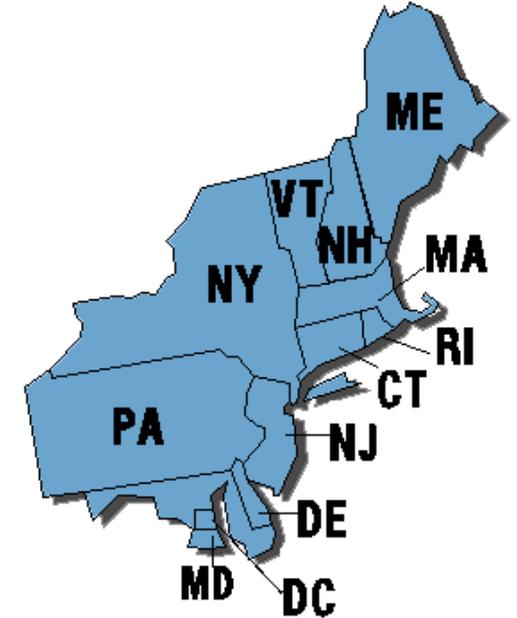


- Legislation
  - Therapeutic purposes only
  
- Courts – Special Appeals Court of MD
  - Bond v. Dep't of Pub. Safety & Corr. Servs., 161 Md. App. 112**, applied for job, required to take a drug test, which she failed; she tested positive for using marijuana. The corrections agency then terminated the employee for the use or possession of a drug on the job under Md. Code Ann. The court sent this case back to the ALJ the inconsistent findings related to the ER's policy of illegal drug use at work as there was no evidence submitted that the employee used marijuana at work.

# District of Columbia

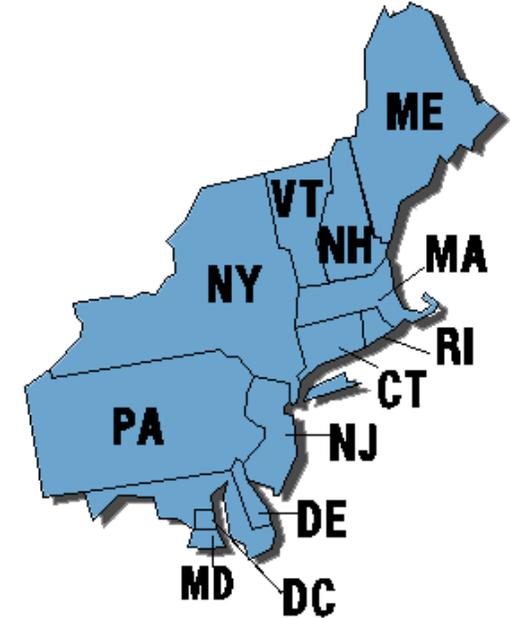
- ❑ Legislation
  - ❑ Therapeutic purposes only
  - ❑ D.C. Code § 32-931(a) “An employer may only test a prospective employee for marijuana use after a conditional offer of employment has been extended, unless otherwise required by law.”

- ❑ Courts – US
  - ❑ *Coles v. Harris Teeter, LLC*, 217 F. Supp. 3d 185, 188 (D.D.C. 2016), "District law does not 'provide a clear mandate of public policy' that employers must accommodate such legal marijuana use by their employees."



# District of Columbia

- ❑ Legislation
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- ❑ Courts – US District Court of the District of DC.
  - ❑ *Coles v. Harris Teeter, LLC*, 217 F. Supp. 3d 185, 188 (D.D.C. 2016), "District law does not 'provide a clear mandate of public policy' that employers must accommodate such legal marijuana use by their employees."





**DOT-regulated employers of safety-sensitive transportation employees:**

- Pilots, bus drivers, truck drivers, train engineers, subway operators, etc.
- Random testing is required, although termination is not:
  - Employer must provide SAP and CBAs may require limited job protection once SAP is completed.

**Government contractors & all grantees**

- Fall under Drug-Free Workplace Act of 1988
- Maintain drug-free workplace policies and programs, but drug-testing is not required

**Federal government agencies**

- Although CBAs will likely have alcohol and drug testing provisions to protect employees in some circumstances

# Should an Employer Have a Drug Policy?

- What is the objective?
  - Safety-sensitive roles
  - Control risk and liability?
- Testing and if so, what kind?
  - Pre-employment, reasonable suspicion, post-accident, random?
  - What is impact?
  - Exclude marijuana?
- What obligations might you have?
  - Disability accommodations
  - Employer policy & last-chance agreement
  - CBAs



“These drug tests, they’re absolutely confidential right?  
I don't want any rumors spread about me.”

# Medical Marijuana Card/Pre-Employment

- Interactive discussion
- Safety sensitive position?
- Disability accommodation?

To Physician Who Prescribed  
Medical Marijuana to \_\_\_\_\_  
[address]

Re: [Applicant Name]

Dear Dr. \_\_\_\_\_:

Your patient, \_\_\_\_\_, has applied for a job with our Company as a \_\_\_\_\_. He should have authorized us to receive the information sought below and attached. If that is not the case, kindly contact us so we can arrange for such authorization to be provided.

[Company] \_\_\_\_\_ is a \_\_\_\_\_ [describe the company's business briefly]... Mr. \_\_\_\_\_ has applied for the position of \_\_\_\_\_. The essential functions of this job include, but are not limited to:

\_\_\_\_\_; among other things, as detailed in the enclosed job description. [Please edit this paragraph to emphasize the particularly dangerous aspects of the job, especially things like driving, operating equipment or machinery, etc.]

Mr. \_\_\_\_\_ recently disclosed to us that he has a [State] medical marijuana card permitting him to use medical marijuana. This has raised a question as to whether Mr. \_\_\_\_\_ can perform the duties of the \_\_\_\_\_ position safely, without endangering the health or well-being of others. We therefore ask you to respond to the attached list of questions. For your convenience, I enclose a self-addressed postmarked envelope to return your responses to the questions. You also may fax the information, if you so choose, to me at [insert fax number]. If you need additional information about the job duties of the \_\_\_\_\_

# Workers' Compensation & Positive Drug Screens

If an employer has a post-accident testing policy, and an injury occurs at work:

- Employer will have to show the intoxication was the proximate cause
  - Investigation, witnesses, proof!
- Otherwise, workers' comp benefits are granted.



# Responsible Suspicion Testing Policy



- Recommended in general for an employee under the influence at work
  
- Your policy will drive your choices here:
  - Do you have already had a written policy?
  - Is it a safety-sensitive role?
  - Past incidents?
  - Last-chance agreement?
  - EAP & SAP?
  - Disability issue – medical card?

## Think of a Question Later?

Please email me at [amy@hr-roi.com](mailto:amy@hr-roi.com)

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