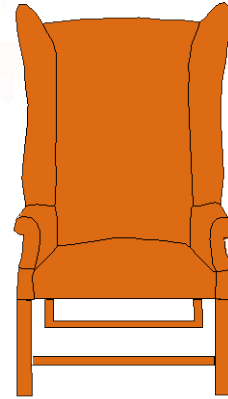


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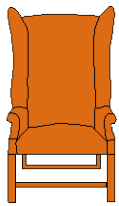
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Equal Pay Developments

* * *

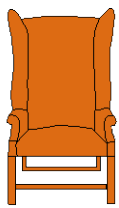
Marijuana/Opioid Use and the Workplace

Gary Clark
Quarles & Brady LLP



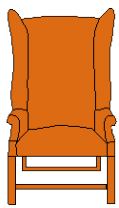
Federal Equal Pay Law

- Equal Pay Act
 - Prohibits sex-based discrimination in the same establishment between men and women who perform jobs that require “*equal skill, effort, and responsibility, and which are performed under similar working conditions.*” 29 U.S.C. §206(d).
 - Seniority and merit systems, a system that measures earnings by quantity or quality of production, and *any other differentiating factor other than sex* are allowed bases explaining pay differences.
- Title VII



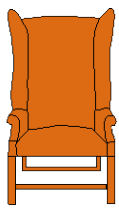
Proliferation of State Laws on Pay Equity

- 45 States have equal pay act laws.
- Seven (7) states have passed new (or amended pre-existing) equal pay act laws in the past two years.
- New state laws go beyond federal protections.
- Some cover race and ethnicity in addition to gender.



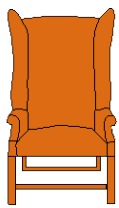
Tougher State Equal Pay Laws

- Expand coverage to “substantially similar work” (not just equal)
 - when considering skill, effort, responsibility and performance under similar working conditions.
- Allow pay differences to be shown among employees at different locations.
- Prior salary history cannot be sole justification for discrepancy.
- Safe harbor and affirmative defense for an employer’s self-evaluation of compensation.



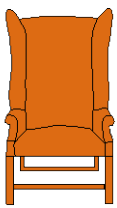
Tougher State Equal Pay Laws, cont.

- Employers must establish any pay discrepancy is result of seniority, a merit system, a system that measures production/sales/revenue or a bona fide factor other than sex (or race or ethnicity).
- A bona fide factor other than sex requires proving reason was not based on protected characteristic and is job related and consistent with business necessity.
 - Examples include education, training or prior experience.



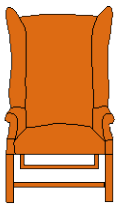
Salary History Inquiries

- Ten (10) states and eight (8) municipalities have implemented some form of a prohibition on salary history inquiries during the hiring process. Each differs in important respects:
 - Most allow employer to consider salary history if it is volunteered.
 - Some provide that, if the volunteered information is used to set a starting salary, that history cannot be relied upon in defending an equal pay claim.
 - Most allow employers to ask about salary expectations.
 - Some require provision of pay ranges upon reasonable request.



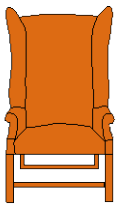
Recommendations

- Regularly audit pay equity under scope of attorney/client privilege.
 - Lay foundation for privilege.
- Understand patchwork requirements regarding salary history or implement nationwide practice.
- Train HR/Recruiting personnel on what they can and cannot ask.
 - Give HR a toolbox for how to navigate salary issues in states with restrictions.
- Internal complaint procedure to address individual pay equity complaints.



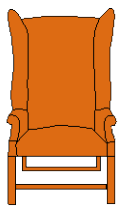
Marijuana/Opioid Use and the Workplace

- Impact of ADA
- Impact of state medical marijuana laws
- Intersection of the two



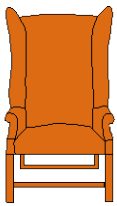
QID

- ADA discrimination provisions are only implicated if an employee or applicant is a qualified individual with a disability. An employee/applicant is a QID if he/she is:
 - Disabled within the meaning of the law;
 - Qualified for the position in question, which includes possessing the necessary skills, experience, license and qualifications for the position; and
 - Able to perform the essential job functions of the position, with or without reasonable accommodation.



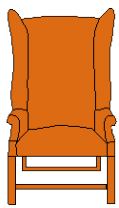
Substance Abuse

- Definition of QID includes:
 - Individuals participating in rehabilitation program and no longer using drugs or alcohol;
 - Individuals that have completed a rehabilitation program and no longer using drugs or alcohol; and
 - Individuals that are erroneously regarded as engaging in drug or alcohol use but are not in fact so using.



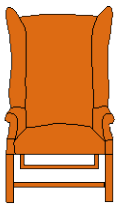
Substance Abuse, cont.

- An individual is not a QID if he/she is engaging in the illegal use of drugs or alcohol and employer acts based upon that use.



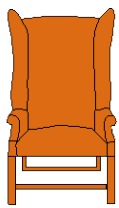
Substance Abuse, cont.

- Nothing in ADA interferes with employer's ability to prohibit use of illegal drugs and alcohol in the workplace or reporting to work under the influence.
- No obligation to reasonably accommodate an employee's use of illegal drugs or alcohol.
- Employees with performance issues due to illegal drug and alcohol use can be held to same performance standards as all employees.



Medical Marijuana

- Currently 31 states have laws providing for medical marijuana purchase and use.
- Nine of these states have laws permitting recreational use.
- Still illegal under federal law.

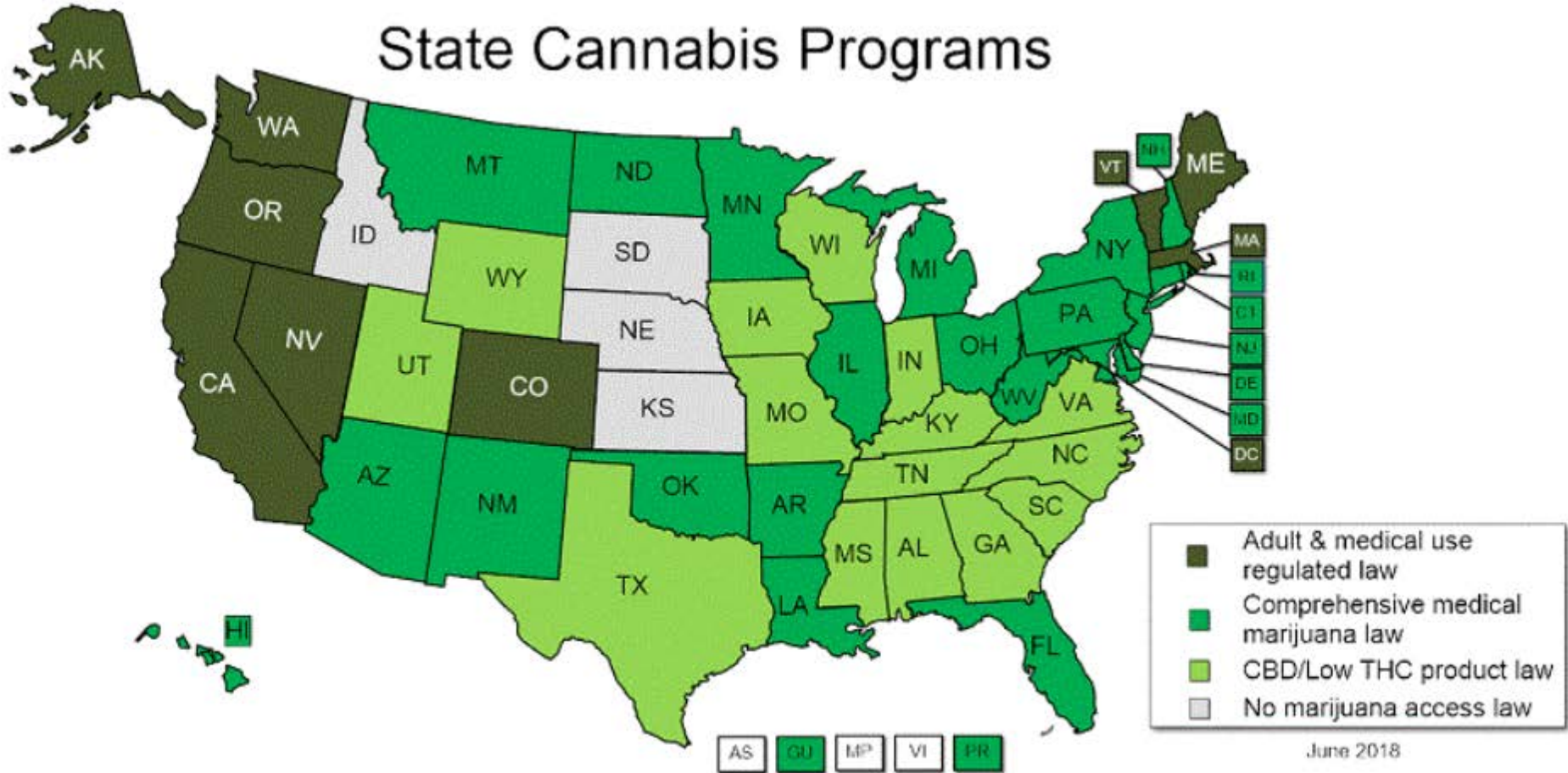


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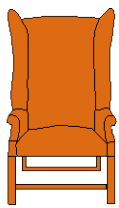


State Cannabis Programs



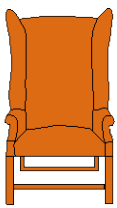
Vermont adult use law signed Jan. 22, 2018. Effective July 1, 2018
 Limited adult possession and growing allowed, no regulated production or sales: DC, VT

June 2018



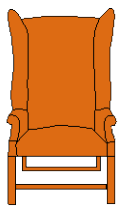
Medical Marijuana, cont.

- Laws vary from state to state, but most prohibit discrimination against qualified medical marijuana user.
- Some states prohibit adverse actions based on a positive drug test, unless can prove under the influence while at work.
- Some expressly permit employers to enact policies prohibiting drug use and make clear no duty to accommodate medical marijuana use in workplace.



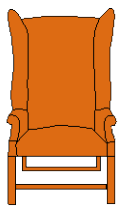
Medical Marijuana and the ADA

- Marijuana still illegal under federal law, so current use of unlawful drugs prevents employee from being a QID.
- No obligation to reasonably accommodate medical marijuana use under ADA.
 - May be an obligation under state law ADA equivalent.
 - May be an obligation to reasonably accommodate underlying medical condition for which medical marijuana is used.



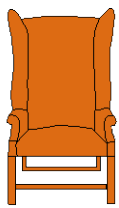
Massachusetts

- *Barbuto v. Advantage Sales and Marketing, LLC* (July 17, 2017).
- Employee terminated for at home use of medical marijuana after positive drug test.
- Employer argued not a reasonable accommodation because illegal under federal law.
- Permissible accommodation when “medical marijuana is the most effective medication for the employee’s debilitating medical condition, and where any alternative medication whose use would be permitted by the employer’s drug policy would be less effective.”



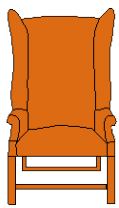
Prescription Use in Workplace

- Treated differently than illegal drugs.
- If prescribed for a medical condition, is governed by the ADA and state law.
- Treat as a request for reasonable accommodation under the ADA.
- Is the individual a QID? Can the employee perform the EJP's of the job safely and without endangering others while on the medication? Is there a job modification or transfer to another position that would enable the employee to perform the EJP's of the job safely and effectively?



Prescription Use in Workplace, cont.

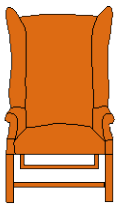
- Always use your right to gather medical information and question the healthcare provider.
- Consider whether this is a situation that gives you the right to seek a second opinion.
- EEOC guidance permits requesting a "second opinion" medical examination in three circumstances:
 - Medical documentation is insufficient and employee has been unable to cure deficiency.
 - HCP does not have expertise to render opinion on medical condition and limitations.
 - Questions of credibility and authenticity exist with regard to documentation.



Right and Wrong Way to Ask

- EEOC Guidance states asking employees to list any prescription medications they are taking is an unlawful disability inquiry.
- Required disclosure must be job related and consistent with business necessity.
- Permissible to ask employees in positions where inability or impaired ability to perform EJP's of job constitute a direct threat to coworker and public safety.
 - Forklift operator versus administrative assistant.
- Specific inquiries based on reasonable observation permissible.

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Questions?

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