FELHABER LARSON

ATTORNEYS AT LAW

Medical Marijuana, Recreational Marijuana, and Drug Testing

(April 23, 2021)

Penelope (Penny) J. Phillips
(612) 373-8428
pphillips@felhaber.com

Presentation Overview

- Minnesotan employers have a right to maintain a drug and alcohol-free workplace.
- However, Minnesota's Drug and Alcohol Testing in the Workplace Act ("DATWA") places several procedural requirements and limitations on an employer's ability to test their employees.
- There are even more pitfalls to avoid when an employee has been legally prescribed medical marijuana.

Presentation Overview

- Permissible Drug Testing under DATWA
  - Reasonable Suspicion Testing Best Practices
- Medical Marijuana Considerations
- Recreational Marijuana
- Drug/Alcohol Use and the ADA

FELHABER LARSON

ATTORNEYS AT LAW

OVERVIEW OF MINNESOTA'S DRUG TESTING LAW (DATWA)

MN DATWA – WHO IS COVERED

Minn. Stat. §§ 181.950-.957:

- The law applies to all employers.
- It covers all employees, including ***independent contractors***.
- Job applicants are also protected.
  - A job applicant is defined as any person who has applied for work with an employer and anyone who has a job offer contingent upon passing a drug or alcohol test.

EMPLOYERS' REQUIREMENTS:

- Testing can **only** be done under an employer's written policy, which must include the following:
  - Who is subject to testing under the policy and when testing is required;
  - The disciplinary consequences of a positive test result;
  - The employee's right to refuse testing and the consequences of refusal; and
  - The employee's right to explain a positive result and to take a re-test.

EMPLOYERS' REQUIREMENTS (CONT.):

- Prior to testing, the employer must provide the written testing policy and a form to acknowledge receipt of the policy to the affected employee.
- Notice of the policy must be posted in an "appropriate and conspicuous" location. The notice must state that employees can inspect the policy during regular work hours.

EMPLOYERS' REQUIREMENTS (TESTING)

- An employer must use an accredited or licensed testing laboratory to conduct the testing.
- The laboratory may notify an employer only that the sample contains evidence of drugs or alcohol and is prohibited from disclosing any other information.
- The test results, with few exceptions, are confidential information which the employer may not disclose without the employee's written consent.

When is Drug/Alcohol Testing Allowed?

Job Applicant Testing

- After an employee has received a conditional job offer, the employer may require or ask that the applicant undergo testing.
- This applies only if all applicants who receive conditional job offers for the same position are required or asked to undergo testing.

When is Drug/Alcohol Testing Allowed?

Routine Physical Examination Testing

- An employer may require employees to take a test as part of a routine physical examination.
- The physical and drug test can only be required once annually.
- The employee must be given at least two weeks' written notice of the testing requirement.

When is Drug/Alcohol Testing Allowed?

Random Testing

- An employer may require random drug testing only if:
  - An employee is in a "safety-sensitive" position, defined by statute as a job in which an impairment caused by drug or alcohol usage would threaten the safety or health of any person; or
  - The employee is a professional athlete and the testing is conducted in accordance with a collective bargaining agreement.

When is Drug/Alcohol Testing Allowed?

Reasonable Suspicion Testing

- An employer may require testing if there is a "reasonable suspicion" that the employee:
  - is under the influence of drugs or alcohol;
  - has violated written work rules regarding drugs or alcohol; or
  - has caused a personal injury or a work-related accident or was involved in operating machinery involved in a work-related accident.

  What constitutes "reasonable suspicion" to test is discussed in greater detail later in this presentation.

When is Drug/Alcohol Testing Allowed?

Treatment Program Testing

- An employer may require an employee to undergo testing if the employee (1) has been referred by the employer for chemical dependency treatment or evaluation; or (2) is participating in a treatment program under an employee benefit plan.
- In such cases, the employee may be required to undergo drug or alcohol testing without prior notice during the evaluation or treatment period and for up to two years after treatment.

MINNESOTA'S DRUG AND ALCOHOL TESTING IN THE WORKPLACE ACT

- **Employers' Limitations**:
  - Employees who fail a drug or alcohol test are entitled to significant protections even after testing positive.
  - The employer must give written notice of a test result to an employee within three workdays of the employer's receipt of the result.
  - After an initial positive screen, the employee must be notified of the right to explain the result, and to disclose any medications taken that could affect the reliability of the result.

CONFIRMATORY TESTS

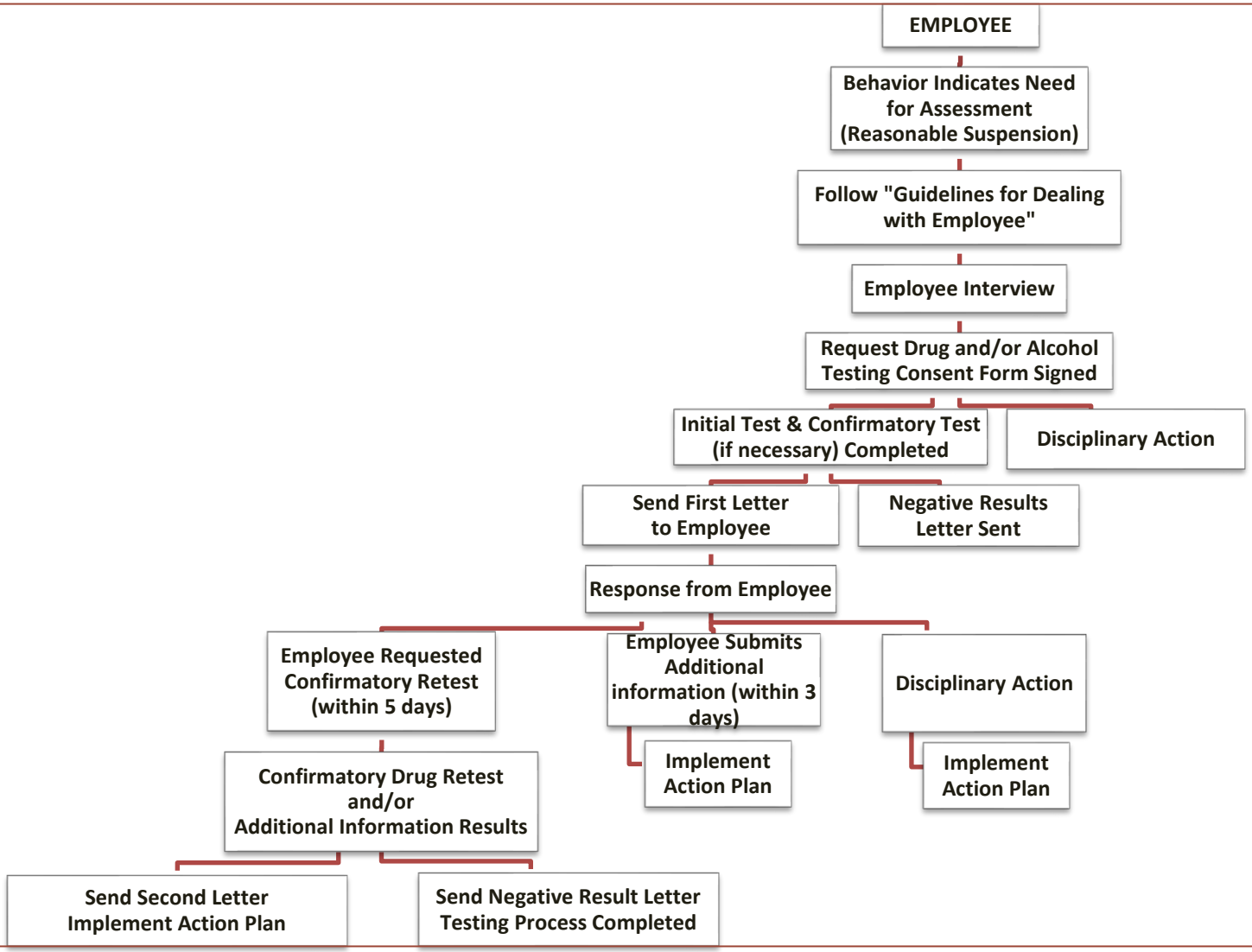
- The laboratory must conduct a confirmatory test on all samples that produce an initial positive test result.
- An employer may not discipline an employee based on a positive result that has not been confirmed by the second test.
- Similarly, an employer may not withdraw an offer of employment to an applicant based on a positive result that has not been confirmed by a second test.

CONFIRMATORY TESTS (CONT.)

- Upon a positive confirmation test, the employee or applicant may request a retest at their own expense.
- If an initial test result is positive and the confirmatory test has not yet been done, an employer may suspend an employee pending the results only if the employer reasonably believes the suspension is necessary to protect the employee, coworkers, or the public.
- If the confirmatory test or a retest is negative, the employee must be reinstated with back pay.

CONFIRMATORY TESTS (CONT.)

- After a confirmatory test result comes back positive, an employer may not discharge an employee unless the employer has first offered the employee the opportunity to participate, at the employee's own expense or under the employee's benefit plan, in a drug or alcohol treatment or counseling program, and the employee refuses to participate in the program or fails to complete it successfully.


EMPLOYEE
Behavior Indicates Need for Assessment (Reasonable Suspension)
Follow "Guidelines for Dealing with Employee"
Employee Interview
Request Drug and/or Alcohol Testing Consent Form Signed
Initial Test & Confirmatory Test (if necessary) Completed
Disciplinary Action
Send First Letter to Employee
Negative Results Letter Sent
Response from Employee
Employee Requested Confirmatory Retest (within 5 days)
Employee Submits Additional information (within 3 days)
Disciplinary Action
Implement Action Plan
Implement Action Plan
Confirmatory Drug Retest and/or Additional Information Results
Send Second Letter Implement Action Plan
Send Negative Result Letter Testing Process Completed

MINNESOTA'S DRUG AND ALCOHOL TESTING IN THE WORKPLACE ACT

- **Statutory Violations**: **Remedies**
  - An employer or laboratory that violates the statute is liable to the employee for damages.
  - Reasonable attorney fees may be awarded if the employer knowingly or recklessly violated the law.
  - The employee may be entitled to an injunction ordering an employer or laboratory not to commit any act in violation of the statute.
  - The employee may be entitled to other equitable relief, including reinstatement with back pay.
- An employee has six years to bring a claim of wrongful termination under DATWA.

REASONABLE SUSPICION

- As noted above, an employer may test (pursuant to a valid written drug testing plan), if they have a reasonable suspicion that the employee is under the influence or has violated written workplace rules prohibiting the use of drugs or alcohol at work.
- However, it important that an employer take proper steps to **verify** and **document** the basis for the belief that testing is needed.

Reasonable Suspicion Process

1. Observe—What do you see, smell, hear?
2. Confirm—Have peer(s) also observe employee
3. Document—Use objective language
4. Confront and Converse—Be direct but supportive
5. Testing—Know your organization's guidelines
6. Services and Treatment

Potential Signs of Drug/Alcohol Use

- **Moods:**
  - Depressed
  - Anxious
  - Irritable
  - Suspicious
  - Complains about others
  - Emotional unsteadiness (e.g., outbursts of crying)
  - Mood changes after lunch or break

Potential Signs of Drug/Alcohol Use

- **Actions:**
  - Withdrawn or improperly talkative
  - Spends excessive amount of time on the telephone
  - Argumentative
  - Has exaggerated sense of self-importance
  - Displays violent behavior
  - Avoids talking with supervisor regarding work issues

Potential Signs of Drug/Alcohol Use

- **Absenteeism:**
- Acceleration of absenteeism and tardiness, especially Mondays, Friday, before and after holidays
  - Frequent unreported absences, later explained as "emergencies"
  - Unusually high incidence of colds, flus, upset stomach, headaches
  - Frequent use of unscheduled vacation time
  - Leaving work area more than necessary (e.g., frequent trips to water fountain and bathroom)
  - Unexplained disappearances from the job with difficulty in locating employee
  - Requesting to leave work early for various reasons

Potential Signs of Drug/Alcohol Use

- **Accidents:**
  - Taking of needless risks
  - Disregard for safety of others
  - Higher than average accident rate on and off the job

Potential Signs of Drug/Alcohol Use

- **Changes in Work Patterns:**
  - Inconsistency in quality of work
  - High and low periods of productivity
  - Poor judgment/more mistakes than usual and general carelessness
  - Lapses in concentration
  - Difficulty in recalling instructions
  - Difficulty in remembering own mistakes
  - Using more time to complete work/missing deadlines
  - Increased difficulty in handling complex situations

Potential Signs of Drug/Alcohol Use

- **Relationship to Others on the Job:**
  - Overreaction to real or imagined criticism (paranoid)
  - Avoiding and withdrawing from peers
  - Complaints from co-workers
  - Borrowing money from fellow employees
  - Persistent job transfer requests
  - Complaints of problems at home such as separation, divorce and child discipline problems

Physical Signs of Drug/Alcohol Use

- Constricted pupils
- Dilated pupils
- Scratching
- Red or watering eyes
- Involuntary eye movements
- Sniffles
- Excessively active
- Nausea or vomiting
- Flushed skin
- Sweating
- Yawning
- Twitching
- Violent behavior
- Drowsiness
- Odor of alcohol
- Nasal secretion
- Dizziness
- Muscular incoordination
- Unconsciousness
- Inability to verbalize
- Irritable
- Argumentative
- Difficulty concentrating
- Slurred speech
- Bizarre behavior
- Needle marks

Best Practice
Observing and Documenting Current Indicators

- Patterns of any of the above conduct or combinations of conduct may occur but must be accompanied by indicators of impairment in order to establish "reasonable cause."

Is Testing Needed?

- Without the results of a drug/alcohol test, an employer may run into legal issues for terminating an employee without having them to submit to a test.
  - The results of a drug/alcohol test is the only way to confirm that an individual is under the influence.
- However, there are limited circumstances where a test may not be needed, for example, if an employee is found using drugs/alcohol on the job site, or if they possess drug paraphernalia during work time.

DRUG PARAPHERNALIA

- Possession of paraphernalia (such as syringe, bent spoon, metal bottle cap, medicine dropper, glassine bag, paint can, glue tube, nitrite bulb, or aerosol can) can be used as a basis for adverse employment action.
- Similarly, taking adverse action for an employee's possession of drugs or alcohol in the workplace can result in termination without a test.

In addition to prohibiting employees being under the influence of drugs/alcohol while working, policies should prohibit the possession of drugs/alcohol by employees as well.

DOCUMENTING REASONABLE CAUSE

- It is important to base any determination of reasonable cause based upon objective, documented observations.
- Facts underlying the reasonable cause determination must be reliable – if information regarding employee drug/alcohol use comes from a witness, is that information reliable or may there be motivations for the reporting employee to lie?

Determining Reasonable Cause – Questions to Ask

1. Has some form of impairment been shown in the employee's appearance, actions or work performance?
2. Does the impairment result from the possible use of drugs or alcohol?
3. Are the facts reliable? Did you witness the situation personally, or are you sure that the witness(es) are reliable and have provided firsthand information?
4. Are the facts capable of explanation?
5. Are the facts capable of documentation?
6. Is the impairment current, today, now?

Do NOT proceed with reasonable cause testing unless all of the above questions are answered with a YES.

Confronting The Employee

- Collect all information
- Get confirmation whenever possible
- Use only objective data
- Consult with HR and/or EAP
- Speak to employee in private
- Be specific—state your concerns and why
- Be prepared for emotional response
- Explain expectations and/or consequences
- Do not allow employee to leave premises on their own
- Document the meeting

FELHABER LARSON

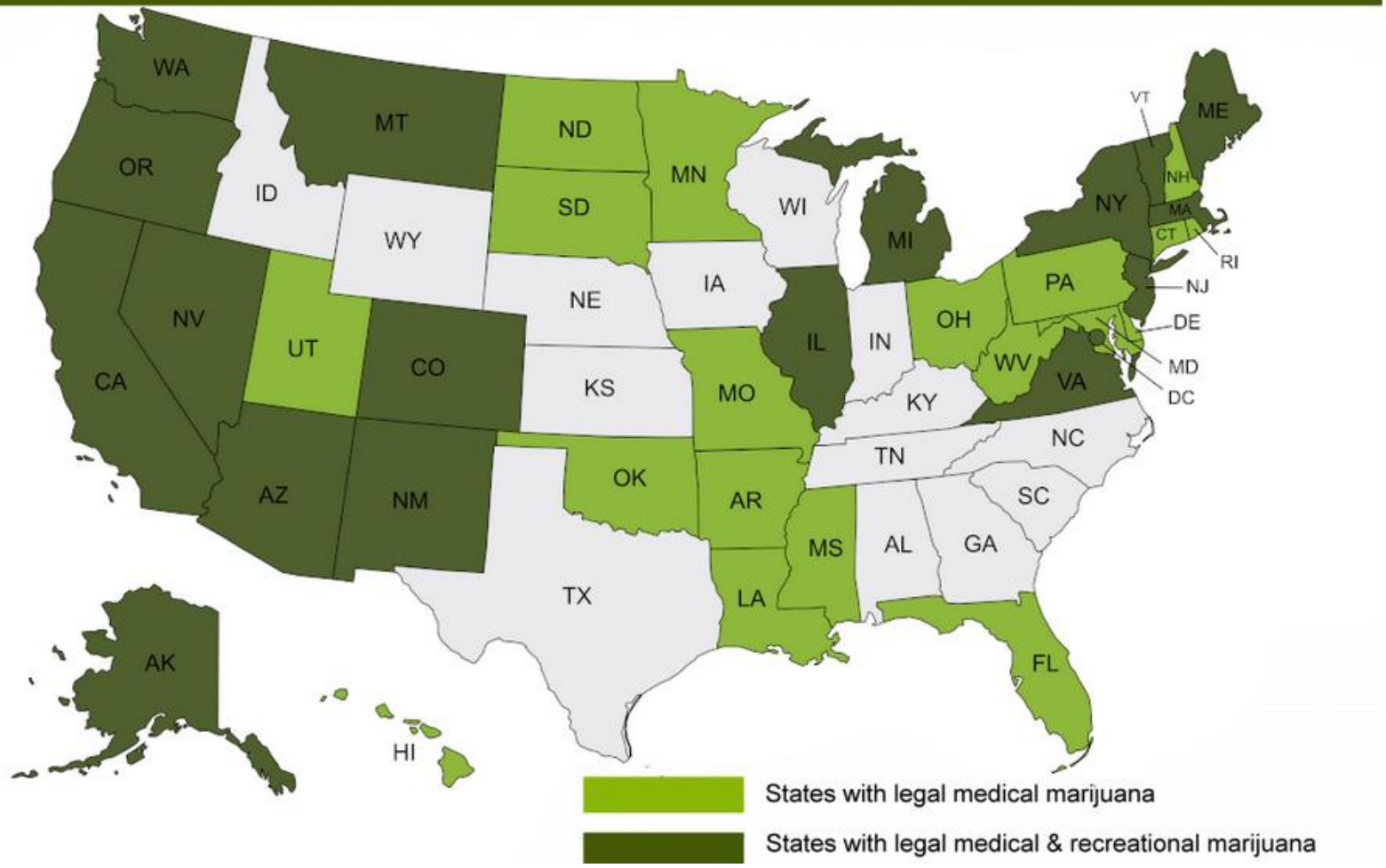
ATTORNEYS AT LAW

Marijuana: Medical and Recreation Use

MEDICAL MARIJUANA

- Minnesota's Medical Cannabis law allows for the use and possession of marijuana for medical purposes.
- Minnesota's Law passed in **2014**.
  - As of April 2021, 36 States have adopted measures regulating marijuana for medical use.

Legal Medical & Recreational Marijuana States



MARIJUANA: WHAT DOES IT DO?

- There are five major cannabinoids in the plant.
- The best-known, THC, is the only one that delivers the "high". It is a muscle relaxant that helps lower blood pressure and stimulates the appetite.
- Another compound, CBD, is good at relieving pain, nausea and convulsions. Similarly, the other three main cannabinoids are each better at treating certain other symptoms.
- http://www.unitedpatientsgroup.com/resources/how-medical-marijuana-works

Medical Marijuana Program Overview

- Patients seeking medical marijuana must go through Minnesota Registry Program.
- Only legal to distribute and consume medical marijuana in pill, vapor, and liquid form.
- Smoking marijuana is unlawful.
- Cannot use marijuana in public places or at work.

How Popular Is Medical Marijuana?

- A January 2021 report by the Minnesota Office of Medical Cannabis says that **42,485** total patients have enrolled in Minnesota's program to date (up from 8,129 as of January 2019).

QUALIFICATION – MINNESOTA

- Minnesota's Medical Cannabis Program is one of the most restrictive in the nation.
- Health care practitioners must register in the Minnesota Medical Cannabis Registry in order to prescribe program participation.
- A patient must be diagnosed with a qualifying condition and then apply to be enrolled in the Patient Registry Program.

Current Qualifying Conditions

- Cancer associated with severe/chronic pain, nausea or severe vomiting, or cachexia or severe wasting
- Glaucoma
- HIV/AIDS
- Tourettes syndrome
- Amyotrophic lateral sclerosis (ALS)
- Seizures, including those characteristic of epilepsy
- Severe and persistent muscle spasms, including those characteristic of multiple sclerosis
- Inflammatory bowel disease, including Crohn's disease
- Terminal illness, with a life expectancy of less than one year, if the illness or treatment produces severe/chronic pain, nausea or severe vomiting, cachexia or severe wasting
- Intractable pain
- Post-traumatic stress disorder
- Autism
- Obstructive sleep apnea
- Alzheimer's disease
- Chronic pain
- Sickle cell disease (effective Aug. 2021)
- Chronic motor or vocal tic disorder (effective Aug. 2021)

QUALIFICATION (CONT'D)

- Once approved for the registry, the patient will receive a registry card that allows them to receive marijuana from a dispensary/clinic.
- Marijuana cannot be "prescribed" by physicians or other health care professionals because it is not approved by the FDA.
- Doctors certify patient as having a qualifying condition and then pharmacists working in clinics dispense.

MEDICAL MARIJUANA – FEDERAL LAW CONSIDERATIONS

- Marijuana remains illegal under federal law.
- The Controlled Substances Act, 21 U.S.C. § 811 classifies marijuana as a Schedule 1 drug, meaning that the federal government views marijuana as highly addictive and having no medical value.
- The U.S. Department of Transportation has taken the position that medical marijuana does not constitute a valid medical explanation for a covered employee's positive drug test result.
- When an employee is subject to mandatory testing under DOT regulations, medical marijuana does not constitute a valid explanation for the positive test result.

MINNESOTA LAW - EMPLOYEE PROTECTIONS

- Minnesota's Medical Cannabis law prohibits workplace discrimination based on:
- The person's status as a patient enrolled in the registry program; and
- The patient's positive drug test for cannabis components or metabolites, **unless** the patient used, possessed, or was **impaired by** medical cannabis on the premises of the place of employment or during hours of employment.

How Does an Employee "Prove" they have a Prescription?

Section 152.32, subd. 3(d) provides that "[a]n employee who is required to undergo employer drug testing pursuant to section 181.953 **may** present verification of enrollment in the patient registry as part of the employee's explanation under section 181.953, subdivision 6"

Drug Testing For Marijuana

The four most common methods of testing for marijuana are:

- **Blood tests:** Cannot identify impairment.
- **Urine tests:** Cannot identify impairment due to length of time between ingestion and excretion.
- **Hair tests:** Cannot accurately measure impairment because marijuana residue does not appear in the hair until days after first use.
- **Saliva tests:** Relatively new and less reliable test.

EMPLOYMENT PROTECTIONS

- Nothing in Minnesota's Medical Cannabis law allows an employee to use, possess, or be **impaired** by medical cannabis while on duty.
- In fact, all use of medical cannabis must occur during non-working hours and in such a manner that does not result in impairment at a future time on the job.
- So, employers should consider including a provision in their policy that prohibits the use of, possession of, and impairment by marijuana on company premises and during work hours.

EMPLOYMENT CHALLENGE- WHAT IS IMPAIRMENT?

- What constitutes "impairment" of marijuana may be hard to determine.
- The National Institute on Drug Abuse has noted that the "noticeable effects of smoked marijuana [i.e. the feeling of being 'high'] generally last from 1 to 3 hours," however, detectable amounts of THC may remain in the body for days or even weeks after use.

National Institute on Drug Abuse, What are marijuana's effects?, https://www.drugabuse.gov/publications/research-reports/marijuana/what-are-marijuana-effects

DRUG TESTING FOR MARIJUANA – "IMPAIRMENT"

- Minnesota's law has no definition of impairment. However, Arizona defines drug impairment as noticeable changes to an employee's:
  - Speech, Walking, Standing, Physical dexterity, Agility, Coordination, Actions, Movement, Demeanor, Appearance, Clothing, Odor
- Arizona also includes irrational or unusual behavior, negligence or carelessness, and/or a disregard for the safety of others as indicators that an individual is impaired by drugs.

CRITICAL ISSUE: IMPAIRMENT

- Unlike alcohol, is very difficult to identify whether an individual who tests positive for marijuana is “impaired.”
- Marijuana is stored in fat cells and can often remain in body (and lead to positive test) for several weeks.
- Blood and saliva tests are not reliable indicators of impairment because cannabinoids remain in the body for up to 30 days, but impairment may only last a few hours.
- The Minnesota Department of Health does not currently have any guidelines regarding what constitutes marijuana impairment.

CRITICAL ISSUE: IMPAIRMENT

- Even when testing accurately measures THC, there is still a lack of scientific agreement, and legal definition, of what levels constitute impairment.
- Colorado, Washington, and Nevada have defined the legal limit for driving under the influence of THC.
  - Colorado and Washington: 5 nanograms of active THC in the blood.
  - Nevada: 2 nanograms of THC in the blood.

CRITICAL ISSUE: IMPAIRMENT

- How to identify when someone is impaired?
- New technology is aiming to fill the gap
- Houndlabs Breathalyzers
  - Breathalyzer device, measures THC.
  - Measures alcohol and marijuana.
  - Measures recent use of smoked and edible marijuana.
  - May replace hair and urine testing.
  - Based on research that THC is detectable in breath for up to three hours after smoking marijuana, and the three-hour time frame is when most people are likely to be impaired.

CRITICAL ISSUE: IMPAIRMENT

- Predictive Safety SRP Alert Meters
  - A “cognitive impairment alertness testing tool.”
  - Measures an individual’s cognitive alertness with a 60-second interactive graphics test, taken on a touchscreen or smartphone.
  - Employers can download the app on their phone.

CRITICAL ISSUE: IMPAIRMENT

Best Practices:

- Create clear policies for identifying impairment.
- Document everything used to support reasonable suspicion that an employee is/was impaired.
- The same criteria used to establish that an employer has reasonable cause to require employees to submit to a drug/alcohol test can be used to determine that an employee is impaired.

Drug Testing for Marijuana

- Isn't a positive test sufficient proof of impairment?
  - Minnesota courts have not ruled on this issue.
  - Other courts have held that a positive test, without more, is insufficient to prove that an employee who legally used medicinal marijuana was under the influence at work.

EXAMPLE CASE – OFF-DUTY PRESCRIBED USE – WALMART

- Plaintiff was a Walmart employee who had an Arizona medical marijuana card which she used as a sleep aid for chronic pain related to arthritis.
- Two days after a bag of ice fell on her wrist at work, Plaintiff notified Walmart that she was experiencing pain and swelling in her wrist.
- Three days later, while not at work, Plaintiff used medical marijuana prior to going to sleep around 2 a.m.
- At 2 p.m. that afternoon, Plaintiff went to urgent care for her wrist as directed under Walmart policy.

Whitmire v. Walmart Stores, Inc., 359 F. Supp. 3d 761 (D. Ariz. 2019).

EXAMPLE CASE – OFF-DUTY PRESCRIBED USE – WALMART, (CONT.)

- While at urgent care, she submitted a urine sample for a post-accident drug test and returned to work.
- Upon returning to work, she told Walmart for the first time that she had a medical marijuana card and gave Walmart a copy.
- Plaintiff's drug screen tested positive for marijuana, and Walmart determined that the high levels of marijuana metabolites in her test indicated that she was impaired during her shift that day.
- Walmart suspended and later terminated her on the basis of her positive drug test.

EXAMPLE CASE – OFF-DUTY PRESCRIBED USE – WALMART, (CONT.)

- Plaintiff sued, alleging that she was discriminated against in violation of the Arizona Medical Marijuana Act ("AMMA").
- Walmart argued that the AMMA did not provide Plaintiff a private cause of action against Walmart.
- Walmart also argued that it terminated Plaintiff based on the results of a drug test taken during her shift, which showed that Plaintiff had the highest levels of marijuana metabolites identifiable by the test, which provided a good faith basis to believe that she was impaired during her shift.

EXAMPLE CASE – OFF-DUTY PRESCRIBED USE – WALMART, (CONT.)

- The court concluded that the AMMA did contain an implied private cause of action for employment discrimination, since no other remedy for a violation was available.
- The court determined that the AMMA and the Arizona drug testing law can be harmonized to hold a qualifying patient may sue their employer if they are terminated for authorized use of medical marijuana unless the employer has a good faith belief that the employee was impaired by marijuana while at work.

EXAMPLE CASE – OFF-DUTY PRESCRIBED USE – WALMART, (CONT.)

- While a good faith belief may be based on the results of a drug test, Walmart erred in relying solely on the results of the drug test and no other evidence of impairment.
- The court determined that proving impairment based on the results of a drug test is a "scientific matter" which required expert testimony from someone with specialized knowledge, skill, experience, training, or education.
- Here, a statement from Walmart's Personnel Coordinator was insufficient to meet this standard.

Medical Marijuana - Presumption of Lawful Use

- Minnesota's Cannabis Act includes presumption that applicant or employee enrolled in registry is engaged in authorized use.
- Employee may be required to prove legal use by presenting verification of enrollment in the patient registry.
- Employer may rebut the presumption by evidence that conduct related to use of medical cannabis was not for the purpose of treating or alleviating the patient's qualifying medical condition or symptoms associated with the patient's qualifying medical condition.

MARIJUANA TESTING – BEST PRACTICES

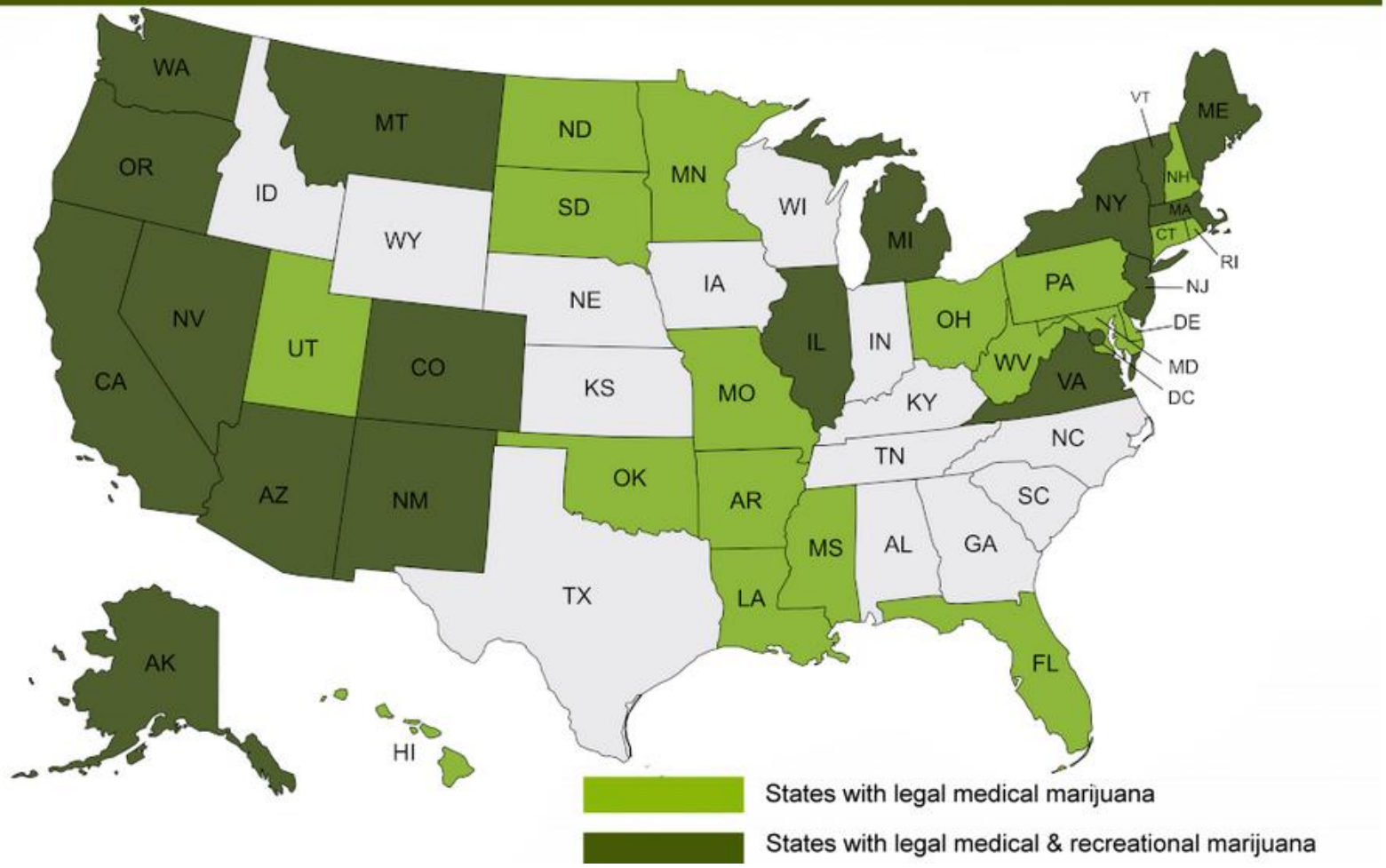
- It is extremely important to have clear policies in place and to document everything used to support a reasonable suspicion that an employee was impaired by marijuana while at work in order to reduce the legal risks involved with taking adverse action against an employee for *suspected* impairment while at work.

WHAT ABOUT RECREATIONAL USE?

- As of November 2020, 15 states have approved some form of recreational marijuana use for adults.

- However, Marijuana remains illegal under Federal law, and therefore, employers can generally still take adverse employment action against an employee who tests positive for recreational marijuana use.

Legal Medical & Recreational Marijuana States



WHAT ABOUT RECREATIONAL USE? (CONT.)

- Some states expressly note that employers can take adverse employment action against an induvial who fails a drug test for marijuana, even if it is otherwise legal.
- For example, Illinois's recreational marijuana law specifically notes that employers can adopt:

  "Reasonable drug and alcohol testing, reasonable and nondiscriminatory random drug testing, and discipline, termination of employment, or withdrawal of a job offer due to a failure of a drug test."

WHAT ABOUT RECREATIONAL USE? (CONT.)

- Even if the state's recreational use law is silent about employment protections, employers still may be able to take adverse action against an employee for testing positive.

Recreational Use in Minnesota?

- HF 600 / SF 757 (2021)
  - Establishes a regulatory framework for adult-use cannabis, moves the medical cannabis program under the newly created Cannabis Management Board, establishes taxes on adult-use cannabis, creates grants to assist individuals entering into the legal cannabis market, amends criminal penalties, provides for expungement and resentencing of certain convictions, reschedules marijuana, and appropriates money.
  - Passed through various House Committees, but has not received a hearing in the Senate.

WHAT ABOUT RECREATIONAL USE? (CONT.)

- In Coats v. Dish Network, LLC, the Colorado Supreme Court noted that an employee can be fired for testing positive for marijuana, notwithstanding the fact that the State passed a law legalizing recreational use, and notwithstanding the fact that the state had a law prohibiting employers from taking action against an employee for "lawful" "outside-of-work activities."
  - The Court noted that marijuana was still illegal under Federal law, and therefore the state must follow federal law regarding the "legality" of marijuana use given the conflict between federal and state law.

350 P.3d 849 (Colo. 2015)

TAKEAWAYS – MARIJUANA TESTING

1. With recreational or medicinal use of marijuana, there is no clear or reliable way to determine current impairment.
2. Prior to requesting a drug test, employers should observe and document behaviors that indicate a "reasonable suspicion" that the employee is impaired.
3. If the employee tests positive, employer may ask to see patient registry card.
4. Unless subject to federal law, Minnesota employers who choose to drug test for marijuana must follow DATWA.

PRE-EMPLOYMENT MARIJUANA TESTING

Nevada

- Became the first state to ban pre-employment testing for marijuana.
- Effective Jan. 1, 2020, it is "unlawful for any employer in [Nevada] to fail or refuse to hire a prospective employee because the prospective employee submitted to a screening test and the results of the screening test indicate the presence of marijuana."
- Exceptions for certain jobs (firefighter, paramedic) and conflicting federal law (e.g., DOT regulations).

PRE-EMPLOYMENT MARIJUANA TESTING

New York City

- Passed a city ordinance banning pre-employment testing for THC.
- Effective May 10, 2020, "[e]xcept as otherwise provided by law, it shall be an unlawful discriminatory practice for an employer, labor organization, employment agency, or agent thereof to require a prospective employee to submit to testing for the presence of any tetrahydrocannabinols or marijuana in such prospective employee's system as a condition of employment."
- Exceptions for certain jobs (firefighter, paramedic) and conflicting federal law (e.g., DOT regulations).

DRUG TESTING AND OTHER LAWS: AMERICANS WITH DISABILITIES ACT

- **Overview of the ADA:**
  - The ADA covers employers with at least 15 workers.
  - If employee has a disability and is qualified to do a job, the ADA protects him or her from job discrimination on the basis of that disability.
  - The ADA defines the term "qualified individual with a disability" as any individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires to hold.

MINNESOTA HUMAN RIGHTS ACT - OVERVIEW

- The MHRA, like the ADA, prohibits discrimination on the basis of disability.
- The MHRA's coverage of individuals with disabilities is generally very similar to the ADA.
  - Generally, individuals with alcohol or drug addiction may be considered to have a disability and are protected.

WHO DOES THE ADA PROTECT?

- **Individuals are defined as disabled if they have a:**
  - Physical or mental impairment that substantially limits on one or more major life activities;
  - Record of such impairment; or are
  - Regarded as having such an impairment.

ALCOHOLISM AS A DISABILITY:

- Alcoholism may qualify as a disability if it "substantially limits one or more major life activities."
- A person who currently uses alcohol may be protected.
- An alcoholic is viewed as a person with a disability and protected by the ADA if he or she is qualified to perform the essential functions of the job.
- An employer may be required to provide an accommodation to an alcoholic.

Drug Addiction as a Disability

- A **past** addiction to illegal drugs or controlled substances is a covered disability under the ADA
- Individuals who are addicted to drugs, have a history of addiction, or who are regarded as being addicted have an impairment under the law.
- To qualify as disabled, the employee's addiction would have to pose a substantial limitation on one or more major life activities – and he or she cannot **currently** be using illegal drugs.

DRUG ADDICTION AS A DISABILITY (CONT.)

- Casual drug use is not a disability under the ADA.
- Individuals who currently engage in illegal drug use are expressly excluded from the ADA's protection.
- Exemption for current illegal drug use does not include employees who:
  - Successfully completed rehab and are no longer using
  - Are participating in supervised rehab and are no longer using; or
  - Are erroneously regarded as using illegal drugs.

ACCOMMODATING ALCOHOLISM OR ADDICTION DISABILITY.

- Engage in "interactive process" with the employee and consider each case individually.
- Remember that employee need not use "magic words," like disability or accommodation, to trigger employer's obligations.
  - However, identifying the need for accommodation generally is the employee's responsibility.

ACCOMMODATING THE DISABILITY (CONT.):

- Reasonable accommodations may include:
  - Time off or leave for treatment, counseling, AA meetings, etc.
  - Granting leave beyond the 12 weeks required under the FMLA.
  - Modifications to work schedule.
  - Ability to make personal calls (e.g., to AA sponsor or health care provider) during work day.

EMPLOYERS' "RIGHTS": ACCOMMODATIONS

- Employer does not need to tolerate misconduct.
- The ADA does not protect the employee from the consequences of his or her conduct.
- Employers may ban alcohol use at work and require that employees are not under the influence while working.
- Employers should request documentation that employee has disability and requires accommodation.

EMPLOYERS' "RIGHTS"(CONT.)

- Individuals who are alcoholics or drug addicts may be held to the same performance and conduct standards as all other employees, even if the unsatisfactory performance or behavior is directly related to the impairment.

ACCOMMODATING MEDICAL MARIJUANA AND THE ADA

- Courts have found that the ADA does **not** require employers to allow medical marijuana use as a reasonable accommodation.
- The ADA specifically excludes individuals engaging in "illegal" drug use from the definition of a qualified individual.
  - Even if prescribed, marijuana remains illegal under federal law.
- The ADA's definition of illegal drugs includes prescribed marijuana.

MEDICAL MARIJUANA AND THE ADA
EXAMPLE CASE

- In EEOC v. Pines of Clarkston, an assisted living facility refused to employ a nursing administrator after she tested positive for marijuana prescribed to treat epilepsy.
- The employer in this case had not made it clear to the candidate that the reason employment was refused was the drug test and made comments about the candidate's ability to perform the job due to her epilepsy.

13-CV-14076 (E.D. Mich. 2015).

EEOC v. Pines of Clarkston (Cont.)

- The employer comments raised the question of whether the candidate was rejected because of the positive drug test or for the disability that required marijuana for treatment.
- The Judge denied the employer's motion to dismiss finding the use of marijuana is not itself a disability, but using positive drug tests to screen out disabled job applicants violates the ADA and most state disability laws. There was sufficient evidence to move forward on the theory that the test was used to screen out disabled applicants.

MEDICAL MARIJUANA AS A REASONABLE ACCOMMODATION – STATE LAW

- Nevada's medical marijuana law is unique in that it requires employers to accommodate its employees use of medical marijuana.
- Most state medical marijuana laws do not require employers to accommodate employee use, they simply prohibit discrimination.
- However, case law is increasingly holding that employees must accommodate medical marijuana use under state law.

Developing Exception – State Law and Medical Marijuana Accommodations

- States are increasingly, but not uniformly, finding an obligation to accommodate medical marijuana use under state law.
- As a result, employers may still need to engage in the interactive process with respect to employee medical marijuana use, even through such accommodation is not required under Federal law.

MEDICAL MARIJUANA AS A REASONABLE ACCOMMODATION – STATE LAW

Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680, 2017 WL 2321181 (R. I. Super. May 23, 2017)

- Plaintiff applied for a paid internship position and disclosed that she had a Rhode Island medical marijuana card, was currently using medical marijuana, and would test positive on the pre-employment drug test.
- The employer's policy prohibited the illegal use, sale, or possession of drugs or alcohol on company property, but did not state that a positive result would cause a withdrawal of a job offer.
- The employer refused to hire Plaintiff because she was currently using marijuana.

CALLAGHAN V. DARLINGTON FABRICS CORP. (CONT.)

- Plaintiff sued the employer under the Rhode Island medical marijuana law and the state's disability discrimination law.
- The Court granted Plaintiff's motion for summary judgment, holding that the state medical marijuana law created an implied private action against employers, since the law provided that employers may not refuse to employ a person solely for his or her status as a medical marijuana cardholder.
- Contrary to the employer's argument, the Court also found that there was no distinction between failing to hire based on cardholder status and failure to hire based on inability to pass a mandatory drug test.

CALLAGHAN V. DARLINGTON FABRICS CORP. (CONT.)

- The Court found that the employer did have *some* obligation to accommodate medical marijuana use under the Rhode Island Medical Marijuana Act.
- While the statute stated that "nothing…shall be construed to require…[a]n employer to accommodate the medical use of marijuana ***in any workplace***," the Court determined that statute does, in some way "require employers accommodate the medical use of marijuana ***outside*** the workplace."
- Although employers do not have to tolerate employees who come to work under the influence of marijuana and are unable to perform their duties competently, the Rhode Island law expressly provides that employers may not refuse to hire someone based on their status as a cardholder. On this level, the law requires employers to accommodate medical marijuana use.

NOFFSINGER V. SSC NIANTIC OPERATING CO. LLC

- In Noffsinger v. SSC Niantic Operating Co. LLC, a federal district Court granted an employee's motion for summary judgment for a claim brough under Connecticut's law prohibiting employers from discriminating against an employee taking medical marijuana.
- The Court rejected the employer's argument that the Federal Drug Free Workplace Act prohibited the company from hiring the Plaintiff, who was a registered medical marijuana user.
- The Court noted that because the employer rescinded the Plaintiff's job offer after discovering the employee tested positive for medical marijuana, the employee had, in effect, discriminated against the employee based upon their status as a patient, by virtue of their positive drug test.

338 F.Supp.3d 78 (D. Conn. Sept. 5, 2018)

BARBUTO V. ADVANTAGE SALES AND MARKETING, LLC

- In the process of applying for a position with the employer, Plaintiff disclosed that she had a valid medical marijuana prescription under the Massachusetts medical marijuana law to treat Crohn's disease.
- The employer had Plaintiff undergo a standard pre-employment drug test and allowed her to begin work before it received her results.
- Plaintiff tested positive for marijuana, and the employer terminated her employment.
- Plaintiff sued, alleging disability discrimination and failure to accommodate her disability in violation of Massachusetts law and violations of Massachusetts's medical marijuana statute.

78 N.E.3d 37 (Mass. July 17, 2017)

BARBUTO V. ADVANTAGE SALES AND MARKETING, LLC (CONT.)

- On appeal, the Massachusetts Supreme Court overturned the lower court's dismissal of Plaintiff's disability discrimination and failure to accommodate claims.
- The Supreme Court rejected the employer's argument that requiring an employer to accommodate medical marijuana use is per se unreasonable because marijuana is illegal under federal law.
- The Court found that disabled employees in Massachusetts have a statutory right or privilege to reasonable accommodations under state antidiscrimination law, and if an employer's tolerance of an employee's use of medical marijuana were a facially unreasonable accommodation, the disabled employee would be effectively denied this privilege solely because of the use of medical marijuana.

BARBUTO V. ADVANTAGE SALES AND MARKETING, LLC (CONT.)

- The court also found that the employer had a duty to engage in the interactive process to determine if there was an alternative, equally effective medication she could use which was not prohibited by the employer's drug testing policy.
- "Where, in the opinion of the employee's physician, 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, an exception to an employer's drug policy to permit its use is a facially reasonable accommodation." Id. at 464.

BARBUTO V. ADVANTAGE SALES AND MARKETING, LLC (CONT.)

- The court acknowledged that employers may be able to show that use of medical marijuana may impose an undue hardship on their business, including the risk that use of medical marijuana could impair performance and pose a significant safety risk, or if the use of marijuana would violate a contractual or statutory obligation (such as DoT regulations, safety sensitive positions, etc.).

Medical Marijuana as a Reasonable Accommodation – Contrary Example

As a contrary example, in a recent case out of Pennsylvania, the Court noted that a community college was not required to accommodate a student's use of medical marijuana under the Pennsylvania Human Relations Act, based on the statute's definition that "disability" "does not include current, illegal use of . . . A controlled substance," and the fact that marijuana remains illegal under federal law.

Harrisburg Area Community College v. Penn. Human Relations Commission 2020 WL 6325862 (Penn. Commw. Ct. Oct. 29, 2020).

MEDICAL MARIJUANA AS A REASONABLE ACCOMMODATION - MHRA

- No one has challenged whether the MRHA includes the duty to allow an employee's use of medical marijuana for a disability.
- It is unclear whether employers in Minnesota run the risk of violating the MHRA by failing to accommodate an employee's lawful medical marijuana use.
- While failing to accommodate medical marijuana use may not violate the MHRA, failing to accommodate such use may violate the Minnesota medical marijuana law itself.
  - This is because failing to do so may "discriminate" against the patient based on status as registered user.

Medical Marijuana as a Reasonable Accommodation

Regardless of the applicable state law with respect to accommodating medical marijuana use, employers must still accommodate the underlying condition for which the medical marijuana was prescribed, even if not required to allow medical marijuana use.

Best Practices – Employees and Medical Marijuana

- Do not ask applicants or employees to disclose whether they are medical marijuana patients.
- If you learn an employee or applicant is a registered patient, do not take adverse action based on this fact alone.
- Discuss expectations regarding use of medical marijuana before work and at work and expectations regarding coming to work impaired.
- Gather evidence to support workplace impairment, use, or possession.
- Workplace policies should be clear about these procedures, and the penalties for violating these procedures.

QUESTIONS?

Thank you.

FELHABER LARSON

ATTORNEYS AT LAW

Office 2.0 – OSHA, Returning to the Office, Remote Work

(April 23, 2021)

Sara Gullickson McGrane
(612) 373-8511
smcgrane@felhaber.com

Brad R. Kolling
(612) 373-8547
bkolling@felhaber.com

The End is (Hopefully) in Sight

- As COVID-19 vaccine roll-out continues, restrictions related to COVID-19 will continue to loosen.
- However, there are several considerations which must be kept in mind as workers are able to return to the office.

When can workers be returned to the office?

- Under the current Executive Orders issued by Governor Walz, all workers who are able to work from home are required to do so.
- However, effective **April 15**, this requirement will no longer be mandatory, although the State has provided that “employers are strongly encouraged to allow employees who can work from home to continue to work from home.”

What if the employee just does not want to come back?

- The requirement that an employer accommodate an individual's desire to work from home only applies to employees who wish to not return to the office due to a disability.
- For an employee who just prefers to work from home, (i.e. not related to a disability) there is no requirement that an employer allow them to do so.
  - However, from a practical standpoint it may be prudent to consider whether workers could be allowed to work remotely on an increased basis moving forward, to avoid potential increased turnover.

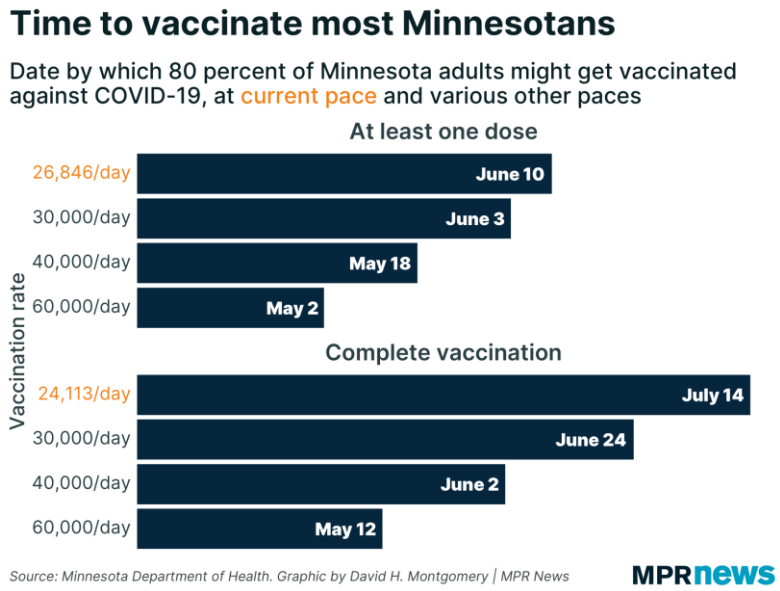
Remote Work Remains Popular

- A survey of managers conducted by HR management company Upwork states that managers believe that 26.7 of the U.S. workforce will continue to remain fully remote in 2021.
- Further, a 2020 Gallup poll indicated that remote work remains extremely popular:
  - 35% of employees would prefer to work remotely moving forward.
  - 30% of employees would like to continue working remotely because of a concern about COVID-19
  - 35% of employees would like to return to working at the office.

- https://www.upwork.com/press/releases/economist-report-future-workforce
- https://news.gallup.com/poll/321800/covid-remote-work-update.aspx

COVID-19 Vaccination

- As of March 30, 2021, all Minnesotan's age 16 and older are eligible to receive the COVID-19 vaccine, however, it will still likely take some time until most Minnesotans are vaccinated:
- This raises a number of considerations regarding an employer's ability to mandate that its employees receive COVID-19 vaccination.



Can an employer require an employee receive COVID-19 vaccination?

- Before enforcing a mandatory vaccination policy, an employer will likely need to await two conditions:

  1. **Full FDA approval/licensure (the vaccines available currently only have EUA status); and**

  2. **Sufficient COVID-19 vaccine available for the employee to receive the vaccine**.

MANDATORY VACCINATION CONSIDERATIONS

If vaccination is made a mandatory condition of employment, there are several additional considerations which apply:

- Time receiving the vaccine is likely compensable;
- You must still accommodate employee disabilities;
- You must accommodate sincerely held religious beliefs against vaccination;
- The Implementation of a mandatory vaccination policy is a mandatory subject of bargaining in a unionized setting; and
- Any injuries resulting from vaccination are covered under worker's compensation.

Return to Work – Disability/Accommodation

- Employers still have an obligation to engage in the interactive process to accommodate any disability an employee may have that prevents them from returning to the office.
- Under the ADA, an employer must provide a reasonable accommodation for an employee's disability unless doing so would place an undue hardship on the employer, or if granting the accommodation would pose a direct threat to the health and safety of others.
- The duty to provide an accommodation triggers when an employee requests an accommodation, but also triggers if the employee's need for accommodation is obvious to the employer.

Return to Work – Disability/Accommodation (cont.)

- Employer must then engage in an "interactive process" to determine if the threat can be reduced through accommodation, such as telework, reassigned duties, or additional protective gear.
- Interactive process should also include obtaining medical verification of the employee's claimed disability.
- If accommodation is not possible, the employee may be removed from the workplace but the EEOC warns that ***termination does not necessarily ensue*** (e.g., FMLA, ADA leave, etc.)

Return to Work – Disability/Accommodation (cont.)

- An employee with a disability is **not** entitled to the accommodation of their choice, and therefore, there may be other accommodations which may allow the employee to still return to the office (for example, alterations to the employee's workspace.
- Employers may argue in certain circumstances that being in the office is an essential function of an employee's position which cannot be eliminated via reasonable accommodation, however, if the employee has been successfully working from home during the COVID-19 pandemic it will be difficult to argue that being in the office is truly "essential."

VOLUNTARY VACCINATION

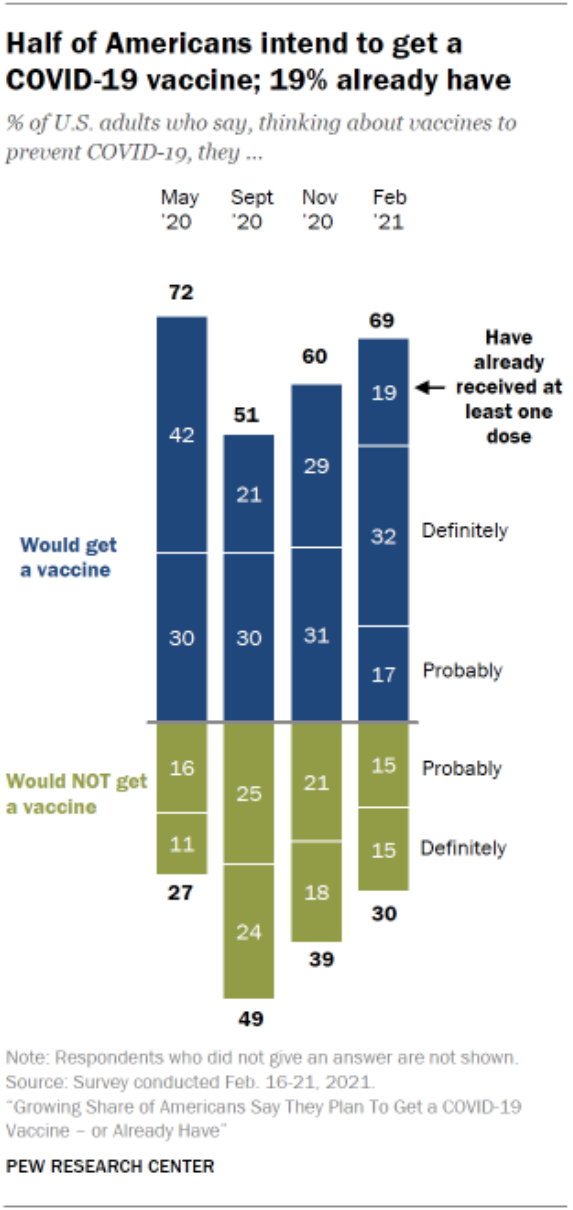
- Strongly encourage employees to receive the vaccine
- If participation voluntary, no accommodation process is needed
  - See Horvath v. City of Leander, No. 18-51011 (5th Cir. Jan. 9, 2020)

VOLUNTARY VACCINATION POLICY (EMPLOYEE PAY)

- If an employer only encourages vaccination, time spent receiving the vaccine is likely not compensable (since vaccination is not a condition of employment).
  - However, if an individual vaccinated during workday, continuous workday rule would likely apply, making the time spent receiving the vaccine to be compensable.

VOLUNTARY VACCINATION POLICY (CONT.)

- Americans are becoming more willing to get a COVID-19 vaccination.
- A smaller majority of women (66%) than men (72%) intend to get a vaccine or have already received at least one dose.



CAN YOU PROVIDE INCENTIVES FOR AN EMPLOYEE TO RECEIVE THE VACCINE?

- Currently, no clear guidance as to what incentives are permissible.
  - ADA and GINA Wellness Rules
    - "Voluntariness" requirement and proposed *de minimis* standard ("water bottle" rule)
    - Proposed rule withdrawn by Biden administration
- Additional guidance on this issue is likely forthcoming, however, main consideration is that an employee's participation is truly **voluntary**.

PRACTICAL TIPS – VACCINE PLANNING

- Survey your workforce about the vaccine.
- How many are going to voluntarily receive the vaccine?
- How many would like more information regarding the vaccine.
  - Educate, educate, educate.
  - The CDC has a “toolkit” for employers.
- For voluntary programs, consider having employees complete “declination” forms stating that they will not receive the vaccine in order to increase participation.

CDC Resources

https://www.cdc.gov/coronavirus/2019-ncov/vaccines/toolkits/essential-workers.html

Felhaber's Employee Vaccination Survey Questions

Employee Survey

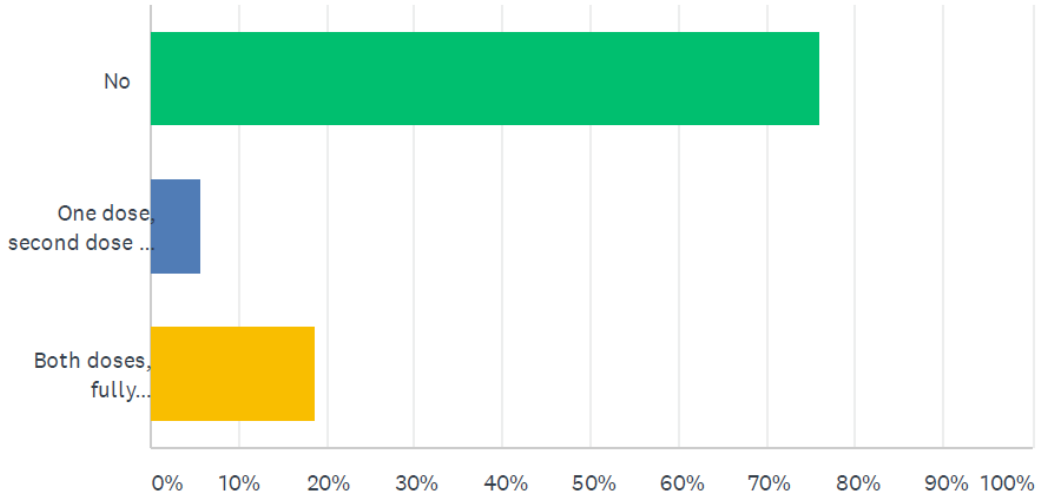
1. Have you already received the COVID-19 vaccine? If yes, please answer this question and skip to question 5.

- [ ] No
- [ ] One dose, second dose to be received within the month
- [ ] Both doses, fully vaccinated

Felhaber's Employee Survey (cont.)

Q1 Have you already received the COVID-19 vaccine? If yes, please answer this question and skip to question 5.

Answered: 54 Skipped: 0



ANSWER CHOICES	RESPONSES	
No	75.93%	41
One dose, second dose to be received within the month	5.56%	3
Both doses, fully vaccinated	18.52%	10
Total Respondents: 54		

Felhaber's Employee Survey (cont.)

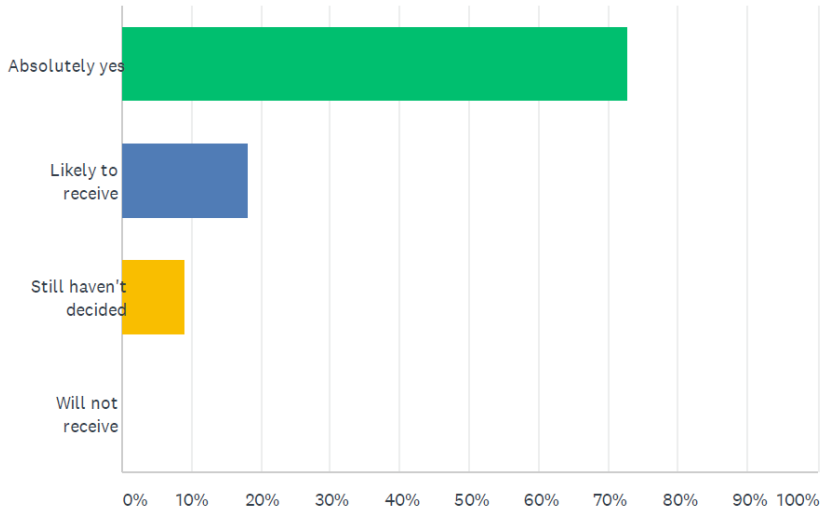
2. If you have not already received the COVID-19 vaccine, how likely are you to receive the vaccine when it is available to you?

- [ ] Absolutely yes
- [ ] Likely to receive
- [ ] Still haven't decided
- [ ] Will not receive

Felhaber's Employee Survey (cont.)

Q2 If you have not already received the COVID-19 vaccine, how likely are you to receive the vaccine when it is available to you?

Answered: 44 Skipped: 10



ANSWER CHOICES	RESPONSES	
Absolutely yes	72.73%	32
Likely to receive	18.18%	8
Still haven't decided	9.09%	4
Will not receive	0.00%	0
Total Respondents: 44		

Felhaber's Employee Survey (cont.)

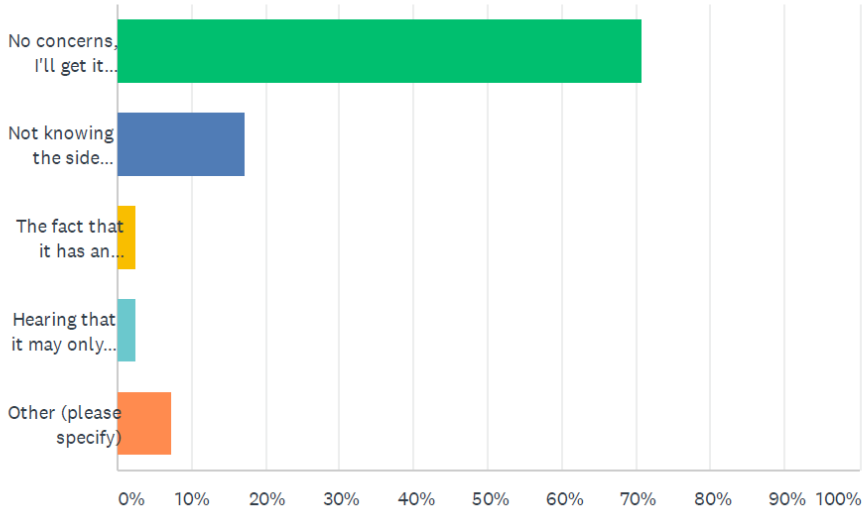
3. If you are not sure you will receive the COVID-19 vaccine, what is making you nervous about the vaccine?

- ○ No concerns, I'll get it when I can
- ○ Not knowing the side effects
- ○ The fact that it has an Emergency Use Authorization
- ○ Hearing that it may only last a year or less
- ○ Other (please specify)

Felhaber's Employee Survey (cont.)

Q3 If you are not sure you will receive the COVID-19 vaccine, what is making you nervous about the vaccine?

Answered: 41 Skipped: 13



ANSWER CHOICES	RESPONSES	
No concerns, I'll get it when I can	70.73%	29
Not knowing the side effects	17.07%	7
The fact that it has an Emergency Use Authorization	2.44%	1
Hearing that it may only last a year or less	2.44%	1
Other (please specify)	7.32%	3
TOTAL		41

Felhaber's Employee Survey (cont.)

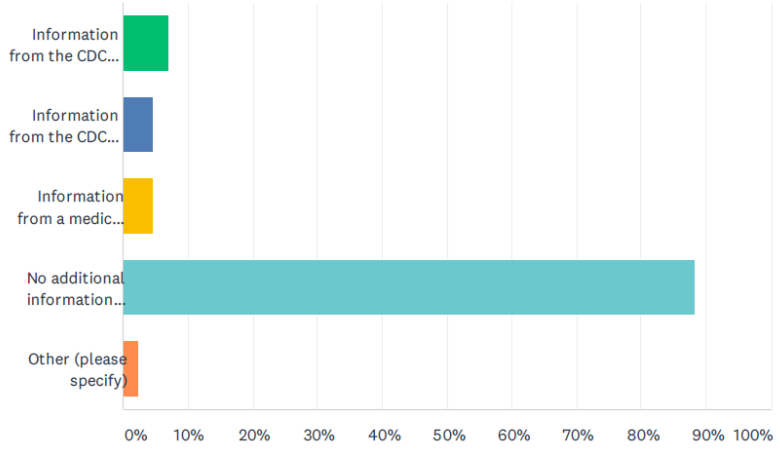
4. Is there any information that would be helpful for you to receive from Felhaber to assist you in making the decision whether or not to receive the vaccine?

- [ ] Information from the CDC on the side effects
- [ ] Information from the CDC on the EUA process and requirements
- [ ] Information from a medical professional
- [ ] No additional information needed
- [ ] Other (please specify)

Felhaber's Employee Survey (cont.)

Q4 Is there any information that would be helpful for you to receive from Felhaber to assist you in making the decision whether or not to receive the vaccine?

Answered: 43 Skipped: 11



ANSWER CHOICES	RESPONSES	
Information from the CDC on the side effects	6.98%	3
Information from the CDC on the EUA process and requirements	4.65%	2
Information from a medical professional	4.65%	2
No additional information needed	88.37%	38
Other (please specify)	2.33%	1
Total Respondents: 43		

Felhaber's Employee Survey (cont.)

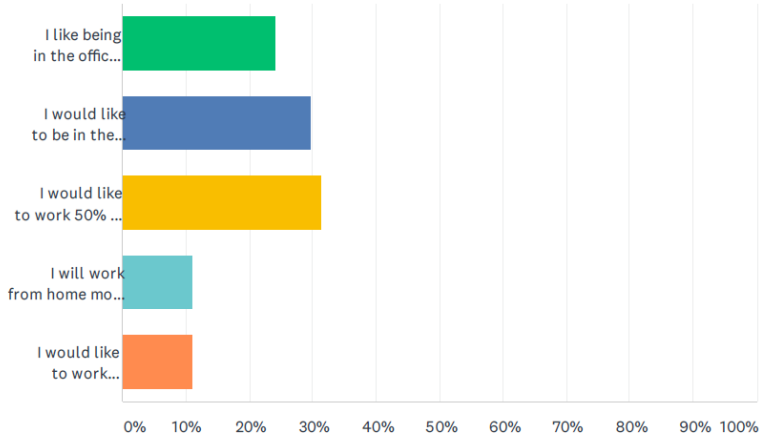
5. When the majority of the office is fully vaccinated, the Governor lifts the work from home order, and if you could work from any location of your choosing, how do you envision your work setting in the future?

- ☐ I like being in the office full time and plan to work full time from the office
- ☐ I would like to be in the office more often than not, but will work from home some
- ☐ I would like to work 50% in the office, 50% from home
- ☐ I will work from home more than in the office, but I will be in the office at least once a week
- ☐ I would like to work remotely as much as possible

Felhaber's Employee Survey (cont.)

Q5 When the majority of the office is fully vaccinated, the Governor lifts the work from home order, and if you could work from any location of your choosing, how do you envision your work setting in the future?

Answered: 54 Skipped: 0



ANSWER CHOICES	RESPONSES	
I like being in the office full time and plan to work full time from the office	24.07%	13
I would like to be in the office more often than not, but will work from home some	29.63%	16
I would like to work 50% in the office, 50% from home	31.48%	17
I will work from home more than in the office, but I will be in the office at least once a week	11.11%	6
I would like to work remotely as much as possible	11.11%	6
Total Respondents: 54		

CAN YOU ASK AN EMPLOYEE TO PROVIDE PROOF THAT THEY ARE VACCINATED?

Yes!

- Guidance issued by the EEOC notes that asking for proof of vaccination is ***not*** a "medical exam" or "medical inquiry."
- However, asking ***why*** an employee did not receive a vaccination could result in such information being divulged and therefore, the "job-related and consistent with business necessity" standard applies to the inquiry.
- This means that employers must stay focused on the need for the vaccine and then ask legitimate questions relating to how getting the vaccine might impact the employee.

CONTINUED PRECAUTIONS AFTER RETURNING

Even with workers returning to the office, certain aspect of COVID-19 safety will continue for the foreseeable future.

- Vaccinated individuals may still be able to catch or transmit COVID-19.

The recent Executive Order rescinding the work from home requirement still notes that:

- "[a]ll work must be conducted in a manner that adheres to Minnesota OSHA Standards and MDH and CDC Guidelines, **including social distancing and hygiene practices**."

CURRENT CDC GUIDELINES

Current CDC guidelines with respect to ongoing safety practices (which may change as vaccination roll-out continues) are as follows:

- 6 feet social distancing
- Wearing a mask in public settings
- Encourage frequent handwashing
- Avoid shared objects and equipment
- Frequently disinfect surfaces.

Preparing the Office for Workers – CDC Requirements

- The CDC has issued guidance for businesses to follow before resuming regular operations, including several recommended steps to take to ensure that the physical office space is safe.

Preparing the Office (cont.)

- The CDC's recommendations in preparing the workplace for the return of workers post COVID-19 fall into two main "categories"
  - **Engineering controls** (i.e. changes to the physical workspace); and
  - **Administrative controls** (i.e. policy changes to facilitate safe work).

CDC - Engineering Controls

- The CDC recommends employers implement “engineering controls” – i.e. modifications to the workplace which reduce the risk of infection – providing the following examples:
  - Modify workspaces to ensure social distancing when possible (including installing physical barriers).
  - Physically separating workers to maintain social distancing, for example, by placing visual cues or colored tape on the floor to keep workers 6 feet apart.
  - Replace high-touch communal items, like coffee pots, with alternatives such as packaged, single-serving items.
  - Using portable HEPA filters to enhance air cleaning.

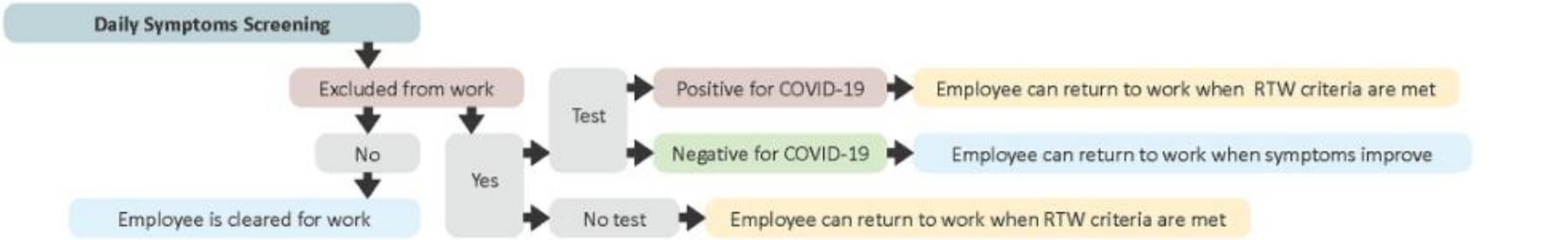
CDC - Administrative Controls

- Encourage employees who have symptoms of COVID-19, or who have sick family members to notify their supervisors and stay home.
- Consider daily in-person or virtual health checks.
- Stagger shifts, start times, and break times as feasible to reduce employee interaction.
- Clean and disinfect high-touch surfaces.
- Establish policies and practices for social distancing, for example, by discouraging handshaking, hugs, and fist-bumps.
- Train employees on methods to reduce the risk of infection, for example, through proper handwashing.

Daily Health Screens

- As noted above, the CDC currently recommends employers conduct daily employee health screens to monitor the workforce for possible know signs of a COVID-19 infection.
- The EEOC has expressly stated that taking an employee's temperature is a medical examination under the Americans with Disabilities Act ("ADA "), and therefore can only be conducted under certain circumstances.
  - However, the EEOC has further noted that "[b]ecause the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may [permissibly] measure employees' body temperature."
- The caveat here, however, is the other provisions of the ADA apply, including the ADA's **confidentiality requirement** regarding the results of any medical examination, and therefore any results from the daily health screen (for example, a "log" of employees' temperatures) **must otherwise be kept confidential.**

Decision Tree for Critical Infrastructure Businesses and Industries



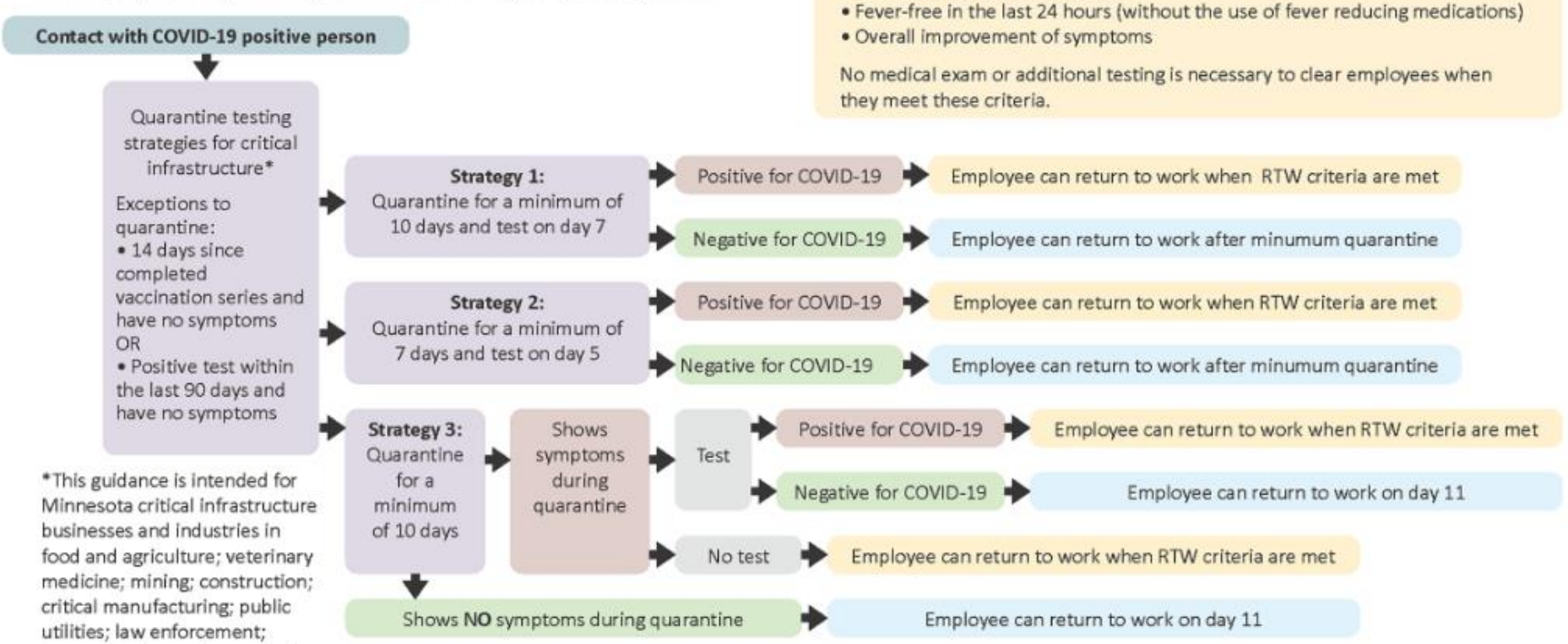
Contact is defined as interacting within 6 feet of an infectious person for a cumulative total of 15 minutes or more, except if all individuals were using a face covering and a face shield (or) if all individuals were using a face covering and there was a physical barrier (ex. full plexi-glass screen) between them during their period of contact.

RETURN TO WORK (RTW) CRITERIA AFTER A POSITIVE COVID-19 TEST RESULT

All three must be true for employees to return to work:

- 10 Days since symptoms started
- Fever-free in the last 24 hours (without the use of fever reducing medications)
- Overall improvement of symptoms

No medical exam or additional testing is necessary to clear employees when they meet these criteria.



*This guidance is intended for Minnesota critical infrastructure businesses and industries in food and agriculture; veterinary medicine; mining; construction; critical manufacturing; public utilities; law enforcement; transportation; and community financial banks.

IF EMPLOYEES HAVE SYMPTOMS OR AN EXPOSURE, THEY MUST REMAIN HOME UNTIL TEST RESULTS ARE RETURNED.

MINNESOTA | STAY SAFE MN

Minnesota Department of Health | health.mn.gov | 651-201-5000 | 625 Robert St N, PO Box 64975, St Paul, MN, 55164-0975
Contact health.communications@state.mn.us to request an alternate format. | Updated 4/14/2021

CDC Guidance re: Quarantine (3/12/21)

Who needs to quarantine?

People who have been in close contact with someone who has COVID-19—excluding people who have had COVID-19 within the past 3 months or who are fully vaccinated.

- People who have tested positive for COVID-19 within the past 3 months and recovered do not have to quarantine or get tested again as long as they do not develop new symptoms.
- People who develop symptoms again within 3 months of their first bout of COVID-19 may need to be tested again if there is no other cause identified for their symptoms.
- People who have been in close contact with someone who has COVID-19 are not required to quarantine if they have been fully vaccinated against the disease and show no symptoms.

What counts as close contact?

- You were within 6 feet of someone who has COVID-19 for a total of 15 minutes or more
- You provided care at home to someone who is sick with COVID-19
- You had direct physical contact with the person (hugged or kissed them)
- You shared eating or drinking utensils
- They sneezed, coughed, or somehow got respiratory droplets on you

Healthcare Setting (3/10/21)

2. Work restriction for asymptomatic healthcare personnel and quarantine for asymptomatic patients and residents

The following recommendations are based on what is known about currently available COVID-19 vaccines. These recommendations will be updated as additional information, including regarding the ability of currently authorized vaccines to protect against infection with novel variants and the effectiveness of additional authorized vaccines, becomes available. This could result in additional circumstances when work restrictions for fully vaccinated HCP are recommended.

- Fully vaccinated HCP with higher-risk exposures who are asymptomatic do not need to be restricted from work for 14 days following their exposure. Work restrictions for the following fully vaccinated HCP populations with higher-risk exposures should still be considered for:
  - HCP who have underlying immunocompromising conditions (e.g., organ transplantation, cancer treatment), which might impact level of protection provided by the COVID-19 vaccine. However, data on which immunocompromising conditions might affect response to the COVID-19 vaccine and the magnitude of risk are not available.
- HCP who have traveled should continue to follow CDC travel recommendations and requirements, including restriction from work, when recommended for any traveler.

MDH Guidance re: Quarantine (3/24/21)

Who needs to quarantine?

- People who were within 6 feet of someone contagious with COVID-19 for 15 minutes or more over the course of a day (24 hours).
- People who live in the same household as someone with COVID-19.
- People who had direct physical or intimate contact (e.g., kissing, hugging, other types of physical contact) with a person who is sick with COVID-19.
- People who provide care for a person who is sick with COVID-19 at home.
- People with direct exposure to respiratory droplets from a person contagious with COVID-19.
- People who have traveled outside of Minnesota, other than crossing the border for work, study, medical care, or personal safety and security. For more information, see Protect Yourself and Others: Traveling (www.health.state.mn.us/diseases/coronavirus/prevention.html#travel).

MDH Guidance re: Quarantine (3/24/21)

Who does not need to quarantine?

If someone has recovered from COVID-19 in the past 90 days and is exposed again, they do not need to quarantine if **ALL** of the following are true:

- Their illness was laboratory confirmed in the past 90 days.
- They have fully recovered.
- They do not currently have any symptoms of COVID-19.

If someone has completed COVID-19 vaccination (two doses in a two-dose series or one dose in a one-dose series) and is exposed, they do not need to quarantine if **ALL** of the following are true:

- The COVID-19 exposure was at least 14 days after their vaccination series was fully completed.
- They do not currently have any symptoms of COVID-19.

Even after a person has recovered from COVID-19 or is fully vaccinated they should still continue to stay distanced, wear a mask that fits well, wash their hands often, and follow other precautions. For more information, see CDC: When to Quarantine (www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine.html).

MDH Guidance re: Quarantine (3/24/21)

Even after a person has recovered from COVID-19 or is fully vaccinated they should still continue to stay distanced, wear a mask that fits well, wash their hands often, and follow other precautions. For more information, see CDC: When to Quarantine (www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine.html).

RETURNING TO WORK – COVID-19 BACK-TO-WORK CHECKLIST

- There are ten main issues employers will need to understand and start preparing for:
- **Workplace Safety:** employers must ensure their workplace is as safe. Safety measures might include:
  - Employee health screening procedures
  - Exposure-response plan that addresses key procedures, requirements, and communications that need to go out
  - Providing personal protective equipment (PPE)
  - Cleaning procedures and procuring ongoing supplies
  - Work vaccination strategy

RETURNING TO WORK – COVID-19 BACK-TO-WORK CHECKLIST

- **Workplace Safety Cont'd:**
  - Physical distancing measures within the workplace
  - Business travel
  - Customer and/or visitor traffic through workplace
  - OSHA record-keeping and reporting obligations

RETURNING TO WORK – COVID-19 BACK-TO-WORK CHECKLIST

- **Recall Procedures:** employers should begin to plan for how and when employees will return to work to create a structured and controlled approach. Some things to consider include:
  - Phasing-in employees returning to work
  - Creating a plan for employees in high-risk categories for infection to return to work
  - Notifying the state employment agency of employees recalled to work.
  - Determining how to handle employees who are unable or unwilling to return to work

RETURNING TO WORK – COVID-19 BACK-TO-WORK CHECKLIST

- **Employee Benefits:** certain notices or actions may be required regardless of whether employees remained on the employer's benefit plans or not. Employers should promptly communicate these changes to employees. Such issues include:
  - Group health insurance
  - Flexible spending accounts
  - 401(k) or other pension plans
  - Paid leave

RETURNING TO WORK – COVID-19 BACK-TO-WORK CHECKLIST

- **Compensation:** many changes to compensation have occurred during the pandemic and other changes will occur open reopening. Employers need to review their compensation policies and communicate any changes to affected employees. Things to address include:
  - How the employer will handle any missed annual pay increases and if those will be applied retroactively
  - Will any pay cuts be made or revoked? Understand how to reduce salaries for exempt employees if necessary
  - Determine if employee status changes (exempt to nonexempt or full to part-time status) are needed to reopen or if those already made will continue
  - How will bonuses be affected, including eligibility for or continuation of, etc.
  - Will hazard pay be offered or revoked?
  - Pay equity as workers return, as pay may be reduced or frozen and may have impacted women differently

RETURNING TO WORK – COVID-19 BACK-TO-WORK CHECKLIST

- **Remote Work:** working-from-home during the pandemic worked well for some employers and employees. Employers should consider using telecommuting as more than a short-term emergency tool but also a permanent work/life balance and cost-saving measure. Actions to consider include:
  - Continuing to allow telecommuting where possible to keep employees safe
  - Staggering weeks in office and at home among team members, or part-time remote work on alternate weekdays
  - Responding to employee requests to continue to work from home, including long-term arrangements
  - Updating technology to support virtual workers
  - Long-term cost savings or impact of offering permanent remote work

RETURNING TO WORK – COVID-19 BACK-TO-WORK CHECKLIST

- **Communications:** a clear communication plan will allow employees and customers to understand how the organization plans to open or reestablish business processes. Topics to cover may include:
  - How staying home if sick and physical distancing policies are being used to protect workers and customers
  - Describe what training on new workplace safety and disinfection protocols have been implemented
  - Have exposure-response communications ready to go to any affected employees and customers
  - Have media communications ready to release on topics such as return-to-work timetables, safety protections in place, and how else the company is supporting workers and customers. Prepare to respond to the media for workplace exposures.

RETURNING TO WORK – COVID-19 BACK-TO-WORK CHECKLIST

- **New-hire Paperwork:** employees who remained on the payroll generally do not need to fill out new paperwork. Employees who were separated from employment (e.g., laid-off workers) should follow normal hiring procedures.
  - Employment application and benefits enrollment requirements for rehired workers
  - Evaluate whether full or adjusted orientation procedures will be utilized
  - Submit new-hire reports for new and rehired workers
  - Notify state unemployment agencies of recalled workers
  - Address I-9 issues

RETURNING TO WORK – COVID-19 BACK-TO-WORK CHECKLIST

- **Policy Changes:** employers need to update or create policies to reflect the new reality. Some examples include:
  - Paid-leave policies
  - Laid-back attendance policies to encourage sick employees to stay home
  - Clarified time-off request procedures
  - Flexible scheduling options
  - Adjust meal and rest break policies
  - Update travel policies
  - Explain telecommuting policies
  - Revise information technology policies

RETURNING TO WORK – COVID-19 BACK-TO-WORK CHECKLIST

- **Business Continuity Plans:** employers learned important lessons regarding business continuity plans, or lack thereof, during the pandemic. Employers should now review and revise these plans to prepare for future emergencies.
  - Implement a business continuity plan, which includes infectious disease control
  - Update existing plans to include the latest emergency information
  - Update plan resources and contact information
  - Establish a pandemic task force
  - Recognize the possibility of additional closings
  - Perform testing and exercises to practice the new or revised emergency plans

RETURNING TO WORK – COVID-19 BACK-TO-WORK CHECKLIST

- **Unions:** employers with unionized workforces may have additional considerations including:
  - Obligations to bargain when implementing changes to mandatory bargaining subjects
  - The need of a force majeure clause into a collective bargaining agreement
  - Reviewing existing no-strike clauses
  - Determining obligations for hazard pay under Section 502 of the National Labor Relations Act (NLRA) during “abnormally dangerous conditions”

RETURNING TO WORK – OTHER POTENTIAL CONSIDERATIONS

- Consider partial work from home arrangements, with employees only going into the office a few days a week.
- Bring back workers in “cohorts” so that all employees are not back at once.
- Consider if there are any employees who can successfully continue working remotely for the foreseeable future, especially if those employees want to work from home.
- Ensure that you have procedures in place to continue operations if there is another outbreak/variant.

Reopening Requirements - OSHA

- While there are no new requirements for employers to follow with respect to the Occupational Safety and Health Act regarding returning to the office, there are several existing OSHA standards which are impacted by COVID-19 and should be kept in mind when developing a reopening plan.
- Indeed, in a January 21, 2021 Executive Order, President Biden ordered OSHA to "launch a national program to focus OSHA enforcement efforts related to COVID-19 on violations that put the largest number of workers at serious risk or are contrary to anti-retaliation principles."

2021 OSHA Guidance

- On Jan. 29, 2021, OSHA issued “Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace.”
- Notes that the implementation of a “COVID-19 prevention program” is the most effective way to mitigate the spread of the virus at work.
- No mandatory requirements, but it does list 15 steps for employers to take as best practices to ensure that they are providing a safe workplace.

2021 OSHA Guidance (cont.)

1. Assigning a workplace coordinator to oversee COVID-19 issues;
2. Conducting a hazard assessment to identify where and how workers might be exposed at work;
3. Identify measures to take to limit the spread of COVID-19 in the workplace;
4. Consider additional protections needed for workers at higher risk of severe illness;
5. Establishing a system for communicating with employees regarding COVID-19 issues in the workplace;

2021 OSHA Guidance (cont.)

6. Educating workers regarding COVID-19 policies and procedures;
7. Instructing workers who are infected or potentially infected to stay home;
8. Minimizing the impact for quarantine and isolation on workers, for example, considering paid sick leave policies or remote work arrangements;
9. Isolating workers who show symptoms at work;
10. Performing deep cleans after persons suspected or confirmed to have OCVID were in the workplace;

2021 OSHA Guidance (cont.)

11. Providing guidance to employees on COVID-19 screening and testing;

12. Recording and reporting COVID-19 infections and deaths;

13. Implementing protections from retaliation and setting up an anonymous process for workers to voice concerns about COVID-19-related hazards;

14. Making a COVID-19 vaccine or vaccination series available at no cost to all eligible employees;

15. Not distinguishing between workers who are vaccinated and those who are not, i.e. continuing to require vaccinated workers to continue following COVID-19 infection control measures, “such as wearing a face covering and remaining physically distant.”

OSHA Guidance re: Vaccines

Are adverse reactions to the COVID-19 vaccine recordable on the OSHA recordkeeping log?

In general, an adverse reaction to the COVID-19 vaccine is recordable if the reaction is: (1) work-related, (2) a new case, and (3) meets one or more of the general recording criteria in 29 CFR 1904.7 (e.g., days away from work, restricted work or transfer to another job, medical treatment beyond first aid).

If I require my employees to take the COVID-19 vaccine as a condition of their employment, are adverse reactions to the vaccine recordable?

If you *require* your employees to be vaccinated as a condition of employment (i.e., for work-related reasons), then any adverse reaction to the COVID-19 vaccine is work-related. The adverse reaction is recordable if it is a new case under 29 CFR 1904.6 and meets one or more of the general recording criteria in 29 CFR 1904.7.

OSHA Guidance re: Vaccines

I do not require my employees to get the COVID-19 vaccine. However, I do recommend that they receive the vaccine and may provide it to them or make arrangements for them to receive it offsite. If an employee has an adverse reaction to the vaccine, am I required to record it?

No. Although adverse reactions to *recommended* COVID-19 vaccines may be *recordable* under 29 CFR 1904.4(a) if the reaction is: (1) work-related, (2) a new case, and (3) meets one or more of the general recording criteria in 29 CFR 1904.7, OSHA is exercising its enforcement discretion to only require the recording of adverse effects to *required* vaccines at this time. Therefore, you do not need to record adverse effects from COVID-19 vaccines that you *recommend*, but do not require.

Note that for this discretion to apply, the vaccine must be truly voluntary. For example, an employee's choice to accept or reject the vaccine cannot affect their performance rating or professional advancement. An employee who chooses not to receive the vaccine cannot suffer any repercussions from this choice. If employees are not free to choose whether or not to receive the vaccine without fearing adverse action, then the vaccine is not merely "recommended" and employers should consult the above FAQ regarding COVID-19 vaccines that are a condition of employment.

Note also that the exercise of this discretion is intended only to provide clarity to the public regarding OSHA's expectations as to the recording of adverse effects during the health emergency; it does not change any of employers' other responsibilities under OSHA's recordkeeping regulations or any of OSHA's interpretations of those regulations.

Finally, note that this answer applies to a variety of scenarios where employers recommend, but do not require vaccines, including where the employer makes the COVID-19 vaccine available to employees at work, where the employer makes arrangements for employees to receive the vaccine at an offsite location (e.g., pharmacy, hospital, local health department, etc.), and where the employer offer the vaccine as part of a voluntary health and wellness program at my workplace. In other words, the method by which employees might receive a recommended vaccine does not matter for the sake of this question.

Common COVID-19 Infractions

OSHA published a list of the most common COVID-19 related citations, including the following:

- Failing to report any COVID-19 related fatality to OSHA within eight hours after the death of an employee.
- Failing to keep a record of any work-related COVID-19 infections (in a OSHA 300 log).
- Failing to assess the workplace to determine if COVID-19 related hazards are present which require the use of PPE.
- Failing to select necessary PPE that properly fits each affected employee.
- Failing to provide accompanying training to each employee who was required to use PPE.
- Failing to provide a workplace free of recognized hazards by failing to install plastic barriers or otherwise ensure social distancing.

OSHA, Common COVID-19 Citations: Helping Employers Better Protect Workers and Comply with OSHA Regulations (Oct. 30, 2020).

MNOSHA Health Hazard Assessment

- Similarly, several employers have recently received complaints of health hazards from Minnesota Occupational Safety and Health (MNOSHA), alleging that health hazards regarding COVID-19 exist in the employer's workplace.
- In these letters, MNOSHA is requesting that employers investigate and correct the identified hazards.

MNOSHA Health Hazard Assessment – Commonly Identified Hazards.

1. The employer does not have a Covid-19 Preparedness Plan in place and/or available for employees.
2. The employer is not ensuring or enforcing that social distancing and face covering are worn to help stop or slow the spread of Covid-19
3. The employer is not ensuring or enforcing that the facility is cleaned and disinfected frequently throughout the workday to help stop or slow the spread of Covid-19.
4. The employer is not ensuring or enforcing that all employees complete the daily health screening questionnaire to help stop or slow the spread of Covid-19.

What happens when every employee is vaccinated?

- The CDC has noted that "widespread vaccination of employees can be one consideration for restarting operations and returning to the workplace."
- Ultimately, employers still must conduct a case-by-case workplace assessment to determine whether it is able to safely return employees to the office, until further guidance from the CDC is issued.
- **However, as it stands now employers must still follow the CDC's social distancing guidelines.**
  - These requirements will likely remain until the country has achieved some level of "herd immunity" although when that will occur is unknown.

American Rescue Plan – Tax Credits

- Under the recently passed American Rescue Plan Act, an employer may be eligible to receive tax credits for providing employees with paid leave for certain reasons related to COVID-19.
- An employer's participation in providing the paid leave is completely **voluntary**, but by doing so an employer may receive tax credit for the wages paid to the employees taking leave.

American Rescue Plan – Reasons for Leave

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. The employee has been advised by a health care provider to self-quarantine related to COVID-19;
3. The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. The employee is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. The employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

These reasons are the same as those previously available under the FFCRA.

American Rescue Plan – Newly Covered Reasons for Leave

The American Rescue Plan adds the follow reasons, mostly related to vaccination, to the list of eligible reasons for covered-tax credit leave.

7. The employee is seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID–19 and such employee has been exposed to COVID–19 or the employee's employer has requested such test or diagnosis, or

8. The employee is obtaining immunization related to COVID–19; or

9. Recovering from any injury, disability, illness, or condition related to such immunization.

QUESTIONS?

Thank you.

FELHABER LARSON

ATTORNEYS AT LAW

POLITICS IN THE WORKPLACE 2021 – SOCIAL MEDIA POLICIES, BLM, Q-ANON, AND BEYOND

(April 23, 2021)

Penelope (Penny) J. Phillips
(612) 373-8428
pphillips@felhaber.com

Scott D. Blake
(612) 373-8538
sblake@felhaber.com

"Divided" States of America

- Political polarization is increasing. According to a 2019 Pew Research Poll:
  - 55% of Republicans say Democrats are "more immoral" when compared with other Americans;
  - 47% of Democrats say the same about Republicans.
- Just three years prior, 47% of Republicans and 35% of Democrats said members of the other party were less moral than other people.

- Partisans also generally agree about their *inability* to agree on "basic facts."
  - Overall, 73% of the public – including 77% of Republicans and 72% of Democrats – say that voters in both parties "not only disagree over plans and policies, but also cannot agree on the basic facts."

"DIVIDED" STATES OF AMERICA

- America is exceptional . . . in its political divide.
  - The 2020 pandemic revealed how pervasive the divide in American politics is relative to other nations.
    - Over the summer, 76% of Republicans felt the U.S. had done a good job dealing with the Covid-19 outbreak, compared with just 29% of those who do not identify with the Republican Party.
    - This 47-point gap was the largest found between those who support the governing party and those who do not across 14 nations surveyed.
    - In addition, 77% of Americans said the country was now more divided than before the outbreak, as compared with a median of 47% in the 13 other nations surveyed.

Politics In the Workplace: It Comes Up

- According to a February 2020 Gartner survey:
  - **78%** of employees report discussing politics at work.
  - **47%** report that the 2020 U.S. presidential election has impacted their ability to get work done
  - **36%** report that the topic of the 2020 U.S. presidential election has led them to avoid talking to or working with a coworker because of their political views.

POLITICS IN THE WORKPLACE: IT COMES UP

- 2020 SHRM Survey:
  - **44%** of HR professionals report intensified political volatility at work in 2020.
    - **NOTE:** in 2016, only **26%** reported increased political volatility compared to prior elections.
  - **74%** of HR professionals say their organization has prohibited political ***attire*** or accessories
    - **BUT: 80%** of HR professionals say their organizations have **not** set guidelines on ***communicating*** about politics at work

What Can Be Done?

- The majority of employment relationships in the United States are **at-will**.
- Under the at-will employment doctrine, an employee can be terminated at any time, for any reason, as long as the reason is not otherwise prohibited by law.
- In other words, unless required by a contract or a collective bargaining agreement, an employer does not need "just cause" to fire an employee.

WHAT ABOUT THE FIRST AMENDMENT?

- "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

WHAT ABOUT THE FIRST AMENDMENT?

- First Amendment limits only the **federal government's** ability to suppress speech. The Fourteenth Amendment extends this to state and local governments.

- Accordingly, there is no violation of the First Amendment when speech is "restricted" by a private individual or organization.

WHAT ABOUT THE FIRST AMENDMENT?

PUBLIC EMPLOYERS

- The rules regarding speech protections for public employees are different than those for private companies and employees.
- Public employers (i.e. government employers) cannot infringe on employees' constitutional rights (including the right to free speech), but may place "certain limitations" on employees' speech.

PUBLIC EMPLOYEE SPEECH LIMITATIONS

- Public employers can limit speech if a two-factor test is met:
  - Is the employee speaking as a citizen on a matter of public concern?; and
  - If so, does the public employer's interest in efficient public service outweigh the employee's interest in speaking?

WHAT IS MATTER OF PUBLIC CONCERN?

- In order to determine whether a matter is one of public concern, a reviewing court will look at the content, form, and context of the speech.
- The speech must be related to matters of social, political, or other concern in the community, or be related to the employee's duties, work conditions, or similar grievances.
- Cannot deal with solely internal administrative matters.

SPEAKING AS A PRIVATE CITIZEN

- In order to be protected, the public employee's speech must not be related to speaking in their official duties or their official capacity.
- The speech must be made *to* the public, and cannot consist of only internal communications.

PUBLIC EMPLOYER V. EMPLOYEE BALANCING TEST

- Courts consider the following factors when balancing the employer's interest with the free speech rights of the employee:
  - The need for harmony in the office or workplace;
  - Whether the employer's responsibilities require a close working relationship between co-workers when the speech has caused that relationship to deteriorate;
  - The time, place, and manner of the speech;
  - The context in which the dispute over the speech arose;
  - The degree of public interest in the speech; and
  - Whether the speech impeded the employee's ability to do his or her job.

SUPPORTING A CANDIDATE IS PROTECTED

- Public employees have the right to both support, and to not support, a particular candidate, party, or political cause.
  - In Galli v. N.J. Meadowlands Comm'n, 490 F.3d 265 (3rd Cir. 2007) a public employee was fired for allegedly not being an active Democrat nor a supporter of the newly elected Democratic Governor.
  - The employee claimed that this violated her First Amendment rights.
  - The Third Circuit agreed, holding that an "employee's failure to support the governor's campaign or the Democratic Party was constitutionally protected under the First Amendment."

Speech in the Private Workplace

- For private employers in Minnesota, political speech is unprotected unless it's covered by another law.

National Labor Relations Act (NLRA)

- Applies to all private sector employers **regardless** of whether they are union or non-union.
- Employee rights are protected by Section 7 of the NLRA.
- Employer rules regarding employee Section 7 rights appear in Section 8(a)(1).

NLRA Section 7

- Guarantees employees:
  - "[T]he right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and ***to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*** . . . ."
  - "[T]he right to refrain from any or all such activities . . . ."
- Simply stated, Section 7 protects the rights of employees to discuss and to complain about **wages, hours, and other terms and conditions of employment.**

NLRA Section 8(a)(1)

- Employers cannot "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 . . . ."
- If an employer interferes with employee Section 7 rights, it commits an unfair labor practice.
- Certain "political" speech may constitute an exercise of the employee's Section 7 rights.

When Employer Conduct Violates Section 7

- The NLRB will determine whether an employer's work rule violates the NLRA by evaluating:
  - The nature and extent of the rule's potential impact on NLRA covered rights; and
  - Legitimate justifications associated with the rule.
    - Examples of justifications include fostering "harmonious interactions and relationships" and maintaining "basic standards of civility."
- However, it is only unlawful for an employer to interfere with, or to discipline/discharge an employee for engaging in, conduct that is ***concerted* and *protected.***

CONCERTED EMPLOYEE ACTIVITY

- In order to be protected by the NLRA, the employee must engage in **concerted activity**.
  - Collective action of two or more employees.
  - Individual activity engaged in with or on the authority of other employees.
  - Individual activity that seeks to initiate or induce group action.
  - Individual activity that is a logical outgrowth of group activity.
  - Individual complaints to management in front of other employees (*e.g.*, at a meeting).

POLITICAL ACTIVITY UNDER THE NLRA

- The NLRB has held that Section 7's protection of protected concerted activity also applies to activity meant to "improve their lot as employees through channels outside the immediate employee-employer relationship," for example, through support of a political candidate or cause.
- However, in order to be protected under the NLRA, there must be "a **direct nexus** between the specific issue that is the subject of the advocacy and a specifically identified employment concern of the participating employees."

DIRECT NEXUS

- The following types of "speech" likely have a sufficient nexus to an employee's terms and conditions of employment to be covered by the NLRA:
  - Supporting raising the minimum wage;
  - Supporting mandatory paid sick leave; and
  - Supporting a particular political candidate based on the candidate's positions on the above issues.
    - Conversely, simply supporting a candidate, without explanation as to what policies they support, is insufficient to establish protection under the NLRA.

CLOTHING AS SPEECH

- In order to be protected, an employee's "speech" does not necessarily require them to "speak" at all.
  - For example, the NLRB has a long history of protecting employees' right to wear union/political buttons while at work, absent a contrary policy that is consistently and neutrally applied.

POLITICS CAN CROSS THE LINE

- Employers must take care to ensure that "political" speech does not turn into speech that disparages an employee's protected class status.

- If political speech crosses the line, it could potentially lead to employer liability for unlawful discrimination, or liability for the creation of a hostile work environment.

POLITICS CAN CROSS THE LINE

- Conversations about immigration could morph into conversations about national origin.
- Talk about equal pay legislation could morph into talk about sex.
- Discussions regarding Black Lives Matter could morph into discussions about race.

EXAMPLE: THE RACIST SUPERVISOR

- In Hababi v. Lutheran Med. Ctr., 2016 N.Y. Misc. LEXIS 4794 (N.Y. 2d J.D. Dec. 16, 2016), a supervisor repeatedly made comments to a Muslim employee regarding the Islamic terrorist group "ISIS".
- For example, the supervisor would make comments such as "you Muslims, look what you do to the Americans" while referring to recent ISIS attacks.
- The Muslim employee sued, alleging a hostile work environment. The Court denied the employer's summary judgment motion, noting that the supervisor's comments could give rise to a hostile work environment.

HYPOTHETICALS – WHERE IS THE LINE?

- A supervisor constantly refers to a female presidential candidate as a “b--ch.”
- An employee makes comments to a co-worker of Mexican heritage that there were “too many Mexicans” in the country and that we needed a border wall.
- An employee tells a coworker that “all Liberals should be shot.”
- An employee tells a co-worker that motorists should run over Black Lives Matter protesters protesting on the freeway.
- An employee tells a Jewish co-worker, on repeat occasion, that they believed Israel was committing humanitarian atrocities in Gaza.

POLITICAL OFF-DUTY CONDUCT

- Employers may additionally take action against employees who engage in arguably "political" speech while not on company time.

"DOXING" AND POTENTIAL CONSEQUENCES

- Following the Capital insurrection, commentators online have identified individuals in attendance.

Is Participating In a Protest Protected?

- Some states have laws which prohibit firing employees for engaging in lawful off-duty participation in political activities.
- For example the following states have similar laws:
  - California;
  - Colorado;
  - New York;
  - Louisiana; and
  - North Dakota.

Is Participating In a Protest Protected?

- For example, California Labor Code § 1102 states:
- No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.

NON-CALIFORNIA EMPLOYERS BEWARE

- Leah Snyder, a computer programmer and coder in California was hired by her employer, a Illinois-based based HR company, after she attended the Capitol protests.

- In January 2021, Snyder sued her employer for $10 million in federal court alleging her firing violated California Labor Code §§ 1101 and 1102.

Specific Protests May Also Be Protected

- On March 13, 2018, the NLRB General Counsel issued an advice memorandum stating that employees engaging in the February 2017 "Day Without Immigrants" walkout demonstration were engaging in protected activity under the NLRA.
- Similar nationwide protests, i.e. "A Day Without Women," will likely continue to occur in the future.

SPECIFIC PROTESTS MAY ALSO BE PROTECTED

- On March 31, 2021, Acting General Counsel Peter Sung Ohr released a memorandum reaffirming that "employee advocacy can have the goal of 'mutual aid or protection' even when the employees have not explicitly connected their activity to workplace concerns. This ***includes*** employees' political and ***social justice advocacy*** when the subject matter has a ***direct nexus to employees' 'interests as employees.'***"

EMPLOYER CONSIDERATIONS

- When employers are confronted with a report of an employee engaging in questionable out of work activity, a number of factors should be considered:
  - Whether the employee's conduct was illegal;
  - Whether the employee's conduct violated any company policy;
  - The potential ramifications for the company due to its association with the employee; and
  - Whether other employees have engaged in similar conduct before, and what action the employer may have taken in those instances.

POTENTIAL PITFALL – UNEQUAL ENFORCEMENT

- When analyzing whether action should be taken against an employee for either on-duty or off-duty political speech, its important to make sure that the employee is not being treated differently than other employees who engaged in similar conduct, as doing so may subject the company to a potential discrimination claim.
- For example, if a female employee were subject to adverse action for engaging in a heated political discussion when a male employee was not disciplined for similar conduct.

EXAMPLE – "SALUTING" THE PRESIDENT

- In April 2018, an employee was terminated from her government contract job for "flipping off" President Trump's motorcade.

- The company claimed that the photograph of her would have an adverse effect on its ability to obtain government contracts.

EXAMPLE – "SALUTING" THE PRESIDENT

- At the same company, a male employee wrote on a Facebook discussion about the Black Lives Matter movement that another commenter was "a f---ing Libtard ---hole."
- This employee was allowed to delete his comments and was not subject to any adverse action.
- The female employee sued her former employer. The case is ongoing.

POTENTIAL PITFALL – YOU'VE GOT THE WRONG GUY!

- Employers must make sure that they do not take action against an "innocent" employee who may not have engaged in any objectionable activity.

POTENTIAL PITFALL – YOU'VE GOT THE WRONG GUY!

- Following the 2017 Charlottesville protests, the image on the left surfaced online.
- Online "detectives" on twitter identified the protester in the red t-shirt as University of Arkansas professor Kyle P. Quinn.
- However, Professor Quinn is **not** the individual in the red shirt.

POTENTIAL PITFALL – YOU'VE GOT THE WRONG GUY!

- Multiple commenters called on the University to terminate Professor Quinn. However the University refused to do so.
- Had the University taken adverse employment action against Quinn, it may have found itself liable for a potential defamation action.

FIRED FOR SUPPORTING QANON

- In October 2020, Jason Gelinas, a New Jersey employee of Citigroup, was fired after it was discovered that Gelinas ran a popular website dedicated to the QAnon conspiracy theory.
- Gelinas' QAnon website had 10 million monthly visitors, according to an analytics firm.
- A spokesperson for Citigroup said, "Mr. Gelinas is no longer employed by Citi. Our code of conduct includes specific policies that employees are required to adhere to, and when breaches are identified, the firm takes action."

Fired for Supporting BLM

FIRED FOR SUPPORTING BLM

- In June 2017, New York's Essex County College adjunct professor Lisa Durden appeared on Fox News to defend a Black Lives Matter chapter's decision to host a Memorial Day event exclusively for black individuals.
- In response to outrage regarding the decision, Ms. Durden stated:
  - "You white people are angry because you couldn't use your 'white privilege' card to get invited to the Black Lives Matter's all-black Memorial Day celebration."

FIRED FOR SUPPORTING BLM

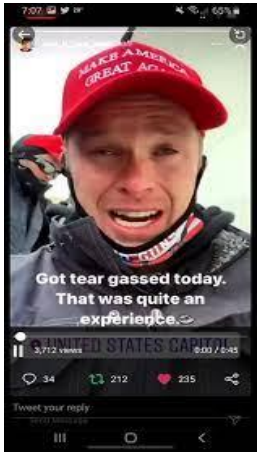
- Fox simply identified Durden as a "political commentator" and did not identify her as a Essex County College employee.
- Nevertheless, the College terminated her employment based on feedback from "students, faculty and prospective students and their families expressing frustration, concern and even fear that the views expressed by a College employee . . . would negatively impact their experience on the campus."

POLITICAL SPEECH THROUGH SOCIAL MEDIA

- 2021 Pew Research data shows that an overwhelming percentage of American adults continue to use a variety of social media platforms.
  - **69%** of adults report they use Facebook, with approximately **70%** of those adults using it on a daily basis;
  - **40%** use Instagram;
  - **25%** use Snapchat;
  - **28%** use LinkedIn;
  - **24%** use Twitter.

EXAMPLE - POST AT YOUR OWN RISK

- Numerous attendees of the infamous Capitol Riot of January 6, 2021, have been terminated after posting their escapades to social media.
- For example, Goosehead Insurance, based in Texas, announced that Paul Davis, an associate general counsel, was no longer working at the company. Davis, wearing a "Make America Great Again" cap, had posted on Instagram that he was tear-gassed at the riot.



EXAMPLE - TWEET AT YOUR OWN RISK

EXAMPLE - TWEET AT YOUR OWN RISK

- On September 11, 2017, ESPN personality and SportsCenter host Jemele Hill tweeted that President Trump was a white supremacist.
- Press secretary Sarah Huckabee Sanders described the tweet as “a fireable offense”.
- A few months later, Hill stepped down from hosting SportsCenter.

EXAMPLE - TWEET AT YOUR OWN RISK

- On May 17, 2019, in a series of tweets addressed to “Mr. President,” Georgia Clark, a high school English teacher in Fort Worth, Texas, said that her school district was “loaded” with undocumented students from Mexico, that her high school had been “taken over by them,” and that drug dealers had not been punished. Ms. Clark blamed an assistant principal, whom she referred to as a “Hispanic assistant principal who protects certain students from criminal prosecution.
- Ms. Clark, who apparently believed the tweets were private messages sent to the President, rather than public posts, was terminated by a unanimous vote of the school board.

"LIKING" A POST

- In the public employment context, in Bland v. Roberts, 730 F.3d 368 (4th Cir. 2013) six sheriff deputies were terminated for supporting a rival candidate for sheriff, in part by "liking" the rival's campaign page on Facebook.
- When the rival lost, the deputies claimed that the department, as a governmental employer, violated their First Amendment rights and terminated their employment.
- The Fourth Circuit agreed, and held that the deputy's speech was protected, noting that "liking" a political candidate's page on Facebook was the "internet equivalent of displaying a political sign in one's front yard."

TAKING ACTION FOR POLITICAL "TWEETS"

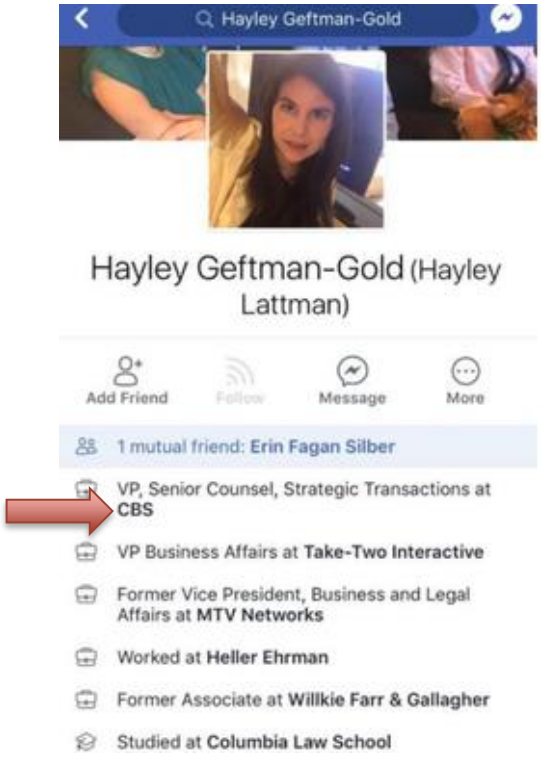
- Does an employer have the right to discipline/terminate an employee for social media use depends on several factors:
  - Content of the tweet or post;
  - Whether the tweet or post was on or off company time or premises;
  - Connection between employee conduct and employer's business interests;
  - Whether other employees were involved; and
  - Terms of the employer's social media policy.

RECENT CONTROVERSIAL "POLITICAL" SPEECH

- Colin Kaepernick and other NFL players protesting by kneeling during the national anthem.
- Comedian Rosanne Barr being terminated by ABC and having her show cancelled for tweeting racist comments.
- "BBQ Becky" - the white woman who called the police over African American family barbequing in a park in Oakland, CA.
- The New York attorney under fire and kicked out of his office building for yelling at workers and threatening to call ICE for speaking Spanish instead of English at a New York restaurant.

EXAMPLES

- Following the 2017 Las Vegas massacre, a CBS executive posted the following post on her personal Facebook, which identified her as a CBS employee.



Ms. Geftman-Gold was promptly terminated.

CONSIDER POTENTIAL BACKLASH

- In 2014, former Mozilla [the company which operates the web browser Firefox] CEO Brendan Eich was forced to resign after it was publicized that he had given $1,000 in support of Proposition 8 in California, which sought to limit marriage to be between a man and a woman.

CONSIDER POTENTIAL BACKLASH (CONT.)

- On January 9, 2018, an employee for Marriott Hotels "liked" the post to the right, which supported Tibetan independence, using one of Marriott's official twitter accounts.

CONSIDER POTENTIAL BACKLASH (CONT.)

- This post and the "like" angered the Chinese government, who retaliated by blocking Marriott's website and mobile app for a week.

- In an effort to deflect blame, Marriott fired the man who liked the tweet on its behalf, a 49 year old working at Marriott's customer engagement center in Omaha, Nebraska, and released a statement apologizing for the "misunderstanding."

CONSIDER POTENTIAL BACKLASH (CONT.)

- On October 4, 2019, Daryl Morey (then the General Manager of the NBA's Houston Rockets) tweeted an image in support of the pro-democracy protests in Hong Kong that read "Fight for Freedom, Stand with Hong Kong"
- The NBA does considerable business in China and Morey's tweet led to immediate backlash.

CONSIDER POTENTIAL BACKLASH (CONT.)

- Morey and his tweet were denounced by the Chinese consulate in Houston, the Chinese Basketball Association announced it was suspending all cooperation with the Rockets, Morey was forced to apologize, and the NBA put out a statement characterizing Morey's tweet as "regrettable" and clarifying that Morey's support for the Hong Kong protestors "does not represent the views of the Rockets or the NBA."
- Chinese sponsors left the NBA in droves and Chinese television stations and streaming services dropped NBA games.
- In total, the NBA estimated that it lost $400 million due to the fallout from Morey's tweet.

CONSIDER POTENTIAL BACKLASH (CONT.)

- In 2018, a Google employee wrote a manifesto criticizing Google's "left-leaning culture" by ignoring the differences between the sexes.
- Google terminated his employment, stating that portions of the memo "violate our Code of Conduct and cross the line by advancing harmful gender stereotypes against female employees."
- As a result, many right-wing blogs and websites called for a boycott of Google's products and services, with alt-right "commentator" Michael Cernovich stating that political affiliation should be "a protected class under anti-discrimination laws."

CONSIDER POTENTIAL BACKLASH (CONT.)

- In 2020, a Wal-Mart social media staffer inadvertently posted a response to Sen. Hawley.
- Sen. Hawley responded by asking Walmart to "apologize for using slave labor" and "the pathetic wages you pay your workers as you drive mom and pop stores out of business."

DRAFT STRONG POLICIES

- The best defense to an employee posting inappropriate postings on social media is to implement and maintain strong social media policies.
  - Ensure consistent enforcement;
  - Keep documentation of online violations;
  - Be critical of the reliability and significance of online information; and
  - Be careful to not restrain or retaliate against employees engaging in protected conduct.

QUESTIONS?

Thank you.