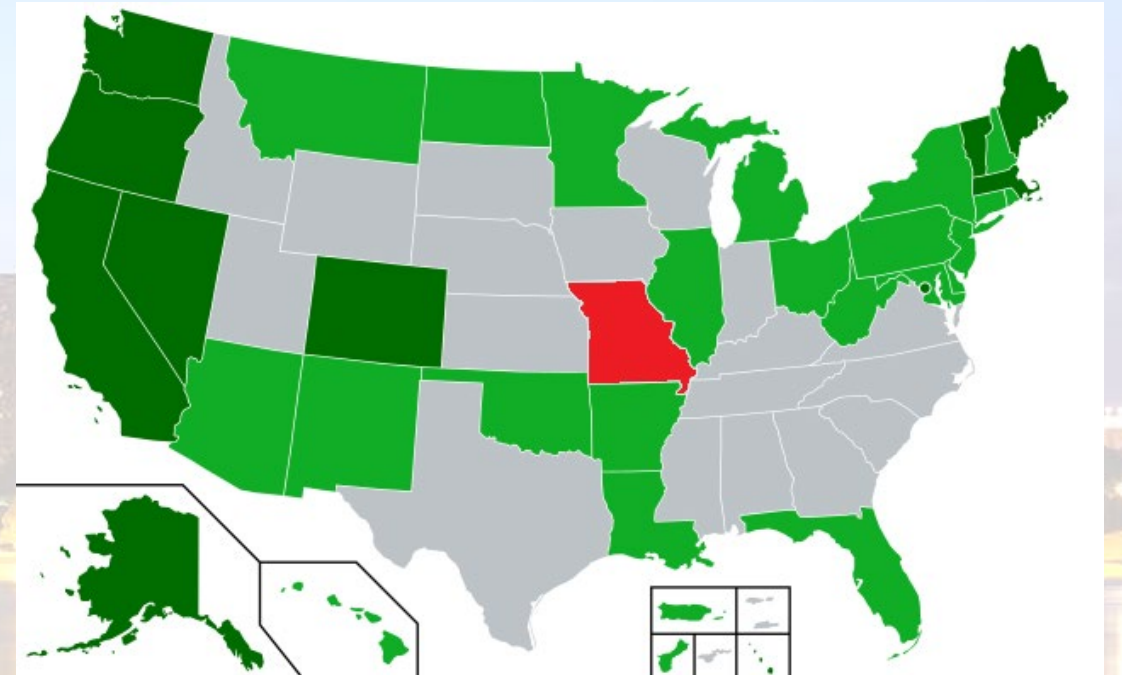




ALFA International St. Louis Regional Transportation Mini-Seminar

Missouri Constitutional Amendment 2: Medical Marijuana Legalization



What does Amendment 2 do?

- Effective December 6, 2018
- Permits doctors to prescribe marijuana for “serious illnesses and medical conditions”
- Permits patients with such conditions to use medical marijuana under the supervision of a physician
- Protects against civil and criminal liability for production, distribution, possession, or use
- Does nothing with regard to recreational use of marijuana – still illegal
- Does not permit public use or driving under the influence – still illegal

Who can get it?

- “Qualifying medical condition” = cancer, AIDS, epilepsy, glaucoma, intractable migraines, severe and persistent pain or muscle spasm, debilitating psychiatric disorders, anything that can be treated with opioids if doctor thinks marijuana is safer alternative
- Catch-All: “any other medical condition” in doctor’s discretion
- Have to get an ID card



What exactly can the patient get?

- Basically, anything commonly understood in the medical community to constitute marijuana
- Traditional marijuana: flower / “buds”
- Capsules
- Teas
- Oils
- Extracts
- Ointments / balms
- Patches
- Paraphernalia

Where can a patient get these products?

- Grow it themselves
- Must obtain license
- Limit 6 plants
- Dispensaries
- Max. 192 = 24 per congressional district
- Must pay \$6,000 and obtain license
- Application / licensing process will take a while – expect openings in late 2019

Implications for Casualty Insurance: Premises Liability and Auto Negligence Cases with Potentially Intoxicated Plaintiffs



Driving While Intoxicated

- Having a prescription IS NO DEFENSE
- “Nothing in this section permits a person to...operate, navigate, or be in actual physical control of any dangerous device or motor vehicle, aircrafts, or motorboat while under the influence of marijuana”
- Still a criminal offense (See RSMo. § 577.010)
- Having any amount of “proscribed” drug in system

Proving Intoxication and Impairment in Civil Cases – The Standard

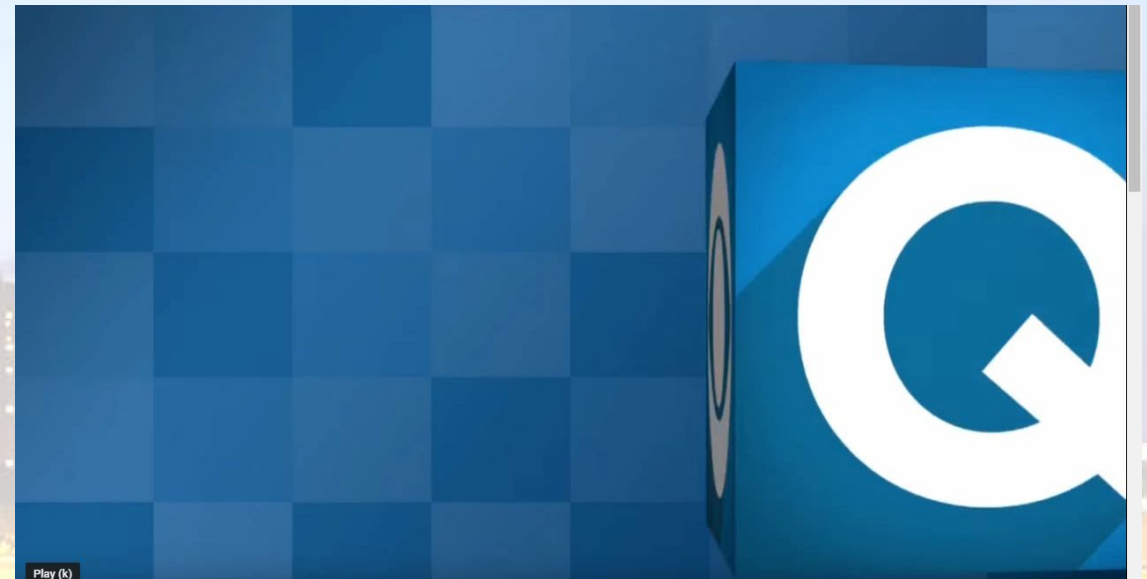
- *Secrist v. Treadstone, LLC* (Mo. App. W.D. 2011)
- Construction worker fell down elevator shaft and brought suit against building owner
- Evidence of mere presence of drug in system is insufficient
- Must show actual “impairment” (impaired ability to drive, walk, etc.)
- Must have an **expert witness** on: (1) effect of THC level on the user, (2) user’s behavior was consistent with THC level, and (3) proximity of time between use and event
- If you can show all of these things, get jury instruction on impairment (See MAI 17.21) (may assess % of fault to extent ability to drive, walk was impaired)
- Usually comes from plaintiff’s medical records

Impairment (cont.)



Practical Challenges to Proving Impairment

- Measured as nanograms / milliliter (ng/mL)
- No “presumptive limit” in Mo.
- THC leaves blood rapidly (2.5 hrs), but effects linger (6-8 hrs)
- Urine tests unreliable because THC metabolites remain (30-45 days for chronic users)
- Saliva may be best – but most police departments don’t have, and:
- Effects vary from person to person depending on history of use, tolerance



Case Example

- Plaintiff on wrong side of road
- Tox screen at hospital: >500 ng/mL
- Toxicologist Testimony:
 - This shows “acute” use of marijuana
 - Marijuana is a hallucinogen
 - Disturbs perception, judgment, motor skills, etc.
- Key Fact: Blood screen, so we know it’s acute use

Don't Forget!!!

- Always hire toxicologist to do analysis and offer ultimate opinion regarding impairment
- Always inquire as to recent history of use



Insureds / Defendants Suspected of Impairment

Physician / Patient Privilege Applies unless Waived (*Gonzenbach v. Lasky* (Mo. App. E.D. 1982))

Only two ways they can prove this:

- 1) Criminal Guilty Plea / Conviction
- 2) Defendant admits

Punitive damages – Will be submissible where intoxication and impairment shown. *Stojkovic v. Weller* (Mo. 1991)

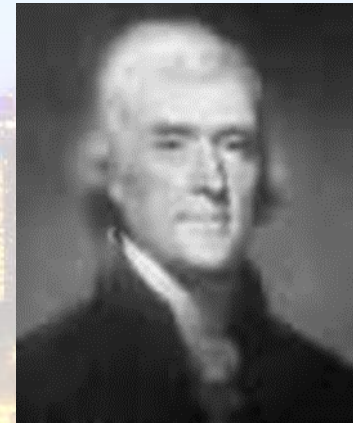
A night-time photograph of the St. Louis skyline, featuring the Gateway Arch as the central focus. The city lights are reflected in the water in the foreground. The text "Employment Law Issues" is overlaid in the center.

Employment Law Issues

Changing Norms

"Hemp is of first necessity to the wealth & protection of the country."

Thomas
Jefferson



Changing Norms

"We shall, by and by, want a world of hemp more for our own consumption."

John Adams



Just 26 years ago . . .



Just 11 years ago...



Issues

1. Can an employee be fired (or not hired) for coming to work high?
2. Can an employee be fired (or not hired) for having a cannabis medical card?
3. Can an employee be fired (or not hired) for failing a THC drug test?

Issue 1

- **Can an employee be fired (or not hired) for coming to work high?**
- The following states have a statute that provides that no employer is required to allow its employees to come to work under the influence of cannabis:
 - Alaska, California, Colorado, Georgia, Florida, Hawaii, Illinois, Michigan, Massachusetts, Montana, New Jersey, Oregon, Washington

Missouri Amendment 2

- No claims allowed for wrongful discharge, discrimination, etc. for prohibiting employees from being under influence at work.
- Employers are allowed to discipline employees, including termination for working or attempting to work while under the influence.

Issue 1

- **Can an employee be fired (or not hired) for coming to work high?**
- **Answer:** Yes, but how will you know? No objective test!!
 - In Illinois, the statute provides that that a cannabis patient can be considered impaired when he or she manifests specific, articulable symptoms while working that decrease or lessen performance of the employee's duties, including speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, carelessness, disregard for the safety of the employee or others, etc.

Ask the employee?



Issue 2

- **Can an employee be fired (or not hired) for having a cannabis medical card?**
- **Answer:** No -- in most states, including Illinois. Probably not in Missouri.
- Eleven states have cannabis patient protection laws: Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Pennsylvania, Oklahoma and Rhode Island.
 - Exceptions include situations where the employer has to comply with federal standards.

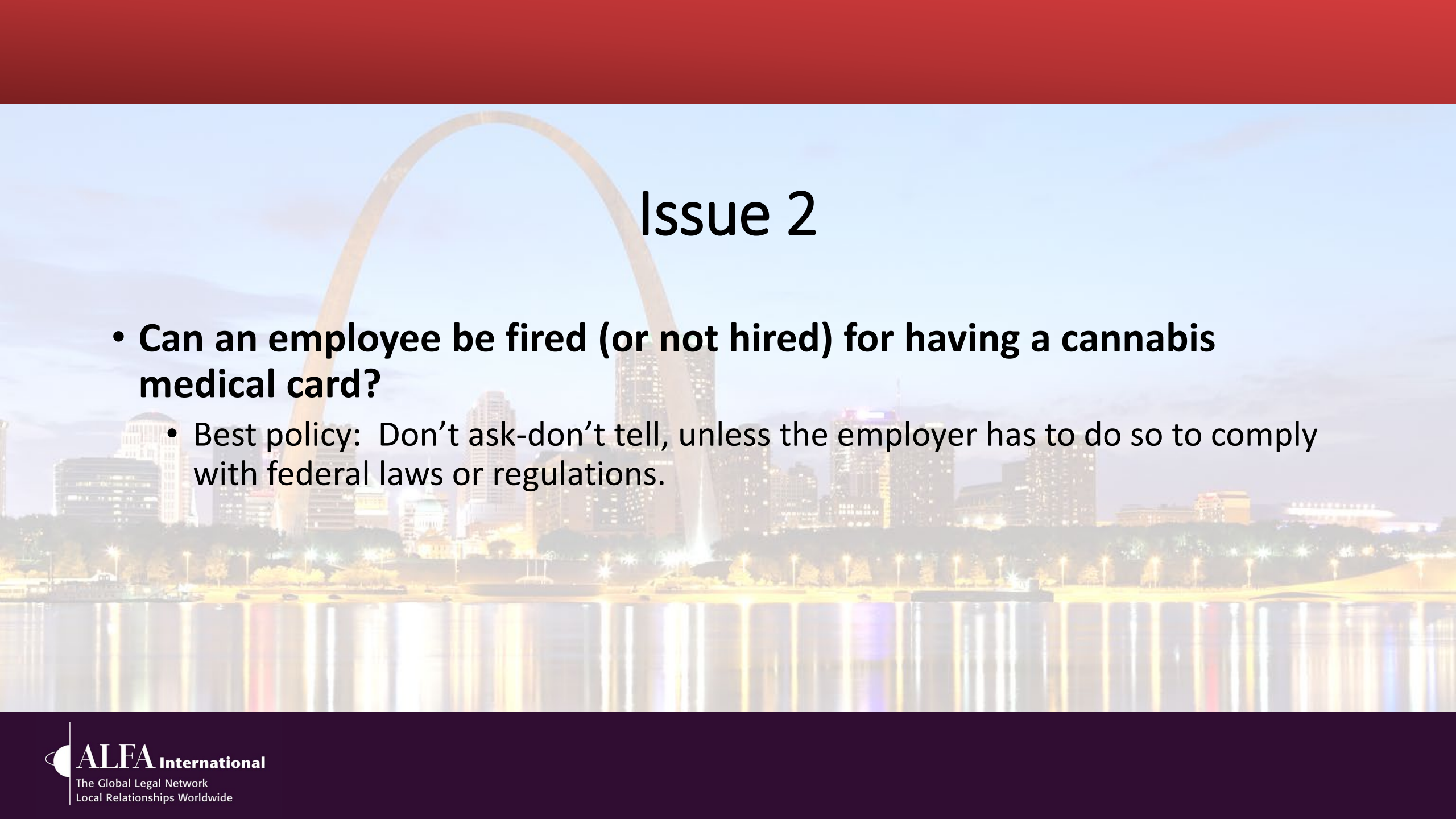
Disability Under Missouri Employment Law

a physical or mental impairment which substantially limits one or more of a person's major life activities, being regarded as having such an impairment, or a record of having such an impairment, which with or without reasonable accommodation does not interfere with performing the job, . . .

The Federal ADA and Illinois discrimination laws are similar.

The Doctor's note...



The background of the slide is a night-time photograph of the St. Louis skyline, featuring the Gateway Arch and various city buildings reflected in the water. The text is overlaid on this image.

Issue 2

- **Can an employee be fired (or not hired) for having a cannabis medical card?**
 - Best policy: Don't ask-don't tell, unless the employer has to do so to comply with federal laws or regulations.

FMCSR and Drugs

- No commercial driver can perform “safety-sensitive functions” when driver uses any controlled substance
 - Unless under direction of licensed medical professional
 - And given advice that controlled substance will not adversely affect ability to safely operate a commercial motor vehicle.
- What are controlled substances?
 - 49 CFR § 40.85
 - Marijuana, cocaine, amphetamines, opiates, and phencyclidine

Threshold Levels

- Cutoff level for testing: 50 ng/ml
- Confirmation cutoff: 15 ng/ml
- How long is it detectable?
 - Depends on quantity and concentration.



Detectable levels

- Single use – 3 days
- Moderate use (4x per week) – 5-7 days
- Chronic use (daily) – 10-15 days
- Chronic heavy smoker -- >30 days

FMCSA Position

- § 40.151 – Medical prescription no excuse for positive test.
- No exceptions for those states that have authorized medical marijuana
- No excuse for residents of states that have legalized recreational marijuana.



Drug Discrimination?

- EEOC v. Old Dominion Freight Line
- Driver self-reported alcohol addiction/abuse to Old Dominion
 - Did not fail an alcohol test
 - Was suspended.
- Contended unqualified to drive
- Jury found violated ADA
 - Alcoholism is a disease that qualifies under law.
 - Discriminated against because of the disease

Drug Discrimination?

- ADA does not prohibit discrimination against illegal drug use
 - Illegal drugs defined by Controlled Substances Act
 - Marijuana falls under the act
 - No exceptions for medical marijuana
- But . . .
 - Past drug addiction could be a disability
 - Discrimination on past drug use could violate ADA.

Issue 3

- **Can an employee be fired (or not hired) for failing a THC drug test?**
 - **General Answer:** Only if the employer has a legitimate reason for having a no-tolerance policy. Otherwise, employer may be liable for disability discrimination.
 - **Transportation Answer:** Yes for a commercial driver

The Drug-Free Workplace Act

Signed by President Reagan in 1988

Affected employers must certify that they will provide a drug-free workplace.

The law doesn't require drug testing, but testing is implicitly authorized as a means to maintain a drug-free workplace.

Employers Affected by the DFWA?

- Federal contractors with contracts of \$100,000+ or more, is not for acquisition of commercial goods, and is performed in the U.S.
- All organizations that are federal grantees.
- All individuals who receive a contract or grant from the federal government.

Issue 3

- **Can an employee be fired (or not hired) for failing a THC drug test?**
 - Over the road truck drivers are prohibited from driving under FMCSR. Other situations may require the employee to be drug free.
 - The Illinois statute provides that an employer can enforce a zero-tolerance drug policy if it is done in a non-discriminatory manner (may be more difficult in Missouri because of liberal qualifications).
 - The following states prevent a zero-tolerance cannabis policy absent federal exceptions: Arizona, Connecticut, Delaware, Maine, Minnesota, Nevada (absent reasonable connection to job), New York and Rhode Island.

Worker's Compensation – In Theory

- Medical marijuana also has significant impacts on worker's compensation
- Missouri:
 - If injured worker tests positive, benefits are to be reduced by 50%
 - If proximate cause of injury was drug use, benefits denied entirely
- Illinois
 - If drug use is proximate cause, all benefits denied



Worker's Compensation – In Practice

- Judges are hesitant to deny benefits
- Statute requires injury sustained “in conjunction” with use of the drug
 - Judges may require specific policy against alcohol or drug use while on shift



Worker's Compensation – An Example

- MVA caused by injured worker
 - Was unsteady at scene and struggled to find words
- Tested positive for marijuana.
 - Told judge that she had smoked earlier in the week but not on accident date
- Employee's IME doctor offered opinion symptoms caused by striking head
 - No evidence employee hit head in accident
- Judge against applying statutory reduction

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Questions?