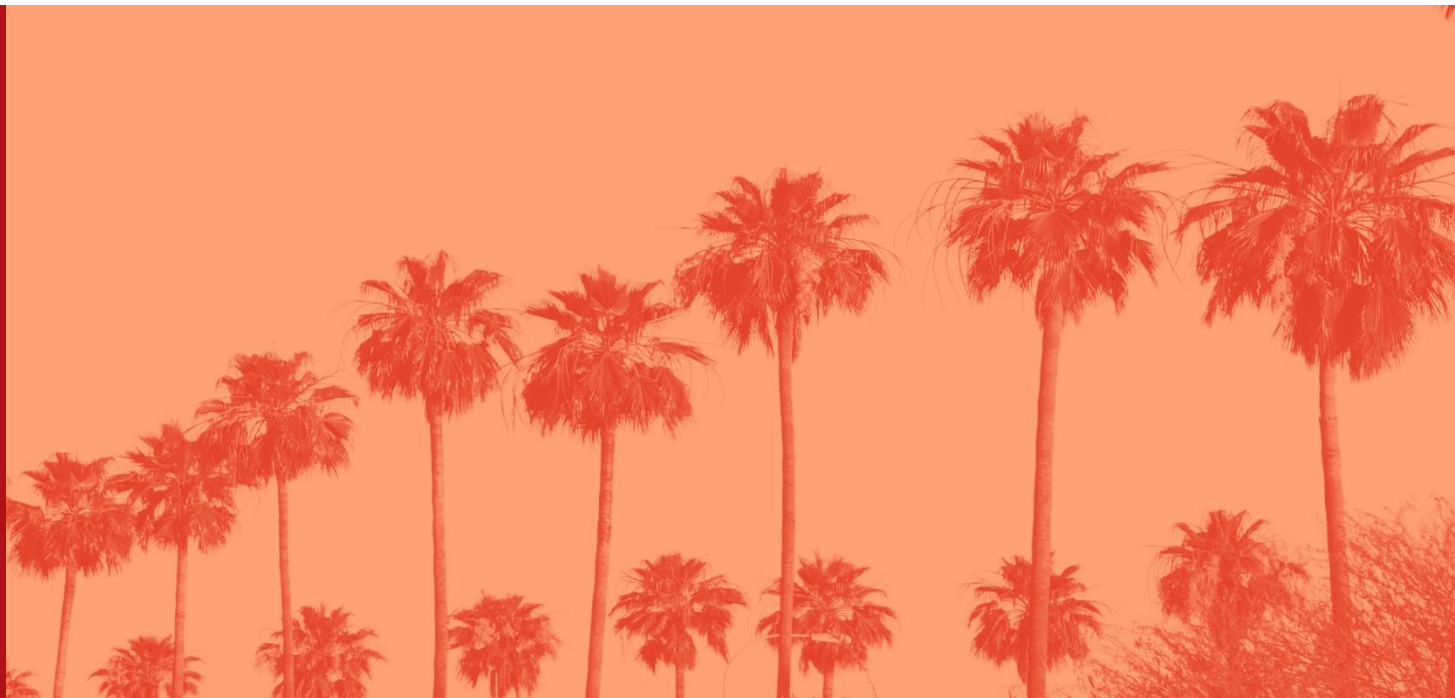


LOOKING AHEAD

- > **Shane Spradlin** – Penske Automotive Group, Inc.
- > **Lesley Marlin** - Northrop Grumman
- > **Angela McCorkle Buckler** - Republic Bank & Trust Company
- > **Danielle Moore** – Fisher Phillips, San Diego



2019 FISHER PHILLIPS INSIDE COUNSEL CONFERENCE
MARCH 6-8 | SCOTTSDALE, AZ

Modern Methods of Addressing Medical and Recreational Marijuana in a Rapidly Changing Landscape

Meet Your Panelists



Shane Spradlin

*Executive Vice President, General Counsel & Secretary
Penske Automotive Group, Inc.*



Angela McCorkle Buckler

*Vice President, Associate General Counsel
Republic Bank & Trust Company*



Lesley Marlin

*Senior Corporate Counsel
Northrop Grumman*



Danielle Moore

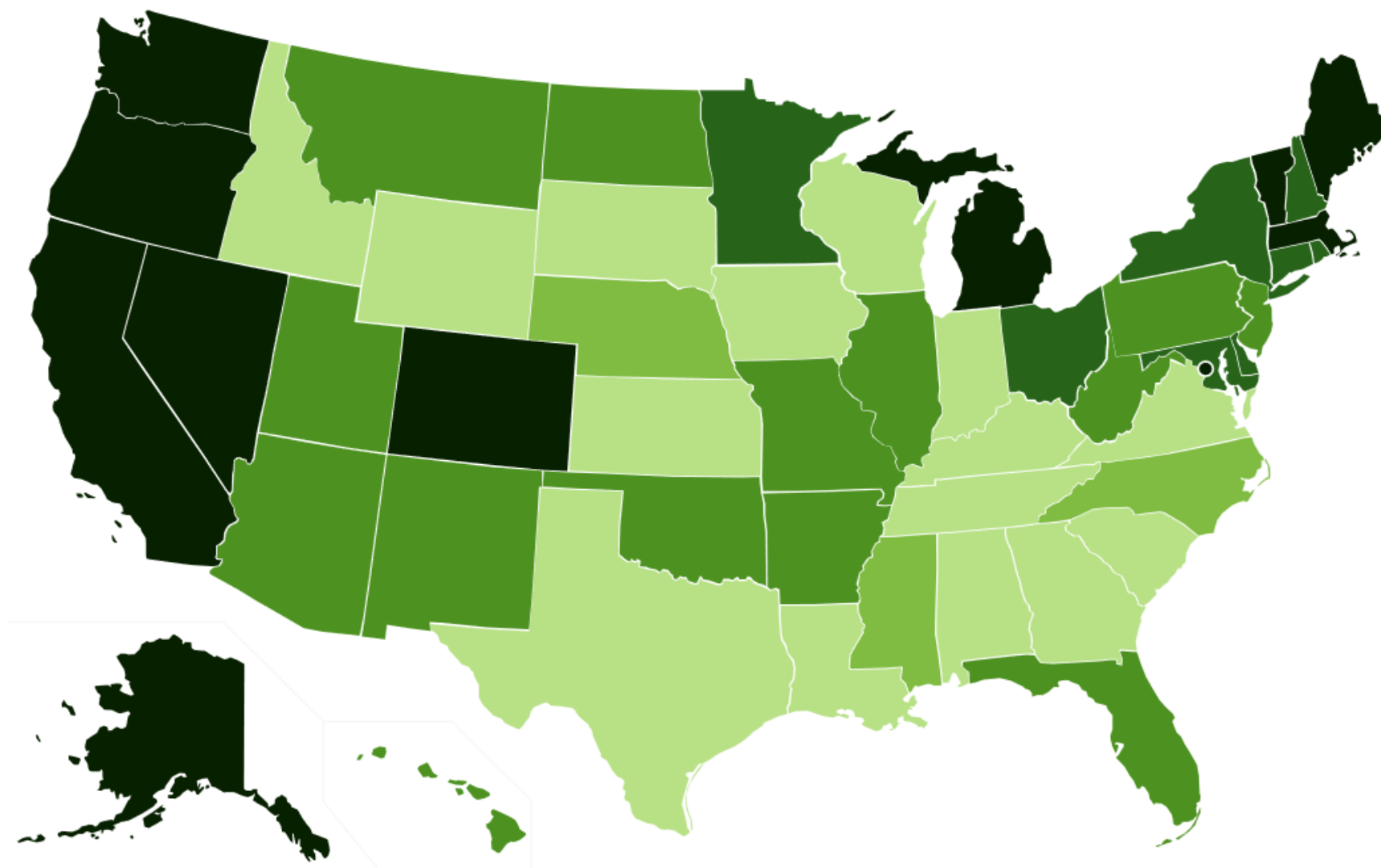
*Partner
Fisher Phillips*

Current Key Issues

- > Can we still refuse to hire marijuana users?
- > Do we need to change our drug free workplace policy?
- > Do we have a duty to accommodate medical marijuana?
- > Can we fire if we discover marijuana is being used by a current employee outside of work?
 - > Does it make a difference if it is off duty use?
 - > What about safety sensitive positions?
- > Is marijuana here to stay?



Legalized Medical and decriminalized Medical Decriminalized Fully illegal



The Current Landscape

LOOKING AHEAD

- > Legal Recreational Marijuana – 10 + the District of Columbia
- > Legal Medicinal Marijuana – 33 states Legal CBD for Medical Use – 44 states
- > Decriminalization – 14 states
- > June 19, 2018 – Canada becomes the first G7 country to legalize recreational marijuana and create a nation-wide marketplace
- > Countries around the world, as well as the World Health Organization have issued pro-marijuana reports and/or statements
- > Legal sales in North America expected to be \$146.4 billion by end of 2025

The States - Cannabis is Big Business

- > Yet, Cannabis remains an illegal schedule 1 drug under federal law.
- > The DEA refused to reschedule in August 2016, but now allows research
- > Several bipartisan efforts are pending
 - > STATES Act
 - > Veterans Medical Marijuana Safe Harbor Act
 - > Congressional hearings on banking for canna-businesses
 - > Trump's stance – it's a state by state issue
- > 64% of Americans surveyed by the Gallup Poll last year said they favor outright legalization

The Feds – Is Cannabis Here to Stay?

Traditionally courts have enforced federal law when it comes to marijuana, but the tide is changing **rapidly**:

- **Accommodation** – “Employers can’t use blanket anti-marijuana policies to dismiss workers whose doctors have prescribed the drug to treat their illnesses.”
- **Discrimination** – “Employers may not refuse to hire based solely upon status as a medical marijuana patient or for testing positive.”
- **Off Duty Activity** – “The fact that the ADA allows employers to prohibit the illegal use of drugs at the workplace did not give employers the power to regulate non-workplace activity.”
- **Government Contractors** - “The federal Controlled Substances Act (CSA), which prohibits the use and sale of marijuana, does not preempt state law.”

*** Delaware, Rhode Island, Connecticut, Massachusetts, Maine*

The Courts – Pro-Cannabis Rulings are Trending

LOOKING AHEAD



Polling Question #1 - Hiring

- > Is your company testing for cannabis pre-employment?
 - A. Yes.
 - B. No.
 - C. It depends on the position or other factors.





Polling Question #1 - Hiring

- > RESULTS - Is your company testing for cannabis pre-employment?



Polling Question #2 – Hiring

- > Are you concerned about hiring competitive talent if you continue to test for cannabis?
 - A. Yes, absolutely.
 - B. No, this is not a concern for us.
 - C. Maybe, we have not yet seen an impact.



Polling Question #2 – Hiring

- > RESULTS - Are you concerned about hiring competitive talent if you continue to test for cannabis?

SCENARIO #1 – “Don’t Bother”

- > An applicant seeks employment at the Rhode Island facility of a large public company. She seeks a position as a Receptionist. She does well in the interview and is offered a position contingent on passing a drug test. When she receives the offer, the employee reveals that she is a medical marijuana user. The Human Resources Representative responds stating, “Oh, in that case, don’t bother following through on your application. We have a no tolerance policy and can’t hire you.” The employee sues for disability discrimination.



SCENARIO #1 – “Don’t Bother”

- > Rhode Island has legalized cannabis for medicinal use. The statute says that employers may not refuse to hire a person **based solely upon the person's status as a medical marijuana patient or for testing positive for marijuana** on a drug test.
- > Would it matter if she did have a medical need, but not a medical marijuana card?
- > Does that fact that the position is as a receptionist, and not a safety sensitive position matter?



Polling Question #3 – Accommodation

- > Do you accommodate cannabis use prescribed by a doctor to treat a disability?
 - A. Yes. We accommodate.
 - B. No. We maintain a firm policy against marijuana use, regardless of the reason.
 - C. We consider it on a case by case basis.



Polling Question #3 – Accommodation

- > RESULTS - Do you accommodate cannabis use prescribed by a doctor to treat a disability?

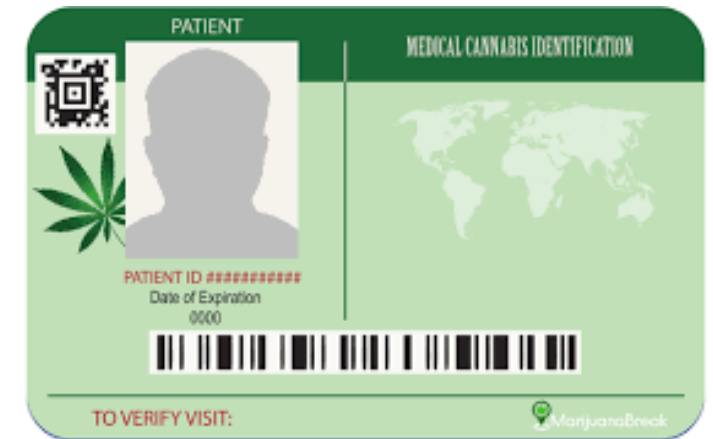
SCENARIO #2 – Oh, What A Pain!

- > A large national corporation performing work for the Navy randomly drug tests its employees. A yard equipment operator has been having back problems. He obtains a medical marijuana card in Delaware, where he lives and works. He uses cannabis periodically to alleviate his back pain.
- > The yard equipment operator fails a random drug test. When he is approached, he produces his medical marijuana card and acknowledges that he has used it off-duty, but vehemently denies any use at work.
- > What does the company do?



SCENARIO #2 - Oh, What A Pain!

- > Can the company discipline? Or terminate?
- > Must they accommodate?
- > Does state law preempt federal law (Controlled Substances Act)?
- > What about the fact that this is a federal contractor?
 - > Drug Free Workplace Act?
 - > False Claims Act?





Polling Question #4 – Company Policy

- > Have you changed, or are considering changing, your drug free work place policy in light of the developing cannabis law?
 - A. No.
 - B. Yes.
 - C. We are still unsure and are watching how the law develops.



Polling Question #4 – Company Policy

- > RESULTS - Have you changed, or are considering changing, your drug free work place policy in light of the developing cannabis law?

SCENARIO #3 – The Rumor Mill

- > There is a rumor going around that a software engineer at a company based in Idaho vapes marijuana on his rest breaks. A payroll clerk hears the rumor and reports it to HR. In doing so, she says that on her birthday, the engineer baked her a cake and “now it all makes sense! I remember feeling funny when I ate the cake later than night.”
- > HR doesn't really trust the Payroll clerk's assessment and the engineer's performance has been fine, so instead of approaching the engineer, they conveniently select him for a “random test” and he tests positive.
- > When they approach him about it, he admits that he smoked marijuana with his friends when he was on vacation in Colorado a week ago, but is adamant that he is not a “stoner,” has never smoked it at work and has never been inebriated on the job.

SCENARIO #3 - The Rumor Mill

- > What do we think about how they handle the report and the testing?
- > What should the employer do about the rumor mill and the payroll clerk, if anything?
- > Can the employer terminate the software engineer?
- > Does it matter that he is a good performer?



CANNABIS
AT WORK

SCENARIO #3 - The Rumor Mill

- > Does it matter that he claims he smoked it off duty?
- > Does it matter that he smoked it in Colorado where it is legal?
- > Given that there is no test for current inebriation from marijuana available, how can the employer decide whether he is telling the truth?





Polling Question #5 - Post-Accident Testing

- > Is your company testing for cannabis post-accident?
 - A. Yes.
 - B. No.
 - C. It depends on whether there is suspicion, or the accident could be related, or another factor.



Polling Question #5 - Post-Accident Testing

- > RESULTS - Is your company testing for cannabis post-accident?

SCENARIO #4 – “It’s My Arthritis Lotion”

- > A Shuttle Driver at a automotive dealership in California gets into a minor car accident with a sales employee who is taking a customer on a test drive. The sales employee is notoriously unreliable and reckless, while the shuttle driver is an all star employee.
- > Although the dealership suspects that the accident is the sales employee’s fault, they have a strict anti-drug policy, so they post-accident drug test both of them.
- > Surprisingly, the shuttle diver tests positive. HR calls the employee and she states that her doctor gave her a lotion for arthritis that has CBD in it that must have caused the positive drug test. She swears that she has never “gotten high.”



SCENARIO #4 - “It’s My Arthritis Lotion”

- > Can they keep the all star employee, without subjecting themselves to risk for not applying their policy uniformly?
- > Can they ask her to take a more sensitive test that will “weed” out CBD and/or only test for habitual users? (pun intended)
- > Do they have a duty to accommodate the employee’s arthritis?
- > Is the accommodation of marijuana an undue hardship?



Key Issues – Current Guidance

- > Can we still refuse to hire marijuana users?
- > Do we need to change our drug free workplace policy?
- > Do we have a duty to accommodate medical marijuana?
- > Can we fire if we discover marijuana is being used by a current employee outside of work?
 - > Does it make a difference if it is off duty use?
 - > What about safety sensitive positions?
- > Is marijuana here to stay?





Takeaways

- > Don't ignore the issue – it's here to stay
- > Consider your industry, company culture and business needs
- > Consider your state and the applicable laws
- > Update your policy that considers both and apply it uniformly
- > But, also at least consider making exceptions for accommodation
- > Don't be the test case
- > AND, stay up to date – watch your legal alerts, read your blogs, and follow your favorite employment attorney on Twitter.

LOOKING AHEAD

FINAL QUESTIONS



Inside
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THANK YOU

FOR JOINING US

Danielle H. Moore

858-597-9616

dmoore@fisherphillips.com

Shane Spradlin

Executive Vice President, General Counsel & Secretary
Penske Automotive Group, Inc.

Lesley Marlin

Senior Corporate Counsel
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Angela McCorkle Buckler

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