

Cannabis: In the Construction Industry Workplace

Martin Kappenman
Phone: (952) 921-4603
Email: mkappenman@nrkalaw.com

Kurt J. Erickson
Phone: (612) 313-7608
Email: kerickson@littler.com



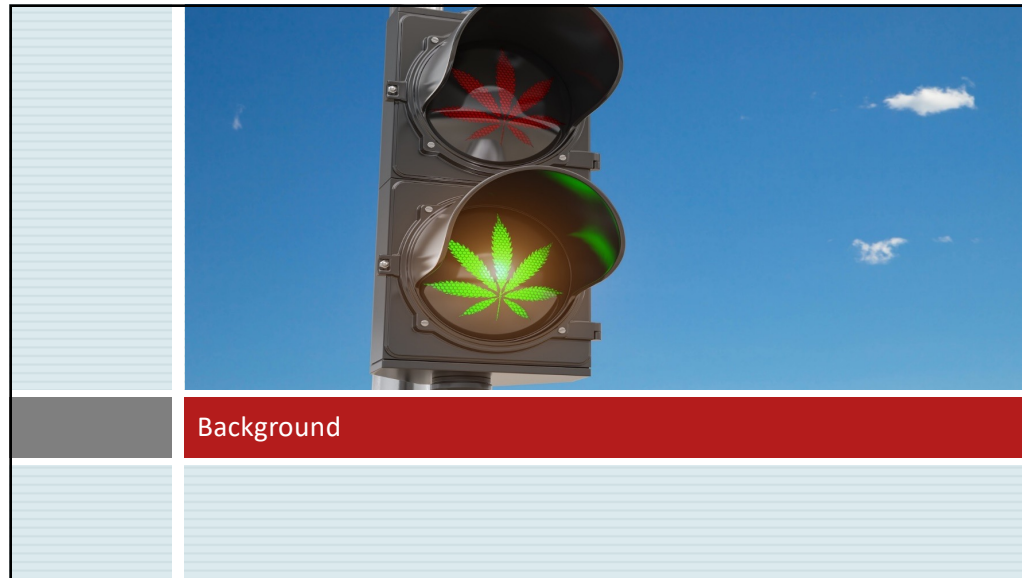
1

Agenda

- Background
- New legislation highlights
- Employment protections & rights
- Workplace injuries & cannabis
- Workplace policies and procedures



2



3

Terminology

- Cannabidiol (CBD): a non-psychoactive compound found mainly in hemp plants. Found in many commercial products and dietary supplements.
- Cannabis: a plant genus from which hemp and marijuana are derived.
- Hemp: a cultivar of the Cannabis sativa plant, with lower concentrations of THC.
- Marijuana: the dried parts of cannabis plants, high in THC.
- Tetrahydrocannabinol (THC): the primary psychoactive compound in cannabis.



4

Scope

- “Employer” = person or entity doing business in MN with 1+ employee
 - ▣ All employers located in MN
 - ▣ All employers doing business in MN
- “Employee” = person, independent contractor, or person working for an independent contractor who performs services for compensation, in whatever form, for an employer
 - ▣ Regardless of relationship between work and employer’s MN activity
- Substantial connections?

5

Timeline in Minnesota

2014 – Medical Cannabis

- ▣ Medical cannabis is legalized for qualifying conditions

2022 – Edibles

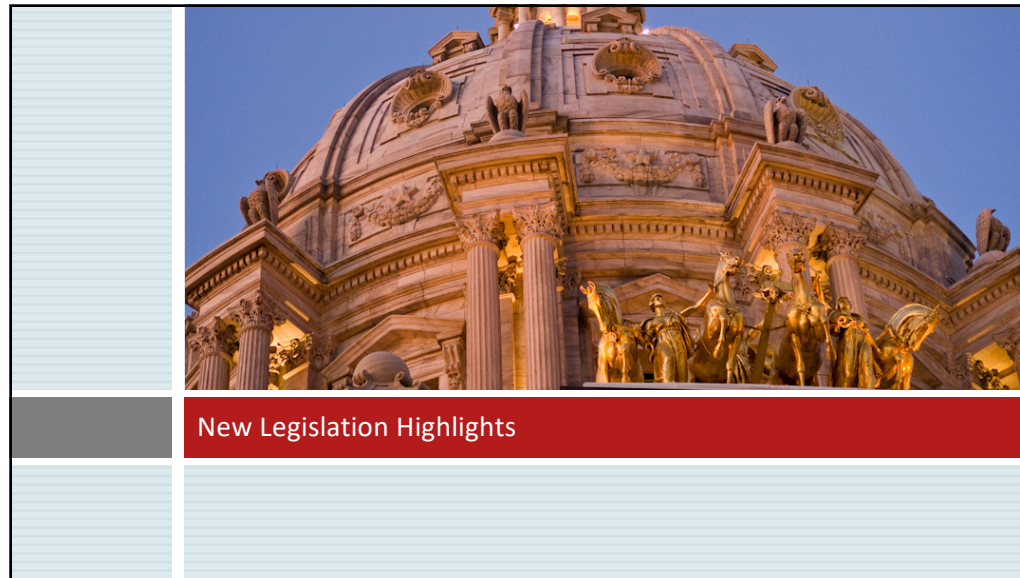
- ▣ Edibles containing small amounts of hemp-derived THC are legalized

2023 – Recreational Cannabis

- ▣ Minnesota becomes the 23rd state to legalize recreational cannabis
- ▣ Signed into law by Governor Tim Walz on May 30, 2023

Note: Cannabis is still illegal under federal law

6



7

What's legal under the new law?

Effective August 1, 2023, adults 21 & older may use, possess, or transport cannabis paraphernalia

- ❑ Legal possession in public: up to 2 oz
- ❑ Legal possession in private: up to 2 lb
- ❑ Cannabis concentrate: up to 8 g
- ❑ Edibles: up to 800 mg of THC
- ❑ Personal cultivation: up to 8 marijuana plants (only 4 may be flowering at once)

Approved locations for cannabis use:

- ❑ private residences
- ❑ private properties that aren't open to the general public (unless the owner expressly forbids it)
- ❑ specific establishments or events that have obtained a license for on-site use

8

General restrictions under the new law

- ❑ No cannabis use in motor vehicles
- ❑ No smoking where prohibited
- ❑ Not allowed in public schools, charter schools, state correctional facilities
- ❑ No operating vehicles under the influence of cannabis
- ❑ No smoking in locations where the smoke, aerosol, or vapor would be inhaled by a minor

However, several exceptions apply for those enrolled in MN's medical cannabis program.

9



Employment Protections & Rights

10

Off-Duty Use of Cannabis: Employment Protections

Minnesota's Consumable Products Act (Minn. Stat. § 181.938) has been amended under the new law. The following are considered "lawful consumable products":

- Cannabis flower
- Cannabis products
- Lower-potency hemp edibles
- Hemp-derived consumer products

Employers are **prohibited** from taking adverse action against job applicants or employees because they engage or have engaged in the use of cannabis off-duty.

11

...do employers have to tolerate cannabis use?



12

Employer Rights

- **No obligations to tolerate cannabis:** Employers are *not* required to tolerate cannabis use during work hours and on-site
- Employers retain the right to:
 - ▣ Discipline or discharge employees for cannabis use, possession, impairment, sale, or transfer during work hours, on-site, or while operating an employer's vehicle, machinery, or equipment; and
 - ▣ Take necessary employment actions if failure to do so breaches federal/state laws or risks losing federal monetary or licensing benefits



13

Cannabis-Related Discipline

- Employer may take adverse action against employee if...

Work-related conduct	Additional factor
Employee used, possessed, was impaired by, sold, or transferred cannabis while working, on employer's premises, or operating employer's vehicle machinery, or equipment	(1) Employee lacks "clearness of intellect and control of self" they otherwise would have due to cannabis consumption
	(2) Cannabis-positive result on confirmatory test
	(3) As provided in employer's written work rules contained in DATWA-compliant drug testing policy
	(4) As federal or state law otherwise requires
	(5) If failure to do so would cause loss of federal monetary or licensing-related benefit

14

Situation 1

- **Scenario:** Max, a software engineer, is found with marijuana in his backpack at the office.
- **Question:** What can Max's employer do?



15

Situation 1 *cont.*

- **Answer:** Even with the legalization of cannabis, employers can maintain and enforce policies prohibiting cannabis-related activities on work premises. Max can be subject to the company's disciplinary procedures as outlined in the employee handbook or company policy.



16

Situation 2

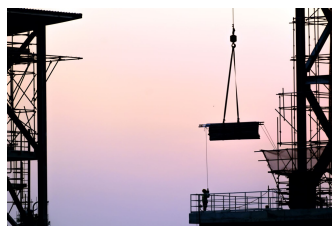
- **Scenario:** Emily, a machine operator at ABC Manufacturing, returns from lunch visibly impaired. It is suspected that she consumed an edible cannabis product during her break.
- **Question:** How can Emily's employer respond?



17

Situation 2 *cont.*

- **Answer:** Employers have the right to take disciplinary actions against employees reporting to work impaired. Emily's employer should follow procedures established by company policy.



18

Positions Subject to Cannabis Testing

Under the new law, cannabis and its metabolites are still considered “drugs” and are subject to DATWA’s testing provisions for the following positions:

- ▣ **Safety-sensitive positions**
- ▣ **Peace officers**
- ▣ **Firefighters**
- ▣ **Roles in direct care:** positions requiring face-to-face care, training, education, supervision, counseling, consultation, or medical assistance to children, vulnerable adults, or patients receiving healthcare services
- ▣ **Driving roles:** positions requiring a commercial driver’s license or operating a motor vehicle for which state or federal law requires drug and alcohol testing
- ▣ **Employment funded by a federal grant**
- ▣ **Any other position for which state or federal law requires cannabis testing**

10

Caveats

- Federal testing requirements preempt state law
 - ▣ Department of Transportation (DOT)
 - ▣ Pipeline Safety Act
 - ▣ Federal Aviation Administration (FAA)
 - ▣ Drug Enforcement Administration (DEA)
 - ▣ Nuclear Regulatory Commission (NRC)
- State testing requirements
- Government contracts
- Professional athletes are in their own league



21

Pre-Employment Cannabis Testing

Testing limitations: Employers cannot make cannabis testing a condition of employment, unless required by state or federal law. Employers may not test on an arbitrary or capricious basis.

Hiring practices: Employers cannot refuse to hire a job applicant solely based on a positive cannabis test, except when required by state or federal law.

22

Random Cannabis Testing

Employers may request or require random cannabis testing for

1. **Safety-sensitive positions:** defined as roles where impairment caused by cannabis usage would threaten the health and safety of any individual
2. **Professional athletes:** only if their collective bargaining agreement allows such testing



23



24

Safety-Sensitive Positions

- All supervisory and management positions
- Any position in which impairment caused by drug, alcohol or cannabis usage would threaten the health or safety of any person
- AGC-MN's position
 - ▣ Poster
 - ▣ Form Contracts



25

Reasonable Suspicion for Cannabis Testing

Employers may request or require cannabis testing if they reasonably suspect an employee:

- ▣ Is under the influence of drugs or alcohol
- ▣ Has violated the employer's written work policies regarding cannabis
- ▣ Has injured themselves or another employee
- ▣ Has caused a work-related accident or was operating or helping to operate vehicles, machinery, and equipment involved in a work-related accident

26

Collective Bargaining Agreements

Freedom to bargain: Parties involved in collective bargaining agreements are free to negotiate and agree upon a policy for cannabis testing. The policy must meet or exceed the minimum standards for employee protection outlined in DATWA.

Existing agreements: The new law will not affect existing collective bargaining agreements with cannabis testing policies, provided those agreements exceed minimum employee protections under DATWA.



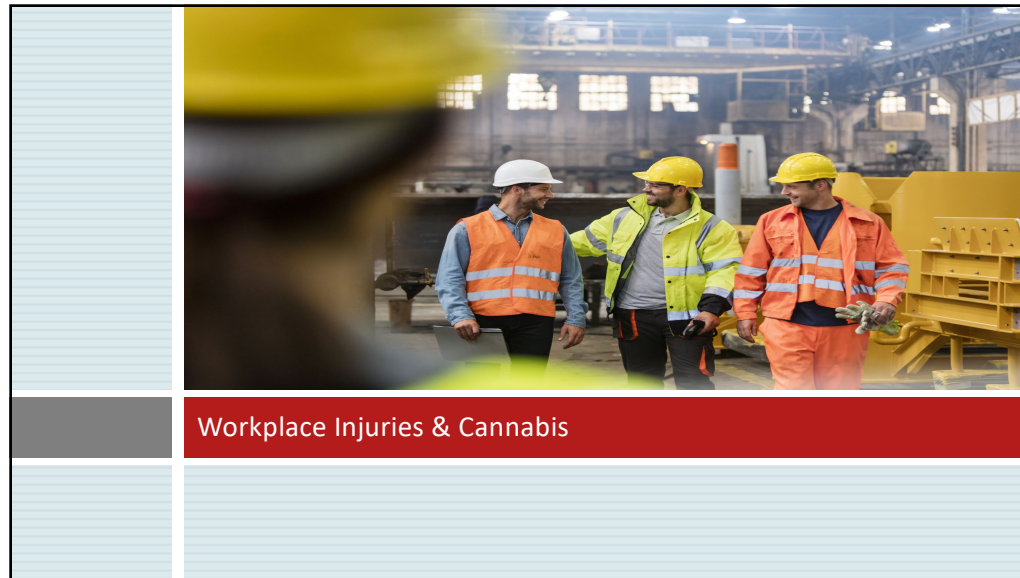
27

Exclusions from DATWA Protections

DATWA protections do not extend to employees and job applicants if their roles require cannabis testing due to:

- ❑ Federal regulations preempting state regulations regarding cannabis testing rules
- ❑ Federal regulations or requirements for operating federally regulated facilities
- ❑ Federal contracts where cannabis testing is for security, safety, or data protection
- ❑ State agency rules adopting federal regulations to align non-federally regulated intrastate components of an industry to federal standards

28



29

Workplace Injuries & Cannabis

The number of American workers testing positive for marijuana after workplace accidents reached its **highest in 25 years**.

7.3% of workers tested positive for marijuana after workplace accidents in **2022**. This is an increase from **6.7%** in **2021**.



Source: Secaucus, N.J., Post-Accident Workforce Drug Positivity for Marijuana Reached 25-Year High in 2022, Quest Diagnostics Drug Testing Index Analysis Finds, PR Newswire (May 18, 2023), [Link](#)

30



31

When Cannabis-Related Situations Arise

- Keep accurate, detailed records
- Document observations, conversations, and actions taken
- Approach cannabis like alcohol – while adults 21+ may legally purchase and consume alcoholic beverages, employers retain the right to prohibit its use during work hours and penalize those who arrive at work intoxicated

32

Prevention

- Take proactive measures:
 - ▣ Encourage open dialogue – encourage employees to communicate concerns, and ensure supervisors and managers are trained to handle these conversations
 - ▣ Educate employees on company policies
 - ▣ Implement training sessions on the implications of cannabis use
 - ▣ Periodically review company policies to ensure compliance
 - ▣ Update drug and alcohol testing policies

33

Takeaways

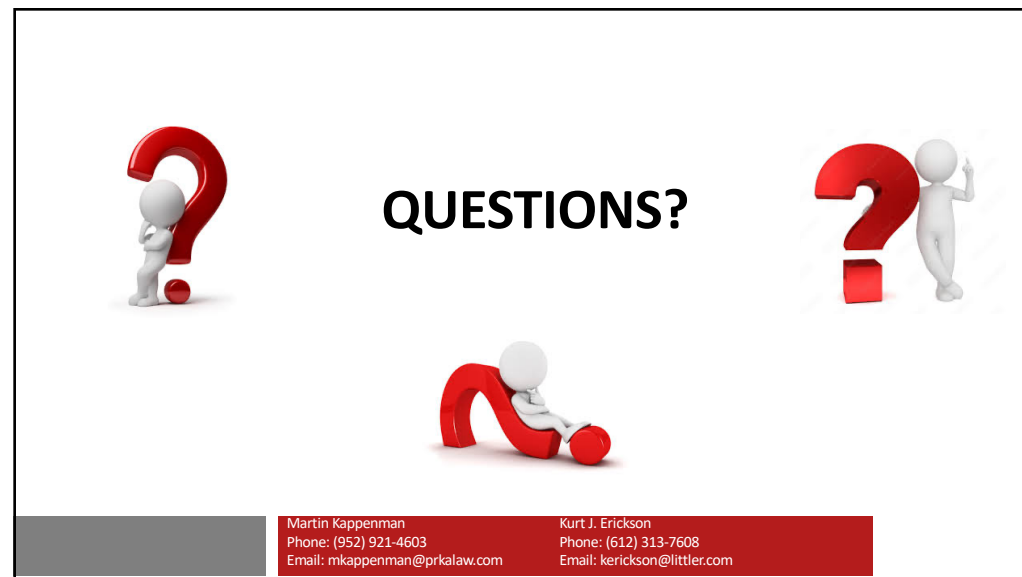
1. Employment provisions effective Aug. 1, 2023
2. Need to identify Safety+ positions
3. No pre-employment cannabis testing unless Safety+
4. Emphasis on reasonable suspicion
5. Testing policies should include written rules prohibiting cannabis use, possession, impairment during work
6. Cannabis-positive test result alone insufficient for adverse action

34

Handbook Updates

- Handbooks should be updated to state that employees may not use, possess, sell, transfer, or be impaired by cannabis while at work.

35



QUESTIONS?

Martin Kappenman Phone: (952) 921-4603 Email: mkappenman@prkalaw.com	Kurt J. Erickson Phone: (612) 313-7608 Email: kerickson@littler.com
--	---

36

THANK YOU!

Martin Kappenman
Phone: (952) 921-4603
Email: mkappenman@prkalaw.com

Kurt J. Erickson
Phone: (612) 313-7608
Email: kerickson@littler.com