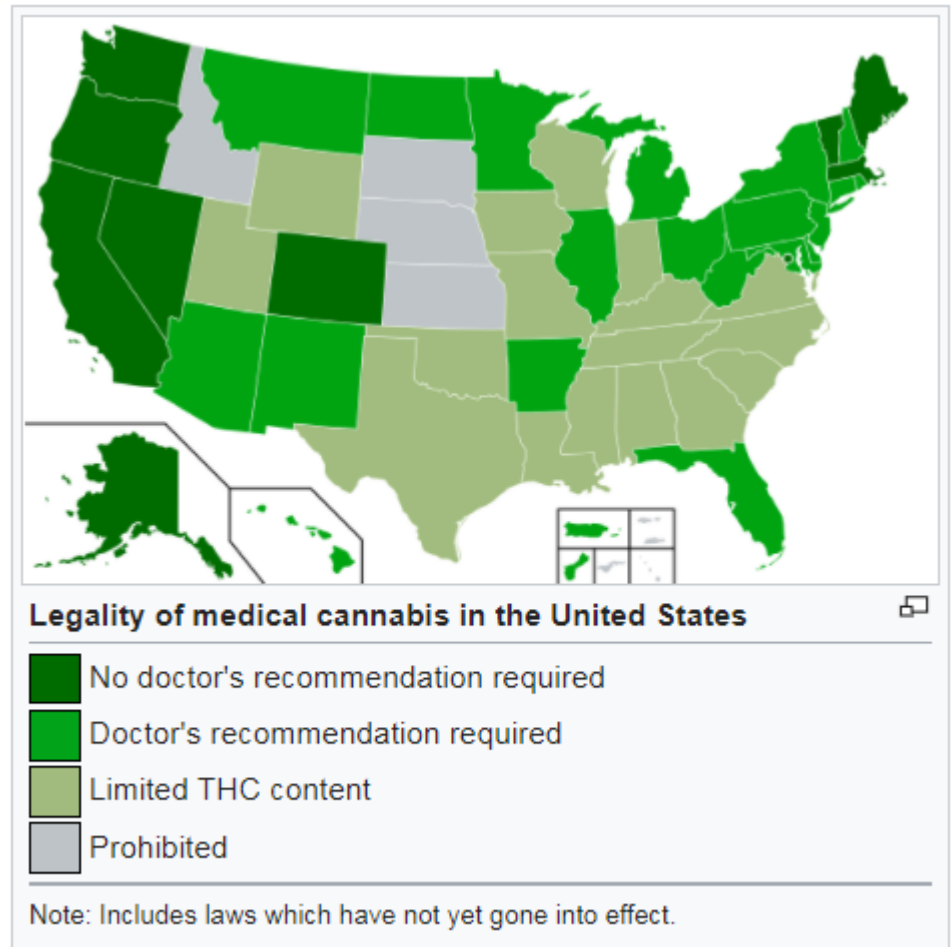


# MEDICAL MARIJUANA ACTS & THE CONSTRUCTION INDUSTRY

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# MEDICAL MARIJUANA: NEARLY EVERYWHERE

- 29 states allow the use of medical marijuana
- As of May 17, 2016, this includes PA
- Includes NJ
- Includes DE



[https://upload.wikimedia.org/wikipedia/commons/thumb/d/d2/Medical\\_cannabis\\_%2B\\_CBD\\_United\\_States\\_map\\_2.svg/959px-Medical\\_cannabis\\_%2B\\_CBD\\_United\\_States\\_map\\_2.svg.png](https://upload.wikimedia.org/wikipedia/commons/thumb/d/d2/Medical_cannabis_%2B_CBD_United_States_map_2.svg/959px-Medical_cannabis_%2B_CBD_United_States_map_2.svg.png)

# PA Medical Marijuana Act, 35 Pa. C.S.A §10231.101

# PA MEDICAL MARIJUANA ACT

- Only applies to Pennsylvania residents
- Establishes medical marijuana program for patients suffering from “serious medical conditions”
- Patients must receive a certification from a practitioner and possess a valid ID card issued by the Department of Health
- What is a “serious medical condition” ?



# “SERIOUS MEDICAL CONDITIONS” UNDER PA ACT

- Cancer
- HIV / AIDS
- Amyotrophic lateral sclerosis
- Parkinson’s
- MS
- Damage to nervous tissue of the spinal court
- Epilepsy
- Inflammatory bowel disease
- Huntington’s disease
- Crohn’s disease
- PTSD
- Intractable seizures
- Glaucoma
- Sickle cell anemia
- Autism
- Neuropathies
- ***And...***

# “SERIOUS MEDICAL CONDITIONS” UNDER PA ACT

“ Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain in which conventional therapeutic intervention and opiate therapy is contraindicated or ineffective”

- very broad -



# PA V. FEDERAL LAW

- “Nothing in this act shall require an employer to commit any act that would put the employer or any person acting on its behalf in violation of federal law.” § 2103(b)(3).
  - e.g., an employer knowingly allowing an employee to bring marijuana onto a federal project



# PA V. FEDERAL LAW

- Drug-Free Workplace Act of 1988 (41 U.S.C. § 8102) requires Federal contractors on projects over \$100,000 to agree that they will provide drug-free workplaces as a precondition of receiving a contract
- **“Drug-Free Workplace”**
  - Publish statement that possession of controlled substance is prohibited in workplace
  - Establish drug-free awareness program teaching about dangers
  - Notifying contract agency of any employees who receive a conviction
  - Other requirements





# EMPLOYER RESPONSIBILITIES UNDER PA ACT

- **Employers cannot discriminate or retaliate**
  - “No employer may discharge, threaten, refuse to hire, or otherwise discriminate or retaliate against any employee regarding an employee’s compensation, terms, conditions, location, or privileges solely on the basis of such employee’s status as an individual who is certified to use medical marijuana.” § 2103(b)(1).



# EMPLOYER RESPONSIBILITIES UNDER PA ACT

- **Employers can prohibit employees from having pot on company property, and can discipline employees who show up for work under the influence of pot.**
  - “Nothing in this act shall require an employer to make any accommodation of the use of medical marijuana on the property or premises of any place of employment. This act shall in no way limit an employer's ability to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for that position.” § 2103(b)(2).

# HOW MEDICAL MARIJUANA “VIBES” WITH THE CONSTRUCTION INDUSTRY?



# PA RESTRICTIONS

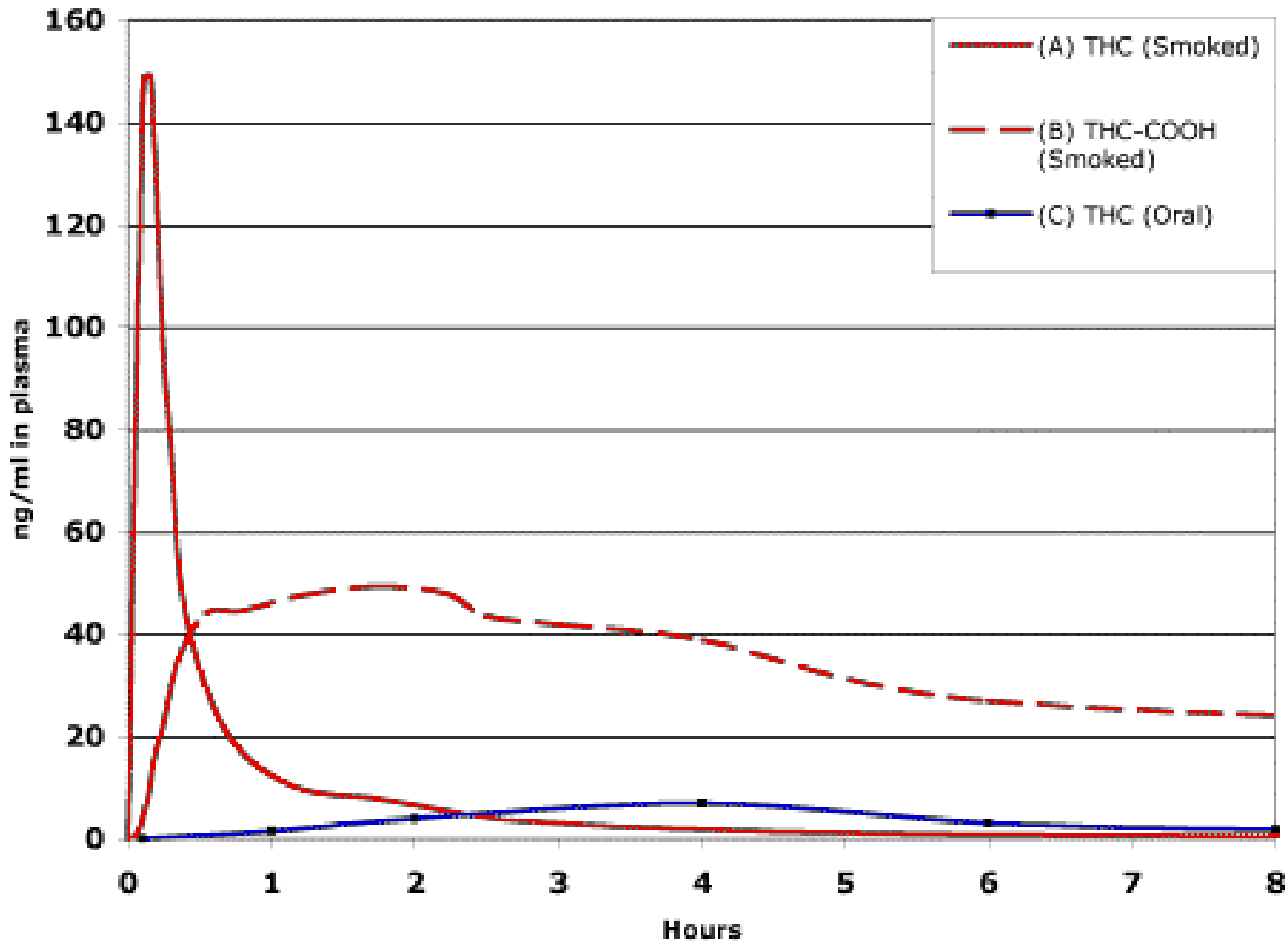
- When patient is under the influence (*i.e.* “ blood content of more than 10 nanograms of active THC per milliliter of blood in serum” ), patient **cannot** operate or control:
  - **Chemicals** that require a permit issued by federal or state government or agency
  - **High-voltage electricity** or any other public utility



# “UNDER THE INFLUENCE” IN PA

- “Under the influence”
  - (*i.e.* “blood content of more than 10 nanograms of active THC per milliliter of blood in serum” )
  - *Compare: Legal limit for driving in Colorado is 5 nanograms/milliliter*
- Blood content varies based on potency, amount of use, type of use (smoking v. vaporizing v. ingesting)
- Hard to measure: first time users may have 100 nanograms drop to 5 ng in the span of 5 hours

## Blood Levels of THC & Metabolite



# TESTING FOR “UNDER THE INFLUENCE”

- Saliva Test
  - Newer method
  - Not yet fully validated
  - Must test within ~20 min of marijuana use
  - ~\$10/test
- Blood
  - Validated
  - Issues with taking blood from an employee



# ADDITIONAL PA RESTRICTIONS

- **No heights or confined spaces.** While under the influence, a patient may not perform any employment duties at heights or in confined spaces.
- **No life-threatening tasks.** An employer may prohibit an employee from performing any task while under the influence that the employer deems life-threatening to any employees.
- **No public health or safety risks.** An employer may prohibit an employee from performing any task while under the influence that could result in a public health or safety risk.





# GRAY-AREAS

- **No heights or confined spaces.**
  - How high? How confined?
- **No life-threatening tasks.**
  - What is “life threatening?”
- **No public health or safety risks.**
  - How likely must the public health or safety risk be?



# EMPLOYEES WHO QUALIFY AS “PATIENTS” UNDER PA ACT

## Is the employee working while under the influence?

- **Is the employee’s conduct falling below standard of care?**
  - Document objective evidence
  - Can “discipline” employee
  
- **Is the employee performing potentially dangerous work?**
  - Heights or confined spaces
  - Chemicals or high-voltage electricity
  - Life-threatening tasks
  - Potential public health or safety risks
  - See if possible to move employee to different role = avoid “constructive discharge” claim



# EMPLOYEES WHO QUALIFY AS “PATIENTS”

**Would it make sense to have a doctor opine on whether employee can perform his or her role?**

- Liability concerns increased or decreased?
- May say something that you did not want to know



# ISSUES IN CONNECTION WITH PHRA

- **Pennsylvania's Human Relations Act**
  - Employers must maintain confidentiality regarding an employee's medical condition or medical history
  - Unless an employee consents or any employer can show a demonstrable business necessity, including need for information to be released to:
    - Supervisors, if information is: (i) about restrictions on employee's work or duties; or (ii) necessary accommodations for a disabled employee
    - Insurers
    - Authorized representatives of labor organizations, if there is a bona fide labor dispute or grievance procedure
- **“Serious medical condition” = likely subject to PHRA**
- **Challenge to keep secret**

# NJ Compassionate Use Medical Marijuana Act N.J.S.A 24:6i-1



# NEW JERSEY COMPASSIONATE USE MEDICAL MARIJUANA ACT

## Patient must have a “debilitating medical condition”

- Seizure disorder
- Intractable skeletal muscular spasticity
- PTSD
- Glaucoma
- HIV
- AIDS
- Cancer
- Any terminal illness
- Amyotrophic lateral sclerosis
- MS
- Muscular dystrophy
- Inflammatory bowel disease, including Crohn’s
- Any other treatment approved by Department of Health by regulation

# WORKPLACE ACCOMMODATIONS UNDER NJ ACT

**“ Nothing in this act shall be construed to require a government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of marijuana, or an employer to accommodate the medical use of marijuana in any workplace.”**

# WORKPLACE ACCOMMODATIONS UNDER NJ ACT

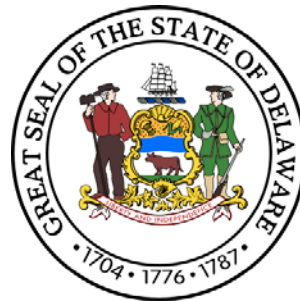
**New Jersey law is unclear whether you can take an adverse employment action against an employee for use of marijuana under the act**

- Potentially a violation of New Jersey's Law against Discrimination
- New Jersey courts have yet to rule on the issue





# Delaware Medical Marijuana Act 16 Del.C. 4902A



# DEBILITATING CONDITIONS UNDER THE DE MEDICAL MARIJUANA ACT

## Patient must have a “debilitating medical condition”

- Terminal illness
- Cancer
- HIV
- AIDS
- Decompensated cirrhosis
- Alzheimer’s
- PTSD
- Intractable epilepsy
- Seizure disorder
- Amyotrophic lateral sclerosis
- Any condition that produces one of the following:
  - Cachexia or wasting syndrome
  - Severe debilitating pain unresponsive to medication
  - Intractable nausea
  - Seizures
  - Severe and persistent muscle spasms
- Any other treatment approved by Department of Health by regulation

# NO DISCRIMINATION UNDER DE ACT

- An employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon either of the following:
  - The person's status as a medical marijuana cardholder; or
  - A registered qualifying patient's positive drug test for marijuana components or metabolites



# NO DISCRIMINATION UNDER DE ACT

- An employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person
- **EXCEPT**
  - If failure to do so would cause employer to **lose monetary** or licensing-related **benefit under federal law** or regulations, or
  - The patient **used, possessed, or was impaired** by marijuana
    - **On the premises** of the place of employment or
    - **During hours of employment**

# EMPLOYER'S ABILITY TO TAKE ACTION UNDER DE ACT

- Employers can prohibit and discipline employees for:
  - **Ingestion of marijuana in any workplace**
  - **Working while under the influence of marijuana**
- **EXCEPT** a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana



# QUESTIONS?



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