

H A M P T O N R O A D S

# CHAMBER

**Virtual Chamber  
Education Series:  
Weed in the Workplace**

June 14, 2022

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# Meet the Speakers



**Anne Graham  
Bibeau**

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and Cannabis Law  
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Manager

VANDEVENTER BLACK LLP  
ATTORNEYS AT LAW



**JONATHAN V. GALLO**

Cannabis Law Group, the  
Cybersecurity & Data Privacy  
Group, and the Government  
Contracts Practice Group



# WEED IN THE WORKPLACE

VANDEVENTER BLACK LLP  

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ATTORNEYS AT LAW

# PRESENTER



## ANNE G. BIBEAU

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Anne Graham Bibeau is the firm's Labor & Employment Law Practice Group Manager. She focuses her practice on labor and employment law, alternative dispute resolution, commercial litigation, tax litigation, and the cannabis industry

She advises clients on the Fair Labor Standards Act (FLSA), discrimination and harassment, the Family and Medical Leave Act (FMLA), disability law, labor relations, employment agreements, and other labor and employment matters.

# PRESENTER



## JONATHAN V. GALLO

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Jonathan is a member of the firm's Cannabis Law Group, the Cybersecurity & Data Privacy Group, and the Government Contracts Practice Group.

Jonathan helped implement New Hampshire's medical cannabis program. Jonathan advises businesses in the cannabis industry as well as businesses in various technology-related fields, advising clients on a range of matters related to cannabis regulations, licensing, and contract negotiations, in addition to data privacy and security, data breach planning and response, cyber risk liability and compliance, software development and licensing, and other technology-related matters.

# FIRM NEWS



# WOODS ROGERS VANDEVENTER BLACK

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# TOPICS



VA's Marijuana Laws



Federal Law



Testing



Employment  
Considerations

# DISCLAIMER

Marijuana remains a Schedule I drug pursuant to the Controlled Substances Act.

Possessing, using, distributing, and/or selling marijuana or marijuana-based products is illegal under federal law, regardless of any state law that may decriminalize/legalize such activity under certain defined circumstances.

Although federal enforcement policy may at certain times defer to states' laws, there is a risk that conflicting federal laws may be enforced in the future, regardless of states' laws. We are not instructing anyone in any manner, to violate federal law.



# A Brief History.....

- 2015 - 2021 Virginia allows use and possession of CBD oil or THC-A oil to treat intractable epilepsy. Virginia establishes its pharmaceutical processor program.
- 5 pharmaceutical processors to produce and dispense; one per Health Service Area.
- Virginia expanded medical cannabis oil program to any diagnosed condition upon physician certification.
- Allows patient, parent, legal guardian, or registered agent to legally possess cannabis oil
- Pharmaceutical processors can produce/sell cannabis products other than cannabis oils: “botanical cannabis”



# Virginia Legislative Update.....

- Effective July 1, 2022, [HB933](#)
- Removes requirement for patients, parents, and legal guardians to register with Board of Pharmacy.
- Written Certification for the use of medical cannabis from a Registered Practitioner for Medical Cannabis is still required and must be presented at dispensary, along with a government-issued ID, to obtain medical cannabis products.
- An optional registration card for medical cannabis may be obtained
- Registered Agents are still required to register with the Board of Pharmacy



# 2021 Legalization In Virginia

- Staggered implementation
- Certain provisions required reenactment in 2022 legislative session
- Provisions effective July 1, 2021:
  - Allows those 21 years or older to legally possess up to one ounce of marijuana, without intent to distribute (simple possession)
  - Allows home cultivation by those 21 years or older of up to 4 marijuana plants per household provided:
    - Plants are labeled with tag that includes identifying information and notation that plant is being grown for personal use as authorized
    - Plants must not be visible unaided from public way
    - Precautions are taken to prevent unauthorized access by those younger than 21
  - Permits adult private “sharing” with certain limitations (no remuneration)
- Note: sale of marijuana remains illegal.



# Virginia's New Marijuana Law SB1406/HB2312 (Chs. 550/551)

- Establishes:
  - Cannabis Oversight Commission
  - Virginia Cannabis Control Authority (VCCA)
  - Cannabis Equity Reinvestment Board
  - Cannabis Equity Reinvestment Fund
  - Virginia Cannabis Equity Loan Fund
- Expungement process for certain marijuana related offenses
- Permits consumer/retail sales to begin January 1, 2024/JLARC Report
- Permits local referendum on prohibition of retail marijuana stores
- Permits limited local restrictions on sales
- Imposes tax rates and modifies/creates criminal penalties
- Funds public awareness campaign on health and safety risks and training for law enforcement





# Virginia Legislative Update.....

- The Virginia General Assembly failed to reenact the licensing/retail sales provisions of Chs. 550/551, placing progress on retail sales on hold
- The General Assembly may revisit retail sales in the 2023 session
- Proposed legislation also sought to permit existing pharmaceutical processors the ability to dispense recreational cannabis as a temporary measure, however the legislation did not make it through the General Assembly



**But....**

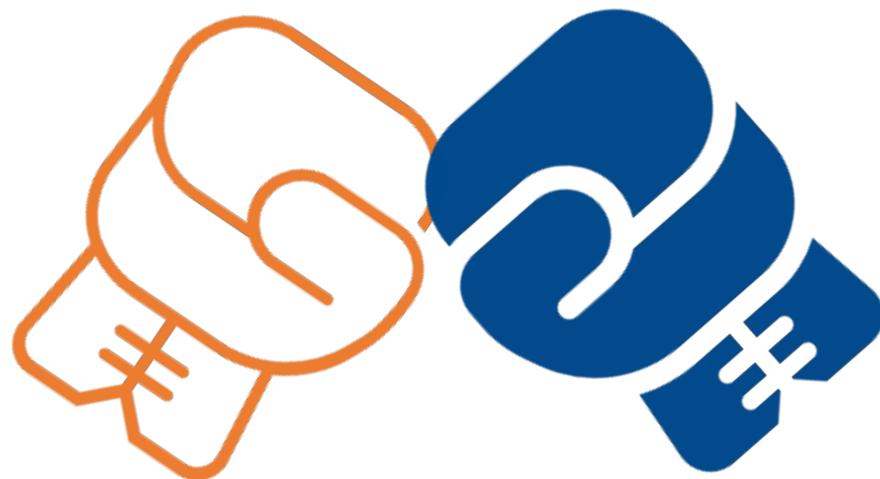
## **Federal Law – Controlled Substances Act**

- **Schedule I:** The drug or substance has a high potential for abuse, has no currently accepted medical use in treatment in the United States, and there is a lack of accepted safety for use of the drug or substance under medical supervision.
- **Examples:** heroin, lysergic acid diethylamide (LSD), and marijuana.



# Conflict between Federal and State Law

- DOJ provided guidance to federal prosecutors related to prosecuting marijuana related offenses in states where marijuana legal under state law, subject to certain exceptions.
- Cole memos
- Bankruptcy
- Banking
- SBA
- Etc.





# Marijuana Opportunity Reinvestment & Expungement Act (MORE Act)



- Removes cannabis from the list of scheduled substances under the Controlled Substances Act
- Decriminalizes manufacture, distribution, possession of marijuana
- Creates opportunity trust fund and imposes taxes
- Creates community investment program
- Passed House Again in April 1, 2022



# Cannabis Administration and Opportunity Act



- Discussion draft released in July 2021 by U.S. Senators Booker, Wyden, and Schumer
- Awaiting revisions and stakeholder input
- Public comment closed September 2021
- Comprehensive de-scheduling and restorative justice bill
- Was expected to be introduced in April 2022 – postponed



# Safe Banking Act



- Passed U.S. House (again, for the 6<sup>th</sup> time) February 4, 2022, as an amendment to the “America COMPETES Act of 2022”
- Prohibits a federal banking regulator from penalizing a depository institution for providing banking services to a legitimate cannabis-related business
- Proceeds from a transaction involving activities of a legitimate cannabis-related business are not considered proceeds from unlawful activity



# Safe Banking Act(cont'd)



- Depository institution is not, under federal law, liable or subject to asset forfeiture for providing a loan or other financial services to a legitimate cannabis-related business.
- Federal banking agency may not request or order a depository institution to terminate a customer account unless (1) the agency has a valid reason for doing so, and (2) that reason is not based solely on reputation risk. Valid reasons for terminating an account include threats to national security and involvement in terrorist financing, including state sponsorship of terrorism
- Decreases the cap on the surplus funds of the Federal Reserve banks



# Medical Marijuana Research Act



- H.R. 5657
- Passed U.S. House April 4, 2022
- Removes barriers to conducting research on marijuana and allow scientists to access cannabis from dispensaries of legal cannabis states.
- Directs the Drug Enforcement Administration to register (1) practitioners to conduct medical marijuana research, and (2) manufacturers and distributors to supply marijuana for such research.
- Department of Health and Human Services must continue to produce marijuana through the National Institute on Drug Abuse Drug Supply Program and implement a specialized process for supplying marijuana products available through state-authorized marijuana programs to researchers until manufacturers and distributors can provide a sufficient supply of marijuana for medical research.



# Food & Drug Administration

- It is illegal to market any CBD product (from hemp or marijuana) as having therapeutic benefits or as a dietary supplement unless the FDA has reviewed and approved it – FDA has issued numerous warning letters to firms marketing new drugs that allegedly contain CBD
- **FDA APPROVED:**
  - Epidiolex - contains CBD. For the treatment of seizures associated with Lennox-Gastaut syndrome or Dravet syndrome
  - Marinol and Syndros – contains dronabinol, a synthetic form of THC. For therapeutic uses, including the treatment of anorexia associated with weight loss in AIDS patients
  - Cesamet - contains nabilone, a synthetic form of THC. For the treatment of the nausea and vomiting associated with cancer chemotherapy



# CBD – Availability and Authenticity

- “CBD” products are widely available
- Fake, untested, and unapproved products have flooded the market
- FDA has sent warning letters to some companies manufacturing CBD products
- FDA has tested some products, and many were found not to contain the levels of CBD claimed\*
- Virginia permits hemp-derived extracts intended for human consumption as approved food ingredients/dietary supplements (must follow food safety guidelines)
- CBD may be derived from hemp or marijuana. It may contain no or some THC

\* Source: <https://www.fda.gov/news-events/public-health-focus/warning-letters-and-test-results-cannabidiol-related-products>





# THC Effects

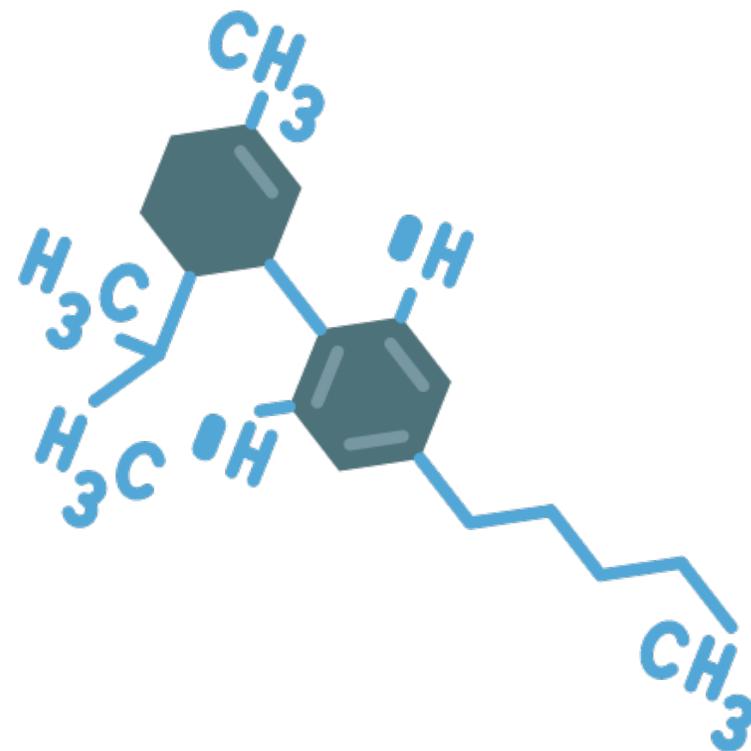
- Stored in fatty tissues; released over a period of time from hours to weeks
- Level and duration of impairment depend on strain of marijuana, individual's metabolism, etc.
- Impairment affects cognitive and physical functions: short-term memory, ability to process and analyze information, ability to concentrate, delayed reaction time, altered sensory perception





# Testing

What does THC level reveal about impairment?





# Employment Considerations / Testing



- Testing: pre-hire, post-accident, random, and reasonable suspicion/for cause
- Types of tests
  - Urine testing
  - Oral fluid testing – HHS Guidelines
  - Screenings vs. Confirmation
- Advantages/disadvantages



# Virginia's limited employment protection

## Va. Code § 40.1-27.4

- Employers are prohibited from discharging, disciplining, discriminating against an employee for the employee's ***lawful use of cannabis oil pursuant to a valid written certification by a practitioner for a diagnosed condition or disease.***
- Exception: where employee is impaired at work. Employer may prohibit possession of cannabis oil during work hours.
  - Employer not required to commit any act that would ***cause employer to be in violation of federal law*** or that would ***result in loss of federal contract/funding*** or would ***require any defense industrial base sector employer to hire/retain employee who tests positive for THC in excess of 50 ng/ml for urine test or 10 pg/mg for a hair test.***



# Americans with Disabilities Act



- Requires employers to provide reasonable accommodations to employee's/applicant's disabilities, unless such accommodation creates an undue burden for the employer.
- Requires interactive process to identify a reasonable accommodation.
- Exception: if disabled individual poses a direct threat to health/safety of self/others that cannot be eliminated by reasonable accommodation.

- Anyone who is “currently engaging” in the illegal use of drugs is not a “qualified individual with a disability.”
- Employees using marijuana or CBD for medical reason may be entitled to an accommodation under the ADA for the underlying medical condition.
- State law *may*
  - Provide employment protection for marijuana use
  - Impose ADA-like obligations on employers, but without the ADA’s prohibition against federally illegal drugs





# DOT/Federal Motor Carrier Safety Admin.

## 49 C.F.R. § 382.213

- No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any drug or substance identified as a Schedule I drug.
- No employer having actual knowledge that a driver has used a controlled substance shall permit the driver to perform or continue to perform a safety-sensitive function.

## 49 C.F.R. § 382.215

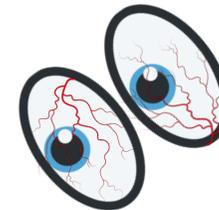
- No employer having knowledge that a driver has tested positive or has adulterated or substituted a test specimen for controlled substances shall permit the driver to perform or continue to perform safety-sensitive functions.



# No ADA Protection for Illegal Drug Use

## *James v. City of Costa Mesa* (9<sup>th</sup> Cir. 2012)

- Plaintiffs sued two California cities that had closed medical marijuana facilities, claiming that the cities violated ADA's Title II, which prohibits states/localities from discrimination on the basis of disability in the provision of public services.
- Held: Marijuana use under a doctor's supervision in accordance with state law is not protected under the ADA.
  - ADA excludes illegal drug users from its definition of qualified individuals with a disability.
  - ADA does not protect individuals who claim to face discrimination on the basis of marijuana use.
  - Medical marijuana may be legal under CA law, but it is illegal under the federal Controlled Substances Act.



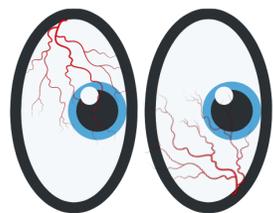
## EEOC v. Pines of Clarkston (E.D. Mich. 2015)

- Holden was hired for a nursing job and was required to take a drug test. As she used medical marijuana for her epilepsy [legal under Mich. law], she failed the drug test. She was fired.
- Holden and EEOC sued employer, alleging disability discrimination.
- Employer argued that it fired Holden because she failed the drug test.
- Court:
  - Discharge for illegal drug use is a permissible nondiscriminatory reason.
  - Factual issue as to whether Holden fired because of marijuana use (no ADA protection) or fired because of her epilepsy (ADA protection).



## Noffsinger v. SSC Niantic Operating Co. (D. Conn.)

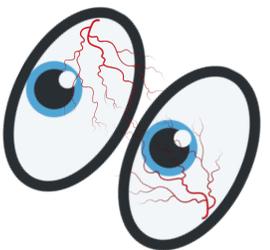
- CT law allows medical marijuana and bars employers from firing/refusing to hire someone for use of medical marijuana in compliance with CT law.
- In job interview, plaintiff disclosed that she had PTSD and took medical marijuana. After a job offer, she failed the company's drug test based on THC; the employer rescinded her job offer.
- ADA allows employer to prohibit the use of illegal drugs at the workplace but does not expressly allow an employer to prohibit drug use outside the workplace.
- ADA allows employer to hold an employee who engages in illegal drug use to the same qualification standards for employment that it holds others, even if any unsatisfactory performance/behavior is related to the drug use. But drug test is not a qualification standard.
- ADA does not protect marijuana users on the basis of their marijuana use, but CT law does.





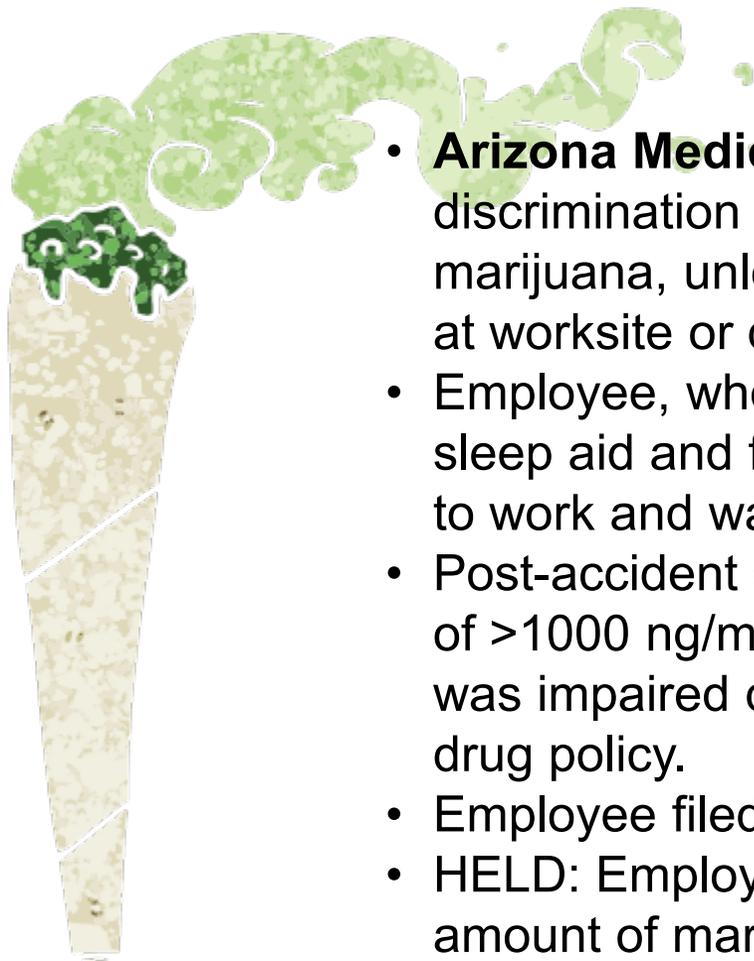
# Noffsinger (cont'd)

- Employer, a federal contractor, argued the Drug Free Workplace Act (DFWA) requires discrimination based on marijuana usage.
- Held: The DFWA does not require drug testing. . . . Nor does the DFWA prohibit federal contractors from employing someone who uses illegal drugs outside of the workplace, much less an employee who uses medical marijuana outside the workplace in accordance with a program approved by state law. That defendant has chosen to utilize a zero-tolerance drug testing policy in order to maintain a drug free work environment does not mean that this policy was actually 'required by federal law or required to obtain federal funding.'





## AZ: *Whitmire v. Wal-Mart Stores Inc.* (2019)



- **Arizona Medical Marijuana Act (“AMMA”)** prohibits employment discrimination based on registered qualifying patient’s positive drug test for marijuana, unless the employee used, possess, or was impaired by marijuana at worksite or during work hours.
- Employee, who had AZ medical marijuana card, smoked medical marijuana as sleep aid and for chronic pain due to arthritis. She claimed she never brought it to work and was never impaired during work hours.
- Post-accident drug test: positive for marijuana metabolites at quantitative value of >1000 ng/ml. Employer determined that the test results indicated employee was impaired during her shift and terminated her employment for violation of drug policy.
- Employee filed suit alleging wrongful termination in violation of AMMA.
- HELD: Employer needs to present expert witness to testify as to whether the amount of marijuana metabolites indicates impairment.



## NH: Paine v. Ride-Away, Inc. (Jan. 14, 2022)

- Employee suffered from PTSD. His doctor prescribed cannabis and enrolled him in NH's therapeutic cannabis program.
- Employee requested exception to employer's drug testing policy as a reasonable accommodation for his disability. Employer rejected the request and fired the employee for using cannabis off-duty.
- Employee sued for disability discrimination based on failure to reasonably accommodate his disability.
- Trial court: disability under NH law does not include current use of a controlled substance, as defined in the CSA. Case dismissed.
- Supreme Court of NH: The exclusion of current users from protection of NH disability law means only that current drug use is not a disability. It does not mean that someone with a different disability loses the protection of the law because his disability is treated with a controlled substance. Trial court erred in deciding that the use of therapeutic cannabis, prescribed in accordance with NH law, cannot be a reasonable accommodation. Case remanded for further proceedings to determine if the requested accommodation was feasible.



# Employer Best Practices

- Identify safety-sensitive jobs. Stress safety-sensitive tasks in job descriptions.
- Drug policy –
  - Address drug use, impairment, possession in the workplace
  - Consequences
  - Testing
    - Pre-employment, reasonable suspicion\*, random, post-accident
    - \*Define reasonable suspicion
  - Address limited employment protection under VA law for medical oils
  - Communicate policy to employees



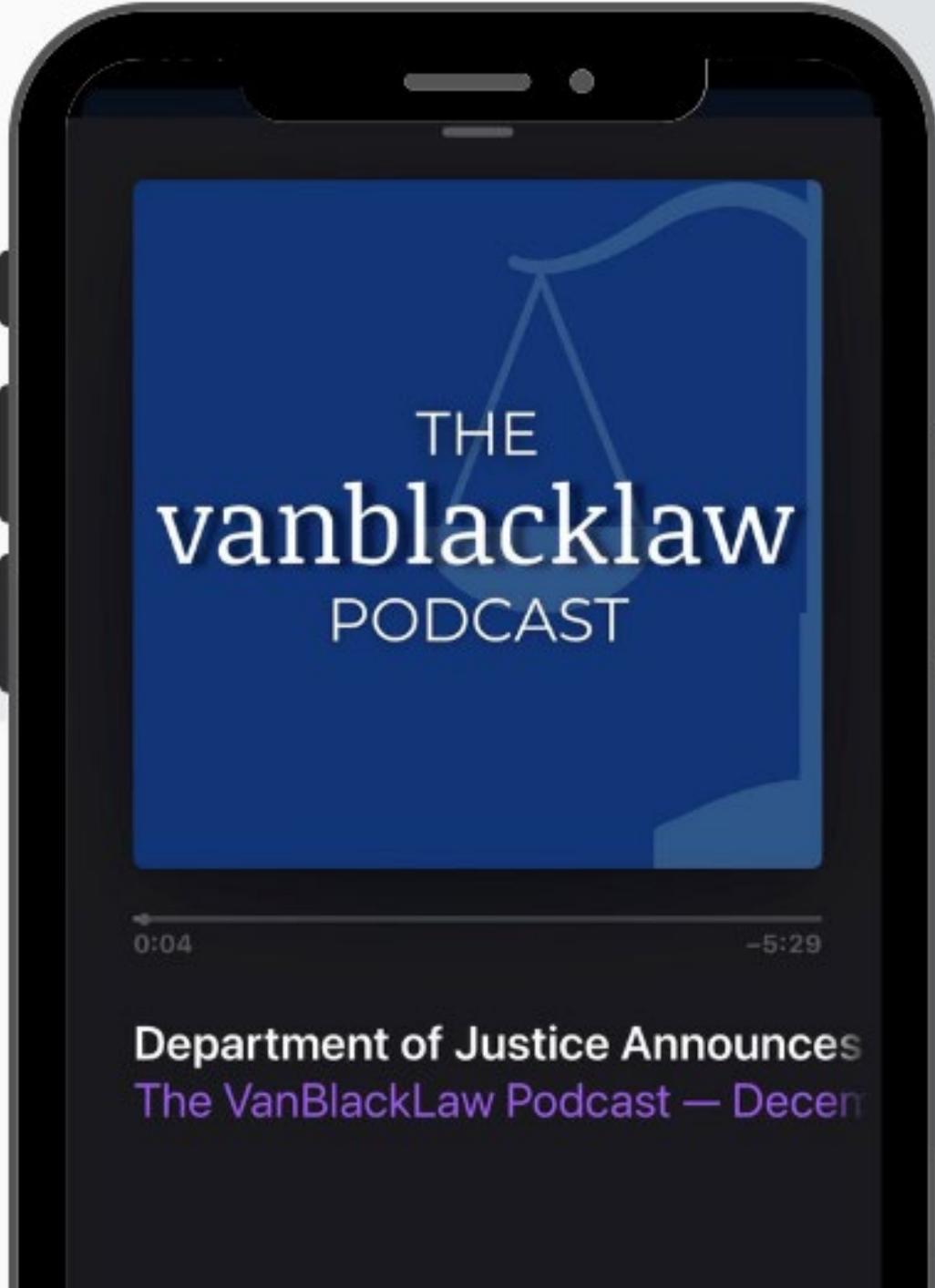


## Proceed cautiously if employee tests **THC positive**

- Why was the individual tested?
  - Was reasonable suspicion documented?
  - Can you show impairment?
- Why does employee have THC?
- Does employee have a valid written certification per VA law?
- Is employee using marijuana to treat a disability?
  - Does employee need an accommodation for the disability?
- What type of work does this employee do?
  - Safety sensitive?
  - Federal contract or jobsite? CDL driver?
  - Are you a defense industrial base sector business? Does test show amount of THC?
- Place employee on administrative leave and consult with legal counsel.



QUESTIONS?

A green rectangular graphic with a cannabis leaf pattern. At the top, the text "The Cannabis Connection" is written in white, with a cannabis leaf icon above the word "Cannabis". Below the title are two circular portraits of the hosts. The first portrait is of a man, with the text "Jonathan Gallo OF COUNSEL" below it. The second portrait is of a woman, with the text "Anne Bibeau PARTNER" below it.

The Cannabis Connection

Anne Bibeau  
PARTNER

Jonathan Gallo  
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SUBSCRIBE  
TODAY!

# THANK YOU



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H A M P T O N R O A D S

**CHAMBER**

# Next Virtual Chamber Education



## Virtual Chamber Education Series: Developing Lifelong Connections through Networking

*Tuesday, July 26, 2022*

11:30 AM -12:30 PM