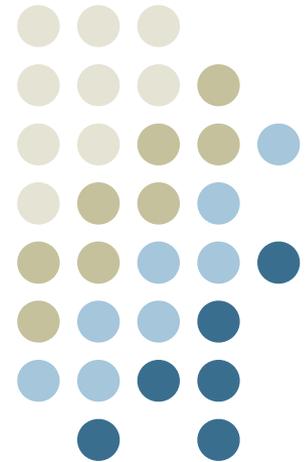
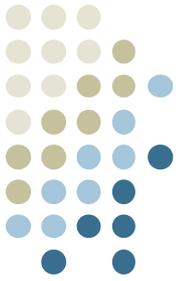


Employment Law Update in TEXAS, including, How To Run Your Business With Legalized Marijuana

Heather A. Bailey, Esq.
SmithAmundsen LLC
Thursday, September 27, 2018
TMVA Annual Meeting



PRESIDENT TRUMP.... ?



- Workplace Regulation is Political, and Elections have Consequences.
- Expect increased regulation at the State and Local Levels (major emphasis on paid leave rights, minimum wage increases, pregnancy and gender protection with higher penalties, equal pay, national origin, religion, and other high visible issues --- i.e. Right to Work)



SmithAmundsen



TMVA 

Texas Merchandise Vending Association
Supporting the Vending and Office Coffee Industry



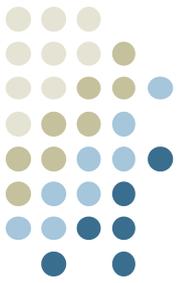
RB HIGH
BLIVE

CBSN

Next 60 Minutes of Fun!

- Wage & Hour Issues
 - Assistant Managers
 - Uncompensated Time
- Paid Sick Leave Laws
- Class Action Waivers
- Ban The Box!
- OSHA
- DOL Initiatives
- Motor Carrier Exemption
- Marijuana & the Workplace!

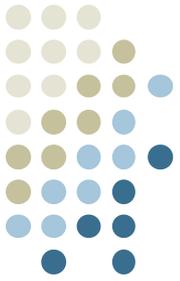




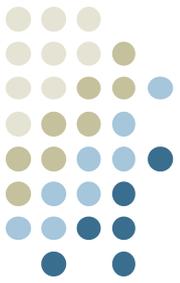
Wage & Hour Nightmare Scenarios

- Problem employees, usually after termination or separation, will look at every angle to challenge their prior employer.
 - 1) The ASSISTANT MANAGER is a huge area of disconnect under wage/hour laws and the issue of overtime exempt status.
 - 2) “Uncompensated” work time with hourly or non-exempt workers continues to cause problems for most employers.

Record Keeping Requirements



- Time cards
 - Clock in when work begins/ends
 - Clock out for lunch breaks if unpaid (make sure this is recorded somehow/some way)
- *****Auto Deductions for Lunch of 30 minutes or more is generally lawful --- but HUGE RISKS (very difficult to manage)**
- Retention
 - Keep payroll and timecards for at least three years (per Federal Law)



WHAT YOU MUST DO:

- Showing **good faith efforts** to curb and correct unlawful pay practices can be done through conducting **routine audits**. In addition, it is imperative to have a **written policy** and **complaint mechanism** through which employees can bring issues related to uncompensated time or pay concerns to the attention of HR/ Management for prompt investigation and possible remedial action.
- Good policies without **Supervisor Training** are almost worthless --- **MUST** train supervisors and enforce discipline on supervisors who “bend the rules”.



Department of Labor Initiatives



- Overtime Salary Threshold Dramatic Increase Changes
 - **\$455 per week** (\$23,660 annually) to **\$913** (\$47,476 annually)
 - Portland Metro: \$480/\$26,960
 - August 31, 2017, Judge Amos L. Mazzant of the Eastern District of Texas answered many business owners' prayers by ruling the DOL indeed exceeded its authority by more than doubling the minimum salary threshold for exempting white-collar employees
 - Alexander Acosta, DOL Secretary, has signaled:
 - Sensitive to fact the threshold has not be changed since 2004
 - May look only to lowering the salary threshold amount
 - May not use salary as a determinative factor at all
- For the time being, fight all overtime lawsuits where salary threshold is at issue

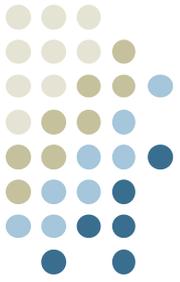


“All Politics Is Local:” Minimum Wage Laws



- Not likely a new FEDERAL minimum wage level will be enacted - \$7.25
- States / Municipalities, compelled to address themselves:
 - None found in Texas....

Who Knows About The Motor Carrier Exemption for Route Drivers?



- Want to pay your route drivers a salary and no overtime?
- Good news for Oregon, bad news for Washington
- Trucks **MUST** have a GVWR of 10,001+
- Routes cross state lines or
- Perishable (non-commissary) goods comes from out of state and don't come to rest at warehouse





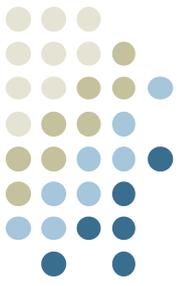
Texas W&H FYI's

- You let an employee go for any reason - final pay within 6 calendar days (quit = normal)
- No required meals or rest periods (follow Federal)
- Deductions must be authorized by EE in writing
- Time off to vote

TEXAS Employee PAID Sick Leave Law -



- **NONE!**
- **Austin Texas, maybe! Court is blocking it for now - was going into effect 10/1 - San Antonio coming soon? They tried. (64 hours accrual)**
- **Be sure to have a written policy and explain:**
 - Who is eligible? How is it earned?
 - Is there carry over vs. use it or lose it?
 - Is it paid out at termination of employment?
 - Will the Company require medical documentation?
 - What reasons may the EE use sick leave for?



Ban the Box!

Texas generally - NO!

Austin - Fair Chance Hiring Ordinance (15 or more EEs)

Take Criminal Conviction Questions off the application

- Can't advertise that criminal convictions relate to hiring
- Can't solicit criminal background until a conditional offer of employment is made

Follow EEOC guidelines from there

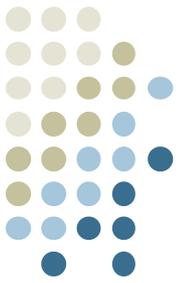
OSHA

- Focus is likely to shift:
 - Aggregate amounts of OSHA fines are likely to fall;
 - Reductions in regulations and reporting obligations that businesses consider costly;
 - Decreases in whistleblower rights and protections.
- President Trump approved the resolution to nullify a new OSHA rule
 - The new rule was to provide a 5 year SOL for recordkeeping violations instead of the standard 6 month SOL for issuing citations. This issue was litigated and ultimately the courts found that the 6 month SOL applied, so OSHA changed the rule that recordkeeping was subject to a 5 year SOL (Trump overturned this quickly through a resolution proposed by Congress).

NEW OSHA AUTOMATIC TESTING LAW



Class Action Waivers Are Enforceable!



- May 21, 2018: US Supreme Court ruled class action waivers are enforceable in Arb Agreements.
- NLRB has previously stated that this violates Section 7.
- What does it mean? Can require employees arbitrate matters individually and not through a class action.
- Just because you can, should you???????



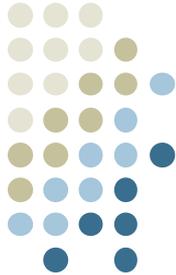
SmithAmundsen



TMVA 

Texas Merchandise Vending Association
Supporting the Vending and Office Coffee Industry

Managing Medical/Recreational Marijuana in the Workplace



Texas Marijuana Update “NONE”



- Compassionate Use Act, which [legalized the sale of a specific kind of cannabis oil](#) for Texans with intractable epilepsy. Three dispensaries have since [opened in Texas](#) to produce and sell the oil.
- 2018 may be the year - Medical?
Recreational?

Drug Tolerance in the Workplace



- **Employers *may***
 - Have and enforce a drug-free workplace policy.
 - Prohibit employees who are registered users from using, possessing, or being impaired while on the employer's premises and during hours of employment.
 - Adopt rules regarding consumption and storage.
 - Discipline employees for violating workplace drug policy.
 - Discipline employees for failing a drug test if failing to do so would put employer in violation of Federal law or cause loss of contract.

Drug Tolerance in the Workplace - Like any other narcotic or alcohol



- If it is not the employee's, then possession and use are NOT protected.
- If it is the employee's:
 - Being a registered patient is protected;
 - Underlying condition is protected;
 - Off-duty use is not subject to discipline;
 - On-duty use and impairment may be disciplined.

Facts On The Drug



Effects: Depending on how consumed, active components that create “high” or impairment that last several hours:

- Smoking: Effects almost immediately and causes a “high” that can last 2-3+ hours.
 - Most behavioral and physiological effects return to baseline levels within 4-6 hours after drug use, although residual effects have been shown in behaviors up to 24-48+ hours after use.
- Eating: Effects start within 1-2 hours and causes a “high” that can last anywhere from 2-8+ hours.
 - Most behavioral and physiological effects return to baseline levels within 9-11+ hours after drug use, although residual effects in have been shown in behaviors up to 24-48+ hours after use.



SmithAmundsen



TMVA 

Texas Merchandise Vending Association
Supporting the Vending and Office Coffee Industry

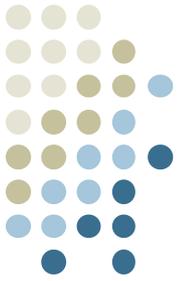
Facts On The Drug (cont.)



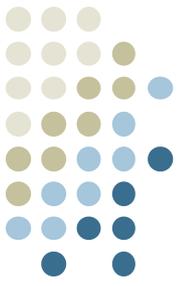
Elimination from system:

- Inactive components showing use of marijuana stay in the system anywhere from a week to several months, depending on the level of use.
- In chronic users, THC and other cannabinoids can accumulate in the fatty tissues.
- Elimination from system is not gradual decrease like alcohol.

What to do if you suspect someone of being impaired or “high” - EVEN if they have disclosed they are a registered user.



- If discipline to occur due to reasonable suspicion:
 - Fill out Reasonable Suspicion checklist.
 - Follow drug testing procedures.
 - Rely on Workplace Search Policy
 - Remember: Nondiscriminatory Application



Reasonable Suspicion?

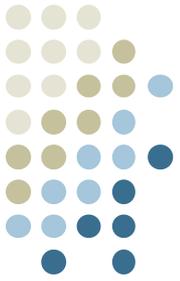
- Moods
- Depressed
- Anxious
- Irritable
- Suspicious
- Complains about others
- Emotionality and unsteadiness (e.g., outbursts of crying)
- Mood Changes after lunch or break



- Absenteeism
- Actions
- Accidents
- Patterns
- Relationships to co-workers



Drug Testing Facts



- **Drug Testing**

- Types of Tests:

- Urine;
- Blood;
- Hair; and
- Saliva.



- **Urine tests** - Most common, but does NOT test impairment!

- Tests for the non-psychoactive metabolite THC-COOH (non-active), showing whether marijuana has been used, not the active psychoactive components.

- **Blood tests** can show levels of active psychoactive component *(Some States are even setting levels similar to BACs for DUI)

- **Saliva tests** potentially can show use within several hours (approximately 6 to 12 hours), though reliability is still questionable.



SmithAmundsen



TMVA 

Texas Merchandise Vending Association
Supporting the Vending and Office Coffee Industry

Dealing with Disabled Employees...



- Remember: Underlying medical condition is still protected under ADA but ADA and FMLA do not recognize medical marijuana as a medical treatment...
- AFTER receive drug test results, BUT before disciplining or taking any adverse action -an employer should provide registered users a reasonable opportunity to contest the basis of the Employer's determination that the individual was impaired.

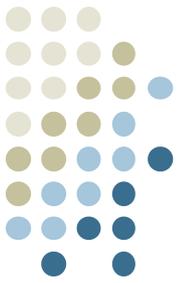


SmithAmundsen



TMVA 

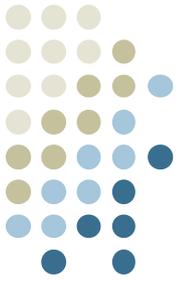
Texas Merchandise Vending Association
Supporting the Vending and Office Coffee Industry



Risk Management

- Update job descriptions - what is safety sensitive?
- Review/update employment policies to comply with the Act(s)
 - Reasonable Accommodations
 - Drug-Free, Drug Testing, Reasonable Suspicion
 - Searches
- Consider interaction with other laws (FMLA, ADA, WC, state human rights acts) and Fed. contracts





- Drug-free workplace policies should include:
 1. Types of Testing (i.e. random, reasonable, post-accident)
 2. Substances Examined (i.e. 5 panel vs. 10 panel)
 3. Methodologies (i.e. urine, blood, breath, hair, saliva)
 4. Preservation through a Chain of Custody
 5. Medical Review Officer Involvement
 6. Define “Positive Test” (include “adulterated samples”)
 7. Specifying Consequences of Positive Tests or Refusals
 8. Deferring to Legal Mandates (i.e. DOT regulations)
 9. Training of Supervisors re: Reasonable Suspicion
 10. Partnering with 3rd Parties to Raise Awareness



Educate Employees on Your Position Towards Medical Marijuana



- Provide clear information on the Employer's position of Medical Marijuana in your Drug and Alcohol Testing Policy.
- Address medical marijuana use and impairment in Safety Training and/or Orientation
 - Go through the potentially dangerous impairing effects of marijuana in the workplace.
 - Address Employer's policies - Get NEW Acknowledgment.
- Address any changes to policies and procedures.
- Address ADA and reasonable accommodation concerns.

Educate Supervisors on Policy Changes and Drug Impairment



- Make sure familiar with changes in policies, procedures and any new forms.
- Provide training to recognize signs of drug use and impairment (Whether due to marijuana, alcohol, or other substances)
REASONABLE SUSPICION
- Address procedure for responding to questions from an employee or applicant
 - Who is a registered user; or
 - About the use/storage of medical marijuana.
- Make clear the Confidential Medical nature of employees or applicants that are registered users of marijuana.



SmithAmundsen



TMVA 

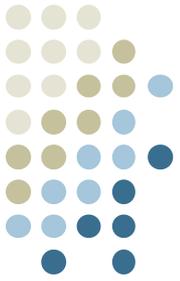
Texas Merchandise Vending Association
Supporting the Vending and Office Coffee Industry

Areas of Potential Legal Challenges



1. REASONABLE SUSPICION TESTING BASED ON ASSESSMENT MADE AND CONDUCTED BY UNTRAINED PERSONNEL.
2. AMBIGUOUS POLICY LANGUAGE THAT FAILS TO PROPERLY DEFINE WHAT CONSTITUTES POST-ACCIDENT or POST-INJURY TESTING.
3. RANDOM TESTING ADMINISTERED WITHOUT PROPER SAFEGUARDS.
4. INCONSISTENT POLICY IMPLEMENTATION --- UNEQUAL TREATMENT.
5. UNLAWFUL MOTIVATION PROVEN THROUGH THE USE OF A DRUG TEST.

Questions?



Heather A. Bailey, Esq.

SmithAmundsen LLC

Partner, Labor & Employment Practice Group

312.894.3266 | hbailey@salawus.com

www.laborandemploymentlawupdate.com

NAMA DEAL! 15 Minutes Free Advice Each Quarter



SmithAmundsen



TMVA 

Texas Merchandise Vending Association
Supporting the Vending and Office Coffee Industry