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# FUNDAMENTALS OF WORKERS' COMPENSATION AND EMPLOYMENT LAW

MAY 25, 2023

HEIDELBERG, STEINBERGER, BURROW & ARMER, P.A. & GULF COAST HUMAN RESOURCE ASSOCIATION

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## FEATURING

KARL R. STEINBERGER, ESQ.

TRISTAN RUSSELL ARMER, ESQ.

MYRA A. CUNNINGHAM, ESQ.

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## INTRODUCTION

► The 2023 Guidebook is available for download on our website under the "webinar" tab.

MISSISSIPPI WORKERS' COMPENSATION

"A GUIDEBOOK FOR EMPLOYERS AND EMPLOYEES"

2023

U.S. DOL

DEPARTMENT OF LABOR

OFFICE OF SAFETY AND HEALTH

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# Elements of a Claim/Benefits

TRISTAN ARMER

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# THE ELEMENTS OF A CLAIM

- ▶ There are three essential elements:
  - Injury- job related injury
  - Disability- incapacity to earn wages
  - Causation- causal connection
- ▶ Claimant bears initial burden of proof

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# SPECIAL CASES

1. Found Dead Presumption
2. Heart Attacks
3. Occupational Disease
4. Emotional Injuries:
  - a. Mental/Physical
  - b. Physical/Mental
  - c. Mental/Mental

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# Benefits

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## BENEFITS

- ▶ Disability
- ▶ Medical Benefits
- ▶ Maintenance During Vocational Rehabilitation
- ▶ Death Benefits
- ▶ Funeral Expenses

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## DISABILITY

- Compensation for Disability
  - ▶ Disability compensation is either temporary or permanent, total or partial, scheduled or non-scheduled
  - ▶ Maximum weekly compensation is 66 2/3 of Mississippi's average weekly wage

For 2023, Mississippi's "Max Rate" is \$585.82

Maximum Indemnity Exposure for 2023:

$\$585.82 \times 450 \text{ weeks} = \$263,619.00$

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## DISABILITY

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- Temporary Total Disability
  - $66\frac{2}{3}$  of the AWW not exceeding maximum weekly rate
- Waiting Period of 5 days before compensation must be paid
  - does not have to be consecutive
- Temporary Partial Disability
  - $66\frac{2}{3}$  of the difference between the AWW and earning after injury

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## DISABILITY

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- Permanent Total Disability
  - Once claimant reaches MMI, there may be permanent benefits
  - PTD is  $66\frac{2}{3}$  of AWW subject to maximum rate x's 450 wks
- Permanent Partial Disability
  - Scheduled Benefits
    - The statute provides for all body parts to be paid based upon a schedule
    - At MMI, doctor awards anatomical rating

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## MEDICAL BENEFITS

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- ▶ Statute requires Employer/Carrier to furnish medical treatment
- ▶ Medical benefits for life
- ▶ To be compensable, the treatment must be:
  - (1) reasonable;
  - (2) necessary; and
  - (3) causally related to employment

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## Utilization Review - Employer's medical exam

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- E/C may elect to have an EME in lieu of UR
- IW and provider must be notified of election within 2 business days
- Unreasonable delay may result in penalties and/or attorney's fees or expenses and/or waiver of right to an EME

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## EX PARTE COMMUNICATIONS WITH MEDICAL PROVIDERS

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- "Ex Parte" means "done for, on behalf of, or on the application of one party only"
- Ex parte communications are prohibited once a Petition to Controvert or equivalent has been filed
- Evidence obtained from unauthorized ex parte contacts is inadmissible

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## DEATH BENEFITS

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- ▶ Statute describes who is eligible and amounts.
  - ▶ Includes widow's allowance \$1000 & funeral expense reimbursement \$5000
  - ▶ Widow = 35% of AWW subject to cap
  - ▶ Children = + 10% of AWW; 15% if widow marries out; 25% each child without depending widow
  - ▶ Grandchildren or brothers/sisters
- ▶ Dependency statute

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# DEFENSES AND WAYS TO REDUCE LIABILITY

Karl Steinberger

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# JURISDICTION

- Concurrent Jurisdiction
  - Between two states or between a state and the federal government
- Maritime claims excluded
- Less than 5 employees
- Owner exemptions



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# APPORTIONMENT

- Applies only to permanent disability benefits
- Employer/Carrier must establish:
  - A pre-existing physical handicap, disease or lesion
  - Shown by conclusive medical findings
  - Condition is material contributing factor to the disability following the injury
- Compensation can be reduced by proportion which pre-existing condition contributes to the disability following injury

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## STATUTE OF LIMITATIONS

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- ▶ General Statute of Limitations: within 2 years of the date of injury or death
  - ▶ Applies to "medical only" cases.
  - ▶ Exception for minors and those with a mental disability.
- ▶ 1 year Statute of Limitations requires proper filing of Form B-31
- ▶ A 30-day reporting law applies only if prejudice is proven
- ▶ Claims can be reopened in certain situations



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## STATUTE OF LIMITATIONS

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- ▶ Exceptions to Defense of SOL
  - Wages in Lieu of compensation
  - Latent injury SOL starts date claimant knew/should know he/she incurred a compensable injury
  - Equitable tolling for intentional misrepresentation of coverage
- ▶ Statute of Limitations may be tolled and not enforced:
  - If Employer fails to properly file first report (B-3) along with other misrepresentation

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## INDEPENDENT CONTRACTOR

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- ▶ Generally independent contractors not a covered employees
- ▶ Except employee of uninsured subcontractor becomes "statutory employee" of general contractor
- ▶ "Dual Employment" or the "loaned servant" doctrine may apply where a person is employed by more than one employer

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## INTERVENING CAUSE

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- ▶ Every natural consequence that flows as a direct and natural result of the injury also "arises out of the injury and is compensable"
- ▶ If an independent, intervening agency interrupts the chain at any point, then liability of employer and carrier ceases
- ▶ "Quasi-course of employment" standard
  - Necessary or reasonable activities that would not have been undertaken but for the compensable injury

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## FRAUDULENT INDUCEMENT

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- ▶ False representation
- ▶ Employer must have "relied" upon the false representation; substantial factor in the hiring
- ▶ Causal connection between the false representation and the injury

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## DEVIATION

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- ▶ Injury in or around work activity not compensable if employee engages in purely personal conduct
- ▶ "In the course of" test
  - Actuated at least in part by a duty to serve the employer
  - Reasonably incidental to the employment

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## GOING AND COMING CASES

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- ▶ Generally, hazards encountered by employees while going to or coming from their regular place of work are not incident to their employment and are not compensable



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## GOING AND COMING CASES

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- ▶ Many exceptions to rule, to name a few:
  - Traveling Employees v. Situs Employees
  - Employer furnishes transportation (vehicle or reimbursement)
  - Injury results in parking place in close proximity to employer's premises
  - Personal Comfort activities
  - Hazard on single route to work

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## THIRD PARTY CLAIMS

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- ▶ Employee or dependents can file suit against any other party responsible for employee's injury or death
- ▶ Employer/Carrier can be reimbursed from the proceeds of the suit for the compensation and medical payments
- ▶ Made whole doctrine does not apply
- ▶ Medicare/Medicaid liens have priority
  - 2022 USSC case strengthens Medicaid lien.

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## INTOXICATION, ILLEGAL DRUGS & IMPROPER PRESCRIPTION Rx

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- ▶ If an employee claims a work injury and:
  - Positive drug test for an illegal drug, or
  - Positive drug test for a legal drug but its use is contrary to the prescriber's instructions or label warnings, or
  - Positive Marijuana as a Medical Cannabis Patient
  - .08% or more Blood Alcohol Content (BAC), or
  - Refusal of a blood test,
- ▶ Proximate cause of injury is presumed to be illegal use of drugs, use of medical marijuana, high BAC or test refusal
  - Deny the claim
- ▶ The employee may rebut the presumption.



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## WILLFUL INTENT TO INJURE

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- ▶ Claimant intentionally injures himself or others
- ▶ Co-employee (including an employer or superior) either intentionally or accidentally injures the claimant for non-work-related reason
- ▶ Third party intentionally injures employee
  - must be "because of" employment
- ▶ "Zone of special danger doctrine"
- ▶ "Imported danger doctrine"



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## ACTS OF GOD

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- ▶ Employer/Carrier not responsible for an accident which results directly from an Act of God because the injury is not causally related to the employment



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## AVERAGE WEEKLY WAGE

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- ▶ Recommended that an accurate average weekly wage always be calculated
- ▶ Calculated based upon the earnings in the 52 wk period immediately prior to the DOI
  - If not employed for 52 consecutive weeks, then earnings are divided by number of weeks worked, provided result is "just and fair to both parties".
  - If impractical, average weekly wage is that earned by similar situated employee.

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## E.M.E./I.M.E.

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- ▶ For the purpose of evaluating temporary or permanent disability or medical treatment
- ▶ More accurately termed an "Employer's Medical Examination" IME is appointed by the ALJ
- ▶ Opinion of EME doctor can be accepted over that of the employee's treating physician



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## VOCATIONAL REHABILITATION

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- ▶ Used to assist in the evaluation of a claim for a non-scheduled injury
- ▶ There is no express authority under the Act to require a claimant to be interviewed or meet with a vocational rehabilitation expert

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## SURVEILLANCE

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- ▶ Can be used to determine whether or not the claimant is accurately relating physical limitations
- ▶ May also be presented to the claimant's attorney as a settlement tool and at the hearing held before the ALJ



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## SECOND INJURY FUND

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- ▶ Fund pays for the permanent disability benefits exceeding the amount for which the employer or carrier is liable for the loss of use of a second scheduled member

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## Bad Faith

MYRA A. CUNNINGHAM

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## BAD FAITH CLAIMS

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- Bad Faith claims are the exception to the Workers' Compensation Exclusivity Rule
- BF claims may be filed against employers, carriers and/or any third-party administrators based upon a willful denial of a claim without reasonable grounds
- Look out! Adjusters have been sued too.

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## ELEMENTS OF BAD FAITH

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- Contract of Workers' Compensation Insurance
- Denial of a claim without a legitimate and arguable reason
- Denial was willful and intentional or maliciously wrong

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## BAD FAITH CLAIMS

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- Examples of Bad Faith:
  - Terminating benefits only because claimant reached MMI or failed to attend doctor's appointment
  - Failure to make adequate initial investigation or failure to continue to investigate during pendency of the claim

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## BAD FAITH CLAIMS

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- More Examples of Bad Faith:
  - Withholding benefits to force a settlement
  - Failing to pay impairment rating awarded by treating physician at MMI
  - Delaying investigation after learning of errors reported by claimant

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## BAD FAITH CLAIMS

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- Suggestions to Avoid Bad Faith:
  - Encourage prompt reporting of claims
  - Thoroughly and promptly investigating each claim
  - File Form B-52 if investigation is not complete in 14 Days
  - Document arguable & legitimate reasons for every denial
  - Assume claims file will be discoverable in litigation
  - Avoid ex-parte communications
  - When in doubt, get advice from counsel

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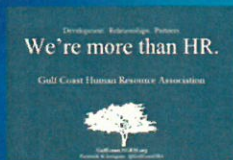
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## JULIANIS WADE, GULF COAST HUMAN RESOURCES ASSOCIATION

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<https://gulfcoaststem.org/>

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Introduction2

► Today we hear of domestic violence, crime, school shootings, protests turning violent and terrorist events spilling into our work environments. Workplace violence is not limited to your current or former employees; it may be perpetrated by customers, family members or even strangers fixated on making a statement.

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Introduction (cont.)3

► The primary focus of this training is to help supervisors be more aware of warning signs of potential violent situations and steps you can take to keep yourself and others out of harm's way. But if there is a situation that cannot be stopped, you also need to be aware of your employer's emergency response procedures so that you can assist employees.

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### Introduction (cont.)

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- ▶ Workplace violence is one of the major causes of death in the corporate world, second only to transportation.
- ▶ Every year, millions of American workers report having been victims of workplace violence.

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### INTRODUCTION (CONT.)

- 23% of Employees worldwide have experienced violence or harassment at work.
- Over 2.6 million Americans were victims of non-fatal workplace injuries in 2021.

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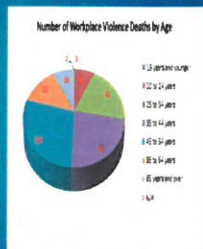
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- There were 481 workplace homicides in 2021, up from 392 homicides in 2020.
- In 2021, there were 387 cases on intentional shootings resulting in the death of the victim.

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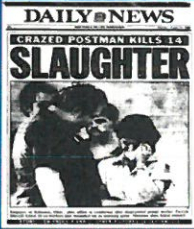
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## Introduction (cont.)

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One of the most horrendous workplace violence incidents occurred over 30 years ago. It was the 1986 Edmond Post Office Massacre, which at the time was the nation's third-largest mass murder committed by one individual in a single incident. Patrick H. Sherrill, a postal worker, reported to work on August 30, 1986, after receiving a formal reprimand the day before. Sherrill was armed with three semiautomatic pistols and ammunition. By the end of the day, Sherrill killed 14 postal workers and wounded six additional workers before killing himself. This instance of workplace violence coined the commonly known phrase "going postal."

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## Introduction (cont.)

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- The following are examples of three acts of workplace violence by employees or former employees that resulted in the deaths of 21 victims:

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## California Shooter

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- On June 25, 2019, a parts department representative of an automobile dealership in Morgan Hill, California was fired. He walked out to his car in the parking lot, got his gun and returned to shoot and kill his service and parts director, the parts manager and one other employee. The investigation concluded he was "disgruntled".

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### California Shooter (cont.)

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- ▶ CA shooter (name not released)
- ▶ Reported to be in his 60s.
- ▶ A co-worker described the shooter as "a very quiet individual, just kind of minded his own business, kept to himself, he did his job."

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### California Shooter (cont.)

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- ▶ CA Shooter (name not released) (cont.)
- ▶ After being fired, he stayed at the dealership for a time.
- ▶ He was heard to say he didn't understand why he was fired.
- ▶ He later shot and killed himself.

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### Samuel James Cassidy

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- ▶ Samuel James Cassidy, was a maintenance worker for the Santa Clara Valley Transportation Authority (VTA) in San Jose, California . He earned over \$160,000 a year .
- ▶ On May 26, 2021, he set fire to his home, reported for work, shot and killed 9 co-workers and then committed suicide.

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## Samuel James Cassidy (Cont.)

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- ▶ He was 57 years old
- ▶ The shooting occurred in two separate buildings during the busiest time of the day - over 100 people were working at the time of the shooting.

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## Samuel James Cassidy (Cont.)

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- ▶ He targeted some of the people and spared others from being shot
- ▶ He fired a total of 39 rounds from three semi-automatic handguns which were legally obtained
- ▶ He had been employed for eleven years. He was promoted in 2014
- ▶ His ex-wife described him as having anger issues and often became angry at his co-workers and at the VTA for what he believed to be its unfair work assignments

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## Samuel James Cassidy (Cont.)

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- ▶ She said he talked about killing people at the workplace for over ten years
- ▶ Cassidy had a pattern of insubordination and had gotten in verbal altercations with co-workers on at least four separate occasions
- ▶ He faced disciplinary action but was never formally discipline
- ▶ In April of 2021 he aired his grievances over the radio communication system
- ▶ He was angered over a change in policy that ended cash pay-outs for unused vacation days

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### Andre Marcus Bing

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► On November 22, 2022, Andre Marcus Bing, who was a night shift manager at the Walmart Supercenter in Chesapeake, Virginia, shot and killed six co-employees and injured four others before he killed himself.

- He was 31 years old.
- He legally purchased a 9mm handgun on the morning of the shooting.
- Bing had no criminal record.
- He had worked for Walmart for the past 12 years and had a good record.
- He was described as difficult and known to be hostile to others.

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### Andre Marcus Bing (Cont.)

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- A survivor reported Bing was laughing as he opened fire.
- Another said he seemed to target specific people and shot them multiple times even if they had already been hit and seemed dead.
- In his death note he claimed he was mocked by co-workers and that his phone had been hacked. He repeatedly mentioned God wanting forgiveness for his actions, claiming he was "lead by Satan." He was distressed and he did not have a wife.

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### Objectives

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- At the close of this session, you will be able to:
  1. Explain what workplace violence is.
  2. Tell how to recognize violent potential.
  3. Cite techniques to diffuse potentially violent situations.
  4. Describe how to respond effectively to workplace violence.

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## Workplace Violence Defined

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- ▶ Workplace violence is:
  - An assault or other violent act or threat that occurs in, or is related to, the workplace and entails a substantial risk of physical or emotional harm to individuals or damage to company resources or capabilities.

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## Workplace Violence Defined (cont.)

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- ▶ Workplace violence may come from:
  - Co-workers
  - External visitors or customers to the workplace
  - Former employees
  - Vendors or independent contractors
  - Family members or domestic partners

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## Workplace Violence Defined (cont.)

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- ▶ Workplace violence is not:
  - Annoying behavior
  - Disliking a co-worker
  - A rude customer



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## Recognizing Violent Potential

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- It can be very difficult to know when a person is going to be violent. While not all people show the following signs, these types of behaviors and physical signs can serve as warning signs that a situation could turn violent.
- One warning sign may not be a particularly strong predictor of violence, but numerous warning signs increase the potential for violence.

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## Recognizing Violent Potential (cont.)

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- ▶ History of violence:
  - Fascination with weapons, acts of violence or both.
  - Demonstrated violence toward inanimate objects.
  - Evidence of earlier violent behavior.
- ▶ Threatening behavior:
  - States intention to hurt someone.
  - Holds grudges.
  - Demonstrates excessive behavior (e.g., phone calls, gift giving, obsessions).
  - Seems preoccupied with violence.

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## Recognizing Violent Potential (cont.)

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- ▶ Intimidating behavior:
  - Is argumentative
  - Displays unwarranted anger
  - Is uncooperative, impulsive or easily frustrated
  - Challenges peers and authority figures
- ▶ Increase of personal stress:
  - An unreciprocated romantic obsession
  - Serious family or financial problems
  - Recent job loss



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## Recognizing Violent Potential (cont.)

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- ▶ Negative personality characteristics:
  - Is suspicious of others
  - Has a sense of entitlement
  - Is unable to take criticism
  - Feels victimized
- ▶ Marked changes in mood or behavior:
  - Displays extreme or bizarre behavior
  - Talks about irrational beliefs or ideas
  - Appears depressed or has heightened anxiety
  - Demonstrates a noticeable decline in work performance

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## Recognizing Violent Potential (cont.)

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- ▶ Socially isolated:
  - Has a history of negative interpersonal relationships
  - Has few family or friends
  - Views the workplace as a home and co-workers as "family"
  - Has obsessive involvement in his or her job

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## Techniques to Diffuse Violence

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- ▶ A potentially violent person may be demonstrating these characteristics:
  - Speaking loudly, frantically or quickly
  - Gesturing wildly
  - Using aggressive stances and gestures, such as pointing, getting close or clinching fists
  - Making threats and personal insults

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## Techniques to Diffuse Violence (cont.)

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- ▶ Some violent situations cannot be stopped; however, you can use proven techniques and take steps to reduce a situation that is escalating.

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## Techniques to Diffuse Violence (cont.)

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- ▶ Things to do when dealing with a potentially violent person:
  - Assess the situation in your mind.
  - Project calmness.
  - Be patient, empathetic, and encourage the person to talk.
  - Focus your attention on the person so that the person feels that you are interested in what he or she has to say.

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## Techniques to Diffuse Violence (cont.)

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- ▶ Things to do when dealing with a potentially violent person (cont.):
  - Maintain a relaxed yet attentive posture and position yourself at a right angle instead of directly in front of the person.
  - Ask for small specific favors, such as if you could talk in a quieter area.
  - Be reassuring and point out choices.
  - Arrange yourself so that your exit is not blocked.

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## Techniques to Diffuse Violence (cont.)

31

- ▶ Actions to avoid when dealing with a potentially violent situation:
  - Do not be the hero. Your focus should be diverting the aggressive individual and keeping others safe without putting yourself in harm's way.
  - Do not make promises you cannot keep.
  - Do not make physical contact with the individual.

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## How to Respond to Emergency Situations:

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1. Contact local law enforcement (911) and follow instructions given
2. Get people away from the scene as quickly as possible
3. Secure the area, if possible
4. Stay calm

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## Responding Effectively to Workplace Violence

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- ▶ After a violent incident has occurred in your workplace, it is important to immediately begin to work with your staff to heal and move on.
  - Step 1: Immediate Recovery
  - Step 2: Evaluation
  - Step 3: Employee Assistance Program (EAP)

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## Responding Effectively to Workplace Violence (cont.)

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### ► Step 1: Immediate Recovery

- Anyone who experiences a crisis first hand will go through several emotional stages in varying degrees. It is important to recognize what stage your employees are in so that you can provide empathy and understanding.

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## Responding Effectively to Workplace Violence (cont.)

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### ► Step 1: Immediate Recovery (cont.)

- Stage 1: An employee experiences emotions such as shock, disbelief, denial or numbness. Physically, the employee is in "fight or flight" mode. Heart rate, sensory perception and adrenaline levels are increased.

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## Responding Effectively to Workplace Violence (cont.)

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- Stage 2: Commonly called the "impact" stage, in which the employee may feel a variety of intense emotions, including anger, fear, rage, grief, sorrow, guilt or depression. This stage may last a few days, a few weeks or a few months.
- Stage 3: The reconciliation stage. The employee tries to make sense of the event, understand its impact and reach closure after the event.

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## Responding Effectively to Workplace Violence (cont.)

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### ► Step 2: Evaluation

- During this step, you should review the incident to determine if everything was done that could have been done to prevent the incident from happening again.
- You should also make suggestions to upper management on improvements or a change in practices that may prevent this situation in the future.

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## Responding Effectively to Workplace Violence (cont.)

38

### ► Step 3: EAP

- Authorities and first responders should be the first to intervene in hostile situations. After the immediate threat has been resolved, employers should refer all employees affected (directly or indirectly) by the incident to your EAP.

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## Workplace Security Procedures

39

### ► Know whom to contact:

- It is important to have a plan on how to handle workplace violence situations. When developing a prevention program, it is important to know whom to contact, when to contact and how to contact.
- Post the plan on desks or phones in all public company places such as reception areas and cash registers.

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## Workplace Security Procedures

40

- Ensure employees are aware of procedures and safety measures before they may be placed in a potential risky situations. Identify security concerns, situations, and areas in the workplace that are more likely to create emotional responses or receive emotional responses:
  - Dark or secluded parking areas. Are any additional security options needed?



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## Workplace Security Procedures (cont.)

41

- Situations when employees may be working alone. What steps can we take to create a safe situation for them?
- Front desk/reception where visitors first enter the facility. What training or changes can we make to improve security in this area?
- Termination meetings. What steps can we take to reduce the risk of these types of emotional situations turning violent?

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## Workplace Security Procedures (cont.)

42

- Develop and review procedures for the following:
  - Calling for help.
  - Calling for medical assistance.
  - Emergency escape procedures or routes.
  - "Safe spots" within and outside the facility.
  - Accounting for all employees after the event.
  - Securing the work area after the event.

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Workplace Security Procedures (cont.)43

▶ Practice Makes Perfect

- It is important to practice your contact procedures and conduct workplace violence drills so that all employees are well versed on what to do when a situation occurs.

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Effectiveness of Prevention Techniques44

▶ CA shooter (name not released)

- ▶ Samuel James Cassidy
- ▶ Andre Marcus Bing
- ▶ Conner James Sturgeon

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California Shooter45

▶ On June 25, 2019, a parts department representative of an automobile dealership in Morgan Hill, California was fired. He walked out to his car in the parking lot, got his gun and returned to shoot and kill his service and parts director, the parts manager and one other employee. The investigation concluded he was "disgruntled".

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## California Shooter (cont.)

46

- ▶ CA shooter (name not released)
  - Reported to be in his 60s.
  - A co-worker described the shooter as "a very quiet individual, just kind of minded his own business, kept to himself, he did his job."

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## California Shooter (cont.)

47

- ▶ CA Shooter (name not released) (cont.)
  - After being fired, he stayed at the dealership for a time.
  - He was heard to say he didn't understand why he was fired.
  - He later shot and killed himself.

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## Samuel James Cassidy

48

- ▶ Samuel James Cassidy was a maintenance worker for the Santa Clara Valley Transportation Authority (VTA) in San Jose, California. He earned over \$160,000 a year.
- ▶ On May 26, 2021, he set fire to his home, reported for work, and shot and killed 9 co-workers and then committed suicide

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### Samuel James Cassidy (Cont.)

49

- ▶ He fired a total of 39 rounds from three semi-automatic handguns which were legally obtained
- ▶ His ex-wife described him as having anger issues and often became angry at his co-workers and at the VTA for what he believed to be its unfair work assignments

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### Samuel James Cassidy (Cont.)

50

- ▶ Cassidy had a pattern of insubordination and had gotten in verbal altercations with co-workers on at least four separate occasions.
- ▶ He faced disciplinary action but was never formally disciplined.

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### Andre Marcus Bing

51

- ▶ On November 22, 2022, Andre Marcus Bing, who was a night shift manager at the Walmart Supercenter in Chesapeake, Virginia, shot and killed six co-employees and injured four others before he killed himself.
  - He had worked for Walmart for the past 12 years and had a good record.
  - He was described as difficult and known to be hostile to others.

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### Andre Marcus Bing (Cont.)

52

- ▶ A survivor reported he was laughing as he opened fire.
- ▶ In his death note he claimed he was mocked by co-workers and that his phone had been hacked. He repeatedly mentioned God wanting forgiveness for his actions, claiming he was "lead by Satan." He was distressed because he did not have a wife.

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### Be Aware of Employee's Rights

53

- ▶ Libel
- ▶ Slander
- ▶ Employee's Privacy Rights



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### Be Aware of Employee's Rights (cont.)

54

- ▶ Americans with Disabilities Act
  - Protects "qualified individuals with a disability"
  - "Disability" is a physical or mental impairment that substantially limits a major life activity. Individuals are protected if they have a disability, have a record of a disability, or are regarded as having a disability

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## Be Aware of Employee's Rights (cont.)

55

- ▶ Americans with Disabilities Act (cont.)
  - An employer is prohibited from discriminating against an ADA protected individual.
  - It is not a violation to discipline an employee for workplace violence.

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## Summary

56

- ▶ Workplace violence is an assault or other violent act or threat that occurs in, or is related to, the workplace and entails a substantial risk of physical or emotional harm to individuals or damage to company resources or capabilities.
- ▶ Workplace violence can occur from a number of sources, including co-workers, customers and family members.

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## Summary (cont.)

57

- ▶ Warning behaviors of violence may include:
  - History of violence.
  - Threatening behavior.
  - Intimidating behavior.
  - Increase in personal stress.
  - Negative personality characteristics.
  - Marked changes in mood or behavior.
  - Social isolation.

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Summary (cont.)

58

► Tips for diffusing escalating situations:

- Assess the situation in your mind.
- Project calmness.
- Be patient and empathetic and encourage the person to talk.
- Focus your attention on the person so the person feels that you are interested in what he or she has to say.

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Summary (cont.)

59

► Tips for diffusing escalating situations (cont.):

- Maintain a relaxed yet attentive posture and position yourself at a right angle instead of directly in front of the person.
- Ask for small specific favors, such as if you could talk in a quieter area.
- Be reassuring and point out choices.
- Arrange yourself so that your exit is not blocked.

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Summary (cont.)

60

How to Respond to an Emergency Situation

- Contact law enforcement (911)
- Get people away from the scene
- Secure the area

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## Summary (cont.)

61

- ▶ Be sure to protect the rights of all persons:
  - Do not libel or slander anyone.
  - Do not discriminate someone protected by the American with Disabilities Act.
- ▶ Recovering after an incident:
  - Immediate recovery
    - ... Three stages: emotional, impact and reconciliation
  - Evaluation
  - EAP

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## Summary (cont.)

61

- ▶ Develop Workplace Security Procedures
  - Identify areas that are more likely to create emotional responses.
  - Create procedures to call for help, medical assistance, escape routes, safe spots, accounting for all employees and securing the work area.
  - Remember, practice makes perfect!



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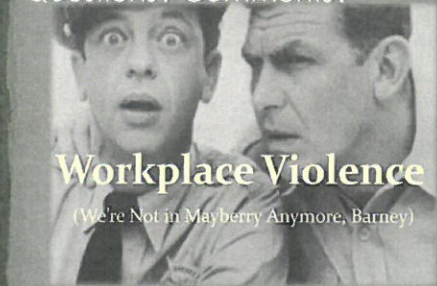
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Questions? Comments?

## Workplace Violence

(We're Not in Mayberry Anymore, Barney)



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REFERENCES

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- ▶ SHPM – Workplace Violence for Supervisors (February 2018)
- ▶ CALIFORNIA SHOOTER <http://www.casale.com/news/2018/02/28/california-shooter/>
- ▶ SAMUEL JAMES CASSIDY <http://www.fox42.com/story/34444444/>
- ▶ ANDRE MARCUS BING <http://www.fox42.com/story/34444444/>

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HEIDELBERG, STEINBERGER,

BURROW & ARMER, P.A.

ATTORNEYS

Accepting Challenges...

Delivering Results.

KARL R. STEINBERGER

711 Delmas Avenue

Pascagoula, MS 39567

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Marijuana is

has

spreading like

a...weed

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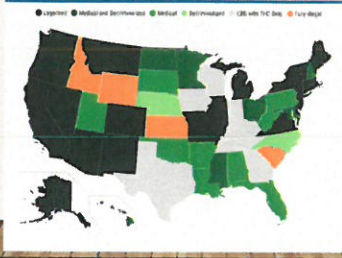
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## I. MARIJUANA



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## America's Workers Testing Positive for Marijuana Reaches 15-Year Record



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## I. MARIJUANA

- Percentage of employees testing positive for **marijuana** following an on-the-job accident rose to 7.3% in 2022, an increase of 9% compared with the prior year.
- From 2012 to 2022, post-accident marijuana positive test rates tripled, tracking with widening legalization. \*Quest Diagnostics.



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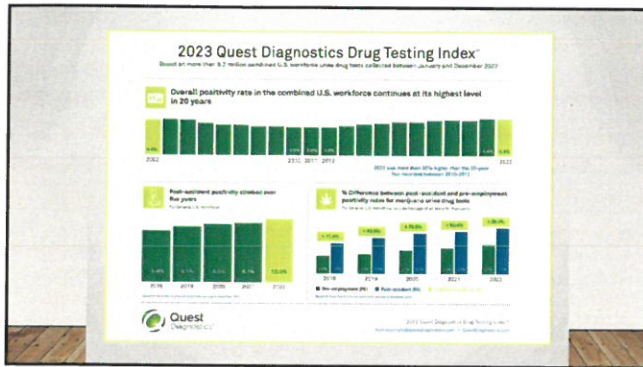
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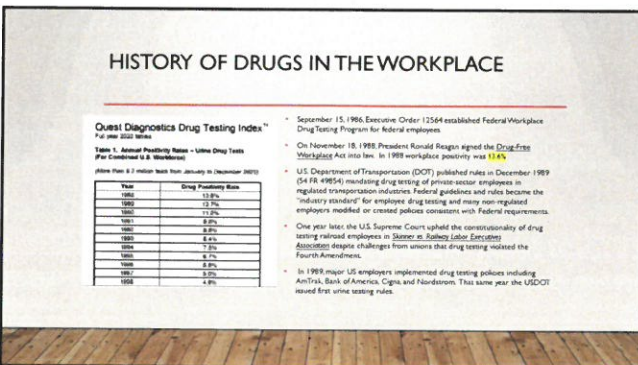
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**II. MISSISSIPPI MEDICAL CANNABIS ACT**  
**MCA § 41-137-1**

A person may be certified to treat a debilitating medical condition.

Conditions include:

- Cancer, Parkinson's, Huntington's, muscular dystrophy, glaucoma, spina, multiple sclerosis, HIV/AIDS, hepatitis, ALS, Crohn's, ulcerative colitis, irritable bowel syndrome, Alzheimer's, depression, dementia, bipolar disorder, PTSD, autism, pain refractory to appropriate opioid management, disease peripheral neuropathy spinal cord disease or severe injury
- Chronic terminal or debilitating disease or condition of a patient can be alleviated by using chronic pain intractable medical symptoms and treatment & persistent muscle spasms characteristic of multiple sclerosis
- Chronic pain or muscle pain which cannot be removed or otherwise treated & which is the generally accepted course of medical practice as an aid or cure is possible or warranted after reasonable efforts by a practitioner
- Severe medical condition or its treatment added by the MS Dept of Health

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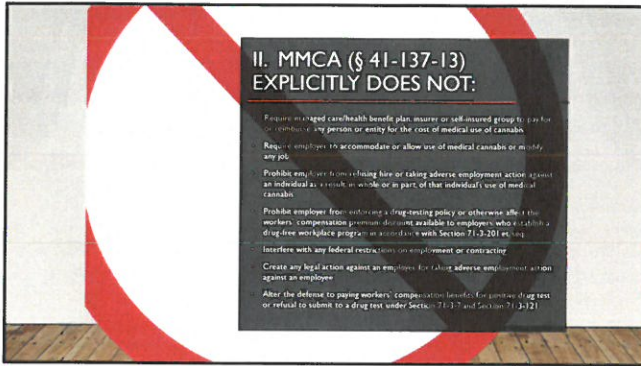
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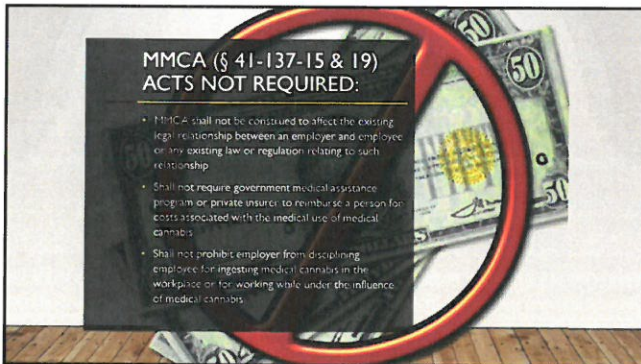
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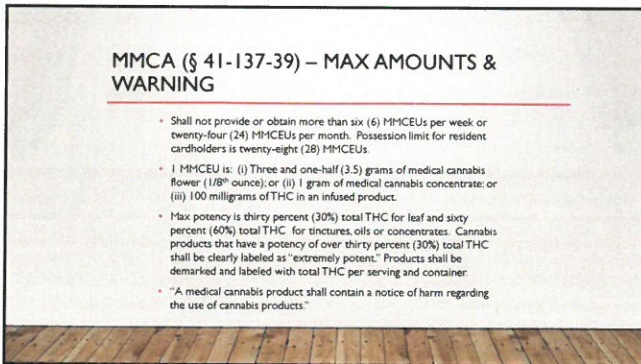
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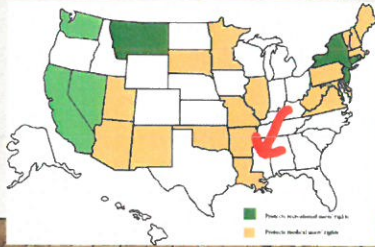
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### III. MMCA – IN THE WORKPLACE – EMPLOYEE PROTECTIONS



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### III. MMCA – IN THE WORKPLACE – EMPLOYEE PROTECTIONS

- 8 (soon 18) states protect employment rights of recreational marijuana users
- Cities (Atlanta, NYC, Philadelphia, Washington DC & others) enacted ordinances protecting employment rights of marijuana users – either all employees or all workers in their cities
- 20 states specifically prohibit employers from discriminating against workers on the basis of their use of medical marijuana. Louisiana protects employment rights of public employees who use medical marijuana
- 2 states protect medical marijuana patients' employment rights under their disability laws and the state supreme court of a 3<sup>rd</sup> ruled the state's disability & accommodation law covers medical marijuana on a case-by-case basis
- 2 states laws specify a positive drug test alone does not necessarily indicate impairment. Some states allow an employee or job applicant to present a medical explanation for a positive test result
- Almost all states do not protect "safety-sensitive" jobs from recreational or medical marijuana use
- Employment subject to the U.S. Department of Transportation's (DOT's) rules must regularly pass drug tests regardless of state and local cannabis laws



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### III. MMCA – IN THE WORKPLACE – EMPLOYEE PROTECTIONS

- ADA application –
  - Employee has qualifying condition – (real or perceived disability)
  - Doctor certifies employee for medical cannabis
  - ADA protects employee for a perceived disability & the treatment therefrom
- Employees who use prescription medications have recourse under the Americans with Disabilities Act (ADA) if they are discriminated against for using their medicine
- However, courts have found that ADA protections do not apply to medical cannabis because it remains federally illegal

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#### IV. MMCA – FEDERAL LAW



- Marijuana remains a Schedule I controlled substance under federal law
  - 21 U.S. Code § 812, Sched. I, (c)(10)
- On July 25, 2022, Senate Leader proposed a bill entitled, "The Cannabis Administration and Opportunity Act" which seeks to decriminalize marijuana and enable states to create their own cannabis-related laws – No vote scheduled

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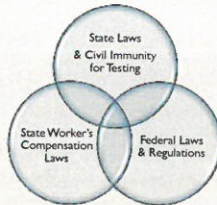
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#### V. TESTING MISSISSIPPI EMPLOYEES FOR DRUGS & MARIJUANA



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#### V. TESTING MISSISSIPPI EMPLOYEES FOR DRUGS & MARIJUANA

❖ Every employer *should* establish drug and alcohol testing policy;

- ❖ Miss. Code §71-3-201 (1997) provides a 5% reduction in workers' compensation premiums;
- ❖ Intoxication defense reduces workers' compensation costs;
- ❖ Reduces employer's liability to third parties;
- ❖ Healthier, more conscientious work force.
  - ❖ Embezzlement, missed time & distracted work

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## V. TESTING MISSISSIPPI EMPLOYEES FOR DRUGS & MARIJUANA

- ❖ Should every employer test for marijuana?
- ❖ Miss. Code Ann. Title 71, Ch. 7 – does not require testing for marijuana
- ❖ Some employers in recreational or medical marijuana states are foregoing marijuana tests
- ❖ Safety-sensitive/DOT employers should always

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## V. TESTING MISSISSIPPI EMPLOYEES FOR DRUGS & MARIJUANA

- ❖ Miss. Code § 71-7-1, et seq.
- ❖ Covers Employer/Employee Drug Testing & provides Immunity from civil lawsuits from employees
  - ❖ D.O.T. Covers transportation, aviation, pipeline & vessel workers

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## V. TESTING MISSISSIPPI EMPLOYEES FOR DRUGS & MARIJUANA

- ❖ "Valid Election" required
- ❖ WRITTEN NOTICE -
  - ❖ At least thirty (30) days prior notice (or at time of hire);
  - ❖ Identify the grounds and consequences (including refusal);
  - ❖ Notify the employee of law "Miss. Code § 71-7-1";
  - ❖ State that test results are confidential;
- ❖ Without any election – statutes do not apply but prior "common law", if any, does

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## V. TESTING MISSISSIPPI EMPLOYEES FOR DRUGS & MARIJUANA

- MSDH "standard language" freely available:
  - <http://msdh.ms.gov>
  - Covers most, but not all Written Notice Requirements
  - Employer utilizing MSDH form presumed to be in compliance with all requirements
- WCDFWP Certification Also Requires:
  - Employee Assistance Program or Resource File
  - Education Program
    - 1 Hour annually educate on addiction, disease, dangers, company policy
    - Train to recognize abuse, document abuse, maintain confidentiality, have/use EAP-Resource File and any health coverage/access to program
  - Supervisor Training
    - 2 Hours annually



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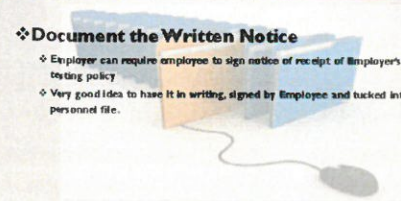
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## V. TESTING MISSISSIPPI EMPLOYEES FOR DRUGS & MARIJUANA

- Document the Written Notice**
  - Employer can require employee to sign notice of receipt of Employer's testing policy
  - Very good idea to have it in writing, signed by Employee and tucked into a personnel file.



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## V. TESTING MISSISSIPPI EMPLOYEES FOR DRUGS & MARIJUANA

- Collecting a Specimen**
  - Doctor, R.N. or L.P.N.; qualified laboratory person;
    - Certified by the Clinical Laboratory Improvement Act, College of American Pathologists or Mississippi State Board of Health
  - But not "the employer" or manager



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## V. TESTING MISSISSIPPI EMPLOYEES FOR DRUGS & MARIJUANA

### ❖ Specimen:

- ❖ Collect sufficient amount for at least two (2) tests
- ❖ CMSR 15-301-053(2011) § 104.01 Drugs - Urine for initial and confirmation tests.
- ❖ CMSR 15-301-053(2011) § 104.02 Alcohol - Breath and/or saliva for initial tests; Blood for confirmation tests.
- ❖ No Hair Follicle Testing Allowed under Mississippi Statute

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## V. TESTING MISSISSIPPI EMPLOYEES FOR DRUGS & MARIJUANA

### ❖ After Positive Test:

- ❖ Specimen must be preserved in frozen state for 90 days;
- ❖ During 90 days employee can re-test portion of the specimen at employee's expense;
- ❖ Within 5 working days after positive confirmed\* test employer must notify employee in writing of positive test & consequences of testing positive;
- ❖ Employee can require employer provide test result report;



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## V. TESTING MISSISSIPPI EMPLOYEES FOR DRUGS & MARIJUANA



### ❖ Positive Test Cont'd

- ❖ Within ten (10) working days after notice of positive test employee may submit explanation or why results do not constitute violation of employer's policy;
- ❖ If Employee's explanation is not satisfactory, Employer must place written rebuttal why the explanation is unsatisfactory and positive test report in medical and personnel records;

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## V. TESTING MISSISSIPPI EMPLOYEES FOR DRUGS & MARIJUANA

- ❖ Employer's response for a positive test :
  - ❖ Suspend or transfer an Employee to another position after obtaining positive initial screening test;
  - ❖ Employer may discharge an employee only after obtaining the results of a positive confirmed test;
  - ❖ Employer may still terminate employment for reasons not related to a positive test – such as possession of drugs at work;
  - ❖ Termination from positive confirmed test is presumed to be "for cause" and "willful conduct" for denying U.E. benefits;
  - ❖ Confidentiality

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## V. TESTING MISSISSIPPI EMPLOYEES FOR DRUGS & MARIJUANA

- ❖ Other Consequences:
  - ❖ Refusal to submit to testing administered in accordance with law provides Employer cause for termination.
  - ❖ Employer, in addition to personnel actions, may refer any Employee to counseling and rehabilitation at a site certified by the Department of Mental Health.



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## V. TESTING MISSISSIPPI EMPLOYEES FOR DRUGS & MARIJUANA

- ❖ When to Test:
  - ❖ Condition of initial employment; or;
  - ❖ Reasonable suspicion with respect to a specific individual; or;
  - ❖ For all employees on a neutral selection (random) basis.
  - ❖ Government employer has limited neutral selection testing to avoid Constitutional search & seizure protections
    - ❖ *Miss. Dept. of Emp't Sec. v. Jackson City*, 166 So. 3d 556, 558 (Miss. App. 2015) (employment as the drug-court coordinator)
  - ❖ After an accident at work\*
    - ❖ \*Consider the new OSHA rule

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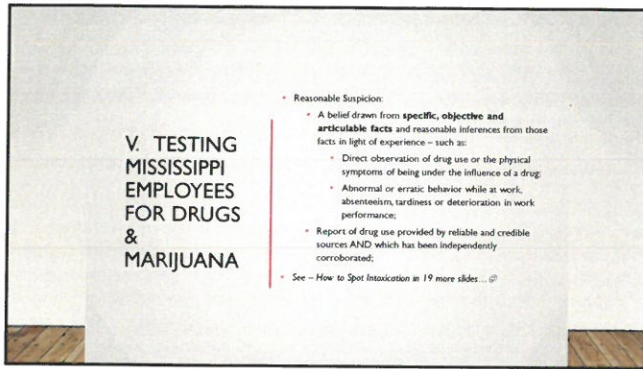
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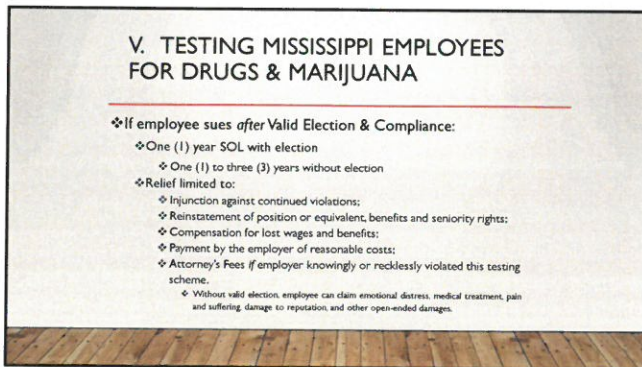
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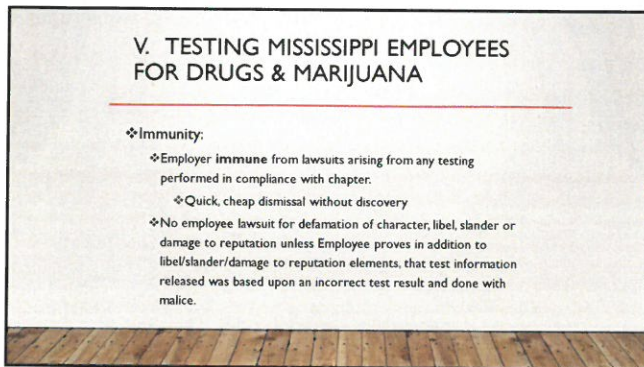
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## V. TESTING MISSISSIPPI EMPLOYEES FOR DRUGS & MARIJUANA

### ❖ Test Result as Evidence:

- ❖ Must establish chain-of-custody procedures ensuring proper records, handling, labeling & identification of specimens
- ❖ For any claim a rebuttable presumption exists the test result was valid if the employer complied with the provisions of this chapter:
  - ❖ confirmed positive test presumed a "cause" discharge and "willful misconduct"
- ❖ Test result not taken in conformity may not be evidence at all – *Southwood Door Co. v. Burton*, 847 So. 2d 833, 842 (Miss. 2003) –
  - ❖ Failed to provide employee opportunity to test specimen
- ❖ Employer pays costs of all drug and alcohol tests which it requests
- ❖ Employee or job applicant pays costs of tests requested by employee or job applicant

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## V. TESTING MISSISSIPPI EMPLOYEES FOR DRUGS & MARIJUANA

*Meek v. Cheyenne Steel Inc.*, No. 2021-WC-01219, COA, 2022 Miss. App. LEXIS 366, at \*10-11 (App. Oct. 11, 2022)

Meek argued MWCCA § 71-3-12(1) cause it did not consider MCA § 71-3-12(1).

MCA § 71-3-12(1) and MCA § 71-3-12(2)

Franklin “[a] private employer who does not make election . . . the rights and obligations of the employer and its employees will not in any way be affected by the provisions of this chapter . . .”

Based on the record there was no indication that Cheyenne implemented drug testing policy or that it requested the drug test in this instance. Hospital made decision to administer the test.

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## V. TESTING MISSISSIPPI EMPLOYEES FOR DRUGS & MARIJUANA



- Meek argued correctly that the drug test was insufficient evidence to raise the presumption of intoxication because, “[t]he drug test results do not note specific levels of positive drugs in Claimant’s system[.]”
- “However, the presence of a specific level of marijuana is not what triggers the statute.”
- MCA § 71-3-12(1) clearly states that if a drug test shows “the presence, at the time of injury, of any drug illegally used . . . it shall be presumed that the proximate cause of the injury was the use of a drug illegally.”
- “Marijuana, being a Schedule I Controlled Substance, was illegal at the time of Meek’s accident and no mechanism existed by which he could have legally ingested it.”
- “We find, therefore, that it was the very presence of marijuana in his system at the time that violated section 71-3-12(1).”

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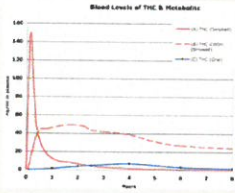
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#### V. TESTING MISSISSIPPI EMPLOYEES FOR DRUGS & MARIJUANA

❖ As of 2023 there is no reliable method of quantitatively determining if a person is impaired due to marijuana consumption on blood or body fluid concentrations *alone*.

❖ Blanke, Ph.D., *Journal of American Medical Association*, 254 p. 2618

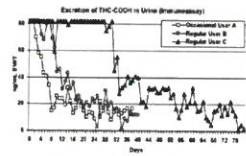
❖ "Cut-Off" detection level is 50ng/ml



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## V. TESTING MISSISSIPPI EMPLOYEES FOR DRUGS & MARIJUANA

### Urine Testing - Regular Use



IF Goossensweert, Candeliskens, Straßburgkult und Arbeitetel, Ruty OM Elio et al. Excretion patterns of cannabidiol metabolites after last use in a group of chronic users. *Clin Pharmacol Ther* 1985;38(5):572-578.

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## V. TESTING MISSISSIPPI EMPLOYEES FOR DRUGS & MARIJUANA



- Presence vs. Impairment
  - \* Relationship between drug's presence and impairing effects is complex and not well understood.
  - \* Presence of a drug does not equal impairment.
  - \* Metabolites remain in the body for days, weeks or months after impairment has dissipated.
  - \* Individuals differ considerably in the rate of absorption, distribution, action, and elimination of drugs.
  - \* Some people are more sensitive to the effects of drugs, particularly first-time or infrequent users.
  - \* Wide ranges of drug concentrations in different individuals produce similar levels of impairment in experimental situations.

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## VI. O.S.H.A. RULE

- ❖ 29 U.S.C. 660(c) – no person can discriminate against employee because employee filed, instituted or caused complaint or proceeding under OSHA
- ❖ 29 C.F.R. 1904.35(b)(1)(iv) – effective January 1, 2017; OSHA is able to cite employer for retaliation (even if the employee did not file a complaint) if employer has program that deters reporting through the threat of retaliation.
- ❖ Employers subject to OSHA – 10+ or history of accidents

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## VI. O.S.H.A. RULE

### ❖ Applied to Drug Testing:

- ❖ "Rule does not prohibit drug testing"
  - ❖ Only "prohibits employers from using drug testing or threat of drug testing to retaliate against an employee for reporting an injury or illness"
  - ❖ Principle: post-accident drug testing must be limited to tests based on a **reasonable possibility** that drug use by reporting employee was contributing factor to the injury or illness
- A. Employers may do post-incident drug testing pursuant to state or federal law, including Workers' Compensation Drug Free Workplace Policies (WCDFWP)
- B. Or, if there is a **reasonable possibility** that employee drug use could have **contributed** to reported injury or illness

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## VI. O.S.H.A. RULE

### ❖ Drugs Caused Accident/No WCDFWP

- ❖ If employee drug use could not have contributed to the injury or illness, "post-incident drug testing would likely only discourage reporting without contributing to the employer's understanding of why the injury occurred."
- ❖ "Drug testing under these conditions could constitute prohibited retaliation"



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## VI. O.S.H.A. RULE

### ❖ OSHA Example:

- ❖ employer required drug test after employee reported work-related carpal tunnel syndrome.
- ❖ employer had no reasonable basis for suspecting that drug use could have contributed to her condition & no other reasonable basis to ask.
- ❖ employer routinely requires employees who report work-related injuries to take a drug test regardless of circumstances.
- ❖ **NO WCDFWP** applicable to employer and no other state or federal law requiring employer to drug test employees who sustain injuries at work.

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## VI. O.S.H.A. RULE

- ❖ Did Employer violate section 1904.35(b)(1)(iv) by subjecting Employee X to a drug test simply because she reported a work-related injury?

❖ According to OSHA – yes.



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## VI. O.S.H.A. RULE

### ❖ OSHA Example II:

- ❖ Employee X was injured when he inadvertently drove a forklift into a piece of stationary equipment & he reported the injury to Employer. Employer required Employee X to take a drug test.
- ❖ Violation? No. Accident facts make conduct/judgment of employee questionable.

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## VI. O.S.H.A. RULE

### ❖ OSHA "objectively reasonable"

#### test criteria:

- ❖ Did all employees in the incident get tested or only the "reporting" employee
- ❖ Safety sensitive job - heightened need, less safety sensitive - less need
- ❖ Whether test is capable of measuring impairment\*
- ❖ Total absence of proximate causation



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## VI. O.S.H.A. RULE

### ❖ Meaningful Measurement:

- ❖ Currently only alcohol tests are generally able to establish a relationship between impairment and use.
- ❖ Urine drug tests currently do not
- ❖ Employers should be aware that post-incident drug testing will not necessarily indicate whether drug use played a direct role in the incident" - OSHA Guidance



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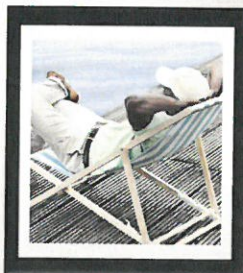
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### VI. OSHA RULE + V. TESTING MISSISSIPPI EMPLOYEES FOR DRUGS & MARIJUANA

- Non-OSHA employer =
- OSHA + WCDFWP Certification =



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## VI. OSHA RULE + V. TESTING MISSISSIPPI EMPLOYEES FOR DRUGS & MARIJUANA

- OSHA - WCDFWP Certification =



- Document causal relationship and signs of intoxication

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## VII. BETTER THAN A TEST?

- Spotting & Documenting Intoxication



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## VII. SPOT INTOXICATION

- Parish v. State, 176 So. 3d 781, 782-83 (Miss. 2015)

- Parish encountered a roadblock. Officer at the roadblock observed Parish "slowed down tremendously and did kind of a crawl roll to the checkpoint." Officer approached car and noticed "green leafy substance all over pants, some ash and he was really nervous." Officer smelled burnt marijuana on Parish's breath and in the vehicle. Parish's speech was slurred, and his eyes were red. Parish admitted smoking marijuana approximately 20 minutes prior to encountering the checkpoint. Officer searched backpack and found a hookah pipe inside. The pipe smelled of burnt marijuana.
- Officer did HGN test and did not observe any signs of impairment. Officer did a lack-of-convergence test and Parish's eyes failed to converge. Officer administered the Romberg Balance Test, which judges the subject's ability to perceive the passage of time. Parish tested within the normal range for judging the passage of time, but he exhibited eyelid and leg tremors while performing the test. Officer placed Parish under arrest for driving under influence.
- Parish consented to blood test. Mississippi Crime Laboratory tested hookah pipe also. Blood and pipe tested positive for marijuana.
- Noted dissent by Justice Kitchens -

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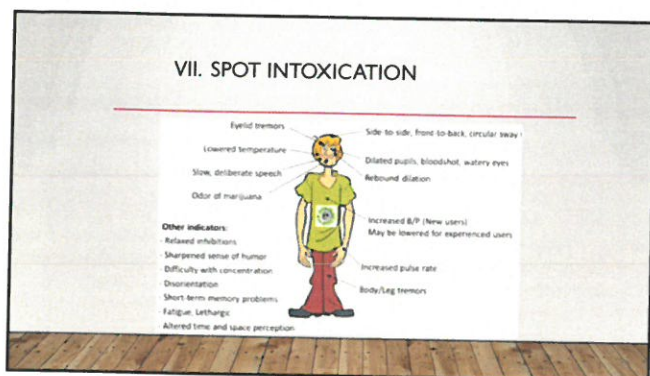
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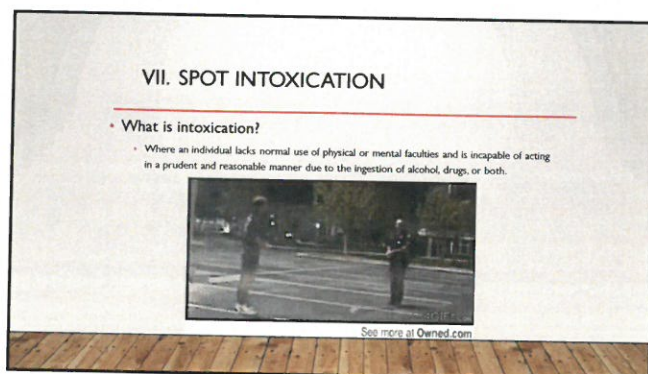
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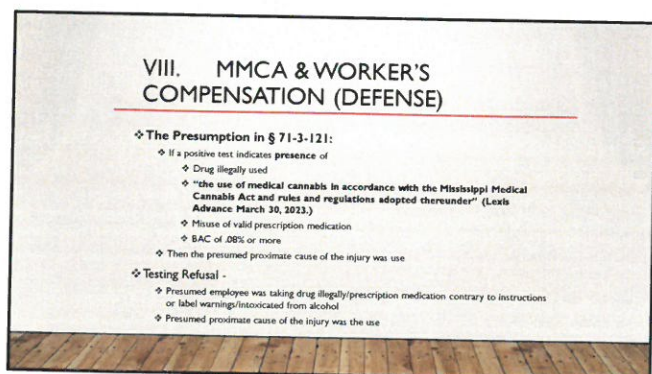
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### VIII. MMCA & WORKER'S COMPENSATION (DEFENSE)

- ❖ After establishing the presumption:
  - ❖ Burden of Proof shifts to employee "to prove"
  - ❖ Use of drugs illegally/valid prescription medication taken contrary to instructions or label warnings/**use of Medical Cannabis**/intoxication due to alcohol
  - ❖ Was not a **contributing cause** of the accident
  - ❖ Employee may still prove "no use" and "no intoxication"
  - ❖ Employee may still prove "no causation"
- ❖ Can the employer rebut- the proof of no intoxication?

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### VIII. VII. MMCA & WORKER'S COMPENSATION (DEFENSE)



- **Edwards v. World Wide Pers. Servs.**, 843 So. 2d 730, 731 (Miss. App. 2002)
  - worker injured fell off a tree
  - hospital drug screen showed concentration level of Marijuana was 111 nanograms per milliliter
    - expert testified level shown in test was not consistent with passive exposure or distant use
  - worker claimed "contact high" to marijuana smoke & conflicting testimony regarding last use
  - co-workers testified worker avoided contact with other workers and climbed on tree to cut it
  - worker was barred from receiving benefits pursuant to Miss. Code Ann. § 71-3-7

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### VII. MMCA & WORKER'S COMPENSATION (BENEFITS)

- MMCA § 41-137-13 DOES NOT:
  - Require managed care, health benefit plan, insurer or self-insured group to pay for or reimburse any person or entity for the cost of medical use of cannabis
  - Prohibit employer from enforcing a drug-testing policy or otherwise affect the workers' compensation premium discount available to employers who establish a drug-free workplace program in accordance with Section 71-3-201 et seq.
    - Terminate for "cause" and "willful violation"
- What if the Tx doctor prescribes medical marijuana?

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## VIII. MMCA & WORKER'S COMPENSATION (BENEFITS)

- 6 states – Pennsylvania, Connecticut, New Hampshire, New Jersey, New Mexico and New York – explicitly allow for employees to have their medical cannabis expenses reimbursed.
- By contrast, 6 states – Maine, Massachusetts, Minnesota, Mississippi, Florida, North Dakota, Ohio, and Washington – expressly prohibit workers' compensation insurance from reimbursing medical marijuana-related costs. Other states are silent on the issue.



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## VII. WHAT TO DO?



- Pick a path to test for drugs or not:
  - you should and then do it right
    - Check your testing company process
    - Do some in-service with employees
- Choose whether to include marijuana in the test panel or not
  - Pick a path to allow medical cannabis or not
  - Pick a path to allow all cannabis or not
- All medical cannabis users (assuming a test) are presumed not to be entitled to VWC Benefits. If you test for it – so, remove it from your testing panel!
- Be aware of when federal law changes!

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- ▶ [www.hs-lawfirm.com](http://www.hs-lawfirm.com)



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