



**YOUNG CONAWAY  
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# **THE GOOD, THE BAD AND THE UGLY: AN OVERVIEW OF LABOR AND EMPLOYMENT ISSUES**

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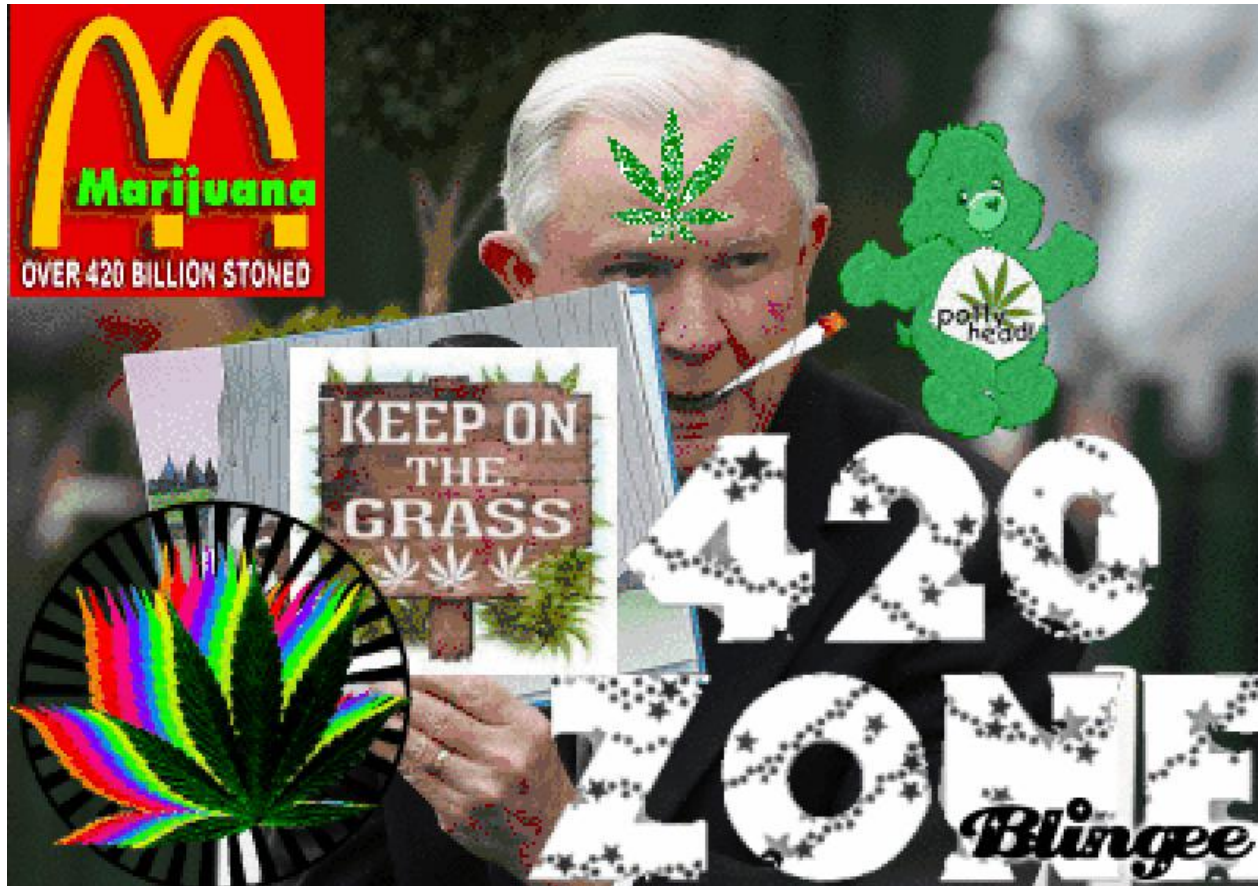
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# State Law Update

- **Marijuana**
- **Janus v. AFSCME Council 31**
- **New State Laws**
  - **Pregnancy**
  - **Family Responsibilities**
  - **Reproductive Health Decisions**
  - **Discussion of Wages**
- **Office of Women's Advancement and Advocacy**

# Marijuana



# Marijuana By the Numbers

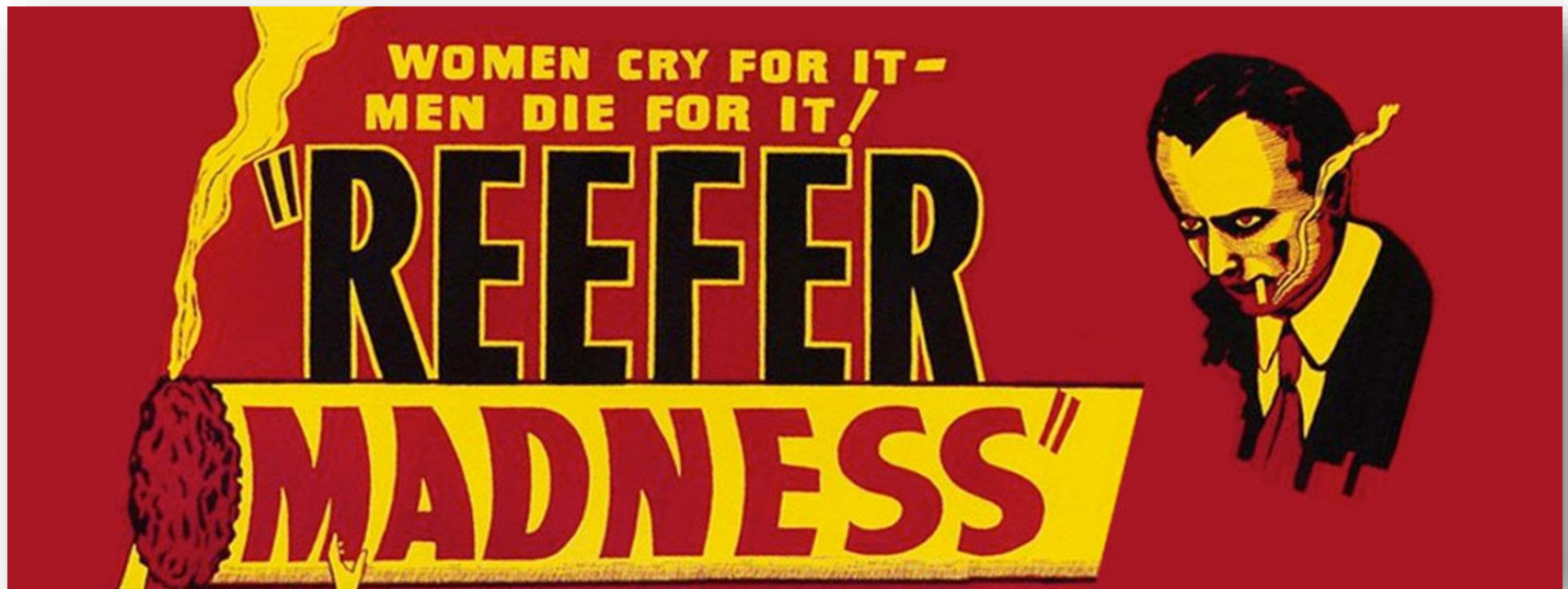
60

50

28

8

# Federal Law



# State Law



# Federal Legislation and Regulation

- **Federal Constitution**
  - **Fourth Amendment**
- **Federal Legislation**
  - **Controlled Substance Act**
  - **Drug Free Workplace Act**
  - **ADA**
- **Federal Agency Regulations**
  - **DOT Testing**

# Delaware Law

- **Decriminalization**
- **Medical Marijuana**
- **Proposed Legalization**
- **Task Force**



# Decriminalization

- **Possession of up to 1 oz.**
  - **Civil Penalty**
  - **Fine up to \$100**

# Medical

- **Use of marijuana permitted to treat certain illnesses**
- **State issued card**
- **“Compassion Centers” distribute**
- **Permits possession**
  - **6 oz. in Delaware**

# Medical

- **Employee Protections for Medical Marijuana Users**
  - **Most states provide no protection for discipline for use**
  - **Delaware provides protection**
    - **Cannot discriminate or penalize employee for positive drug test unless:**
      - **Employee "used, possessed, or was impaired" on premises or during hours of employment**
  - **“Impaired” is not defined.**

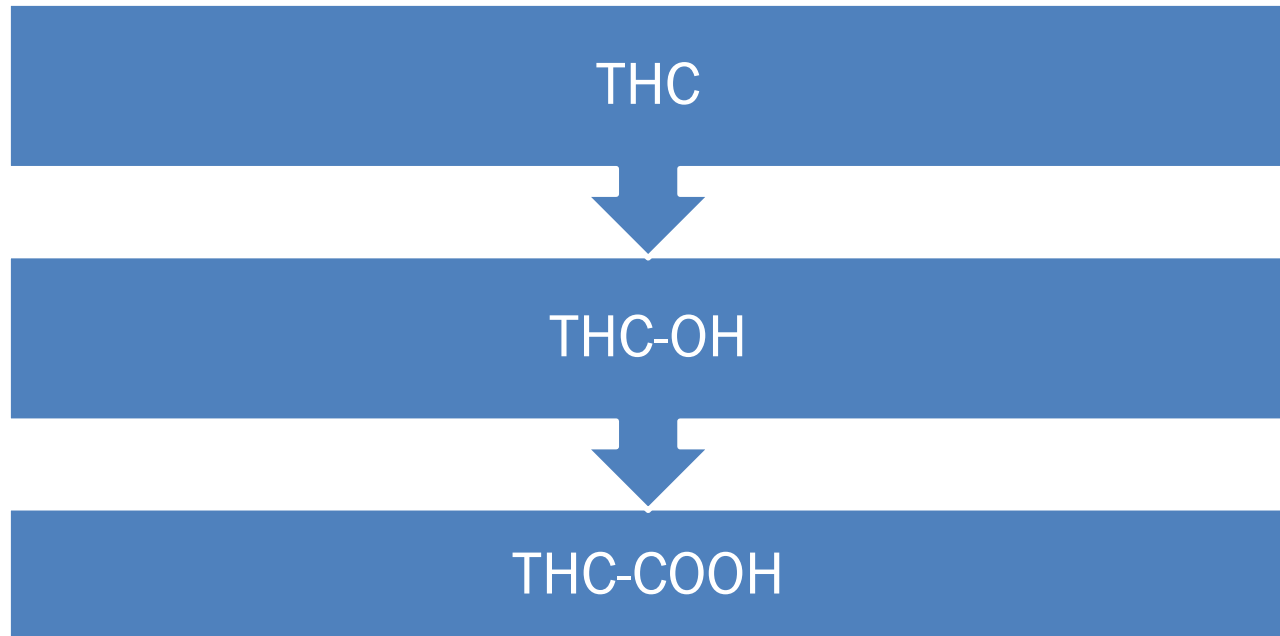
# Legalization

- **HB 110**
  - **“Regulates and taxes marijuana in the same manner as alcohol.”**
  - **Permits possession of up to 1 oz.**
  - **Failed to Pass**

# Legalization

- **Section 4905B:**
- **Allows employers to:**
  - **prohibit use and possession in workplace**
  - **have policies restricting the use of marijuana by employees**
  - **discipline employees who are “under the influence of marijuana in the workplace.”**
- **“Under the influence “ is not defined**

# Marijuana in the Body



# Detecting Impairment

- **Urine test**
  - Won't work for impairment
  - Sufficient for DOT and Zero tolerance policies
  - Won't work in Delaware
- **Blood Test**
  - Can detect THC and THC-OH
  - Most employers don't use
  - Not required by DOT

# Proving Impairment

- **Written Policy and Procedures**
  - **Blood test needed for impairment**
- **Trained Supervisors**
  - **DOT training**
- **Objective Symptoms**
  - **Written checklist**
  - **Video?**
- **Procedural Safeguards**
  - **Approval by HR before testing**
- **MRO**



# Legalization

- **Adult-Use Cannabis Task Force**
- **HCR No. 52**
- **“Study adoption of a model for regulation and taxation”**
- **Must submit a report to Governor and General Assembly by January 31, 2018**

# Janus v. AFSCME Council 31

- **Are “agency fees” permitted in public sector**
- **Supreme Court will hear this term.**
- **What does it mean for Delaware?**

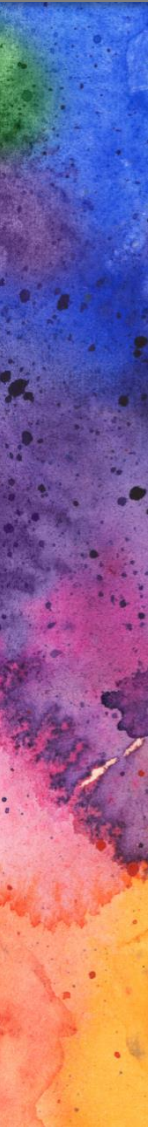
# Compensation History

**Unlawful for an employer or employer's agent to:**

- **Screen applicants based on their compensation histories,**
  - including by requiring that an applicant's prior compensation satisfy minimum or maximum criteria.
- **Seek the compensation history of an applicant from the applicant or a current or former employer.**

# Federal Law Update

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# Fair Labor Standards Act

## Salary Threshold

- **July: Reopened for Comment**
- **Aug. 31: Texas Court Decision**

# Discrimination & Harassment

**Adverse  
Action**



**Protected  
Characteristic**

**“Severe or  
Pervasive”**

**Not  
Supervisor**

# Sexual Orientation & Title VII

- **EEOC: Yes**
- **DOJ: Yes**
- **Pa.: Yes (2016)**
- **7<sup>th</sup> Cir.: Yes (Apr. 2017)**
- **DOJ: No (July 2017)**

# Fair Pay and Safe Workplaces

- **EO 13672:**
  - Fed. contractors
  - Barred discrimination for orientation or gender identity
- **EO 13673:**
  - Required compliance with '72
  - Revoked in March



# Discrimination & Harassment

**Adverse  
Action**



**Protected  
Characteristic**

**“Severe or  
Pervasive”**

**Not  
Supervisor**

# “Severe or Pervasive”

- **Castleberry (3d Cir.)**
- **Single comment**

# Discrimination & Harassment

**Adverse  
Action**



**Protected  
Characteristic**

**“Severe or  
Pervasive”**

**Not  
Supervisor**

# Who Is a Supervisor?

- **Moody (3d Cir.)**
- **Custodian Foreman**
- **Could assign work**
- **Could not fire**
- **Could not take other personnel action**

# Discrimination & Harassment

**Adverse  
Action**



**Protected  
Characteristic**

**“Severe or  
Pervasive”**

**Not  
Supervisor**

# Title VII

- **Let's Talk about Sex (Baby):  
Pregnancy, Breastfeeding, and  
Parental Leave (on the federal level)**

# Title VII

- ***EEOC v. Estee Lauder***
  - **Filed August 30, 2017, E.D. Pa.**
  - **Alleges sex discrimination on the basis of paid parental leave policy that gives women more time than men**
  - **Policy grants paid leave to recover from child birth (✓) and 6 weeks of bonding leave of mothers (x)**
  - **Only 2 weeks of bonding leave for fathers**

# Title VII and the FMLA

- **Hicks v. City of Tuscaloosa, Alabama**
  - **11th Circuit, September 7, 2017**
  - **Alabama, Florida, Georgia**
  - **Police officer on the narcotics taskforce**
  - **Took 12 weeks of FMLA leave**



# Title VII and the FMLA

- **Hicks v. City of Tuscaloosa, Alabama**
  - Harassed and disciplined on return, demoted to patrol 8 days later
  - Took leave for PPD
  - Doctor's note requesting transfer, because ballistic vest might cause mastitis
  - Requested desk duty

# Title VII and the FMLA

- **Hicks v. City of Tuscaloosa, Alabama**
  - **Alternative duty denied**
  - **Told to give up her vest, or wear a specially fitted vest that left “gaping, dangerous holes.”**
  - **Resigned immediately.**

# Title VII and the FMLA

- **Pregnancy Discrimination Act**
  - **Prohibits discrimination on the basis of “pregnancy, childbirth, or related medical conditions”**
  - **Held: lactation is “a related medical condition”**
  - **Termination based on a woman’s need to breastfeed violates Title VII via the PDA**

# Title VII and the FMLA

- **Pregnancy Discrimination Act**
  - No duty to provide *special* accommodations to breastfeeding workers
  - Issue was denial of accommodations provided to other employees, e.g. those with temporary injuries who were given alternate work
  - Invokes the *Young* decision

# ADA

- ***Severson v. Heartland Woodcraft, Inc.***
  - **Seventh Circuit, September 20, 2017**
  - **Severson took 12 weeks of FMLA for a back injury**
  - **Surgery on the last day of leave, which required 2-3 months of recuperation**
  - **Heartland denied request for additional leave and terminated employment**

# ADA

- ***Severson v. Heartland Woodcraft, Inc.***
  - **Filed suit under the ADA, alleging failure to accommodate**
  - **ADA is an anti-discrimination statute, not a medical-leave entitlement**
  - **Employee who needs long-term medical leave cannot work, and is not a “qualified individual”**

# ADA

- ***Severson v. Heartland Woodcraft, Inc.***
  - Expressly notes that leave of a “couple of days or even a couple of weeks” may be a reasonable accommodation
  - Analogized to a part-time or modified work schedule, which are listed in the statute
  - The ADA is not an open-ended extension of the FMLA