

HR & the Law for Transit Professionals




FiveL COMPANY
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 Helping Leaders Limit their Liability by Learning the LawSM

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This Afternoon's Agenda

- Your Parking Lot
- Employment Law Basics
- Managing Disability & Leave Issues
- Marijuana and the Workplace
- Non-Discrimination, Harassment & Bullying

This presentation and materials do not constitute the rendering of legal advice. Please consult with your department's, agency's, or organization's legal counsel.



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Employment Law Basics: Employment At-Will

- What is it?
- Separation by either for any lawful reason, any time, with or without notice.
- Some unlawful reasons:
 - Protected status
 - Breach of contract
 - Public policy violation
- Of all 50 states, how many are employment at-will states?




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Legally Protected Status

- Federal: age, race, religion, sex, sexual orientation, gender identity, pregnancy, national origin, disability, military status, protected activity, genetic information...
- Maryland adds: any age, marital status, hair texture/style association with race
- At least ___ local jurisdictions add at least ___ more!
- Thus, why the answer often is, "It depends!"




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Employment Law Basics: Employment At-Will

- Who's *not* employed at will?
 - Bargaining unit / unionized employees
 - Certain military employees upon return from covered service
 - *Some* contractual employees
 - Employees whom we (inadvertently) make contractual



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Managing Disability & Leave Issues

- Americans with Disabilities Act
 - Title I for Employers
- Pregnant Workers Fairness Act
- Family & Medical Leave Act
- Uniformed Services Employment & Reemployment Rights Act (USERRA)
- Maryland's
 - Time to Care Act (Paid FMLI)
 - Maryland's Healthy Working Families Act (Sick and Safe Leave)



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Quick Basics Updates

- Titles II and III (Mike Noel's presentation)
- Title I: Two key provisions
 - Reasonable accommodation & no discrimination
- Covered employer - 15 or more employees
- Covered individual
 - A *qualified* individual with a *disability*
- Qualified - can perform *essential functions* w/ or w/out a *reasonable accommodation*
- EEOC looks first at whether discrimination has occurred, assessing if qualified is secondary



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Individual Coverage

No discrimination, including retaliation

An individual is covered under the ADA who has a:

- Present
- P _____
- P _____ or who
- A _____



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Non-Discrimination & Reasonable Accommodation: For What?

Non-Discrimination

- Present - Yes
- Past - Yes
- Perceived - Yes
- Association - Yes

R.A.

- Present - Yes
- Past - No
- Perceived - _____
- Association - No




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Reasonable Accommodation: When?

- How are you to know?
- How *should* you have known?
- EEOC Rep said, “When an employee says s/he can’t do ‘x’ and ‘x’ is part of the job, because of a physical or mental condition.”




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No Fault Attendance Policies

- EEOC does not like:
 - AKA “Bright Line” leave policies
 - 100% healed policies
 - No light duty policy/practice



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Watch Transfers

- AKA reasonable accommodation of last resort

You cannot reasonably accommodate an employee in the current position but have another job to which you can transfer the employee and already have some *more* qualified employees who have bid.

1. Must you transfer the employee over more qualified candidates?
2. What if you have two open jobs, the 2nd is lower paying. Must the transfer be to a comparable job to be a R.A.?



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Undue Hardship: What to Consider

- Regulatory factors:
 1. The nature and **net cost** of the accommodation...
 2. The overall **financial resources** of the facility...
 3. The overall **financial resources** of the entity...
 4. The type of operation or operations...and
 5. The impact of the accommodation upon the operation of the facility
- Despite its repeated reference, don't rely on cost as your #1 argument.



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Pregnant Workers Fairness Act

- Covers employers with 15 or more employees
 - Including state and local gov't
- Proposed regulations published
 - Notice & comment period ends October 10th
- Requires reasonable accommodation for "known limitations" related to pregnancy, childbirth, and related conditions
- Broader than reasonable accommodation under the ADA



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FMLA Recap

- Covered Employer, Private Sector
 - 50 or more EE's for 20 or more weeks in this or the preceding calendar year
 - Half full / half empty
- Covered Employer, Public Sector
 - Regardless of # of employees
- Covered Employee
 - Worked for covered ER a *total* of 12 months in the last seven years
 - 1,250 hours in the immediately preceding 12 months
 - Works at a location with 50+ EE at/within 75 miles



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FMLA Recap

- Two key provisions
 - No interference or retaliation
- 12 workweeks of **job protected** leave for 5 reasons
- Common Pitfalls
 - Missing or late notices – Call HR or your TPA!!
 - Your bells and whistles
 - 4th day in a row of absence OR
 - Intermittent absences for the same chronic health condition



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FMLA

Why Does HR Ask So Many Questions?

An employee was taking intermittent FMLA leave. During that time, her director and another manager issued a corrective action notice for the way she handled an employee relations issue. On a day she returned from FMLA leave, they counseled her again about a previous incident and placed on a performance improvement plan. Two days later, the regional director removed the employee from the client’s account based solely on the director and manager’s reports, placed her on a 30-day leave of absence, and invited her to apply for another opportunity within any of the company’s four divisions. When she failed to do so, the regional director discharged her. The regional director had no knowledge of her FMLA leave.



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USERRA

- Covers nearly every employer *and* employee
- Provides job protected leave for service in the U.S. Uniformed services
- Reemployment - Provides job reinstatement for up to five years of covered service, including escalator clause
- Employment – Cannot discharge the employee except for cause for 180 days to one year.



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Maryland's Paid Leave Programs

- Healthy Working Families Act
 - Aka Sick and Safe Leave
 - ER: Private sector, state & local gov't ER's
 - EE: Any who regularly works at least 12 hours/week
 - At least 1 hour of paid leave for every 30 hours worked (and LOTS more)
 - Leave is job protected, similar to FMLA



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Maryland's Paid Leave Programs

- Time to Care Act
 - Aka Paid Family & Medical Leave Insurance Program (PFML)
 - Tax to be defined October 1st (not > 1.2%)
 - 50-50 split, tax scheduled to start 10-1-24, benefits scheduled to start 01/01/26
 - Covered reasons are broader than FMLA
 - Partner with your HR Dept/Rep for communication plan.



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Marijuana & the Workplace: Where We've Been

- April 9, 2022 – HB1 / 837 pass
- Nov 8, 2022 – Q#4 passes by about 2/3's
- May 3, 2023 – [HB556](#) Cannabis Reform Act enacted
 - Legal purchase and use age is at least 21
 - A person 21 years or older may lawfully cultivate up to two plants in their home, out of public view (max two per household; four for authorized medical use)
 - Cannot leave or enter the state with cannabis
 - Regulations due 7/1/24

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What's What?

- Cannabis – the plant
- Marijuana – primary product containing THC
- Cannabinoids – other products of the plant (>100)
- THC – Cannabinoid that gives you the “high”
 - Feds *generally* use a .3% rule, e.g., hemp
- CBD – Cannabinoid that, alone, does not



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Employment-Related FAQ's

- Q1: Can I test employees/applicants for cannabis?
- Q2: Can I take an adverse employment action for a positive result?
- Answer: ...



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(F) NOTHING IN THIS SECTION MAY BE CONSTRUED TO PREVENT OR PROHIBIT ANY EMPLOYER FROM DENYING EMPLOYMENT OR A CONTRACT TO AN INDIVIDUAL OR DISCIPLINING AN EMPLOYEE OR A CONTRACTOR FOR TESTING POSITIVE FOR THE PRESENCE OF CANNABINOIDS OR CANNABINOID METABOLITES IN THE URINE, BLOOD, SALIVA, BREATH, HAIR, OR OTHER TISSUE OR FLUID OF THE EMPLOYEE'S OR CONTRACTOR'S BODY, IF THE TEST WAS CONDUCTED IN ACCORDANCE WITH THE EMPLOYER'S ESTABLISHED DRUG TESTING POLICY.



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Maryland Cannabis Administration's FAQ's

- Can I use cannabis at work?
- The Cannabis Reform Act does not address cannabis use or impairment in the workplace. Individuals remain subject to any existing laws and workplace policies on substance or cannabis use (e.g., federal laws prohibiting the operation of commercial transport vehicles while impaired, or workplace policies prohibiting cannabis use specifically and/or impairment generally). The legislation does not address the use of employer drug screening of employees or prospective employees. Your employer or prospective employer can provide more specific information about its policies regarding substance use in the workplace.



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ADA Implications

- EEOC Compliance Manual reads:
- **Example 24:** Alice returns from a break smelling of marijuana smoke. You send her for a drug test, which comes back positive. Alice tells you that before you hired her, she was diagnosed as a drug addict and completed a drug rehabilitation program.
- May you terminate Alice today without violating the ADA?



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DOT Drivers

The screenshot shows the Transportation.gov website with a search bar and navigation menu. The main content area displays two notices:

DOT "Medical Marijuana" Notice
 • DOT "Medical Marijuana" Notice (PDF)

DOT Office of Drug and Alcohol Policy and Compliance Notice
 Recently, the Department of Justice (DOJ) issued guidelines for Federal prosecutors in states that have enacted laws authorizing the use of "medical marijuana." <http://www.justice.gov/opa/documents/medical-marijuana.pdf>

We have had several inquiries about whether the DOJ advice to Federal prosecutors regarding pursuing criminal cases will have an impact upon the Department of Transportation's longstanding regulation about the use of marijuana by safety-sensitive transportation employees - pilots, school bus drivers, truck drivers, train engineers, subway operators, aircraft maintenance personnel, transit fire-armed security personnel, ship captains, and pipeline emergency response personnel, among others.

We want to make it perfectly clear that the DOJ guidelines will have no bearing on the Department of Transportation's regulated drug testing program. We will not change our regulated drug testing program based upon these guidelines to Federal prosecutors.

The Department of Transportation's Drug and Alcohol Testing Regulation - 49 CFR Part 40, at 40.151(e) - does not authorize "medical marijuana" under a state law to be a valid medical explanation for a transportation employee's positive drug test result.



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It's Not Just CDL Drivers



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Reasonable Inference?

An applicant is offered a safety-sensitive position as a driver. He is told that he will have to take a drug test as a part of the conditional offer. He tells the HR Director that he will take the test but also disclosed he has a medical marijuana (MM) card. The offer is withdrawn. Did the employer violate the Americans with Disabilities Act?



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It's Not Just Pot!

- Camel's Nose
- Oregon Legalizes Schedule I-IV drugs
 - Heroin
 - Methamphetamine
 - Cocaine
 - LSD
 - MDMA
 - Oxycodone
 - Methadone



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Testing Tips

- Whom? - applicants v. employees
- What? – which drugs? Alcohol? How many panels?
- Where? – on-site or off-site
- When? – random, post-accident, for cause, post-offer
- How? urine, blood, hair, saliva, (**watch breath**)
- Results – define positive (diluted / tampered sample)
- Costs & Notice requirements
- Talk to your lab/service provider



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Proactive Policy & Practice Tips

- Define illegal substance broadly
- Under the influence v. **fit for duty**
- Substance testing v. **functional testing**
- Use zero tolerance only if you mean it
- Talk to your lab about various panels
- Know your state authorized specimens (watch breath in MD)
- Include essential functions in your job description!



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What is Unlawful Harassment?

- Discrimination – broad umbrella
 - Adverse treatment v. adverse impact
- Harassment, a form of discrimination
 - Quid Pro Quo – this for that, sexual harassment
 - Hostile Work Environment
 - When the conduct is based on membership in a protected class **and** “so objectively offensive as to alter the conditions of the victim’s employment.”
- Maryland’s definition is broader since 2022!



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What is it *Not*?

- Today, the U.S. EEOC reminds us that unlawful harassment does not include, “petty slights, annoyances and isolated incidents (unless extremely serious) will not rise to the level of illegality.”
- But such conduct likely violates your related policies.



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The What, Where, When & By Whom of Harassment

1. Harassment by third parties
2. Unintentional harassment
3. Gossip or rumor
4. Confidentiality v. privacy
5. Requests for inaction
6. Duty to report in good faith as a witness as well as victim



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ALL Employees’ Rights *and* Responsibilities

- To be free from unlawful harassment
- To be free from false claims
- To be free from retaliation for reporting or participating in the investigation.




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Exercise Bystander Intervention
 You know *what* to do; the question is often *how*?

- Three D's
 - _____
 - _____
 - _____




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Elements of Unlawful Harassment

- The Behavior Complained of Must Be:
 - Based on Membership in a Protected Class
 - Unwelcome
 - Severe or Pervasive (under federal law)




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EEOC's Guidance on Workplace Retaliation

- “managers and supervisors alleged to have engaged in discrimination should be provided with guidance on how to handle any personal feelings about the allegations when carrying out management duties or interacting in the workplace.”




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Workplace Bullying

- In the Workplace Bullying Institute’s 2021 national survey, what percentage of victims reported that they were bullied by *their boss*?
- By a coworker?
- Remotely?



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Your Role As Agent

- Agency Relationship
- What you See, Hear and Know
- Knowledge Implied
- Your Duties
- If you fail, can you be subject to individual, legal liability?
 - Tort Claims!
 - Keep yourself and others safe




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Your Duty

1. To exercise reasonable care to prevent and correct.
2. If you fail to do either, you or the employer may be liable.
3. Employee generally shares a duty to pursue your preventive and corrective measures.




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Be the Role Model and Monitor

- Listen for repeated jokes or comments
- Silence = condoning
- Don't **ignore**
- Don't **participate**
- Don't **condone**



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Join Me on Thursday!

Recruitment, Selection & Hiring
10:30 – Noon


Beach House Ballroom

Visit <https://www.fivel.net/events/> for a full of FiveL Company's upcoming events!





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