LABOR & EMPLOYMENT YEAR IN REVIEW

34th Annual Labor & Employment Law Conference

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YEAR IN REVIEW

- EEO update
  - EEOC 2018-2022 initiatives
  - Harassment
    - The “#MeToo” and “Time’s Up” movements
  - Discrimination
  - Retaliation
- FLSA Update
  - DOL Initiatives
  - Case Updates
- FMLA Update
- NLRB Update
- The Marijuana Landscape

EEOC INITIATIVES

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CONTINUED FOCUSES

- The EEOC has indicated that it will continue to follow the enforcement priorities outlined in the agency's strategic enforcement plan ("SEP") for 2017-2021
- The SEP goals prioritize:
  - Eliminating barriers in recruitment and hiring
  - Protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination
  - Ensuring equal pay protections for all workers
  - Preserving access to the legal system
  - Preventing systematic harassment

CONTINUED FOCUSES (CONT.)

- Addressing selected emerging and developing issues:
  - Qualification standards and inflexible leave policies that discriminate against individuals with disabilities
  - Accommodating pregnancy-related limitations under the ADA and the PDA
  - Protecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex
  - Clarifying the employment relationship and the application of workplace civil rights protections
  - Addressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent

END OF FISCAL YEAR FILING SURGE

- Historically, see a surge of lawsuit filing by the EEOC in September
- Roughly 90 lawsuits were filed by the EEOC in September
- EEOC filed more cases in the last three months of FY 2017 (July, August and September) *than it did during all of FY 2016*
- Of the cases filed by the EEOC in FY 2017
  - More than 50% of lawsuits were brought under Title VII
  - Roughly 30% of lawsuits were brought under ADA
  - 11 EPA claims, compared to six in 2016, five in 2015, and two in 2014

OUTREACH EFFORTS

- On October 4, 2017, the EEOC announced that it is launching two new trainings for employers:
  - Leading for Respect (for supervisors)
  - Respect in the Workplace (for all employees)
- Trainings are conducted on-site by EEOC Training Institute staff

HARASSMENT

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“#METOO” AND “TIME’S UP”

- The MeToo movement (or "#MeToo") took the world by storm in 2017. Searched on Google in more than 196 countries.
- #MeToo deals specifically with sexual violence
- “Time’s Up” can be thought of as a solution-based, action-oriented next step in the #Metoo movement. The aim is to create concrete change, leading to safety and equity in the workplace.

NIKE – JUST (DON'T) DO IT

- Last year, a group of female employees at Nike circulated an informal survey about inappropriate behavior by men at the company
  - Survey was the result of growing frustrations over pay disparity, gender imbalance in upper-management, and inappropriate workplace behavior by men
- Survey came to the attention of Nike's CEO – which triggered a formal review of workplace behavior by an outside firm
- As a result of the internal review, two top-ranking executives resigned after being accused of protecting male employees who demeaned women and bullied workers from other countries

ADVERSE EMPLOYMENT ACTION

- *Watford v Jefferson County Public Schools*, 870 F3d 448 (CA 6, 2017)
  - Court held that CBA provision which holds (termination) grievance in abeyance upon subsequent filing of EEOC charge constitutes an adverse employment action
- *Dikker v 5-Star Team Leasing, LLC* 243 F Supp 3d 844 (WD MI 2017)
  - When a voluntary quit does not amount to a constructive discharge or the employee is not forced out of the job, the court concluded there was no adverse employment action taken against the Plaintiff

SEX DISCRIMINATION

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TITLE VII PROTECTION DIVIDED AMONG CIRCUITS

- 6th Circuit holds that transgender status protected by Title VII
- *EEOC v. R.G. & G.R. Harris Funeral Homes* 2018 U.S. App. Lexis 5720, March 7, 2018
  - Individual was fired after informing her employer that she would begin presenting as a woman because she is transgender
  - "An employer cannot discriminate on the basis of transgender status, without imposing its stereotypical notions of how sexual organs and gender identity ought to align….It is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex"

TITLE VII PROTECTION DIVIDED AMONG CIRCUITS (CONT.)

- *Hively v Ivy Tech Community College of Indiana*, 853 F3d 339 (CA 7, Ind. 2017)
  - Overruling prior decisions, the Court held that discrimination on the basis of one's sexual orientation is unlawful sex discrimination in violation of Title VII
  - "Any discomfort, disapproval, or job decision based on the fact that the complainant – woman or man – dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex"

TITLE VII PROTECTION DIVIDED AMONG CIRCUITS (CONT.)

- *Christiansen v Omnicom Group, Incorporated,* 852 F3d 195 (CA2, NY, 2017)
  - Employee alleged that supervisor described him as effeminate, that supervisor depicted employee in tights and low-cut shirt “prancing around” in drawing on whiteboard, and that another depiction was of employee's head attached to a bikini-clad female body lying on the ground
  - The Court found that the plaintiff had made out a cognizable gender stereotyping claim even though majority of allegations related to sexual orientation discrimination as opposed to typical gender stereotyping

SEX DISCRIMINATION

- Childbearing capacity regarded in the same light as sex discrimination
- *Noll v Club Fit, Ltd*., 2017 WL 3642309 (ND Ohio 2017)
  - Classifying employees on the basis of childbearing capacity, whether or not they were already pregnant, must be regarded, for Title VII purposes, in the same light as explicit sex discrimination
  - Where a woman alleges that she was targeted for her intent to become pregnant, she brings a sex discrimination claim, not a gender-plus claim
- *Spink-Krause v Medtronic, Inc.*, 2017 WL 4778730 (ED MI, 2017)
  - In the Sixth Circuit, "sex-plus" discrimination exists when a person is subjected to disparate treatment based not only on her sex, but on her sex considered in conjunction with a second characteristic
  - The comparator must be outside of the protected classification

DISABILITY DISCRIMINATION

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DISABILITY DISCRIMINATION – REGARDED AS

- *Equal Employment Opportunity Commission v MGH Family Health Center*, 230 F Supp 3d 796 (WD Mich, 2017)
  - Employers do not escape their legal obligations under the ADA by contracting out certain hiring and personnel functions to third parties
  - "An employer cannot have it both ways; if it delegates the individualized inquiry to a third party, it cannot then insulate itself by claiming no 'knowledge' of a person's impairment or 'responsibility' for the recommendation that it adopted. It's stuck with the inquiry that was done – or in this case, not completely done."

DISABILITY DISCRIMINATION – ACCOMMODATION/INTERACTIVE PROCESS

- Interplay with the FMLA
- *Acker v. General Motors, L.L.C.*, 853 F.3d 784167 (CA 5 2017)
  - The FMLA and accompanying regulations require employees to follow their employer's "usual and customary" call-in procedures requesting FMLA leave absent "unusual circumstances." FMLA leave is not a reasonable accommodation under the ADA
- *Severson v Heartland*, 872 F3d 476 (CA 7 2017)
  - The term reasonable accommodation as used in the ADA is expressly limited to those measures that will enable the employee to return to work. An employee who needs long-term medical leave cannot work and thus is not a qualified individual under the ADA.
- *Terre v Hopson*, 708 Fed Appx 221 (CA 6 2017)
  - Plaintiff's placement on medical leave and resultant absence did not make him unqualified because his leave was finite and the plaintiff intended to return to work without accommodation after his leave ended

DISABILITY DISCRIMINATION – ESSENTIAL JOB FUNCTIONS AND SUBSTANTIAL LIMITATIONS

- *Brown v Milwaukee Board of School Directors*, 855 F3d 818 (CA 7 2017)
  - Plaintiff, a high school principal, who made a request for an accommodation to not be "in the vicinity of potentially unruly students" was not a reasonable request for an accommodation
- *Blatt v Cabela's Retail, Inc.,* 2017 WL 2178123 (ED Pa, 2017)
  - Even though the ADA excludes "gender identity disorders," the plaintiff's gender dysphoria claim was allowed to proceed

PREGNANCY DISCRIMINATION

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PREGNANCY DISCRIMINATION

- *Kubik v Central Michigan University Board of Trustees*, --- FedAppx ---- (CA 6, 2017)
  - Where the timeline is less probative, plaintiffs must offer other evidence to establish the required nexus between pregnancy and the alleged adverse employment action
- *Ramirez v Bolster & Jeffries Health Care Group, LLC*, --- FSupp3d ---, 2017 WL 4227944 (WD KY, 2017)
  - UIA transcript and Plaintiff's prior testimony provide issue of fact on Motion to Dismiss

PREGNANCY DISCRIMINATION

- *Hicks City of Tuscaloosa, Alabama* 870 F3d 1253 (CA 11, 2017)
  - Plaintiff's physician had opined that vest could interfere in her ability to breastfeed
  - Chief of police did not believe that she needed alternative assignment because other breastfeeding officers had worn the vest and reassigned the Plaintiff to a different taskforce when she refused to wear the vest
  - Eleventh Circuit upheld jury verdict in Plaintiff's favor that she had been constructively discharged as a result of the failure to accommodate and reassignment to less desirable unit
  - Employer was not required to provide accommodation based upon her pregnancy, but was required to provide the plaintiff with alternative duty just as it had provided to others who were limited in their ability to work

RACE/NATIONAL ORIGIN DISCRIMINATION

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RACE DISCRIMINATION – FAILURE TO PROMOTE

- *Presley v Ohio Department of Rehabilitation and Correction*, 675 Fed Appx 507 (CA 6, 2017)
  - Promoting white nurse rather than black nurse due to support of management and trust management placed in white nurse was not pretext for discrimination
  - No showing that a reasonable employer would have chosen white nurse over black nurse because black nurse's qualifications were significantly better than those of white nurse
- *Bradley v XDM, Inc.*, 2017 WL 467407 (ED MI, 2017)
  - XDM was not liable even though it failed to advise Plaintiff of promotional opportunities where Plaintiff's poor work history would likely have made her ineligible for any promotion

AGE DISCRIMINATION

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AGE DISCRIMINATION

- Multi-claim case
- *MacEachern v Quicken Loans, Inc.*, 2017 WL 5466656 (CA 6, 2017)
  - Confidentiality Agreements mean something and violation of these agreements can support a legitimate non discriminatory basis for discharge under any theory

RELIGIOUS DISCRIMINATION

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RELIGIOUS DISCRIMINATION – ACCOMMODATIONS

- *Pierce v General Motors LLC*, --- Fed Appx ----, (CA 6, Dec. 1, 2017)
  - Honest Belief Rule – an explanation honestly believed by a supervisor counts as a factual basis for a decision not as a pretext of discrimination
- *U.S. Equal Employment Opportunity Commission v Consol Energy, Inc.*, 860 F3d 131 (CA 4, 2017)
  - Accommodations not uniformly applied results in finding against the employer
- *Fallon v Mercy Catholic Medical Center of Southeastern Pennsylvania*, 877 F3d 487 (CA 3, 2017)
  - Plaintiff's claim that a flu shot would "violate his conscious as to what is right and what is wrong" while strongly held, were not religious in nature and therefore not protected under Title VII

RETALIATION

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RETALIATION—TEMPORAL PROXIMITY INSUFFICIENT

- *Adamov v U.S. Bank National Association*, 681 FedAppx 473 (CA 6, 2017)
  - Plaintiff presented sufficient evidence to create an issue of fact regarding whether there was a causal nexus between his complaint of national origin discrimination and his termination
- *Meyer v Shulkin, Secretary, Department of Veteran Affairs*, --- Fed Appx ---, 2018 (CA 2, January 19, 2018)
  - Court rejected Plaintiff's argument that rejection for job eight years after protected activity established plausible inference of discrimination

RETALIATION – PROTECTED ACTIVITY

- *Frazier v Richland Public Health*, 685 FedAppx 443 (CA 6, 2017)
  - Group of female employees internal complaint that another male manager had a camera facing the women's restroom was a sex based complaint by female workers and therefore constituted protected activity under Title VII
- *Linkletter v Western & Southern Financial Group, Inc.*, 851 F3d 632 (CA 6, 2017)
  - Plaintiff's job offer was rescinded when employer learned she had signed an online petition supporting a women's shelter
  - Court held that the employer's action constituted retaliation in violation of the Fair Housing Act because its actions interfered with the Plaintiff's rights to 'aid or encourage' another's enjoyment of the rights provided by the FHA

FLSA UPDATE

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OPINION LETTERS … THEY'RE BAAAACK

- In 2009, the DOL announced that 17 Wage and Hour Administrator Opinion Letters issued, but not necessarily published, in January 2009 were rescinded, and in 2010, the DOL announced it would no longer issue Opinion Letters in response to specific inquiries from the public, and would instead issue Administrator Interpretations

- In January 2018, the DOL announced that it will resume issuing Opinion Letters and republished those rescinded by the prior administration as official Wage and Hour Administrator Opinion Letters of the Department of Labor

DOL'S INDEPENDENT CONTRACTOR/EMPLOYER GUIDANCE

- *Saleem v Corp Transp Grp., Ltd,* 854 F.3d 131 (2d Cir 2017)
  - "Black car" drivers employed by Corporate Transportation Group ("CTG") alleged they were improperly classified as independent contractors by their employer in violation of the FLSA
- *Hardison v Healthcare Training Sols., LLC* 2017 U.S. Dist. LEXIS 80479 (D. Md. May 25, 2017
  - The Court applied the six factor non-dispositive factors to determine whether Plaintiff was an independent contractor
  - Even though the Court held four factors were in favor of an employee status, the bulk of Plaintiff's wages came for another job and another company

STATUS OF CHANGES TO SALARY TEST FOR FLSA EXEMPTION -- BACKGROUND

- The DOL issued its Final Rule on May 18, 2016
  - The rule would have increased the minimum salary level for applicability of FLSA white-collar exemptions from $455 per week to $913 per week ($47,476 per year)
  - The rule would have increased the minimum salary for FLSA exemption for highly – compensated employees from $100,000 to $134,004 or the 90th percentile of full-time salaried workers nationally
  - The rule would have established an automatic updating mechanism that would adjust the minimum salary level every three years
  - The rule was to take effect on December 1, 2016
  - Legal challenges were filed, which employment law experts scoffed at as unlikely to succeed

STATUS OF CHANGES TO SALARY TEST FOR FLSA EXEMPTION – DOL APPEAL

- The Obama Administration DOL filed an appeal to the U.S. Court of Appeals for the Fifth Circuit on December 1, 2016
- The Trump Administration DOL has not withdrawn the appeal
- The Trump Administration filed a responsive brief on June 30, 2017
- The position of the Trump Administration:
  - The DOL does have the authority to set a minimum salary threshold for the white-collar exemptions
  - The DOL is not advocating in support of the salary threshold set by the Obama Administration ($913/week; $47,476/year)
  - The DOL intends to undertake further rulemaking to determine what the appropriate salary level should be

STATUS OF CHANGES TO SALARY TEST FOR FLSA EXEMPTION – FURTHER ACTIVITY AT THE TRIAL COURT LEVEL

- On August 31, 2017, the district court granted summary judgment in favor of the plaintiffs
  - Holding: The DOL has the authority to use a salary test, but not to increase the salary threshold to high levels, or to provide for automatic increases in the salary threshold
- In light of the district court's decision, the Trump Administration DOL will likely withdraw the appeal

JOINT EMPLOYERS

- *Crosby v Cox Communs., Inc*., 2017 U.S. Dist. LEXIS 1549552 (E.D. La. May 1, 2017)

- Finding no joint-employer situations where:

  - Cox's background check requirement, distribution of work orders and customer satisfaction surveys reflect no more than a legitimate contractor relationship

  - Cox's specifications merely reflect its concern for the services being provided to its customers

  - Cox's involvement in hiring, firing, supervision, scheduling, and payment of technicians is minimal and indirect at best

  - The Plaintiffs disingenuously distort and exaggerate the implications of boilerplate provisions of the FSA to attempt to prove a case of joint employer status, with no evidence of actual control by Cox as a practical matter

ARBITRATION OF COLLECTIVE ACTIONS

- *Epic Systems, Inc. v. Lewis*, 823 1147 (7th Cir. 2016), cert granted, ___ U.S.___ (2018)

- Defendants moved to compel arbitration arguing that pursuant to a clause in Defendant's employment contract, signed by all employees including Plaintiffs, all disputes were to be resolved by mediation and arbitration. The Illinois district court disagreed, finding that while the contract might have waived the procedural right to litigate in court in favor of arbitration, the terms of Defendant's contract were illegal because the contract waived a substantive federal right – under the NLRA, class and collective actions waivers are unenforceable because they violate the prohibition on interference with the right of employees to engage in concerted activity. The Seventh Circuit affirmed. Epic Systems appealed to the Supreme Court which granted cert. and consolidated with the Ninth and Fifth Circuits. Oral arguments were heard on October 2, 2017. Stay Tuned!

FMLA UPDATE

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FMLA

- *Boadi v. Center for Human Development, Inc.*, 239 F. Supp. 3d 333 (D. Mass. 2017)
  - Employee became hospitalized due to a mental health condition. Upon her admission to the hospital, she asked that her son call the company to report that she was in the hospital and unable to report to work.
  - The son contacted the employer several times, made clear that his mom was ill, in the hospital and could not come to work. He eventually stated that his mom could speak, but was "unintelligible."
  - The employer concluded that the employee was a "no call/no show" when she failed to personally notify the company of her continued absences
  - The jury disagreed – awarding the employee $150,000, liquidated damages (another $150,000), and her attorney fees

FMLA (CONT.)

- *Stewart v. Wells Fargo Bank,* 2017 WL 977412 (N.D. Ala. 2017)
  - Shortly after being told that she was "off track" in nearly every work category, Debby took medical leave for five weeks due to a medical procedure performed on her neck
  - Upon her return, her performance further deteriorated – more client complaints, poor sales numbers and that fact that Debby simply wasn't trying anymore
  - In an email recommending Debbie's termination, her supervisor outlined her performance issues **and** added that Debbie's termination "was justified because 'Debby submits a request for medical leave'"
  - The result: Debbie's supervisor transformed a justifiable termination into a question of fact left for a jury to decide

WHAT'S HAPPENING AT THE NLRB?

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RECENT DECISIONS

- Decision of the U.S. Supreme Court in *NLRB v. Murphy Oil USA Inc*., Case No. 16-307 (US)
  - Issue: Whether an employer's individual agreements with employees barring them from pursuing employment-related claims as class actions are unenforceable, because the agreements limit employees' right to engage in "concerted activity" under the NLRA
  - Argued on October 2, 2017
- Decision on joint-employment
  - In *Hy-Band Industrial Contractors*, 365 NLRB No. 156 (2017), the Board overruled Browning-Ferris and reviving pre-Browning-Ferris precedent. HyBand found that to be considered joint-employers, two entities must directly and immediately exercise control over the essential employment terms of another entity's employees. No longer is indirect control, the contractual right to control that's not actually exercised, or limited and routine control, enough to establish joint-employer status.

LEGAL LANDSCAPE OF MEDICAL MARIJUANA

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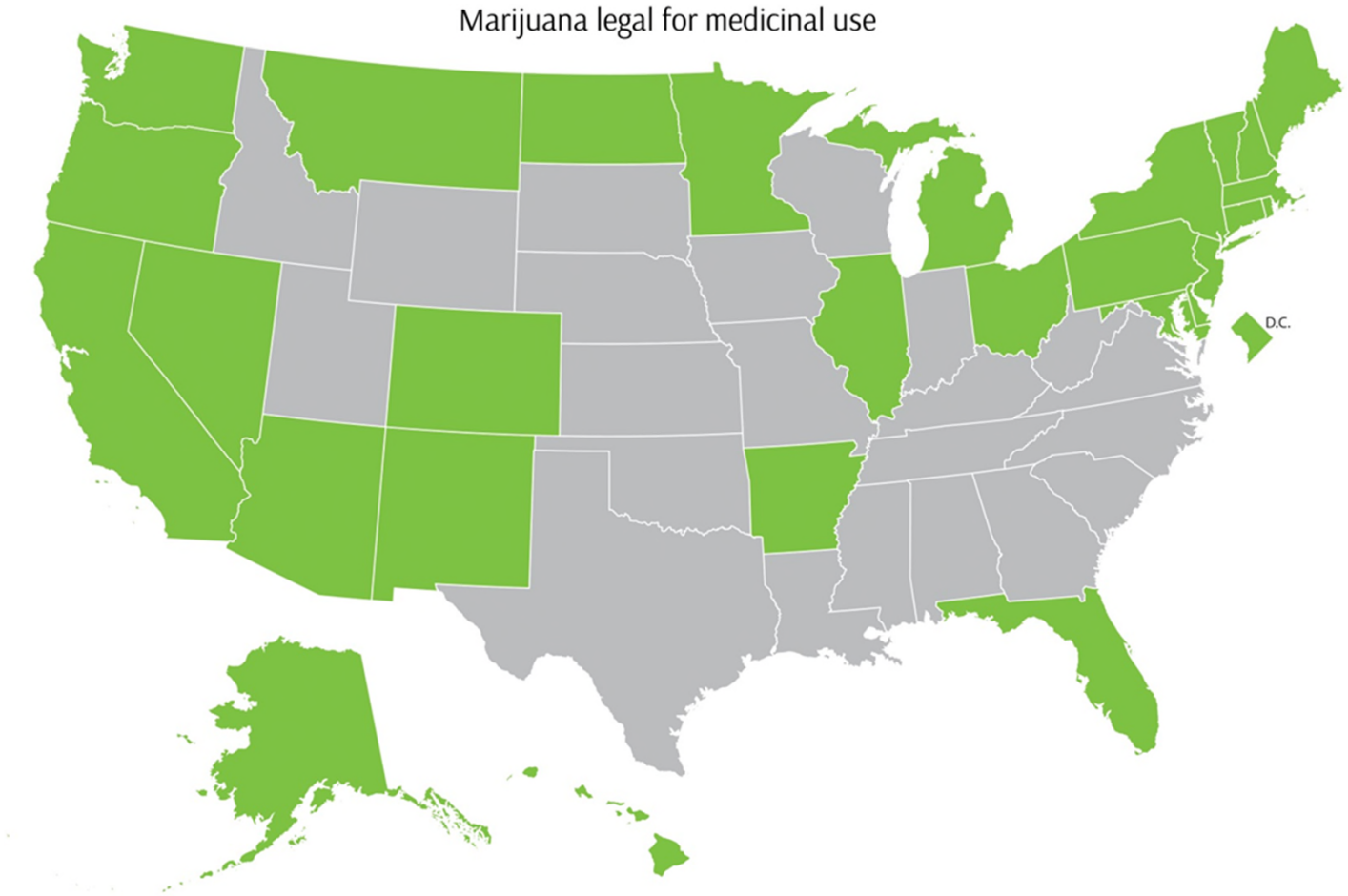
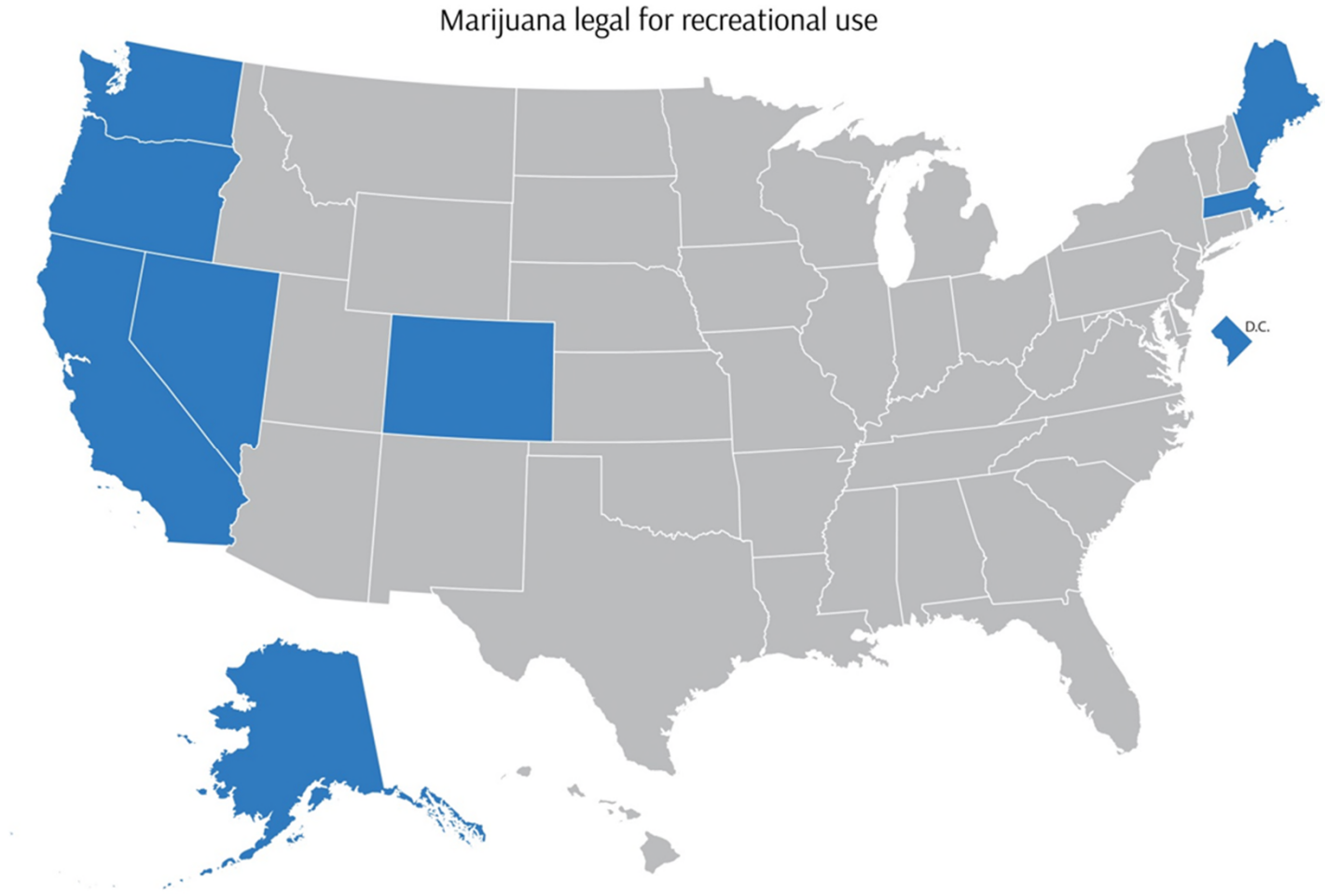
STATES THAT HAVE LEGALIZED MARIJUANA FOR MEDICINAL PURPOSES



STATES THAT HAVE LEGALIZED MARIJUANA FOR RECREATIONAL PURPOSES



FEDERAL POSTURE, REDUCED PROSECUTION, NOT LEGAL

- Marijuana remains an illegal controlled substance under federal law
- Attorney General Jeff Sessions stated recently that the DOJ and the Drug Enforcement Administration probably will not take action against the eight states that have legalized recreational marijuana
- "But if you … smoke marijuana, for example, where you have no idea how much THC you're getting is probably not a good way to administer a medicinal amount. So forgive me if I'm a bit dubious about that."
- In short, he will have more to say on this topic. Stay tuned.

THE DUTY TO ACCOMMODATE

- Michigan's Persons with Disabilities Civil Rights Act (PWDCA)
  - An employer may do one or more of the following: Establish employment policies, programs, procedures or work rules regarding the use of alcoholic liquor or the illegal use of drugs
- Michigan Marijuana Legalization Initiative
  - Likely to appear on the ballot in 2018
  - The measure would legalize the recreational use and possession of marijuana for persons 21 years of age or older and enact a tax on marijuana sales

QUESTIONS?

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THANK YOU

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