

# 2023 MINNESOTA SESSION UPDATE

July 13, 2023 | Cory A. Genelin, Chair, Employment Labor & Benefits Practice Group

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GISLASON & HUNTER LLP  
ATTORNEYS AT LAW

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# Overview: Me and why you should listen to me

- I am the Chair of Gislason & Hunter's Employment, Labor, & Benefits Practice Group.
- Employment law is my biggest practice area
  - Started out working for employees
  - Now 99% employers
- I am the Legislative Chair for the Southern Minnesota Area Human Resources Association
  - Shameless plug: SMAHRA Law Day, Mankato, October 26, 2023
- Staff Judge Advocate for Air National Guard
  - Most of that work is employment law

## Overview: Alibies, etc.

- Much of this is still developing
  - Agencies to produce rules
  - Litigation will fill in some gaps and confusion
  - Even other experts on line don't agree
- Some of my answers may include:
  - Wow, I didn't even think of that! I don't know.
  - We won't know until someone gets sued.
- I may not get through all of this
- **This is not legal advice for your specific situation**

# Overview: Format

- Questions via chat only
  - I'll do my best, probably look at chat at end of each section
  - If I don't understand your question, not much I can do about it
  - Probably best to input your questions on the "takeaway" slide
    - That means I'm nearing the end
    - If you ask early, I might cover it later, or think I did
    - "Questions" bullets are really just reminders to me to look in the chat
- Presentation is being recorded
  - Available on our website
  - Slides too

# Overview

- CROWN ACT
- Ban on Non Competes
- ~~Ban on Restrictions in Franchise Agreements~~
- Sick and Safe Leave
- Paid Family Medical Leave
- Nursing and Pregnancy
- Wage Disclosure Protections

~~Construction Workers Wage Protections~~  
~~ER Sponsored Meetings~~  
~~Cannabis~~  
~~Veteran's Rights Poster~~  
~~Ergonomics~~  
~~Nursing Home Standards Board~~  
~~Prevailing Wage~~  
~~Cases (maybe we'll get there)~~

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Construction Workers Wage Protections  
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# CROWN Act

- In Brief:
  - Already in place, effective January 31, 2023
  - Adds a definition of "Race" to Minn. Stat. 363A.03 (MN HRA)
  - Misconception: *"Adds hair to definition of race."*
    - "Race" was not previously defined by the act
      - Discrimination on race was prohibited, but "race" was not defined.
    - The addition is not limited to hair

# CROWN Act

- “Subd. 36a. Race. "Race" is inclusive of traits associated with race, including but not limited to hair texture and hair styles such as braids, locs, and twists.”
  - So at least we now have a definition of race.
  - But the definition includes the word defined
  - Appears to be subjective “associated with”
    - But associated by who?
      - The defendant?
      - The plaintiff?
      - The general public?
        - A majority?
        - A substantial minority?
  - What about a trait associated with a race, found in a plaintiff who isn't of that race?



# CROWN Act

- Takeaway:
  - Think of this like the definition of disabled under ADA
    - Objective and subjective
    - Very broad
    - Future litigation will tell
  - Best way to avoid illegal discrimination remains the same
    - Discriminate only on
      - Bona fide job requirements
      - Employee outcomes

# CROWN Act

- Questions?

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Construction Workers Wage Protections  
ER Sponsored Meetings  
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# Ban on Non Competes

- In Brief:
  - 2023 SL Ch. 53 (labor omnibus bill); creates 181.988
  - Effective July 1, 2023
    - Applies to agreements after that date
    - No effect on agreements before that date
  - Applies to all ERs
  - Not a complete ban
    - But pretty close

# Ban on Non Competes (In Detail)

- May not
  - Make an agreement with a current EE to restrict post employment work
- May contract to restrict post employment work
  - With owners in the context of a sale of business
  - In anticipation of a dissolution of a business
  - With former employees
- May contract for
  - Prohibit competition during employment
  - Nondisclosure and confidentiality
  - Trade secrets
  - Non solicitation

# Ban on Non Competes (Takeaways)

- I've never liked non competes
  - Hard to predict enforcement
  - Rarely negotiated
- ERs with actual needs will need to beef up protections via solicitation, etc.
- What about inevitable disclosure?
  - Can a strong non disclosure act as a non-compete?
- What about a non compete with an employee who was fired ten seconds ago . . . for example in a severance agreement?
  - Text of statute seems to allow

# Ban on Non Competes

- Questions?

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Construction Workers Wage Protections  
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# Two Different Things

(We'll cover each in detail, this is just simple ways to differentiate)

## Sick & Safe Leave

- Just like sick leave
- But now you have to have it
- And it has to be paid
- By Employer
- Administered by Employer
- Short term

## Paid Family Medical Leave

- A lot like Federal FMLA, but paid
- Paid by the State\*
  - \*Via taxes
  - Like Unemployment
- Administered by the State
- Long term

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- Paid Family Medical Leave
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- Wage Disclosure Protections

Construction Workers Wage Protections  
ER Sponsored Meetings  
Cannabis  
Veteran's Rights Poster  
Ergonomics  
Nursing Home Standards Board  
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# Sick and Safe Leave (In Brief):

- Creates Minn. Stat. 181.9445-9448
  - Is MN new leader in decimals?
- Effective January 1, 2024
- Applies to all ERs
- Applies to EEs performing 80 or more hours a year of work for the ER in MN
- Paid 100% by ER at wage/salary rate
- Don't confuse this with Paid Family and Medical Leave
  - That's the program run by the State like UI/FMLA
  - We'll cover that next

# Sick and Safe Leave (In Detail)

- Leave can be used for:
  - EE's
    - mental or physical health condition
    - Diagnostic appointments
    - Treatment
    - Preventative Care
  - EE's care for a family member receiving any of the above
    - Family defined on next slide
  - Domestic abuse, sexual assault, or stalking of EE, or FM, including treatment, services, counseling, relocation, legal advice, or court involvement
  - EE or FM business or school closed for WX or public emergency
  - ER quarantine of EE if telework not available; includes waiting on test results
  - Government quarantine of EE or FM, regardless of contracting disease

# Sick and Safe Leave (In Detail)

- “Family Member” means:
  - Child, foster child, adult child, legal ward, child for whom EE is the legal guardian, or child to whom the employee stands or stood in loco parentis;
  - Spouse or registered domestic partner;
  - Sibling, stepsibling, or foster sibling;
  - Biological, adoptive, or foster parent, stepparent, or a person who stood in loco parentis when the employee was a minor child;
  - Grandchild, foster grandchild, or stepgrandchild;
  - Grandparent or stepgrandparent;
  - Sibling’s child;
  - Parent’s sibling;
  - Child-in-law or sibling-in-law;
  - Family members of a spouse or registered partner;
  - Other individuals related by blood or whose close association with the employee is equivalent to a family relationship; and
  - Up to one individual annually designated by the employee.

# Sick and Safe Leave (In Detail)

- How ESSL must be accrued:
  - EEs accrue at least 1 hour ESSL for every 30 hours worked (ERs may provide more)
  - OT Exempt EEs (salaried) are deemed to work 40 hours per week; unless normal week is less, then based on normal week
  - ESSL carries over year to year
    - Or may frontload annually
      - Statute doesn't say how much, but 48 hours makes sense
      - Frontloading ERs must cash out at end of year if they give less than 80
  - Accrual basis need not cash out
  - ERs may cap at 80 hour bank
  - ERs may use any anniversary they want
  - May be used in smallest increment of time tracked by ER's system, but not more than 4 hours

# Sick and Safe Leave (In Detail)

- Notice to ER prior to use
  - ERs may require 7 day notice for foreseeable use
  - For unforeseeable use, ERs may require use as soon as practicable
  - Any ER notice requirement must be in writing, provided to EEs
  - May deny leave for EE failure to give notice(?)
    - “If a copy of the written policy has not been provided to an EE, an ER shall not deny the use of ESSL on that basis.”
    - Pretty clear that otherwise, you can.

# Sick and Safe Leave (In Detail)

- Documentation
  - None required for 3 or fewer consecutive days
  - ERs may require documentation for more than 3 consecutive days
    - Signed statement from HCP
  - Documentation may include a written statement from EE if
    - No services were obtained
    - Documentation cannot be obtained in a reasonable time
    - Documentation cannot be obtained without added expense
  - ER may NOT require
    - Evidence of family member's medical condition
    - Details of abuse, assault, stalking, etc.



# Sick and Safe Leave (In Detail)

- Continuation of Pay and Benefits
  - Any insurance coverage must continue
  - EE continues to pay EE's share
- Need not be paid out at end of employment for any reason
- Transfer within ER continues bank
- Bank continues with successor ER.
  - If successor fires EE and rehires in 30 days, bank continues
- If EE separates but returns within 120 days, bank from date of separation is reinstated

# Sick and Safe Leave (In Detail)

- Notices to EEs
  - Full notice of all terms, including prohibition of retaliation
  - On January 1, 2024 or at the commencement of employment
    - (I guess we're all working NYD)
  - Must be in handbook if you have one.
  - DOLI will prepare a uniform EE notice

# Sick and Safe Leave (In Detail)

- Earning Statements
  - 181.032 requires earning statements (old law)
  - Now amended, must include:
    - Current bank of SSL
    - Hours earned and used each pay period

# Sick and Safe Leave (In Detail)

- Other
  - Anti retaliation provisions
    - Specifies immigration reporting in addition to the usual prohibitions
  - Can't use SSL as an absence for discipline purposes
  - Can't require EEs to find their own replacements
  - Confidentiality
  - Civil remedies for EE plaintiffs
    - Atty fees
  - \$10K fine for failure to provide documentation to DOLI

# Sick and Safe Leave (In Detail)

- Takeaways
  - Hard to see how PTO is a practical option
    - Not illegal
    - But an accounting nightmare
  - Anniversaries?
    - If whole company is on same year, will you have annual plague?
  - Frontloading and cashing out may avoid malingering?
  - Frontloading and cashing out may encourage EEs to work while sick?

# Sick and Safe Leave (In Detail)

- ERs with no paid sick time now can probably get to \$0 net change.
- 2023
  - Job pays \$20/hr x 2,000 hrs/yr = \$40K/yr
  - EEs average 5 unpaid sick days/yr so = \$39,200
  - EE taking 6 sick days/yr = \$39,040
- 2024
  - ER gives 48 hours SSL and cashes out
  - New rate of pay = \$19.53
    - EEs who use no sick time earn \$40K inclusive of cash out
    - EEs who use all sick time earn \$39,062.50
- Pay cuts probably not practical, but diminished raises in time of inflation reach same result

# Sick and Safe Leave (In Detail)

- Out of the box solution?:
  - ER in 2023 gives 80 hours PTO and allows 80 hours unpaid vacation
  - ER and EE's don't want any change, but ER wants to comply with the law
  - 2024
    - ER eliminates PTO
    - ER frontloads 80 hours SSL
    - ER still allows 80 hours unpaid vacation
    - ER doesn't care if EEs use their SSL as they did PTO
      - Wants to maximize EE happiness with flexibility
  - IF EEs are using SSL for non-approved uses, ER had better be 100% blind to it.

# Sick and Safe Leave

- Questions?
- (“I hate this!” is not a question, but you may say it at this time if the spirit moves you.)



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Construction Workers Wage Protections  
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# Paid Family and Medical Leave

- In Brief:
  - Important—This sounds a lot like Paid SSL, but it's not the same thing
  - Creates 268B.01-29
  - All ERs
  - All EEs except
    - IC's
    - Self Employed – may opt in
    - Federal EEs
    - Seasonal EEs
  - Effective January 1, 2026
  - Many implementation details not yet resolved

# Paid Family and Medical Leave (In Detail)

- State-run program like UI
  - Tax paid by both ER and EE
  - Benefits paid by State, not ER
  - Partial wage replacement tied to compensation
  - Capped at State AWW (Currently \$1,287.00)
- Two banks of 12 weeks, capped at 20 weeks/year combined
  - Serious health condition
  - Other (pregnancy, bonding, safety, family care, military service)
- Caps are by year, not by event
- ERs may opt out if they provide benefits exceeding this
  - But must apply and get approval from the commissioner
  - “benefits” includes reinstatement benefits

# Paid Family and Medical Leave (In Detail)

Workers will receive:

- 90 percent of the portion of their weekly wages that is less than or equal to 50 percent of the state average weekly wage, plus:
- 66 percent of the portion of their weekly wages that is more than 50 percent of the state average weekly wage but less than or equal to 100 percent of the statewide average weekly wage, plus:
- 55 percent of the portion of their weekly wages that is more than 100 percent of the state average weekly wage

Benefits will be capped at 100 percent of the state average weekly wage. For 2023, 50 percent of the state average would equal \$643.50 per week, and 100 percent would be \$1,287.00 per week.

# Paid Family and Medical Leave (In Detail)

Workers will receive:

90% of \$0--\$643.50

66% of \$643.50--\$1,287.00

55% of \$1,287.00+

Sally makes \$1500 a week, her benefit is

90% of \$0--\$643.50 = \$579.15

66% of \$643.50--\$1,287.00 = \$424.71

55% of \$1,287.00--\$1500.00 = \$117.15

Total Benefit = \$1,121.01 = 74.7% of her income

# Paid Family and Medical Leave (In Detail)

- “Serious Health Condition”
  - Complicated, page long definition
  - Akin to what qualifies under FMLA
  - Not your call
- Eligibility for Each Incident
  - Benefit account like UI; no account, no benefits
  - Single event of 7 day duration
  - Again, not your call

# Paid Family and Medical Leave

- Notice to ERs
  - EE must provide ER with notice only if ER provided EE with notice of obligation to provide notice
  - 30 days in advance if foreseeable
  - ER may demand a copy of the certification of need
  - No consequences on benefits for failure to provide notice
  - No prohibition on AA for failure to provide notice
    - But be careful!
    - My standard handbook language

# Paid Family and Medical Leave

- Employment Protections:
  - No retaliation, damages, atty fees, \$1-10K penalty
  - No interference, damages, atty fees, \$1-10K penalty
  - Insurance must be continued, but EE must pay EE share
  - Reinstatement on return
    - If qualifications or training have expired, must have opportunity to fix
    - Unconditional pay increases (COL) must be instated
    - Right to overtime (if any) must be reinstated, bonuses too
    - Seniority must be treated as ER does for any other LOA



# Paid Family and Medical Leave

- Limitations on reinstatement rights:
  - No rights other than those EE would have if continually employed
  - Layoffs
    - All ER obligations terminate
    - Burden is on ER to show layoff would have affected EE even if not on leave
  - If EE was employed for a specific term, ER obligations terminate at that time

# Paid Family and Medical Leave

- Interaction of ESSL and PFML
  - The two bills were not written together
  - Only consolidated at the end
  - EE may use vacation, sick pay, etc. in lieu
    - No requirement that they do so
  - As written, the benefits stack as to time
    - May use all ESSL, then all PFML
    - Not both at same time
- Interaction of WC and PFML
  - Not eligible for PFML if receiving WC wage loss
- Offset of PFML for severance (like UI).

# Paid Family and Medical Leave

- Takeaways
  - Don't dive into this now, you've got time and the State has some rulemaking to do.
  - Big hit is going to be the reinstatement issue for small employers
    - An ER not covered by FMLA, now has to figure out how to do without an EE for 20 weeks.
    - If you are politically inclined, this should be the point of attack
  - Adds yet another protected class and opportunity for retaliation lawsuits

# Paid Family and Medical Leave

- Questions?

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Construction Workers Wage Protections  
ER Sponsored Meetings  
Cannabis  
Veteran's Rights Poster  
Ergonomics  
Nursing Home Standards Board  
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# Nursing Mothers and Pregnant Employees

- Modifies existing statute 181.939
- Lactation modifications:
  - Removes the 12 month limitation
  - Removes “unduly disrupt operations” exception
    - So now breaks must be provided even if they unduly disrupt operations
  - Clarifies that lactation breaks can run concurrently with other breaks
- Automatic Pregnancy Accommodation modifications:
  - Longer breaks (used to just say more)
    - Restroom, water, and food.
    - Longer regular breaks
  - ER must consider temporary leave of absence, modification of work schedules, job reassignments
    - DO NOT DO THIS UNLESS ASKED!

Questions?

# Federal Pregnant Workers Fairness Act (in detail)

- In Brief:
  - Pregnancy Discrimination Act of 1978 amended the CRA of 1964 to prohibit discrimination on basis of pregnancy
    - But no affirmative obligations to accommodate
  - ADA of 1990 required accommodation of pregnancy-related conditions
    - But not pregnancy itself
  - PWFA still doesn't cover pregnancy itself
    - But does cover "known limitations related to pregnancy, childbirth, or related medical conditions"
  - PWFA is effective June 27, 2023

# Federal Pregnant Workers Fairness Act

- “Known” not fully defined, but specifically includes limitations voiced by the EE
- Requires an interactive accommodation process like ADA
- ERs can’t deny employment opportunities based on the need for accommodations
- ERs can’t require leave if an accommodation can be provided
- Can’t retaliate for accommodations or request
- Can’t retaliate for reporting a violation
- EEOC rulemaking and Enforcement Memos forthcoming



# MN Nursing & Pregnant Mothers vs. Federal Pregnant Workers Fairness Act

- Automatic accommodations
  - Only under MN law
- EE specific accommodations
  - No conflict between State and Federal
  - Federal requires and lays out a more robust process, so use that as a guide
    - (technically only if you are 15+)

# Pregnancy in General

- Takeaway
  - We are getting to the point where any time an EE says they can't physically do any part of the job, you need to slow down and think accommodation
  - Also, one more retaliation provision to be used as a weapon against ERs
  - Always focus on job duty outcomes
- Questions?

# Federal Pump Act

- Effective December 9, 2022
- ERs shall provide
  - Reasonable break time to express
  - Private place other than a bathroom
  - 1 year from delivery
  - Need not be paid
    - Unless not fully relieved from duty
      - Remote work . . . I guess?
- ERs less than 50 not subject if undue hardship
- Questions?

# MN Nursing vs. Federal PUMP act

- No conflict
- MN is stronger—no exemption for small ERs.
- Substantively the same.

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Construction Workers Wage Protections

ER Sponsored Meetings

Cannabis

Veteran's Rights Poster

Ergonomics

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# Modified Wage Disclosure Protections

- Modifies 181.172 (existing wage disclosure protections for current wages)
- Effective July 1, 2023
- Applies to all ERs and EEs
- Prohibits ERs from requiring, asking about, or considering pay history of an applicant.
  - What if EE voluntarily discloses?
  - What if it's a tight industry and you know the pay scales at the ER they're coming from?
- Questions?

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- Sick and Safe Leave
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- Nursing and Pregnancy
- Wage Disclosure Protections

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Cannabis

Veteran's Rights Poster

Ergonomics

Nursing Home Standards Board

Prevailing Wage

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# Employer-Sponsored Meetings and Communications

- 181.531 Created
- Bans “captive audience” meetings for political or religious matters
- Poll: who has ever heard of this happening?
- Civil remedies, attorney fees
- Almost certainly unconstitutional
  - I can require that my employees listen to me talk about my latest fishing trip
  - Treats religious and political speech differently
- Questions?



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- Paid Family Medical Leave
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Construction Workers Wage Protections  
ER Sponsored Meetings

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# Cannabis

- Recreational cannabis will be legal for 21 and older on August 1, 2023
- 321 page bill to make something legal
  - This seminar does not cover:
    - Employment within the cannabis business
    - Regulation of cannabis
    - What you can and can't have
    - How to roll a fatty
- Even as signed, the bill is a mess
  - Redundancy
  - Cross references that don't line up
- This bill covers a lot of things, this section will jump around (sorry)

# Cannabis, THC = LCP

- 181.938 (“lawful consumable products” provision) modified
  - Subd. 2(a): ER may not take adverse action against an EE for use of LCP’s off premises during nonworking hours.
    - LCP now includes cannabis
  - Subd. 2(b): ER may take adverse action for possession, use, impairment, sale or transfer during work hours, on premises, or while operating ER’s equipment **IF**
    - Required or incentivized under Federal or State law
    - (Don’t worry, more ER protections in separate section.)

# Cannabis, Non Testing Rules

- These ER protections appear in the testing section of the bill
- ERs MAY:
  - Prohibit use, possession, impairment, sale, and transfer on premises or while operating ER's equipment
    - Prohibition must be in writing
  - This is in a separate section from LCP, so broad permission even if not required under law

# Cannabis, Workplace Testing

- Simplest way to understand: Treat Cannabis like alcohol.
  - But that's not 100% precise (differences on next slide)
  - Cannabis is no longer a "Drug" or controlled substance under 181.950 Subd. 4.
  - Bill just adds cannabis to existing language for:
    - Initial test,
    - follow up test,
    - safety-sensitive position,
    - reasonable suspicion testing,
    - treatment program testing.

# Cannabis, Workplace Testing

- Differences between alcohol and cannabis:
  - Can't require an applicant to test for cannabis, and can't act on a positive (if required testing for other drugs)
    - Unless required by state or federal law
  - New Subd. 5 removes cannabis from "Drug and Alcohol testing" and creates new "Cannabis testing."
    - Standards established under 181.953, Subd. 1
    - Cannabis standards on next slide

# Cannabis, Workplace Testing

- 181.953, Subd. 1-10 testing standards are not new
  - Changes “drug or alcohol” to “drug, alcohol, or cannabis”
  - No change:
    - Use an accredited 3<sup>rd</sup> party lab
    - Chain of custody rules
    - Written notice of policy
    - Written notice of results
    - Right to re-test
    - Limitations on discharge

# Cannabis, Workplace Testing

- 181.953, Subd. 10a: “Additional limitations for cannabis.”
  - I don’t want to introduce confusion but . . . These could be read as limits on ER action or as limits on cannabis use by EEs.
  - 181.953 is all about testing, but testing is not explicit in this section.
  - 10a says ER may take AA as follows; doesn’t say ER may ONLY take AA as follows.
  - Substance on next slide



# Cannabis, Workplace Testing

- 181.953, Subd. 10a: May take AA as follows:
  - (1) if, as the result of use, EE doesn't have "clearness of intellect and control of self that the EE otherwise would have;"
    - No reference to test, how would you know of the use?
    - Why is this in the testing section?
  - (2) positive test;
  - (3) as provided in ER's written rules;
  - "or"
  - (4) as otherwise required by law.
- My standby advice:
  - If you want to take AA and you have evidence to do so, DON'T test, just act.

# Cannabis, Workplace Testing

- Exempt from limitations on testing (can test)
  - Safety-sensitive positions as defined by 181.950, Subd 13: "impairment caused by drug or alcohol usage would threaten the health or safety of any person."
  - Peace officer
  - Firefighter
  - CDL
  - Funded by federal grant
  - Face to face training, education, supervision, counseling, consultation or medical assistance to:
    - Children
    - Vulnerable adults
    - Emergency patients
  - Otherwise required by law
  - I see nothing in the bill that would allow a financial professional to be tested for THC.
    - Otherwise required by law?
    - Safety sensitive? I doubt it

# Cannabis, what to do?

- Takeaways
- Prohibit at work use, possession, etc. in writing
- Test only if you have a reason
  - Safety sensitive as defined in statute
  - Legal requirement
  - And only when in a written policy
- Act on outcomes and avoid testing when you can
  - If you want to take AA, and you have non-cannabis reasons, use those

# Cannabis, Questions?

- Questions?

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- ~~Ban on Restrictions in Franchise Agreements~~
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- Paid Family Medical Leave
- Nursing and Pregnancy
- Wage Disclosure Protections

~~Construction Workers Wage Protections~~  
~~ER Sponsored Meetings~~  
~~Cannabis~~  
~~Veteran's Rights Poster~~  
~~Ergonomics~~  
~~Nursing Home Standards Board~~  
~~Prevailing Wage~~  
~~Cases (maybe we'll get there)~~

# Last Call for Questions

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# Thank you!

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