

# **DRUGS, VIOLENCE, AND VAPING: DRAFTING EMPLOYMENT POLICIES IN THE AGE OF RECREATIONAL MARIJUANA**

## **I. OVERVIEW**

- A. Review considerations in drafting effective Substance Abuse Policies.
- B. Understand state of Michigan and federal laws concerning smoking, vaping and fragrances in the workplace.
- C. Learn how to craft effective violence prevention policies and procedures in light of state and federal law protections.

## **II. CRAFTING EFFECTIVE SUBSTANCE ABUSE POLICIES IN A CHANGING CLIMATE**

- A. Marijuana: An Overview Across the Country.
  - 1. Federal law.
    - a. The federal Controlled Substances Act, 21 USC §801 *et seq.*, classifies marijuana as a Schedule I drug. 21 USC §812(c). Schedule I drugs have been deemed to “lack any accepted medical use;” therefore, federal law prohibits marijuana’s manufacture, distribution, and possession. 21 USC §812(b)(1); §841(a)(1).
    - b. There is a wave of legislation being introduced that would affect the federal government’s ability to enforce the Controlled Substances Act in states that have legalized marijuana. Most recently, a bipartisan bill referred to as the STATES (Strengthening the Tenth Amendment Through Entrusting States) Act (with 13 Democratic and 13 Republican co-sponsors) was introduced.<sup>1</sup> It would greatly limit the federal government’s

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<sup>1</sup> See *Lawmakers Optimistic About New Federal Marijuana Bill*, Matt Laslo, <https://www.rollingstone.com/culture/culture-news/marijuana-pot-federal-states-act-congress-817670/>

ability to enforce the federal ban in states that have legalized and regulated the industry.

2. State law.

- a. Medical marijuana is now legal in 33 states<sup>2</sup>, while recreational marijuana is legal in 10 states (Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont and Washington).<sup>3</sup>

3. Marijuana use across the country.

- a. Marijuana has become a booming industry worth approximately 10 billion dollars in 2018, and expected to grow to 16 billion by 2019.<sup>4</sup>
- b. A recent survey found that 1 in 7 adult Americans had used marijuana in 2017 ("12.9 percent reported smoking marijuana, 6 percent said they had consumed edibles, 4.7 percent reported

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<sup>2</sup> See California—Cal. Health & Safety Code §11362.5(a); Alaska—Alaska Stat. §17.37.010; Colorado—Colo. Rev. Stat. Ann. §18-14-1; Hawaii—Haw. Rev. Stat. §329-122; Maine—Me. Rev. Stat. Ann. tit. 22, §2383-B; Montana—Mont. Code Ann. §50-46-101; Nevada—Nev. Rev. Stat. §453A.120; New Mexico—N.M. Stat. §26-2B-1; Washington—Wash. Rev. Code §69.51A.005; Oregon—Or. Rev. Stat. §475.300; Rhode Island—R.I. Gen. Laws §21-28.6-4(a); Vermont—Vt. Stat. Ann. tit. 18 §4471; Michigan—Mich. Comp. Laws §333.26421; New Jersey—SB 119 (2010); D. C.—Amendment Act B18-622; Arizona—Proposition 203 (2010); Delaware—Senate Bill 17 (2011); Connecticut—HB 5389 (2012); Massachusetts—Ballot Question 3 (2012); Illinois—HB 1 (2013); New Hampshire—HB 573 (2013); Minnesota—SB 2470 (2014); Maryland—HB 881 (2014); New York—AB 6357 (2014); Arkansas—Ballot Measure 6 (2016); Florida—Ballot Amendment 2 (2016); North Dakota—Ballot Measure 5 (2016); Ohio—HB 523 (2016); Pennsylvania—Senate Bill 3 (2016); Louisiana—Senate Bill 271 (2016); West Virginia—Senate Bill 386 (2017); Utah—HB 3001 (2018); Missouri—Ballot Amendment 2 (2018); Oklahoma—Ballot Question 788 (2018)

<sup>3</sup> See *New Jersey Lawmakers Postponed a Critical Vote to Legalize Marijuana — Here Are All The States Where Pot Is Legal*, Jeremy Berke and Skye Gould, <https://www.businessinsider.com/legal-marijuana-states-2018-1>.

<sup>4</sup> See *Legal Marijuana Industry Had Banner Year in 2018 with \$10B Worth of Investments*, <https://www.nbcnews.com/news/us-news/legal-marijuana-industry-had-banner-year-2018-10b-worth-investments-n952256>.

vaping, 1.9 percent said they had used concentrates and 0.8 percent reported using topical versions of cannabis.”).<sup>5</sup>

- c. While marijuana use has grown in the workforce, opioid use has seen a decline.
- d. Approximately 4.4 percent of the U.S. workforce had positive drug tests in 2018. The number of workers and job applicants who tested positive for marijuana climbed 10 percent last year to 2.3 percent.<sup>6</sup> However, positive opioid tests fell 21% from 2017 to 2018.<sup>7</sup>

B. The state of marijuana in Michigan.

1. Medical marijuana in Michigan.

- a. “The Michigan Medical Marijuana Initiative was approved by voters on November 04, 2008. It was enacted into law as the Michigan Medical Marijuana Act (MCL 333.26421 to 333.26430) and became effective on December 04, 2008. The Act allows patients to grow up to 12 marijuana plants and possess up to 2.5 ounces of usable marijuana, allows primary caregivers to grow up to 12 marijuana plants for a patient, and limits primary caregivers to a maximum of 5 patients.”<sup>8</sup>
- b. The Michigan Medical Marijuana Facilities Licenses Act (MMFLA), MCL 3332701 *et seq.*, created a licensing, regulation, and tracking system for medical marijuana in Michigan. It was

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<sup>5</sup> See *One In Seven U.S. Adults Used Marijuana in 2017*, Linda Carroll, <https://www.reuters.com/article/us-health-marijuana-us-adults/one-in-seven-us-adults-used-marijuana-in-2017-idUSKCN1LC2B7>.

<sup>6</sup> See *Marijuana Use Up Among Workers; Opioid Use Down*, Roy Maurer, <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/marijuana-use-up-among-workers-opioid-use-down.aspx>.

<sup>7</sup> See *id.*

<sup>8</sup> See *Michigan Medical Marijuana Laws*, <https://www.medicalmarijuana.com/law/michigan-medical-marijuana-laws/>.

approved on September 21, 2016 and made effective December 20, 2016. The MMFLA allows for five categories of licensed medical marijuana businesses including growers, processors, secured transporters, provisioning centers, and safety compliance. However, licensees must also have municipal approval before operations begin.

2. Recreational marijuana in Michigan.
  - a. The Michigan Regulation and Taxation of Marijuana Act (MRTMA) was passed by the voters of the state of Michigan on November 6, 2018 and became law on December 6, 2018. The MRTMA legalized the use, possession and transfer of recreational marijuana by persons 21 and older in Michigan.
3. The projected marijuana industry in Michigan is expected to exceed 700 million dollars.<sup>9</sup>

C. What are employer's rights with regard to maintaining a zero-tolerance policy?

1. Neither the MMMA, MMFLA, nor the MRTMA require employers to allow marijuana use in the workplace.
  - a. MMMA, MCL 333.26427, states that "An employer is not required to accommodate the ingestion of marijuana in any workplace or any employee working under the influence of marijuana." However, it then states that qualifying patients may not be subject to "penalty in any manner, or denied any right or privilege ... or disciplinary action by a business ... for the medical use of marijuana."

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<sup>9</sup> See *Michigan Awards First Medical Marijuana Licenses*, Kathleen Gray, <https://www.freep.com/story/news/marijuana/2018/07/12/medical-marijuana-michigan/779840002/>.

- b. This contradiction was addressed in *Casias v Wal-Mart Stores, Inc*, 764 F Supp2d 914, February 11, 2011, which held that “the MMMA does address—potential state prosecution or other potential adverse state action—the MMMA says nothing about private employment rights. Nowhere does the MMMA state that the statute regulates private employment, that private employees are protected from disciplinary action should they use medical marijuana, or that private employers must accommodate the use of medical marijuana outside of the workplace.”
- c. In 2014, the Michigan Court of Appeals held for the employees stating that the employees were not disqualified for benefits when they possessed valid medical marijuana cards, did not refuse to take drug tests and there was no evidence that they consumed marijuana or were under the influence in the workplace. *Braska v Challenge Mfg Co*, 307 Mich App 340 (2014). The Court distinguished this case from *Casias*, stating that the *Braska* case involved *state action* as opposed to a *private employer action*.
- d. The MRTMA does not require an employer to “permit or accommodate conduct otherwise allowed by this act in any workplace or on the employer’s property;” nor does it “prohibit an employer from disciplining an employee for a workplace drug policy or working under the influence of marijuana.” In addition, the act does not “prevent an employer from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person because of that person’s violation of a work-place drug policy or because that person was working under the influence of marijuana.” MCL 333.27954(3).

- e. Therefore, employers are still within their rights to refuse to allow marijuana consumption by employees and to take adverse employment action if such prohibitions are violated.
2. Most recent Michigan Court of Appeals case.
- a. One Michigan employee recently challenged such an adverse employment action based on marijuana use.<sup>10</sup> The employee challenged a potential employer's decision to rescinded a job offer after she tested positive for marijuana (she had a medical marijuana card as required under state law). Again, dealing with the state as the employer, the court held that the MMMA "does not create affirmative rights but instead provides immunity from penalties and the denial of rights or privileges based on the medical use of marijuana...." and "does not provide an independent right protecting the medical use of marijuana in all circumstances, nor does it create a protected class for users of medical marijuana." <sup>11</sup>

D. Is a zero-tolerance policy right for your company?

- 1. The growing number of American marijuana users paired with a competitive market and low unemployment rates means that a zero-tolerance policy will reduce the pool of candidates. Large companies are taking this into consideration. For example, Target has "stopped across-the-board screening and instead began focusing only on safety-sensitive positions such as security guards and warehouse machinery operators."<sup>12</sup> Meanwhile, Kroger, has "narrowed its drug screens to

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<sup>10</sup> See *Eplee v City of Lansing*, 2019 WL 691699, (unpublished opinion, Court of Appeals, Docket No. 342404, February 19, 2019); *Medical Marijuana User Loses Workplace Case in Court of Appeals*, Kathleen Gray, <https://www.freep.com/story/news/marijuana/2019/02/20/medical-marijuana-workplace/2931942002/>.

<sup>11</sup> *Id.* at 9–10.

<sup>12</sup> See *Marijuana Use Up Among Workers; Opioid Use Down*, Roy Maurer, <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/marijuana-use-up-among-workers-opioid-use-down.aspx>.

just one-fifth of its job candidates, including managers and pharmacy workers.”<sup>13</sup>

2. Some industries may be more prone to substance abuse problems.
    - a. Food preparation and service, construction, extraction, health care, health care support, personal care, transportation and manufacturing.
    - b. Healthcare has heightened opioid abuse vulnerability due to easy access.
  3. Safety considerations.
    - a. An employer will need to evaluate the safety risks to its workforce if anything less than a zero-tolerance policy is being considered. This is an industry-specific analysis.
  4. Public image and the progressive workplace.
    - a. More employers are feeling pressure to stray from the traditional zero-tolerance policy based on public perception and the growing wave of marijuana support across the country.
  5. Comparisons with off-duty use and alcohol.
    - a. Some employers feel that they are creating a double standard, pitting employees who choose to imbibe alcohol in their off-duty time against those that ingest marijuana off-the-job.
- E. Coming technologies for real-time marijuana use testing.
1. As legalization of marijuana continues to expand across the country, law makers and law enforcement are growing more concerned about real-time impairment. Tests are being created and research to determine actual impairment of drivers, similar to breathalyzers and field sobriety tests for alcohol. Such tests could prove applicable for

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<sup>13</sup> See *id.*

employers seeking to test for real-time, on-the-job impairment as opposed to prior use of marijuana.

- a. Currently, law enforcement has to rely largely on field sobriety tests and general observations in order to determine marijuana impairment, however, several technologies are currently in development.
  - i. The marijuana breathalyzer: designed to detect THC on an individual's breath.<sup>14</sup> According to one manufacturer, Hound Labs, THC only stays in breath during the "peak window of impairment," or one to two hours after smoking or consuming marijuana.<sup>15</sup>
  - ii. The saliva test: less likely to indicate actual impairment, but still being considered by law enforcement.<sup>16</sup>

F. What to consider in crafting your Substance Abuse Policy.

1. The challenges of lawful and unlawful substance abuse.
  - a. ADA and FMLA protections for legal vs. illegal use.
  - b. An employee is not protected by the ADA for marijuana use, even when prescribed by a physician due to the fact that marijuana is still illegal under federal law (but state laws vary).
  - c. Recovering and recovered substance abusers may be considered "disabled".

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<sup>14</sup> See *The Pot Breathalyzer Is Here. Maybe*, <https://www.npr.org/2018/08/04/634992695/the-pot-breathalyzer-is-here-maybe>; *Marijuana Breathalyzer Aims to Detect High Drivers 'Without Unjustly Accusing'*, Lilly Price, <https://www.cnbc.com/2018/08/07/marijuana-breathalyzer-test-aims-to-detect-drivers-who-are-high.html>

<sup>15</sup> See *id.*

<sup>16</sup> See *Roadside Saliva Testing for Marijuana Use Gets House Hearing in Michigan*, Rick Thompson, [https://www.safeaccessnow.org/roadside\\_saliva\\_testing\\_for\\_marijuana\\_use\\_gets\\_house\\_hearing\\_in\\_michigan](https://www.safeaccessnow.org/roadside_saliva_testing_for_marijuana_use_gets_house_hearing_in_michigan).



- i. As such, leaves of absence for treatment could be considered a reasonable accommodation.
      - d. There is potential for a claim under the Michigan Persons with Disabilities Civil Rights Act, although there is no specific accommodation provision.
  - 2. Other state and federal laws that may be implicated.
    - a. Employers in multiple states must know all state and local laws.
    - b. ADA and FMLA may be implicated when substances are lawfully used. However, marijuana is still unlawful under federal law.
    - c. There are no employee protections for illegal drugs or misuse of lawfully prescribed drugs.
- G. What to include in crafting your Substance Abuse Policy.
  - 1. Prohibition on use of intoxicating substances while on duty, including:
    - a. Alcohol.
    - b. Illegal drugs.
    - c. Certain legal drugs (marijuana).
    - d. OTC and prescription drugs that could impair performance and affect safety.
  - 2. Drug testing requirements.
    - a. Pre-employment.
    - b. Random testing.

- c. Post injury or accident (**upon reasonable suspicion**).<sup>17</sup>
  - d. As required by law (for example, under certain state Workers' Compensation laws or the U.S. Department of Transportation requirements).
  - e. Consequences of refusing to submit to testing or positive test results.
- 3. The company's right to inspect/privacy expectations.
  - 4. Rehabilitation assistance (if offered) and reinstatement.
    - a. Information regarding the company Employee Assistance Programs.
    - b. Resources regarding substance abuse programs.
    - c. Return to work, probationary periods, and other reinstatement requirements

### III. SMOKING, VAPING & FRIENDLY FRAGRANCE POLICIES

- A. Smoking and the current state of the law.
  - 1. Federal Law.
    - a. It used to be that many businesses allowed workers to smoke indoors. However, those days are long gone, and now you will be hard-pressed to find any public building that allows people to smoke inside. While there are no federal laws regarding smoking tobacco in the workplace, many states have picked up the slack and have instituted their own laws on the subject. You

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<sup>17</sup> See <https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11> (Permitting "Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees. If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries."); see also <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/osha-clarifies-when-post-accident-drug-testing-is-permitted.aspx>.

should check the laws in whatever state you reside to make sure everyone working for you is protected.

2. Michigan.

- a. Amendments to the Michigan Clean Indoor Air Act ("Act") that became effective on May 1, 2010, require that all employers prohibit smoking of "any substance that contains a tobacco product in all public and private enclosed indoor places of employment."<sup>18</sup>
- b. The Act also requires that employers:
  - i. "Clearly and conspicuously post "No Smoking" signs or the international no smoking symbol where smoking is prohibited, including at the entrances to buildings or work places.
  - ii. Remove all ashtrays and smoking paraphernalia from all areas where smoking is prohibited.
  - iii. Ask any person smoking in violation of the Act to stop and, if they refuse, request the violator to leave, as well as inform them that they are in violation of state law and subject to penalties, and refuse to serve the violator."<sup>19</sup>

B. Drafting effective smoking policies.

1. "Cigarette smoking is the leading cause of illness and death in the U.S. In a study of U.S. adults, results showed 19.6% of workers smoked overall. Current cigarette smoking was highest among the following groups: Workers with less than a high school education (28.4%), Workers with no health insurance (28.6%), Workers living below the

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<sup>18</sup> See *Michigan's New Law Banning Smoking in the Workplace*, <https://saginawchamberleadingbusiness.wordpress.com/2010/06/18/michigan%E2%80%99s-new-law-banning-smoking-including-in/>

<sup>19</sup> *Id.*

federal poverty level (27.7%), Workers aged 18–24 years (23.8%). Cigarette smoking by industry ranged from 9.7% in education services to 30.0% in mining. For occupations, smoking ranged from 8.7% in education, training, and library to 31.4% in construction and extraction. Of an estimated 19 million workers in healthcare and social assistance, 16% reported cigarette smoking, while 25.9% of an estimated 9.3 million workers reported smoking in the accommodation and food services.”<sup>20</sup>

- a. Of all smokers in the workplace, approximately 22.8% were men and 18.3% were women.<sup>21</sup>
  - b. Even with growing smoke-free workplaces and policies, one in ten U.S. workers report “regular exposure to secondhand smoke while at work.”<sup>22</sup>
2. Accordingly, the National Institute for Occupational Safety and Health (NIOSH) recommends that employers take the numerous actions related to employee tobacco use:
- a. “Establish and maintain smoke-free workplaces that protect those in workplaces from involuntary, secondhand exposures to tobacco smoke and air borne emissions from e-cigarettes and other electronic nicotine delivery systems. Smoke-free workplaces should be established in concert with tobacco cessation support programs. Smoke-free zones should include:
    - i. all indoor areas without exceptions (i.e., no indoor smoking areas of any kind, even if separately enclosed and/or ventilated).

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<sup>20</sup> *Tobacco Smoking: Smoking by Industry, Occupation, & Gender*, The National Institute for Occupational Safety and Health (NIOSH)  
<https://www.cdc.gov/niosh/topics/tobacco/tobaccosmoking.html>

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

- ii. all areas immediately outside building entrances and air intakes.
  - iii. all work vehicles.<sup>23</sup>
- b. Given available data on the safety of exposure to e-cigarette emissions, these products should be included in indoor smoking policies.
- c. Establish and maintain entirely tobacco-free workplaces, allowing no use of any tobacco products across the entire workplace campus.
- d. Comply with current OSHA and MSHA regulations that prohibit or limit smoking, smoking materials, and/or use of other tobacco products in work areas characterized by the presence of explosive or highly flammable materials or potential exposure to toxic materials.
- e. Provide information on tobacco-related health risks and on benefits of quitting to all employees and other workers at the worksite (e.g., contractors and volunteers).
- f. Provide information on employer-provided and publicly available tobacco cessation services to all employees and other workers at the worksite (e.g., contractors and volunteers).
- g. Offer and promote comprehensive tobacco cessation support to all tobacco-using workers and, where feasible, to their dependents. Provide employer-sponsored cessation programs at no cost or subsidize cessation programs for lower-wage workers to enhance the likelihood of their participation.
- h. Develop, implement, and modify tobacco-related policies, interventions, and controls in a stepwise and participatory

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<sup>23</sup> *Id.*

manner. Get input from employees, labor representatives, line management, occupational safety/health and wellness staff, and human resources professionals.

- i. Make sure that any differential employment benefits policies that are based on tobacco use or participation in tobacco cessation programs are designed with a primary intent to improve worker health and comply with all applicable federal, state, and local laws and regulations.
- j. Ensure that all workers (smokers and nonsmokers) are aware of the occupational safety and health risks associated with their work, including those that can be made worse by personal tobacco use, and how to limit those risks.”

C. Vaping in the workplace – considerations.

1. Approximately 11 million adults use e-cigarettes.<sup>24</sup> Although many sources state that e-cigarettes are safer than cigarettes, they are still not safe. In fact, they are considered a gateway into smoking, especially for teens and those that have never smoked.
2. “The Food and Drug Administration (FDA) has issued a proposed rule that would extend the agency’s tobacco authority to cover additional products that meet the legal definition of a tobacco product, such as e-cigarettes. FDA’s Extending Authorities to Additional Tobacco Products webpage offers more information on the proposed rule.”<sup>25</sup>
3. While some of states have passed anti-vaping laws, Michigan has yet to formally address the issue.
4. More and more employers are opting to apply the same rules to vaping

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<sup>24</sup> See *3 Things to Know about Workplace Smoking Policies for Vaping*, Jessie Saul, <https://www.theexprogram.com/resources/blog/workplace-smoking-policy-vaping/>.

<sup>25</sup> See *Vaping in the Workplace: Do You Need a Policy on E-Cigarettes?* <https://www.aseonline.org/News/Articles/ArtMID/628/ArticleID/161/Vaping-in-the-Workplace-Do-You-Need-a-Policy-on-E-Cigarettes>

as apply to smoking cigarettes.

- a. "Productivity lost during smoke breaks accounts for approximately \$3,077 in losses per year per smoker, based on an estimate of 5 smoke breaks throughout the workday."<sup>26</sup> This figure could be even higher for vaping.
- b. Heath concerns still exist with vaping, contrary to popular belief.

D. The friendly fragrance policy – more than just a courtesy.

1. A reasonable accommodation under the ADA?
  - a. If someone with a fragrance sensitivity asks for a fragrance policy to be implemented in the workplace, the request should be evaluated as a reasonable accommodation under the Americans with Disabilities Act (ADA).
  - b. Although the request may not appear to be related to a disability at first blush, the employer should take the request seriously, even if an accommodation isn't readily apparent or available.
  - c. The employer should engage in the interactive process with the employee to see if a reasonable accommodation is possible without posing an undue hardship on the employer.
2. Allergies and Other Medical Reasons.<sup>27</sup>
  - a. Employers should remember that requests for friendly fragrance policies may be related to underlying medical conditions.

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<sup>26</sup> See *3 Things to Know about Workplace Smoking Policies for Vaping*, Jessie Saul, <https://www.theexprogram.com/resources/blog/workplace-smoking-policy-vaping/>.

<sup>27</sup> See *How to Tell Employees Not to Wear Excessive Perfume*, Colleen Reinhart, <https://smallbusiness.chron.com/tell-employees-not-wear-excessive-perfume-17615.html>

("Some reactions, like shortness of breath, are particularly severe for people with preexisting respiratory conditions, such as asthma and chronic obstructive pulmonary disease.").

- b. Inquiries should be limited accordingly so that the employee is not being interrogated about his or her medical condition, but rather the accommodation they are seeking.
- 3. Encouraging sensitivity and flexibility.
  - a. Even if not for a disability related reason, friendly fragrance policies can be incorporated into overall appearance and hygiene policies.
  - b. Employees should be educated as to how their personal grooming and hygiene practices may affect others in the workplace.<sup>28</sup>

#### IV. VIOLENCE PREVENTION, GUNS AND OTHER WEAPONS IN THE WORKPLACE

- A. Balancing violence prevention with employee rights.
  - 1. The Michigan Constitution proclaims "Every person has a right to keep and bear arms for the defense of himself and the state." Mich. Const 1963, Art 1, §6.
  - 2. Concealed pistol license – state of the law in Michigan.
    - a. "It is the intent of the legislature to create a standardized system for issuing concealed pistol licenses to ... allow law abiding residents to obtain a license to carry a concealed pistol, and to prescribe the rights and responsibilities of individuals

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<sup>28</sup> See *id.* ("Sit down with the worker and discuss the sensitivities that some people have to artificially scented products. If the employee is wearing excessive amounts of product regularly, it's unlikely they have encountered someone with such a problem previously. Explain that perfumes can cause sniffing, dizziness, headaches, nausea and breathing problems for other workers . . . Tell employees that perfumes aren't necessarily the only culprit. Heavily scented makeups, soaps, shampoos and even laundry detergents cause problems for some people. If you're clear about this fact, a worker who likes fragrant soaps can't make the mistake of thinking she's fine just because she doesn't use scented sprays. Educate your workforce on how to find products without heavy scents. Look for "parfum" or "fragrance" in cosmetic ingredient lists, even when a product is labeled "unscented." . . . When a direct conversation isn't the best course forward - perhaps there are multiple offenders during pumpkin spice product season - send a scent-free workplace memo to remind employees of any basic guidelines.)



who have obtained a license to carry a concealed pistol.” MCL 28.421a. In fact, Michigan is an “open-carry” state, whereby citizens do not need a license to carry a firearm openly (so long as the firearm has been legally obtained) *See Combs v City of Birmingham*, 2013 U.S. Dist. LEXIS 124335 (ED Mich., August 30, 2013).

- b. The Michigan Firearms Act, MCL 28.421 *et seq.*, regulates the carrying of firearms, including concealed pistols.
  - c. Approximately 1 in 12 Michigan residents carry a concealed weapon.<sup>29</sup> To obtain a concealed pistol license, you must be 21 years old, a United States citizen or legal alien, a legal resident of Michigan who has resided in Michigan for at least six months before applying for a CPL (with certain exceptions), and have completed a pistol safety training course. MCL 28.425b(7)(a)–(c).
  - d. A licensee is permitted to “carry a pistol concealed ***on or about his or her person*** anywhere in this state . . . [and to] carry a pistol in a ***vehicle***, whether concealed or not, anywhere in this state.” MCL 28.425c(3)(a)–(b).
3. The “Pistol Free Zone”.
- a. There are certain areas where a concealed weapon is not permitted, including schools, sport arenas, hospitals, bars, etc. A person’s workplace is not explicitly included as a “pistol free zone” in the statute.

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<sup>29</sup> *See Where Can You Carry a Gun in Michigan? It’s Complicated*, Ron French <https://www.grandhaventribune.com/State/2018/02/21/Where-can-you-carry-a-gun-in-Michigan-It-s-complicated> (“According to the most recent data from the Michigan State Police, 617,000 Michigan residents age 21 or older have a concealed carry license. That’s one in 11.7 adults across the state. The rate ranges from one in every 6.7 adults in Keweenaw County in the Upper Peninsula, to one in every 19.5 adults in Kent County.”)

- b. However, an employer who is not necessarily a designated “pistol free zone” can prohibit an employee from carrying a concealed pistol in “the course of his or her employment”. MCL 425n(2)(a)–(b).
- c. What about employer parking lots? Much would depend on whether they are accessible to the public at large or just employees. However, an employer can likely prohibit the pistol if the employee is in a company-owned vehicle when the employee is in the course of his or her employment.
- d. While the Sixth Circuit has held that an employer need not have a written policy prohibiting the employee from carrying a concealed pistol, *Hoven v. Walgreen Co*, 751 F3d 778, 786 at fn 3 (CA 6, 2014), it is always best to include important policies in a written handbook or other manual distributed to employees.

B. Workplace violence statistics.

1. Workplace violence is a “growing concern for employers and employees,” according to OSHA. According to the Bureau of Labor Statistics, in 2016, workplace homicides increased by 83 cases to 500, the highest homicide figure since 2010.<sup>30</sup>
2. According to OSHA, approximately 2 million workers are victims of workplace violence each year.<sup>31</sup>
3. OSHA recommends that “The employer [] establish a workplace violence prevention program or incorporate the information into an existing accident prevention program, employee handbook or manual of standard operating procedures.”<sup>32</sup>

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<sup>30</sup> See *Workplace Violence: Steps for Prevention*, <https://www.safetyandhealthmagazine.com/articles/17596-workplace-violence-steps-for-prevention>

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

- C. Violence Prevention: Policies and Training.
  - 1. Drafting comprehensive violence prevention policies.
    - a. Must address all prohibited conduct, including threats and intimidation.
    - b. List items deemed “weapons” by employer.
    - c. Provide carve-out and exceptions, if any.
      - i. Required as part of the job?
      - ii. Potential weapons.
      - iii. Company or personal vehicles?
    - d. Detail consequences for violations.
  - 2. Training and drills.
    - a. Much like active-shooter drills in schools, more and workplaces are seeing the benefits of including response drill as part of their prevention plan.

V. CONCLUSION

- A. The workplace is ever-evolving and it important for employers to stay current on developments in employment law, including changes to employer and employee rights. At times this means balancing company values with those more progressive workplace attributes most valued by the workforce.
- B. Although the law may be clear as to certain things that can be banned in the workplace, the changing climate has created other “gray areas.” It is always important to analyze new issues outside of the vacuum and consider whether other laws and protections may be at play before taking definitive action.
- C. Protecting the safety of employees in the most important priority for employers. This involves a careful weighing of employee rights and the goals of creating a safe and healthy environment for all employees. Prevention is

always the best avenue and policies, trainings, and drills can help to prepare employers for the worst.