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Drugged Driving: Standards, Legislative Trends and Legal Impact

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(NAMSDL)

Topics

- Standards
 - “Under the influence”
 - Specified concentration
 - “Any amount”
- Recently proposed / enacted legislation
- Issues addressed by courts
- Practicality

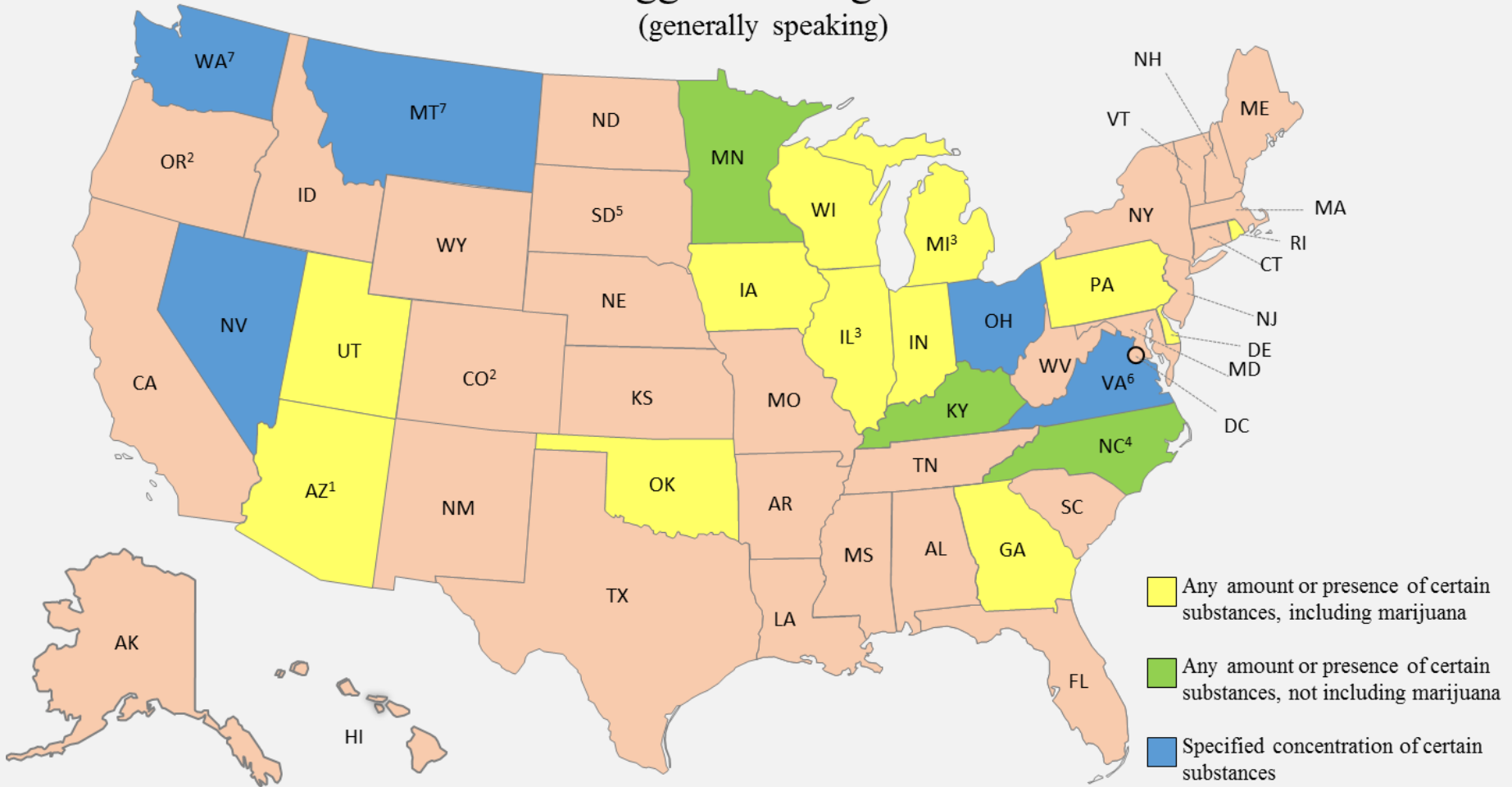
Standard

- Question – what is the legal standard in [State X] for “drugged driving”?

Standard

- Question – what is the legal standard in [State X] for “drugged driving”?
- Response – with respect to what substance?

State Drugged Driving Standards (generally speaking)



- Any amount or presence of certain substances, including marijuana
- Any amount or presence of certain substances, not including marijuana
- Specified concentration of certain substances
- Under the influence / impaired / intoxicated

¹ Arizona – it is illegal to drive with certain defined drugs “or its metabolite in the person’s body.” The Arizona Supreme Court has held that this standard applies only to metabolites “capable of causing impairment.” *State ex rel. Montgomery v. Harris*, 237 Ariz. 98, 346 P.3d 984 (2014).
² Colorado and Oregon – it is illegal to use or consume marijuana while driving. ³ Illinois and Michigan – with respect to marijuana, the standard applies only to unlawful use and not the lawful use for medicinal purposes. ⁴ North Carolina – the standard applies to more substances (including marijuana) for drivers under age 21. ⁵ South Dakota – for drivers under age 21, the standard is “as long as physical evidence of consumption” of marijuana or a controlled substance remains present in the body. ⁶ Virginia – marijuana is not one of the specified substances. ⁷ Montana and Washington – THC is the only substance subject to a specified concentration limit.

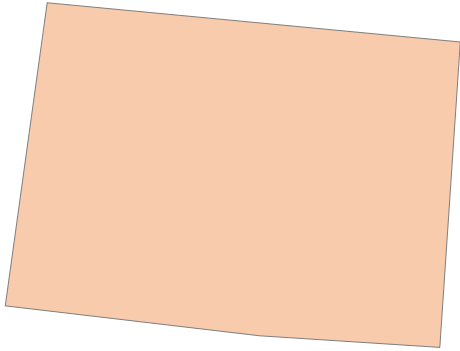
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“Under the Influence”

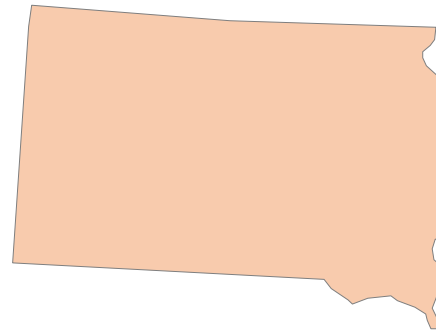
- Other similar standards:
 - “impaired” / “so far impaired”
 - “intoxicated”
 - “renders ... incapable of safely driving”
- Baseline standard – 50 states + D.C.
- Only standard – 28 states + D.C.
- No affirmative defense

“Under the Influence”

- Colorado – “permissible inference” re THC

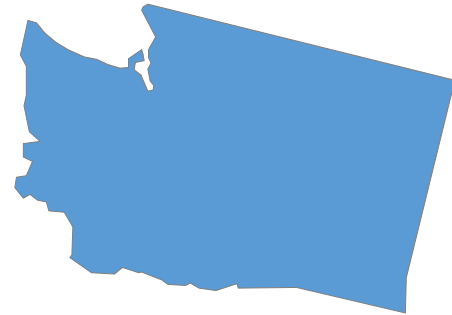
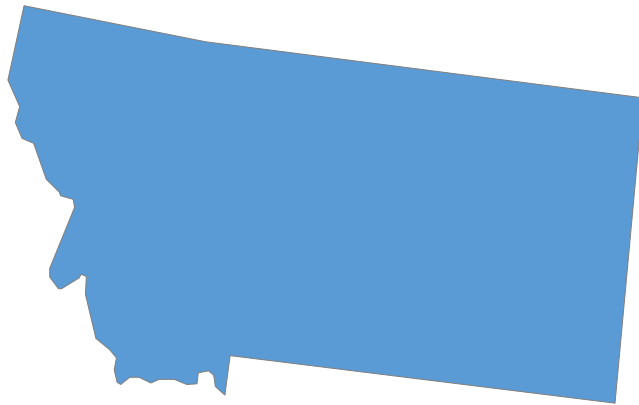


- South Dakota – age 21 and older



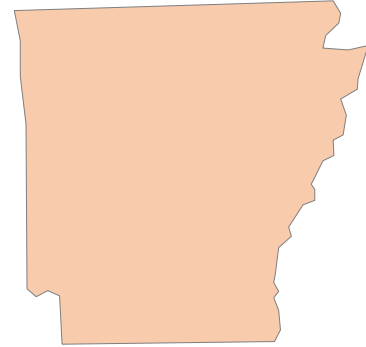
“Under the Influence”

- Montana / Washington – applies to all drugs except THC.



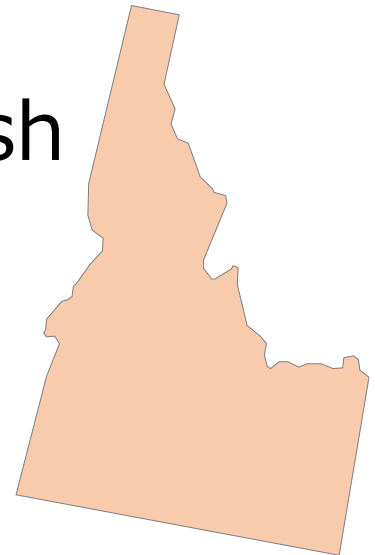
“Under the Influence”

- Arkansas
- ***Leeka v. State*** (June 2015) – DWI requires “a culpable mental state”
- 2015 1st Ex. Session Act 6 (2015) – alcohol violation is a strict liability offense



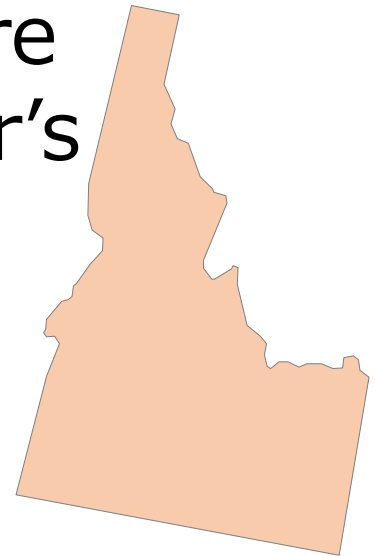
“Under the Influence”

- Idaho
- *State v. Stark* (April 2013) – evidence of Carboxy-THC (but not THC) in driver’s blood insufficient by itself to establish “under the influence”



“Under the Influence”

- Idaho
- *State v. Morin* (Feb. 2015) – evidence of inactive metabolite is admissible as relevant where state linked presence to driver’s impairment and marijuana intoxication



Specified Concentration (*“per se”*)

- Violation “by itself” to have a blood or urine concentration above [X]
- Five states (plus Colorado)
- Substances covered vary
- Affirmative defense (?)
- Proposed legislation re THC in six states
- AAA Foundation – May 2016 report

Specified Concentration (*"per se"*)

- Nevada (1999)
- Amphetamine, cocaine, cocaine metabolite, heroin, heroin metabolite, lysergic acid diethylamide, marijuana, marijuana metabolite, methamphetamine, phencyclidine
- Differing blood / urine concentrations



Specified Concentration ("*per se*")

- Nevada (1999)
- ***U.S. v. Reed*** (Aug. 2013) – Nevada's *per se* drugged driving law could be assimilated into federal law without interfering with federal policy



Specified Concentration ("*per se*")

- Ohio (2006)
- Amphetamine, cocaine, cocaine metabolite, heroin, heroin metabolite, LSD, marijuana, marijuana metabolite, methamphetamine, phencyclidine, salvia divinorum
- Differing blood / urine concentrations



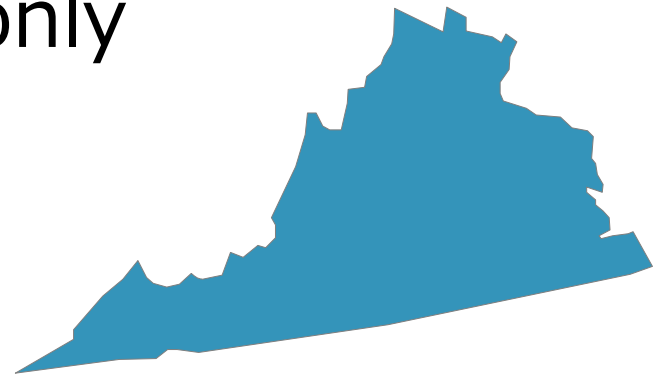
Specified Concentration ("*per se*")

- Ohio (2006)
- *State v. Whalen* (May 2013) – *per se* statute not unconstitutionally vague on its face as related to marijuana; provision discouraged “arbitrary and discriminatory enforcement”



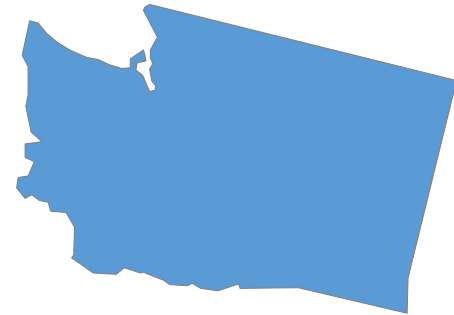
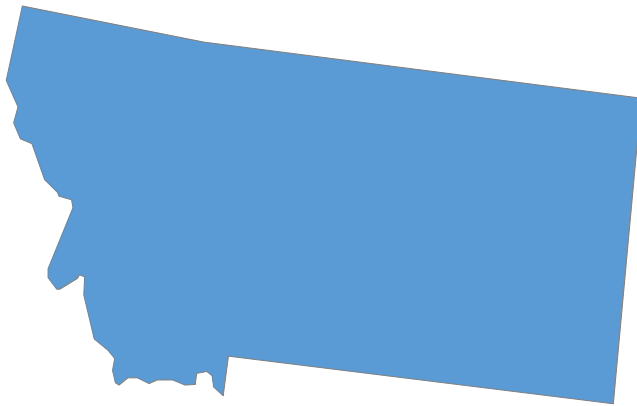
Specified Concentration ("*per se*")

- Virginia (2005)
- Cocaine, methamphetamine, phencyclidine, 3,4-methylenedioxymethamphetamine
- Blood concentrations only



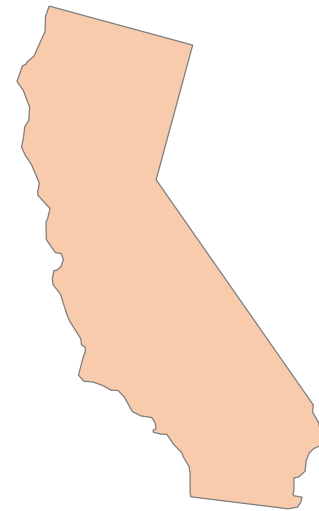
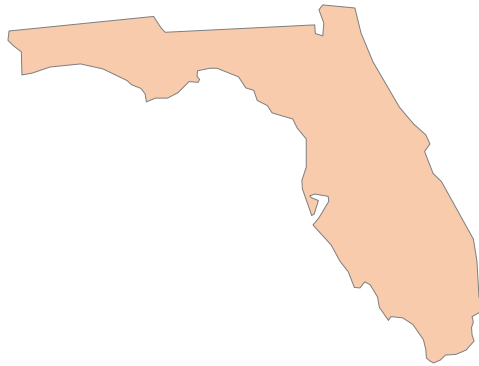
Specified Concentration ("*per se*")

- Montana (2013)
- Washington (2012)
- THC only – 5 ng/ml in blood



Specified Concentration ("*per se*")

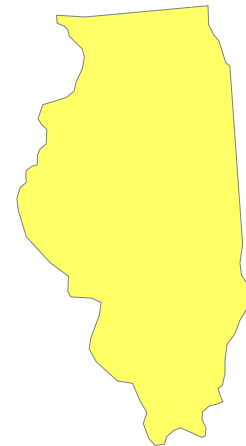
- California – 2015 A.B. 2740
- Florida – 2016 H.B. 161
- Similar to Montana / Washington
- THC – 5 ng/ml in blood



Specified Concentration ("*per se*")

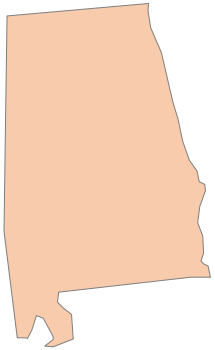


- Georgia – 2015 H.B. 375 / 722
- THC – 2 ng/ml in blood



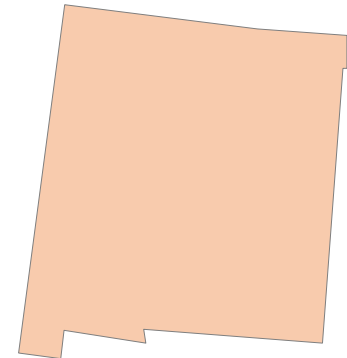
- Illinois – 2015 S.B. 2228
- THC – 5 ng/ml in blood or 10 ng/ml in other substances

Specified Concentration ("*per se*")



- Alabama – 2015 S.B. 255
- THC – 5 ng/ml in blood
- “Quantifiable amounts” of others

- New Mexico – 2016 H.B. 44
- Listed substances
- THC – 5 ng/ml in blood



Specified Concentration ("*per se*")

- AAA Foundation – May 2016 report
- “Based on this analysis, a quantitative threshold for *per se* laws for THC following cannabis use cannot be scientifically supported.”
- <https://www.aaafoundation.org/impaired-driving-and-cannabis>

“Any Amount” (Zero Tolerance)

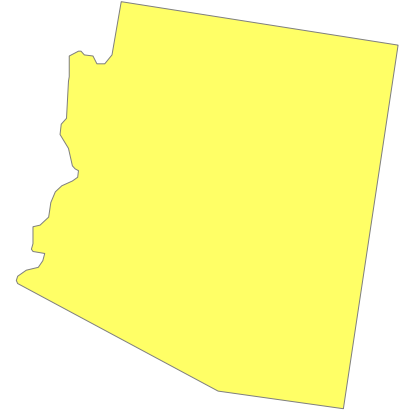
- 15 states (plus South Dakota)
- Substances covered vary
- Marijuana / THC not included in three states – KY, MN, NC (21+)
- Affirmative defense(s)
 - Valid prescription
 - Medicinal use of marijuana

“Any Amount” (Zero Tolerance)

- Any controlled substance – GA, IA, IL*, RI, SD*, UT
- Schedule I – MI*, OK
- Schedule I + other listed – AZ*, DE, NC*, PA*, WI
- Schedules I and II – IN, MN
- Listed – KY

* exception(s)

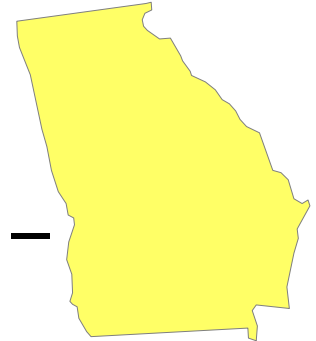
“Any Amount” (Zero Tolerance)



- Arizona
- ***State v. Harris*** (April 2014) – standard applies only to metabolites “capable of causing impairment”
- ***Dobson v. McClennan*** (Nov. 2015) – possession of registry card alone does not prove marijuana level below impairment

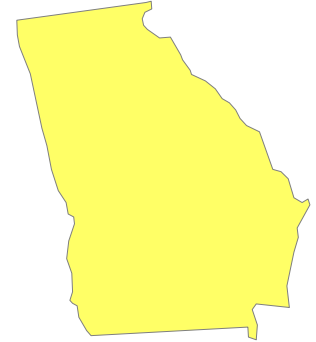
“Any Amount” (Zero Tolerance)

- Georgia
- ***Kevinezz v. State*** (Feb. 1995) – standard not unconstitutionally vague or indefinite; provides adequate notice to anyone who ingests marijuana or any other drug specified in statute and then drives that they are in peril of violating statute



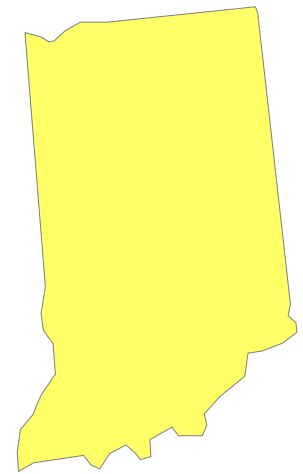
“Any Amount” (Zero Tolerance)

- Georgia
- *Sandlin v. State* (Jan. 2011) – affirmative defense in cases of legal entitlement to use drug violates equal protection; distinction between legal and illegal users is “not directly related to the public safety purpose of the legislation”



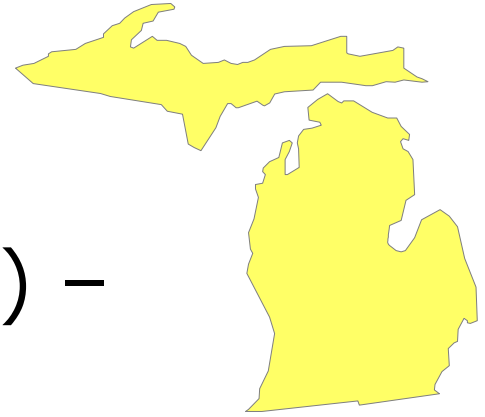
“Any Amount” (Zero Tolerance)

- Indiana
- *Hucker v. State* (Feb. 2014) – provision does not violate state constitution’s privileges and immunities clause; amount necessary to cause impairment not easily quantifiable



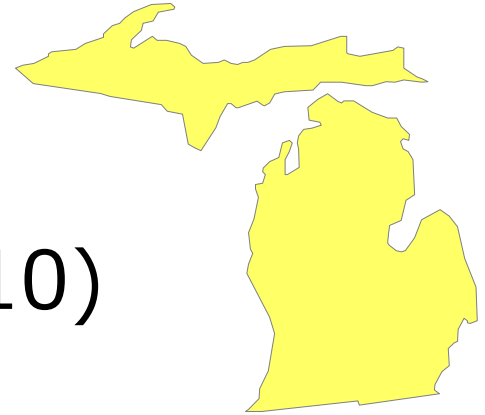
“Any Amount” (Zero Tolerance)

- Michigan
- ***People v. Koon*** (May 2013) – MMMA protection allows a registered patient to drive when he or she has indications of marijuana in his or her system but is not otherwise under the influence of marijuana



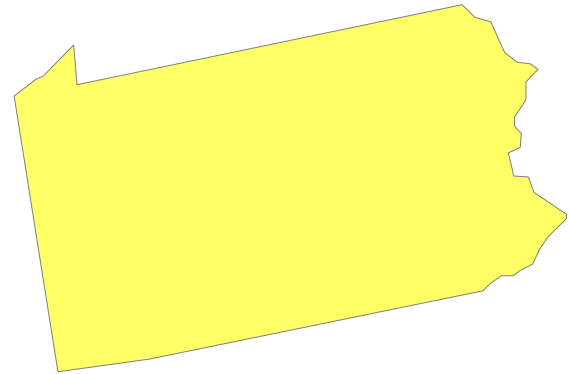
“Any Amount” (Zero Tolerance)

- Michigan
- ***People v. Feezel*** (June 2010)
 - 11-carboxy-THC found in driver’s blood did not constitute schedule 1 controlled substance



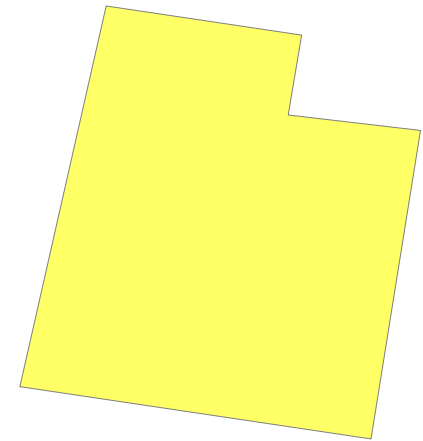
“Any Amount” (Zero Tolerance)

- Pennsylvania
- Pa. Act. 2016-16 (2016) –
marijuana to be rescheduled
from Schedule I



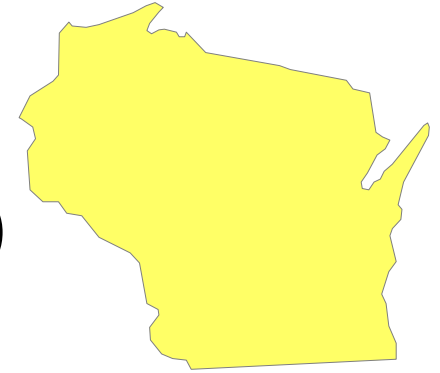
“Any Amount” (Zero Tolerance)

- Utah
- *State v. Eberwein* (Mar. 2001)
 - driver’s admission to ingesting pain medication insufficient to convict under drugged driving provision

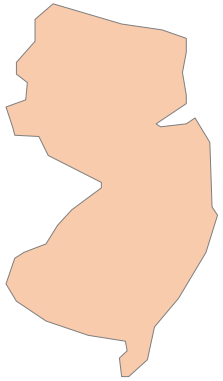


“Any Amount” (Zero Tolerance)

- Wisconsin
- ***State v. Luedtke*** (April 2015)
 - provision satisfies rational basis scrutiny test for substantive due process; with no reliable measure of impairment for many drugs, legislature could have concluded zero tolerance best option



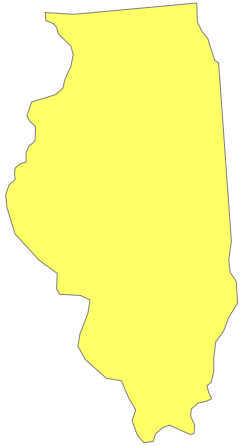
“Any Amount” (Zero Tolerance)



- New Jersey – 2016 A.B. 1263
- “Inhalant”

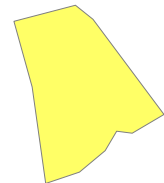
- New Jersey – 2016 S.B. 1483
- Schedule I – IV
- Defense for authorized prescription

“Any Amount” (Zero Tolerance)

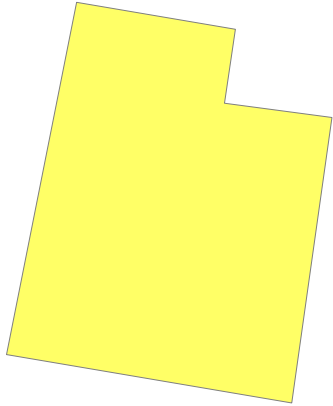


- Illinois – 2015 S.B. 2980
- Any amount “in excess of the prescribed amount”

- Rhode Island – 2015 H.B. 7752 / S.B. 2420
- Impairment standard for persons aged 21 or older, or medicinal use



“Any Amount” (Zero Tolerance)



- Utah – 2016 S.B. 89
- Adds specific affirmative defense for “cannabis-based medicine recommended by a physician”

Predicting the Future

- Marijuana / THC
- Move to tiered approach?
- Scientific basis for specified concentrations
- Constitutional challenges

CONTACT INFORMATION

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