



2019 GUAM & FEDERAL LAW UPDATE

Presented By:

Vince Camacho, Esq.

Vice President Legislative &
Affairs – SHRM Guam Chapter



SHRM 2019
Agenda



U.S. Supreme
Court Review



Free Speech in the
Workplace



Impact of
Marijuana in the
Workplace



Guam Minimum
Wage Debate

AGENDA:

SHRM 2019 AGENDA



BETTER WORKPLACES
BETTER WORLD™

SHRM in partnership with Charles Koch Institute, launched Getting Talent Back to Work Initiative and toolkit.

SHRM is asking employers to commit to giving opportunities to qualified people who paid their debt to society.

SHRM created Toolkit to help HR professionals get talent back to work.

Getting Talent Back to Work

- Each year close to 700,000 men and women are released from prison and re-enter society.
- After 1 year of release 75% of them remain unemployed.

www.GettingTalentBackToWork.org

BETTER WORKPLACES
BETTER WORLD™

[HOME](#) [PLEDGE](#) [TOOLKIT](#) [ABOUT](#) [PARTNERS](#)



GETTING TALENT BACK TO WORK TOOLKIT

The Toolkit empowers business and HR leaders to confidently evaluate applicants with criminal records by equipping them with the latest research, evidence-based best practices and industry guidance needed to reduce legal liability and increase inclusive hiring from this untapped talent pool. Read our [Executive Summary](#).

Explore the Getting Talent Back to Work Toolkit:

COMPLIANCE



RISK ANALYSIS



BACKGROUND CHECKS



NEGLIGENT HIRING



INTERVIEWING & ASSESSMENT



INCENTIVES & SUPPORT



SCREENING GUIDANCE



CULTURE & COMMUNICATION



EMPLOYER PROVIDED EDUCATION ASSISTANCE



IRC Section 127 allows an employee to exclude from income up to \$5,250 per year in education assistance provided by an employer for courses at the associate, undergraduate, and graduate level.

In today's competitive workforce, a comprehensive employer-sponsored benefits package is a key component that employers use to attract and retain top talent. Employers carefully construct a benefits package that reflects the need and demands of their specific workforce.

44 Million Americans with student loan debt amounting to more than \$1.5 Trillion

SHRM supports Section 127 benefits and the effort to increase the monetary limits and scope of Section 127 to include student loan repayment.

AMERICAN WORKFORCE POLICY ADVISORY BOARD

Seeks to bring more Americans off the sidelines and into the workforce by improving jobs data transparency and skills-based hiring and training, advancing opportunities for lifelong learning, and promoting multiple pathways to family sustaining careers.

Co-chaired by Commerce Secretary Wilbur Ross and Advisor to the President Ivanka Trump, members of the Advisory Board include:

Tim Cook, CEO, Apple

Marillyn Hewson, Chairman, President, & CEO, Lockheed Martin

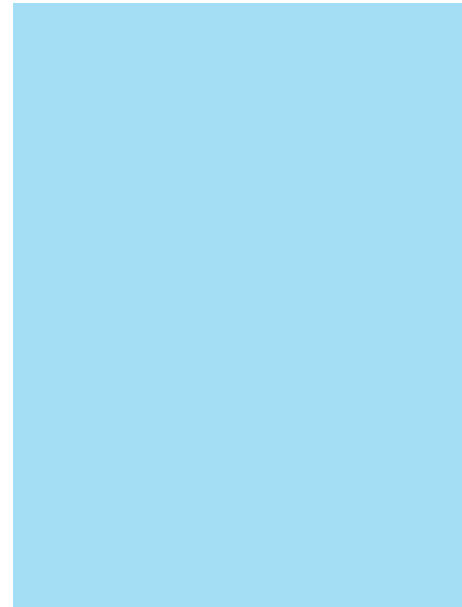
Barbara Humpton, CEO, Siemens USA

Sean McGarvey, President, North America's Building and Trades Unions

Craig Menear, Chairman, President, & CEO, Home Depot

Scott Pulsipher, President, Western Governors University

Johnny Taylor, President & CEO, Society for Human Resource Management



AMERICAN WORKER INITIATIVE

BETTER WORKPLACES
BETTER WORLD™





Review: 6 Cases

Preview: 2 Cases

Focus Area: Arbitration



SUPREME COURT OF THE UNITED
STATES

REVIEW — FLSA EXEMPTIONS

Encino Motorcars, LLC v. Navarro (April 2, 2018)

Facts:

- Service advisors filed suit against employer, arguing they were entitled to overtime pay under the FLSA.
- Employer (car dealership) argued that the service advisors were exempt from the FLSA's overtime requirements because they fell into the category of “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles,” and as a result not covered by the FLSA.
- Ninth Circuit ruled that the service advisors were non-exempt and thus entitled to overtime pay.

**ENCINO
MOTORCARS,
LLC V.
NAVARRO
(APRIL 2, 2018)**

Issue:

Whether a service advisor is a salesman who is “primarily engaged in ... servicing automobiles,” and thus exempt from the FLSA’s overtime pay requirements.

**ENCINO
MOTORCARS,
LLC V.
NAVARRO
(APRIL 2, 2018)**

Holding:

Court held in favor of Encino Motorcars, LLC.

The best reading of the statute lead to the conclusion that **service advisors are exempt** from overtime because they are salesmen in that they do make sales of services for vehicles and they are primarily engaged in servicing automobiles.

Twice the Supreme Court has reversed and remanded a Ninth Circuit ruling in this very case.

Majority ruled that the FLSA exemptions should be accorded a fair, as opposed to a narrow reading.

This ruling may open the door to apply the exemptions provided by the FLSA.

ENCINO MOTORCARS, LLC V. NAVARRO (APRIL 2, 2018)



REVIEW: FAIR SHARE UNION FEES

Janus v. American Federation of State, County, and Municipal Employees (June 27, 2018)

Facts:

Aboud v. Detroit Board of Education, issued by the U.S. Supreme Court in 1997 rejected a First Amendment challenge to a Michigan law that allowed a public employer whose employees were represented by a union to require those employees who did not join the union to pay “agency or fair share fees” because they benefited from the union’s collective bargaining agreement with the employer.

Under the Illinois Public Relations Act, a union that represents public employees may collect dues from its members, but may only collect fair share fees from non-members on whose behalf the union negotiates.

JANUS V. AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES (JUNE 27, 2018)

Facts:

In 2015, the Governor of Illinois filed suit to challenge the collection of fair share fees, arguing that the statute violates the First Amendment by compelling employees who disapprove of the union to contribute money to it.

**JANUS V.
AMERICAN
FEDERATION OF
STATE, COUNTY,
AND MUNICIPAL
EMPLOYEES
(JUNE 27, 2018)**

Issue:

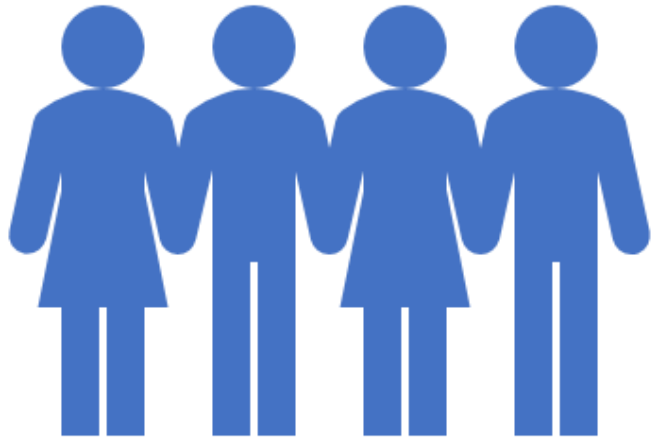
Whether *Abood* should be overruled and public sector “agency shop” arrangement invalidated under the First Amendment.

JANUS V. AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES (JUNE 27, 2018)

Holding:

- In a 5-4 decision authored by Justice Alito, the Court held in no uncertain terms that **ALL** public sector union activities, not just those identified as “ideological,” implicate the First Amendment.
- As a result, unions may not require that public sector employees pay dues as a condition of employment.

JANUS V. AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES (JUNE 27, 2018)



Impact:

Nearly half (7.2 million) of the 14.8 million union members in the United States work in the public sector, even though the private sector employs approximately five times as many workers.

Due to Janus, all 7.2 million of those public sector employees now work in a right-to-work environment as a matter of federal constitutional law.

Moving forward, unions must convince those public employees to pay dues as a matter of individual choice, rather than compulsion.

Private sector impact?

REVIEW — COMPENSATION (TAXATION)

Wisconsin Central Ltd. v. United States (June 21, 2018)

Employee stock options are not taxable “compensation” under the Railroad Retirement Tax Act because they are not “money remuneration.”

BNSF Railway Company v. Loos (March 4, 2019)

A railroad company’s payment to an employee for working time lost due to an on-the job injury is “compensation” subject to employment taxes.

REVIEW — AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

Mount Lemmon Fire District v. Guido (November 6, 2018)

Issue:

Whether, under the ADEA, the same 20 employee minimum that applies to private sector employers also applies to political subdivisions of a state or whether the ADEA applies instead to all state political subdivisions of any size.

Holding:

The Court held that the ADEA applies to all state political subdivisions, regardless of the number of employees. The decision cleared up a split between the Ninth Circuit and four other circuits.

REVIEW — CHEVRON DEFERENCE

Pereira v. Sessions (June 21, 2018)

Issue:

Whether the issuance of a notice that does not state the time and place of the removal hearing, but states that a hearing will be held at a time and place to be later specified, stops the running of the 10-year period.

The Chevron deference doctrine requires that federal courts defer to an agency's interpretation of a statute if: (1) the statute is ambiguous and (2) the agency's interpretation is reasonable.

PEREIRA V. SESSIONS (JUNE 21, 2018)

Background:

The Board of Immigration appeals (BIA) found the statute ambiguous as to whether the 10-year period would stop running from the issuance of an initial notice lacking date and time information if a subsequent notice contained that information. Six court of appeals agreed that the statute was ambiguous and that the BIA's interpretation was reasonable.

Holding:

The Supreme Court disagreed with the courts of appeals, holding that the statutory text requiring specification of date and time in the notice to stop the running of the statute was "clear and unambiguous." Therefore, the Chevron doctrine did not apply.

REVIEW — ARBITRATION CLAUSE

Lamps Plus Inc. v. Valera (April 24, 2019)

Issue:

Whether the FAA forecloses a state law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.

Holding:

An ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to arbitration.

PREVIEW: AGENCY DEFERENCE

Kisor v. Wilkie (March 27, 2019 – Argument)

Issue:

Whether the Supreme Court should overrule precedent, which directs courts to defer to an agency's reasonable interpretation of its own ambiguous regulation.

The 5th Circuit Court of Appeals deferred to the Department of Veterans Affairs' interpretation of its regulation rejecting plaintiff's claim for benefits dating back to 1983.

PREVIEW: TITLE VII'S EXHAUSTION REQUIREMENT

Fort Bend County, Texas v. Davis (April 22, 2019 – Argument)

Issue:

Whether employees can bring claims under Title VII in federal court if they don't first file a charge with the EEOC.

The 5th Circuit Court of Appeals held that the administrative exhaustion requirement was not jurisdictional (and thus can be waived).

COURT'S FOCUS: ARBITRATION & CLASS ACTION WAIVERS

Epic Systems Corp v. Lewis (May 21, 2018)

Facts:

- Jacob Lewis filed a class action lawsuit in federal court alleging that his employer failed to compensate him and other similarly-situated workers for overtime.
- The company filed a motion to dismiss the lawsuit and to compel arbitration pursuant to agreements signed by the employees. The agreement also stipulated that employees could not pursue those claims via class or collective action.
- A federal district court denied the company's motion and the Seventh Circuit held that the class or collective action waiver for work-related claims violated provisions of the National Labor Relations Act (NLRA).

EPIC SYSTEMS CORP V. LEWIS (MAY 21, 2018)

Issue:

Whether arbitration agreements that prohibit employees from pursuing class or collective actions are lawful under the NLRA and unenforceable under the FAA?

Holding:

- 5-4 – the Court ruled for the employer and upheld class action waivers in arbitration agreements.
- Relying heavily on the text of the FAA and “a congressional command requiring us to enforce, not override, the terms of the arbitration agreements before us,” the Court ruled that the FAA instructs “federal courts to enforce arbitration agreements according to their terms— including terms providing for individualized proceedings.”
- The Court also reasoned that neither the FAA’s savings clause nor the NLRA contravenes this conclusion.

MOVING FORWARD:

State Legislative Response to limit employment arbitration:

- Passed: New York, Maryland, Washington, Vermont
- Rejected: California

Arbitration Fairness Act:

- Introduced in U.S. Senate - would end employment arbitration

Ending Forced Arbitration of Sexual Harassment Act of 2017

- Introduced in Senate – would bar arbitration of all sex discrimination disputes

REVIEW: ARBITRATION AND INDEPENDENT CONTRACTORS

New Prime Inc. v. Oliveira (January 15, 2019)

Facts:

The plaintiff was engaged by New Prime Inc., an interstate trucking company, as an independent contractor driver.

- Despite signing an arbitration agreement requiring that any disputes be brought in arbitration, the plaintiff filed a class action lawsuit seeking unpaid wages in federal court.
- New Prime Inc. responded with a motion to compel arbitration.

NEW PRIME INC. V. OLIVEIRA (JANUARY 15, 2019)

Issues:

- When a contract delegates questions of arbitrability to an arbitrator, does the court or arbitrator decide whether the transportation worker exclusion applies?
- Does the phrase “contracts of employment,” as used in the FAA, refer only to contracts between employers and employees, or does it also reach contracts with independent contractors?

Ruling:

- The Court held that (1) a court, not an arbitrator, must determine the applicability of Section 1 of the FAA, and (2) under that provision, the term “contracts of employment” includes independent contractor agreements.

NEW PRIME INC. V. OLIVEIRA (JANUARY 15, 2019)

Impact:

- Although a “win” for plaintiffs on issue 1, the ruling on issue 2 is good for employers.
- The decision does not address the crucial issue of who falls within the transportation worker exclusion.
- The decision also does not address the enforceability of arbitration agreements under state laws, as well as the potential impact of choice-of-law provisions.

REVIEW — ARBITRATION

Henry Schein Inc. v. Archer and White Sales Inc. (1/8/19)

Issue:

Whether the FAA permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is “wholly groundless.”

Held:

“The ‘wholly groundless’ exception to arbitrability is inconsistent with the [FAA] and this Court’s precedent. Under the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms.”

LGBT Workplace Discrimination Rights:

- Three cases considered for review.
 - Bostock v. Clayton County Georgia
 - Altitude Express Inc. v. Zarda
 - R.G. and G.R Harris Funeral Homes v. EEOC

Religious Accommodation

- Patterson v. Walgreen Co.

Pay Equity

- Yovino v. Rizo - vacated

**BREAKING
NEWS:**



FREE SPEECH IN THE WORKPLACE

QUIZ

For which one of these actions could an employer lawfully discharge or discipline an employee?

- A. Placing a “Make America Great Again” bumper sticker on his car.
- B. Sending emails to his co-workers soliciting support for the repeal of Obamacare.
- C. Hanging controversial political cartoons on her office door.
- D. Writing a blog at home stating his opinions about the results of the most recent mid-terms and forecasting the upcoming 2020 elections.
- E. Sending co-workers a SNL political skit from YouTube using company computer network
- F. All of the above.

ANSWER:
IT DEPENDS

Generally, political party affiliation and political speech are not protected in the workplace like: gender, race, color, age, national origin, religion, disability, sexual orientation, gender identity, etc.

Note: There are a few exceptions: NY, CA and DC.

HOWEVER, THERE ARE SOME PROTECTIONS FOR SPEECH ...

- **Actions employers can take depend on:**
 - Whether you are a public or private employer
 - Where the employee works (which state)
 - Whether the workplace is union or non-union
- **Other considerations:**
 - Company policies and practices
 - State or local laws
 - National Labor Relations Act (NLRA)

FREEDOM OF SPEECH

Contrary to popular belief, there is no right to “free speech” in private workplaces under the U.S. Constitution.

“An employee may have a constitutional right to talk politics, but he has no constitutional right to be employed.” - Oliver Wendell Holmes, Jr., 1891
(paraphrased)



Political speech at work is not protected by the First Amendment.



– Employers generally have the authority to control how employees express themselves on the job, and may discipline and terminate employees who act unprofessionally or create disturbances (even if the expression at issue is political in nature).



– BUT, many states have laws protecting employees from discipline, termination, or other penalties based upon their exercise of federal or state constitutional free speech rights.

FREE COUNTRY?



EXAMPLES:

- Alabama factory worker discharged after refusing to remove a candidate's bumper sticker from her car.
- Pennsylvania waitress let go after customers complained that she was wearing a Tea Party bracelet at work.
- Mississippi bank supervisor discharged after black employees complained the supervisor commented she wished there wasn't so much attention to President Obama's race in the inaugural proceedings.
- Sports commentator suspended after tweeting that President Trump was "ignorant," stating that his election was a "direct result of white supremacy" and commenting on NFL kneeling controversy.
- Employer discharged employees last year who participated in Charlottesville, VA protest and violence (based on their social media posts and news coverage).
- A Virginia woman was fired from her job after raising her middle finger as President Trump's motorcade drove by. (The scene was captured on video that went viral.)

- Employee 1-on-1 discussions

- Potential disagreements, lack of cooperation

- Group discussions

- Distraction and hard feelings/interference with work

- Email messages on company systems

- Inconsistent application of policy and implications

- Material/postings on desks, walls, boards

- Controversial/disruptive

- Social media messaging

- Distracting/brand implications

HR'S REACTION TO POLITICAL DISCUSSIONS AT WORK

PROBLEMS & CONCERNS



- Hats, buttons, pins

On or in conflict with uniforms



- Distribution of materials

By employees, union, customers or other third parties



- Employee activity which appears to reflect endorsement of employer



- Customer complaints/business impact if activity occurs in work area

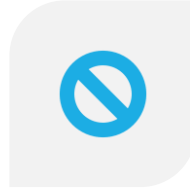


- Requested leave in support of candidate or political party

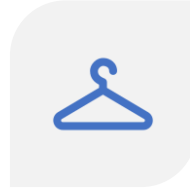
MORE PROBLEMS AND CONCERNS FOR HR... **POLICING WORKPLACE SPEECH**



- NO SOLICITATION/
DISTRIBUTION RULES



- ACCESS RULE



- APPEARANCE
STANDARDS



- SOCIAL MEDIA



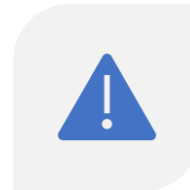
- USE OF COMPANY
COMPUTERS AND
EQUIPMENT



- PROHIBITION AGAINST
DISCRIMINATION AND
HARASSMENT



- RULES ON CIVILITY,
DISPARAGEMENT



- RETALIATION/
WHISTLEBLOWER
CONCERNS

WORKPLACE POLICIES... POTENTIAL IMPLICATIONS

DISCUSSION: LEGAL CONSEQUENCES

- Immigration = National Origin

- Terrorism = Religion, National Origin

- Police Shootings = Race / National Origin

- Sexual Harassment = Gender / Sexual Orientation

GENERAL RULES

Public employers (Balancing Test)

- Balance between the interests of the employee as a citizen, in commenting on matters of public concern
- The interest of the State, as the employer, in promoting efficiency of public services it performs through its employees

PUBLIC EMPLOYERS



Does speech relate to a matter of public concern?



What is the effect of the speech upon the public and public entity?



Was speech made pursuant to the employee's official duties?

GENERAL RULES: PRIVATE SECTOR

While there is no “free speech” right to political expression in the private workplace under the federal Constitution, some states provide their own protections.

Several states and local governments have laws protecting employees from adverse employment actions because of their political speech or activities outside of the workplace, including:

- California, Colorado, Connecticut, Georgia, Illinois, Iowa, Louisiana, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, South Dakota, Ohio, Oregon, South Carolina, Washington, West Virginia, Seattle (Washington), and Madison (Wisconsin)

Scope of protections vary greatly among states' laws.

LIMITS ON PUBLIC SECTOR/GOVERNMENT

Barcetti v. Ceballos, 547 U.S. 410 (2006)

Split Decision 5-4

Statements about being passed over for promotion as public employee, not as a private citizen, so no 1st Amendment protection for speech in this case.

NATIONAL LABOR RELATIONS ACT?

- Applies to both union and non-union private workplaces
- Employees at union and non-union workplaces have the right (under the NLRA) to help each other by sharing information, signing petitions and seeking to improve working conditions in a variety of ways.

NATIONAL LABOR RELATIONS ACT:



- **Act does not apply to political speech**



- **Speech (and related action) is protected if:**

Concerted

- Can be a group or an individual expressing concerns about work on behalf of others similarly situated

About a work-related issue



- **Scope of protections vary greatly among states' laws.**

TITLE VII AND RELATED ANTI-DISCRIMINATION STATUTES



Employees have the right to be free from discrimination / harassment based on their membership in protected categories

Recall hot button issues implicating race, gender, national origin, religion, etc.

A few states (e.g. NY, CA and DC) directly protect political beliefs



Applies to behavior both in and outside of work, including employee gatherings (whether sponsored by the company or not) and social media.



All allegations of discrimination or harassment must be promptly and appropriately investigated.

BEST PRACTICES:



Establish and communicate clear expectations as to your company's policy on political expression, and the sound reasons for it.



Train supervisors and managers on the company's policy, which may include:

Steps to take if they observe inappropriate conduct
Avoiding engaging in inappropriate conduct themselves (e.g. favoritism toward certain employees based on political affiliation or views)



Restrict access to bulletin boards or e-mail systems for political purposes.



Do not allow third party political activity on the premises.

MORE BEST PRACTICES:

- Don't overreact to short discussions among employees. However, do not permit significant distractions during working time. Use progressive steps:
 - beginning with a simple reminder or coaching
 - to enforce company policy.
- Enforce dress code and attendance policies, consistent with past practice.
- Promptly and appropriately investigate any employee complaints of harassment, similar to other investigations of reported misconduct.



TAKE AWAY....
BY:
JIM REIDY
SHEEHAN- PHINNEY

In short, generally **you can regulate political speech and activity in the workplace.**

You can always insist on “work time is for work”.

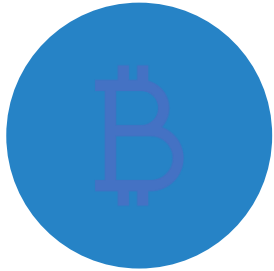
You can and should insist on civility and respect in the workplace.

Let’s remember, in the end, we have more in common than we have differences.

A decorative pattern on the left side of the slide, consisting of a grid of overlapping circles in a light blue color, creating a geometric, floral-like design.

IMPACT OF MARIJUANA IN THE WORKPLACE

WHERE ARE WE?



The U.S. Government estimates that domestic marijuana production has increased tenfold over the last 25 years.



158.8 million people around the world use marijuana = 3.8% of world population



Next to alcohol marijuana is the 2nd most found substance in drivers involved in fatal car accidents



40% of adult males arrested, for any crime, test positive at the time of arrest



Marijuana is the most frequently used illicit drug of abuse in the United States and the drug most often detected in workplace drug testing



2016 one in five (7.2 million) Americans age 18-25 self identified as current users of marijuana



2016 15.2 million (7.2%) ages 26 and older used marijuana

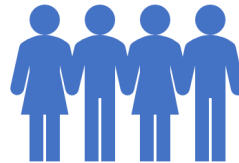
WORKFORCE

WHY SHOULD EMPLOYERS BE CONCERNED:

70% OF AMERICANS WHO USE ILLEGAL DRUGS ARE EMPLOYED



Employees who test positive for marijuana have a 55% more industrial accidents

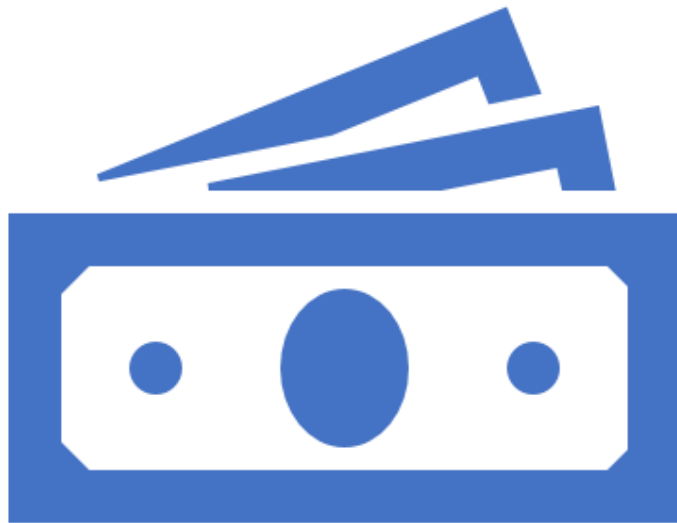


Employees who test positive for marijuana have 75% greater absenteeism rate



Employees who test positive for marijuana have 85% more injuries

COST TO EMPLOYERS:

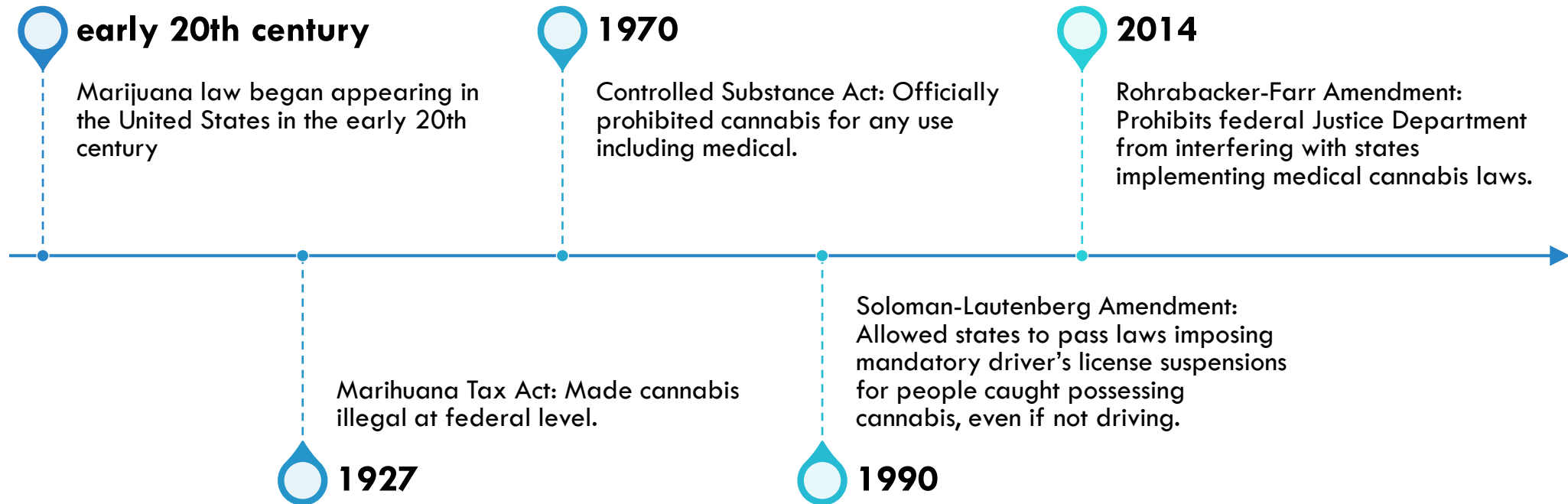


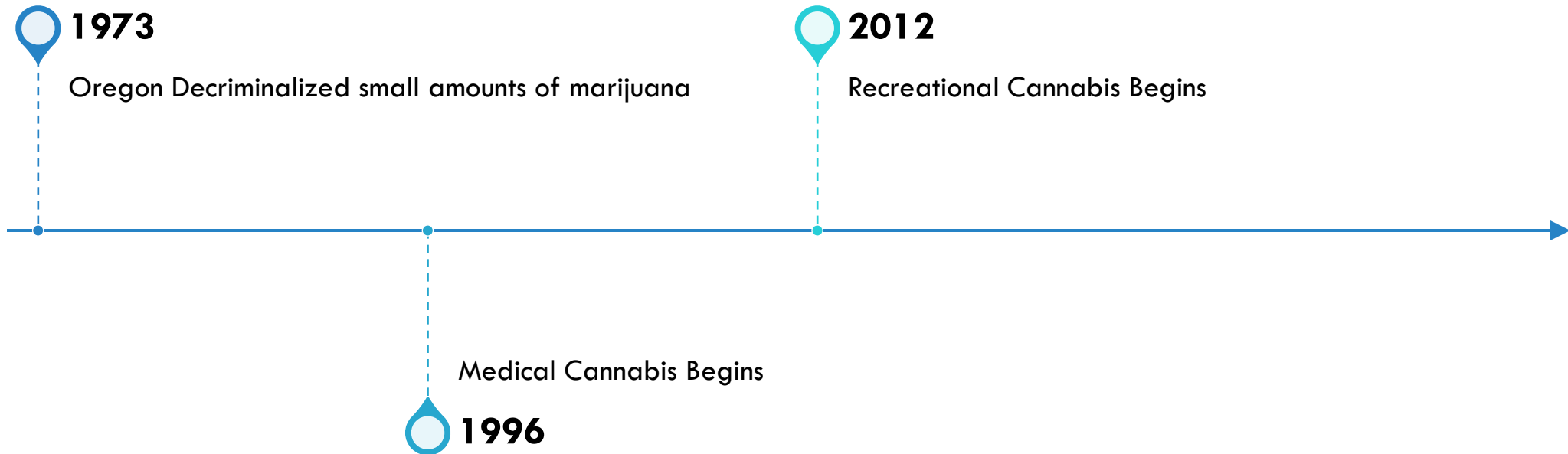
Employers can expect to spend about \$7,000 per year on an employee who abuses drugs (not including employment claims or legal action)

If 1 in 6 employees has a substance abuse problem in a company with 500 employees

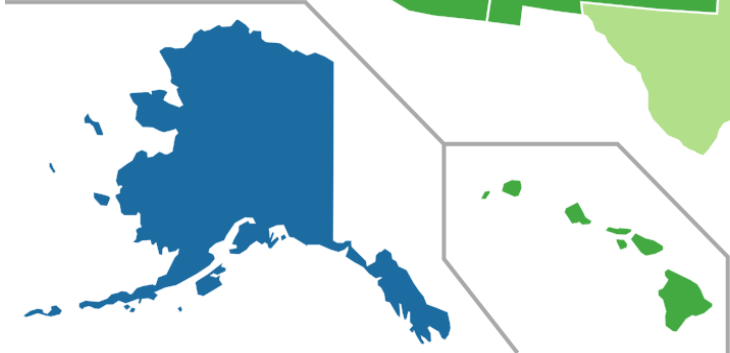
That can cost an employer **\$600,000** a year.

LEGALITY OF MARIJUANA — FEDERAL LEVEL





LEGALITY OF MARIJUANA — STATE LEVEL



HR DILEMMA

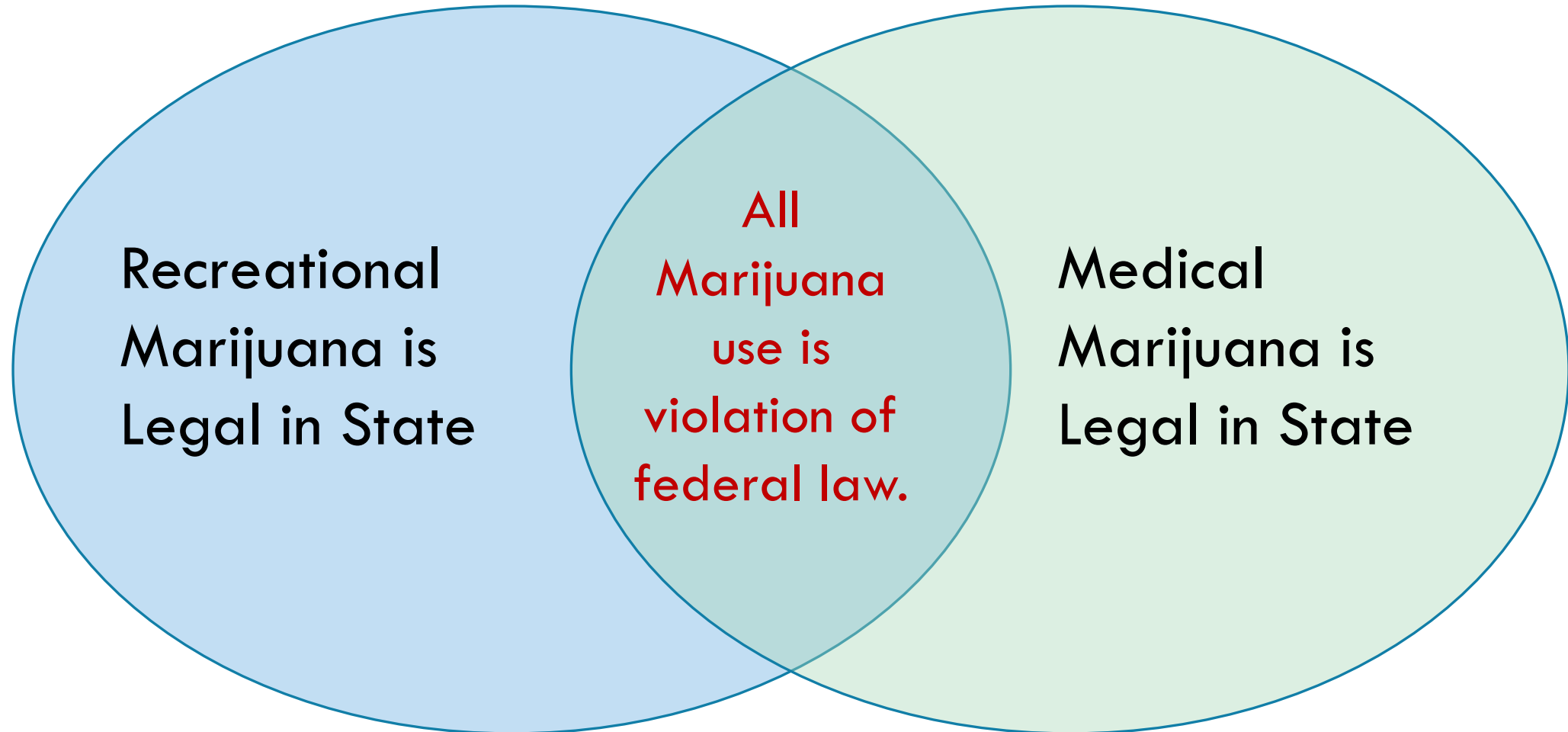
Marijuana is becoming legal for varying reasons at more and more locations in the United States based on state or territorial law but remains illegal at the federal level.



WHAT LAW APPLIES ?

The Supremacy Clause — Article VI of the U.S. Constitution established that if federal and state law conflict, federal law prevails and state courts are required to apply federal law.

BASIS FOR TERMINATIONS — EVEN IF LEGAL



Having a medical marijuana card:

Subject to State law

Enables a patient to obtain, possess, or cultivate cannabis for medical use

Permits a patient to be under the influence at work

**HR WHERE
MEDICAL
MARIJUANA IS
LEGAL**



ISSUE:

Can an employer terminate or fail to hire an employee for testing positive for marijuana if that person has a legal MMID?



Some courts have maintained that employers can uphold workplace policies based on use or possession being in violation of the Federal Controlled Substances Act that does not cover medical marijuana usage



NJ – 2018- Cotto v. Ardagh Glass – Court ruled that employee who used medical marijuana was not entitled to a waiver of employer’s drug test under state disability law.



CO - 2015- Coats v. Dish Network, LLC: CO Supreme Court ruled that employer who terminated quadriplegic who used marijuana at home did not violate State Lawful Activities statute which prohibits employers from firing employees who engage in lawful activities outside of work. Said “lawful” meant permitted by both state and federal law.

PERHAPS

STATE RESPONSES:

13 States passed statutes to explicitly prohibiting workplace discrimination against registered marijuana patients.

Arizona – Employers may not discriminate against MMID holders solely based on their status as cardholders or for testing positive

Connecticut – Employers may not discriminate against applicant or employees based on their status as a qualifying patient or primary caregiver of a qualifying patient under medical marijuana laws

Question: How do you comply with the anti-discrimination laws without violating federal law?

HR ISSUE: WHAT ABOUT THE ADA AND OTHER DISABILITY DISCRIMINATION LAWS?

ADA does not protect illegal drug use – Marijuana is illegal under federal law so its use is not protected by the ADA



ADA requires reasonable accommodation for workers with qualified disabilities



U.S. Circuit Court of Appeals – *James v. City of Costa Mesa* – Although plaintiff was gravely ill and medical marijuana was legal in California, ADA did not provide protection for drug treatments for drugs explicitly banned by the Federal Controlled Substance Act

STATE DISABILITY LAW:

8 STATES WITH FAVORABLE RULINGS FOR EMPLOYER (WA, OR, CA, MO, CO, NM, MI, NJ)

4 STATES WITH FAVORABLE RULINGS FOR EMPLOYEE (MA, CONN, RI, DEL)



Pro Employer – California
Ross v. Ragingwire
Telecommunications (2008).
CA Supreme Court held
that medical marijuana
was not protected under
state disability law.



Pro Employee –
Massachusetts Barbutu v.
Advantage Sales and
Marketing (2017). MA
Supreme Court held that
employee could bring suit
against employer for
disability discrimination
after being fired for a
positive marijuana test
and employee has right to
reasonable
accommodation



Pro Employee – Rhode
Island Callaghan v.
Darlington Fabrics – Court
ruled that employer
illegally discriminated
against an applicant who
had a MMID and failed
pre-employment drug test
by failure to
accommodate.

**AND THE
PARADIGM
SHIFTS?
FEDERAL DISTRICT COURT
CONNECTICUT:**

**Noffsinger v. Niantic Operating Company LLC
(2018)**

Court held that employer's failure to hire an applicant with MMID violated the state anti-discrimination provisions

Court rejected employer's argument that federal law pre-empted state law basically making employer's zero tolerance policy unlawful

Court rejected that hiring applicant would be barred by Federal Drug Free Workplace Act

Who is Covered?

- Recipients of all federal grants
- Recipients of federal contracts of \$100K or more
- DOT:
 - Alcohol and drug-testing required for safety-sensitive employees in aviation, highway, rail, and mass transit
- State and local medical marijuana laws have no bearing on DOT's required drug testing

What is required?

- Publish a statement
- Establish awareness program
- Distribute statement to employees
- Employee must agree to abide by statement and notify employer of any drug related criminal convictions that occur in the workplace
- Impose sanctions or require rehabilitation
- Notify contracting agency within 10 days of becoming aware of conviction
- Make good faith effort

What is not required?

- Drug Testing
- Zero Tolerance Policy
- Not employing individuals who use drugs outside the workplace

FEDERAL DRUG FREE WORKPLACE



Medical marijuana legalization is the norm.



No current law permits on-duty use, possession, or being under the influence.



Employer responsibilities are dependent upon state law and recent court rulings.



In most jurisdictions, the Employer is still permitted to have a zero-tolerance policy.



Be careful.

SUMMARY — MEDICAL MARIJUANA



HR IN LOCATIONS WHERE **RECREATIONAL MARIJUANA** IS LEGAL

Issue:

Can you terminate for fail to hire an employee for testing positive if that person does not have an MMID?

GUAM PUBLIC LAW 35-5: GUAM CANNABIS INDUSTRY ACT OF 2019 SECTION 8112:



Employers may maintain a drug and alcohol free workplace;



Employers are **NOT** required to permit or accommodate use, consumption, possession, transfer, display, transportation, sale, or growth of cannabis in the workplace;



Employers may have policies that prohibit the use of marijuana by employees and prospective employees in the workplace; and



Employers may enact and enforce workplace policies restricting the use or consumption of cannabis by employees in the workplace.

GUAM PUBLIC LAW 35-5

Governor's Message:

“Employers including the Government of Guam, will still require employees to abide by Drug-Free Workplace policies. To avoid confusion, I have also issued Executive Order #2019-11, solidifying that the Government of Guam Drug Free Workplace continues to prohibit the use of cannabis. Government employees, while acting in their official capacities, may not possess, consume or otherwise be under the influence of any derivation of cannabis.”

“Public Law 35-5 is far from the perfect piece of legislation.”

STATE OF MAINE 2018



Employers cannot test applicants for marijuana



Employers are still permitted to prohibit use at work and can discipline for being under the influence while on duty



Positive test not enough to establish that employee was under the influence

SUMMARY — RECREATIONAL MARIJUANA



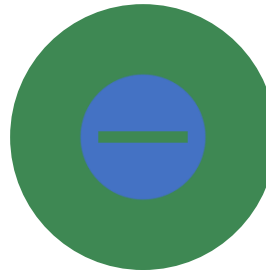
Recreational marijuana is legal in a minority of states



No current law permits, on duty use, possession, or being under the influence



Employer's responsibilities depend on state law and recent court rulings



In most locations employers are still permitted to have zero-tolerance policies



DRUG TESTING PROGRAMS

How do you know if a positive test means that marijuana use happened on or off duty?

Blood and Saliva – Few Hours



Urine

One-time use – Up
to 13 days

Regular use – Up
to 45 days

Heavy use – Up to
90 days



Hair – Up to 90 days

MARIJUANA DETECTION TIMES

Urine

- Only shows recent use
- Most common test used by employers
- Does not show current intoxication

Blood

- Rarely used
- Exceptions: auto accidents, sobriety check points
- Shows current intoxication but not level of intoxication or impairment – THC blood levels are not accurate test for impairment

Saliva

- New and prone to false positives
- Shows current intoxication but not level of intoxication
- Less invasive
- Not legal in Maine, Hawaii, Vermont

MARIJUANA TEST RESULTS

HR CHALLENGE: WHAT TO TEST FOR AND WHEN?



If recreational use is legal in your state, is there any value to pre-employment urine testing (where permitted)?



If you suspect on-duty use or impairment, will urine testing give you any actionable information?



If you suspect on-duty use or impairment, can blood or saliva testing be useful?



In a location where no marijuana usage is legal, can you continue to test applicants and current employees?



What is your general company culture on the subject of marijuana?



Do you have a rich candidate pool?



How much of a concern is safety in your workplace or in certain positions?

Is medical marijuana legal?

- Are MMID holders protected from employment discrimination?

Is recreational marijuana legal?

- Are ERs legally permitted to enforce zero-tolerance policies?

What have been the most recent/significant court cases?

Is there pending legislation?

Are there off-duty conduct laws?

Are there relevant privacy laws?

What are the local discrimination laws?

Are there specific laws regarding drug testing procedures?

HR CHALLENGE WHAT TO DO?

IS THERE A SOLUTION:



There is no one right answer



Many employers feel strongly about retaining ability to keep marijuana and opioid users out of the workplace



Legal compliance is important, but there are other issues to consider- employees who test positive for marijuana:

Have 55% more industrial accidents
85% more injuries
75% higher absenteeism

Educate, dialogue, and brainstorm	Educate, dialogue, and brainstorm with executive management.
Acknowledge	Acknowledge the trends even if you don't like them
Stop	Stop testing applicants for marijuana usage.
Start	Start thinking of marijuana in the workplace like you do alcohol.
Accommodate	Accommodate MMID holders making the assumption that there is an underlying disability.
Focus on	Focus on prohibiting the use, possession, or being under the influence at work.
Focus on	Focus on safety and testing when there is reasonable suspicion.

ADVICE:
LAURINE BIFULCO (VANTAGGIO HR)

ADVICE:

Train all involved on what constitutes reasonable suspicion.

Recognize that a positive marijuana test alone may not be enough to terminate.

Investigate emerging testing methods (saliva).

If you want to maintain a zero-tolerance policy, consult with legal counsel.

Draft a comprehensive drug-free WP policy and procedure (zero tolerance or not) and have reviewed by counsel that includes testing protocol and consequences.

Focus on employee education. Use an EAP.

Get help from insurance carriers.

Keep abreast of changing landscape. Don't get stuck in the weeds.

GUAM MINIMUM WAGE DEBATE

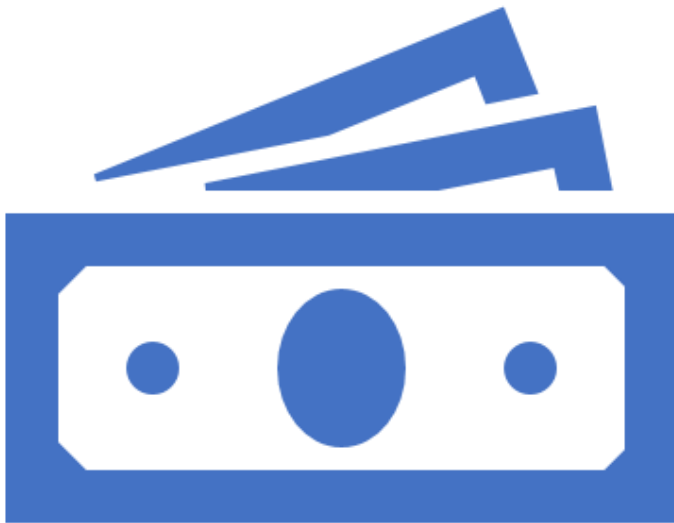


GUAM'S MINIMUM WAGE PROPOSAL

SHRM Guam conducted survey of membership on the proposed increase to the Guam minimum wage from \$8.25 to \$9.25.

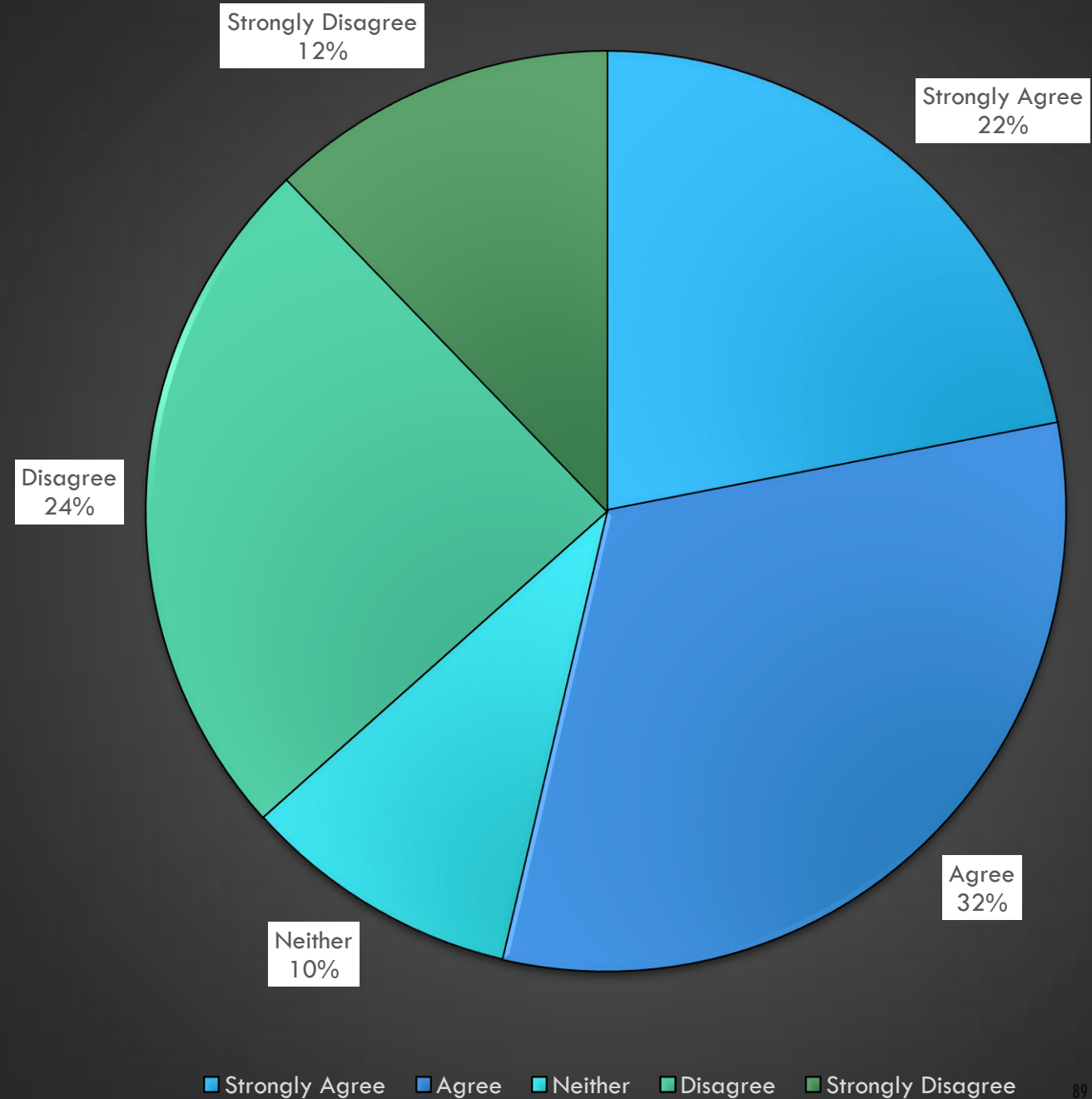
Questions:

1. Do you agree or disagree that Guam's minimum wage should be raised?
2. If the minimum wage were to be raised, what amount should it be raised to?
3. If the minimum wage will be increased, should the increase occur in increments?
4. If the increase should occur in increments, how should the increments be implemented?
5. If the minimum wage is increased, will the increase have a negative effect on your workplace?
6. If you believe the increase will have a negative effect, please list the negative effect the minimum wage will have on your workplace? Choose all that apply.
7. Comments?

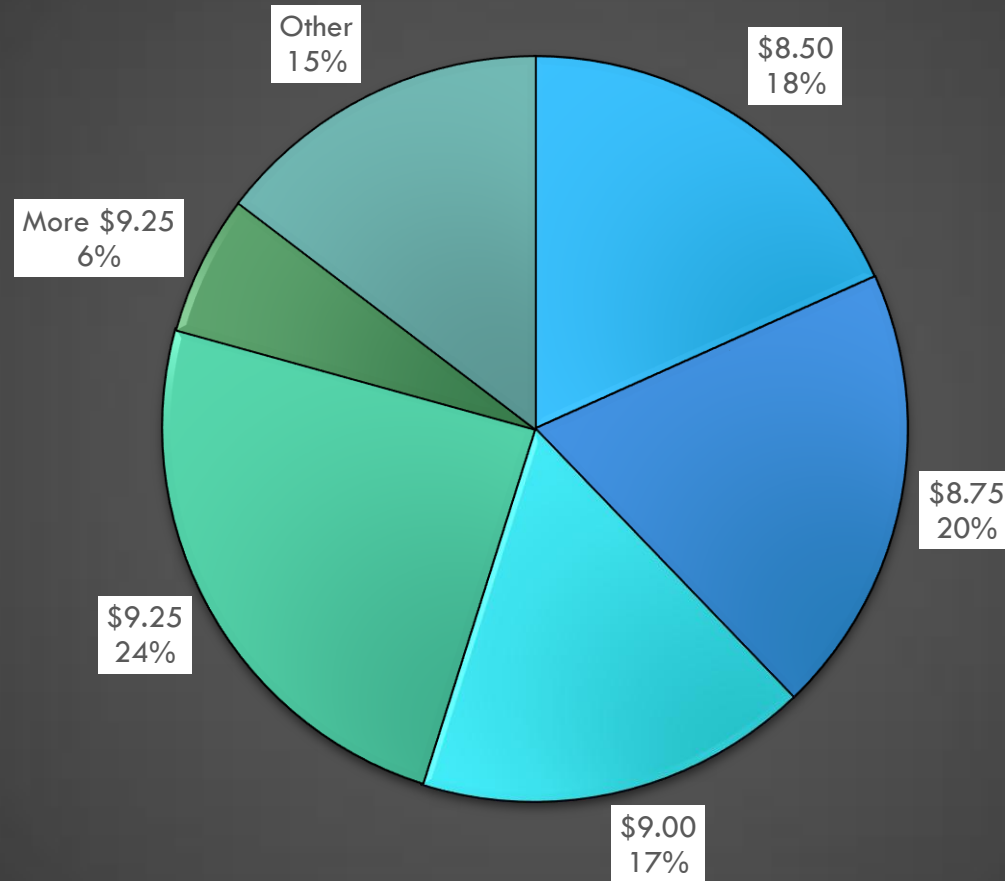


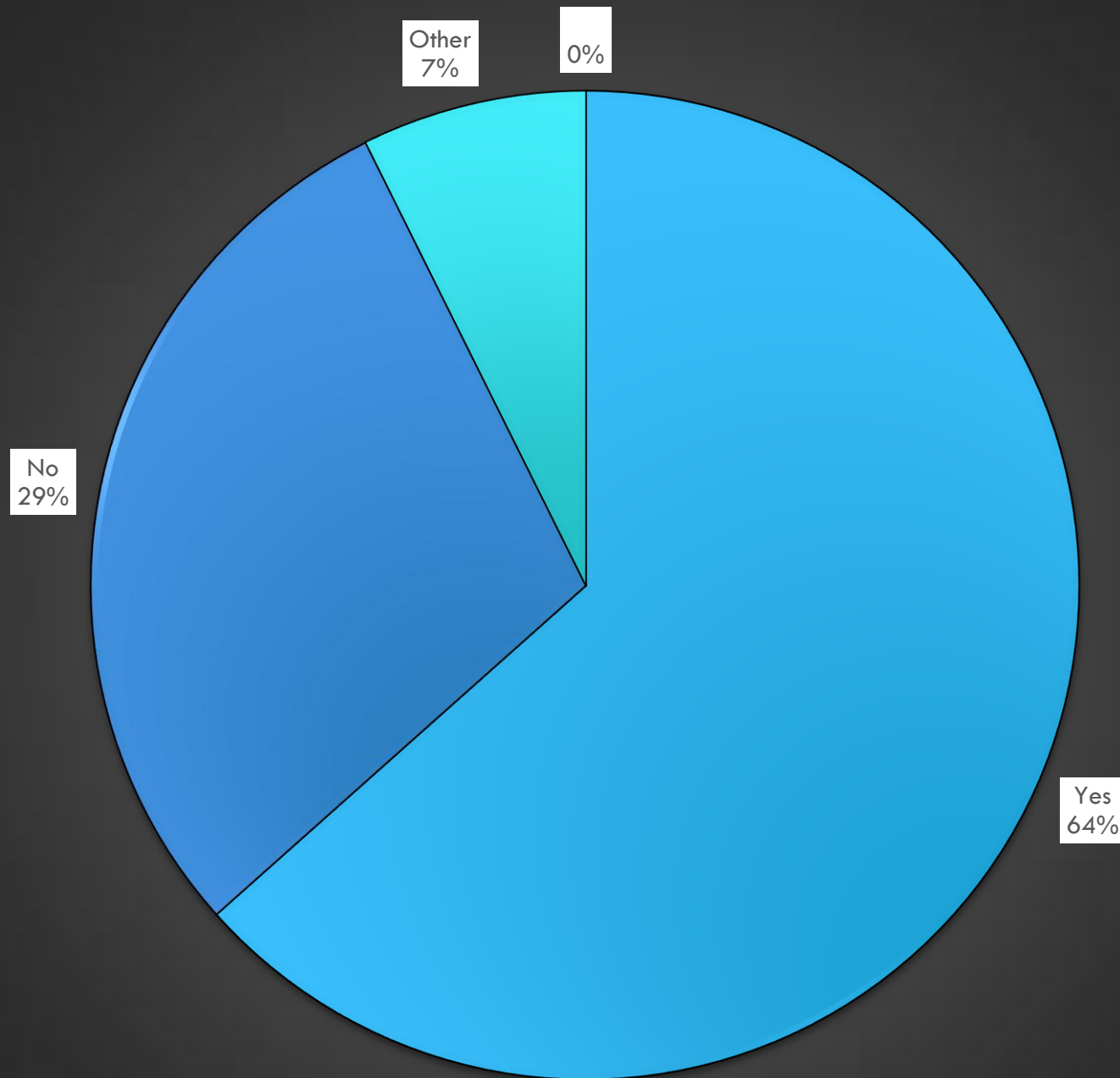
DO YOU AGREE OR DISAGREE THAT GUAM'S MINIMUM WAGE SHOULD BE RAISED?

- ✓ 54% Agree
- 36% Disagree
- 10% Indifferent



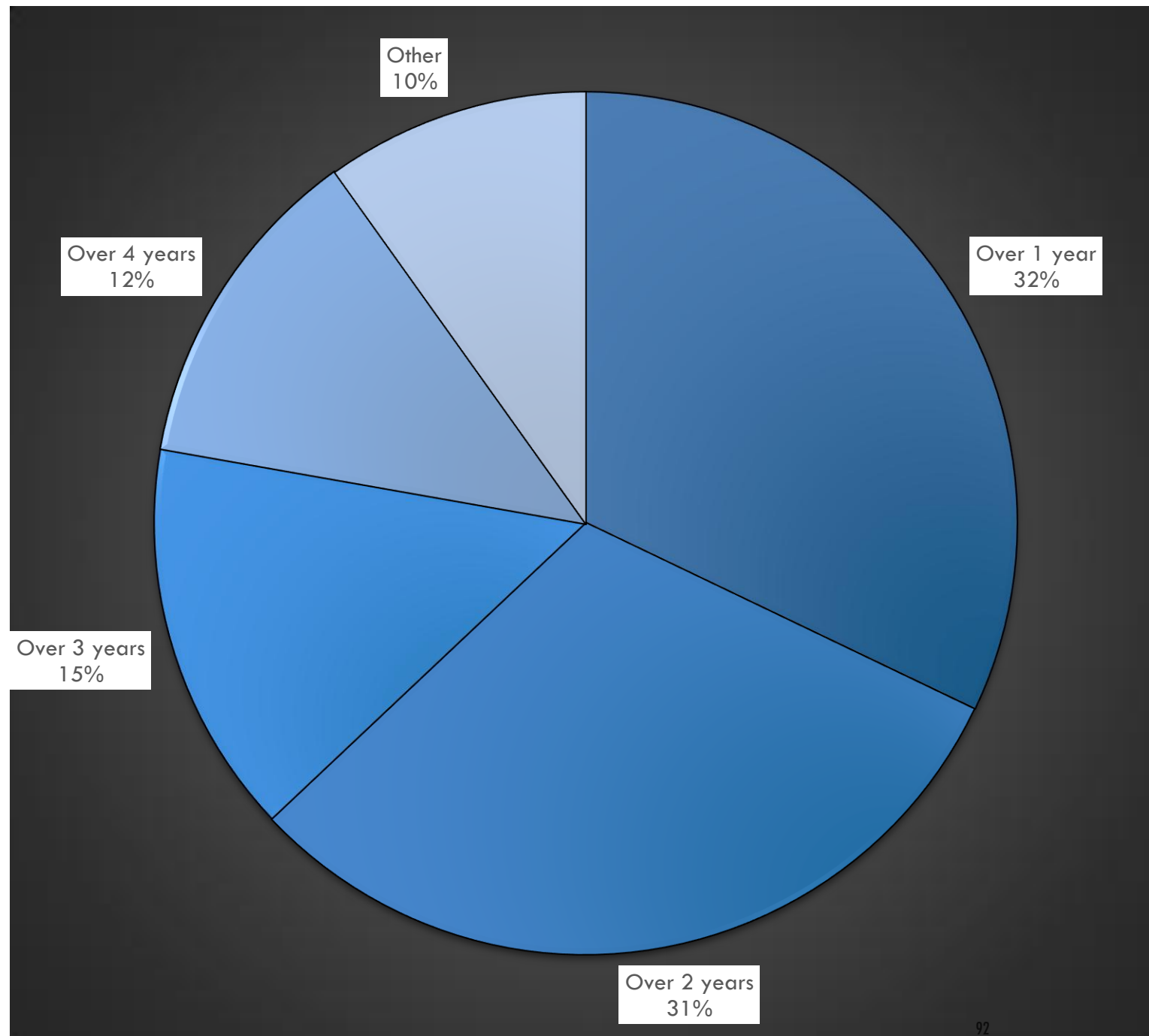
IF THE MINIMUM WAGE WERE TO BE RAISED, WHAT AMOUNT SHOULD IT BE RAISED TO?

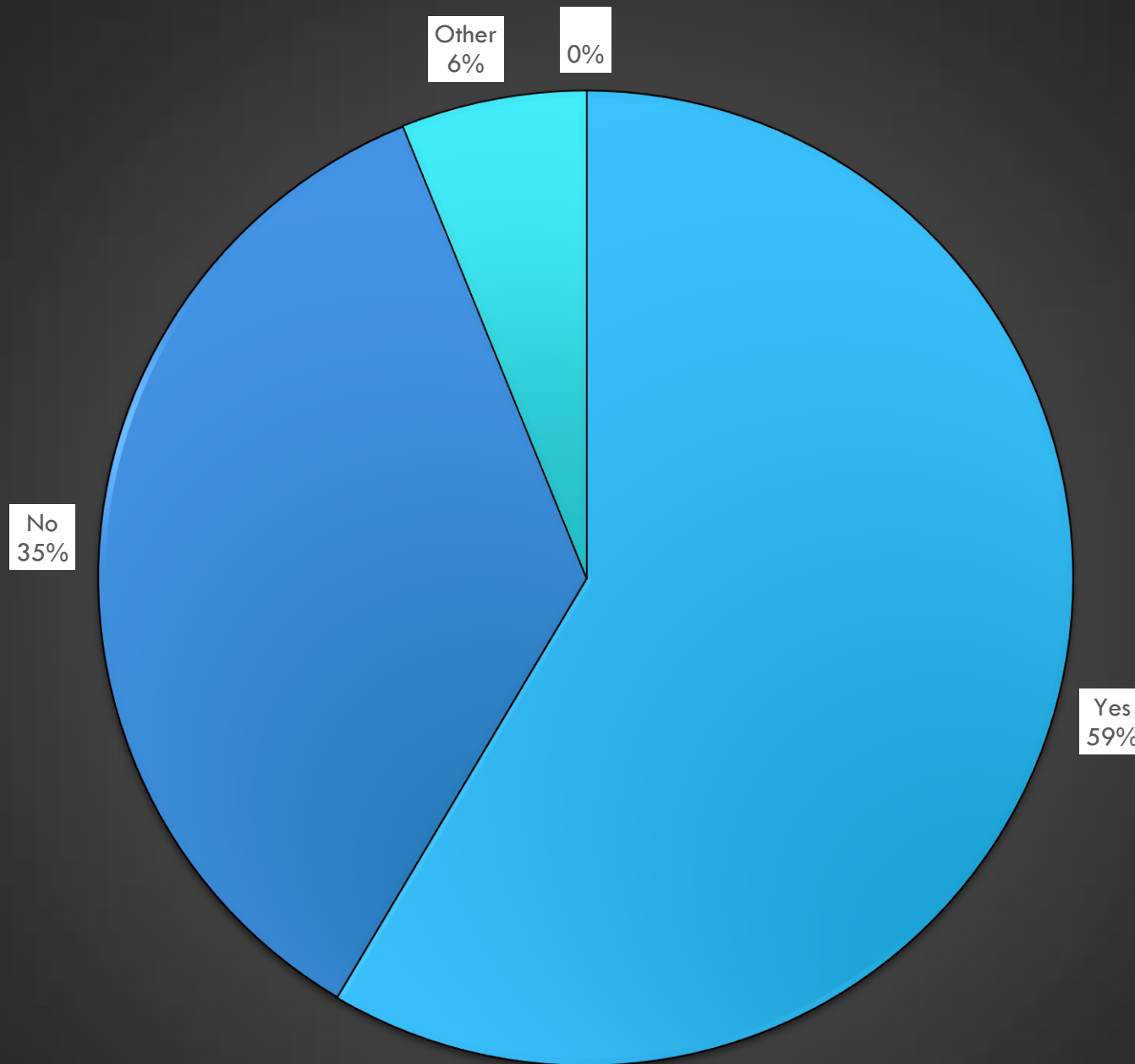




IF THE MINIMUM
WAGE WILL BE
INCREASED,
SHOULD THE
INCREASE
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INCREMENTS?

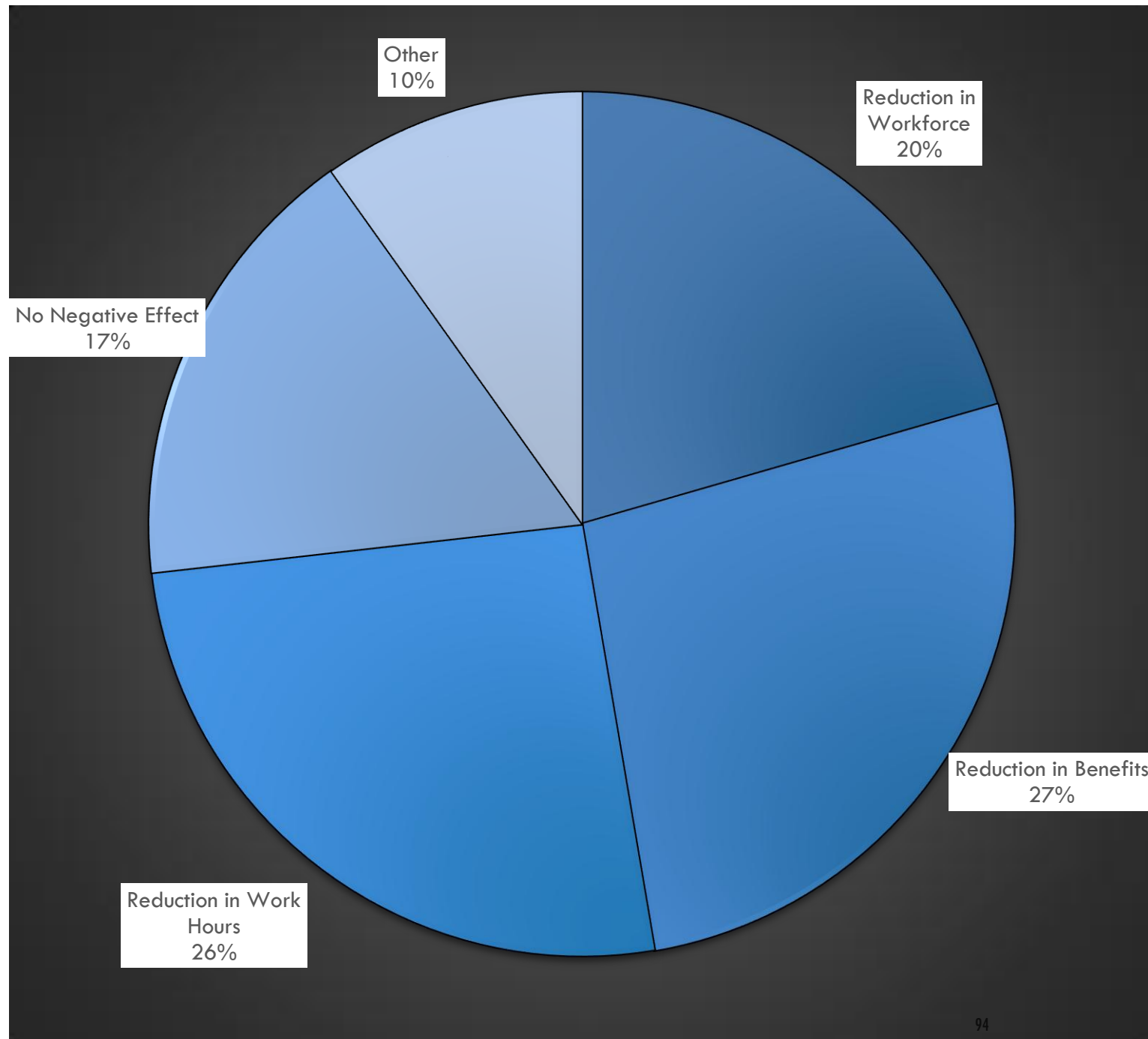
IF THE INCREASE
SHOULD OCCUR
IN INCREMENTS,
HOW SHOULD
THE
INCREMENTS BE
IMPLEMENTED?





IF THE MINIMUM
WAGE IS
INCREASED,
WILL THE
INCREASE HAVE
A NEGATIVE
EFFECT ON YOUR
WORKPLACE?

IF YOU BELIEVE THE INCREASE WILL HAVE A NEGATIVE EFFECT, PLEASE LIST THE NEGATIVE EFFECT THE MINIMUM WAGE WILL HAVE ON YOUR WORKPLACE?
CHOOSE ALL THAT APPLY.



COMMENTS:

Overall, I have a positive outlook of wage increases. However, it must be done in a manner where the entire structure is taken into account. We have yet to see the full scope of the effect from the last increase and how it has effected Guam as a whole.

Small businesses and large businesses will feel the effect. We already have an increased GRT, shipping costs, water is soon to increase... doing business on Guam is becoming increasingly difficult to provide jobs for employees. This wage increase, just like GRT increase, will hurt businesses across the board.

By increasing minimum wage, everything else will go up even more and some may loose jobs. I think \$8.25 is good, at least for now.

The bigger challenge is how will company's afford to do both the increase in Guam minimum wage along with the Federal proposed increase in White Collar overtime brining the minimum salary for an exempt employee to \$35,308.00 per year. It will lead employers to look at other avenues to still meet business needs and manage salary budget.

It is needed and achievable, as long at it is phased in. For example January 2020 @ \$8.75 January 2021 @ \$9.00 and September 2021 @ \$9.25.



Pay Equity Legislation



Paid Family Leave



Workplace Violence



Workers Compensation
Reform

TOO MANY OTHER ISSUES TO COVER NOT
ENOUGH TIME — WHAT'S ON THE BURNER

QUESTIONS:

Thank You!