



**WEEDING
OUT THE
FACTS**

Marijuana Legislation
& the Workplace

Presented by Dr. Barry Sample & D. Faye Caldwell | February 15, 2017

Today's presenters

Weeding Out the Facts: Marijuana Legislation & the Workplace



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What is marijuana?

- **Cannabis sativa**
 - *C. indica*; *C. ruderalis*
- **Used for > 4,000 years**
- **Chemically complex**
 - > 500 compounds & >100 cannabinoids in *C. sativa*
 - Δ⁹-tetrahydrocannabinol (THC): primary psychoactive ingredient
 - Cannabidiol (CBD): antipsychotic, anticonvulsant, antiemetic, not psychoactive
 - Cannabinol (CBN): weakly psychoactive
 - Ratios (and potency) vary age, origin, method of cultivation
- **THC potency (1993 vs. 2008)**
 - "Marijuana": ~3.5% → ~6%
 - Sinsemilla (female buds, no seeds): ~6% → ~11%



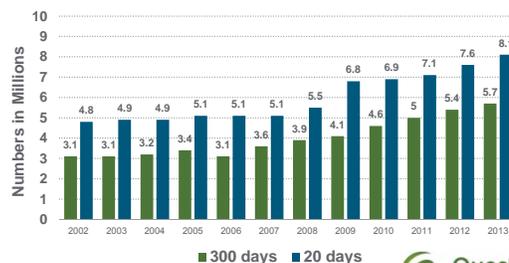
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Frequency of marijuana use

National Survey on Drug Use and Health (NSDUH)

- Marijuana was the most commonly used illicit drug. In 2015, there were **22.2 million (8.3%)** past month users. The 2015 estimates were on par with 2014, but higher than the estimates for 2002 (**6.2%**) thru 2013 (**7.5%**). Increase primarily driven by rate of use among adults 26 years or older.
- In 2013, **5.7 million** persons aged 12 or older used marijuana on a daily or almost daily basis in the past 12 months (*i.e., on 300 or more days in that period*), which was an increase from the **3.1 million** daily or almost daily marijuana users in 2006. The number of daily or almost daily users of marijuana in 2013 represented **17.4%** of past year users.
- Daily or almost daily use of marijuana (*i.e., used on 20 or more days in the past month*) increased from **5.1 million** persons in 2007 to **8.1 million** persons in 2013.
- Daily or almost daily users in 2013 represented **41.1%** of past month marijuana users.



Source: National Survey on Drug Use and Health (NSDUH)

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Impairment and the law

- States have passed medical marijuana, recreational marijuana, or DUI laws that relate to impairment for marijuana.
- **“Per se” laws:** Set at a defined cutoff for marijuana metabolites in blood or other specimen type.

State	Marijuana Blood	Marijuana Urine	Marijuana Metabolite Blood	Marijuana Metabolite Urine	Marijuana Metabolites + Other Drug
Colorado*	5 ng/mL (THC)	N/A	N/A	N/A	N/A
Montana	5 ng/mL (THC)	N/A	N/A	N/A	N/A
Nevada	2 ng/mL	10 ng/mL	5 ng/mL	15 ng/mL	N/A
Ohio	2 ng/mL	10 ng/mL	35 ng/mL	50 ng/mL	Urine 15 ng/mL Blood 5 ng/mL
Pennsylvania	1 ng/mL	N/A	N/A	N/A	N/A
Washington	5 ng/mL (THC)	N/A	N/A	N/A	N/A

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Routes of administration

- **Smoking**
- **Oral**
 - Plant material
 - Prescription (synthetic THC)
- **Absorption and pharmacokinetics significantly impacted by route of administration**



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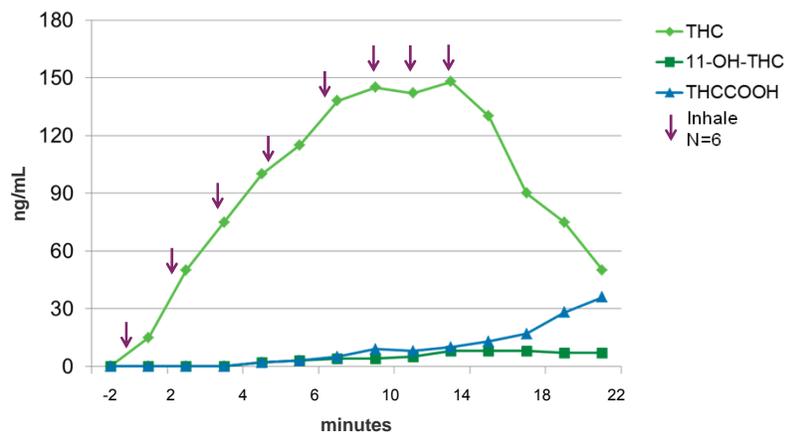
Smoking marijuana

- **Primary route of administration**
 - Rapid, efficient... contributes to abuse potential
 - Better able to titrate dose
- **Bioavailability – 2 to 56% (greatly impacted by smoking dynamics)**
- **Single (1.75% or 3.55%) THC cigarette (computer-paced)**
 - Detectable in blood after first puff
 - Peak <10 minutes (before last puff)
 - Large inter-subject variability in concentration (50-129 vs. 76-297 ng/mL)
 - THC <5 ng/mL within 2 hours
 - Detection time 3-12 hr. (1.75%) vs. 6-27 hr. (3.55%) (LOQ-0.5 ng/mL)
- **“Feel” drug: At least 3 hours (similar profiles for both doses)**



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Concentrations after a single THC cigarette



Source: Workshop #1, "Marijuana Pharmacology" Practical Applications for the Forensic Toxicologist, Society of Forensic Toxicologists (SOFT) Annual Meeting, October 18, 2010.

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Oral marijuana

- **THC is readily absorbed, but slower (peak 1-5 hours)**
 - Dose, vehicle, physiological factors influence drug concentrations (even in same vehicle)
- **Bioavailability – 4 to 20% (as compared to IV)**
 - Absorption, vehicle, degradation in stomach, first-pass metabolism
- **Single 10 mg Marinol® (dronabinol) dose**
 - Peak THC concentration (3.8 ng/mL, range: 1.1-12.7) in 1-2 hours
- **Compared to pharmacodynamic effects of smoking**
 - Onset is later, magnitude is lower, & duration is longer
- **Bioavailability of dronabinol appears to be superior to hemp oil**
 - THC-COOH concentrations after 7.5 mg/d dronabinol > 14.8 mg/d hemp oil



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Medical and recreational routes of administration

- **Smoking**
 - Marijuana leaves/buds
 - Vaping (oil)
- **Oral (taken by mouth and enters gastrointestinal system)**
 - Pills
 - Edibles
 - Oils



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Distribution

- **Blood/plasma concentrations decrease rapidly after smoking**
 - Distribution and metabolism
- **THC is highly lipophilic**
 - Highly perfused tissues absorb rapidly
 - Fat accumulates more slowly
 - Both THC and 11-OH-THC stored in fat



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Metabolism

- **Extensively metabolized (> 100 metabolites)**
 - 11-OH-THC: Primary *active* (equipotent) metabolite
 - 11-Nor-9-Carboxy-THC (THCCOOH): Primary *inactive* metabolite
 - 8-OH-THC: α -OH (inactive) / β -OH (active)
 - 8,11-OH-THC (inactive)
 - Conjugation (glucuronide)
- **Lower blood 11-OH-THC (~10 percent of THC) observed after smoking vs. oral**
 - 11-OH-THC ~50% of THC after oral administration
- **THCCOOH in plasma > THC 30-45 minutes after cessation of smoking**
- **Rate limiting step in THC metabolism is redistribution from fat**



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Elimination

- **THC dose, 80% to 90% eliminated within 5 days**
 - > 65% in feces, ~20% in urine
 - THCCOOH most abundant in urine
 - 11-OH-THC most abundant in feces
- **Greatly impacted by slow release from lipids and enterohepatic recirculation**
- **THC $t_{1/2}$ > 4.1 days in plasma (chronic users)**
- **THCCOOH $t_{1/2}$ 4.3 days in plasma (12.6 days in a single user)**
- **THCCOOH $t_{1/2}$ 3-4 days in urine**
 - Last positive THCCOOH in urine (15 ng/mL cutoff)
 - Low dose: 1.75% cigarette: 33.7 hr. (Range, 8-68.5)
 - High dose: 3.55% cigarette: 88.6 hr. (Range 57-122.3)
- **Little difference in pharmacokinetic profiles for frequent and infrequent users**



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Effects of marijuana use

Subjective

- Enhancement of senses
- Errors in time and space judgment
- Impaired impulse control
- Emotional changes could include anxiety, panic attacks and paranoia
- Illusions
- Hallucinations

Objective

- Decreased psychomotor performance (complex motor skills)
- Interference with attention span
- Loss of efficiency of short-term memory
- In infrequent users, impairment
 - NHTSA 2004: up to 5 hours
 - Raemakers et. al 2008: up to 8 hours

Physiological

- Vasodilation
- Tachycardia
- Immunosuppressant
- Dry mouth and throat
- Bloodshot eyes
- Increased appetite



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Drug test specimen types

- **Urine**

- Easily obtained in large(r) volume/typically not observed collection
- Detection window (THCCOOH) days to weeks (greatly impacted by usage pattern)
- Not correlated with effects/impairment



- **Hair**

- More specialized collection/observed
- Detects pattern of repetitive use (THCCOOH)
 - THC at higher concentration (environmental exposure?)
- Not correlated with effects/impairment



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Drug test specimen types

- **Oral fluid**

- Easily obtained/observed collection (most non-invasive of common specimen types)
- Detection window (THC), 1-2 days
 - THCCOOH detectable (66% of THC+ specimens), not as well studied
- Not well correlated with effects/impairment
 - Few controlled studies of THC disposition
- Measures residual THC in oral fluid mucosa
 - No THC in oral fluid of patients treated with dronabinol

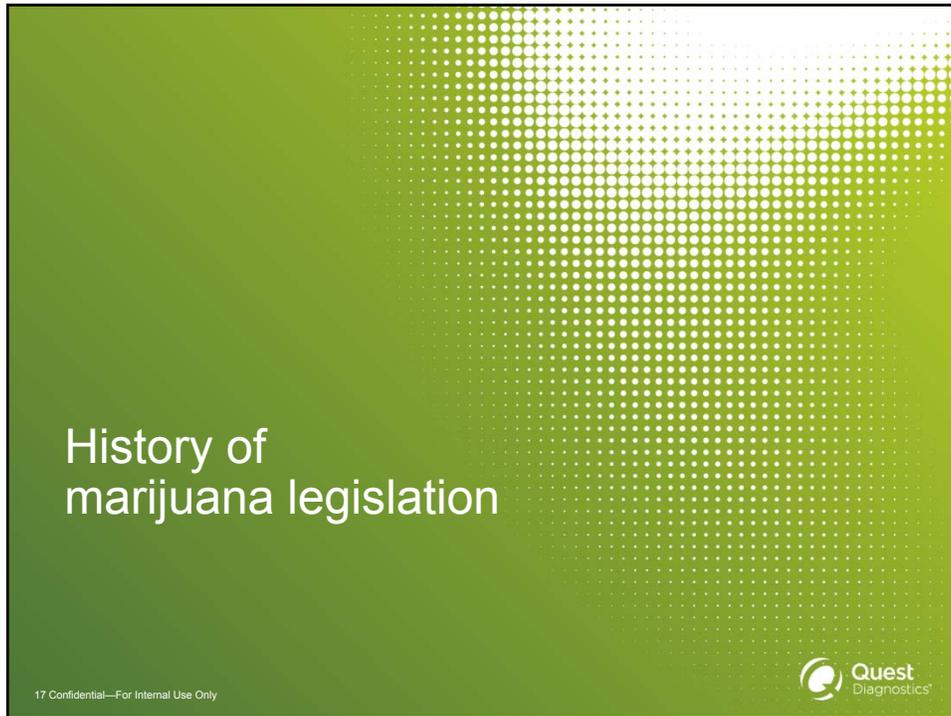


- **Blood**

- Specialized/invasive collection/observed
- Best correlation with effects/impairment
- Few "per se" levels and vary by state

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History of marijuana legislation

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History of medical marijuana

- **Federal Criminalization**
 - 1970: Controlled Substances Act classifies marijuana as a Schedule I drug with "no accepted medical use."
- **The Beginnings of Legalization**
 - **New Mexico - 1978**
 - Controlled Substances Therapeutic Research Act
 - Recognized value of medical marijuana
 - Would not enact full medical marijuana law until 2007
 - **Virginia - 1979**
 - For cancer/glaucoma patients only
 - Very limited criminal protection for possession via valid prescription
 - **South Carolina - 1980**
 - South Carolina Controlled Substances Research Act of 1980
 - Passed but defunded



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History of medical marijuana

States that have passed medical marijuana laws

- California: 1996
- Alaska: 1998
- Oregon: 1998
- Washington: 1998
- Maine: 1999
- Hawaii: 2000
- Colorado: 2000
- Nevada: 2000
- Montana: 2004
- Vermont: 2004
- Rhode Island: 2006
- New Mexico: 2007
- Michigan: 2008
- New Jersey: 2010
- Washington, D.C.: 2010
- Arizona: 2010
- Delaware: 2011
- Connecticut: 2012
- Massachusetts: 2012
- New Hampshire: 2013
- Illinois: 2013
- Maryland: 2014
- Minnesota: 2014
- New York: 2014
- Louisiana: 2015
- Pennsylvania: 2016
- Ohio: 2016
- Arkansas: 2016
- Florida: 2016
- North Dakota: 2016



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History of recreational marijuana

States with medical marijuana that have also passed recreational marijuana laws

- Colorado: 2012
- Washington: 2012
- Alaska: 2014
- Oregon: 2014
- Washington, D.C.: 2014
- California: 2016
- Maine: 2016
- Massachusetts: 2016
- Nevada: 2016



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History of medical marijuana

States that have passed low THC/high CBD marijuana laws

- Wisconsin: 2013
- Alabama: 2014
- Kentucky: 2014
- Mississippi: 2014
- Missouri: 2014
- North Carolina: 2014
- South Carolina: 2014
- Tennessee: 2014
- Utah: 2014
- Georgia: 2015
- Iowa: 2015
- Oklahoma: 2015
- Texas: 2015
- Virginia: 2015
- Wyoming: 2015



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Marijuana today: state laws

States with marijuana laws



- **Earlier medical marijuana laws typically provided only criminal protections**
- **Growing trends**
 - To provide protections related to housing, schooling, domestic relations, and employment
 - Some states even go so far as to discuss actions you can or cannot take when you find marijuana metabolites in urine

Source: Quest Diagnostics Marijuana Legislation by State infographic

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Marijuana today: state laws

- **While states are passing laws allowing medical and recreational marijuana remember:**
 - Marijuana is still illegal under Federal Law
 - Marijuana is classified as a Schedule I drug by the Drug Enforcement Agency
 - Reaffirmed by DEA in August 2016
 - No currently accepted medical use in treatment, lack of accepted safety for use under medical supervision, and high potential for abuse
- **Medical marijuana is not a legitimate medical explanation under U.S. Department of Transportation (DOT) drug testing regulations.**
 - 2013 and 2015 DOT Notices re-affirming issue.
- **Executive branch (U.S. Department of Justice) will not intervene in state medical marijuana laws**



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Marijuana laws

- **Constantly changing**
- **Inconsistent**
- **Impacts**
 - Company drug testing policies and procedures
 - How drug testing programs are administered
 - How drug test results are handled



Photo: "The Haze of Marijuana Laws" HR magazine February 2017

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Medical marijuana laws: state law inconsistencies

- **Medical marijuana programs vary from state to state in almost every aspect**
 - Possession limits
 - Distribution
 - Methods of ingestion
 - Requirements for qualifications to possess medical marijuana card
 - Standards for physician evaluations; qualifying conditions
 - Patient/caregiver registry/cards
 - Civil and employment protections
 - Degree of protections



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State medical marijuana laws: common terms

- **Qualifying patient:** A person diagnosed as having a debilitating medical condition.
 - Diagnosis procedure, application requirements, and debilitating medical conditions vary
- **Primary caregiver:** A person who assists qualifying patient with medical marijuana.
 - Sometimes referred to as designated caregiver and other terms
 - Number of patients caregiver can assist and permitted age of caregiver varies
 - Protections vary, typically related to possession and obtaining and assisting with the use of medical marijuana
 - Unclear what "assisting with medical marijuana" protections would entail
- **Physician or practitioner:** Typically a doctor licensed in the related state.
 - Can sometimes be a nurse or other healthcare professional
- **Written certification:** Signed statement from physician or practitioner for qualified patient affirming patient has met the health condition requirements and would benefit from medical marijuana.



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State medical marijuana laws: common terms

- **Dispensary:** Many states have set up laws for marijuana to be purchased from a registered dispensary.
 - Names vary, alternative treatment center, compassion center, etc.
 - Employees /volunteers of these centers often offered limited protections for activities related to selling marijuana through a center
- **Registry card:** A card that typically identifies the qualified patient or primary caregiver as having registered with the state
 - Typically required to obtain protection
 - Sometimes also provided to dispensary workers
 - Other times they receive “licenses”
 - Often significantly different than cards for patients and caregivers
 - Most cards expire after a set time
 - Most states provide specific criteria for what must be on card



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State medical marijuana laws

Various protections provided

- **Criminal protections**
 - All medical marijuana statutes provide some form of criminal protection.
 - Some are as little as an affirmative defense to a crime when arrested and charged
 - Others are to protect from arrest and prosecution
 - Protection is not from all crimes, there are many exceptions
- **Civil protections**
 - Some statutes provide protection from civil fines, etc.
 - They also protect from action from licensing boards.
 - i.e., a nurse who is a qualified medical marijuana user in theory could not lose her license for medical marijuana use
 - Other states have said that a qualified individual cannot suffer “any penalty” from a “business.”
 - Unclear what this means
 - Michigan found such language does not provide employee protection



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State medical marijuana laws

Various protections provided

- **Landlord/schooling protections**

- Often grouped together, prohibits discrimination in leasing or enrolling people who have medical marijuana cards in those various states.
- Many protections related “solely” to the applicant having a medical marijuana card and not use or possession of medical marijuana.

- **Domestic relations protections**

- Some statutes provide for protection for domestic relations and custody issues.
- Example: A parent who uses medical marijuana cannot lose custody/visitation on that basis.
 - Exceptions are provided.
 - Example: welfare of child is in danger.
 - Smoking directly around children not addressed in most instances. Unclear if such activity would be protected.



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State medical marijuana laws

Common exemptions from protection

The majority of states that offer protection have some form of the following exemptions:

- In these areas, medical marijuana use or possession is typically not permitted and no accommodation for use has to be made.
 - Schools
 - Public transportation
 - Substance abuse centers
 - Correctional facilities
 - Public places
- While driving under the influence
 - Some states set “per se” limits for driving under influence, some states have found that the mere presence of metabolites is not sufficient to show impairment.
- If use would constitute general or professional negligence



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Medical marijuana laws: current trends

- **Limiting methods of ingestion (smoking prohibited)**
 - Most recent states prohibit smoking
 - New York, Minnesota, Louisiana, Pennsylvania, Ohio
 - Introduced/proposed legislation to prohibit smoking
 - Arkansas, North Dakota
- **Adding post-traumatic stress disorder (PTSD), chronic pain, and substance abuse disorders as qualifying conditions**
 - In 2015/2016, a number of states have added PTSD as a qualifying condition
- **Providing employee protections**
 - Employment protections vary; employer may have duty to accommodate



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Medical marijuana laws: current trends

- **Providing explicit employee protections**
 - Employment protections vary; employer may have duty to accommodate
 - Some states have explicit protections against discrimination
 - Courts that have addressed employment protections generally find no protections but those cases have been in states with no explicit protections and based on classification of marijuana as illegal under federal law
- Currently, there are **NO** restrictions on testing for marijuana
- **NO** law requires accommodating on-duty drug use in the workplace
- **NO** law prohibits action if employee working under the influence of marijuana



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Medical marijuana laws: employee protections

Biggest issues for most employers falls into these four categories

1. **States explicitly finding no employee protection**
 - Statute or case law has found no employee protection
2. **States with likely no employee protection**
 - Law appears to only provide criminal protections or similar to states that have found no protection
 - Departments of Health or other case law has found no protections
3. **States with explicit employee protection**
 - Newer laws provide specific protections for employees for various reasons related to medical marijuana
 - States still prohibit use at job site or while working
4. **States with unclear employee protection**
 - Laws silent or vague and could potentially be interpreted to provide protection
 - No current guidance
 - Pending cases or off-duty use statutes



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States with no employee protection

- California
- Colorado
- Michigan
- Montana
- Ohio (2016)
- Oregon
- Washington



Either statute explicitly provides no protections or statute silent and state has case law that found no employee protection under each states' respective medical marijuana act.

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States likely providing no employee protection

- Alaska
- Hawaii
- Maryland
- Massachusetts
- New Hampshire
- New Mexico
- Vermont
- Washington, D.C.



These states' medical marijuana laws are silent as to employee protections and generally only provide criminal protections.

States with explicit employee protections

- Arizona
- Arkansas (2016)
- Connecticut
- Delaware
- Illinois
- Maine
- Minnesota
- Nevada
- New York
- Pennsylvania (2016)
- Rhode Island



Statutes have explicit language (anti-discrimination or reasonable accommodation provisions) providing varying levels of protection.

States with explicit employee protections

- **Cardholder status protection:** States with explicit employee protections all have anti-discrimination provisions that prohibit adverse action against employees based solely on participation in medical marijuana program/status as a cardholder (patients/caregivers)
- **Drug testing protection:** Some statutes provide positive drug test cannot automatically be grounds for refusal to hire or other adverse employment action
 - Arizona
 - Delaware
 - Minnesota
- **Some provisions include explicit disability/reasonable accommodation language**
 - Nevada
 - New York
- **None have been tested in court yet**

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Unclear employment protections

- Florida (2016)
- Louisiana
- New Jersey
- North Dakota (2016)



These states' medical marijuana laws are silent as to employee protections and the state departments of health also provide no guidance on employee protections or state has pending cases or legislation to watch.

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Unclear employment protections

Florida

- Passed November 8, 2016; effective January 3, 2017
 - U.S. Department of Health has 6 months after effective date to issue regulations
- Extent of employment protections unclear
 - "The medical use of marijuana by a qualifying patient or caregiver in compliance with this section is not subject to criminal or civil liability or sanctions under Florida law." (Article X, Section 29(a)(1))
 - "Nothing in this section shall require any accommodation of any on-site medical use of marijuana in any ... place of... employment, or of smoking medical marijuana in any public place." (Article X, Section 29(c)(6))
- Pending Legislation (2017): legislation to implement new medical marijuana law explicitly provides to employment protection; another proposed bill is silent

Louisiana

- Amends law passed in 2015: changes "prescribed" to "recommended"
 - Still current issues for implementation
- Silent as to employment protections
- Limits THC



Low THC/high CBD laws

- Alabama
 - Florida
 - Georgia
 - Iowa
 - Kentucky
 - Mississippi
 - Missouri
 - North Carolina
 - Oklahoma
 - South Carolina
 - Tennessee
 - Texas
 - Utah
 - Virginia
 - Wisconsin
 - Wyoming
- All laws passed since 2014 in mostly southern states
 - Movement began after CNN documentary, *Weed*, with stories of children with severe epilepsy using "Charlotte's Web Oil"
 - Laws contain varying levels of permitted THC; no consensus on ratio



Low THC/high CBD laws

State (Year)	THC/CBD levels allowed
Alabama (2014)	≤ 3% THC
Florida (2014)	0.8% or less THC and more than 10 percent CBD by weight
Georgia (2015)	≤ 5% THC and equal or greater amount of CBD
Iowa (2014)	≤ 3% THC
Kentucky (2014)	No definition
Mississippi (2014)	≤ 5% THC and more than of 15% CBD
North Carolina (2014)	≤ 3% THC by weight, at least 5% CBD by weight, and no other psychoactive substance
Oklahoma (2015)	≤ 3% THC in liquid form
South Carolina (2014)	At least 98% CBD and not more than .90% THC by volume
Tennessee (2014)	≤ .9% THC
Texas (2015)	≤ 5% THC by weight and not less than 10% by weight CBD
Utah (2014)	≤ .3% THC by weight, at least 15% CBD by weight, , and no other psychoactive substance
Virginia (2015)	At least 15% CBD but no more than 5% THC
Wisconsin (2013)	CBD must be in form without psychoactive effect; THC and CBD levels not defined
Wyoming (2015)	≤ 3% THC and at least 5% CBD by weight

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Recreational marijuana laws

- **Impairment/driving under the influence (DUI)**
 - Most states prohibit driving under the influence, but no guidance
 - Colorado and Washington have “per se” limits of 5 ng/mL of THC in blood
- **Current trend is explicitly providing NO employee protections**
 - Three (3) states silent on employment protections; but guidance provides no protections
 - Colorado, Oregon, and Washington
- **Four (4) states explicitly provide no employment protections**
 - Alaska, California, Massachusetts, and Nevada
- **One (1) state appears to provide employment protections for off-duty use**
 - Maine



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2017 marijuana legislation

Recreational marijuana

Introduced: at least 14 states

- Arizona
- Connecticut
- Hawaii
- Kentucky
- Maryland
- Mississippi (died)
- Missouri
- New Hampshire
- New Jersey
- New Mexico
- New York
- Pennsylvania
- Texas
- Wyoming

Medical marijuana

Introduced: at least 11 states

- Iowa
- Indiana
- Kansas
- Kentucky
- Mississippi (*died*)
- Missouri
- Nebraska
- Oklahoma
- South Carolina
- Texas
- Virginia



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Pending marijuana legislation

Florida

- Legislation to implement new medical marijuana law
- One bill explicitly provides employment protections

Hawaii

- HB 1464 (2017): introduced recreational marijuana law
 - Explicitly provides no employment protection
- 2015/2016: introduced legislation to amend existing medical marijuana law
 - Seeks to provide explicit employment protection

Kansas (SB 155)

- Proposed medical marijuana law
- Contains status protection for patients and caregivers
- Contains drug testing protection for patients

New Jersey

- 2016 Introduced legislation to amend medical marijuana act
- Provides explicit employment protections



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Pending marijuana legislation

New Mexico

- 2017 proposed amendment to existing medical marijuana law
- Adds substance abuse disorder as qualifying condition

New York (A03506)

- Proposed recreational marijuana law
 - Appears to provide explicit employment protection for positive drug test

Oregon (SB 301)

- Proposed off-duty use statute that would appear to apply to marijuana
- May effect both medical and recreational marijuana

Oklahoma (HB 1877)

- Proposed medical marijuana legislation
- Contains anti-discrimination provision with cardholder status protection for patients and caregivers



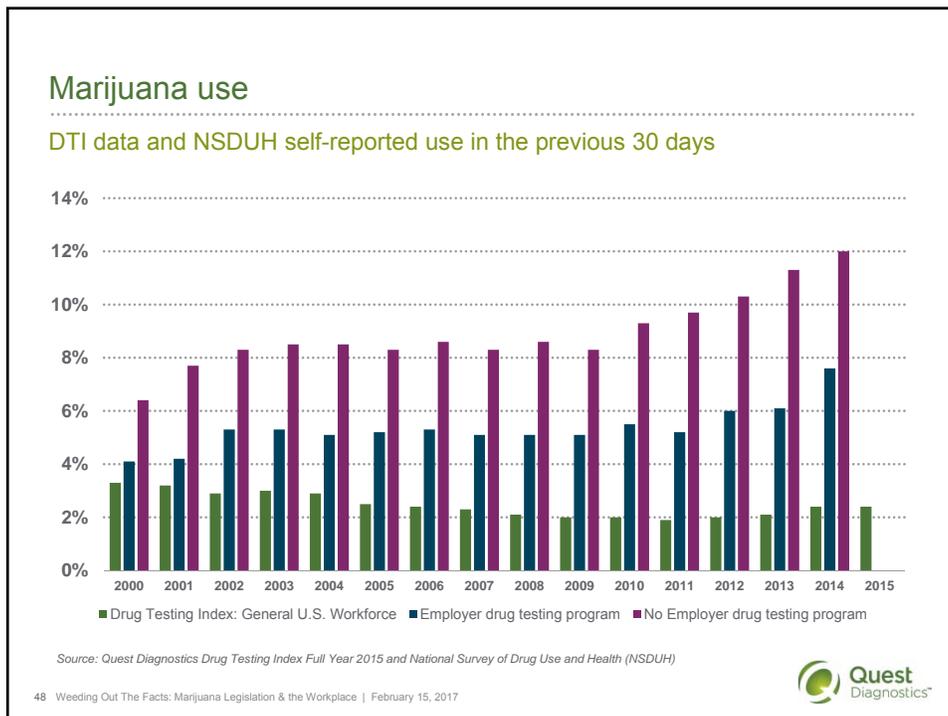
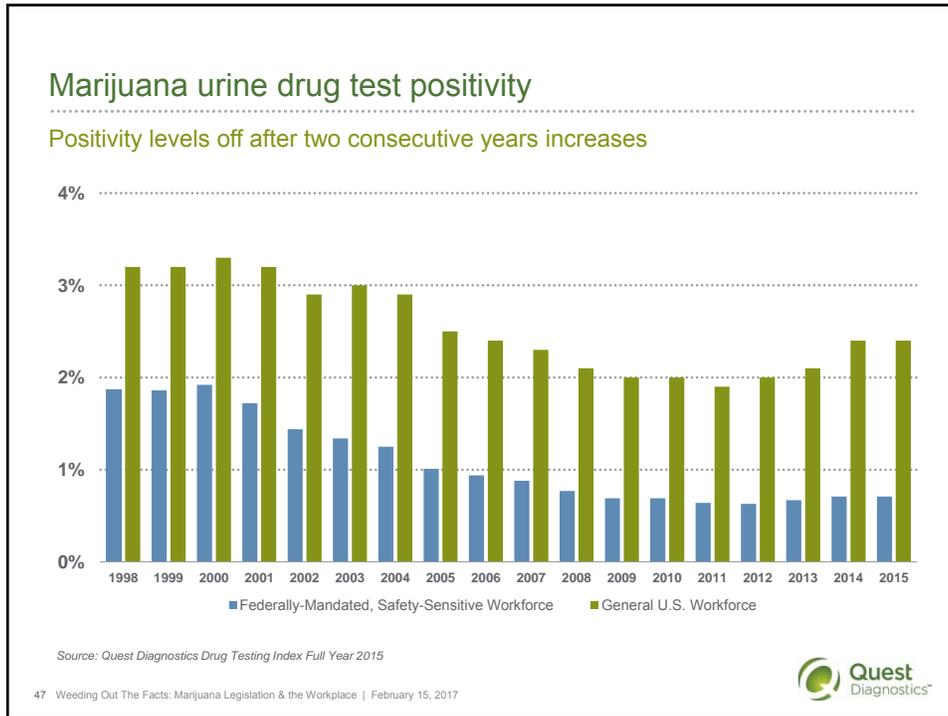
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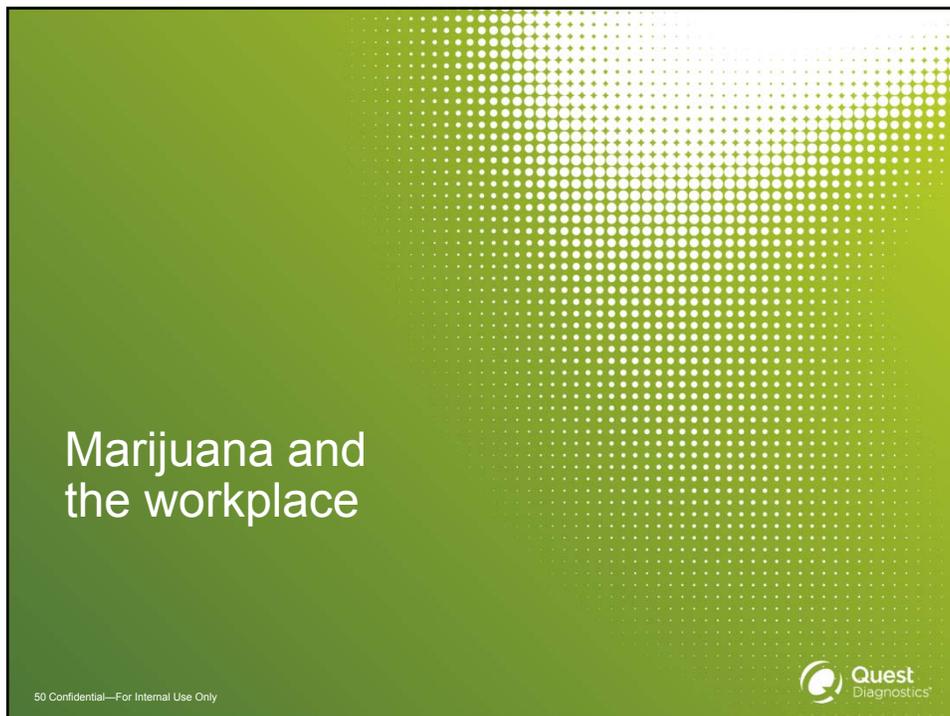
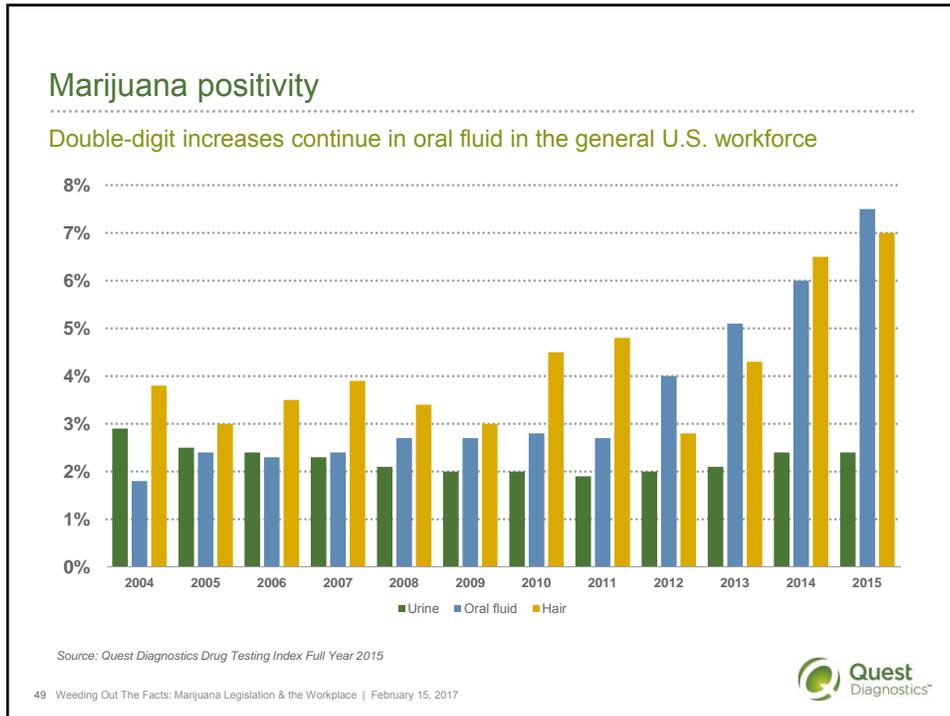


Data from the
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Marijuana and the workplace

How to develop and manage a drug testing program

- **Determine how you want to handle medical / recreational marijuana in your company policy**
 - Research state and local laws
- **Do you want to accommodate medical marijuana?**
- **Have a written policy**



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Marijuana and the workplace

Marijuana use can be impairing

- **Psychomotor and divided attention (e.g. tracking, reaction time)**
 - Functions that impact driving ability
 - Significant effect on both occasional and frequent users
 - Effects greater in occasional than frequent, suggesting some tolerance
- **Psychophysical task performance (part of field sobriety tests)**
 - ≥ 2 "clues" = DRE "impairment" criteria
 - Oral cannabis impaired one leg stand and walk and turn tasks in occasional smokers
 - Impairment related to blood THC & 11-OH-THC in occasional smokers, but not frequent smokers
- **Lateral control (Cannabis or alcohol or both)**
 - Standard deviation of lateral position (SDLP, "weaving") - either
 - Lane departures – alcohol only
 - Maximum acceleration – alcohol only

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Marijuana effects on driving

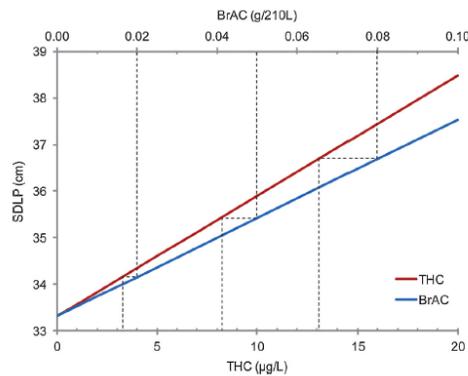


Fig. 2. GLM Select modeled standard deviation of lateral position (SDLP) versus blood Δ^9 -tetrahydrocannabinol (THC) concentration (lower x-axis) and versus breath alcohol concentration (BrAC, upper x-axis). Note x-axis scales are different so slopes cannot be directly compared; dotted lines indicate THC concentrations producing equivalent SDLP to 0.02, 0.05, and 0.08 g/210 L BrAC.

Source: Hartman, R.L., et al., Cannabis effects on driving lateral control with and without alcohol. *Drug Alcohol Depend.* (2015). <http://dx.doi.org/10.1016/j.drugaldep.2015.06.015>

Effects of cannabis, the most commonly encountered non-alcohol drug in driving under the influence cases, are heavily debated. The paper aimed to determine how blood THC concentrations relate to driving impairment, with and without alcohol.



Photo: The National Advanced Driving Simulator: view of night-drive simulation

Marijuana and the workplace

Drug testing policy

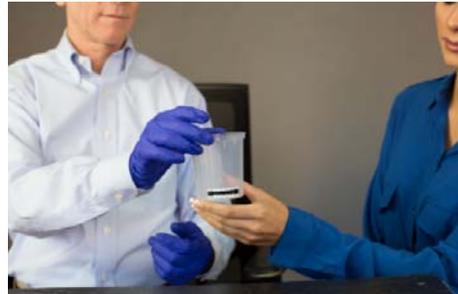
- **Be explicit**
 - Who is subject to testing?
 - How will it be administered?
 - What are the consequences of positive drug test results, specifically address how marijuana usage will be handled?
 - Be clear and transparent
- **How to drug test**
 - Urine, hair, and oral fluid
 - Check state and local workplace drug testing laws



Marijuana and the workplace

Drug testing policy

- **Inform employees of the policy and reason for the policy**
 - Employers are never required to allow use or impairment in the workplace
- **Current employee protection laws have no exemption for “safety-sensitive” employees**
- **Apply consistent treatment**

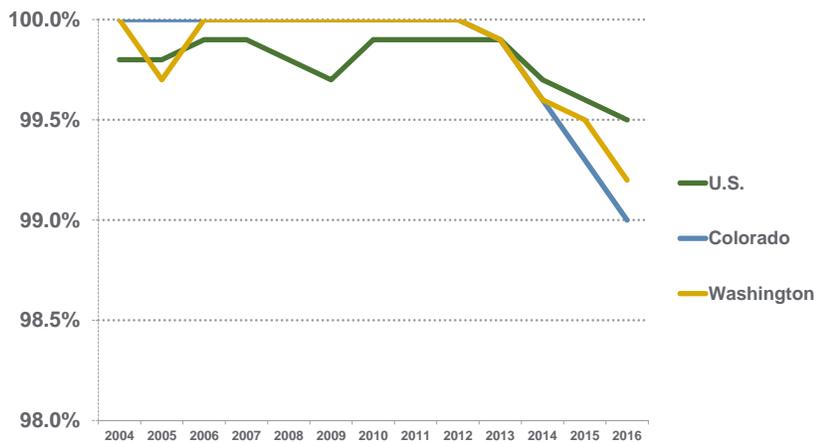


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Marijuana and employer testing programs

Percentage of U.S. general workforce urine tests including marijuana (THCA)



Source: Quest Diagnostics
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How to handle positive medical marijuana test results

- **Even if employee claims medical marijuana status, a Medical Review Officer (MRO) will report as positive for marijuana/THC**
- **MRO will generally tell an employer that employee claims medical marijuana cardholder status**
 - MRO has no way to verify cardholder status
- **Employer verifies employee's cardholder status**
 - View card
 - Laws do not entitle employer to determine reason for marijuana card
- **Information regarding marijuana cardholder status should be treated confidentially**



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Thank you

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Q & A



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Addendum

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Marijuana today: federal law

- **2013 DOJ Memo:** Guidance on marijuana enforcement - DOJ will not intervene with state medical marijuana laws
- **2014:** Medical Marijuana Protection Provision in Spending Bill
 - Prohibits DOJ/DEA from using resources to prevent states from implementing medical marijuana laws; previously blocked for 10 years; renewed June 2015 and December 2016
- Introduction of CARERS Act seeking to reschedule marijuana
- NIDA publications citing studies with positive effects
- Increased research and growth of plants for federal research
- **June 2015:** eliminated additional requirement of Public Health Service Review for non-federal research
- **April 2016:** 1st approved research study on effectiveness of marijuana for PTSD in veterans
- **August 11, 2016:** DEA denied petition to reschedule marijuana- research does not support reclassification
 - Relied on FDA/HHS supporting documentation; found insufficient data, lack of information; too many variables (potency, methods of consumptions, etc.)
 - BUT, DEA made policy change to remove restrictions and allow more research

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States with no employee protection

California (1996)

- Only provides criminal protections
- No employment protection - employer not required to accommodate by statute
- 2008: California Supreme Court found Act provided no protection
 - *Ross v. Ragingwire Telecomms, Inc.*, 174 P.3d 200 (Cal. 2008)
- 2016: Federal Court upheld *Ross*
 - *Shepherd v. Kohl's Dep't Stores*, 2016 U.S. Dist. LEXIS 101279 (E.D. Cal. 2016)

Colorado (2000)

- Medical Marijuana Act provides no employment protections
- Broad off-duty use statute:
 - Providing discriminatory/unfair employment practices to terminate employee engaging in lawful activities off premises during non-working hours
- 2015: Colorado Supreme Court held employee's off-duty use not "lawful activity" protected by statute because illegal under Federal law
 - *Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015)

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States with no employee protection

Michigan (2008)

- No statutory employment protections
- 2012: 6th Circuit held Act did not regulate private employment; no state law decision but no disapproval of case
 - *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. Mich. 2012)
- Impairment and DUI
 - *People v. Koon*, 494 Mich. 1, 3 (Mich. 2013): Act allows person to drive with indications of marijuana in system but not otherwise under influence; under influence not defined

Montana (2004)

- Statute explicitly provides no employment protections: Employer can include contract provision prohibiting use as condition of employment; Act does not provide cause of action for wrongful discharge/discrimination
- 2009: Montana Supreme Court upheld discharge of employee for positive marijuana drug test
 - *Johnson v. Columbia Falls Aluminum Co.*, 350 Mont. 562 (2009) (unpublished)
- Broad off-duty use statute

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States with no employee protection

Ohio (2016)

- Effective September 8, 2016
- Explicitly provides NO employee protections
 - Employers have right to establish and enforce zero-tolerance drug testing policies and law does not give employees right to sue employer for taking action related to use of medical marijuana
 - Not required to permit/accommodate employee's use, possession, distribution of medical marijuana
 - Act does not permit a person to sue an employer for taking an adverse employment action an employer may take under current law because of use, possession, or distribution of medical marijuana

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States with no employee protection

Oregon (1998)

- Statute provides no employment protections
- 2010: Oregon Supreme Court found Act provided no protection to employees
 - *Emerald Steel Fabricators, Inc., v. Bureau of Labor and Indus.*, 230 P.3d 518 (Or. 2010)
- 2016: Arbitrator reinstates county employee fired for off-duty medical marijuana use
 - Union employee - senior programmer any systems analyst fired after testing positive after reported smelled marijuana on jacket; admitted to using medical marijuana after work
 - Arbitrator found Contract language and past practices key; no evidence employee used marijuana at work or that off-duty use hurt job performance
 - Union contract: required "just cause" for termination; permitted discipline for off-duty use "only when the employee's ability and effectiveness to perform his/her job is impaired;" and required progressive discipline process
 - County's drug-free workplace policy contained exception for prescribed drugs: if substance taken under supervision of licensed health care professional and "does not present a safety hazard or otherwise adversely impact and employee's performance"
- **Pending Legislation (SB 301):** off-duty use statute- makes unlawful employment practice to condition employment on refraining from using any substance that is lawful to use in state- would include marijuana

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States with no employee protection

Washington (1998)

- Statute provides protections for criminal and civil consequences
- 2011: Washington Supreme Court held Act provided does not provide a cause of action for wrongful termination based on authorized medical marijuana use
 - *Roe v. Teletech Customer Care Mgmt., LLC*, 257 P.3d 586 (Wash. 2011)
- 2015: federal district court held no duty to accommodate medical marijuana in drug-free workplaces under Washington law even when use is outside workplace
 - *Swaw v. Safeway, Inc.*, No. C15-939 (W.D. Wash. Nov. 20, 2015)

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Likely no employee protections

Alaska (1998)

- No statutory employment protections
- Not required to accommodate use in workplace (§ 17.37.040(d)(1))
- Alaska DOH silent on issue

Hawaii (2000)

- Silent on employment protections; prohibits use/possession at place of employment
- Amended in 2015: addition of other civil protections
 - Prohibits discrimination against patients and caregivers by schools, landlords, and courts regarding medical care and parental rights; still silent on employment protections
- DOH FAQ on employment drug testing: prohibits use in workplace but silent on employer's rights and duties
- 2015/2016 introduced legislation to provide explicit employment protections

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Likely no employee protections

Maryland (2014)

- DOH FAQ: “Maryland law does not prevent an employer from testing for use of cannabis (for any reason) or taking action against an employee who tests positive for use of cannabis (for any reason)”

Massachusetts (2012) (watch)

- “No punishment under state law for qualifying patients;” provides “protection from state prosecution and penalties;” “shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions”
- Not required to accommodate on-site use in place of employment
- 2016: state Court found no duty to accommodate use of drugs illegal under federal law; no private right of action under Act; no clear public policy to forbid dismissal; Act doesn’t restrict employer’s ability to discipline employee for medical marijuana
 - *Barbuto v. Advantage Sales & Mktg, LLC*, (Mass. Super. Ct., May 31, 2016): Court Dismissed claims for disability discrimination, violation of medical marijuana act and regulations, and termination in violation of public policy
 - Notice of Appeal filed July 12, 2016

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Likely no employee protections

New Hampshire (2013)

- No statutory employment protections
- No protections for being under the influence while in place of employment or for possession of marijuana in place of employment without written permission of employer
- Not required to accommodate medical use on property/place of employment
- Does not limit employer’s ability to discipline employee for using cannabis in workplace or for working while under the influence

New Mexico (2007)

- Statute provides criminal protections; silent on employment protections
- DOH FAQ: statute does not provide employment related protections
- 2016: federal district court held employer had no duty to accommodate and no violation of New Mexico law or public policy for termination based on failed test
 - *Garcia v. Tractor Supply*, No. 15-cv-00735 (D. N.M. Jan. 7, 2016)
- Pending Case: *Stanley v. Cnty of Bernalillo Comm’ers et al*: alleging violation of NM human Rights Act; Defendant’s Motion to Dismiss pending

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Likely no employee protections

Vermont (2004)

- Statute provides limited criminal protections
- Does not exempt patients from arrest or prosecution for being under the influence of marijuana in a workplace or place of employment or using or possessing marijuana “in a manner that endangers the health or well-being of another person”

Washington, D.C. (1998)

- Provides limited criminal protections for patients
- 2014: law limiting employers from drug testing until conditional offer of employment

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Explicit employee protections: Arizona

- Cardholder Status Protection (patients, caregivers, dispensary workers)
- Drug Testing Protection
 - Prohibits discrimination based upon patient's positive drug test for marijuana
 - Except: if patient used, possessed, or was impaired by marijuana on premises or during work hours
- Cardholder may not use, possess, be impaired in workplace or during hours of employment
- Employer not prohibited from disciplining employee for ingesting in workplace or working under the influence
 - BUT: not considered “under the influence” solely because of the presence of metabolites/components that appear in insufficient concentration to cause impairment (A.R.S. § 36-2814 (2015))
 - Impairment Guidelines
- Verification system for employers
 - Registry Card System allows verification for pre-employment applicants and current employees

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Explicit employee protections: Arkansas

- Passed November 8, 2016; effective November 9, 2016
 - DOH to adopt rules within 120 days of effective date; delayed 60 days
- Cardholder Status Protection (patient or caregiver)
 - “qualifying patients . . . shall not be subject to criminal or civil penalties or other forms of discrimination for engaging in or assisting with the patients’ medical use of marijuana”
 - “A qualifying patient or designated caregiver in actual possession of a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner or denied any right or privilege, including without limitation a civil penalty or disciplinary action by a business, occupational, or professional licensing board or bureau, for the medical use of marijuana in accordance with this amendment if the qualifying patient or designated caregiver possesses not more than two and one-half ounces (2 ½ oz.) of usable marijuana.” (§ 3(a))
 - “employer shall not discriminate . . . or otherwise penalize an individual, based upon the individual’s past or present status as a qualifying patient or designated caregiver” (§ 3(f)(3))
- Employer not required to accommodate ingestion “in a workplace or an employee working while under the influence of marijuana” (§ 6(b)(2))

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Explicit employee protections: Connecticut

- Cardholder Status Protection (patient or caregiver)
- Employer may prohibit use of intoxicating substances during work hours
- Employer may discipline employee for being under the influence during work hours
- 2016: Connecticut Supreme Court held public policy of Connecticut does not require termination of state employee for smoking marijuana during work hours
 - *Connecticut v. Conn. Employee’s Union Ind.* (SC 19590) (Aug. 30, 2016)
 - Maintenance worker at University of Connecticut Health Center terminated for violation of drug and alcohol testing policy and smoke-free workplace policy after observed smoking marijuana in state van, admitted smoking
 - Arbitrator found misconduct but found termination too harsh because policy permitted but did not mandate termination; trial court vacated on public policy grounds
 - Connecticut Supreme court held public policy did not mandate termination

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Explicit employee protections: Delaware

- Cardholder Status Protection (patients and caregivers)
- Drug Testing Protection
 - Prohibits discrimination based upon Patient's positive drug test for marijuana
 - Except: if patient used, possessed, or was impaired by marijuana on premises or during work hours
- Employer not required to allow ingestion of marijuana in workplace or allow employee to work while under the influence
 - BUT: Patient not considered under the influence solely because of presence of metabolites or components of marijuana

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Explicit employee protections: Illinois

- Cardholder Status Protection (patient or caregiver)
- Potential Drug Testing Protection:
 - Nothing limits employer's ability to discipline employee for failing a drug test if "failing to do so would put the employer in violation of federal law or cause it to lose a federal contract or funding" (410 ILCS 130/50(d))
- Does NOT prohibit employer from:
 - Enforcing drug testing policy, zero-tolerance policy, or a drug free workplace if policy applied in nondiscriminatory manner
 - Adopting reasonable regulations for consumption, storage, or time keeping for patients related to use of medical marijuana
 - Disciplining employee for violating workplace drug policy
- Impairment Guidelines
 - Provides description of when employer may consider qualifying patient/employee impaired
 - Employers can take actions based on "good faith" beliefs about employee impairment but must give employee reasonable opportunity to contest basis

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Explicit employee protections: Maine

- Cardholder Status Protection (patient or caregiver)
- Employer not required to:
 - Accommodate ingestion in any workplace
 - Permit employee to work under the influence
- *Savage v. Maine Pretrial Services, Inc.*, 58 A.3d 1138 (Me. 2013):
 - Worker allegedly fired for applying for a dispensary license and filed lawsuit
 - Court found that applying for a license was not a protected activity

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Explicit employee protections: Minnesota

- Cardholder Status Protection (patient)
- Drug Testing Protection (patient)
 - Prohibits discrimination based upon patient's positive drug test for marijuana
 - Except: if patient used, possessed, or was impaired by marijuana on premises or during work hours
- If employee/applicant tests positive for drugs, employees may present verification of enrollment in patient registry as part of explanation for the results prior to any adverse employment action
- Broad off-duty use statute that could be read to include marijuana

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Explicit employee protections: Nevada

- Previous law provided only criminal protection, amended 2014
- Effective April 1, 2014: Employer must attempt to make reasonable accommodations for employee with valid registry card if it would not:
 - Pose threat of harm/danger to persons or property;
 - Impose undue hardship on employer; OR
 - "Undue hardship" undefined
 - Prohibit employee from fulfilling any/all of their job responsibilities
- Employer does NOT have to:
 - Allow use in the workplace (453A.800(2));
 - Modify job or working conditions if based upon reasonable business purpose (453A.800(2))
- Unclear how much protection statute provides
- **Broad off-duty use** statute could be read to include marijuana (N.R.S. 613.33(1))
 - Unlawful employment practice for employer to discriminate because the "employee engages in the lawful use in this state of any product outside the premises of the employer during nonworking hours, if that use does not adversely affect the employee's ability to perform his/her job or the safety of other employees"
 - Medical marijuana act does not specifically state such use is lawful

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Explicit employee protections: New York

- Implemented January 2016
- Patients and caregivers shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau solely for certified medical use or for any other action/conduct in accordance with act
- Certified patients deemed to have a "disability" under New York Human Rights Law
- Employer may enforce policy of prohibiting employee from performing employment duties while impaired by controlled substance

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Explicit employee protection: Pennsylvania

- Signed by Governor April 17, 2016
- Appears to provide explicit Employment Protections
 - Cardholder Status Protection
 - Not required to accommodate use on property or place of employment
 - May discipline employee under the influence in workplace or for working under the influence when conduct falls below standard of care normally accepted for that position
 - Does not define under the influence or standard of care
 - Silent on whether employer can rely on positive test for adverse action alone or as evidence of impairment - appears to require contemporaneous documentation of characteristics of physical impairment for adverse action
- Includes specific identification for some safety sensitive functions that cannot be performed with more than 10 ng/mL of active THC in blood

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Explicit employee protections: Rhode Island

- Cardholder Status Protection
- Employer not required to accommodate medical use in the workplace
- Patient not considered under the influence solely for having marijuana metabolites in system
- *Callaghan v. Darlington Fabrics, Corp.*, C.A. No. PC (RI Nov. 12, 2014)
 - Plaintiff denied summer internship after she disclosed her condition and medical marijuana cardholder status; sued employer for disability discrimination under Rhode Island Civil Rights Act and Medical Marijuana Act
 - Employer filed motion to dismiss; plaintiff argued required to accommodate use as long as use not IN workplace
 - Court denied motion to dismiss

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Employment protections unclear: New Jersey

- Potential Employment protections
 - “a qualifying patient, primary caregiver, alternative treatment center, physician, or any other person acting in accordance with the provisions” of the Act :shall not be subject to any civil or administrative penalty, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a professional licensing board, related to the medical use of marijuana as authorized under [the] Act”
 - Does not limit employer’s ability to discipline employee for using cannabis in workplace or for working while under the influence
- DOH FAQ: referenced the provisions above and recommended patient be familiarized with NJS.2C:35-18
- Pending Case: *Barrett v. Robert Half Corp.*, 2:15-cv-06245-CCC-MF (D.N.J.)
 - Plaintiff a certified medical marijuana cardholder who worked for temporary staffing agency; informed staffing agency of cardholder status upon hire and initially employed; later terminated when received work assignment and failed drug test
 - Plaintiff filed suit alleging disabled under New Jersey Law Against Discrimination - alleging staffing agency failed to accommodate his disability by firing him for his medical marijuana use
 - Motion to dismiss pending
- 2016 Introduced Legislation: to revise Act and prohibit adverse action against employees for off-duty medical marijuana use unless employer can prove employee’s legal use has impaired employee’s ability to do the job

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Employment protections unclear: North Dakota

- Passed November 8, 2016; effective within 30 days
- Extent of employment protections unclear
 - Participation in medical marijuana program by qualified patient or primary caregiver does not relieve patient or caregiver from:
 - (1) “criminal prosecution or civil penalties for activities not authorized in this rule and Act;” or
 - (3) “criminal prosecution or civil penalty for possession, distribution, or transfers of marijuana or use of marijuana... in the workplace of the qualified patient’s or primary caregiver’s employment” (§ 19-24-09. 7(a)(3)(c))
- No other explicit discrimination provisions
- Broad off-duty “lawful activities” statute similar to Colorado (N.D. Cent. Code 14-02/4-03 (2003))

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Other

Texas-ALJ Advisory Opinion (1/10/2017)

- Texas public high school teacher was interviewed after anonymous email accusing teacher of wrongdoing unrelated to marijuana or drugs; during interview teacher admitted to smoking marijuana occasionally
- Teacher agreed to submit to drug test, tested positive for marijuana in hair (negative urine); teacher admitted to eating an edible in Colorado over Christmas
- Teacher resigned and Texas State Board of Educator Certification was seeking to suspend her license for 2 years- ALJ proposal for decision
- ALJ recommended Texas Department of Education take no action against teacher
 - Found that a preponderance of the evidence did not show teacher was unfit to teach; no evidence under the influence; policy only prohibited working under the influence or consuming on the property
 - Policy only mentioned post-accident, reasonable suspicion, and random testing
 - Not unlawful under CO law
 - State did not argue legality under Federal law

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Marijuana laws: unemployment and workers' comp benefits

Michigan

- Appellate court held employee with medical marijuana card not disqualified from unemployment benefits after terminated for marijuana positive test result (*Braska v. Challenge Mfg.*, 307 Mich. App. 340 (2014))

Illinois

- Appellate court found employee's admission of off-duty marijuana use not "misconduct" sufficient to deny unemployment benefits even if sufficient for discharge (*Eastham v. Housing Authority of Jefferson County*, No. 09-MR-57 (Ill. App. Ct. 5th Dist. Dec. 2, 2014))

New Mexico

- Worker's Comp: Required employer and insurance company to pay for patient's medical marijuana for back pain (*Vialpando v. Ben's Automotive Servs et al.*, No. 32,920 (N.M. Ct. App., May 19, 2014))

Arizona

- In 2015, law amended: removed requirement that workers' comp carriers and self-insurers reimburse patients for medical marijuana

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Recreational marijuana laws

Alaska (2014)

- Explicitly provides NO employment protections (17.38.120)
 - Not intended to require employer to permit or accommodate use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in workplace or “to affect the ability of employers to have policies restricting the use of marijuana by employees”

Colorado (2012)

- Law silent on employment protections
- CO state web portal - laws about marijuana use: “Despite legalization, employers can still test for marijuana and make employment decisions based on drug test results”
- *Coates v. Dish* (Colo. 2015)

Oregon (2014)

- Law silent on employment protections
- Guidance in Oregon OLCC FAQ Sheet: Measure does not affect existing employment law and “employers who require drug testing can continue to do so”

Washington (2012)

- Law silent on employment protections
- Guidance in Washington State Liquor and Cannabis FAQ: “It is our understanding that employers may still conduct drug testing at their discretion”

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Recreational marijuana laws: explicit no employee protections

California: Proposition 64 (2016)

- Passed November 8, 2016; effective November 9, 2016
- “Nothing in section 11362.1 shall be construed or interpreted to amend, repeal, affect, restrict, or preempt: The rights and obligations of public and private employers to maintain a drug and alcohol free workplace or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the work place, or affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees, or prevent employers from complying with state or federal law.” (§ 11362.45(f))

Massachusetts: Question 4 (2016)

- Passed November 8, 2016; effective December 15, 2016
- “This chapter shall not require an employer to permit or accommodate conduct otherwise allowed by this chapter in the workplace and shall not affect the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees.” (Section 2(e))

Nevada: Question 2 (2016)

- Passed November 8, 2016; effective January 1, 2017
- “Sections 1 to 18 do not prohibit . . . A public or private employer from maintaining, enacting, and enforcing a workplace policy prohibiting or restricting actions or conduct otherwise permitted under sections 1 to 18, inclusive, of this act” (Sec. 2(a))

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Recreational marijuana laws

Maine: Question 1 (2016)

- Passed November 8, 2016; effective January 30, 2017
- Appears to provide explicit employment protections for off-duty use
 - “Employment policies. This chapter may not be construed to require an employer to permit or accommodate the use, consumption, possession, trade, display, transportation, sale or growing of cannabis in the workplace. This chapter does not affect the ability of employers to enact and enforce workplace policies restricting the use of marijuana by employees or to discipline employees who are under the influence of marijuana in the workplace.” (§ 2454(2))
 - “School, employer or landlord may not discriminate. A school, employer or landlord may not refuse to enroll or employ or lease to or otherwise penalize a person 21 years of age or older solely for that person’s consuming marijuana outside of the school’s, employer’s or landlord’s property.” (§ 2454(3))