

# Marijuana in the Workplace

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ALYSON FOSTER



# Overview

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- ❑ Relevance to Idaho
- ❑ Basic terminology and uses
- ❑ Historical overview
- ❑ Current legal landscape
  - Federal criminal laws
  - State laws
- ❑ Testing options and limitations
- ❑ Employment policies



# Relevance to Idaho

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*On any given Saturday night in  
downtown Boise...*

# Relevance to Idaho

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- Increased availability and use
- Idaho employment workforce
  - ✓ Job growth: #1
  - ✓ Tech sector growth: #2
  - ✓ Population growth: #7
  - ✓ Forbes “best states for business”: #18
- Neighboring states’ laws
- Multi-state companies

**Hotbox Farms**  
**Legal Pot** just past Ontario  
**1 hour away from Boise**

Free **4/20** BBQ      Free **4/20** Smells

**Huge 4/20 specials**

**4.20\$** Grams of **Flower**  
**120\$** oz's  
**24\$** Grams of **Shatter**



# Basic Terminology & Uses

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# Basic Terminology & Uses

- Anandamide: the “bliss molecule”
- Cannabis or marijuana
  - ✓ Sativa, indica, ruderalis
- Hemp
- Tetrahydrocannabinol (THC)
- Cannabidiol (CBD)



















# Basic Terminology & Uses

- Recreational use
  - ✓ #3 behind alcohol and tobacco
- Medical use
  - ✓ Pain relief, appetite stimulation, anti-nausea, anti-spasticity, epilepsy, chemotherapy, etc.
  - ✓ More than 60 US and international health organizations support
- Industrial use
  - ✓ Textiles, paper, paints, clothing, plastics, cosmetics, foodstuffs, insulation, animal feed



# Historical Overview

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# Historical Overview

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## **Pre-1850s**

- Hemp widely used for rope and fabric

## **1850s**

- Introduced into use in Western Medicine – U.S. Pharmacopeia
- Pharmaceutical regulations began to develop

## **Early 1900s**

- Harrison Narcotics Act of 1914
- Uniform State Narcotic Act – 1934
- Reefer Madness – 1936
- Marihuana Tax Act – 1937
- All twenty-two states that had prohibited marijuana by the 1930s created exceptions for medical purposes





1936







# Historical Overview

## 1970s

- ❑ Controlled Substances Act, Title II of Comprehensive Drug Abuse Prevention and Control Act
- ❑ State decriminalization attempts
- ❑ Shafer Commission

## 1980-1998

- ❑ Reagan & “Just say no”
- ❑ 1988: DEA judge recommends allowing marijuana as medicine; DEA overrules
- ❑ Drug Free Workplace Act of 1988
- ❑ State efforts undertaken to reclassify marijuana’s Schedule 1 status

## 1998 – present

- ❑ State legalization of medical & recreational marijuana
- ❑ Pending bills before Congress to legalize marijuana
- ❑ Policy statements of DOJ



# Current Legal Landscape

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# Current views

- ❑ Public support at an all-time high
  - ✓ 61% support legal marijuana use
  - ✓ 70% want feds to refrain in legalized states
  - ✓ 88% favor medical marijuana
- ❑ Trump Administration: Sessions Doctrine
- ❑ Congressional Cannabis Caucus: “Path to Marijuana Reform”

## Currently Pending Bills in the 115<sup>th</sup> Congress (2017-2018)

- Respect States and Citizens’ Rights Act of 2017
- Separate cannabidiol from marijuana in the CSA
- Secure and Fair Enforcement (SAFE) Banking Act
- Rescheduling legislation
- Better Drive Act
- The Veterans Equal Access Act
- Regulate Marijuana Like Alcohol Act
- Ending Federal Marijuana Prohibition Act
- Respect State Marijuana Laws Act of 2017
- LUMMA (Legitimate Use of Medicinal Marijuana Act)
- Compassionate Access Act
- States’ Medical Marijuana Property Rights Act
- Small Business Tax Equity Act
- Responsibly Addressing the Marijuana Policy Gap Act
- Marijuana Revenue and Regulation Act





# Current legal landscape

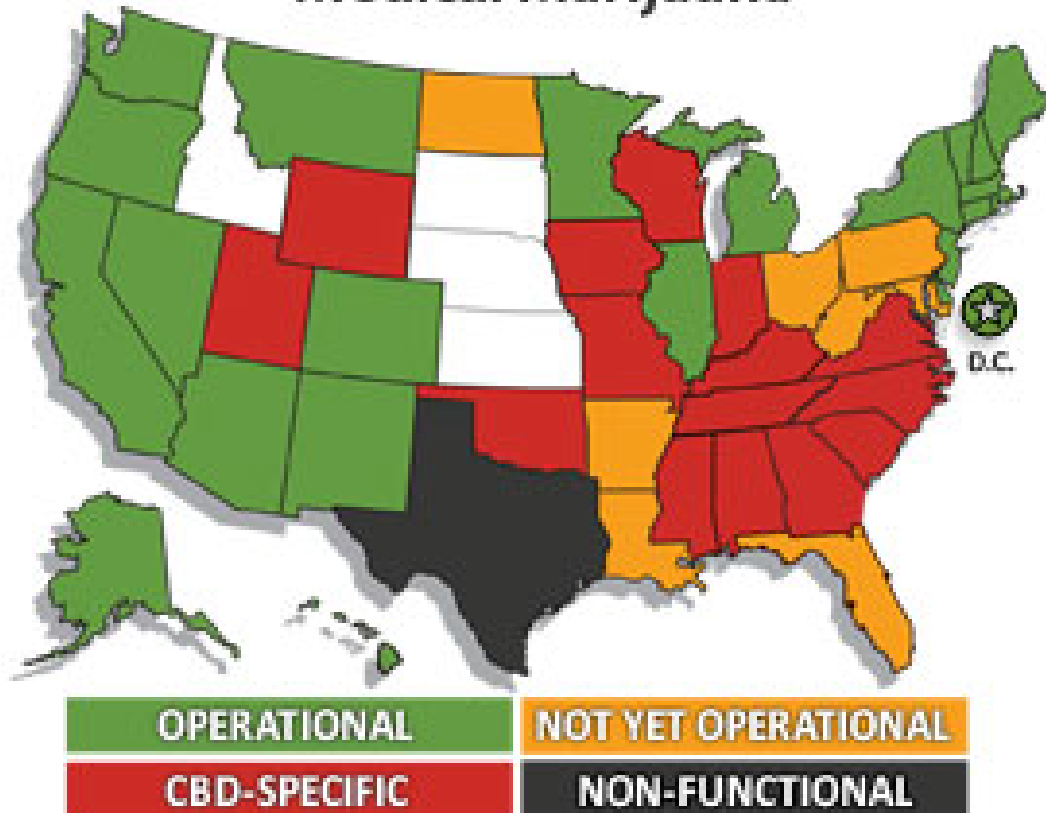
- ❑ Controlled Substances Act, 21 U.S.C. 801 et seq.
  - ❑ 812(c)(10) “Hallucinogenic Substances” – “Marihuana”
  - ❑ *Gonzalez v. Raich*, 545 U.S. 1 (2005): constitutional use of commerce clause power, and as applied to medical marijuana users/givers
- ❑ Drug-Free Workplace Act of 1988, 21 USC 1501 et seq.
  - ❑ Recipients of federal grants or contracts must maintain a zero-tolerance workplaces
- ❑ DOJ Enforcement Guidance Memoranda
  - ❑ Ogden Memo, Oct. 19, 2009
  - ❑ Cole Memos: June 29, 2011, Aug. 29, 2013, and Feb. 14, 2014
  - ❑ Sessions Memo, May 10, 2017



# Medical Use



## States That Have Legalized Medical Marijuana



**Operational:** No state-level criminal penalties; programs up and running; registered users must have doctor's recommendation.

**Not yet operational:** States with medical marijuana laws but not yet operational.

**CBD-specific:** Laws allowing for use of cannabis extracts high in CBD (non-psychoactive) and low in THC (psychoactive) for specific conditions (e.g. epilepsy).

**Non-functional:** Law requires doctor to provide prescription rather than recommendation – unlike the other medical marijuana laws; but federal law prohibits doctors from prescribing Schedule I controlled substances, so currently unclear whether any physicians will participate.



# Medical Use

❑ **Lawful use of medical marijuana:** AK, AZ, AR, CA, CO, CT, DE, DC, FL, Guam, HI, IL, LA, ME, MD, MA, MI, MN, MT, NV, NH, NJ, NM, NY, ND, OH, OR, PA, Puerto Rico, RI, VT, WA, WV

❑ **Characteristics:**

- Qualifying conditions: hospice; cachexia/wasting syndrome; cancer; glaucoma; HIV/AIDS; multiple sclerosis; seizures; severe or chronic pain; severe nausea; Alzheimer's; Lou Gehrig's; Crohn's; epilepsy; fibromyalgia; hepatitis C; Parkinson's; PTSD; sickle cell anemia; spinal cord disease/injury; Tourett's; TBI; etc.
- Limits on possession, cultivation, dispensaries
- Restrictions on use in school areas, correctional facilities, vehicles, and public smoking
- May preserve employer right to forbid use (e.g. WA)



- ❑ Statutory protections for marijuana medical users: AK, AZ, CN, DE, IL, ME, MN, NY, NV, PA, RI
- ❑ “Discrimination Prohibited”
  - Schools, landlords, parenting (unless unreasonable danger shown by CCE)
  - “Unless a failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon either:
    1. The person's status as a cardholder.
    2. A registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment.”



# Medical Use – CBD

Lawful use of medical cannabinoids (low THC): AL, FL, GA, IN, IA, KY, MS, MO, NC, OK, SC, TN, TX, UT, VA, WI, WY

## Characteristics:

- Qualifying conditions (many limit to epilepsy)
- Registered/certified individuals may possess small amounts of low-THC (less than 5%) cannabinoids for very specific list of medical conditions

## FDA has approved two synthetic THC medicines

- Marinol: contains dronabinol, a synthetic delta-9-THC
- Cesamet: contains nabilone, synthetic with a chemical structure similar to THC



# Recreational Use

- ❑ Lawful recreational use: AK, CA, CO, DC, ME, MA, NV, OR, WA
- ❑ Anti-discrimination: ME
  - ❑ 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.
- ❑ Preservation of employer drug-free workplace rights: AK, CO, DC, ME, MA, NV
  - ❑ Nothing in this section shall prohibit a[n] . . . employer. . . or any other entity who occupies, owns or controls a property from prohibiting or otherwise regulating the possession, consumption, use, display, transfer, distribution, sale, transportation, or growing of marijuana on or in that property.
  - ❑ Nothing in this chapter is intended to require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees.



# Idaho

- ❑ 2015: Senate Bill 1146 – CBD law
  - CBD-heavy but no-THC cannabis oil to be used by medical patients, particularly aimed at helping children suffering severe seizures
  - affirmative defense to possession/use prosecution; cancer, amyotrophic lateral sclerosis, seizure disorders, multiple sclerosis, Crohn's disease, mitochondrial disease, fibromyalgia, Parkinson's disease, or sickle cell disease; written recommendation of Idaho doctor
  - Passed Senate, Governor Otter vetoed
- ❑ 2016: proposed ballot initiative (did not receive 46,523 signatures)
  - Included prohibition on discrimination by employers
- ❑ Public opinion: more support for medicinal than recreational



# Employment Laws

## □ Federal Laws

- OSH Act
  - General duty clause: employers must “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.” 29 U.S.C. § 654(a)(1).
- ADA
  - An individual who is currently engaging in the illegal use of drugs is not an “individual with a disability” when the employer acts on the basis of such use.



# Employment Laws

## □ State laws

- At will / public policy exception
- State disability discrimination statutes
- State lawful use statutes – activities (CO, NY, ND) and products (IL, MN, MO, MT, NV, NC, TN, WI)
- Marijuana medical use protections – AK, AZ, CN, DE, IL, ME, MN, NY, NV, PA, RI
- Recreational Use – ME
- Smoker (tobacco) protection laws – CO, DC, IN, KY, LA, ME, MI, MO, NH, NJ, NM, OK, OR, RI, SC, SD, VA, WV, WY



# Caselaw sample

- ❑ Medical marijuana use statutes do not require employers to accommodate use:
  - *Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225 (D.N.M. 2016)
  - *Coles v. Harris Teeter, LLC*, 217 F. Supp. 3d 185 (D.D.C. 2016)
  - *Roe v. TeleTech Customer Care Mgmt.*, 171 Wash. 2d 736 (2011) (including off-site use)
  - *Beinor v. Indus. Claim Appeals Office*, 262 P.3d 970, 976 (Colo. App. 2011)
- ❑ Lawful activities statutes do not protect medical marijuana use:
  - *Coats v. Dish Network, LLC*, 350 P.3d 849, 852 (Colo. June 15, 2015)
- ❑ Medical marijuana use is an illegal substance disqualifying protection under ADA:
  - *Emerald Steel Fabricators, Inc. v. BOLI*, 230 P.3d 518 (Or. 2010)
- ❑ CSA preempts contrary provisions of state medical use statutes:
  - *People v. Crouse*, 2017 CO 5, 388 P.3d 39 (2017)
  - *Emerald Steel Fabricators, Inc. v. BOLI*, 230 P.3d 518 (Or. 2010)



# Testing Options & Limitations

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# Testing

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## Urine test

- Does not detect psychoactive component of marijuana (THC) and thus does not measure impairment
- Detects only non-psychoactive metabolite THC-COOH

## Blood test

- Better detector of impairment because measures active presence of THC and therefore impairment.; invasive and expensive so used less often
- Detects another blood metabolite 11-hydroxy-THC, a psychoactive byproduct produced when THC is processed by the liver after oral ingestion; no appreciable levels detected in smoked marijuana

## Limits

- Variable and inconsistent results dependent upon individual
- Urine tests--possible to test negative one day, positive the next
- Some conclude users are impaired with THC levels of 3.5-5 ng/ml in blood; but, chronic users may develop tolerance; chronic users with severe attention deficit disorder failed driving test without marijuana use but passed after use



## Testing Types

- Computer-based tests of mental alertness
- Monitoring eyes' ability to smoothly track an object moving horizontally ("horizontal gaze nystagmus")
- Monitoring pupil's response to light stimuli

## Reported employer experiences

- Very few employers have employed impairment testing; those that have report high success rate
- Chamberlain Contractors reported 50–75% reduction in accidents with use of light stimuli impairment testing, primarily with operators of heavy equipment
- Employers that have used impairment testing found it superior to urine testing

*Source: National Workright Institute: Impairment Testing – Does it work?*



# Employment policies

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# Employment policies

## ❑ **Conservative approach: zero-tolerance**

- So long as marijuana is illegal under federal law, employers may have a zero-tolerance policy without risk of liability under employment discrimination statutes

## ❑ **Risks**

- Potential loss of good employees
- Testing limits

## ❑ **Permissive approach: consider impairment**

- A policy that accommodates lawful marijuana use yet provides adequate work place protections

## ❑ **Risks**

- Assurance of adequate workplace safety
- Time and money

### Colorado Employment Practice Guide

- “An employer who wants to ensure its employees do not use marijuana or other illegal substances on or off the job should implement and consistently enforce a written zero-tolerance policy.” 16 Colo. Prac., Emp. Law & Practice § 2.21 (2d ed.)



# Best practices

- ❑ Zero tolerance for workplace impairment and intoxication
- ❑ Drug testing:
  - Federal contractor or grantee: the federal Drug-Free Workplace Act encourages drug testing
  - Adopt appropriate, non-discriminatory policies compliant with state testing and privacy laws
  - May include incident-response or reasonable suspicion/for-cause testing
- ❑ Industry-specific hazard prevention and control
- ❑ ADA permits prohibition of illegal use of drugs
- ❑ State-specific protections for those states with protections for those legally using medical marijuana
- ❑ Provision of counseling for abuse
- ❑ Address marijuana use specifically
- ❑ General best practices for employment policies (written acknowledgment, clear consequences of violations)



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