

MARIJUANA – WORKPLACE CONCERNS

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OUR CONVERSATION

- ▶ Introduction and overview
- ▶ State vs. federal marijuana laws
- ▶ Employment issues
- ▶ National trends
- ▶ Michigan Experience
- ▶ Other issues to note
- ▶ Questions and hopefully answers!

WORKPLACE CHALLENGES

- ▶ Workplace challenges
 - ▶ Drug testing policies
 - ▶ Hiring/firing
 - ▶ Recruitment and retention
 - ▶ Driving
- ▶ Unemployment benefits, workers' compensation

CALIFORNIA

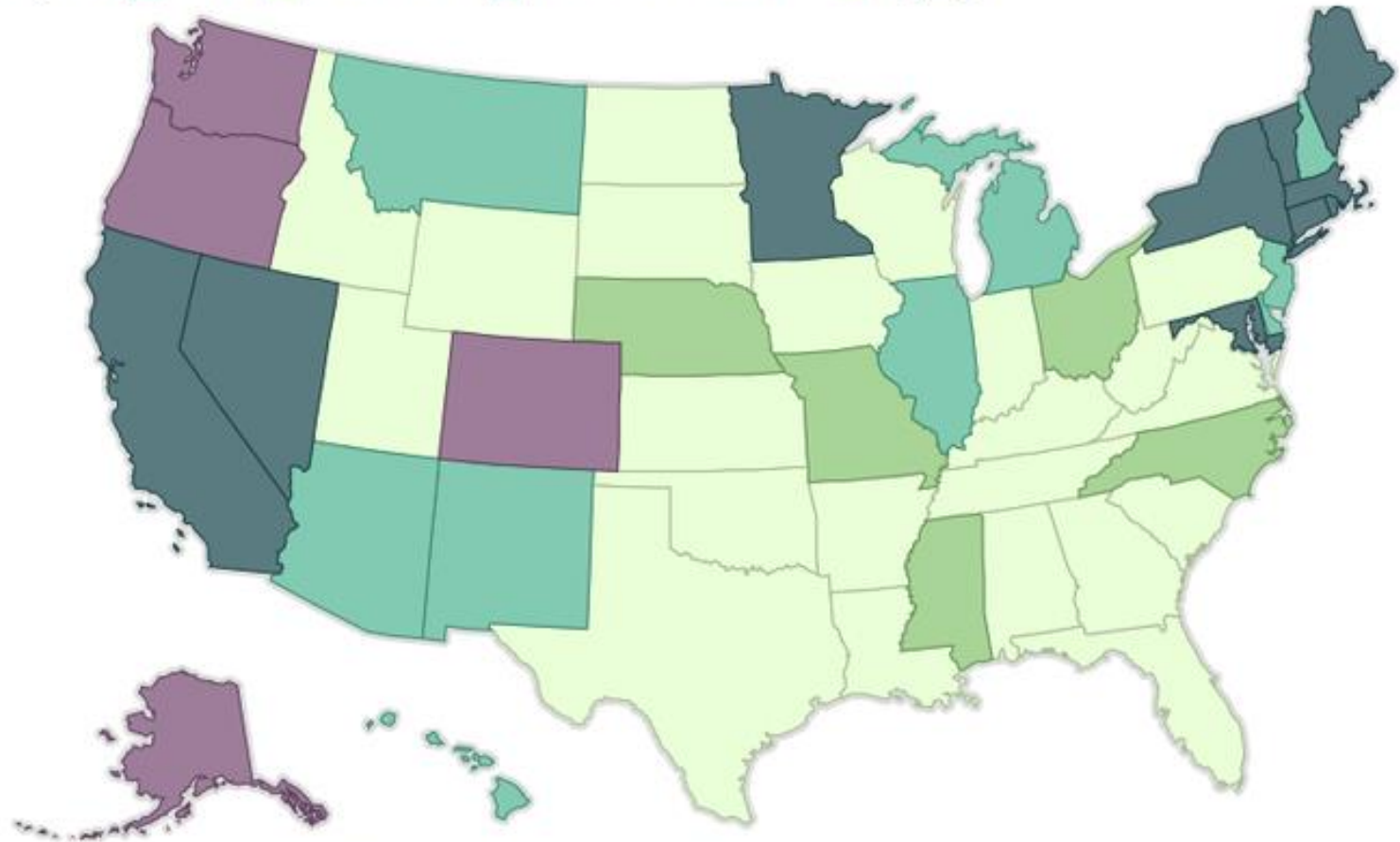
- ▶ Medical in 1996 - First in the nation.
- ▶ No state regulations, only local.
- ▶ Multiple 2016 ballot initiatives to legalize adult recreational use.
- ▶ 55% of California voters support legal adult use.
- ▶ Northern California accounts for 70% of cannabis grown in the West.
- ▶ California cannabis industry = \$18 billion.

LEGAL ADULT USE OF MARIJUANA

- ▶ Known as Adult Recreational Use
- ▶ Has been legalized in four states, and Washington DC
 - ▶ Alaska, Oregon, Colorado, Washington
- ▶ States that may legalize in 2015 or 2016:
 - ▶ Nevada, California, Arizona
 - ▶ Maine, Massachusetts, Hawaii
- ▶ Many legislatures considering legal medical use

Status of marijuana laws in the United States

Legalized Medical Decriminalized Medical and decriminalized Fully illegal



Source: NORML, Drug Policy Alliance, and the Marijuana Policy Project

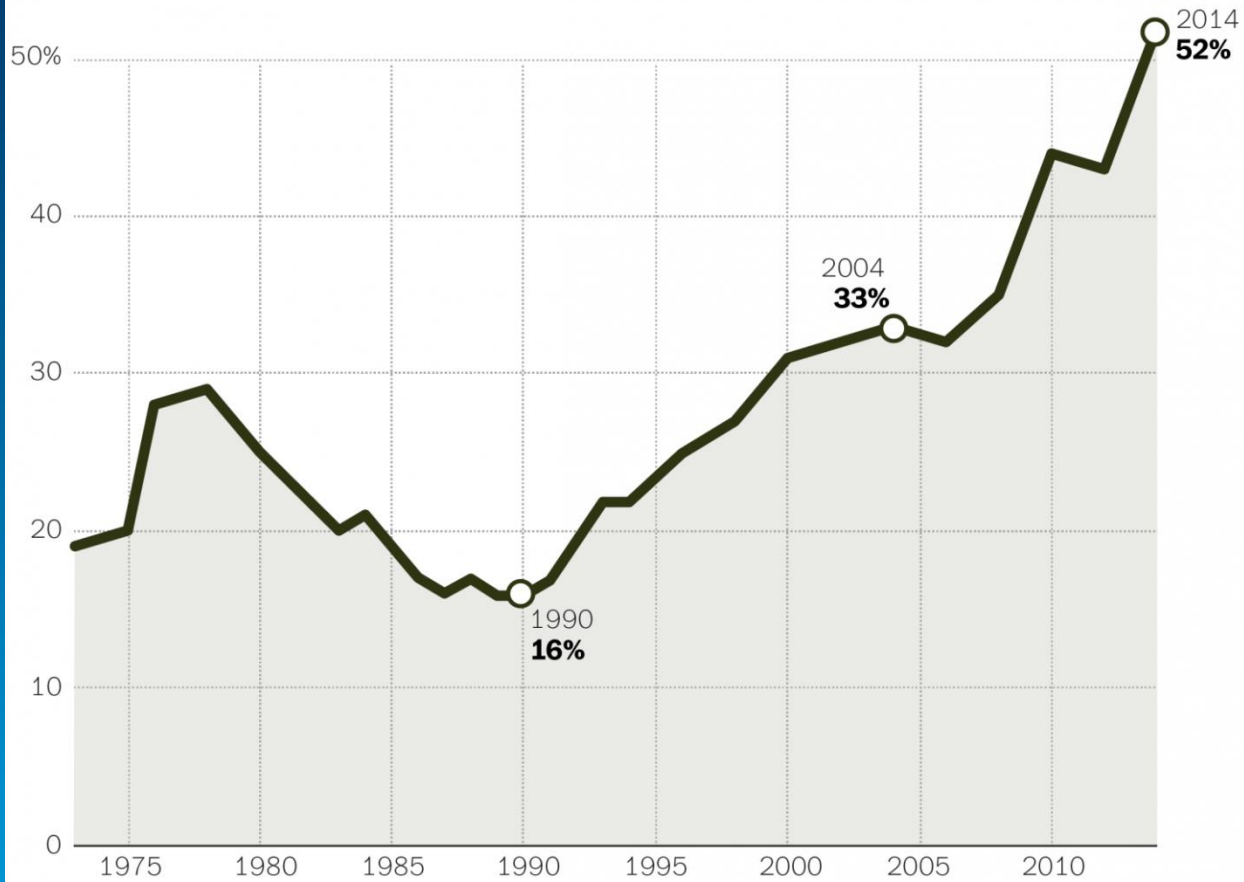


NATIONAL POLLING

Nationwide polling ranges from
52% to 58% in support of
legalization of adult recreational
use of Marijuana

Support for marijuana legalization rose sharply in 2014

% of respondents saying the use of marijuana should be made legal



WASHINGTONPOST.COM/WONKBLOG

Source: General Social Survey

STATE VS. FEDERAL LAW

- ▶ Marijuana remains illegal under federal law.
- ▶ Creates challenge for state implementation.
- ▶ DOJ guidance recommends against prosecuting individuals in states where marijuana use is legal.
- ▶ Guidance rests on DOJ's expectation that states have regulations in place to enforce federal marijuana priorities.
- ▶ No guarantee that federal enforcement will not occur.

IMPAIRMENT

- ▶ No test for impairment or under the influence of marijuana
- ▶ Marijuana can remain in the body long after effects have worn off, sometimes for weeks after use
- ▶ Without determining impairment, employers may choose to prohibit altogether
- ▶ In most states, employer may terminate an employee or refuse to hire an applicant who tests positive regardless of impairment
- ▶ Research underway for true impairment test

DRUG-FREE WORKPLACE

- ▶ Drug-free workplace policy not required unless due to federal requirements (funding, truck drivers, etc.).
- ▶ Policy may prohibit drug use on or off the job.
- ▶ Employer may drug test job applicants and refuse to hire if they test positive.
- ▶ Employer may require test if reasonable suspicion of impairment.
- ▶ Employer may require test after work-related accident if reasonable suspicion that employee involved in the accident was impaired or if the accident was serious.
- ▶ Generally, random drug tests allowed only if required by federal law, or are in positions that are critical to public safety or the protection of life, property or national security

Ballot Initiative Language – Recreational Use

EMPLOYMENT PROVISIONS

COLORADO

- (a) Nothing in this section 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.

WASHINGTON

- ▶ Washington law is silent on employer's right to maintain a drug-free workplace.
- ▶ Washington Supreme Court decision in 2011 upholds right of an employer to terminate an employee who violated the company's drug policy through medical marijuana use that was lawful under state law.
- ▶ Similar results from state supreme courts in some other states with medical marijuana laws—California, Montana and Oregon.
- ▶ For now, legal experts suggest that employers can continue to enforce the drug testing and drug-free workplace policies in those states with laws allowing for some types of marijuana use.

ALASKA

- (a) 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.

- (d) Nothing in this chapter shall prohibit a person, employer, school, hospital, recreation or youth center, correction facility, corporation or any other entity who occupies, owns or controls private property from prohibiting or otherwise regulating the possession, consumption, use, display, transfer, distribution, sale, transportation, or growing of marijuana on or in that property.

OREGON

Limitations. Sections 3 through 70 of this Act may not be construed: (1) to amend or affect in any way state or federal law pertaining to employment matters.

- ▶ No job protection provisions in the new law
- ▶ Employers may still enforce drug free workplace policies

WASHINGTON D.C.

Section (4) Nothing in this subsection shall be construed to require any district government agency or office, or any 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 any such agency, office or employer to establish and enforce polices restricting the use or marijuana by employees.

- ▶ Council unanimously passed rule to prohibit pre-employment drug testing in D.C.
- ▶ Aims to prevent the loss of a job opportunity for job seekers who have used marijuana prior to receiving a job offer but it does not remove an employer's right to prohibit the use of drugs at work or at any time during employment.

UNEMPLOYMENT INSURANCE BENEFITS

- ▶ Can employees collect benefits if terminated for violating workplace drug policy?
- ▶ Yes and No. Depends on state.
- ▶ California: misconduct or violation of policy — yes.
- ▶ “Irresistible compulsion” no — until completion of treatment program.
- ▶ Case-by-case basis.

MICHIGAN EXPERIENCE

WORKERS' COMPENSATION

- ▶ Is an injury compensable if a post-accident drug test is positive, and the claimant has been prescribed medical marijuana?
- ▶ Insurers getting requests to pay for prescribed marijuana.
- ▶ Lack of approval by FDA, and banned by federal law, some disagree about payment.
- ▶ Benefit eligibility not clear – is it the cause, is it legally prescribed?
- ▶ Positive test may result in compensable injury; employer may still discipline the worker for violating company policy.

RECRUITMENT AND RETENTION

- ▶ Many unaware that although legal, employers may have drug-free workplace policies.
- ▶ Anecdotal reports of increase in failed tests.
- ▶ Requires more recruitment.
- ▶ Higher positive tests in random testing will lead to higher turnover.
- ▶ Employers should review policies and strategies for recruitment and retention.

DO THIS TODAY!

- ▶ Update drug & alcohol policy - statement on marijuana use
- ▶ Communicate policy to employees
- ▶ Choose your prohibitions/test points: pre-employment, reasonable suspicion, post-accident
- ▶ Provide training to all supervisors and managers – include reasonable suspicion
- ▶ Expect more positive tests, especially pre-employment

FUTURE POLICY ISSUES

- ▶ Will employers be able to maintain drug-free workplace in light of legalization?
 - ▶ Is the fact that marijuana is illegal under federal law enough to allow employers to prohibit lawful use under state law?
 - ▶ Measures that do not include job protections – could courts assume protection due to legality?
 - ▶ Will courts decide employers cannot take action based on off-duty usage, then limit employers to testing only for reasonable suspicion and post accident/incident similar to alcohol testing?
- ▶ If a definitive test for impairment is developed, how will that change the conversation?
- ▶ Will medical marijuana patients have different employment rights than recreational users?
- ▶ What does the future hold for workers' comp and unemployment insurance issues?

MARIJUANA INDUSTRY ISSUES

- ▶ Banking
- ▶ Taxation (tax on marijuana and business tax)
- ▶ Labor and safety
- ▶ Land use
- ▶ Local control
- ▶ Licensing
- ▶ Testing
- ▶ Water and environmental

QUESTIONS?

White papers:

<http://www.calchamber.com/GovernmentRelations/IssueReports/Documents/2015-Reports/Workplace-Safety.pdf>

<http://www.uclalawreview.org/cooperative-federalism-and-marijuana-regulation-2/>