



Marijuana: The Highs and Lows in the Workplace

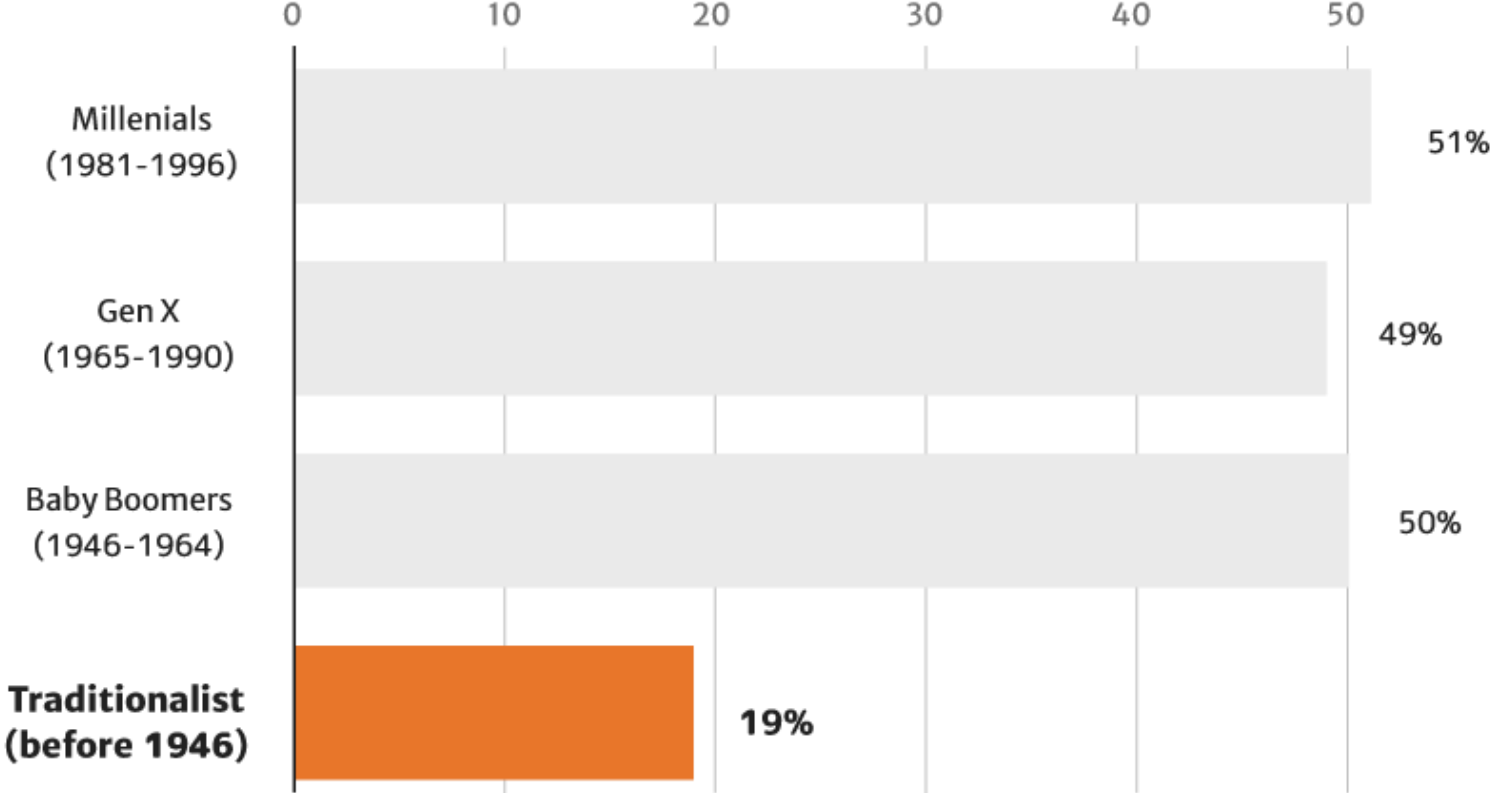
Cat Burgett | April 26, 2024

Fact: Marijuana remains the most commonly used federally-illicit substance

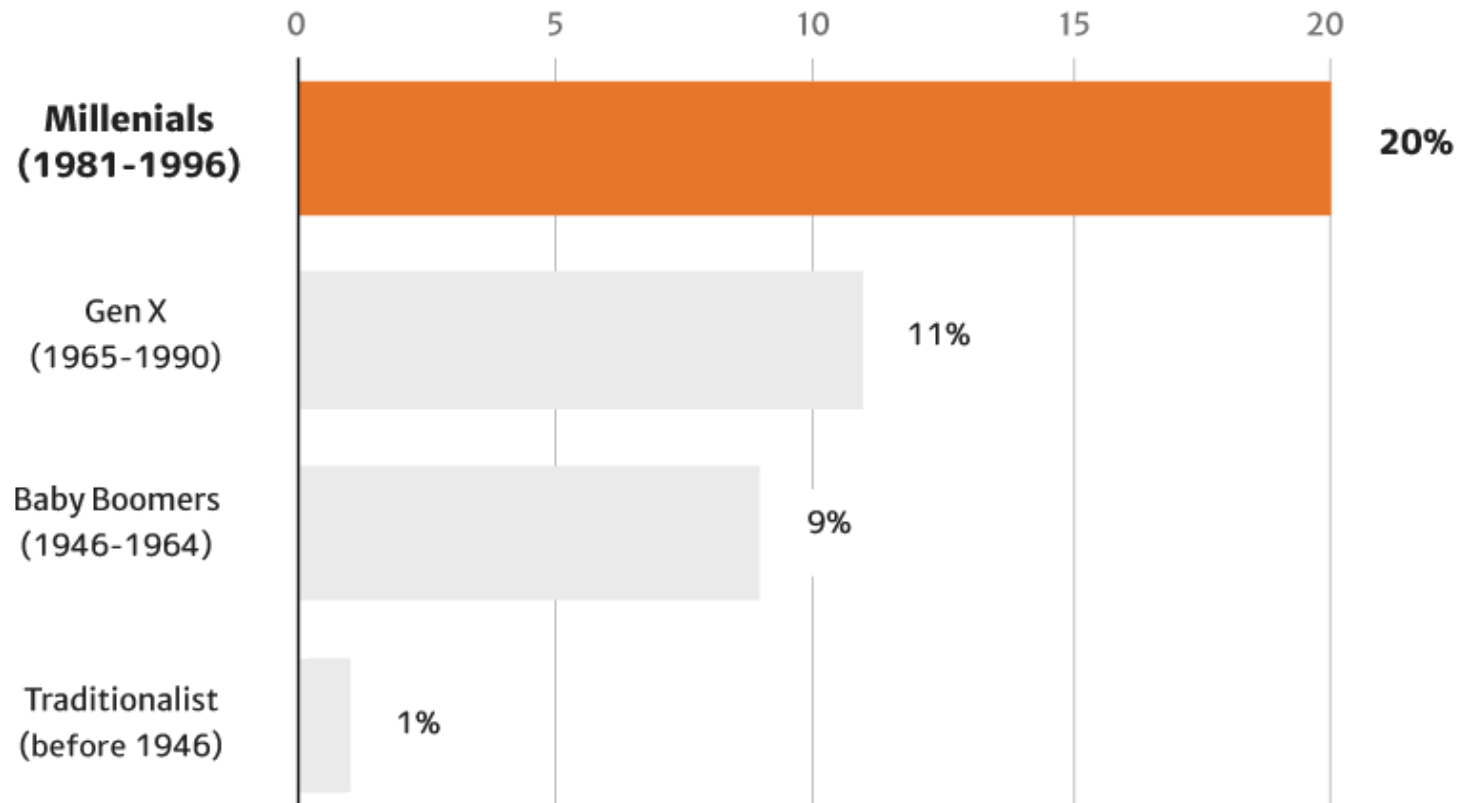
- Over 94 million people in the US have admitted using it at least once.
- According to WHO, approximately 147 million people or 2.5% of the total global population consume marijuana.
- 24.0 million current marijuana users in U.S. (83.9%)
- In 2018, over 11.8 million young adults in the US said they had used marijuana in the past year.
- Next to alcohol, marijuana is the second most frequently found substance in the bodies of drivers involved in fatal automobile accidents.
- Marijuana is the third most used drug in the United States (behind alcohol and tobacco)



The Percentage of Each Generation That Have Tried Marijuana

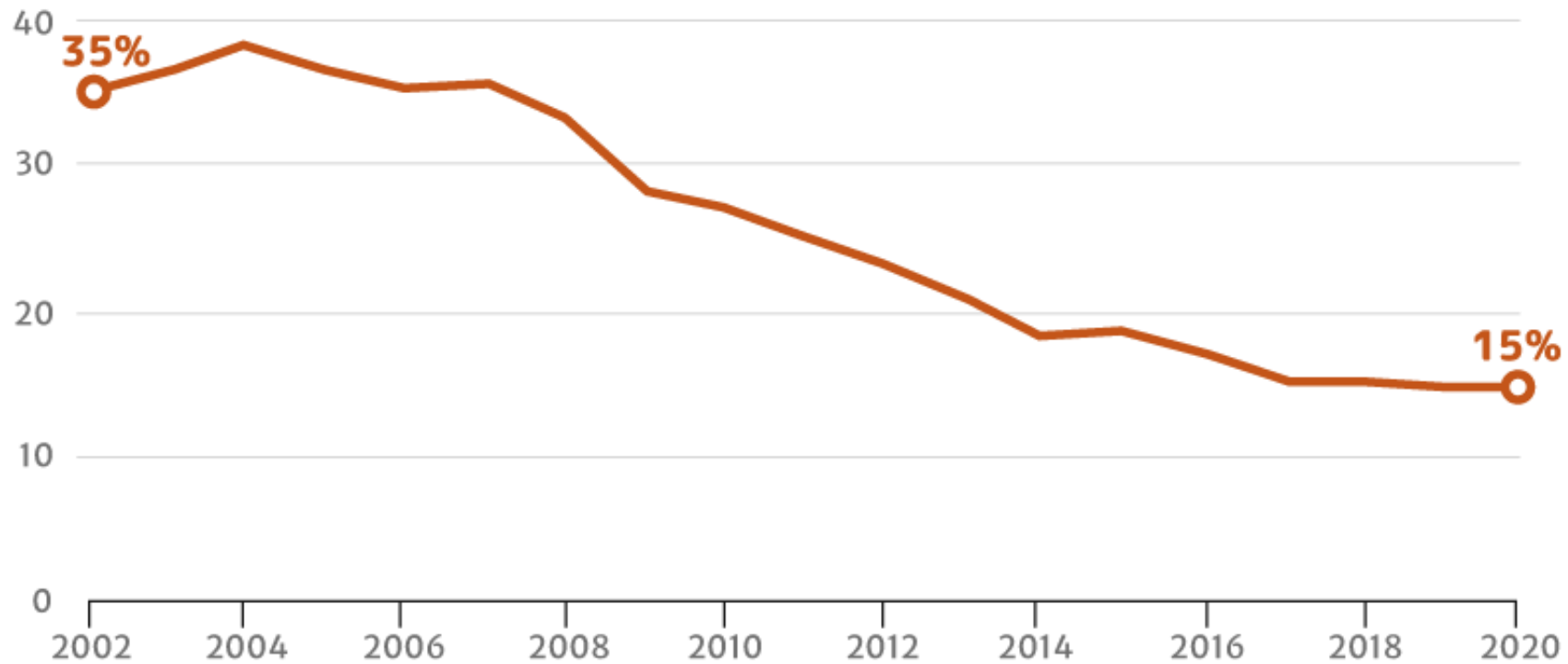


Which Generation Smokes the Most Weed



Marijuana Risk of Harm Perception Among Young Adults

Percent of Young Adults Perceiving Great Risk



Substance Abuse in the Workplace

- According to the National Drug-Free Workplace Alliance, of the **17.4 million** current illicit drug users aged 18 and over, more than 75% were employed
- Of the **20.4 million** adults classified with substance dependence or abuse, over 60% were employed full-time
- Of the **55.3 million** adult binge drinkers, nearly 80% were employed – **16.4 million** of these employees classified themselves as heavy drinkers

Legal Use of Marijuana

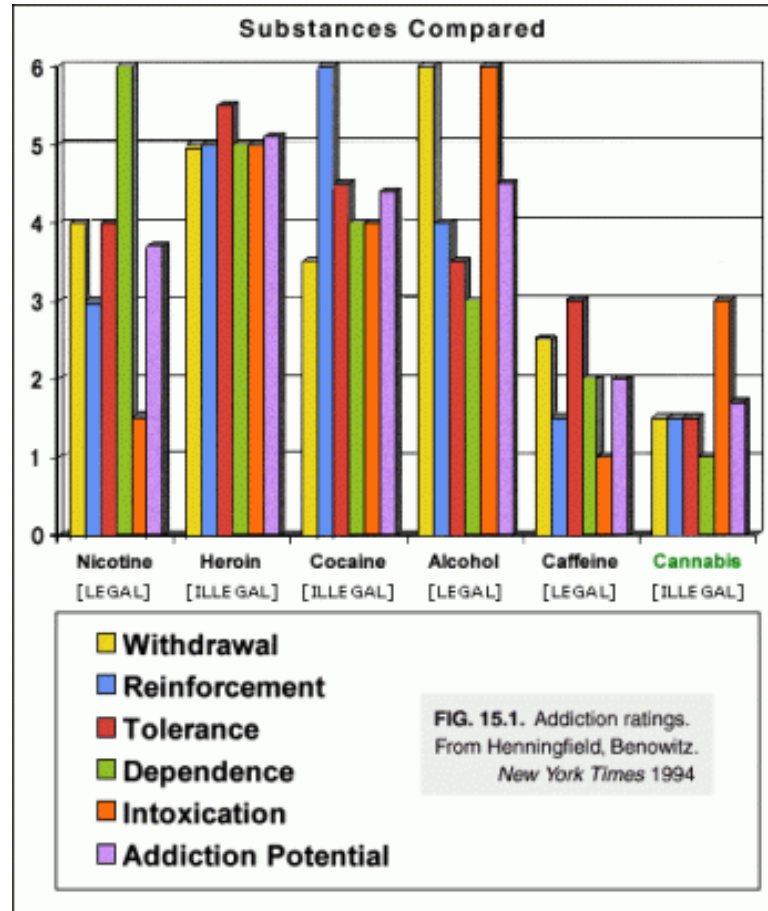
Medical



Recreational



How Does Marijuana Fit In?



Marijuana Overdose?

- You would have to smoke 800 marijuana cigarettes.
- Cause of death? Carbon monoxide poisoning, not overdose.



Criminalization

- In the wake of Prohibition, Congress initially imposed federal prohibitions outlawing cannabis' recreational, industrial, and therapeutic use by the passage of the Marihuana Tax Act of 1937
- Federal marijuana prohibition was later reaffirmed by Congress' decision to classify marijuana - as well as all of the plant's active compounds - as Schedule I substances under the Controlled Substances Act of 1970
- This classification asserts that cannabis is equally as dangerous to the public as heroin and is more dangerous than cocaine

Restraints on Federal law enforcement – The Rohrabacher Amendment

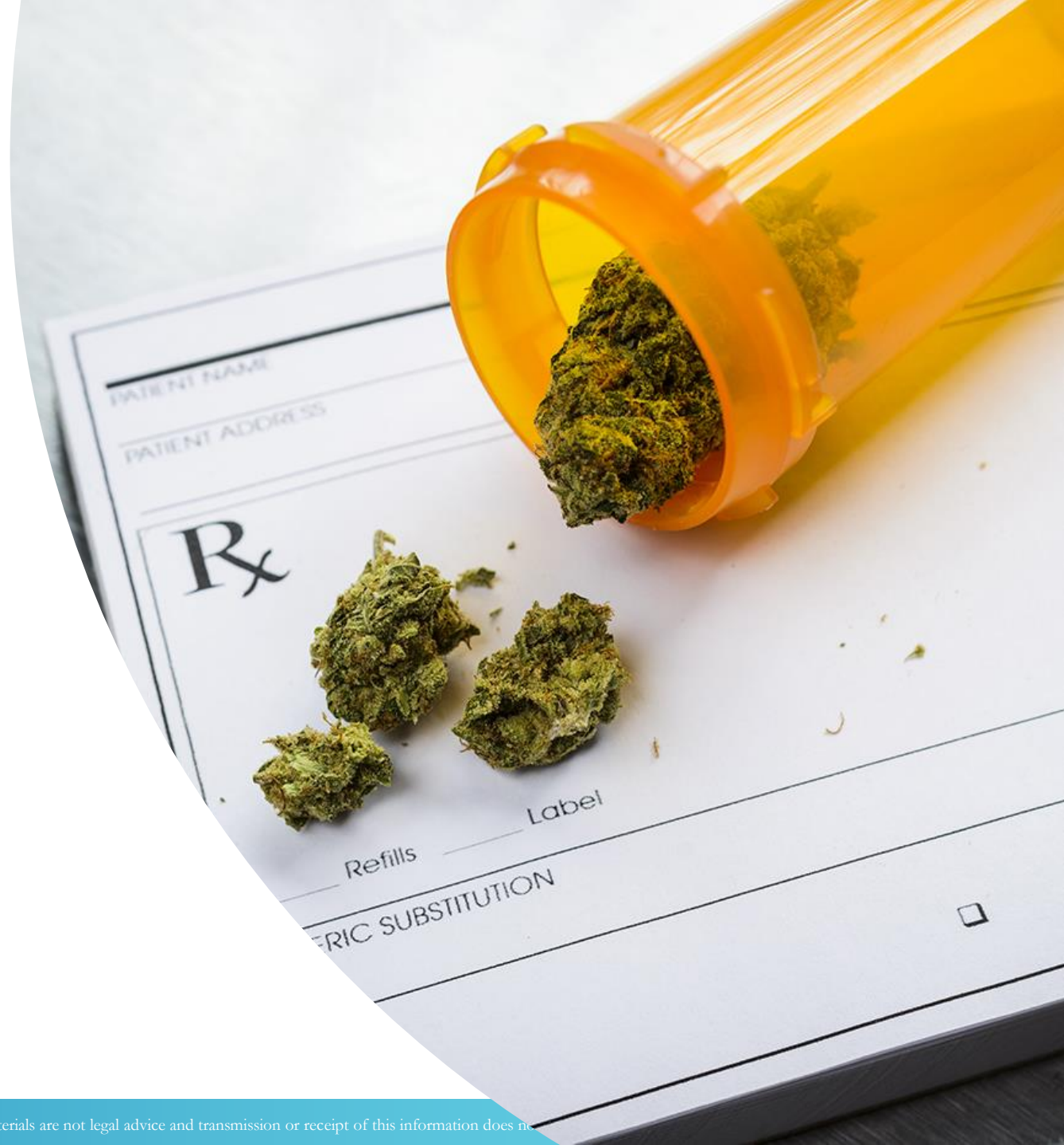


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1. Biggest restraint.
2. Included in federal government's spending bill.
3. Prohibits DOJ from using federal funds to interfere with those strictly complying with a state's medical marijuana law. *United States v. McIntosh*, 833 F.3d 1163, 1179 (9th Cir. 2016).
4. However, violations can be prosecuted for up to 5 years after occurrence.

Restraints on Federal law enforcement – “prescription” v. “recommendation”

1. In many states, including Ohio, physicians do not “prescribe” medical marijuana, they “recommend” it.
2. Derived from *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) decision.
 - a. Federal government cannot prosecute physicians or revoke a DEA license for a recommendation.
 - b. First amendment right.



Restraints on Federal law enforcement – the Cole Memorandum

1. Guided U.S. attorneys to only enforce federal marijuana laws in certain situations:
 - a. prevent distribution to minors;
 - b. prevent marijuana money from going to gangs; and
 - c. prevent diversion from legal states to non-legal states.
2. Rescinded in January 2018 by former Attorney General Jeff Sessions.
3. All but reinstated by AG Merrick Garland



Medical Marijuana

- Doctors and researchers have found medical marijuana to help patients with the following:
 - Pain control
 - PTSD
 - Glaucoma
 - HIV
 - Crohn's Disease
 - Certain forms of cancer
 - Epilepsy
 - Multiple Sclerosis



Legal routes of administration

- Pills
- Oil or Liquid Tincture
- Topical gels, creams, ointments
- Vaporization or nebulization

- Dry leaf/flower added....

- But No Smoking....



Medical Marijuana - CBD v. THC

- THC is the compound in marijuana known for its psychoactive properties (i.e. gives user “a high”)
- CBD is the non-psychoactive compound in marijuana that reduces inflammation
- CBD can also be derived from the hemp plant



Delta-8 vs. Delta 9

- Delta-8 and Delta-9 are both cannabinoids, but they have different chemical structures and effects.
- Delta-9 is more potent and psychoactive than Delta-8. Some people report experiencing a euphoric feeling without the paranoia sometimes associated with Delta-9 THC consumption. Others, especially those who consumed Delta-8-infused edibles (gummies, brownies, beverages, etc.), reported anxiety, hallucinations, insomnia, confusion, dizziness, and generally unpleasant experiences
- Based on the 2018 Farm Bill that legalized CBD, Delta-8 is federally legal, provided it comes from hemp and has less than 0.3% of Delta-9.
- Some states have banned Delta-8 products, imposing the same limit on all THC variants.
- Delta-8 is the wild, wild west.

CBD Oil

- CBD extracted from Cannabis whole plant- mixed with a carrier oil
- Low (>.03% THC)
- Non-psychoactive
- Can be bought OTC or at Certified Seller
- Used to treat: anxiety/depression, pain, cancer related symptoms



Hemp Oil

- Extracted from seed of cannabis plant
- Contains no THC
- Can be bought OTC
- Used in food and skincare products
- Included in some paints, plastics and lubricants

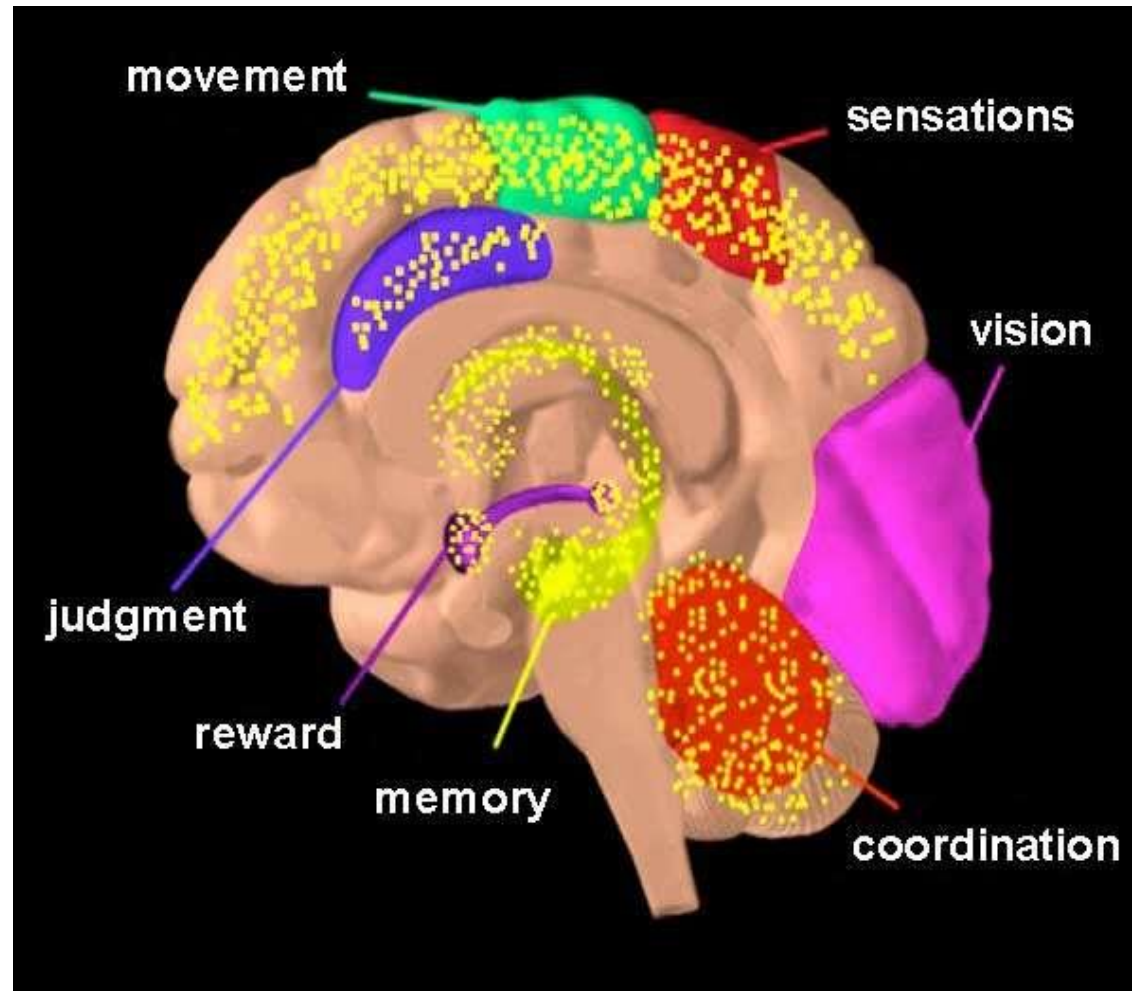


THC's Psychological Effects

- Effects include:
- altered senses (for example, seeing brighter colors)
- altered sense of time
- changes in mood
- impaired body movement
- difficulty with thinking and problem-solving
- impaired memory
- hallucinations (when taken in high doses)
- delusions (when taken in high doses)
- psychosis (when taken in high doses)



THC acts on numerous areas in the brain (in yellow).



- Effects of smoking marijuana are noticeable within minutes after the first toke, and usually reach peak levels after 30 minutes.
- Most physical and psychological effects of marijuana will return to normal within 5 hours after administration, with exceptional strains or high potency THC effects reported to last for 24 hours.
- If marijuana is ingested orally, it takes longer to be absorbed into the blood, usually from 20 minutes to 1.5 hours.



How long is MJ detectable in an employee?

- **THC metabolites detectable in Blood**
 - Single use: Up to 24 hours
 - Frequent use: Up to 3 days
 - Regular, daily use: Up to 1 week
- **THC metabolites detectable in Saliva**
 - Single use: Up to 24 hours
 - Frequent use: Up to 3 days
 - Chronic, heavy use: Up to one week
- **THC metabolites detectable in Hair**
 - Single use: Up to 90 days
 - Frequent use: Up to 90 days
 - Regular, daily use: Up to 90 days
- **THC metabolite detectable in Urine**
 - Single use: Up to 24 hours
 - Frequent use: Up to a few weeks
 - Chronic, heavy use: Up to one month



An overview of Ohio's medical marijuana program



An overview of Ohio's medical marijuana program

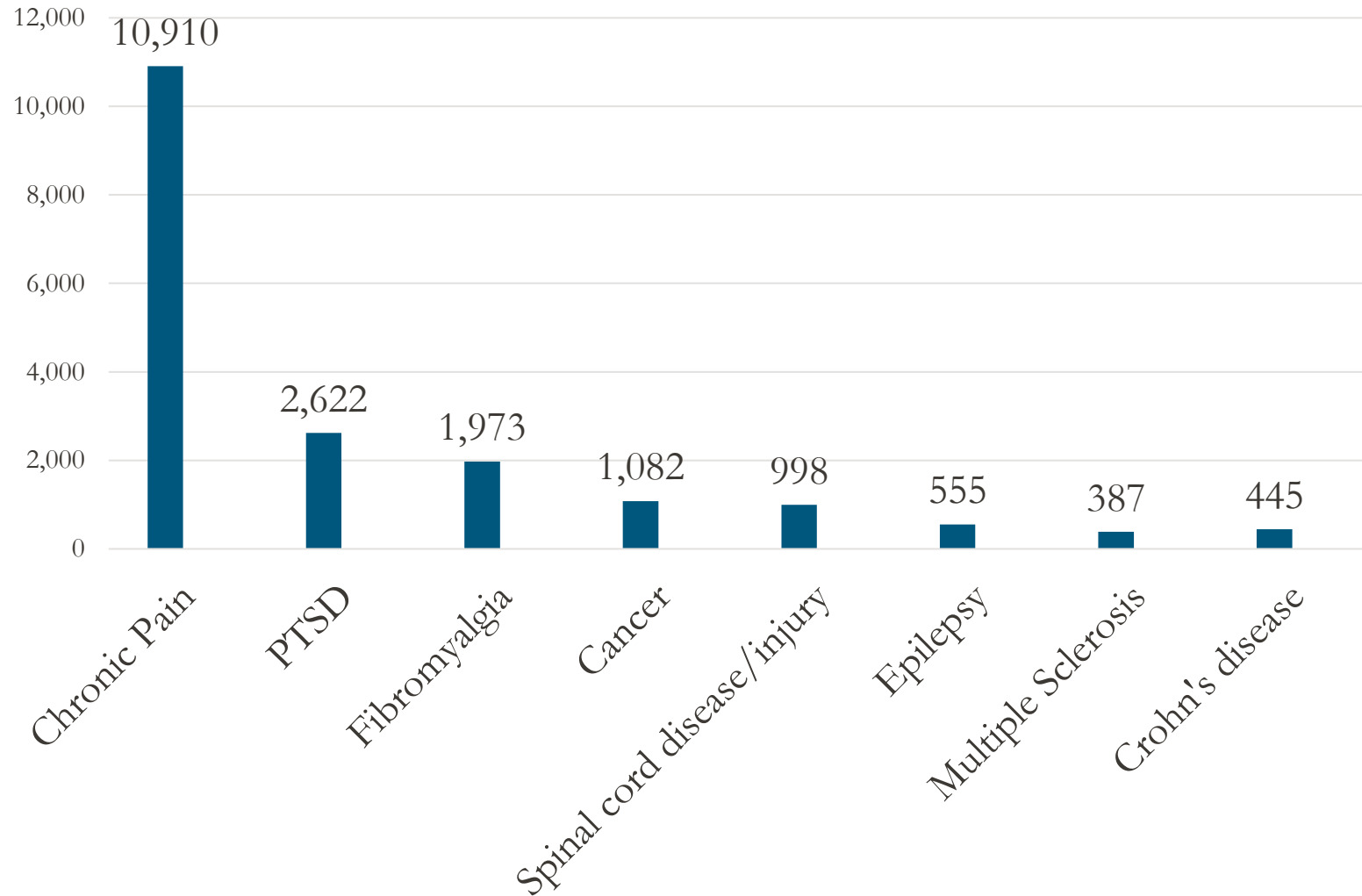
1. Authorizes the recommendation, cultivation, processing, sale, and use of marijuana for medical purposes.
2. Ohio Law DOES NOT
 1. Require employers to permit or accommodate an employee's use, possession, or distribution of medical marijuana
 2. Prohibit employers from establishing and enforcing:
 1. Drug testing policies
 2. Drug-free workplace policies
 3. Zero-tolerance drug policies

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Qualifying medical conditions

AIDs, Alzheimer's disease, Amyotrophic lateral sclerosis; cachexia, Cancer; Chronic traumatic encephalopathy; Crohn's disease; Epilepsy or another seizure disorder; Fibromyalgia; Glaucoma; Hepatitis C; Huntington's disease, Inflammatory bowel disease; irritable bowel syndrome, Multiple sclerosis; Pain that is either of the following: (i) Chronic and severe; or (ii) Intractable; Parkinson's disease; positive status for HIV; Post-traumatic stress disorder; Sickle cell anemia; spasticity, Spinal cord disease or injury; terminal illness, Tourette's syndrome; Traumatic brain injury; and Ulcerative colitis.

Top 8 Ohio Medical Marijuana Qualifying Medical Conditions by Patient*



***Data as of
February 2019**



An overview of Ohio's recreational marijuana law



An overview of recreational marijuana in Ohio

1. Over 21 yrs old-get 2.5 ounces of cannabis flower and 1.5 grams of extract
2. 6 plants/12 per household
3. Not available in Ohio yet (technically illegal to get in another state or order through the mail)
4. Similar rules as cigarettes for where can smoke
5. Protections for responsible use
6. Ohio Law DOES NOT
 1. Require employers to permit or accommodate an employee's use, possession, or distribution of marijuana
 2. Prohibit employers from establishing and enforcing:
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Employment Implications

The Constitution

- Drug testing by government employers constitutes a “search” under the Fourth Amendment – there must be a valid public interest to be protected by drug testing.
- If a local government employer wants to implement drug and/or alcohol testing, it must first determine who is to be tested and why it’s necessary to test that group.
 - Documented drug or alcohol problem in the particular workforce?
 - Performing duties that are “fraught with such risks
 - **Need a compelling interest**
- For job applicants, courts have held that government employers may require a drug test as a condition of employment in or promotion to a safety sensitive position – but NOT necessarily all positions.
 - Drug screens are considered less intrusive where the applicant is already required to undergo a physical examination requiring a blood or urine sample.
- Reasonable suspicion testing is widely believed to be justified for all government employees – BUT courts have held that suspicion of off-duty drug or alcohol use will not justify testing unless it results in on-the-job impairment.
- Random testing can be problematic for non-safety sensitive positions.
- Post-accident testing was allowed by the Supreme Court in *Skinner* for railroad employees who were directly involved in an accident. The testing must be limited to those employees who actually could have caused the accident.

Workers' Compensation

Ohio

Bureau of Workers'
Compensation

- Ohio's law **does not affect** the authority of the administrator of workers' compensation
- Rebates or discounts on premium rates may still be granted to employers that participate in a drug-free workplace program
- Ohio law maintains an employee's **ineligibility** for compensation and benefits if the employee was under the influence of marijuana and being under the influence of marijuana was the proximate cause of the injury
- This applies regardless of whether the marijuana use is recommended by a physician

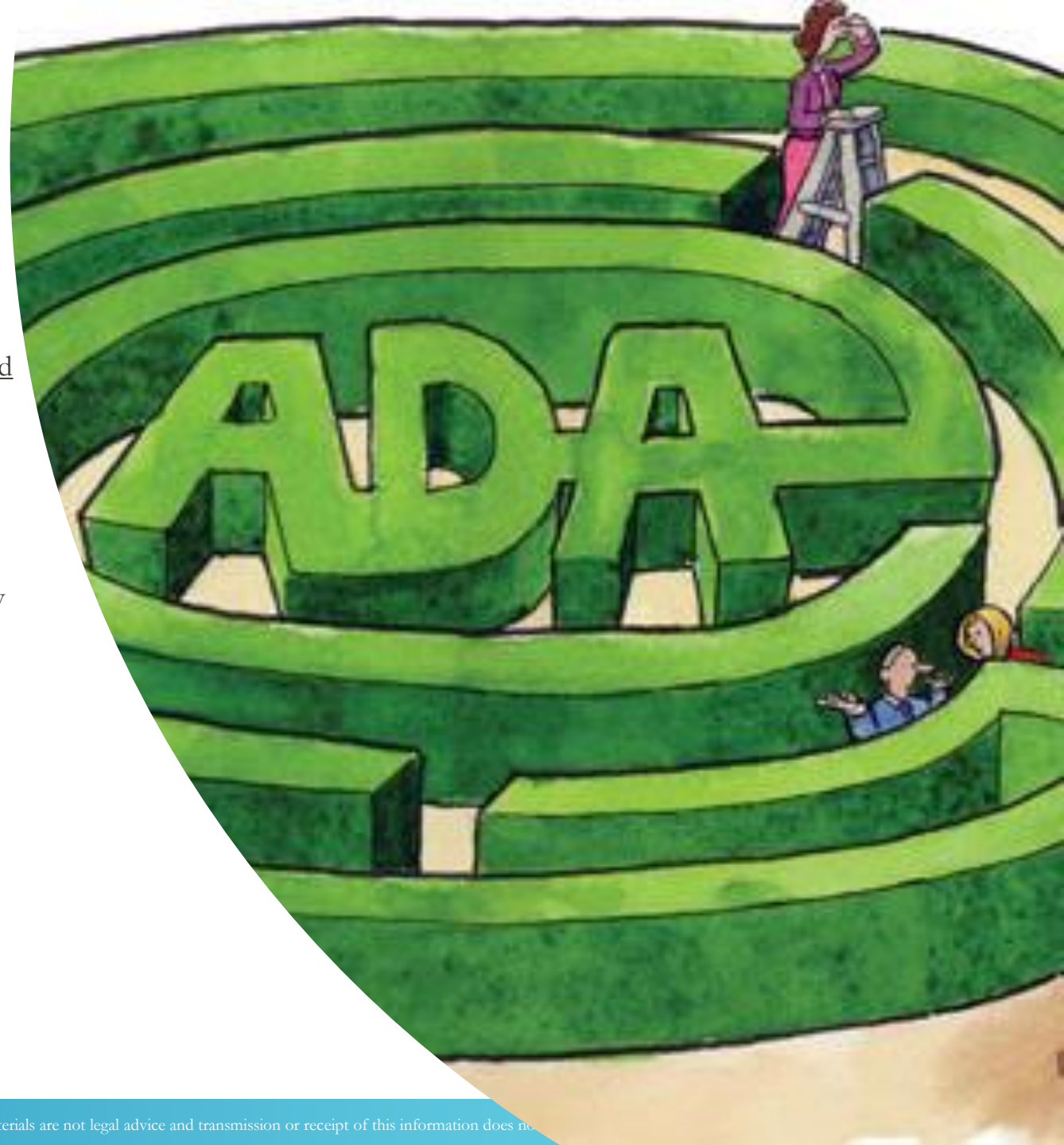
Unemployment Eligibility - Ohio



- Employees discharged for their use of marijuana in violation of employer's workplace drug policies will be considered discharged for *just cause*
- Such employees *will not* be eligible for unemployment compensation

Marijuana and the ADA

- The federal Controlled Substances Act states that marijuana is illegal and has “no accepted medical use.”
- The ADA expressly excepts illegal drug use from coverage – employers do not need to accommodate illegal drug use
- *James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012)
 - “Congress has made clear ... that the ADA defines “illegal drug use” by reference to federal, rather than state, law, and federal law does not authorize the plaintiff’s medical marijuana use. We therefore necessarily conclude that the plaintiff’s medical marijuana use is not protected by the ADA.”
- What does this mean?
 - Terminating or disciplining an employee for medical marijuana use generally should not implicate federal anti-disability discrimination law
- Ohio
- Other States



Transportation Workers

- DOT *expressly prohibits* marijuana use, even where state law conflicts
 - Sensitive Transportation Employees include pilots, school bus drivers, truck drivers, train engineers, subway operators, aircraft maintenance personnel, transit, armed security personnel, ship captains, and pipeline emergency response personnel
- DOT made it clear that states authorizing the use of medical marijuana “will have no bearing on the [DOT’s] regulated drug testing program.”
- Medical Review Officers will not verify a drug test as negative based upon information that a physician recommended that the employee use “medical marijuana.”
- “Marijuana remains a drug listed in Schedule I of the Controlled Substances Act. **It remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation’s drug testing regulations to use marijuana.**”
- See more at: <https://www.transportation.gov/odapc/medical-marijuana-notice#sthash.oVnlJd3T.dpuf>



What Impacts Employers?

- SERB
 - Unionized employers need not bargain over pre-employment testing
 - But unionized employers must bargain to obtain the right to conduct substance abuse tests
 - An employer can test based on a specific reservation of rights or the negotiation of language permitting certain types of testing

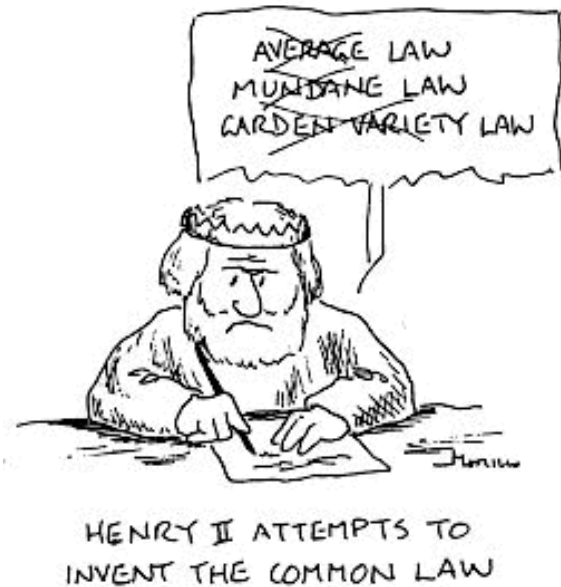


What Impacts Employers?



- Just cause relationships/contracts
 - A positive drug test, in and of itself, proves very little about whether an employer has “just cause” to terminate an employee
 - But coupled with suspicion of on the job use, or with a safety-sensitive position, then just cause may be proven
 - Just cause will be decided on a case-by-case basis
 - Justifications must be considered

What limits Employers?



- Common law.
 - Invasion of privacy can be eliminated with a policy and a consent form
 - But include safeguards to avoid direct observation – let the professionals handle it
 - NO TOUCHING
 - The distribution of the results of an accurate test should not lead to defamation claims
 - But the employer should keep the results confidential, with very limited exceptions

What limits Employers?



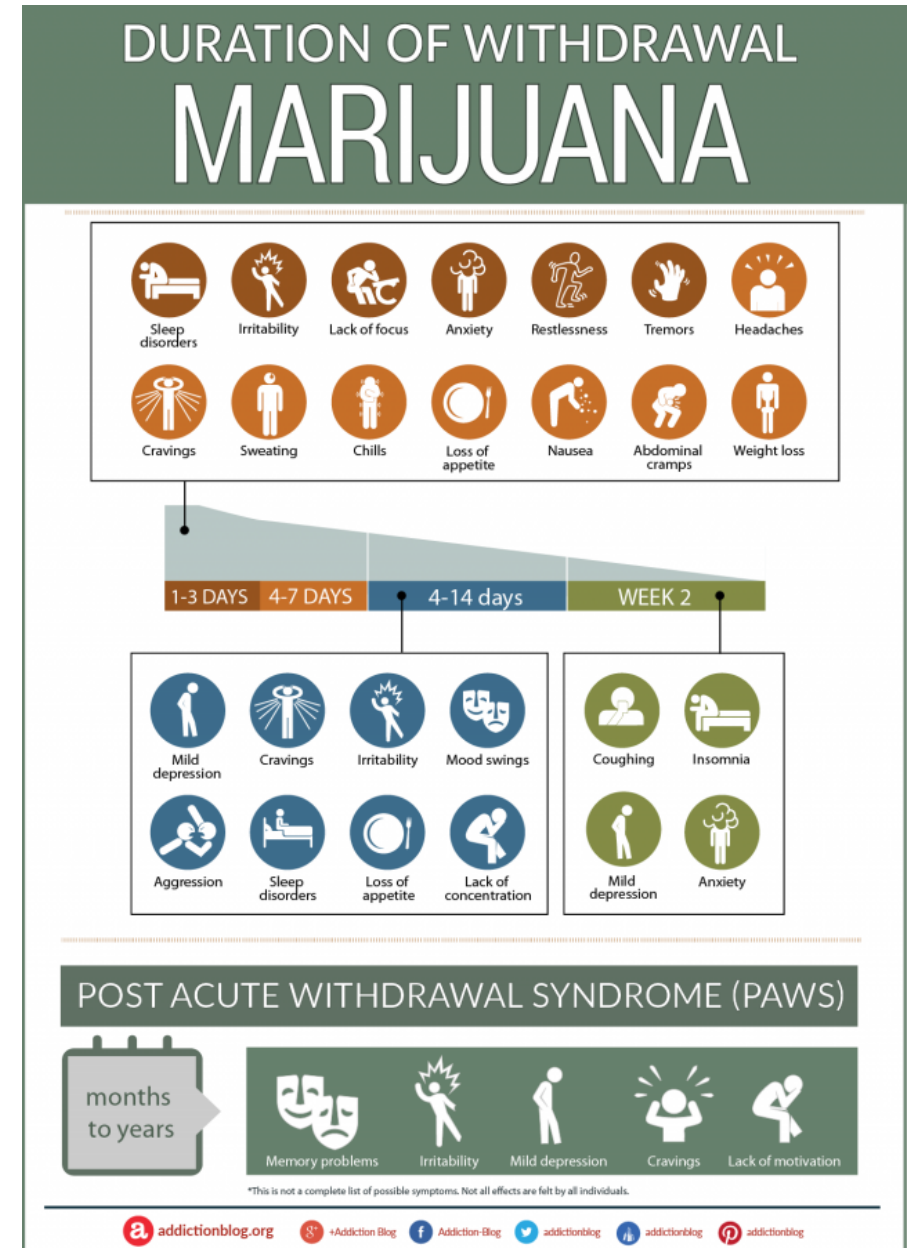
- The FMLA.
 - Requested leaves for drug rehabilitation may qualify, but if termination occurs in your workplace for illegal drug use, then leave need not be granted
 - You may conduct a drug test within the first few days of an employee's return to work, without violating the FMLA's fitness for duty requirements

Hallucinogen Effects - Cannabinols

- **Short Term**
 - Feeling of well-being, relaxation
 - Distortion of reality, see things more clearly, sharply, new colors/shades of colors
 - Mental confusion, distortion of perception & thinking
 - Lack of concentration, decreased attention span, difficulty forming ideas & completing thoughts
 - Loss of sense of time, time seems to slow
 - Reduced intellectual performance
 - Impaired thinking, reading comprehension, coordination, judgment
- **Long Term**
 - Cancer, bronchitis, lung infection
 - Impaired short-term memory, concentration, abstract thinking ability.
 - Anxiety, personality disturbances and depression
 - Amotivational Syndrome (less active & ambitious than non-users, unconcerned about the future, unwilling or unable to make long-term plans)

Hallucinogen Withdrawal

- Anxiety
- Depression
- Flashbacks
- Irritability
- Physical tension
- Decreased appetite
- Chills
- Headaches
- Muscular cramps
- Abdominal pain
- Tremors



Reasonable Suspicion Checklist

Employee's Name: _____ Employee's ID/SSN: _____
Job Title: _____
Location of Incident: _____ Date: _____ Time Observed: _____
Trained Supervisor's Name & Signature: _____
Witnessing Supervisor's Name & Signature: _____

Observations by Trained Supervisor (Check all that apply; provide brief descriptions of any changes in behavior)

Appearance:

- | | | | |
|-------------------------------------|--|--|--|
| <input type="checkbox"/> Normal | <input type="checkbox"/> Tremors/ Twitches | <input type="checkbox"/> Flushed or Pale | <input type="checkbox"/> Dilated Pupils |
| <input type="checkbox"/> Sleepy | <input type="checkbox"/> Sores/ Puncture Marks | <input type="checkbox"/> Heavy Eyelids | <input type="checkbox"/> Bloodshot eyes |
| <input type="checkbox"/> Disheveled | <input type="checkbox"/> Excessive Sweating | <input type="checkbox"/> Cleanliness | <input type="checkbox"/> Other (explain below) |

Description/Notes: _____

Behavior/ Demeanor:

- | | | | |
|--|------------------------------------|--|--|
| <input type="checkbox"/> Nervous | <input type="checkbox"/> Erratic | <input type="checkbox"/> Mood Swings | <input type="checkbox"/> Lethargic |
| <input type="checkbox"/> Irritable | <input type="checkbox"/> Paranoid | <input type="checkbox"/> Verbally/Physically Abusive | <input type="checkbox"/> Highly Excited |
| <input type="checkbox"/> Confusion/Inattentive | <input type="checkbox"/> Combative | <input type="checkbox"/> Fatigue/ Sleeping/ Drowsiness | <input type="checkbox"/> Other (explain below) |

Description/Notes: _____

Motor Skills:

- | | | | | |
|-----------------------------------|---|----------------------------------|-------------------------------------|--|
| <input type="checkbox"/> Normal | <input type="checkbox"/> Swaying | <input type="checkbox"/> Falling | <input type="checkbox"/> Unbalanced | <input type="checkbox"/> Other (explain below) |
| <input type="checkbox"/> Unsteady | <input type="checkbox"/> Lack of Coordination | <input type="checkbox"/> Fidgety | <input type="checkbox"/> Stumbling | |

Description/Notes: _____

Speech:

- | | | | |
|-------------------------------------|--------------------------------------|--|--|
| <input type="checkbox"/> Normal | <input type="checkbox"/> Slurred | <input type="checkbox"/> Loud | <input type="checkbox"/> Other (explain below) |
| <input type="checkbox"/> Incoherent | <input type="checkbox"/> Exaggerated | <input type="checkbox"/> Talking Excessively | |

Description/Notes: _____

Odor:

- | | | |
|------------------------------------|---|--|
| <input type="checkbox"/> Normal | <input type="checkbox"/> Smell of Alcohol | <input type="checkbox"/> Excessive Cologne |
| <input type="checkbox"/> Body Odor | <input type="checkbox"/> Smell of Marijuana | <input type="checkbox"/> Other (explain below) |

Description/Notes: _____

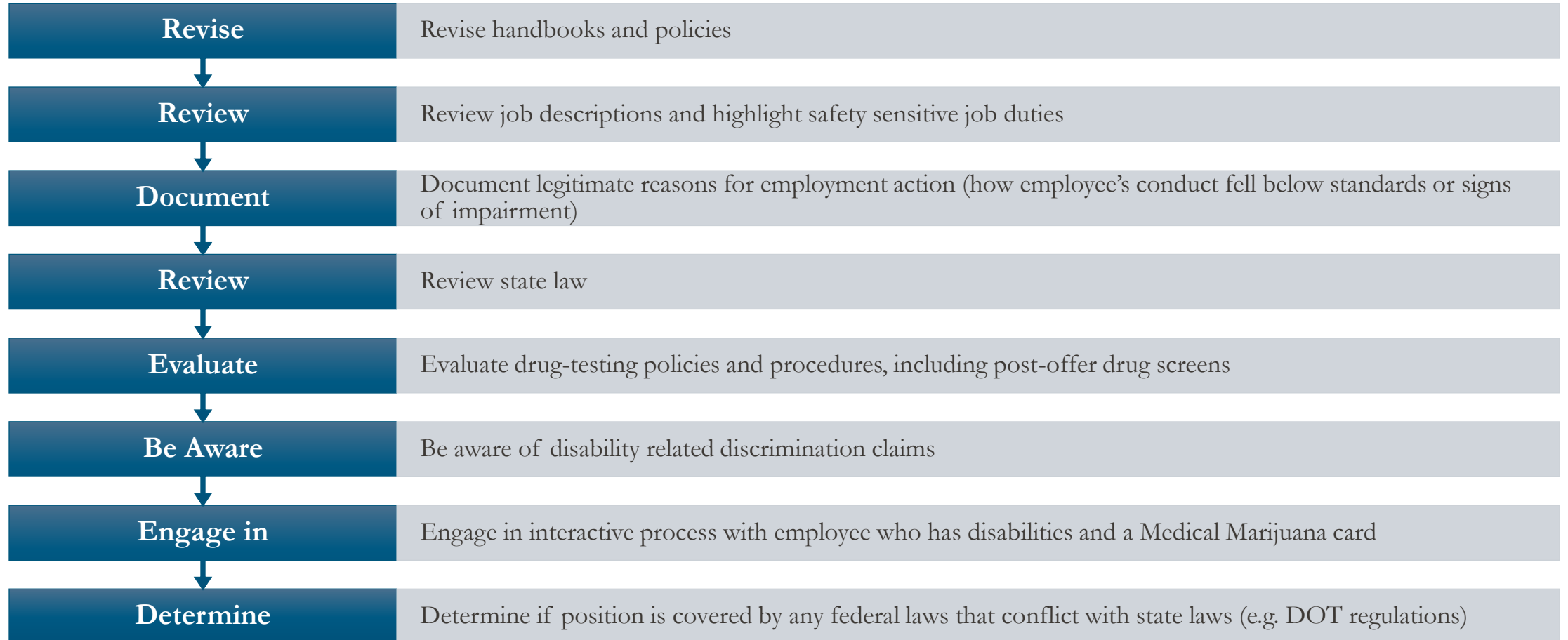
Test Conducted: Yes No

Additional Comments:

Reasonable Suspicion List

- Strong odors
- Questionable or shaky movements
- Twitching or staggering
- Dilated, bloodshot, or watery eyes
- Slurred or slowed speech
- Inability to talk
- Argumentative, irritable, or drowsy
- Sleeping
- Non-responsive
- Lack of motivation
- Slowed reaction time
- Impaired coordination
- Anxiety
- Dry mouth

What should an employer do?



Best Practices

- Decide on your policy
- Communicate your policy to your workforce
 - Employees think they have a right to use!
- Enforce your policy
- Be prepared to answer questions about your policy





Thank you