

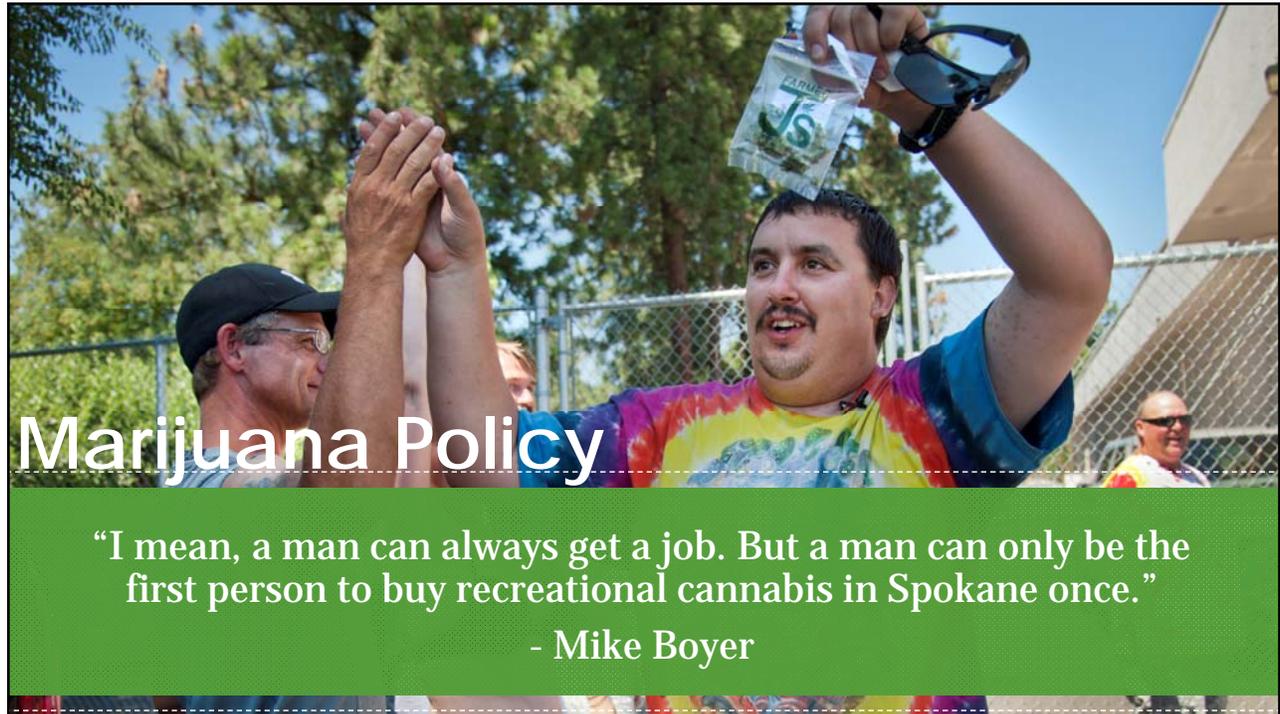
# Marijuana in the Workplace: Navigating Potential Potholes



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April 4, 2018



## Marijuana Policy

“I mean, a man can always get a job. But a man can only be the first person to buy recreational cannabis in Spokane once.”

- Mike Boyer



1. Marijuana Trends
2. Changing Federal Enforcement Policy
3. Changing State Regulatory Regimes
4. Drug Testing Laws
5. Medical Marijuana Accommodation Laws
6. Disability Accommodation Primer
7. Hypotheticals
8. Questions

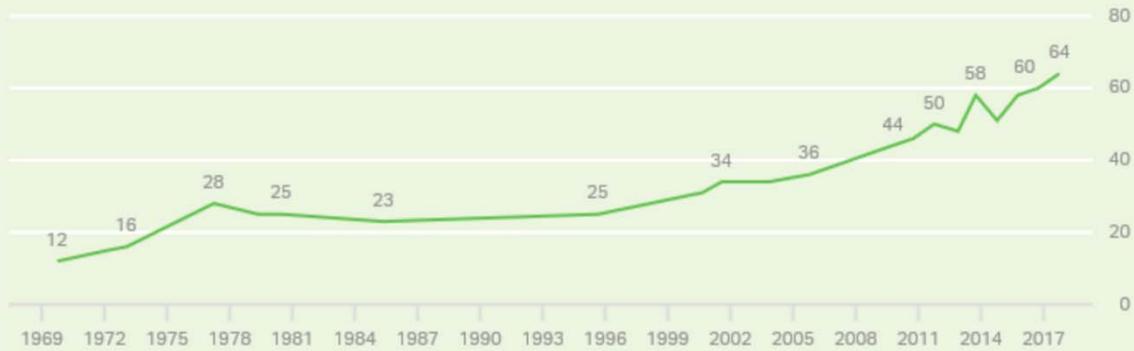
Boring legal disclaimer

# Marijuana Trends

## Americans' Support for Legalizing Marijuana Continues to Rise

Do you think the use of marijuana should be made legal, or not?

■ % Yes, legal

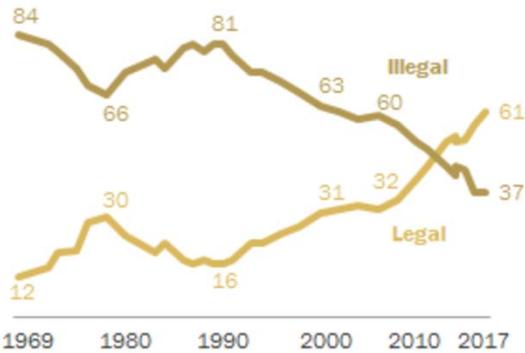


GALLUP

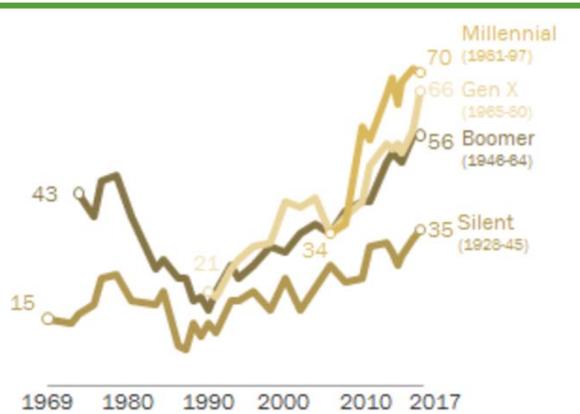
# Marijuana Trends

## U.S. public opinion on legalizing marijuana, 1969-2017

Do you think the use of marijuana should be made legal, or not? (%)



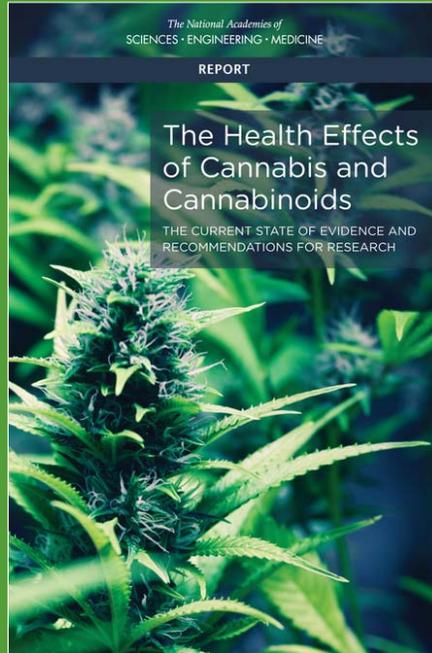
% who say marijuana should be made legal



Note: Don't know responses not shown. 1973-2008 data from General Social Survey; 1969 and 1972 data from Gallup. Source: Survey of U.S. adults conducted Oct. 25-30, 2017.

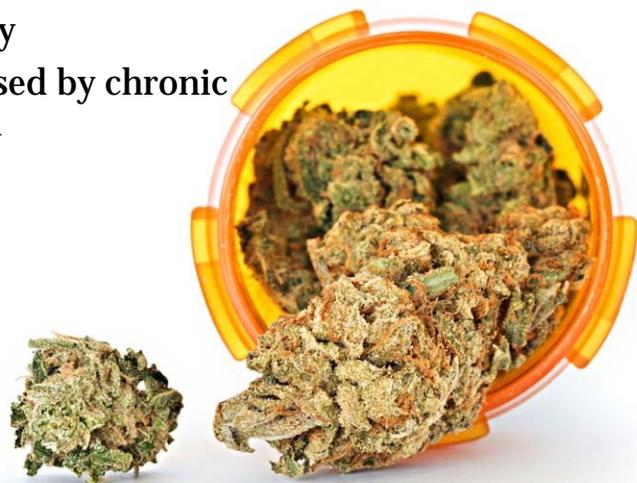
PEW RESEARCH CENTER

# Medical Marijuana



## Medical Uses

- Chronic Pain
- Muscle spasms caused by multiple sclerosis
- Nausea from cancer chemotherapy
- Poor appetite and weight loss caused by chronic illness, such as HIV, or nerve pain
- Seizure disorders
- Crohn's disease
- Tourette's syndrome
- Insomnia
- Anxiety
- Post-Traumatic Stress Disorder



## Federal Law



Marijuana classified by DEA as a “Schedule 1” drug under the Controlled Substances Act



Schedule 1 Drugs: “[N]o currently accepted medical use in treatment in the United States.”



Schedule 1 Drugs: LSD, Ecstasy, Heroin, etc.

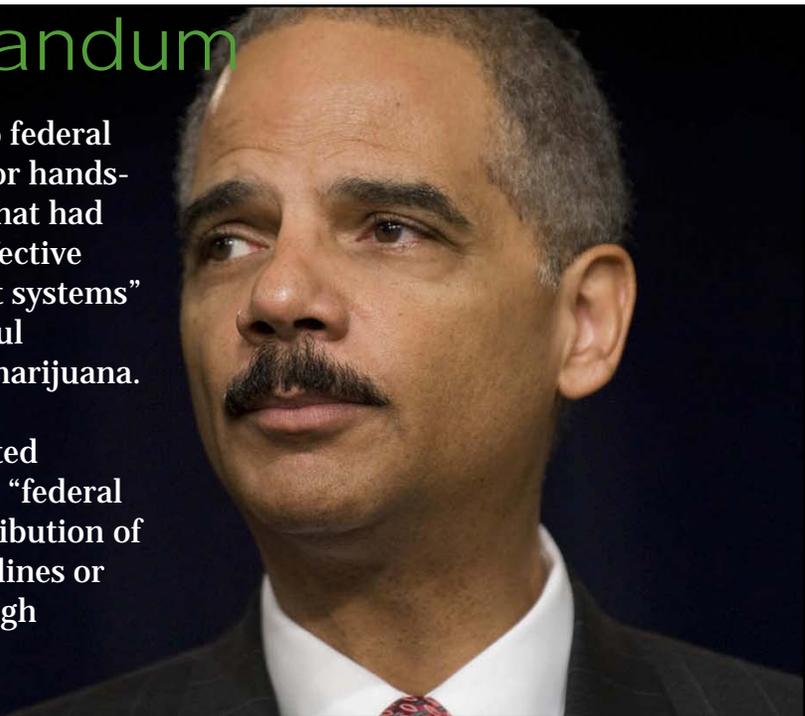


Schedule 2 Drugs: Cocaine, Opium, Methamphetamine, etc.

## Cole Memorandum

→ Obama-era guidance to federal prosecutors provided for hands-off approach in states that had enacted “strong and effective regulatory enforcement systems” for controlling the lawful cultivation and use of marijuana.

→ Guidance further directed prosecutors to focus on “federal priorities” such as distribution of marijuana across state lines or sale of marijuana through criminal enterprises.



## New Administration

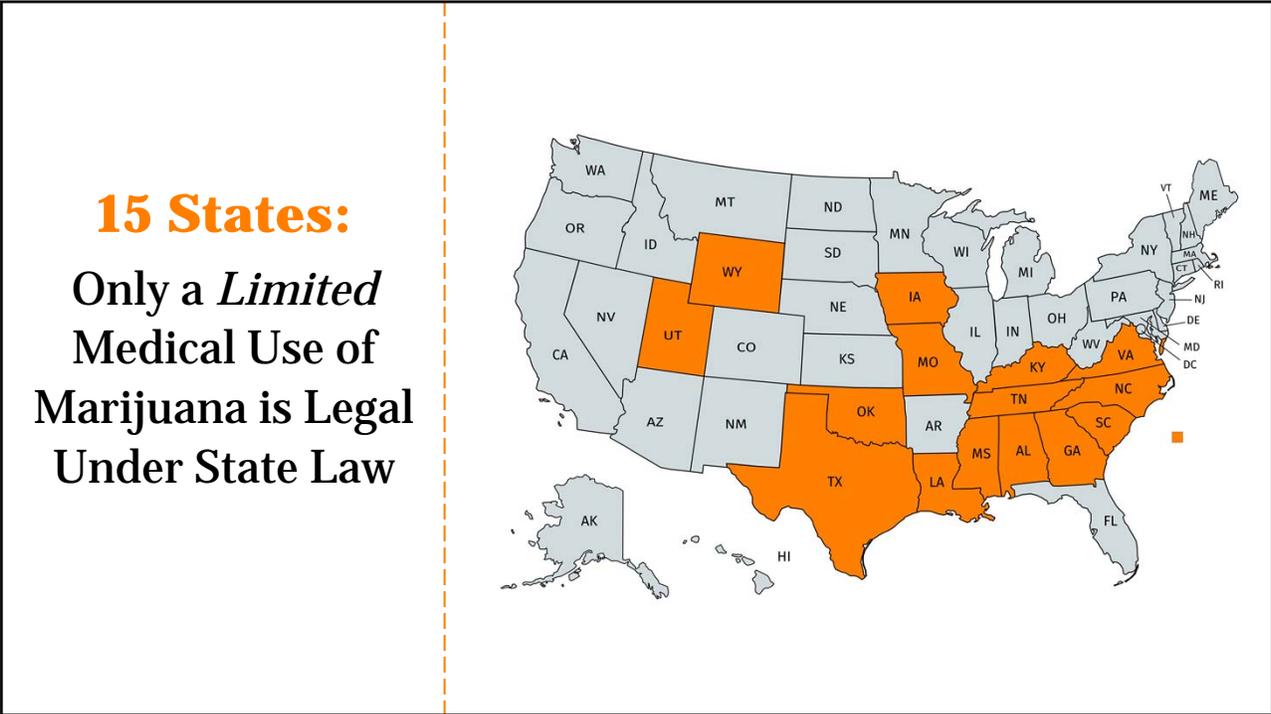
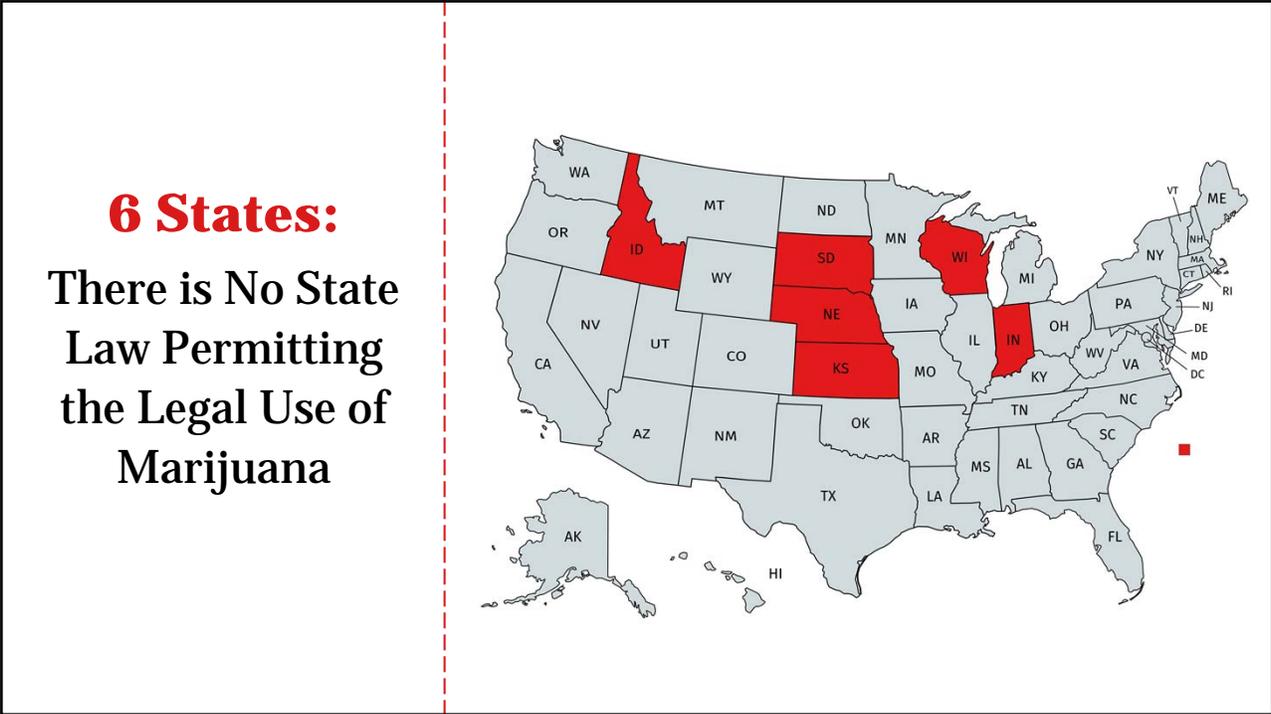
During his campaign, President Trump made three statements about marijuana policy:

1. He was “in favor of medical marijuana 100 percent”
2. He was skeptical of legalizing it more broadly
3. The states should largely set marijuana policy

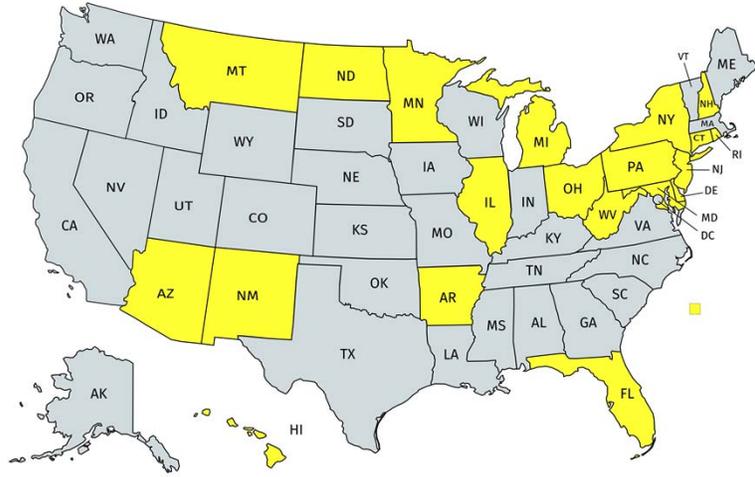
## New Administration

“Good people don't smoke marijuana ... [It is] not the kind of thing that ought to be legalized.”

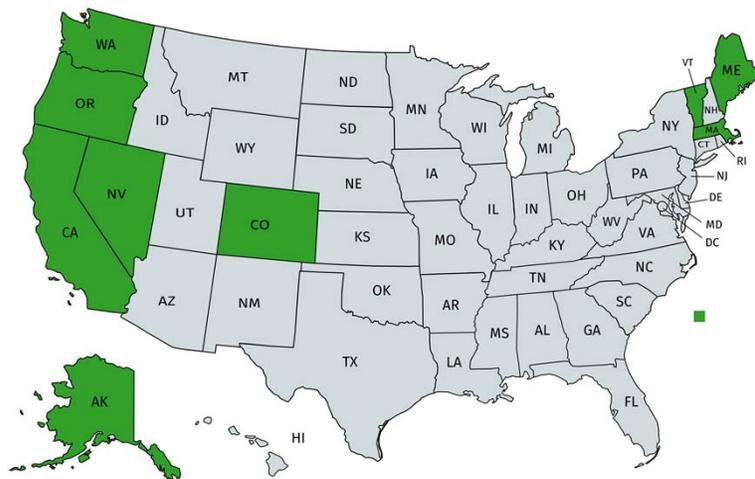
“You can't have the President of the United States of America talking about marijuana like it is no different than taking a drink ... It is different ... It is already causing a disturbance in the states that have made it legal.”



**20 States:**  
Only the Medical  
Use of Marijuana  
is Legal Under  
State Law



**9 States:**  
The Recreational  
and Medical Use  
of Marijuana are  
Both Legal Under  
State Law



# Drug Testing



According to a 2006 survey by the Society for Human Resource Management:

- 84% percent of private employers conduct pre-employment testing
- 39% conduct random testing
- 73% percent conduct for-cause testing



Quest Diagnostics reports that failed drug tests increased 20% in Colorado following its legalization of marijuana.



## Types of Drug Testing



1. Pre-Employment

2. Reasonable Suspicion

3. Post-Accident

4. Random

## Drug Testing Considerations

- ➔ Advanced notification
- ➔ Retesting to confirm
- ➔ EAP referral
- ➔ No termination for first-time positives
- ➔ Last chance agreement
- ➔ Strict confidentiality





### Reasonable Suspicion Checklist

- ☰ Go through checklist, with at least one witness signing off as well
  
- ⚠ Signs of current impairment include:
  - Bloodshot eyes
  - Poor coordination
  - Drowsiness
  - Perception of time
  - Odor, or cover-up

## US Department of Transportation (DOT) Drug Testing

 Anyone designated in DOT regulations as a safety-sensitive employee is subject to DOT drug and alcohol testing.

 DOT drug test is done by urinalysis and the test panel includes marijuana metabolites/THC

-  Pre-employment
-  Reasonable Suspicion/Cause
-  Random
-  Return-to-duty
-  Follow-up
-  Post-Accident

## Federal Drug Testing Requirements

“Please note that 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.”

*-DOT “Medical” Marijuana Notice,  
February 2013*

## Zero Tolerance Drug Testing Policy



## Disability/Handicap Under The Law

A person is disabled/handicapped if he or she:

- 1** Has a physical or mental impairment which substantially limits one or more major life activities;
- 2** Has a record of having such an impairment; or
- 3** Is regarded by his or her employer as having an impairment

## Qualified Disabled/Handicapped Individuals



Capable of performing the **essential functions** of a job with or without reasonable accommodation.



*Essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires



Does not include the marginal functions of the position.

## Evaluating Essential Functions



How often is the function performed?



Will removing the function fundamentally change the nature of the job?



What does the job description say?



What would employees holding that job say



## What Is Reasonable Accommodation?



Enables Employee to perform the essential functions of his position



Does not cause the employer undue hardship



Significant difficulty or expense -- based on net cost (outside funding, employee contribution, etc.)



Unduly extensive, substantial or disruptive (does not include morale); or



Would fundamentally alter the nature or operation of the business

## What Is Not Reasonable Accommodation



**Holding disabled persons to lower standards**



**Putting up with poor performance or misconduct**



**Eliminating essential job functions.**

## Interactive Process

Employee's request or employer knowledge triggers obligation to engage in interactive dialogue

Employer and employee should work together to identify reasonable accommodation

Employer is not required to adopt employee's suggestion if another accommodation is feasible

In most instances, the interactive dialogue will be conducted by Human Resources, not the employee's manager!

## Medical Marijuana Policy

Factors to consider in assessing whether to offer accommodation:

-  Frequency of use
-  Work schedule
-  Federal and state regulatory requirements
-  Safety sensitive position
-  Vulnerable population
-  Transfer to another position
-  Length of service



## State Accommodation Requirements

### Look to State Statutes and Court Decisions

In MA, employers must accommodate the off-site, off duty use of medical marijuana pursuant to the medical marijuana statute unless doing so would impose an undue hardship

VS

In CO, employers need not accommodate the off-site, off duty use of medical marijuana because its use is unlawful under Federal law

## Drug-Free Workplace Requirements

The Drug-Free Workplace Act of 1988 requires some Federal contractors and all Federal grantees to agree that they will provide drug-free workplaces as a precondition of receiving a contract or grant from a Federal agency

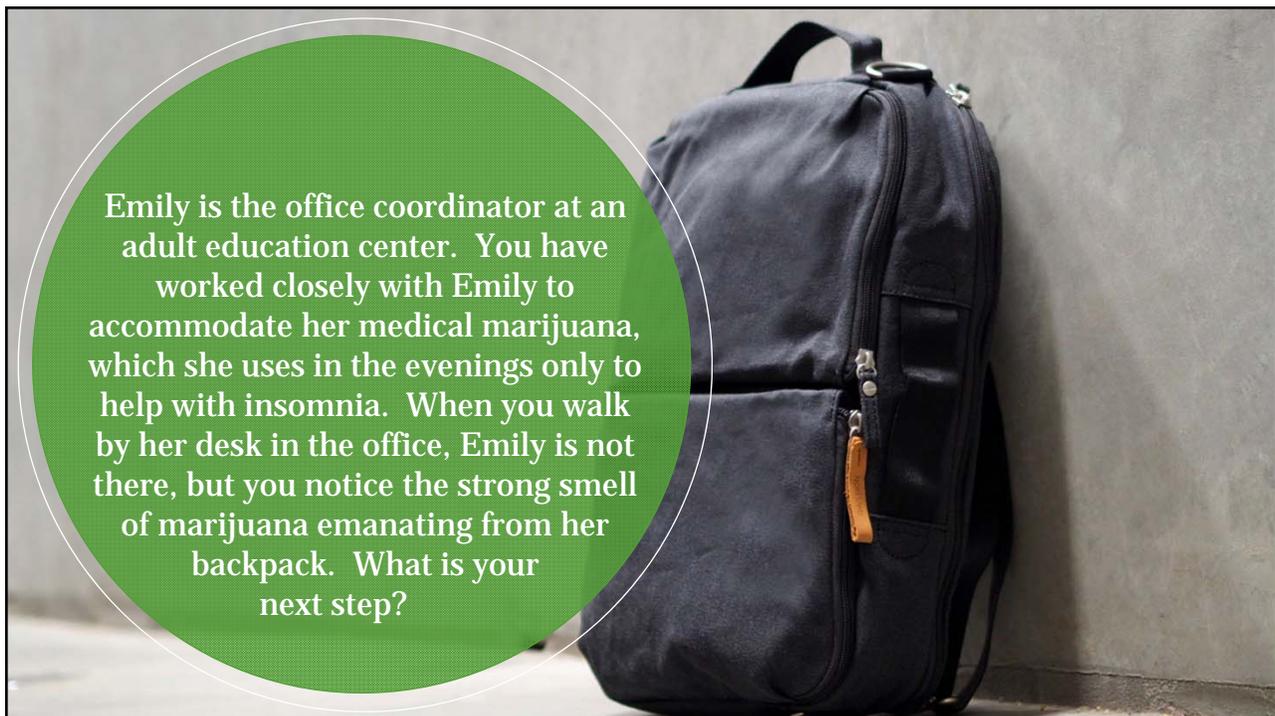
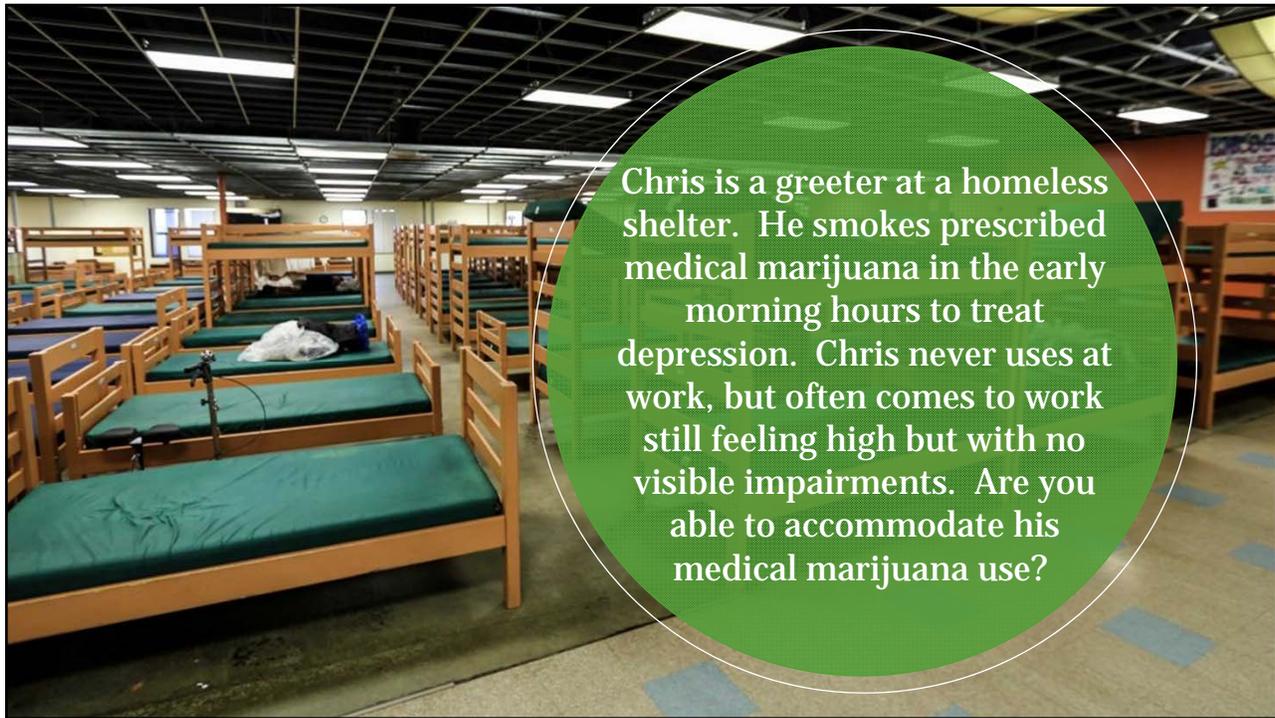
- Establish and distribute policy
- Implement a drug-free awareness program
- Notice to employees
- Notice to federal agency
- Requirements for convicted employees
- Make an on-going, good faith effort

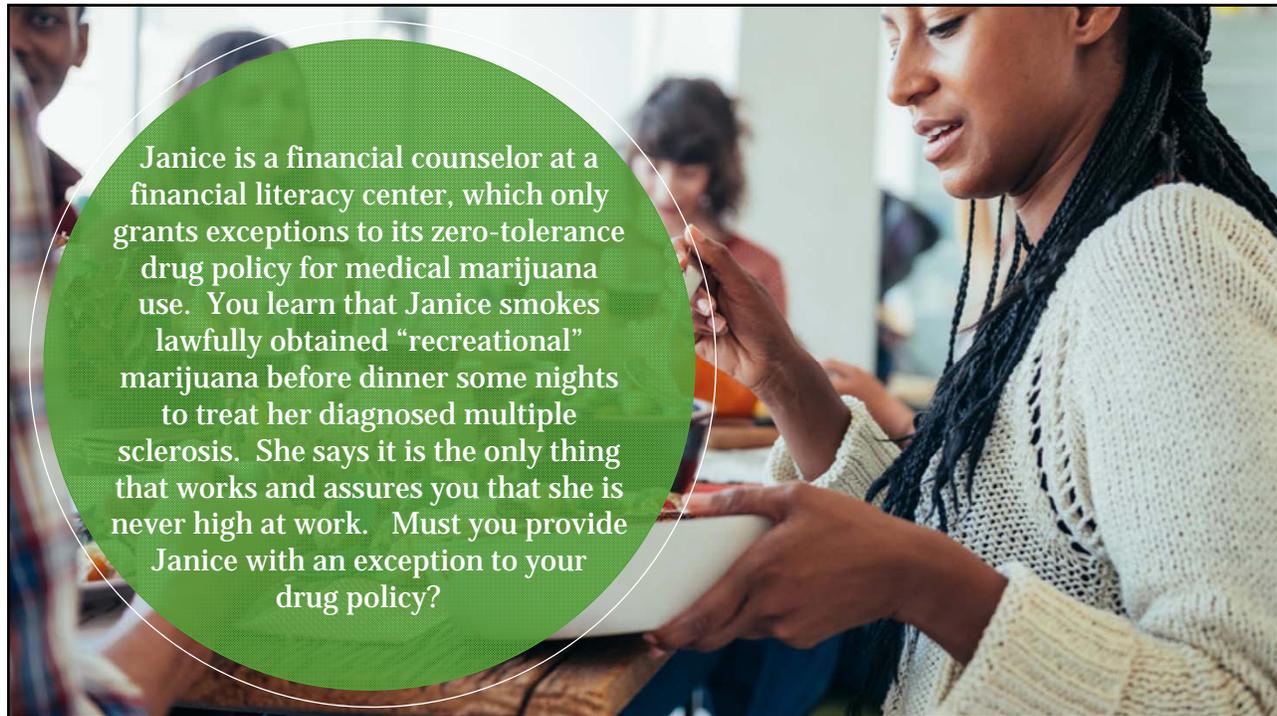


Frank is a driver for Meals on Wheels. To help with his chronic pain, his doctor has recently provided him with a medical marijuana prescription, and he tells you that he will need to smoke a small amount in the mornings to help him get through the day. How do you respond?



Jane is a pre-school teacher for a local Head Start agency. She smokes prescribed medical marijuana before dinner some nights to treat Crohn's Disease. She is clear with you that she never uses at work and is never high at work. Are you able to accommodate Jane's medical marijuana use?





## Next Steps

**01**

Educate employees about the law and Company’s position

**02**

Consider revising Company’s Substance Abuse Policy

**03**

Consider revising Company’s Drug Testing Protocol

**04**

Consider revising Company’s Reasonable Accommodations Policy

# Questions?



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