

# Marijuana in the Workplace:

## Navigating Potential Potholes



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## 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

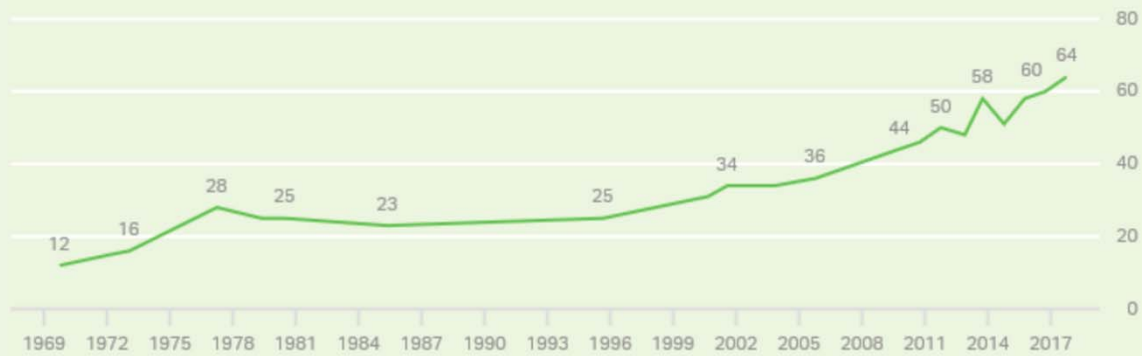
Boring legal disclaimer

# 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

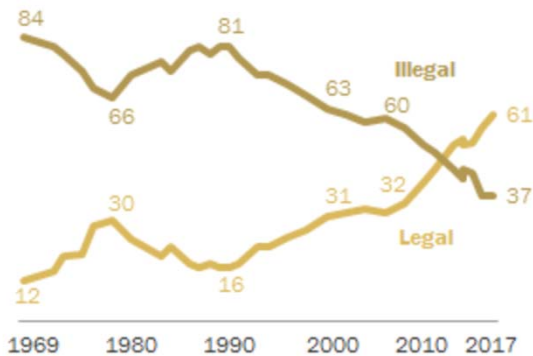


GALLUP

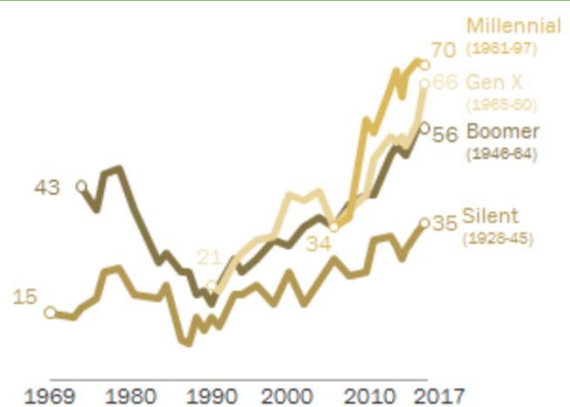
# Marijuana Trends

## 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

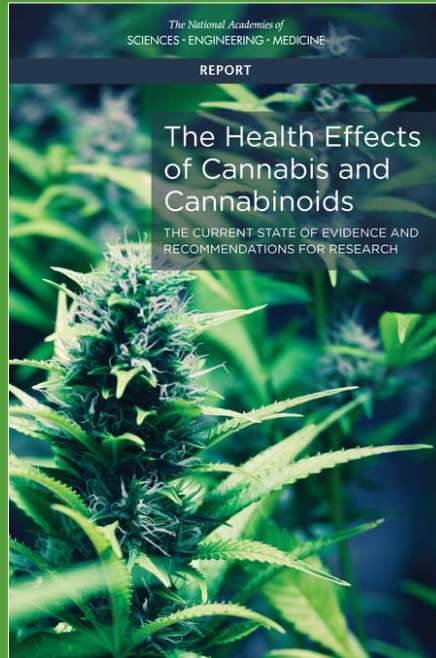


Note: Don't know responses not shown. 1973-2008 data from General Social Survey; 1969 and 1972 data from Gallup. Source: Survey of U.S. adults conducted Oct. 25-30, 2017.

PEW RESEARCH CENTER

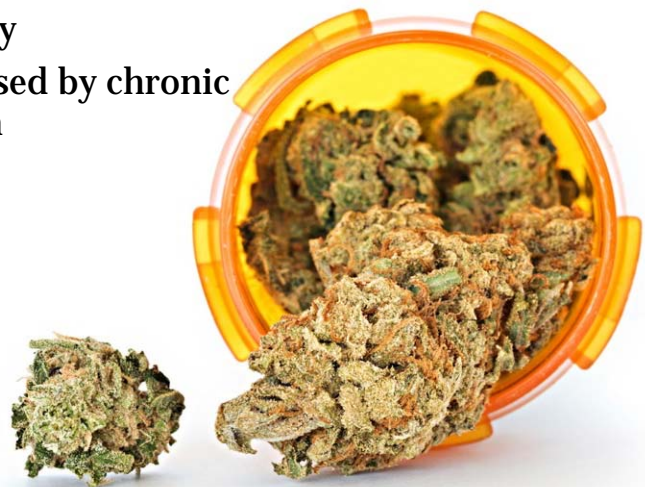


# Medical Marijuana



## 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.

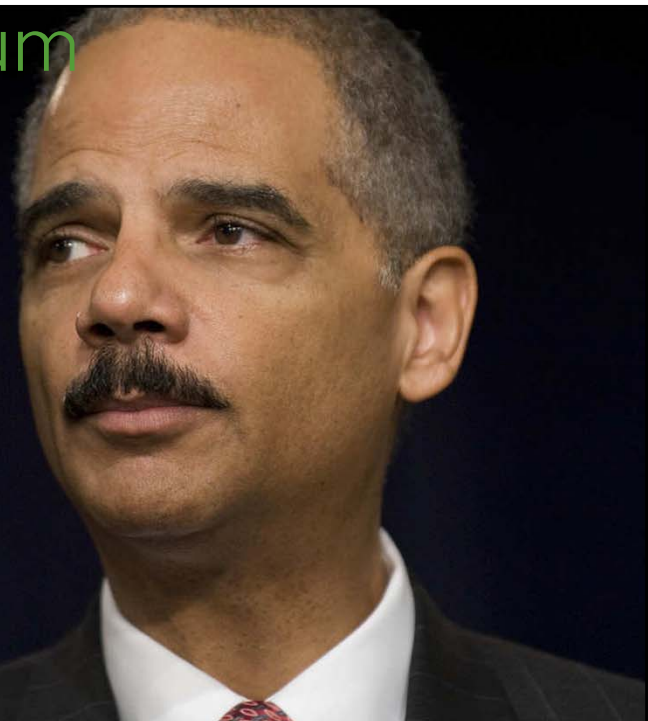


Schedule 2 Drugs: Cocaine, Opium, Methamphetamine, etc.

## 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

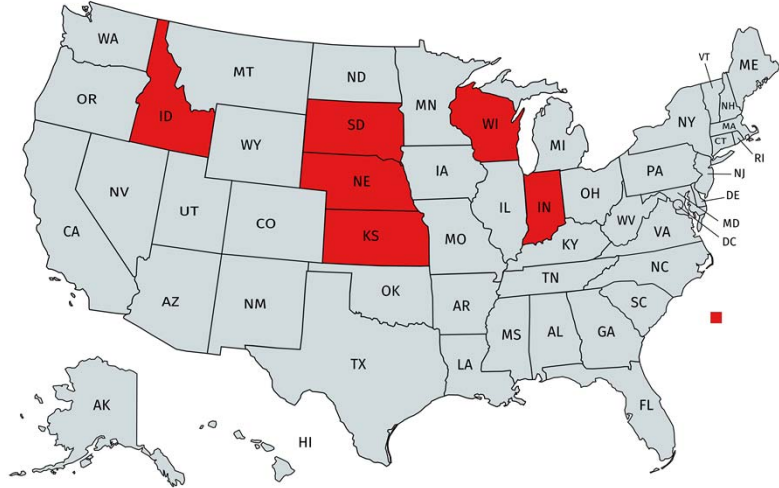
## New Administration

“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.”

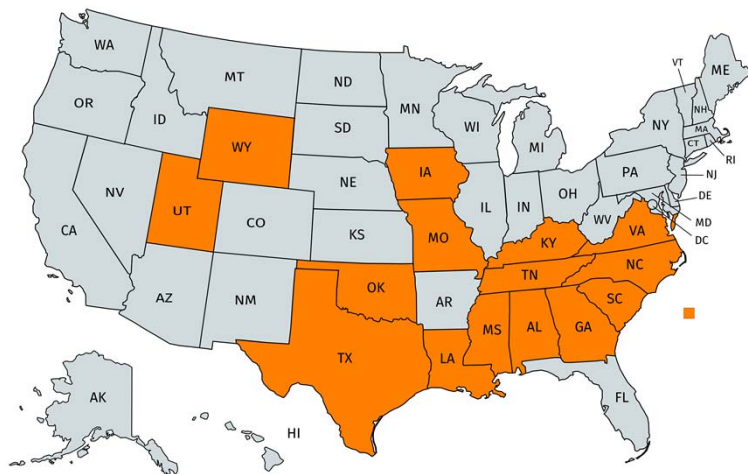
## 6 States:

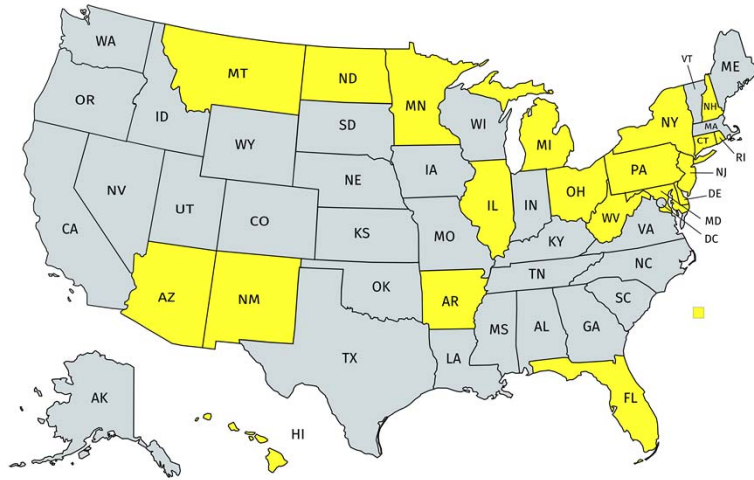
There is No State  
Law Permitting  
the Legal Use of  
Marijuana



## 15 States:

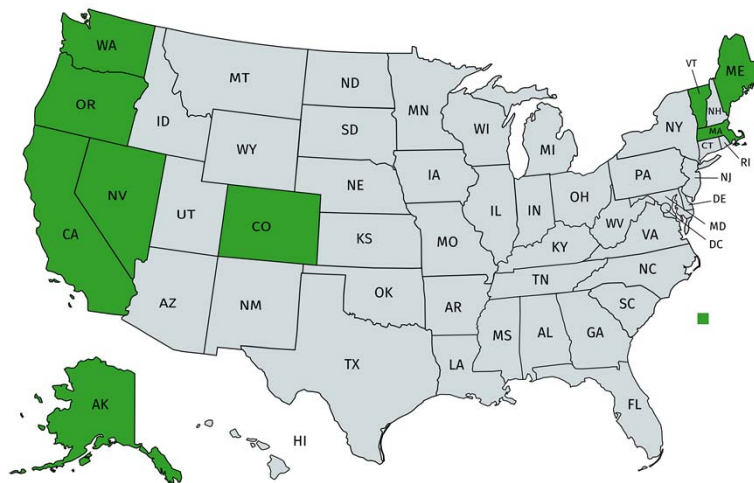
Only a *Limited*  
Medical Use of  
Marijuana is Legal  
Under State Law





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

The map shows the following states highlighted in green: WA, OR, CA, NV, CO, AK, ME, NH, and MA. All other states are shown in light gray.





# 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*







## 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

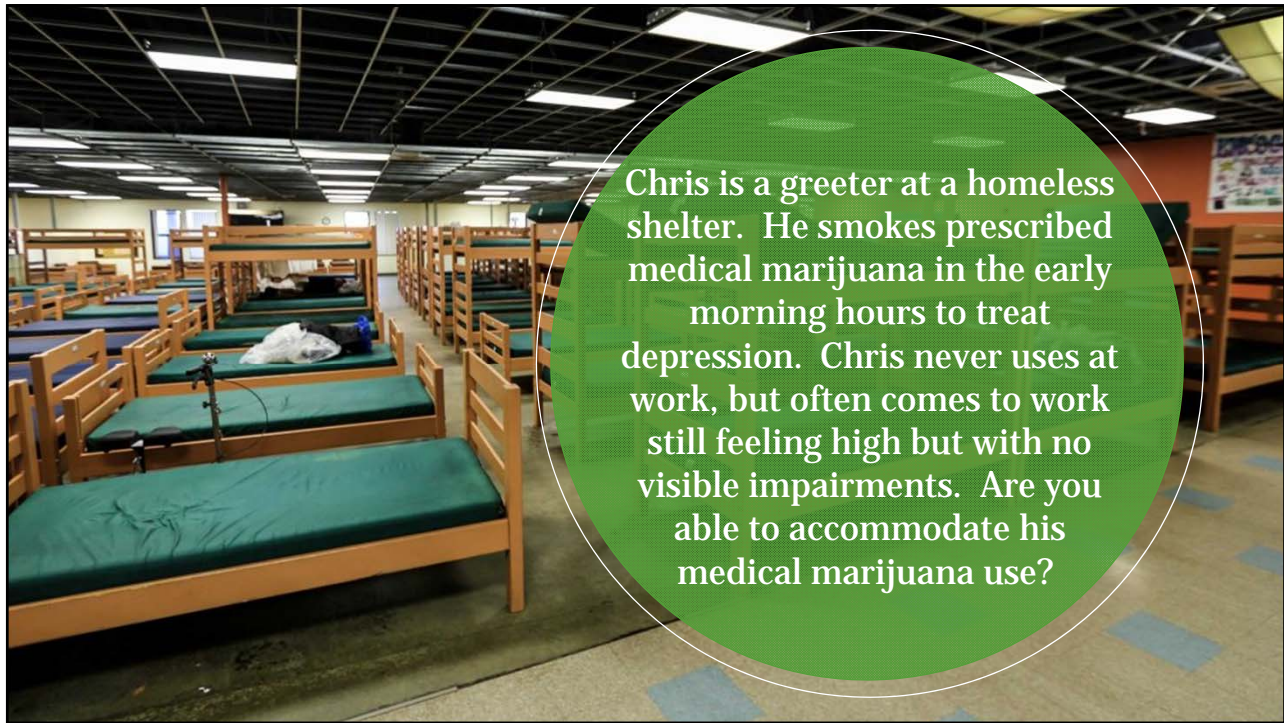
## Drug-Free Workplace Requirements

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

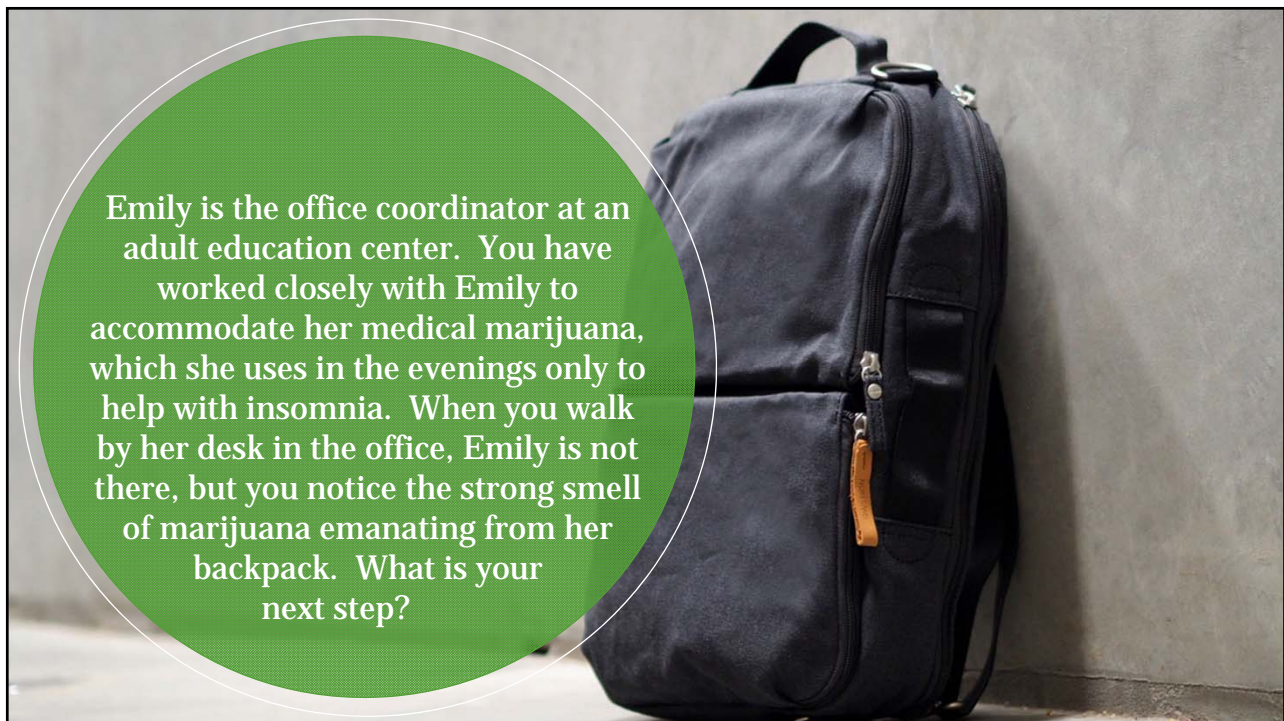
- Establish and distribute policy
- Implement a drug-free awareness program
- Notice to employees
- Notice to federal agency
- Requirements for convicted employees
- Make an on-going, good faith effort





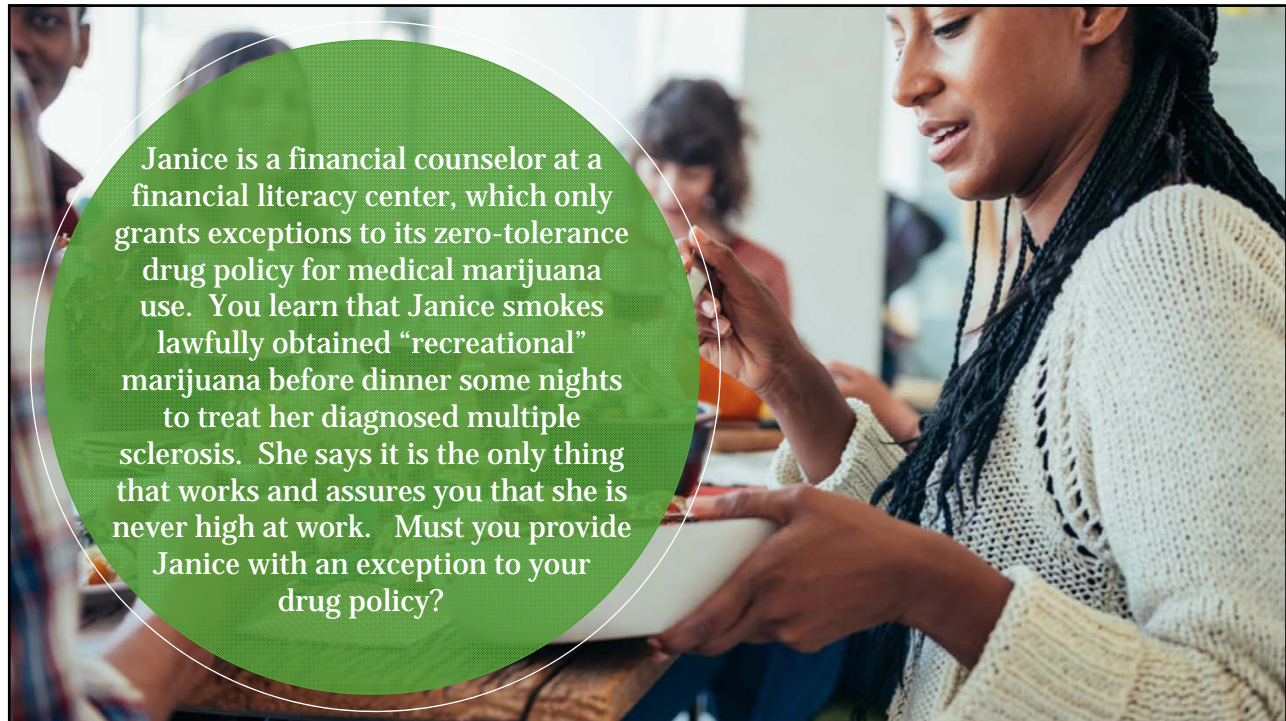


Chris is a greeter at a homeless shelter. He smokes prescribed medical marijuana in the early morning hours to treat depression. Chris never uses at work, but often comes to work still feeling high but with no visible impairments. Are you able to accommodate his medical marijuana use?



Emily is the office coordinator at an adult education center. You have worked closely with Emily to accommodate her medical marijuana, which she uses in the evenings only to help with insomnia. When you walk by her desk in the office, Emily is not there, but you notice the strong smell of marijuana emanating from her backpack. What is your next step?





Janice is a financial counselor at a financial literacy center, which only grants exceptions to its zero-tolerance drug policy for medical marijuana use. You learn that Janice smokes lawfully obtained “recreational” marijuana before dinner some nights to treat her diagnosed multiple sclerosis. She says it is the only thing that works and assures you that she is never high at work. Must you provide Janice with an exception to your drug policy?

## 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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