



Complimentary Employer Education Series Webinar

Marijuana in the Workplace: Navigating Potential Potholes



Thank you for joining us! Our program will begin at 10:00AM

Marijuana in the Workplace:

Navigating Potential Potholes 🍃



**Tobias W. Crawford and
David B. Wilson**

Hirsch Roberts Weinstein LLP

March 1, 2017

A photograph of a man with a mustache, wearing a colorful tie-dye t-shirt and sunglasses on his head, holding up a small white bag of 'FARMED Js' cannabis. He is clapping his hands with another man who is wearing a black cap and glasses. The background shows a chain-link fence and trees under a clear blue sky.

Marijuana Policy

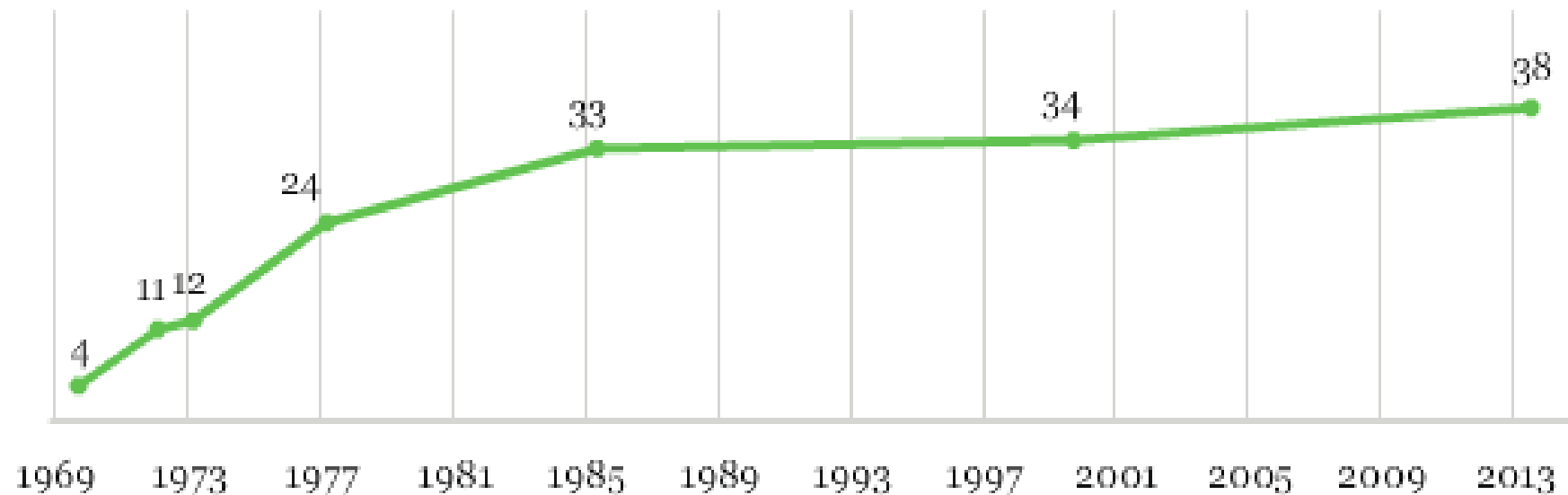
“I mean, a man can always get a job. But a man can only be the first person to buy recreational cannabis in Spokane once.”

- Mike Boyer

Marijuana Use

Keeping in mind that all of your answers in this survey are confidential, have you, yourself, ever happened to try marijuana?

■ % Yes



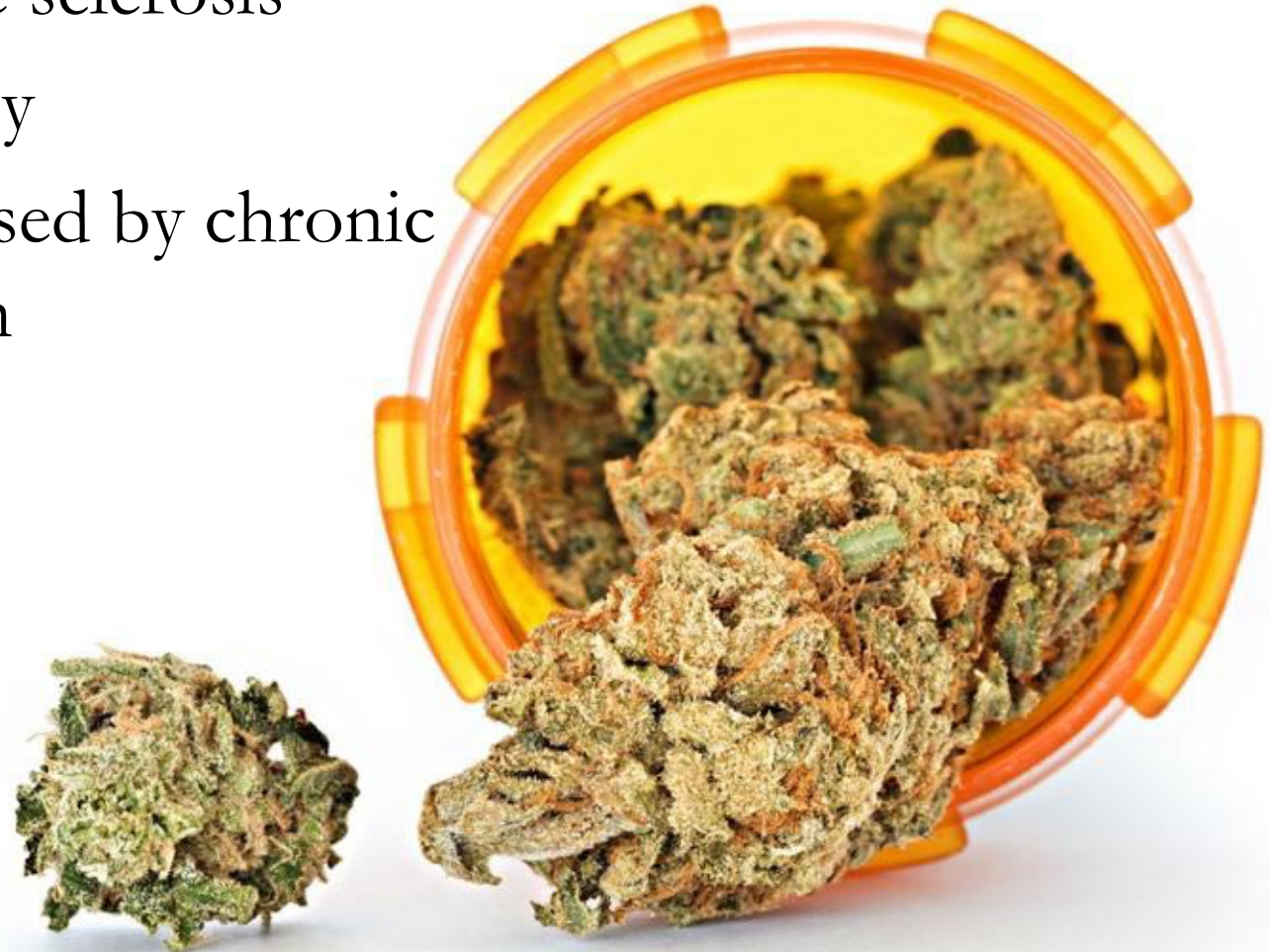
Based on 972 national adults in Form A

Question wording for 1969-1985 trends: Have you, yourself, ever happened to try marijuana?

GALLUP®

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



Federal Law



Controlled Substances Act



Gonzales v. Raich (2005)

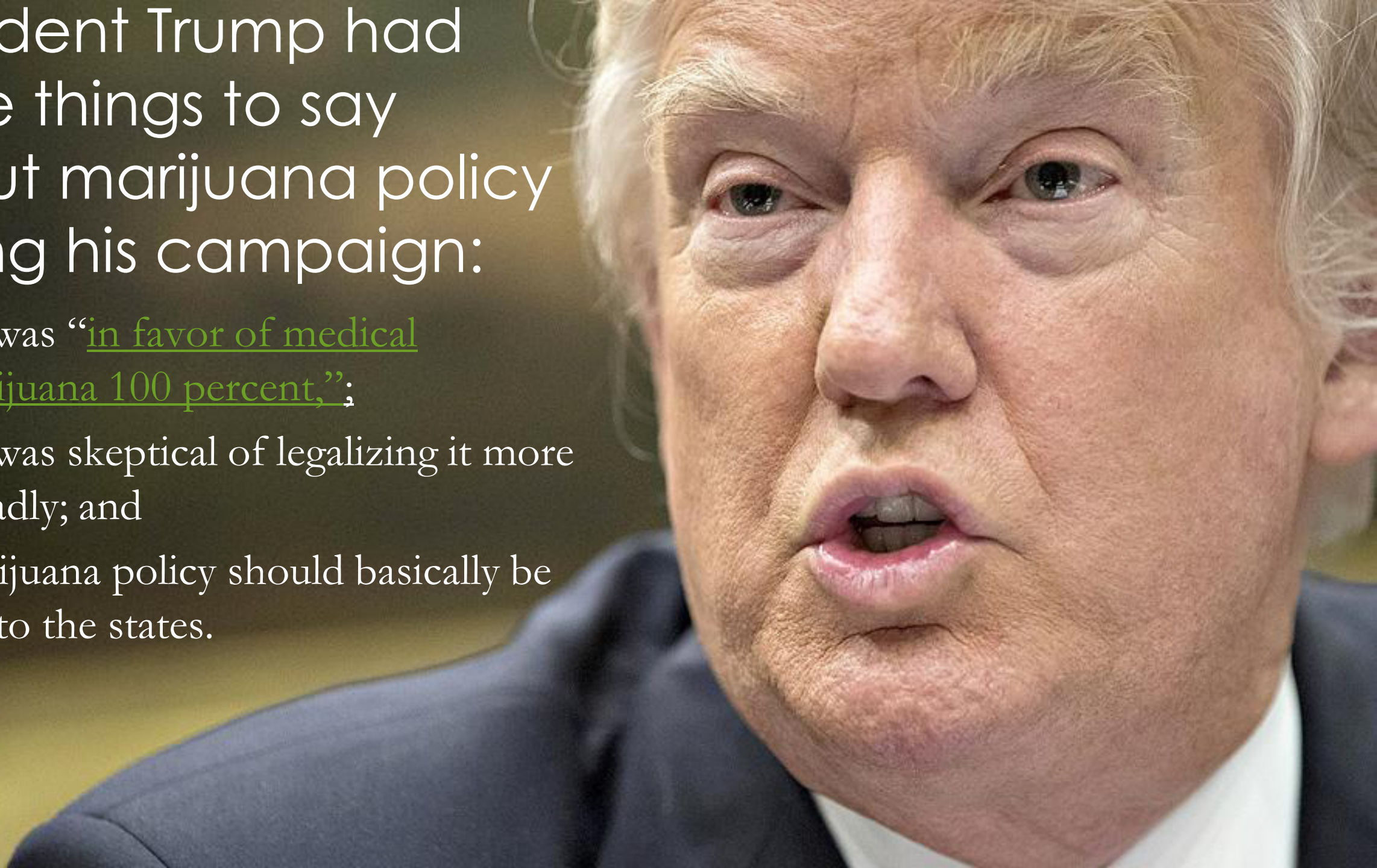


Cole Memorandum



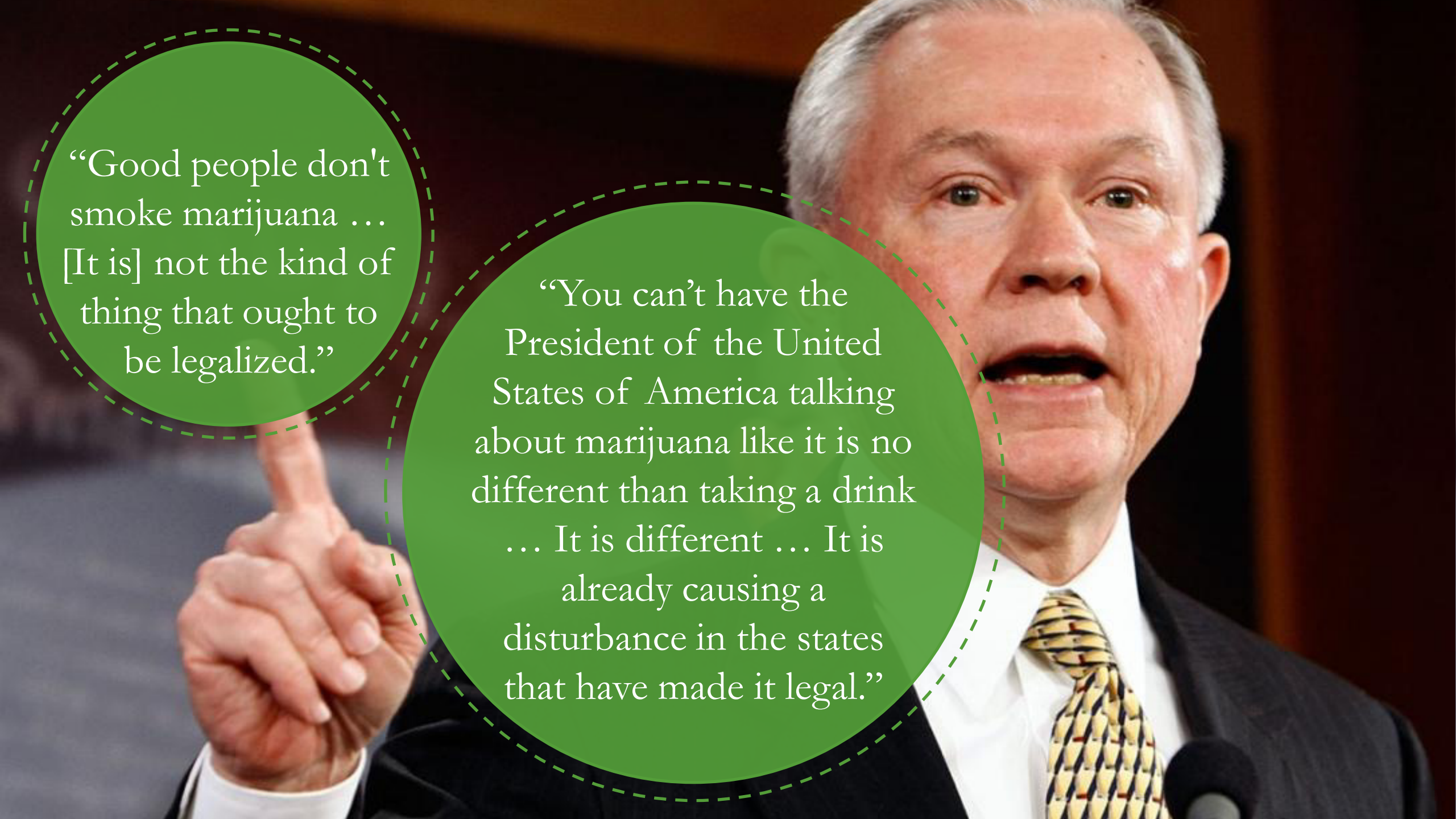
President Trump had three things to say about marijuana policy during his campaign:

1. He was “in favor of medical marijuana 100 percent”;
2. He was skeptical of legalizing it more broadly; and
3. Marijuana policy should basically be left to the states.



Public Support for Marijuana Grows...

- ➔ A 2/23/17 Quinnipiac poll found U.S. voters favored legalization 59% to 36%, with only Republicans and older voters opposed.
- ➔ An impressive 71%, including majorities of Republicans and older voters, think the federal government should not interfere in states that have legalized marijuana. Gallup and other polls report similar findings, including strong majority support for legalizing among Republican millennials.

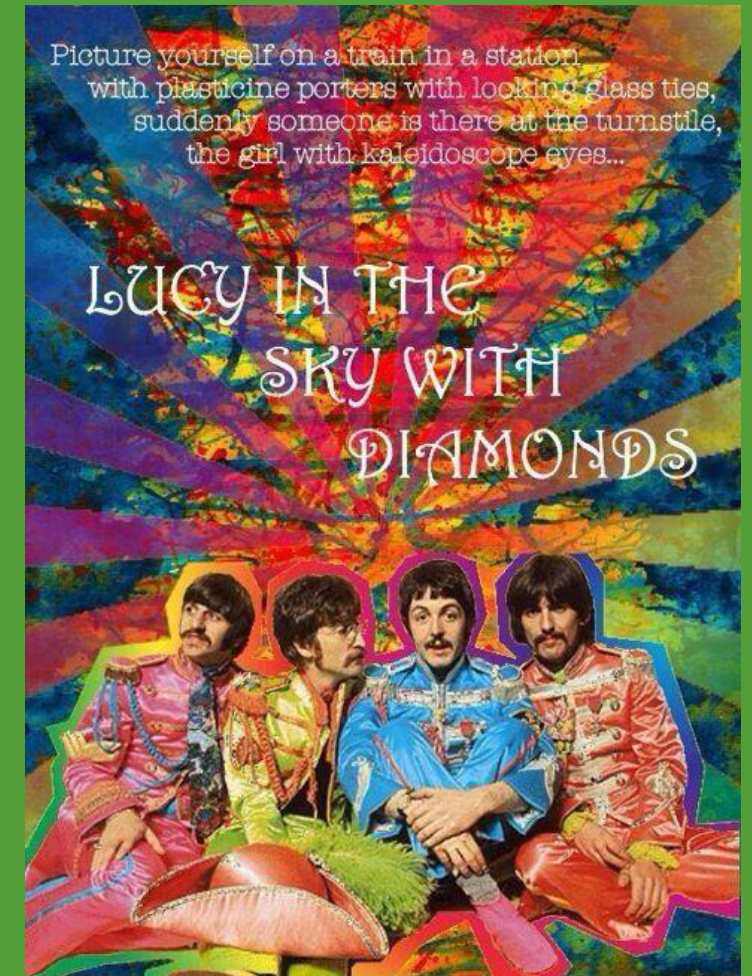


“Good people don't
smoke marijuana ...
[It is] not the kind of
thing that ought to
be legalized.”

“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.”

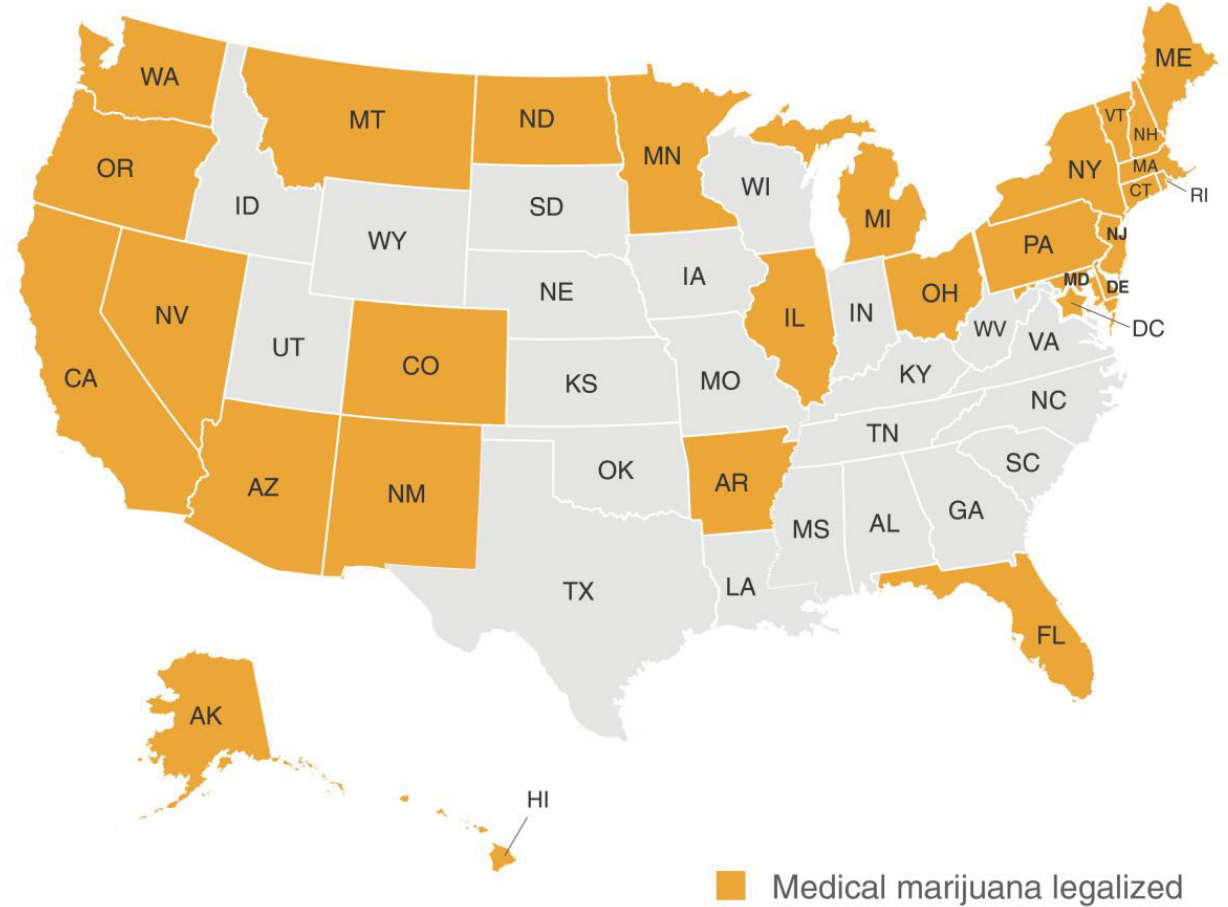


Federal Law



State Law

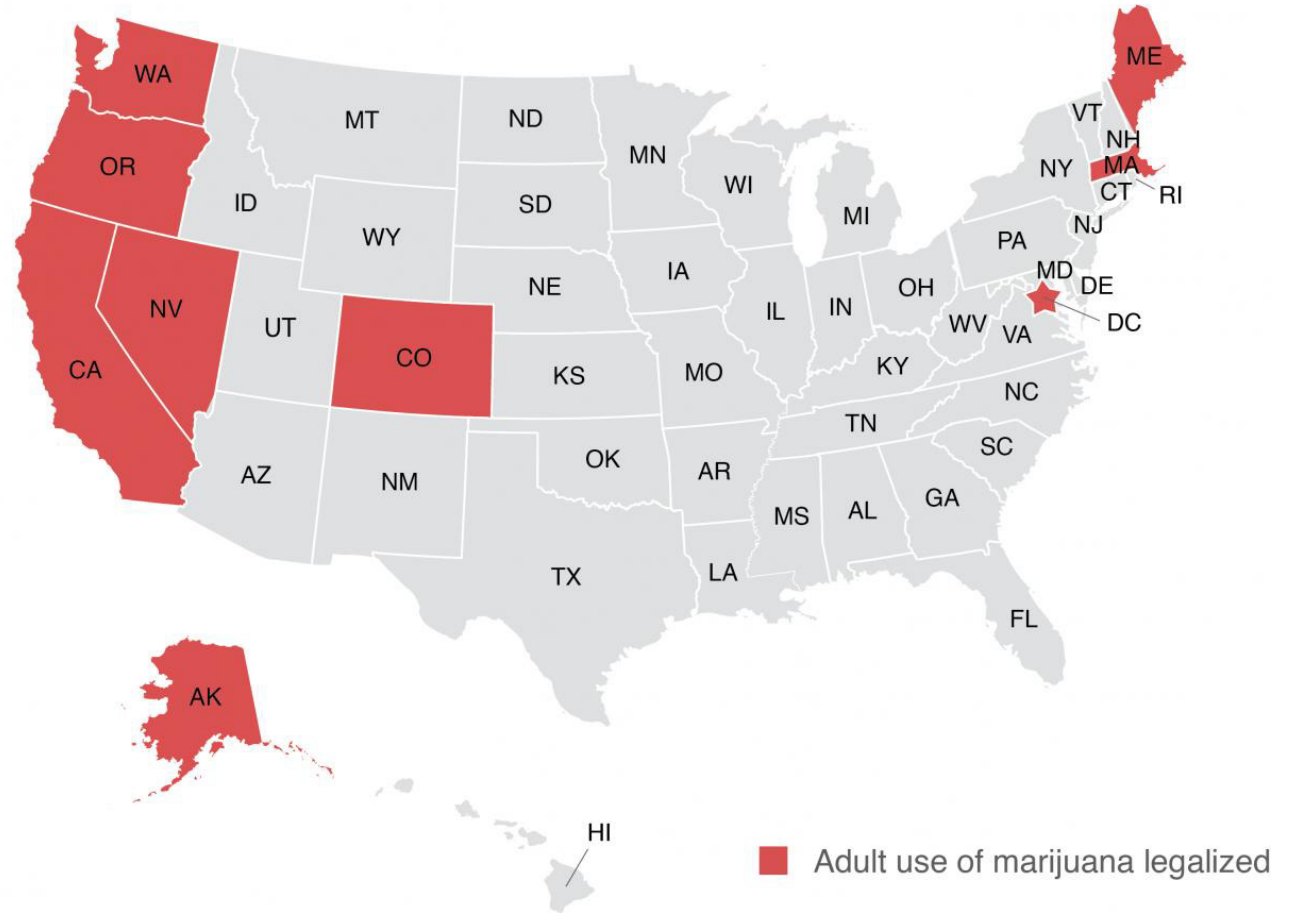
29 states and DC have legalized medical marijuana for medical purposes.



State Law



8 states have legalized recreational marijuana



Massachusetts Law



Massachusetts Marijuana Legalization Initiative (2016)



Massachusetts Medical Marijuana Initiative (2012)



Massachusetts Sensible Marijuana Policy Initiative (2012)

Recreational Marijuana

Only possession and use
by adults over age 21

Possession of up to
1 ounce outside
home and 10 ounces
in home.

Retail license from newly-formed
Cannabis Control Commission
required to sell marijuana

No marijuana use in public places

No “open
containers” in
motor vehicles

A user must obtain “written certification” from a physician that in his/her “professional opinion, the potential benefits of the medical use of marijuana would likely outweigh the health risks for the qualifying patient.” M.G.L. c. 369, s. 1(N).

Medical Marijuana Law



Medical Marijuana



ID cards carried at all times
in possession of marijuana



ID cards issued every
three years



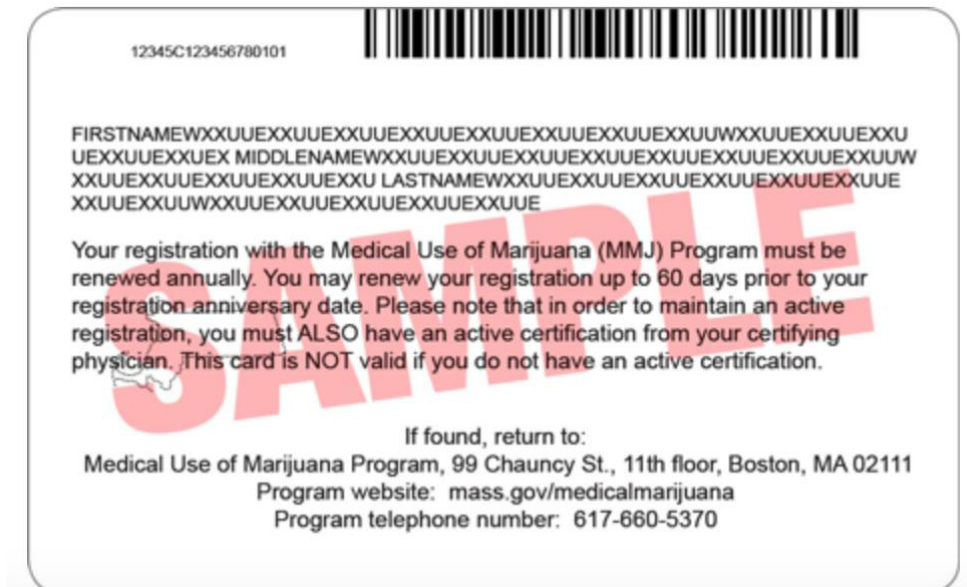
Annual renewal requirement,
including physician
certification

Sample Patient ID Card

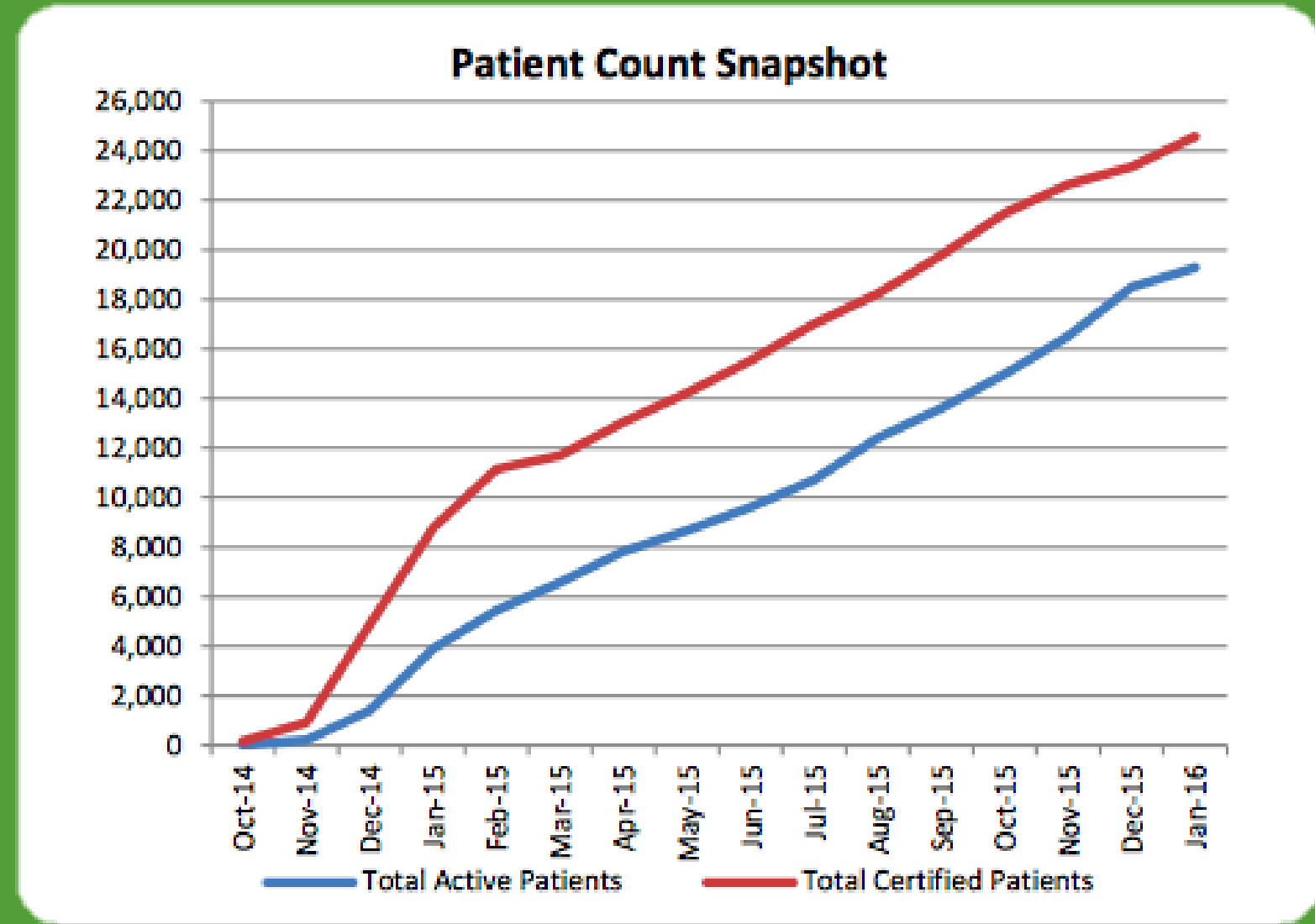
Front



Back



Massachusetts Law



Recreational Law:

This chapter shall not require an employer to permit or accommodate conduct otherwise allowed by this chapter in the workplace and shall not affect the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees.



Medical Law:

[N]othing in this law requires any accommodation of any on-site medical use of marijuana in any place of employment.”



Americans with Disabilities Act explicitly excludes employees “currently engaging in the illegal use of drugs” from its coverage.

Accommodation



Courts have declined to read employment protections into state medical marijuana laws.



Barbuto v. Advantage Sales & Marketing

Barbuto v. Advantage Sales & Marketing

A reading of the [Medical Marijuana] Act and its implementing regulations supports a finding that it does not require an employer to accommodate an employee's use of marijuana to treat a medical condition. The Act does not contain an anti-discrimination provision. To the contrary, it explicitly provides that "[n]othing in this law requires an accommodation of any on-site medical use of marijuana in any place of employment." While the Act does not reference the "off-site" use of marijuana, it provides that "[n]othing in this law requires the violation of federal law or purports to give immunity under federal law." The use of marijuana for medical purposes remains illegal under federal law.

Coats v. Dish Network, LLC

“It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours.” Colo. Rev. Stat. § 24-34-402.5



Coats_v. Dish Network, LLC

“We still must determine ... whether medical marijuana use that is licensed by the State of Colorado but prohibited under federal law is ‘lawful’ for purposes of section 24–34–402.5. Coats contends that the General Assembly intended the term “lawful” here to mean ‘lawful under Colorado state law,’ which, he asserts, recognizes medical marijuana use as ‘lawful.’ We do not read the term ‘lawful’ to be so restrictive. Nothing in the language of the statute limits the term “lawful” to state law. Instead, the term is used in its general, unrestricted sense, indicating that a ‘lawful’ activity is that which complies with applicable ‘law,’ including state and federal law.”

Legislative Response



- Rhode Island and Connecticut both prohibit employers from penalizing an employee “solely” on the basis of his/her “status” as a medical user.
- Rhode Island, but not Connecticut, explicitly permits an employer to enforce a “drug testing, zero-tolerance, or drug free workplace” policy against a medical user.
- New York’s law deems medical users automatically “disabled” within the meaning of its disability discrimination law.
- Like many states, Rhode Island, Connecticut, and New York do prohibit on-premises use and/or impairment.



Workers' Compensation



Many medical marijuana laws provide that carriers do not need to reimburse medical users.



In states without a statutory prohibition, however, courts have ordered that medical marijuana be reimbursed.



Polling Question



Do you drug test
your employees?

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.





Discussion Question

What are the pros and cons of drug testing employees?








Drug Testing

Types of Drug Testing

1. Pre-Employment
2. Reasonable Suspicion
3. Post-Accident
4. Random
 - Balancing test: does legitimate, business interest of employer outweigh employee's interest in privacy?
 - Safety sensitive positions only

Procedure

-  Advanced notification
-  Retesting to confirm
-  EAP
-  No termination for first-time positives
-  Last change agreement

Drug Testing



	Urine	Blood	Hair	Saliva
Marijuana- Single Use	1-7 + days	12-24 hours	Doubtful	Not validated. Estimated 0-24 hours
Marijuana – Regular Use	7-100 days	2-7 days	Months	
Amphetamines/ Methamphetamines	1-3 days	24 hours		
Barbiturates	3-8 days			
Benzodiazepines	2-14 days			
Cocaine	1-3 days	1-3 days		
Heroin, Opiates	1-5 days	1-3 days		
Methadone	2-8 days			
PCP	3-8 days	1-3 days		
Tricyclic Antidepressants	10 days			

ROGEN

PINEAPPLE EXPRESS

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

FROM THE GUYS WHO BROUGHT YOU **SUPERBAD**

AUGUST 2008

RideTheExpress.com

Federal Drug Testing Requirements

A red semi-truck is driving on a multi-lane highway. The truck is moving away from the viewer towards the horizon. The sky is blue with scattered white clouds. The road has a white dashed line on the left side. The overall scene is bright and clear.

“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

OSHA Guidance



[D]rug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use.

- OSHA's Commentary to Final Rule amending its Recording and Reporting Occupational Injuries and Illnesses Regulation (May 12, 2016)





Polling Question

Would you choose to accommodate
a medical marijuana user?

Yes or No?

Medical Marijuana Policy



Sample Accommodation Policy Language:

The Company may in its discretion seek to accommodate legally recognized Massachusetts medical marijuana users when possible depending on the Employee's position. Employees who obtain a registration card from the Massachusetts Department of Public Health must submit a letter to the Director of Human Resources attaching a copy of their card and requesting a reasonable accommodation. The Company will then enter into a discussion with the Employee and where applicable the Employee's Health Care provider to determine if such accommodation is appropriate under the circumstances.

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





Problems

A medical assistant, Jack, leaves
a backpack reeking of marijuana
in his locker before his shift.

Do you open his backpack?

Yes or no?



Problems

You hear a rumor that Mary, a repair technician at the manufacturing plant where you work, has begun taking medical marijuana for her chronic pain. What is your next step?

Problems

Bill goes out to his car during breaks and comes back looking unsteady. You don't smell alcohol or marijuana, but you are suspicious about the employee's behavior. What should you do?

A person is sitting at a wooden desk, working on a silver laptop. Their hands are on the keyboard. To the left, a blue mug is partially visible. In the background, there is a wire mesh pencil holder containing several blue pencils. The scene is softly lit, suggesting an indoor office or study environment. A large green circle with a white border is centered over the image, containing text.

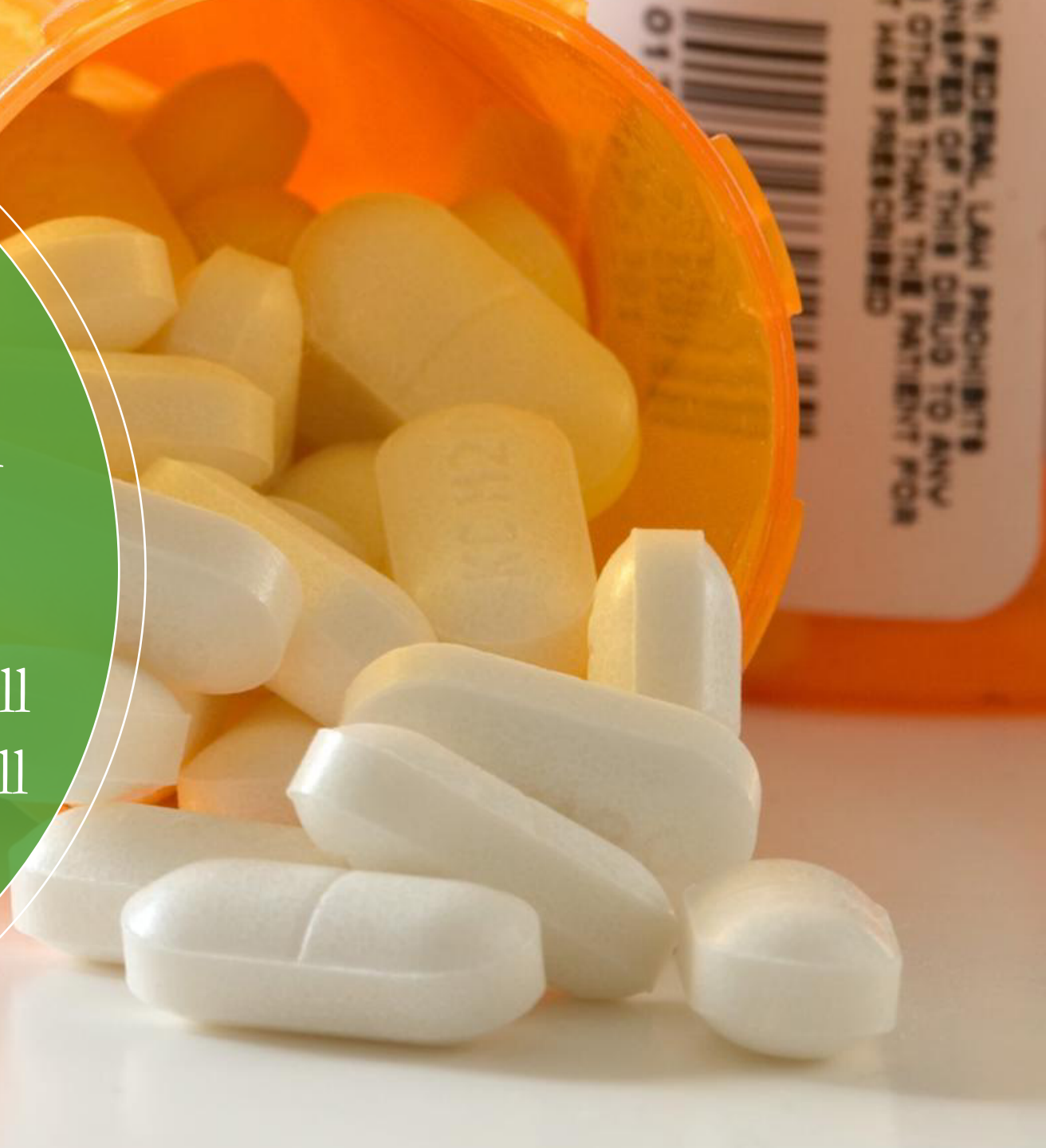
Problems

Security calls you after break and reports that they believe they just saw Joe in the back of the building smoking marijuana.

After walking by him, you realize that you do not smell it on him. Do you confront him anyway? Yes or no?

Problems

Mike has just been injured on the job. While going to the drug testing room, he reports that he is on Suboxone and will likely test positive. Do you still test him? Yes or no?



Problems

Your company enforces its zero-tolerance drug policy through random drug tests. When an employee, Jill, is randomly selected for a test, she responds, “I don’t have to take the test,” and presents a medical marijuana card. Do you still test Jill? Yes or no?





Problems

Laura's test is non-negative. It is the weekend and HR is not on-site. You arrange for her to go to CompreCare and you call the taxi. Later in the shift, the taxi service calls you and advises that Laura demanded to be taken home and they did not drive her to CompreCare. What happens now?

A festive holiday party scene with people wearing Santa hats and holding wine glasses. The background is blurred, showing a social gathering in a restaurant or bar.

Problems

ABC Company hosts a holiday party, with an open bar, at a local restaurant. Several employees begin smoking marijuana outside on the veranda, causing another employee to complain. May you tell the employees to stop smoking?

Yes or no?

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?



David B. Wilson

dwilson@hrwlawyers.com

617-348-4314



Tobias W. Crawford

tcrawford@hrwlawyers.com

617-348-4367



HIRSCH
ROBERTS
WEINSTEIN LLP

Please remember to ← ---
take our brief survey
when you exit

THANK YOU



Colleen Doherty, SPHR

SVP, Compliance & Client Services

Eastern Benefits Group

cdoherty@easternbenefitsgroup.com

508-923-2442