

# In the Weeds



A Deep Dive Into  
Marijuana Users in the  
Workplace

# Presented By

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# Program Overview

- ▶ Marijuana laws across the U.S.
  - ▶ Growing divergence between state and federal law
  - ▶ Emerging workplace protections for marijuana users
- ▶ The legal landscape in Rhode Island
  - ▶ Medical marijuana program
  - ▶ Reasonable grounds drug testing
- ▶ Frequently asked questions for employers

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# California Leads, the States Follow . . .

- ▶ In 1996, California became the first state to allow for the medical use of marijuana
- ▶ Since then...
  - ▶ 22 states and the District of Columbia have decriminalized possession of small amounts of marijuana
  - ▶ 32 states, the District of Columbia, Guam, and Puerto Rico have approved comprehensive medical marijuana programs
  - ▶ 10 states and the District of Columbia have approved marijuana for adult recreational use
  - ▶ In 2016, 8 states passed marijuana-related ballot initiatives

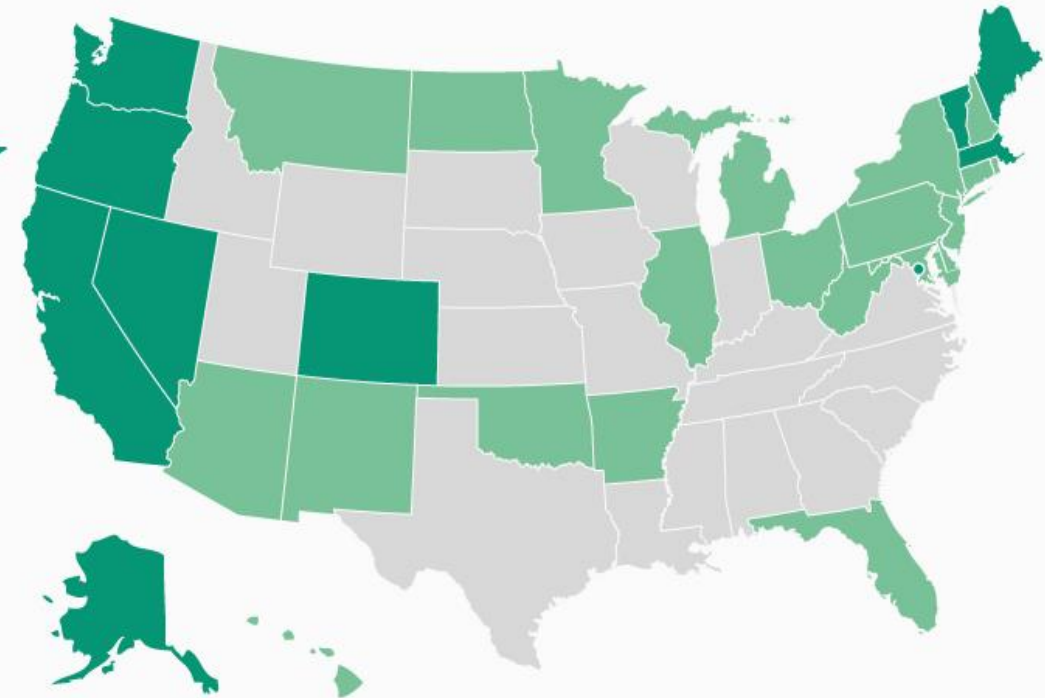
## The States Where It's Legal To Smoke Marijuana

Laws on recreational and medical marijuana use in the US\*

■ Legalized for recreational & medical use   ■ Medical use only

### Legalized recreational marijuana

Alaska  
California  
Colorado  
District of Columbia  
Maine  
Massachusetts  
Nevada  
Oregon  
Vermont  
Washington



# ...and the Feds Lag Behind

- ▶ **Federal Controlled Substances Act (1970)**
  - ▶ Marijuana classified as a Schedule I controlled substance
- ▶ **Drug-Free Workplace Act (1988)**
  - ▶ Federal grant recipients and contractors
  - ▶ Zero tolerance for drug use
  - ▶ Certification of drug-free workplace
- ▶ **DOT Regulations**
  - ▶ Random drug-testing required for certain safety-sensitive positions
- ▶ **Cole Memorandum (2009)**
- ▶ **Marijuana Enforcement Memorandum (2018)**



# Emerging Workplace Protections

The following states have some form of statutory and/or case law protection for workers using marijuana medicinally:

1. Arizona
2. Arkansas
3. Connecticut
4. Delaware
5. Illinois
6. Maine
7. Massachusetts
8. Minnesota
9. Nevada
10. New York
11. Pennsylvania
12. West Virginia

▶ **Status-based discrimination against medical marijuana cardholders prohibited**

- ▶ Arizona
- ▶ Connecticut
- ▶ Delaware
- ▶ Illinois
- ▶ Maine
- ▶ Minnesota
- ▶ New York
- ▶ Pennsylvania
- ▶ West Virginia

▶ **Positive drug test by medical marijuana cardholder not sufficient to trigger adverse employment action**

- ▶ Arizona
- ▶ Arkansas
- ▶ Delaware
- ▶ Maine
- ▶ Minnesota
- ▶ New York



# Rhode Island's Medical Marijuana Program



- ▶ Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act signed into law in 2005
- ▶ Section 21-28.6-1 et seq. of the Rhode Island General laws
- ▶ Program numbers as of March 31, 2018
  - ▶ 18,728 active registered patients
  - ▶ 1,789 active registered caregivers
  - ▶ 1,317 new patient applications between January 1 - March 31, 2018

# Rhode Island's Medical Marijuana Program (Cont.)

## ▶ Eligibility

- ▶ Check with doctor regarding qualifying medical condition
- ▶ Register with Department of Health to become cardholder

## ▶ Qualifying medical conditions

- ▶ Cancer
- ▶ Glaucoma
- ▶ HIV/AIDS
- ▶ Hepatitis C
- ▶ Chronic or debilitating medical conditions (e.g. chronic pain, severe nausea, seizures)
- ▶ Severe and persistent muscle spasms
- ▶ PTSD

## ▶ How medical marijuana is dispensed

- ▶ Licensed compassion centers and home cultivation
- ▶ 12 mature plants
- ▶ 2.5 oz. available for purchase every two weeks

# Hawkins-Slater Balances the Rights of Employers and Employees...

## ▶ Protections for medical marijuana cardholders

- ▶ “A qualifying patient cardholder who has in his or her possession a registry identification card shall not be . . . denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marijuana[.]” See Section 21-28.6-4(a)
- ▶ “No . . . employer . . . may refuse to . . . employ . . . or otherwise penalize, a person solely for his or her status as a cardholder.” See Section 21-28.6-4(d)

## ▶ Protections for employers

- ▶ “This chapter shall not permit . . . [a]ny person to undertake any task under the influence of marijuana, when doing so would constitute negligence or professional malpractice[.]” See Section 21-28.6-7(a)(1)
- ▶ “This chapter shall not permit . . . [a]ny person to operate, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marijuana.” See Section 21-28.6-7(a)(3)
- ▶ “Nothing in this chapter shall be construed to require . . . [a]n employer to accommodate the medical use of marijuana in any workplace.” See Section 21-28.6-7(b)(2)

# ...and the Superior Court Tips the Scale

## ▶ Callaghan v. Darlington Fabrics (R.I. Super. Ct. - May 23, 2017)

- ▶ Plaintiff applied for a paid internship with the employer and disclosed that she had a medical marijuana card and would not pass a required pre-employment drug test.
- ▶ Employer's policy prohibited the use of drugs on company property. It did not state that a positive drug test result would lead to withdrawal of a job offer.
- ▶ When she was not hired, plaintiff sued the employer under the Hawkins-Slater Act as well as Rhode Island's disability discrimination statute.
- ▶ Court agreed that employers are not required to tolerate employees who report for work "under the influence" of marijuana.
- ▶ Court rejected the argument that employers have no obligation to accommodate medical marijuana use under the Act.
- ▶ ***Court held the Act expressly states that an employer may not refuse to employ a person due to his or her status as a medical marijuana cardholder.***

# Want to “Weed Out” Marijuana Users with a Drug Test? Proceed Carefully.

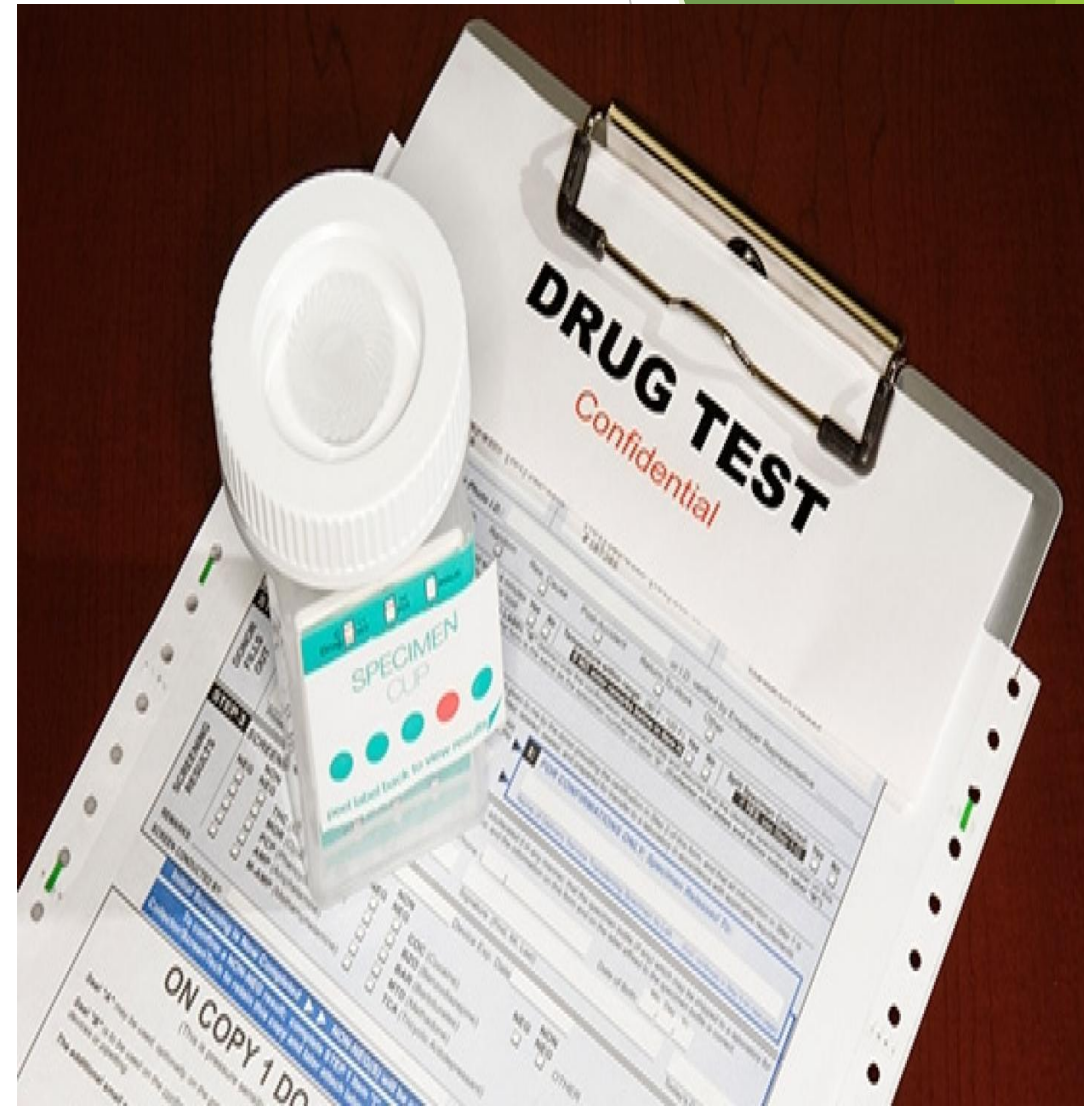
- ▶ Rhode Island’s drug testing statute is one of the strictest in the country.
- ▶ Covers testing of the following for the presence of drugs:
  - ▶ Urine
  - ▶ Blood
  - ▶ Bodily tissues (e.g. hair follicle)
  - ▶ Bodily fluids (e.g. saliva)
- ▶ All random drug testing is prohibited (except for certain well-defined occupations and industries).
- ▶ Testing must be based on the following criteria:
  - ▶ Reasonable grounds to believe employee is using drugs; and
  - ▶ Evidence that drug use is actually interfering with job performance
- ▶ Workplace rumors that an employee is “under the influence” or impaired are not sufficient grounds to require a test if the above criteria are not met.
- ▶ Blanket policy requiring employees to be tested after any workplace accident would violate the law.

# How to Conduct Reasonable Grounds Testing

1. Employee must be allowed to give the sample in private, without anybody watching.
2. Any positive test result must be confirmed by a federally-certified laboratory by means of scientifically accurate technology (e.g. gas chromatography).
3. If the test comes back positive, employee must be given the opportunity, at the employer's expense, to have the sample re-tested by another facility.
  - ▶ Employee must also be given the chance to explain the results (e.g. taking a prescribed medication that shows up as a positive result).
  - ▶ Any positive test results must be kept confidential by the employer and may only be disclosed to other employees who have a job-related “need to know.”

# How to Conduct Reasonable Grounds Testing (Cont.)

4. Testing is allowed only if the employer has formally adopted a drug abuse prevention policy that complies with the Rhode Island drug testing statute.
5. The testing must have a remedial, not punitive, purpose.
  - ▶ It is illegal to fire a worker solely on the basis of a positive drug test result.
  - ▶ Employers can require employees testing positive to seek treatment with a substance abuse professional. Only if, in the course of such treatment, further testing indicates continued use of controlled substances, can the employee be fired based on test results.



# Frequently Asked Questions (FAQs)

- ▶ **Do I need to tolerate the use of medical marijuana in the workplace?**
  - ▶ NO. Employers are not required to accommodate medical use of marijuana in any workplace.
  - ▶ Off-duty use without a card from the Dept. of Health is still illegal (for now).
- ▶ **Do I need to reasonably accommodate off-site, off-duty use by a cardholder?**
  - ▶ Employers are required to accommodate employee's underlying medical condition under state and federal law.
  - ▶ After Darlington Fabrics, employers cannot refuse to hire or discriminate based on cardholder status.
  - ▶ Employers are not required to accommodate use in the workplace or working “under the influence”
- ▶ **Can I take adverse action based solely on a positive drug test for marijuana?**
  - ▶ NO. Adverse action may result in a claim under the Hawkins-Slater Act, state anti-discrimination law, and drug testing law.
  - ▶ Exception for safety-sensitive positions.



# Frequently Asked Questions (FAQs) (Cont.)

- ▶ How does an employer test for and document that an employee came to work or performed a task “under the influence” of marijuana?
  - ▶ Unless a “safety-sensitive position,” not advisable to take adverse action based solely on positive drug test results.
  - ▶ Employers must engage in a fact-specific inquiry for reasonable grounds testing.
  - ▶ “Under the influence” may be evidenced by the following indicia:
    - ▶ Appearance (e.g. speech pattern, walking, physical dexterity, agility, demeanor, clothing, odor)
    - ▶ Negligence or carelessness in operating equipment
    - ▶ Disregard for safety
    - ▶ Involvement in a workplace accident that results in property damage or injury
    - ▶ Other behavior inconsistent with usual conduct of employee

# Frequently Asked Questions (FAQs) (Cont.)

- ▶ **What are some best practices for developing substance abuse policies that address medical marijuana users?**
  - ▶ Train employees on policies and procedures regarding use, possession, consumption, and penalties for impairment on the job.
  - ▶ Train supervisors to identify signs and symptoms of impairment and how to properly document their observations.
  - ▶ Advise employees that illegal drug use at work, including the use of medical marijuana, is prohibited.
  - ▶ Conduct thorough investigations of any violations of your policy.

# Panel Introductions



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# Questions?



Thank You!





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**Thank you!**