



**COUNCIL OF  
STATE CHAMBERS**



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# **Marijuana Legalization: National Perspective**

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**Bill Kramer**

Policy Director, COSC  
[bill@statechambers.org](mailto:bill@statechambers.org)

# PRESENTATION OVERVIEW

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## What I'm Covering:

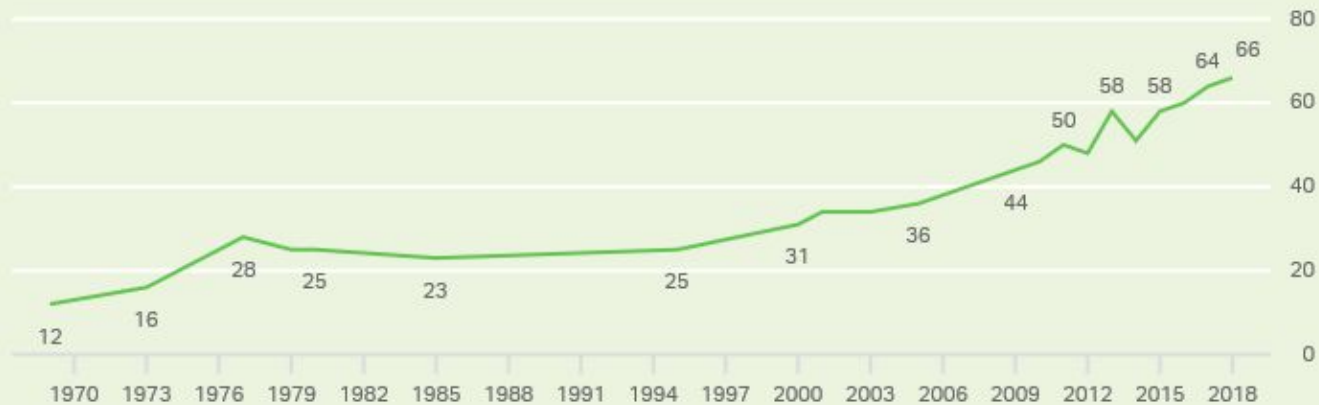
- Popularity
- Federal Status
- States of Play
- State Laws
  - Decriminalization
  - Non-Discrimination Mandates
  - Accommodation Requirements
- Litigation & Uncertainty
- What State Chambers Are Saying

# MARIJUANA POPULARITY

## Support for Legalizing Marijuana Continues to Edge Up

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

■ % Yes, legal



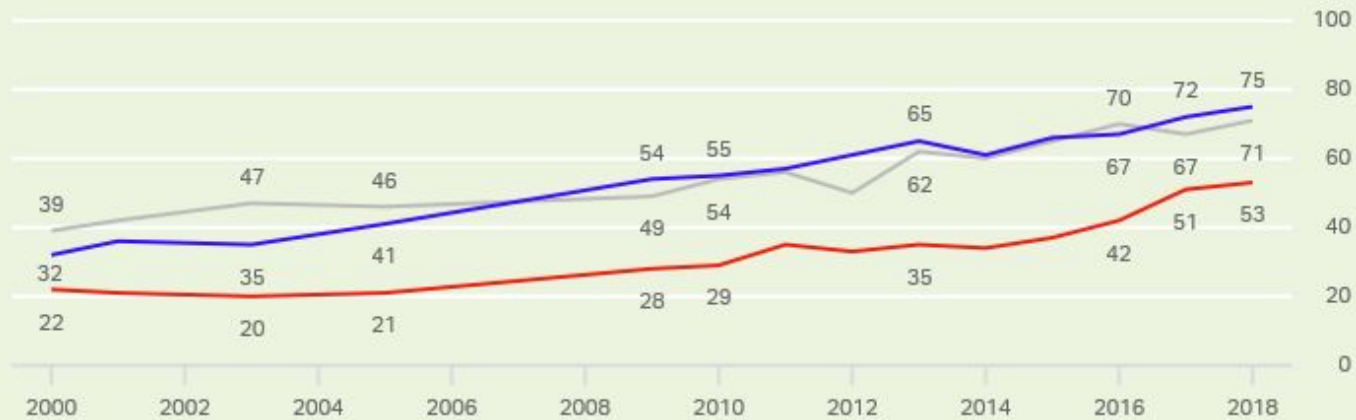
GALLUP

# MARIJUANA POPULARITY

## Majorities of All Political Identification Groups Continue to Support Legalization of Marijuana in 2018

% Yes, marijuana should be made legal

■ Republicans ■ Independents ■ Democrats



GALLUP

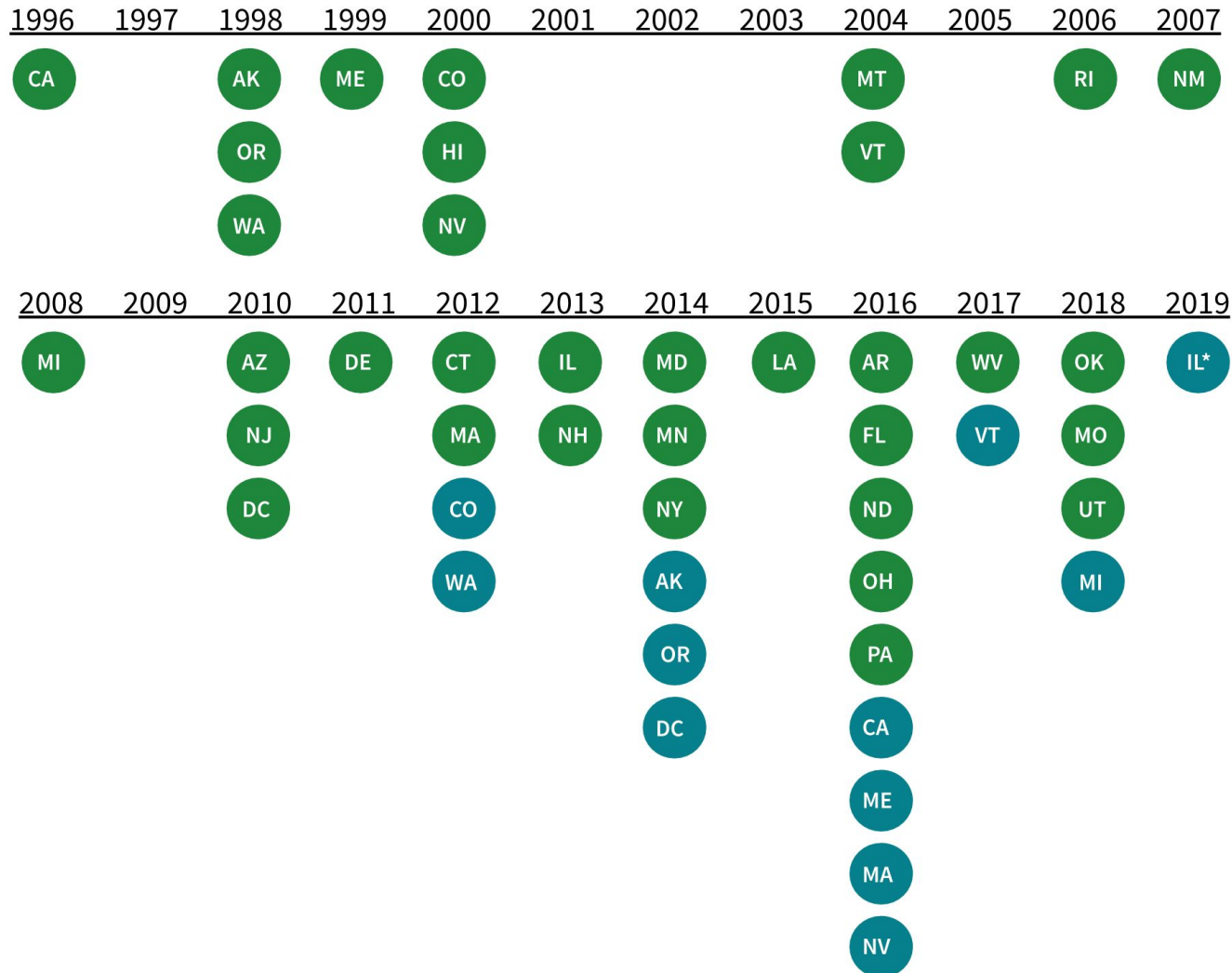
# MARIJUANA FEDERAL STATUS

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- Controlled Substances Act (CSA) (1970) created five schedules to classify drugs based on medical use and potential for abuse.
- Marijuana is classified as a Schedule I substance: no current accepted medical use and a high potential for abuse.
- Obama Admin. released Cole Memo: federal prosecutors will not prioritize possession legal under state laws. Trump Admin. rescinded but no increase in enforcement detected.
- Drug-Free Workplace Act (1988) requires federal contractors to promote drug-free policies but does not require drug testing.
- State courts have relied on federal law to preempt state medical marijuana laws (other courts have ruled against preemption).



# MARIJUANA STATES OF PLAY



# MARIJUANA STATE LAWS

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Three aspects of state marijuana laws that employers should pay attention to:

- **Decriminalization**
- **Non-Discrimination Mandates**
- **Accommodation Requirements**



# MARIJUANA

## DECRIMINALIZATION

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- Decriminalization typically removes criminal penalties for possession of small amounts of marijuana by certified medical users (or in the case of recreational, everyone 21 and older).
- Some states still require violators to pay a fine or have reduced possession to a misdemeanor.
- A decriminalization policy typically includes no express employment protection for medical or recreational users.

# MARIJUANA

## NON-DISCRIMINATION

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- State laws that include a non-discrimination provision typically prohibit employers from taking adverse action against certified or registered medical users solely based on status as a lawful marijuana user.
- Generally, to be protected, patients and their caregivers must receive certification from a medical practitioner.
- Most states with non-discrimination provisions usually exclude jobs where drug testing is required by federal law.

# MARIJUANA ACCOMMODATION

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- Some states (e.g., CA, CO, OH) do not provide protections for employees that may legally use marijuana, even if they are following the state's law and limit marijuana use to off-duty time.
- Other states expressly require accommodation of off-duty use.
- However, employers are never required to accommodate on-the-job marijuana use.

# MARIJUANA TESTING

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But how would employers know the difference between on-the-job impairment and at-home use?

- There are currently no accurate tests that can differentiate between at-home use and on-the-job impairment.
- Recognizing impairment is very difficult.
- Many employers are simply dropping marijuana testing of job applicants completely.
- NYC first locality to legally prohibit employers from testing applicants for marijuana use as “discriminatory” (effective 2020).

# MARIJUANA TESTING

## Retail among highest failure rates for marijuana tests

Industry	2015	2016	2017
Retail and trade	4.09%	4.48%	4.65%
Machinery repair, funeral homes and dry cleaners	3.59%	3.83%	4.30%
Administrative, clerical, cleaning and waste disposal	3.94%	3.98%	4.22%
Transportation and warehousing	2.61%	3.57%	3.87%
Healthcare and social assistance	3.42%	3.59%	3.68%
Construction	2.78%	2.94%	3.23%
Professional, scientific and technical services	2.60%	2.86%	3.07%
Manufacturing	2.50%	2.48%	2.81%

Source: Quest Diagnostics & Margot Roosevelt, *Los Angeles Times*, In the age of legal marijuana, many employers drop 'zero tolerance' drug tests (Apr. 12, 2019).

New Jersey-based Quest Diagnostics, compiling data on 10 million tests a year, reports an increase in workers testing positive for pot, especially in states where recreational use is legal.

# MARIJUANA LITIGATION

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Vague Legislative Language  
+  
Scant Legal Precedent  
=  
Uncertainty

# MARIJUANA LITIGATION

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## *Coats v. Dish Network (Colo. 2015)*

- **FACTS:** Colorado law prohibits employers from terminating an employee for lawful off-duty conduct. Employer terminated employee after testing positive for marijuana use. Employee legally used marijuana off-duty and no allegation of on-the-job impairment.
- **HOLDING:** Colorado Supreme Court upheld lower court's ruling that marijuana use off-duty does not constitute "lawful conduct" under federal law (still illegal under CSA), and therefore the termination was not unlawful under state statute.
- **TAKEAWAY:** Marijuana is still illegal under the CSA and even state statutory provisions providing protection for marijuana use may not withstand judicial scrutiny.

# MARIJUANA LITIGATION

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## *Carlson v. Charter Communications* (Mont. 2018)

- **FACTS:** After an accident in a company-owned vehicle, employees, a legal medical marijuana user under Montana law, tested positive for marijuana use. Employers, a federal contractor required to comply with DFWA, terminated employment for violating employment policy.
- **HOLDING:** Ninth Circuit held there was no duty to accommodate under Montana medical marijuana law, therefore termination of employment was lawful.
- **TAKEAWAY:** Court found that DFWA does *not* preempt Montana medical marijuana law but state law did not provide employment protections for medical marijuana users.



# MARIJUANA LITIGATION

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## *Barbuto v. Advantage Sales & Marketing (Mass. 2017)*

- **FACTS:** Employee used marijuana to treat Crohn's disease under state medical marijuana law. Employee notified employer of marijuana use, and after failing drug test, employer terminated employment.
- **HOLDING:** Massachusetts Supreme Court ruled the employee could continue with lawsuit under claim of "disability discrimination."
- **TAKEAWAY:** Case could proceed under a separate state Fair Employment Practices Act, but court found medical marijuana statute did not contain an implied private right of action.

# MARIJUANA PREEMPTION

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## CSA preempts state law:

- *Emerald Steel Fabricators vs. Bureau of Labor & Indus.* (Or. 2010).
- *Garcia v. Tractor Supply Co.* (NM 2016).

## CSA does NOT preempt state law:

- *Coats v. Dish Network* (Colo. 2015).
- *Chance v. Kraft Heinz Food Co.* (Del. 2018).
- *Callaghan v. Darlington Fabrics* (RI 2017).
- *Noffsinger v. SSC Niantic Operating Co.* (Conn. 2017).

## DFWA does NOT preempt state law:

- *Noffsinger v. SSC Niantic Operating Co.* (Conn. 2017).
- *Carlson v. Charter Communications* (9th Cir. 2018).



# MARIJUANA LITIGATION

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## *Medical Marijuana Case Law*

- **Bottom Line:** If the state medical marijuana law contains an anti-discrimination provision, the applicant/employee *may* be protected from adverse employer action based *solely* on a positive drug test result – *if* the state protections are not preempted by federal law (state courts coming to different opinions).

## *Recreational Marijuana Case Law*

- **???** Still too early as potential cases are working their way through the legal system. Uncertainty remains especially for employers.

# MARIJUANA LEGALIZATION

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## *What state chambers are saying:*

“Many CBIA members, especially manufacturers, are concerned with marijuana legalization's impact on their ability to meet workforce demands, already a considerable challenge.

Businesses are also worried about their exposure to civil liability if an employer has a good faith belief that an employee possesses or appears impaired by cannabis. . . .

CBIA's Louise DiCocco told the committee that state law prohibits an employee from working while impaired—but unlike alcohol, there is no reliable test for marijuana impairment.”

— Connecticut Business & Industry Association (CBIA)



# MARIJUANA LEGALIZATION

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## *What state chambers are saying:*

**“The Indiana Chamber opposes the legalization of marijuana in any form for recreational use.”**

**“Employers use drug screenings in hiring, random testing, for cause and as follow-up to treatment. Therefore, we believe legalizing medicinal marijuana will increase access and increase the number of positive drug tests, further negatively impacting Indiana’s workforce.”**

**The Chamber’s Mike Ripley stated, “It comes down to whether individual benefits are worth the tradeoffs. Some of you (legislators on the committee) are convinced that they are worth it; some of us are not.”**

**— Indiana Chamber of Commerce**



# MARIJUANA LEGALIZATION

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## *What state chambers are saying:*

“Testing detects the presence of marijuana long after an employee may have used the drug during non-work hours. But there is no clear test to determine whether or not that employee is impaired and may represent a danger to co-workers or customers,” said AIM’s Kyle Pardo.

“It has created a confusing situation for employers.”

— **Associated Industries of Massachusetts (AIM)**

# MARIJUANA LEGALIZATION

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**Questions?**

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