

Marijuana 2015

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2015: The Year of Marijuana

- Why do we care?
 - Drug testing policies
 - Employee Protections/accommodations
 - Workers' Compensation
 - Unemployment Benefits



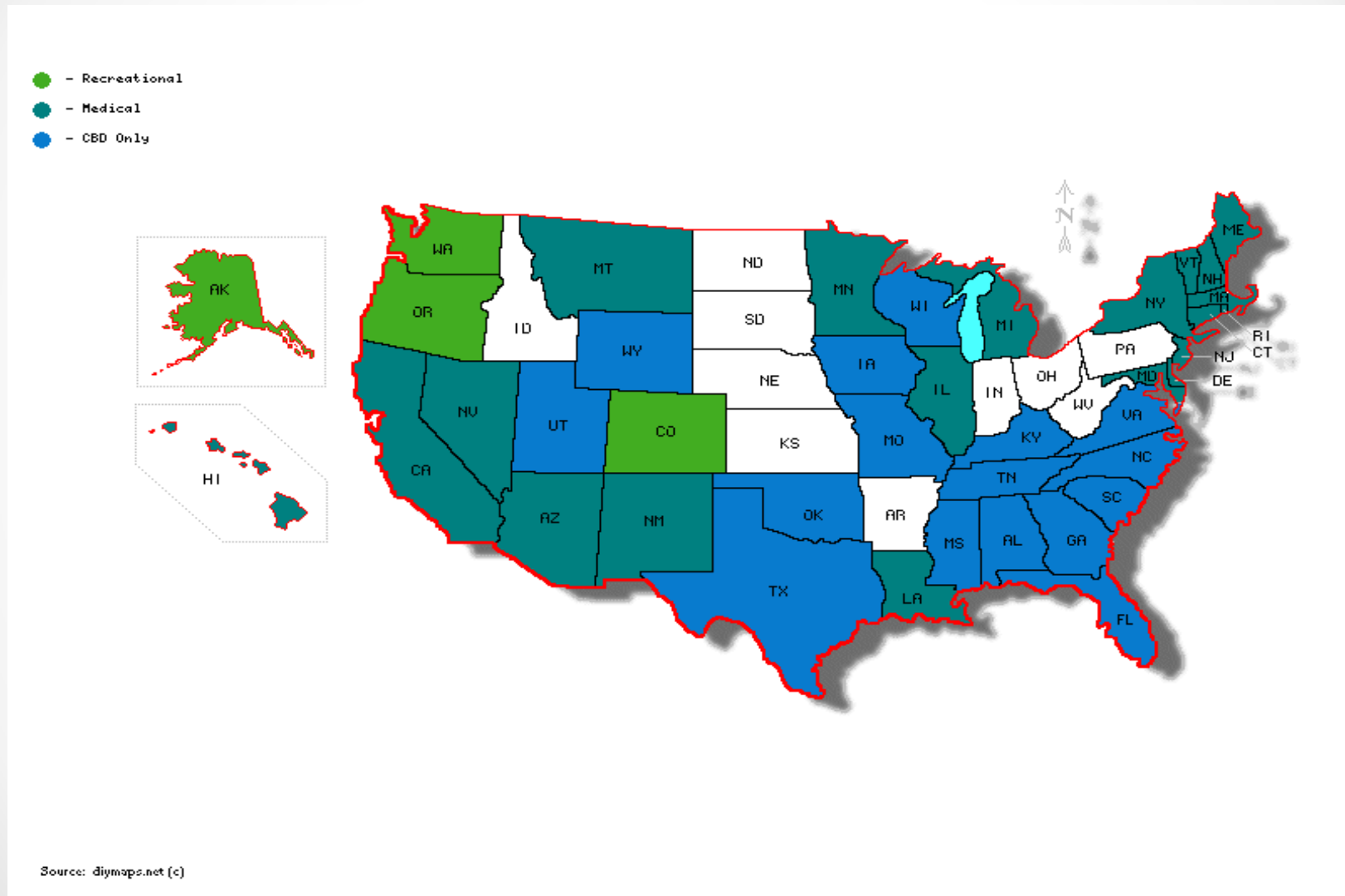
Recreational Marijuana Today: State Laws

- 4 states + D.C. have legalized marijuana for recreational use :
 - Regulates marijuana like alcohol: laws allow adults 21+ to lawfully use/possess certain amounts of marijuana
 - All recreational states also have comprehensive medical marijuana laws
- Some cities have legalized possession of marijuana by voter initiative even in states where illegal
 - E.g., Portland, Maine (may possess up to 2.5 oz.)
- 20 States have de-criminalized marijuana for recreational purposes
 - Possession of a certain amount is a civil fine, not a crime
 - 2015: Delaware and Illinois

Medical Marijuana Today: State Laws

- 24 states, D.C., and 2 U.S. territories (Guam and Puerto Rico) have comprehensive medical marijuana laws
 - Additional 16 states have low THC/high CBD laws
 - Laws allow use of low THC, high CBD products for medical purposes in limited situations or as a legal defense
- *Total of 40 states, D.C., and 2 U.S. territories allow some form of marijuana or its extracts for medicinal purposes

Marijuana Today: Medical, Recreational, & CBD States



Marijuana Today: Federal Law- Still Prohibited

- While states are passing laws allowing medical and recreational marijuana:
 - Marijuana is still illegal under federal law
 - Marijuana is still classified as Schedule I drug by DEA
- Medical marijuana is not a legitimate medical explanation under Department of Transportation (DOT) drug testing regulations
 - February 2013 DOT Notice re-affirming issue

Recreational v. Medical Marijuana: Why Does It Matter?

- Different purposes
 - Medical marijuana is used to alleviate pain and reduce symptoms; recreational is used to get high
 - Recreational and medical dispensaries are separate and have different governing oversight agencies (DOH vs. alcohol and tobacco)
- Access to and Possession Amounts
 - Medical marijuana requires physician's recommendation and qualifying condition
 - Recreational from purchase, homegrown, gifted from someone else
- Price
 - Recreational marijuana more expensive because of higher taxes
- Employment and other Civil Protections

Marijuana Legislation: Current Trends in State Laws

- Introduction of marijuana legislation in 2015
 - Recreational Legislation: at least 19 states
 - Medical Legislation: at least 19 states
 - CBD Legislation: at least 9 states
- Medical Marijuana Law Trends
 - Providing Explicit Employee Protections
 - Limiting Methods of Ingestion
 - PTSD as a Qualifying Condition
 - Passage of High CBD/Low THC Laws



Marijuana Legislation: State Law Trends 2014-2015

- Passed Legislation
 - Recreational: 2 States + D.C. legalized recreational marijuana by voter initiative
 - Medical: Louisiana, Puerto Rico (by Executive Order)
 - Hawaii: regulations to create dispensaries
 - Washington: overhaul of law
 - California: established a regulated marijuana distribution and production system
 - CBD: 15 states passed Low THC/High CBD Laws

States with Legal but Unavailable or largely inaccessible Marijuana

- Medical

- Massachusetts
- Illinois
- New York
- Minnesota
- New Jersey
- New Hampshire

- Recreational*

- Alaska
- Oregon

*Waiting on rules and regulations

Recreational Marijuana: Overview

- Currently all passed by voter initiatives, not legislatures
 - Colorado (2012)
 - Washington (2012)
 - Alaska (2014)
 - Oregon (2014)
 - Washington D.C. (2014)
- But Legislatures are taking action also
 - 2014: New Hampshire House approved legalization bill (first time any state legislative chamber approved legalization)
 - 2015: 19 states introduced legislation to regulate marijuana like alcohol
 - *In Texas, legalization bill passed out of committee

Recreational Marijuana: Colorado (amendment 64)

- First state to legalize in 2012, Effective 2014
- Can buy up to 1 oz. in store with Colorado I.D., out of state can buy ¼ oz.; can grow up to 6 plants in home
 - May gift up to 1 oz.
- Cannot smoke in public
- Driving under the influence specifically prohibited
- No explicit employment protections

Recreational Marijuana :

Alaska (measure 2)

- Passed 2014, effective February 24, 2015
- Can possess up to 1 oz. of marijuana and grow up to 6 plants
- Regulations still in development; Will not be available commercially until 2016;
 - Marijuana Control Board in process of proposing rules- must be drafted by September 2015
- Bans all public consumption, not just smoking
- Driving under the influence explicitly prohibited
- Explicitly provides no employment protections (sec. 17.38.120)
 - “Nothing in this chapter is intended to require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees.”

Recreational Marijuana: Oregon (measure 91)

- Passed 2014, effective July 1, 2015
- Can possess up to 8 oz. of usable marijuana in home and grow up to 4 plants per household, and possess up to 1 oz. in public
- Oregon Liquor Control Commission (OLCC) has until 1/1/16 to implement regulations
 - Starting October 2015, may purchase up to ¼ oz. of recreational marijuana per day from medical marijuana dispensaries but will not be allowed to purchase extracts, edibles, etc.
 - Retail stores expected to open sometime in 2016
- May not be sold or smoked in a public place
- Law requires OLCC to examine, research, and present report on driving under the influence to legislature
- Law silent as to employment protections but Guidance:
 - Oregon OLCC FAQ sheet: Measure does not affect existing employment law and “employers who require drug testing can continue to do so”

Recreational Marijuana: Washington (I-502)

- Passed 2012, sales began July 8, 2014
- Must purchase from state-licensed retailer; law does not permit home grown marijuana for recreational use
- Unlawful to open or consume marijuana or marijuana infused product in view of general public
- DUI provision- sets per se limit of THC levels greater than or equal to 5 ng/mL of blood
- Law silent as to employment protections but Guidance:
 - Washington State Liquor and Cannabis FAQ: “it is our understanding that employers may still conduct drug testing at their discretion.”

Recreational Marijuana: Washington D.C. (Initiative 71)

- Passed 2014; deferred until 2017 per the federal government
- Can possess up to 2 oz.; 3 mature plants in home and 6 total; may transfer up to 1 oz. if no payment
- Use restricted to personal residence
- Illegal to drive under the influence
- Employment Protections
 - Cannot drug test for marijuana unless conditional offer of employment

Recreational Marijuana: Taxes

- Washington
 - 37% marijuana excise tax at retail point of sale (tax reforms 6/30/15)
 - During 1st fiscal year, marijuana industry generated over \$64 million in tax revenue
- Colorado
 - 25% state tax + usual 2.9% state sales tax
 - *Recreational marijuana is one of the most heavily taxed consumer products in Colorado
- Alaska
 - Excise tax of \$50 per oz. on marijuana sold by cultivation facilities at wholesale
- Oregon
 - 25% state tax- will not begin until 1/4/2016

Marijuana: Driving Under the Influence

- Colorado and Washington have per se limits
 - DUI per se limit if blood shows more than 5 ng/mL of THC
- Alaska and Oregon no per se limits
 - Oregon: law requires OLCC to examine, research, and present report to legislature on driving under the influence of marijuana
 - Alaska: Law provides nothing intended to allow driving under the influence or marijuana or supersede law related to driving under influence of marijuana (Sec. 17.38.120)

Recreational Marijuana: Ballot Initiatives 2016

- May be on the 2016 ballots in up to 17 states
 - Nevada
 - California
 - Massachusetts
 - Maine
 - Arizona
 - Ohio
- Laws died in 2015 but will carry over to 2016
 - Hawaii
 - New York
 - Vermont



Medical Marijuana Laws: State Law Inconsistencies

- Marijuana remains illegal under federal law
- States must create rules and regulations for marijuana programs without any medical protocol or federal guidance
- As a result, medical marijuana programs vary widely from state to state in almost every aspect
 - Possession Limits
 - Distribution
 - Dispensaries vs. Home Cultivation: Some states require patients to use dispensaries and do not permit home cultivation
 - Lab testing: some states require, some only permit, most have no testing requirements
 - Requirements for qualifications
 - Standards for physician evaluations
 - Qualifying Conditions
 - Civil Protections and Employment Protections
 - Taxes

Medical Marijuana Laws: Current Trends

- Older laws typically only provided criminal protections
- Current trend is in providing explicit employee protections and limiting methods of ingestion
 - Most recent States passing Medical Marijuana Legislation
 - Proposed Legislation also providing explicit employee protections and limiting methods of ingestion
 - 2015: Hawaii introduced legislation for explicit employee protections (deferred until 2016)
- There are no restrictions on testing for marijuana, although there may be restrictions on the use of the result

Medical Marijuana Laws 2015: Louisiana

- On June 29, 2015, became 24th Medical Marijuana state and first state in the South to pass Comprehensive Medical Marijuana
 - Technically legalized in 1991 but law did not provide structure for legal access
 - Louisiana also passed legislation reducing criminal penalties for possession of marijuana
- Law not limited to CBD only but requires levels of THC “be reduced to lowest acceptable therapeutic levels available through scientifically accepted levels”
 - Board of Pharmacy to adopt rules to establish standards and procedures for testing prescribed samples for levels of THC
- Problem: Is law even workable? Language in law provides for a “prescription” rather than a “recommendation”

Medical Marijuana Laws: Employee Protections

Biggest Issue for Most Employers — Four Categories

1. States with Law Explicitly Finding No Employee Protection

- Case law has found no employee protection

2. States with Explicit Employee Protection

- Newer states' laws provide specific protections for employees for various reasons related to medical marijuana
- States still prohibit use at job site or while working.

3. States with Potential Employee Protection

- Vague laws could potentially be interpreted to provide employee protection.
- Broad “Off-Duty Use” laws or pending cases

4. States with Likely No Employee Protection

- Law appears to only provide criminal protections
- Departments of Health have weighed in on issue of no protection



Other Considerations

- Workplace Drug Testing Laws
- Impairment/testing with blood
- States amending current medical marijuana laws to include employment protections

States Explicitly Finding No Employee Protection

- California
- Oregon
- Washington
- Michigan
- Montana
- Colorado



States with Explicit Employee Protection

- Arizona
- Delaware
- Minnesota
- Rhode Island
- Connecticut
- Maine
- Illinois
- Nevada
- New York



*Each state's medical marijuana statute has explicit language (anti-discrimination or reasonable accommodation provisions) that provides varying levels of protection to employees who are cardholders or who use medical marijuana

States with Explicit Employee Protection

- Anti-discrimination provisions prohibit adverse action against employees solely on the basis of participation in state's medical marijuana program
- Some states' provisions explicitly address workplace drug testing: positive drug test cannot automatically be grounds for refusal to hire or other adverse action
 - Arizona
 - Delaware
 - Minnesota
- Some protections limited to discrimination for being part of medical marijuana program (a cardholder), not positive tests or actual use
- Some provisions include explicit disability accommodation language
 - Nevada
 - New York

States with Explicit Employee Protection

- All laws with anti-discrimination provisions provide the following exceptions:
 - If failing to penalize cardholder would violate federal law or regulations, or cause employer to lose licensing/monetary benefit under federal law
- All laws with anti-discrimination provisions explicitly provide they do not require employers to allow on-duty drug use in the workplace
- All statutes provide they do not permit employees to work while under the influence
- All statutes provide limitations and do not prevent imposition of criminal or civil penalties for:
 - Undertaking task under the influence that would constitute negligence or professional malpractice
 - Operating vehicle, aircraft, boat while under the influence

States that May Provide Employee Protection

- New Mexico

- Provides criminal protections but silent on employment protections
- Dep't of Health FAQ: statute does not provide employment related protections

- **2 Pending Cases**

- 2014: fired physician assistant sues Presbyterian Healthcare Services after failing drug test (state district court scheduled for trial fall 2015)
- 2014: Stanley v. Metropolitan Detention Center: war vet fired following positive test-claiming violations of State Human Rights Act



States Likely Providing No Employee Protection

- Alaska
- DC
- Hawaii
- Vermont
- Massachusetts
- Maryland
- New Hampshire
- New Jersey



*These States Medical Marijuana Laws are silent as to employee protections and generally only provide criminal protections

The State Departments of Health also provide no guidance on employee protections

Marijuana Laws and Unemployment Benefits

- Michigan

- Appellate court held employee who holds state medical marijuana card not disqualified from receiving unemployment benefits after employee terminated for receiving marijuana positive test result (*Braska v. Challenge Mfg.*, 307 Mich. App. 340 (2014))

- Illinois

- Appellate court found employee’s admission of off-duty marijuana use not “misconduct” sufficient to deny unemployment benefits even if it was sufficient for discharge (*Eastham v. Housing Authority of Jefferson County*, No. 09-MR-57 (Ill. App. Ct. 5th Dist. Dec. 2, 2014))



Marijuana Laws and Workers' Compensation

- New Mexico

- Workers' comp case required employer and insurance company to pay for patient's medical marijuana for back pain (*Vialpando v. Ben's Automotive Servs et al.*, No. 32,920 (N.M. Ct. App., May 19, 2014))

- Arizona

- In 2015, legislature amended law to remove requirement that workers' comp carriers and self-insurers reimburse patients for medical marijuana



State Law Trends: Limiting Methods of Ingestion

Most Recent Medical Marijuana States Prohibiting Smoking

- New York
- Minnesota
 - Permits vaporized delivery method with the use of liquid or oil but that does not require the use of dried leaves or plant form, or
 - Cannot smoke or vape plant material
 - Any other method, excluding smoking, approved by the governor
 - Only permits marijuana by liquid, including oil, pill form
- Louisiana (2015)
 - Allowed in any form except for inhalation, raw or crude form

Limiting Methods of Ingestion: Smoking vs. Vaping

- There is little research on vaping
- While many believe vaping may be healthier, it is also stronger/more potent
- Vaping takes longer to feel effects

Medical Marijuana: Qualifying Conditions

- State laws vary widely with qualifying conditions
- Only anecdotal evidence that marijuana can help with different conditions, not evidence based
 - FDA has not yet recognized or approved marijuana as medicine
 - Little research has been done to determine whether marijuana can effectively treat conditions that it is currently being recommended for
- Different from FDA approved medications
 - FDA approved medications have rather uniform compositions
 - Composition of Marijuana can vary substantially in the levels of THC and CBD

Medical Marijuana: Inconsistent Qualifying Conditions

- Most Common conditions: cancer, glaucoma, HIV/AIDS, Crohn's disease, ALS, chronic pain
- Illinois: 33 conditions
 - Spinal chord disease, Rheumatoid arthritis, traumatic brain injury, post-concussion syndrome, lupus, Tourette's
- New Mexico: 19 conditions
- Minnesota: 9 conditions (includes Tourette's syndrome)
- Colorado: 8 conditions
- Louisiana: 3 conditions
- Massachusetts:
 - Includes "and other conditions as determined in writing by a qualifying patient's physician"
- California: No specified Conditions

Medical Marijuana Trends: Qualifying Conditions-PTSD

- At least 9 states allow PTSD as a qualifying condition
 - New Mexico (2009)
 - Connecticut
 - Delaware (when it manifests itself in severe physical suffering- DHHS website)
 - Nevada
 - Oregon (added 2013)
 - Maine (added 2013)
 - Arizona (added beginning 1/1/15)
 - Michigan (added 2015-only condition added since 2008)
 - Washington (added 2015)
- 2 state Boards have voted to add PTSD as qualifying condition
 - Illinois (but rejected by Commissioner)
 - New York
- Federal Government Proposed Senate VA amendment
- NIDA approved study to explore marijuana as treatment for PTSD
- Colorado: 2015 Board of Health rejected adding PTSD as qualifying condition for the 3rd time, citing lack of science in efficacy to treat

State Law Trends: Passage of Low THC/High CBD Laws

- States without comprehensive medical marijuana passing low THC/High CBD laws for children
- States with comprehensive medical marijuana laws amending laws to include CBD for children under 18 with severe epilepsy
 - Delaware (2015)
 - Illinois (2014): SB 2636

Low THC/High CBD Laws: What is CBD?

- CBD, or cannabidiol, is one of many cannabinoids found in marijuana
- Non-psychoactive
 - Does not act on CB1 receptors (pathways THC acts on): does not affect mind or behavior
- Common medical benefits
 - Anticonvulsant, anti-inflammatory, antipsychotic/ anxiolytic/anti-depressant, anti-cancer (combats tumor and cancer cells), anti-oxidant
 - NIDA Facts recognize benefits
- Epidiolex: CBD based liquid medication currently undergoing testing in U.S. clinical trials
 - FDA recently approved request to trial in children with 2 rare/severe forms of epilepsy (Dravet syndrome and Lennox-Gastaut syndrome)

THC vs. CBD

THC

- Psychoactive
- Increases anxiety, paranoia
- Sleep-inducing effects

CBD

- Non-psychoactive
- Reduces anxiety, paranoia
- Increases alertness
- Most commonly seen to treat epilepsy
- Current FDA approved clinical trial

Low THC/High CBD Laws: Overview

- All laws passed since 2014, in mostly southern states and most named after children
 - Movement started in 2013 after CNN aired Dr. Sanjay Gupta's documentary, *Weed*, containing stories of children with severe epilepsy and claimed "Charlotte's Web Oil" strain that is high in CBD and low in THC reduces intractable seizures
- Varying levels of permitted THC
 - Laws contain mandatory ratio of THC to CBD to limit psychoactive effect of THC but no consensus on ratio
 - Legislated usage/amount unusual for medical conditions
- Varying qualifying conditions
- CBD still illegal under federal law and not approved by FDA
- Gateway to more comprehensive medical marijuana laws?



States with Low THC/High CBD Only Laws

- Alabama (2014)
- Florida (2014)
- Iowa (2014)
- Kentucky (2014)
- Mississippi (2014)
- Missouri (2014)
- North Carolina (2014)
- South Carolina (2014)
- Tennessee (2014)
- Utah (2014)
- Wisconsin (2014)
- Georgia (2015)
- Oklahoma (2015)
- Texas (2015)
- Virginia (2015)
- Wyoming (2015)

CBD Laws: THC/CBD Levels

STATE (YEAR)	THC/CBD Levels Allowed
Alabama (2014)	≤ 3% THC
Florida (2014)	.8% or less THC and more than 10% CBD by weight
Georgia (2015)	≤ 5% THC and equal or greater amount of CBD
Iowa (2014)	≤ 3% THC
Kentucky (2014)	No definition
Mississippi (2014)	≤ .5% THC and more than 15% CBD
Missouri (2014)	≤ .3% THC by weight, at least 5% CBD by weight, and no other psychoactive substance
North Carolina (2014)	< .3% THC by weight, at least 10% CBD by weight, and no other psychoactive substance
Oklahoma (2015)	≤ .3% THC in liquid form
South Carolina (2014)	At least 98% CBD and not more than .90% THC by volume
Tennessee (2014)	≤ .9% THC
Texas (2015)	≤ .5% THC by weight and not less than 10% by weight CBD
Utah (2014)	< .3% THC by weight, at least 15% CBD by weight, and no other psychoactive substance
Virginia (2015)	At least 15% CBD but no more than 5% THC
Wisconsin (2013)	CBD must be in form without psychoactive effect; THC and CBD levels not defined
Wyoming (2015)	< .3% THC and at least 5% CBD by weight

Low THC/High CBD Laws: Delaware and Illinois

States with Comprehensive medical marijuana programs are amending laws to provide access to CBD oils to children under 18

- Delaware: Rylie's Law- SB 90 (2015)
 - Amended medical marijuana law to include intractable epilepsy and dystonia as qualifying conditions, added definition of CBD, and amended to provide access to CBD oil to children under 18
 - Previously, law only allowed for qualifying patients 21 +
 - Law now allows use of non-smoked cannabis oil at least 15% CBD and no more than **7% THC (highest of all)** for minors with intractable epilepsy or dystonia
- Illinois: SB 2636 (2014)
 - Amended law to allow children under 18 to be qualifying patients and added seizures to list of qualifying conditions

Medical Marijuana Trends: Federal Law- Is there a shift in Stance?

- 2013 DOJ Memo: Guidance on marijuana enforcement
 - DOJ will not intervene with state medical marijuana laws if states have legalized and implemented effective regulatory measures
- 2014: Medical Marijuana Protection Provision in Spending Bill
 - Prohibits DOJ/DEA from using funds or resources to prevent states from implementing their State laws that authorize medical marijuana
 - Defunds raids in states where medical marijuana legal
 - Previous amendments on issue were blocked on House floor for more than 10 years
 - Renewed by House vote on 6/3/15
- July 28, 2015: new leader of DEA Chuck Rosenberg: “heroin is probably more dangerous than marijuana;” agents not prioritizing enforcement

Medical Marijuana Trends: Federal Law- Is there a shift in Stance?

- **May 2015: First time a Senate committee voted in favor of pro-marijuana amendment offered in chamber**
 - Allows VA to recommend marijuana (now included in CARERS Act)
- **June 2015: DEA de-funding renewed by House for Second Time**
 - Also now includes CBD states
 - DEA budget cut by \$23 million
- **June 2015: Federal Budget plan on D.C. Recreational Initiative 71**
 - Federal budget would prohibit legal sales in DC until 2017 but did not roll back the Initiative
- **July 2015: First time Senate Panel voted in favor of recreational marijuana in banking**
 - Appropriations committee voted 16-14 on amendment to open access to federal banking system for marijuana businesses
 - Blocks use of any federal funds to enforce federal rules

Medical Marijuana Trends: Federal Law- Is there a shift in Stance?

- Feb 2015: Surgeon General
 - “We have some preliminary data showing that for certain medical conditions and symptoms, that marijuana can be helpful.”
- Publications by government citing studies with positive effects
 - NIDA: Recognizes Effectiveness in killing certain cancer cells
 - NIDA: Recognizes Effectiveness of CBD
 - Fact sheet: notes effectiveness of CBD in treating Alzheimers, inflammation and pain, seizures, mental disorders, and substance abuse
 - Research Report: Marijuana: “CBD does not have the rewarding properties of THC, and anecdotal reports indicate it may have promise for the treatment of seizure disorders, among other conditions.”
- The American Medical Association, The Institute of Medicine, the American College of Physicians, and others support re-scheduling to allow research

Medical Marijuana Trends: Federal Law- Is there a shift in Stance?

- Increased research
 - 2014 NIDA records: 28 active grants for research regarding medical benefits of marijuana
 - NIDA approved study to explore marijuana as treatment for PTSD- study will be 1st in US to use whole plant instead of extracted THC
- Increased growth of plants for federal research at Ole Miss
 - June 2014 DEA adjusted and increased 2014 aggregate production quota for marijuana from 21,000 grams to 650,000 grams to “provide for the estimated scientific, research, and industrial needs of the United States”
- June 2015: Eliminated additional requirement of Public Health Service review for non-federal research

Current Trends in Federal Law: 2015 Introduced Legislation

- CARERS ACT 2015
 - Re-classifies marijuana as schedule II drug
 - Excludes cannabidiol from definition of marijuana
 - Increases FDA approved research facilities that grow marijuana for research
 - Opens banking system to marijuana dispensaries
 - Allows VA health care providers to recommend medical marijuana in states with legal medical marijuana
 - Referred to Committees in House and Senate
- Veterans Equal Access Amendment
 - Authorizes Dep't of Veteran Affairs' health care providers to recommend medical marijuana to patients in states where medical marijuana is legal
 - Currently, VA medical providers are banned from giving recommendations/opinions to patients on participation in medical marijuana program in states with medical marijuana
 - *Passed Senate Appropriations Committee 18-12
- Therapeutic Hemp Medical Access Act
 - Exempts from Controlled Substances Act strains of hemp to fight seizures in children and adults suffering from intractable epilepsy; Contains less than .3% THC

Medical Marijuana

- Typically medicine is left to scientific and medical community, not politicians
- Medical marijuana has been the opposite because it is being left to legislatures and voters

Questions?



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