

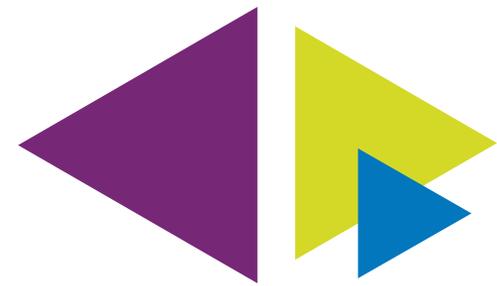


EMPLOYMENT LAW & COMPLIANCE CONFERENCE



March 28-30, 2022 | Washington, DC & Virtual





Has America Gone to Pot?

Recent Changes to State Marijuana Laws and the Impact on Workplace Policies and Practices

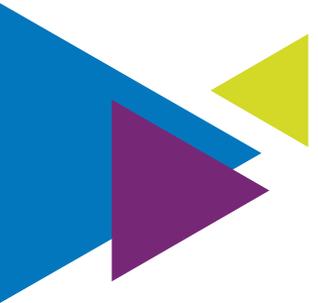
with

Attorney Jim Reidy

SHEEHAN PHINNEY

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March 30, 2022



With recent changes to laws in several states regarding marijuana, and the demand for skilled workers, many employers have revisited their drug and alcohol policies and testing procedures especially with regard to Cannabis.



Have Drug Laws Gone to Pot?

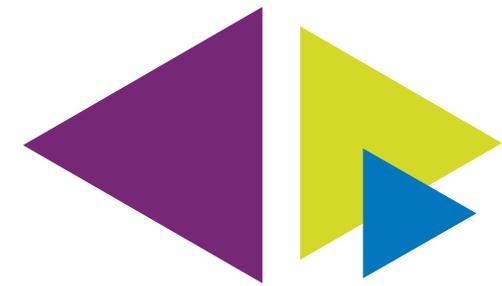
- **38 states (and the District of Columbia) have legalized marijuana possession and use in one form or another**
- **19 of those states (and the District of Columbia and Guam) have legalized recreational use of marijuana for adults over age 21**



Altered States?

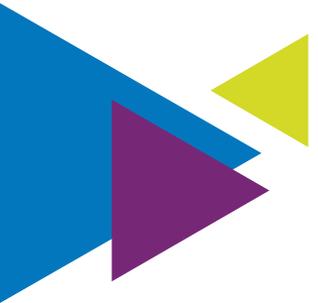
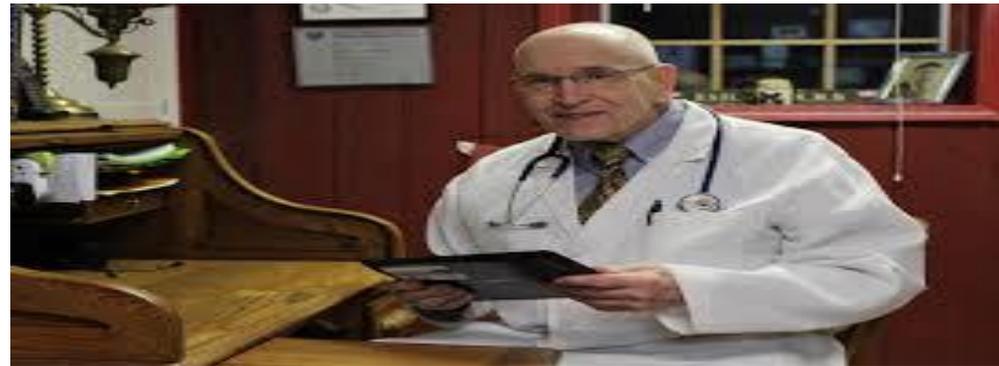
In the 2020 election voters passed recreational cannabis use laws in New Jersey, Arizona, Montana and South Dakota.



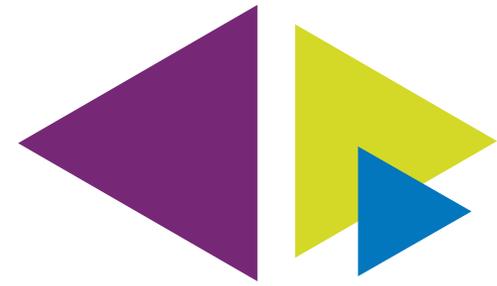


Altered States?

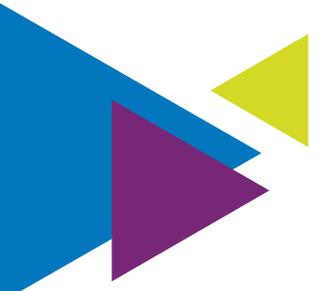
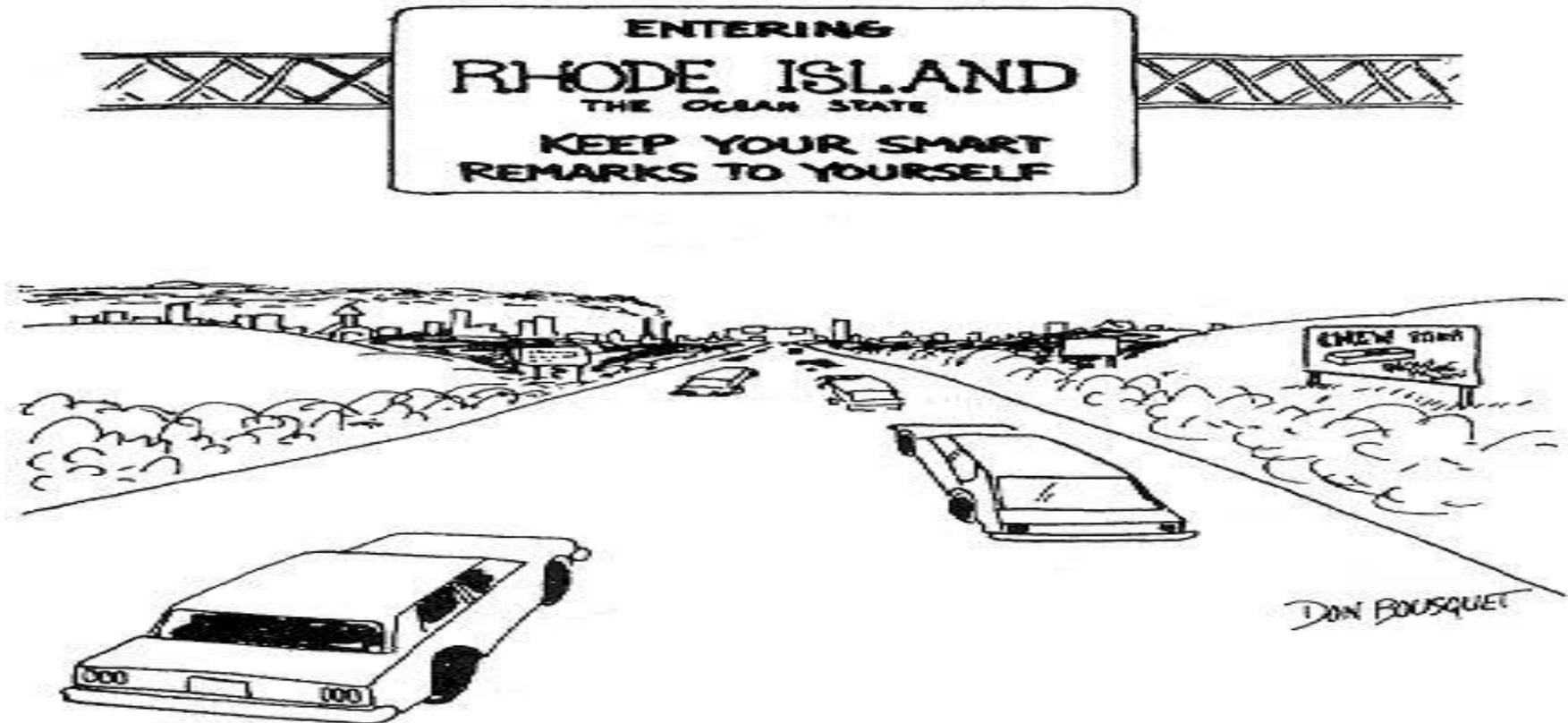
New Mexico, Virginia and Connecticut have also recently legalized adult use of cannabis. Alabama followed by authorizing medical marijuana use.



Altered States



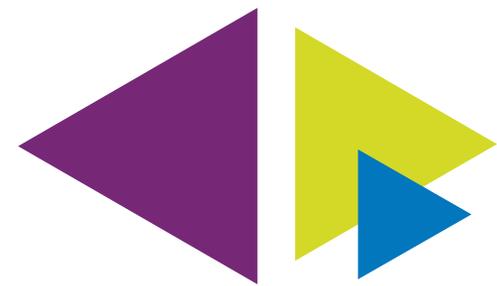
Even little Rhode Island could be next !



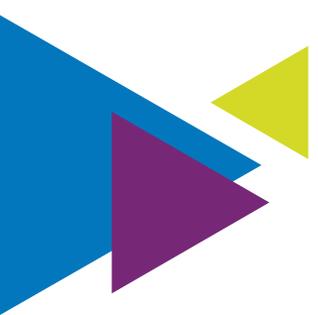
Altered States?

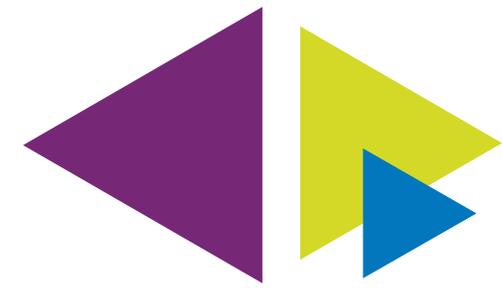
So now a clear majority of states have legalized cannabis use in one form or another.





**And now all of Canada has approved
legalized marijuana.**





**No, that isn't smoke from a
distant fire ...**



Some recent statistics

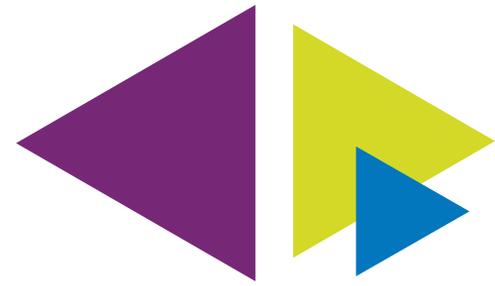
- **Marijuana production in the U.S. has increased tenfold over the last 25 years**
- **Next to alcohol, marijuana is the second most frequently found substance in drivers involved in fatal auto accidents**
- **Employees who test positive for marijuana have 55% more industrial accidents, 75% higher absenteeism and 85% more injuries than those who test negative**
- **1.2 million authorized users of medical marijuana in the U.S.**

Employer's Pot Dilemma

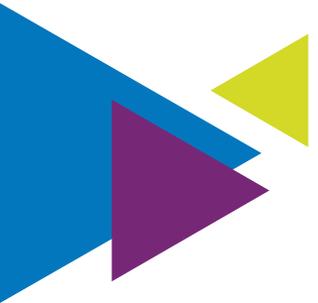
There is no doubt that the change in marijuana laws over the last 10 years has “clouded” issues for employers.



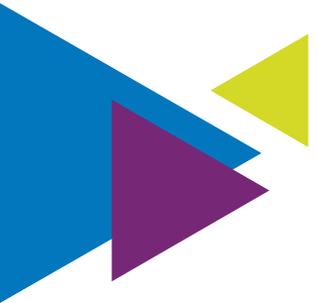
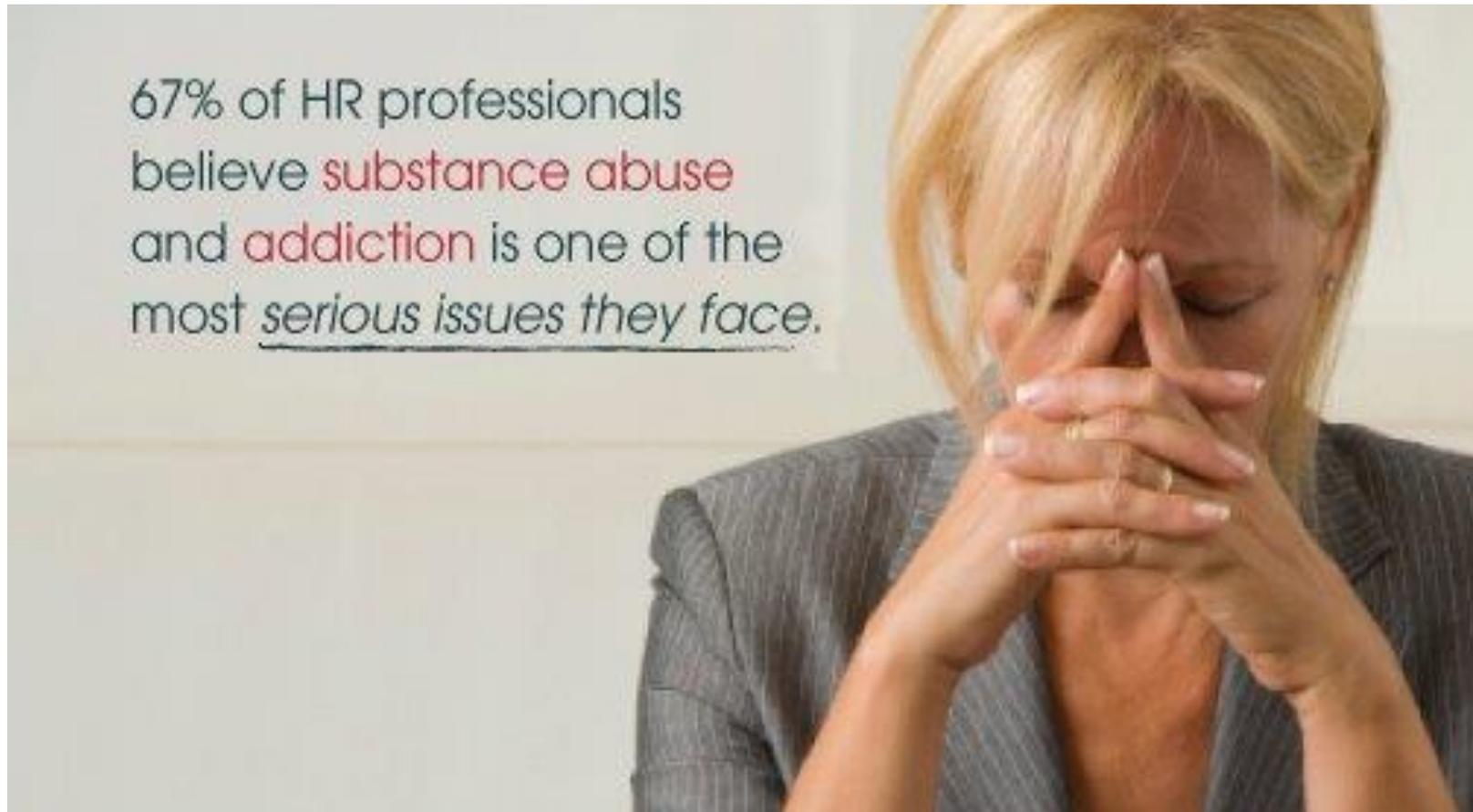
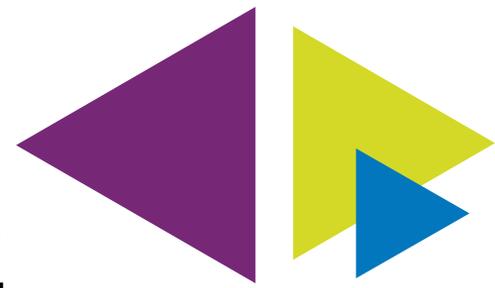
Employer's Pot Dilemma



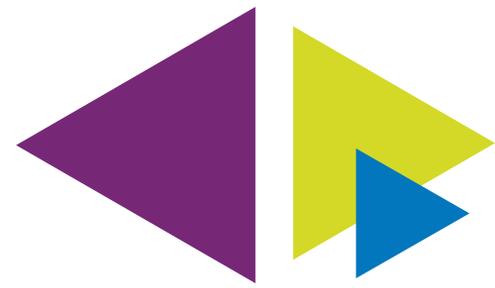
- Americans' view on marijuana has changed
- Medical marijuana use has increased significantly
- Many states have legalized recreational marijuana
- This is a very tight labor market with tough competition
- Testing only confirms prior consumption not impairment
- Some states limit how, when and why employers can test
- Often zero tolerance from the C Suite
- Workplace safety concerns



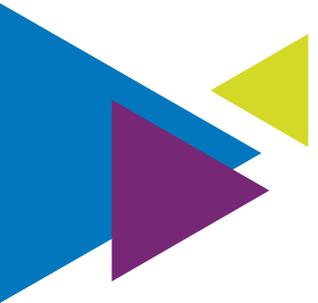
There's no way around it: HR has to dealing with this Issue



Employer's Pot Dilemma



- **Again, while marijuana is still illegal under federal law, 38 states have legalized use in one form or another.**
- **65% of Americans favor legalization of pot.**
- **The labor pool is thin and competition is stiff to fill vacant positions.**
- **More and more employers aren't testing applicants for marijuana.**
- **The problem remains when drug (or alcohol) use interferes with an employee's ability to safely and effectively perform his/her job.**



Marijuana: Potential for Impairment



Short Term

- High: when inhaled, THC quickly passes into bloodstream, effects felt within 30-60 minutes

Short-term effects:

- Altered senses (colors brighter)
- Altered sense of time
- Changes in mood
- Impaired motor skills
- Difficulty problem solving
- Lethargy

Long Term

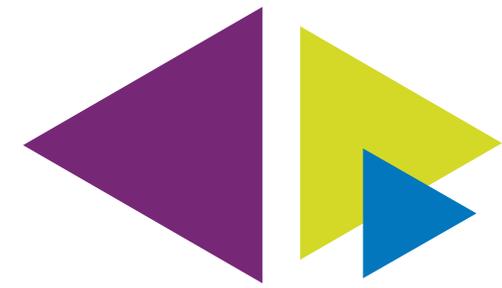
- 1 in 10 potentially addicted
- Reduced memory and attention for some
- Poorer cognitive and executive functions (especially if started as teen)
- Less gray matter in brain with most receptors

[No, this isn't from a 1980's "Just Say No" poster]



Marijuana: Potential for Impairment





Ok, HR professionals, let's test your knowledge in this area of the law.



Quiz #1

Generally, before you discipline an employee for suspected drug or alcohol use you should:

- A. Have evidence (e.g. empty bottles; Dorito crumbs; parked car on the lawn; Phish or Grateful Dead playing in cubicle)
- B. Have solid test results
- C. Alert your lawyers and check state law
- D. Have back up reasons (e.g. attendance, performance, etc.)



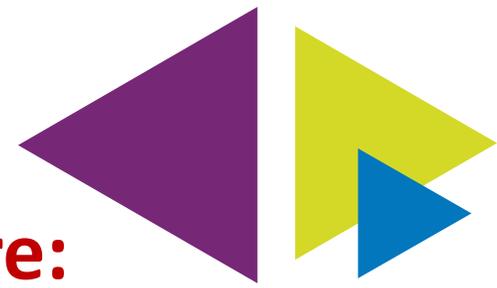
Quiz #2

Which industries/professions in the U.S. have the highest prevalence of illicit drug use?

- A. Medical/dental
- B. Professional sports
- C. Construction
- D. Food preparation
- E. Oil producers who set gas prices



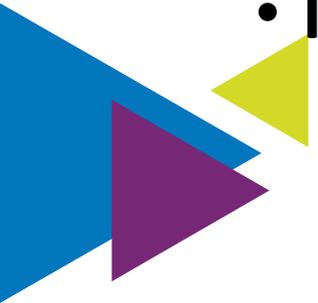
According to SAMHSA Study – Occupations with highest current drug use among full-time workers were:



- **Food preparation and serving (17.4 percent)**



- **Construction (15.1 percent)**
- **Arts, design, entertainment, sports, and media (12.4 percent)**
- **Sales (9.6 percent)**
- **Installation, maintenance, and repair (9.5 percent)**



Quiz #3

Which former U.S. President admitted to smoking marijuana?

- A. George W. Bush
- B. Barack Obama
- C. Bill Clinton
- D. All of the above

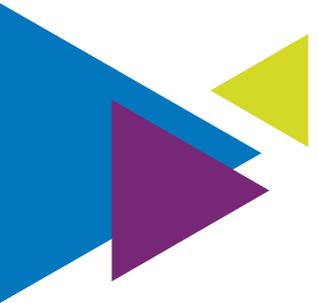
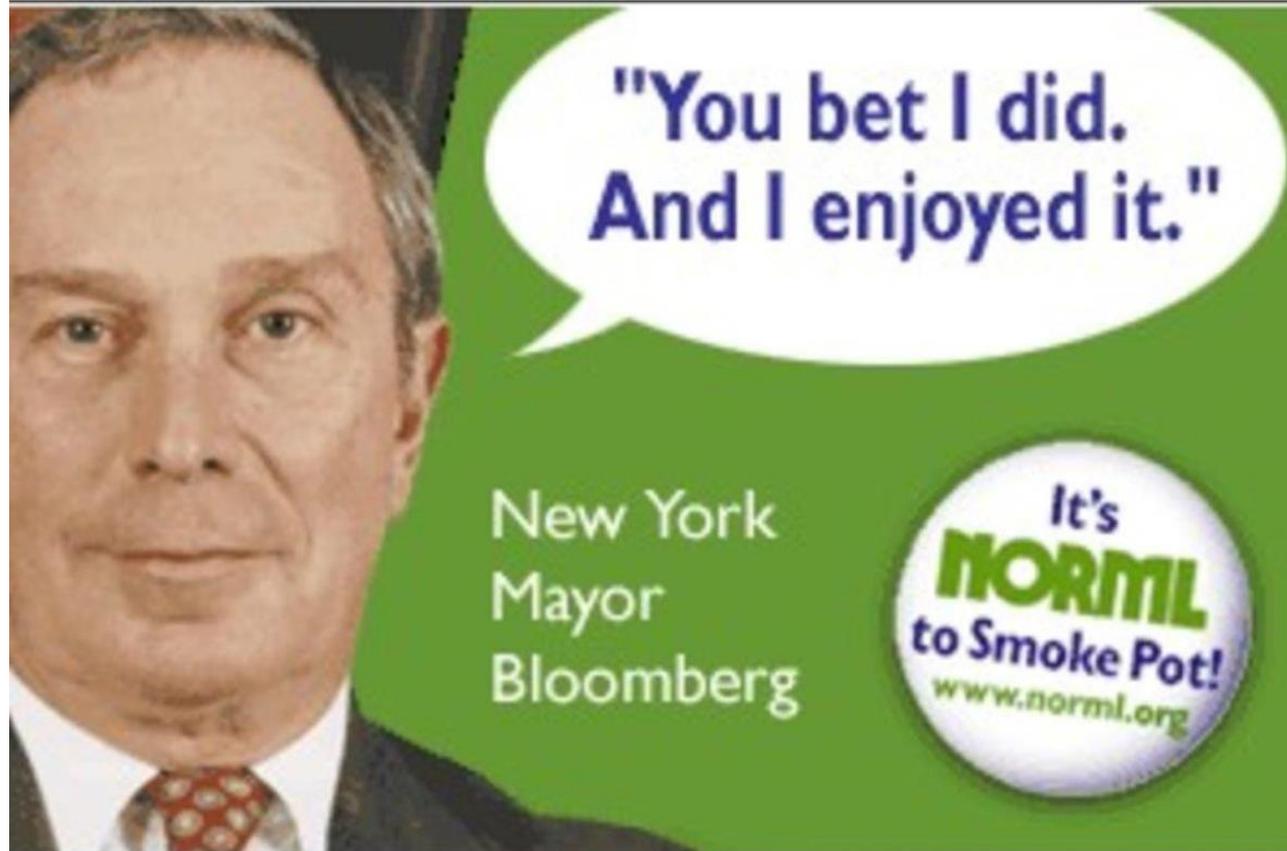
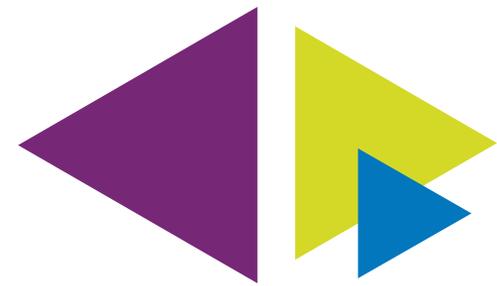


Quiz #4

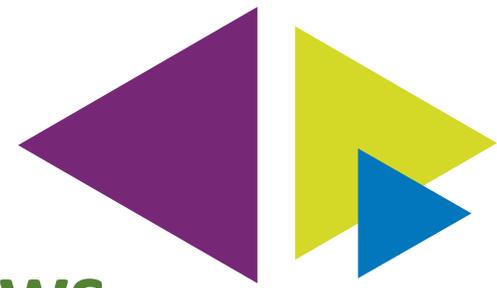
Which candidates for White House in 2020 advocated for federal legalization of marijuana?

- A. Bernie Sanders
- B. Kamala Harris
- C. Kirsten Gillibrand
- D. Cory Booker
- E. All of the above.





Legal Framework



There are no comprehensive federal laws governing drug testing in the private sector.

- **However, there are some federal laws that require drug and alcohol testing in safety-sensitive industries including:**
 - Transportation
 - Defense
- **And there are also many state and local laws dealing with workplace drug and alcohol tests.**

While federal law hasn't changed yet,
popular opinions on marijuana has changed
over the years.



While many states have legalized marijuana, employers in those and other states still have to deal with policies and testing options.



Quiz #5

What is the most common type of workplace drug/alcohol test?

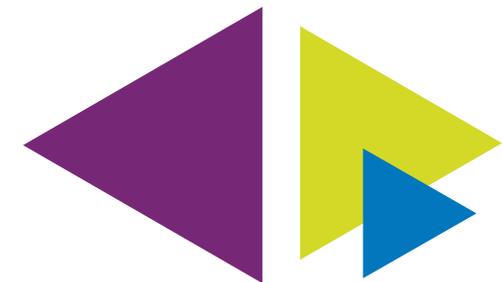
- A. Urine test
- B. Blood test
- C. Saliva and breath test
- D. Giggling or sleeping at work
- E. Closing eyes and walking a straight line



Quiz #6

When are workplace drug and alcohol tests most commonly administered?

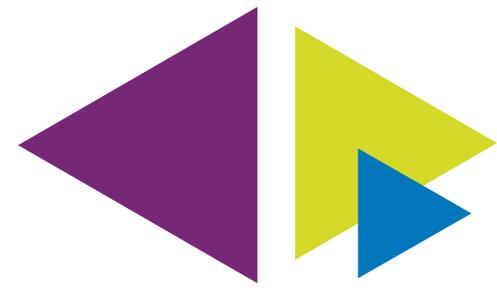
- A. Random testing
- B. Post-accident testing
- C. Pre-employment testing
- D. The day or two after a holiday party or company outing
- E. Reasonable suspicion testing



Advantages of Testing

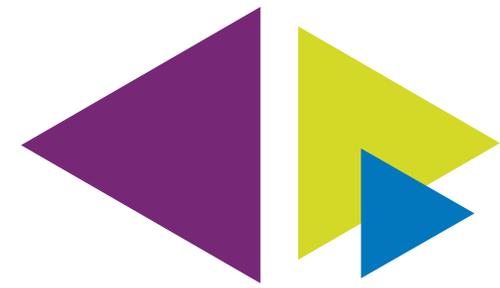
- **Improve productivity/attendance**
- **Maintain safe workplace/reduce workplace accidents**
- **Ensure safety of the public**
- **Minimize liability and reputational risk for employer**
- **Deterrence**





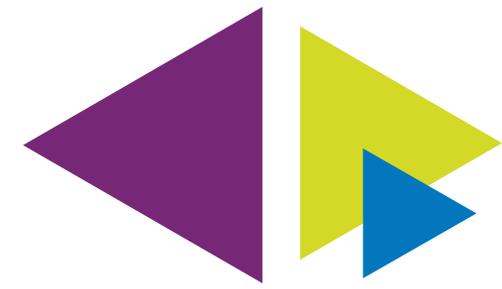
Advantages of Testing (continued)

- **Reducing health insurance costs**
- **Reducing shrinkage/theft**
- **Reducing potential workplace violence**
- **Identifying employees in need**



Risks/Disadvantages of Testing

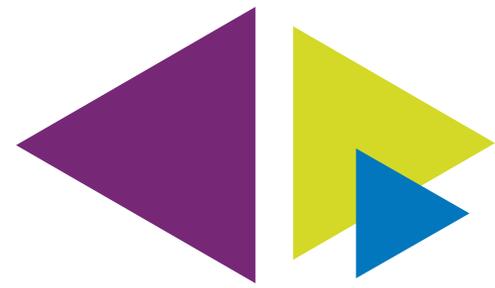
- **Privacy concerns (invasion of privacy)**
- **False negatives/false positives**
- **May not determine impairment or current drug use**
- **“Perceived as” disability claims**
- **Potential mis-steps under state law**
- **Adverse impact on recruitment and retention**



A recent survey shows that more and more employers are no longer testing for marijuana.



Legal Considerations for Employers



What laws might be implicated?

- ADA
- FMLA
- FLSA
- Mental Health Parity and Addiction Act
- Drug Free Workplace Act
- ACA
- State (disability discrimination) laws
- State laws permitting medical or recreational marijuana use

Quiz #7

How many states have drug/alcohol testing laws in one form or another?

- A. All 50 states in some form or another**
- B. 32**
- C. 44**
- D. Please tell me why my state isn't on the list**



Cannabis: New Workplace Realities



With the number of states that have now legalized medical and recreational marijuana, can employers still have a zero tolerance policy towards cannabis?

Yes _____

No _____

Depends _____



Zero Tolerance



- Depends on laws of each state and if federal law applies
- Can prohibit:
 - Cannabis use on the job
 - And on the job impairment

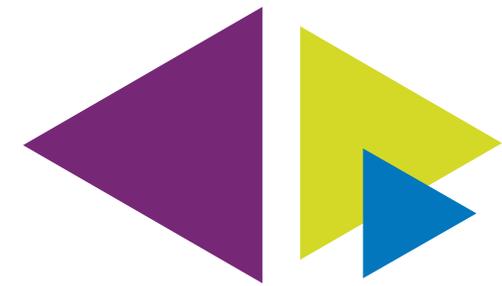


Don't Ask – Don't Tell ?



Some states prevent employers from firing an employee OR refusing to hire an employee simply because the employee tests positive for cannabis use





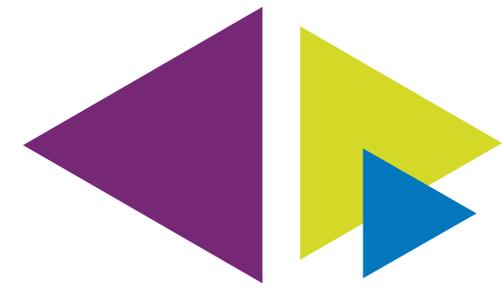
Quiz #8

Why are some employers reluctant to drug test?

- A. The expense and aggravation**
- B. Don't want to be uncool**
- C. Don't care if not a safety sensitive job**
- D. Complicated by state laws**
- E. Recruitment/impact on employee morale**

And what do you do about remote workers?

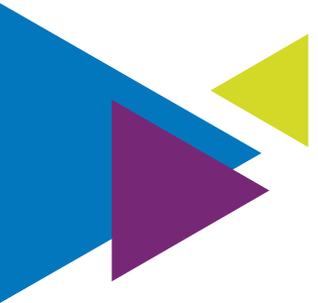




Quiz #9

True or False

Employees who have a Medical Marijuana Identification Card (MMID) must now be permitted to work with pot in their system.



Quiz #10

True or False

Pot use may be a reasonable accommodation under the ADA.



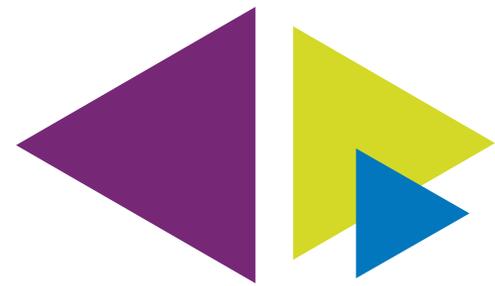
Quiz #11

True or False

Of the 38 states where medical marijuana is legal, how many prohibit employment discrimination against medical marijuana users?

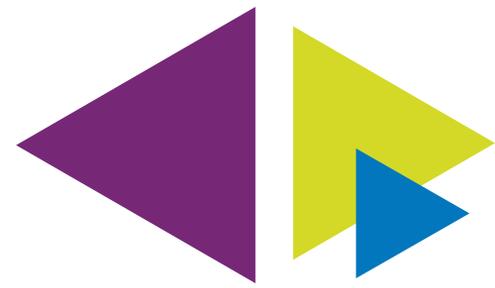
- A. All 38
- B. Only 15
- C. 25 but that number is increasing
- D. Wait, I thought we could do that because it's still illegal under federal law

Marijuana use as a reasonable accommodation?



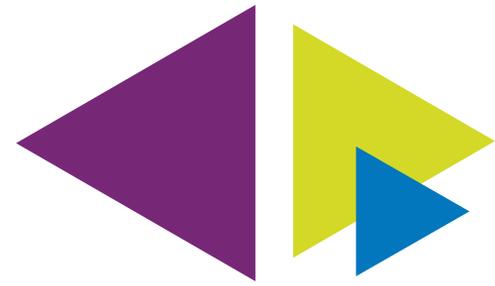
- Neither the ADA nor most state laws require employers to accommodate an employee who is under the influence of marijuana at work. **[But check your state]**
- Generally employers can terminate employees if marijuana is found in their system (even if they have a MMID). **[Again, check your state]**
- However, there are more legal challenges these days when the employee has a MMID

Marijuana use as a reasonable accommodation?



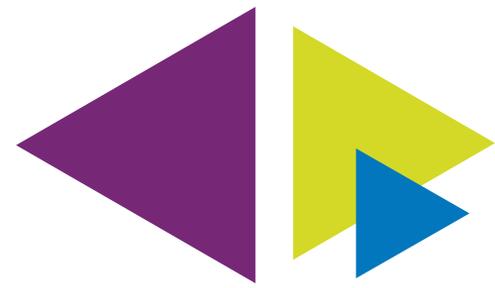
- Several courts have held that employers can uphold drug free workplace policies relying on federal law
- More recently courts have sided with employees (trend developing?)
- At least 25 states have passed laws that prohibit workplace discrimination against patients who use medical marijuana
- Several recent Workers Comp cases – allowing marijuana for the injured employee's treatment

Marijuana use as a reasonable accommodation?



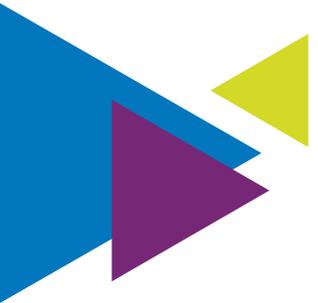
- While the ADA does not protect illegal drug use (and that includes marijuana) many states have disability discrimination laws and they don't mention medical marijuana
- That means “zero tolerance” policies are getting more difficult to enforce (except in safety sensitive positions)
- Multi-state employers need to check to be sure their policies comply with each state's laws
- For now you can still prohibit possession, use and being under the influence of marijuana at work

How should a multi-state employer approach a unified cannabis policy?

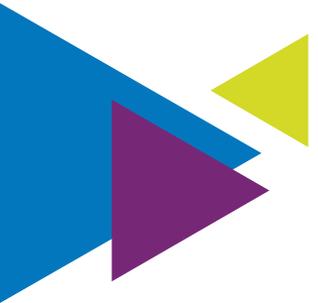
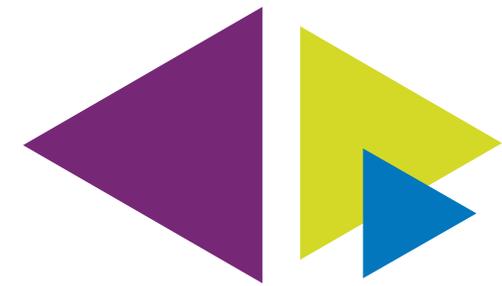


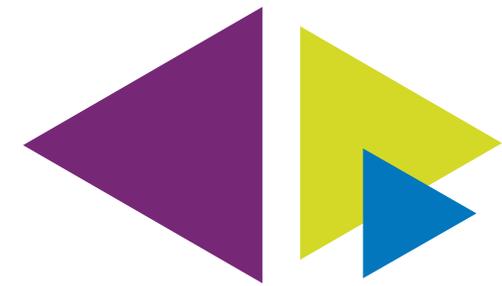
Two Options:

1. **Develop state-specific policies (but must be monitored for changes and must train managers) OR**
2. **Adopt single, uniform but looser company-wide policy that protects safety and quality (and doesn't run afoul of applicable laws)**



What about CBD?





Quiz #12

True or False

- **CBD oil from cannabis is not psychoactive like THC**
- **CBD is an increasingly popular treatment for pain relief**
- **CBD can also treat anxiety and depression**
- **CBD is everywhere and business is booming**

Quiz #13

True or False

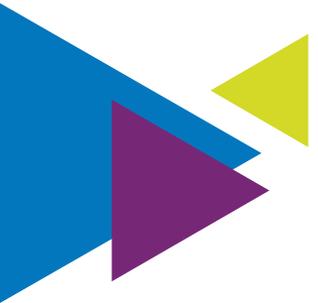
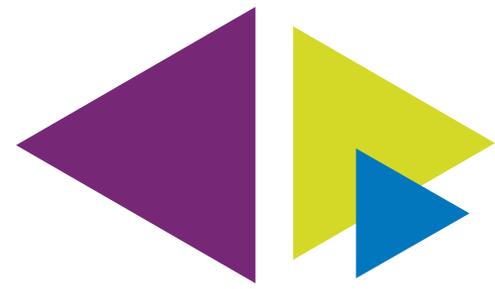
CBD could show up in a drug test.

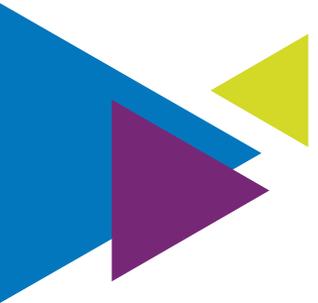
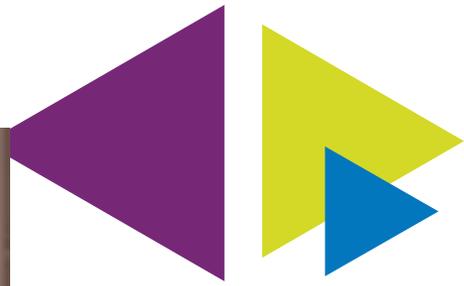


Quiz #14

True or False

During COVID-19 marijuana use actually declined across the U.S.

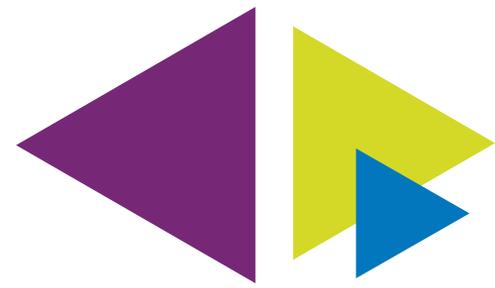






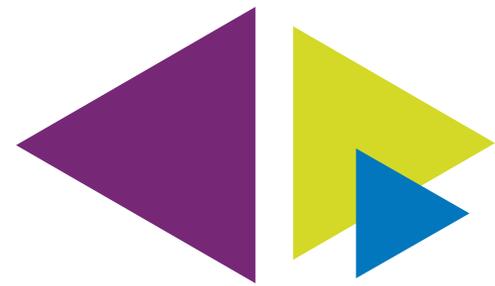
Other than complying with applicable laws, what should employers consider when creating or updating workplace policies around cannabis use?





New Approach to Pot Policies and Procedures:

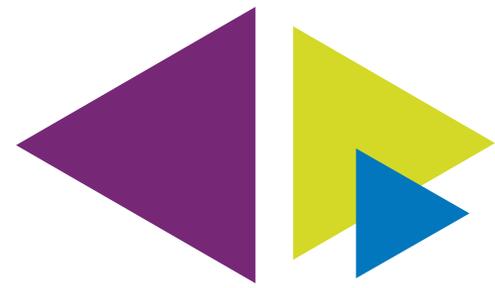
- **Comply with applicable laws**
- **What policies make most sense in terms of recruitment and retention**
- **Safety sensitive positions special treatment**
- **Focus on production and quality**



New Approach to Pot Policies and Procedures:

- **Decide whether testing is a requirement or option**
- **Decide when testing will be administered and who will administer the test**
- **Decide consequences for failed tests or other violations of policy**

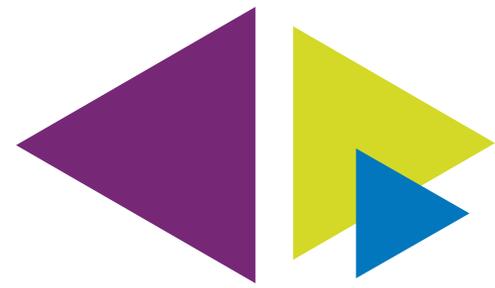
Back to Policy Basics Even in a Cannabis Culture



Adopt Drug and Alcohol Policy That, at a Minimum:

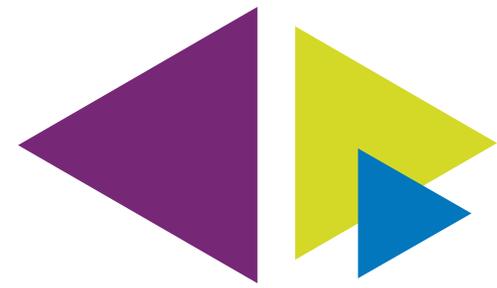
- Prohibits sale, use, distribution, manufacture, or possession of alcohol, drugs, prescription drugs, and paraphernalia
- Forbids employees from reporting to work under the influence
- Reserves the right to conduct searches of work space upon reasonable suspicion

Back to Policy Basics Even in a Cannabis Culture



- **Outlines drug/alcohol testing procedures (as applicable)**
- **Describes consequences of positive alcohol/drug test**
- **If there is testing, notify employees that they have the right to refuse testing and make clear consequences for refusal**
- **Requires employees who are taking prescription medications that may affect performance to notify employer at start of employment or during employment if that changes**

Back to Policy Basics Even in a Cannabis Culture



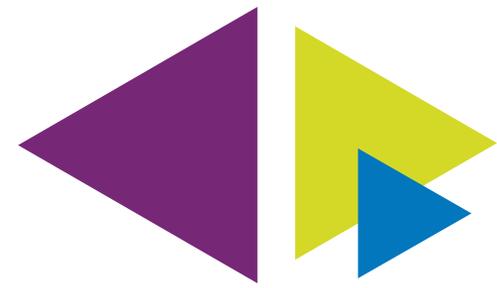
- **Employees acknowledge drug/alcohol testing and participation in program (as applicable) is condition of continued employment**
- **Get employee's written consent to test**
- **Ensure *Chain of Custody* procedures for test samples**
- **Maintain confidentiality of test results and related medical records**

Back to Policy Basics Even in a Cannabis Culture

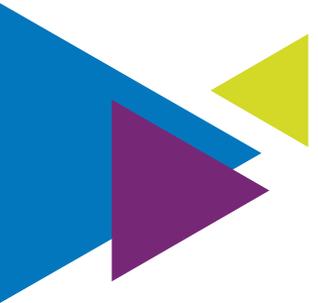


- Select vendor(s) for testing/decide whether to use Medical Review Officer (“MRO”)
- Better employee education on dangers of drug use and resources available
- Train supervisors on spotting signs of drug or alcohol use/abuse [*“If you see/hear something – say something!”*]
- Consider benefits of Employee Assistance Program (EAP) in discipline/fitness for duty process/employee rehabilitation

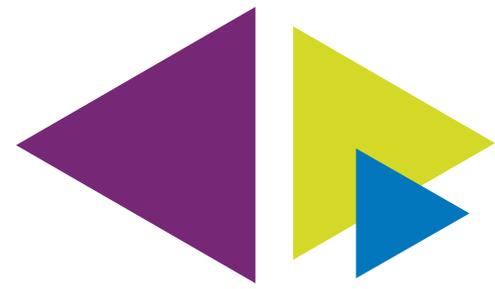
So, to test or not to test?



- Under most drug test programs a positive drug test will not indicate impairment or even if the marijuana use happened on or off of work premises
- In fact, a positive test for marijuana only confirms use – sometimes as far back as 90 days

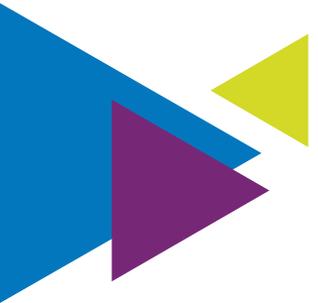


So, to test or not to test? (continued)



When employers are developing or revising testing policies that include marijuana they should consider:

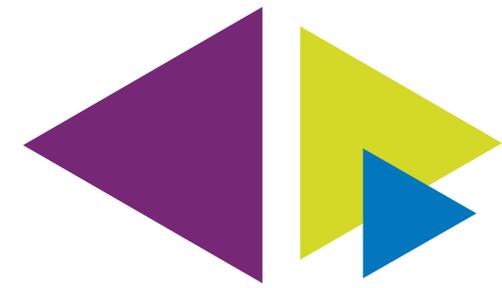
- **How much of a safety concern is this in the workplace or certain positions?**
- **If medical marijuana is legal how are MMID holders treated?**
- **If recreational use is legal does zero tolerance make sense?**
- **Does your state protect off duty conduct?**



Remember, if your policy is clear and the employee still violates the policy, you still can discipline/terminate the employee



(unless state law or your policies state otherwise)



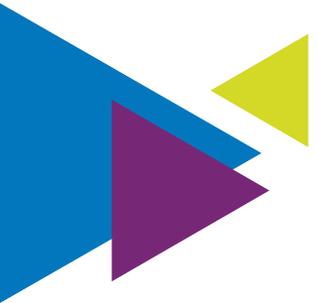
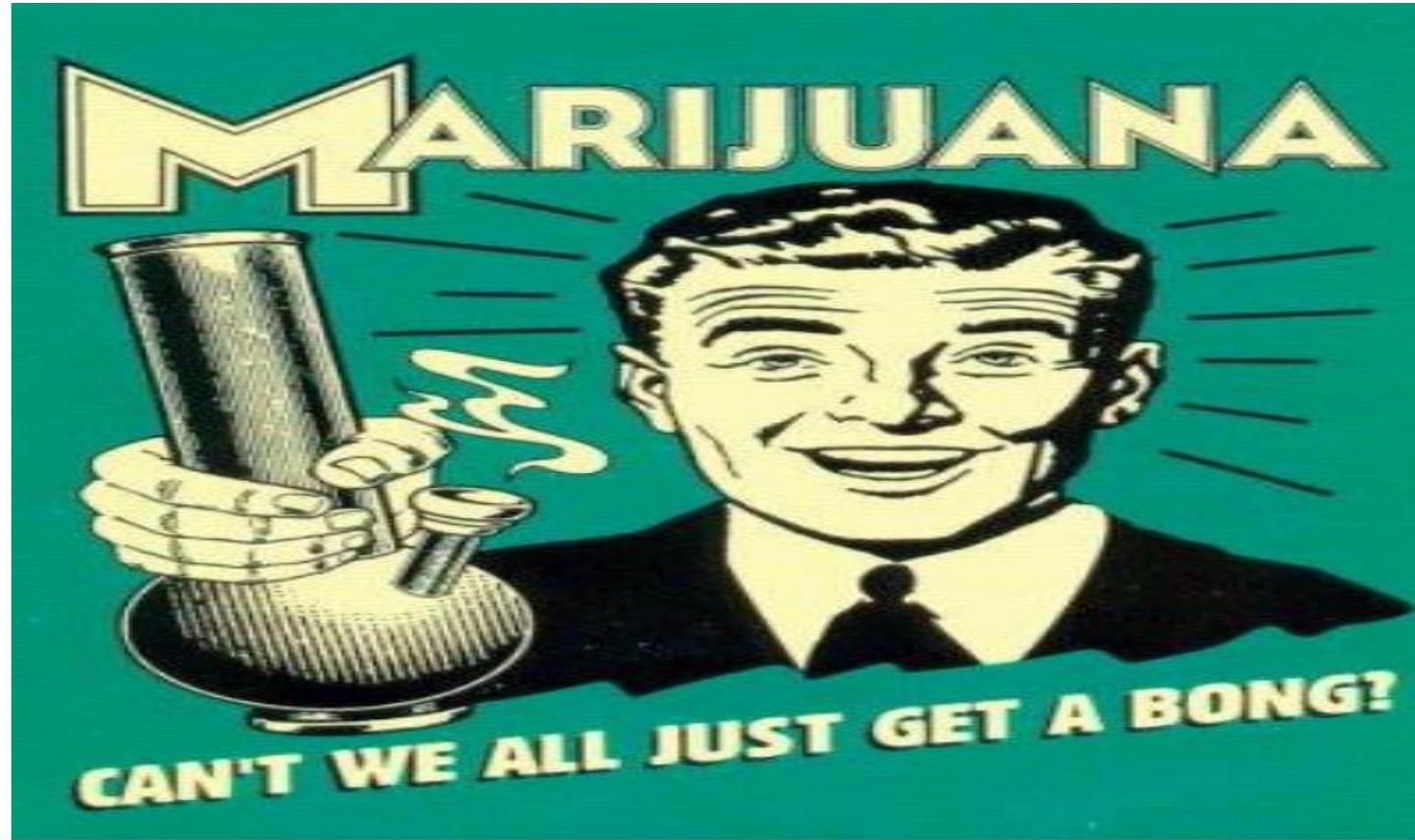
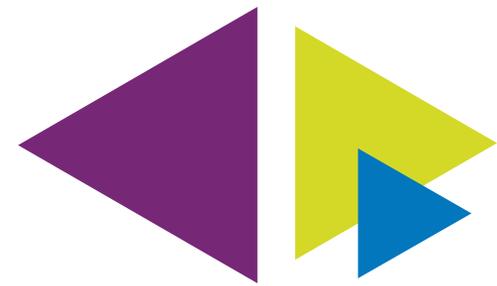
So what are employers going to do now?

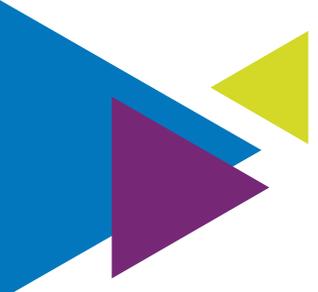
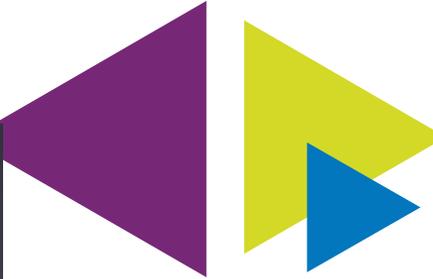


Quiz #15

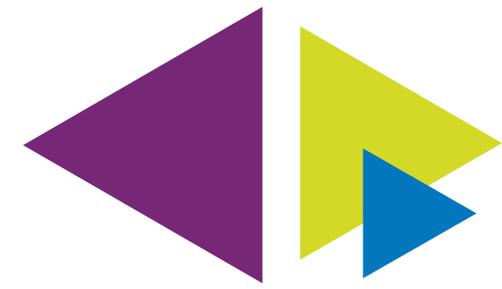
Given labor shortages and the liberalization of marijuana laws, many employers are now:

- A. Not pre-screening applicants
- B. Not doing post-accident testing
- C. Only doing reasonable suspicion testing
- D. Automating as much as possible
- E. “If you can’t fight em’, join em’!





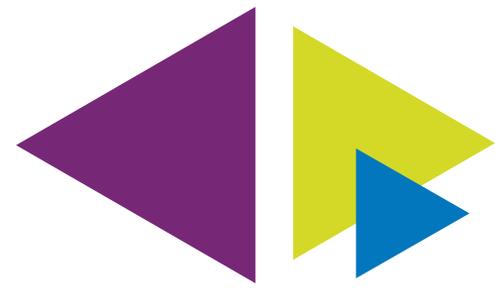
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Quiz #16

Employers who want to search to detect illegal drugs on their premises should:

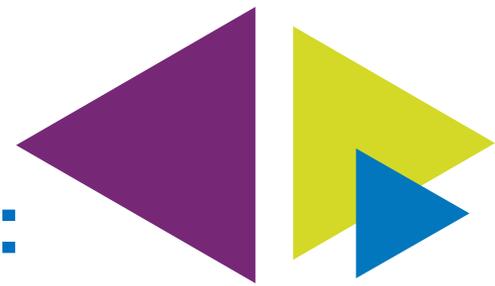
- A. Get a warrant**
- B. Have a policy putting all employees on notice first**
- C. Consult with legal counsel and conduct only proper searches**
- D. Assume once they announce a new policy the guilty employees will soon leave the company (voluntarily or involuntarily)**



Drug Testing in the Era of Recreational Marijuana

**Three keys to success in 2022
(and hopefully beyond)**

Three keys to success in 2022 (and beyond):



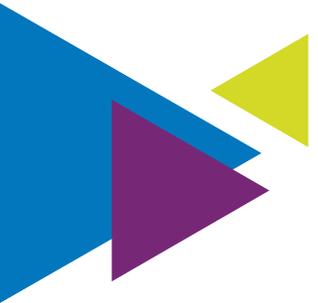
If you have more than one location, check the state laws on drug testing and be sure you are in compliance



Update your policy and testing procedures in keeping with law and changes in company culture

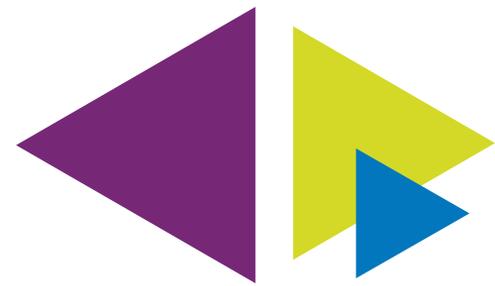


Be consistent in your drug / alcohol policy testing, enforcement and discipline



Recommendations in this Brave New World

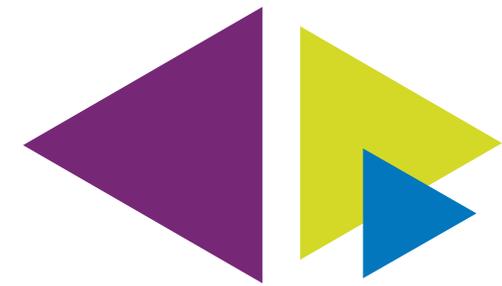
- **If pot is legal start thinking of it like alcohol – and enforce consistently under your policy**
- **Consider reasonable accommodations for MMID holders assuming they are disabled**
- **Test only applicants in safety sensitive positions**
- **Focus on prohibiting possession and being under the influence at work (including MMID holders)**
- **Testing should be based on reasonable suspicion, including post-accident**



Conclusion

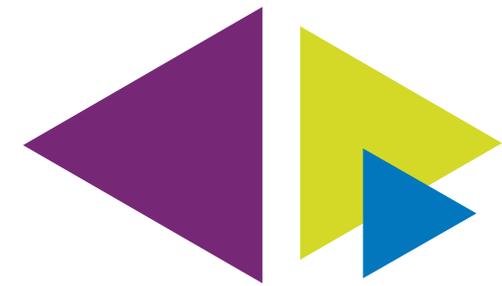
So, What Should We Do Now?

- **Take a fresh look at your alcohol and drug policies**
- **Don't just take something off of the Internet!**
- **Consult with legal counsel**
- **Consider the pros and cons for marijuana use**



So, What Should We Do Now? (continued)

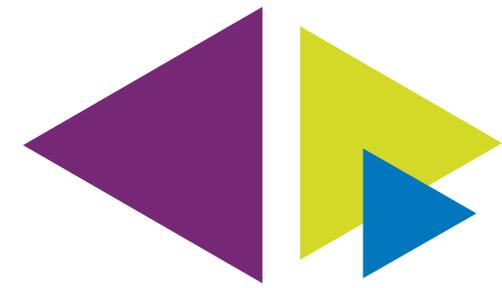
- If you are required or elect to test, carefully implement and administer testing. (*Use a certified testing facility!*)
- Be consistent when disciplining employees
- Comply with all applicable federal and state laws
- Work with your workers comp provider regarding the use of pain medication for injured and returning workers
- Don't be afraid to act
- **Be careful out there!**



Final Quiz Question

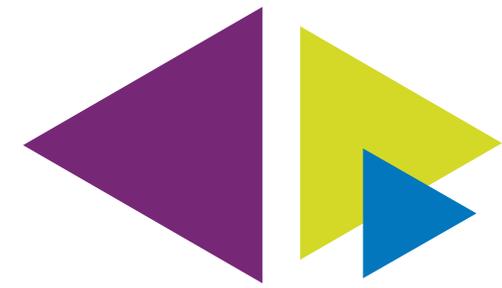
Based upon the information in this presentation, you are more inclined to:

- A. Revisit your drug/alcohol policy especially with regard to cannabis
- B. Revisit your testing procedures regarding cannabis
- C. Reconsider locating any new facilities in a state where pot is legal
- D. Prohibit all homemade brownies at company functions
- E. All of the above



**This is a serious issue and an ever
changing area of the law**

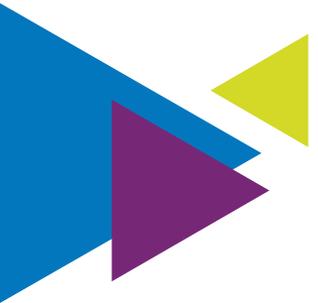
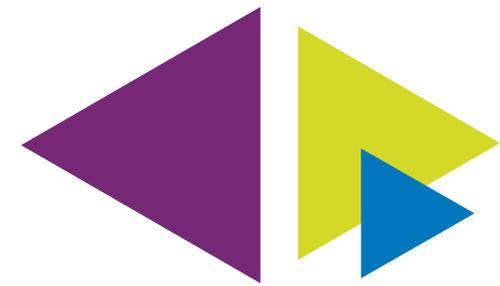


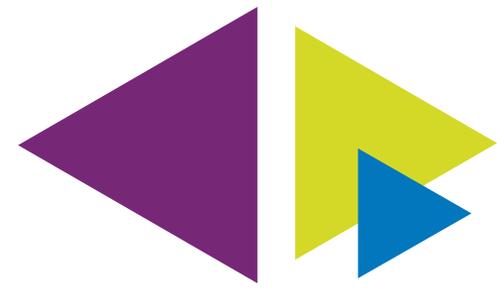


And many of the old approaches to cannabis simply don't apply to the modern workforce

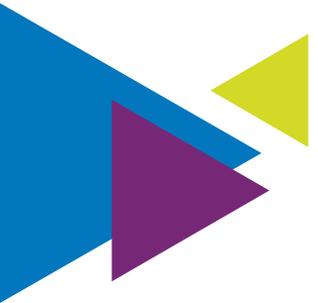


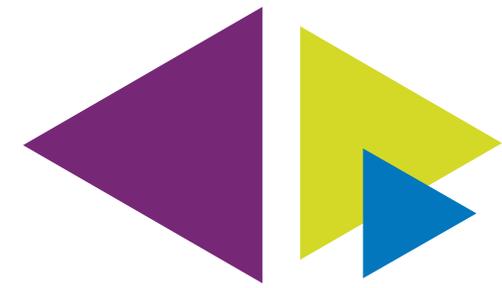
Stay Tuned!





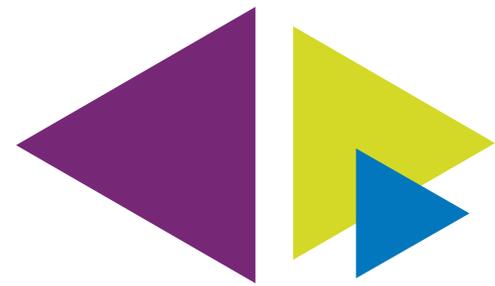
Questions?





THUNDERING APPLAUSE





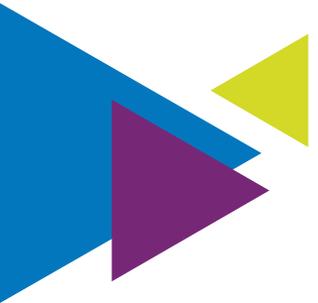
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