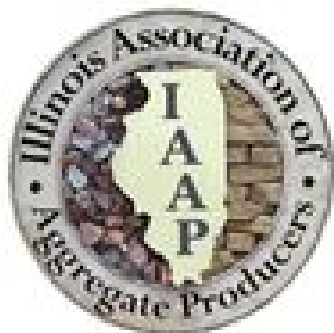


Marijuana In The Workplace

What Employers Need to Know

William J. Judge, JD, LL.M.

March 2020



Building
Illinois'
Future



DSCI

**DRUG SCREENING
COMPLIANCE INSTITUTE**

Why Are We Here?

§382.603 Training for supervisors.

Each employer shall ensure that all persons designated to supervise drivers receive at least 60 minutes of training on alcohol misuse and receive at least an additional 60 minutes of training on controlled substances use. The training will be used by the supervisors to determine whether reasonable suspicion exists to require a driver to undergo testing under §382.307. The training shall include the physical, behavioral, speech, and performance indicators of probable alcohol misuse and use of controlled substances.

Marijuana and Employment Practices



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An Overview

- 45 million workplace drug tests each year;
- 8 million federally regulated
- Positive rate hit 14 year high (4.5%)
- Positive rate up nearly 5% between 2017 and 2018
- Marijuana positive rates (2017 – 2018)
 - General workforce increased up nearly 8%
 - Federal up nearly 5%





Federal Position



**Marijuana is still illegal
Schedule I Drug**

1. Congress: Budget Limits on DOJ/DEA action
2. Department of Transportation (DOT)
5. Federal Contractors must follow federal law



MRO
will NOT
verify as negative

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Personal Use of Marijuana

DOT OFFICE OF DRUG AND ALCOHOL POLICY AND COMPLIANCE NOTICE



Recently, some states passed initiatives to permit use of marijuana for so-called "recreational" purposes.

We have had several inquiries about whether these state initiatives will have an impact upon the Department of Transportation's longstanding regulation about the use of marijuana by safety-sensitive transportation employees – pilots, school bus drivers, truck drivers, train engineers, subway operators, aircraft maintenance personnel, transit fire-armed security personnel, ship captains, and pipeline emergency response personnel, among others.

We want to make it perfectly clear that the state initiatives will have no bearing on the Department of Transportation's regulated drug testing program. The Department of Transportation's Drug and Alcohol Testing Regulation – 49 CFR Part 40 – does not authorize the use of Schedule I drugs, including marijuana, for any reason.

Therefore, Medical Review Officers (MROs) will not verify a drug test as negative based upon learning that the employee used "recreational marijuana" when states have passed "recreational marijuana" initiatives.

We also firmly reiterate that an MRO will not verify a drug test negative based upon information that a physician recommended that the employee use "medical marijuana" when states have passed "medical marijuana" initiatives.

It is important to 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.

We want to assure the traveling public that our transportation system is the safest it can possibly be.

Jim L. Swart
Director
Office of the Secretary of Transportation
Office of Drug and Alcohol Policy and Compliance
Department of Transportation
December 3, 2012

Medical Marijuana

DOT OFFICE OF DRUG AND ALCOHOL POLICY AND COMPLIANCE NOTICE



Recently, the Department of Justice (DOJ) issued guidelines for Federal prosecutors in states that have enacted laws authorizing the use of "medical marijuana."
<http://www.justice.gov/opa/documents/medical-marijuana.pdf>

We have had several inquiries about whether the DOJ advice to Federal prosecutors regarding pursuing criminal cases will have an impact upon the Department of Transportation's longstanding regulation about the use of marijuana by safety-sensitive transportation employees – pilots, school bus drivers, truck drivers, train engineers, subway operators, aircraft maintenance personnel, transit fire-armed security personnel, ship captains, and pipeline emergency response personnel, among others.

We want to make it perfectly clear that the DOJ guidelines will have no bearing on the Department of Transportation's regulated drug testing program. We will not change our regulated drug testing program based upon these guidelines to Federal prosecutors.

The Department of Transportation's Drug and Alcohol Testing Regulation – 49 CFR Part 40, at 40.151(e) – does not authorize "medical marijuana" under a state law to be a valid medical explanation for a transportation employee's positive drug test result.

That section states:

§ 40.151 What are MROs prohibited from doing as part of the verification process?

As an MRO, you are prohibited from doing the following as part of the verification process:

(e) You must not verify a test negative based on information that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act. (e.g., under a state law that purports to authorize such recommendations, such as the "medical marijuana" laws that some states have adopted.)

Therefore, Medical Review Officers will not verify a drug test as negative based upon information that a physician recommended that the employee use "medical marijuana." 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.

We want to assure the traveling public that our transportation system is the safest it can possibly be.

Jim L. Swart

Cannabidiol (CBD)

- Any product, including “Cannabidiol” (CBD) products, with a concentration of **more than 0.3% THC** remains classified as marijuana, a Schedule I drug under the Controlled Substances Act
- The FDA has stated: “It is currently illegal to market CBD by adding it to a food or labeling it as a dietary supplement.” * * * Also, the FDA has issued several warning letters to companies because their products contained more CBD than indicated on the product label.

DOT OFFICE OF DRUG AND ALCOHOL POLICY AND COMPLIANCE NOTICE



The Agricultural Improvement Act of 2018, Pub. L. 115-334, (Farm Bill) removed hemp from the definition of marijuana under the Controlled Substances Act. Under the Farm Bill, hemp-derived products containing a concentration of up to 0.3% tetrahydrocannabinol (THC) are not controlled substances. THC is the primary psychoactive component of marijuana. Any product, including “Cannabidiol” (CBD) products, with a concentration of more than 0.3% THC remains classified as marijuana, a Schedule I drug under the Controlled Substances Act.

We have had inquiries about whether the Department of Transportation-regulated safety-sensitive employees can use CBD products. Safety-sensitive employees who are subject to drug testing specified under 49 CFR part 40 (Part 40) include: pilots, school bus drivers, truck drivers, train engineers, transit vehicle operators, aircraft maintenance personnel, fire-armed transit security personnel, ship captains, and pipeline emergency response personnel, among others.

It is important for all employers and safety-sensitive employees to know:

1. The Department of Transportation requires testing for marijuana and not CBD.
2. The labeling of many CBD products may be misleading because the products could contain higher levels of THC than what the product label states. The Food and Drug Administration (FDA) does not currently certify the levels of THC in CBD products, so there is no Federal oversight to ensure that the labels are accurate. The FDA has cautioned the public that: “Consumers should beware purchasing and using any [CBD] products.” The FDA has stated: “It is currently illegal to market CBD by adding it to a food or labeling it as a dietary supplement.”* Also, the FDA has issued several warning letters to companies because their products contained more CBD than indicated on the product label.*
3. The Department of Transportation’s Drug and Alcohol Testing Regulation, Part 40, does not authorize the use of Schedule I drugs, including marijuana, for any reason. Furthermore, CBD use is not a legitimate medical explanation for a laboratory-confirmed marijuana positive result. Therefore, Medical Review Officers will verify a drug test confirmed at the appropriate cutoffs as positive, even if an employee claims they only used a CBD product.

It remains unacceptable for any safety-sensitive employee subject to the Department of Transportation’s drug testing regulations to use marijuana. Since the use of CBD products could lead to a positive drug test result, Department of Transportation-regulated safety-sensitive employees should exercise caution when considering whether to use CBD products.



Burning Questions



1. Will CBD cause a positive drug test?
2. Is there a test for marijuana that reveals impairment?

CBD

Will CBD Get You High?

Yes . . . If you buy from an unauthorized source.
Why?

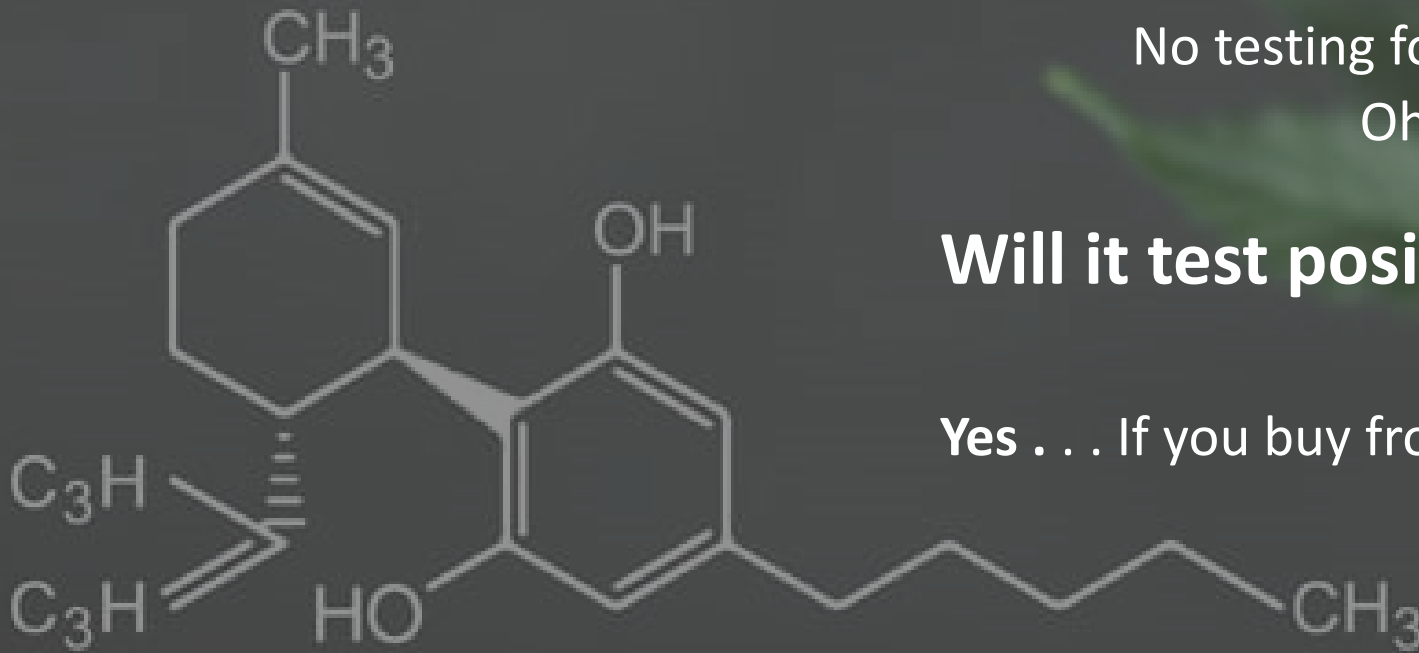
No control over its production

No testing for THC levels

Oh . . . And it's ILLEGAL!

Will it test positive?

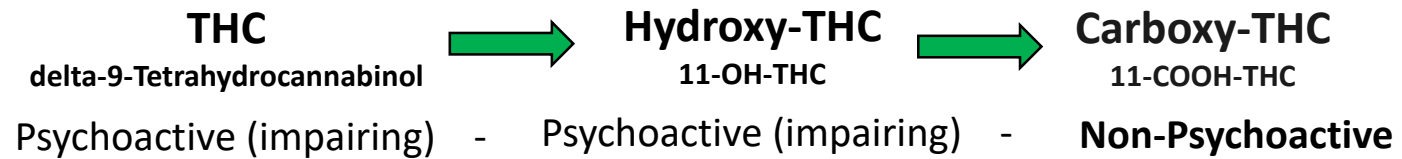
Yes . . . If you buy from an unauthorized source.



?

DSCI

Break It Down



No Longer Detectable	
THC	6 – 12 hrs.
Hydroxy-THC	6 – 12 hrs.
Carboxy-THC	a few days to weeks

Drug Test Detection Times

		SALIVA		URINE		HAIR	
		Appears Within	Disappears After	Appears Within	Disappears After	Appears Within	Test Cutoff*
Amphetamine	AMP	5-10 min	1-3 days	2-5 hours	1-4 days	5-7 days	90 days
Methamphetamine	mAMP	5-10 min	1-3 days	2-5 hours	3-5 days	5-7 days	90 days
Cocaine	COC	5-10 min	1-3 days	2-5 hours	1-3 days	5-7 days	90 days
Opiates	OPI	5-10 min	1-2 days	2-5 hours	2-4 days	5-7 days	90 days
Marijuana	THC	5-10 min	6-24 hours	2-5 hours	3-30 days	5-7 days	90 days
Phencyclidine	PCP	-	-	2-5 hours	7-14 days	5-7 days	90 days
Oxycodone	OXY	5-10 min	1-2 days	2-5 hours	2-4 days	5-7 days	90 days
Ecstasy	MDMA	-	-	2-5 hours	1-3 days	5-7 days	90 days
Benzodiazepines	BZO	5-10 min	1-3 days	2-5 hours	3-7 days	5-7 days	90 days
Buprenorphine	BUP	5-10 min	1-3 days	2-5 hours	1-3 days	5-7 days	90 days
Barbiturates	BAR	-	-	2-5 hours	4-7 days	5-7 days	90 days
Methadone	MTD	5-10 min	1-3 days	2-5 hours	3-5 days	5-7 days	90 days
Fentanyl	FTY	-	-	1-4 hours	1-3 days	5-7 days	90 days
Tramadol	TRA	-	-	8-12 hours	3-7 days	5-7 days	90 days

Detection times will vary based on a number of factors including frequency of use, route of administration, body mass, and age.

Information on urine and saliva detection times provided by Alere Technologies.

Information on hair detection times for the consumer market provided by Confirm Biosciences.

*Hair Test Cutoff - 90 days is the standard cutoff with hair from the head in the consumer market and for many businesses employing hair drug testing as a testing method. However, drugs do remain in the hair beyond 90 days and hair analysis can go back beyond even a year in workplace and legal situations. It should also be noted that hair from the body has a different detection period than hair from the head. Body hair grows more slowly so drugs will not appear in the hair as quickly. An inch and a half of body hair generally represents a period of 6 months to a year.

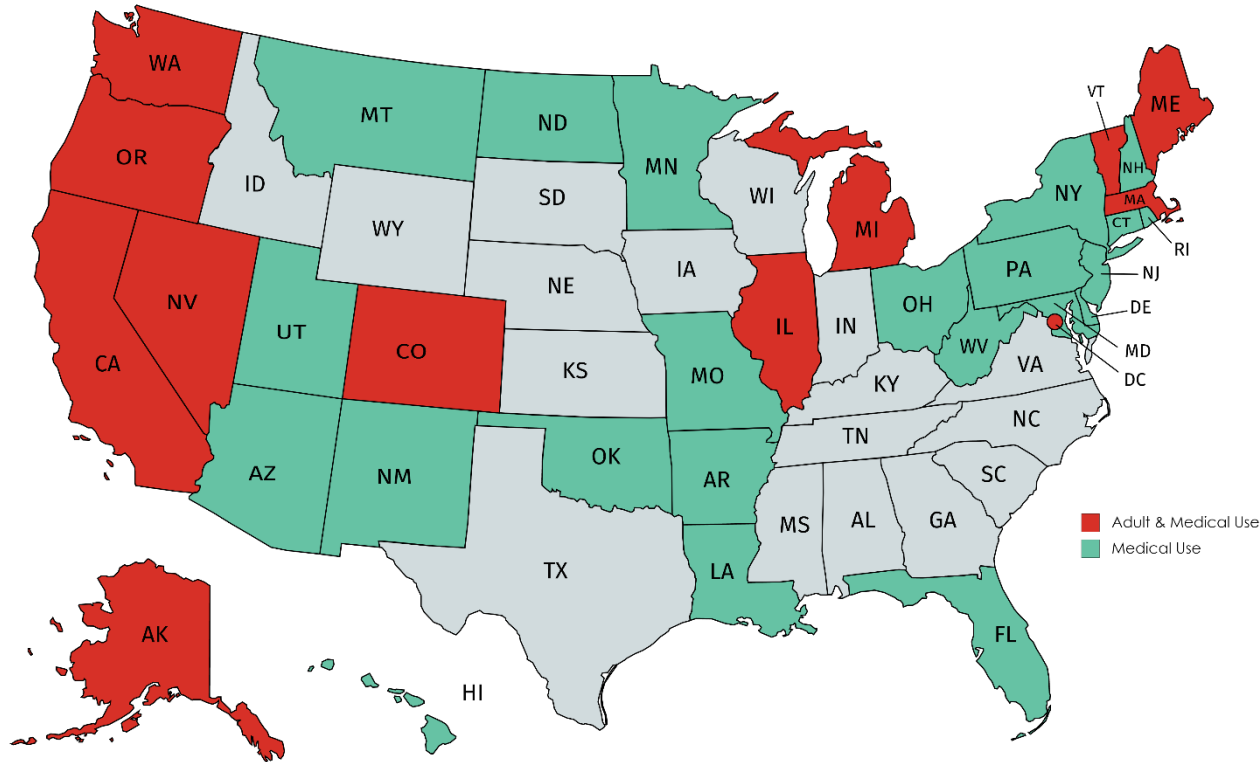
The States



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As it Stands Today



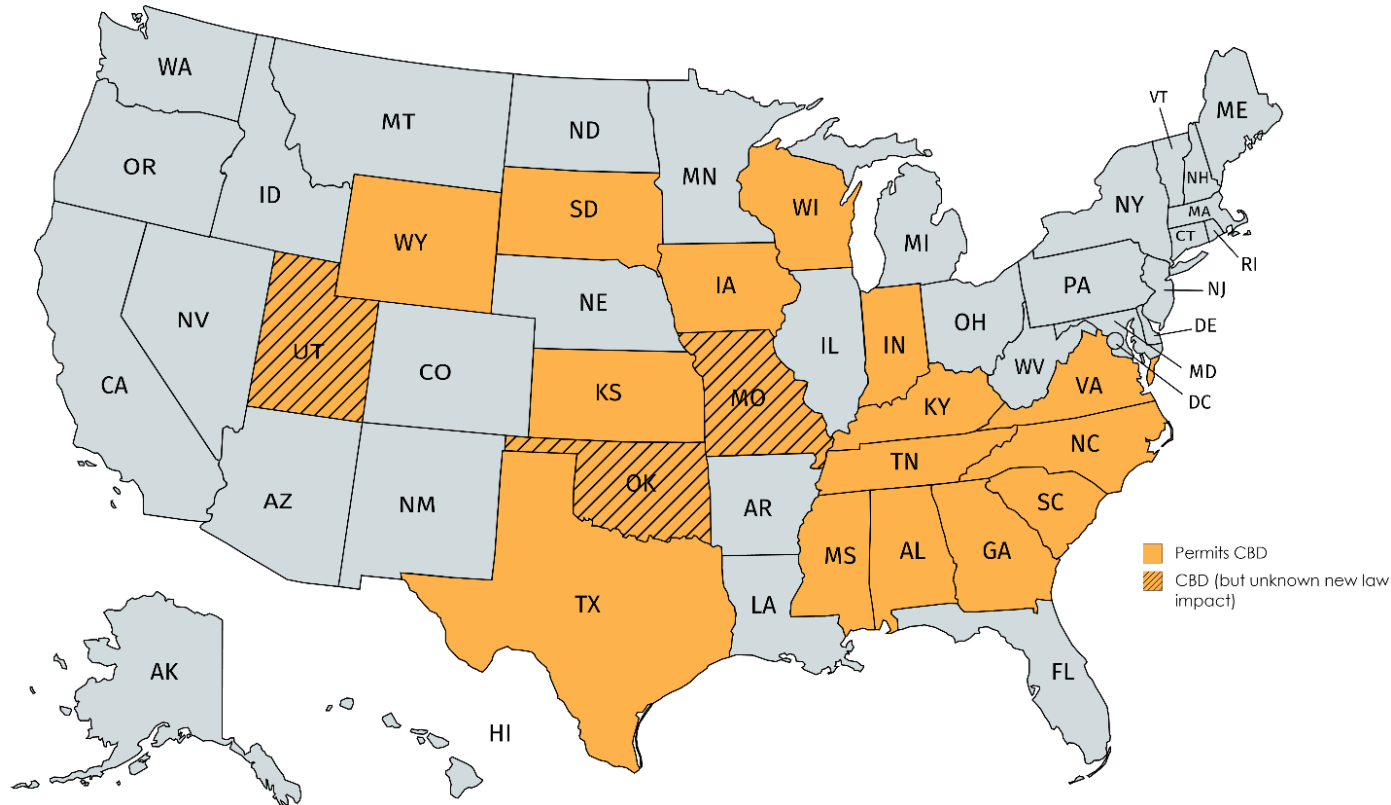
- **33** states and Washington D.C. authorize medical use of marijuana.
- **11** states and Washington D.C. authorize both the personal-adult and medical use of marijuana for any over 21.

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Cannabidiol (CBD)



18 states have authorized the medical use of cannabidiol (CBD).

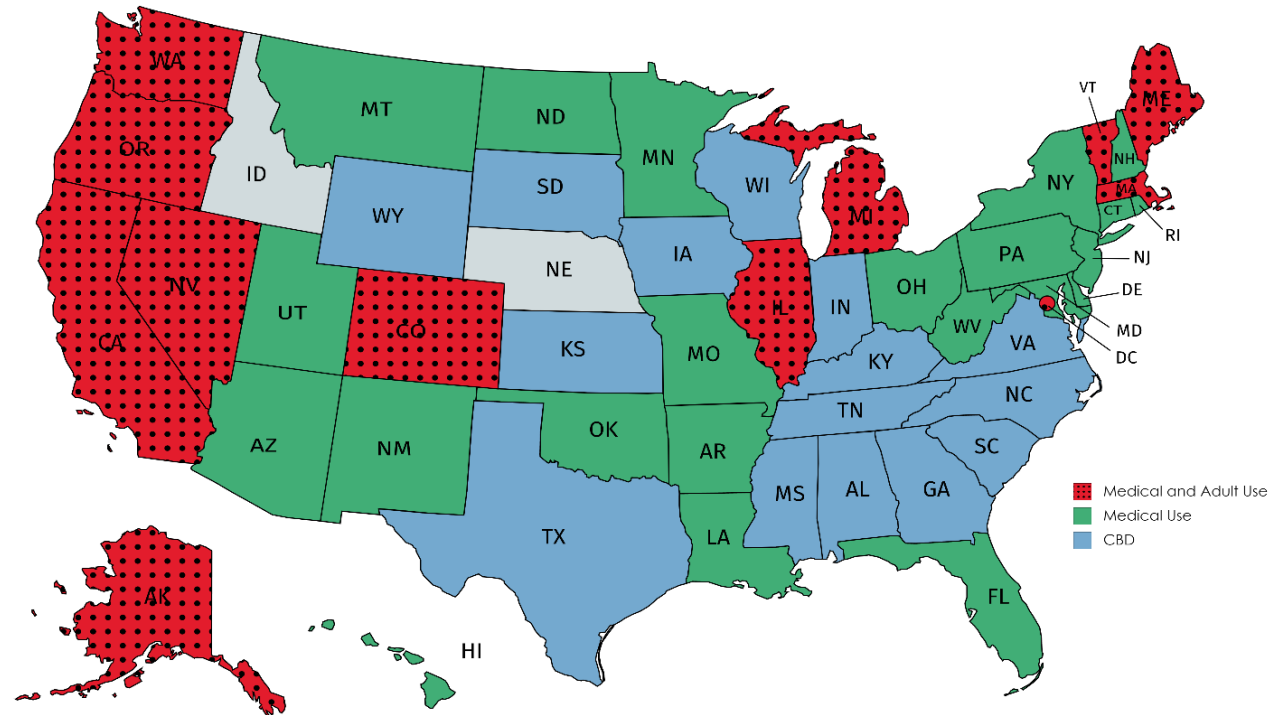
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The Complete Picture

33 states & Washington, DC authorize the **medical use of marijuana**; **11** States & Washington, DC allow **medical and adult-personal use of marijuana**, & **18** states allow the **medical use of CBD** (Non-Hemp).

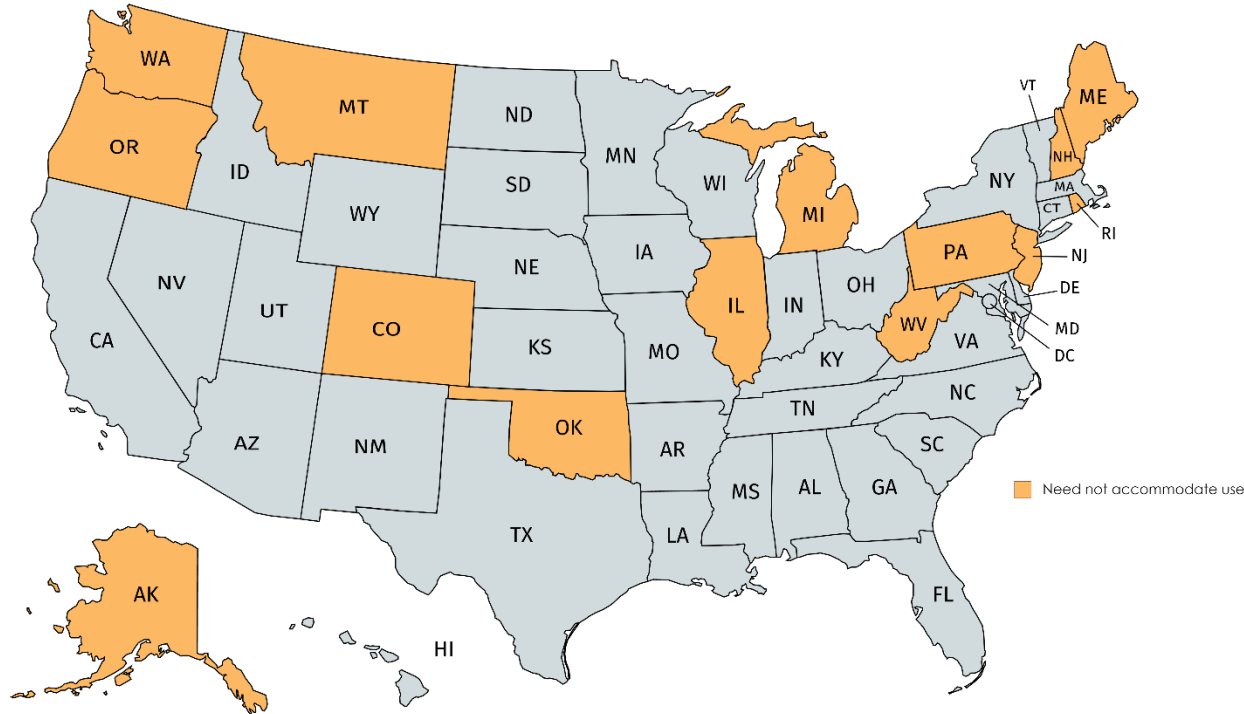


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The Language of the Laws



These **14** states laws specify that employers need not accommodate use or an employee being under the influence of marijuana at work.

The language of some states varies, such as Illinois, Ohio, and Pennsylvania and are more protective of employers.

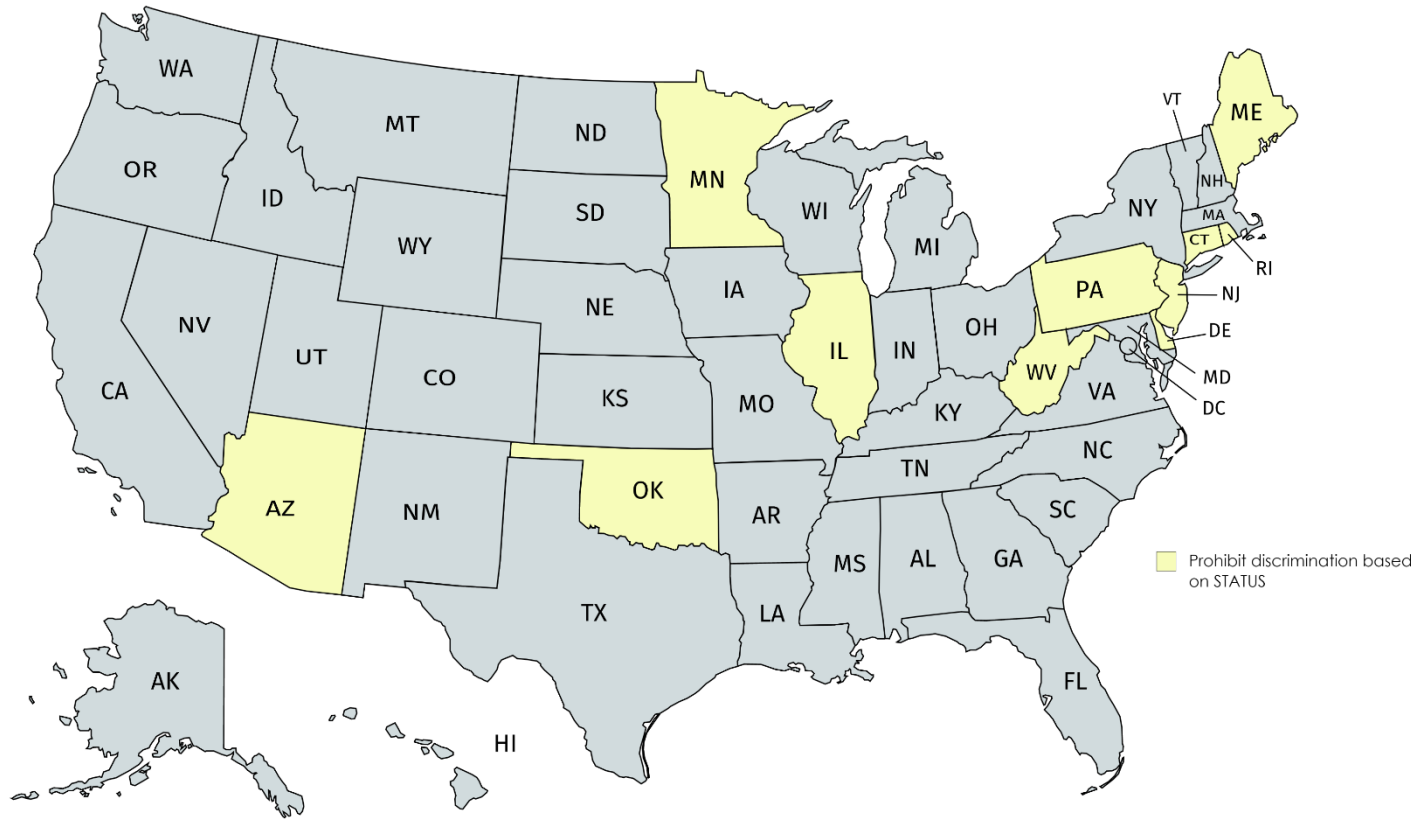
But, **Massachusetts, Nevada, and New York** require employers to at least determine if the employee's medical issues can be accommodated.

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The Language of the Laws - Discrimination



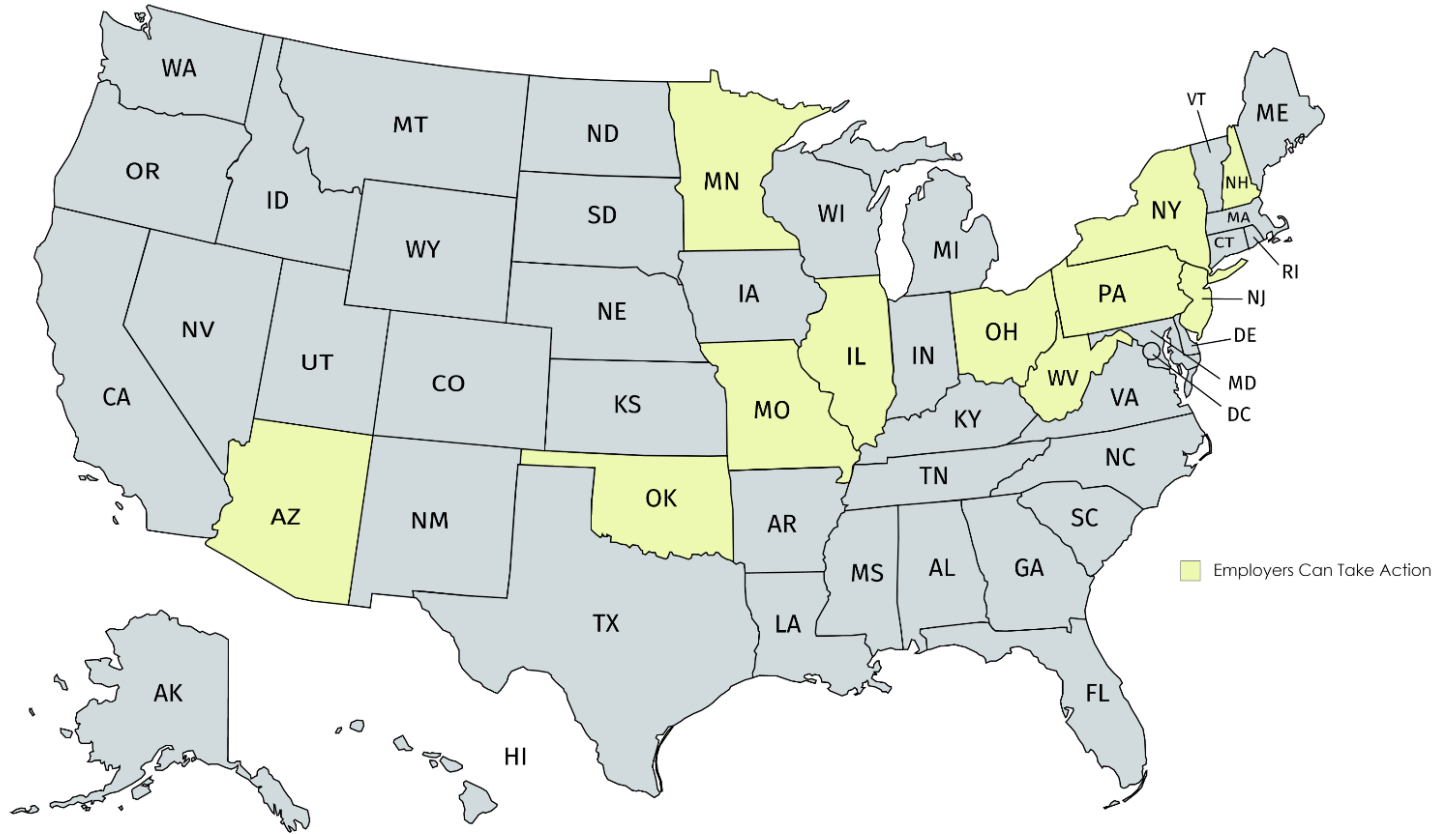
The law in **11** states provide that an employer may not discriminate against an individual due to that individual's **STATUS** as a qualified medical marijuana patient.

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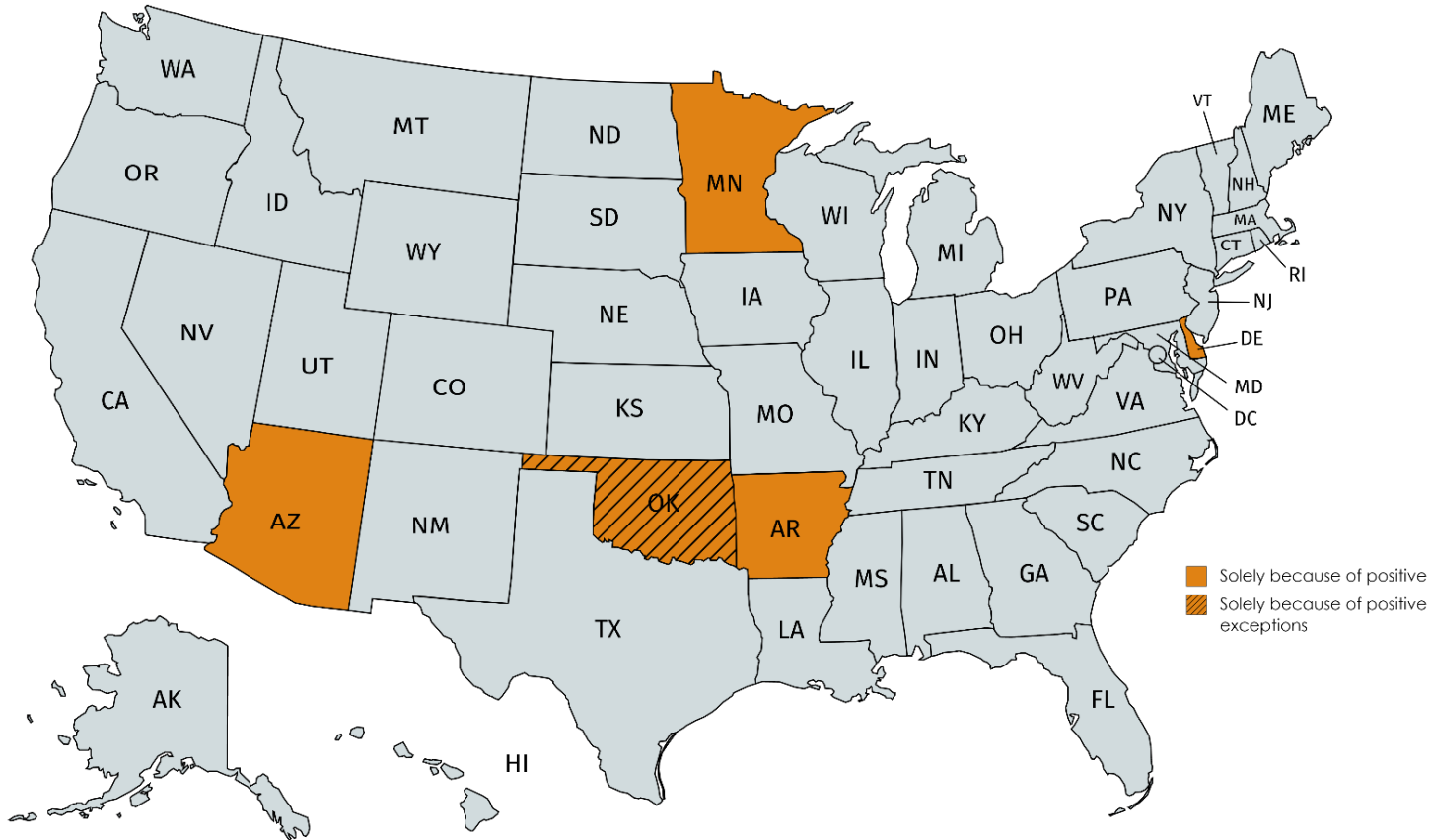
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The Language of the Laws – Employers Can Act



In these **12** states an employer is specifically authorized the take action if an employee if found to be **using** or **under the influence** of marijuana on duty.

The Language of the Laws – Positive Test?



In these **five** states an employer can discipline for being under the influence.

But a **positive test alone** is not proof of being under the influence!



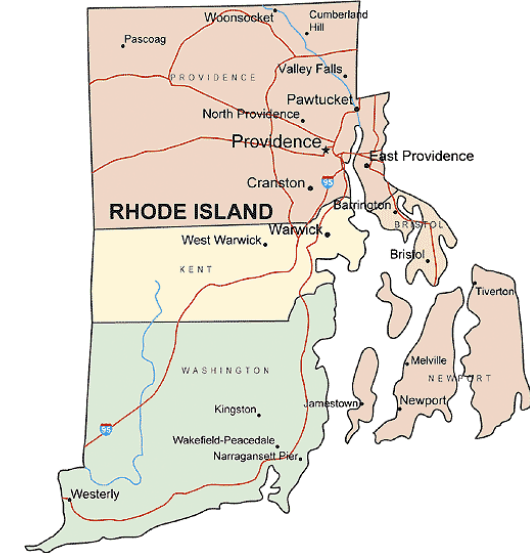
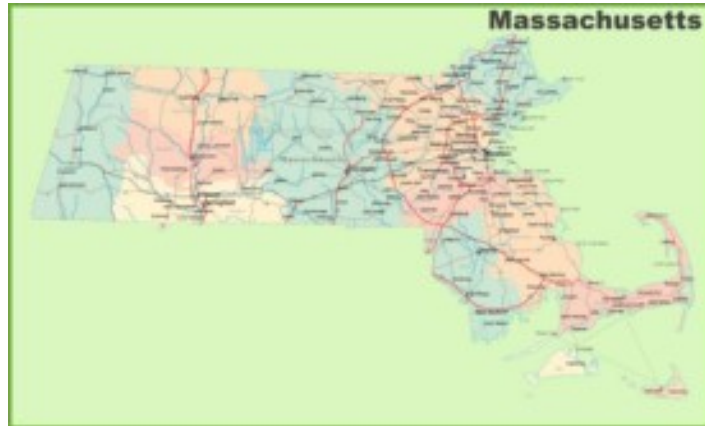
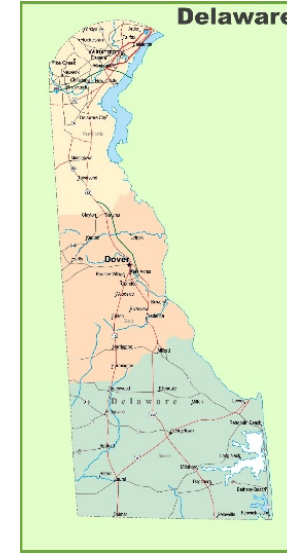
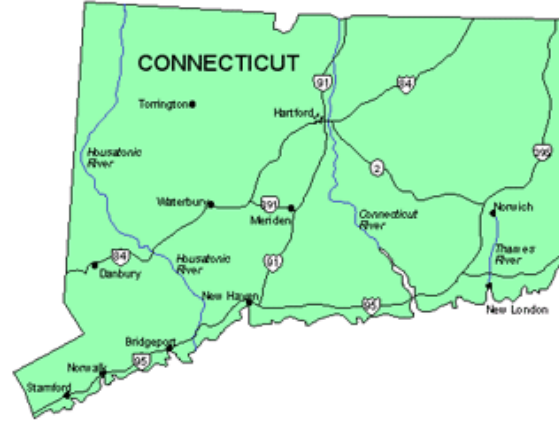
Recent Key Court Decisions

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Arizona



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Legal Updates: Hot off the press

- **New York City** - New law (Intro. No. 1445-A) prohibits pre-employment testing for marijuana, effective 5/10/2020.
- **Nevada** – New law (Assembly Bill 132) makes NV the first state to prohibit action based on pre-employment positives for marijuana, effective 1/1/2020.
- **Illinois** – The 11th state to legalize the adult personal use of marijuana, effective 1/1/2020. Revised language of the law brings some confusion for employers.
- **New Jersey** – Amended Medical Marijuana Law, limits employers.

State Human Rights Laws – More Complications

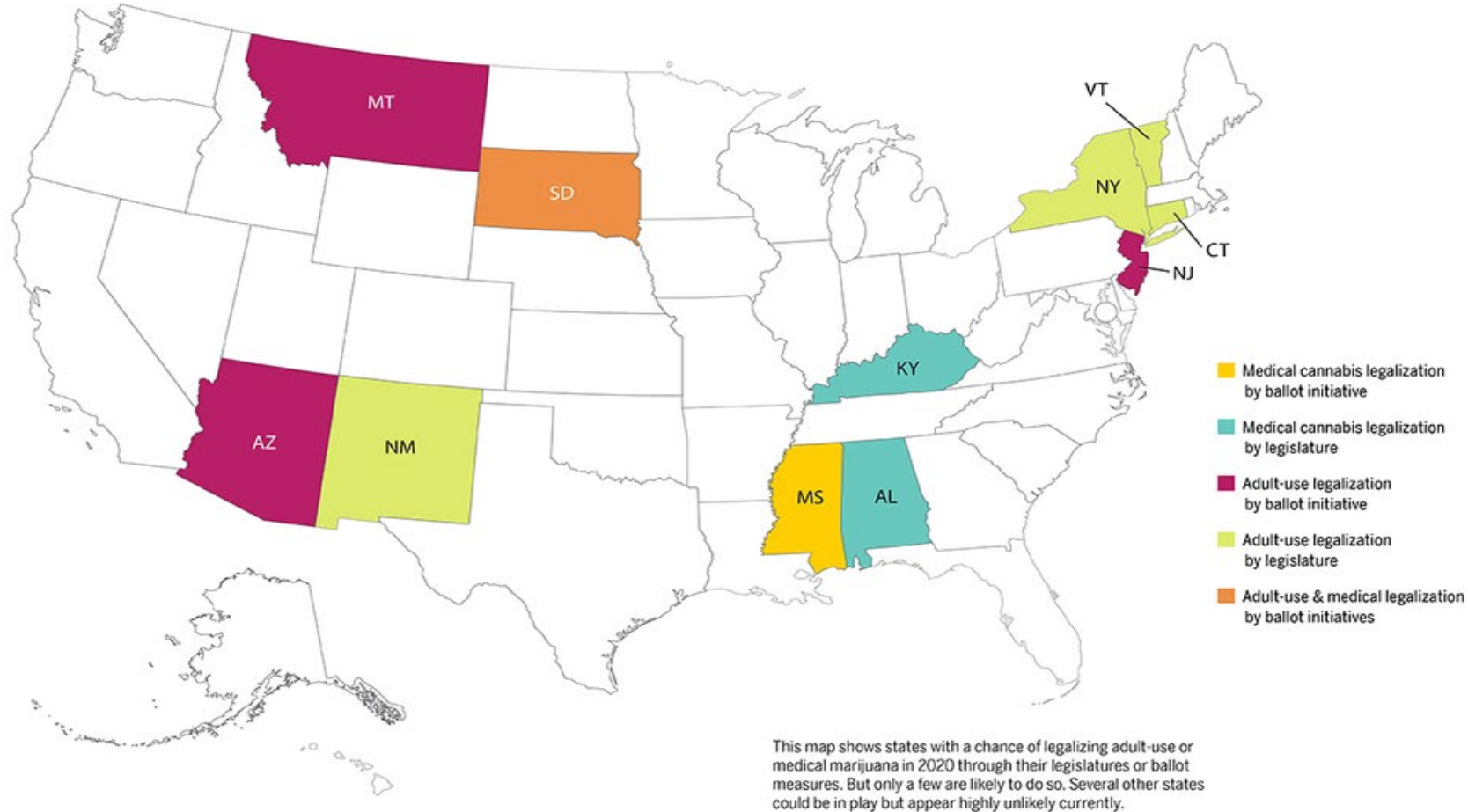


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2020 Outlook

Important States to Watch as Cannabis Legalization Prospects in 2020



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Illinois Personal 'Adult' Use of Marijuana

**House Bill 1438 – Effective 1/1/2020
Amended December 4, 2019**



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Illinois Personal 'Adult' Use of Marijuana

Illinois Personal Use of Marijuana Law	
Statutory Language	Key Points
<p>Cannabis Legalization Equity Act. HB 1438</p> <p>Article 10.</p> <p>* * *</p> <p>Section 10-50. Employment; employer liability.</p> <p>(a) Nothing in this Act shall prohibit an employer from adopting reasonable zero tolerance or drug free workplace policies, or employment policies concerning drug testing, smoking, consumption, storage, or use of cannabis in the workplace or while on call provided that the policy is applied in a nondiscriminatory manner.</p> <p>(b) Nothing in this Act shall require an employer to permit an employee to be under the influence of or use cannabis in the employer's workplace or while performing the employee's job duties or while on call.</p> <p>(c) Nothing in this Act shall limit or prevent an employer from disciplining an employee or terminating employment of an employee for violating an employer's employment policies or workplace drug policy.</p> <p>(d) An employer may consider an employee to be impaired or under the influence of cannabis if the employer has a good faith belief that an employee manifests specific, articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position, including symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, or negligence or carelessness in operating equipment or machinery; disregard for the safety of the employee or others, or involvement in any accident that results in serious damage to equipment or property; disruption of a production or manufacturing process; or carelessness that results in any injury to the employee or others. If an employer elects to discipline an employee on the basis that the employee is under the influence or impaired by cannabis, the employer must afford the employee a reasonable opportunity to contest the basis of the determination.</p>	<ul style="list-style-type: none">• Can have <i>reasonable</i> "zero tolerance" or drug free workplace policy.• Nothing in this law requires an employer to allow an employee to be <i>under the influence</i> or <i>use</i> marijuana in the workplace.• Nothing in this law shall limit or prevent discipline or termination of an employee for violating the employer's policy.• Employer may consider an employee to be impaired/under the influence if the employer "has a good faith belief"<ul style="list-style-type: none">▪ the employee manifests "articulable signs/symptoms that:<ol style="list-style-type: none">1. lessen performance2. speech, behavioral, agility, dexterity3. carelessness operating equipment, disregard for safety4. involved in any accident or injury• Must afford anyone disciplined an <i>opportunity</i> to contest the basis of the determination.

Illinois Personal 'Adult' Use of Marijuana

Illinois Personal Use of Marijuana Law	
Statutory Language	Key Points
<p>Cannabis Legalization Equity Act. HB 1438</p> <p>(e) Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for:</p> <p>(1) actions taken pursuant to an employer's reasonable workplace drug policy, including but not limited to subjecting an employee or applicant to reasonable drug and alcohol testing, reasonable and nondiscriminatory random drug testing, and discipline, termination of employment, or withdrawal of a job offer due to a failure of a drug test; (Amended by SB 1557, Signed into law 12/04/19);</p> <p>(2) actions, including discipline or termination of employment, based on the employer's good faith belief that an employee was impaired as a result of the use of cannabis, or under the influence of cannabis, while at the employer's workplace or while performing the employee's job duties or while on call in violation of the employer's workplace drug policy; or</p> <p>(3) injury, loss, or liability to a third party if the employer neither knew nor had reason to know that the employee was impaired.</p> <p>(f) Nothing in this Act shall be construed to enhance or diminish protections afforded by any other law, including but not limited to the Compassionate Use of Medical Cannabis Pilot Program Act or the Opioid Alternative Pilot Program.</p> <p>(g) Nothing in this Act shall be construed to interfere with any federal, State, or local restrictions on employment including, but not limited to, the United States Department of Transportation regulation 49 CFR 40.151(e) or impact an employer's ability to comply with federal or State law or cause it to lose a federal or State contract or funding.</p> <p>(h) As used in this Section, "workplace" means the employer's premises, including any building, real property, and parking area under the control of the employer or area used by an employee while in performance of the employee's job duties, and vehicles, whether leased, rented, or owned. Workplace" may be further defined by the employer's written employment policy, provided that the policy is consistent with this Section.</p> <p>(i) For purposes of this Section, an employee is deemed "on call" when such employee is scheduled with at least 24 hours' notice by his or her employer to be on standby or otherwise responsible for performing tasks related to his or her employment either at the employer's premises or other previously designated location by his or her employer or supervisor to perform a work-related task.</p>	<ul style="list-style-type: none">• No Cause of Action against an employer for . . .<ol style="list-style-type: none">1. drug testing (amended 12/04/19).2. discipline including termination based on good faith belief the employee used or possessed at work or on duty.3. discipline based on good faith belief employee was impaired or under the influence at work or on duty or on call.4. injuries, loss, liability to a third party if the employer neither known or had reason to know the employee was impaired.• Nothing in this law interferes with required compliance with federal law.

Illinois Personal 'Adult' Use of Marijuana

Illinois Personal Use of Marijuana Law	
Statutory Language	Key Points
<p>Cannabis Legalization Equity Act. HB 1438</p> <p>Section 900-50. The Right to Privacy in the Workplace Act is amended by changing Section 5 as follows:</p> <p>(820 ILCS 55/5) (from Ch. 48, par. 2855)</p> <p>Sec. 5. Discrimination for use of lawful products prohibited.</p> <p>(a) Except as otherwise specifically provided by law, <u>including Section 10-50 of the Cannabis Regulation and Tax Act</u>, and except as provided in subsections (b) and (c) of this Section, it shall be unlawful for an employer to refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the individual uses lawful products off the premises of the employer during nonworking and non-call hours. As used in this Section, "lawful products" means products that are legal under state law. For purposes of this Section, an employee is deemed on-call when the employee is scheduled with at least 24 hours' notice by his or her employer to be on standby or otherwise responsible for performing tasks related to his or her employment either at the employer's premises or other previously designated location by his or her employer or supervisor to perform a work-related task, hours.</p> <p>(b) This Section does not apply to any employer that is a non-profit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public. This Section does not apply to the use of those lawful products which impairs an employee's ability to perform the employee's assigned duties.</p> <p>* * *</p> <p>(Source: P.A. 87-807.)</p>	<ul style="list-style-type: none">• Amends <i>The Right to Privacy in the Workplace Act</i>.• Specifically references the new <i>Cannabis Regulation and Tax Act</i> (Personal Use of Marijuana law).• Unlawful to refuse to hire or discharge any individual or otherwise disadvantage re compensation terms, conditions of employment, etc.• for use of lawful products off employer premises or during nonworking, non-call hours.• "Lawful product" means products <i>legal under state law</i>.• This section doesn't apply to the use of those lawful products <i>which impairs an employee's ability to perform</i> the employee's assigned duties.

Illinois – Medical Use of Marijuana

Illinois Medical Marijuana Law	
Statutory Language	Key Points
<p>The law prohibits discrimination because of one's status as a medical marijuana patient:</p> <p>(410 ILCS 130/40)</p> <p>Sec. 40. Discrimination prohibited.</p> <p>(a)(1) No school, employer, or landlord may refuse to enroll or lease to, or otherwise penalize, a person solely for his or her status as a registered qualifying patient or a registered designated caregiver, unless failing to do so would put the school, employer, or landlord in violation of federal law or unless failing to do so would cause it to lose a monetary or licensing-related benefit under federal law or rules. *</p> <p>* *</p>	<ul style="list-style-type: none">• Discrimination Clause• Status alone – can't discriminate• Unless doing so violates federal law or jeopardizes financial status or licensing under federal law.

Illinois – Medical Use of Marijuana

Illinois Medical Marijuana Law	
Statutory Language	Key Points
<p>Sec. 50. Employment; employer liability.</p> <p>(a) Nothing in this Act shall prohibit an employer from adopting reasonable regulations concerning the consumption, storage, or timekeeping requirements for qualifying patients related to the use of medical cannabis.</p> <p>(b) Nothing in this Act shall prohibit an employer from enforcing a policy concerning drug testing, zero-tolerance, or a drug free workplace provided the policy is applied in a nondiscriminatory manner.</p> <p>(c) Nothing in this Act shall limit an employer from disciplining a registered qualifying patient for violating a workplace drug policy.</p> <p>(d) Nothing in this Act shall limit an employer's ability to discipline an employee for failing a drug test if failing to do so would put the employer in violation of federal law or cause it to lose a federal contract or funding.</p> <p>(e) Nothing in this Act shall be construed to create a defense for a third party who fails a drug test.</p>	<ul style="list-style-type: none">• Employer can adopt rules re medical use of marijuana• Employer can have “zero tolerance” policy.• Employer can discipline medical marijuana patient who violates employer’s policy.• Employer can discipline medical marijuana patient for testing positive on a drug test per federal rules (e.g. DOT).• Employee has no defense under the law.

Illinois – Medical Use of Marijuana

Illinois Medical Marijuana Law	
Statutory Language	Key Points
<p>Sec. 50. Employment; employer liability.</p> <p>(f) An employer may consider a registered qualifying patient to be impaired when he or she manifests specific, articulable symptoms while working that decrease or lessen his or her performance of the duties or tasks of the employee's job position, including symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, negligence or carelessness in operating equipment or machinery, disregard for the safety of the employee or others, or involvement in an accident that results in serious damage to equipment or property, disruption of a production or manufacturing process, or carelessness that results in any injury to the employee or others. If an employer elects to discipline a qualifying patient under this subsection, it must afford the employee a reasonable opportunity to contest the basis of the determination.</p>	<ul style="list-style-type: none">• Employer may consider medical marijuana patient "impaired" if demonstrating behavioral symptoms.• An accident = impairment resulting in:<ul style="list-style-type: none">-- serious damage to equip. or property-- disruption of mfg./production-- carelessness resulting in injury• Employer must afford the employee an opportunity to contest the basis of the discipline.

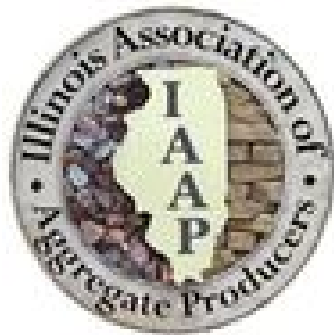
Illinois – Medical Use of Marijuana

Illinois Medical Marijuana Law	
Statutory Language	Key Points
<p>Sec. 50. Employment; employer liability.</p> <p>(g) Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for: (1) actions based on the employer's good faith belief that a registered qualifying patient used or possessed cannabis while on the employer's premises or during the hours of employment; (2) actions based on the employer's good faith belief that a registered qualifying patient was impaired while working on the employer's premises during the hours of employment; (3) injury or loss to a third party if the employer neither knew nor had reason to know that the employee was impaired.</p> <p>(h) Nothing in this Act shall be construed to interfere with any federal restrictions on employment including but not limited to the United States Department of Transportation regulation 49 CFR 40.151(e).</p>	<ul style="list-style-type: none">• No cause of action created based on . . .<ol style="list-style-type: none">1. Good faith belief that med. marijuana patient used or possessed at work.2. Good faith belief the med. Marijuana patient was impaired <i>on premises during work hours</i>.3. Injury or loss to a third party if employer neither knew nor had reason to know the employee was impaired.• Nothing in this law interferes with employer obligations under federal law (e.g. DOT)

DOT Supervisor Reasonable Suspicion & Drug Awareness Training

William J. Judge, JD, LL.M.

March 2020



Building
Illinois'
Future

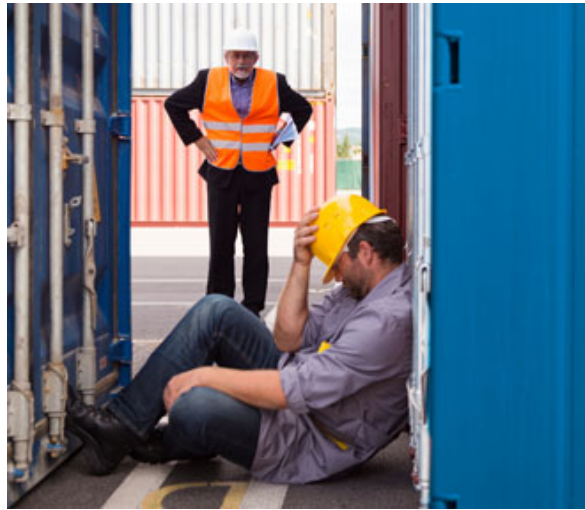


DSCI

**DRUG SCREENING
COMPLIANCE INSTITUTE**

Reasonable Suspicion

What Is It?



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Reasonable Suspicion

- Illinois Cannabis Regulation and Tax Act
 - Employer may consider an employee to be impaired/under the influence if the employer “has a **good faith belief**” the employee manifests articulable signs/symptoms that:
 1. lessen performance
 2. speech, behavioral, agility, dexterity
 3. **carelessness** operating equipment, disregard for safety
 4. involved in any **accident** or **injury**



When are tests conducted?

Reasonable Suspicion (DOT/FMCSA)

§382.307 Reasonable suspicion testing.

- An employer **shall require** a driver to submit to an alcohol test when the employer has reasonable suspicion to believe that the driver has violated [the policy] concerning alcohol and/or controlled substances.
- The employer's determination that reasonable suspicion exists to require the driver to undergo an alcohol test must be **based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver.**
- The observations may include indications of the chronic and **withdrawal** effects of controlled substances.
- The required observations for alcohol and/or controlled substances reasonable suspicion testing shall be made by a supervisor or company official who is **trained** in accordance with §382.603. The person who makes the determination that reasonable suspicion exists to conduct an alcohol test shall not conduct the alcohol test of the driver.

When are tests conducted?

Reasonable Suspicion (continued)

§382.307 Reasonable suspicion testing.

- Alcohol testing is authorized . . . **only if the observations . . . are made during, just preceding, or just after the period of the workday** that the driver is required to be in compliance with this part.
- A driver may be directed by the employer to only undergo reasonable suspicion testing **while the driver is performing** safety-sensitive functions, **just before** the driver is to perform safety-sensitive functions, or **just after** the driver has ceased performing such functions.
- If an alcohol test required by this section is not administered within **two hours** following the determination [to test], the employer shall prepare and maintain on file a **record** stating the reasons the alcohol test was not promptly administered.
- If an alcohol test . . . is not administered within **eight hours** following the determination to test, the employer shall cease attempts to administer an alcohol test and shall state in the **record** the reasons for not administering the test.

A Drug Test is a Search



Skinner v Railway Labor Executives' Assoc., 489 US 602 (1989)

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Reasonable Suspicion – What Is It?

Terry V. Ohio

392 U.S. 1
(1968)

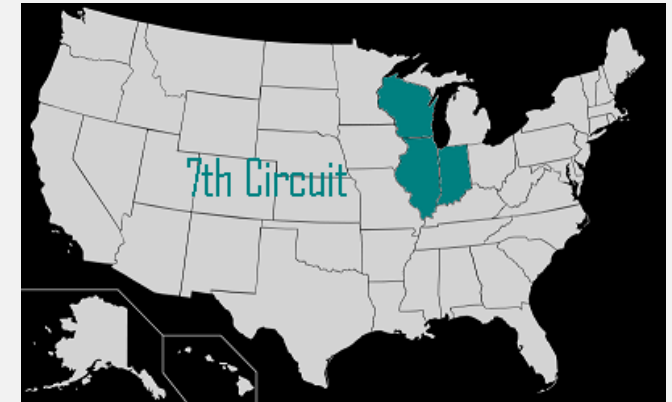
“Something more than a hunch.”

- based on ***specific and articulable facts***.
- where a man of **reasonable caution in the belief** that the action taken was appropriate?

Based on 1959 US Supreme Court decision, *Henry v. United States* , 361 U.S. 98, 102, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959)



Reasonable Suspicion – What Is It?



US v. Hagenow

423 F.3d 638

(Seventh Cir. 2005)

- Reasonable suspicion amounts to something less than probable cause but more than a hunch.”
- “. . . Must be based on common-sense judgments and inferences about human behavior.”



Reasonable
Suspicion
means
PROOF

Proof of
what?

“Less Than Probable Cause But More Than A Hunch”

Proof that . . .

- Employee *may have violated* Company policy.
- Employee *may have used* drugs or alcohol.

Something More Than a HUNCH

Defined as . . .

“a feeling or guess based on intuition rather than known facts.”

<https://www.dictionary.com/>

Something More Than a HUNCH - Other Courts

“ . . . sufficient probability, **not certainty**, is the touchstone of reasonableness under the Fourth Amendment

-Hill v. California, 401 U.S. 797, 804 (1971).

Reasonable Suspicion – What Is It?

Reasonable Suspicion means

PROOF

Start With A Hunch

**Now Compare to Other Levels of
Proof**

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Reasonable Suspicion – What Is It?

Reasonable Suspicion means

PROOF

Proof of what?

J
A
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Beyond a
Reasonable
Doubt

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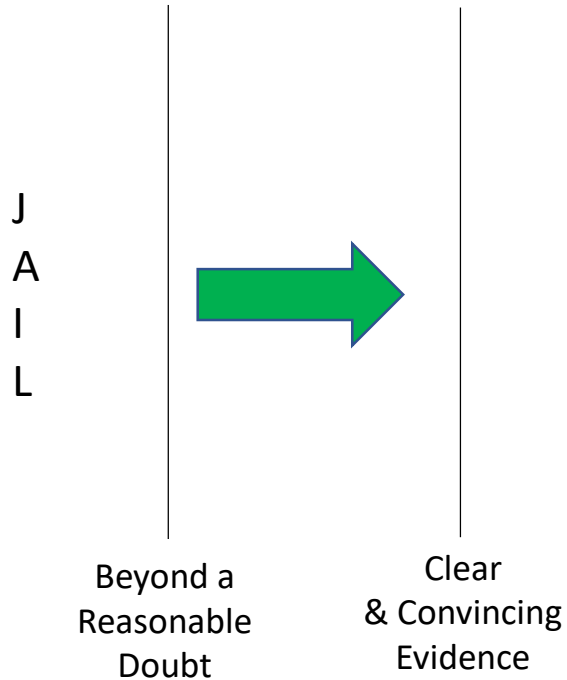
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Reasonable Suspicion – What Is It?

Reasonable Suspicion means

PROOF

Proof of what?



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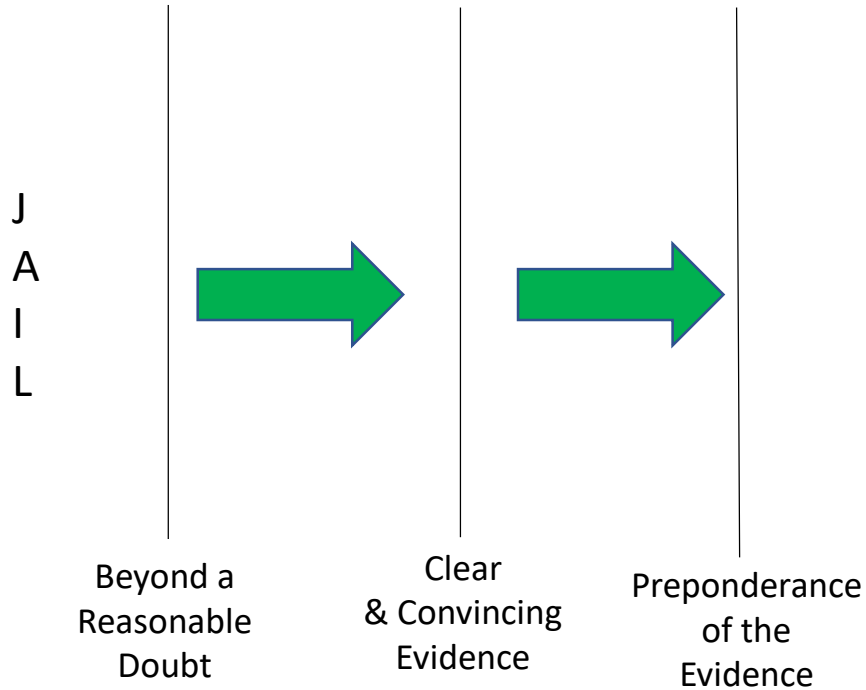
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Reasonable Suspicion – What Is It?

Reasonable Suspicion means

PROOF

Proof of what?



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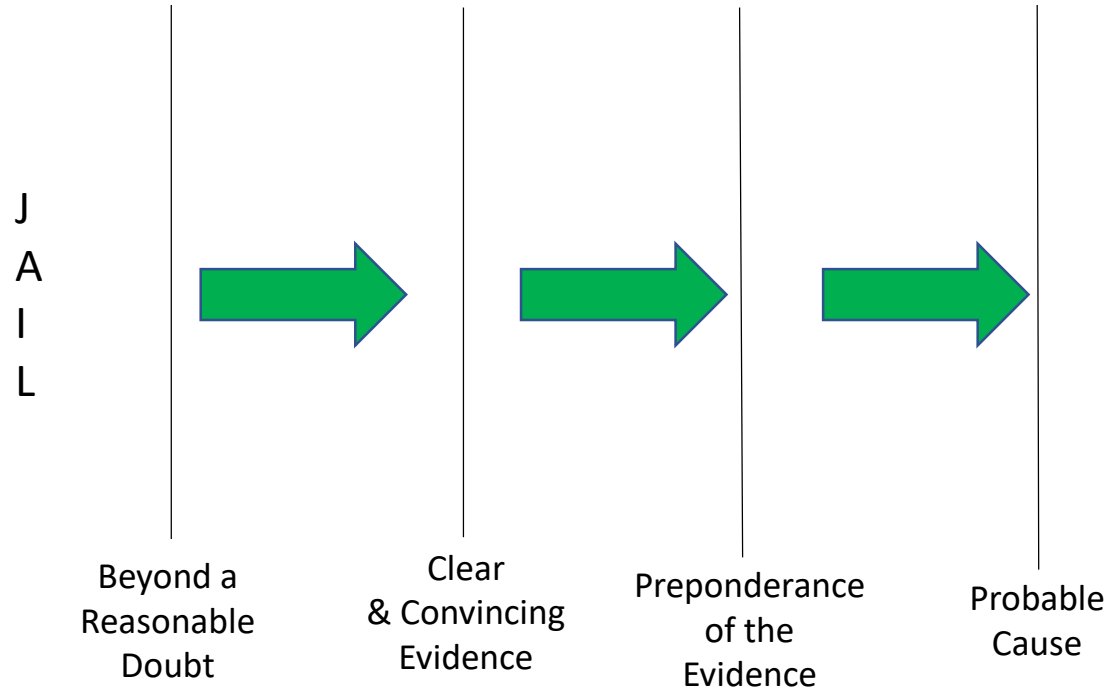
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Reasonable Suspicion – What Is It?

Reasonable Suspicion means

PROOF

Proof of what?



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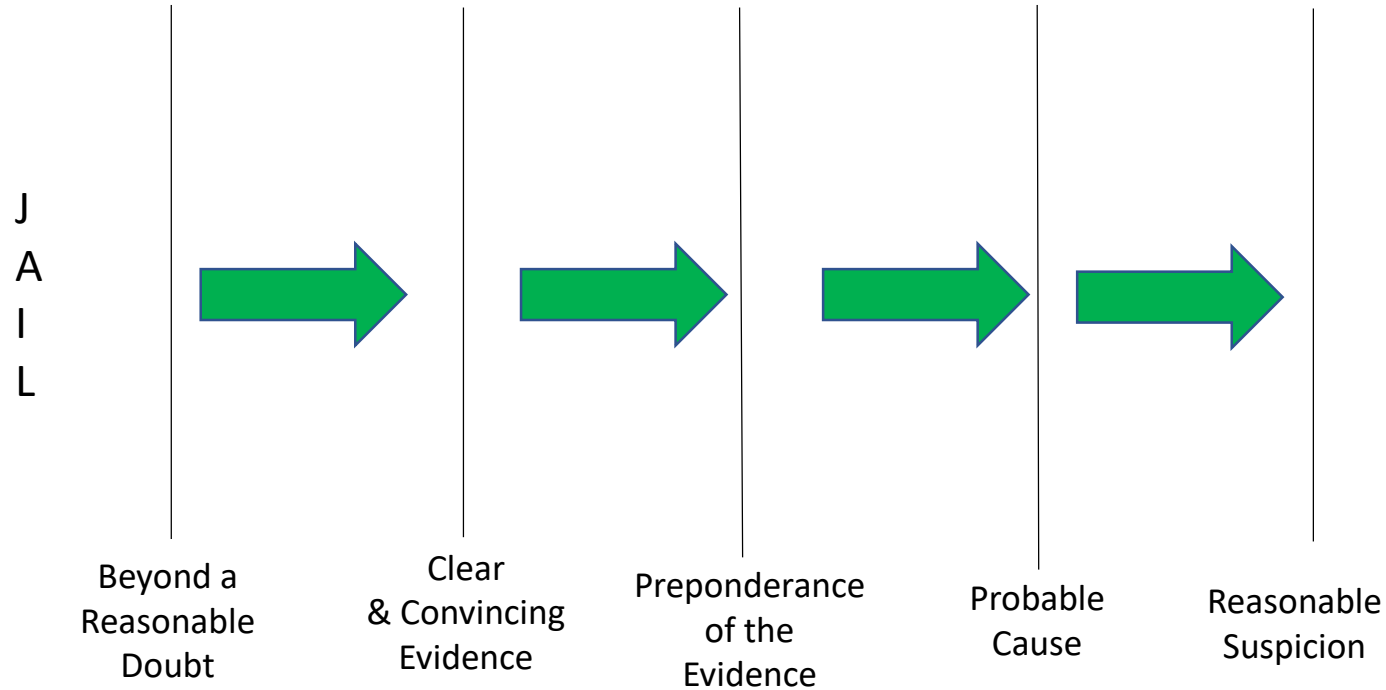
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Reasonable Suspicion – What Is It?

Reasonable Suspicion means

PROOF

Proof of what?



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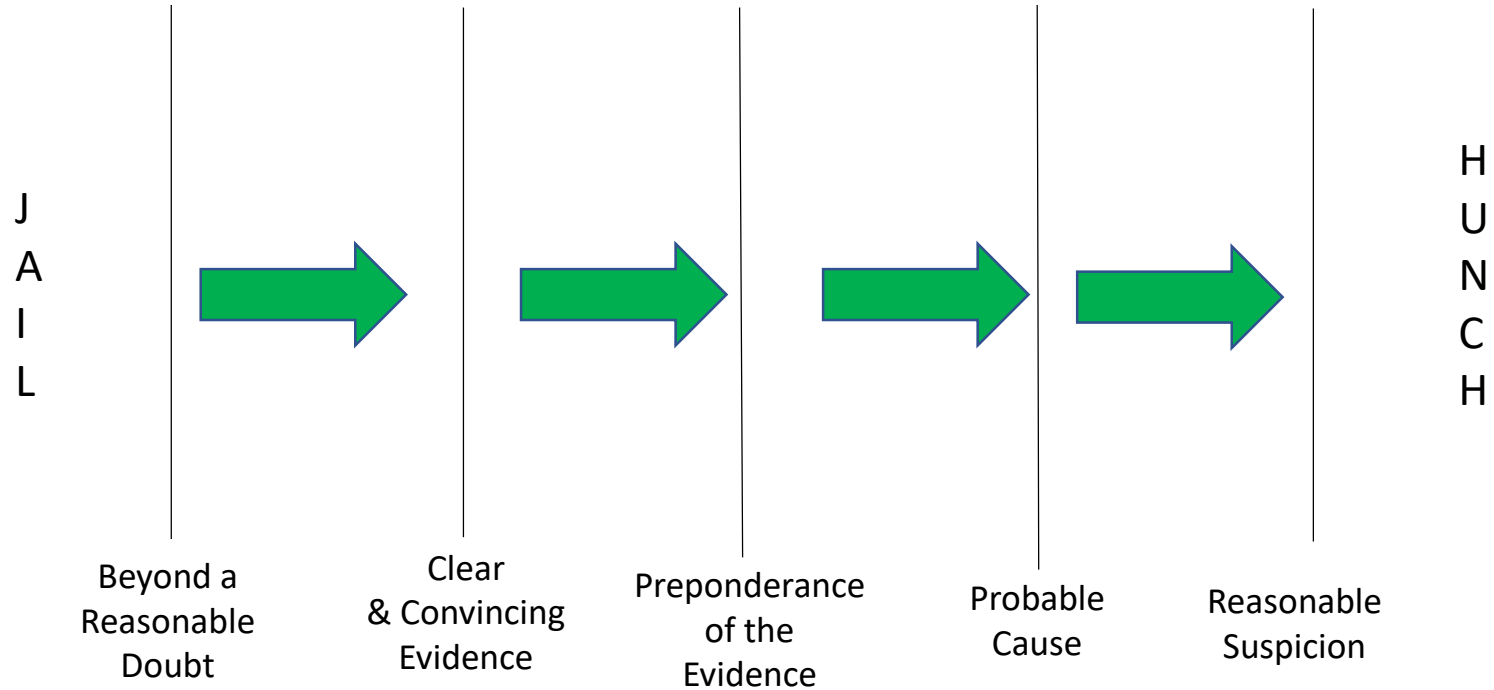
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Reasonable Suspicion – What Is It?

Reasonable Suspicion means

PROOF

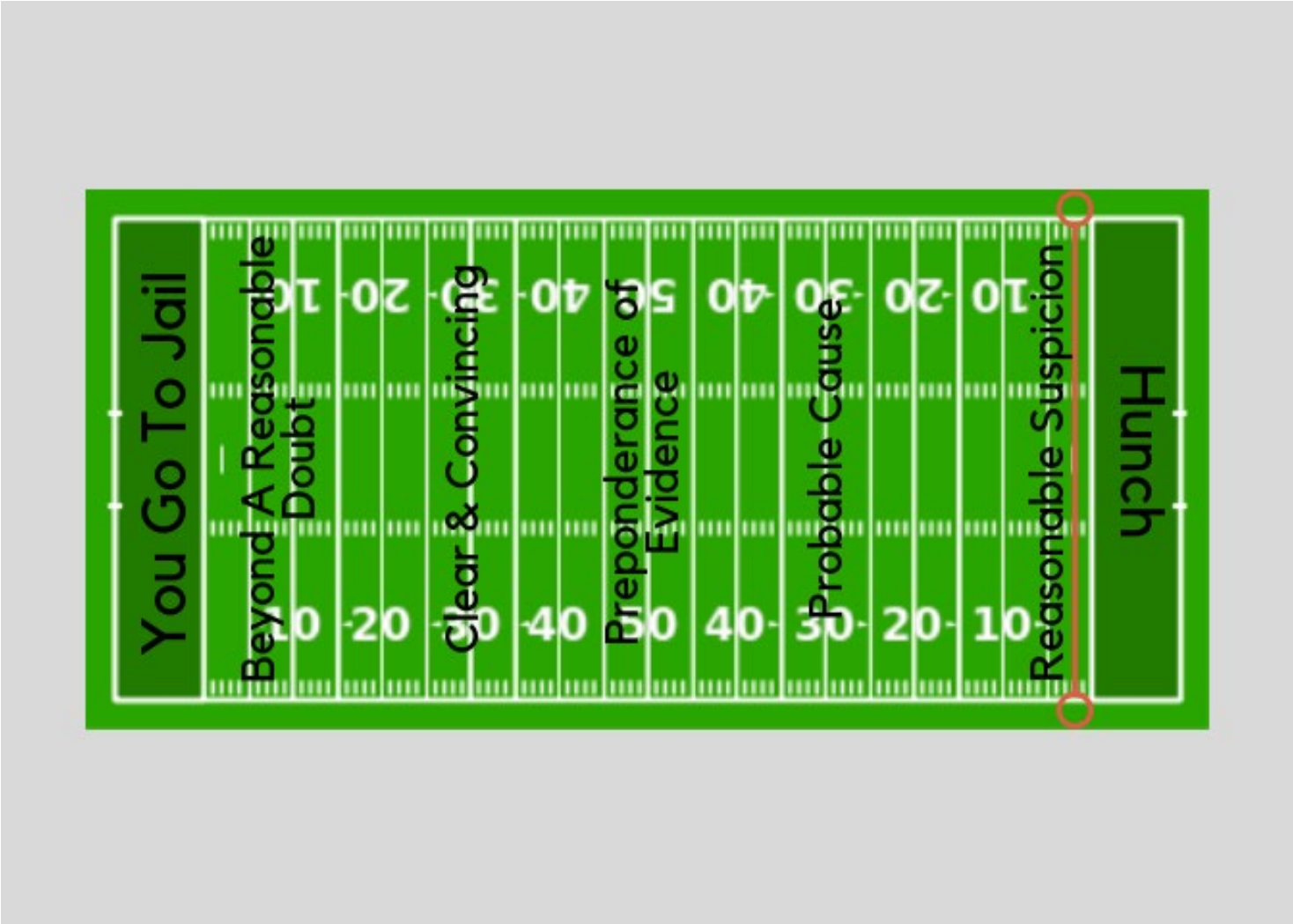
Proof of what?



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Reasonable Suspicion – Something MORE Than a Hunch



Drugs of Abuse



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ALCOHOL



Alcohol: The most abused drug in the United States and the leading cause of workplace incidents.

- **70%** of people ages 18 or older reported that they drank alcohol in the past year;
- **56%** reported that they drank in the past month.
- **26%** reported that they engaged in binge drinking in the past month.
- An estimated **88,000** people die from alcohol-related causes annually.



Street Names:

- Beer, Wine, Booze, Liquor, Shots, Drunk, Cold One, Hard Stuff, Hooch, Liquid courage, many others.

Use:

- Most commonly a liquid or drink, sometimes found in powder form.

Effects: •Slurred Speech •Glassy or bloodshot eyes •Unsteady, unbalanced, staggering •Intense emotion or change in mood •A blank non-reactive stare or total loss of consciousness, which can be signs of potential alcohol poisoning.

Paraphernalia: Beer bottles or cans, wine bottles, airplane bottle size shots, bags of unknown liquid, other misc. cups, canisters, bottles.



BLOOD ALCOHOL CONTENT (BAC) Table for Male (M) / Female (F)

Number of Drinks		Body Weight in Pounds								Driving Condition
		100	120	140	160	180	200	220	240	
0	M	.00	.00	.00	.00	.00	.00	.00	.00	Only Safe Driving Limit
	F	.00	.00	.00	.00	.00	.00	.00	.00	
1	M	.06	.05	.04	.04	.03	.03	.03	.02	Driving Skills Impaired
	F	.07	.06	.05	.04	.04	.03	.03	.03	
2	M	.12	.10	.09	.07	.07	.06	.05	.05	
	F	.13	.11	.09	.08	.07	.07	.06	.06	
3	M	.18	.15	.13	.11	.10	.09	.08	.07	
	F	.20	.17	.14	.12	.11	.10	.09	.08	
4	M	.24	.20	.17	.15	.13	.12	.11	.10	Legally Intoxicated
	F	.26	.22	.19	.17	.15	.13	.12	.11	
5	M	.30	.25	.21	.19	.17	.15	.14	.12	
	F	.33	.28	.24	.21	.18	.17	.15	.14	

Subtract .01% for each 40 minutes that lapse between drinks.

1 drink = 1.5 oz. 80 proof liquor, 12 oz. 5% beer, or 5 oz. 12% wine.

Fewer than 5 persons out of 100 will exceed these values.



Binge Drinking

For women, 4 or more drinks consumed on one occasion

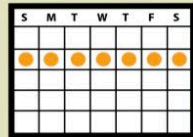


For men, 5 or more drinks consumed on one occasion



Heavy Drinking

For women, 8 or more drinks per week



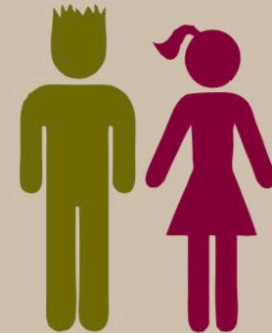
For men, 15 or more drinks per week



Any alcohol used by pregnant women



Any alcohol used by those under the age of 21 years



Heavy Alcohol Use Higher in College Students than Non-College Peers

BINGE DRINKING

Five or more drinks in a row



Past 2 Weeks

INTOXICATION

Having been drunk



Past Month



College Student Group



Non-College Group

<https://sites.sju.edu/wade/for-coaches-resources/alcohol-use-image/>

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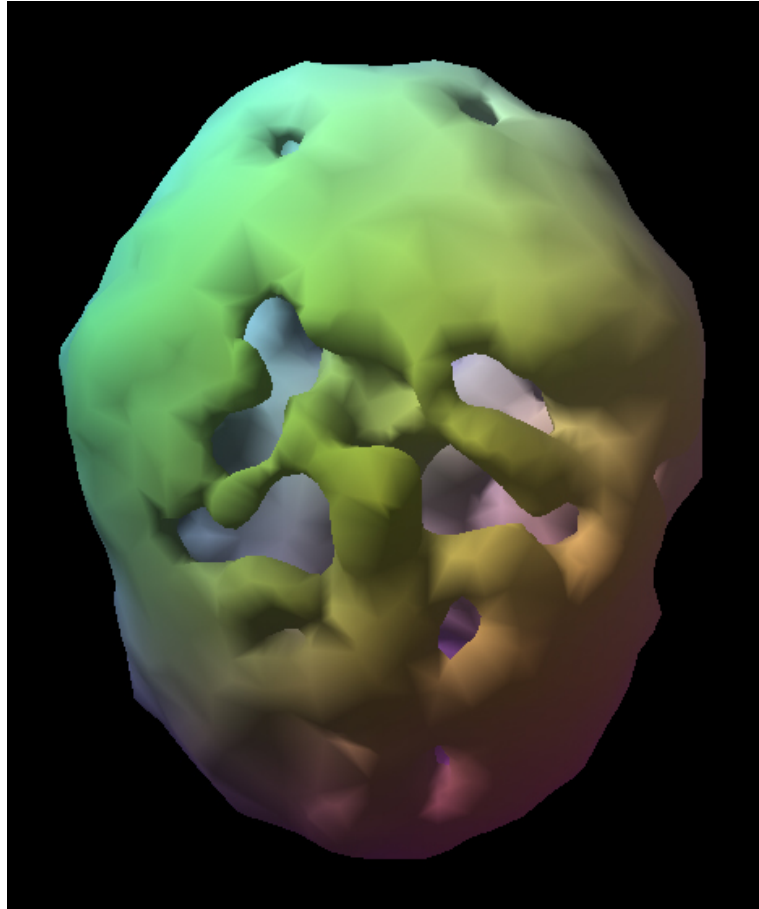


What health problems are associated with excessive alcohol use?

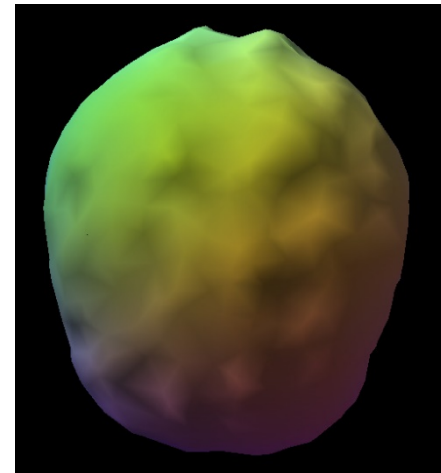
Excessive drinking both in the form of heavy drinking or binge drinking, is associated with numerous health problems, including:

- Chronic diseases such as liver cirrhosis (damage to liver cells); pancreatitis (inflammation of the pancreas); various cancers, including liver, mouth, throat, larynx (the voice box), and esophagus; high blood pressure; and psychological disorders.
- Unintentional injuries, such as motor-vehicle traffic crashes, falls, drowning, burns, and firearm injuries.
- Violence, such as child maltreatment, homicide, and suicide.
- Harm to a developing fetus if a woman drinks while pregnant, such as fetal alcohol spectrum disorders.
- Sudden infant death syndrome (SIDS).
- Alcohol use disorders.

<https://www.cdc.gov/alcohol/faqs.htm#excessivealcohol>

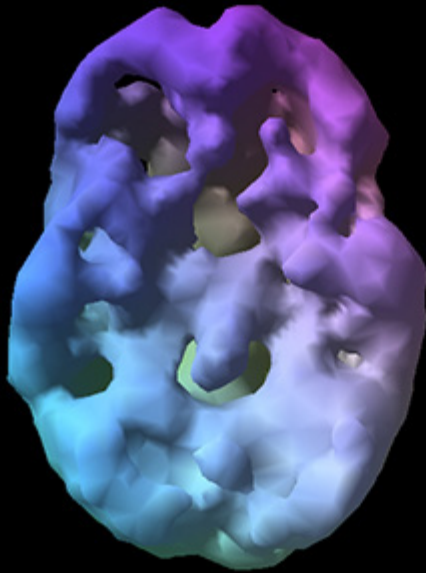


Effects of Long Term Alcohol Abuse on Brain



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WHOSE BRAIN ARE WE LOOKING AT?

48-YEAR-OLD WITH 22 YEARS OF DAILY ALCOHOL USE AND A HISTORY OF PAST HEAD INJURY. NOTE THE MARKED SCALLOPING AND OVERALL DECREASED ACTIVITY

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What Causes Hangover Symptoms? (DOT/FMCSA permits testing based on hangover symptoms)

Several factors can contribute to hangovers:



- *Mild dehydration*
- *Disrupted sleep*
- *Gastrointestinal irritation:*
- *Inflammation:*
- *Acetaldehyde exposure:*
- *Mini-withdrawal:*

Because individuals are so different, it is difficult to predict how many drinks will cause a hangover. Any time people drink to intoxication, there is a chance they could have a hangover the next day.

Marijuana





Marijuana

What is it?

Mind-altering psychoactive drug. Dry, shredded, green/brown mix of flowers, stems, seeds and leaves from the cannabis sativa plant. THC (delta-9-tetrahydrocannabinol) is the main ingredient that produces the psychoactive effect.

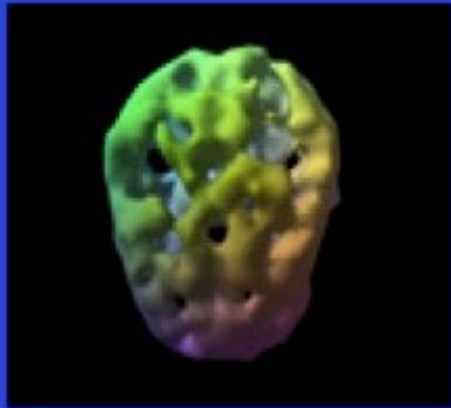
How does it affect the body?

- Relaxation, disinhibition, increased appetite, sedation, increased sociability
- Effects memory and learning
- Difficulty in thinking and problem-solving
- Hallucinations
- Impaired judgment, reduced coordination
- Distorted perception
- Decreased blood pressure, increased heart rate, dizziness, nausea, tachycardia
- Confusion, anxiety, paranoia, drowsiness
- Respiratory ailments

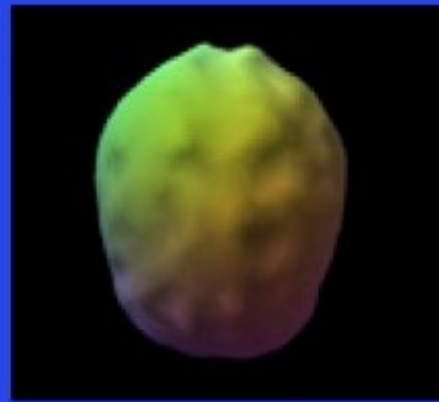


Paraphernalia: Joints, cigarettes, blunts, bong, pipe, vapor pen, a bag of green leafy substance, edibles, product packaging with distinct branding.

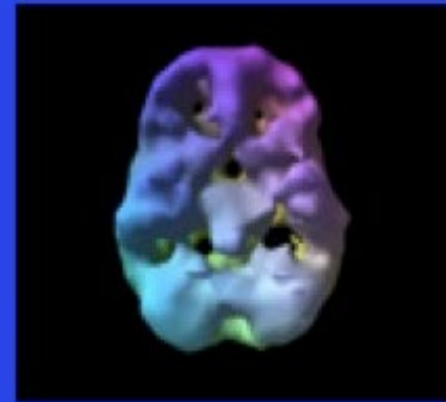
**38 year old with
17 years heavy week-end use**



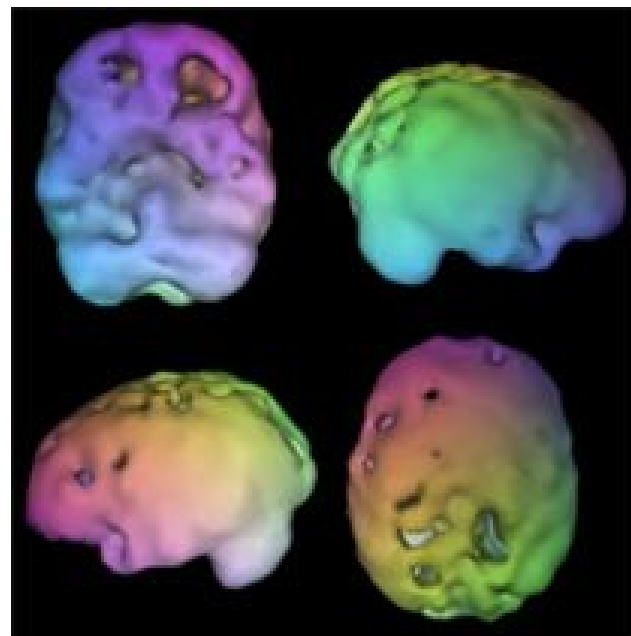
Top-Down



Normal Brain



Underside



SPECT Image:
25 year-old daily marijuana smoker



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Cocaine



Cocaine

What is it?

A white, crystalline powder derived from coca leaves. Cocaine base (crack) looks like small, irregularly shaped white rocks.

Street Names

Coca, Coke, Crack, Crank, Flake, Rock, Snow, Soda Cot, White Lady

How does it affect the body?

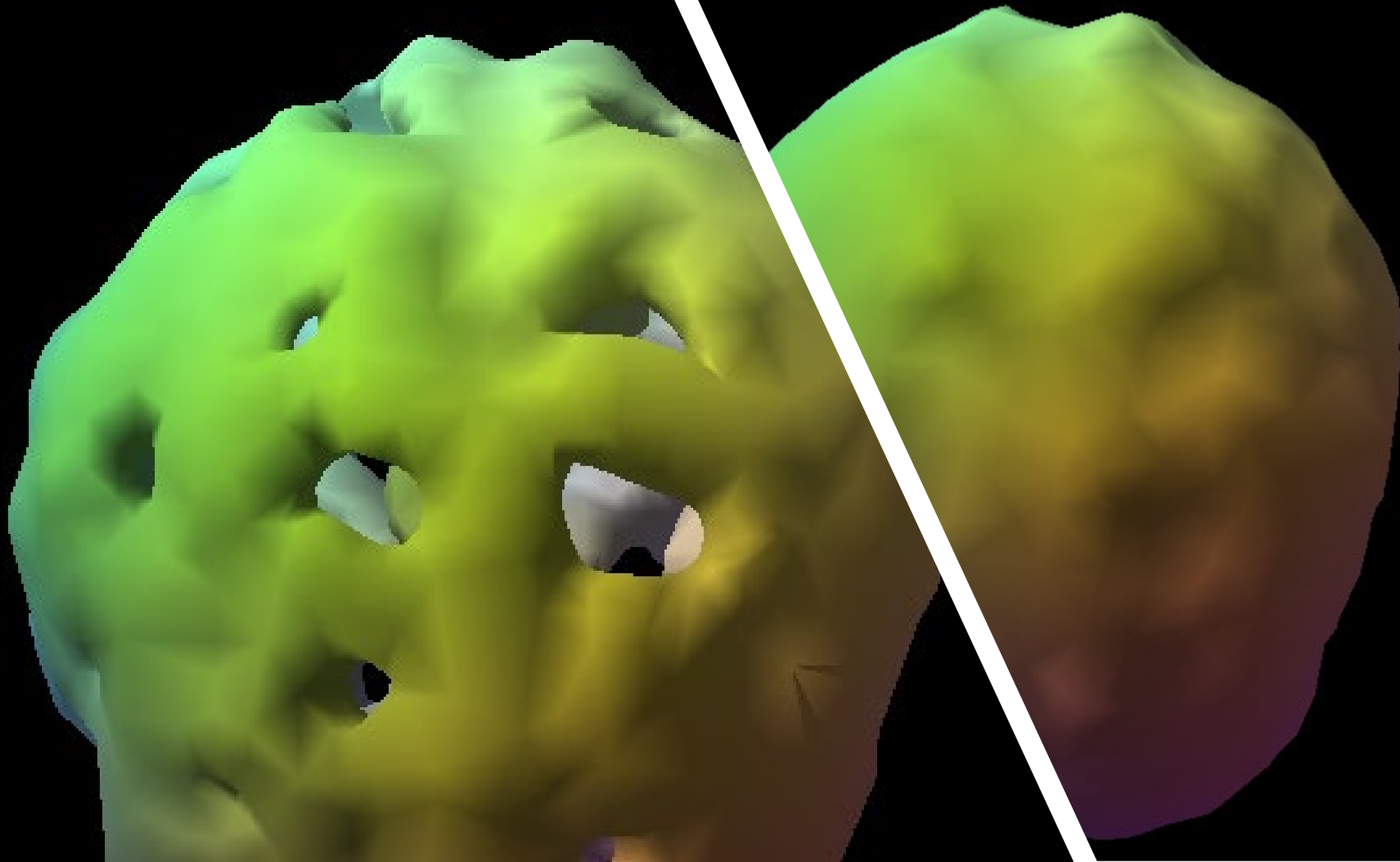
- Smoking or injection creates an intense euphoric 'rush'
- Tolerance builds quickly, easy to overdose
- Cardiac arrhythmias
- Increased blood pressure and heart rate
- Restlessness, irritability, anxiety, paranoia
- Insomnia, loss of appetite
- Convulsion, Sudden cardiac arrest, stroke or death
- The crash that follows a high is mental and physical exhaustion, sleep, and depression lasting several days. Following the crash, users crave cocaine again.

How is it used?

Snorted, Dissolved in water and injected, Crack cocaine is smoked. Cocaine users usually binge on the drug until they are exhausted or run out of cocaine.



Paraphernalia: White power substance (or small, irregularly shaped white rocks), straw, a burnt spoon, needle, pipe, rolled dollar bill.



Opioids



EXAMPLES OF OPIATES/OPIOIDS



OPIUM



HEROIN



MORPHINE



OXYCODONE



METHADONE



HYDROCODONE

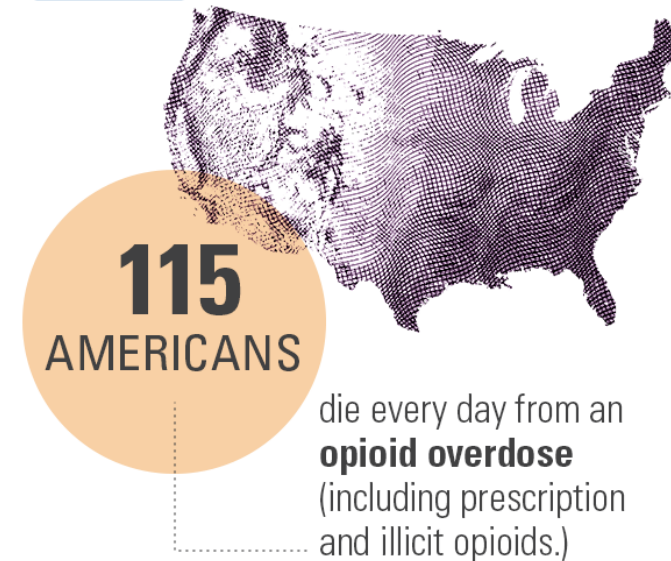


CODEINE

CDC – Latest Numbers

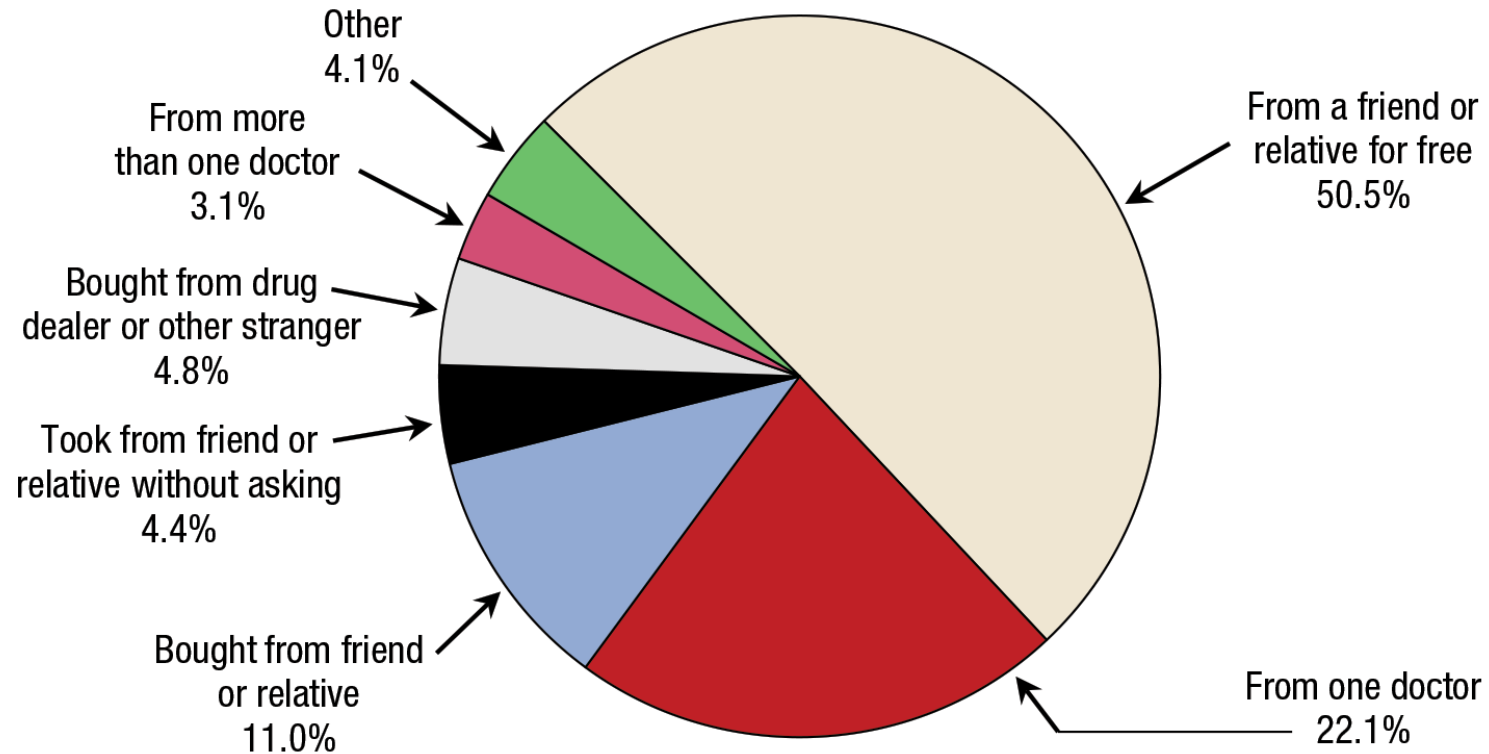
Drug overdose deaths and opioid-involved deaths continue to increase in the United States. The majority of drug overdose deaths (**more than six out of ten**) involve an opioid.

- Since 1999, the number of **overdose deaths** involving opioids (including prescription opioids and heroin) **quadrupled**.
- **115 Americans die every day** from an opioid overdose.
- Since 1999, the amount of **prescription** opioids sold in the U.S. **nearly quadrupled**,
- Deaths from prescription opioids—drugs like oxycodone, hydrocodone, and methadone—have **more than quadrupled** since 1999.



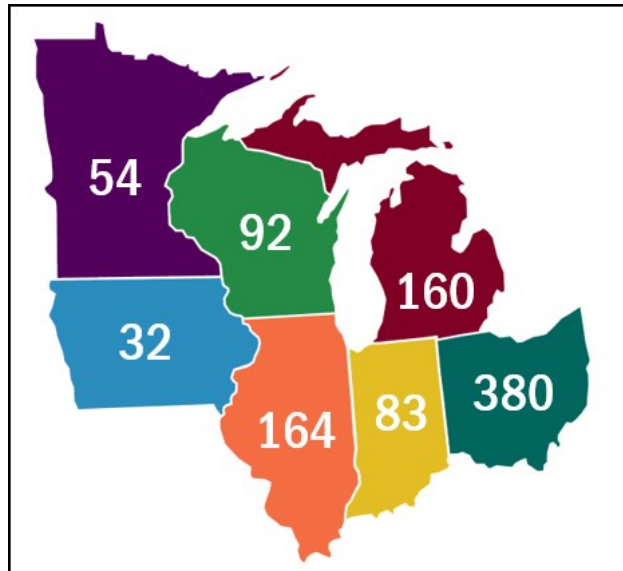
<https://www.cdc.gov/drugoverdose/epidemic/index.html>

Where do pain relievers come from?



Drug Screening Compliance Institute ("DSCI") is NOT a law firm. The information contained herein is for general informational purposes only and is not intended to and does not constitute legal advice. DSCI is an information service only. We use our best efforts to see that the information is complete and up to date.

Prescriptions @ Work in the Midwest



Nearly 1,000 **construction workers** across the Midwest **died** from an opioid overdose in 2015

Construction Worker Deaths by State
from Opioid Overdoses, 2015



Source: The Midwest Policy Institute:

<https://midwestepi.files.wordpress.com/2018/02/opioids-and-construction-final2.pdf>

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Prescriptions @ Work in The Midwest

The opioid epidemic **cost** the Midwest's construction industry an estimated **\$5.2 billion** in 2015.

Illinois \$867 million;
Indiana \$450 million;
Iowa \$168 million;
Michigan \$858 million;

Minnesota \$292 million;
Ohio \$2 billion; and
Wisconsin \$524 million.

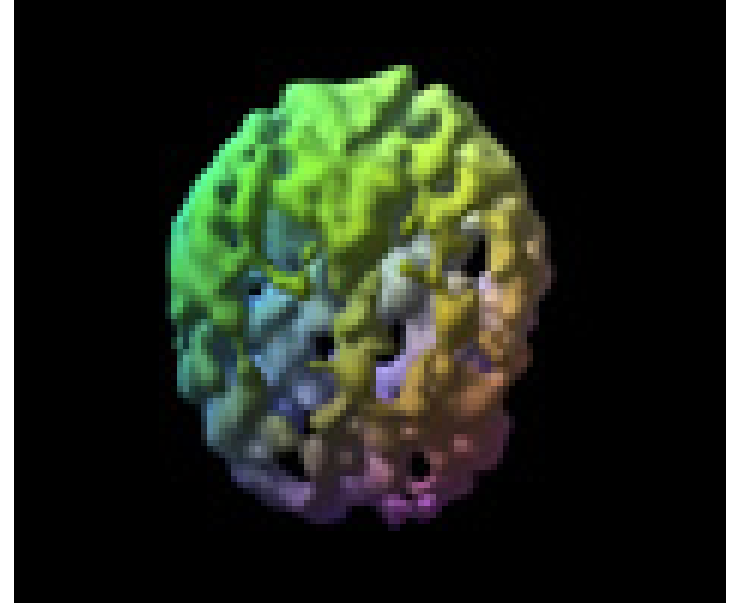
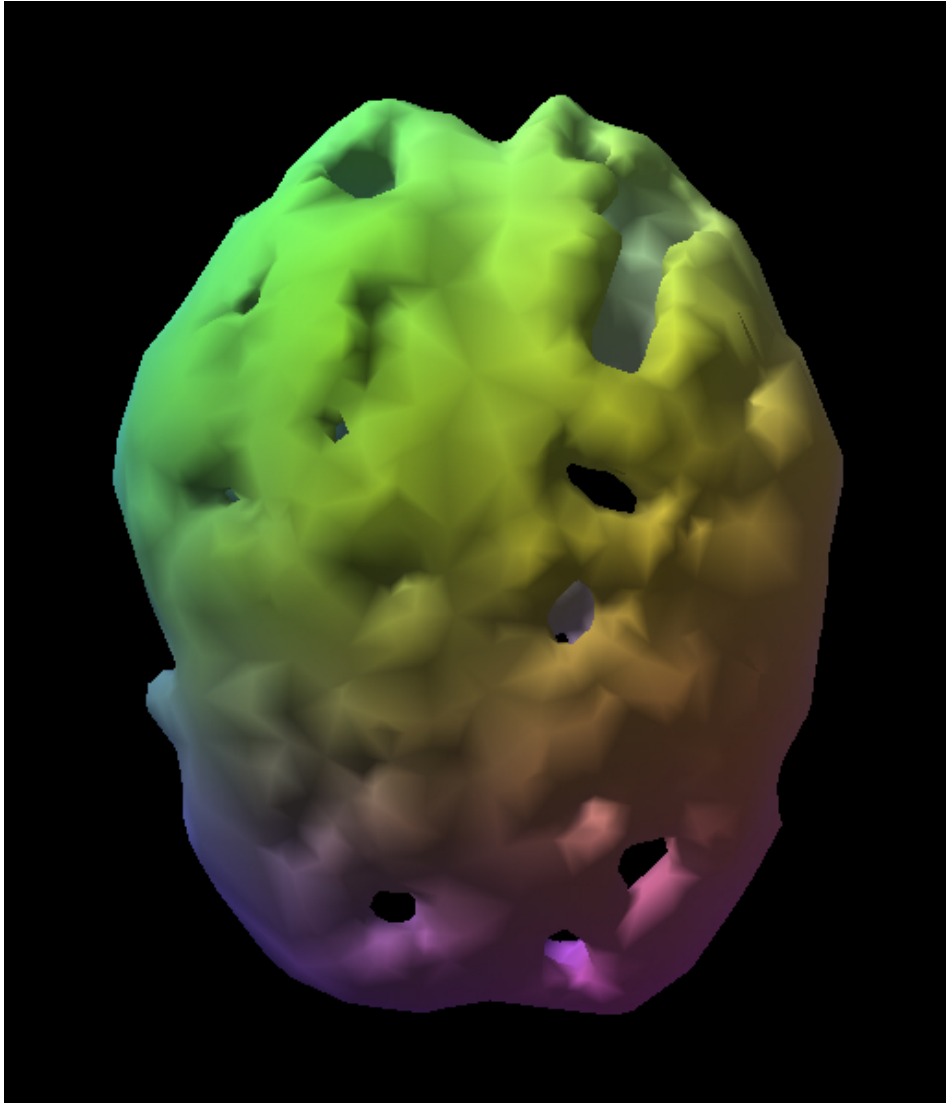
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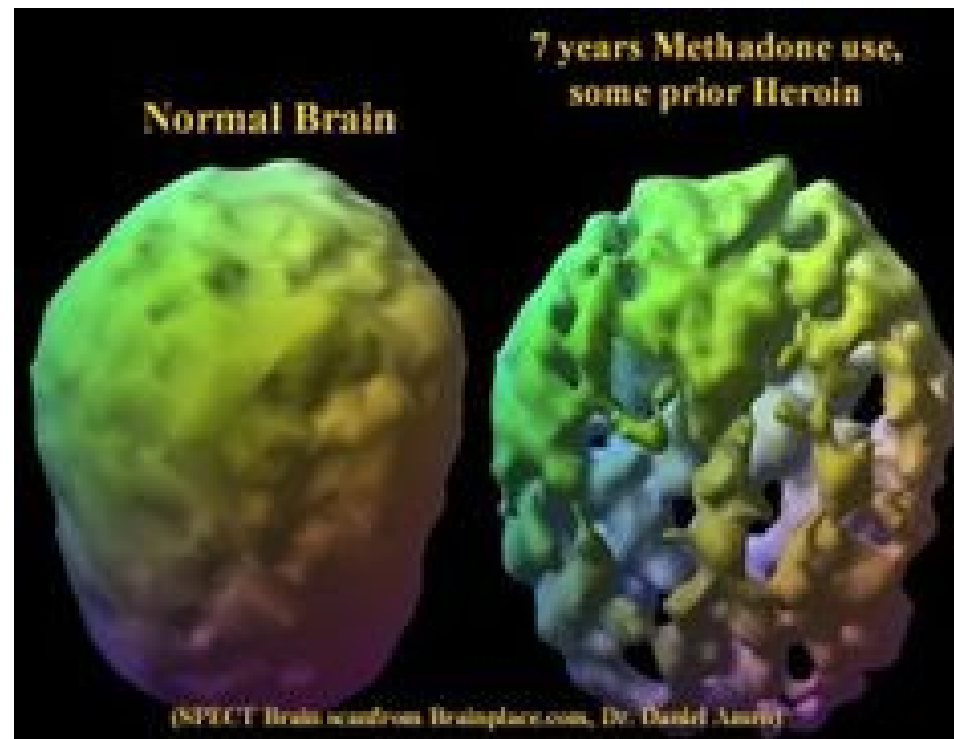


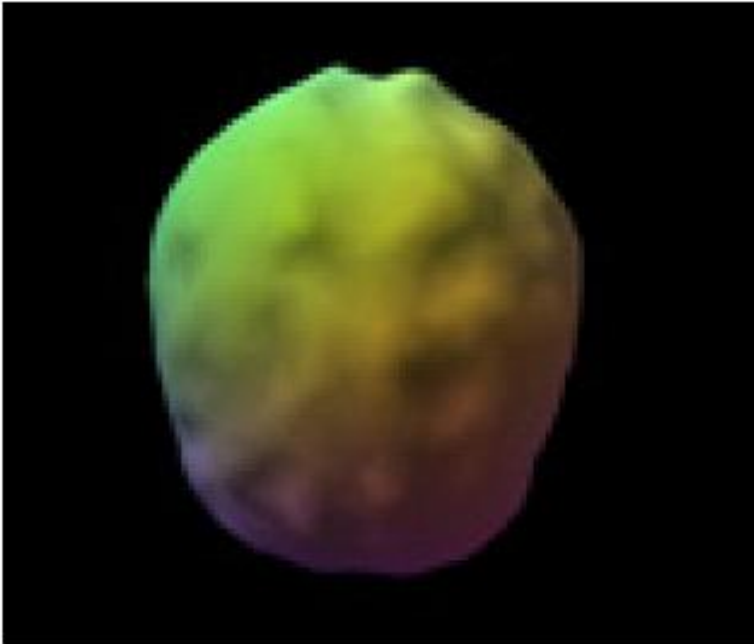
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Heroin





Normal view of brain



25 years of frequent heroin use

Amphetamines



Amphetamines



How is it used?

Orally or injected. “Ice” or crystallized methamphetamine hydrochloride is smoked.

Paraphernalia: Pipe, Pill Bottle, Bag of pills, Needle.

What is it?

Prescription stimulants used to treat Attention-deficit hyperactivity disorder (ADHD). Used as a study aid, to stay awake, and to suppress appetites. Prescribed as Adderall®, Concerta®, Dexedrine®, Focalin®, Metadate®, Methylin®, Ritalin®.

Street Names

Bennies, Black Beauties, Crank, Ice, Speed, Uppers, Meth, AMPs

How does it affect the body?

- Similar to cocaine, but slower onset and longer duration
- Increased body temperature, blood pressure and pulse rates, insomnia, loss of appetite, physical exhaustion
- Chronic abuse produces a psychosis that resembles schizophrenia: paranoia, hallucinations, violent and erratic behavior
- Overdose can be fatal

Phencyclidine (PCP)



Phencyclidine



How is it used?

- Tablets, capsules are swallowed
- In powder form, snorted
- Leafy material sprayed or dipped in liquid and smoked

Paraphernalia: White powder substance, straw, pills, vile of liquid, cigarette that looks wet.

What is it?

Synthetically produced hallucinogen

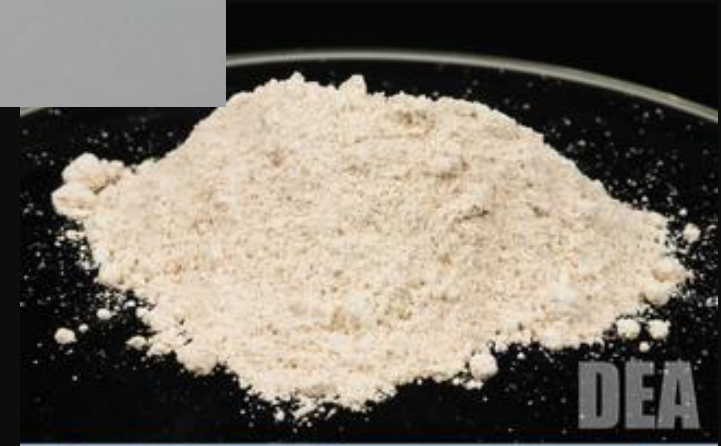
Street Names

Angel Dust, Boat, Crystal, Embalming Fluid, Hog, Ozone, Rocket Fuel, Shermans, Supergrass, Tic Tac, Wack, Zoom

How does it affect the body?

- Dissociative drug, induces distortion of sight and sound and produces feelings of detachment
- Disorientation, delirium
- Sedation, immobility, amnesia
- Numbness, slurred speech, loss of coordination
- Feeling of strength, power, and invulnerability
- Increased blood pressure, rapid and shallow breathing, elevated heart rate and temperature
- Addictive

Fentanyl



Fentanyl



How is it used?

Orally or injected. “Ice” or crystallized methamphetamine hydrochloride is smoked.

Paraphernalia: Patches, pills, white power substance, pipe, needle.

What is it?

Fentanyl is a synthetic opioid that is 80-100 times stronger than morphine. Pharmaceutical fentanyl was developed for pain management treatment of cancer patients, applied in a patch on the skin. Because of its powerful opioid properties, Fentanyl is also diverted for abuse. Fentanyl is added to heroin to increase its potency, or be disguised as highly potent heroin. Many users believe that they are purchasing heroin and actually don’t know that they are purchasing fentanyl – which often results in overdose deaths. Clandestinely-produced fentanyl is primarily manufactured in Mexico.

Street Names

Apace, China Girl, China Town, China White, Dance Fever, Goodfellas, Great Bear, He-Man, Poison and Tango & Cash

How does it affect the body?

- Intense, short-term high
- Temporary feelings of euphoria
- Slowed respiration and reduced blood pressure
- Nausea
- Fainting
- Seizures & Death

Your Role



Somebody tell me what to do!

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Where do you start?



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Takeaways for Employers

- **Clearly understand** the language contained within **state-specific drug & alcohol screening laws** and court & agency rulings that apply to your company, in each state(s) where you operate.
- Create, implement, and routinely review a **written Drug-Free Workplace Policy** that clearly states the company's stance on prohibited drug & alcohol use and the related consequences that will be imposed.
- **Design and implement sound processes and procedures** that complement the language within your company policy. This will remove any guessing or potential mistakes when action needs to be taken in the “heat of the moment.”
- Be sure to **document comprehensive job descriptions** for each role within your company. Especially crucial for job functions that are to be considered “safety-sensitive.” Be prepared to defend why you defined these roles as such.

Takeaways for Employers

- Be prepared to **engage in an interactive process** with an applicant or employee to determine if their underlying medical condition and/or disability can be **reasonably accommodated** or whether it would create an undue hardship to the company, safety, financially, etc.; when and where required by law.
- **Educate your employees** on the dangers and impacts of drug & alcohol use.
- **Encourage employees to seek help** with any drug or alcohol dependency or addiction through your Employee Assistance Program (EAP) benefits or from a Substance Abuse Professional (SAP).
- **Train your managers and supervisors** on the details of your company's drug-free workplace policy. Help them understand the laws that apply (including applicable disability discrimination laws) to their role with policy enforcement as a company leader.
- **Train your managers and supervisors** on how to recognize, document, and confidently act on the signs and symptoms of impairment from drug use. Clearly define the action steps they should take in reasonable suspicion instances.

Questions? Just Ask!

THANK YOU!

Bill Judge

Call: 866-775-3724

Visit: www.askbilljudge.com

Email: support@drugscreeningci.com

This program is valid for 2 PDCs toward SHRM-CP and SHRM-SCP recertification.

