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**Medical Marijuana on Campus:  
Employment and Student  
Conduct Implications**

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**Without getting into the weeds...**

**Controlled Substances Act**



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**“Scheduling”**

**Schedule 1:** no currently acceptable medical use, lack of accepted safety for use under medical supervision, and a high potential for abuse

**Schedule 2:** high potential for abuse

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## Drug-Free Schools and Communities Act



- The Drug-Free Schools and Communities Act Amendment of 1989 (amended the Higher Education Act) 20 U.S.C. § 1011i; 34 C.F.R. Part 86 *et seq.*
- Law requires institutions of higher education receiving federal financial assistance to establish drug and alcohol abuse prevention programs for students and employees.

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## Drug-Free Schools and Communities Act



- Under the DFSCA, colleges must, on an annual basis:
- Distribute materials to students and employees that contain
  - Standards of conduct (on-campus and at sponsored activities);
  - A description of the various laws that apply in that jurisdiction regarding alcohol and other drugs (AOD);
  - A description of the various health risks of drug and alcohol abuse;
  - A description of AOD counseling;
  - Sanctions, including expulsion, termination of employment and referral to law enforcement

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## Drug-Free Workplace Act



Drug-Free Workplace Act of 1988 (DFWA) (41 U.S.C. 81)

- Applies to entities receiving federal contracts in **excess of \$100,000 or receiving any federal grant**;
- Institution of Higher Education (IHE) who receive grants or contracts must, in part, establish a policy prohibiting the "manufacture, use, and distribution of controlled substances in the workplace."
- IHE's failure to demonstrate its "ongoing good-faith effort" to maintain a drug-free workplace can disqualify that institution from obtaining future government funding.

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## Changes in Enforcement

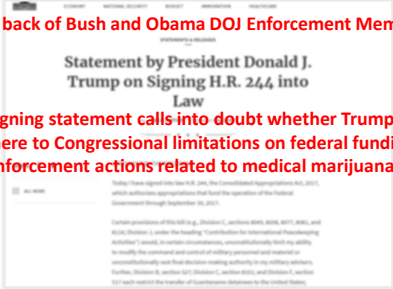


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Roll back of Bush and Obama DOJ Enforcement Memos

Statement by President Donald J. Trump on Signing H.R. 244 into Law

Signing statement calls into doubt whether Trump will adhere to Congressional limitations on federal funding for enforcement actions related to medical marijuana



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## Doobie-ous science?



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- Marijuana is a complex plant
- Limited scientific studies
- Limited studies involving kids



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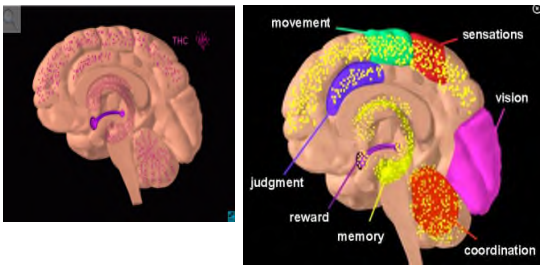
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## NIH/NIDA



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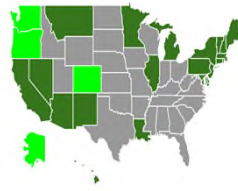
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## Legalization is growing like a weed



Marijuana Legislative Status

- Medical marijuana legalized
- Marijuana legalized for recreational use
- No laws legalizing marijuana

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## 2016...



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## Recreational Marijuana

- Alaska
- Colorado
- Oregon
- Washington

### 2016 Reefer-endums?

- Arizona
- California
- Maine
- Massachusetts
- Nevada
- North Dakota

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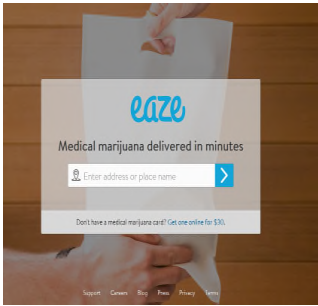
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## That was easze-y!





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## Cannabi\$ i\$ big busine\$\$



**Industrial hemp:** plant parts with <0.3% THC. Hemp production requires permit from DEA.

**Infused food products:** oils and spreads, candy/candy bars, “relaxing mints”, infused jams, infused coffee, tea, cider ( “G-cups”™), baking supplies, flavored moustache wax

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## 2015 ResponsibleOhio





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## Ohio pot-entially dodged a bullet on November 3, 2015



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## Survey says....



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## April 14, 2016



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## Sub. H.B. 523 - May 8, 2016





**June 8, 2016: governor signs, = ORC 3796**

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Ian James and Jimmy Gould, who backed Ohio's 2015 unsuccessful marijuana legalization measure, said Monday they are prepared to raise millions of dollars to put another measure on the 2018 ballot. (Gus Chan, The Plain Dealer)

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## Highlights of ORC 3796



- No home grow
- Cultivators must apply with the Ohio Department of Commerce to become licensed
- Those with certain criminal convictions are disqualified from growing marijuana

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## Permissible forms

- Cannot be combustible (smoked)
- Oils
- Tinctures
- Transdermal patches
- Plant materials
- Edibles
- Other forms that may be permitted by regulations





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## CAVEAT: cannot be attractive to children





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**DON'T HARSH OUR MELLOW, DUDE**

**I FELT A SCARY SHUDDER GO THROUGH MY BODY AND BRAIN. I BARELY MADE IT FROM THE DESK TO THE BED, WHERE I LAY CURLED UP IN A HALLUCINATORY STATE FOR THE NEXT EIGHT HOURS.**



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### Pot-pourri of approved conditions

- AIDS; positive for HIV
- amyotrophic lateral sclerosis
- Alzheimer's disease
- Cancer
- chronic traumatic encephalopathy
- Crohn's disease
- Epilepsy/other seizure disorder
- Fibromyalgia
- Glaucoma
- hepatitis C
- IBS
- multiple sclerosis
- pain that is either chronic and severe or intractable
- Parkinson's disease
- PTSD
- sickle cell anemia
- spinal cord disease or injury
- Tourette's syndrome
- traumatic brain injury
- ulcerative colitis



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### Dr. Feelgood is in!

Physicians who are certified by the State Medical Board can recommend, **NOT PRESCRIBE**, medical marijuana.





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### Physician must:



- Have *bona fide* relationship with patient
- Confirm qualifying condition
- Determine that current Tx doesn't work
- Develop Tx plan, discuss risks and benefits, warn of abuse and of database reporting obligations
- Register unregistered patients
- Recommend of up to 90-day supply, + 3 renewals
- Submit annual report of effectiveness

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### Use/Consumption



- 4 oz. of plant material of 24-35% THC content
- 6 oz. of plant material less than 23% THC
- Unspecified quantities of:
  - vaping oil that contains 40.5 grams of THC
  - skin patches with 19.8 grams of THC
  - edibles, oils and tinctures with 9 grams of THC

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### A plant is a plant. Or is it?



- "Indica" variety relaxes muscles, calms seizures and works on the nervous system. Little THC.
- "Sativa" variety has high THC, so patient is always high. Grows much faster, could be more profitable.
- Statute does not specify limitations on varieties

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### The law does NOT:

- Prohibit an e'r from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person because of that person's use, possession or distribution of MM.
- Prohibit an e'r from establishing a zero-tolerance drug policy.



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### Higher-ing challenges

- Finding enough qualified applicants who can pass pre-employment drug screens
- Increased absences, tardiness
- Accidents, workers' compensation claims
- Turnover



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### Where the rubber hits the road:

- State legalization does not alter DEA status
- Testing mandated for pilots, truck drivers, bus drivers
- Consequences for failing to test include **criminal sanctions**

<http://www.dot.gov/odapc/medical-marijuana-notice>



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## Indirect costs to employers

- Drug-testing applicants, employees
- Increased management training
- Increased need for supervision, oversight



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## We're on a weed-to-know basis

- ADA, ORC §4112 limitations on asking about health conditions
- ORC 3796 does not require accommodation. Lack of knowledge about medical marijuana side effects makes accommodation difficult.
- Employers cannot verify whether employees are lawfully registered users.



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## Remember: drug testing identifies presence, not impairment



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### Where there's smoke...



- Vaping permitted
- Cannot be consumed in public

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### The pot thickens...

- Will EPLI cover claims?
- Will carriers require zero-tolerance policy?
- Will carriers exclude claims involving acts occurring outside of work time?
- Will states ever be on the same page?

STAY TUNED...

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### UNEMPLOYMENT

- The statute bars claims for unemployment benefits **IF** the employer has a clear policy that was violated, not merely for failing a drug test.
- Costs of contesting claims.



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**Ohio Bureau of Workers' Compensation**

**Required Posting**

Effective Oct. 13, 2014, Section 4123.54 of the Ohio Revised Code requires notice of rebuttable presumption. Rebuttable presumption means an employee may dispute or prove untrue the presumption (or belief) that alcohol or a controlled substance not prescribed by the employee's physician is the proximate cause (main reason) of the work-related injury.

The burden of proof is on the employee to prove the presence of alcohol or a controlled substance was not the proximate cause of the work-related injury. An employee who tests positive or refuses to submit to chemical testing may be disqualified for compensation and benefits under the Workers' Compensation Act.

**Ohio Bureau of Workers' Compensation**

OP-28 BWC-1529 1/1/15

A positive test may support rejecting a claim, **IF** the employer has a policy prohibiting marijuana use, even if it is legally available medical marijuana

P.S. Claims denials still implicate claims-related costs

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## Let's just take a DEEP breath

- Asking about illegal use is not prohibited
- Zero-tolerance policies are permitted
- Testing is not prohibited
- Terminating is not prohibited



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- Update substance abuse policies, blanket testing policies, smoking policies?
- Train managers and supervisors
- Job descriptions should identify safety-sensitive aspects
- Educate employees about hazards of abuse

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## Higher Education Specific Issues



- Increased number of students using marijuana and changing perceptions of risk.
- Compliance with Federal law to maintain Federal Funding
  - Drug-Free Schools and Communities Act (DFSCA)
  - Drug-Free Workplace Act (DFWA)
  - CSA

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## Students' changing habits



Increased number of students using marijuana before College:

- 37.1% of 12<sup>th</sup> graders (w/in last year)
- 45.0 % of 12<sup>th</sup> graders (lifetime)

Historic low in perceived risk:

- 29% - perceive "great risk" for regular marijuana use
- 14.1 – perceive "great risk" for smoking "from time to time"

Miech, R. A., Schulenberg, J. E., Johnston, L. D., Bachman, J. G., O'Malley, P. M., & Patrick, M. E. (December 14, 2017). "National Adolescent Drug Trends in 2017: Findings Released." Monitoring the Future: Ann Arbor, MI. Retrieved 12/18/2017 from <http://www.monitoringthefuture.org>

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## Students' changing habits



- Conflict between incoming beliefs and policy
  - DFWA/DFSCA education and risk prevention requirements should address incongruence.
- Conflicts between student norms and disciplinary outcomes.
- Consider increased availability of drug education/rehabilitation programs

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## Accommodations?



### Federal Discrimination laws do not apply to use of illegal drugs:

- See Americans with Disabilities Act 42 U.S.C. § 12114(a)("[T]he term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.";
- See Rehabilitation Act, 29 U.S.C. § 701(a)("[T]he term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use."

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## Considerations



**No. 1:** IHE's should make clear that they are prohibited by federal law to permit the use of marijuana regardless of state law permitting its medical use.

**No. 2:** IHE's should consider the reach of their student conduct process (reviewing off-campus behaviors that have an adverse impact on the academic community) and ways to draw clear boundaries to where the prohibition will be enforced.

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## Considerations



**No. 3:** IHE's should educated students, particularly those who have medical marijuana cards both in Ohio and outside of Ohio with reciprocity, that they may not use medical marijuana on campus.

**No. 4:** IHE's should clearly communicate to students that their use of medical marijuana can impact both their ability to obtain jobs for federal employers (See, *DFWA*) and may impact their ability to obtain federal financial aid.

- Consider increasing appropriate local sources of AOD treatment to permit offenders to become eligible for Fed. Fin. Aid.

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## Do You Have a Medical Marijuana Card?



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## Questions?



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