

# CANNABIS IN THE WORKPLACE

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# Cannabis in the Workplace

- ✿ What is Cannabis?
- ✿ Why you're likely to face cannabis in the workplace
- ✿ How cannabis affects the human body
- ✿ History of Cannabis in the United States
- ✿ Is the Federal Government Moving Toward Cannabis Tolerance?
- ✿ Medical Use Accommodations - When Is An Employer Required to Accommodate Employee's Medical Use and How?
- ✿ Can an Employer Still Have a Zero Tolerance Policy?
- ✿ Why Drug Testing is Not Reliable for Determining if an Employee is Under the Influence.
- ✿ Best Practices

# What Is Cannabis?

**Scientifically, there are three species of cannabis:**



Cannabis Sativa



Cannabis Indica



Cannabis Ruderalis

# What is Cannabis?

**Along With Two Recognized Subspecies of Cannabis Sativa:**



Cannabis Sativa L.  
Common Name: **HEMP**



Cannabis Sativa C.  
Common Name: **CANNABIS**

# What Is Cannabis?

- ▶ For clarity, the term cannabis will be used in the common vernacular, where cannabis refers to all cannabis plants and their derived products -

- ▶ EXCEPT those originating from

Cannabis Sativa L. = Hemp

- ▶ . . . But remember,

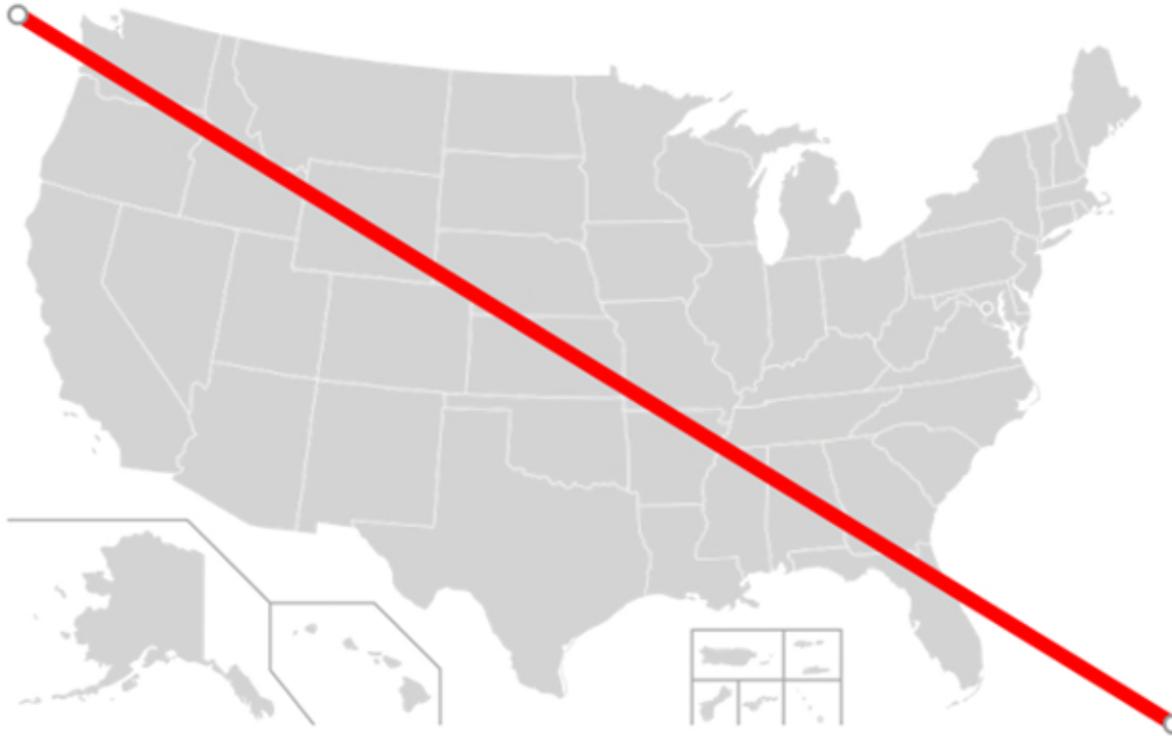
scientifically, hemp belongs to the cannabis family.

# What Is Cannabis?

- ▶ In the U.S., Hemp can be Legal or Illegal
- ▶ Hemp is legal if it fully complies with 2018 Farm Bill by containing  $\leq 0.3\%$  THC and fulfills local state requirements.
- ▶ Hemp failing the above requirements is not legal.

# Why you're likely to face cannabis in the workplace

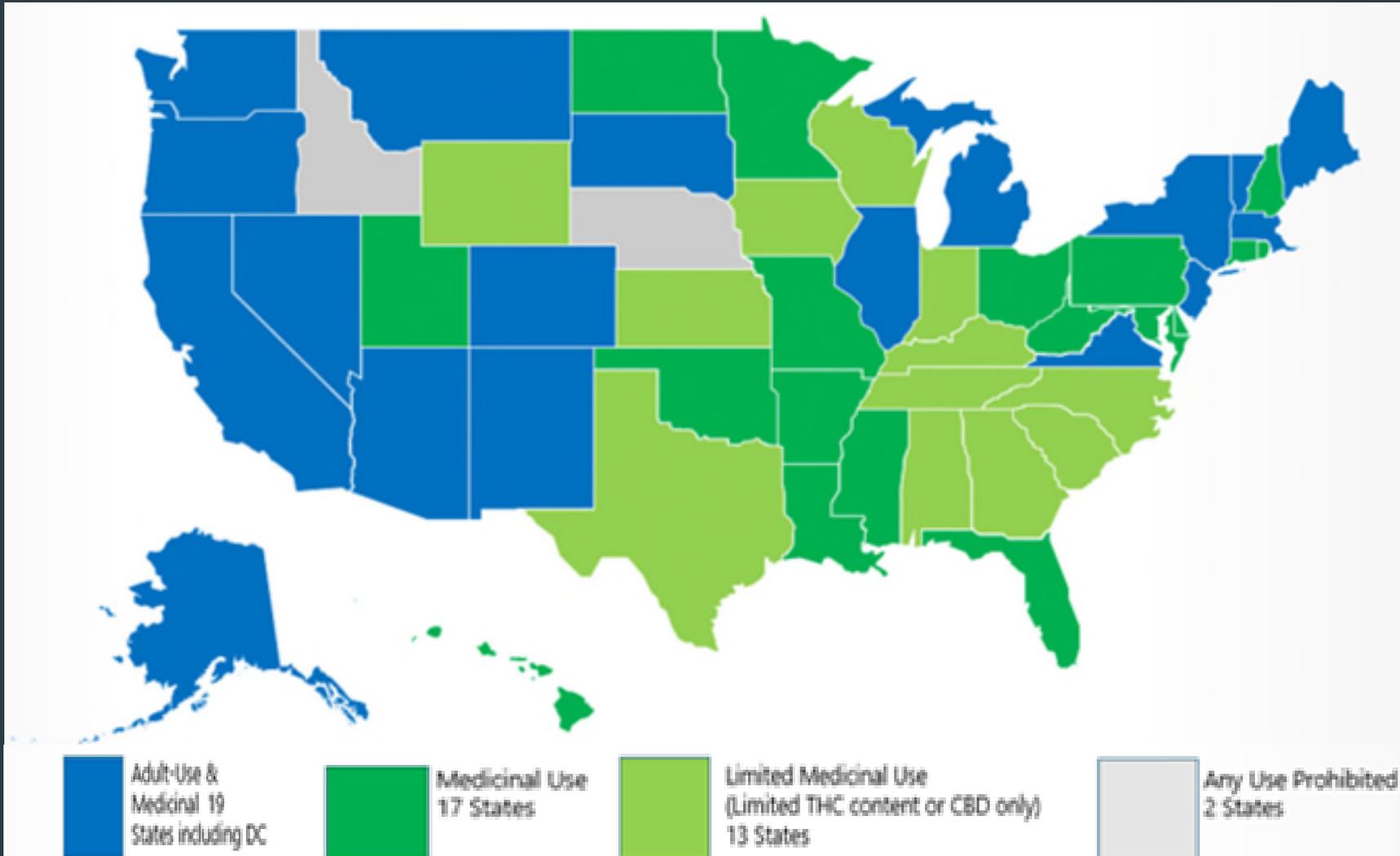
## Legal Status of Cannabis at the Federal Level



**Any Use Prohibited.** The Controlled Substances Act (CSA), prohibits, among other things, manufacturing, distributing, dispensing, or possessing cannabis and cannabis-based preparations.

Why you're likely to face cannabis in the workplace

# Cannabis At The State Level



How cannabis affects the body

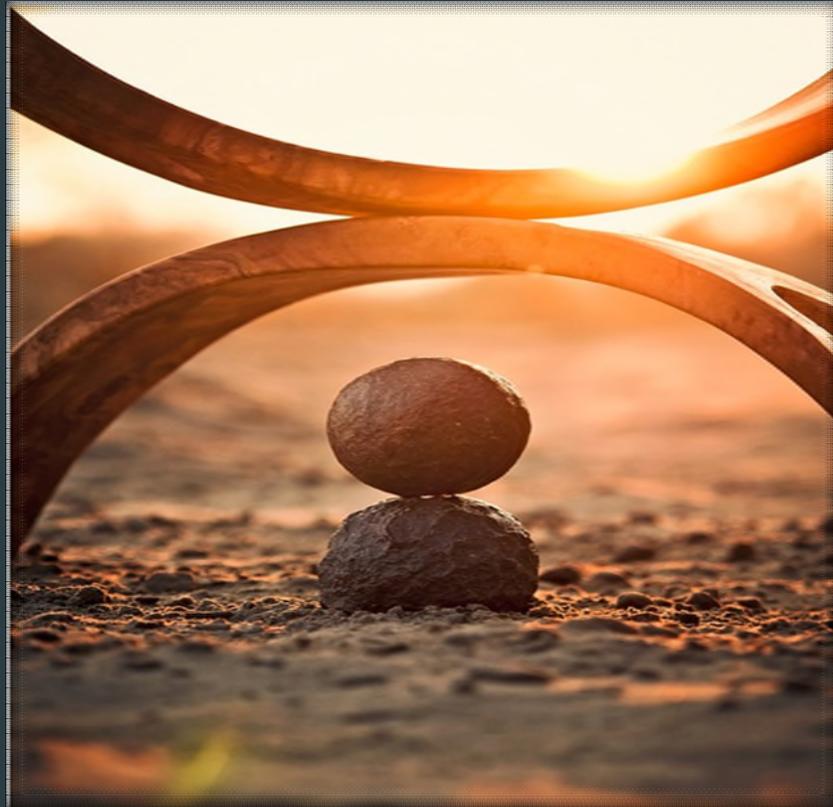
# The Endocannabinoid System (ECS)

- ▶ In 1988 scientists detect that the mammalian brain has cannabinoid receptors
- ▶ By mapping the DNA of the cannabinoid receptors in humans, the Endocannabinoid System (the body's 12<sup>th</sup> known major organ system) was discovered in 1990
- ▶ The ECS regulates homeostasis across all major body systems ensuring the systems work in concert with on another

How cannabis affects the body

# Homeostasis

*The ability to seek and maintain internal equilibrium or stability when dealing with outside changes*



How cannabis affects the body

## How the ECS regulates homeostasis

There are three key components of the ECS

- ▶ **Cannabinoid Receptors** found on the surface of cells
- ▶ **Cannabinoids** are small molecules that activate cannabinoid receptors, and
- ▶ **Metabolic Enzymes** that quickly break down endocannabinoids after they are used

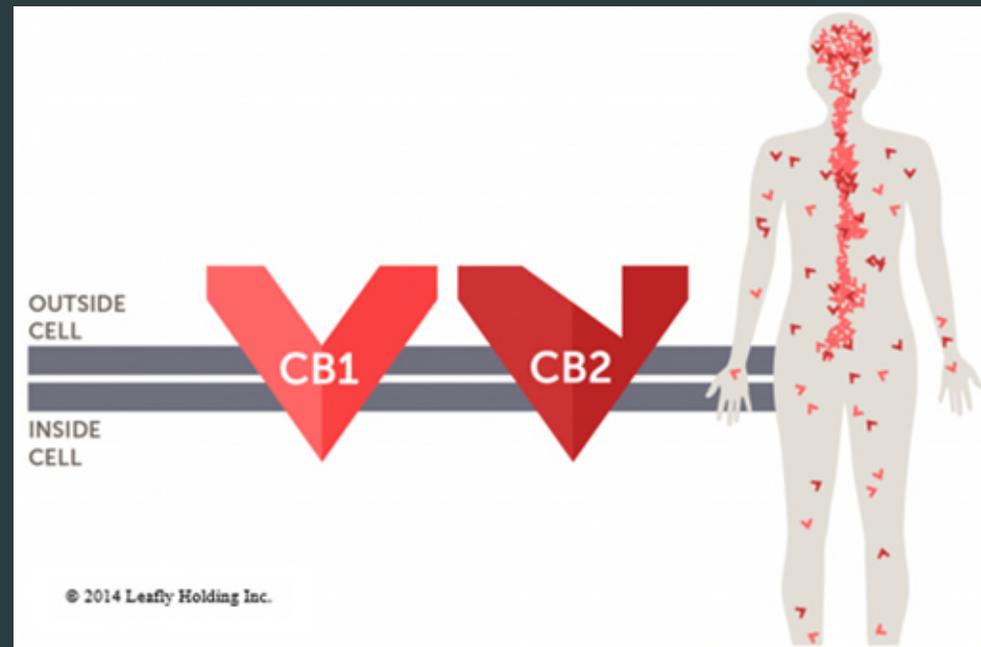
How cannabis affects the body

## Cannabinoid Receptors

Are found on the surface of cells, monitor conditions outside the cell, and transmit information of changing conditions to the inside of the cell

CB 1 Receptors in the brain and central nervous system; and

CB 2 Receptors in the immune system and peripheral nervous system



How cannabis affects the body

# Cannabinoids

There are three types

- ▶ Endocannabinoids - produced naturally by the human body (Anandamide, 2-AG)
- ▶ Phytocannabinoids - found in plants, more than 113 exist in cannabis and hemp (THC, CBD)
- ▶ Synthetic Cannabinoids - Manufactured cannabinoids, four approved by the FDA



How cannabis affects the body

# Metabolic Enzymes

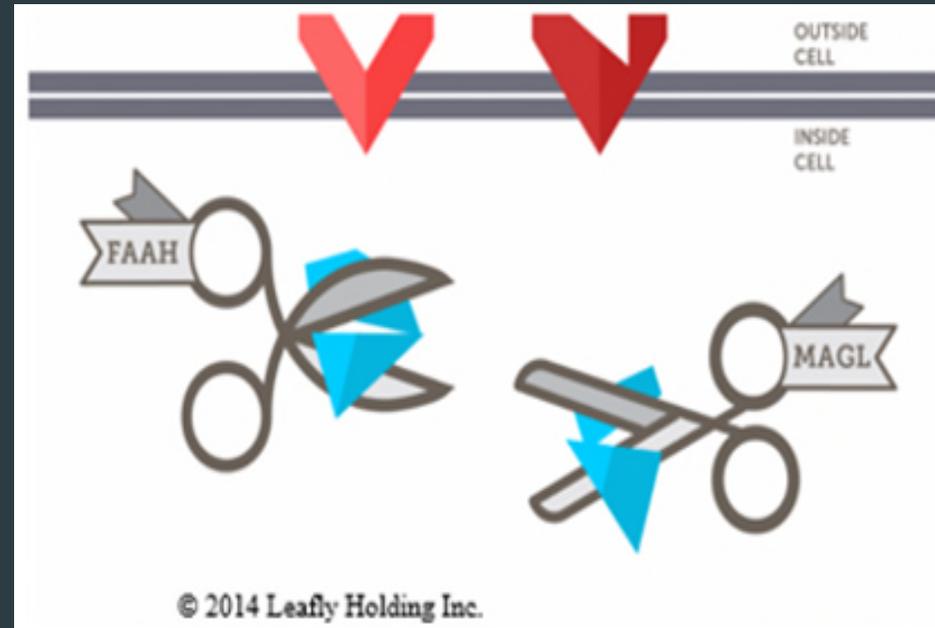
The final piece of the ECS triad

FAAH breaks down Anandamide  
MAGL breaks down 2-AG

Both destroy endocannabinoids very quickly

BUT, they are not effective at breaking down phytocannabinoids (THC and CBD)

That is why accurate tests for cannabis have proven elusive as THC remains in blood long after being utilized.

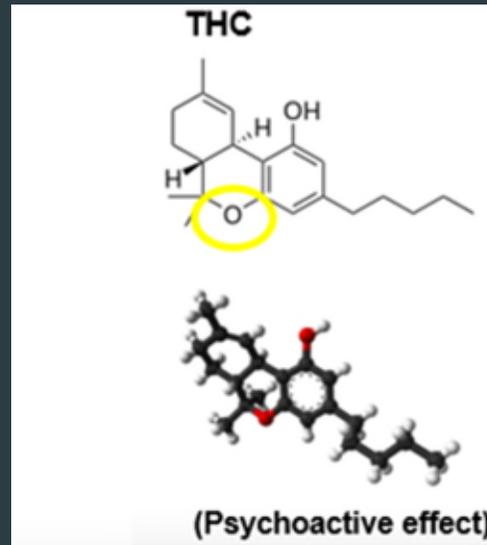
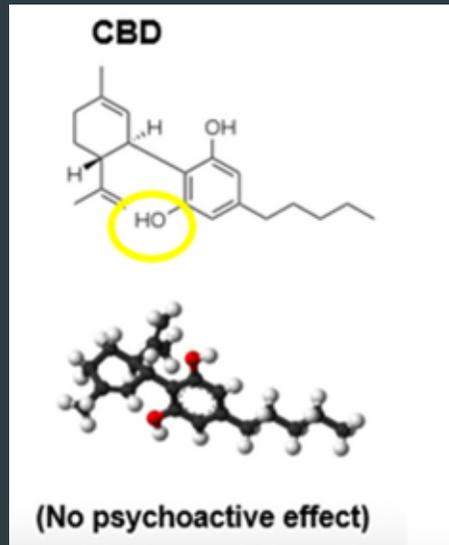


How cannabis affects the body

# The minute difference between CBD & THC

Each contain: 21 carbon atoms, 30 hydrogen atoms, and 2 oxygen atoms

The arrangement of a single atom differentiates the two cannabinoids as highlighted below



How cannabis affects the body

# How THC & CBD Affect The Body

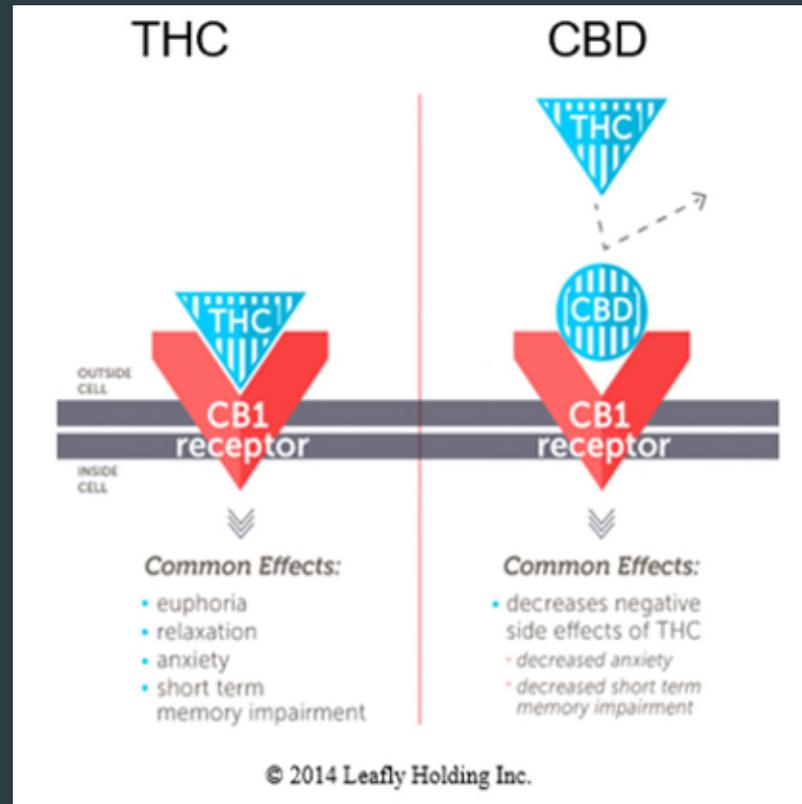
Only THC binds directly to CB1 Receptors

When THC binds with a CB1 Receptor it creates the psychoactive effect of cannabis

CBD can attach to CB1 Receptors

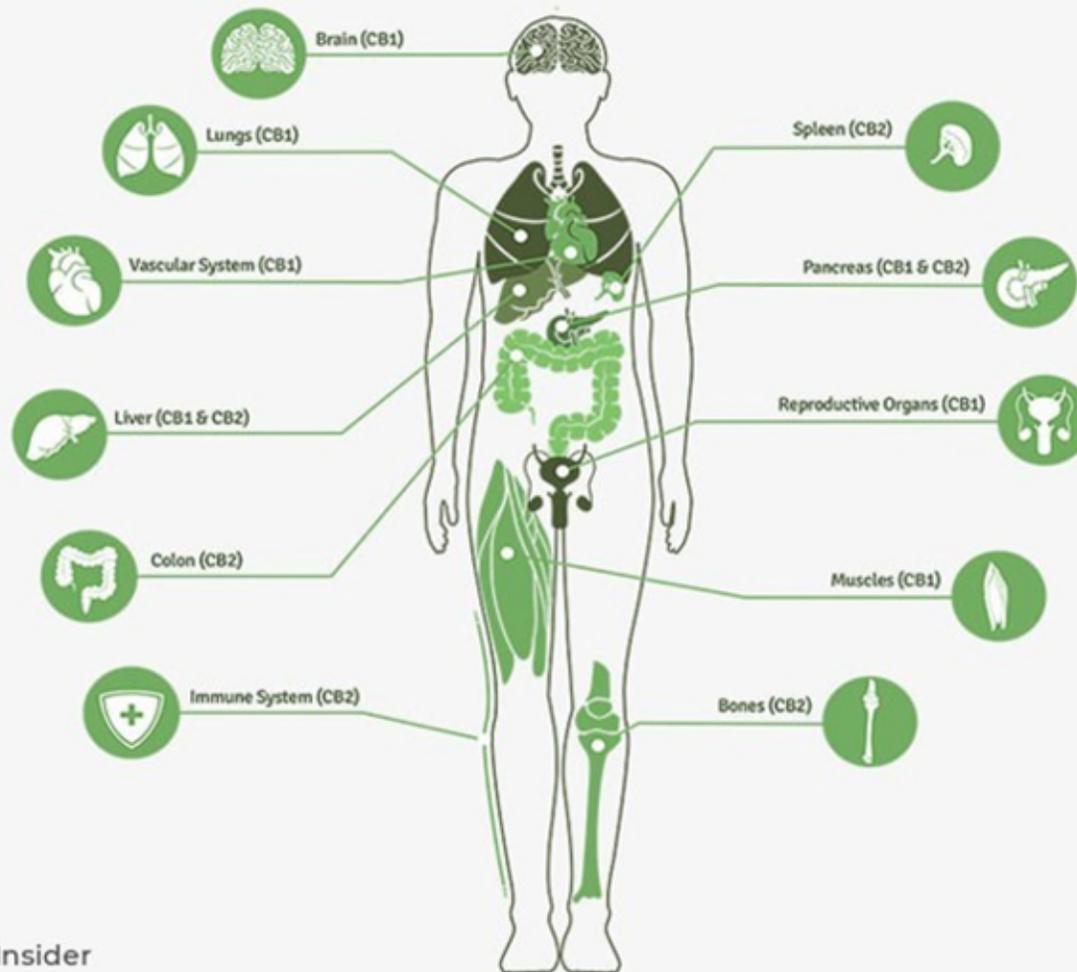
When CBD attaches to CB1 Receptors it negates the bond between THC and CB1 Receptors and minimizes the psychoactive effect of THC

CBD offers many of the same benefits of THC but without any psychoactive effect



How cannabis affects the body

# Cannabinoid receptors interaction with the body



Source: Cannalinsider

How cannabis affects the body

# Cannabis based medical treatments



How cannabis affects the body



## The Myths Surrounding CBD Oil

- ▶ CBD oil will make me “high.”

**It Depends:** *CBD oils derived from legal hemp will not get you high.*

*However, some CBD oils derived from cannabis contain 5% or more THC and will produce a psychoactive effect.*

- ▶ CBD oil is not legal in the U.S.

**It Depends:**

*At the Federal level, CBD (no matter its source) cannot legally be used for human or animal consumption. Federal Regulations, however allow CBD in cosmetics if derived from legal hemp.*

*At the State level, each state has its own restrictions and local ordinances.*

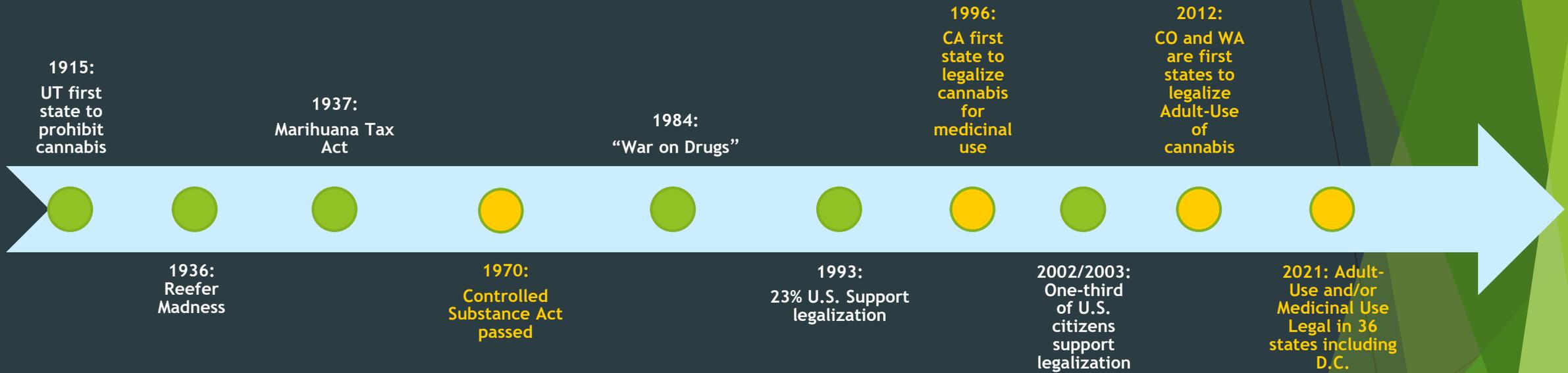
- ▶ You will not fail a drug test if using CBD oil products.

**FALSE:** *Nearly all CBD oils on the market contain THC. The level depends on the source and type of extraction. Even small amounts of THC can trigger a positive drug test for cannabis.*

# The United States History of the Legalization of Cannabis



# From Non Regulation to Prohibition to Legalization



# Cannabis, Racism, and Social Inequity

Why use the term “Cannabis” and not “Marijuana.”

Cannabis is the plant’s scientific name

Reefer Madness - U.S. Commissioner on Narcotics Harry Anslinger attacks hempweed

President Ronald Reagan - War on Drugs 2.0.



We know it as the ordinary hempweed which can be grown in any backyard in any State in the Union. Its use as a stimulant or narcotic is, however, of recent date. It was introduced about 10 years ago by Mexican peddlers in the form of cigarettes. Its use has spread like wildfire and is associated with crime in its most vicious aspects.

- Harry Anslinger,  
US Commissioner on Narcotics

# The State of Legalization for Adult-Use in 2021:

- ▶ **New Jersey** - (February 22, 2021)
- ▶ **New York** - (March 31, 2021) - 15<sup>th</sup> State to Legalize.
- ▶ **New Mexico** - (April 2, 2021)
- ▶ **Connecticut** - (April 6, 2021) General Assembly's Judiciary Comm. approved Governor Lamont's bill to legalize for adult-use.
- ▶ **Virginia** - (April 7, 2021) First Southern State to legalize adult-use.
- ▶ **Pennsylvania** - Governor Tom Wolf has made legalization a priority for 2021 legislative session.
- ▶ **South Dakota** - On July 1, 2021, Court struck down the adult-use measure passed by voters last November on constitutional grounds. **The voter-passed ballot measure legalizing medical use will soon take effect.**

## 2022 Legalization Momentum:

Rhode Island legislature moving toward passing **adult-use** use.

North Carolina legislature for the first time advanced a measure to legalize for **medicinal cannabis**.

Ballot measures are in various stages in preparation for 2022 election:

- ❖ Arkansas
- ❖ Idaho
- ❖ Maryland
- ❖ Mississippi
- ❖ Missouri
- ❖ Nebraska
- ❖ North Dakota



# Federal Tolerance?

## Business/Industry Protection

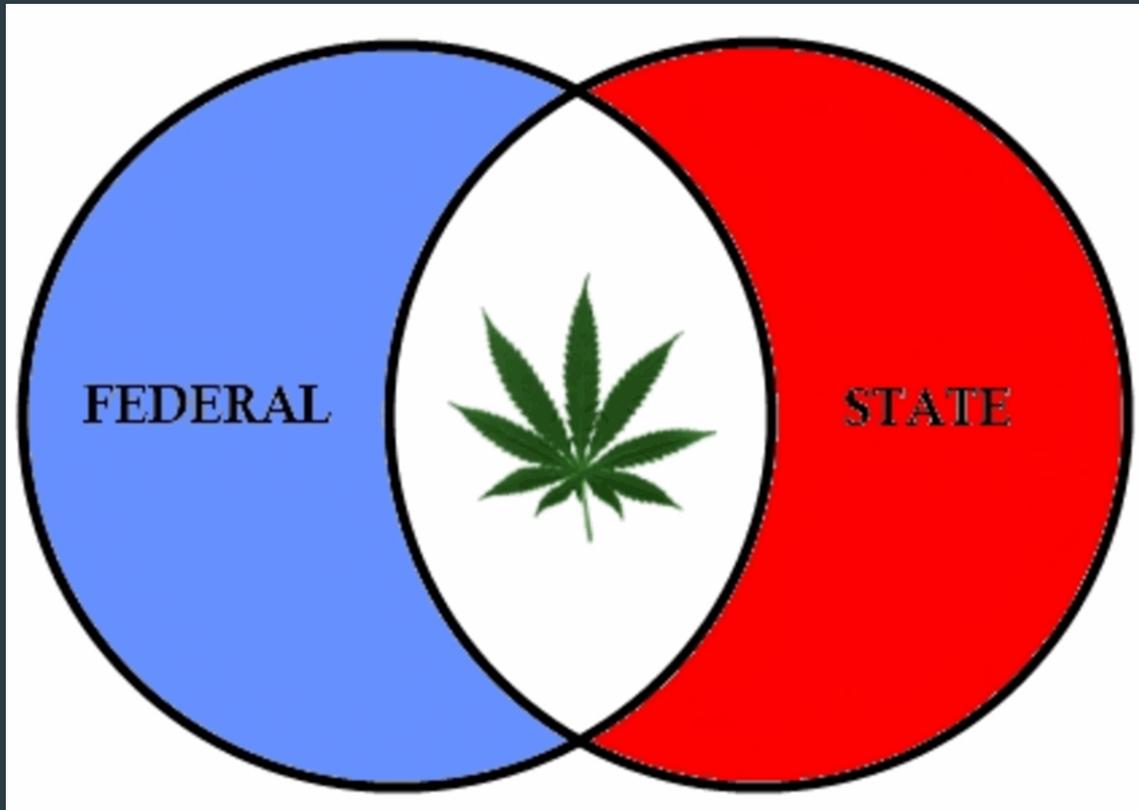
- SAFE Banking Act of 2021
- The CLAIMS Act

## Social Reform/Decriminalization

- Cannabis Administration and Opportunity Act



# Conflict Between Federal and State: What Law Does the Employer Follow?



# Federal Laws Governing the Workplace

- ▶ **Americans with Disabilities Act (“ADA”)** requires employers to provide reasonable accommodations for qualified workers with disabilities. A person who is “currently engaging” in the illegal use of drugs is not a “qualified individual with a disability.” While cannabis remains illegal under federal law the ADA will not protect employees who use medical marijuana.
- ▶ **Omnibus Transportation Employee Testing Act of 1991**, mandates employers with employees requiring a Commercial Driver’s License (“CDL”) to be drug tested. DOT does not recognize medical marijuana use as a valid medical explanation for a positive drug test.
- ▶ **Federal Contract Compliance - Drug Free Workplace Act** applies to certain federal contractors and grant recipients. Requires a continuous good faith effort for companies to maintain a drug-free workplace. Zero tolerance policy.

# Duty to Accommodate: Employer Friendly Decisions

State courts that have issued rulings in favor of employers who have taken adverse action against an employee based on his or her legal cannabis use have relied on federal law and the respective state's cannabis law.

- ▶ **California and Colorado** - Rely on cannabis use being illegal under federal law to allow employers to take adverse action against employee.

**\*Warning: This view is shifting\***

- ❖ *Ross v. Raging Wire Telecommunications, Inc.*, 70 Cal.Rptr.3d 382 (2008).
- ❖ *Coats v. Dish Network, LLC*, 2015 CO 44 (2015).

- ▶ **Washington** - Relies on statutory language in cannabis law that explicitly states the law is in effect as an affirmative defense against criminal action.

- ❖ *Roe v. Teletech Customer Care Management, LLC*, 171 Wn.2d 736 (2011).

## Duty to Accommodate: Employee Friendly Decisions

**No preemption of federal law:** The current trend is in those courts where the state's Medical Marijuana Act creates a private right of action for medical marijuana users to sue their employers when the use results in adverse action.

- Pennsylvania: *Palmiter v. Commonwealth Health Systems, Inc.*, C.A. No., 19 CV 1315 (Pa. Ct. C.P. Lackawanna County, Nov. 22, 2019).
- Arizona: *Whitmire v. Wal-Mart Stores, Inc.*, 359 F.Supp.3d 761 (D. Az. 2019).
- Delaware: *Chance v. Kraft Heinz Foods Co.*, C.A. No. K18C-01-056NEP (Del. Super. Ct. Dec. 17, 2018).
- Connecticut: *Noffsinger v. SSC Niantic Operating Co.*, 338 F.Supp.3d 78 (2018).
- Massachusetts: *Barbuto v. Advantage Sales and Marketing, LLC*, 477 Mass. 456 (2017).

## Duty to Accommodate: Medical Use

Some state medical use laws explicitly offer users protection from employment discrimination for use outside the workplace.

Some states prohibit employment decisions based solely on the person's status as a medical user or cardholder.

**AR, AZ, CT, DE, IL, ME, MN, NJ, NY, NV, PA, and RI.**



## Duty to Accommodate: Medical Use

Positive test for medical marijuana will not result in adverse action, unless the individual used, possessed, or was impaired by marijuana in the workplace or during work hours. Exceptions from the employment protections include safety-sensitive positions and/or when it would result in the loss of a business license or a government contract.

AR, AZ, CT, DE, IL, ME, MN, NJ, NY, NV, PA, and RI



# New Jersey Protects Employees Off-Duty Use



- ▶ Prohibits employers from taking adverse employment action against employees or applicants based on their use (or nonuse) of cannabis items.
- ▶ Employers may establish drug and alcohol free workplace and do not have to permit or accommodate cannabis use in the workplace or during work hours.
- ▶ For those employers who would be adversely impacted by the requirements of a federal contract, those employers may revise their prohibition consistent with federal law, rules and regulations.

# New Jersey Protects Employees Off Duty Use

## ▶ Drug Testing:

A drug test must include “scientifically reliable objective testing methods and procedures, such as testing of blood, urine, or saliva” and a “physical evaluation.”

The individual conducting the “physical evaluation” must be certified under regulatory standards established by the Cannabis Regulatory Commission, in consultation with the Police Training Commission, as a “Workplace Impairment Recognition Expert” (WIRE).

## ▶ WIRE:

To be certified must receive education and training “in detecting and identifying an employee’s usage of, or impairment from, a cannabis item or other intoxicating substance, and for assisting in the investigation of workplace accidents.”

A WIRE can be an employee or another who “contract[s] to perform services on behalf of an employer.

# Accommodating Off-Duty Medicinal Use

- ▶ Duty to accommodate is found in the language and terms of the respective state's discrimination and cannabis statutes.
- ▶ Engage in the interactive process with any employee who discloses a disability and medical use of cannabis for that disability and evaluate the employee's ability to safely perform the essential functions of the job with or without reasonable accommodation.
- ▶ States that protect cannabis for medical users prohibit refusing to hire or terminate an employee who disclosed cannabis use, the exception is for **safety sensitive jobs**.

## What is a Safety Sensitive Position?

Any job designated by an employer or includes tasks or duties that the employer in *good faith* believes could affect the safety or health of the employee performing the task or others.



Employers should demonstrate that the employee's inability or impaired ability to perform job-related tasks could result in a *direct threat to his or her safety and/or the safety of others*.

# Safety Sensitive Position

- Driving any motor vehicle
- Working with power tools
- Operating equipment (manufacturing industry)
- Working on elevated surfaces (ladders, scaffolding)
- Construction industry
- Security guards (or any industry/profession where employees carry weapons)
- Performing duties in the residential or commercial premises of a customer, supplier, or vendor
- Preparing or handling food or medicine.



# Safety-Sensitive Position: Off Duty Use Prohibited

When an occupation is designated as **safety-sensitive**, it is permissible for employers to inquire:

- ❖ whether an employee is currently taking any prescription drugs or medications;
- ❖ whether the employee has taken any such drugs or medications in the past;
- ❖ or monitoring an employee's taking of such drugs or medications.



# Safety Sensitive Position: Off-Duty Use Prohibited

- ▶ The workers in these roles must have full use of their skills and faculties while performing their jobs.



- ▶ Negative effects of use includes impaired motor performance, impaired mind, loss of balance and coordination, decreased attentiveness and alertness, prolonged response time to stimuli and danger, decreased ability to judge distance and space, and impaired ability to perform complex tasks.

# Prohibiting Use and Impairment in the Workplace

## On-Duty Use

None of the medical or recreational cannabis laws require employers to allow employees to use, possess, or be impaired by cannabis during work hours or in the workplace, even if for medicinal purposes.

None of these laws place restrictions on employer's right to administer drug tests (but the state may have separate laws regarding how to use the results from the drug tests).

## Off-Duty Use

**Maine and New Jersey** are the only states that protects employees from off-duty use of recreational cannabis.

**Arizona, Arkansas, and Delaware** (along with other states) prohibit an employer from taking adverse action if an employee is using cannabis for medical purposes the employer cannot rely on the positive drug test *unless the employer had reason to believe employee was under the influence at work.*

**Florida and Ohio's** medical cannabis laws specifically state employers have the right to establish and enforce a zero tolerance drug testing and drug use policy.

## Drug Testing for Cannabis

Employers are allowed to conduct drug testing for certain positions (i.e., safety position) and not others, so long as everyone in that position is treated equally and there is prior notice of when the employer would conduct testing.



# Why is Testing for Cannabis Difficult?

## Testing for Cannabis

There is no reliable metric for determining when a particular level of THC from cannabis usage impairs the user and for how long the user is impaired.

- **Occasional user:** 1 to 5 days
- **Regular user:** 1 to 3 weeks
- **Multiple daily user:** 4 to 6 weeks



## Testing for Other Illegal Drugs and Alcohol

### Alcohol -

- Breath tests: 24 hours
- Urine test: 10 to 12 hours
- Blood tests: Up to 12 hours

### Cocaine

- Breath tests: 24 hours
- Saliva test: 1 to 2 days
- Urine test: 1 to 3 days

### Amphetamine

- Urine test: 2 to 5 days
- Blood test: Up to 2 days
- Saliva test: 1 to 5 days



# When Should An Employer Drug Test?

## Pre-Employment Screening

- ▶ Employers ceasing this testing over concerns of viable workforce candidates.
- ▶ Due to the unreliability and the infringement of one's legal right to use cannabis off-duty there is a movement toward prohibiting employers from conducting pre-employment tests for cannabis.
- ▶ **Nevada and New York City** prohibit employers from taking adverse action based on a positive pre-employment test.

## Post-Accident Testing

- Issues with cannabis staying in the employee's body for so long that if there is an accident and employee tests positive does not mean that employee was under the influence at the time of the accident.

## Reasonable Suspicion

- Recognize Impairment AND Drug Test to Support Evidence of Impairment.

# RECOGNIZING IMPAIRMENT

Lack of focus

Slurred words

Lethargic

Glazed eyes

Stumbling

Paranoia

Physical dexterity

Irrational Behavior

Impaired Judgment

Impulsiveness

Odor

Loss of Self Control

Tiredness

Lack of Motivation



# Under the Influence

1. Evaluate Employee's Behavior and Learn to Recognize Signs Of Impairment.
2. Immediately Send Employee for a Drug Test (a higher level of THC is an indicator of more recent use of cannabis).
3. Treat the Drug Test ONLY as Supporting Evidence to Impairment.



# Best Practices: Medicinal Use

- ▶ Be aware of the states who are or will be legalizing medical and adult-use cannabis in the future.
- ▶ Recognize state cannabis laws are not the same, and each state affords different protections.
- ▶ Engage in the interactive process when discovering an employee is using cannabis for medical reasons.
- ▶ Evaluate the employee's ability to safely perform the essential functions of the job with or without reasonable accommodations.
- ▶ Remember the “safety-sensitive” position exception.



# Best Practices: Safety Sensitive Position



- Designate safety sensitive positions in writing and make sure that job descriptions reflect how impairment would pose a safety risk.
- Include in job descriptions a notice of potential drug testing for safety sensitive positions.
- Have employee take job description to their doctor for review to determine whether employee can safely perform the tasks.
- Offer employee assistance where appropriate (e.g., leave for drug/alcohol rehabilitation, Employee Assistance Program).

# Best Practices: Drug Testing

- Company's Alcohol and Drug-Free Workplace policies should include when drug testing will occur and for what type of drugs.
- Company Policy Should Be Consistently Enforced.
- Drug Tests are not yet reliable source to establish whether employee is under the influence.
- Remind employees of Company's Zero Tolerance for On-Job Impairment.



# Best Practices: Drug Testing

- ▶ Train Managers and Supervisors to Identify Signs of Impairment;
- ▶ Manage Employee's Expectations;
- ▶ Revise drug and alcohol policy to state that employees will be disciplined up to and including termination, when the employee is found to be displaying behaviors consistent with being **under the influence and tests positive for cannabis**.



# Q&A



# Thank you!

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