



The Blunt Facts: What Employers Need to Know about Marijuana

Mark A. Shaw, Esq.
MAShaw@eastmansmith.com

Melissa A. Ebel, Esq.
MAEbel@eastmansmith.com

Agenda:

- The **highlights** of nationwide legalization efforts
- Shifting through the **weeds** of some state marijuana laws
- The impact **toking up** will have on employment:
 - Drug free workplace and zero-tolerance drug policies
 - Workers' compensation defenses
 - An employer's duty to accommodate
 - Disciplinary action
 - Other effects/concerns



The **H**ighlights of Legislation Efforts

- Election night focused on weed ✨
- Nine states voted on marijuana-related measures
 - 5 recreational (AZ, CA, MA, ME, NV) – all passed except AZ
 - 4 medical (AR, FL, ND, MT) – all passed
- Initially viewed as a significant step toward federal drug policy reform.





Until Sen. Jeff Sessions became Attorney General

- Election day may be bittersweet.
- Sen. Jeff Sessions oversees federal prosecutors and the Drug Enforcement Administration.
 - Marijuana classified as a Schedule 1 drug under Federal Controlled Substances Act
- “We need grown-ups in Washington to say marijuana is not the kind of thing that ought to be legalized, it ought not be minimized, that it is in fact a very real danger.”
- “Good people don’t smoke marijuana.”



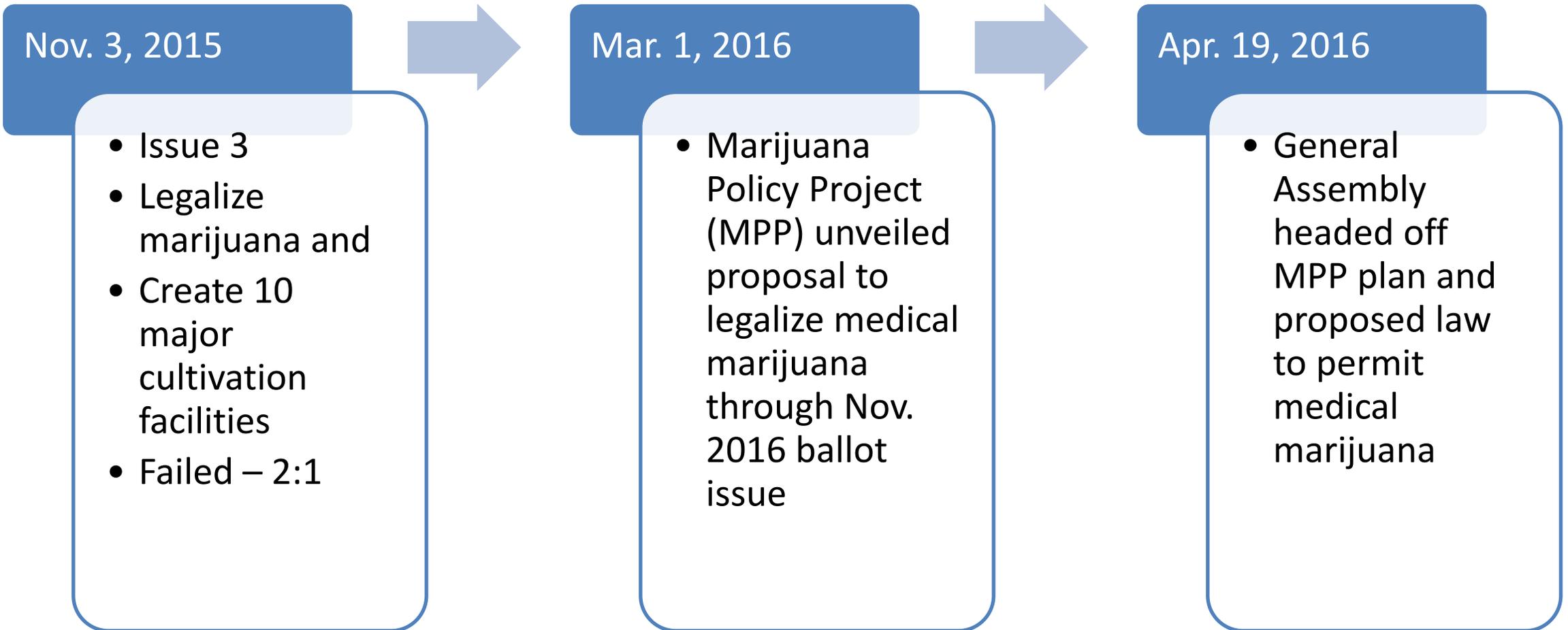
The Trump Administration Seems to Agree ...

- At a February 23, 2017 press conference, Press Secretary Sean Spicer suggested greater enforcement of the federal marijuana laws in states where recreational use is permitted is likely.
- Distinguished medical marijuana from recreational marijuana.

Shifting through the **weeds** of some states' marijuana laws

- Ohio
- Indiana
- Kentucky
- Maryland
- New York
- Pennsylvania

Interesting history on how H.B. 523 was enacted



Timeline continued ...

May 25, 2016

- General Assembly approves H.B. 523

Law sent to Gov. Kasich for signature

May 28, 2016

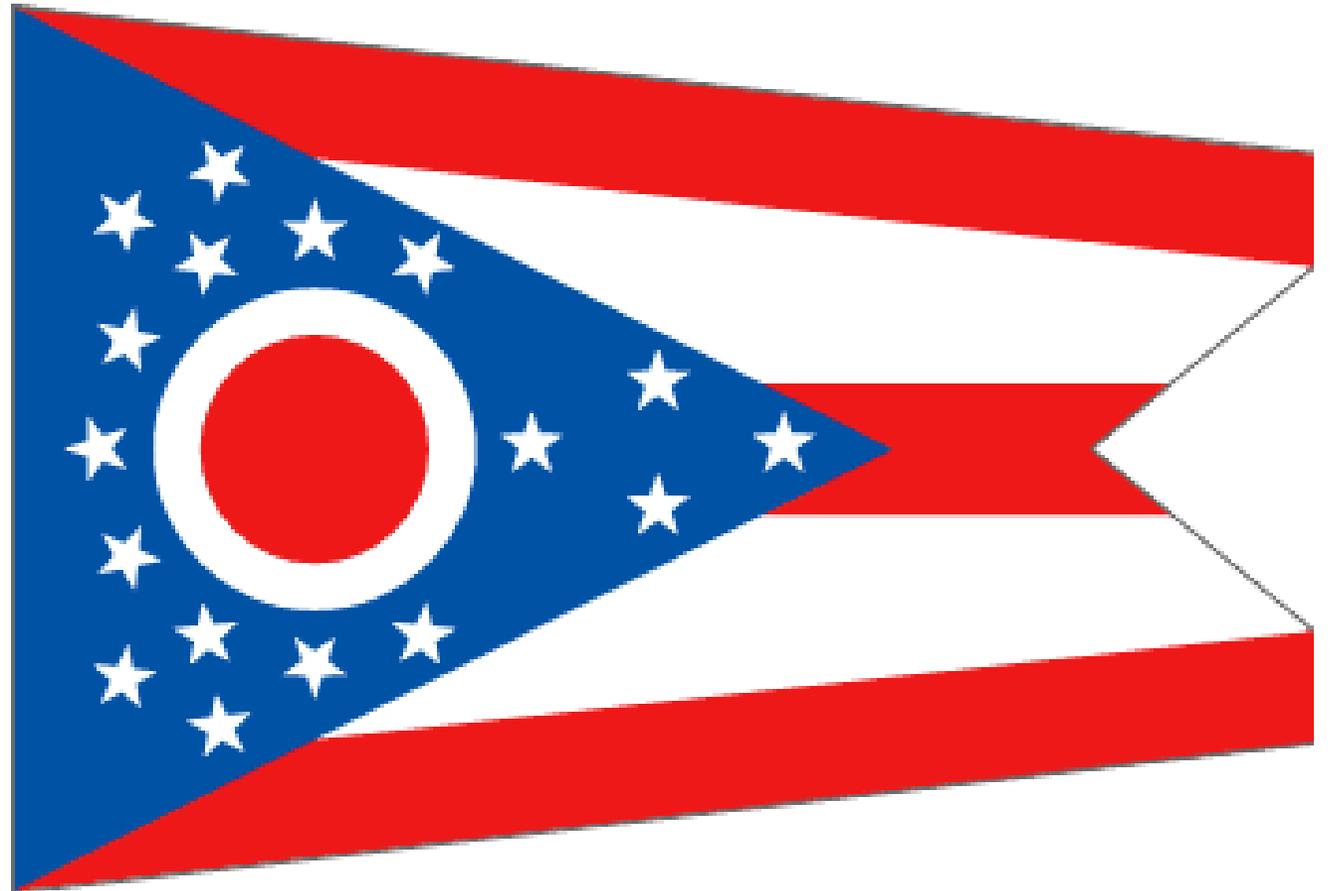
- MPP suspends its ballot campaign

Jun. 8, 2016

- Gov. Kasich signs HB 523

Ohio's Medical Marijuana Law

- HB 523 created the Medical Marijuana Control Program.
- Established the Medical Marijuana Advisory Committee.
- Permits a patient, on the recommendation of a physician, to use medical marijuana to treat a qualifying condition.
- Restricts permissible uses.



Limited Qualifying Medical Conditions

- Acquired immune deficiency syndrome;
- Alzheimer's disease;
- Amyotrophic lateral sclerosis;
- Cancer;
- Chronic traumatic encephalopathy;
- Crohn's disease;
- Epilepsy or another seizure disorder;
- Fibromyalgia;
- Glaucoma;
- Hepatitis C;
- Inflammatory bowel disease;
- Multiple sclerosis;
- Parkinson's disease;
- Positive status for HIV;
- Post-traumatic stress disorder;
- Sickle cell anemia;
- Spinal cord disease or injury;
- Tourette's syndrome;
- Traumatic brain injury; and
- Ulcerative colitis

Qualifying medical conditions also include ...

- Pain that is either:
 - Chronic and severe; or
 - Intractable.
- Any other disease or condition added by the state medical board under R.C. 4731.302.

But **caution** – permissible forms are limited ...





Eastman & Smith Ltd.



NO smoking!

With respect to the methods of using medical marijuana, all the following apply:

- The smoking or combustion of medical marijuana is prohibited.
- Vaporization is permitted.
- The state board of pharmacy may approve additional methods of using medical marijuana, other than smoking or combustion, under R.C. 3796.061.



The impact Ohio's program will have on employment

R.C. 3796.28 provides employers:

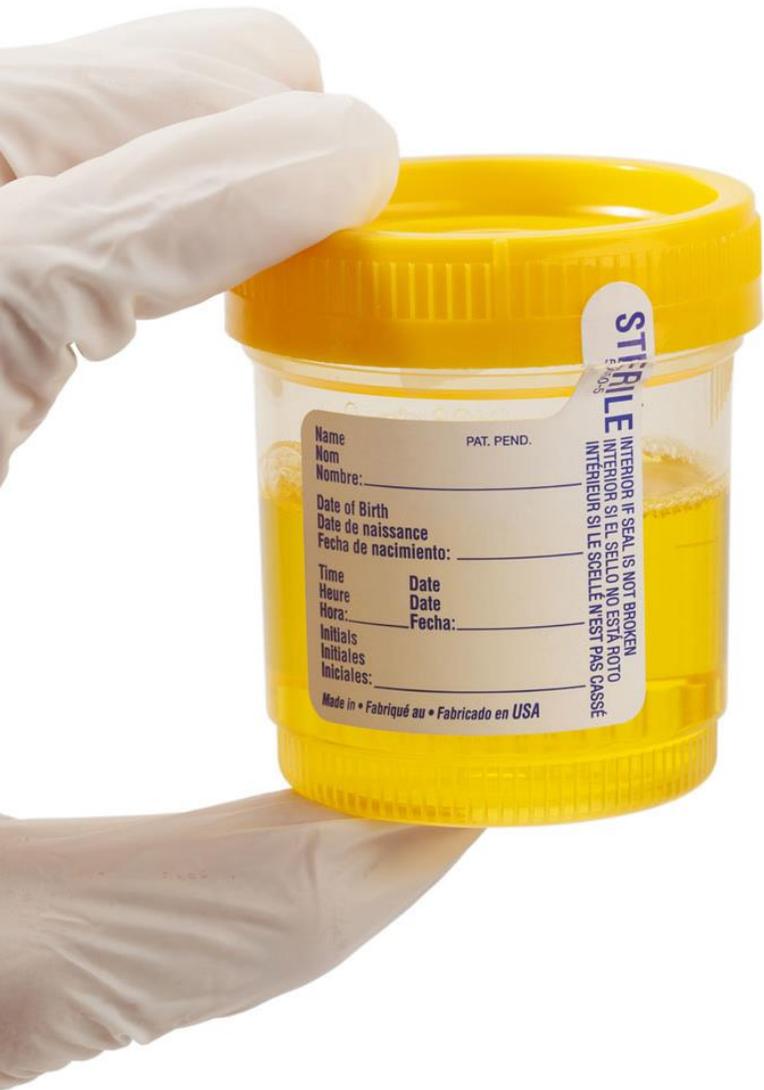
- Do not have to permit or accommodate an employee's use, possession, or distribution of medical marijuana.
- May refuse to hire, discharge, discipline, or otherwise take adverse action against someone because of the individual's use, possession, or distribution of medical marijuana.
- May establish and enforce drug testing policies, drug-free workplace policies, or zero-tolerance drug policies.
- Have "just cause" for the purposes of unemployment compensation to fire employees for violating drug-free workplace policies or zero-tolerance drug policies.
- No private right of action.

Medical Marijuana and Workers' Compensation

- Law specifies marijuana is covered under the “rebuttable presumption.”
- Rebuttable presumption places the burden on the employee to prove the marijuana was not the proximate cause of the injury.
- This is true even if the marijuana was recommended by a physician.



How to establish the “rebuttable presumption”

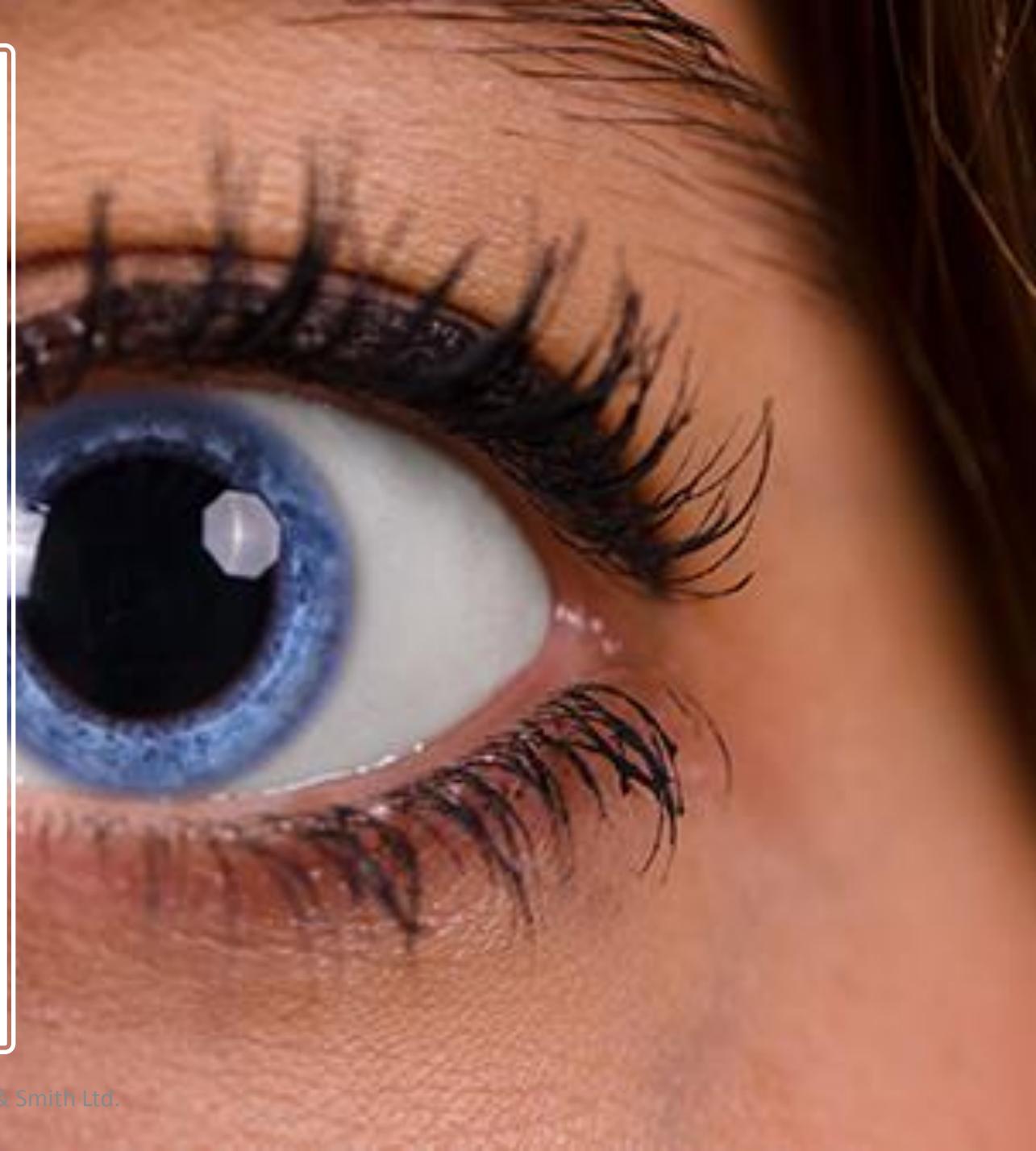


Employer **must**:

- Post written notice that the refusal to submit to any chemical test may affect the employee’s workers’ compensation eligibility.
- Conduct a qualifying chemical test within:
 - 8 hours of an injury for alcohol
 - 32 hours of injury for controlled substances (marijuana included)

Reasonable cause includes ...

- Observable phenomena – slurred speech, dilated pupils, odor of marijuana, or dynamic mood swings
- A pattern of abnormal conduct, erratic or aberrant behavior, or deteriorating work performance such as frequent absenteeism, excessive tardiness, or recurrent accidents that appear to be related to marijuana





And ...

- Identification of an employee as the focus of a criminal investigation into the trafficking of marijuana.
- A reported use of marijuana provided by a reliable source.
- Repeated or flagrant violations of safety or work rules that pose a substantial risk of physical injury or property damage that appear to be related to the use of a controlled substance (marijuana).

“Inadequate documentation of reasonable cause is probably the **most common reason** the BWC does not consider rebuttable presumption in the initial claim determination or the Ohio Industrial Commission does not consider it during the appeals process.”

If the rebuttable presumption is inapplicable ...

The employer must prove the marijuana in the employee's system was the proximate cause of the work-related injury.





Evidence to establish proximate cause ...

To establish proximate cause, the employer must present **strong** evidence the claimant was significantly impaired prior to the injury:

- Extremely high levels of marijuana found immediately after the injury;
- A physician's opinion the levels of marijuana found in the employee's system would have resulted in a substantial impairment at the time of the injury; and
- Coworker statements

INDIANA



- All forms of marijuana are illegal.
- In the 2017 legislative session, more than 10 bills have been filed pertaining to medical marijuana.
- In February, the House unanimously passed a bill to permit people with epilepsy to treat with marijuana derived oil.

Kentucky



- All forms of marijuana are illegal
- 2016 both House and Senate introduce Marijuana bills but neither received serious consideration
- SB 57 is currently pending which would create a medical marijuana program.

Maryland

- Recreational use is illegal, however, in 2014 decriminalized possession of 10 grams or less of marijuana.
- 2014 state law enacted a medical marijuana program, however, due to an issue over dispensaries, the program is not yet operational.
- Estimated patients will be able to obtain medical marijuana in Summer 2017.
- Law is silent about employment implications.



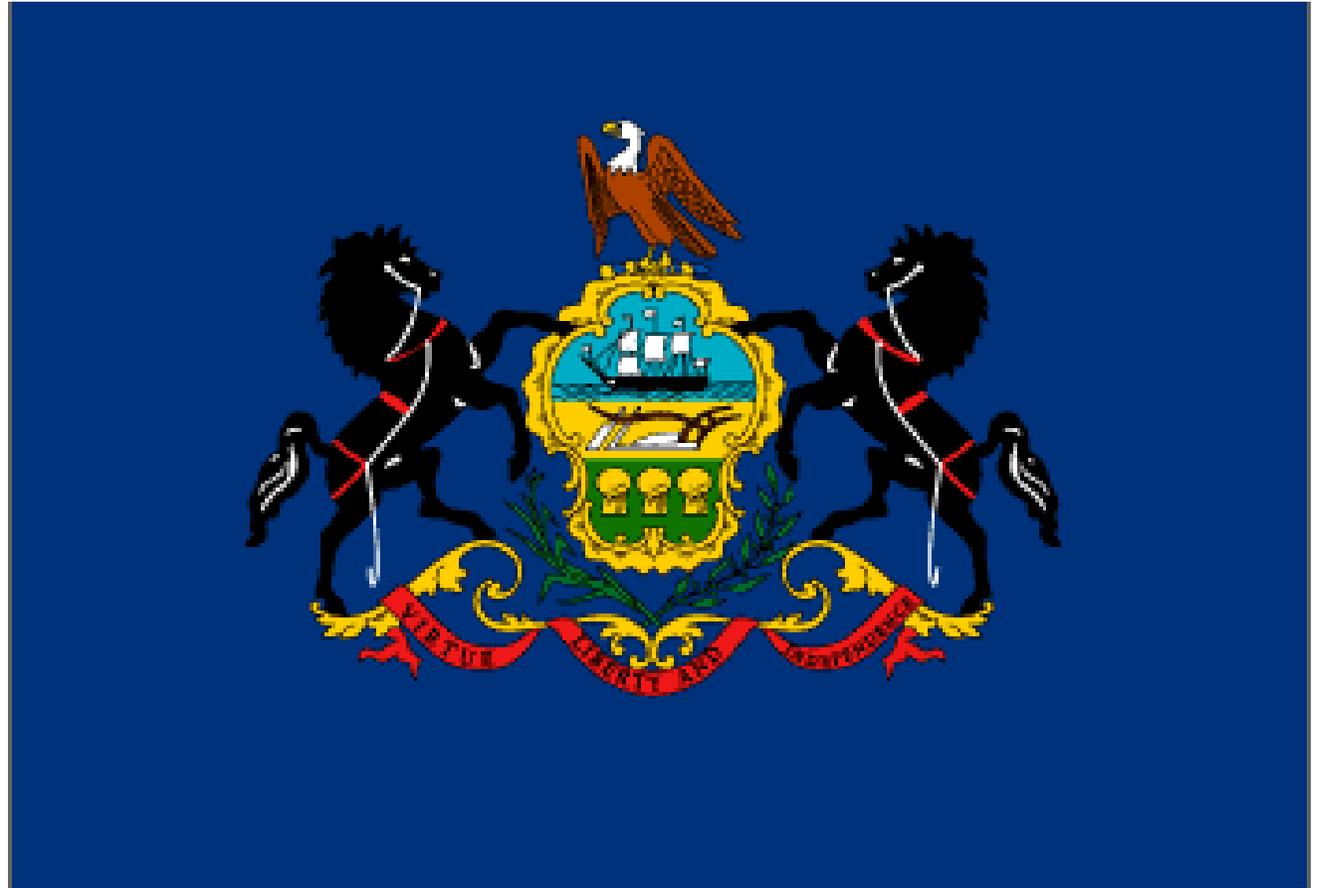
New York

- Medical marijuana passed in July 2014.
- First dispensaries opened January 6, 2016.
- Does not authorize use of the plant, only liquids manufactured by certified laboratories.
- Establishes employment protections.



Pennsylvania

- Spring 2016, Pennsylvania passed a medical marijuana law.
- No edibles and no smoking.
- Program is not yet operational. Dept. of Health recently released grower/processor and dispensary permits.
- Legal protections for users.



Remember

- Marijuana is still listed as a Schedule I controlled substance.
- Under federal law, employers are not required to accommodate an employee's use of medical marijuana under the ADA.
- An employee is not a qualified individual with a disability when engaging in the illegal use of marijuana.
- Employers are not required to provide FMLA related leave for medical marijuana use.



MSHA

- Regulations do not address medical or recreational use of marijuana as legalized under state law.
- Law does make it clear substances hazardous at work or illegal under federal law are prohibited.
- MSHA specifically provides that intoxicating beverages and narcotics shall not be permitted or used in or around mines. Persons under the influence of alcohol or narcotics shall not be permitted on the job.



Questions



Thank You!

Mark A. Shaw

MAShaw@eastmansmith.com

(614) 564-1441

Melissa A. Ebel

MAEbel@eastmansmith.com

(614) 564-1447