

Marijuana in the Arizona Workplace

Presented by:

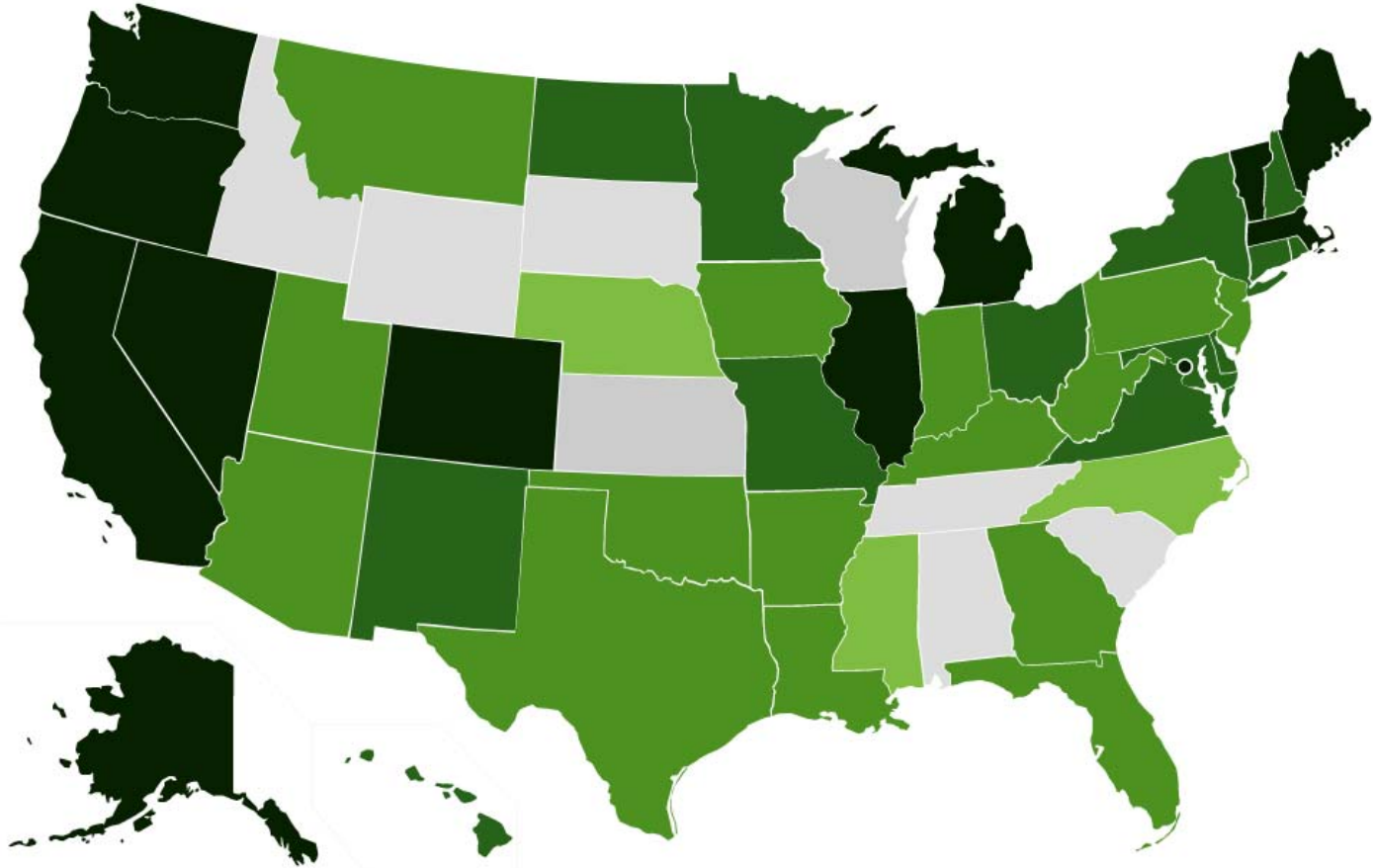
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Presented to: Arizona Chapter Associated General Contractors

October 27, 2020

State Cannabis Programs

Legalized Medical and Decriminalized Medical Decriminalized Fully illegal





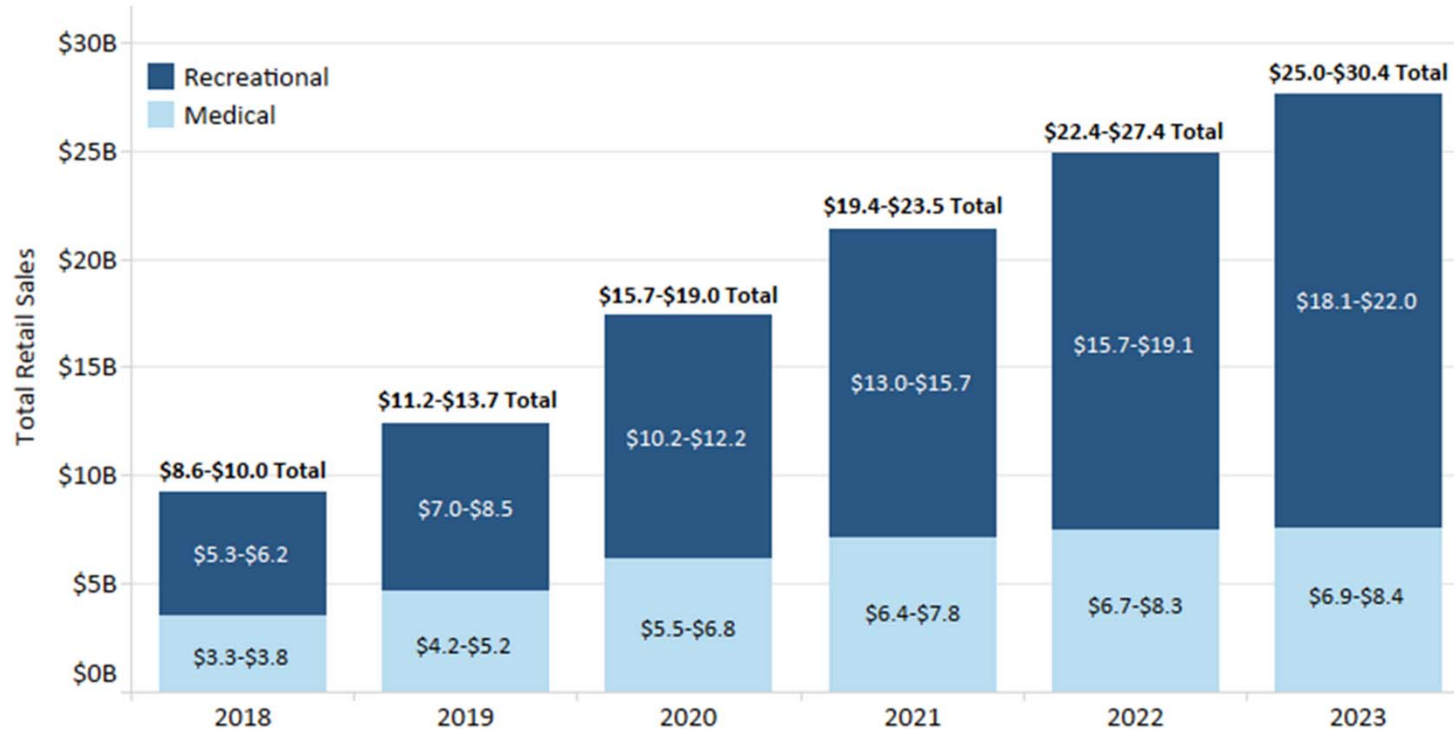
Federal Law Disclaimer

- Under the federal Controlled Substances Act it continues to be a criminal offense – punishable by forfeiture, fines, and imprisonment – to manufacture, distribute, dispense, or possess marijuana, even where state law authorizes its use. Whatever the federal government’s current position on enforcement of federal law, that position does not change the law itself, or negate the possibility that the enforcement position may change.



US Cannabis Sales Projections

U.S. Cannabis Retail Sales Estimates: 2018 - 2023
(In Billions Of U.S. Dollars)

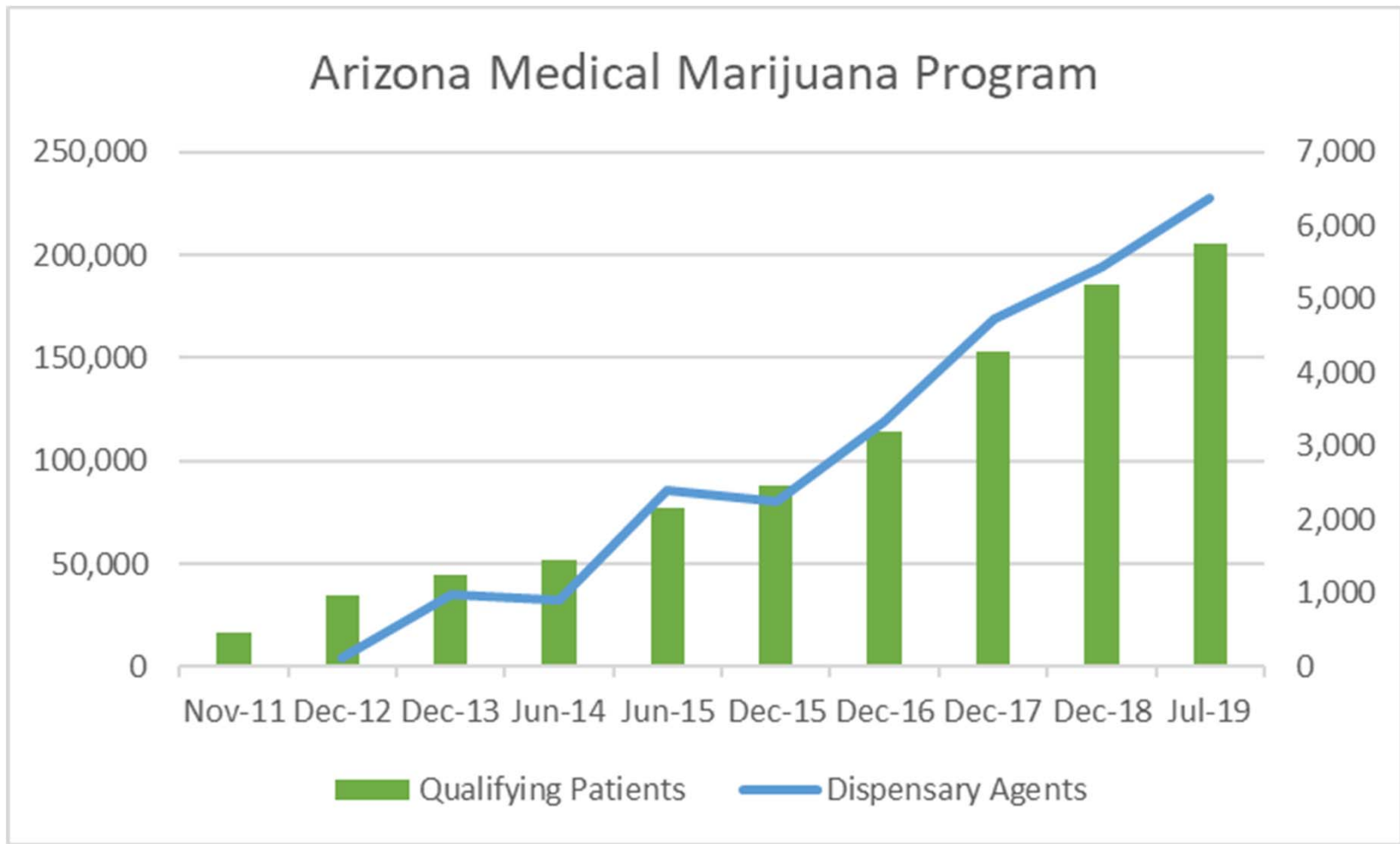


Source: 2019 Marijuana Business Factbook
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Arizona's Medical Marijuana Act (AMMA)

- The 2010 initiative permits a qualifying patient with a debilitating medical condition to obtain marijuana from a medical marijuana dispensary
- Prohibits discrimination by employers against registered medical marijuana cardholders.

Arizona's Medical Marijuana Program



AMMA's Non-Discrimination Provision

- Unless a failure to do so **would cause an employer to lose a monetary or licensing related benefit** under federal law or regulations, an employer **may not discriminate** against a person in hiring, termination or imposing any term or condition of employment **or otherwise penalize** a person based upon either:
 1. The person's status as a cardholder
 2. **A registered qualifying patient's positive drug test** for marijuana components or metabolites, unless the patient **used, possessed or was impaired by marijuana** on the **premises** of the place of employment or **during the hours** of employment

AMMA's Non-Discrimination Provision

What does “impaired by” mean?

- Has to happen either on the premises, or during work hours.
- Virtually no testing method can guarantee a finding of “impairment”
- Look for outward indices of marijuana impairment:
 - Dilated (large) pupils
 - Smell of marijuana on clothing, or in car
 - Bloodshot eyes
 - Sleepy appearance
 - Reduced motivation
 - Anxiety
 - Difficulty thinking



Whitmire v. Wal-Mart – February 2019 (D. Ariz.)

- Considered the interplay between the AMMA and Arizona Drug Testing of Employees Act (DTEA).
- Employee held a valid medical marijuana card.
- After sustaining a work-related injury, the employee was given a drug test for which she tested positive for marijuana metabolites at the highest level the test could record.
- Her employer terminated her employment based on its zero-tolerance drug policy and the results of the employee's drug test.
- The employee filed suit, claiming discrimination under the AMMA.
- The employer claimed relief under the DTEA, arguing that the high level reported in the positive drug test supported its HR representative's good-faith belief that the employee was impaired at work.

Whitmire v. Wal-Mart – February 2019 (D. Ariz.)

- Court ruled in the employee's favor, finding that the employer failed to establish that the employee was impaired at work.
- Issue: whether the employee's positive drug test at a high level alone was sufficient to support the employer's good-faith belief that the employee was impaired by marijuana at work.
- The Court did not answer whether a drug test itself could prove impairment, but concluded that it was a scientific matter that required expert testimony (not just the interpretation of the test results by the employer's HR representative)
- Because the employer did not offer expert testimony demonstrating that the employee's drug screen showed marijuana metabolites or components in a sufficient concentration to cause impairment, the employer was unable to prove that the employee's drug screen gave it a good-faith basis to believe the employee was impaired at work.

Marijuana and Safety-Sensitive Positions

- In April 2011, the Arizona legislature amended Arizona's twenty-year old drug testing law (DTEA), providing more protection for employers.
- Although no penalty exists for not complying with the drug testing law, employers who do choose to comply are provided a "safe harbor" in which employers can be shielded from certain types of civil lawsuits.

Medical Marijuana and Safety-Sensitive Positions

- If an employer has a good faith belief that an employee is currently using a drug, whether for medical purposes or not, and that the drug could cause an impairment or impede the employee's job performance, the employer can exclude that employee from performing a "safety-sensitive position" without having to worry about being sued.

Marijuana and Safety-Sensitive Positions

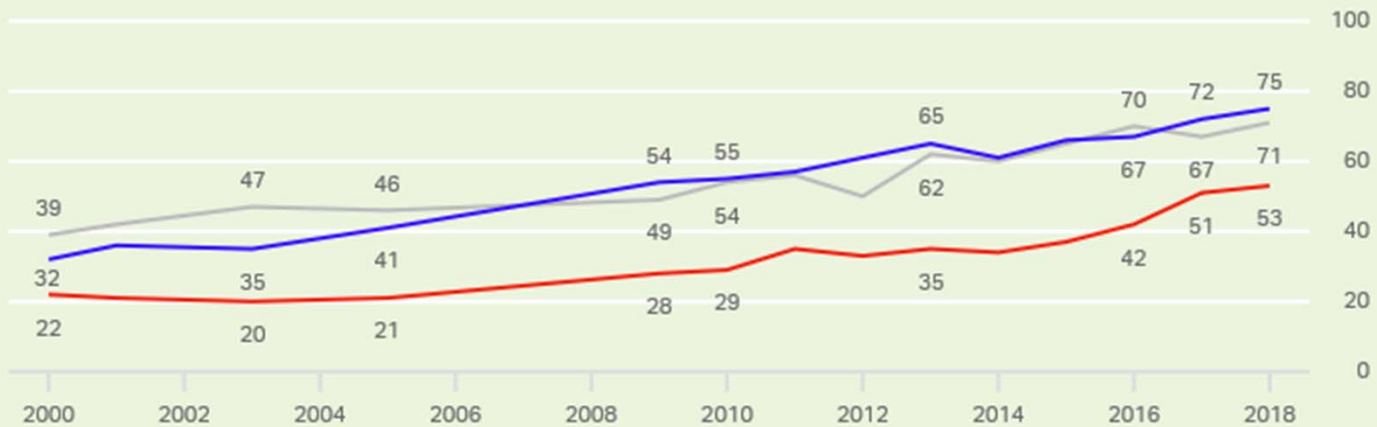
- A safety sensitive position is any job that the employer believes in good faith could affect the safety or health of the employee performing the task or of others.
- Examples include:
 - (a) Operating a motor vehicle, other vehicle, equipment, machinery or power tools.
 - (b) Repairing, maintaining or monitoring the performance or operation of any equipment, machinery or manufacturing process, the malfunction or disruption of which could result in injury or property damage.
 - (c) Performing duties in the residential or commercial premises of a customer, supplier or vendor.
 - (d) Preparing or handling food or medicine.
 - (e) Working in any occupation regulated pursuant to title 32 (e.g. the medical profession).
- Designated as safety-sensitive in written job description? Offer letter?

Recreational Marijuana

Majorities of All Political Identification Groups Continue to Support Legalization of Marijuana in 2018

% Yes, marijuana should be made legal

■ Republicans ■ Independents ■ Democrats



GALLUP

Recreational Marijuana in Arizona – Not New!

- 2016 – Prop 205 also sought to legalize the possession and use of marijuana for individuals aged 21 and above.
- Prop 205 was *narrowly defeated* by voters by approximately **51.3 percent to 48.7 percent**,
- At the same time similar initiatives were passed in California, Massachusetts, and Nevada.
 - This led some pundits to conclude that a similar initiative on Arizona's 2020 ballot may receive enough support to pass.

Recreational Marijuana in Arizona – Is it Next?

Prop 207 - the “Smart and Safe Arizona Act”

- Seeks to legalize the possession and use of marijuana for persons who are at least 21 years old under certain circumstances, enacts a tax on marijuana sales, and requires the state Department of Health and Human Services to develop rules to regulate marijuana businesses.
- If passed, Arizona would join California, Colorado, Washington, Oregon, and Alaska as states with legalized recreational marijuana.
- Montana, South Dakota, and New Jersey are also set to vote on the issue.

Does Prop 207 allow marijuana in the workplace?

- **Short answer: NO!**

- The proposed A.R.S. § 36-2851 expressly provides that the Chapter:
 - (1) “[d]oes not restrict the rights of employers to maintain a drug-and-alcohol-free workplace or affect the ability of employers to have workplace policies restricting the use of marijuana by employees or prospective employees”; and
 - (2) “[d]oes not require an employer to allow or accommodate the use, consumption, possession, transfer, display, transportation, sale or cultivation of marijuana in a place of employment.”
- **Passage of Prop 207 would maintain the status quo as to employers and employees with respect to marijuana.**

Best Practices for Employers to Consider

- Evaluate whether position is truly safety-sensitive (and document it!)
- Identify the indicators of use
- Document these indicators
- Follow your written testing policy
- Don't rely on the test alone!
- Consult legal counsel if unsure





Questions?