

High or Dry: What Employers Need to Know About Cannabis & Opioids in the Workplace

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Association of Corporate Counsel MCLE Program

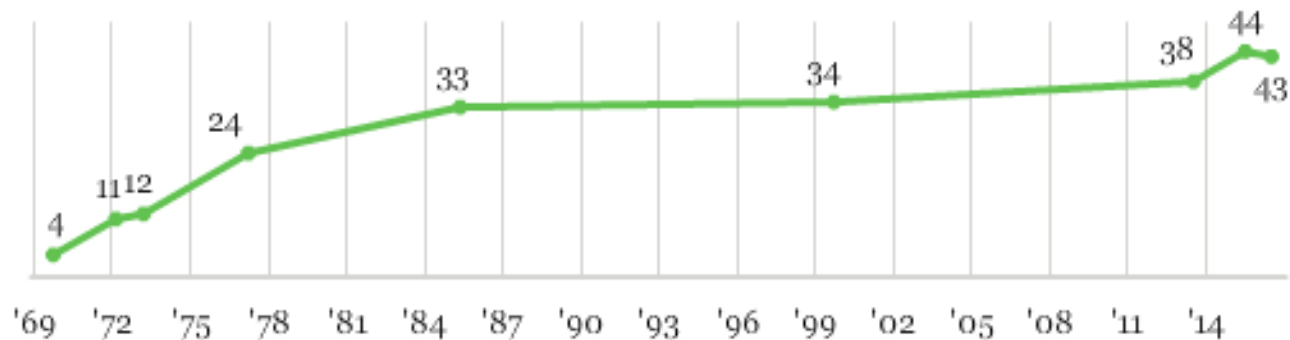
August 13, 2019

Marijuana Usage is Increasing

Americans Who Say They Have Tried Marijuana

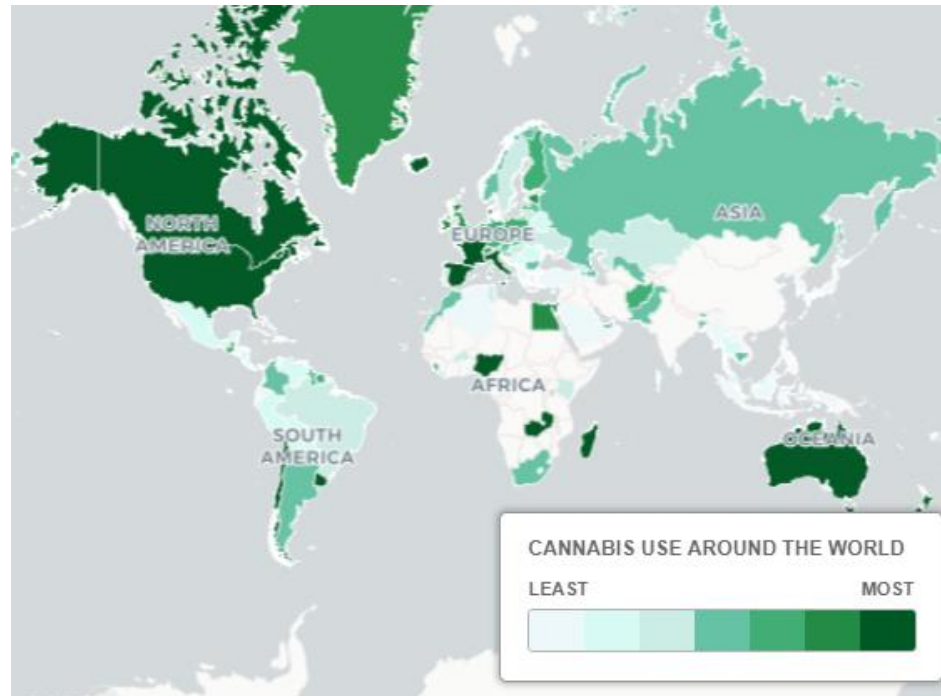
Keeping in mind that all of your answers in this survey are confidential, have you, yourself, ever happened to try marijuana?

■ % Yes



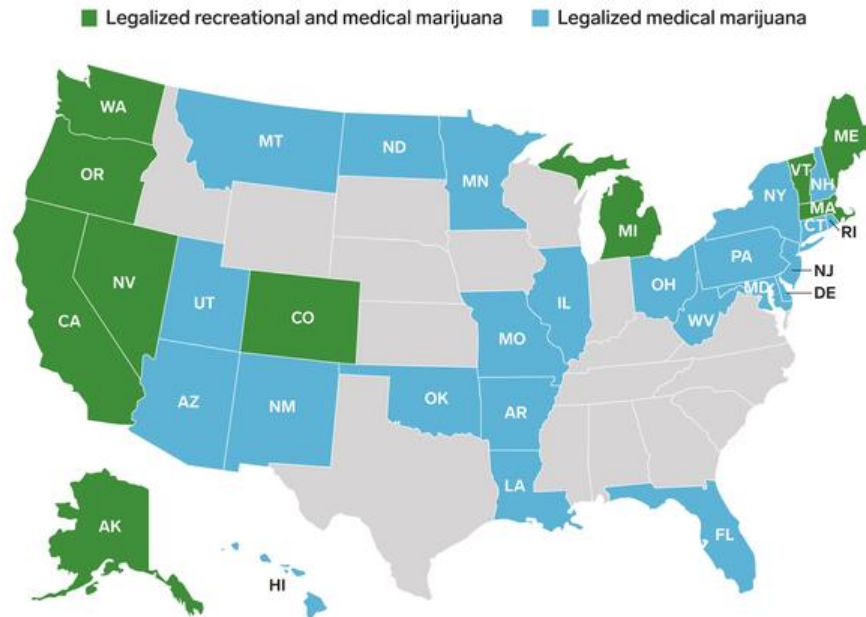
Source: <https://news.gallup.com/poll/194195/adults-say-smoke-marijuana.aspx>

How We Rank in the World



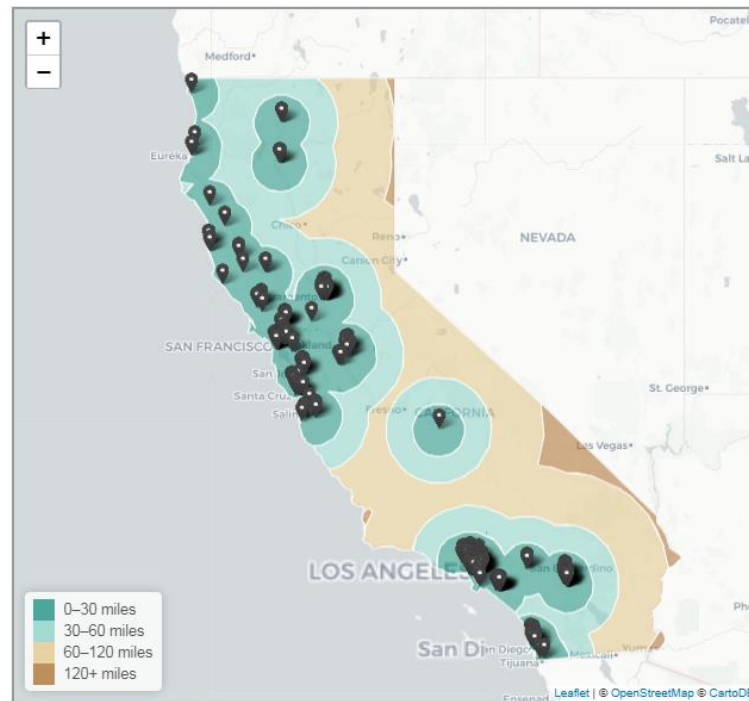
Source: <https://www.telegraph.co.uk/travel/maps-and-graphics/mapped-the-countries-that-smoke-the-most-cannabis/>

Where is Marijuana Legal?



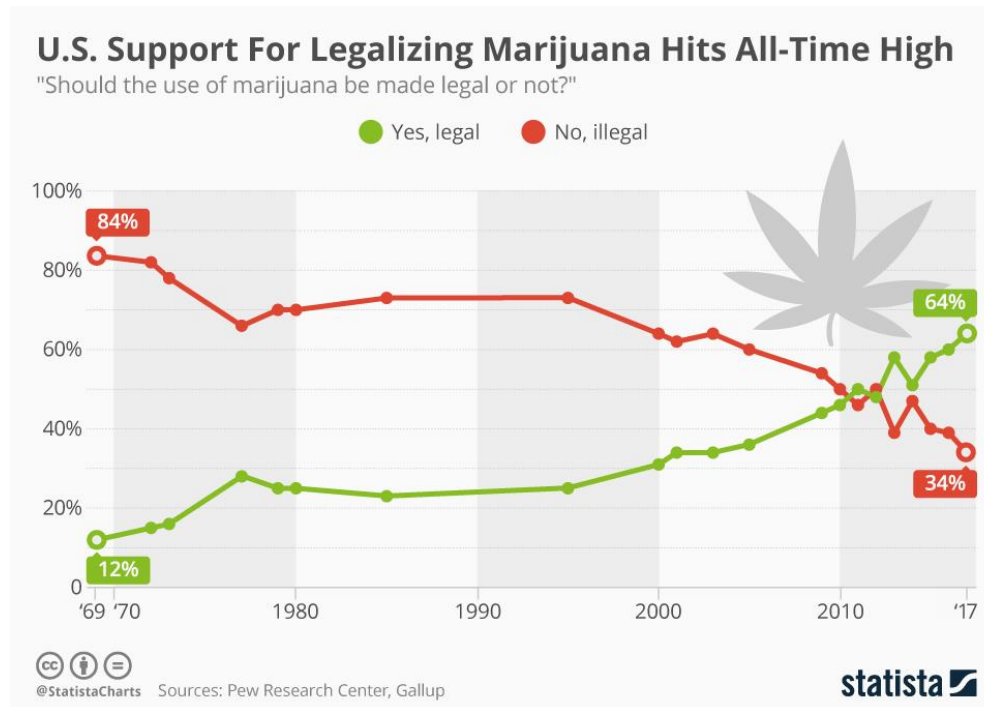
Source: <https://www.businessinsider.fr/us/legal-marijuana-states-2018-1>

Access is Easy



Source: <https://www.sacbee.com/news/state/california/california-weed/article205524479.html>

The Support is There

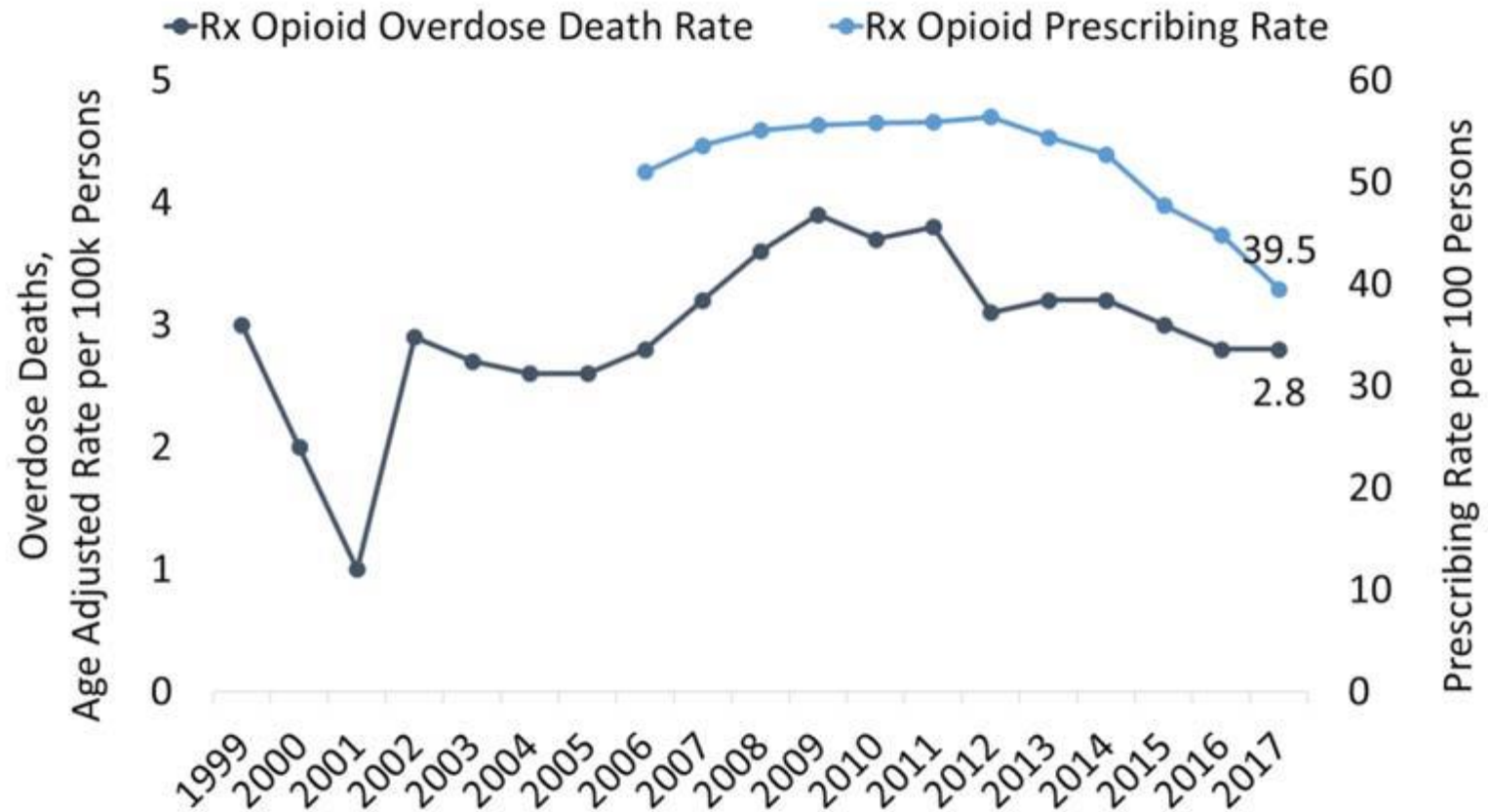


Source: <https://www.statista.com/chart/6242/us-support-for-legalizing-marijuana-hits-all-time-high/>

What are Opioids?

- A class of narcotics that include heroin as well as a wide range of legal prescription drugs (e.g. hydrocodone, oxycodone, codeine, morphine)
- While opioids are used for a wide range of legitimate purposes (predominantly pain management), they have a high rate of abuse and addiction

California Opioid Usage



Source: <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-summaries-by-state/california-opioid-summary>

Accommodations for Opioid Use

- ❑ Employers are required to engage in the interactive process with users of legally obtained prescription opioids
- ❑ Use of prescription drugs could signal another form of protected disability
- ❑ CFRA allows for protected leave for drug and alcohol recovery and rehabilitation

Proposition 64

- Approved by voters on November 8, 2016
- Adults (over the age of 21) can smoke or ingest marijuana for recreational use
- Adults are also permitted to:
 - Possess, transport, and/or purchase up to 28.5 grams of cultivated marijuana and/or 8 grams of marijuana concentrate; and
 - Grow up to six (6) living marijuana plants in a private residence for personal use

Proposition 64

- ❑ Consumption of marijuana is permitted in private residences or in structures/outdoor areas that are adjacent to private residences in which consumption is permitted
- ❑ Consumption is not permitted in public areas, areas in which tobacco smoking is prohibited, or within 1,000 feet of a school, youth center, or day care center (with limited exceptions when inside private residences)

But What Does this
Mean for Employers?

Employers Can Still...

- Maintain a drug-free workplace
- Insist that employees refrain from working under the influence
- Decline to accommodate employees that use marijuana (even medicinally)
 - ▣ But be careful...
- Drug test candidates
 - ▣ But be careful...
- Drug test employees
 - ▣ But be careful...

Can We Test?

- Yes, but...
- Pre-employment drug testing is still generally permitted, but it must be conducted in a fair and consistent manner
 - ▣ Can't single out certain individuals
 - ▣ If you are going to drug test one individual or candidate for a position/job class, you need to test them all

When Should We Test?

□ Pre-Employment

- ▣ It is generally a best practice to refrain from drug testing until a conditional offer has been made
 - Keep in mind the “ban the box” protections
 - Perhaps “ban the bud” will be next?
 - Washington D.C. has already done so

When Should We Test?

- During Employment
 - ▣ After an incident?
 - Only if there is a reasonable suspicion that drugs were involved
 - ▣ Random testing?
 - Still allowed in San Diego, but some municipalities have begun banning random testing altogether
 - ▣ Exceptions still exist
 - For example, the Department of Transportation still has policies that allow for random drug testing

The Changing Tides of Legislation

- Marijuana is still classified as a Schedule I drug under federal law (Controlled Substances Act)
- Currently, California law does not require reasonable accommodations for medicinal marijuana usage
 - ▣ See: *Ross v. RagingWire Telecommunications, Inc.*
- However, a number of other states have enacted legislation prohibiting discrimination against applicants and employees based on medicinal marijuana permission and usage
- Proposed legislation would extend these same protections in California

What About CBD?

- ❑ Cannabidiol (CBD) is the non-psychoactive component of the cannabis plant
- ❑ It has become popular for various medical and health purposes, particularly for the treatment of chronic conditions
- ❑ Marijuana-derived CBD is legal for medicinal use in 46 states (although various caveats apply)
- ❑ Most conventional drug tests are not designed to detect the presence of CBD

What Does the Future Hold?



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What SHOULD Employers Do?

Practical Considerations

- ❑ The California Constitution provides a right to privacy, meaning employers cannot restrict off-duty conduct
- ❑ The law is changing in favor of permissive drug use
- ❑ Other parts of the country are already ahead of California on pro-marijuana legislation
- ❑ The workforce is using with increasing frequency

Best Practices

- Look at your company's employee handbook
 - ▣ Is your policy regarding drug use outdated?
 - ▣ Does it need to be updated to comply:
 - With the law?
 - With changes in company opinions/policies?
- Whatever policy you implement, apply it uniformly
- Communicate
 - ▣ With your employees to whom policies will apply
 - ▣ To managers that will be expected to uphold the policies

Sound Familiar?



“So, umm, does your
company drug test?”

Sound Familiar?



“But we’ve always drug
tested...”

- The Management

Sound Familiar?



“Just so you know, I’m going
to fail my drug test...”

Sound Familiar?



“I’m going to step outside to
take a smoke break...”

Sound Familiar?



“But it’s perfectly legal...”

Sound Familiar?



“But I have a prescription...”

Sound Familiar?



“You can’t control what I do
during my free time...”

Sound Familiar?



“I just got in an accident...”

Sound Familiar?



“That random selection
didn’t seem very random...”

Sound Familiar?



“You need to keep drug
testing...”

- The Government

Questions?





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Ryan H. Nell is an employment attorney responsible for representing California employers statewide in both counseling and comprehensive litigation support. With the ever-changing landscape of California and federal employment law, Ryan prides himself on assisting clients in staying ahead of the curve in an effort to avoid legal trouble before it arises. He has extensive experience representing clients in harassment, retaliation, and discrimination matters, as well as large-scale wage and hour lawsuits.

Ryan speaks regularly on a wide range of topics aimed at assisting California employers in the avoidance of legal trouble before it arises, and his work in the field has led to his recognition as a Rising Star by *San Diego Super Lawyers*®.

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