

Drug Testing + UI Eligibility

*Impact on Employers,
Claimants and States*

KEGLER
BROWN
HILL +
RITTER

presented by Tony Fiore

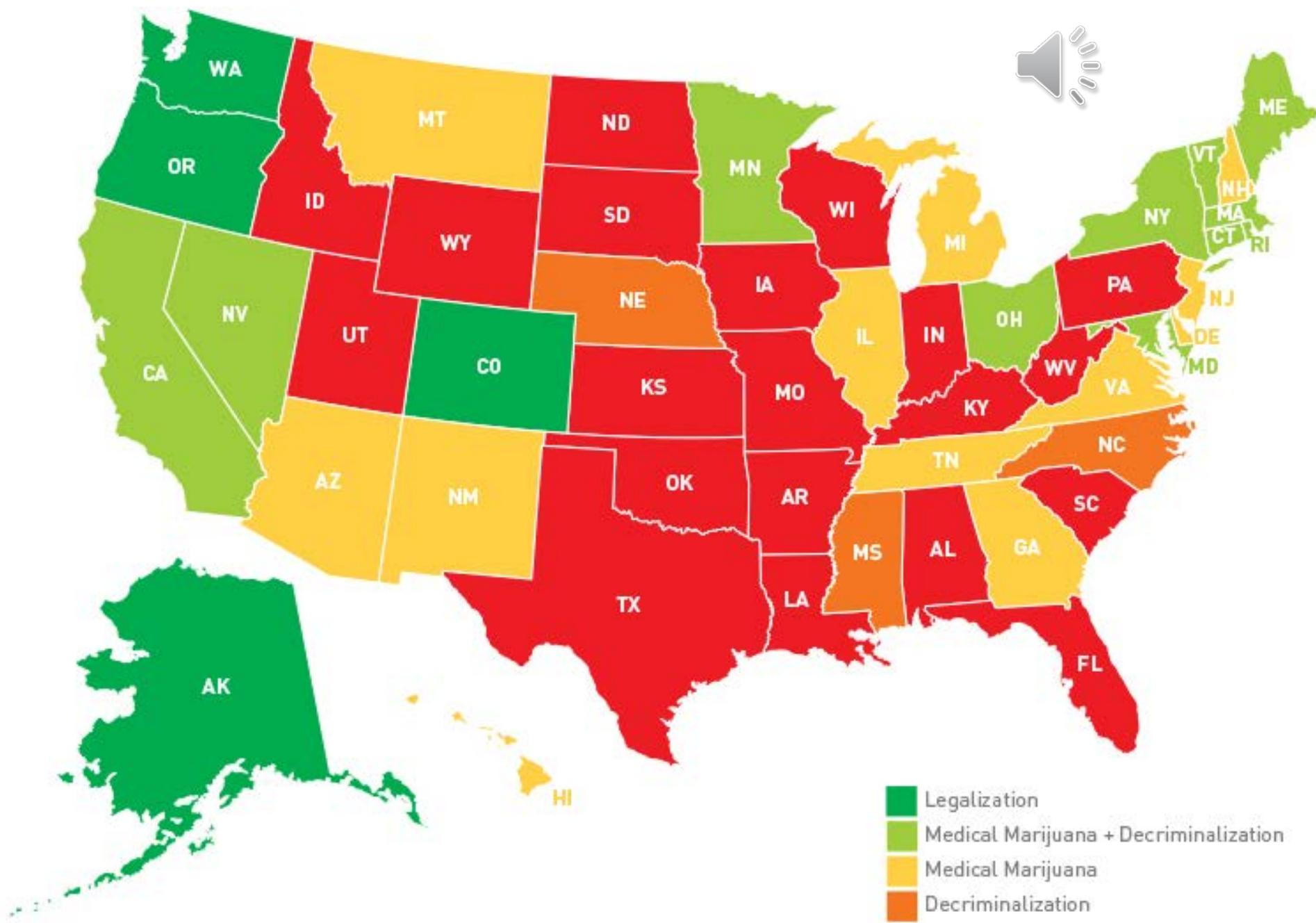
*June 23, 2016 – UWC 35th Annual
National UI Issues Conference*





**BUT WHY SHOULD
WE CARE**





- Legalization
- Medical Marijuana + Decriminalization
- Medical Marijuana
- Decriminalization
- Prohibition

A close-up photograph of Justice Sandra Day O'Connor. She has short, wavy white hair and is wearing a blue top. She is looking slightly to the right of the camera with a serious expression. Her right hand is raised, with her index finger pointing upwards. A microphone is visible in the lower right foreground. A white speech bubble with a tail pointing to her mouth is overlaid on the left side of the image. A yellow arrow-shaped box is overlaid at the bottom left.

"One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'"

Gonzales v. Raich, 545 U.S. 1, 42 (2005)
(O'Connor, J., dissenting)

(quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))

FEDERAL **TENSION**



FEDERAL TENSION



"[Marijuana legislation is] reckless and irresponsible"

-Top DEA Official



Federal Illegality

DEA Drug *Schedules*

Description

Drug Examples

Schedule I drugs, substances, or chemicals are defined as drugs with no currently accepted medical use and a high potential for abuse. Schedule I drugs are the most dangerous drugs of all the drug schedules with potentially severe psychological or physical dependence.

Heroin, lysergic acid diethylamide (LSD), marijuana (cannabis), 3,4-methylenedioxymethamphetamine (ecstasy), methaqualone, and peyote

Schedule II drugs, substances, or chemicals are defined as drugs with a high potential for abuse, with use potentially leading to severe psychological or physical dependence. These drugs are also considered dangerous.

Combination products with less than 15 milligrams of hydrocodone per dosage unit (Vicodin), cocaine, methamphetamine, methadone, hydromorphone (Dilaudid), meperidine (Demerol), oxycodone (OxyContin), fentanyl, Dexedrine, Adderall, and Ritalin

Schedule III drugs, substances, or chemicals are defined as drugs with a moderate to low potential for physical and psychological dependence. Schedule III drugs abuse potential is less than Schedule I and Schedule II drugs but more than Schedule IV.

Products containing less than 90 milligrams of codeine per dosage unit (Tylenol with codeine), ketamine, anabolic steroids, testosterone

Schedule IV drugs, substances, or chemicals are defined as drugs with a low potential for abuse and low risk of dependence.

Xanax, Soma, Darvon, Darvocet, Valium, Ativan, Talwin, Ambien, Tram

Schedule V drugs, substances, or chemicals are defined as drugs with lower potential for abuse than Schedule IV and consist of preparations containing limited quantities of certain narcotics. Schedule V drugs are generally used for antidiarrheal, antitussive, and analgesic purposes.

Cough preparations with less than 200 milligrams of codeine or per 100 milliliters (Robitussin AC), Lomotil, Motofen, Lyrica, Parepectolin

The DOJ Cole **MEMORANDUM**

8

*Enforcement
Priorities
Preventing:*

- 1** *Distribution of marijuana to minors*
- 2** *Revenue from sale of marijuana from going to criminal enterprises, gangs and cartels*
- 3** *Diversion of marijuana from states where it's legal under state law to other states*
- 4** *State-authorized marijuana activity from being used as a cover or pretext for trafficking of other illegal drugs/activity*

The DOJ Cole **MEMORANDUM**

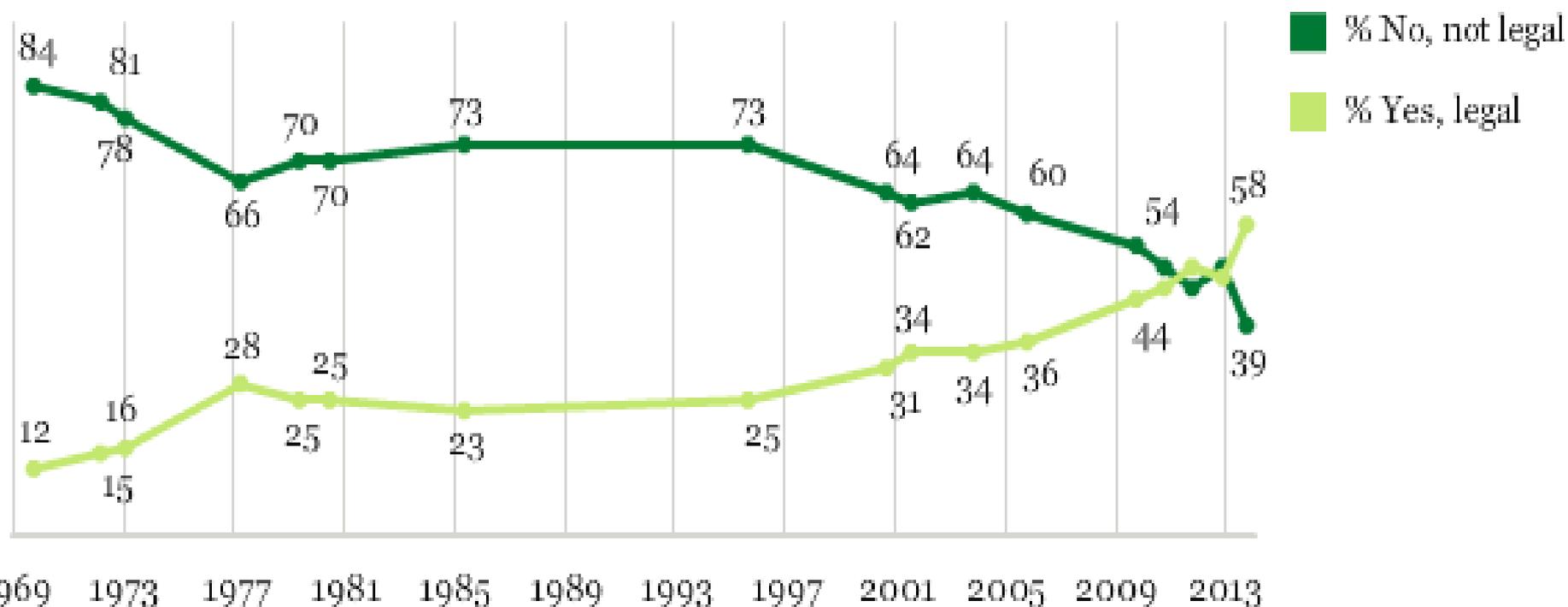
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*Enforcement
Priorities
Preventing:*

- 5** *Violence and use of firearms in the cultivation and distribution of marijuana*
- 6** *Drugged driving + exacerbation of other adverse public health consequences associated with marijuana use*
- 7** *Growing marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands*
- 8** *Marijuana possession or use on federal property*

Americans' Views on Legalizing Marijuana

Do you think the use of marijuana should be made legal, or not?



GALLUP

Result	Votes	Percentage
Alaska – Ballot Measure 2	Turnout	56.1%
Yes	149,021	53.23%
No	130,924	46.77%
Colorado – Amendment 64	Turnout	71%
Yes	1,383,139	55.32%
No	1,116,894	44.68%
Oregon – Measure 91	Turnout	70.90%
Yes	847,865	56.11%
No	663,346	43.89%
Washington – Initiative 502	Turnout	81.25%
Yes	1,724,209	55.7%
No	1,371,235	44.3%
Washington, DC – Initiative 71		64.87
Ohio – Issue 3	Turnout	43.24%
Yes	1,166,692	36.35%
No	2,042,902	63.65%



Date of Poll	Organization	% of Ohioans Supporting
April 27-30, 2016	Quinnipiac University	90%
March 17-28, 2016	Quinnipiac University	84%
February 17-18, 2016	Public Policy Polling	74%
Sept. 25-Oct. 5, 2015	Quinnipiac University	90%
March 17-28, 2015	Quinnipiac University	84%

Medical Marijuana **POLLING**



MPP is devoting significant resources to ending prohibition in **12 more states by 2019**



Campaign committees already formed to raise money for marijuana legalization and regulation initiatives in 2016 in Arizona, California, Massachusetts, and Nevada



Lobbying + building coalitions to regulate marijuana like alcohol in several states that don't have the option of voter initiatives: Delaware, Illinois, Maryland, New Hampshire, Rhode Island, Texas + Vermont



In the states where cannabis has not already been decriminalized — Illinois, New Hampshire, and Texas — MPP is working to achieve that reform first



Advocating for medical marijuana-related bills in several other states, including Georgia, Louisiana, Nebraska, Texas, and West Virginia and providing funding for medical marijuana initiative efforts in Arkansas, Missouri + Ohio

Timeline of Medical Marijuana Legalization in the U.S.

1996: California

1998: Alaska, Oregon, Washington

1999: Maine

2000: Colorado, Hawaii, Nevada

2004: Montana

2006: Rhode Island

2007: New Mexico, Vermont

2008: Michigan

2010: Arizona, New Jersey

2011: Delaware, Washington, D.C.

2012: Connecticut, Massachusetts

2013: New Hampshire, Illinois

2014: Maryland, Minnesota

2015: Georgia, Tennessee, Virginia

2016: Pennsylvania, Ohio

Total States: 25/28



Pending Medical Marijuana Bills (2016)

Target States for MPP

- + **Florida** (SB 852, HB 1183)
- + **Georgia** (HB 722, amended: no longer comprehensive – fails to include in-state access)
- + **Indiana** (SB 209, HB 1284)
- + **Iowa** (SF 484)
- + **Kansas** (HB 2691, HB 2011, SB 9)
- + **Mississippi** (HB 1360)
- + **Missouri** (HB 2213, SB 912, SJR 29)
- + **Nebraska** (LB 643, passed Senate once in 2015; 3 votes in unicameral Senate required)
- + **Pennsylvania** (SB 3, HB 193; SB 3 passed Senate 40-7 on May 12, now on House floor)
- + **South Carolina** (HB 3140, HB 4003, HB 4037, SB 672)
- + **South Dakota** (SB 171, amended: applies only to low-THC cannabis)
- + **Tennessee** (HB 561, SB 660)
- + **Utah** (SB 73)
- + **Virginia** (SB 701)
- + **West Virginia** (SB 640)
- + **Wisconsin** (AB 224 – both a medical and adult use bill)



Sub. HB523

Implementation Timeline

Permissible Forms

*Qualifying Medical
Conditions*

Recommendations





EMPLOYMENT

A photograph of two men in business suits, one Black and one white, laughing and raising their fists in a celebratory gesture. They are wearing light blue shirts and ties. The background is bright and slightly blurred.

*“Reminder: Your
job’s not safe just
because pot’s legal”*

*- Bryce Crawford
Reporter, Colorado Springs
Independent*

EMPLOYMENT

Unemployment Compensation

- + Middle Class Tax Relief and Job Creation Act of 2012
- + President Obama signed on February 22, 2012
- + Provision establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants
- + 79 FR 61013 proposed October 9, 2014
- + 20 C.F.R part 620 codified

Subsection (1) to Section 303, SSA

Permits states to test a UC applicant for unlawful use of controlled substances (drugs) as an eligibility condition if the applicant:

- 1) Was terminated from employment with his/her most recent employer (state law) because of the unlawful use of controlled substances; or
- 2) Is an individual for whom suitable work (state law) is only available in an occupation that regularly conducts drug testing (DOL Secretary regs)

Controlled Substances Act

303(l)(1)(A)(i) SSA - ("controlled substance" has the meaning given such term in section 102 of the Controlled Substances Act (21 U.S.C. 802)

(6) The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

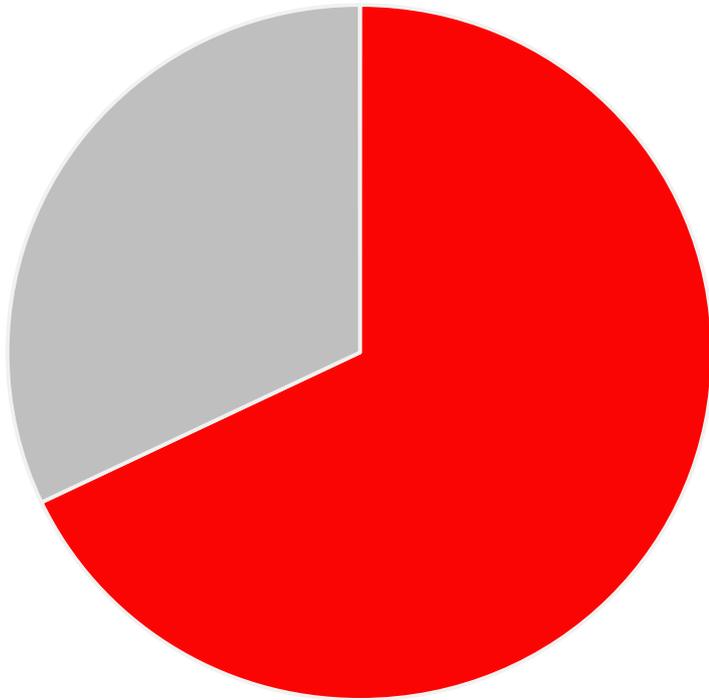
(c) Factors Determinative of Control or Removal from Schedules

In making any finding under subsection (a) of this section or under subsection (b) of section 812 of this title, the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:

1. Actual or relative potential for abuse
2. Scientific evidence of its pharmacological effect, if known
3. State of current scientific knowledge regarding the drug or other substance
4. History and current pattern of abuse
5. Scope, duration, and significance of abuse
6. What, if any, risk there is to the public health
7. Psychic or physiological dependence liability
8. Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

**DRUG
TESTING**

+ Workplace Issues



67.9%

*of all adult illegal drug users
are employed full or part
time, as are most binge and
heavy alcohol users*

**DRUG
TESTING**

+ Workplace Issues

Compared with non-substance users, substance using employees are more likely to:

- ✓ *Change jobs frequently*
- ✓ *Be late/absent from work*
- ✓ *Be less productive*
- ✓ *Be involved in a workplace accident or file WC claim*

Source: U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Substance Abuse and Mental Health Services Administration
Center for Behavioral Health Statistics and Quality



This usually involves collecting urine samples to test for drugs such as marijuana, cocaine, amphetamines, PCP, and opiates

Ways to Drug Test Employees:

- ✓ *Pre-employment testing*
- ✓ *Random testing*
- ✓ *Reasonable suspicion/cause testing*
- ✓ *Post-accident testing*
- ✓ *Return to duty testing*
- ✓ *Follow-up testing*



BENEFITS *of Drug Testing*

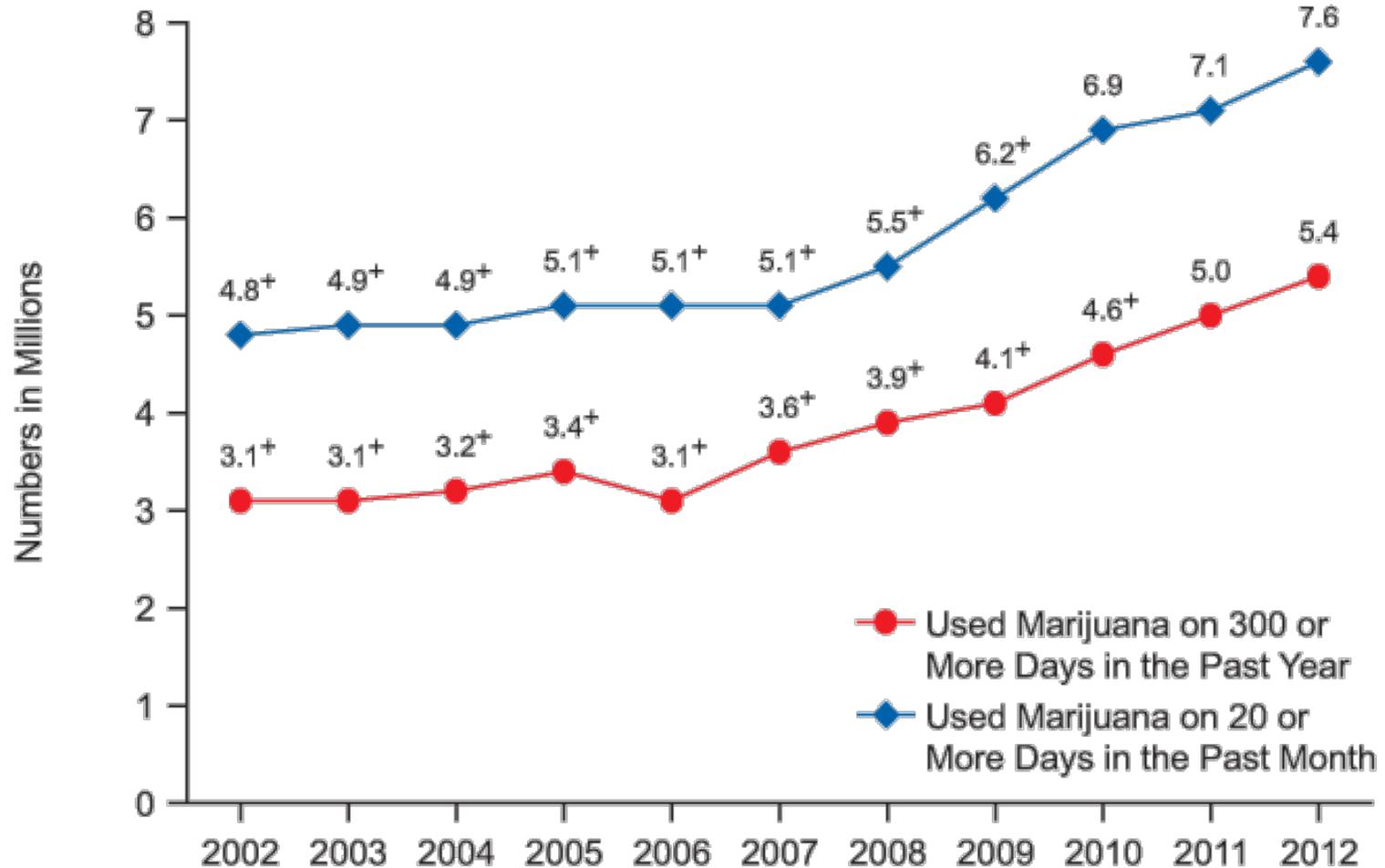
Important experiences to share

Improvements in morale and productivity, and decreases in absenteeism, accidents, downtime, turnover, and theft

Better health status among employees and family members and decreased use of medical benefits by these same groups

Some organizations qualify for incentives, such as decreased costs for workers' compensation and other kinds of insurance

Daily or Almost Daily Marijuana Use in the Past Year and Past Month Among Persons Aged 12 or Older: 2002-2012



Criminal Population

A close-up photograph of a person's hands gripping vertical metal prison bars. The hands are positioned in the center of the frame, with fingers wrapped around the bars. The lighting is dramatic, highlighting the texture of the skin and the metallic sheen of the bars against a dark background.

1.5 million

Source: U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES Substance Abuse and
Mental Health Services Administration Center
for Behavioral Health Statistics and Quality

estimated adults aged 18+ in 2012
were on parole or other supervised
release from prison at some time
during the past year

Criminal Population



About 25%

Source: U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES Substance Abuse and
Mental Health Services Administration Center
for Behavioral Health Statistics and Quality

were current illicit drug users, 18.1%
reporting current use of marijuana -
higher than those reported by
adults aged 18+ not on parole or
supervised release during past year



CASH *Implications?*



Prior to 2011 – Cash + Bank Accounts
Budget for break-ins

2011+2012 – Banks out



2012 to Present – Alternatives

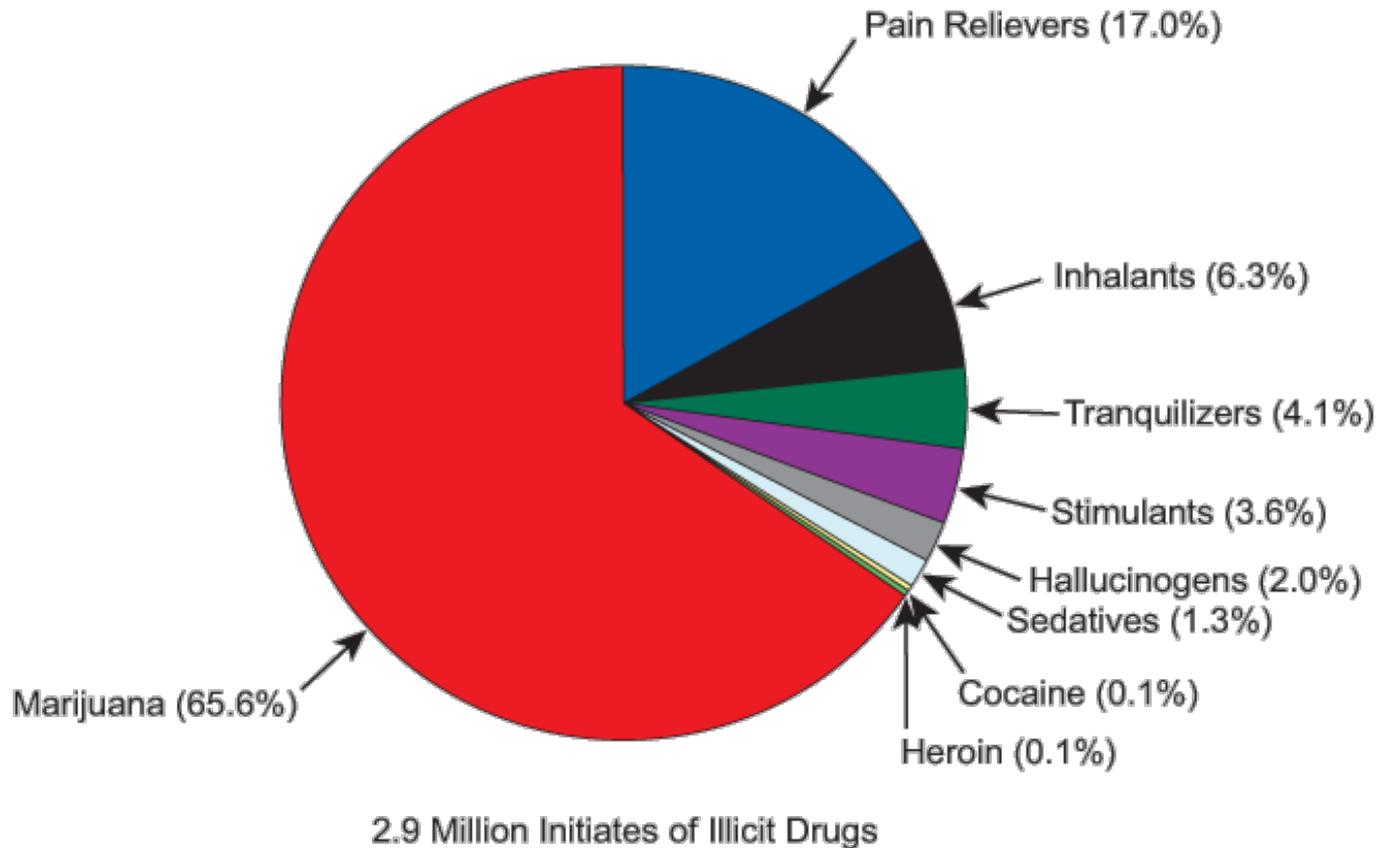
All cash, card runners, ATMs, rolling accounts, side accounts, bank loosening, MJ mortgages



Industry Status

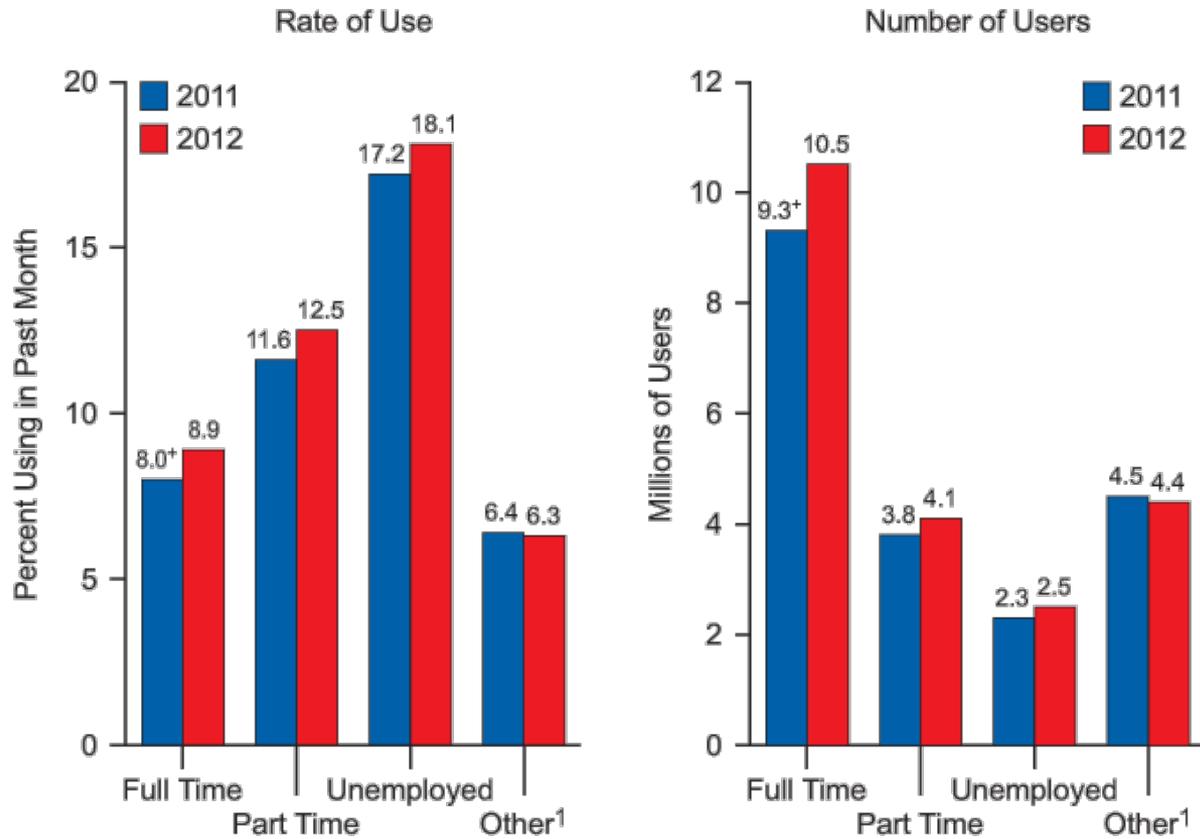
- + Informal political coalition
- + Pre-2000: **95%** of MJ smoked
- + 2015: **40%** of MJ smoked
- + Oligopoly, sophisticated operators
- + Nearly **20 million** Americans report past-month usage
- + Approx. **50%** admit use at least once
- + Estimated national legal cannabis market size in 2019: **\$10.2 billion**
- + Number of Americans that regularly use cannabis: **17.4 million**
- + MJ Consumption mirrors alcohol

First Specific Drug Associated with Initiation of Illicit Drug Use Among Past Year Illicit Drug Initiates Aged 12 or Older: 2012



Source: U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Substance Abuse and Mental Health Services Administration
Center for Behavioral Health Statistics and Quality

Past Month Illicit Drug Use Among Persons Aged 18 or Older, by Employment Status: 2011 + 2012



Source: U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
 Substance Abuse and Mental Health Services Administration
 Center for Behavioral Health Statistics and Quality



Drug Testing **RESOURCES**



Local Counsel/Attorney



*Substance Abuse and
Mental Health Services
Administration (SAMHSA),
Division of Workplace
Programs*



*U.S. Department of
Labor (DOL), eLaws
Drug-Free Workplace
Advisor*



*U.S. Department of
Transportation (DOT),
Office of Drug & Alcohol
Policy & Compliance*



**BUT WHY SHOULD
WE CARE**





**Workplace Impact +
Other Considerations**



Courts Upholding *Employer Policies...So Far*

State supreme court cases have upheld that employers are not obligated to accommodate the use of medical marijuana—even outside the workplace

Several medical marijuana states have implicit employee protections in place, where the law mentions only on-the-job consumption or impairment as grounds for termination, these include Colorado, Hawaii, Michigan, Montana, New Jersey, New Mexico and Vermont



Company Reputation



Federal Funding

BENEFITS



Third-Party Employee Benefits



Drug Testing

Action
STEPS
for Employers



1

Adopt policies that emphasize it is illegal to work under the influence or consume drugs at the workplace + consequences for not obeying policies



2

Work with a reputable drug testing company that administers random testing and complies with all state and federal regulations



Watch for law changes at the federal and state level on medical marijuana



Politics



Grade:

A

Source: Marijuana Policy Project

"States which want to regulate marijuana would remain free to do so the same way local laws now govern sales of alcohol and tobacco. Bernie would continue to allow federal law enforcement officials to arrest and prosecute drug dealers for trafficking in marijuana sales."

Bernie Sanders Campaign Website, October 28, 2015



Grade:

B

Source: Marijuana Policy Project

"I think that states are the laboratories of democracy, and four states have already taken action to legalize, and it will be important that other states and the federal government take account of how that's being done, what we learn from what they're doing. I think that the states moving forward is appropriate and I think the federal government has to move to make this more available for research that they can then distribute to interested people across our country. I do think on the federal level we need to remove marijuana from the Schedule I of drugs, move it to Schedule II, which will permit it to be the basis for medical research because it's important that we learn as much as possible. And since it was a Schedule I drug we haven't done that research. A lot of experts in the field are telling me we've got to learn a lot more." - WBZ NewsRadio, January 25, 2016



Grade:

C+

Source: Marijuana Policy Project

"In terms of marijuana and legalization, I think that should be a state issue, state-by-state. ... Marijuana is such a big thing. I think medical should happen — right? Don't we agree? I think so. And then I really believe we should leave it up to the states."

Washington Post, October 29, 2015

Statewide Races



Election 2016: November 8

**Presidential
Race**

**Ballot
Issues**

**U.S.
Senate Seats**

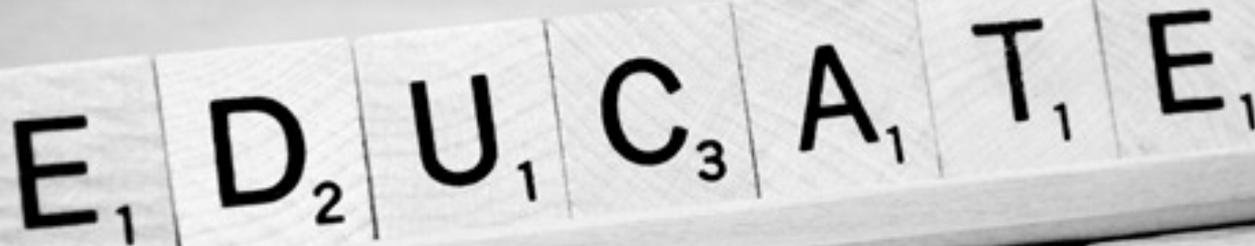
**All U.S.
House Seats**

**U.S.
Supreme
Court Seat**

**State
House Seats**

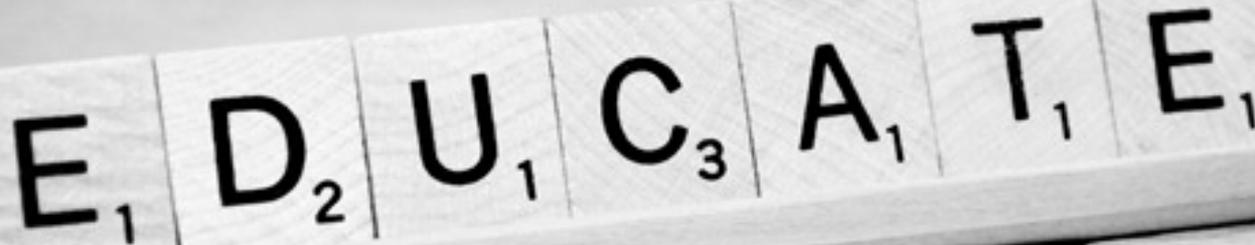
**State
Senate Seats**

**State
Supreme
Court
Races**

A black and white photograph of a wooden tray containing seven wooden blocks. Each block has a letter and a subscript number: E₁, D₂, U₁, C₃, A₁, T₁, and E₁. The blocks are arranged in a row to spell out the word 'EDUCATE'. The tray is placed on a light-colored wooden surface.

E₁ D₂ U₁ C₃ A₁ T₁ E₁

Employers must educate employees on who the candidates are and what their positions are on certain issues

A row of seven wooden blocks spelling out the word "EDUCATE". Each letter is on a separate block, and the blocks are arranged in a slightly curved line. The letters are in a bold, sans-serif font. The subscripts are: E₁, D₂, U₁, C₃, A₁, T₁, E₁.

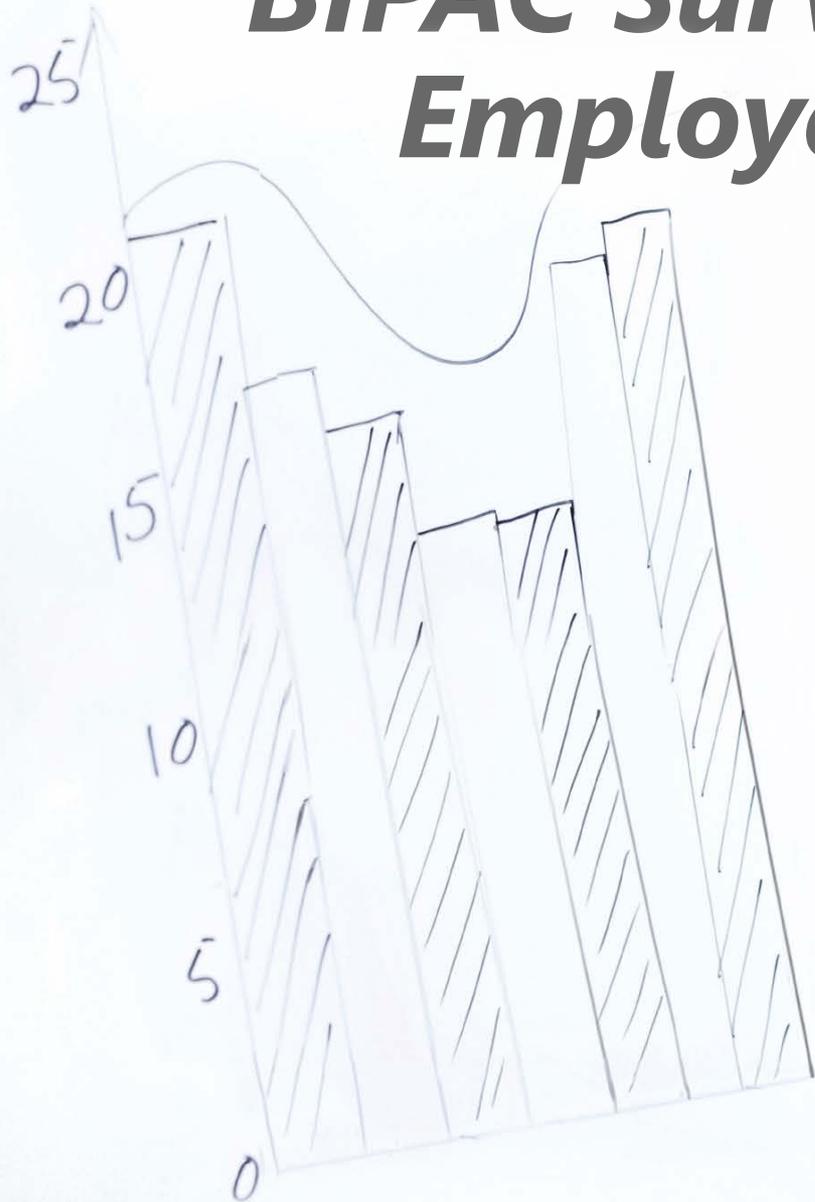
E₁ D₂ U₁ C₃ A₁ T₁ E₁

Do you currently provide information to employees on how certain laws will positively or negatively impact your company?

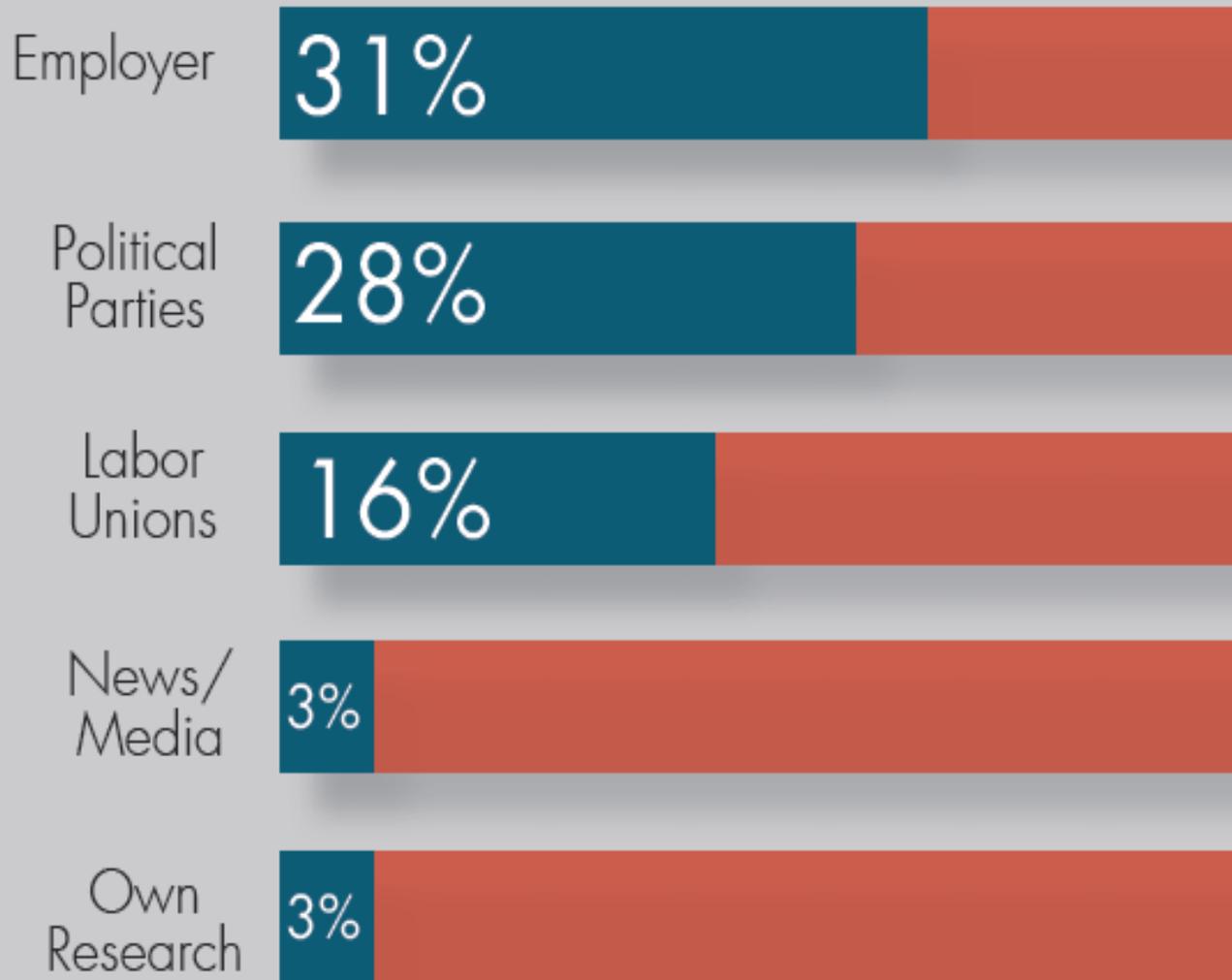
***Do your Employees
Agree or Disagree?***



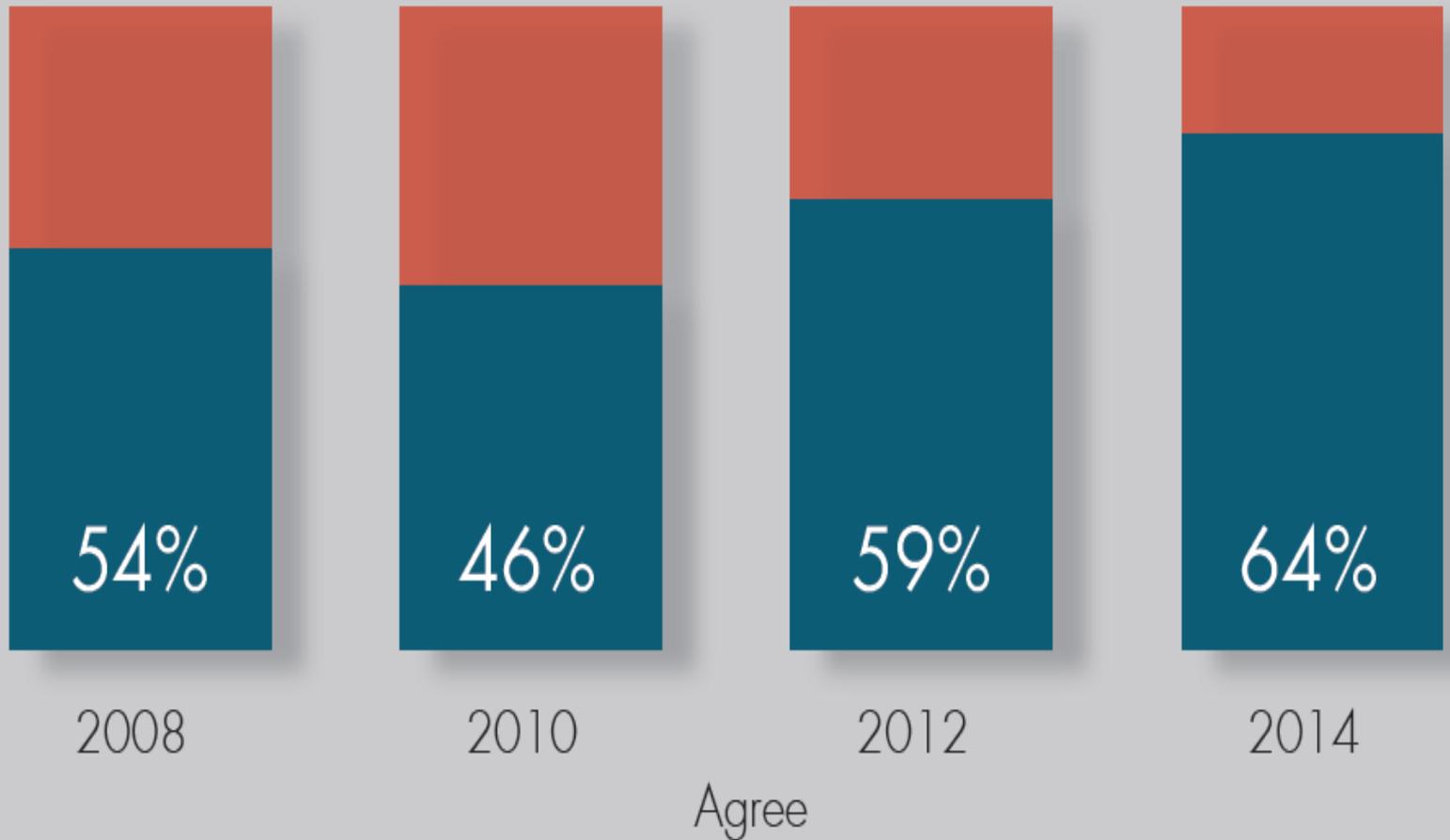
BIPAC Survey of Employees



Most Credible Information Sources*



"Would you say you generally agree or disagree with your employer's approach to public policy issues affecting your industry or workplace?"





We in America do not have government by the majority. We have government by the majority who participate.

(Thomas Jefferson)

Thank You!

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