

The Legalization of Marijuana in Massachusetts:

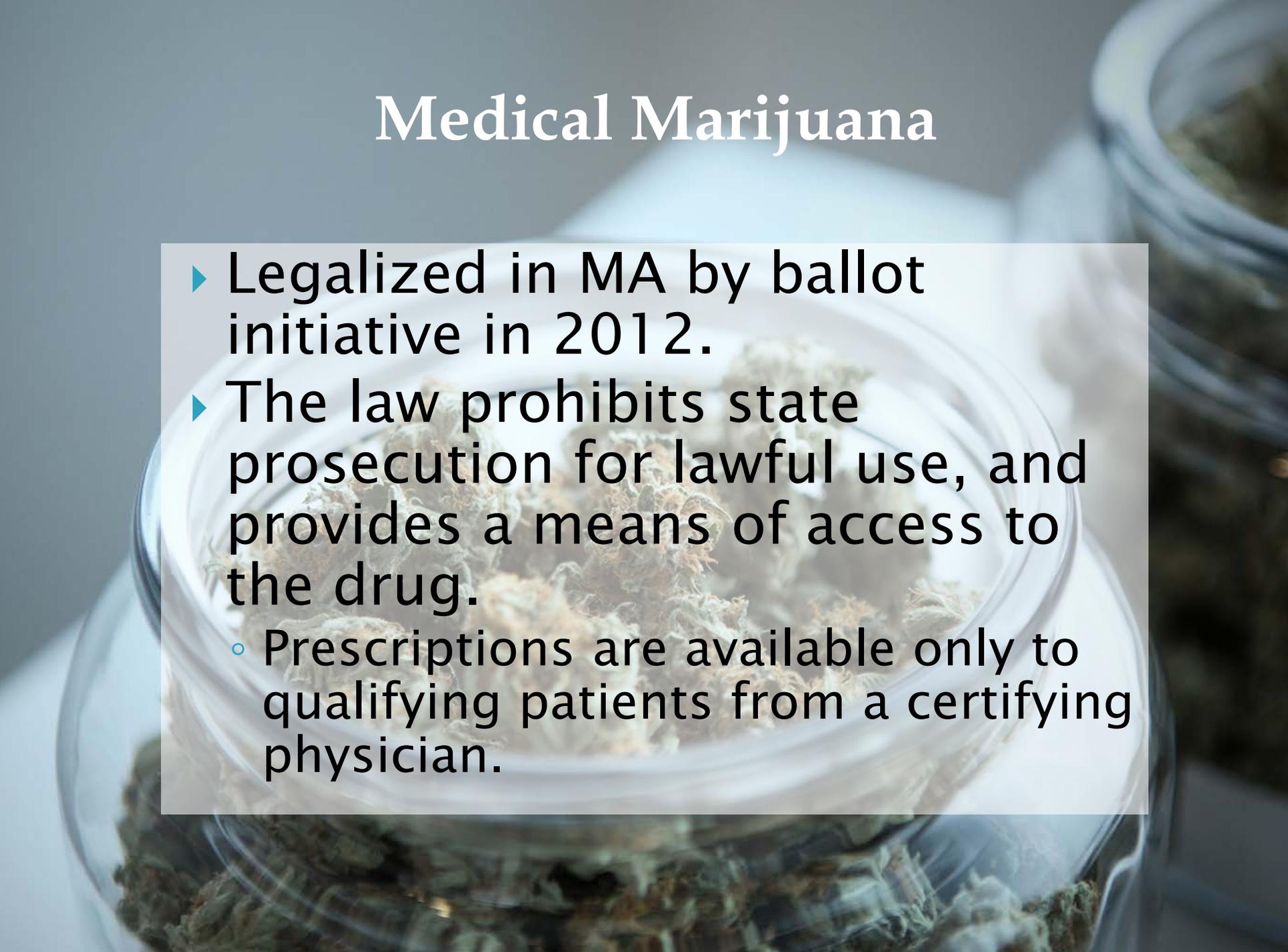
Implications for Employers

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Medical Marijuana



- ▶ Legalized in MA by ballot initiative in 2012.
- ▶ The law prohibits state prosecution for lawful use, and provides a means of access to the drug.
 - Prescriptions are available only to qualifying patients from a certifying physician.

Medical Marijuana

The Basics

- In Massachusetts, a patient must:
 - ✓ Be at least 18 years old (with a limited exception); and
 - ✓ Have been diagnosed with a debilitating medical condition by a certifying physician.
- Examples include cancer, HIV/AIDS, Hepatitis C, Parkinson's and MS.



Medical Marijuana

The Basics

- BUT - *Any* condition can be certified as “**debilitating**” under the law if it causes symptoms like pain, weakness or nausea and has progressed to the point where “**one or more of a patient’s major life activities is substantially limited.**”
- *“Wait just a minute! That language sure looks familiar...”*



Are users “disabled”?

- ▶ Yes, odds are that a patient who is lawfully using medical marijuana has a “physical or mental impairment” that would qualify as a “disability” under the ADA and similar state laws.
- ▶ “Does that mean I have to accommodate the use of medical marijuana in my workplace?”



Do I have to accommodate?

- ▶ The MA medical marijuana law specifically states that it does not require “any accommodation of any on-site medical use of marijuana in any place of employment.”
- ▶ Can clearly prohibit on-site use
- ▶ What about off-site use?



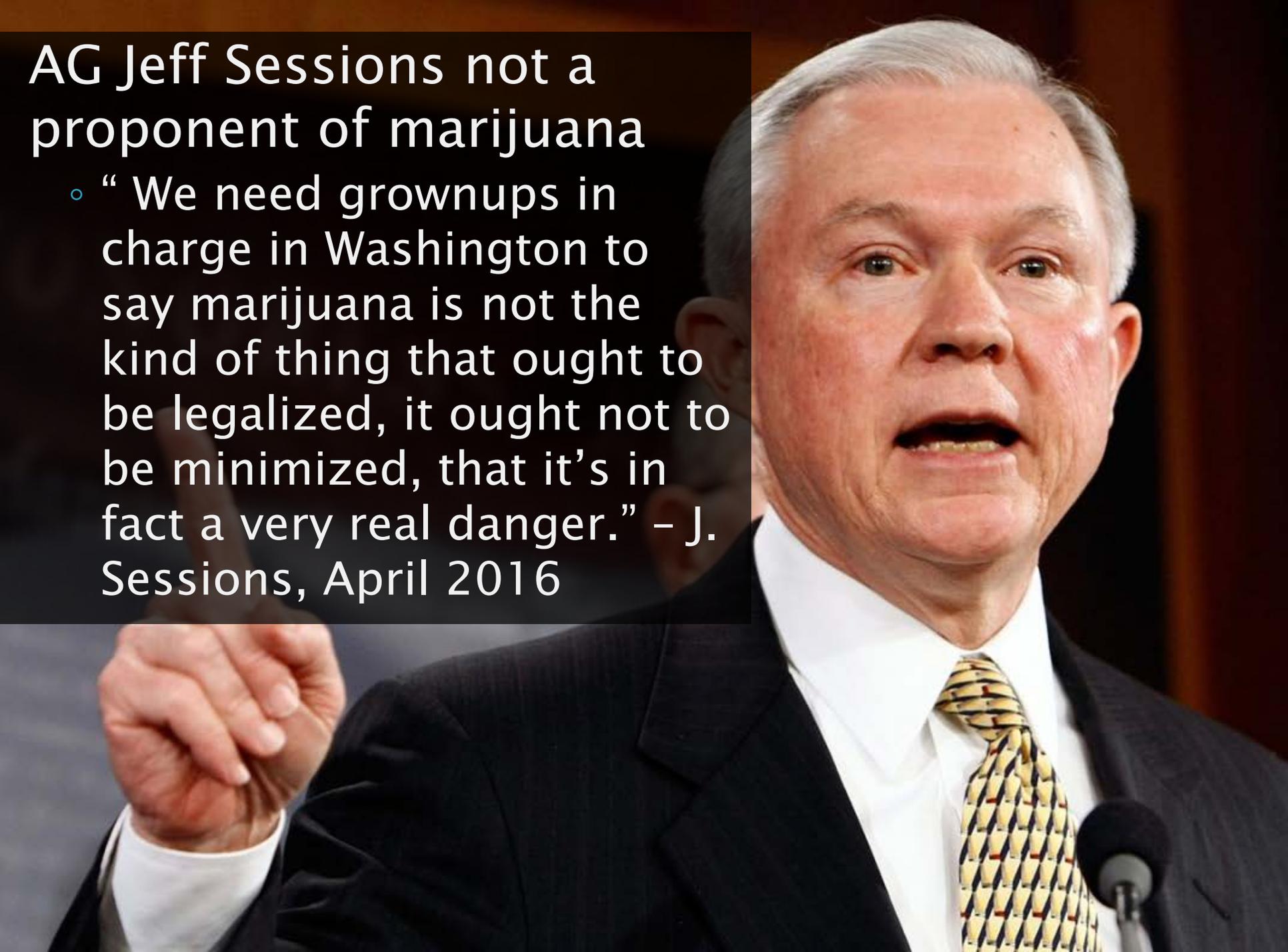
Under Federal Law...

- ▶ Marijuana remains an illegal drug
 - Marijuana is Schedule I drug
 - Same as heroin
 - The cultivation, manufacture, sale, and distribution are crimes
- ▶ In 2009, former Attorney General Holder reassured people that the feds would not prosecute (DOJ Memo 10/19/09)



AG Jeff Sessions not a proponent of marijuana

- “ We need grownups in charge in Washington to say marijuana is not the kind of thing that ought to be legalized, it ought not to be minimized, that it’s in fact a very real danger.” – J. Sessions, April 2016



Medical Marijuana

Barbuto v. Advantage Sales

- Cristina Barbuto uses medical marijuana to treat Crohn's disease.
- She disclosed that fact to Advantage prior to her pre-employment drug test.
- Advantage terminated her when her test result came back positive for marijuana.
- She sued, alleging failure to accommodate under Chapter 151B, among other claims.



Medical Marijuana

Barbuto v. Advantage Sales

- The Court dismissed the claim:
 - “A reading of the [medical marijuana law] and its implementing regulations supports a finding that it does not require an employer to accommodate an employee’s use of marijuana to treat a medical condition.”
 - “Similarly, there is no support for finding that G.L. c. 151B requires an employer to accommodate an employee’s use of medical marijuana.”



Medical Marijuana

Barbuto v. Advantage Sales

- The Court relied on the facts that marijuana remains illegal under federal law and the medical marijuana statute does not require employers to violate federal law.
- The Court also dismissed Barbuto's claims for a violation of the medical marijuana statute and for wrongful discharge



Medical Marijuana

But what about state law?

- ▶ This means that, unless the legislature takes additional action, the issue will be decided by the courts.
- ▶ Every court that has considered the issue so far has said no accommodation was required
- ▶ . . . including a state court in MA.



So what's the bottom line?

- ▶ The Barbuto case is the only authority on this issue so far, so MA employers should feel comfortable refusing to accommodate medical marijuana use by employees.
- ▶ Practically speaking, this means that Mass. employers can discipline or terminate employees who fail a lawful drug test.

BUT



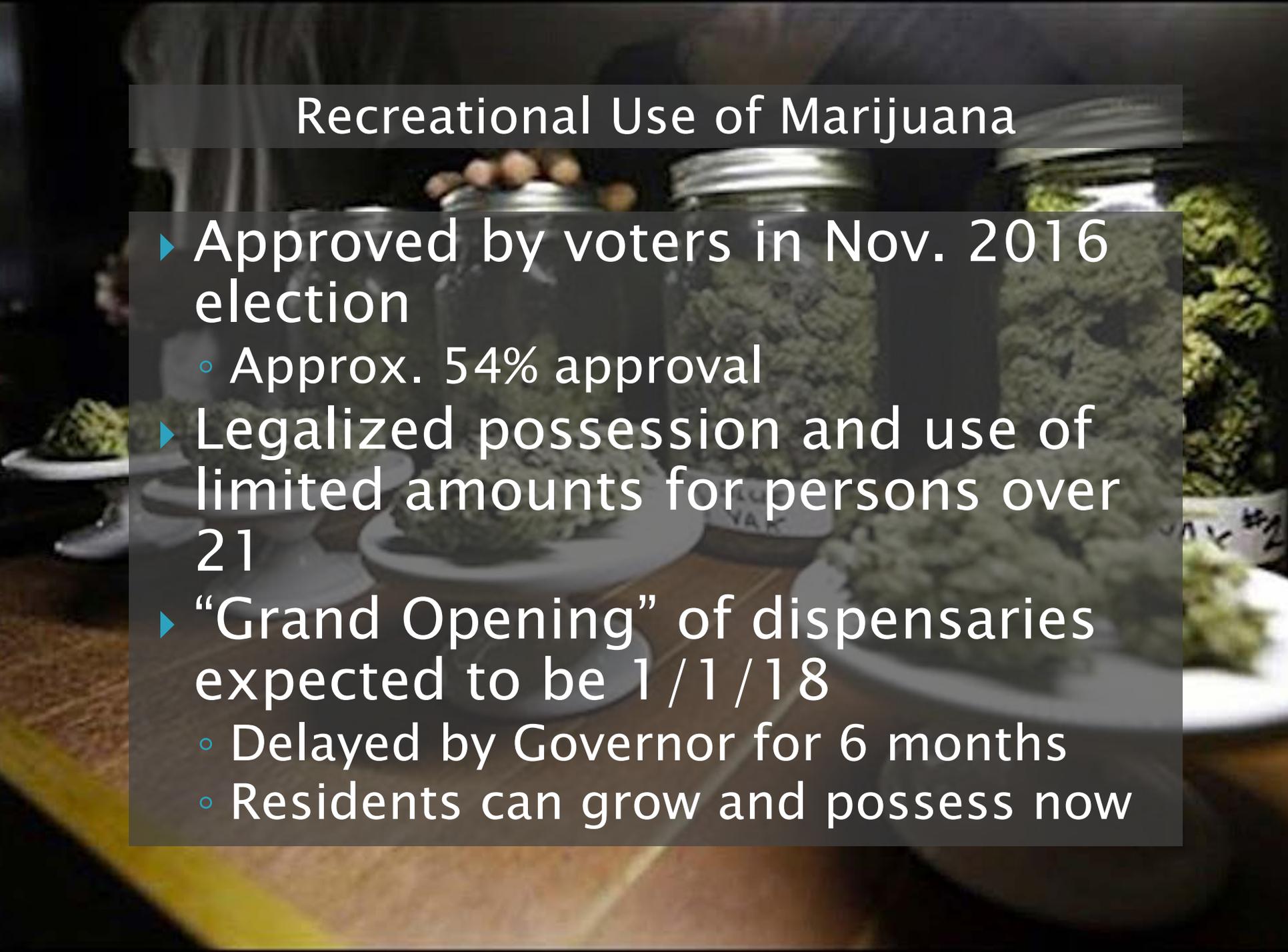
Barbuto v. Advantage Sales

▶ Caution:

- Case has been appealed, expect decision from state's highest court this spring/summer
- MCAD filed brief supporting Barbuto's position
 - MCAD: Employer should have engaged in the interactive process to determine whether off-site use would impact ability to do the job
 - Employer is not being asked to tolerate illegal behavior



Recreational Use of Marijuana



- ▶ Approved by voters in Nov. 2016 election
 - Approx. 54% approval
- ▶ Legalized possession and use of limited amounts for persons over 21
- ▶ “Grand Opening” of dispensaries expected to be 1/1/18
 - Delayed by Governor for 6 months
 - Residents can grow and possess now

Recreational Use of Marijuana

- ▶ Impact on employers:
 - Law specifically states employers not required to permit use
 - Law does not affect right of employers to enact and enforce workplace policies prohibiting employee use
- ▶ Employers can still:
 - Prohibit use and/or possession at work
 - Implement pre-employment testing policies
 - Discipline/terminate for being under the influence
 - *But remember, if employee is using for medicinal reasons, could be some risk in refusing to accommodate disability*

Implications for Unemployment

Rule Violation

- ▶ Doesn't a positive test violate a drug-free workplace policy, regardless of present impairment?
- ▶ Isn't that a rule violation?
- ▶ *It depends...*



The employer must prove the following:

- The rule or policy existed;
- It was effectively communicated to employees;
- It was reasonable;
- It was uniformly enforced;
- The claimant knowingly violated it; and
- The violation was not the result of the employee's incompetence.



Implications for Unemployment

Rule Violation

- ▶ Considerations specific to testing:
 - Was the test within the scope of the policy?
 - Was the employer consistent in terms of the outcome for a positive test result?
 - Was the test administered in accordance with federal testing standards?
- ▶ Also, recent Board decisions have required on-the-job impairment even under the rule violation prong.



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Overtime Rule

The verdict is in. Last night, the U.S. Department of Labor (DOL) issued its heavily anticipated Final Rule regarding overtime exempt status for "white collar" workers. The Final Rule will raise the minimum annual salary threshold for exempt "white collar" workers to \$47,476 (\$913/week). This means that almost all employees earning a salary less than \$47,476 per year will need to be classified as nonexempt for the purposes of [wage and hour law](#) (there are very limited exceptions - consult with employment counsel if you have questions regarding possible exceptions to the new rule). Nonexempt employees are entitled to an overtime premium when working more than 40 hours in a workweek, and employers must keep [more detailed records](#) for nonexempt employees. The \$47,476 threshold is slightly less than the [previously proposed minimum of \\$50,440](#). DOL estimates that the Final Rule will extend overtime protections to [more than 4 million workers](#). The Final Rule does not make any changes to the duties test for executive, administrative and professional employees.

The Final Rule includes the previously proposed minimum salary escalator, meaning the new threshold of \$47,476 will automatically increase over time. However, the minimum salary threshold will increase every three years, rather than every year as originally proposed. In a departure from the proposed rule, the Final Rule allows employers to count nondiscretionary bonuses, incentives, and commissions toward up to 10 percent of the required minimum salary, so long as employers pay those amounts on a quarterly or more frequent basis. Previously, nondiscretionary bonuses were not allowed to be included in the minimum salary calculus.

The Final Rule gives businesses more than 6 months to comply, as the rule has an effective date of December 1, 2016. Given the considerable increase in the minimum salary threshold, and the current political climate, we expect congressional challenges to the Final Rule. House and Senate Republicans have already [introduced legislation calling for the rule to be nullified](#). The Final Rule might also get challenged via the Congressional Review Act, which allows Congress to overrule "major" final rules issued by federal agencies—like the DOL—by a "joint resolution of disapproval." The resolution is part of a potential presidential veto (a virtual last consideration President Obama was the driving

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