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?

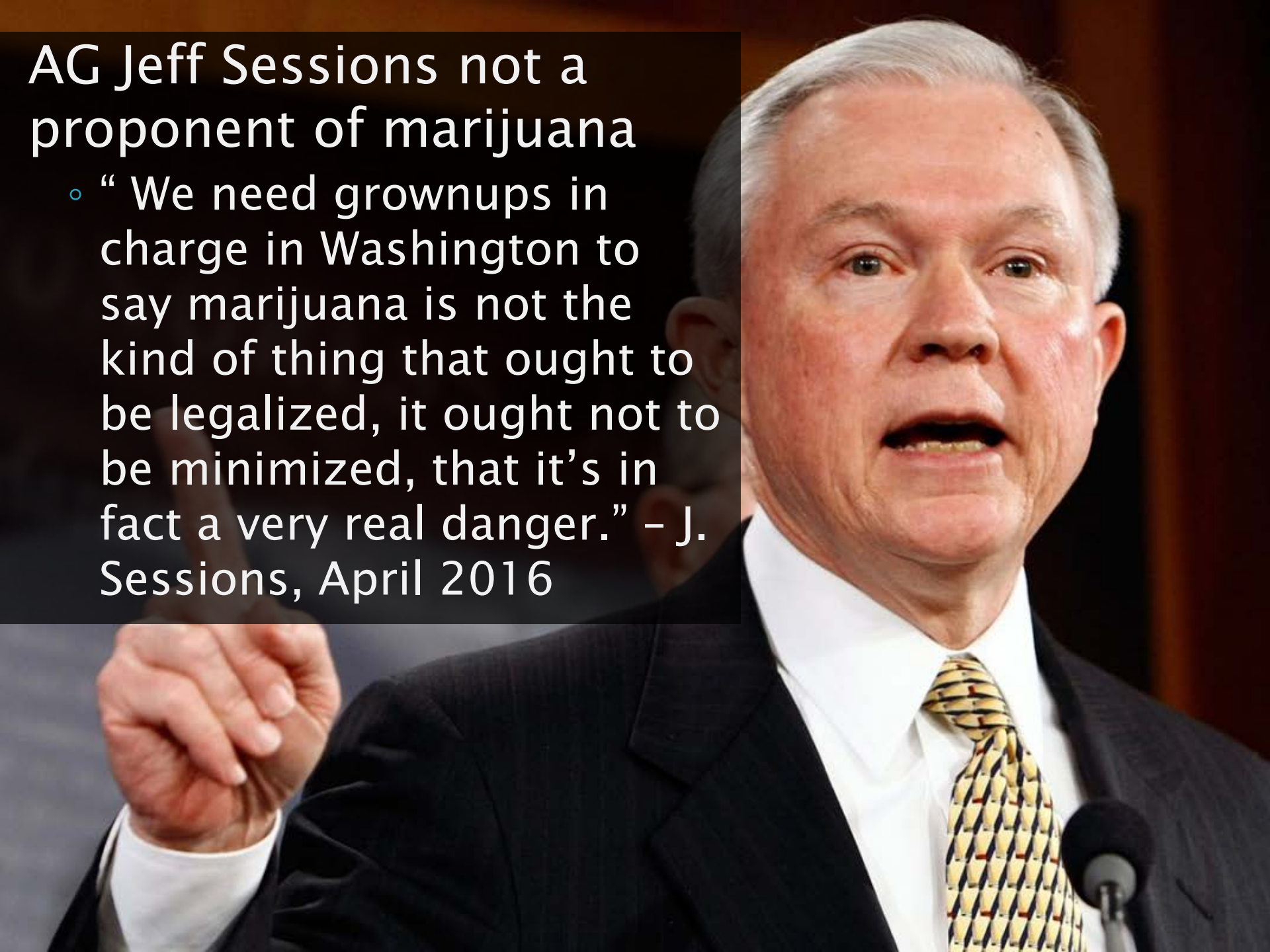
- The MA medical marijuana law specifically states that it does not require "any accommodation of any on-site medical use of marijuana in any place of employment."
- Can clearly prohibit on-site use
- What about off-site use?

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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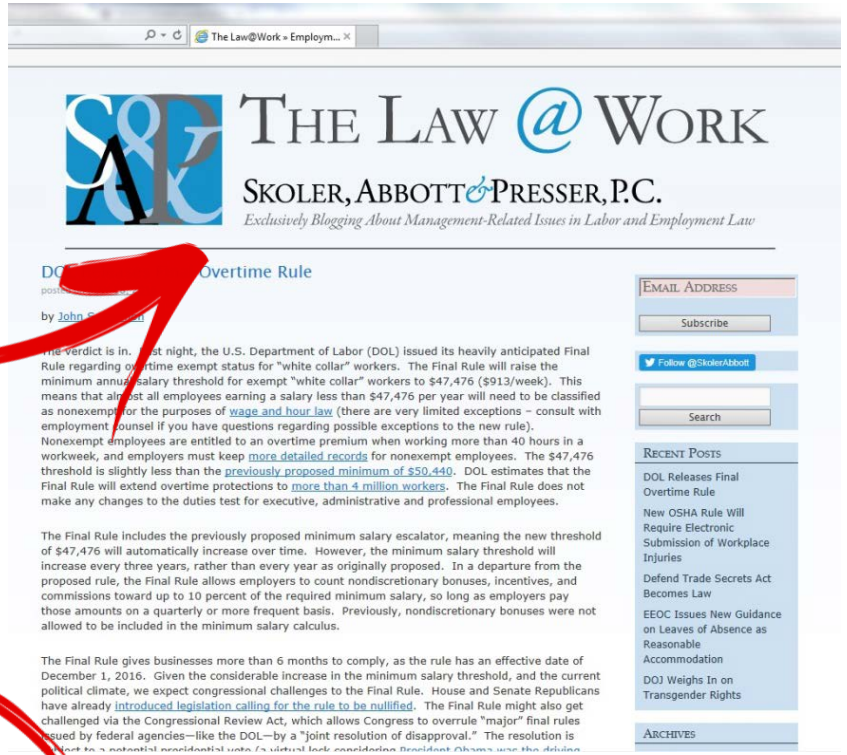

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