

5 Questions to Ask if Your State is Considering Marijuana Legalization



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Four states and the District of Columbia have legalized recreational marijuana and twenty-four states (and D.C.) have legalized marijuana for medical use. Yet there is still no good guidebook for states thinking through whether, and how, to follow in their footsteps. The federal government can't offer much in the way of advice, as marijuana remains a Schedule I drug under the *Controlled Substances Act*, so its consumption for any purpose is strictly prohibited. But 51% of the country now lives in a state that has legalized marijuana for adult or medical use, and there are lessons to be learned from those early adopters. Below are the five questions policymakers and voters should consider if they choose to legalize and examples of how they can handle each in the smartest and most responsible way possible.

How Will We Protect Against Drugged Driving?

Driving laws are typically a major flashpoint in states that have legalized marijuana or may do so in the future—for both political and policy reasons. Politically speaking, public opinion research identifies drugged driving as one of the biggest concerns for the American public when it comes to changing marijuana laws. In Third Way's own poll, 65% of voters worried that “increasing access [to marijuana] will cause more drugged driving and make our roads more dangerous.” Furthermore, when it comes to the policy specifics, there is no easy fix. The science is still unclear on the best ways to measure intoxication in this context, given that THC (one of the active ingredients in marijuana) affects people differently and can build up in the bloodstream over time. But waiting indefinitely for science to find the answer isn't an option. In what's known as the Cole Memo, which defines when the federal government will intervene despite

the fact that a state has legalized marijuana, drugged driving was one of eight important federal interests listed for the Department of Justice and the Drug Enforcement Administration to consider.

So while the science is developing, what matters is that states set some measurable standard, and that it can be rebutted in court if the driver can show he or she was not actually intoxicated. That's what Colorado's law does, establishing a permissible inference of intoxication at five nanograms of THC per liter of blood. Unfortunately, of the 24 states that have legalized medical marijuana (including the four that have also legalized recreational marijuana), 14 don't have any sort of THC limit on the books—rebuttable or not. And only six states have comprehensive open container laws that prevent all marijuana consumption in a moving car. In the future, states should be thinking about not only measuring intoxication (in addition to THC tests, Colorado employs Drug Recognition Experts), but also keeping drivers and passengers from lighting up and discouraging simultaneous use of both marijuana and alcohol (e.g. a lower THC limit when alcohol is also found in the blood stream).

How Will We Keep Marijuana From Youth?

As with driving, the public and the Obama Administration have both made their concerns about increasing youth access and use clear. Fifty-seven percent of voters in our poll were concerned that loosening marijuana laws would “increase use by children, sending a message that it's safe, and would allow sellers to market marijuana-laced candy to kids.” The Cole Memo also highlights youth use as an important concern the federal government will take into account when determining whether to intervene in a state that has legalized marijuana for medical or adult use.

Though it's illegal in every state for minors to consume marijuana, there are additional steps that states can take to make sure legalization makes it *harder* for adolescents to get

their hands on marijuana, rather than *easier*. In Washington, for example, it is a felony for an adult to give marijuana to a minor. And not only are minors prohibited from even being present in marijuana establishments, but any establishment that sells to a minor—even unintentionally—is subject to fines and license revocation or suspension.

One issue of particular importance when it comes to kids is the regulation of the packaging and labeling of marijuana and marijuana products. For example, in Colorado the law explicitly prohibits packaging designed to target people under the age of 21 and forbids the use of the words “candy” or “candies” on any marijuana package, unless it is part of the business’s name. But six states don’t have any laws regulating labels and packaging with regards to kids—which means manufacturers aren’t prohibited from deliberately appealing to children with cartoon characters, mandated to include any sort of warning, or required to pack marijuana in opaque or child-resistant containers. These safety precautions are crucial if we are going to ensure that changing our marijuana laws does not put young children at risk.

How Will We Keep Marijuana Within The Legalizing State?

Preventing diversion across state lines should be a major priority when states establish legal marijuana systems. Not only was diversion one of the major concerns highlighted by the federal government in the Cole Memo, but the “laboratories of democracy” theory (letting different states try out different policies to see what works) only works if everyone stays in their own petri dish. Colorado learned this lesson the hard way, when two of its neighbors—Nebraska and Oklahoma—took it to Court to challenge that state’s law and the way it was impacting their law enforcement needs when marijuana crossed state lines. While the Supreme Court declined to hear that case at this point (though it still could step in if rulings work their way up through the lower courts),

the risk of diversion is something legalizing states need to take very seriously.

There are several ways states can crack down on diversion, with some combination of them likely to be most successful. For example, every state with a legal system (either medical or recreational) already has some sort of limit on how much marijuana a user or patient may purchase (or that an establishment may dispense). Inventory controls, of which “seed-to-sale” tracking is the most common, have shown great success and are used in some form by all but four states.¹ Some states, like Arizona, Massachusetts, and Montana, require medical marijuana patients to pledge that they will not divert marijuana to ineligible persons. In Minnesota, every marijuana product must be labeled with a warning stating that if a patient transfers it to another person, he or she could lose their registration. And nearly every state has criminal and/or regulatory sanctions for illegal trafficking or negligent diversion of marijuana. Oregon, for example, does a particularly effective job of cracking down on diversion—not only does it require seed-to-sale tracking, it also makes it a felony for an employee of a marijuana establishment to sell marijuana out of state, punishes negligent diversion with fines and license suspension or revocation, and prohibits advertising from encouraging the transportation of marijuana across state lines. Other states should look to Oregon as a model for how to ensure marijuana that may be legal in their state does not travel to others.

How Will We Protect Consumers?

Consumer protection is turning out to be one of the big sleeper issues of the state marijuana legalization debate. Though it’s not listed as a federal priority in the Cole Memo, it is something with which several states are struggling—in some cases significantly. The problems are compounded by the fact that the Environmental Protection Agency (EPA) cannot recommend or approve safe pesticide use for

marijuana plants so long as it remains illegal under federal law, leaving states to determine their own guidelines. A Cannabis Safety Institute study found that many edibles contain a higher level of pesticide than is allowed on other foods—and even some pesticides that aren't allowed on food at all.

Without help from the EPA, states need to set their own pesticide rules and safety testing requirements. Of the twenty-four states with legal marijuana, five currently lack any sort of testing requirement, leaving patients and consumers without accurate information on the safety or potency of the product. One state that has done a good job setting consumer protection regulations, however, is Connecticut. Under that state's medical program, marijuana is required to undergo random testing at independent labs. Every marijuana establishment must prepare and file with the state a recall plan to ensure that unsafe marijuana is disposed of properly. And every package of marijuana must be labeled with the product's strain, potency, and information on active ingredients. Other smart laws to consider modeling include New Jersey's, which allows both the soil and the plant itself to be tested, and Delaware's, which establishes random testing.

Another important piece of consumer protection relates to edible marijuana products, like cookies, candies, and baked goods, and the ways in which they are packaged and labeled. Unfortunately, most states have failed to establish effective rules that ensure people know what they are eating and in what quantity. One notable exception is Colorado, which limits the quantity of THC allowed in each edible serving and mandates that all edible goods be physically stamped with a special mark identifying them as containing marijuana. States should consider regulating the ways in which edibles can be sold—either by requiring a clear demarcation between servings or that edibles only be sold in single serving sizes. Additionally, states should be thinking about comprehensive labeling regulations to ensure that people know exactly what they are consuming and how much THC it contains.

Though complicated, it is clear that state policymakers need to think about how they will prioritize consumer protection in their markets, both as it relates to tainted marijuana and the packaging and labeling of edibles.

How Will We Handle Advertising For Legal Marijuana?

The final political flashpoint that every state needs to contemplate when establishing regulations for marijuana legalization is advertising. This is an especially difficult line for states to walk, due to the protections in the First Amendment, but it is very important given public health concerns and the lessons we've learned from the past. No one wants another Joe Camel cartoon that attracts attention from children, and that means states should be cracking down on efforts like Buddie, the anthropomorphic superhero marijuana bud that served as the mascot of the doomed Ohio ballot initiative in 2015.

Two ways states are dealing with advertising concerns are by establishing rules around location and around content. In Alaska, for example, marijuana can't be advertised within 1,000 feet of a library, park, child-centered facility, substance abuse or treatment facility, or on a public transit vehicle or bus shelter. And where advertising is allowed, it cannot promote over-consumption, feature cartoon characters, or be false or misleading. Colorado has effectively banned television advertising before 10pm and states like Massachusetts and New Jersey prohibit dispensaries from selling marijuana-branded merchandise. On the other hand, seven states currently don't have any time, place, or manner restrictions regulating advertising at all—even if those ads target children. State policymakers should get ahead of the curve and make sure advertising around legal marijuana is targeted where it belongs: at adult users.

Conclusion

States are increasingly becoming laboratories of democracy when it comes to marijuana legalization. Without longitudinal data, we don't yet know which exact policies are the most effective at protecting public safety and ensuring consumption is safe and responsible. But having analyzed the laws of the twenty-four states that have legalized medical and/or recreational marijuana, we do know that these five issues are major political and policy flashpoints that every state should consider when crafting laws and regulations around this issue. There may not be one right way to address drugged driving, youth access, diversion, consumer protection, or advertising, but failing to address them at all would be a major failing—not just making laws less effective and regulatory systems less safe, but also turning the public against legalization and even potentially bringing down the enforcement hammer of the federal government against a state, its legal market, and its consumers.

For detailed information on each state's laws, please see our report, [All State Marijuana Laws Are Not Created Equal](#).

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END NOTES

1. Seed-to-sale tracking is a comprehensive form of inventory control used by several states with legal marijuana laws, in which the state tracks marijuana from the seed of origin to the point at which it is sold to a consumer or destroyed.