

A top-down view of a desk with a silver laptop on the left, a pair of black-rimmed glasses in the upper right, and a black pen in the middle right. The background is a plain white surface.

Work**Smarts** Half-Day Seminar

# No Need to Phone a Friend: What Employers Need to Know About Workplace Drug Testing

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# Why Conduct Workplace Drug Testing

- Primary Purposes
  - Enhance worker health, safety, and productivity.
  - Deterrent and prevention method to avoid on-the-job impairment.
  - Establish grounds for discipline and termination.
  - One part of a comprehensive drug-free workplace program.
- Secondary Purposes
  - Avoid liability and reduce costs from misuse of alcohol and drugs.
  - Comply with customer or contract requirements.
  - Satisfy insurance carrier requirements.
  - Discounts on state workers' compensation insurance.
  - May serve to limit or deny unemployment benefits.

# Why Conduct Workplace Drug Testing

- Legal Purposes
  - Drug-Free Workplace Act of 1988 (soft requirement for federal contractors).
  - Occupational Safety and Health Act (soft requirement for post-incident testing)
  - Mandated under regulations from the Department of Transportation.
  - Required for industries that perform public safety and national security.
  - State and local law enforcement and emergency service providers.
- Substance Abuse and Mental Health Services Administration (SAMHSA)
  - Best practices for drug and alcohol testing.
  - Best resources for private employers.

# Components of Workplace Drug Testing

- Written Policy
  - Who receives testing?
  - When are drug tests given?
  - What substances are tested?
  - What steps are taken to ensure the accuracy of the test?
  - What are the consequences of a positive test, refusal to test, and tampering?
- Employee Education
  - Notice to employees.
  - Consent by employees.
- Supervisor Training
  - Recognize substance abuse and impairments.
  - Confidentiality protocols.

# When to Conduct Workplace Testing

- Pre-Employment
- Reasonable Suspicion
- Safety-Sensitive Positions
- Post-Accident
- Random Testing

# Pre-Employment Testing

- Procedure:
  - Applicants should be notified that testing will be part of the hiring process.
  - Testing should be conducted *after* giving a conditional offer of employment.
  - Obtain consent from applicant before testing.
- Risks
  - Make sure testing requirements are consistent to avoid discrimination issues (i.e., all job candidates in the same classification receive the same drug tests before hire).
  - If drug testing before conditional offer of employment, drug test may detect only the use of illegal drugs (not alcohol).

# Reasonable Suspicion Testing

- Procedure
  - Credible report of on-the-job impairment because of drugs or alcohol.
  - Direct observation of behavior that indicates an employee may be impaired (under the influence) because of drugs or alcohol.
  - Remove employee from safety-sensitive area.
  - If reasonable suspicion is present, arrange for transportation to testing facility and suspend (with or without pay depending on your policy) employee pending results.
- “Reasonable Suspicion”
  - Less than probable cause but more than mere suspicion.
  - Needs specific objective factual basis to justify reasonable suspicion.
- Supervisor Training
  - The best practice is for supervisors and human resources to be trained on an annual basis about recognizing alcohol and drug use and impairments, documentation and corroboration.

# Documenting Reasonable Suspicion

- Have two managers personally observe employee and document findings.
- Document physical and behavioral indicators observed:
  - Walking, speech, eyes, face, odors, appearance, movements, standing.
  - Demeanor (paranoid, uninhibited, drowsy) and actions (fighting, excessive laughter)
- Additional facts:
  - Presence of alcohol or drugs in possession or vicinity.
  - On-the-job misconduct or workplace accident.
  - Witness statements.
- Employee's response: Document employee's explanation or reasons for conduct.
- Action Plan:
  - Agrees to test, refuses to test, no test required.
  - *Weingarten* rights for union employees.
  - Employee Assistance Program.



# Post-Accident and Random Drug Testing

- Post-Accident Drug Testing
  - Testing employees who were involved in a workplace accident or unsafe practices can help determine whether alcohol or drug use was a contributing factor.
  - Some employers may automatically test employees post-accident, however, automatic testing is limited by state and industry.
  - If employer chooses to automatically test post-accident, make sure to test all participants involved rather than selectively choosing employees.
  - Do not forget about OSHA's anti-retaliation provisions.
- Random Testing
  - Testing certain portion or percentage of employees randomly throughout the year.
  - Needs truly unbiased and random method of choosing individuals to drug test.

# How to Conduct Workplace Drug Testing

- Obtain written consent every time and provide a copy of the policy for review.
- Tests may be done by a collector who visits your workplace to collect specimens or employees go to a certified laboratory.
  - Urine, blood, hair, saliva, or sweat samples can be used as test specimens.
  - Tests are commonly used for five categories of drugs: amphetamines, cocaine, marijuana, opiates, and phencyclidine (PCP).
- Pay regular rate for the time spent testing and for the test itself.
- Chain of custody must be continuous from receipt until disposal.
- Laboratory confirmation of initial test (split sample).
- Medical review officer (MRO) interprets test result together with employee's medical history and other relevant information and renders opinion.

# How to Conduct Workplace Drug Testing

## SAMHSA Thresholds for a Positive Drug Test

Controlled Substance	Initial Threshold	Confirmatory Threshold
Marijuana Metabolites	50 ng/mL	15 ng/mL
Cocaine Metabolites	150 ng/mL	100 ng/mL
Phencyclidine	25 ng/mL	25 ng/mL
Opiates	2,000 ng/mL	2,000 ng/mL
Amphetamine	500 ng/mL	250 ng/mL

Citation: 82 FR 7920

# Enforcing Drug and Alcohol Policies

- Types of disciplinary cases:
  - Immediate
  - Progressive
    - Counseling.
    - Written warning.
    - Suspension without pay.
    - Termination.
- For all cases:
  - NEVER terminate on the spot, instead:
    - 1) Suspend, subject to discharge pending investigation;
    - 2) Investigate; and
    - 3) Decide and communicate.

# How to Respond to Positive Test

- When employer receives confirmed positive test, notify the employee in writing of the result and the employment action taken or that a decision is pending.
- Best Practices for Notice Following Positive Test
  - Provide a copy of the test result.
  - Provide notice of the right to request and obtain a retest (of original sample) at employee's expense at an approved laboratory of the employee's choice.
  - Provide the employee the name and address of the medical review officer who made the report.
  - Provide notice of the employee's right to request records from the laboratory where the testing was conducted.
- These best practices are required in many states (Alabama, Florida, Georgia, Iowa, Maryland, and New Jersey).
- Also, remember Fair Credit Reporting Act requirements, if a consumer reporting agency provides the test results.

# Top Tips for Workplace Drug Testing

- Ensure compliance with state drug testing laws.
- Have a clear written policy and procedure in place.
- Train managers:
  - How to handle these types of situations.
  - How to look for specific, observable criteria.
  - The need to accurately and timely document the observations.
- Designate impartial person to report reasonable suspicion up the chain.
- Use a reliable third party to conduct drug tests.
- Keep drug tests confidential.
- Decide actions to take once results are received.

# Marijuana Under Federal Law

- Regulated and banned certain drugs, substances and chemicals through a law called the Controlled Substances Act (“CSA”)
  - CSA has 5 schedules.
  - Schedule 1 includes drugs that do not have an “accepted medical use in the United States, a lack of accepted safety for use under medical supervision, and a high potential for abuse.”
- 2018 Farm Bill – marijuana/cannabis not illegal if it contains less than .3% of delta-9-tetrahydrocannabinol (THC).
- The Marijuana Opportunity and Expungement Act is pending before Congress – effort to remove marijuana from the CSA completely but so far, the Senate did not approve the Act.

# Drug Testing for Marijuana Under Federal Law

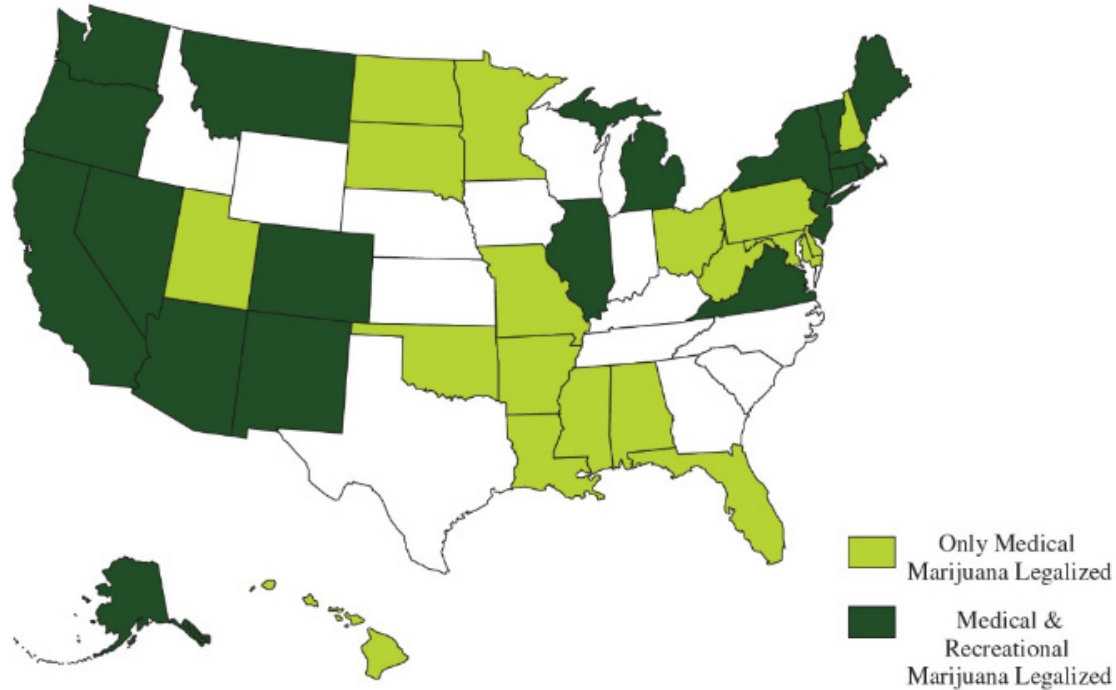
- Generally requires private employers to:
  - drug test their employees; or
  - prevents employers from testing their employees.
- No distinction between marijuana and any other schedule-one drug.
- ADA permits but does not require employers to test employees and applicants for marijuana.
- Employers may both:
  - Test for marijuana.
  - Take adverse employment action against an employee testing positive for marijuana, even if the employee has a medical marijuana prescription.



# Marijuana Under State Laws

- Some states decriminalized marijuana - no regulated market, but possession of small quantities of marijuana is not a criminal offense.
- Some states legalized
  - Marijuana products available for sale to adults from businesses licensed by the state.
  - Medical purposes only
    - Requires a card or entering a registry to purchase marijuana and marijuana products to treat a medical condition.

# Medical and Recreational Marijuana Legalization



# Problems Arising from Testing for Marijuana

- Lawful Off-Duty Statutes
- Anti-Discrimination Laws Protecting Marijuana Use
  - Employer may not take any adverse action due to the presence of marijuana in a drug test, *unless* employees used, possessed or were impaired.
    - Arizona (medical), California legislation pending (recreational and medical), Connecticut (medical), Delaware (medical), Minnesota (medical), New Jersey (recreational and medical), and Oklahoma (medical).
  - Employer may not discriminate against employees on the sole basis of their status as a qualified patient (cardholder status).
    - Arkansas, Illinois, Maine, Pennsylvania, Rhode Island, West Virginia.
  - Some exceptions for safety-sensitive positions, for possible loss of state or federal funding, or if employer would violate federal law.

# Problems Arising from Testing for Marijuana

- Difficulty Establishing Impairment
  - Marijuana metabolites remain in one's system for days or weeks after use.
  - Acute effects wear off after several hours, though chronic use may cause long-term effects.
  - Generally, employers cannot assume employees are under the influence merely because marijuana is detected in a drug test.
- Developing Accommodations
  - Allowing off-site medical marijuana use may be a reasonable accommodation under state anti-discrimination laws.
  - Accommodations are not required when they pose a threat of harm or danger to employee or others, cause undue hardship, or prevent employees from fulfilling their job responsibilities.

***Is testing for marijuana worth it?***

***Treat marijuana like alcohol?***

# State Laws Continued...

- States that require accommodation for marijuana use outside of work:
  - Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island and West Virginia.
- Failure to accommodate could led to state discrimination claim:
  - Massachusetts Supreme Court ruled medical marijuana user who was terminated for testing positive for THC could pursue a state law discrimination claim against the employer. Court noted that even if an employer's policies banned marijuana use, the employer was required to engage in the interactive process and bore the burden of establishing "undue hardship."

# Sample Language for Workplace Policies

- **Defining illegal drugs**

“The Company considers medical marijuana and recreational marijuana to be illegal drugs because they are not legally obtainable under federal law.”

- **Focus on safety and being unimpaired**

“To protect the safety of yourself and the safety of others, the Company requires that you are able to perform your job safely and unimpaired by illegal drugs. If your supervisor believes that you are not working in a safe and unimpaired manner, you may be reassigned to another role or suspended while the Company conducts an investigation that may include a drug test.”

- **Addressing medical marijuana**

“A prescription for medical marijuana is not recognized by the Company because marijuana is not legally obtainable under federal law.”

# Bottom Line for Marijuana Policies

- Employers can still create and enforce drug-free workplace policies prohibiting use, possession, and working under the influence.
- Employers can still discipline and terminate employees when legal or illegal drugs create a safety hazard or impair an employee's performance.
- No federal or state law requires employers to accommodate employees who use medical or recreational marijuana during work hours or while at work.
- Need to determine the laws in each state your business has operations to see what the state law requires/allows for medical/recreational marijuana.



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## Top Tips

# Workplace Drug Testing & Marijuana in the Workplace Top Tips

## Workplace Drug Testing

- Ensure compliance with state drug testing laws.
- Have a clear written policy and procedure in place.
- Train managers properly.
- Designate impartial person to report reasonable suspicion up the chain.

## Marijuana in the Workplace

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# Thank You



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