



WHITE PAPER

THE EVOLUTION OF WORKPLACE DRUG TESTING & MARIJUANA LAWS



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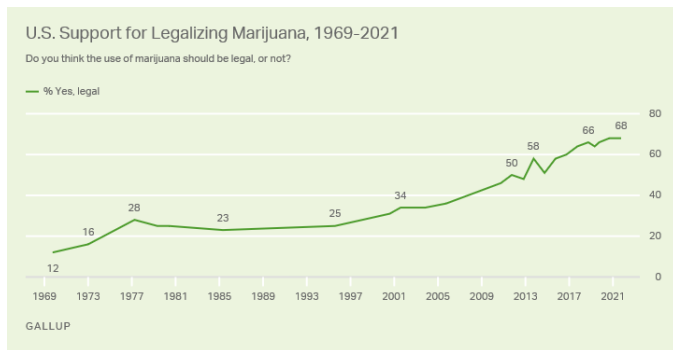
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Drug Screening Compliance Institute (DSCI)

As of this publication, 36 states have legalized the medical use of marijuana.¹ Patients can qualify for medical marijuana to treat a wide variety of medical conditions, which varies by state. Seniors (age 65+) in Washington D.C. are even allowed to 'self-certify' that their marijuana use is for medical purposes and are not required to present a doctor's approval to purchase marijuana at one of the district's dispensaries. Currently, 18 states and Washington D.C. have legalized the adult use of marijuana (along with medical use)². Connecticut, New Mexico, New Jersey, New York, and Virginia are the newest states to adopt legal adult use in the last year.

According to a 2021 Pew Research poll³, 91% of Americans believe marijuana should be legalized to some degree: 31% for medical use, and 60% for both medical and recreational use. The latest Gallup poll⁴ shows that a record high (no pun intended) of 68% of Americans support marijuana legalization in general.



Primary Issues for Employers

Employers are required to maintain a safe workplace. The federal Occupational Safety and Health Act's (OSHA) General Duty Clause⁵ requires that employers "shall furnish to each of his employee's employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." Marijuana legalization is the single greatest recent 'monkey wrench' challenging employers to maintain a balance of safety and productivity. Let's look at the primary considerations employers are facing.

SUBSTANCE USE

Correlating with the record rise in Americans supporting marijuana legalization, substance use, in general, is also on the rise⁶. Add in the uncertainty and stress of a global pandemic, it's obvious that Americans are turning to substance use to cope. Alcohol⁷ and marijuana sales⁸ have skyrocketed. Alarming, alcohol-related deaths soared by more than 25% during COVID⁹, and more than 100,000 Americans now die of drug overdoses.¹⁰ "Driven largely by surging rates of marijuana general U.S. workforce positives and steady rates of amphetamines positives, the rate of drug positivity remained stubbornly high despite seismic shifts to the workplace caused by the COVID-19 pandemic," said Barry Sample, Ph.D., senior director of science & technology at Quest Diagnostics¹¹. "However, as we see upticks in hiring and many employees returning to the workplace, it is important that employers consider workforce drug testing as a way to keep the workplace, their customers, and the community safe."

It's a fair bet that the increased use of impairing substances is having an impact on our nation's workplaces, proving more critical than ever before the value of maintaining substance abuse testing programs.

GROWING LEGAL LIMITATIONS

A recent trend of the laws in some states and municipalities is the limitations or prohibitions of employers taking adverse employment actions against employees or applicants for their legal off-duty marijuana use. Some states and municipalities are considering creating or amending marijuana legalization laws that either include employee protections or expand existing protections. This greatly impacts when, why, how employers can test for marijuana and what disciplines they can impose on job applicants and employees.



While commonplace in years past, testing for marijuana may now violate state or local marijuana or “lawful activities” or “lawful products” laws. Maine, New York,¹² and Montana are a few states that made it unlawful for an employer to discriminate against an applicant or employee for using marijuana outside of the workplace. Recently, the New York Department of Labor announced its position that all pre-employment marijuana tests are unlawful without signs or symptoms of impairment, with no exception or consideration for those applying to work in safety-sensitive positions. New York City and Philadelphia also prohibit pre-employment marijuana testing, and Nevada prohibits an employer from taking adverse action based on a positive marijuana test result (all three recognize exceptions for safety-sensitive jobs). City officials in St. Louis have approved new municipal provisions suspending marijuana-specific pre-employment and random drug screenings for public employees in non-safety sensitive positions. California, among several other states and municipalities, is considering legislation prohibiting pre-employment marijuana testing.

Most states have medical marijuana laws as mentioned above. There is a growing trend in the courts allowing applicants and employees to sue their employers under the state’s disability discrimination law, protecting the underlying medical condition(s) for which the individual is authorized to use medical marijuana. A few court decisions even hold that an employer may have to consider accommodating marijuana use for medicinal purposes. Employers should be prepared to engage in an interactive dialogue with authorized medical marijuana patients to determine if their use of marijuana can be reasonably accommodated or not – before taking any adverse employment action.¹³

‘FAIRNESS’ OF MARIJUANA TESTING

The original purpose of workplace drug testing was to detect the presence of substances in a specimen. Most drugs of abuse have a detection time of 2-72 hours from last use. However, for marijuana, a fat-soluble drug, the detection time is much broader. A positive drug test for marijuana identifies the *non-psychoactive* metabolite of marijuana - carboxy-THC (THC-COOH) - not hydroxy-THC or delta-9-THC which are psychoactive. The presence of the carboxy-THC metabolite does not indicate impairment. A positive result would only indicate that an individual has used marijuana anywhere from a day ago to several weeks or months ago, depending on the screening method used and the timing of the drug test. For the most part, traditional urine or hair-based employment drug testing has lost its ‘fairness’. Although it’s been available



for more than two decades, the drug testing industry has seen an increase in employers conducting oral-fluid-based testing, currently the best methodology to detect the recent use of marijuana (within the past few hours) as well as other illicit substances¹⁴. The U.S. Department of Transportation (DOT) recently proposed rules¹⁵ that will permit the use of oral fluid drug testing for Federally regulated employees. In its proposal, DOT said adding oral fluid drug testing to its drug testing program would “give employers a choice that will help combat employee cheating on urine drug tests and provide a more economical, less intrusive means of achieving the safety goals of the program.”¹⁶

LABOR MARKET CONSIDERATIONS

Increased public opinion on marijuana legalization, the increased use of marijuana; medically or otherwise; COVID-19, remote workforces... and then the pandemic-era labor shortage. Yikes.

According to the U.S. Department of Labor,¹⁷ more than 4.5 million people voluntarily left their jobs in November 2021, a record, up from 4.2 million in October 2021 and the highest in the 20 years the government has kept track of. The so-called “Great Resignation” shows that several job sectors experienced high turnover rates during the pandemic, leisure and hospitality top the list. Trade industries, transportation and utilities, professional services, and retail round out the top five. Many employers transitioned to a remote work-from-home or hybrid workforce. The increased flexibility, among other factors, created competition for workers now seeking better pay, fewer hours, and nonfinancial benefits like more favorable work-life balance, and the ability to conduct their work from wherever there’s an internet connection.

Faced with the challenge of a 15-year high global talent shortage,¹⁸ many employers in the U.S. believe that something

must change, there must be something they can do to attract and retain talent. For several companies that means looking at the option of eliminating drug testing for marijuana.

With a better understanding of the science, anyone making hiring or firing decisions loath to reject an applicant or employee because of a positive drug test result for marijuana. In the wake of increasing marijuana legalization, many employers are reviewing their drug and alcohol screening programs and reviewing their options on how they will choose to handle marijuana in their workplace.

DRUG SCREENING PROGRAM REVIEW

Every employer across our nation is (or will soon be) impacted by marijuana laws. Companies faced with the dilemma of attracting and retaining talent might reconsider their stance on marijuana, especially for positions that do not pose a safety or security-sensitive risk to others. Some employers will elect to remove marijuana from pre-employment testing while ensuring a robust post-employment screening program (reasonable suspicion, post-accident, and potentially random testing). Some will elect to remove marijuana testing for their non-safety or security-sensitive employees. Most employers will continue conducting drug screening as allowed by federal, state, and local laws. Employers should also consider reviewing the drug testing method(s) they utilize. This is not a one-size-fits-all solution, each workplace is different so the solution will be unique to each employer.

Some employers must test for marijuana. Companies with employees that are regulated by or do business with the federal government, that operate under a Collective Bargaining Agreement (CBA), unions, or industry-specific jobs such as childcare workers or zip-line operators may still be required to test for marijuana. Department of



Transportation (DOT) regulated safety-sensitive positions, such as commercial motor vehicle drivers, pilots, and pipeline employees, are subject to mandatory alcohol and drug screening. The DOT has issued separate bulletins reminding DOT-regulated employers and their employees that it “remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation’s drug testing regulations to use marijuana,”¹⁹ even for medicinal use.²⁰

Safety is an important consideration. As a reminder, OSHA’s “general duty clause” mandates that employers furnish “employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees.” The National Safety Council reports²¹ that employees who are impaired by marijuana present a safety risk in the workplace, particularly if they work in safety-sensitive positions, where an impairment will put the employee and others at risk of serious physical harm or death. According to Quest Diagnostics, the marijuana positivity rate of post-accident test results grew faster than the rate for pre-employment testing²². Employers concerned about safety are encouraged to continue reasonable suspicion and post-accident marijuana testing even if they eliminate the drug from their pre-employment panel.

Federal contractors must maintain a drug-free workplace. The federal Drug-Free Workplace Act (DFWA) is silent on drug testing. Instead, it merely requires that a government contractor have a clear drug-free workplace policy that reminds employees that possession, distribution, and use of controlled substances are prohibited in the workplace. Because the law focuses on possession and use in the workplace, and not drug testing, there arguably may be no conflict between the DFWA and a state or local marijuana law, making it possible for a government contractor to modify its drug testing practices while still complying with the DFWA.

Remain compliant. Due to the risks to occupational safety and health posed by workplace marijuana use, the National Safety Council advises that employers adopt a zero-tolerance policy for marijuana use in safety-sensitive positions. That said, such a policy might conflict with state or local marijuana laws that may not contain exemptions for safety-sensitive positions. An employer must understand the rules that apply to them in each state(s) in which they conduct business. Marijuana laws are found at the federal, state, and local levels. The language of these laws varies greatly, and the Courts are bound by what the Legislatures provide or intend. For one example, some state laws indicate that medical

marijuana “should be treated like any other prescribed medicine.” Related court rulings and industrial commission decisions must also be considered.

Employers considering discontinuing marijuana testing should work with industry experts, experienced counsel, and their service providers and balance the increased use of marijuana and the need for a safe workplace. Each employer should consider the many legal and procedural issues discussed above.

WORKERS COMPENSATION CLAIMS

This may come as a surprise to some, but another hotly contested issue is whether or not an employer must cover the cost of marijuana for a state-authorized medical marijuana patient injured at work. Suppose your employee is injured on the job, and they are authorized to use medical marijuana to treat their injuries. If you or your workers’ compensation insurance carrier refuse to cover the cost of medical marijuana, does state law protect that decision? State-level courts have answered that question differently, and now the dilemma has landed before the U.S. Supreme Court. The Court asked the Solicitor General to file a brief²³ on this matter, a significant development that we are keeping an eye on.

Employer Action Items

This rapidly evolving legal landscape presents new challenges for employers, especially employers operating in multiple states. Employers must balance several competing issues, including complying with conflicting federal, state, and local laws, maintaining a safe work environment, protecting applicants’ and employees’ privacy, medical, and other legal rights, and attracting and retaining quality talent.

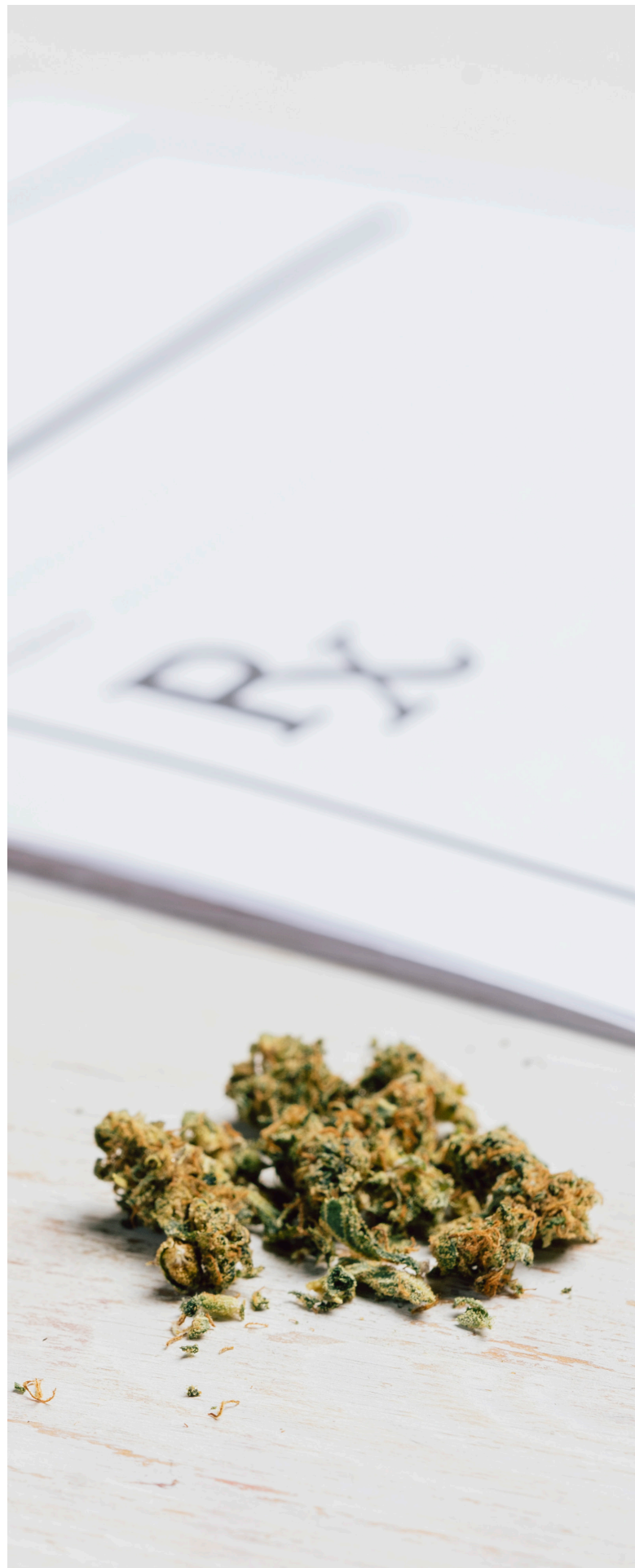
Employers should:

- Clearly understand the language contained within state-specific drug & alcohol screening laws and court & agency rulings that apply to your company, in each state(s) where you operate.
- Create, implement, and routinely review a written Drug-Free Workplace Policy that clearly states the company’s stance on prohibited drug & alcohol use (including marijuana) and the related consequences that will be imposed. Review when testing should occur and what test methodologies should be used. Stay up to date with regulatory or court decisions, as these rules change often.

- Design and implement sound processes and procedures that complement the language within your company policy. This will remove any guessing or potential mistakes when action needs to be taken in the “heat of the moment.”
- Provide your managers and supervisors with comprehensive training on the details of your substance abuse policy & procedures. Train them on how to recognize the signs and symptoms of drug and alcohol use, and the action steps they should take in such situations.
- Be sure to document and routinely review comprehensive job descriptions for each role within your company. Especially crucial for job functions that are to be considered “safety-sensitive.” What are the essential functions of the job that are safety or security-sensitive? Be prepared to defend why you defined these roles as such – if you were to ever be challenged.
- Be prepared to engage in an interactive conversation for medical marijuana patients to determine if their underlying medical condition(s) can be reasonably accommodated in your workplace based on the essential functions of the job – or not, before taking any adverse action.

CITATIONS

1. Alaska, Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Virginia, Washington, and West Virginia. In addition, Washington D.C., the territories of Puerto Rico, Guam, the Northern Mariana Islands, and the US Virgin Islands have all legalized medical marijuana.
2. Alaska, Arizona, California, Colorado, Connecticut, Illinois, Maine, Massachusetts, Michigan, Montana, New Jersey, New Mexico, New York, Nevada, Oregon, Vermont, Virginia, and Washington. Washington DC, Guam, and the Northern Mariana Islands also legalized adult marijuana use. Voters in South Dakota approved a 2020 amendment to legalize recreational marijuana, passing by 54% of the vote, but the law was struck down by the state Supreme Court a year later, following a lawsuit led by Republican Gov. Kristi Noem.



3. <https://www.pewresearch.org/fact-tank/2021/04/16/americans-overwhelmingly-say-marijuana-should-be-legal-for-recreational-or-medical-use/>
4. <https://news.gallup.com/poll/356939/support-legal-marijuana-holds-record-high.aspx>
5. <https://www.osha.gov/laws-regs/oshact/section5-duties>
6. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8896880/>
7. <https://pubs.niaaa.nih.gov/publications/surveillance-covid-19/COVSALES.htm>
8. <https://www.marijuanamoment.net/marijuana-sales-increased-in-multiple-states-during-covid-study-finds/>
9. <https://www.yahoo.com/now/alcohol-related-deaths-soared-more-171910141.html>
10. https://www.nytimes.com/2021/11/17/health/drug-overdoses-fentanyl-deaths.html?te=1&n=the-morning&emc=edit_nn_20220213
11. https://blog.employersolutions.com/wp-content/uploads/2021/05/sb9607_5397_drug_testing_index_2021_5-26-21_v7.pdf
12. <https://www.drugscreeningci.com/blog/new-york-when-can-employers-test-for-marijuana>
13. See for example, *Barbuto v. Advantage Sales and Marketing, LLC*, 477 Mass. 456 (2017)
14. <https://cannabis.net/drive/1000/media/typesofdrugtests.jpg>
15. <https://www.drugscreeningci.com/blog/updated-dot-releases-notice-of-proposed-rules-for-the-use-of-oral-fluid-drug-testing>
16. <https://www.regulations.gov/document/DOT-OST-2021-0093-0001>
17. <https://www.nbcnews.com/business/economy/record-4-5-million-americans-quit-their-job-november-n1286930>
18. <https://www.prnewswire.com/news-releases/global-talent-shortages-reach-15-year-high-as-workforce-transformation-reshapes-in-demand-skills-301302536.html>
19. <https://www.transportation.gov/odapc/dot-recreational-marijuana-notice>
20. <https://www.transportation.gov/odapc/medical-marijuana-notice>
21. <https://www.nsc.org/membership/training-tools/best-practices/marijuana-at-work>
22. https://blog.employersolutions.com/wp-content/uploads/2021/05/sb9607_5397_drug_testing_index_2021_5-26-21_v7.pdf
23. <https://www.marijuanamoment.net/u-s-supreme-court-asks-feds-to-weigh-in-on-medical-marijuana-workers-compensation-cases/>

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ABOUT CISIVE

Cisive, headquartered in Holtsville, New York, is a leading background screening provider focused on providing high-value employment background checks and industry-specific compliance services to highly regulated, risk-sensitive industries. Cisive has long-term relationships with a diverse base of clients across healthcare, financial services, transportation and other regulated industries.

Founded in 1977, Cisive has developed a broad range of differentiated vertical business lines and risk mitigation offerings including the core Cisive brand (global and enterprise), PreCheck (healthcare), Driver iQ (trucking and transportation), eVerifile (rail and contractor), Inquiries Screening (government), IntelliCorp (small and mid-market) and CARCO (insurance risk mitigation). Cisive's solutions deliver compliant employment intelligence to employers who are highly averse to employee-related risks and operate in highly regulated industries.

With Cisive, your business will not only gain a background screening provider, but a true partnership: a company that stands by our work, protects our clients, and provides the consultation and guidance world-class organizations seek.

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