



WHITE PAPER

MEDICAL MARIJUANA & STATE LAW COMPLIANCE



In the more than 40 years since workplace drug testing began in this country, we have grown from about 12 state laws and approximately 100 court cases to more than 600 state laws and regulations and more than 12,000 court and agency decisions that impact what we do. Certainly, not all of these statutes, regulations, and court or agency decisions affect your business. But some do!

The responsibilities you have as an HR leader, specifically regarding drug testing in your workplaces, are evolving quickly and are very complicated.

Marijuana legalization can have a direct and lasting impact on employers; particularly employers with drug-free workplace policies. Employers can be placed in a difficult position when trying to enforce these policies while avoiding not just medical marijuana law limitations but state disability discrimination lawsuits by employees who use medical marijuana outside of the workplace.

Although marijuana is still illegal under federal law, many states have adopted laws that permit medical marijuana consumption and protect patients from discrimination in employment based on their status as medical marijuana users.

Do you know all of the federal and state-specific rules that impact your organization and its drug testing program?

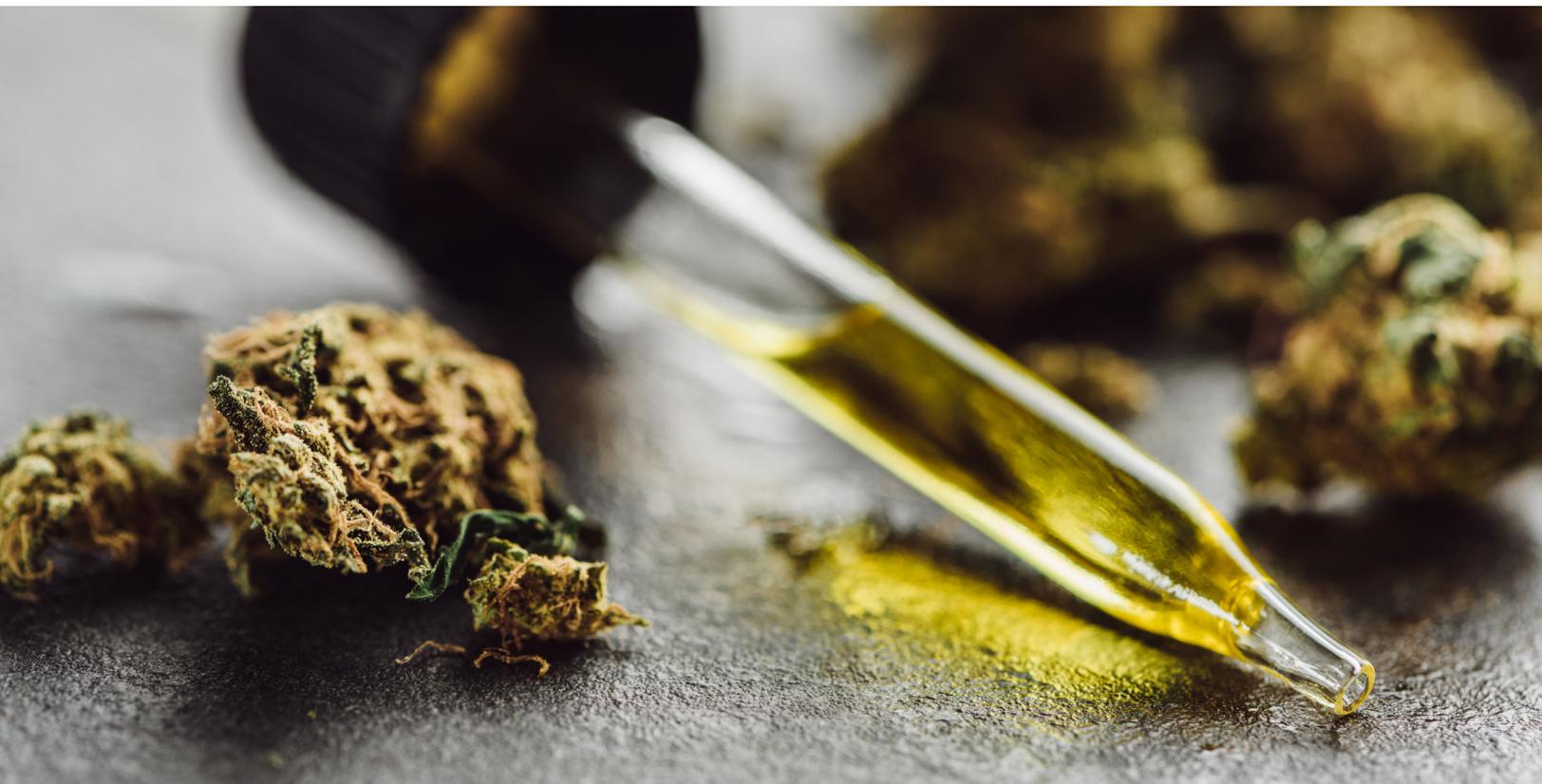
If your organization is doing workplace drug and alcohol testing, it is imperative that you align with experts in the field who can keep you current on all state and federal laws (statutes, regulations, and court/agency decisions) and help maintain your workplace drug and alcohol policies and procedures.

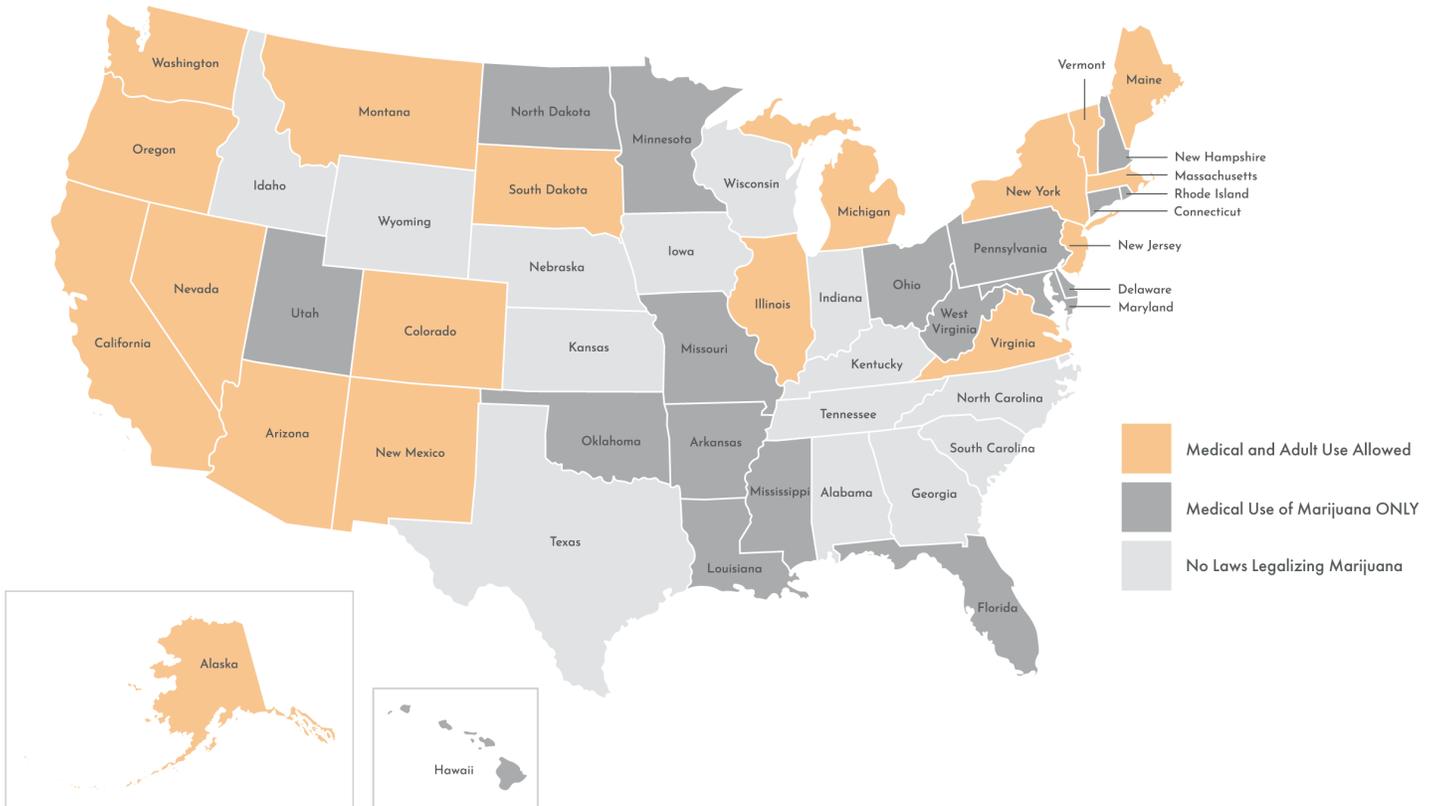
THE COST OF NON-COMPLIANCE

When you act without the right information, it's going to cost you money. We see this today from results of judgments, settlements, jury awards and consent decrees ranging from \$30,000 to \$2.1 million for violating the various rules and regulations.

In this paper, we will address state compliance rules and marijuana issues. You will be amazed at the various nuances and rules that exist that can impact your program. And if you're not aware of the rules and laws, it can cost you significant amounts of money.

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MARIJUANA LAWS

Today, 35 states and Washington, D.C. authorize the medical use of marijuana. In addition, there are now 18 states and Washington, D.C. that authorize the personal and medical use of marijuana for any over 21. *Virginia lawmakers passed a law to legalize marijuana but the law will not go into effect until Jan. 2024.

There are also 18 states that have authorized the use of Cannabidiol (CBD)/low THC oils extracted from hemp and marijuana for treatment of specific medical conditions. Several more states have bills that are pending and under consideration to add to that list of states that authorize some form of marijuana use. The impact of these laws in the workplace will undoubtedly continue to grow.

STATE COMPLIANCE REGULATIONS DIFFER FROM STATE TO STATE

State drug testing requirements are tricky as they differ significantly from state to state and change from time to time. Many states and municipalities have laws that regulate workplace drug testing. Employers testing in these states and municipalities must follow the rules. Many employers operate in multiple states and must be in compliance with the state laws in all states where they conduct business.

There are different types of states laws that affect drug testing programs:

1. 'Open States' have no statutory rules or guidelines for drug testing in the workplace. Examples of Open States include: New Hampshire, Nebraska, Wisconsin, Washington, Texas, South Dakota, Pennsylvania, and Michigan. That said, some of these states may have restrictions stemming from their medical marijuana rules. So, are there truly any "open" states anymore?
2. 'Voluntary States' do not require workplace drug testing but offer financial benefits and workers' compensation claim defenses to companies who voluntarily meet their program requirements. Georgia and Ohio have the most aggressive voluntary law with workers' compensation premium discounts up to 7% for Ohio and 7.5 % for Georgia. Other states with voluntary drug-free workplace laws include: Alabama, Alaska, Arizona, Arkansas, Florida, Idaho, Kentucky, Mississippi, South Carolina, Tennessee, Utah, Virginia and Wyoming.
3. 'Mandatory States' are those with mandatory workplace drug & alcohol screening requirements. These states have statutes and regulations that spell out what can and cannot be done with workplace drug and alcohol testing programs. Examples of Mandatory States include: Connecticut, Hawaii, Iowa, Louisiana, Maine, Maryland,

Montana, Nebraska, North Carolina, Oklahoma, Oregon and Vermont. The rules in these states vary greatly.

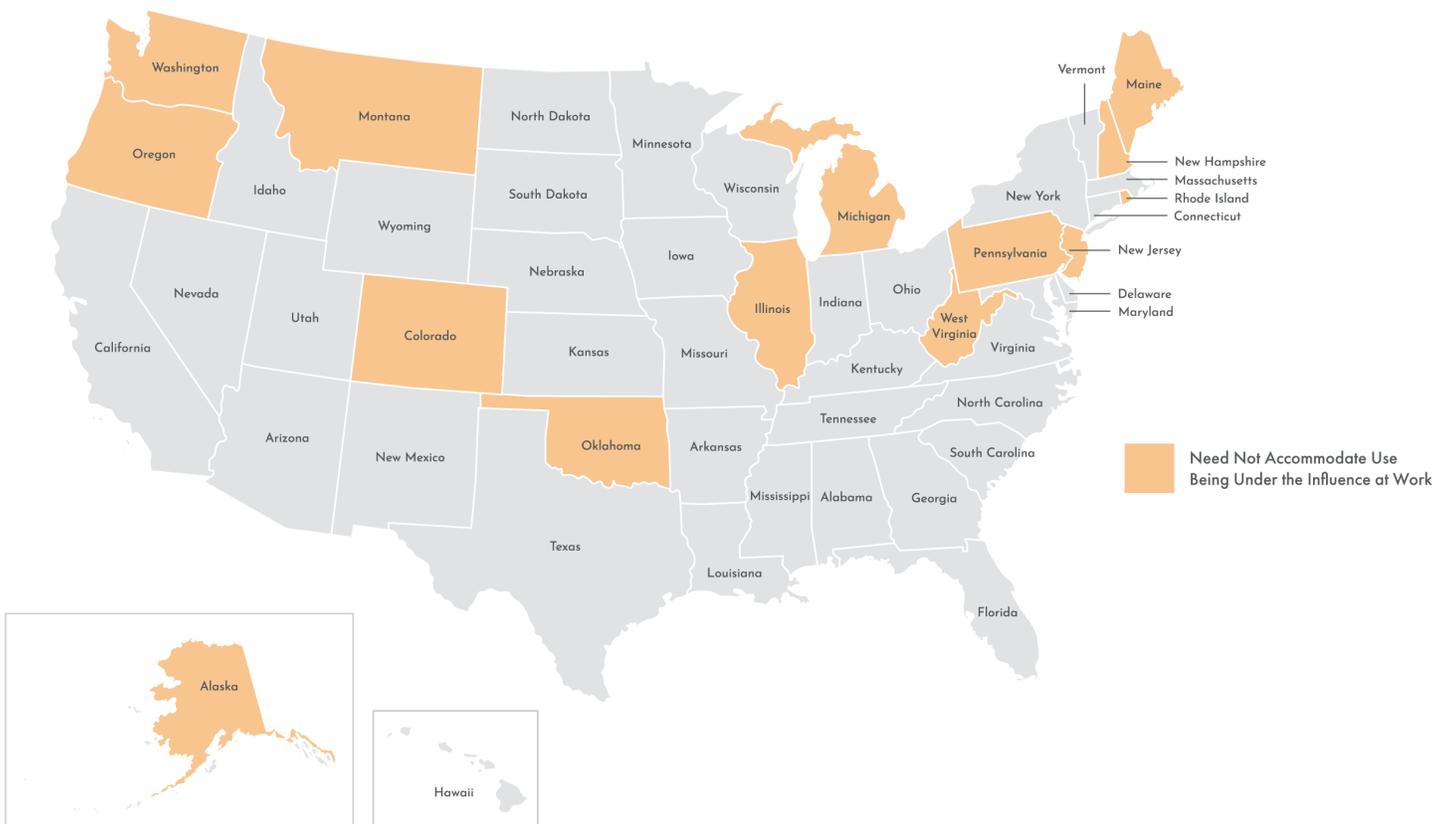
EMPLOYERS' OBLIGATION TO ACCOMMODATE

When it comes to accommodating a disability, including one which requires the use of medical marijuana, employers must clearly understand their duty to accommodate the disability (not the use of marijuana at work). Those that take appropriate steps to identify and mitigate workplace risks before an incident arises will be able to substantially reduce the "gray area" associated not just with the emerging issue of marijuana in the workplace and the Americans with Disabilities Act (ADA), but with their broader duty to accommodate a disability as well.

As we mentioned, state laws are not the same; in fact, they differ significantly. If you are in a state that authorizes medical or personal use of marijuana, what do those states laws actually permit?

The language of state marijuana laws vary. For example, Illinois, Pennsylvania, and Ohio laws tend to be more protective of employers. Whereas in some states, marijuana laws do not mention workplace at all.

In Some Cases, the State Mandatory Rules Require Employers to Mirror Federal (DOT) or Samhsa Drug Testing Rules and Guidelines. Some States Rules Are Governed Specifically From a Court Ruling. Other States Have Created Their Own Set of Comprehensive Rules That Employers Must Follow.



There are 14 states' laws that specifically mention that 'employers do not have to accommodate the use or an employee being under the influence of marijuana at work.'

Massachusetts, Nevada, and New York require employers to at least determine if the employee's medical issues can be accommodated.

On February 22, 2021 New Jersey passed the New Jersey Cannabis Regulatory Enforcement Assistance, and Marketplace Modernization Act (NJCREAMMA), or A21. The new law still allows employers to establish drug and alcohol-free workplace programs, however, the new legislation details that a positive test alone for marijuana is insufficient for an employer to take "adverse employment action," such as refusing to hire an applicant or firing a current employee solely because they are a cannabis user. Such action must first include the results of a "physical evaluation" by the Workplace Impairment Recognition Expert (WIRE).

In Connecticut, it is unlawful for an employer to refuse to hire, terminate, penalize or threaten an employee solely because of that employee's status as a qualified medical marijuana patient.

In Nevada, lawmakers passed a law that prohibits discrimination against any individual testing positive for marijuana in a pre-employment test, except for those positions that are determined by the employer to be safety-sensitive.

In New York, the law states that employees and applicants who are registered medical marijuana users are considered to be disabled under the law. Although this law does not specifically require employers to accommodate medical marijuana users, by qualifying such employees as per se "disabled," these individuals will have a stronger standing to sue in the event that they request an accommodation related to their status as a cannabis user and the employer unreasonably denies that request. Employers within New York City limits are also prohibited from testing for marijuana on a pre-employment basis, with some safety-sensitive exceptions.

The state of Oklahoma also amended its medical marijuana law to prohibit discrimination against any individual testing positive for marijuana in a pre-employment test, with some safety-sensitive exceptions.

That makes sense, but what is 'under the influence'? There are currently four states that specifically indicate that if someone tests positive, that positive test alone does not demonstrate that they're under the influence or otherwise 'impaired.'

So how do you determine whether someone is under the influence?



As of today, there is no medical or scientific way to determine if somebody is under the influence of marijuana. A positive drug screening result simply proves the use and presence of drug metabolites. There are many groups, universities and private organizations that are out there trying to develop a device or means that can better determine very recent use and/or impairment. But as of today, it does not exist.

COURT CASES

Courts across the country continue to struggle with the paradox of marijuana being banned by the federal government but allowed by some state governments.

In a recent case in Connecticut, *Noffsinger v. SSC Niantic Operating Company LLC*, a federal court held that federal statutes do not supersede or preempt state medical marijuana statutes and their protections. The Court explicitly noted that the ADA did not take precedence over the state statutes that also provide protection to an applicant. This is important because there is considerable judicial precedent in which employees or applicants tried to use federal ADA disability rules to protect their medical marijuana use and failed. The Court here essentially removed that tool from Connecticut employers' defenses by holding that the state statute can be another legislative defense for employees. That same court, in September 2018, ruled in the applicant's favor again finding that the employer violated the antidiscrimination provisions of the state's law when it withdrew its offer of employment due to the applicant's status as a medical marijuana patient.

In the case of *Barbuto v. Advantage Sales and Marketing, LLC*, and another, SJC-12226, 477 Mass. 456, 78 N.E.3d 37 (7-17-17), the Court relied on the state's discrimination law to find that the employer had discriminated against the employee who was also a medical marijuana patient.

The employer argued that because marijuana was a crime under federal law, to possess marijuana, that any accommodation would be unreasonable. The State Supreme Judicial Court of Massachusetts looked at marijuana and equated it to any other prescribed medication.

The Court said, a "qualifying patient who has been terminated from her employment because she tested positive for marijuana as a result of her lawful medical use of marijuana has a civil remedy against her employer" and "may seek a remedy through claims of handicap discrimination in violation of state prohibited practices law.

This is a very important case and could signal where the future of litigation related to medical marijuana patients is headed. However, this will not be the same for the personal 'recreational' use in the workplace. Personal 'recreational' users do not have the same protections under the discrimination laws that medical patients do. Only medical patients can argue that, based on their medical condition, they are entitled to disability discrimination protection and to reasonable accommodations.

DRUG TESTING: FREQUENTLY ASKED QUESTIONS

1. How do you handle a positive marijuana test result, in states where marijuana is legal? And should I still test for marijuana since it is legal in some states?

In general, medical marijuana patients may have protection from discrimination while recreational users do not. Continuing to test for marijuana is still permissible for all employers throughout our country and is a decision each employer must address with the assistance of your counsel and the people who are helping you create your policies. Employers should keep in mind that it's not the testing that's the issue, it's the action you take for those who test positive. Are you able to accommodate medical marijuana users? What consequences will be in place for recreational users?

Rule #1 – Federal law trumps state law (in most all cases).

Rule #2 – Laws are changing daily. You need to routinely audit your program for compliance.

Federal (DOT) drug testing regulations specifically require testing for marijuana and removing someone who tests positive from performing safety-sensitive work. Some states laws specifically require employers to test for marijuana, including some of the states that allow for the personal 'recreational' and medical use of marijuana. Educate yourself on the laws & rules that apply to your program.

2. Can I test for marijuana?

Aside from the New York City ordinance, drug testing is still legal in every state. As stated above, all states continue to permit employers to test for marijuana. Employers can, and should, continue to screen for marijuana use, however, there may be limitations on what actions an employer can take with a positive test result.

3. Does marijuana pose a safety risk at work?

Yes, but the answer may depend on the job functions. According to the Task Force Report that studied marijuana legalization, "Marijuana impairs a number of brain functions needed for safe driving such as coordination, judgement of distances, reaction time, and ability to pay attention..." Employees who, for example, operate vehicles, operate heavy equipment, work with power tools, and oversee machines and processes that could pose a danger, etc. could pose a safety risk if they are impaired by marijuana at work

4. Is workplace safety the only concern?

No. Impairment by marijuana and the after-effects of marijuana use can also impact on productivity.

5. Can I ban employees from possessing marijuana at work?

Yes. Many workplaces already ban employees from possessing alcohol at work. The same can be said for marijuana. One common item in most all states law, regardless if it's the medical or personal 'recreational' use of marijuana, states that employers need not accommodate use, possession or being under the influence at work. Please note that employees that are authorized to use medical marijuana may require accommodation of their underlying medical condition.

6. If I ban marijuana use at work, will that solve the problem?

Unfortunately, no. Like alcohol, impairment by marijuana can last several hours after consumption, and even longer in the case of edibles and oils. It is recommended that companies prohibit both the 'use' or consumption and impairment by marijuana while at work.

7. Are there tests that detect if a person has consumed marijuana?

Yes, though it is a complicated question and there is no "breathalyzer" equivalent for marijuana that can show impairment - yet. Currently, there are blood, urine and saliva tests available where a laboratory confirmed positive test result will indeed prove the 'use' of marijuana. Saliva testing has the advantage of being able to detect relatively recent smoking or inhalation of marijuana. However, currently, there is no bright line where an employee with a certain concentration of THC in their blood, urine or saliva can be said to be 'impaired'. In other words, there is no .08 blood alcohol equivalent for marijuana.



8. When can I test my employees for impairment by marijuana?

The answer to that question also depends in part on whether you operate a unionized or non-unionized workplace. In the unionized workplace, random testing is usually not allowed except in highly safety-sensitive workplaces with a history of drug problems. Post-incident testing, that is testing after an accident, is more commonly allowed. Pre-employment testing may also be permitted.

In non-unionized workplaces, testing commonly takes place during the pre-employment process, under reasonable suspicion instances, in post-accident events, and/or a part of a random screening program. Employers should take caution that some states specifically prohibit when testing can take place, so it is very important to understand the rules that apply to your program.

9. If I find an employee possesses marijuana at work, has consumed marijuana at work or is impaired by marijuana at work, can I fire them?

Potentially. Employer workplace policies should certainly provide for this possibility, but whether an employee can be terminated for possession, use or impairment may depend on many circumstances and the laws that apply. Before deciding whether there is an approved action to terminate an employee, it is best to review the laws, consult a lawyer or human resources professional. Employers need to be aware of the duty to accommodate an employee who has been approved for medical use. Please see our FAQ on Accommodation related to marijuana for more information.

IN CONCLUSION

No longer is it a possibility to have a one-size-fits-all approach to workplace testing. With the trend for most drugs of abuse in the workplace showing no signs of future decline, especially marijuana, paired with the fact that these laws and court decisions are evolving at a faster pace than ever before, employers should focus their efforts on the following:

- Educate themselves on all the state drug and alcohol screening laws and court and agency rulings that apply to their company in each state(s) they operate in.
- Develop and/or update and implement a written drug-free workplace policy that clearly states the company's stance on prohibited drug and alcohol use and the related consequences that will be imposed. This policy

should be reviewed at routinely. Twice a year, if not more often.

- Design and implement sound processes and procedures that complement the language within the company policy. This will remove any guessing, ambiguity or potential mistakes for managers and supervisors when action needs to be taken in the 'heat of the moment'.
- Educate your employees on the dangers and impacts of drug and alcohol use.
- Encourage employees to seek help with any drug or alcohol dependency or addiction through your Employee Assistance Program (EAP) benefits.
- Train your managers and supervisors on the details of your company's drug-free workplace policy. Help them understand the laws that apply (including the Americans With Disabilities Act (ADA)). Train them on how to recognize the signs of impairment from drug or alcohol use and clearly define the action steps they should take in these instances.
- Stay current with the rules, regulations and court decisions that may impact your program.

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