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WHITE PAPER

# WORKPLACE DRUG TESTING DESIGN – TOP EMPLOYER CONCERNS WITH MARIJUANA & CANNABIDIOL



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The legal landscape of workplace drug testing is changing rapidly – primarily driven by changing state-specific marijuana laws. Currently, 37 states and Washington D.C. have legalized the medical use of marijuana.<sup>1</sup> Patients can qualify for medical marijuana to treat various medical conditions, which varies widely by state. Employers in these states should take caution with growing protections for medical marijuana users. Primarily prohibitions from denying employment solely because the employee or prospect is a medical marijuana user and disability discrimination laws that protect the underlying medical condition(s) for which the employee or prospect is using medical marijuana.

Currently, 19 states and Washington D.C. have legalized the adult use of marijuana (along with medical use)<sup>2</sup>. Employers in these states should notice that the language of these laws is trending in support of protecting an employee's 'off-duty' use of legal products or marijuana use 'while at work.' Rhode Island is the latest state to adopt legal adult use of marijuana within the last year.

There are currently 18 states that authorize the medical use of Cannabidiol (CBD). Each state has its list of very limiting qualifying medical conditions. Only one state, Virginia, provides employment protections for medical CBD users. Cannabidiol is commonly infused into an oil tincture for medical (and now legal) products that are required to contain less than .03% THC. Cannabidiol can be extracted from both the cannabis plant and hemp. The Farm Bill of 2018 removed hemp from the Controlled Substances Act, thus legalizing CBD derived from hemp (no greater than .03% THC) for use in the U.S. The CBD market has exploded and can be

found everywhere you look. The primary issue for employers is that the CBD industry has very little oversight on product testing; therefore, products have been found to contain far higher levels of THC than they are supposed to. Nationwide availability of CBD products leads to the question of 'can I test positive for THC with my legal use of CBD?' While workplace drug testing panels do not specifically look for CBD, the answer is 'it's possible.' CBD products with elevated levels of THC could potentially cause an individual to test positive on an employment drug test for THC. Buyer beware!

## Top Concerns for Employers

Employers have a duty to maintain a safe workplace. The federal Occupational Safety and Health Act's (OSHA) General Duty Clause<sup>3</sup> 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 quickly becoming an incredible challenge for employers working to maintain a balance of safety and productivity. Let's dig into the top employer concerns regarding marijuana and cannabidiol.

### SUBSTANCE USE

Substance use and abuse have dramatically increased over the last couple of years<sup>4</sup>. Primarily driven by the uncertainty and stress of a global pandemic, it's evident that Americans are turning to substance use to cope. Alcohol<sup>5</sup> is still the most common drug of abuse in the U.S., and marijuana sales<sup>6</sup> have skyrocketed. Alarmingly, alcohol-related deaths soared by more than 25% during COVID<sup>7</sup>, and more than 100,000 Americans now die of drug overdoses.<sup>8</sup> "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 Diagnostics<sup>9</sup>. "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."

Quest Diagnostics, one of the nation's largest laboratories processing workplace drug tests (more than 11 million tests annually), collected and provided data that shows that the overall drug testing positivity rate reached a 20-year high of 4.6% in 2021.<sup>10</sup> Even more surprisingly, federally regulated (DOT) workplace drug testing positivity rates are also up



12% compared to 2017. 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 comprehensive pre-and post-employment substance abuse testing programs.

## **GROWING LEGAL LIMITATIONS**

States and municipalities are amending or considering changes to marijuana legalization laws to include employee protections or expand existing protections. These legal changes significantly impact when, why, and how employers can test for marijuana and what disciplines they can impose on job applicants and employees. A recent trend of the laws in some states and cities is the limitations or prohibitions of employers taking adverse employment actions against employees or applicants for their legal off-duty use of 'lawful products', now including marijuana in a growing number of states.

While commonplace in years past, testing for marijuana may now violate state or local marijuana or "lawful activities" or "lawful products" laws. Maine, Montana, New Jersey, and New York<sup>11</sup> are a few states that made it unlawful for an employer to discriminate against an applicant or employee for using marijuana outside the workplace. Recently, the New York Department of Labor announced 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. 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 is the most recent state to adopt pre-employment restrictions for the testing of marijuana use<sup>12</sup>, effective 1/1/2024, with the only exception being for construction workers. Many other states and municipalities are considering similar marijuana testing limitations.

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.<sup>13</sup>

## **'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 substances<sup>14</sup>. The U.S. Department of Transportation (DOT) recently proposed rules<sup>15</sup> that 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."<sup>16</sup>

## **LABOR MARKET CONSIDERATIONS**

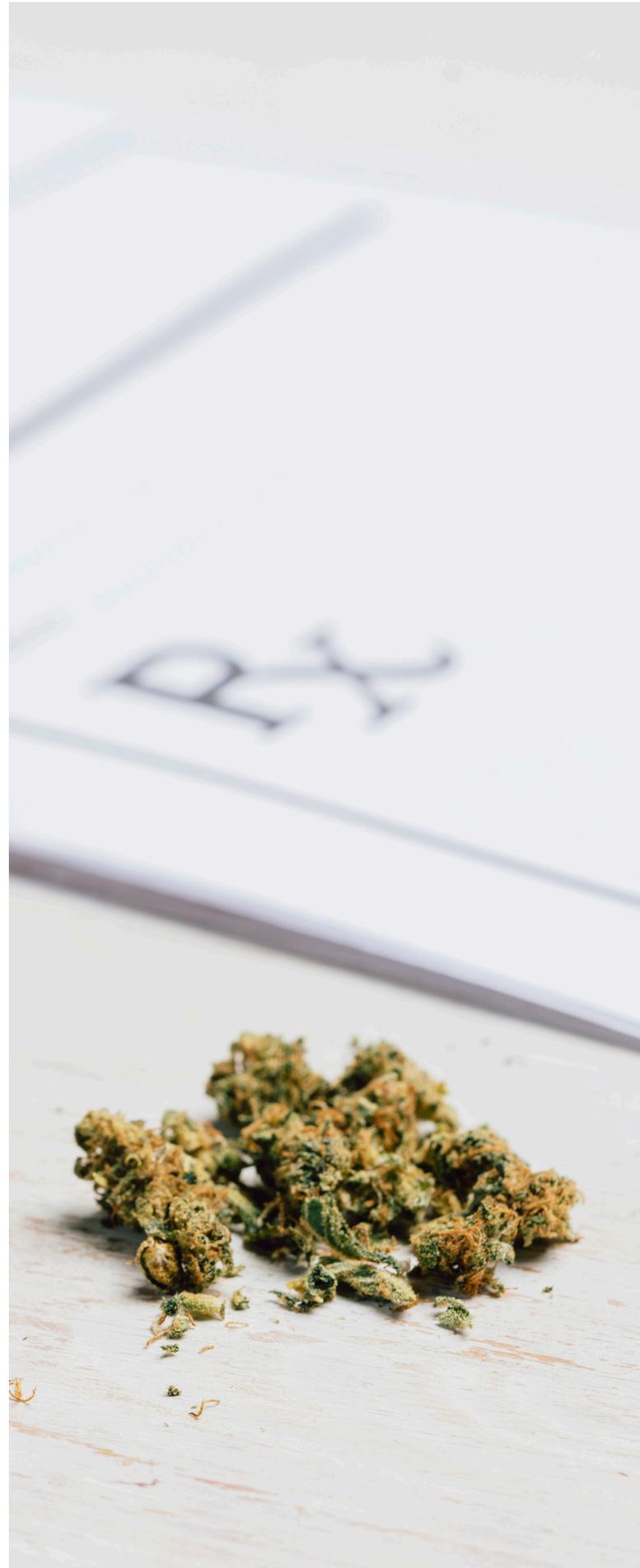
According to the U.S. Department of Labor,<sup>17</sup> more than 4.5 million people voluntarily left their jobs in last year (November 2021), up from 4.2 million in October 2021 and the highest in the 20 years the government has kept track. The so-called "Great Resignation" showed that several job sectors 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 wherever there's an internet connection.

Faced with the challenge of a 15-year high global talent shortage,<sup>18</sup> 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 pre-hire drug testing for marijuana. Thankfully the overall labor issue is declining as COVID-19 rates decrease and companies look to return to the 'new normal'; however many employers are still reviewing their drug and alcohol screening programs and accessing their options on how to respond to the increase in marijuana legalization. With a better understanding of the science of testing for marijuana, anyone making hiring or firing decisions is reluctant to reject an applicant or employee because of a positive drug test result for marijuana. It is critical to understand that, as of right now, only two jurisdictions, New York City and Philadelphia, prohibit an employer from TESTING for marijuana (California's law does not take effect until 1/1/2024). All other laws related to what action an employer can take in response to a positive drug test. Employers are encouraged to consider the potential use of second chance agreements, providing reasonable accommodation(s), or reassignment(s) where it makes sense to retain employees.

## **COMPREHENSIVE DRUG SCREENING PROGRAM**

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 random testing). Some will select to remove marijuana testing for their non-safety or security-sensitive employees. Most employers will continue drug screening as federal, state, and local laws allow. Employers should also consider reviewing the drug testing method(s) they utilize. It is not a one-size-fits-all solution; each workplace is different and brings unique challenges; thus, the answer 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,”<sup>19</sup> even for medicinal use.<sup>20</sup>

**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 reports<sup>21</sup> that employees who are impaired by marijuana present a safety risk in the workplace, mainly 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 testing<sup>22</sup>. 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 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.

## 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 consequences that will be imposed. Review when testing should occur and what test methodologies should be used. Stay updated 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 ever to 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, Rhode Island, Vermont, Virginia, and Washington. Washington DC, Guam, and the Northern Mariana Islands also legalized adult marijuana use.
3. <https://www.osha.gov/laws-regs/oshact/section5-duties>
4. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8896880/>
5. <https://pubs.niaaa.nih.gov/publications/surveillance-covid-19/COVSALES.htm>
6. <https://www.marijuanamoment.net/marijuana-sales-increased-in-multiple-states-during-covid-study-finds/>
7. <https://www.yahoo.com/now/alcohol-related-deaths-soared-more-171910141.html>
8. [https://www.nytimes.com/2021/11/17/health/drug-overdoses-fentanyl-deaths.html?te=1&n=the-morning&emc=edit\\_nn\\_20220213](https://www.nytimes.com/2021/11/17/health/drug-overdoses-fentanyl-deaths.html?te=1&n=the-morning&emc=edit_nn_20220213)
9. [https://blog.employersolutions.com/wp-content/uploads/2021/05/sb9607\\_5397\\_drug\\_testing\\_index\\_2021\\_5-26-21\\_v7.pdf](https://blog.employersolutions.com/wp-content/uploads/2021/05/sb9607_5397_drug_testing_index_2021_5-26-21_v7.pdf)
10. <https://www.questdiagnostics.com/content/dam/corporate/restricted/documents/employer-solutions/DTI-2022-Tables.pdf>
11. <https://www.drugscreeningci.com/blog/new-york-when-can-employers-test-for-marijuana>
12. [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=202120220AB2188](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2188)
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](https://blog.employersolutions.com/wp-content/uploads/2021/05/sb9607_5397_drug_testing_index_2021_5-26-21_v7.pdf)

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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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