

As NDASA Members, we are often asked these common questions that can cause confusion and frustration for employers when it comes to employee marijuana use, the workplace drug & alcohol policy and workplace safety. Below is a simple Q&A you may find helpful when navigating these issues.

MARIJUANA, WORKPLACE POLICIES & DRUG TESTING

- **Why should I continue to test for marijuana when medical and/or recreational marijuana is legal in my state(s)?** Prescription and over-the-counter medications and alcohol are also legal and yet those substances are included in testing where workplace safety is a priority. Not testing for marijuana could put an employer at risk for negligent hiring practices and greater worker's compensation claims.
- **Do the federal laws supersede those laws passed by states with regard to the workplace?** While federal law does supersede state law according to the Supremacy Clause of the U.S. Constitution, there are no specific federal laws regarding workplace drug testing. The Safe and Drug Free Workplace Act applies to companies receiving federal monies. Most states address employer's rights but some do not.
- **Would you recommend removing marijuana from drug testing panels?** Marijuana is an impairing substance with higher rates of accidents and injury for those employees who choose to consume¹. Eliminating THC would be similar to eliminating Breath Alcohol Testing where alcohol could have contributed to an incident or disqualify an employee from working in a safe manner.
- **As an employer in a state where recreational and/or medical marijuana is legal, we continue to test for marijuana with a zero-tolerance policy. How can we prevent employees from challenging their dismissal?** In cases where employees have challenged their dismissal, courts have ruled in favor of employers who: 1) Have a sound drug testing policy. 2) Regularly make their employees aware of the policy. 3) Enforce the policy consistently. 4) Have a drug testing program to deter employee drug use².
- **Is it enough for an employer to have a zero-tolerance policy?** In states that have not placed limitations on employers, the enforcement of zero-tolerance policies are acceptable. If you do business in a state with protections for medical marijuana, it is important to understand the specific accommodations your state requires. On-going communication with your employees is key to strong policy enforcement in a work culture that emphasizes safety first.
- **How do the regulations apply if an employee lives in one state and works in another and the laws vary? What about employees working internationally?** Typically, it depends upon what is stated in the workplace drug & alcohol testing policy. Follow your policy regarding specific behaviors that impact the workplace. If you are unsure about conflicting state and international laws, seek legal counsel.
- **How does the new state marijuana legislation apply to federal contractors and subcontractors?** Federal contractors may be subject to the Safe and Drug-Free Workplace Act³. Your workplace drug and alcohol policy should address whether or not you require contractors and subcontractors to be drug and alcohol free. Proceed according to your policy and/or the requirements of the Federal Act.

¹ www.drugabuse.gov

² <http://www.naag.org/publications/nagri-journal/volume-1-number-2/the-effects-of-marijuana-legalization-on-employment-law.php>

³ U.S. House of Representatives. 1988. Drug-Free Workplace Act of 1988 U.S.C. 701–707. and U.S. House of Representatives. 1998. Drug-Free Workplace Act of 1998 U.S.C. 105–584.

Marijuana & Workplace Policies

- **What laws (state or federal) apply to employers who receive federal funding?** All Federal agencies are to be drug-free as well as Federal grantees and recipients of Federal contracts of \$100,000 or more⁴.
- **How should an employer handle off-duty use?** The use of any impairing substance that impacts safety in the workplace or prevents an employee from performing their duties in a safe manner should be prohibited by your company drug and alcohol policy.
- **How would federal de-regulation of a Class I drug affect a zero-tolerance policy?** Many drugs that are not Schedule I are prohibited in the workplace. Regardless of its schedule status, marijuana is still an impairing substance. While re-scheduling could change a physician's ability to prescribe, the level of safety sensitivity and ability to work safely is the priority where zero-tolerance is necessary.
- **If there is an indication that employees are using drugs and random tests are given to all employees, can anyone who fails the drug screen be terminated?** If there is an indication of drug use, the drug test should be performed under reasonable suspicion determination. If your workplace drug and alcohol policy indicates termination is the disciplinary action that may be taken for failing a drug test, then follow your policy.
- **What options should be available for the employee who accidentally ingests marijuana edibles and self-reports to avoid disciplinary action?** Some workplace drug and alcohol policies include provisions for self-reporting an incident without reprisal as long as the employee is willing to undergo further testing to ensure they are safe and drug-free.
- **Can employers in states where recreational marijuana is legal continue to test for marijuana?** If your workplace drug & alcohol policy clearly states so, testing for THC can and should continue.
- **Can someone have a positive drug test for THC from secondhand smoke?** Studies suggest this would not happen for an employee who leaves their home each day⁵. Laboratory confirmation testing cut-off levels rule-out second-hand exposure as an excuse for a positive drug screen⁶.
- **What about breathalyzer tests that are being developed for marijuana?** Marijuana does not exit the body via the breath. Tests are being developed that detect trace amounts of oral fluid released from the body while exhaling. These devices would be oral fluid tests and require accepted impairment standards for evidentiary use. Otherwise, it will continue to be a presence-in-system test.
- **How can a company test for impairment in its workforce?** How can we drug test to detect levels of impairment? A drug test is a confirmatory tool that supports a supervisor's good faith belief that an employee may be under-the-influence based upon their behaviors, speech or body odors.
- **What is the difference between presence-in-system and impairment testing?** Presence-in-system testing for all drugs provides confirmation that a particular metabolite has been present in an individual's body which would indicate the use of the parent drug. There is no impairment testing for any drug, however a drug test that is combined with documented observed behaviors indicating an individual may be under-the-influence of an impairing substance can be substantiated.

⁴ ibid.

⁵ J. Rohrich, et al, Concentrations of Δ-9 Tetrahydrocannabinol in Blood and Urine After Passive Exposure to Cannabis Smoke in a Coffee Shop, Journal of Analytical Toxicology, Vol. 34, May 2010

⁶ U.S. Dept. of Justice, NCJRS, Drug Testing in a Court Environment, Common Issues to Address; Using Confirmation Testing, p.11, May 2000
<https://www.ncjrs.gov/pdffiles1/ojp/181103.pdf>

UNDERSTANDING MEDICAL MARIJUANA

- **Is an employer required to honor a medical marijuana card?** Because marijuana is a Federal Schedule I Controlled Substance, employers are not required to accept a medical marijuana card as a reasonable excuse for failing a workplace drug test. Some states have created limited protections, many of them being unclear. Please be familiar with your state laws and what limitations may be in effect.
- **When an employee gives proof of a medical marijuana card to an MRO, is the drug test result handled similar to other prescription medications?** No. Marijuana cards are not legal prescriptions, even in states where marijuana for medical use is allowed. Schedule I status prevents physicians from prescribing marijuana by federal law. A Medical Review Officer may not accept a medical marijuana card as a valid explanation for the failure of a drug test.
- **Does marijuana recommended to patients differ from other kinds of marijuana?** With the exception of FDA-approved Cesamet® or Dronabinol® (which is prescribed in pill form) there is no raw marijuana-based products distinguishable as “medical grade” from any other marijuana product. The MRO should receive proof of the prescribed pharmaceuticals if the employee fails a drug test for THC.
- **Is there a standard dosage for medical marijuana?** No. Standard dosing has not been established due to the instability of the raw cannabis plant.

WHAT EMPLOYEE PROTECTIONS MEAN

- **Can an employer ask an employee or job applicant about their medical marijuana status?** Most states that allow marijuana for medical use have confidentiality protections for registered participants. It is unwise and likely a violation of state law for an employer to request disclosure.
- **Do employee protections cover only pre-employment testing or do they extend to other types of testing as well?** For the few states that have enacted employee protections, some disallow discrimination or adverse action based on the results of a pre-employment drug screen. Find out what your state permits or prohibits for compliance.

THE IMPAIRMENT QUESTION

- **When will impairment tests be available for marijuana?** Leading toxicologists worldwide generally agree that impairment testing for marijuana could potentially be decades away.
- **What can an employer use to determine impairment of an employee by THC, particularly in a safety-sensitive position?** If the employee is safety-sensitive as defined by 49 CFR Part 40, a presence-in-system test is sufficient, as Federal Law prohibits marijuana use by those under D.O.T. rules⁷. Determining impairment can depend upon the specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee. A confirmatory drug test can serve as a tool that supports the good faith belief that your company’s policy has been violated.

⁷ 49 CFR Part 40, at 40.151(e); <https://www.transportation.gov/odapc/medical-marijuana-notice>; <https://www.transportation.gov/odapc/dot-recreational-marijuana-notice>

Marijuana & Workplace Policies

- **Are there any studies that examine impairment from marijuana?** There are studies reflective of active THC in the blood⁸⁹¹⁰. Active THC leaves the body quickly while signs of impairment can remain for hours. Impairment time-frames vary widely based on many factors such as THC potency, method of ingestion, individual tolerance, metabolism, etc. Impairment standards for marijuana have yet to be determined scientifically due to a number of unpredictable variables. Employers are encouraged to know their employees' base-line conduct well enough that behaviors suggesting the employee may be under-the-influence of any impairing substance would be subject to actions as appropriate, according to the workplace drug and alcohol policy.

ODDS AND ENDS

- **If federal law says marijuana has no medical explanation, how can it be accepted as an explanation for employers?** Marijuana remains a Federal Schedule I drug because it has been determined that raw cannabis has no proven medicinal value. Employers are not required to accept marijuana for medical use as an explanation for the failure of a workplace drug test.
- **How is employee marijuana use not a violation of the OSHA general Duty Clause?** The OSHA General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health Act (OSHA) of 1970 states employers are required to provide their employees with a place of employment that *"is free from recognizable hazards that are causing or likely to cause death or serious harm to employees."*¹¹ As such, employers should actively engage in advocating for their rights to enforce safe and drug free workplace policies with a sound drug and alcohol testing program that promotes workplace safety.
- **Have states that have legalized marijuana seen an increase in work-related injuries?** At this time, base-line data has not been tracked or explored by states with legal marijuana, nor are statistics available to make a determination.
- **Do the state marijuana laws impact workers' compensation programs?** Typically, no; however, check with your work comp carrier to learn about the laws in your particular state.
- **Where is the best place to find current laws about marijuana and employers?**
www.askbilljudge.com
- **Where is the best place to find best practices for Drug Free Workplace Programs?**
<https://www.samhsa.gov/sites/default/files/workplace-kit.pdf>
<https://www.samhsa.gov/sites/default/files/workplace/ModelPlan508.pdf>
<http://www.drugfreeworkplace.org/establish-a-drug-and-alcohol-abuse-prevention-policy/>

Q&A Compiled by Jo McGuire, NDASA Chairman

⁸ Bosker, et.al., 2013, Psychomotor Function in Chronic Daily Cannabis Smokers During Sustained Abstinence, PLoS ONE 8(1): e531127 doi:10.1371/journal.pone.0053127

⁹ Grotenhermen, et.al., Developing limits for driving under cannabis doi:10.1111/j.1360-0443.2007.02009.x

¹⁰ Hartman, Huestis, Cannabis Effects on Driving Skills, Clinical Chemistry 59:3, 2013, doi:10.1373/clinchem.2012.194381

¹¹ https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=OSHACT&p_id=3359