

# Providing a Safe Workforce and Managing Risk: How to Administer an Effective Drug Testing Program

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Faye Caldwell

DATIA

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## Objectives

- Overview of current trends/recent laws and developments impacting workplace drug testing programs
- Provide examples from state laws and experience
- Considerations in implementing drug testing policies and procedures

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## 5 Elements For A Successful Drug-free Workplace Program

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- Written Policy
  - EAP
  - Drug Testing
  - Employee Education
  - Supervisor Training

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## Drug free Workplace Laws

- Many federal, state, and local laws impact drug free workplace policies and procedures
- Laws are:
  - Complex
  - Inconsistent
  - Constantly changing (by legislatures and court decisions)
- Must consult with an attorney to comply with all applicable laws in developing and implementing program and procedures

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## Examples of State Laws

- Workplace Drug Testing Laws
  - General employees/private employers
    - Mandatory laws
    - Voluntary laws (entitled to certain legal protections or other benefits)
  - Specific employees (public employees, specified jobs)
- Other laws regulating drug testing in some manner (lab regulation)
- Workers' Compensation Laws
  - Premium discount
  - Claim reduction/denial
- Unemployment Laws (benefits reduction or denial)
- Marijuana Laws
  - Medical Marijuana
  - Recreational Marijuana
- Other state laws
  - Off-duty use laws
  - Anti-discrimination laws/human rights laws/privacy laws

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## Common Legal Claims Related to Drug Testing

### Violation of drug testing statute

(may also be subject to civil/other penalty)

### Invasion of Privacy

(constitution/common law)

### Discrimination Claims

(ADA, state Human Rights Laws, other)

### Negligence/ wrongful termination

### Defamation

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## State Law Examples

### Mandatory Drug Testing Statutes (gen)

- Connecticut
- Hawaii
- Iowa
- Maine
- Minnesota
- Montana
- Oklahoma
- Rhode Island
- Vermont

### Voluntary Drug Testing Statutes

- Arizona
- Mississippi
- West Virginia

### Regulate Drug Testing in Some Manner

- Louisiana
- Maryland
- Nebraska
- Oregon
- Utah

### Workers' Comp Premium Discount

- Florida
- Georgia
- Ohio
- South Carolina
- Wyoming

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## 2017 Legislation: Workplace Drug Testing Laws

### **West Virginia (HB 2857)- passed**

- Signed by Governor May 2017
- Workplace drug testing statute
  - Not mandatory drug testing statute but entitled to certain protections if comply with statute
    - Case law limits random testing to reasonable suspicion or safety sensitive employees only; compliance with statute avoids case law restrictions and entitles employer to certain legal protections
  - No specific or detailed requirements

### **Iowa (SB 32)-passed**

- Signed by Governor May 2017
- Amends mandatory drug testing law to permit hair for pre-employment testing

### **Maine (SB 1222)-pending**

- Amendments to mandatory drug testing statute

### **Maryland (SB 72)-passed**

- Workers' comp premium discount and drug testing

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## Examples of State Laws: Maine

- Mandatory workplace drug testing statute has stringent and unique requirements
  - Observed collections prohibited
  - First Accident Exemption
    - May not base probable cause determination on single work-related accident or "first accident"
  - Rehab/EAP required for first positive
    - May not terminate for first positive
  - Specimen Type: blood only at employee's request
    - Employer not permitted to test blood
    - Employee may request blood specimen for testing for alcohol and marijuana and if so, employer may not test other specimens for alcohol or marijuana/metabolites
  - Mandatory cut-offs
- **2017 Proposed legislation/ changes to law (SB 1222):**
  - Removes probable cause standard, replaces it with an "impairment detection" standard; adds "impairment detection process"
- Medical marijuana statute with explicit employment protections
- Recreational marijuana statute with explicit employment protections
  - Currently, the only recreational marijuana law with explicit protections
  - Delayed until 2018

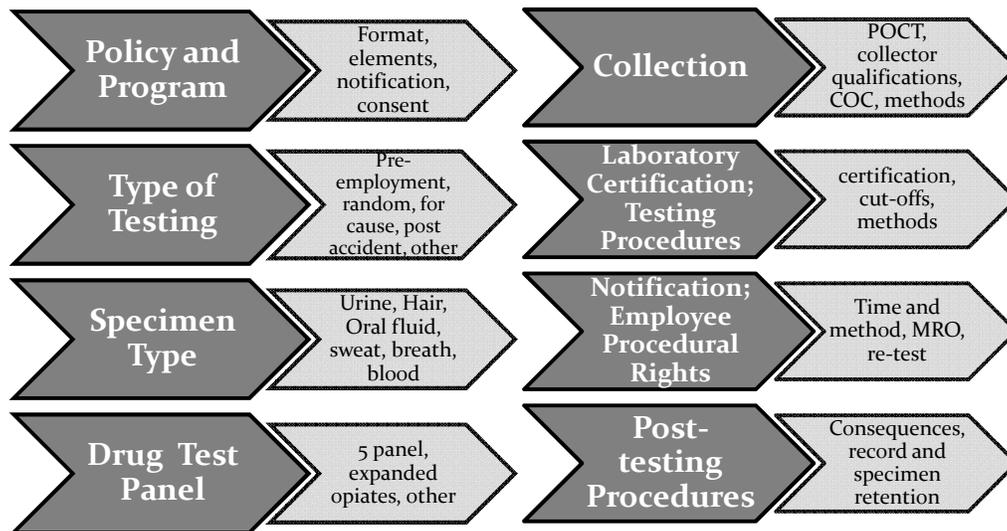
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# Kansas

- Kansas Workers' Comp case: insufficient urine specimen, without evidence of an intent to thwart test, is not a refusal to submit to a test for purposes of the Workers' Compensation Act
  - *Byers v. Acme Foundry*, 2017 Kan. App. LEXIS 12 (KS. Ct. App. Jan. 27, 2017)
- *Washington v. Unified Gov't of Wyandotte Cty.*, 847 F.3d 1192 (10th Cir. 2017)
  - Kansas did not violate a public employee's 4<sup>th</sup> Amendment rights by requiring employee to submit to a random drug test or by terminating employee after he tested positive for cocaine
    - Lieutenant at county juvenile detention center (safety-sensitive position) terminated after testing positive for cocaine in random drug test; filed civil rights lawsuit against county and co-workers alleging test was illegal search that violated 4<sup>th</sup> and 14<sup>th</sup> amendment rights and breach of employment contract
    - 10<sup>th</sup> Circuit affirmed dismissal-finding drug test not an unreasonable search because employee's interaction with children outweighed his individual privacy interest and the county's drug testing and HR policies did not create protected a property interest in continued employment or an implied contract

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# Elements of Drug Testing Program



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## Mandatory State Law Examples

	MAINE	MINNESOTA	OKLAHOMA	VERMONT
<b>Specimen Type</b>	Urine, hair, oral fluid, and sweat patch permitted <b>Blood</b> : at employee's request only for alcohol/ marijuana		Urine, hair, and oral fluid permitted; <b>Hair</b> : limitations on drugs tested	<b>Oral fluid</b> : prohibited
<b>Circumstances of testing</b>	Random: limitations First Accident Exemption and other testing limitations	Random: limited to safety sensitive only Other testing limitations		Random: prohibited Other testing limitations
<b>Collection</b>	In medical facility (on site first aid) under supervision of physician or nurse	N/A	Detailed, specific procedures for each specimen type	
<b>Testing</b>	Initial and confirmation cut-offs for each specimen	POCT prohibited; lab required	Initial and confirmation cut-offs for each specimen	POCT Prohibited
<b>Notification</b>		Detailed and specific; written notice of negatives and positives		
<b>Consequences</b>		1 <sup>st</sup> positive rehab required		1 <sup>st</sup> positive rehab required

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## Drug Use in The Workplace

- Percentage of U.S. workforce testing positive for drugs is increasing and is currently at its highest level in 10 years (Quest Diagnostics Drug Testing Index “DTI”)
  - **4.0%** of employees in combined U.S. workforce tested positive for drugs
  - Laboratory positives\* increasing in post-accident urine drug testing for general U.S. and federally-mandated safety sensitive workforces
    - \*Laboratory positives are without regard to prescriptions (pre-MRO review); does not mean illegal drug use
- **Opioids in the workplace (2011-2015)**
  - Heroin doubled in US general workforce
  - Expanded opiates slightly decreasing
- **Marijuana in the workplace (2011-2015)**
  - Marijuana positives in urine drug testing increased 26%

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## Preliminary Considerations

- Is testing legal?
  - Is it permitted, required, prohibited, or limited by applicable federal, state, or local laws?
  - Are there specific procedures to follow?
    - Some states have detailed procedures and requirements
      - May need pre-approval of policy from state DOL and must wait specified time before testing (*e.g.*, Maine)
- What state law applies?
  - State statutes may have multi-state reach
  - Fact specific scenario
  - Considerations:
    - Where is employee's state of residency?
    - Where does employee work?
    - Where is employer located? Does business?
    - Where does drug testing occur?
- Local Laws?
  - *E.g.*, Boulder, CO and San Francisco, CA limit testing

All policy provisions and implementation should comply with all applicable laws

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## Applicability of State Law: Examples

### Minnesota

- Minnesota has mandatory statute with stringent requirements
  - Defines employer as person/entity located or doing business in MN and having 1 or more employees
- *Olson v. Push, Inc.*, No. 14-3160 (8<sup>th</sup> Cir. Feb. 22, 2016): drug testing statute may apply to employee working in another state if "significant contacts" between MN and parties or facts giving rise to claim
  - MN Act applied to out-of-state employee because employer did business in Minnesota
    - MN resident applied for job in West Virginia
    - Employer conducted business in MN
    - Drug testing performed in MN
  - Significance unknown but if contacts with Minnesota and other states, may be subject to Act
- Cannot assume that state law is inapplicable

### Oklahoma

- Mandatory workplace drug testing law defines employer as person/entity that has 1 or more employees within the state, "or which has offered or may offer employment to one or more individuals in this state"
- Based on employees within the state; based on residency

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## Preliminary Considerations

- Who to Hire?
  - Qualified collectors
  - Laboratories
  - Medical Review Officer (“MRO”)
    - Protection from ADA issues
  - DER?
  - EAP?
- Who is subject to testing and under what circumstances?
  - What are the procedures and consequences for testing?
  - What is considered a “refusal to test”?
- Prescription drugs?
- Marijuana policy?
  - Medical and recreational
- Must have clearly defined terms
  - Circumstances, procedures, and consequences
- Before testing:
  - Distribute to applicants and employees; post in workplace
  - Obtain written consent for testing
  - Wait specified time before testing (generally 60 days)
- Apply consistently
- Employee education
- Train supervisors and managers

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## Circumstances of Testing: Overview

Pre-  
Employment/  
Applicant

Random

Reasonable  
Suspicion/  
probable cause

Post  
accident/injury

Other

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## Pre-Employment/Applicant Testing

- State law limitations
  - *E.g.*, Connecticut, Maine, and Minnesota require written notice before testing
  - Procedures and requirements are often different for applicants and employees
  - Most states require conditional offer of employment before testing
- Generally, should not test entire applicant pool; should only test after a conditional offer of employment is made
  - If pre-offer testing, increased risk of ADA issues
- Employment/offer should be conditional on passing a drug test
- Testing and any action taken based on results should occur before applicant begins working
  - If applicant begins working before pre-employment test is performed, may be considered employee, entitled to more protections
    - Case Example: *Olson v. Push Inc.*
- Use of an MRO, even if not required, offers more protection

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## Random Testing

- Unannounced testing not based on individualized suspicion
  - Blanket testing (similar to random): every employee at worksite is subject to testing as opposed to a randomly selected percentage
- May be prohibited or limited (by statute or case law)
  - Rhode Island, Vermont, San Francisco, and Boulder prohibit
  - Some states limit to safety-sensitive positions only
- Considerations
  - Who is included in random testing pool?
    - How is employee defined?
  - How to implement? How often?
  - Issues with off-duty use and impairment determinations

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## Random Testing

- **You must know your workforce**
  - (1) Identify safety-sensitive positions and tasks (list with current job descriptions)
    - Even in states where random testing is generally prohibited, it may be permitted for safety-sensitive employees
      - Most states do not define “safety-sensitive” positions
  - (2) Temporary employees?
    - Maine: temporary employees not considered “employees” and may not test temp employees provided by employment agencies (i.e., not included in random or probable cause testing)
  - (3) Managerial/supervisory employees?
- **Should be computer generated based on employee identifier** (social, employee ID)
- **Each employee should have the same chance of being selected**
- **No advance notice should be provided**

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## Reasonable Suspicion/Probable Cause Testing

- Performed at discretion of supervisors/management based on documented individualized suspicion of drug use/policy violation
  - En-masse reasonable suspicion testing may give rise to privacy claims
  - Since testing discretionary, supervisor training on recognition and documentation is key
- **Defining and determining impairment**
  - Currently, no recognized standard for drug test alone (except for alcohol) to determine whether a person is impaired at the time of the testing
- **What is sufficient to trigger testing?**
  - May be defined by state law
  - Clear and consistent policy with behavior
  - Objective behavior and observations
    - Direct observation of drug use
    - Signs/symptoms of drug use
    - Abnormal conduct/erratic behavior
    - Information from confidential source?
  - Written documentation and corroboration
- **Timing of testing? Employee permitted to work while waiting for results?**

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## Reasonable Suspicion/Probable Cause Testing

### **Layne v. Kanawha Cty. Bd. of Educ., No. 16-0407, 2017 W. Va. LEXIS 112 (W.VA. Feb. 17, 2017)**

- West Virginia supreme court affirmed dismissal of teacher who challenged termination after she refused to submit to a reasonable suspicion drug test
- Case highlights how to conduct reasonable suspicion testing
  - 5 teachers reported teacher's erratic behavior
  - Teacher then called into principal's office for observation; principal was familiar with teacher's normal behavior and personally observed teacher and noted observations in writing
    - Noted unusual body movements and rapid speech were "accelerated," "heightened," and "extreme" and noted "glassy" eyes, "rambling" speech, "dry mouthed," "overly talkative," "exaggerated politeness," "messy hair," "could not hold pen in her hand"

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## Reasonable Suspicion/Probable Cause Testing

### **Cook v. Warrior Energy Servs. Corp., No. 15-2195 and Ron Bros. v. Warrior Energy Servs. Corp., (W.D. La. Apr. 11, 2017)**

- En masse reasonable suspicion testing may raise privacy concerns
- Some of plaintiffs (employees) subjected to "en masse" drug testing- 40 employees required to submit hair, urine, and breath specimens and brought defamation and invasion of privacy claims against employer, alleging that:
  - Some were observed collections;
  - Employer made false reports of preliminary unconfirmed positive results;
  - Employer made false reports that tests were ordered based on "reasonable suspicion" tests where there was no individualized suspicion of drug use
- Court denied employer's motion to dismiss

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## Post-Accident or Injury Testing

- Testing after an accident or injury to determine whether drugs/alcohol was a contributing factor
- Considerations
  - What triggers post-accident or injury testing?
    - Injury or property damage?
  - When and how must testing occur?
    - Procedures may be different
  - Return to work while waiting on results?
- State law limitations
  - *E.g.*, Iowa
    - Post accident testing if property damage more than \$1,000
    - Blood is not generally permitted as specimen type; only permissible for post-accident testing if taken by medical provider (not at request of employer)

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## Post-Accident or Injury Testing

- May 12, 2016: OSHA published final rule on electronic reporting of workplace injuries and illnesses
  - Rule requires employers establish a “reasonable procedure” to allow employee to report work related injuries/illness
  - Prohibits practices that discourage reporting
    - Language in preamble appears to prohibit blanket post-accident testing policies- suggests testing may deter reporting
- OSHA issues guidance
- Rule is currently being challenged in 2 pending cases
  - *TEXO ABC/AGC Inc. v. Perez*, No. 3:16-cv-01998-L (N.D. Tex.)
  - *Nat’l Assoc. of Home Builders of U.S. v. Perez*, 5:17-cv-00009-R (W.D. Okla.)
- Both cases stayed for 60 days
  - March 2017: U.S. Government requested stays to “allow incoming leadership personnel” at U.S. DOL “adequate time to consider the issue[s] raised”
- New Administration?

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## Post-Accident or Injury Testing

- Establish objective criteria that will trigger testing
  - How will the determination be made?
  - Who will make the determination?
- Blanket policies regardless of accident/injury generally not best practices
  - Test if employee conduct could have caused or contributed to accident or injury
- Testing should occur as soon as possible
- Apply consistently

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## Circumstances of Testing: Other

- Follow-up testing
- Periodic testing
- Return-to-duty testing
- Return-after-illness testing
- Voluntary testing
- Probationary testing
- Pre-promotion testing

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# Choosing a Specimen Type

All are different with benefits and drawbacks

Urine

Hair

Oral Fluid

Blood

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Urine

Detection window:  
1-3 days

Most common

Many collection points; invasive, privacy concerns

Not observed

Not correlated w/ impairment/effects

Hair

Detection window:  
Longer detection window, pattern of repetitive use

Prohibited in some states

More specialized collection

Observed

Not correlated w/ impairment/effects

Oral Fluid

Detection window:  
1-2 days

Prohibited in some states

Least invasive and easily collected; typically by hiring manager not 3<sup>rd</sup> party collection site

Observed

Not well correlated w/ impairment/effects

Blood

Detection window:  
Hours

Not typically used in employment testing for drugs

Specialized collection, **invasive**

Observed

**Best correlation w/ impairment**

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## Specimen Type Considerations, E.g., Hair

- Prohibited or limited in some states
  - Maryland: permitted for applicants only
  - Oklahoma: permitted but drugs permitted to test for in hair are more limited than in urine and saliva
- Length of hair?
  - Oklahoma: specified
- Recent legislation to permit hair testing
  - Louisiana: 2015 added hair
  - Iowa: 2017 Iowa added hair for pre-employment testing only

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## Choosing a Drug Testing Panel

- What drugs to test for?
  - State law limitations
    - Oklahoma: hair testing limited
- Marijuana?
- 5 panel v. expanded panel

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## Prescription Opioid Misuse/Abuse in the Workplace

### Safety Risks

- **Increased accident rate**
  - Quest DTI: Comparing post accident laboratory opiate positive results (hydrocodone and Oxycodone) to pre-employment and random positive results in the general workforce
    - ~3x higher than pre-employment positives
    - ~2x higher than random positives
- **Impairment and injury**

### Financial Risks

- **Decreased productivity**
- **Increased health care and workers' comp costs**
- **Absenteeism**

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## Prescription Opioids

- **Problems with policies and prescription opioids**
  - **Traditional policies and practices may be insufficient**
    - Prescription drug abuse may not be covered in policy-traditionally concerned with detecting/deterring illegal drug use, not with abuse/misuse of legally prescribed drugs
    - Standard 5 panel test will not detect prescription opioids
  - **Drug misuse/abuse difficult to detect**
    - Drug testing-no ability to distinguish between prescription usage and abuse/misuse
- **Privacy concerns**
  - If valid prescription, employer will not be told

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## Prescription Opioids in the Workplace

- Be clear in policy regarding prescription drug use/abuse/misuse in workplace
- If prescription opioids/other drugs a concern, testing panel should include synthetic opioids or other commonly abused drugs
- Insist on Safety Concern Notification for safety sensitive employees
  - Require safety sensitive employees to report use of medications that can cause impairment/affect work
    - But do NOT ask why
    - Then make an individualized assessment
    - May need to accommodate employee
- Use of an MRO offers more protection

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## Collection and Testing Procedures

- Place of collection
  - On site/off? Qualified site? Medical?
  - POCT?
- Collector qualifications
- Collection procedures
  - Generally urine should not be observed
  - Chain of custody documentation
- Laboratory requirements
- Cut-off levels

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## Notice Requirements and Employee Procedural Rights

- MRO Review
- Test results and notification requirements
  - What to report: results and other information/procedures
    - Positives only or negatives also?
      - Maine, Minnesota, Montana: must provide reports of negatives
    - Right to re-test?
  - How to report: format and method
    - Iowa: notification must be by certified mail
  - When to report: time limitations
- Document release
- Right to re-test
  - When and how to request?
  - Procedures for retest?
  - Who will pay?

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## Post Testing Procedures

- Consequences of Positive Results—Be Consistent
  - Termination or suspension? Rehab? EAP?
    - Some states require EAP/rehab for 1<sup>st</sup> positive test result and employer may not terminate employees who test positive for the first time
      - *E.g.*, Maine, Minnesota, Rhode Island, Vermont, Iowa (alcohol)
  - Impairment limitations
    - Positive test alone may be insufficient
- Confidentiality
- Record and Specimen retention requirements

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# Marijuana

As of April 27, 2017:

**30 states + D.C. have medical marijuana laws**  
**9\* of these states also have recreational marijuana**

- Recent polls suggest support for marijuana is at an all time high
  - CBS Poll
    - 61% support legalizing recreational marijuana
    - 88% support medical marijuana
      - Quinnipiac University Poll (Feb. 23, 2017): 93% support medical
    - More than ½ of U.S. adults have tried marijuana
- Employment protections?
- Should marijuana be removed from drug testing panel?

\*Vermont Recreational Marijuana law still waiting for Governor's signature

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# State Marijuana Laws

## Medical Marijuana

- 2016: 5 states passed
  - Ohio
  - Pennsylvania
  - Arkansas
  - Florida
  - North Dakota
- 2017: 1 state passed (West Virginia)
  - Introduced: at least 16 states

## Recreational Marijuana

- 2016: 4 states passed
  - California
  - Nevada
  - Maine
  - Massachusetts
- 2017: 1 state passed (Vermont—waiting Gov. signature)
  - Introduced: at least 22 states

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## States With Medical Marijuana Laws

- California (1996)
  - Alaska (1998)
  - Oregon (1998)
  - Washington (1998)
  - Maine (1999)
  - Hawaii (2000)
  - Colorado (2000)
  - Nevada (2000)
  - Montana (2004)
  - Vermont (2004)
  - Rhode Island (2006)
  - New Mexico (2007)
  - Michigan (2008)
  - New Jersey (2010)
  - Washington, D.C. (2010)
  - Arizona (2010)
  - Delaware (2011)
  - Connecticut (2012)
  - Massachusetts (2012)
  - New Hampshire (2013)
  - Illinois (2013)
  - Maryland (2014)
  - Minnesota (2014)
  - New York (2014)
  - Louisiana (2015)
  - Pennsylvania (2016)
  - Ohio (2016)
  - Arkansas (2016)
  - Florida (2016)
  - North Dakota (2016)
  - West Virginia (2017)
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## States With Recreational Marijuana Laws

- Colorado (2012)
- Washington (2012)
- Alaska (2014)
- Oregon (2014)
- Washington, D.C. (2014)
- California (2016)
- Maine (2016)
- Massachusetts (2016)
- Nevada (2016)
- Vermont\* (2017) (\*waiting Governor's signature)

All states also have medical marijuana laws

Vermont: first recreational marijuana law passed by legislature; all others passed by voter initiatives

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## Marijuana Today: Federal law—Still Prohibited

- Marijuana remains illegal under Federal law; it is still classified as a Schedule I Drug
  - No currently accepted medical use in treatment; lack of accepted safety for use under medical supervision; and high potential for abuse
  - August 2016: DEA denied petition to reschedule marijuana
    - But eased restrictions to expand access to research
- Medical marijuana is NOT a legitimate medical explanation under DOT drug testing regulations



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## State Marijuana Laws: Current Trends

### Providing Explicit Employment Protections

- Most recent states passed and 2017 proposed legislation
- Marijuana group NORML (National Organization for Reform of Marijuana Laws): formed multi-state workplace drug testing coalition to advocate for employment protections in state marijuana laws

### Providing Other Civil Protections (custody, medical care and organ transplants, housing, school)

### Limiting Methods of Ingestion (prohibit smoking)

### Per Se Levels for Marijuana/metabolites

### Adding PTSD and Opioid Addiction as Conditions

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## Marijuana Laws: Employment Protections

### Biggest Issue for most employers; 4 general categories

#### 1. States Explicitly providing NO Employee Protections

- Statute explicitly provides, or case law has found, no employee protections for off-duty marijuana use
- Even in these states, not insulated from all action and trend is to add protections

#### 2. States with Explicit Employee Protections

- Newer laws provide explicit protections, but extent of protections unclear

#### 3. States with Likely no Employee Protections

- Law appears to provide only criminal protection or language similar to states in which courts have found no protections; or state has other case law or guidance

#### 4. States with Unclear Employee Protections

- Laws silent or vague and could be interpreted to provide protections; states with broad off-duty use laws; no clear guidance or case law on protections; or states have pending cases or legislation to watch

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## Medical Marijuana Laws: Employment Protections

### No Employee Protections

- California
- Colorado
- Michigan
- Montana
- Ohio (2016)
- Oregon
- Washington

### Explicit Employee Protections

- Arizona
- Arkansas
- Connecticut
- Delaware
- Illinois
- Maine
- Minnesota
- Nevada
- New York
- Pennsylvania
- Rhode Island
- West Virginia

### Likely No Employee Protections

- Alaska
- Hawaii
- Maryland
- Massachusetts
- New Hampshire
- New Mexico
- Vermont
- Washington, D.C.

### Unclear Employee Protections

- Florida
- Louisiana
- New Jersey
- North Dakota

\*States in red have recent statutes or case law, or pending cases/legislation to watch regarding employment protections.

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## Medical Marijuana Laws: Explicit Employment Protections

**12 states have explicit language providing varying levels of protection**

- Anti-discrimination provisions prohibit adverse action against employees/applicants based solely on participation in medical marijuana program (cardholder status protection)
  - Some statutes provide a positive drug test for marijuana/metabolites cannot automatically be grounds for adverse action
    - Arizona, Minnesota, Delaware
  - Most states do not address action based on positive test alone
- Some statutes include disability accommodation language
  - Nevada, New York
- Several states require a showing of impairment before adverse action
- Some states include per se levels in blood for certain safety sensitive positions
  - Pennsylvania (10 ng/mL THC in blood); West Virginia (3 ng/mL THC in blood)
- Generally provide exception that employers are not required to accommodate use on premises or during work hours
- Extent of protections unclear
  - Mostly newer states; none have been tested in court

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## Recreational Marijuana Laws: Employment Protections

### Explicitly NO Employee Protection

- **Alaska (2014)**
- **California (2016)**
- **Massachusetts (2016)**
- **Nevada (2016)**
- **Vermont\* (2017)**

### Silent; Guidance Provides No Protection

- **Colorado (2012)**
- **Oregon (2014)**
- **Washington (2012)**

### Explicit Employee Protection for Off-Duty Use

- **Maine (2016)**
  - Provision delayed until 2018

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## 2017 Pending Marijuana Legislation

### Washington (HB 1094)

- Medical marijuana amendment to add explicit employment protections including positive test

### Massachusetts (H.2385, H.113)

- Medical marijuana amendment to add explicit employment protections

### New Jersey (AB 2161, 1294)

- Medical marijuana amendment to add explicit employment protections

### Kansas (SB 155)

- Medical marijuana law- contains explicit employment protections including positive test

### Oklahoma (HB 1877)

- Medical marijuana law- contains explicit employment protections including positive test

### New York (A03506)

- Proposed recreational marijuana law- appears to provide explicit employment protections including positive test

### Hawaii (HB 1464)

- Proposed recreational marijuana law- explicitly NO employment protections

### Minnesota (HB 927/SF 1320)

- Proposed recreational marijuana law- explicitly NO employment protections

### Oregon (SB 301)

- Off-duty use statute
- Likely dead

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## Marijuana: Methods of Ingestion

### Smoking

- Immediate effects; quickly peaks and diminishes

### Vaporizing

- Effects similar to smoking
- Reduced odor

### Oral Ingestion (e.g., edibles, oil)

- Effects take longer; effective longer; wears off gradually
- No odor; more likely to be used on accident or take too much

### Other

- Topical application (e.g., lotion); tinctures

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## Marijuana: Methods of Ingestion

- Trend is to prohibit smoking
  - Most recent states passed prohibit smoking
    - Minnesota (2014), New York (2014), Louisiana (2015/2016), Pennsylvania (2016), Ohio (2016), West Virginia (2017)
  - 2017 introduced legislation:
    - Florida
    - North Dakota
- Impacts on workplace?
  - Impairment determinations or reasonable suspicion/probable cause testing determinations?
  - Use at workplace (edibles)?

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## Marijuana and Impairment

States have per se limits: set defined cut-off for marijuana/metabolites; no consensus on limit and no standard

5 ng/mL	1 ng/mL	2 ng/mL	3 ng/mL
<ul style="list-style-type: none"> <li>• Colorado</li> <li>• Montana</li> <li>• Washington</li> <li>• Illinois</li> </ul>	<ul style="list-style-type: none"> <li>• Pennsylvania               <ul style="list-style-type: none"> <li>• 10 ng/mL for certain safety-sensitive positions</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Ohio</li> <li>• Nevada               <ul style="list-style-type: none"> <li>• Also has 10 ng/mL in urine</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• West Virginia (for certain safety sensitive positions)</li> </ul>

### 2017 Proposed Legislation:

- Hawaii: adds per se limits
- New Mexico (HB 22): adds per se limit of 5ng/mL THC in blood
- Arkansas (SB 130): adds per se limit 5 ng/mL THC in blood
- Nevada: seeks to eliminate per se limit in urine, maintain limits for blood only

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## Marijuana and Workplace Policies

- **Decide how you want to handle marijuana in your policy**
  - Compliance with all applicable federal, state, and local laws
  - Do you want to accommodate marijuana?
- **Written policy must be clear**
- **Be consistent**
- **How to handle positive results**
  - Even if employee claims medical marijuana status, MRO will generally report as positive for marijuana/THC
    - Will tell employer that employee claims medical marijuana cardholder status
    - MRO generally has no way to verify cardholder status
  - Employer verifies employee's cardholder status
    - View Card
    - Laws do not entitle employer to determine reason for marijuana card
  - All information should be treated confidentially

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## Questions?



Faye Caldwell  
Attorney at Law  
fcaldwell@caldwelleverson.com



2777 Allen Parkway, Suite 950  
Houston, Texas 77019  
tel: (713) 654-3000  
fax: (713) 654-3002  
www.caldwelleverson.com

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