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Delta Means Change: THC and Other High-Risk Issues

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What the numbers show…

- Hair test positivity rates among American workers reached 19.1% in 2025
  - Represents a 58.9% increase from 5 years ago
  - 2026 rates trending in line with 2025
- Meanwhile, urine drug test positivity rates have hovered around 4% for nearly a decade

(Quest Diagnostics 2026 Drug Testing Index)

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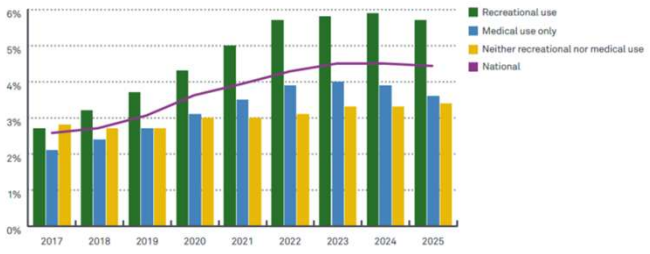
What the numbers show…

- Marijuana continues to be the largest driver of positive tests; accounted for 52.5% of hair drug test positives in 2025
- Traditional urine testing methods only capture drug use within a relatively short window of time, while hair analysis provides an extended detection window
- Findings suggest a sizeable portion of the U.S. workforce uses drugs, principally marijuana, on a recurring or chronic basis

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Marijuana Positivity by 2025 State Legalized Use Status: Urine Drug Tests | *Annual Report*

For general US workforce, as a percentage of all tests for marijuana metabolite



Drug category	2017	2018	2019	2020	2021	2022	2023	2024	2025
Recreational use	2.7%	3.1%	3.6%	4.1%	4.8%	5.5%	5.8%	5.9%	5.7%
Medical use only	2.1%	2.4%	2.7%	3.2%	3.6%	4.0%	4.0%	3.9%	3.6%
Neither recreational nor medical use	2.8%	2.7%	2.7%	3.0%	3.0%	3.1%	3.3%	3.3%	3.4%
National	2.6%	2.8%	3.1%	3.6%	3.9%	4.3%	4.5%	4.5%	4.4%

(Quest Diagnostics 2026 Drug Testing Index)

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State Laws on Marijuana

- **LEGAL** for **recreational and medical use**
  - AK, AZ, CA, CO, CT, DE, DC, IL, ME, MD, MA, MI, MN, MO, MT, NV, NJ, NM, NY, OH, OR, RI, VT, VA, WA
- **LEGAL** for **medical use only**
  - AL, AR, FL, HI, KY, LA, MS, NE, NH, ND, OK, PA, SD, UT, WV
- **LEGAL** for **CBD/Low-THC**
  - GA, IN, IA, NC, SC, TN, TX, WI, WY
- **NO** legal access
  - ID, KS

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State Laws on Marijuana

- Attitudes and laws continue to relax, but...
- Laws are CONSTANTLY CHANGING and INCONSISTENT
- Creating CONFUSION across the board for employers

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Trends in State Laws

- Some states with medical/recreational use laws provide little to no job-related protections for off-duty use of marijuana
- Others (generally states with newer laws) provide more protections for both medical/recreational use
  - States with earlier medical and recreational laws are taking steps to catch up with employee protections

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Trends in State Laws

- Based on premise that testing is meant to identify impairment, but most tests show only presence of THC metabolites, which do not reliably indicate current impairment
- Require clear policies regarding impairment (underscores need for defensible reasonable suspicion tests)
- Prohibit discriminating against or penalizing applicants/employees for use off the job and away from work (outright and/or through lawful use laws)

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Trends in State Laws

- Still do not require permitting employees to possess, be impaired by, or use while working or on company premises
- Generally permit exceptions for DOT-covered employees, safety-sensitive employees, compliance with federal contracts, applicants/employees requiring federal government background investigation/security clearance, etc.

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Employee Protections for Medical Use

- Employers never required to allow marijuana use at work or permit employees to work under the influence
- In some states, applicants/employees using medical marijuana have certain limited job protections
  - Protections vary: prohibit adverse action based solely on medical use; prohibit positive test from being automatic grounds for adverse action; disability accommodation; showing of impairment required for adverse action; private right of action
  - Exceptions apply for compliance with federal law and when federal funding is at stake

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Employee Protections for Medical Use

- In other medical use states, applicants/employees may have no, or no explicit, protection
  - Generally, no accommodation obligation, no private right of action, no restriction on discipline
- Status of protection unclear in some states
- Again, trending toward more express protections for medical use

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Restrictions on Pre-Employment Tests

- Some local jurisdictions have adopted stronger pre-employment protections for prospective employees
- Examples: New York City / Philadelphia
  - Prohibit employers from requiring prospective employees to submit to testing for presence of any THC or marijuana as condition of employment
  - Exemptions exist for certain safety-sensitive roles, DOT-covered workers, and where testing is required by applicable law

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Restrictions on Pre-Employment Tests

- California
  - With limited exceptions, employers cannot discriminate against an applicant based on off-duty use of cannabis
  - Employers also restricted from using information about an applicant's prior cannabis use that is obtained from other sources, such as criminal records

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Restrictions on Pre-Employment Tests

- Connecticut
  - Subject to limited exceptions, a positive test result for a THC metabolite cannot be the sole basis for refusing to hire an applicant unless:
    - The drug test was in connection with a conditional job offer
    - The employer has an established written policy that is provided to the prospective employee outlining the potential consequences of a positive test result

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Restrictions on Pre-Employment Tests

- New York (state)
  - Per DOL, no testing for cannabis unless employer permitted to do so under applicable state or other laws

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Restrictions on Pre-Employment Tests

- New Jersey
  - Can require pre-employment testing, but cannot take adverse action solely based on presence of marijuana (effectively bans pre-employment testing for marijuana)
  - Must meet "reasonable suspicion" standard – be able to articulate observable signs of impairment while employee is on the job
  - Requires use of a Workplace Impairment Recognition Expert (WIRE)

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Restrictions on Pre-Employment Tests

- Nevada
  - Can still test for marijuana, but unlawful to fail/refuse to hire prospective employee because of presence of marijuana in test
  - Exceptions exist for certain public safety positions, DOT-covered workers, workers whose positions could affect safety of others, etc.

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Restrictions on Pre-Employment Tests

- Washington
  - With limited exceptions, employers cannot discriminate against an applicant based on off-duty use of cannabis
  - Employers may require an applicant be tested for spectrum of controlled substances, which may include cannabis, as long as the cannabis results are not provided to the employer

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Restrictions on Pre-Employment Tests

- Multiple states only permit pre-employment testing when an offer already has been made, and the offer is contingent on the applicant's testing results

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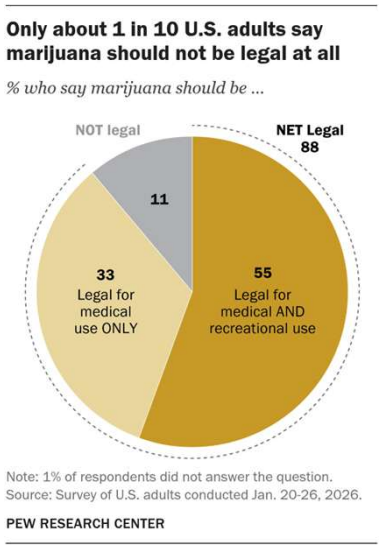
Pre-Employment Testing in NC

- Still OK
- But more to come on a potential wrinkle…

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Federal Trends

- Public support for legalization has increased for decades
- Executive Order 14370
  - Directed the Attorney General to reschedule marijuana from Schedule I to Schedule III
- Recreational use still illegal at federal level in all 50 states



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Status of Reschedule from I to III

- Schedule I
  - No currently accepted medical use; high potential for abuse
  - Examples: heroin, LSD, peyote
- Schedule II
  - Some accepted medical use; high potential for abuse
  - Examples: fentanyl, oxycodone, methamphetamine
- Schedule III
  - Accepted medical use; moderate to low potential for dependence
  - Examples: Tylenol with codeine, ketamine, anabolic steroids

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Status of Reschedule from I to III

- April 2026 – DEA rescheduled FDA-approved and state-regulated marijuana drug products to Schedule III
  - Still illegal, but federal penalties for some offenses reduced
  - Did not reschedule all marijuana; other marijuana remains Schedule I
  - Did not make recreational marijuana legal under federal law
- No effect on DOT testing
- Effort to reschedule "all marijuana" currently stayed by the courts

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Hazy Areas of the Law…

- 2018 - Congress removed hemp (defined as *Cannabis sativa L.* with a Delta-9 THC concentration of no more than 0.3% on a dry weight basis) from the Controlled Substances Act
  - Goal was to increase commercial production of hemp
- However, the bill also created a legal gray area that has grown into a multi-billion-dollar industry
  - Did not address other psychoactive/chemically similar cannabinoids (like Delta-8 THC)
  - Some producers argue the weight-based cap applies to the weight of the product being sold

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Planned Changes for 2026

- November 2025 - Congress passed new federal definition of "hemp" that restricts commercial hemp industry nationwide
- Hemp was redefined to address "loophole" and final-form hemp-derived cannabinoid products will be capped at 0.4 mg total THC per container
- Prohibition on synthetic cannabinoids is still set to go live November 12, 2026
- Limitation of THC per container has been delayed until December 2026

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What does this mean for employers?

- Rescheduling currently limited to state-regulated medical marijuana products and FDA-approved products
  - Recreational marijuana still illegal under federal law
- Rescheduling does not apply to employees working in "safety-sensitive" positions regulated by the U.S. Department of Transportation
- Some areas for potential change:
  - Drug testing programs
  - ADA accommodations
  - Employee discipline

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To test or not to test?

- Many employers forging ahead with testing as usual (where they can)
- Other employers are:
  - Concerned about staffing shortages, especially in states where marijuana is legal
  - Removing marijuana from testing panels in light of new laws and because positive test may not necessarily mean person is impaired at work
  - Evaluating applicants/positions on case-by-case basis
  - Testing only for regulated/safety-sensitive positions

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Testing Options – No Testing

- Stop all testing for marijuana/cannabis/THC
  - Unless required to test specific classes of employees under applicable law (for example, DOT-regulated employees)

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Testing Options – Tolerate Use

- Tolerate use only if allowed under applicable law; states will fall in different "buckets"
  - States in which marijuana is illegal – keep testing
  - States in which only medical use is legal – keep testing, but keep ADA/state law protections in mind for those testing positive for claimed medical use
  - States in which all use is legal – stop testing for it, or, if permitted, keep testing but use approach above for medical users
  - States in which all use is legal and testing is illegal – don't test for it

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ADA/Other Considerations

- No ADA duty to accommodate illegal drug use
  - But what is "illegal" now?
- State disability laws may create obligations around accommodation
- Interactive process for employees with disabilities who are medical marijuana users or are legally using other products
- Protections for individuals in recovery who are not currently using illegal drugs
- Leave for treatment

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Handling Requests for Use of THC

- HR to analyze request on case-by-case basis under applicable state law
- If no express state law covering circumstances (for example, if employee not seeking approval for medical use), tell employee company cannot "approve"
- If state law applicable to use for medical purposes, require employee to:
  - Provide documentation to support request for accommodation under ADA, including certification of HCP
  - Keep label from product being used in event of positive test

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NC Lawful Use of Lawful Products

- Unlawful employment practice for employer of 3 or more employees to fail or refuse to hire a prospective employee, or discharge or discriminate against any employee, because they engage in or have engaged in the lawful use of lawful products:
  - if the activity occurs off the premises of the employer during nonworking hours, and
  - does not adversely affect:
    - the employee's job performance or ability to properly fulfill the responsibilities of the position, or
    - the safety of other employees

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NC Lawful Use of Lawful Products

- Not a violation for an employer to:
  - Restrict lawful use of lawful products by employees during nonworking hours if restriction relates to (1) a bona fide occupational requirement and is reasonably related to employment activities, or (2) fundamental objectives of the organization
  - Discharge, discipline, or take any action against an employee because of their failure to comply with requirements of employer's substance abuse prevention program or recommendations of substance abuse prevention counselors employed or retained by the employer

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Anderson v. Diamondback Inv. Group

- Employee was terminated following two failed drug tests
  - Employee claimed positive tests were result of lawful use of lawful product to treat purported disability
- Employee filed lawsuit challenging her termination based on:
  - ADA disability discrimination
  - Wrongful termination in violation of NC's lawful use of lawful products law
- Employee specifically claimed use of lawful "over the counter" hemp-derived product containing Delta-9 THC to treat her anxiety

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Anderson v. Diamondback Inv. Group

- Fourth Circuit held:
  - Two positive drug tests were a legitimate and nondiscriminatory reason for termination
  - Employee had the burden of demonstrating that hemp-derived product was actually "lawful"
  - Even if product was lawful, employer safety concerns fell within exception to lawful products statute
- Takeaways:
  - Employees may need to demonstrate product used was "lawful"
  - Positive results may still serve as legitimate reason for termination

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Bottom line…

- NC's lawful use of lawful products statute generally will provide employees the right to use lawful CBD/Delta-8 THC products off duty, provided use does not undermine fundamental objectives of employer
- Are the products lawful?
  - That's complicated...

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Recommendations

- Keep current on evolving laws in states/localities in which you operate – use a color-coded map
- Decide how marijuana will be treated, considering state/local laws
- Always clearly prohibit possession, use, or impairment while working or in workplace
- Avoid advising applicants or employees regarding positivity risk of using Delta-8 THC or CBD products – you just don't know

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Recommendations

- Review and solidify reasonable suspicion processes and procedures
  - Train managers and supervisors!
  - Determinations should be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odor of the employee
  - Summarize facts and circumstances surrounding the incident/observation
  - Test right away consistent with state law requirements

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Recommendations

Physical Indicators	Behavioral Indicators	Speech Indicators
❑ Bloodshot or watery eyes	❑ Fidgety/agitated	❑ Slurred or slowed speech
❑ Flushed or very pale complexion	❑ Irregular breathing	❑ Loud, boisterous
❑ Extensive sweating/skin clamminess	❑ Nausea/vomiting	❑ Incoherent, nonsensical
❑ Dilated or constricted pupils	❑ Slow reactions	❑ Repetitious, rambling
❑ Disheveled clothing/unkempt grooming	❑ Unstable walking	❑ Rapid, pressured
❑ Unfocused, blank stare	❑ Poor coordination	❑ Excessive talkativeness
❑ Runny or bleeding nose	❑ Hand tremors	❑ Exaggerated enunciation
❑ Jerky eye movement	❑ Suspicious, paranoid	❑ Cursing, inappropriate speech
❑ Body odor	❑ Depressed, withdrawn	❑ Inability to concentrate
	❑ Lackadaisical attitude	❑ Impulsive, unusual risk-taking
	❑ Irritable, moody	❑ Delayed decision-making
	❑ Extreme fatigue	❑ Reduced alertness

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Recommendations

- Perform regular evaluations of your drug testing programs to ensure compliance with evolving regulations
  - This includes providing updated training to supervisors/HR teammates as the laws change
- Consider applicable federal/state law protections before initiating any employee discipline

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