

## Marijuana and the Workplace - What the Trend Toward Legalization Means for Employers



J. Travis Hockaday

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### What the numbers show . . .

- Test positivity rate of 4.6% for 2021, up from 4.4% in 2020 (but way down from 13.6% in 1988)
- Positivity rate at highest level since 2001; up more than 30% from all-time low of 3.5% in 2010-2012

*(Quest Diagnostics Drug Testing Index, released March 2022)*

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## What the numbers show . . .

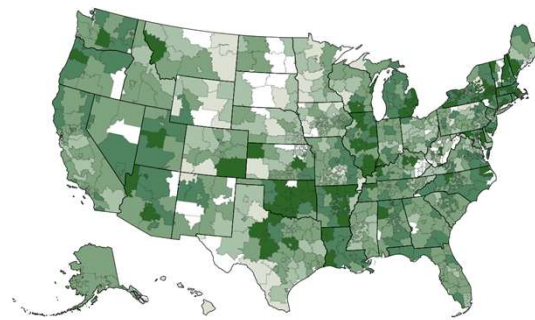
- Largest driver is increased positivity for marijuana (especially in recreational use states)
  - In last 5 years, marijuana positivity increased by 50%
  - Marijuana positivity now at 14.8% for oral fluid tests
- Cocaine and meth positivity rates also up - cocaine by 46.6% (from 0.58% to 0.85%), and meth by 26.4% (from 0.53% to 0.67%)

*(Quest Diagnostics Drug Testing Index, released March 2022)*

## Who's high(est)?

Drug Testing Index™: Overall Positivity Rate in 2021

This interactive map shows drug test positivity for 51 states in the United States. The Quest Diagnostics Drug Testing Index™ is a comprehensive analysis of workplace drug use trends. This map is an analysis of the combined U.S. workforce.



*Quest Diagnostics Drug Testing Index, released March 2022*

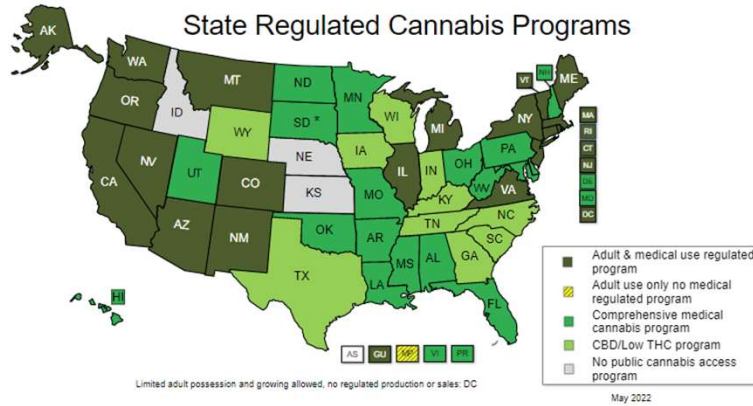
## State laws on marijuana

- **ILLEGAL** in all 50 states (per federal law)
- **LEGAL** for recreational and medical use in 19 states and D.C.
  - MN, VT, NY, MA, CT, NJ, VA, MI, IL, NM, CO, MT, WA, OR, NV, CA, AZ, AL, DE (and SD?)
- **LEGAL** for CBD/low-THC in 10 states
  - NC, SC, GA, TN, KY, IN, WI, IA, WY, TX
- **LEGAL** for medical use in 18 states
  - NH, RI, PA, OH, WV, MD, FL, AL, MS, LA, AK, MO, OK, MN, ND, UT, SD, HI
- **NO legal access** in 3 states
  - ID, NE, KS

## State laws on marijuana

- **CONSTANTLY CHANGING** and **INCONSISTENT**
- **CONFUSION** across the board for employers

# State laws on marijuana



National Conference of State Legislatures, May 2022

# 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

## Trends in state laws

- Based on premise that testing is meant to identify impairment, but most tests show only presence of THC metabolites, which have no correlation to 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)

## 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 gov't background investigation/security clearance, etc.

## 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 (including AK, AZ, CT, DE, IL, ME, MA, NV, NJ, NM, NY, OK, RI, SD, WV)
  - 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

## 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

## Restrictions on pre-employment tests

- 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 required by applicable law

## 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

## 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 on the job
  - Requires use of “WIRE”s

## 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.



## What about pre-employment testing in NC?

- Still OK
- But, more to come on a potential wrinkle . . .

## State of the law per the feds

- Marijuana is (still) a Schedule 1 narcotic
  - “high potential for abuse”
  - “no currently accepted medical use in treatment”
  - Manufacture, sale, distribution, possession are federal crimes

## State of the law per the feds

- Changing politics
  - October 2009 - Obama administration memo encourages federal prosecutors not to prosecute people who distribute for medical purposes under state law
  - August 2013 - Obama administration / “Cole Memorandum” deferred to state enforcement and gave discretion regarding enforcement to U.S. Attorneys
  - January 2018 - AG Sessions rescinded Cole Memorandum, giving prosecutors authority to prosecute anyone violating federal drug laws
  - March 2018 - AG Sessions advised that focus would be on drug gangs
    - Prosecutors “haven’t been working small marijuana cases before” and “are not going to be working them now.”
  - October 2022 - President Biden pardons those who committed or convicted of offense of simple possession under federal law

## State of the law per the feds

- U.S. Department of Transportation . . .
  - . . . doesn’t give a rat’s “you know what” about state laws or the USDOJ’s position!
  - “We want to make it perfectly clear that the DOJ guidelines will have no bearing on the [DOT’s] regulated drug testing program,” which “does not authorize ‘medical marijuana’ under a state law to be a valid explanation for a transportation employee’s positive drug test.”
  - MROs are prohibited from verifying a test as negative based on medical use under state law that “purports to authorize” such use.

## To test or not to test?

- Many employers forging ahead with testing as usual (where they can)
- Other employers are:
  - concerned about staffing shortages resulting from marijuana positivity, especially in states where marijuana is legal
  - removing marijuana from testing panels in light of new laws, and because it stays in body for long periods and positive test may not necessarily mean that the person is impaired at work
  - evaluating applicants/positions on case-by-case basis and considering whether marijuana use is/should be a bar (but be careful about disparate treatment)
  - testing only for regulated/safety-sensitive positions

## To test or not to test? - options

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

## To test or not to test? - options

- 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 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

## Pot, or not?

- CBD
- delta-8 THC

## delta-8 THC

- Psychoactive substance found in small traces in hemp and cannabis plants
  - Reported to have psychoactive effects, though weaker
- Chemical structure similar to delta-9 THC, the main psychoactive compound in marijuana
- 2018 Agricultural Improvement Act (“Farm Bill”) - made hemp-derived products below 0.3% THC by volume legal
  - This 0.3% limit is what makes hemp different from marijuana
- Hemp contains over 100 different cannabinoids, including CBD (cannabidiol), but also delta-8 THC

## delta-8 THC and Drug Tests

- Testing looks for THC (that is, delta-9 THC)
- But delta-8 THC is so similar in chemical structure, positive test is possible
- Presumptive test for user of legal delta-8 product may give false positive for illegal delta-9 THC
- If CBD product contains enough THC, could also result in positive test
- Talk to testing provider and consider use of test that is specific enough to determine source of THC (for MRO’s use)

## Impact of delta-8 THC/CBD on NC employers

- Must consider lawful use of lawful products statute

## 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

## 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 a (1) 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

## 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 . . .

## 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-9 THC or CBD products - you just don't know

## 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



## Recommendations

### Physical Indicators

- Bloodshot or watery eyes
- Flushed or very pale complexion
- Extensive sweating/skin clamminess
- Dilated or constricted pupils
- Disheveled clothing/unkept grooming
- Unfocused, blank stare
- Runny or bleeding nose
- Jerky eye movement
- Body odor

### Behavioral Indicators

- Fidgety/agitated
- Irregular breathing
- Nausea/vomiting
- Slow reactions
- Unstable walking
- Poor coordination
- Hand tremors
- Suspicious, paranoid
- Depressed, withdrawn
- Lackadaisical attitude
- Irritable, moody
- Extreme fatigue

### Speech Indicators

- Slurred or slowed speech
- Loud, boisterous
- Incoherent, nonsensical
- Repetitious, rambling
- Rapid, pressured
- Excessive talkativeness
- Exaggerated enunciation
- Cursing, inappropriate speech
- Inability to concentrate
- Impulsive, unusual risk-taking
- Delayed decision-making
- Reduced alertness

## ADA/other considerations

- No ADA duty to accommodate illegal drug use
  - But, what is “illegal” now?
- Interactive process for employees with disabilities who are medical marijuana users or legally using other products
- Protections for addicts
- Leave for treatment

## Handling requests for use of CBD/delta-8 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” and remind of risk of THC content
- 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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