



When the Smoke Clears: The Realities of Marijuana and the Workplace in Illinois and Other Midwestern States

Central Illinois Chapter of the CPCU Society

All Industry Virtual Day

"Rise and Thrive"

November 5, 2020

Littler[®]

Presented by



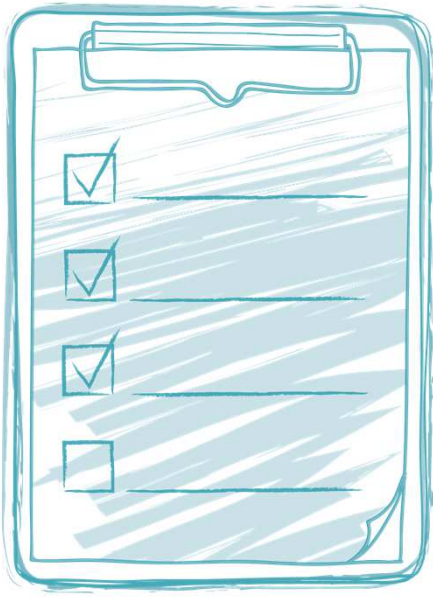
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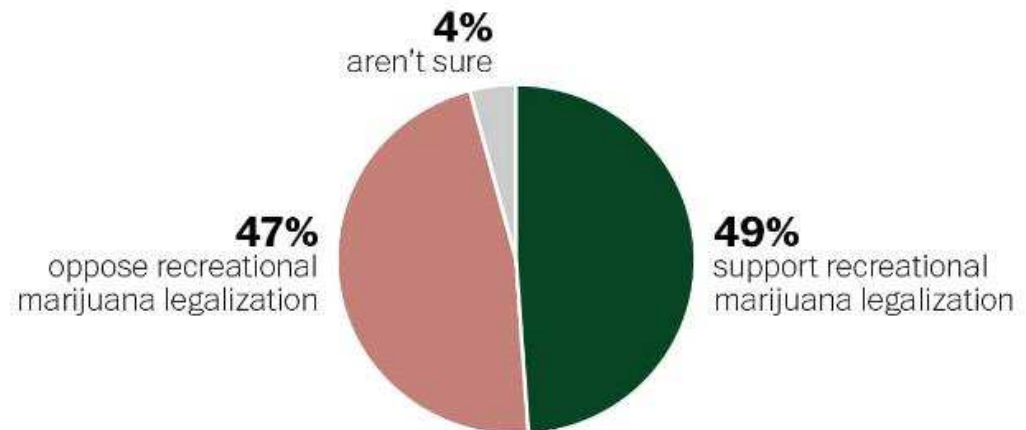
Agenda

- Federal Law
- Legalization Trends Nationally
- Legalization in Illinois
- Semi-Legalization in Missouri
- Drug Testing
- Reasonable Suspicion of Impairment
- OSHA Rules & Drug-Free Workplaces

Recreational Marijuana

U.S. Marijuana Use

- 52% of Americans, 18 or older have tried marijuana
- 22% of those who tried it still use it today
- 49% support legalizing recreational use



WAPQ.ST/**WONKBLOG**

Source: Yahoo News/Marist survey

Littler's Executive Employer Survey 2019



- “Legalization of marijuana” was the second-most commonly cited issue making employers nervous about compliance in May 2019 on this survey of over 1,300 executives, in-house counsel, and human resources representatives
- Despite this, 51% had not updated policies or taken other measures to address marijuana in the workplace
- 6% had dropped some marijuana testing
- 5% had increased their marijuana testing



Federal Marijuana Law

Controlled Substances Act

Federally:

- Marijuana is classified as a Schedule 1 controlled substance
 - Little or no medicinal value and a high likelihood of abuse
- Use, possession, and cultivation of marijuana is illegal

However:

- No significant CSA enforcement against marijuana users in those states that have legalized either medical or recreational marijuana



Federal Law: Marijuana is Illegal – Period!

Controlled Substances Act

- Requests for reclassification denied by DEA in August 2017
- Studies by NIDA show some possible medicinal effects, but significant short and long-term health concerns remain poorly understood

- ***U.S. v. Oakland Cannabis Buyers' Cooperative*** (2001) (growers)
- ***Gonzales v. Raich*** (2005) (MMJ users)
- ***Americans for Safe Access v. Drug Enforcement Agency*** (D.C. Cir. 2013)



Federal Law & Marijuana

Drug-Free Workplace Act

- Requires federal contractors to promote a drug-free workplace
 - Only contracts for services, not goods
 - Only contracts above the simplified acquisition threshold (currently, \$150,000)
 - Subcontractors not covered
 - Grants in any amount
- Does not require drug testing; only policy, education
- Must report to contracting officer individuals convicted of criminal offenses involving drugs while working on federal contracts



Marijuana & Federal Law

- U.S. Department of Transportation Regulations
 - Cover 8 million+ private sector workers in transportation work
 - Prohibit drug abuse and alcohol misuse
 - Require drug & alcohol testing
 - Marijuana use of any kind prohibited for regulated workers. (Yes, this includes CBD products.)



Marijuana & Federal Law

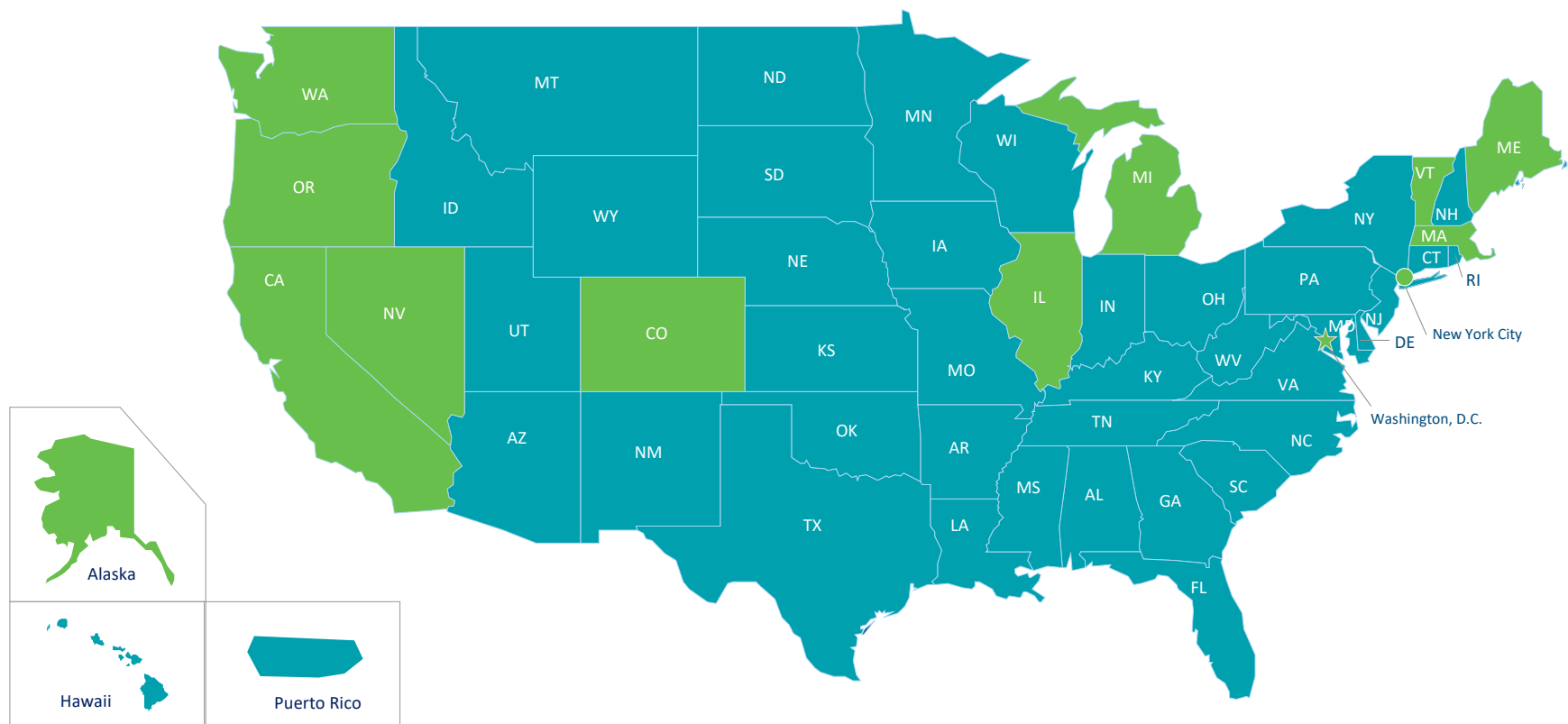
Americans with Disabilities Act and Illegal Drugs:

- Individuals engaging in the current illegal use of drugs are not considered disabled for that reason; it is not discrimination to take adverse action on the basis of illegal drug use
- “Illegal use of drugs” means use that is unlawful under the Controlled Substances Act, but excludes from this definition the use of drugs taken under supervision of a health care professional

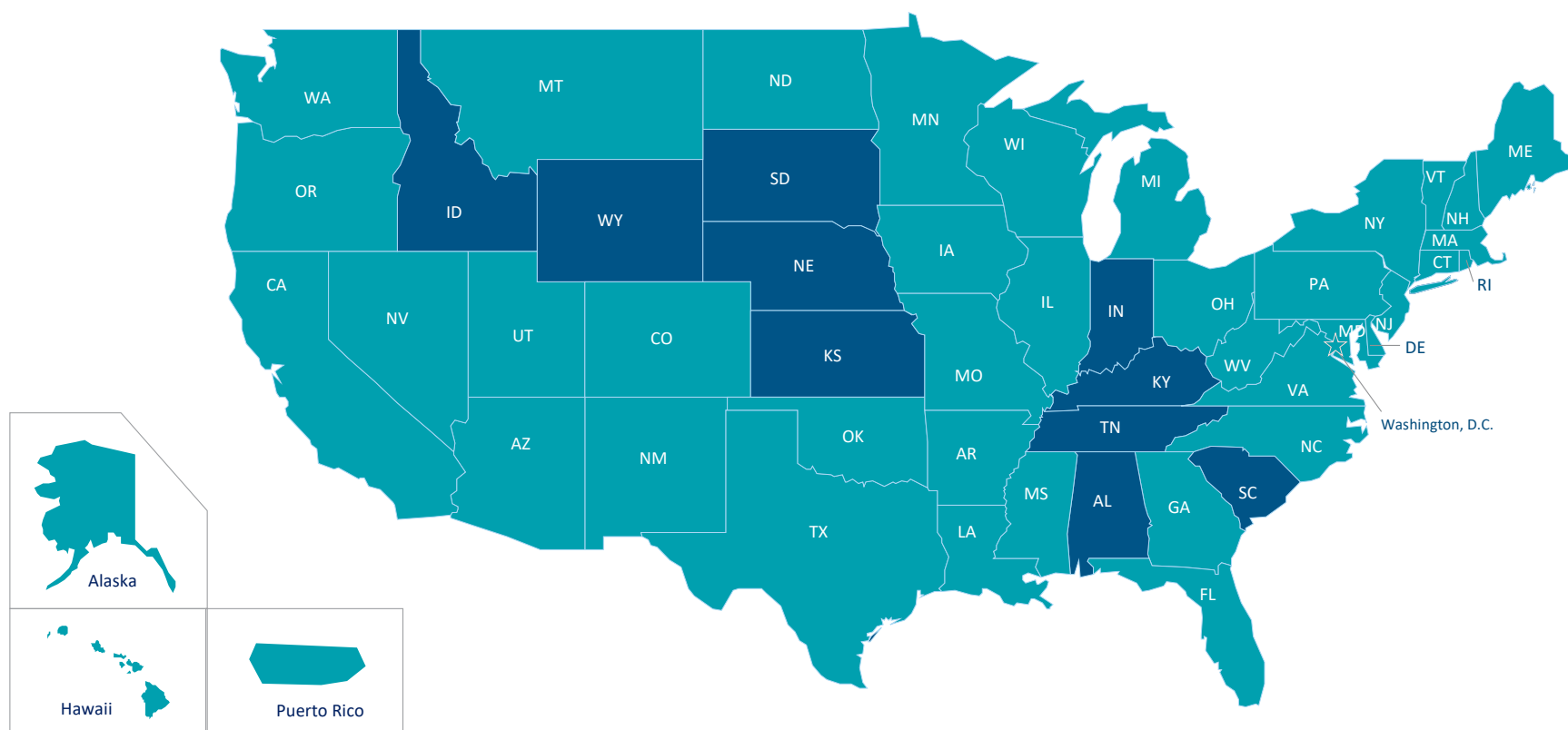


Note: if individual who abuses illegal drugs is not terminated, obligation to accommodate underlying disability continues

State Recreational Marijuana Laws



States That **DO NOT** Allow Use of Medical Marijuana





Illinois and Marijuana

Recreational Marijuana Legalization – Workplace Protections

- Effective January 1, 2020
- You must be 21 Years Old!
- Limits on how much and what form you can carry.
- Smoking, vaping, consumption in public is not permitted (this includes bars, restaurants, and outside your office/work location!)
- But, why is this a big deal . . . We've had medical marijuana in Illinois for awhile?



Illinois & Marijuana

- Legal for medicinal use
 - As of August 2019, over 82,000 qualifying patients participate in the medical cannabis program
 - Participants no longer have to undergo fingerprinting or criminal background checks



www.wearenotgoingtotellyou.com (but it's not hard to find)



HYTEK MEDICAL

Illinois MJ Medical Marijuana Cards

Get your evaluation today and get approved for a medical card in Illinois.

STARTING AT \$99

SEE IF YOU QUALIFY

The advertisement features a woman in a white lab coat and glasses, smiling and holding a large, green cannabis plant in front of her. The background is a soft, out-of-focus light gray.

Recreational Marijuana Legalization – ORIGINAL LAW AND THE DRAMA!

- Contemporaneous amendments to the Illinois Workplace Privacy Act: (820 ILCS 55/5)
- Sec. 5. Discrimination for use of lawful products prohibited.
 - Unlawful for an employer to refuse to hire, discharge, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the individual uses lawful products off the premises of the employer during nonworking hours. *As used in this Section, "lawful products" includes cannabis for personal use as permitted by the Cannabis Regulation and Tax Act.*
 - Does not apply to non-profit organizations that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public.
 - **This Section does not apply to the use of those lawful products which impairs an employee's ability to perform the employee's assigned duties.**

SAVED BY THE BELL . . . OR AMENDMENT!

Illinois – Public Act 101-0593 signed into law on December 4, 2019

Sec. 10-50. Employment; employer liability

(e) Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for:

(1) actions taken pursuant to an employer's reasonable workplace drug policy, including but not limited to subjecting an employee or applicant to reasonable drug and alcohol testing, reasonable and **nondiscriminatory random drug testing, and discipline, termination of employment, or withdrawal of a job offer due to a failure of a drug test**

CHICAGO TRIBUNE: January 7, 2020



“Illinois marijuana dispensaries sold more than \$10.8 million worth of recreational weed in the first five days of sales. “

“

By the Seventh Day of Legalization . . .

Illinois shops run out of marijuana just six days after start of legalization.

Washington Post, January 7, 2020

Illinois – Now What?

- Can employers enforce a zero tolerance standard when employees cannot be discriminated against for using marijuana during non-work hours?
 - **Yes! Employers can still prohibit marijuana use, possession, and impairment in the workplace, during working hours or when employees are on call**
 - **And with the amendments, employees or applicants will not have a cause of action arising from nondiscriminatory random or pre-employment drug testing**



Recreational Marijuana Legalization – Safe Harbor Provision

- Act contains a limited safe harbor provision protecting, among other things, the following activity:
 - reasonable drug and alcohol testing;
 - acting based on employee's refusal to be tested or cooperate in testing;
 - disciplining or terminating employment, based on the employer's **good-faith belief** that an employee is under the influence or in possession of cannabis in the employer's workplace, while performing the employee's job duties, or while on call in violation of the employer's employment; or
 - Discipline/term for any injury, loss, or liability to a third party based on an employee's allegedly impaired actions, if the employer neither knew nor had reason to know that the employee was impaired

Illinois – Impact of Amendments to Recreational Marijuana Statute

- Employers are empowered to rely on positive drug tests
- Random and pre-employment tests are a-okay!
- Illinois employers can rely on federal law
- However, still be aware of issues associated with the use of medical marijuana





Missouri and Marijuana

Missouri & Marijuana

- **Mo. Const. Art. XVI. Section 1.1:** “...to allow for the limited legal production, distribution, sale and purchase of marijuana for medical use. “



Missouri & Marijuana

Nothing in this section permits a person to:

Bring a claim against any employer, former employer, or prospective employer for wrongful discharge, discrimination, or any similar cause of action or remedy, based on the employer, former employer, or prospective employer prohibiting the employee, former employee, or prospective employee from being under the influence of marijuana while at work or disciplining the employee or former employee, up to and including termination from employment, for working or attempting to work while under the influence of marijuana.



Mo. Const. Art. XVI. Section 1.7(1)(d)

Missouri's Medical Marijuana “Rollout”

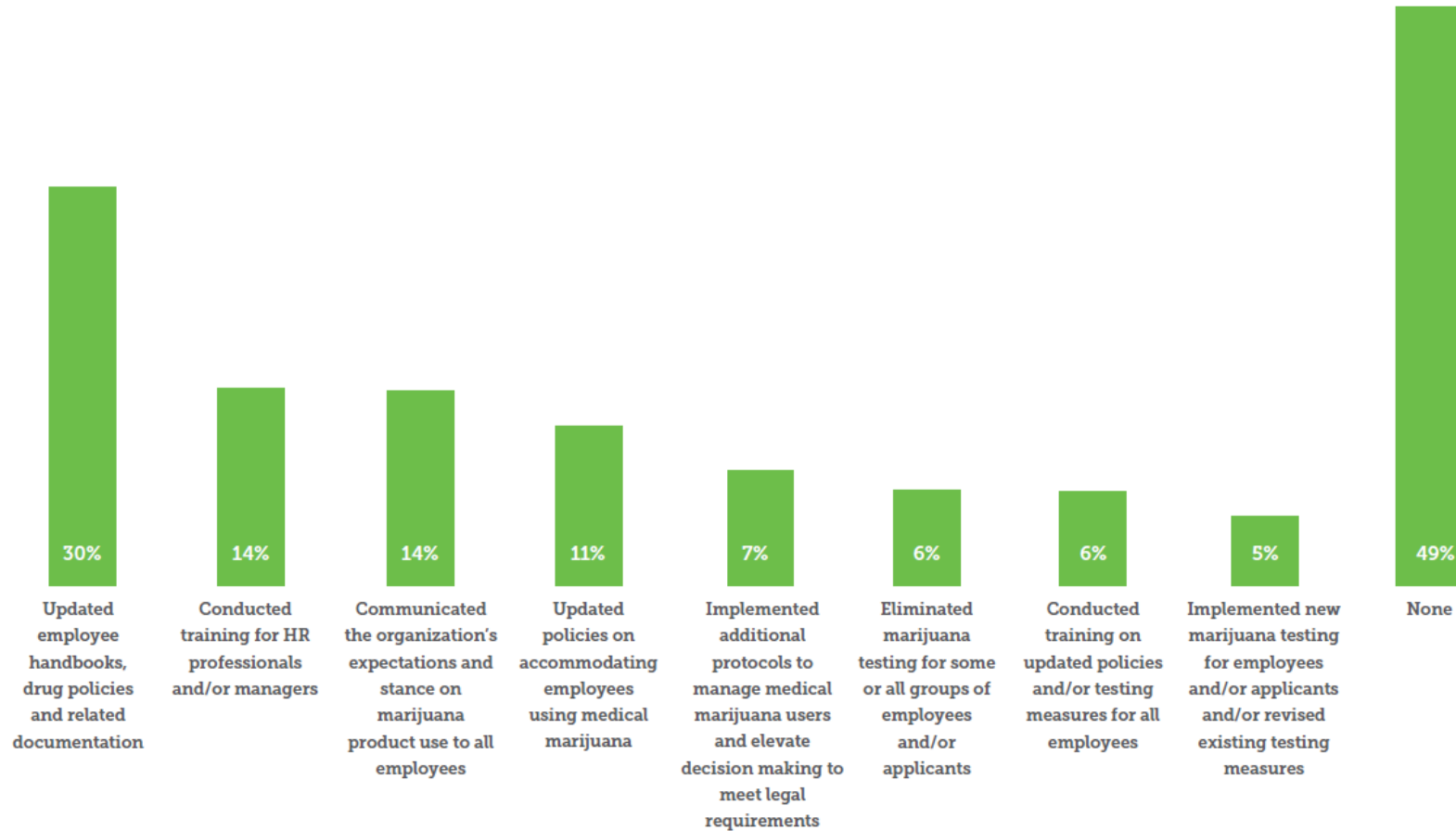
- **November 6, 2018** – 66% of Missouri Voters say yes to medical marijuana
- **July 4, 2019** – Applications for medical marijuana ID Cards filed with the State
- Some estimated medical marijuana being available by **January 1, 2020** – did not happen
- Missouri received over 1,163 dispensary applications
- Dispensary locations have been announced – 14 in St. Louis City area alone
- As of October 2020, only one dispensary in Missouri is up and running
- **BUT patients with a valid ID card may legally possess marijuana now**





Working and Weed

How Are Employers Responding?



Marijuana Legalization – Ways for Employers to Reduce Risks



- Review and revise (or create) drug testing policies – outline expectations and intentions as they relate to drug and alcohol use in the workplace
- Policies should be clearly relayed to employees to avoid confusion in states where recreational and/or medical marijuana is legal under state law
- If appropriate, ensure you have robust reasonable suspicion drug testing programs and supervisory impairment determination training
- Train managers on any new laws



Drug Testing & Proving Impairment

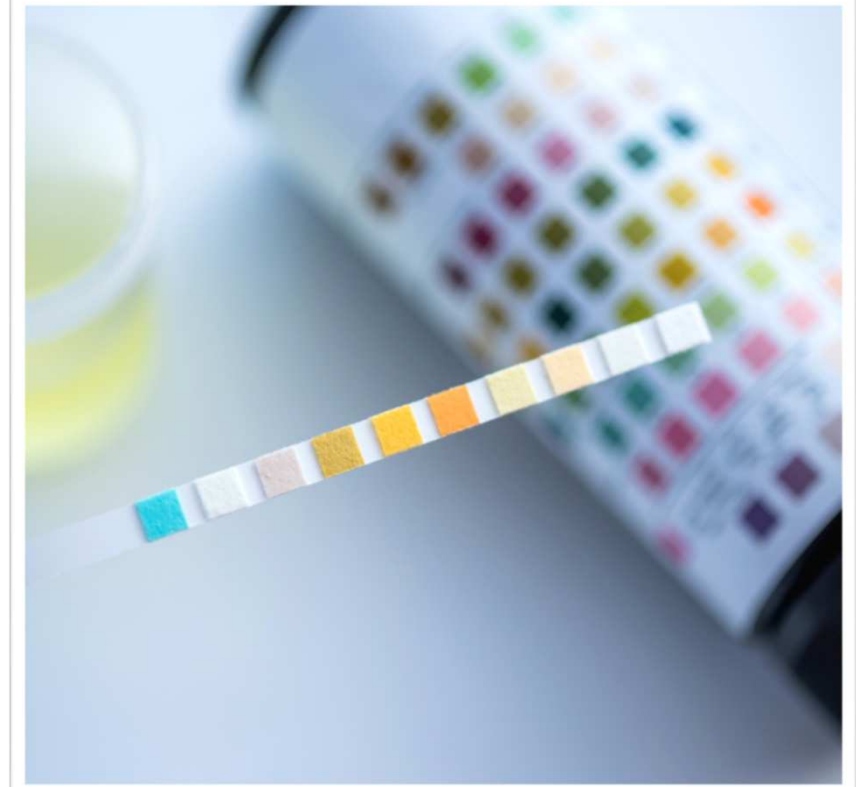
Pre-Hire Testing



- Appealing in some businesses
- Conduct a cost/benefit analysis
 - What is the risk of poor hiring decisions (increased absenteeism and turnover)?
 - Will workers be well supervised?
 - Will reasonable suspicion testing be a useful tool?
 - Are there regulatory requirements – *e.g.*, skilled nursing, pharmacy, DHS secure facilities, DOT drivers?

Types of Drug Tests

- Blood
- Urine (lab-based or instant)
- Oral fluids
- Hair



What Do Drug Tests Detect?

- Blood Tests Are Impractical
- Detection Windows: Urine, Oral Fluids, and Hair

Detection Window	Urine (Lab-based)	Urine (instant)	Oral Fluids	Hair
Amphetamines	24-72 hours	24-72 hours	24-36 hours	1-3 months
Cocaine/Metabolite	24-72 hours	24-72 hours	24-36 hours	1-3 months
Opiates	24-72 hours	24-72 hours	24-36 hours	1-3 months
PCP	Occasional use: 1 to 5 days; Habitual/chronic use: up to 30 days	Occasional use: 1 to 5 days; Habitual/chronic use: up to 30 days	24-36 hours	1-3 months
THC/Metabolite	Occasional use: 1 to 3 days; Habitual/chronic use: up to 30 days	Infrequent use: 1 to 3 days; Habitual/chronic use: up to 30 days	< 24 hours	1-3 months

Source: Quest Diagnostics

Weed: How Much is Too Much?

- THC is the impairing substance
- THC content in 1990: 3 – 6 %
- Average THC content in Colorado in 2016: 24 – 26%
- Marijuana “edibles” have range of potency – serving size may be tiny. Can you eat just one square of chocolate? One-sixth of a cookie? When will you feel the effects?
- Distilled marijuana oils and “dabbing” – 90% THC or more?
- Recognizing impairment is very difficult



CBD in Your Smoothie? With Your Spa Treatment? Or in Your Hand Cream?

- Marijuana and hemp both contain CBD (Cannabidoil)
- CBD is marketed and sold in a variety of forms, including oil (the most popular), health and beauty products, vapors, beverages, and infused edibles, such as chocolates and gummies
- Pure CBD usually will not report a positive test result for marijuana because drug tests typically look for THC levels that are too low to be detected from pure CBD
- **If the CBD product contains a sufficient amount of THC, it is entirely possible the product could cause a positive drug test result for marijuana**
- CBD users: Buyer beware as to THC levels!





Reasonable Suspicion of Impairment

Reasonable Suspicion – What Is It?

As defined by the Illinois statutes – Good-faith belief that an employee manifests specific, articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks

- Speech
- Physical dexterity
- Agility
- Coordination
- Demeanor
- Irrational or unusual behavior

Specific, Articulate Symptoms

As defined by the Illinois statutes – Good-faith belief that an employee manifests specific, articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks

- Negligence or carelessness in operating equipment or machinery
- Disregard for the safety of the employee or others
- Involvement in any accident that results in serious damage to equipment or property
- Disruption of a production or manufacturing process
- Carelessness that results in any injury to the employee or others

Possible Examples of Supervisory Observations

BEHAVIOR

- Stumbling, irregular, unsteady gate
- Drowsy, lethargic
- Agitated, anxious, restless
- Hostile, belligerent
- Irritable, moody
- Withdrawn
- Unresponsive, distracted
- Clumsy, uncoordinated
- Loss of balance/coordination
- Tremors, shakes
- Suspicious, paranoid
- Hyperactive, fidgety
- Inappropriate, uninhibited behavior
- Possessing, dispensing or using controlled substances or alcohol

APPEARANCE

- Flushed complexion
- Excessive sweating
- Cold, clammy sweats
- unkempt grooming
- Disheveled clothing
- Bloodshot/red eyes
- Tearing, watery eyes
- Dilated/constricted pupils
- Rapid/continuous eye movement (not tracking)
- Unfocused, blank stare

SPEECH

- Slurred, thick
- Fragmented, slow
- Soft/Loud/boisterous
- Incoherent/illogical
- Exaggerated enunciation
- Confusion/disorientation
- Excessively talkative
- Nonsensical, silly
- Cursing, verbal abusiveness
- Inappropriate verbal response to questions or instructions



OSHA's 2016 Injury Reporting and Tracking Rule

- 29 C.F.R. Section 1904.35(b)(1)(iv) (“Employers must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness.”)
- Initial guidance attached to the rule targeted certain post-incident drug testing
- OSHA encouraged employers to adopt a “reasonable suspicion”-like procedures for conducting drug testing
- Two suits filed by business groups to block the anti-retaliation rule (Texas and Oklahoma); one currently proceeding in litigation

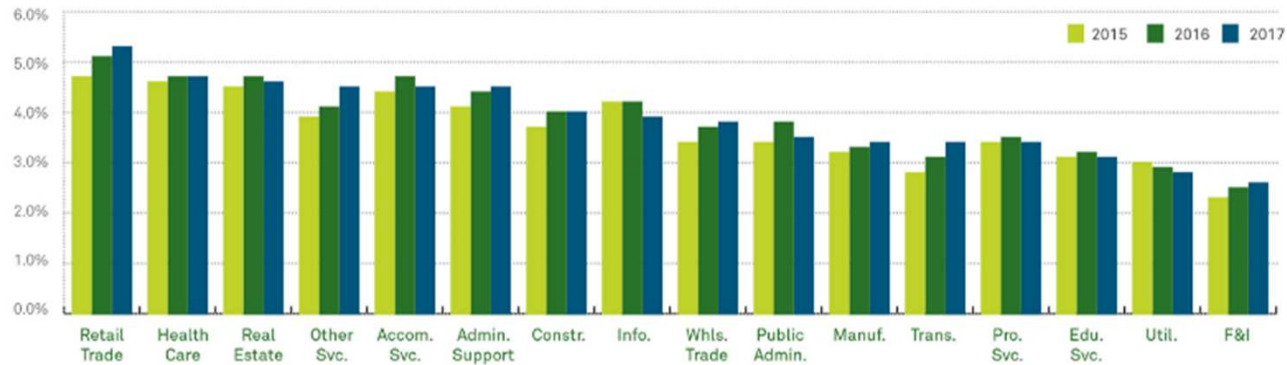


New 2018 OSHA Guidance on Post-Accident Drug Testing

- **Post Accident Drug Testing – What is Acceptable?**
 - Random drug testing
 - Drug testing unrelated to the reporting of a work-related injury or illness
 - Drug testing under state workers' compensation law
 - Drug testing under other federal law, such as a U.S. Department of Transportation rule
 - Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees. If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries.
- To the extent any other OSHA interpretive documents could be construed as inconsistent with the interpretive position articulated here, this memorandum supersedes them
- OSHA has announced it intends to codify this recent guidance in the regulatory text of the rule



Drug positivity rates by industry sector



Percentages reflect increases between 2015 and 2017. Percent increases have been rounded to the nearest whole number. Classifications are based on the North American Industry Classification System (NAICS). Sixteen of the 20 industry sectors were included in the DTI analysis; four classifications were excluded from the analysis due to insufficient testing volume.



Quest Diagnostics Drug Testing Index™ 2018
1.973.520.2800 | QuestDiagnostics.com/DTI

How To Be OSHA Compliant

- Review state and local laws regarding drug testing, along with workers' compensation requirements.
- Blanket post-reporting drug testing still prohibited by the Agency.
- Ensure that post-injury testing focuses on testing individuals who were involved in an accident, not just the person who reported an injury. (It's not just OSHA – many state laws already require some degree of responsibility on the part of the tested individual before a post-accident drug test may be requested.)
- Develop safeguards to ensure that employees do not otherwise feel discouraged from reporting injuries and illnesses.

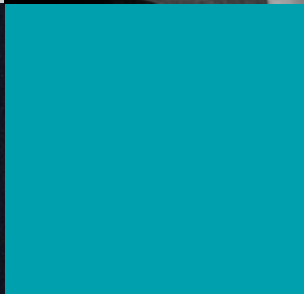
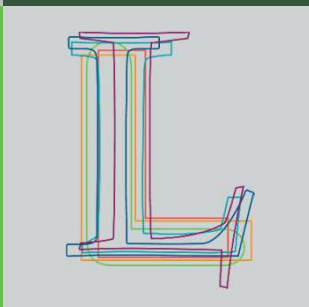
General Recommendations for Employers to Reduce Risks



- Stay on top of changes in the law of the relevant jurisdictions relevant
- Stay flexible
- Individualized accommodations mean different outcomes for different individuals filling different roles
- Don't shy away from reacting to perceived impairment
- Train your workers on your policy
- Prioritize safety



**We are here if
you need help
seeing the forest
through the
trees**



Questions?

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