



NORTH RISK PARTNERS™

Marijuana in the Workplace

December 2020

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Presented by:



SYNERGY
HUMAN RESOURCES

Mike Bourgon



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TOPICS INCLUDE:

- A description of federal marijuana laws and regulations
- A review of state medical marijuana laws
- An examination of state recreational marijuana laws
- How to handle possible problems in the workplace
- An analysis of a sample medical and recreational marijuana policy

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Introduction

Possession or use of marijuana remains illegal under federal law. But state laws are changing at a dizzying speed, including some that now limit a company's ability to fire an employee for failing a drug test. Courts have begun siding with workers who say their off-duty use of cannabis for medical reasons led to their unfair dismissal. Recent court cases have left employers facing discrimination charges for taking action against workers who flunk marijuana tests. Nevada in June limited rejecting job applicants for failing a test. Even cities are getting into the act, with the New York City Council voting in April to ban marijuana testing for job applicants (with exceptions for such jobs as public-safety workers).



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Introduction

State laws aside, experts agree that employers have a right to implement drug-free workplace policies.

"From a legal perspective, it's fascinating," says Lauraine Bifulco, president and CEO of Vantaggio HR Ltd., a human resources consulting firm in Orange County, California.

"From an HR perspective, it's, 'Oh my gosh, could you do anything to make my life more complicated?' Every day we turn around and find out there's a state or city that legalizes some form of marijuana use. The challenge for HR is keeping up to speed with the current climate and what an employer can and cannot do with regard to marijuana and the workplace. It's changing extremely fast."



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Introduction

Californians voted to legalize medical marijuana in 1996. Now at least 33 states have a comprehensive medical marijuana program. Colorado and Washington legalized cannabis for recreational use in 2012; nine other states, and Washington, D.C., followed suit.



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Introduction

About 66 percent of Americans favor legalizing marijuana—the highest measure in 50 years of polling—according to Gallup.

About 24 million Americans ages 12 and older are current users of marijuana, according to a 2016 Substance Abuse and Mental Health Services Administration survey. The numbers have increased mostly due to more marijuana use by adults 26 and older.



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Introduction

The widespread use is evidenced by the increasing number of people failing marijuana tests, especially in states where recreational use is legal. Barry Sample, Ph.D., director of science and technology for the employer solutions division of Quest Diagnostics, says the rate of positive tests has increased 35 percent since 2010 in places where marijuana is illegal and has risen even faster in states where it's legal—in those areas it jumped 71 percent during that period. (Although the rates are increasing, the percentage who flunk in the general workforce was just 2.8 percent nationwide last year, according to Sample.)



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Marijuana Laws by State

For information on marijuana laws by state, including legalization, medical use, recreational use, and more:
<https://disa.com/map-of-marijuana-legality-by-state>



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Testing?

Some employees fall under federal regulations that require testing for marijuana and other substances. Workers covered by Department of Transportation rules, such as trucking, mass transit, and airline and rail workers, must be screened for drug and alcohol use if they're in safety-sensitive jobs.

Testing can provide benefits by removing those under the influence who may pose safety risks or hurt productivity. Individuals who test positive for marijuana have 55 percent more industrial accidents, according to a study published by C. Zwerling, J. Ryan and E.J. Orav in JAMA: The Journal of the American Medical Association, as well as 85 percent more injuries and 75 percent more absenteeism.



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Testing?

The National Academies of Sciences, Engineering and Medicine found substantial evidence that marijuana use increases the risk of motor vehicle crashes but insufficient evidence to say whether it causes more occupational injuries and accidents. However, Curtis Graves, an attorney with the Employers Council, which represents 4,000 companies in Colorado and nearby states, says the impact of legalization hasn't been what was feared.

"It was a bit of panic when we got recreational marijuana for sale, but it hasn't been much of an impact," Graves says. "It's like alcohol. It's not like a bunch of people are coming to work stoned."



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Testing?

Testing for marijuana is different from testing for alcohol, creating complications for HR. There's no consensus over just how much THC—the drug's psychoactive component—means a person is impaired. With alcohol, "impairment" is more clearly defined. Federal rules set .04 percent blood alcohol readings as a violation for workers in jobs such as driving trucks or forklifts. Private companies generally use a range somewhere between .02 and .04 percent.



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Testing?

Alcohol is burned off at a rate of about one drink per hour, though the comparable rate for marijuana varies dramatically, based on factors like whether the person is a casual smoker or a heavy user. Those in the latter group may test positive for a month or more after use.



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Testing?

What companies really wrestle with is the quality of the drug test and what the results mean. Just because a drug test comes back and is positive for THC doesn't mean the individual was high at the time of the test.



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Testing?

We need to get away from this fixation on using drug tests as detection tests. Instead, companies should look for tests that measure performance impairment—some of which specifically target marijuana's impact on qualities such as short-term memory. That's the direction things are going.



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Testing?

Companies need to figure out whether they care if an employee used marijuana on the weekend and then came to work sober but failed a drug test. Many companies are saying, "Don't come to work impaired. But if you do marijuana on your own personal time, as an employer I'm not going to make myself crazy figuring that out."



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What to do When Hiring

The labor market is further complicating employers' decisions. They're weighing the upside of drug testing against the downside of losing talented people who can't pass those tests.

It's the employers who are inhaling now—holding their breath and hoping their best employees and candidates can pass a drug test.

Many companies have dropped pre-employment testing because it hurts their ability to compete in the labor market. You can ask the question: What good reason do I have to drug test?



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What to do When Hiring

Delaney McKinley, senior director of government affairs and membership at the trade group Michigan Manufacturers Association, says the companies she hears from among the group's 1,700 members struggle because they want to ensure their workplaces are safe, but they're also desperate to find workers.



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What to do When Hiring

Chris Beckage, senior vice president for North America at Acara Solutions Inc., a Buffalo, N.Y.-based staffing agency, says more companies he works with are dropping marijuana testing, especially for light assembly jobs not directly tied to safety. One electronics manufacturer, for instance, had 40 production openings before it dropped the marijuana test and filled the slots. Six months later, a worker was fired for using and distributing cannabis on the job. Still, the company kept the no-testing policy. Many companies that don't test believe that helps them fill jobs and meet production goals.



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What to do When Hiring

Last year, Caesars Entertainment stopped marijuana screening for prospective employees. "We believed we were losing too many otherwise qualified candidates," says Richard Broome, the company's executive vice president of communications and government relations. "We still screen for marijuana if we have reason to believe an employee is under the influence at work."



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What to do When Hiring

Apple used to test all prospective employees but now tests only those applying for jobs with safety risks, according to a spokesperson. The company still forbids employees from being under the influence of alcohol or drugs while performing their jobs and tests employees if there's an accident at work that requires an investigation by the Occupational Safety and Health Administration.



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What to do When Hiring

A range of employers with higher-than-average turnover rates, including hospitality and construction, have stopped all drug testing, including for marijuana, because it inhibited their ability to attract enough job applicants to stay in business. "If we had to turn away every applicant who tested positive for marijuana, we'd lose 80 percent of our potential hires," says the talent acquisition director at a national fast-food chain who requested anonymity.



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What to do When Hiring

But manufacturers sometimes see the testing differently from companies that have dropped it. "It's safer if you're using a computer than if you're using a knife to cut things," points out Bea Rodriguez, HR manager for Bravo, a Commerce, California-based manufacturer of secondary containment systems for fuel handling. Last year, a manufacturing worker was in an accident and turned out to be under the influence of marijuana.

"You don't want anyone to suffer an accident because they were under the influence," she adds. "[Testing] is too important for manufacturing."

Rodriguez spoke a day after finding a candidate with just the right skills and ability to get along with colleagues for a job in sanding and grinding. But after being asked to take a drug test, he became unreachable. "We spend a lot of time interviewing and making sure the candidates are a good fit," she says. "It's disappointing ... when they don't show up for the drug screen or for the job."



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What to do When Hiring

Some companies adopted "second-chance" policies, where employees who test positive are sent for treatment instead of fired, partially for compassion, partially for business reasons—we need to fill these jobs.



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What to do When Hiring

Some companies adopted "second-chance" policies, where Peter Cappelli, head of the Center for Human Resources at The Wharton School at the University of Pennsylvania, says many companies are dropping testing but don't want to talk about it publicly. "They don't want to be seen as the only place in town where stoners should apply," he says.

To be sure, a growing number of employees rely on legally obtained marijuana to treat, alleviate or counteract a range of medical conditions. For that reason and others, Cappelli doubts many companies will return to marijuana testing, because there's little evidence that it has proven useful from a business outcome standpoint.



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What to do When Hiring

Drug testing can be done for a variety of reasons. Some companies test randomly; some only when there's reasonable suspicion that a person is under the influence; and some after accidents, since many insurance companies require post-accident testing. The rates for those categories haven't dropped as much as for pre-employment testing, Meyer says.

Reasonable-suspicion tests often still include marijuana, Graves says. The last thing an employer wants is to test someone it believes is high and then have the test come back negative and end up with an employee lawsuit.



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What to do When Hiring

For years, courts ruled that employers could have zero-tolerance policies and fire, or not hire, based on positive marijuana tests. That has been changing, however.



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What to do When Hiring

For instance, in a 2017 case (*Barbuto v. Advantage Sales*), the Massachusetts Supreme Judicial Court said a registered medical marijuana patient could bring suit against her employer for disability discrimination after she was fired for a positive marijuana test. Employers must explore reasonable accommodations if an employee is registered for medical marijuana use to treat a condition that's covered under the state's anti-discrimination law, the court said. A federal district court decision in Connecticut last year could be a game changer, because a federal (not state) court held that failing to hire an applicant with a medical marijuana card was a violation of state nondiscrimination laws.



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What to do When Hiring

Some companies have dropped marijuana testing because they don't want to get sued by a medical marijuana user claiming disability. Who wants to be a legal guinea pig?



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What to do When Hiring

McKinley's trade group provides reasonable-suspicion training to instruct managers on what to look for, what to document and how to handle tests. A recent Michigan case (*Braska v. Challenge Manufacturing*) that went to the state appeals court found that employers could face economic consequences. The court ruled that a medical marijuana user could be fired for failing the test but still be eligible for unemployment compensation. A federal district court judge in Arizona found that Walmart had discriminated by firing an employee who failed a drug test. She was tested and fired after being injured on the job, although she had a medical marijuana card.



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What to do When Hiring

The New Jersey Supreme Court recently said it will hear the case of Justin Wild, a funeral director who uses medical marijuana as part of his cancer treatment. State law says companies don't have to allow marijuana use on the job, but Wild argued that he's using it outside the workplace. The appellate court sided with Wild, saying he could sue for discrimination after being fired.



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What to do When Hiring

The whirlwind of changes has created a lot of confusion. It's left employers perplexed about how to protect their businesses and their employees and stay competitive in a global economy.



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What Does the Law Say?

- Marijuana is still illegal under federal law.
- State laws vary. Illinois recently became the 11th state to allow recreational use of marijuana. And 33 states allow marijuana for medical use.
- Nevada and the city of New York have passed laws on pre-employment marijuana testing.
- Other states also bar turning away potential employees based solely on a positive cannabis test if the individuals are eligible for medical marijuana.



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What Does the Law Say?

- Regardless of state law, federal rules require substance testing, including for marijuana, of certain employees such as truck drivers. Companies with federal contracts and grants, as well as federal agencies, must have a drug use policy that's enforced.
- CBD (cannabidiol) products are increasingly popular. They're not supposed to contain much THC—which is what gives marijuana users the high—but since they're not well-regulated, they can be contaminated with THC and cause false-positive tests.



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Best Practices for HR

- Don't tolerate marijuana use on the job, just as you wouldn't tolerate alcohol use.
- Train managers to spot signs of impairment.
- Think carefully about the type of test your company uses and stay on top of developments in the technology of testing.
- Talk to a lawyer about relevant state laws before setting policies and testing rules.



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Best Practices for HR

- For companies operating in different states, know that testing policies may need to vary by location.
- Educate employees about the company marijuana-use policy and the repercussions for failed tests, including random, post-accident or reasonable suspicion tests.



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Drug Testing in Minnesota and Nearby States



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Drug Testing in Minnesota

Minnesota allows employers to require applicants and employees to take drug tests, but only in certain circumstances. Minnesota law protects employees who test positive for the first time from termination, if the employee successfully completes a rehabilitation program.



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Drug Testing in Minnesota

Employers may require applicants to take drug tests, but only after the applicant has received a job offer and a written notice of the testing policy. An employer may test an applicant only if it tests all applicants for the same position.



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Drug Testing in Minnesota

If an applicant tests positive, the applicant has three days to explain the results and five days to request a confirmatory retest. If the employer has already made a job offer contingent on the applicant passing a drug test, the employer may not rescind the offer based on an initial positive test until it verifies the result in a confirmatory test.



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Drug Testing in Minnesota

Minnesota employers are not required to drug test employees, and they may not test on an arbitrary or capricious basis. Employers may require testing only according to a written testing policy, which must set forth the consequences of testing positive or refusing to take a test. The policy must be posted.



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Drug Testing in Minnesota

Employees may be required to take a drug test if the employer has a reasonable suspicion that:

- The employee is under the influence of drugs or alcohol
- The employee has violated the employer's drug policy
- The employee has been involved in an accident, or
- The employee has sustained or caused another employee to sustain a personal injury



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Drug Testing in Minnesota

An employer may also require an employee to take a drug test as part of a routine physical exam taking place no more often than once a year, as long as the employee has at least two weeks' notice. An employer may test an employee who has been referred by the employer to, or is participating in, a chemical dependency treatment program. These employees may be tested without notice during treatment and for two years afterward.



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Drug Testing in Minnesota

Random drug tests are permitted only for employees in safety-sensitive positions and for professional athletes.

If an employee tests positive, the employee may request a confirmatory retest within five days. An employer may not discharge an employee for a first-time positive test without offering counseling or rehabilitation. However, an employee who refuses treatment or does not complete the program successfully may be discharged.



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Drug Testing in South Dakota

South Dakota employers are free to implement drug testing programs at their own discretion.



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Drug Testing in South Dakota

South Dakota law requires drug screening for applicants for the following positions:

- Positions at the Human Services Center or the South Dakota Development Center with a primary duty of patient or resident care or supervision;
- Positions at the South Dakota Veterans' Home with a primary duty of patient or resident care or supervision;
- Safety-sensitive positions; *and*
- Positions in the Department of Agriculture, Wildland Fire Suppression Division with duties that include firefighting.



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Drug Testing in South Dakota

In November 2020, voters in South Dakota approved an amendment to the state constitution that requires the state legislature to pass laws providing for the use of medical marijuana and the sale of hemp by April 1, 2022 (*Amendment A*).

In November 2020, voters in South Dakota approved an amendment to the state constitution legalizing the recreational use of marijuana by a person who is at least 21 years old (*Amendment A*). The amendment takes effect July 1, 2021. The South Dakota Department of Revenue is responsible for issuing regulations to implement the law by April 1, 2022.



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Drug Testing in South Dakota

Under the law, it is legal for a person to possess, use, ingest, inhale, process, transport, deliver, or distribute 1 ounce or less of marijuana. The amendment expressly states that it does not require employers to permit or accommodate conduct that is authorized by the amendment. It also does not affect an employer's ability to restrict the use of marijuana by employees.



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Drug Testing in North Dakota

North Dakota employers are free to implement any kind of drug testing programs at their own discretion. However, if an employer requires an employee or applicant to take a drug or alcohol test as a condition of retaining or obtaining employment, the employer must pay for the test and for the furnishing of any medical records.



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Drug Testing in North Dakota

A person is guilty of a class A misdemeanor if he or she willfully defrauds a urine test and the test is designed to detect the presence of a chemical substance or a controlled substance. A person is guilty of a class A misdemeanor if he or she knowingly possesses, distributes, or assists in the use of a device, chemical, or real or artificial urine advertised or intended to be used to alter the outcome of a urine test.



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Drug Testing in North Dakota

The North Dakota Human Rights Act prohibits discrimination in employment based on certain classifications, including disability. The law applies to all employers in the state and could, in theory at least, apply to someone with an addiction to alcohol or drugs. To be covered, such individuals would have to meet the definition of "disability," i.e., be able to prove that they have a physical or mental impairment that substantially limits one or more major life activities. They would also have to be able to perform the job in question satisfactorily, with reasonable accommodation. Current use of illegal drugs is not a protected disability under the federal Americans with Disabilities Act (ADA).



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Drug Testing in Nebraska

Nebraska's drug testing law permits employers to set up alcohol and drug testing programs provided the procedures ensure accuracy, privacy, and confidentiality. Nothing in the law *requires* employers to conduct testing. The law covers private employers with six or more employees and public sector employers.



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Drug Testing in Nebraska

Employees who test positive for drug or alcohol use, refuse to submit to a drug or alcohol test, or tamper with a test specimen may be subject to disciplinary action, including discharge. In order to use test results as the basis for such action, employers must comply with the following testing standards:

- All initial positive test results must be confirmed.
- All employees subjected to breath-testing must be given the chance to request confirmation by a blood sample.
- All results must be kept confidential, except as required by law.



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Drug Testing in Wisconsin

Although many states have passed laws regulating or restricting an employer's right to require drug testing, Wisconsin is not one of them. Although Wisconsin requires state contractors on certain public works projects to drug test, no Wisconsin statute addresses drug testing in private employment. Workplace drug testing is neither required nor prohibited.



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Drug Testing in Iowa

Iowa law doesn't require drug testing, nor does it encourage or discourage testing. The state allows testing by employers in certain circumstances.



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Drug Testing in Iowa

An employer may require applicants to take a drug test as a condition of employment. The employer must have a written drug testing policy available for applicants to review.

An employer may require employees to take a drug test in the following circumstances:

- Based on reasonable suspicion of drug use
- During and after the employee's participation in a drug rehabilitation program, and
- Following an accident that caused a reportable injury or more than \$1,000 in property damage.



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Drug Testing in Iowa

An employer may also conduct unannounced testing of employees selected from the entire workforce at one site, all full-time employees at one site, or all employees in safety-sensitive positions.



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Drug Testing in Iowa

An employer must have a written drug testing policy that states the discipline or rehabilitation that will be required for positive test results, among other things. The employer must have employee assistance (EAP) resources, an employee awareness program, and supervisor training. State law also dictates the procedures for gathering specimens, conducting the tests, confidentiality of results, and so on.



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Drug Testing in Iowa

An employee who tests positive has seven days to request a retest. An employee who tests positive for alcohol use must be given an opportunity to enter a rehabilitation program, if the employee has worked for the employer for at least 12 of the past 18 months and has not previously violated the substance abuse policy. This provision applies only to employers with at least 50 employees.



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