

FAQs Legalization of Marijuana Webinar

1. Can I test for marijuana and do I need to assess for impairment to confirm a positive test in federally regulated drug testing?

A: In federally regulated drug testing with the DOT's FMCSA, FAA, FRA, and PMHSA you must test for marijuana as it is included in the DOT panel. A positive test for marijuana (THC) is a violation and you must take employment action as per DOT regulations. There is no need to assess for impairment.

2. Can I test for marijuana and do I need to assess impairment to confirm a positive test in non-federally regulated drug testing?

A: A company can determine their drug testing policy and can drug test their employees according to their policy. A company can state through their drug testing policy that they are a drug free workplace. A company can decide to take employment action against an employee with a positive marijuana (THC) drug test. Once marijuana is legalized however, the employer is at risk for a discrimination lawsuit if they take employment action against an employee with a positive marijuana (THC) drug test and they do not demonstrate that the employee was impaired at the time of the drug test. The employee can claim that they legally used the marijuana off work according to state law and were not impaired when they came to work.

3. Why does an employee need to perform an impairment assessment on an employee who tests positive for marijuana?

A: A positive test for marijuana confirms that employee has used marijuana, but it does not prove that the employee is impaired. Marijuana can be stored in an individual's fat cells for a period of days to weeks. The individual may not be impaired because they used the marijuana days or weeks ago, even if their urine drug test is still positive. Marijuana "breathalyzers" are more accurate in demonstrating recent use of marijuana, but again they do not prove impairment.

4. How does a company assess for impairment?

A: An employee is assessed for impairment by observation of their behavior and their speech. There are also physical signs that would indicate impairment such as being unsteady on their feet, abnormal pupil eye reactions, or admitting that they are high. Companies should have safety officers who undergo reasonable suspicions training who can complete this assessment. This training is available online through Sanford OccMed. An employer may also employ testing such as a psychomotor vigilant test (PVT) which measures alertness. The employer's drug testing policy must clearly state how they will assess impairment and if they will be employing a PVT. A PVT measures impairment, but does not determine what is the cause of the impairment.

5. What was the app to test for impairment called?

The app that has scientific validation of impairment assessment is called: PVT Workfit iPad app by Pulsar Informatics Inc.

6. If an employer holds a federal contract, do they have to maintain a drug free workplace?

A: The Drug Free Workplace Act of 1988 (DFWA) does require an employer to provide a drug free workplace if the employer holds a federal contract. However, the DFWA only requires that the employee not use drugs while at the workplace and does not present to the workplace impaired. It does not prohibit an employee legally using marijuana away from work in states where marijuana is legalized.

7. Should an employer stop drug testing on all employees?

A: No. An employer should continue to perform drug testing on their employees to provide a safe workplace. The employer may use different drug panels based on the type of drug test and state law. Drug testing for all the illegal drugs is important to maintain a safe workplace, otherwise employees using heroin, cocaine, methamphetamine, or PCP would create an unsafe workplace. Testing for these illegal drugs should continue for pre-employment, random, post-accident, or reasonable suspicion. An employer can take employment action against employees who test positive for these illegal drugs without assessing impairment.

8. Should employers test for marijuana (THC) when marijuana is legalized in the state?

A: An employer can continue to test for marijuana, but are at risk if impairment is not documented at the time of the test. Testing for marijuana on pre-employment and random tests and not assessing impairment puts the company at risk if they take employment action. If the marijuana testing is done because of reasonable suspicion (impairment has been established) or post-accident and impairment has been demonstrated, then the company can take employment action. A company could include marijuana in their reasonable suspicion drug testing panel and use a panel without marijuana in their pre-employment or random panel.

9. If I have safety sensitive positions at my workplace, should I continue to test for marijuana along with illegal drugs in a state where marijuana is legalized?

A: Even if marijuana is legalized, there are certain employment positions where the employer may not feel it is safe to employ legal users of marijuana. In those cases, you must perform an individualized assessment of the employee and perform a direct threat analysis to determine if you can provide reasonable accommodation to the marijuana user to maintain a safe workplace. The employer must then make an individualized decision on whether to hire or take employment action with this specific employee who tested positive for marijuana.

10. Which state laws does an employer have to follow in testing for marijuana?

A: Each state or city may have different laws. Some states provide employment protection for users of medical or recreational marijuana, while others do not. Legal cases in some states have ruled against employers who carried out employment actions on employees who tested positive for marijuana and impairment was not documented. Some states provide protection to their residents no matter where the employer is located or where the employee will be working. Some state laws have allowed the courts to supersede federal law. It is important to seek legal advice in creating your company substance abuse policy, especially if you are operating in more than one state.

11. Can an employer mandate that employees notify the employer of their use of medical marijuana?
A: Yes. Consider including in your policy a requirement that safety-sensitive employees must advise the company about warnings accompanying any prescribed or other medications or substances if it may impact the ability to perform the job safely, before reporting to work under the influence of such substances.
12. What can an employer prohibit in their drug testing policy?
A: In all states, it is permissible to prohibit use and possession of marijuana at work, and to prohibit being impaired at work.
13. How can an employer have a drug testing policy that assures they follow state laws and continue to provide a safe workplace?
A: A drug testing policy could include statements such as safety-sensitive employees who use medical marijuana under state law must report this use to their supervisor or HR, so that the company may analyze the potential safety risk. The company will comply with applicable state laws with regard to the use of medical marijuana to the extent that those laws impose any obligations on employers and to the extent that safety is not compromised.
14. When testing for marijuana, is there a way to specify that you want to test for THC only?
A: Testing for marijuana always tests for THC only. Urine drug tests do not measure CBD levels. However, products that are listed as containing CBD only or as THC free are not regulated closely and may actually contain THC so the donor is at risk for testing positive for THC with these products. If a donor tests positive for THC and claims that they used a CBD-only product, the MRO will not accept that as a legitimate medical explanation and the employer will receive a THC positive result for that donor. The employer must deal with this result based on their drug testing policy.
15. Is it correct that a positive THC test doesn't show a level, like a blood alcohol test, it is only positive or negative?
A drug test for marijuana does provide a level of the THC to the MRO and not just a positive or negative. However, I recommend that a company treat a THC positive test as a positive and not be affected by the level of THC. MROs should not release the THC level to companies to protect them from making decision based on the level of THC. Companies should treat all employees the same with a positive result, regardless of the THC level.
16. Does Marinol show up as a positive or negative test if the person has a prescription?
A: If a donor has THC in his urine but has a legitimate prescription for Marinol, the MRO will certify the drug test result as negative.
17. How long does Marijuana stay in your system?
With heavy long-term use, marijuana is stored in the user's fat cells. In some of these cases, THC has been found in urine drug tests several weeks after use.

18. Is there a cut-off level that proves impairment?
No, unlike alcohol, THC levels in the urine test do not correlate with impairment.
19. Do employers determine impairment or is that done at the testing facility?
It is the employer's responsibility to determine whether an employee is impaired or not. Then based on finding impairment, the employer decides to send the employee for a drug screen. The testing facility performs the urine drug test collection only. It does not determine impairment.
20. If the employer's drug testing policy does not allow employment action with a positive result on a random test, can the employer put an employee through an EAP program for substance abuse counseling?
Based on your drug testing policy, EAP services are allowed.
21. When you refer to employment sanctions, does that mean termination or disciplinary action for a positive THC result?
Employment action includes termination, discipline, or preventing promotion. It includes anything that adversely effects an employee.
22. If working on a project that is funded strictly by the state of South Dakota. How do I find out what the state law is?
Once the state of South Dakota has finalized its regulations regarding the new marijuana law, they will publish these regulations, which will outline how the law will be implemented. I suggest you obtain a legal opinion to interpret these regulations.
23. If an employee with proper medical marijuana fails a random test in ND, is it grounds for termination if the company has a zero tolerance policy?
At the present time, the state of ND has not provided any specific employment protection for medical marijuana users. However, a court ruling favoring a medical marijuana user in the state could open up the risk of discrimination cases for all companies.
24. Does having a pre-employment screen policy or not affect workforce safety insurance rates?
Yes. WSI does provide premium discounts for companies who have substance abuse testing policies.



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