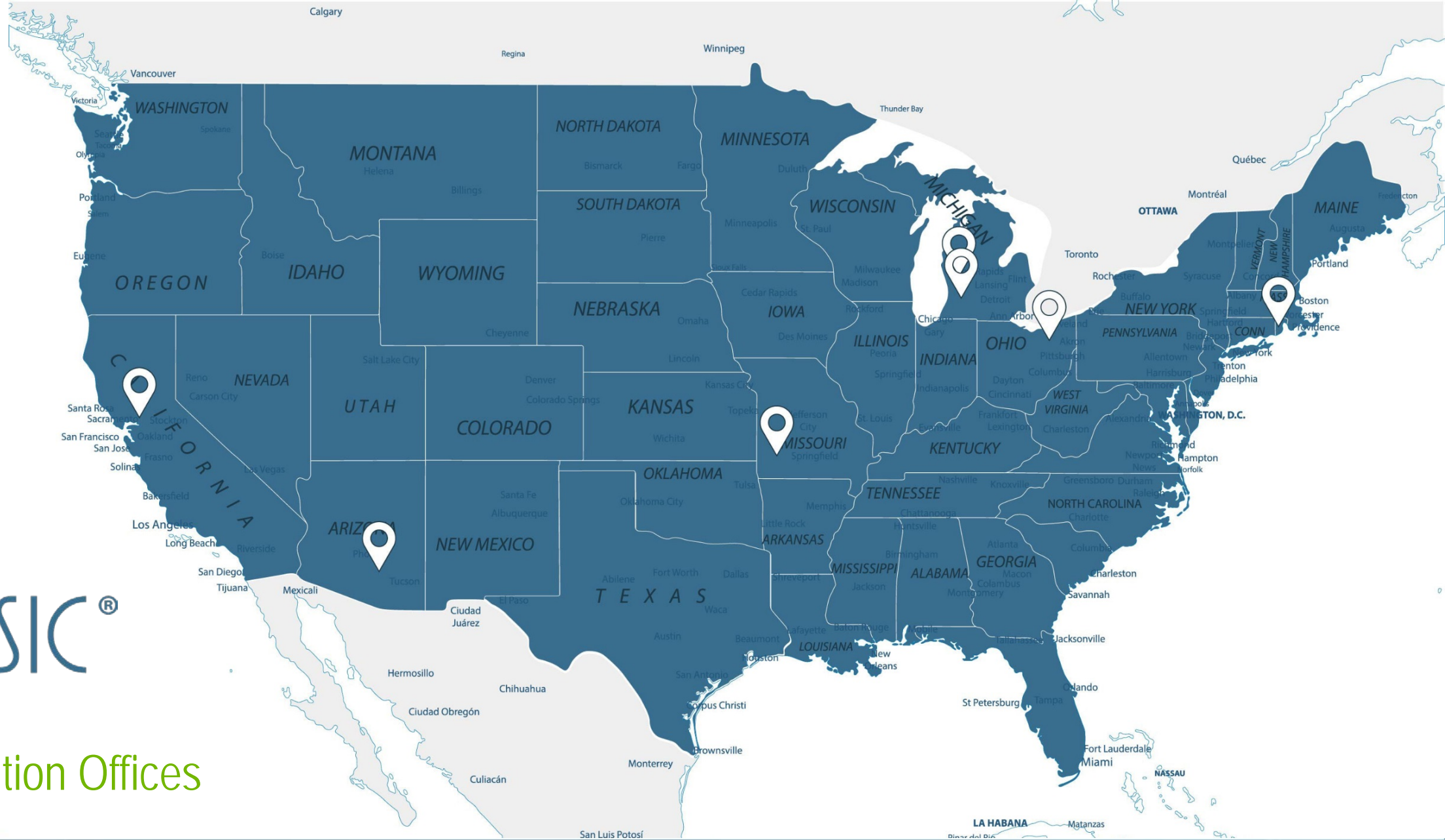




Marijuana in the Workplace



Presented by Joe Aitchison



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➤ Presenter



Joe Aitchison *SPHR, SHRM-SCP, CHRS*
BASIC Senior Vice President of
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➤ Marijuana in the Workplace



Legalizing Marijuana
State vs Federal law



Impaired Employees – what is an
employer to do



Drug Testing
Employer Policies



Marijuana
Government Contracts



Background
Checks



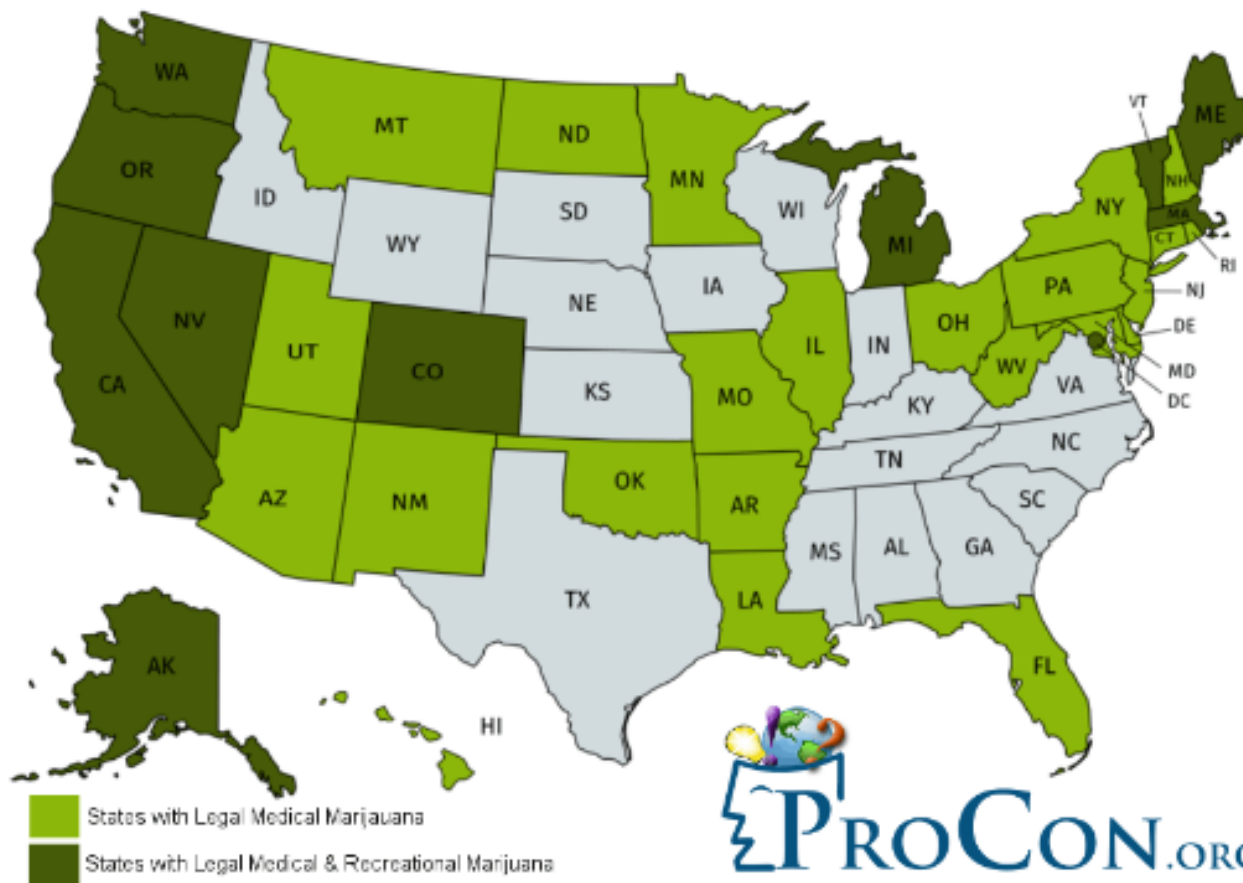
Marijuana – Employer challenges



When and under what scenarios can an employer drug test employees

➤ State Marijuana Laws

33 Legal Medical Marijuana States & DC
10 Legal Recreational Marijuana States & DC



Information Current as of April 2019



➤ Federal Law – No Change



- Marijuana remains on the federal list of controlled substances
 - Marijuana use, possession, and sale still illegal under federal law
 - State marijuana use laws do not change federal law
 - Federal Courts have not taken legal action against medical marijuana users
- Bipartisan bills have been introduced to de-schedule and decriminalize marijuana
 - Marijuana Justice Act (<https://www.govtrack.us/congress/bills/116/s597>)

➤ The Stats

National Institute on Drug Abuse, Department of Health and Human Services, DHHS).



➤ Marijuana vs. Hemp - What's the Difference?

Hemp and Marijuana are Versions of the Cannabis Sativa L. Plant

- Hemp and Marijuana contain cannabidiol (CBD) which is known for its muscle relaxant properties. CBD is non-psychoactive and is effective in treating seizures, even in young children. CBD oils must contain less than 3% THC for medical use.
- Hemp is a non-psychoactive plant – but has relaxing capabilities based on the CBD content.
- Marijuana is a cannabis plant that is most frequently harvested for its euphoric, psychoactive properties. It contains **tetrahydrocannabinol (THC)** which is the compound that causes its euphoric effect.



➤ Fed Contractors, Public Employers & DOT

Federal Drug Free Workplace Act

The Drug Free Workplace Act covers federal government agencies, federal contractors with contracts or purchase orders totaling \$25,000 or more, recipients of federal grants, and any individuals awarded federal contracts.

- The Act does not require alcohol or drug testing but, testing is authorized as a means to maintain a drug-free workplace.

Fed Contractors and Employers Who Receive Federal Grants Must

- Establish a drug free awareness program
- Publish a statement
- Distribute a statement
- Make good faith effort to maintain drug free workplace
- Other requirements are applicable

➤ Fed Contractors, Public Employers & DOT

Drug Free Awareness Program Must Inform Employee of:

- The dangers of drug abuse in the workplace
- The penalties that may be imposed for drug abuse violations
- The employer's policy of maintaining a drug-free workplace
- Any available drug counseling, rehabilitation, or EAP
- Statement will notify all employees that the possession, use, sale, or distribution of controlled substances in the workplace is prohibited

U.S. Dept. of Transportation (DOT) Employers

Marijuana use is Prohibited

Drug testing rules cover employers in the air, rail, trucking, and mass transit industries.

Dot drug test required:

- Pre-employment
- Post-accident
- Reasonable suspicion
- Random
- Return to duty/Follow-up

Note: Not all employer/employees are affected. Only required for those who are engaged in contract or grant work.

➤ Marijuana and Privacy Rights

What do Employers Need to Consider?

- Federal and state law
- Federal Drug-Free Workplace Acts
- Federal Department of Transportation Regulations (DOT), if applicable.
- Americans with Disabilities Act (ADA) and the Rehabilitation Act
- Fair Employment and Housing Act (FEHA - CA)
- Federal and state law privacy rights



➤ Zero Tolerance Drug Policy

What if an employee tests positive for marijuana and the candidate / employee has a medical marijuana card?

- Under federal law and most state laws, the employer is not required to accommodate an employee's use of medical marijuana in the workplace even if the employee is using marijuana as a treatment for a medical condition.
- Many state laws allow individuals to have access to recreational and/or medical marijuana but does not disallow employer's right to hire or not hire individuals who test positive for marijuana.

➤ Alcohol & Drug Policy

- Review your policy – It's important to spell out the organization's position on medical and recreational marijuana.
- A violation of the company's drug policy, even a first offense, can serve as the basis for discipline.

Discipline can include:

- An offer of assessment, counseling, and treatment
- Termination
- Allows federally contracted employers to comply with federal testing standards:
 - Federal Motor Carrier Safety Administration's DOT standard
 - Establish thresholds that are same as other similar organizations

➤ Alcohol & Drug Policy

It's a Business Decision

- Employers should consider having a comprehensive, up-to-date, drug-free workplace policy that meets federal laws and policies, as well as statutory and case law for the state or states in which the company operates.

Recommendation for Employers:

- **Example policy statement:** “In accordance with federal law, the company prohibits any employee from the use, possession, cultivation, manufacture, distribution, dispensation, sale or storage of marijuana under any circumstance, including being under the influence of marijuana while on company property or engaging in company business, regardless of whether the employee has a medical marijuana card, or a prescription for medical marijuana.”

➤ Alcohol & Drug Policy

Option 1. (Good help is hard to find policy)

You will be immediately removed from performing safety-sensitive functions (or suspended without pay) and will not be returned to safety-sensitive functions until you have:

1. Undergone an evaluation by a Substance Abuse Professional (SAP). At your own expense or as covered under the company's health benefits and / or Employee Assistance Plan (EAP).
 2. Successfully completed a course, counseling or treatment prescribed by the SAP prior to returning to service.
 3. Undergone a follow up evaluation by the same SAP to determine your compliance with their recommendations.
 4. **AND** provide a breath, saliva, urine and/or other specimen that tests negative for drugs and/or alcohol prior to returning to safety-sensitive functions.
- You will be subject to unannounced "Follow-Up" testing for drugs and/or alcohol for at least 6 times during the first 12 months of active service with the possibility of unannounced testing for up to 60 months (as prescribed by the SAP). The Return-to-Duty and Follow-Up drug tests will be conducted under direct observation.

➤ ADA - Marijuana Use

ADA Protected Disability

- Alcoholism
- Former drug users may be protected under the ADA

ADA - 42 U.S.C. § 12114(b): “Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who— (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (2) is participating in a supervised rehabilitation program and is no longer engaging in such use.”

Current Drug Use, Including Marijuana

- Unlawful use is not protected under the ADA
- Historic / past drug addiction/ drug dependency that qualified as an ADA condition under state or federal ADA laws not subject to disqualification for employment.
- Past felony conviction may be disqualifying for employment

➤ Marijuana at Work – What to Watch for

Train Managers to be Observant and Set Policy to Prohibit.

Smoking

- Marijuana is the most common method of cannabis consumption



Vaporizers

- Vaporizers (also known as vapes or vape pens) come in all shapes and sizes
- Smaller vape pens are quickly becoming a popular alternative and vapes can fit easily in your pocket and be disguised as many things

➤ Marijuana at Work – What to Watch for

On average, users who consume marijuana orally tend to feel the effects in thirty minutes to six hours or longer depending on the user. “Peak effects” occur around two hours after consumption. The problem with edibles is that you don’t know how much marijuana is in the edible nor do you know the potency of the THC.

- **Edibles**- When cannabis is consumed orally, there are two important things to keep in mind:
 - The time it takes for the cannabinoids to take effect will be longer
 - The effects the marijuana produces will be stronger
- **Tinctures** - A liquid concentration of marijuana. Placing a few drops on your tongue, the effects can take hold anywhere between five and fifteen minutes after ingestion.
- **Sprays** - THC sprays are basically tinctures inside a spray bottle.



➤ Symptoms of Marijuana Use



- Dilated (large) pupils
- Bloodshot eyes
- Sleepy appearance
- Reduced motivation
- Difficulty thinking
- Distorted sensory perceptions
- Dry mouth
- Euphoria (temporary feelings of elation and energy)
- Feeling sluggish
- Red, puffiness under the eyes
- Impaired judgment
- Impaired short-term memory
- Inappropriate laughter
- Increased heart rate
- Increased appetite, craving sweets
- Reduced coordination
- Temporary feelings of reduced anxiety or stress
- Sadness/depressed mood
- Sensation that time is passing slowly

➤ Drug Testing For Marijuana

- Marijuana (Cannabis) accumulates in body fats and **will stay in your system longer than most other drugs**. Although the drug may be present in your system, the **psychoactive (euphoric) high is temporary and dissipates most often within hours of consumption**.

➤ Drug Testing For Marijuana

Urine Test



- For single use: up to 8 days
- For frequent use: up to 15 days
- For regular use: up to 30 days
- For heavy use: up to 45-77 days

Hair Test



- Cannabis metabolites will show up in hair after about seven days post-consumption
- Can be detected up to 90 days

Saliva Testing

- For single use: up to 24 hours
- For frequent use: up to 72 hours
- For chronic, heavy use: up to one week



Blood Test

- For single use: up to 24 hours
- For frequent use: up to 3 days
- For regular use: up to 1 week





➤ Other Drug Detection

Urine Test



- Amphetamines: up to 2-3 days
- Alcohol: up to 5 days
- Cocaine: up to 2-10 days
- Phencyclidine (PCP): up to 7 days
- Opiates (including heroin): up to 2-5 days
- LSD: up to 2-3 days
- Psilocybin: up to 5 days
- Ecstasy/MDMA/Molly/Sass: up to 1-3 days

➤ Post Accident Drug Testing

Does your company have a Drug Testing Policy?	Do you conduct post-incident drug test.
<ul style="list-style-type: none">○ Random, reasonable suspicion, post- incident, other 	<p>If Yes</p> <ul style="list-style-type: none">○ We test everyone, after every accident / incident or worker's compensation claim○ Only if there is an injury / illness○ We test for "near misses" when reported○ We don't test○ We only test under specific circumstances based on the occurrence 

The new "correct answer" is: "We conduct post-incident drug & Alcohol Testing only when the injury or illness occurrence may be due to the employee being **under the influence of alcohol or prohibited substance.**

Pre-employment, reasonable suspicion and random testing is allowable. Some states allow for 100% post incident testing.

➤ OSHA Drug & Alcohol Testing

Employer drug / alcohol policies may be out of date due to a change in Federal OSHA language as it pertains to alcohol / drug testing.

- We suggest that employers have their policies reviewed to assure compliance with current interpretation of the regulations. In question is when an employer does “post Incident” drug testing.
- **Consider adding the following to the statement** ... “Employees who are injured, in an accident, involved in a near miss, or otherwise required to see a health care provider as a result of an occurrence on company property, or at any facilities, operations or other locations while working, are required to submit to a alcohol / drug test if the occurrence (or severity of the occurrence) may be a result of the employee being under the influence of drugs or alcohol.”
- This additional statement protects the employer from whistle blower retaliation claims which can be filed by an employee under OSHA law.

➤ OSHA Clarifies Drug Testing Rules

October 11, 2018 OSHA Issues Memorandum on Drug Testing (<https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11>)

Memorandum States ... “Most instances of workplace drug testing are permissible under § 1904.35(b)(1)(iv).

Examples of permissible drug testing include:

- Random drug testing
- Drug testing unrelated to the reporting of a work-related injury or illness
- Drug testing under a 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

➤ Drug Testing Due to an Occurrence

- If Drugs/Alcohol could be a reasonable basis for the occurrence in part or in its entirety.
- Absence of drug or alcohol may of resulted in a lesser or, no occurrence.
- Therefore, the result of the drug test could provide insight into the severity or why the injury or illness occurred at all



- **Determining who needs to be tested.**
- **If more than one person is injured is it necessary to test all employees or not?**



- In some situations, heightened safety standards may be required to protect workers and others that are exposed to or work in hazardous positions requiring rigid safety testing standards for the protection of everyone.
- DOT Standard, First responders, Air crew members, etc.



➤ Drug Testing Policy

The following or similar language should be included in your drug testing policy

- 1 Inform employees about why and when testing may occur, and what may happen if the test is failed. Pre-employment, **following accident, injury or illness when being under the influence of a prohibited substance or alcohol may have been the cause as determined by the company and when an employees presentment or behavior (demeanor, actions or physical condition) indicates that the employee may be under the influence of a controlled substance .**
- 2 Clearly define what substances are prohibited. The definition should define prohibited substances, include illegal drugs and legal drugs that are abused or used without a prescription. Working while under the influence of any drug or alcohol is prohibited.
- 3 Clearly state that the use of **medical or recreational marijuana** on company property in any form including, but not limited to, smoke, vapor, consumed, inhaled or applied topically is prohibited.
- 4 Prohibit the possession, manufacture, distribution, dispensation, transfer, and sale of **prohibited substances** while on company premises, on company time, or while in company vehicles.
- 5 Failure to cooperate in a company investigations of substance abuse may be subject to disciplinary action.
- 6 Refusing to submit to a drug test when requested to do so is subject to disciplinary action, including termination.
- 7 Include language advising employees that the company reserves the right to search lockers, desks, and other company property, and any personal property or personal vehicles on company premises, subject to state, federal and other applicable (county / municipal) laws.

➤ Positive Drug Test or Refusal

Positive Drug Test

Employee tests positive & demands a retest

- Follow policy or past practice
- Allow a new retest

Whose expense if “split test” is positive?

- Have the employee sign an agreement that if the 2nd sample test is returned positive the employee is responsible for the cost of the 2nd test
- If the test is returned negative, the employer at their expense, may test the same sample a 3rd time or accept the 2nd finding. Employee may be reinstated and compensated for time away from work



Refusing to be Tested

What does your policy state?

- Determine if “state law” has restrictions on pre-employment drug testing (recreational marijuana)
- At present, most states including states allowing recreational marijuana allow for pre-employment drug testing and testing for occurrences with employee discipline to include termination



QUESTIONS





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