

"The Modern Drug Free Workplace Program with Discussion of Marijuana Testing"

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Drug Free Workplace Historical Background

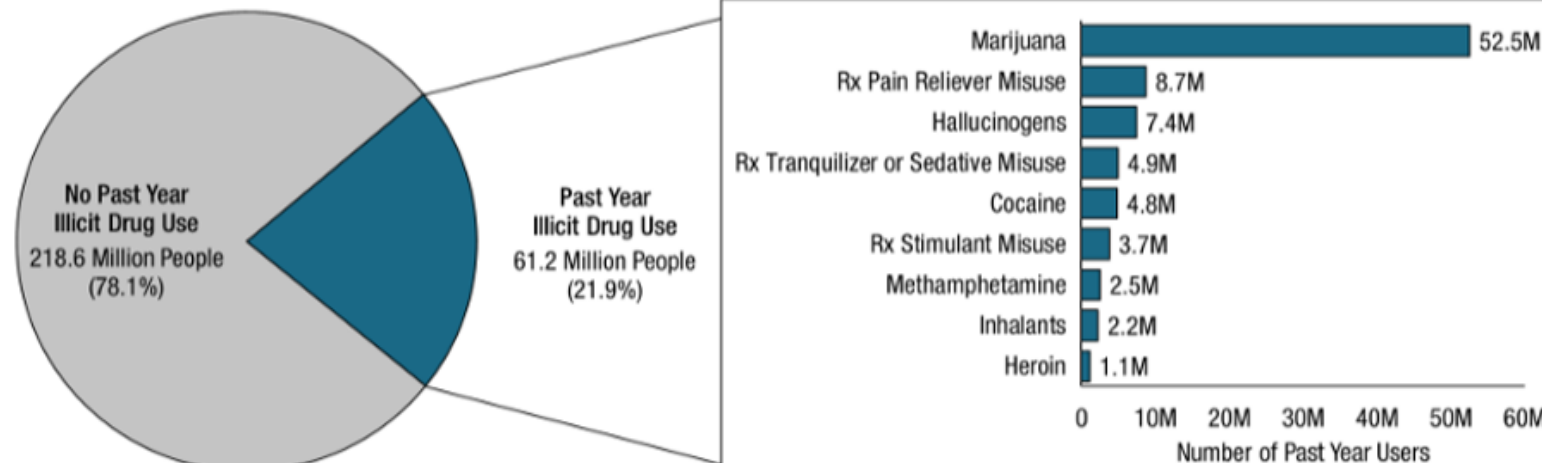
- ▶ Executive Order 12564, 09/15/1986 - Federal Drug Free Workplace Program
- ▶ HHS originally published the Mandatory Guidelines for Federal Workplace Drug Testing Programs (Guidelines) in the Federal Register on 04/11/1988
- ▶ Drug Free Workplace Act of 1988
- ▶ Omnibus Transportation Employee Testing Act of 1991
 - ▶ Created required DOT drug & alcohol testing programs
 - ▶ Oral fluid testing has been approved but not yet operational
- ▶ States now provide workers compensation premium discounts to employers who establish drug-free workplace programs
- ▶ Non-Regulated or Non-DOT testing has evolved from urine testing only to now oral fluid testing, hair testing and instant/rapid testing or Point of Collection Testing (POCT). Check state laws on these additional options.
- ▶ Current statistics from laboratories show highest increase in positive tests in past 10 years

Why Drug Free Workplace Programs?

- ▶ Serious drug problems and alcohol abuse in America
- ▶ Companies lose money when employing substance abusers
- ▶ Safety issues, accidents, workers comp claims
- ▶ Lost productivity, increased absenteeism, tardiness, theft in workplace
- ▶ Compliance with regulations, insurance requirements or contractual obligations
- ▶ Serves as a deterrence to drug use or alcohol misuse
- ▶ Positive public image - “We are a drug free workplace”

2021 SAMHSA Annual Household Survey

- 61.2 million people (or 21.9 percent of the population) used illicit drugs in the past year
- 52.5 million people used Marijuana (18.7% of the population) in the past year
- 9.2 million people 12 and older misused opioids in the past year

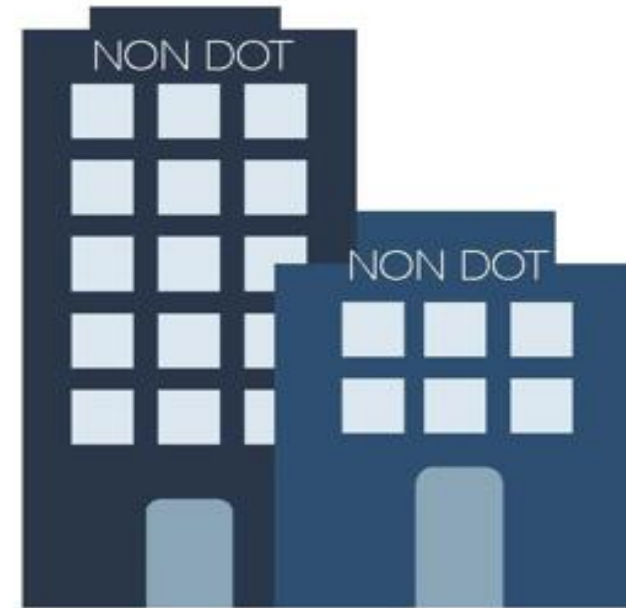


Differences between DOT-regulated and Non-DOT Drug & Alcohol Testing



Regulated by the U.S. Department of Transportation

- Required for DOT-regulated employees
- Trained and qualified specimen collectors required
- Federal Control and Custody Form use required
- SAMHSA-certified laboratory use required
- MRO analysis of test results required
- Only DOT 5-Panel Drug Test permitted
- Marijuana/THC testing required
- Breath alcohol testing required
- Random testing required
- Removal of employee who tests positive from covered position, or refusal to test, required
- Use of Substance Abuse Professional required
- Return-to-Duty and Follow-up testing required



Testing optional — but a Best Business Practice for Employers

- Use of qualified specimen collectors a best practice
- Forensic Control and Custody Form required; use of Federal CCF prohibited
- SAMHSA-certified lab use a best practice
- Various drug test panels permitted
- Marijuana/THC and Alcohol testing optional
- Use of an MRO a best practice, although required by law in several states
- Employer decides adverse reactions for a positive test result or refusal to test
- Referral to an Employee Assistance Program a best practice
- Return-to-Duty and Follow-up testing a best practice
- State laws for drug testing vary. Check yours.

Drug Free Workplace Program



Needs
Assessment



Policy



Supervisor Training



Employee
Education



Access to EAP



Testing

Policy : Drug Free Workplace (DFW)

- ▶ Company leadership should review state laws and make policy decisions
- ▶ The who, what, where, when & how of the drug/alcohol testing program
- ▶ Should be written and distributed to all employees
- ▶ Emphasis should always be on safety
- ▶ Who is in charge of the program
- ▶ When is testing conducted
- ▶ How is testing conducted
- ▶ What are consequences of positive test or refusal to test
- ▶ What assistance is available to employees with substance abuse issues
- ▶ Address marijuana in the workplace

Supervisor Training

- ▶ Supervisors should know the company's policy
- ▶ Training required for DOT and some state drug free workplace program
- ▶ Training should include recognizing signs and symptoms of potential “on the job” use of drugs or alcohol
- ▶ Referral for reasonable suspicion drug/alcohol test
 - ▶ Must be based on specific, contemporaneous, articulable and documentable observations concerning the appearance, behavior, speech, odor or unusual characteristics of the employee.
 - ▶ Must not be based on rumor, speculation, or unsubstantiated information from 3rd parties.
 - ▶ Test when behaviors, appearance, performance may indicate drug/alcohol use

Employee Education

- ▶ Education required for DOT and some state drug free workplace program
- ▶ May be a training program or display and distribution of information
- ▶ ***Helping Employees Understand:***
 - ▶ The requirements of the DFW Policy
 - ▶ The prevalence of alcohol and drug abuse and its impact on the workplace
 - ▶ How to recognize the link between poor performance and alcohol and/or drug abuse
 - ▶ The progression of the disease of alcohol and drug addiction
 - ▶ What types of assistance may be available

Employee Assistance Program (EAP)

- ▶ What help is available for substance abusing employees
- ▶ For DOT it is Substance Abuse Professional (SAP) required after a violation
- ▶ For Non-DOT it is a company option and can be part of a second or last chance agreement after a violation
- ▶ EAP may be part of group health insurance
- ▶ For smaller companies it may be a resource file of local and national resources; organizations and substance abuse treatment providers
- ▶ EAP programs are designed to assist in the identification and resolution of productivity problems associated with personal problems, such as alcohol and/or drug abuse.

DFW Programs :

What's Changed Over The Years

- ▶ More Non-DOT programs than DOT programs
- ▶ Hundreds of state laws regulating non-DOT programs
- ▶ Non-DOT has added drugs beyond the five-panel drug test
- ▶ Expanded opiates (Opioids) added for DOT and Non-DOT
- ▶ Non-DOT using alternative specimens for testing: oral fluid and hair
- ▶ Some employers training employees as collectors and collecting specimens in house
- ▶ Legal challenges - some successful, some not
- ▶ Confusion with CBD products
- ▶ **MARIJUANA (THC)**

Let's Talk About Marijuana



Impairs your memory.

Using marijuana can affect your memory, learning, concentration, and attention. Other effects include difficulty with thinking and problem solving.

Lowers brain power.

Marijuana affects your brain development. Use by adolescents has been linked to a decline in IQ scores — up to 8 points! Those are points you don't get back, even if you stop using.



Affects your performance.



Using marijuana can lead to worse educational outcomes. Compared with teens who don't use, students who use marijuana are more likely not to finish high school or get a college degree.

Driving danger.

People who drive under the influence of marijuana can experience dangerous effects: slower reactions, lane weaving, decreased coordination, and difficulty reacting to signals and sounds on the road.



[* National Institute on Drug Abuse](#)

MARIJUANA - THC METABOLITE

Medical

- Qualifying illnesses
- Different from State to State
- Use at work always prohibited

Recreational

- Use at work always prohibited
- Labs cannot distinguish between use at home or use at work
- Labs cannot detect impairment

CBD Products

- Labs cannot distinguish between THC from marijuana or from CBD Products
- Use CBD at your own risk

Viewpoint on Safety and Illegality

▶ Historical

- ❖ Presence of illegal drug in urine was sufficient to remove from a safety-sensitive position even if use was historical
- ❖ Company policy violation with disciplinary action up to and including termination of employment

▶ Current Landscape

- ❖ New focus on impairment :
New York, New Jersey, California, Washington
- ❖ Focus : “no adverse action based solely on positive THC test”
- ❖ Focus : testing of active drug, perhaps oral fluid, breath and other new methodologies.
- ❖ Is employer making an accommodation for medical marijuana cardholders?

Testing for Impairment

- ▶ No national standard for impairment
- ▶ Positive levels do not prove impairment
 - ▶ Some methods of testing show recent use - oral fluid testing
- ▶ No testing methods currently on market that can definitively prove impairment
 - ▶ Not DOT approved
 - ▶ Some methods are in development:
 - ▶ Cannabis breathalyzer
 - ▶ Brain imaging procedure
 - ▶ DRUID - tests for things like hand-eye coordination to determine whether someone is fit to drive

Signs & Symptoms - Drug Recognition, Reasonable Suspicion

Workplace Considerations - Marijuana

- ▶ DOT - Prohibited, no exceptions
- ▶ Non-DOT:
 - ▶ Medical & Recreational Marijuana
 - ▶ State laws are a major consideration
 - ▶ Employers must define their safety sensitive positions
 - ▶ Employers (Leadership) must make decisions & address in company policy
 - ▶ Reasonable suspicion training becomes much more critical
 - ▶ Some employers may elect to not test for marijuana
- ▶ **No changes to this policy statement:**
“The company prohibits employees from reporting for work with an illegal drug, including marijuana (medical, recreational, or otherwise), in his or her system. The company prohibits any use or possession of marijuana in the workplace; medical, recreational, or otherwise. The company enforces this policy consistently with respect to all drugs, including medical or recreational marijuana, as the law allows the company to do.”

State Law Changes Related to Marijuana

- ▶ New laws have objectives to protect employees who use marijuana outside of work from discriminatory hiring and employment practices.
 - ▶ Reasonable suspicion determinations with documentation becomes critical
 - ▶ California, Washington - January 1, 2024;
 - ▶ Testing prohibited when testing for non-psychoactive cannabis metabolites (this is the case with a urine drug test)
 - ▶ Some exceptions for safety sensitive positions
 - ▶ Caution with respect to taking adverse action on a positive test:
Arizona, Delaware, Connecticut, Michigan , Rhode, Washington DC, New Jersey

40 states + DC + 4 US territories have medical marijuana laws
23 states + DC + 3 US territories have recreational marijuana laws

Employer Takeaways Regarding Marijuana

- ✓ Be aware of State laws on drug testing specifically marijuana laws and laws addressing testing for marijuana
- ✓ Leadership must make decisions regarding marijuana in the workplace and testing for marijuana
- ✓ Decide on any accommodations for medical marijuana use
- ✓ Policies must be revised or implemented based on the decisions made regarding marijuana in the workplace and testing for marijuana
- ✓ Seek legal counsel or guidance from professionals specializing in drug testing and marijuana policies
- ✓ Have an interactive conversation with employees claiming medical marijuana use after testing positive for marijuana

Questions

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Thank You