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## Addressing Drug Use's Changing Social and Legal Environment in Your Workplace Policies

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## Introduction

Drug testing is, by no account, a brand-new phenomenon in the American workplace. Perhaps inspired by the passage of the Drug Free Workplace Act in 1988, organizations all over the United States have since increasingly adopted employment policies that require their applicants and employees to be subject to testing for the illegal use of controlled substances. This growing adoption can be attributed to a mixture of influences, like social pressure, regulatory mandates, the rising costs of health insurance and workers' compensation claims, safety issues, concerns over liability and litigation, and greater awareness of corporate citizenship. Today, nearly 80 percent of employers require some sort of drug testing from their workforce.<sup>1</sup>



Just as employers have adapted their policies and approaches to drug testing over the last few decades to respond to a powerful confluence of social, economic, and regulatory pressures, they are continuing to contend with changes in these influences. One such key shift centers on the legal and regulatory framework of drug use. New laws are emerging—at a fairly rapid rate—at the state level that address critical issues like the medical and recreational use of marijuana.<sup>2</sup> This evolution at the state level is compounded by ever-changing federal attitudes toward enforcement.

Employers' drug testing policies are also being impacted by cultural and social transformations. Acceptance of marijuana use is growing among Americans, a social trend that has definitely influenced the transformation of laws at the state level. Another important social impact for employers is the increasing awareness of prescription drug use and abuse and the corresponding effects on the workplace. Organizations are grappling with two intertwined issues: strong rates of recreational use coupled with a concerning trend of employees reporting to work under the influence of often powerful prescription medications, even when they are using these drugs properly and as prescribed.

So, whereas once upon a time many employers could utilize a blanket “drug-free workplace” policy that centered solely on illegal drugs, an ever-evolving regulatory and social environment is forcing many organizations to take a closer look at their internal programs. Specifically, organizations should determine whether their drug testing policies address evolving legal and cultural attitudes toward marijuana, as well as a robust phenomenon of prescription drug use and abuse at work. Employers are deciding whether the historical approach of taking adverse action against a candidate or employee with a failed drug test is still valid today, while they are also grappling with how to address workers who are either using prescribed medications in ways not sanctioned by the employees' doctors or coming to work under the influence of these potentially powerful drugs. To help organizations navigate these unfamiliar waters, it may be beneficial to better understand the changing environment in more detail, as well as to explore some best practices utilized by other employers, which have proven successful in helping them in similar circumstances.

<sup>1</sup> HireRight, “2013 Employment Screening Benchmarking Report”.

<sup>2</sup> This eBook uses the terms “marijuana” and “cannabis” interchangeably.

## Marijuana: A Whole New Paradigm

### **A Brief History**

Though marijuana has been a popular topic in the news over the last few years, it is certainly no recent invention. Accounts of the medical use of cannabis, the plant from which marijuana is derived, can be found in a number of historical records, including those from ancient China, Egypt, and Greece. References to marijuana speak to its variety of medical applications, such as a salve, anti-nausea treatment, diuretic, and laxative.

In modern times, cannabis has continued to be used to treat a number of medical ailments. Throughout the nineteenth century, cannabis was a popular pain reliever in the Western world, and medicinal preparations of it were commonly found in American pharmacies. With the turn of the century, social attitudes toward many drugs, like marijuana and morphine, began to shift, and with them, came stricter regulation of these drugs.

Over the next several decades, increased regulation eventually led to outright criminalization of marijuana. In 1970, Congress passed the Controlled Substances Act (CSA), which categorizes a wide range of drugs according to their potential for abuse, appropriateness for medical use, and general safety. Marijuana was categorized alongside heroin and LSD as a Schedule 1 drug, which not only made it illegal under federal law, but also strongly communicated that it had no legitimate medical purpose. Nevertheless, a small but vocal opposition to marijuana's Schedule 1 classification arose, purporting that marijuana was relatively safe, had a low propensity for abuse, and boasted a number of medical purposes.<sup>3</sup> Specifically, these medical marijuana advocates pointed to the drug's efficacy in treating the symptoms and side effects of such debilitating conditions as cancer, HIV/AIDS, epilepsy, multiple sclerosis, and glaucoma.

### **Medical Marijuana: Two Decades of Transformation**

In the mid-1990s, a grass-roots campaign organized in California eventually led to the passage of Proposition 215, which protected patients, caregivers, and physicians from state-level criminal prosecution for the possession, use, cultivation, or recommended use of medical marijuana. The new statute introduced an era of ongoing tension between state and federal law, since under the latter, marijuana for any purpose was still illegal. As a result, the U.S. Department of Justice (DOJ) initiated criminal prosecution of physicians who recommended marijuana to their patients, sparking a number of lawsuits by the doctors and their patients. A class action lawsuit, *Conant v. Walters*, resulted in a permanent injunction by a federal court, essentially allowing physicians to discuss with and recommend to their patients the use of marijuana as part of medical treatment.

With the decision in California, the tide was beginning to turn, and more states were also implementing similar statutes. By the end of the decade, five states in total had medical marijuana laws on the books.



<sup>3</sup> HOPES (Huntington's Outreach Program for Education, at Stanford), "Medical Marijuana Policy in the United States," May 15, 2012. Available at <http://www.stanford.edu/group/hopes/cgi-bin/wordpress/2012/05/medical-marijuana-policy-in-the-united-states/>

## U.S. States and Districts Where Medical Marijuana Is Permitted

### 1990s:

1. California, 1996
2. Alaska, 1998
3. Oregon, 1998
4. Washington, 1998
5. Maine, 1999

### 2000s:

6. Colorado, 2000
7. Hawaii, 2000
8. Nevada, 2000
9. Montana, 2004
10. Vermont, 2004
11. Rhode Island, 2006
12. New Mexico, 2007
13. Michigan, 2008

### 2010s:

14. Arizona, 2010
15. District of Columbia, 2010
16. New Jersey, 2010
17. Delaware, 2011
18. Connecticut, 2012
19. Massachusetts, 2012
20. Maryland, 2013

As of today, 19 states plus the District of Columbia all permit the medical use of marijuana (see sidebar). Most of these laws were passed following a direct voter referendum, indicating strong social support. Taken as a whole, these laws were designed to decriminalize the therapeutic use of marijuana by individuals with serious medical conditions—but that is where the similarities end. Across the spectrum of this landscape, there is a broad diversity in the particular language of each law. There is little commonality on such issues as:

- » How much cannabis may be legally possessed (varies from a single ounce to 1.5 pounds)
- » How a patient can acquire the marijuana (some permit cannabis plants at home, and others have a dispensary system regulated by the state)
- » The specific medical conditions that allow a person to qualify for medical marijuana
- » What sort of registration process the patient has to undergo
- » How a patient proves a medical marijuana exemption to law enforcement

### **State vs. Federal Law**

This lack of consistency certainly makes it challenging to make broad statements about medical marijuana laws in the U.S. Nevertheless, it is important to keep in mind that, because of cannabis's classification as a Schedule 1 drug, physicians cannot *prescribe* it (only drugs regulated by the U.S. Food and Drug Administration may be prescribed), only *recommend* it to their patients for use as part of therapeutic or palliative medical treatment. Additionally, there is no uniform governance or guidance for which

specific medical conditions marijuana may be an appropriate treatment. State laws vary greatly; some are incredibly specific and limit recommendation of cannabis to debilitating illnesses or conditions, while others are decidedly more liberal and provide room for interpretation. For example, in New Mexico, an individual must suffer from one of 15 named conditions in order to qualify for medical marijuana use. California's laws are much more flexible, and an individual who has any "illness for which marijuana provides relief" can be recommended cannabis as part of his/her medical treatment. This lack of specificity opens the door to abusive practices. In the recent film *50/50*, a character mentions, while smoking marijuana recreationally, that he is using it to treat his "night-blindness". Though intended as humor, the scene sheds light on the potential for some people to obtain recommendations for marijuana from their physicians and use it in a non-medical manner.



Despite the variance of laws at the state level, marijuana clearly remains illegal under federal law. Its continued classification as a Schedule 1 drug under the CSA has led to strong conflict between state and federal law. The Clinton Administration took swift action in response to the passage of California's Proposition 215, and later presidential administrations have also emphasized enforcement of the CSA. Though medical dispensaries proliferated throughout the first decade of the millennium, under the Bush Administration, raids on these facilities occurred with some regularity. With the election of Barack Obama, the federal government has exhibited a quasi-schizophrenic approach to enforcement of federal drug laws. In 2009, the DOJ issued guidelines that it would not pursue prosecution of individuals using or physicians recommending marijuana for treatment of serious conditions, as such enforcement was not a good or effective allocation of limited federal resources. Just two years later, however, the federal government had changed its tack, releasing a subsequent DOJ memo stating that it would pursue prosecution of individuals or businesses that cultivate, sell, or distribute medical marijuana. According to some experts, this revised approach was a response to a growing sense that the medical marijuana industry was unregulated, unwieldy, and abusing its privileges.<sup>4</sup>

This stand-off between federal and state law could seemingly be remediated by a more widespread awareness of the drug Marinol (aka dronabinol), a synthetic form of cannabis that is legal under federal law. Classified as a Schedule 3 drug under the CSA, Marinol provides many of the same therapeutic benefits as natural marijuana. Unlike marijuana, it can be outright prescribed by a physician, and moreover, its dosage tightly controlled. With natural cannabis, there is no standard dosage, so physicians struggle with whether their patients are using it as recommended and not for recreational use. Marinol prescriptions, conversely, offer doctors visibility into how much and how often their patients are taking the medication. Unfortunately, the medical marijuana community has been slow to adopt Marinol as a legitimate alternative to natural cannabis. For one, the pill, because it is swallowed and must be absorbed via the digestive system, is slower-acting than smoked marijuana, so may not provide the immediate level of relief to which some patients are accustomed. Another negative of Marinol is the very fact that it must be taken orally. For some patients, for whom marijuana is used to combat nausea and vomiting, swallowing a pill is difficult. Additionally, some medical cannabis advocates deride Marinol because it is created in a laboratory and therefore not "natural."

### **Recreational Marijuana: Complicating the Matter**

Adding to this incredible complexity is the growing acceptance of marijuana used for non-medical purposes. Though the history of marijuana primarily centers on its therapeutic uses, there are also accounts of individuals using cannabis for recreational reasons. Such accounts expanded during the twentieth century in the U.S., when non-medical marijuana was popular during several eras, such as the Jazz Age and the sixties and the seventies. Most of the anti-marijuana stance and eventual criminalization of the drug was a result of its recreational usage by individuals considered counter-cultural or otherwise outside the norm.

Yet, there has recently been a fairly dramatic shift in cultural attitudes toward marijuana, perhaps bolstered by more acceptance of its medical applications. A recent Pew Center research poll revealed that, for the first time in 40 years, a majority of Americans (52 percent) favored the outright legalization of marijuana, representing a dramatic increase from the early 2000s, when only 32 percent of Americans supported legalization. This support is even more marked for the ascending Millennial generation, of which 65 percent favor legalization.<sup>5</sup> As members of this generation age, it is not unthinkable that their lenient attitudes will inspire greater acceptance.

<sup>4</sup> William Yardley, "New Federal Crackdown Confounds States That Allow Medical Marijuana," New York Times, May 8, 2011.

<sup>5</sup> Pew Research Center, <http://www.people-press.org/2013/04/04/majority-now-supports-legalizing-marijuana/>.

In late 2012, this growing social support resulted in two landmark votes. Citizens in Colorado and Washington passed ballot initiatives to decriminalize the non-medical possession and use of marijuana. With these votes, recreational marijuana is essentially legal in these two states, though both governments are grappling with the realities of implementing the new laws. Specifically, the states must address foundational issues such as how to oversee sales and distribution, gather taxes, and regulate the industry. Safety concerns are also at the forefront for Colorado and Washington, as they seek a framework for keeping roads and highways safe from impaired drivers. One stumbling block to this is that there is no established, easy, and effective way for law enforcement to determine if a driver is currently under the influence of marijuana. Unlike alcohol intoxication, which can easily be determined via a relatively simple breathalyzer test, marijuana impairment is much more difficult to gauge.

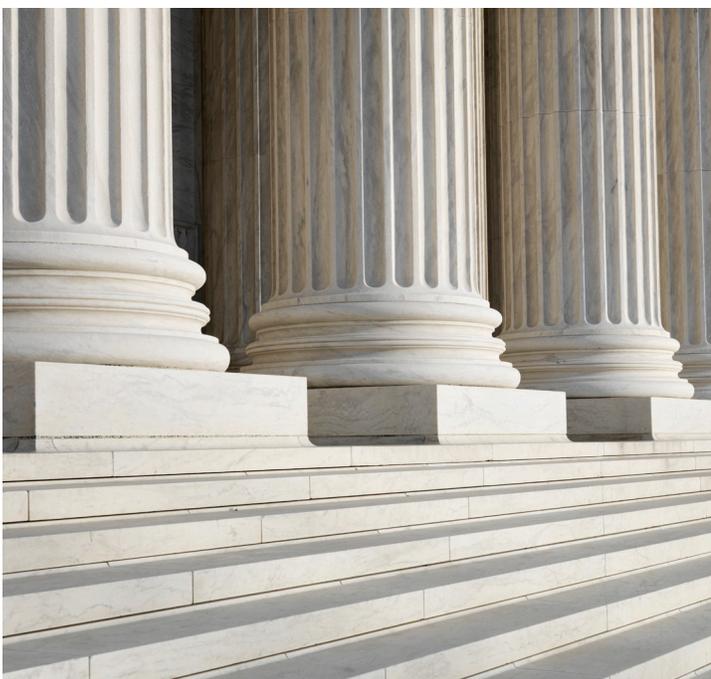
Additionally, Colorado and Washington suffer from the same tension between their individual state laws and those of the federal government. As long as marijuana is classified as a Schedule 1 drug, outright legalization is a thorny legal matter. Nevertheless, other states, likely bolstered by changing social attitudes, are considering similar initiatives, which will make the situation even more complex.

Therefore, there exist a number of heady complications presented by the tension between state and federal law. Organizations must continue to be aware of the ever-changing social and legal landscape of medical and recreational marijuana. This landscape is still evolving; several states are currently considering new marijuana laws, meaning that there exists the potential for more than half the states in the U.S. to have decriminalized the use of medical or recreational cannabis. As attitudes and regulations continue to change, employers may find themselves caught in the middle, unsure whether to recognize state-level laws in their drug testing policies.

### **Employee Protections under the Law: Do They Exist?**

For many employers, the fundamental question they want to address when reviewing their drug testing policies in light of an evolving legal and social environment is as follows: do we need to accommodate our employees' ability under their state laws to consume or possess marijuana for medical or recreational purposes? Luckily for organizations, the guidance stemming from both the regulatory and case law environment has, with a few exceptions, been relatively clear and consistent—as long as cannabis remains illegal under federal law, organizations can take adverse employment action against a candidate or employee who tests positive for marijuana.

For the states that do have medical marijuana laws, the vast majority do not specifically address an employee's right to consume cannabis. Given the lack of direct references, there subsequently exists a gray area in the law that has provoked litigation by individuals who claim their legal rights to consume medical marijuana were not honored by their employers, resulting in wrongful termination or other discriminatory actions. Though these lawsuits have definitely appeared in recent years, the decisions by the courts (including the supreme courts of California, Washington, Oregon, and Montana, the



appellate court of Colorado, and the U.S. District Court for the Western District of Michigan) have been rather uniform. To date, all courts have supported an employer's right to take adverse action against a candidate or employee based on the presence of marijuana in a drug test, even if that individual is permitted to use marijuana in accordance with state law. These decisions have been based on two primary points: 1) that marijuana is still classified as a Schedule 1 drug by the federal government, and 2) that marijuana use by employees could present safety concerns for an organization, and organizations can take steps to protect themselves from these risks.

A few states do have provisions in their medical marijuana statutes that directly address issues of employment. Currently, five states—Arizona, Connecticut, Rhode Island, Delaware, and Maine—provide some employee protection under the law. While generally speaking, these states' laws address the rights of medical marijuana users and their employment status, there is some variation in their specific intent and application (see sidebar). Arizona, Connecticut, Maine, and Delaware seem to provide the broadest protections for employees using medical cannabis, while the language of the Rhode Island statute is somewhat vaguer and potentially gives employers more latitude (that is, until case law provides some clarification or interpretation). Yet under all these laws, employers can take action on an employee possessing, using, or being impaired by marijuana while in the workplace or otherwise on the job. Additionally, employers in these states that are subject to regulations by the Department of Transportation (DOT) or other federal agencies or have federal contracts, also have greater freedom to take adverse action against a candidate or employee using medical marijuana. Similarly, for those organizations that have employees in safety-sensitive positions (e.g., operation of heavy machinery), they may also be able to exercise more liberal judgment in the application of these laws.

## State Medical Marijuana Laws Addressing Employee Rights

### **Arizona**

- » Employer cannot discriminate against an individual based on his/her status as cardholder or positive test for marijuana
- » Can take action if individual "used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment."
- » Provides exception for employers with federal contracts or that are federally regulated or licensed

### **Connecticut**

- » Employer cannot discriminate against an individual based solely on his/her status as qualifying patient or caregiver
- » Can prohibit use of marijuana during work hours and discipline employee impaired during work hours
- » Provides exception for employers subject to federal requirements or receiving federal funding

### **Delaware**

- » Employer cannot discriminate against an individual based solely on his/her status as qualifying patient or caregiver
- » Can prohibit use of marijuana during work hours and discipline employee impaired during work hours
- » Provides exception for employers subject to federal requirements or receiving federal funding

### **Maine**

- » Employer cannot discriminate against an individual based solely on his/her status as qualifying patient or caregiver
- » Can prohibit smoking of marijuana on premises if all smoking is prohibited and notice of prohibition is posted
- » Provides exception for employers subject to federal requirements or receiving federal funding/contracts

### **Rhode Island**

- » Employer cannot refuse employment to individual based solely on cardholder status
- » Employers do not have to accommodate medical use of marijuana in any workplace
- » Employers do not have to accommodate employee under influence of marijuana if job presents possibility for negligence or professional malpractice

The recreational marijuana laws, given their very recent passage, have not produced the same volume of case law that would provide employers in Colorado and Washington with clearer direction on how to treat individuals who test positive for marijuana. That said, there is nothing in either statute that prohibits employers from taking adverse action against an applicant or employee for cannabis use. The likelihood that case law will side with individuals in such matters seems relatively low, since unlike medical marijuana cases, plaintiffs in these lawsuits cannot sue on the basis of disability discrimination or violations of public policy (as is typically done in medical marijuana cases). Until these cases come to trial and reach a judgment, organizations in Colorado and Washington should most likely not be forced to accommodate recreational marijuana users.

Therefore, with few exceptions, employers currently have the latitude to continue to take adverse action against candidates or employees who test positive for marijuana. As the landscape continues to evolve, this ability may change as well. Organizations should pay close attention to clarifications from state legislatures, regulatory bodies, and case law in order to better ensure that their internal drug testing policies comply with future developments.

### **Prescription Drugs: When Presence Isn't Necessarily an Offense**

As organizations adapt to the new paradigm of marijuana laws and culture in the U.S., they are also grappling with another relatively novel concern—the use and abuse of prescription drugs. Employers are seeking to address safety concerns of their workers who may be using drugs properly and as prescribed, but still report to work or perform employment duties while under the influence of these potentially powerful medications. Meanwhile, these organizations are simultaneously trying to develop ways in which to address the non-medical, or recreational, use of such drugs.

In a recent 2011 survey by the National Institute on Drug Abuse (NIDA), nearly one out of every five Americans older than age 12 reported using prescription drugs in a non-medical manner at some point in their lifetime. What may be even more alarming is that 12.7 percent of adults age 25 or younger indicated that they have used these types of drugs recreationally in the past year.<sup>6</sup> The NIDA also reports that prescription drugs are, after marijuana and alcohol, the most commonly abused substance in the U.S.<sup>7</sup> Recently, the Centers for Disease Control and Prevention have classified this type of abuse as an epidemic and indicate that it is the fastest growing drug problem in the U.S., with one death every 19 minutes.<sup>8</sup>

Correspondingly, the media and various federal and state agencies have responded to this growing problem with awareness campaigns, legal mechanisms for stemming the tide, and public health initiatives. As a result, employers are reacting by trying to fully grasp the effects of prescription drug use and abuse in the workplace. Like illicit drugs, the use of prescription medications can have far-reaching and often negative effects on the workplace, like increasing the potential for on-the-job accidents, impacting job performance, and providing a stronger impetus for workplace theft. In some cases, safety issues can arise even if the medication is being used legally and as directed by a physician. Some statistics indicate that this is a growing problem in the workplace. According to Quest Diagnostics, a leading drug testing laboratory, there has been a marked spike in the incidence of employees testing positive for prescription opiates—more than 40 percent from 2005 to 2009.<sup>9</sup>

<sup>6</sup> <http://www.drugabuse.gov/national-survey-drug-use-health>

<sup>7</sup> <http://www.drugabuse.gov/drugs-abuse/prescription-drugs>

<sup>8</sup> <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6101a3.htm>

<sup>9</sup> Katie Zezima and Abby Goodnough, "Drug Testing Poses Quandary for Employers," *New York Times*, October 24, 2010.



Yet unlike illicit drugs, for which most U.S. employers can test easily and legally, prescription medications present a number of challenges to organizations concerned about their impact on the workplace. For one, the mere presence of these substances in a drug test does not constitute an offense, unlike with illegal drugs. Additionally, many employees using these medications are protected by the federal Americans with Disabilities Act (ADA), which limits an organization's ability to question its employees' use of such drugs unless an employee's

behavior is compromising workplace safety or is otherwise indicative of a reduced ability to perform his or her job. Furthermore, workers can claim the privacy of their health information and not share details of medication use with their employers.

One recent situation can possibly help provide some guidance to employers as they navigate this issue. In 2007, Dura Automotive Systems, an automotive parts manufacturer, was concerned about what it believed to be a higher than normal rate of workplace accidents at one of its factories. Suspecting that the underlying cause of these accidents was drug use by employees, Dura banned the use of several prescription medications and required all its workers in the facility to take a drug test that comprised a panel of 12 substances, five of them illegal and seven of which were commonly abused prescription medications. Dura then took adverse action, including suspension and termination, against several employees who tested positive for these substances, most of whom had legitimate prescriptions for the medications.

The U.S. Equal Employment Opportunity Commission (EEOC) subsequently initiated a lawsuit against Dura, on the basis that the drug testing violated the employees' rights under the ADA.<sup>10</sup> The case resulted in a settlement of \$750,000 in favor of the EEOC, which contended that Dura's actions constituted unlawful medical inquiries and required medical examinations that were not job-related or consistent with business needs.<sup>11</sup> According to the EEOC:

"...certain employers may be able to demonstrate that it is job-related and consistent with business necessity to require employees in positions affecting public safety to report when they are taking medication that may affect their ability to perform essential functions. Under these limited circumstances, an employer must be able to demonstrate that an employee's inability or impaired ability to perform essential functions will result in a direct threat."<sup>12</sup>

In some instances, therefore, employers may have some latitude to inquire into, or even test for, prescription medications used by the employee. Employees in safety-sensitive positions or in a post-accident situation could potentially be subject to questions about their use of prescribed medications and could also possibly be tested for the presence of these medications in their systems. Employers, however, should be very judicious and careful in these situations and engage their employment counsel to help guide them as to when this type of inquiry or testing would be appropriate.

<sup>10</sup> *EEOC v. Dura Automotive Systems, Inc.*, Case No. 1:09-cv-0059 (United States District Court, M.D. Tennessee. Aug. 31, 2012).

<sup>11</sup> EEOC, "Press Release: Dura Automotive Systems to Pay \$750,000 to Settle EEOC ADA Lawsuit", May 5, 2012. Available at <http://www.eeoc.gov/eeoc/newsroom/release/9-5-12.cfm>.

<sup>12</sup> EEOC, "Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA)". Available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

## Pressure on the Policy: Time for a Review?

As organizations better understand the myriad social and legal changes that have occurred in recent years surrounding drug use in the U.S., many are taking a close look at their workplace drug policies. Even those employers who feel confident in their drug-free workplace policies and hardline stance on taking adverse action against any applicant or employee who tests positive for illegal drugs may be well-served to at least engage in a review of this approach. A review of your organization's workplace drug policy will better ensure that it is not only meeting your ongoing needs (which could change over time), but also is responding to the evolving regulatory and cultural landscape regarding drug use in the U.S. For those employers wishing to engage in this process, there are a number of best practices, enacted by other organizations that have undergone similar initiatives, which may provide some excellent guidance.

### **Step One: Start with the Fundamentals**

Any examination of your organization's workplace drug policies should begin with some baseline considerations that will serve as foundational elements as you navigate the process:

1. *Establish whether your policy adequately addresses your organization's goals, culture, values, safety concerns, security needs, and privacy issues.*

This essential question is perhaps the most important you must address. Every organization is different—a start-up Internet company probably has a particularly different risk profile, typical employee type, vision, and workforce composition than, say, a national hospital system. Asking yourself these critical questions can help determine if your workplace drug policy reflects who you are, where you are headed, and how you see yourself getting there.

2. *Create a list of the types of positions within your organization and assess how much each position type impacts the safety of your organization, your workers, your locations, your customers, and the society at large.*

Employers whose workers have a greater exposure to safety-sensitive situations—for example, construction companies—may have a much more aggressive approach to their workplace drug policies than other organizations. Better understanding the specific makeup of your workforce and the safety profile of each position can help guide you in fine-tuning your internal drug policy. More safety-sensitive positions may warrant a lower tolerance of drug use by employees.

3. *Clarify if your organization is subject to any federal regulations or if you derive revenue from the federal government and/or operate under a federal contract.*

Employers that meet any of these criteria may find it prudent to prioritize federal law over state law. In many instances, giving precedence to federal law may be outright mandated by the federal government as part of doing business with it. Organizations with no ties to the federal government may have more flexibility with their workplace drug policies, whereas employers with such relationships may be prohibited from accommodating marijuana users.

4. *Construct a detailed list of the states in which your organization operates.*

Because drug laws can vary dramatically from state to state, it is critical that all employers thoroughly understand their legal requirements, if any, regarding drug testing in each state in which they do business, hire employees, or have a location. Those organizations that do not operate in states with enacted medical or recreational marijuana laws may not feel compelled to address these statutes in their workplace drug policies, though their specific company cultures or objectives may merit such consideration.

## **Step Two: Layer In Complexity**

Once foundational issues are addressed, employers can then move onto the subsequent step of a best practice review of their workplace drug policies. In this stage, since organizations typically tackle more complicated issues, they would probably benefit from engaging external expertise to better navigate the process.

1. *Engage your employment counsel at the outset.*

Attorneys well-versed in labor and employment law can help guide your organization in better understanding what, if any, amendments you may need to make to your current workplace drug policies to better ensure that they are compliant with all federal, state, and local regulations. Counsel can also help you determine a drug testing policy and associated procedures that provide you with the optimal balance of risk mitigation, budget considerations, and legal requirements.

2. *Work with your medical review officer (MRO) provider to better understand their processes.*

If your current drug testing process includes MRO services, it would be beneficial to gain deeper insight into your provider's internal policies and procedures, as these may impact your review. For example, many MROs, because they follow strict guidelines of the DOT, do not currently recognize medical marijuana as a legitimate exemption and would therefore still return a sample as positive for cannabis. In this manner, the onus would be on the employer to adjudicate the situation and make an employment decision based on the evidence provided by the applicant or employee. If your MRO does recognize medical marijuana exemptions, it would be helpful to have definitive clarity around how they handle this process.

3. *Know that the best policies are characterized by the four Cs: clear, consistent, concise, and broadly communicated.*

For your workplace drug policy to be effective, it is important to remember that all your employees must understand it and its implications. Otherwise, you may place yourself in possibly negative situations—like losing a high-value employee who thought he or she had the right to partake in medical marijuana believing that it was legal in the state. So, when crafting a new policy or making changes to your current policy, focus on clarity, uniformity, and brevity (if possible), and have a plan in place as to how you will communicate the new or updated policy to your employees. Being prepared for questions or feedback would also be a prudent measure.

4. *Establish a methodology for ongoing reviews, updates, and changes to your policy.*

Given the sheer volume of changes to the social and regulatory landscape just in the last few years, there is a strong likelihood that this landscape will continue to evolve in the near future. By establishing a process by which your organization can stay abreast of and respond to these changes, you will be in a stronger position of not having to make rushed amendments when the situation demands them. Outside expertise may prove invaluable to have on deck: employment attorneys and drug screening providers can provide insightful guidance and help you better manage change as it arises.

## **Step Three: Address Specific Issues**

After performing the first two steps, your organization may have come to the conclusion that it would be in your best interest to include provisions in your policy that address and/or accommodate medical or recreational marijuana users in your workforce, or that you want to create mechanisms to deal with the use and abuse of prescription drugs in the workplace. If so, then there are some best practice guidelines that can help maximize the effectiveness of your revised policy.

1. *Determine if your organization is comfortable creating a policy with exceptions.*

During the initial phases of your policy review, your organization may have concluded that widely accommodating medical marijuana users is inconsistent with the fundamental elements of your make-up. You may, however, be compelled to accommodate users in certain locations given the laws in those states. Since doing so could create inconsistencies in your policy (e.g., taking adverse action based on a positive drug test for marijuana in every location but Arizona), your organization should assess its own internal tolerance for managing these exceptions and communicating them to employees. Similarly, you may have determined that you do want to accommodate medical marijuana users, except for those in safety-sensitive positions. In this situation, exceptions would exist and your tolerance for these inconsistencies would need to be gauged.

2. *Ensure that your testing panel comprises the right drugs.*

If you have determined that you want to broadly accommodate medical or recreational marijuana users, it could be in your best interest to remove cannabis from your testing panel. This could potentially help alleviate the adjudication of MRO exemptions and make your testing program more cost-effective. Conversely, you may want to expand your post-accident or reasonable suspicion panels to include testing for commonly used or abused prescription medications. In either situation, you should work directly with your employment counsel to determine if this course of action reflects your best interests and complies with federal, state, and local laws.

3. *Establish how your organization will determine “proof” of a medical marijuana exemption.*

As discussed earlier, most MROs currently will not recognize a medical marijuana exemption and will instead transfer the liability of a hiring, retention, or disciplinary decision back to the employer. So if you outsource your drug screening process and utilize a third-party MRO, your organization may be unfamiliar with how to manage claims of legitimate medical use. Likewise, if you manage this process in-house, you may not be currently comfortable with processing medical marijuana exemption claims, given that there is no outright prescription from a physician. Therefore, your organization should consider possible options, like requesting a copy of a state-issued card from the individual or a letter from the recommending physician. Once again, engaging your employment counsel can help you better understand how to manage this process.

4. *Include specific language as to use, possession, or influence in the workplace or when performing employment duties.*

Those employers that do want to accommodate marijuana users typically draw the line when it comes to the drug’s direct effect on the workplace. As a result, many policies that accommodate recreational or medical marijuana use usually have provisions that employees are prohibited from possessing, using, or being under the influence of marijuana while at work—similar to many organizations’ approach to alcohol use by employees. Additionally, you may want to incorporate comparable language into your drug policy that addresses these issues for prescription medications.

#### **Step Four: Know Your Limitations and Challenges**

Any employer considering either accommodating marijuana users or addressing prescription drug misuse/abuse in its workplace drug policy should be aware of the challenges and limitations of doing so, which can help the organization address specific situations as they arise and not be blindsided by unforeseen circumstances.

1. *Determining “impairment” on the job or in the workplace can be very difficult for both marijuana and prescription drugs.*

As mentioned earlier, there is no easy, effective, and established way to determine on-the-job impairment for many drugs, including marijuana and prescription medications. Unlike alcohol impairment, which can be determined by a fairly easily administered breath-based test, it is much

more difficult to determine whether an individual is currently under the influence of a certain drug. A drug's presence in urine or hair, two common employment testing methodologies, does not necessarily mean the individual was impaired. Moreover, these methods may not offer much usable insight into the time of last use. For example, given the manner in which marijuana metabolizes in the human body, the time period could be as long as 30 days in the past. While saliva- and blood-based testing may have smaller testing windows and thereby indicate more recent use, a positive test does not necessarily mean the employee was impaired. Many states are currently grappling with this same issue, as they strive to keep public roads and waterways safe from operators under the influence, so there is some future potential for accepted baselines for marijuana impairment.

2. *For drugs that are recommended or prescribed by a physician, it can be hard to assess whether the drug is being misused or abused.*

One of the key challenges of medical marijuana recommendations is that there is no standard, established dosage for its various therapeutic uses. A physician could make a recommendation to a patient as to how much and how often the patient should consume the drug, but may have little to no visibility into whether the patient is using the drug as recommended. This makes the line between recommended medical and recreational use very difficult to determine. Likewise, an individual could have a legitimate prescription for a medicine, but could be abusing the drug by taking it more often or in higher dosages than prescribed by his or her doctor. Though the physician in this instance may have more insight into an abuse situation (e.g., the patient requests a refill much sooner than anticipated), individuals could indulge their addictions by illegally acquiring the drugs from other sources.

## Conclusion

Employers in the U.S. have embraced drug testing as part of their approach to combatting the dangerous effects of substance use and abuse in the workplace. These negative impacts can affect an organization both directly (higher medical costs, increased workers' compensation claims, workplace theft, etc.) and indirectly (higher turnover, greater absenteeism, reduced performance, etc.).<sup>13</sup> Additionally, drug use and abuse in the workplace can have devastating safety repercussions. For example, a study by the National Institute on Drug Abuse (NIDA) revealed that drug users were 3.6 times more likely to be involved in a workplace accident.<sup>14</sup> Given these impacts on economic performance and safety, the high rate of drug testing among U.S. employers comes as no surprise.

Yet, the legal and social landscape in which many employers originally developed their workplace drug policies is changing at a remarkably rapid rate. As organizations struggle to respond to this chaotic environment, many are concluding that there is no time like the present to engage in a review of these policies and better ensure that they are reflective of the organization's core values, long-term objectives, and overall culture, while remaining compliant with and responsive to the ever-evolving regulatory and cultural environment of drugs in the U.S. As organizations navigate this process, they can take advantage of both external expertise, in the form of employment attorneys and drug screening providers, as well as best practices exhibited by other organizations that have undertaken similar initiatives.

<sup>13</sup> US Department of Health and Human Services (USDHHS) Substance Abuse and Mental Health Services Administration (SAMHSA), Office of Applied Studies, "Worker Drug Use and Workplace Policies and Programs: Results from the 1994 & 1997 NHSDA. OAS Series A#11, DHHS Publication No. (SMA) 99-3352, Rockville, MD, 1999. Available at [www.samhsa.gov/data/NHSDA/A-11/TOC.htm](http://www.samhsa.gov/data/NHSDA/A-11/TOC.htm)

<sup>14</sup> Thomas E. Baker, Ph.D., *Strategic Planning for Workplace Drug Abuse Programs*, National Institute on Drug Abuse, 1987, p.4.

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Katie Goetzl is a shareholder in Littler Mendelson’s Washington, DC office. She regularly advises employers on substance abuse related issues and assists employers in drafting and implementing substance abuse prevention policies.

### **About Littler Mendelson**

With more than 950 attorneys, 55 locations, and a practice that extends into every area of workplace law, Littler Mendelson’s employment practice is the nation’s largest, and they regularly advise and defend many of the world’s leading corporations. Learn more at [www.littler.com](http://www.littler.com).

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HireRight is a leading provider of on-demand employment background checks, drug and health screening, and electronic Form I-9 and E-Verify solutions that help employers automate, manage and control background screening and related programs. Learn more at [www.hireright.com](http://www.hireright.com).

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