SMACNA Substance Testing Guidelines

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IMPLEMENTING AND ADMINISTERING AN EFFECTIVE SUBSTANCE TESTING POLICY IN A UNIONIZED WORKFORCE

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I. Introduction

Testing employees and applicants for the presence of drugs and/or alcohol is a complex issue, involving myriad, and often conflicting, state and federal laws. Specifically, the form drug/alcohol policies must take, how tests must be conducted, and when an employer is allowed to test employees may vary greatly depending on the circumstances of the test and the work the employee performs. The purpose of this document is to provide an outline for employers to follow when drafting, implementing, and administering drug and alcohol testing policies and employee substance abuse assistance programs, especially in the context of a workforce covered by a collective bargaining agreement.[1]

II. Drug and Alcohol Testing in General

A. Introduction: Overview of Drug and Alcohol Testing.

When and how an employer is allowed to subject an individual to drug or alcohol testing depends in part on the circumstances necessitating the test and what stage of employment to employee is in. Below is a summary of the different types of circumstances where drug and/or alcohol testing may be required:

1. Pre-Employment/Applicant Testing.

Pre-employment testing occurs before an applicant begins work. As discussed below, pre-employment testing may be limited by state law. For example, employers may only be able to test applicants who have received a conditional offer of employment, or may only be able to test applicants if the test is given to all employees who receive offers for a particular position. Some state laws mandate that job postings for jobs that require drug testing must indicate so on the posting itself.

2. Post-Accident Testing.

Post-accident drug testing occurs after an employee is involved in an accident. Post- accident drug testing is permissible under many state laws.[2]

[1] As noted at multiple points in this outline, drug and alcohol testing is heavily regulated by State and Local law. As a result, while this document can be used to provide a general overview regarding potential challenges and considerations regarding the implementation of drug and alcohol testing programs, legal counsel should be consulted regarding specific drug and alcohol testing policies to ensure compliance with all applicable laws.

[2] Although OSHA regulations prohibit an employer from retaliating against employees for reporting work-related injuries or illnesses, 29 C.F.R. § 1904.35(b)(1)(iv), recently issued guidance states that testing an employee to "evaluate the root cause of a workplace incident that harmed or could of harmed employees" is "permissible." *See* OSHA, Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 C.F.R. § 1904.35(b)(1)(iv) (Oct. 11, 2018) (available at: https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11).

3. Random Testing.

As discussed in more detail below, random testing of employees is subject to multiple requirements, both under state and federal law, and may be limited to certain types of employees, for example, those working in a **safety sensitive position**.

What constitutes a safety-sensitive position may vary from state-to-state, but generally a safety-sensitive position refers to a position where an employee could cause injury to themselves or others due to the nature of their job.

Other states impose certain requirements on how an employee is selected for random testing, for example, if a number must be selected through a random number generator to select the individuals tested. Some states, for example Rhode Island, completely prohibit random testing of employees not covered by a contrary federal regulation.

4. Reasonable Suspicion Testing.

Reasonable suspicion testing allows an employer to test employees if the employer has a "reasonable suspicion" that the employee is under the influence of drugs and/or alcohol.

There is no specific "formula" to establish a reasonable suspicion, but rather a reason suspicion that an employee is under the influence of drugs/alcohol should be based on the totality of the circumstances. Factors which can lead to a reasonable suspicion include, but are not limited to:

- Smelling of alcohol or marijuana;
- Displaying physical signs or symptoms customarily associated with alcohol or drug use (e.g. glassy eyes, slurred speech);
- Displaying violent or unusually confrontational or argumentative behavior;
- Showing a major personality change;
- A change in the employee's usual job performance; and/or
- Disregarding safe operating procedures of equipment/machines or placing another person's safety in jeopardy by intentional or unintentional actions.

5. Return-To-Duty Testing.

Certain states allow an employee to be tested after they have previously tested positive for drugs/alcohol, but before the employee is allowed to return to duty. Testing may be additionally mandated pursuant to state law in the event an employee has previously completed a rehabilitation or treatment program following a prior positive test result.

6. Customer/Jobsite Required Testing.

Certain customers and/or jobsites may require that all employees assigned to said jobsite pass a drug and/or alcohol test before being allowed to work, including employees of contractors who receive contracts for work on those sites.

For certain jobsites, federal regulations **require** that all workers undergo drug and/or alcohol testing prior to being authorized to access the site. For example, certain U.S. Department of Energy contracts require contractors to subject certain classes of employees to drug testing. *See* 10 C.F.R. § 707 *et seq.* The Department of Defense and the Nuclear Regulatory Commission have similar requirements.

One potential conflict which could arise under state laws could occur if customers impose their own requirement, separate from a law or regulation, that a contractor's employees be tested subject to working on a contract. In the event that a customer requires job-site drug/alcohol testing, and this testing is not mandated by any state or federal regulation, local counsel should be consulted if relevant state law places any restriction on when testing can occur. *See infra* at Section IV.

III. Federal Law – Mandatory Testing

Under certain circumstances, drug and alcohol testing, as well as other actions related to potential employee substance abuse, may be required by federal law.

A. Department of Transportation Regulations.

The U.S. Department of Transportation ("DOT") **requires** drug and alcohol testing of employees in various transportation industries, including industries regulated by the Federal Aviation, Railroad, Transportation, and Highway Administrations ("FHWA"). The DOT regulations cover a number of employees **outside** of the trucking industry, including any individual who operates a commercial motor vehicle as part of their position, both interstate and intrastate, holding a commercial driver's license. 49 C.F.R. § 382.103(a).

Given the fact that DOT regulations impose specific requirements governing these types of tests, the general best practice is for employers to implement a separate DOT-compliant drug testing policy for employees working in positions covered by the regulations.

1. DOT-Drug Testing - General Overview.

DOT regulations **require** covered employers to conduct the following types of tests of employees covered by the DOT regulations:

- **Pre-employment testing**. 49 C.F.R. § 382.301. This includes testing an employee prior to the first time they perform a covered duty, for example, if an employee transfers into a different position.
- **Post-accident testing.** 49 C.F.R. § 382.303. Following an accident, covered employees must be tested "as soon as practicable."
- **Random testing.** 49 C.F.R. § 382.305. Employers must conduct random alcohol testing of at least 10 percent of its covered employees annually, and conduct drug testing on at least 25 percent of covered positions.
- **Reasonable Suspicion.** 49 C.F.R. § 382.307. Employers must conduct testing when the employer has a reasonable suspicion the employee has violated the employer's prohibition on drug and alcohol use/intoxication during work.
- **Return-to-Duty.** 49 C.F.R. § 382.309.
- **Follow-Up Testing.** 49 C.F.R. § 382.31.

Notably, DOT regulations expressly preempt State or local law. 49 C.F.R. § 382.109.

A covered employee must be notified, either verbally or in writing, that alcohol or drug testing is required by DOT regulations prior to the administration of a test. 49 C.F.R. § 382.113.

a. DOT-Covered Alcohol Testing.

DOT-covered employees are prohibited from working under the influence or impaired by alcohol, denied as having a blood alcohol concentration of .04 or greater. 49 C.F.R. § 382.201. Employees are further prohibited from using alcohol within four hours before reporting for work. 49 C.F.R. § 382.207.

Alcohol tests may only be conducted using breath and saliva testing methods.

b. DOT-Covered Drug Testing.

DOT drug tests are conducted only using urine specimens, and only check for the following drugs/drug metabolites:

- Marijuana/THC
- Cocaine
- Amphetamines
- Opiates
- Phencyclidine (PCP)

See 49 C.F.R. § 40.85.

B. Federal Drug-Free Workplace Act.

1. Current Legal Status of the Federal Drug-Free Workplace Act.

The legal status of the Federal Drug-Free Workplace Act is currently unclear. The statute implementing the Federal Drug-Free Workplace Act, 41 U.S.C. § 8101 remains in effect as of December 21, 2018. However, the United States Department of Labor's website notes that "[t]he Department of Labor ended the drug-free workplace program in 2010." Despite this, courts have noted as recently as August 2017 that "a federal government contractor required to comply with the Drug-Free Workplace Act." *See Carlson v. Charter Communs., LLC*, 2017 U.S. Dist. LEXIS 128019 (D. Mont. 2017).

Accordingly, it is currently unclear both 1) whether the Drug-Free Workplace Act remains in effect, and 2) which federal agency, if any, is currently tasked with administering the program. Given the fact that the requirements of the Drug-Free Workplace Act, discussed below, are minimal, and that said requirements only apply to federal contracts valued at $100,000 or more, the best practice for contractors is to comply with the requirements of the Federal Drug-Free Workplace Act, even if the Act's current legal status is unclear.

2. Federal Drug-Free Workplace Requirements.

The Federal Drug-Free Workplace Act does **not** require drug or alcohol testing, but **does** require contractors who receive a federal contract of $100,000 of more to implement a drug-free workplace policy. The Act similarly does not prohibit organizations from doing more than strictly required as part of its efforts to maintain a drug-free workplace.

Employers that have federal government contracts or grants must take steps to eliminate the effects of illegal drugs in the workplace. The required steps are as follows:

1. Publishing and giving a policy statement to all covered employees informing them that the manufacture, distribution, dispersion, possession or use of a controlled substance is prohibited, and that disciplinary action will be taken against employees who violate the policy.

2. Establish a drug-free awareness program informing employees of:
    a. The dangers of drug abuse in the workplace
    b. The policy of maintaining a drug-free workplace
    c. Any available drug counseling, rehabilitation, and employee assistance programs; and
    d. The penalties that may be employees upon employees for drug abuse violations.

3. Notify employees that as a condition of employment on a Federal contract or grant, the employee must abide by the contract and notify the employer within five calendar days if he or she is convicted of a criminal drug violation in the workplace.

4. The contractor or grantee must notify the contracting or granting agency within 10 days after receiving notice that a covered employee has been convicted of a criminal drug violation in the workplace.

5. Impose a penalty on-or require satisfactory participation in a drug abuse assistance or rehabilitation program by – any employee who is convicted of a reportable workplace drug conviction.

6. Make an ongoing, good faith effort to maintain a drug-free workplace by meeting the requirements of the Act.

IV. State Law Drug Testing Requirements

Testing policies and practices not mandated by the Federal Regulations are left up to regulation by individual states. In fact, the majority of states have enacted drug and alcohol statutes. Unlike the above Federal Regulations, while states often encourage the testing of employees, testing is generally not mandatory. Some states however, for example, Georgia, require drug testing of employees before their employer receives a state contract or grant.[3]

While the majority of states allow most types of drug testing, some limit or prohibit specific types of testing, for example, random testing. The vast majority of states with drug testing statutes require some protections for employees to protect their privacy/the confidentiality of results. Many states additionally impose requirements to ensure the reliability and accuracy of test results, for example, by requiring that tests be conducted at certified laboratories, that strict chain of custody procedures are followed, or that a confirmatory retest of an initial positive result is required before any adverse action be taken before an employer can take adverse action based on the results of the test.

The majority of state drug testing laws also require that an employee be given the opportunity to contest or explain a positive test result before adverse employment action is taken. Some states additionally require that testing be conducted only pursuant to a written policy, and that employees be given notice of said policy before it goes into effect.

Complying with state-specific drug and or alcohol testing requirements can pose a challenge for employers wishing to implement a drug and/or alcohol testing policy. As a result, local counsel

[3] States that place additional requirements on contractors receiving certain state contracts or grants are discussed further in the attached State Law summary table.

should be consulted prior to implementing a drug testing policy to ensure that it complies with relevant state law. For employers working in multiple states, the implementation of multiple policies to cover each states law may be prudent.

Additionally, many states indirectly restrict drug testing by tying compliance with certain restrictions or drug testing program requirements with receiving discounts on the employer's workers' compensation premiums. For example, Washington does not place restrictions on the drug testing of applicants by private employers. However, in order to qualify for a discount on the employers workers' compensation premium payments, applicants can only be tested with advance written notice.

For reference, attached to this outline is a table highlighting the general requirements of each state's drug testing law, including a listing of what types of testing are, and are not, permissible. While this table provides an overview regarding the most salient aspects of each state's drug testing requirements, local counsel should be consulted when drafting drug/alcohol testing policies to ensure compliance with relevant state law, especially in situations where it is noted that restrictions/prerequisites are placed on testing.

V. Marijuana and Drug Testing

The inconsistent legality of marijuana, both for recreational and medical use, creates a number of issues that should be considered regarding the legality of drug testing, and may, in certain circumstances, place limitations on the ability of an employer to terminate or otherwise take adverse action against an employee who tests positive for marijuana.

The legality of using marijuana, both recreationally and for medicinal purposes currently varies greatly from state to state, with some states allowing individuals to obtain marijuana for medicinal reasons, with others allowing for the purchase and recreational use of marijuana.

Whether or not an employee can be terminated or not hired for testing positive for marijuana will ultimately depend on a number of factors, including the employee's job duties, whether they are covered by Federal Regulations, relevant state law, and whether the marijuana was obtained for recreational or medicinal use.

A. Marijuana Under Federal Law.

Despite multiple states legalizing marijuana for recreational and/or medical use, marijuana remains illegal under federal law. Specifically, the Controlled Substances Act, 21 U.S.C. § 811 classifies marijuana as a Schedule 1 drug, meaning that the federal government views marijuana as highly addictive and having no medical value.

As a result of marijuana's status as a controlled substance, for tests covered or mandated by federal law, marijuana use is impermissible, even if the marijuana was medically prescribed. For example, for DOT-required drug tests, the U.S. Department of Transportation has taken the

position that medical marijuana does **not** constitute a valid medical explanation for a covered employee's positive drug test result. *See* 49 CFR § 40.151(e). Accordingly, for drug tests mandated by DOT regulations, medical marijuana does **not** constitute a valid explanation for the positive test result.

B. Medical Marijuana Under State Law.

The majority of states with medical marijuana programs do not provide any additional protections for medical marijuana program participants, and those individuals may be terminated for testing positive for marijuana, even if it was legally prescribed.

Applicable state law may have an impact regarding an employer's ability to take adverse employment action against an employee on the basis of that employee testing positive for marijuana that they obtained through participation in a medical marijuana program. An overview of state specific medical marijuana protections in included in the attached state law summary table.

A number of states have enacted laws, or included provisions in their state medical marijuana laws, providing some employment protection for medical marijuana users. For example, Arizona, Delaware, Minnesota, and New York have passed laws stating that an employer may not discriminate against a medical marijuana user based on a positive drug test for marijuana, unless it can be shown that the employee used, possessed, or was **impaired by**, medical marijuana while at work. Similarly, the Maine Department of Labor has taken the position that an employee may be terminated for the use of medical marijuana in the workplace, but that a drug test alone is insufficient to show than an employee is under the influence. Arkansas is an outlier, as its medical marijuana law prohibits adverse employment action against an employee due to that employee's possession of less than 2 ½ ounces of medical marijuana, although employers do not need to accommodate the "ingestion" of medical marijuana or working under the influence of the same.

Other states, for example, Illinois, only provide that an employee may not be discriminated against on the basis of their status as a medical marijuana patient, but expressly say that an employee may be terminated for testing positive for marijuana, even if the marijuana was medically prescribed. *See also Noffsinger v. SSC Niantic Operating Co. LLC,* 273 F. Supp. 3d 326 (D. Conn. 2017) (holding that Connecticut's medical marijuana law protects job applicants from being refused for hire due to their status as a medical marijuana user); *Ross v. RagingWire Telecommunications, Inc.*, 42 Cal 4th 920 (Cal. 2008) (noting that employers need not accommodate an employee's medical marijuana use).

C. Recreational Marijuana Under State Law.

Currently, marijuana has been legalized for recreational use in ten states, specifically Alaska, California, Colorado, Massachusetts, Maine, Michigan, Nevada, Oregon, Washington, and

Vermont, as well as in the District of Colombia. For recreational marijuana in states where it is legal, the leading position is that an employer is able to terminate an employee who tests positive for marijuana even if the recreational use of marijuana is permitted by state law. *See Coats v. Dish Network, LLC*, 350 P.3d 849 (Co. 2015) (holding that employee could be terminated for legal marijuana use, despite the fact that a state law prohibited discharging an employee based on his engagement in "lawful activities").

To date, no state has passed a law protecting employees from adverse employment action for legally using recreational marijuana while off-duty, and no court has held that an employee cannot be fired due to their use of recreational marijuana. However, it's important to note that as more states legalize recreational marijuana; this may change in the future, especially if marijuana is ever decriminalized at the federal level.

VI. Substance Abuse Testing Considerations Under the ADA

Under certain circumstances, an employer's ability to test employees for drugs/alcohol or take adverse employment action against an employee may be limited by the Americans with Disabilities Act (ADA).[4]

The ADA makes it illegal for employers with fifteen or more employees to discriminate against an individual "on the basis of a disability." *See* 42 U.S.C. § 12112(a). Under certain circumstances, drug and alcohol use may qualify as an ADA-covered disability. The ADA additionally places limitations on when an employer may make "disability related inquiries" or require employees to undergo "medical examinations." These limitations impact an employer's ability to inquire into an employee or applicant's prior or current drug/alcohol use, or ability to subject an individual to drug/alcohol testing.

A. Employee Substance Abuse Under the ADA.

The ADA prohibits discrimination against persons with disabilities, persons who have a record of having had a disability, or persons who are regarded as having a disability. *See* 42 U.S.C. § 12102(1).

1. Drug Use as a "Disability."

The ADA expressly excludes current users of illegal drugs from the definition of an individual with a disability. *See* 42 U.S.C. § 12210(a). Similarly, employees who engage in misconduct caused by drug use are not protected by the ADA. *See Lopez v. Pac. Mar. Ass'n*, 657 F.3d 762 (9th Cir. 2011) (holding that refusing to rehire workers who lost their jobs due to drug-related misconduct did not violate the ADA).

[4] Many states additionally have their own State Human Rights Acts that impose similar restrictions.

a. On one hand, the EEOC has taken the position that casual drug use does not constitute a disability. On the other hand, Courts have held that "one strike" rules regarding drug use are not discriminatory because they constitute adverse employment action based on drug use, rather than addiction, and as noted above current drug users are not protected under the ADA, even if they are addicts. *See Lopez v. Pac. Mar. Ass'n*, 657 F.3d 762, 764 (9th Cir. 2011).

b. However, **recovering** drug addicts, who no longer use drugs and are either receiving treatment for drug addiction or who have been rehabilitated **successfully** are protected under the ADA. *See* 42 U.S.C. § 12210(b).

Courts have held, however, that simply enrolling in a rehabilitation program is not sufficient to render an employee a "former" user, they must successfully have completed a program. *See Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1188 (9th Cir. 2001).

Whether or not an individual is a current or former drug user is a case-by-case analysis to determine whether a "sufficient period of time" has passed to "justify a reasonable belief that drug use is no longer a problem." *Mauerhan v. Wagner Corp.*, 649 F.3d 1180, 1188 (10th Cir. 2011). Stated differently, an employer does not violate the ADA by discharging employees for drug-related misconduct when the drug usage occurred recently enough to indicate that the individual is **actively** engaged in such conduct. *See Collings v. Longview Fibre Co.*, 63 F.3d 828 (9th Cir. 1995).

2. Use of Prescription Medication.

Employee **prescription** drug use raises a number of different concerns. Subject to a few exceptions described below, employees are generally entitled to use prescription drugs that were legally prescribed to them, so long as such use is in the manner/dosage prescribed.

Although employees are allowed to take legally prescribed drugs in a manner consistent with their prescription, courts have found that employers may test for, and prohibit, an employee's use of medications/prescription drugs not prescribed to them. *Bates v. Dura Auto. Sys., Inc.*, 767 F.3d 566, 575 (6th Cir. 2014). However, in order to test an employee for prescription drug use, or to inquire as to whether an employee is taking any prescription drugs, such an inquiry/test must be job-related and consistent with business necessity, a concept discussed in further detail below.

On the other hand, other Courts have held that a drug-free workplace policy that prohibited the "abuse of prescription drugs which includes exceeding the recommended prescribed dosage" and a "failure to advise a supervisor or manager of the use of a prescription or over-the-counter drug which may alter the employee's ability to perform the essential function of his or her job" was compliant under the ADA. *Meyer v. Qualex, Inc.*, 388 F. Supp. 2d 630, 636 (E.D.N.C. 2005).

For employees working in safety-sensitive positions, employers are able to prohibit the use of prescription medications if the use, or side effects, of the medications creates a direct threat of harm to the employee or to others. *See Williams v. FedEx Corp. Servs.*, 849 F.3d 889, 901 (10th Cir. 2017) (noting that inquiries regarding an employee's use of prescription drugs are impermissible when made to determine if an employee was disabled, but permissible for a legitimate business purpose).

3. Alcoholism and the ADA.

Alcoholism is a protected disability under the ADA. *See Alexander v. Washington Metro. Area Transit Auth.*, 826 F.3d 544, 548 (D.C. Cir. 2016). However, the ADA permits employers to discipline an employee having performance problems **because of** alcoholism in the same way an employer would discipline any other employee. *See Ames v. Home Depot U.S.A., Inc.*, 629 F.3d 665 (7th Cir. 2011) (noting that employer did not have to accommodate an employee's alcoholism by overlooking workplace rule violations). For example, Courts have held that an employer can terminate an alcoholic employee whose alcoholism caused them to miss numerous work days. *See Nanos v. City of Stamford*, 609 F.Supp.2d 260 (D. Conn. 2009). The key distinction here is that an employee cannot be disciplined or terminated because they are an alcoholic, but they **can** be terminated or disciplined as a result of misconduct **caused by** their alcoholism. *See EEOC v. Walgreen Co.*, 34 F. Supp. 3d 1049 (N.D. Cal. 2014) (noting that the ADA "does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability.")

However, an employer cannot apply policies more strictly towards an alcoholic employee than they do towards other employees. For example, Courts have held that when an employer has allowed non-alcoholic employees to violate a work rule prohibiting drinking on the job, but fired an alcoholic employee for their first violation of the same policy, violated the ADA. *See Flynn v. Raytheon Co.*, 868 F. Supp. 383 (D. Mass 1994).

4. Medical Marijuana and the ADA.

Courts have held that the ADA does **not** protect medical marijuana users who claim to face discrimination on the basis of their marijuana use. *See James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012). However, some states have passed laws that provide employment protections for employee medical marijuana use.[5]

[5] The attached state law summary table provides guidance as to which states provide employment protections for medical marijuana users.

B. Drug/Alcohol Testing Under the ADA.

1. Drug/Alcohol Testing as Medical Examinations.

In addition to the limitations discussed above regarding an employer's ability to take adverse employment action against an employee for disabilities arising out of or relating to drug/alcohol use, the ADA places certain restrictions over when an employer can require an employee to submit for a **medical examination**, or otherwise make inquiries regarding an employee's potential disability, which, as discussed above, may include alcoholism or a former addiction to drugs.

a. Drug screens for illegal drugs are not medical examinations. A drug screen for illegal drugs is not considered a physical examination under the ADA, and therefore an employer may request such an exam at any time, subject to state law as described above. Hiring halls may conduct drug screens prior to referring members.

b. Drug screens for legally prescribed drugs are medical examinations. On the other hand, a drug screen testing for legally prescribed drugs is likely a medical examination, as it seeks information related to a potential disability.

c. Alcohol screens are medical examinations. An alcohol screen **is** considered to be a physical examination under the ADA, and therefore can only be required if such a test is allowed under the ADA, as described below.

2. Drug/Alcohol Use and Disability Related Inquiries.

The ADA additionally regulates when an employer can make **disability related inquiries**, which may include inquiries regarding an employee's use of alcohol/drugs, both prescription and illegal**.**

A disability related inquiry is a question that is likely to elicit information about a disability. Disability related inquiries are not limited to asking an employee a pointed question such as "are you disabled," but can also include questions such as "do you drink regularly," as such a question would likely illicit information regarding a potential disability (alcoholism).

The EEOC has taken the position that asking an employee if they are taking any prescription drugs or medications is a disability related inquiry. Courts have echoed this position. *Roe v. Cheyenne Mountain Conference Resort*, 920 F. Supp. 1153, 1154 (D. Colo. 1996). Similarly, asking an employee about a past addiction to illegal drugs or past participation in a rehabilitation program is also disability-related inquiry. 29 C.F.R. § 1630.3(b)(1). However, the EEOC has also

taken the position that asking an employee about the current use of illegal drugs is **not** a disability-related inquiry.

Finally, employers may ask questions regarding prescription drug/alcohol use when doing so is related to eliminating a direct threat of harm to themselves or others, for example, if an employee works in a safety sensitive position. *See* Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA). *See also, Williams v. FedEx Corp. Servs.*, 849 F.3d 889, 901 (10th Cir. 2017) (noting that inquiries regarding an employee's use of prescription drugs are impermissible when made to determine if an employee was disabled, but permissible for a legitimate business purpose).

3. Permissibility of Medical Examinations/Disability Related Inquiries.

Whether or not a medical examination or a disability related inquiry is permissible depends in part upon what stage of the employment relationship the parties are in:

Pre-Offer	Prior to receiving an offer of employment, the ADA prohibits **all** disability-related inquiries and medical examinations, even if they are related to the job. 42 U.S.C. § 12112(c)(B).
Post-Offer	After an employee has received a conditional job offer, but before starting work, an employee may be required to respond to disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, if the same requirement is placed upon all employees in the same job category.[6]
Current Employees	Disability-related inquiries and medical examinations are only permissible if they are job-related and consistent with business necessity.[7]

The EEOC has taken the position that alcohol testing of current employees is only permissible if the employer has "a reasonable belief that an employee may be under the influence of alcohol at work." *See* EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA). Courts have echoed this position. *See, e.g., Blazek v. City of Lakewood*, 576 F. App'x 512, 513 (6th Cir. 2014).

[6] For example, an employer does not need to test every new employee, but may test all entering field workers who have received a conditional offer of employment while not testing managerial/supervisory employees who have received a conditional offer of employment.

[7] The EEOC has stated that a disability-related inquiry or medical examination is job-related and consistent with business necessity when the employer has "a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired . . . or (2) an employee will pose a direct threat." *See* EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (1997).

VII. Drug/Alcohol Testing and Just Cause

In a unionized environment, even if an employee fails a drug and or alcohol test, there may still be additional issues surrounding any resulting discipline or termination, specifically related to whether the employer has just cause under the relevant CBA to discipline/terminate the employee.

Drug and alcohol policies prohibiting the use, possession, and sale of alcohol and drugs on the employer's premises have been "universally accepted as reasonable." Norman Brand and Melissa H. Biren, *Discipline and Discharge in Arbitration* 6-7 (BNA Books 3rd ed. 2015).

However, arbitrators generally require substantial evidence showing that the employee violated the drug/alcohol policy in order to justify discipline. *See, e.g.*, *City of Portland*, 123 BNA LA 1444 (Gaba, 2007) (upholding termination where employee was found to have drugs in his personal vehicle in the company parking lot); *Exxon Pipeline Co.*, 109 BNA LA 951 (Abercrombie, 1997) (just cause found based on positive test for alcohol without consideration of mitigating circumstances because of nature of company's business and danger to public); *Willow Run Cmty. Sch.*, 112 BNA LA 115 (Brodsky, 1999) (positive marijuana test provided just cause for termination even though no evidence that employee used drugs at work or was impaired). Generally, this requires either testimony of direct observation that the employee has violated a drug/alcohol policy, or the results of a positive drug/alcohol test.

It is important to note that arbitrators tend to give great deference to expert testimony regarding the interpretation of drug test results, in both upholding and overturning any resulting discipline. *Compare Rothe Development, Inc.*, 106 BNA LA 97 (Baroni, 1996) (upholding termination in part based on medical review officer's testimony that the grievant was "under the influence" of marijuana), *with Fitzpatrick Co.*, 108 BNA LA 686 (Briggs, 1997) (refusing to sustain discipline based on a confirmed reading of a cocaine metabolite, when expert testified that this provided no clue as to when the drug was ingested), *and Indep. Sch. Dist. No. 2154*, 110 BNA LA 353 (Duly, 1998) (reversing discipline when expert testified that positive drug test for unspecified amount of marijuana "particulates" did not prove the grievant was impaired while at work).

A. Potential Just Cause Factors Concerning Drug/Alcohol Testing.

In determining whether an employer has sufficient just cause to terminate an employee for violating an employer's drug and alcohol policy, arbitrators consider a number of factors, including the following:

- Whether the policy specifically says that termination may result for a violation of the policy. *See County of Wayne, Mich.*, 118 BNA LA 417 (Brodsku, 2003).
- Whether the policy specifically says that termination **will** result for a violation, i.e. a "No Strike" policy. *See BASF Catalysts, LLC*, 130 BNA LA 1124 (Hoffman, 2012) (overturning discharge in part because policy did not call for mandatory termination).

- Whether the policy has been strictly and consistently enforced. *New York Univ.*, 121 BNA LA 522 (Gregory, 2005).
- Whether the employer can show if the employee used or was actually under the influence at work. *Wheatland Tube Co.*, 119 BNA LA 897 (Franckiewicz, 2004) (discharge reversed where employee failed drug test on day off, inasmuch as he did not report to work under influence); *Pacific Bell*, 87 BNA LA 313 (Schubert, 1986) (discharge for off-duty, off-premises drug usage lacks "just cause").
- The type of drug used. Arbitrators have also considered the type of drug the employee was found to have used, upholding discipline for "harder" drugs as opposed to marijuana. *See Sacramento Sch. Dist.*, 125 BNA LA 483 (Staudohar, 2008) (upholding termination based on the "common knowledge that methamphetamine is a harder, addictive, and more dangerous drug than marijuana.")
- Whether the employee was previously given an opportunity to rehabilitate has been considered a relevant factor. *Tosco Ref. Co.*, 112 BNA LA 306 (Bogue, 1999).

B. Other Considerations Regarding Just Cause and Drug/Alcohol Testing.

Any potential procedural irregularities may also have affect whether an arbitrator will find that just cause exists. For example, in *Mail Contractors of America*, 122 BNA LA 649 (Hoffman, 2006), an employee's termination for failing a drug test was overturned when a non-DOT compliant test was use, when the CBA stated that all tests would be done in accordance with DOT regulations. *See also Eagle Energy*, 110 BNA LA 257 (Feldman, 1998) (overturning discipline where employer failed to follow reasonable chain of custody procedures.)

Other arbitrators have held that even when an employee fails a properly administered drug test, there may not exist sufficient just cause to immediately terminate, as opposed to imposing a lesser level of discipline, when the policy did not say that termination was guaranteed for violating the policy. *See U.S. Smokeless Tobacco Mfg. LP*, 120 BNA LA 1587, 1598 (Kossoff, 2005) (overturning termination when the relevant CBA did not list a first violation under the company's drug and alcohol policy as a terminable offense).

At times, unions will challenge whether or not the employer had a sufficient reasonable suspicion to require the drug test to begin with, to varying success. *Compare McLaren Reg'l Med. Ctr.*, 120 BNA LA 1579 (Daniel, 2004) (overturning termination when employer did not have sufficient reasonable suspicion to conduct a test under the terms of the CBA) *with, Packaging Corp. of Am.*, 120 BNA LA 634 (Sugerman, 2004) (upholding discipline for failing an alcohol test when employer established that the employer had a sufficient reasonable suspicion to require the test).

Some arbitrators have held that if an employee can show that their drug use was unintentional or inadvertent, then there may be no just cause to terminate. *See Washington County*, 124 BNA LA

1317 (Donovan, 2007) (reinstating employee with backpay after employee ate a brownie which they did not know contained marijuana at the time it was ingested).

Finally, several arbitration decisions have upheld the termination of employees who refuse to submit for drug testing. *Lorillard Tobacco Co.*, 125 BNA LA 1390 (Nolan, 2008); *Kellogg Co.*, 124 BNA LA 1674 (Smith, 2008); *Battle Creek Health Sys.*, 121 BNA LA 1640 (Poindexter, 2005).

VIII. Collective Bargaining and Drug and Alcohol Testing

The implementation of a drug and alcohol testing program may additionally trigger an employer's statutory duty to bargain with the union representing its employees under the National Labor Relations Act.

A. Drug and Alcohol Testing of Employees – Mandatory Subject of Bargaining.

Drug and alcohol testing practices for individuals currently employed by a contractor are mandatory subjects of bargaining under the National Labor Relations Act. *See Johnson-Bateman Co.*, 295 NLRB 180, 182 (1989).

Accordingly, contractors and employers cannot unilaterally implement a drug and alcohol testing policy involving workers represented by a Union or under a Collective Bargaining Agreement.

The NLRB has additionally held that **changing** a drug and alcohol testing policy without providing the union with notice and an opportunity to bargain is an unfair labor practice. *See Union-Tribune Pub. Co.*, 353 NLRB 11 (2008).

B. Drug and Alcohol Testing of Applicants – Permissive Subject of Bargaining.

The general rule is that policies concerning the drug testing of applicants for employment do not affect employees' terms and conditions of employment and therefore drug testing of a job application is not subject to mandatory bargaining. *See Star Tribune and Newspaper Guild of the Twin Cities*, 295 NLRB 543, 545 (1989).

C. Hiring Hall Considerations – Mandatory/Permissive Subject of Bargaining.

If an employer receives employees <u>exclusively</u> through a Union hiring hall, then the drug/alcohol testing of applicants sent from the hall is a mandatory subject of bargaining. *See Construction and General Laborers, Local 563*, FMCS Case No. 130919-59150-3 (Daly, 2014). This includes hiring hall agreements where an employer is obligated to receive a certain percentage of its workforce from the hall. *Carpenters Local 17*, 312 NLRB 82, 84 (1993).

If an employer does not receive a portion of its workforce exclusively through a hiring hall, subjecting the applicants to drug and/or alcohol testing is a permissive subject of bargaining. *See Hotel Ramada of Nevada*, 2001 NLRB LEXIS 958, *17 (2001) (ALJ decision).

D. Employee Assistance Program – Mandatory Subject of Bargaining.

Although the NLRB has never addressed this issue directly, any implementation or change to an Employee Assistance Program is likely a mandatory subject of bargaining, as it affects a change to terms and conditions of bargaining unit members' working conditions. *See also Def. Logistics Agency*, 39 FLRA 999 (1991) (holding that changes to an agency's employee assistance program was a mandatory subject of bargaining under the Federal Service Labor-Management Relations Statute).

E. The Applicability of State and Federal Law to Collectively Bargained Substance Abuse Programs.

Notably, drug/alcohol testing policies negotiated between an employer and a union must generally comply with any applicable requirements imposed by state or federal law. In other words, an employer and a union cannot bargain away statutory requirements for testing, or bargaining away instances where testing would otherwise be mandatory. *See, e.g.*, *Williams v. National Football League*, 582 F.3d 863 (8th Cir. 2009) (holding that state law drug testing requirements superseded contrary provisions in the relevant CBA).

However, state law may expressly contradict the above general rule. For example, Arizona's drug and alcohol testing statute expressly notes that an employer and a union may bargain drug/alcohol testing policies that do not confirm with relevant state law requirements and still be "in compliance" with the statute. *See* Ariz. Rev. Stat. § 23-493.10.

IX. How to Talk to an Employee Who You Suspect Has a Substance Abuse Problem

One of the goals of having a substance abuse policy that is administered by a third party is that the employer is taken out of the equation, and does not need to communicate directly with the employee who is suspected of being chemically dependent. Therefore, if an employer tests an employee under a substance abuse policy, the third party administrator should communicate with the employee.

However, there are times when an employer may have to address issues related to drug/alcohol use and abuse directly with an employee. Talking to an employee without the assistance of EAP may come up if, for example, you were to see declining job performance accompanied by signs of a hangover, but there were not enough signs to request a test as it does not appear that the employee was intoxicated while at work. In this case, the third party administrator would not be involved.

The following are some general best practices regarding communicating directly with an employee who you suspect has a substance abuse problem.

1. When you suspect an employee of having a problem at work due to substance abuse, talk with the employee to discuss the inadequate work performance. You may explain to the

employee specific behaviors you have seen which cause you to be concerned that there may be a problem with substance abuse.

Do not tell the employee you believe the employee is an alcoholic, has a drinking problem, or has problems with drugs. **Address the behavior.**

Telling an employee that you believe they are an alcoholic may open up the company to liability under the ADA, on the basis that the employer believes that the employee has a disability.

2. Suggest to the employee that they consider talking to EAP which could help the employee with the work-related problems.

3. Since you cannot force an employee into treatment or rehabilitations for a substance or alcohol problem, if the employee declines your offer of assistance, clearly explain the potential consequences should the employee's actions continue in the future.

   NOTE: An offer to undergo treatment or to be terminated is not an accommodation where employer makes no attempt to confirm employee is an alcoholic. *Miners v. Cargill Communications, Inc.* 113 F.3d 820 (8th Cir. 1997). Practically, this means that an employer should not send an employee to treatment without first knowing whether the employee is chemically dependent.

4. If the employee chooses to talk to EAP and is referred to treatment, the employee may be given a leave of absence as a reasonable accommodation under the ADA.

   Under the ADA a leave of absence to obtain medical treatment for alcoholism is a reasonable accommodation. *Van Ever v. New York State Dept. of Corrections at Sing Sing*, 2000 WL 1727713 (S.D.N.Y. 2000); *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991 (D. Or. 1994). Indeed, some courts have suggested that the **only** accommodation required for an addict is "that such an employee be given unpaid time off to participate in a treatment program." *Klaper v. Cypress Hills Cemetery*, 2014 U.S. Dist. LEXIS 46470, *10 (E.D.N.Y. 2014).

X. Miscellaneous Legal Issues Relating to Drug/Alcohol Testing

A. FMLA Implications.

FMLA regulations hold that substance abuse may be a serious health condition for which employees are entitled to take FMLA covered leave. 29 C.F.R. § 825.119. However, the same regulations note that attempting to obtain treatment for substance abuse does not prevent an employer from taking employment action against an employee. *Id.*

The FMLA applies to employers with at least 50 employees. Employees who work at least 1,125 hours during the preceding 12-month period are entitled to up to 12 workweeks of leave. Employers with fewer than 50 employees may be covered by equivalent state laws.

1. If the employee returns to work following FMLA leave related to substance abuse, and relapses, consider whether you have an obligation to offer another chance as treatment. If not, the employer may issue discipline for the work problems.

2. Also consider whether you need a written return to work agreement which outlines the employee's responsibilities to stay substance free, comply with any treatment program, and outlines the consequences (usually termination) if the employee fails to comply with the agreement (also known as a "Last Chance Agreement").

B. Employee Assistance Programs.

Drug and alcohol testing, rehabilitation and the ADA are issues which must be addressed when administering an effective substance abuse policy.

1. An employer may condition an employee's return to work or continued employment on an EAP assessment, and even on successful completion of a substance abuse program if it is determined that the employee is chemically dependent. *Keith v. Ashland, Inc*., 205 F.3d 1340 (6th Cir. 2000); *Aubrey v. City of Bethlehem*, 2011 U.S. Dist. LEXIS 18406 (E.D. Penn. 2011).

2. An employer may require an employee to prove that he is fit for duty and does not pose a direct threat to the health or safety of himself or others. *Keith*, 205 F.3d 1340.

C. Other State Law Considerations.

Other state laws may regulate how substance abuse testing is accomplished, or the effect a positive drug/alcohol test has on employee rights. As a result, it is imperative that local counsel be consulted when implementing a drug/alcohol testing policy in order to fully understand any potential intersection with relevant state law.

1. Workers' Compensation/Unemployment Benefits.

An employee who is terminated as a result of a failed drug/alcohol test may forfeit any right to workers compensation benefits. For example, Florida's law on drug and alcohol testing provides that an employee who tests positive for drugs and/or alcohol while at work may be terminated and be denied eligibility for workers' compensation benefits if the injury is caused by the use of alcohol and/or drugs. *Brinson v. Hosp. Housekeeping Servs., LLC*, 2018 Fla. App. LEXIS 8898 (Fla. Ct. App. 2018).

Similarly, Louisiana law provides that employees lose the right to unemployment benefits. *See* La. Rev. Stat. § 23:1601(10)(a).

2. Confidentiality.

Some states regulate EAP programs in addition to substance abuse testing. For example, Idaho law regulates what information an employer can obtain from an EAP when an employee is referred for an assessment and treatment for substance abuse problems. *See* Idaho Stat. § 44-202.

3. Privacy Rights.

States which have adopted statutes guaranteeing the "Right to Privacy" (e.g. Wisconsin), or states which recognize the common law right to privacy (e.g. Minnesota), may provide a basis for legal action if an employer were to improperly disseminate the results of a drug and/or alcohol screen. Indeed, the majority of states with drug and alcohol testing statutes include provisions requiring that the results of said tests be kept confidential.

D. Lawful Consumable Products Laws.

Many states also have statutes which prohibit discrimination against employees for the **off-duty** use of lawful products such as alcohol and tobacco. While such statutes do not prohibit an employer taking adverse action against an employee who is intoxicated while at work, they do prevent an employer from taking action against an employee who, for example, drinks while off duty.

Even in states where marijuana is legalized for recreational use, to date no court has applied a lawful consumable product law to extend to marijuana use, on the basis that marijuana is still illegal under federal law. *See Coats v. Dish Network, LLC*, 350 P.3d 849 (Co. 2015). However, as more states legalize recreational marijuana, this may change, especially if marijuana is ever removed from the Federal Controlled Substances Schedules.

XI. Developing Successful Substance Abuse Policies and Employee Assistance Programs

From both a practical and legal standpoint, there are four key elements to developing an effective substance abuse program: a clear written policy, drug and alcohol testing, Employee Assistance Programs (EAP), and training for supervisors and employees.

A. Develop a Clear Written Policy.

A successful substance abuse policy requires a clear written policy. Indeed, many states require an employer have a written drug/alcohol testing policy in order to conduct testing. Its provisions should include, at a minimum, 1) an explanation concerning why the program is being implemented, 2) what behavior the program prohibits, and 3) the consequences of violations to the policy. The policy should state that safety is a primary concern in adopting the policy.

When drafting successful substance abuse policies, it is important to clearly describe the behavior that is prohibited. For example, the policy should not only prohibit the use of drugs while at work, but should also prohibit the possession, transfer, and sale of illegal drugs and the possession of drug-related paraphernalia while at work/during work hours. The policy should also address appearing at work as well as working anywhere on behalf of the employer while under the influence of alcohol or illegal drugs.

The policy should additionally list the potential consequences for failing a test, as well as the potential consequences for an employee refusing to submit to the test.

Precise language is critical. In developing successful policy, precise language of the prohibited behavior is critical. Example: there is a vast difference between prohibiting working "under the influence" versus working while "intoxicated." Also, keep in mind that there are no legal definitions of intoxication levels for drug use in most states. Rather, laboratories set a threshold detection level for a positive drug test. The laboratory will only indicate whether the employee has a positive or negative test. Similarly, how will the policy define illegal drugs?

The policy should prohibit the use of illegal drugs as well as the use of prescription medications which contain a controlled substance which is used for a purpose or by a person for which they were not prescribed or intended.

B. Drug and Alcohol Testing Policy Language.

Having a substance abuse program and drug and alcohol testing are not one and the same. A substance abuse/employee assistance program is a program to help identify and treat employees who have substance abuse problems. Generally, a goal of substance abuse policy is rehabilitation.

1. State Laws. As set forth above, many states now impose requirements/procedural standards for drug and alcohol testing. In order to comply with these changing requirements, it is imperative that local counsel be contacted prior to implementation of a drug and alcohol testing program to ensure compliance with state law.

2. Testing Policy Specifics. Before implementing a substance abuse testing program, questions which need to be answered include:

    a. Who will be tested? Applicants, certain job classes? All employees?

    b. When will testing be conducted/what types of testing will be allowed? Post-accident, reasonable suspicion, post-treatment, random?

    c. How will testing be accomplished?

d. What will you be testing for? Alcohol and drugs? Which drugs? At what levels will detection be set? Are there relevant state laws which regulate the substances tested for or detection levels?

e. Is a separate DOT-covered policy required?

f. Who will receive the results of the test? Does the employer receive the results or should a third-party administrator or medical review office (MRO) receive the results?

g. What rights does an employee have to challenge or explain a positive test result?

h. What are the consequences of a positive test? Once again, local law and local counsel must be consulted on this issue since each state may have a different law addressing how to deal with positive results.

i. What are the consequences of refusing to submit to a test?

C. Employee Assistance Programs.

Employees who are identified as working under the influence of drugs or alcohol need to understand the consequences of such actions. As set forth above, drug and alcohol testing and substance abuse programs are **not** the same thing. A successful substance abuse program should clearly communicate to employees that rehabilitation – not necessarily termination – is the goal. To that end, an EAP is considered essential to a successful Substance Abuse Program.

Notably, in some states, employees must be first offered the option of attending a treatment or rehabilitation program following their first receipt of a positive test result before being terminated.

D. Training.

Finally, training supervisors and employees on the elements of the program is critical to its success.

1. Supervisors. Supervisory training should include a solid understanding of the policy itself, including legal requirements for testing and the consequences of a positive test. Supervisors must also know how to refer an employee to an EAP program.

   Supervisors should additionally be trained on the factors necessary to establish a reasonable suspicion to test for drugs/alcohol, as well as best practices regarding the documentation of the observation/factors that leads to such reasonable suspicion.

2. Employees. Employees must also understand the policy itself, including what behavior is prohibited. Employee training should also ensure that they understand the consequences of a policy violation. *See Advance Transportation Co.*, 105 BNA LA 1089 (Briggs, 1995).

State Specific Laws Regarding Applicant and Employee Drug/Alcohol Testing and Medical Marijuana

State	Applicant Testing	Employee Testing	Other Considerations	Special Considerations for Marijuana	Citation
Alabama	In order to qualify for a worker's compensation discount, testing of applicants can only be conducted after a conditional offer of employment has been made and notice of the drug-testing policy has been provided.	Testing is authorized upon 60 days' advance notice of the testing policy to employees.	Testing is only regulated to the extent the employer wishes to receive a workers compensation premium discount. The policy must be posted in a conspicuous location on the employer's premises. Employees must be given an opportunity to contest or explain the positive test results must be given within five days of receiving the test results.	Medical marijuana, specifically medical marijuana containing THC, is not legal in Alabama.	Ala. Code § 25-5-330.
Alaska	No restrictions on applicant testing.	All testing authorized so long as test is job-related and consistent with business necessity.	Testing must be carried out pursuant to a written policy that the employees must have been given 30 days' prior notice before the policy goes into effect. Employees must be given an opportunity to explain a positive test result within 10 days. Test results must be kept confidential.	Although marijuana is legal in Alaska for both recreational and medical use, employers are not required to accommodate use in the work place and may terminate an employee for a positive test. Alaska Stat. § 17.37.10 *et seq.*	Alaska Stat. § 23.10.600 *et seq*.
Arizona	Applicant testing is authorized if applicant is informed of the testing requirement in writing before testing.	Testing must be job related and consistent with business necessity, including random testing, reasonable suspicion, post-accident testing. Employees must receive a copy of the written drug testing	A written policy must include: 1. A statement of the employer's policy respecting drug and alcohol use by employees. 2. A description of those employees or prospective employees who are subject to	The Arizona Medical Marijuana act prohibits employers from discriminating against employees unless the failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law on the basis of an employee's	Ariz. Rev. Stat. § 23-493 et seq.

Arizona (cont.)		policy, have the test included in an employee handbook, or be posted publically. Employers and unions may collectively bargain requirements different to those listed in the statute, so long as such requirements are included in a written CBA. *See* Ariz. Rev. Stat. § 23-493.10.	testing. 3. The circumstances under which testing may be required. 4. The substances as to which testing may be required. 5. A description of the testing methods and collection procedures to be used. 6. The consequences of a refusal to participate in the testing. 7. Any adverse personnel action that may be taken based on the testing procedure or results. 8. The right of an employee, on request, to obtain the written test results. 9. The right of an employee, on request, to explain in a confidential setting, a positive test result. 10. A statement of the employer's policy regarding the confidentiality of the test results.	participation in Arizona's medical marijuana registry program. Patients still cannot possess or be impaired by marijuana during work hours. However, a legal user of medical marijuana cannot be considered impaired "solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment." Therefore, an employer cannot discipline an employee based solely on the fact that the employee's legal medical marijuana use caused the employee to test positive on a drug test. Ariz. Rev. Stat. § 36-2802, 2813-14. *Whitmire v. Wal-Mart Stores, Inc.*, 359 F. Supp. 3d 761 (D Ariz. 2019)	
Arkansas	No laws directly prohibit drug testing, although there are limitations which may be placed if the employer wishes to implement a drug-free workplace program for workers' compensation discounts. Specifically, applicants must be given notice of the testing policy after a conditional offer of employment is made. Job advertisements must include notice of the drug testing requirement.	Testing of employees is not limited, other than to receive workers compensation benefits. One notable requirement, if reasonable suspicion testing is undertaken, a written record of the observations that led to the reasonable suspicion must be kept.	Results must be kept confidential, and employees must be given the opportunity to contest or explain a positive result within five days of receiving notice of the positive test. Employees must be provided notice of the implementation of a testing policy 60 days prior to its implementation.	Arkansas recently passed a law providing protection to individuals enrolled in the State's medical marijuana program. Registered patients cannot be discriminated against in employment, and cannot take adverse employment action against patients possessing less than 2 ½ ounces of medical prescribed marijuana while at work. Employers do not need to "accommodate the ingestion of	Ark. Code § 11-14-101 *et seq.*

Arkansas (cont.)				marijuana" during work hours and can take adverse action against employees under the influence of medical marijuana. Still can exclude medical marijuana patients from safety sensitive positions. *See* Ark. Medical Marijuana Amend. of 2016.	
California	California does not have a statute that specifically covers drug testing, but there are concerns regarding the California Constitution. Specifically, California Courts will balance the employer's reason for testing against the applicant's expectation of privacy.	Much like with applicants, the permissibility of testing depends on a balancing test between the reason for the test with the employee's expectation of privacy. Note that random testing is generally hard to implement under California's balancing test. An employer generally has a more robust reason to test employees in safety sensitive positions.	California does not have any statutory prohibitions on testing, however, taking steps that diminish an employee's privacy expectation (for example, by adopting/distributing a written testing) policy will weigh into the required balancing test. State contractors must meet certain drug-free workplace requirements. *See* Cal. Gov't Code § 8355.	The California Supreme Court has held that employers need not accommodate an employee's medical marijuana use. *See Ross v. RagingWire Telecommc'ns, Inc.*, 42 Cal 4th 920 (Cal. 2008). Recreational marijuana is legalized in California. However, employer may still maintain drug and alcohol free workplace policies.	*See, e.g.*, *In re Carmen M.*, 141 Cal App. 4th 478 (Cal. 2006).
Colorado	No laws govern or prohibit applicant testing.	No laws govern or prohibit private employer testing of employees.	The city of Boulder Colorado has specific laws that limit testing to instances where the employer has a reasonable suspicion that the employee is under the influence of drugs on the job.	Despite the fact that Colorado was one of the first states in the country to legalize recreational marijuana, employers may test and terminate employees who test positive for marijuana. Nothing in Colorado's Medical Marijuana Act provides any employment protections. *See* Co. Rev. Stat. § 18-18-406.3.	*Coats v. Dish Network, LLC*, 350 P.3d 849 (Co. 2015).

Connecticut	Applicant testing is authorized if the applicant is informed of the testing requirement in writing beforehand.	Testing allowed only for reasonable suspicion. Random testing is **only** allowed for employees in safety sensitive positions.	Results must be kept confidential. Additional privacy concerns apply regarding the collection of specimen A confirmatory retest is required in order to discipline or discharge a current employee.	Connecticut law prohibits discrimination of participants in the state's medical marijuana program. Employers may still discipline or terminate patients if they are found to be using or under the influence of medical marijuana during working hours. *See* 420f Conn. Gen. Stat. § 41a-408 *et seq*.	Conn. Gen. Stat. § 31-51t *et seq*.
Delaware	Delaware does not restrict private employer applicant drug testing, other than employers who provide transportation services to schools or to the Delaware Department of Corrections.	Delaware does not restrict employee drug testing, other than employers who provide transportation services to schools or to the Delaware Department of Corrections.	N/A	Medical marijuana is legal. Unless the failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law, an employer may not discriminate against a participant based on a positive test result unless the employee used, possessed, or was impaired by marijuana during work hours. Employers may enforce policies restricting marijuana use by employees. 78 Del. Laws § 4905A.	N/A
District of Columbia	No restrictions on testing.	No restrictions on testing.	N/A	Employer may only test prospective employee for marijuana after conditional offer of employment has been extended. However, an employer need not accommodate the use of marijuana at the workplace and may deny a position based on a positive test for marijuana. D.C. Code § 32-931. Recreational marijuana is also legal. However, an employer need not permit or accommodate	D.C. Code § 32-931.

				the use or possession of marijuana, and may enforce policies restricting marijuana use by employees. D.C. Code § 48-904.01.	
Florida	Testing of applicants is authorized with advance notice.	Testing is authorized on reasonable suspicion of substance abuse, as part of a routine fitness-for-duty exam, or as follow-up to an employee's participation in counseling or rehabilitation.	Written notice of a testing program must be given 60 days in advance of testing. Tests must comply with a number of procedural standards including privacy for the employee during testing, collection, storage, and transportation methods that preclude the contamination of a specimen, and confidentiality of results. Tests must be confirmed by a confirmatory retest before adverse employment action can be taken. Employers may have their program approved by the State Department of Labor to receive a workers' compensation premium discount.	Medical marijuana is legal, but employers may still terminate employees who test positive for medical marijuana under Florida law. Fla. Stat. § 381.986(15).	Fla. Stat. § 440.101 *et seq*.
Georgia	Testing is authorized for applicants.	Employee testing is authorized for: • Reasonable suspicion • Random Testing • As part of routine fitness-for-duty examinations • Following on the job injury • Rehabilitation follow-up.	Relevant statute requires that employers utilize testing facilities to assure privacy during collection, provide assurance that the method, storage, and transportation of specimens preclude contamination. Confirmation tests required after an initial positive result. Contractors who receive state contracts of $25,000 or more	Georgia law does not "require an employer to permit or accommodate the use, consumption, [or] possession . . . of marijuana in any form." It also allows employers to maintain "written zero-tolerance policies prohibiting the on-duty, and off-duty, use of marijuana, or prohibiting any employee from having a detectable amount of marijuana in such employee's system while at work."	Ga. Code. § 45-23-1 *et seq*.

			must meet additional requirements. State approval required for a workers' compensation discount.	*See* Ga. Code. § 16-12-191.	
Hawaii	Testing of applicants is authorized if the applicant receives advance notice of the test in writing and is given the opportunity to disclose current prescription and nonprescription medications. Applicants must be given a list of the substances that will be tested for.	Testing of employees is authorized if the employee receives advance notice of the test in writing and is given the opportunity to disclose current prescription and nonprescription medications. Employees must be given a list of the substances that will be tested for.	Testing in Hawaii must meet certain procedural and reliability requirements. A confirmation retest is required following an initial positive result before taking adverse employment action.	Medical marijuana is legal, but there are no statutory protections for medical marijuana users.	Hawaii Rev. Stat. § 329B-1 *et seq*.
Idaho	Testing as a condition of employment is authorized.	Authorized testing includes: (a) Baseline; (b) Post-accident; (c) Random; (d) Return to duty; (e) Follow-up; (f) Reasonable suspicion.	Policies must list all of the types of testing which may be required, and state that violation of the policy is grounds for discharge. Employers are required to pay the cost of all tests. Tests are required to be conducted pursuant to listed standards that ensure the validity and confidentiality of the tests. Applicants and employees have a right to explain any positive test result and request a retest.	Medical marijuana is currently not authorized under Idaho law.	Idaho Code § 72-1701 et seq.
Illinois	No limitations, however the Illinois Human Rights Act explicitly states that it is illegal to require drug testing of applicants based on past	No limitations, however, the Illinois Human Rights Act explicitly states that it is illegal to require drug testing of employees based on past	Contractors who receive a state contract of $5000 or more must provide a drug free workplace, the requirements of which are equivalent to the requirements	Medical marijuana is legal in Illinois. Employers may not discriminate against an employee for his or her status as a registered patient on the state's	30 ILCS 580/1 *et seq*.

	participation in a drug rehabilitation program.	participation in a drug rehabilitation program.	under the Federal Drug-Free Workplace Act.	medical marijuana registry, unless failing to do so would cause it to lose a monetary or licensing-related benefit. However, the law does not prohibit terminating an employee for failing a drug test, even if the employee is a qualified patient. *See* 410 ILCS 130/40. Recreational marijuana is also legal, effective January 1, 2020. Under this law, an employer can adopt *reasonable* zero tolerance policies, and need not accommodate or tolerate use or impairment at work. HR 1434.	
Indiana	Testing not restricted, unless the work is being performed on a public contract or grant.	Testing not restricted, unless the work is being performed on a public contract or grant, in which case certain substances are required to be tested for.	In order to receive a public contract, contractors must submit and implement a drug testing policy that complies with IC 4-13-18-1 *et seq.*	Medical marijuana is not legal in the state of Indiana.	IC 4-13-18-1 *et seq*.
Iowa	Applicant testing is authorized if the applicant is informed orally at the time of application that testing is required, and if the application/advertisements carry notice of the testing requirement.	Reasonable suspicion is authorized. Unannounced testing of all employees at the worksite is also authorized. Randomized testing is permitted if a computer-based random number generator is utilized.	Employees must be given 30 days' notice of implementation a test. Test subjects must be given the opportunity to explain or rebut a positive test. Employees who fail their first test must be offered treatment and rehabilitation before termination.	There are no statutory protections for individuals participating in Iowa's medical marijuana registry. *See* Iowa Code § 124.201A *et seq*.	Iowa Code Ann. § 730.5.
Kansas	No restriction on applicant testing for private employers.	No restriction on employees for private employers.	N/A	Medical marijuana is not legal in Kansas.	N/A

Kentucky	No restriction on applicant testing for private employers.	No restriction on the testing of employees for private employers.	Employers may receive a workers' compensation discount for meeting certain requirements. *See* Ken. Rev. Stat. § 304.13-167.	Medical marijuana is not legal in Kentucky.	N/A
Louisiana	No restriction on applicant testing for private employers, so long as a certified laboratory conducts the tests.	Testing of current employees is authorized, subject to procedural requirements. No specific types of testing are prohibited for private employers.	Employees have seven days to request records related to a positive test. Employers are required to keep records confidential. Employers must use certified laboratories in order to take adverse action, or refuse to hire, based on a drug test.	Nothing in Louisiana's medical marijuana law prohibits an employer from taking adverse employment action as a result of a positive test. *See* La. Rev. Stat. § 40:1046.	La. Rev. Stat. § 49.1001 et seq.
Maine	Applicant testing is authorized following a conditional offer of employment or a position on a roster of eligibility.	Reasonable suspicion (designated as probable cause) testing is allowed, random testing is allowed in safety sensitive jobs under certain circumstances. Notably, a single work-related accident is alone an insufficient reason to test.	A written policy is required, and must be provided to employees at least 30 days prior to it going into effect. Any changes or implementation of a drug testing policy must first be submitted and **approved** by the Maine Department of Labor. Employers of over 20 employees must also have an employee assistance program that was certified by the Maine Department of Health and Human Services. A number of procedural requirements apply to the test itself, for example, employees must be provided the option of providing blood rather than a urine sample.	Maine protects employees from adverse employment action due to off-duty medical marijuana use, unless the failure to do so would negatively affect federal funding or if the employee works in a safety-sensitive position. Recreational marijuana is also legal in Maine. Employers can discipline employees who are under the influence of or use marijuana in the workplace, but the Maine Department of Labor has taken the position that a drug test alone will not be sufficient to show that an employee is under the influence. *See* Maine Rev. Stat. § 2430-C.	Maine Rev. Stat. § 26:681 *et seq.*

Maryland	No legal restrictions on applicants.	Employee testing must be supported by a "legitimate business reason."	Confirmatory retests must be offered on positive results, but the confirmatory retest can be required to be paid for by the employee. State contractors must meet additional drug-free workplace requirements.	There are no employment protections for employees in Maryland's medical marijuana regulations. Md. Code. Ann. Health Gen. § 10.62.01 *et seq.*	Md. Code. Ann. Health Gen. § 17-214.
Mass.	No restrictions on applicant testing.	No statutory restriction on employee testing. However, courts have held that a drug testing requirement must balance the employee's privacy rights against the employer's interest in maintaining a drug free workplace. *See Folmsbee v. Tech Tool Grinding & Supply*, 630 N.E.2d 586 (Mass. 1994).	N/A	Medical marijuana is legal in Massachusetts, and courts have held employers must accommodate the medical needs of an employee who uses medical marijuana. However, an employer need not tolerate the use or impairment at work. *Barbuto v. Advantage Sales and Marketing, LLC*, 477 Mass. 456 (Mass. 2017). Recreational marijuana is legalized in Massachusetts. However, there are no restrictions on an employer's ability to discipline an employee for a positive test based on recreational marijuana use. Mass. Gen. Laws ch. 94G § 2.	*Webster v. Motorola, Inc.*, 637 N.W.2d 203 (Mass. 1994).
Michigan	No restrictions on applicant testing.	No restrictions on employee testing.	N/A	The "Michigan Medical Marihuana Act" does not provide any employment protections to employees who use or are impaired by medical marijuana. Employer may refuse to hire an applicant who uses medical marijuana and tests positive on a mandatory pre-employment	Mich. Stat. § 333.26424.

				drug test. *Eplee v. City of Lansing*, 2019 Mich. App. LEXIS 277 (Mich. Ct. App. Feb. 19, 2019). Recreational marijuana is legalized in Michigan. However, employers need not accommodate an employee's marijuana use or impairment.	
Minnesota	Applicant testing is authorized after a conditional offer of employment is made and only if all job applicants conditionally offered employment for that position are tested.	Reasonable suspicion, post-accident, and treatment program testing are authorized. Random testing is authorized only if employee is in a safety-sensitive position. Testing along with routine physical examination authorized if the employee has been provided at least two weeks' written notice. Follow-up testing is authorized for a period of two years after an employee has completed a rehabilitation program.	Employees who fail their first confirmed test must be given the option to undergo treatment prior to termination. Test results must be kept confidential. Testing must be made pursuant to a written policy, which must explain which employees or applicants are subject to testing, the circumstances under which testing may be performed, the employee or applicant's right to refuse and the consequences thereof, the discipline to follow a positive test, and the right to request a confirmatory test. Employer must provide written notice of the policy to all affected applicants and employees, and must post notice at the employer's premises.	Employer cannot discriminate against an applicant or employee based on his or her status as a medical marijuana patient or based on a positive test for marijuana. Employers can still terminate employees who possess, use, or are "impaired" by medical marijuana while at work. Minn. Stat. § 152.32, subd. 3.	Minn. Stat. § 181.850 *et seq.*
Mississippi	Applicant testing is permitted if written notices given prior to test.	Reasonable suspicion, routine physical exam, routine physical exam testing authorized. Random testing is authorized if it is required by a collective bargaining agreement.	Employees must be given advance written notice of the test and an opportunity for the employee to explain positive findings. Test results must be kept confidential. Compliant testing programs receive a workers' compensation premium discount.	Medical marijuana is not currently authorized in Mississippi.	Miss. Stat. § 71-7-1 *et seq.*

Missouri	No law covering drug testing in private employment.	No law covering drug testing in private employment.	N/A	Medical marijuana users do not receive any employment protection under Missouri's recently passed (Nov. 6, 2018) Constitutional Amendment legalizing medical marijuana. *See* Mo. Const. Amd. 2.	No applicable statute.
Montana	Testing of applicants is permitted.	Random testing is allowed, if all employees are tested by a certain date, or if each employee obtains a signed statement from each employee confirming that they have received a written description of the random selection process. Reasonable suspicion testing also authorized. Post-accident testing permitted if accident results in injury or in property damage in excess of $1,500.00.	Employees must be given 60 days' advance notice before a drug testing policy is implemented or changed. Before adverse employment action is taken, an employee must have a confirming test in the case of positive findings and an opportunity for the employee to rebut a positive result.	The Montana Marijuana Act does not prevent employers from taking adverse employment action against medical marijuana use. *See* Mont. Code Ann. §§ 50-46-320(4)(b), (5).	Mont. Code Ann. 39-2-205 *et seq*.
Nebraska	No restrictions on private employers.	Employee testing is authorized without restriction. However, a confirmatory positive test is required before discipline or discharge may be implemented.	Testing methods must contain procedures which provide for confidentiality of results. A written chain of custody must be maintained of testing specimens.	Medical marijuana is not legalized in Nebraska.	Neb. Rev. Stat. § 48-1901 *et seq.*
Nevada	No law restricts private employers from conducting drug tests under Nevada law.	No law restricts private employers conducting drug tests under Nevada law.	N/A	Nevada requires employers to reasonably accommodate the medical needs of an employee who uses medical marijuana, unless doing so poses a threat of harm, impose an undue hardship, or prohibits the employee from fulling their job responsibilities. Nev. Rev. Stat. § 453A.800(3).	No applicable statute.

				Nevada also legalized recreational marijuana. But, employers can prohibit or restrict the use or possession of marijuana. NRS 453D.100. Effective January 1, 2020, an employer may not refuse to hire a prospective employee because prospective employee tested positive for marijuana. If an employer requires an employee to submit to a screening test within 30 days after beginning employment, the employee may rebut the results of a positive test, and the employer shall give "appropriate consideration" to the subsequent test. The bill includes an exception for situations in which the positive test "could adversely affect the safety of others." AB 132.	
New Hampshire	No restrictions, other than all tests must be paid for by the employer.	No restrictions, other than all tests must be paid for by the employer.	All tests must be paid for by the employer.	Employees are not protected for being under the influence of medical cannabis or possessing medical cannabis while at work. N.H. Rev. Stat. Ann. § 126-X.	N.H. Rev. Stat. Ann. § 275:3.
New Jersey	No restrictions on applicant drug testing.	The benefits of drug testing must be balanced against the privacy rights of the individual. *Hennessey v. Coastal Eagle Point Oil*, 609 A.2d 11 (N.J. 1992). Random testing is authorized **only** for safety sensitive positions.	N/A	Employers cannot refuse to hire or terminate an employee or applicant based solely on the employee's status as a qualifying medical marijuana patient. N.J.S.A. 24:6i *et seq.* An employer may still drug test applicants or employees, but must provide the applicant or employee written notice of a	No applicable statute.

				positive result and an opportunity to, within 3 working days, provide a legitimate medical explanation or request a re-test. An employer may also be required to accommodate an employee's disability for which medical marijuana is prescribed. *Wild v. Carriage Funeral Holdings, Inc.*, 458 N.W. Super. 416 (N.J. App. Div. 2019).	
New Mexico	No restrictions on private employer applicant testing.	No restrictions on private employer testing of employees.	No restrictions on private employer applicant testing.	SB 406 prohibits employers from disciplining employees or applicants based solely on a prescription for or legal use of medical marijuana, unless the employees work in safety-sensitive positions or the employer risks losing federal benefits by retaining employees who test positive for marijuana. Employers can discipline employees for use of, or impairment by, marijuana during working hours.	No applicable statute.
New York	No restrictions on private employer applicant testing.	No restrictions on private employer testing of employees.	N/A	Employers have an obligation to accommodate an employee's use of medical marijuana. However, nothing in the relevant law "bar[s] the enforcement of a policy prohibiting an employee from performing his or her employment duties while **impaired** by a controlled substance." N.Y. Pub. Health L. § 3369. Effective May 10, 2020, New York City employers will be	No applicable statute.

				prohibited from conducting pre-employment drug testing for marijuana.	
North Carolina	Applicant testing is allowed.	Employee testing is allowed.	Procedural requirements apply, including testing by an approved laboratory, documentation regarding chain of custody, employee notice, and a confirmation test in the case of an initial positive test.	Nothing in North Carolina's Epilepsy Alternative Treatment Program, provides any employment protection. No other medical marijuana is authorized in North Carolina.	N.C. Gen. Stat. § 95-230 *et seq*.
North Dakota	Applicant testing is not subject to restrictions.	Employee testing is not subject to restriction.	An employer who requires drug testing must pay the cost of the tests. N.D.C.C. § 34-01-15.	North Dakota's Compassionate Care Act does not allow employees to possess marijuana in the workplace, nor does it prohibit taking adverse action against an employee to tests positive for marijuana. N.D. Code § 19-24-01.	No applicable statue.
Ohio	No restriction on the drug testing of applicants.	No restriction on the drug testing of employees.	Contractors bidding on state contracts are required to establish a drug-free workplace program. These requirements place limitations on testing. *See* Ohio Code § 153.03. Similarly, employers who comply with Ohio's Workers' Compensation Drug-Free Safety Program may receive workers' compensation premium discounts.	Ohio's medical marijuana law allows employers to establish and enforce zero-tolerance drug policies. Employers need not accommodate an employee's use, possession, or distribution of medical marijuana. *See* Ohio Code § 3796.28.	Ohio Code § 123:1-76 *et seq*.
Oklahoma	Applicant testing is authorized with advance notice to the applicant and after an offer of employment has been made. The notice must be in writing and describe the testing methods, procedures, and policies in detail.	Testing is authorized if the policy is distributed to employees at least 10 days prior to the test. The following types of tests are permitted – 1. Reasonable suspicion 2. Post-accident	Testing procedures must ensure privacy and confidentiality of results. A confirming test must be used in case of a positive finding.	Oklahoma's Medical Marijuana Act states that an employer cannot discriminate against an employee based solely on their status as a medical marijuana patient, but employers **can** still restrict the use of marijuana by employees just like any other controlled substance.	Okla. Stat. Tit. 40 § 551-563 revised (2011).

		3. Random 4. Scheduled or periodic 5. Transfer or reassignment 6. Fitness for duty 7. Post rehabilitation.		*See* Okla. State Question No. 788.	
Oregon	Drug testing of applicants is not restricted. Alcohol testing of applicants is authorized if there is a reasonable suspicion that an applicant is under the influence of alcohol.	Drug testing of employees is unrestricted. Alcohol testing is authorized only based on a reasonable suspicion that an employee is under the influence of alcohol.	Testing must be conducted by a "clinical laboratory." An employer can set a limit they consider to be "under the influence of intoxicating liquor" in the relevant CBA (or work handbook if no CBA exists.	Despite having a medical marijuana law and legalized recreational marijuana, the Oregon Supreme Court has held that employers are not required to accommodate use of medical marijuana, and may terminate an employee for testing positive. *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Ore. 2010).	ORS § 659A.300 *et seq*.
Penn.	No restrictions on applicant testing.	No restrictions on employee testing.	N/A	Pennsylvania legalized medical marijuana use. Under this statute, an employer cannot discipline an employee solely on the basis of his or her status as a medical marijuana patient. However, the statute provides that an employer need not accommodate the use of or impairment by marijuana in the workplace. 35 P.S. § 10231.2103(b).	No applicable statute.
Rhode Island	Applicant testing is authorized only after an offer of employment has been made.	Random testing is expressly **prohibited**. Employee testing is authorized in the following circumstances: 1. Reasonable suspicion. 2. In conjunction with a rehabilitation program.	Employees must be given the option of attending treatment in lieu of termination following their first positive test. Other procedural protections apply. For example, an employee must be given the opportunity to rebut test findings, and testing must be conducted pursuant to a written	Nothing in Rhode Island's medical marijuana act expressly requires an employer to accommodate the medical use of marijuana in the workplace. However the act states that an employer cannot refuse to employ "a person solely for his or her status as a cardholder." Accordingly, applicants cannot	R.I. Gen. Laws §§ 28-6.5-1 *et seq*.

			policy.	be refused employment because of a belief that the employee would fail a drug test. See Callaghan v. Darlington Fabrics Corp., 2017 R.I. Super. LEXIS 88 (R.I. 2017).	
South Carolina	South Carolina places no limits on private employer testing of applicants.	All testing of employees is authorized, including random testing, so long as a follow up test is conducted within 30 minutes of an initial test.	Written notice of the testing program must be provided when implemented or upon an employee's hire. Results must be given to employees within 24 hours. Workers' Compensation premium discount available. *See* S.C. Code § 41-1-15. Additional requirements may apply to work on state contracts valued at $50,000 or more.	South Carolina currently only has a very restricted medical marijuana program, only applying to certain patients with epilepsy. There are no employment protections in that law.	S.C. Code § 38-73-500.
South Dakota	South Dakota places no limits on private employer testing of applicants.	South Dakota places no limits on private employer testing of employees.	N/A	Medical marijuana is not authorized in South Dakota.	No applicable statute.
Tennessee	Applicant testing is unrestricted for private employers, unless the employers have opted into the state's Drug-Free Workplace Program. If they have done so, applicant testing is authorized after the applicant has received written notice of the drug testing policy and after a conditional offer has been made. Job ads must also then include notice of testing.	Current employee testing is unrestricted for private employers. For employers opting into the state's Drug-Free Workplace Program then the following types of tests are authorized: 1. Reasonable suspicion 2. Fitness for duty 3. Post-injury, and 4. Rehabilitation Program Follow-Up.	If the employer has opted into the state's Drug-Free Workplace Program employees must receive 60 days' notice of a testing policy. Program participants receive a Workers' Compensation premium discount. The policy itself must be conspicuously posted. Employees must be given the opportunity to contest or explain a positive result on a confirmatory retest within five days of receiving results.	Medical marijuana is not authorized in Tennessee.	Tenn. Code § 50-9-101 *et seq*.

Texas	Texas law expressly authorizes applicant testing.	Texas law expressly authorizes employee testing.	N/A	No restrictions or employment protections are found in Texas's Compassionate Use of Cannabis Program. *See* 37 Tex. Admin. Code 1, Ch. 12.	Tx. Labor Code § 21.120.
Utah	Utah places no restriction on applicant testing in private employment. An employer may refuse to hire an applicant who refuses to provide a sample.	Employee testing is authorized in the following circumstances: 1. Investigation of possible individual employee impairment; 2. Investigation of accidents in the workplace or incidents of workplace theft; 3. Maintenance of safety for employees or the general public; or 4. Maintenance of productivity.	Testing must be conducted pursuant to a written policy which must be distributed to all employees. Utah requires documentation showing the chain of custody from the time of collection and confirming test in a case of positive findings. An employer may discipline an employee if the employee tests positive, the positive test is confirmed, and the positive test violates the employer's written policy.	Utah's Medical Cannabis Act contains a nondiscrimination provision; however, this provision expressly only applies to government employees. Utah Medical Cannabis Act H.B. 3001 (Dec. 3, 2018).	Utah Code Ann. § 34-38-1 *et seq.*
Vermont	Applicant testing is authorized only if a conditional offer has been made and the employer provides advance notice in writing to the applicant. The notice must state which drugs will be tested and that therapeutic levels of medically-prescribed drugs tested will not be reported.	**Random testing is prohibited** unless required by a federal regulation**.** Employee testing is authorized as part of an employee assistance program or if the employer has probable cause to believe the employee is using or under the influence of a drug on the job.	Testing must be conducted pursuant to a written test and conducted by a certified laboratory. Employees have the right to agree to seek rehabilitation after their first positive test. A confirmatory test with part of the original sample must be conducted following a positive result. An employee must be given an opportunity to explain the findings.	Both medical and recreational marijuana are legal in Vermont. For medical marijuana, an employee cannot be terminated unless they are "under the influence" of marijuana during work hours or at the job site. 18 V.S.A. § 4472. Employers can also ban the use or possession of recreational marijuana, and can terminate an employee for being under the influence. 18 V.S.A. § 4230 *et seq.*	21 V.S.A. § 511 *et seq.*

Virginia	No restriction on applicant testing generally; however, public contractors are required to maintain drug-free workplaces.	No restriction on employee testing generally; however, public contractors are required to maintain drug-free workplaces.	Contractors with over $10,000 in state contracts must establish "drug-free workplaces." This includes providing notice to employees that drug use will not be tolerated, and list the actions that will result following a positive test. Workers' Compensation premium discount available. Va. Code § 65.2-813.2	No employee protections for medical marijuana use.	Va. Code §§ 32.1-162.9:1:2.2-4312.
Washington	Testing is only restricted if private employers seek to qualify for a workers' compensation drug-free workplace premium discount. If so, testing of applicants is authorized with advanced written notice to the applicant and after a conditional offer of employment has been made.	Testing is only restricted if private employers seek to qualify for a workers' compensation drug-free workplace premium discount. If so, the following types of test are authorized: • Reasonable suspicion • Random testing • Post-accident • EAP Testing	Employees must be given 60 days' notice of a policy change or implementation. First time positive tests may not be grounds for termination. Confidentiality of test findings must be maintained, and testing must be conducted only by a certified laboratory.	Recreational and medical marijuana are legal in Washington. The Washington recreational use statute does not address workplace drug testing. Under Washington's Medical Use of Marijuana Act, employers may establish drug-free workplace policies. RCW 69.51A.060. Additionally, courts have held that an employer is not liable for terminating or refusing to hire an individual who tests positive for marijuana, even if the marijuana was legally prescribed. *Roe v. TeleTech Customer Care Management*, 257 P.3d 586 (Wa. 2011).	Wash. Rev. Code § 49.127.1 *et seq.*

West Virginia	Applicant testing is authorized if conducted pursuant to a written policy.	Testing of employees is authorized under the following conditions: 1. Deterrence and/or detection of possible drug use 2. Investigation of possible individual employee impairment; 3. Investigation of accidents in the workplace or incidents of workplace theft or other employee misconduct; 4. Maintenance of safety for employees, customers, clients or the public at large; or 5. Maintenance of productivity, quality of products or services, or security of property or information.	Testing must be carried out pursuant to a written policy provided to all employees and available for review by prospective employees. Test results must be kept confidential. Limitations exist regarding when the test is scheduled, specifically testing must be conducted during the "regular work period" or immediately before or after said period. All positive results must be confirmed using a different process than the initial screen. Employers must provide employees with information regarding any EAP program they may have.	Medical Marijuana currently not authorized in West Virginia. A program for patient registry is slated to begin in July 2019. Nothing in West Virginia's Medical Cannabis Act prohibits adverse employment action being taken as a result of testing positive for medical marijuana.	W. Va. Code § 21-3E-1 *et seq*.
Wisconsin	Wisconsin has no law limiting applicant testing for private employers.	Wisconsin has no law limiting employee testing for private employers.	Additional testing requirements may exist for contractors working on public works projects. *See* Wis. Stat. § 103.503.	Wisconsin's Medical Marijuana Act does not provide any employment protections for testing positive for marijuana. *See* 2013 Wis. Act. 267.	No applicable statute.
Wyoming	Wyoming does not limit applicant testing for private employers.	Wyoming does not limit employee testing for private employers.	Employers in Wyoming may qualify for a workers compensation premium discount for following the state's drug free workplace program approved by the Wyoming Department of Workforce Services	Wyoming does not have a law authorizing the use of medical marijuana.	Wy. Code. Ann. §27-14-102 *et seq.*

Sample Testing Policy

DRUG AND ALCOHOL TESTING
POLICY AND PROCEDURE

STATEMENT OF PURPOSE: SMART Local Union No. [insert name] ("UNION"), SMACNA of [insert name] and all contractors signatory to the current collective bargaining agreement between the two (collectively, EMPLOYER), are committed to maintaining a workplace that is safe, productive, and free of alcohol and illegal drugs.

The parties have adopted this substance abuse program which will include, as a minimum, the following components: owner mandated reasonable suspicion, post-accident, [and, if permitted by state law, random drug and alcohol testing] and post-treatment testing. Any testing will be in conformity with applicable state law. EMPLOYER and the UNION acknowledge that to be effective it is critical to offer rehabilitation opportunities and programs to those who abuse drugs and alcohol. EMPLOYER and the UNION will cooperate in identifying appropriate referral services for the treatment of substance abuse.

Commented [P(P2]: State law

SCOPE OF POLICY: This Policy applies to all employees of EMPLOYER that are covered by the collective bargaining agreement, including referrals and applicants. It does not cover non-bargaining unit employees of EMPLOYER or independent contractors of EMPLOYER, although EMPLOYER may have a separate policy for testing of non-bargaining unit employees and independent contractors.

STATEMENT OF POLICY: Employees may not use, possess, distribute, sell, offer, purchase, transfer, or be under the influence of alcohol, illegal drugs or other controlled substances while at work or working anywhere on behalf of EMPLOYER, or using an EMPLOYER vehicle, machine or equipment. This policy applies to all official or unofficial break and meal periods, and all other times during working hours in which an employee has reported for work, including unpaid meal breaks.

An employee that is on-call is expected to refrain from the use of alcohol during that time. If an employee is on call, and called to duty, and that employee has recently used alcohol while off-duty, the employee shall advise the EMPLOYER of his/her recent use of alcohol at that time.

I. PERSONS SUBJECT TO TESTING/CIRCUMSTANCES WHEN SUBJECT TO TESTING.

A. Applicant Testing: All Employees who have received conditional offers of

employment, including applicants and referrals from the hiring hall, are subject to being required to undergo an Alcohol Test and Drug test [optional within 24 hours] after receiving the offer of employment or referral from the hiring hall.

B. Reasonable Suspicion (or For Cause) Drug and Alcohol Testing: EMPLOYER may test its employees for drugs and/or alcohol when there is a reasonable suspicion that an employee is at work impaired by or under the influence of drugs or alcohol or has violated the policy statement outlined below.

1. "Reasonable suspicion" is defined as a basis for forming a belief based on specific facts and rational inferences drawn from those facts. Reasonable suspicion will be documented and will not be based on rumor, speculation, or unsubstantiated information of third parties. Reasonable suspicion drug testing must be conducted in a manner that can accurately identify actual impairment caused by drug use.

   Reasonable suspicion must be interpreted with common sense and good judgment based on the totality of the circumstances. Reasonable suspicion may include, but is not limited to, a personal observation that:

C. Observation of Impairment: An EMPLOYER may test an employee who appears to be under the influence of a controlled substance and/or alcohol based on behavior, job performance or odor including, but not limited to: smelling of alcohol or marijuana, displaying physical signs or symptoms customarily associated with alcohol or drug use (e.g. glassy eyes, slurred speech), displaying violent or unusually confrontational or argumentative behavior, showing a major personality change, disregarding safe operating procedures of equipment/machines or placing another person's safety in jeopardy by intentional or unintentional actions.)

D. Use/Possession of Drugs or Alcohol: An EMPLOYER may test an employee based on observation or assessment that the employee has violated EMPLOYER's written work rules prohibiting the use, possession, sale, or transfer of drugs or alcohol while the employee is working or while the employee is on the EMPLOYER's premises or operating the EMPLOYER's vehicle, machinery, or equipment,

E. Workplace Injury Testing: An EMPLOYER may test an employee if the employee has sustained or has caused another employee, knowingly or unknowingly, to sustain a personal injury that requires medical attention beyond jobsite first-aid, in the course of employment; and/or

Commented [P(P3]: Alternative definition:

Reasonable suspicion" is defined as those circumstances, based on objective evidence about the employee's conduct in the workplace that would cause a reasonable person to believe that the employee's performance, perception or abilities are impaired because of prohibited substances. Examples of such evidence include, but are not limited to, the employee's difficulty in maintaining balance, slurred speech, erratic or atypical behavior, or other indications that the employee cannot perform the employee's position safely and efficiently. Reasonable suspicion also exists when an employee is involved in an on-the-job accident involving any lost time, personal injury or property damage.

F. Post-Accident Testing: An EMPLOYER may test an employee if has caused or contributed to a work-related accident, knowingly or unknowingly, or was helping to operate machinery, equipment or vehicles involved in a work-related accident resulting in property damage.

G. Customer or Jobsite Required Drug and/or Alcohol Testing (or Pre-Access Or On Project Site Or Work Opportunity Testing): EMPLOYER's employees may be tested when required by a customer of EMPLOYER when the customer has a drug and alcohol testing policy in place and when such testing is in accordance with the customer's policy and consistent with state and federal law. Testing may also occur prior to accessing a jobsite or while working at a project location when a jobsite or project requires workers to have completed such testing before beginning work.

H. Regulatory Testing: Employees may be subjected to testing as required by federal law or regulation or by law enforcement.

I. Treatment Program Testing: [or Return-to-Work or Follow-Up Drug and/or Alcohol Testing, Rehabilitation testing]: An employee who has been referred for chemical dependency evaluation or treatment by EMPLOYER or who is participating in a chemical dependency program, may be requested or required by EMPLOYER to undergo a drug and/or alcohol test without prior notice at any time during the evaluation and treatment period, and for up to two years following completion of any prescribed chemical dependency treatment program.

J. Random Testing: Subject to applicable law, EMPLOYER reserves the right to require its employees to present themselves for random, unannounced testing. EMPLOYER will adopt an objective procedure, using a statistically valid number generation process, to randomly select employees to be tested. Upon anonymous selection, EMPLOYER will notify the employee(s) to report immediately for drug testing. EMPLOYER solely determines the time and frequency of random drug tests. Any employee may be selected for random testing in accordance with state/local laws. An employee could be randomly selected for testing more than once a year.

II. **RIGHTS OF EMPLOYEES AND APPLICANTS.**

A. **Right to Refuse to Be Tested.** An applicant or employee has a right to refuse

Commented [P(P4]: Another possibility:

If a reasonable drug testing program is imposed by the Contractor signatory to XXX by the owner, or general contractor, that requirement, subject to review, will be accepted by the Union provided that the testing program is administered uniformly for all employees for the employer and conducted by a third party certified agency.

Commented [P(P5]: Optional:

Substance abuse testing programs mandated by federal agencies, such as the U. S. Department of Transportation, or by other users of construction services, may contain testing requirements not covered in this program. In such an event, the mandated requirements shall be made a part of this program for the duration of the work involved only upon mutual agreement with the Union.

to be tested. Any employee or applicant who refuses to cooperate with the testing procedure or who or who engages in behavior which prevents meaningful completion of testing (including tampering with the sample or testing materials, or behavior intended to provide a dilute sample), tampers, adulterates, or otherwise interferes with the testing sample will be deemed to have refused to take the test. Any applicant who engages in this behavior will have the offer of employment revoked. Any employee engaging in such actions will be subject to disciplinary action up to and including discharge.

B. Right to a copy of the test report. An applicant or employee has the right to request and receive a copy of the test result report on any drug or alcohol test from EMPLOYER.

C. **Employee's Right to Written Test Results**. Results shall be communicated in writing to the employee and to the appropriate employer within XXX hours. Upon written request made within six months after the date of the test, the tested employee may obtain written test results, which the employer shall provide within five working days of receipt of the written request. Any cost for obtaining the written test shall be the responsibility of the employee.

D. **Appeal rights.** Any applicant or employee who tests positive on a confirmatory test will have XXX 5 working days following the day on which the employee is notified of the positive confirmatory test result to disclose drugs/medications that they have taken and/or other information to explain or challenge the reliability of the test result. In addition, an applicant or employee who tests positive on a confirmatory test will have XXX five (5) working days following the day on which he or she is notified of the confirmatory test result to advise EMPLOYER in writing of his or her desire to request a confirmatory retest of the original sample at the individual's own expense.

Commented [MGM6]: Certain state laws have different time periods for submitting information or challenging the test result, if applicable. Consult your state laws and modify accordingly.

E. **Use of Additional Information.** Any medical information provided by an applicant or employee after a confirmed positive test result will be used for the purpose of evaluating the reliability of the drug and alcohol test administered to the employee.

No employee will be discharged, disciplined, discriminated against, or requested or required to undergo rehabilitation based upon medical information provided in response to a confirmed positive test result unless the individual had a duty to provide that information before, during or after the time they were hired.

EMPLOYER reserves the right, however, to seeks additional medical information regarding the effects of a prescription medication on an employee's ability to safely and effectively perform his or her job duties while taking the medication.

III. **CONSEQUENCES OF A NEGATIVE TEST.** If the result of the initial drug and alcohol screening is negative, or if the results of the confirmatory test or confirmatory retest (these tests are explained below) are negative, the applicant or employee is considered to have satisfactorily completed the drug and/or alcohol test.

IV. **CONSEQUENCES OF A POSITIVE TEST.**

A. Positive or Confirmatory Test - Applicants. If the confirmatory test result is also positive, the offer of employment will be revoked based solely on the results of the positive drug test.

Commented [MGM7]: State laws vary on whether, or not, a confirmatory test must be offered to applicants. Consult your state laws and modify accordingly.

B. Positive or Confirmatory Test - Employees. If the confirmatory test result is also positive, the employee may be subject to disciplinary action, up to and including discharge.

Commented [MGM8]: State laws vary on whether, or not, a confirmatory test must be offered to employees. Consult your state laws and modify accordingly.

Subject to applicable state law, if an employee has a confirmed positive test result, the employer may refer the employee to a treatment program, suspend, or terminate the employee.

Commented [P(P9]: Option:

Workplace problems arising out of an employee's relationship with substance abuse may warrant a variety of management responses, including referral for treatment, testing, disciplinary action or termination of employment.

C. Rehabilitation: An employee will not be discharged for a positive result on a confirmatory test for alcohol and/or illegal drugs which was the first such result on a test requested or required by EMPLOYER unless he or she has been given the opportunity to participate in a drug or alcohol counseling or rehabilitation program and either has refused to participate or has failed to successfully complete the counseling program. Employees required to attend a counseling or rehabilitation program will be required to inform EMPLOYER of the type of program to which they have been referred.

[Optional: If the counseling or rehabilitation program permits immediate return to work, the employee will be returned to work on the next regularly scheduled shift.

If the employee is referred to an outpatient treatment program, then the employee must agree to attend and must provide the EMPLOYER with

certification from the treatment provider regarding the expected length of treatment. The employee will be returned to work only after the treatment provider certifies the employee's ability to return. If the employee is certified to return before completion of the outpatient program, the employee will be asked to provide weekly certification from the treatment provider of continued participation in the outpatient program. If the employee fails or refuses to provide such certification, EMPLOYER will not return the employee to work prior to completion of the program.

If the evaluation results in a referral to inpatient treatment, the employee must agree to attend and will not be returned to work until the company receives evidence of satisfactory completion of the program.

In all cases, the employee must present evidence of satisfactory completion of the treatment program in order to maintain employment.

Time spent by an employee completing a treatment program will not constitute hours worked under the collective bargaining agreement, and no wages or fringe benefit contributions are due on behalf of the employee.

D. Subsequent Positive Test Result. An employee who receives a positive result on a confirmatory test for alcohol and/or illegal drugs requested or required by the EMPLOYER and who has previously received a positive result on a confirmatory test for alcohol and/or illegal drugs requested or required by EMPLOYER may be disciplined up to and including discharge.

E. Suspensions. Employees may be suspended from work without pay pending the receipt of testing results if EMPLOYER believes that doing so is consistent with a safe workplace. Any employee who has been suspended, and who receives a negative result on the drug or alcohol test, will be reinstated with full back pay.

F. Cost of Testing. For initial tests under this program, the costs for tests (and for reasonable transportation costs to an employee if the test is conducted at a location other than the employee's normal work site) shall be paid by the employer. Employees will be paid actual time for testing. Retests shall be at the employee's expense.

V. HOW TESTS ARE CONDUCTED.

Commented [P(P10]: Testing methods are state specific: For example, Alaska, "Tests shall be conducted by qualified and accredited laboratories that are approved or certified by the federal Substance Abuse and Mental Health Services Administration, or the College of Pathologists of the of the American Association of Clinical Chemistry. The laboratories shall maintain high quality control procedures, and shall follow the manufacturer's protocols.

All initial positive tests shall be subject, at the employee's discretion and request, to a confirmation test by gas chromatography mass spectrometry who results have been reviewed by a licensed physician or doctor of osteopathy.

A test conducted for a drug for which the United States Department of Health and Human Services has established a cutoff level shall be considered to have yielded a positive result if the test establishes the presence of the drug at levels equal to or greater than that cutoff level. In all instances, tests shall be conducted utilizing a five panel, Department of Transportation (DOT) look-alike screen. Specimen collection and handling will be a chain of custody collection in compliance with standards set forth by the Department of Health and Human Services (i.e., photo ID, washing of hands, temperature check, blue toilet water, etc.) Analysis of the specimen will occur in a Substance Abuse and Mental Health Services Administration (SAMHSA) certified laboratory, formerly known as NIDA, which will employ Gas Chromatography/Mass Spectrometry (GC/MS) confirmation of all specimens screened positive on the Immunoassay screen (EMIT). The services of a certified medical review officer will be utilized on all tests and a medical review officer's confirmation will be required for all positive results.

A. Authorized Laboratory. Testing will be conducted by a laboratory authorized under applicable law to perform alcohol and drug tests. All testing will be based upon urine and/or blood samples, or any other technology deemed appropriate by the testing laboratory.

B. Sample Collection. Whenever testing is utilized it shall be accomplished through dignified and humane procedures insuring complete confidentiality of specimen custody and test results.

If testing is conducted off-site, Employees requested or required to take a drug and/or alcohol test may be escorted by a manager, supervisor or other appointed individual to the designated sample collection site or placed in a taxi or third party transportation.

C. Employee Notification Form. An applicant or employee who is to be tested for illegal drugs and/or alcohol will be given a copy of this drug and alcohol testing policy and an opportunity to read it before testing occurs. The individual will be asked to sign a form acknowledging receipt of this opportunity.

D. CONFIDENTIALITY. Test result reports and other information acquired in the testing process are private and confidential information except where permitted or required by law.

VI. MISCELLANEOUS.

A. MEDICAL MARIJUANA. Unless otherwise required by state law, EMPLOYER does not accept an employee or applicant's use of prescribed medical marijuana as a valid excuse for testing positive on a confirmatory test. Testing positive for marijuana, even if the employee was legally prescribed the marijuana, may result in discipline up to and including discharge if it is concluded that the employee was impaired at work.

B. **USE OF PRESCRIPTION AND OVER-THE-COUNTER MEDICATIONS.** The use of any prescription or over the counter medications by an employee during working time or any time while on EMPLOYER property or in an EMPLOYER-owned /-leased vehicle is prohibited if such use may detrimentally affect or impair the safety of coworkers, customers or members of the public, or the employee's job performance, or the safe or efficient operation of tools, equipment, or machinery.

Commented [P(P11]: Subject to state law:

All facilities used for testing must have laboratories that are approved either by the substance abuse and mental health administration, or the College of American Pathologists under the Forensic Urine Drug Testing Program (FUDT). Specimen collection and substance abuse testing under this agreement shall be performed in accordance with regulations and procedures approved by the United States Department of Transportation Regulations for alcohol and drug testing.

Commented [P(P12]: Depending on state law and preference, if an MRO is used, "The Employer and Union shall be notified only of the positive or negative results of the tests."

Commented [MGM13]:

Certain state laws prohibit discipline of an employee as the result of testing positive on a confirmatory test, where the employee was legally prescribed marijuana. Most states permit discipline if an employee is impaired by the use of medical marijuana. Consult your state laws and modify accordingly.

The EMPLOYER recognizes that prescription and over-the-counter medications may affect job performance and workplace safety. The legal use of prescribed drugs is permitted on the job only if it does not impair an employee's ability to perform the essential functions of the job effectively and in a safe manner that does not endanger other individuals in the workplace.

An employee who is taking prescription medication(s) is expected to consult with his/her physician regarding any side effects of the medication(s) that may affect safety or job performance. If, after conferring with his/her physician, an employee has reason to believe that his/her ability to perform his/her job competently and safely may be adversely affected, the employee should consult with his/her supervisor. Employees must notify their supervisor of the use of prescribed drugs / other substances that may affect their ability to perform their job.

An employee who is taking medication that may cause drowsiness or otherwise adversely affect his/her job performance, coordination, judgment or fitness for duty is **required** to notify his/her supervisor of such use as soon as possible.

EMPLOYER reserves the right to obtain a medical opinion regarding the effects of a prescription medication on an employee's ability to safely and effectively perform his or her job duties while taking the medication.

C. [Optional] Training and Education: An Employer shall provide training to all management, security and supervisory personnel who have responsibility for the oversight of employee activities of work performance. This training shall include the recognition of impairment from drugs and alcohol in the workplace, and of material of substances that may cause physical harm or illness, as well as observation, documentation and reporting skills, and procedure and methods for workplace substance evaluations and analysis.

D. Drug Related Activities: An Employee who is convicted for violations of laws involving illegal drugs while on work status will be considered to be in violation of this policy and subject to any of the disciplinary actions outlined in this policy. Failure of an Employee to notify his or her immediate supervisor within five (5) days after such conviction is cause for immediate termination.

ATTACHMENT "A"

POLICY RECEIPT

I hereby acknowledge receipt of the Drug and Alcohol Testing Policy and Procedure negotiated by SMACNA [insert] and SMART Local Union No. [insert], and I also acknowledge the applicability of this policy to me.

Employee: _____ [print name]

_____ [signature]

Date: _____

Statistical Information Supporting Drug Testing Policies

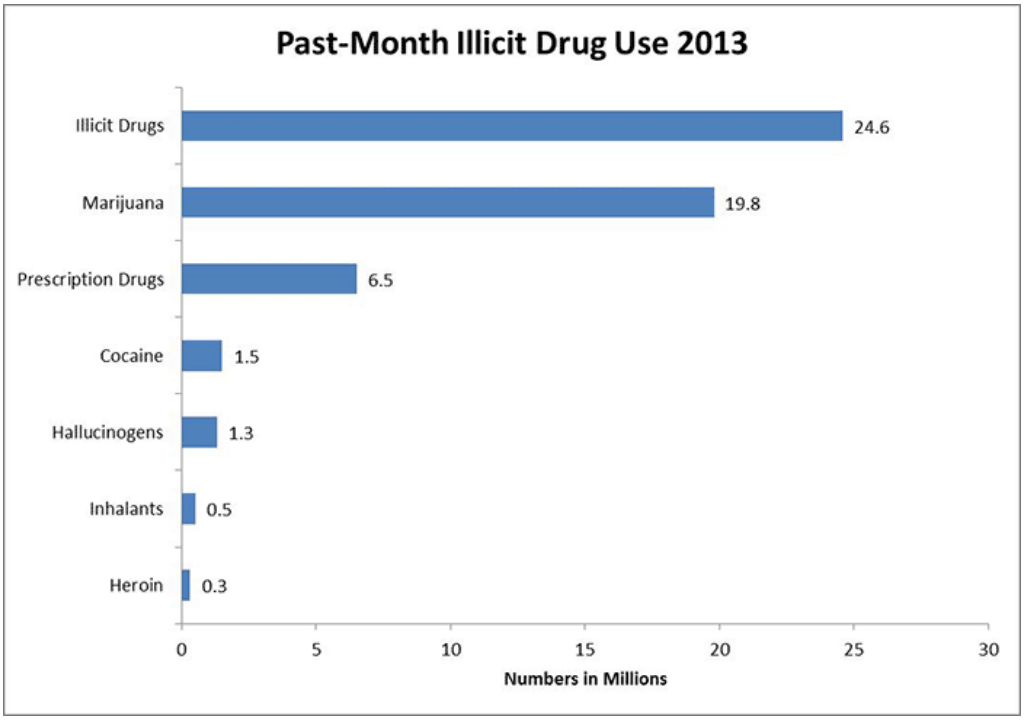
SUBSTANCE ABUSE IS WIDESPREAD

The U.S. Surgeon General reports[1]:

The United States has a serious substance misuse problem. In 2015, over 66 million people aged 12 or older in the United States reported binge drinking and 27.1 million people were current users of illicit drugs or misused prescription drugs. Binge drinking is defined, for men, as having 5 or more standard drinks and, for women, 4 or more standard drinks on the same occasion on at least 1 day in the past 30 days.

- In 2015, 20.8 million people aged 12 or older in the United States had a substance use disorder. That number is similar to the number of people who suffer from diabetes and more than 1.5 times the annual prevalence of all cancers combined (14 million).
- In 2015, 15.7 million people were in need of treatment for an alcohol use disorder (7.8 percent for men and 4.1 percent for women) and nearly 7.7 million people needed treatment for an illicit drug use disorder (3.8 percent for men and 2.0 percent for women).
- Behavioral health problems such as substance use, violence, impaired driving, mental health problems, and risky sexual activity are now the leading causes of death for those aged 15 to 24.
- Substance use and misuse becomes increasingly likely across adolescence, with rates peaking among people in their twenties, and declining thereafter.
- Alcohol misuse contributes to 88,000 deaths in the United States each year; 1 in 10 deaths among working adults is due to alcohol misuse.
- In 2014, more than 47,000 people died from a drug overdose. Included in this number are nearly 30,000 people who died from an overdose involving prescription drugs. This is more than in any previous year on record.
- Substance misuse and substance use disorders cost the U.S. more than $442 billion annually in crime, health care, and lost productivity.
    - These costs are almost twice as high as the costs associated with diabetes, which is estimated to cost the United States $245 billion each year.
    - Alcohol misuse and alcohol use disorders cost the United States approximately $249 billion in lost productivity, health care expenses, law enforcement, and other criminal justice costs.
    - The costs associated with misuse of illegal drugs and non-prescribed medications and drug use disorders were estimated to be more than $193 billion in 2007.

[1] Highlights: At-a-Glance is a brief introduction to Facing Addiction in America: The Surgeon General's Report on Alcohol, Drugs, and Health. https://addiction.surgeongeneral.gov/sites/default/files/report-highlights.pdf



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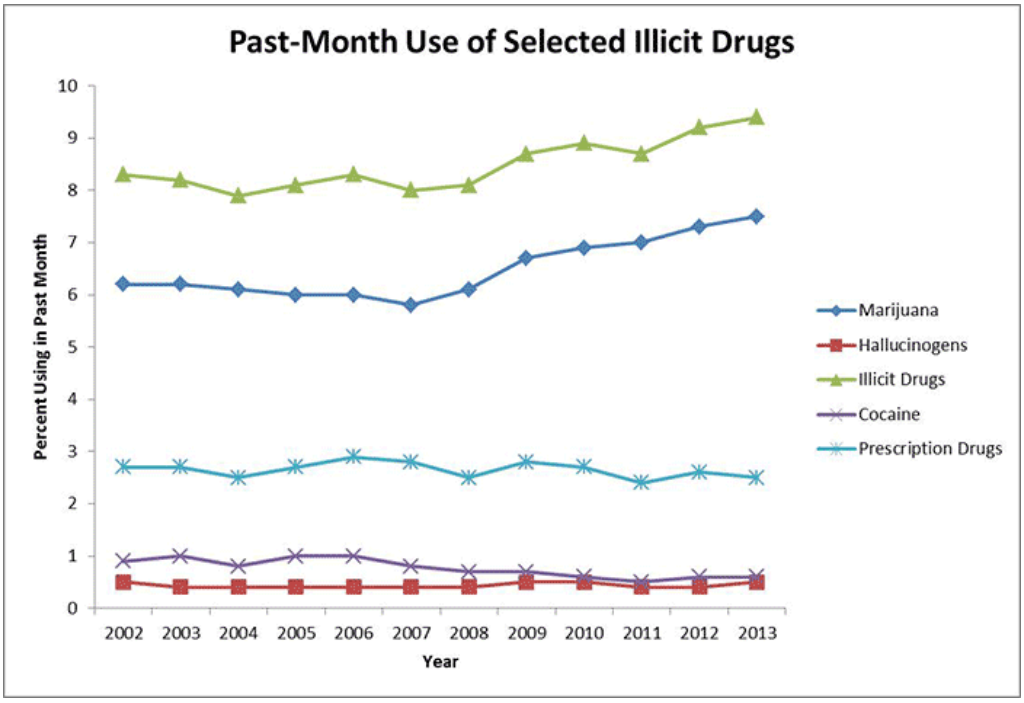

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[2] https://www.drugabuse.gov/publications/drugfacts/nationwide-trends
[3] https://www.drugabuse.gov/publications/drugfacts/nationwide-trends

CONSTRUCTION INDUSTRY IS A LEADER IN SUBSTANCE ABUSE

Why it happens?

According to the book Addiction at Work: Tackling Drug Abuse and Misuse in the Workplace, there are probably several reasons that construction workers have relatively higher rates of substance use disorders.

Many construction workers typically work long hours during the construction season. Individuals working more than 50 hours per week are far more likely to engage in alcohol use and abuse than individuals working less than 50 hours per week.

Many construction jobs are routine and predictable. Individuals who work long hours on jobs like this are more open to developing substance abuse and substance use disorders.

Related to the above reason, there is little opportunity for advancement in many jobs in the construction industry. Many individuals working in these jobs, even though they may be making decent wages, may harbor feelings of stagnation or resentment.

The nature of the work and the attitudes of many of the workers are similar to the "work hard and play hard" philosophy of this particular social group. In addition, many individuals working in the construction industry come from backgrounds where alcohol use and even illicit drug use are relatively accepted and common.

The cyclical nature of the construction industry in many states results in many individuals spending significant periods of time either unemployed or in some other position where work is less available. This may result in boredom, feelings of job insecurity, and other variables associated with high rates of substance abuse, especially alcohol abuse.

How bad is it?

- According to the Substance Abuse and Mental Health Services Administration (SAMHSA), the construction industry has one of the highest rates of substance abuse and substance use disorders compared to other industries in the United States.
- The construction industry had the second highest rate of past-year substance use disorder diagnoses over the period (14.3 percent), the second highest rate of reported past-year heavy alcohol use (16.5 percent), and the fifth highest rate of reported past-year illicit drug use (11.6 percent) compared to 18 other industries for the period of 2008 through 2012.
- Even though the rates of substance use disorders in the construction industry declined from previous years (17.4 percent in 2003-2007), the prevalence still remained high compared to other industries.
- Under the Drug-Free Workplace Act of 1988, drug testing is not required by organizations. The majority of employers in the United States do not test employees for drugs unless they are required to do so by regulations enacted by state or federal government. However, a 1989 study from Cornell University indicated the following:
    - Within two years after instituting drug testing in construction companies, there was a 51 percent reduction in injuries.
    - Companies with drug testing programs have over 11 percent reductions in workers' compensation claims.

- Larger construction companies are more likely to have provisions for drug testing their employees, whereas smaller companies that do not have these programs are more likely to be burdened with issues of substance abuse in their employees.

Cost of Substance Abuse

The National Institute on Drug Abuse indicates many adults who use illegal drugs are employed full or part time.[4] In addition, when compared with those who do not use substances, substance-using employees are more likely to:

- change jobs frequently
- be late to or absent from work
- be less productive
- be involved in a workplace accident and potentially harm others
- file a workers' compensation claim

Employers with successful drug-free workplace programs report improvements in morale and productivity and decreases in absenteeism, accidents, downtime, turnover, and theft.

Employers with long-standing programs report better health status among employees and family members and reduced healthcare costs.[5]

Some organizations with drug-free workplace programs qualify for incentives, such as decreased costs associated with short- and long-term disability and workers' compensation.

[4] Substance Abuse Center for Behavioral Health Statistics and Quality. Results from the 2015 National Survey on Drug Use and Health: Detailed Tables. SAMHSA. Published September 8, 2016. Accessed January 18, 2017.
[5] Substance Abuse and Mental Health Services Administration. 14 Short Employer Cost Savings Brief. https://www.samhsa.gov/workplace/toolkit. Published 2008. Accessed March 29, 2017.

Economic Cost from Drugs And Alcohol (Direct & Indirect)
$578 BN