



Drug Testing in the Era of Medical Marijuana, Recreational Marijuana, CBD and Edibles



Nov. 15, 2022



Grant T. Collins

Minnesota State Bar Association

Certified ▲ Specialist

Labor and Employment Law

(612) 373-8519
gcollins@felhaber.com



Where Are We Headed?

1. State Drug Testing Laws
2. Collectively Bargained Testing
3. Medical Marijuana, CBD, and Edibles
4. Law Marijuana Use, the ADA, and state accommodation laws

Marijuana under Federal Law





WHITE HOUSE

Biden pardons marijuana offenses, calls for review of federal law

The president will also be urging governors to do the same for cases regarding state offenses of civil possession of marijuana.



By EUGENE DANIELS and NATALIE FERTIG

10/06/2022 03:01 PM EDT

Updated: 10/06/2022 05:35 PM EDT



President Joe Biden on Thursday granted a pardon to all people convicted of simple marijuana possession under federal law, in what amounts to the most extensive White House action taken to date on U.S. drug policy.



Marijuana under Federal Law

- 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.
- Under federal law, possession of marijuana (no intent to distribute) is punishable by up to 1 year in jail and a minimum fine of \$1,000 for a first conviction.
 - For a second conviction, the penalties increase to a 15-day mandatory minimum sentence with a maximum of 2 years in prison and a fine of up to \$2,500.



Drug Testing under Federal Law

- (1) Federal Contractors and Grantees
- (2) Safety and Security-Sensitive Industries



Drug-Free Workplace Act of 1998

- Applies to any organization that receives a federal contract of \$100,000 or more and any organization receiving a federal grant of any size.
- Requirements
 - (1) Prepare and distribute a formal drug-free workplace policy statement. This statement should clearly prohibit the manufacture, use, and distribution of controlled substances in the workplace and spell out the specific consequences of violating this policy.



Drug-Free Workplace Act (cont.)

- Requirements (cont.)
 - (2) Establish a drug-free awareness program. This program that includes the following:
 - Informing employees of the dangers of workplace substance use;
 - Review the requirements of the organization's drug-free workplace policy; and
 - Offer information about any counseling, rehabilitation, or employee assistance programs (EAPs) that may be available.



Drug-Free Workplace Act (cont.)

- Requirements (cont.)
 - (3) Ensure that all employees working on the federal contract understand their personal reporting obligations. Under the terms of the Drug-Free Workplace Act, an employee must notify the employer within five calendar days if he or she is convicted of a criminal drug violation;
 - (4) Notify the federal contracting agency of any covered violation. Under the terms of the Drug-free Workplace Act, the employer has 10 days to report that a covered employee has been convicted of criminal drug violation.



Drug-Free Workplace Act (cont.)

- Requirements (cont.)
 - (5) Take direct action against an employee convicted of a workplace drug violation.
 - This action may involve imposing a penalty or requiring the offender to participate in an appropriate rehabilitation or counseling program.



Drug-Free Workplace Act (cont.)

- Requirements (cont.)
 - (6) Maintain an ongoing good faith effort to meet all the requirements of the Drug-free Workplace Act throughout the life of the contract. Covered organizations must demonstrate their intentions and actions toward maintaining a drug-free workplace. Their failure to comply with terms of the Drug-Free Workplace Act may result in a variety of penalties, including suspension or termination of their grants/contracts and being prohibited from applying for future government funding.



Safety and Security-Sensitive Industries

- Employers and employees in such industries are subject to drug-testing requirements from the Department of Transportation (DOT), Department of Defense (DOD), and Nuclear Regulatory Commission (NRC).
- Under Executive Order 12564, all federal employees involved in "law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of public trust" are subject to mandatory drug testing.



DOT Drug Testing

- The Omnibus Transportation Employee Testing Act of 1991 requires drug and alcohol testing of all safety-sensitive transportation employees in aviation, trucking, railroads, mass transit, pipelines, and other transportation industries.
- Federal Aviation Administration (FAA), Federal Motor Carrier Safety Administration (FMCSA), Federal Railroad Administration (FRA), Federal Transit Administration (FTA), National Highway Traffic Safety Administration (NHTSA), Pipeline and Hazardous Materials Safety Administration (PHMSA), U.S. Coast Guard

Marijuana Effects





Marijuana at Work

- National Institute on Drug Abuse Study
 - Found 55% more industrial accidents, 85% more injuries, and 75% greater absenteeism among employees who tested positive for marijuana compared to those who tested negative
- 2019 National Safety Council (NSC) Policy Statement
 - “Cannabis impacts psychomotor skills and cognitive ability” and “there is no level of cannabis use that is safe or acceptable for employees who work in safety-sensitive positions”



Marijuana at Work (cont.)

- Research has also demonstrated an association between marijuana use and motor vehicle crashes.
- NIOSH
 - Currently developing information and resources on the topic of impairment testing as a potential adjunct or alternative to certain forms of workplace drug testing.
- State Workers' Compensation Statutes
 - Most state laws restrict workers compensation benefits when the injury is attributed to intoxication or drug use

State Drug Testing Laws





State Drug Testing Laws

- Types of Laws
 - **Mandatory vs. Voluntary *Testing***
 - Most states do *not* mandate testing for private employers, but there may be state contractor requirements.
 - **Mandatory vs. Voluntary *Policies***
 - Some state laws specify the actual requirements of a policy and the types of testing that are permitted (e.g., MN, IA).



Wisconsin

- No state law mandating drug testing for private employers.
- But, private employers working on public works or public utility construction projects must have a written program in place for the prevention of substance abuse among their employees prior to starting work on a project.
 - Must include pre-employment, random, reasonable suspicion, and post-accident testing.



Minnesota

- In Minnesota, drug testing **only** can be done under an employer's written policy, which must include the following:
 - Who is subject to testing under the policy and when testing is required;
 - The disciplinary consequences of a positive test result;
 - The employee's right to refuse testing and the consequences of refusal; and
 - The employee's right to explain a positive result and to take a re-test.



Minnesota (cont.)

- Prior to testing, the employer must provide the written testing policy and a form to acknowledge receipt of the policy to the affected employee.
- Notice of the policy must be posted in an “appropriate and conspicuous” location. The notice must state that employees can inspect the policy during regular work hours.



California

- There is no statute or regulation governing drug testing of employees and applicants by private employers in California.
- California Assembly Bill 2188 (2022)
 - Effective Jan. 1, 2024
 - Prohibits employers from discriminating against employees based on: (1) the employee's use of cannabis off the job and away from the workplace; and (2) a drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.



California (cont.)

- California Assembly Bill 2188 (2022)
 - AB 2188 does not apply to employees in the “building and construction trades.”
 - Does not apply to employees in positions requiring federal government background investigations or security clearances through the United States Department of Defense.

Collectively Bargained Testing





Collectively Bargained Testing

- DC-14 (Glazers)

ARTICLE 25

DRUG TESTING

If an owner or general contractor requires the Glazing Contractors employees to submit to a drug testing program or policy, the Union will permit such testing provided it is applied equally to all trades on the site.

An Employer may request a drug free work place, provided Employer tests all company personnel, including management, office personnel, glaziers, other union and hourly employees of other trades employed by the Employer. All such personnel are required to be tested and have a drug free card.

All drug testing and notifications shall be conducted by Employer at his expense.

CBA Testing (cont.)

- NFL drug testing policy and the “Williams Wall”
- Tested positive for “bumetanide”
- Because it was not a “drug” as defined by Minnesota law, it was not subject to the state drug testing statute.
- Court noted that “our holding is limited to the specific facts of this case and should **not** be read to excuse the NFL from complying with DATWA when applicable.”





CBA Testing (cont.)

- DC-16 (Nevada)

ARTICLE 32

DRUG FREE WORKPLACE

SECTION 1. The Signatory Floor Covering Contractors and District Council No. 16 have negotiated a drug free and alcohol free workplace policy for individuals covered by this Agreement. The policy is included in this Agreement as Attachment 1.

ATTACHMENT 1

DRUG & ALCOHOL POLICY

POLICY STATEMENT

The signatory parties are committed to providing all employees with a drug-free and alcohol-free workplace. It is our combined goal to protect the health and safety of signatory employers, management personnel, craft workers, and visitors to our job sites; to promote a productive workplace, and protect the reputation of all signatory organizations and their people.

Consistent with those goals, the joint parties agree to prohibit the use, possession, distribution or sale of drugs, drug paraphernalia or alcohol at the facilities or project sites of signatory employers who adopt this Drug and Alcohol Policy. A program which includes the "testing of body fluids(*)" may be instituted to monitor compliance with this policy.



POLICY ADMINISTRATION

1. Prohibited Substances

A drug is defined as any substance which may impair mental or motor function including but not limited to illegal drugs, controlled substances, designer drugs, synthetic drugs, look alike drugs and, under circumstances described in this policy, prescription drugs. Alcohol is defined as any beverage or substance containing alcohol.

2. Pre-Employment Testing

Prior to the start of employment, prospective employees will be asked to provide a body fluids (*) specimen to test for the presence of prohibited substances. Presence of one or more prohibited substances will be cause for rejection of employment. Refusal to provide a specimen for the test will be considered voluntary withdrawal of the application for employment. If the medical facility cannot provide test results prior to the scheduled reporting date, employment will be considered probationary until the test results are known to the Company.

3. Testing of Employees

Employees may be asked to undergo a body fluids(*) test under the following circumstances:

- (a) As part of a jobsite massive drug screening.
- (b) Direct involvement in any type of accident. Accident testing will be performed in accordance with "Points of Understanding" paragraph 2.
- (c) When supervision has reason to suspect employee drug use or alcohol intoxication, testing will be accomplished in accordance with the provisions of Section IV, paragraph C, after a reasonable effort to contact Union Steward or Business Representative prior to taking action.



5. **Prescription Drugs**

Employees using a prescription drug, which may impair mental or motor function, shall inform their supervisor of such drug use. For the safety of all employees, the Company may place persons using such drugs in a less hazardous job assignment or place them on temporary medical leave until released as fit for duty by the prescribing physician. The Company reserves the right to have its physician determine if a prescription drug produces hazardous effects or to restrict the quantity the employee is allowed to bring to the workplace.

6. **Disciplinary Action**

- (a) Applicants testing positive will not be hired.
- (b) Employees testing positive, in both the basic and positive test verification, will be terminated.
- (c) Employees found in possession of illegal drugs or drug paraphernalia will be terminated.
- (d) Employees found selling drugs will be terminated and turned over to proper authorities for prosecution.
- (e) Employees found under the influence of alcohol while on duty or while driving a Company vehicle will be subject to termination.
- (f) Employees who refuse to cooperate with testing procedures will face disciplinary action consistent with a positive test.
- (g) Employees who refuse to cooperate will not be forcibly detained or searched. But, failure to cooperate will result in disciplinary action.



URINE DRUG-OF-ABUSE THRESHOLDS

Drug	Screening Detection Limit	Screening Method	Confirmation Limit	Confirmation Method
Amphetamines	1000 ng/mL	EMIT/ABUSCREEN	500 ng/mL	GC/MS
Barbiturates		EMIT/ABUSCREEN	200 ng/mL	GC/MS
Secobarbital	300 ng/mL			
Phenobarbital	1000 - 3000	ng/mL		
Butalbital	1000 ng/mL			
Benzodiazepines -		EMIT/ABUSCREEN	200 ng/mL	GC/MS
Oxazepam	300 ng/ml			
Chlordiazepoxide	3000 ng/mL			
Diazepam	2000 ng/mL			
Cocaine Metab	300 ng/ml	EMIT/ABUSCREEN	150 ng/mL	GC/MS
Methadone	3000 ng/mL	EMIT/ABUSCREEN	100 ng/mL	GC/MS
Methaqualone	300 ng/mL	EMIT/ABUSCREEN	300 ng/mL	GC/MS
Opiates		EMIT/ABUSCREEN	300 ng/mL	GC/MS
Morphine	300 ng/mL			
Codeine	1000 ng/mL			
PCP (Phencyclidine)	25 ng/mL	EMIT/ABUSCREEN	25 ng/mL	GC/MS
THC (Marijuana)				
Employment	100 ng/mL	EMIT/ABUSCREEN	15 ng/mL	GC/MS
Treatment	20 ng/mL	EMIT/ABUSCREEN	5 ng/mL	GC/MS
Propoxyphene	300 ng/mL	EMIT/ABUSCREEN	100 ng/mL	GC/MS
Ethanol	.10 g/dL	ADH*	0.03 g/dL	GC

*Alcohol dehydrogenase method NIDA specified threshold



Nevada

- Nevada does not have any general employment drug or alcohol testing laws.
- Effective January 1, 2020, passed Nev. Rev. Stat. § 613.132, which prohibits employers from failing or refusing to hire “a prospective employee because the prospective employee submitted to a screening test and the results of the screening test indicate the presence of marijuana.”
- But, § 613.132 specifically does ***not*** apply to any conflicting “provisions of an employment contract or ***collective bargaining agreement.***”

Medical Marijuana – Federal Law





Medical Marijuana – Federal Law

- Remember, marijuana is a Schedule 1 drug under the Controlled Substances Act.
- The DOT has taken the position that medical marijuana does not constitute a valid medical explanation for a covered employee's positive drug test result.
 - When an employee is subject to mandatory testing under DOT regulations, medical marijuana does not constitute a valid explanation for the positive test result.

State Medical Marijuana Laws

Summary:

- ***Most*** do ***not*** include “employment protections”
- **All** state laws ***prohibit*** impairment during working time.
- **All** include ***exceptions*** for employees governed by federal law (e.g., DOT, DoD, etc.)



Minnesota Medical Marijuana

- Minnesota's law includes ***employment protections***:
 - “[A]n employer may not discriminate . . . or otherwise penalize a person,” if the discrimination is based upon the person’s status as a qualified patient or a qualified patient’s positive drug test for cannabis components or metabolites.



MN Medical Marijuana (cont.)

- Exceptions:
 - “[T]he patient used, possessed, or was impaired by medical cannabis on the premises of the place of employment or during the hours of employment.”
 - Failure to take action “would violate federal law or regulations or cause an employer to lose a monetary or licensing-related benefit under federal law or regulations.”
 - E.g., a CMV driver, pilot (i.e., job regulated by federal drug testing).

Illinois

- Illinois law authorizes the use of medical marijuana.
- But:
 - The law does not require Illinois employers to accommodate on-site medical marijuana use.
 - Employers may also enforce a drug testing, zero-tolerance, or drug-free workplace policy if they apply the policy in a nondiscriminatory manner.



Arizona

- Arizona Medical Marijuana Act allows qualifying patients to obtain or cultivate marijuana
- Employers may not discriminate against employees or applicants who either:
 - Are registered, qualified patients for medicinal marijuana.
 - Fail drug tests for marijuana if they are registered, qualified patients, **unless** the employee used, ***possessed***, or was ***impaired*** at the ***place of employment*** or ***during work hours***.



Washington

- Washington law authorizes the use of medical and recreational cannabis.
- Employers are **not** required to accommodate on-site medical cannabis **use**.
- Employers are expressly permitted to “**establish drug-free work policies**” and “[n]othing in [the Washington state law] requires an accommodation for the medical use of cannabis if an employer has a drug-free workplace.”



New York

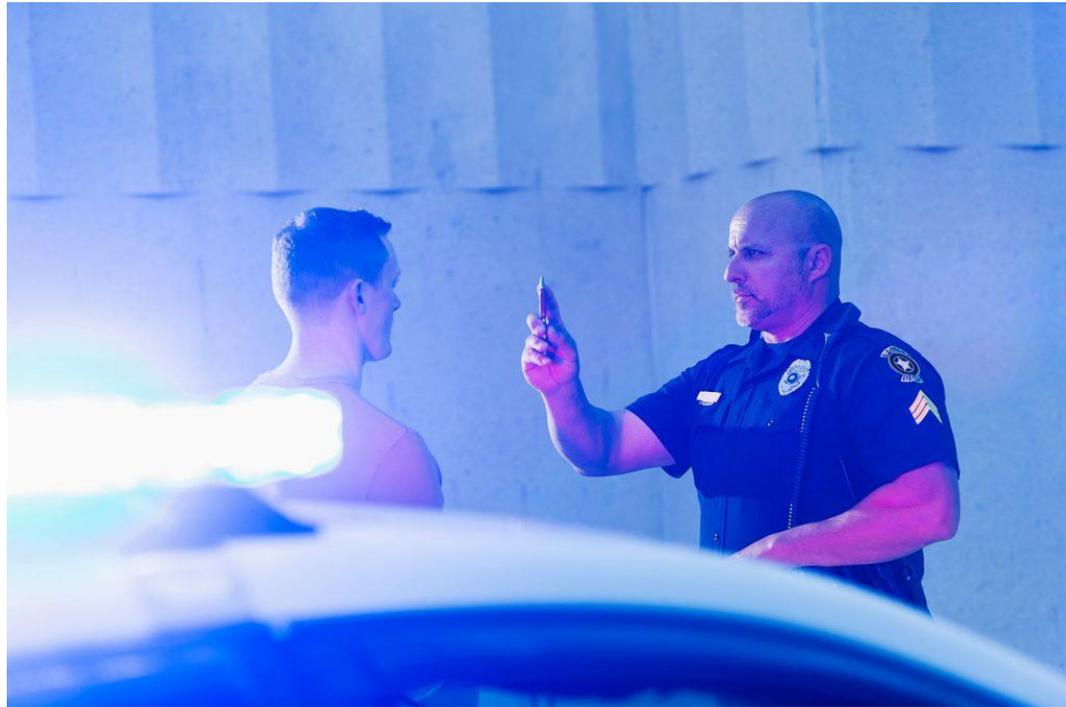
- Effective March 31, 2021, New York prohibits employers from discriminating against employees based on legal consumption of marijuana or related activities and may not discipline an employee for using medical marijuana.
- Employers may, however, take action based on “an established substance abuse or alcohol program or workplace policy, professional contract or collective bargaining agreement.”



New Jersey

- Effective Aug. 19, 2021, New Jersey's law protects anyone who uses marijuana and prohibits adverse employment actions based “**solely**” on a positive marijuana test.
- Employers can still maintain and enforce drug-free workplace policies that prohibit the use, possession, or being under the influence of marijuana in the workplace and during work hours.
- Thus, reasonable suspicion testing still permitted.

What Is Impairment?





What is Impairment?

- What constitutes “impairment” of marijuana may be hard to determine.
- The National Institute on Drug Abuse has noted that the “noticeable effects of smoked marijuana [i.e. the feeling of being ‘high’] generally last from 1 to 3 hours,” however, detectable amounts of THC may remain in the body for days or even weeks after use.



Testing for Impairment

- The four most common methods of testing for marijuana are:
 - **Blood tests:** Cannot identify impairment.
 - **Urine tests:** Cannot identify impairment due to length of time between ingestion and excretion.
 - **Hair tests:** Cannot accurately measure impairment because marijuana residue does not appear in the hair until days after first use.
 - **Saliva tests:** Relatively new and less reliable test.



Critical Issue: What Is Impairment?

- State law typically has no definition of impairment.
- Unlike alcohol, it is very difficult to identify whether an individual who tests positive for marijuana is “impaired.”
- Marijuana is stored in fat cells and can often remain in body (and lead to positive test) for several weeks.
- Blood and saliva tests are not reliable indicators of impairment because cannabinoids remain in the body for up to 30 days, but impairment may only last a few hours.



Critical Issue: Impairment

- Even when testing accurately measures THC, there is still a lack of scientific agreement, and legal definition, of what levels constitute impairment.
- Colorado, Washington, and Nevada have defined the legal limit for ***driving*** under the influence of THC.
 - Colorado and Washington: 5 nanograms of active THC in the blood.
 - Nevada: 2 nanograms of THC in the blood.



Reasonable Suspicion Process

Observe—
What do you
see, smell,
hear?

Document—
Use objective
language

Confront and
Converse—Be
direct but
supportive

Testing—
Know your
organization's
guidelines

Services and
Treatment



Reasonable Cause – Questions to Ask



Has some form of impairment been shown in the employee's appearance, actions or work performance?



Does the impairment result from the possible use of drugs or alcohol?



Are the facts reliable? Did you witness the situation personally, or are you sure that the witness(es) are reliable and have provided firsthand information?



Are the facts capable of explanation?



Are the facts capable of documentation?



Is the impairment current, today, now?



REASONABLE SUSPICION OBSERVED BEHAVIOR REPORT

Behavior that provides reasonable suspicion supporting a test for controlled substances or alcohol use must be observed and documented by a supervisor. If possible, the behavior should be observed and documented by two supervisors. The documentation of the employee's conduct shall be prepared by the observing supervisor(s) within 24 hours of the observed behavior or before the results of the tests are released, whichever is earlier. Distribute this report to appropriate authorities based on agency policy and procedures while maintaining employee confidentiality.

Employee Name _____ Employee ID Number _____

Employee Job Title _____ Agency _____

Employee is reporting for duty _____ Employee is already on duty _____

Behavioral observation timeline:
 From (date/time) _____/_____/_____ am/pm To (date/time) _____/_____/_____ am/pm

Site or Location where observation(s) occurred:
 Street Address _____ City _____ Zip Code _____

CAUSE FOR REASONABLE SUSPICION
NOTE: A manager or supervisor must complete this form. A combination of one or more observable signs and symptoms of drug or alcohol use must be observed to establish reasonable suspicion. Determination of reasonable suspicion must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, body odors or speech (ABBS) of the employee. The observations may include indications of the chronic and withdrawal effects of controlled substances. In making a determination of reasonable suspicion, additional factors may include, but are not limited to the following:

- Pattern of unsatisfactory job performance or work habits;
- Occurrence of a serious or potentially serious work-related accident that may have been caused by human error or flagrant violations of safety, security, or other operating procedures;
- Evidence of illegal substance use, possession, sale, or delivery while on duty and/or possession of drug paraphernalia;
- Information provided by either a reliable or credible source independently corroborated or having corroborative evidence from a supervisor;

Physical Signs or Symptoms (CIRCLE ALL THAT APPLY)

Flush/pale/sweaty face	Dry mouth/lip smacking	Odor of alcohol
Profuse/excessive sweating	Vomiting/excessive belching	Odor of marijuana
Red/bloodshot eyes	Shaking hands/body tremors/twitching	Odor of chemicals
Glassy/watery eyes	Disheveled appearance	
Closed eyes	Needle tracks or puncture marks	
Droopy eyelids	Frequent sniffing	
Dilated/constricted pupils	Shortness of breath/difficulty breathing	
	Runny nose/sores around nostrils	

Behavioral Indicators (CIRCLE ALL THAT APPLY)

Agitated/insulting speech	Irritable/angry/impulsive	Sad, depressed, withdrawn
Combative/threatening speech	Use of profanity/argumentative	Anxious/fearful
Incoherent/sturred/slow speech	Swaying/stumbling/staggering	Cannot control machinery/equipment
Rapid/rambling/repetitive speech	Lack of coordination	Excessive yawning/fatigue/lethargy
Delayed/mumbling speech	Disoriented/confused	Unaccounted time/extended breaks
Shouting/whispering/silent	Euphoric	Loss of inhibition
Uncharacteristically talkative	Tearful	Inappropriate wearing of sunglasses
	Impaired judgment	Falling down/reaching for support
	Sleepy/stupor	In appropriate wearing of outerwear

SAMPLE last update 6.23.22



REASONABLE SUSPICION OBSERVED BEHAVIOR REPORT

Behavior that provides reasonable suspicion supporting a test for controlled substances or alcohol use must be observed and documented by a supervisor. If possible, the behavior should be observed and documented by two supervisors. The documentation of the employee's conduct shall be prepared by the observing supervisor(s) within 24 hours of the observed behavior or before the results of the tests are released, whichever is earlier. Distribute this report to appropriate authorities based on agency policy and procedures while maintaining employee confidentiality.

Employee Name _____ Employee ID Number _____

Employee Job Title _____ Agency _____

Employee is reporting for duty _____ Employee is already on duty _____

Behavioral observation timeline:

From (date/time) _____/_____/_____ am/pm To (date/time) _____/_____/_____ am/pm

Site or Location where observation(s) occurred:

Street Address _____

City _____

Zip Code _____



CAUSE FOR REASONABLE SUSPICION

NOTE: A manager or supervisor must complete this form. A combination of one or more observable signs and symptoms of drug or alcohol use must be observed to establish reasonable suspicion. Determination of reasonable suspicion must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, body odors or speech (ABBS) of the employee. The observations may include indications of the chronic and withdrawal effects of controlled substances. In making a determination of reasonable suspicion, additional factors may include, but are not limited to the following:

- Pattern of unsatisfactory job performance or work habits;
- Occurrence of a serious or potentially serious work-related accident that may have been caused by human error or flagrant violations of safety, security, or other operating procedures;
- Evidence of illegal substance use, possession, sale, or delivery while on duty and/or possession of drug paraphernalia;
- Information provided by either a reliable or credible source independently corroborated or having corroborative evidence from a supervisor;


Physical Signs or Symptoms (CIRCLE ALL THAT APPLY)

Flush/pale/sweaty face
 Profuse/excessive sweating
 Red/bloodshot eyes
 Glassy/watery eyes
 Closed eyes
 Droopy eyelids
 Dilated/constricted pupils

Dry mouth/lip smacking
 Vomiting/excessive belching
 Shaking hands/body tremors/twitching
 Disheveled appearance
 Needle tracks or puncture marks
 Frequent sniffing
 Shortness of breath/difficulty breathing
 Runny nose/sores around nostrils

Odor of alcohol
 Odor of marijuana
 Odor of chemicals

Behavioral Indicators (CIRCLE ALL THAT APPLY)

Agitated/insulting speech
 Combative/threatening speech
 Incoherent/slurred/slow speech
 Rapid/rambling/repetitive speech
 Delayed/mumbling speech
 Shouting/whispering/silent
 Uncharacteristically talkative

Irritable/angry/impulsive
 Use of profanity/argumentative
 Swaying/stumbling/staggering
 Lack of coordination
 Disoriented/confused
 Euphoric
 Tearful
 Impaired judgment
 Sleepy/stupor

Sad, depressed, withdrawn
 Anxious/fearful
 Cannot control machinery/equipment
 Excessive yawning/fatigue/lethargy
 Unaccounted time/extended breaks
 Loss of inhibition
 Inappropriate wearing of sunglasses
 Falling down/reaching for support
 Inappropriate wearing of outerwear



Description of actions or behaviors Provide a detailed description of the behaviors or indicators you observed.
Apply BOAS - Describe Behavior, O odors, Apppearance, Speech when documenting observations.

Post Accident (Complete if applicable) Specify indicators of drug or alcohol use as a potential factor in this accident:

Employee Interview Ask employee, "Explain the behaviors we have observed" and provide employee response:



Checklist Answer the following questions to establish reasonable cause for testing. Consult with your Human Resources Business Partner, Human Resources Representative, Appointing Authority or designee to determine appropriateness of testing upon answering the following questions.

1. Has impairment been displayed by the employee in their workplace appearance, actions and/or performance?
 Yes No
2. Could the impairment result from the possible use of drugs and/or alcohol?
 Yes No
3. Is the impairment current?
 Yes No
4. Did you personally witness the situation and/or the concerning appearance, actions, behavior or performance?
 Yes No
5. Are observers able to (and/or have they) document(ed) facts about the situation?
 Yes No

Observer Information (Must be a manager or supervisor)

Supervisor/Manager Name: _____

Title: _____ **Date/Time:** _____

IMPORTANT NOTE: SECONDARY OBSERVER must complete a separate, original form. Always seek a secondary observation from another supervisor, manager, or team lead.



Confronting the Employee

- Collect all information
- Get confirmation whenever possible
- Use only objective data
- Consult with HR and/or EAP
- Speak to employee in private
- Be specific—state your concerns and why
- Be prepared for emotional response
- Explain expectations and/or consequences
- Do not allow employee to leave premises on their own
- Document the meeting



What About Edibles?

- Hemp vs. Marijuana
 - Hemp is defined as cannabis that has a THC concentration of no more than 0.3% on a dry weight basis
 - Marijuana is cannabis that exceeds the 0.3% threshold.
- Unlike THC, CBD does not cause a high.



What About Edibles?

- The 2018 Farm Bill (Pub. L. No. 115-334) clarified that cannabidiol (CBD) extracted from hemp is legal under certain conditions.
- CBD is legal under federal law if:
 - It contains no more than **0.3% THC** on a dry weight basis.
 - It is derived from ***hemp*** grown by a business compliant with its governing state's requirements, or federal requirements if the state does not have a hemp production plan in place.
- State law remains unclear.



Minnesota

- Effective July 1, 2022, Minnesota enacted a law which allows small amounts of hemp-derived THC (either delta 8 or delta 9) products in food and beverages.
- How much THC?
 - No more than 0.3% of any hemp-derived THC and the product may not contain more than 5 mg of THC per serving or 50 mg per package.

Edibles (cont.)

What do I do if one of my employees tests positive test for THC and claims it's because of the edibles available under the new law?

- For now, a positive test for THC is a positive test for THC regardless of how the employee came to test positive.
- MN-DATWA does not specifically address the level at which an applicant or employee is considered to have a positive test.
- Let your MRO or the lab tell you whether the employee is positive.

Edibles (cont.)

Can drug screens tell the difference between marijuana-derived THC and hemp-based THC?

- At this time, it does not appear that most regular drug screens (an immunoassay test, saliva or hair test) can tell the difference between lawful use and unlawful use.

Edibles (cont.)

What about a state's lawful consumables statute?

- A court in Colorado concluded that an employer may terminate for off-duty use of THC because even though the use of the THC was authorized by state law, it was not authorized by federal law.
- Now, however, the 2018 Federal Farm Bill legalized hemp-derived THC, so edibles may be legal under state and federal law.

Workers' Compensation Benefits

- Minnesota and Maine have held that the federal Controlled Substances Act preempted state law requiring employers reimburse employees for medical marijuana treatment costs.
- New Jersey's Supreme Court found no conflict between state law requiring reimbursement for medical marijuana and the federal Controlled Substances Act.

Medical Marijuana and the ADA





Medical Marijuana and the ADA

- Courts have found that the ADA does not require employers to allow medical marijuana use as a reasonable accommodation.
- The ADA specifically excludes individuals engaging in “illegal” drug use from the definition of a qualified individual.
- Even if prescribed, marijuana remains illegal under federal law.
- The ADA’s definition of illegal drugs includes prescribed marijuana.



Developing Exception – State Law and Medical Marijuana Accommodations

- States are increasingly, but not uniformly, finding an obligation to accommodate medical marijuana use under state law.
- As a result, employers may still need to engage in the interactive process with respect to employee medical marijuana use, even through such accommodation is not required under Federal law.

Developing Exception – State Law and Medical Marijuana Accommodations

- Paine v. Ride-Away, 274 A.3d 554 (N.H. Jan. 14, 2022)
 - Holding that an employee's use of therapeutic cannabis prescribed by physician in accordance with the law could, as a matter of law, be a reasonable accommodation for employee's disability.
- Other states
 - Arizona, Connecticut, Delaware, Massachusetts, New Jersey, New York, and Rhode Island, among others.

State ADA/Accommodation Laws

- The law in this area is very unsettled.
- While failing to accommodate medical marijuana use may not violate the state ADA/accommodation, failing to accommodate may also constitute “discrimination” under the state medical marijuana statute.
 - E.g., Arizona and Minnesota statutes prohibit “discrimination” against the patient based on status as registered user.



Medical Marijuana as a Reasonable Accommodation

- Regardless of the applicable state law with respect to accommodating medical marijuana use, employers must still accommodate the underlying condition for which the medical marijuana was prescribed, even if not required to allow medical marijuana use.
- What about “edible cannabinoid products”?
 - Do they need to be “prescribed” by a physician?



QUESTIONS?

Thank you.