

Handbook Hot Topics: State Laws Shape Drug-Testing Policies

By **Kasey Cappellano and Meaghan Gandy** (September 2, 2025)

This article is part of a bimonthly column that discusses trending employee handbook issues. In this installment, we focus on how the recent uptick in state laws regulating drug testing have affected employer considerations in relation to creating and following drug-testing policies.

In the last few years, several states have passed laws regulating marijuana use to varying degrees.[1] In particular, state laws regulating employer drug testing have grown in popularity.

This continues what has been a nonstop trend of such legislation since 1996, when California became the first state to enact medical marijuana legislation with the Compassionate Use Act.[2]

As of February 2024, approximately 47 states had decriminalized medical marijuana and at least 24 states had even enacted protections for off-duty recreational use of marijuana.[3]

In light of the continued trend of decriminalizing or protecting marijuana use, employers — especially multistate employers or employers with remote workers outside the organization's primary state — should consider whether the cost and effort of tracking and revising employee handbook policies and procedures on drug testing to comply with the constantly evolving patchwork of state laws, where voluntary, is useful and efficient.[4]



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Deciding Whether to Drug Test

When reviewing or implementing a drug-screening policy, employers first should assess whether drug testing is required by applicable law. If it is not required, employers should carefully consider whether testing serves a useful purpose.

Employers may simply assume that drug screening is necessary without considering the specific circumstances of their particular business.

For example, testing may be appropriate, regardless of any administrative challenges, if the work environment is extremely dangerous.

Likewise, employers may choose to test employees who work in safety-sensitive positions, which may include those who are tasked with medical or caregiving duties, or those who work in roles that require handling sensitive confidential information or financial data.

Finally, employers may be required to drug test workers in specific roles, such as commercial drivers who are regulated by the U.S. Department of Transportation, or to ensure workplace safety, pursuant to the Occupational Safety and Health Act and similar laws.

Where drug testing is not required by applicable law, or where workers are unlikely to endanger themselves or others, or present any other security concerns, employers may

choose not to drug test.

The benefits of eliminating testing include not only avoiding the expenses, time and resources that are associated with testing, but also avoiding the administrative burden and costs of monitoring changes in the law and updating policies and procedures to comply with those changes.

Perhaps most significantly, employers that choose not to drug test may have a larger pool of qualified applicants to draw from, particularly in industries like technology, retail sales, fast food and fitness.

Employers that are considering a change in their drug-testing procedures should ensure that they consider all potential requirements and risks.

Drug-Testing Policies

For employers that are required to drug test, or those that choose to do so, a comprehensive policy is crucial.

Several states, including, but not limited to Iowa and Minnesota, explicitly require employers to create and provide notice of a formal drug-testing policy before screening applicants or employees.[5]

Even in states where no law requires a policy, courts have upheld claims for violation of the right to privacy if an employee is not given written notice of the possibility of testing and the procedures involved.

A drug-testing policy should start by setting forth the organization's philosophy or position on drug or alcohol use in the workplace, which should signal the extent of the employer's drug-testing procedures.

An employer's stance may be completely prohibitive of all substances that can cause impairment, or it may specify prohibitions on illegal drugs while excluding any reference to medical marijuana or prescription medications that may nonetheless cause impairment.

Even employers that do not intend to drug test should state the expectation that workers must be able to perform their duties safely and productively, and that employees must never use or possess drugs or alcohol while on company property or while engaged in company business.

Next, the policy should specify the types of testing that it may or will conduct, which can include preemployment, reasonable suspicion, random and post-accident testing, as permitted by applicable state law.

The policy should also describe the circumstances in which each type of testing will occur and specify the segment of employees who are subject to the type of testing.

A drug-testing policy should include testing procedures, including the collection of the employee's consent, how and where the sample will be collected, the fluid used for the test, e.g., urine, saliva or blood, the amount of time within which the employee must report to test after being asked to do so, and whether an employee will be taken out of the workplace pending the result of the test.

The policy should specify disciplinary consequences for a positive test, as well as consequences for attempting to adulterate a sample or refusing to submit to a test.

Importantly, employers are obligated to consider exceptions to a drug-testing policy as reasonable accommodations under the Americans with Disabilities Act.

For example, some individuals take legally prescribed medications or use marijuana off duty. Use of these substances could cause an employee to fail a drug test, but they may not be impaired or unqualified to perform the essential functions of their role. In such a case, an employer may be required to permit the use of such substances.

Notably, no employer is required to permit on-duty use of marijuana, or to allow an employee to work in a state of impairment that is caused by any medication or drug.

Despite employers' obligation to consider exceptions to a drug-testing policy as an accommodation, most states do not require employers to include this information in a drug-testing policy.

However, the inclusion of such information is helpful to establishing an employer's knowledge of, and compliance with, the ADA, and it may also result in more self-reporting of medications by employees, which can, in turn, result in a safer workplace.

Finally, if applicable, an employer may wish to include information related to any employee assistance programs, in which companies give employees the option to self-report a problem with drugs or alcohol and seek assistance from a substance abuse facility without penalty, as long as the report does not come after a positive test.

Medical and Recreational Marijuana Laws

As discussed above, most states have regulated marijuana to some extent. However, the extent to which this will affect your drug-testing procedures varies according to the individual protections provided by the state — especially because marijuana is still illegal under federal law.

Laws that simply decriminalize marijuana are typically the least relevant to employers. These laws usually eliminate criminal sanctions for possessing small amounts of marijuana, but they do not limit employers from testing or disciplining employees who have marijuana in their systems.

Nonetheless, to the extent that an employee consumes a legal substance off duty and comes to work free of impairment, some courts have held that an employee should not be penalized for lawful, off-duty conduct where applicable law protects such conduct.[6]

In recognition of this possibility, employers should consider imposing drug-testing cutoff levels that would exclude from discipline employees who have very low levels of marijuana in their system.

Some states protect employees who have been prescribed medical marijuana in accordance with the state's regulatory scheme. These protections usually require the employer to consider accommodating off-duty marijuana use, including potentially withholding disciplinary action for a medical marijuana user's positive test result.

Other states provide that while an employee may be disciplined for being under the

influence of marijuana at work, an employer cannot assume such impairment based solely on a positive test and must have other reasonable grounds for such action. In these states, employers should modify their policies to indicate that testing will be conducted where reasonable grounds exist.

Employers are also advised to train supervisors to look for physical, psychological or performance-based factors that would give rise to a reasonable suspicion of drug use.

Some states have enacted laws that regulate an employer's ability to test for marijuana, usually by limiting such testing to a subset of employees who work in safety-sensitive positions. State laws typically define what is considered to be safety-sensitive and how such roles must be designated.

Several states, and even some cities, have enacted laws that prohibit employers from refusing to hire or otherwise discriminating against applicants or employees solely on the basis of a drug test that is positive for marijuana.

Further, some cities and states prohibit asking about or testing applicants for marijuana use. Written policies need not necessarily be modified to account for these laws, but employers must know and follow the appropriate procedures in these jurisdictions.

Finally, some states allow legal use of low-THC and low-CBD products. These products generally cause little to no impairment because they contain smaller amounts or none of the chemicals that cause euphoria or psychoactive symptoms.

Nonetheless, the use of these products may still result in a positive test. Employers should generally consider having flexibility in their testing to account for the possibility that the lawful use of these products resulted in a positive test.

In addition, employers should be aware that California's A.B. 2188, which was signed into law in 2022 and took effect in January 2024, prohibits reliance on drug-testing results that do not conclusively indicate metabolites associated with the recent use of a high-THC product, i.e., a product containing high amounts of the chemical in marijuana that causes impairment.[7]

Testing for high-THC metabolites can only be conducted with a blood sample, and will only identify high-THC metabolites for approximately 24 hours after use, so some employers may choose not to test for marijuana at all in California.

Conclusion

As a result of the ever-changing patchwork of laws regulating the use of marijuana, employers have an increasingly difficult job in drafting, implementing and following drug-testing policies.

Employers should consider the benefits and costs that are associated with maintaining these policies, particularly where they are subject to multiple states' conflicting laws. Even where drug testing is permitted and desirable for an employer, exceptions to the policy may be required as accommodations.

Employers are strongly encouraged to monitor trends in drug-testing laws before making substantial changes to these policies.

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[1] See Nebraska Medical Cannabis Patient Protection Act, Neb. Rev. Stat. § 71-24, 104 et seq. (effective December 10, 2024) (removing penalties from patients who possess and use small amounts of cannabis with a healthcare practitioner's written recommendation). Regulations were issued July 1, 2025, and licensing of business begins October 1, 2025. [https://sos.nebraska.gov/sites/default/files/doc/regulations/Emergency%20Regs/Emergency%20Regulations%20238%20NAC%201%20\(effective%20through%209-28-25\).pdf](https://sos.nebraska.gov/sites/default/files/doc/regulations/Emergency%20Regs/Emergency%20Regulations%20238%20NAC%201%20(effective%20through%209-28-25).pdf).

[2] Compassionate Use Act of 1996, Cal. Health & Safety Code § 11362.5 (1996).

[3] Cannabis and Public Health, U.S. Centers for Disease Control and Prevention (Feb. 16, 2024), <http://www.cdc.gov/cannabis/about/state-medical-cannabis-laws.html>.

[4] Note that marijuana is still criminalized under federal law. Employers that are required to test under applicable law, such as Department of Transportation ("DOT") covered employers, must continue to test for marijuana and follow federal law.

[5] See Iowa Code § 730.5 (2025); Minn. Stat. § 181.951 (2024).

[6] Compare *Coats v. Dish Network, LLC*, 2015 Colo. 44, 350 P.3d 849 (2015) with *Ceballos v. NP Palace, LLC*, 138 Nev. 625, 514 P.3d 1074 (2022).

[7] California Assembly Bill 2188 (2022); Cal. Gov't Code § 12954 (2024).