

Marijuana Drug Testing: A Quick Guide



Why This Guide?

If you landed here, it's probably because your head is spinning regarding marijuana drug testing, and no wonder.

At the writing of this guide, **33 states in the U.S. and the District of Columbia have legalized the use of marijuana** either for medicinal or recreational purposes (or both). Other jurisdictions at the municipal level are also legalizing marijuana.

The federal government, however, still classifies marijuana as a Schedule I drug, which means it is illegal at the federal level. And federal law always supersedes state law. In other words, use or possession of marijuana on federal property is always illegal, even in states where recreational or medicinal use of cannabis is legal.

Given all this, workplace drug testing has gotten incredibly complex, which is why we put together this guide.

An important caveat, however: This isn't an exhaustive guide on the issue of marijuana drug testing (that would span dozens of pages). Nor is it a guide about workplace drug testing in general (you can access that free guide on the [Good Egg website under "Resources"](#)).

Instead, this quick guide will provide high-level information around three important topics that don't get enough coverage:

- 1 Why employers shouldn't ditch weed on their drug test panels**
- 2 5 common mistakes employers make when drug testing for marijuana**
- 3 Employment law and marijuana drug testing: what you need to know**

Let's get started ▼

Should Employers Ditch Drug Testing for Marijuana?



Because of complexities (or vagueness) with state laws and/or the fact that drug testing alone cannot determine if someone is impaired due to marijuana, we're seeing more and more employers opting to remove marijuana from their employment drug test panels. This is a mistake (more on this in a moment).

Regarding the point about impairment...if someone is a habitual marijuana user and they take a drug test, they *will* test positive for marijuana—even if they're not currently high.

Why?

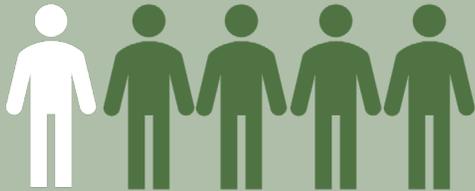
First, as [Healthline reports](#), weed “is usually detectable in bodily fluids for 1 to 30 days after last use”—and upwards of three months for heavy users. Second, drug tests only detect the *presence* of marijuana (specifically tetrahydrocannabinol or THC—the chemical that produces the high). Today's drug tests cannot determine the source/timing of marijuana ingestion. And, unlike alcohol, the test cannot determine if a person is presently under the influence of marijuana.

As you can imagine, this presents challenges for employers. Because whether a person uses marijuana at work or they use it regularly during their personal time, the fact remains that the person will test positive for marijuana in both cases.



Good Egg's Position: Keep Marijuana on Your Drug Test Panels

As we mentioned earlier, many employers are removing marijuana from their drug test panels altogether due to the above issues. At Good Egg, we believe this is a mistake. To begin to understand why, consider the following:



1 in 5 people

have admitted to using marijuana during work hours. [source: DrugAbuse.com]

57% of cannabis consumers are millennials (those who are 23-38 years old), a demographic that will make up 75% of the workforce by 2025.

[source: TheKindLand.com]

57%

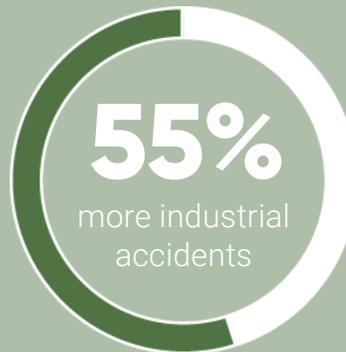
75%



"Marijuana use has been linked to an increase in job accidents and injuries."

[source: Occupational Health & Safety]

Employees who tested positive for marijuana had:



[source: The National Safety Council]



Research suggests the potential for increased use of marijuana among adults over 21 in states where it's legal.

[source: Vox.com]



States with legalized weed have seen an increase in car accidents (this is relevant to employers, because you likely have more people driving on behalf of your company than you realize).

[source: CNN.com]

As these statistics suggest, marijuana use in the workplace remains a relevant topic particularly when you consider that it can adversely affect safety, productivity, and morale. And given how many millennials use marijuana, employers would be remiss if they didn't address marijuana use in their drug and alcohol policies. Just as you wouldn't want someone drunk on the job, you wouldn't want someone high, either. Even though the legal and testing landscapes make it challenging to deal with, a "head in the sand" approach isn't smart.

Instead, employers should adapt their workplace drug testing programs to reflect and incorporate changes in state laws regarding recreational and/or medical marijuana.

Strategies for Adapting Your Drug Testing Program to Include Marijuana

- › Identify your resources – find a drug-testing partner with the expertise to assist you.
- › Research state laws in the states where your company conducts business.
- › Determine your company's policy for marijuana; make sure you understand who—if anyone—must be tested due to federal regulations (e.g., workers covered by DOT rules).
- › Train managers to recognize signs of impairment.
- › Discuss/plan for how your company will handle various scenarios.
- › Update your company's written drug and alcohol policy accordingly.
- › Consider consulting an attorney, especially if the employment laws in your state are unclear regarding employment protection and marijuana (we'll discuss this in more depth later in the guide).
- › Notify employees about changes, new protocols, etc.
- › Revisit your drug and alcohol policy yearly (at the very least) and adjust, as needed.

Now that we've addressed whether employers should still include marijuana on their drug test panel, let's talk about some of the other mistakes employers still make.



Drug Testing for Marijuana: 5 Mistakes Employers Make

Because so many states in the U.S. have legalized the use of marijuana (either for medicinal purposes, recreational purposes, or both), creating drug testing policies that include marijuana has become challenging.

After all, if so many states are legalizing weed, what's the big deal, right?

This faulty logic often leads employers to make five critical mistakes when it comes to drug testing for marijuana.

Let's go over each mistake below.

Mistake #1: Underestimating the consequences of marijuana impairment on the job.

Marijuana has a reputation for being a “chill” drug, but it's still a drug. Reflexes are affected. So are cognitive abilities. Employees who work under the influence of marijuana pose risks to themselves, their fellow employees, and to the company's good name.

[The National Safety Council notes the following:](#) “According to a study reported by the National Institute on Drug Abuse, employees who tested positive for marijuana had 55% more industrial accidents, 85% more injuries and 75% greater absenteeism compared to those who tested negative.”

Would you want one of your employees driving the company car on company time while under the influence of marijuana? Or operating machinery? Or making important decisions? Yet as we pointed out previously, we're seeing more and more companies remove marijuana from their drug testing panels. That's an incredibly short-sighted decision.





Mistake #2: Not keeping up with changes in state laws.

Pot laws at the state level are constantly changing. You need to keep up! If you have operations in more than one state, you will need to research and understand the pot laws in each state—and adjust your drug testing policies accordingly. As you likely already know, many states have conflicting laws on marijuana.

Due to the complexities, it's important to work with a screening provider that has deep expertise not only in drug testing, but also the laws governing drug testing.

Mistake #3: Failing to understand the company's obligations as an employer.

For example, employers have a duty under the [Occupational Health and Safety Act of 1970](#) to “maintain conditions or adopt practices reasonably necessary and appropriate to protect workers on the job.” So if an employee is injured due to an impaired co-worker who's been smoking recreational pot on the job, your company could be held liable ([learn more about negligent retention](#)).

Or consider this: federal contractors and federal grant recipients might be mandated to follow the [Drug Free Workplace Act of 1988](#). (Remember, marijuana is still illegal at the federal level.) So if your company contracts federal workers, what then?

It's probably easy to think your organization is doing everything correctly and “by the book,” but unless you work with a screening provider with expertise in employment law, your organization might not be compliant.

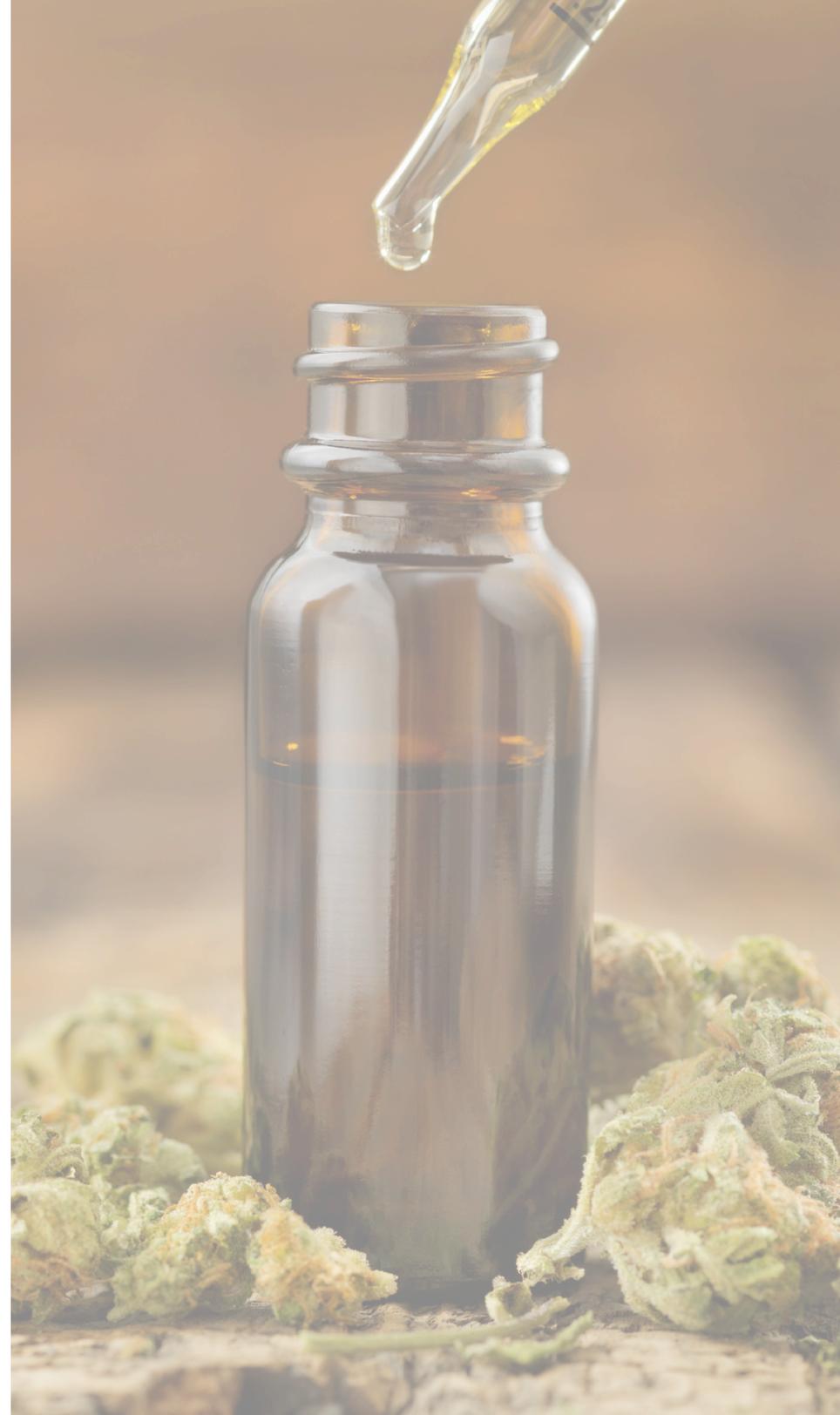
Mistake #4: Failing to educate the workforce about cannabidiol (CBD).

First, some background. What is CBD?

- CBD oil is produced from either the marijuana plant or hemp.
- The oil is created through a process that claims to remove THC—the hallucinogenic element in marijuana that produces the high—from the product.
- The quality of CBD manufacturing varies; currently, no federally-mandated standards exist regarding the manufacturing of CBD.
- People typically use CBD for medicinal purposes, such as treatments for anxiety and arthritic pain (to name just a few).
- So far, [the FDA has cleared only one CBD-based medication](#) (for epilepsy).
- THC-positive results have been known to occur from CBD use.

One of the biggest issues surrounding CBD is the lack of integrity in the manufacturing process to remove the THC from the product. Many manufacturers will claim that they've removed the THC from their products. But since no manufacturing standards exist, these claims can't be verified or guaranteed. So some products still contain THC—and consumers have no way of knowing which ones.

And that's another point—CBD products are readily available in drug stores, supermarkets, even your local gas stations.



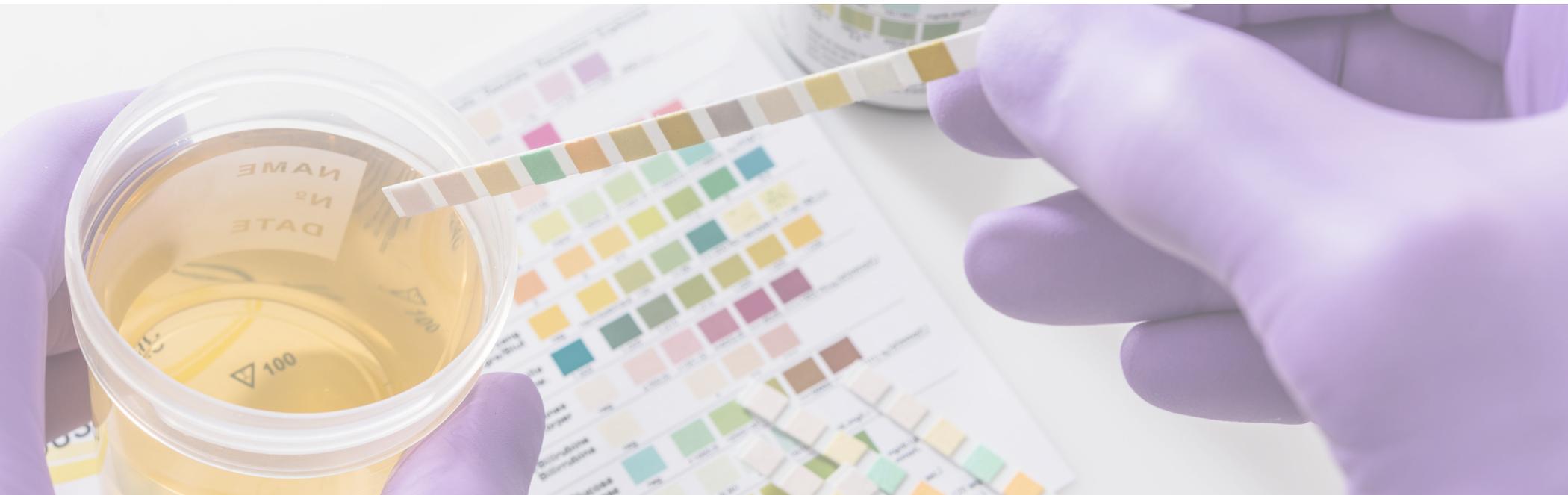
We've seen cases where employees who are taking CBD for medicinal purposes will test positive for THC and marijuana. This can be a BIG problem. Think about it: if you're in a state that does not have employee protections and your policy is that you do not hire or that you fire that individual for testing positive for marijuana, you and your employee are going to be in a tough situation.

The best thing employers can do is educate employees on the risks of taking CBD. For employees who need to use CBD, encourage them to work with their physician or provider to find the best sources of CBD to ensure they're getting a quality product where the THC has been removed.

In addition, employers should consider adding language to their drug testing policies to discourage the use of CBD oil and educate employees regarding the risks.

Mistake #5: Failing to have a comprehensive drug testing policy in the first place.

Your drug testing policy should be clear, comprehensive, and compliant, particularly when it comes to testing for marijuana. Since every state is different, and because laws are constantly changing, this is no easy feat, which is why it's essential that you and your screening provider review your drug testing policy (annually at the very least).



Employment Law & Marijuana Drug Testing: What You Need to Know



As you can imagine, the ever-changing cannabis laws can cause headaches for many, especially employers. One area that's particularly problematic is each state's employment laws regarding how employers can and can't address job candidates and employees who test positive for marijuana.



Employment Protection and *Medical Marijuana*

Simply put, some states prohibit an employer from refusing employment or taking adverse action based upon an individual's status as a medicinal marijuana recipient or user of medicinal marijuana.

In other words, in states where this employment protection applies, employers can't not hire or fire someone because they use medical marijuana and/or test positive for marijuana on a drug test (note: there are exceptions for employers with federal contracts or funding that are subject to federal regulations).

Currently, eleven states and the District of Columbia [provide employment protection for people who use medical marijuana](#).

Employment Protection and *Recreational* Marijuana

Employment protections for recreational marijuana potentially exist in several states. The challenge involves that pesky word “potentially,” meaning some laws are unclear or silent on the issue—at least, for now. But as more and more states legalize weed, they’ll likely clarify their position regarding this important point (or the courts will settle it).

Consider the following example. [SHRM reports](#) these updates for 2020: “On Jan. 1, a Nevada law took effect barring employers from considering a pre-employment marijuana test result, and beginning May 10, a New York City law will prohibit employers from conducting pre-employment marijuana tests. Both laws have exceptions for safety-sensitive positions and jobs regulated by federal programs that require drug testing.”

Laws can also change in the other direction. For example, [the National Conference of State Legislatures \(NCSL\) reports](#), “In 2016, Maine voters passed an initiative permitting the recreational use, retail sale and taxation of cannabis by popular vote. The initiative included an employment anti-discrimination provision for recreational users as well. Maine’s General Assembly repealed this statute through legislation in 2017.”

Is your head spinning?

The NCSL goes on to note that “Wisconsin is considering AB 220 which would legalize recreational cannabis and includes employment protections for the lawful use of cannabis” and Massachusetts is considering the elimination of workplace drug testing for cannabis altogether. Not to mention plenty of other states will continue to make noise regarding changes to their laws.

Is your head spinning now? It should be.



How Employers Should Approach Employment Protection in the Age of Legal Weed

1. Understand the laws in each state you operate in and develop your drug and alcohol policy accordingly.

When developing your drug testing policy, employers must thoroughly understand the laws in each state they operate in regarding employment protection and the use of medicinal marijuana and/or recreational marijuana.

Keep in mind that some states have clearly defined employment protections and others don't. The latter can prove problematic when developing your policy. For those states that don't have clearly defined employment protections, you have to look to case law in order to determine what the right policy is for your company. Also keep in mind that the categories of exempt employers can vary under each state's statutory exceptions.

2. Make sure you have a clear and comprehensive policy regarding marijuana impairment—and that you train employees and managers about what this means.

Employment protection doesn't mean employees can be impaired by marijuana on the job (just as no one would expect you to tolerate a drunk employee in the workplace). The challenge, however, is the limitation of drug tests when it comes to marijuana.

As noted previously, unlike alcohol, drug tests for marijuana only detect the presence of THC; they do not determine whether someone is currently impaired (THC can remain in a person's system for several days, and even longer for regular users). So even if a drug test is positive for marijuana, that doesn't necessarily mean the worker is impaired while on the job.

So employers would need to establish proof of impairment in addition to the drug test result. You will need to clearly define and articulate the process of identifying impairment (e.g., observations of employee behavior, physical indications of use, admission by the employee) and provide education/training for employees and managers.

3. Work with knowledgeable experts to make sure your business is compliant.

As we mentioned, where things get truly complicated is if you're operating in multiple states, where you have one state that does offer employee protection, another state that does not offer employee protection, and then a third state that is silent on employee protection. Another pitfall occurs when state law changes—you need to adjust your policies and procedures accordingly.

Hiring an experienced attorney to help draft your policy is always a smart move. So is working with a compliant drug testing partner like Good Egg (we have our own in-house counsel).

We hope this guide was helpful

Remember, marijuana drug testing isn't a one-size-fits-all solution. Working with a reputable vendor who takes the time to learn about your business and goals will go a long way in making sure you develop a successful program that meets those goals.

At Good Egg, we have the legal expertise and experience in launching effective drug and alcohol programs across various industries. We'd love to work with you. [Get in touch online](#) or call us directly: 631-557-0100.



About Good Egg:

Today, everyone has a digital footprint, thanks to social media. As a result, conducting employee background checks has become a lot more complicated. Plus, old screening methods haven't kept up. Enter Good Egg. We combine the human touch with lightning fast technology that not only looks at a person's past, but also their present and future behaviors. This helps HR managers hire more good eggs faster and with confidence, while maintaining 100% compliance. Learn more at www.goodegg.io.