



CRISIS MANAGEMENT FOR COVID 19

Phase 40: What Employers Need to Know About the Changing Drug Landscape

*Presented by:
Hanna Resource Group
and
Morris & Morris, PSC*

INTRODUCTIONS



**Lyle S. Hanna SPHR,
SHRM-SCP**
*President and CEO
Hanna Resource Group*



James M. Morris, Esq.
*Juris Doctor, MPA
Morris & Morris, P.S.C*



Brad Patrick
*Adviser/Consultant for
Practical Performance
Solutions*



Allison Pettrey
*SHRM-CP, PHR
Manager HR Outsourcing
HRG*



Autumn Morris
*MBA, SHRM-CP
HR Assessments and
Analytics - Consultant
HRG*



Chase Adams
*M.S. SHRM-CP
Mgr Organizational
Development
HRG*

WHAT WE'LL COVER

1

Drug Testing
Considerations for
Employers

2

Legal Drug Testing
Concerns and
Discussion

3

Legal and
Regulatory
Updates



1

Drug Testing Considerations for Employers



Allison Pettrey
SHRM-CP, PHR
Manager HR Outsourcing
HRG

Why are we talking about drug screenings now?

- Scarcity of qualified candidates
 - Multiple factors
- Some employers considering changing drug testing policies and/or dropping marijuana from the drug panel
- State laws vary on marijuana use
 - Limits on discipline or refusing to hire after positive test
 - Bans on pre-employment marijuana tests
 - Several states bar employers from adverse action based on positive pre-employment marijuana test
 - Amazon, Marriott, and Hilton Hotels removed marijuana screening for some workers recently

*Rethinking the When & Why
Or
"We've Always Done it This Way!"*

- What is the reason for drug testing?
 - Reduce risk of litigation
 - Prevent accidents/improve safety (WC exclusion)
 - Mandated in industry
 - Culture trying to create
 - High risk workforce
- When to test?
 - Pre employment
 - Post accident
 - Random
 - Reasonable Suspicion
- Value of other factors:
 - Cost of testing
 - Speed of testing/hiring process
 - Candidate experience
 - Culture trying to create
 - What protecting against
 - When test

- Length of time marijuana stays in system
 - Employee/applicant issues
 - Vacation
 - Work impairment
 - Legality
- Varying state laws and regulations
 - Medical marijuana
 - Recreational use
 - Limits on discipline/adverse action

- Policy requiring employees report criminal convictions and charges/drug statutes
- On the job use – never have to tolerate!
 - Legal use may still cause impairment
- Refusal to take drug test
- For reasonable suspicion, train managers and supervisors to observe:
 - Strong odors
 - Questionable movements, twitching or staggering
 - Dilated or watery eyes
 - Flushed, confused, or blank facial expressions
 - Slurred speech or an inability to verbalize
 - Argumentative, irritable, or drowsy behavior

Rehabilitation Sample Statement

COMPANY is prepared to help and reasonably support any associates requesting assistance in dealing with drug or alcohol problems if the assistance is self-reported and not as a result of an incident at the workplace or failed drug or alcohol test. Associates will not be disciplined for requesting assistance if COMPANY believes that the request is made in good faith. Please consult the assigned designated HR leader to discuss employee assistance programs available.

Return-to-Work Agreements

Following a violation of the drug-free workplace policy, an employee may be offered an opportunity to participate in rehabilitation. In such cases, the employee must sign and abide by the terms set forth in a Return-to-Work Agreement as a condition of continued employment.

Next Steps

- Consider any applicable state laws and industry requirements
- Evaluate goal organization's policy is trying to accomplish
- Update and communicate your policy, as sppropriate



2

Legal Implications
For Businesses
Dealing with
Convolutted Drug
Laws



James M. Morris, Esq.
J.D., MPA
Morris & Morris, P.S.C

2 Drug Use and Issues Nationally

Implications for HR and Businesses

With the transition to remote working environments, and the substantial proliferation of CBD and THC, employers have an uphill battle

- What is illegal?
- If someone goes to another state, where drug use was legal, and is not currently under the influence, can you take adverse action?
- When can you drug test an employee or prospective employee?
- What questions can be asked pre-employment? Post-hire, Pre-Placement? Post-employment?
- What types of drug testing procedures are being utilized?
- Does the drug test accurately measure current substance abuse versus residual (marijuana has the ability to remain in the system for up to three to six months)
- What is the actual worksite?
- What if someone works remotely, but reports to a Kentucky-based facility?
- What state laws control? What if the employee works in more than one state?
- How does the federal law impact state laws regarding drug use?

These are just a few of the myriad of issues currently affecting the HR world and businesses!

2 Kentucky's Law on Drug Screening

Kentucky's Anti-Drug Policies are Among the Most Stringent in the Country

First, the basics Kentucky

- Kentucky does not have **any** laws regulating or prohibiting drug testing within the private sector, and as such, Kentucky employers are free to implement testing policies maybe
- Certain public sector positions are governed by different laws (e.g., KSP, FAA, etc.)
- Kentucky offers credits to the insurance premiums of coal mining employers w/EAP
- Kentucky offers certification for drug-free workplaces, regulated under KAR 25:280
- All Marijuana is illegal in Kentucky; CBD derived from Hemp is not Causing potential issues
- Hemp derived CBD products are legal in Kentucky pursuant to 2018 Kentucky Farm Bill::
 - CBD is required to contain less than 0.3% THC by dry weight

OSHA

- On May 12, 2016, OSHA published a final rule that prohibited employers from retaliating against employees for reporting work-related injuries or illnesses – including drug testing

Federal Law

- Supreme Court held that while drug testing does infringe on an employee's privacy, reasonable suspicion in order to protect the health and safety of others. *Skinner v. Railway*

2 Drug Use and Issues Nationally

Multi-State Recruitment and Hiring of Employees

So, if Kentucky is so stringent, why should Kentucky Employers care about drug use?

- Despite the Federal Law still declaring Marijuana as an illegal substance, **36 States have legalized marijuana, and 17 states have legalized marijuana for adult recreational use.**
 - Among those states is the Commonwealth of Virginia, which adopted a new recreational use, with sweeping employer ramifications, effective July 1, 2021!
- Raises substantial questions and concerns for HR and businesses:

Hypothetical:

Employee works for Kentucky-based company, paid out of Kentucky, but resides and works remotely in Virginia. Can the employer restrict the employee's use of medical marijuana?

- No. Virginia has legalized marijuana use for recreational purposes and for medicinal purposes, ***and has protected employees from potential retaliation for recreational use.***
- If the employee resides and works locally in Virginia, the employer ***cannot*** take adverse action against the employee based upon a positive drug test.
- The answer would be different if the employee is working in Kentucky, living in Virginia....

2 Drug Use and Issues Nationally

State-by-State Primer for Drug Policies regarding Marijuana Use

The following states have explicit language regarding marijuana in the workplace, either through anti-discrimination provisions or reasonable accommodation provisions, providing different levels of protection for employees:

- Arizona (Medical and Recreational)
 - Addresses drug testing and states that positive drug test alone cannot be a reason to refuse to hire/fire
- Arkansas (Medical)
- Connecticut (Medical)
- Delaware (Medical)
 - Addresses drug testing and states that positive drug test alone cannot be a reason to refuse to hire/fire
- Illinois (Medical)
- Maine (Medical and Recreational)
 - Requires employers to stop drug testing job applicants for marijuana use and prevents employers from firing workers 21 years old or older for the use of marijuana outside the workplace – strongest protections
- Minnesota (Medical)
 - addresses drug testing and states that positive drug test alone cannot be a reason to refuse to hire/fire
- Nevada (Medical and Recreational)
- New York (Medical and Recreational (March 1, 2021))
- Pennsylvania (Medical)
- Rhode Island (Medical)

And, additionally, localities are passing their own laws: just a quick research reveals:

Denver allows mushrooms; Boulder allows specific drug testing laws; San Francisco prohibits random drug testing altogether

2 Drug Use and Issues Nationally

State-by-State Primer for Drug Policies regarding Marijuana Use – Virginia (Medical and Recreation)

In late April, Virginia's Governor signed a Bill into law making recreational marijuana legal starting July 1, 2021:

- Virginia does not expressly prohibit employers from restricting or monitoring the recreational use of marijuana by their employees
- However, a different law that becomes effective July 1, 2021 prohibits an employer from discharging, disciplining, or discriminating against an employee based on the employee's **lawful use of cannabis oil**
 - As a result, employers may no longer rely on a positive test for marijuana as the basis for discipline without first evaluating whether the positive result is associated with the protected medicinal use of cannabis oil.
 - However, the new law does not “restrict an employer’s ability to take any adverse employment action for any work impairment caused by the use of cannabis oil or to prohibit possession during work hours.
 - Or “require an employer to commit any act that would cause the employer to be in violation of federal law or that would result in the loss of a federal contract or federal funding”
 - “require any defense industrial base sector employer or prospective employer To hire or retain any applicant or employee who tests positive”
 - Importantly, however, there are no carve outs for safety-sensitive positions

We expect that the adoption of this new provision, by Virginia, will create substantial problems for Kentucky-based businesses, and will need to be monitored in the upcoming months for enforcement – especially as it pertains to any employees based within the Commonwealth of Virginia.

2 Drug Use and Issues Nationally

State-by-State Primer for Drug Policies regarding Marijuana Use

The following states have no protections for employees:

- Alaska, California, Colorado, Massachusetts, Michigan, Montana, New Jersey, Oregon, Vermont, Virginia, Washington, Washington DC (Medical and Recreational)
- Florida, Mississippi, Missouri, New Hampshire, New Mexico, North Dakota, Ohio, Pennsylvania (Medical)
- Massachusetts (Medical and Recreational)

California is discussing employee protection

Ohio has explicitly allowed employer oversight, scrutiny, and drug testing

Other states are seemingly changing, adopting, and adapting daily

New York City and San Francisco disallow all drug testing

The following states have unclear employee protections because the regulation was assigned to state administrative agencies, and they have failed, to date, to issue guidance on employee protections:

- Florida, Louisiana, New Jersey, North Dakota
- It is still unclear: What if an employee works in multiple states, one of which disallows, and one allows?
- How do the laws apply to an employee who lives in one state, and works in another where it is legalized?
- Multi-State employers must address employees differently, depending upon where the work is performed
- Employers must be up to date on Federal, State, city-specific, Workers' Compensation, employment laws, etc.

Employers facing this new landscape of conflicting state laws, adoption of hemp-approved products, and other issues need to act to address.

As addressed in the first section, with this new reality, questions arise as to what level of “tolerance,” if any, should be allowed by employers:

- Drug testing policies will need to be reviewed to remove “zero tolerance” of non-THC hemp
- Discussions will need to take place addressing the potential disruption for strict marijuana use
- Do not utilize internal drug-testing schemes or “rapid result” tests without adequate safeguards. Highly recommend a third party facility
- Have frank and open discussions with the third-party facility regarding levels, expectations, etc., and verify what your company is authorizing
- Openly discuss expectations with management and employees. As more and more products containing THC, CBD, Hemp proliferate, companies need to re-evaluate expectations
- Engage in post-hire, pre-placement evaluations instead of pre-employment drug testing
- Constantly re-read, review, and update your Policies and Procedures! A few years is forever!

Several different sampling types are used to test for the presence of marijuana. These tests vary in the timeframe during which they can detect marijuana and its metabolites in a person's system.

Saliva test: A person can test positive for weed for up to 34-48 hours after last use.

Urine test: This is the most common drug test used.

- Infrequent users (less than 2 times/week) can test positive for 1-3 days.
- A moderate user (several times per week) can test positive for 7–21 days after last use.
- A heavy user can test positive for a month or longer after last use.
- Digested marijuana may produce a positive result for 1-5 days.

Hair test: Marijuana can be detected on a hair test for up to 90 days.

Blood test: Marijuana and its metabolites can show up on a blood test for up to 36 hours.

Besides the type of test, other factors that can affect how long marijuana will show up on a drug screen include:

- Amount of THC in the marijuana.
- Frequency of use.
- Length of time since last use.
- How quickly the person's system processes THC.
- Level of hydration.

Third-Party Testing Companies have Developed New Testing Procedures to Differentiate Between CBD and THC

Investigate your current industrial requirements (Federal, State, etc.) and verify that the testing company is in compliance with your specific regulation

Finally, make sure to maintain confidentiality, HIPAA, and GINA regarding drug-testing procedures

A graphic for LabCorp's CBD/THC testing service. It features a background of laboratory glassware, including test tubes and a pipette. The text 'CBD/THC TESTING' is prominently displayed in large white letters, with 'NOW AVAILABLE THROUGH LABCORP' underneath in smaller white letters. The LabCorp logo is in the top right corner.

CBD/THC TESTING

NOW AVAILABLE THROUGH LABCORP

Cannabidiol (CBD)/Tetrahydrocannabinol (THC) Ratio, Urine

With the rise in the commercial availability and use of products containing CBD^{1,2}, health care providers are increasingly faced with the challenge of determining if a positive marijuana drug test was caused by use of a CBD product, or from use of marijuana, medical THC, or other THC products. To assist our clients in differentiating CBD use from marijuana use, LabCorp has developed a new assay measuring and calculating a ratio of CBD and THC metabolites in urine.

Test Number: 701907, Cannabidiol (CBD)/Tetrahydrocannabinol (THC) Ratio, Urine
Specimen Type: Urine (random)
Methodology: Liquid chromatography/tandem mass spectrometry (LC/MS-MS)
Use: To assist in distinguishing whether a positive urine THC test is exclusively the result of CBD use
Volume: 30 mL
Ordering: May be ordered in addition to a drug-test panel or separately.

Questions and Answers



3 Legal Update



James M. Morris, Esq.
J.D., MPA
Morris & Morris, P.S.C

- EEOC declared that federal law does not prohibit employers “from requiring all employees physically entering the worksite to be vaccinated for COVID-19.”
 - Employers that adopt such policies “must comply with the reasonable accommodation requirements of the ADA” and other federal equal employment opportunity requirements, and “should keep in mind” that such policies could have a potential disparate impact on certain employees.
- Employers may incentivize employees to voluntarily provide proof of 3rd party vaccination
- Employers that administer vaccines to employees may provide incentives to encourage vaccination “as long as the incentives are not coercive” (e.g., so large as to render the employees’ decisions to disclose disability-related screening information involuntary).
- Offers additional guidance and information for reasonable accommodations for employees with disabilities and/or sincerely held religious beliefs
- Employers may not lawfully offer employees incentives for vaccination of family members
- EEOC confirms that vaccination status is confidential medical information
- EEOC has now indicated that pre-screening inquiries do not implicate GINA or ADA
- Voluntary Vaccinations for certain employees is acceptable if done non-discriminatorily

On May 21, 2021, OSHA revoked recent enforcement guidance regarding the recordability of situations where employees suffered adverse side effects from a COVID-19 vaccination.

- The original guidance states that if an employer requires its employees to be vaccinated as a condition of employment, the adverse reaction is recordable
 - This was widely considered a disincentive for employers to mandate that their employees get vaccinated. With a mandatory vaccination policy, the guidance ensured that employees' adverse reactions (with arguably little correlation to actual work-related injuries) could end up on a company's OSHA recordkeeping logs
- New guidance quietly reversed course, stating "OSHA does not wish to have any appearance of discouraging workers from receiving COVID-19 vaccination, and also does not wish to disincentivize employers' vaccination efforts. As a result, OSHA will not enforce 29 CFR 1904's recording requirements to require any employers to record worker side effects from COVID-19 vaccination through May 2022. We will reevaluate the agency's position at that time to determine the best course of action moving forward."
- OSHA's website also reflects the revoked enforcement guidance as "archived" as of 5/26/21

- ETS “applies to all settings where any employee provides healthcare services or healthcare support services.”
- The ETS defines “healthcare services” as:
 - services that are provided to individuals by professional healthcare practitioners (e.g., doctors, nurses, emergency medical personnel, oral health professionals) for the purpose of promoting, maintaining, monitoring, or restoring health. Healthcare services are delivered through various means including: hospitalization, long-term care, ambulatory care, home health and hospice care, emergency medical response, and patient transport. For the purposes of this section, healthcare services include autopsies.”
 - “Healthcare support services” mean “services that facilitate the provision of healthcare services. Healthcare support services include patient intake/admission, patient food services, equipment and facility maintenance, housekeeping services, healthcare laundry services, medical waste handling services, and medical equipment cleaning/reprocessing services.”

- Specifically excluded from the scope provision are:
 - “the provision of first aid by an employee who is not a licensed healthcare provider; pharmacists in retail settings; Fully screened non-COVID non-hospital ambulatory care, well-defined hospital ambulatory care, or home healthcare settings; healthcare support services not performed in a healthcare setting; or telehealth services
- The ETS does not identify how a medical facility determines fully vaccinated status
- ETS goes into effect immediately upon publication in the Federal Register (June 14, 2021)
- Compliance deadlines go into effect on June 28, 2021 for:
 - COVID-19 plans; patient screening and management; standard and transmission-based precautions; PPE, including “facemasks”; aerosol-generating procedures on a person with suspected or confirmed COVID-19; physical distancing; cleaning and disinfection; health screening and medical management; vaccination; anti-retaliation; requirements implemented at no cost to employees; recordkeeping; reporting COVID-19 fatalities and hospitalizations to OSHA; and mini-respiratory protection program
- Compliance deadlines of July 14, 2021 for physical barriers; ventilation; and training
- All ETS requirements must be implemented at no cost to employees

- Adopted CDC's May 13 and 28, 2021, guidance relating to fully vaccinated employees.
- Fully vaccinated “can resume activities without wearing masks or physically distancing”
- “Except for workplace settings covered by OSHA's ETS and mask requirements for public transportation, most employers no longer need to take steps to protect their workers from COVID-19 exposure in any workplace, or well-defined portions of a workplace, where all employees are fully vaccinated.”
- OSHA recommends that employers encourage employees to get vaccinated with paid time off to do so and to also recover from potential side effects from the vaccine.
 - Instructing unvaccinated and at-risk workers who have had close contact with an infected person, and workers showing signs or symptoms, to stay home from work;
 - Requiring social distancing and masking for unvaccinated and at-risk workers;
 - Providing training in an appropriate language that employees can understand;
 - Maintaining ventilation systems;
 - Following CDC guidance on cleaning and disinfection; and
 - protecting employees from retaliation and establishing an anonymous reporting system

Unanswered: How employers must verify employee vaccination status – how to determine?!

ARPA implemented a 100% COBRA subsidy beginning on 4/1/21 and ending on 9/30/21

On May 18, 2021, the IRS released 86 FAQ regarding the COBRA Subsidy

- An individual may become an AEI more than once, if he or she (or spouse) experiences more than one qualifying event during the applicable time period (Q&A 3).
- An employer may require an individual to self-certify (i) COBRA-qualifying event and (ii) not eligible for coverage under another group health plan or Medicare (Q&A 4 and Q&A 5).
- May be eligible for the subsidy even if the reductions were voluntary (Q&A 21) and that they may include reductions and temporary cessations due to furloughs (Q&A 22), lawful strikes and lockouts (Q&A 23), or leaves of absence that result in a loss of coverage (Q&A 25).
- “Involuntary termination” is “a severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the employee’s implicit or explicit request ...”
- The credit is claimed on IRS Form 941 or IRS Form 7200, “Advance Payment of Employer Credits Due to COVID-19”
- The credit is included in the gross income of the premium payee
- A third-party payer, such as a PEO, CPEO, or Internal Revenue Code § 3504 agent, may claim

As we previously announced here, two different changes are forthcoming:

EEOC Conciliation Rule Revocation: The U.S. Senate voted 50–48 to rescind the EEOC conciliation rule which required EEOC to provide employers with more information during the statutorily required conciliation process, such as notifying employers of the legal basis for reasonable cause findings.

Union Transparency Rule: The Department of Labor is expected to rescind Rescind Union Transparency Rule (2020 Form T-1 Rule), which established new transparency requirements for union financial reporting. In late May, 2021, the DOL issued a notice of proposed rulemaking to rescind the rule altogether. The DOL maintains that rescission is necessary because the 2020 rule was overbroad, unnecessary, and unsupported by the rulemaking record. Comments are due on or before July 26, 2021. The DOL will undoubtedly move swiftly to revoke thereafter.



HANNA RESOURCE GROUP



Morris & Morris, PSC