

Weeding Out Employees: The Ups and Downs of Drug-Testing Manufacturing Workforce

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March 27, 2023

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Finding and keeping dependable employees has always been a priority for employers. For manufacturers, drug testing is a tried-and-true method of weeding out employees who may be less dependable. However, the COVID-19 pandemic and changing laws have significantly impacted the employment landscape.

Now might be a good time for manufacturers to remind themselves – and their employees – why they have drug-testing policies and re-evaluate whether their substance abuse prevention policy is compliant with federal, state, and local regulations.

Turnover rates have increased exponentially; that is, if employers are even able to hire a candidate before they disappear to a competitor. Combine that new reality with ever-growing numbers of state laws on cannabis use, and the social environment may make it even more difficult for manufacturers to find and retain talent.

Acceptance of Drug Use

Generally, drug use is accepted by the majority of Americans. Among people aged 12 or older, in 2021, 61.2 million people (or 21.9% of the population) admitted using illicit drugs in the past year, according to the Substance Abuse and Mental Health Services Administration (SAMHSA), an agency within the U.S. Department of Health and Human Services. (See [SAMHSA Announces National Survey on Drug Use and Health \(NSDUH\) Results Detailing Mental Illness and Substance Use Levels in 2021; January 4, 2023.](#))

With the opioid epidemic at the forefront of national consciousness, it may be easy to forget that there are still laws (including federal laws) against other, arguably less harmful drugs, like marijuana. For example, the U.S. Department of Transportation does not permit marijuana in industries like trucking, aviation, railroad, pipeline and marine. Further, the Federal Drug-Free Workplace Act, applicable to federal contractors with a contract of at least \$100,000, requires that those contractors prohibit their employees' use of illegal drugs while at work. Nevertheless, plenty of Americans use marijuana in their day-to-day lives, whether recreationally or medicinally. In late-2019, Los Angeles opened its first Cannabis Café and Michigan allowed marijuana shops to open.

The [Pew Research Center reported in November 2022](#) that 88% of Americans supported marijuana legalization, with 59% believing that marijuana should be legal for medical and recreational use by adults and another 30% believing that it should be legal for medical use only. The reality is that Gen Z simply does not hold the same view of marijuana as previous generations did. Another reality is that manufacturers have legitimate safety concerns about marijuana use, and other drug use, by their employees.

Safety Concerns

Consider the questions an in-house counsel at a major manufacturer asked a group of other labor lawyers in the same industry about hair-follicle marijuana testing of

employment candidates. Approximately 75% of the labor lawyers in the room said their company had given up hair-follicle testing for marijuana. While their companies' reasons for giving up that testing are unknown, the requesting in-house counsel explained that they are losing candidates due to the policy. Apparently, when candidates found out the manufacturer would require a hair-follicle test for tetrahydrocannabinol (THC), the active ingredient in marijuana, many simply dropped out. Presumably, they had other job opportunities (in the employee-friendly market) and did not want to submit to a hair-follicle test that could show a positive THC result due to a single use of marijuana months prior to the testing.

Without commenting on the specific pros-and-cons of hair-follicle testing, this conundrum showed the conflicting considerations between intense safety awareness, for good reason, and broader social norms. Of course, when an employee is on a rig or the manufacturing floor, the risk for severe injury or death outweighs the potential to lose an employee or two because of drug testing.

Compliance With Federal, State Law

After decades of supporting employers' use of drug testing, more and more courts are finding that the federal illegality of marijuana, including the Federal Drug-Free Workplace Act, is not incompatible with states' permissive marijuana-use laws. Employers generally are permitted to test for, and restrict use of, drugs at the workplace, including marijuana, especially if it is shown to be directly related to identifiable safety reasons. However, employers must comply with applicable state and local laws. For instance, the following states have statutory language prohibiting cannabis-related employment discrimination: Arkansas, California (beginning Jan. 1, 2024), Illinois, Maine, Minnesota, Missouri, Nevada, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Virginia, and West Virginia. Washington, D.C. law also prohibits such discrimination.

Manufacturers should ensure their substance abuse prevention policy is clear, comprehensive, and effective. Put employees on notice of the employer's expectations. Explain, where feasible, the reasons for the policy: safety and, as applicable, legal requirements. Prohibited conduct should be described in detail and should be more than just "drugs and alcohol are prohibited." As with any known disability or medically related need indicated by an employee, the employer may be required to engage in the interactive process (*i.e.*, under the Americans with Disabilities Act or similar state laws) should it be put on notice that an employee is using a drug for a medical reason.

For multi-state employers, the patchwork of contrasting state-level laws means that rarely is a one-size-fits-all policy adequate. Instead, manufacturers reconsidering and re-implementing their substance abuse prevention policy or testing procedures should work with an experienced attorney knowledgeable in the requirements of the jurisdictions in which they operate. Contact a Jackson Lewis attorney if you have any questions.

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