

Environment, Labor & Safety+ Conference

Spotting Marijuana Impairment in the Workplace



TODAY'S SPEAKERS



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LEGAL STUFF

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AGENDA

- Substance Use on the Rise
- New Legal Limitations: Off-Duty Use of Lawful Products (Example: CA & WA)
- Benefits of Oral Fluid Testing
- Guidance & Action Items
- Q&A



Substance Use



Substance Use

IS ON THE RISE

- Overall drug testing positivity rate reached a 20-year 'high' (4.6%).*
- Marijuana positivity in the general workforce increased by more than 53% over the last five years (2018-2022).*
- Marijuana positives in post-accident tests **increased 204%** from 2012-2022.*
- In states with legal adult use of marijuana, the positivity rate increased by 118.2%; in states with medical use of marijuana, the positivity rate increased by 68.4% between 2012 and 2020.*
- In states with no legalized use of marijuana, the positivity rate increased 57.9%.*
- Alcohol & Marijuana sales skyrocketed during the Pandemic.
- Increase in Amphetamines & Cocaine Positives.*

*Source: Quest Diagnostics – Drug Testing Index 2022

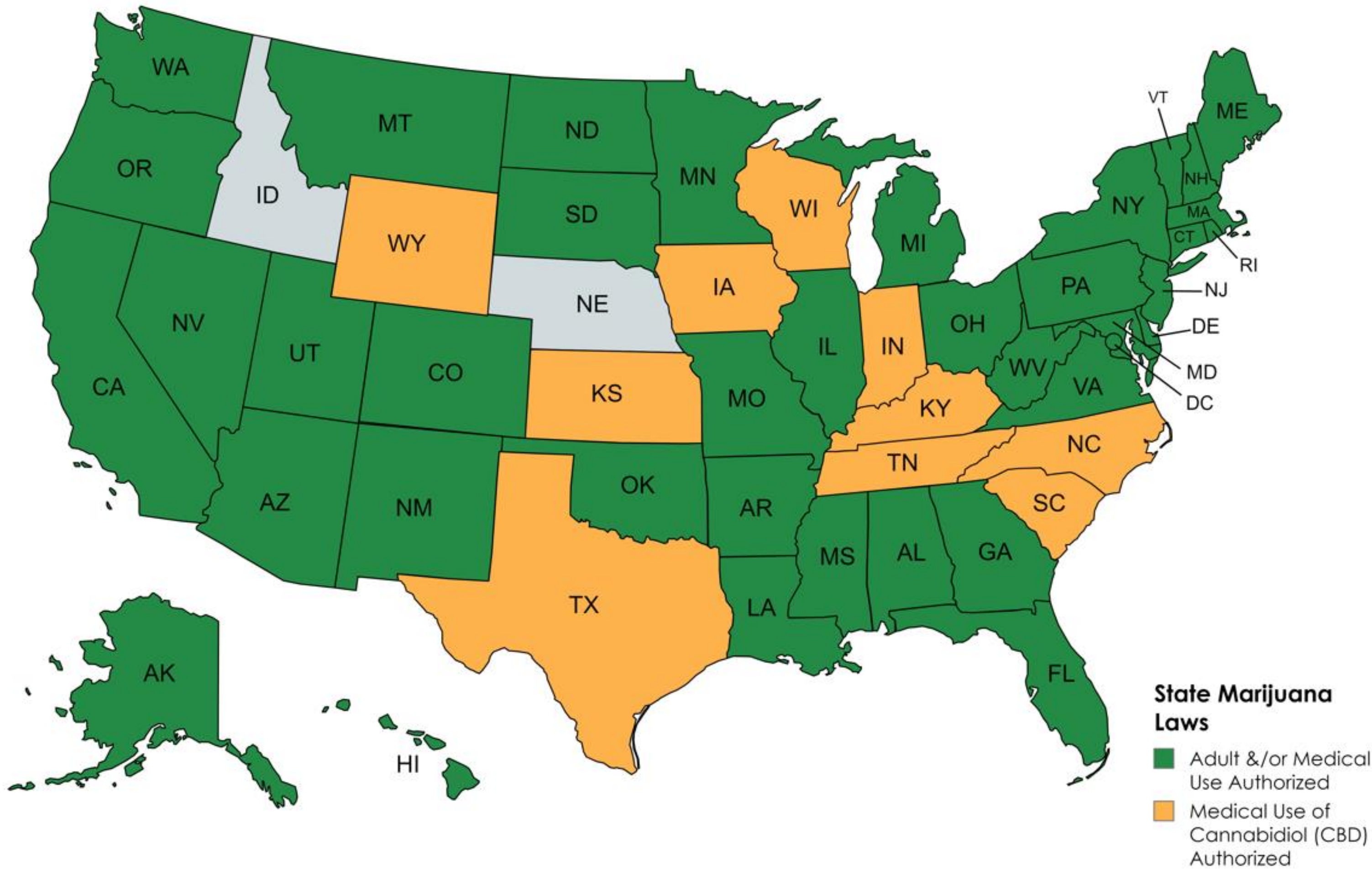


A man in a grey suit, white shirt, and dark tie is shown from the chest up. He is holding a silver pen horizontally between his lips, with his fingers gripping the ends. He has a thoughtful expression, with his eyebrows slightly furrowed and his eyes looking directly at the camera. The background is a blurred office setting with bookshelves filled with books.

**New Legal Limitations:
Off-Duty Use of Lawful
Products**



Overview of Cannabis Laws



As it Stands Today

- 38 states and Washington D.C. authorize the **medical use** of marijuana.
- 24 states and Washington D.C. authorize the **adult use** of marijuana.
- 18 states have authorized the medical use of **cannabidiol (CBD)** or low-THC oils.
- The language of these laws varies widely.



Legal Limitations

State-specific Marijuana Laws

A recent trend of the laws in some states and municipalities is the limitations or prohibitions of employers taking adverse employment actions against employees or applicants for their legal off-duty marijuana use.

- Some states and municipalities are considering creating or amending marijuana legalization laws that either include employee protections or expand existing protections.
- These laws greatly impact **when**, **why**, and **how** employers can test for marijuana and **what disciplines** they can impose on job applicants and employees.
- Testing for marijuana may now violate state or local marijuana or “lawful activities” or “lawful products” laws.



Legal Limitations

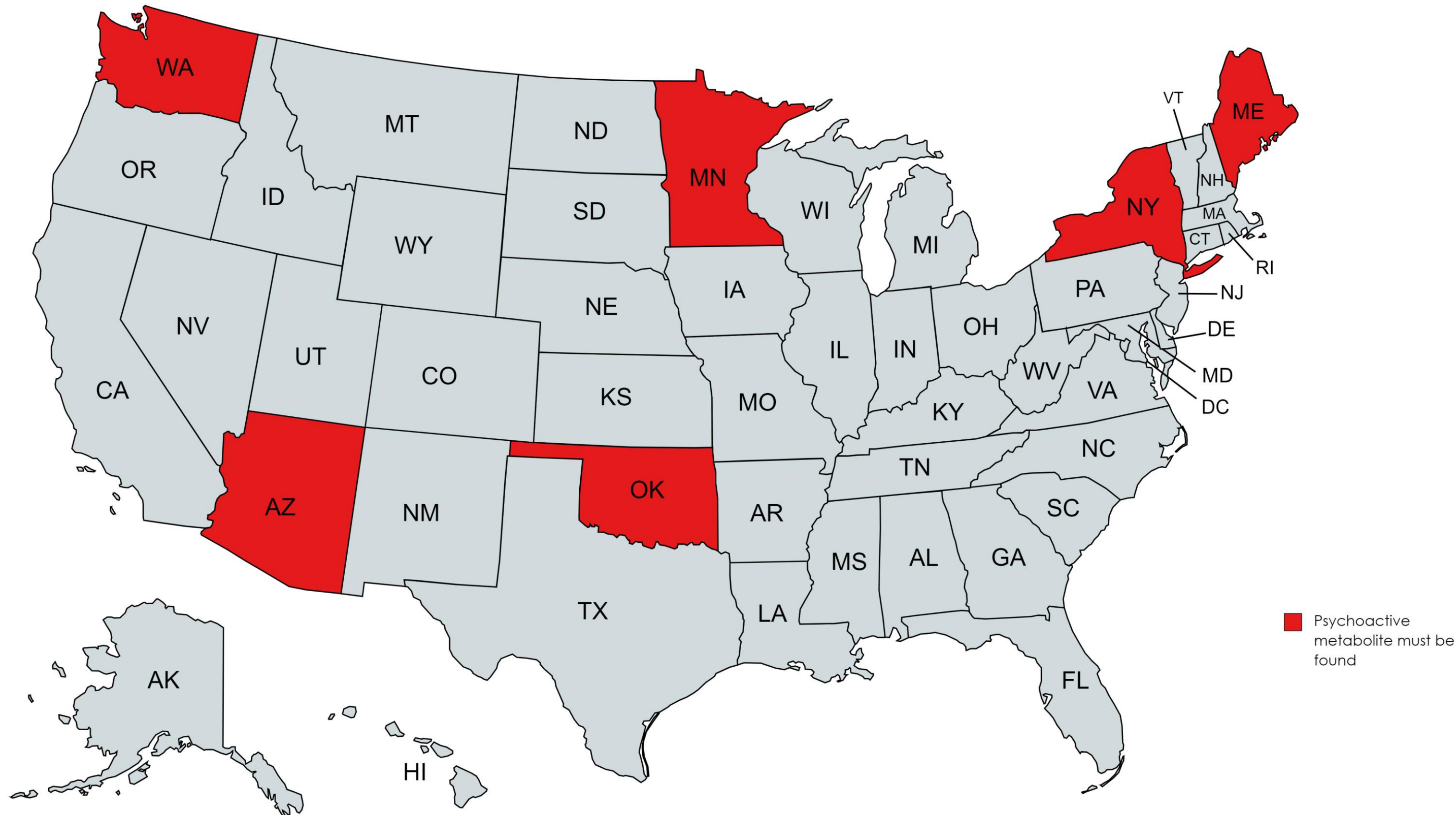
State-specific Marijuana Laws

- The laws in eight states limit/prohibit employer action or discrimination against lawful marijuana use **outside the workplace**: Arizona, California, Connecticut, Maine, Minnesota, New York, Montana, & Washington. Dozens of other states have similar limitations that are ‘implied.’
- Some states and municipalities limit or prohibit testing for marijuana as a condition of employment (**Pre-employment**): California, Nevada, New York, New Jersey, Philadelphia, PA, and Washington.
- New York State (Prohibits testing outside reasonable suspicion), & New York City Laws (Prohibits marijuana testing, with some exceptions).
- **Medical Marijuana**: Growing trend in the courts allowing applicants & employees to sue their employers under state disability discrimination laws, protecting their underlying medical condition(s). *Example: Barbuto (MA)*
- It is **CRITICAL** to understand the laws in each state or municipality in which you conduct business in.



Legal Limitations

State-specific Marijuana Laws



Cannabis Testing Limitations: Pre-employment

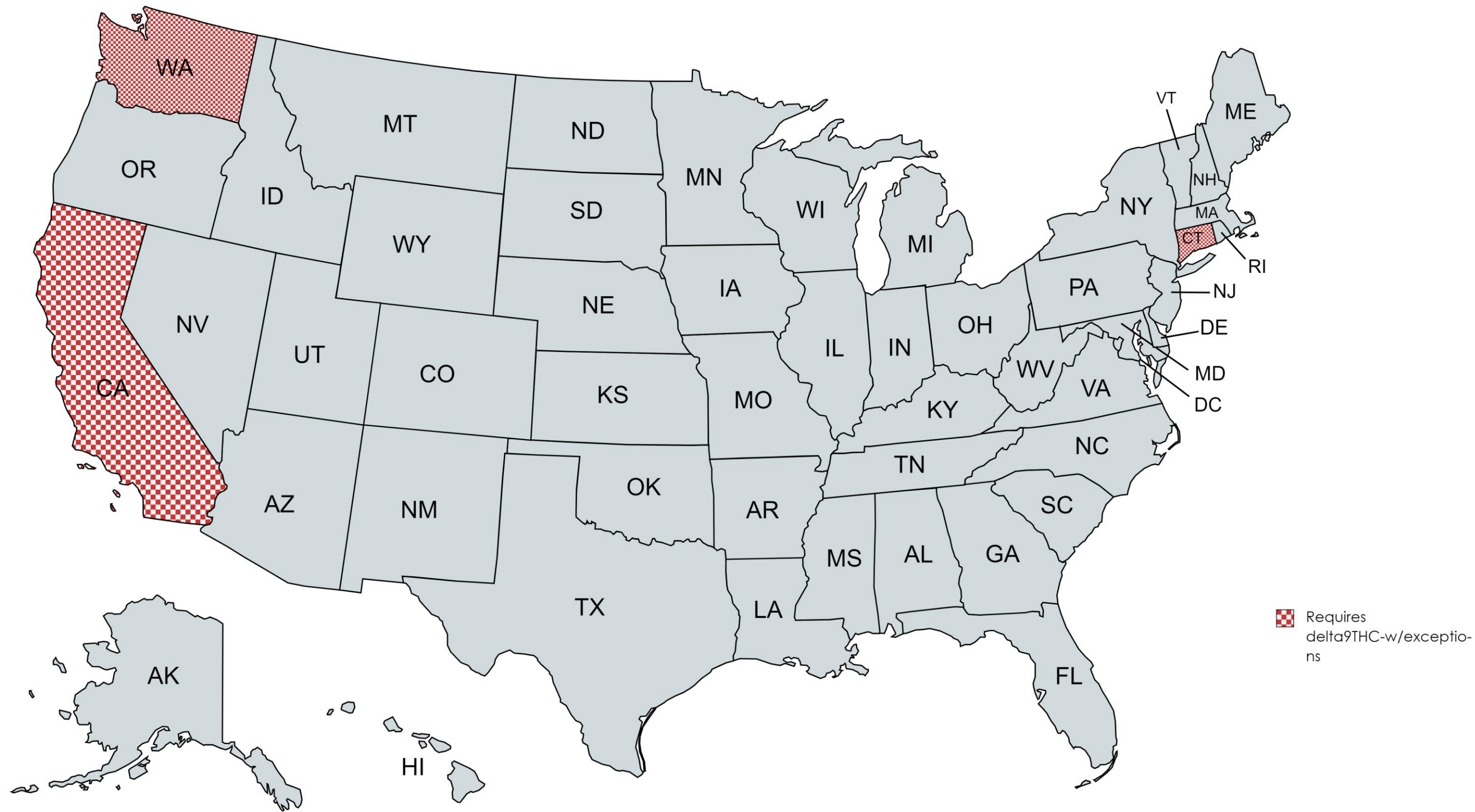
In these six states, as well as New York City, NY, and Philadelphia, PA, pre-employment cannabis testing is limited or prohibited.

(Safety-sensitive exceptions may exist)



Legal Limitations

State-specific Marijuana Laws



- As of 1/1/2024, California and Washington will allow employer action **ONLY IF** the drug test reveals psychoactive marijuana (THC) metabolites.
- New Washington law only applies to applicants (pre-employment).
- Connecticut exempts cases of reasonable suspicion, post-accident/injury, or approved random.
- Testing cannot include any other marijuana metabolites.



Legal Limitations

California

AB 2188 was signed into law on 9/18/2022, bringing new limitations to almost all employers in the state.

As of **1/1/2024**, California employers are limited in testing employees for cannabis. In relevant part, the new law states as follows:

Legislative Findings

“(a) Tetrahydrocannabinol (THC) is the chemical compound in cannabis that can indicate **impairment** and cause psychoactive effects.

(b) The intent of **drug tests** is to identify employees who may be **impaired**. While there is consensus that an employee should not arrive at a worksite high or impaired, when most tests are conducted for cannabis, the results only show the presence of the **nonpsychoactive** cannabis metabolite and have **no correlation to impairment on the job**.

(c) As science has improved, employers now have access to multiple types of tests that do not rely on the presence of nonpsychoactive cannabis metabolites. These alternative tests include. . . tests that identify the presence of THC in an individual’s bodily fluids.” (Emphasis added)



Legal Limitations

California

The law adds Section 12954 to the Government Code to read:

12954.

(a) It is unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalizing a person, if the discrimination is based upon any of the following:

(1) The person's use of cannabis off the job and away from the workplace. This paragraph does not prohibit an employer from discriminating in hiring, or any term or condition of employment, or otherwise penalize a person **based on scientifically valid pre-employment drug screening** conducted through methods that do not screen for nonpsychoactive cannabis metabolites.

(Emphasis added)

(2) An employer-required drug screening test that has found the person to have **nonpsychoactive cannabis metabolites** in their hair, blood, urine, or other bodily fluids. (emphasis added)



Legal Limitations

California

The law provides that employees cannot possess, be impaired by, or use cannabis on the job. Under state law, employers are specifically permitted to have a drug and alcohol-free workplace.

Exemptions

The new law exempts employees in the “building and construction trades” and applicants and employees hired under Department of Defense regulations, other federal agencies, or those applying for or working under a federal contract or grant.

NOTE: The law does not prohibit or limit cannabis testing; it prohibits discrimination related to those test results. Why is this important? Because even if not in an exempt business, an employer could still make a case for not allowing a person to perform specific safety-sensitive tasks.



Legal Limitations

Washington

SB 5123 was signed into law on 5/9/2023, protecting an individual's lawful off-duty use of cannabis.

As of **1/1/2024**, it is unlawful for an employer to discriminate against a person in the initial hiring for employment if the discrimination is based upon:

- (a) The person's use of cannabis off the job and away from the workplace; or
- (b) An employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.

But the law goes on to provide that "Nothing in this section:

- (a) Prohibits an employer from basing initial hiring decisions on scientifically valid drug screening conducted through methods that do not screen for nonpsychoactive cannabis metabolites;
- (b) Affects the rights or obligations of an employer to maintain a drug and alcohol free workplace, or any other rights or obligations of an employer required by federal law or regulation; or
- (c) Applies to testing for controlled substances other than preemployment, such as post-accident testing or testing because of a suspicion of impairment or being under the influence of alcohol, controlled substances, medications, or other substances.



Legal Limitations

Washington

Exemptions

This section does not apply to an applicant seeking:

- (a) A position requiring a federal government background investigation or security clearance;
- (b) A position with a general authority Washington law enforcement agency as defined in RCW 10.93.020;
- (c) A position with a fire department, fire protection district, or regional fire protection service authority;
- (d) A position as a first responder not included under (b) or (c) of this subsection, including a dispatcher position with a public or private 911 emergency communications system or a position responsible for the provision of emergency medical services;
- (e) A position as a corrections officer with a jail, detention facility, or the department of corrections, including any position directly responsible for the custody, safety, and security of persons confined in those facilities;
- (f) A position in the airline or aerospace industries; or
- (g) A safety sensitive position for which impairment while working presents **a substantial risk of death**. Such safety sensitive positions must be identified by the employer prior to the applicant's application for employment." [emphasis added]

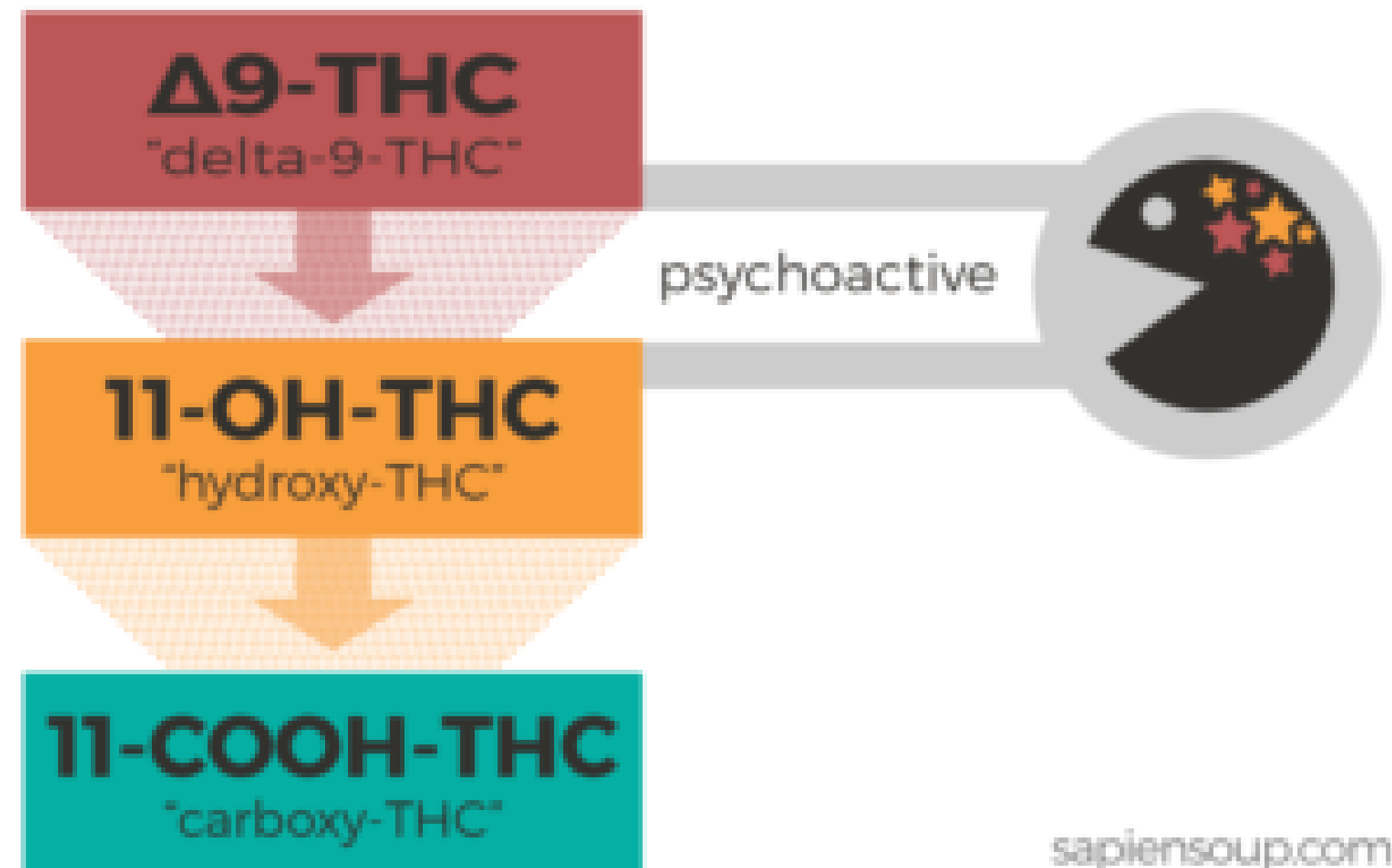


The Science of Marijuana Testing



The Science of Marijuana Testing

A quick science lesson from a lawyer



How Cannabis breaks down in the body

1. Delta-9 THC: ~1-8 hours
2. Hydroxy-THC: ~2-12 hours
3. Carboxy-THC: ~12 hours to several days

Note: Detection times will vary by screening method – oral fluid testing is recommended to detect more recent use of cannabis.

The Science of Marijuana Testing

Understanding the evolution of testing for THC

- Drug testing was originally designed to detect the **presence** of substances.
- Most drugs of abuse detection time ~2-72 hours from last use.
- Cannabis (A fat-soluble drug) has a much broader detection time.
- With today's testing, a positive result for cannabis identifies the **non-psychoactive** metabolite of cannabis (Carboxy-THC).
- Presence of Carboxy-THC metabolite **does not** indicate impairment. No methodology or *per se* limit exists to determine 'impairment' or 'under the influence' of marijuana.
- Oral Fluid drug testing is growing in popularity (able to detect more recent use).





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**Benefits of Oral Fluid
Testing**



Benefits of Oral Fluid Testing

Oral fluid (saliva) drug testing has many benefits over other screening methods:

- Shorter detection time, excellent for determining more recent use of prohibited substances (minutes after ingestion, up to several hours).
- Easy, quick, and less intrusive collection experience.
- Oral fluid collections are always directly observed, eliminating substitution and adulteration attempts that are common with urine drug testing.
- Has the ability to identify parent drugs and metabolites. This is particularly important for employers navigating new laws that require cannabis testing for Delta-9 THC, and not other 'nonpsychoactive' cannabis metabolites.
- Oral fluid testing for non-regulated screening events has been successfully utilized for years. The popularity is growing.

Employers take note: Some state laws specifically define 'specimen,' which may limit or prohibit the use of oral fluid testing, and state laws may also limit the use of instant/rapid/POCT drug screening devices. Also, understand the differences in cutoff levels between instant/rapid/POCT testing versus lab-based testing.

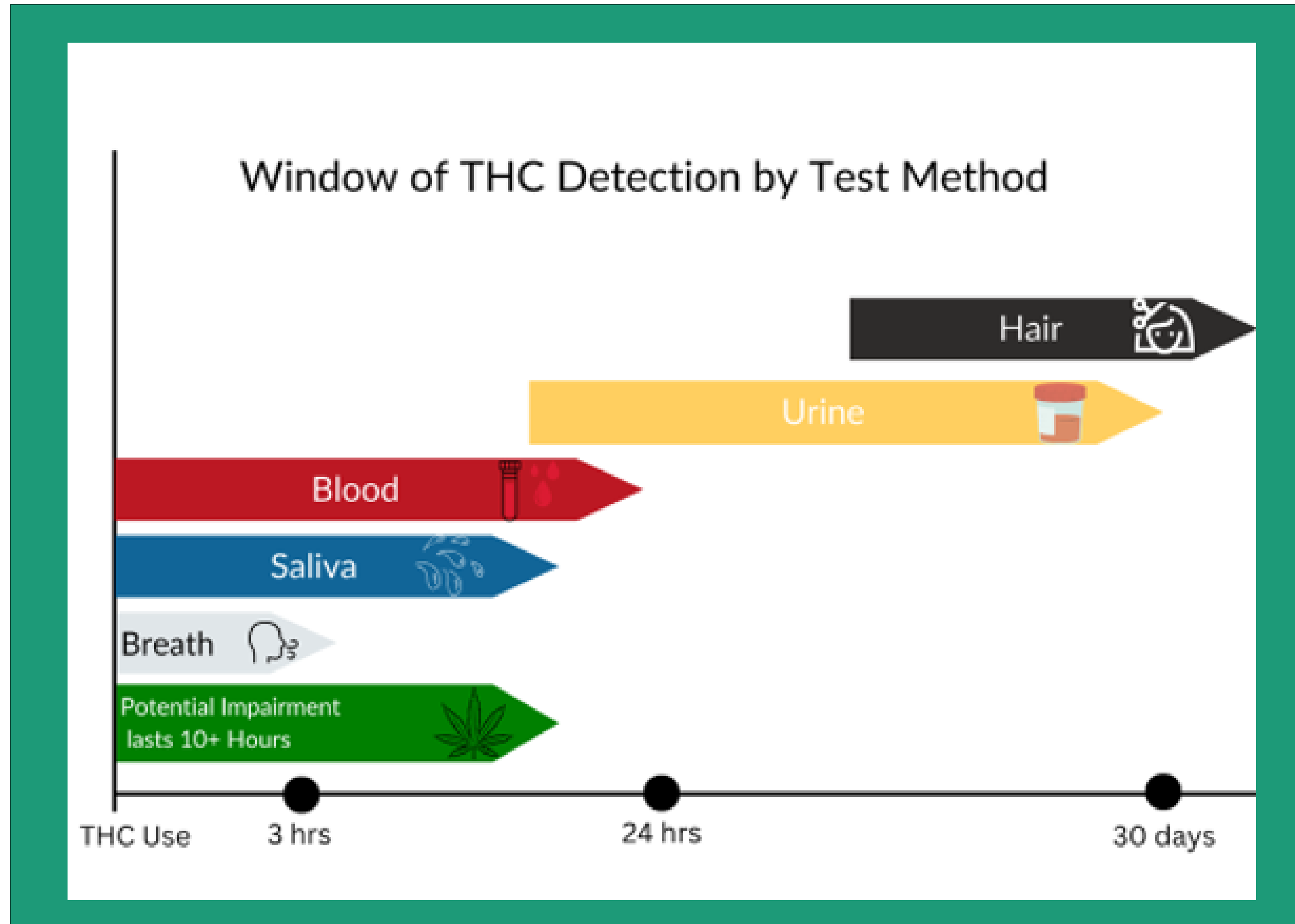


Benefits of Oral Fluid Testing

- The Department of Health and Human Services (HHS) has vouched for the legitimacy of oral fluid testing, stating that “the scientific basis for the use of oral fluid as an alternative specimen for drug testing has now been broadly established and the advances in the use of oral fluid in detecting drugs have made it possible for this alternative specimen to be used in Federal programs with the same level of confidence that has been applied to the use of urine.”
- Notably, HHS stated that its “Oral Fluid Mandatory Guidelines (OFMG) provides the same scientific and forensic supportability of drug test results as the Mandatory Guidelines for Federal Workplace Drug Testing Programs using Urine.”
- HHS addressed concerns about passive exposure as the result of someone else’s drug use (e.g., from second-hand smoke) in the context of cutoffs or metabolites used in oral fluid testing, particularly concerning cannabis. HHS concluded that a 4 ng/mL screening test cutoff for Tetrahydrocannabinol (THC) would detect cannabis use while eliminating the possibility of positive tests resulting from passive exposure.



Benefits of Oral Fluid Testing



Post-Employment Screening

A CRITICAL Component to Workplace Safety

- Employers are evaluating their desire to test for marijuana. Don't just “put your head in the sand.”
- Some employers **must continue** testing for marijuana:
 - Federal (DOT) Regulations
 - Federal Contracts or Grants
 - Collective Bargaining Agreements (CBA)
 - Voluntary Drug-Free Workplace Laws
- Remain Compliant: Marijuana laws are found at the federal, state, and local levels. Court rulings and agency decisions must also be considered.
- Outside of states or municipalities that prohibit screening for marijuana pre-hire, employers should plan for robust post-hire testing.
- The role of Reasonable Suspicion, Post-incident, and Random Testing is CRITICAL.



Importance of Job Descriptions

Do you have them documented? Are they detailed?

Safety Sensitive Jobs – DETAILS MATTER:

- Not all jobs within a company are ‘safety-sensitive.’
- Be sure to have up-to-date job descriptions for each role within your company.
- Be as detailed as possible - especially when describing the ‘essential functions’ for safety-sensitive job roles.

“The term **essential functions** means the fundamental job duties of the employment position the individual with a disability holds or desires. The term “essential functions” does not include the marginal functions of the position.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

- (i) The employer's judgment as to which functions are essential;
- (ii) **Written job descriptions** prepared before advertising or interviewing applicants for the job;
- (iii) The amount of time spent on the job performing the function;
- (iv) The consequences of not requiring the incumbent to perform the function;”
- (v) The terms of a collective bargaining agreement;
- (vi) The work experience of past incumbents in the job; and/or
- (vii) The current work experience of incumbents in similar jobs.

29 CFR 1630.2(n)(1) (Miller v. Cnty of Lebanon Transit Auth. Civil No. 1:17-CV-1368, M.D. Penn., April 2, 2019)





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**Guidance &
Action Items**



SAFETY IS YOUR RESPONSIBILITY

THE GENERAL DUTY CLAUSE



“Each employer shall furnish to each of his employees' employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”

– Section 5(a)(1) of the Occupational Safety and Health Act of 1970
(29 USC §654)



LIMIT YOUR LIABILITY

Employer Action Items

- Clearly understand the language contained within federal and state-specific drug and alcohol screening laws and court and agency rulings that apply to your company in each state(s) where you operate.
- Create, implement, and routinely review your Drug-Free Workplace Policy that clearly states the company's stance on prohibited drug and alcohol use (including cannabis) and the related consequences that will be imposed. Review when testing should occur and what test methodologies should be used. Stay up to date with regulatory or court decisions, as these rules change often.
- Design and implement sound processes and procedures that complement the language within your company policy. This will remove any guessing or potential mistakes when action needs to be taken in the "heat of the moment."
- Review the drug screening methodologies and products you are utilizing (whether they differ pre-hire from post-hire) and what your laboratory's testing capabilities are - to ensure they comply with the changing laws.



LIMIT YOUR LIABILITY

Employer Action Items

- Provide your managers and supervisors with comprehensive training on the details of your substance abuse policy & procedures. Train them on how to recognize the signs and symptoms of drug and alcohol use, and the action steps they should take in such situations.
- Be sure to document and routinely review comprehensive job descriptions for each role within your company. Especially crucial for job functions that are to be considered “safety-sensitive.” What are the essential functions of the job that are safety or security-sensitive? Be prepared to defend why you defined these roles as such – if you were to ever be challenged.
- Be prepared to engage in an interactive conversation for medical marijuana patients to determine if their underlying medical condition(s) can be reasonably accommodated in your workplace based on the essential functions of the job – or not, before taking any adverse action.



The Wheel of Workplace Drug Screening Compliance



- 1.Americans with Disabilities Act
- 2.Occupational Safety & Health Administration
- 3.National Labor Relations Board



HELP

THANK YOU!

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**DRUG SCREENING
COMPLIANCE INSTITUTE**

QUESTIONS?

Continue the conversation: [drugscreeningci.com](https://www.drugscreeningci.com)

