Employer Policies and Testing Employees for Marijuana Use and Opioid Use

Presented by:
Jennifer Sandberg
Phone: (404) 240-4152
Email: jbsandberg@fisherphillips.com

First and Foremost

- Know current state law in your states of operation
- Know current state law where employee lives
- Know what your policy says
- Know and support your organization's culture
  - Ownership
  - Size
  - Locations
  - Safety considerations
  - Hiring and retention challenges

Scenario

- All four members of your QC department were randomly selected for drug testing today.
- All four employees failed.
- Your zero tolerance drug testing policy says everyone who fails a drug test will immediately be terminated.
- But, you can't run your production line without QC.
  - What should you do?
  - Is your drug testing policy ***effective***?

Competing Interests

- Interest 1: Hiring and retaining enough good workers.
- Interest 2: Safety, productivity, and discipline.
- Drug abuse makes it hard to find and keep workers.
  - Opioids are in the news and workplaces everywhere.
  - Marijuana is increasingly socially acceptable.
- An aggressive drug testing policy serves Interest 2.
  - But may disserve Interest 1.
- An **effective** drug testing policy serves both interests.

What are Opioids?

- Legally prescribed painkillers.
  - Morphine, methadone, oxycodone, OxyContin, hydrocodone, Vicodin, Percocet, fentanyl, buprenorphine, and codeine.
- Opioids interact with nerve centers in the brain.
  - Create a pleasurable experience
  - Relieve pain
- Opioids may lead to heroin.
  - Illegal, cheaper, accessible.
  - Four in five heroin addicts started while taking painkillers.

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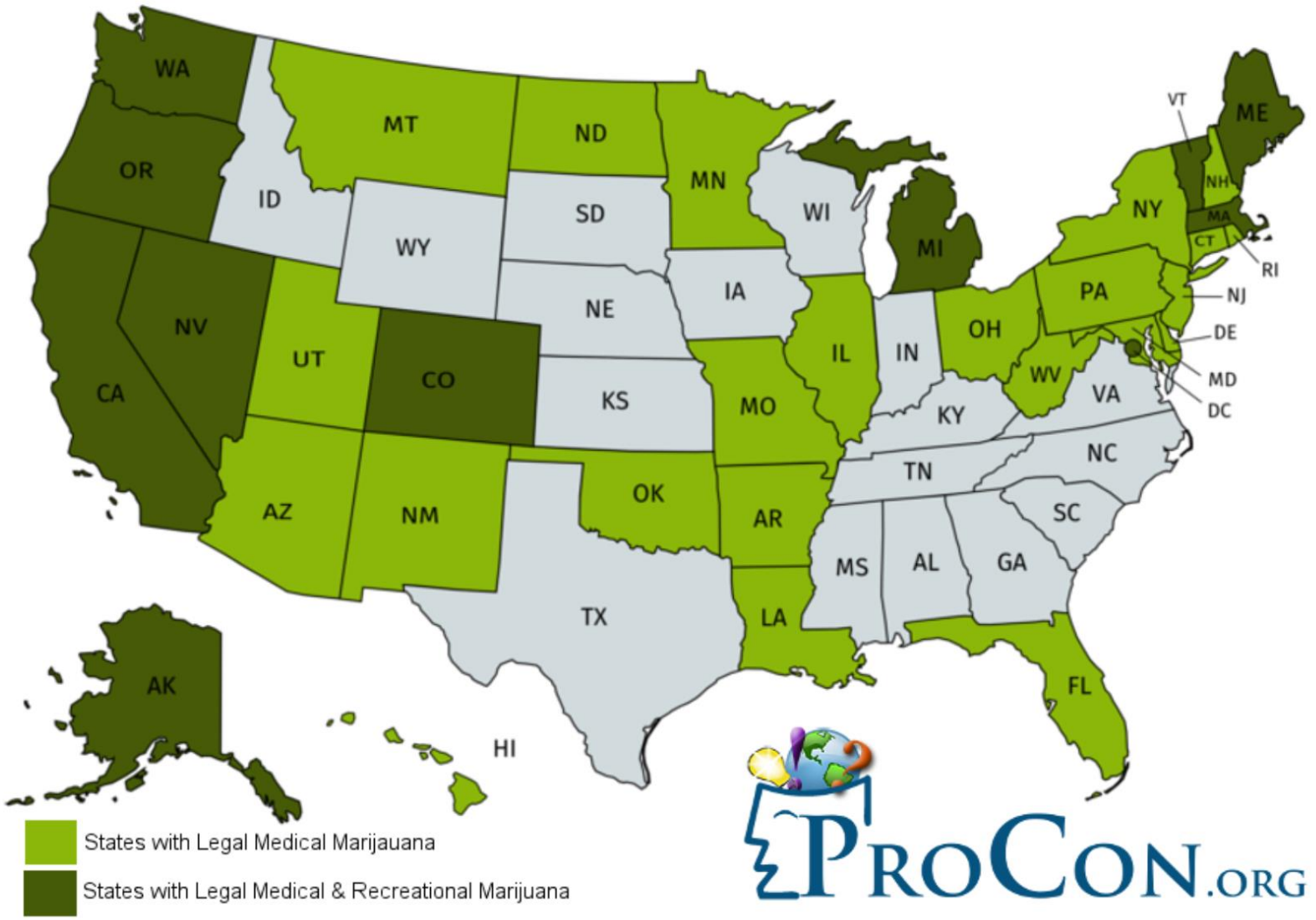
33 Legal Medical Marijuana States & DC
10 Legal Recreational Marijuana States & DC



Medical Marijuana

- Employers in most states are not required to tolerate medical marijuana use or possession at work.
  - What about offsite use and positive drug tests?

Recreational Marijuana

- 10 states and D.C. now permit recreational marijuana use
- As with medical marijuana, employers in most states remain free to enforce work rules against drugs.

Other Marijuana Issues

- How to handle inquiries from employees:
  - It's still an illegal drug under federal law.
  - Employers can still test for it, and take adverse employment action.
- What if you want to have a more relaxed standard?
  - Consider safety-sensitive positions and federal obligations (DOT regulations and federal contracts) before relaxing standards.

Drug Abuse Impacts the Workplace

- Health absences
- Productivity
- Safety
- Judgement
- Business image
- Security/Theft
- Employee morale
- Insurance costs

What's An Employer to Do?

- Casual drug users may not apply if they know they'll be tested.
- If they apply and you offer a job, they'll fail the test.
- If you hire a drug user for a safety-sensitive job, but don't test them, someone may get hurt.
- Various laws limit how and when you can test.

An effective policy helps balance these risks.

Legality of Drug Testing

- No federal law prohibits drug testing in private employment.
- State laws
  - Vary greatly
  - Some states offer voluntary workers comp discount programs

Occupational Safety & Health Administration (OSHA)

- OSHA does not specifically require drug testing, but:
  - Drug testing may be necessary to provide a safe workplace under the general duty clause.
  - Depends on nature of the work and how drug use might affect safety.

Occupational Safety & Health Administration (OSHA)

- October 11, 2018: *Clarification of OSHA's Position*
  - 2016 Final rule "does not prohibit workplace safety incentive programs or post-incident drug testing."
  - Post-incident drug testing to determine the root cause of an incident that harmed or could have harmed employees is okay, but:
    - Must not be done in a way that could be viewed as penalizing employees who report a work-related injury; and
    - Everyone whose conduct could have contributed to the incident should be tested (not just those who reported injuries).

Americans with Disabilities Act (ADA)

- Drug addiction is a disability under the ADA.
  - ADA protects rehabilitated (non-using) drug addicts.
  - ADA does not protect current illegal use of drugs.
- Leave for rehab may be reasonable accommodation.
  - If requested before a policy violation.
  - Must engage in "interactive process."

ADA – “Current Use”

- EEOC: Means “recently enough” to justify employer’s belief that drug use is an ongoing problem.
- Courts: Not limited to “the day of” or even within a matter of days or weeks before the event/issue/accident
- Intended to mean recently enough to indicate actively engaged in illegal drug use.

ADA and Drug Testing Policies

- Post-offer/pre-employment medical examinations and inquiries
- Once employed, medical examinations and inquiries must be job-related and consistent with business necessity.
  - Evidence of a job performance or safety problem
  - Required by other federal laws
  - Determine current fitness to perform a particular job

Family and Medical Leave Act (FMLA)

- Drug addiction is a “serious health condition.”
- May use FMLA leave to participate in a substance abuse program.
  - But not to recover from the side effects of substance abuse (e.g., a hangover or drug-induced incapacity).
  - FMLA is not a shield if the employee has already violated policy.

AN EFFECTIVE DRUG TESTING POLICY

Effective Drug Testing Policy

- "Effective" means it balances your interests in:
  - Minimizing drug-related problems
  - Maintaining a safe, adequate workforce
- Focus on prevention, rather than punishment.
  - Don't scare away potential applicants
  - Test as necessary to protect safety and productivity
  - Encourage early intervention
  - Leave room for management discretion

Be Honest With Yourself

- You won't have many workplace drug problems if you test all applicants, refuse to hire anyone who fails a drug test, and terminate every current employee who fails a test.
  - Probably will have trouble finding and keeping employees.
  - Might have trouble with anti-discrimination laws, federal contracts, union labor agreements, etc.
- How much testing do you <u>really</u> need?

Identify Your Priorities

- Is policing morality more important than running your business?
- Require only as much testing as you really need.
  - Do you need to know whether the person you're considering hiring as grocery bagger has smoked a joint in the past month?
  - Maybe you don't need to test for jobs that are not safety sensitive, don't involve access to cash or drugs, etc.
  - Reasonable suspicion is useful for most jobs, but pre-hire and random testing may not be necessary.

Be Honest With Others

- Identify effective deterrents & incentives.
  - Notice deters abuse, and maybe applications.
  - Specific notice deters abuse where it matters most, without scaring away as many potential applicants.
- Plan for test failures.
  - What will you do if a key employee fails or a whole group fails?
  - What if your “superstar” fails, and so does the person who just complained of harassment?
  - Back-fill plan? Consistent enforcement? Discrimination?

Zero Tolerance Policies

- Not “zero thinking.”
  - Termination for every infraction, big or small, is not “effective.”
  - Leaves no room for discretion.
  - Widely perceived as needless and unfair.

- Let’s take another look at that earlier scenario.

Scenario

- All four members of your QC department were randomly selected for drug testing today.
- All four employees failed.
- Your zero tolerance drug testing policy says everyone who fails a drug test will immediately be terminated.
- But, you can't run your production line without QC.
  - Ignore your own policy?
  - Apply your policy and shut down?
  - *This policy is not effective!*

Smart Zero Tolerance

- The QC department employees' test results:
  - Two tested positive for marijuana.
  - One tested positive for Methadone.
  - One tested positive for heroin, and appeared high.
- If the policy had left room for discretion, you could:
  - Give the marijuana smokers a last chance agreement.
  - Suspend the Methadone user, pending proof of prescription.
  - Terminate the heroin user.
- Might be even smarter to implement random testing

Written Policy

- Should address:
  - Expectations and behaviors that violate the policy
  - Who, when, and why you'll test
  - Substances tested for
  - Inspection issues
  - Consequences of a positive test
  - Consequences of refusal to test
  - Benefits of early intervention

Education & Training

- Notice improves deterrence.
- Train everyone regarding:
  - Company's policy.
  - Risks of drug abuse.
  - How to spot signs of impairment/abuse, and what to do.
  - Advantages of intervention vs. "getting caught."
- Train supervisors and managers regarding:
  - Handling reports of prescription medicine or other drugs.
  - How to respond to questions about drugs and the drug policy.
  - Maintaining confidentiality of medical information.

Emphasize Prevention

- Encourage employees to seek help before “getting caught.”
  - Make it easy for the employee.
  - Make sure they know what resources are available.
  - Open door; EAP; hot-line, etc.
  - Consider one chance at rehab in lieu of discipline or termination.
- Think creatively to facilitate rehab and staying “clean”:
  - Time off to attend rehab meetings.
  - Insurance policies that cover rehab costs.
  - On-site meeting space for support groups.

Employee Assistance Program (EAP)

- Can help prevent or mitigate drug abuse.
  - Confidential source of information, support, and/or treatment.
  - Studies indicate that employer supported and monitored treatment has better sustained recovery rates than treatment initiated at the request of friends and family members.
- Prevention and rehab can be cost effective:
  - Replacing an employee costs time, money, knowledge, continuity, and productivity.

Circumstances for Drug Testing

- Most employers test in one or more of these circumstances:
  - Post-offer/Pre-employment
  - Reasonable suspicion
  - Random
  - Post-accident
  - Fitness for duty/return to work
  - Periodic

Post-Offer, Pre-Employment Testing

- Virtually no limitations after conditional offer.
- Don’t invite discrimination claims:
  - Test, or don’t test, everyone who is offered the job position in question.
  - Apply the same standards to everyone tested for that position.
  - Protect confidentiality of test results.
- *Testing only for certain jobs may increase the number of applicants (and employees)*.

“Reasonable Suspicion” Testing

- Based on reliable information or evidence that an employee has violated policy.
  - Information may come from a credible third party (e.g., co-worker, spouse or child) or from supervisor’s observations.
  - The basis for each reasonable suspicion test should be well documented.
- **TIP**: Have more than one supervisor confirm the “reasonableness” of a suspicion.
- Be consistent, to avoid creating the impression of discrimination.

Reasonable Suspicion

- Bloodshot or watery eyes, or very large or small pupils
- Slurred speech, unsteady walking or unusual clumsiness
- Drowsiness, sleeping or lethargy
- Possession of drugs or drug paraphernalia
- Odor of marijuana
- Unusually poor, careless or unacceptable work performance
- Excessive perspiration
- Erratic or unusual behavior
- Situationally inappropriate exuberance, sadness or anger
- Irritability or unpredictable responses to ordinary requests

Random Testing

- Should actually be “random.”
  - NOT an excuse to “catch” a particular person.
  - Names generated via computer algorithm.
  - Some people may be tested several times; others may never be tested.
- Leave some room for discretion.

Smart Random Testing

- Need not be entirely random.
  - If everyone in the Payroll Department is randomly selected, generate a new list.
  - Otherwise, whole department could simultaneously fail.
- Best not to begin random drug testing without notice.
  - 30-60 days' notice.
  - Casual users can "get clean;" addicts have time to seek help.
  - Helps avoid choice between suddenly firing a lot of employees or violating your own policies to keep running your business.
  - Use reasonable suspicion testing in the interim.

Periodic Testing

- A discrete group of employees is tested at recurring intervals.
  - Example: Maintenance Dept. is tested every 90 days.
- Can be helpful when:
  - There are rumors or concerns that a particular group is using drugs, but not enough evidence for reasonable suspicion to test any particular person; or
  - Jobs are particularly safety sensitive.
- Be careful not to select a group that is predominately of a particular race, color, sex, etc.

Choose the Right Testing Method(s)

- Each has pros and cons.
  - Urine
  - Hair
  - Saliva
  - Blood
- Use the one(s) that best suit your needs.

Urine Testing

- Most common.
  - Standard DOT test detects cocaine, amphetamines, marijuana, PCP & certain opioids.
  - Inexpensive and accurate.
- Detects recent use but not current intoxication
- Only approved method for DOT
- Popular for pre-employment, random, post-accident, reasonable suspicion, follow-up, and return-to-duty.

Testing Method Comparison

- **Urine:** cheap, quick, accurate, reveals recent use (but not whether intoxicated), provides only limited information about opioid use; good enough for many purposes. The only approved method for DOT testing.
- **Hair:** expensive, accurate, longer turn-around, reveals historic patterns, harder to "cheat," but doesn't reveal recent use.
- **Saliva:** cheap, quick, hard to cheat, reveals very recent use; but does not reveal use after about 48 hours.
- **Blood:** expensive, accurate, longer turn-around, reveals recent use and degree of intoxication, but not historic patterns, harder to "cheat."

Consequences of Policy Violations

- Notice improves deterrence.
- Announce potential consequences:
  - Discipline or termination.
  - Last chance agreement, mandatory drug rehabilitation program, follow-up testing.
- Be reasonably specific, but leave room for employer discretion.

Consequences of Testing Violations

- Policy should make clear:
  - Must fully cooperate in testing process.
    - Must not attempt to delay, interfere with, or defeat testing process;
    - Must complete all required forms; and
    - Must comply with collection and testing personnel's instructions.
  - Must authorize lab to release results to employer.
  - Anything less will result in same or harsher consequences as a positive test result.

Last Chance Agreements

- Potential alternative to termination.
- Avoids firing a “good” employee.
- Possible conditions of continued employment:
  - Entering and completing a rehab program;
  - Periodic and/or random drug testing for one or two years after; and
  - Immediate termination for any violation of LCA or violating any significant company policy.
- Leave room for employer’s discretion.

Key Takeaways

- Develop a drug testing policy that **effectively** serves ***your organization's*** competing interests.
  - When, why, and how to test.
  - Emphasize prevention and retain management discretion.
- Educate managers and employees, to understand and comply with your policy.
- Consistently enforce your policy.

Finally…

- Know current state law in your states of operation
- Know current state law where employee lives
- Know what your policy says
- Know and support your organization's culture
  - Ownership
  - Size
  - Locations
  - Safety considerations
  - Hiring and retention challenges

Final Questions

uba@fisherphillips.com

HRCI – _____

SHRM – _____

Presented by:
Jennifer Sandberg
Phone: (404) 240-4152
Email: jbsandberg@fisherphillips.com

Thank You

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