

# What's the Buzz



## UP IN SMOKE

### CANNABIS ISSUE

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# POLICY BEST PRACTICES FOR CANNABIS



BY SHARON BOTTCHER

Legalization of marijuana continues to be a trending topic of debate in the United States as well as other countries worldwide. Despite your opinion on this matter, the reality is that cannabis legalization continues to grow. The acceptance of marijuana has led an abundance of states to legalize medical and recreational cannabis and employers are faced with decisions on how to deal with cannabis use in the workplace.

## Preparing your workplace for legal marijuana

As with all other drug testing program decisions, testing for cannabis must be discussed in advanced and decisions pinned down regarding the company's position on marijuana used to treat a health condition or marijuana positives in state(s) that allow for recreational cannabis use. Employers have a fair amount of flexibility to determine cannabis related practices for their company, but since states decide on marijuana laws, it is not feasible to have one general policy. Policies must be tailored, where applicable, on a state-by-state basis.

So, depending on state laws, employers in some states can choose to drug test their employees including testing for cannabis, with very few restrictions. On the other end of the spectrum, there are medical and/or recreational laws that give certain protections to employees and applicants and require employers to implement specific conditions that determine how you must structure your testing program. Under federal law, the Department of Transportation (DOT) does not currently allow any flexibility for a THC positive test. These regulations prohibit THC positive results regardless of any applicable state medical or recreational laws.

### State laws can make your policy complicated

For instance, in Nevada, employers are prohibited from failing or refusing to hire prospective employees because a drug test indicates the presence of marijuana metabolites. The law does not prohibit employers from testing for marijuana for pre-employment purposes, it only prohibits taking action based on a marijuana positive test under certain circumstances (i.e., safety-sensitive positions in the following position/industries:

- Firefighter (as defined in NRS 450B.071);
- Emergency medical technicians (as defined in NRS 450B.071);
- Any position requiring an employee to operate a motor vehicle and for which federal regulations or state laws require the employee to submit to drug and alcohol testing; and
- Any position that, in the employer's opinion, could adversely impact other's safety.

In New Jersey, an employer may not penalize an individual solely based upon the presence of cannabinoid metabolites in the bodily fluids of a person engaged in conduct permitted under state law. A drug test for cannabis must include a physical evaluation to determine an employee's state of impairment. The physical evaluation will be conducted by an individual with necessary certification to opine on the employee's state of impairment, or lack thereof, related to the usage

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of a cannabis item in accordance with state law. Also, it is required to provide applicants and employees with a post-testing written notice of the individual's right to explain a positive cannabis test result. Upon receipt of the written notice, the applicant or employee has three days to submit information to the employer explaining the cannabis positive test result, and, if applicable, a medical marijuana authorization from a health care practitioner or proof of registration with the medical marijuana commission indicating a valid medical reason for a marijuana positive test result. In addition, an applicant or employee with a confirmed positive marijuana test may request a confirmatory retest of the original sample, but it is their responsibility for costs associated with the retest. All these specific state requirements must be included in your workplace policy to remain compliant.

### Creating your policy

Regardless of the state or states involved, each company must first decide how to proceed with marijuana as part of its testing program. The decision may be determined by several factors such as the company philosophy, type of industry, or employee positions within the company weighing the risks or safety features of employee positions.

A company will either decide to accept or deny marijuana as a legitimate explanation for a positive THC test result. In some circumstances, it is possible for individuals using CBD to test positive for THC and employers can treat CBD oil the same as medical marijuana. Most state marijuana laws either specifically permit employers to restrict marijuana use by employees or do not mention employers or workplace at all.

After making the decision on the company's position regarding marijuana, crafting a policy to include the details of marijuana testing requirements is the next logical step. Overall, there are four fundamental choices that reveal the appropriate language to incorporate in a policy for marijuana. They are:

1. General language that addresses the basic requirements to accept/deny medical marijuana violations.

2. General language that addresses the basic requirements to accept/deny recreational marijuana violations.
3. Custom language that addresses the specific requirements to accept/deny marijuana related violations for each applicable state law.
4. General language that addresses the requirements for marijuana under federal DOT regulations.

Determining the language for each of the above four categories is where it becomes a bit more complicated. A thorough review of the marijuana laws must be performed for every applicable state while simultaneously considering the type of program. According to the examples above, policy language must be created with regards to prohibited conduct and consequences for marijuana violations, CBD violations, violations of the DOT regulations, and guidance specific to each state regarding marijuana violations. In addition, if a company should decide to limit marijuana testing in certain circumstances or remove it all together, the decision should also be addressed in the policy.

### Conclusion

When writing or reviewing a policy, it is a necessity to keep up with changes to medical and recreational marijuana laws. Companies that successfully navigate compliance do so by tracking marijuana laws in the states where they conduct business, following trends in surrounding states, and by keeping their policies, especially regarding marijuana in the workplace, current. Marijuana laws are actively changing, and companies need to stay vigilant and partner with experts in the industry to ensure company policies are clear, concise and compliant.

**Most state marijuana laws either specifically permit employers to restrict marijuana use by employees or do not mention employers or workplace at all.**



# LEGAL CANNABIS: AN OVERVIEW

BY YVETTE FARNSWORTH BAKER, ESQ.

Any employer with a workplace drug testing policy needs to be well-educated on marijuana law(s) in the states in which they operate. In 2023, there is such variation in the way that different states permit or restrict workplace discipline for off-duty marijuana use that an uninformed policy will easily expose an employer to liability. When implementing marijuana testing, it is imperative that an employer understand the basics of marijuana law across the states.

## What is cannabis?

Marijuana is something familiar to most, if not all, people, but the various terms thrown around like “cannabis,” “hemp,” “THC” and “metabolites” can sometimes confuse. Cannabis is a plant that contains over 100 different compounds, including tetrahydrocannabinol (THC) and cannabidiol (CBD).

Tetrahydrocannabinol, or “THC,” is the psychoactive chemical found in cannabis that causes the “high” or euphoric effects, associated with marijuana. Levels of THC vary in different cannabis plants or strains. Delta-9 is the most common chemical THC; however, there are other forms of THC such as Delta-8 and Delta-10, which cause a similar “high.” In addition to THC’s euphoric effects, it can also have negative effects on the body including impaired memory, impaired coordination, paranoia, anxiety and disordered thinking.

Hemp and marijuana are two types of cannabis. Marijuana is a term for cannabis that contains more than 0.3% THC. Marijuana can contain large amounts of THC, and in recent years the amount of THC found in marijuana has risen. Hemp is a term for cannabis that contains less than 0.3% THC. It has been used to describe non-intoxicating cannabis that is harvested for the industrial use of its derived products. Hemp has been historically used in paper products, clothing and textiles, body care products such as lotion and food. Hemp was legalized federally in 2018 through the Farm Bill. Because hemp contains a low amount of THC, it generally contains high amounts of the chemical cannabidiol or “CBD.”

In recent years the amount of THC found in marijuana has risen.

Drug tests are designed to detect either THC, which is referred to as the “parent drug” or a THC metabolite. Urine testing detects only metabolites of THC. This is because metabolites are more stable and stay in the body longer than parent drugs. When THC is broken down and metabolized by the body, it separates into several different metabolites. Most urine drug tests detect the metabolite THC-COOH, which in and of itself is non-psychoactive. Oral fluid testing, however, tests for the parent drug, psychoactive THC and not the metabolite. Once THC has been metabolized, it is not detectable on an oral fluid test.

A drug test cannot differentiate between THC from marijuana, hemp or a CBD product. Most current drug tests detect Delta-9 THC. Delta-8, Delta-10 THC and others are not currently detected in most drug tests that screen for THC and are sometimes used by drug abusers to circumvent drug tests.

## State laws and marijuana

Currently, 39 states and the District of Columbia have legalized medical marijuana and 22 of those states have also legalized recreational marijuana. Additionally, 11 states have passed laws that protect off-duty marijuana use by employees, including recent law changes in California and Washington, which make it more difficult for employers to discipline employees for a positive marijuana test.

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However, in 49 states and the District of Columbia it is still legal to test employees for marijuana use, with New York state as the lone exception that prohibits testing in nearly all circumstances.

As marijuana legalization has risen, so have marijuana positivity rates. Even from 2020-2021, marijuana positivity rates increased 8.3% in one year. Marijuana positivity rates have especially escalated in states with legal recreational marijuana, rising 118.2% from 2012 to 2020.<sup>1</sup> This is important to note as more states move towards restricting workplace discipline for marijuana positives.

Early marijuana legalization never protected an employee's use of marijuana from workplace discipline. However, as legalization grew so did protections for marijuana users. These protections first started with laws that protected the medical use of marijuana. Employees with medical cards could not be disciplined for testing positive unless they were impaired on the job or used medical marijuana in the workplace. However, in recent years even recreational use has received those same protections, with California and Washington being the latest states to enact such laws.

### California AB 2188

California's recent law prohibits employers from disciplining employees or refusing to hire applicants based on marijuana use off work hours and off work property. The law prohibits discrimination in "hiring, termination, or any term or condition of employment" if that discrimination is based on "an employer-required drug screening test that has found the person to have non-psychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids." The law is scheduled to take effect January 1, 2024.

California's law does include exceptions. One notable exception is the building and construction trades. This is important as those industries include many safety-sensitive positions. Other exceptions include positions for which state or federal law require drug screening for marijuana, positions that require a federal government background investigation or security clearance in accordance with regulations issued by the United States Department of Defense, and employers that must conduct testing in order to receive federal funding or federal licensing-related benefits or pursuant to a federal contract.

While California's law is restrictive, there is still a lot employers in California can do to protect the safety and productivity of their workplace. Employers are still permitted to test employees for marijuana. Employers are still permitted to discipline and terminate employment if an employee is impaired by marijuana while working, uses marijuana during work hours or brings marijuana into the workplace. Employers should have clear policies regarding these prohibited activities and should monitor employees for signs of impairment in the workplace.

The California law's reference to testing for non-psychoactive cannabis metabolites is thought-provoking but unclear. As mentioned, oral fluid testing does not detect non-psychoactive metabolites but instead detects the parent drug, psychoactive THC. The law on its face seems to permit workplace discipline if based on a test that detects the



## A drug test cannot differentiate between THC from marijuana, hemp or a CBD product.

psychoactive parent drug rather than the non-psychoactive metabolites. However, even a drug screening test that detects THC, the parent drug, cannot prove impairment and cannot prove whether a person used marijuana on the job or off-duty. So whether oral fluid testing is an exception to California's prohibition on discrimination solely based on a drug screening test remains murky.

### Washington SB 5123

Similar to California, Washington state also recently passed a law severely limiting employer rights in regard to pre-employment testing for THC. The law prohibits employers discriminating against an applicant during the hiring process if discrimination is based on off-duty and away from the workplace cannabis use or a required drug test that indicates the presence of "nonpsychoactive cannabis metabolites" in the hair, blood, urine or bodily fluid.

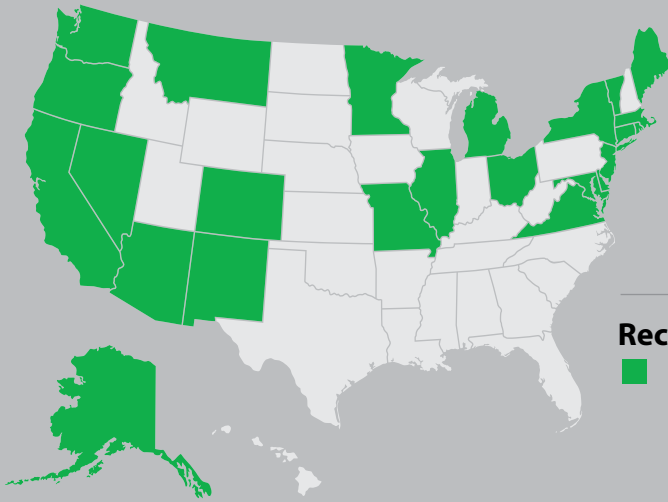
Despite this law change, employers in Washington still maintain a plethora of rights when it comes to drug testing. Employers are still permitted to base hiring decisions on "scientifically valid drug screening conducted through methods that do not screen for non-psychoactive cannabis metabolites." Employers are also still permitted to maintain a drug- and alcohol-free workplace, comply with federal laws and regulations, and continue marijuana testing for all circumstances outside of pre-employment. Employers can also continue to test applicants for marijuana so long as pre-employment THC-positives are not reported to the employer. Washington's law includes a lengthy list of exceptions that should be consulted, including exceptions for safety-sensitive positions "for which impairment while working presents a substantial risk of death." The law is scheduled to take effect January 1, 2024.

Washington's law is restrictive, but less so than California's, as it only applies to pre-employment testing. Employers should have clear policies in place for pre-employment testing, as well as current employee testing. Similarly to California, Washington's law pertaining to non-psychoactive metabolites is thought-provoking, but ultimately unclear. On its surface, it would appear that an employer could choose not to hire an applicant based on the results of a pre-employment test that detects

*Continues on page 7...*

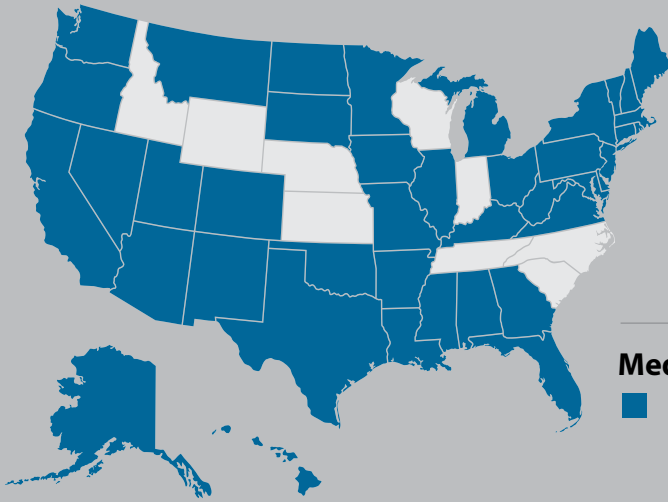
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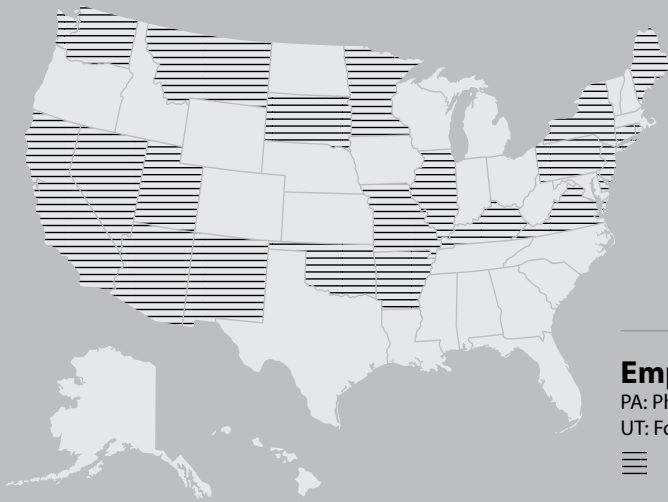
- |                      |               |              |
|----------------------|---------------|--------------|
| Alaska               | Maryland      | New York     |
| Arizona              | Massachusetts | Ohio         |
| California           | Michigan      | Oregon       |
| Colorado             | Minnesota     | Rhode Island |
| Connecticut          | Missouri      | Vermont      |
| Delaware             | Montana       | Virginia     |
| District of Columbia | Nevada        | Washington   |
| Illinois             | New Jersey    |              |
| Maine                | New Mexico    |              |

## Recreational cannabis



- |                       |               |                          |
|-----------------------|---------------|--------------------------|
| Alabama               | Louisiana     | Ohio                     |
| Alaska                | Maine         | Oklahoma                 |
| Arizona               | Maryland      | Oregon                   |
| Arkansas              | Massachusetts | Pennsylvania             |
| California            | Michigan      | Rhode Island             |
| Colorado              | Minnesota     | South Dakota             |
| Connecticut           | Mississippi   | Texas (low-THC cannabis) |
| Delaware              | Missouri      | Utah                     |
| District of Columbia  | Montana       | Vermont                  |
| Florida               | Nevada        | Virginia                 |
| Georgia (low THC oil) | New Hampshire | Washington               |
| Hawaii                | New Jersey    | West Virginia            |
| Illinois              | New Mexico    |                          |
| Iowa (low THC oil)    | New York      |                          |
| Kentucky              | North Dakota  |                          |

## Medical cannabis



- |                      |            |              |
|----------------------|------------|--------------|
| Arizona              | Maine      | Oklahoma     |
| Arkansas             | Minnesota  | Pennsylvania |
| California           | Missouri   | Rhode Island |
| Connecticut          | Montana    | South Dakota |
| Delaware             | Nevada     | Utah         |
| District of Columbia | New Jersey | Virginia     |
| Illinois             | New Mexico | Washington   |
| Kentucky             | New York   |              |

## Employer's rights restricted?

PA: Philadelphia specifically  
 UT: For public employers



only the psychoactive parent drug rather than the non-psychoactive metabolites. Ultimately, it will be up to individual employers to determine their hiring policies with the understanding that no drug test can prove marijuana impairment or when and where marijuana was consumed.

### Other important state laws

Other states have similarly restrictive laws to California and Washington when it comes to marijuana testing in the workplace. The state of New York has the most restrictive law in the country. The New York state legislature passed an amendment to the marijuana law in 2021 that prohibits employers from discriminating against employees who use recreational marijuana off-duty and off work premises. Then in 2022, the New York Department of Labor issued guidance that clearly stated that employers are prohibited from testing employees for marijuana unless specifically required by law. Examples provided of permissible marijuana testing are for-hire motor vehicle carriers as required by state law and commercial motor vehicle drivers regulated by the Department of Transportation. New York remains the only state with an outright prohibition on workplace drug testing for marijuana for nearly all workplaces.

Both Illinois and Nevada also have laws that restrict the action an employer can take based on a positive test for marijuana. In both states, an employer cannot refuse to hire or discharge any individual because

the individual uses marijuana off the premises of the workplace during non-working and non-call hours. However, in both states an employer can discipline or terminate an employee if the employee is impaired by marijuana on the job, consumes marijuana during work hours, or brings marijuana into the workplace. And in both states testing for marijuana is permitted. Nevada does differ from Illinois law in that Nevada permits an employer to terminate employment or refuse to hire based on a positive marijuana test for the following positions: firefighter, emergency medical technician, positions that require an employee to operate a motor vehicle and for which state law or federal regulations require the employee to submit to screening tests, and, importantly, positions that, in the determination of the employer, could adversely impact the safety of others.

### Conclusion

The wrangle over legal marijuana will continue for years to come. Whether more states will join California and New York in restricting employee discipline for marijuana use, or whether the pendulum has swung as far as it will go in that direction, remains to be seen. But either way, employers should be educated on the basics of marijuana law and should make an informed and legally defensible decision on their workplace policy.

1. See Quest Diagnostics Drug Testing Index.

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### Swab



### Snap



### Seal



# 3 easy steps



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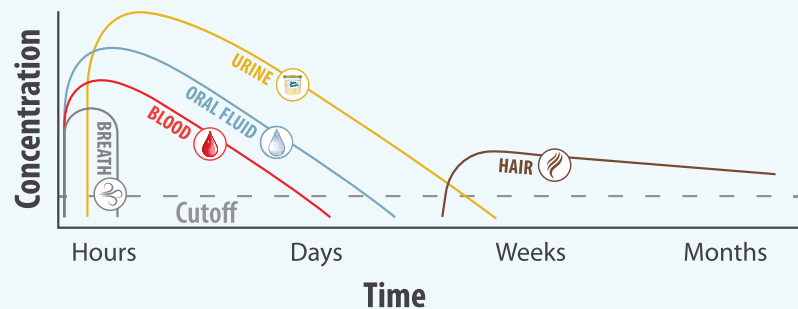
SAMHSA drug panel	Urine analysis	Saliva analysis
<b>Overall positivity rate</b>	<b>5.5%</b>	<b>13.6%</b>
Amphetamine/ Methamphetamine	1.3%	1.24%
Cocaine	0.22%	0.58%
Marijuana	3.6%	12.3%
Oxycodone	0.29%	0.24%
PCP	0.009%	0.04%

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Oral fluid lab-based testing has been outperforming and outpacing urine lab-based testing since 2009 and more than doubled the overall positivity rates in 2020.

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Oral fluid is able to detect recent drug use, making it a first choice for under the influence or potential impairment testing.<sup>2</sup>



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<sup>1</sup> 2021. Quest Diagnostics. General U.S. workforce data table. Quest Drug Testing Index.  
<sup>2</sup> Cone, E. 2017. A primer on the science of oral fluid testing. Seller's Guide.

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# TESTING FOR CANNABIS: WHICH SPECIMEN IS BEST?

KATHERINE MILLER

Parent drug is more likely to correlate with recent-use detection than a metabolite.

The environment around workplace testing for cannabis is becoming increasingly difficult to navigate. States like Delaware place nearly no restrictions on employers, while states like California limit employers to only certain specimens, and states like New York prohibit nearly all testing. It is essential for employers to not only be aware of complicated state laws and city ordinances, but also have knowledge of the best test specimen to fit their needs when testing for cannabis use.

### How to continue testing for cannabis, particularly in states that limit testing capabilities

It is becoming more common for states to severely limit an employer’s abilities when it comes to workplace cannabis testing, whether it be for recreational or medical purposes. California, for example, will prohibit employers from discriminating against off-duty cannabis use or taking action based on test findings that indicate non-psychoactive cannabis metabolites as of 2024. What does this mean for employers? Some may think that this will prohibit testing for cannabis entirely; however, it is important that employers are aware of the entirety of the legislation passed, not just the “punchy” parts.

Most important for employers to note is the law permits them to discriminate in hiring, terms or conditions of employment, or penalize an individual based on a “scientifically valid” pre-employment test conducted using a method that does not screen for non-psychoactive cannabis metabolites. Using a testing method that identifies the presence of the parent drug THC in bodily fluids rather than the metabolite(s) is essential in this circumstance.

Employers nationwide should be looking for a test specimen that detects parent drug rather than metabolites. Not only is this essential in some states, but it is also best practice as parent drug



BREATH



BLOOD



ORAL FLUID



URINE



HAIR

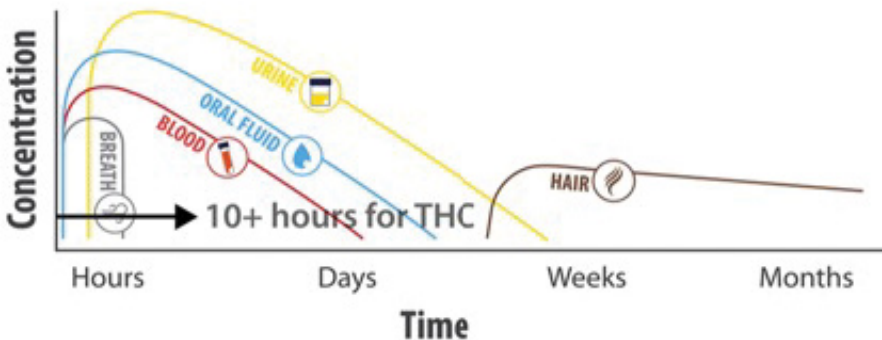
is more likely to correlate with recent-use detection than a metabolite that can remain in the body for days or even weeks post-use. Unlike urine, oral fluid measures the parent drug, allowing employers most states to continue using it for workplace drug testing in light of recent updates to cannabis laws. It is likely that we will see more states moving toward limiting workplace testing to only specimens that detect parent drug in the near future.

In addition to choosing a specimen that detects the parent drug, such as oral fluid, it is essential to ensure that your testing methodologies comply with applicable state laws and federal regulations. Look for a specimen that has a track record of being legally defensible in addition to one that is generally accepted and well-known.

### What to look for when testing for cannabis?

In addition to looking for a specimen that detects the parent drug, ensure that the specimen you choose detects only recent use. Hair, for example, detects the parent drug, but doesn't detect recent use. Recent-use detection, meaning the detection of drugs that have been used in the past minutes to hours, is essential in cannabis detection as cannabis metabolites can stay in the user's system for days and up to weeks.

Oral fluid is the only specimen that not only detects recent use, but also covers the entire window of impairment (meaning the period post-ingestion where the individual experiences impairing effects) for cannabis. Breath and blood, for example, don't cover the entire window of impairment, although they do focus on recent use. Urine and hair far outlast the window of impairment and focus on historic use (meaning use that has happened within days to weeks).



Oral fluid is the only specimen that detects the parent drug, covers the entire window of impairment for THC, and also only detects recent use. Oral fluid is legal in nearly all 50 states and is the only test specimen that fits the needs of more restrictive testing laws.

### Oral fluid is the way of the future

As more states follow California's lead, it will become essential for employers to use a test specimen that detects the parent drug, focuses on recent use, and covers the entire window of impairment for cannabis. Oral fluid is the only specimen that meets all of those needs and more.



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