



# THE PROS & CONS

## OF ELIMINATING MARIJUANA FROM WORKPLACE TESTING

BY NINA M. FRENCH

Imagine yourself in the role of recruiting for a national employer. The unemployment rate is low. In fact, it is lower than it has been in nearly 20 years.<sup>1</sup> That alone makes your job more difficult. Now imagine you are in a highly competitive field like healthcare or Information Technology. Finding and keeping good employees just became a bit more difficult. Finally, imagine that the majority of the states where you do business have legalized marijuana. Actually, that is not difficult to imagine as it is the reality in 2019. Over 30 states and the District of Columbia have legalized medicinal marijuana and 11 plus D.C. have legalized marijuana for recreational use. As a result, the rate of workforce drug positivity hit a fourteen-year high in 2018, according to Quest Diagnostics.<sup>2</sup> Positivity rates in the combined U.S. workforce increased nearly 5% in urine drug tests from 4.2% in 2017 to 4.4% in 2018. That represents the highest level since 2004 (4.5%) and is more than 25% higher than the thirty-year low of 3.5% recorded between 2010 and 2012.<sup>3</sup>

As a national employer, elimination of THC in all states and for all positions is simply not possible at this time.

In the past, when otherwise qualified applicants are located, interviewed, and an offer is made, the vetting process continues for many employers and an essential part of that process is the pre-employment drug test. If that candidate's drug test comes back positive for marijuana, you are back to the drawing board. Suddenly, your job of finding a qualified candidate is a lot more difficult. As an employer is it just smarter to drop marijuana from your drug testing panel altogether? As with most things in the complex world of marijuana, the answer is not simple. There are pros and cons that must be considered before making this very important decision.

### Eliminating Marijuana from your Panel

#### STATE LAW DISPARITY

**Pro:** Simply put, state laws pertaining to marijuana vary, and several states have laws that prohibit and/or severely limit an employer's right to test and/or discipline most non-safety-sensitive employees based on marijuana card-holder status or even, in some cases, a marijuana positive drug test regardless of card-holder status. Given the disparity between states, dropping THC from all drug testing panels seems easy, creating uniformity across the entire population and simplifies policy enforcement.

**Con:** Many states have mandatory drug testing laws that require a specific panel and that panel, without exception, includes marijuana. As well, many other states provide voluntary laws that protect employers from some of the costs of drug use in the workplace. Many of these laws require testing for THC. As a national employer, elimination of THC in all states and for all positions is simply not possible at this time.

*This information is provided for educational purposes only. Reader retains full responsibility for the use of the information contained herein.*

## COST

**Pro:** If your current program includes testing for marijuana, eliminating it from the panel is unlikely to reduce or change the laboratory cost. In fact, if you are using an outside collector, collection fees will remain the same as well. If the elimination of THC from your panel results in a lower positivity rate, there is a possibility to negotiate a lower fee structure from the Third-Party Administrator (TPA) or the Medical Review Officer (MRO). If the MRO fee is bundled into the cost of the test, tracking the decrease in positives may support a lower per test fee. Although the trend will take some time to be established, the data in the first year should be sufficient to establish the reduction in MRO reviews.

**Cons:** Increased use of drugs in your workplace equals increased cost. Substance abusers are responsible for 35% of all absenteeism and 2.5 times more likely to be absent more than eight days a year than their non-substance abusing co-workers.<sup>4,5</sup> Additionally, substance abusers are 1/3 less productive than their non-substance abusing co-workers.<sup>6</sup> Nationally, U.S. companies lose approximately \$100 billion/year due to alcohol and drug-related abuse.<sup>7</sup> 40% of all industrial workplace fatalities are caused by substance abusers.<sup>8</sup> On average, 10-20% of all work-related fatalities in the U.S. test positive for drugs or alcohol.<sup>9</sup> 55.1% of adults with a substance use disorder are employed full-time.<sup>10</sup> Each substance abuser with a pain medication use disorder costs their company an average of \$2,500/year in missed work (this does not include other costs as lost productivity, potential workplace accidents, etc.).<sup>11</sup> The costs are somewhat challenging to correlate directly, but are irrefutable.

## REASONS FOR TESTING

**Pro:** Eliminating marijuana from your panel may improve your ability to hire quickly. That speed to hire can improve productivity and, in turn, profits. Eliminating marijuana from random, post-accident, and reasonable suspicion testing can make HR decisions easier to

administer since they no longer require you to understand and incorporate medical and recreational marijuana accommodations or considerations at a state level.

**Cons:** Hiring fast may improve productivity, but quality may suffer in turn. Review the costs, consider your corporate culture, and balance the benefits against the risks. Speed to hire may seem like a benefit, but the downstream impact could be far more difficult to fix than a bit of additional time spent up front finding the right candidate. Additionally, THC elimination from post-accident and reasonable suspicion testing allows for a greater number of impaired employees on the job without the ability to discipline them based on that use.

## RISK

**Pro:** Based on the current state of marijuana in the US, the risks are plentiful. Eliminating marijuana from your test panel will likely protect you from the myriad of lawsuits that are popping up across the country alleging discrimination.

**Cons:** Eliminating testing for THC will increase the number of marijuana users at your workplace. The increase in users will likely result in more accidents, errors, and incidents, which means opening your company up to a negative impact to your brand as well as potential lawsuits from customers, shareholders, and employees by way of negligence suits. As an employer, you are required to take reasonable efforts to maintain a safe workplace, and failure to test for marijuana when vetting of employees and during the employment lifecycle could open that risk for your organization.

## Legislation Complicates the Issue

A number of states and cities passed or considered legislation in 2019 that only complicates the issue of dropping or keeping marijuana in your testing panel. Massachusetts proposed eliminating testing for marijuana in the workplace entirely. Nevada passed legislation that

*Continued on back cover...*

**OraSure Technologies**

**Over 100 million oral fluid drug tests sold. Are you using the #1 brand?**

**Intercept**  
Oral Fluid Drug Test

In USA only. "100 million" data on company file. "#1 brand" 2019 Drug testing survey by CCG of U.S. based companies only.

prohibits employers from discriminating against applicants based on a marijuana positive drug test. Texas has a proposed bill that would eliminate screening for THC or CBD for employees and/or independent contractors of state agencies and/or political subdivisions. Washington, D.C. has multiple proposed bills that eliminate pre-employment testing for marijuana entirely.

Additionally, a number of states proposed legislation that would make it so an employer cannot take action based on a medical marijuana card holder's positive test for marijuana metabolites unless they are able to prove impairment. While a number of these bills contain safety-sensitive carve-outs for certain positions and industries, not all of them do. How is an employer supposed to juggle where they can or cannot test, which positions they can or cannot take action against, and keep track of new legislative updates?

**Conclusion**

Bandages may stop a wound from bleeding, but they don't fix the cause of it and failure to

repair the real problem is likely to make the issue worse. Likewise, eliminating marijuana from your drug screening panel may seem like a quick remedy but it will, for most employers, only cause their issues to worsen.

Savvy employers will consider an evaluation of their program and positions against the testing methodologies, laws, technology, and reasons for testing that are available today and consider modifications to their program versus outright elimination of testing for THC. The shorter window of detection for THC in oral fluid compared to that of urine or hair may provide a solution that allows an employer the benefits of testing as a hiring assessment tool while allowing for responsible use of legal products outside of the workplace. And although no drug test available on the market today proves "impairment" from THC, the shorter detection window aligns more closely with near term use and, if challenged, could offer more protections to employers.

Marijuana is complicated. The right solution may not be as simple as eliminating THC from

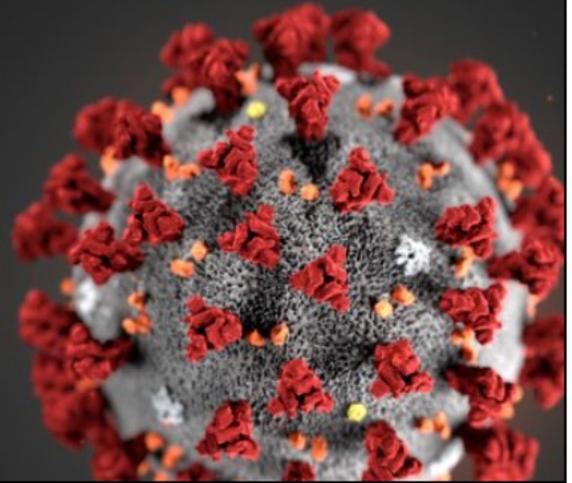
your panel altogether but, as is most always the case, the effort in developing the right solution will provide far better returns.

1. "Unemployment Rate: 20 years and over." FRED Economic Data, 2 Aug. 2019, <https://fred.stlouisfed.org/series/LNS14000024>.
2. "Workforce Drug Testing Positivity Climbs to Highest Rate Since 2004, According to New Quest Diagnostics Analysis." Quest Diagnostics, 11 April 2019, <http://newsroom.questdiagnostics.com/2019-04-11-Workforce-Drug-Testing-Positivity-Climbs-to-Highest-Rate-Since-2004-According-to-New-Quest-Diagnostics-Analysis>.
3. *Id.*
4. Martin, Erik. "Fatal Addiction: The cost of substance abuse at work." The Daily Advocate, 23 Feb. 2017, <https://www.dailyadvocate.com/news/29751/fatal-addiction-the-cost-of-substance-abuse-at-work>.
5. "Workplace Safety." CLEANFleet, date unknown, <https://www.cleanfleet.org/workplace-safety-with-drug-testing/>.
6. United States Department of Labor, United States Small Business Administration, United States Office of National Drug Control Policy. Working partners: confronting substance abuse in small business: national conference proceedings report. 1992.
7. Hampton, Ryan, Murillo, Sharon. "Addiction Costs Employers \$100 Billion Every Year. We're Dedicated to A Better Way." Thrive Global, 9 July 2019, <https://thriveglobal.com/stories/addiction-costs-employers-100-billion-every-year-were-dedicated-to-a-better-way/>.
8. "Workplace Safety." CLEANFleet, date unknown, <https://www.cleanfleet.org/workplace-safety-with-drug-testing/>.
9. "10.8 Million Full-Time Workers Have a Substance Use Disorder." SAMHSA: The NSDUH Report Data Spotlight, date unknown, <https://www.samhsa.gov/data/sites/default/files/NSDUH-SP132-FullTime-2014/NSDUH-SP132-FullTime-2014.htm>.
10. "Real Costs of Substance Use in Your Workforce: The Real Cost of Substance Use to Employers." ShatterProof, date unknown. <https://www.shatterproof.org/real-cost-substance-use-employers>.

©2010-2020 The Current Consulting Group, LLC – No portion of this article may be reproduced, retransmitted, posted on a website, or used in any manner without the written consent of the Current Consulting Group, LLC. When permission is granted to reproduce this article in any way, full attribution to the author and copyright holder are required.

# Have questions about drug testing during COVID-19?

[Click here](#) to access the white paper "Drug Testing During COVID-19: Essential and Smart"



**OraSure Technologies**

220 East First Street, Bethlehem, PA 18015

800-ORASURE • [chooseintercept@orasure.com](mailto:chooseintercept@orasure.com)

This information is provided for educational purposes only. This is not offered as legal advice, but is instead offered for informational purposes. Reader retains full responsibility for the use of the information contained herein. No portion of this newsletter may be reproduced, retransmitted, posted on a website, or used in any manner without the written consent of the copyright holder. When permission is granted to reproduce this article in any way, full attribution to the author and copyright holder are required.

