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## Testing Policies

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**Richard D. Alaniz** • Apr. 16, 2015



Facing end-stage renal disease, Charlie Davis began using legally prescribed marijuana through New Jersey's Medicinal Marijuana Program in 2013. A five-year employee with New Jersey Transit, he was "bumped" from his job as a lead clerk by a

more senior employee last year. So he applied for a job in the agency's railroad

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Nearly half of U.S. states allow for some legal usage of marijuana, generally under a doctor's oversight. To further complicate the situation, the federal government still considers marijuana an illegal drug. According to the White House's Office of National Drug Control Policy, "It is important to recognize that these state marijuana laws do not change the fact that using marijuana continues to be an offense under Federal law."

According to the National Institute on Drug Abuse, part of the National Institutes of Health, studies have suggested links between marijuana use and negative consequences in the workplace, such as a higher risk for injury or accidents. One study found that postal workers who tested positive for marijuana on a pre-employment drug test had 55 percent more industrial accidents, 85 percent more injuries, and 75 percent greater absenteeism compared with those who tested negative for marijuana use.

This leaves employers attempting to balance sometimes-conflicting state and federal laws with standards and policies designed to ensure that employees are not impaired on the job. In order to avoid absenteeism, accidents, lawsuits, and regulatory investigations, employers must understand their rights and obligations, particularly regarding to drug testing.

### **Current Laws and Regulations**

Workplace drug testing has been complicated by the rise in legal marijuana. According to the National Conference of State Legislatures, 23 states and the District of Columbia have passed laws allowing medical marijuana: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington. Several states, including Alaska, Colorado, and Washington, as well as Washington,

D.C., have legalized recreational marijuana use, and voters in Oregon made

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federal law. Along with the federal Controlled Substances Act, which classifies marijuana as a Schedule 1 drug along with LSD and heroin, a number of different federal laws can impact employers, employees, and their drug policies. Those laws include the [Drug-Free Workplace Act](#) and [U.S. Department of Transportation regulations](#).

### ***Employees Lawsuits Over Failed Drug Tests***

When employees have sued over rules around drug testing for marijuana, the courts have generally sided with employers. In 2012, the U.S. Court of Appeals for the Sixth Circuit ruled in favor of Wal-Mart Stores Inc., after it fired an employee with cancer who had a state-issued medical marijuana registry card. The Sixth Circuit held that Michigan's medical marijuana law does not regulate private employment.

However, several other cases have recently emerged where employees have sued their employers over medical marijuana use. Along with the Davis case in New Jersey, many have been closely watching the Colorado lawsuit filed by Brandon Coats against his employer, Dish Network. That lawsuit has dragged on for years and has been appealed to the Colorado Supreme Court, which heard arguments last year.

Coats, a quadriplegic since a car accident in his teens, had a legal prescription for medical marijuana and a good employment record with Dish when he failed a random drug test. Citing its zero-tolerance drug policy, the company fired Coats. Coats then sued, claiming his termination violated Colorado's Lawful Activities Statute. That law prohibits firing employees who take part in "any lawful activity off the premises of the employer during non-working hours." The trial court and appeals court sided with Dish, holding that marijuana use is not lawful activity, but the state's highest court heard oral arguments late last year, and a decision is expected shortly.

## What to Do Now

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When looking at drug testing policies, employers need to work with those knowledgeable about state and federal regulations, and current case law. These experts should include in-house resources such as the HR department, as well as the company's attorneys. Industry associations can also be a valuable source of information and best practices.

- Consider your location, company, and industry

Companies that are based in states where marijuana is legal, such as Colorado and Washington, may need to have different conversations than those based in places where marijuana is completely illegal. Companies that fall under federal regulations, such as those in the transportation industry, also have a different set of rules to comply with.

Companies should also consider job functions and the specific requirements of their industries. While no company should tolerate any sort of on-the-job impairment, a worker who operates power equipment has different safety considerations than an administrative assistant.

- Update and communicate policies

After talking with attorneys and HR, employers need to make any necessary updates and adjustments to their employee policies. Once the updates are completed, employees need to be regularly educated about the company's policies, standards, and expectations. That includes specific information about when and how drug testing can occur.

As more states allow marijuana use, employers should take some time to consider their approaches to drug testing. Companies may use drug testing for a variety of reasons—as a condition of employment, randomly, annually, for cause, or after

accidents. The laws on drug testing vary by state and industry, and companies need

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- Use drug testing consistently

As more states legalize marijuana, some companies may decide to increase drug testing. For other companies, particularly those that do not have safety-sensitive positions, it may be worthwhile to abandon random or annual drug testing and only use drug testing when employees are suspected of being impaired by drugs and alcohol at work, or after an accident. Whatever companies decide, it's critical to develop and implement policies that are uniformly applied. An inconsistent approach can leave companies open to lawsuits and claims of discrimination.

Navigating the various issues involving employee drug use has always been complicated for employers. Compliance with the conflicting laws around marijuana has only added to the headaches. Until the laws and courts have become more consistent around the country, companies need to proceed cautiously and consult regularly with HR and attorneys.

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