



# The Hazy Truth Regarding Workplace Drug Testing

Insights

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John has been a good technician throughout his relatively short tenure at your dealership. But today he is a bit careless as he test-drives the customer vehicle he just finished working on. As John returns the car to the dealership, he pulls in front of a dump truck traveling faster than he expects, and the rear end of the customer's car is nearly ripped off.

As you run to the scene of the accident, you see John step out of the car unharmed. You also hear the familiar sounds of Bob Marley coming from the car radio and detect a distinctive smell wafting out of the vehicle. Your immediate reaction (after ensuring no one is hurt, of course) is that you are going to send John for a post-accident drug test.

While this has long been a standard practice throughout the country, will sending John for a drug test put your dealership at risk in today's pro-marijuana landscape? Would your opinion change if you knew John was a card-carrying medicinal marijuana patient?

Here is a quick summary of the current state of marijuana laws in the country, along with a review of some important changes regarding post-accident drug testing.

## Legalization Of Marijuana And Prohibitions On Drug Testing

Our country has come a long way from the heydays of Pablo Escobar, George "Georgie" Jung, and the federal war on drugs. The push for legalization of marijuana continues to grow exponentially; 26 states now have some form of law permitting the use of marijuana. These laws range from those permitting medical marijuana (in states such as Florida, Ohio, and Pennsylvania) to those allowing recreational use (such as in California, Washington, and Nevada).

Additionally, many states have implemented state-specific requirements for drug testing and screening. For example, Connecticut and Minnesota limit random drug testing to those employees in safety-sensitive positions. Other states, such as Arizona, Arkansas, Connecticut, Louisiana, and Maryland (among others) require some form of confirmatory testing after an employee receives a positive test. Some states have even more specific requirements. For example, in Rhode Island, you must refer the employee to a substance abuse professional after a first failed test, and can only terminate the individual for continued use despite treatment.

This hazy pro-marijuana cloud does have a silver lining, however. The legalization of medical marijuana and increased drug testing limitations do not mean you need to sit idly by and watch your

marijuana and increased drug-testing limitations do not mean you need to sit idly by and watch your dealership go up in smoke. Marijuana is still listed as an illegal Schedule I drug under the federal Controlled Substances Act, and employees using the drug are not currently afforded protections under the Americans with Disabilities Act.

Regardless whether your state law permits recreational or medicinal marijuana use, you still have the right in most states to test your employees for drug use and discipline them accordingly, up to and including termination, if their marijuana use violates your drug-free workplace policy. Check your specific state law before proceeding, however, as some states protect medical marijuana users, while others prevent you from disciplining workers for certain off-duty conduct.

### **OSHA's Post-Accident Drug Testing Rule**

The times are also changing when it comes to post-accident drug testing. The Occupational Safety and Health Administration (OSHA) implemented a new rule, effective December 1, 2016, that could significantly alter your post-accident drug-testing procedures, among other things.

OSHA has taken the position that its new anti-retaliation rule prohibits you from implementing a blanket mandatory post-accident testing program. The agency's general position is that you should only use drug testing as "a tool to evaluate the root causes of workplace injuries and illness in appropriate circumstances," and not to deter employees from reporting injuries.

In light of this new rule, you should evaluate your drug-testing policies to determine whether any changes may be necessary. One such change may be to limit post-incident testing to situations where drug use likely contributed to the incident, and for which the drug test can accurately identify that the impairment was caused by drug use. You might also require testing absent an injury, such as when there is a certain amount of property damage, or when certain equipment (such as a vehicle) is involved.

### **Bottom Line**

While the above information might be helpful, you may be asking yourself: what does this mean for John, the card-carrying technician? Depending on the state in which John is employed, the dealership likely has sufficient information to justify a reasonable suspicion that drug use contributed (at least in some sense) to the accident.

Despite the changing atmosphere regarding drug use, your dealership's drug testing policy hasn't gone completely up in smoke. However, you need to check with your labor and employment attorney to ensure you remain in compliance in these ever-changing times.

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