Majority of States Have Legalized Marijuana, but OSHA’s Post-Incident Drug-Testing Guidance Hasn’t Changed

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As of May 1, 2023, marijuana had been legalized for medicinal or recreational use, or both, in thirty-eight states. Some 35–55 million Americans report using marijuana two or more times per month. According to published reports, drug tests administered by one large national testing laboratory returned the highest rate of marijuana positive tests since 1997. Accommodation, food services, and retail trade employees led the various industry sectors with an 8.1 percent positivity rate. Transportation and warehouse workers weren’t far behind at 6.4 percent. In addition to marijuana, there has been a push to legalize other drugs, such as in Oregon, where some “hard drugs” in small quantities have been decriminalized.

Quick Hits

- With the increased decriminalization of marijuana use, a number of states have restricted or limited drug testing for marijuana.
- Federal law has not changed, however; marijuana is still illegal, and drug testing is required to comply with a number of federal laws, including the Motor Carrier Safety Act.
- OSHA allows an employer to drug test an employee who reports a work-related injury or illness, if the employer has an “objectively reasonable” basis for testing.

Against this backdrop of skyrocketing marijuana use, many states and localities where recreational marijuana has been legalized have implemented measures that restrict or limit drug testing in favor of indicia of impairment. Given the long presence of tetrahydrocannabinol (THC) metabolites, someone who used marijuana days or weeks earlier, while no longer impaired, can still test positive for marijuana. Moreover, it is not possible, with a drug test alone, to measure the level of impairment—it is only possible to determine that the person tested has that substance in his or her system. Some states and locales have all but eliminated pre-employment drug testing as a result of the impossibility of correlating impairment with a certain level of metabolite. In some states, even post-accident drug testing where there is no sign of impairment is not permitted.

In contrast, federal law has not changed and marijuana and other “drugs” are still illegal, and drug
testing is still required to comply with federal laws such as the Motor Carrier Safety Act. In addition, drug testing of federal contractors is still required. But what about post-incident drug testing and the federal Occupational Safety and Health Administration (OSHA)?

In 2016, OSHA issued a standard interpretation related to 29 C.F.R. section 1904.35(b)(1)(i) and (iv) that broadly addressed two topics: safety incentive programs and post-accident drug testing. In short, as relates to post-incident drug testing, OSHA took the position in that memorandum that section 1904.35(b)(1)(iv) does not prohibit an employer from drug testing employees who report work-related injuries or illnesses if the employer has an “objectively reasonable” basis for testing, and the policy does not apply to drug testing employees for reasons other than injury reporting. The memo continued and stated that “the central inquiry will be whether the employer had a reasonable basis for believing that drug use by the reporting employee could have contributed to the injury or illness.” If there was a reasonable basis for believing drug use by the employee could have contributed to the injury or illness, then OSHA would view the testing as “objectively reasonable” and not issue citations for testing the employee.

Though OSHA stated testing someone who had reported an injury or illness would be objectively reasonable, it also said:

> When OSHA evaluates the reasonableness of drug testing a particular employee who has reported a work-related injury or illness, it will consider factors including whether the employer had a reasonable basis for concluding that drug use could have contributed to the injury or illness (and therefore the result of the drug test could provide insight into why the injury or illness occurred), whether other employees involved in the incident that caused the injury or illness were also tested or whether the employer only tested the employee who reported the injury or illness, and whether the employer has a heightened interest in determining if drug use could have contributed to the injury or illness due to the hazardousness of the work being performed when the injury or illness occurred. OSHA will only consider whether the drug test is capable of measuring impairment at the time the injury or illness occurred where such a test is available.

Thus, a host of factors beyond mere indicia of impairment are considered by OSHA in terms of whether the testing of an injured employee is reasonable or not. OSHA continued and said that testing someone whose injury could not have been caused by drug or alcohol use was likely a violation of 29 C.F.R. section 1904.35(b)(1)(iv).

In 2018, OSHA issued a second standard interpretation on the issue and stated: “The purpose of this memorandum is to clarify the Department’s position that 29 C.F.R. § 1904.35(b)(1)(iv) does not prohibit workplace safety incentive programs or post-incident drug testing.” That standard interpretation went into far less detail than the 2016 version, but it did offer the following examples of permissible workplace drug testing:

- “Random drug testing.”
- “Drug testing unrelated to the reporting of a work-related injury or illness.”
- “Drug testing under a state workers’ compensation law.”
- “Drug testing under other federal law, such as a U.S. Department of Transportation rule.”
- “Drug testing to evaluate the root cause of a workplace incident that harmed or could have
harmed employees. If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries.”

OSHA has not cited a significant number of employers for post-incident drug testing, but given the apparent increased use of marijuana and the growing number of state restrictions prohibiting employers from testing, it is very possible that we will see OSHA begin to focus on and scrutinize employer post-incident drug testing. With that scrutiny, we are likely to see more citations and penalties.


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