

Coronavirus Complicates Workplace Drug-Testing Programs

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As the coronavirus crisis continues to impact the workplace and the economy, many businesses are focused on keeping workers and customers safe. Some safety programs—such as drug-free workplace initiatives—have become more complicated to administer.

Here are some tips for employers that may be struggling to maintain their existing policies and practices in light of the pandemic.

Rethinking Policies

Is drug testing still a priority for employers? When it comes to marijuana screening, many businesses have already considered scrapping pre-employment tests and treating cannabis consumption like alcohol use by monitoring for on-the-job intoxication.

"There is a labor shortage in some industries due to COVID-19-related illnesses, unemployment subsidies, fear and child care issues," observed Anne-Marie Welch, an attorney with Clark Hill in Birmingham, Mich. "As a result, employers are grappling with finding qualified applicants."

Attitudes toward cannabis have changed in recent years. According to Gallup, about 66 percent of Americans favor legalizing marijuana, which is the highest percentage in 50 years of polling.

In some states where marijuana is legal, such as California, cannabis dispensaries remained open during coronavirus closures because they are considered essential businesses.

Employers who test for marijuana use may decide to revisit their policies, as marijuana sales appear to be hitting record highs in states where it is legal under state law, noted Jill Vorobiev, an attorney with Reed Smith in Chicago.

In Arizona, for example, where medical marijuana is legal, dispensary sales in May reportedly increased by more than 30 percent (<https://www.phoenixnewtimes.com/marijuana/arizona-medical-marijuana-sales-soar-to-record-highs-during-pandemic-11471886>) compared to the same time last year. Cannabis sales in Colorado—where both medical and recreational use is allowed—also hit a record high (<https://www.denverpost.com/2020/07/13/colorado-cannabis-marijuana-sales-record-high/>) in May.

"Individuals may be using marijuana more recreationally or for medical purposes as they deal with stresses and anxieties associated with the pandemic," Vorobiev noted.

Employers should be mindful of these increased uses, she said, and consider how they impact existing drug-testing and related policies.

For employers that decide to continue screening for marijuana use, Welch recommends mentioning the drug-testing requirement in job postings. This will help employers know which candidates can't pass the test.

"Those employers that opt to relax their screening measures for non-safety-sensitive positions should be sure to do so indiscriminately and consider the possible precedents created by such a practice," she said.

🔒 SHRM RESOURCE SPOTLIGHT

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Testing Logistics

Employers are also facing issues when handling drug-testing logistics during the pandemic. Typically, employers will send new hires and employees to an occupational health facility for drug screening, explained David Barron, an attorney with Cozen O'Connor in Houston. But many of these facilities are now being used for COVID-19 testing.

Employers don't want to put workers at risk if facilities are being used to test people who have COVID-19 symptoms, Barron noted. So some employers are forgoing pre-employment drug-testing altogether and others are putting testing on hold temporarily (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/employment-screening-drug-testing-options-covid19-pandemic.aspx) and telling new hires they will be tested at a later date when it is safe.

Employers should note, however, that some states have very strict laws on when and how drug tests can be performed, so they should check with counsel before implementing new policies.

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Jobs that are subject to U.S. Department of Transportation (DOT) and other regulations will still require screening. Employers should review DOT guidance (<https://www.transportation.gov/odapc/compliance-with-dot-drug-and-alcohol-testing-regulations>) about how the public health emergency has affected drug- and alcohol-testing requirements.

DOT said it is "committed to maintaining public safety while providing maximum flexibility to allow transportation industries to conduct their operations safely and efficiently during this period of national emergency."

Drivers still must pass a pre-employment drug test to perform any DOT safety-sensitive functions, according to the agency. "Employers should review the applicable DOT Agency requirements for testing to determine whether flexibilities allow for collection and testing at a later date."

Business that must or want to continue screening may want to consider mobile-testing services (<https://usamdt.com/>) as an alternative to sending employees to a clinic.

Monitoring for Impairment

Employers who opt to drop pre-employment drug screens may want to focus on reasonable suspicion of on-the-job impairment. David Morrison, an attorney with Goldberg Kohn in Chicago, suggested that when employers are seeking to test only for impairment, they should train managers and supervisors on ways to reasonably observe when someone is working under the influence. Reasonable-suspicion-based testing could be prompted by the following observations:

- Strong odors.
- Questionable movements, twitching or staggering.
- Dilated or watery eyes.

- Flushed, confused or blank facial expressions.
- Slurred speech or an inability to verbalize.
- Argumentative, irritable or drowsy behavior.
- Sleeping, falling unconscious or otherwise being nonresponsive.

Supervisors should also be trained on how to properly document their observations. "If there is reasonable suspicion that an employee is currently under the influence of marijuana, then the company should explain to the employee what has been observed," Morrison said.

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