

Viewpoint: Closing the Gap on Risk Mitigation Strategy Created by Cannabis Reform

By Jaime Feinberg | November 28, 2022

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Article

Nearly 185 million adults in the U.S. have legal access to cannabis. Before legalization, organizations could create cannabis testing policies centered around zero-tolerance, as the drug's use was uniformly illegal. Policy-holding employers could simply deter employee cannabis use with testing methods that prohibited use.

But over the last decade, the patchwork of cannabis reform laws has created pain points for both carriers and their insureds – leaving questions about how to appropriately balance risk with fairness.



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In an effort to tip the balance towards employee fairness, some organizations have reduced their cannabis testing efforts – partly because conventional testing methods including oral fluid, urine, and hair have extended detection windows that may present a greater chance of returning positive results. But dropping THC from a workplace drug testing program can create a gaping hole in a company's risk mitigation strategy.



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What's Really at Risk

A known risk associated with the use of cannabis is the potential for an increase in workers' compensation claims due to a rise in the number of workplace safety and security incidents. In a recent National Safety Council survey, nearly half of the employers that stopped cannabis testing report an increase in safety incidents and employee performance issues.

But the most considerable risk for a company is the unknown liability. Without the benchmarks provided by cannabis testing, insurers can't be sure if the information they gather at the first report of a claim is correct and reliable for determining if and how cannabis use was a contributing factor. They may be left to wonder if the drug-free workplace policies and associated discounts are working to reduce risk as intended.

This problem is further complicated by the fact that conventional testing methods cannot isolate when an employee has used THC based on the positive result. Did the



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employee use hours before the incident? Or did they use days, weeks, or even months before the incident? Was cannabis use even a factor in the incident? Without this definitive insight, those lingering questions could create additional unknown risks for policyholders.

In the era of cannabis reform, policyholders need objective cannabis policies and testing methods that prioritize both safety and fairness for employees. This approach can also help reduce litigation concerns, as studies show a 10% probability of a wrongfully terminated employee filing a lawsuit.



Solving For The Unknown

Understanding the effectiveness of an organization's cannabis testing program can help insurance carriers reduce risk. For greater effectiveness, insurance carriers and their policyholders should come together to create holistic cannabis policies. One question to ask is, "What is the purpose of the cannabis testing policy?" The resounding answer should be to deter use. Policies that promote deterrence include forms of random and pre-access testing, as they represent more preventative than reactive measures. Waiting to test until after an incident has occurred could be an inadvertent deterrent to timely claim reporting and could also expose the company to claims of negligence.

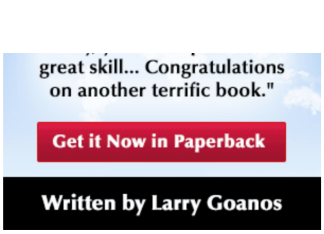
A holistic approach not only helps to maintain safety but also enables policyholders to promote fairness for employee choices outside the workplace. An important aspect is ensuring access to the latest testing methods capable of isolating recent use. By detecting only recent use, policyholders can move from zero-tolerance policies to modern policies aimed at deterring cannabis use associated to the workday.

A cannabis breathalyzer measures THC in breath and allows for fast, accurate, and on-site answers regarding whether an employee used cannabis within a few hours of the test. Automated processing and instrument-read results eliminate the possibility of biased interpretation and reduce human error.

Some cannabis breathalyzers automatically and electronically record test results, giving policyholders a recoverable log for accurate record-keeping. Finally, the ability to confirm non-negative screening test results at a laboratory via liquid chromatography-mass spectrometry confirmatory testing using chain of custody protocols mirrors the forensic defensibility standards that are universally considered best practices in workplace drug testing.

As with any workplace drug testing policy, policyholders should discuss new testing methods with legal counsel and review options for incorporating them into programs. By updating testing methods to include cannabis breath testing, policyholders can isolate recent use to better address safety-sensitive and post-incident scenarios. Expanding the safety-sensitive category to include roles such as cybersecurity, finance, and other risk-sensitive positions can help further close gaps in an organization's risk mitigation strategy. For employees in these roles and others, continuous testing throughout their tenure (post-hire, random, post-incident, reasonable suspicion) can help deter use and reduce risks.

Insurance carriers and their policyholders have options to modernize policies to address cannabis legalization. By re-evaluating the scope of testing, methods of testing, and workplace policies to focus on the recent use of THC, policyholders will be able to reduce their risks fairly and objectively.



Feinberg is the vice president of partnerships for insurance, risk, and safety at Hound Labs Inc. Her career spans nearly two decades as a safety professional for Fortune 500 companies. Most recently, she worked in the insurance and risk industry as vice president of risk control for insurance provider Captive Resources Inc. Feinberg serves on the impairment advisory board for the National Safety Council.

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