

# The Victorious

## Employer: EMPLOYMENT AND LABOR NEWS FOR WINNING IN THE WORKPLACE

### MARIJUANA AND Management

HOW YOUR BUSINESS CAN IMPROVE PRODUCTIVITY, MITIGATE RISK, AND INCREASE EMPLOYEE SAFETY THROUGH DRUG SCREENINGS

#### A Growing Problem

For the past 40 years, the most significant threat to workplace safety and productivity has been substance abuse. Now, with the legalization of marijuana for recreational use in several states, including Nevada, employers can expect to struggle to recruit and retain a productive workforce and to maintain a safe work place. In this article, I will explain why employers must have policies to address workplace substance abuse. Recent trends and developments highlight the importance of having such policies in place, and case law provides guidance for employers seeking to navigate such issues. Thereafter, I will provide practical recommendations that employers and human resources departments can adopt to mitigate the risks and costs of workplace substance abuse.

Unfortunately, the prevalence of drug and alcohol abuse among employees is rising. More than 1 in 5 young adults (18-25) reported using an illegal

drug in 2012 and 40.3% of those who reported using marijuana in the last 30 days also reported daily or nearly daily marijuana use. Of the 21.5 million current illicit drug users aged 18 or older in 2012, 14.6 million (67.9%) were employed either full- or part-time, roughly 1.5 million more than reported in the prior year.



Among employees, food service workers and construction workers are most likely to have used an illegal drug within the last month. In addition to the type of workplace, the nature of the workplace environment can also impact drug use. Drug users are more likely to work for companies that do not have drug-free workplace programs than those that do. A drug-free workplace can improve employee morale, decrease absenteeism, increase productivity, improve workplace safety, and positively impact costs.

Last year, Nevada legalized the use of recreational marijuana. People aged 21 years or older are permitted to



**JASON  
GUINASSO**

PARTNER

We are pleased to present the first issue of The Victorious Employer, our periodic employment law newsletter. This and future issues will cover a range of topics of interest to those with an interest in employer/employee interactions.

The attorneys at Hutchison & Steffen provide extraordinary legal counsel, advocacy, and services to our clients and community. Our Firm has earned a strong reputation in the legal and business community for providing excellent legal work, sound judgment, and results that exceed the expectations of our clients.

With our strong employment and labor law practice, we work closely with HR professionals, claims examiners, and employer representatives to protect the rights and reputation of businesses. Our range of legal services spans training, strategic advice and guidance, and advocacy to provide insightful, practical, and effective legal representation. While avoiding litigation is always the goal, we provide aggressive representation, when necessary.

Please visit our website at [hutchlegal.com](http://hutchlegal.com) and/or contact the Firm for more information.

over →

buy, use, and cultivate limited amounts of marijuana; however, the ballot initiative permits employers to implement marijuana bans in the workplace.

Legalization of recreational marijuana will result in more work-related accidents and injuries. OSHA published an article<sup>1</sup> validating this concern, stating:

“Safety concerns are often a company’s primary reason for prohibiting marijuana in the workplace, and they are a valid basis for banning the drug. Marijuana use has been linked to an increase in job accidents and injuries, and the National Institute on Drug Abuse notes that the short-term effects of marijuana include impaired body movement, difficulty with thinking and problem-solving, memory problems, and an altered sense of time.”

Citing a May 2015 article in the Journal of Occupational and Environmental Medicine, OSHA explains: “There is a likely statistical association between illicit drug use, including marijuana, and workplace accidents. While some studies suggest that marijuana use may be reasonably safe in some controlled environments, its association with workplace accidents and injuries raises concern.”

Another report, released recently by major drug testing firm Quest Diagnostics, reveals a 47% spike in the rate of positive oral marijuana test results in U.S. workplaces from 2013 to 2015 — and more detailed data shows an incredible 178% rise in that rate from 2011 to 2015.<sup>2</sup> The Quest study draws from over 900,000 oral workforce drug tests in 2015 alone. It also indicates that after years of declining drug use in the workplace, the percentage



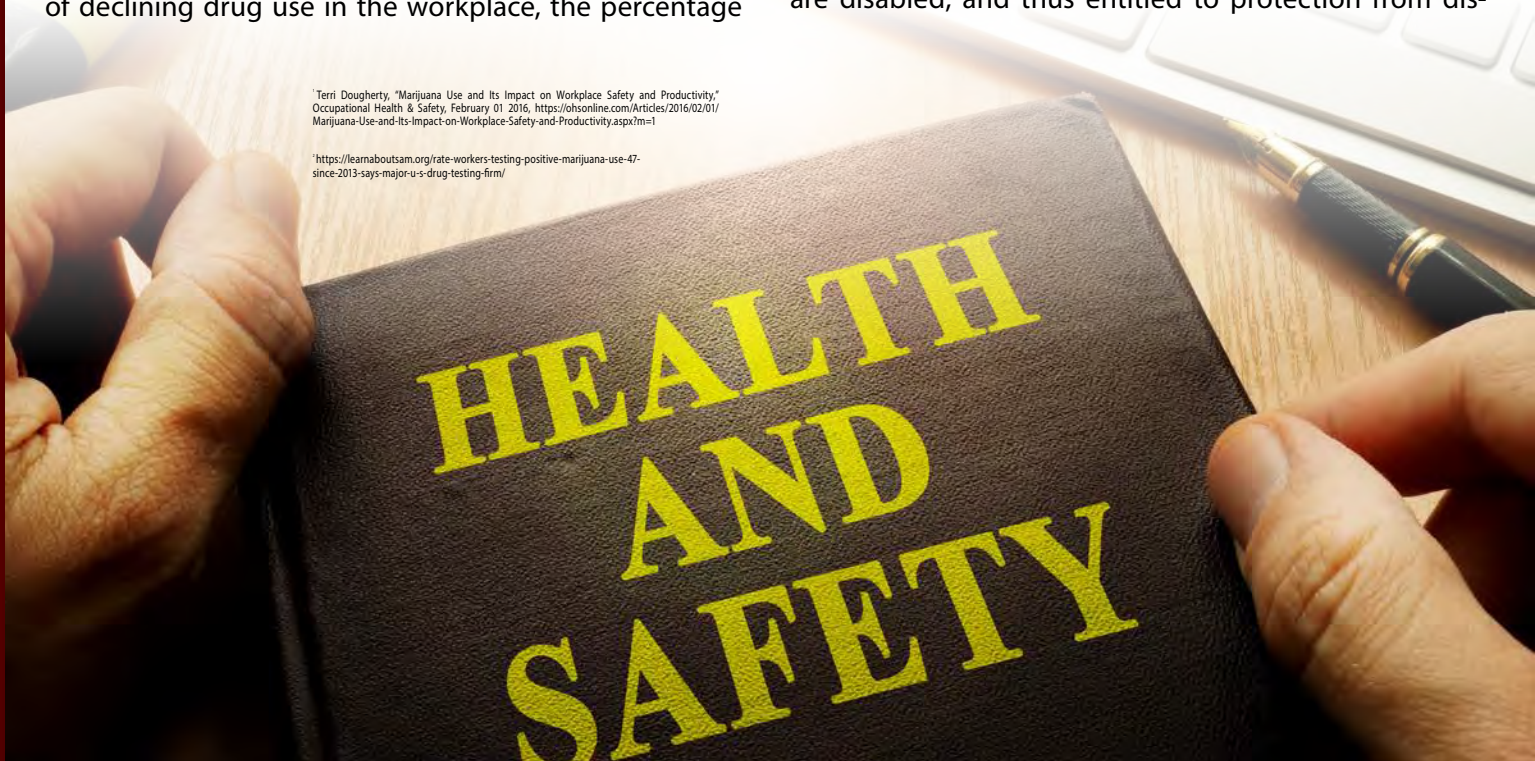
of employees in the combined U.S. workforce testing positive for drugs has steadily risen over the last three years to reach a 10-year high.

Among other clear and present dangers, OSHA is particularly alarmed about the impact marijuana use has on transportation safety. In this regard, marijuana impairs attentiveness, motor coordination, and reaction time and impacts the perception of time and speed. Studies from the National Institute on Drug Abuse have found that marijuana negatively impacts driving performance, and other researchers have found that acute use of the drug increases the risk of crashes and fatal collisions. In addition, the National Highway Traffic Safety Administration reports that, since medical marijuana was legalized in Colorado in 2009, the percentage of marijuana-positive drivers involved in fatal motor vehicle crashes there has increased significantly.

Employees using medical marijuana may claim that they are disabled, and thus entitled to protection from dis-

<sup>1</sup>Terri Dougherty, “Marijuana Use and Its Impact on Workplace Safety and Productivity,” Occupational Health & Safety, February 01 2016, <https://ohsonline.com/Articles/2016/02/01/Marijuana-Use-and-Its-Impact-on-Workplace-Safety-and-Productivity.aspx#m=1>

<sup>2</sup><https://learnaboutsam.org/rate-workers-testing-positive-marijuana-use-47-since-2013-says-major-u-s-drug-testing-firm/>





---

**“There is no question that maintaining workplace safety is a legitimate and vital business necessity.”**

---



crimination on the basis of their disability. Permitting them to use marijuana, they claim, is a reasonable accommodation of their condition as a matter of state law. Arizona, Connecticut, Delaware, Maine, and Rhode Island laws require employers to accommodate the use of medical marijuana by employees or applicants in certain circumstances.

### **Case Law**

In *Washburn v. Columbia Forest Products, Inc.*, the Oregon Supreme Court concluded that a construction worker terminated after testing positive for marijuana could not state a claim for disability discrimination under the state's anti-discrimination laws. The claim was rejected because the employee failed to prove he was, in fact, disabled. The employer must consider each individual's circumstances to determine whether a reasonable accommodation of the underlying disability is possible.

In *Ross v. RagingWire Telecommunications*, a job applicant challenged the decision of the employer to not hire him after he tested positive for marijuana. The court ruled that California employers have no duty to accommodate medical marijuana users. The act of "decriminalizing" the use of marijuana by residents with health conditions did not simultaneously modify the state's employment laws. This case concluded that the California Supreme Court does not equate medical marijuana to prescription medicines.

Furthermore, in *EEOC v. United States Steel Corp.*, the EEOC sought to prevent US Steel and its unions from implementing a policy that required suspicionless alcohol tests and sought to recover restitution for individual employees who were adversely affected by the policy. US Steel argued its work environment was hazardous enough that the law does not require it to wait until an employee appears to be impaired to test for the presence of alcohol. The court held, "There is no question that maintaining workplace safety is a legitimate and vital business necessity."

### **Testing Methodology**

There are several methods of drug and alcohol testing that employers should be aware of. First, urine testing is the most common, but it is particularly vulnerable to claims of invasion of privacy. Second, breath testing reveals volatile solvents that have reached the breath by diffusion from the bloodstream to the lungs. Third, blood testing is regulated by most state's laws and is not a common element of a drug-testing program. It is usually employed for post-accident tests. Fourth, saliva testing can be used to detect alcohol, but a positive result from a breath test must accompany a positive saliva test for validity. Fifth, hair testing is used, but not to detect a recent use of drugs. Lastly, sweat testing is available; however, this practice is not widely used by employers.

### **Mitigating Employer Liability**

There are several steps that employers should take when testing to minimize employer liability. Employers should provide formal training for supervisors and managers in the detection and recognition of drug abuse and alcohol misuse. Employees and applicants should be provided with a copy of the testing policy that clearly sets forth drug and alcohol prohibitions and consequences of violating the policy. An explanation of the testing protocols and the individual's right to challenge adverse test results should be provided.

There are also many methods that employers can and cannot use to monitor workplace substance abuse that do not involve drug testing. Employers can implement anti-drug and alcohol policies and education in the workspace. Undercover agents pose as a liability threat when it comes to privacy invasions; however, dogs are used more and more and are generally not objectionable.

Employers should not monitor conversations between employees unless the employer previously has advised the

employees that their conversations could be monitored and has obtained their written consent to the monitoring. However, surveillance of the physical premises is generally permissible, so long as cameras are not in places where employees have a reasonable expectation of privacy. A private employer will not violate employee privacy by searching desks and lockers, so long as they have established a clear policy that claims desks/lockers as company property that are subject to searches.

Lastly, employers can encourage rehabilitation and prevention. The FMLA requires employers to allow employees to take job-protected leave to seek treatment for drug addiction or alcoholism. In addition, some states (Maine, Minnesota, Puerto Rico, Rhode Island, Vermont, Iowa, and California) require an employer to permit an employee to enter into a rehabilitation program in lieu of termination following a first positive drug test. Employers not required by their state should still consider this policy. Employee assistance programs can provide treatment and counseling for a variety of personal problems. Some employers choose to have such programs in-house, while others refer to outside programs.

## Types of Tests

Employers should understand that there are multiple types of tests that an employer could perform to evaluate compliance with its workplace drug and alcohol policies, but not all are legal. The following points explain each type and whether or not it is a legally supported method.

## Pre-Employment Testing of Applicants

Pre-employment testing can be part of the application process before an offer of employment is made. The least controversial method is testing that is part of the hiring process after an offer of employment is made, but before actual employment begins. Employers can also test sometime soon after the individual begins work, however, it is recommended the employer inform the potential employee that passing the drug test is a condition of employment. Pre-employment testing is a common business practice; however, several states require that job applicants be extended a conditional employment offer before being asked to test.



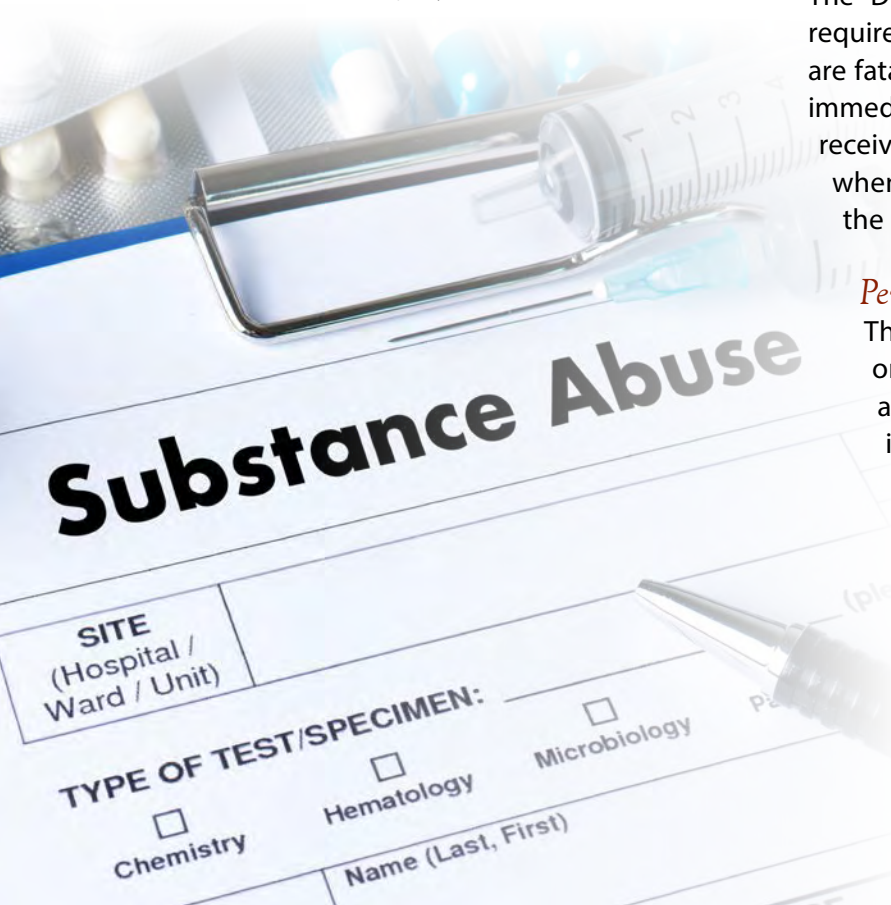
## Post-Accident Testing

Post-accident testing focuses on employees who have been involved in an on-the-job accident that may have involved human error, and that causes a fatality, a serious injury, or significant property damage. It is wise to test only those whose actions, or failure to act, caused or contributed to the accident and not to test injured employees who may not have had a role in the cause of the accident. The DOT's Federal Motor Carrier Safety Administration requires testing after the following: 1) instances when there are fatalities, 2) instances when there is an injury requiring immediate treatment away from the scene and the driver receives a citation for a moving violation, and 3) instances when one or more vehicles incurs disabling damage and the driver receives a citation for a moving violation.

## Periodic Testing

This type includes any drug test that is conducted on a periodic basis, most often in conjunction with an annual physical evaluation. Periodic testing can include unannounced suspicionless testing for a group too large for truly random testing (e.g., employees in safety or security sensitive positions). Given their scheduled nature, generally the tests do little to detect or deter substance abuse. Under the ADA, physical examinations must be voluntary or job-related consistent with business necessity. An employer choosing to do this should notify employees that drug and/or alcohol tests will be administered

*continued on back...* →





as part of physical examinations required for continued employment. The employer should advise employees that disciplinary action will be taken if they refuse to consent to a test.

### *Pre-Assignment Testing*

This type of testing is part of assigning someone to a position or promoting someone. For example, it may be required by an employer's customers as a condition of assignment to a project or account. Pre-assignment testing is becoming popular in circumstances when the employee will work at the customer's or client's worksite or even with prospective customers of the employer's clients. Generally, state drug-testing laws make no provision for pre-assignment testing.

### *Reasonable Suspicion Testing*

Reasonable suspicion testing includes those tests that are triggered by an employee's specific, contemporaneous, and articulable observations of behavior, appearance, odors, and/or speech that suggest drug or alcohol use or where other credible factors suggest a violation of the company's substance-abuse prevention policy. An employee's mere association with another employee believed to be involved with drugs may not justify reasonable suspicion testing. Refusal to submit to suspicion testing has been upheld as an appropriate ground for termination.

### *Random Drug Testing*

This involves selecting employees for tests at random, without suspicion and without advance notice of when the test will occur. This testing also may include the unannounced testing of all employees. Some industries (trucking, nuclear power, oil, gas, and airline) are required to conduct random drug and/or alcohol tests of designated classes

of employees. Random testing in the private sector is legal in the vast majority of states. Some states restrict random testing to only employees in safety or security-sensitive positions.

### *Return-to-Work & Follow-Up Testing*

Rehabilitation testing occurs during an employee's participation in a rehabilitation program and is generally conducted by that program without employer involvement. Return-to-work testing occurs after an employee has tested positive or otherwise violated a company policy, following rehabilitation and prior to resuming work. Follow-up testing in post-rehabilitation is designed to encourage recovering addicts to stay "clean" and is usually administered by an employer after an employee has been cleared to return to work by a treatment professional.

### **Recommendations**

In response to the foregoing threats to workplace safety, it is important for employers and human resources departments to take steps to mitigate those risks. In this regard, we recommend that employers adopt a policy prohibiting possession, use, distribution, sale, or purchase of drugs at any time, and the use or abuse of alcohol while at work, as well as offers to sell or distribute. Additionally, we recommend employers include in their policy documents a general statement giving management full discretion to determine whether an employee is fit to work.

In addition to a strong policy prohibiting possession, use, distribution, sale, or purchase of drugs at any time, regular training for managers and human resources professionals on the signs and symptoms of substance abuse should be facilitated by a competent trainer, and an overview of legal rights of both employer and employee should be reviewed. The training should provide guidance on when it is appropriate to test for substance abuse under state law.

While we strongly recommend the implementation of zero tolerance policies for substance abuse, we also recommend employers develop an employee assistance program providing treatment, counseling, or professional referrals. A zero tolerance does not necessarily have to mean automatic termination. Using zero tolerance policies to encourage drug abusers to get assistance can be an effective tool to helping an employee overcome addiction and return to the workforce as a productive contributor. ■



# The Victorious Employer:

EMPLOYMENT AND LABOR NEWS  
FOR WINNING IN THE WORKPLACE

PECCOLE PROFESSIONAL PARK  
10080 WEST ALTA DRIVE, SUITE 200  
LAS VEGAS, NEVADA 89145  
702.385.2500

500 DAMONTE RANCH PKWY., SUITE 980  
RENO, NEVADA 89521  
775.853.8746

885 TAHOE BLVD.  
INCLINE VILLAGE, NEVADA 89451  
775.853.8746

## AREAS OF PRACTICE

Administrative & Regulatory Law  
Alternative Dispute Resolution  
Appellate Litigation  
Asset Protection & Business Planning  
Banking  
Bankruptcy & Creditor's Rights  
Business Law & Commercial Litigation  
Condemnation Law  
Constitutional Law  
Construction Law  
Corporate & Commercial Law  
Election, Campaign, & Political Law  
Employment & Labor Law  
Family Law  
Healthcare Professionals Advocacy  
Human Resources Support  
Insurance Litigation  
Landlord/Tenant  
Personal Injury  
Professional Liability Defense  
Public Entity Law  
Public Interest & Nonprofit Organizations  
Real Estate Law  
Tax Audits & Litigation  
Trust & Probate Litigation  
Worker's Compensation

**HUTCHISON & STEFFEN**  
ATTORNEYS

[hutchlegal.com](http://hutchlegal.com)

INCLINE VILLAGE

RENO

LAS VEGAS

NOTICE: THIS IS AN ADVERTISEMENT!

**HUTCHISON & STEFFEN**  
ATTORNEYS  
A FULL-SERVICE, AV-RATED LAW FIRM  
PECCOLE PROFESSIONAL PARK  
10080 WEST ALTA DRIVE, SUITE 200  
LAS VEGAS, NEVADA 89145

PRSR5TD  
U.S. POSTAGE  
PAID  
Las Vegas, NV  
Permit No. 2470