

# UNDER THE INFLUENCE

Dealing with drug-impaired employees and reducing risk for your business

By Phillip M. Perry

## Editor's note:

*Studies report that the presence of drugs is increasing in workplaces. What can door and access employers do? The answer is becoming more complicated with the growing number of states legalizing cannabis and the increasing misuse of prescription drugs.*

*Should your company implement drug testing? How should employees be penalized? Do employers have to accommodate for medical use of marijuana? Phil Perry's article answers these important questions and offers steps to reduce the potential risks of drug-impaired workers.*

## Employer dilemma

An employee receives a prescription for medical marijuana from a naturopathic physician. He asks for permission to smoke the substance on the job. The employee argues that Colorado—the state where the business was located—had recently legalized marijuana.

The supervisor said, "He told me I should allow him to smoke the marijuana on the job just as I allowed other people to take their legal medications."

What did the employer decide? The answer is at the end of this article, but for the moment, our anecdote illustrates a larger problem.

Door and access businesses large and small must deal appropriately with the growing possibility of drug-impaired employees. Workers under the influence of alcohol, marijuana, amphetamines, cocaine, heroin, codeine, morphine, barbiturates, or any such substance—legal or otherwise—directly threatens the bottom line.

"Impaired workers are safety risks," said Faye Caldwell, managing partner at Caldwell Everson, a law firm specializing in workplace drug testing. "They pose a danger to themselves, to coworkers, to company property, and to the public."

## Drug-impaired workers influence the workforce

For door and access businesses, there are many clear downsides of worker impairment. "Employers responding to our surveys cite absenteeism as the number one negative result of substance misuse," said Karen Pierce, managing director at the Working Partners consulting firm in Ohio. "The number two and three responses, in order of severity, are decreased productivity and workforce shortages."

Pilferage may also increase, and workplace morale will decline when "clean" employees must shoulder tasks neglected by their impaired coworkers.

However, accidents caused by drug-impaired workers perhaps pose the greatest risk. Anyone under the influence of drugs or alcohol can potentially be a danger to themselves or others.

According to the tracked data from the national drug testing company Quest Diagnostics 47% of workplace accidents involving alcohol and/or other drugs result in serious injury and 40% of that percentage result in death.

## SOME CONSEQUENCES OF DRUG IMPAIRMENT IN THE WORKPLACE:

1. Absenteeism
2. Decreased productivity
3. Workforce shortages
4. Accidents
5. Increased pilferage
6. Decline in workforce morale

## Drug-impaired workers cost your business money

In addition to the increased risk of serious injury or death, workplace accidents can also cause spikes in workers' compensation premiums. Plus, customers and/or visitors injured by impaired workers could potentially sue for damages.

Courts often assume the employer is at fault when someone is hurt at a commercial enterprise. "It's critically important for any business to protect employees and the public," said Joe Reilly, president of a drug testing consulting firm in Florida.

"At smaller companies especially, one accident can be devastating." Smaller door and access businesses that forego drug testing might be an attractive option for abusers trying to avoid the pre-hire drug tests typically required of larger companies. The problem escalates at high-turnover organizations relying on part time, temporary, and seasonal workers.

## Trickle-down effects of escalating marijuana use

National testing activity data indicates a growing percentage of incidents caused by workers who were under the influence. According to Quest Diagnostics, the portion of U.S. employees testing positive for marijuana, amphetamine, and heroin, for example, recently reached a 10-year high. In the general U.S. workforce, overall drug test positivity reached 5.5% in 2020, up from 5.3% in 2019. The 2020 figure was 12.2% higher than in 2016.

So, what's driving all this?

The largest reason is that society now accepts impairment from drug use more readily than it has in past decades. Today, marijuana is legal in 19 U.S. states and Washington D.C., and medical marijuana is legal in 37 states.

As more states legalize marijuana for recreational and medical use, it helps normalize the drug. Some believe that greater tolerance of marijuana has helped raise the social acceptance of other illicit substances.

The opioid epidemic, specifically the trend toward abuse of pain pills, has also become a significant issue for employers. They must now face the confusing task of responding appropriately to the abuse of prescription drugs that employees have obtained legitimately or illicitly.

Finally, the COVID-19 pandemic has had an important effect on substance misuse. "We know that there was about a 29% increase in overdose deaths during the pandemic last year," said Pierce.

"We're also seeing a lot more suicides, substance misuse, and mental health issues. 40% of adults reported struggling with a mental health or a substance misuse issue, according to the CDC. I'm not even sure we've seen all that we're going to see as far as the impact of the pandemic."

## Reducing drug-related risk in the workplace

Employers are not powerless. "We believe that a drug free workplace program is the best way



**"THOSE WHO WANT TO BE MORE PROACTIVE CAN ADD RANDOM TESTING, WHICH CAN DETER SUBSTANCE MISUSE."**



to prevent substance misuse," said Pierce.

"Such a program consists of five essential elements: a legally sound, state-specific policy; a program of annual employee education; supervisor training on substance misuse issues; testing in whatever flavor the employer thinks appropriate; and finally, a plan (such as an Employee Assistance Program) to help people who may have a problem or may be on the verge of a problem."

### 1. Create a clear company policy

A successful program starts with a written policy prohibiting the use of illegal drugs on the job or on the way to work. "Employees need to know the consequences of a policy violation," said Reilly. "They should be informed of the harmful effects of drug use, how it can affect their work, their coworkers, and the overall business."

### 2. Implement a drug testing program

Testing is vital for protecting your door and access business. Pierce said that employers can conduct pre-employment or new hire tests and reactive tests—both for reasonable suspicion and post-accident.

"Those who want to be more proactive can add random testing,

which can deter substance misuse." The more safety-sensitive the work, the more likely a company should consider random testing.

Prior to starting a drug testing program, an employer should consult legal authority to ensure compliance with federal, state, and local laws, many of which directly address the topic. Random testing requirements and guidelines can vary depending on the state, said Pierce.

### 3. Mandate appropriate actions

A workplace drug policy should mandate the appropriate action. One option is immediate termination. Another is to offer the employee a second chance if they are willing to complete an education and/or treatment program and then undergo follow up testing.

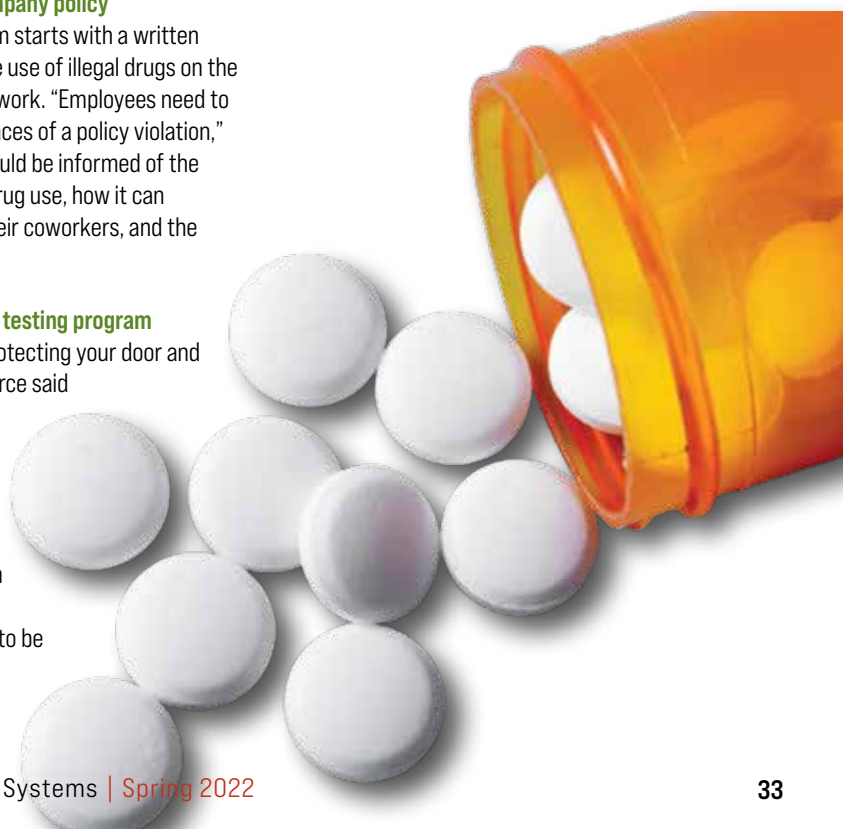
Many counselors urge employers to look seriously at the second chance option for first offenders. A large percentage of people who test positive for the first time are not yet dependent but have only recreationally imbibed. With proper counseling, they may turn into excellent, loyal employees.

### 4. Prescription drug use allowances

Drug testing is designed to uncover illegal drug use. Employers will not receive positive test reports for use of a prescribed drug. In such cases, the medical officer confirms the existence of the prescription and reports the test as negative with no details included.

That can pose a problem. What if an employee is exhibiting erratic behavior because of legal prescription drug use? The employer may have actionable performance issues or a legal

*continued on page 34*



continued from page 33

obligation to accommodate the drug user with a change in job duties. In this situation, an attorney must confirm compliance with federal, state, and local laws.

At the very least, a workplace policy should require employees to report any negative side effects of prescription drugs. "Many prescribed drugs have warnings about operating machinery or driving vehicles," said Reilly. "People on prescribed medications should provide statements from their physicians as to whether or not the medicine will affect their job performance."

Supervisors should monitor and respond to any resulting performance concerns, Reilly added. "If it turns out an employee using prescribed drugs cannot do an assigned job, consider accommodating the disability by reassigning duties, or granting medical leave for a set period of time."

### 5. Offer supervisor training

Of all the tools available to the employer, the most effective is supervisor training," said Caldwell. Train employers on how to recognize signs and symptoms when an employee might be under the influence and what actions to take when symptoms are suspected.

"If the observed behavior is a safety issue, supervisors must not be afraid to intervene and remove the employee from the duty causing the danger," said Caldwell. "Then they must investigate by talking with the individual and performing a drug test if appropriate."



## IF YOU DON'T WANT TO KNOW IF YOUR EMPLOYEES ARE USING MARIJUANA, THEN DON'T TEST FOR IT.



Recognizing substance misuse may be easier than responding to it. "Sometimes supervisors are not trained properly, or they lack the nerve to take action," said Pierce. Several factors can hinder action. "Maybe they're users themselves, or at one time they were peers of the individual whom they are now supervising. Or maybe they don't know what to do: They just don't have the necessary skills."

One solution is to have supervisors sign off on the company policy and seek higher level

assistance when required. Evidence shows that many companies have more work to do in this area.

"In one of our recent surveys, half of the organizations did not have procedures in place for what to do when they had a reasonable suspicion of substance misuse," said Pierce. "And another survey revealed that less than a quarter of employers do the requisite annual supervisor training."

### 6. Customize your drug policy

One size does not fit all. Broad-brush drug testing requirements, for example, may not be suitable for all categories of workers. Employees in safety-critical jobs, who drive vehicles, or who interface with clients, may be subject to one set of drug policies. Those in accounting and sales may be subject to another.

### Solving the prescription puzzle

Now, finally, we can address the conundrum posed in this article's opening scenario when an employee requested permission to smoke medically prescribed marijuana on the job.

For the supervisor in charge, the answer was clear: "I said I couldn't allow it. Doing so would set a bad precedent for the rest of the employees. To me, it's like alcohol — if we find someone drinking on the job they're not going to be here for long, because they violated our policy of no tolerance."

The employer's attorney supported his decision, adding a critical detail: Any substance illegal at the federal level can be banned from the work premises regardless of state law.

### So, your state has legalized marijuana ...

Has your state legalized marijuana for recreational or medical use? You may be wondering how the conflict between federal and state law will affect your ability to test your employees for marijuana and prohibit its use. Here's some insights into an evolving situation.

"It is still legal to test for marijuana in every jurisdiction," said Nancy N. Delogu, shareholder in the Washington, D.C. office of Littler Mendelson, the nation's largest law firm defending employers in labor disputes. "And it is still legal to decline to hire or employ workers who use marijuana for recreational purposes."

One caveat, said Delogu: If you don't want to know if your employees are using marijuana, then don't test for it. "Knowing that someone uses marijuana and failing to take steps to ensure that he or she doesn't work while impaired could lead to liability if the employee



### STATES THAT HAVE FULLY LEGALIZED MARIJUANA:

Alaska	Montana
Arizona	New Jersey
California	New Mexico
Colorado	New York
Connecticut	Oregon
Idaho	Vermont
Illinois	Virginia
Maine	Washington
Massachusetts	Wyoming
Michigan	

*Nineteen states have fully legalized marijuana for recreational and medicinal purposes. Additional states have partially legalized the substance, often for strictly medicinal purposes.*

*Source: DISA Global Solutions. <https://disa.com/map-of-marijuana-legality-by-state>*

does something that harms a third person."

As for medical use of marijuana, know your state law. "In a few states that ask employers to accommodate medical marijuana use, terminating the worker following a positive test without evidence of impairment could be risky," said Delogu.

"In New York, for example, if marijuana is being used for medicinal reasons, the employer might have to determine whether it could accommodate that worker in some way so as to permit effective work." (Although, to date, no court has held that an employer must accommodate such use while federal law differs).

Finally, it is "absolutely and everywhere" allowable to terminate any employee who brings marijuana into the workplace, said Delogu.

The insights above are provisional, so consult with your attorney about your own state and local legislation. "It's important to know the current law in your jurisdiction and to watch for updates," said Delogu. "This area of the law is very dynamic and changing all the time." ■