



Navigating Marijuana Law for Employers: Compliance, Testing, and Policy Essentials

Jennifer L. Mora
Frederick T. Smith

December 19, 2024

Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).
©2024 Seyfarth Shaw LLP. All rights reserved. Private and Confidential



Legal Disclaimer

This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

Presenters



Jennifer L. Mora
Senior Counsel
San Francisco, CA

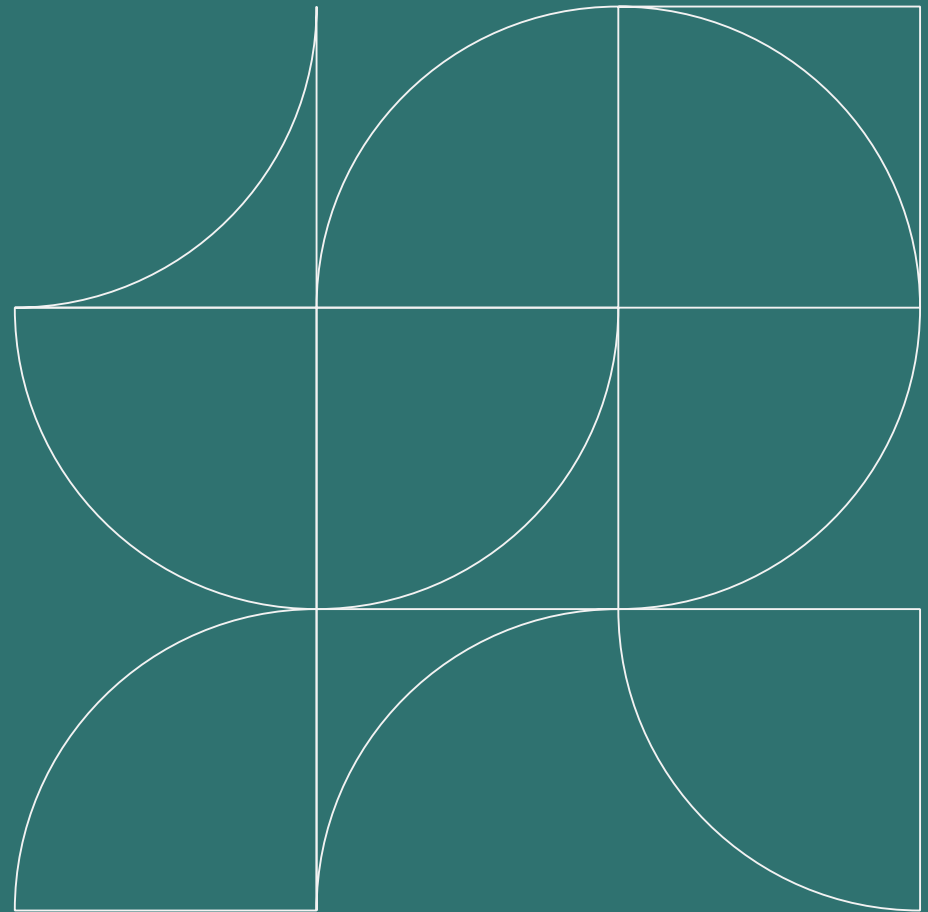


Frederick T. Smith
Partner
Atlanta, GA

Agenda

- 1. The Current Landscape**
- 2. What Does the Science Tell You?**
- 3. Recent Developments?**
- 4. Should Employers Test for Cannabis?**
- 5. Drug Testing Policies**

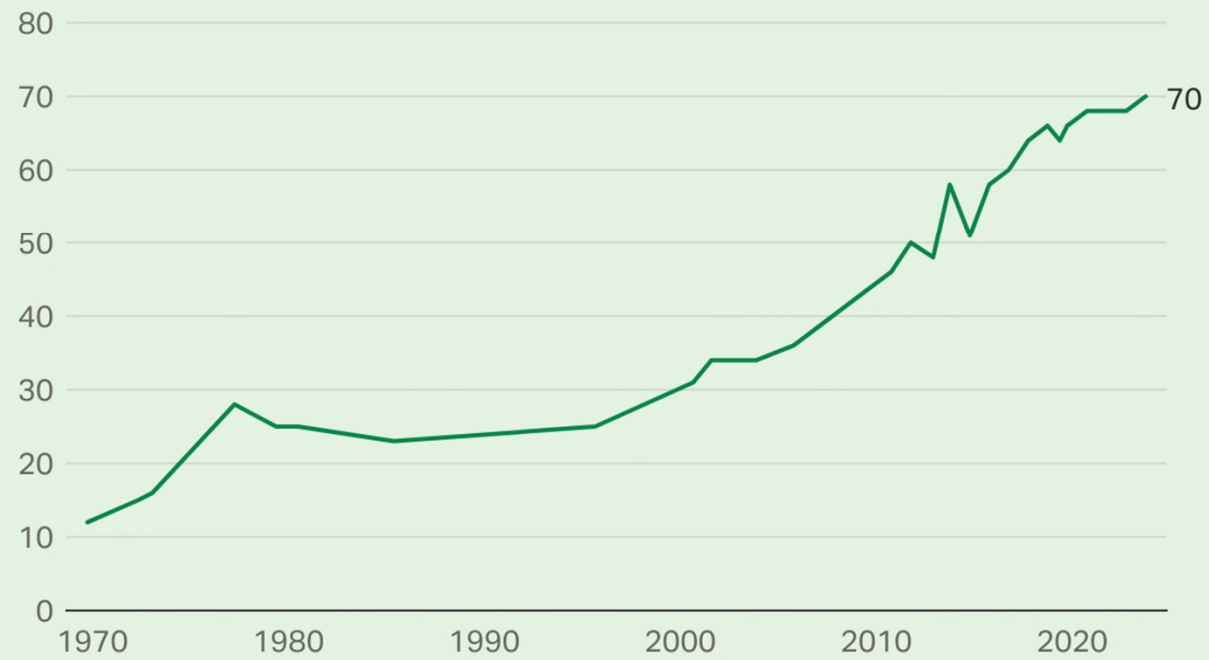
The Current Landscape



Americans' Support for Marijuana, 1969-2023

Do you think the use of marijuana should be legal, or not?

— % Yes, legal



GALLUP

Federal v. State Law



- The Drug Enforcement Administration issued a proposed rule to transfer marijuana from Schedule I to Schedule III of the Controlled Substances Act.
 - Marijuana remains illegal under federal law.
 - Until a final rule is published, which will not happen soon (and may not happen), marijuana remains a Schedule I controlled substance.
- States continue to pass laws legalizing marijuana.
 - Many laws have express employee protections.
 - Litigation is growing, with trend supporting employees who lawfully use marijuana for medical reasons
 - Disability discrimination laws.
 - Off-duty laws.
 - Whether there is a private right of action is unclear under some laws.
- Difficult to navigate depending on geographic footprint.

Jurisdictions Authorizing Medical Use

- Alabama
- Alaska
- **Arizona**
- **Arkansas***
- **California**
- Colorado
- **Connecticut**
- **Delaware**
- **District of Columbia**
- Florida
- Guam
- Hawaii
- Kentucky (eff. 1/1/25)
- **Illinois**
- Louisiana
- **Maine**
- Maryland
- **Massachusetts**
- Michigan
- **Minnesota**
- Mississippi
- **Missouri***
- **Montana***
- Nebraska
- **Nevada**
- **New Hampshire**
- **New Jersey**
- **New Mexico***
- **New York**
- North Dakota
- Ohio
- **Oklahoma***
- Oregon
- **Pennsylvania (including Pittsburgh)**
- **Puerto Rico**
- **Rhode Island**
- **South Dakota**
- Utah
- **Vermont**
- **Virginia**
- Washington
- **West Virginia*s**

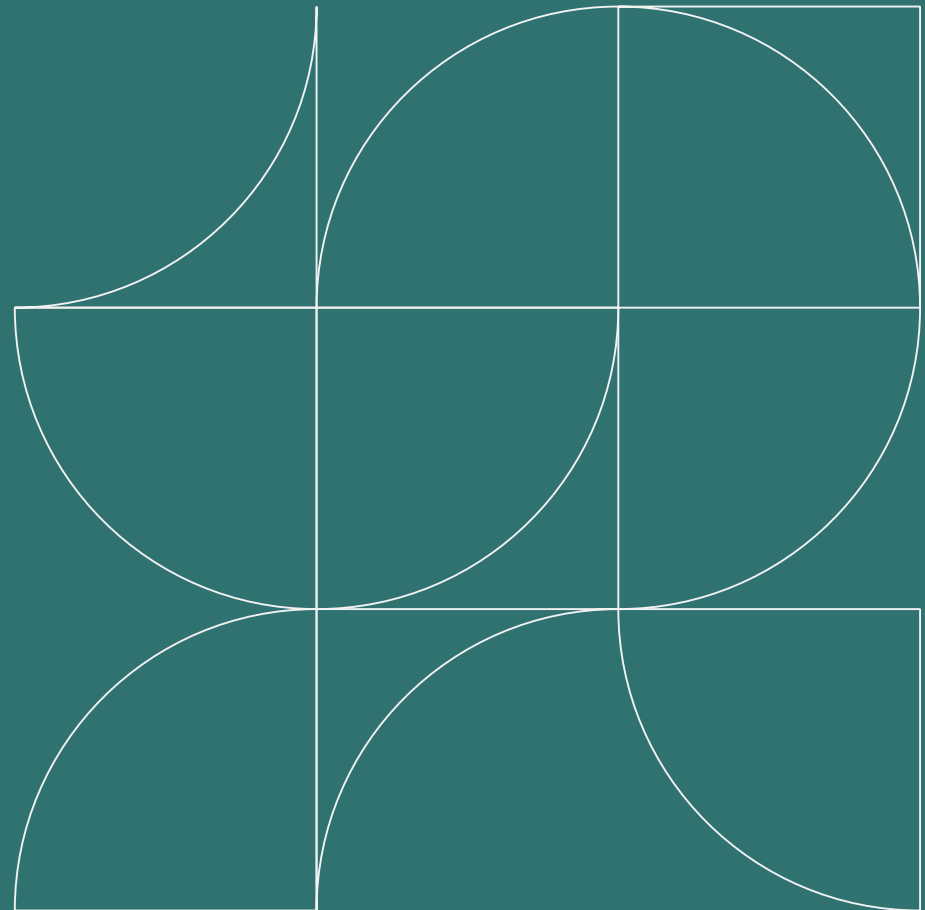
Bold and underlined states have worker protections (per statute, case law, or regulatory guidance)

Recreational Laws

- Alaska
- Arizona
- California
- Colorado
- Connecticut
- Delaware
- District of Columbia
- Guam
- Illinois
- Maine
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Missouri
- Montana
- Nevada
- New Jersey
- New Mexico
- New York | New York City
- Northern Mariana Islands
- Oregon
- Philadelphia
- Rhode Island
- Vermont
- Virginia
- Washington



What Does the Science Tell You?



What Does the Science Tell Us?

- What gets people high?
 - Delta-9-tetrahydrocannabinol (THC).
 - Once metabolized, THC is converted and stored in the body as non-psychoactive cannabis metabolites.
- Urine tests target the metabolite, which is non-psychoactive.
 - What this tells you – someone has used in the past (days or weeks).
 - What this does not tell you – when or whether they are impaired.
- Oral fluids tests.
 - THC is the primary target and found in greater concentrations.
 - What this tells you – recent use.
 - What this does not tell you - whether they are impaired.

The CBD Craze

- A product in need of oversight
 - “THC Free” or “Pure CBD”
 - Yet, workers still testing positive for THC
 - Trucker sued a CBD manufacturer for false/deceptive advertising
 - Recent DOT bulletin
- Virginia
 - First state to pass a law providing employment protections to CBD users
- Policy considerations



Why Do the Methodologies Now Matter?



California

- Effective January 1, 2024
- Unlawful for most employers to discriminate against a person in connection with any employment decision if the discrimination is based upon either:
 - The person’s use of marijuana off the job and away from the workplace.
 - However, this does not prohibit an employer from discriminating in hiring, or any term or condition of employment, or otherwise penalize a person based on scientifically valid pre-employment drug screening conducted through methods that do not screen for non-psychoactive marijuana metabolites.
 - An employer-required drug screening test that has found the person to have non-psychoactive marijuana metabolites in their hair, blood, urine, or other bodily fluids.

California AB 2188

The Bottom Line

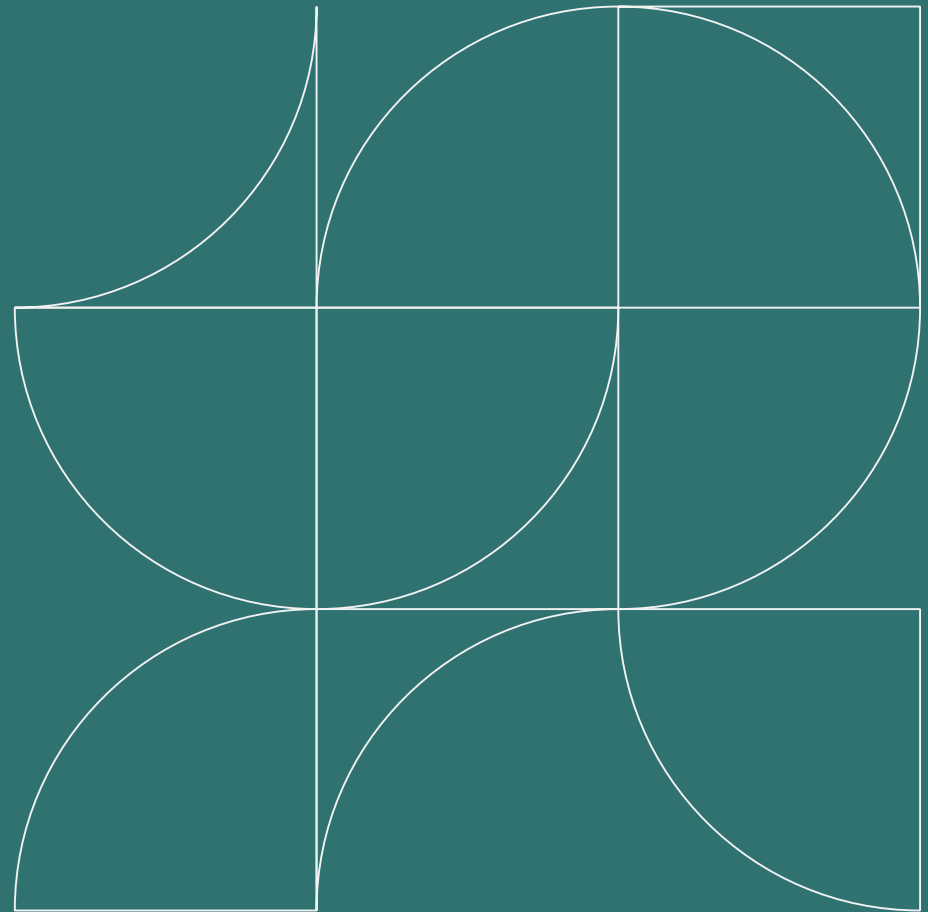
- Covered employers who wish to test for cannabis should consider discontinuing urine testing regardless of whether the test is for a job applicant or a current employee.
- Saliva/oral fluids.
 - Job applicants – suggests employers can consider and take action on a positive test based on saliva/oral fluids.
 - Employees – significant risk!
 - Off-duty protections.
 - Oral fluids may not be the solution to your problems.
- Law recently amended to prohibit employers from considering any past marijuana use.
 - Update criminal history questionnaire.
- Protected by the FEHA's anti-discrimination scheme.

California AB 2188

Exceptions

- Employees in the building and construction trades.
- Positions that require a federal government background investigation or security clearance in accordance with Department of Defense regulations, or equivalent regulations applicable to other agencies.
- Individuals required to be tested under state or federal laws and regulations or as a condition of an employer receiving federal funding or federal-licensing benefits or entering into a federal contract.
- **No general exception for safety-sensitive workers.**

Recent Developments



Washington

Effective January 1, 2024

Washington employers cannot discriminate against a person in the initial hiring for employment if the discrimination is based on:

- their use of cannabis off the job and away from the workplace or
- an employer-required drug test that has found the person to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.

The law does not prohibit an employer from basing initial hiring decisions on scientifically valid drug screening conducted through methods that do not screen for nonpsychoactive cannabis metabolites.

Washington employers can reject job applicants for cannabis use if the employer uses the appropriate drug testing methodology.

Testing of current employees—business as usual.

Broad list of exceptions, including if the person will work in a “safety sensitive position for which impairment while working presents a substantial risk of death.”

- Must provide advance notice.

Minnesota

- Protects off-duty use.
- Pre-employment test for marijuana disallowed.
 - Exceptions include safety-sensitive positions, positions requiring CDLs, positions in which state or federal law requires testing, positions funded by a federal grant.
- Other drug tests:
 - Business as usual.
- Employers must comply with the Drug and Alcohol Testing in the Workplace Act.
 - DATWA was recently amended to permit oral fluids testing.

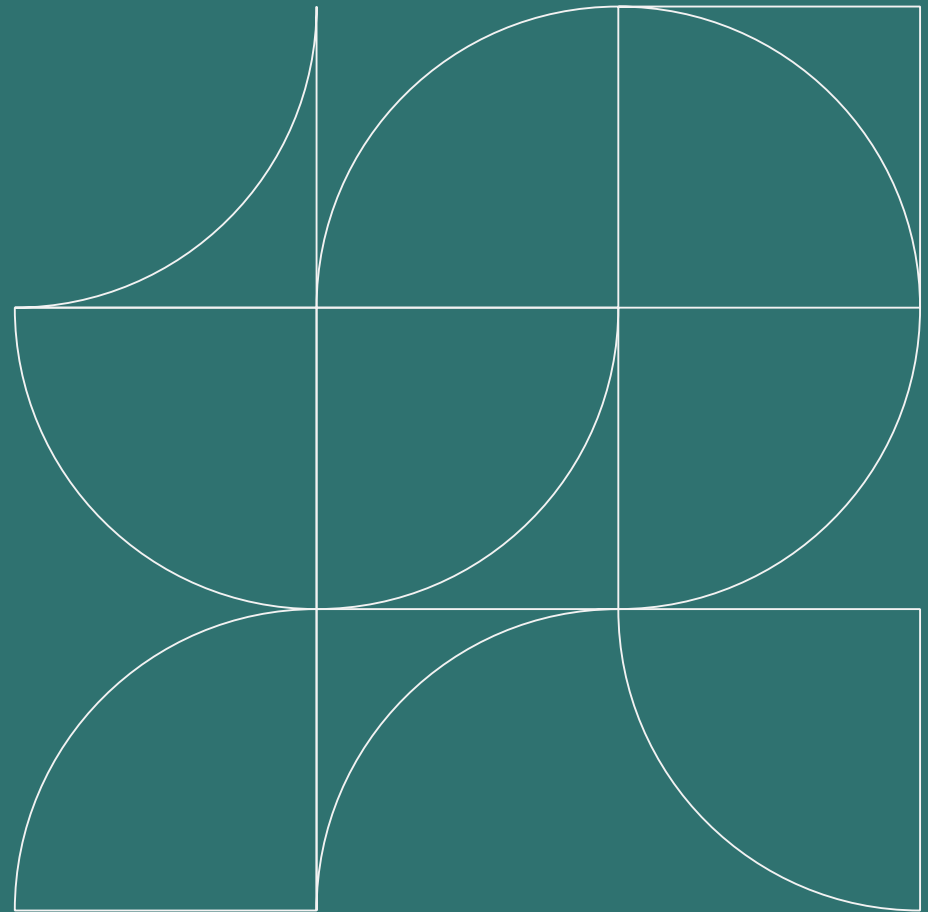
Pittsburgh, Pennsylvania

- Effective **immediately**
- Pennsylvania already protects medical marijuana users from employment discrimination
- Pittsburgh's ordinance is the first of its kind:
 - Restricts employers from testing those with valid medical marijuana cards for marijuana
 - Extremely narrow exceptions (DsOT testing, positions requiring the employee to carry a firearm, and requirements in collective bargaining agreements)
 - Can test employees if there is suspicion of impairment
 - Problematic because employers typically do not know whether someone is a medicinal user until after the test

Special Mentions From Prior Years

- New York
- Rhode Island
- Missouri
- New Jersey
- Connecticut

Should Employers Test for Cannabis?



What Are Employers Doing?

- Eliminate entirely.
- Eliminate for pre-employment only.
- Only test for safety-sensitive roles.
- Follow a state-by-state approach.
- Accommodations?
 - No duty under ADA (but still need to consider the disability).
 - States vary.

Part 40 Department of Transportation

Business as usual!

Employers cannot ignore a positive test for cannabis even for medicinal use.

2019 DOT “Medical Marijuana” Notice.

- Qualification FAQ
- § 40.151 What are MROs prohibited from doing as part of the verification process?
- As an MRO, you are prohibited from doing the following as part of the verification process:
 - (e) You must not verify a test negative based on information that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act. (e.g., under a state law that purports to authorize such recommendations, such as the “medical marijuana” laws that some states have adopted.)

Government Contractors

Drug-Free Workplace Act

- Says nothing about testing.
- Policy prohibiting use or possession **at work**.
- Read your contracts.



CLE: NEW PROCESS

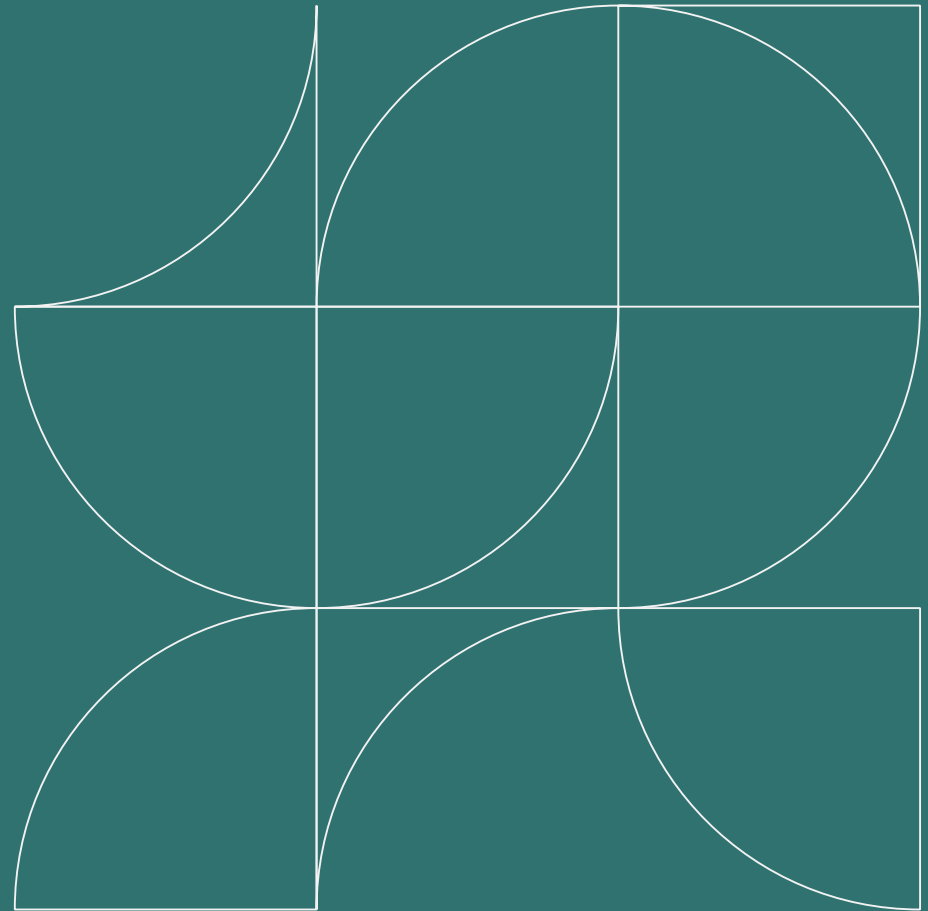
Please scan the QR code and complete the digital attendance verification form to receive CLE credit for this program.

You will need:

1. **Title:** Navigating Marijuana Law for Employers
2. **Date Viewed:** December 19, 2024
3. **Attendance Verification Code:** SS_____

State-specific CLE credit information can be found in the form.

Drug Testing Policies



Drug Testing Policies

Keep in mind state drug and alcohol testing statutes and any policy requirements.

Heavily regulated in some states (e.g., Boulder, San Francisco, Iowa, Minnesota).

- Maine: has the state approved your policy?
- Some policy requirements based on case law (e.g., California, Massachusetts, New Jersey and West Virginia).
- Have a clear definition of “illegal drugs” and need carve-outs in Minnesota.
- California
 - Authorization for the release of medical information

You and Your Vendor

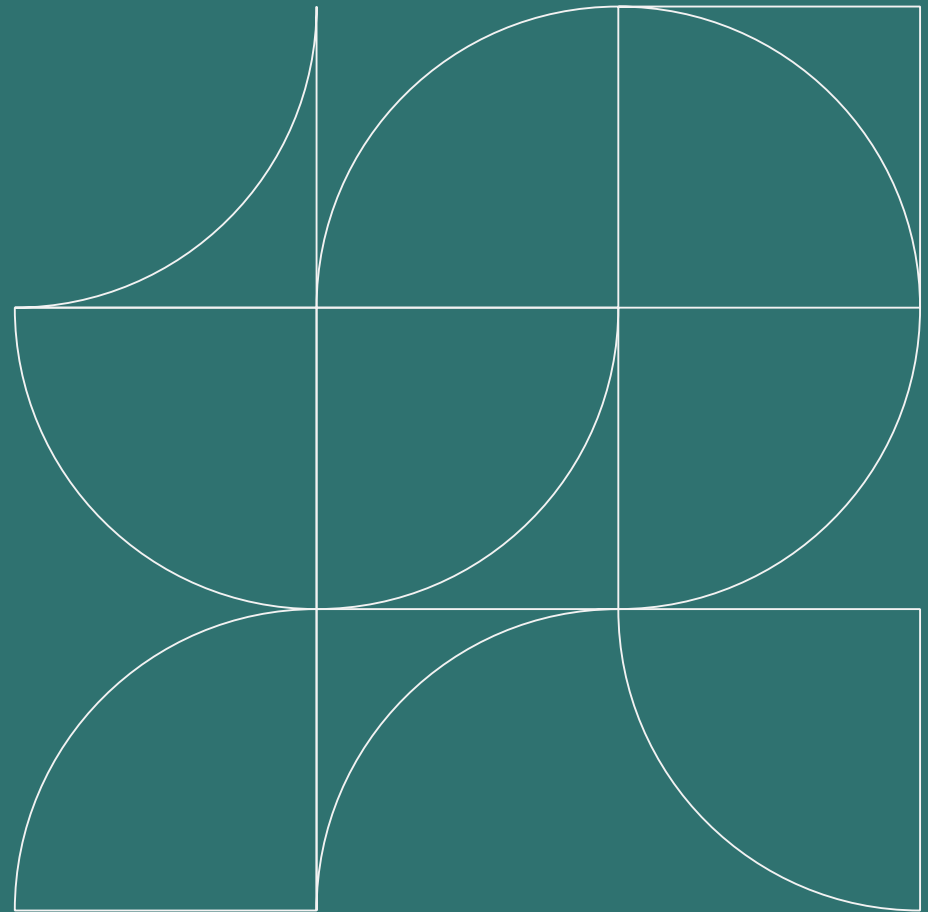
Are pre-adverse and adverse action notices required for failed drug tests?

- Opinion Letter from the Federal Trade Commission.
- *Hodge* decision.

What do you want to do or know?

- Modify panel.
- Change methodology (e.g., California, Washington).
- Mask result.
- Pass medical users?

Q & A



**thank
you**

For more information, please contact:

Jennifer Mora

email: jmora@seyfarth.com

Fritz Smith

email: fsmith@seyfarth.com