

In a Rare Alignment, Red and Blue States Turn Green

By Nina M. French

With the conclusion of the 2020 U.S. election, where the electorate seemed as polarized as ever, voters in both red and blue states agreed on one thing – marijuana legalization. Voters from across the political spectrum approved all five ballot initiatives related to the legalization of marijuana.

Voters in New Jersey, Arizona, and Montana passed new adult recreational use laws while voters in South Dakota approved both recreational and medical use. Mississippi voters legalized medicinal use. The result is that America now has only 11 states where marijuana is fully illegal, while in 15 states cannabis is legal for adult recreational use, covering 1/3 of the U.S. adult population.

The alignment among voters extends far beyond the ballot box as the acceptance of legal marijuana use has outpaced legalization of recreational use. Two-thirds of U.S. adults indicate that the use of marijuana should be legal according to a 2019 Pew Research Study¹ including the majority of Democrats, Republicans, and Independents². This era of marijuana acceptance combined with continuing legalization has profound implications for U.S. employees – forcing employers in all industries to rethink how to mitigate the safety threats from increased use of marijuana while balancing the rights of employees who increasingly have legal rights to use.

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impact on their businesses and the need to evolve their existing marijuana drug testing policies, predicated on illegal marijuana, or risk losing valuable employees. Prior to marijuana legalization, the prevailing approach to marijuana drug testing was zero tolerance – it did not matter when an employee used. Even if employees used marijuana days before their oral fluid tests or weeks before their urine test (and were no longer impaired), employers fired employees because they had used an illegal substance. Employers are beginning to accept that zero tolerance alone will not work in 2021 because most U.S. adults have legal access to marijuana and if they use it, peak impairment only lasts a few hours according to research by the National Highway Traffic Safety Association (NHTSA)³.

Employers who embrace the fact that marijuana only impairs for several hours after use will be the most successful when updating their drug testing programs for two reasons. First, incorporating the concept of “recent use” into a comprehensive drug testing program is the only way to ensure policies balance safety and risk mitigation with fair treatment of responsible employees who legally use marijuana. Second, employers who embrace the science underpinning recent use as shown in the 2018 study published in *Clinical Chemistry*⁴ will understand that testing breath for marijuana is the better way to align positive results with probable impairment. Although using oral fluid, urine, and hair samples to test for marijuana sufficed pre-legalization, these tests are not as useful now because they cannot isolate recent use.

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¹ <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/>

² <https://news.gallup.com/poll/267698/support-legal-marijuana-steady-past-year.aspx>

³ http://home.trafficresourcecenter.org/~media/Microsites/Files/traffic-safety/NHTSA-Drugs_Human_Performance.ashx

⁴ <https://academic.oup.com/clinchem/article/65/9/1171/5608513>

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if they are no longer impaired. So, increasing use of legal marijuana means increasing positivity rates if employers are not testing breath for recent marijuana use. It also means an increasing number of employees are at risk for losing their jobs for legal choices to use marijuana over the weekend. Currently, a marijuana breathalyzer that isolates recent marijuana use in breath is a great way to conduct marijuana drug testing because positive results indicate that employees have used within several hours of the test – not days, weeks, or months earlier.

The reality that an increasing number of employees are legally using marijuana does not mean that employers should drop marijuana testing entirely, but it does mean

shifting the focus of marijuana drug testing policies from “if” employees use marijuana to “when” they use. Defining “when” as recent use within hours of a test means that positive results will align with the peak impairment window identified by NHTSA, allowing employers to balance safety and risk mitigation with fairer outcomes for employees. Employers may wish to consider breath technology and drug testing policies to allow measurements of recent marijuana use – preserving jobs for responsible employees, mitigating risk, and maintaining safety while aligning with their employees who are increasingly concerned with fairness. ●

Nina M. French, Executive Vice President of Employer Solutions, entered the screening industry in 1992 and is a highly regarded speaker and thought leader in employment drug screening. Nina is an author and speaks at industry conferences, SHRM events and has been featured on radio and news segments on workplace drug screening trends, practices and laws.

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