

How to Get the Most Out of Drug Testing in the Age of Legal Marijuana

Presented by:

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Meet the Presenters



Bill Current

Founder of the Current Consulting Group in 1998.

Former VP of Consulting at Employee Information Services.

Former Executive Director of the American Council for Drug Education.

Former Director of the Institute for a Drug-Free Workplace.

Author of 10 books on substance abuse prevention & drug testing.



Yvette Farnsworth Baker, Esq.

Current Consulting Group's Senior Legal Consultant.

Licensed attorney, a member of the bar in Florida, and has practiced law for over 15 years.

As an expert in drug and alcohol testing case law, regularly consults on state law and federal regulation questions in addition to authoring articles for industry publications.



Drug Testing Policy Development and Review

Compliance Services for Scott Insurance Customers:

- Drug Testing Policies
- On-line and in-person training for DERs, Supervisors, and Employees
- State Drug Testing Law Database



DOT (All Modes)



Non-DOT (Single State, Multi-State, Mandatory & Voluntary Laws)



Every policy is customized and guaranteed to remain compliant for one full year.

State Drug Testing Law Database for Scott Insurance Customers



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State Summary



Single Issues



Search Laws





State Drug Testing Law Database Subscription Service



Current Compliance is the drug testing industry's most comprehensive and up to date on-line source of state laws that affect workplace drug and alcohol testing.

- Individual sections for each state
- All state laws that affect workplace drug testing
- All state laws that affect workplace alcohol testing
- Individual single-issue charts combining all 50 states
- Fully searchable
- Subscription includes Current Consulting's monthly newsletters, invitations to free webinars, 10% discount on articles from our extensive archives



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West Virginia

State Disposition:



HEADS UP:

West Virginia has a general mandatory drug testing statute that does not require reasonable suspicion or safety-sensitive workplaces in order to conduct drug testing. However, there is case law that limits drug testing to safety-sensitive and reasonable suspicion. The drug testing statute specifically establishes public policy allowing drug testing and may override existing case law to the contrary. It is strongly recommended to consult a legal expert before implementing drug testing in the state of West Virginia. Additionally, the state mandates drug and alcohol testing of certain workers involved in Public Works Improvement projects. The mandatory drug testing law allows employers to deny workers' compensation and unemployment compensation benefits for employees who fail a drug test. However, there are workers' and unemployment compensation laws in West Virginia that contain their own drug testing requirements.

Drug Testing Laws

Drug Testing / General / Case Law
Drug Testing / General / Mandatory
Drug Testing / Industry / Mining
Drug Testing / Industry / Public Works

Marijuana Laws

Medical Marijuana
Recreational Marijuana

Workers and Unemployment Compensation Laws

Unemployment Compensation Denial
Workers' Compensation/Denial

Citation

Twigg v. Hercules Corp. (1990) Supreme Court of Appeals of West Virginia
West Virginia Code 21-3E-1 et al.
West Virginia Code 22A-1A-1 to -3
West Virginia Code 21-1D-1 et al.

Citation

West Virginia Code 16A-1-1 et al.
None

Citation

West Virginia Code 21A-6-3
West Virginia Code 23-4-2

	Virginia	Tennessee	N. Carolina	S. Carolina	California
Type of Law	Voluntary*	Voluntary*	Mandatory	Voluntary*	Case Law
Marijuana	Medical & Recreational	None	None	None	Medical & Recreational
WC Discount	Yes	Yes	No	Yes	No
WC Denial	Yes	Yes	Yes (lots of WC case law)	Yes	Yes
Federal Regulations	N/A	Yes	N/A	N/A	N/A

* Law only applies to participating companies; outside of voluntary law most conditions do not apply

Agenda

- The difference between federal regulations and state drug testing laws
- How to address multiple applicable state laws in a single drug testing policy
- Marijuana laws that restrict drug testing and how to comply
- The consequences of dropping marijuana from pre-employment screening
- Oral fluid testing (lab-based vs. rapid-result, compared to urine and hair, ROI)



Federal Regulations vs. State Drug Testing Laws

State Laws



Mandatory/Voluntary

- 17 states, 4+ cities, 1 territory
- 16 states (voluntary)*



Case Law

- Many states, some with multiple cases
- Employer's risk adversity helps determine policy
- May still have local laws that must also be considered



Workers' and Unemployment Compensation

- Unemployment comp denial – 49 states, 1 territory, D.C.
- Workers' comp denial – 46 states, 1 territory, D.C.
- Workers' comp premium discount – 13 states
- Legal Liability Protection, (LLP)



Industry Specific

- Impact to certain industries
- Mining, public works, childcare, etc.



Medical and Recreational Marijuana

- 39** states, 1 territory, and D.C. have medical marijuana laws
- 24 states and D.C. have recreational marijuana laws
- Do not always address workplace-related issues, but there is a trend toward limiting testing for marijuana

Mandatory Laws vs. Voluntary Laws



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Mandatory Laws

- Unless otherwise noted (e.g., specific industries), **compliance is mandatory**



Voluntary Laws

- Compliance is **voluntary** – generally an **incentive is offered** for compliance (insurance discount, legal protection, etc.)
- Employers that choose not to comply can **test as they wish**

Caselaw

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- Only binding in the **state in which the case is decided**
- Can place **additional testing requirements/restrictions** on employers
- Employers are **recommended to comply** – non-compliance opens an employer to litigation as a ruling has already been established

Unemployment Compensation and Workers' Compensation Denial Laws



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Unemployment Comp Denial

- Only required to comply if the employers wants to **deny unemployment compensation** claims
- Can include additional testing requirements

Workers' Comp Denial

- Only required to comply if the employer wants to **deny workers' compensation** claims
- Can include additional testing requirements



Industry Specific Laws

- Laws provided by a state that **only** apply to a **specific industry**
- Compliance is **required**
- Employers not in compliance **risk legal action**
- Employers **do not need to comply with other** mandatory or voluntary **state laws**



Medical and Recreational Cannabis Laws



Medical Cannabis

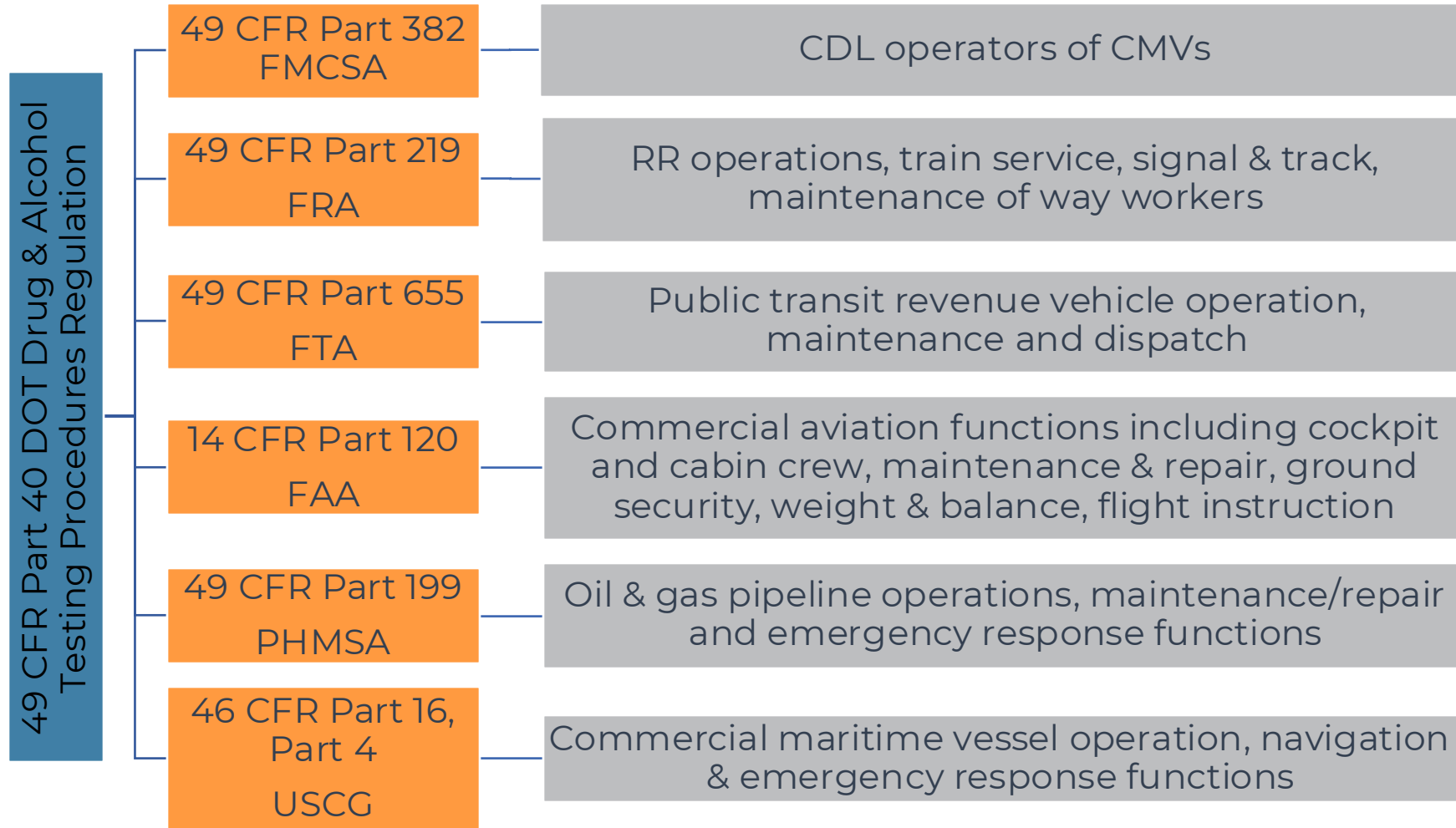
- Sometimes contain provisions about taking employment action based **solely** on medical cannabis card holder status
- Compliance is **required**
- Do not always contain workplace provisions

Recreational Cannabis

- Compliance is **required**
- Do not always contain workplace provisions
- More and more, containing language **prohibiting certain types of testing** for cannabis



Federal Regulations: DOT





Federal Regulations

- Only applies to **federally regulated employers** (DOT modalities, government employees, etc.)
- Federal regulations **always trump state laws**
- If you are regulated, **compliance is required**
- Some states also require compliance with SAMHSA/DOT regs – review applicable state laws fully to ensure complete compliance





How Laws and Regulations Work Together

- Federal regulations **always** trump state laws
- State laws **always** trump city ordinances
- When in doubt, **follow the narrowest definition** provided
 - Laws, regulations, case law, and unemployment/workers' comp laws **can often be contradictory**
- Drug-free workplace policies need to **ensure compliance with specific state laws**
- **Multi-state employers** should have **custom addendums** for each state in which they operate
 - **Template/blanket policies** are never sufficient
- Compliant policies not only insulate from potential legal outcomes, but also ensure that you are eligible for all available incentives



Your Drug Testing Policy



What to Address in a Drug Testing Policy

- Define **why** the policy is being implemented.
- Define **who** will be covered by the policy.
- Identify **which drugs** may be tested – can include cut-off levels and if alcohol testing is included.
- Identify **how** candidates and employees will be tested, including methodology.
- Explain **when** testing may occur.
- Define what constitutes a **refusal to test**.
- Define the **consequences** of a positive drug test result or a refusal.
- How will you **train** responsible supervisors for consistent policy enforcement.
- Include a dedicated section on **marijuana**.

Policy Recommendations

- ✓ Combine **recent-use detection drug testing** with **signs of impairment** in states where impairment is required to discipline employees for a positive test.
- ✓ **Train** supervisors to recognize signs of impairment (very important for prescription drug abuse).
- ✓ **Document**, document, document!
- ✓ Have a **written policy** that is updated and communicated to all employees.
 - Must include all the states in which you operate.
 - **Make sure it reflects current laws of each state.**

Addressing Marijuana in Your Policy

- Your base policy should include a **dedicated cannabis section**.
- Explain the company's position clearly...
 - Your company complies with all applicable cannabis laws.
 - It **will not tolerate** cannabis use while on the job, including:
 - Employees **bringing cannabis into the workplace**, (i.e., buildings, company vehicles and remote worksites).
 - Consuming cannabis during work hours.
 - Being at work while **under the influence** of THC regardless of when the use took place.
 - **Whether you will accept medical cannabis use as a legitimate excuse for a positive result** (some state laws answer that question for you).





Prohibited Conduct In Your Policy

Additionally, you may prohibit employees from:

- Demonstrating the **signs and symptoms** of being under the influence.
- **Testing positive for marijuana**, other prohibited drugs, or alcohol.



Don't Let Changing Laws Scare You Away from Workplace Drug Testing



- While changing laws can be confusing, **it is very possible** to incorporate them into an effective workplace drug testing policy.
- Increased legalization leads to increased drug use, which leads to **increased incidents** involving **impaired employees in the workplace**.
- Impaired workers lead to workplace accidents, decreased productivity, increased healthcare costs, and **exposure to increased legal liability for employers**.
- Drug testing protects against this trend.





Marijuana Laws That Restrict Drug Testing and How to Comply



New Laws In California & Washington

- As 2024 began, employers in **California and Washington** faced important decisions on marijuana drug testing
- Both states passed laws that became **effective on January 1, 2024** (California AB2188; Washington SB5123)
- Depending on circumstances, these new laws **prohibit employers from discriminating** against an employee based on drug testing results that reveal the presence of the so-called **“non-psychoactive metabolite”** of cannabis
- In California, the new law applies to both pre- and post-hire drug testing, whereas in Washington it only applies to pre-employment drug testing

California AB 2188



- Prohibits employers from **disciplining** or **refusing to hire** based on marijuana use **before or after work hours** and **off work property**
- **Testing** for marijuana is **still permitted** in California. But to discipline an employee for a positive test, you need **proof of impairment**
- “Unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalizing a person”
- **if the discrimination is based upon**, among other things,
 - “an employer-required drug screening test that has found the person to have **non-psychoactive cannabis metabolites** in their hair, blood, urine, or **other bodily fluids**”





Testing for Parent Drug vs. Non-Psychoactive Metabolites

- California law **prohibits** discrimination **in hiring or discipline** based on a test result that indicates the presence of **non-psychoactive metabolites of cannabis**
- **Urine** tests detect **non-psychoactive metabolites**
- **Oral fluid testing** detects **parent drug** or **psychoactive THC**
- Employers **cannot discriminate** based on a **positive urine screen** because it only detects non-psychoactive metabolites



California vs. New York: What Can Employers Do?

	California	New York
Test for marijuana?	Yes, with method that reveals “ psychoactive cannabis ”	Prohibited unless federal or state law requires it or specifically permitted in the law
Discipline for marijuana use?	Maybe when based on test that reveals “psychoactive cannabis”	Only if required by federal reg., the individual is impaired by marijuana, or if not acting would violate federal law
Prohibit off-duty marijuana use?	No, employers cannot act based on marijuana use off-the-job and away from work	No, employers cannot prohibit use prior to or after work hours and off the employer’s premises

Washington SB 5123*

- Employers **cannot discriminate** against **applicants** based on a **required drug test** that indicates the presence of “**nonpsychoactive cannabis metabolites**” in the hair, blood, urine, or bodily fluid
 - **Hiring decisions** can be based on “**scientifically valid** drug screening conducted through methods that **do not screen for non-psychoactive cannabis metabolites**”
 - Includes a long list of **safety-sensitive exceptions**

*Notice the Washington law **only applies to pre-employment testing**

The Importance of Both Laws



- Both laws present a crucial difference: they focus on metabolites, not the parent drug of marijuana.
- This distinction opens the door for **oral fluid testing**.
- Urine testing exclusively detects marijuana metabolites and not the parent drug of active THC.
- **Oral fluid testing detects the active THC parent drug and provides a clearer picture of recent use and potential impairment.**
- This means that the California and Washington laws restrict employers from using urine tests to make employment decisions based solely on the presence of cannabis metabolites.

5 Things You Should Do

1. Know the laws—Comply with the laws
2. Be as comprehensive as possible and keep your policy up to date
3. Use a testing method endorsed by SAMHSA, if possible
4. Use a SAMHSA-certified lab and/or an FDA-cleared POCT device
5. Don't ignore legal marijuana laws





The Consequences of Dropping Marijuana from Pre- Employment Screening

Magnitude of the Marijuana Problem

- **Positive drug tests for marijuana increased 10.3% from 2021 to 2022** according to a report from one major laboratory.
- Marijuana positives increased 11.8% in 2022 **in states where recreational marijuana is legal** and 8.3% in states in which **medical marijuana is legal**.
- Between 2012 and 2022, **post-accident marijuana positive drug tests increased 204.2%**.





Considering the Following...

- In Current Consulting Group's 2024 Drug Testing Industry Survey, **59%** of participants said they believe the decision to discontinue testing for marijuana **encourages employees to consume marijuana before work**. Only 14% said it does not.
- In an independent survey of employed marijuana users, **31% admitted to using marijuana while on their way to the workplace**.
- And **48% admitted to using marijuana at work**, including during breaks as well as while actively working.
- According to a survey conducted by American Addiction Centers, **22.5%** of individuals who admit to being current drug users say they use during the workday.
- And **"40% of people who work from home** full-time say that they have gotten high before and during work hours."



Pros and Cons of Marijuana Testing

PROS

- Positive post-accident drug tests hit a **25-year high** in 2023
- Permitting marijuana impairment at work **increases dangerous and costly accidents and mistakes**
- When safety in the workplace is increased, **liability decreases**

CONS

- Testing does not measure or prove **impairment**
- Urine and blood testing do not capture very recent use

Eliminating marijuana from your drug screening panel may seem like a quick remedy but it will likely result in **more problems**

"Post-Accident Workforce Drug Positivity for Marijuana Reached 25-Year High in 2022, Quest Diagnostics Drug Testing Index Analysis Finds." Quest Diagnostics, 18 May 2023.

"How does marijuana use affect school, work, and social life?" National Institute on Drug Abuse, September 2019.



The Hot Button Issue: Cannabis

- A recent report found that **cognitive impairment** from cannabis use lasts between **3-10 hours**
 - **Varies** depending on THC level, frequency of use, how cannabis is consumed, and what tasks are being performed
- **Impairment from cannabis use** will **continue to be a major issue** facing employers in 2024
- **Ensure your testing method (urine, oral fluid, hair) covers the entire window of impairment** or you may be inadvertently permitting impaired workers to remain on the job



Source: Report from the University of Sydney published in Neuroscience & Bio behavioral Reviews, analyzed 80 separate studies to determine when people would be impaired after cannabis use



Hot Air Balloon Pilot was Impaired on the Job

- Albuquerque, New Mexico, 2021
- The **balloon crashed** into a power line, causing the basket to detach from the envelope and plummet to the ground
- **Five people, including the pilot, were killed**
- The National Transportation Safety Board (NTSB) said that the crash was, in part, **caused by the pilot's use of cocaine and cannabis**
- “Contributing to the accident was the pilot’s use of impairing, illicit drugs” ...
“Some **impairing effects of THC would likely have been present**, that would have affected the pilot’s ability to successfully operate the balloon.”

Source: BILD report March 20, 2017



More Marijuana Users Means...

- The legalization of marijuana has resulted in more people using marijuana and more employees testing positive
- It stands to reason, therefore, that as legalization continues to spread across the country, usage and positive test results will increase exponentially
- Which will result in a **predictable increase** in:
 - workplace accidents
 - workers' compensation claims filed
 - usage of health care benefits
 - turnover
 - absenteeism and tardiness
 - reduced productivity





Oral Fluid Testing (Lab-Based Vs. Rapid-Result, Compared to Urine and Hair, ROI)

Many Testing Methods Available Today



Urine
Testing

Instant
Urine
Testing

Hair
Testing

Lab-based
Oral Fluid
Testing

Instant
Oral Fluid
Testing



Federally Endorsed Drug Testing Methods

Lab-based Urine Testing

- #1 testing method, legal in every state
- Allowed by DOT
- Federal lab-based urine testing guidelines for 30+ years

Lab-based Oral Fluid Testing

- Federal guidelines issued by SAMHSA in 2019
- **Allowed by DOT as of May 2023**
- Already legal in 47 states
- Only government-approved recent-use detection testing method

Hair Testing (soon?)

- Legal in most states
- Not permitted by DOT (yet)
- Notice of Proposed Rule-Making in 2020 from SAMHSA



Comparing Testing Methods

	Urine	Oral Fluid	Hair	Blood
Lab-based or rapid-result (or POCT)	Both	Both	Lab only	Lab only
Window of Detection	3-4 days	-POCT up to 12 hours for THC - Lab up to 24 hours for THC - 24-48 hours for other drugs	Up to 90 days	2-3 days
Recent-Use Detection	Lag time of several hours after initial usage	Within several minutes after usage of any drug	Lag time of 7-10 days after initial usage	Within several minutes after usage of any drug
Legal by States	Lab: 50 states POCT: Where permitted	Lab: 47 states POCT: Where permitted	Lab: Most states	Usually not permitted for workplace testing
SAMHSA Regs	Yes	Yes	Proposed	Only in very limited circumstances
Detection of Other Drugs	Virtually all drugs + alcohol	Virtually all drugs + alcohol	Virtually all drugs	Virtually all drugs + alcohol

Lab-based Urine Testing

Pros

- Considered the **gold standard**
- Configurable panel
- Availability
- Permitted for **DOT**
- Supported in most states
- Procedures have **withstood legal challenges**

Cons

- Privacy
- Availability
- Adulteration
- Observed collections and **gender issues**
- Shy bladder
- Window of detection
- Cost and **cost fluctuation**



Lab-based Oral Fluid Testing

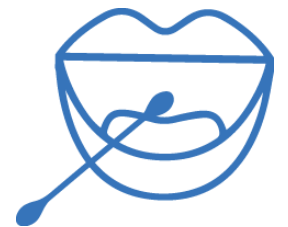


Pros

- Collect **anytime**, anywhere
- No need for private restrooms or same gender collectors
- **Adulteration** is nearly impossible
- Standardization of pricing
- Legally **defensible**
- **Recent use** detection
- Eliminates shy bladder issues
- Reduced **time away from work***

Cons

- **Not allowed for** some states
- Inventory management
- **Up-front costs** for employers
- **Dry mouth** can pose issues
- Use of outsourced collection services changes benefit of standard cost



Hair Testing



Pros

- Window of detection, and **marijuana**
- High certainty of **promptly detecting** moderate or high use
- No **gender collection issues**
- **Non-disruptive** in the workplace
- Unannounced testing is unnecessary

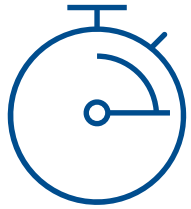


Cons

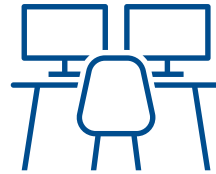
- **Lack of standardization** of lab procedures
- Collection **complications**:
 - Sometimes short hair or no head hair
 - Body hair has very long (>1 year) detection window
- Does not detect ~up to one week of most recent use
- **Perceived controversy** over race/hair color and passive exposure
- Not HHS/DOT Approved



What is Rapid Testing?



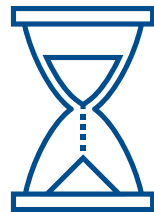
Instant testing



Point-of-collection testing
(POCT)



Point-of-care testing
(POCT)



Rapid
Testing



Onsite test results



Key Differences Between Lab-based & Rapid Oral Fluid Testing

Rapid Oral Fluid Testing

- Near **immediate results**
- (Generally) human read
- Best for **initial screening**
- FDA clearance is relatively new
- Cut-off levels vary
- **Simple collections**
- **Quick** speed to hire

State laws may affect the use of oral fluid as a sample and/or the use of rapid testing. **Make sure you are informed about the laws of the state(s) in which you operate.**

Lab-based Oral Fluid Testing

- Results within **24-72 hours**
- Laboratory read
- **Initial screening** and **confirmation testing**
- **Long history** to draw from
- Cut-off levels vary
- **Simple collections**



Current Policy Services

- Contact Current Consulting Group for all your Drug Testing Policy writing and review services.
- Email Sharon at sbottcher@currentconsultinggroup.com.
- Call us at 954.944.0400.
- Mention Scott Insurance to receive special pricing.



Questions?



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Current (noun): a body of water moving in a definite direction, especially through a surrounding body of water in which there is less movement.



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