

# Contemporary Issues in the Workplace and Safety Considerations

October 16, 2018

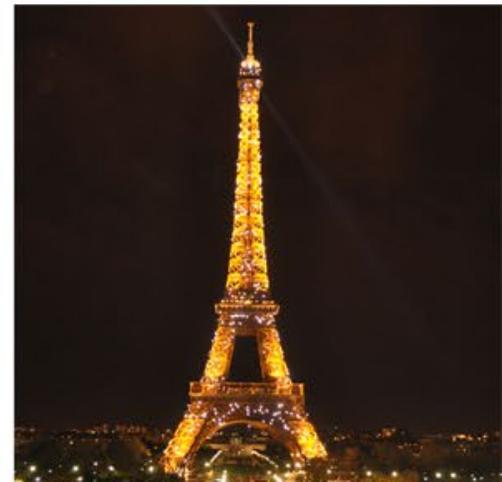
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# Drug Policies in a Changing Legal Landscape



- Basics of drug testing policies
- Marijuana legalization in states and impact on drug testing in the workplace
- Best practices for drug testing policies
- OSHA's recent recordkeeping rule and statements on post-accident drug testing

# BASIS FOR DRUG TESTING POLICIES

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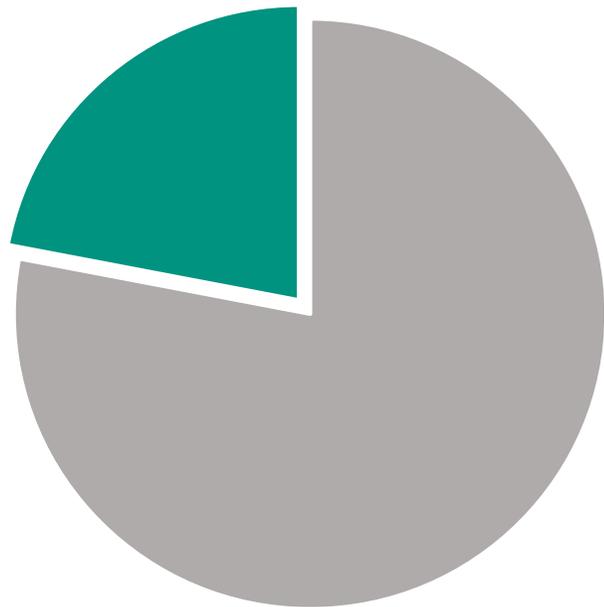


- Why have a drug testing policy?
  - Worker safety
  - Job performance, productivity, attendance
  - Health care and Workers Comp costs
  - Work culture/environment
  - Liability management
- Employers have the right to maintain a drug-free work environment

# WHO IS TESTING?

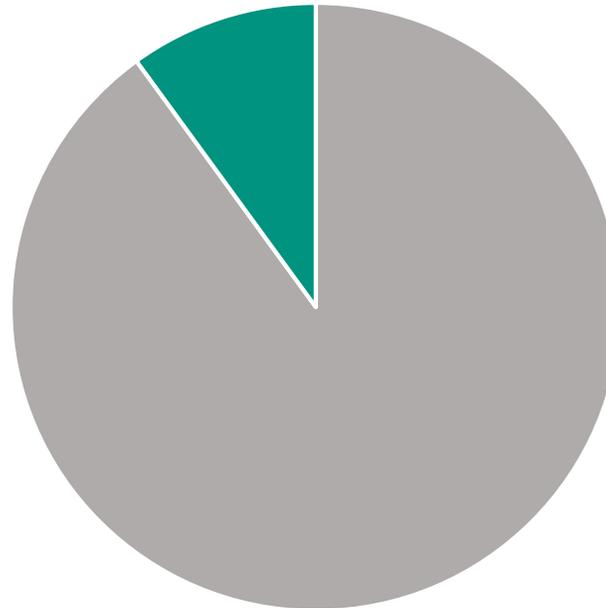


Employers who test some portion of their workforce



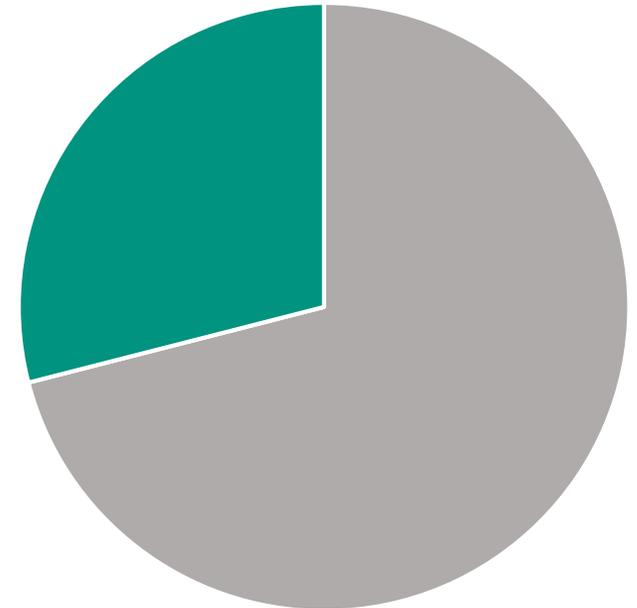
■ Test ■ Do Not Test

Employers who screen job candidates



■ Screen ■ Do Not Screen

Employers who screen current employees



■ Screen ■ Do Not Screen

HireRight's [2013 Employment Screening Benchmarking Report](#),

# ARE TESTS NECESSARY?

- Employees who test positive?



...About 4 to 4.5%

Quest Diagnostics Drug Testing Index, reported by SHRM May 24, 2017

# TYPES OF DRUG TESTING

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- Types of drug testing
  - Pre-employment screening
  - Random drug testing
  - Drug testing following an accident
  - Drug testing based on probable cause
- Probable cause
  - Facts sufficient for reasonable person
  - Observation (stumbling, slurred speech), odor, conduct

# WHERE TESTING IS REQUIRED

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- Classified work
- Drug Free Workplace
- Transportation (Federal Motor Carrier Safety Reg.)

# EFFECT OF MARIJUANA LEGALIZATION

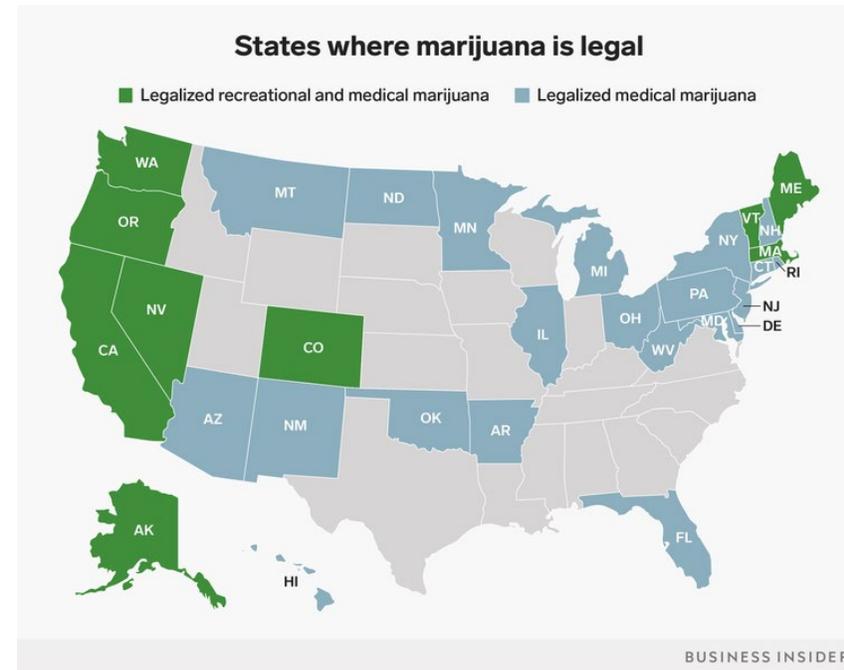
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- Federal law
  - Marijuana still illegal under federal law
  - ADA does not require employers to accommodate employees with medical marijuana cards
- State law
  - States continue to legalize medical use
  - Some state laws say illegal drug use doesn't disqualify the employee from disability law

# EFFECT OF MARIJUANA LEGALIZATION

- Recreational marijuana legalized in 9 states & D.C.



- Medical marijuana legalized in 30 states.

- May 12, 2016: OSHA’s “Improve Tracking of Workplace Injury and Illness” Rule
  - “Clarifies” that an employer's procedure for reporting work-related injuries and illnesses must not deter or discourage employees from reporting
  - Rule prohibits employers from using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses
  - Blanket post-injury drug testing policies, per OSHA, deter proper injury and illness reporting

- OSHA: limit test in post-incident to:
  - Employee likely to have contributed, and
  - test can accurately tie impairment to drug use
  - objectively reasonable basis for belief that the drug use contributed to the injury
- Industries challenged rule in federal court
- Latest roll-back of rule does not revisit this

- Policy:
  - Consequences of a negative test
  - When an employee can be tested
  - Which drugs will be tested
  - Consequences for failure to appear at test
- Training for supervisors in how to detect workers under the influence
- Employee assistance programs
- Notification of employee's rights under OSHA, HIPPA, etc.
- Coordination with workers compensation

# Cell Phone Use In the Workplace



- Privacy, Trade Secrets (camera, microphones)
- Safety
  - Heavy machinery – distraction
  - Driving - distraction
  - Hearing as warning detection (back-up signals, overhead door signals, re-start up of machinery)
- Wage Hour
  - Off-hours use for work while clocked out
  - On-duty use for personal reasons

- Driving
  - No Distractions (including use of mobile device), or
  - Hands-free use only (meaning no mapping, texting, etc, even for work use)
  - Use for mapping, dialing, etc. while vehicle is stationary is permitted
  - No headphones
- At facility
  - No use while on duty (permitted during breaks, away from work area), or
  - For work use only (no camera or other recording)
  - No use for personal calls during on-duty hours
  - Appropriate content (even in break areas, off duty)

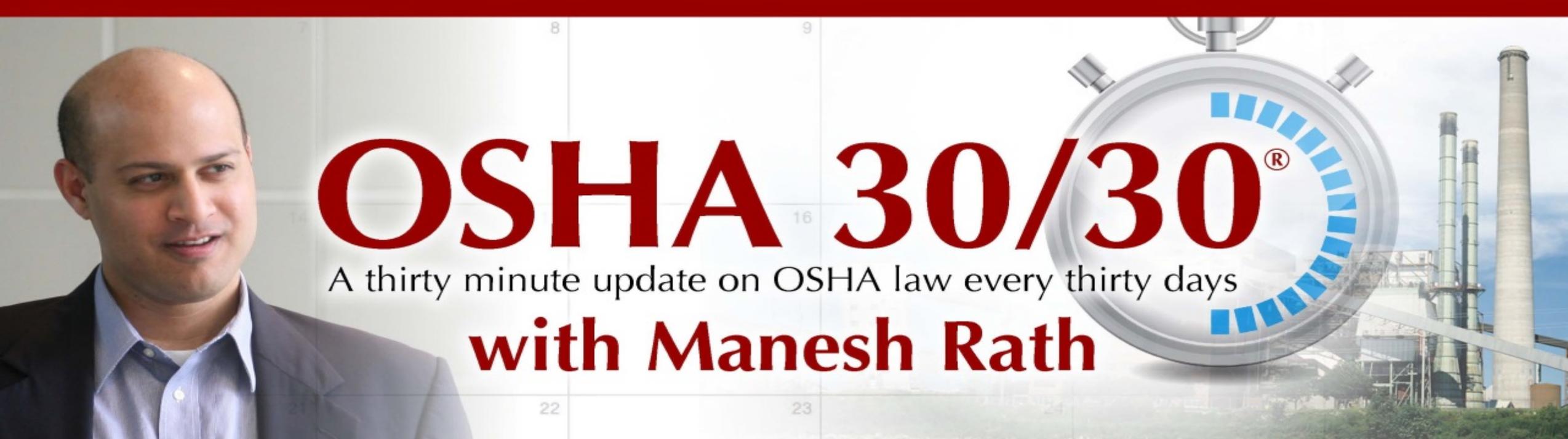
# COMPANY-ISSUED DEVICES

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- Tracking for vehicle use (EOBR, connected, GPS)
- Tracking for hours worked (connected to perimeter)
- No expectation of privacy (texts, email, internet usage)
- Wage Hour implications

- Training – attendance sheets
- Handbook and Orientation
- Acknowledgement of Policy
  - Facility-wide
  - When assigned mobile device
  - When assigned to a vehicle
- For company-issued devices
  - When assigned, no expectation of privacy
- Record of disciplinary actions



# OSHA 30/30<sup>®</sup>

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**with Manesh Rath**

**Please join us at  
1:00 PM Eastern U.S.  
Wednesday, October 24, 2018  
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# THANK YOU

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