

A Confirm
BioSciences Report

U.S. Drug Testing 2020: **Trends and Predictions**

Published January 2020

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CBD: A Game-Changer for Employers

On December 20, 2018, President Trump signed the 2018 U.S. Farm Bill into law — and within months, the drug testing landscape for employers underwent a seismic shift.

Hemp, a strain of cannabis once considered a controlled substance by the federal government, is now legal to grow commercially. As a result, CBD, a cannabinoid most often derived from the hemp plant, is legal as well. CBD doesn't instill a high like THC, the main reactive ingredient in marijuana. Instead, CBD has several therapeutic uses as an anti-inflammatory, a sleep aid and a pain reliever. Many people suffering from anxiety also report that CBD provides a calming effect.

The problem is many products infused with CBD, including tinctures, lotions, creams and beverages, aren't pure. One in five CBD products contain trace amounts of THC. The most recent research on the subject published in the *Journals of the American Medical Association (JAMA)*¹ found that, of 84 different CBD products purchased online from 25 different companies, 42.85% had more CBD than indicated on the label, 26.19% had less CBD than indicated and only 30.95% were accurately labeled. The researchers also found varying amounts of THC in 18 of the 84 products.

Because of this confusion, employees using CBD for legitimate purposes sometimes fail drug tests. Mislabeled or impure products and misleading information about the products are putting employees *and* employers at risk.

CBD is a prime example of the many changes affecting drug testing today. Laws, customs and regulations are all in a state of transition. CBD is legal at the federal level, but regulations governing CBD derived from cannabis vary from state to state. What's legal for an employer in one community or state may not be elsewhere.

Who should take responsibility for a positive THC test in the unregulated CBD industry? Employees are getting fired, and employers are often left on the defensive, when tests come back positive for THC use when none was intended. Workers never know if their "pure" CBD product is truly free of THC.

This report from Confirm BioSciences, a provider of comprehensive screening tools and solutions, discusses the current trends and issues in drug use and drug testing. It also describes new options open to employers to protect themselves, their employees, their customers and the public.

New Drug Laws Raise Questions

Drug testing today is a patchwork of requirements that vary greatly by industry, location, government agency, employer and employment status. In states where marijuana is legal for recreational use, companies still have the right to set drug policies that match the nature of their work.

People are bewildered. How can they be penalized by their employer for a positive THC reading, especially after their state legalized it recreationally or medically? Is it discriminatory for a prospective employer to pass on a candidate strictly on the basis of a positive THC drug test?

Making workplace decisions in such an environment is no easy task. It's difficult, for example, to set appropriate drug use policy in states where marijuana is legal medically, but not recreationally. In states where recreational use is legal, how much is acceptable? And how much time must pass before the person's workday begins?

Some companies in legalized states are no longer interested in a positive test. For other companies, it depends on the job description or the amount of time since ingestion. It's important to note that despite the changes brought about by the 2018 Farm Act, the use of marijuana in any form is still illegal according to U.S. statutes. Federal guidelines are still in effect for many occupations. Furthermore, drug use regulations must be followed for employees of the Federal Aviation Administration (FAA), the Department of Transportation (DoT), the Coast Guard and other agencies.

Legitimate Concerns Over Recreational Marijuana

In Colorado, one of the earliest states to legalize marijuana for recreational use, almost 30% of adults between 18 and 25 reported smoking marijuana in the past 30 days.² The situation is acute enough that many private companies in these states are moving away from marijuana testing altogether, especially where the workforce tends to be concentrated in a younger demographic.

Yet some companies are forced to continue THC screening. The effects of THC persist for up to 48 hours after intake; this can disqualify an employee for a work shift, especially in occupations where quick reflexes or mental acuity are required.

Legalized marijuana can also create hiring problems. Some candidates drop out of the hiring process preemptively at companies that prohibit marijuana use because of a potentially positive THC test. As a result, hiring executives at these firms must find significantly more candidates to cover their "drug losses."

Workplace Test Options: Past, Present and Future

At the federal level, drug testing requirements are set by the Substance Abuse and Mental Health Services Administration (SAMHSA). SAMHSA rules govern testing protocols for the DoT, FAA, Federal Housing Administration (FHA), Coast Guard and

other agencies. Many companies, even those not required to follow government mandates, follow SAMHSA testing standards.

Currently, urine and oral fluid testing are acceptable methods of drug testing under the latest SAMHSA guidelines. The addition of oral fluid testing, a newer option, permits federal agencies to choose between oral fluid and urine testing or to utilize both methods. The new guidelines have also prompted federal agencies that mandate drug testing in the private sector, such as the DoT, to develop their own oral fluid testing regulations.

SAMHSA projects up to 30% of all federal employee drug tests, and eventually 25-30% of all DOT- and NRC-mandated drug tests, will be conducted using lab-based oral fluid in four years.³ If the same transition estimate is applied to the nearly 40 million non-mandated workplace drug tests conducted annually, lab-based oral fluid testing could become a major force in the drug testing industry and is expected to make a significant market impact. Hair testing, an even more advanced testing method, is still in the data collection phase.

For employers not bound by federal mandates, hair and oral fluid tests have several advantages over urine testing. Chief among these is the elimination of tampering, as specimens can be taken directly and in the presence of testing staff. Hair and oral fluid samples are easily acquired and can be evaluated within 10 to 15 minutes. Should there be a positive result and the sample has to go to a lab for further testing, there is no chance for substitution or other form of cheating.

Urine tests, by contrast, require that the subject be ready and able to provide a sample. This can raise issues for individuals who have a difficult time providing a urine specimen. Additionally, if the person hasn't consumed liquids recently, it may take time before a sample can be supplied. The situation becomes even more challenging if the person reports to a testing lab close to closing time, as it may require a second visit and more time off from work.

Other plusses for hair and oral fluid testing include immediacy and longer lookbacks. Oral fluid testing can detect marijuana use in the first 14 hours (making it ideal for random or post-accident testing), and up to the past 48 to 72 hours for other substances. Hair testing can reveal virtually any form of common drug use as far back as 90 days. Urine testing, on the other hand, can only detect marijuana use over the prior three to 10 days. For other drugs the period can go as far back as 14 days, depending on the substance.

Since many companies aren't interested in whether a person has used marijuana or other substances in the past ten to twelve weeks, oral fluid testing can be an excellent choice. Not only does it reveal the most recent ingestion of marijuana or THC for companies concerned about worker or passenger safety, but it can screen for all substances during the period that employers are most concerned about.

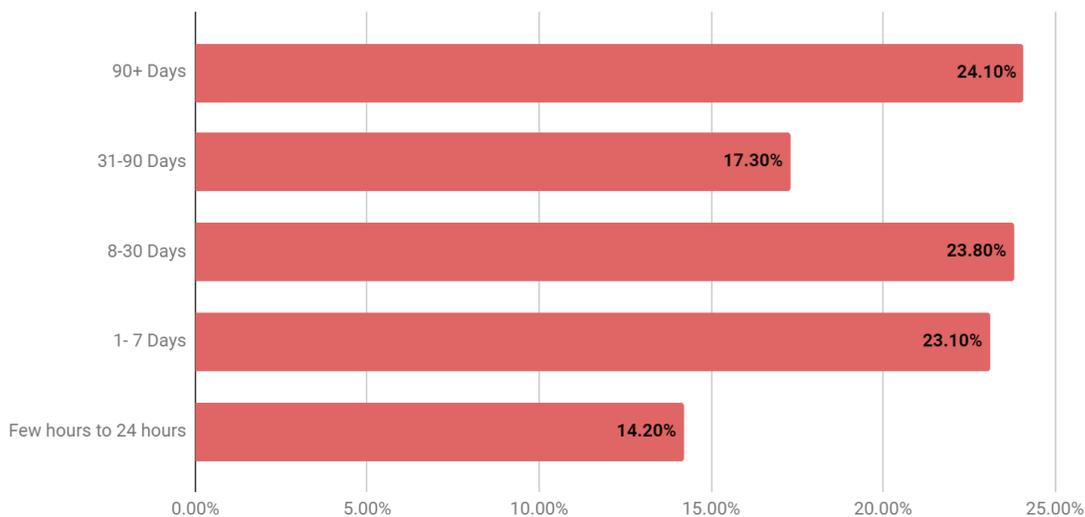
Despite their shorter track record in comparison to urine testing, hair and oral fluid test methods are admissible in most courts across the U.S. as evidence in wrongful termination, discrimination or criminal cases. Only Hawaii, Maine and Vermont prohibit oral fluid test results.

Range of Choices Provides Flexibility

When viewed together, urine, oral fluid and hair tests offer a powerful spectrum of screening alternatives to meet virtually any employment requirement. Considering the complexity of the workplace today, flexibility is important.

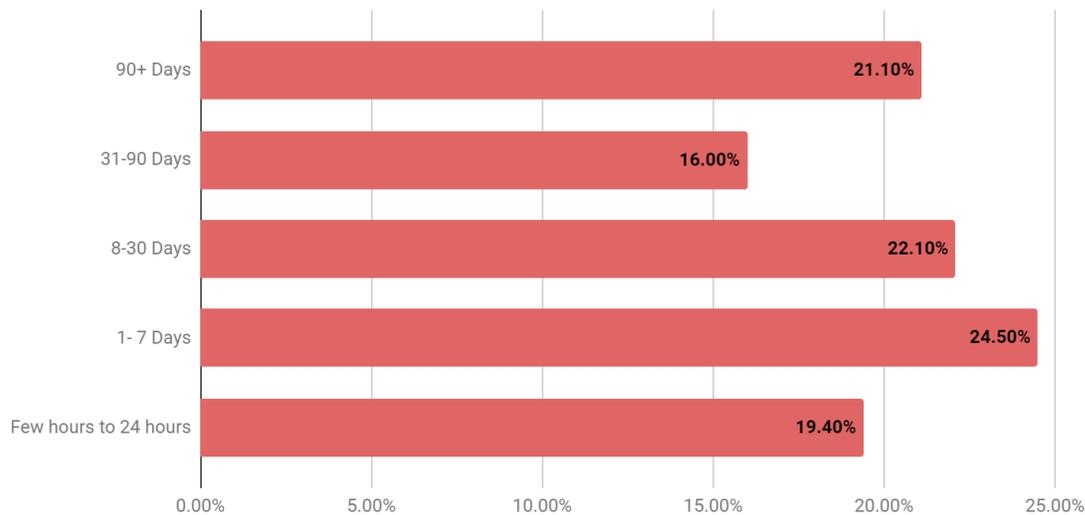
For example, at many workplaces urine testing is an insufficient choice due to its limited detection time. In a recent Confirm BioSciences study of 1,600 hiring and HR professionals, 41% of employers said they needed the ability to test new hires for drug use going back more than 30 days⁴:

If you were hiring a new employee, and you would do drug test to screen for potential drug abuse, how long back would you want the drug test you use to detect back in time?



The testing picture changes somewhat for current employees. Due to the change in laws for recreational and medicinal marijuana use, many employers want shorter detection windows. They need to ensure employees aren't under the influence of THC at work and yet don't want the detection window to be too long either, as it would potentially cover weekends and recreational use:

If you were drug testing an existing employee for suspicion of drug abuse on the job, how long back would you want the drug test you use to detect back in time?



It's notable that the opioid crisis and high rates of abuse for various prescription drugs cause the demand for longer windows of detection to remain high, even for current employees.

Importance of Staying Up to Date

It's clear that attitudes, as well as regulations, regarding cannabis are changing. The number of states legalizing marijuana for recreational and/or medicinal use is expected to increase in 2020 and beyond. Other laws are changing as well; in 2020, New York City and Nevada will begin preventing employers from eliminating job seekers due to marijuana use. Maine already has such a law on the books.

Testing for other drugs is also gaining in popularity among employers. Given the number of controlled substances in common use, companies are testing for K2, Spice, Fentanyl, synthetic hallucinogens, synthetic PCP and many other drugs. The opioid crisis may still be plaguing the country, but other prescription drugs, including barbiturates, benzodiazepines, codeine, OxyContin, Percocet, Vicodin and amphetamines, are abused on a more regular basis.

In a legal environment that changes almost daily, employers need to stay up to date. They also need to tailor their testing to suit their particular circumstances. Speed, regulatory requirements, cost, workplace requirements and tampering risks are all important. Fortunately, there are practical and accurate testing options today that cover almost any business need. Hundreds of combinations are available — even within a single testing format such as oral fluid, screening panels exist for multiple substances.

With all the testing possibilities available, it's important to keep inertia out of the equation. An attitude of "we've always done it this way" can prevent the implementation of a better policy, one that more closely matches the company's current legal, ethical and business situation. The best advice in an era of turbulent change is to stay informed, know your options and commit to adapting quickly. Across the U.S. and around the world, drug laws are in a state of transition. For employers, a new era of responsibility is just beginning.

¹Bonn-Miller MO, Loflin MJE, Thomas BF, Marcu JP, Hyke T, Vandrey R. Labeling Accuracy of Cannabidiol Extracts Sold Online. *JAMA*. 2017;318(17):1708–1709. doi: <https://doi.org/10.1001/jama.2017.11909>

²Smith R, Hall KE, Etkind P, Van Dyke M. Current Marijuana Use by Industry and Occupation—Colorado, 2014-2015. *MMWR Morb Mortal Wkly Rep* 2018;67:409-413. DOI: <http://dx.doi.org/10.15585/mmwr.mm6714a1>

³"Mandatory Guidelines for Federal Workplace Drug Testing Programs-Oral/Fluid." *Federal Register*, The Department of Health and Human Services, 25 Oct. 2019, <https://www.federalregister.gov/documents/2019/10/25/2019-22684/mandatory-guidelines-for-federal-workplace-drug-testing-programs-oralfluid>.

⁴June 2019 Confirm BioSciences study