

WHITEPAPER



# ARE YOUR EMPLOYEES UNDER THE INFLUENCE?

Developing and Maintaining a  
Compliant Drug & Alcohol Program





# DEVELOPING AND MAINTAINING A COMPLIANT DRUG AND ALCOHOL PROGRAM

The cost of employee substance abuse adds up quickly. Absenteeism, productivity, turnover rates, and health care and workers' compensation claims are all affected, draining profits from your business. There's a social impact as well; the National Institute on Drug Abuse estimates that the fallout from substance abuse costs the nation more than \$500 billion each year due to costs related to health care, lost work productivity, and crime.

In addition, substance abuse can have devastating consequences when it comes to safety. Imagine the emotional impact of a workplace accident or the damage that an impaired driver could inflict on the general public.

Companies that have experienced this can tell you firsthand about the potential aftermath: a lawsuit, penalties, and a publicity nightmare.

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With so much at stake, it is vital for your company to detect and deter drug and alcohol abuse among employees. The details aren't always easy to navigate; a number of laws and regulations impact an organization's substance abuse policy and the way its program is run. Because of this, staying up-to-date on relevant laws is a must, as state drug testing laws and evolving state marijuana legalization may alter an employer's responsibilities. If you have employees who drive commercial motor vehicles (CMVs), Federal Motor Carrier Safety Administration (FMCSA) drug and alcohol regulations must be followed.

To help you handle the complexities of a drug and alcohol program, and manage substance abuse issues in the workplace, we've answered some commonly asked questions associated with drug and alcohol program management.

## DO I NEED A SUBSTANCE ABUSE POLICY?

A substance abuse policy is a good idea for all employers, but it's a requirement in only some situations:

- If you have transportation employees in safety-sensitive positions (such as CMV drivers who are required to have a commercial driver's license (CDL)), you need to have a drug and alcohol testing policy.
- If you need to comply with the Drug-Free Workplace Act of 1988 because you have a covered federal contract or grant, you need to have a policy statement that lets employees know what is prohibited and what will happen if they violate the policy.

A policy is recommended for all employers, however, because it lets workers know what is expected of them. In addition, if a worker is fired because of substance abuse, an employer can point to the policy violation as a reason for termination. This may be significant if an employer is contesting an unemployment insurance or workers' compensation claim.



## IS A SUBSTANCE ABUSE POLICY THE SAME AS A DRUG-FREE WORKPLACE POLICY?

It can be. Many employers have a policy that prohibits illegal drug use and regulates alcohol consumption. It can be referred to a substance abuse policy, a drug-free workplace policy, or a drug and alcohol policy.

## WHEN IS A DRUG-FREE WORKPLACE A REQUIREMENT?

Employers with a federal contract or grant of \$100,000 or more are required to have a drug-free workplace under the Drug-Free Workplace Act of 1988. Employers covered by the act must prohibit the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

An employer can establish consequences for employees who break the rules.

For example, an employee who fails to follow a drug-free workplace policy could face suspension or termination, or could be required to attend a drug abuse rehabilitation program.

While most private employers are not required to have a drug-free workplace there is nothing that prohibits an employer from having one, and having a drug-free workplace is certainly an advantage for any employer from a safety and productivity perspective.

## CAN I STILL HAVE A DRUG-FREE WORKPLACE IF MY STATE HAS LEGALIZED MEDICAL MARIJUANA?

Yes, in all states an employer may prohibit the use of marijuana in the workplace and can require that employees not be under the influence of the drug.

In addition, it is not acceptable for transportation employees who fall under federal drug and alcohol testing regulations to use medical marijuana. Under federal regulations, the use of medical marijuana is not a valid reason for a positive drug test result for transportation employees.

In states where medical marijuana is legal, an employer may have to be careful with restrictions on hiring medical marijuana users or the way a positive test for marijuana is handled.

Some state laws prohibit discrimination against a person with a valid medical marijuana card, or against a person who uses medical marijuana under state law. In those states, a blanket prohibition against hiring medical marijuana users, or a policy requiring termination after a positive marijuana test, could be problematic. An employer may need to consider whether or not an accommodation can be made for the employee's marijuana use outside of work hours. However, an employer may require that all employees be sober at work.

## WHAT IF RECREATIONAL MARIJUANA IS LEGAL IN MY STATE?

An employer does not need to make any exceptions to a substance abuse policy for recreational marijuana use. Marijuana remains an illegal drug under federal law, and an employer may treat a positive test for recreational marijuana as a positive test for an illegal drug.

## MAY I TEST ALL EMPLOYEES FOR ILLEGAL DRUGS?

Yes, but state and federal laws need to be considered.

Some states place restrictions on when tests can be conducted. For example, random tests for illegal drugs are not allowed in California in most situations. An employer would reasonably need to suspect drug use before testing an employee for drugs.



AN EMPLOYER ***DOES NOT NEED TO MAKE ANY EXCEPTIONS*** TO A SUBSTANCE ABUSE POLICY FOR RECREATIONAL MARIJUANA USE.

Other states regulate the type of testing that can be done, and may prohibit hair or saliva tests. In certain states, tests must be conducted in a lab rather than at the worksite.

If you are testing CMV drivers, the U.S. Department of Transportation (DOT) regulations must be followed.

## WHAT REGULATIONS DO WE FOLLOW FOR DOT TESTING?

You must look at the following parts in 49 CFR (Code of Federal Regulations) in order to fully understand your regulatory obligations:

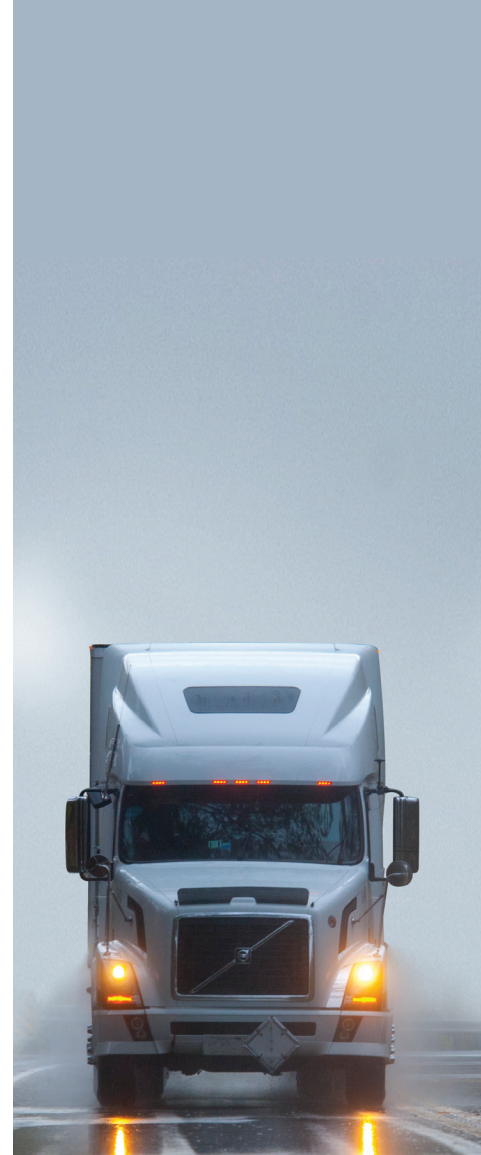
- Part 40: The DOT compiled testing and return-to-duty procedures for all modes (i.e., highway, rail, maritime, air, pipeline, transit).
- Part 40 applies to employers, collection sites, labs, medical review officers, and substance abuse professionals. It is used for consistency in performing and processing drug and alcohol tests and returning a covered employee back to a safety-sensitive position.
- Part 382: Each agency under the DOT umbrella has mode-specific regulations on how to carry out testing. For example, the highway mode — which is regulated by the Federal Motor Carrier Safety Administration (FMCSA) — uses Part 382 to explain who is covered by the regulation, reasons for testing, prohibitions, policies, training, recordkeeping, and so forth. This information is unique to the agency.

## WHO IS SUBJECT TO DOT TESTING REQUIREMENTS?

FMCSA links a safety-sensitive function to the operation of a vehicle used in commerce, whether interstate or intrastate, that meets one of the following criteria:

- Has a Gross Combination Weight Rating (GCWR) or Gross Combination Weight (GCW) of 26,001 pounds or more, whichever is greater, and includes a towed unit(s) with a Gross Vehicle Weight Rating (GVWR) or Gross Vehicle Weight (GVW) of more than 10,000 pounds, whichever is greater;
- Has a GVWR or GVW of 26,001 pounds or more, whichever is greater;
- Is designed to transport 16 or more passengers, including the driver; or
- Is of any size and is used in the transportation of hazardous materials required to be placarded.

Basically, this CMV definition from §382.107 mimics the requirement for a commercial driver's license (CDL). In other words, any driver and motor carrier operating a CDL vehicle is subject to Part 382.



## ARE YOU SUBJECT TO DOT TESTING?

- ✓ GCWR OR GCW OF 26,001 POUNDS OR MORE
- ✓ GVWR OR GVW OF 26,001 POUNDS OR MORE
- ✓ DESIGNED TO TRANSPORT 16 OR MORE PASSENGERS
- ✓ USED TO TRANSPORT HAZARDOUS MATERIALS OR IS PLACARDED

## ARE NON-CDL CMV DRIVERS SUBJECT TO DOT TESTING?

Although non-CDL CMV drivers are subject to the bulk of the federal safety regulations, they are not subject to DOT testing. However, non-CDL CMV drivers do have drug and alcohol restrictions placed on them in the safety regulations.

According to §392.4, the driver cannot use drugs — even if legally prescribed or purchased over the counter — that affect his or her ability to safely operate a CMV.

In addition, the non-CDL CMV driver has prohibitions in regard to alcohol. He or she cannot be under the influence of alcohol while on duty or consume alcohol within four hours of coming on duty.

## ARE OCCASIONAL DRIVERS SUPPOSED TO BE IN OUR TESTING PROGRAM?

Yes, your company must include anyone operating a CDL CMV under your authority in its testing program.

This includes part-time, occasional, seasonal, and intermittent drivers and leased owner-operators. Individuals at your company who are not drivers for human resources purposes but occasionally operate a CDL CMV are subject to DOT testing rules. Examples might include mechanics and managers.

## ARE ALL CDL DRIVERS SUBJECT TO DOT TESTING?

Not necessarily. A driver who holds a CDL but is never called upon to operate a CDL CMV does not qualify. Your employee should not be placed in your DOT testing program based on licensing alone.

If this individual may be called upon to be a fill-in driver, however, you should include him or her on your driver roster and in your DOT testing program.

## WHAT IF A TEST IS POSITIVE?

A driver or another employee who tests positive for alcohol or illegal drugs can be subject to discipline or termination.

The action that's taken after a driver tests positive will depend on state law, as well as your workplace policy. In some states an employee must be offered the opportunity to attend a rehabilitation program the first time he or she tests positive.

In all states, an employer has the option of offering the opportunity to complete a rehabilitation program in lieu of termination. The employee can be referred to the services through your employee assistance program (EAP), and the follow-up testing could be conducted for a period of time after the employee returns to work.

A CMV driver who tests positive or refuses a DOT-required test is subject to:

- An evaluation by a substance abuse professional,
- Prescribed education/treatment,
- A return-to-duty test, and
- At least six follow-up tests in the first 12 months after returning to duty.

The CMV driver may be subject to follow-up testing for up to a total of five years.

## WHAT SHOULD I DO NOW?

Make sure your workplace substance abuse policy is in compliance with all applicable state and federal laws. If you are in a state with a medical marijuana law that has anti-discrimination provisions, consider accommodations that may need to be made for medical marijuana patients. Laws are changing constantly, so it is important to stay on top of them.

In addition, ensure that workers are aware of your substance abuse policy and your workplace expectations. Your policy should reflect your company's culture and address safety responsibilities, and needs to comply with state drug testing and marijuana laws. If you have drivers who fall under DOT regulations or if you are required to have a drug-free workplace, your policy must follow federal regulations.

Training and education are important as well. Supervisors should be trained to spot the signs of substance abuse and should know what to do if an employee exhibits them. It can be uncomfortable to confront a person who may be under the influence, but a supervisor should be ready to take the necessary steps.

Managing a DOT testing program involves a variety of tasks, often performed collectively by multiple individuals at the company.

Employees and/or managers involved with the implementation of your program must know their roles, the safety regulations, and company-specific policies. If someone does not know the requirements or lets testing slide, you have a greater risk of an impaired driver — a risk that is best not taken.

A solid policy and program can help you manage the complex issue of workplace substance abuse. Once created, your program shouldn't be ignored, as constantly changing regulations and shifting attitudes toward marijuana require consideration. Everyone benefits from a workplace that's safe, productive, and drug-free. Paying attention to substance abuse issues and regulations can help keep things running smoothly.

# A DRIVER TESTS POSITIVE — NOW WHAT?

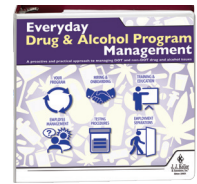
- ✓ AN EVALUATION
- ✓ EDUCATION/TREATMENT
- ✓ RETURN-TO-DUTY TEST
- ✓ FOLLOW-UP TESTS

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## Everyday Drug & Alcohol Program Management

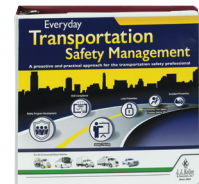
This comprehensive "how-to" publication serves as your complete drug and alcohol program resource by providing valuable guidance, industry best practice examples, and detailed program management content. This publication addresses common concerns faced by employers in all industries and also provides important information needed by DOT-covered employers, who have additional drug and alcohol testing requirements. Updates keep you on top of changing laws, including those relating to marijuana, medical marijuana, and drug and alcohol testing. Includes a one-year subscription to our Online Edition, which offers our popular Expert Help feature — direct access to J. J. Keller® regulatory experts for answer to specific compliance questions.



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## Alcohol & Drug Testing: What Drivers Need to Know

Using a conversational tone that speaks directly to drivers, this program discusses the specific rules under Parts 40 and 382 of the FMCSRs, including key definitions, prohibited conduct, the circumstances under which drivers will be tested. Details the six types of required testing (pre-employment, post-accident, random, reasonable suspicion, return-to-duty, and follow-up), and emphasizes why drivers must comply with alcohol and drug testing requirements. Available in DVD, Pay Per View, Video Training Book and Online Course formats.



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Terri joined J. J. Keller & Associates in 2011. As an editor in the Human Resources Editorial Department, she specializes in information about drug and alcohol testing, marijuana laws, and employee wellness. She also oversees the editorial content of the labor law poster line. She speaks about workplace drug and alcohol issues and presents webcasts on substance abuse. Terri has PHR and SHRM-CP designations.



## KATHY CLOSE, J. J. KELLER & ASSOCIATES, INC.

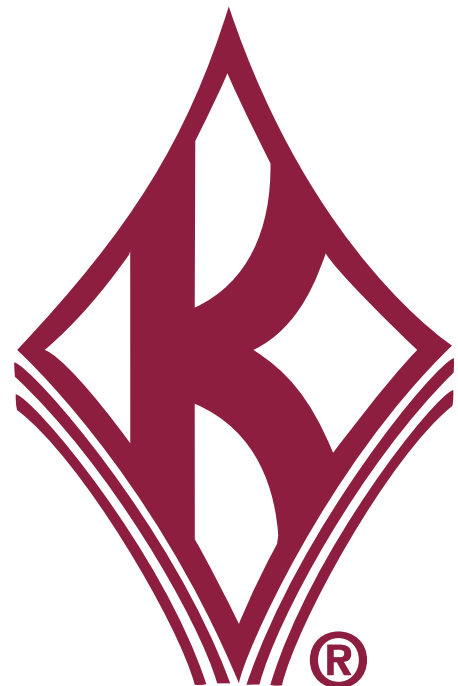
Kathy joined J. J. Keller & Associates, Inc. in 1999, serving as a driver's qualification file auditor, reviewing clients' compliance with 49 CFR Part 391, and as a third-party administrator of DOT drug and alcohol testing programs for motor carriers. Kathy is currently an editor in Transportation Publishing, Editorial Resources, with expertise in the Compliance, Safety, Accountability (CSA) enforcement model, transportation security, DOT drug and alcohol testing, and driver qualification.



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