



## The Impact of Worker Impairment on the Job

**TSCOTA**  
TRAINING ACADEMY

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## Total Safety Consulting, LLC - Update



201.437.5150 | [totalsafety.org](http://totalsafety.org)  
 A GALLAGHER BASSETT COMPANY

- ❑ After 25 years Total Safety Consulting, LLC (TSC) and its affiliated companies TSC have been acquired by Gallagher Bassett a Division of Arthur J. Gallagher & Co.
- ❑ TSC will become part of their new Technical Services Group. TSC will have access to significant additional resources, locally, geographically, technically that can help us continue to develop innovative solutions for their clients' safety management, loss control and risk management needs.
- ❑ This strategic alignment expands our services across environmental, health and safety, emergency response and remediation management, property adjusting, cost control systems and full-service claims investigations, including field handling, desktops and surveillance.
- ❑ For our clients nothing will change; the same teams will continue to be on site in the Site Safety Management and Loss Control Engineering, MedTech, Safety Supplies, Training Academy operations will continue business as usual.

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## Learning Outcomes



After completing this course, students will be able to:

- Understand how workplace policies and procedures are affected by legalization of recreational cannabis use
- Recognize the cognitive impairment, the physical, behavioral and performance cues on the jobsite
- Define reasonable suspicion and the role of the employer in identifying potentially impaired employees
- Learn about recommended solutions to address impairment in the workplace including the introduction of an application-based solution for identifying impairment due to ANY cause, including drugs, alcohol, fatigue, illness, chronic condition or injury.

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## Cannabis Legalization By State



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## NYS Legalizes Recreational Marijuana



- The [Marihuana Regulation and Taxation Act](#) amends section 201-d of the New York Labor Law (NYLL), which **prohibits discrimination because of an individual's lawful outside work activities**, to include cannabis use in accordance with state law.
- There is an **interplay with Federal Law** (things like the Federal Controlled Substance Schedule, Drug Free Workplace Act)
- [Colorado Supreme Court in Coats v Dish Network](#) (seems to be the **best precedent** right now on the cannabis issue) held an employer's Federal right to drug test/remove workers outweighs an employee's State right to recreationally use cannabis under state law.
- I would expect most NYS employers do not want the expense of litigating cannabis discrimination claims
  - **NYS Courts might also find differently from Colorado**
- Current White House administration did make a campaign promise to decriminalize cannabis under federal law (could be done administratively by removing cannabis from the Federal Controlled Substance Schedule).

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## Marijuana Legalization & the Workplace



- Workers are prone to alcohol and drug abuse as shown in a study by the Substance Abuse and Mental Health Services Administration (SAMSA):

- ✓ Heavy alcohol use: 1) mining (17.5%); 2) construction (16.5%)

- ✓ Substance abuse: 1) accommodations (16.0%); 2) construction (14.3%)

- **Issues with current testing**

- ✓ **Proxy testing** in blood, breath, saliva, urine, or hair is
  - ✓ Expensive, time-consuming, invasive and narrowly focused
  - ✓ For certain drugs, like cannabis, is ineffective because bodily presence of drug correlates only very narrowly with impairment
  - ✓ Cannot test for fatigue, illness, chronic condition or injury such as concussion

- **Standard Field Sobriety Tests** are imprecise and subjective

### In Brief

- Combined data from 2008 to 2012 indicate that an annual average of 8.7 percent of full-time workers aged 18 to 64 used alcohol heavily in the past month, 8.6 percent used illicit drugs in the past month, and 9.5 percent were dependent on or abused alcohol or illicit drugs in the past year.
- The highest rates of past month heavy alcohol use among full-time workers aged 18 to 64 were found in the mining (17.5 percent) and construction industries (16.5 percent).
- The highest rates of past month illicit drug use were found in the accommodations and food services industry (19.1 percent).
- The workers in the accommodations and food services industry (16.9 percent) had the highest rates of past year substance use disorder.

Substance abuse by industry (2012). Source: [SAMSA](#)

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## Current Legal Uses of Marijuana in NYS



The New York penal law is immediately amended to expressly declare the following "lawful" for people aged 21 or older:

- Possessing, displaying, purchasing, obtaining, or transporting up to 3 ounces of cannabis and up to 24 grams of concentrated cannabis.
- Transferring, without compensation, to a person 21 years of age or older, up to 3 ounces of cannabis and up to 24 grams of concentrated cannabis.
- Using, smoking, ingesting, or consuming cannabis or concentrated cannabis (unless otherwise prohibited by state law).
- Possessing, using, displaying, purchasing, manufacturing, transporting, or giving to any person 21 years of age or older cannabis paraphernalia or concentrated cannabis paraphernalia.
- Assisting another person who is 21 years of age or older, or allowing property to be used, in any lawful acts listed above.
- There are some restrictions on cannabis use, such as smoking or vaping it in most public places and automobiles.

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## Protections from Employer Discrimination for Legal Marijuana Use in NYS



- Section 201-d of the New York Labor Law now specifically protects an employee from job discrimination based on the *"legal use of consumable products, including cannabis in accordance with state law."*
- The protection extends to use that is all of the following:
  - (a) outside of work hours,
  - (b) off the employer's premise, and
  - (c) without the use of the employer's equipment or other property.

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## Employer Exceptions to the Employee Discrimination Protections



An employer does not violate section 201-d of the Labor Law based on employee cannabis use when:

- The **employer's actions were required by state or federal statute**, regulation, ordinance, or other state or federal government mandate;
- The **employee is impaired** by the use of cannabis, meaning the employee manifests specific articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position, or such specific articulable symptoms interfere with an employer's obligations to provide a safe and healthy workplace, free from recognized hazards, as required by state and federal occupational safety and health law; or
- The **employer's actions would require** such employer to commit any act that would cause the **employer to be in violation of federal law** or would result in the **loss of a federal contract or federal funding**.

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## Challenges



- Testing
  - Lack of biometric test for impairment.
    - Cannabis binds to proteins/lipids and can remain in the body for up to 45 days.
    - People metabolize marijuana differently.
  - Testing impairment → behavioral test.
    - "specific articulable symptoms"
    - Objective standards?
  - Proxy testing in blood, breath, saliva, urine, or hair is expensive, time-consuming, invasive and narrowly focused
  - Proxy testing for certain drugs, like cannabis, is ineffective because bodily presence of drug correlates only very narrowly with impairment
  - Proxy tests cannot test for fatigue, illness, chronic condition or injury such as concussion
  - Standard Field Sobriety Tests are imprecise and subjective
- Strict liability (LL240/241) - Impairment is not a defense under the scaffold law.

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## Impairment & Safe Workplace – Regulatory and Insurance



OSHA - General Duty Clause § 5(a)(1)- OSH Act of 1970 (29 USC § 654) °

- Each employer shall furnish to each of employee a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees.

NYC DOB - General Duty Clause

- 3301.1.1 – Responsibility for Safety: Nothing in this chapter shall be construed to relieve persons engaged in construction or demolition operations from complying with other applicable provisions of law, nor is it intended to alter or diminish any obligation otherwise imposed by law on any party engaged in a construction or demolition operation...to engage in sound design and engineering, safe construction or demolition practices ... to act in a reasonable and responsible manner to maintain a safe construction or demolition site.
- Insurance Considerations - Workers Compensation Policies, General Liability Policies & Auto Policies potentially impacted.

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**Dawid Ditrich**  
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**OSHA 500 & 501 Authorized Trainer**

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## Consumption of Marijuana and Related Products



- Marijuana and related products can be consumed in several ways, including:
- Inhalation (either by smoking or vaporizing) of dried plant matter or concentrates (such as hashish or kief)
- Oral ingestion (edibles, capsules, infusible oils)
- Sublingual ingestion (lozenges)
- Topical application (lotions, salves, oils).

### METHOD OF CONSUMPTION

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# INHALATION

### WATER PIPES

- Many sizes and designs
- Less carcinogenic compounds
- Water acts as a filter

### JOINTS

- Inexpensive
- Popular
- Carcinogenic compounds in smoke
- Increase risk of bronchitis

### VAPES

- No harmful products in smoke
- Minimal odor
- High cost

### HAND PIPES

- Best option for smoking
- Better taste
- Smaller doses

### DABBING

- Cost effective for high amount of THC
- Higher level of toxic substances
- Not a good option for newbies

### BLUNTS

- Flavored options

### PENS

- Small size
- No odor
- Huge variety
- Disposable
- Ready to use

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## Factors Influence Intoxication

- Factors influence intoxication onset, intensity, and duration, include: method of consumption, type of marijuana product consumed, product potency, and user characteristics
- Smoking often causes almost immediate intoxication, with impairment typically lasting 2 to 4 hours
- Intoxication onset is more delayed for other methods, sometimes up to two hours for edibles – and impairment may last much longer



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## Articulate Symptoms

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Physical, Behavioral, Speech  
and Performance Cues Related  
to Marijuana Impairment



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## Effects of Marijuana Consumption Can Vary

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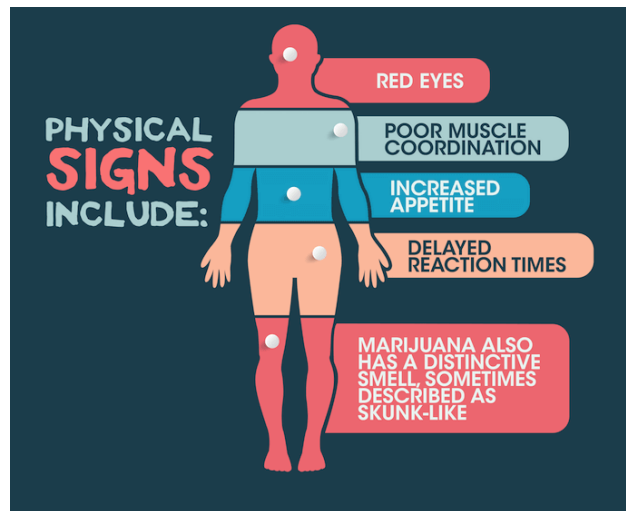


- Marijuana can affect users differently, depending on a variety of factors, including user tolerance
- Common experiences while intoxicated include feelings of euphoria and relaxation
- Some may also experience heightened sensory perceptions and altered perceptions of time

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## What are specific articulable symptoms of impairment?



Physical Symptoms



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## SIGNS OF USE

COMMON PHYSICAL SIDE EFFECTS ASSOCIATED WITH MARIJUANA USE:

- PANIC.
- ANXIETY.
- POOR MUSCLE AND LIMB COORDINATION.
- DELAYED REACTION TIMES AND ABILITIES.
- AN INITIAL LIVELINESS.
- INCREASED HEART RATE.
- DISTORTED SENSES.
- RED EYES.

Side Effects



## Increased Risks On Construction Jobsites



- THC altering motor skills such as depth perception, muscle coordination and balance affects work performance
- Accident risk increases when these impairments are combined with operating heavy machinery or working on scaffolding
- Effect is multiplied when combined with risks associated with fall hazards, power tools, and potentially dangerous materials

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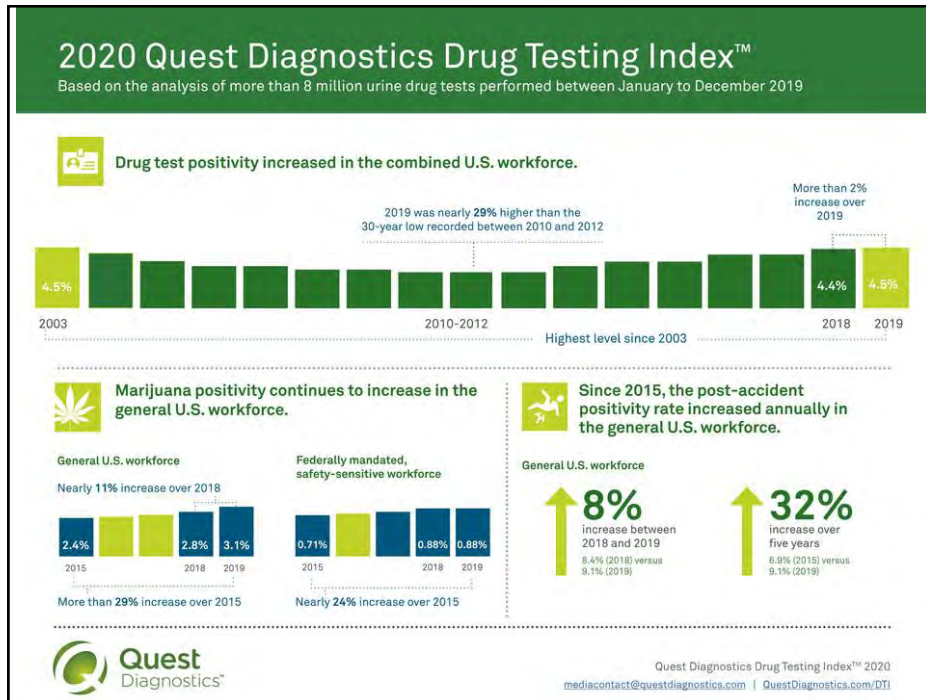
## Workers Under the Influence of Marijuana

Based on National Institute on Drug Abuse(NIDA) study:

- 55% more industrial accidents
- 85% more injuries
- 75% greater absenteeism rate



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## Safe Levels?

The National Safety Council (NSC) released a position statement in 2019 stating that “cannabis impacts psychomotor skills and cognitive ability” and “there is no level of cannabis use that is safe or acceptable for employees who work in safety-sensitive positions”



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## State Legalization Laws



- Marijuana laws are changing at a rapid pace across all 50 states, making things a bit confusing at times
- States such as NY and VA introduced restrictions on an employer's ability to discipline or terminate employees for using marijuana, as well as
- States also limit employers' ability to refuse to hire a prospective employee for consuming the drug
- It is now unlawful for employers to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion, or terms, conditions or privileges of employment because that individual uses cannabis as permitted under state law

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## State Legalization Laws



- Similar approach to treating workers intoxicated with marijuana as with alcohol
- BIG DIFFERENCE – you can test effectively for alcohol but not for cannabis use
- Managers and supervisors must identify specific and articulable symptoms of cannabis intoxication
- Symptoms must be linked with a decrease in the employee's job performance or
- Interference with employer's obligation to provide safe and healthful workplace

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## Bottom Line

In most situations, employer is allowed to treat cannabis and alcohol in similar fashion:

- ✓ Can be excluded from workplace;
- ✓ Can prohibit employees from being impaired at work and during work hours; but
- ✓ CANNOT terminate for legal, off-duty use



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## Americans With Disabilities Act (ADA) of 1990



- Physical symptoms that are commonly associated with intoxication—slurred speech, disorientation, or a lack of coordination—can also be the result of a serious physical disability or medical condition, such as diabetes, low blood sugar, or mental illness
- Individuals with these conditions are protected under the provisions of the ADA
- Singling them out for testing or disciplinary action could result in charges of discrimination

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## Civil Rights Act of 1964



- Prohibits private employers with 15 or more employees from discriminating against individuals on the basis of race, sex, religion, or nationality
- Treat all workers equally and avoid singling out any particular racial, ethnic, or gender group for testing or disciplinary action
- Produce a program that is culturally competent, fairly enforced, and sensitive to the needs of all employees.

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## FMLA and NRLA



- **FMLA** - allows employees unpaid, job-protected leave because of their own serious health condition or to care for a spouse, child, or parent who has a serious health condition (public agencies and to private employers with more than 50 workers)
- Under FMLA employer cannot demote, fire, or refuse promotion to an employee simply because that employee takes 12 weeks off for treatment of a substance use disorder
- **NRLA** - Under NRLA, any drug-testing program affecting unionized workers must be negotiated and agreed on with the union through a formal collective bargaining process

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## What is Reasonable Suspicion?



Set of circumstances that indicate a reason to conduct an investigation or assessment of an employee's fitness for duty, or to explore possible explanations for an employee's conduct, actions or appearance

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## Reasonable Suspicion – Supervisor's Role in Identifying Potentially Impaired Employees



- Suspicion based on observations of individual employee
- Has to be more than a hunch. Cannot be based on "gut feeling", based on dress, ethnicity, age or occupation
- Reasoned conclusion from objective observation of individual
- Don't need to be "drug recognition expert" to make sound, effective decisions about reasonable suspicion testing
- Not expected that supervisor be able to establish "probably cause", or provide evidence that employee is impaired
- Supervisor's responsibility is to be alert to changes in the employee's behavior and/or appearance, not to a specific set of symptoms associated with each drug or drug class

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## Questions to Consider



- Does unusual behavior appear to be taking place (for example, illegal activity or policy violations)?
- What specific behavior is visible?
- Does the situation involve an individual employee or a group?
- Are reliable witnesses available?
- What are the physical dangers of taking or not taking action?

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## Questions to Consider



- Is the situation serious enough to call security, law enforcement, or 911?
- Is there a specific policy that applies to the situation?
- Is it necessary to call in expert consultation with human resources, an EAP, or security?
- Does the situation call for reasonable-suspicion testing?

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## Reasonable Suspicion - Investigating and Documenting Employee Impairment



- Immediately upon notice of this type of concern, the supervisor should go to this employee's work area for firsthand observation.
- Firsthand observations should be made by the employee's immediate supervisor and one other person (preferably another supervisor).
- This second observer should perform his or her own firsthand observation of the employee, either at the employee's work site or during the supervisor's meeting with the employee

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## Reasonable Suspicion - Documenting Observations



- Both observers should clearly [document their observations](#).
- Be as specific as possible in your description, but do not attempt to diagnose the situation.
- Observations may include references to:
  - Odors (smell of alcohol, body odor or urine).
  - Movements (unsteady, fidgety, dizzy).
  - Eyes (dilated, constricted, watery, involuntary eye movements).
  - Face (flushed, sweating, confused or blank look).
  - Speech (slurred, slow, distracted
  - mid-thought, inability to verbalize thoughts).
  - Emotions (argumentative, agitated, irritable, drowsy).
  - Actions (yawning, twitching).
  - Inactions (sleeping, unconscious, no reaction to questions).

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### Reasonable Suspicion Checklist

(The following checklist should be completed when a manager or supervisor suspects drug or alcohol use based on the physical appearance and behavior of the employee. Also completing the checklist should be all other managers or supervisors who witnessed the employee being unfit for duty.)

#### PART 1: EMPLOYEE INFORMATION

Employee Name: \_\_\_\_\_

Employee Job Title: \_\_\_\_\_

Observation Date: \_\_\_\_\_

Observation Time (indicate a.m. or p.m.): \_\_\_\_\_

Location: \_\_\_\_\_

#### PART 2: OBSERVATIONS

(Place a **checkmark** next to any of the following observations exhibited by the employee.)

##### PHYSICAL

##### **Walking:**

\_\_\_\_ Holding on; \_\_\_\_ Stumbling; \_\_\_\_ Unable to walk; \_\_\_\_ Unsteady; \_\_\_\_ Staggering;  
\_\_\_\_ Swaying; \_\_\_\_ Falling; \_\_\_\_ Other (describe) \_\_\_\_\_

##### **Standing:**

\_\_\_\_ Swaying; \_\_\_\_ Feet wide apart; \_\_\_\_ Unable to stand; \_\_\_\_ Rigid; \_\_\_\_ Staggering;  
\_\_\_\_ Sagging at knees; \_\_\_\_ Dizziness; \_\_\_\_ Other (describe) \_\_\_\_\_

##### **Movements:**

\_\_\_\_ Fumbling; \_\_\_\_ Jerky; \_\_\_\_ Nervous; \_\_\_\_ Slow; \_\_\_\_ Normal; \_\_\_\_ Hyperactive;  
\_\_\_\_ Reduced reaction time; \_\_\_\_ Not following tasks; \_\_\_\_ Diminished coordination;  
\_\_\_\_ Tremors; \_\_\_\_ Other (describe) \_\_\_\_\_

##### **Eyes:**

\_\_\_\_ Bloodshot; \_\_\_\_ Watery; \_\_\_\_ Droopy; \_\_\_\_ Glassy; \_\_\_\_ Closed;  
\_\_\_\_ Dilated/Constricted Pupils; \_\_\_\_ Other (describe) \_\_\_\_\_

##### **Face:**

\_\_\_\_ Flushed; \_\_\_\_ Pale; \_\_\_\_ Sweaty; \_\_\_\_ Other (describe) \_\_\_\_\_

##### **Breath:**

\_\_\_\_ No alcoholic odor; \_\_\_\_ Faint alcoholic odor; \_\_\_\_ Alcoholic odor; \_\_\_\_ Chemical odor;  
\_\_\_\_ Sweet/pungent tobacco odor; \_\_\_\_ Heavy use of breath spray;  
\_\_\_\_ Other (describe) \_\_\_\_\_

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## Meeting with the Employee



- Based on documented observations and assessment
- A witness should be present at this meeting
- Additional personnel may also be necessary to provide security in the event that the employee becomes unreasonable or violent

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## Supervisor's Role in Reasonable Suspicion



- Supervisor should not accuse an employee of drug or alcohol use or offer a diagnosis of substance abuse, addiction, or alcoholism
- Identify the specific observations of employee behavior or appearance
- Confront the employee concerning the requirement to follow the company specific policy
- Fully explain the consequences of the employee's refusal to comply

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## With the Legalization of Cannabis, a Shift In The Testing Paradigm is Needed



- Drug tests check for drugs. Alcohol tests check for alcohol. But impairment has many causes
- Not detectable by proxy test is impairment due to fatigue, illness, chronic condition or injury such as concussion
- Reliable tests for impairment are needed, regardless of cause
- Some drugs may be bodily present but have no impairing effect. For instance, marijuana impairs for a couple of hours but remains in your system for at least three weeks. Tests for its presence do not correlate with impairment and are not useful

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## Address Employee's Use of Legalized Cannabis



### 1) Updated Drug/Alcohol Policy Must Be Implemented to Address New Laws

Policies should endorse Integration of impairment testing as part of current drug policy and encourage testing when reasonable suspicions of impairment are noticed.

### 2) Enforce Employee Training

Ensure all workers are trained and specifically be educated on the fact that employers may perform impairment tests if "Specific Articulate Symptoms" are observed, appropriate staff should be trained to perform testing.

### 3) Ensure Testing by Independent, Qualified Individual

Protocol should enforce and implement an articulable symptom monitoring program, where an independent, qualified individual, is utilized to evaluate the cognitive impairment of an individual using validated and objective testing methods.

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**Christopher Bensley**  
**VP of Business Development for**  
**Impairment Science, Inc.**  
**Partnering and Licensing for Druid**  
**Enterprise**

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## Introducing Druid

A testing paradigm shift that tests  
impairment, not for alcohol or drug use



**Welcome**

**Log In**

**Create Account**

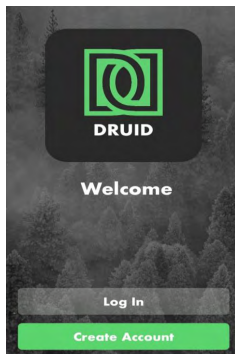


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## Quick/Accurate Solution to Test Impairment



**Druid**, an app for all iOS and Android smartphones and tablets, represents a testing paradigm shift.



- Tests for the condition of impairment itself, not for the use of alcohol or drugs
- Tests for impairment due to any cause
- Test is quick, portable, accurate, sensitive, objective, and inexpensive

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## Druid – Look & Feel Of The App



### Druid Test – Sequence of Tasks

Screen Shots



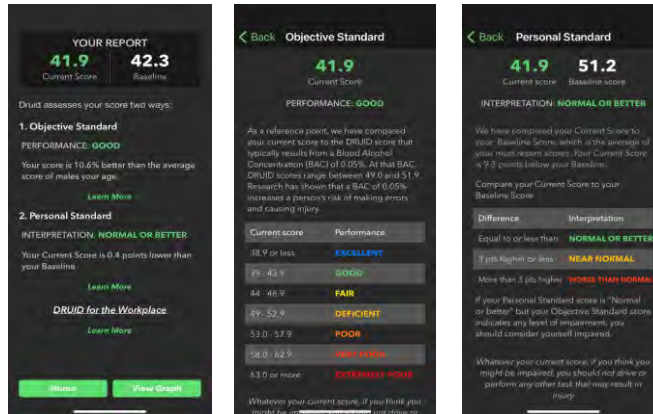
**Video**

[Link](#)

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## Test results: Objective and Personal Standard



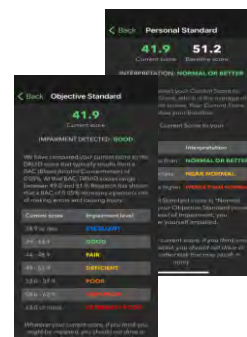
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## How Druid Works



- Takes several hundred measurements of key neurophysiological indicators while performing divided attention tasks:
  - 1) reaction time
  - 2) hand-eye coordination
  - 3) decision-making
  - 4) time estimation
  - 5) balance.
- Data is statistically integrated to calculate an impairment score:
  - 1) by comparing it to both the user's baseline score (the "Personal Standard")
  - 2) by interpreting it as a blood alcohol concentration equivalent (the "Objective Standard").

Interpreting results:  
Objective vs Personal Standard



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## Druid - New Testing Paradigm



The Druid App is the only impairment test on the market with extensive scientific validation.

- **Marijuana Breathalyzer** – In development, accuracy questionable and limited use.
- **Vision Goggles** – Based on Pupillary Light Reflex, not validated.
- **Other Apps** – Not calibrated to impairment, no peer-reviewed science.
- **Druid advantages** – Accurate, fast, objective, inexpensive, proven.

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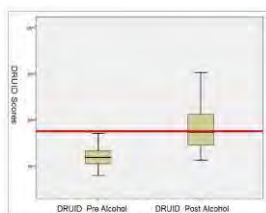
## DRUID Finds Significant Increases in Impairment in 3 Validation Studies



### Institution sponsor:

Municipal Police Training Academy,  
Massachusetts cadets

### Volunteers with Alcohol BAC > .08

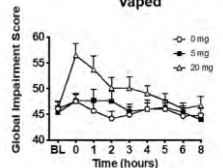


**Figure 4.** Boxplot of the medians for the DRUID® Baseline scores vs. DRUID® Intoxicated scores beyond BAC 0.08%

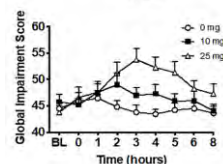
### Institution sponsor:

The Johns Hopkins University  
School of Medicine, Behavioral  
Pharmacology Research Unit

### Infrequent cannabis users Vaped



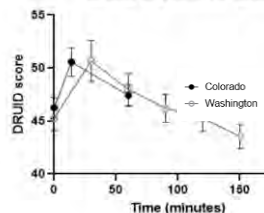
### Oral



### Institution sponsors:

University of Colorado, Boulder;  
Washington State University

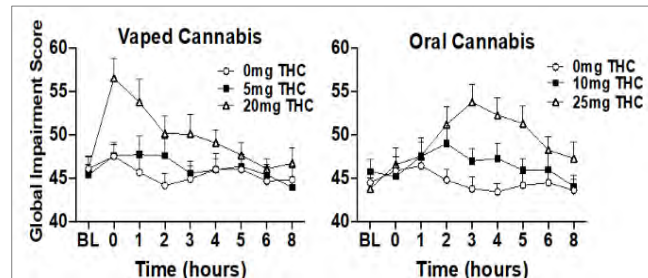
### Frequent cannabis users



Karoly, H. C., Milburn, M. A., Brooks-Russell, A., Brown, M., . . . Bidwell, L. C. (2020). "Effects of high potency cannabis on psychomotor performance in frequent cannabis users." *Cannabis and Cannabinoid Research*

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## Druid - Most Sensitive Measure of Impairment



- Research sponsored by US National Institute of Health (NIH) at Johns Hopkins University School of Medicine concluded:
  - “A novel mobile device application, DRUID, was the **most sensitive measure of impairment** when compared to the other cognitive performance tasks administered (i.e., the DSST, DAT, and PASAT) as well as several common field sobriety tests (i.e., the WT, OLS and MRB).”

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## Workplace Safety Druid Enterprise



### Capabilities include:

- Secure access to Management Dashboard.
- Scheduling tests.
- Notifying management of irregular scores.
- Scores of any individual or group of employees over any period of time.

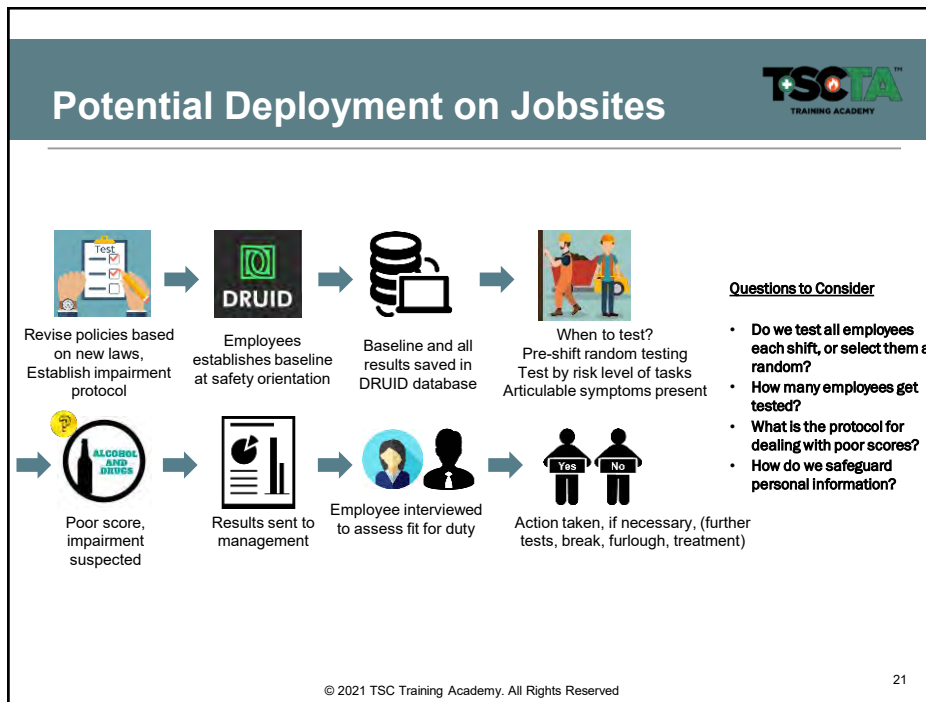
**DEMO**

<https://vimeo.com/643239604>




**Druid Enterprise**


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## Contact Us for More Information




**For More Information Regarding The Druid App and the Jobsite Impairment Program Contact:**




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# Questions?

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