

# **MRO UPDATE 2019**

**PRESENTED AT MARCOEM 2019 PHILIDELPHIA PA  
KARL AUERBACH MD, MS, MBA, FACOEM**

# CONFLICT STATEMENT

- Through a public stock market, I own a small number of shares in a company developing field marijuana testing devices. I play no role in the company.
- Otherwise, I have no known conflicts of interest

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# GOALS

- As a result of participating in this course, the participant will have working knowledge of changes in the Federally regulated drug testing program and be able to apply this knowledge to their MRO work.
- As a result of participating in this course, the participant will be able to distinguish Federal regulated drug testing procedures from non-regulated drug testing and be able to apply this knowledge to their MRO work.
- As a result of participating in this course, the participant will be able to share best practices with other participants in the course especially as it applies to marijuana testing and MRO review

# A TALE OF TWO SYSTEMS

- Federal
- Non-regulated



# FEDERAL SYSTEM

## THE ELEPHANT IN THE ROOM



- Has been fairly stable in terms of regulations- 2018 to 2019
  - Medical Marijuana
  - Recreational Marijuana
  - CBD
  - Opioids and clarifications
  - Shy bladder rules for collectors
  - Clearinghouse (ok not so stable)

# FEDERAL SYSTEM MEDICAL MARIJUANA



- “Medical Review Officers will not verify a drug test as negative based upon information that a physician recommended that the employee use “medical marijuana.” Please note that marijuana remains a drug listed in Schedule I of the Controlled Substances Act. It remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation’s drug testing regulations to use marijuana.”
- ODAPC/DOT Oct 22, 2009 updated 4/29/2019

# FEDERAL SYSTEM RECREATIONAL MARIJUANA



- Recreational Marijuana “It is important to note that marijuana remains a drug listed in Schedule I of the Controlled Substances Act. It remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation’s drug testing regulations to use marijuana”.
- No change since to 12/3/2012 guidance



# FEDERAL SYSTEM

## CBD



- CBD and hemp products continue to be restricted on the federal level
- CBD oils and other products can contain THC that can show up in a drug test
- Remains to see how this will change of CBD falls under more regulatory purview

# FEDERAL SYSTEM OPIOIDS



- The DOT testing at HHS-certified laboratories continues to be a 5-panel drug test regimen. As of January 1, 2018, the DOT testing panel is:  Marijuana metabolites  Cocaine metabolites  Amphetamines  Opioids\*  Phencyclidine (PCP) Four semi-synthetic opioids were added to the DOT testing panel (i.e., hydrocodone, hydromorphone, oxycodone, and oxymorphone).
- Reminder- changes made prior year
- But codified on 4/23/2019 final rules

# FEDERAL SYSTEM AMPHETAMINES



- In addition, under the amphetamines drug category, DOT has removed methylenedioxyethylamphetamine (MDEA) as a confirmatory test analyte from the existing drug testing panel, and added methylenedioxyamphetamine (MDA) as an initial test analyte. D
- Reminder- changes made previously

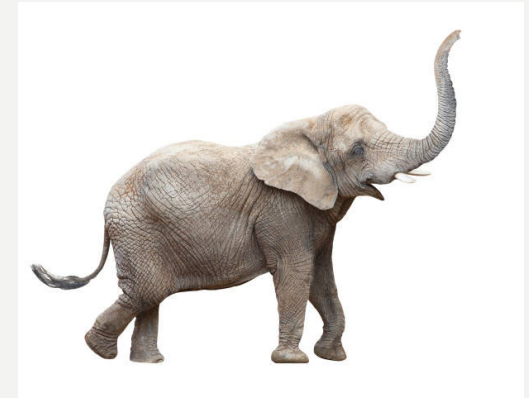
# FEDERAL SYSTEM

## SHY BLADDER RULES



- The shy bladder process has been modified so that the collector will discard any specimen provided during the collection event when the employee does not provide a sufficient specimen by the end of the three hour wait period.

# **FEDERAL SYSTEM CHANGES FOR MRO IN PART 40 REMINDERS**



- The term ‘prescription’ has been clarified;
- You have authority to conduct D,L stereoisomer and THC-V testing; and
- The timing when you communicate a significant safety risk has been modified

# FEDERAL SYSTEM

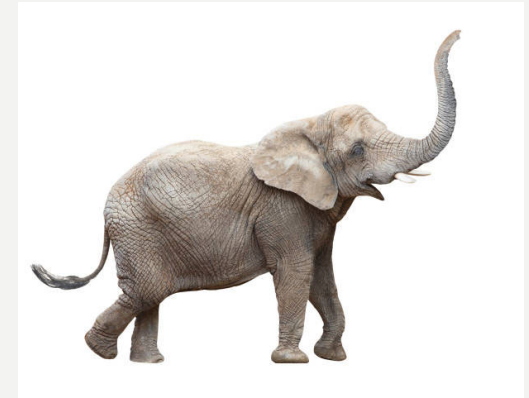
## CHANGES FOR MRO IN PART 40

### REMINDERS 5 DAY RULE



- During the verification interview, the MRO may learn about a legally prescribed medication that would likely make the employee medically unqualified or would likely pose a significant safety risk. Section 40.135(e) requires **the MRO to tell the employee to have his/her prescribing physician contact the MRO** to discuss the MRO's concern about the medication. If the prescribing physician does not speak with the MRO within 5 business days of the MRO informing the employee to have his/her prescribing physician contact the MRO, the MRO will report the information about the legally prescribed medication to the appropriate third party. (Can do before 5 days if declined permission to contact, earlier contact or medical disqualifier.)

# **FEDERAL SYSTEM CLEARINGHOUSE-FMCSA ISSUE**



- For CDL drivers
- To be operational 1/6/2020
- Need to register
- Applies to MROs and SAPs as well as TPAs
- Responsibilities for employers to query

# FEDERAL SYSTEM CLEARINGHOUSE-FMCSA ISSUE



- Within two business days of making a determination or verification of a Department of Transportation (DOT)-approved drug test, an MRO must report:
  - Verified positive, adulterated, or substituted controlled substances test results; or
  - Refusal-to-test determination.
- The MRO must report any changes of a verified drug test within one business day of making any changes to the reported results.



# **FEDERAL SYSTEM**

## **FMCSA**



- Rates remain stable for  
2019

# FEDERAL SYSTEM

## FAA



- Made technical changes to bring terminology in line with part 40 including “opioids” rather than opiates
- Some other “harmonizing” changes
- No major substantive changes
- Random testing rates remain the same at 10%

# FEDERAL SYSTEM

## FTA



- Increased annual random drug testing rates to 50% for 2019.
- Random alcohol testing remains 10%

# FEDERAL SYSTEM

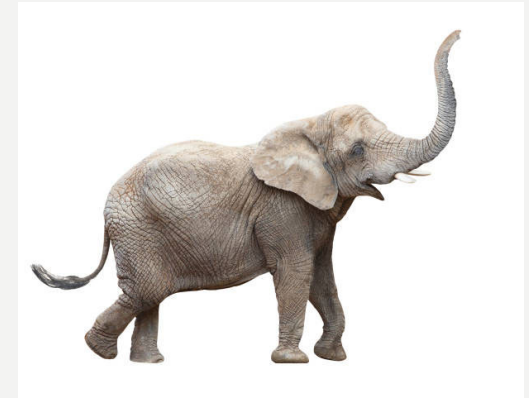
## USCG



- Increased annual random drug testing rates to 50% for 2019.
- Expanded definition of covered employees

# FEDERAL SYSTEM

FRA



- Rates remain stable at 25% for drugs and 10% for alcohol

**FEDERAL SYSTEM  
PIPELINE AND HAZARDOUS MATERIAL  
SAFETY ADMINISTRATION**



- Rates remain stable for  
2019

# **NON-REGULATED TESTING CHOAS AND CONFUSION**



# NON-REGULATED TESTING



- SINCE IT IS NON-REGULATED- THERE ARE NO STANDARD RULES
- COMPANY POLICY
- DEFENSIBLE FEDERAL APPROACH
- WATCH OUT FOR STATE OR LOCAL LAWS



# NON-REGULATED TESTING

- WHILE IT MAY BE GOOD POLICY TO FOLLOW FEDERAL GUIDELINES THERE ARE SOME THINGS CANNOT DO
  - CANNOT USE FEDERAL FORMS
  - ALTHOUGH MANY NON-REGULATED LOOK SIMILAR
  - IF THERE ARE LOCAL REGULATIONS- need to be aware of them
  - IF EMPLOYER HAS THEIR OWN POLICY WITHIN THE ABOVE-  
review and follow

# **NON-REGULATED TESTING**

- BIG ISSUE IS MARIJUANA TESTING
- CONSIDER LOCAL LAWS
- CONSIDER EMPLOYER POLICY
- BE CONSISTENT
- PROVIDER INFORMATION

# MARIJUANA STATUS BY STATE

SOURCE [HTTPS://DISA.COM/MAP-OF-MARIJUANA-LEGALITY-BY-STATE](https://disa.com/map-of-marijuana-legality-by-state)

State	Legal Status	Medicinal	Decriminalized	State Laws
Alabama	Fully Illegal	No	No	<a href="#">View State Laws</a>
Alaska	Fully Legal	Yes	Yes	<a href="#">View State Laws</a>
Arizona	Mixed	Yes	No	<a href="#">View State Laws</a>
Arkansas	Mixed	Yes	No	<a href="#">View State Laws</a>
California	Fully Legal	Yes	Yes	<a href="#">View State Laws</a>
Colorado	Fully Legal	Yes	Yes	<a href="#">View State Laws</a>
Connecticut	Mixed	Yes	Reduced	<a href="#">View State Laws</a>
Delaware	Mixed	Yes	Reduced	<a href="#">View State Laws</a>
District of Columbia	Fully Legal	Yes	Yes	<a href="#">View State Laws</a>
Florida	Mixed	Yes	No	<a href="#">View State Laws</a>
Georgia	Mixed	CBD oil	No	<a href="#">View State Laws</a>

# BY STATE CONTINUED

Hawaii	Mixed	Yes	Reduced*	<a href="#">View State Laws</a>
Idaho	Fully Illegal	No	No	<a href="#">View State Laws</a>
Illinois	Fully Legal*	Yes	Yes*	<a href="#">View State Laws</a>
Indiana	Mixed	CBD Oil	No	<a href="#">View State Laws</a>
Iowa	Mixed	CBD Oil	No	<a href="#">View State Laws</a>
Kansas	Fully Illegal	No	No	<a href="#">View State Laws</a>
Kentucky	Mixed	CBD Oil	No	<a href="#">View State Laws</a>
Louisiana	Mixed	Yes	No	<a href="#">View State Laws</a>
Maine	Fully Legal	Yes	Yes	<a href="#">View State Laws</a>
Maryland	Mixed	Yes	Reduced	<a href="#">View State Laws</a>
Massachusetts	Fully Legal	Yes	Yes	<a href="#">View State Laws</a>
Michigan	Fully Legal	Yes	Yes	<a href="#">View State Laws</a>
Minnesota	Mixed	Yes	Reduced	<a href="#">View State Laws</a>
Mississippi	Fully Illegal	No	Reduced	<a href="#">View State Laws</a>
Missouri	Mixed	Yes	Reduced	<a href="#">View State Laws</a>

# BY STATE CONTINUED

Montana	Mixed	Yes	No	<a href="#">View State Laws</a>
Nebraska	Fully Illegal	No	Reduced	<a href="#">View State Laws</a>
Nevada	Fully Legal	Yes	Yes	<a href="#">View State Laws</a>
New Hampshire	Mixed	Yes	Reduced	<a href="#">View State Laws</a>
New Jersey	Mixed	Yes	No	<a href="#">View State Laws</a>
New Mexico	Mixed	Yes	Reduced	<a href="#">View State Laws</a>
New York	Mixed	Yes	Reduced	<a href="#">View State Laws</a>
North Carolina	Fully Illegal	No	Reduced	<a href="#">View State Laws</a>
North Dakota	Mixed	Yes	Reduced	<a href="#">View State Laws</a>
Ohio	Mixed	Yes	Reduced	<a href="#">View State Laws</a>
Oklahoma	Mixed	Yes	No	<a href="#">View State Laws</a>
Oregon	Fully Legal	Yes	Yes	<a href="#">View State Laws</a>
Pennsylvania	Mixed	Yes	No	<a href="#">View State Laws</a>
Rhode Island	Mixed	Yes	Reduced	<a href="#">View State Laws</a>
South Carolina	Fully Illegal	No	No	<a href="#">View State Laws</a>
South Dakota	Fully Illegal	No	No	<a href="#">View State Laws</a>

# BY STATE CONTINUED

South Dakota	Fully Illegal	No	No	<a href="#">View State Laws</a>
Tennessee	Fully Illegal	No	No	<a href="#">View State Laws</a>
Texas	Mixed	CBD Oil	No	<a href="#">View State Laws</a>
Utah	Mixed	Yes	No	<a href="#">View State Laws</a>
Vermont	Fully Legal	Yes	Yes	<a href="#">View State Laws</a>
Virginia	Mixed	CBD Oil	No	<a href="#">View State Laws</a>
Washington	Fully Legal	Yes	Yes	<a href="#">View State Laws</a>
West Virginia	Mixed	Yes	No	<a href="#">View State Laws</a>
Wisconsin	Fully Illegal	No	No	<a href="#">View State Laws</a>
Wyoming	Fully Illegal	No	No	<a href="#">View State Laws</a>

# **MEDICAL MARIJUANA IN MARCOEM REGION**

- MEDICAL MARIJUANA IS LEGAL IN NY, NJ, PA, DELEWARE AND MARYLAND
- RECREATIONAL IS LEGAL IN DC BUT FEW OUTLETS TO GET

# RECOMMENDING MARIJUANA OVER OPIOIDS

- People with an opioid addiction can qualify for a medical marijuana card in:
  - New Jersey
  - New York
  - Pennsylvania
  - New Mexico



# RECENT DEVELOPMENTS

- NEW YORK FURTHER DECLIMINALIZED MARIJUANA
- POSSESSION OF LESS THAN ONE OUNCE IS A VIOLATION SUBJECT TO \$50 FINE AND BETWEEN ONE TO TWO OUNCES WILL BE COME A VIOLATION WITH \$200 FINE
- STOPPED SHORT OF FULLY LEGALIZING

# **CONTROVERSIES**

## **HOW OLD A RX IS TOO OLD**

- THERE ARE NO SPECIFIC RULES ON THE MATTER IN FEDERAL SYSTEM
- IN STATE SYSTEMS, TENNESSEE SAYS 6 MONTHS
- DON'T CONFUSE EXPIRATION/ SHELF STOCK DATE FOR PHARMACIST WITH AGE FOR AN MRO ASSESSMENT
- REMAINS A CONTROVERSY
- THOUGHTS?

# STATE DRUG TESTING

[HTTPS://WWW.PAYCOR.COM/RESOURCE-CENTER/PRE-EMPLOYMENT-DRUG-TESTING-LAWS-BY-STATE](https://www.paycor.com/resource-center/pre-employment-drug-testing-laws-by-state)

<b>Alabama</b>	All	Testing permitted after applicant receives drug-testing policy and a conditional employment offer.	N/A
<b>Alaska</b>	All employers, including school districts or regional educational attendance areas.	Testing not restricted. Positive results or refusal may be grounds for not hiring.	Medical and Recreational
<b>Arizona</b>	All private employers, plus school districts and entities that furnish transportation to school districts.	Testing permitted after applicant receives drug testing policy. Refusal to submit to a drug test can be basis for not hiring. Testing is required for school bus driver certification.	Medical

# STATE

<b>Arkansas</b>	N/A	No state laws; follows federal law where required.	Medical
<b>California</b>	State Agencies	Testing permitted for applicants to positions of sensitivity in state agencies if testing is job related. Testing is required for public transportation drivers.	Medical and Recreational
<b>Colorado</b>	N/A	No state laws; follows federal law where required.	Medical and Recreational

# STATE

<b>Connecticut</b>	All private employers	Testing permitted after applicant receives drug-testing policy. Cannot test former employees unless they have been gone for at least 12 months. Testing is required for school bus driver certification.	Medical
<b>Delaware</b>	Public and private schools and school transportation; Department of Corrections.	Testing is required for school bus driver certification and for security positions at Department of Corrections.	Medical
<b>District of Columbia</b>	N/A	No state laws; follows federal law where required.	Medical and Recreational

# STATE

## Florida

Private employers with 3 or more employees. Public employers with safety-sensitive and law enforcement positions.

Testing permitted after applicant receives drug testing policy. Refusal to submit to a drug test can be basis for not hiring.

Medical

## Georgia

State government employers, public schools, and companies that furnish school transportation; private employers.

Testing authorized for applicants of state government, public schools, and private companies. Refusal to submit to a drug test or a positive test result may disqualify applicant from state and public school employment for two years.

N/A

# STATE

<b>Hawaii</b>	All employers	Testing permitted after applicant receives drug testing policy and has opportunity to disclose current prescription and nonprescription drugs being taken. Testing required for civil service applicants with city of Honolulu.	Medical
<b>Idaho</b>	All employers	Testing permitted.	N/A
<b>Illinois</b>	N/A	No state laws; follows federal law where required.	Medical
<b>Indiana</b>	N/A	No state laws; follows federal law where required.	N/A

# STATE

<b>Iowa</b>	Public and private employers	Testing permitted if applicant is informed at the time of application that a drug test is required. Ads and applications must carry notice of drug test.	N/A
<b>Kansas</b>	State government	Testing permitted for applicants to safety-sensitive jobs after a job offer has been made. Ads for safety-sensitive jobs must carry notice of drug test.	N/A
<b>Kentucky</b>	N/A	No state laws; follows federal law where required.	N/A



# STATE

<b>Louisiana</b>	Public and private employers not subject to a federally mandated testing program.	Testing not restricted.	Medical
<b>Maine</b>	Public and private employers	Testing permitted after applicant receives drug testing policy. Refusal to submit to a drug test or a positive test result can be basis for not hiring.	Medical and Recreational
<b>Maryland</b>	All employers	Testing not restricted.	N/A

# STATE

<b>Massachusetts</b>	N/A	No state laws; follows federal law where required.	Medical and Recreational
<b>Michigan</b>	N/A	No state laws; follows federal law where required.	Medical and Recreational
<b>Minnesota</b>	Public and private employers	Testing permitted after applicant receives drug-testing policy and a conditional employment offer and only if all job candidates are tested.	Medical

# STATE

<b>Mississippi</b>	Public and private employers	Testing not restricted.	N/A
<b>Missouri</b>	N/A	No state laws; follows federal law where required.	Medical
<b>Montana</b>	Public and private employers	Testing permitted for applicants to intrastate transport jobs, hazardous environments jobs, or positions with security, public safety, or fiduciary responsibility.	Medical

# STATE

<b>Nebraska</b>	Private employers with six or more employees and public employers	Testing not restricted.	N/A
<b>Nevada</b>	State agencies	Testing permitted for public safety jobs.	Medical and Recreational
<b>New Hampshire</b>	N/A	No state laws; follows federal law where required.	Medical
<b>New Jersey</b>	N/A	No state laws; follows federal law where required.	Medical

# STATE

<b>New Mexico</b>	N/A	No state laws; follows federal law where required.	Medical required.
<b>New York</b>	N/A	New York City bans pre-employment screening for marijuana use except for safety and security sensitive jobs and jobs bound by a federal or state contract or grant.	Medical
<b>North Carolina</b>	Public and private employers	Testing not restricted.	N/A

# STATE

<b>North Carolina</b>	Public and private employers	Testing not restricted.	N/A
<b>North Dakota</b>	N/A	No state laws; follows federal law where required.	Medical
<b>Ohio</b>	All employers	Applicant testing authorized with advance notice to applicant and after offer of employment has been made.	Medical

# STATE

<b>Oklahoma</b>	Public and private employers	Applicant testing authorized with advance notice to applicant and after offer of employment has been made. Notice must be in writing, describing methods, procedures, and policies in detail.	Medical
<b>Oregon</b>	All employers	Testing permitted if reasonable suspicion exists that applicant is under the influence of alcohol or controlled substance.	Medical and Recreational
<b>Pennsylvania</b>	N/A	No state laws; follows federal law where required.	Medical

# STATE

<b>Rhode Island</b>	Public and private employers	Private sector applicant testing permitted only after offer of employment has been made. Public sector testing permitted for jobs involving public safety or when required by federal law.	Medical
<b>South Carolina</b>	All employers S.C. Code § 1-13-30.	Testing not restricted.	N/A
<b>South Dakota</b>	State government	Testing permitted for applicants to safety-sensitive state jobs only after offer of employment has been made. Public announcements and ads	N/A



# STATE

<b>Tennessee</b>	State Dept. of Corrections	Testing not restricted.	N/A
<b>Texas</b>	N/A	No state laws; follows federal law where required.	N/A
<b>Utah</b>	Private employers, local government entities, and state institutions of higher education	Testing not restricted in the private sector. Local governments and state colleges can test applicants with advance notice and a written policy. Refusal to submit to a drug test or a positive test result can be basis for not hiring.	Medical

# STATE

**Virginia**

N/A

No state laws; follows federal law where required.

N/A

**Washington**

Private employers seeking to qualify for a 5% workers' comp. premium discount, with approval by state authorities.

Testing authorized with advance written notice and after conditional offer of employment has been made.

Medical and Recreational

# STATE

**West Virginia**

N/A

No state laws; follows federal law where required.

Medical

**Wisconsin**

N/A

No state laws; follows federal law where required.

N/A

**Wyoming**

N/A

No state laws; follows federal law where required.

N/A

# CONTROVERSIES

- CASE- NON-REGULATED TEST
- FIRST SAMPLE- INSUFFICIENT VOLUME
- EMPLOYEE DECLINED TO STAY FOR REPEAT TEST TO GET ADEQUATE VOLUME CLAIMED FAMILY RESPONSIBILITY
- FIRST SAMPLE SENT
- COMPANY HAS NO POLICY ON MATTER
- HOW TO REPORT?

# RESPONSES ON MRO LIST

- **SOME SAID FOLLOW FEDERAL- FIRST SAMPLE SHOULD NOT HAVE BEEN SENT**
- **REPORT AS REFUSAL TO TEST**
- **OTHERS SAID SINCE NON-REGULATED REPORT AS NEGATIVE**
- **SOME SUGGESTED COMPANY POLICY (There was none)**
  
- **OPINIONS?**

# MRO LIST

- SEND E MAIL TO MRO-LIST AT GOOGLEGROUPS.COM
- MRO-LIST@GOOGLEGROUPS.COM
- SEND ME AN E-MAIL AT [KAUERBACH@AOL.COM](mailto:KAUERBACH@AOL.COM)
- SEND THE LIST AN E-MAIL TO  
MROListServe@GMail.com
- ITS FREEE

# QUESTIONS FOR CME

## QUESTION 1

- Why is it not sufficient to strictly follow Federal drug testing procedures when dealing with non-regulated testing.
- Because it is not a federal test and federal processes may only be used for Federal tests
- Because there are possible local regulations regarding drug testing that is not Federally regulated
- Because an employer may have their own procedures
- A and B only
- B and C only
- None
- All are correct

# ANSWER 1

- Answer: G all are correct. A. While many parts of federal process may be used, the forms may not be used
- B. Some jurisdictions (states and cities) have prohibited either all drug testing or specific drug testing (usually marijuana)
- C. Since these are not regulated, in theory an employer can do what they want. The MRO should be sure that what they are doing is appropriate for best/appropriate practices



# QUESTION 2

- 2. How are some employers dealing with the issues of medical or recreational marijuana in their state
  - A. Ignoring medical or recreational marijuana as an explanation on federal tests
  - B. deciding on a case by case basis
  - C. A only
  - D. B only
  - E. A and B.

# ANSWER TO QUESTION 2

- Answer: A only- in Federal testing, medical or recreational marijuana is not an acceptable explanation. Marijuana is still a schedule I substance
- B is not correct- consistency is critical in drug testing and MRO work

# QUESTION 3

- Until what time after the prescription being used by the employee as a valid medical expiation was written can the MRO accept it as still being valid?
- Please fill in the time and give an explanation
-

# ANSWER TO QUESTION 3

- Answer- there is no time limit defined. Some would say a year, others would say no limit, there<sup>4</sup> is a relatively new law in Tennessee regarding drug testing in comp case that says 6 months. But this is an ongoing “controversy” in MRO work

# QUESTIONS?

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**THANK YOU**

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