

Workplace Drug Screening: How to Prevent it from Driving Away Millennial Employees

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Marijuana is decriminalized in states, but still violates Federal laws. Employers face a scenario where employee drug testing is alienating Millennials. While few Millennials use marijuana, they favor the right to use and are strongly against workplace testing for use. Further, Millennials have demonstrated they will, in greater numbers than preceding generations, leave employers they do not feel politically or socially aligned with. This paper discusses these issues, offers suggestions on how employers can retain testing practices while addressing Millennial concerns, and create an environment where Millennials feel more positively aligned with their employers despite workplace testing.

INTRODUCTION

Random employee drug screens, or screening as part of the hiring process, have become a common feature of the employment landscape. A recent survey by researchers at The University of Toledo College of Business and Innovation indicates that marijuana testing may foster ill-will with Millennial employees. As more and more states decriminalize marijuana use, it is incumbent upon employers of Millennials who have drug testing programs to educate employees as to the need for marijuana testing, or face losing otherwise qualified and competent Millennial employees.

THE LEGAL LANDSCAPE

Michael Boyer was elated when his home state of Washington decriminalized recreational marijuana use via a popular vote. He made a bit of history when he was filmed by news crews as the first person in Spokane to purchase marijuana under the new state laws¹. His employer, True Blue Labor Ready saw the broadcast, and promptly fired him.

Within days, the employer reversed the termination and issued a statement that the termination was a mistake². The reasons given for the termination and rehiring were that 1) the employer saw the media coverage of Boyer purchasing and consuming marijuana, 2) the purchase took place when Boyer was “on assignment”, 3) the employer then terminated him, 4) the employer then discovered that Boyer actually had that day off work and was not on assignment, 5) the employer rehired him because it was all a misunderstanding, and 6) according to the employer, True Blue, “Pot is legal and we know that”³.

What True Blue left out of their PR statement was that between steps 3 and 4 above, there was a massive national public outcry against True Blue for terminating Boyer over a drug that had been decriminalized. A Google search for stories covering the event yielded over one thousand stories, from sources as diverse as Fox News, NBC News, USA Today, The Daily Mail and The Mirror (both UK news media), the Huffington Post, and outrage on blog posts around the globe⁴.

True Blue became the international poster child of an oppressive and unfair corporation so the termination was rescinded.

Marijuana was not “legal” under Federal laws in the state of Washington when Boyer purchased it. All U.S. citizens are governed by the laws of the state they are in and also by the Federal laws and regulations of the United States. Marijuana possession has been decriminalized by the state of Washington, but it is still illegal under Federal laws and regulations. The voiding of the Washington state laws does not in any way affect marijuana possession and use under the Controlled Substances Act⁵ (CSA) and other Federal laws and regulations. For a first offense, Mr. Boyer could have been incarcerated under Federal law for a period of up to one year and fined up to \$1,000⁶.

When Mr. Boyer purchased marijuana with the news media filming him in a marijuana sales shop, he was violating Federal law.

Courts have ruled that an employer can terminate a person for violating the CSA even in states where marijuana and/or medicinal marijuana have been decriminalized. A lead case in Colorado for this is *Coats v. Dish Network*⁷, in which Brandon Coats failed a marijuana test by his employer. He was terminated and sued to get his job back by arguing that marijuana had been decriminalized in Colorado and that Colorado law prohibits employers from terminating employees for off-duty activities which are legal. In its ruling, the Colorado Supreme Court stated Federal law is clear, “There is no exception for marijuana use for medicinal purposes, or for marijuana use conducted in accordance with state law.”⁸ In short, it didn’t matter that Coats had been paralyzed in a car crash as a teenager and had been a medical marijuana patient since 2009⁹. It also did not matter that Coats was a telephone operator and there were no safety concerns surrounding his job and off-duty marijuana use¹⁰. It also did not matter that there was no allegation that his work had been affected or that Coats had been asked to submit to random urinalysis, and that he had freely admitted he probably would not pass¹¹. All that mattered was that the employer, Dish Network, could rely on the Federal laws and regulations and fire any employee who tested positive for marijuana—a substance which can be detected for weeks after use¹².

The “twitterverse” and “blogosphere” were not happy with the firing of Coats. While Dish Network spokespeople argued about the need for a drug free workplace¹³, the online news media and other internet sources had already posted pictures of Coats—a quadriplegic—in his wheelchair at the Colorado Supreme Court oral arguments¹⁴. They criticized Dish Network for refusing to admit that they were out of touch with medical science, the will of the people, and accused Dish Network of being hypocritical because alcohol was exempt from any such scrutiny¹⁵.

Dish Network won an important and legally valid Colorado Supreme Court decision. It also became known as a company that terminated a quadriplegic telephone operator for use of a medically recognized drug that it did not approve of and used Federal laws to justify an unjust termination. This is not the kind of public relations most companies wish for.

Similar rulings have come forth in other states and as of the date of this writing, no cases have been found in which the employee has prevailed. In response to the growing trend of medical marijuana use, Arizona, Delaware, and Minnesota have made it illegal for an employer to terminate a medical marijuana patient for failing a drug test¹⁶. However, it is unclear how those laws would fare if challenged by employers under Federal law. It seems unlikely they would survive, as the basic argument is the state has

made it illegal for employers to prevent an employee from violating Federal law by bringing the residue of marijuana use (THC in the bloodstream) into the workplace.

Those are the parameters in which this paper, and its guidance, operate. Any employer in any state may terminate any employee for testing positive for marijuana even though the marijuana use may not have impacted work and could have been consumed weeks before. But there may be a public relations price—both internally and externally—for doing so.

There are situations where drug testing is not discretionary. These include:

1. Occupations where state or Federal laws require marijuana testing for certain job classifications¹⁷.
2. There are also non-covered occupations such as those involving the use of heavy machinery, coupled with legal concerns and fear of negligent hiring or supervision lawsuits, where an employer may voluntarily decide in favor of proactively doing drug screens.
3. There is a growing trend for companies to require that subcontractors perform drug testing for certain employees who come onto the company facilities.

In other situations, such as with Mr. Coats above, an employer may still decide to do drug screening based on its own policies. However, in each of these situations, as discussed below, the shifting mindset of Millennials and their view on employment creates situations where employers will want to create awareness programs to help win over the good will of employees in favor of drug testing programs.

GENERATIONAL DIFFERENCES IN THE WORKPLACE

As part of an ongoing “Generational Differences in the Workplace” study by The University of Toledo College of Business and Innovation¹⁸, an independent survey was conducted at The Ohio State University and The University of Toledo concerning student views on: 1) marijuana decriminalization and 2) their attitudes towards drug testing in the workplace.

The survey was conducted using Qualtrics research software on a web-based platform. Students were invited via email to participate anonymously. A total of 1,053 participants representing a variety of ages participated in the relevant section of the study. For purposes of this paper, and the survey, Millennials were treated as anyone born from 1983 onwards¹⁹. Anyone born prior to 1983 was placed into a single Non-Millennial grouping for comparison purposes against the Millennials.

Survey participants were given the following question:

Do you feel that marijuana and/or some other illegal drugs should not be criminalized, but rather it should be an individual's choice to use, provided adults use them responsibly? (i.e. similar to alcohol—if you drink you only get penalized if you violate a law while intoxicated?)

The response break-down by Non-Millennials and Millennials was:

| | Pct in Favor |
|----------------|--------------|
| Non-Millennial | 59.82% |
| Millennial | 59.19% |

Millennial and Non-Millennial responses were within 0.7% of each other. The overall approval rate for decriminalization by both groups was 59.26%, which was within the general range of a recent Quinnipiac poll that found 53% of the general population of Ohio voters favored decriminalization²⁰.

The next question presented in the survey was only asked of those who had also indicated that they favored decriminalization. It read:

You have stated you feel marijuana and possibly other currently illegal drugs should be decriminalized. Which of the following statements describes how you feel about the government having made these drugs illegal? (Select all that apply.)

The options presented and response rates were:

**TABLE 1
OPTIONS PRESENTED AND RESPONSE RATES**

| | | | | | | | |
|----------|--|--------|--|--|--|--|--|
| 1 | It shows hypocrisy on the part of the Government—if alcohol is legal, other similar effect drugs should also be legal. | | | | | | |
| | | | | | | | |
| | Non-Millennials | 55.70% | | | | | |
| | Millennials | 48.94% | | | | | |
| 2 | It demonstrates ignorance on the part of the lawmakers who passed these laws, and keep them in place. | | | | | | |
| | | | | | | | |
| | Non-Millennials | 31.40% | | | | | |
| | Millennials | 34.25% | | | | | |
| 3 | It represents the greed of government—marijuana was something they could not control the revenue of, but now that they can tax and regulate it, they are finally beginning to agree to decriminalize it. | | | | | | |
| | | | | | | | |
| | Non-Millennials | 30.00% | | | | | |
| | Millennials | 39.92% | | | | | |
| 4 | It shows the Government has no respect for our individual rights. If I wish to take a harmless substance into my body to relax or to enhance a mood, such is my right. | | | | | | |
| | | | | | | | |
| | Non-Millennials | 18.60% | | | | | |
| | Millennials | 30.13% | | | | | |
| 5 | I believe the people who made these laws and fight to keep them in place only have good intentions for what is best for their own agendas, and not for me. | | | | | | |
| | | | | | | | |
| | Non-Millennials | 28.50% | | | | | |
| | Millennials | 29.42% | | | | | |
| 6 | I believe the people who made these laws and fight to keep them in place only have good intentions for what is best for me even if I disagree with them. | | | | | | |
| | | | | | | | |
| | Non-Millennials | 12.90% | | | | | |
| | Millennials | 19.29% | | | | | |

Both Millennials and Non-Millennials felt strongly that marijuana laws display hypocrisy on the part of government with few believing that government has the people’s best interests at heart. It is logical to believe that employers who help enforce marijuana laws, without demonstrating why they must do so, will share the same contempt expressed above for the government.

HOW MILLENNIALS VIEW URINALYSIS IN THE WORKPLACE

The “Generational Differences in the Workplace” survey mentioned above asked a third question regarding marijuana-related views. That question offered three possible responses, of which the subject was allowed to pick only one response:

If marijuana is currently legal, or becomes legal where you live, should your employer be allowed to require you to undergo urinalysis, and possibly terminate you if you test positive for it?

**TABLE 2
GENERATIONAL DIFFERENCES IN THE WORKPLACE RESULTS**

| | |
|--|--------|
| | Yes |
| Non-Millennial | 43.59% |
| Millennial | 34.73% |
| | No |
| Non-Millennial | 16.23% |
| Millennial | 14.84% |
| Only if there is evidence that my recreational use is negatively spilling over into my work product or work behaviors. | |
| Non-Millennial | 40.17% |
| Millennial | 50.43% |

Thus 34.73% of Millennials would permit an employer to do marijuana testing as it is now done. This is consistent with results from the Quinnipiac survey that found 40.74% would not permit testing as it is now conducted.

However, 43.59% of Non-Millennials were willing to accept urinalysis testing policies as a condition of employment.

Of those who had a negative view of workplace testing, 14.84% would ban any testing outright and roughly half would only permit it when there was evidence that marijuana use was affecting workplace behaviors and performance.

When all these factors are taken together, every employer that performs urinalysis testing risks creating an atmosphere that Millennials find unfavorable and not in line with their world view. Those employers are creating a work environment that, while legally sound, may alienate employees, especially the Millennials.

Again, an employer can, as a condition of employment, require all employees to undergo marijuana testing every day when they report for work. While obviously wasteful, this would be legal. The problem

arises not with the legality of testing, but how it makes employees—especially Millennials—feel towards their employers.

IMPLICATIONS FOR EMPLOYERS

Just as Millennials will gravitate to a political candidate who shares their views, they will seek out employers that share their views and abandon those that do not,²¹ as Karl Moore argued in a Forbes article, “Millennials Work For Purpose, Not Paycheck”²². Millennials do not view their purpose in life to work, but rather their purpose in work is to help create a better life for themselves and others. They will align themselves with employers that promote their own views and advance their own causes and abandon employers that they do not find ‘emotionally fulfilling’. As Moore wrote in his article,

“Millennials are loyal to a job rather than an employer. This is partly a response to their parents sometimes being loyal to a firm that would often lay them off without hesitation when times got rough.”

Past generations gave and felt they received a degree of loyalty from their employers. By the end of the last century, downsizing, outsourcing, and massive employee lay-offs were the norm for business. As an example, Schlumberger recently made news as it announced that it was laying off 25,000 workers and the CEO was going to be compensated \$18.3M for his work²³. Such news reports are not rare and hardly a new trend. Millennials believe their employer is only loyal to them up to the next restructuring.

To a Millennial, the employer is either an intrinsically good company to work for because it is part of their life view of what a good (holistic) company is, or it is a job they are anticipating leaving. A recent Deloitte survey found that 25% of Millennials anticipate leaving their employers within one year—not “might leave” but rather are actively planning for it to occur²⁴.

Some of the top factors Millennials are looking for from their employers that would encourage them to stay include: “Good work/life balance”, “Sense of meaning from my work”, “The impact it has on society”, and “A leading company that people admire”²⁵. If the Millennials do not receive an internal sense of satisfaction and alignment with the company they work for, they will leave for as little as a 10% pay increase²⁶ and those in their 20s will take a large pay cut to work for a job that is more intrinsically rewarding²⁷.

Money is a poor way to motivate and retain Millennials. They want an employer that makes them feel they are contributing to the greater good of society and allows them their own time for family and friends. They will abandon, without hesitation or remorse, an employer that they feel does not share their life views and attitudes.

To a Millennial, why should they act any differently? To them, corporate America has failed to demonstrate loyalty to workers over the last several decades. Loyalty is only given to employers that demonstrate genuine care for their employees.

Workplace urinalysis does not demonstrate an employer cares about its employees, but rather conveys the exact opposite message—the employer is engaging in acts that the Millennial feels it should not be doing and is interfering in the employee’s private life.

RETENTION OF MILLENNIALS

As stated above, only 34.73% of college-educated Millennials in the Generational Differences survey would allow an employer to conduct marijuana testing as it is now done. A majority of 50.43% would prohibit testing unless there was evidence that marijuana use was affecting work product, and 14.84% would ban testing completely.

As employers are facing pressures where testing is legally or contractually required, or at least considered prudent due to business goals and needs, legislatures and public sentiment are creating an environment where employees are rebelling against an employer’s ability to perform testing.

Leadership must respond by causing awareness programs for employees that explain in positive terms why the company performs drug testing, or it will alienate otherwise good employees. The response is to have awareness programs educating employees as to why the company needs to do testing. There are four main strategies that leadership can implement based upon the justifications for testing employees:

1. **If testing is required by a governmental body:** The company should first mandate that all employees are tested, and then educate each and every employee that this is not a program the company has decided to implement, but rather it is an involuntary duty imposed upon it. The company can, and probably should emphasize the fact it understands that this is not something employees enjoy doing, but is required by law. In so doing, the employer will educate the employee that the testing is required by the government and that the employer empathizes with the employee.
2. **If testing is required by contractual obligations by third parties:** Again, education is the key. Leadership needs to make certain that the Human Resource department is properly educating employees that it is a third-party customer requiring the testing. Additionally, this awareness program should explain how the contract with the customer benefits the employees by providing income that makes the work positions possible.
3. **If safety concerns mandate testing:** The employer should have an approach of showing concern over employee health and safety. However, the emphasis should not be on protecting the employee from their own malfeasance. The number of Americans that regularly use marijuana is as low as 7.3%²⁸. This means a message where the employer claims it is protecting the employee from themselves will alienate the 92.7% of employees who do not use marijuana and do not need to be tested. Therefore a company must educate employees that higher worker's compensation claims threaten the survival of the company itself, and thus the livelihood of the employees. Additionally, the employer should educate employees that testing is required so that employees are protected from injuries due to impacts from marijuana influence.
4. **When there are no obvious legitimate reasons for testing:** This one has no easy answers. Dish Network expressed its commitment to a drug free workplace, but the one thing they did not clearly express was how home medical marijuana use by a quadriplegic telephone operator, Mr. Coats, had or could negatively impact the company. It is difficult to construct an argument that home marijuana use is more harmful to the company than home use of alcohol. This does not automatically mean Dish Network lacked a good, logical reason which employees, especially Millennials, might not accept as valid. Perhaps Dish Network had a genuine reason. But if it had such a reason, it failed to effectively convey it and suffered an international public relations black-eye.

In situations where the need for testing is not clear, leadership must examine the legitimate reasons within their own company for workplace testing and convey those concerns in a way that speaks to the concerns of the employees. An example would be a message that emphasizes the fact that the company wishes to detect people with high levels of THC and help such people before it becomes a threat to their work product. But a message like that cannot be coupled with a zero-tolerance policy or employees will see through it and react negatively.

The leaders of the company need to communicate this message and make sure it is aligned with the corporate culture and policies. An employer may have multiple reasons for testing. In those situations, each and every reason should be stated in a positive light. Provided the messages are positive-focused, employees—and specifically Millennials—will view their company as a more favorable employer based upon the increased concern and respect for their employees.

An employer can turn the otherwise negatively-viewed act of drug screening into a positive PR move with its employees.

CONCLUSION

The most valuable resource a company has is its employees. Corporations are modifying how they treat employees in order to lower turnover rates and costs. Corporate leaders must make sure that the Millennial employee talent pool is retained . Modifying the message given to employees about why workplace drug testing is conducted is an inexpensive way of turning what Millennials view as a negative (workplace testing) and transforming it into a positive—namely the company tests for valid reasons. Ultimately, this will help to reduce Millennial employee turnover rates and also develop a more committed, loyal employee base.

ENDNOTES

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16. Id.
17. One example being the The Drug-Free Workplace Act of 1988 (41 U.S.C. 81), which requires certain standards for testing of employees of Federal Government Contractors, with another being the Omnibus Transportation Employee Testing Act, 49 CFR Part 40, which requires testing of Commercial Driver's License holders engaged in their work.
18. The authors of this paper contributed to and perform this ongoing research.
19. At present, there is no accepted standard for what constitutes a "Millennial". While not an authority itself, Wikipedia's entry trying to define Millennial lists 28 different legitimate authorities that use a range of dates and terminology. Those wishing to do more research should start with: <https://en.wikipedia.org/wiki/Millennials#Terminology>
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