



ON THE ROAD TO COMPLIANCE:

*Marijuana, Oral Fluid, and Other
Updates for Trucking
Professionals*



Steven Spencer

DISA Global Solutions

Extensive experience in transportation sales, compliance, and operations and consistently driving growth and innovation in the industry.

Member of ATA Safety Policy Committee
Member of ATA Controlled Substance and Wellness Subcommittee

Today's Focus:

- ❖ Oral Fluid Testing Update
- ❖ Marijuana Decriminalization / Legal Challenges
- ❖ Marijuana Policy Considerations
- ❖ Clearinghouse Reminders
- ❖ End of i9 Flexibility for Employers



1

Oral Fluid Testing Update

The DOT has approved it... but you can't use it...
YET!

May 2, 2023:

- ❖ DOT published Final Rule authorizing use of oral fluid as alternative testing methodology for DOT drug testing
 - Harmonizes with HHS Mandatory Guidelines published October 25, 2019
- ❖ Effective June 1, 2023... BUT
 - Employers may not use oral fluid testing until **at least 2 laboratories are certified** by the U.S. Department of Health and Human Services (“HHS”) to perform oral fluid testing
- ❖ **As of August 1, 2023, zero laboratories are certified by HHS for oral fluid**

We are also waiting for DOT approved oral fluid collection devices and collector trainings.

Once it's all approved...

Employer Considerations

- ❖ Choice to use oral fluid/urine is up to employer
- ❖ Employers may choose to use oral fluid:
 - For all required test purposes (*except for FRA post-accident)
 - In combination with urine:
 - For any testing when direct observation is required
 - When a second specimen collection is needed (e.g., urine specimen temp out of range, urine is of insufficient quantity)
- ❖ Oral fluid must be available for directly observed collections for non-binary/transgender individuals

Next Steps for Employers

Employer Considerations

- ❖ Review/revise DOT drug testing policies and procedures
 - Choose specimen type for test purpose (E.g., urine for random; oral fluid for follow-up testing)
 - May not collect both urine and oral fluid at beginning of collection
 - Choose specimen type for subsequent collections following shy bladder, dry mouth, or other test that requires direct observation collection
 - If combined program, provide circumstances when use one or the other- no case-by-case determination
 - Even if only using urine, must still designate oral fluid laboratory for circumstances when oral fluid is required
- ❖ Communicate changes to employees

Next Steps for Employers

Employer To Do:

- ❖ Ensure agreements are in place for collections, laboratories, MROs
- ❖ **Best practice:** Have a standing order in place with collection sites
 - What kind of collection to perform and when
 - Now more important than ever that DER always available to discuss standing orders if problem arises

Self-Collect Considerations

- ❖ Oral fluid collection device is specific to laboratory (must meet FDA, HHS, DOT requirements)
- ❖ **Collector Qualifications**
 - Collector cannot be supervisors of employees unless no other available trained collector
 - Collector cannot be friend/relative of donor
 - Must complete qualification training, including mock collections
 - Specific to collection device, which is specific to lab. Not available until DOT certifies labs
 - Must obtain training to proficiency in the operation of particular oral fluid collection device will be using; If using more than 1 device, must prove initial proficiency on each device
- ❖ You must manage device expirations and storage conditions
 - Use of expired device is fatal flaw

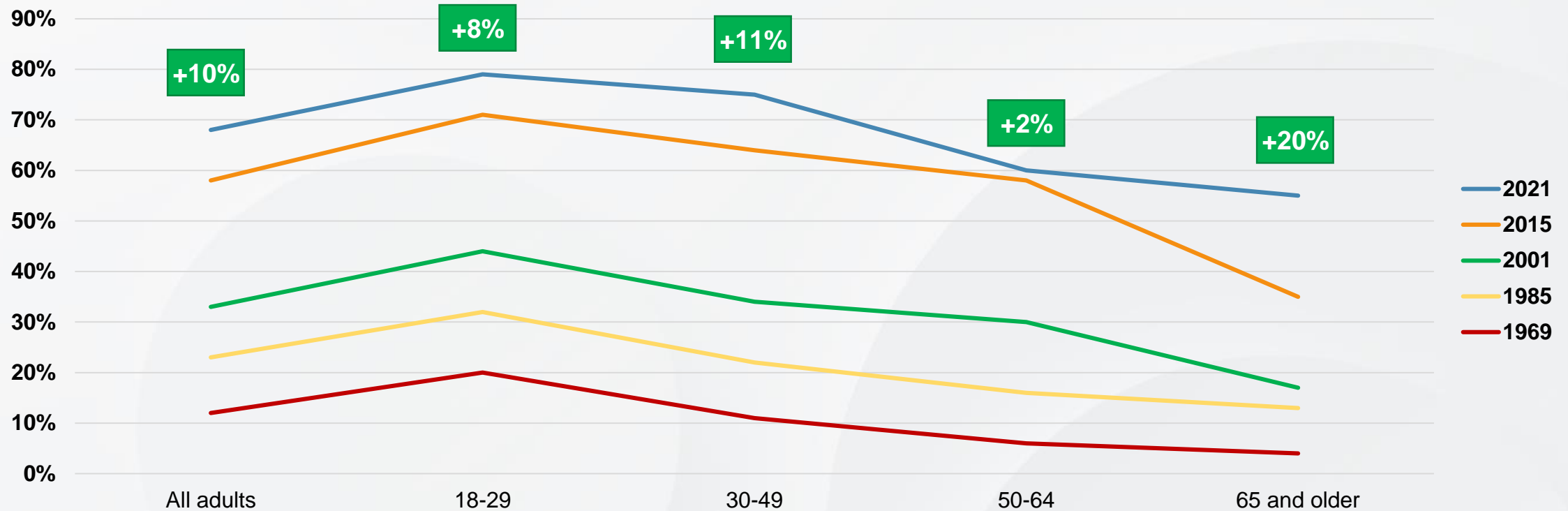


2

Navigating the Haze

Marijuana Decriminalization and
Legal Challenges in Drug Testing

Marijuana Legalization: Public Opinion

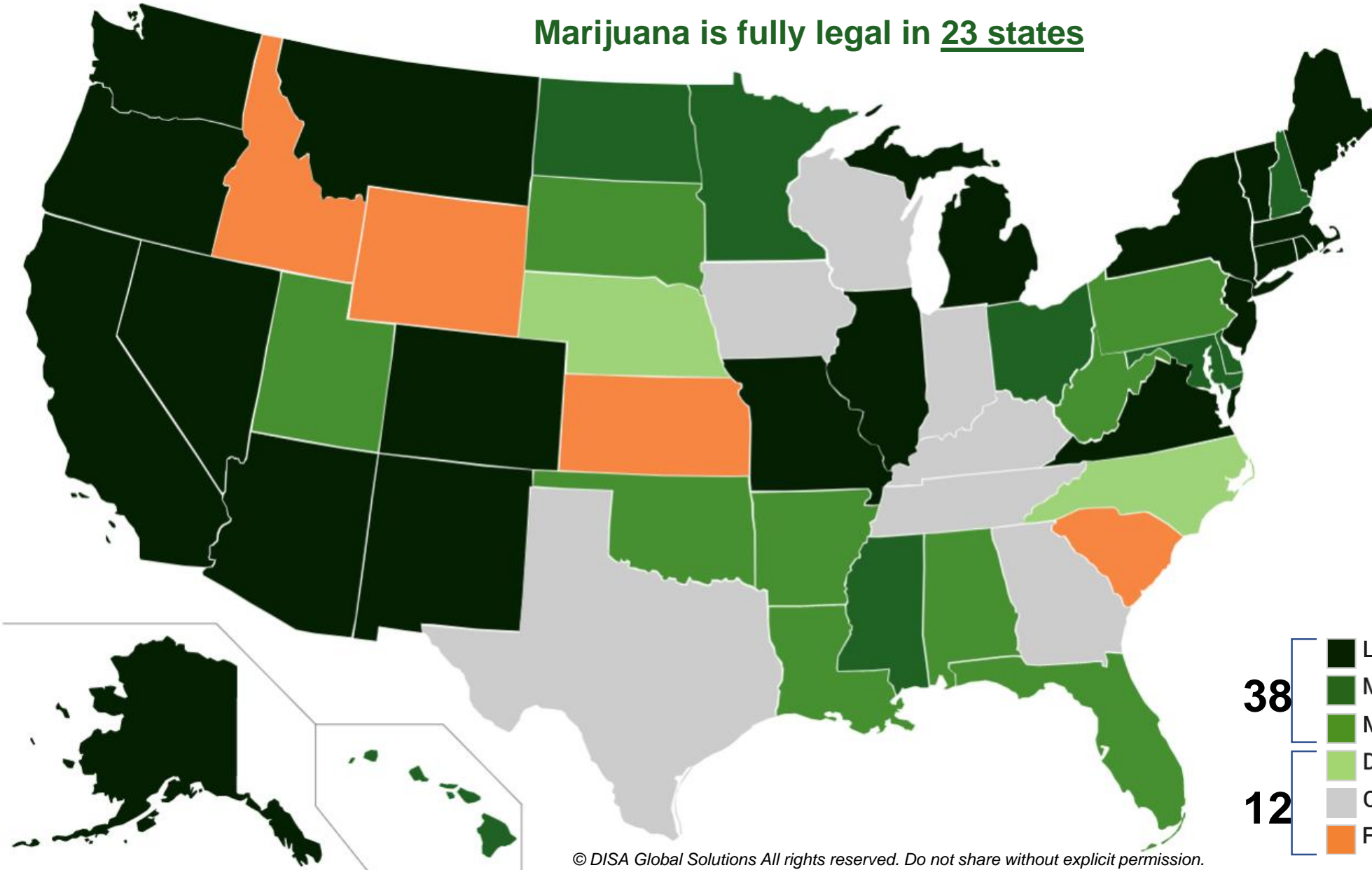


In 1969, only 12% of all adults supported legalization. Since then, support for legalization has increased, and in 2021, most American adults (68%) supported legalization.

This is up 10% in the last 5 years.

Marijuana Legalization at the State Level

Marijuana is fully legal in 23 states



Maryland voted to **FULLY legalize** effective July 1, 2023

Minnesota voted to **FULLY legalize** effective April 1, 2023

Kentucky passed **medicinal marijuana** effective Jan 1, 2023

Colorado 2nd state to **legalize psychedelic mushrooms**

38

- Legalized
- Medical and Decriminalized
- Medical
- Decriminalized

12

- CBD Only
- Fully Illegal

- ❖ From 2017 to 2021, positive marijuana tests for employees increased from 2.6% to 3.9% nationwide, **a 50% increase.**
- ❖ Marijuana positivity rates **increased 8.3%** in the general workforce from 2021 to 2022
- ❖ Side effects of marijuana include but are not limited to dizziness, speech disorders, muscle twitching, numbness, psychiatric issues, euphoria, dysphoria, impaired memory, acute psychosis, attention disturbances, disorientation or confusion, and blurred vision.

CBD Oil – A Consistently Baffling Discussion

- ❖ CBD Oil has documented, medicinal benefits
 - (e.g., Chronic inflammation and pain relief)
- ❖ CBD Oil can be made from marijuana OR hemp containing less THC
- ❖ CBD Oil is federally legal if it contains less than 0.3% Delta-9 THC
- ❖ The FDA DOES NOT regulate or test the THC levels in CBD Oil



CBD Oil – A Consistently Baffling Discussion

- ❖ There are real world cases of CBD Oil containing significantly more THC
- ❖ Consuming regular or high doses of CBD Oil can result in a positive test for THC
- ❖ **There is no confirmatory test to separate THC in CBD Oil from Marijuana**
- ❖ An equivalent example would be taking pills to feel better, without knowing what they were. Then failing a drug test for oxycodone.



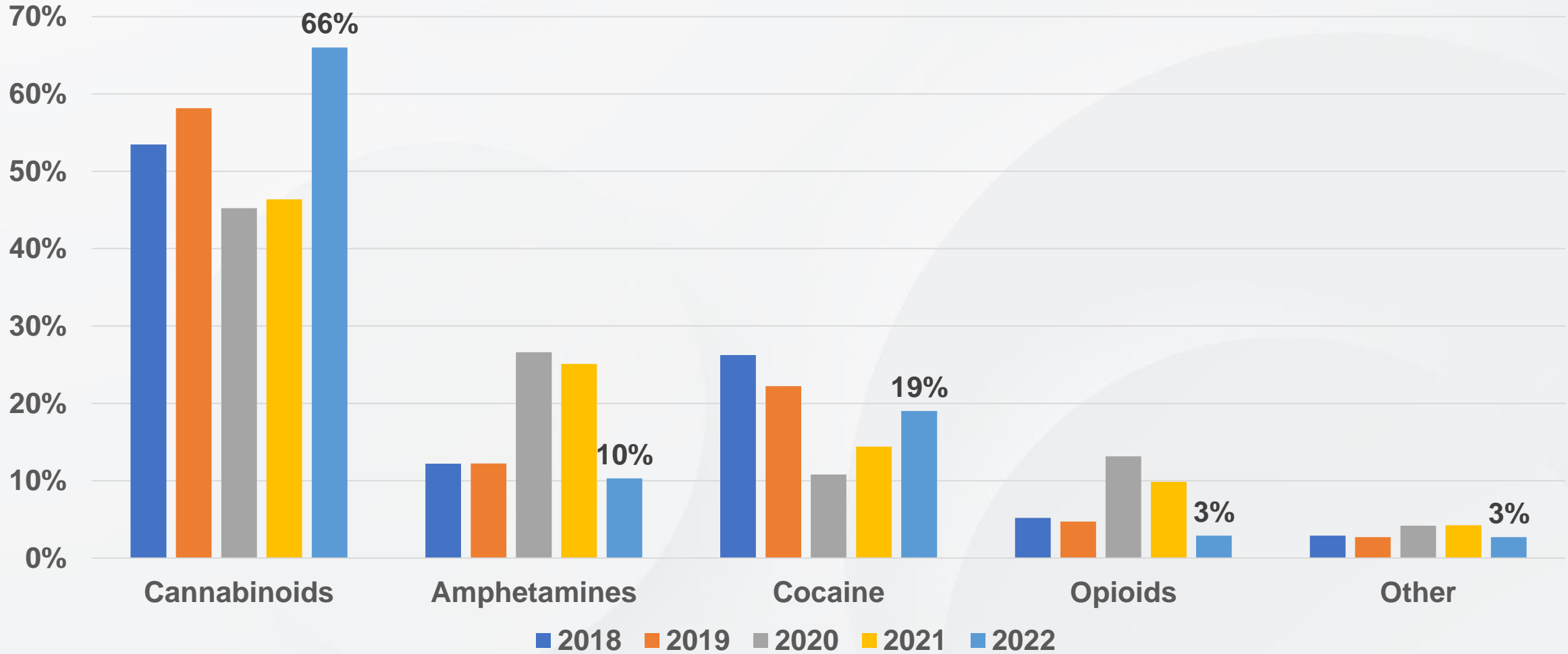
Delta-9 vs. Delta-8

- ❖ The Controlled Substances Act of 1970 outlawed “all parts of the plant *Cannabis sativa* L.”
- ❖ Biologically speaking, hemp and marijuana are the same species - cannabis. This definition outlawed both plants.
- ❖ The 2018 Farm Bill wanted to legalize hemp federally and had to make a legal distinction between hemp and marijuana. The 2018 Farm Bill states:
 - Hemp.--The term `hemp' means the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol (THC) concentration of not more than 0.3 percent on a dry weight basis.

- ❖ Delta-9 is one cannabinoid.
 - According to the National Hemp Association, scientists believe that there may be more than 100 different cannabinoids in cannabis.
- ❖ It's reported that Delta-8 creates less/different impairment, but it still impairs.
- ❖ 21 U.S. states that have regulated, restricted, or banned Delta-8
- ❖ Delta-10 was just discovered in 2021
- ❖ Keeping up WILL be an ongoing challenge

It's Not Just Marijuana

% of Positive Randoms by Drug (2018 - 2022)



- ❖ Over **two million** Americans are estimated to have a problem with opioids.
- ❖ Roughly **21 to 29 percent** of patients prescribed opioids for chronic pain misuse them; About **80 percent** of people who use heroin first misused prescription opioids
- ❖ The COVID-19 pandemic caused Opioid random positivity rates to **increase 221%** from 2019 to 2021.
- ❖ Prescription and illicit opioids accounted for 49,860 overdose deaths in 2019 **increasing 137%** from 2010 and resulting in 53% of all overdose deaths.

- ❖ In 2020, **Fentanyl overdoses become the #1 cause of death** among US adults 18-45 with nearly 37,208 deaths in 2020.
- ❖ Fentanyl is similar to morphine but is **50 to 100 times more potent**.
- ❖ **50 million counterfeit pills** were seized in 2022, **up from 20 million** in 2021.
These counterfeit pills look like other pills including opioids or benzodiazepines.
- ❖ The U.S. Department of Defense has now **added fentanyl to their drug testing panel**
- ❖ “Robust, frequent and random drug testing of our personnel is one of our greatest weapons against drug use,” said U.S. Navy Capt. Eric R. Welsh, Office of Drug Demand Reduction director



3

Policy Considerations

Multi-state workforces and considerations before removing marijuana from your policy

AB-2188 states that beginning in January 2024 it will be:

- ❖ “Unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalizing a person” ... if the discrimination is based upon, among other things...
- ❖ “... an employer-required drug screening test that has found the person to have non-psychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.”
- ❖ This effectively bans testing for cannabis in California **except** for industries or occupations specifically exempted from the law (*i.e., an “employee in the building and construction trades.”*)
- ❖ DOT regulations trump California law and DOT-covered employers would still be required to conduct lab-based urine testing for all covered drugs, including marijuana.

Common Questions:

- ❖ How should companies navigate having a workforce in multiple states that all have differing laws?
 - ❖ DOT Employees should be held to DOT Policy
 - ❖ DISA Recommends a state-by-state policy, even city specific where applicable (*e.g., Philadelphia*)
 - ❖ The days of a one-size fits all policy have long been over.
- ❖ How should companies navigate workers that live in one state but work in another state that have differing laws?
 - ❖ We recommend you follow the most stringent regulations to avoid litigation risk.

5 States + D.C.+ 1 local government

New Jersey

New York *(generally prohibiting employment testing for marijuana)*

Nevada *(pre-employment only)*

Rhode Island (2022)

Washington, D.C.

Philadelphia *(pre-employment)*

California *(operative Jan. 1, 2024)*

What if I just remove THC completely?

Removing Marijuana Key Notes

- ❖ Federal Law supersedes all state/city laws for DOT Covered Employees
- ❖ Most employer restrictions are specifically for pre-employment or random drug testing, you can typically still test for THC with reasonable suspicion and post accident testing.
- ❖ Switching to a THC free panel doesn't reduce prices
 - Labs have similar lift, increased variety in panels, and have not modified pricing in the wake of rising positivity confirmation rates.
- ❖ Risk of increased litigation after an accident IF you are shown to have poor safety policies.

Not Testing for Marijuana

Especially in states that still allow for pre-employment THC testing, excluding marijuana from your drug-test panel **invites marijuana users** in your community to your company.

Studies show that marijuana users increase...

- ❖ Absenteeism
- ❖ Turnover
- ❖ Accidents and workers' comp claims
- ❖ A decrease in productivity and safe work behavior

- ❖ The legalization of marijuana has not suspended the laws of:
 - negligent hiring
 - respondeat superior...
 - ... that can hold employers legally liable for accidents, property damage, fatalities, theft, fraud and other bad acts caused by or committed by employees.



4

Clearinghouse Reminders

Limited vs. Full Clearinghouse Queries

❖ Limited queries

- Provides a binary 'yes' or 'no' response, but no additional violation details.
- Quick, easy way to conduct annual checks without violating privacy laws.
- Scope is limited, and they cannot provide the complete picture.

❖ Full queries

- Comprehensive view of a driver's history regarding drug and alcohol violations.
- Essential during the hiring process **OR** when a limited query raises a red flag.

- ❖ Despite early belief in the industry, the FMCSA Drug and Alcohol Clearinghouse **DOES NOT** eliminate the requirement to contact previous employers.
 - Per regulation 391.23(d) of the FMCSA guidelines, employers are still obligated to contact previous employers to obtain safety performance history to include "general employment details" and accident records. The Clearinghouse does not override this requirement. ... that can hold employers legally liable for accidents, property damage, fatalities, theft, fraud and other bad acts caused by or committed by employees.



5

i9 Flexibility

❖ **Meet In-Person Deadline**

- Employers have 30 days to get in compliance. Must effectively complete in-person inspections for all relevant employees by August 30.

❖ **Identifying Virtually Reviewed I-9 Forms**

- Identify and isolate all Forms I-9 that underwent virtual review during the period of COVID-19-related flexibility.

❖ **Design an In-Person Review Process**

- Design a viable and efficient process for conducting in-person reviews of these Forms I-9.

❖ **Maintaining Compliance**

- DHS and ICE will also resume their compliance enforcement activities.
- This includes conducting Form I-9 audits and issuing Notices of Inspection.

THANKS!

Any questions?

You can find me at:

Steven.Spencer@disa.com

