



WHY CANNABIS SCHEDULING CHANGES REQUIRE A SAFETY CARVE-OUT FOR U.S. DOT SAFETY SENSITIVE EMPLOYEES

The *Transportation Workplace Drug and Alcohol Testing Program* outlined in [49 CFR Part 40](#) applies to those employees with the potential to cause harm to public transportation by violating workplace drug and alcohol policies.

These testing procedures cover safety-sensitive employees defined by the FAA, FMCSA, FRA, FTA, and PHMSA which include, among others:

- Airline Pilots
- School Bus Drivers
- Long-Haul Truck Drivers
- Railroad Operators
- Pipeline Workers
- Hazardous Materials Transporters
- Public Transit Operators
- Air Traffic Controllers

WHAT THE LAW SAYS

The “Procedures for Testing” guidance of the Omnibus Transportation Employees Testing Act of 1991 states, “with respect to laboratories and testing procedures for controlled substances, incorporate the Department of Health and Human Services scientific and technical guidelines”. It further states that HHS will “establish the minimum list of controlled substances for which individuals may be tested”¹.

Executive Order 12564 -- Drug-free Federal workplace of Sept. 15, 1986, Section 7(c) Definitions states, “For purposes of this Order, the term “illegal drugs” means a controlled substance included in Schedule I or II, as defined by section 802(6) of Title 21 of the United States Code, the possession of which is **unlawful** under chapter 13 of that Title.”² (Emphasis added)

Chapter 13 describes **unlawful**: “The term “felony” means any Federal or State offense classified by applicable Federal or State law as a felony.”³

The HHS Federal Register / Vol. 73, no. 228, p.71880, Section 3.2(a) states that an employee may be tested for “any drugs listed in Schedule I or II of the Controlled Substances Act (other than the drugs listed in Section 3.1, or when used pursuant to a valid prescription or when used as otherwise **authorized by law**).”⁴ (Emphasis added)

THE OUTCOME

Should states be authorized by federal law to deem marijuana as **lawful**, the direct result is that HHS will remove THC (marijuana) from the Federal Register.

When HHS removes THC from the Federal Register, DOT is NOT ALLOWED to test for that substance.

THE SOLUTION

- 1.) There must be an immediate and clear **Safety Carve-Out** for safety-sensitive employees under the U.S. Department of Transportation.
- 2.) It would be prudent to mandate a **Safety Carve-Out** for all safety-sensitive employees whether D.O.T. or non-D.O.T. so that employers may have the continued right to a Safe and Drug-Free Workplace where employees, workplaces, and the general public could be at risk from those operating while under-the-influence of THC.

HOW NDASA CAN HELP

Our network of Subject Matter Experts in the field of workplace drug and alcohol testing are available to offer technical assistance. This includes: Medical Review Officers, Drug Collections Professionals, Toxicologists, Substance Abuse Professionals, etc. We can also provide legally reviewed sample language for the Safety Carve-out.

¹ www.transportation.gov/sites/dot.gov/files/docs/199111028_Omnibus_Act.pdf

² www.archives.gov/federal-register/codification/executive-order/12564.html

³ www.govinfo.gov/content/pkg/USCODE-2010-title21/pdf/USCODE-2010-title21-chap13-subchapl.pdf

⁴ www.govinfo.gov/content/pkg/FR-2008-11-25/pdf/E8-26726.pdf