

BE PREPARED!

RECOMMENDATIONS FOR COMPLIANCE WITH THE ARKANSAS MEDICAL MARIJUANA AMENDMENT



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Meet the Presenters



J. Bruce Cross

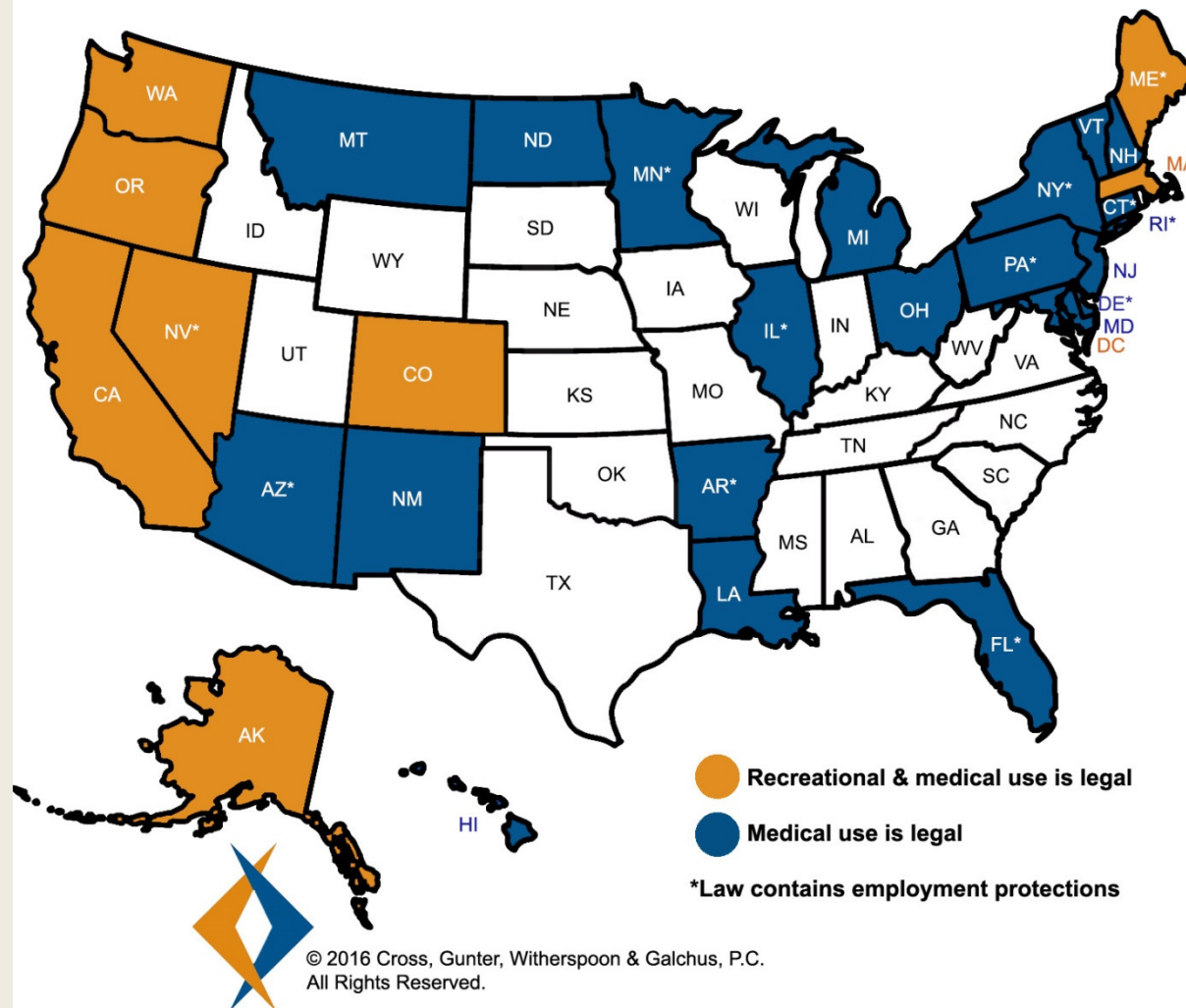
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J. Bruce Cross is a director in the firm of Cross, Gunter, Witherspoon & Galchus, P.C. in Little Rock, Arkansas, who practices in the areas of labor and employment defense law. Bruce is a Fellow in the College of Labor and Employment Lawyers of the American Bar Association. He was also named Lawyer of the Year in Little Rock in Labor Law – Management in 2014. Bruce is also listed as a Leading Lawyer in Labor and Employment in *Chambers USA: America's Leading Lawyers for Business*; *Best Lawyers in America* in Labor and Employment Law; *Mid-South Super Lawyers* and the *Top 50 Arkansas Mid-South Super Lawyers*.

Bruce received his undergraduate degree from the University of Notre Dame and his J.D. degree from the University of Arkansas School of Law. Bruce's practice includes work before the National Labor Relations Board, the Equal Employment Opportunity Commission, the Wage & Hour and OFCCP Divisions of the Department of Labor, as well as related federal and state court litigation.



Marijuana Laws in the U.S.



Marijuana Laws in the U.S.



State	Year Passed	How Passed (Yes Vote)	Possession Limit
Marijuana State Laws – Summary Chart adapted from ProCon.org			
1 Alaska	1998	Ballot Measure 8 (58%)	1 oz usable; 6 plants (3 mature, 3 immature)
2 Arizona	2010	Proposition 203 (50.13%)	2.5 oz usable; 12 plants
3 Arkansas	2016	Ballot Measure Issue 6 (53.2%)	3 oz usable per 14-day period
4 California	1996	Proposition 215 (56%)	8 oz usable; 6 mature or 12 immature plants
5 Colorado	2000	Ballot Amendment 20 (54%)	2 oz usable; 6 plants (3 mature, 3 immature)
6 Connecticut	2012	House Bill 5389 (96-51 H, 21-13 S)	2.5 oz usable
7 Delaware	2011	Senate Bill 17 (27-14 H, 17-4 S)	6 oz usable
8 Florida	2016	Ballot Amendment 2 (71.3%)	Amount to be determined
9 Hawaii	2000	Senate Bill 862 (32-18 H; 13-12 S)	4 oz usable; 7 plants
10 Illinois	2013	House Bill 1 (61-57 H; 35-21 S)	2.5 ounces of usable cannabis during a period of 14 days
11 Louisiana	1978*	Senate Bill 245	
12 Maine	2013	Ballot Question 2 (61%)	2.5 oz usable; 6 plants
13 Maryland	2014	House Bill 881 (125-11 H; 44-2 S)	30-day supply, amount to be determined
14 Massachusetts	2012	Ballot Question 3 (63%)	60-day supply for personal medical use (10 oz)
15 Michigan	2008	Proposal 1 (63%)	2.5 oz usable; 12 plants
16 Minnesota	2014	Senate Bill 2470 (46-16 S; 89-40 H)	30-day supply of non-smokable marijuana
17 Montana	2004	Initiative 148 (62%)	1 oz usable; 4 plants (mature); 12 seedlings
18 Nevada	2000	Ballot Question 9 (65%)	2.5 oz usable; 12 plants
19 New Hampshire	2013	House Bill 573 (284-66 H; 18-6 S)	Two ounces of usable cannabis during a 10-day period
20 New Jersey	2010	Senate Bill 119 (48-14 H; 25-13 S)	2 oz usable
21 New Mexico	2007	Senate Bill 523 (36-31 H; 32-3 S)	6 oz usable; 16 plants (4 mature, 12 immature)
22 New York	2014	Assembly Bill 6357 (117-13 A; 49-10 S)	30-day supply non-smokable marijuana
23 North Dakota	2016	Ballot Measure 5 (63.7%)	3 oz per 14-day period
24 Ohio	2016	House Bill 523 (71-26 H; 18-15 S)	Maximum of a 90-day supply, amount to be determined
25 Oregon	1998	Ballot Measure 67 (55%)	24 oz usable; 24 plants (6 mature, 18 immature)
26 Pennsylvania	2016	Senate Bill 3 (149-46 H; 42-7 S)	30-day supply
27 Rhode Island	2006	Senate Bill 0710 (52-10 H; 33-1 S)	2.5 oz usable; 12 plants
28 Vermont	2004	Senate Bill 76 (22-7) HB 645 (82-59)	2 oz usable; 9 plants (2 mature, 7 immature)
29 Washington	1998	Initiative 692 (59%)	8 oz usable; 6 plants
30 Washington, DC	2010	Amendment Act B18-622 (13-0 vote)	2 oz dried; limits on other forms to be determined
*Currently, Louisiana does not have a functional medical marijuana program.			

Medical Marijuana in the Workplace



Substance Abuse Program Administrators Association (SAPAA) reports:

- 13.1 million employed drug abusers in 2007
 - Drug and alcohol problems cost roughly \$276 billion every year
 - From 2012-14, positive employee marijuana drug test results increased by 6.2% nationally, and between 20-23% in Colorado and Washington

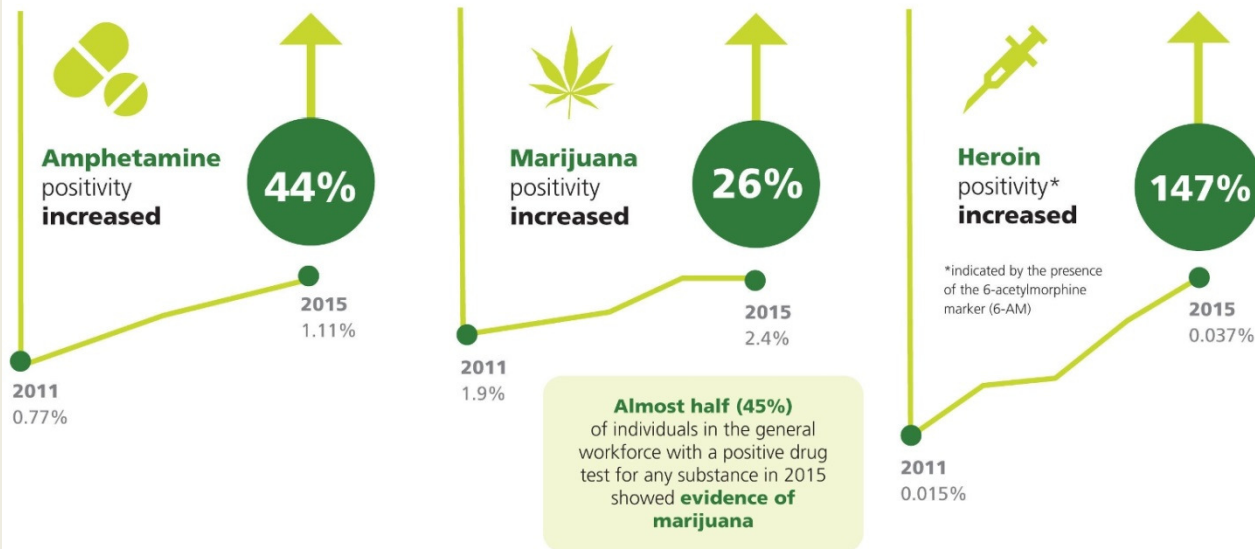
Colorado User Statistics as of August, 2016:

- 63.8% male; 36.2% female
 - Average patient is 42-43 years old
 - Most common conditions being treated are severe pain and muscle spasms
 - Source: https://www.colorado.gov/pacific/sites/default/files/CHED_MMR_Report_August_2016_Statistics_092016_1.pdf

National Trends in Workplace Drug Testing

In the General U.S. Workforce, the Rate of Amphetamine, Marijuana and Heroin Detection Increased Annually for the Past Five Years in Urine Testing

Between 2011 and 2015

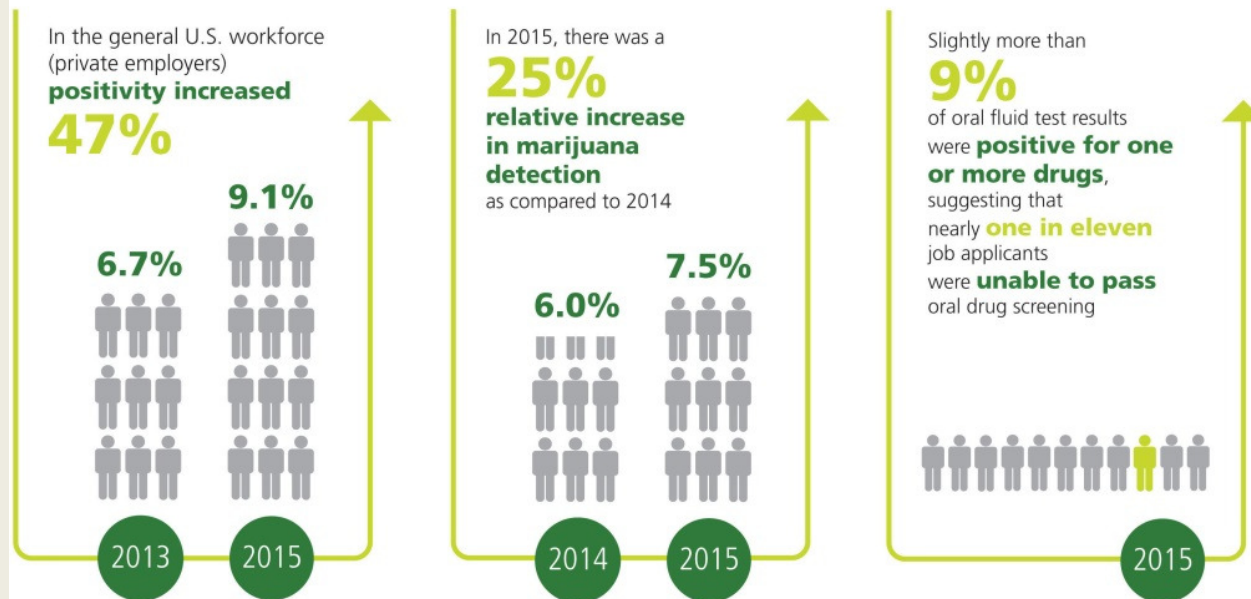


SOURCE: 2016 Quest Diagnostics Drug Testing Index™, based on nearly 11 million workforce drug test results.



National Trends in Workplace Drug Testing

In Oral Fluid Testing, Overall Positivity Rate Surges over the Last Three Years



SOURCE: 2016 Quest Diagnostics Drug Testing Index™, based on nearly 11 million workforce drug test results.
www.QuestDiagnostics.com/DTI



Marijuana in the Workplace



Arkansas employers must balance competing interests.

- Ensure workplace safety
 - Employers have a duty under the Occupational Safety & Health Act (OSHA) to “maintain conditions or adopt practices reasonably necessary and appropriate to protect workers on the job.”
- Maintain employee productivity – Avoid anti-productive behaviors, such as:
 - Inability to concentrate or remain focused
 - Increased drowsiness, fatigue, and lethargy
 - Decreased ability to accurately gauge lengths of time and distance
 - Impaired hearing, vision, motor skills, and short term memory
 - Apathetic, uncommitted attitude
- Protect employee rights
 - ADA, Arkansas Civil Rights Act, nondiscrimination clause, lawful activity presumption, unemployment benefits, workers’ compensation, health insurance, privacy laws (drug testing)

Arkansas Medical Marijuana Amendment

Introduction to the Arkansas Medical Marijuana Amendment



Photo credit: <http://www.medicalclinicsofnyc.com/wp-content/uploads/Marijuana-Doctors.jpg>

Arkansas Medical Marijuana Amendment



Applicability

- Cardholders
 - Qualifying Patient
 - Designated Caregiver
 - Cultivation Facility Agent
 - Dispensary Agent
- Out-of-state visitor with a medical cannabis card issued in their state of residence for a qualified medical condition in Arkansas



Photo credit: http://articles.chicagotribune.com/2014-02-11/news/ct-medical-marijuana-rules-met-20140211_1_dispensaries-cultivation-centers-medical-marijuana

Quantity Allowed

- 2.5 oz. of usable marijuana every 14 days

How Dispensed

- Licensed dispensaries
 - At least 20 but no more than 40 dispensary licenses in the state
 - No more than 4 dispensaries in 1 county



Arkansas Medical Marijuana Amendment



How to Obtain a Registry ID Card

- Registry Identification Card issued by the Arkansas Department of Health
- **Written Certification:** document signed by a physician stating the following:
 - (1) in his/her professional opinion,
 - (2) after reviewing the patient's medical history and current medical condition in the course of a physician-patient relationship, the patient has
 - ✦ (a) a Qualifying Medical Condition, and
 - ✦ (b) the potential benefits of the Medical Use of Cannabis would likely outweigh the health risks to the patient.*
 - Note: The Written Certification should also specify the Qualifying Medical Condition.
 - Note: While it is illegal to prescribe marijuana under federal law, some states have held that a written certification for marijuana is the “functional equivalent” of a prescription for the purposes of some state benefits. (There is no such Arkansas court interpretation or constitutional amendment by the legislature.)
- **This opinion may no longer be required if HB 1058 is passed.*
 - HB 1058 would also clarify a physician's records stating that a qualifying patient has a qualifying medical record; an application or renewal, including supporting information from a physician, and dispensary records with patient information **are not medical records.**

Arkansas Medical Marijuana Amendment



Qualifying Medical Conditions

- **12** enumerated conditions:
 - Alzheimer's, Amyotrophic Lateral Sclerosis (ALS), Arthritis, Cancer, Crohn's Disease, Fibromyalgia, Glaucoma, Hepatitis C, HIV/AIDS, Post Traumatic Stress, Tourette's Syndrome, Ulcerative Colitis
- **And** a chronic or debilitating disease that produces the following:
 - Wasting Syndrome or cachexia, peripheral neuropathy, severe nausea, seizures, or severe and persistent muscle spasms; or
 - Intractable pain (defined as pain that has not responded to ordinary treatments for more than **6 months**).
- Any other medical condition or its treatment as approved by the Arkansas Dep't of Health (ADH).
 - The Amendment requires the ADH to create rules outlining how new medical conditions may be added to the list of qualifying conditions.

Arkansas Medical Marijuana Amendment



Organizations charged with implementation

- 3 State agencies have **120 days** to promulgate new rules*
 - **Department of Health**
 - ✦ Consider applications for and the renewal of registry identification cards for qualifying patients and designated caregivers
 - ✦ Create labeling and testing standards
 - ✦ Consider petitions to add new qualifying conditions
 - **Medical Marijuana Commission**
 - ✦ Create licensing process for dispensaries and cultivation facilities
 - ✦ Must accept applications for licenses by June 1, 2017**
 - **Alcoholic Beverage Control Division**
 - ✦ Create rules for oversight, record-keeping, security, personnel, manufacturing and packaging process, advertising restrictions, procedures for disposal of marijuana, inspection, and investigation of dispensaries and cultivation facilities
 - ✦ Create licensing process for agents of dispensaries and cultivation facilities
- *This deadline will likely be extended to **180 days** if HB 1026 is passed.
- **This deadline will likely be extended to **July 1, 2017** if HB 1026 is passed.

Arkansas Medical Marijuana Amendment



Organizations charged with implementation

○ **Medical Marijuana Commission**

- ★ The five-person Medical Marijuana Commission was appointed on December 7, 2016.
 - Dr. Ronda Henry-Tillman, M.D. - Chairwoman (Appointed by Governor Hutchinson)
 - James Miller (Appointed by Senator Dismang)
 - Dr. J. Carlos Roman M.D. (Appointed by Senator Dismang) (2-Year Term)
 - Dr. Stephen J. Carroll, PharmD. (Appointed by Representative Gillam) (2-Year Term)
 - Travis W. Story, Esq. (Appointed by Representative Gillam)

Arkansas Medical Marijuana Amendment



Organizations charged with implementation

○ Medical Marijuana Commission

✦ The Commission has decided on the following:

○ Five (5) cultivation facilities

- Applicants must show \$1 million surety bond or assets worth \$1 million and \$500,000 in cash.
- \$15,000.00 initial application fee.
- \$100,000.00 annual licensing fee for each grower.

○ Thirty-two (32) dispensaries across Arkansas with a two-tiered option.

- \$7,500.00 initial application fee (half will be refunded if application is unsuccessful).
- For dispensaries that do not grow marijuana:
 - \$2,500.00 initial license fee and \$10,000.00 annual renewal fee.
- For cultivation dispensaries that choose to grow marijuana:
 - \$25,000.00 initial license fee and \$32,500.00 annual renewal fee.
- At this time, draft rules envision a lottery system rather than a primarily merit-based system.

Arkansas Medical Marijuana Amendment



Employment Protections

- **Creates broad civil and criminal protections**
 - Qualifying Patients and Designated Caregivers “shall not be subject to arrest, prosecution, or penalty in any manner or **denied any right or privilege**, including without limitation a civil penalty or disciplinary action by a business, occupational, or professional licensing board for the medical use of marijuana in accordance with this [law] . . .”
- **Creates a rebuttable presumption of lawful activity**
 - Qualifying patients and designated caregivers are “presumed to be **lawfully engaged** in the Medical Use of Cannabis in accordance with this chapter” if in actual possession of a lawfully issued card and a legal amount of Cannabis.
 - ✦ Presumption can be rebutted by evidence that conduct related to marijuana was not for the purpose of medical treatment.
 - ✦ Medical use and possession is restricted to 2.5 oz. usable marijuana per qualifying patient or designated caregiver.

Arkansas Medical Marijuana Amendment

Employment Protections (cont.)

- **Prohibits employment discrimination**
 - “An **employer shall not discriminate** against an individual in hiring, termination, or any term or condition of employment, or otherwise penalize an individual, based upon the individual’s past or present status as a Qualifying Patient or Designated Caregiver.”



Photo credit: <http://businesswest.com/blog/employers-struggle-with-fine-print-of-medical-marijuana-law/>

Arkansas Medical Marijuana Amendment



Employment Protections (cont.)

- In order to take adverse employment action, the employer must have proof of the employee's public/workplace use OR proof of being “under the influence.”
 - “This amendment does not permit any person to:
 - ✦ Undertake any task **under the influence** of marijuana when doing so would constitute negligence or professional malpractice;
 - ✦ Possess, smoke, or otherwise engage in the use of marijuana;
 - On a school bus;
 - On the ground of a daycare center, preschool, primary or secondary school, college or university;
 - At a drug or alcohol treatment facility;
 - At a community or recreation center;
 - In a correctional facility;
 - On any form of **public transportation**;
 - Or in a **public place**;

NOTE: The Amendment does not define “under the influence” or “public place.”

Arkansas Medical Marijuana Amendment



Employment Protections (cont.)

- “This amendment does not permit any person to:
 - ✦ Operate, navigate or be in actual physical control of any motor vehicle, aircraft, motorized watercraft or any other vehicle drawn by power other than muscular power while **under the influence** of marijuana.”
- “This amendment does not require:
 - ✦ A government medical assistance program or **private health insurer to reimburse a person for costs associated with the medical use** of marijuana unless federal law requires reimbursement;
 - ✦ An employer to **accommodate the ingestion** of marijuana in a workplace or an employee working **under the influence** of marijuana;
 - ✦ An individual or establishment in lawful possession of property to allow a guest, client, customer, or other visitor to use marijuana on or in that property;
 - ✦ An individual or establishment in lawful possession of property to admit a guest, client, customer, or other visitor who is **inebriated** as a result of his or her medical use of marijuana;
- **NOTE: “Inebriated” is not defined by the Amendment.**

Arkansas Medical Marijuana Amendment



Amendment by General Assembly

- Arkansas Legislature would not be allowed to make medical marijuana illegal again without voter approval.
- Permits General Assembly to amend any section of the Amendment with a **supermajority vote** except for the following provisions:
 - Civil and criminal protections for users and caregivers
 - Lawful engagement presumption
 - Limits on minimum and maximum number of dispensaries and cultivation facilities



Photo credit: <https://www.washingtonpost.com/news/wonk/wp/2016/09/02/an-unprecedented-number-of-states-will-vote-on-marijuana-this-fall/>

Arkansas Medical Marijuana Amendment



Amendment by General Assembly

- State Rep. Doug House, R-North Little Rock, was named by House Speaker Jeremy Gillam as the legislative point person for medical marijuana issues.
- “The amendment addressed employers, but it’s not really an employer issue as much as it is a **worker safety issue**,” House said. “We do not want anybody under the influence of anything at a job site in a critical situation where, if their judgment is clouded, somebody, including themselves, can get hurt.”

Photo credit: <https://www.washingtonpost.com/news/work/wp/2016/09/02/an-unprecedented-number-of-states-will-vote-on-marijuana-this-fall/>

Guidance from the Arkansas Department of Finance and Administration



Medical Marijuana Statement:

“Please be aware however that, at this time, the Department is not issuing permits, taking names or applications, or otherwise authorizing the use of marijuana. Use of marijuana under circumstances outside the limits of the amendment is still illegal in Arkansas.”

- Alcohol Beverage Control Administration Division

<http://www.dfa.arkansas.gov/Pages/MedicalMarijuanaAmendment.aspx>

Conflict with Federal Law



Under the federal **Controlled Substance Act (CSA)**, marijuana is still classified as a Schedule I Drug.

- Drugs are classified as Schedule I drug if:
 - (A) The drug or other substance has a high potential for abuse.
 - (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
 - (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

However, the Department of Justice has allowed states to legalize marijuana for **medicinal and recreational** purposes.

The DOJ has listed eight priorities for enforcing violations of the Controlled Substances Act, none of which include prosecuting users of marijuana for medicinal and recreation use.

DOJ's Position

DOJ has stated that CSA will be enforced against states to prevent:

- Distribution to minors
- Proceeds from benefitting gangs and cartels
- “Legal” marijuana being transported to states where it is illegal
- State-sanctioned operations being used as a cover for other illegal narcotic operations
- Violence and firearms from being used in the marijuana industry
- Driving under the influence and other adverse public health consequences
- Growing marijuana on public lands
- Use or possession of marijuana on federal property

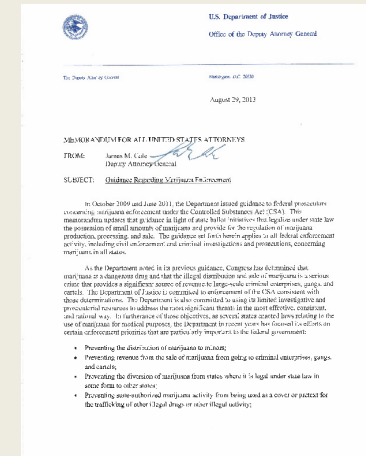


Photo credit: <http://www.southerncoalition.org/herald-sun-op-ed-urges-durham-re-examine-marijuana-enforcement/>

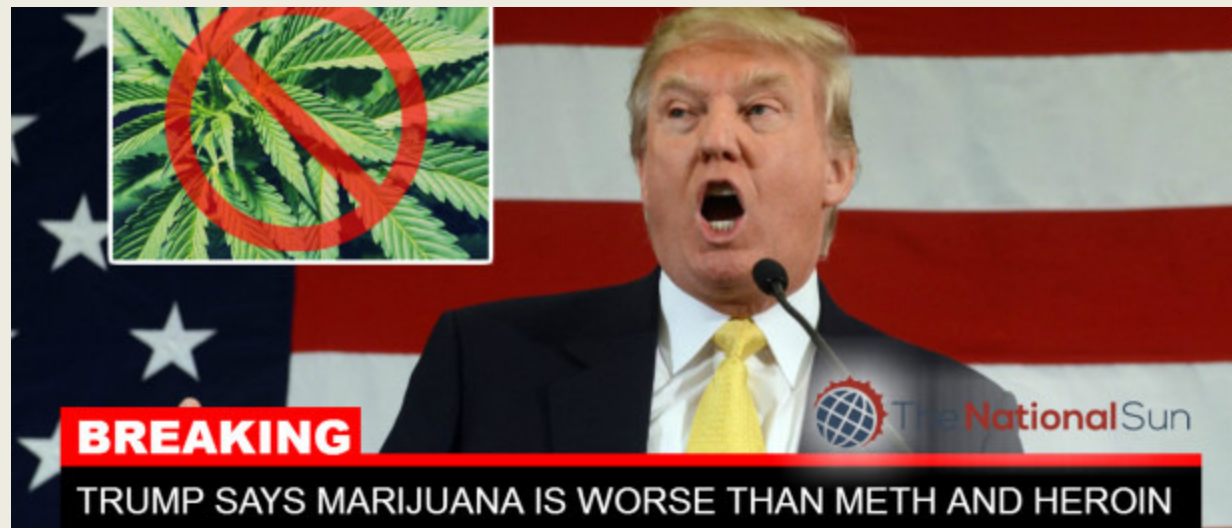
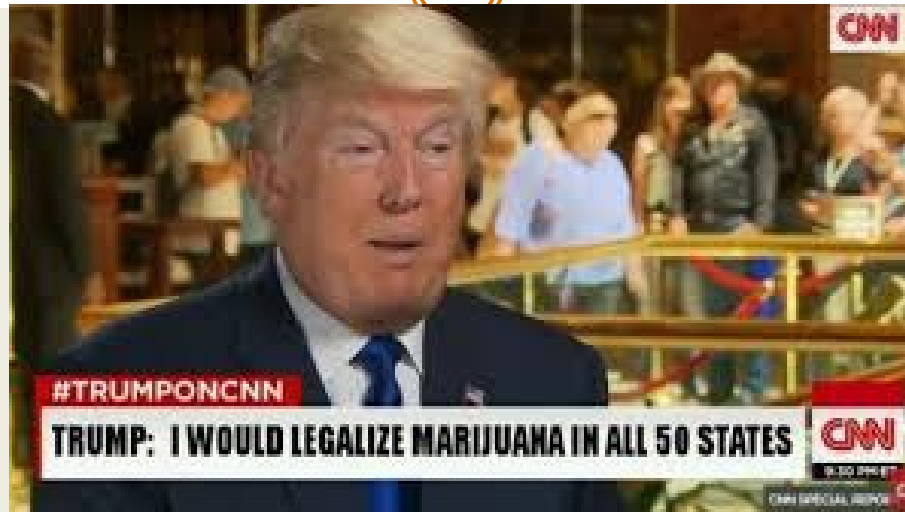
DOJ's Position



DOJ: As long as state enforcement methods are “sufficiently robust” to protect against these harms, legalization will not be challenged.



New Administration, New Position?



“Zero Tolerance” Policies



Federal Drug-Free Workplace Act

- Federal grant recipients and contractors must adopt a zero tolerance policy for drug use and certify that the workplace is drug free.
 - Publish a written policy and require employee consent;
 - Initiate awareness programs about dangers of drug abuse and available counseling/rehabilitation;
 - Requires employees to notify employers of any drug-related conviction; and
 - Make an ongoing good faith effort to maintain a drug-free workplace.
 - NOTE: Does NOT require mandatory drug testing

Department of Transportation

- The Omnibus Transportation Employee Testing Act of 1991 requires DOT Agencies to implement drug testing of safety-sensitive transportation employees in the aviation, trucking (including school bus drivers, and certain limousine and van drivers), railroads, mass transit, and pipelines industries. In 1994, DOT added alcohol testing requirements to its regulations.

“Zero Tolerance” Policies



Department of Transportation (cont.)

- October 22, 2009
 - DOT’s Drug Alcohol Testing Regulation – 49 CFR Part 40 – “does not authorize ‘medical marijuana’ under a state law to be a valid medical explanation for a transportation employee’s positive drug test result.”
- December 3, 2012
 - “Recently, some states passed initiatives to permit use of marijuana for so-called ‘recreational’ purposes. We want to make it perfectly clear that the state initiatives will have no bearing on the Department of Transportation’s regulated drug testing program. The Department of Transportation’s Drug and Alcohol Testing Regulation – 49 CFR Part 40 – does not authorize the use of Schedule I drugs, including marijuana, for any reason.”

-- Jim L. Swart, Director Office of the Secretary of Transportation, Office of Policy and Compliance, Department of Transportation

“Zero Tolerance” Policies



Arkansas’s Voluntary Program for Drug-Free Workplaces

- Allows employers to implement a drug-free workplace program, qualifying them for workers’ comp premium credit.
- Employers are required to implement mandatory drug testing.
 - After making a conditional offer of employment to a job applicant after providing notice of the testing requirements
 - After an accident resulting in physical injury
 - Follow-up drug testing after entering rehab program
 - At routine times according to written policy
 - When employer has reasonable suspicion of drug use
 - Any other lawful reason
- Consequences of failing drug test
 - An employee who fails or refuses to take the test may be terminated and precluded from receiving workers’ compensation medical and indemnity benefits.
 - If an applicant fails or refuses to take the test, employer may refuse to hire an applicant who fails/refuses to take the test.
- Employers must provide notice of mandatory drug testing, as well as the consequences.
- Employers must provide substance abuse education.
- Employers must comply with procedural requirements for drug and alcohol testing.

Non-Discrimination Protections



- **American with Disabilities Act**

- Applies to employers of fifteen (15) or more employees
- Prohibits employers from discriminating against qualified individuals on the basis of disability
- Employers are required to provide reasonable accommodations to disabled employees
- Does not protect employees who engage in illegal use of drugs under Controlled Substances Act
 - ✦ Excludes prescription medications

- **Arkansas Civil Rights Act**

- Applies to employers of nine (9) or more employees
- Protects against discrimination on the basis of disability in the workplace
- Allows for:
 - ✦ Civil action to enjoin employers from further violations
 - ✦ Compensatory and punitive damages ranging from \$15,000-\$300,000 depending on number of employees in workplace
 - ✦ Litigation and attorney's fees

- **Arkansas Medical Marijuana Amendment**

- Creates broad civil and criminal protections
- Creates a rebuttable presumption of lawful activity
- Prohibits employment discrimination based upon the individual's status as a Qualifying Patient or Designated Caregiver"
- Appears to require proof of public/workplace use OR proof of being "under the influence"

Problems with Drug Testing



- **Urinalysis does not accurately detect when someone is “under the influence.”**
 - Urinalysis detects THC metabolites; it does not detect impairment.
 - ✦ Testing positive for marijuana may not necessarily mean that the person was “under the influence” at the time.
 - ✦ For a first-time user, urinalysis has a detection time of 1-7 days.
 - ✦ For a regular user, this detection time is 7-100 days.
- **Blood and saliva tests provide shorter detection times.**
 - For a first-time user, blood testing has a detection time of 12-24 hours. For a regular user, blood testing has a detection time of 2-7 days.
 - ✦ However, blood testing is invasive and may implicate privacy violations for public employees, who must ensure compliance with the 4th Amendment requirement for unreasonable searches.
 - Oral testing has a detection time of 0-24 hours, but is not validated.
 - ✦ Oral fluid testing can detect the metabolite as well as the parent drug THC (while the drug is in the mouth or upper respiratory tract), and cannot be adulterated or substituted as easily as urinalysis (saliva testing is a directly observed collection).
- **However, employers must still use urinalysis for safety-sensitive positions to comply with federal rules and regulations.**

Problems with Drug Testing



OSHA Post-Accident Testing Recommendation

- OSHA recommends that post-accident testing should be limited to situations in which “employee drug use is **likely to have contributed** to the incident, and for which the drug test can **accurately identify impairment** caused by drug use.”
 - Note: This rule does not prohibit post-accident drug testing to comply with the requirements of a state of federal law or regulation, including the federal Drug-Free Workplace Act, the Arkansas Voluntary Program for Drug-Free Workplaces, and DOT rules and regulations.
- On May 12, 2016, OSHA published its final rule on electronic reporting of workplace injuries and illnesses.
- OSHA will be publishing employer injury/illness records on the internet, without explanation of facts and circumstances.
- This rule goes into effect on January 1, 2017.
- Note: The final rule *does not* prohibit employers from using drug testing (or the threat of testing) as a form of adverse action.

Employment Issues: General Questions



- 1. Who is an “employer” within the meaning of the law?**
- 2. Can employees bring wrongful termination claims?**
- 3. How does an employer test for and document “under the influence”?**
- 4. Do employers have to provide registered cardholders with reasonable accommodations under the ADA?**
- 5. What constitutes “misconduct” for the purposes of unemployment benefits?**
- 6. Does the illegal drug exclusion to the workers compensation statute still apply in an accident involving a registered cardholder?**
- 7. Are employers required to pay for medical marijuana treatments to treat an employee’s injury as part of workers compensation?**

Employment Issues:

Specific Answers to Questions



1. Who is an “employer” within the meaning of the law?

- The Arkansas Medical Marijuana Amendment does not define “employer.”
- For now, we advise that employers treat the law as though it applies to all employers.

2. Can employees bring wrongful termination claims under the law?

- Employees will likely have a wrongful termination claim under the non-discrimination provision and the lawful-presumption provisions of the Arkansas Medical Marijuana Amendment.
- Employers seeking to take adverse action against an employee likely need to prove that the employee either ingested medical marijuana or was “under the influence” at work. However, the law doesn’t define “under the influence,” or its relationship to current drug testing methods.

Employment Issues:

Specific Answers to Questions



3. How does an employer test for and document that an employee came to work or performed a task “under the influence” of marijuana?

- We do not advise employers to take adverse action based solely on positive drug results.
- Nuances created by anti-discrimination provisions in the Arkansas Amendment warrant employer attention.
- Employers should engage in a **fact-specific inquiry**:
 - 1) Whether the applicant or employee is lawfully enrolled in the State’s medical marijuana program,
 - 2) Whether the level of cannabis shown on the test is consistent with such use, and
 - 3) Whether there is a job-related reason that a medical marijuana user could not be hired or remain in the position in question.
- Employers should carefully deliberate and document reasons for disqualifying a medical marijuana user from employment.
- Employers should consult legal counsel in each situation.
- For employees in safety-sensitive positions covered by federal law, there is likely a legitimate basis for taking an adverse action if there is a positive test result, regardless of the Amendment.

Employment Issues:

Specific Answers to Questions



4. Do employers have to provide registered cardholders with reasonable accommodations under the ADA?

- Unless the state marijuana statute explicitly requires accommodations, most state and federal courts that have examined this question have held that employers are not required to provide reasonable accommodations.
- The Arkansas Amendment provides that employers are not required to **accommodate the ingestion** of marijuana in a workplace or employees working **under the influence** of marijuana.
- In light of similar provisions in those states' marijuana laws and the federal Controlled Substances Act, state courts in California, Colorado, Washington and Montana, as well as the federal appellate courts for the Sixth and Ninth Circuits, have held that state medical marijuana laws do not require employers to accommodate medical marijuana use in the workplace.
 - Employers have no obligation under the ADA to accommodate an employee's use of medical marijuana because it is illegal under federal law. *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 348 Or. 159, 230 P.3d 518 (2010).
 - Medical marijuana constitutes an "illegal use of drugs" under the ADA. *James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012).

Employment Issues:

Specific Answers to Questions



5. When does an employee's marijuana use constitute “misconduct” for the purposes of unemployment insurance benefits?

- In Arkansas, an individual shall be disqualified for UI benefits if he/she is discharged for the following:
 - “. . . **misconduct in connection with the work** on account of . . . reporting for work while **under the influence** of intoxicants, including a controlled substance . . . Ark. Code Ann. § 11-10-514(b)(1).
 - “. . . **testing positive for an illegal drug** pursuant to a United States Department of Transportation-qualified drug screen conducted in accordance with the employer's **bona fide written drug policy** . . .” Ark. Code Ann. § 11-10-514(b)(2)(A).
- ***George's Inc. v. Director*, 50 Ark.App. 77, 900 S.W.2d 590 (1995)**
 - “Misconduct,” for purposes of unemployment compensation, involves: (1) disregard of the employer's interest; (2) **violation of the employer's rules**; (3) disregard of the standards of behavior which the employer has the right to expect; and, (4) disregard of the employee's duties and obligations to his employer.

Employment Issues:

Specific Answers to Questions



5. **When does an employee's marijuana use constitute "misconduct" for the purposes of unemployment insurance benefits? (cont.)**
- Some state courts have ruled in favor of **employers**:
 - Colorado courts denied unemployment benefits to an employee fired for using medical marijuana in violation of employer's zero tolerance policy. *Beinor v. Industrial Claim Appeals*, 262 P.3d 970 (Colo. Ct. App. 2011).
 - ✦ Colorado's statute disqualifies an individual from receiving unemployment benefits after the presence of a controlled substance that was not medically prescribed was found in the individual's system during working hours.
 - ✦ The court explained that Colorado's medical marijuana amendment created an exception to criminal prosecution and was not a grant of an unlimited right to use the drug in any place or in any manner.
 - The court also distinguished a medical certification from a medical prescription.

Employment Issues:

Specific Answers to Questions



5. **When does an employee's marijuana use constitute “misconduct” for the purposes of unemployment insurance benefits? (cont.)**
 - Other courts have ruled in favor of **employees**:
 - In Michigan, employees discharged after lawfully using medical marijuana are still entitled to unemployment benefits. *Braska v. Challenge Manufacturing Co.*, 861 N.W.2d 289 (2014).
 - ✦ The court reasoned that unemployment benefits were governed by state law, and under state law, marijuana is a legal substance.
 - In Illinois, an employee was “entitled to unemployment insurance benefits after he was terminated for using illegal, non-medical marijuana outside the workplace.” *Eastham III v. Housing Authority of Jefferson Cty., et al.*, 2014 Ill. App (6th) 130209.
 - ✦ The court reasoned that the employee was not under the influence while at work, and his recreational use did not violate the state's Unemployment Insurance Act, which prohibits granting benefits after “**misconduct . . . while in the course of employment.**”

Employment Issues:

Specific Answers to Questions



5. What constitutes “misconduct” for the purposes of the unemployment benefits? (cont.)

- The Arkansas Amendment create a rebuttable presumption of lawful activity.
 - Arkansas courts might follow approach of the court in the Michigan case, and decide that unemployment benefits are governed by state law, and under state law, marijuana is a legal substance.
- The Arkansas benefits statute requires a showing of “misconduct in connection with the work.”
 - Arkansas courts have held that failing a drug test may constitute “misconduct” if the employee reports to work with the intoxicating substance in his/her system in violation of the employer’s reasonable drug policy.
 - However, “misconduct in connection with the work” is similar to the language in the benefits statute in the Illinois case, in which the court held that recreational use outside of work did not constitute “misconduct . . . while in the course of the employment.”
- Therefore, Arkansas employers seeking to prove “misconduct” under the Arkansas Unemployment Insurance code provisions will likely be required to prove that the employee was “under the influence” of marijuana at work.
 - It’s unclear whether a positive drug test plus a bona fide written drug policy are sufficient to find “misconduct.”
 - “Under the influence” is not defined in the Arkansas Amendment.
 - The safe route is to document observable signs and symptoms.

Employment Issues:

Specific Answers to Questions



6. Does the illegal drug exclusion to the workers compensation statute still apply in an accident involving a Registered Cardholder?

- A North Carolina Workers' Comp Board found that an employee who was injured at work and later tested positive was entitled to workers' comp benefits. *Moore v. Sullbark Builders, Inc.*, 680 S.E.2d 732 (N.C. Ct. App. 2009).
 - The toxicology test did not indicate the levels of concentration of the drugs, and the employer failed to produce any other “credible evidence” to show impairment. Thus, the employer failed to demonstrate that the employee was impaired at the time of the injury.
- Under the Arkansas workers' compensation statute, to collect workers comp benefits, an employee must show by a *preponderance of the evidence* that the illegal drugs did not *substantially occasion* the injury or accident.
 - The burden of proof under the workers' compensation statute is on the employee.
 - The lawful-presumption provision of the Amendment **flips** this burden of proof with regard to use of marijuana, appearing to require the employer to prove that the employee was “under the influence.”

Employment Issues:

Specific Answers to Questions



- 6. Does the illegal drug exclusion to the workers compensation statute still apply in an accident involving a Registered Cardholder?**
- There is no clear answer at this time.
 - On the one hand, marijuana remains illegal under federal law. On the other hand, Arkansas courts could decide that medical marijuana is a legal drug for the purposes of the Arkansas workers' comp statute.
 - At this time, medical review officers are hesitant to testify on the basis of a positive marijuana drug test that an individual was impaired at the time of the injury for the purposes of workers' compensation because of the problems with drug testing.

Employment Issues:

Specific Answers to Questions

7. **Are employers required to pay for medical marijuana treatments to treat an employee's injury as part of workers' compensation?**
- Some courts have ruled in favor of the **employer**:
 - Maine's Workers Comp Board held that the employee failed to prove that the employer is not a private health insurer within the meaning of the workers' compensation and medical marijuana statutes. *Noll v. LePage Bakeries*, 2016 ME Wrk. Comp. LEXIS 145 (2015).
 - ✦ The medical marijuana statute states that governmental medical assistance programs and private health insurers are not required to cover the costs of purchasing medical marijuana.
 - ✦ This is similar to the language in the Arkansas Amendment.
 - Some courts have ruled in favor of **employees**:
 - New Mexico courts have consistently held that the state's worker's compensation statute authorizes reimbursement for medical marijuana. *Vialpando v. Ben's Auto. Servs.*, 331 P.3d 975 (N.M. Ct. App. 2014); *Maez v. Riley Indust.*, 347 P.3d 732 (N.M. Ct. App. 2015).
 - ✦ Medical marijuana treatment is "reasonable and necessary medical care."
 - ✦ Physician certification for marijuana is "the functional equivalent" of a prescription.

Employment Issues:

Specific Answers to Questions



7. **Are employers required to pay for medical marijuana treatments to treat an employee's injury as part of workers' compensation?**
- Currently, there is no clear answer.
 - The Arkansas Amendment provides that it does not require a government medical assistance program or private health insurer to reimburse for costs associated with medical marijuana unless federal law so requires it to be done.
 - On the other hand, the Amendment creates a rebuttable presumption of lawful activity, and Arkansas courts could decide that a written certification is the “functional equivalent” of a physician's prescription (unless the Legislature so defines what a written certification is).

Compliance Recommendations



Photo credit: <http://www.bramletagency.com/m/blog/fyi-the-four-major-types-of-employee-benefits.aspx>



Photo credit: <http://www.onestopbrokers.com/2016/07/29/wisebos-aml-risk-scoringkyc-system-100-compliance-selk-recommendations/>

Compliance Recommendations



1. Understand the **Arkansas Medical Marijuana Amendment** and the issues facing employers;
2. Update employee **job descriptions**;
3. Train supervisors in **reasonable-suspicion-signs-and-symptoms training**;
4. Consider adopting a **pre-duty drug safety policy** with a third-party drug testing lab that covers prescription medication and other legal substances that have impairing effects;
5. Consider adopting a **fitness-for-duty policy**;
6. Adopt an **ADA compliant policy** on reasonable accommodations;
7. Adopt a legally compliant **substance abuse policy** and forms that cover medical marijuana;
8. Use a **Medical Review Officer** to conduct drug testing; and
9. Let employees know your stance on medical marijuana use.

Update Job Descriptions



- Every job description should list “Essential Job Functions.”
- Add this language to the essential functions: “**the ability to work in a constant state of alertness and in a safe manner.**”
 - This language makes alertness “job related” under the ADA and OSHA.
 - For an employee in a safety-sensitive position, this makes alertness a “business necessity.”
- Add the specific **physical and mental competencies** required for the position.
 - E.g., lift 50 lb., operate heavy machinery
 - E.g., concentrate for long periods of time



Reasonable Suspicion Signs and Symptoms



- **Educate yourself on the workplace related impairing effects of marijuana:**
 - Inability to accurately gauge lengths of time and distance
 - Hearing and vision impairment, visual and/or auditory hallucinations
 - Inability to cope with sudden changes and/or emergencies
 - Loss of balance
 - Short-term memory loss
 - Non-caring, uncommitted, unconcerned attitude
 - Decreased cognitive reasoning and motor coordination
 - Inability to concentrate
 - Increased drowsiness, fatigue, and lethargy

Reasonable Suspicion Documentation

- Employee's Name
- Date of Observation
- Start of Observation (time)
- End of Observation (time)
- Location
- Checklist of Observable Indicators
 - ❖ Physical
 - ❖ Behavioral
 - ❖ Speech
 - ❖ Performance
 - ❖ Other abnormal behavior
- “To the best of my knowledge and belief, this report represents the **physical, behavioral, speech, or performance indicators** of the above-named employee, observed by me and upon which I base my decision to require said employee to submit to a reasonable suspicion: Drug Test.”
- Signatures
 - ❖ Witness
 - ❖ Supervisor/Company Official

REASONABLE SUSPICION DOCUMENTATION

Drivers Name:

Date of Observation: month, day, year

Start of Observation: A.M. ▼

End of Observation: A.M. ▼

Location:

Observed Behavior: (Check all that apply)

Physical Indicators	<input type="checkbox"/> Dilated Pupils	<input type="checkbox"/> Chronic Redness of Eyes	Behavioral Indicators	<input type="checkbox"/> Depression	<input type="checkbox"/> Anxiety
<input type="checkbox"/> Constricted Pupils	<input type="checkbox"/> Chronic Nasal Problems	<input type="checkbox"/> Moodiness	<input type="checkbox"/> Intability		
<input type="checkbox"/> Drowsiness	<input type="checkbox"/> Odor of Marijuana	<input type="checkbox"/> Alienation	<input type="checkbox"/> Agitation		
<input type="checkbox"/> Cold Sweats	<input type="checkbox"/> Odor of Alcoholic Beverage	<input type="checkbox"/> Combativeness	<input type="checkbox"/> Restlessness		
<input type="checkbox"/> Tremors	<input type="checkbox"/> Noticeable Weight Loss	<input type="checkbox"/> Panic Reactions	<input type="checkbox"/> Euphoria		
<input type="checkbox"/> Excessive Yawning	<input type="checkbox"/> Loss of Appetite	<input type="checkbox"/> Neglect of Personal Hygiene			
<input type="checkbox"/> Rapid Breathing	<input type="checkbox"/> Ravenous Appetite				
<input type="checkbox"/> Dizziness	<input type="checkbox"/> Unsteady Walk/Stumbling				

Speech Indicators

<input type="checkbox"/> Thick	<input type="checkbox"/> Rapid
<input type="checkbox"/> Slurred	<input type="checkbox"/> Incoherent
<input type="checkbox"/> Excessively Talkative	

Performance Indicators

<input type="checkbox"/> Unable to Concentrate
<input type="checkbox"/> Errors in Judgement
<input type="checkbox"/> Impaired Reasoning

Other abnormal behavior observed:

To the best of my knowledge and belief, this report represents the physical, behavioral, speech, or performance indicators of the above-named driver, observed by me and upon which I base my decision to require said driver to submit to a reasonable suspicion:

The above behavior has been witnessed by:

X _____ X _____
Signature of Supervisor or Company Official Signature of Supervisor or Company Official

Date

Date

Adopt a Pre-Duty Drug Safety Policy (if appropriate)



- This policy requires employees in safety-sensitive positions to pre-duty disclose that they have taken an impairing drug, whether legal, illegal, over-the-counter, or prescription.
 - Define “safety sensitive” and list the job classifications that qualify.
 - Make this part of the employer’s safety policy.
 - The employee does not have to disclose the drug or the medical condition to comply.
- Once disclosed, the employer reserves the right to send the employee to a fitness-for-duty evaluation.
 - The employer should encourage employees to give the examining physician a copy of the employee’s job description so the physician can make a fitness-for-duty determination.
- The employer reserves the right to make the final determination as to employment consequences.

Adopt an ADA Compliant Handbook Policy on Accommodation



- State in your pre-duty drug safety policy, or other EEO policy, that you do not accommodate the use of medical marijuana by employees who are otherwise restricted from use under federal law.
- Develop an ADA reasonable accommodation policy discussing typical interactive steps.
- The ADA favors individualized assessments based on essential job duties.
- Consider consulting an occupational physician to guide you through the ADA reasonable accommodation steps.
- Types of reasonable accommodations
 - Leave of absence beyond FMLA
 - Work Continuation Agreement
 - Modified work schedules
 - Based on an individualized assessment

Inquiring into an Employee or Applicant's Status as a Registered Cardholder



- **Status as Qualifying Patient or Designated Caregiver:** A person diagnosed as having a qualifying medical condition or caring for someone who does, and who has registered with the Department of Health.
 - An employer who becomes aware that an employee has, or is caring for an individual with, a qualifying medical condition may then be placed on notice that the employee may qualify as a person having a disability under the ADA.
 - Employers have the right to request confirmation that employee is an actual cardholder.
 - Monitor the Department of Health's promulgation of rules to:
 - ✦ Consider applications for and the renewal of registry identification cards for qualifying patients and designated caregivers
 - ✦ Create labeling and testing standards
 - ✦ Consider petitions to add new qualifying conditions

Triggering the Interactive Process



The following situations may trigger the interactive process:

- Employee requests an accommodation or otherwise expresses the need for an adaptation to work.
- Employer received medical information (FMLA).
- Employee confides in a coworker or supervisor that he/she has a substance abuse problem.
- Employee voluntarily requests substance abuse assistance.



Photo credit: <https://smallbiztrends.com/2016/09/substance-abuse-policy.html>

Engaging in the Interactive Process



The following are suggestions for engaging an employee in the interactive process:

- The employer should conduct the interactive process in person with the employee.
 - At least two employer representatives should participate.
- The employer should address only the medical condition and the affected work issue.
- The employer should inquire into the nature, extent, severity, and duration of any impairment or leave sought.
- The employer is entitled to seek medical documentation about an employee's disability and functional limitations.
- Again, consider consulting an occupational physician to guide you through the ADA reasonable accommodation steps and obtain a written clearance opinion from your MRO.

Substance Abuse Policy and Forms

- Review your current substance abuse policy and forms to ensure that they cover medical marijuana and comply with the new Amendment.



Photo credit: <http://katv.com/news/local/issue-6>



Photo credit: <http://www.timesnews.co.uk/wp-content/uploads/2016/01/Drug-Free-workplace-notice.gif>

Use a Medical Review Officer to Conduct Drug Testing



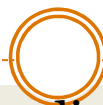
- A Medical Review Officer (MRO) is a licensed physician who is employed by a third-party drug testing laboratory.
 - The MRO acts as a gatekeeper of drug test results between the testing lab and the employer, insulating the employer from knowledge of the specific drug and medical condition associated with the employee.
 - The MRO is trained to conduct drug tests in compliance with state and federal law.
- The MRO determines whether an employee who tests positive for a legal drug has a legitimate reason for using the drug, such as a current prescription from a licensed physician.
- The MRO can provide recommendations to the employer, such as conducting fitness-for-duty testing, providing safety concern notices, and follow-up monitoring.

Make Your Position on Marijuana Clear



- Include clear information on marijuana use in a substance abuse policy.
- Have employee awareness meetings to discuss the impairing effects of marijuana.
- Emphasize the importance of safety in the workplace and in public areas.
- Monitor Arkansas law carefully for updates.
- Do not take disciplinary action against an employee for medical marijuana without consulting legal counsel.
- Treat marijuana like any other (legal) impairing drug or substance.

Summary



1. Monitor the rulemaking process regarding registered cardholders;
2. Update employee job descriptions to include “the ability to work in a constant state of alertness and in a safe manner” as an essential job function, state if a position is safety sensitive, and include the required physical and mental competencies;
3. Train supervisors in reasonable-suspicion-signs-and-symptoms training;
4. Adopt a pre-duty drug safety policy with a third party drug testing lab;
5. Adopt a fitness-for-duty policy;
6. Adopt an ADA compliant handbook policy on reasonable accommodations;
7. Adopt a legally compliant substance abuse policy and forms that cover medical marijuana;
8. Treat all impairing effect medications equally to avoid discrimination claims;
9. Obtain a written fitness-for-duty opinion from an occupational physician/MRO before taking an adverse employment action; and
10. Let employees know your stance on medical marijuana use.

CGWG is Here to Help



1. CGWG can review your current **substance abuse policy** and forms for compliance with the Arkansas Medical Marijuana Amendment.
2. CGWG provides **supervisor training**, including reasonable suspicion signs and symptoms.
3. CGWG can advise regarding **compliance with OSHA, the ADA, and the FMLA**.
4. CGWG can review your **job descriptions** to ensure that the essential functions are properly stated and that safety-sensitive positions are classified as such.
5. CGWG can advise you on taking any **adverse employment action** based on suspicion that an employee is abusing marijuana.

Contact CGWG



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