

Arkansas Medical Marijuana: Key Employment Law Issues for Petroleum Marketing Operations

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Arkansas passage of the Medical Marijuana Amendment of 2016 set in motion fast-paced efforts to put in place rules that will allow the cultivation, processing, dispensing, and purchase of marijuana for medicinal-related consumption. As a result, marijuana will likely begin to be dispensed for medicinal purposes in the next 18 months.

The legalization of certain uses/cultivation of marijuana in Arkansas will generate a host of legal issues including healthcare, insurance, banking, OSHA, etc. However, employers will face particular challenges. Consequently, Arkansas petroleum marketers or jobbers need to begin considering how to address the potential workplace issues involving medical marijuana.

A typical Arkansas petroleum marketer or jobber utilizes varying numbers of employees. Jobber or marketer workplace settings might include:

- Bulk oil plants
- Retail convenience stores
- Fixed Base Operations (“FBOs”)
- Service stations
- Lube oil facilities
- Card/Key lock operations
- Petroleum terminals
- Carwashes
- Transport terminals

This article will identify issues that marketers should consider in view of potential employee use of medicinal marijuana. They may include any number of issues involving both job applicants or current employees. Suggestions for addressing issues arising out of medicinal use of marijuana in the employment context are provided.

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A. Arkansas Medical Marijuana Act Non-Discrimination Provision

Arkansas petroleum marketers or jobbers should anticipate that some job applicants and employees may produce a medical marijuana registry ID card approved by the Arkansas Department of Health (“ADH”) in response to a failed drug test. In fact, as of October 26, 2017, the ADH has already approved over 2000 applications for medical marijuana registry ID cards with additional applications pending.

Although some applications have already been approved, the ADH has not yet begun to issue the medical marijuana registry ID cards to applicants. Registry ID cards will not be available for printing until one month prior to medical marijuana availability in Arkansas dispensaries. Cultivation and dispensary licenses are expected to be issued in 2018.

Non-compliance with the Arkansas Medical Marijuana Amendment of 2016 (“AMMA”) can pose significant risks for an employer. It includes a non-discrimination provision directed at employers. The provision provides that:

“An employer shall not discriminate against an applicant or employee in hiring, termination, or any term or condition of employment, or otherwise penalize an applicant or employee, based upon the applicant’s or employee’s past or present status as a qualifying patient or designated caregiver.”

Damages under the AMMA for an employment discrimination claim based on an applicant’s or employee’s past or present status as a qualifying patient or designated caregiver is capped in accordance with the statutory caps in the Arkansas Civil Rights Act. Liability for back pay is limited to no more than two years prior to the filing of an action and the period within in which an applicant or employee can bring such an action is one year from when the alleged discrimination occurred.

Faced with this potential liability and the projected influx of applicants and employees with medical marijuana registry cards into the workplace, how should an Arkansas petroleum marketer or jobber prepare?

We recommend businesses in Arkansas take the followings steps.

B. Suggestions for Addressing AMMA Issues

1. Create Written Job Descriptions which Designate Safety Sensitive Positions within your Organization.

The AMMA permits employers to “exclude a qualifying patient from being employed in or performing a safety sensitive position based on the employer’s good faith belief that the qualifying patient was engaged in the current use of marijuana.” A safety sensitive position is in turn defined as “any position designated in writing by the employer as a safety sensitive position in which a person performing the position while under the influence of marijuana may constitute a threat to health or safety.” Creating written job descriptions which designate certain jobs as “safety sensitive positions” permits employers to exclude job applicants and employees with medical marijuana registry ID cards from those positions.

2. Review and Update Your Employee Handbooks, and Drug Testing Policies and Practices.

Some petroleum marketing operations use employee handbooks to provide definitive guidance on workplace policies or rules. Take the opportunity to revise your employee handbook to address the use of marijuana in the workplace. Employee handbooks should make clear that employees are not permitted to possess, smoke, ingest or engage in the use of marijuana while on the employer’s premises during the hours of employment. Likewise, employees should not be permitted to be under the influence of marijuana while on an employer’s premises or during the hours of employment.

Arkansas jobbers and petroleum marketers should also review their drug testing policies and procedures. Under the AMMA employers may continue to establish and implement a substance abuse and drug-free workplace policy that includes a drug testing program that complies with state or federal law and may take action with respect to an applicant or employee under such a policy. Businesses which have yet to implement formal drug testing policies and procedures should do so. Having such policies and procedures reinforces the employer's prohibition on the use of marijuana in the workplace and communicates the consequences of either a positive test for marijuana or an applicant or employee's refusal to be tested.

3. Train Managers and Supervisors to Identify Employees Under the Influence with a Good Faith Belief Sufficient to Support the Administration of a Drug Test

Employers may only act against an employee so long as they have a good faith belief that the employee possessed, smoked, ingested, or otherwise used marijuana, or was under the influence of marijuana, while on the premises of the employer or during the hours of employment. It will be critical then for employers to demonstrate they have the necessary "good faith belief" to warrant the administration of a drug test before taking action against the employee. Managers and supervisors should not rely on a good faith belief alone to support taking action against an employee. Rather, the observations of the manager or supervisor should be used to support the administration of a subsequent drug test.

Under the AMMA "good faith belief" means a reasonable reliance on fact and can be based on observed conduct, behavior or appearance, information reported by a person believed to be reliable, or written, electronic or verbal statements from the employee or other persons. For practical purposes a manager or supervisor deciding whether to administer a drug test to an employee must be able to identify not only the source of the information on which he or she is acting, but also why their reliance on the information is reasonable. Documentation by the manager or supervisor will be critical.

Businesses should also train their frontline supervisors and managers to identify when an employee may be under the influence of marijuana during their hours of employment. Physical symptoms from the use of marijuana could include impairment of the employee's speech, walking, standing, physical dexterity, agility coordination, actions, movement, demeanor, appearance, clothing, and odor—all of which are listed in the AMMA. In addition, any symptom of the current use of marijuana that may negatively impact the performance of the employee's job duties, or tasks or constitute a threat to health or safety constitutes being "under the influence" for purposes of the AMMA. The observation of these physical symptoms supports the administration of a drug test, which if positive supports the employer taking action against the employee assuming the proper policies are included in the employer's handbook.

C. Department of Transportation Regulations

Many petroleum marketers or jobbers operate transports subject to United States Department of Transportation ("DOT") regulations. Such regulations specifically address the issue of marijuana use by certain classes of employees involved in transportation. A key question is how these DOT regulations are affected by the AMMA (if at all).

Employers must still comply with the DOT regulations regarding the use of marijuana by safety-sensitive transportation employees. The DOT's Office of Drug and Alcohol Policy & Compliance has issued a notice which makes clear that the DOT's Drug and Alcohol Testing Regulation does not authorize medical marijuana under a state law to be a valid medical explanation for a transportation employee's positive drug test result. According to the DOT notice "[i]t remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation's drug testing regulations to use marijuana."