Medical Marijuana/Employment-Safety Issues for the Oil/Gas Industry: May 26th Arkansas Independent Producers and Royalty Owners Presentation

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

06/01/2021

My law firm colleague Nate Read and I undertook a presentation at the May 26th virtual meeting of the Arkansas Independent Producers and Royalty Owners ("AIPRO")

The presentation was titled:

Medical Marijuana: Employment/Safety Issues for the Oil and Gas Industry ("Presentation")

The focus of the *Presentation* was the passage of the Arkansas Medical Marijuana Constitutional Amendment ("MMA") and the potential impact on Arkansas oil and gas exploration/production facilities from a safety and employment standpoint.

Key points initially noted during the *Presentation* included:

- MMA decriminalizes (from a state [Arkansas] standpoint) certain use of marijuana
- Establishment of regulation of cultivators and dispensaries
- Does not require "Employer to accommodate the ingestion of marijuana in a workplace or an employee working under the influence of marijuana."
- Outlines process pursuant to which an individual can become a "Qualifying Patient" who can use medical marijuana
- Doctor certifies he/she has a "Qualifying Medical Condition"

A particular effort was made to discuss the United States Department of Transportation's ("DOT") continuing directive that prohibits CDL drivers from using medical marijuana or CBD oil. In fact, DOT within the last month issued a second what it described as clarification noting the prohibition.

The clarification was issued because of DOT's concern that the occurrence of positive drug tests for CDL drivers using such products is increasing. DOT also noted that Medical Review Officers conducting driver tests will not issue a negative test simply because the THC detected in a urine sample was from legal marijuana or CBD oil.

Concurrent with this point was a reminder that marijuana is still illegal at the federal level as a DEA Schedule I controlled substance.

A description of the MMA noted that cultivation facilities and dispensaries have been established in the state and are operating. Further, thousands of registry cards have been issued by the Arkansas Department of Health ("DOH"). Consequently, as noted, this legalization is generating a host of legal issues including health care, insurance, banking, OSHA, etc.

Oil and gas exploration/production facilities were noted to face particular difficulties because of the following:

- Remote drilling sites
- Exposure to heavy machinery
- Often long commutes to drilling sites
- Wells produce explosive/poisonous gas
- More difficult to find young employees because of strict drug policies

Additional complications related to MMA include:

- Federal American Disabilities Act
- Federal Drug Free Workplace Act of 1988
- State Workers' Compensation laws
- Federal Department of Transportation Regulations

The various qualified medical conditions which potentially allow a person to obtain an MMA card were identified. Once the card is procured by a person, the potential impact of the MMA's "non-discrimination provision" was discussed. This 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."

The remedy for violation of this provision was noted to include damages which can encompass liability for backpay.

Nevertheless, the *Presentation* reminded employers that:

- There is no protected right either from the state or federal government to be under the influence in the workplace
- Off-duty consumption of marijuana without a registration card is still illegal

The systemic marijuana side effects were noted along with the unique properties of this substance (i.e., carry-over impairment effect, slow rate of metabolization, etc.)

From a safety standpoint, concern was expressed about the potential impact of such substances which might include distracted driving, etc. Industrial, manufacturing, and energy facilities have particularly complex operations including those relating to protection of environment, health and safety. Therefore, the impact of such substance is of particular concern.

Other employer issues might include:

- Costs of drug-testing applicants, employees
- Increased management training costs
- Increased need for supervision

Addressed were a number of key questions faced by Arkansas employers:

- Do employers continue to enforce their traditional substance-abuse policies, or adopt a new approach for dealing with employees who test positive for marijuana in the workplace?
- Does the Americans with Disabilities Act (ADA) protect employees who claim discrimination based upon their use of marijuana for a disabling medical condition? (Yes)

- Do employers continue to enforce their traditional substance-abuse policies, or adopt a new approach for dealing with employees who test positive for marijuana in the workplace?
- Does the Americans with Disabilities Act (ADA) protect employees who claim discrimination based upon their use of marijuana for a disabling medical condition? (Yes)
- Do employers violate the Occupational Safety and Health Administration's (OSHA's) General Duty Clause by allowing employees who use marijuana to perform safety-sensitive jobs, and thereby create a workplace hazard that OSHA standards seek to eliminate?
- Do the Department of Transportation's (DOT's) substance-abuse regulations trump state marijuana laws? (Yes)
- Heightened level of concern when claimant returns to a safety-sensitive occupation, such as driving or construction, while subject to potential adverse cognitive and psychological effects of marijuana?
- Quantification of the amount of marijuana consumed by claimant is not available through urine medication testing, thereby limiting ability to determine if he or she has consumed prescribed dose, or is in fact acutely intoxicated
- Can an employer ban the use of marijuana by an employee if it is permitted by state law - and if the employee has a prescription?
- Does an employer have the right to terminate an employee who tests positive for marijuana, even if the employee shows no signs of impairment on the job?

Recommendations for the steps employers in the oil and gas industry should undertake these issues included:

- Establish a Drug Free Workplace
- Note: qualified medical marijuana users can still be employed
- Make jobs with specific safety sensitive tasks or related to public health
- Have a way of tracking job performance
- Have an action plan for how you will respond to an employee who is a medical marijuana user

A particular focus was the need to create written job descriptions which designate safety sensitive positions within the organization. The MMA permit 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.

The safety sensitive position is 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." Therefore, 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.

The need to consider what are safety sensitive positions in the oil and gas industry was therefore addressed.

Topics also discussed included:

- Review/updating employee handbooks and drug testing policies and practices
- Impact of the Drug-Free Workplace Act of 1988 (and its six requirements)
- Need to review drug testing policies and procedures
- Training managers and supervisors to identify employees under the influence with a good faith belief sufficient to support the administration of a drug test (including the definition of "good faith belief")
- Training frontline supervisors and manages to identify when an employee may be under the influence of marijuana during their hours of employment
- Issues associated with the Americans with Disabilities Act
- Health coverage issues
- Relevance of the Occupational Safety and Health Administration General Duty Clause

A copy of the slides from the Presentation can be downloaded here.