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Arkansas Medical Marijuana/Workplace Health and Safety Issues: Arkansas Environmental Federation Presentation

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I undertook a presentation on October 11th at the Arkansas Environmental Federation Convention titled:

Arkansas Medical Marijuana/Workplace Health and Safety Issues ("Presentation").

The focus of the Presentation was the Arkansas Medical Marijuana Constitutional Amendment ("Amendment") and potential workplace health and safety issues.

The Presentation addressed:

- Medical Marijuana Constitutional Amendment.
- Establishment of regulation of cultivators and dispensaries.
- Outlining process pursuant to which an individual can become a "qualifying patient" who can use medical marijuana.
- Does not require employer to accommodate the ingestion of marijuana at a workplace or an employee working under the influence of marijuana.
- Notes marijuana is still illegal at the federal level.
- Biden Administration states U.S. Department of Justice is proposing to reschedule marijuana to a Schedule III drug.
- Pervasiveness.
- As of May 1, 2023, marijuana had been legalized for medicinal or recreational use or both in 38 states.
- Some 35-55 million Americans have been reported in a study to be using marijuana two or more times per month.
- Arguably a particularly difficult issue for many industrial, energy, waste management, facilities, etc. because workplaces:
 - Often remote sites.
 - Exposure to heavy machinery.
 - Explosive/poisonous gas/problematic chemicals, etc.
 - More difficult to find young employees because of strict drug policies.
 - Critical activities involving environmental protection.
 - Concentration and problem solving required.
- Other laws create further confusion:
 - Federal American Disabilities Act.

- Federal Drug Free Workplace Act of 1988.
- State Workers' Compensation laws.
- Federal Department of Transportation Regulations.
- Employer issues.
- Costs of drug-testing applicants, employees.
- Increased management training costs.
- Increased need for supervision, oversight.
- Arkansas Amendment non-discrimination provision provides:
- ... "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."
- From a workplace standpoint, the systemic marijuana side effects are listed.
- Unique properties of marijuana are addressed.
- Medical marijuana as a safety issue is important.
- Cost of insuring safe workplaces due to risks such as distracted driving, increased driving time, faster production demands, etc.
- Industrial, manufacturing, energy, facilities have particularly complex operations including those relating to protection of environment, health, and safety.
- The Arkansas Medical Marijuana Amendment 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.
- 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.
- Creating written job description which designates certain jobs as safety-sensitive positions permits employers to exclude job applicants and employees with medical marijuana registry ID cards from those positions.
- Shape your policies around specific job tasks that would not be allowed to perform.
- Recent Arkansas case of *Prinsen v. Domtar Paper Co.*, No. 4:22-cv-04076, 2023 U.S. Dist., LEXIS 16187 (W.D. Ark. Jan. 31, 2023) in which the Court considered whether the language of the Amendment granted the employer the right to designate all jobs at a location as safety-sensitive regardless as to the duties of each job (will other Arkansas courts similarly hold?).
- Does the Americans with Disabilities Act protect employees who claim discrimination based on their use of medical marijuana for disabling medical conditions?
- Do employers violate the Occupational Safety and Health Administration's General Duty clause by allowing employees who use medical marijuana to perform safety-sensitive jobs, and therefore create a workplace hazard that OSHA standards seek to eliminate.
- Treat all employees who perform hazardous duty the same whether white or blue collar... hazards of driving in a company car on sales calls is different from operating a forklift?
- Public policy requiring employees who have hazardous duty jobs to report to HR or company medical department if they are taking medication that may affect the ability to safely perform the job.
- Review and update your employee handbooks and drug testing policies and practices (employees should not be permitted to be under the influence of marijuana while on an employer's premises or during the hours of employment).
- Certain federal agencies/laws still prohibit use of medical marijuana regardless of states allowing it.
- U.S. Department of Transportation.
- Drug Free Workplace Act of 1988.
- Train managers and supervisors to identify employees under the influence with a good faith belief sufficient to support the administration of a drug test.
- Observation of physical symptoms supports the administration of a drug test.

- 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.
- EEOC Interpretive Guidance (Americans with Disabilities Act does not prohibit employer from refusing to hire or from removing employee with disability from job if employer can demonstrate that the individual poses a direct threat.

A copy of the slides from the Presentation can be downloaded [here](#).