

**Arkansas Environmental Federation**  
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**Arkansas Medical Marijuana Update:  
Issues for the EHS Professional**

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# Arkansas Environmental Energy and Water Log Blog

<http://www.mitchellwilliamslaw.com/blog>


Three combined posts every business day addressing  
federal/Arkansas legislation, regulation,  
administrative/judicial decisions and personnel transitions

# Medical Marijuana Constitutional Amendment


- 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”

# Update

- What is credible evidence of marijuana impairment?  
(lack or disagreement regarding objective criteria)
- Use still prohibited by U.S. DOT for CDL drivers (DOT a few months ago issued second clarification because the occurrence of positive drug test results for CDL drivers using these products is increasing.)
- Medical Review Officer conducting driver tests will not issue a negative test result simply because the THC detected in a urine sample was from legal marijuana or CBD oil. (Creams and oils may contain higher levels of THC than labeled.)
- CBD not regulated by FDA

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- Marijuana is still **illegal** at the Federal level
    - DEA Schedule I controlled substance
    - Substances in this schedule have *no currently accepted medical use* in the United States, a lack of accepted safety for use under medical supervision, and a high potential for abuse
  
  - Obama Administration Attorney General relaxed federal enforcement
  - Trump Administration sending mixed messages
  - What will Biden Administration do?

- Arkansas passage of the Arkansas Medical Marijuana Amendment (“AMMA”) 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.
- Cultivation and dispensaries operating across the State of Arkansas
- Thousands of registry cards issued by Arkansas Department of Health
- The legalization of certain uses/cultivation of marijuana in Arkansas is generating a host of legal issues including healthcare, insurance, OSHA, etc.



This poses particular concerns for EHS professionals at many industrial and energy facilities.

➤ Marijuana short term effects can include:


- Distorted perception
- Loss of coordination
- Memory and learning difficulty
- Problem solving difficulty
- Abstract reasoning
- Inattention to speed
- Manual dexterity issues






For example, consider oil and gas exploration/production facilities:

- 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



Any number of other industrial and energy facilities will likely face their own set of challenges.

EHS professionals recognize many of their activities/processes involve safety/environmental risks to employees or the public in the event of mistakes.



EHS professionals will arguably have to be more vigilant about observing employees for signs of impairment.

Documentation of employee actions that cause suspicion of impairment.


Designation of “safety sensitive” positions as allowed by the AMMA will be a particularly important task that will involve the EHS professional.

Should contractors, consultants, etc., be addressed in your policies and procedures?

# Medical Marijuana

- 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

How does legalization impact the workplace?  
Impact employer policies?

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- Presentation will identify issues that employers might 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.

# Arkansas Amendment Details

## Qualifying Medical Condition

- Cancer
- Glaucoma
- HIV/AIDS
- Hepatitis C
- ALS
- Severe Arthritis
- Crohn's Disease
- Ulcerative Colitis
- PTSD
- Tourette's Syndrome
- Fibromyalgia
- Alzheimer's Disease

# Arkansas Amendment Details

## Qualifying Medical Condition (cont.)

Also includes chronic or debilitating diseases with enumerated severe symptoms including:

- Intractable Pain
- Severe Nausea
- Severe Muscle Spasms
- Seizures

# Next Steps

- If a physician provides a written certification of a qualifying condition, the qualifying patient can use the certification to obtain a registry identification card from the Arkansas Department of Health
- Once the Qualifying Patient Obtains a Registry Identification Card, he/she can purchase and possess up to 2.5 ounces of marijuana without threat of criminal prosecution or adverse state actions



# Arkansas Amendment Non-Discrimination Provision

Some job applicants and employees may produce a medical marijuana registry ID card approved by the Arkansas Department of Health in response to a failed drug test.

# Arkansas Amendment Non-Discrimination Provision (Cont.)

- 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.”

# Arkansas Medical Marijuana Act Non-Discrimination Provision (Cont.)

- 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.

# Arkansas Medical Marijuana Act Non-Discrimination Provision (Cont.)

What if your employee has a registry card?

- Two straightforward conclusions:
  - 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 still illegal
  - Reasonable suspicion testing

The rest of the questions are more difficult.

# Systemic Marijuana Side Effects (THC)

- Short-term memory problems
- Impaired thinking and ability to perform tasks requiring mental alertness
- Loss of balance and motor function (e.g., coordination)
- Decreased ability to concentrate
- Changes in sensory perception
- Decreased reaction time
- Increased heart rate
- Increased blood pressure
- Dry mouth
- Increased appetite, thirst
- Drowsiness
- Anxiety, insomnia, panic attacks
- Hallucinations

# Unique Properties of Marijuana

- Carry-over impairment effect
- Slow rate of metabolization
- Remains in system for extended period
- Easily accessible
- Pervasive unlawful use
- High rates of chronic and habitual use

# General Concerns

- ▶ What do we mean by “medical marijuana”?  
What would be permissible? Oil? Edibles?  
Smoked?
- ▶ Could impact workplace policies on:
  - Smoking
  - Possession at work
  - Whether it can be consumed during work time

# Safety Still Important

- Costs of ensuring safe workplaces continue to escalate, including due to risks such as distracted driving, increased driving time, faster production demands, etc.
- Industrial, manufacturing and energy facilities have particularly complex operations including those relating to protection of environment, health and safety.
- More injuries means increased workers' compensation, unemployment, and litigation costs



# Employer Issues

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

# 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)

# Key Questions Faced by Arkansas Employers (Cont.)

- 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? (irrelevant fun fact – note use of drones by OSHA and LA DEQ)
- Do the Department of Transportation's (DOT's) substance-abuse regulations trump state marijuana laws? (Yes)

# Key Questions Faced by Arkansas Employers (Cont.)

- 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 under the influence.

# Key Questions Faced by Arkansas Employers (Cont.)

- 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?

# Conclusions

- Employees shown to be “impaired” on the job may be disciplined and discharged by an employer.
- As we will discuss, Federal government contractors/grantees subject to the Drug Free Workplace Act of 1988 should continue to follow all of the requirements of the Act, even in states permitting marijuana use by employees
- Employers subject to Department of Transportation HAZMAT rules must recognize the continued ban of marijuana use.

# What Should Employers Do?

- Consider Establishing 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

# The Arkansas Amendment Employer Issues/Suggestions

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.”

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.



# The Arkansas Amendment Employer Issues/Suggestions

Creating or revising 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.

What are safety sensitive positions in your facility or industry? Are they actually performed? Example – would inattentiveness because of impairment result in injury, illness, or death?

# The Arkansas Amendment Employer Issues/Suggestions

Use common sense and do not simply label every position “safety sensitive.” (The receptionist was driving a vehicle to get coffee for the boss three years ago is unlikely to qualify.)

This will be particularly important for many positions/tasks involving environmentally related activities.

Shape your policies around specific job tasks.

# The Arkansas Amendment Employer Issues/Suggestions

Review and Update Your Employee Handbooks, and Drug Testing Policies and Practices?

Some employers use employee handbooks to provide definitive guidance on workplace policies or rules.

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.

# The Arkansas Amendment Employer Issues/Suggestions

- Employees should not be permitted to be under the influence of marijuana while on an employer's premises or during the hours of employment.
- Modify definition of "under the influence" to comply with Amendment

# The Arkansas Amendment Employer Issues/Suggestions

- The Drug-Free Workplace Act of 1988
  - Prohibits the possession and use of marijuana (and other drugs) in the workplace if the employer has a federal contract of over \$100,000 or is a federal grantee of any kind
  - Applicable to certain federal contractors and grantees
  - Penalties include cessation of payment, termination of contract/grant, suspension/loss of federal contractor or grantee status

# The Arkansas Amendment Employer Issues/Suggestions

Drug Free Workplace Act of 1988 (cont.)

Six requirements

- Publish a policy statement informing employees that it is unlawful to have or use drugs in the workplace and the penalties imposed if they do
- Create a drug free awareness program to educate employee
- Notify employees that employment on a federal contract requires the employee to abide by the drug free workplace policy
- Notify the contracting federal agency within 10 days of receiving notice that any employee has been convicted of a criminal drug violation in the workplace
- Impose a penalty on employees convicted of drug violations or require participation in a drug rehabilitation program
- Make an ongoing good faith effort to maintain a drug free workspace

It does not mandate testing

# The Arkansas Amendment Employer Issues/Suggestions

- Drug “use” vs. “under the influence”
- Policy should address prescription medication that may affect employee’s ability to work safely and competently
- Address the consequences for a refusal to submit to test
- Identify the circumstances in which drug testing will occur
- Make clear the employer will not discriminate against medical marijuana users

# The Arkansas Amendment Employer Issues/Suggestions

- 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
- 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.



# The Arkansas Amendment Employer Issues/Suggestions

- Institute policy that requires employees to disclose use of medications that may impair their ability to work if this request is job-related and consistent with business necessity
- If an employee tests positive for marijuana, provide the employee the opportunity to show they have been prescribed marijuana

# The Arkansas Amendment Employer Issues/Suggestions

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.

# The Arkansas Amendment Employer Issues/Suggestions

- Employers must 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.
- The observations of the manager or supervisor should be used to support the administration of a subsequent drug test.

# The Arkansas Amendment Employer Issues/Suggestions

- “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.
- 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.

# The Arkansas Amendment Employer Issues/Suggestions

## The Americans with Disabilities Act

- Employers may prohibit current illegal use of drugs and alcohol in the workplace and require that employees report for duty without engaging in the unlawful use of drugs
- A positive test result establishes “current” use
- Under federal law, medical marijuana use is considered illegal drug use

# The Arkansas Amendment Employer Issues/Suggestions

- Americans with Disabilities Act (cont.)
  - Contains an illegal drug provision (exception for use of Schedule I drug taken under supervision by a licensed health care professional)
  - Employees are seeking accommodation for the underlying disability that necessitates the use of medical marijuana
  - Does the accommodation impose an “undue hardship”?
    - Nature and cost of the accommodation
    - Financial resources of the employer
    - Type of operation of the employer
    - Impact of the accommodation
- Is there a connection between the medical screening and the work performed?
  - Examples – airline pilots, school bus drivers

# The Arkansas Amendment Employer Issues/Suggestions

## Health Coverage Issues?

- Some states with medical marijuana laws expressly do not require health insurance providers to reimburse for medical marijuana
- Arkansas Amendment does not require a governmental medical assistance program or private health insurer to cover medical marijuana unless federal law requires it.

# “Zero Tolerance” Policies - Federal

- Department of Transportation
  - Federal law 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
  - Arkansas law does not trump federal statutes.



# Laws and Regulations (cont.)

## ➤ Occupational Safety and Health Administration (OSHA)

### General Duty Clause

- Maintain workplaces that are free from hazards likely to cause death or serious physical harm to employees
- Impairment caused by marijuana could be considered a hazard and a possible violation of OSHA
- Does legalization have the potential to increase injury and citation risks?

# Laws and Regulations (cont.)

- OSHA-Post-Accident Drug Testing
  - Employers may conduct post-incident drug testing if there is a reasonable possibility that employee drug use could have contributed to the reported injury or illness.
  - However, if employee drug use could not have contributed to the injury or illness, post-incident drug testing would likely only discourage reporting without contributing to the employer's understanding of why the injury occurred.
  - Drug testing under these conditions could constitute prohibited retaliation.
  - Testing consistently reduces chances of OSHA retaliation claim

# Laws and Regulations (cont.)

- U.S. Department of Transportation
  - Omnibus Transportation Employee Testing Act of 1991
    - Requires drug and alcohol testing of drivers, pilots, and other “safety-sensitive” jobs that are under the domain of the Department of Transportation (DOT)
    - The DOT prohibits the use of medical marijuana by transportation workers including pilots, school bus drivers, truck drivers, subway operators, ship captains and fire-armed transit security workers
    - 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.”

# Laws and Regulations (cont.)

## Department of Transportation

- Pilots, bus drivers, truck drivers, train engineers, subway operators, aircraft maintenance personnel, transit fire armed security personnel, ship captains and pipeline emergency response personnel, among others
- No driver may report for or remain on safety-sensitive duty while using any controlled substance
- No driver shall report for or remain on safety-sensitive duty after testing positive for unlawful drugs

# Laws and Regulations (cont.)

## Department of Transportation (cont.)

- On 10/22/09, DOT issued a statement asserting that its regulated drug testing program will not change based upon the DOJ's 10/19 statement
- DOT regs do not authorize 'medical marijuana' under state law to be a valid medical explanation for a transportation employee's positive drug test result. (DOT takes priority)
- "Therefore, Medical Review Officers will not verify a drug test as negative based upon information that a physician recommended that the employee use 'medical marijuana...' It remains unacceptable for any safety-sensitive employee subject to drug testing under the Dept. of Transportation's drug testing regulations to use marijuana."

# Laws and Regulations (cont.)

- Employers subject to DOT regulations should continue to follow the DOT substance-abuse regulations and testing obligations per the DOT Medical Marijuana Notice of February 22, 2013, and the Recreational Marijuana Notice of May 27, 2014.