

Steps to Develop and Implement a Safety-Sensitive Job Structure to Maximize Enforcement of a Drug-Free Workplace Under Oklahoma's Medical Marijuana Laws.

Presented by:

Vic Albert, Attorney

Ogletree, Deakins, Nash, Smoak & Stewart, P.C. , Oklahoma City, OK



Ogletree Deakins

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Avoiding the Potential Collision Course of the Laws

- Oklahoma Standards for Workplace Drug and Alcohol Testing Act
 - Provides for Employers to have a Drug-Free Workplace
- Oklahoma Medical Marijuana Act (“OMMA”)
 - Provides for medical marijuana
- Federal Controlled Dangerous Substances Act
 - Marijuana is still an illegal substance in all ways

Oklahoma Drug and Alcohol Testing Act (“ODTA”)

- If an employer chooses to enact a workplace drug and alcohol testing policy, it must comply with the ODTA, Okla. Stat. tit. 40, § 554.
- All employees must be given notice of the policy or any changes to it of at least 10 days prior to it taking effect.
- Notice may be done by email or a hard copy being provided to the employee.

Basis for Drug or Alcohol Testing Under an ODTA Policy

- Applicant/Transfer Testing
- For Cause Testing
- Post-Accident Testing
- Random Testing
- Scheduled Fitness for Duty Testing
- Post-Rehabilitation Testing

Reasons for For-Cause Testing Under an ODTA Policy

- For-Cause Testing is defined as:
 - a) drugs or alcohol on the person/vicinity,
 - b) conduct that suggests impairment,
 - c) a report of drug or alcohol use while at work or on duty,
 - d) information that an employee has tampered with drug or alcohol testing,
 - e) negative performance patterns, or
 - f) excessive or unexplained absenteeism or tardiness.

Oklahoma Medical Marijuana Act (“OMMA”) as to Employers

Unless a failure to do so would cause an employer to imminently lose a **monetary or licensing related benefit under federal law or regulations**, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon either:

1. The person’s **status as a medical marijuana license holder**; or
2. Employers may take action against a holder of a medical marijuana license if the holder uses or possesses marijuana while in the holder’s place of employment or during the hours of employment. Employers **may not take action against the holder of a medical marijuana license solely** based upon the status of an employee as a medical marijuana license holder or the results of a drug test showing positive for marijuana or its components.

Important Features of the OMMA as Applied to Employers

1. Potential exception if employer will **imminently lose** a federal license or financial benefit. (CAUTION: could be difficult to prove).
2. Only prohibits actions based on being a license holder or solely a positive marijuana drug test.
3. Employers may lawfully take action for possession/use on/in employer property, or during work hours.
(CAUTION: “Use” or “impairment” is often difficult to prove.)

Interplay Between ODTA and OMMA

1. The OMMA only applies to persons with a valid medical marijuana license issued by the OSDH.
2. Impairment at work remains unlawful and is reason for disciplinary action, including termination from employment.
3. A “positive test result” is no longer allowed as the sole basis to refuse to hire a medical marijuana license holder.
4. A positive drug test for marijuana will not be allowed to be the sole basis to continue testing an employee if the employee was a medical marijuana license holder.

Oklahoma Law Provides 3 Options for Employers

1. Use an applicable federal law (DOT or FAA) to prohibit medical marijuana use by applicants or employees.
2. Use the exception in the Oklahoma law for federal contractors or licensees to prohibit medical marijuana use by applicants or employees.
3. Comply with Oklahoma law on allowance for medical marijuana in the workplace, but except out applicants and employees in safety-sensitive job positions.

Key Takeaways – Option 1

DOT and FAA Applicability

- Medical marijuana remains illegal under federal law (i.e., the CSA).
- Possession or use of marijuana, even if medical marijuana, is not allowed under the federally-based regulations for the U.S. Department of Transportation and the Federal Aviation Administration, or the federal Drug-Free Workplace Act.
- If an employer is covered by any of these regulations, it may want to amend its drug and alcohol testing policies to adhere to the applicable federal law and educate its employees that the possession or use of marijuana is not allowed and is grounds for disciplinary action, up to and including discharge.

Key Takeaways – Option 2

Federal Licenses and Contractors

- Employers who are licensed by the federal government or are federal contractors may choose to maintain current policies that forbid marijuana use by referencing the Federal Drug-Free Workplace Act in the “purpose” section of the policy.
- This procedure would put the employer in a position to keep marijuana out of the workplace, but increases the potential that an employee may sue the employer.

Key Takeaways – Option 3

Complying with the OMMA

- Under the OMMA, protections are limited to employees:
 - who are medical marijuana license holders, and
 - who are subjected to adverse employment action solely because of a positive test for marijuana and are a medical marijuana license holder.
- Employers retain the right to take disciplinary action, pursuant to an ODTA-compliant policy, as to an employee's possession or use of marijuana on or in company property, while at work, or during work hours.

Key Takeaways - Option 3

Complying with the OMMA, continued

- Consider amending the workplace drug and alcohol testing policies.
 - Ensure that all bases for drug and alcohol testing are reserved in the policy, especially all bases for “For Cause” testing.
 - “For Cause” testing is something more than “solely because of a positive test for marijuana.
 - Treat medical marijuana as prescription drugs are treated in the policy.
 - State in the policy that:
 - The Employer does not discriminate against persons who are licensed holders.
 - The possession, use, or impairment from medical marijuana on or in company property/premises, during work hours or on company business is prohibited, and may lead to disciplinary action, including termination from employment.
 - **Note: ODTA requires 10 days advance notice to employees of amended policy.**

Key Takeaways - Option 3

Complying with the OMMA, continued

- The Unity Bill. Effective on August 29, 2019.
- The Unity Bill allows employers to lawfully refuse to hire applicants for safety-sensitive jobs or to discipline or discharge employees who work in safety-sensitive jobs if they test positive for marijuana, even if they have a valid license to use medical marijuana. According to the bill, safety-sensitive jobs are those with “tasks or duties the employer reasonably believes could affect the safety and health of the employee . . . or others.”

Key Takeaways - Option 3

Complying with the OMMA, continued

- A non-exhaustive list of job examples is included in the law, listing the following:
 - “the handling, packaging, processing, storage, disposal or transport of hazardous materials,
 - the operation of a motor vehicle, other vehicle, equipment, machinery or power tools,
 - repairing, maintaining or monitoring the performance or operation of any equipment, machinery or manufacturing process, the malfunction or disruption of which could result in injury or property damage,
 - performing firefighting duties, (continued)

Key Takeaways - Option 3

Complying with the OMMA, continued

- A non-exhaustive list of job examples is included in the law, listing the following (continued):
 - the operation, maintenance or oversight of critical services and infrastructure including, but not limited to, electric, gas, and water utilities, power generation or distribution,
 - the extraction, compression, processing, manufacturing, handling, packaging, storage, disposal, treatment or transport of potentially volatile, flammable, combustible materials, elements, chemicals or any other highly regulated component,
 - dispensing pharmaceuticals,
 - carrying a firearm, or
 - direct patient care or direct child care.”

Key Takeaways - Option 3

Complying with the OMMA, continued

- **The Unity Bill also:**

- **Provides that an employee's exclusive remedy for a violation of the OMMA is under the Oklahoma Standards for Workplace Drug and Alcohol Testing Act; and**
- **Amends the existing Oklahoma Standards for Workplace Drug and Alcohol Testing Act to clarify that a breath or blood specimen may be used for a confirmation test for alcohol. A confirmation test for drugs may be urine, saliva, or blood.**

Key Takeaways - Option 3

Complying with the OMMA, continued

- **Designing or Enhancing a Safety-Sensitive Workplace**
- **The amended OMMA allows the employer to determine what job positions are “safety-sensitive” based on what the employer reasonably believes to affect the safety of the employee or others.**

Choices for employers:

- **Path 1 - Employers may be very specific and list the safety-sensitive job positions by title on an attachment to the policy, or**
- **Path 2 - Employers may be more general and describe in the policy the tasks that would be used to deem a job safety-sensitive**

Key Takeaways - Option 3

Complying with the OMMA, continued

- **Whichever Path is taken, the next steps for the employer are:**
 - **A job position function/task Audit to determine the current requirements of doing each job safely.**
 - **An update of written job positions to include statements that:**
 - **The employee is expected to work safely in and around other persons, equipment and machinery.**
 - **The itemization of the safety-sensitive job functions in each Job Description.**
 - **Education and training with Managers and Supervisors on the revised Job Descriptions.**
 - **Education and training with Employees on the revised Job Descriptions.**

OSHA and Workplace Drug Testing Policies

- In a recently released Standard Interpretation, the Occupational Safety and Health Administration (OSHA) clarified its position as to whether certain types of drug testing constituted a violation of regulations prohibiting employers from discharging or discrimination against an employee for reporting a work-related injury or illness.
- Previously, OSHA stated that employers could not use "drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses." Rather, employers were limited to drug testing when there was a "reasonable possibility" that drugs or alcohol contributed to the accident or injury.

OSHA and Workplace Drug Testing Policies

- However, in the Standard Interpretation released on Oct. 11, 2018, OSHA clarified that "most instances of workplace drug testing are permissible," including:
 - "Random drug testing";
 - "Drug testing unrelated to the reporting of a work-related injury or illness";
 - "Drug testing under a state workers' compensation law";
 - "Drug testing under other federal law, such as a U.S. Department of Transportation rule"; and
 - "Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees. If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries."

OSHA and Workplace Drug Testing Policies

- The memorandum concluded by saying that to the extent any other interpretive documents could be construed as inconsistent with the position articulated here, this memorandum supersedes them.
- Accordingly, based on OSHA's clarification and revised guidance, employers are permitted to implement post-accident drug testing programs, *so long as they are not discriminatory in any way and are enforced consistently for all employees.*

Key Takeaways – Additional Considerations

- Employers may want to train supervisors, managers, and safety personnel on how to assess employee impairment at work or during work hours.
- Note: Training should be done on how to recognize and document impairment of drug use at work.

Key Takeaways – Additional Consideration

- Employers may want to provide training and/or materials to employees as to medical alternatives that are safer and less addictive than opioids or marijuana.
- Note: Employee education about the effects of opioids and marijuana is necessary to increase awareness of the potential problems to the employee from the use. Employees should be advised of alternative medicines that may be equally effective.

Key Takeaways – Additional Considerations

- Employers may want to add to or enhance their employee assistance programs to help employees with problems from drug and/or alcohol use.
- Note: With expanded legal use of impairing drugs, addiction and misuse issues will also increase. Employers need to refresh EAP options for employees.



**Ogletree
Deakins**

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Vic Albert, Attorney
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Oklahoma City, OK
victor.albert@ogletree.com



Ogletree Deakins

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