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**If Interpreting  
Oklahoma's Medical  
Marijuana Statutes  
Doesn't Spark Joy,  
We Kondo Find a Solution**

Presented by: Evan Way

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**Evan Way**

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- Labor & Employment Practice Group member
- \*Subsequent information should not be understood as, or considered a substitute for, specific legal advice. For inquiries, please contact Evan Way, or another licensed attorney.



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**Medical  
Marijuana in the  
Workplace—  
A Refresher**

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### State Question (SQ) 788

What are the requirements of SQ 788?

- Must possess a valid Oklahoma-issued license (good for two years)
- Residents (out-of-state license holders [substantial equivalence test] have 30-day temporary license)
- 18 years or older (under 18 requires signature of parent and two treating physicians)
- Signed by board certified physician
  - No qualifying medical conditions
  - Accepted standards of a reasonable and prudent physician
- \$100 application fee (\$20 for government healthcare)



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### Medical Use

- Consume legally
- Possess up to 3 ounces on person
- Possess up to 8 ounces in residence
- Possess 6 mature plants
- Possess 6 seedling plants
- Possess up to 1 ounce concentrated product
- Possess up to 72 ounces edible product



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### How Many People are We Really Talking About?

- Oklahoma Medical Marijuana Authority is in charge of the licensing process
  - Oklahoma State Department of Health website went live with license applications on July 26, 2018
- 14-day turnaround
- More than 196,000 medical marijuana licenses have been issued so far
- More than 7,000 licenses to businesses looking to make money in the wild, wild west of weed



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## Non-discrimination Provisions

- Employer may not discriminate in hiring, termination or other term or condition of employment or otherwise penalize a cardholder
  - Unless employer would imminently lose federal monetary/licensing benefit (or is subject to federally mandated testing)
  - May take action based on use/possession at/during employment
  - But **not** based on status as a license holder or failed drug test for medical marijuana (if license holder)



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## The Creation of a New Protected Class

- We have grown accustomed to the presence of protected categories of employees – race, gender, disability, whistleblower, religion, etc...
- Are we on the cusp of a new category, and if so, where will it come from and what form of lawsuit will it take?
  - The role of the Burk public policy tort (exception to the at-will rule)
  - Will this be the next twist/turn for this more than 30-year-old tort?



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## So, What is the Best Defense?

- There is still a lot that can be prohibited when it comes to medical marijuana in the workplace:
  - Possession
  - Use
  - Impairment at work

**It is the ability to establish impairment that will be the key. We are “going back in time” to pre-2012 reasonable suspicion standards, and you and front-line supervisors must focus on proving more than just the presence of the drug in the system.**



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**Safety Sensitive Jobs Finally Addressed!**

- As originally written, SQ 788, codified at Title 63 Section 420 of the Oklahoma Statutes, does not address this issue
- Left impression it would be a violation of the Act for an employer to either terminate an employee with a medical marijuana card for a positive marijuana test solely on the basis that the position held by that employee is safety-sensitive, or to otherwise restrict employees with medical marijuana cards from holding safety-sensitive positions in the workplace

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**Safety Sensitive Jobs Finally Addressed!**

- On March 14, 2019, Governor Stitt signed House Bill 2612, commonly referred to as the "Unity Bill," into law
- Designed (bi-partisan no less!) to address gaps and ambiguities that remain after the enactment of SQ 788
- The Act is wide-ranging and impacts a large swath of regulatory issues in the growing cannabis industry in Oklahoma

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### Safety Sensitive Jobs Finally Addressed!

- New law is called the Oklahoma Medical Marijuana and Patient Protection Act
- Allows employers to designate certain positions as "safety-sensitive"
- Broadly speaking, the Act defines "safety-sensitive" as any job that includes tasks or duties that the employer reasonably believes could affect the safety and health of the employee performing the task or others



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### Safety Sensitive Jobs Finally Addressed!

- Employees who work in positions classified as "safety-sensitive" can be disciplined if they test positive for marijuana or its metabolites, even if they have a valid Oklahoma medical marijuana license
- Employers may also refuse to hire applicants for safety-sensitive jobs who test positive for marijuana as part of a pre-employment drug test, even if those applicants can produce a valid medical marijuana patient license



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### A Fly in the Ointment?

- "No employer may refuse to hire, discipline, discharge or otherwise penalize an applicant or employee solely on the basis of a positive test for marijuana components or metabolites, unless...the position is one involving safety-sensitive job duties...."
- "Safety-sensitive" is defined to include "any job that includes tasks or duties that the employer reasonably believes could affect the safety and health of the employee performing the task or others."



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### A Fly in the Ointment?

- What about stopping a card-holder/applicant from taking the position in the first place?
- What about licensed card-holders currently in "safety sensitive" positions?
- Does the Act as written mean that an employer must wait for an accident/injury to test and terminate, rather than stop the card-holder from ever holding the job in the first place?
  - The answer appears to be yes.



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### Safety-Sensitive Examples

- The Act provides a non-exhaustive list of duties which may qualify as "safety-sensitive," and includes each of 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



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### Safety Sensitive Examples

- Performing firefighting duties
- 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



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### Safety Sensitive Examples

- Dispensing pharmaceuticals,
- Carrying a firearm, or
- Direct patient care or direct child care



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### Best Practices

- Assume that this exception will be construed narrowly
- So, limit the overall number of persons or job positions who qualify for the exception



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### Best Practices

- Analyze job duties
- Keep the Act's examples in mind
- Are the duties actually performed? Involve front-line supervisors (like a job description review)
- Document your process



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### Best Practices

- Provide notice to those employees working in "safety-sensitive" jobs
  - The key will be showing he/she knew they were subject to this exception and subject to disciplinary action in the event of a positive test for marijuana



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### Best Practices

- Update your drug-testing policies!
- Incorporate the definition of "safety-sensitive"
- Consider including examples of applicable duties from the Act
- Use a "non-exhaustive" list



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### Best Practices

- Regularly review any "safety-sensitive" designations to ensure the positions remain subject to the exception
- Review and confirm a safety-sensitive designation prior to taking disciplinary action against an employee in a "safety-sensitive" job



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## Best Practices

- Train appropriate personnel on establishing impairment (appearance, behavior and conduct) and understanding the importance of not voluntarily soliciting license holder status
- Keep an eye on developments regarding a potential marijuana breathalyzer



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## Best Practices

- Might not be a bad idea to remind your workforce about a few important things:
  - It will remain a violation of company policy and will be a terminable offense for an employee to possess marijuana in the workplace
  - It will remain a violation of company policy and will be a terminable offense for an employee to smoke, consume or otherwise use marijuana in any capacity while at work
  - It will remain a violation of company policy and will be a terminable offense for an employee to be under the influence of marijuana during work hours, regardless of whether or not the marijuana was smoked, consumed or otherwise used prior to the commencement of work



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## Drug and Alcohol Testing

- Applicants (who have received conditional job offer)
- Scheduled, periodic
- Post-accident
- Random
- Post-rehabilitation



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## Drug and Alcohol Testing

- For-cause Testing occurs when the company reasonably believes individual may be under influence of alcohol or drugs
- Factors that can lead to this belief include:
  - Drugs or alcohol on employee's person or in his/her vicinity
  - Employee behavior that suggests impairment or influence of drugs or alcohol
  - Report of drug or alcohol use while at work or on duty
  - Information that employee has tampered with drug or alcohol testing at any time
  - Negative performance patterns
  - Excessive or unexplained absenteeism or tardiness



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## Procedures

- An employee may speak with the Medical Review Officer prior to confirmation of positive test
- An employee may request confirmation test if he or she believes initial positive to be incorrect
  - Costs of confirmation test are usually paid by requesting employee
  - If retest reverses findings, the company usually will reimburse individual for costs of retest
- Time spent on drug and alcohol testing is treated as work time
- Test results are confidential; shared only with tested employee, MRO, HR or pursuant to valid court or administrative order
- Employee Assistance Program is often available for those facing challenge of alcohol or drug addiction



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## Hypothetical #1.1

Steve is an administrative assistant. He is selected for drug screening as part of a scheduled, periodic testing. Steve reveals, when he is selected, that he is a medical marijuana license holder, and he tests positive for marijuana.

**What should the company do in response to this positive test?**



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## Hypothetical #1.2

Later, Steve's supervisor, Tina, notices that Steve seems to lack motivation and is slow in his actions and movements. His eyes also appear bloodshot. Tina is aware that Steve is a medical marijuana license holder.



What should Tina do?



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## Hypothetical #2

Susan is an organ recovery coordinator. Susan is identified for drug screening as part of a random test. She has not exhibited any signs of impairment at work. Susan's screen comes back positive for marijuana, and Susan then reveals that she is a medical marijuana license holder.

What options does the company have in responding to this positive screen?



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## A Few Thoughts on Workplace Drug Testing

- Standard workplace drug tests do not test for THC itself, but rather its residual non-psychoactive metabolite THC-COOH
- Just identifies use in the past 90 days
- Can't distinguish between actual impairment versus use days, weeks or months prior
- May detect the presence of legally consumed CBD derived from hemp
  - Hemp is legal as of January 2019 under federal law
- Technology may present better options to identify impairment than traditional tests because there is no bright-line cutoff for THC impairment
  - E.g., Alert Meter by Predicative Safety



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## Workers' Compensation and Medical Marijuana

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**Rose v. Berry Plastics Corp.**

- Workers' Compensation Court denied claimant benefits because claimant tested positive for marijuana following an accident
- Claimant was a machine operator who's hand and wrist were crushed in a guillotine machine
- Employer originally provided medical treatment, but denied the claim was compensable because of positive marijuana test
  - Affirmative defense of intoxication
- Claimant admitted to smoking marijuana the night before around 11:00 p.m.
- No supervisors or fellow employees alleged claimant appeared impaired at work
- Accident took place approximately 10 hours later
- Post-accident test was positive for THC & morphine\*
  - Just presence; no quantitative measurements

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**Rose v. Berry Plastics Corp.**

- The Court of Civil Appeals reversed the Workers' Compensation Court and reinstated the ALJ order granting claimant benefits
- "The critical focus is not whether an intoxicating substance was present in the worker's system, but rather whether there was a causal connection between the accident and the state of intoxication, from whatever source."
- "While every intoxicated person will show the presence of an intoxicating substance in their blood, the reverse is not true."
- "[W]e must reject the WCC's underlying inference that the mere presence of marijuana in claimant's bloodstream inevitably means he was intoxicated."
- TAKEAWAY: A positive drug test does not necessarily prove an employee has consumed or was under the influence while at work.

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### Recent Cases

- *Ward v. Gamma Healthcare Inc.*
  - Burk tort—Employer rescinded employment offer after Plaintiff tested positive for medical marijuana
    - Employee is a medical-marijuana patient license holder
    - Employer allegedly stated company policy supersedes state
  - \*\*\*Pending in Oklahoma County
- *Flowers v. Mr. Ed Auction Co.*
  - Employment and wrongful termination. Plaintiff was fired when her boss saw her post on Facebook, claiming to be a "marijuana farmer"
    - Employee had three plants pursuant to a medical-marijuana patient license
  - \*\*\*Pending in Rogers County

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### Recent Case

- *Rodriguez v. Federal Express Corp.*
  - Even though plaintiff is a medical marijuana license holder, defendant wrongfully fired him after he tested positive for marijuana
    - 23-year employee with FedEx
    - 19 years as a manager with FedEx
  - \*\*\*Pending in the Northern District of Oklahoma (federal)
- *Asimakis v. American Castings LLC*
  - Defendant wrongfully fired plaintiff because he refused to stop using medical marijuana, which he obtains with his medical marijuana license, to treat his chronic knee pain
    - Employee was a forklift operator
    - Never tested positive, just informed employer he received a card
    - Conflicting physician
    - Filed a Burk tort after termination
  - \*\*\*Case settled in Mayes County

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## Recent Cases

- *Harris v. Oxbow Carbon LLC*
  - Plaintiff was fired when a drug test revealed his marijuana usage, even though he has a license to use medical marijuana.
    - Employer terminated employment because marijuana is "federally illegal"
    - Claims brought under the Oklahoma Anti-Discrimination Act (OADA) (disability) and a Burk tort
  - \*\*\*Pending in the Western District of Oklahoma (federal)



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## Recent Cases

- *Chockely v. Tapstone Energy LLC*
  - After being involved in a minor car collision while on the job, plaintiff received a false positive result for marijuana due to his use of CBD oil for arthritis pain. Defendants refused to perform a quantification test to verify or refute the test result, or speak to plaintiff's doctor, and ultimately fired him based on the flawed results.
    - EEOC issued a right to sue
    - Employee took CBD oil consistent with his physician's advice
    - Employee was involved in a minor accident and tested positive for THC
    - Employee states that he never used marijuana
    - Alleges wrongful termination in violation of the Americans with Disabilities Act, OADA and Standards for Workplace Drug and Alcohol Testing Act
  - \*\*\*Pending in the Western District of Oklahoma (federal)



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