



STATE QUESTION 788 – MEDICAL MARIJUANA: WHAT EMPLOYERS NEED TO KNOW

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Oklahoma State Question 788 passed per voter approval in the June 26, 2018 primary election (to be codified in the Oklahoma Statutes as Sections 420-26 of Title 63) (“Oklahoma’s Medical Marijuana Act”). Employers now face deciphering what it means for current drug and alcohol policy enforcement. While a special session may be called, allowing the Oklahoma Legislature to amend the proposed statutes, employers should be prepared for when the new law takes effect one month from today.

Federal Prohibition

According to the Controlled Substances Act, 21 U.S.C. §§ 801-904, marijuana is classified as a Schedule I drug, which is the category of substances that, as determined by Congress, have a high potential for abuse, do not have a currently accepted medical use for treatment, and pose unacceptable safety risks even under medical supervision. 21 U.S.C. § 812(b)(1)(A)-(C), (c). As a Schedule I drug, marijuana is still illegal under federal law regardless of conflicting state laws. 21 U.S.C. § 812(b)(1)(A)-(C). Its use remains barred by a myriad of federal laws that apply to certain employers and employees. And, being allowed to use marijuana is still not considered a *reasonable* accommodation under federal law.

Oklahoma’s Medical Marijuana Statute

The provisions in Oklahoma’s Medical Marijuana Act (the “Act”) that are dedicated to the employer-employee relationship are to be codified as Section 425 of Title 63 subsection B (currently, Section 6(B)):

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 holder 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.

What Employers Need to Know

The referendum is effective one month after passage. (Section 9). The Oklahoma Department of Health must then promulgate regulations to implement the Act for the purposes of administering licenses. As the Department of Health has 30 days after passage of the initiative to make applications for medical marijuana licenses available (Section 1 (D)) and 14 days to approve or reject an applicant's license (Section 1(G)), the earliest any employee may fall under the scope of the Act is 44 days after passage. Now that the Act has passed, employers should keep the following in mind:

- *What employers are covered:* The Act applies to all employers. There is a limited carve-out that permits employers to discriminate against license holders if required to by federal law or regulations.
- *Who is protected:* By a strict reading of the Act, only medical marijuana license holders are protected from discrimination by an employer. Nevertheless, the Act could be interpreted to protect a caregiver license holder on the basis of his or her status. See Section 1(K) (stating that caregiver licenses give the same protections). Section 6 of the Act does not address whether the license must be issued by the State of Oklahoma or whether temporary license holders will receive the same protections. The Act does not provide protections for persons who are applicants for a license, recreational users, or individuals who have been denied a license from the Department of Health, regardless of any doctor's recommendation.
- *What employers can do to enforce a safe and drug-free workplace:*

- Continue to enforce drug testing policies as required by federal laws and regulations that preclude employees from performing covered duties if they test positive for marijuana.
 - Continue to enforce drug testing policies that are compliant with the Oklahoma Standards for Drug and Alcohol Testing Act against any employee who tests positive for the use of marijuana who is not a holder of a valid medical marijuana license.
 - Discipline and/or terminate employees who are in possession of marijuana in the workplace or during their working hours depending on an employer's policies and practices.
 - Discipline and/or terminate employees who use marijuana in the workplace or during their working hours; however, in taking adverse action, the decision must not be based solely upon the result of a positive marijuana drug test if the person is a holder of a valid medical marijuana license.
- *What employers should do in response to the Act:*
 - Update policies and procedures to ensure that a positive drug test for medical marijuana by a medical marijuana license holder is treated in the same manner as other positive drug tests for prescription drugs.
 - Review vendor agreements and address the Act with drug testing vendors and medical review officers.
 - Review training for supervisors and managers for reasonable suspicion drug testing.
 - Emphasize importance of documenting reasonable suspicion and underlying performance issues for all employees.
 - Identify any safety-sensitive positions with the assistance of outside counsel if no federal regulations or laws already require drug testing and permit discrimination under the Act.
- *What employers cannot do under the Act:*
 - Take adverse action against an employee solely because the employee is a medical marijuana license holder.
 - Fail to hire, promote, or otherwise discriminate against an employee solely because the employee is a medical marijuana license holder.
 - Rely on a positive drug test for medical marijuana as the sole basis for employment decisions with respect to medical marijuana license holders.
- *What employers should not do under the Act.*
 - Do not ask applicants or employees if they are a license holder unless they test positive for use of marijuana and the person inquiring has a legitimate reason or need to do so in connection with confirming whether the use of marijuana is lawful under the circumstances.
 - Do not inquire with employees who do not perform safety-sensitive work if they use medicinal marijuana.

GableGotwals will host a complimentary webinar in the coming months to address the many nuances and legal considerations that accompany drug and alcohol testing in the workplace. The webinar will also provide practical guidelines for compliance with the Act while maintaining the safety of all employees.

Ellen A. Adams and Paula M. Williams are attorneys in GableGotwals' Labor & Employment Practice Group who assist clients in the area of Labor and Employment Law. For help auditing and updating your employment practices and for defense of labor and employment related claims, contact **GableGotwals**.



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