

MEDICAL

MARIJUANA

I N T H E W O R K P L A C E

Employee Protections

Arkansas Civil Rights Act

Arkansas Medical Marijuana Act



Arkansas Civil Rights Act

An employer shall not discriminate against an applicant or employee based on race, religion, national origin, gender, or the presence of any sensory, mental, or physical disability.



Arkansas Medical Marijuana Act

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 on past or present status as a qualifying patient.

Qualifying Patient

“a person who has been diagnosed by a physician as having a qualifying medical condition and who has registered with the department under section 5 of this amendment.”

“qualifying patient” shall not include a member of the Arkansas National Guard or the United States Military.

According to the Department of Health, 1 in 6 Arkansans currently suffer from a named qualifying condition.

Qualifying Medical Condition

Cancer

Glaucoma

HIV/AIDS

Hepatitis C

ALS

Tourette's
Syndrome

Chron's Disease

Ulcerative
Colitis

PTSD

Severe Arthritis

Fibromyalgia

Alzheimer's
Disease

The General Rule

An employer MAY NOT

Discriminate in (1) hiring, (2) firing, or (3) condition of employment

Based on an applicant/employee's past or present status as a qualifying patient or caregiver

YOU MUST TREAT THIS STATUS LIKE YOU WOULD OTHER PROTECTED CLASSES.

General Rule Continued...

Status as a qualifying patient or caregiver is not the same thing as a good faith belief that an employee is engaged in current use.

- 1** Does your employee have a “green card?”
- 2** Do you have a good faith belief that they are engaged in the current use of medical marijuana?

The General Rule Continued...

DO NOT ASK IF AN APPLICANT IF THEY HAVE A MEDICAL MARIJUANA CARD IN THE INTERVIEW.

- Even if you think that they do.
- Even if someone told you that they do.
- DO NOT ASK!

- If you do not know, it cannot be a basis for your hiring decision.



What you CAN do?

Establish a drug-free workplace policy

Discipline, up to and including termination, employees who:

- Possess
- Smoke
- Ingest
- Otherwise use marijuana

Requirements:

- Occurs on county property or during working hours
AND
- Good faith belief of employee's current use.

“Good Faith Belief”

A good faith belief that an applicant/employee is currently engaged in the use of marijuana can be established by:

- Observed conduct, behavior or appearance;
- Information reported by a person who witnessed the use or possession of marijuana/marijuana paraphernalia;
- Written, electronic, or verbal statements from the employee;
- Lawful video surveillance;
- A record of government agencies, law enforcement agencies, or courts;
- A positive drug test for marijuana
 - A positive drug test for marijuana CANNOT provide the SOLE basis for an employer’s good faith belief (unless the employee is in a safety sensitive position).

“Under the Influence”

“Under the influence” includes without limitation:

- Symptoms of the applicant/employee’s speech, walking, standing, physical dexterity, agility, coordination, actions, movement, demeanor, appearance, clothing, odor, or other irrational or unusual behavior that are inconsistent with the usual conduct of the applicant/employee;
- Negligence or carelessness in operating equipment, machinery, or production or manufacturing processes;
- Disregard for safety;
- Involvement in an accident that results in:
 - Damage to equipment, machinery, or property;
 - Disruption of a production or manufacturing process; or
 - An injury; or
- Other symptom(s) causing a reasonable suspicion that the current use of marijuana may negatively impact the performance of the job duties or tasks or constitute a threat to health or safety.

Exception to the General Rule: Safety Sensitive Positions

Safety sensitive positions are positions that require:

- (1) Carrying a firearm;
- (2) Performing life-threatening procedures;
- (3) Working with confidential information or documents; pertaining to criminal investigations;
- (4) Working with hazardous or flammable materials, controlled substances, food, or medicine; OR
- (5) A position in which a lapse in attention could result in injury, illness, or death, including without limitation a position that includes the operating, repairing, maintaining, or monitoring of heavy equipment, machinery, aircraft, motorized watercraft, or motor vehicle as part of the job duties.



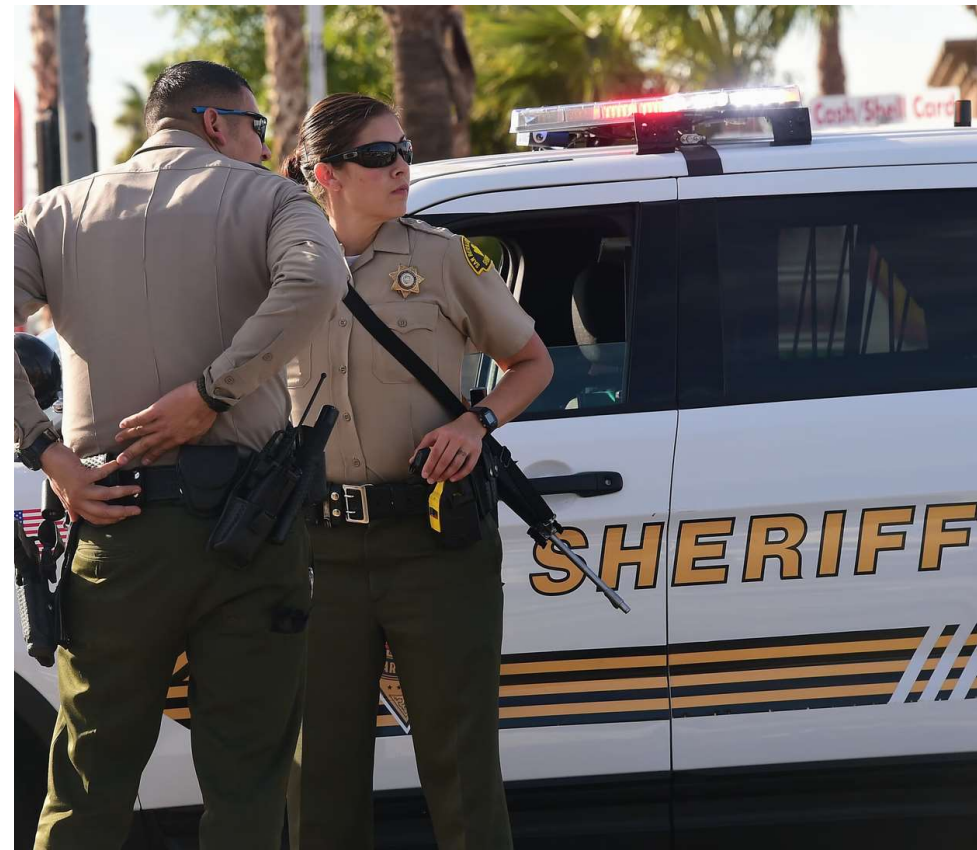
Safety Sensitive Exception Continued:

H I R I N G :

- You CAN refuse to hire a safety sensitive applicant if you have a **good faith belief** they are a **current user** of marijuana (medical or otherwise).
- **NOT** because they have a “green card”
- **ONLY** if they are safety-sensitive.

T E R M I N A T I O N :

- a positive drug test is enough to terminate



Accommodating a Disability



You do not have to accommodate the use of marijuana in the workplace.

You still have to accommodate an employee's underlying disability.

You still must use the interactive process under ACRA as you would for any other prescribed medication that you would otherwise violate your drug policy.

Do's and Don'ts

- **DON'T** ask your employees if they have, or plan to get, a registry ID card.
- **DON'T** disqualify candidates or terminate employees based solely on a positive marijuana screen if:
 - They have a card,
 - Show no signs of impairment, and
 - **ARE NOT** in a safety-sensitive position.



Do's and Don'ts

- **DO** review your written drug testing policy.
 - The policy should state it is a condition of employment that employees shall not work or report to work “under the influence.”
- **DO** review your job descriptions and classifications for safety sensitive positions (as defined by the act) and **UPDATE DOCUMENTS AS NEEDED.**
- **DO** provide reasonable suspicion training.
- **DO** adopt a pre-employment drug screening policy.

Do's and Don'ts

- **DO** make your position on marijuana use and substance abuse clear in your employee handbooks and policy manuals.
- **DO** consult legal counsel prior to taking any adverse employment action against an employee or hiring a candidate based on medical marijuana issues.



E M P L O Y E E



T E S T I N G

Types of Drug Testing

Post-Offer, Pre-Employment

Reasonable Suspicion

Random*

Post-Accident*



Post-Offer, Pre-Employment Drug Testing

- Optional for all employees **except** those who are covered by DOT regulations (CDL)
- What does your county personnel policy say?
- What does your executive office policy say?
- What is your practice and custom?

** MUST be done in a nondiscriminatory manner - all similarly situated jobs must be treated the same.



Post-Offer, Pre-Employment Drug Testing

- Only **AFTER** a contingent offer of employment has been made.
 - I recommend your offer be made in writing
 - Example: “Dear John, You are being offered the position of X, for X dollars an hour. This offer is contingent upon you successfully passing a drug test.”
- The test **MUST** be administered **AND** the results returned **BEFORE** the employee begins work. ANY WORK!!
- It does not violate the Fourth Amendment to require a suspicionless drug test for all applicants.



Random Drug Testing

- SAFETY SENSITIVE EMPLOYEES ONLY
 - Those who fall under DOT regulations, and those who have duties where a momentary lapse in attention can result in injury or death to another person.
- MUST be truly random.
 - Testing all employees or all employees in a department **IS NOT RANDOM!**



Reasonable Suspicion Drug Testing (good faith belief)

Can you articulate why there was suspicion?

- Odor
- Behavior
- Appearance
- Etc.

Did you document it in a report?

Are there witness statements?

Video or photographs?

● Can you articulate why there was suspicion?

Reasonable Suspicion Drug Testing (good faith belief)

Uncorroborated tips and hunches are not enough.

DOT RULE:

Reasonable suspicion testing must be based upon individualized suspicion of an on-duty drug use or impairment, which is documented by a trained supervisor.



Post-Accident Drug Testing

- Reasonable suspicion is **REQUIRED** for a post-accident drug test involving a **NON-DOT EMPLOYEE**

Example:

Sheriff's deputy is involved in an accident.

Responding to a Positive Drug Test

Post-offer, Pre-employment drug test AND Random drug testing:

A positive test CANNOT be the sole basis for denying employment **EXCEPT** when (1) the employer is bound by federal drug testing requirements, (2) the job is classified as safety sensitive, or (3) if the employee is not a qualified patient.

Reasonable Suspicion drug testing:

A positive test CAN support a good faith belief that the employee is under the influence, resulting in an employment action consistent with the personnel policy.

Return to duty & Follow-Up testing:

DOT/CDL ONLY

A positive test CAN be the sole basis for an employment action.

Post-Accident drug testing:

DOT ONLY

A positive test CAN, along with an accident that cause an injury or damage, support a good-faith belief that the employee is under the influence, resulting in an employment action consistent with the personnel policy.



U S E I N T H E W O R K P L A C E

Cannabidiol (AKA “CBD”)

- CBD is a compound found in marijuana.
- The Agricultural Improvement Act of 2018
 - Removed “hemp” from the definition of marijuana under the Controlled Substances Act.
 - Hemp derived products containing a concentration of up to 0.3% tetrahydrocannabinol (THC) are not controlled substances.
 - **Any product, including CBD products, with a concentration of more than 0.3% THC remains classified as marijuana, a Schedule I drug under the Controlled Substance Act.**

DOT Office of Drug and Alcohol Policy and Compliance Notice



What the DOT Wants You to Know:

- 1** The DOT requires testing for marijuana and not CBD.
- 2** The labeling of many CBD products may be misleading because the products **COULD** contain higher levels of THC than what the product label states.
 - The Food and Drug Administration (FDA) does not currently certify the levels of THC in CBD products, so there is no Federal oversight to ensure that the labels are accurate.
 - FDA has issued several warning letters to companies because their products contained more CBD than indicated on their product's label.

What the DOT Wants You to Know:

3 The DOT's Drug and Alcohol Testing Regulation does not authorize the use of Schedule I drugs, including marijuana.

4 CBD use is not a legitimate medical explanation for laboratory-confirmed marijuana positive results.

- Medical review officers will verify a drug test confirmed at the appropriate cutoffs as positive, even if an employee claims they only used a CBD product.

Since the use of CBD products could lead to a positive test result, DOT regulated safety-sensitive employees should exercise caution when considering to use CBD products.



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