



THE ARKANSAS MEDICAL MARIJUANA AMENDMENT & ACT 539 OF 2017

Practical Tips for Compliance

ASSOCIATION OF ARKANSAS COUNTIES



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Marijuana Usage in the Workplace

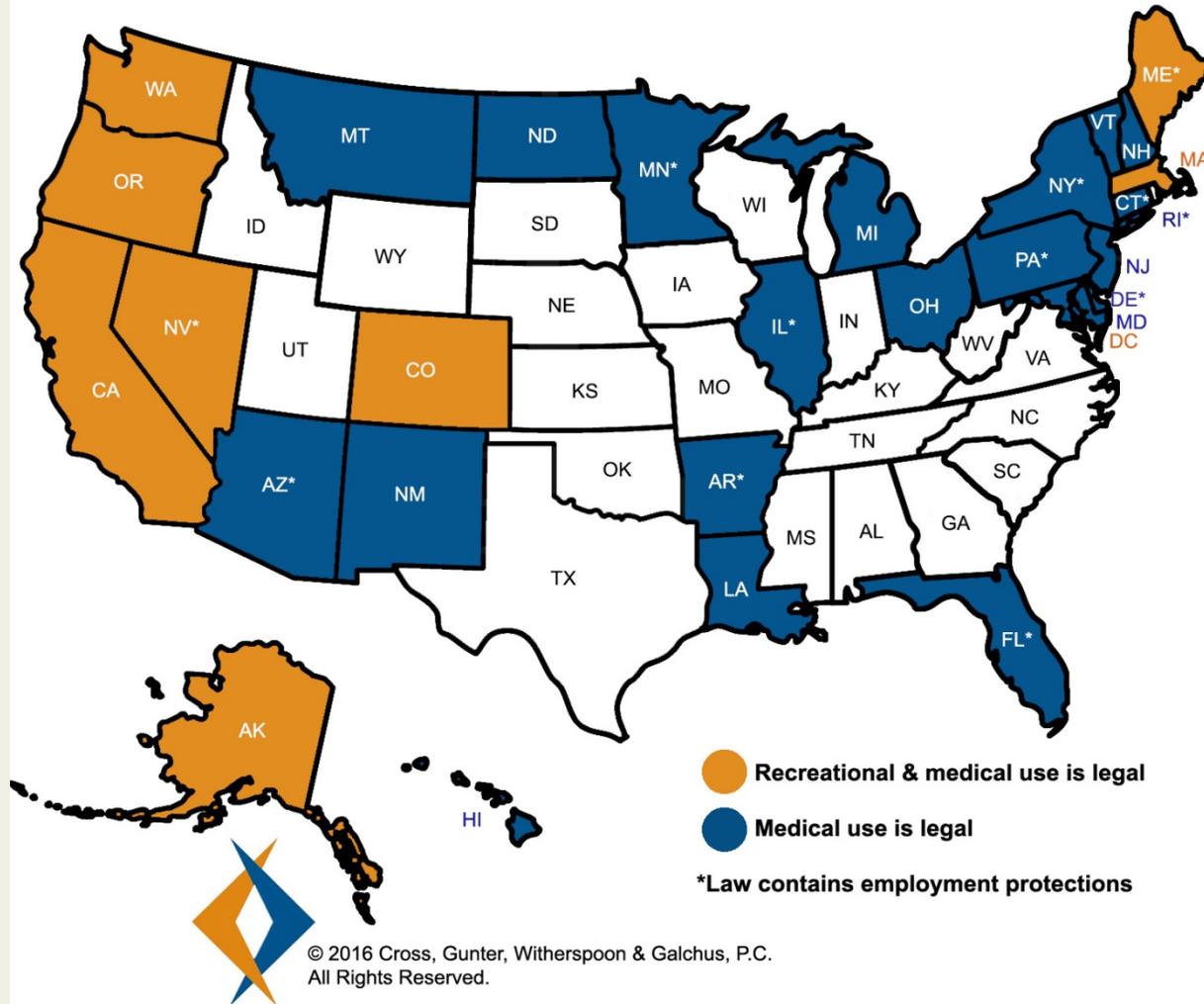


WHICH STATES HAVE LEGALIZED MEDICAL MARIJUANA? RECREATIONAL?

WHO IS THE AVERAGE MEDICAL MARIJUANA USER?

HOW HAS LEGALIZATION AFFECTED DRUG TESTING RESULTS?

Marijuana Laws in the U.S.



Medical Marijuana in the Workplace



Substance Abuse Program Administrators Association (SAPAA) reports:

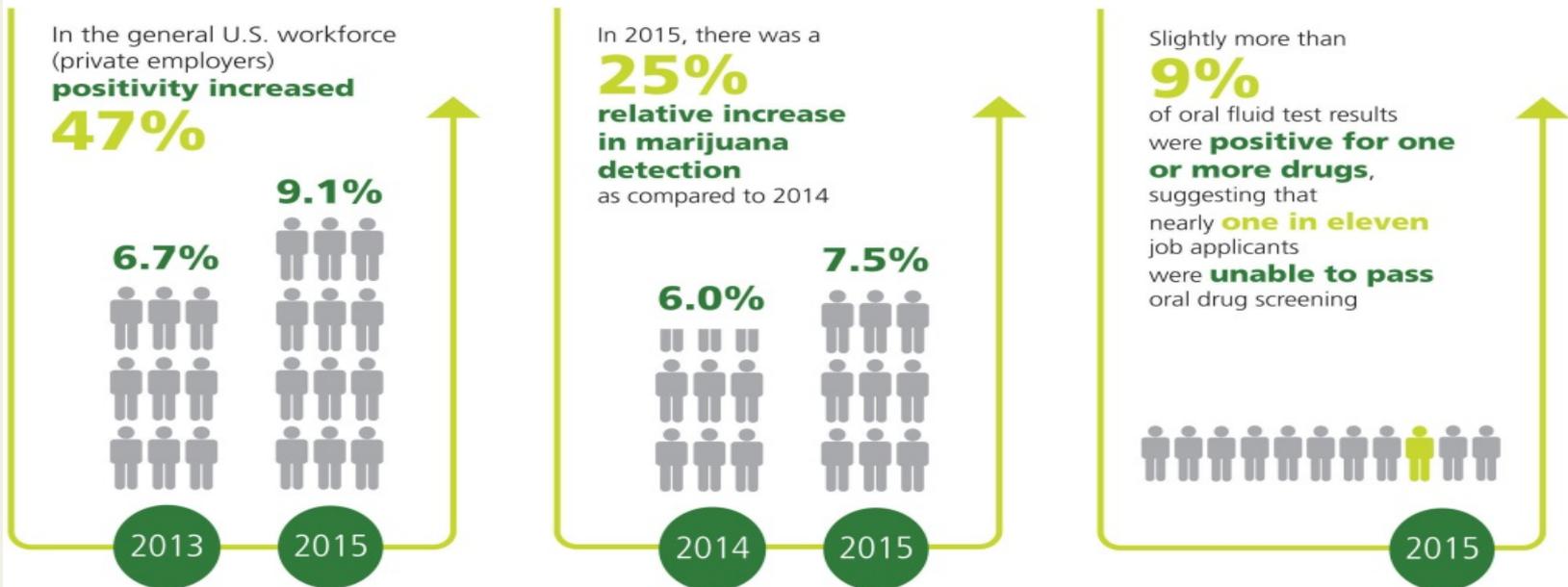
- 13.1 million employed drug abusers in 2007
 - Drug and alcohol problems cost roughly \$276 billion every year
 - From 2012-14, positive employee marijuana drug test results increased by 6.2% nationally, and between 20-23% in Colorado and Washington

Colorado User Statistics as of August, 2016:

- 63.8% male; 36.2% female
 - Average patient is 42-43 years old
 - Most common conditions being treated are severe pain and muscle spasms
 - Source: https://www.colorado.gov/pacific/sites/default/files/CHED_MMR_Report_August_2016_Statistics_092016_1.pdf

National Trends in Workplace Drug Testing

In Oral Fluid Testing, Overall Positivity Rate Surges over the Last Three Years



SOURCE: 2016 Quest Diagnostics Drug Testing Index™, based on nearly 11 million workforce drug test results.
www.QuestDiagnostics.com/DTI





Practical Tips for Compliance



HYPOTHETICAL WORKPLACE SCENARIOS



wikiHow to Get a Medical Marijuana ID Card

Scenario #1



- **Q:** Joan, an employee in the Assessor's office, provides you with her registration identification card via email. Is this considered medical information and must you keep it separate from personnel records?



- The employee's registry identification card will be issued by the Arkansas Department of Health. According to the Department's rules, the card will not include the employee's medical condition.



- However, the ID card should be kept separate from personnel records because it indicates that the employee has a qualifying medical condition, i.e., a disability.



- Keep it confidential, secure, and disclose only to other employees on a need-to-know basis.



- Is James, her supervisor, a need to know person?
- What about her co-workers?

Scenario #2



- **Q:** What if instead Joan gives you a written certification from her treating physician?



- A doctor will give a qualifying patient a written certification that states his/her qualifying medical condition. The qualifying patient uses the written certification to get a registry card from ADH.



- The AMMA has been amended to clarify that the written certification is not a prescription or a medical record.



- However, to be on the safe side, an employer who obtains the written certification should treat it like any other documentation containing medical information, i.e., keep it confidential, secure, and disclose only to other employees on a need-to-know basis.

Scenario #3



- **Q:** Your Accounting Manager is reviewing your policies and asks you which policies are affected by the new law?



- Review and revise your Substance Abuse Policy.
 - ✦ Modify the definition of “drugs” (legal or illegal) to address medical marijuana usage under the AMMA.
 - ✦ Modify the definition of “under the influence” to comply with the AMMA.
 - ✦ Clarify the consequences of testing positive for medical marijuana.
 - ✦ Consider adding a pre-duty disclosure requirement for safety sensitive employees.



- If you don't have a Substance Abuse Policy, consider adopting one.

Drug & Alcohol Policies



- Should your Drug & Alcohol testing policies should be in writing?
 - Yes. Set forth conditions for testing and impact of positive results.



Scenario #4



- **Q:** Jim, who is a supervisor in the County Clerk's Office, was arrested last night for the use of marijuana at the movies. He failed to report that arrest. You learned about it from another employee. Can you still prohibit the off-duty use of illegal drugs?



- It depends. What does your policy say?
 - If Jim is not a qualifying patient, you may terminate him because he is not protected under the AMMA.
 - If Jim is a qualifying patient in a safety sensitive position, you may terminate him under Act 593.
 - If Jim is a qualified patient in a non-safety sensitive position, you may terminate him if he comes to work under the influence of marijuana or if your policy allows for termination for convictions of illegal drug offenses.
- Make it a condition of employment that employees do not work or report to work under the influence of drugs and/or alcohol and your policy should also include the use of legal drugs at work.
 - Off-duty use of *illegal* drugs may be prohibited.
 - Address the use of legal drugs at work.

Scenario #5



- **Q:** Susan and Perry literally run into each other in separate vehicles in your parking lot during work hours. You tell both that they must be tested. Both refuse. What do you do?



- If you have a mandatory post-accident testing policy, explain your policy to both.
- If your policy provides that employees may be terminated for refusing to submit to drug testing, advise that they can be terminated for the refusal according to your policy.
- If Susan was in a County vehicle and Perry was not, would your responses be different?

Drug & Alcohol Policies



- What can you include in your own Drug & Alcohol Policies?
- Recommended testing provisions:
 - Reasonable suspicion testing
 - Pre-employment testing (post-offer)
 - Post-accident testing
 - Consequences of refusing to be tested or failing a test
 - Identification of drugs for which tests will be administered (5-panel, 10-panel, others)
 - Advisement of the failure levels (and exceptions)
- Who to test?



Scenario #6



- **Q:** I haven't updated my Substance Abuse Policy. Can I still drug test under our old policy?



- Yes. Under Act 593, employers may still conduct drug testing that complies with state and federal law.



- However, be aware of the AMMA's employment protections for registered cardholders, particularly for qualifying patients.

Scenario #7



Q: I'm an employer under a federal contract. Should I know about an employee who is taking marijuana?



- Some federal contractors and all federal grantees are required to comply with the requirements of the Federal Drug-Free Workplace Act:
 - ✦ Publish a written policy and require employee consent;
 - ✦ Initiate awareness programs about dangers of drug abuse and available counseling/rehabilitation;
 - ✦ Requires employees to notify employers of any drug-related conviction; and
 - ✦ Make an ongoing good faith effort to maintain a drug-free workplace.
 - ✦ No prohibition against or requirement for drug testing.

Scenario #8



Q: Elizabeth, an accountant, is using medical marijuana for the pain associated with her cancer treatment. She tested positive on a drug test. What do you do?

- What would you do differently if she was a 3 month employee?



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MEDICAL MARIJUANA DURING CHEMO,
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- Employers should take precautions when using a positive marijuana test to take adverse employment action against a **qualifying patient**, i.e., individuals who are allowed to ingest marijuana for medical purposes.
 - ✦ Employers may take adverse employment on the sole basis of a positive test against a **qualifying patient** in a **safety sensitive position**, as defined by state or federal law or as designated in writing by the employer pursuant to Act 593.
 - ✦ Otherwise, employers need a **good faith belief** that the applicant or employee was **under the influence**, possessed, smoked, ingested, or otherwise engaged in the use of marijuana in the workplace. A positive drug test alone is not enough.
- The analysis does not differ for permanent or temporary employees.

Scenario #9



- **Q:** Barry, an applicant for a clerical position, comes in and does not tell you he has a registry identification card, but you know he does. His aunt lives behind you and has told you all about Barry's health issues. Should you ask Barry about it?



- The AMMA does not prohibit employers from asking applicants if they are using prescription marijuana or about their underlying medical condition.



- However, just as we would not advise an employer to ask if an applicant is using any legal prescription medication, we would not advise an employer to ask about medical marijuana or the applicant's medical condition because now the employer is on notice of the applicant's actual or perceived disability.



- The AMMA contains employment protections for cardholders.
- The Americans with Disabilities Act and the Ark Civil Rights Act prohibit discrimination on the basis of disability.



- Asking an applicant about their prescription marijuana use opens the door to potential liability for subsequent employment actions, e.g., “You refused to hire me because you knew I was using medical marijuana for XYZ medical condition.”

Scenario #10



- **Q:** Jerry, a Road Department employee, is a qualifying patient and refuses to tell you about his underlying medical condition. Are you allowed to ask for this information?



- For the reasons stated on the previous slides, employers are not prohibited from asking employees if they are using prescription marijuana or about their underlying medical condition.



- However, we would not advise an employer to ask about medical marijuana or the employee's underlying medical condition.



- Instead, the employer may choose to adopt a **pre-duty disclosure policy** and reserve the right to refer the employee to a licensed **medical review officer**, who can indicate if the employee can safely perform the essential job duties of the position.
- Send the employee's job description to the MRO.

Scenario #11



- **Q:** Sam is a backhoe operator. Your policy requires pre-duty disclosures if they are taking some type of impairing drug, whether legal or illegal, over the counter or prescription.
- Do I need to discuss this with him even if I don't have a job description?
- Sam comes in and asks me what to do about coming back to work. How do I respond if I don't have a job description?



- Identify safety-sensitive positions.
 - ✦ It is important to list the job qualifications that qualify for safety-sensitive positions. You may list them in your policy or in each job description.
 - ✦ Your substance abuse policy should explain the consequences for testing positive in a safety sensitive position.
- Adopt a pre-duty disclosure policy.
 - ✦ The employee does not have to disclose the drug or the medical condition to comply.

Scenario #12



- **Q:** Sam reports to work after an accident. I asked him to disclose the drug or medical condition to comply with our drug policies. He has refused. What are my next steps?



- You cannot require your employees to disclose the drug or the medical condition to comply with the policy.
- However, you can require return-to-work testing if the employee returns from an extended absence, and you can send him/her to a physician for a recommendation on his/her ability to safely perform the essential functions of the job.
- Send the employee's job description to the physician.

Scenario #13



- **Q:** So once Sam has disclosed that he has a herniated disc, can I as the employer, send him for a fitness for duty evaluation?



- Yes, if you reserve this right in your policy.
- You should send a copy of the job description to the physician so the physician can make a fitness for duty determination. That determination should be whether or not the employee may safely perform the essential functions of the job while using any type of medication.

Scenario #14



- **Q:** A forklift accident occurs at a citizen's location by Mary who is using marijuana. The forklift is not damaged. Mary is not hurt. A water line was broken. What are the ramifications of liability for us?



- Discuss tort immunity



- Employers should designate job positions as safety sensitive.
 - ✦ Under Act 593, employers may automatically terminate an employee in a safety sensitive position who tests positive for marijuana, even if the employee has a marijuana card.



- Of concern is why the supervisor did not notice the employee operating the forklift was demonstrating aberrant behavior. What should you do about that?

- **RETRAIN AND DISCIPLINE IF NECESSARY**
 - ✦ Supervisors should be trained to identify signs and symptoms of impairment caused by drug or alcohol use.
 - ✦ Supervisors who observe employees who appear to be under the influence should document observable signs and symptoms. Another witness should sign the documentation.
 - ✦ Place the employee on temporary suspension and require that the employee submit to a drug test if your substance abuse policy provides for reasonable suspicion testing. If the drug test result is positive, you may take adverse employment action consistent with your substance abuse policy.

Scenario #15



- **Q:** Misty, a flagger on the road crew, has told you that she has a card, and you have a reasonable suspicion she is high at work. What can you do?



- The ADA is a federal law, and under federal law, marijuana remains illegal. Further, the AMMA provides that employers are not required to accommodate the ingestion of marijuana in the workplace or employees working under the influence of marijuana.



- Even if an employee has a card, the AMMA does not allow employees to be high at work.



- **Employers may conduct reasonable suspicion drug testing.**
 - ✦ Supervisors should be trained to identify signs and symptoms of impairment caused by drug or alcohol use.
 - ✦ Supervisors who observe employees who appear to be under the influence should document observable signs and symptoms. Another witness should sign the documentation.
 - ✦ Place the employee on suspension, and require that the employee submit to a drug test if your substance abuse policy provides for reasonable suspicion testing. If the drug test result is positive, you may take adverse employment action consistent with your substance abuse policy.

Scenario #16



- **Q:** My supervisor advises me that one of her employees, Freddie, has lately become very unconcerned about her job. On occasion, the same employee shows an inability to concentrate and sometimes is found asleep at her desk. What steps should be taken at this point?



- Managers and supervisors should be trained to identify workplace related impairing effects of marijuana. Some of the signs and symptoms do include the points raised by the supervisor. If the supervisor has not been trained to identify these signs, there could be a problem so immediate training may be required.

Scenario #17



- **Q:** John has a registration identification card and his job requires him to drive a county vehicle, a lease vehicle, or his car. If John cannot drive, do we have to accommodate the employee by moving him to another equivalent position?



- If the position is designated as safety sensitive, and the employee fails a drug test, the employer may fire the employee for violating the Company Substance Abuse Policy.

Scenario #18



- **Q:** How does the Ark Civil Rights Act impact the situation with John, if at all?



- Marijuana is legal under Arkansas state law.



- However, the analysis is the same as under the ADA because the Ark Civil Rights Act prohibits employment discrimination based on disability.



- Act 593 protects employers who take the following actions in these circumstance:
 - ✦ Implementing, monitoring, or taking measures to assess, supervise, or control the job performance of an employee;
 - ✦ Reassigning an employee to a different position or job duties;
 - ✦ Placing an employee on paid or unpaid leave;
 - ✦ Suspending or terminating an employee;
 - ✦ Requiring an employee to successfully complete a substance abuse program before returning to work; or
 - ✦ Refusing to hire an applicant.

Scenario #20



- **Q:** My employees want to have a Friday afternoon party and distribute their medical marijuana to some of their friends. They have argued that it is a free country. Do I have to allow this?



- No. You are not required to accommodate the ingestion of marijuana in the workplace by your employees. Also, off duty consumption of marijuana without a card is still illegal.

Scenario #20



- **Q:** One of my suppliers (toilet paper) has indicated that as a sign of thanks for the work that she has done for the County, she would like to have a marijuana party at our park. My employees seem to all be in favor of it. I am not, however, and wonder what my answer should be.



○ **By employees?**

- ✦ **No.** An employer is not required to “accommodate the ingestion of marijuana in a workplace.”
- ✦ Also, off-duty consumption of marijuana, without a card, is still illegal.

○ **By customers or other members of the public?**

- ✦ No person is permitted to “possess, smoke, or otherwise engage in the use of marijuana” on any form of public transportation or in any public place.
- ✦ An individual or establishment in lawful possession of property is not required to “allow a guest, client or customer, or other visitor to use marijuana on or in that property.”

Scenario #22



- **Q:** A doctor states Sue can't come to work because she is taking medical marijuana. How do I handle recertification issues when the employee returns?



- The AMMA provides that employers do not have to accommodate the use of marijuana in the workplace.
- The Family Medical Leave Act is a federal statute, and marijuana remains illegal under federal law.
 - ✦ Thus, the AMMA likely won't change how marijuana is treated under the FMLA.
 - ✦ As for recertification and return-to-work issues, the employer is advised to use a licensed medical review officer to make these determinations.
 - ✦ Employers may require return-to-work and follow-up drug testing in their Substance Abuse Policies.

Scenario #23



- **Q:** Bill is a Registered Cardholder and is involved in an on the job accident. Does the illegal drug exclusion to the workers compensation statute still apply?



- We need to wait for the Arkansas courts to decide this.



- Courts in other states with medical marijuana have dinged employers who relied solely on drug tests to deny workers' comp benefit. The employer failed to produce any other “credible evidence” to show impairment, and thus failed to demonstrate that the employee was impaired at the time of the injury.



- At this time, medical review officers are hesitant to testify on the basis of a positive marijuana drug test that an individual was impaired at the time of the injury for the purposes of workers' compensation because urinalysis has a long detection time and does not prove that an employee was under the influence at the time of testing.



- **Takeaway:** Document reasonable signs and symptoms before drug testing!

Scenario #24



- **Q:** Are employers required to pay for medical marijuana treatments to treat an employee's injury as part of workers' compensation?



- We need to wait for the Arkansas courts to decide this.



- Courts in states with medical marijuana have gone both ways.



- However, the Arkansas Amendment provides that it does not require a government medical assistance program or private health insurer to reimburse for costs associated with medical marijuana unless federal law so requires it to be done.

Scenario #25



- **Q:** As an employer seeking to prove “misconduct” under the Unemployment Insurance code provisions, what constitutes “misconduct”?



- We need to wait for the Arkansas courts to decide this.



- Courts in states with medical marijuana have gone both ways.



- It's unclear whether a positive drug test plus a bona fide written drug policy are sufficient to find “misconduct.”



- The safe route is to document observable signs and symptoms.



- Arkansas courts will likely consider the AMMA’s rebuttable presumption of lawful activity and whether failing a drug test constitutes “misconduct in connection with the work.”

General Compliance Recommendations



- Update Job Descriptions.
- Review Substance Abuse Policies and forms.
- Train supervisors how to identify and document reasonable suspicion signs and symptoms.
- Use a Medical Review Officer to conduct drug testing.
- Consider adopting a pre-duty disclosure policy.
- Let employees know your stance on medical marijuana use.



Make Your Position on Marijuana Clear



- Include clear information on marijuana use in a substance abuse policy.
- Have employee awareness meetings to discuss the impairing effects of marijuana.
- Emphasize the importance of safety in the workplace and in public areas.
- Monitor Arkansas law carefully for updates.
- Do not take disciplinary action against an employee for medical marijuana without consulting competent labor counsel.

QUESTIONS?



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