

Cannabis: **concerns about safety,** **cautionary tales, and** **compliance issues for the oil** **and gas industry**

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SAFETY CONCERNS:

Marijuana, Medical Or Not, Is Still
Illegal Under Federal Law

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Various Federal Laws

- **Controlled Substances Act**
 - Schedule I drug:
 - High potential for abuse
 - No accepted medical treatment
 - Unacceptable safety risks even under medical supervision
- **Drug Free Workplace Act**
- **Federal Regulations enforced by DOT**
- **Americans with Disabilities Act**



Federal Law

Drug Free Workplace Act

- Fed contractors must maintain a drug-free workplace by ensuring employees don't engage in "unlawful maintenance, distribution, dispensation, possession, or use of a controlled substance," or
- Payment of federal funds may be suspended or terminated

The DOT Regulations: No “medical marijuana”.

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DOT Regulations

April 29, 2019 Update:

- Section 40.151: Medical Review Officers will not downgrade a positive test for medical marijuana even if “state-sanctioned”.
- “Marijuana remains a drug listed in Schedule I of the Controlled Substances Act. It remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation’s drug testing regulations to use marijuana.”

State-sanctioned MJ: The “Growth” of a New Protected Class

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Employee Protections

- **Status** as a license-holder, caregiver, qualified patient, registered user or the like
- **“Off-duty” use** without employer’s ability to prove that the employee was impaired on employer property, while working, during working hours
- Drug-testing statutes
- Potentially protected from discrimination based on underlying reason for medical use

Recreational Programs

- **Illinois**

- Express employee protections
- General “off-duty” lawful activity statute
- Is marijuana use “lawful activity”?

- **Colorado**

- No express employee protections
- General “off-duty” lawful activity statute
- Because it’s illegal under federal law, it’s not lawful activity

Qualifying Medical Conditions

- Cancer
- Glaucoma
- Epilepsy
- AIDS/HIV
- Chronic Medical Conditions
- Other Injuries (not responsive to other treatment)

Oklahoma

- Unless otherwise required by federal law or required to obtain federal funding:
 - No adverse action on the basis of status as a medical marijuana licensee; and
 - No adverse action solely on the basis of a positive test for marijuana, unless
 - Impaired while at work or during employment obligations; or it's safety-sensitive

The Safety-Sensitive Conundrum

- No scientific ability to “test” for on-duty v. off-duty use (at least as of right now)
- Simplest practice outside of safety concerns is to solely manage performance
 - Avoids violating state-sanctioned employee protections
 - Avoids acquiring information about potential “disabilities”
- Employers are worried about liability for not testing and enforcing in safety-sensitive positions that are not federally regulated



“Reasonable”:

Must make
sure policy is
defensible

Cannabis:

Cautionary Tales

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Re-evaluate Policies & Procedures

Protected Class Status Creates Risk

- Why drug testing?
 - Successful? Elimination of Risk?
- Who needs to know?
 - What was the real reason for adverse action?
- Evidentiary support?
 - Proving on-duty use and/or safety risk and/or reasonableness
- Investigation and Privacy
 - Off-duty use?

Identify Safety-Sensitive Jobs

- **Federally regulated – already covered**
- **Identify** other jobs with safety-sensitive duties:
 - Update job descriptions to identify safety-sensitive tasks
 - Consider your strategy based on your risk tolerance
 - Enforce consistently



Verify With Your Vendor



- Contact your drug testing vendor to confirm:
 - The vendor is aware of any applicable state-sanctioned program
 - How the vendor plans to handle drug tests that are positive for marijuana
 - Who in your organization is designated to receive confidential communications

Communicate Expectations

- CBD
- Performance, behavior, and safety
- **No using or possessing** drugs at work, including medical marijuana
- **No working while “impaired”**
 - In the absence of an express statement, ambiguity exists for medical need under state rather than federal disability discrimination laws



Cannabis:

Compliance Issues for the Oil and Gas Industry

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Impaired Employee

- Get a witness and document “signs”
- Suspend pending investigation?
- Require “for cause” test? – Oklahoma not DOT
- Who is watching?



Focus on Performance

- If you suspect impairment, either require a “for-cause” or “reasonable suspicion” drug test *or* focus on performance and behavior
- Neither license-holder status nor a related disability excuses poor performance or behavior problems
- If they blame an impairment (disability), initiate interactive accommodation process



Positive Drug Test

- Possess a valid license?
- If so and if no exceptions to state-sanctioned program, then must have:
 - Signs of impairment at work
 - Performance or behavior problems
 - Other job-related reasons or business need to take action
 - Articulate reason to conduct a fitness-for-duty exam



NEED HELP CLEARING THE SMOKE?

GableGotwals employment attorneys are well versed in the intersection of state and federal laws impacting drug testing and state-sanctioned marijuana programs. Click here to learn more:

[GG Employment Lawyers](#)

This is legal education and not legal advice.

You should consult your lawyer before taking any action that has legal consequences.

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