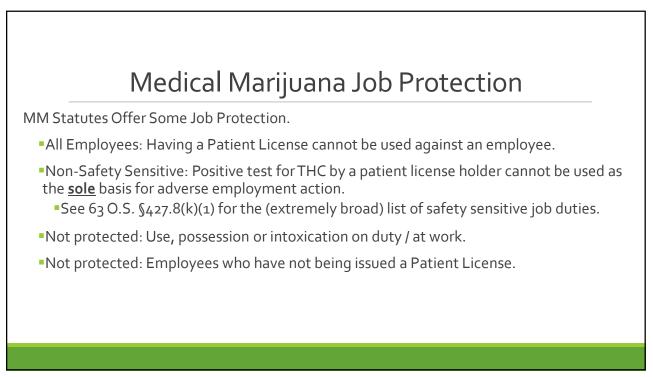
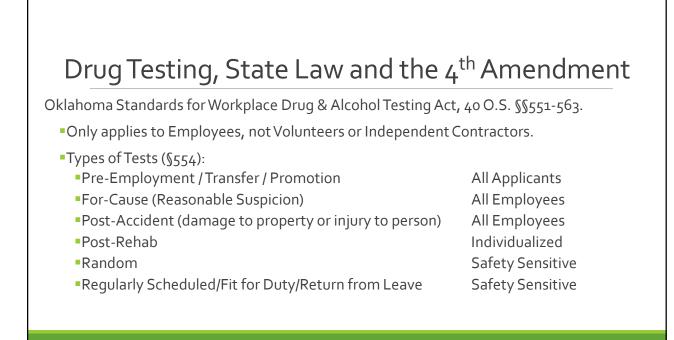
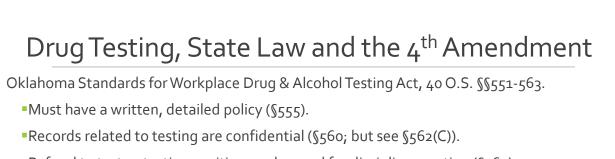
# Medical Marijuana in the Workplace & Reasonable Suspicion Drug Testing

#### MATT LOVE

OMAG DEPUTY GENERAL COUNSEL







- Refusal to test or testing positive can be used for disciplinary action (§562).
- Civil Cause of Action for violation of the Act (§563).
  - Damages: lost wages (less interim earnings) plus an equal amount for liquidated damages.Attorney Fees.

# Drug Testing, State Law and the 4<sup>th</sup> Amendment

4<sup>th</sup> Amendment

- Public employees do not surrender Constitutional rights.
- <sup>1</sup>st, 4<sup>th</sup> & 5<sup>th</sup> Amendment standards relaxed when Government acts as an employer.
- <sup>4</sup>4<sup>th</sup> & 5<sup>th</sup> Amendment rights can only be waived knowingly and voluntarily. *See <u>Garrity</u>*.
- Violation of Constitutional Right actionable in a civil suit under 42 U.S.C. §1983.
  No cap on damages; Personal, individual liability; Attorney fees.
- No such thing as a minor (de minimis) 4<sup>th</sup> Amendment violation you either violated the 4<sup>th</sup> Amendment or you didn't.

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# Drug Testing, State Law and the 4<sup>th</sup> Amendment

 $4^{th}$  Amendment

- Drug/Alcohol testing is a "search" under the 4<sup>th</sup> Amendment.
- •Supreme Court has never given us *the* test for workplace searches/seizures under the 4<sup>th</sup> Amendment in general, but has given definitive guidance on drug testing.
- •4<sup>th</sup> Amendment search is only reasonable if 1) there is individualized suspicion <u>or</u> 2) if the Government has a "special need" which justifies the lack of individualized suspicion.
- •Government bears the burden of proof to show the justification for the search.
  - Presumption of unreasonableness.

# Drug Testing, State Law and the 4<sup>th</sup> Amendment

4<sup>th</sup> Amendment

Individualized Suspicion: 4<sup>th</sup> Amendment usually deals with Probable Cause or Reasonable Suspicion. For Drug Testing, Reasonable Suspicion applies.

Reasonable Suspicion is:

- More than a hunch, based on what you know, not what you don't know.
- •Totality of the Circumstances, not Divide-and-Conquer.
- About probabilities not certainty. Not more likely than not, and possible innocent explanations do not dispel reasonable suspicion.
- Conclusions reached based on specialized training relevant, but common sense is too.
- Is there reasonable suspicion to believe that the employee was engaging in unlawful activity involving controlled substances (use, possession or impairment) on the job.

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### Drug Testing, State Law and the 4<sup>th</sup> Amendment

4<sup>th</sup> Amendment

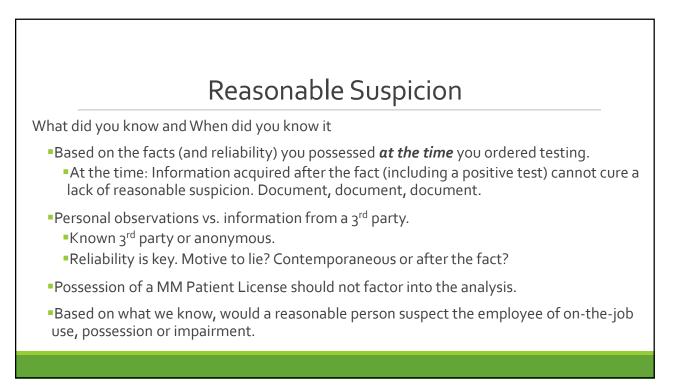
- Suspicion-less Testing (Special Needs)
  - Post Accident Testing: Collect now, determine relevance later.
  - Random Testing of Safety Sensitive: Too Important not to.
- Consistency is key: Courts abhor searches based 1) on the discretion of a Government official which 2) lack individualized suspicion. Objective standards should be used.
- •Failure to implement testing in a way designed to detect drug use or which lacks a real deterrent effect can lead to a 4<sup>th</sup> Amendment violation.

#### "Safety Sensitive"

Statutory vs. Constitutional

Constitutionally:

- "Safety Sensitive" is the exception to the rule requiring individualized suspicion.
- "[A] job in which safety is an important concern."
- A job where "even a momentary lapse of attention can have disastrous consequences." Safety sensitive duties can be performed "sporadically" or on a "on-call" basis with the job still being considered safety sensitive.
- \$427.8(K)(1): an extremely broad list of job duties which qualify as safety sensitive.
- Caution: §427.8(K)(1) largely overlaps with the Constitutional principals on what is a safety sensitive job. At the outer limits (i.e. if you are trying to "stretch" the statute to your benefit) it may extend "safety sensitive" beyond the Constitutional limits.



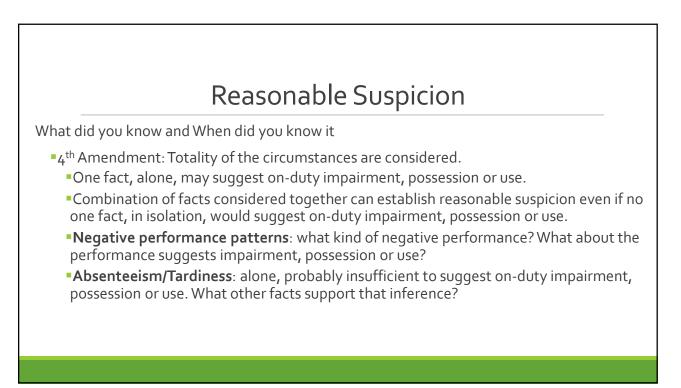
#### **Reasonable Suspicion**

What did you know and When did you know it

■40 O.S. §554(2) statutory factors (examples, but not exhaustive):

- Drugs/alcohol on or about the employee's person or in the employee's vicinity;
- Conduct on the employee's part that suggests impairment or influence of drugs or alcohol;
- A report of drug or alcohol use while at work or on duty;
- Information that an employee has tampered with drug or alcohol testing at any time;
- Negative performance patterns; or
- Excessive or unexplained absenteeism or tardiness;
- •Factors apply to all employers. Public employers are further constrained by the 4<sup>th</sup> Amendment.
  - See O'Connor v. Ortega, 480 U.S. 709 (1987) (compare opinions from Justices O'Connor & Scalia).

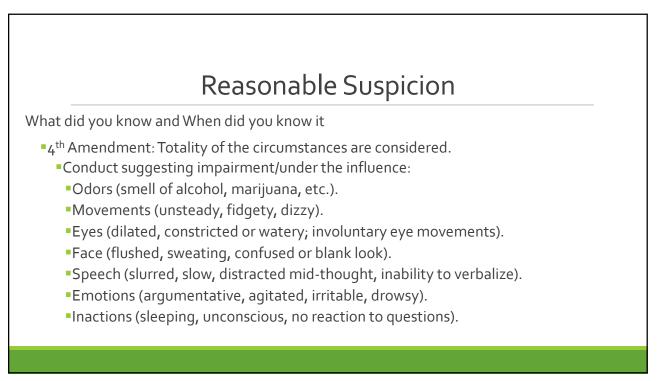




#### **Reasonable Suspicion**

What did you know and When did you know it

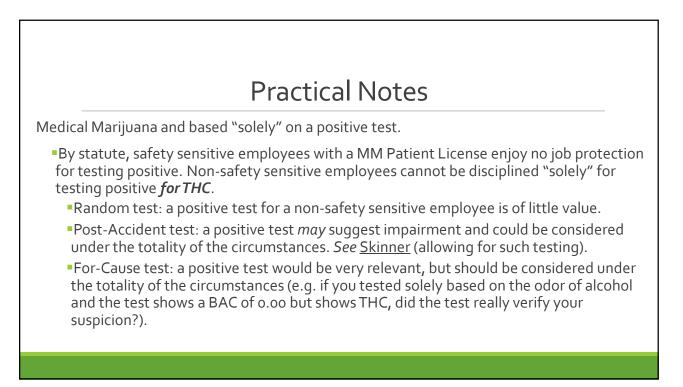
- <sup>4</sup>th Amendment: Totality of the circumstances are considered.
  - Conduct suggesting impairment/under the influence:
    - •Specialized training not required, but will allow a person to reach informed, reasonable conclusions that an untrained person would not. Difference between assumptions and reasonable inferences based on commonly held knowledge acquired in everyday life.
    - Avoid generalized statements (e.g. "acting funny"; "tweaking"; "spacy"). Provide concrete examples of what the employee did that led to these generalized conclusions.
    - Where feasible, get a "second set of eyes" to independently verify (and document) their observations of the employee.
    - In most cases, a face-to-face meeting with the employee will need to occur.



#### **Reasonable Suspicion**

What did you know and When did you know it

- <sup>4</sup>th Amendment: Totality of the circumstances are considered.
  - Conduct suggesting impairment/under the influence:
    - Should you use a Police Officer to observe the employee? Specialized training would be of benefit so long as you remember that, for 4<sup>th</sup> Amendment purposes, we are talking about a search (test) for non-Law Enforcement purposes. This should be made clear to the Officer and their role (administrative) documented.
    - Relying on information about the past: ok, but only in as much as it suggests present, on-duty impairment, possession or use.



#### **Practical Notes**

Medical Marijuana and based "solely" on a positive test.

- •Alcohol is blood soluble. Alcohol can be detected quickly after ingestion and there is a correlation between BAC and impairment.
- •THC is lipid soluble. Delay between ingestion and ability to detect. THC stores in fat and can be released into the system long after impairment has subsided. Depending on frequency of use, THC can be detected up to 30 days after last use.
  - Delivery mechanism (smoking vs. edible) can impact time from ingestion to impairment as well as time from ingestion to the subsiding of impairment.
  - Positive test for THC suggests use at some point in time, but not necessarily on-duty use or impairment.

