

Medical Marijuana in the Workplace & Reasonable Suspicion Drug Testing

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Medical Marijuana Job Protection

MM Statutes Offer Some Job Protection.

- All Employees: Having a Patient License cannot be used against an employee.
- Non-Safety Sensitive: Positive test for THC by a patient license holder cannot be used as the sole basis for adverse employment action.
 - See 63 O.S. §427.8(k)(1) for the (extremely broad) list of safety sensitive job duties.
- Not protected: Use, possession or intoxication on duty / at work.
- Not protected: Employees who have not being issued a Patient License.

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Drug Testing, State Law and the 4th Amendment

Oklahoma Standards for Workplace Drug & Alcohol Testing Act, 40 O.S. §§551-563.

- Only applies to Employees, not Volunteers or Independent Contractors.
- Types of Tests (§554):

▪ Pre-Employment / Transfer / Promotion	All Applicants
▪ For-Cause (Reasonable Suspicion)	All Employees
▪ Post-Accident (damage to property or injury to person)	All Employees
▪ Post-Rehab	Individualized
▪ Random	Safety Sensitive
▪ Regularly Scheduled/Fit for Duty/Return from Leave	Safety Sensitive

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Drug Testing, State Law and the 4th Amendment

Oklahoma Standards for Workplace Drug & Alcohol Testing Act, 40 O.S. §§551-563.

- Must have a written, detailed policy (§555).
- Records related to testing are confidential (§560; but see §562(C)).
- 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.

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Drug Testing, State Law and the 4th Amendment

4th Amendment

- Public employees do not surrender Constitutional rights.
- 1st, 4th & 5th Amendment standards relaxed when Government acts as an employer.
- 4th & 5th Amendment rights can only be waived knowingly and voluntarily. See *Garrity*.
- 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) 4th Amendment violation – you either violated the 4th Amendment or you didn't.

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Drug Testing, State Law and the 4th Amendment

4th Amendment

- Drug/Alcohol testing is a “search” under the 4th Amendment.
- Supreme Court has never given us **the** test for workplace searches/seizures under the 4th Amendment in general, but has given definitive guidance on drug testing.
- 4th Amendment search is only reasonable if 1) there is individualized suspicion or 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.

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Drug Testing, State Law and the 4th Amendment

4th Amendment

- Individualized Suspicion: 4th 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 4th Amendment

4th 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 4th Amendment violation.

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"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.

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Reasonable Suspicion

What did you know and When did you know it

- Based on the facts (and reliability) you possessed **at the time** you ordered testing.
 - At the time: Information acquired after the fact (including a positive test) cannot cure a lack of reasonable suspicion. Document, document, document.
- Personal observations vs. information from a 3rd party.
 - Known 3rd party or anonymous.
 - Reliability is key. Motive to lie? Contemporaneous or after the fact?
- Possession of a MM Patient License should not factor into the analysis.
- Based on what we know, would a reasonable person suspect the employee of on-the-job use, possession or impairment.

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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 4th Amendment.
 - See O'Connor v. Ortega, 480 U.S. 709 (1987) (compare opinions from Justices O'Connor & Scalia).

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Reasonable Suspicion

What did you know and When did you know it

- 4th Amendment: Totality of the circumstances are considered.
 - One fact, alone, may suggest on-duty impairment, possession or use.
 - Combination of facts considered together can establish reasonable suspicion even if no one fact, in isolation, would suggest on-duty impairment, possession or use.
 - **Negative performance patterns:** what kind of negative performance? What about the performance suggests impairment, possession or use?
 - **Absenteeism/Tardiness:** alone, probably insufficient to suggest on-duty impairment, possession or use. What other facts support that inference?

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Reasonable Suspicion

What did you know and When did you know it

- 4th 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.

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Reasonable Suspicion

What did you know and When did you know it

- 4th Amendment: Totality of the circumstances are considered.
- Conduct suggesting impairment/under the influence:
 - Odors (smell of alcohol, marijuana, etc.).
 - Movements (unsteady, fidgety, dizzy).
 - Eyes (dilated, constricted or watery; involuntary eye movements).
 - Face (flushed, sweating, confused or blank look).
 - Speech (slurred, slow, distracted mid-thought, inability to verbalize).
 - Emotions (argumentative, agitated, irritable, drowsy).
 - Inactions (sleeping, unconscious, no reaction to questions).

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Reasonable Suspicion

What did you know and When did you know it

- 4th 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 4th 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.

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Practical Notes

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

- By statute, safety sensitive employees with a MM Patient License enjoy no job protection for testing positive. Non-safety sensitive employees cannot be disciplined "solely" for testing positive *for THC*.
 - Random test: a positive test for a non-safety sensitive employee is of little value.
 - Post-Accident test: a positive test *may* suggest impairment and could be considered under the totality of the circumstances. See Skinner (allowing for such testing).
 - For-Cause test: a positive test would be very relevant, but should be considered under the totality of the circumstances (e.g. if you tested solely based on the odor of alcohol and the test shows a BAC of 0.00 but shows THC, did the test really verify your suspicion?).

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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.

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Practical Notes

Final thought:

- Would we ever refuse to hire / discipline an employee because they had a drink off duty? A drug and alcohol test will not typically detect alcohol that was consumed the night before (or even over the weekend). But what if it did – how would that change our reliance on such testing results?
- For non-safety sensitive positions, this is very relevant due to statutory protections.
- For safety sensitive positions, there is no statutory protections, but each City/Town must decide for itself whether it will exclude citizens from serving the community based solely on their lawful, *off* duty activity.
- But Note: Feds have no sense of humor about weed, and statutory protections do not shield a CDL from losing their CDL for testing positive – it’s about the CDL, not the THC.

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