



### The Impact of Medical Marijuana in a Municipal Workplace

By: Suzie Paulson, OMAG General Counsel

OMAG

---

---

---

---

---

---

---

---

### Oklahoma Standards for Workplace Drug & Alcohol Testing Act

(40 O.S. § 551 et seq.)

#### THE IMPORTANT STUFF!

- Written detailed policy before a drug test is administered
- Employee is defined as person who supplies labor for remuneration to his employer
- Testing can occur (1) pre-employment (2) for cause (3) post accident (4) random (5) post rehabilitation or return to work/fitness for duty in certain safety sensitive positions

---

---

---

---

---

---

---

---

### Oklahoma Standards for Workplace Drug & Alcohol Testing Act

(40 O.S. § 551 et seq.)

#### THE IMPORTANT STUFF!

- Only 5 categories of employees who can be RANDOMLY tested
- Strict rules for collection, storage, transportation, and testing facilities
- EAP that provides drug/alcohol dependency care
- Monetary fines for employers (\$500 each violation)

---

---

---

---

---

---

---

---

**All the requirements of**

**The Oklahoma Standards for**  
**Workplace Drug & Alcohol Testing Act**

**are still in place!**

---

---

---

---

---

---

---

---

**For Cause**  
**Factors:**  
 (reasonable suspicion)

- Observation of drugs/alcohol on or about the employee's person or vicinity
- Observation that suggests that the employee is impaired or is under the influence of drugs/alcohol
- Receipt of a report of drug/alcohol use by an employee while at work
- Information that an employee has tampered with drug/alcohol testing at any time
- Negative job performance patterns by the employee
- Excessive or unexplained absenteeism or tardiness

---

---

---

---

---

---

---

---

**Random**  
**Factors:**

- Random pool should ONLY include:
- (1) Police
  - (2) Fire
  - (3) Directly affect the safety of the public
  - (4) Direct contact with DOC inmates
  - (5) Federal: DOT (CDL) & PHMSA (Pipeline), etc.

---

---

---

---

---

---

---

---

**Random Factors:**

NOT (typically) included:

- (1) Volunteers
- (2) Office staff
- (3) Administrative staff
- (4) Directors

*NOTE: unless these positions include job duties that would put them in a safety sensitive position*

---

---

---

---

---

---

---

---

**Drug/Alcohol Testing Vendor:**

- Is your vendor licensed by the State Department of Health to perform drug and alcohol tests?
- Will your vendor report a positive test to the City even if the employee can produce a valid medical marijuana license?
- Who is the designated City employee to receive the results and does that individual understand the law and confidentiality?

---

---

---

---

---

---

---

---

**What's Changed?**

**To Sum it Up:**  
Medical Marijuana license holders are now a protected group with a few *exceptions*

Effective: August 20, 2019

---

---

---

---

---

---

---

---

# dis·crim·i·na·tion

The unjust or prejudicial treatment of different categories of people or things, especially on the grounds of race, age, or sex.

*Synonyms: prejudice, bias, bigotry, intolerance, narrow-mindedness, unfairness, inequity, favoritism, one-sidedness, partisanship*

---

---

---

---

---

---

---

---

## The Exceptions

- Use or possession of marijuana at work or during work hours
- The City would imminently lose a monetary or licensing-related benefit under federal law or grant
- The employee is required to possess CDL or equivalent federal/state license as part of job duties
- Safety sensitive positions (as defined by the MM statute)

Effective: August 28, 2019

---

---

---

---

---

---

---

---

## Safety Sensitive Duties:

- a. the handling, packaging, processing, storage, disposal or transport of hazardous materials
- b. the operation of a motor vehicle, other vehicle, equipment, machinery or power tools
- c. repairing, maintaining or monitoring the performance or operation of any equipment, machinery or manufacturing process, the malfunction or disruption of which could result in injury or property damage

Effective: August 28, 2019

---

---

---

---

---

---

---

---

### Safety Sensitive Duties:

- d. performing firefighting duties
- e. the operation, maintenance or oversight of critical services and infrastructure including, but not limited to, electric, gas, and water utilities, power generation or distribution
- f. the extraction, compression, processing, manufacturing, handling, packaging, storage, disposal, treatment or transport of potentially volatile, flammable, combustible materials, elements, chemicals or any other highly regulated component

Effective: August 28, 2019

---

---

---

---

---

---

---

---

### Safety Sensitive Duties:

- g. dispensing pharmaceuticals
- h. carrying a firearm, or
- i. direct patient care or direct child care

NOTE: You will need to notify your testing vendor that the employees being tested are non-DOT safety sensitive.

- Non-DOT safety sensitive employee

Effective: August 28, 2019

---

---

---

---

---

---

---

---

### What do you need to do?

- Update Drug Testing Policy
- Update Job Descriptions/ Application
- Train Supervisors




---

---

---

---

---

---

---

---

**Proposed Drug Testing Policy Changes**

Section 19. Medical Marijuana: Effective August 28, 2019 employees possessing a valid State issued Medical Marijuana license shall not be discriminated against for possessing a license or testing positive for marijuana that is at or above the cutoff concentration level established by the United States Department of Transportation or Oklahoma law regarding being under the influence, whichever is lower, except in the following circumstances:

- 19.1 Use or possession of marijuana at work or during work hours;
- 19.2 The City would imminently lose a monetary or licensing-related benefit under federal law or regulation;
- 19.3 The employee is required as part of the job duties to possess a federal license under the Federal Motor Carrier Safety Administration, the Federal Aviation Administration, Federal Railroad Administration, Federal Transit Administration, National Highway Traffic Safety Administration or Pipeline and Hazardous Materials Safety Administration.
- 19.4 Safety Sensitive Positions. The employee's position involves safety sensitive job duties, including, but not limited to: [list duties from statute here]
- 19.5 Health and Workers Compensation Benefits. Employer is not required to reimburse the costs associated with the use of medical marijuana.

---

---

---

---

---

---

---

---

**Job Description**

NOTICE: This classification is a "safety sensitive" position as defined by the United States Department of Transportation drug and alcohol testing regulations, the Oklahoma Standards for Workplace Drug and Alcohol Testing Act and/or Oklahoma Medical Marijuana laws. As a "safety sensitive" classification, you will be subject to drug and alcohol testing, including random testing. Marijuana is one of the substances included in the drug panel screening. Possession of a medical marijuana license will not excuse you from the testing process, or the consequences of testing positive for marijuana.

PLAINTIFF'S EXHIBIT

---

---

---

---

---

---

---

---

**DO NOT JUST TYPE  
"SAFETY SENSITIVE"  
ON THE JOB DESCRIPTION  
AND CALL IT GOOD!**

---

---

---

---

---

---

---

---

## Job Application

**NOTICE:** Certain jobs are classified as "safety sensitive" as defined by the United States Department of Transportation drug, alcohol testing regulations, The Oklahoma Standards for Workplace Drug and Alcohol Testing Act and/or Oklahoma Medical Marijuana laws. As a "safety sensitive" classification, you will be subject to drug and alcohol testing, including random testing. Marijuana is one of the substances included in the drug panel screening. Possession of a medical marijuana license will not excuse you from the testing process, or the consequences of testing positive for marijuana. If you have questions about whether the position you are applying for is classified as "safety sensitive" please consult with the HR Department.

---

---

---

---

---

---

---

---

## Train Supervisors

- Make sure they have read and understand The City's Drug and Alcohol Testing Policy
- Make sure supervisor knows what to do in a situation where an employee appears under the influence
- Make sure supervisor knows what to do after an accident
- Make sure supervisor knows what to do when an employee is selected for random testing
- Make sure supervisor knows who to contact in each situation

---

---

---

---

---

---

---

---

## Health and Workers' Compensation Benefits

The employer, private health insurer, workers' compensation carriers, or self-insured employer are not required to reimburse the cost associated with the use of medical marijuana.

---

---

---


---

---

---

---

---



**Other Employment Issues to Consider**

---

---

---

---

---

---

---

**10 Most Common Uses**

1. Multiple Sclerosis	7. Epilepsy
2. Spinal Cord Injury	8. Inflammatory Bowel Disease
3. Spinal Cord Disease	9. End of Life Care
4. Cancer	10. Insomnia
5. HIV/AIDS	
6. Arthritis	

---

---

---

---

---

---

---

**BEWARE OF THE ADA**

1. Is there a disability?
2. Was there a request for an accommodation?
3. Did you engage in an interactive process?

---

---

---

---

---

---

---



### Reasonable Accommodation

- ✓ Must be reasonable for the position held
- ✓ Must not create an undue hardship on the employer
- ✓ Do not have to accommodate the use on premises or during work hours

---

---

---

---

---

---

---

---

### Interactive Process

- ✓ Analyze job description for essential functions
- ✓ Consult with employee on limitations
- ✓ Identify and discuss potential accommodations with employee
- ✓ Consider the preference of the employee
- ✓ Consider undue hardships to the Department/City

---

---

---

---

---

---

---

---

### BEWARE OF THE FMLA

1. Are you aware of a qualifying medical condition?
2. Has the employee been notified about rights?
3. Has the City interfered with the employee's rights?

---

---

---

---

---

---

---

---

**BEWARE OF THE 4th Amendment**

*Romero v. City of Miami*

8 F.Supp.3d 1321 (2014)

Former Finance Director alleged the city's drug testing policy violated federal law by allowing the city to randomly test any city employee regardless of whether the employee worked in a safety sensitive position

---

---

---

---

---

---

---

---

**BEWARE OF THE 4th Amendment**

*Romero v. City of Miami*

Who was sued?

- ✓ City
- ✓ City Manager
- ✓ HR Director
- ✓ All Councilmembers
- ✓ Risk Manager
- ✓ City Attorney
- ✓ MESO

---

---

---

---

---

---

---

---

**What's the best legal defense?**

- ✓ Make sure you have a policy in place before any employee is tested
- ✓ Be sure to follow the policy
- ✓ Make sure job descriptions are up to date
- ✓ Do NOT put employees in the random pool that are not safety sensitive
- ✓ Keep matters confidential (need to know basis)

---

---

---

---

---

---

---

---

### Wrap Up!

- Be just as concerned about the Workplace Standards for Drug and Alcohol Testing Act
- Only random test "safety sensitive" employees
- Train everyone
- Use a reputable testing facility
- The Job Description is Exhibit #1
- Don't be afraid to call someone (who understands municipal law) for help - there are resources!




---

---

---

---

---

---

---

---

### Resources

#### Attachments:

- ✓ Revised Sample OMAG Drug and Alcohol Testing Policy
- ✓ OMAG Loss Bulletins
- ✓ Statute 40 O.S. 551 et seq
- ✓ *Romero v. City of Miami* case

#### Websites:

- ✓ OML
- ✓ OMAG
- ✓ OMHRP
- ✓ OMMS




---

---

---

---

---

---

---

---

# OMAG

Suzie Paulson, General Counsel  
 3650 S. Boulevard  
 Edmond, OK 73013  
 405-657-1444  
[spaulson@omag.org](mailto:spaulson@omag.org)  
[www.omag.org](http://www.omag.org) and [www.omhrp.org](http://www.omhrp.org)

---

---

---

---

---

---

---

---