DRUG AND ALCOHOL POLICIES, PROCEDURES AND ISSUES FOR PUBLIC EMPLOYERS

a/k/a

IDENTIFYING AND DEALING WITH IMPAIRED EMPLOYEES IN THE WORKPLACE

Margaret McMorrow-Love
LOVE LAW FIRM
228 Robert S. Kerr Ave., Suite 540
Oklahoma City, Oklahoma 73102
(405) 235-3848
Email: mml@lovelawfirm.legal

DRUG AND ALCOHOL TESTING POLICIES, PROCEDURES AND ISSUES FOR PUBLIC EMPLOYERS

PART A- INTRODUCTION TO DRUG/ALCOHOL TESTING

I. INTRODUCTION

An employer who desires to conduct drug or alcohol testing of its employees must ensure that: 1) it has a written policy; 2) that the policy complies with state and federal statutory and regulatory mandates; 3) that the policy is distributed to all applicants and employees; and 4) that the procedures used in obtaining and testing samples comply with the regulations of the Oklahoma Department of Health.

In addition, a public employer must also ensure that its policies and procedures comply with the mandates of the Fourth Amendment of the United States Constitution which provides, in part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated...[1]

The United States Supreme Court has long held that a drug or alcohol test constitutes a search and seizure within the meaning of the Fourth Amendment. Therefore, when the drug or alcohol test is conducted by or on behalf of a public entity, both the policy i.e. the reason for the test, as well as the testing process itself must pass constitutional muster under the Fourth Amendment.

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[1] In addition, Article 2, Section 30 of the Oklahoma Constitution contains the same language as in the Fourth Amendment of the United States Constitution. In 1998 OK AG 16, the Oklahoma Attorney General, citing *Turner v. City of Lawton*, 1986 OK 51, 733 P.2d 375, 378-379, noted that the State, in the exercise of its sovereign powers, may provide more expansive individual liberties than those conferred by the United States Constitution. The opinion arose from a question regarding the extent of authorized drug testing of applicants and employees of the Department of Corrections. However, the Attorney General declined to address the specific factual issue presented regarding drug testing.

II. VIEW OF THE UNITED STATES SUPREME COURT

The United States Supreme Court has addressed the issue of the validity of drug and alcohol testing in certain contexts including public employment: *Skinner v. Railway Labor Executive Association*, 489 U.S. 602 (1989) and *National Treasury Employees Union v. Von Rabb*, 489 U.S. 656 (1989); public education: *Veronia School District 47J v. Acton*, 515 U.S. 646 (1995); and *Board of Education v. Earls*, 536 U.S. 822 (2002) a case dealing with the Tecumseh school district; and public elections: *Chandler v. Miller*, 520 U.S. 305 (1997). Taken collectively, they provide guidance and words of caution in applying the Oklahoma statute and regulations to the public employment sector.

Acton and *Earls* stand for the proposition that in the school context, drug testing without a warrant and without any reasonable suspicion of drug use does not violate the Fourth Amendment. However, this broad conclusion was based on the unique relationship between a school and its student and because the Court concluded that to require a warrant or probable cause "would unduly interfere with the maintenance of swift and informal disciplinary procedures that are needed."*Veronia, supra.* 515 U.S. at 653.

The opposite end of the spectrum of decisions of the United States Supreme Court on drug testing is found in the Court's opinion in *Chandler v. Miller, supra.* In that case, the Court held that a mandatory drug test of all candidates for public office constituted an unconstitutional search in the absence of any reasonable suspicion of drug use. It held that "where public safety is not genuinely in jeopardy, the Fourth Amendment precludes a suspicionless search no matter how conveniently arranged." 520 U.S. at 323.

For the purpose of our discussion today, the cautionary note to take from the holding in

Chandler is that courts will not take an expansive view of what the public entity deems "public safety."

The issue of the validity of drug testing without a warrant or reasonable suspicion based on claims of public safety concerns was directly addressed in *National Treasury Employees Union v. Von Rabb supra.* and *Skinner v. Railroad Labor Executives Association, supra.* In *Skinner,* the United States Supreme Court upheld the drug and alcohol testing mandates adopted by the Federal Railroad Administration that allowed for testing without a warrant or reasonable suspicion. It found that there was a compelling governmental interest in regulating the conduct of railroad employees that outweighed the privacy concerns of the employees. In upholding the regulations, the Court specifically noted that the "intrusions are defined narrowly and specifically in the regulations."

It held:

> In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. We believe this is true of the intrusion in question. 489 U.S. 602 at 624.

The same day in *Von Rabb,* the United States Supreme Court upheld drug testing for customs service employees involved in drug interdiction or who carried a weapon. **However,** it rejected that section of the policy that authorized random testing for any employee the customs service determined might handle classified materials. Unlike the regulation upheld in *Skinner* that the Court found to be tailored to a legitimate safety concern, it held in *Von Rabb*:

> We are unable, on the present record, to assess the reasonableness of the Government's testing program insofar as it covers employees who are required "to handle classified materials." We readily agree that the Government has a compelling interest in protecting truly sensitive

> information from those who "under compulsion of circumstances or for other reasons...might compromise such information. 489 U.S. 656 at 677-678.
>
> It is not clear, however, whether the category defined by the Service's testing directive encompasses only those Customs employees likely to gain access to sensitive information. Employees who are tested under the Service's scheme include those holding such diverse positions as "accountant," "accounting technicians," "animal caretaker," "attorney," "baggage clerk," "co-op student," "electronic equipment repairer," "mail clerk/assistant," and "messenger."

These cases provide guidance for the drafting and implementation of drug and alcohol testing policies under the Oklahoma Standards for Workplace Drug and Alcohol Testing Act, 40 O.S. §551 *et.seq.*

III. KEY FEDERAL STATUTES OF INTEREST TO MUNICIPALITIES

The Drug-Free Workplace Act, 41 U.S.C. §8101 *et.seq.* should be reviewed by any municipality in connection with the receipt of federal grants and when entering into any federal contract. For the purposes of our discussion today will focus on key provisions pertaining to federal grants. Many if not most of the grant applications require the municipality to certify that it will abide by the Drug Free Workplace Act, 41 U.S.C. §8181 and following. The key provision is 41 U.S.C. §8103 entitled: "Drug-free Workplace Requirements for Federal Grants." It provides that an entity may not receive a grant from a federal agency unless:

- It publishes a statement to employees that "unlawful" manufacturing, distribution, dispensing, possession or ***use*** of a controlled substance is prohibited in the workplace and specifying what actions will be taken for violation of the policy;
- It establishes a drug-free awareness program to inform employees of the danger of drug abuse; its policy on maintaining a drug free workplace; drug counseling, rehabilitation and assistance programs; and penalties that may be imposed on the employee for drug abuse violations;

- It requires each employee who will be engaged in the grant to be given a copy of the municipality's policy;
- It advises all employees that as a condition of employment the employee must abide by the municipality's policy; must notify the municipality within 5 days of a conviction of criminal drug statute for an offense occurring in the work place;
- It notifies the granting agency within 10 days after notification from the employee of the conviction;
- It imposes sanctions on the employee or requires participation in a substance abuse program; and
- It makes a good faith effort to maintain a drug free workplace.

In addition, the Omnibus Transportation Employee Testing Act, 49 U.S.C. §31301 may be applicable. It creates drug and alcohol testing requirements and protocols under the jurisdiction of the U.S. Department of Transportation in a variety or areas including employees whose job duties require the possession and use of a commercial driver's license. The applicable regulations may be found at 49 CFR Part 382.

IV. DRUG AND ALCOHOL TESTING UNDER OKLAHOMA LAW

In 1993, the Oklahoma Legislature adopted the first version of the Oklahoma Standards for Workplace Drug and Alcohol Testing Act (the "Act). The Act has been substantially amended on several occasions. The current version is found at 40 O.S. §551 *et.seq.* Therefore, a municipality should review its policy on a regular basis to ensure full compliance with both the current version of the Act and any updated regulations of the Board of Health, OAC:310:638-1-1*et.seq.*

In addition, in reviewing the current version of the Act, it is important to remember that the Act applies to ***both*** public and private employers. Therefore, a municipality must exercise caution and not assume that every provision of the Act will apply to a municipal entity in the same way that

it applies to the private sector. A municipality's policy must be tailored to meet the requirements of the Fourth Amendment of the United States Constitution. Private employers have no such constraint.

Step One: **The Policy**

The Act does not require or even encourage an employer to conduct drug or alcohol testing. Rather, it merely requires that if an employer elects to do so, it must comply with the Act. See 2006 OK AG 3.

If an employer elects to conduct drug or alcohol testing ***it must have a written policy. No policy- no testing***. See Section 555 of the Act. In addition, as currently written, it is my opinion that the ONLY people who may be tested are "employees of the municipality. An "employee" is defined in the Act at Section 552(9) to mean:

> Employee means any person who supplies labor ***for remuneration*** to his or her employer in this state and shall not include independent contractors, subcontractors, or employee of an independent contractor...

Therefore, a question arises as to whether volunteers may be subject to drug testing, such as a reserve police officer or volunteer firefighter. It is my position that this is not currently allowed under the Act.

Step Two: **Content of the Policy and Dissemination of the Same**

Section 555(A) of the Act requires that any written policy must include at least the following:

1. A statement of the employer's policy regarding drug and alcohol use by employees;

2. Which applicants and employees may be subject to testing;

3. Circumstances under which testing may be conducted;

4. Substances which may be tested: Under the new version of the Act it is now

sufficient to state that the substances will be drugs and alcohol. Prior versions required a list of the drugs to be tested by chemical and street names. However, see Section 552(6) defining the term "drug"- which is very specific;

5. Testing methods and collection procedures: It is very important to pay attention to the Board of Health's regulations on these subjects. See OAC 310:638-1-4 and following;

6. Consequences of refusing to undergo testing;

7. Potential adverse personnel action as a result of a positive test result;

8. Ability of the person being tested to explain, in confidence, the test results;

9. Ability of the person being tested to obtain copies of all information and records relating to the person's test;

10. Confidentiality requirements; and

11. Any available appeal procedure.

Section 555(B) requires that any employer who adopts ***or amends*** its policy must provide ***ten (10) days notice***- down from the former thirty (30) day requirement- of the policy or any change. In addition, the employer must provide a copy of the policy or any amendment to each applicant upon acceptance of a job offer and each employee by:

1. Hand delivery of a paper copy;

2. Mailing a copy; or

3. Electronically transmission through email or posting on the employer's website or intranet site.

My old fashioned preference is to provide a hard copy that each person signs acknowledging receipt. The signed acknowledgment form is then placed in the person's personnel file.

NOTE: Drug and alcohol testing has been held to be a term and condition of employment.

Therefore, a city with bargaining units must negotiate for the content of the policy and any changes thereto.

Step Three: **Who Can Be Tested and When They Can Be Tested**

Section 554 of the Act contains six (6) separate circumstances where it may be possible to drug or alcohol test certain individuals. Unlike the private sector, ***two of these circumstances are restricted to a limited class of public employees***. The six categories are:

1. Applicants for employment: NOTE: This section, as amended, also allows for testing of an "employee who transfers to a different position or job, or who is reassigned to a different position or job." It also provides that refusal to undergo testing or a positive test (See discussion below on marijuana) is a basis for refusal to hire i.e. withdrawal of a conditional offer of employment.

NOTE: I personally have no problem with testing for all job applicants who are in the same job category for employment. I am concerned with: a) selecting only certain applicants within in the same job category; b) testing a public employee merely because he/she has transferred or has a change of positions – See discussion above–

NOTE: It is VERY important that the post-offer/pre-employment drug or alcohol testing be conducted BEFORE the applicant begins any work for the municipality.

2. For Cause Testing– formerly known as "Reasonable Suspicion Testing":

   My suggestion: Ignore the term "for cause." My position is that the "for cause" concept is a better fit for the private sector not public employers who must still comply with the Fourth Amendment i.e. establish "reasonable suspicion." However, certain of the criteria outlined in Section 554(4) may be helpful in determining whether reasonable suspicion exist. The criteria under this section are:

   a. drug/alcohol on or about the employee or vicinity;

   b. conduct by the employee that suggests impairment/influence of drugs or alcohol;

   c. report of drug/alcohol use at work/on duty;

d. information that an employee has tampered with a test;

e. negative performance pattern; or

f. excessive or unexplained absenteeism or tardiness

For a public employer, I would not risk a test based solely on items e and/or f based on the United States Supreme Court's view of the standard for "reasonable suspicion" for a drug or alcohol test for a public entity as discussed in Section 1. I would also strongly suggest that the municipal employer use a check list signed by two supervisory employees that list the symptoms being exhibited by the employee that forms the basis of "reasonable suspicion." A form check list is attached as Exhibit "1."

3. Post Accident Testing: This is allowed: 1) if the employee or another person is injured while on the job; or 2) property damaged at work- NOTE: the last amendment deleted the former requirement of $500 or more injury to property.

NOTE: This section, as amended, states that anyone who tests position for drug or alcohol or who refuses to take a drug or alcohol test will be not be eligible for unemployment compensation. However, Courts of Civil Appeal have taken a fairly narrow interpretation of this section in connection with the revocation of driver's licenses if the public entity has not fully complied with the testing requirements and qualification set forth by the Board of Health in OAC: 310:638-1 and following.

4. Random Testing: CAUTION- Only certain groups may be subject to random testing:

a. police or peace officers;

b. employees having drug interdiction responsibilities;

c. employees authorized to carry firearms;

d. employees engaged in "activities directly affecting the safety of others;

e. employees working for a public hospital including any hospital owned or operated by a municipality, county or public trust; or

f. employees who work in direct contact with inmates in the custody of the DOC or work in direct contact with juvenile delinquents or children in need of supervision in the custody of DHS.

Based on the decisions of the United States Supreme Court addressed in Subsection I, particularly the *National Treasury Employees Union v. Von Rabb*, a municipality should be careful not to attempt to overly expand the scope of categories of employees it deems to be "engaged in activities which directly affect the safety of others."

I am aware of drug and alcohol testing policies adopted by certain municipalities that classify all public employees as being in safety sensitive positions and, therefore, subject to random testing. It is my opinion that this will not pass muster if a city and/or its officials are faced with challenges both under the Fourth Amendment and the Act.

I personally have not been faced with the argument that under the Oklahoma concealed carry firearms statute any municipal employee is "authorized to carry firearm" on the job– except in public buildings or other spaces defined by that statute. I do not think that the Oklahoma Supreme Court would extend random testing to those employee. Rather, it is my best guess that it would limit this provision to employees who, by virtue of their job descriptions, are authorized to carry weapons.

5. Scheduled fitness for duty, return from leave and other periodic testing: This section is limited to the groups of employees subject to random testing– however, the city must have an established policy about such exams.

6. Post-rehabilitation Testing: This provision allows for a city to require an employee to undergo testing for a period of up to two (2) years upon the employee's return to work "following a positive test or following

participation in a drug or alcohol dependency treatment program."

Suggestion: It may be helpful to couple a municipality's agreement to allow an employee to undergo dependency rehabilitation treatment in lieu of termination of employment following a positive test with a Last Chance Agreement. Such an agreement could require the employee to verify that he/she is actually undergoing a dependency treatment program. The employee would authorize the facility to provide verification of participation.

Note: A municipal employer may not dictate a particular 12 step program. There are court cases that found that since Alcoholic Anonymous has a religious foundation, a public entity cannot dictate participation in that program.

Step Four: **The Testing Procedures**:

Section 556 of the Act provides that any testing of employees "shall be deemed" work time for the purposes of compensation and benefits. It also mandates that the employer pay the cost of the testing. If the employee or applicant requests a confirmation test (which is defined in Section 552(4[2]) within 24 hours of receiving notice of a positive test results, to challenge the results, the employee or applicant pays the cost of the confirmation test. However, if the confirmation test reverses the first test results, the employer must reimburse the individual for the cost of the confirmation test.

Some issues overlooked or not clearly understood in the area of testing include: a) who can conduct testing: b) what type of tests can be done i.e. blood, breath, urine or hair samples; and c) the levels that will be tested both initially and on any re-testing.

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[2] "Confirmation test" is defined as a test on the same sample and which uses different chemical principles and is of equal or greater accuracy than the first test. Where a breathalyzer test was used, a confirmation test is defined as a second sample that confirms the prior results. Where a single-use test is utilized, a confirmation test means a second test confirmed by a testing facility.

Section 557 of the Act grants the Board of Health the power and duty to "promulgate, prescribe, amend and repeal rules for licensing and regulation of testing facilities." Each facility used by a city must meet the standards set by the Board of Health. See Section 558.

A licensed facility must comply with Section 559 of the Act. These requirements include:

a. samples must be deemed appropriate by the Board's regulations;

b. collection must be under reasonable and sanitary conditions;

c. the sample must be in sufficient quantity to be split into two samples;

d. the sample is collected/tested with due regard to the privacy of the individual;

e. in the event of urinalysis, no employer or its representative may directly observe the process of producing the sample;

f. all samples must be documented to include: 1) labeling in a manner to preclude erroneous identification of test results; and 2) an opportunity for the person being tested to provide information relevant to the test, including current or recent prescription use or non-prescription use;

g. procedures to preclude the probability of contamination or adulteration of the sample;

h. testing must conform to scientifically accepted methods as discussed in the statue and regulations;

I. A written chain of custody of the sample must be maintained

As noted, the regulations adopted by the Board of Health are found at OAC 310:638-1-1 and following. They are divided into four sub-chapters: 1: General Provisions; 3: Administration; 5: Drug Testing Facilities; and 7: Alcohol Testing Facilities.

Sub-chapter 1 has very detailed information regarding what types of tests may be used for the first and second test for drugs; what drugs have been approved for testing by urine or saliva versus testing by hair sample; and the cut off level for drug confirmation. See OAC 310:638-1-4

through 1-7. Sections OAC 310:638-1-8-1 through 638-1-8-3 address the approved methods for the collection of urine, hair and saliva samples.

While reading these regulations is a sure cure for insomnia, it is important to ensure that the city's testing facility is properly licensed and that it is following the protocols established by the Board of Health. Furthermore, in connection with union negotiations, a city may want to verify that any proposal submitted by the union, particularly in connection with the use of hair samples as opposed to urine or blood samples, fits within the regulations.

Step Five: Record of Results and Action on the Results:

Section 560 of the Act provides that records of all drug and alcohol test results and related information are confidential and remain the property of the employer. [3] Section 560(B), as amended, provides that the employer may release the records:

a. in a case or proceeding before a court of record or administrative agency if either the employer or the employee is a named party;

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[3] The current version of the Workers' Compensation Act provides that an injury where the accident was causes by the use of alcohol, illegal drugs or prescription drugs in contravention of a physician's order is not compensable. If, within 24 hours of the injury or report of the same, the person tests positive or refuses to under go testing, a rebuttal presumption arises that the injury was caused by the impairment. The presumption can only be overcome by clear and convincing evidence that the employee's intoxication had no causal relationship to the injury. 85A O.S. §2(9)(b)(3).

An employee who has been discharged on the basis of refusing to undergo a drug or alcohol test or who tests positive will be deemed to have been discharged for misconduct and, therefore, disqualified for benefits. In a challenge, the employee has the burden to show that the test was not properly conducted but the employer had the burden of establishing the proper chain of custody. 40 O.S. §2-406.1(A). Subsection B of Section 2-406-1 provides that in any claim brought by a discharged employee for compensation, a written report of the drug or alcohol test results shall be accepted.

b. in order to comply with a valid judicial or administrative order; or

c. to an employer's employees, agents and representatives who need access to the records in administering the Act.

Section 562 states that an employer ***may*** take disciplinary action, up to and including termination of employment, against an employee who: 1) refuses to undergo drug or alcohol testing; or 2) test positive for the presence of drugs or alcohol. It provides that the municipality's policy must state the scope of the disciplinary action that might be taken for example: "up to and including possible termination of employment."

Caution:

An employer needs to bear in mind that alcoholism is deemed a disability under the Americans With Disabilities Act, 42 U.S.C. §12101 *et.seq.* Furthermore, drug addiction is considered an impairment and may, under certain circumstances, be considered a disability. However, the ADA excludes current illegal drug use from protected status. Casual drug use is not considered a disability. Persons participating in or who have participated in a rehabilitation program are covered by the ADA. Furthermore, the Family and Medical Leave Act allows for job protected leave for the employee or a family member to participate in a drug or alcohol rehabilitation program. 29 U.S.C. §2612 and 29 C.F.R.§825.119(a).

Therefore, before disciplinary action is taken, the employer should verify that status of the employee and what it knew about the employee's possible addiction before the positive test result were received. Having said this, an employer has the absolute right to prohibit alcohol use and drug abuse in the work place.

POSSIBLE PENALTIES:

Section 563 of the Act is entitled "civil actions." It provides that any person aggrieved by a "willful violation" of the Act is entitled to file a civil suit within one (1) year of the alleged violation (formerly two years). It states that a "willful violation" requires proof by a preponderance of the evidence that the employer had a specific intent to violate the Act.

In *Estes v. ConocoPhillips Co.*, 2008 OK 21, ¶22, 184 P.3d 518, the Oklahoma Supreme Court addressed the issue of a "willful violation" in connection with a prior version of Section 563 that did not define the term. In *Estes* it held:

> ...we find that the term willful violation as found in 40 O.S. 2001 §563(A) contemplates not only conscious, purposeful violations of the Testing Act, but also deliberate disregard of the law by those who know, or should have known, of the requirements of the Testing Act.

In *Jones v. State ex.rel. Office of Juvenile Affairs,* 2011 OK 105, 268 P.3d 72, the Oklahoma Supreme Court found that the newest version of Section 563(A) creates an independent cause of action. As such, an employee is not required to exhaust any administrative remedies provide by law or the employer before filing suit.

Subsection B of Section 563 states that a prevailing party ***may be awarded*** lost wages the person would have earned as well as an equal amount for liquidated damages. It also states that ***reasonable costs and attorney fees may be awarded to the prevailing party, whether plaintiff or defendant."***

The United States District Court for the Northern District of Oklahoma discussed the standard to be applied in determining whether to award attorney fees to a prevailing party in *Rice v. Valmont Industries*, 951 F. Supp 2d 1250, (N.D. Okl., 2013). The plaintiff in that action was the fired

employee who sued and lost his argument that the drug test was invalid. His former employer sought an award of attorney fees.

Judge Frizzell held:

> ... Oklahoma case law suggests that attorney fees sought pursuant to a permissive statute are subject to the sound discretion of the court citing *Stroud Nat. Bank v. Owens*, 2006 OK CIV APP 37, 134 P.3d 870, 879-80. 951 F.Supp. 2d. 1250 at 1255.

In *Romero v. City of Miami*, 8 F. Supp. 3d 1321, 2014 U.S. Dist. LEXIS 36660 (N.D. Okl., 2014), the former Chief Financial Officer (CFO) of the City of Miam sued alleging that he had been forced to undergo an unconstitutional drug and alcohol screening i.e. a breath test and urine sample in the absence of any reasonable suspicion and where he contended that he was not in a safety or security sensitive position. He asserted that he was fired when he raised questions about the propriety of the test. His suit also alleged retaliation for reporting problems with the work being performed by contractors and that the City had failed to comply with competitive bidding requirements.

The individuals named as defendants filed Motions to Dismiss. As to the Section 1983 claim for alleged violation of the Fourth Amendment in connection with the drug test, the District Court held:

> Viewing the allegations in the light most favorable to the non-movant, Romero has adequately alleged personal involvement on the part of the Individual Defendants sufficient to satisfy the pleading requirements of a supervisory liability §1983 claim. Here, Romero alleges that the City's official drug and alcohol testing policy itself violates federal law by permitting the City to test any City employee without individualized suspicion regardless of whether the employee works in a safety sensitive or security position.
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> Romero also alleges that each of the Individual Defendants, all of whom are city officials, had a role in promulgating, creating or implementing the policy, or possessed responsibility for the policy's

continued operation. 8 F. supp.3d 1321 at 1329.

V. APPLICATION OF DRUG TESTING IN THE ERA OF LEGAL MARIJUANA

Several issues/question have arisen that need to be addressed by Human Resource professionals in connection with the implementation of the will of the people of Oklahoma following the adoption of State Question 788 dealing with the issue of medical marijuana. As it now stands, there are more gray or just plain unknown areas than there are clear answers to multiple questions that can arise in the work place.

As always, it is essential that you promptly direct questions to your municipal attorney. The areas outlined below are designed to be "food for thought" as we go forward. In addition, Oklahoma is not breaking new ground. Over 30 states and the District of Columbia have already adopted statutes and have faced many if not most of the same issues. The decisions in those states serve as guidance in address the application of the law in Oklahoma.

In dealing with any questions that might arise, it is essential that, as a representative of a public entity, you always bear in mind that marijuana is ***still illegal*** under federal law both for recreational as well as medical use.

A. KEY STATUTORY AND REGULATORY PROVISIONS

1. **FEDERAL:**

The following is a list of federal statutory provisions that may come into play:

1. Americans with Disabilities Act, as amended: 42 U.S.C. §12101 *et.seq.*: illegal drug use is not deemed a protected disability:

2. Controlled Substance Act:21 U.S.C. §812(b): Marijuana is a Schedule I illegal narcotic;

3. Drug Free Workplace Act: 41 U.S.C. §§8101-8103: Most federal grants require the applicant to certify that it does not allow illegal drug use (remember marijuana is deemed illegal under federal law);

4. Family and Medical Leave Act: 29 U.S.C. §2601 *et..seq.*; and

5. Omnibus Transportation Employee Testing Act, 49 U.S.C. 31301 *et.seq.*and

6. Title VIII of the Civil Rights Act of 1968-Fair Housing Act: 42 U.S. C. §3601 *et.seq.*

2. **OKLAHOMA LAW**:

1. Medical Marijuana statutes: 63 O.S. §§420A-426A;

2. Emergency Regulations of the Department of Health: Title 310, Section 681 *et.seq.*;

3. Oklahoma Anti-Discrimination in Employment Act: 25 O.S. §1301 *et.seq.*;

4. Oklahoma Anti-Discrimination in Housing Act: 25 O.S. §451 *et.seq.;*

5. Standards for Oklahoma Workplace Drug and Alcohol Testing Act: 40 O.S. §551 *et.seq.*

B. BACKGROUND ISSUES WITH MEDICAL MARIJUANA IN EMPLOYMENT

In order for an individual employee to be entitled to protection under any of these statutes, the person must be a holder of a valid and current medical marijuana license, either a regular license issued to a resident or a temporary license from a person coming into the state from another state that issued the person a license.

i. What An Employee May Possess:

Under Subsection A of Section 420A of Title 63, an individual person in possession of a medical marijuana license issued by the State of Oklahoma is entitled to the following:

a. Legally possess up to three (3) ounces on marijuana on his/her person;

b. Legally possess up to six (6) mature marijuana plants;

c. Legally possess up to six (6) seeding plants;

d. Legally possess one (1) ounce of concentrated marijuana;

e. Legally possess up to seventy-two (72) ounces of edible marijuana; and

f. Legally possess up to eight (8) ounces of marijuana in his/her residence.

Section 420(A)(N) of Title 63 contains the following interesting provision;

> Counties and cities may enact medical marijuana guidelines allowing medical marijuana license holders or caregivers ***to exceed the state limits set forth in subsection A of this section.*** (Emphasis added).

In other words, cities can allow an individual to possess more medical marijuana but cannot restrict the amounts set forth in the statute.

ii. <u>What An Employer Can Do and (Perhaps) Cannot Do</u>:

Section 425A of Title 63:

Section 425(A)(B) of Title 63 states as follows;

B. Unless a failure to do so would cause an employer to ***imminently*** lose a monetary or licencing related benefit under Federal law or regulation, an employer ***may not discriminate against a person in hiring, termination, or imposing any term or condition of employment*** or otherwise penalize a person based upon either:

1. The person's status as a medical marijuana holder; or

2. Employers ***may take action*** against a holder of a medical marijuana license holder if the holder uses or possesses marijuana while ***in the holder's place of employment or during hours of employment.*** Employers ***may not take action*** against the holder of a medical marijuana license solely based upon the status of an employee as a medical marijuana license holder ***or the results of a drug test showing positive for marijuana or its components.*** (Emphasis added)

Section 425(A)(E) provides that no medical marijuana licensee may unduly be withheld from

holding a state issued license by virtue of being a medical marijuana license holder. This would include such things as ***a concealed carry permit.***

Section 310:680-2-11 of the emergency regulations of the Department of Health provides:

> (a) All smokable, vaporized, vapable and e-cigarette medical marijuana and medical marijuana products ingested, smoked, or consumed by a patient license holder is subject to the restrictions for tobacco under section 1-1521 et.seq. of Title 63 of Oklahoma statutes, commonly referred to as the ***"Smoking in Public Places and Indoor Workplaces Act."*** (Emphasis added)

Subsection (b) prohibits smoking, vaporized, vapable and e-cigarettes medical marijuana and medical marijuana products being consumed in the presence of a minor under the age of eighteen.

The Smoking in Public Places and Indoor Workplaces Act (Smoking Act) has several key components that may come into play. I use the term "may" since that Act addresses the use of tobacco products ***not the use of marijuana.*** Therefore, it will be up to the courts to decide if this ***regulation*** by the Department of Health conflicts with the intent of the public in passing State Question 788.

However, since the Smoking Act is contained in the regulation, the following sections should be reviewed with the City Attorney to determine their possible application.

Definitions in Section 1-1522:

Subsection (3): "Indoor workplace" is defined as any ***indoor place of employment*** or employment-type service ... of any public.... entity....An indoor workplace includes work areas, employee lounges, restrooms, conference rooms, classrooms, employee cafeterias, hallways, and other spaces used or visited by employees.... The provisions of this section shall apply to such indoor

workplace at any given time, whether or not work is being performed.

Subsection (4): "Meeting" means a meeting as defined in the Oklahoma Open Meeting Act

Subsection (5): "Public body" means a public body as defined by the Open Meeting Act.

Subsection (6): "Public place" means any enclosed indoor areas where individuals other than employees are invited or permitted.

Subsection (8): "Smoking" means the carrying by a person of a lighted cigar, cigarette, pipe or other lighted smoking device.

Applying these definitions, **Section 1-1523(A) of Title 63** contains the following prohibitions that may be applicable to this discussion:

> Except as specifically provided in ....the Act, no person shall smoke in a public area....in an indoor workplace, in any vehicle providing public transportation, at a meeting of a public body...

A potentially problematical provision is Section 1-1523(E) of Title 63 that states:

> Smoking is prohibited in all vehicles owned ***by the State of Oklahoma and all its agencies and instrumentalities.***

Note: It ***does not*** use the term subdivisions i.e. cities and towns. Therefore, if a city or town currently allows its employees to smoke in publically owned vehicles, some consideration should be given to revisiting this issue to make sure it is clear that smoking or vaping of medical marijuana is not allowed in city owned vehicles during work hours. BUT: what about take home vehicles? These vehicles are not used during normal business hours or on city property within the meaning of Section 63 O.S. §425(A)(B)(1).

Section 1-1527 of Title 63 of the Smoking Act contains preemption language providing that the provisions of the Act preempt any other regulations to control smoking in public places.

However, it goes on to state:

> ...however, that cities and towns shall be authorized to enact laws restricting smoking ***on properties owned or operated by the respective governing bodies***. Nothing in this section shall be construed as to prevent county or municipal governments, at the respective governing bodies, from prohibiting smoking in or on property owned or operated by the respective governing bodies. (Emphasis added)

Under this section, and if courts find that the regulation adopted by the Department of Health incorporating the Smoking Act in its provisions is valid, an argument can be made that a municipality could potentially ban medical marijuana in open air recreation areas and the like.

C. SELECT POTENTIAL EMPLOYMENT ISSUES

1. EMPLOYEES WITH A DISABILITY:

As you are well aware, all municipalities, regardless of size, are covered by the Americans with Disabilities Act, as amended (ADA). The ADA prohibits discrimination against an otherwise qualified individual with a disability due to his/her disability. A disability is a condition that impacts a major life activity. An employer is required to provide a reasonable accommodation for a person's self-disclosed disability so long as the accommodation does not impose an undue hardship.

In the case of medical marijuana, presumably the employee has obtained a license to use and possess marijuana because of a health condition i.e. a medical condition. However, remember that under the ADA an employer ***may not ask*** if the employee is disabled or the nature of the disability. Rather, the employee generally self-discloses the disability or it is disclosed through other means, such as a Workers' Compensation Form 5 outlining permanent restrictions and the like.

The ADA is a federal statute. As a general rule of thumb, ***illegal*** drug use is not a protected disability (although alcoholism is protected). See 42 U.S.C. §12111(6)(a) and (b) and 29 C.F.R.

§1630.3(a). Under the Controlled Substance Act, marijuana is classified as a Schedule I illegal drug[4]. Therefore, employers have successfully argued, in the past, that they may not be sued under the ADA when they terminate an employee (with an underlying disability) if the person tests positive for marijuana.

Oklahoma's Anti-Discrimination in Employment Act provides, at 25 O.S. §1302(A)(1), that it is a discriminatory practice to discharge or otherwise discriminate against an individual with respect to the terms and conditions of employment due to, among other things, a disability unless the employer can demonstrate that an accommodation would impose an undue hardship.

As noted in Section II above, Section 425(A)(B) of Title 63 provides that an employer may not discriminate against a person in hiring, termination or other terms and conditions of employment based on his status as a medical marijuana license holder. This would include a person who has a medical marijuana license due to a condition that rises to the level of a disability.

Therefore, this leaves open the door to various legal arguments that obviously have not been resolved by Oklahoma Courts i.e. whether the provisions of the ADA preempt state laws in this area or whether the anti-discrimination provision in the state law will control. Courts in other states have reached conflicting findings on the issue of preemption and only time will tell what the courts in Oklahoma will rule.[5] The cases appear to make it clear that the outcome may be dictated by the

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[4] A bill has been introduced in Congress entitled "Strengthening of the Tenth Amendment Through Entrusting States (STATES) Act. If this is ever passed and signed by the President it would exempt marijuana from the Controlled Substance Act activities involving marijuana in states where the use of marijuana has been made legal.

[5] For a comprehensive discussion of emerging case law dealing with both medical and recreational marijuana issues see: HR Up in Smoke: Marijuana Legalization and Employment Law, May/June 2018, Vol 59, No. 3 *Municipal Lawyer* by Lara Donlon, Esq. of the firm of Torcivia, Donlon,

language of the state statute. In addition, there appears to be a ***slight*** emerging trend favoring employees who test positive for the use of medical marijuana where a state law provides anti-discrimination protection for the use of medical marijuana.

2. DRUG TESTING ISSUES:

As discussed above, municipalities seeking federal grants/contract are normally required to certify that they will abide by the Drug Free Workplace Act, 41 U.S.C. §8181 and following. The key provision is 41 U.S.C. §8103 entitled: "Drug-free Workplace Requirements for Federal Grants." However, the Drug Free Workplace Act restricts the use of illegal drugs ***in the work place.*** Oklahoma law, Section 435(A)(B)(2) allows a municipality to take action against a holder of a medical marijuana license if the holder has marijuana ***in the work place*** or uses marijuana during normal business hours.

Also, Section 425(A)(N) of Title 63 does contain and exemption for an employer to not hire or retain an employee with a medical marijuana license ***but only*** if it is in imminent danger of losing a monetary or licensing benefit. My personal thought is that it might be difficult to rely on this limited exemption to treat employees working under a grant more harshly than other employees since the Drug Free Workplace Act only addresses illegal drug use in the "workplace."

SUGGESTION: A municipality should consider updating its policies to make it explicit that it does not allow the use or possession of medical marijuana at the place of employment or during business hours.

This brings up the issue of whether the employer should routinely scan from marijuana in any drug test under the Oklahoma Workplace Drug and Alcohol Testing Act. Under Section 552(6) of

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Goddeau & Ansay, West Palm Beach, Florida.

that Act defines illegal drugs to include cannabinoids i.e. marijuana. Therefore, in conducting certain drug tests, such as post-offer/pre-employment; random testing where allowed or post accident testing, an employee may test positive ***but*** for a legal drug. Mr. Williams will explain the issues with testing for marijuana in considering when a person is impaired- now by a potentially legal drug.

Therefore, it may be beneficial to question the wisdom/need to test for marijuana other than under "reasonable suspicion/for cause" testing under the Oklahoma Workplace Drug and Alcohol Testing Act.

3. FAMILY AND MEDICAL LEAVE ACT:

Of all of the personnel issues this may be the easiest one to deal with since an employee is already entitled to FMLA leave for treatment of the employee or a family member for: a serious medical condition that includes drug abuse issues.

This might be a good time to review and revise the municipality's FMLA policy and to provide training to supervisory employees on the need to be attuned to when entitlement to FMLA might be an issue.

4. SPECIAL POSITIONS:

There are categories of employees that will require special consideration in connection with the use of medical marijuana. Among others, these may included: law enforcement officers; any employee authorized to carry a firearm as part of his/her duties and employees who must have a CDL in order to perform their assigned duties. Currently, federal law would prohibit these individuals from using or being impaired by marijuana. In addition, there is an argument that, under federal law, law enforcement officers may not have a firearm if they use marijuana.

5. BENEFIT ISSUES:

Ms. Diana Bardes, an attorney with Mooney, Green, Saindon, Murphy & Welsh, a law firm in Washington D.C. published a paper in the August 2018 issue of Benefits Magazine entitled *From on High-A Discussion of Federal Law and State Court Decisions on Medical Marijuana and the Workplace.*

Among other things, the article addressed an issued that I had not personally seen addressed in any of the news articles in Oklahoma about the effect of medical marijuana on personnel issues. Specifically, the article raised the issue of the taxability of benefits provided by an employer whose health insurance plan covers the cost of medical marijuana. Ms. Bardes opined;

> Benefits paid to participants for medical marijuana are taxable. According to the Internal Revenue Service (IRS) benefits may be provided tax-free only for medical goods and services that are "legally procured." Because marijuana continues to be banned under federal law, it cannot be lawfully procured within the meaning of the Tax Code and, therefore, is excludable from income. Citing Rev. Rul. 97-9.

Ms. Bardes also noted that, in her opinion, medical marijuana may not be provided by an employer-funded health reimbursement account (HRA).

I freely admit that I am not versed in the Internal Revenue Code nor do I provide advice on qualified benefit plans. However, the issues raised by Ms. Bardes in her article warrant attention. It is suggested that, particularly for those municipalities that have self-funded health plan, the plan documents be reviewed to ensure that there is no nasty surprise either to the employee in terms of unexpected taxable income or the municipality in failing to properly calculate taxable income.

D. WORKING THE PRETZEL PROBLEM

The difficulties in navigating the interaction of state versus federal laws and regulations may be shown by trying to resolve the following scenario;

Suzie Q., a female over the age of 40 who is of Asian decent, has been employed as a full time dispatcher for the City of Oz for over five years. She is currently assigned to the day shift, from 7:00 a.m. to 3:00 p.m. Monday through Friday. Normally, there are at least two dispatchers on duty per shift. Ms. Q's performance has always been rated above average. The City of Oz has over 50 full time employees.

Suzie comes to you, the faithful H.R. Director, and reveals that she has been diagnosed with breast cancer and needs to start treatment immediately. You obviously do the following:

a. Offer your best wishes for her full and speedy recovery;

b. Provide FMLA paperwork

c. Explain the City's position on the mandatory use of accrued leave and in what order

d. Explain the need for updates on her condition every 30 days.

Thankfully, Suzie Q. notified you 6 weeks later that her treatment plan is going very well and that she will be able to return to work in two weeks but will need to be off work every Friday for another 8 weeks for ongoing out patient treatment including intensive radiation treatment. You do the following;

a. Express your pleasure at such good news;

b. Explain intermittent leave under FMLA

c. Explain the need for updates every 30 days

NOTE: Suzie clearly qualified as a person with a disability under the ADA. She also is

entitled to FMLA benefits. You then determine whether her accommodation i.e. to be off one day a week is a reasonable accommodation

HERE COME THE ISSUES:

As she is preparing to come back to work 4/5 work days i.e off on Fridays for ongoing needed treatment, she self-discloses to you that due to the adverse impact of her radiation treatment, she has procured a medical marijuana license. She advises that she will be using marijuana on Fridays after her treatment and probably on Saturdays as needed. However, she promises that she will not be using marijuana after 6:00 p.m. on Saturday.

Suzie is in a safety sensitive position as a dispatcher and, therefore, may be subject to random drug testing. It is likely (See Mr. Williams' explanation) that she will test positive for marijuana particularly if the test is done early in the week. The City of Oz receives several federal grants, many of which relate to the operations of the Police Department where Ms. Q works.

WHAT DO YOU DO?

1. Analyze her position
2. Any reasonable accommodation
3. Issue of undue hardship
4. Detailed analysis of whether Suzie Q. is protected under Oklahoma law as a person with a disability
5. Is there a true ***imminent*** threat of the loss of needed federal grant funds
6. Is there any issue with Suzie Q. having full access to federal data basis via OLETS since marijuana use is still illegal in the federal system i.e. is she no longer able to actually do her job

E. CONCLUSION

The first thing to remember is that sky has not fallen. Over 30 other states have been dealing with marijuana in the workplace issues, some for over 2 decades. They are still functioning. Oklahoma is at an early stage and work needs to be done to refine the statutes and adopt permanent rules. However, those events will not occur, if at all, until the spring of 2019. Marijuana will be available by November or December for purchase by an individual license holder.

My best suggestions include the following:

a. Review your current code of conduct- even if a person holds a medical marijuana license that person cannot:

1. Use marijuana in the work place
2. Possess marijuana in the work place
3. Be impaired on the job

b. DO NOT allow supervisory employees to make decisions on discipline of employees who hold marijuana licenses. Rather:

1. Review the job description of the position the person holds
2. Analyze whether a "reasonable accommodation" can be made to the need of the person to use marijuana off duty
3. Take steps to ensure that personal beliefs and any animus towards the use of drugs has not impacted the decision making process

c. EDUCATE YOUR SUPERVISORY STAFF

Margaret McMorrow-Love
228 Robert S. Kerr Ave., Suite 540
Oklahoma City, Oklahoma 73102
(405) 235-3848
Fax: (405) 235-3863
Email: mcmorrowlove@sbcglobal.net