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Q&A with Scott Kiplinger: Oklahoma laws allow employers to fire workers under the influence of medical marijuana at work



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Marijuana strains for sale are displayed at an Oklahoma City dispensary on Thursday, May 30, 2019 [Chris Landsberger/The Oklahoman]

What is the current status of medical marijuana in Oklahoma?

After some turbulence, it appears that the medical marijuana industry is firmly entrenched in the state. The Oklahoma Medical Marijuana Authority issued more than 200,000 licenses since the program began in August of 2018. The Oklahoma Tax Commission reports that the combined sales from the nearly

2,000 dispensaries in the state exceeded \$250 million.

While the Legislature and the courts may resolve nuanced issues moving forward, the industry has been successful in its first year.

How do Oklahoma's medical marijuana laws differ from those in other states?

Oklahoma enacted some of the most patient-friendly medical marijuana laws in the country. For instance, Oklahoma's statutes grant broad protection to an employee who legally consumes medical marijuana so long as that employee is not considered "safety sensitive."

Other states, such as Colorado, Nevada and Washington, do not provide similar legal protections to workers. Also, doctors in Oklahoma have wide discretion to issue a medical marijuana license, as no qualifying condition is necessary for a prescription.

So while Oklahoma's laws are relatively new, they actually provide greater protection for employees who consume medical marijuana than laws in states that have traditionally favored the legalization of marijuana.

What about employees who are not “safety sensitive?” Can they consume medical marijuana at work?

No, employees cannot consume medical marijuana at the workplace, regardless of whether they are deemed “safety sensitive.” Oklahoma laws permits an employer to discharge any employee who consumes or is under the influence of marijuana while at work.

But how do you prove that an employee is under the influence of medical marijuana at work?

That's the precise issue that many employers are facing.

The Oklahoma Court of Civil Appeals recently considered the case of an employee who was severely injured at work and subsequently failed a post-accident drug test for marijuana. The Workers' Compensation Commission denied his claim for workers' compensation benefits, explaining that the failed drug served as proof of intoxication at the time of the injury. His benefits were reinstated on appeal.

The court found that the failed drug test merely served as a presumption of intoxication, which the employee overcame by showing that he smoked marijuana more than 10 hours before his shift began — that he went to bed, woke up at 6 a.m., drove two hours to work, and operated machinery for the first two hours of his shift without incident.

This case was not decided in a medical marijuana context, but it suggests that a positive drug test alone does not necessarily prove that an employee consumed marijuana at the workplace or was under the influence while working.

So how would you advise an employer who wants to keep a safe workplace without violating the law?

Keep diligent records and document behavior. Oklahoma employees may be drug tested “for cause” if their employer can articulate a reasonable suspicion of drug use at work. Common examples include a report of intoxication from a co-worker, negative performance patterns and excessive absences or tardiness.

The case of the injured employee illustrates that absent additional evidence beyond a failed drug test, an employer who takes adverse action against a medical marijuana licensee may face risk of legal liability.



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