

ABC Arkansas – Western



# MEDICAL MARIJUANA IN THE WORKPLACE

## Understanding and Complying With the Arkansas Medical Marijuana Amendment

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# Arkansas Medical Marijuana Amendment



## **INTRODUCTION**

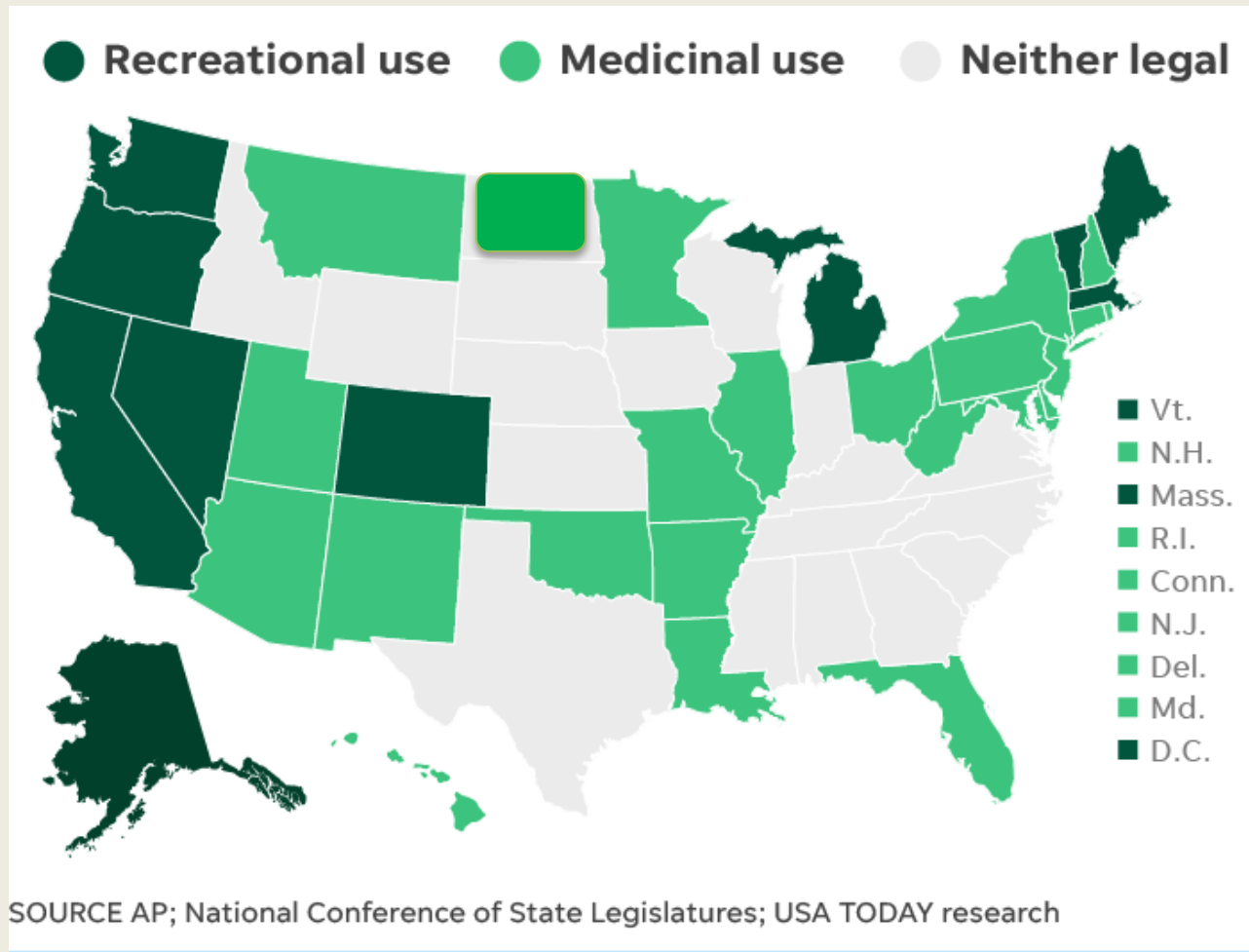
**WHO CAN OBTAIN MEDICAL MARIJUANA?**

**HOW MUCH?**

**HOW?**

**FOR WHICH MEDICAL CONDITIONS?**

# Marijuana Laws in the U.S.



# Applicability in Arkansas



## Applicability

- Cardholders
  - Qualifying Patient
  - Designated Caregiver
  - Cultivation Facility Agent
  - Dispensary Agent
- Out-of-state visitor with a medical cannabis card issued in their state of residence for a qualified medical condition in Arkansas

## Quantity Allowed

- 2.5 oz. of usable marijuana every 14 days

## How Dispensed

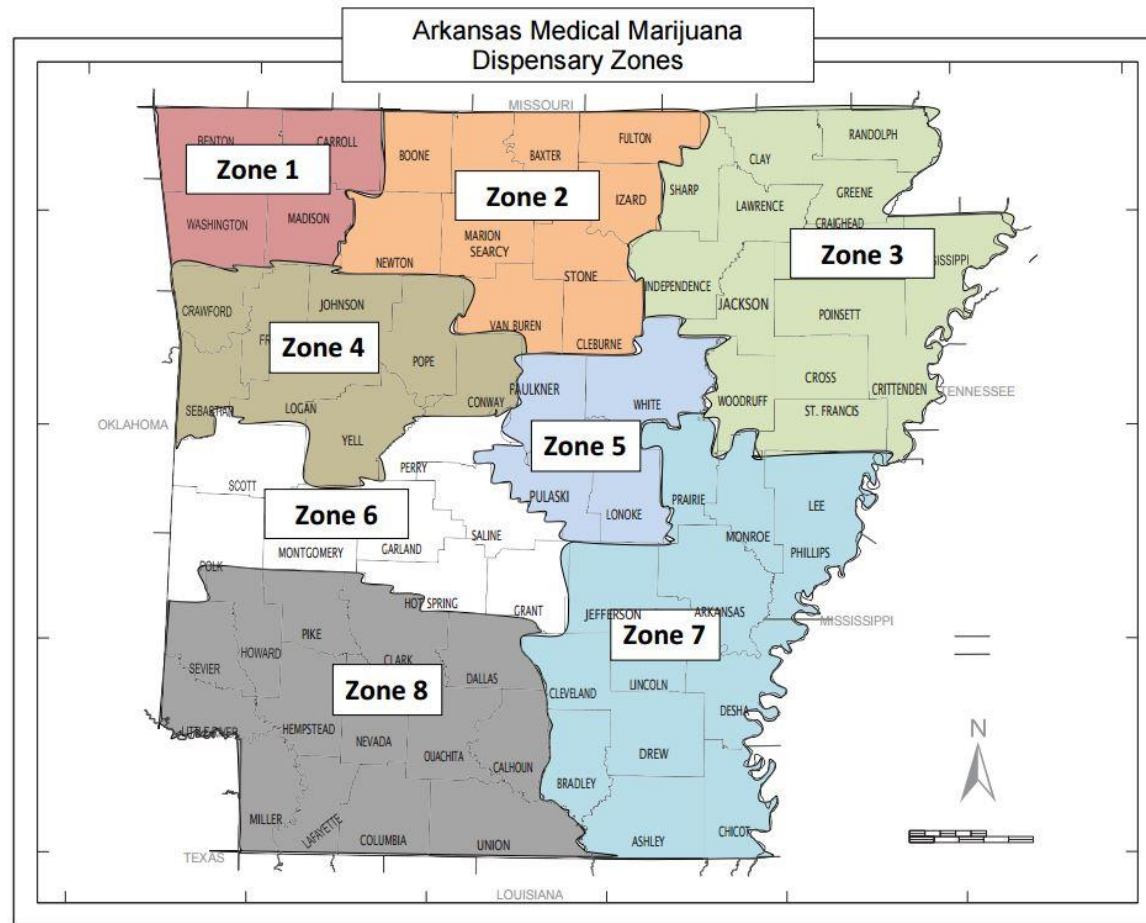
- Licensed dispensaries
  - 32 dispensaries in the state
  - Only 4 dispensaries in each of the 8 geographic zones designated by Medical Marijuana



Photo credit: [http://articles.chicagotribune.com/2014-02-11/news/ct-medical-marijuana-rules-met-20140211\\_1\\_dispensaries-cultivation-centers-medical-marijuana](http://articles.chicagotribune.com/2014-02-11/news/ct-medical-marijuana-rules-met-20140211_1_dispensaries-cultivation-centers-medical-marijuana)



# Dispensary Zones



# Registry ID Card



## How to Obtain a Registry ID Card

- Registry Identification Card issued by the Arkansas Department of Health
- **Written Certification:** document signed by a physician stating the following:
  - (1) in his/her professional opinion,
  - (2) after reviewing the patient's medical history and current medical condition in the course of a physician-patient relationship, the patient has a qualifying medical condition.
- Several bills passed this legislative session clarify that a written certification is not a **prescription** or a **medical record**.

# Qualifying Medical Conditions



## Qualifying Medical Conditions

- **12 enumerated conditions:**
  - Alzheimer's, Amyotrophic Lateral Sclerosis (ALS), Arthritis, Cancer, Crohn's Disease, Fibromyalgia, Glaucoma, Hepatitis C, HIV/AIDS, Post Traumatic Stress, Tourette's Syndrome, Ulcerative Colitis
- **Or** a chronic or debilitating disease that produces the following:
  - Wasting Syndrome or cachexia, peripheral neuropathy, severe nausea, seizures, or severe and persistent muscle spasms; or
  - Intractable pain (defined as pain that has not responded to ordinary treatments for more than **6 months**).
- Any other medical condition or its treatment as approved by the Arkansas Dep't of Health (ADH).
  - The Amendment requires the ADH to create rules outlining how new medical conditions may be added to the list of qualifying conditions.

# Medical Marijuana in the Workplace



## Colorado (Medical) User Statistics as of July 2018:

- 88,143 registered medical users (463 doctors recommended use)
- 62% male; 38% female
- Average patient is 44 years old
- Most common conditions being treated are “severe pain” and seizures (for children under 10)
  - Approximately 93% of users report severe pain and muscle spasms as conditions.
  - More Data available at: <https://www.colorado.gov/pacific/sites/default/files>

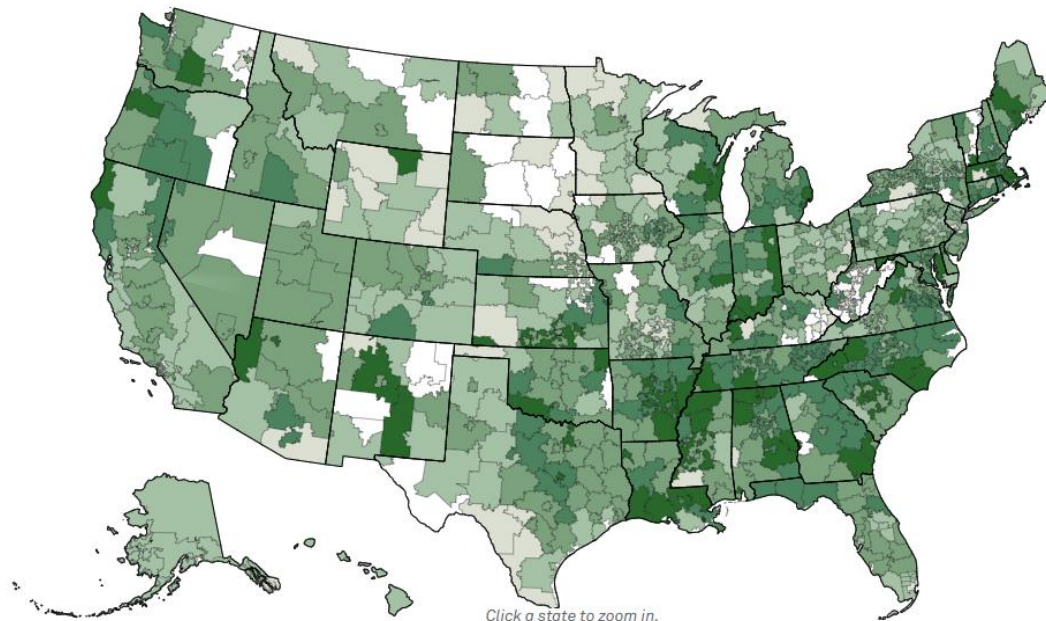


# National Trends in Workplace Drug Testing



## Drug Testing Index™: Overall positivity rate in 2017

This interactive map shows urine drug test positivity by 3-digit zip code in the United States. The Quest Diagnostics Drug Testing Index™ is a comprehensive analysis of workforce drug use trends.



☒ Show History

Drug  
Overall ▾



Year  
2017

Percent Positive



# Arkansas Medical Marijuana Amendment



**EMPLOYMENT PROVISIONS**

**CONFLICT WITH FEDERAL LAW**

**PROBLEMS WITH DRUG TESTING**

# Employment Protections

- Prohibits employment discrimination

- “An **employer shall not discriminate** against an individual in hiring, termination, or any term or condition of employment, or otherwise penalize an individual, based upon the individual’s past or present status as a Qualifying Patient or Designated Caregiver.”



Photo credit: <http://businesswest.com/blog/employers-struggle-with-fine-print-of-medical-marijuana-law/>

# Scope



- Employees cannot use marijuana at work or come to work “under the influence.”
- Employees cannot possess, smoke, or otherwise use marijuana in the following locations:
  - School bus
  - Grounds of a daycare center, preschool, primary or secondary school, college, or university
  - Drug or alcohol treatment facility
  - Community or recreation center
  - Correctional facility
  - Any form of public transportation
  - Public place
- An individual or establishment in lawful possession of property is not required to “allow a guest, client or customer, or other visitor to use marijuana on or in that property.”

# Conflict w/ Federal Law



- Isn't marijuana illegal under federal law?
  - Yes! Under the federal **Controlled Substance Act (CSA)**, marijuana is still classified as a Schedule I Drug.
  - However, the Department of Justice has allowed states to legalize marijuana for **medicinal and recreational** purposes.
  - The Obama DOJ has listed eight priorities for enforcing violations of the Controlled Substances Act, none of which include prosecuting users of marijuana for medicinal and recreation use.
  - Jeff Sessions has recently reversed the Obama DOJ's position on this issue leaving a lot of uncertainty.

# Federal Agencies – Safety Sensitive Positions



- Certain federal agencies require drug testing for safety sensitive positions
  - E.g., The U.S. Dep't of Transportation (DOT) requires employers to implement drug testing of **safety-sensitive** transportation employees in the aviation, trucking (including school bus drivers, and certain limousine and van drivers), railroads, mass transit, and pipelines industries.
  - DOT's testing requirements preempt state law, including marijuana legalization laws.
  - DOT's Drug Alcohol Testing Regulation – 49 CFR Part 40 – “does not authorize 'medical marijuana' under a state law to be a valid medical explanation for a transportation employee's positive drug test result.”

# Problems with Drug Testing



- **Urinalysis does not accurately detect when someone is “under the influence.”**
  - Urinalysis detects THC metabolites; it does not detect impairment.
    - ✦ Testing positive for marijuana may not necessarily mean that the person was “under the influence” at the time.
    - ✦ For a first-time user, urinalysis has a detection time of 1-7 days.
    - ✦ For a regular user, this detection time is 7-100 days.
- **Blood and saliva tests provide shorter detection times.**
  - For a first-time user, blood testing has a detection time of 12-24 hours. For a regular user, blood testing has a detection time of 2-7 days.
    - ✦ However, blood testing is invasive and may implicate privacy violations for public employees, who must ensure compliance with the 4<sup>th</sup> Amendment requirement for unreasonable searches.
  - Oral testing has a detection time of 0-24 hours, but is not validated.
    - ✦ Oral fluid testing can detect the metabolite as well as the parent drug THC (while the drug is in the mouth or upper respiratory tract), and cannot be adulterated or substituted as easily as urinalysis (saliva testing is a directly observed collection).
- **However, employers must still use urinalysis for safety-sensitive positions to comply with federal rules and regulations.**

# Easy Questions



- **Do I have to tolerate the use of marijuana in the workplace?**
  - **By employees?**
    - ✦ **No.** An employer is not required to “accommodate the ingestion of marijuana in a workplace.”
    - ✦ Also, off-duty consumption of marijuana, without a registration card lawfully issued by the Department of Health, is still illegal.
  - **By client or other members of the public?**
    - ✦ **No.** No person is permitted to “possess, smoke, or otherwise engage in the use of marijuana” on any form of public transportation or in any public place.
    - ✦ An individual or establishment in lawful possession of property is not required to “allow a guest, client or customer, or other visitor to use marijuana on or in that property.”



# Act 593 of 2017



**DEFINITIONS**

**EMPLOYMENT PROVISIONS**

# Act 593 of 2017



- State Chamber of Commerce and local law firms (including CGWVG) drafted a bill to clarify the employment provisions. The bill was enacted as Act 593 of 2017.
- Act 593 creates key definitions:
  - Employer
  - Employee
  - Under the influence
  - Safety sensitive position



# Act 593: Definitions



- **Employers** are the same as those subject to the Arkansas Civil Rights Act.
  - An entity must employ 9 or more employees in the State of Arkansas for 20 or more calendar weeks in the current or preceding calendar year
- **Employees** do not include the following:
  - Independent contractors
  - Employees who work for their immediate family
  - Individuals participating in a specialized employment training program conducted by a nonprofit sheltered workshop or rehabilitation facility
  - Individuals employed outside of Arkansas
- A **written certification** from a physician is not a medical prescription.

# Act 593: Definitions



- **Under the influence** means symptoms of current use of marijuana that may negatively impact the performance of the job duties or constitute a threat to health or safety. It includes without limitation:
  - Symptoms of the applicant's or employee's speech, walking, standing, physical dexterity, agility, coordination, action, movement, demeanor, appearance, clothing, odor, or other irrational or unusual behavior that are inconsistent with the usual conduct of the applicant or employee;
  - Negligence or carelessness in operating equipment, machinery, or production or manufacturing processes;
  - Disregard for safety;
  - Involvement in an accident that results in property damages, disruption to a production or manufacturing process, or an injury; or
  - Other symptoms causing a reasonable suspicion that the individual may be under the influence of marijuana.

# Act 593: Drug Testing Policies



- Employers may still have substance abuse policies with drug testing programs.
- HOWEVER, to take adverse action against a qualifying patient, an employer must have a **good faith belief** that the employee was under the influence of marijuana at work, not just a positive drug test.
- A **positive drug test result for marijuana** means a result that comports with federal DOT standards or Arkansas DUI/DWI laws, whichever is lower.

# Act 593: Definitions



- An employer's **good faith belief** may be based on the following:
  - Observed conduct, behavior, or appearance;
  - Information reported by a person believed to be reliable;
  - Written, electronic, or verbal statements;
  - Lawful video surveillance;
  - Records of government agencies, law enforcement agencies, or courts;
  - A warning label, usage standard, or other printed material that accompany instructions for usable marijuana;
  - Positive drug test result;
    - ✦ But a positive drug test alone is not enough to take action against a qualifying patient in a non-safety sensitive position.
  - Information from a physician, medical review officer, or a dispensary;
  - Information from reputable reference sources in print or on the internet;
  - Other information reasonably believed to be reliable or accurate;
  - Or any combination of the items listed above.

# Act 593: Safety Sensitive Positions



- Special rule for **safety sensitive positions**
  - Employers may exclude a qualifying patient from performing a safety-sensitive position if s/he tests positive for marijuana.
- What is a **safety sensitive position**?
  - A position may be designated as safety sensitive in two ways: (A) by state or federal law or (B) by the employer if the position meets the definition in Act 593.

# Act 593: Safety Sensitive Positions



- (A) A **safety sensitive position** is any position involving a safety sensitive function pursuant to federal regulations adopted by the United States Department of Transportation or any other federal or state agency's rules, guidelines, or regulations.
  - Zero tolerance policies for certain federal contractors.



# Act 593: Safety Sensitive Positions



- (B) A **safety sensitive position** is any position designated in writing by an employer as a safety sensitive position, in which a person performing the position while under the influence of marijuana may constitute a threat to health or safety, including without limitation a position:
  - That requires any of the following activities:
    - ✦ Carrying a firearm;
    - ✦ Performing life-threatening procedures;
    - ✦ Working with confidential information or documents pertaining to criminal investigations; or
    - ✦ Working with hazardous or flammable materials, controlled substances, foods, or medicine; or
  - In which a lapse of attention could result in injury, illness, or death, including without limitation a position that includes the operating, repairing, maintaining, or monitoring of heavy equipment, machinery, aircraft, motorized watercraft, or motor vehicles as part of the job

# Recommendations



**REVIEW SUBSTANCE ABUSE POLICIES AND  
FORMS**

**REASONABLE SUSPICION TRAINING FOR  
SUPERVISORS**

**UPDATE JOB DESCRIPTIONS**

**ADOPT A PRE-DUTY DISCLOSURE POLICY**

**USE A MEDICAL REVIEW OFFICER**