

Medical Marijuana and Drug Testing in the Construction Industry

This article discusses procedures the Oklahoma construction industry employers need to develop with the legalization of medical marijuana, including how to handle drug testing.

With the [passage of State Question 788](#) and the decision by the Governor not to call a special session, many of the ancillary questions regarding the impact of medical marijuana will remain unanswered until the next legislative session in 2019. But, in jobs where safety is key, such as construction, employers will need to develop procedures now to ensure that they are complying with safety rules and regulations as well as not stepping on an [employee's rights](#).

Q: How does the passage of State Question 788, medical marijuana, affect my safe work site and drug free policies?

A: The provisions of State Question 788 provide that an employer can take action against an employee who uses or possesses medical marijuana at the place of employment or during work hours. Thus, a contractor's safe work site policy that prohibits the use of drugs or alcohol on the job is allowable under the law. However, unless an employer can show an imminent risk of losing a monetary or licensing benefit under federal law or regulation, an employer cannot refuse to hire, terminate, or otherwise discriminate against an employee simply because the employee has a medical marijuana card.

Q: If one of my employees with a medical marijuana card is "high" on the job can I still terminate him or her?

A: Maybe. Contractors will need to carefully differentiate between being impaired at work (ie, under the influence of

marijuana and its attendant effects) and drug testing positive for medical marijuana although the employee may not be impaired. Unlike alcohol, scientific research has not been able to put a specific number on the THC levels (the compound in marijuana that makes one “high”) that impairs a person’s ability to drive or work safely—and THC may appear in a blood or urine screen well after it is consumed. So, unless the legislature chooses a legal level of THC, the key will likely be whether, based on an objective observation, the employee was able to safely function.

Q: My company is working on federal projects, how can I mesh the state law requirements and federal law requirements?

A: Federal law still considers marijuana to be a Schedule I Narcotic under the Controlled Substances Act. Thus it is against federal law to consume or possess marijuana, medical or not. Additionally, most, if not all, federal projects are subject to the federal Drug Free Workplace Act which requires employers to have a drug free work place policy prohibiting the unlawful possession or use of drugs in the workplace and make an ongoing good faith effort to maintain a drug free workplace. These policies include requiring the employee to report to the employer and the employer to report to the contracting agency any workplace criminal drug conviction. However, the distinctions are fine and the interplay between federal law and the imminent risk of losing federal contracts or licensing has yet to be defined by Oklahoma or Federal courts and not by the federal or state government.