

# 7 Ways Employers Can Prep For Okla. Medical Marijuana Law

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On June 26, 2018, Oklahoma voters passed State Question 788 legalizing medicinal marijuana. SQ788 left many questions for employers unanswered. For example, it forbade employers from penalizing employees for holding a medical marijuana license or testing positive for marijuana unless failing to do so caused a loss of benefits under federal law or the license-holder possessed or used marijuana while at work.



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However, SQ788 did not address whether employers could take action against license holders who worked in safety-sensitive positions, leaving many employers to decide which risk they were willing to tolerate: face a discrimination lawsuit or expose themselves to accidents and injuries caused by those potentially impaired on the job.

To address the unanswered questions of SQ788, on March 11, 2019, the Oklahoma Legislature nearly unanimously passed medical marijuana legislation known as the “Unity Bill” for its broad support among employers and segments of the cannabis industry. Oklahoma Gov. Kevin Stitt signed the Unity Bill into law on March 14, echoing the need for the bill’s key provisions that help employers mitigate major safety risks. The new law and its employer-friendly provisions take effect on Aug. 28, 2019.



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What should employers be doing before Aug. 28? Here’s our recommended checklist.

## **1. Get acquainted with the new safety-sensitive-jobs exception.**

The Unity Bill amends the Oklahoma Medical Marijuana Act, or OMMA, which broadly prohibits adverse action against medical marijuana license holders regardless of whether they are applying for or work in a safety-sensitive job. The Unity Bill creates a critical exception to that, and, beginning Aug. 28, allows employers to (1) refuse to hire applicants for safety-sensitive jobs or (2) discipline or discharge employees who work in safety-

sensitive jobs if they test positive for marijuana even if they have a valid license to use medical marijuana.

According to the Unity Bill, safety-sensitive jobs are those with tasks or duties the employer reasonably believes could affect the safety and health of the employee or others, such as but not limited to:

- Handling, packaging, processing, storage, disposal or transport of hazardous materials;
- Operation of a motor vehicle, other vehicle, equipment, machinery or power tools;
- 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;
- Performing firefighting duties;
- Operation, maintenance or oversight of critical services and infrastructure including, but not limited to, electric, gas, and water utilities, power generation, or distribution;
- 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;
- Dispensing pharmaceuticals, or preparing or handling food;
- Carrying a firearm; or
- Direct patient care or direct child care.

## **2. Update your drug and alcohol testing policies to conform to the OMMA and take advantage of the employer-friendly Unity Bill amendments.**

For instance, clarify that you don't discriminate against licensed medical marijuana users, but you will not hire a license holder for a safety-sensitive job if they test positive for marijuana, and you may fire a license holder who works in a safety-sensitive job if they test

positive. Use the Aug. 28 effective date for planning the rollout of your updated policy. You must give at least 10-days advance notice before implementation.

**3. Contact your drug testing vendor to verify it is abiding by the new requirements for what constitutes a positive drug test for marijuana.**

The act now requires cutoff concentration levels be at or above a certain concentration level according to the U.S. Department of Transportation regulations (50 nanograms per milliliter) or Oklahoma law (15 ng/ml), whichever is lower. Consequently, employers should ensure that their drug tests meet the 15 ng/ml concentration level requirement and keep a pulse on DOT and Oklahoma regulations, in case either change their concentration requirements.

**4. Use the Unity Bill's nonexhaustive list of safety-sensitive duties to identify jobs that you reasonably believe to be safety-sensitive.**

Document the articulable reasons for your conclusion and collaborate with your employment counsel to confirm.

**5. Update the job descriptions for your safety-sensitive jobs to ensure the safety-sensitive tasks are adequately reflected in the list of essential job functions.**

Also, make sure the description of the physical requirements or the work environment emphasize the safety-sensitive nature of the job. If you like to include minimum qualifications in your job descriptions, then you may want to clarify that because the job is safety-sensitive, medical marijuana license holders who test positive for marijuana will not be qualified for the position. Well-written job descriptions will be important evidence for justifying your designation and defending against discrimination claims.

**6. Train managers and supervisors regarding your new policy and approach to safety-sensitive jobs.**

Training should address the importance of basic harassment, discrimination and retaliation prevention principles (since the OMMA creates a new protected class) and these principles will apply; what you can and can't do in the hiring process (candidates volunteering information about their license holder status during job interviews); Americans with Disabilities Act and Family and Medical Leave Act basics (since most cases of medical

marijuana use will implicate an underlying disability or serious health condition — though the ADA says a current user of illegal drugs isn't a qualified individual with a disability, it remains unclear whether failure to accommodate an underlying disability will violate the Oklahoma Antidiscrimination Act); and spotting the signs of impairment in order to justify a “for-cause” drug test.

## **7. Proactively educate employees regarding your new policy and approach to safety-sensitive jobs.**

Establish and document clear expectations and clear consequences for violating your expectations, and then enforce them in a consistent, uniform, nondiscriminatory manner — *before* you learn an under-performer received a license to use medical marijuana.

## **Conclusion**

The newly signed Unity Bill creates opportunity for proactive employers to minimize costly risk by taking steps now to capitalize on its favorable provisions in anticipation of the Aug. 28, 2019, effective date. Follow the checklist above to determine what you can do now and how you're going to do it. Then, educate your managers and front-line supervisors on your strategy so you are prepared when the Unity Bill takes effect.

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