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Unity Bill Update: Safety-Sensitive Positions

As Oklahoma approaches the one-year anniversary of its legalization of medical marijuana, state lawmakers continue working to fill in the gaps in the statutory framework governing the cultivation, processing, distribution, and sale of cannabis in the Sooner State. They have also enacted provisions clarifying both the obligations of employers to applicants and employees possessing valid medical marijuana patient licenses and the legal protections afforded to such applicants and employees.

On March 12, Oklahoma Governor Kevin Stitt signed into law House Bill 2612, officially called the Oklahoma Medical Marijuana and Patient Protection Act, but commonly referred to as the “Unity Bill.” The Unity Bill, like existing law, prohibits employers from taking adverse employment action against applicants and workers who possess valid medical marijuana licenses solely on the basis of a positive test for marijuana or its metabolites. But the Unity Bill makes clear that employers may take adverse employment action (including refusing to hire, discipline, or discharge), on the basis of a positive test if the licensee possesses, consumes or is under the influence of medical marijuana “while at the place of employment or during the fulfillment of employment obligations.” This provision supplements current law, which permits employers to take action against licensees who use or possess marijuana while in the licensee’s place of employment or during the hours of employment. The current provision does not appear to contemplate a scenario in which an employee uses medical marijuana during off hours but reports for duty while still under the drug’s influence, a fear of many employers and one that legislators apparently took into consideration when drafting the Unity Bill.

Perhaps the most noteworthy of the employment-related provisions in the Unity Bill concerns safety-sensitive positions. Since Oklahoma voters passed State Question 788 legalizing medical marijuana, many employers have voiced concerns about possible safety risks posed by the legal use of cannabis by employees. Lawmakers attempted to address those concerns by inserting into the Unity Bill a provision allowing employers to take adverse employment action against a licensee who tests positive for marijuana if the position held by the employee or sought by the applicant involves safety-sensitive job duties.

Any job that includes tasks or duties the employer reasonably believes could affect the safety and health of either the employee performing the task or of others will be considered safety-sensitive under the Unity Bill. Lawmakers provided a non-exclusive list of tasks and duties that will be considered safety-sensitive. Those tasks and duties include:

- Handling, processing, storing, or transporting hazardous waste
- Operating a motor vehicle, other vehicle, equipment, machinery or power tools
- Repairing, maintaining or monitoring the performance or operation of equipment, machinery, or manufacturing processes
- Performing firefighting duties
- Operating critical services and infrastructure such as electric, gas and water utilities
- Handling or working with potentially volatile, flammable or combustible materials
- Dispensing pharmaceuticals
- Carrying a firearm
- Engaging in direct patient or child care

Although the Unity Bill's definition of "safety-sensitive" provides employers with significant latitude in determining whether a position meets that definition, employers should nonetheless analyze each position carefully before deeming it safety-sensitive.

The Unity Bill is scheduled to become law 90 days after the current legislative session ends. According to the Oklahoma legislative calendar, the 2019 session is scheduled to adjourn on May 31, 2019, which would make the law effective on August 30, 2019. However, at least one lawsuit has already been filed in Oklahoma state court challenging the Unity Bill on constitutional grounds. The lawsuit seeks temporary and permanent injunctive relief, which if granted could delay the law's implementation or derail it altogether. Oklahoma employers should continue working with their employment counsel to monitor developments at the Capitol and in the courts as Oklahoma's medical marijuana laws continue to evolve.

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The foregoing should not be understood as, or considered a substitute for, legal advice. For specific inquiries, please contact Pacewicz or another licensed attorney.