



HARRIS DOWELL FISHER & YOUNG L.C.

Management Labor-Employment Law/
Workers Compensation Defense

Marijuana Legalization: How Does This Impact Drug Testing and Employee Discipline?



By J. Bradley Young

WHO AM I ?

- **Workers Comp Legal Consultant for Associated Industries of MO**
- **Defending Employers and Insurance Companies for over 30 years**
- **Worked with the Missouri House of Representatives to draft and pass the overhaul of the Missouri Workers Compensation Act in 2005 and 2018**
- **KMOX & KFTK 97.1FM Talk Radio Legal Analyst and Host**



DEALING WITH MARIJUANA



Marijuana in Missouri

- **Medical Marijuana legalized in 2018**
- **Recreational Marijuana passed on November 8, 2022, and was available for purchase in Missouri in early February 2023.**
- **To learn how Employers should respond, we must start with the Missouri Workers Compensation Act.**



Drug Use Penalty Provision

- **§287.120.6 – “Where the employee fails to obey any rule or policy...related to a drug-free workplace...the compensation and death benefit provided for herein shall be reduced 50% if the injury was sustained in conjunction with the use of alcohol or non-prescribed controlled drugs”**



Drug Use Penalty Provision

Requirements:

- **First, Employer MUST have a *“Drug-Free Workplace Policy”*. (Sprinkler Company)**
- **Posting Not Required**



Drug Use Penalty Provision

Proximate Cause of the Injury.

- **Rebuttable presumption that being under the influence of drugs was the proximate cause of the injury.**
- **What does “Rebuttable Presumption” mean?**



Drug Use Penalty Provision

Refusal to take drug test results in forfeiture of benefits if:

- **(1) Employer had sufficient cause to suspect use of drugs by claimant, and**
- **(2) If Employer's policy authorized post-injury drug testing.**



Drug Use Penalty Provision

Marijuana/Cocaine Metabolites

- **Prior to 2017, the Industrial Commission did not treat “Metabolites” as a positive drug test pursuant to §287.120.6 (See Richard Hertzing v. Beck Motors 2015)**
- **In August of 2017, §287.120.6 was amended to include “metabolites”.**



Drug Use Penalty Provision

A positive drug test will be a rebuttable presumption of both proximate cause and was used in conjunction with the accident if:

- **(a) The initial testing was administered within twenty-four hours of the accident or injury;**



Drug Use Penalty Provision

A positive drug test will be a rebuttable presumption of both proximate cause and was used in conjunction with the accident if:

- (b) Notice was given to the employee of the test results within fourteen calendar days of the insurer or group self-insurer receiving actual notice of the confirmatory test results;**



Drug Use Penalty Provision

A positive drug test will be a rebuttable presumption of both proximate cause and was used in conjunction with the accident if:

- (c) The employee was given an opportunity to perform a second test upon the original sample; and**



Drug Use Penalty Provision

A positive drug test will be a rebuttable presumption of both proximate cause and was used in conjunction with the accident if:

- (d) The initial or any subsequent testing that forms the basis of the presumption was confirmed by mass spectrometry using generally accepted medical or forensic testing procedures. (See §287.120.4 a-d)**



Drug Use Penalty Provision

Recommendations for maximizing effectiveness of Drug/Alcohol penalty:

- **Ensure company policy clearly provides for a *“drug free workplace”*.**
- **Ensure that company policy clearly allows for post-accident drug testing.**



Drug Use Penalty Provision

Recommendations for maximizing effectiveness of Drug/Alcohol penalty:

- **Employer must ask for the drug test to be performed, not the carrier.**
- **Request the highest level of testing possible to ensure accuracy.**



Drug Use Penalty Provision

Recommendations for maximizing effectiveness of Drug/Alcohol penalty:

- **Testing labs should keep the tested samples to ensure chain of custody.**
- **Advise the claimant as soon as possible of the results of the positive drug test and the plan to reduce benefits.**



Drug Use Penalty Provision

Recommendations for maximizing effectiveness of Drug/Alcohol penalty:

- **Get a recorded statement from the claimant as soon as possible to obtain an admission of drug use.**



OSHA Considerations

- **29 C.F.R. 1904.36 Prohibition against Discrimination: An employer cannot discriminate against an employee for reporting a work related injury.**
- **OSHA interprets this rule as meaning that an Employer cannot use drug testing as a form of punishment for reporting a work injury.**



OSHA Considerations

- **Drug testing policies should limit post-incident testing to situations in which the alleged drug use is likely to have contributed to accident.**



OSHA Considerations

OSHA gives these examples of situations where drug testing would NOT be reasonable:

- **Bee sting**
- **Repetitive trauma**
- **Injuries resulting from the absence of machine guarding.**



OSHA Considerations

- **OSHA wants to eliminate all post-accident drug testing.**
- **THIS IS WRONG: All Employers have a vested interest in preventing impaired employees from harming themselves or others in the workplace.**



OSHA Considerations

OSHA Cannot, in my opinion, ban all post-accident drug tests:

- **29 USC Sec. 653(b)(4) provides:**
“Nothing in this chapter shall be construed to...in any manner affect any workmen’s compensation law or to...diminish or affect in any other manner the...statutory rights...of employers...under any law with respect to injuries...of employees arising out of, or in the course of, employment.”



OSHA Considerations

OSHA Cannot, in my opinion, ban all post-accident drug tests:

- **The Missouri Workers Compensation Act specifically provides that Employers can perform drug and alcohol testing: §287.120.6(1) gives Missouri Employers the right to adopt a *“rule or policy...relating to...the use of alcohol or non-prescribed controlled drugs in the workplace”*.**



OSHA Considerations

Recommended Policy Language to Ensure Post-Accident Drug Testing:

“In accordance with applicable state and federal laws, employees may be required to submit to drug and/or alcohol tests whenever Employer has a reasonable suspicion that they have violated any of the rules set forth in this policy or other accident-related policies...”



OSHA Considerations

Recommended Policy Language to Ensure Post-Accident Drug Testing:

“Reasonable suspicion may arise from, among other factors, supervisory observation, co-worker reports or complaints, demeanor, appearance, performance decline, attendance or behavioral changes, erratic behavior (such as involvement in an accident resulting in property damage)...



OSHA Considerations

Recommended Policy Language to Ensure Post-Accident Drug Testing:

“...results of drug searches or other detection methods, or involvement in a work-related accident when drug and/or alcohol use is reasonably believed to have contributed to the accident, as determined in the Employer’s sole and exclusive discretion....”



OSHA Considerations

Recommended Policy Language to Ensure Post-Accident Drug Testing:

“Employees are expected to report all work accidents and injuries to Employer, and employees will not be retaliated against for reporting an accident or injury to Employer.”



Drug/Alcohol Penalty Recap

- **If ANY non-prescribed drugs OR alcohol at less than 0.08% BAL, are in the Employee's system AT THE SAME TIME AS the injury, medical is still paid but compensation is reduced 50%.**
- **If alcohol is in the system at 0.08% BAL or more, all benefits are forfeited.**



Responding...

- **As you have seen, even though Marijuana is legal, Employers can still penalize for usage.**
- **Future ADA issues (“reasonable accommodation”)**
- **Future FMLA issues (positive drug test after off-work medical care)**
- **Until we have appellate decisions on these issues, proceed as outlined herein.**

Medical Marijuana is legal, but must Employers pay for it?

- **But just because medical marijuana is legal, does that mean that Employer's must pay for it?**
- **What happens if a doctor prescribes Medical Marijuana to treat a work-related injury?**



CAN EMPLOYERS BE FORCED TO PAY FOR MEDICAL MARIJUANA?

- **Missouri - - Employers/Insurers authorize medical care, so unlikely to authorize any provider who would prescribe Medical Marijuana.**

- **But what if....and how does Illinois handle this?**



CAN EMPLOYERS BE FORCED TO PAY FOR MEDICAL MARIJUANA?

- **Jerry Valdez v. City of Harvey** (Illinois Workers Compensation Commission Dec. 16, 2020).
- **Here, the treating doctor ordered claimant to use Medical Marijuana to treat his work injury. Employer refused to pay.**



CAN EMPLOYERS BE FORCED TO PAY FOR MEDICAL MARIJUANA?

- **The Illinois Workers Compensation denied benefits for the Medical Marijuana, even though it is legal both medically and recreationally.**



CAN EMPLOYERS BE FORCED TO PAY FOR MEDICAL MARIJUANA?

- ***“The Arbitrator notes that the Illinois Compassionate Use of Medical Cannabis Pilot Program Act exempts participants from criminal prosecution under Illinois controlled substances laws. However, the Arbitrator also notes that the Illinois Compassionate Use of Medical Cannabis Pilot Program Act does not, and cannot, exempt participants from criminal prosecution under federal controlled substances laws.”***

CAN EMPLOYERS BE FORCED TO PAY FOR MEDICAL MARIJUANA?

- ***“The Arbitrator cannot authorize medicinal care which violates federal law. Thus, the Arbitrator finds that due to the principle of federal preemption medicinal marijuana is not reasonable or necessary under the Illinois Worker's Compensation Act. Therefore, Petitioner's claim for compensation for care and treatment and prescriptions relating to medicinal marijuana is denied.”***

CAN EMPLOYERS BE FORCED TO PAY FOR MEDICAL MARIJUANA?

- **While we do NOT have a similar holding in Missouri yet, I believe the result would be the same.**



Legislative Trend To Watch

- **July 14, 2021, U.S. Senate Democrats released a draft bill to legalize marijuana on a federal level.**
- **This would NOT have legalized weed nationally, but would have allowed each state to determine whether weed is or is not legal in that state.**



Legislative Trend To Watch

- **On September 13, 2023, the Department of Health and Human Services (HHS) proposed that marijuana be rescheduled from Schedule 1 to Schedule 3 under the Controlled Substances Act (CSA).**
- **This also will NOT legalize marijuana, but will allow for federal funding of Marijuana for medical purposes.**



Impact on Drug Testing

- **The Drug Testing and Drug Use Penalty under Section 287.120.6 only allows testing and penalties for: *“the use of alcohol or nonprescribed controlled drugs in the workplace”***
- **How will drug testing and penalties be impacted when Marijuana is eventually (soon) legalized on a federal level?**



Impact on Drug Testing

- **Once Marijuana is Federally legalized, Employers in Missouri will be able to test for Marijuana or reduce benefits when someone is injured while using Marijuana.**
- **To remedy this situation, the Missouri Workers Compensation Act MUST be amended along the following lines:**



- **§287.120.6 “(1) Where the employee fails to obey any rule or policy adopted by the employer relating to a drug-free workplace or the use of alcohol, marijuana, or nonprescribed controlled drugs in the workplace, the compensation and death benefit provided for herein shall be reduced fifty percent if the injury was sustained in conjunction with the use of alcohol, marijuana, or non-prescribed controlled drugs.”**



Impact on Drug Testing

- **The insertion of the word “marijuana” in all places in the Act that reference drug testing and penalties for work injuries while using marijuana would also be necessary.**
- **This SHOULD be an easy legislative fix, but in reality, few, if any, legislative fixes are easy.**



Legislative Trend To Watch

- **January 2024 - - HB 2135 and SB 935: Bills that I drafted and are currently pending in the Missouri Legislature.**
- **If passed into law, these bills would ensure that Employers could continue to drug test for marijuana and reduce benefits for on-the-job marijuana use at the time of a work accident.**





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Questions?

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