



MONTANA MUNICIPAL INTERLOCAL AUTHORITY
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RISK MANAGEMENT BULLETIN

Please distribute to all appropriate personnel and post in a conspicuous place.

DATE: January 19, 2012 **RM Bulletin #05-12**
TO: Cities and Towns
FROM: MMIA Risk Management
RE: Employee Related Drug Testing

CMV Operators Have More than Employment-Related Drug Screens to Consider When it Comes to Medical Marijuana

By Kristen K. Shea, National District Attorneys Association, National Traffic Law Center, Senior Attorney

Fifteen states and the District of Columbia currently allow some use of medical marijuana.¹ Most of those states also provide for the cultivation of marijuana plants under limited circumstances. While states that have legalized medical marijuana require proof of residency prior to the issuance of a marijuana card, at least two states will issue cards to out-of-state residents. Thus far, the United States Department of Justice (DOJ) has presented no impediment to states opting to allow marijuana use or possession for medical purposes. On March 19, 2009, United States Attorney General Eric Holder issued a press release indicating that it would no longer be the policy of federal prosecutors to “prosecute patients.”²

With 30% of states and the DOJ shifting their view of marijuana from an illegal drug to a medication, many employers are now being forced to reconsider their internal policies on drug use in the work place. To further complicate the issue, marijuana remains listed as a Schedule 1 illegal narcotic.³ In other words, the DOJ decision not to prosecute individuals for growing or possessing marijuana for purported medical use is an act of discretion and not a dictate of law. Employers must find the best way to allow their employees to take medication as prescribed or recommended while maintaining a safe work environment through the prohibition of drug use. This is a challenge for businesses across the country attempting to follow both state and federal laws. It may take years for the courts to determine exactly what is and what is not permissible as workplace policy.

For one group of employers, however, the path seems clearer. Motor carriers have another federal policy to consider. Following the DOJ policy announcement, the United States Department of Transportation (DOT) issued its own statement. DOT sought to clarify the impact that the DOJ policy regarding criminal prosecution of medical marijuana would have on DOT’s mandated drug testing of “safety-sensitive transportation employees.” The statement indicated the DOT’s desire to “make it perfectly clear that the DOJ guidelines will have no bearing on the Department of Transportation’s regulated drug testing program. We will not change our regulated drug testing program based upon these guidelines to Federal prosecutors.”⁴ The policy statement noted that marijuana remained a Schedule 1 narcotic under federal law. It went on to warn Medical Review Officers performing federally regulated drug testing that they should “not verify a drug test as negative based upon information that a physician recommended that the employee use ‘medical marijuana’.”



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The Federal Motor Carrier Safety Administration (FMCSA) position on medical marijuana is consistent with the DOT policy prohibiting marijuana use by any safety-sensitive employee and the federal governmental drug-free work place policy.⁵ The Federal Motor Carrier Safety Administration, through the Federal Motor Carrier Safety Regulations published in the Code of Federal Regulations (CFR), promulgates regulations aimed at ensuring the safest possible operation of commercial motor vehicles. Some regulations in Title 49 of the CFR address the qualifications states should require before licensing a commercial driver.

Regulations for physical qualification to receive a commercial driver's license (CDL) are established in 49 CFR 391.41. This section provides guidelines establishing who is and who is not medically qualified to hold a CDL. For instance, someone with epilepsy, severe heart disease, hearing or vision loss, or other physical limitations would be unable to qualify for a CDL. Within the context of 49 CFR 391.41, the use of a controlled substance identified in 21 CFR 1308.11, Schedule 1 (2010) would similarly prevent a driver from being considered physically qualified.⁶ A narrow exception exists which would allow a driver taking a controlled substance prescribed by a doctor to hold a CDL. This exception would only apply if the doctor is familiar with the duties of a CMV driver and has advised the driver that the medication will not affect his ability to operate a CMV.⁷ In accordance with 49 CFR 392.4, drivers shall not "be on duty and possess, be under the influence of...(a)ny 21 CFR 1308.11 Schedule 1 substance." The combined interpretation of these two CFR sections makes it clear that marijuana use, medically authorized or otherwise, would not be permissible for an active CDL holding driver.

The FMCSA's website also addresses the question of medical marijuana for commercial drivers. In the section of the site that addresses "Frequently Asked Questions" about medical qualification, the FMSCA answers the question of whether or not a driver taking medically recommended marijuana is physically qualified to hold a CDL. The FMCSA response states unequivocally, "No. Drivers taking medical marijuana cannot be certified."⁸ Medical marijuana seems to receive the same treatment as methadone. Regardless of whether either substance is medically recommended or prescribed, it will prevent a driver from qualifying for a CDL.⁹

Commercial motor vehicle operators have more than employment related drug screens to consider. In addition to the federal regulations, most states prohibit drugged driving by any driver. Drivers may be considered impaired by illegal or prescription drugs. CDL holders convicted of driving under the influence of drugs or alcohol or for refusing to submit to a law enforcement officer's request to submit to drug testing can be disqualified from operating a commercial motor vehicle. The disqualification can run for a year up to life.¹⁰ This disqualification would occur whether the impaired driving occurred in a CMV or the driver's personally owned vehicle.

Commercial motor vehicle drivers, operators and the public have an interest in keeping drivers impaired by marijuana from getting behind the wheel of large trucks and buses. A 1990 National Transportation Board survey on "Fatigue, Alcohol, Other Drugs, and Medical Factors in Fatal-To-The-Driver Heavy Truck Crashes" determined that just as many crashes were caused by marijuana impairment as alcohol impairment. NTSB Chairman, James Hall offered his analysis of that study stating that 33% of drivers tested had some form of commonly abused drug in their blood with alcohol and marijuana both reflecting a 13% positive result.¹¹



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Although there is little recent independent research to determine how many commercial motor vehicle drivers are using drugs while on duty, a study some years ago found that the most commonly detected illegal substance was marijuana.¹² The National Institute on Drug Abuse (NIDA) indicates that “long-term marijuana abuse can lead to addiction” and that as many as 9% of casual users and 25% of daily users can become addicted. NIDA also reports that such addiction or “compulsive drug seeking and abuse” occurs “despite the known harmful effects upon functioning in the context...work.”¹³

Classifying marijuana as a medication instead of an illegal drug will not necessarily lessen this risk. In fact, the Centers for Disease Control reports that emergency room visits due to misuse of prescription medication nearly doubled from 2004 to 2008. The bottom line for employers, including motor carriers, is that they must reassess their policies concerning marijuana use in the workplace. For employers of commercial motor vehicle drivers, the guidance from the Department of Transportation will help make those policy choices clear.

Notes

1. The National Conference of State Legislatures provides a complete list of state statutes authorizing medical marijuana use at its website, www.NCSL.org.
2. The entirety of the press release can be viewed at the Department of Justice Public Affairs website; www.justice.gov/opa/pr/2009/October/09-ag-1119.html.
3. 21 CFR 1308.11, Schedule 1 (2010).
4. The entirety of the policy statement can be viewed at the Department of Transportation’s website; www.dot.gov/ost/dapc/NEW_DOCS/ODAPC%20Medical%20Marijuana%20Notice.pdf.
5. The Drug-Free Workplace Act of 1988 imposes the requirement of a drug-free workplace policy on entities awarded large contract of any grant from the federal government. The drug-free workplace rule discourages the use any illegal narcotic or alcohol at the workplace.
6. 49 CFR 391.41(12)(i)(2010).
7. 49 CFR 391.41(12)(ii)(2010).
8. <http://www.fmcsa.dot.gov/rules-regulations/topics/medical/faqs.aspx#question88>.
9. Within the 49 CFR 391.43, DOT Interpretations section, Question 4 indicates that prescription methadone use is prohibited as a habit-forming narcotic that is not allowable for CMV drivers. 49 CFR 391.43 (2010).
10. 49 CFR 383.51 (2010).
11. “Alcohol and Other Drug Use in Commercial Transportation”, National Transportation Safety Board Chairman James Hall.
12. In his report, “Alcohol and Other Drug Use in Commercial Transportation”, National Transportation Safety Board Chairman James Hall sighted an Insurance Institute of Highway Safety roadside survey that found close to 30% of drivers tested positive for drugs in their blood or urine. Of those, the marijuana, at 15%, was the most commonly detected substance, followed by stimulants at 12%.
13. “NIDA Info Facts” marijuana fact sheet issued by the National Institute on Drug Abuse. Additional information regarding the use and abuse of marijuana can be found at the National Institutes of Health, National Institute on Drug Abuses website at www.nida.nih.gov.

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