

# Use of Cannabis by Workers in Safety-Sensitive Positions

May 16, 2023

## *States Regulating Marijuana Use Off-Site and At Work*

**While states continue to regulate employers' right to refuse to hire, discipline, or terminate employees based on their on- and off-duty marijuana use, some legal tools remain for maintaining drug-free employees and workplaces.**

The use of medical marijuana, which has been permitted for decades in some states, is not protected under the Americans with Disabilities Act. As a result, even in states which legally permit its use, employers are free to terminate employees who use medical marijuana without fear of violating federal discrimination laws.

In response to this lack of federal protection from discrimination, about one-third of the states that have legalized medical marijuana use have now also passed laws protecting medical cannabis patients from the consequences of failing employment drug screenings. Recently, there has been a legislative trend in the states to protect all off-duty – including non-medical, often called recreational or adult-use – marijuana use. Washington state recently became the eighth state to protect employees from adverse actions based on their off-duty marijuana use.

While these laws generally do permit employers to take action against an employee who is impaired and under the influence of marijuana while on the job, that comes with its own set of risks. Additionally, many of these laws also carve out a “safety-sensitive” designation for certain employees, i.e., persons working in positions which have zero tolerance for the consumption of marijuana, regardless as to when or where it was consumed.

## *States Where “Safety-Sensitive” is Specifically Defined by Statute*

Some states have attempted to define “safety-sensitive” exceptions to their laws prohibiting discrimination based on off-duty marijuana use. These states include:

- **Oklahoma**, which defines “safety-sensitive” as “any job that includes tasks or duties that the employer reasonably believes could affect the safety and health of the employee performing the task,” such as dispensing pharmaceuticals, operating a motor vehicle, directly caring for a patient, carrying a firearm, or handling hazardous materials.[1]
- **New Mexico**, which defines a “safety-sensitive position” as “a position in which performance by a person under the influence of drugs or alcohol would constitute an immediate or direct threat of injury or death to that person or another.”[2]

- **Pennsylvania**, where medical marijuana patients are prohibited from performing employment duties in small, confined spaces or at great heights and can be prohibited by their employer “from performing any duty which could result in a public health or safety risk while under the influence of medical marijuana.”[3]
- **Iowa**, which defines “safety-sensitive” as “a job wherein an accident could cause loss of human life, serious bodily injury, or significant property or environmental damage, including a job with duties that include immediate supervision of a person in a job that meets the requirement of this paragraph.”[4] The Iowa Supreme Court recently had opportunity to address this statute in *Dix v. Casey’s Gen. Stores, Inc.*, 961 N.W. 2d 671 (Iowa 2021), in which it ruled that two employees who stacked cigarette boxes were improperly classified as safety-sensitive workers under Iowa’s drug-testing statute. In its ruling, the Iowa Supreme court cautioned employers to assess safety-sensitive positions on a job-by-job basis rather than make blanket designations of groups of employees.
- **Washington, D.C.**, which defines “safety-sensitive” jobs, as designated by the employer, in which it is “reasonably foreseeable” that an employee performing the job under the influence of drugs or alcohol “would likely cause actual, immediate, and serious bodily injury or loss of life to self or others.” These may include, among others, security services such as police, special police, and security officers; operation of motor vehicles or heavy or dangerous equipment; regular or frequent work on an active construction site; regular or frequent work on or near power or gas utility lines; regular or frequent handling of hazardous materials; and positions that involve administering medications, performing or supervising surgeries, or providing other medical services requiring “professional credentials.”[5]

While these definitions may differ slightly from state to state, one common theme emerges: the specific job duties the employee has will likely govern whether the employee is considered employed in a safety-sensitive position.

### ***When The Employer Has The Authority to Designate: Prinsen v. Domtar Paper Co.***

However, the specific duties of an employee do not always govern whether the employee is considered employed in a safety-sensitive position. Take, for example, the state of Arkansas, where voters passed Issue 6, the Arkansas Medical Marijuana Amendment, in 2016. The Arkansas Medical Marijuana Amendment of 2016 (Amendment) provides that an employer is not permitted to discriminate against a worker because of their status as a past or present qualifying medical marijuana patient. However, this Amendment excludes claims for discrimination for those qualifying patients whose jobs require safety-sensitive work.[6] Under the Amendment, a safety-sensitive job could be any position *so designated* by an employer.[7]

The extent of an employer’s ability to designate a job as safety-sensitive was recently examined in the case *Prinsen v. Domtar Paper Co.*, No. 4:22-cv-04076, 2023 U.S. Dist, LEXIS 16187 (W.D. Ark. Jan. 31, 2023). In *Prinsen*, a district court in Arkansas addressed whether the Amendment granted the employer the right to designate all jobs at a location as safety-sensitive, regardless as to the duties of each job.

In *Prinsen*, the employer, a pulp and paper mill, adopted a drug-free workplace policy in February 2022 under a collective bargaining agreement. In doing so, it listed all mill jobs as safety-sensitive, and as a result, all jobs at the mill were categorized as safety-sensitive. Two employees who were qualified medical marijuana patients and failed drug tests were subsequently terminated by the employer under the justification that their jobs were

safety-sensitive and, therefore, exempt from the Amendment. The employees sued, alleging, among other things, that their roles were not truly safety-sensitive as contemplated under the Act.

The District Court rejected the argument that the employee's termination was a violation of the Amendment because their jobs were not truly safety-sensitive. Instead, because the language of the Amendment explicitly permits an employer to designate any position as safety-sensitive, even through a blanket categorization for all positions at a given location as the defendant did in the *Prinsen* case, the employer's conduct in terminating the employees did not violate Arkansas law.

### *The Employer Takeaway*

Not all states and municipalities have adopted safety-sensitive carve-outs in their off-site marijuana use discrimination statutes, and of those that have, not all have clearly defined the term "safety-sensitive." For those states that do have safety-sensitive exceptions but have not specifically defined what that means, as noted in this article, some positions can clearly be identified, such as those individuals administering medical care, handling firearms, heavy equipment, or hazardous materials.

The cases analyzing these statutes further demonstrate that when in doubt, an employer should focus on the duties the employee regularly performs and determine whether those duties create a risk of harm, whether to the general public, co-workers, or self.

Finally, in those states or municipalities, such as Arkansas, which leave it up to the employer to designate which positions are safety-sensitive, the employer likely has wide latitude under this decision, and the courts are not likely to second-guess an employer's determination that a position is safety-sensitive.

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[1] Okla. Stat. tit. 63, § 427.8(K)(1).

[2] N.M. Stat. Ann. § 26-2B-3(Q).

[3] 35 Pa. Stat. Ann. § 10231.510.

[4] Iowa Code § 730.51(1)(j).

[5] D.C. Code § 32-951.01.

[6] Ark. Const. Amendment 98, §3.

[7] Ark. Const. Amendment 98, §2(25)(B).

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