

Marijuana Waste Management/Employer-Employee Issues: 2021 Arkansas Recycling Coalition Conference Presentation



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My law firm colleague Cara Butler and I undertook a presentation at the September 15th Arkansas Recycling Coalition Conference titled:

Marijuana Waste Management/Employment Issues Related to Arkansas Medical Marijuana ("Presentation")

The focus of the *Presentation* was the passage of the Arkansas Medical Marijuana Constitutional Amendment ("MMA"), issues associated with medical marijuana waste management, and potential impact on Arkansas waste/recycling facilities/operations from a safety and employment standpoint.

Key points initially noted during the *Presentation* included:

- MMA decriminalizes (from a state [Arkansas]) certain use of marijuana
- Establishment of regulation of cultivators and dispensaries
- Employer not required to accommodate the ingestion of marijuana in a workplace or an employee working under the influence of marijuana.
- Outlines process pursuant to which an individual can become a "Qualifying Patient" who can use medical marijuana
- Doctor certifies he/she has a "Qualifying Medical Condition"

Marijuana waste issues noted included:

- Waste generated (variety of wastes may be generated)
- Disposal/treatment activities
- Potentially applicable federal and state environmental legal requirements
- Contract Issues/allocation of liability associated with disposal

A particular effort was made to discuss the United States Department of Transportation's ("DOT") continuing directive that prohibits CDL drivers from using medical marijuana or CBD oil. In fact, DOT within the last month issued a second what it described as clarification noting the prohibition.

The clarification was issued because of DOT's concern that the occurrence of positive drug tests for CDL drivers using such products is increasing. DOT also noted that Medical Review Officers conducting driver tests will not issue a negative test simply because the THC detected in a urine sample was from legal marijuana or CBD oil.

Concurrent with this point was a reminder that marijuana is still illegal at the federal level as a DEA Schedule I controlled substance.

A description of the MMA noted that cultivation facilities and dispensaries have been established in the state and are operating. Further, thousands of registry cards have been issued by the Arkansas Department of Health (“DOH”). Consequently, as noted, this legalization is generating a host of legal issues including health care, insurance, banking, OSHA, etc.

Arkansas Waste Regulation

Non-hazardous marijuana plants waste (including stalks, roots/soil/ and unusable marijuana).

Examples include:

- Trim (leaves and other materials removed during a harvest)
- Shake (leaves fall off naturally)
- Grow Medium

Potential Solid and RCRA Hazardous Waste

Examples include:

- Trim and solid plant material used to create an extract
- Waste solvent (example – butane making concentrates via hydrocarbon extraction)
- Laboratory waste
- Extract that fails to meet quality testing
- Used reactants
- Residual solvents include butane, hexane, alcohol, and ethanol which are byproducts of extraction
- Alcohols
- Residual pesticides/fertilizers
- CO2 cartridges
- Cleaning solution
- Lighting ballasts
- Hydroponic waste
- Nutrients (significant phosphorous, nitrogen, calcium and zinc)
- Wastewater
- Light bulbs ([mercury] grow lights)

Alcohol Beverage Control Commission

- RR 18.1 Disposal of Marijuana by Cultivation Facilities and Dispensaries. All medical marijuana waste shall be disposed of in accordance with this rule.
- All medical marijuana waste shall be stored in a secure, limited access area on the premises of the cultivation facility or dispensary.
- All medical marijuana shall be rendered unusable pursuant to the methods set forth in this rule prior to disposal.
- All steps taken to render the marijuana unusable shall be conducted under video surveillance by the licensed facility’s video surveillance system.
- All medical marijuana waste set for disposal shall be properly weighed and recorded in the Inventory Tracking System.
- A cultivation facility or dispensary shall notify the Division at least three (3) business days prior to rendering the medical marijuana waste unusable and disposing of it. The notification shall include the weight of the marijuana to be rendered unusable.
- Medical marijuana shall be rendered unusable by grinding and incorporating the cannabis plant waste with other ground materials so the resulting mix is at least 50% non-cannabis waste by volume.

- Medical Marijuana waste rendered unusable by the methods described in section (2), may be delivered to a permitted solid waste facility for final disposition. Permitted solid waste facilities may include:
- Compostable Mixed Waste: Compost, anaerobic digester, or other facility approved by the Division
- Noncompostable Mixed Waste: landfill, incinerator

Energy Issues

- A significant topic in states already allowing cultivation is the energy impact of cultivation.
- 2000-3000 Kilowatt hours of energy per pound of product. (NPCC)
- The publication Utility Dive quotes Mr. Pete Rumsey, Executive Vice President of Business Development at Lighting Science, who states:

Cannabis is one of the most energy-intensive industries in the world. Statistics show that one percent of all electricity used in the United States today is used by indoor marijuana growers, to the tune of almost \$6 billion

- The same publication notes that growing four mature marijuana plants consume about as much power as running 29 refrigerators around the clock.
- Why are cultivation facilities motivated regarding energy conservation?
- Highly competitive industry
- Margins decreasing
- Energy is one of the largest cost components for cultivation/infusion facilities

Water Use

Cultivating and processing marijuana is water intensive. A facility tapping into a public utility or municipal water line if among a concentration of such facilities could be a material issue in terms of quantity used.

For purposes of producing high marijuana yields influent water may be scrutinized for:

- Total soluble salt
- Proportion of sodium cations
- Excessive concentrations of elements that causes toxicity or ionic imbalance in plants
- Bicarbonate anion concentration as related to calcium plus magnesium cations

Wastewater

Wastewater utilities will need to evaluate cultivating/infusion facilities' wastewater streams:

- Scrutinize pollutant concentration
- Nutrient issues (Phosphates and Nitrates)
- Biocides interfere with treatment
- Facility practices to address potential wastewater issues
- Available agronomy practices to reduce pollution
- Minimize/use best practices for reducing solvent usage for processing plant material
- Recirculating hydroponic system
- Address/sewer entry points in cultivation rooms
- Infusion/Extraction/Production
- Relevant pollutants?
- Prevent gaseous solvents like carbon dioxide, propane or butane discharging into sewer system wastewater
- Solvents such as hexane, etc., may be flammable
- Fats, oils, and grease from edible production
- High concentration or improper use of cleaning agents

Air

- Odors (release of VOCs) from cultivation/processing (odor control plans are required such as carbon filtration, etc.
- Emission of volatile Organic compounds associated with extractions and infusions
- Fermentation of produce CO₂ to accelerate plant growth (creating CO₂, nitrogenoxides, PM, SO₂, and VOCs)
- Natural gas fired boilers/emergency generators

Service/Disposal Agreements

- Potential liability for improper disposal of medical marijuana wastes
- Allocate liability in service agreements
- Generator warrant/certification waste meets definition of unusable
- Use of waste profile
- Provisions for indemnity, rejection, expense for sending back, etc.

Note: Landfills operating procedures may consider need for immediate burial, etc., to prevent scavenging.

Waste management/recycling facilities were noted to face particular difficulties because of the following:

- Exposure to heavy machinery
- Often long commutes in a rural state
- Hazardous materials/equipment
- More difficult to find young employees because of strict drug policies

Additional complications related to MMA include:

- Federal American Disabilities Act
- Federal Drug Free Workplace Act of 1988
- State Workers' Compensation laws
- Federal Department of Transportation Regulations

The various qualified medical conditions which potentially allow a person to obtain an MMA card were identified. Once the card is procured by a person, the potential impact of the MMA's "non-discrimination provision" was discussed. This provision provides that:

"An employer shall not discriminate against an applicant or employee in hiring, termination, or any term or condition of employment, or otherwise penalize an applicant or employee, based upon the applicant's or employee's past or present status as a qualifying patient or designated caregiver."

The remedy for violation of this provision was noted to include damages which can encompass liability for backpay.

Nevertheless, the *Presentation* reminded employers that:

- There is no protected right either from the state or federal government to be under the influence in the workplace
- Off-duty consumption of marijuana without a registration card is still illegal

The systemic marijuana side effects were noted along with the unique properties of this substance (i.e., carry-over impairment effect, slow rate of metabolization, etc.)

From a safety standpoint, concern was expressed about the potential impact of such substances which might include distracted driving, etc. Industrial, manufacturing, and energy facilities have particularly complex operations including those relating to protection of environment, health and safety. Therefore, the impact of such substance is of particular concern.

Other employer issues might include:

- Costs of drug-testing applicants, employees
- Increased management training costs

- Increased need for supervision

Addressed were a number of key questions faced by Arkansas employers:

- Do employers continue to enforce their traditional substance-abuse policies, or adopt a new approach for dealing with employees who test positive for marijuana in the workplace?
- Does the Americans with Disabilities Act (ADA) protect employees who claim discrimination based upon their use of marijuana for a disabling medical condition? (Yes)
- Do employers continue to enforce their traditional substance-abuse policies, or adopt a new approach for dealing with employees who test positive for marijuana in the workplace?
- Does the Americans with Disabilities Act (ADA) protect employees who claim discrimination based upon their use of marijuana for a disabling medical condition? (Yes)
- Do employers violate the Occupational Safety and Health Administration's (OSHA's) General Duty Clause by allowing employees who use marijuana to perform safety-sensitive jobs, and thereby create a workplace hazard that OSHA standards seek to eliminate?
- Do the Department of Transportation's (DOT's) substance-abuse regulations trump state marijuana laws? (Yes)
- Heightened level of concern when claimant returns to a safety-sensitive occupation, such as driving or construction, while subject to potential adverse cognitive and psychological effects of marijuana?
- Quantification of the amount of marijuana consumed by claimant is not available through urine medication testing, thereby limiting ability to determine if he or she has consumed prescribed dose, or is in fact acutely intoxicated
- Can an employer ban the use of marijuana by an employee if it is permitted by state law - and if the employee has a prescription?
- Does an employer have the right to terminate an employee who tests positive for marijuana, even if the employee shows no signs of impairment on the job?

Recommendations for steps employers in the waste management and recycling industry should undertake include:

- Establish a drug free workplace
- Note: qualified medical marijuana users can still be employed
- Make jobs with specific safety sensitive tasks or related to public health
- Have a way of tracking job performance
- Have an action plan for how you will respond to an employee who is a medical marijuana user

A particular focus was the need to create written job descriptions which designate safety sensitive positions within the organization. The MMA permit employers to:

... exclude a qualifying patient from being employed in or performing a safety sensitive position based on the employer's good faith belief that the qualifying patient was engaged in the current use of marijuana.

The safety sensitive position is defined as "any position designated in writing by the employer as a safety sensitive position in which a person performing the position while under the influence of marijuana may constitute a threat to health or safety." Therefore, creating written job descriptions which designate certain jobs as "safety sensitive positions" permits employers to exclude job applicants and employees with medical marijuana registry ID cards from those positions.

The need to consider what are safety sensitive positions in the waste management and recycling facilities was therefore addressed.

Topics also discussed included:

- Review/updating employee handbooks and drug testing policies and practices
- Impact of the Drug-Free Workplace Act of 1988 (and its six requirements)
- Need to review drug testing policies and procedures

- Training managers and supervisors to identify employees under the influence with a good faith belief sufficient to support the administration of a drug test (including the definition of “good faith belief”)
- Training frontline supervisors and managers to identify when an employee may be under the influence of marijuana during their hours of employment
- Issues associated with the Americans with Disabilities Act
- Health coverage issues
- Relevance of the Occupational Safety and Health Administration General Duty Clause

A copy of the slides from the *Presentation* can be downloaded [here](#).