

# Arkansas Medical Marijuana Amendment: Arkansas Attorney General Opinion Addresses Scope of Phrase "Safety Sensitive Position"



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The Arkansas Attorney General ("AG") issued an August 2nd Opinion addressing the scope of the safe harbor for employers provided by the Arkansas Medical Marijuana Amendment ("Amendment") for "safety sensitive position." See Opinion No. 2021-031.

The Opinion was issued in response to a request by Representative Carlton Wing of North Little Rock.

Non-compliance with the Amendment can pose significant risk for an employer. It includes a non-discrimination provision directed at employers. The 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.

Damages under the Amendment for an employment discrimination claim based on an applicant's or employee's past or present status as a qualifying patient or designated caregiver can be recovered.

The Amendment permits 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."

A safety sensitive position is in turn 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."

Representative Wing asks whether the phrase "safety sensitive position" includes:

. . . a position . . . working with confidential information or documents pertaining to criminal investigations.

The query also asked:

. . . whether this definition of a position that may be designated as safety sensitive under [Amendment 98] is limited to only those positions working with confidential information pertaining to a criminal investigation, or if positions working with confidential information unrelated to criminal investigations would also fall under this definition for designation as safety sensitive.

The AG's Opinion concludes that the definition identifies two distinct positions:

- One that involves working with confidential information
- One that involves working with criminal investigation documents

The basis for this conclusion is the use of the disjunctive “or” in the definition, which is stated to introduce an alternative.

As a result, the AG’s Opinion states that the definition of “safety sensitive positions” under the Amendment is not limited to positions working with confidential information pertaining to a criminal investigation.

A copy of the Opinion can be downloaded [here](#).