



Medical Marijuana and the Employee Relationship

Presented by Paul Ross

Oklahoma Rural Health Conference - May 30, 2019

Overview

- Medical marijuana licenses – How they are obtained and by whom
- Rights of license holders
- Employment protections
- Workplace restrictions that are lawful
- Recommended action items for employers



Medical marijuana licenses

- Only covers those individuals who hold a valid, Oklahoma-issued medical marijuana license
- Must be an Oklahoma resident
- 18 years or older; If under 18, application must be signed by parent and two physicians
- License good for two years
- \$100 application fee



License holders' rights

- Consume marijuana
- Possess
 - 3 ounces on their person
 - 8 ounces in their residence
 - 6 mature plants
 - 6 seedlings
 - 1 ounce of concentrate
 - 72 ounces of edibles

Note: Licenses not valid on tribal or federal lands

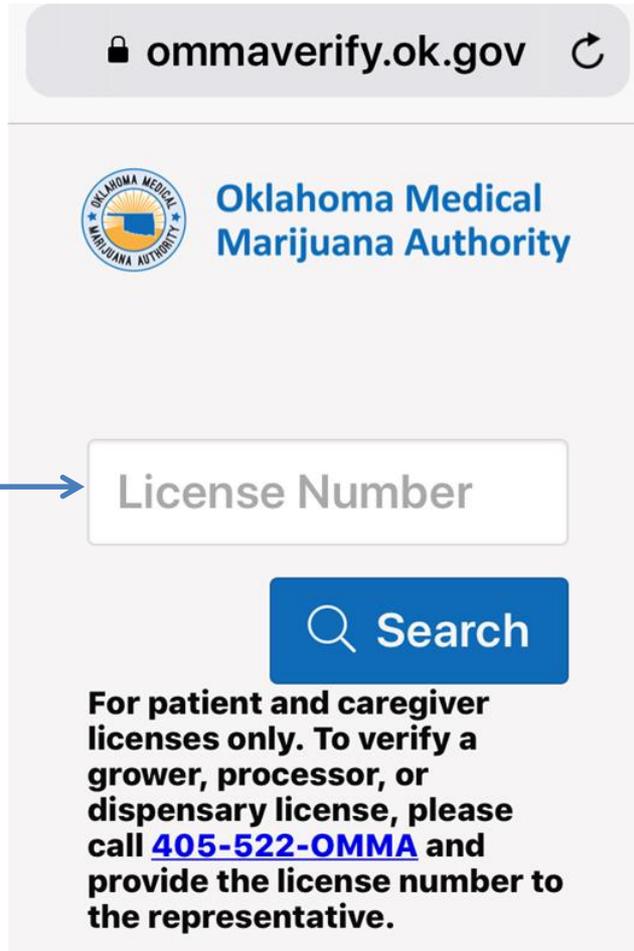


What licenses look like



License verification

24 Character
Patient ID #



ommaverify.ok.gov

 Oklahoma Medical
Marijuana Authority

License Number

 Search

For patient and caregiver licenses only. To verify a grower, processor, or dispensary license, please call [405-522-OMMA](tel:405-522-OMMA) and provide the license number to the representative.



Employment protections for license holders

- Employers may not **discriminate** against or **penalize** an employee or applicant based upon their medical marijuana license status
- Employers may not take any action against a license holder based **solely** on a positive drug test for marijuana
 - ✓ **Do not ask applicants or employees whether they are license holders unless and until they test positive for marijuana**



Federal exception to employment protections

- **Exception:** These employment protections do not apply to employees who are subject to federally mandated substance testing requirements
- **Exception:** May discriminate if employer would “**imminently** lose a monetary or licensing related benefit under federal law or regulations”
- Drug Free Workplace Act (DFWA) issues



New OMMA exception

- **“Safety Sensitive” Exception:** Employers may refuse to hire an applicant or may terminate an employee in a safety-sensitive position who tests positive for medical marijuana even if he/she has a valid medical marijuana license.



“Safety sensitive” positions

- “Any job that includes tasks or duties that the employer **reasonably believes** could affect the safety and health of the employee performing the task or others”



Statutory examples of “safety-sensitive” positions

- Work with hazardous materials
- Operation of vehicles or machinery
- Maintenance of equipment
- Work with utilities
- **Preparing or handling of food or medicine**
- Carrying a firearm
- **Patient care**
- Child care



Updating drug and alcohol testing programs

- Continue to test for all substances, including marijuana
- May not know what particular substance contributed to behavior or accident
- If not a valid medical marijuana license holder, a positive test for marijuana for an employee or applicant can result in employment action
- Safety-sensitive positions?
- After positive test, determining action on a case-by-case basis



What if an employee tests positive for marijuana?

- The MRO or HR will inquire whether employee has a medical marijuana license
 - If answer is yes, request to see the license
 - Verify the validity of the license through the Oklahoma Medical Marijuana Authority's portal
- If valid license holder, determine if employee can perform job duties while using medical marijuana
 - ✓ **Is this a safety-sensitive position?**



What if an employee tests positive for marijuana? *(cont'd)*

- Can employee safely and successfully perform job duties – fitness for duty
 - Rely on physician's medical opinion rather than making assumptions
 - Treat just like a prescription



Accommodating medical marijuana use

- No obligation to accommodate medical marijuana use or possession while working
- But license holder may have an underlying medical issue
 - Consider accommodations that do not involve the use/possession of marijuana while working



Lawful workplace restrictions

- May not **possess** marijuana while working
- May not **use** marijuana while working
- May not be “**under the influence**” while working



Strengthen workplace policies

- An absolute prohibition of **possession or use** of any prohibited substances **while working**
 - Includes license holders
 - Covers areas outside the employer's building
 - Covers off-premises while working



Strengthen workplace policies *(cont'd)*

- An absolute prohibition of working while **under the influence** of any prohibited substances
 - Includes impairment of license holders from marijuana use
 - Covers impairment observable from appearance, behavior or conduct



Identify “safety-sensitive” positions

- Identify facts to support why jobs are safety-sensitive
 - Be prepared to defend designation
- ✓ **Identify safety-sensitive positions to applicants and employees**



Educate your workforce

- Employee has received misinformation about how the new law works
 - What rights are granted
 - What prohibitions still apply
- An opportunity to review with employees your new, more robust possession, use, and impairment policies
- Walk through your drug testing policy – how it works and how it still applies



Train your supervisors

- Dealing with medical marijuana issues on a daily basis
- Likely to get questions from employees about marijuana use in the workplace
- How MMA works – and doesn't work – particularly in conjunction with your new workplace policies and drug testing program
- Responsible for applying and executing these policies
- Training that increases their skills at recognizing and documenting impairment





Medical Marijuana and the Patient Relationship

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Federal Law

- Classified as a Schedule I drug
- Illegal to prescribe, use, distribute, possess, or cultivate Schedule I drugs except as part of approved research study
- Not approved by FDA as a safe and effective drug for any indication
 - Exception: Epidiolex (June 2018) and certain synthetic substances – CBD (trace THC)



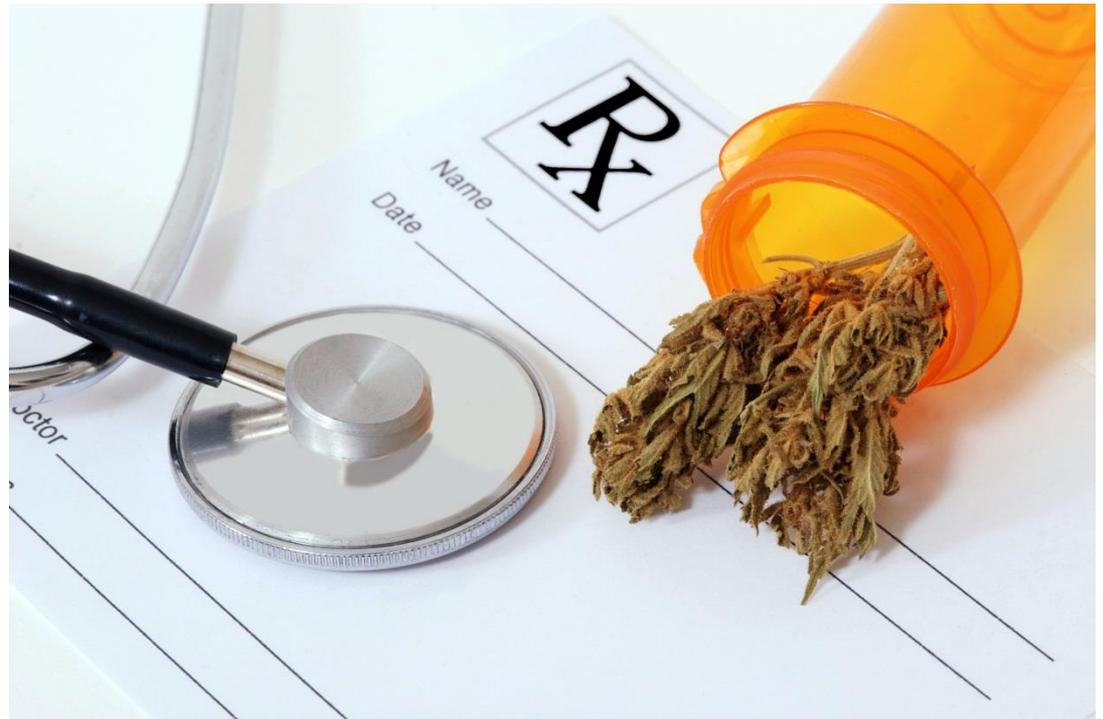
Prescribe vs. Recommend

- Controlled Substances Act – illegal to prescribe marijuana
 - Revocation of DEA registration
 - Criminal penalties
- First Amendment may protect “recommendations”
 - U.S. Court of Appeals for the Ninth Circuit – physician discussing benefits of medical marijuana constitutes protected speech



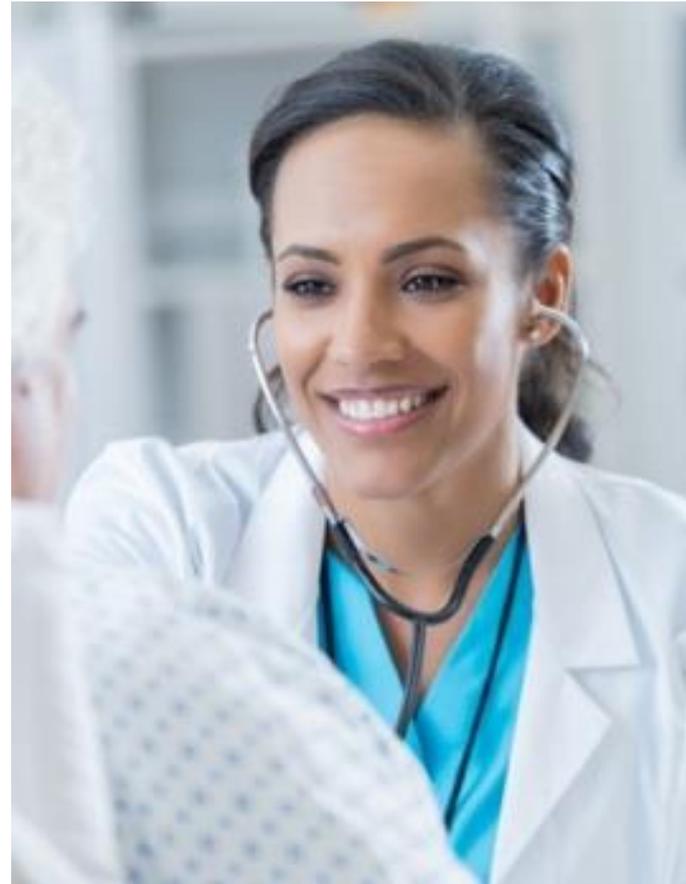
Reluctance to Recommend

- Lack of large-scale clinical research
- Safety concerns
- Liability concerns
- Professional repercussions
- Lack of clinical education
- Social stigma – “pot docs”



Who is eligible?

- MD or DO
- Valid, unrestricted, existing license to practice medicine in Oklahoma
- No longer a board certification requirement



Physician Attestation

- Established medical record and bona fide physician-patient relationship
- Medical condition for which patient is likely to receive therapeutic or palliative benefit from medical marijuana
- Recommendation in accordance with accepted standards a reasonable and prudent physician would follow when recommending a medication
- Verified patient's identity



Possible Approaches

- Total ban
 - Employed physicians prohibited from recommending
 - Independent physicians with medical staff privileges prohibited from recommending on hospital campus
- Limit to specific specialties or specific conditions supported by evidence-based research
- Establish committee to consider requests on case-by-case basis
- Implement recommendation guidelines



Guidelines to Consider



- Face-to-face visit
- Comprehensive evaluation
- Required follow-up visits
- Exhaust alternatives first
- Required CME
- Informed consent process
- Treatment agreement



Marijuana in the Hospital

- Verification
- Handling
- Order to continue
- Storage
- Administration
- Delivery mechanisms
- Caregiver involvement
- Discharge planning
- Removal
- Visitors



Regulatory Concerns

- Medicare Conditions of Participation for Hospitals
 - No definitive policy statement from CMS
- Pharmacy's DEA registration
- Attending physician's DEA registration
- Accreditation requirements
- State licensure



Other Risks

- Patient safety
- Interactions with other drugs/treatments
- Diversion by staff, others
- No pharmacy involvement = difficult to verify integrity



Varied Approaches Across the U.S.

- Total ban
- Attending physician may obtain exception on case-by-case basis
- “Don’t ask, don’t tell”
- Self-administration only
- Caregiver transport to and from facility
- Treated as medication and integrated into workflow
 - Not permitted under Oklahoma law



Possible Repercussions of Total Ban

- Unwanted press attention
 - “Dying patient kicked out of hospital for using medical marijuana”
 - “Stage 4 cancer patient says police searched his hospital room for marijuana”
- Possible civil rights challenge
- Patients choose to go elsewhere



If Prohibited . . .

- Instructed to remove marijuana from premises
- Treated as contraband
- Advised of alternative medications
- If unconscious or incapacitated, kept with personal belongings until family/friend can remove
- Consider discharge instructions separately
- Possible exception for palliative end-of-life or other limited conditions



If Permitted . . .

- Verify patient's medical marijuana license
- Secured storage (in room?)
 - No involvement by pharmacy
- Prohibit smoking/vaping
- No staff involvement in administration
 - Self-directed administration or by caregiver
- Patient acknowledgement/waiver
- Removal upon discharge



Questions?



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