

1 State of Arkansas *As Engrossed: H2/16/17 H2/28/17 H3/2/17*

2 91st General Assembly

A Bill

3 Regular Session, 2017

HOUSE BILL 1460

4

5 By: Representatives Wing, House

6 By: Senators Irvin, Standridge

7

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For An Act To Be Entitled

9 AN ACT TO AMEND ARKANSAS CONSTITUTION, AMENDMENT 98,
10 ALSO KNOWN AS THE "ARKANSAS MEDICAL MARIJUANA
11 AMENDMENT OF 2016" REGARDING EMPLOYEE PROTECTIONS AND
12 EMPLOYEE SAFETY; AND FOR OTHER PURPOSES.

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Subtitle

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TO AMEND THE ARKANSAS MEDICAL MARIJUANA

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AMENDMENT OF 2016 REGARDING EMPLOYEE

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PROTECTIONS AND EMPLOYEE SAFETY.

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21 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

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23 SECTION 1. Pursuant to § 23 of Arkansas Constitution, Amendment 98,
24 also known as the "Arkansas Medical Marijuana Amendment of 2016", Arkansas
25 Constitution, Amendment 98, § 2(19), concerning the definition of "written
26 certification" within the Arkansas Medical Marijuana Amendment of 2016, as
27 amended by Acts 2017, No. 5, is amended to read as follows:

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(19)(A) "Written certification" means a document signed by a

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physician stating that in the physician's professional opinion, after having
30 completed an assessment of the qualifying patient's medical history and
31 current medical condition made in the course of a physician-patient
32 relationship, the qualifying patient has a qualifying medical condition.

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(B) A written certification shall specify the qualifying
34 patient's qualifying medical condition, which also shall be noted in the
35 physician's records.

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(C) A written certification is not a medical prescription.



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SECTION 2. Pursuant to § 23 of Arkansas Constitution, Amendment 98, also known as the "Arkansas Medical Marijuana Amendment of 2016", Arkansas Constitution, Amendment 98, § 2, is amended to add additional subdivisions to read as follows:

(20)(A) "Current use of marijuana" means use of marijuana that justifies the good faith belief of an employer that *an applicant or employee* is engaging in the use of marijuana.

(B) "Current use of marijuana" is presumed when a positive test result for marijuana occurs;

(21) "Employee" means an individual employed by an employer, but does not include:

(A) An individual employed by his or her parents, spouse, or child;

(B) An individual participating in a specialized employment training program conducted by a nonprofit sheltered workshop or rehabilitation facility;

(C) An individual employed outside the State of Arkansas; or

(D) An independent contractor;

(22) "Employer" means *an entity that* who employs nine (9) or more employees in the State of Arkansas in twenty (20) or more calendar weeks in *the current or preceding calendar year*;

(23)(A) "Good faith belief" means reasonable reliance on a fact, or that which is held out to be factual, without intent to deceive or be deceived and without reckless or malicious disregard for the truth.

(B) "Good faith belief" does not include a belief formed with gross negligence.

(C) "Good faith belief" may be based on any of the following:

(i) Observed conduct, behavior, or appearance;

(ii) Information reported by a person believed to be reliable, including without limitation a report by a person who witnessed the use or possession of marijuana or marijuana paraphernalia by *an applicant or employee in the workplace*;

(iii) Written, electronic, or verbal statements from

1 the employee or other persons;

2 (iv) Lawful video surveillance;

3 (v) A record of government agencies, law enforcement
4 agencies, or courts;

5 (vi) A positive test result for marijuana;

6 (vii) A warning label, usage standard, or other
7 printed material that accompany instructions for usable marijuana;

8 (viii) Information from a physician, medical review
9 officer, or a dispensary;

10 (ix) Information from reputable reference sources in
11 print or on the internet;

12 (x) Other information reasonably believed to be
13 reliable or accurate; or

14 (xi) Any combination of the items listed in
15 subdivisions (23)(C)(i)-(x) of this section;

16 (24) "Positive test result for marijuana" means a result that is
17 at or above the cutoff concentration level established by the United States
18 Department of Transportation or the Arkansas laws regarding being under the
19 influence, whichever is lower;

20 (25)(A) "Safety sensitive position" means any position involving
21 a safety sensitive function pursuant to federal regulations governing drug
22 and alcohol testing adopted by the United States Department of Transportation
23 or any other rules, guidelines, or regulations adopted by any other federal
24 or state agency.

25 (B) "Safety sensitive position" also means any position
26 designated in writing by an employer as a safety sensitive position in which
27 a person performing the position while under the influence of marijuana may
28 constitute a threat to health or safety, including without limitation a
29 position:

30 (i) That requires any of the following activities:

31 (a) Carrying a firearm;

32 (b) Performing life-threatening procedures;

33 (c) Working with confidential information or
34 documents pertaining to criminal investigations; or

35 (d) Working with hazardous or flammable
36 materials, controlled substances, food, or medicine; or

1 (ii) In which a lapse of attention could result in
 2 injury, illness, or death, including without limitation a position that
 3 includes the operating, repairing, maintaining, or monitoring of heavy
 4 equipment, machinery, aircraft, motorized watercraft, or motor vehicles as
 5 part of the job duties; and

6 (26)(A) "Under the influence" means symptoms of the current use
 7 of marijuana that may negatively impact the performance of the job duties or
 8 tasks or constitute a threat to health or safety.

9 (B) "Under the influence" includes without limitation:

10 (i) Symptoms of the applicant's or employee's
 11 speech, walking, standing, physical dexterity, agility, coordination,
 12 actions, movement, demeanor, appearance, clothing, odor, or other irrational
 13 or unusual behavior that are inconsistent with the usual conduct of the
 14 applicant or employee;

15 (ii) Negligence or carelessness in operating
 16 equipment, machinery, or production or manufacturing processes;

17 (iii) Disregard for safety;

18 (iv) Involvement in an accident that results in:

19 (a) Damage to equipment, machinery, or
 20 property;

21 (b) Disruption of a production or
 22 manufacturing process; or

23 (c) An injury; or

24 (v) Other symptoms causing a reasonable suspicion
 25 that the current use of marijuana may negatively impact the performance of
 26 the job duties or tasks or constitute a threat to health or safety.

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 28 SECTION 3. Pursuant to § 23 of Arkansas Constitution, Amendment 98,
 29 also known as the "Arkansas Medical Marijuana Amendment of 2016", Arkansas
 30 Constitution, Amendment 98, § 3(f)(3), concerning the protections for the use
 31 of medical marijuana, is amended to read as follows:

32 (3)(A) An employer shall not discriminate against an individual
 33 applicant or employee in hiring, termination, or any term or condition of
 34 employment, or otherwise penalize an individual applicant or employee, based
 35 upon the individual's applicant's or employee's past or present status as a
 36 qualifying patient or designated caregiver.

1 (B) A cause of action shall not be established against an
2 employer based upon, and an employer is not prohibited from, any of the
3 following actions:

4 (i) Establishing and implementing a substance abuse
5 or drug-free workplace policy that may include a drug testing program that
6 complies with state or federal law and taking action with respect to an
7 applicant or employee under the policy;

8 (ii) Acting on the employer's good faith belief that
9 a qualifying patient;

10 (a) Possessed, smoked, ingested, or otherwise
11 engaged in the use of marijuana while on the premises of the employer or
12 during the hours of employment; or

13 (b) Was under the influence of marijuana while
14 on the premises of the employer or during the hours of employment, provided
15 that a positive test result for marijuana cannot provide the sole basis for
16 the employer's good faith belief; or

17 (iii) Acting to exclude a qualifying patient from
18 being employed in or performing a safety sensitive position based on the
19 employer's good faith belief that the qualifying patient was engaged in the
20 current use of marijuana.

21 (C) The authorized or protected actions of an employer
22 under this subdivision (f)(3) include without limitation:

23 (i) Implementing, monitoring, or taking measures to
24 assess, supervise, or control the job performance of an employee;

25 (ii) Reassigning an employee to a different position
26 or job duties;

27 (iii) Placing an employee on paid or unpaid leave;

28 (iv) Suspending or terminating an employee;

29 (v) Requiring an employee to successfully complete a
30 substance abuse program before returning to work;

31 (vi) Refusing to hire an applicant; or

32 (vii) Any combination of the actions listed in
33 subdivisions (f)(3)(C)(i) - (f)(3)(C)(vi) of this section.

34 (D)(i) Damages established for an employment
35 discrimination claim based on an applicant's or employee's past or present
36 status as a qualifying patient or designated caregiver in violation of this

1 amendment shall be limited to the damages available for an employment
2 discrimination claim under § 16-123-107(c) of the Arkansas Civil Rights Act
3 of 1993, § 16-123-101 et seq., including the statutory limits provided under
4 § 16-123-107(c)(2)(A)(i)-(v).

5 (ii) Liability for back pay shall not accrue from a
6 date more than two (2) years prior to the filing of an action.

7 (iii) Damages under this subdivision (f)(3) shall
8 not duplicate or increase an award for damages over the statutory limit
9 allowed by state law or federal law existing on January 1, 2017, whichever is
10 lower.

11 (E) An action based on employment discrimination in
12 violation of this subdivision (f)(3) shall be brought within one (1) year of
13 the occurrence of the alleged discrimination.

14 (F) An individual employee, agent of the employer, or
15 employee of the agent of the employer is not liable for any violation of this
16 subdivision (f)(3) that the employer is found to have committed.

17 (G) This amendment does not waive the sovereign immunity
18 of the State of Arkansas.

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20 /s/Wing

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23 **APPROVED: 03/23/2017**
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