

Stricken language would be deleted from and underlined language would be added to present law.

State of Arkansas      *As Engrossed: H2/16/17 H2/28/17 H3/2/17*  
91st General Assembly      **A Bill**  
Regular Session, 2017

HOUSE BILL 1460

By: Representatives Wing, House

By: Senators Irvin, Standridge

### **For An Act To Be Entitled**

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

### **Subtitle**

TO AMEND THE ARKANSAS MEDICAL MARIJUANA  
AMENDMENT OF 2016 REGARDING EMPLOYEE  
PROTECTIONS AND EMPLOYEE SAFETY.

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

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

(19)(A) "Written certification" means a document signed by a physician stating that in the physician's professional opinion, after having completed an assessment of the qualifying patient's medical history and current medical condition made in the course of a physician-patient relationship, the qualifying patient has a qualifying medical condition.

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

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



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

the employee or other persons;

(iv) Lawful video surveillance;

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

(vi) A positive test result for marijuana;

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

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

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

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

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

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

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

(B) "Safety sensitive position" also means any position designated in writing by an 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, including without limitation a position:

(i) That requires any of the following activities:

(a) Carrying a firearm;

(b) Performing life-threatening procedures;

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

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

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

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

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

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

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

(iii) Disregard for safety;

(iv) Involvement in an accident that results in:

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

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

(c) An injury; or

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

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

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

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

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

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

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

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

(iii) Acting 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.

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

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

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

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

(iv) Suspending or terminating an employee;

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

(vi) Refusing to hire an applicant; or

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

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

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

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

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

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

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

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

/s/Wing