

## Marijuana Legalization Push May Impact PA Utilities' Zero Tolerance Policies

Pennsylvania Governor Tom Wolf, in his 2021 budget address on February 3, 2021, again pressed the Pennsylvania Legislature to legalize adult-use recreational marijuana. His recommendation stems from a report by Lieutenant Governor John Fetterman, now a candidate for the U.S. Senate, that concluded legalization is supported by a majority of Pennsylvanians and would help mitigate the commonwealth's fiscal woes. For Pennsylvania's regulated public utilities, the administration's proposal creates uncertainty regarding whether they will be permitted to continue their zero tolerance drug use policies for employees involved in the operation of critical infrastructure.

Public utilities have a statutory obligation to provide safe, adequate, and reliable service on behalf of their patrons, employees, and the public.<sup>1</sup> As demonstrated by the February 5, 2021, cyberattack on the water treatment plant in Oldsmar, Fla., there is no room for error when it comes to protecting essential utility services. But for the quick response of the on-duty treatment plant operator, a hacker would have been able to contaminate the drinking water supply of approximately 15,000 people by remotely increasing sodium hydroxide (lye), a caustic chemical used in water treatment, to dangerous levels. The need for quick response by utility workers was also recently highlighted by the emergency situation in Texas caused by electricity and water outages during the week of February 15, 2021, due to extreme cold weather.

Similar positions of public trust are found throughout utility operations. Electric linemen must exercise extreme caution when working on high voltage lines; a wastewater treatment plant operator prevents the release of untreated sewage into streams; a natural gas pipeline repairman has little time to respond to a leak before an explosion occurs. For these reasons, public utilities have maintained zero tolerance drug use policies for their employees.

According to a report by the National Safety Council, a national nonprofit association dedicated to workplace safety: "THC [tetrahydrocannabinol] in marijuana affects depth perception, reaction time, coordination and other motor skills, and it creates sensory distortion."<sup>2</sup> The report cites a study by the National Institute of Drug Abuse which found that employees who tested positive for marijuana had 55 percent more industrial accidents, 85 percent more injuries and 75 percent greater absenteeism compared to those who tested negative.<sup>3</sup> For obvious reasons, these realities are of serious concern to public utility management as elected officials continue to advocate for marijuana legalization.

The Wolf/Fetterman administration has yet to reveal the details of its legalization proposal; however, several bills have been previously floated that could have resulted in employment law challenges to zero tolerance policies.<sup>4</sup> By way of example, House Bill 2050 (Printer's No. 3417) of the 2019-2020 session would have amended Pennsylvania's existing Medical Marijuana Act to allow for adult use of recreational marijuana.<sup>5</sup> With limited exceptions (such as restrictions under federal law and collective bargaining agreements), it would have prohibited an employer from terminating or taking disciplinary action against an employee if a drug test revealed a non-intoxicating level of marijuana in the employee's system. An employer would have also been prohibited from discriminating against a job applicant on the basis of a test revealing a non-intoxicating level.<sup>6</sup>

A significant problem with the issue of a "non-intoxicating" test level is that, unlike alcohol, there is no universal agreement on what is an intoxicating level of marijuana.<sup>7</sup> Despite passing recreational use of marijuana in Canada, it has yet to establish an impairment cut-off testing level. While the General Assembly can define it for Pennsylvanians,<sup>8</sup> there still could be a legal challenge to such



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definition in an actual case, particularly if there is conflicting language in the bill creating ambiguity. Must the test reflect an intoxicating level or actual intoxication? Additionally, any definition of intoxicating level would depend on a blood test — not a urine test to determine the level of active THC in a person’s system. A urine test only examines for the presence of metabolized THC that does not provide any reliable indication of intoxication. The increased cost of blood tests over urine tests has yet to be considered. Moreover, given that blood testing is invasive, there will likely be greater objection by unions and employees to the test.

The average drug test ranges from \$30-\$60 for urine tests to over \$200 for blood and hair tests. The cost of a drug test depends on the test type, number of panels, purpose of testing, the number of tests needed and who is mandating the test. ... Blood testing is considered the most reliable form of drug testing, but it is also considered the most expensive — and intrusive. The reliability comes with a higher price tag. For example, one national direct-to-consumer lab prices a 10 panel blood test at \$279, with a turnaround time of 5 to 8 days. As with other mechanisms, the cost of screening depends on the substances you are testing for — the panel. Other labs range between \$85 for a single substance (such as THC or cocaine) and over \$200 for an 8 to 10 panel test.

For regulated public utilities, blood testing (which likely will have to occur on a frequent basis to determine whether an employee is intoxicated on any particular day) is going to lead to increased drug testing costs and litigation costs associated with employment disputes.<sup>10</sup> The utilities are entitled by law to recover such expenses through increases to consumer rates.<sup>11</sup>

If recreational use is legalized, public utilities’ zero tolerance drug use policies and the use of a simple (cheaper) urine test may be in jeopardy unless the legislature affirmatively exempts the utilities from anti-retribution and anti-discrimination provisions intended to protect employment opportunities for recreational marijuana users. Alternatively, the legislature could mandate the Pennsylvania Public Utility Commission (PA PUC) to adopt regulations specifically identifying classes of employees who may properly be subject to zero tolerance policies for public safety reasons. In this regard, it should be noted that the PA PUC currently lacks any meaningful regulations or policy statements that explicitly acknowledge a utility’s right to prevent users of mind-altering drugs from holding positions of public safety responsibility.<sup>12</sup> Historically, utility management has been afforded broad discretion on employment matters and such regulations have never been necessary ... but utilities may soon need regulatory support for continuation of their zero tolerance policies.

Safe, adequate, and reliable utility service is an issue of the utmost importance to the public — as seen in the Oldsmar and Texas occurrences. As Pennsylvania engages in a debate on the legalization of the recreational use of marijuana, the continued permissibility of zero tolerance drug use policies of public utilities will need to be affirmatively addressed in some manner.

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**Cozen O’Connor’s Utility & Energy Group and Labor & Employment Department are available to assist public utility companies as they navigate these and other public policy changes.**

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<sup>1</sup> Pennsylvania Public Utility Code, 66 Pa. C.S. § 1501 (“Character of service and facilities”).

<sup>2</sup> <https://www.nsc.org/membership/training-tools/best-practices/marijuana-at-work>

<sup>3</sup> <https://www.drugabuse.gov/publications/research-reports/marijuana/how-does-marijuana-use-affect-school-work-social-life>

<sup>4</sup> State Senators Daniel Laughlin (Republican-Erie) and Sharif Street (Democrat-Philadelphia) announced on February 24, 2021, that they would be sponsoring a bill to legalize recreational marijuana use. It would be first time that a Republican legislator has sponsored a recreational legalization measure.

<sup>5</sup> <https://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2019&sInd=0&body=s&type=b&bn=350>

<sup>6</sup> Pennsylvania law currently prohibits a medical marijuana patient with a blood content of more than 10 nanograms of active tetrahydrocannabinol per milliliter of blood in serum from being in physical control of high voltage electricity or any other public utility. See Pennsylvania Medical Marijuana Act, Act 16 of 2016, § 510(1) (ii). The provisions of HB 2050, however, make no mention of similar limitations on persons who engage in the recreational use of marijuana.

<sup>7</sup> Tamara Lytle, *Marijuana and the Workplace: It's Complicated*, HR Magazine | Fall 2019, SHRM (Aug. 28, 2019), <https://www.shrm.org/hr-today/news/hr-magazine/fall2019/pages/marijuana-and-the-workplace-its-complicated.aspx>. (“Testing for marijuana is different from testing for alcohol, creating complications for HR. There’s no consensus over just how much THC — the drug’s psychoactive component — means a person is impaired.”).

<sup>8</sup> See *Drugged Driving | Marijuana-Impaired Driving*, National Conference of State Legislatures (Nov. 11, 2020), <https://www.ncsl.org/research/transportation/drugged-driving-overview.aspx>. For example, though most states take a “zero-tolerance” approach, others have enacted *per se* limits for THC. *Id.* In *per se* states, once a person has reached or surpassed the legal limit — which can range from 1 to 5 nanograms — that person is considered impaired by law. *Id.* Furthermore, at least one state has enacted a “reasonable inference” approach, which holds that where THC is identified in a driver’s blood in excess of a defined quantity, it is permissible to assume the driver was under the influence. *Id.* Even in Canada, which has a longer history of legalized recreational use, there is no defined limit.

<sup>9</sup> Northpoint Staff, *Drug Testing Explained: Cost, Devices, Privacy and Accuracy*, Northpoint Recovery (May 13, 2019).

<sup>10</sup> Public utilities may also be exposed to increased civil liability risk due to harm caused by intoxicated employees. The utilities are permitted to include limitation of liability provisions in their tariffs, see 52 Pa. Code § 69.87, but such limitations may need to be expanded to protect utility shareholders and ratepayers from increased risk resulting from marijuana legalization.

<sup>11</sup> By way of example, a public utility with 1000 key operational employees that tests such employees on a quarterly basis would incur an additional annual expense of approximately \$1,160,000 (4000 blood tests at \$279 per test) — which will eventually be borne by its ratepayers. This amount does not take into consideration the additional personnel expenses associated with administering the drug testing program and potential civil liabilities associated with not administering the program properly.

<sup>12</sup> An exception is the PA PUC’s regulation prohibiting use of a controlled substance by drivers of common carriers of passengers. See 52 Pa. Code § 29.507. The PA PUC’s Pipeline Safety Division is also tasked with enforcing the U.S. Pipeline and Hazardous Material Safety Administration (PHMSA) regulations on drug and alcohol testing found at 49 C.F.R. § 199.1 *et seq.*