

MEDICAL MARIJUANA

Low Impact or *HIGH* Cost?

Efforts to legalize the use of marijuana as a medical alternative have gained momentum over the past several years. Purported to alleviate pain and stimulate appetite in the ailing, medical marijuana has also raised a hailstorm of medical, legal and regulatory questions that have left employers in an operational no-mans' land, especially with regard to workers' compensation. The morass, however, does not relieve employers of the possibility of having to deal with a worker's claim for medical marijuana.

How should employers handle these claims? Judiciously, of course. But what will the process entail? York Risk Services, in partnership with its pharmacy benefit manager (PBM) Progressive Medical and labor and employment law attorneys Vance Knapp and Larry Cianciosi, seeks to separate fact from fiction in an effort to provide insight into ways for traveling across this unknown terrain.

THE STATE OF AFFAIRS

In 1996, California voters passed the first measure legalizing the use of marijuana as a medical option. Prompted by a series of approvals at the county level, the state held a ballot that was passed by some 56% of California voters.⁽¹⁾

In a sense, this voter referendum highlights the inconsistency that surrounds the legalization of medical marijuana as both legislators or voters without medical expertise weigh in with a 'nay' or 'yay' on whether and under what conditions a substance - where research is limited and results are conflicting - may be used for medical purposes.

The lack of uniform medical evidence has not prevented the legalization of medical marijuana in a growing number of states. Early adopters include Oregon and Washington in 1998, Maine in 1999, and Colorado, Hawaii and Nevada in 2000. A dribble of enactments occurred over the next eight years. But activity picked up in 2010 when Arizona, the District of Columbia and New Jersey passed measures, legalizing the use of medical marijuana.

Since then, five more states have taken similar steps to bring marijuana into the medical fold, bringing the total, as of this writing, to 20 states and the District of Columbia.

This year, some form of legalization is being considered by at least 13 states, including Florida, New York, Ohio and Pennsylvania.⁽²⁾ Even in traditionally conservative states, the possibility of legalization is not completely off the radar screen if use were to be tightly regulated.⁽³⁾



Medical Marijuana: Low Impact or High Cost?

State	Year	Passed	How passed (yes vote)	Possession Limit
Alaska	1998	Ballot Measure 8	(58%)	1 oz usable; 6 plants (3 mature, 3 immature)
Arizona	2010	Proposition 203	(50.13%)	2.5 oz usable; 0-12 plants
California	1996	Proposition 215 (56%)		8 oz usable; 6 mature or 12 immature plants
Colorado	2000	Ballot Amendment 20	(54%)	2 oz usable; 6 plants (3 mature, 3 immature)
Connecticut	2012	House Bill 5389	(96-51 House, 21-13 Senate)	One-month supply (exact amount to be determined)
DC	2010	Amendment Act B18-622	(13-0 vote)	2 oz dried; limits on other forms to be determined
Delaware	2011	Senate Bill 17	(27-14 House, 17-4 Senate)	6 oz usable
Hawaii	2000	Senate Bill 862	(32-18 House; 13-12 Senate)	3 oz usable; 7 plants (3 mature, 4 immature)
Illinois	2013	House Bill 1	(61-57 House; 35-21 Senate)	2.5 ounces of usable cannabis during a period of 14 days
Maine	1999	Ballot Question 2	(61%)	2.5 oz usable; 6 plants
Massachusetts	2012	Ballot Question 3	(63%)	Sixty day supply for personal medical use
Michigan	2008	Proposal 1	(63%)	2.5 oz usable; 12 plants
Montana	2004	Initiative 148	(62%)	1 oz usable; 4 plants (mature); 12 seedlings
Nevada	2000	Ballot Question 9	(65%)	1 oz usable; 7 plants (3 mature, 4 immature)
New Hampshire	2013	House Bill 573	(284-66 House; 18-6 Senate)	Two ounces of usable cannabis during a 10-day period
New Jersey	2010	Senate Bill 119	(48-14 House; 25-13 Senate)	2 oz usable
New Mexico	2007	Senate Bill 523	(36-31 House; 32-3 Senate)	6 oz usable; 16 plants (4 mature, 12 immature)
Oregon	1998	Ballot Measure 67	(55%)	24 oz usable; 24 plants (6 mature, 18 immature)
Rhode Island	2006	Senate Bill 0710	(52-10 House; 33-1 Senate)	2.5 oz usable; 12 plants
Vermont	2004	Senate Bill 76	(22-7) HB 645 (82-59)	2 oz usable; 9 plants (2 mature, 7 immature)
Washington	1998	Initiative 692	(59%)	24 oz usable; 15 plants

Source: <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>

Of the 20 states that have passed laws to legalize medical marijuana, many, though far from all, cite a 1999 Institute of Medicine (IOM) report, Marijuana and Medicine: Assessing the Science Base, as medical justification for use of the substance in relief of pain or nausea, multiple sclerosis, epilepsy and wasting syndrome associated with AIDS. But the similarity in state laws ends there.

State laws differ greatly on the severity of the medical condition for which marijuana may be used, patient registration requirements, practitioner requirements, limits of possession and dispensary requirements,⁽⁴⁾ but the source of greatest ambiguity for employers is perhaps the wide variety of medical indications for which laws have been enacted. At the top of the list is pain, which may ensnarl employers in a variety of claims related to workplace injuries. But marijuana has also been attributed with providing relief for arthritis, asthma, glaucoma and migraine headaches among other conditions.⁽⁵⁾

With the increase in use of medical marijuana, there are now hundreds of varieties of the plant that have cropped up for use with specific medical conditions.⁽⁶⁾

But even without so many variations on a theme, the “plants contain a variable mixture of biologically active compounds and cannot be expected to provide a precisely defined drug effect,” when inhaled, according to the 1999 IOM report. Soil, climate, water, harvesting and storage can each affect the efficiency and potency of inhaled marijuana.⁽⁷⁾

As alternatives, two drugs, Marinol and Cesamet, a synthetic form of the active ingredient, tetrahydrocannabinol (THC) that is believed to produce therapeutic benefits, have been developed by drug makers and approved for use by the Federal Drug Administration (FDA) to treat vomiting associated with chemotherapy and loss of appetite for AIDS patients.

Largely, these medications have been accepted by the medical community. These pharmacologically-developed options, however, have not completely quelled the call for medical marijuana because they have not produced the same level of benefit as the inhaled form, according to some patients. A handful of other pharmacologically-developed options are also in clinical trials.⁽⁸⁾

THE FEDS

The controversy over the medical benefits is further complicated by the federal government's classification of marijuana as a Schedule I drug under the Controlled Substance Act (CSA). As such, marijuana is defined as a drug with a high potential for abuse, no currently accepted medical use in treatment in the United States and a lack of accepted safety for its use even when under medical supervision.

Based on this definition, physicians would be in violation of federal law if they were to prescribe marijuana to patients. Possessing any amount of marijuana, even for medical reasons, is prohibited under federal law.

The direct conflict between state and federal laws sets the stage for a battle over preemption that may ultimately be decided in the courts, but it is unlikely to shield employers from the inexorable creep of medical marijuana claims into the system – claims that could take an inordinate time to manage compared with their actual number.



Moreover, the FDA has flatly refused to endorse its use, stating that “no sound scientific studies support medical use of marijuana for treatment in the United States, and no animal or human data support the safety or efficacy of marijuana for general medical use.”⁽⁹⁾

The American Medical Association (AMA), American Glaucoma Society, National Multiple Sclerosis Society, Official Disability Guidelines (ODG), American College of Occupational and Environmental Medicine (ACOEM) and state medical treatment guidelines have failed to support the use of marijuana as a therapeutic option.

A FIRM STANCE ON WORKERS' COMPENSATION

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Any request for a payment of a prescription would therefore be rejected as part of a utilization review process. This position is in accordance with a number of states, including Colorado, Michigan, Montana, Oregon and Vermont that have explicitly stated that the cost of medical marijuana is not covered under their workers' compensation statutes. This is also consistent with the position taken by York and Progressive Medical, and the available medical/scientific evidence.

Appellate courts and appellate workers' compensation boards have also consistently ruled against workers who have petitioned for reimbursement for the cost of a prescription for medical marijuana. If ruling were to favor workers' requests, lower courts and workers' comp boards would be required to follow suit and grant payment.⁽¹⁰⁾

It is also worth noting that the conditions for which medical marijuana is typically prescribed rarely if ever arise out of employment, and that state laws governing the dispensing of medical marijuana typically require both the prescribing physician and the clinic providing the medical marijuana to be specially certified.

At this time, it is unlikely that physicians who are certified to prescribe medical marijuana would be included in workers' compensation managed care preferred provider networks.

THE REALTIES OF THE SITUATION

Because marijuana is a Schedule I substance, it does not have a National Drug Code (NCD) or a procedure code, which would put any claims outside the standard processing system of PBMs. Handling any of these types of claims would require manual workarounds and add layers of review and approval.

Likewise, pharmacies in PBM networks have no way to bill or dispense marijuana, and it is unlikely that the select group of physicians and licensed clinics authorized to prescribe marijuana would be part of a provider network used in workers' compensation.

THINGS TO THINK ABOUT

The position of York – and other TPAs and pharmacy benefit managers who have commented on this issue – appears to draw a clean line: medical marijuana is unlikely to be approved for use in workers' compensation claims – at least for the foreseeable future. But lines blur all the time and this is an evolving issue. Changes to federal laws or to state workers' compensation laws, or new research findings on the use and efficacy of medical marijuana can reshape both the debate and companies' positions.

Given that York feels that a more useful approach is to recognize legalized use of medical marijuana in some states – and even recreational use of marijuana in others – raises a number of questions about what workplace safety, drug testing, and other policies employers may want to adopt or modify and the downstream consequences of some of those policies.

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The intent here is not to offer guidance as to what an employer's decisions or policies should be, but rather to identify issues to consider when making decision or setting policies. Given the complicated and evolving nature of this issue, companies are advised to seek the advice of their employment and/or labor relations counsel and to craft comprehensive, clear policies and communicate them to employees at least annually.

INSTRUCTIONS TO YOUR TPA

As noted above, at this time it is unlikely that claims will be submitted through the regular pharmacy benefit management process. That said, claimants may pay for medical marijuana out of pocket and submit a claim for reimbursement. Employers should consult with their carriers and determine what coverage is provided under any insurance policies they have in place and decide what they will choose to cover if they self-insure. The next step is to clearly communicate coverage determinations or decisions to their TPA. The adjuster should, of course, always verify coverage from a carrier. But medical marijuana is enough of a hot button issue that it is worth setting out the company's position clearly.

Instructions can also include a directive that there must be discussion between the adjuster and the employer when there is a request for reimbursement for medical marijuana or when there is a physician's recommendation for medical marijuana. Does a similar policy exist with regard to opioid medications? The goal of such a discussion would be to ensure a safe return to work for employees whose treatment plan includes medications that can impair their judgment or performance.

ZERO TOLERANCE

Many employers adopt "zero tolerance" policies that forbid employees to use illegal substances on the job and/or to report for work with those substances or their metabolites in their system. The goals of such a policy are workplace safety and compliance with Federal law. To date, state courts – even in states that have legalized medical and/or recreational marijuana – have been siding with employers, giving them the right to terminate employment if an employee violates the company's drug policy. It is worth noting, however, that if your state has not established this precedent, it can cost, on average, \$300,000 to defend a wrongful termination lawsuit.

Some things to consider when evaluating your company's zero tolerance policy:

- Does your company have a policy that addresses use of illegal drugs in the workplace?
- Does that policy specifically state your position on the use of medical and/or recreational marijuana?
- If you choose to carve out an exception for the use of medical marijuana, do you still have a zero tolerance policy that will hold up if it is challenged in court?
- Have you defined:
 - What constitutes accommodation of marijuana use in the workplace?
 - What constitutes "use" (e.g., any positive marijuana drug screen test result)?

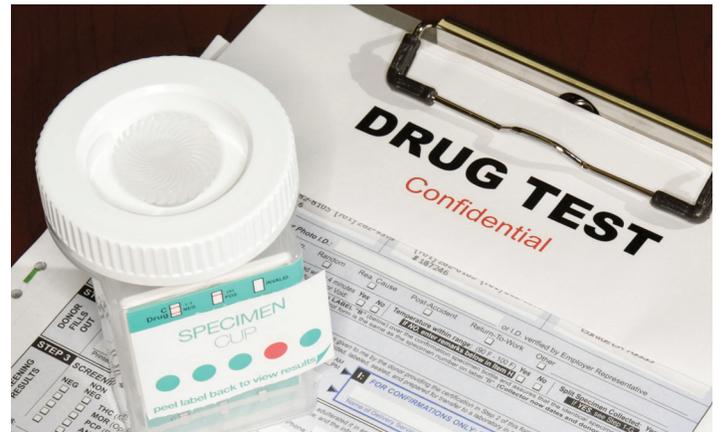
DRUG TESTING

Does your company have a drug testing policy? Will the policy as it is currently written, clearly state the consequences of test results that are positive for the presence or use of illegal drugs? Is medical marijuana specifically included in that policy?

- Under what conditions does your company's drug testing policy permit testing:
 - Post-job offer testing for safety sensitive positions
 - Random testing
 - Post-accident testing
 - Reasonable suspicion testing when there is reason to believe an employee may be using illegal substances
- You should consult with your labor and employment counsel to ensure that your drug testing is in compliance with all federal, state, and local drug testing laws and regulations

One interesting issue that law enforcement officials are encountering as they attempt to identify drivers who are operating a vehicle under the influence of marijuana is that the "field sobriety" or roadside tests that are often used to detect whether someone is under the influence of alcohol don't work as well for marijuana.

The tests – balancing on one foot for 30 seconds, walking heel to toe for nine steps or following a pen with your eyes while the officer moves it back and forth – can catch up to 88 percent of drivers who are under the influence of alcohol. But only 30 percent of drivers under the influence of marijuana failed the test.⁽¹¹⁾



That means that it can be hard for a supervisor to detect through normal observation when an employee is impaired due to marijuana. While a variety of new "breathalyzer" tests are coming to market to assist the police, for employers, deciding what constitutes "reasonable suspicion" in a workplace setting may be difficult. If an employee is acting erratically, or there are independent observations that the employee consumed marijuana, or actually smells like marijuana, an employer would have "reasonable suspicion" to drug test the employee. Again, this is something to discuss with legal counsel.

WORKPLACE SAFETY

If your company has adopted a workplace safety policy that forbids employees to report for work while impaired, consider these questions:

- Use of prescription opioids is legal but opioids can produce more impairment than marijuana. Does your policy address use of opioids or any other medication that may affect the employee's ability to do his/her job?
- What constitutes "impairment"?
- Who determines that (e.g., physician, supervisor, employee)? Policies that define "impairment" should consider opioids and other similar medications as well as marijuana.
- Can you / have you defined all your job descriptions to classify all positions as "safety sensitive"?
- Can you create a separate policy for employees in safety-sensitive jobs (e.g., operating heavy machinery, driving a vehicle)?

Under the Americans with Disabilities Act ("ADA"), employers cannot ask employees to provide a list of medications that they are using, because that would be an impermissible medical inquiry.

Employers can ask their employees to indicate if they are currently using any substances that may impair their ability to safely perform their job duties and responsibilities.

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Employers should also familiarize themselves with their state's law(s) regarding willful misconduct. Many states have laws that do not hold the employer liable for workers' compensation benefits or that reduce the workers' compensation benefits, if an employee is engaged in willful misconduct at time of injury and that misconduct caused the injury. However, it can be difficult to show the connection between the misconduct - in this case, use of a Schedule I drug such as marijuana - and the occurrence of the injury.

Detectable levels of marijuana can remain in an individual's system for several weeks; an employee could claim after receiving a positive test result for THC that he/she has a "high" tolerance for marijuana, and that they were not impaired when they reported to work. Thus, employers should review their substance abuse policies to ensure that they address recreational and medical marijuana use.

TERMINATION POLICIES

Terminating employment immediately following an injury that occurred while the employee was in violation of a zero tolerance policy can allow the employer to deny wage loss benefits without having to show that misconduct caused the injury. The termination breaches the connection between wage loss and indemnification. In some jurisdictions, the terminated employee may still be eligible for workers' compensation benefits. If you have a disciplinary policy that calls for progressive or step discipline, it may be difficult to fire someone immediately for violating a zero tolerance or workplace safety policy.

Employers should consult with their legal counsel to ensure that their disciplinary policies allow them the option to discipline employees for violating their substance abuse policies, up to and including immediate termination of employment.

RETURN TO WORK

Employers create return to work programs to enable employees to safely return to the workplace to perform a light duty, modified duty or alternate duty job before the employee is able to return to their full pre-injury duties. The benefits of a return to work program range from improved employee morale, shortened claim duration and reduced indemnity costs. But if the employee's recovery includes pain management, how are the effects of pain medication taken into account in designing the light or modified duty assignments?

How does your return to work policy concerning pain management medication fit with your substance abuse policy?

UNPAID LEAVE/SHORT TERM DISABILITY/FAMILY MEDICAL LEAVE ACT

Employers should also consider the impact of their drug policies on employees who are using medical marijuana as part of a healthcare claim. In most states, once an employee is cleared to return to work by a treating physician, the lost time portion of their medical claim ends as do any indemnity benefits they may be receiving. If the employer has a policy stating that an individual cannot be under the influence of marijuana (medical or not) while at work, the employer does not have to allow the employee to return to work.

But what if the employer wants them to return to work? Is there an easy process whereby the employee can share relevant company policies with treating physicians so the physician may, if he or she chooses, prescribe alternative medications that would fit within the employment policies?

Employees who are using medical marijuana may opt not to return to the workplace - e.g., to take leave without pay - until their treatment is completed so as to avoid violating their employer's drug policy. Do the company's policies permit that? While employees are not entitled to short term disability benefits once they have been cleared to return to work, employees in some states may be entitled to FMLA protection of their employment.

CONCLUSION

The issue of medical and recreational marijuana and the impact of new laws on workplace policies, safety and claims is an evolving one. In the past, the Schedule I classification of marijuana has discouraged any significant research into its medical benefits. That may change. There may come a time when state workers' compensation laws mandate the acceptance of medical marijuana in treating some occupational injuries or illnesses.

There is, however, an opportunity for employers, in conjunction with their employment law and/or labor law attorneys, to examine and, if they wish, revise corporate policies. Policies that are clear, consistent with all applicable federal, state and local laws and regulations and that support the position the employer wants to take on the issues of illegal drugs in the work place, legal medications that may impair workers' judgment or performance can help the employer, their TPA and their attorney address issues surrounding legalized medical and recreational marijuana.

Citations

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