sedgwick

Workers' Compensation Practice Group
SPOTLIGHT on Workers' Comp

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Twenty states and the District of Columbia have enacted laws legalizing medical marijuana.

How will medical marijuana laws impact workers' compensation claims handling?

Since 1996 when California voters passed Proposition 215, 19 more states and the District of Columbia have enacted laws legalizing the use of medical marijuana. Click here for more information regarding those state medical marijuana laws. Seven other states are in various stages of pending legislation to legalize the use of medical marijuana.

Colorado, Washington and the city of Portland, Maine, passed ballot initiatives during the 2012 election that legalized, under local law, the possession of small amounts of marijuana and provided for the regulation of marijuana production, processing and sale.

Conflict between state and federal law

On the federal level, marijuana, even for medicinal use, remains classified as a Schedule I substance under the Controlled Substances Act (CSA) passed in 1970. Schedule I substances are illegal to distribute, prescribe, purchase or use outside of medical research because they have "a high potential for abuse" and "no currently accepted medical use in treatment in the United States."

A change in the classification of marijuana as a Schedule I substance seems unlikely in the near future. In a report, The DEA Position on Marijuana, issued April 2013, the Drug Enforcement Agency (DEA) maintained that the clear weight of the currently available evidence continues to support classification of marijuana under Schedule I of the CSA. Additionally, the United States is a signatory to the United Nations 1961 Single Convention on Narcotic Drugs, an amended 1972 version of that convention, and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which requires punishment of citizens found to be in violation.

In 2005 the U.S. Supreme Court ruled in a 6–3 vote in Raich v. Gonzales, 03-1454 that the federal government may enforce the Controlled Substances Act's prohibition on medical marijuana against those who use the drug under state laws. This remains true; however, on October 19, 2009 U.S. Deputy Attorney General David W. Ogden issued a U.S. Department of Justice memorandum stating that "federal resources should not be focused on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."

On August 29, 2013, the U.S. Department of Justice announced in an update to its federal marijuana enforcement policy that marijuana remains an illegal drug under the Controlled Substances Act and that federal prosecutors will continue to aggressively enforce this statute. However, the department informed the governors of Colorado and Washington that it was deferring its right to challenge their legalization laws at this time.

This contradiction between federal and state laws is a source of confusion regarding the rights and responsibilities of the employer, injured employee, and, in the case of an injury on the job, benefits due under workers' compensation.

Impact on employers and employees

In addition to CSA, there are other federal laws and regulations that may affect an employer's position on the use of marijuana by employees. For example:

- **OSHA*:*** Under OSHA's General Duty Clause, Section 5(a) (1), employers must maintain a workplace free from recognized hazards that are causing or are likely to cause death or serious physical harm. OSHA has indicated recognition that impairment by drug or alcohol can constitute a potentially avoidable workplace hazard for safety-sensitive jobs.
- **The Drug Free Workplace Act of 1988**: Requires *some* federal contractors and *all* federal grantees to agree that they will provide drug-free workplaces as a precondition of receiving a contract or grant from a federal agency.
- **The Omnibus Transportation Employee Testing Act of 1991**: Requires drug and alcohol testing of safety-sensitive transportation employees in aviation, trucking, railroads, mass transit, pipelines and other transportation industries. As recently as December 3, 2012, the Department of Transportation Office of Drug and Alcohol compliance issued a notice advising that it "remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation's drug testing regulations to use marijuana."

While medical marijuana laws vary from state to state and many have not yet been tested in the court, most exclude use during working hours or coming to work impaired. See the excerpts below:

- ***Colorado***: *"Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place."*
- **Montana**: *"Nothing ... may be construed to require an employer to accommodate the medical use of marijuana in any workplace."*
- **New Jersey**: Employers *are not required "to accommodate the medical use of marijuana in any workplace."*
- **Rhode Island**: "*...employers are not required to make accommodations for employees who use medical marijuana*."

Court rulings to date on workplace medical marijuana issues have been in the employer's favor.

In the case *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries of the State of Oregon,* 348 Ore. 159, 230 P.3d 518 (2010), the Oregon Supreme Court addressed whether an employer should be held liable for an unlawful employment practice if it chooses not to hire a worker who discloses that he would not pass a drug test due to his medical marijuana use. On April 15, 2010, the high court overturned lower court decisions in favor of the worker and ruled that the employer did not have to engage in a "meaningful interactive process" with the drill-press operator as required by Oregon statute 659A.112 (2) (e) and (f) because the state statute requiring the interactive process and a "reasonable accommodation" did not apply to people who "are currently engaged in the illegal use of drugs."

Courts in other jurisdictions have ruled similarly. For example, in 2008, the California Supreme Court ruled in *Gary Ross v. Raging Wire Telecommunications, Inc.,* No. S138130 that employers can fire workers who use medical marijuana under the state's Compassionate Use Act – even if they are off duty and even if job performance is not affected – because it's illegal under federal law. The high court said that the Compassionate Use Act only protected users from criminal prosecution.

Marijuana as medicine

Federal law generally requires that prescription drugs in the U.S. be shown to be both safe and effective prior to marketing, and the Federal Drug Administration (FDA) is the federal agency charged with this responsibility. The FDA's evidence-based drug approval process requires demonstration that drug products have reliably expected identity, strength, quality and purity. Furthermore, FDA's review of drug labeling insures that health care professionals and patients have the information necessary to understand a drug product's risks and its safe and effective use.

In an "Inter-Agency Advisory Regarding Claims That Smoked Marijuana Is a Medicine," the FDA stated that smoked marijuana is not approved for any condition or disease indication and pointed out that there are alternative FDA-approved medications in existence for treatment of many of the proposed uses of smoked marijuana.

In November 2009, the American Medical Association (AMA) issued a report calling for the review of marijuana's status as a federal Schedule I controlled substance, with the goal of facilitating the conduct of clinical research and development of cannabinoid-based medicines and alternate delivery methods. It is important to note that the AMA indicated that their statement "should not be viewed as an endorsement of state-based medical cannabis programs, the legalization of marijuana, or that scientific evidence on the therapeutic use of cannabis meets the current standards for a prescription drug product."

The only two drugs currently approved by the FDA that contain the synthetic form of tetrahydrocannabinol (THC) are Marinol® and Cesamet®. These drugs are available through prescription and come in pill form for use in relieving nausea and vomiting associated with chemotherapy for cancer patients and to assist with loss of appetite with AIDS patients. The drugs may also be submitted under the generic names Dronabinol and Nabilone. As is the case with other drugs, physicians sometimes prescribe them for other off-label purposes such as pain relief.

In *Creole Steele vs. Ricky Stewart,* No. WCA 11-1285 (La. Ct. App. 03/07/12), the Louisiana Court of Appeal 3rd Circuit affirmed a ruling by a workers' compensation judge that the prescription of Marinol was a necessary medical expense pursuant to Louisiana Revised Statute 23:1203. The court found that the judge erred in refusing to order reimbursement to Mr. Stewart for the amounts he had already spent on the medication and amended the judge's order to include reimbursement for payment of his prescription expenses.

Impact on workers' compensation claim handling

While most state marijuana laws do not address workers' compensation, Colorado, Michigan, Montana, Oregon and Vermont indicate that coverage or reimbursement for the medical use of marijuana is not required for workers' compensation.

At this time there has not been a workers' compensation case related to the compensability of medical marijuana in treating a workplace injury. However, of the states that have approved medical marijuana, only New Jersey and Massachusetts do not list chronic or severe pain among approved conditions. The impact of medical marijuana on workers' compensation claims handling will likely increase as its use becomes more acceptable for pain management, and we must be watchful for requests to authorize or pay for this drug.

Sedgwick's current position is that benefits will not be paid for medical marijuana for the following reasons:

1. Marijuana is a Schedule I drug per the CSA and illegal to distribute, prescribe or purchase in the United States.
2. Marijuana is not FDA-approved to treat any medical conditions or diseases.
3. Several states, including Colorado, Michigan, Montana, Oregon and Vermont, contain provisions in their legislation indicating that workers' compensation is not required to cover the cost of medical marijuana.
4. Medical marijuana is not approved in the Official Disability Guidelines (ODG), American College of Occupational and Environmental Medicine (ACOEM) practice guidelines or any of the state medical treatment guidelines and would be denied in utilization review if recommended by a treating physician.
5. The status of marijuana as a Schedule I substance prohibits the assigning of a National Drug Code (NDC) or a procedure code to medical marijuana for billing purposes.

Additional recommendations include:

- Immediately review requests for marijuana or the pill forms of THC with your claims and medical management team as well as a local defense attorney, if assigned.
- Be aware of and reference the state laws and any case law in the jurisdiction of the claim.
- It is important to communicate with the client and obtain their buy-in of our position
- If the injured employee continues to work for the employer, determine if the employer has established a written policy regarding the use of medical marijuana.
- This is a rapidly evolving issue, so stay informed of changes in legislation and case law.