A REPORT TO THE INDUSTRY

Working Through the Haze: Implications of Legalized Marijuana for California Workers' Compensation System

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California employers have been dealing with the ramifications of legal medicinal marijuana for years. Now that voters have passed Proposition 64,[1] legalizing so-called "recreational" marijuana use, employers face a new reality of potentially outdated workplace policies, employee accommodation, and the applicability of drug-free workplace guidelines. Workers' compensation carriers and self-insured employers in particular must begin to consider the impact that Proposition 64 may have on claims processing.

America's Journey from Compassionate Use to Recreational Use

In 1996, California passed the Compassionate Use Act (Prop 215), becoming the first state in the nation to legalize medical marijuana.[2] Oakland was the first city in the country to license (and tax) a medical marijuana dispensary.[3] As of November 1, 2016, 25 states and the District of Columbia had legalized medical marijuana[4]; four states and the District of Columbia had legalized recreational use of marijuana.[5]

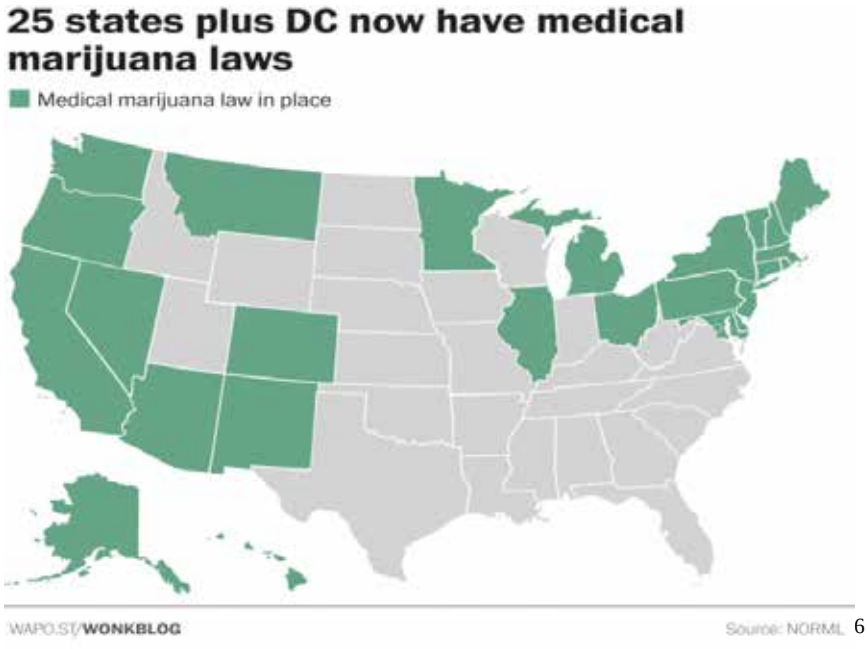
[1] The informal title of the initiative is "Adult Use of Marijuana Act (AUMA)." The initiative allows Californians to possess and use up to an ounce of marijuana, effective immediately; however, the state has until January 1, 2018, to develop a regulatory system for licensing growers, transporters, and sellers of marijuana for recreational use. So, like John Travolta explained in *Pulp Fiction*, "It's legal, but it ain't hundred percent legal." Californians can legally possess marijuana for personal use, but will not be able to legally purchase it until sometime in 2018.

[2] California Health and Safety Code §11362.5. The legislation allows qualified patients and their caregivers to possess up to 8 ounces of marijuana and/or six mature plants.

[3] Unlike many other municipalities, Oakland continues to expand the number and types of permits for operation of medical marijuana businesses. Oakland currently has eight licensed dispensaries operating within the city; for 2016, the city projected approximately 100 licensed businesses, including 30 cultivators, 12 delivery businesses, five distributors, five transporters, two testing facilities and 28 manufacturing businesses. "Oakland looks to bring pot industry out of the shadows, raise revenue," *San Francisco Chronicle*, May 2, 2016.

[4] Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio (eff. 09/01/2016), Oregon, Pennsylvania, Rhode Island, Vermont, and Washington, and the District of Columbia have legalized medical marijuana.

[5] Alaska, Colorado, Oregon, Washington, and the District of Columbia have statutes permitting recreational use of marijuana.



[6]

Legalization of recreational marijuana, as distinguished from medical marijuana, has been shown to affect individual use. In Colorado, where recreational marijuana was legalized in 2012, surveys by the federal government have found that the percent of residents using the drug increased more than 45% in two years.[7]

On November 8, 2016, voters in four states considered measures calling for the legalization of medical marijuana,[8] while several others had ballot initiatives calling for the legalization of recreational marijuana.[9] In California, the ballot initiative was titled "The Control, Regulate, and Tax Adult Use of Marijuana Initiative." Proposition 64 was designed to legalize marijuana and hemp under state law, and enact a 15% sales tax along with other regulations and restrictions. It was supported by Lieutenant Governor Gavin Newsom, Senator Bernie Sanders, the National Organization for the Reform of Marijuana Laws (NORML), the NAACP, and the California Medical Association, with major funding from Napster founder and former Facebook president Sean Parker. Opposition included the California Hospital Association, the California Teamsters, and a consortium of small growers.

[6] Source: "25 States Now Call Marijuana 'Medicine.' Why Doesn't the DEA?" *Washington Post*, June 9, 2016 (https://www.washingtonpost.com/news/wonk/wp/2016/06/09/25-states-now-call-marijuana-medicine-why-doesnt-the-dea/).

[7] "Cannabis Critics Fear Marketing to Masses," *San Francisco Chronicle*, October 18, 2016. The government study showed an increase in marijuana from 10.2% in 2012 to 14.9% in 2014.

[8] Arkansas, Florida, North Dakota, and Montana.

[9] In addition to California, similar measures were on the ballot in Arizona, Maine, Massachusetts, and Nevada.

What Does the Federal Government Have To Say About All This?

Federal law prohibits marijuana use as it has been designated by the Drug Enforcement Administration (DEA) as a Schedule I controlled substance with "no currently accepted medical use," a lack of accepted safety for use under medical supervision, and a high potential for abuse. As a Schedule I drug under the Controlled Substances Act, marijuana may not be prescribed, administered, or dispensed, and it is illegal to possess, use, purchase, sell, or cultivate.[10] Meanwhile, Schedule II drugs are legal, albeit highly regulated; these drugs have been determined to have some level of medicinal value but a high potential for abuse which could lead to severe psychological or physical dependence.[11]

In August 2016, the National Conference of State Legislatures adopted a resolution asking the federal government to remove marijuana from Schedule I. But the following day, the Drug Enforcement Agency announced that it would not remove marijuana from its Schedule I classification, reaffirming its determination that the drug's therapeutic value has not been scientifically proven.[12]

So on a federal level, cannabis remains illegal throughout the United States[13] and is not approved for prescription as medicine.[14] Federal law prohibits doctors from prescribing marijuana; thus, even in states where medical marijuana is legal, doctors can only write a "recommendation" for the remedy.

But the federal government has decided it has higher priorities than enforcement of its anti-marijuana stance. The US Department of Justice has actually formalized a "hands-off" policy, leaving enforcement of minor drug activity up to the states, while the federal government's priorities have been restricted to eight significant issues, including the operation of drug cartels, narcotics activity leading to violence, and preventing drugs from being provided to minors. "For states…that have enacted laws to authorize the production, distribution, and possession of marijuana, the Department expects these states to establish strict regulatory schemes that protect the [priority] interests identified by the Department," leaving the decision on whether to enforce

[10] Controlled Substances Act of 1970, 21 U.S.C. 801 *et seq.* Schedule I drugs are illegal in virtually all circumstances, and include substances such as heroin, LSD, peyote, and ecstasy.

[11] Controlled Substances Act of 1970, 21 U.S.C. 801 *et seq*. Schedule II classification includes most narcotic painkillers, opioid medications such as oxycodone, and even methamphetamine.

[12] "US Affirms Its Prohibition on Medical Marijuana," *The Washington Post*, August 11, 2016.

[13] 21 U.S.C. § 801 *et seq.*

[14] Federal law does provide some prescription drug medicinal use. For example, Mariol (synthetic THC) is a Schedule III substance that is FDA approved for appetite stimulation and nausea in patients with cancer, AIDS, and multiple sclerosis; and Cesamet (nablione) (synthetic canniboid) is a Schedule II substance that is FDA approved for nausea and vomiting in cancer patients. Controlled Substances Act of 1970, 21 U.S.C. 801 *et seq.*

non-priority issues involving marijuana up to the states.[15] Thus, if California fails to enforce its restrictions on marijuana being sold to minors or trafficked to other states, federal authorities could step in with enforcement. Otherwise, states can decide to legalize, tax, and regulate marijuana.

Compensable Marijuana in Workers' Compensation Law

Since states first started legalizing medical marijuana, one of the main questions among workers' compensation payers is whether they must pay for the drug when prescribed for a claimant in a state where it is legal.

Out of 25 states that allow medical marijuana, only five explicitly exempt workers' compensation payers from liability for medical marijuana.[16] And at least one state[17] has no legislation or judicial case law either requiring or prohibiting workers' compensation payers from reimbursing an injured worker for medical marijuana.

The remainder of the states that allow medical marijuana, including California, rely on analogous statutory language that precludes a private health insurer from being forced to pay for marijuana. In California, Health and Safety Code Section 11362.785(d) specifically provides that nothing in the state's medical marijuana program shall require any other health insurance provider or health care service plan to be liable for reimbursement for the medical use of marijuana.[18]

But there may be a developing trend toward compelled compensation, if other states follow the lead of New Mexico. Beginning with a New Mexico Supreme Court case in 2014, New Mexico has required reimbursement for medical marijuana pursuant to that state's workers' compensation statute requiring provision of "reasonable and necessary" medical treatment services to an injured worker.[19] The following year, the New Mexico Supreme Court ruled that a

[15] "Guidance Regarding Marijuana Enforcement," US Department of Justice memorandum, August 29, 2013.

[16] Arizona, Michigan, Montana, Vermont, and Washington.

[17] Maryland.

[18] Health and Safety Code §11362.785(d): Nothing in this article shall require a governmental, private, or any other health insurance provider or health care service plan to be liable for any claim for reimbursement for the medical use of marijuana.

[19] In *Vialpando v. Ben's Automotive Services* (331 P.3d 975 (N.M. Ct. App. 2014), cert. denied, 331 P.3d 924 (N.M. 2014); 2014 N.M. App. LEXIS 50), an employee was injured in 2000 while lifting a rear assembly out of a Saab. A failed back surgery left him in unrelenting pain, and in 2008 he was awarded 99% permanent disability. In 2013, he received approval to participate in a state-sanctioned medical cannabis program, for which he obtained two doctors' certifications. Because New Mexico's workers' compensation statute requires provision of "reasonable and necessary" treatment services to an injured worker, the court required reimbursement from the carrier to the injured worker for medical marijuana used to treat industrial low back pain despite the fact that it was not a prescription drug, reasoning that the "service" from a licensed dispensary qualifies as medical treatment.

physician's after-the-fact certification of recreational marijuana use transformed an employee's use under the same "reasonable and necessary" statutory language, and required reimbursement.[20] And in the most recent decision, the New Mexico Court of Appeals ruled that employers must compensate workers who are medical marijuana patients for the cost of medical marijuana.[21]

Shortly thereafter, the New Mexico Legislature established a fee schedule for medical marijuana in workers' compensation, effective 01/01/2016. Now, injured workers can get reimbursed up to $10,904 per year for up to 2 pounds of marijuana. Carriers are required to reimburse the injured worker for up to 8 ounces every three months.[22] Based on calculations by persons in a position to know, one ounce equals approximately 60 joints.[23] Therefore, the new fee schedule allows injured workers about 5 joints per day or 1,920 joints per year.

Insurance industry efforts to push back in New Mexico have not been successful. In January 2016, House Bill 195 was introduced, which would have removed any requirement that workers' compensation carriers reimburse claims for medical marijuana. The legislation passed the House, but following impassioned testimony from the original injured worker in the 2014 New Mexico Supreme Court case,[24] the legislation died in committee.

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[20] In *Maez v. Riley Industrial* (347 P.3d 732 (N.M. Ct. App. 2015)), the injured worker was prescribed injections, physical therapy, and opioid medication without benefit, and thereafter tested positive for marijuana. His primary treating physician subsequently certified the marijuana use on an industrial basis. The court determined that because the physician supported the use of marijuana, it should be deemed "reasonable and necessary" under workers' compensation.

[21] In *Lewis v. American General Media/Gallagher Bassett* (2015- NMCA-90), the employee's health care provider opined that the "benefits of medical marijuana outweigh the risk of hyper doses of narcotic medications." The court ruled in her favor and held that federal law classifying marijuana as a Schedule I illegal substance did not supersede New Mexico's law allowing marijuana use for medical purposes.

[22] The maximum limit of 8 ounces per quarter year is based on the New Mexico Department of Health rules restricting medical marijuana patients to the same amount.

[23] "The Cheapest Intoxicant," Dale Gieringer, Ph.D., Coordinator, California NORML, June 1994.

[24] "Emotional Testimony on Medical Cannabis May Sway GOP Votes," *The Santa Fe New Mexican*, February 4, 2016. Greg Vialpando, the injured worker in the precedent-setting case requiring employers to reimburse workers for medical marijuana, testified against the bill. According to his testimony, for more than 14 years after he injured his back, his employer's carrier had no complaints about paying for opiates including fentanyl, oxycodone, and oxycontin. He testified that he did not understand why carriers would be opposed to paying for something that costs less and works better for his back pain than narcotics.

Industry efforts in Arizona have had better luck. In 2015, Arizona lawmakers passed a bill that exempts workers' compensation carriers and self-insured employers from paying for medical marijuana.[25] The Arizona bill was introduced in direct response to the three court decisions in neighboring New Mexico.

But the trend toward finding compensability for marijuana treatment seems to be spreading. Beyond New Mexico, workers' compensation payers have been required to reimburse payments for medical cannabis in Minnesota, Maine, Connecticut, and Massachusetts.[26] In two cases from Maine, for example, the Appellate Division of the workers' compensation system upheld rulings from an administrative law judge that marijuana could be a compensable form of medical treatment for injured workers.[27]

Only two reported cases at the California WCAB have addressed a claims administrator's liability for marijuana treatment. The first, in 2012, *Cockrell v. Farmers*,[28] did not directly resolve the question of compensability for medical marijuana. Instead, the Appeals Board merely returned the matter to the trial level for consideration of the impact, if any, of the prohibition against payment for marijuana by health insurance providers under Health and Safety Code §11362.785(d). It appears the case was thereafter resolved by settlement. But in 2013, a second case, *Pedro de Dios v. Carroll's Tire Warehouse*,[29] specifically found that the workers' compensation carrier was not liable for reimbursement of medical marijuana under the Health and Safety Code exemption.

How Is Payment Made?

To date, legalized marijuana has been a cash-only business. This is because the drug is still classified as illegal under Federal law, which means payment for it cannot involve the federal banking system. As detailed above, New Mexico has required payment for medical marijuana under workers' compensation, but carriers are still challenged in how to issue the required

[25] AZ HB 2346.

[26] "Cannabis Reimbursement Trend Grows," *Risk & Insurance*, June 24, 2016. In addition, an injured worker in Iowa (a state without legal medical marijuana) who subsequently moved to Oregon obtained a doctor's recommendation for medical marijuana treatment for her industrial injuries. The Iowa Workers' Compensation Commission initially ordered reimbursement, but thereafter determined that there was no jurisdiction to enforce the order; the carrier did not make any payments for marijuana. *McKinney v. Labor Ready / ESIS*, No. 5005302.

[27] *Bourgoin v. Twin Rivers Paper Co.* and *Noll v. Lepage Bakeries* (en banc). Utilizing a "clear and convincing evidence" standard, the Appellate Division court found that medical marijuana was a reasonable and necessary medical treatment, given the workers' long history of chronic pain and the ineffectiveness of conventional drug treatments. Notably, the Appellate Division found that a provision in the state's Medical Use of Marijuana Act proscribing a "private health insurer" from being compelled to pay for medical marijuana was inapplicable to a self-insured employer. Both cases are currently on appeal to the Maine Supreme Judicial Court.

[28] ADJ504565; ADJ2584271.

[29] ADJ528481; ADJ602408.

payments. Certainly, payment cannot be made to a pharmacy since retail pharmacies do not keep marijuana in stock. That leaves carriers the choice of either paying the injured worker or paying the marijuana dispensary. Currently, the trend is toward reimbursing the injured worker who submits a receipt from a registered dispensary rather than directly paying the dispensary.

In each instance where workers' compensation payers have been ordered to fund cannabis purchases, a determinative factor seems to be a distinction between a requirement for reimbursement as opposed to an order for direct payment. "Judges evidently believe that requiring reimbursement insulates claims payers from federal law prohibiting the purchase of marijuana."[30] However, the theory that the distinction between reimbursement and direct payment is legally significant and insulates the payer has not been tested in any federal court.

The Curious Question of Compensability

In addition to reimbursement for marijuana as a medical treatment, the flip side of the compensability question is that of compensability of an injury, where a post-accident drug screen has revealed the presence of marijuana. The states where recreational marijuana has been legalized have approached the question of compensability of injury in very different ways.

For instance, in Colorado, injured workers face a rebuttable presumption that, where a controlled substance shows up on a post-injury drug screen, the industrial injury was caused by that substance. If the presumption is upheld, non-medical benefits can be cut in half and temporary disability benefits can be terminated even if workers used marijuana in the weeks before their accidents.[31]

Other states require a "proximate cause" connection between the drug and the injury – and that is often difficult to show. An Ohio employer was denied relief from a finding of compensability for failing to adhere to the strict requirements for drug testing. The injured worker initially refused to take a drug test following the industrial injury. When he did so six days later, the test was still positive – but the court disallowed the evidence because the test was not conducted within the 36 hours required by statute.[32]

California law also precludes compensability for injuries caused by intoxication. Thus, if an employer can prove that marijuana (whether medicinal or recreational) is the cause of a work-related injury, then the injury is not compensable.[33]

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[30] "Cannabis Reimbursement Trend Grows," *Risk & Insurance*, June 24, 2016.

[31] "Panel Will Hash Out Whether Medical Marijuana Is a Cure for Opioid Epidemic," *Work Comp Central News*, July 28, 2016.

[32] *Trent v. Stark Metals Sales*, 2015-Ohio-1115.

[33] Lab. C. §3600(a)(4) precludes liability for a claim of injury "caused by the intoxication, by alcohol or the unlawful use of a controlled substance, of the injured employee [emphasis added]." This discussion assumes that federal law making all marijuana use illegal prevails over any state law making it legal. Obviously, the recent legalization of marijuana could complicate the interpretation of this statute.

But proving that marijuana was the proximate cause of an accident presents an often insurmountable hurdle. Marijuana remains in a person's system longer than alcohol, but impairment cannot be objectively measured by any scientifically proven methodology.[34] That makes it much harder to pinpoint marijuana use as the proximate cause of the accident.[35] And in California, the burden of proof of intoxication rests solely on the employer.

Marijuana and the Drug-Free Workplace

Even if the comp claim is deemed compensable, employers still enjoy almost universal protection in disciplining employees for the presence of illegal substances, up to and including termination.

Studies have suggested specific links between marijuana use and adverse consequences in the workplace, such as increased risk for injury or accidents. One often-cited study of postal workers concluded that marijuana smokers are more likely than non-marijuana smokers to file workers' compensation claims.[36] According to that study by the National Institute on Drug Abuse, postal employees who tested positive for marijuana on a pre-employment urine drug test had 55% more industrial accidents, 85% more injuries, and a 75% increase in absenteeism compared with those who tested negative for marijuana use.[37]

A new report from the American Automobile Association discovered that fatal road crashes in Washington more than doubled after that state legalized recreational marijuana.[38] The study becomes particularly relevant to workers' compensation payers when it is recognized that transportation-related accidents are the leading cause of death in work-related accidents in California.[39]

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[34] Current testing permits identification only of the presence of marijuana metabolites or THC (the psychoactive ingredient in pot), not intoxication. Both can linger in the body for days after the drug's effects wear off, and individuals metabolize drugs differently.

[35] Despite the deficiencies, some states have adopted drugged driving standards. According to the American Automobile Association, Montana and Washington have implemented a *per se* limit for marijuana at 5 ng/mL; Nevada and Ohio have set a limit at 2 ng/mL; and Pennsylvania uses 1 ng/mL. Twelve states have strict *per se* laws that forbid the presence of any levels of marijuana. In Colorado, a blood concentration of 5 ng/mL or more gives rise to permissible inference that a person was driving under the influence of the drug. *AAA Newsroom*, May 10, 2016.

[36] *"The Efficacy of Pre-employment Drug Screening for Marijuana and Cocaine in Predicting Employment Outcome,"* (JAMA 1990).

[37] *"The Efficacy of Pre-employment Drug Screening for Marijuana and Cocaine in Predicting Employment Outcome,"* (JAMA 1990; 264(20):2639-2643).

[38] "Prevalence of Marijuana Involvement in Fatal Crashes: Washington, 2010-2014," AAA Foundation for Public Safety, May 2016. According to the data, the percentage of drivers involved in fatal crashes who had recently used marijuana increased from 8% to 17% following legalization.

[39] According to the most recent data from the DIR's Office of Policy, Research, and Legislation, released April 2016, California's Census of Fatal Occupational Injuries showed that 119 California workers were killed in traffic accidents in 2014; the next leading cause was workplace violence, responsible for 75 deaths.

As a result of these and other studies, many employers now have strict drug-free workplace policies. Legal issues have arisen as to whether the termination of a worker for their use of marijuana as a treatment modality in light of the employer's drug-free workplace policy would result in a claim for discrimination. Ten states that have legalized medical marijuana have included anti-discrimination provisions that (a) require employers to accommodate medical marijuana users, and (b) preclude an employer from firing or discriminating against an employee or job applicant who uses medical marijuana.[40] But across the nation, courts continue to be very protective of an employer's right to a drug-free workplace:

- In a seminal 2008 decision, the California Supreme Court dismissed a lawsuit by an employee who had tested positive for past use of marijuana in a pre-employment drug screen test. The court ruled that legalized medical marijuana did not create a general right to use medical marijuana, but only protected patients from criminal sanctions.[41]

- Likewise, the Washington Supreme Court in 2011 held that the state's Medical Use of Marijuana Act does not allow employees with marijuana prescriptions to sue their employers for wrongful termination when marijuana use was the reason for the discharge.[42]

[40] Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Pennsylvania, and Rhode Island.

[41] *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal. 4th 920, finding no fundamental public policy requiring employers to accommodate marijuana use by employees: "Under California law, an employer may require pre-employment drug tests and take illegal drug use into consideration in making employment decisions."

[42] *Roe v. TeleTech* (2011) 171 Wn.2d 736, 257 P.3d 586. The plaintiff testified that she used marijuana four times a day at home for her migraine headaches, and informed her prospective employer as part of the interview process. When her pre-employment drug screen came back positive for THC, she was terminated.

- Earlier this year, a US District Court in New Mexico ruled that an employer lawfully fired a medical marijuana patient after he tested positive in a post-offer, pre-employment drug test.[43]

Importantly, the cases upholding an employer's right to a drug-free workplace are not limited to early terminations following pre-employment drug screening:

- A federal appeals court upheld the termination of a five-year employee who tested positive for marijuana following a workers' compensation injury, even though Michigan's Medical Marijuana Act allowed for the use of marijuana for non-industrial cancer pain. The court reasoned that "[w]hatever protection the MMMA does provide users of medical marijuana, it does not reach to private employment."[44]

- Colorado's Supreme Court issued a unanimous decision in 2015 concluding that an employer lawfully terminated an employee for off-the-job medical marijuana use. The court determined that while medical marijuana use was legal in Colorado, it was illegal under federal law, and upheld the termination.[45]

- In the context of a drug test following a workplace injury, a state court in Washington held that an employer may terminate an employee for using marijuana, even when the employee had a prescription and used it off-duty. The court ruled that the employer "was under no legal obligation to make an exception to its [drug-free workplace] policy for Plaintiff, regardless of his medical marijuana prescription."[46]

[43] *Garcia v. Tractor Supply Co.,* (2016) -- F. Supp.3d -- (2016 U.S. Dist. LEXIS 3494), finding a "fundamental difference between requiring compensation for medical treatment and affirmatively requiring an employer to accommodate an employer's use of a drug that is still illegal under federal law." The employee originally filed the case in state court; the employer removed it to federal court.

[44] *Casias v. Wal-Mart Stores, Inc.*, 764 F. Supp. 2d 914, 926 (W.D. Mich. 2011).

[45] *Coats v. Dish Network, LLC*, 350 P. 3d 849 (Colo. 2015). The case involved a paraplegic telephone customer service representative who used medical marijuana off duty. Prior to his hire, he told his employer of his medical marijuana use. But when he tested positive for THC, he was terminated. The court stated: "[U]nder the plain language of…Colorado's 'lawful activities statute,' the term 'lawful' refers only to those activities that are lawful under both state and federal law. Therefore, employees who engage in an activity such as medical marijuana use that is permitted by state law but unlawful under federal law are not protected by the statute."

[46] *Swaw v. Safeway, Inc.* (W.D. Wash. 2015). After a workplace injury, the employee tested positive for marijuana due to the legal use of medical marijuana outside of work, and was terminated pursuant to the employer's drug-free workplace policy. The employee alleged unlawful discrimination on the basis of a disability, and that he was treated more harshly than employees found to be intoxicated by alcohol at work. The court disagreed, holding that Washington law does not require employers to accommodate medical marijuana in drug-free workplaces. And because users of an illegal substance are not a protected class, the employee could not state a claim for discrimination on the basis of a disability.

- Most recently, a federal district court in California reaffirmed that an employer maintains the right to discipline employees even where the marijuana use is recommended by a physician: "It does not violate (California's laws against workplace discrimination) to terminate an employee based on their use of marijuana, regardless of why they use it….."[47]

These cases demonstrate the general rule that an employee can lawfully be fired for using marijuana legally. But the employer-friendly judicial interpretation is not universal: In August 2016, the Connecticut Supreme Court ruled that a state worker who was fired after being caught smoking marijuana *on the job* must be reinstated.[48]

California employers understandably want to know whether Proposition 64 will require them to accommodate an employee's use or possession of marijuana. The short answer is that employers will not have any such duty under the new law. The California law does not prohibit employers from banning the use or possession of marijuana on the job or taking other adverse action against employees for marijuana use.[49] Furthermore, federal laws, including the Americans with Disabilities Act and the Family Medical Leave Act, do not protect marijuana use.[50] As such, employers can likely continue to prohibit the use or possession of marijuana, including both medical and recreational marijuana, as part of their drug policies.

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[47] *Shepherd v. Kohl's Dep't Stores, Inc.*, No. 1:14-cv-01901-DAD-BAM (E.D. Cal. Aug. 2, 2016). The employee was hired in 2006 and was diagnosed with acute anxiety in 2011. He obtained a doctor's approval for medical marijuana but did not notify his employer. While he was being treated for a 2014 work-related injury, the employer's health care provider found traces of marijuana in his system and terminated him for reporting to work while impaired by drugs. The federal court rejected his argument that he was fired because of a disability that he was treating with marijuana, stating that "[t]here is no evidence before the court that [the employer] was actually motivated by [the employee's] disability rather than his chosen treatment for the disability."

[48] *State of Connecticut v. Conn. Employees Union Independent*, SC 19590 (August 30, 2016). The employee was terminated from his maintenance job at the University of Connecticut Health Center in 2012 after a police officer arrested him for smoking marijuana in a state-owned vehicle. The charges were later dismissed and the employee obtained a ruling from an arbitrator that he should have been suspended rather than terminated. The employer appealed, but in a unanimous decision the Supreme Court ruled that although state policy on drug use in the workplace allows for firing workers, it does not *require* it.

[49] Proposition 64 adds new Health & Safety Code §11362.45, providing that nothing in the law will "amend, repeal, affect, restrict, or preempt…[the] rights and obligations of public and private employers to maintain a drug and alcohol free workplace, or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace, or affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees, or prevent employers from complying with state or federal law."

[50] Employers should be aware of related federal laws (such as the new anti-retaliation regulation from the federal Occupational Health and Safety Administration) that place restrictions on the use of post-accident drug-testing. The OSHA rule prohibits the use of drug screening as a form of punishment against workers who report an injury, and is scheduled to take effect December 1, 2016.

However, the issue is complex and careful legal analysis is required. Employers should make sure that their anti-marijuana policies are in writing and provided to employees. Employers who do not have a well-documented marijuana policy could expose themselves to allegations of discrimination. While employers can currently treat marijuana as an illegal drug that need not be accommodated in the workplace, close monitoring of developing case law is critical because court opinions could shift as public policy evolves in favor of marijuana in general.

Is Marijuana Medical Treatment?

A great deal of debate still rages as to the medical efficacy of marijuana. While marijuana treatment is usually invoked for chronic pain conditions, it has been found to be effective in varying degrees for numerous medical conditions.[51]

The scientific community simply does not share a universal view on the effectiveness of marijuana as a medical treatment. On the one hand, neither the American College of Occupational and Environmental Medicine nor the American Medical Association support marijuana use as a treatment option; the Official Disability Guidelines published by the American Pain Society expressly preclude marijuana as a treatment for pain.[52] Even the

[51] Medical conditions typically found eligible for medical marijuana include: AIDS, ALS, Alzheimer's, anxiety, arthritis, autoimmune disorder, cancer, chronic pain, chronic traumatic encephalopathy, Crohn's disease, epilepsy or other seizure disorder, fibromyalgia, glaucoma, hepatitis C, HIV, inflammatory bowel disease, kidney disease, lupus, multiple sclerosis, pain (chronic/intractable), Parkinson's disease, PTSD, sickle cell anemia, spinal cord conditions, stroke, Tourette's syndrome, traumatic brain injury, and ulcerative colitis. *See, e.g.*, "Medical Marijuana," Mayo Clinic, October 14, 2016; "Is Marijuana Medicine?" National Institute on Drug Abuse, July 2015; "How Effective Is Medical Marijuana?" *Prevention Magazine*, April 22, 2015.

[52] "Maine Appellate Division for Comp Board Orders Reimbursement for Medical Marijuana," *Work Comp Central News*, September 22, 2016. Without approval by these standard evidence-based guidelines for treatment of occupational injuries, many comp payers have been denying coverage altogether. "Medical Marijuana: A Growing Issue for Employers in Workers' Compensation," *Property Casualty 360°*, July 2, 2015.

American Society of Addiction Medicine has concluded that cannabis is not recommended due to a lack of clear evidence of efficacy: "For every disease and disorder for which marijuana has been recommended, there is a better, FDA-approved medication."[53]

But according to the largest research study on medical marijuana, published last year by the Journal of the American Medical Association, medical marijuana may alleviate muscle stiffness from chronic pain and multiple sclerosis, although there is not yet any good evidence of its ability to treat other conditions.[54] Another study in the journal Health Affairs found that the prescription of painkillers in states where medical marijuana was legal decreased as compared to states where marijuana is completely outlawed.[55]

The findings from these two studies that (a) marijuana can help treat chronic pain in particular, and (b) prescription of painkillers decreased where medical marijuana was available, seem to validate one of the major arguments for marijuana as a medical treatment: marijuana can be a substitute for opioid-based prescription painkillers. Proponents of legalized marijuana point to these studies as evidence that broader use of medical marijuana could save lives if provided in place of the powerful painkillers that cause tens of thousands of overdose deaths each year.[56]

Beyond the question of efficacy, marijuana as medicine raises other unanswered questions. Without a National Drug Code, or NDC, payers will encounter difficulty in tracking payments and prescriptions for marijuana.[57] In workers' compensation, claims administrators rely on utilization review to evaluate medical treatment concerns, such as whether a prescribed dosage is appropriate. But a determination of uniform dosage levels is difficult because the potency of marijuana varies depending on the strain, growing techniques, and method of application.

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[53] American Society of Addiction Medicine, 44th Annual Medical-Scientific Conference, April 25, 2013.

[54] *Cannabinoids For Medical Use: A Systemic Review and Meta-Analysis* (JAMA, 2015 Jun 23-30; 313(24): 2456-73). The JAMA review evaluated 79 studies that tested marijuana's medicinal effectiveness among nearly 6,500 patients. It concluded that there is "moderate-quality evidence" for medical marijuana treating chronic pain and muscle stiffness among multiple sclerosis patients, and "low-quality evidence" for pot improving nausea and vomiting due to chemotherapy, weight gain in HIV infection, sleep disorders, and Tourette's syndrome. And medical marijuana was linked to short-term adverse effects such as dizziness, dry mouth, nausea, fatigue, drowsiness, and confusion.

[55] *Medical Marijuana Laws Reduce Prescription Medication Use In Medicare Part D* (Health Affairs, July 2016 vol. 35 no. 7 1230-1236). Researchers analyzed data from Medicare Part D from 2010 to 2013, comparing states that had legalized medical marijuana against states that did not, to determine the impact that legal medical marijuana had in prescription drug trends. The research team looked at nine conditions for which marijuana might be considered as a substitute for FDA approved medications (anxiety, depression, nausea, pain, psychosis, seizures, sleep disorders, and spasticity). The researchers found that legal medical marijuana had the greatest effect on prescriptions for painkillers, counting 1,826 fewer daily doses of painkillers prescribed on average per year in states with legal medical marijuana.

[56] Of course, other pain-fighting options with zero addiction potential also exist -- including anti-inflammatory drugs, cognitive behavioral therapy, biofeedback, physical therapy, and acupuncture.

[57] While synthetic cannabinoids Cesamet and Marinol both have NDCs, neither "medical marijuana" nor any of the various different strains and "brand name" marijuana products has an NDC code.

Marijuana does not have a standardized dosing protocol for each medical condition, nor does it have a standardized method of delivery (marijuana can be smoked, vaporized, eaten, dissolved in an oral tincture, or administered through a transdermal patch). There simply is no accepted guideline on what is or is not appropriate.

Likewise, because marijuana is not regulated by the FDA, there is no standardized potency guideline. There are not yet any significant controls on the quality or type of marijuana being dispensed. There are a large number of cannabinoids, the active ingredients in marijuana, that have different effects and have not been fully studied. The result of all of this is that patients themselves ultimately determine the appropriate dosing. This is as problematic as a doctor simply saying opioids are reasonable without identifying what opioid to take, or the appropriate dosage, or how long opioid therapy should last. And it makes it extremely difficult to perform effective utilization review.

Marijuana in Workers' Compensation

For claims administrators, the primary concerns over the use of marijuana in workers' compensation center on the potential violations of the federal Controlled Substances Act, the lack of scientific evidence supporting medical use of marijuana, and the possibility that marijuana could cause other health problems for injured workers. The American Insurance Association is already on record in opposition to any state mandate that its members pay for medical marijuana. [58]

Some states have extended flexibility to carriers on the question of medical marijuana. Washington State law, for example, permits health insurers to develop coverage (or non-coverage) criteria for payment (or non-payment) of medical marijuana, in their sole discretion. New Mexico permits compensability for medical marijuana in workers' compensation, but requires a patient to obtain a registry ID card and maintain medical supervision and monitoring by licensed caregivers and practitioners.

With the advent of legalized recreational marijuana, individual Californians no longer need to satisfy any of the regulatory criteria necessary for medical marijuana because they will be able to simply purchase marijuana from a licensed dispensary. In the context of workers' compensation, some observers anticipate an increase in recommendations for use of recreational marijuana as a treatment modality for work-related injuries. In other words, medical professionals who previously lacked federal approval to prescribe controlled substances (*e.g.*, chiropractors, naturopaths, registered nurses) might now recommend the use of recreational marijuana as an alternative to opioid medications.

[58] AIA Comments (submitted in response to New Mexico's proposed fee schedule), October 21, 2015: "[S]o long as the manufacture, distribution and dispensing of marijuana remains a federal crime, there is no objective medical evidence that marijuana is effective in treating workplace injuries, and marijuana is understood to have serious harmful health effects, AIA will object to state court decisions and agency rules requiring workers' compensation insurers to comply with the treatment of injured workers via marijuana."

Conclusions

Are workers' compensation payers in California obligated to provide payment or reimbursement for recreational marijuana as part of a treatment for work-related injuries? The simple answer is, nobody knows yet. Employers and carriers are required to provide medical treatment that is reasonably required to cure or relieve the effects of the injury.[59] But as a matter of federal law, marijuana is classified as a Schedule I controlled substance, and by definition is devoid of any medical value.

With recreational marijuana now legal in California, employers and insurers are well-advised to monitor this developing area of the law and its practical impact on claims processing requirements. Proposition 64 presents an opportunity for claims administrators to advise their employers to protect themselves by adopting a drug-free workplace policy and to make sure that all employees have been advised of the policy. Claims administrators should work to establish standards of review for requested marijuana treatment and payment. Any policies that are developed should also consider the impact of California's broad medical privacy laws,[60] and the potential conflicts under the Employer's Bill of Rights as codified in the Labor Code.[61]

In all likelihood, the development of case law will determine whether marijuana can be considered as a legitimate treatment modality for work-related injuries. But it is only a matter of time before a lawsuit is filed seeking to compel California insurance companies to violate federal law.

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[59] Lab. C. §4600(a).

[60] *See, e.g.*, Calif. Const. Art. 1 Sec. 1 (right to privacy), Civ. C. §§56.20-56.245 (California's Confidentiality of Medical Information Act), and Gov't Code §§ 12900–12996 (Fair Employment and Housing Act); *see also* Civ. C. §1798.81.5; Govt. C. §12940.

[61] Lab. C. §§3761 et seq. Section 3762 specifically requires the claims administrator to "discuss all elements of the claim file that affects the employer's premium with the employer," particularly including the diagnosis, the treatment provided, and any work restrictions.

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California Workers' Compensation Institute

The California Workers' Compensation Institute (CWCI), incorporated in 1964, is a private, nonprofit membership organization of insurers and self-insured employers. CWCI conducts and communicates research and analyses to improve California's workers' compensation system. CWCI members include insurers that collectively write more than 70 percent of California's workers' compensation direct written premium, as well as many of the largest public and private self-insured employers in the state. Additional information about CWCI research and activities is available on the CWCI's website (www.cwci.org).

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