Marijuana Legalization: Insurance and Risk Management Perspectives for Employers

Across the US, states have enacted laws legalizing marijuana for medical and, in some cases, recreational use. Employers must balance these recent changes to longstanding laws with their desire to maintain safe and drug-free workplaces. Legislation and recent court rulings generally support employers’ rights to keep marijuana out of the workplace, with some limits. As case law in this area evolves, risk professionals should stay abreast of developments, review existing workplace policies, and handle carefully any workers’ compensation or other insurance claims in which marijuana use may be a factor.

**LEGAL STATUS OF MARIJUANA**

As of November 2014, 23 states and the District of Columbia allowed for comprehensive medical marijuana programs, according to the National Conference of State Legislatures (see **FIGURE 1**). Limited medical use — for example, in clinical trials and for treatment of specific medical conditions — is legal in 11 other states. In the most recent elections, voters in Alaska, Oregon, and Washington, DC, approved measures to legalize recreational use of marijuana; recreational use has previously been legalized in Colorado, Washington state, and Portland, Maine.

But no states currently allow for marijuana use in the workplace, while a number of federal laws and regulations explicitly bar its use in and out of workplace settings. For example:

- Under the Controlled Substances Act of 1970 (CSA), it is illegal to cultivate, possess, use, or distribute marijuana.
- The Drug-Free Workplace Act of 1988 requires some federal contractors — those with contracts worth $100,000 or more — and all federal grantees to maintain drug-free workplaces.

The Omnibus Transportation Employee Testing Act of 1991 requires drug and alcohol testing of drivers, pilots, and others in “safety-sensitive” jobs. A December 2012 notice from the Department of Transportation’s (DOT) Office of Drug & Alcohol Policy & Compliance stated that the use of marijuana is “unacceptable for any safety-sensitive employee” subject to DOT drug testing.

The Occupational Safety and Health Administration’s General Duty Clause requires that employers maintain workplaces that are “free from recognized hazards that are causing or are likely to cause death or serious physical harm” to employees. Impairment by drugs or alcohol may be considered such a hazard.

![Map of states with legal status of marijuana](image-url)
The split between federal and state laws has created some confusion. In 2005, the US Supreme Court held in *Gonzales v. Raich* that the Commerce Clause of the US Constitution allows the federal government to enforce the CSA even in states where medical marijuana use is legal. But an October 2009 Department of Justice (DOJ) memo stated that federal resources should not focus “on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.” In August 2013, the DOJ said it would continue to enforce federal law, but would not challenge marijuana legalization in Colorado and Washington.

**INSURANCE COVERAGE CONSIDERATIONS**

**WORKERS’ COMPENSATION**

Most state workers’ compensation laws allow an employer to use an “intoxication defense” to dispute an employee’s claim of injury at work if the employee was intoxicated or impaired by alcohol, drugs, or medication at the time of injury. But in some jurisdictions the employer must prove that the intoxication or impairment was the sole cause of the injury in order to deny the claim. This means that contributing factors — for example, a wet floor, a falling object, or an equipment malfunction — could invalidate an intoxication defense, whether for marijuana, alcohol, or other drug use. In these cases, coverage could apply even if such use is against company policy. That could give rise to a scenario in which the employer may be able to terminate the employee for drug use, but still be obligated to provide coverage for the workers’ compensation claim.

An intoxication defense may also be complicated by the fact that marijuana can stay in a person’s system for months. Following an accident, an employee could test positive for marijuana even if he or she had used the drug during off hours and was never impaired at work. This means that it can be extremely difficult for employers and workers’ compensation courts to determine whether an employee was actually impaired at the time of an injury.

**MARIJUANA AS MEDICAL TREATMENT**

Research studies indicate that the active ingredients in marijuana contain therapeutic potential to relieve pain, control nausea, stimulate appetite, and reduce ocular pressure, as noted in a recent National Council on Compensation Insurance (NCCI) report. Advocates argue that the drug is less expensive and less addictive than many commonly prescribed painkillers, such as oxycodone.

But the US Food and Drug Administration (FDA) has not conducted clinical trials to determine the safety and efficacy of marijuana. The FDA has not approved its use as a form of medical treatment — nor is the drug included in the Work Loss Data Institute’s Official Disability Guidelines (ODG) or the American College of Occupational and Environmental Medicine’s (ACOEM) Practice Guidelines. It’s also unclear how to properly dose medical marijuana, because its ingredients are not well defined and can differ from plant to plant.

Smoking marijuana can also have adverse effects similar to those associated with cigarette smoking, including respiratory illnesses and cancer. And according to the National Institute on Drug Abuse, marijuana use has the potential to cause or exacerbate problems in daily life, including increased absences, tardiness, accidents, workers’ compensation claims, and job turnover.

Also at issue is whether workers’ compensation coverage will be required to pay for the use of marijuana as a medical treatment when prescribed in a state where such treatment is legal. Statutes in Colorado, Michigan, Montana, Oregon, and Vermont allow workers’ compensation insurers to deny payments for medical marijuana. Courts in other states have taken varying approaches to this issue:

In 2012, in *Creole Steele v. Ricky Stewart*, the Louisiana Court of Appeal, Third Circuit, upheld a ruling by a workers’ compensation judge that an employee’s prescription purchase of a drug containing synthetic tetrahydrocannabinol (THC) — the psychoactive component of marijuana — was “a necessary medical expense” under Louisiana law. The employee was prescribed the drug for treatment of a spinal injury suffered on the job, and the court ordered the employer to pay for the prescription.

In 2012, in *Cockrell v. Farmers Insurance and Liberty Mutual Insurance Company*, a California workers’ compensation judge ordered reimbursement for medical marijuana that an injured employee had self-procured as treatment for post-surgery spinal pain. The ruling was later overturned on appeal to the California Workers’ Compensation Appeal Board, which returned the case to the trial level.

In 2014, in *Vialpando v. Ben’s Automotive Services*, the New Mexico Court of Appeals affirmed a decision by a workers’ compensation judge that an employer and its insurer must pay for an injured employee’s medical marijuana treatment. The prescription was made under New Mexico’s Compassionate Use Act, which “constituted reasonable and necessary medical care” for his back injury suffered on the...
job, according to the court. The court also noted that while the federal government has made “equivocal” statements about the legal status of marijuana, New Mexico’s public policy allowing for the use of medical marijuana is clear.

AUTO LIABILITY

Some states have established specific legal limits on the amount of marijuana that drivers can have in their system before they are considered criminally impaired. Others have zero-tolerance policies, meaning that any presence of THC is unlawful, although some states make exceptions for medical marijuana patients.

An employer could be held responsible for damage stemming from an auto accident involving an employee who tests positive for marijuana. The facts of an accident will ultimately determine whether an auto liability policy will provide coverage for an injury to another driver or damage to a third party’s car or other property.

GENERAL LIABILITY

An employee who is under the influence of marijuana while at work could injure others, including customers. This is not likely to have any bearing on general liability coverage. Whether the employee is impaired or not, an employer’s insurance policy will typically provide coverage for injuries to customers or other third parties on company premises.

EMPLOYMENT PRACTICES LIABILITY

Generally, employers cannot discriminate in hiring and promotions or other terms and conditions of employment based on an employee’s status as a medical marijuana patient. There are, however, some exceptions to this rule:

Because DOT guidelines prohibit the use of marijuana for drivers, pilots, and others in “safety-sensitive” jobs, employers may be able to decline to hire applicants for these positions based on medical marijuana patient status alone. (Other federal and state agencies may have similar prohibitions.)

If a job applicant voluntarily discloses use of a prescribed medication that would preclude him or her from safely performing the job, the employer may decline to hire the applicant.

Employers should ensure that human resources personnel and others involved in hiring, promotion, and other employment decisions affecting terms and conditions of employment are familiar with applicable federal and state policies regarding the use of marijuana. Unless job-related or required by law, employers should avoid asking job applicants and employees about their prescription drug use as it may elicit information about disabilities — which could potentially violate the Americans with Disabilities Act or state anti-discrimination laws.

Employment practices liability insurance policies could provide coverage for wrongful termination, discrimination, invasion of privacy, and other claims that could potentially arise from decisions pertaining to an applicant’s or employee’s use of medical marijuana.

ENFORCING DRUG-FREE WORKPLACE POLICIES

Marijuana is the most commonly detected illicit drug in workplace drug testing, according to clinical laboratory services company Quest Diagnostics. Marijuana positivity in the US workforce increased slightly in 2013, to 1.7% from 1.6% in 2012. Driven by greater use of marijuana and amphetamines, the percentage of positive tests for all drugs increased in 2013 for the first time in a decade, to 3.7%.

To date, the law has favored employers seeking to prohibit the use of marijuana and other drugs in the workplace. Legislation in many states specifically permits employers to terminate employees following positive drug tests, and federal employment laws do not protect or allow for the use of medical marijuana in the workplace.

Courts have frequently supported employers’ rights in this regard. For example, in August 2013 the United States District Court for the District of Colorado held that the state’s medical marijuana statute does not protect employees from being fired for violating company policy. This followed a September 2012 ruling by the 6th US District Court of Appeals — in a case involving a retailer that had fired an employee after a positive drug test — that Michigan’s medical marijuana law “does not regulate private employment.” The employees in both cases had been prescribed medical marijuana legally and had neither used marijuana on company premises nor been under the influence of the drug while at work.

Still, employers must be mindful of employees’ rights. Because marijuana can stay in a person’s system for months, an employee who is legally prescribed marijuana may test positive for the drug even if he or she is not impaired at work. Terminating an employee solely for a positive drug test — without evidence that the employee was actually impaired at work — could give rise to a claim.
of discrimination based on medical marijuana patient status or based on the underlying disability or illness for which the drug is prescribed.

Laws regarding employers’ rights to terminate employees for “lawful” activities outside of work hours vary by state. Before terminating an employee for violating drug-free workplace policies, employers should observe and document any objective factors that support a good faith belief that an employee was impaired at work and such impairment was not for lawful reasons or medically necessitated.

### MANAGING THE RISK

The trend toward legalization of marijuana at the state level is well underway, although the ultimate impact on workforce risk issues remains uncertain. For now, employers can feel confident about their ability to enforce anti-drug policies, although it may be prudent to review and update them as appropriate. Employers should work with their insurance and legal advisors to stay abreast of legislation and court decisions governing marijuana use and the potential impact on such risk management areas as workers’ compensation, workplace safety, and liability.

### ABOUT THIS BRIEFING

This briefing was prepared by Marsh’s Casualty, FINPRO, and Claims Practices and Marsh’s Workers’ Compensation Center of Excellence, with contributions from Maital B. Savin of Bryce Downey & Lenkov LLC, a Chicago-based law firm.

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