

Medical marijuana poses challenges for employers

Medical marijuana has been the subject of much cultural and legal debate over the past few years. The case for legalization has increasingly gained ground as state lawmakers weigh the drug's potential value in combating pain associated with diseases such as cancer against the long-standing federal prohibition against its use. Twenty-two states have already legalized the comprehensive use of medical marijuana, and New York is poised to become the twenty-third. As decriminalization continues at the state level, employers face ongoing challenges in dealing with employee medical marijuana use.

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Background

California was the first state to legalize the medical use of marijuana, when voters passed Proposition 215 in 1996. Now, nearly half of the states in the US have enacted similar laws legalizing the comprehensive use of medical marijuana. A few other states have enacted more restrictive laws that allow the limited use of only low tetrahydrocannabinol (THC), high cannabidiol (CBD) substances medically or as a legal defense. (The potency of marijuana is measured by THC content, the psychoactive ingredient in marijuana.)

New York is poised to become the twenty-third state to legalize medical marijuana, as Governor Andrew Cuomo has indicated he will sign a bill approved by the legislature to establish a pilot medical marijuana program in the state. As decriminalization of medical marijuana takes root, employers face challenges — and emerging risks — in dealing with employee medical marijuana use.

Buck comment. Colorado and Washington state have also legalized the recreational use of marijuana, potentially creating an additional layer of employment and safety issues for employers.

Conflicting state and federal laws

The current legal status of marijuana appears to be in a state of conflict and a state of flux. While marijuana-related activities are generally prohibited and



subject to criminal prosecution under federal law, states increasingly allow marijuana use for medical purposes.

Employers are subject to both state and federal regulations that restrict the use of marijuana. At the federal level, employers must comply with a variety of federal laws including the Controlled Substances Act ([CSA](#)), Drug Free Workplace Act of 1988 (DFWA), and Department of Transportation (DOT) guidelines where applicable. The CSA (enacted as Title II of the [Comprehensive Drug Abuse Prevention and Control Act of 1970](#)) sets out the federal drug policy under which the manufacture, importation, possession, use, and distribution of certain substances is regulated.

Under the CSA, drugs, substances, and certain chemicals used to make drugs are classified into five categories or [schedules](#) based on the drug's acceptable medical use and abuse or dependency potential rather than its main properties. Schedule I substances are considered to be the most dangerous types of drugs with a high potential for abuse and severe dependency and no accepted medical use. Despite growing acceptance at the state level, marijuana remains classified as a Schedule I substance by the federal Drug Enforcement Administration ([DEA](#)). As such, federal law prohibits a prescription for marijuana, and its use remains illegal.

Buck comment. Possession and use of controlled substances for federally approved research is permitted, but is subject to extensive licensing, registration, storage, security, use, and disposal requirements.

Federal enforcement

In October 2009, Attorney General Eric Holder issued [guidelines](#) for federal prosecutors in the 14 states that had enacted laws authorizing the medical use of marijuana. The guidelines encouraged prosecutors not to pursue criminal cases against individuals who use or distribute marijuana for medical purposes in compliance with existing state laws. In August 2013, the US Department of Justice [announced](#) an updated marijuana enforcement policy. While acknowledging that marijuana remains illegal under federal law, the DOJ said it would defer challenging state legalization laws but expects states like Colorado and Washington to create "strong, state-based enforcement efforts."

State regulation

Many states have recognized that medical marijuana may be used to treat a range of problems that are ineffectively treated with other drugs and therapies. States that have legalized medical marijuana have put various protections in place to control its distribution, possession, and use. Whether dispensaries are allowed, medical conditions for which marijuana may be provided are specified, or patients from other states are recognized, varies among the states that have enacted medical marijuana laws. States with such laws in place generally have some form of patient registry or identification cards to protect against arrest for possession of small amounts of the substance.

Although the CSA prohibits the cultivation, distribution, and possession of marijuana for any reason other than federally approved research, 22 states and the District of Columbia currently exempt qualified users of medical marijuana from criminal penalties imposed under state law. States that have enacted medical marijuana laws include: Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. Legalization in New York is expected soon.

Drug-free workplace policies and safety issues



Drug-free workplace policies promote safety and accountability. The DFWA requires any entity that receives federal contracts with a value of more than \$100,000 or that receives any federal grant to maintain a drug-free workplace. To qualify, and remain eligible, for federal funds, these entities must make ongoing, good faith efforts to comply with the drug-free workplace requirement. Employees who work for federal contractors may be subject to discipline or even termination if they use marijuana while on the job or show up for work under the influence, regardless of whether marijuana use is permitted by state law.

The DOT requires drug and alcohol testing of safety-sensitive transportation employees in aviation, trucking, railroads, mass transit, pipelines, and other transportation industries. The DOJ enforcement policy discussed above does not affect or modify the DOT's regulated drug testing program, and DOT regulated employers must continue to comply with applicable regulations. Despite its growing legalization at the state level, marijuana continues to be listed in Schedule I of the CSA. The DOT has made clear that its permitted use under a state law for either [medical](#) or [recreational](#) purposes will not excuse an employee's positive drug test result.

Employers under the jurisdiction of the Occupational Safety and Health Administration have a general duty under the Occupational Safety and Health Act to provide a safe workplace for their employees. With the growing trend toward legalization, employers are concerned about medical marijuana's future impact on safety and productivity in the workplace. Because even low doses of marijuana can impair concentration and coordination, an employee who uses marijuana at work can present a workplace hazard and potential liability to third parties. Employers must have appropriate policies in place to reduce the risk that such an employee may pose to himself or others, enforce those policies, or face penalties if they fail to do so.

Buck comment. Hiring or retention of employees that put other employees at risk of harm in the workplace may also subject the employer to negligent hiring claims.

Employment actions and employee protections

Medical marijuana laws vary from state to state, but most exclude workplace use or coming to work impaired. Courts are just beginning to address many of the employment issues surrounding medical marijuana, but initial rulings in states such as California and Oregon have rejected wrongful discharge claims and upheld employee terminations for testing positive for marijuana, regardless of whether the state authorized its use for medical purposes. The rulings generally recognize that applicable medical marijuana laws create a narrow exception for medical users (and their caregivers) from state criminal — not employment — laws.

In [Ross v. RagingWire Telecommunications Inc.](#), for example, the California Supreme Court upheld termination when the employee tested positive for marijuana even though he provided a doctor's note explaining that he was using marijuana — in accordance with state law — for back pain. The court ruled that the state's Compassionate Use Act did not address the respective rights and duties of employers and employees, and confirmed that an employer may require pre-employment drug tests and take illegal drug use into consideration in making employment decisions.

The Oregon Supreme Court considered whether an employer had an obligation to accommodate an employee's medical marijuana use. In [Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries](#), the court concluded that state employment discrimination laws did not require the employer to engage in a "meaningful interactive process" or otherwise accommodate the employee's use of medical marijuana to treat a disabling medical condition.

Although most states do not provide employee protections for medical marijuana users, a handful provide some measure of protection. With certain limited exceptions, Minnesota's new Medical Cannabis Act protects patients enrolled in the state's registry program from discrimination in hiring, firing, or other terms or conditions of employment based on their enrolled status or a positive drug test — unless the employee used, possessed, or was impaired on the employer's premises or during work hours.

Buck comment. Once the employer knows the employee is registered under the state program, the employer may have to consider whether it is obligated to provide a reasonable accommodation under Minnesota's Human Rights Act. Since medical marijuana is still illegal under federal law, the Americans with Disabilities Act would not require reasonable accommodation for its use.

Under Nevada's law, employers are not required to allow the use of medical marijuana on premises or to modify a medical marijuana user's job or working conditions that are based on the employer's reasonable business purposes. The employer may, however, be required to make reasonable accommodation for the user's medical needs if the employee has a valid registry identification card. Exceptions exist for accommodations that would pose a threat to persons or property, impose an undue hardship on the employer, or prohibit the employee from meeting job responsibilities. Connecticut and Illinois also provide some form of employment protection based on an employee's status as a state-authorized medical marijuana user.

Lawful off-duty conduct

Many states have laws that protect employees against adverse employment action based on their conduct outside the workplace. Colorado's Lawful Off-Duty Activities Statute (often referred to as a smoker's rights law), for example, prohibits employers from terminating employees for *lawful* activities performed off duty and off the employer's premises. While state law allows both medical and recreational use of marijuana, it remains illegal under federal law. Whether employers in Colorado are prohibited from firing an employee for off-the-job use depends on what constitutes "lawful activity."

In a case of first impression under Colorado law, the state's highest court has agreed to decide whether an employer can fire an authorized medical marijuana user for failing a random company drug test. In *Coats v. Dish Network LLC*, a quadriplegic customer service representative was fired after testing positive for marijuana, which he used off-site and off-hours. The trial court upheld the dismissal, finding that the medical marijuana law did not establish a state constitutional right to medical marijuana use, but only created an affirmative defense from prosecution for such use. In upholding the dismissal, the [appellate court](#) considered whether federally prohibited but state-licensed medical marijuana use is "lawful activity" under Colorado law, but concluded that it is not because it did not comply with both state and federal law.

Buck comment. Now that recreational marijuana use has been legalized in Colorado, employers have even more reason to wonder what, if any, impact it will have on their ability to test their employees for using marijuana and take employment actions based on that use.

Workers' compensation

Medical marijuana is emerging as a workers' compensation issue to watch. There are legal substances — such as prescription painkillers — that can impair an individual's ability to safely perform on the job, and may increase the likelihood of injury to themselves, co-workers, or others. Although the workplace effects of using medical marijuana may not differ substantially from the use of FDA-approved drugs or legal intoxicants like alcohol, its use remains illegal under federal law. Against this backdrop, two key questions have emerged — whether the intoxication defense commonly available to employers remains viable in this context and whether medical marijuana is a compensable medical expense under workers' compensation.

In most states, employers and insurers have been able to rely on intoxication as a defense against workers' compensation claims. Whether an employer may still rely on the defense if the employee is impaired by marijuana use — or has the drug in his or her system — when the on-the-job injury occurs will vary depending on which state's law controls. States that view use as a violation of federal law generally will allow the defense, while other states that allow medical marijuana use may not.

Whether medical marijuana is a legitimate medical expense under workers' compensation is an open question, and employers and insurers are uncertain about funding its use. While payment or reimbursement for medical marijuana would seem to be unavailable under federal programs, the cost of medical marijuana for use in connection with a compensable work-related injury or illness claim may be legitimate in a state where medical marijuana is legal. Even so, employers and insurers are questioning whether they may become liable by paying for medical marijuana for additional injuries to an employee, or injuries to others, caused by an employee's drug intoxication.

Last month, a New Mexico appeals court [ruled](#) that an employer and insurer must reimburse an injured worker for medical marijuana used pursuant to the state's medical marijuana law along with other injury-related expenses. Because marijuana is a controlled substance and cannot be prescribed, the court characterized its use as a reasonable and necessary service, compensable under the state's workers' compensation laws. By contrast, in neighboring Colorado, state law excuses insurers from covering any claim for reimbursement for the medical use of marijuana.

Marijuana and smoke-free laws

As legalization of marijuana spreads, new state laws are raising public health concerns. According to the National Institute on Drug Abuse ([NIDA](#)), marijuana smoke contains as much tar and more carcinogens than tobacco smoke. Because marijuana users tend to inhale more deeply and longer than tobacco smokers do, their lungs may be exposed to more carcinogenic smoke. While NIDA reports that several studies have suggested marijuana smoke may cause lung cancer, the evidence has been inconclusive. However, the American Lung Association [suggests](#) that frequent marijuana users have more health problems and a higher absenteeism rate than nonsmokers.

Like efforts to limit exposure to second-hand tobacco smoke, some states — such as Colorado — have added marijuana to their smoke-free laws. For example, California bans smoking medical marijuana in any place where smoking is prohibited. Montana's clean indoor air act, which requires workplaces to be smoke-free, includes medical marijuana, and North Dakota's smoke-free law bans "plant products intended for inhalation" along with

tobacco. With a broad prohibition against “any kind of lighted pipe, cigar, cigarette, or any other lighted smoking equipment,” Washington’s smoke-free law likely covers smoking marijuana.

In closing

Marijuana — even for medical use — is still illegal under federal law. As more states legalize medical marijuana, employers are increasingly concerned about whether, or to what extent, they may have to accommodate employees’ use. In most states and many industries, employers remain free to decide what their policies should look like and how they will address claims related to medical marijuana use. At least for now, employers can prohibit employees from using medical marijuana in the workplace. As these laws continue to evolve, courts will have to grapple with their intersection with employment laws. Periodically, employers will want to make sure that their pre-employment or random drug testing programs and substance abuse policies continue to reflect the needs of their workplaces, and that they are clearly communicated to their workforce.

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