Imagine this scenario:

Injured worker: “I have a backache.”

Treating physician: “Smoke two joints and call me in the morning.”

To workers comp payers, that conversation could be the stuff of nightmares. Among the myriad of questions it raises are, “How much do the joints cost?” since there is no National Drug Code for marijuana, and, “Who do I pay?” since it is unlikely your favorite retail pharmacy will be stocking marijuana anytime soon.

But the issue is increasingly being discussed as more states allow the use of medical marijuana. The conflicts among state and federal laws, the lack of definitive medical evidence, and the risks posed to overall workplace safety make it incumbent on workers comp practitioners to take any and all precautions.

According to the experts, that means staying abreast of changing legislation and case law, determining a company’s risk tolerance, and regularly reviewing and updating policies and procedures to ensure they are in compliance.
The Laws
As a Schedule I drug under the federal Controlled Substances Act, marijuana may not be prescribed, administered, or dispensed, and it is illegal to possess, use, purchase, sell, or cultivate. Along with LSD, heroin, and other Schedule I drugs, marijuana has no currently accepted medical use.

Nevertheless, 20 states and the District of Columbia have legalized marijuana for medicinal use, and several others are considering legislation. Those with medical marijuana laws on the books are Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, Michigan, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

The state medical marijuana laws vary widely. California—the first state to legalize medical marijuana—allows “qualified patients” and their primary caregivers to possess 8 ounces of dried marijuana and/or 6 mature or 12 immature plants. Washington’s medical marijuana patients are allowed to possess a 60-day supply, defined as up to 24 ounces of “usable” marijuana and up to 15 plants.

Legal Questions
Among the legal issues plaguing the workers comp system is whether an injury is compensable if a post-accident drug screen is positive for a claimant who has been prescribed medical marijuana.

“But the issue is far from clear cut, even in states that deny compensability when marijuana is involved. “The proof problem, as we see in intoxication situations, is whether the presence in the system is what led to the accident,” Randall said. “Because it can be in the system longer than alcohol and it can’t be objectively measured, it is much harder to pin the use of marijuana to being a sole cause or contributing cause.”

Since marijuana can remain in a person’s system anywhere from 24 hours to 30 days, depending on usage, proving impairment is difficult, if not impossible. However, there are other avenues available to employers.

“They may have bought the workers comp claim, but that positive test may still result in employer action,” Randall said. “Every court I am aware of has held that an employer is completely protected in disciplining, up to and including termination, for the presence of illegal substances in [a worker’s] system.”

Payment
Another legal question workers comp payers may increasingly ponder is whether they must pay for medical marijuana prescribed for a claimant in a state where it is legal.

Language in Oregon’s law is typical of that in other states: “Nothing in the Medical Marijuana Act shall be construed to require a government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of marijuana.”

However, Washington’s law says that health insurers “may enact coverage or noncoverage criteria … for payment or nonpayment of medical cannabis in their sole discretion.” New Mexico’s goes further: “The workers compensation system requires a patient registry identification card, supervision and monitoring, and caregiver and practitioner licensing in order for the drug to be compensable.”

While there have been cases of workers comp boards or judges ordering payers to fund medical marijuana, most have been overturned. For example, in the 2012 California case Cockrell v. Farmers Insurance and Liberty Mutual Insurance Company, a workers comp judge ordered reimbursement to an applicant for marijuana. However, on appeal, the Workers Compensation Appeals Board cited a separate statute and returned the matter to the trial level for further proceedings.

“I know a lot of people have received requests for medical marijuana, especially in California and Washington where the
use of medical marijuana is pretty well established,” said Mark Walls, senior vice president and workers compensation market research leader for Marsh USA, Inc. “Those requests are coming in and being denied. I’m not really seeing the courts allow it. It doesn’t mean they won’t, but it’s not happening a lot.”

One of the issues for payers is the lack of a basis on which to pay for medical marijuana. “There is no real visibility to healthcare solutions on bills for medical marijuana because there is no formal way to bill them like other drugs we see in the workers comp world, and there isn’t a defined reference to state fee schedules as a basis of reimbursement,” said Jim Andrews, executive vice president of Pharmacy Services at Cypress Care/Healthcare Solutions. “This lack of standard billing practices creates a significant barrier for the automated drug utilization reviews conducted by pharmacy systems to assure ongoing patient safety.”

In some cases, workers comp payers have funded medical marijuana voluntarily. “Under workers comp in Colorado, medical marijuana is not part of medical treatment guidelines, so it is not a recognized normal treatment we pay for,” said attorney Ronda K. Cordova of the firm Ritsema & Lyon, P.C. “The parties can, if both agree, cover something like that. We do have unique cases where medical marijuana may be a cheaper route to go than prescription painkillers that are not as effective. That is something that gets discussed, but a carrier that doesn’t want to pay is not forced to. It is not part of our guidelines, and we depend on the guidelines.”

Cordova said she is familiar with one such case in which the parties were awaiting approval from the Centers for Medicare and Medicaid Services (CMS) for a Medicare Set-Aside (MSA) for medications other than the marijuana. The issue of MSAs is another sticky wicket for workers comp practitioners.

“The interesting aspect is, given that with the federal government [marijuana] is still banned, CMS won’t review that because it is a non-Medicare payment,” attorney Randall said. “So it’s not something that meets any review threshold for CMS; but at least one MSA provider has provided for it as a future medical cost. That creates an interesting conundrum—medical marijuana being a future medical cost, but not one which Medicare would cover or review.”

Additional Considerations
Proponents of medical marijuana say it may be less addictive and less costly than more potent medications, such as opioids. Opponents argue that there is no firm evidence to support the use of medical marijuana.

The issue was raised during a panel session on the impact of medical marijuana on workers comp at the National Workers’ Compensation and Disability Conference® & Expo.

“With opioids, we know there are very significant side effects,” said Walls, the session’s moderator. “We know they are significantly overprescribed, that there are long-term health consequences, and it is a big cost driver. I asked, taking that into consideration, ‘Why not medical marijuana instead of opioids?’ The response was essentially, ‘Because it’s not proven to do anything.’ There is no evidence to support it, no studies to support that it actually treats conditions we see in workers comp.”

As the panelists also pointed out, marijuana could turn into a major cost driver for workers comp claims if there are side effects that necessitate other medications, as there are for opioids.

“Opioids have been studied and studied and gone through Phase III clinical trials for pain management. Medical marijuana has not,” said Dr. Theresa Genovese-Elliott of the Spine and Pain Institute of Santa Fe and a member of the panel. “With narcotics you can do point-of-center testing in the physician’s office …. At this point we don’t have testing parameters for medical marijuana.”

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The inconsistencies and lack of oversight also weigh heavily as considerations in the use of medical marijuana. “We think of our healthcare system as having our best interests at heart, based on systems like the Food and Drug Administration [verifying] that medications are safe and effective,” said Nelson Aragon, Pharm. D., senior clinical pharmacist with PMSI. “It’s going to be difficult for physicians and the healthcare community to really know for sure if there is a beneficial effect if all we are doing is allowing patients to produce their own. The conditions for growth from one location to another are different. The potency is different.”

For medical providers, the question of whether to prescribe marijuana is not only a medical consideration, but a legal one as well. In addition to the disparity between the federal Controlled Substance Act laws and the state laws, there are conflicts between state laws and regulations from the state medical licensing boards, as well as medical guidelines. Medical providers in the workers comp space say there’s often a balancing act involved.

“As providers, we try to relieve pain and suffering, get people back to work, and restore function. At the same time, we aim to keep our patients from harm,” said Dr. Robert Hall, medical director of Progressive Medical. “We also think about potential liability as we may be asked to write that script and the implications if the claimant is in an accident or has another injury.”

Advice

“All employers should have a drug policy in place against the use [of medical marijuana],” attorney Cordova said. “Not random testing, but when they are hired, make it really clear they cannot be under the influence at work.”

Bringing an injured worker back to the job may present additional concerns if the person is using medical marijuana. The safety of the workplace, as required by OSHA, may be in jeopardy.

“Seek input from HR or risk managers of employer groups, as you would normally do under other return-to-work situations,” said Tron Emptage, chief clinical officer for Progressive Medical. “What jobs are the workers doing, what do they have to do from an alertness standpoint? Handle it just like any other position where you are bringing a person back who is on medication.”

Employers are also advised to continually reevaluate any drug testing policies they have in place. “They need to make sure they are in compliance with state and federal law since it continues to evolve rather quickly,” Randall said. “At least you may be able to enhance the safety of the workplace, ensure it is safe, and monitor and train supervisors so they are aware of any warning signs of intoxication or impairment, which may lead to a legally justified drug test.”

Randall says that payers need to be aware of gray areas. For example, a worker could legally take medical marijuana under state law but would not be permitted to drive under US Department of Transportation regulations and guidelines.

“Do you really want that individual, even if he is being prescribed medical marijuana, getting behind the wheel of a vehicle regardless of whether it is a DOT-regulated safety sensitive position?” Randall said. “You may be damned if you do, damned if you don’t.”

As Randall explained, there may also be concerns that the Equal Employment Opportunity Commission, the agency that investigates and enforces Title VII claims, may take the position that employers accommodate the use of medical marijuana as an ADA-protected disability or treatment for a disability. Knowing that such an employee is using medical marijuana could create tort liability and other safety concerns. “There is not necessarily a right answer,” Randall said. “It’s a matter of weighing your risks and where you are willing to accept those risks.”

Editor’s note: According to the Marijuana Policy Project, which supports legalization, at least 14 states are considering new medical marijuana laws this year. In Florida, an initiative has already qualified for the state ballot. An additional 12 states and the District of Columbia are considering decriminalization, in which the drug remains illegal, but the penalties are softened or reduced to fines.

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