Legalization of Marijuana

Background
Over the last few years, several states have legalized marijuana in some form for medical use. And as a direct result of these actions, courts are increasingly dealing with contested cases of medical marijuana in the work environment.

While the 2016 elections could result in changes to the federal government’s tolerance toward state laws and state positions on the legalization of marijuana, at this time, 24 states and the District of Columbia have legalized medical marijuana use. In addition, recreational use of marijuana has been legalized in four states (AK, CO, OR, WA), one city (Portland, ME), and the District of Columbia. In 2016, at least 14 states have legislation or ballot measures to legalize marijuana. To date, at least 17 states have legalized the limited use of low-tetrahydrocannabinol (THC) forms of marijuana for medical use.

The legalization of marijuana was a main topic at the 2015 National Conference of State Legislatures’ (NCSL) annual Legislative Summit. Many state legislators indicated that they expected medical marijuana and/or the legalization of the recreational use of marijuana to be an issue in their state in 2016. NCSL adopted a policy resolution—“In Support of States Determining Their Own Marijuana and Hemp Policies Without Federal Interference.” The resolution states the following:

- NCSL believes that federal laws, including the Controlled Substances Act, should be amended to explicitly allow states to set their own marijuana and hemp policies without federal interference and urges the administration not to undermine state marijuana and hemp policies
- NCSL recognizes that its members have differing views on how to treat marijuana and hemp in their states and believes that states and localities should be able to set whatever marijuana and hemp policies work best to improve the public safety, health, and economic development of their communities

Federal Law
On a federal level, it is currently illegal to possess marijuana for any reason. Marijuana was legal for medicinal purposes until 1970 when the Controlled Substances Act was introduced, classifying marijuana as a Schedule I drug. Schedule I drugs have a high potential for abuse and are not accepted for medicinal purposes in the United States. Marijuana was categorized as a Schedule I drug because there were insufficient clinical trials to show that the benefits outweighed the risks, and marijuana does not have well-defined and measurable ingredients consistent from unit to unit. Marijuana compounds differ from plant to plant—THC levels can vary from 3% to 20%.

In 2015, legislation was introduced to legalize marijuana at the federal level. The legislation (H.R. 1013: Regulate Marijuana Like Alcohol Act) would decriminalize marijuana at the federal level and remove it, in any form, from all schedules of controlled substances under the Controlled Substances Act. The power to regulate marijuana would be left to the states, similar to the regulation of alcohol. The bill is currently pending in committee.

Treatment of Injured Workers
Scientists have confirmed that the cannabis plant contains active ingredients with therapeutic potential for relieving pain, controlling nausea, stimulating appetite, and decreasing ocular pressure. While marijuana could be used for injured worker pain relief, it is not typically recommended as the first choice of drugs to address pain. However, the high costs and addictive nature of drugs like OxyContin are contributing to the increase in discussions and actions around marijuana.

There are some concerns with using marijuana to treat injured workers. For example, there is no strong evidence that marijuana is effective at improving function. Furthermore, side effects and behavioral effects make it counterproductive to the treatment of pain for injured workers. According to the National Institute on Drug Abuse, marijuana has the potential to cause or exacerbate problems in daily life, including increased absences, tardiness, accidents, workers compensation claims, and job turnover.

Workplace and Insurance Challenges
Currently, no state allows employees to use marijuana in the workplace or requires employers to allow its use on the job. Therefore, employers who can legally use marijuana while off duty may still face consequences for arriving at work with detectable amounts in their system. In addition, there is a question as to whether lingering side effects may impact an employee’s performance of regular work duties. For example, someone who smoked marijuana on Saturday could still test positive for THC at work on Monday. At this time there is no breathalyzer for marijuana and no standard to determine what level of THC constitutes impairment.

Many state laws allow for reduced benefits in the event the injured employee is under the influence while working. Even though marijuana is legal in some jurisdictions, courts have held that employers that enforce their drug-free workplace policy can legally fire an employee who has marijuana in his/her system. Many employers are revising their drug-free workplace policies to include the prohibition of marijuana regardless of whether it is taken for medicinal purposes.

The Centers for Medicare & Medicaid Services (CMS) will not provide payment for products or services if a provider does not comply with federal law. Because marijuana is still an illegal substance according to federal law, no reimbursement can be made. In addition, the Schedule I status of marijuana prohibits the assigning of a National Drug Code (NDC), which creates difficulties in processing medical marijuana transactions.

Increasingly, insurers are receiving requests to pay for medical marijuana, but there are issues that need to be resolved:
- Can an insurer legally pay for an illegal drug?
- Whom does the insurer pay—the injured worker or the dispenser?
How can the insurer process the payment without an NDC?

Judicial Activity
There have been several court cases of note addressing these issues.

In *Coats v. Dish Network*, the employee in the case argued that using marijuana was a “lawful activity” under Colorado’s lawful activities statute, but the court rejected that argument stating that the term “lawful” refers to activities that are lawful under both state and federal law.

The employee, Brandon Coats, legally used marijuana for his disability. His employer, Dish Network, conducted a random drug test that found THC in Coats’s system. So Coats was fired for violating the employer’s drug policy, and the courts upheld the termination.

The New Mexico Court of Appeals has ruled that an insurer must reimburse a workers compensation claimant for the cost of medical marijuana to treat his low back pain (*Vialpando v. Ben’s Automotive Services and Redwood Fire & Casualty*). That same court decided two other cases based on the holding in *Ben’s Automotive*, ruling in both that reimbursement is required if the drug is reasonable and necessary medical care for treatment of a work injury (*Maez v. Riley Industrial and Chartis; Lewis v. American General Media*).

As a result of these decisions, the New Mexico Workers’ Compensation Administration promulgated a rule and adopted a fee schedule to provide a system for reimbursement of medical marijuana to injured workers. The rule and fee schedule went into effect on January 1, 2016.

However, a federal district court in New Mexico recently upheld an employer’s decision to terminate an employee for medical marijuana use (*Garcia v. Tractor Supply Company*). Separately, the US District Court for the Western District of Washington dismissed an employee’s claims against his employer after he was terminated for testing positive for marijuana following a workplace injury and violating the employer’s drug-free workplace policy. The fact that the employee had a valid prescription for medical marijuana had no bearing on the outcome (*Swaw v. Safeway, Inc.*).

Finally, in the US Supreme Court, Nebraska and Oklahoma challenged that Colorado’s marijuana law violates the Supremacy Clause of the US Constitution (*States of Nebraska and Oklahoma v. State of Colorado*). However, the Court declined to hear the case.

State Activity
Of the 24 states that legalized the use of medical marijuana, 22 have passed legislation with provisions that either implicitly or explicitly exempt insurers or employers from responsibility for reimbursement for medical marijuana. At this time, only Maryland and New Mexico have not passed such legislation.

However, New Mexico considered legislation this session that would have amended the state workers compensation act to provide that a workers compensation carrier or an employer providing workers compensation benefits is not liable for a claim for reimbursement associated with medical cannabis (*HB 195/SB 245*). The New Mexico legislature adjourned without advancing the legislation. In addition, Kansas introduced medical marijuana legislation this session which states that one of the purposes of the bill is to “recognize that workers compensation should cover medical cannabis as it would all other medications” (*HB 2691*).

Please note: The country’s regulatory, legislative, and legal environments change quickly. This article provides a snapshot at the time of publication.