

# PERSPECTIVES

## MEDICAL MARIJUANA AND WORKERS' COMPENSATION

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*The issue of using marijuana to treat medical conditions is not new. But in the past few years the use and approval – both cultural and legal – of recreational marijuana has accelerated and brought the topic back to the forefront. It has also brought the issue of medical marijuana into the world of Workers' Compensation and raised a number of questions about the use of legal, medical and recreational marijuana in the workplace that federal and state regulators and employers are struggling to answer.*

*York recently hosted a webinar on "Medical Marijuana and Workers' Compensation." Our panelists were JJ Schmidt, SVP – Managed Care and two experts from Optum (Helios), Tania Smiley, RPh, Clinical Pharmacist Liaison and Kevin Tribout, Executive Director, Government Affairs.*

*You can read an executive summary of the webinar and the issues our panel of experts discussed below. You can access a recording of the entire webinar by clicking [here](#).*

### AN OVERVIEW OF MEDICAL MARIJUANA

A number of states have laws that define the medical conditions, circumstances, and methods of consumption by which an individual can secure and use medical marijuana. Some of the most common uses of medical marijuana include:

- Stimulating appetite / treating wasting syndromes such as HIV induced cachexia
- Treating nausea and vomiting as a result of chemotherapy
- Reducing intra-ocular pressure that is caused by glaucoma
- Helping to manage chronic pain, especially neuropathic or nerve-related pain.
- Treating or preventing seizures associated with epilepsy.
- Reducing muscle spasms associated with multiple sclerosis
- Treating / reducing inflammation associated with inflammatory bowel disease

There are two main chemicals in the marijuana plant that are of interest medically. These are tetrahydrocannabinol or THC, and cannabidiol, or CBD. You would more typically see CBD used as medical marijuana and THC used for recreational purposes.

THC is the most psychoactive cannabinoid and gives the effect of feeling high. The THC can affect the cardiovascular system, the respiratory system, and the nervous system, and may result in:

- Mood changes such as anxiety or depression
- Cognition effects, such as decreased concentration, decreased attention spans, short term memory loss, paranoia, and time distortion
- Decreased spasticity
- Increased appetite
- Analgesic effects

Cannabidiol is a non-psychoactive and results in feeling relaxed and heavy or what is commonly called "feeling stoned." Cannabidiol has the potential to decrease the immune system and decrease blood sugar. The biggest concern with cannabidiol are drug interactions. These interactions can result in either an increased or decreased effect of the given medication that an individual is taking. This can be a concern if the medication in question, for example, is controlling a respiratory condition or is acting as a blood thinner.

As with many medications, there is the possibility of abuse. The Institute of Medicine finds that while there may be a risk of dependence in terms of medical marijuana, it's less than that of some prescription drugs. So as we consider the risks in terms of medical marijuana as it compares to other types of medications used to treat pain, the risk of dependence, while is still there, may not be as significant.



### THE LEGAL PERSPECTIVE

When we look at what is happening with medical and recreational marijuana from a legal perspective, we start to see conflicts and contradictions. Currently there are 25 states plus the District of Columbia and Guam that make medical marijuana available for a treatment in some form or fashion. Recreational marijuana is legal in four states – Washington, Oregon, Alaska and Colorado. Ohio had a ballot resolution this spring during their primary to legalize medical marijuana, and it failed. We believe that California is going to see a ballot resolution initiative this fall on their ballot to actually legalize recreational marijuana and we expect to see that ballot initiative come back in Florida to legalize medical marijuana across the board.

A number of government entities – from municipalities to states – are moving away from prosecuting recreational marijuana use. The Obama Administration has stated that they will not prosecute recreational marijuana use. The Department of Justice is standing aside on some of these medical marijuana decisions that are taking place in the states and not prosecuting recreational marijuana users in those states where it is legalized.

There are currently several states that prohibit paying for medical marijuana under Workers' Compensation, including Colorado, Michigan, Montana, Oregon and Vermont.

There was some recent legislative activity this year in Tennessee, as well as Wisconsin and Arizona, to try to exempt payment for medical marijuana in a Workers' Compensation claim. Those efforts fell through. More importantly, there was a bill that did pass one of the chambers in New Mexico, which would have exempted insurers and carriers operating under federal RICO requirements from paying for medical marijuana, which is classified by the Federal government as an illegal substance.

That legislation fell through, and unfortunately, in New Mexico, the fee schedule, which was amended late last year, does stipulate that reimbursement for medical marijuana. New Mexico also created a process by which the injured employee could purchase the medical marijuana and then seek reimbursement from their employer or their insurer.

There have also been several cases in California that are starting to push that envelope of making medical marijuana a recognized treatment under Workers' Compensation law, which then gives rise to the question, "Does medical marijuana become part of the fee schedule?"

However, marijuana is still classified as a Schedule I drug under the controlled substance act and is still considered to be an illegal controlled substance under the law. The FDA is studying the issue of reclassifying marijuana as a Schedule II drug. There is a concern that this would make medical marijuana more difficult to deal with it from a Workers' Compensation perspective, such as for treating chronic pain resulting from an injury on the job, and raise the issue of ADA accommodations and what employers would need to accommodate in order for an employee to utilize medical marijuana in the workplace.



### MEDICAL AND RECREATIONAL MARIJUANA AND WORKERS' COMPENSATION

When we look at the nexus of medical – and recreational – marijuana and the workplace, there are more questions than answers. The laws and regulations pertaining to medical and recreational marijuana have changed considerably over the past few years and will continue to change, creating ongoing challenges for employers.

Some of the issues discussed by our panel of experts include:

- If medical marijuana is legal and an employee has a legitimate prescription, and has marijuana in his or her system or uses marijuana during work hours, do you still have a drug free workplace? If you have a drug-free work place policy, can you fire someone who tests positive for medical marijuana?
- How does legalized marijuana affect an employer's drug screening policies and practices?
- How does the use of legal, medical or recreational marijuana affect an employer's ability to screen / decline candidates or terminate employees? When does use of medically prescribed marijuana need to be disclosed to an employer or prospective employer?
- How does legal use of recreational or medical marijuana affect employees in safety sensitive positions such as heavy machinery or precision tool operators, school bus drivers, police or fire fighters? It's important to understand who is actually taking this medication and making sure that you're monitoring this and building this into your workplace policies including safety policies.
- How do employers determine at that point of accident, what the level of the drug that was in their system and what their impairment level was at the time of an accident or injury?
  - In some states, currently Rhode Island and Delaware, employees are not considered to be operating a vehicle "under the influence." solely because of the presence of marijuana in their system.
  - Some jurisdictions require proof that the marijuana-related impairment was the sole call of the injury in order to deny the claim.
  - It can be hard to determine how intoxicated an employee is. Urine tests don't always provide sufficient or necessary information and breathalyzer tests may not be applicable. It can also be hard to legally substantiate a "judgment call" by a supervisor.
- In states where medical marijuana is legal, are payment / denial and reporting guidelines clearly defined and consistent?
- How does legalization of marijuana impact the employer's obligations under the Americans with Disabilities Act (ADA)? The ADA contains an illegal drug provision. But employees in states where medical marijuana is approved may seeking accommodations for the underlined disability that necessitates the use of medical marijuana. This may force employers to make some type of accommodation for the medical marijuana. However, the same questions that need to be asked about any requested accommodation apply here, as well:
  - Does the requested or required accommodation impose an undue hardship on either party?
  - What is the cost of the accommodation?
  - Does the accommodation create a loss of financial resources for the employer?
  - What type of work does the employee in question do and how will use of marijuana affect their ability to do that job from either a cognitive or a motor skills perspective?
  - What is the impact of the accommodation on the place of business and the other employees?
  - If I'm paying or allowing medical marijuana, does it increase the claim costs and are there longer periods of recovery?
- How do OSHA regulations impact the use of medical or recreational marijuana in the workplace? OSHA requires that employers maintain workplaces that are free from hazards that are likely to cause death or serious physical harm to employees. So employers need to consider some of the impairments that might come into play as it relates to this medication. The impairment that's caused by marijuana could be considered a hazard and it could be a possible violation of OSHA and CAL OSHA.