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Riding the Green Wave: Navigating the Intersection of Medical Marijuana, Politics, Medicine and Workers Compensation

The Legal issues affecting the legal use of medical marijuana – where we stand today.

As of November 2018, the use of cannabis for medical purposes is legal in 33 states, plus the territories of Guam, Puerto Rico, and the Northern Mariana Islands, and the District of Columbia. Ten states have legalized adult recreational use of marijuana.

There is considerable variation in medical cannabis laws from state to state, including how it is prescribed, produced and distributed, how it can be consumed, and what medical conditions it can be used to treat.

Nonetheless, there exists a fundamental legal conflict between the states statutes and federal law with regard to the legal use of marijuana. While many states are legalizing marijuana for a multitude of reasons, it remains classified as a Schedule I drug under the Controlled Substances Act of 1970 and therefore federally illegal.

Federal Law

1. The Controlled Substances Act of 1970

The Controlled Substances Act ("CSA"), Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, regulates the manufacture, importation, possession and distribution of controlled substances in the United States. The Food and Drug Administration must approve any substance before it may be prescribed or sold in the United States. The CSA also confers regulatory authority over "controlled substances" to the DEA. Marijuana (or cannabis) is defined as a Schedule I controlled substance, which makes it a federal crime to possess, distribute, or dispense marijuana. The DEA has the

authority to reclassify a controlled substance if new evidence becomes available justifying the change.

2. 2018 Farm Bill

The Agriculture Improvement Act of 2018, or Farm Bill, was signed into law on December 20, 2018. This law amended the CSA to remove the Schedule I classification of industrial hemp plants containing no more than 0.3 percent THC. Under the Farm Bill's provisions, any part of the hemp plant, from its seeds to its extracts, acids, salts, and isomers are now fully legal as an ordinary agricultural commodity.

3. Rohrabacher-Blumenauer Amendment

While marijuana remains a Schedule I controlled substance, the Department of Justice is prohibited from using federal funds to prevent the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin from implementing their own states laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

This amendment was originally introduced by Rep. Maurice Hinchey (D-NY) in 2001, but was not passed by the house until 2014 (when it was known as the Rohrabacher-Farr amendment due to the retirement of its original sponsor. It is required to be renewed annually by Congress and has been renewed every year since 2014. Nonetheless, the Department of Justice continued to prosecute individuals and non-State entities (interpreting the amendment as only applying to the prosecution of state officials). Because state officials were not prosecuted prior to its passage, it essentially had no effect. However, in 2015, the United States District Court for the Northern District of California in *US v. Marin Alliance for Medical Marijuana*, 139 F.Supp.3d 1039 (2015), lifted an injunction against a California dispensary so long as it continued to operate in accordance with California's laws, consistent with a plain reading of the amendment. In 2016, the DOJ's interpretation was again rejected by the Ninth Circuit Court of Appeals in a case consolidating the appeals involving 10 medical cannabis providers in California and Washington. *US v. Macintosh*, 833 F.3d 1163 (9th Cir. 2016).

4. The STATES Act

In June 2018, Senator Elizabeth Warren (D-MA), Cory Gardner (R-CO) and six other co-sponsors introduced legislation known as the Strengthening the Tenth Amendment Through Entrusting States (STATES) Act (<https://www.congress.gov/bill/115th->

congress/senate-bill/3032/text). Rep. David Joyce (R-OH) introduced companion legislation in the House (<https://www.congress.gov/bill/115th-congress/house-bill/6043/text>). The STATES Act would amend the CSA to except from federal enforcement individuals or corporations in states who are in compliance with local laws (whether it be State, U.S. territory, District of Columbia, or tribal law) on cannabis. The bill also contains restrictions with regard to the employment or hiring of any individual under 18 years old to manufacture, produce, distribute, dispense, administer, or deliver marijuana.

Despite Sen. Gardner's attempt to attach the bill as an amendment to the First Step Act, the criminal justice reform bill signed into law on December 21, 2018, Senate Majority Leader Mitch McConnell blocked this attempt. Sen. Chuck Grassley (R-IA) called the idea a "back door to legalization."

5. The Compassionate Access, Research Expansion and Respect State Act

Bipartisan bill introduced by Cohen (D-TN) and Young (R- AK). House Bill H.R.127 proposes "To extend the principle of federalism to State drug policy, provide access to medical marijuana, and enable research into the medicinal properties of marijuana". The CARERS Act essentially states that the federal government would take a hands-off approach to medical marijuana and allow states to legalize and regulate their own markets. Furthermore, the CARERS Act would allow the V.A. to actively issue medical marijuana recommendations for patients, something that the department has proven reluctant to do.

6. H.R. 420 - Regulate Marijuana Like Alcohol Act.

Introduced by Rep. Earl Blumenauer (D-OR), the bill proposes to remove marijuana from the Controlled substances Act and regulate marijuana similar to the way alcohol is regulated.

7. Sensible Enforcement of Cannabis Act.

A bipartisan group of lawmakers filed legislation that, if enacted, would essentially revive the Obama-era marijuana enforcement memo that was rescinded by then-U.S Attorney General Jeff Sessions last year. The bill specifies that the attorney general "shall not prosecute for any conduct that concerns marihuana for medicinal or recreational use and is authorized by the laws of the State involved."

8. The Legitimate Use of Medical Marijuana Act (LUMMA)

Rep. Morgan Griffith (R-VA) introduced a bill that would reschedule marijuana and clarify that the federal government cannot “prohibit or otherwise restrict” state-legal use, possession, transportation, production and distribution of medical cannabis.

9. Washington v. Whitaker

The most important pending federal case is *Washington v. Whitaker*¹ (*Sessions*), which is pending before the United States Court of Appeals for the Second Circuit. This lawsuit was filed on behalf of several plaintiffs challenging the constitutionality of the Controlled Substances Act Schedule I classification of marijuana.

A. State Law

1. Medical and Recreational Use

As of November 2018, the use of cannabis for medical purposes is legal in 33 states, plus the territories of Guam, Puerto Rico, and the Northern Mariana Islands, and the District of Columbia. There is considerable variation in medical cannabis laws from state to state, including how it is prescribed, produced and distributed, how it can be consumed, what medical conditions it can be used to treat, and important for this discussion, how it must be paid for.

Ten states and the District of Columbia now have legalized small amounts of marijuana for adult recreational use. These states include Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington. States that are leaning towards legalizing adult recreational marijuana use in 2019 include New York, New Jersey and Illinois.

Workers Compensation Issues

The controversy and debate surrounding the use of medical marijuana has now entered the workers compensation arena, with New York, New Jersey and New Mexico leading the charge. In all three states, workers compensation judges and appellate courts have rendered decisions approving the use of medical marijuana for injured workers and have mandated that insurance carriers reimburse the injured worker for same.

¹ Docket No. 18-859-cv

In 2007, New Mexico became the 12th state in America to legalize medical marijuana through passage of the Lynn and Erin Compassionate Use Act. In 2010, New Jersey passed the Compassionate Use Medical Marijuana Act. In 2014, New York passed the Compassionate Care Act. While not all states use the term “compassionate” in the names of their legislation, it has become widely recognized in this context.

1. New Mexico

The Court of Appeals has on three separate decisions², held that a patient in the state’s medical marijuana program who was injured on the job must be reimbursed by an employer for the expense of marijuana used for treatment.

In fact, the New Mexico Workers’ Compensation Administration states on its website: “New Mexico allows an injured worker the use of medical marijuana when deemed “reasonable and necessary care” under the Workers’ Compensation Act. The injured worker must pay out of pocket, and is reimbursed per fee schedule for the cost of medical cannabis deemed necessary in the workers’ compensation claim.”

2. New York

In February 2018, the New York Workers Compensation Board (NYWCB) in *Matter of WFD, Inc.* 2017 NY Wrk Comp G1403803, upheld a lower court decision directing the workers compensation carrier to reimburse the claimant for the medical marijuana prescription on the grounds that medical marijuana is legal in New York. The NYWCB reasoned that The Public Health Law permits marijuana to be prescribed to treat chronic pain (see 10 NYCRR 1004.2[a][8][xi]). The NYWCB further reasoned that neither the federal courts in the 2nd Circuit nor the New York Court of Appeals have found the Public Health Law invalid under federal preemption. Therefore, absent a directive by controlling authority, the Board Panel found that Title V-A of the Public Health Law is valid and applicable law.

On the heels of this decision, the New York legislature recently introduced a bill that would categorize medical marijuana just like any other prescription drug and must be covered by workers’ compensation insurance. Assembly Bill A11390 is sponsored by Assemblyman Richard Gottfried, D-Manhattan, who has advocated for other medical marijuana legislation in recent years. The bill stipulates that public insurance programs, including Medicaid and workers’ compensation, would have to pay for medical marijuana if prescribed in accordance with state regulations. This Bill is pending for the 2019 legislative session.

² See *Viapando v. Ben’s Automotive Services*, Opinion No. 2014-NMCA-084; *Lewis v. American General Media*, Opinion No. 33,236; *Maez v. Riley Industrial*, Opinion No. 33.154

3. New Jersey

Citing a need to stop "killing people" by forcing injured people to take opioids for their pain, a New Jersey Workers' Compensation Judge ordered Freehold Township (Monmouth County) to pay for a municipal employee's medical marijuana. In *McNeary v. Freehold Township*, Claim Petition No. 2007-10498 (argued June 28, 2018), an injured worker filed an application to compel the employer to pay for medical marijuana used to treat his muscular spasticity. At issue, however, was whether marijuana's illegality under the federal Controlled Substance Act precluded the court from using New Jersey's Medical Marijuana Act as a predicate for compelling Freehold to pay for the injured worker's medical marijuana. Judge Lionel Simon, a former prosecutor, stated that while he is in full support of federal and state narcotics laws he didn't believe "in [his] heart of hearts" that an employer or its insurer who reimburses an employee for medical marijuana "is in any way complicit with the distribution of illicit narcotics." Judge Simon also noted that the employee had "a documented medical need" for medical marijuana and expressed concern that he might become addicted to opioids if he did not receive medical marijuana.

Subsequent to the *McNeary* decision, a New Jersey lawmaker filed a bill that would require workers compensation carriers to pay for medical marijuana. A.B. 4505, introduced by Assemblyman John J. Burzichelli, D- Cumberland/Gloucester/Salem, would amend the state's medical marijuana statute, affecting how the drug is covered under liability stemming from personal-injury protection insurance policies and workers compensation. The proposal provides that "automobile insurance benefits and workers' compensation benefits must include coverage for costs associated with the medical use of marijuana provided that the insured or the employee is a qualifying patient authorized for medical marijuana pursuant to the Compassionate Use Medical Marijuana Act". The bill clarifies the requirement that "at least one other medication or treatment has been attempted and found to be unsuccessful in treating the debilitating medical condition that qualified the patient for the medical use of marijuana."

4. Maine

On the opposite side of the spectrum, Maine has been resistant to this growing legal use of medical marijuana, with its state Supreme Court ruling that An employer cannot be ordered to reimburse an injured worker for medical marijuana, because such a payment would be "aiding and abetting" a violation of federal law. See *Bourgin v. Twin Rivers Paper Company*, 2018 ME 77.

I. Medical Benefits of Cannabis and CBD Oil in Treating Injured Workers

Notwithstanding the legality of cannabis products, including hemp and marijuana, for medical purposes, there is a debate as to the medical efficacy of these products. There is a growing opinion that Cannabidiol (CBD) oil, which can be extracted from hemp, can treat various ailments, including anxiety, depression, stress, insomnia, muscle inflammation, joint pain, and even acne. CBD oil is legal in 30 states where medicinal and/or recreational marijuana is legal. 17 other states have CBD-specific laws on the books.

With regard to the flower itself, it has been approved by states to treat a range of serious medical conditions, including cancer, HIV/AIDS, ALS, Parkinson's or Huntington's Disease, MS, epilepsy, PTSD, neuropathy, and chronic pain, among others. Relevant to our conversation today, it has been identified as an alternative to prescription opioid medication in the treatment of chronic pain. However, the Schedule I classification of cannabis has prevented the efficacy of cannabis for treating these conditions from being evaluated sufficiently. As such, the legislation passed by the various states and surrounding litigation has shown how states have served as what Justice Brandeis referred to as "laboratories of democracy."

II. The Cannabis Industry

The marijuana industry has developed into an economic force to be reckoned with. Wall Street analysts have predicted the legal marijuana industry to be a \$5 billion dollar a year industry in the United States. According to a newly released report from the Bank of Montreal, the global cannabis market could be worth \$194 billion in seven years.

Retail dispensaries have opened throughout the nation, each with different brands and strains of medical marijuana including different types of delivery devices such as vape pens, capsules and edible food products. Different types of strains of marijuana are alleged to treat different types of diseases and conditions.

III. The Efficacy Issue

There still exists a medical debate as to the efficacy of medical marijuana and whether it is truly an alternative to treating injured workers. While there is a growing medical opinion that medical marijuana can be used for a variety of medical conditions including chronic pain, neuropathic pain, anxiety and even diabetes, there still exists a medical community which questions the true efficacy of MMJ and remains calling for further studies.

IV. Reimbursement Issues

Putting the legality issues aside, the modality for reimbursing the injured worker for medical marijuana should also be carefully considered with a keen effort to be as transparent as possible. The options that currently exist are (1) reimbursing the claimant directly, (2) depositing the reimbursement into the claimant's attorney's trust account or (3) processing the prescriptions through a Pharmacy Benefits Manager who is able to adjudicate the prescriptions on a real time platform so as to allow prior authorization utilization.

V. Using Medical Marijuana as a tool for claims resolution

Requests for medical marijuana can also be used strategically to help resolve workers compensation claims since physicians are prescribing medical marijuana in lieu of opioids for chronic pain and in some cases, psychotherapeutic medications. This could effectively alter the prescription regimen and thereby lower the cost of Medicare Set Asides and making the settlement more cost effective. Therefore, settlement of the claim should be always be explored when a requests is received for medical marijuana.