

Medical Marijuana: Workplace Considerations




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Outline:

- I. Developments in the past year
 - II. Opioid Crisis: Studies on Marijuana and Opioid Deaths
 - III. Legal Status: Medical and Recreational Marijuana
 - IV. Workers Compensation: trends and issues
 - V. Returning to Work: Employer policies and best practices
 - VI. Massachusetts Test Case at the SJC
 - VII. Recreational Marijuana
 - VIII. Stay tuned . . .
 - IX. Ethics considerations for lawyers and doctors
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**What is new in the past
year? A lot!**

Recent Developments in the Law

- A Few More Workers Compensation Decisions
- OSHA Weighs in on Post-Accident Drug Testing
- Massachusetts Case of First Impression: *Barbuto*
- Recreational Use Approved
- More Facilities Approved to Grow and Distribute for FDA Authorized Research Purposes (81 FR 53846 8/12/16)
- Trump Administration – Signaling Change of Non-enforcement Policy on the Horizon? (Consolid. Appropri. Act of 2016, s. 532)
- Ethics Guidance



Growing Opioid Crisis



The Opioid Crisis: Marijuana options to treat workplace injuries?

“States that have implemented medical marijuana laws have a 25 percent lower annual rate of opioid overdose deaths than states without medical marijuana laws.”

Marcus A Bachhuber, MD. *Medical Cannabis Laws and Opioid Analgesic Overdose Mortality in the United States, 1999-2010*, JAMA Internal Med. 2014, 174 (10): 1668-1673

AAA Study:

Fatal road crashes doubled after Washington state legalized recreational marijuana.

“Prevalence of marijuana involvement in fatal crashes: Washington 2010-2014” AAA Foundation for Public Safety (May 2016).




Legal Status of Recreational & Medical Marijuana Use

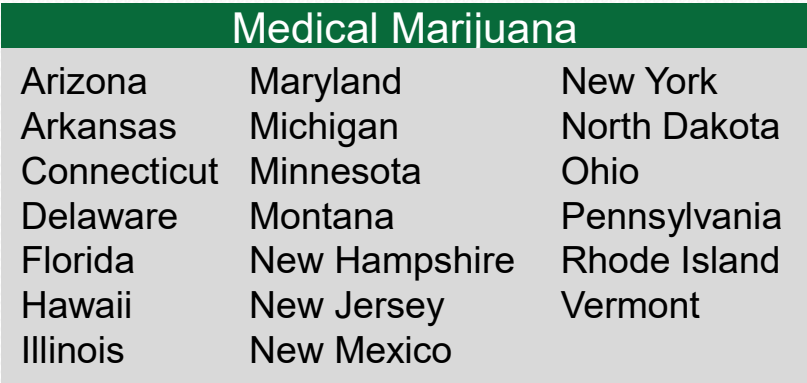




Twenty Nine States and DC

- Medical Marijuana is legal in 29 states and the District of Columbia.
 - Still a Schedule I illegal drug under federal law.
 - A handful of states' workers compensation boards have addressed whether carriers have to pay for medical marijuana.
 - Eight States approve recreational marijuana, including Massachusetts
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Introduction



Alaska	Nevada
California	Oregon
Colorado	Washington
Maine	Washington, D.C.
Massachusetts	

Alabama	Mississippi	Texas
Georgia	Missouri	Utah
Iowa	North Carolina	Virginia
Kentucky	South Carolina	Wisconsin
Louisiana	Tennessee	Wyoming

Source: National Conference of State Legislatures
<http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>




Workers Compensation Update

Reported Workers Comp. Decisions

- A handful of states have issued reported decisions addressing medical marijuana in the Workers Comp. context:
 - California: Two reported, WCAB not uphold reimbursement
 - Connecticut: Petrini, 6021 CRB-7-15-7; 2016 WL 6659149
 - Iowa: McKinney, 2002 WL 32125774
 - Maine: Seven reported cases; Mixed results fact specific
 - New Jersey: Watson and 84 Lumber (unpublished)
 - New Hampshire: Nutting v. Benchmark Elect (not reasonably necessary)
 - New Mexico (now statutory reimbursement): three reported cases




Massachusetts DIA?

- No reported decisions (a few conciliations).
 - Proposed voluntary trial opiate diversion program.
 - Pending Trust Fund appeal regarding reimbursement for medical marijuana.
 - DIA Health Care Services Board public meeting November 19, 2016 – grappling with establishing DIA policy regarding medical marijuana. Among other things, the HCSB develops and endorses treatment guidelines which serve as a basis for evaluating the medical necessity of treatment.
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Obstacles to Comp. Coverage

- State law may expressly provide that “health insurers” do not have to reimburse for medical marijuana.
 - No FDA approval.
 - No large scale Human Trials to prove “efficacy.”
 - Currently, not included in any workers compensation treatment guidelines, such as the Official Disability Guidelines (ODG) and the American College of Occupational & Environmental Medicine (ACOEM) Practice Guidelines.
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Other Issues for Coverage...

- Is it “reasonable and necessary”?
 - Is it a “Prescription” or “Service”?
 - What is the reimbursement rate?
 - How to reimburse – not thru bank to dispensary because Schedule I.
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State Law Eligibility/Cross Border

- Does the injured worker have a “debilitating condition” under the state’s medical marijuana statute?
 - Which state’s law applies if the employee lives and works in different states?
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RTW: What is an Employer to Do?

Returning the Worker to Employment?

- So far, generally, terminated employees have not fared well in the courts.
- Even in New Mexico....*Garcia v. Tractor Supply Company*, No. CV 15-00735 (D. N.M. 2016)(upheld employee termination for positive drug test; no duty of employer to accommodate).
- Federal ADA: Employer has no duty to accommodate.
- State law?
 - Most states do not require workplace accommodation but. . . is this changing?
 - Private right of action under state legalization law? Off Duty Conduct? Privacy laws?

Good Workplace Policies

- Best practice for employers to adopt:
 - Zero Tolerance
 - Drug Testing:
 - Pre-employment
 - Reasonable Suspicion
 - Post Accident (OSHA?)
 - No Smoking/Vaping
 - Government Contractor Obligations/DFWP?
 - But reasonable accommodation considerations?

Slippery Slope ... Impairment?

- Positive test? No current test for “impairment.”
- Stays in the blood a long time for a positive test, even if not “impaired.”
- What will the MRO test for?
- What will the MRO report as a positive result?
- Employer liability for negligent retention?



Barbuto: The MCAD Weighs In: Reasonable Accommodation




Barbuto v. Advantage Sales & Marketing, LLC (SJC Docket No. 12226)

- In August, 2016, Judge Robert Tochka granted the employer's motion to dismiss 5 of 6 counts in first Massachusetts case involving an employee's termination for off duty use of medical marijuana.
- Plaintiff alleged six counts:
 - Violation of the Massachusetts Anti-discrimination statute M.G.L. c. 151B, failing to provide reasonable accommodation;
 - Violation of the Medical Marijuana law under 105 C.M.R. 725 and Section 369 of the 2012 Acts;
 - Violation of public policy; and
 - Invasion of privacy.



Barbuto: A favorable plaintiff


- Christina Barbuto was recruited by Advantage Sales.
 - Ms. Barbuto was offered the job, and later informed she would need to take a drug test.
 - Ms. Barbuto disclosed to Advantage Sales that she would test positive for marijuana because she used marijuana off duty in small quantities, two to three times per week, to treat Crohn's Disease.
 - The marijuana was “prescribed” by Ms. Barbuto's physician and her use was in compliance with Massachusetts law.
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Barbuto Superior Ct. Decision

- The Suffolk Superior Court dismissed all counts, *except for* invasion of privacy re drug test under M.G.L. c. 214, §1B.
- The Plaintiff appealed to the Massachusetts Court of Appeals.
- The Plaintiff retained Vincente Sederberg, known as “the marijuana law firm”.
- Massachusetts Supreme Judicial Court took the case on direct appellate review, and requested amicus briefs on two issues.



SJC Asks for Amicus Questions

- Amicus Questions:
 - (1) whether termination of an employee's employment based on her lawful use of medical marijuana outside the workplace violates the MGL c. 151B or is otherwise wrongful; and
 - (2) whether the medical marijuana act and its regulations create a private right of action. (MCAD and Mass. NELA filing amicus)
 - Oral Argument March 8, 2017; waiting for decision
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MCAD Position:

- In its Amicus Brief, the MCAD took the position that the employer MUST engage in an interactive dialogue re reasonable accommodation. *See also* NY and Nevada.
- Employer cannot simply terminate the employee for violation of the Zero Tolerance drug testing policy (exceptions)
- Need to consider underlying medical condition
- Use the interactive process to determine if a reasonable accommodation may be made
- Employer burden of proving “undue burden.”
- Will need medical opinion re ability to safely perform job duties.
- On site use? Impairment?

If you fire them ...Unemployment Compensation?

- Several Massachusetts decisions have upheld unemployment benefits for employees terminated following a positive drug test. O'Connor Company v. Commissioner of Employment Training, 422 Mass. 1007 (1996)(A positive drug test is not alone sufficient to establish violation of the employer's drug policy).
- Employers have failed to prove that the employee was "working under the influence," particularly where employer failed to comply with the federal drug testing protocols. See Board of Review BR-118149; BR 110354; BR-109252A.



Recreational Marijuana: Impact on Workers Comp. and Employer Practices?

Massachusetts Recreational Marijuana Referendum?

- Effective December 15, 2016, recreational marijuana use is legalized up to 10 oz. inside homes and less than 1 oz. in public.
- Will be legal to grow up to six marijuana plants in the home.
- Retailers subject to state sales tax.
- Creates a Cannabis Control Commission to regulate legalization and issue retailer licenses.
- Workers Comp. carriers assert now like any other OTC; is it? Or is there a “prescription strength?”
- Just because is it not illegal, does not mean employer has to allow use, possession, dispensing, or impairment on company property (like guns).



What are employers to do?

- Stay tuned....
- SJC will issue its decision and provide guidance for Massachusetts employers
- MCAD disclosed its position for now, and NH HRC unofficially is in accord with the MCAD
- For accommodation, how is marijuana different than opioids? Cesamet? Marinol?
- Impairment more easily assessed with other drugs?
- National Conference of State Legislatures adopted a resolution seeking removal of marijuana from Schedule I (denied by DEA)

What are doctors and lawyers to do?

- Medical Ethics: Controlled Substance Registration limits
- Attorneys Ethical Concerns:
 - New Hampshire Bar Association Ethics Committee (8/30/16) requested the New Hampshire Supreme Court to address the application of the NH rules of professional conduct to representation of clients with respect to medical marijuana.
 - The Request contains a comprehensive discussion of all states ethics commissions position on attorney professional conduct limitations.



QUESTIONS????

NAJJAR EMPLOYMENT LAW GROUP, P.C.

- **Debra Dyleski-Najjar** founded the Najjar Employment Law Group, P.C. in April, 2008 as a labor, employment and benefits boutique law firm providing top quality legal advice, as well as litigation expertise, for employers to keep employers ahead of the curve. Ms. Najjar is a graduate of Boston University School of Law, third in her class, and a magna cum laude graduate of Wellesley College. She is admitted to practice in the state and federal courts of Massachusetts, Maine and New Hampshire as well as the United States Supreme Court. Ms. Najjar is a fellow of the College of Labor and Employment Attorneys, a certified member of the American Society of Pension Professionals and Actuaries, AV rated by Martindale Hubbell, and recognized as a New England Super Lawyer over ten consecutive years. Over her 30 plus year career, Ms. Najjar has advised many employers regarding workplace accommodations and successfully defended ADA claims before state and federal agencies as well as in the courts. www.nelgpc.com 