

# Marijuana Legalization, Workers' Compensation & The Workplace

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# Runners High??



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# The History of U.S. Marijuana Policy

- Marijuana Tax Act of 1937
  - Backed by Special Interests
  - Opposed by the American Medical Association or AMA

# 1970 Controlled Substance Act or CSA

- Schedule 1 Drugs: Has no accepted medical use, has a lack of accepted safety for use under medical supervision and has a high potential for abuse.
  - Examples: Heroin, LSD, Ecstasy and Marijuana

- **In 1996 California Passes Proposition 215**
  - making it the first state in the country to pass legislation legalizing marijuana for medical purposes.



# 31 States and D.C. with Legal Medical Marijuana Laws

Alaska  
Arizona  
Arkansas  
California  
Colorado  
Connecticut  
Delaware  
Florida  
Hawaii  
Illinois  
Louisiana  
Maine  
Maryland  
Massachusetts  
Michigan  
West Virginia  
Minnesota  
Montana  
Nevada  
New Hampshire  
New Jersey  
New Mexico  
New York  
North Dakota  
Ohio  
Oregon  
Pennsylvania  
Rhode Island  
Vermont  
Washington  
Oklahoma  
\*Washington D.C.



# 9 States and D.C. Legalize Recreational Marijuana

- Oregon
- Colorado
- Washington
- Alaska
- California
- Massachusetts
- Nevada
- Vermont
- Maine
- Washington D.C.

\* States considering it this coming year: NJ, Michigan, N. Dakota,

# Federal Developments

- January 2018: AG Sessions Rescinded the Obama era policy or “Cole Memo Policy”. This policy allowed for those legally operating under their state’s law to do so without the threat of federal prosecution.
  - \*Not Recreational
- However.....

# Federal Developments

- Congress continues to include the Rohrabacher-Blumenauer / Farr amendment in the budget, which blocks the DOJ from using federal funds to impede state **medical** marijuana laws.
- This means that federal prosecutors are still not able to pursue cases against **medical marijuana** users or businesses operating legally within their states.

\*This does not provide protection for the recreational marijuana industry.

\* 9<sup>th</sup> Circuit Case U.S. V. Marin Alliance 2015



# The Impact on Workers' Comp

*Bourgoin v. Twin Rivers Paper Co.* , 2018 ME 77,  
2018 WL 2976309 (June 14, 2018)

- The Maine Supreme Court held that requiring a respondent to pay for the cost of marijuana would require the respondent to be aiding and abetting in the commission of a crime
- CSA supersedes state law under the Supremacy Clause of Constitution.

# New Jersey Workers' Comp

- On June 28, 2018 in the case of ***McNeary v. Freehold Township*** Judge Lionel Simon, Toms River, ordered the carrier to reimburse the petitioner for the cost of the marijuana, despite the DOJ policy change and the recent Maine SC opinion in the Bourgoin case.
- No Trial, just a hearing
- Prior to this ....

# New Jersey Workers' Comp

- In ***Watson v. 84 Lumber***, No. 2009-15470 (December 2016) Judge French ordered a carrier to reimburse the petitioner for the cost of marijuana to treat CPRS.
- At trial doctor testified that marijuana would **reduce the petitioner's opiate intake** and discussed the negative side effects of opiates. (Maine, New Mexico and Connecticut WC decisions discussed as well).
- Judge French in her opinion, stated "the effects of the marijuana, in many ways, is not as debilitating as the effects of the Percocet" and "the pharmacy records show that, ultimately petitioner was able to reduce his use of oral narcotic medication.....As a result of his improved pain management, he has achieved a greater level of functionality".
- Judge level not binding on other Judges.

# Marijuana & Opiate's Intersect

- The costs of authorizing opioid pain management are often subtle and go far beyond the cost of the medications.
- A 2012 Lockton Companies report concluded “prescription opioids are the #1 WC problem in controlling the ultimate cost of indemnity losses.

# The Cost of Opiates WC

- A Hopkins-Accident Research Fund Study from 2012 found that injured employees who were prescribed even one opioid had an average total claims costs 4 to 8 times greater than employees with similar claims who were not given opioids.

# The Cost of Opiates WC

- These higher costs were attributed to several factors:
  - Increased ER visits
  - Death
  - Addiction treatment
  - Related illness

# Government Response

- States have approached the crisis in a variety of ways, but generally, control is given to state medical and/or pharmacy boards.
- Governor Murphy has proposed combatting Opiate addiction with Marijuana??
- NJ Law regulating dispensing opiate based pain medications – 5 day supply NJ / 7 days in PA
- Prescription Drug Monitoring Programs (PDMP)

# NJ Compassionate Use Act

- N.J.S.A. 24:61-1 to 24:61-116. The law limits the debilitating medical conditions for which the medical use of marijuana may be used for the following conditions:

## **JUST ADDED**

- **Chronic pain** related to musculoskeletal disorders or of a visceral origin
- **Migraines**
- **Anxiety**
- **Tourette's Syndrome**
- Terminal illness (less than 12 months to live)
- Seizure disorder
- Glaucoma
- HIV / AIDS
- Cancer
- Multiple sclerosis
- terminal cancer
- muscular dystrophy
- Inflammatory bowel disease including Crohn's disease

# NJ Compassionate Use Act

- Need a registered doctor.
- Permitted up to 2 ounces costing between \$400 to \$500 per ounce. Legislature is considering increasing to 4 ounces.
- Need a bona fide doctor patient relationship, but do not need to be on an online registry or marijuana doctor list.
- No driving or smoking in Public.
- Private health plans do not have to pay.
- Currently 6 distributions centers increasing to possibly around 80.

# How Should Employers Address the Issue?

- **General Rule – Employers in all 50 states and the District of Columbia can regulate an employee's use of marijuana by:**
  - Prohibiting marijuana possession and use at work
  - Prohibiting employees from reporting to work impaired or under the influence of marijuana
- **Zero Tolerance Policies**
  - First determine if the work place is regulated by The Drug Free Workplace Act (or DOT)
  - Private employers are not required to, but many do adopt zero tolerance policies.
- **HOWEVER YOU NEED TO KNOW if your state has an Anti Discrimination provision**

# Can an Employee be Fired for Using Medical Marijuana Legally

- It depends on the circumstances and the State.
- If intoxicated or using while at work yes, but if not then...
  1. Does your state have an anti discrimination provision in its marijuana statute?(States with PA, DE, NY, AZ, CT, IL, ME, MN, NV, RI, while NJ does not).
  2. Have there been any Court rulings on the topic in your state?

# Employment & Marijuana

## Rulings for Employers

- **New Jersey** – Federal Court Ruling an employer does not have to waive its requirement for mandatory drug testing for a worker using medical marijuana under NJLAD. *Cotto v. Ardagh Glass* (D.N.J 2018)
- **California** - Supreme Court held the sole purpose of the MM law was to protect patient's from criminal prosecution. *Ross v. RangingWire Telecom*, 42 Cal. 4th 920, 174 p.3d 200 (2008)
- **Colorado** – Supreme Court held that despite marijuana use is “lawful” per state law it still unlawful under federal law. *Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015)

# Employment & Marijuana

## Rulings for Employees

- **Rhode Island** – Superior Court held that RI's MMA created an implied private right of action that an employer had violated the act when it refused to hire a mm user. *Callaghan v. Darlington Fabrics Corp.* (No. PC-2014-5680 (R.I. Super. Ct., May 23, 2017).
- **Massachusetts** – Supreme Court held that although MMMA does not create a private right of action (no anti discrimination provision) failure to accommodate an employee's use runs afoul of the state's Fair Employment Practices Law. *Barbuto v. Advantage Sales and Marketing*. 477 Mass. 456 (2017)

# Employment & Marijuana

## Rulings for Employees

- **Connecticut** – Federal Dist. Ct. held in favor of employee when the employer denied employment due to a failed pre-employment drug test finding their actions violated CT's MM law, despite the employer being regulated by the Federal Drug-Free Workplace Act (DFWA). *Noffsinger v. SSC Niantic Operating Co. LLC d/b/a Bride Brook Nursing & Rehab. Ctr.*, 273 F.Supp.3d 326 (2017).
  - Specifically the Court said that the DFWA does not require drug testing and does not regulate employees who use illegal drugs outside of work while off-duty.

# ISSUES

- Marijuana is still a Schedule I banned substance under Federal law, however medical marijuana businesses are currently protected in the federal budget.
- Is Marijuana effective medicine?..... its debatable.
- Marijuana has been shown to lower a person's opiate intake reducing the cost for employers and carriers.
- Consult with an attorney in the preparation of your company drug policy and insure it is communicated to your employees.
- Train management to detect the signs of marijuana intoxication



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# Thank you!

**Any questions please contact:**

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