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The Marijuana Law Trend and Resulting Impact on Healthcare Providers

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Growing support for the legalization of marijuana has led to a majority of states passing laws allowing medical and/or recreational use of marijuana. Despite state approval, marijuana remains illegal under federal law. The contradiction between federal and state laws present unique challenges for healthcare providers in carrying out their legal obligations. Providers must be vigilant about this rapidly developing area in order to navigate complex patient care and employment issues carefully.

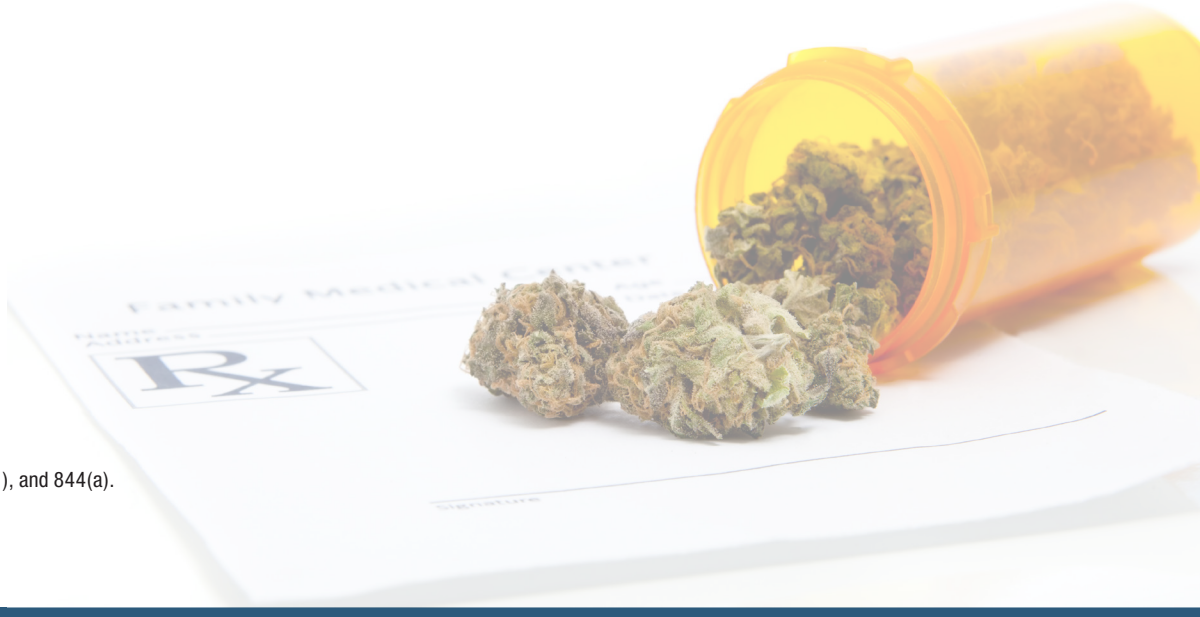
The federal U.S. Controlled Substances Act of 1970 (CSA) classifies marijuana as a Schedule I prohibited substance. As a Schedule I substance, marijuana is considered to be an illegal substance that: 1) possess a high potential for abuse; 2) has no currently accepted medical use in the U.S.; and 3) lacks accepted safety for use under medical supervision.[1] There have been legislative attempts to reclassify the drug, but they have been unsuccessful to date.

Complexities arise in those states that afford varying levels of legal protections for marijuana, conflicting with the federal CSA. A total of 29 states and the District of Columbia allow marijuana use to varying degrees, with recreational marijuana use legalized in Alaska, Colorado, Oregon, Washington, California, Maine, Massachusetts, Nevada and the District of Columbia. Seven states approved ballots measures to legalize marijuana in the 2016 election— voters in Arkansas, Florida and North Dakota approved medicinal marijuana use and voters in California, Maine, Massachusetts and Nevada approved recreational marijuana use.

1. 21 U.S.C. §812(b)(l)(A)-(C).

It is illegal for providers to prescribe a Schedule I drug.[2] For this reason, providers cannot prescribe marijuana, even in a state that has legalized medical marijuana use. However, state laws may authorize healthcare professionals (MD, DO, PA, or ARNP) to write a recommendation for medical marijuana if they have a qualifying health condition. State laws dictate which health conditions qualify for medical marijuana, which may include nausea associated with cancer therapy, Alzheimer's, Hepatitis C, glaucoma, pain, weight loss due to debilitating disease, muscle spasms or seizure disorders.

In addition to the varying state laws on qualifying medical conditions, state laws also vary significantly on mandatory or voluntary registration, acceptance of other state's registry identification cards, the amount to supply, the possession limits and the approved methods of usage. New York takes the approval process one step further prior to allowing physicians to certify patients for medical marijuana use— physicians must undergo a four-hour training program as part of the provider registration program, which ensures patient safety and tracks usage.[3]



[2] 21 U.S.C. §§ 823(f), 841(a)(1), and 844(a).
[3] 10 NYCRR § 1004.1.

From an employer standpoint, healthcare providers need to be aware of applicable state marijuana laws due to the impact on internal drug testing and disability accommodation policies. Specifically, a handful of states that legalize marijuana provide employee protections that prohibit discrimination against marijuana users and/or require workplace accommodations for medical marijuana users. Providers operating in these states, including Arkansas, Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Pennsylvania and Rhode Island, must be particularly vigilant to ensure their policies comport with the law.

State marijuana laws do not require employers to tolerate marijuana use in the workplace. Employers have a legitimate interest in keeping marijuana off the premise due to workplace productivity and safety concerns and may continue to enforce drug free policies. However, state laws vary, and it is important to heed any explicit restrictions on the basis of drug testing to stay compliant.

Some states explicitly exempt employers from accommodating medical marijuana users. This means that employers can take adverse action (such as discipline or termination) against applicants and employees that test positive for marijuana in accordance with internal policies. Challenges arise in states, such as Arizona, Delaware and Minnesota, that prohibit employers from taking adverse action against an individual for off-duty marijuana use. For example, in Delaware, an employer is not required "to allow the ingestion of marijuana in any workplace or to allow any employee to work while under the influence of marijuana, ***except that a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana.***" In these states, employers must be able to show that an individual was impaired by marijuana during work hours before taking any adverse action.

[4] 16 Del. C. § 4907(A)(a)(3).

Given the fact that common methods of drug testing only indicate recent marijuana use, there is no way to differentiate between off-duty use versus an impairment at the time of testing. For instance, a urinalysis tests for the presence of tetrahydrocannabinol (THC) metabolites. THC remains in a person's system for days and even weeks after marijuana consumption. This means that a urinalysis does not provide any level of certainty as to whether an individual that tests positive for marijuana is impaired on the job or if the use was off-duty. While an exception may exist for safety-sensitive positions (such as operating machinery or motor vehicles) healthcare positions, for the most part, do not fall into this category.

Therefore, a failed drug test alone is not grounds for a negative employment action in states with strict drug-testing requirements. Instead, employers must take additional due diligence steps before taking adverse employment action, such as documenting evidence of actual on-the-job impairment and determining whether the individual is a registered marijuana cardholder, which will largely depend on the employer's state. Moreover, employers should revise drug-testing policies in accordance with state law(s).

The federal Americans with Disabilities Act (ADA) applies to employers with 15 or more employees and precludes employers from discriminating against a qualified individual with a disability and are generally required to provide reasonable accommodations (unless an undue hardship or direct threat exception applies).[5] The ADA clearly states that it does not protect individuals using illegal drugs, which is defined as the possession or distribution of drugs which are unlawful under the CSA (such as marijuana), but does not include drugs taken under the supervision of a licensed health professional. Therefore, an individual using marijuana by itself does not have a claim for disability rights under the ADA.

On the other hand, it is likely that a medical marijuana user has a health condition that is a recognized disability under the ADA. In that case, the individual has the right to be free from discrimination and the right to reasonable accommodations for the underlying disability. The fact that an employee uses marijuana for treatment purposes would not void his/her rights under the ADA. Employers should tread with caution in this scenario; disciplining or terminating an individual for marijuana use may risk a claim that the individual was fired for an underlying disability. The best approach here is to engage in the interactive process required by the ADA, to determine if the individual has a qualifying disability and whether there is a reasonable accommodation that the employer can provide.

[5] 42 U.S.C. §12101 et seq.

Besides the ADA, state laws add another layer of complexity. Certain states that legalized marijuana explicitly provide protections for medical marijuana users through antidiscrimination or reasonable accommodation provisions. States with these employment protections include Arkansas, Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Pennsylvania and Rhode Island. However, case law is still developing in this area, which presents a challenge to employers dealing with these workplace issues. At a minimum, employers need to be aware if they reside in a state that provides heightened accommodations for medical marijuana users and engage in the interactive process of determining whether a suitable accommodation exists.

In summary, marijuana laws vary widely from state to state. Since this continues to be a rapidly developing area of the law, providers need to determine if they operate in a state that has legalized medical or recreational marijuana use, be aware of any state employment protections for marijuana users, and revise internal drug testing and disability accommodation policies to stay compliant. Understanding a providers' legal rights and responsibilities is paramount to mitigating risk when dealing with these sorts of patient care and employment issues, along with up to date policies and careful documentation.

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