



# Compliance

## TODAY

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A portrait of Ryan Meade, a middle-aged man with short, light-colored hair, wearing a dark suit, a light blue shirt, and a patterned tie. He is smiling slightly and looking directly at the camera. The background is a blurred interior space with large windows and what appears to be a library or study area with bookshelves.

## The mission of making Compliance an academic discipline

an interview with **Ryan Meade**  
Director, Center for Compliance Studies  
Loyola University Chicago School of Law

See page 16

**24**

Understanding MACRA's strategic and compliance implications

Bruce A. Johnson and Marissa R. Urban

**33**

Caution: Hospital nurse practitioners may raise Stark issues

Charles Oppenheim and Amy Joseph

**39**

McDonnell's impact on the evolution of the Anti-Kickback Statute

David L. Kirman and Cameron G. Smith

**48**

2016 False Claims Act review: A truly extraordinary year

Michael A. Morse

“ Compliance deals with speculative and practical ethics, organizational theory, psychology, finance, behavioral theory, and law. We need people who will help tie together the themes. ”

See page 18

## ARTICLES

- 55 [CEU] **Guiding board members away from operations**  
by Paul P. Jesep  
How to diplomatically set boundaries for overly enthusiastic board members.
- 61 **Wearable technology: The new frontier**  
by Juliette Stancil and Ahmed Salim  
Tips for avoiding risks with any piece of electronic technology that can transfer patient information, including smartwatches.
- 65 **Complying with the laws of physics**  
by Patrick E. Midden  
Five laws of physics and how they can help you improve your compliance program.
- 69 **The other annual work plan, Part 2**  
by Walter E. Johnson, Frank Ruelas, and Anne Van Dusen  
The benefits of making a commitment to invest time and resources in your personal development plan.
- 72 [CEU] **The marijuana law trend and resulting impact on healthcare providers**  
by Jill Brooks and Sheba E. Vine  
Employers must know their state laws and take extra due diligence steps before initiating negative employment actions for marijuana use.
- 76 [CEU] **Analyzing the 2017 OIG Work Plan, HIPAA, and your annual work plan**  
by Frank Ruelas  
Taking a close look at what is in the annual OIG Work Plan will help you focus on important areas in your organization's compliance work plan.

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VOLUME 19, ISSUE 4

by Jill Brooks, MD, CHCO and Sheba E. Vine, JD, CPCO

# The marijuana law trend and resulting impact on healthcare providers

- » The legalization of medical and recreational marijuana use in a majority of states presents unique patient care and employment scenarios for healthcare providers.
- » Because it is illegal to prescribe medical marijuana, some states allow healthcare professionals to provide written recommendations for marijuana use if there is a qualifying health condition.
- » Healthcare employers do not have to tolerate marijuana use in the workplace, but some states require more evidence than a positive marijuana test before adverse action can be taken.
- » State disability laws may provide greater protections than the federal Americans with Disabilities Act for medical marijuana users.
- » Revise internal policies to ensure compliance with developing state marijuana laws.

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Growing support for the legalization of marijuana has led to a majority of states passing laws that allow medical and/or recreational use of marijuana. Despite state approval, marijuana remains illegal under federal law. The contradiction between federal and state laws presents 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 conflicting intersection of state and federal laws

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) possesses 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.<sup>1</sup> 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 ballot measures to legalize marijuana in the 2016 election; voters in Arkansas, Florida,



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and North Dakota approved medicinal marijuana use, and voters in California, Maine, Massachusetts, and Nevada approved recreational marijuana use.

### **Marijuana laws and patient care**

It is illegal for providers to prescribe a Schedule I drug.<sup>2</sup> For this reason, providers cannot prescribe marijuana, even in a state that has legalized medical marijuana use. However, state laws may authorize healthcare professionals (i.e., MD, DO, PA, or ARNP) to write a recommendation for medical marijuana if the patient has 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.<sup>3</sup>

### **Marijuana laws and employment policies**

From an employer standpoint, healthcare providers need to be aware of applicable state marijuana laws and their impact on internal drug testing and disability accommodation policies. Specifically, a handful of states that legalized 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.

### **Marijuana and drug testing policies**

State marijuana laws do not require employers to tolerate marijuana use in the workplace. Employers have a legitimate interest in keeping marijuana off the premises 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 who test positive for marijuana in accordance with internal policies. Challenges arise in states (e.g., Arizona, Delaware, 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."<sup>4</sup> In these states, before taking any adverse action, employers must be able to show that an individual was impaired by marijuana during work hours.

Given the fact that common methods of drug testing indicate only 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 who tests positive for marijuana is impaired on the job or if the use was off-duty. An exception may exist for safety-sensitive positions (such as operating machinery or motor vehicles) but 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, before taking adverse employment action, employers must take additional due diligence steps, such as documenting evidence of actual on-the-job impairment and determining whether the individual is a registered marijuana cardholder. The allowable adverse employment actions will largely depend on the employer's state. Moreover, employers should revise drug testing policies in accordance with state law(s).

### **Marijuana and disability accommodation policies**

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. Employers are generally required to provide reasonable accommodations (unless an undue hardship or direct threat exception applies).<sup>5</sup> The ADA clearly states that it does not protect individuals using illegal drugs, which is defined as the

possession or distribution of drugs that are unlawful under the CSA (such as marijuana), but does not include drugs taken under the supervision of a licensed health professional. Therefore, as an illegal drug under federal law, an individual does not qualify for federal ADA protections if marijuana use is not due to a qualifying disability.

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

## **Certain states that legalized marijuana explicitly provide protections for medical marijuana users through anti-discrimination or reasonable accommodation provisions**

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.

Besides the ADA, state laws add another layer of complexity. Certain states that legalized marijuana explicitly provide protections for medical marijuana users through anti-discrimination 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.

### Final thoughts

Marijuana laws vary widely from state to state. Because 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 provider's 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. ☐

1. 21 U.S.C. §812(b)(1)(A)-(C). Schedules of Controlled Substances. Available at <http://bit.ly/2ITdvBP>
2. 21 U.S.C. §§ 823(f), 841(a)(1), and 844(a). Subchapter 1: Control and Enforcement. Available at <http://bit.ly/2kCXu0Z>
3. 10 NYCRR § 1004.1. New York State Medical Marijuana Program: Practitioner Information. Available at <http://on.ny.gov/2ITc3iC>
4. 16 Del. C. § 4907(A)(a)(3). State of Delaware, Title 16: The Delaware Medical Marijuana Act. Available at <http://bit.ly/2lopHfW>
5. 42 U.S.C. §12101 et seq. Equal Opportunity for Individuals with Disabilities. Available at <http://bit.ly/2kX67Xu>

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