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Although 24 states and the District of Columbia have decriminalized or legalized the use of medical marijuana, marijuana is still illegal under federal law. What are employers, employees and health plans to do?

Getting Out of the Weeds:

Medical Marijuana and the Workplace

by | Diana M. Bardes and Paul A. Green

With a growing number of states legalizing the use of medical marijuana, numerous questions have cropped up for employers, employees and health plans alike regarding their respective rights and obligations under state and federal law.

Twenty-four states (and the District of Columbia) have passed some form of legislation that either decriminalizes or legalizes the use of medical marijuana. Although this legislation has been passed by many state legislatures, marijuana remains a Schedule I controlled substance under federal law, meaning that it may not lawfully be used for any purpose.

Not only do state laws regarding medical marijuana use conflict with federal law, but they also differ greatly from state to state. And, because these state laws are so new, courts have had little opportunity to provide interpretations of the various statutes to provide any guidance.

In this unique legal no man's land of medical marijuana, it is not surprising that employers, employees and health plans are mired in the weeds trying to determine what they can and cannot do regarding employee use of medical marijuana. This article addresses a number of frequently asked questions in the medical marijuana landscape and seeks to provide some clarity.

Health Plan Coverage of Medical Marijuana

Starting with a question for which there is a clear and definitive answer that applies nationwide: Does a health plan have to provide coverage for medical marijuana? The answer is a simple and unequivocal no. Given that marijuana is classified as a Schedule I drug pursuant to the federal Controlled Substances Act, a health plan is not required to provide coverage for medical marijuana regardless of the state of residence of the plan participant.

So a health plan does not have to provide coverage, but can it? Not surprisingly, given the morass of conflicting laws regarding medical marijuana use, the answer is ambiguous, but several things are clear.

First, benefits for medical marijuana are taxable. According to the Internal Revenue Service (IRS), benefits may be provided on a tax-free basis only for medical goods and services that are "legally procured."[1] Because marijuana continues to be banned under federal law, it cannot be lawfully procured within the meaning of the Tax Code and, therefore, is not excludable from income.[2] Furthermore, such benefits would normally be considered "wages" subject to payroll taxes and reportable on a W-2 form rather than a 1099.

For the same reason, there is a substantial question whether medical marijuana would be considered to be a benefit that may be provided by a trust that is tax-exempt under Internal Revenue Code Section 501(c)(9) as a voluntary employees' beneficiary association (VEBA). The question is whether medical marijuana benefits could be considered as provided "because of illness" when federal law definitively decrees that it has "no currently accepted medical use in treatment . . . ."[3] Even if it is not a benefit permitted to be provided by a VEBA, however, that will not necessarily cost the VEBA its tax-exempt status. As long as the total benefits provided for nonpermitted purposes are *de minimis*, meaning that, in any year, less than 3% of the VEBA's total expenditures are for nonpermitted purposes, the VEBA should be able to retain its tax-exempt status.[4]

Finally, medical marijuana may not be provided by an employer-funded health reimbursement arrangement (HRA). Because this type of individual account medical plan is barred from providing any benefit that does not qualify as a "medical expense," payment of any benefits for medical marijuana during a year is likely to mean that all benefits for all participants and beneficiaries would become taxable for that year.[5]

Despite these answers, other questions regarding health plan coverage of medical marijuana abound. Is it a breach of fiduciary duty to provide benefits for a purpose that violates federal law? Is it criminal conspiracy? A Racketeer Influenced and Corrupt Organizations Act (RICO) predicate? As long as marijuana retains its status as a Schedule I controlled substance, these questions may have very troubling answers.

Employer Drug Policies in States With Legalized Use of Medical Marijuana

If state law allows for the legal use of medical marijuana, what are an employer's rights to limit such use by its employees? What rights does an employee have to use medical marijuana off the job? Although the answers to these questions will vary from state to state depending on that state's specific statute, the Colorado Supreme Court recently decided a case

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that sheds light on whether an employer can lawfully terminate an employee for using medical marijuana.

In *Coats v. Dish Network, LLC*,[6] the Colorado Supreme Court was faced with the question whether a quadriplegic employee who possessed a valid medical marijuana prescription and who used marijuana only outside of work hours could be terminated for failing a random drug test that revealed a detectable level of marijuana in violation of the company's drug policy.

Coats filed a wrongful termination claim on the basis of Colorado's lawful-activities statute, which provides that "[i]t shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours."[7] Put simply, in Colorado, an employer cannot terminate an employee for legal off-the-clock behavior. Coats argued that his medical marijuana use was a lawful activity because the term *lawful* meant "lawful under Colorado state law."

Dish Network argued that marijuana use was not a lawful activity because marijuana use is illegal under federal law.

Ultimately, the Colorado Supreme Court agreed with Dish Network and held that Coats' usage of medical marijuana was not protected by the Colorado lawful-activities statute because the use was not lawful under federal law.

The decision in *Coats v. Dish Network* is important in several respects. Colorado has been at the forefront of marijuana legalization, and both advocates and detractors of medical marijuana use paid close attention to this case as it developed through the Colorado court system. If a state as liberal on this issue as Colorado allows employers to enforce zero-tolerance drug policies against use of medical marijuana, then it is likely that other states and their courts will follow suit.

Thus, following the *Coats* decision, it is likely that, as long as marijuana remains illegal under federal law, employers will retain the power to prohibit its use in other states where this question is raised. It is important to note, however, that each state's medical marijuana statute is different, as is each state's version of a lawful-activities statute, if it has one. An employee seeking to use medical marijuana should be aware of her or his employer's policy, and an employer seeking to enforce a zero-tolerance drug policy would be well-advised to become aware of the applicable state laws.

Reasonable Accommodations for Medical Marijuana Use

Is an employer required to allow for medical marijuana use as a reasonable accommodation to a disabled employee? What would the accommodation be? Again, the answers to these questions will depend on what law applies.

Under federal law, individuals who engage in the use of illegal drugs, including marijuana, are excluded from the definition of a qualified individual with a disability under the Americans with Disabilities Act (ADA).[8] As such, an employer is not required to provide any sort of ADA accommodation to an individual for the use of medical marijuana.

A number of state courts have reached a similar conclusion when interpreting their state disability or fair employment statutes. For example, the California Supreme Court found that the state's Fair Employment and Housing Act does not require employers to accommodate the use of illegal drugs because the state's marijuana law merely exempted medical users from state criminal liability and nothing in the law intended to address the respective rights and obligations of employers and employees.[9] The Oregon Supreme Court similarly found that the state's disability discrimination law does not protect employees engaged in drug use that would be illegal under federal law, even where state law exempts the user from state criminal liability.[10]

Although there is a trend of rulings finding that no reasonable accommodation is required, recent legislation in several states seeks to require accommodation. The legislatures in these states have

takeaways >>

- State laws regarding medical marijuana use conflict with federal law and differ greatly from state to state, with little guidance from courts on interpreting the laws.
- A health plan is not required to provide coverage for marijuana and, if it does, the benefit is taxable.
- Based on a Colorado court case, it appears an employer can have a zero-tolerance drug policy even in a state where medical marijuana is legal.
- So far, an employer needn't provide any sort of ADA accommodation to an individual for the use of medical marijuana.
- State law can change quickly based on new legislation or judicial interpretation of existing legislation, and employers need to stay on top of changes.

gone further to explicitly require accommodations in certain circumstances and directly address the employer/employee relationship in a way that the California statute, for example, does not.

Thus, although much of this new legislation has not yet been challenged in the courts, it is likely that these statutes have a reasonable chance of withstanding judicial review.

Take Nevada's medical marijuana law, which once explicitly stated that it did not require an employer to accommodate the medical use of marijuana in the workplace. In 2014, the Nevada legislature amended the law to require employers to attempt to make reasonable accommodations for the medical needs of an employee who holds a valid medical marijuana card as long as the accommodation would not "(a) pose a threat of harm or danger to persons or property or impose an undue hardship on the employer or (b) prohibit the employee from fulfilling any and all of his or her job responsibilities."[11]

New York's Compassionate Care Act also provides protections to "certified patients" such that they are considered disabled under the New York State Human Rights Law.[12]

Neither of these laws, however, has been subject to judicial scrutiny. If and when the laws are challenged, eyes will be on New York and Nevada to see if the courts follow the trend of Oregon and California in finding that an accommodation cannot be required under state law because of marijuana's continuing illegality under federal law.

Regardless of how this area of the law develops, once again, employers and employees alike should be mindful of the applicable state statute. What is required for an employer in Nevada regarding efforts to provide a reasonable accommodation is certainly not required in California or Oregon. Thus, employers should be aware of the relevant requirements before rejecting an accommodation request.

The no man's land that is medical marijuana law leaves a number of questions unanswered and can lead to a great deal of uncertainty in the workplace. As long as marijuana remains illegal under federal law, this uncertainty will only persist. If the federal government were to legalize the use of medical marijuana, the law in this area would change rapidly.

Similarly, state law can change quickly based on new legislation or judicial interpretation of existing legislation. Don't get caught in the weeds. Employers, employees and health plans are all advised to stay informed of any changes to federal or state law and consult with a knowledgeable attorney on these issues as they may arise.

Endnotes

1. 26 C.F.R. §1.213-1(e)(2).
2. Rev. Rul. 97-9.
3. 21 U.S.C. §812(b)(1)(B).
4. See I.R.S. P.L.R. 201415011 (April 11, 2014).
5. See IRS Notice 2002-45, 2002-2 C.B. 93.
6. 2015 Colo. Law. 44 (Colo. June 15, 2015).
7. Colo. Rev. Stat. §24-34-402.5 (2014).
8. See *James v. City of Costa Mesa,* 700 F.3d 394 (9th Cir. 2012).
9. *Ross v. RagingWire Telecommunications, Inc.,* 174 P.3d 200 (Cal. 2008).
10. *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus.,* 230 P.3d 518 (Or. 2010) (en banc).
11. Nev. Rev. Stat. §453A.800 (2014).
12. N.Y. Pub. Health Law §§3360(3), 3369(2) (2014).

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