

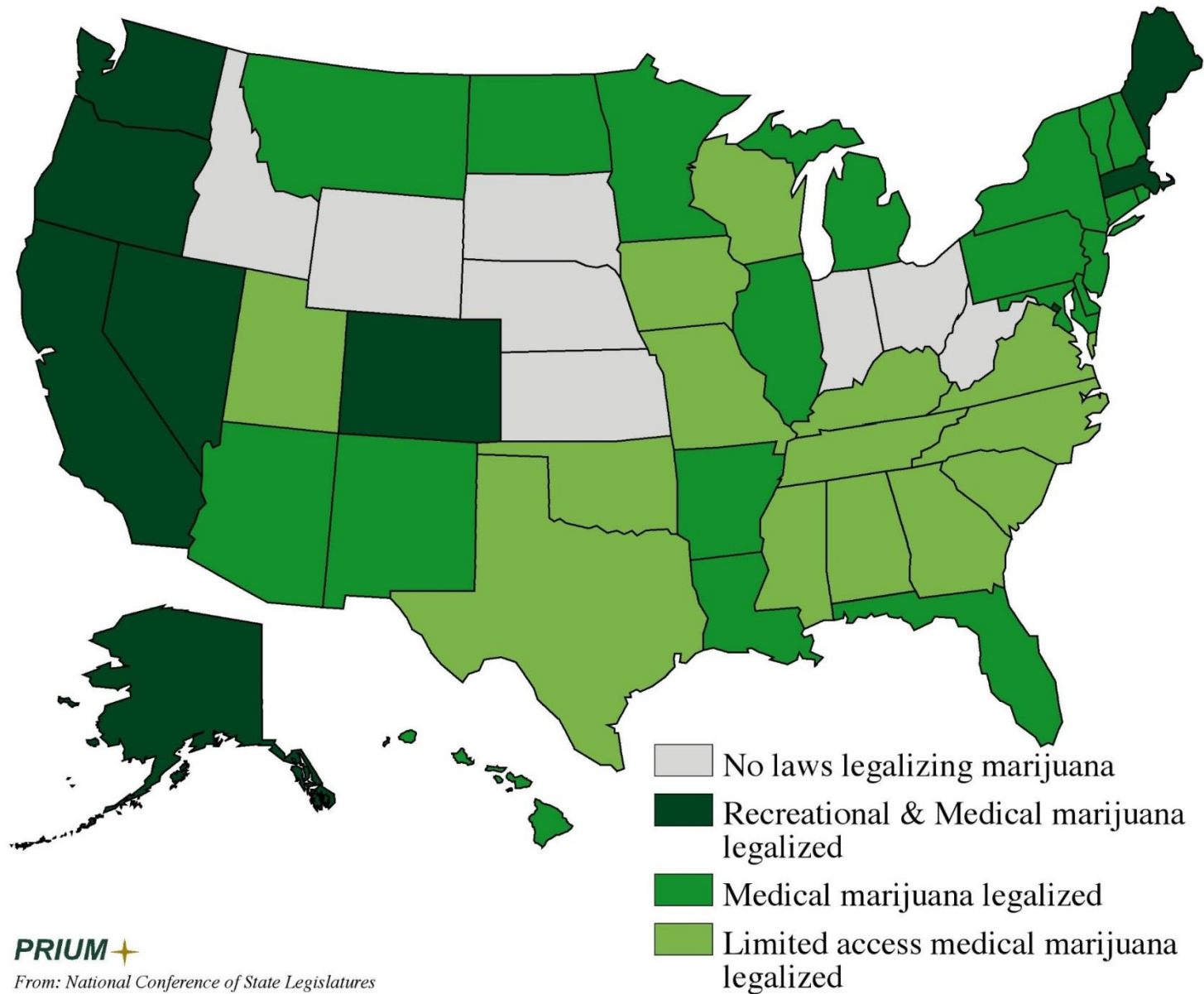
Is Legalized Pot a Drag on Workers' Comp?

A JOINT PRESENTATION

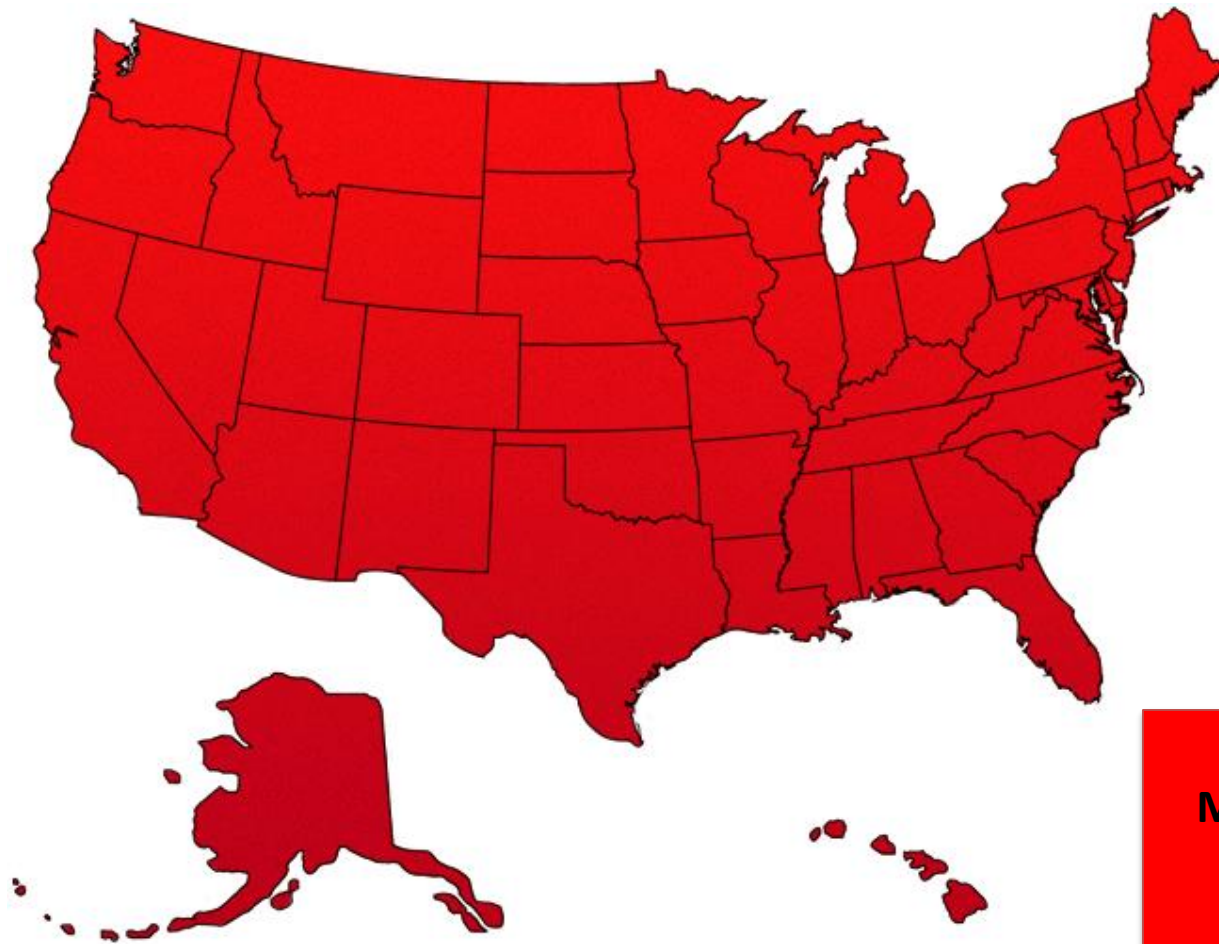
2017 DWC Educational Conference

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U.S. States with Legalized Marijuana



2017 Federal Marijuana Laws



**Countries Where
Marijuana is Illegal:**

United States

Not Legal

- Marijuana is **illegal** at the Federal level
 - DEA Schedule I controlled substance
 - Substances in this schedule have *no currently accepted medical use* in the United States, a lack of accepted safety for use under medical supervision, and a high potential for abuse
 - Heroin, LSD, peyote, meth, Ecstasy

<http://www.dea/diversion.usdoj.gov/schedules/>

Not Legal

- DEA, FDA and NIDA decided on August 11
 - *Marijuana science still half-baked (?)*
 - <http://bit.ly/2bcEG56>
- The argument:
 - Cannabis has accepted medical use in the United States;
 - Cannabis is safe for use under medical supervision;
 - Cannabis for medical purposes has a relatively low potential for abuse, especially in comparison with other Schedule II drugs.
- The response:
 - In accordance with the CSA rescheduling provisions, after gathering the necessary data, the DEA requested a scientific and medical evaluation and scheduling recommendation from the Department of Health and Human Services (HHS). **The HHS concluded that marijuana has a high potential for abuse, has no accepted medical use in the United States, and lacks an acceptable level of safety for use even under medical supervision.** Therefore, the HHS recommended that marijuana remain in Schedule I.

Demographics

- Pew Research Center national poll (March 2015)
 - **53%** said marijuana should be legal
 - 39% of Republicans
 - 40% of Hispanics
 - 50% of Baby Boomers
 - 68% of Millennials
 - 29% of the “Silent Generation” (ages 70-87)
 - **12%** said marijuana should be legal in 1969
 - From 2010 to 2013, favoring legalization increased by 11 points
- Other results:
 - 15% felt **marijuana** is harmful to health
 - 69% felt **alcohol** is harmful to health
 - 49% have tried marijuana (12% within the past year)

<http://www.pewresearch.org/fact-tank/2015/04/14/6-facts-about-marijuana/>

Implications – Risk Management

Compensability of injury

- Colorado: Rebuttable presumption that industrial injury was caused by drug ingestion, and indemnity benefits can be decreased or even terminated
- California: Labor Code §3600(a)(4) precludes liability for a claim of injury “caused by the intoxication, by alcohol or the *unlawful use* of a controlled substance, of the injured employee.”
- Most states, including California: Proximate cause must be shown between the injury and the drug use
 - No objective methodology for measurement of marijuana intoxication
 - Ohio: *Trent v. Stark Metals Sales*, 2015-Ohio-1115, employer was denied relief from a finding of compensability for failing to adhere to the strict requirements for drug testing

Since presence \leftrightarrow impairment, how should employers handle medical use in hiring, firing, RTW, drug-free worksites and other workplace restrictions?



Implications – Drug Testing

- **Pre-employment testing?**

- Workplace safety implications?
- Empty seats?
- Liability?

George W. Goodman, Esq.
9/22/16 NWCDN
conference in Chicago IL

- **Post-accident testing?**

- Per OSHA effective December 1, blanket post-accident drug and alcohol testing is prohibited (deters proper reporting of injuries)
 - Employer options:
 - Abolish for cause drug testing.
- OR-
- Test when there is reasonable concern that impairment may have contributed to an incident.
 - Test for all violations of workplace safety rules.
 - Test pursuant to any state or federal law, or internal zero tolerance policy, which mandates testing.
 - Test pursuant to any state workers' compensation law which would be "affected" by OSHA's interpretation

Implications – Drug Testing

Drug-free workplace

- General rule is that an employee can lawfully be fired for using marijuana legally
- California Supreme Court has already ruled that there is no general right to use medical marijuana, and EE can be terminated for violation of drug-free workplace rules

Application – Drug Free Workplace

California

- *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal. 4th 920
- Court found no fundamental public policy requiring employers to accommodate marijuana use by employees
- “Under California law, an employer may require pre-employment drug tests and take illegal drug use into consideration in making employment decisions.”

Application – Drug Free Workplace

Washington

- *Roe v. TeleTech* (2011) 171 Wn.2d 736, 257 P.3d 586
- Held that the Washington's Medical Use of Marijuana Act does not allow employees with marijuana prescriptions to sue their employers for wrongful termination when marijuana use was the reason for the discharge.

Application – Drug Free Workplace

Federal Court – New Mexico

- *Garcia v. Tractor Supply Co.* (2016) -- F. Supp.3d -- (2016 U.S. Dist. LEXIS 3494)
- Court found a “fundamental difference between requiring compensation for medical treatment and affirmatively requiring an employer to accommodate an employer’s use of a drug that is still illegal under federal law.”

Application – Drug Free Workplace

Federal Court – Michigan

- *Casias v. Wal-Mart Stores, Inc.*, 764 F. Supp. 2d 914 (W.D. Mich. 2011)
- Federal appeals court upheld the termination of a five-year employee who tested positive for marijuana following a workers' compensation injury

Application – Drug Free Workplace

Colorado

- *Coats v. Dish Network, LLC*, 350 P. 3d 849 (Colo. 2015)
- Unanimous decision from Colorado Supreme Court interpreted state’s “lawful activities statute” and determined that “lawful” refers to activities that are lawful under both state and federal law.
- Court held that while medical marijuana use was legal in Colorado, it was illegal under federal law, and upheld the termination.

Application – Drug Free Workplace

Washington

- *Swaw v. Safeway, Inc.* (W.D. Wash. 2015)
- Court held that an employer may terminate an employee for using marijuana, even when the employee had a prescription and used it off-duty.
- The court ruled that the employer “was under no legal obligation to make an exception to its [drug-free workplace] policy for Plaintiff, regardless of his medical marijuana prescription.”

Application – Drug Free Workplace

Federal Court – California

- *Shepherd v. Kohl's Dep't Stores, Inc.*, No. 1:14-cv-01901-DAD-BAM (E.D. Cal. Aug. 2, 2016)
- Holding that an employer maintains the right to discipline employees even where the marijuana use is recommended by a physician
- “It does not violate (California’s laws against workplace discrimination) to terminate an employee based on their use of marijuana, regardless of why they use it.....”

Prop 64 – Legalized Marijuana

Proposition 64 adds new Health & Safety Code §11362.45:

- Nothing in this law will “amend, repeal, affect, restrict, or preempt... [the] rights and obligations of public and private employers to maintain a drug and alcohol free workplace, or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace, or affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees, or prevent employers from complying with state or federal law.”

Prop 64 – Legalized Marijuana

BUT ...

While the general rule is that an employee can lawfully be fired for using marijuana legally...

... the employer-friendly judicial interpretation is not universal:

- *State of Connecticut v. Conn. Employees Union Independent, SC 19590* (August 30, 2016), Connecticut Supreme Court ruled that a state worker who was fired after being *caught smoking marijuana on the job* must be reinstated.

How is medical cannabis being evaluated for reimbursement?

It's illegal - Period

Healthcare - Like other drugs

Implications – Work Comp Payers

Six states have required reimbursement for medical marijuana in comp:

- Connecticut
- Maine
- Massachusetts
- Minnesota
- New Jersey
- New Mexico

Six states preclude a carrier from being ordered to pay for medical marijuana in comp:

- Arizona
- Colorado
- Michigan
- Montana
- Oregon
- Vermont

Because marijuana is illegal under federal law, payment cannot involve the federal banking system

- Reimbursement is typically made to injured worker, rather than direct payment to dispensary

Implications – Work Comp Payers

California Health and Safety Code §11362.785(d):

(d) Nothing in this article shall require a governmental, private, or any other health insurance provider or health care service plan to be liable for any claim for reimbursement for the medical use of marijuana.

Implications – Work Comp Payers

New Mexico

- *Vialpando v. Ben's Automotive Services* (331 P.3d 975 (N.M. Ct. App. 2014), cert. denied, 331 P.3d 924 (N.M. 2014); 2014 N.M. App. LEXIS 50)
- Because New Mexico's workers' compensation statute requires provision of "reasonable and necessary" treatment services to an injured worker, the court required reimbursement from the carrier to the injured worker for medical marijuana used to treat industrial low back pain despite the fact that it was not a prescription drug
- N.M. Supreme Court reasoned that the "service" from a licensed dispensary qualifies as medical treatment

Implications – Work Comp Payers

New Mexico

- *Maez v. Riley Industrial* (347 P.3d 732 (N.M. Ct. App. 2015))
- Physician's after-the-fact certification of recreational marijuana use transformed an injured worker's use of marijuana under statutory language mandating "reasonable and necessary" treatment
- The N.M. Supreme Court determined that because the physician supported the use of marijuana, it should be deemed "reasonable and necessary" under workers' compensation.

Implications – Work Comp Payers

New Mexico

- *Lewis v. American General Media/Gallagher Bassett* (2015- NMCA-90)
- Court of Appeals held that federal law classifying marijuana as a Schedule 1 illegal substance did not supersede New Mexico's law allowing marijuana use for medical purposes.
- Employers must compensate workers who are medical marijuana patients for the cost of the marijuana

Implications – Work Comp Payers

Connecticut

- *Petrini v. Marcus Diary* (Case #6021 CRB-7-15-7)
- Appeals Board level review in a case of first impression, upholding the WCJ's order compelling reimbursement of medical marijuana receipts
- Analogized failure of FDA approval and non-sanctioned use of marijuana to the “ubiquitous” off-label use of legal drugs
- Rejected defense arguments regarding potential criminal penalties and impact on a drug-free work-place, because such public policy considerations were beyond the purview of the Commission -- and besides, the same concerns exist with use of prescription narcotics

Implications – Work Comp Payers

New Jersey

- *Watson v. 84 Lumber / Gallagher Bassett* (Case #2009-15740)
- Trial court administrative law judge ordered the comp carrier to provide reimbursement, ruling that “whether or not [marijuana] should be prescribed for a patient in a state where it is legal to prescribe it is a medical decision” and legal under the laws of the state.

Implications – Work Comp Payers

Maine

- *Bourgoin v. Twin Rivers Paper Co.*
- *Noll v. Lepage Bakeries* (en banc)
- Utilizing a “clear and convincing evidence” standard, the Appellate Division court found that medical marijuana was a reasonable and necessary medical treatment, given the workers’ long history of chronic pain and the ineffectiveness of conventional drug treatments.
- Court found that a provision in the state’s Medical Use of Marijuana Act proscribing a “private health insurer” from being compelled to pay for medical marijuana was *inapplicable* to a self-insured employer.

Implications – Work Comp Payers

California WCAB Cases

1. *Cockrell v. Farmers* (ADJ504565; ADJ2584271)

- Appeals Board returned matter to the trial level for consideration of the impact, if any, of the prohibition against payment for marijuana by health insurance providers under Health and Safety Code §11362.785(d).
- Case did not directly resolve the question of compensability for medical marijuana

2. *Pedro de Dios v. Carroll's Tire Warehouse* (ADJ528481; ADJ602408)

- Appeals Board specifically held that the workers' comp carrier was not liable for reimbursement of medical marijuana under Health and Safety Code exemption

Medical – FDA Criteria

- To be accepted as medicine, the following criteria must be met:

1. The drug's chemistry must be known and reproducible \checkmark
 2. There must be adequate safety studies $\frac{1}{4} \checkmark$
 3. There must be adequate and well-controlled studies proving efficacy $\frac{1}{4} \checkmark$
 4. The drug must be accepted by qualified experts $\frac{1}{4} \checkmark$
 5. The scientific evidence must be widely available $\frac{1}{2} \checkmark$
- $2\frac{1}{4} \checkmark$**

“Marijuana as Medicine? The science behind the controversy,”
Allison Mack & Janet Joy

Medical – Does it work?

Of the medical conditions typically included in Medical Cannabis Program, which ones have the most legitimate science?

- nausea
- lack of appetite
- epilepsy / seizures
- muscle spasticity
- glaucoma
- end-of-life care

And ... Chronic Pain in Adults

National Academies of Sciences, Engineering and Medicine

Yuuuuuge implications to Work Comp!

Medical – Opioid Replacement?

2M (painkillers) + 591K (heroin) – substance use disorder in 2015

20,101 overdose deaths from painkillers in 2015

12,990 overdose deaths from heroin in 2015

<http://www.asam.org/docs/default-source/advocacy/opioid-addiction-disease-facts-figures.pdf>

Yes / No / Maybe

A False Choice

(<http://bit.ly/2dSaOLV>)

The Future

So What's Next?

- Societal trends and growing acceptance, both medically and generally
- New administration in D.C. may affect current DOJ “hands-off” policies
- Utilization Review in California will require standardization of
 - ❖ quality
 - ❖ dosage
 - ❖ strength

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THE
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- 35+ years in P&C, 20+ years in Work Comp
- Created PRIUM's *award-winning* Chronic Pain Intervention Program in 2003, Intervention Triage in 2010, Texas Closed Formulary turnkey in 2011, Centers with Standards in 2012, TaperRx in 2014
- From March 2012 thru December 2016 ...
 - **386** presentations, **26,466** people, **40** states + DC
 - **16** national webinars
- Published and quoted in CLM Magazine, Risk & Insurance, Business Insurance, WorkCompCentral, WorkCompWire, Insurance Thought Leadership, etc
- IAIABC Medical Issues Committee, SIIA Work Comp Committee, CompSense Pharmacy group in CA (chairman) & NY
- 2016 Best Blog and Magna Comp Laude recipient



Implications of Legalized Marijuana on California Workers' Compensation

- by Ellen Sims Langille, General Counsel, California Workers' Compensation Institute
- Published November 2016
- Available to the public at cwci.org/Research
- Analysis of the intersection and new areas of conflict between Prop 64 (legalized marijuana) and California's workers' compensation system

