



Recreational marijuana and Oregon workers' compensation: more questions than answers

By Nathan R. Goin and Kelly J. Niemeyer ■ October 12, 2015

On July 1, 2015, Oregon's Measure 91 went into effect, legalizing recreational marijuana in the state of Oregon. House Bill 3400, signed into law by the Governor on June 30, 2015, provides the roadmap or blueprint by which Measure 91 will be implemented. Administrative management of the program will be provided by the Oregon Liquor Control Commission, which will oversee and police recreational marijuana by creating and enforcing the regulatory framework required by Measure 91 and HB 3400.

With the legalization of recreational marijuana, employers throughout the Pacific Northwest are left to puzzle through potentially outdated workplace policies. While issues such as employee accommodation under the Oregon Equality Act, or the applicability of drug-free work place guidelines prohibiting the use of "illegal" drugs may now be called into question, employers and insurers are well advised to also consider the impact recreational marijuana may have on claims processing.

The historic use of marijuana as a treatment modality has been highly regulated under state-based medical marijuana laws such as Oregon's Medical Marijuana Act (OMMA), which decriminalized the use of marijuana for qualifying OMMA card holders.¹ Although decriminalized for medical use, physicians remain at risk for prescribing marijuana due to its continuing classification as a schedule I controlled substance under the Federal Controlled Substances Act.² State-based medical marijuana programs thus work on a "recommendation system" to avoid the attendant federal risks involved with formally prescribing a schedule I substance.³

With the advent of recreationally-available marijuana, the Oregon medical marijuana program has lost its relevancy. Individuals are no longer required to satisfy the regulatory criteria for obtaining an OMMA card, and may simply purchase or cultivate marijuana absent medical "recommendation." In the context of workers' compensation, the legislative death of OMMA likely signals an increase in "recommendations" for the use of recreational marijuana as a treatment modality for work-related injuries by medical professionals who lack the ability to prescribe controlled pharmaceuticals.

"Recommendations" for herbal supplements and other non-regulated homeopathic substances have long been a mainstay for medical professionals

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As a matter of federal law, marijuana remains a schedule I controlled substance, and is therefore not considered to have any medical value



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who could not otherwise prescribe controlled narcotic medications. This list often includes chiropractors, naturopaths and registered nurses. Medical professionals who previously lacked federal approval to prescribe controlled substances may now prospectively recommend the use of recreational marijuana as an alternative to opiate medications.

Adjusters, carriers and employers may ask whether they are obligated to provide payment or reimbursement for recreational marijuana that has been “recommended” as a treatment modality. Frustratingly, the answer to this question is unclear. The present law remains in a state of flux. The Oregon Workers’ Compensation Division traditionally shies away from outrightly prohibiting treatment modalities. However exceptions exist, such as was the case for DMSO, a salve with multiple reported health benefits that became popular in the late 1970s.⁴

Employers and insurers are required to process compensable medical services for payment. By definition, medical services include “drugs and medicine.”⁵ Services deemed excessive, inappropriate or ineffectual are precluded from coverage as a compensable medical service.⁶ As a matter of federal law, marijuana remains a schedule I controlled substance, and is therefore not considered to have any medical value. The Division will therefore be left to determine whether recreational marijuana should be considered a legitimate treatment modality. Although marijuana reimbursement is still relatively novel, this issue was recently addressed by the New Mexico Court of Appeals, which found a worker’s reimbursement request for medical marijuana to be compensable.⁷ The legitimacy of marijuana as a medical service thus remains up for debate.

The conflict between the legalization of recreational marijuana, the use of marijuana as a valid treatment modality and a worker’s return to modified duty raises other concerns as well. Employees using marijuana as a treatment modality may resist returning to workplaces that implement a drug free workplace policy and perform random drug screenings. In these instances it is unclear as to whether the worker is unreasonably refusing modified duty accommodation, in which case time loss may be terminated. Similar issues arise as to whether the termination of a worker for their use of recreational marijuana as a treatment modality in light of the employer’s drug-free workplace policy would result in a claim for discrimination.⁸ These questions remain legally untested and will likely prove to be the subject of future litigation.

Although legal in Oregon, the licensing and regulatory structure necessary for the widespread sale of recreational marijuana is not expected to be functional until mid-2016. The influence of recreational marijuana on workers’ compensation processing will therefore remain an unknown until the availability of cannabis increases. At this juncture, employers and

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insurers are advised to monitor this newly developing area of the law and its practical impact on claims processing requirements as recreationally available marijuana becomes more prevalent. ■

For additional background regarding recreational and medical marijuana prior to legalization in the Pacific Northwest, please see our 4-part blog series, "Higher Conflict and Controversy: A blog series on medical and recreational marijuana in the workplace." [Click here](#) to read the first blog or [click here](#) to read the 4-part pdf.

¹ ORS 475 § 300-346

² 21 U.S.C. § 811; *Conant v. McCaffrey*, 2000 WL 1281174, Lexis 13024 (N.D. Cal. 2000)

³ ORS 475.309

⁴ OAR 436-009-0015(6)

⁵ OAR 436-009-0005(29)

⁶ ORS 656.327(1)(a)

⁷ *Vialpando v. Ben's Auto. Servs.*, 331 P.3d 975, (N.M. Ct. May 2014)

⁸ ORS 659A.040

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