Marijuana and Workers’ Compensation: Trends & Challenges Regarding Workplace Safety & the Responsibilities of Employers
Many Americans are regular users of marijuana, making it the most commonly detected drug in workplace testing and one that outpaces other major drug categories. This continues to be a growing concern for employers, especially since the legalization of the drug for recreational use in many states, and as more Americans turn to medical marijuana as a means to manage chronic pain.

Today, marijuana use has employers balancing state laws against federal anti-drug policies, as well as against employees’ rights and maintaining a safe and drug-free workplace. And although case law, legislation and court rulings generally support employers’ rights to keep marijuana out of the workplace with certain limits, the critical question of whether to use marijuana as a form of treatment in workers’ compensation claims remains a debatable issue fraught with confusion.

In this white paper, we’ll look at:

- Trends and Challenges your employer clients are up against regarding marijuana in the workplace as they navigate drug testing
- Job Safety as it relates to marijuana use
- Compliance with evolving federal and state laws to ensure a productive and safe workplace

According to a RAND Corp. survey, it’s not unusual to see conflicting studies on the extent to which marijuana use increases the risk of occupational accidents, with one study showing evidence between on-duty impairment and occupational injuries with off-duty use and others showing no correlation at all. However, regardless of the conflict, most studies agree that marijuana intoxication can impair a person’s coordination, memory, associative learning, attention, cognitive flexibility and reaction time.

The fact is, THC is a psychoactive constituent, which means that a worker’s motor skills and cognitive ability could be affected while performing various tasks. As a result, cognitive and psychomotor skills are compromised to some degree, but the extent of this is subject to various

MARIJUANA AND WORKPLACE SAFETY CONCERNS

In January 2020, 11 states have legalized recreational adult use of marijuana and 33 states have legalized medical marijuana, demonstrating just how dramatically the legal landscape and attitudes toward marijuana across the country have shifted in just over two decades. Since its legalization, the rate of marijuana positivity in urine testing has steadily increased. This has created concerns for employers believing that the intoxicating effects of marijuana from employees who use the drug – whether off or on duty – may be putting themselves and others in danger.

In this white paper, we’ll look at:

- Trends and Challenges your employer clients are up against regarding marijuana in the workplace as they navigate drug testing
- Job Safety as it relates to marijuana use
- Compliance with evolving federal and state laws to ensure a productive and safe workplace

According to a RAND Corp. survey, it’s not unusual to see conflicting studies on the extent to which marijuana use increases the risk of occupational accidents, with one study showing evidence between on-duty impairment and occupational injuries with off-duty use and others showing no correlation at all. However, regardless of the conflict, most studies agree that marijuana intoxication can impair a person’s coordination, memory, associative learning, attention, cognitive flexibility and reaction time.

The fact is, THC is a psychoactive constituent, which means that a worker’s motor skills and cognitive ability could be affected while performing various tasks. As a result, cognitive and psychomotor skills are compromised to some degree, but the extent of this is subject to various

Many Americans are regular users of marijuana, making it the most commonly detected drug in workplace testing and one that outpaces other major drug categories. This continues to be a growing concern for employers, especially since the legalization of the drug for recreational use in many states, and as more Americans turn to medical marijuana as a means to manage chronic pain.

Today, marijuana use has employers balancing state laws against federal anti-drug policies, as well as against employees’ rights and maintaining a safe and drug-free workplace. And although case law, legislation and court rulings generally support employers’ rights to keep marijuana out of the workplace with certain limits, the critical question of whether to use marijuana as a form of treatment in workers’ compensation claims remains a debatable issue fraught with confusion.

In this white paper, we’ll look at:

- Trends and Challenges your employer clients are up against regarding marijuana in the workplace as they navigate drug testing
- Job Safety as it relates to marijuana use
- Compliance with evolving federal and state laws to ensure a productive and safe workplace

According to a RAND Corp. survey, it’s not unusual to see conflicting studies on the extent to which marijuana use increases the risk of occupational accidents, with one study showing evidence between on-duty impairment and occupational injuries with off-duty use and others showing no correlation at all. However, regardless of the conflict, most studies agree that marijuana intoxication can impair a person’s coordination, memory, associative learning, attention, cognitive flexibility and reaction time.

The fact is, THC is a psychoactive constituent, which means that a worker’s motor skills and cognitive ability could be affected while performing various tasks. As a result, cognitive and psychomotor skills are compromised to some degree, but the extent of this is subject to various

MARIJUANA AND WORKPLACE SAFETY CONCERNS

In January 2020, 11 states have legalized recreational adult use of marijuana and 33 states have legalized medical marijuana, demonstrating just how dramatically the legal landscape and attitudes toward marijuana across the country have shifted in just over two decades. Since its legalization, the rate of marijuana positivity in urine testing has steadily increased. This has created concerns for employers believing that the intoxicating effects of marijuana from employees who use the drug – whether off or on duty – may be putting themselves and others in danger.

In this white paper, we’ll look at:

- Trends and Challenges your employer clients are up against regarding marijuana in the workplace as they navigate drug testing
- Job Safety as it relates to marijuana use
- Compliance with evolving federal and state laws to ensure a productive and safe workplace

According to a RAND Corp. survey, it’s not unusual to see conflicting studies on the extent to which marijuana use increases the risk of occupational accidents, with one study showing evidence between on-duty impairment and occupational injuries with off-duty use and others showing no correlation at all. However, regardless of the conflict, most studies agree that marijuana intoxication can impair a person’s coordination, memory, associative learning, attention, cognitive flexibility and reaction time.

The fact is, THC is a psychoactive constituent, which means that a worker’s motor skills and cognitive ability could be affected while performing various tasks. As a result, cognitive and psychomotor skills are compromised to some degree, but the extent of this is subject to various

MARIJUANA AND WORKPLACE SAFETY CONCERNS

In January 2020, 11 states have legalized recreational adult use of marijuana and 33 states have legalized medical marijuana, demonstrating just how dramatically the legal landscape and attitudes toward marijuana across the country have shifted in just over two decades. Since its legalization, the rate of marijuana positivity in urine testing has steadily increased. This has created concerns for employers believing that the intoxicating effects of marijuana from employees who use the drug – whether off or on duty – may be putting themselves and others in danger.

In this white paper, we’ll look at:

- Trends and Challenges your employer clients are up against regarding marijuana in the workplace as they navigate drug testing
- Job Safety as it relates to marijuana use
- Compliance with evolving federal and state laws to ensure a productive and safe workplace

According to a RAND Corp. survey, it’s not unusual to see conflicting studies on the extent to which marijuana use increases the risk of occupational accidents, with one study showing evidence between on-duty impairment and occupational injuries with off-duty use and others showing no correlation at all. However, regardless of the conflict, most studies agree that marijuana intoxication can impair a person’s coordination, memory, associative learning, attention, cognitive flexibility and reaction time.

The fact is, THC is a psychoactive constituent, which means that a worker’s motor skills and cognitive ability could be affected while performing various tasks. As a result, cognitive and psychomotor skills are compromised to some degree, but the extent of this is subject to various
factors, such as the method of consumption, the type of marijuana product consumed, product potency and user habits.

MEDICAL MARIJUANA AND WORKERS’ COMPENSATION CLAIMS

Today, several states have medical marijuana laws that allow people with serious medical conditions to use marijuana with a doctor’s authorization. However, just because marijuana is legal in many states doesn’t mean that it’s allowed in the employment context. While some states protect an employee’s right to use medical marijuana (provided the employee’s use does not occur during working hours and doesn’t impact the employee’s ability to perform the requirements of the job), most employers are free to fire, discipline or take other adverse action against an employee who uses marijuana at work or is under the influence of marijuana — even if it is used to treat a medical condition.

When it comes to workers’ compensation, new research published in Health Economics indicates that after states passed medical marijuana laws, there was a 6.7% decline in workers’ compensation claims. These results were based on the premise that medical marijuana may help workers better manage pain associated with workplace injuries and illnesses and, in turn, reduce the need for workers’ compensation. Additionally, the study reported other positive effects medical cannabis can have in the workplace, including increased work capacity and reduced absences. However, the research study also found that despite these findings there was only a 0.1% drop in propensity to file a workers’ compensation claim and a 0.8% reduction in the monetary amount of a claim when medical marijuana was made available.

MARIJUANA IN THE WORKPLACE: KEY TRENDS AND ISSUES

Since the legalization of both medical and recreational marijuana, workers’ compensation professionals have had concerns as to just exactly how this will affect the industry. The following are key trends and issues your employer clients should be aware of.
Substances Act. As of January, only six states — Connecticut, Minnesota, New Hampshire, New Jersey, New Mexico and New York6 — hold that medical marijuana is a permissible and reimbursable treatment under workers’ compensation. However, whether workers’ compensation insurers are required to reimburse medical marijuana expenses will depend on the state.

Compliance Regarding Protection for Registered Medical Employees

While effective for detecting employee drug use, drug tests can’t distinguish between employees who use marijuana for recreational or medical purposes. With the rate of positive drug tests for marijuana increasing and the number of employees being terminated based on these results, it makes it difficult for workers who are using the drug medicinally to gain employment protections.

Currently, 13 states — Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Massachusetts, Minnesota, Nevada, New York, Pennsylvania and Rhode Island, West Virginia — prohibit employers from discriminating against workers on the basis of use of medical marijuana and have extended employment protections to qualified medical marijuana cardholders (either by statue or court decision). Employers in many other states can fire employees who test positive for marijuana — even when used off duty and for a medical condition.7

California is also considering legislation that will protect workers who are using marijuana medicinally. According to the Los Angeles Times,8 the bill, introduced by Assemblyman Rob Bonta (D-Alameda), will require employers to provide workers using medical marijuana with reasonable accommodations. The bill is in direct conflict with Proposition 64, which, in addition to making recreational marijuana use legal, now allows public and private employers to maintain drug-free policies and to terminate workers who violate the rules.

Take Note! Protections for employees who are qualified medical marijuana users may fall under existing state disability laws. This means that state disability discrimination laws could apply even if a state does not explicitly protect medical marijuana users. This leaves it up to the employer to determine whether their workplace policy violates their obligation under state disability accommodations and leave laws.

Compensability After a Positive Post-Accident Drug Test

Employers understand the importance of maintaining a drug- and alcohol-free workplace. It’s why most have a strict zero-tolerance policy that requires employees to regularly submit to alcohol and drug tests. But because recreational and medical marijuana use is legal in many states and THC can remain in the user’s system anywhere between one and seven days, can an employee who suffers a workplace injury and tests positive for marijuana be denied workers’ compensation benefits? The answer is that it depends.

Most state laws prohibit employers from discriminating against an employee or applicant because he or she engages in the lawful use of legal cannabis products during nonworking hours and off the employer’s premises. However, in Arkansas, a worker who tests positive for marijuana is not entitled to workers’ compensation benefits unless he or she can prove that the drug use did not contribute to the injury.

Medical Marijuana Use & Workplace Accommodation

On Duty: No state that permits medical marijuana requires employers to accommodate on-duty use or possession or abide employees being impaired while on the job.

Off Duty: Some state laws protect employees who use medical marijuana off the job or are medical marijuana cardholders from discrimination or adverse employment actions.

Today, laws that determine how to proceed if an employee has used medical marijuana will vary. For example, employers in Arkansas can discharge an employee based on a good-faith belief that the employee was impaired by medical marijuana on company property or during work hours. However, to remain in compliance with state law, the employee not only needs to test positive, but the employer must also observe something in the worker’s conduct, behavior or appearance that indicates being under the influence or must receive information about the worker’s impairment from a reputable source.
A key issue in determining the prevalence and effects of workplace marijuana impairment is THC persistence. Unlike alcohol, THC levels in a user’s body may not be an accurate indication of impairment. The fact is, the human body processes THC differently than it does alcohol. THC and its metabolites can remain in a user’s bloodstream or urine for days or weeks, long after intoxication has ended. Chronic users may have low THC levels even without having recently consumed any marijuana. Furthermore, peak impairment can occur when THC levels have already begun to decline and user-reported impairment can continue long after THC levels have dropped to low levels. For these and other reasons, it is not currently possible to determine worker impairment based on THC levels alone.

Today, employees can and are being drug tested and disciplined based on a positive result, even if they are in compliance with state law by not using marijuana at work and not being impaired while on the job. As such, state laws regarding post-accident marijuana testing remains a contentious issue in the workers’ compensation arena and employers will most likely continue to find inconsistencies between state and federal regulations regarding medical cannabis products and workers’ compensation.

Take Note! Because workers’ compensation laws differ from state to state, it’s important for employers to know the laws in their respective states to remain in compliance with drug and alcohol testing standards.

Pre-Employment Drug Screen Challenges

It is common for employers to require a job candidate to complete a pre-employment drug test and that the offer for work be contingent upon the applicant’s ability to pass. This practice can help improve workplace safety as well as help reduce the number of costly workers’ compensation claims involving employees who regularly use drugs or alcohol. However, much like post-accident drug testing, pre-employment screening and marijuana use are also creating challenges for employers.

According to Quest Diagnostics, marijuana is most often detected during pre-employment screenings. As many states revise their marijuana laws, employers are having to revise their own pre-employment drug screening based on the growing public adult consumption of cannabis — testing that specifically excludes the presence of THC in test results. According to the National Organization for the Reform of Marijuana Laws, these trends will continue to affect laws in certain states as legislators review the issue of pre-employment screening for both medical and recreational marijuana use and update changes in certain jurisdictions.9

Earlier this year, a Nevada law took effect barring employers from considering pre-employment marijuana testing. In May 2020, New York City declared it unlawful for an employer, labor organization, employment agency or agent thereof to require a prospective employee to

Of Employers Surveyed:

• 81% are concerned about marijuana having a negative impact on their workforce.

• 71% indicated their organization’s written policies cover employee use of illicit cannabis.

• 54% said their policies cover employee use of legal or prescribed cannabis.

Source: 2019 National Safety Council survey

24% of employers indicated they would dismiss an employee found to be misusing legal cannabis, such as being under the influence while on the job.

7% of employers said they would most likely relocate an employee suspected of misusing legal cannabis to a position of lesser responsibility.

Source: 2019 National Safety Council survey

24% of employers indicated they would dismiss an employee found to be misusing legal cannabis, such as being under the influence while on the job.

7% of employers said they would most likely relocate an employee suspected of misusing legal cannabis to a position of lesser responsibility.

Source: 2019 National Safety Council survey
submit to testing for the presence of THC in the prospective employee’s system as a condition of employment. The ruling, however, did exclude employees and candidates in safety-sensitive positions, such as law enforcement officers, emergency medical professionals, commercial drivers and workers who fall under federal drug-testing guidelines. Later that month, the Rochester, NY city council voted to remove THC as a chemical in the testing of pre-employment drug screenings, but has continued testing for other drugs, such as heroin, cocaine and methamphetamines. Potential hires for certain positions where safety is a concern, such as police officers, will still be tested for THC.

Because the legality of pre-employment drug testing is rapidly evolving and will vary from state to state, employers are advised to stay informed regarding all relevant state regulations, consult with legal counsel if they have questions about their testing program and deploy general best-practice guidelines, which can include:

- Informing applicants in advance that pre-employment drug testing is part of the employer’s new-employee screening process.
- Ensuring that applicants for the same job will undergo the identical type of drug test.
- Having all drug tests administered at a state-certified laboratory.

When it comes to post-accident drug testing, it all comes down to liability. For example, was the injured worker impaired while on the job and responsible for his or her own accident? Or did the employee test positive but was not under the influence at the time of the incident and, therefore, the employer is liable? Unfortunately, most conventional drug testing and urinalysis are unable to provide concrete answers to these questions. For now, employers will most likely see changes in post-accident drug testing beginning at the state and local levels and should stay informed.

**BEST PRACTICES FOR MANAGING RISKS**

In addition to increased workers’ compensation and unemployment compensation claims, marijuana use (medicinal or recreational) can decrease employee productivity, increase worker turnover and result in employment-related lawsuits. Today, as marijuana policies evolve, employers face significant challenges in navigating workers’ compensation issues.

In managing marijuana in the workplace, your employer clients should consider taking the following proactive steps:

- Focus on employee safety training.
- Establish a new or update an existing workplace drug policy.
- Stay informed on legal, regulatory and compliance shifts at the state and federal levels.
- Know what accommodations, if any, the employer is expected to provide for workers who use marijuana.
- Identify how marijuana use might have an impact on workplace safety.
- Know whether the business workers’ compensation insurance policy provides benefits to injured employees testing positive, including reimbursement for injured workers who use medical marijuana.
- Work with an experienced broker who can assist in developing a comprehensive workers’ compensation policy based on the business’s exposures and needs.

Employees who tested positive for marijuana had **55% more industrial accidents, 85% more injuries and 75% greater absenteeism** compared with those who tested negative.

Source: **National Institute on Drug Abuse**

---

5 • COPYRIGHT © 2020. WORLDWIDE FACILITIES, LLC. ALL RIGHTS RESERVED.
CONCLUSION

As the legalization of recreational and medical marijuana expands, employers will continue to grapple with questions and concerns related to workplace safety and workers’ compensation insurance issues. Unfortunately, solutions to many of these concerns are forthcoming as many states, courts and regulators consider, develop and implement new laws. To complicate matters further, state laws and regulations regarding marijuana are in a continual state of flux, with some employment and insurance activities that were once prohibited now being allowed or even required. The best your employer clients can do to ensure compliance with changing laws and regulations is to consider the needs of their business and become proactive in staying informed as to the applicable laws in their operating state.

Staying informed on workers’ compensation issues and trends can help insurers, employers and stakeholders better manage emerging risks.

To learn how Worldwide Facilities can help, please contact a Worker’s Compensation specialist.

TODD POLLOCK
Senior Vice President, Workers’ Compensation
(508) 625-3547
tpollock@wwfi.com

JEFF GANS
Senior Vice President, Workers’ Compensation
(775) 473-7366
jgans@wwfi.com

NOTES

7. Ibid.
ABOUT WORLDWIDE FACILITIES

Established in 1970, Worldwide Facilities is a national wholesale insurance broker, managing general agent, and program underwriter. Our team of insurance specialists has access to virtually every specialty domestic and international insurance market.

DISCLAIMER

This whitepaper is Copyright © 2020 by Worldwide Facilities, LLC. It may be freely redistributed in its entirety provided that this copyright notice is not removed. It may not be sold for profit or used in commercial documents without the written permission of the copyright holder. This whitepaper is provided “as is” without any express or implied warranty. This whitepaper is for educational purposes only and does not purport to provide legal advice. If you require legal advice, you should consult with an attorney. The information provided here is for reference use only and does not constitute the rendering of legal, financial, or other professional advice or recommendations by Worldwide Facilities. The listing of an organization or website does not imply any sort of endorsement and Worldwide Facilities takes no responsibility for the products, tools, and Internet sites listed.

HEADQUARTERS

725 S. Figuroa Street, 19th Floor
Los Angeles, CA 90014
(213) 236-4500

Visit wwwfi.com for a full list of offices around the country