

## **Who Pays? Medical Marijuana as Treatment for Workers' Compensation Claims**

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As the prevalence of the use of medical marijuana increases, there has also been a split in state court decisions regarding whether an employer can be required to pay for medical marijuana when the drug is used for treatment for work-related injuries. Two recent cases filed in the U.S. Supreme Court that arose in Minnesota have resulted in the Supreme Court asking the U.S. Justice Department for its opinion on the issue. Marijuana continues to be listed as a Schedule 1 drug of the Controlled Substances Act. This means that the drug is illegal, is highly addictive, and has no accepted medical use. It also means that the manufacture, distribution, and possession of marijuana (and aiding and abetting the same) are technically crimes, despite current restrictions by Congress over enforcement of the law. In recent years, there have been multiple attempts to “reschedule” marijuana so that it would no longer be an illegal controlled substance. To date, those attempts have been unsuccessful. However, there are currently 47 states that have some form of legalized medical marijuana or allow its restricted use. As a result, the use of medical marijuana for work-related injuries is becoming more prevalent.

In *Musta v. Mendota Heights Dental Center* and *Bierbach v. Digger's Polaris*, the issue for the U.S. Supreme Court is whether the federal Controlled Substances Act preempts state orders requiring that employers pay for medical marijuana to treat work-related injuries. The Supreme Court of Minnesota and Maine ruled that federal law preempts state laws while the Supreme Courts of New Jersey and New Hampshire ruled the opposite. For the past several years, the U.S. Department of Justice has taken a “hands off” approach to dealing with states’ legalization of marijuana. The Supreme Court is asking the Justice Department to provide its opinion on whether the federal prohibition would apply to state workers’ compensation laws.

So far, a handful of states require workers’ compensation coverage for medical marijuana: Connecticut, Minnesota, New Jersey, and New Mexico. Other states, including Ohio, have specifically concluded that payment for medical marijuana for a work-related injury is not required. The Ohio Bureau of Workers’ Compensation concluded that its rules only provide for reimbursement of drugs that have been approved by the U.S. Food and Drug Administration – which does not include medical marijuana. Additionally, Ohio BWC rules require that drugs be dispensed by a registered pharmacist and, in Ohio, medical marijuana is dispensed from marijuana dispensaries, not pharmacies. Finally, the Ohio BWC only pays for medications on its pharmaceutical formulary and medical marijuana is not on the formulary. Similarly, Michigan law provides that employers are not required to pay for medical marijuana.

Employers should also be mindful of the current movement to legalize recreational marijuana in Ohio. The Coalition to Regulate Marijuana Like Alcohol has submitted signatures to have legalized recreational marijuana in Ohio reviewed by the state legislature for passage or for placement on the ballot. If passed, the law would allow Ohioans age 21 and older to possess up to 2.5 ounces of marijuana and 15 grams of marijuana concentrates. Ohioans would also be allowed to grow up to 6 plants each or 12 plants per household. The law would also provide for a 10% sales tax. However, the law would not require employers to allow employees to use marijuana or prohibit employers from disciplining employees for marijuana use.

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