

Cannabis In The Workplace:

AS LEGISLATION EVOLVES, WHAT CAN EMPLOYERS DO?

A.I.M. Mutual
INSURANCE COMPANIES



ANITA has been recovering at home for six weeks with work-related back strain. At the same time, she is dealing with a longtime chronic condition, Crohn's disease, whose symptoms include reduced appetite. To help Anita, her primary care physician has prescribed medical marijuana—to reduce her symptoms and as an appetite stimulant—which she uses every evening before dinner.

Anita has now finished her course of physical therapy, is free of back pain, and is now ready to return to work.

**"ULTIMATELY, YOUR RESPONSIBILITY IS TO KEEP YOUR EMPLOYEES AS SAFE AS POSSIBLE AND MINIMIZE ANY RISK OF WORKPLACE INJURY."
- LAURIE PARSONS**

Or is she?

Anita's case is fiction, but it illustrates some of the emerging issues employers need to be prepared for. Marijuana use is now legal, in some form, in 32 states and the District of Columbia.

Medicinal marijuana use is legal in the

states where A.I.M. Mutual provides workers' compensation coverage. And Massachusetts approved recreational marijuana use in a 2016 ballot initiative, with sales delayed until July 2018. Yet using the drug—a Schedule 1 substance—continues to be a federal offense.

Understandably, it's creating some confusion for employers. But A.I.M. Mutual has been responding to these concerns ever since marijuana legalization began appearing on state ballots.

What Should Employers Do?

From a workers' compensation standpoint, the focus continues to be on workplace safety, according to Laurie Parsons, Director of Claim, and Dan Ilnick, Senior Manager of Injury Prevention and Worksite Wellness. New state marijuana laws haven't changed the fact that an employee can't be impaired on the job.

A.I.M. Mutual policyholders are encouraged to establish a drug-free workplace immediately, if they haven't already. The Drug-Free Workplace Act of 1988 considers a variety of prohibited substances, which includes marijuana and other prescription drugs. AIM HR Solutions

at Associated Industries of Massachusetts can help in developing a drug-free workplace policy (www.AIMHRsolutions.com).

A zero-tolerance drug policy will apply to anyone coming to work "under the influence (UI)." That UI language is important because it broadens the definition. Make it clear that your drug-free policy includes marijuana as a banned substance at the workplace.

Also, specify that the drug is subject to, and falls within the scope of, your drug testing policy. You should, however, avoid listing any classifications such as whether a substance is legal or prescribed, or an alcohol or a Schedule 1 drug. Bottom line, that makes no difference: employers should practice due diligence in identifying any persons under the influence, and your workers need to know that.

"Ultimately, your responsibility is to keep your employees as safe as possible and minimize any risk of workplace injury," Laurie says.

Keep in mind, since marijuana remains illegal under federal law, any workplace falling under the jurisdiction of OSHA remains subject to those federal laws and must meet all OSHA regulations. Federal law

does not make allowances for prescription use of medical marijuana, despite what some states are doing.

"You are obliged to provide a place of employment free from all recognized hazards, an interpretation that has always included persons under the influence of any substance causing an altered state," Dan adds.

Having a zero-tolerance drug policy allows for consistent recognition, evaluation, and discipline in the workplace. Impairment is a recognizable hazard. The US Department of Transportation has guidelines for your supervisory personnel and rules on drug-and-alcohol testing at <https://www.fmcsa.dot.gov/regulations/drug-alcohol-testing-program>. Additional information related to each industry is available through A.I.M. Mutual's regional claim specialists and injury prevention and worksite wellness consultants.

The Ongoing Impact

The widespread implications of marijuana's legalization are among employers' top concerns. "We've addressed it in our last two claim seminars," Laurie points out, "and we continue to get a lot of questions from policyholders."

As marijuana's impact on employment laws is further defined, both federally and at the state level, employers need to pay close attention. For instance, the Massachusetts Supreme Judicial Court ruled in July that an employer should have discussed possible accommodations before terminating an employee whose pre-employment drug screen showed marijuana use, something she'd disclosed beforehand. [*Barbuto v. Advantage Sales and Marketing, LLC, SJC-*

12226, 217 WL 3015716 (Mass. July 17, 2017)].

Employers do need to consider how the Americans with Disabilities Act (ADA) and the Health Insurance Portability and Accountability Act (HIPAA) may apply going forward. Under the ADA, you could be alerted to a condition (based on the prescription of medical marijuana) that is significant enough for the prescription and may result in a reasonable accommodation request. HIPAA involves discussions of a medical nature that may require privacy and discretion. Contact AIM HR Solutions for guidance in interpreting these statutes.

Employers are also asking whether marijuana could be a compensable treatment option under workers' compensation in the future. In Massachusetts and New Hampshire, A.I.M. Mutual partners with Best Doctors Occupational Health Institute (BDOHI). Its medical professionals make clinical recommendations on a case-by-case basis for each patient, including those involving any medication regimen. As for medical marijuana as a possible opioid alternative, Michael Shor, BDOHI's Managing Director, says "there is a growing body of very interesting clinical research, but we really do need larger scale, randomized, controlled studies."

The drug's current Schedule I status currently precludes this.

Laurie adds that A.I.M. Mutual and most workers' compensation insurance carriers have not been ordered to cover costs for medicinal marijuana.

What Constitutes Impairment?

Dan notes marijuana can affect work performance in different ways, such as the following:

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- short-term memory loss
- impaired thinking
- loss of balance and coordination
- decreased concentration
- changes in sensory perception
- impaired ability to perform complex tasks
- decreased alertness
- decreased reaction time

Part of the problem, according to Michael Shor, is that there aren't any formal standards to assess impairment. He cites real and simulated driving studies which clearly indicate that marijuana negatively affects drivers' attentiveness, perception of time and speed, and ability to draw on information obtained from previous experience.

Further complicating the medical marijuana debate is tetrahydrocannabinol (THC), the chemical in marijuana that makes users high. THC can stay in the system for up to 30 after use, though Mike notes it's generally undetectable after ten days. Still, it generates even more questions about impairment, so—at minimum—you need a detailed, zero-tolerance, drug-free workplace policy as your framework. ▀



Laurie Parsons, WCLA, FCLA, is Director of Claim for A.I.M. Mutual. She has specialized in workers' compensation for 20 years and is licensed to handle claims in Massachusetts, New Hampshire, Connecticut, and Vermont.



Daniel Ilnick, CSP, is Senior Manager, Injury Prevention and Worksite Wellness. He has more than 25 years of risk management, health, and safety experience in both private industry and insurance.



Michael J. Shor, MPH, is the Managing Director of Best Doctors Occupational Health Institute. He currently chairs the Massachusetts Bar Association's Workplace Safety Taskforce Subcommittee on Opiate Use in Work-Related Injury.