Smoke and Mirrors: Navigating the New Medical Marijuana Law

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First, Some History

- Maine first permitted medical marijuana use in 1999, but the 2009 enactment of the Maine Medical Use of Marijuana Act significantly changed the landscape.

- Maine is one of 16 states that currently have medical marijuana laws

- Maine is one of 7 states that have a regulated dispensary system
Statutory Requirements and Protections

• Qualifying patient

• Registry Identification Card or Physician Certification Form

• Not subject to arrest, prosecution or penalty…or denied any right or privilege
Individual Amount and Storage

• No more than 2 ½ ounces of usable marijuana

• If no designated primary caregiver, no more than 6 plants in enclosed, locked facility
Primary Caregiver Amount and Storage

- Still no more than 2 ½ ounces per patient
- Still no more than 6 marijuana plants per patient
- Still kept in locked facility unless being transported
Dispensary Amount and Storage

• Possess up to 2 ½ ounces per patient

• Up to 6 marijuana plants per patient

• No more than 2 ½ ounces may be distributed to any one patient in a 15-day period
Registration

• Must have written certification from a physician (osteopath or allopath)
  ▪ on tamper-resistant paper
  ▪ signed by a physician
  ▪ valid for one year

• May also register with the State as a “registered patient”, but no longer mandatory as of Sept. 28, 2011
Physician’s Role

- Opinion that person will get “therapeutic or palliative benefit”
- Qualifying medical condition
- Bona fide physician-patient relationship, shown by:
  - Evaluation
  - Treatment Plan
  - Periodic review and documentation
Qualifying Medical Conditions

- Cancer
- Glaucoma
- HIV/AIDS
- Hepatitis C
- Amyotrophic Lateral Sclerosis
- Crohn's Disease
- Agitation due to Alzheimer's Disease
- Nail-Patella Syndrome
- Intractable Pain
- Seizures
- Severe and Persistent Muscle Spasms
- Cachexia or Wasting Syndrome
- Severe Nausea
- Any other condition approved by Commissioner
Maine Statistics

- As of March 2011
  - More than 790 Certified Medical Marijuana Users
  - 126 Registered Physicians
  - 211 Registered Caregivers
  - 4 of 8 Dispensaries are open for business
Drug and Alcohol Impairment in the Workforce

- 8.4% of full-time employees in the U.S. reported using illicit drugs
- 8.8% reported heavy alcohol use
- 3.1% admitted to using drugs before or during work hours in the previous year
- 2.9% admitted to working under the influence of an illicit drug
Maine’s Statistics

- 4% of tested job applicants were positive for cannabinoids
- Just fewer than 3% of random employee tests showed positive results for cannabinoids
- Cannabinoids represented 84.2% of all positive drug tests
- Construction and Trade Industries had highest rates of positive tests, at 5.6% each
Impairment’s Effects on Maine Employers

- Increased rate of absences/tardiness
- Potential danger to self and co-workers
- Increased risk of injury
- Decreased productivity

- What about OSHA’s promise of “safe and healthful working conditions”? 

[Image]
Impairment’s Effects on Maine’s Employees

- Decreased ability to self-care
- Increased risk of loss of support systems
- Increased risk of family discord
- Increased risk of long-term joblessness
- Increased risk of co-morbidities, such as depression/mood disorders
On May 16, 2011, the U.S. Attorney for Maine issued a letter stating:

“while the department does not focus its limited resources on seriously ill individuals who use marijuana as part of a medically recommended treatment regimen in compliance with state law...we will enforce the (Controlled Substances Act) vigorously against individuals and organizations that participate in the unlawful manufacturing and distribution activity…even if such activities are permitted under state law.”
Here’s the Kicker

• “A…employer…may not refuse to…employ or otherwise penalize a person solely for that person’s status as a registered qualifying patient or a registered primary caregiver unless failing to do so would put the…employer…in violation of federal law or cause it to lose a federal contract or funding.” 10-144 CMR, Ch. 122, Sec. 2, 2.1.5.2
And a Carrot from the Regulations

• The Regulations prohibit undertaking any task under the influence of marijuana “when doing so would constitute negligence or professional malpractice or otherwise violate any professional standard.” 10-144 CMR Ch. 122, Section 2, 2.2.1
More Prohibitions on Use in the Regulations

• May not possess marijuana
  ▪ In a school bus
  ▪ At a school
  ▪ In a correctional facility

• Can’t “light up”
  ▪ While on public transportation
  ▪ In any “public place”

10-144 CMR, Ch. 122, Sec. 2.2.2, Sec. 2.2.3
• Regulations prohibit operation of a motor vehicle, aircraft, motorboat, snowmobile or all-terrain vehicle while under the influence of marijuana 10-144 CMR, Ch 122, Sec. 2.2.4
What is an Employer To Do?

• Unlike many “at-will” states, Maine’s law specifically prohibits “discrimination” for permitted users

• Qualifying patient is also likely a “qualifying individual with a disability” under the ADAA

• What might be a “reasonable accommodation”?
An Employer May...

• Impose “a restriction on the administration” of marijuana on the premises when “inconsistent with the general use of the premises”

• May refuse to accommodate ingestion of marijuana in the workplace
“These rules [do not require] an employer to accommodate...any employee working while under the influence of marijuana.” 10-144 CMR, Ch. 122, Sec. 2.3.2
Case Study #1

• A Tale of Two Employees
  ▪ Bob and Joe are both forklift operators at the manufacturing plant for which you serve as HR Manager
  ▪ Joe is an excellent long-term employee with many awards on file
  ▪ Bob has been positively reviewed in each review since his hire, a year and a half ago
Tale of Two Employees (cont.)

- You learn that they both were witnessed using marijuana off-site, after work
- You have a zero-tolerance drug use policy
- When confronted, Bob shows you his physician certification permitting medical marijuana use
- Joe has no such certification, nor is he a registered user.

What Do You Do?
Case Study #2

- The Federal/State Conflict
  - Eva had a work-related low back injury in 1996
  - Despite efforts to treat her low back pain, it has not responded to any conventional treatments
  - Eva’s new physician certifies that she would get “therapeutic benefit” from use of medical marijuana
Federal/State Conflict (cont.)

• You are self-insured for purposes of workers’ compensation insurance

• Eva contacts your dedicated adjuster and requests payment for medical marijuana

• Your Adjuster, knowledgeable of Federal Law, files a NOC

What Do You Do?
Case Study #3

- A Whiff of Smoke
  - Mike has worked loading trucks for your company for seven years
  - He has not been a particularly good employee, with a lot of Friday/Monday absences
  - Mike has had four recorded safety outages in the past year
  - He has had three work-related injuries involving lost time in the past two years
• Each injury’s root cause was lack of concentration

• Mike has recently had conflicts with his immediate supervisor, whom he used to date before coming to work for you

• Mike’s supervisor approaches you saying that she thought he seemed “out of it” the other day
Whiff (cont.)

• She adds that she thought she smelled marijuana smoke on Mike’s clothes

What Do You Do?
Resources

• Maine Medical Use of Marijuana Program
  ▪ John Thiele, Program Manager
    john.l.thiele@maine.gov

• Maine Department of Labor Office of Substance Abuse
Questions?