

# DAZED AND CONFUSED ABOUT THE IMPACT OF PA'S MEDICAL MARIJUANA ACT ON EMPLOYERS

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# MEDICAL MARIJUANA ACT

It is the intent of the General Assembly to:

- Provide a program of access to medical marijuana which balances the need of patients to have access to the latest treatments with the need to promote patient safety.
- Provide a safe and effective method of delivery of medical marijuana to patients.
- Promote high quality research into the effectiveness and utility of medical marijuana.

# MEDICAL MARIJUANA ACT

- 35 Pa. Stat. Ann. § 10231.101, *et seq.*
- Section 103:
  - 17 qualifying medical conditions
    - Among the conditions: Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain in which conventional therapeutic intervention and opiate therapy is contraindicated or ineffective
  - Terminal illness

# CONCERNS WITH MEDICAL MARIJUANA IN THE WORKPLACE

- Excessive lunch breaks
- Altercations over the last bag of Funyuns in the snack machine
- Increased internet usage attributable to online gaming
- Terrible tie-dyed work uniforms



# EMPLOYEE PROTECTIONS



No employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges *solely* on the basis of such employee's status as an individual who is certified to use medical marijuana.

# EMPLOYEE PROTECTIONS

Nothing in this act shall require an employer to make any accommodation of the use of medical marijuana on the property or premises of any place of employment. This act shall in no way limit an employer's ability to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for that position.

# EMPLOYEE PROTECTIONS

## **Defense to Employee Protections:**

- **Nothing in this act shall require an employer to commit any act that would put the employer or any person acting on its behalf in violation of Federal law.**

# PROHIBITIONS

## Section 510:

- Employee/patients may not use certain chemicals or high-voltage electricity/ other public utility with more than 10 nanograms of active tetrahydrocannabis per milliliter of blood in serum
- No employment duties at heights or confined spaces



# PROHIBITIONS

## Section 510:

- Employer may prohibit patient from:
  - Performing any task which the employer deems life-threatening
  - Performing any duty which could result in a public health or safety risk while under the influence of medical marijuana
  - Prohibition is not deemed adverse employment action, even if financial harm to employee

# DEFINITION OF UNDER THE INFLUENCE

- Method to test precisely?
- Does specific definition apply to entire statute?

# EMPLOYMENT POLICY CONSIDERATIONS

- Drug Free Workplace
- Off-duty drug use
- Disability accommodations
  - ADA
  - PHRA

# IMPACT ON WORKERS' COMP

- Under Workers' Comp Act, "serious medical condition" may include:
  - Cancer
  - Damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity
  - Neuropathies
  - Post-traumatic stress disorder

# IMPACT ON WORKERS' COMP

## 4 MAJOR AREAS

- 1. Intoxication Defense**
- 2. Potential Wage Loss Defense When Post-Injury Determination Results from Positive Drug Test**
- 3. Cost of Medical Marijuana to indemnity exposure of claim**
- 4. Cost of Medical Marijuana as Medical Expense**

# WORKERS' COMP ACT



## Section 301(a):

...no compensation shall be paid when the injury or death is . . . caused by the employe's violation of law, including, but not limited to, the illegal use of drugs, but the burden of proof of such fact shall be upon the employer . . . In cases where the injury or death is caused by intoxication, no compensation shall be paid if the injury or death would not have occurred but for the employe's intoxication, but the burden of proof of such fact shall be upon the employer

# INTOXICATION AS A COMPLETE DEFENSE

- Employer can successfully establish intoxication defense by demonstrating that the employee would not have been injured if he or she was not intoxicated
  - *Thomas Lindstrom Co. v. W.C.A.B. (Braun)*, 992 A.2d 961 (Pa. Cmwlth. 2010)

# INTOXICATION AS A COMPLETE DEFENSE

- Depending on how employer's Drug and Alcohol Policy is written, a Claimant's refusal to submit to post-injury testing or a positive post-injury test result may serve as a basis on which to deny wage loss benefits to a workers' compensation claimant
- Where a positive post-accident drug test results in a termination of employment in accordance with an employer's drug and alcohol policy, ongoing wage loss is not due to the work injury thus potentially precluding an award of wage loss benefits to a claimant
  - *Edwards v. W.C.A.B. (Sear's Logistic Services)*, 770 A.2d 805 (Pa. Cmwlth. 2001)



# STANDARD DRUG POLICY FOR EMPLOYERS

- **Illegal Drugs.** It is a violation of Company Policy for an Employee to sell, manufacture, distribute, dispense, use, possess, purchase, obtain, transfer, convey, be under the influence or test positive for controlled substances *in contravention of federal or state law* (or to attempt any of the foregoing acts).
- Will a post-injury drug test positive for THC for an employee who has a legal prescription for medical marijuana provide a possible wage loss defense to the Employer in this case?

# SECONDARY POTENTIAL IMPACT ON INDEMNITY EXPOSURE

- After Claim Acknowledged
- Will injured workers to whom medical marijuana is prescribed be capable of working when taking the medication resulting in increased wage loss exposure?
  - Similar strategy used with respect to narcotics
  - If medical marijuana precludes someone from driving or otherwise inhibits their ability to work in a safe manner its use can render otherwise physically suitable work unavailable
  - The MMA sets forth numerous prohibitions in Section 510 which reinforce the reality of this potential exposure

# IMPACT OF MEDICAL MARIJUANA ON MEDICAL EXPOSURE

- **Section 2102. Insurers.**
- *Nothing in this act shall be construed to require an insurer or a health plan, whether paid for by Commonwealth funds or private funds, to provide coverage for medical marijuana.*
- **General consensus:**
  - workers' compensation carriers will not be required to pay for medical marijuana at this time given the broad language of Section 2102 at least until the issue has been addressed through the court system



# PRACTICAL CONSIDERATIONS

- Nothing in the act prohibits an insurer or health plan from covering medical marijuana.
- Situations may exist where coverage of medical marijuana may make sense. This will need to be assessed on a case by case basis.
- How will the substance be repriced and paid if it has not been assigned a national drug code?
- Can an insurance carrier legally pay for a substance that is not FDA approved and is not legal under federal law?

## CONCLUSION

It's too early to tell the impact of the MMA on workers' compensation claims. However, there is sufficient room for interpretation to believe that this law will have some impact on claims in the future. It is anticipated that judicial interpretation of the MMA will play a large part in determining the extent of impact in the future.

# THANK YOU!

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