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Medical Marijuana in Pennsylvania – What Does It Mean for Employers?

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On Sunday, April 17, 2016, Governor Tom Wolf signed the Pennsylvania Medical Marijuana Act (commonly referred to as "Senate Bill 3" and referenced herein as "the Act"), into law, thereby making Pennsylvania the 24th state to legalize medical marijuana. This law enacts a sweeping change in the Commonwealth, legalizing the use of medical marijuana per the parameters of the Act, despite the ongoing prohibition of same under Federal law.

A cursory review of the Act as it was passed - or even a review of numerous interviews given by those who voted for it - reveals that the Pennsylvania Medical Marijuana Act was drafted from the perspective of, and with great emphasis on, the interests of Pennsylvania residents who have long been seeking access to medical marijuana. To this end, the overwhelming majority of the Act is devoted to setting forth a detailed framework outlining who can produce, provide, and obtain medical marijuana, and how this process will be implemented and regulated.

That patient-access legislative framework is important and will no doubt be analyzed in depth in the coming months, however, that aspect of the Act is not the focus of this article. Prospective Pennsylvania medical marijuana patients do not exist in isolation. For better or worse, this legislation will also impact those who interact with medical marijuana patients, including employers, insurance carriers, third-party administrators and other related entities who simply must be aware of the various nuances of the Act and its potentially wide-reaching effects.

Who Can Use Medical Marijuana in Pennsylvania?

One cannot assess how medical marijuana can impact employers and insurance carriers in Pennsylvania without first determining who may have access to it. In that regard, the Act quite succinctly sets forth the "who" and the "how" of anticipated medical marijuana usage in the Commonwealth.

If the question is "who" will have access to medical marijuana in Pennsylvania, the answer is those with "serious medical conditions." These serious medical conditions are not loosely defined; rather, Section 103 of the Act explicitly sets forth seventeen (17) enumerated conditions which may allow access to medical marijuana. These conditions include the following:

- cancer;
- HIV/AIDS;
- amyotrophic lateral sclerosis (ALS);
- Parkinson's disease;
- multiple sclerosis;
- damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity;
- epilepsy;
- inflammatory bowel disease (IBS);
- neuropathies;
- Huntington's disease;
- Crohn's disease;
- post-traumatic stress disorder (PTSD);
- intractable seizures;
- glaucoma;
- sickle cell anemia;
- severe chronic or intractable pain of neuropathic origin or severe or intractable pain in which conventional therapeutic intervention and opiate therapy is contraindicated or ineffective; and
- autism.

Conditions excluded from this list, if any, cannot be disregarded as mere oversight as the legislative history of Senate Bill 3 demonstrates that medical conditions were added to, or removed from, this list with nearly every successive review. Should a Pennsylvania resident receive a recommendation from a doctor for usage of medical marijuana to address an excluded condition, they likely would run afoul of the Act in doing so.

How Does a Patient Gain Access to Medical Marijuana?

The Act is equally precise in outlining how eligible patients under the Act obtain medical marijuana. Section 303 of the Act specifies that the only forms of medical marijuana allowed under the Act are pills, oils, topical forms (including gels, creams or ointments), tinctures, or liquids. Smoking of medical marijuana is not explicitly allowed by the Act, although Section 303(B)(2) does contemplate nebulization or vaporization of dry leaf or plant forms pending issuance of future regulations.

The Act also creates an advisory board consisting of fifteen members from the Department of Health (eight members appointed by the House, Senate and the Governor, and seven permanent members). Two years following the commencement of the Act, this board will be required to submit a written report to the General Assembly and the Governor, with recommendations regarding proposed revisions or changes to the Act.

With respect to a patient gaining medical clearance to use medical marijuana, both medical and osteopathic doctors may apply to the Department of Health to become registered as a "practitioner." However, physicians must complete formal training before becoming a registered practitioner. Only registered practitioners may certify patients to use medical marijuana. Once approved, identification cards will be issued to patients and caregivers permitting access to medical marijuana.

What Does This Mean For Pennsylvania Employers and Insurers?

Clearly, the Pennsylvania Medical Marijuana Act was contemplated and drafted to benefit patients suffering from serious medical conditions. This is understandable and perhaps laudable, but there are implications at issue in the Act which extend well beyond patients' rights.

First and foremost, the use of medical marijuana remains illegal under federal law. The applicable Federal law in this context - the Controlled Substance Act ("CSA") - went into effect in 1970 and classifies cannabis as a Schedule I substance. As such, the cultivation, distribution and/or possession of cannabis, even for valid medical treatment, is a federal crime. In this light, the issue of who can even pay for medical marijuana treatment in Pennsylvania becomes quite complicated.

There are a variety of entities who pay for medical treatment in Pennsylvania including insurance carriers, third-party administrators and self-insured employers. All of these groups have a vested interest, and a valid concern, about issuing payment for medical marijuana in light of the ongoing conflict between state and federal law.

In an attempt to address these concerns, Section 2012 of the Act states that *"[n]othing 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."* While this language seems quite clear in its scope and intent - insurance carriers and health care plans are not required to pay for medical marijuana – it is nonetheless problematic. Unfortunately, this provision might not be sufficiently worded to protect every entity that pays for medical treatment in Pennsylvania.

Specifically in the workers compensation arena, there are numerous entities who might not be viewed as "insurers" or "health plans." This would include self-insured employers or, perhaps, the various state-run entities that do not function as traditional "insurers." As such, it is unclear if these entities are afforded the protection set forth by Section 2012 of the Act. Since the Medical Marijuana Act does not provide an explicit definition for "insurers" or "health plans," this is an issue that, unfortunately, might be left to the courts to decide.

Of course, this discussion says nothing of the fact that some entities may *want* to provide coverage for medical marijuana. To be sure, the billing and pricing of this treatment has yet to be established, but it is not hard to envision a scenario wherein the cost of medical marijuana is much more reasonable and favorable than traditional alternatives. For example, the Act provides for treatment of two conditions commonly seen in workers' compensation: neuropathy and severe chronic pain. Currently, these conditions are regularly treated with expensive opiates. As the price of narcotic pain medication continues to rise, the cost of paying for medical marijuana as a substitute for pain medication may ultimately save insurance carriers a significant amount of money, provided they can even make such payments within the current confines of Federal law.

There are also major implications for employers. Section 2103 (A) of the Act, entitled "Protections for Patients and Caregivers," states that *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 marijuana.*

Notwithstanding this protection, the very next provision of the Act suggests that an employer may be able to discipline an employee for their use of medical marijuana. Section 2103

(B) states that, *"[t]his 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."* This "standard of care" language seems to offer some degree of protection to employers, but the definition of "standard of care" remains unknown and is certainly open to interpretation.

The question also arises as to whether the discipline or firing of an employee based on the proper use of medical marijuana constitutes unlawful discrimination under the Pennsylvania Human Relations Act (PHRA). Section 955 of the PHRA states, in pertinent part, that "*it shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification … for an employer because of … a non-job related handicap or disability … of any individual or independent contractor, to refuse to hire or employ or contract with, or to bar or to discharge from employment such individual or independent contractor, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract*."

In other words, the Pennsylvania Medical Marijuana Act and the Pennsylvania Human Relations Act may be in conflict. It is an open question as to whether or not an employer who fires, suspends or fails to hire, an employee based on the employee's proper use of medical marijuana, is in violation with the PHRA.

Other questions arise regarding medical marijuana use and the issue of workplace safety. Section 510 of the Pennsylvania Medical Marijuana Act specifies that an employee may not operate or be in physical control of strong chemicals or high voltage electricity (or any public utility) if that patient has more than 10 nanograms of tetrahydrocannabis in their blood.

Without any apparent blood measurement standards, this section of the Act also specifies that an employee "under the influence of medical marijuana" may not perform any employment duties at heights or in confined spaces. Furthermore, employees "*may be prohibited by an employer from performing any task which the employer deems life-threatening, to either the employee or any of the employees of the employer*."

This second prohibition, which allows the employer to determine which job-specific tasks could be deemed life-threatening, includes an additional provision that "*[t]he prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient*." As with other aspects of the Act, what is and what is not "life-threatening" is not elsewhere defined.

As is now obvious, while Section 2103(A) of the Act seems to enact a general prohibition against discharge or refusal to hire due to an employee's medical marijuana usage, other aspects of the Act seem to allow just that. Thus, not only does the Act potentially contradict the PHRA, it may contradict itself.

Additionally, in the workers' compensation context, just because an employer *could* suspend or discharge an employee for reasons related to their medical marijuana usage, it does not necessarily mean that they *should*. While payors of Pennsylvania workers' compensation medical benefits may be excluded from having to pay for medical marijuana, depending on their status, that does not mean that medical marijuana usage will have no impact on Pennsylvania workers' compensation claims. To the contrary, under the current construct of the Medical Marijuana Act, if an employee is using medical marijuana to treat a work-related injury and that employee is sent home from work because his or her employer prohibits said use, that employee might have a strong argument for reinstatement of wage loss benefits under the Pennsylvania Workers' Compensation Act. Should that happen, there do not appear to be any exclusions in the Pennsylvania Medical Marijuana Act that would protect employers and their workers' compensation insurers.

These are but a few of the significant issues that insurance carriers, third-party administrators, employers and other entities will likely encounter as the Pennsylvania Medical Marijuana Act is being implemented. It is recommended that a through review of policies, procedures and employee handbooks is conducted to ensure compliance with the Act but also to address the conflict between the Act and other laws. If you or your company has questions, you are encouraged to contact The Chartwell Law Offices for further guidance.

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