

**HEALTH CARE COMPLIANCE ASSOCIATION
22ND ANNUAL COMPLIANCE INSTITUTE
APRIL 15-18, 2018 LAS VEGAS, NV**

601- DEALING WITH LEGALIZED MEDICAL MARIJUANA; THE DILEMMA CREATED BY CONFLICTING FEDERAL AND STATE LAWS

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- Views expressed are not the opinion or position of either:
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 - Presentation is not intended to promote or discourage the use of cannabis/marijuana

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What is Cannabis?



- Genus of flowering plants that includes multiple subspecies. One species is *Cannabis sativa*.
 - Identified over 400 chemical compounds
 - Over 80 compounds are unique to the cannabis plant, and they are called cannabinoids (or **phytocannabinoids**).
 - **CBD** and **THC** are the most common phytocannabinoids present in medical cannabis medicines

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Cannabis history



- Medicinal use dates back at least 3000 years
- Origin in China and India
- Introduced into Western Medicine in the 1840s by William Brooke O'Shaughnessy MD
- Used cannabis for its analgesic, sedative, anti-inflammatory, antispasmodic and anticonvulsant properties.

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History in U.S.

- Cannabis products produced and marketed in U.S. since early in the 20th century.
- Marijuana Tax Act of 1937- first regulation of cannabis
- 1941- cannabis removed from US Pharmacopeia

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History in US

- Marijuana – the 1960's view
 - Counterculture
 - HIPPIE Drug
 - Act of rebellion
 - Safer than alcohol
 - "Gateway Drug"
 - "Reefer Madness"

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History in U.S.

- 1970 – “War on drugs”
- Comprehensive Drug Abuse Prevention and Control Act of 1970
- Created “Schedule 1” Drugs:
 - High potential for abuse
 - No currently accepted medical use in treatment
 - Lack of accepted safety for use under medical supervision
- No prescriptions may be written for clinical use

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History in U.S.

- What are the Schedule 1 Drugs?
 - Heroin
 - LSD
 - Mescaline
 - MDMA/Ecstasy
 - GHB
 - Psilocybin
 - Methaqualone/Quaalude
 - Kahl, Bath Salts
 - THC/Marijuana

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History in U.S.

- 1972: Shafer Commission (investigative body appointed by Nixon):
 - Recommends removing marijuana from Schedule 1
 - Rejected by Nixon
- 1988: DEA Chief Administrative Law Judge Francis Young:
 - Ruled marijuana should be rescheduled
 - "Marijuana, in its natural form, is one of the safest therapeutically active substances known to man. By any measure of rational analysis marijuana can be safely used within a supervised routine of medical care."
 - Rejected by DEA administrator

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History in U.S.

- Consequences of Schedule 1 classification:
 - Arrests and convictions for marijuana possession and distribution skyrocket
 - Drug cartels flourish
 - Evidence that marijuana is a “gateway drug”?

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History in U.S.

- 1996: California passes Proposition 215 – first state legal medical marijuana program
- NIDA - only Federally legal source of cannabis for research in country
 - Mandate limits NIDA to study drugs (including marijuana) ONLY as substances of abuse



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Federal Response

- 8/29/13 “Cole Memo”
 - DOJ guidance- If state enforcement [of marijuana prohibition] is not “sufficiently robust”, DOJ may seek to challenge the state’s regulatory structure and bring actions on its own
 - Marijuana remains classified as a Schedule 1 drug

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Federal Response

- 80 Fed. Reg. 35,960 (June 23, 2015)
 - In order to streamline the application and approval process for cannabis research, the PHS review is eliminated
 - Effective immediately, application, review and approval of cannabis research is the responsibility of NIH

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Federal Response

- Consolidated Appropriations Act of 2016
 - §542 Hinchey-Rohrabacher Medical Marijuana Amendment ("Rohrabacher Amendment")
 - "None of the funds made available in this Act to the Department of Justice may be used, with respect to [those states that have legalized the possession and use of marijuana] to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana."

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Federal Response

- United States v. McIntosh (9th Cir. 8/2016)
 - 10 consolidated interlocutory appeals involving defendants charged with violating the Controlled Substances Act for activities related to the possession, distribution, or use of marijuana.
 - 9th Circuit held that if the defendants were acting within the bounds of established California law, DOJ had no authority to expend funds under the Rohrabacher Amendment to investigate or prosecute them

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Federal Response

- Rohrabacher Amendment
 - Included in 2017 Appropriations Act
 - Current status: Still included in appropriations act through end of February 2018
 - After that?

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Federal Response

- The cultivation, distribution and possession of marijuana is a criminal offense and may serve as the basis for criminal prosecution under other statutes (ex. money laundering). "These statutes reflect **Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime**"
- "...previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately."
 - January 4, 2018 – Memorandum to All United States Attorneys from Jefferson B. Sessions, Attorney General

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Marijuana Economics

- 2016- approximate value of legal cannabis industry - \$6.6 billion
 - Projected to be \$50 billion by 2026
 - Florida- by 2020 expected to be a \$1.6 billion industry
- State tax revenues derived from cannabis taxes in 2017- \$559 million
 - Projected tax revenues (all sources) from a mature marijuana industry - \$28 billion

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Current Status of Marijuana Legalization

- 29 states and DC with legal medical cannabis;
- 9 states and DC allow adult use
- Majority of population live in states where marijuana has been legalized
 - 60% of U.S. population supports legalization
 - 71% in Florida voted to adopt Amendment 2
- At the federal level - production, processing, distribution and use of marijuana remains illegal

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Legalizing Marijuana in Florida

- Compassionate Medical Cannabis Act of 2014
 - Authorized dispensing "low-THC cannabis"- No more than 0.8% THC in dried flowers
 - Creates Office of Compassionate Use
 - Physician must undergo training course before being authorized to recommend marijuana for patients
 - Establishes vertical integration of production, processing and dispensing; limited to 5 "Dispensing Organizations" statewide

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Legalizing Marijuana in Florida

- Compassionate Medical Cannabis Act of 2014 (cont.)
- Limited to "qualified patients"-Florida residents on "compassionate use registry"
- Patient must be diagnosed with cancer or a physician medical condition that chronically produces symptoms of seizures or severe and persistent medical spasms if no other satisfactory alternative treatment options exist.

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Legalizing Marijuana in Florida

- Right to Try Act of 2015
 - Expanded Compassionate Medical Cannabis Act to include high THC marijuana
 - Expands “qualified patients” to give Florida residents who are terminally ill access to experimental medications and therapies that have not yet approved for general use by the FDA

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Legalizing Marijuana in Florida

- 2016 – Amendment 2
 - Approved by 71% of voters
 - Florida Senate Bill 8A; §381.986, F.S.
 - Vertical integration of growing, processing, and dispensing
 - Qualified physicians may certify the dispensing of marijuana to patients with “qualifying medical conditions”
 - Smoking marijuana remains prohibited
 - Vape, drops, eatables, etc.

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Legalizing Marijuana in Florida

- Patient must be:
 - Florida resident with a “qualifying medical condition” and be diagnosed with:
 - Cancer
 - Epilepsy
 - Glaucoma
 - HIV/AIDS
 - Terminal condition
 - Medical conditions of the same kind or class or comparable to those enumerated above
 - Multiple sclerosis
 - Chronic’s disease
 - ALS
 - PTSD
 - Chronic nonmalignant pain

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Legalizing Marijuana in Florida

- Florida employers are not required to:
 - Accommodate use of medical marijuana in any workplace;
 - Permit employees to accommodate the medical use of marijuana in any workplace; or
 - Permit any employee to work while under the influence of marijuana.
- This section does not create a cause of action against an employer for wrongful discharge or discrimination”

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Legalizing Marijuana – What Courts Say

- Gonzales v. Raich, 545 U.S. 1 (2005)
- Under the Commerce Clause of the U.S. Constitution, Congress may criminalize the production and use of homegrown cannabis even if states approve its use for medicinal purposes.

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Legalizing Marijuana – What Courts Say

- What to do when employees are using legal marijuana?
- Coats v. Dish Network (S.C. Colorado)(2015).
 - Plaintiff a paraplegic with chronic pain
 - Terminated by employer for using medical marijuana
 - Colorado has statute prohibiting adverse employment actions when employee's conduct protected under law
 - S.C. Colorado- Dish Network did not violate state law, as medical marijuana still prohibited under federal law

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Legalizing Marijuana – What Courts Say

- Rhode Island- Callaghan v. Darlington Fabrics

- Job applicant disclosed her legal use of medical marijuana outside of work to prospective employer
- Darlington Fabrics, a drug-free workplace, declined to hire Callaghan, because passing employer's drug test was a condition of employment
- Trial court held Darlington's actions violated R.I. medical marijuana prohibition against refusing to "employ ... a person solely for his or her status as" someone eligible to receive medical marijuana in that state.

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Legalizing Marijuana - What Courts Say

- Connecticut – Noffsinger v. SSC Niantic Operating Company (D. CT)
- State medical marijuana statute permits use by "qualified patients" and prohibits discrimination, but does not include an explicit private right of action for aggrieved job applicants or employees
- Plaintiff, tested positive in pre-employment drug test
- SSC, a nursing home, rescinded its job offer
- Fed. district court held
 - CT law had an implied private right of action
 - Federal law does not preempt discrimination claim under state medical marijuana law

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Legalizing Marijuana – What Courts Say

- Washington, et al., v. Sessions, et al. (U.S.D.C. NY Feb. 14, 2018)
- Plaintiffs sought to have court overturn prohibition on cannabis or have it reclassified as a Schedule 2 drug.
 - Plaintiffs alleged marijuana laws traditionally discriminated against minorities and preclude users from boarding planes, which are federally regulated.
- Court denied plaintiffs' motion and granted defendants' motion to dismiss this suit.
 - Plaintiffs failed to exhaust their administrative remedies as they did not petition D.E.A. to reclassify marijuana (NOTE: D.E.A. rejected similar requests in 2011 and 2016)
 - Judge did not address medical efficacy of marijuana, rather-
 - Congress and the DEA have the right to regulate medical marijuana

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Legalizing Marijuana – The Dilemma

Marijuana is Legal - Yes

- Legal in 29 states and D.C.
- Majority of Population live in jurisdictions where it is legal
- Decisions of state courts uphold legality under state law
- Rohrabacher Amendment
- Potential source of tax revenue

Marijuana is Legal - NO

- Still a Schedule 1 drug
- Lack of Clinical Trials
- Congress has power to criminalize
- Position of Attorney General Sessions
- Risk of Prosecution
- Federal Courts uphold right of Congress and the D.E.A. to regulate

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Legalizing Marijuana –Issues/Questions

- Obligation to comply with federal law
- Interference with physician-patient relationship
- What to do with employees who use medical marijuana
 - Obligation to discipline
 - Obligation to report to disciplinary board
 - Obligation to notify law enforcement
 - What user is employee's partner, rather than the employee him/herself?

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Legalizing Marijuana – Issues/Questions

- What to do with a patient who -
 - - tests positive for medical marijuana?
 - - is admitted while already using medical marijuana?
 - - requests medical marijuana after admission?
 - - does not respond to other pain/seizure medication?
 - - resides in another state and uses medical marijuana?
 - - brings marijuana into the hospital?

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Medical Marijuana

Questions?

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