In the weeds on marijuana and workers' compensation

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It's a topic that gets much buzz – how will the cloud of legislation surrounding recreational and medical marijuana use impact businesses, specifically when it comes to compensability for workers' compensation? I am sure you have all caught up on news about additional states voting to legalize marijuana for medical use and adult recreational use during the November 2016 election. Let's take a look at those changes, as well as what action they may prompt to shake up the state and federal status quo.

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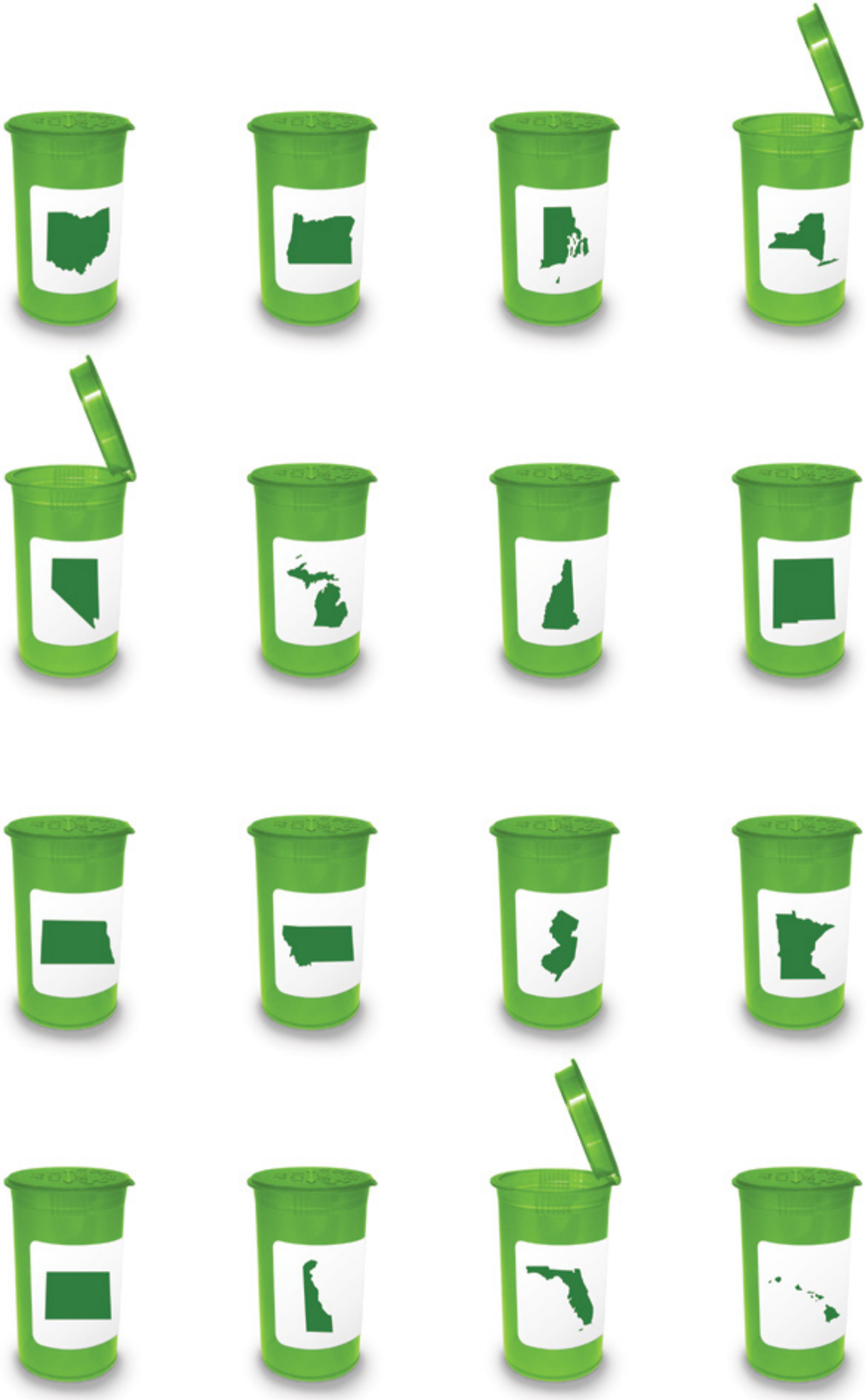
After receiving certified results of a state recount, 2016 closed with Maine Gov. Paul LePage issuing a proclamation of the Referendum Question 1 vote that allows recreational use of marijuana by those at least 21 years of age. Maine joins Alaska, California, Colorado, Massachusetts, Nevada, Oregon, Washington and the District of Columbia in voting to legalize marijuana for adult recreational use. Arizona was the only state where voters rejected a legalization measure during the November election.

With the passage of ballot initiatives in Arkansas, Florida and North Dakota, medical marijuana is now legal in 28 states and the District of Columbia, Guam and Puerto Rico.

An additional 17 states have laws that only allow the use of "low THC, high cannabidiol (CBD)" products for specified medical conditions. The National Conference of State Legislatures provides a summary of those state laws on their website at www.ncsl.org.



STICKINESS IN THE STATES

Despite the increase in the number of states that have legalized the medicinal use of marijuana, the impact on workers' compensation claims was limited until about three years ago.

In 2014, New Mexico became the first state to have a state appellate court order a workers' compensation insurance carrier to provide reimbursement to an injured worker for medical marijuana. The New Mexico Workers' Compensation Administration began requiring employers and insurers to reimburse injured workers when the state's healthcare provider fee schedule took effect January 1, 2016. The trend continues to grow.

In two recent decisions, the Appellate Division of the Maine Workers' Compensation Board affirmed two different administrative law judge (ALJ) awards reimbursing workers for their medical marijuana expenses, Bourgoin v. Twin Rivers Paper Co. and Noll v. Lepage Bakeries.

On December 15, 2016, an ALJ in New Jersey issued an order in Watson v. 84 Lumber requiring reimbursement of an injured worker for medical marijuana payment. It should be noted that this is a division level case, so this decision is not binding on other New Jersey courts. The case is not being appealed.

It is noteworthy that in each of the above cases:

- Marijuana was recommended by physicians only after other treatment regimens for chronic pain were attempted without success, and
- These judges were not persuaded by the fact that marijuana remains illegal under federal law.

FEDERAL HAZE

While there has been some activity on the federal side over the past year, it has not changed the fact that marijuana, even for medicinal use, violates federal law.

Marijuana remains illegal under federal law because it is listed under Schedule I in the Controlled Substances Act (CSA), along with other drugs such as heroin. Schedule I substances are illegal to distribute, prescribe, purchase, or use outside of medical research due to "a high potential for abuse" and "no currently accepted medical use in treatment in the United States." As a result of this status, physicians recommend the use of marijuana instead of prescribe.

On July 19, 2016, the Drug Enforcement Administration (DEA) denied two petitions to reschedule marijuana concluding that it continues to meet the criteria for control under Schedule I because:

- Marijuana has a high potential for abuse. This is based on the Department of Health and Human Services (HHS) evaluation and additional data gathered by DEA.

- Marijuana has no currently accepted medical use in treatment in the United States. Using an established five-part test, it was determined that marijuana has no "currently accepted medical use" because, as detailed in HHS evaluation, the drug's chemistry is not known and reproducible; there are no adequate safety studies; there are no adequate and well-controlled studies proving its effectiveness; the drug is not accepted by qualified experts; and the scientific evidence is not widely available.
- Marijuana lacks accepted safety for use under medical supervision. At present, there are no U.S. Food and Drug Administration (FDA)-approved marijuana products, nor is marijuana under a New Drug Application (NDA) evaluation at the FDA for any indication.

Interestingly, the DEA noted that marijuana could not be placed in a schedule less restrictive than Schedule II in view of U.S. obligations under international drug control treaties.

Although marijuana is not being rescheduled at this time, on August 11, 2016 the DEA announced a policy change meant to increase research by expanding the number of DEA-registered facilities allowed to grow and distribute marijuana for FDA-authorized research purposes.

Currently, the U.S. Department of Justice (DOJ) marijuana enforcement policy is to allow states to create their own "strong, state-based enforcement efforts," but DOJ reserves its right to challenge the states' legalization laws at any time necessary.

Congress passed the Consolidated Appropriations Act (CAA) of 2016 that in Section 542 restricts federal law enforcement activity in states that allow medical marijuana cultivation, distribution, and use. Now that voters in half of the states have voted for legalization of medical marijuana, will Congress take action to change its scheduling?

The new administration may change the broad leeway states have been given to regulate marijuana usage and sales.

- President Trump has expressed varying views regarding medical and recreational marijuana over the years.
- Attorney General Jeff Sessions, a former federal prosecutor, has expressed opposition to medical and recreational marijuana.
- Secretary of Health and Human Services Tom Price, a physician, has also been a vocal opponent of legalization.

If the conflict between federal and state law is not resolved politically, the U.S. Supreme Court may have the last word. The high court last weighed in on marijuana in 2005. In an unsigned opinion issued March 2016, the high court refused to hear a request from Nebraska and Oklahoma to declare Colorado's legalization of marijuana unconstitutional because it is against federal law and therefore violates the Constitution's supremacy clause, which states federal law trumps state laws. Justices Alito and Thomas dissented. Will President Trump's lates addition to the U.S. Supreme Court make a difference?

Yes, the future of federal marijuana policy and enforcement remains hazy. What is clear is that employers contending with this complex and rapidly changing issue must understand the laws and relevant legal decisions pertaining to marijuana in each of the states where their business operates.

In such an uncertain time, we will continue to provide updates and perspective. We recommend seeking legal assistance to develop a sound company policy addressing the use and reimbursement of medical marijuana for on-the-job injuries.

ADDITIONAL RESOURCE

Read our blogs on the impact of marijuana legislation –
http://blog.sedgwick.com/?s=marijuana