

The Michigan Medical Marijuana Act

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The Michigan “Medical Marijuana Act” Overview

- Passed on November 4, 2008, effective as of December 4, 2008
- Qualifying, registered patients may make “medical use” of marijuana for “dehabilitating medical conditions”
 - Includes “severe and chronic pain”¹

Marijuana Overview

- A mixture of dried and shredded leaves, stems, seeds, and flowers of the *cannabis sativa* plant²
- Consumed by smoke inhalation as a psychoactive (mind-altering) drug
- May be produced in alternate, stronger forms, but all contain delta-9-tetrahydrocannabinol (THC)³
- The most commonly-used illegal drug in the United States⁴

Effects of Marijuana

- Effects upon user depend upon the strength or potency of the THC the drug contains⁵
- Short term effects include⁶:
 - Loss of short term memory
 - Decreased motor coordination
 - Decreased perception and reaction time
 - Decreased concentration
 - Feelings of intoxication/euphoria⁷
- Long term effects include⁸:
 - Damage to the reproductive system⁹
 - Damage to brain tissue, mental health, memory and intelligence¹⁰
 - Potential increased risk of cancer¹¹

Details of Medical Marijuana Statute

- To qualify, a patient must have written certification from a physician that the patient:
 - Has a serious or debilitating medical condition¹², and
 - Is likely to receive therapeutic or palliative benefit from medical use of marijuana to treat or alleviate the medical condition or its symptoms¹³
- Registered¹⁴, card-holding patients then able to make “medical use” of marijuana¹⁵
 - Will not be subject “to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau”

Limitations on use and possession

- A qualifying patient may not possess more than 2.5 ounces of usable marijuana at a time¹⁶
 - If self-cultivating, no more than 12 marijuana plants¹⁷
- Permissible use does NOT include:
 - Undertaking any task “under the influence” of marijuana when doing so would constitute negligence or professional malpractice¹⁸
 - Being “under the influence” of marijuana while “operat[ing], navigat[ing], or [being] in actual physical control of any motor vehicle, aircraft, or motorboat”¹⁹
 - “Nothing in this act shall be construed to require...an employer to accommodate the ingestion of marijuana in any workplace or any employee working while under the influence of marijuana.”²⁰

Troubling implications

- Broad definition of “debilitating medical condition”
 - “Severe and chronic pain” can be applied to almost any condition for which a claimant typically treats in workers’ compensation
- What exactly does the statute mean when it refers to a person “under the influence” of marijuana?
 - Not explicitly defined
 - Due to the body’s metabolic treatment of THC, drug tests may evince false positives

Key questions

- Concern that an employer must now accommodate an employee who notifies that he/she uses medical marijuana pursuant to the Statute.
 - Are employers required to allow employees to possess marijuana in the workplace?²¹
 - May an employer with a “zero-tolerance” policy for drug use continue to enact that policy?
 - How does this impact employees in job positions where they are required by state or Federal law to undergo random or regular drug tests?²²

Impotence of MMMA

- Impact of Michigan Medical Marijuana Act will likely be negligible, due to interplay of:
 - The explicit terms of the MMMA itself
 - The Federal Controlled Substances Act
- Ultimately, the Act is a broken reed.²³

The Terms of the MMMA

- M.C.L. 333.26427(c)(2) explicitly allows an employer to proscribe “the ingestion of marijuana in any workplace or any employee working while under the influence of marijuana.”
 - An employer is therefore not required to allow his employees to smoke marijuana on the job, nor to be “under the influence” of marijuana
 - Exact terms of statute leave open other actions permitted by statute (possession, delivery, transfer, transportation)²⁴

Loopholes of MMMA

- Might an employee be permitted to possess or traffic in marijuana on his work premises?²⁵
- Does the employer have a statutorily-required duty to accommodate these activities?
 - What about long-lasting drug tests?²⁶
 - Here, current testing fails us.

The interworkings of federal law²⁷

- The Federal Controlled Substances Act makes it illegal to possess, distribute, or possess with an intent to distribute, marijuana.²⁸
 - Loophole by MMMA is closed – employers may raise the FCSA as a defense for employees who possess marijuana in workplace or intend to deal it there
- The ADA does not protect the offending employee.²⁹
- The MMMA creates a horrifying potential for law enforcement abuse.³⁰
- There still exists a problem of inaccurate drug testing.³¹

Ultimate implications of MMMA

- Employers may continue to affect a no-tolerance drug policy.
- Employees such as truck drivers continue to be barred from the use or influence of marijuana.
- No employee may ingest or be under the influence of marijuana in the workplace.
 - This is complicated by the inaccuracy of drug testing for marijuana.
 - In future, suits concerning “under the influence” issue will likely rely heavily on an employer’s own observations of the employee’s behavior.
- All of these effects will exist in spite of the Act’s purport to make marijuana use legal.

Interplay of MMMA and WC

- With the nullity of the MMMA, our approach to marijuana use in the workplace is unchanged
 - Use and being under the influence of marijuana is considered to be a form of “willful misconduct,” a kind of uncompensable behavior³²

Willful misconduct and marijuana

- Statute provides that “if the employee is injured by reason of his intentional and willful misconduct, he shall not receive compensation under the provisions of this act.”³³
 - Marijuana use is treated as a form of willful misconduct
 - Was there a willful and violation of a safety rule?
 - If so, the claimant loses his right not just to wage loss benefits, but also medical benefits³⁴

Kuikstra v. Challenge Mfg. (2008)

- The latest case to deal with drug use in the workplace and the question of entitlement to compensation³⁵
- Claimant tested positive for non-prescription Vicodin following a claimed left shoulder injury
 - Terminated following drug test – claimant acknowledged receipt of a company handbook which outlined drug policy³⁶
- Magistrate Barnes ruled that, by knowingly violating company policy, the claimant's actions "constitute a voluntary removal of himself from the workplace setting."
 - Wage loss benefits were denied, though the magistrate curiously ruled that the claimant was still entitled to medical benefits.

Footnotes

¹ Access to medical marijuana is limited to those patients diagnosed by a physician with a “debilitating medical condition.” This is defined alternately in M.C.L. 333.26423(a) as one of a number of specific conditions, including HIV, AIDS, Hepatitis C, or else as a condition that “produces 1 or more of the following: cachexia or wasting syndrome; **severe and chronic pain**; severe nausea; seizures, including but not limited to those characteristic of epilepsy; or **severe and persistent muscle spasms**, including but not limited to those characteristic of multiple sclerosis.”

Obviously, “severe and chronic pain” can be stretched to cover any number of the conditions we see claimants treating for in workers’ compensation.

² AKA hemp, hence the seldom-used appellation “rope.” More common nicknames include dope, weed, pot, grass, Mary Jane, reefer, and chronic.

³ Alternate forms include sinsemilla and hashish, the latter incidentally responsible for the modern English word “assassin,” after the *hashishin*, the radical Islamic sect active in the Holy Land during the Second and Third Crusades, who used cannabis to produce mind-altering experiences as a form of religious mysticism and as a recruiting tool. They conducted political assassinations of prominent Europeans and those native Palestinians deemed to be collaborators.

All forms of the cannabis plant used as psychoactive substances may be smoked in a joint like a cigarette, or alternately consumed as food. These are the most common methods of use. Smoking is by far the most harmful means of consumption to the health.

⁴ The fourth-most popular drug of any kind behind alcohol, caffeine, and tobacco.

⁵ Different hybrid varieties and cultivars of cannabis contain varying degrees of THC, the main psychoactive component. As a general indicator, most marijuana confiscated by law enforcement officials in the year 2006 contained, on average, 7% THC.

Magnitude of effects can also be affected by the means of ingestion, the user’s level of THC tolerance, and the combined use of other drugs or alcohol.

⁶ Assuming that the user smokes only one joint, is smoking average-quality marijuana, and has not built up a tolerance, these effects tend to fade after 2 to 3 hours.

⁷ This is precisely why statutes like the Michigan Medical Marijuana Act seek to regulate limited use of marijuana for treatment purposes – it acts as a mild pain-killer and anti-depressant.

⁸ PLEASE NOTE: Most of these effects are very controversial, and medical studies go back and forth on the long term health effects of cannabis use by humans. To the extent

that authorities disagree with each other, each of these effects is to some degree potential or speculative.

The most controversial effect, not terribly important to the issue of workers' compensation, is the argument that marijuana is a "gateway drug" – that consumption of marijuana leads or influences the user to experiment in harder drugs such as heroin or cocaine. This is a cornerstone of U.S. drug policy, but it has never really been conclusively proven, and contains a massive problem of correlation vs. causality.

⁹ Studies on animals have shown that administration of high doses of THC lowers testosterone levels, impairs sperm production, and disrupts the ovulation cycle, among other things. With regard to humans, tests have implied that smoking marijuana can impact sperm function, but the exact impact is unknown.

¹⁰ This is also somewhat controversial. A 2002 longitudinal study published in the Canadian Medical Association Journal (*see attached*) found that long-term marijuana use had a statistical negative impact on intelligence only for "heavy users," defined as those users who smoked 5 or more joints per week. Among "heavy users," the study found an average 4.1 IQ point drop over a roughly 8-year period.

Apart from a long-term intelligence drop, however, long term marijuana use may also decrease motivation and influence the development of mental health conditions such as depression and psychosis.

¹¹ Again, debatable. Smoking marijuana produces tar, just like smoking tobacco. The logical expectation is that smoking marijuana over a long period, like smoking tobacco, would build up tar deposits in the lungs, causing lung cancer. Moreover, past studies have shown that marijuana tar contains about 50% higher concentrations of chemicals linked to lung cancer. In addition, marijuana joints, because they are home-rolled, are packed less tightly than commercial cigarettes, so there is less filtration and more particles are absorbed into the lungs.

Despite this, a study presented to the American Thoracic Society International Conference on May 23, 2006 found no correlation between long term marijuana use and lung cancer.

¹² Again, please recall that a "debilitating condition" is loosely defined by the Statute, and could easily be made to cover typical workers' compensation injuries.

¹³ M.C.L. 333.26423(1)

¹⁴ Once the patient has written certification, he applies to receive a registry identification card that identifies him as a registered qualified patient.

¹⁵ “Medical use” is defined very broadly to include not only the possession and use of marijuana, but also cultivation, delivery, transfer, or transportation of marijuana and marijuana paraphernalia. M.C.L. 333.26423(e)

¹⁶ M.C.L. 333.26424(a). There is no standardized size for a marijuana “joint,” and they can range from extremely small to gigantic, Bob Marley-esque proportions. A 1997 World Health Organization report, however, found that the average joint contains 0.5 to 1.0 grams of cannabis plant matter (*see attached report, page 15*); this is about 0.017636 to 0.035273 ounces, making the maximum permissible amount equivalent to roughly 71 to 142 joints worth.

¹⁷ Said plants must be grown and kept in a closed, locked facility. M.C.L. 333.26424(b)(2)

¹⁸ M.C.L. 333.26427(b)(1). The statute does not provide a formal definition for “under the influence” of marijuana. This is a fairly nebulous concept. Although the short term effects of one marijuana joint wear out in a relatively short time, as noted above, the body stores non-psychoactive THC metabolites for long periods of time in fat cells, and THC has an extremely low water solubility. It is therefore not “flushed” from the system as quickly as other chemical compounds, and is usually detectable in drug tests from 3 days up to 10 days after use. Rate of elimination is slightly greater for more frequent users due to tolerance.

We would most certainly expect that a patient experiencing acute short term effects of marijuana would be “under the influence,” but the fact that THC remains in the body for such a long time would make it difficult to determine whether a worker is currently “high,” or whether he actually last smoked several days ago. As the Deromedi and Buckley-Norwood article points out, a determination of “under the influence” may end up being heavily fact-specific and dependent on the employer’s observation of the employee’s behavior.

¹⁹ M.C.L. 333.26427(b)(4). This obviously cuts out a large class of workers who we would be concerned about performing their duties while using marijuana – more on this in a bit.

²⁰ M.C.L. 333.26427(c)(2). The employer has no obligation to permit the employee to smoke/eat/otherwise consume (my implied definition of “ingest”) marijuana in the workplace, NEITHER MUST HE ACCOMMODATE AN EMPLOYEE “UNDER THE INFLUENCE,” though this language is, as mentioned, somewhat nebulous.

²¹ Note also the change of language of M.C.L. 333.26427(c)(2). The employer is not required to accommodate the “ingestion” or “working while under the influence.” This is an abrupt and tacit move away from the more regular language of the statute “medical use,” which if you will recall included not only “use,” but also “possession.” By normal rules of statutory interpretation, this is intentional. *See Footnote 14*. One interpretation might then be that POSSESSION of marijuana is tacitly accepted by the MMMA.

²² As examples, Federal law imposes mandatory testing for “controlled substances” for commercial motor carriers (49 U.S.C. 31306), air carriers (49 U.S.C. 45102), and all public transportation employees (49 U.S.C. 5331). The Controlled Substances Act classifies marijuana as a Schedule I controlled substance under 21 U.S.C. 812(c)(10).

Michigan also classifies marijuana as a Schedule I substance generally, a classification that, aping the language of the equivalent Federal statute, recognizes that the drug has no valid medical use. HOWEVER, it MAY be classified as a Schedule II substance, one with a currently accepted medical use with severe restrictions, where it is dispensed in the manner provided by the Medical Marijuana Act. M.C.L. 333.7212(1)(c).

²³ It’s federal law that does this – although all state law is a broken reed ultimately, given the present state of federal law: more on this in a moment. But the takeaway point is that this law is “a tale told by an idiot, full of sound and fury, signifying nothing.” *Macbeth Act 5, Scene 5*.

²⁴ This was alluded to earlier. The statute mostly refers to “medical use” of marijuana, defined as “the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marijuana or paraphernalia,” which leads one to suspect, given typical means of statutory interpretation, that the act meant to indemnify all of these potential uses except for “ingestion.” The visible lack of the phrase “medical use” in 333.26427(c)(2) implies that that was the only “use” of the drug proscribed.

²⁵ The language of the act deals with only “ingestion” of marijuana, as alluded to above. So do employers need to permit their employees to traffic and deal in marijuana – in effect, everything beyond the direct use of it?

²⁶ As noted above, testing for THC is a tricky business. An employee might test positive for marijuana who had last used the drug several days before – and who is no longer suffering from its short term effects. Herein lies a problem. By the best current means of testing for marijuana, we have no idea if he did marijuana several weeks ago or only today.

There is a real question here: what does it mean for our own testing methods when the fellow tests positive for THC? ANSWER: Nothing, and, we don’t care. The terms of the MMMA are very loose – is this fellow exhibiting signs of being “high”?

The MMMA is loose, but that cuts in both directions. Tests for marijuana use may detect THC many days after the use. But here we are. Tests have indicated marijuana use, in work or without, and given the standards by law, an employer has plenty of room to proscribe that employee. The fact is that the current state of testing cannot determine whether the claimant did or was under the influence of marijuana at the time of work, but it should not matter.

²⁷ The Act itself claims a kind of indifference to Federal law. M.C.L. 333.26422 acknowledges that use and general activities pertaining to marijuana are proscribed by federal law, but then, rather smarmily, points out that the states are not required to uphold federal law.

Michigan might not be required to enforce federal law, but that does not stop any employer from citing federal law AS A DEFENSE where applicable.

²⁸ 21 U.S.C.A. 844. Any attempt to do so is also criminalized. An employer who permits his employees to carry grass on-premises could theoretically be charged with conspiracy.

²⁹ The Americans with Disabilities Act explicitly denies protection for an employee engaged in drug use where the employer has acted because of that drug use. 42 U.S.C. 104(c).

³⁰ This is something of an aside, but it must be said. ALL state laws regulating marijuana, including the Michigan law, are powder kegs begging for abuse of the system. The point is that the average citizen is being told two different things – he is told on the one hand that marijuana use is legal, and on the other that it is not.

There are two provisos. First, that the exact marijuana use the citizen may believe to be permitted will depend upon the law – it is worst in a state like California, which purports to legalize marijuana use for the general public. Second, the old saw that “ignorance of the law is no defense.” We learn that in Day 1 of Criminal Law, but we recognize it as a trite legal fiction: the average citizen is no where near as active a participant in the government process as he should be – he can not practically be expected to know the law.

So we have a system where a citizen is being told two different things. He is told on the one hand that marijuana use is illegal, and on the other that it is (legal). So what is he to do? This law effectively coerces citizens into breaking Federal law.

While beat cops might not be required to enforce federal law, they certainly may if they choose. This creates a huge problem of police discretion. A cop normally has discretion to write or not write a ticket for a minor offense – jaywalking, or speeding. The maximum punishment to the offender is a fine. Under this system, a cop could potentially elect to enforce federal law against a citizen who merely possesses marijuana, even if he has a prescription for it under state law, and that citizen could potentially see jail time.

³¹ There is a still a problem of a drug test for THC giving positive results for a worker who may have last used marijuana days before. The Act explicitly denies permission for an employee to “ingest” or “be under the influence” of marijuana in the workplace, so an employer may continue to maintain a no-tolerance policy, if one preexisted. The question is one of accuracy. As noted above, suits concerning this issue will likely deal with the employer’s observations of the employee in addition to drug tests – they will

have to, since a drug test is to inaccurate to state whether an employee is truly “under the influence.”

³² Unlike some states, Michigan does not have a specific provision in the Workers’ Compensation Disability Act that deals with illegal drugs in the workplace. The law that has developed to combat drug use is entirely court-made.

³³ M.C.L. 418.305

³⁴ When an employee is injured because he willfully, knowingly breaks a safety rule, he voluntarily removes himself from the employment setting, essentially abrogating his right to receive compensation.

In *Marcinek v. Norcote, Inc.*, 2004 ACO #172, the claimant injured his finger and sought medical treatment – while treating, he was made to undergo a drug test per standard company policy. When he tested positive for marijuana, the magistrate ruled that he had been under the influence of the drug at the time of his injury. Moreover, that the claimant had violated an enforced safety rule which was specifically intended to prevent these kinds of workplace injuries. Finally, that the above-quoted language of the Act (*See Footnote 33*) should be construed to mean ALL forms of compensation, and not simple wage loss compensation. The claimant therefore received nothing.

³⁵ Magistrate Barnes’ opinion is dated April 28, 2008, and proceedings were held here at the Grand Rapids Workers’ Compensation Agency.

³⁶ A representative for the employer testified that the claimant’s violation of the company’s zero-tolerance policy was the basis of termination. Interestingly, he also testified specifically that the claimant had not been terminated for showing visible outward signs of intoxication or being under the influence, and that he had not shown signs of posing a danger to himself or others at the time of his alleged accident.