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DEA Rejects Petitions Seeking to Reschedule Marijuana

Article By:

Paul M. Bessette

The long-awaited decision maintains the illegal status of marijuana under federal law.

On August 12, the ***US Drug Enforcement Agency (DEA)***, despite much speculation to the contrary, published in the Federal Register its long-anticipated decision rejecting two petitions, pending since 2009 and 2011, seeking to reclassify marijuana from its current *Schedule I* position to Schedule II under the ***Controlled Substances Act (CSA)***. With input from the US Food and Drug Administration and the National Institute on Drug Abuse (both within the US Department of Health and Human Services), the DEA concluded in a lengthy decision that "marijuana does not have a currently accepted medical use in treatment in the United States" and "at this time, the known risks of marijuana use have not been shown to be outweighed by specific benefits in well-controlled clinical trials that scientifically evaluate safety and efficacy." By maintaining marijuana as a Schedule I drug, it continues to be classified as a drug with "high potential for abuse" and "no currently accepted medical use," thus making its use—even in states that have legalized medical and/or recreational use of marijuana—still illegal under federal law. But the DEA did loosen restrictions on the supply of marijuana for medical research, which could have a longer-term effect on the public policy debate regarding marijuana's medical benefits and continued criminalization.

CSA Drug Schedules

Under the CSA, Schedule I drugs (which currently include marijuana) and Schedule II drugs have the most regulatory restrictions on research, supply, and access. Schedule I drugs are effectively illegal for anything outside of research. Schedule II drugs require a prescription and may only be dispensed by licensed pharmacists and healthcare professionals. Drugs can be rescheduled by the US Congress, although it generally leaves such decisions to the DEA. Members of the public can also petition the DEA to have a drug rescheduled, which is the impetus for last week's decisions to maintain marijuana as a Schedule I drug.

Effect of State Laws on Federal Classification

Twenty-four states and the District of Columbia have now legalized medical marijuana. Several states, including Colorado, Washington, Alaska, Oregon, and the District of Columbia have also legalized recreational use. Other states have implemented specific, but varying, employee protections related to marijuana use, such as prohibiting discrimination against an applicant or employee in hiring or conditions of employment based on one's status as a qualified medical

marijuana user, or barring the termination of a worker for engaging in lawful activity outside the workplace during nonwork hours. As a result, a majority of the US population now lives in states where marijuana may be used legally, albeit with state-imposed limits. And with a pending November ballot measure to legalize recreational use in California, that percentage is poised to grow substantially. But even in these states, state laws generally do not require employers to allow marijuana use or possession in the workplace or allow employees who perform duties that could result in a public health or safety risk to be “under the influence” in the workplace. Further, such state laws currently conflict with the CSA, which classifies marijuana as illegal or unlawful and under the supremacy clause of the US Constitution—if there is any conflict between federal and state law, federal law shall prevail.

Despite the growing prevalence of state laws authorizing medical or recreational use, the government’s decision to maintain marijuana as a Schedule I drug maintains—at least for now—generally broad employer discretion prohibiting marijuana use. But because the current status is based on the relatively few cases decided by the courts in this area to date, and because state laws vary widely on employee protections, employers should continue to closely monitor for developments in this area of law.

Possible Employer Policy Changes

From a policy perspective, some employers—primarily those not involved in matters of public health and safety—are considering changing their drug policies from a zero-tolerance to a no-impairment standard. Others are considering express exceptions for medical conditions in states where medical marijuana is legal. Such policies are geared toward accommodating off-duty medical marijuana use while ensuring unimpaired workplace performance. But given the novel nature of such policy changes, potential liability issues, the lack of clear “impairment” standards, and the substantial differences in state laws, employers should confer with company counsel well before making any such changes.

Potential Future Action by the NRC

The DEA’s decision to maintain the status quo avoids any need by the Nuclear Regulatory Commission (NRC) to implement changes to its Fitness for Duty rules and regulations. But in anticipation of potential rescheduling of marijuana, the NRC has been considering how it would address that change. One option that the NRC is considering is to require all employees to declare to a company medical review officer (MRO) any use of prescription and over-the-counter drugs, including marijuana, and the MRO would then make a case-by-case determination of impairment. But as currently perceived, NRC would classify marijuana as a medically disqualifying drug, thus prohibiting any use of marijuana—even prescribed—for key nuclear positions. NRC’s position is based on the lack of any established medical data establishing a cut-off level of impairment based on marijuana drug testing results (such as there is for alcohol). Although such positions clearly include operators and security personnel, the scope of additional positions is not yet defined and could pose challenges for NRC and licensees alike to define and implement. But for now, such changes are still on the drawing board. Nevertheless, given the rapidly changing public perception of marijuana as a drug with no “accepted medical use,” employers—particularly those in the nuclear and other highly regulated industries—should continue to follow this issue closely.

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