

## Not So Likely That PA Employers Must Pay For Pot

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Like other jurisdictions, the Pennsylvania Medical Marijuana Act (MMA) is not very clear about an employer's obligation to provide medical marijuana to its employees as a workers' compensation medical benefit. However, compared to New Jersey,[1] for example, we believe Pennsylvania is less likely to require its employers to pay for pot.

### Similarities

The Pennsylvania and New Jersey Medical Marijuana Acts are very similar, and it is likely that Pennsylvania will be influenced to some degree by the reasoning of the courts in its neighboring state.

Like New Jersey's law, the Pennsylvania MMA was enacted to decriminalize the possession of a certain amount of marijuana for medical use by qualified patients. This runs afoul of the federal Controlled Substance Act, which defines marijuana in the strictest "Schedule I" category, making the "manufacture, distribution, or possession" of marijuana a felony.

Future court reviews in Pennsylvania may agree with New Jersey in the *Hager* decision that its marijuana act prevails, reasoning that (1) the employer is not engaging in the "manufacture, distribution, or possession" of marijuana when it reimburses an employee's cost for it; (2) it is not "aiding and abetting" a violation of federal law, because the employer does not have the "intent" and "active participation" that are required elements for aiding and abetting; (3) federal prosecution is not a real risk; and (4) medical marijuana can be "reasonable and necessary" in the right circumstances.

### Distinction

However, Pennsylvania employers can point to an important part of its MMA that appears to relieve them from any responsibility for an employee's medical marijuana. The Pennsylvania MMA states that it "**shall not 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**". 35 Pa. Stat. Section 10231.2102.

The *Hager* Court in New Jersey relied on a comparable provision in its MMA that states "**[n]othing in [the MMA] shall be construed to require a government medical assistance program or private health insurer**" to reimburse medical marijuana expenses. Section 24:61-14 of the NJ MMA. The definition of "health insurance" specifically states that it **does not include workers' compensation coverages**." Section 17B:17-4.

### Takeaway

We believe this is an important distinction between Pennsylvania and New Jersey's MMA. The "insurer" label in Pennsylvania is broad, and there is no reason to exclude workers' compensation insurance from this. Employers and insurers are synonymous in the eyes of the Pennsylvania Workers' Compensation Act. Until the Pennsylvania courts provide certainty, it is safe to assume Pennsylvania employers are not required to pay for pot.

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That said, some cases may be compelling enough that an employer will want to pursue this option. There may be a medically recommended plan that includes medical marijuana in order to wean an employee from more risky pain management methods, such as fentanyl patches or a morphine pump. If that choice is made, it is safest to reimburse the employee rather than paying directly in order to avoid an allegation of "aiding and abetting" a federal crime.

For questions or further information, please contact Sandra Niemotka (niemotkas@whiteandwilliams.com; 215.864.6338) or another member of the Workers' Compensation Group.

[1] New Jersey Superior Court's decision in *Hager* requires employers to reimburse employees for medical marijuana as a workers' compensation medical benefit. On May 12, 2020, the New Jersey Supreme Court agreed to review the Superior Court's decision.

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