



Marijuana, Unemployment Insurance, and Workers' Compensation— Colorado's Experience

**35th Annual National UI Issues Conference—UWC
Philip Spesshardt, CDLE**



“Legalization” of Marijuana in CO

- ▶ Article XVIII of CO Constitution amended on two separate occasions
 - Creation of Section 14
 - Medical use of marijuana
 - Voter approved November 7, 2000
 - Creation of Section 16
 - Recreational use of marijuana
 - Voter approved November 6, 2012



Medical use of Marijuana

- ▶ Medical use of marijuana for persons suffering from debilitating medical conditions.
 - (1)(a)(I) Cancer, glaucoma, positive status for human immunodeficiency virus, or acquired immune deficiency syndrome, or treatment for such conditions;
 - (1)(a)(II) A chronic or debilitating disease or medical condition, or treatment for such conditions, which produces, for a specific patient, one or more of the following, and for which, in the professional opinion of the patient's physician, such condition or conditions reasonably may be alleviated by the medical use of marijuana: cachexia; severe pain; severe nausea; seizures, including those that are characteristic of epilepsy; or persistent muscle spasms, including those that are characteristic of multiple sclerosis; or
 - (1)(a)(III) Any other medical condition, or treatment for such condition, approved by the state health agency, pursuant to its rule making authority or its approval of any petition submitted by a patient or physician as provided in this section.



Medical use of Marijuana

- ▶ Requirements to create an affirmative defense to state's criminal laws that may also impact UI entitlement decisions
 - (2)(a)(I) The patient was previously diagnosed by a physician as having a debilitating medical condition;
 - (2)(a)(II) The patient was **advised** by his or her physician, in the context of a bona fide physician-patient relationship, that the patient **might benefit** from the medical use of marijuana in connection with a debilitating medical condition
 - Patient must apply for and obtain a registry identification card



Medical use of Marijuana

- ▶ Exceptions to Colorado Criminal laws created for physicians that may also impact UI entitlement decisions
 - (2)(c)(I) **Advise** a patient whom the physician has diagnosed as having a debilitating medical condition, about the risks and benefits of medical use of marijuana or that he or she might benefit from the medical use of marijuana, provided that such advice is based upon the physician's contemporaneous assessment of the patient's medical history and current medical condition and a bona fide physician-patient relationship; or
 - (2)(c)(II) Provide a patient with **written documentation**, based upon the physician's contemporaneous assessment of the patient's medical history and current medical condition and a bona fide physician-patient relationship, stating that the patient has a debilitating medical condition and **might benefit** from the medical use of marijuana. No physician shall be denied any rights or privileges for the acts authorized by this subsection.



Medical use of Marijuana

▶ “Written Documentation” defined

- (1)(j) "Written documentation" means a statement signed by a patient's physician or copies of the patient's pertinent medical records.

▶ Insurance and employer considerations

- (10)(a) No governmental, private, or any other health insurance provider shall be required to be liable for any claim for reimbursement for the medical use of marijuana.
- (10)(b) Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place.



Medical Marijuana Registration

- ▶ Obtained annually through Colorado Department Of Public Health and Environment
 - Must reside in Colorado and submit application that includes all of the following
 - The original or a copy of **written documentation** stating that the patient has been diagnosed with a debilitating medical condition and the physician's conclusion that the patient might benefit from the medical use of marijuana
 - The name, address, date of birth, and social security number of the patient
 - The name, address, and telephone number of the patient's physician
 - The name and address of the patient's primary care-giver, if one is designated at the time of application.



Recreational use of Marijuana

- ▶ Recreational use for individuals over 21 years of age.
 - (1)(a) In the interest of the efficient use of law enforcement resources, enhancing revenue for public purposes, and individual freedom, the people of the state of Colorado find and declare that the use of marijuana should be legal for persons twenty-one years of age or older and taxed in a manner similar to alcohol.
 - (1)(b) In the interest of the health and public safety of our citizenry, the people of the state of Colorado further find and declare that marijuana should be regulated in a manner similar to alcohol....



Recreational use of Marijuana

► Employer considerations

- (6)(a) Nothing in this section is intended to require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace **or to affect the ability of employers to have policies restricting the use of marijuana by employees.**
- (6)(d) Nothing in this section shall prohibit a person, employer, school, hospital, detention facility, corporation or any other entity who occupies, owns or controls a property from prohibiting or otherwise regulating the possession, consumption, use, display, transfer, distribution, sale, transportation, or growing of marijuana on or in that property.



Pertinent CO UI Entitlement Statutes

- ▶ Benefit disqualifications: Section 8-73-108(5)(e), C.R.S.
 - (VIII) Off-the-job use of not medically prescribed intoxicating beverages or controlled substances, as defined in section 18-18-102(5), C.R.S., to a degree resulting in interference with job performance
 - (IX) On-the-job use of or distribution of not medically prescribed intoxicating beverages or controlled substances, as defined in section 18-18-102(5), C.R.S.
 - (IX.5) The presence in an individual's system, during working hours, of not medically prescribed controlled substances, as defined in section 18-18-102(5), C.R.S., or of a blood alcohol level at or above 0.04 percent, or at or above an applicable lower level as set forth by federal statute or regulation, as evidenced by a drug or alcohol test administered pursuant to a statutory or regulatory requirement or a previously established, written drug or alcohol policy of the employer and conducted by a medical facility or laboratory licensed or certified to conduct such tests



Pertinent CO UI Entitlement Statutes

- ▶ Benefit awards: Section 8-73-108(4), C.R.S.
 - (b)(IV) The off-the-job or on-the-job use of not medically prescribed intoxicating beverages or controlled substances, as defined in section 18-18-102(5), C.R.S., may be reason for a determination for a full award....
 - Must declare addiction to the UI Division
 - Must substantiate addiction through physician statement, or successful completion of, or ongoing participation in a treatment program within four weeks of declaration
 - Any benefits awarded under this section are not charged against employer account



Other Laws with Influence

- ▶ Colorado Criminal Code: Section 18-18-102(5), C.R.S.
 - "Controlled substance" means a drug, substance, or immediate precursor included in schedules I through V of part 2 of this article, including cocaine, marijuana, marijuana concentrate, cathinones, any synthetic cannabinoid, and salvia divinorum.

- ▶ Controlled Substances Act: 21 U.S.C. Section 812(c)
 - Lists Marijuana as a Schedule I drug

 - High potential for abuse, no currently accepted medical use in treatment in United States, lack of accepted safety for use under medical supervision



Federal Regulations with Influence

- ▶ Drug Enforcement Administration registration: 21 C.F.R. Section 1301.11
 - Requires individuals engaged in manufacturing, distributing, dispensing, importing, or exporting any controlled substance to register

- ▶ Application for Drug Enforcement Administration registration: 21 C.F.R. Section 1301.13
 - Registration for physicians can only be obtained for Schedule II through Schedule V controlled substances
 - A physician cannot **prescribe** a Schedule I controlled substance



Early CO UI Entitlement Decisions

- ▶ Vast majority of issues involved statute related to testing positive for marijuana during working hours
 - Inconsistencies with decisions at initial adjudication level and lower level appeals
 - Disqualifications pursuant Section 8-73-108(5)(e)(IX.5), C.R.S.
 - Awards with contention that use was authorized or approved by physician
 - Awards with contention claimant had a constitutional right related to the use of medical marijuana in Colorado



Court Guidance

- ▶ *Beinor v. Indus. Claim Appeals Office*, 262 P.3d 970 (Colo. App. 2011).
 - Unemployment Compensation case with claimant denied benefits for having the presence of marijuana in his system during working hours. Initial adjudication resulted in denial of benefits. Claimant appealed and Hearing Officer reversed, citing, partially, that claimant had a state constitutional right to use marijuana. ICAO reversed Hearing Officer Decision. ICAO decision affirmed by Colorado Court of Appeals and certiorari denied by Colorado Supreme Court.
 - Marijuana was not prescribed and could not be prescribed
 - Written documentation is not a prescription and specifically stated, “This assessment is not a prescription for marijuana.”
 - 21 C.F.R. Section 1301.11 and 21 C.F.R. Section 1301.13, physician prescriptions can only be for Schedule II through V controlled substances



Court Guidance

- ▶ *Beinor v. Indus. Claim Appeals Office*, 262 P.3d 970 (Colo. App. 2011), continued.
 - Claimant's right to use marijuana for medical purposes does not prohibit denial of unemployment benefits
 - Amendment specifically provides exceptions to the state's **criminal** laws for individuals lawfully possessing the required registry identification card to engage in the medical use of marijuana
 - Article XVII, Section 14(10)(b)—Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place



Court Guidance

- ▶ *Coates V. Dish Network, LLC* 2015 CO 44. No. 13SC394 Issued June 15, 2015
 - Wrongful termination claim against Dish Network after Mr. Coats was fired for testing positive for THC during working hours. Mr. Coats is a quadriplegic with a Colorado registry identification card to consume medical marijuana. He did not consume at work. Suit was brought contending Mr. Coats was protecting from being discharged for his use of medical marijuana in accordance with Colorado's lawful activities statute. Trial Court dismissed the case, which was affirmed by the Colorado Court of Appeals. The Colorado Supreme Court affirmed that decision.
 - Lawful Activities Statute did not prevent discharge for consumption of medical marijuana away from the work site
 - Statute does not restrict lawful activity only to that defined in state law; therefore, activity must be legal under both state and federal law for legal protection from discharge



Pertinent CO WC Statutes

- ▶ Wage Replacement Reduction: Section 8-42-112.5, C.R.S.
 - (1) Nonmedical benefits otherwise payable to an injured worker are reduced fifty percent where the injury results from the presence in the worker's system, during working hours, of controlled substances, as defined in section 18-18-102 (5), C.R.S., that are not medically prescribed or of a blood alcohol level at or above 0.10 percent, or at or above an applicable lower level as set forth by federal statute or regulation, as evidenced by a forensic drug or alcohol test conducted by a medical facility or laboratory licensed or certified to conduct such tests....If the test indicates the presence of such substances or of alcohol at such level, it is presumed that the employee was intoxicated and that the injury was due to the intoxication. This presumption may be overcome by clear and convincing evidence.
 - (2) As used in this section, "nonmedical benefits" means all benefits provided for in articles 40 to 47 of this title other than disbursements for medical, surgical, nursing, and hospital services, apparatus, and supplies.



Pertinent CO WC Statutes

- ▶ Termination of Temporary Disability: Section 8-42-105(4)(a), C.R.S.
 - In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.
 - If an employer has a zero-tolerance drug policy and the employee tests positive, the injured worker may be discharged as an action separate from the workplace accident
 - A positive test for marijuana, even if it had no bearing on the cause of the accident, may drastically reduce work comp benefits.



The Marijuana Industry in Colorado

- ▶ Licensed medical marijuana businesses as of 05/03/16
 - Total = 1,534
 - Centers = 528
 - Cultivations = 781
 - Infused Product Manufacturers = 225



The Marijuana Industry in Colorado

- ▶ Licensed recreational marijuana businesses as of 05/03/16
 - Total = 1,157
 - Stores = 421
 - Cultivations = 538
 - Product Manufacturers = 184
 - Testing Facilities = 14



Other UI Administration Issues

- ▶ Marijuana businesses initially conducted transactions for UI Tax payments in cash
 - Required procedures for handling large cash transactions
 - Number of cash transactions has decreased to only two or three per quarter as the industry has found other means and some banks to handle accounts
 - Limited number of banks and credit unions due to associated costs related to Bank Secrecy Act compliance concerns
 - Some have also found ways to utilize payroll service companies to provide reports and pay tax on large accounts



UI Tax Compliance Audits

- ▶ Conducted through random audits and targeted audits
 - Treated the same as any other business being audited
 - Level of records varies with some maintaining detailed records and others not as well kept
 - Most lack any bank records due to the difficulties or cost associated with banking
 - Find that most businesses are reporting employees on some level
 - “Bud Trimmers” are typically erroneously classified as independent contractors



Future Considerations

- ▶ April, 2016—Drug Enforcement Administration reveals plan to decide, within three months, whether to remove marijuana from Schedule I classification
 - If removed, it could lead to attempts to further amend the Colorado Constitution related to medical marijuana since a physician could prescribe it
 - Replace “written documentation” with “prescribe”
 - Might lead to changes in Section 8-73-108(5)(e)(IX.5) to add a blood level for marijuana for a disqualification from UI benefits to exist
 - If removed, it might also lead to easing banking regulations that impact the industry and the payment of unemployment taxes in Colorado dependent upon where it would be rescheduled



Questions?

Philip Spesshardt
Branch Manager, UI Operations
Division of Unemployment Insurance
Colorado Department of Labor and Employment
303-318-9415