

## Draft Pending Adoption

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Workers' Compensation (C) Task Force  
Virtual meeting (*in lieu of meeting at the 2023 Fall National Meeting*)  
November 6, 2023

The Workers' Compensation (C) Task Force met Nov. 6, 2023. The following Task Force members participated: Alan McClain, Chair, and Jimmy Harris, (AR); John F. King, Vice Chair and Paula Shamburger (GA); Mark Fowler, Jennifer Brown, Jimmy Gunn, Erick Wright, and Yada Horace (AL); Ricardo Lara represented by Yvonne Hauscarriague and Mitra Sanandajifar (CA); Andrew N. Mais represented by George Bradner (CT); Karima M. Woods represented by Angela King (DC); Michael Yaworsky represented by Greg Jaynes (FL); Doug Ommen represented by Mathew Cunningham and Travis Grassel (IA); Dean L. Cameron represented by Maria Del Villar and Randy Pipal (ID); Vicki Schmidt represented by Julie Holmes and Sara Hurtado (KS); Sharon P. Clark and Sue Hicks (KY); James J. Donelon represented by Tom Travis (LA); Gary D. Anderson represented by Jackie Horigan and Matthew Mancini (MA); Timothy N. Schott represented by Brock Bubar, Sandra Darby, and Robert Wake (ME); Grace Arnold represented by Tammy Lohmann (MN); Chlora Lindley-Myers represented by Joe LeDuc, Patrick Lennon, and Rebecca Shavers (MO); Mike Causey represented by Tracy Biehn, Robert Croom, Fred Fuller, Sharon Thorton-Hall, and John Wren (NC); Scott Kipper represented by Gennady Stolyarov (NV); Glen Mulready represented by Kim Hunter and Cuc Nguyen (OK); Andrew R. Stolfi represented by Raven Collins (OR); Michael Humphreys represented by Aaron Hardenstine, Shannon Kost, Xiofeng Lu, Michael McKenney, Dennis Sloand, and Eric Zhou (PA); Elizabeth Kelleher Dwyer represented by Beth Vollucci (RI); Michael Wise represented by Will Davis (SC); Larry D. Dieter and Tony Dorschner (SD); Carter Lawrence represented by Jessica Thomas (TN); Kevin Gaffney, Rosemary Raszka, Mary Richter, and Zoie Y. Swaim (VT); and Allan L. McVey and Ellen Potter (WV). Also participating were: Tom Zuppan (AZ); Susan Jennette and Lucretia Prince (DE); Reid McClintock and Julie Rachford (IL); Patrick O'Connor (IN); Chris Arth and Paige Dickerson (MI); Chris Aufenthie (ND); and Christian Citarella (NH).

### 1. Heard a Presentation from QPWB on the Unintended Consequences of the Legalization of Cannabis on Workers' Compensation

Julie Schum (Quintairos, Prieto, Wood & Boyer, P.A.—QPWB) provided a history of cannabis legalization. The Pure Food and Drug Act of 1906 established the Food and Drug Administration (FDA). This act was followed by the Marijuana Tax Act of 1937, which effectively outlawed cannabis. However, the Marijuana Tax Act was found to be unconstitutional because it was passed for discriminatory reasons. By the time the bias against cannabis had taken effect, the Controlled Substances Act of 1970 was passed, making cannabis a Schedule 1 drug. The Comprehensive Drug Abuse Prevention and Control Act of 1970 followed the comprehensive act and further increased penalties. In 1986, the Anti-Drug Abuse Act was passed. In 1996, California passed Proposition 215, which was the first legalization of cannabis in the U.S. since the early 1900s.

Currently, 38 states have medical cannabis laws, and 21 states, the District of Columbia, and Guam have legalized cannabis for adult use. Only one state has not done anything regarding cannabis, meaning the state has not decriminalized, legalized cannabis medically, or legalized cannabis for adult use. U.S. Congress (Congress) has been considering the Secure and Fair Enforcement Regulation (SAFER) Banking Act, which would pave the way for the legalization of cannabis. Cannabis would be taxable. The Drug Enforcement Administration (DEA) is considering the recommendation to reschedule cannabis and remove it from Schedule 1, which would effectively legalize cannabis for medical purposes.

Cannabis and hemp are technically the same plant. However, they differ in the content of tetrahydrocannabinol (THC). Most states have a threshold at which a plant would convert from hemp to cannabis. Leaving a hemp plant in the ground can turn it into a cannabis plant.

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A cannabinoid is a component of cannabis. However, the term is sometimes used to cover all of the types of cannabidiol (CBD) and the derivative products being sold. The various components of a cannabis plant can have different effects on the body. Additionally, some of these components provide benefits without being intoxicating substances.

Cannabis fits into workers' compensation in the following ways: 1) it can be the cause of an accident; 2) intoxication can be used as a defense to an accident; 3) intoxication of any kind can make a difference in an accident; 4) it can be used to treat a workers' compensation injury; and 5) it can be a long-term alternative for workers' compensation injuries.

The main question is whether legalized cannabis has increased the number of workplace accidents. The answer is not known. The Journal of the American Medical Association's (JAMA's) studies indicate that employees who tested positive for cannabis had 55% more industrial accidents and 85% more injuries compared to those who tested negative. Unfortunately, a similar scope study by the National Bureau of Economic Research found that the workers' compensation claims frequency and benefits declined 20% in workers over the age of 40 in response to recreational cannabis laws. Hence, the severity of those injuries declined. There is insufficient evidence at this point to say whether cannabis use increases occupational accidents. However, there is a caveat: workers performing hazardous or ultra-hazardous activities, such as construction workers working with heavy equipment, make the use of cannabis more dangerous. Until cannabis is legalized federally, research is limited and cannot cross state lines. Once cannabis is federally legal, the FDA will be able to do nationwide studies.

So far, every state that has enacted its cannabis laws has completely failed to consider workers' compensation when the substance is first legalized. Every state that has legalized cannabis has had to reconsider cannabis. Most states have considered workers' compensation when they wanted to add an intoxication defense to their statute or practice. The state must decide if it wants to bar an employee from any benefits when testing positive for cannabis or if the employee must be so intoxicated it is outside of the scope of employment. Unless the employer is set up to monitor the intoxication levels of their employees, the employer will fail on the intoxication defense.

Commissioner King said the challenge that he has discussed with many people in Georgia is that it is easy to determine the presence of cannabis, but it is difficult to assess the level of intoxication. He said no one asked the question regarding what effect cannabis would have on the workforce. Schum said this is a barrier because science has not yet caught up with the state of the law.

Schum said since cannabis is federally illegal, research cannot be done on a larger scale. Research is conducted on a limited population. There is no ability to have the population studies that the U.S. has with alcohol. There is no formula for how intoxicated a person is with cannabis, so there is no way of knowing how long the drug has stayed in a person's system.

Cannabis can stay in a person's bloodstream for up to 30 days, depending on the compounds that are being tested. Cannabis can only be found in saliva for a short period of time, but it can be found in a habitual user's hair for more than a month. Following an accident, the testing for cannabis needs to stand up in court. Hospitals that have trauma centers are more equipped to conduct a double-blind test because state police have trained them that this is necessary. A rural hospital that does not deal with trauma regularly will not be aware of this type of testing.

Several substances, including cannabis, can produce a false positive based on the type of testing done. The occurrence of false positives is one of the reasons why the New England area has banned testing for cannabis in any employment-related setting.

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Many employers are starting to train their supervisors to identify the signs of traditional intoxication. This training helps supervisors to spot any type of intoxication, not just cannabis. It also identifies employees who are experiencing sleep deprivation.

Some employers have established a neurological baseline. This means when a person is hired, they go through something like the alcohol intoxication test. If at any point intoxication is suspected, the neurological test can be run at that time to see if the employee is deviating from their norm. While other factors for deviation can occur, there are at least some protocols in place.

There is confusion surrounding intoxication in the workplace. There is a difference between an accident that happens to someone and an accident where something happens to someone. For example, if an auto mechanic is walking across the floor and someone hits the wrong button, the mechanic might have an engine fall on them. It does not matter whether the person walking across the floor was intoxicated. However, if the worker who pushed the button was intoxicated, they caused an accident that hurt someone.

If an injured worker wants to use medical cannabis for treatment, six states require payment or reimbursement for cannabis. These states are Connecticut, Minnesota, New Hampshire, New Jersey, New Mexico, and New York. This reimbursement requirement for cannabis has been codified in both New Jersey and New York. New Mexico was one of the first to require reimbursement for cannabis as a medical treatment. However, New Mexico has never actually determined how reimbursement can be made while it is a federal crime to make payments or provide money for cannabis.

There have been a few studies about opioid use for injuries:

- A 2017 study conducted by the Centers for Disease Control and Prevention (CDC) found that opioid healthcare and recovery costs slightly less than \$35 billion.
- A John Hopkins study indicated that the addition of cannabis to a regimen of someone who had been on chronic opioids led to a 25% reduction in overdose deaths.
- A study in 2022 conducted by the National Institute for Occupational Safety & Health (NIOSH) found that 32% of workers' compensation claims had at least one prescription for opioids.

The National Council on Compensation Insurance (NCCI) data indicates that claims in the top three expense brackets have risen 7% in the last three years. The top three expense brackets are \$1 to \$5 million, \$5 - \$10 million, and over \$10 million. However, death claims have remained steady.

Cannabis can be used as part of a treatment plan, as well as to mitigate costs. For example, cannabis can have a positive effect on people who are suffering from certain types of post-traumatic stress disorder (PTSD).

Insurers need employers to keep their human resource (HR) policies up to date and within legal bounds. Cannabis law is shifting every six months, and some regions have undergone radical changes. These shifts include what cannabis law is restricting and what it is allowing. New England laws do not allow the use of cannabis in any employment-related decisions. However, there is a small window in which an employer can test for cannabis in some post-accident scenarios. In the western part of the U.S., cannabis can be used for employment-related decisions. An employer's drug testing policies need to be kept up to date.

Employers need to decide if they will categorize employees into hazardous, ultra-hazardous tiers and standard employees. Employers also need to ensure that separating these categories is effective within their business.

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Newer workers' compensation policies are being written with the duty to investigate. This gives the employer more responsibility to look for potential witnesses to speak to whether the injured party was showing any kind of neurological signs of intoxication that could be documented. Employers should be tracking documentation, such as cannabis prescriptions. Most medical cannabis users have a strict regimen, and they keep to it.

Insurers are beginning to look at policy issues, like whether they should or should not be writing cannabis exceptions into their insurance policies or whether the insurer should write cannabis into the policy's coverage. Insurers are also considering what investigation and training support they can offer. Additionally, since cannabis is still federally illegal, the payment of or giving of money for cannabis is a federal crime, which causes payment issues. Federal banks cannot process a transaction for cannabis. Rescheduling cannabis may solve the payment problems in part, but the banking system will also need to provide updates. Most state banks have part already started making mechanisms to have isolated transactions regarding cannabis.

There is evidence that cannabis is damaging for people under the age of 25. The brain is still developing until this time, and the consistent use of cannabis makes those under the age of 25 more prone to certain mental disorders, such as schizophrenia, bipolar disorder, and other mood disorders.

There is no hard science regarding how cannabis affects a person differently when using edibles as opposed to smoking it. Smoking is more effective in certain scenarios for transporting certain cannabinoids. However, there is no science on edibles.

Susan Donegan (NCCI) asked if there is a parallel between the legalization of cannabis and the legalization of hallucinogens. Schum said she believes this is an up-and-coming issue. There have been studies showing that hallucinogens for people with certain types of autism, as well as some with brain damage, are helpful. For instance, there are studies that show that developmental windows that have been closed due to autism can be reopened by micro-dosing hallucinogens. It remains to be seen when and if hallucinogens will become legal for treatment.

Schum addressed some of the best ways to spot cannabis intoxication in the workplace. She said it is important to focus on the quality of a person's interactions in the workplace by paying attention to detail. People can be trained to look for specific signs, like eye redness, unusual activity, and impaired coordination. These things could also identify sleep deprivation.

Having no further business, the Workers' Compensation (C) Task Force adjourned.

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