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Federal Marijuana Rescheduling and Employer Drug-Free Workplace Policies

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Marijuana or, more broadly, "cannabis" has been decriminalized and more affirmatively made legal for adults to purchase and use in New Jersey since 2021. Seventeen other states and the District of Columbia have adopted laws permitting adult recreational marijuana use, while half the states have robust medical marijuana programs. Federal law, however, continues to treat marijuana and marijuana products with more than trace amounts of Delta-9 THC (the best-known psychoactive compound in marijuana) as unlawful.[1] The drug is classified a "Schedule I" controlled substance pursuant to the federal Controlled Substances Act, meaning that it has no significant medical benefit and a high likelihood of abuse.

These differences between state and federal have led to consternation among marijuana advocates and confusion about the rules for everyone. Confusion is particularly prevalent for workers and employers who may be balancing federal and state law requirements within the same

[1] Federal law does permit the cultivation and sale of "hemp" products that include very low amounts of Delta-9 THC. Cannabis and cannabis products that contain more than 0.3 percent Delta-9 THC are still unlawful as a matter of federal law regardless of origin and are referred to as "marijuana" here for ease of reference.

work force. So when the Drug Enforcement Administration announced its intent to reclassify marijuana earlier this year, the news was greeted with interest far beyond that expressed by those who participate in the cannabis industry. But what would reclassification mean to employers and employees?

At present, marijuana's Schedule I classification means that marijuana and marijuana products cannot be prescribed as medication. (There are a handful of medications that contain THC that have been approved for medical use even under federal law and that are placed on Schedules II or III of the CSA.) Of course, many states have adopted medical marijuana programs. In these jurisdictions, health care providers can typically recommend marijuana, but they cannot actually prescribe it. What this means for individuals who use marijuana for medical reasons is that their use of marijuana is *not* lawful as a matter of federal law, and not protected by the Americans with Disabilities Act (ADA). Even if the worker uses the drug away from work and outside of work hours, the ADA does not protect workers from adverse action when the employer acts on the basis of that use. As a practical matter, even employers that may have a practice of accommodating medical marijuana users in roles where they are safely able to do so wisely prohibit the use and possession of marijuana and marijuana products during the workday and at their work sites.

If marijuana is reclassified from Schedule I to Schedule III, as has been proposed, health care providers would be permitted to prescribe marijuana, and marijuana products would be subject to federal regulation more focused on use. Workers who test positive on a workplace drug test could then, presumably, present evidence of their prescription medication and receive a "negative" result. Employers might need to consider whether they could reasonably accommodate employees using marijuana for medical reasons, perhaps by offering job modifications, without undue hardship. Patients would continue to be cautioned against driving while under the influence or impaired by their medicine and could be found responsible for driving under the influence just as they are now if they operate impaired because of the use of prescribed medicine or effects of alcohol. State medical marijuana programs might sunset as redundant, with patients able to access medical quality products by prescription. Federal transportation regulations might continue to prohibit the use of these products, even by prescription, for transportation workers such as commercial drivers, pilots, and transit workers. Further or different regulations might follow.

What the proposed reclassification would *not* do, however, is make recreational marijuana use lawful for any adult as a matter of federal law. Workers who did not have a prescription for the drug would, for example, continue to be considered to be abusing the drug in violation of federal law. In essence, the use of marijuana "off script" would be prohibited just as the use of other medications absent a valid prescription is now. In most jurisdictions, those employees would likely continue to be subject to discipline as a matter of employer policy (only a handful of jurisdictions such as New Jersey offer employee protections against discipline for engaging in off-work use of marijuana for recreational purposes absent demonstrated impairment), suggesting that state and local differences would persist even after the reclassification.

Of course, these predictions are no more than informed speculation at this time. If federal regulators do reschedule marijuana as a matter of federal law, prescribing instructions may include additional limitations or precautions. Independently, states likely will continue to debate whether non-medical use of marijuana qualifies as lawful as a matter of state law and what appropriate restrictions or safety precautions should be.

About the Author: Nancy N. Delogu is a shareholder at Littler Mendelson, P.C., specializing in advising employers on developing, implementing, and administering substance abuse prevention programs that comply with the myriad federal and state laws that affect such programs, including Department of Transportation (DOT) mandated programs. She also maintains an active litigation practice defending employers on a range of employment matters. Ms. Delogu is admitted to the bar in Massachusetts, the District of Columbia, and Virginia. She can be reached at nndelogu@littler.com.