

Virginia Workers' Compensation Update (2)

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Virginia Cannabis Legislation | Leaving Workplace Safety Up in Smoke?

Effective July 1, 2021, marijuana will be a legal substance in the Commonwealth of Virginia. The decision by the Virginia Legislature in February was celebrated by deregulation advocates and anyone who looked fondly on the late 1960s. Access, growth, possession and, most importantly, consumption will reach new highs in the Commonwealth this summer, which presents new challenges for Employers whose workforce has taken a sudden agricultural interest in the devil's lettuce.

How does this Legislation Impact Employer Policies Regarding Workplace Safety?

The short answer is... it doesn't. The bill functions to eliminate criminal penalties for individuals found in possession of no more than one ounce of marijuana and to ease restrictions on the growth and distribution of cannabis **in the public**. It does not force Employers to change their current drug testing policies or any specific corporate rules on the use, possession or consumption of marijuana in the workplace. Despite the radical change promoted by this legislation, Employers and their Insurers should take a moment to breathe in deeply and exhale, knowing that this new legislation does not require major overhaul of their workplace drug-use policy. Employers almost always impose work-place restrictions well beyond what the state defines as legal or illegal. The right to establish these rules is part of the written or implied employment contract. While an Employer may want to reevaluate their termination policy following the discovery of THC during a post-accident drug test to avoid losing talented employees, the Employer is under no obligation to do so.

Compensability Analysis | The Intersection of Virginia Code 65.2-306

Virginia provides a complete bar to recovery for a workplace injury when the injury results from intoxication. An intoxication defense includes the use of drugs or alcohol. Importantly, the intoxication must cause or contribute to the injury. The examples below help explain sticky-icky situations Employers may find themselves in when THC appears in a post-accident drug screen:

SUMMARY: Mary feels a pop in her low back while lifting a 30lb box at work on Monday. She complies with the Employer's mandatory post-accident drug screen but tests positive for THC. Mary had smoked on Friday night, after work, but traces of the drugs remained in her system.

OUTCOME: Mary is unlikely to be barred from compensation under Virginia workers' compensation law because the presence of drugs in her system did not cause or contribute to the workplace accident.

SUMMARY: Mary and Bud smoke marijuana in Mary's car before her work shift starts at 9:00 am. She feels a pop in her low back around 11:00 am while lifting a 30lb box and, with a lack of judgment, immediately reports the injury to her supervisor as required by the rules of the workplace. Jane, her supervisor, immediately notices a dank smell coming from Mary and rushes her to complete a post-accident drug screen. Unsurprisingly, the test reveals THC.

OUTCOME: The outcome is the same as the first scenario. Here, Mary was likely intoxicated when her injury occurred, but there is no causal link between the intoxicant, her impairment due to intoxication and the actual injury.

SUMMARY: Mary, Bud and Jane have secured new employment with a roofing contractor. On the last day of the contract, Mary and Jane share a joint before heading to work up high on the roof. Mary dozes off in the warm sun and falls off the roof. Once again, the post-accident drug screen reveals evidence of marijuana in her system.

OUTCOME: An intoxication defense may apply depending on the development of the evidence. A medical expert would likely need to link Mary's sleep to her drug use and without any aggravating factors, like a loose shingle, Mary is more likely barred from compensation due to the contribution that her intoxication had on her eventual injury.

Taking the Edge Off through Medical Pain Management

Marijuana accessibility is likely to light up medical management over the course of the lifetime medical award. Virginia Code 65.2-603 guides an injured workers' right to medical benefits following the entry of a lifetime medical award. An injured worker is entitled to all reasonable and necessary medical treatment related to their prior work injury. As cannabis is normalized through legalized public use, it is logical that a medical community will follow suit through more frequent recommendations for marijuana as an alternative source of medical pain management.

Active medical claim management will be critical in utilizing cannabis as an alternative to expensive prescription medications or challenging a medical recommendation for marijuana and nipping it in the bud before costs unnecessarily accumulate over time.

Conclusion | Concerns are Only Half-Baked

The new legislation presents interesting challenges for Employers as their workforce has legal access to a previously illegal substance. However, this shift in public policy does not change an Employer's right to maintain or enforce workplace safety rules. The most common analogy is alcohol; a perfectly legal substance that is still banned from most workplaces. The Employer and Carrier can still defend a worker's compensation claim based on intoxication and the Employer can still terminate the employment relationship for violating corporate policy. Nevertheless, there are reasonable concerns relating to medical pain management and the costs associated with a lifetime of medical marijuana. This may prove to be a better alternative to chronic opioid use from an employee-health and a cost-per-claim perspective. As we wait for the to smoke clear, it appears that there are no immediate changes needed for claim management.

Questions? Please contact [Brian Frame](#) or [RJ Williams](#) in our MGC Richmond office.

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ABOUT THE AUTHOR

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