

PRESCRIBING CANNABIS

Help patients and their employers find middle ground

BY DAVID G. WAYTZ

I am a lawyer who is married to an oncologist, which means I understand some of the concern and skepticism that physicians have regarding medical cannabis. I understand there may be a dearth of high-quality studies on cannabis and you may be unsure about its medical effectiveness. I also know that many physicians have discomfort surrounding the legal aspects of medical cannabis as well.

As an employment lawyer, I spend a lot of time with clients who are employers that want to do the right thing. They want a safe and welcoming work environment and they are willing to accommodate and employ people in accordance with the law.

My clients share the same concerns about medical cannabis that some physicians do. When a client has an employee or applicant using medical cannabis, my clients are also concerned about workplace safety and whether such usage complies with the law. The use of medical cannabis is somewhat inextricable from a patient's employment status.

As physicians, you play an important role in certifying patients for medical cannabis. By going beyond the certification process, you can inform and help your patients navigate these employment issues. Here are my tips.

Understand and explain the confusion first

Minnesota's medical cannabis law has strong written protections for employees using medical cannabis, but employers may be confused about applying the protections. Under Minnesota law, employers may not take adverse action against an employee or applicant based on their status as a medical cannabis patient or a positive drug test due to the use of medical cannabis unless:

- The employee was impaired, using or possessing medical cannabis at work.
- The failure to take adverse action would cause the employer to violate federal law or regulations or cause an employer to lose a monetary or licensing-related benefit under federal law or regulation.

What does that mean? Cannabis is still illegal at the federal level and some employers have requirements under federal law that conflict with state protections. That is a tricky position to be in. And what happens if an employer drug tests an employee who uses medical cannabis? Does the positive test indicate the employee was using or impaired at work or is it just a reflection of therapeutic usage?

How can physicians help?

Inform

Your responsibility as a physician goes beyond certifying that a patient has a quali-

fying medical condition. As part of your discussion regarding treatment options, I recommend:

- Explaining to patients that medical cannabis usage may implicate their employment status.
- Reminding patients that medical cannabis can cause impairment and explaining to them that they should consider how this usage might affect any requirements (drug testing or otherwise) of their job.
- Understanding the nature of your patient's job, including any safety sensitivity that might make the patient's cannabis use problematic.
- Suggesting that your patients consult legal counsel (not me) or proactively talk to human resources at their company.

In Minnesota, employers may only drug test if they have a written testing policy that complies with certain requirements. Ask patients to see if such a policy exists, so they can determine whether their employer tests for cannabis and in what situations.

When considering prescribing medical cannabis, the patient's health will be paramount to you and them. However, it is important they consider the employment aspects, too, since a person's livelihood has a big impact on their physical and mental health.

Talk about dosing with your patients and help them avoid impairment

As I mentioned, employees may not use, possess or be impaired by medical cannabis at work. To help avoid impairment and to assist your patients who need to discuss their medical cannabis usage with employers, consider the following:

- Whether the patient would be able to potentially benefit from medical cannabis by using it only after work or at night, and recommend that schedule.
- Recommending the lowest possible effective dosage.
- Alternative therapies if patients cannot avoid impairment with cannabis usage.

By following these recommendations, you give your patients a roadmap to discuss their usage with employers who may be concerned about safety. In the event that a patient tests positive for medical cannabis, they can explain to their employer that they never use cannabis before work and that they are taking the lowest therapeutically effective dose. With this information, you and your patient can help their employer feel more comfortable about your patient's commitment to safety.

Smoking or no smoking?

According to a recent story on MPR ("Major change to Minnesota's medical cannabis law approved"), Minnesota's

medical cannabis program is among the country's most restrictive. As part of those restrictions, patients previously could only use medical cannabis in liquid, oil, and pill forms.

A recent change to the law, however, will soon allow patients to use cannabis the old-fashioned way, by smoking the dried plant buds. This change in the law (which potentially will be implemented in March 2022) is expected to cut costs of the drug and consequently increase the number of patients interested in medical cannabis.

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While smoking cannabis may be cheaper for your patients, it may not be the best option for those navigating a tricky employment law landscape. I recommend discussing the following with your patients:

- Previous delivery options (i.e. liquid, oil and pill) may provide an easier way for patients to monitor dosing and potential impairment.
- If employers smell cannabis on clothes or personal items, will they suspect impairment or improper usage while the employee is on the clock?
- Is there a cultural bias against smoking that is not present with taking a pill?

It may not be fair, but patients should understand the possible consequences. Recall the discomfort you may feel about certifying patients for medical cannabis usage? Employers may feel the same way about your patients who are participating

in this relatively new program and it is important that patients are fully informed about *all* the benefits and risks associated with cannabis use.

Get your patients ready to explain how they use medical cannabis

While I do not recommend employees or applicants volunteer more medical information than necessary, you can prepare your patient by encouraging them to discuss with their employer:

- The patient's understanding that they will never use, possess or be impaired at work.
- The steps the patient is taking to avoid any potential for impairment (i.e. low dosages and only after work).

By preparing your patients for these conversations, you can help them succeed at work and can help employer clients like

mine feel comfortable when presented with these issues.

Conclusion

In my practice, I have found that navigating a tricky employment issue is not rocket science—or even rheumatology (apologies to my father the rheumatologist). With forethought, flexibility and transparency, employers and employees can work together to solve most problems and find middle ground. **MM**

David G. Waytz is a lawyer and litigator at Fredrikson & Byron in Minneapolis. He counsels employers on employment issues and works with businesses to prevent trade secret theft and unfair competition.

This article is for information purposes only and should not be construed as legal guidance. It is meant as a starting point to begin thinking about best practices and ways everyone can work together within the confines of our relatively new medical cannabis regime.



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