Trustee Alert – Health Plan Exclusion of Medical Marijuana

Due to changes in state marijuana laws, including medical and recreational use, health plan administrators are wondering whether they may be required to cover medical marijuana or whether a plan can or should exclude it from coverage. The best approach is to exclude it for now.

Most states (37) now allow some form of legalized medical marijuana. Twenty-three states and Washington, D.C., allow comprehensive medical marijuana use, while 14 other states allow low THC, high cannabidiol (CBD) products in limited situations or as a legal defense. Despite this, marijuana remains a Schedule 1 drug under the federal Controlled Substances Act ("CSA"). Schedule 1 drugs are those classified as highly addictive with no beneficial medical use. This classification makes it difficult to get approved testing. Consequently, there is no FDA approval, and most insurers are not covering it. In Nevada, entities that provide coverage for medical or health care services are not required to pay for or reimburse costs associated with medical marijuana. *See* NRS § 453A.800(1).

Due to the lack of widespread coverage, there are no model guidelines for plans to follow. Proper control, dosage, and reimbursement policies remain unclear. Typical use for pain treatment may easily exceed $1,000 per month. The FDA has approved some synthetic drugs, which contain active ingredients that are present in botanical marijuana, but there is no FDA approval for whole plant use. The American Medical Association has called for a change in marijuana's treatment as a Schedule 1 drug to improve opportunities for research, but until it is removed as a Schedule 1 drug or gains FDA approval, most plans will not cover it.

There are a variety of other facts to consider:

- If coverage is approved, employee handbook or collective bargaining agreement drug use and testing policies should be reviewed and revised appropriately.
- Employers in Nevada are not required to allow medical marijuana use in the workplace or to modify a job or working conditions, but are required to accommodate employees using medical marijuana (if properly registered) so long as such use does not endanger anyone or anything, there is no hardship to the employer, and the use does not preclude the employee from fulfilling his/her duties. NRS § 453A.800(2), (3).
- Courts have ruled that the Americans with Disabilities Act ("ADA"), which prohibits discrimination in the provision of public services against individuals with disabilities, did not protect individuals from discrimination based on use of medical marijuana, even if that use was authorized under state law. Marijuana remains illegal under federal law and the ADA defines "illegal drug use" according to federal rather than state law. *See, e.g., James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012).
- Some workers' compensation boards have approved reimbursement for medical marijuana for injured workers to treat pain.
- Such things as edibles and vaporization continue to develop that will make delivery more practical regarding doses and costs. When health plans start to cover medical marijuana, it will likely be in forms other than whole plant use.

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Recommendations: At this time, health plans should consider the following actions:

- Exclude medical marijuana from coverage to prevent having to review claims for reimbursement.
- Continue to monitor changes in federal law including the classification of marijuana as a Schedule 1 drug under the CSA.

Continue to monitor health industry practice changes regarding research, dosage, control, and acceptance of medical marijuana.

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