Managing Medical Marijuana on the Mainline

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As of the start of 2014, twenty states plus the District of Columbia have enacted legislation allowing for the medical use of marijuana. Not surprisingly, major U.S. railroads operate in each of the 20 states where the medically prescribed use of marijuana is now permitted under state law. Several other states currently have legislation pending which would allow for the use of medical marijuana or in some cases, the outright decriminalization of marijuana. In 2014, Colorado and Washington became the first two states to legalize the recreational use of marijuana.

Despite the overwhelming modern trend towards the legalization and decriminalization of medical and recreational marijuana, marijuana remains in Schedule I of the Controlled Substances Act (CSA). As such, growing, distributing, and possessing marijuana in any capacity, other than as part of a federally authorized research program, is a violation of federal law regardless of state laws permitting such activities. Currently, no legislation is pending in Congress to amend the CSA or to remove marijuana from Schedule I.

Beginning in 2009, the U.S. Department of Justice (DOJ) began issuing memorandums providing clarification and guidance to federal prosecutors in the States that have enacted laws authorizing the medical use of marijuana. Today, it is the written policy of the Department of Justice that broad prosecutorial discretion should be used to decline to investigate or prosecute the manufacture, use and sale of marijuana when done in compliance with state law. Following the release of the U.S. Department of Justice's most recent positional memorandum, the United States Department of Transportation (DOT) and other federal agencies, including the Federal Railroad Administration (FRA), have struggled to provide their own guidance on the state law use of medical and recreational marijuana.

Most significant to the railroad industry is the DOT's 2013 compliance notice issued under 49 CFR Part 40. In its notice, the DOT made clear that "the DOJ guidelines will have no bearing on the DOT's regulated drug testing program" and that the DOT would "not change [its] regulated drug testing program based upon" the guidelines of the DOJ. The notice goes on to expressly provide that the DOT's Drug and Alcohol Testing Regulation – 49 CFR Part 40, at 40.151(e) – does not authorize "medical marijuana" under a state law to be a valid medical explanation for a sensitive transportation employee's positive drug test result. Under the FRA's guidance, sensitive transportation employees on a railroad include all railroad employees who perform duties subject to the Hours of Service laws; such

as, locomotive engineers, trainmen, conductors, switchmen, locomotive hostlers/helpers, utility employees, signalmen, operators and train dispatchers.

The FRA, though 49 CFR Part 219.201, requires mandatory post-accident toxicological testing upon the occurrence of several different circumstances, including primarily a train accident involving a fatality; or the release of hazardous lading material; or damage to railroad property of $1M or more. Because testing is mandatory and because the DOT guidelines dictate the acceptable limits of such testing, all railroads must be aware that under the DOT's current guidelines and regulations, the presence of marijuana in an employee's system after an accident, even if prescribed by a medical professional under state law, will be deemed a violation of federal law. Thus, despite the DOJ's recent relaxation on the investigation and prosecution of marijuana offenses under the CSA, railroads must still continue to be hyper diligent to maintain a zero tolerance policy on marijuana use. Regardless of an employee's medically licensed permission to use marijuana under state law, railroads must exclusively continue to follow the DOT's requirements which deem it "unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation's regulations to use marijuana." Railroads are in the unique position of being subject to federal drug testing regulations that outright prohibit the use of marijuana, medically or recreationally. Accordingly, when dealing with a railroad employee and the use of medical marijuana, railroads should always look exclusively to federal law and give no deference to any contrary and inconsistent state laws.

Unfortunately, the inquiry does not end there and railroads, like many other industries, will soon be faced with a growing number of questions on how best to regulate their employment practices to comply with all state and federal laws. Upcoming issues are likely to include how railroads should treat non safety-sensitive employees who are medically proscribed marijuana under state law, but do not work on or near the rails? How to ensure that a railroad's hiring practices conform to state anti-discrimination laws on medical marijuana use, including primarily in Arizona and Delaware where state law "bars an employer from discriminating against a registered and qualifying patient who has failed a drug test for marijuana metabolites or components?" This is a topic that is not going away anytime soon and will likely be the subject of years of litigation with the railroad and trucking industries being at the forefront of a federal v. state marijuana fight.

Watch for upcoming NARTC presentations, in none other than Colorado (the first state to decriminalize recreational marijuana), further exploring this topic and how railroads can best manage medical marijuana on the mainline.