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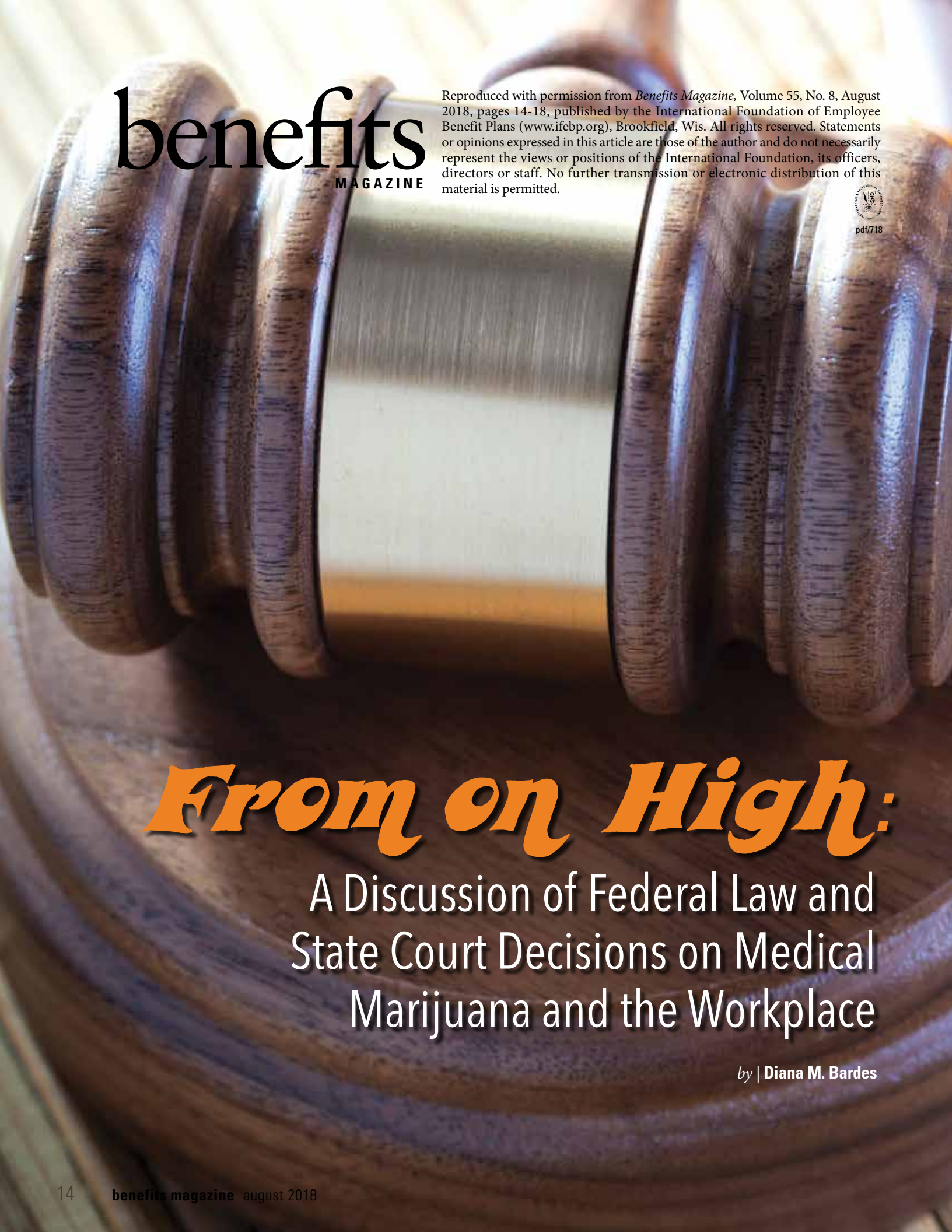

From on High:

A Discussion of Federal Law and State Court Decisions on Medical Marijuana and the Workplace

by | **Diana M. Bardes**

Despite the trend in many states toward legalization or decriminalization, marijuana remains illegal under federal law. That leaves health plans and employers in a puzzling position when it comes to health plan coverage and reasonable workplace accommodations.

For years, since a growing number of states began legalizing the use of medical marijuana, employers, employees and health plans have been looking high and low for guidance with respect to their rights and obligations under state and federal laws.

As of this writing, 30 states and the District of Columbia have passed legislation that legalizes or decriminalizes marijuana in some form. Despite this trend of legislation by the states in favor of legalization, marijuana remains a Schedule I controlled substance under federal law, meaning that, according to the federal government, it has no accepted medical use and has a great potential for abuse.

Compounding the confusion, state laws differ in many ways, including what protections employees may have in the workplace if they are using medical marijuana. Employees, employers and health plans are left trying to piece together this puzzling legal framework, so it is high time to address a number of developments in the medical marijuana landscape as it pertains to the workplace.

Health Plan Coverage of Medical Marijuana

Although there remains debate in the medical community regarding the effectiveness of marijuana for medical purposes, health plans are faced with the question of whether to provide coverage for medical marijuana to legal users in states that allow it. But what a health plan can offer is still ambiguous given the current state of the law. However, a few aspects of health coverage for medical marijuana are clear.

First, a health plan is not required to provide coverage for medical marijuana in any state where it is legal. Due to the classification of marijuana as a Schedule I drug under the Controlled Substances Act, a health plan is not required to provide coverage for medical marijuana regardless of the state of residence of the plan participant.

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Second, even if a health plan wanted to provide coverage and was allowed to provide coverage under state law, certain federal implications must be considered. Benefits paid to participants for medical marijuana are taxable. According to the Internal Revenue Service (IRS), benefits may be provided on a tax-free basis only for medical goods and services that are "legally procured."[1] Because marijuana continues to be banned under federal law, it cannot be lawfully procured within the meaning of the Tax Code and, therefore, is not excludable from income.[2] Such benefits would normally be considered "wages" subject to payroll taxes and reportable on a W-2 form, rather than on a 1099.

In addition, medical marijuana may not be provided by an employer-funded health reimbursement account (HRA). This type of individual reimbursement account is barred from providing any benefit that does not qualify as a medical expense, such as marijuana, under the Tax Code.

Even a tax-exempt employee benefit plan may run into problems providing coverage. Given the tax implications at issue, it would seem that a tax-exempt trust set up under Internal Revenue Code Section 501(c)(9) as a voluntary employees' beneficiary association (VEBA) would have greater latitude. But a VEBA can provide benefits only "because of illness," and federal law states that medical marijuana has "no currently accepted medical use."[3] Even if a VEBA were not permitted to provide the benefit, it would be unlikely that a VEBA would lose its tax-exempt status if it did. As long as the total benefits provided for nonpermitted purposes are *de minimus*, meaning that in any year less than 3% of the VEBA's total expenditures are for nonpermitted purposes, the VEBA should be able to retain its tax-exempt status.[4]

Finally, any national health plan would have to provide a patchwork benefit depending on the applicable state laws of its participants. If a health plan wanted to provide coverage, it would need to differentiate between offered coverage based on where the participant was located and the allowances provided by state law in that participant's state.

Regardless of the aspects of marijuana coverage that are clear, the continuing status of marijuana as a Schedule I drug has deterred the vast majority of health plans from providing such benefits. A 2016 survey by the International Foundation of Employee Benefit Plans found that just 2.1% of health plans for public sector workers and 3.1% of multiemployer health plans in the United States provided any sort of medical marijuana benefit.[5] No corporate plans offered coverage

at all. It is likely that there will be little change in the coverage unless the federal government reclassifies marijuana to a different schedule. Given these various issues, any health plan considering providing marijuana benefits should consult with fund counsel.

takeaways

- Thirty states and the District of Columbia have passed legislation that legalizes or decriminalizes marijuana in some form.
- A health plan is not required to provide coverage for medical marijuana in any state where it is legal.
- The Americans with Disabilities Act (ADA) does not require employers to provide ADA accommodations to workers for the use of medical marijuana. State laws, however, can provide additional disability protections and require accommodations not required by federal law.
- The issue of whether medical marijuana users should be protected from discrimination in the workplace or termination from employment has become less clear with recent court decisions.
- Because state law can change quickly, employers, employees and health plans should stay informed of any changes and consult with a knowledgeable attorney on medical marijuana issues.

Reasonable Accommodations for Medical Marijuana

Because employees may receive prescriptions for medical marijuana from their physicians, employers often wonder if they can continue to enforce traditional zero-tolerance drug policies or if they are required to provide reasonable accommodations under the Americans with Disabilities Act (ADA) or state disability laws. Federal law does not require any accommodations, but the answer really depends on the state in which the employee is located.

Under federal law, individuals who engage in the use of illegal drugs, including marijuana, are excluded from the definition of *qualified individual with a disability* under ADA.[6] As such, employers are not required to provide any sort of ADA accommodation to an individual for the use of medical marijuana.

State laws, however, can provide additional disability protections and require accommodations not required by the federal statute. A number of states that were early adopters of medical marijuana did not take the steps necessary in their legislation to protect medical marijuana users from workplace discrimination. For example, California allowed medical marijuana use in 1996, but the California Supreme Court has ruled that employers are not required to accommodate an employee's medicinal use under the California statute. The ruling came in a 2008 lawsuit filed by an employee who claimed his employer discriminated against him for having a disability by firing him after a drug test revealed his use of medical marijuana.[7] Despite the fact that recreational use is also legal in California as of January 1, 2018, the court's ruling still stands to allow employers in California to enforce zero-tolerance policies. The Oregon Supreme Court held that Oregon, another state that was an early adopter of medicinal use and now allows recreational use, similarly did not extend its disability discrimination law to protect employees engaged in marijuana use that would be legal under its own laws.[8]

In response to these court cases, other states began to be more explicit in terms of the protections to be granted to employees for medical use. In 2014, the Nevada legislature amended its statute to require employers to attempt to make reasonable accommodations for the medical needs of an employee who holds a valid medical marijuana card as long as the accommodation would not "(a) pose a threat of harm or danger to persons or property or impose an undue hardship on the employer or (b) prohibit the employee from fulfilling any and all of his or her job responsibilities."[9] New York has a similar statute that provides protections to "certified patients" such that they are considered disabled under the New York State Human Rights Law.[10]

Because the various state laws on these issues went into effect within the past ten to 15 years, it was initially difficult to identify any trends because so few courts had weighed in on the interpretation of the statutes. Once cases like the ones discussed here were decided, however, a rule of thumb began to develop. It seemed simple: If a state statute explicitly provided for protections for medical marijuana in the workplace, then such protections would be upheld; if a state statute was silent about whether medical marijuana users should be protected from adverse workplace decisions as a result of their use, no such protections would be read into the statute. Employers could look to the language contained in the

law of the state at issue and infer whether a zero-tolerance marijuana policy would be enforceable with a moderate degree of certainty.

That rule of thumb recently became unreliable following decisions by the Massachusetts and Rhode Island Supreme Courts in 2017. In *Barbuto v. Advantage Sales & Marketing, LLC,*[11] the Massachusetts Supreme Judicial Court was asked to interpret the reach of the state disability discrimination statute as it related to use of medical marijuana that was deemed legal by the state. Barbuto applied for a job at Advantage Sales and was hired contingent upon her passing a mandatory drug test. She disclosed to the company that she would test positive because she used lawfully prescribed medical marijuana to treat Crohn's disease. She was terminated after her drug test came back positive and filed a lawsuit alleging that her termination was unlawful under the Massachusetts antidiscrimination law.

The Massachusetts antidiscrimination law provides that a qualified handicapped employee has a right to a reasonable accommodation for a handicap to enable the employee to perform the essential functions of his or her job and a right to be free from discrimination because of his or her handicap. The Massachusetts Supreme Judicial Court held that these protections extended to qualified handicapped employees who lawfully used medical marijuana to treat their handicaps. The court came to this conclusion despite the fact that neither the state medical marijuana law nor discrimination law explicitly extended these protections.

The Rhode Island Superior Court also issued a decision in 2017 pushing forward the protections of medical marijuana users. The Rhode Island medical marijuana statute prohibits discrimination against medical marijuana cardholders. In *Callaghan v. Darlington Fabrics & the Moore Co.,*[12] an employer attempted to argue that even though it could not discriminate against a potential hire for simply having a card, it could decide not to hire that potential employee based on the cardholder's actual use of medical marijuana. The court did not look favorably upon this distinction and extended the statute's protections for medical marijuana cardholders to cardholders who used medical marijuana.

Although the Rhode Island case seems like a more natural extension of that state's statute, the Massachusetts case is unusual in its advancement of protections that are not explicitly set forth in the statute. This means that in liberal-leaning states, employers should be wary of enforcing zero-tolerance policies (absent safety issues) even where the statute is silent on whether an accommodation must be provided or whether a medical marijuana user will be protected from discrimination in hiring or employment. With public opinion continuing to trend increasingly toward legalization, it would not be surprising to see more decisions like the one in Massachusetts.

Given that state law changes quickly based on either new legislation or judicial interpretation of existing legislation, employers, employees and health plans should stay informed of any changes and consult with a knowledgeable attorney on these issues as they arise so as to not be left high and dry.

bio

Diana M. Bardes is a partner at Mooney, Green, Saindon, Murphy & Welch, P.C., in Washington, D.C. Her practice is primarily devoted to advising private and public sector unions on a wide array of labor and employment issues. She also represents individuals and tax-exempt organizations in various employment matters and represents employee benefit plans in litigation. Bardes received a J.D. degree from The George Washington University Law School.

Endnotes

1. 26 CFR §1.213-1(e)(2).
2. Rev. Rul. 97-9.
3. 21 USC §812(b)(1)(B).
4. See I.R.S. P.L.R. 201415011 (April 11, 2014).
5. *Employee Benefits Survey—2016 Results.* International Foundation of Employee Benefit Plans. 2016.
6. *James v. City of Costa Mesa,* 700 F.3d 394 (9th Cir. 2012).
7. *Ross v. RagingWire Telecommunications, Inc.,* 174 P.3d 200 (Cal. 2008).
8. *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries,* 230 P.3d 518 (Or. 2010) (en banc).
9. Nev. Rev. Stat. §453A.800 (2014).
10. N.Y.Pub. Health Law §3360(f), 3369(2) (2014).
11. 477 Mass. 456 (2017).
12. Case No. PC -2014-5680, 2017 WL 2321181 (May 23, 2017).