



# Medical Marijuana and the Supremacy Clause

Workers' Compensation

*"Change is the law of life. And those who look only to the past or present are certain to miss the future."*—John F. Kennedy

An unsettled area of the law has emerged between the widespread adoption by the states to permit prescribed marijuana to relieve certain medical conditions and the strict federal law mandating the substance as a Schedule 1, Controlled Substance [CSA]. With an estimated 43.3 million Americans using the elicited drug and the challenges of the "opioid epidemic" creating massive addiction and fatal results, the nation's workers' compensation system has been challenged to provide adequate authorized medical treatment.

## THE SUPREMACY CLAUSE

The Supremacy Clause of the United States Constitution did not preempt a NJ compensation judge from ordering an insurer to pay for prescribed medical marijuana to relieve the residuals of chronic pain following a work-related back injury. A New Jersey appellate court held that the State's legislation, the Compassionate Use of Medical Marijuana Act [MMA] had established a "clear public policy" for the use of prescribed medical marijuana to relieve chronic pain.

The court held that the MMA was not in conflict with the CSA, and the "conflict preemption" execution to the Supremacy Clause permitted the injured workers to obtain and use a prescription for medical marijuana. The court, in its discretion, recognized that the workers who suffered from chronic pain after two failed back surgeries were far better off using marijuana than additive and deadly opioids regularly.

A thaw is apparent in the ongoing tension between Federal and state laws. Recent legislation now pending in the US Congress attempts to bridge the conflict and permit the use of medical marijuana.

## PENDING FEDERAL LEGISLATION

### H.R. 171, the "Legitimate Use of Medicinal Marijuana Act"

H.R. 171, the "Legitimate Use of Medicinal Marijuana Act" or "LUMMA," introduced by Rep. Griffith (R-VA), transfers marijuana from Schedule I to Schedule II of the CSA. It also specifies that no provision of the CSA or the FFDCA shall prohibit or restrict activities related to medical marijuana that comply with a state's medical marijuana law. The bill does not affect any federal, state, or local law that regulates or prohibits smoking in public.

### H.R. 601, the "Medical Cannabis Research Act of 2019"

H.R. 601, the "Medical Cannabis Research Act of 2019", introduced by Rep. Gaetz (R- FL), requires the Attorney General to assess the supply of research-grade cannabis and directs the Attorney General to increase the number of federally registered cannabis manufacturers for research purposes. The bill also allows Department of Veterans Affairs health providers to provide information to veterans about federally-approved cannabis clinical trials and to participate in such trials if registered under the CSA.

### H.R. 1151, the "Veterans Medical Marijuana Safe Harbor Act"

H.R. 1151, the "Veterans Medical Marijuana Safe Harbor Act", was introduced by Rep. Lee (D-CA). The bill amends the CSA to include a safe harbor provision for veterans to use, possess, or transport medical marijuana. The bill would also allow physicians to discuss medical marijuana treatment with veterans and allows physicians to recommend a veteran participate in medical marijuana treatment programs

approved by State or tribal laws. The bill also directs the Secretary of Veterans Affairs to conduct a study on the effects of medical marijuana on veterans in pain.

### **H.R. 2843, the “Marijuana Freedom and Opportunity Act”**

H.R. 2843, the “Marijuana Freedom and Opportunity Act”, introduced by Rep. Jeffries (D-NY), decriminalizes marijuana by removing marijuana and THC from the list of Schedule I substances. The bill includes directives to conduct research on the impact of marijuana on the brain, the efficacy of medicinal marijuana, identification of additional medical benefits and uses of cannabis, and support highway safety research. The bill requires Alcohol and Tobacco Tax and Trade Bureau to promulgate regulations restricting the advertising and promotion of marijuana products. The bill also includes a grant program for States and local governments for marijuana conviction expungement programs.

### **H.R. 3797, the “Medical Marijuana Research Act of 2019”**

H.R. 3797, the “Medical Marijuana Research Act of 2019”, introduced by Rep. Blumenauer (D-OR), would direct the Secretary of Health and Human Services (HHS) to ensure a supply of marijuana for research purposes through the NIDA Drug Supply Program. Among other provisions, the bill directs NIDA and HHS to act on marijuana research registration applications within 30 days before supplying marijuana through the NIDA Drug Supply Program. The bill directs FDA to issue guidelines on the production of marijuana and to encourage authorized researchers and manufacturers to produce marijuana in coordination with the law. The bill gives researchers approved for Schedules II through V the authorization to conduct research on marijuana. The bill also streamlines the protocol for researchers to receive application approval from the Attorney General. The bill prevents HHS from reinstating an additional review process related to marijuana research.

### **H.R. 3884, the “Marijuana Opportunity Reinvestment and Expungement Act of 2019” or the “MORE Act of 2019”**

H.R. 3884, the “Marijuana Opportunity Reinvestment and Expungement Act of 2019” or the “MORE Act of 2019”, introduced by Rep. Nadler (D-NY), would remove marijuana and THC from the list of Schedule I drugs. The bill directs the Attorney General to finalize rulemaking to remove marijuana and THC from the schedules of controlled substances and deem the drug or substance that does not meet the requirements for inclusion in any schedule. The bill directs the Bureau of Labor Statistics to compile public data on the demographics of the cannabis industry.

### **ESTABLISHMENT OF A CANNABIS JUSTICE OFFICE**

The bill also creates an Opportunity Trust Fund at the Treasury to support new programs, including the establishment of a Cannabis Justice Office within the Department of Justice Office of Justice Programs; and a Community Reinvestment Program that offers job training, reentry services, legal aid for civil and criminal cases, including expungement of cannabis convictions, literacy and health education programs, and youth recreation or mentoring programs. The bill includes authorities for the Small Business Administration to support services for cannabis-related businesses. The bill further includes a provision regarding the expungement of arrests, convictions, or adjudication related to federal cannabis offenses.

At a recent Congressional hearing, Chairman Frank Pallone, Jr. stated:

“In my home state of New Jersey, for example, state law allows for the use of medical cannabis and, at the end of last year, state lawmakers passed a referendum that will put the question of legalizing adult cannabis use to New Jersey voters on the 2020 ballot.

### **APPROVED CANNABIS PROGRAMS**

“New Jersey is not alone in its state-level changes. The National Conference of State Legislatures reports

that 33 states, Puerto Rico, Guam, the U.S. Virgin Islands, and the District of Columbia approved medical cannabis programs. In comparison, 11 states, the District of Columbia, Guam, and the Northern Mariana Islands approved adult-use cannabis. Although some states have changed their policies, national laws, such as the Controlled Substances Act, have yet to change in the same way.

## FEDERAL APPROVAL

Also, federal administrators have expressed a growing trend toward accepting the legalization of medical marijuana. Nora Volkow, MD., Director of the National Institute of Drug Abuse, National Institute of Health, remarked:

“While cannabis has been legalized for medical use in many states, it remains a Schedule I substance under the [Federal Controlled Substances Act](#) (CSA). It does not have FDA approval for any indication. Some synthetic forms of THC are FDA approved (i.e., Marinol and Syndros) for treating anorexia and weight loss in AIDS patients and for nausea and vomiting associated with cancer treatment. The FDA also approved Cesamet, which contains the active ingredient nabilone, a synthetic chemical similar to THC, for treating nausea and vomiting related to cancer chemotherapy.”

## THE TREND TOWARD NATIONAL APPROVAL

Change happens, even if old habits and attitudes are deeply ingrained. As legislative and judicial deliberations continue on both the Federal and state level, it is becoming more apparent that in the future, medical marijuana will become an approved and accepted modality to treat injured workers’ pain.

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1 Address in the Assembly Hall at the Paulskirche in Frankfurt, June 26, 1963.

2 Thirty-three states and the District of Columbia, Guam, and Puerto Rico have legalized medical marijuana. New Jersey Compassionate Use of Medical Marijuana Act, N.J.S.A. 24:61-1 to -29.

3 [Controlled Substances Act](#), 21 U.S.C. § 841.

4 [U.S. Const.](#), art. VI, cl. 2.

5 [Hagar v. M&K Construction](#), NJ: Supreme Court 2021.

6 NJ has recognized the conflict preemption. [Puglia v. ELK Pipeline, Inc.](#), 226 N.J. 258, 141 A. 3d 1187 (NJ 2016), where it was held that the [Conscientious Employee Protection Act \(CEPA\)](#), N.J.S.A. 34:19-1 to -14 was not preempted by the [Labor Management Relations Act \(LMRA\) 1947](#) (NLRA) § 301(a), 29 U.S.C.A. § 185(a). and the National Labor Relations Act, §§ 7,8(a)(1), 29 U.S.C.A. §§ 157, 158(a)(1). See also [Vialpando v. Ben’s Auto Servs.](#), 331 P. 3d 975 (N.M. Ct. App. 2014) recognizing no preemption; and [Bourgoin v. Twin Rivers Paper Co.](#), 187 A.3d 10 (Me. 2018) recognizing preemption.

7 [Memorandum, Committee on Energy & Commerce, Chairman Frank Pallone, Jr., Hearing on “Cannabis Policies for the New Decade,” January 15, 2020.](#)

8 Energy and Commerce Committee Subcommittee on Health, Hearing on “Cannabis Policies for the New Decade” January 15, 2020

9. [Statement of Nora Volkow, MD, Director of the National Institute of Drug Abuse \(NIH\) 1/15/2020](#)

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Law (Thomson-Reuters). For over five decades, the Law Offices of Jon L Gelman 1.973.696.7900 [jon@gelmans.com](mailto:jon@gelmans.com) have represented injured workers and their families who have suffered occupational accidents and illnesses.

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