

Podcast

Navigating Cannabis Rescheduling: Key Insights for Healthcare

By Kathryn J. Russo & Catherine A. Cano

November 7, 2024

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November 7, 2024

Earlier this year, the DEA responded to President Biden's directive to reschedule cannabis from Schedule I to Schedule III of the Controlled Substances Act. This pivotal change, if finalized, would reclassify marijuana as a drug with moderate to low potential for dependence, strictly for medical use.



Transcript

INTRO

Earlier this year, the DEA responded to President Biden's directive to reschedule cannabis from Schedule I to Schedule III of the Controlled Substances Act. This pivotal change, if finalized, would reclassify marijuana as a drug with moderate to low potential for dependence, strictly for medical use. While not federally legalized, this shift opens new avenues for medical applications and regulatory compliance, impacting healthcare organizations.

On this episode of We get work™, we discuss the Notice of Proposed Rulemaking to reschedule cannabis and the questions and difficulties that employers face when enforcing their drug policies.

Our hosts today are Kathryn Russo and Catherine Cano, principals in Jackson Lewis's Long Island and Omaha offices and members of the Drug Testing and Substance Abuse Management group.

Kathryn and Catherine, the question on everyone's mind today is: What are the workplace policy implications if the transfer to Schedule III of the Controlled Substances Act is finalized, and how does that impact my business?

CONTENT

Kathryn J. Russo

Principal

This is Kathryn Russo and I'm here with my partner Catherine Cano. Today we're going to talk about the potential federal rescheduling of marijuana and how that is going to impact employers and particularly how it will impact health care

employers.

Catherine and I were talking yesterday about how one of the most common questions we get from employers is: Why do we have to comply with state and local marijuana laws when technically it's still illegal under federal law?

The short answer to that is that the federal government has been ignoring the law that makes marijuana illegal and they've been ignoring it for over a decade now. Congress has expressly prohibited the Department of Justice from using federal funds to interfere with state and local marijuana laws. In effect, the federal government has allowed the states to regulate marijuana for over a decade.

There's a lot of problems with that, a couple of which are because marijuana is still illegal under federal law — that prohibits medical research into whether marijuana can be used as a medicine. It also inhibits or impedes banks and other financial institutions from funding cannabis businesses. Those are the two big obstacles, and for those reasons there's been a big push to legalize marijuana or at least reschedule it.

So, what is rescheduling? What prompted us to do this podcast, as you may know, is back in May, the Department of Justice published a notice of proposed rulemaking which is what they need to do to reschedule a drug from one Schedule to another. Under the Federal Controlled Substances Act, the DEA, which is the Drug Enforcement Administration, classifies all drugs into five distinct categories or schedules, depending on the drug's acceptable medical use and its potential for abuse or dependence.

- Schedule I drugs are the worst. They're defined as having no currently accepted medical use and a high potential for abuse. That's things like heroin.

Marijuana is in Schedule I: Marijuana is basically considered to be as bad as heroin.

- Then we have additional schedules. It goes down to Schedule V.

As you get lower in the schedules, Schedule V drugs are those that have the least amount of potential for abuse.

This current proposed rule would move marijuana from Schedule I to Schedule III. Schedule III drugs are defined as drugs with a moderate to low potential for physical and psychological dependence. Other examples of Schedule III drugs are Tylenol with codeine, ketamine, anabolic steroids. It's just going to be moved down so that it won't be considered to be as bad as drugs like heroin. And that will allow medical research. It'll allow funding for cannabis businesses. It should help with a lot of things.

What I want to stress, though, is it's not going to legalize marijuana altogether. These schedules are really for medical use. So, if it gets moved to Schedule III, marijuana is just going to be considered a drug with a moderate to low potential for physical and psychological dependence. And it would be available for medical use only. It won't be legal altogether for all purposes.

So, then you may be wondering: “Well, why are we doing this? And why now?” That's always a big question. Why now? The reason this happened in May is that

this was a big issue for the Biden administration. The Biden administration has been pushing and prodding the Department of Justice and the DEA to get this done because back in 2020, President Biden made a campaign promise that he was going to fix the marijuana laws in the country and decriminalize marijuana. At the time that this rule came out, President Biden thought he was going to be running for reelection. So, his administration was very big on “We got to get this done. We have to do it before election day” because he clearly was planning to campaign on this.

As we know now, President Biden is not running for reelection and so there's really a lot less pressure on the DEA. Quite honestly, when this first happened, I couldn't imagine how the DEA would get this done before Election Day. Catherine is going to tell you in a second. It's a long, slow process to reschedule a drug. So, there's less pressure on DEA now.

We also have this election coming up in a couple of weeks. Today is October 23 [2024]. The election is coming up soon. I think both candidates support the rescheduling to Schedule III. Donald Trump indicated on his social media platform that he supports the rescheduling to Schedule III, as well as marijuana decriminalization. Kamala Harris also has said she supports the Biden administration's proposal to move it to Schedule Three, as well as decriminalization. More recently, within the last week or two, she has also said that she supports the legalization of recreational adult-use marijuana.

So, it'll be interesting, depending on who gets elected. It'll be interesting to see what happens. The other thing is, of course, after the election, they could change their minds and do something else. So, we don't really know what's going to happen, but here we are.

Catherine, why don't you tell us a little bit: What's the current status? This has been pending for several months now. What's the current status of the rescheduling? Do we think this is likely to happen this year?

Catherine A. Cano

Principal

I don't know if this is likely to happen in my lifetime, Kathryn. No, I'm kidding. I think it will happen in my lifetime but it's definitely not going to be this year — or it's very unlikely that it would happen this year. I know some people had hoped for a determination on rescheduling by the DEA before election day, but it's a whole process.

DEA has scheduled a public hearing for sometime in early 2025. The purpose for that hearing is to receive factual evidence and expert opinion regarding whether marijuana should be transferred to a Schedule III status under the Controlled Substances Act. Once the hearing is completed, the presiding administrative law judge will write and file a report on the testimony provided. After that happens, the DEA still needs to review the report and write its final rulemaking; that rulemaking has to take into consideration all the relevant materials presented during the public comment period. To recap:

- We have a public hearing;
- We have to have a written report from an administrative law judge; and
- Then the DEA needs to review that and make its own final rule.

DEA received more than 43,000 comments regarding its notice of proposed rulemaking. It could be months or, like I said, years before we get a determination here. DEA has denied petitions to reschedule marijuana in the past because the scientific evidence supporting the medical and other benefits of marijuana was lacking.

DEA will be looking for submission of medical and other evidence supporting a rescheduling. Some have pointed out that medical evidence about marijuana's medicinal properties is lacking because research can't be conducted on a drug that's illegal. It makes it extremely difficult to do research when it's already a Schedule One substance, right?

But many proponents of rescheduling support that rescheduling so that more scientific research about marijuana can be conducted. Maybe one silver lining from the fact that we have a bunch of states that are just doing their own thing and not following federal law is that we potentially have more evidence to go off of than if everybody was just treating it as a Schedule I substance under state law as well.

The proposed rule focused on a number of issues that DEA will evaluate before making its decision. The topics are:

- The drug's actual or relative potential for abuse. In 2016, DEA found that marijuana had a high potential for abuse and now recommends gathering additional data to assess marijuana's actual or relative potential for abuse.
- The scientific evidence of its pharmacological effect, if known. In the past 30 years, the potency of marijuana's Delta 9 THC has dramatically increased, so they're looking for evidence there.
- The status of current scientific knowledge regarding the drug or other substance. DEA here has noted that additional data regarding routes of administration of marijuana and the impact on Delta 9 THC potency may be appropriate for consideration.
- The history and current pattern of abuse. That's, again, another thing that DEA is looking for. In 2016, DEA found that marijuana is the most widely used illicit drug. I'm sure that that's probably still true, particularly as we have more and more states since 2016 that have legalized it on a recreational basis. It's pretty widely available.
- The scope and duration and significance of abuse is another factor that DEA is looking at. In 2016, DEA found that abuse of marijuana was widespread and one of the primary drugs leading to the admission for substance abuse treatment.
- What, if any, risk there is to the public health? In 2016, again, DEA wasn't favoring marijuana at that time. They said the marijuana posed a number of risks to public health, including impaired driving and physical and psychological dependence. And I think the impaired driving thing is certainly something that has been a struggle in states that have recreational marijuana, where they've been trying to figure out how to address that. As we'll talk about a

little bit later, there's some testing challenges around marijuana.

- The last piece that DEA is looking at evidence on is the psychic or physiological dependence liability associated with marijuana. In 2016, DEA found that long-term heavy use of marijuana can lead to physical and psychological dependence and that this dependence is underdiagnosed and undertreated in the medical setting.

So, there are a lot of things that they're looking at before they can make that decision. Like I said, we have the hearing coming up in the beginning of 2025 and we'll see what kind of information they receive then.

Kathryn, going back to you, what are some of the questions being raised about rescheduling marijuana to a Schedule Three substance?

Russo

There's a lot of unanswered questions. Even if we get to Schedule III, which seems to be what a lot of people want, there's some huge, huge questions. The first big one that has been raised by some organizations who have submitted comments to DEA is: How is that going to impact federally regulated industries that are required to test for marijuana?

Some of you may know that the U.S. Department of Transportation has drug and alcohol testing regulations that mandate marijuana testing for certain transportation workers, people like commercial motor vehicle drivers, bus drivers, pilots, train operators and other people in the transportation industry. But the law that applies to them, which is the mandatory guidelines for federal workplace drug testing, only allows testing for drugs in Schedules I and II of the Controlled Substances Act. Of course, this has led many people to say, "Hey, wait a second. If marijuana gets moved to Schedule Three, does that mean that we can't test pilots and truck drivers for marijuana?"

So, there's a lot of real outrage by employers and companies in the transportation industry because they think it's a safety issue — and it is a safety issue — and they're concerned about whether or not they'll be able to continue testing these transportation workers for marijuana. As Catherine just mentioned a few minutes ago, on drug tests when there are positive test results, marijuana is number one. So, to just stop testing for it altogether is going to be a very significant problem.

Another big issue or question if DEA moves marijuana to Schedule III is, as I said earlier, it will become available for medical use but not recreational use. That means marijuana will be subject to the prohibitions in the federal Food, Drug and Cosmetic Act, which is enforced by the FDA, the Food and Drug Administration. Now, the FDA approval process . . . there's another very lengthy [process]. We're talking to you today about this lengthy DEA approval process. Now we're going to have to go through a lengthy FDA approval process and who knows how long that will take. In addition, if that happens: What about people who are already obtaining their marijuana through state dispensaries and what about all of the states that have set up their own regulatory schemes and other things to control the production and sale of marijuana? What happens there? We don't really know. So, we'll see what happens there.

The other issue is that if marijuana is transferred to Schedule III, the manufacture, distribution, dispensing and possession of marijuana is still going to be subject to the criminal prohibitions of the Controlled Substances Act.

So again, moving it to Schedule III has a limited purpose, which it would be for medical purposes. But there's a lot of other stuff that won't change: We still have the issue of federal law is still going to conflict with the state laws, especially the states that allow recreational use and protect it. We've all been hoping, especially those of us who advise employers, for a change in federal law to kind of bring it more into line with state law. And that's really not going to happen.

Catherine, let me give it back to you. What impact will the potential rescheduling have on employers?

Cano

I go to your comments that people are often hoping or employers are often hoping that we get some sort of a silver bullet where we're going to have consistency and we're not going to have to learn the marijuana laws in all 50 states and then add cities on top of that because that's where we're at right now. But as a practical matter, I don't have good news. There's not going to be any immediate impact on employers.

Again, we do expect that it's going to take DEA a long time to make its decision. And then if it decides to reschedule marijuana to Schedule III, there are going to be many time-consuming related issues such as FDA regulation of those products. You might think about how FDA has tried to address hemp products because hemp was legalized back in 2018. It hasn't been a very smooth process. In the meantime, employees are already potentially obtaining it under state laws and at state-approved dispensaries.

Another issue that is going to come up — and it's not going to be a helpful point for employers, but it's something that you do need to know: Once marijuana is regulated and available at the federal level, there could potentially be claims under the federal Americans with Disabilities Act related to requests for reasonable accommodation or even potentially disability discrimination if you're taking action against somebody based on marijuana use.

At this point, ADA claims related to marijuana have been rejected by the courts under federal law because marijuana is illegal at the federal level. There's a provision in the ADA that says employers don't have to accommodate the illegal use of drugs, and there's just specific provisions in there that give employers flexibility if somebody is using an illegal drug. Marijuana is still illegal under federal law, and courts have looked at that because it's a federal statute. So, we're looking at federal law; it's illegal under federal law and the ADA is going to follow federal law regardless of what state law provides. If that changes and marijuana is no longer quote “illegal” under federal law, then we expect that we will absolutely see ADA claims asserted and it's going to potentially open a whole new claim for employees.

As Kathryn pointed out, it may create some issues in the states that have recreational marijuana laws. I think we're up to 20 or more than at this point, so

it's not a small number. If we have marijuana as a Schedule Three drug, that leaves a conflict with those state laws that permit marijuana without the use of any sort of prescription. For employers who conduct drug testing, there will still be many state and local laws impacting marijuana drug testing. Whatever change we might have at the federal level will not make compliance with those laws any easier. I know we already struggle with those on a daily basis, so it's not going to make things much better.

In short, rescheduling to Schedule III is not going to harmonize federal and state marijuana laws. The laws will continue to conflict with each other, and we're just going to have to work through how to best address that.

Kathryn, what are some of the current legal issues that healthcare employers are grappling with around marijuana in the workplace?

Russo

Well, one big issue for employers in many industries, but particularly in healthcare, is recruiting qualified candidates in states where recreational marijuana is legal. The issue with drug testing is that marijuana stays in the body for a very long time, so drug tests, and particularly urine drug tests, cannot detect current impairment or very recent usage. For this reason, many employers are moving away from testing for marijuana on a pre-employment drug test because it doesn't tell you that the person was high at the time of the test. And if it's legal in that state the applicant is going to say, "I didn't do anything wrong. You know? You don't have any proof that I'm going to use it while I'm at work." So, it's not really that helpful anymore to test for marijuana on a pre-employment test.

Some other big problems are some of the newer state laws and local laws that either restrict or prohibit marijuana testing in certain jurisdictions as well as in certain circumstances.

For example, in New York State where I am, all marijuana testing is prohibited. A lot of employers, especially health care employers, just can't believe that. They keep asking me: "There has to be some exception in the law for dangerous jobs, like doctors, nurses, ambulance drivers, EMTs. Are you telling me we can't test them for marijuana?" In New York state, you can't.

California has another law that is really more than a little confusing. In California, all marijuana testing is prohibited unless the employer uses a test device that can detect only the psychoactive components of marijuana. And what that means is you have to be able to tell that the person is currently high, like right now. And there are no tests. There are no tests that can do that. So, the law, in some ways, doesn't make a lot of sense although it seems to be anticipating that eventually we'll have a test that does that. But right now we don't.

Now the problem with it is that many drug testing vendors are telling employers in California to use oral fluid or oral swab testing. The reason for that is it has a shorter window of detection for marijuana, shorter than urine. But my understanding is that an oral fluid or oral swab test has a window of detection of

about 24 hours. So I still see that as a problem because you're going to have an employee who says, "Hey, I used my marijuana last night and then I came in to work today and then you're testing me, even with an oral swab, and now you're going to fire me because I did what I'm legally allowed to do when I'm off duty?" I think that's a problem in California. My advice is not to test for marijuana there until the California courts clarify what exactly is the kind of test that is acceptable under the law.

Now, there are certainly other states and cities. Be aware that you've got to look at cities as well. In Pennsylvania, we've got some laws prohibiting marijuana testing in both Pittsburgh and Philadelphia. An employer has just got to make sure in all the locations where you have employees, that you're making sure you comply with all of the applicable laws.

Safety, I know, is really the biggest concern for health care employers and most employers. But one of the big questions that Catherine and I are getting is, "Well, what are we supposed to do? If we can't test for marijuana in New York and California and other places, what are we supposed to do?" The main things that I'm advising now is, number one, make sure you've got a really good policy that really clearly explains to people that even though marijuana is legal in this state, you can't use it during work time. Don't bring it to work. You can't use it during lunch — honestly, a lot of people think you can go out to lunch and smoke it like a cigarette, which you cannot do. It's always acceptable for an employer to have rules saying you can never use it during work time. Can't use it in our vehicles. You can't use it during lunch or rest breaks. You want to be really, really clear about that.

The other big thing that I'm really pushing employers about is training. One of the problems I'm seeing here in New York is that because it's legal and because employees think they can use it whenever they want to — which they can't — they will come in to work after lunch. They will come in to work seemingly high, and the supervisors and managers don't know what to do. My advice is you've really got to do some training there. You want your supervisors and managers to be able to assess employees, to recognize impaired behaviors, and you want to be able to have them take action. Whether that action is sending them home, administering disciplinary action, you want to have an action plan for when employees come into work seemingly impaired.

I think that really kind of wraps it up, Catherine, unless you have anything else.

Cano

I have one other just very quick comment on the last point that you're making about how to address this if we can't test. Another thing to just keep in mind is that if the employee is having performance issues or has some sort of policy violation, separate it from potential marijuana use and think about if they come to work high and then they make a mistake or cause performance issues, you can still take action based on performance issues. I try to think through the situation holistically and not completely focused on "can we establish impairment in this case" because there sometimes are other paths to move forward.

Russo

Right. I think that's 100 percent right because very often, if the employee comes in and they're high, but the manager's not sure if they're high, they're probably not going to be able to do their job duties. So that's an issue you could always address with an employee: "Hey, why are you standing there, you know, not doing your job?" So, that's 100 percent right.

These issues are very challenging and we want to thank you all for listening. Certainly, if you have any other questions, please feel free to reach out to Catherine or me or any other Jackson Lewis attorney that you work with. Thank you.

OUTRO

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