

## Marijuana And Group Health Plans: Is Coverage Possible?

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As Illinois prepares to become the 11<sup>th</sup> state that has legalized marijuana in some form, group health plan sponsors, especially self-insured plan sponsors, may be considering whether they can or should include medical marijuana or cannabis products in their group health plans. At this time, the answer is likely “no” for most medical marijuana or cannabis products.

Federal law (unlike many state laws) still considers marijuana to be a controlled substance which has not been approved for medical use by the Food and Drug Administration (FDA). Specifically, marijuana is classified by the U.S. Drug Enforcement Administration (DEA) as a Schedule I drug pursuant to the federal Controlled Substances Act (CSA), meaning its possession and use is still unlawful.

This classification makes it difficult to disseminate marijuana legally because physicians are not allowed to prescribe Schedule I drugs under the CSA. Additionally, it is a violation of federal criminal law to possess marijuana without a valid medical prescription.

As FDA approval is the benchmark for drug coverage under all group health insurance plans in the U.S.; it is unlikely that any fully insured group health insurance plan will cover medical marijuana or cannabidiol (CBD)-based medication and products unless it is first FDA-approved.

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As for self-insured group health plans, IRS tax implications should also be considered.

- Medical Marijuana Would be Taxable. Under current Internal Revenue Service (IRS) guidance, “qualified medical expenses” do not include medical care through the use of illegal drugs, even if used for valid medical treatments. As such, any payment for such drugs under a group health insurance plan (including payment through a health flexible spending arrangement (Health FSA), health savings account (HSA) or health reimbursement account (HRA)) would be taxable to the participant.

Also, IRS Publication 502 specifically excludes “controlled substances” as qualified medical expenses and further states that “[y]ou can’t include in medical expenses amounts you pay for controlled substances (such as marijuana, laetrile, etc.) that aren’t legal under federal law, even if such substances are legalized by state law.”

- Regulatory Scrutiny on Audit. If a group health plan covers an illegal drug or substance, the IRS could disqualify the plan on audit. Although a plan disqualification may be rare, the heightened scrutiny that may be placed on the employer and its health plan by a federal regulating body should be considered before covering medical marijuana or cannabis products.

Despite the restrictions on the use of marijuana under federal law, the FDA recognizes the expanding acceptance of CBD products across the states. In fact, in 2018, the FDA approved Epidiolex, which contains a purified form of CBD for the treatment of seizures associated with certain forms of epilepsy in patients 2 years and older. There are no other FDA-approved drug products that contain CBD. In order to better understand the potential opportunities that cannabis or cannabis-derived products may offer, the FDA is currently working with various stakeholders to gather additional information related to such products. For example, the FDA hosted a hearing on May 31, 2019, to “obtain scientific data and information about the safety, manufacturing, product quality, marketing, labeling, and sale of products containing cannabis or cannabis-derived compounds.”

Nevertheless, it is clear that the FDA will be taking a cautionary approach to its review of cannabis and cannabis-derived products. According to its website related to FDA Regulation of Cannabis and Cannabis-Derived Products, the FDA states that it “continues to be concerned at the proliferation of products asserting to contain CBD that are marketed for therapeutic or medical uses although they have not been approved by FDA.”

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Despite the growing acceptance of the use of various forms of marijuana, employers that sponsor group health plans should carefully consider the impact on their plans if they elect to cover cannabis or cannabis-derived products or treatments given the general wariness of such products by the FDA and IRS.