Medical Marijuana: Health Care and Workforce Implications for Clinicians

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Objectives:

- Understand how medical marijuana will impact the physician/patient relationship
- Consider legal implications of federal controlled substance laws
- Understand professional liability protections and exposure
- Identify workforce issues surrounding employee use of medical marijuana
The Landscape

• Medical marijuana is legal in 33 states, as well as the District of Columbia, Guam and Puerto Rico.
  ➢ California the first to legalize, in 1996.
  ➢ Neighboring states - Illinois, Arkansas and Oklahoma
• Ten states allow recreational use – including Illinois
• Majority approach is to decriminalize use - Missouri
• Some states add protections against discrimination in employment, medical care, housing, etc.
Federal Law and Policy

• Marijuana use is illegal under the federal Controlled Substances Act.
  ➢ Schedule 1 – high potential for abuse, no accepted medical use
  ➢ Providers may not prescribe, administer or dispense, aid or abet cultivation, distribution or possession.
• Many physicians are unwilling to recommend medical marijuana for fear of jeopardizing their DEA registration/participation in Medicare and Medicaid.
  ➢ DEA pressure on physicians connected to cannabis industry
Federal Law and Policy

• U.S. Supreme Court has ruled that federal law enforcement agencies can investigate and prosecute for violations of the Controlled Substances Act, even if activity is legal under state law.
• Department of Justice enforcement policies have differed under the Obama and Trump administrations.
  ➢ Limited enforcement activity – Attorney General Barr against legalization but advocates for a federal framework.
Federal Law and Policy

• August 2019 letter from the U.S. Food and Drug Administration and National Institutes of Health advocates for increase in licensed cultivators for cannabis research and “larger body of rigorous research.”

• August 2019 advisory from the Surgeon General warned against marijuana use by adolescents and pregnant women.

• Veteran’s Administration – lawful medical marijuana use by non-active military does not affect eligibility for VA services, but VA physician may not recommend or prescribe medical cannabis.
Federal Law and Policy

- Agriculture Improvement Act of 2018 removed hemp from Schedule 1 – hemp is defined to include any cannabis plant or derivative with no more than .3% THC on dry-weight basis.
- Hemp-derived CBD may be distributed in interstate commerce.
- USDA will regulate hemp cultivation.
- HHS/FDA have authority to regulate products containing cannabis or CBD.
Federal Law and Policy

- FDA asserts CBD products are drugs requiring FDA approval, whether hemp- or marijuana-derived.
- FDA has announced hulled hemp seeds, hemp seed protein and hemp seed oil are safe for use in foods and other products, but may not be subject of disease treatment claims.
- FDA asserts foods to which CBD and THC have been added may not be distributed in interstate commerce, but no known enforcement – agency stated it is exercising discretion unless sellers make “over the line claims” of health benefits.
Cannabidiol in Hospitals

- DHSS guidance states that most hemp-derived CBD products, while not controlled substances, are not FDA approved.
- Epidiolex is the only CBD-derived drug approved by FDA and DEA that may legally be ordered and administered in the hospital setting.
Missouri Law – Amendment 2

Purpose statement:

• Establishes right of state-licensed physicians to provide professional advice to patients concerning the possible benefits of and to recommend medical marijuana

• Intended to make only those changes to Missouri law necessary to protect patients and physicians from civil and criminal penalties
Amendment 2 Overview

Marijuana defined as *Cannabis indica*, *Cannabis sativa*, and *Cannabis ruderalis*, along with hybrids and other common strains

- Includes resin extracted from the plant and marijuana-infused products
- Marijuana infused products are consumed other than by smoking (edibles, ointments, tinctures, oils and concentrates)
- CBD Oil not included
- Differing effects/implications for treatment and medical benefits
- Is cannabis a “medication?”
Physician Certification

Physicians do not **prescribe** medical marijuana. They provide the patient a form certifying that they have a qualifying condition.

- Cancer
- Epilepsy
- Glaucoma
- Intractable migraines unresponsive to other treatment
- Chronic medical condition causing severe, persistent pain or muscle spasms
**Physician Certification**

Qualifying conditions (cont.)

- Debilitating psychiatric disorders
- Human immunodeficiency virus or AIDS
- Chronic medical condition normally treated with prescription that could lead to addiction, when a physician determines that marijuana could be effective in treating the condition and is a safer alternative
- Terminal illness
- Any other chronic, debilitating or other medical condition based on judgment of physician
Physician Certification
19 CSR 30-95.110 – Physicians

- Requires physician to submit certification form electronically
- Physician must verify he or she:
  - Met with and examined the patient
  - Reviewed the patient’s medical records or medical history
  - Reviewed the patient’s current medications and medication allergies
  - Discussed the patient’s current symptoms
  - Created a medical record for the patient regarding the meeting
Physician Certification
19 CSR 30-95.110 – Physicians

• Physician must verify he or she discussed with the patient:
  ➢ Risks associated with medical marijuana, including known contraindications applicable to the patient
  ➢ Risks of medical marijuana use to fetuses
  ➢ Risks of medical marijuana use to breastfeeding infants
Physician Certification

- Only individuals licensed and in good standing to practice medicine or osteopathy under Missouri law may certify patients.
- A physician can certify a non-emancipated minor as having a qualifying condition.
  - Requires written consent of parent or legal guardian
  - Card issued to patient/guardian
  - Only parent or guardian can serve as caregiver and purchase or possess marijuana for minor qualifying patient
Physician Certification

- Lawful possession limits may be exceeded with written certification from two independent physicians.
- Certification form requires recommended dose if patient to exceed possession amount – but does recommending dose become a prescription?
- Note: Recommended dose **only** required if recommending above the lawful possession limits.
Marijuana and the Patient/Physician Relationship

- Amendment 2 *permits* physicians to recommend medical marijuana
  - Does not require physicians to certify qualifying conditions
  - Does not require physicians to recommend medical marijuana
  - Employed physicians may be restricted from certifying by hospital?
Patients and Caregivers

- Patient applies to DHSS for identification cards – separate cards to possess and grow marijuana
- Physician certification – less than 30 days old
- Applications for qualifying patients, primary caregivers and patient cultivation submitted electronically
- DHSS will provide one notice to patient that application is incomplete
- Cards are valid for one year
- Failure of DHSS to act on application within 30 days constitutes approval
Possession Limits

- Patient/caregiver may **cultivate** up to 6 flowering marijuana plants, up to 6 nonflowering plants and up to 6 clones
- Patient/caregiver may **purchase** four ounces dried, unprocessed marijuana in a 30-day period
- Patient/caregiver who do not cultivate may **possess** up to 60-day supply; otherwise may have up to 90-day supply
Timeline for Implementation

- Acceptance of applications for patient/primary caregiver identification and cultivation cards began July 4
- Issuance of identification cards began August 4
- Acceptance of applications for cultivation, manufacturing and dispensing facilities began August 3
- Marijuana likely available for purchase late 2019/early 2020
Liability Protections

Amendment 2 protects physicians from civil or criminal liability, sanctions or discipline of a professional license arising from:

- Owning, operating, investing in, being employed by or contracting with a medical marijuana dispensary or a cultivation, manufacturing or testing facility
- Issuing a certification to any patient diagnosed with a qualifying medical condition
  - Consistent with Amendment 2 and standards of professional conduct
Liability Protections

Liability protections for physicians would generally prevent licensure action for existing causes of discipline in Section 334.100 relating to controlled substances:

- “Performing or prescribing medical services which have been declared by board rule to be of no medical or osteopathic value”
- “Violation of the drug laws or rules and regulations of this state, including but not limited to any provision of chapter 195, or the federal government”
Liability Protections

Amendment 2 protects health care providers from civil or criminal prosecution, denial of any right or privilege, civil or administrative penalty or sanction or discipline by an accreditation or licensing board or commission for:

- Owning, operating, investing in, being employed by or contracting with a dispensary, cultivation, manufacturing or testing facility
- Providing health care services that involve the medical use of marijuana consistent with Amendment 2 and standards of professional conduct
Liability Protections

Health care providers are not subject to mandatory reporting requirements regarding medical marijuana use by non-emancipated minors with consent of parent or guardian

• Should exercise professional judgment in any instance in which minor is likely subject to harm, abuse or neglect
Liability Concerns

Amendment 2 does not protect individuals who “undertake any task under the influence of marijuana when doing so would constitute negligence or professional malpractice”

- Anticipate discovery regarding status as qualifying patient in malpractice litigation

Malpractice pitfalls
- Contraindications/interactions with other drugs
- Coverage exclusions
Liability Concerns

Amendment 2 does not protect against discipline for unprofessional or negligent conduct under Section 334.100:

- Misrepresenting that a condition can be cured by a particular medicine
- Prescribing a controlled substance without sufficient examination/failing to establish a valid physician-patient relationship – i.e., failure to follow certification requirements
- Use of any controlled substance to the extent that it impairs the ability to practice medicine
Liability Concerns

DEA/BNDD Registrations:

- Anecdotal reports of DEA pressure on physicians in other states who are involved in the business of marijuana
- DHSS guidance states department does not maintain lists of physicians who certify patients and patient records are not shared with BNDD due to privacy considerations
- BNDD does not foresee taking action unless a physician’s activities go beyond state law
Medical Marijuana and Hospital Administration

DHSS states hospital cannot allow medical marijuana on its premises without violating federal law

- Allowing possession/consumption would violate Controlled Substances Act
- Storage/administration violates Conditions of Participation
- Cannot certify compliance with federal health care laws, including Controlled Substances Act

Amendment 2 prohibits consumption in a “public place” unless authorized by law
Medical Marijuana and Hospital Administration

- Adopt policies prohibiting patients from possessing/using on premises
- Do not store on patients’ behalf – require removal or destruction
  - DHSS states law requires patients/caregivers to securely store marijuana at all times – hospital cannot store on their behalf
- Disincentive to discuss marijuana use with patients?
  - But consider discharge planning
- Adapt treatment plan to disruption in use?
Medical Marijuana and the Workplace

Amendment 2 prevents employees from bringing a claim against an employer for wrongful discharge or discrimination based on employer prohibiting employees from being under the influence of marijuana at work or for working or attempting to work while under the influence

• Possession?
Medical Marijuana and the Workplace

Employee considerations:

• Disability discrimination and accommodations
• Drug testing policies
• Patient safety
• Workplace impairment
Medical Marijuana and the Americans with Disabilities Act

The ADA does not consider the illegal use of controlled substances to constitute a disability.

- Individual suffering from addiction to illegal substance is not qualified to perform the job.
- Under federal Controlled Substance Act, marijuana use is illegal.
- Federal law does [should] not require an accommodation for using medical marijuana.
Medical Marijuana and the Missouri Human Rights Act

• MHRA, like the ADA, requires employers to make reasonable accommodations for individuals with a qualifying disability.
• A qualifying disability is “a physical or mental impairment which substantially limits one or more major life activities.”
• Employee with a qualifying disability must be able to perform the essential functions of the job with or without a reasonable accommodation.
Medical Marijuana and the Missouri Human Rights Act

Physical or mental impairment: physiological disorder, condition, cosmetic disfigurement, or anatomical loss affecting these systems:

- Neurological
- Musculoskeletal
- Sensory organs
- Cardiovascular
- Respiratory (including speech)

- Hemic and lymphatic, skin
- Endocrine
- Digestive, genito-urinary
- Reproductive
Medical Marijuana and the Missouri Human Rights Act

• Use of medical marijuana *may be* a reasonable accommodation
• Case-by-case analysis
• **Must engage in an interactive process**
  ➢ Reasonableness standard
  ➢ Is off-the-job use reasonable?
Medical Marijuana and the Missouri Human Rights Act

Scenario

You perform pre-employment drug screens for all positions with patient contact. You extend an offer to a respiratory therapist, who informs you that she will not pass the requisite drug screen as she uses medical marijuana to manage her Crohn’s disease. She avers that she uses the drug sporadically after work and on weekends. She submits to a drug screen and reports for orientation. On the second day of orientation, she is fired for her positive drug screen. Does she have a viable claim under the MHRA?
Medical Marijuana and the Missouri Human Rights Act


- Crohn’s disease identified in initiative as “debilitating medical condition” for which medical marijuana is authorized
- Employer failed to engage in the interactive process
- Is waiver of a policy that disqualifies anyone who tests positive for controlled substance a reasonable accommodation?
- Note – this was not a *safety sensitive position*
Medical Marijuana and the Public Policy Exception to At-Will Employment

- Narrowly drawn exception to at-will doctrine for whistleblowers
- May not discipline/discharge employee for refusing to perform illegal act/reporting violation of law or clear public policy mandate
- Amendment 2 establishes constitutional right to use medical marijuana
- Will courts extend the public policy exception?
- Dependent on text of the law - intended to “make only those changes necessary to protect patients ... from civil and criminal penalties...”
Medical Marijuana and the Public Policy Exception to At-Will Employment

*Roe v. Teletech Customer Care Mgmt*, 171 Wn.2d 736 (2011)

- Court narrowly construed public policy exception
- Initiative provided defense against criminal possession, not clear mandate of public policy in favor of use (like Missouri’s law)


- Discharge for positive drug screen did not violate “lawful activities” statute because use illegal under prevailing federal law

Compare: Both were statutory enactments; Amendment 2 is a constitutional provision
Medical Marijuana and the Drug Free Workplace Act

- Certain federal contractors must maintain a drug-free workplace policy and a drug-free awareness program
  - Prohibit the use, manufacture, distribution, dispensation or possession of controlled substances in the workplace
  - Require employees to notify employer within five days of any criminal conviction relating to drug use, possession or distribution in the workplace
  - Discipline employees who are criminally convicted of a drug offense or require them to participate in a treatment program
Medical Marijuana and the Drug Free Workplace Act

Missouri’s law prohibits an employee from being under the influence at work or attempting to work while under the influence; therefore, an employer can provide reasonable accommodations without violating the Drug Free Workplace Act

• Possession?

• Identifying employees who are impaired:
  ➢ How do you identify impairment now?
  ➢ Compare to unauthorized/unsafe use of prescription opiates
Medical Marijuana and Unemployment Compensation

- An individual fired for “misconduct connected with work” is not eligible for unemployment benefits.
- Section 287.120, RSMo, states that an employee at work with a “detectible” amount of a controlled substance in their system, in violation of the employer's policy has committed misconduct connected with work.
- Employee must have advance notice of the policy.
Medical Marijuana and Unemployment Compensation


• Colorado law denies unemployment benefits for the presence of a non-prescribed controlled substance in the employee’s system during working hours.
• Statute insulates individuals from criminal liability but does not alter state’s unemployment laws.
  ▶ Medical marijuana certification versus prescription
Medical Marijuana and Unemployment Compensation


- Michigan unemployment law denies benefits to those testing positive on a non-discriminatorily administered drug test.
- Medical marijuana act protects QPs from penalty, or denial of any right or privilege, including “disciplinary action by a business.”
- Broader protections of the medical marijuana statute apply.
Next Steps for Employers

• Review your employment policies on drug testing.
  ➢ Waiver may be a reasonable accommodation.
  ➢ Avoid discipline for known off-the-job use.
  ➢ Until court says otherwise, presence of controlled substance is misconduct for unemployment purposes.

• On-the-job possession or use — enhance ability to identify impairment
Discussion/Questions
Contact Information

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