

Medical Marijuana FAQs: What Providers Need to Know if Legal in Their State

This guidance is designed to help senior living providers explore the following questions surrounding the expanding area of medical marijuana:

What states allow medical marijuana?

What are the similarities of the various state medical marijuana laws?

How do state laws interface with federal laws and policies on marijuana use?

Do providers have to allow medical marijuana in their communities?

Overview

Medical marijuana (in some form) is now legal in 31 states and the District of Columbia. The landscape is changing rapidly as more states explore medical marijuana. The following frequently asked questions should help providers as they wrestle with medical marijuana today and moving forward.

Is medical marijuana legal in my state?

Medical marijuana is currently legal in 31 states and the District of Columbia. The following states have legalized medical marijuana in some form:

Alaska	Hawaii	Montana	Oklahoma
Arizona	Illinois	Nevada	Oregon
Arkansas	Louisiana	New Hampshire	Pennsylvania
California	Maine	New Jersey	Rhode Island
Colorado	Maryland	New Mexico	Vermont
Connecticut	Massachusetts	New York	Washington
Delaware	Michigan	North Dakota	Washington, DC
Florida	Minnesota	Ohio	West Virginia



There are additional states where cannabidiol (CBD) oil (which is not psychoactive) is allowed to treat seizures in children. Additionally, the Federal Drug Administration (FDA) has just approved cannabidiol oil for the treatment of two rare forms of epilepsy.

Currently, 9 states and the District of Columbia have legalized recreational marijuana.

What do medical marijuana laws look like?

Although the details of medical marijuana laws vary from state to state, they generally address some common elements, including:

- A list of qualifying medical conditions to use medical marijuana.
- The types of medical marijuana allowed in that state's program (whether oils, edibles, tinctures, ointments, marijuana to smoke, etc.).
- The maximum amount a patient can possess or a physician can prescribe at one time.
- A process to register and obtain access to use medical marijuana – typically through a medical professional's certification of one of the conditions identified for use.
- A designation of where the patient can use medical marijuana (not in a public place typically).
- A "caregiver" identification to help identify those who can help patients procure or administer the medical marijuana.

Review your state law and consult with your state department of health to understand the specific requirements for patients and your community, as each state law on this topic is unique.

Are nursing, assisted living, or housing providers required to allow residents to use medical or recreational marijuana if it is legal in our state?

Generally, no – it is not required that communities allow medical or recreational marijuana as it is still illegal under federal law.

Marijuana remains a Schedule I drug under the Controlled Substances Act (CSA). Drugs classified as Schedule I are determined to have a high potential for abuse and there is no currently accepted medical use for treatment in the U.S. As such, physicians are not allowed to prescribe Schedule I drugs (which include heroin and LSD).

Providers that accept Medicare and Medicaid funding are required to comply with certain federal standards and laws. Under the Social Security Act (SSA), individuals or entities that are convicted of felonies related to the manufacture, distribution, prescription or dispensing of a Schedule I drug could be excluded from participation in federal health care programs. Thus, allowing medical marijuana could put Medicare and Medicaid funds at risk, although, to date, no nursing home has been cited for allowing its residents to utilize medical marijuana pursuant to state laws.

HUD has also addressed the issues through various memorandums or guidance. Because marijuana remains a Schedule I drug, HUD prohibits housing communities from admitting new residents who use medical marijuana, but gives the community discretion on how to address existing residents who use medical marijuana. In addition, HUD has determined that reasonable accommodation requests for the use of medical marijuana under the Fair Housing Act are not allowed.

If you do not participate in a federal program such as Medicare, Medicaid, or HUD, review your state law to determine if there are provisions that protect patients from discrimination on the basis of using medical marijuana.

What has been the federal government's response to state medical marijuana laws?

In August 2013, DOJ Deputy Attorney General James Cole issued a memorandum (“Cole Memo”) that provides guidance to federal prosecutors regarding the exercise of prosecutorial discretion in states where marijuana use—either medical or recreational—has been legalized. It is basically a “live and let live” approach to state marijuana legalization.

In June 2015, The Consolidated Appropriations Act, 2016 (Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015)) (the “2015 Spending Bill”) is enacted. The 2015 spending bill contains the Rohrabacher-Farr amendment that prohibits the use of federal funds to enforce the Controlled Substances Act with respect to medical marijuana in those states in which it has been legalized. It does not apply to recreational marijuana.

The U.S. Court of Appeals for the 9th Circuit, in *United States v. McIntosh*, upheld the language of the Rohrabacher-Farr Amendment in an August 2016 decision.

In May 2017, President Trump signed into law the Consolidated Appropriations Act, 2017 (Pub. L. No. 114-31, 131 Stat. 135 (2017)) (the “2017 spending bill”) that included a new version of the Rohrabacher-Farr Amendment (now referred to as the “Rohrabacher-Blumenauer Amendment”) at Section 537. Again, the Rohrabacher-Blumenauer Amendment does not apply to recreational marijuana.

On January 4, 2018, Attorney General Jeff Sessions issued a memo (the “Sessions Memo”) that rescinds the Cole Memo and restores the principles governing prosecutorial discretion that were in effect prior to the issuance of the Cole Memo. Specifically, the memo states that Federal prosecutors, in deciding which cases to prosecute, are to “weigh all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community.”

The Attorney General has requested that that any new spending bills not contain a renewal of the Rohrabacher-Blumenauer Amendment. The Rohrabacher-Blumenauer Amendment was included in the March 2018 spending bill but that expires on September 20, 2018.

As a result, there is considerable uncertainty as to whether and to what extent the federal government will seek to enforce the Controlled Substances Act against organizations that permit the use of medical marijuana by those whom they serve.

What are the operational considerations if providers allow residents to use medical marijuana pursuant to their state's law?

If your community decides to allow the use of medical marijuana, you must follow the state laws and regulations governing it. There are many issues that arise when devising a policy on medical marijuana that your state may or may not have addressed in the law or regulations. Some of the more common issues include the following:

Storage

Make sure you follow state law on storage of medical marijuana as it is still illegal under federal law and is considered a controlled substance. Some state licensing rules allow for the central storage of medications, but medical marijuana containers may not comply with those rules. An alternative is to allow residents to use a locked storage box in their room to store medical marijuana.

Administration of the Medical Marijuana

A community must determine under the state law who can administer medical marijuana. Some states have mandated that only the patient can administer medical marijuana, while other states allow a designated "caregiver." If there is a "caregiver" designation, you must explore whether that person can be an employee of the community or a friend or relative of the resident. Furthermore, the administration of medical marijuana will depend on the form of marijuana the resident is prescribed.

Procurement

Another area that needs to be addressed is how the resident procures the medical marijuana. Typically the medical marijuana is available from dispensaries throughout the state. Some residents may not be able to visit the dispensary to pick up their prescription. Check your state law to determine the procedures for residents to procure their medical marijuana and whether that person may be a relative or friend, "caregiver," or community employee.

Mobility Devices

As medical marijuana can cause cognitive impairment, you should examine the use and safety of mobility devices used by residents who use medical marijuana. There should be some effort to determine if medical marijuana use will affect the ability of the user to operate a mobility device safely during certain times. When making such assessments, you should examine each case individually and not make any assumptions based on other cases.

We have a non-smoking policy in our community, can we ban smoking marijuana?

Yes. Many providers have campus-wide non-smoking policies and can limit usage of medical marijuana to other available forms like edibles, tinctures, oils and ointments.

What are the next steps for our community?

As medical marijuana laws proliferate, now is the time to address it in your community. Examine your state law and regulations regarding medical marijuana. Next, your organization should explore what policies and procedures best reflect your organization's values and the needs of your residents. Finally, if your community decides to allow medical marijuana, draft a policy outlining the protocols for storage, administration, and procurement, as well as any other operational issues that may arise in your particular community by permitting the use of medical marijuana.

Resources

Department of Justice Resources:

[Memo on investigations and prosecutions in states authorizing the medical use of marijuana \(Ogden 2009\)](#)

[Memo on guidance regarding the Ogden memo in jurisdictions seeking to authorize marijuana for medical use \(Cole 2011\)](#)

[Memo on guidance regarding marijuana enforcement \(Cole 2013\)](#)

[Memo on marijuana enforcement \(Sessions 2018\)](#)

HUD Resources

[Memo on medical use of marijuana and reasonable accommodation in federal public and assisted housing](#)

[Memo on marijuana in multi-family assisted properties](#)

[Memo on medical marijuana use in public housing](#)

Miscellaneous

[Rohrabacher-Farr Amendment Language](#)

[McIntosh Opinion](#)

[2017 Spending Bill \(including Rohrabacher-Blumenauer Amendment text\)](#)