

# Welcome to this MHI Webinar

## The presentation will begin shortly.

- All lines will be muted. This webinar is in “listen only” mode.
- To ask a question, type it into the question section of the GoToWebinar control panel.
  - The presenter will address questions at the end of the webinar.
- The presenter’s contact information will be provided during the webinar.
- Today’s webinar is being recorded and will be available on the MHA website.





# Medical Marijuana: Hospitals as Employers

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## Amendment 2 Overview

- Missouri voters approved Amendment 2 on November 6, 2018
- Establishes constitutional right of **qualifying patients** (QP) to freely discuss benefits of medical marijuana with their physician and right to use medical marijuana under physician supervision

## Amendment 2 Overview

A QP is someone diagnosed with at least one of the following:

- Cancer
- Epilepsy
- Glaucoma
- Intractable migraines unresponsive to other treatment
- Chronic medical condition causing severe, persistent pain or muscle spasms
- Debilitating psychiatric disorders

## Amendment 2 Overview

- 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

## Amendment 2 Overview

QPs apply to the Department of Health and Senior Services for a medical marijuana card.

- DHSS must make application forms publicly available by June 4, 2019.
- DHSS must begin accepting applications for medical marijuana cards by July 4, 2019.
- \$25 application fee

## Amendment 2 Overview

- Must renew card annually
- DHSS can limit amount of marijuana purchased by/on behalf of a QP in 30 days
  - Allowed at least 4 oz. of dried, unprocessed marijuana or its equivalent
  - No limit if two physicians certify compelling reason(s) for larger amount

# Amendment 2 Overview

## Personal Cultivation

- Separate card required for cultivation
- QPs or their primary caregiver can cultivate up to six plants
- QP can possess a 90-day supply of marijuana so long as cultivation is on property under their control
  - No limit if two physicians certify compelling reason(s) for larger amount

# Amendment 2 Overview

## I.D./Cultivation Cards

- DHSS must grant application within 30 days or issue written reasons for denial.
- If DHSS fails to act on application, physician certification serves as ID card for up to one year.
- All applications require physician certification less than 30 days old.

# Amendment 2 Overview

## Protections

- DHSS cannot unreasonably restrict patient access.
- QP cannot be arrested/subject to civil liability for possessing or transporting legal quantity of marijuana from dispensary to home.
- Board of Healing Arts cannot discipline a licensee for issuing a certification to a QP.
- Health care providers are not mandated to report medical marijuana use by QPs under age 18 if they have parental/guardian consent.

# Amendment 2 Overview

## Limitations

- No immunity for negligence or criminal liability for operating a vehicle, aircraft, dangerous device or boat under the influence of marijuana
- Cannot consume in a public place unless allowed by law
- Cannot come to work impaired
- No immunity from negligence or malpractice

# Amendment 2 Overview

## Sanctions

- Possession of up to twice the legal limit — administrative penalty and loss of card for up to one year
- Possession exceeding twice the legal limit — fine up to \$2,000 and imprisonment up to one year

# Employment Considerations

- Disability discrimination and accommodations
- Patient safety
- Workplace impairment
- Unemployment compensation
- Workers compensation
- Drug testing policies

# 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 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
- Respiratory, including speech organs
- Cardiovascular
- Reproductive
- Digestive, genito-urinary
- Hemic and lymphatic; skin
- Endocrine

# Medical Marijuana and the Missouri Human Rights Act

## Qualifying Conditions for Medical Marijuana

- Cancer?
- Epilepsy?
- Glaucoma?
- Intractable migraines?
- Chronic medical condition causing severe, persistent pain or muscle spasms — multiple sclerosis, Parkinson's, Tourette's?
- Psychiatric disorders, including PTSD?
- AIDS?
- Chronic medical condition normally treated with prescription medication?
- Terminal illness?
- Any other chronic, debilitating or other medical condition based on judgment of physician?

# Medical Marijuana and the Missouri Human Rights Act

- Use of medical marijuana **may be** a reasonable accommodation
- **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

*Barbuto v. Advantage Sales and Marketing*, 477 Mass. 456 (2017)

- Crohn's disease identified in initiative as "debilitating medical condition" for which medical marijuana is authorized
- Employer failed to engage in the interactive process
- Waiver of policy barring anyone from employment who tests positive for controlled substance a reasonable accommodation
  - Employer argued waiver unreasonable because marijuana use is a federal crime; court looked to state law

# Medical Marijuana and the Public Policy Exception to At-Will Employment

Do employees have the right to use medical marijuana?

- Conflicting provisions
  - Purpose statement says the law is intended to allow patients “the **right** to use medical marijuana for treatment under the supervision of a physician”
  - Also says is intended to “make only those changes to Missouri laws that are necessary to protect patients ... from civil and criminal penalties...” associated with use of medical marijuana

# Medical Marijuana and the Public Policy Exception to At-Will Employment

- Exception to the at-will doctrine
- In Missouri, typically applied to whistleblowers
- Cannot discipline/discharge an employee for
  - Reporting violation of law or clear public policy mandate
  - Refusing to violate the law
- Line of cases codified at Section 285.575, RSMo
- Courts could revisit — Is discharge/discipline of employee for exercising constitutional right a violation of public policy?

# 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

## *Coats v. Dish Network*, 2015 CO 44 (2015)

- 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 Unemployment Compensation

## 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

*Beinor v. Industrial Claim Appeals Office of Colorado and Service Group, Inc.*, 262 P.3d 970 (2011)

- Colorado law denies unemployment benefits for the presence of a nonprescribed 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

*Braska v. Challenge Mfg. Co.*, 307 Mich. App. 340 (2014)

- Employees entitled to unemployment after failed drug tests
- Michigan unemployment law denies benefits to those testing positive on a nondiscriminatorily 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.

# Medical Marijuana and Unemployment Compensation

## Considerations in Missouri

- Statutory language is restrictive.
- But is difficult to ascertain from level of THC in system whether employee ingested marijuana prior to or at work.
- Amendment 2 establishes a constitutional right.
- But, also says that it is only intended to protect against criminal and civil penalties – is denial of unemployment a civil penalty?
  - *Braska* said it is a penalty (under slightly different language).

# Medical Marijuana and Workers' Compensation

- 287.120, RSMo, reduces benefits by 50 percent when employee violates a workplace rule relating to drug use and injury is sustained in conjunction with use of controlled substance.
- Benefits are forfeited if use is the proximate cause of the injury.
- Positive test result for a nonprescribed controlled drug creates a rebuttable presumption that the drug was in the employee's system at the time of the injury; injury was sustained in conjunction with use of the drug.
  - Must follow testing requirements

# Medical Marijuana and Workers' Compensation

- No published cases on effect of medical marijuana use outside the workplace on test results
- Look to evidence of impairment — rebuttable presumption standard

# Is There Any Safe Harbor for Employers?

Yes. The law prohibits:

- An employee from being under the influence at work or attempting to work while under the influence.
  - How do you identify impairment now?
    - Compare to unauthorized/unsafe use of prescription opiates
- Undertaking any task under the influence of marijuana when so doing would constitute negligence or professional malpractice
- No mandate for health insurance coverage of medical marijuana

## 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

# Contact Information

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**Thank you!**