MEDICAL MARIJUANA AND HEALTH CARE FACILITIES

In November, Missourians voted to decriminalize medical marijuana by approving constitutional Amendment 2. The proponents of Amendment 2 intended patients and their physicians to freely discuss the potential benefits of medical marijuana without fear of civil or criminal penalty, including discipline by the Board of Healing Arts. Under Amendment 2, physicians do not prescribe medical marijuana. Rather, they certify a patient as having one or more qualifying medical conditions for which an individual may use the drug. The act also protects physicians and other health care providers who engage in the production and sale of medical marijuana.

AMENDMENT 2 OVERVIEW

Beginning in July 2019, the Missouri Department of Health and Senior Services must begin accepting applications for identification cards permitting individuals with a qualifying medical condition to possess and use cannabis. Applications for I.D. cards must be accompanied by a physician certification that the patient has a qualifying condition. Only Missouri licensed medical doctors or osteopaths may certify a patient. Qualifying conditions are described in Amendment 2 and include the following.

- Cancer
- Epilepsy
- Glaucoma
- Intractable migraines unresponsive to other treatment
- Chronic medical conditions causing severe, persistent pain or muscle spasms, including but not limited to those associated with multiple sclerosis, seizures, Parkinson's disease and Tourette's syndrome
- Debilitating psychiatric disorders, including but not limited to post-traumatic stress disorder, if diagnosed by a state-licensed psychiatrist
- Human immunodeficiency virus or AIDS
- Chronic medical conditions normally treated with potentially addictive medications, when a physician determines that marijuana could be an effective and safer alternative
- Terminal illness
- Any other chronic or debilitating medical condition, including hepatitis C, amyotrophic lateral sclerosis, inflammatory bowel disease, Crohn's disease, Huntington's disease, autism, neuropathies, sickle cell anemia, agitation of Alzheimer's disease, cachexia and wasting syndrome, if a physician deems marijuana to be a potentially effective treatment

Patients must obtain a new I.D. card annually. All applications for I.D. cards must be accompanied by a physician certification less than 30 days old. Hospitals and physicians must be prepared for patients to begin seeking certification of qualifying conditions beginning in June. While it is unlikely dispensaries will sell medical marijuana in Missouri before late 2019, patients likely will begin using the drug before that time, raising numerous legal and clinical considerations for hospitals treating patients with qualifying conditions.

IMPLICATIONS OF FEDERAL LAWS PROHIBITING MARIJUANA USE

Amendment 2 has the effect of decriminalizing the possession and use of marijuana under Missouri law if the individual possesses a valid medical marijuana I.D. card.[i] It also protects both patients and physicians from civil liability and other sanctions when conducting activities permitted by Amendment 2. However, marijuana remains a Schedule I drug under the federal Controlled Substances Act, and is therefore deemed by Congress to have no medically accepted use and a high potential for abuse.[ii] The United States Supreme Court determined that the federal interest in combatting drug trafficking preempts state laws decriminalizing marijuana. Therefore, federal officials may enforce federal laws prohibiting marijuana use and possession even if such conduct is legal under state law.[iii]

Because of its status as a Schedule I drug, physicians and other health care providers may not prescribe, administer or dispense marijuana. The law also prohibits them from aiding or abetting the cultivation, distribution or possession of cannabis. While Amendment 2 expressly protects those activities, a physician still could be subject to criminal prosecution under federal law for helping patients obtain medical marijuana. The consequences for violating federal drug laws include fines, imprisonment, termination from Medicare and Medicaid programs, and/or loss of a prescriber's registration with the Drug Enforcement Agency.

The Department of Justice enforces federal criminal statutes. During the Obama administration, the DOJ issued the Cole Memorandum to clarify the agency's stance toward medical marijuana. The memorandum acknowledged Congress had identified marijuana as a dangerous substance, the sale of which is a serious crime supporting large-scale criminal enterprises. However, in light of the DOJ's limited investigative and prosecutorial resources, the memo signaled that federal agents largely would refrain from enforcement activity against individuals whose conduct complied with state medical marijuana laws. Former Attorney General Jeff Sessions rescinded the Cole Memorandum early in the Trump administration; however, to date, there appears to be no significant uptick in federal enforcement activity against lawful users of medical marijuana.

Under Amendment 2, a physician does not prescribe medical marijuana – he or she merely certifies that the patient has a qualifying condition described in the law. At least one federal court concluded that recommending medical marijuana is **not** aiding and abetting the patient's possession of the drug under the CSA.[iv] The court found the physician's certification to be too attenuated from the patient's activities to obtain the marijuana to hold the physician liable for violating federal law.

The lack of criminal enforcement does not mean other federal agencies cannot penalize health care providers for actions that are legal under a state medical marijuana law. If the Centers for Medicare & Medicaid Services or the DEA were to find that a provider violated the CSA or federal health and safety regulations, either agency could take administrative action, such as referring the provider for exclusion from federal health care programs or revocation of a DEA registration. Some physicians have reported pressure from the DEA to withdraw from involvement with a manufacturing or cultivation facility or dispensary or suffer the loss of their DEA registration.[v]

A physician does not prescribe medical marijuana – he or she merely certifies that the patient has a qualifying condition described in the law. At least one federal court concluded that recommending medical marijuana is not aiding and abetting the patient's possession of the drug under the CSA.[iv]

Hospitals must attest to compliance with laws and regulations regarding the provision of health care services when submitting an annual cost report (CMS Form 2552). If a hospital was found to have aided and abetted a patient's possession or use of medical marijuana, this attestation could be deemed a false claim under the federal False Claims Act, exposing the facility to civil and criminal liability, monetary penalties and exclusion from Medicare and Medicaid.

It is unclear whether a hospital faces liability for the actions of employed or privileged physicians who certify patients as having qualifying conditions under a state's medical marijuana law. A hospital that is concerned about exposure for physician conduct should consider policies prohibiting employed physicians from providing patient certifications. Adjustments likely will need to be made to the medical staff bylaws to prevent physicians with hospital privileges from certifying patients seen at the facility. A ban on physician certification is not without risk, as physicians could claim that the hospital is interfering with their medical practice or their physician/patient relationship.

Many patients will seek ingestible marijuana-infused products, or ointments, tinctures and oils, so physicians who are willing to discuss medical marijuana with their patients should be prepared to answer questions about the vast array of products that will be available.

PRACTITIONER CONSIDERATIONS

Clinical Issues and Patient Certification: Amendment 2 encourages physicians to discuss the possible benefits of medical marijuana with their patients. This includes nonemancipated minors who may be certified as having a qualifying condition with the written consent of a parent or legal guardian. Amendment 2 does not require physicians certify patients for the purpose of obtaining an I.D. card to use medical marijuana. However, physicians should be prepared for patients to ask about the potential benefits of cannabis for a variety of conditions. Unfortunately, a dearth of research presently may leave them unprepared to discuss the issue with any degree of medical certainty.

Amendment 2 defines "marijuana" to include three specific strains of the drug – *Cannabis indica, Cannabis sativa* and *Cannabis ruderalis*, along with hybrids and other common strains. Each of these strains has distinct effects, and one strain may be better suited to treat particular symptoms than others. Many patients will seek ingestible marijuana-infused products, or ointments, tinctures and oils, so physicians who are willing to discuss medical marijuana with their patients should be prepared to answer questions about the vast array of products that will be available.

Patients may not be denied access to, or priority for, an organ transplant because they have an I.D. card or use medical cannabis. While use of marijuana cannot be the motivating factor for evaluating transplant candidates, its potential effects on a patient's condition, including the presence of a substance use disorder, possible post-surgical complications and drug interactions, can be among the assessment considerations applied by physicians.

Professional Liability Issues: Physicians and other health care providers are protected from discipline by their respective licensing boards when engaged in lawful conduct under Amendment 2. That includes involvement in the cannabis industry – the law exempts physicians from civil or criminal liability, sanctions, or licensure discipline because they own, operate, invest in, are employed by or contract with a medical marijuana dispensary or a cultivation, manufacturing or testing facility. Physicians also are free from liability for certifying patients who are diagnosed with a qualifying medical condition, so long as they do so within the parameters of Amendment 2, the rules duly promulgated thereunder and existing standards of professional conduct. Therefore, a physician should not certify patients with qualifying medical conditions for whom they believe marijuana to be medically contraindicated.

Physicians also should ensure that they have an established physician/patient relationship with a patient before certifying a qualifying medical condition. In Missouri, a physician/patient relationship arises when the patient knowingly seeks treatment and the physician consents to treat the patient, typically through an in-person encounter. Before certifying patients, physicians should confirm that their professional liability insurer will cover claims arising from patient certification activities.

The law specifically states that physicians are not mandated to report lawful use of medical marijuana by minors to the Department of Social Services; however, if a physician believes a parent or legal guardian is causing harm to a child through the administration of marijuana, he or she may, in the exercise of professional judgment, report the conduct to the department. A physician who believes a parent is placing his or her child at risk by the parent's use of medical marijuana also must follow the mandated reporting statute[vii] if a parent's marijuana use leads to abuse or neglect of the child.

Amendment 2 does not provide immunity for conduct occurring when an individual is impaired. The law expressly prohibits undertaking any action while under the influence when doing so would constitute negligence or medical malpractice. As a consequence of this provision, plaintiffs' attorneys in medical malpractice actions likely will ask for information about a health care provider's status as a qualifying patient or holder of a medical marijuana I.D. card. Malpractice insurers likely are to deny coverage for negligent acts occurring when a provider may be under the influence of cannabis.

HOSPITAL CONSIDERATIONS

As patient use of medical marijuana becomes widespread, hospitals will have to determine how to address use within the facility, and develop policies and procedures to manage those decisions. Amendment 2 does not require health care facilities to allow onsite use. In fact, it prohibits use in a "public place," unless authorized by law. The amendment does not define "public place," so it is unclear if state or local law is required for patients to consume marijuana on hospital premises.[viii] It also is possible that some portions of a hospital facility or campus would be considered public places, while other more private areas, such as patient rooms, would not.

When deciding whether to allow patients to bring and use medical marijuana, a hospital should consider whether permitting consumption on site carries regulatory risks. Medicare Conditions of Participation require that facilities be "in compliance with applicable federal laws related to the health and safety of patients." As marijuana is a Schedule I drug, it is possible a survey team could cite a hospital for noncompliance with the regulations for allowing the use of an illegal controlled substance on hospital grounds. There is no evidence that a hospital in any state in which medical marijuana is legal has been cited for allowing consumption on site, but hospitals must consider the risk as they evaluate whether to do so.

If a hospital elects to allow cannabis use, it may dictate the form in which it may be used. Amendment 2 permits the use of edible products, ointments, tinctures and oils. Under Missouri's Indoor Clean Air Act, smoking may be restricted within a health care facility. This would include both marijuana and tobacco products. Hospitals should review their smoking policies to ensure they address smoking marijuana in the facility.

Staff with direct patient care responsibilities must be aware of patients' medical marijuana use and ensure it is documented in the medical record. As legalization becomes more prevalent, there likely will be more research on how it interacts with other medications. Hospital staff will need to become educated on the effects of marijuana, as well as drug interactions and contraindications, to ensure accurate diagnoses of medical conditions and proper treatment. Hospitals must develop policies and train staff to ensure an individual's status as a qualifying patient is entered into the medical record. Amendment 2 also allows patients to designate a primary caregiver who may possess marijuana on their behalf and aid in consumption. Hospitals should consider policies and procedures for identifying a patient's primary caregiver and ensuring they are following the hospitals policies for patient possession and use of medical marijuana. If the hospital does not allow the consumption of marijuana in the facility, such restrictions should be communicated to the primary caregiver as well as the patient.

Hospital staff will need to become educated on the effects of marijuana, as well as drug interactions and contraindications, to ensure accurate diagnoses of medical conditions and proper treatment.

Hospitals that elect to ban medical cannabis from the premises must be aware of federal restrictions on the storage of marijuana. Schedule I drugs **may not** be stored in the pharmacy without express permission from the DEA. Therefore, if a facility elects to confiscate and store the substance until the patient is discharged, it should be stored in a secure, locked location accounted for in the same manner as other patient valuables.

Hospitals electing to allow patients to bring medical marijuana into the facility during an episode of care must determine whether the individual will self-administer the drug or if consumption will be controlled by hospital staff. Both raise issues for the patient's treatment regimen. If the patient is allowed to self-administer, the care team lacks control over timing and dosage, which could affect the planned course of treatment. However, if hospital staff provide the drug to the patient, such conduct is more likely to be considered "aiding and abetting" the use of marijuana under the Controlled Substance Act, raising a host of legal issues for the individual's providers and the hospital.

All marijuana and marijuana products sold in Missouri must be cultivated and manufactured within the state. Hospitals that allow patients to bring medical marijuana to the facility should familiarize themselves with the packaging and labels for such products to readily identify that patients are bringing legal forms of the drug. The hospital's policy may require that the drug be brought in its original packaging. Hospitals must develop a process for validating that patients and primary caregivers have a valid I.D. card.

As medical marijuana use becomes more commonplace, hospitals will need to address the threshold question of whether use will be permitted on premises. Those with employed physicians will have to determine whether to permit or restrict them from certifying qualifying patients to obtain I.D. cards. Those that ban the substance still will be required to account for the patient's ongoing use as they make treatment decisions, and adopt policies and procedures for monitoring patients and caregivers to identify cannabis brought on site in violation of the rules. Hospitals that allow patients to use medical marijuana during their stay must determine the level of staff involvement in administering the drug and how to secure it, among other issues. MHA will continue to develop guidance for its members on policies that will be affected by the implementation of Amendment 2 and how to adapt to the increased prevalence of cannabis use among patients.

[i] Under Amendment 2, DHSS has 30 days to act on an application for a medical marijuana card. If the department fails to act, the physician certification of the individual's qualifying condition can serve in lieu of an I.D. card for a period of one year.
[ii] 21 U.S.C. § 801 et seq.
[iii] Gonzales v. Raich, 545 US 1 (2005)
[iv] Conant v. Walters, 309 F.3d 629 (9th Cir. 2002)
[v] Lazar, K. & Murphy, S. (June 4, 2014). DEA Targets Doctors Linked to Medical Marijuana. Retrieved from https://www.bostonglobe.com/metro/2014/06/05/drug-enforcement-administration-targets-doctors-associated-with-medical-marijuana-dispensaries-physicians-say/PHsP0zRlaxXwnDazsohIOL/story.html
[vi] Corbet v. McKinney, 980 S.W.2d 166, 169 (Mo. App. 1998)
[vii] Section 210.115, Mo. Rev. Stat. (Supp. 2018)
[viii] Missouri's Indoor Clean Air Act defines a health care facility as a public place, so hospitals that elect to allow patients to bring cannabis into the facility may restrict smoking under the statute. Section 191.765 Mo. Rev. Stat. et seq.

MISSOURI HOSPITAL ASSOCIATION

P.O. Box 60 | Jefferson City, MO 65102-0060 | www.mhanet.com

04/19