

In November 2022, Missouri voters approved Constitutional Amendment No. 3, which revised existing constitutional provisions regarding medical marijuana and legalized recreational marijuana for adults ages 21 and older. The new laws implicate hospitals both as employers and health care providers. Key issues arising from the measure are summarized below.



HOSPITALS AS EMPLOYERS

While the law prohibits use or impairment in the workplace regardless of whether the employee uses medical or recreational cannabis, employers should be aware of slight differences between the two sections of the law. Instances of marijuana use by employees should be assessed and addressed based on the protections that apply to their situation.



PROTECTIONS FOR EMPLOYEES WHO HOLD A VALID MEDICAL MARIJUANA CARD

An individual must have a qualifying medical condition to obtain a medical marijuana card. Amendment 3 extended to nurse practitioners the authority, according to their collaborative agreement, to certify a patient as having a qualifying condition. Qualifying conditions include cancer, epilepsy, glaucoma, intractable migraines, chronic pain, debilitating psychiatric disorders, HIV or AIDS, terminal illnesses, and chronic conditions that normally would be treated with opioids or, in the professional judgment of a physician or nurse practitioner, would benefit from the use of medical cannabis. Medical marijuana identification cards now are valid for three years.

Existing constitutional provisions state that a medical marijuana user has no cause of action against an employer who prohibits marijuana use at work or disciplines an employee who works or attempts to work while under the influence.

A new employment-related provision was added by Amendment 3. Employers may not discriminate against a prospective or existing employee based on: their status as a qualifying patient or caregiver with a valid medical marijuana card, legal use of marijuana outside of work, or a positive drug test for marijuana without evidence the employee was impaired at work. Merely testing positive for cannabis is not grounds for discipline. Exceptions exist for situations in which the employer would “lose a monetary or

licensing-related benefit under federal law,” or when an employee’s legal, off-duty use of marijuana conflicts with a bona fide occupational qualification, would affect the individual’s ability to perform job-related functions or threaten the safety of others. Employers would need to demonstrate that an employee’s work performance, physical appearance, cognitive faculties or communication suggested they could be impaired due to marijuana or other substance use. This may include, but is not limited to, impaired work performance, errors, decreased productivity, injury, cognitive impairment, affirming statements, patient or staff complaints.

While marijuana remains illegal under federal law, the licensure standards generally do not contemplate sanctions against a facility purely because its employees test positive for illegal substances. Some hospitals also may be subject to the Drug-Free Workplace Act of 1988 by virtue of receiving federal grant funds; however, a positive test result for cannabis does not violate the Act. Grantees must maintain policies against the use, manufacture, possession and distribution of illegal substances in the workplace. The law does not reach off-site employee conduct unconnected with work.

In short, an individual with a medical marijuana card, with few exceptions, is entitled to use cannabis on their own time as long as they do not consume at work or come to work impaired.



PROTECTIONS FOR RECREATIONAL USERS

Workplace restrictions associated with recreational marijuana are slightly different. The constitution states that an employer is not required to accommodate marijuana use in the workplace or on the employer's property. It also does not prohibit an employer from discriminating against an employee for working while under the influence, including decisions associated with hiring, firing or discipline.

The provision is silent as to protections for positive drug screens. One could argue that the absence of such language means an employer is not limited in taking action against an employee who tests positive for cannabis, even without evidence of impairment.

Alternatively, one could argue that the existing provision contains the only restrictions an employer can impose – prohibition on use at work.

Because an individual using medical marijuana likely is entitled to protection against disability discrimination, such employees arguably are entitled to greater job protections in the form of accommodations than recreational users. Therefore, an employer could reasonably assert that it is not required to accommodate positive drug screens from recreational users, especially where patient and workplace safety are at issue. Ultimately, the courts may be required to harmonize the ambiguities between the two provisions.



EXPUNGEMENT PROVISIONS

Amendment 3 includes provisions for the expungement of criminal records for misdemeanor marijuana offenses, as well as felony offenses that no longer would be illegal under the provisions of the new law, unless they involved distribution to a minor, a violent crime or operation of a motor vehicle while under the influence. For employers

who consider past drug convictions in the hiring process, these crimes no longer will be reported as part of an individual's criminal background screening. Employers performing their own background screening or using a third party, especially out of state, should ensure there is an accurate understanding of the law.



FACILITY POLICIES

Additional changes resulting from Amendment 3 may affect how facilities govern use of marijuana by patients and visitors. For example, a health care provider

previously could not deny access to or prioritize organ transplants based on medical marijuana use. That restriction now applies to all medical care.





POSSESSION BY PATIENTS AND VISITORS

While Amendment 3 expands the ability of individuals to access and use marijuana in Missouri, conflicts between state and federal law remain. The Drug Enforcement Administration still classifies marijuana as a Schedule I drug. While nothing in the Conditions of Participation expressly addresses marijuana possession or use by patients, 42 C.F.R. 482.25 requires that drugs and biologicals be controlled and distributed in accordance with federal law. Similarly, 42 C.F.R. 485.608 broadly requires critical access hospitals to comply with “applicable federal laws and regulations regarding the health and safety of patients.” MHA is unaware of any federal enforcement actions against a hospital for allowing patients to possess or use their own marijuana on premises.

When a patient or visitor presents with marijuana in their possession, the hospital must choose between having the individual remove the substance from the premises or confiscating it. Since it is legal for the individual to possess marijuana, removal is preferable where possible. Hospitals should have a policy addressing what to do when a patient is incapacitated or otherwise unable to take the substance to another location.

Arguably, a hospital cannot possess marijuana on a patient’s behalf without violating the Controlled Substances Act and thereby risking its DEA registration. Therefore, a hospital may decline to store marijuana on behalf of patients to avoid that risk. It is possible that a patient would sue for the confiscation and destruction

of the drug. Patients may legally possess three ounces of marijuana at one time, the value of which will vary depending on market factors and whether the substance is in edible or flower form.

In developing a policy for managing situations in which a patient is unable to remove cannabis from the facility, a hospital must weigh the potential risks of jeopardizing its DEA registration versus its liability for the value of destroying patient property. MHA is not aware of any DEA enforcement actions against a hospital for storing marijuana on behalf of an incapacitated patient until they are able to remove the drug or are discharged.

If a hospital elects to store the drug on a patient’s behalf, it should never be stored in the pharmacy. If stored, the substance should be inventoried and maintained in a secure location to mitigate diversion. If a hospital confiscates marijuana with the intent to destroy, the Bureau of Narcotics and Dangerous Drugs suggests that the substance be destroyed as any other illicit street drug.

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CONSUMPTION ON HOSPITAL PREMISES

Previously, the medical marijuana law prohibited consumption of marijuana in a public place, unless otherwise authorized by law. That provision has been removed and replaced with a prohibition on smoking medical marijuana in public. Unless otherwise restricted by law, Amendment 3 generally appears to permit consumption of marijuana in public by means other than smoking. A local governmental entity with the power to enact ordinances could limit the consumption of recreational marijuana in public areas within its jurisdiction. Whether a hospital may do so without violating state law depends on whether it is considered a public place.

The law is not clear on whether a hospital would be considered a public place under Amendment 3. The term is not defined in the measure, and the Missouri Department of Health and Senior Services, the agency with rulemaking authority over medical and recreational marijuana, has not defined the term by rule. Other provisions in Missouri law may provide some guidance.

Section 191.765, RSMo defines a public place to be a health care facility for purposes of the Indoor Clean Air Act. Section 574.005, RSMo defines a public place for the purpose of crimes against the public order as “any place which at the time of the offense is open to the public. It includes property which is owned publicly or privately.” As interpreted by the Missouri Supreme Court, a public place is “any place where the public is permitted or invited to go or congregate, a place of common resort, a

place where the public has a right to go and be.” *Wann v. Reorganized School District No. 6*, 293 S.W. 2d 408, 414 (Mo. 1956).

Missouri statutes also define places of public accommodation, which are “all places or businesses offering or holding out to the general public, goods, services, privileges, facilities, advantages or accommodations for the peace, comfort, health, welfare and safety of the general public . . .” Section 213.010, RSMo.

Arguably, portions of a hospital facility or campus would be considered public places, at least during normal business hours. If so, Amendment 3 would permit individuals to consume marijuana by means other than smoking on hospital premises, at least in certain areas and/or during certain hours of the day, unless a local ordinance provided otherwise.

Because cannabis remains a Schedule I drug under federal law, hospitals likely will wish to bar consumption on facility premises, citing patient and workplace safety. Changes to Missouri’s marijuana laws under Amendment 3 may lead to increased complaints and/or challenges by patients to prohibitions on marijuana use. However a hospital decides to proceed, it should consult legal counsel to ascertain the risks and benefits of any position, and it should draft clear and comprehensive policies on the various issues surrounding marijuana possession and use.



INFANTS AFFECTED BY SUBSTANCE USE

Before the enactment of Amendment 3, hospitals commonly screened birthing mothers and/or infants when there was evidence of controlled substance use or alcohol exposure in the child. While a pregnant woman may lawfully use marijuana in Missouri, hospitals still are required to report to the Children’s Division infants suspected of prenatal exposure to marijuana.

Section 191.737, RSMo requires a health care provider to report infants identified as affected by substance use

or who have withdrawal symptoms associated with prenatal drug exposure, evidenced by either medical documentation of signs and symptoms consistent with the presence of controlled substances in the child at birth or confirmed toxicology on the mother or child. To address the legalization of marijuana, the law no longer is limited to reports of illicit substances but requires the presence of any controlled substance. The change was intended to comply with federal provisions requiring reporting the presence of cannabis in newborn infants.



CONCLUSION

The legalization of marijuana presents numerous challenges for hospital executives, health care providers and hospital staff. Missouri is not the first state to legalize medical or recreational marijuana. Despite the tension between federal and state law, there has been little to no enforcement activity associated with the presence of cannabis in hospitals.

As hospitals craft policies to address marijuana

possession and use by employees, patients and visitors, each decision will require a careful risk/benefit analysis based on knowledge of the relevant state and federal laws. Those decisions will change over time as state and federal courts resolve differences between their respective laws. Creating and revising strong policies, and ensuring staff are fully equipped to implement them, will help to avoid unexpected issues and resolve operational issues over time.

ⁱ In 2018, the voters passed a ballot initiative legalizing medical marijuana, which also was designated as Amendment 3 for purposes of that election.

