When Ohio House Bill 523 (HB 523) became effective in September, Ohio joined the company of 25 other states, the District of Columbia, and several U.S. territories that have legalized cannabis use for medicinal purposes. Modeled after highly restrictive regimes adopted by state legislatures in Illinois, Maryland, and New York, the Medical Marijuana Control Program (MMCP) envisioned by HB 523 has the potential to be one of the most complex and heavily regulated medical cannabis programs in the country. Yet, once fully implemented, Ohio is also expected to have one of the five largest medical marijuana programs in the country, generating up to $800 million in annual sales by 2020.

The ultimate functionality of the MMCP—both in terms of the opportunity for seriously ill patients to access the medicine, and the opportunity for market participants to create a sustainable program to serve those patients—will largely be determined by the extensive rulemaking process to be carried out by the Department of Commerce, the state Board of Pharmacy, and the State Medical Board of Ohio. It is slated to be completed by Sept. 8, 2017.

On Sept. 24, the SMBO dealt a significant blow to patients hoping to avail themselves of the so-called “affirmative defense” protections of HB 523. The affirmative-defense provision was added by the legislature to allow patients to use cannabis for qualifying medical conditions prior to the opening of dispensaries in 2018. In its carefully worded guidance, the Medical Board instructed physicians that they cannot issue a “state of Ohio-approved written recommendation” to use medical cannabis until the Medical Board adopts rules for doing so, which could take up to a year. In the meantime, physicians who receive requests from patients for medical cannabis were encouraged to “consult with their private legal counsel and/or employer for interpretation of the legislation.”

In response to the Medical Board’s guidance, representatives from the Ohio State Medical Association (OSMA) reiterated the association’s previous stance that doctors should not recommend cannabis until the Medical Board adopts its formal rules. The OSMA’s interpretation of the Medical Board’s guidance, in turn, quickly drew widespread news coverage. One of the lead state legislators behind HB 523, Senator Dave Burke (R-Marysville), responded in interviews that “willing physicians are in the free and clear” to recommend cannabis during the affirmative-defense period, and representatives from the Medical Board added that the Medical Board would “review a medical marijuana-related complaint as they would any other... [and] would consider whether someone violated state law, including the immunity provision.”

The affirmative-defense provision and the varying interpretations of it by key actors have created quite a hairball for Ohio doctors and patients to untangle with their lawyers. The uncertainty around this provision, and the implications of that uncertainty for the physician recommendation process under the MMCP once fully implemented, has also caused concern among patients and prospective market participants as to how effectively the MMCP will be implemented.

In an effort to facilitate discourse among the legal and medical professions regarding the affirmative-defense provision (and by no means to provide legal advice to anyone), the remainder of this article covers some of the relevant considerations that doctors and their employers may want to evaluate with counsel in order to minimize risks when recommending cannabis to patients during the affirmative-defense period. While the recommendation and use of medical cannabis does pose at least some theoretical legal risk to all parties involved in the process, it is reasonably clear that Ohio physicians willing to face those risks do currently have the ability to recommend cannabis to patients with qualifying medical conditions.

A bit of background on the affirmative-defense provision of HB 523 is helpful for understanding the Medical Board’s reluctance to provide guidance on the topic. Recognizing that it would take up to two years to fully implement the MMCP, and hearing incredibly heart-wrenching and compelling testimony from seriously ill constituents in urgent need of access to legal sources of cannabis, the legislature attempted to create an alternative path for qualifying patients to obtain cannabis prior to the opening of dispensaries in Ohio. According to Section 6(B) of HB 523, if a patient is arrested and charged with possession or use of cannabis in Ohio and can establish that she or he (1) received a written recommendation from a licensed physician and (2) possessed and used cannabis only in the forms and by the methods permitted under HB 523 (namely, did not smoke it), the patient should be acquitted of the charges.

The most significant obstacle to a patient’s ability to establish the affirmative defense is the requirement to obtain a written recommendation from a physician licensed in Ohio. For the written recommendation to qualify under the affirmative defense, the physician must certify all of the five following criteria:

(1) that a “bona fide physician-patient relationship” exists between the physician and patient;
(2) that the patient has been diagnosed with a “qualifying medical condition”; 
(3) that the physician or physician delegate has requested from the Ohio Automated Rx Reporting System (OARRS) a report of information related to the patient that covers at least the twelve months immediately preceding the date of the report;
(4) that the physician has informed the patient or the patient’s parent or guardian of the risks and benefits of medical marijuana as it pertains to the patient’s qualifying medical condition and medical history; and
(5) that the physician has informed the patient or the patient’s parent or guardian that it is the physician’s opinion that the benefits of medical marijuana outweigh its risks.

For doctors who are knowledgeable of the pharmacology of cannabis and they are comfortable making the risk/benefit determination set out above, recommending

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medical cannabis to patients during the affirmative-defense period should not present significant risk of legal or professional liability. HB 523 and federal case law provides for broad protections of doctors against criminal, civil and professional liability for recommending medical cannabis to qualifying patients in compliance with state law.

Most relevant to Ohio doctors considering recommending cannabis under HB 523, O.R.C. Section 4731.30(H) provides that:

“a physician is immune from civil liability, is not subject to professional disciplinary action by the state medical board or state board of pharmacy, and is not subject to criminal prosecution for any of the following actions: (1) Advising a patient, patient representative, or caregiver about the benefits and risks of medical marijuana to treat a qualifying medical condition; (2) Recommending that a patient use medical marijuana to treat or alleviate the condition; (3) Monitoring a patient’s treatment with medical marijuana.”

This provision is broad and unqualified in its scope, and serves to insulate physicians from criminal, civil and professional liability for recommending cannabis during the affirmative-defense period and thereafter. Not only does it allow doctors to recommend cannabis without fear of losing their medical license or facing criminal penalties in Ohio, including during the affirmative-defense period, but it could also protect them from potential civil malpractice liability to their patients or others. Even with the broad immunity provided to physicians under HB 523, it would be wise for doctors to check with their malpractice insurance carrier to confirm that they are covered for claims that may arise related to recommending medical cannabis to patients. Of course, doctors who are not self-employed should also check with their employer regarding relevant policies and restrictions on their ability to recommend cannabis to patients.

As cannabis remains a federally illegal “Schedule I” controlled substance under the Controlled Substances Act (CSA), the other major concern that many doctors cite with recommending cannabis is the risk that the U.S. Drug Enforcement Administration (DEA) will revoke the doctor’s DEA registration to prescribe other controlled substances. HB 523 follows most other states by relying on “recommendations” for medical cannabis instead of “prescriptions.” This distinction is derived from the seminal Conant v. Walters decision, where the Ninth Circuit Court of Appeals found that the act of merely recommending medical cannabis constituted physician-patient speech that is protected under the First Amendment to the U.S. Constitution.

The mere act of discussing the risks and benefits of cannabis and recommending cannabis for qualifying medical conditions under HB 523 should not be grounds in itself for revoking a DEA registration. If a physician were to prescribe cannabis (meaning providing an order that cannabis be dispensed to the patient) or directly dispense cannabis to the patient, however, those acts could be viewed as aiding and abetting the patient’s violation of the CSA and subject the physician to loss of his or her DEA registration (among other penalties).

As a result of the broad liability protections provided to physicians under HB 523 and First Amendment protections for the act of recommending cannabis to patients, it is unlikely that doctors would face much practical risk for recommending cannabis to patients in a manner that satisfies the affirmative-defense provisions. ■

Disclaimer: The above analysis is provided for general informational and educational purposes only. This article does not provide legal advice or create an attorney-client relationship. Perhaps most importantly, please remember that the use, possession, distribution and sale of marijuana remains a crime under federal law and (except as specifically permitted by HB 523) the laws of Ohio. This publication does not, and should not in any way be construed to, assist anyone in violating applicable law.

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4. See O.R.C. Section 3796.01(A)(6).

(Editor’s Note: The State of Ohio Board of Pharmacy and the State Medical Board of Ohio are asking for public input on the proposed medical marijuana dispensary and physician rules. To view the proposed rules, including instructions on how to provide comments, visit www.medicalmarijuana.ohio.gov/rules.)

**AMCNO Disappointed with the Department of Veterans Affairs’ New APRN Policy**

The Department of Veterans Affairs (VA) has issued a final rule allowing most advanced practice nurses (APRNs) within the VA to practice independently of a physician’s clinical oversight, regardless of individual state law.

Medical associations from around the country, including the AMCNO, sent letters and provided comments opposing the proposed rule (the AMCNO communications are available on our website), emphasizing that coordinated, physician-led, patient-centered, team-based care is the best approach to improving quality care for our country’s veterans. Although the VA refined some parts of the proposed rule that we agree with, such as excluding nurse anesthetists from it and clarifying that only individuals with credentials in radiology can perform radiology studies, we were disappointed to learn of the new policy. The final rule is available at www.federalregister.gov.