Legalization of Medical Marijuana in Ohio – Fact Sheet (02/2019)

By Isabelle Bibet-Kalinyak, Esq., McDonald Hopkins LLC

Medical Marijuana is now legal in Ohio. As dispensaries begin to flourish, medical providers and all employers need to take proactive steps to decide whether they will accommodate patients and employees who desire to use Medical Marijuana on their work sites. This fact sheet provides a brief summary of Ohio law applicable to Medical Marijuana and non-exhaustive list of practical considerations for all employers.

Summary of Ohio Law Legalizing Medical Marijuana

1. Effective date: September 8, 2016 – Ohio adopts Medical Marijuana law, HB 523 (RC 3796.01 et. seq.).
2. Effective date of Medical Marijuana Program: September 8, 2018. Dispensaries are now open.
3. Scope: Permits individuals (including minors, subject to parental or authorized representative consent) who suffer from covered medical conditions (and their official caregivers) to purchase and use Medical Marijuana that will be cultivated and processed in Ohio without state criminal prosecution.
4. Qualifying Conditions: Medical Marijuana is only legal for individuals with either AIDS/ HIV, Alzheimer's disease, ALS, cancer, chronic traumatic encephalopathy, Crohn's disease, epilepsy and other seizure disorders, fibromyalgia, glaucoma, hepatitis C, inflammatory bowel disease, intractable or chronic and severe pain, multiple sclerosis, Parkinson's disease, PTSD, sickle cell anemia, spinal cord disease and injury, Tourette syndrome, traumatic brain injury, and ulcerative colitis.
5. Who can prescribe Medical Marijuana?
   No one. It is still illegal at the federal level.
6. Who may recommend Medical Marijuana?
   Certified physicians (M.D. and D.O.), provided they obtain a certificate to recommend (CTR) from the State Medical Board (the “Board”). CTRs renew with medical licenses after the initial grant by the Board. The list of providers with a CTR is available on the Board’s website.¹
7. Which types of providers may not recommend Medical Marijuana:
   All other providers, including Physician Assistants, Nurse Practitioners, podiatrists, chiropractors, massage therapists, etc.
8. Patients and caregivers:
   Patients and caregivers must first visit a certified physician who will enter them into the Patient and Caregiver Registry upon verification of eligibility. They will then have to pay a registration fee online to obtain their individual Medical Marijuana card. The annual fee is $50 for patients and $25 for caregivers.
9. Acceptable forms and routes of administration:
   (a) oral administration: oil, tincture, capsule, or edible form; (b) vaporization: metered oil, solid preparation, or plant material (with use of vaporizing devices); (c) transdermal: patches; and (d) topical: lotions, creams, or ointments.
10. Illegal forms and routes of administration:
    (a) smoking; (b) forms considered “attractive to children” (i.e. edibles, candy, etc.); and (c) cannot grow for self-consumption.
11. How much is permissible:
    The amount of Medical Marijuana possessed by a registered patient or caregiver must not exceed a 90-day supply.
12. Official resources and updates for physicians:
    Available at https://www.medicalmarijuana.ohio.gov/

Requirements for Physicians to Obtain a Certificate to Recommend Medical Marijuana²

1. Unrestricted active Ohio medical license.
2. OARRS database access.
3. Active DEA registration.
4. Never have been denied a license to prescribe, possess, dispense, administer, supply or sell a controlled substance by the DEA due to the physician's inappropriate prescribing, furnishing, dispensing, administering, supplying or selling a controlled substance, or never have had a DEA or state prescribing license restricted for the same.
5. Never have been subject to disciplinary action by any licensing entity based on the physician's prescribing, furnishing, dispensing, diverting, administering, supplying or selling a controlled substance or other dangerous drug.
6. At least two hours of continuing medical education (CME) in courses that assist in the administration of Medical Marijuana.
7. No ownership or investment interest in or control over a Medical Marijuana entity licensed or seeking licensure in Ohio.

Key Considerations for Health Care Providers

1. Permission to recommend: Health care providers have to decide whether they will permit their respective owners, employees, or medical staff to “recommend” Medical Marijuana. Prior to doing so, they should contact their professional liability carrier or broker to ensure that their medical malpractice coverage includes Medical Marijuana. Most insurance policies do not include coverage for this risk and will need to be updated.
2. Patients, caregivers and visitors: Health care providers must decide whether to authorize patients, caregivers, and visitors to possess and/or use Medical Marijuana on their premises. Communication is paramount. Solicit staff input and try to anticipate potential scenarios to best prepare everyone. After updating internal policies, first start by training staff to roll out implementation smoothly. Advise patients upon admission (e.g., by using a modified version of your informed consent form) and during the History & Physical examination (H&P), and document in the medical records. Use signage in facilities, waiting rooms, treatment rooms, etc. Implementation must be systematic to avoid discrimination claims based on other factors such as race, age, etc.
3. Proper documentation of the medical diagnostic in the medical records (record retention period – 3 years minimum), including supporting evidence, is defined by law as follows:
   a. Treatment plan.
   b. Access OARRS report covering at least the preceding 12 months.
   c. Discussion with the patient regarding possible abuse or drug diversion of any drugs listed in OARRS report.
   d. Explanation of the risks and benefits of Medical Marijuana treatment.
   e. Patient's consent (or consent of a legal representative).
   f. Whether the patient needs a caregiver to assist in the administration of Medical Marijuana.
   g. Confirm patient's active registration with Board of Pharmacy registry.
   h. Plan for follow-up care to assess efficacy.

Standard of Care and Documentation³

1. Physicians must establish and maintain a bona fide physician-patient relationship including an initial in-person visit (not via telemedicine) and ongoing care.
2. Documentation in medical records (minimum statutory requirements):
   a. Patient's name and dates of office visits.
   b. Description of current medical condition.
   c. Medical, prescriptive, and substance use disorder history.
   d. Review of diagnostic test results, prior treatment and current medications.

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determine if they will let patients bring in
their own supply of Medical Marijuana
(similar to when they bring their own
medications) and how they will handle
compliance and enforcement. Some forms
or Medical Marijuana may be difficult to
spot and/or identify (e.g., oils and
ointments). On the flip side, inpatient
providers must also ensure that employees,
medical staff, and independent contractors
do not divert patients' Medical Marijuana if
it is permitted onsite. All applicable policies
should be updated to place employees on
notice of the potential disciplinary
consequences. In addition, consider
updating the medical staff bylaws and
standard contractual terms with outside
providers, including physicians or physician
groups providing medical services on an
independent contractor basis.

Key Considerations for All Employers,
Including Health Care Providers

1. **All or none:** Employers need to decide
whether they will endorse and
accommodate Medical Marijuana generally,
i.e. for all the medical conditions listed in
the statute. They cannot pick and choose
which condition(s) they will accommodate
as this may open them up to some
discrimination claims.

2. **Drug policies:** Employers are under no
legal obligation to endorse, permit, or
accommodate an employee’s use,
possession, or distribution of Medical
Marijuana in the workplace. However, they
must still accommodate employees with a
disability, as defined under the Americans
with Disabilities Act (ADA). Importantly,
unless they take action and update all
applicable internal policies, employers may
have a hard time disciplining employees
that are using Medical Marijuana at work. A
“Zero Tolerance” drug policy is not
sufficient. Such drug policy should explicitly
state that employees in possession or, and/
or using Medical Marijuana with a valid
physician certificate and/or Medical
Marijuana card are not exempt from the
drug policy and will be subject to all the
provisions of the drug policy. In addition,
the drug policy should affirmatively list
Medical Marijuana in the definition of
“illegal drugs.” Updating H.R. policies will
be essential for employers dealing with
unemployment benefits or workers
compensation claims.

3. **Unemployment compensation:** An
individual terminated from employment
because of Medical Marijuana use will be
deemed terminated for just cause if the use
was in clear violation of the employer’s
drug-free workplace policy, zero-tolerance
policy, or other formal program or policy
that includes Medical Marijuana as a
prohibited substance. If the policy does not
explicitly prohibit Medical Marijuana use,
the employee may be entitled to
unemployment compensation.

4. **Workers’ compensation:** Ohio law
permits employers with a clear drug policy
to reject workers compensation claims
involving a positive drug screen and places
the burden on claimants to rebut that
presumption. A positive drug test may
support rejecting a claim if the employer’s
H.R. policies then in place explicitly prohibit
Medical Marijuana. The claimant may still
argue that he or she was not impaired and
that the Medical Marijuana was not the
proximate cause of the injury but he or she
will bear the burden of proving so.

5. **OSHA:** OSHA regulations are another factor
employers need to consider. OSHA
regulations obligate employers to provide a
workplace “free from recognized hazards
that are causing or are likely to cause death
or serious physical harm.” Consequently,
since Medical Marijuana may affect the rate
of work injuries, it may also expose
employers to additional OSHA violations.

6. **Insurance:** Employers should consult their
insurance carriers or brokers prior to
deciding whether to accommodate Medical
Marijuana in the workplace. Additional
riders may be required to extend coverage.

Ohio employers are facing new risks due to the
legalization of Medical Marijuana. A proactive
assessment of such risks is strongly
recommended for employers of all types,
especially health care providers who may quickly
find themselves caught between patient
satisfaction and increased risk of liability.

For additional information, please contact
Isabelle Bibet-Kalinyak, Esq., at (330) 554-4133
or IBK@McDonaldHopkins.com.

**References**

1. OAC 4731-32-02, available at http://codes.ohio.gov/oac/4731-32-02, see also video
explaining how to apply for a CTR available at https://www.youtube.com/
watch?v=xz25rW1tnMI.
2. Roster of providers with CTR, available at https://med.ohio.gov/Publications/Rosters
3. Id.
5. Ohio Revised Code Section 4123.54(B).