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

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 that desire to use Medical Marijuana on their worksites. 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) 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.
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 Marijuana**

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 diagnosing and treatment of a qualifying medical condition for Medical Marijuana.
7. No ownership or investment interest in or compensation agreement with a Medical Marijuana entity licensed or seeking licensure in Ohio.

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1 OAC 4731-32-02, available at [http://codes.ohio.gov/oac/4731-32-02](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=xz25rW1tnMl](https://www.youtube.com/watch?v=xz25rW1tnMl)
2 [Roster of providers with CTR](https://med.ohio.gov/Publications/Rosters)
3 Id.
Standard of Care and Documentation

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.
   e. Drug screen at physician’s discretion if evidence of drug abuse.
   f. Physical exam and diagnosis of the patient’s medical condition.
   g. Diagnosis or confirmation of prior diagnosis of a qualifying medical condition for Medical Marijuana.

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.

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.

4. Inpatient facilities: Hospitals, nursing homes, and other inpatient facilities must 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\(^5\) 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.

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\(^5\) Ohio Revised Code Section 4123.54(B)