



**Caring
for Patients
Taking
Medical
Marijuana
in Pennsylvania**

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Michael Campbell, Professor of Law
Villanova University Charles Widger School of Law



What Do States Regulate?

Qualifying medical conditions
 Who are practitioners and what can they do?
 Who can possess and under what circumstances?
 Growth and distribution
 Forms of marijuana legally available
 Fees, fines and penalties
 Collection and dissemination of information
 Impact of other states' laws

The Law in Pennsylvania

Act 16 of 2016:
 35 P.S. §§ 10231.101 et seq.
 Temporary Regulations:
 20 Pa.Code Chapter 1141

What is Marijuana?

(i) All parts of the plant *Cannabis sativa* L., whether growing or not, the seeds of that plant and resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin.

(ii) The **term does not include industrial hemp.**

(iii) The term does not include the mature stalks of *Cannabis sativa* L., fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt or derivative, mixture or preparation of the mature stalks.

Qualifying Medical Conditions

1. Cancer, *including remission therapy* 2. Positive status for HIV virus or AIDS 3. Amyotrophic lateral sclerosis (ALS) 4. Parkinson's disease 5. Multiple sclerosis 6. Damage to nervous tissue of spinal cord with objective neurological indication of intractable spasticity *and other associated neuropathies* 7. Epilepsy 8. Inflammatory bowel disease 9. Neuropathies 10. Huntington's disease 11. Crohn's disease 12. Post-traumatic stress disorder 13. Intractable seizures 14. Glaucoma 15. Sickle cell anemia 16. Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain (*amended by regulation*) 17. Autism 18. *Neurodegenerative diseases* 19. *Terminally ill* 20. *Dyskinetic and spastic movement disorders* 21. *Opioid use disorder for which conventional therapeutic interventions are contraindicated or ineffective or for which adjunctive therapy is indicated in combination with primary therapeutic interventions*

Forms Allowed

- Pill
- Oil
- Topical forms (gels, creams, ointments)
- A form appropriate for vaporization or nebulization *including dry leaf or plant form*
- Tincture
- Liquid

Who May Certify Use?

- Practitioner (physician) included on the registry
- To be eligible for the registry, a physician must:
 - Apply in the form and manner required by the department
 - Be determined by training or experience to be qualified to treat serious medical conditions
 - Have successfully completed the course

Conditions for Issuance

- Licensed practitioner is on registry at time of issuance of certification
- **Practitioner has determined that patient a serious medical condition** and has included the condition in the patient's health record.
- Patient is under the practitioner's **continuing care** for the serious medical condition
- In the **practitioner's professional opinion and review of past treatments**, the patient is likely to receive **therapeutic or palliative benefit** from the use of medical marijuana.

Provider Do's

- Comply with DOH registration process
- Complete required 4-hour course on latest research etc.
- Notify DOH if practitioner knows or has reason to know that:
 - Patient no longer has a serious medical condition
 - Medical marijuana would no longer be therapeutic or palliative
 - Patient has died
- **Must** review the Rx drug monitoring program prior to:
 - Issuing a certification to determine the controlled substance history
 - Recommending a change of amount or form of medical marijuana

Provider May

- Access the Rx drug monitoring program to:
 - **Determine** whether a patient may be under **treatment** with a controlled substance **by another physician or other person**
 - Allow the practitioner to review the patient's controlled substance history **as deemed necessary by the practitioner**
 - **Provide the patient** or patient's caregiver, on behalf of the patient if authorized by the patient, **a copy of the patient's controlled substance history**
- **Choose not to be publicly listed as a practitioner.**

Practitioner Don'ts

- Accept, solicit, or offer any remuneration other than for examination of the patient to determine whether to issue a certification
- Hold direct or economic interest in a medical marijuana organization
- Advertise services as a practitioner who can certify a patient
- Issue certification for self, family or household member

The Federal Controlled Substances Act

21 U.S.C § 841 (a) **Unlawful acts** Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally— (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance

21 U.S.C. § 812 (c) Schedules I,II,III,IV and V ... shall ... consist of the following...
Schedule I ... (c) (10) marihuana

21 U.S.C. § 812. (b) **Placement on Schedules** ... (1) Schedule I drug:

- (A) The drug or other substance has a **high potential for abuse**.
- (B) The drug or other substance has **no currently accepted medical use in treatment in the United States**.
- (C) There is a **lack of accepted safety for use of the drug** or other substance under medical supervision.

Obama Era Guidance

Deputy AG **Ogden Memo** of 10/19/09 to all U.S. Attorneys

- DOJ is committed to **enforcement of Controlled Substances Act**
- DOJ is committed to **efficient and rational use of resources**
- Prosecution of **significant traffickers** of illegal drugs a **core priority**
- **Not focus** federal resources on individuals whose actions are in **clear and unambiguous compliance with existing state medical marijuana laws**

Deputy AG **Cole Memo** of 8/29/13 to all U.S. Attorneys

- DOJ **not historically focused** on individuals possessing **small amounts**
- DOJ **prioritizes preventing: 1) distribution to minors, 2) revenues to criminal enterprises, 3) diversion to other states, 4) trafficking other illegal drugs, 5) violence, 6) drugged driving, 7) growth on public lands, and 8) possession on federal property**
- Memo rests on **expectation of strong state and local enforcement systems**

Congress Intervenes

Rohrabacher-Farr Amendment to the federal budget bill prohibits Department of Justice (DOJ) from using federal funds to prevent States from implementing their own State medical marijuana laws

Ninth Circuit Court of Appeals rules DOJ may not prosecute individuals who engage in conduct permitted by state laws and who **fully comply** with such laws. U.S. v. McIntosh, 833 F. 3d 1163 (9th Cir. 2016)

Trump: "I will treat this provision (Rohrabacher-Farr) consistently with my constitutional responsibility to take care that the laws be faithfully executed."

Provider Risk

- Congress could choose not to renew the budget rider
- Provider might fail to strictly comply with a provision of state law
- Courts outside the Ninth Circuit (or the Supreme Court) might interpret the law differently
- Evidentiary hearings to demonstrate compliance could prove very costly, even when successful

Medical Malpractice

- Duty of Care: Same as for physician prescription of meds?
- Breach of the Duty: Two schools of thought doctrine in PA. Physician not responsible in the exercise of judgment if following a course of treatment advocated by a **considerable number of recognized and respected professionals** in the given area of expertise.
- Informed Consent Issues: Must disclose risks, benefits, likelihood of success, and alternatives. Causation requirement: A reasonable person, properly informed, would have refused.
- Obtaining Insurance: Audience experience?

Employment Rules

- No discharge, threats, refusal to hire, other discrimination, etc. **based on employee status** as medical marijuana user.
- **No requirement that employer accommodate use**
- Employer not required to put **self or any person acting on its behalf in violation of Federal law.**
- No heights or confined spaces while under the influence
- Employer may prohibit performance of tasks employer deems life threatening to employee or others while under influence
- Employer may prohibit duties risking public health or safety while under the influence
- No control of chemicals requiring federal permit or operation of high-voltage electricity or other public utility

Some Other Legal Issues

- Health Insurance Coverage: Wild v. Carriage Funeral Holdings Ltd. Superior Court of NJ, Appellate Division DOCKET NO. A-3072-17T3; Fund for those unable to afford med marijuana
- Liability to third parties for injuries attributable to medical marijuana use: Dram shop rules?
- Use of medical marijuana in schools: State DOH and DOE joint Guidance, pending regulations. Schools must provide private place for **caregiver to administer**.
<https://www.health.pa.gov/topics/programs/Medical%20Marijuana/Pages/School.aspx>

Some Other Legal Issues

- Discrimination issues: Noffsinger v. SSC Niatic Operating Company, LLC 338 F.Supp. 3d 78 (D. Conn. 2018)
- Tax deductions: Feinberg v. Commissioner 916 F. 3d 1330 (10th Cir. 2019); Alpenglow v. United States, 894 F. 3d 1187 (10th Cir. 2018)
- Custody: **Status** of certification cannot by itself be considered
- Product liability: Contamination?
- Labeling and packaging issues: Safety insert required, package must be sealed, safety warning and other detailed requirements

Today's Lesson

Follow the Law!