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# Navigating Marijuana Use in Senior Living Settings: Legal Rights and Policy Considerations

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## Disclaimer

The information contained herein is provided as general information but is not legal advice; every situation requires a review of the specific factual circumstances.

If you would like advice on situations specific to your circumstances, please do not hesitate to contact Emily Solum at [Emily.Solum@huschblackwell.com](mailto:Emily.Solum@huschblackwell.com) to discuss.

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## Agenda

- Current Legal Landscape in the United States
- Missouri Laws
- Federal Law
- Impact of Rescheduling
- Marijuana in Long Term Care Facilities
- Marijuana and Employees

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## Current Landscape in the United States

- **Federal:** Schedule I controlled substance, pursuant to the Controlled Substances Act, which does not allow for medical or recreational use.
- **Adult Recreational Use:** Legal in 24 states, 2 territories, and DC.
- **Decriminalization:** 7 states have changed their laws so personal-consumption amounts of marijuana qualify as a civil or local infraction or the lowest misdemeanor crime at the state-level with no possibility of jail time.
- **Medical Cannabis:** 14 states, 2 territories—in addition to those jurisdictions that allow adult recreational use—allow cannabis for medical use.
- **CBD/Low THC programs:** 9 states
- **Only 3 states with complete illegality:** Idaho, Kansas, Nebraska

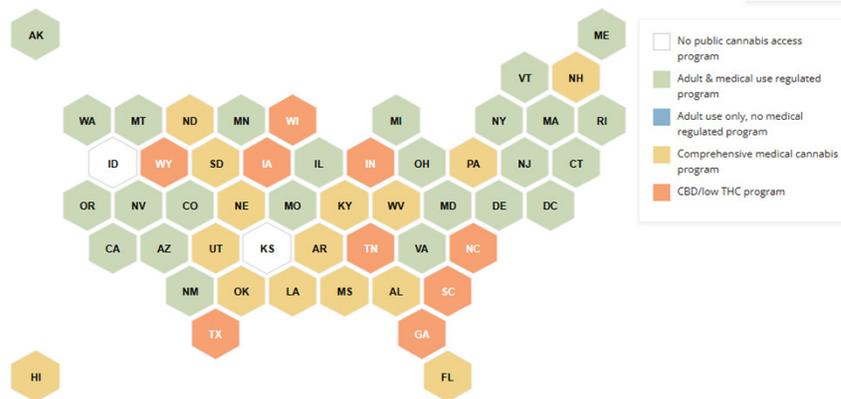
National Conference of State Legislatures,  
<https://www.ncsl.org/civil-and-criminal-justice/cannabis-overview>.

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## State of Legalization in the United States



National Conference of State Legislatures,  
<https://www.ncsl.org/civil-and-criminal-justice/cannabis-overview>.

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## Missouri Law

- 2018 – Missouri Constitutional Amendment 2
  - Passed with a large majority
  - Added Article XIV to the Missouri Constitution.
  - Created a Constitutional right of qualifying patients to freely discuss medical marijuana with their physician and the right to use medical marijuana under physician supervision.
  - Protects patients, their primary caregivers, and their physicians from civil and criminal penalties and allowed the production, distribution, sale, and purchase of medical marijuana.
- 2022 – Missouri voters approved Amendment 3, which amended Article XIV
  - Legalized recreational use of marijuana for adults
    - Must be 21 or older
    - Limits possession to 3 oz. of dried marijuana or six plants
  - Allows court to expunge records of all non-violent marijuana crimes
  - Made changes to medical marijuana provisions

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## Missouri Law, cont'd

- Qualifying patient (QP) is someone diagnosed with a qualifying medical condition
- Only a limited quantity permitted (4 oz. for 30-day period or 6 plants)
- QPs cannot consume in a public place.
- QPs cannot bring a claim against an employer for prohibiting employees from working under the influence of marijuana.
- There is no mandate for health insurance coverage of medical marijuana.
- Medical marijuana can only be purchased from dispensaries or personally cultivated
  - Pharmacies cannot sell medical marijuana
  - Dispensaries can transport medical marijuana to patients or their primary caregivers
  - Dispensaries collect a tax for the Missouri Veteran's Health and Care Fund

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## Missouri Law, cont'd

- 2022 Changes to Medical Marijuana provisions:
  - Allows nurse practitioners to determine need
  - Expressly allows individuals on bond for pre-trial release, on probation, or on supervised release to use medical marijuana
  - Expressly allows a family court participant to use medical marijuana
  - Prohibits denial of adoption, custody, visitation, or right to bear firearms on the basis that the person uses medical marijuana
  - Requires evidence that the person was in fact under the influence when operating a vehicle (since users can test positive for marijuana even when not under the influence)
  - Clarifies employer obligations towards the medical use of marijuana
  - Prohibits discrimination for certain medical use
  - No obligation to accommodate the use of marijuana in the workplace

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## Federal Law

- Early cannabis regulation fell under state pharmaceutical and poison laws.
- **Comprehensive Drug Abuse Prevention and Control Act of 1970**
  - Repealed the Marihuana Tax Act, which previously regulated cannabis possession and sales, which was found to be unconstitutional in 1969.
  - Repealed mandatory minimums for cannabis offenses (which came back years later).
  - Included the Controlled Substances Act (21 USC § 801 *et seq.*) (CSA)
    - Created five distinct schedules that categorize drugs based on acceptable medical use and potential for abuse and/or dependency.
    - Cannabis was classified by the federal government as a “Schedule I” controlled substance, meaning it has no current accepted medical use.

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## Controlled Substances Act (21 U.S.C. § 801 et seq.)

Schedule	Accepted Medical Use	Potential for Abuse	Potential for Psychological or Physical Dependence	Examples
I	None	High	Severe	Heroin, LSD, Marijuana, Ecstasy, Methaqualone (Quaaludes), Peyote
II	Yes	High	Severe	Cocaine, Methamphetamine, Methadone, Hydromorphone, Meperidine, Oxycodone, Fentanyl, Dexedrine, Adderall, Ritalin
III	Yes	Moderate	Moderate to Low	Ketamine, Anabolic Steroids, Testosterone, Tylenol with Codeine
IV	Yes	Low	Low	Xanax, Soma, Darvon, Darvocet, Valium, Ativan, Ambien, Tramadol
V	Yes	Lowest	Lowest	Robitussin AC, Lomotil, Motofen, Lyrica, Parepectolin

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United States Drug Enforcement Administration,  
<https://www.dea.gov/drug-information/drug-scheduling>.

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## Federal Law, cont'd

- CSA criminalizes leasing, renting, using, managing, or controlling property for the purpose of manufacturing, distributing, or using marijuana.
- Aiding and abetting someone to commit a violation of the CSA is also a federal crime.
- **August 2013:** Cole Memorandum encourages U.S. Attorneys to avoid prosecuting state-legal cannabis enterprises. Rescinded in January 2018.
- **2014:** Rohrabacher-Blumenauer Amendment – rider to a Congressional appropriations act and providing that federal funding could not be used to prevent states from implementing laws authorizing the use, distribution, possession, or cultivation of medical marijuana.
  - Effectively shielded patients, caregivers, and businesses operating in compliance with state law from federal prosecution
  - Included in every federal spending bill since 2014—until the Big Beautiful Bill passed

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## Most Recent News

- **December 2018:** Farm Bill redefines cannabis to not include hemp or low-THC products.
- **October 2022:** Presidential pardon for all simple possession convictions under federal and DC law. (Proclamation 10467)
- **December 2023:** Presidential pardon for all simple possession, attempted possession, and use of marijuana convictions under federal and DC law (Proclamation 10688)
- **May 2024:** Proposed rule to reclassify cannabis as a Schedule III drug.

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## Changes to Marijuana Schedule Classification: Agriculture Improvement Act of 2018 § 10113 (2018 Farm Bill, PL 115-334)

- Hemp (*Cannabis sativa L.*) and derivatives with extremely low concentrations of THC are no longer included in the definition of marijuana in the Controlled Substances Act.
- FDA retains regulatory authority over hemp products, similar to other food products, dietary supplements, human and veterinary drugs, and cosmetics.



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## Changing a Drug's Schedule (21 U.S.C. § 811, Sec. 201)

**Q: Who can initiate proceedings to add a drug, transfer between schedules, or remove a drug from control altogether?**

A: Congress, the U.S. Drug Enforcement Administration (DEA), U.S. Dept. of Health and Human Services (HHS), or by petition from any interested party, including:

- Drug manufacturer
- Medical society or association
- Pharmacy association
- Public interest group concerned with drug abuse
- State or local government agency
- Individual citizen

United States Drug Enforcement Administration,  
<https://www.dea.gov/drug-information/csa>.

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## Changing a Drug's Schedule (21 U.S.C. § 811, Sec. 201)

**Q: What factors are considered when determining whether to add or transfer between schedules or remove from control altogether?**

A: The following factors:

- Actual or relative potential for abuse.
- Scientific evidence of its pharmacological effect, if known.
- State of current scientific knowledge regarding the drug/substance.
- History and current pattern of abuse.
- Scope, duration, and significance of abuse.
- What, if any, risk there is to public health.
- Psychic or physiological dependence liability.
- Whether drug/substance is an immediate precursor of a substance already controlled under the CSA.

United States Drug Enforcement Administration,  
<https://www.dea.gov/drug-information/csa>.

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## Current Rescheduling Proposed Rule (Docket No. DEA1362; A.G. Order No. 5931-2024)

**Q: What agency issued the proposed rule?**

A: U.S. Department of Justice

**Q: What does the proposed rule do?**

A: Changing the schedule of a drug is required to go through rulemaking, including public comment. The agency proposed following an August 2023 recommendation from the U.S. Department of Health and Human Services to reclassify cannabis to be a Schedule III drug, because of the currently accepted medical use and lower propensity for abuse potential and physical or psychological dependence.

However, the NPRM states that “manufacture, distribution, dispensing, and possession of marijuana would remain subject to the applicable prohibitions of the [Controlled Substances Act].”

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## What Rescheduling Won't Change

- With no other legal changes beyond rescheduling, the following issues will remain, in terms of federal legality:
  - Federal medical marijuana appropriations rider will continue to be needed to shield state-legal industry actors from federal prosecution at the discretion of the DOJ.
  - Manufacture, distribution, and possession of recreational use cannabis would remain illegal under federal law.
  - FDA will need to approve cannabis products for medical use.
  - Controlled Substances Act criminal penalties specific to marijuana, like quantity-based mandatory minimum sentences would still apply for recreational use.

CRS Report, *Legal Consequences of Rescheduling Marijuana* (May 1, 2024), <https://crsreports.congress.gov/product/pdf/LSB/LSB11105>.

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## Outstanding Questions Remain

- Without additional guidance from federal regulators, the following questions remain unanswered:
  - Will prescription schemes for medical use differ from current schemes?
  - What cannabis products will be approved by the FDA for legal prescribing by clinicians? What regulations will exist for these products?
  - Will medical use cannabis business entities be required to register with the DEA or will they be exempt due to public interest concerns pursuant to 21 USC § 823(f)?
  - Will potential registration preclude an entity from also being part of a recreational use supply chain?
  - Will recreational use cannabis business entities be left out of banking and bankruptcy systems due to the Controlled Substances Act?
  - How would this impact current adverse immigration, government benefits, and gun ownership and possession consequences and restrictions for individuals?

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## Small Business Administration Prohibition

- Businesses that provide direct or indirect products or services that aid the use, growth, or enhancement of cannabis are prohibited from accessing SBA loans and programs. This means that state-legal cannabis enterprises are not allowed to access:
  - 7(a) loans
  - Disaster loans (e.g. PPP loans)
  - Microloans
  - Small Business Investment Company (SBIC) program
  - SBA resource partners, including SCORE, Veterans Business Outreach Centers, and Women's Business Centers

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## Small Business Administration Prohibition, Cont'd

- Various proposals for legislative fixes have been introduced in recent years, including the following:
  - S.4226 Cannabis Administration and Opportunity Act (2024)
  - H.R.5601 MORE Act (2024)
  - S.5131 Fair Access for Cannabis Small Business Act (2023)
  - H.R.6028 States Reform Act (2023)
- Meanwhile, third parties have been targeting cannabis enterprises for improper application and use of SBA programs through *qui tam* False Claims Act lawsuits.
  - Docklight Brands agreed to pay \$989,438 to the U.S. government to settle their case regarding improperly claimed PPP loans. A third-party company, Sidesolve LLC, brought the case and is set to receive a portion of the settlement.

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## What's Next

- Final Rule for the cannabis rescheduling may be forthcoming.
- Current Farm Bill expires Sept. 30, 2025.
- Pending legislation:
  - Cannabis Administration and Opportunity Act (CAO Act)
  - Strengthening the Tenth Amendment Through Entrusting States (STATES) 2.0 Act
  - Marijuana Opportunity Reinvestment and Expungement (MORE) Act
  - Secure and Fair Enforcement Regulation (SAFER) Banking Act

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## Secure and Fair Enforcement Regulation (SAFER) Banking Act

- Provides protections for federally regulated financial institutions that serve state-sanctioned marijuana businesses.
  - Would prohibit regulators from terminating or limiting the deposit or share insurance of depository institution.
  - Proceeds from transactions conducted by state-sanctioned marijuana business would no longer be considered proceeds from unlawful activity. Proceeds from unlawful activity trigger anti-money laundering laws, subjecting individuals to fines and imprisonment.
  - Would shield financial institutions, insurers, or federal agencies from liability and asset forfeiture for providing a loan, mortgage, or other financial service to state-sanctioned marijuana businesses.
- Senate Bill (S.2860) – 36 cosponsors
- House Bill (H.B.2891) – 128 cosponsors

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## Participation in Federal Programs

- Federal Programs include Medicare/Medicaid, Veterans Administration, HUD, federal grants, etc.
- Facilities that participate in Medicare and Medicaid agree to comply with all federal and state law.
- Social Security Act § 1919(d)(4)(A) (42 USC 1396r) provides that: A nursing facility must operate and provide services in compliance with all applicable Federal, State, and local laws and regulations.
- As of today, cannabis is illegal under Federal law.
- CMS has not issued any guidance on this issue.
- **But, we are unaware of any deficiencies cited or sanctions imposed by CMS against facilities allowing residents to use medical marijuana in compliance with state law.**

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## Other Considerations

- In addition to Medicare/Medicaid participation, lender covenants may require compliance with all federal and state laws.
- Veterans Administration
  - In December 2017, VA issued a directive prohibiting veterans from being denied access to VA services solely because they are participating in state medical marijuana programs, but veterans cannot use marijuana while on VA grounds.
  - Facilities with VA contracts must proceed with caution
- HUD Financing – While the program itself doesn't directly address cannabis use within long-term care facilities, HUD guidance for public housing prohibits the admission of marijuana users to HUD-assisted housing, even those using medical marijuana in compliance with state law.

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## Resident Rights

- Federal law requires that resident rights be respected.
- 42 CFR § 483.10(e)(3) – right to receive services in facility with reasonable accommodation of Resident’s needs and preferences, except when other resident health and safety would be endangered.
- 42 CFR § 483.10(f)(2) – right to make choices about aspects of his or her life in the facility that are significant to the resident.
- Although residents have these rights, since cannabis is still illegal under federal law, it can likely be prohibited in a nursing facility despite state law.

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## Other States

- **Washington**
  - 2015 Department of Social and Health Services issued guidance states:
    - Although marijuana use is illegal under federal law, the state would not cite facilities for allowing residents to use marijuana so long as providers: (1) ensure residents are safe; and (2) have clear policies in place so staff and residents know what is expected.
    - How the resident receives it, uses it, and is supervised must be included in the resident’s negotiated care plan.
    - Medicaid funds cannot be used directly or indirectly for activities or expenses related to marijuana use.

<https://www.dshs.wa.gov/sites/default/files/AL TSA/rcs/documents/afh/015-007.pdf>

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## Other States, Cont'd

- **California**
  - Guidance for residential care facilities: <https://www.ccl.dss.ca.gov/res/pdf/MedicationsGuide.pdf> (2016)
    - Smoking form is subject to the same restrictions applicable to tobacco.
    - Facility should treat marijuana as it does any other self-administered medication for purposes of storage, administration, and documentation.
    - In 2021, California enacted the “Compassionate Access to Medical Cannabis Act” (Ryan’s Law) to support terminally ill patients’ safe access to medical cannabis within health care facilities (including SNFs).
- **Colorado**
  - Colorado previously had guidance requiring assisted living facilities to have and disclose policies and procedures, and indicated it would cite deficiencies if the facility:
    - Did not disclose its policies regarding usage;
    - Failed to ensure residents have a valid authorization; or
    - Failed to store marijuana in a manner that prevents unauthorized use and diversion.

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## Other States, Cont'd

- **Arizona and North Dakota**
  - Have statutes authorizing nursing facilities, assisted living facilities, adult day care facilities, and adult foster care homes to adopt reasonable restrictions on medical marijuana
  - But statutes also prohibit facilities from unreasonably limiting a qualified patient’s use of medical marijuana (unless failing to do so would cause the facility to lose a monetary or licensing-related benefit under federal law).
  - See Ariz. Rev. Stat. § 36-2805; N.D. Cent. Code § 19-24.1-35

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## Other States, Cont'd

- **Maine**
  - Immunity for facilities under statute. See ME ST T. 22 § 2430-C.
  - State law allows facilities to be registered caregivers.
  - Regulation addressing marijuana use in inpatient hospices and nursing facilities. See 18-691 Me. Code Ch. 2, § 11.
  - Allows patients to use/store marijuana if permitted by the facility's policies. Patients are not permitted to cultivate their own marijuana in the facility.
  - All patients using marijuana must be kept strictly confidential; facility must develop a "need to know" protocol. A resident may not be discharged solely because the patient is a qualifying patient under the state's marijuana program.
  - Facilities may voluntarily participate to assist qualified patients. The facility would be required to be registered as a caregiver. Staff members assisting QPs also have to be registered.
  - Medical marijuana documentation is not to be kept in the medical record or MAR. Must be a separate record.

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## Other States, Cont'd

- **Minnesota** – Similar to AZ and ND, Minnesota allows facilities to adopt "reasonable" restrictions (i.e., facility will not store, is not responsible for providing, or permits use in designated areas only). However, this statute also expressly permits facility staff to assist residents with medical cannabis. Minn. Stat. Ann. § 152.34. Effective March 1, 2025, Minnesota health care facilities are not generally permitted to prohibit the use of medical marijuana, but may still institute reasonable restrictions. (<https://www.health.state.mn.us/facilities/regulation/nursinghomes/cannabisfaq.html>)
- **Virginia** – Allows ALF staff to administer cannabis oil. Va. Code § 63.2-1803.01.
- **Florida** – Allows medical use of marijuana in facilities if not prohibited in the facility's policies. Fla. Stat. Ann. § 381.986.
- **New Hampshire** – Allows for "Facility caregivers" (nursing homes, inpatient hospices, RCFs that have agreed to assist residents with therapeutic cannabis). N.H. Rev. Stat. § 126-X:1.

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## Other States, Cont'd

- **Pennsylvania** – Under 35 Pa. Stat. Ann. § 10231.103, residential facilities, including LTC nursing facilities, skilled nursing facilities, assisted living facilities, personal care homes, independent LTC facilities, and intermediate care facilities for individuals with intellectual disabilities, may designate employees as caregivers for medical cannabis patients. Facilities must be state-licensed, have significant responsibility for patient care, and receive patient authorization for designation.
- **Massachusetts** – Effective November 22, 2024, Massachusetts Cannabis Control Commission regulations establish a framework for “institutional caregivers,” employees of hospice programs, LTC facilities, or hospitals who provide care to registered qualifying patients on-site. Institutional caregivers receive registration cards that confer legal protections and facilitate status verification with law enforcement. 935 CMR 501.002, 501.021.
- **Illinois** – The Illinois Compassionate Use of Medical Cannabis Program Act excludes healthcare facilities from the definition of “public place” for cannabis use restrictions. This means hospitals, nursing homes, hospice care centers, and LTC facilities are not considered public places under these rules. However, the law specifically prohibits *smoking* medical cannabis within healthcare facilities. 410 Ill. Comp. Stat. 130/30.

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## Policy Options

- **Option 1: Don't allow it**
  - It is still illegal under federal law
  - Important: Notify prospective residents of the facility's policy before admission
  - Arguments against this approach:
    - It is not patient-centered and violates residents' rights.
    - It interrupts a patient's treatment, worsens outcomes, and/or deprives patients of improved symptom management and quality of life.
    - Studies show allowing marijuana reduces use of opioids (and their harmful side effects).
    - Study of Part D prescriptions showed Medicare Part D spending was reduced by \$165.2 million per year in 2013 in states that had legalized medical marijuana. See Medical Marijuana Laws Reduce Prescription Medication Use in Medicare Part D, Health Affairs, Vol. 35, No. 7, available at <https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2015.16>

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## Policy Options, Cont'd

- **Option 2: Allow medical marijuana**
  - Additional oversight of residents using medical marijuana required.
    - Care plans should address possible side effects of medical marijuana use.
    - For example, residents who use medical marijuana to improve appetite or reduce nausea may need to be escorted to and from the dining area or common areas if the resident has been assessed as a fall risk as a result of marijuana use.
  - Policies allowing *medical* marijuana should require the resident have a current registration with the state, which must be shown to the facility upon request.
  - Policy should also require that all requirements of the state's medical marijuana law be following (including obtaining medical marijuana from licensed dispensaries only).

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## Policy Options, Cont'd

- **Policies need to address:**
  - Form of marijuana permitted
    - Smoking or vaporizing of marijuana, or only edible, capsule, liquid, or topical forms of marijuana?
    - If allowing smoking, the facility should follow its tobacco-smoking policies (designated areas, assessments, etc.)
  - Areas of use
  - Assistance with administration
  - Storage
  - Transportation/Cultivation

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## Policy Options, Cont'd

- **Assistance with Administration**
  - In Missouri, only “primary caregivers” are protected from criminal or civil liability or sanctions for administering marijuana to a QP
  - Other states expressly allow facilities to be caregivers; Missouri does not
  - But, Missouri Constitution expressly prohibits the state from unreasonably restricting patient access

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## Policy Options, Cont'd

- **Storage – Options:**
  - No storage on-site: require that resident designate a caregiver responsible for bringing the medical marijuana to the resident and then promptly removing it
  - Resident storage: Require that residents store it under lock and key, or provide residents with individualized lock boxes
    - Approach taken by Hebrew Home, a 735-bed skilled nursing facility outside of NYC. See <https://www.forbes.com/sites/abbierosner/2019/02/19/the-nursing-home-with-a-medical-cannabis-program-the-feds-can-live-with/>
  - Central storage: Facility securely stores
  - Missouri law does not expressly permit facilities to offer central storage

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## Policy Options, Cont'd

- **Transportation/Cultivation**

- Consider whether the facility will offer transportation for residents to obtain marijuana from state-approved dispensaries, similar to transportation for other medical treatment.
- Some dispensaries offer delivery and there are also licensed transportation companies in Missouri
- The facility's policy should clearly indicate if cultivation will be permitted or not
- We are unaware of any facility allowing cultivation (some state laws expressly prohibit cultivation at a long-term care facility)

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## Protections for Employees

- When Missouri passed Amendment 3 legalizing recreational use, it implemented employment protections for medical marijuana users (i.e., qualifying patients)
  - Cannot penalize a qualifying patient (or primary caregiver) for their status as such, and/or for use while off-duty and off-site\*
    - Unless the person was under the influence on-site or on-duty
  - Cannot penalize a qualifying patient for a positive drug test\*
    - Unless they used, possessed, or were under the influence while on-site or on-duty
- \*Exception: would cause the employer to lose a monetary or licensing-related benefit under federal law (e.g., DOT-related licensing)
- This applies to applicants AND employees
- **No similar protections for recreational users**

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## Exceptions to Employee Protections

- The employment protections for medical marijuana users do not apply when the employee's lawful off-duty/off-site use:
  - Affects their ability to perform job-related responsibilities;
  - Affects the safety of others; or
  - Conflicts with a bona fide occupational qualification that is reasonably related to the employment.
- **Does not mandate or curtail an employer's decision to require drug testing**

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## Tricky Issues

- How do you know whether an employee is working while “under the influence” since tests don’t show active impairment or when marijuana use occurred?
  - Probably need some other evidence of impairment to be comfortable (reliance on positive test alone is shaky ground)
- Can you test applicants for marijuana? Things to consider:
  - Up to 50% of adults in US admit to trying marijuana—do you want to limit your applicant pool during a staffing crisis if marijuana use would not affect the person’s ability to perform their job safely?
  - If a qualifying patient tests positive, Amendment 3 limits what you can do with that information.
  - Once you know about someone’s medical condition, you cannot unring that bell—for the rest of that person’s employment, you know that they use marijuana for a qualifying medical condition, which is likely a disability and opens the company to potential liability for related employment claims

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## Tricky Issues, Cont’d

- When does lawful off-duty use of medical marijuana “affect the safety of others”?
  - Safety-sensitive position enough?
  - Driving a company vehicle sufficient?
  - We do not know what the level of “affect” is – especially without medical support
  - Impairment may vary between individuals, even with a similar usage amount

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## Best Practices

- Review and update workplace policies with assistance of legal counsel.
  - Employers may still maintain a drug-free workplace, which includes prohibiting employees from working while under the influence.
  - Determine whether the organization will continue to test for marijuana.
    - If so, beware that medical marijuana users with a valid card have employment protections. Though they are not allowed to be under the influence at the workplace, an employer cannot take an adverse employment action against an individual with a valid identification card for partaking in off-site legal use of marijuana during non-working hours (with limited exceptions).
- Employers should provide training for HR employees, managers, and/or supervisors on procedures dealing with employee use of marijuana and spotting the signs of an employee under the influence while working.

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# Questions?

## Thank you for attending!

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