

Dinsmôre

"O-High-O" **The Impact of Marijuana Decriminalization on the Skilled Nursing Industry**

OHCA Winter Conference

February 15, 2024



Dinsmôre

Accomplish môre. 



Daniel S. Zinsmaster

Partner | Columbus, OH

(614) 628-6949

daniel.zinsmaster@dinsmore.com

Agenda

- Ohio's Medical Marijuana Control Program
- Issue 2 and Decriminalization of Adult Use
- Current Federal Landscape
- Differing Implications for Skilled Nursing, Independent Living, and Assisted Living
- Employment Considerations
- Hemp, CBD, and Delta 8
- The Future



Marijuana use increased among elderly population

- ❖ According to figures released by the State of Ohio Board of Pharmacy, more than two thirds of medical marijuana cardholders are older than 40. Roughly 21% are between 40 and 49, another 21% between 50 and 59, and around 20% between 60 and 69.
- ❖ By contrast, only around 10% are between 18 and 29.



Marijuana use increased among elderly population

- “As far as the qualifying conditions the board has approved for (marijuana treatment), a lot of those are conditions that people under 30 may not experience as much,” said Christopher Mastrilli, general manager of the Ohio Provisions dispensary in Carroll, about 30 minutes southeast of Columbus.
- Chronic pain, for example, is by far the most common basis for medical marijuana use in Ohio.



Medical Marijuana in Ohio



Medical Marijuana in Ohio

House Bill 523:

- At the time, Ohio became the 25th state to enact a comprehensive medical marijuana program when Governor Kasich signed Ohio HB 523 into law on September 8, 2016.
- Legalizes medical marijuana in Ohio and establishes the Medical Marijuana Control Program, which was to be fully operational by September 8, 2018.
- Permits patients, on the recommendation of a physician, to use medical marijuana to treat a qualifying medical condition.
- Does not require an employer to permit or accommodate an employee's use, possession, or distribution of medical marijuana.

Ohio's Medical Marijuana Control Program

- Jurisdiction previously spread out over several different agencies, namely Ohio Department of Commerce, Ohio Board of Pharmacy, and State Medical Board of Ohio
- Recent transfer of Board of Pharmacy's authority to Ohio Department of Commerce and newly formed Division of Cannabis Control
- Newly appointed Director of Division - James V. Canepa, Esq.
- Division will regulate medical marijuana cultivators, processors, dispensaries, and testing laboratories, incl.
 - Determine eligibility criteria for licensure
 - Determine number of licenses issued
 - Establish production control mechanisms
 - Develops rules for:
 - Facility security
 - Product quality control and assurance
 - Packaging and labeling standards
 - Product consistency and availability
 - Testing laboratory standards
 - Establish enforcement and compliance measures



Ohio's MMCP – State Medical Board of Ohio

❖ Certificate to Recommend

- Physicians are prohibited from "prescribing" medical marijuana. Instead, patients must have a "recommendation" from a certified physician.
- Approximately 220 physicians in Ohio have a Certificate to Recommend.
- Certified physicians can recommend up to a 90-day supply of medical marijuana with three refills.



❖ Qualifying Conditions

- Medical Board can consider whether to add new conditions to the list of qualifying conditions at any time.
- Previously rejected conditions include depression, insomnia, opioid use disorder, autism, and anxiety.
- Currently 26 approved conditions.

Qualifying Conditions

- AIDS
- Amyotrophic Lateral Sclerosis
- Alzheimer's Disease
- Cachexia/wasting syndrome
- Cancer
- Chronic Traumatic Encephalopathy
- Crohn's Disease
- Epilepsy or another seizure disorder
- Fibromyalgia
- Glaucoma
- Hepatitis C
- Huntington's disease
- Inflammatory bowel disease
- Irritable bowel syndrome
- Multiple Sclerosis
- Pain that is either chronic and severe or intractable
- Parkinson's Disease
- Positive status for HIV
- PTSD
- Sickle Cell Anemia
- Spasticity
- Spinal Cord Disease or Injury
- Terminal illness
- Tourette's Syndrome
- Traumatic Brain Injury
- Ulcerative Colitis

Qualifying Conditions



How to Get a Patient & Caregiver Registry Card

1. Find a doctor with a Certificate to Recommend.

- Establish a bona fide physician-patient relationship, including at least one in-person or telemedicine visit per year.
- Physician must confirm that patient has a qualifying medical condition after a screening and consultation.
- Physician will submit the recommendation for a patient to receive medical marijuana directly to the patient registry.

2. Register with the Patient Registry

- Patient will receive an email prompting them to login to their profile in the patient registry. Patient must complete the application and pay the fee.
- After completion of application and payment of fee, patient can download Patient & Caregiver Registry Card.
- Currently, the annual cost of a medical marijuana registration is \$50 for patients and \$25 for caregivers. Proposed rule changes would eliminate these fees.

3. Find a Dispensary

- Only patients with an active registry card, an active recommendation, and their government-issued ID can purchase medical marijuana at a licensed dispensary.
- Recommendations are active for a maximum of one-year.
- Currently 120 actively licensed dispensaries in Ohio (and an additional 12 with provisional licenses).

Recreational Marijuana in Ohio



Ballot Initiative 2

- Recreational marijuana was legalized in Ohio by a ballot measure that passed in November 2023, with 55% of the vote in favor of the issue
- Ohio became the 24th state to permit recreational marijuana (plus D.C.)
- The measure, known as Issue 2, was introduced by the Coalition to Regulate Marijuana Like Alcohol
- Became effective December 7, 2023



Ballot Initiative 2

- Legalizes the cultivation, manufacture, testing and sale of cannabis
- Decriminalizes the growing of up to 6 plants per person and 12 plants per residence
- Permits the sale of cannabis products in the form of plant material and seeds, live plants, clones, extracts, drops, lozenges, oils, tinctures, edibles, patches, smoking or combustible product, vaporization of product, beverages, pills, capsules, suppositories, oral pouches, oral strips, oral and topical sprays, salves, lotions or similar cosmetic products and inhalers
- Provides for a 10% adult use tax—which is separate from the sales tax—on the sale of cannabis
- Establishes the cannabis social equity and jobs program, which will focus on addressing historically disproportionate enforcement of marijuana-related laws through efforts such as licensing and financial assistance
- Authorizes landlords and employers to prohibit the use of cannabis in certain circumstances
- Creates a program for cannabis addiction services

Ballot Initiative 2 – Cont'd

- The passage of Issue 2 is not a *carte blanche* to cultivate, sell and possess marijuana/cannabis
- Criminal laws and penalties will still be enforced for:
 - Use of cannabis in public areas
 - Underage purchase / possession
 - Trafficking
 - OMVI / DUI
 - Possession when the amount is greater than what is authorized



Ballot Initiative 2 – Where can I buy it?

So where can someone go in Ohio to purchase recreational cannabis?

- Nowhere (yet)
- Right now, there are no authorized sellers.
- The Division of Cannabis Control isn't set to start processing retailer applications until June 2024, which means you likely won't be able to legally buy marijuana until late summer or early fall

Can I buy in Michigan or other states with recreational cannabis and bring it into Ohio?

- No – still against federal law to transport marijuana across state lines



Ballot Initiative 2 – How much can I possess and where can I use it?

How much can I possess?

- Law allows adults over the age of 21 to possess 2.5 ounces of cannabis flower and 15 grams of extract



Where can I use it?

- Private residences
- Commerce has indicated that smoking marijuana would follow similar rules as cigarettes — not in public indoor places
- Gov. DeWine has asked for more clarifications on public use (among other issues)

Ballot Initiative 2 – What might happen next?

- Law *not* enshrined in Ohio Constitution
 - Issue 2 was an “initiated statute” that amended the Ohio Revised Code rather than amending the Ohio Constitution, meaning the Ohio General Assembly could pass laws to modify the changes to state law implemented under the ballot initiative
- Competing bills in Ohio House and Ohio Senate to change aspects of program:
 - Immediate access to purchase at current medical marijuana dispensaries
 - Home grow
 - Public use
 - Advertising
 - Permissible THC levels
 - Taxes



Federal Landscape



Federal Landscape

❖ Controlled Substances Act

- Marijuana remains classified as Schedule I Controlled Substance, meaning that at the federal level, marijuana has no currently accepted medical use, lack of accepted safety for use under medical supervision, high potential for abuse.
- Unlawful to manufacture, distribute, dispense, possess, or use marijuana.
- No FDA approval.



Federal Landscape Cont'd

The US Department of Justice has issued several policy statements over the years:

❖ 2009 Cole Memorandum

- Directed U.S. Attorneys to utilize their resources prudently and to use discretion before prosecuting those using medical marijuana in compliance with their State's laws.

❖ 2014 Rohrabacher–Farr amendment

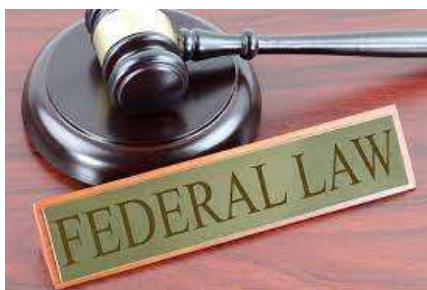
- Prohibits the Justice Department from spending funds to interfere with the implementation of state medical cannabis laws.

❖ Cole Memorandum rescinded

- U.S. Attorney General Jeff Sessions issued a "Marijuana Enforcement Memo" in 2018, stating: "These statutes reflect Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime."
- Recent and current U.S. Attorney Generals, including William Barr and Merrick B. Garland, seem to support the position asserted in the Cole Memorandum.

Centers for Medicare & Medicaid Services (CMS)

"In order to provide patient safety, drugs and biologicals must be controlled and distributed in accordance with applicable standards of practice, *consistent with federal and state law.*" 42 CFR 482.25(b)



Shifting Federal Landscape? HHS vs. DEA

- On August 29, 2023, the US Department of Health and Human Services recommended to the Drug Enforcement Administration that marijuana be rescheduled from Schedule I to Schedule III under the Controlled Substances Act.
- DEA is still reviewing HHS's recommendation.
- When considering whether to schedule or reschedule a controlled substance, DEA is bound by HHS's recommendations on scientific and medical matters. *However*, DEA has also stated that it has "final authority to schedule, reschedule, or deschedule a drug under the Controlled Substances Act."



Shifting Federal Landscape Cont'd

Some legal consequences if marijuana is moved from Schedule I to Schedule III:

- Moving marijuana from Schedule I to Schedule III, without other legal changes, would not bring the state-legal medical or recreational marijuana industry into compliance with federal controlled substances law.
- The key difference between placement in Schedule I and Schedule III is that substances in Schedule III have an accepted medical use and may lawfully be dispensed by prescription, while substances in Schedule I cannot.
- Prescription drugs must be approved by the Food and Drug Administration (FDA).
- Section 280E of the Internal Revenue Code – moving marijuana from Schedule I to Schedule III would allow marijuana businesses to deduct business expenses on federal tax filings.
- Because U.S. banks are insured by the federal government, they cannot bank with businesses that grow and sell marijuana since it is illegal under federal law. Rescheduling would open the door for banks to work with marijuana businesses.



Shifting Federal Landscape Cont'd

- In late 2022, President Biden issued an executive order to pardon all federal marijuana possession charges.
- The President also urged governors to do the same at the state level saying, "Just as no one should be in a federal prison solely due to the possession of marijuana, no one should be in a local jail or state prison for that reason, either."
- While President Biden's pardons signal a step toward overhauling U.S. policy, state convictions based on simple marijuana possession far outnumber the amount at the federal level.
- Ballot Initiative 2 did not affect prior marijuana convictions under Ohio law.



Marijuana and Implications for Nursing Homes



Conditions for Participation – Nursing Homes

- ❖ The Medicare Conditions of Participation, Conditions for Coverage and Requirements for Skilled Nursing Facilities (SNFs) and Nursing Facilities (NFs) are sets of requirements for acceptable quality in the operation of health care entities. They are outlined in 42 CFR part 483, subpart B.
- ❖ The Medicare Conditions of Participation for long term care facilities do not anticipate that Schedule 1 controlled substances will be stored or distributed on the premises.
- ❖ Further, the Social Security Act (SSA) requires that any individual or entity that has been convicted of a felony offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance be excluded from participation in any federal health care programs.
- ❖ Due to accreditation through the Centers for Medicare & Medicaid Services, nursing homes/operators can face penalties, lose federal funding, and/or be excluded from participation by allowing patients to use marijuana, including medical cannabis.

Medical Marijuana & Nursing Homes

❖ Balancing resident rights and conditions of participation

- **42 C.F.R. § 483.10 - Residents Rights**: Includes resident right to self-determination, freedom of choice, the right to have needs reasonably accommodated, and the right to participate in his or her treatment, including the self-administration of medications (when deemed clinically appropriate).
- **42 C.F.R. §483.25 - Quality of Care**: Each resident must receive, and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care.

Enforcement Guidance?

- U.S. Department of Health and Human Services (HHS) and the Centers for Medicare & Medicaid Services (CMS) have largely been silent on the issue of marijuana and actual enforcement actions in the realm of nursing homes / senior care residents.
- Mandatory exclusion under the SSA is required only after a felony conviction relating to the "unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." This does not provide clarity on facilitating or allowing use.
- While there have been no reported cases of exclusion or threats of exclusion against any operator for simply allowing marijuana use, there is a nonetheless risk of exclusion involved.
- HHS's recent recommendations mitigate, but do not eliminate risks.

What About Assisted Living Facilities?

- ❖ **Residential Care Facilities (RCF) and Assisted Living Facilities (ALF) are NOT regulated by the federal government.**
- ❖ **Private pay ALFs must comply with state law in order to allow medical marijuana on their facility.**



Medical Marijuana in Assisted Living Facilities

- ❖ **While private pay assisted living facilities have a much lower risk of enforcement, some facilities may be hesitant to allow medical marijuana on the premises due to the drug's federal classification and status.**
- ❖ **ALFs are NOT required to allow medical marijuana at their facility. It is NOT a resident right.**



Assisted Living Facilities – Medicaid

❖ Ohio's Assisted Living Medicaid Waiver Program

- Ohio's Assisted Living Waiver Program pays the costs of care in a participating assisted living facility for eligible people with Medicaid, allowing the consumer to use his or her resources to cover "room and board" expenses.
- For Medicaid beneficiaries, providers must certify they are in compliance with all state *and* federal law when billing for services.
- ALFs who participate in Medicaid will have the same issues as Nursing Homes with federal funding being paid to a facility allowing a still-illegal Schedule I Controlled Substance.

Can AL staff help administer? Handle?

- ❖ Because the medication is being provided to an "ultimate user", staff should not administer medical marijuana.
 - "Administration" generally means the direct application of a drug to the body of a patient either by injection, inhalation, ingestion, or any other means.
- ❖ However, assistance with self-administration can be handled per facility policy (e.g. staff member removes it from locked location in the resident's apartment and brings it to the resident).



Marijuana Use by Staff

❖ Ohio law does not:

- Require an employer to permit an employee's use, possession or distribution of marijuana.
- Require an employer to accommodate an employee's use, possession or distribution of marijuana.
- Prohibit an employer from taking any action that it may take under current law because of a person's use, possession or distribution of marijuana. An employer may refuse to hire, discharge or take adverse employment action due to an individual's use, possession or distribution of marijuana.
- Prohibit an employer from keeping or establishing and enforcing a drug-free workplace policy.
- Prohibit an employer from keeping or establishing and enforcing a lawful drug-testing policy.
- Supersede any federal rules governing employment in federally-regulated industries.
- Create a private right of action against employers.

ADA & State Disability Discrimination Laws

ADA does not require a reasonable accommodation of medical marijuana used to treat a disability

- "Illegal use" exception to ADA coverage
- Marijuana remains illegal under federal law

Ohio's law explicitly does not require accommodation

- Still must accommodate the underlying disability

Staff Use of Marijuana

➤ **A number of factors have caused employers to reevaluate their position**

- Historically low unemployment rates
- A lack of qualified candidates
- Loss of candidates/employees due to positive test results
- Shifting societal attitudes regarding marijuana use

➤ **Increasingly, employers have begun to consider alternatives that include:**

- Changing testing practices
- Changing policies, including drug-free workplace policies, with regard to marijuana

Staff Use of Marijuana Cont'd

➤ **But...testing is imprecise:**

- Cannot determine whether an employee was impaired at a specific time.
- Cannot determine when last used – so employees who test positive may not be impaired.
- Various testing methods (saliva, urine, hair), each with different “windows of detection”.

➤ **Marijuana affects depth perception, reaction time, coordination and other motor skills and creates sensory distortion.**

➤ **Employees testing positive for marijuana had 85% more injuries and 75% greater absenteeism compared to those who tested negative – National Institute on Drug Abuse; Journal of Occupational and Environmental Medicine.**

Medical Marijuana Alternatives (Medications)

- **Any product, including a cannabis product, which is marketed with a claim of therapeutic benefit or with any other disease claim is considered to be a “drug”.**
- **A new drug must be approved by the FDA for its intended use before it may be introduced into interstate commerce.**
- **Four products approved:**
 1. **Marinol** (dronabinol) (1985): nausea from cancer chemotherapy. Schedule III controlled substance.
 2. **Cesamet** (nabilone) (1985 / 2006): nausea & neuropathic pain. Schedule II controlled substance.
 3. **Syndros** (dronabinol) (2016): nausea from cancer chemotherapy. Schedule II controlled substance.
 4. **Epidiolex** (CBD) (2018): for seizures. Removed from DEA's controlled substance list in 2020.

Marijuana Alternatives (Non-Medications)

Hemp:

- The plant *Cannabis sativa* and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a Delta-9 tetrahydrocannabinol concentration of **not more than 0.3 percent** on a dry weight basis.
 - Delta-9 is what produces the intoxicating effect.

Cannabidiol (CBD):

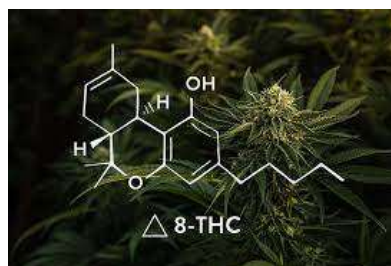
- The primary non-psychoactive compound in *Cannabis sativa*.
- CBD has been lauded for its health benefits.



Marijuana Alternatives Cont'd

Delta-8:

- Delta-8 tetrahydrocannabinol ("Delta-8 THC") is a naturally occurring minor cannabinoid compound, or active constituents, found in the Cannabis sativa plant.
- Typically manufactured in concentrated amounts from hemp-derived CBD.
- "Diet Weed" or "Weed Light"- Less potent than Delta-9 THC.
- Depending on quality, quantity and other factors, Delta-8 THC can produce psychoactive effects.



Hemp, CBD, and Delta-8

Federal:

❖ 2018 Farm Bill

- Legalizes cultivation and commercialization of hemp.
- "Hemp" defined as containing less than 0.3% THC.

❖ 2023 Farm Bill – postponed per Congressional resolution

- Extends 2018 Farm Bill through Sept. 2024



SB 57:

- Signed into law by Governor Mike DeWine on July 30, 2019.
- Decriminalizes hemp and hemp products and allows anyone to (1) buy, sell, or possess hemp or a hemp product, and (2) cultivate and process hemp, if properly licensed.

Hemp, CBD, and Delta-8 Cont'd

Legality of Delta-8 THC

❖ Federal Law:

- If derived from hemp, it's legal.
- If synthetically created or from non-hemp plants, it is illegal.
- Numerous FDA warning letters to manufacturers of Delta-8 THC products for violating the Federal Food, Drug, and Cosmetic Act.
- The warning letters address misbranding, such as not providing adequate instructions for use, illegal marketing of products as treatments for medical conditions or other therapeutic uses and adding Delta-8 THC to foods, such as gummies, chocolate and other consumables.

❖ Ohio Law:

- Hemp-derived Delta-8 is legal in Ohio.
- The Ohio Department of Agriculture regulates hemp products (cultivating; testing; processing; and marketing).

Delta-8 THC Products

- There's currently no state or federal legislation seeking to change Delta-8's legality...yet
- However, the federal government / DEA might place it as a controlled substance, and Governor DeWine has expressed concerns about it and has interest in regulating or even banning it altogether



Trends in the Future?

- ❖ Changes to Issue 2 laws?
- ❖ Federally legalized?
- ❖ Reimbursable?
- ❖ Employee protections?
- ❖ Expungement / Sealing of Criminal Records?



Bottom Line

- Monitor regulatory developments
- Create policies
- Training
- Frequent changes



Dinsmôre

Accomplish môre. 



Daniel S. Zinsmaster

Partner | Columbus, OH

(614) 628-6949

daniel.zinsmaster@dinsmore.com

Accomplish môre.™