



Grandma Wants Special Brownies? Ohio Nursing Facilities Prepare for Medical Marijuana

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Undoubtedly, Ohio nursing facility (independent living, assisted living, skilled nursing, etc.) residents and their families will raise similar questions to determine whether medical marijuana treatment may help them or their loved ones, respectively. Therefore, nursing facility leaders will need to take time to understand medical marijuana laws and, regardless of whether a nursing facility will prohibit or permit the product's use, adopt a compliance program with sound policies and procedures to address all legal risks and prevent the threat of federal prosecution.

Although Ohio's medical marijuana law authorizes qualifying patients to use medical marijuana beginning in September 2018, the federal Controlled Substances Act (CSA) classifies marijuana as a Schedule I controlled substance, making its use, even for medical purposes, illegal – ANNNNND CUT, THAT IS ALL FOR TODAY FOLKS, NOTHING FURTHER HERE.

Jokingly, this discussion is paused here because almost every legal article out there seems to indicate that this is the only understanding necessary when it comes to medical marijuana – “medical marijuana is illegal federally.” Oh, and “Attorney General [Jeff Sessions hates marijuana](#),” that is it, right? No, this is a shallow understanding and nursing facilities must cultivate deeper knowledge of medical marijuana laws for a couple of reasons: (1) their elderly patients are more likely to inquire about medical marijuana treatment because this population often suffers from many of the [qualifying medical conditions](#) for which medical marijuana treatment is available (Alzheimer's disease, chronic pain, cancer, glaucoma, among others) and (2) patients generally are willing to [replace opioids and other prescription drugs with medical marijuana](#). AND NOW, BACK TO OUR REGULARLY SCHEDULED (I) PROGRAM.

Federal Law

Yes, the federal CSA classifies marijuana as a Schedule I controlled substance. Furthermore, long-term care facilities must comply with [federal laws and regulations](#) to qualify to participate as a skilled nursing facility in the Medicare program, and as a nursing facility in the Medicaid program (note that in contrast, assisted living facilities are not federally regulated.) Consequently, if an Ohio nursing facility allows patients to use medical marijuana, will it be federally prosecuted? Will it lose its Medicare enrollment?

While it is impossible to confirm whether an Ohio nursing facility that allows medical marijuana will be federally prosecuted, the likelihood of that happening seems low because the biggest protection to those engaged in state-sanctioned medical marijuana conduct is still in place – the Rohrabacher Amendment (discussed below). Additionally, a nursing facility can circumvent some concerns by ensuring that it does not commit a prosecutable offense under federal law. For example, nursing facilities must not engage in the delivery of medical marijuana to their patients and must not administer medical marijuana to their patients. These are two acts that are specifically prohibited by the CSA.

Rohrabacher Amendment

The Rohrabacher Amendment has been interpreted as prohibiting the Department of Justice (DOJ), which includes the Drug Enforcement Administration, from using federal funds to interfere with state-sanctioned medical marijuana programs. The Amendment is not permanent law, which means it must be periodically renewed by Congress. Most recently, it was extended to September 2018 in the spending bill enacted by Congress on March 21, 2018.

Federal courts have interpreted the Amendment as a bar to federal medical marijuana prosecutions when the accused can [demonstrate](#) that their conduct strictly complied with the state's medical marijuana laws.^[1] Three district courts within the Sixth Circuit – the federal court system with jurisdiction over Ohio – have applied this reasoning to enjoin federal medical marijuana

prosecutions in Michigan, which also has a medical marijuana program.^[2] Therefore, the Amendment can give nursing facilities some solace that if permission is given to patients to use medical marijuana, and all conduct remains within the boundaries of [Ohio's medical marijuana law](#), prosecution is unlikely.

Developing a Compliance Program

So how does a nursing facility ensure that it is strictly complying with the federal CSA and Ohio's medical marijuana law? The nursing facility must develop a compliance program with policies and procedures that meticulously tracks the language of the CSA and Ohio's medical marijuana law to ensure that all conduct involved in a patient receiving and consuming medical marijuana is compliant. Not only will a compliance program provide assurance that the nursing facility can rely on the Amendment for protection from federal prosecution, it will be an initial deterrent to any federal prosecutor considering a charge against the facility. You see, one of the principles utilized by the DOJ when considering whether to charge a business organization is the [existence and effectiveness of a corporate compliance program](#). Therefore, the existence of a nursing facility's robust compliance program is likely to cause any federal prosecutor to focus his or her attention and resources elsewhere.

Measures may also be explored and included in the compliance program to ensure a patient safely maintains their medical marijuana supply. This will mitigate the risk that any patient in a nursing facility has their medical marijuana taken from their room by nursing facility personnel or other residents.

These are only a few examples of what should be included in a nursing facility's compliance program, but tracking the nuances of the product from delivery to administration should all be addressed, and all personnel should be trained on the subject to avoid any funny business.

Ohio nursing facilities need to prepare for September and the rollout of Ohio's medical marijuana program. To be sure your compliance program is in place, please do not hesitate to contact a

member of Frost Brown Todd's [Health Care Industry Team](#). We have health care lawyers with solid knowledge and understanding of the law, who can assist in the development and implementation of compliance programs.

Visit our [Health Law Matters blog](#) for more insight into legal issues impacting healthcare entities.

[1] [United States v. McIntosh](#), 833 F.3d 1163, 1178 (9th Cir. 2016).

[2] See *United States v. Bally*, No. 17-20135, 2017 WL 5625896, at *4 (E.D. Mich. Nov. 22, 2017); *United States v. Samp*, No. 16-CR-20263, 2017 WL 1164453 at *1 (E.D. Mich. Mar. 29, 2017); *United States v. Ragland*, No. 15-CR-20800, 2017 WL 2728796 at *1 (E.D. Mich. June 26, 2017).

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