

# MEDICAL MARIJUANA IN OHIO

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# Medical Marijuana In Ohio

## Agenda

- Federal Law Governing Marijuana
- Ohio Medical Marijuana Law
- What Physicians Should Understand
- Other Considerations

# What is Medical Marijuana?

- **Federal Definition:**
  - Using the whole unprocessed marijuana plant or its basic extracts to treat a disease or symptom
- **State Definition**
  - Marijuana that is cultivated, processed, dispensed, tested, possessed, or used for a medical purpose

# Is Marijuana Legal Now?

- **Federal Law:**
  - Under federal law, marijuana is prohibited for both recreational and medical uses
- **State Law:**
  - Eight states and the District of Columbia allow “recreational” (i.e., personal) use of marijuana
  - 31 states and the District of Columbia allow medical use of marijuana

# Federal Law Governing Marijuana

- Marijuana is classified as a Schedule 1 drug under the federal Controlled Substances Act.
  - There are no exceptions for medical use
  - The federal government's position is that "to date, researchers have not conducted a sufficient number of large-scale clinical trials to show that the benefits of the marijuana plant (as oppose to the cannabinoid ingredients) outweigh its risks in patients it is meant to treat."
  - Two FDA approved medications contain cannabinoid chemicals in pill form

# Federal Enforcement Policy

- **2009**: Ogden Memo – Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana
- **2011**: Cole Memo – Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use
- **2013**: Cole Memo – Guidance Regarding Marijuana Enforcement
- **2015**: Stemier Memo – Memo to All Federal Prosecutors

# Federal Enforcement Policy

- 2017:
  - Trump campaign advocated for transparency in federal health care policy and for providing significant latitude to states
  - Sessions has issued controversial memo and has pushed for greater enforcement and criminal sentences
  - Current bi-partisan efforts

# How Does the Current Paradox Impact Business?

- **Potential enforcement activity results in criminal, licensure, legal, and financial risks to businesses and their principals**
  - e.g., physician licensure requirements, attorney ethical implications, HUD financing, employment laws, fair housing laws
- **Regulatory hurdles increase cost of doing business**
  - e.g., tax deductions, FDIC restrictions, workforce impact, litigation by employees and tenants
- **Evolving state of the laws results in increased investment related risk – bolster your PPM risk factors!!**



# Federal Enforcement Policy



Marijuana: Last Week Tonight with John Oliver (HBO)

[https://www.youtube.com/watch?v=BcR\\_Wg42dv8](https://www.youtube.com/watch?v=BcR_Wg42dv8)

# OHIO LAW GOVERNING MARIJUANA

- 2015
  - Effort to legalize marijuana defeated
- 2016
  - Proposal to amend Ohio Constitution to legal medical marijuana
  - HB 523 passes and drive for constitutional amendment was then suspended
    - Legalizes marijuana under Ohio law for certain specified medical purposes – prohibits cultivation for personal, family, or household use – recreational marijuana is still illegal

# Ohio House Bill 523

- May, 2016 – Enacted by Ohio's General Assembly
- June, 2016 – Signed by Governor Kasich
- September, 2016 – Effective date
- September, 2018 – Operational date



# Ohio House Bill 523

- Ohio HB 523 legalizes marijuana in Ohio for certain specified medical purposes
- Recreational use of marijuana is still illegal under both federal and Ohio law



# What are the Qualifying Conditions?

- AIDS
- Amyotrophic lateral sclerosis
- Alzheimer's disease
- Cancer
- Chronic traumatic encephalopathy
- Crohn's disease
- Epilepsy or another seizure disorder
- Fibromyalgia
- Glaucoma
- Hepatitis C
- Inflammatory bowel disease
- Multiple sclerosis
- Pain that is either chronic and severe or intractable
- Parkinson's disease
- Positive status for HIV
- Post-traumatic stress disorder
- Sickle cell anemia
- Spinal cord disease or injury
- Tourette's syndrome
- Traumatic brain injury
- Ulcerative colitis

# What are the Permissible Forms of Medical Marijuana?

- ✚ Inhalation of marijuana through a vaporizer (not direct smoking)
- ✚ Oils
- ✚ Tinctures
- ✚ Plant material
- ✚ Edibles
- ✚ Patches
- ✚ Any other forms approved by the State Board of Pharmacy



# What is the Implementation Timeline?

<b>September 5, 2016</b>	<b>Medical Marijuana Control Program established</b>
<b>May 6, 2017</b>	<b>Adoption of Cultivator Rules</b>
<b>September 8, 2017</b>	<b>Adoption of:</b> <b>(a) Processor Rules</b> <b>(b) Testing Laboratory Rules</b> <b>(c) Dispensary Rules</b> <b>(d) Patient/Caregiver Rules</b> <b>(e) Physician Certificate to Recommends Rules</b>
<b>September 8, 2018</b>	<b>Ohio Medical Marijuana Program Operational</b>

# Who are the Regulators?

- Department of Commerce – issues licenses to medical marijuana cultivators, processors, and testing laboratories
- State Board of Pharmacy – registers patients and caregivers, issues licenses to medical marijuana retail dispensaries, and monitors usage through OARRS
- State Medical Board – issues certificates to physicians seeking to recommend treatment with medical marijuana
- Medical Marijuana Advisory Committee – makes recommendations regarding Medical Marijuana Control Program



# Who are the Stakeholders?

**PATIENTS**

Processors

**Cultivators**

*Banks*

**Physicians**

*Lawyers*

Testing Laboratories

*Investors*

**Tenants**

*Landlords*

Zoning Boards

*Others*

**Employers**


**Dispensaries**

# What are Some of the New Licensure Requirements?

- **Licensed by Department of Commerce**
  - Cultivators
  - Testing Laboratories
  - Processors
- **Licensed by Department of Pharmacy**
  - Retail Dispensaries

# Once Licensed, Can these Businesses Operate Anywhere?

- Ohio law prohibits cultivators, processors, retail dispensaries, and laboratories from being located within 500 feet of a school, church, public library, public playground, or public park
- Townships and municipal corporations may prohibit or limit number and location of retail dispensaries
- Land on which medical marijuana is cultivated or processed does not qualify for current agricultural use valuation for property tax purposes



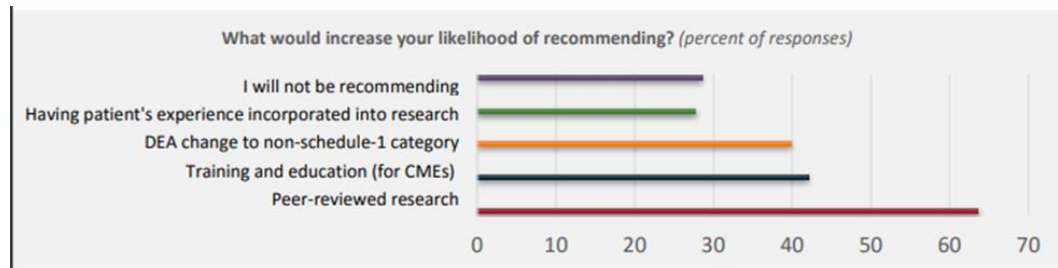
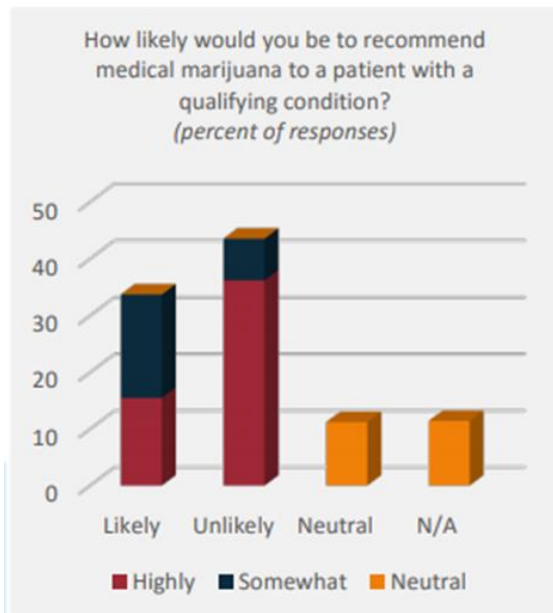
# **What Do Ohio Physicians Need To Understand About Medical Marijuana From a Legal Perspective?**

# What Do Ohio Physicians Need To Understand?



Ohio physicians have some reservations about medical marijuana.

# What Do Ohio Physicians Need To Understand?



2016 Survey by the Board of Medicine.

<https://www.medicalmarijuana.ohio.gov/Documents/advisory-committee/December%202016/Physician%20Survey%20-%20Handout.pdf>

# What Do Ohio Physicians Need To Understand?

- Ohio Physicians recommend use of medical marijuana



- Ohio physicians are not permitted to prescribe medical marijuana
- Possessing, distributing or aiding someone to possess or distribute marijuana is a violation of federal law
- Recommending is arguably physician-patient speech protected under First Amendment of U.S. Constitution

# What Do Ohio Physicians Need To Understand?



- **Ohio physicians may recommend medical marijuana if they have a Certificate to Recommend from the State Medical Board of Ohio**
  - Mid-level providers (e.g., physician assistants and nurse practitioners) are not permitted to have a Certificate to Recommend
  - There is no fee for the Certificate to Recommend



# What Do Ohio Physicians Need To Understand?



- **Applications for a Certificate to Recommend are made through the Medical Board**
  - The Medical Board began accepting applications during March, 2018
  - The Medical Board will review applications during its monthly meetings
  - Physicians apply through the eLicense portal
  - More information is available at the following link: <http://med.ohio.gov/Apply/Certificate-to-Recommend-CTR>

# What Do Ohio Physicians Need To Understand?



State Medical Board of Ohio Video

<https://www.youtube.com/watch?v=xz25rW1tnMI#action=share>

# What Do Ohio Physicians Need To Understand?

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Physicians must satisfy certain eligibility requirements in order to obtain a Certificate to Recommend

### Eligibility Requirements

- Active and unrestricted Ohio license to practice medicine and surgery (M.D. or D.O.)
- Access to the Ohio Automated RX Reporting System (OARRS)

# What Do Ohio Physicians Need To Understand?

## Eligibility Requirements

- Active Drug Enforcement Administration (DEA) registration
- Never denied a license to prescribe, possess, dispense, administer, supply, or sell a controlled substance by DEA due to inappropriate prescribing, furnishing, dispensing, administering, supplying, or selling a controlled substance, or never have had a DEA or state prescribing license restricted for same
- Never subject to disciplinary action by any licensing entity based on prescribing, furnishing, dispensing, diverting, administering, supplying, or selling a controlled substance or other dangerous drug

# What Do Ohio Physicians Need To Understand?

## Eligibility Requirements

- No ownership or investment interest in, or compensation arrangement with, a medical marijuana entity licensed or seeking licensure in Ohio.
- Completion of at least two hours of CME in OSMA or OOA approved courses that assist in the diagnosing of a qualifying medical condition for medical marijuana and treating qualifying conditions with medical marijuana

# What Do Ohio Physicians Need To Understand?

- Physicians will renew their Certificates to Recommend during the licensure renewal process
  - Certificate to Recommend will automatically renew with the physician's license
  - Additional two hours of CME required prior to automatic renewal



# What Do Ohio Physicians Need To Understand?

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### Minimum Requirements to Satisfy Standard of Care Under Ohio Medical Board Rules

#### Minimum Requirements

- Establish and maintain bona fide physician-patient relationship, including (a) an in-person physical examination of the patient by the physician; (b) a review of the patient's medical history by the physician; and (c) an expectation of providing and receiving care on an ongoing basis
  - Medical marijuana is available to minors if consent of parent or other person responsible for providing consent to treatment

# What Do Ohio Physicians Need To Understand?

## Minimum Requirements

- Documentation in the medical records must include at least the following:
  - Patient's name and the dates of the office visits
  - Description of the current medical condition being treated
  - Detailed medical, prescriptive, and substance use disorder history
  - Review of diagnostic test results, prior treatment, and current medications



# What Do Ohio Physicians Need To Understand?

## Minimum Requirements

- Documentation in the medical records must include at least the following:
  - That standard medical treatment has been attempted or considered or, if not, why
  - Drug screen at physician's discretion if the physician unveils evidence of drug abuse
  - A physical exam and diagnosis of the patient's medical condition
  - Diagnosis or confirmation of prior diagnosis of a qualifying medical condition for medical marijuana.
    - If patient already diagnosed with a qualifying condition, physician must verify diagnosis with the prior provider that made such diagnosis and document step in the medical records

# What Do Ohio Physicians Need To Understand?

- If physician diagnoses or confirms diagnosis of qualifying medical condition, physician must document
  - Development of treatment plan
  - Review of OARRS report and discussion with patient regarding indicators of possible abuse or diversion of controlled substances reflected on report
  - Explanation of risks and benefits of treatment with medical marijuana
  - Consent of patient (or patient's legal representative in the case of a minor) prior to completing a recommendation
  - Whether the patient needs a caregiver to assist in use or administration and, if so, the name of the designated caregiver

# What Do Ohio Physicians Need To Understand?

- Recommendation must include statement by physician certifying:
  - Bona fide physician-patient relationship exists
  - Patient has been diagnosed with at least one qualifying medical condition
  - Description of the qualifying medical conditions and indication whether terminal with less than 6 months – during follow-up care, physician must confirm whether condition continues to be terminal
  - The physician or delegate has requested OARRS report that covers at least prior 12 months
  - Physician has informed patients of risks and benefits

# What Do Ohio Physicians Need To Understand?



- A Physician must terminate or decline to issue a new medical marijuana recommendation under certain circumstances
  - Diagnosis or symptoms of the qualifying condition no longer exist
  - Physician no longer holds a valid certificate to recommend
  - Patient or caregiver is abusing or diverting medical marijuana
  - Patient is deceased

# What Do Ohio Physicians Need To Understand?

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Employed Physicians should check with their employer regarding relevant policies and restrictions on to their ability to recommend cannabis to patients

# What Do Ohio Physicians Need To Understand?

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- Physicians should review coverage under professional liability insurance policy
  - Many insurance companies will deny coverage of cannabis-related claims because of the federal government's classification of cannabis as a Schedule 1 narcotic
  - See also "Malpractice Liability and Medical Marijuana," American Bar Association – The Health Lawyer (Volume 29, Number 2, December 2016)

# What Do Ohio Physicians Need To Understand?

- ✚ Ohio law (although underdeveloped) provides broad liability protection for physicians.
  - *“a physician is immune from civil liability, is not subject to professional disciplinary action by the state medical board or state board of pharmacy, and is not subject to criminal prosecution for any of the following actions: (1) Advising a patient, patient representative, or caregiver about the benefits and risks of medical marijuana to treat a qualifying medical condition; (2) Recommending that a patient use medical marijuana to treat or alleviate the condition; (3) Monitoring a patient’s treatment with medical marijuana.”*  
O.R.C. Section 4731.30(H)

# What Requirements Apply to Patients?

- ✚ In order to lawfully use medical marijuana in Ohio, patients must:
  - Register (and have caregiver register) with Board of Pharmacy
    - Registration information will not be publicly available
    - Registrations valid for one year unless patient is terminally ill and then registration expires after 6 months
  - Receive a written recommendation from a licensed physician
  - Have application submitted on their behalf by physician who has certificate
    - Must show diagnosis of a qualifying medical condition and evidence patient physician relationship
  - Possess and use cannabis only in the forms and by the methods permitted under HB 523
  - Possess no more than a 90-day supply
  - Obtain medical marijuana from dispensaries--physicians may not possess medical marijuana in the course of their practices



# What are Some Potential Downsides to Patients?

- + Housing
- + Employment
- + Immigration
- + Strict parameters
- + Driving
- + Reputational
- + Others

# How are Employers Impacted?

- ✚ Employers in Ohio can prohibit medical marijuana at work and discipline or fire employees who use, possess, or distribute it at work
- ✚ Employers have no ADA obligation to accommodate an employee who uses marijuana for medical reasons
- ✚ Employers are not required to grant Family and Medical Leave to an employee who wants a leave of absence related to medical marijuana use for treatment of a serious health condition
- ✚ Ohio's law protects employers from lawsuits by employees who are disciplined or fired for reasons related to medical marijuana

# How are Employers Impacted?

- ✚ Ohio's medical marijuana law does not:
  - Require an employer to permit an employee's use, possession or distribution of medical marijuana
  - Require an employer to accommodate an employee's use, possession or distribution of medical marijuana
  - Prohibit an employer from refusing to hire an individual based upon that individual's use, possession or distribution of medical marijuana

# How are Employers Impacted?

- ✚ Ohio's medical marijuana law does not:
  - Prohibit an employer from disciplining or taking any other adverse action against an individual based upon that individual's use, possession or distribution of medical marijuana
  - Prohibit an employer from keeping or establishing and enforcing a drug-free workplace policy

# How are Employers Impacted?

- ✦ Ohio's medical marijuana law does not:
- ✦ Supersede any federal rules governing employment in federally-regulated industries (e.g., DOT regulations)
- ✦ Prohibit an employer from keeping or establishing and enforcing an otherwise lawful drug-testing policy

# What Should Employers do Today?

- ✚ Develop a medical marijuana policy with legal guidance
- ✚ Enforce it consistently
- ✚ Stay current--the law in this area is under development!!!

# What Are Some Ways Employees Are Impacted?

- Unemployment Eligibility. Discharge from employment because of medical marijuana use is considered discharge for just cause if use violated employer's policy or program
- Workers Compensation. Influence of marijuana that is proximate cause of injury results in ineligibility for workers compensation

# Do Landlords Need to Be Concerned About Medical Marijuana Laws? Yes!

- Controlled Substances Act
- HUD Financing
- Fair Housing Laws
- Under current Ohio law, medical marijuana users are not a protected class and landlords do not have to allow medical marijuana use by tenants as a reasonable accommodation





# What Should Landlords Do Today If They Haven't Already?

- ✚ Develop a policy with legal guidance
- ✚ Bolster lease provisions
  - Prohibition on any use or distribution of marijuana on the premises
  - Non-smoking provisions that apply to both cigarette and marijuana
  - Prohibition of illegal activity generally
  - Enforce leases and policies consistently

# Where Can I Go For Additional Information?

- ✚ Ohio Medical Marijuana Control Program  
[www.medicalmarijuana.ohio.gov](http://www.medicalmarijuana.ohio.gov)
- ✚ Ohio State Medical Board  
<http://med.ohio.gov/Apply/Certificate-to-Recommend-CTR>
- ✚ U.S. Drug Enforcement Administration  
[www.dea.gov](http://www.dea.gov)
- ✚ Ohio State Medical Association [www.osma.org](http://www.osma.org)

# QUESTIONS?

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