

MEDICINAL MARIJUANA IN SENIOR LIVING

Complying at the Community Level

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Companies that operate in states where medicinal marijuana is legal can prohibit its use in their communities—or make sure they safely accommodate seniors.

In recent years, 14 states have enacted laws legalizing medical marijuana—and there is evidence that marijuana use among the elderly is increasing. For example, the Substance Abuse and Mental Health Services Administration has reported steady increases in the number of people age 50 and older who report using marijuana. As a result, an increasing number of senior living communities are inquiring about how best to proceed with residents who have prescriptions for marijuana.

Here's what providers should know.

Communities should first be aware of the unique legal status of marijuana. Although it's legal in 14 states for medical use, it remains illegal under federal drug laws. The Obama administration recently issued formal guidelines for federal prosecutors in states that have legalized medical marijuana. Attorney General Eric Holder stated that the U.S. Department of Justice (DOJ) would not focus its resources on prosecuting sick individuals or their caregivers in states that have legalized medical marijuana if they are in compliance with state law.

This should provide some comfort to seniors and caregivers who are complying with state law. However, it does not provide absolute protection from prosecution. Although the DOJ has indicated that it's not a priority, federal prosecutors retain discretion on whether to prosecute medical marijuana users.

Impact on Communities

Senior living companies operating in a state that has legalized medical marijuana will be confronted with a variety of issues as they contemplate allowing residents to use marijuana in their communities. How a community responds to a prescription for marijuana will depend on its view of medical marijuana. Although the issue has not been litigated, a provider that is opposed to medical marijuana (whether on philosophical, medical, or other grounds) can probably prohibit its use on its premises. The fact that marijuana remains illegal under federal law likely should be sufficient justification for a community to ban its use even where a resident uses marijuana to treat a condition that is recognized as a disability.

In the context of employment, the California

LIGHTING UP LEGALLY

These states have passed legislation making medicinal marijuana use legal.

1. Alaska
2. California
3. Colorado
4. Hawaii
5. Maine
6. Michigan
7. Montana
8. Nevada
9. New Jersey
10. New Mexico
11. Oregon
12. Rhode Island
13. Vermont
14. Washington

Supreme Court recently ruled that an employer could terminate an employee who tests positive for marijuana use even though the employee had a prescription to treat a bona fide disability (*Ross v. Ragingwire Telecommunications 2008 Cal. Lexis 1798*). Arguably, a court could apply the same line of reasoning from this case and find that senior living communities can prohibit marijuana usage on their premises.

A community that prohibits medical marijuana can evict a resident who uses it, although the basis for eviction will vary by state. Some state regulations may permit evictions when a resident violates federal drug laws. Others may permit evictions when the resident does not comply with the written policies of the community. If the community has a written rule against (a) smoking, (b) using marijuana, or (c) violating federal laws generally, it could evict a medicinal marijuana user for violation of its policies.

Marijuana-Friendly Measures

Senior living companies and communities that wish to accommodate a resident's use of medicinal marijuana must carefully think through the issues this presents. Medical marijuana is a prescription drug and the same rules for all prescription drugs apply. Initially, a community must determine whether the resident can administer his or her own medications.

If not, the community will need to treat the resident's marijuana prescription as it would any other prescription. This may include centrally storing the drug.

There are some legal risks involved in handling a resident's prescription marijuana. While the Obama administration is more tolerant of medical marijuana than the Bush administration was, providers may still wish to minimize their risk by not storing and disseminating marijuana. If a resident is incapable of handling his or her own medications and the community does not wish to centrally store the marijuana, these are the available options:

- Don't allow medical marijuana.
- Require the resident to use Marinol, an FDA-approved synthetic drug.
- Have an outside caregiver assist the resident with medicinal marijuana. The caregiver would either bring the drug to the community each time or ensure that it was inaccessible to the resident if stored in the apartment.
- Allow the resident to obtain marijuana at a local outpatient establishment.

The last option presents additional concerns for a senior living community. The resident would need to travel to and from the establishment and no community wants a frail resident (who is incapable of handling his or her own medications) traveling while under the influence of any kind of controlled substance. The community would need to assist the resident by arranging for appropriate transportation and perhaps an escort, just as it would for any resident who leaves the community to obtain medical treatment.

Local Accommodations

Residents who can administer their own medications present a different set of issues for senior living communities. For example, the community would need to have a locked storage area so the medication would be inaccessible to other residents, and perhaps staff. Second, the community would need to establish a place for the resident to smoke. Most communities ban smoking indoors, but may consider an exception for medical marijuana. If so, the community would have to ensure it has strategies in place to prevent second-hand smoke, such as installing a smoke filter.

If smoking is only permitted outdoors, second-hand smoke issues still must be

addressed, perhaps by designating an outdoor smoking area just for medicinal marijuana users. Finally, for any resident who uses marijuana (or Marinol), the community must take precautions to minimize the risk of falls or other injuries that an intoxicated resident may sustain.

As medicinal marijuana use becomes more prevalent among seniors, we will no doubt gain greater insight into the myriad issues that will arise. We can also expect

to see state agencies develop policies and perhaps even regulations to address these emerging issues. □

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