Minnesota Department of Health
HEALTH REGULATION DIVISION

Issue Brief: Medical Cannabis in Health Care Facilities

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DISCLAIMER OF LEGAL ADVICE: The following is provided by the Minnesota Department of Health for informational purposes only. This information is not legal advice, and should not be relied upon as legal advice. Readers are directed to consult with a lawyer of their own choosing for legal advice.

The references to Minnesota and Federal law are not intended to be an inclusive, exhaustive list of all potential legal authority that might apply to the issues discussed. Minnesota law related to medical cannabis and health care providers and facilities covers only potential sanctions under Minnesota law and does not override federal law or protect against potential federal criminal prosecution. Readers need to be aware of any potential conflicts between federal and state law and, after obtaining legal advice from their own attorney, decide how they want to approach medical cannabis in their facilities or in their professional practice.

Background

On May 29, 2014, Governor Dayton signed the Minnesota Medical Cannabis Act into law (Minn. Stat. Sec. §§152.22 to 152.37). This law allows those with a qualifying medical condition (certified by a health care practitioner) to enroll in the patient registry program established by MDH and, if certain conditions are met, be eligible to receive certain designated forms of smoke-free medical cannabis. The intent of the law is designed to enable Minnesota patients to engage in the therapeutic use of cannabis while preventing it from being misused or diverted from its medical purpose.

However, under current federal law, marijuana is classified as Schedule I drug[1] under the Controlled Substances Act of 1970 (CSA). This means that the cultivation, manufacture, sale distribution, and use of medical cannabis violates the CSA and constitutes a federal felony. This conflict between state and federal law raises many legal questions for Minnesota residents and health care providers, and the answers are not evident.

[1] Schedule I means the drug or other substance has a high potential for abuse, has no currently accepted medical use in treatment in the United States, and there is a lack of accepted safety for use of the drug or other substance under medical supervision (refer to 21 U.S. Code § 812)

State Law

In accordance with the Minnesota Medical Cannabis Act, nursing homes, boarding care homes, *assisted living facilities* and hospitals may adopt reasonable restrictions on use and storage. MDH reads the law to include MDH licensed home care providers even though home care providers are not specifically identified because assisted living settings are included and home care services are provided in assisted living settings. The restrictions may include a provision that the provider will not store or maintain the patient's supply of medical cannabis, that the provider is not responsible for providing the medical cannabis for patients, and that medical cannabis be used only in a place specified by the provider. Under Minnesota state law, employees of these facilities are not subject to violations under the medical cannabis statutes for possession of medical cannabis *while carrying out employment duties*, such as providing or supervising care to a registered patient, or distribution of medical cannabis to a registered patient (refer to Minn. Stat. Sec. §152.34)

Federal Law

In a 2009 memo to federal prosecutors, the Department of Justice (DOJ) advised federal prosecutors to focus on core federal enforcement priorities. The memo explains that the DOJ's core enforcement priority was the "prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks" and that resources should be directed toward those objectives. It further explains that federal resources should not be utilized on "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."

The Department of Justice provided another memo in August of 2013 (the Cole memo), also advising federal prosecutors to exercise prosecutorial discretion. However, it also stated that there is not a guarantee, safe harbor, or immunity of any kind that federal authorities will not prosecute marijuana offenses. Like the previous memo, the Cole memo also detailed federal enforcement priorities, none of them including the use of medical cannabis legal under state law. The Cole memo expects state governments to "implement strong and effective regulatory and enforcement systems."

Centers for Medicare and Medicaid Services

Providers certified by the Centers for Medicare and Medicaid Services (CMS) are subject to a Condition of Participation that requires providers to operate and provide services in accordance with all applicable Federal and State laws. Because marijuana is classified as a Schedule 1 controlled substance, that classification renders the manufacture, distribution, or possession of marijuana a criminal offense[2]. Therefore, it is CMS's standpoint that federal law prohibits certified providers from dispensing medical marijuana.

Despite federal exercise of prosecutorial discretion, marijuana remains a Schedule 1 drug under federal law, and federal law regulating marijuana supersedes state law. Based on the Department of Justice memos (such as the 2009 and the 2013 Cole memo), it is unlikely that federal authorities would

[2] CMS Newsletter, "Best of the West". Volume 4 Issue 2, Newsletter Date June 2011

prosecute individuals for legally receiving and using medical cannabis under state law. However, Minnesota providers certified by CMS should be aware they may not be insulated from federal enforcement, given guidance offered by CMS continues to reflect the fact that marijuana is a federally controlled substance and that certified providers must remain in compliance with all applicable federal laws.

Conclusion

While eligible Minnesota residents are permitted under state law to use medical cannabis, certified providers may be at risk of federal action, such as losing federal reimbursement for allowing residents to use medical cannabis. As mentioned before, providers may adopt reasonable restrictions on the use of medical cannabis by registered patients by electing policies that they will not store or maintain the patient's supply of medical cannabis, that they are not responsible for providing the medical cannabis to patients, and/or that medical cannabis be used only in a place specified by the provider. Until the conflict between state and federal law resolves, Minnesota providers, after consulting with their own attorney, will need to assess all risk factors and make the best decision for their clients and business.

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