

Medical Marijuana in Post-Acute Care

By Marla McDade Williams

Former Deputy Administrator of the
Division of Public and Behavioral Health

Objectives

- Describe Nevada's Medical Marijuana (MM) law
- Identify Nevada's laws about patient rights in post-acute care
- Identify issues related to the Centers for Medicare and Medicaid Services, aka CMS
- Discuss policy considerations

What is “medical marijuana”?

- As a plant, may not be distinct from marijuana used recreationally
- Used to alleviate certain symptoms of patients to help them deal with consequences of a medical condition
- Some evidence certain strains help with specific conditions, but needs more study for higher level of agreement

NV's MM Cardholder Law

- Chapter 453A of the Nevada Revised Statutes and the Nevada Administrative Code
- Patients in NV have been able to use marijuana for medicinal purposes since 2001
- Only MDs and DOs may recommend it
- Is not a prescription
- Law is largely one identifying who may legally possess marijuana
- Requires a person to hold a registry card or be registered as a caregiver of a valid cardholder

Allowable Conditions

NRS 453A.050 “Chronic or debilitating medical condition” defined.

“Chronic or debilitating medical condition” means:

1. Acquired immune deficiency syndrome;
 2. Cancer;
 3. Glaucoma;
 4. A medical condition or treatment for a medical condition that produces, for a specific patient, one or more of the following:
 - (a) Cachexia;
 - (b) Persistent muscle spasms, including, without limitation, spasms caused by multiple sclerosis;
 - (c) Seizures, including, without limitation, seizures caused by epilepsy;
 - (d) Severe nausea; or
 - (e) Severe pain; or
 5. Any other medical condition or treatment for a medical condition that is:
 - (a) Classified as a chronic or debilitating medical condition by regulation of the Division; or
 - (b) Approved as a chronic or debilitating medical condition pursuant to a petition submitted in accordance with NRS 453A.710.
- (Added to NRS by 2001, 3054)

Allowable Conditions (cont)

- Specific conditions can be added by regulation or by petitioning the State Medical Director
- Due to a petition early in 2014, post-traumatic stress disorder, or PTSD, was authorized as a condition for which an MD or DO may recommend the use of marijuana for patients
- No other new conditions had been added as of the end of June 2014

Allowable Possession Limits

Pursuant to Section 3 of **NRS 453A.200**, as of April 1, 2014:

3. The exemption from state prosecution set forth in subsection 1 applies only to the extent that a person who holds a registry identification card issued to the person pursuant to paragraph (a) of subsection 1 of NRS 453A.220 and the designated primary caregiver, if any, of such a person:

(a) Engage in or assist in, as applicable, the medical use of marijuana in accordance with the provisions of this chapter as justified to mitigate the symptoms or effects of the person's chronic or debilitating medical condition; and

(b) Do not, at any one time, collectively possess, deliver or produce more than:

(1) Two and one-half ounces of usable marijuana in any one 14-day period;

(2) Twelve marijuana plants, irrespective of whether the marijuana plants are mature or immature; and

(3) A maximum allowable quantity of edible marijuana products and marijuana-infused products as established by regulation of the Division.

Enforcement Authority

- Law enforcement enforces the cardholder provisions related to the possession of marijuana
- Division may deny a card under certain limited circumstances
- Cardholder may possess more than the allowable amount under the provisions of NRS 453A.310, “Affirmative defenses.”
- A person found with marijuana, who is not a lawful cardholder/caregiver may be prosecuted through the criminal justice system

Prohibitions

Section 1 of **NRS 453A.300 Acts for which registry identification cardholder is not exempt from state prosecution and may not raise affirmative defense; additional penalty.** [Effective April 1, 2014.]

(a) Driving, operating or being in actual physical control of a vehicle or a vessel under power or sail while under the influence of marijuana.

(b) Engaging in any other conduct prohibited by NRS 484C.110, 484C.120, 484C.130, 484C.430, subsection 2 of NRS 488.400, NRS 488.410, 488.420, 488.425 or 493.130.

(c) Possessing a firearm in violation of paragraph (b) of subsection 1 of NRS 202.257.

(d) Possessing marijuana in violation of NRS 453.336 or possessing paraphernalia in violation of NRS 453.560 or 453.566, if the possession of the marijuana or paraphernalia is discovered because the person engaged or assisted in the medical use of marijuana in:

(1) Any public place or in any place open to the public or exposed to public view;
or

(2) Any local detention facility, county jail, state prison, reformatory or other correctional facility, including, without limitation, any facility for the detention of juvenile offenders.

(e) Delivering marijuana to another person who he or she knows does not lawfully hold a registry identification card issued by the Division or its designee pursuant to NRS 453A.220 or 453A.250.

(f) Delivering marijuana for consideration to any person, regardless of whether the recipient lawfully holds a registry identification card issued by the Division or its designee pursuant to NRS 453A.220 or 453A.250.

Other Provisions Affecting Patients

- Patients may buy from a dispensary, but there are circumstances that allow a patient to continue to grow and produce his own product (Section 6 of NRS 453A.200)
 - A key provision is not having a dispensary within 25 miles of the cardholder's residence
- Law also requires reasonable accommodations for employees who are lawful MM cardholders (NRS 453A.800), but employers are not required to allow MM to be used in the workplace

Employer Accommodations

NRS 453A.800 Costs associated with medical use of marijuana not required to be paid or reimbursed; medical use of marijuana not required to be allowed in workplace; medical needs of employee who engages in medical use of marijuana to be accommodated by employer in certain circumstances. [Effective April 1, 2014.] The provisions of this chapter do not:

1. Require an insurer, organization for managed care or any person or entity who provides coverage for a medical or health care service to pay for or reimburse a person for costs associated with the medical use of marijuana.

2. Require any employer to allow the medical use of marijuana in the workplace.

3. Require an employer to modify the job or working conditions of a person who engages in the medical use of marijuana that are based upon the reasonable business purposes of the employer but the employer must attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of marijuana if the employee holds a valid registry identification card, provided that such reasonable accommodation would not:

(a) Pose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or

(b) Prohibit the employee from fulfilling any and all of his or her job responsibilities.

(Added to NRS by 2001, 3065; A 2013, 3726, effective April 1, 2014)

What the law doesn't do

- Doesn't address whether a patient can specifically use MM in post-acute care facilities
- Doesn't require a physician to recommend marijuana for an eligible patient
- Unlike a prescription, doesn't require a physician to recommend a specific quantity or strain of marijuana for a patient

NV's MM Establishments Law

- In 2013, the NV Legislature enacted a law allowing marijuana to be grown and sold
- Created four types of MM establishments:
 - Dispensaries for retail sales
 - Cultivation facilities to grow marijuana
 - Production facilities to turn marijuana into other products such as edibles, lotions, or other forms for medicinal use
 - Laboratories to test marijuana for potency as well as pesticides, heavy metal content, residual solvents, etc.

Certification of Establishments

- The Division is currently accepting applications for MM establishments (8/5/14 - 8/18/14)
- Authorized establishments must have a state certificate and the required licenses/approvals from local governments
- 66 dispensaries are allowed statewide; does not appear that number will be realized
- The Division will determine the number of cultivation and production facilities and labs

Steps before First Sale

- Division has 90 calendar days to approve or deny an application
- Provisional certificates are the first step and should be issued sometime in November 2014
- Establishments then work with local governments for necessary approvals
- After local government approval, the Division will eventually issue a final registration certificate after demonstrated compliance

Steps before First Sale (cont)

- Once final registration certificate is issued, marijuana needs to be grown and harvested (60 to 120 days)
- First sales may happen in the Spring of 2015
- Not likely until much later in 2015

Rules for Patients in Post Acute Care

- No specific NV laws addressing use of marijuana for medical purposes in post acute care facilities
- Fall back to patient's rights, which are governed by NRS 449.700 to NRS 449.750
- NRS 449.705 specifies transfer of medical records—should be where there is the specific identification of a physician's recommendation that marijuana may help a patient's medical condition

Patient's Rights

- Facilities need to ensure compliance with NRS 449.710
 - Section 5 addresses the “complete and current description of the patient’s diagnosis, plan for treatment and prognosis in terms which the patient is able to understand.”
 - Section 6 addresses informed consent to include:
 - (a) A description of the significant medical risks involved;
 - (b) Any information on alternatives to the treatment or procedure if the patient requests that information;
 - (c) The name of the person responsible for the procedure or treatment; and
 - (d) The costs likely to be incurred for the treatment or procedure and any alternative treatment or procedure.

Patient's Rights (cont)

- Ensure compliance with NRS 449.720, including as required by Section 1, the patient has the right to:
 - (d) Retain his or her privacy concerning the patient's program of medical care.
 - (e) Have any reasonable request for services reasonably satisfied by the facility considering its ability to do so.
- As required by Section 2, "discussions of the care of a patient, consultation with other persons concerning the patient, examinations or treatments, and all communications and records concerning the patient are confidential" unless patient consents to sharing

Patient's Rights (cont)

- Pursuant to NRS 449.730, the patient must be informed of his rights
- Fundamentally, NV's medical marijuana law exercises the concept of state's rights
- Similarly, these patient rights are established by state law
- Residents are likely using a caregiver & caregiver has legal authority to provide product to patient

Confidentiality Provisions

- Confidentiality is key to the cardholder program (NRS 453A.700)
- Division cannot share information with a facility about whether a person is an authorized cardholder
- Division cannot share information with a facility about the physician who recommended marijuana for a patient
- Division can verify that a person is an authorized cardholder during an inspection of a facility

Applicable State Regulatory Sections Related to Patient's Rights

- The following provisions address patient's rights in the Nevada Administrative Code in post-acute care facilities:
 - Paragraph (f) of Section 1 of NAC 449.268 specifies that residents are allowed to make their own decisions in residential care facilities
 - Section 1 of NAC 449.74449 requires skilled nursing facilities to give notice to each patient admitted to the facility of:
 - (a) His or her rights as a patient and of the policies of the facility relating to the conduct and responsibilities of patients in the facility; and
 - (b) The services available at the facility and the charges for those services, including, without limitation, charges for services that are not covered by the facility's per diem rate.

Applicable State Regulatory Sections (cont)

- Under state law, other provisions that may apply for skilled nursing facilities include:
 - Quality of Care
 - Provision of Services
- Patient's rights aren't as specific for residents of homes for individual residential care, but the NRS provisions still apply and can be cited

What about federal rules?

- There are references to:
 - Abuse of marijuana (aka cannabis)
 - Treatment issues related to comorbidities
- These issues are distinct from using marijuana to manage or treat a medical condition
- CMS does not appear to recognize managing or treating a medical condition with marijuana

Discussion of Policy Considerations

- “Marijuana Laws Put Senior Living Between a Bud and a Hard Place”
- Accommodating recreational use is much different from accommodating medical use
- Unlike Colorado or Washington, Nevada facilities only need to accommodate medical use

Recommendations

- Division should work with industry to identify expectations of facilities for working with residents/patients who are using marijuana for medical purposes
- Facilities should review policies to ensure they are accommodating patient's needs
- Facilities should ensure policies prevent diversion of patient's marijuana

Concluding Comments

- Bureau of Health Care Quality and Compliance of the Division of Public and Behavioral Health must provide formal guidance to facilities
- Bureau Chief: Kyle Devine, 775/684-1030
- Other resources:
 - Advisory Commission on the Administration of Justice's Subcommittee on the Medical Use of Marijuana, Staff: Nicolas C. Anthony, Senior Principal Deputy Legislative Counsel, 775/684-6830