



A physician's guide to navigating medical marijuana registration

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In April 2016, Gov. Tom Wolf signed into law Pennsylvania's compassionate medical cannabis legislation (Act 16), effectively legalizing medical marijuana in the Commonwealth. Since that time, the Pennsylvania Department of Health (DOH) has awarded 12 licenses to grow medical marijuana and 27 licenses to operate medical marijuana dispensaries. It is anticipated that the grow operations and dispensaries will be open for business in early 2018. Although the proponents of medical marijuana have enjoyed widespread support (as evidenced by the 29 states that have enacted a medical marijuana law, including six since 2016), those in the industry are left to trust that Pennsylvania physicians will register with the DOH and send patients to the dispensaries. In other words, now that the legal medical marijuana system is in place, the onus is on physicians to ensure that patients have access to treatment.

Patient and physician registration

It is important for medical professionals to understand that they are not permitted to "prescribe" medical cannabis products. Rather, physicians who have met the registration requirements of Act 16 are permitted to issue "certifications" to patients who qualify

for medical marijuana treatment.

In order for a patient to qualify for medical marijuana treatment, the patient must obtain a certification from a registered physician stating that the patient suffers from one of the 17 "serious medical conditions" identified in Act 16. These conditions include:

- Amyotrophic Lateral Sclerosis;
 - Autism;
 - Cancer;
 - Crohn's Disease;
 - Damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity;
 - Epilepsy;
 - Glaucoma;
 - HIV/AIDS;
 - Huntington's Disease;
 - Inflammatory Bowel Disease;
 - Intractable Seizures;
 - Multiple Sclerosis;
 - Neuropathies;
 - Parkinson's Disease;
 - Post-Traumatic Stress Disorder;
 - Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain in which conventional therapeutic intervention and opiate therapy is contraindicated or ineffective; and
 - Sickle Cell Anemia.
- Once a patient obtains a certification, then the patient must apply for a medical marijuana ID card through

DOH. If the application is accepted, the patient (or a qualified, registered caregiver) may take the medical marijuana ID card to a state-licensed dispensary to obtain marijuana products.

In order for physicians to issue medical marijuana "certifications," they must register with the DOH and complete a four-hour training course offered by DOH-approved providers. The DOH training course covers the following areas:

- Summary of Act 16;
- General information about medical marijuana under state and federal law;
- Scientific research on medical marijuana;
- Recommendations for medical marijuana, including pain management, risk management, palliative care, misuse of opioids and medical marijuana, and informed consent.

Physicians also are required to be licensed to practice medicine in Pennsylvania and be qualified, by training or experience, to treat at least one of the 17 serious medical conditions.

Once registered, the DOH will place the physician's name, business address and medical credentials on the physician medical marijuana registry. The registry does not include contact information (telephone numbers or email addresses).

Importantly, registered physicians

are not permitted to advertise that they are credentialed to certify patients for medical marijuana use. The DOH regulations have not provided much guidance in the way of what constitutes “advertising” or what is actually permitted, including whether physicians may list medical cannabis certification on their “menu” of services.

A certified physician’s obligations

Prior to issuing a medical marijuana certification to a patient with a serious medical condition, registered physicians are required to consult with the patient and review the Prescription Drug Monitoring Program and the patient’s controlled substance history.

In certifying that a patient may use medical cannabis products, physicians are required to identify the recommendations, requirements and limitations as to the form of cannabis and the dosage. The certification also must state the length of time (not to exceed one year) for which the physician believes medical marijuana will be therapeutic or palliative. Physicians are permitted to recommend that a patient consult with a medical professional employed by a medical marijuana dispensary. For example, medical marijuana dispensaries must have a pharmacist on staff, and certifying physicians may defer to the pharmacist’s expertise.

Registered physicians are required to provide continuing care to their patients for the serious medical condition. During the ongoing care of patients, physicians are required to notify the DOH if:

- The patient no longer has the serious medical condition for which the medical marijuana certification was issued;
- Medical marijuana would no longer

be therapeutic or palliative; or

- The patient has died.

Obstacles to physician certification

On July 26, 2017, the DOH opened the physician registry, and Pennsylvania physicians were able to begin the registration process. As of Jan. 5, 2018, approximately 250 physicians have registered for the medical cannabis program, and an additional 400 physicians have started the process. While these numbers place Pennsylvania ahead of the curve compared to other states with similar registration processes, registration is still well below the 75 percent of Pennsylvania physicians who have indicated that they intend to register for the program. With more than 10,000 patients already registered for the medical marijuana program, some physicians are reporting a waiting list of up to 1,000 patients seeking certification.

There are several factors contributing to the shortfall of registered physicians. These factors include:

- Medical marijuana is still illegal under federal law;
- Cannabis products are not an FDA approved treatment;
- The cost of cannabis products is not covered by most medical insurances;
- The Pennsylvania Medical Society in 2015 voted to oppose the Pennsylvania Medical Marijuana Act; and
- Attorney General Jeff Sessions’ opposition to legalized marijuana.

Certainly, the political and medical/scientific concerns are important; however, they are outside the scope of this article. With respect to the legal concerns, there is justifiable consternation in the health care community regarding potential criminal prosecu-

tion of physicians certifying the use of medical cannabis products, especially considering the recent actions of the Department of Justice and Attorney General Jeff Sessions.

The Obama Administration’s policy toward marijuana was set forth in a series of documents drafted by U.S. Department of Justice Deputy Attorney General James Cole (commonly referred to as the Cole Memorandum). This policy directed federal prosecutors to use investigative and prosecutorial resources to address the most significant threats in the most effective, consistent and rational way, which does not include prosecuting physicians, patients and others who are engaged in the medical marijuana business within a state that permits such activities. The implication of this policy was that federal prosecutors should refrain from investigating and prosecuting cannabis operations that are legal under applicable state law.

Furthermore, the Consolidated Appropriations Act of 2016, Section 542 (specifically, the Rohrabacher-Blumenauer Amendment) precludes the Department of Justice from spending funds on the prosecution of individuals who are engaged in conduct permitted by state medical marijuana laws (such as Act 16) and who fully comply with state laws. The Rohrabacher-Blumenauer Amendment was passed in December 2014 as part of an omnibus spending bill, and must be renewed each fiscal year in order to remain in effect. Attorney General Jeff Sessions has called on Congress not to renew the Rohrabacher-Blumenauer Amendment, but it has been renewed in the most recent stopgap spending bill.

Federal district courts have provided those in the medical marijuana industry

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with additional comfort that they will not be prosecuted for operating within the parameters of state medical marijuana programs. In 2015, the Ninth Circuit Court of Appeals ruled that the Department of Justice is prohibited from prosecuting any individual engaged in the use, distribution, possession, or cultivation of medical marijuana, provided that those activities are conducted in strict compliance with the state's applicable medical marijuana law. However, failure to strictly comply with state law could result in federal prosecution.

On Jan. 4, 2018, Attorney General Jeff Sessions rescinded the guidance provided in the Cole Memorandum. While initial reactions to Mr. Sessions' announcement have ranged from panic to outrage to defiance, it is still

unclear what new policies (if any) will arise from this decision and whether this decision will be supported by other branches and agencies of the federal government. Mr. Sessions' decision to reverse course from the Obama Administration does not necessarily change the landscape of Pennsylvania's medical marijuana industry, because marijuana has been and remains illegal under federal law.

For those in the medical marijuana industry in Pennsylvania, including registered physicians and physicians considering registration, it is important to recognize that Mr. Sessions' actions did not create any new rights, either substantive or procedural, that are enforceable in a civil or criminal legal action. Mr. Sessions simply stated that each United States Attorney's office has the discretion to prioritize enforcement of federal laws. In other

words, local prosecutors may continue to follow Obama-era enforcement guidelines. Furthermore, as long as the Rohrabacher-Blumenauer Amendment remains in effect, the Justice Department and each local U.S. Attorney's Office are not permitted to spend funds to investigate or prosecute state-licensed medical cannabis business.

Conclusion

There certainly is trepidation among physicians with regard to compliance with a new regulatory scheme, federal law and shifting federal policies and enforcement priorities. But compliance with state law is possible, and the various legal issues can be navigated with the help of experienced counsel.

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