



Cannabis Laws Overview and Issue Considerations

On July 1, 2021, Virginia will become the seventeenth state to legalize recreational cannabis.¹ The issues surrounding cannabis use are complex, especially in health care field. As the new law is implemented, questions and discussions surrounding its impact on our industry, employment, and the care we provide will continue to proliferate. This advisory is intended to address basic questions and share what we know now. This advisory will be updated and expanded as new concerns arise.

This advisory is for informational purposes only and **not** intended to serve as legal advice. If you have specific questions concerning the new laws and how they apply to your facility, please seek counsel.

Cannabis 101

What's legal?

Under current law, adults may obtain written certifications from qualified health care providers for cannabis oil. Use and possession by adults pursuant to such valid certification are legal for medicinal purposes. This is commonly referred to as "medical cannabis." There are currently four licensed processors of medical cannabis in the Commonwealth.

As of July 1, 2021 employees or contractors who are licensed or registered to administer medications at a "designated caregiver facility" will be permitted 1) to accept cannabis oil on behalf of a resident or patient who possesses such a valid certification and 2) assist in the administration of such cannabis oil to the patient or resident. A "designated caregiver facility" is defined as an assisted living facility (ALF), hospice facility, home care organization, or an adult day care center (ADCC). It does **not** include any facility designated as a certified nursing facility. Certified nursing facilities were removed from this legislation as the Office of Licensure was not able to confirm that even if Virginia law permitted a certified nursing facility to be a "designated caregiver facility," it would not run afoul of prohibitions in federal law.

Also, as of July 1, 2021 possession and gifting of less than one ounce of marijuana will be legal. This is commonly referred to as "recreational cannabis." At the same time, cultivation of up to four plants per household ("place of residence") will be legal provided they are not visible from the street and are protected against access by minors. The plants must be tagged, stating it is for personal use and listing the owner's name and driver's license number. Recreational cannabis for retail sale will not be legal until July 1, 2024.

What's illegal?

In Virginia, possession of more than one ounce of recreational cannabis will be subject to a \$25 civil fine; possession of more than one pound will be a felony. The retail sale of recreational cannabis will remain illegal until July 1, 2024.

Under federal law, possession, cultivation, and use of recreational cannabis remains illegal.

¹ "Cannabis" refers to marijuana, generally.

Employment Concerns

What can I do?

There are several concerns regarding the impact these new laws will have on employers who perform background checks for prior drug convictions or screen for marijuana use as a condition for employment. In short, if such a background check or drug screen is required by federal law, it will be exempt from this new law. Examples include some airport employees, positions requiring a commercial driver's license, employment that may involve matters of national security, or otherwise required by federal law (e.g., contracts with any federal government agency, including Centers for Medicare and Medicaid Services or Veterans Administration, or provides services to Medicare beneficiaries). Furthermore, all private employers may continue to require drug screens, including for cannabis, generally as a condition of employment.

Employers should be mindful of employees who have been provided a written certification to consume medical cannabis by a licensed health care provider. If such an employee tests positive but remains unimpaired on the job, employers will have to decide how to handle these situations based on their risk tolerance.

Employers can certainly still prohibit working while impaired by marijuana, alcohol, or any other substance. Accordingly, NFs may continue to have a policies that prohibit medical and recreational cannabis as well as alcohol and other recreational drug possession, use, or impairment during work hours.

What can't I do?

Also as of July 1, 2021, employers will be prohibited from discharging, disciplining, or discriminating against an employee for such employee's lawful use of medical cannabis pursuant to a valid written certification issued by a practitioner for the treatment or to eliminate the symptoms of the employee's diagnosed condition or disease. The statute provides that such prohibition does **not**:

- (i) restrict an employer's ability to
 - (a) take any adverse employment action for any work impairment caused by the use of cannabis or
 - (b) prohibit possession during work hours, or

- (ii) require an employer to commit any act that would cause the employer to be in violation of federal law or that would result in the loss of a federal contract or federal funding.

Essentially, under the new law, an employer cannot reject an applicant for employment on the sole basis that the applicant has a valid certificate for medical cannabis. It also prevents adverse employment actions against current employees solely for the reason of the employee having a medical cannabis certificate and using medical marijuana oil as prescribed. Employers may still prohibit use on the job, recreational use by employees, and impose discipline as a result of impairment on the job.

The General Assembly has passed an update to the Virginia Human Rights Act that prohibits discrimination against employees with "disabilities" under state law as of July 1, 2021. This law supplements the existing Virginians with Disabilities Act which created a limited obligation to provide a reasonable accommodation to protected individuals. Now under state law, employers with more than

five employees have a broader duty to provide a reasonable accommodation for employees with a disability unless the employer can show an undue hardship.

While the new law described above allows an employer to discipline for actions as a result of impairment or recreational use, it remains to be seen how a court will rule if an employee with a valid certificate claims an employer failed to reasonably accommodate his or her disability. The questions of whether the Americans with Disabilities Act, which does not require an employer to make an accommodation that involves illegal drug use, will preempt state law remains untested.

What's the bottom line?

Facilities like NFs that are regulated under federal law should continue to prohibit possession and use by employees and continue to drug screen employees for whom it is required under federal law. Facilities like ALFs and ADCCs that are regulated solely under state law should consult with counsel, review, and update their drug testing policies with the goal of addressing both business needs and risk tolerance. ALFs and ADCCs can continue to prohibit employees from possession and use at the facility and impairment while working, but should be mindful of employees who could test positive for proper medical use or recreational use after July 1, 2021. NFs, ALFs, and ADCCs that want to continue drug screening for cannabis use despite legal use should be mindful of employment retention and acquisition concerns.

Patient, Resident, and Visitor Concerns

What can I do?

NFs should continue to prohibit outright **all** cannabis use and possession by patients, residents, and visitors. Because NFs are federally regulated by Centers for Medicare and Medicaid Services (CMS) and the fact that NFs were intentionally left out of the law allowing designated care facility providers to administer cannabis oil, there is no risk in such an outright prohibition. Indeed, there is significant risk if cannabis use and possession are allowed in a NF for the same reasons in addition to health and safety concerns.

For ALFs, the risk calculation is a little different. Under state law, ALF employees who are qualified to administer medication may accept on behalf of and aid in the administration of prescribed cannabis oil to residents of the facility as of July 1, 2021. The facility may also permit lawful (limited) possession and cultivation of marijuana pursuant to the laws described above. Senior living operators may wish to develop different policies for cultivation for their assisted living residents and independent living residents with consideration giving to the setting (apartment-style, independent home, condo.)

Similarly for ADCCs, qualified employees may administer and patients may use and possess cannabis oil pursuant to a valid certification. However, because there are no residents, cultivation is not permitted.

What's the bottom line?

If your facility accepts federal money or is federally regulated, then the facility must follow federal law and prohibit all possession, cultivation, and use of recreational cannabis on the premises. If your facility is solely regulated under state law, then you should determine your risk tolerance and consult legal counsel in updating your policies with regard to patients, residents, and visitors.