

**Reefer Madness:**  
**Marijuana in Senior Care and Housing**



LeadingAge Oregon  
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**OVERVIEW**

- National Legalization Movement
- Federal v. State Law
- Marijuana Basics
- Resident Use in Different Care Settings
- Employees and Marijuana
- Best Practices



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**National Legalization Movement**

- As of 2017, 28 states and D.C. have laws legalizing marijuana (“MJ”)
- Several states enacted laws in November 2016
- 19 States have legalized Medical MJ, and 9 states have legalized **BOTH** Recreational and Medical MJ
- Note parallels between MJ and Death With Dignity trends!
- **CA**: first MM law in US (’96)



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### Oregon Medical MJ Laws: Elements



- Qualifying condition confirmed by MD; varies with state law  
 > Ex: Glaucoma, AIDS, Cancer, Chronic Pain
- Medical MJ Card - State Registry of Medical MJ Users and Growers
- Limit on MJ amount Patients/Primary Caregivers can have (2 to 24 oz.)
- **Primary Caregiver** - can possess useable MJ and mature plants on behalf of patient; has responsibility to manage patient's well-being
- Home cultivation – 6 to 12 plants in various levels of "maturity and State Medical MJ dispensaries (not operational in all states)

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### Oregon Recreational MJ Laws: Elements



- 21 Years or Older
- May not be Consumed in Public Places  
 > Streets, Hallways, Dining Rooms, Waiting Rooms, Public Buildings, Lobbies, Room in Apartment Houses not designed for actual residence
- May only be sold at state-licensed store (counties may be able to further regulate)
- Purchase Limits: 1 to 16 oz. (edibles) or 72 oz. (liquid form)
- May not transport out of state
- May possess MJ plants (4 immature/10 seeds) at various levels of maturity

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### Medical v. Recreational: Key Differences

- Medical MJ laws afford right of **access** to eligible patients
- Recreational MJ laws **decriminalize** certain acts (possession, use)
- Medical users have greater rights than recreational users:
  - Higher possession amounts (in OR, 24 oz. v. 16 oz.)
  - Lower taxes (in OR, 0% for MM v. 20%)
  - No legal age limit (v. 21 y.o.)
  - Different concentration of active ingredients (THC, CBD) in some states (OR, Rec. up to 50 mg THC; MM 100 mg THC)




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### Cannabis Conundrum



Is Marijuana Really Legal?  
Federal v. State Law




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### Federal Law: Controlled Substances Act

- Treats MJ as a **Schedule I** drug; efforts to reclassify it failed in 2016
- Marinol or Cesamet, which contains synthetic THC, **is** legal
- Reserved for drugs that have a high potential for abuse, no currently accepted medical use, or a lack of accepted safety for use under medical supervision
- Schedule I drugs also include **heroin and LSD**




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## Federal Law: Controlled Substances Act

### Prohibits:

- MJ production, distribution, possession, sale
- Knowingly leasing, renting, using, managing, or controlling a place for purpose of manufacturing, distributing, or using MJ

### Penalties:

- Criminal prosecution; forfeiture of cars, vessels, aircraft used for illegal purpose; real property interest (including leasehold) used or intended for violation




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## Cole Memos



- Effort to harmonize State and Federal law
- 2013 Memo provided **for prosecutorial discretion** involving MJ by DOJ in states with "robust" laws
- Priorities in prosecution: protecting minors, preventing trafficking, gang activity, drugged driving, possession/use on Federal property.
- **No** discretion where conduct falls outside state-approved use
- 2014 Memo focused on financial crimes in use, storage, distribution
- **Bottom line:** Even if state has robust enforcement, if conduct threatens federal priorities, feds may prosecute!




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## White House:



- Mixed signals
- States' rights v. zero tolerance
- Some tolerance for medical MJ
  - Bad optics to prosecute medical users?
- Strict enforcement posture against recreational MJ
- Cole Memos are expected to be rescinded
- **SB 863:** Shields MJ users' identities, shops cannot keep or transfer customer info and must remove info from databases




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## Medicare / Medicaid Participation



- Requirements of participation include compliance with Federal and State laws
- Marijuana is currently illegal under **Federal** law
- Risks:
  - Loss of Medicare/Medicaid provider status
  - Federal prosecution?




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## State Agency Guidance

### Washington



2015: Federal/Medicaid Funds can't be used directly or indirectly for activities or expenses related to use of MJ  
 State won't cite facility if assure residents are safe, have clear use policies

### Colorado

2010 Guidance for ALFs: Must have strong P&P if allow MJ use 

### California

- Treat as medication; subject to smoking laws; must comply with storage, admin, documentation regs; can decide to admit or retain based on health & safety of resident and others; stipulate in admission agreement




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## OR DHS Guidance?

- Nothing formal
- No rules/policies on use of marijuana
- Case-by-case analysis
- May prohibit/allow marijuana at facility
- Surveyors look the other way —**BUT** beware underlying violations/citations (care plans, safety)




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## Federal Resident Rights



- Include rights to:
  - Receive services in facility with reasonable accommodation of resident's needs and preferences, except when other residents' health and safety would be endangered
  - Make choices about aspects life in facility that are significant to resident; self-determination
- **BUT Federal law prohibits possession or use of marijuana**; federal law preempts state law; affects SNF, Medicaid waiver ALF
- No guidance from CMS; may follow Cole Memos (for now)




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## Resident Rights: Involuntary Transfer?

- **SNF**: Transfer grounds include endangering safety/welfare of individuals
  - Can facility transfer resident simply because MJ is illegal under federal law? Must it keep a resident who follows rules?
- **ALF**: Transfer grounds include dangerous behavior threatening others' safety, rights
  - Check state law; can likely transfer resident if community accepts Medicaid because MJ is illegal




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## Marijuana Basics: Delivery Modes

- Smokeable plant
- Vaporizer and cannabis oil or wax
- Edibles (candy, chocolate, soda, pretzels, gummies)
- Oils, salves and creams
- Tinctures (sublingual)
- Dissolving strips
- Transdermal patches
- More....




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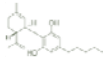
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### Marijuana Basics: Active Ingredients

- Total of 500
- Key components are THC (tetrahydrocannabinol) and CBD (cannabidiol)
- **THC:** psychoactive (produces a high); creates euphoria, relaxation, heightened or altered senses; effective for pain relief
- **CBD:** produces **no** high; reduces anxiety; can increase energy; has anticonvulsive, antipsychotic, anti-nausea, and anti-inflammatory properties; effective for pain relief




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### Marijuana Basics: Can relieve...



- Chronic pain
- Rheumatoid arthritis
- Cancer
- Glaucoma
- Alzheimer's-related agitation
- Nausea
- Seizure disorder
- Bipolar disorder, depression
- Crohn's , Huntington's, Parkinson's disease; multiple sclerosis
- HIV/AIDs




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### Statistics:

#### How Prevalent is MJ Use in OR Senior Care?



2016 Oregon DHS and Portland State University Study:

- 66,291 medical MJ patients; majority of users 60-64 years old; second highest group: 55-59 years old
- 27% of AL communities permit **medical** MJ use (8% memory care) of the 52% of 491 ALFs that responded
- 14% allow **recreational** MJ




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### Risk Management Issues



- Storage and Administration
- Primary Caregivers
- Care Planning
- Memory Care
- Consumption Areas
- Policy Violations
- ADA; Mobility Devices




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### Risk Management: Medical MJ Storage/Administration



- **SNF** must store, manage, label, and administer drugs
- If resident self-administers, IDT must confirm it is safe for resident to do so, and continue to assess to assure it is safe
- **AL** must confirm that resident can self-administer MJ, assure safe central storage, including locked cabinets or storage if self-administered
- **Issues:** No standard dosing; poor labeling; clean air acts
- **Rx:** No smoking/vaping; only edibles or creams/tinctures/teas
- If self-administer, confirm safety, get Dr. order, provide locked drawer, or ask resident to store offsite; have primary caregiver bring to facility
- If cannot centrally store, ask agencies for guidance




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### Risk Management: Recreational MJ Storage/Use

#### Different rules for Medical and Recreational MJ:

- If medical MJ, may need to allow on-site storage
- If recreational, can require off-site storage; can impose **stricter** protocols
  - NO consumption in public; limit to certain locations
  - NO smoking
  - NO storage on-site




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### Risk Management: Primary Caregivers

- Some Medical MJ Laws (OR, CO, CA) allow users to designate PCG
- PCGs are responsible for care and well-being of resident
- **OR:** Can possess mature plants (6), useable MJ (24 oz.)
- **OR:** Can be owners, ALFs, hospice providers, home care providers
- Present risks of theft, loss, law enforcement




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### Risk Management: Care Planning



- Must assess on admission, quarterly, on change in condition
- **Challenges:**
    - MJ can affect judgment, lead to addiction, interfere with medications, lead to loss of balance/coordination, cause anxiety or psychosis, increase appetite...**but ask: does MJ contain THC?**
  - **Rx:**
    - Robust assessment protocols to assess mobility risk, risk of falls
    - Coordination with MD for interactions, ltd. access to electric scooters, plan for possible overdose, monitor signs of addiction
    - Negotiated Risk Agreement? Compare OR and CA




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### Risk Management: Memory Care

- 8% of ALFs in OR allowing MJ are memory care communities
- Sonoma County, CA: Medical MJ Rx to manage behavioral issues
- **Challenges:**
  - Can Residents consent?
  - Is there an agent under an AHCD? A guardian?
- **RX:**
  - Strong policies to obtain consent to treat or administer MJ
  - Confirmation of executed copies of AHCDs and guardianship documents
  - Regular assessments to confirm no adverse effect




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## Risk Management: Consumption Areas



- Clean-air laws ban smoking or vaping inside public buildings or in places of employment (or prescribed distance from entrances, exits)
- OR law includes e-cigarettes, other inhalant delivery systems
- Plus, MJ law specifically prohibits MJ consumption in public
- **Rx:**
  - No Smoking of MJ
  - Use in resident rooms or designated areas away from public spaces
  - Don't use in community areas, hallways, visible locations




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## Risk Management: Policy Violations



What if:

Community has no MJ policy, but resident has MJ in possession, including marijuana plants?

- MJ policies (whether allow use or not) should include enforcement mechanism in case of violations
- If plan to confiscate/destroy marijuana, mitigate risk by providing notice and allowing resident time to cure breach, including removing MJ from premises




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## Risk Management: ADA

### Reasonable Accommodations

- 2011 HUD Memo: No duty to reasonably accommodate medical MJ users because use is illegal under Federal law
- Must still accommodate underlying disability (e.g., mobility issues)




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### Risk Management: Mobility Devices

- **Rx:** Mitigation Is Key
  - Require residents to notify you if they bring MJ to community or plan to consume it
  - Assess and care plan BEFORE Resident consumes MJ
  - Consider safety interventions to reduce risk:
    - Remove electric W/C or scooter for reasonable time period
    - Provide manual W/C
    - Perform 2-hour safety checks
    - Require resident to use MJ in apt.




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### Employment Issues



- Recreational MJ
- Medical MJ
- Off-Duty Use
- ADA; Reasonable Accommodations
- Drug Testing
- Best Practices




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### Employment Issues: Recreational MJ



- Case law provides little guidance: MJ laws are reasonably new
- MJ remains illegal under Federal law
- Employers are **NOT REQUIRED** to accommodate use, possession, transfer, display, sale, or growing of MJ in workplace
- Can prohibit or regulate MJ activities on property
- Can still have drug-free policies (including medical MJ)
- Can still terminate violators of policies
- To avoid surprise, should ID marijuana as illegal, prohibited drug




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### Employment Issues: Medical MJ

- Employers not required to accommodate use of MJ in workplace
- May discipline employees for ingesting MJ during work hours at work
- But **some states provide protections:**
  - **NY:** Registered medical MJ users are deemed to have a disability subject to state employment protection laws
  - **AZ:** Employers cannot discriminate based on medical MJ use or positive drug test unless used/possessed/impaired while at work
  - **NV:** Must reasonably accommodate registered medical MJ users, but allow no threat of harm/danger to a person or undue hardship to employer




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### Employment Issues: Off-Duty Use



Can an employer discipline an employee for off-hours, off-site use of medical or recreational MJ?

- See State law for protections for medical MJ users
- CO law prevents employers from discharging or discriminating against employees for "lawful conduct" occurring during non-working hours; similar law in CA
- But CO Supreme Court held that state does not protect worker's off-duty use of medical MJ because it is still unlawful under Federal law




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### Employment Issues: ADA, reasonable accommodations



- Ninth Circuit (2012) - ADA does not protect individuals using illegal drugs (MJ is illegal under CSA)
- But underlying covered disability may require accommodation
- **CAUTION:** using MJ as pretext for otherwise unlawful firing
  - Michigan ALF fired nursing administrator because of medical MJ use to treat epilepsy; she failed drug test on 2d day on job
  - Court held that firing employee for testing positive for an illegal drug was a pretext




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### Employment Issues: Drug Testing

- Can an employer fire or take other adverse action against an employee for testing positive for MJ use?
- Most State laws allow employers to fire employee who tests positive for drugs if employer prohibits MJ use in the workplace
- Regular MJ users often test positive weeks after their last use of MJ; may try to argue that MJ use occurred weeks before test
- AZ, DE, NY, and MN require employer to show impairment before taking action against employee who tests positive for MJ




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### Employment Best Practices

- Replace random drug testing with reasonable suspicion testing – focus on testing employees who look impaired or cannot fulfill work responsibilities
- Consider replacing urine test with oral fluid test - detects use 24-36 hours before test
- Evaluate jobs and designate certain jobs (e.g., van drivers) as “safety sensitive”
- Include disclaimer in personnel policies that MJ use policies do not change employment at will
- Exercise care before taking adverse action against employee who is not visibly impaired but tests positive for drugs and has requested a reasonable accommodation




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### Best Practices: Should You allow MJ?

Depends on risk tolerance...

- If little to none: Ban all MJ
- If somewhat tolerant: Allow medical MJ only
- If very tolerant: Allow all forms of marijuana



Also consider **resident demand, culture/values of provider, licensing regime**

After deciding on policy, notify residents, develop robust policies with enforcement mechanism, and train staff




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### How Risk-Tolerant are you?

Not at all?



- ❑ Exclude ALL marijuana
- ❑ Advise residents before admission
- ❑ Implement policies ASAP
  - ❖ A no-smoking policy may not be enough
  - ❖ Rx: no illegal drugs policy, including MJ of all kinds
  - ❖ Disallow Personal Caregiver (residents/staff)




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### What if you want to Exclude MJ, but...

- Your community has no policies in place?
  - Prepare them NOW
- You currently allow medical marijuana?
  - Grandfather in new rule (like smoking ban)
  - Rx: 30 days' notice; help find another location




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### Are you Somewhat Tolerant of Risk?

Allow medical MJ; exclude recreational MJ

- Policies with reasonable limitations
  - No smoking, but edibles, creams, teas are ok
  - Evaluate BEFORE use if resident wants to self-administer:
    - ❖ Difficult to dose/administer?
    - ❖ Risk of theft or sampling? Need lockbox?
  - Resident responsible for storing off-site
  - Use only in private room
  - Do not operate motorized vehicle/cart/car
  - No employees as caregivers (if so, no live plants)




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### If you plan to allow MJ use:



- Train staff:
  - Do not "share" resident's MJ
  - ID typical reactions
  - Advise to call MD re drug interactions
- Perform assessment/care plan/interventions
- Monitor psychological, physical response
- Enter into negotiated risk agmt? Care planning agreement?




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### If You Allow Medical & Recreational MJ:

Need strong policies with reasonable limitations

- ▣ No smoking except in designated smoking area (not public)
- ▣ Resident must store (off-site) and self-administer
- ▣ Primary Caregiver – No? Yes? Training required
- ▣ Limit use to room/apt or designated area
- ▣ No operating cart/electric wheelchair/car while under influence
- ▣ No selling/gifting marijuana in facility




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### Best Practices - Policies & Procedures

- ▣ Inform residents of policy before or at ADMISSION
- ▣ Assess safety BEFORE allowing consumption
- ▣ Obtain proof of registry card (if allow medical MJ)
- ▣ Enter into agreement including right to prohibit MJ if danger to self or others
- ▣ If allow PCG, obtain PCG's info.; encourage participation in care planning
- ▣ ID who will dispose of any unused MJ upon discharge or death
- ▣ Develop notice procedure if MJ is brought to facility (by resident or 3d party)




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### More Best Practices

- If resident stores MJ, provide lockbox or require storage offsite
- If provider stores MJ, keep w/other meds, stay below legal limit
- Require resident to dose; if not safe, require outside caregiver
- If resident is impaired: consider whether it's a change of condition requiring assessment/intervention
- Have an enforcement tool for violations
- Limit # of mature plants, useable MJ residents can have
- If allow, provide brochures from state agencies re MJ use




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### Last ones ...



- Don't allow staff to be primary caregiver or provide MJ to residents
- Allow MJ use only in room or apartment
- Require drug paraphernalia to stay in room/apt.
- Do not allow smoking; allow edibles, teas, tinctures, creams, etc.




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### Food for thought

See: *New York Times*: "When Retirement Comes with a Daily Dose of Cannabis" (Feb. 19, 2017)

[https://www.nytimes.com/2017/02/19/nyregion/retirement-medicinal-marijuana.html?\\_r=0](https://www.nytimes.com/2017/02/19/nyregion/retirement-medicinal-marijuana.html?_r=0)




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