

## Considerations for Policies on Marijuana After Recreational Legalization in Ohio August 2024

*We offer these considerations for members who are developing or reviewing their policies relating to marijuana because we have received inquiries. They are not the only items that may be relevant and are not policies in themselves. We strongly recommend involving experienced health care legal counsel in development and review of your policies.*

### General:

- The relevant considerations differ by whether the provider is or is not federally regulated, whether the services and supports are provided in a facility/congregate care setting or in a person's private residence, and whether individuals served or workers are at issue.
- Conservative practice to ensure compliance with all applicable laws and enforcement by regulatory agencies may be two different things. To our knowledge, ODH never has cited a regulated provider purely for resident use of marijuana. In our discussions with sister associations in states that have had legalized recreational marijuana for some time, we found that they have not experienced citations either.
- For the sake of clarity, provider policies should explicitly cover both medical and recreational marijuana.

### Workers:

- Despite legalization of medical and now, recreational, marijuana at the state level, federal law still prohibits its use.
- Policies for federally-regulated or funded services should prohibit staff members from procuring, handling, storing, or administering either medical or recreational marijuana.
- Federally-regulated or funded services typically have requirements for compliance with all state and federal laws.
- Until medical use of marijuana is legalized at the federal level and state law is adjusted to conform with the federal provisions, workers providing these services should not assist individuals in obtaining or using either medical or recreational marijuana.
- This consideration does not apply to providers that do not receive federal funds (e.g., private-pay assisted living communities), although these providers may wish to mirror the employee policies for federally-funded providers.
- Most regulated providers are required to prohibit employees from working while under the influence of any intoxicating substance, which would include marijuana. Providers who are not under such a prohibition should adopt it by policy.
- Some providers have policies regarding off-duty use of illegal drugs or drug testing. These policies should be reexamined in light of state legalization of recreational marijuana.

Persons served:

- Individuals living in private residences, even if they are served by federal-regulated or funded home care providers, can use marijuana in accordance with state law.
- Individuals living in regulated facilities/residences, even though those settings are their homes, do not have that right. At the present time, no legally-prescribed residents' bill of rights or similar rights statement includes the right to use marijuana.
- A conservative view would be that Medicaid/Medicare-certified facilities such as SNFs or ICFs should not permit residents to possess or use marijuana within the facility because the presence of marijuana in the building, even if under the control of a resident, could be considered storage by the facility.
- In light of non-enforcement by ODH, a less-conservative perspective might be that if the marijuana is under the control of the resident and staff members have no involvement with it, the resident could use it in the facility.
- Home and community-based settings, particularly those that do not participate in Medicaid waivers, are at even less regulatory risk for allowing beneficiary use.
- A provider who chooses to allow use by people served within a setting should consider policies addressing such corollary matters as the forms of marijuana permitted, safe storage, sharing with other individuals, and restrictions on where the substance is consumed.
- Smoking marijuana (including vaping) should be addressed under the setting's smoking policy and either prohibited or regulated relative to place and supervision, as well as care-planned if permitted.
- Both home-based and facility-based providers should consider a policy that individuals served must disclose whether they use marijuana because of potential interactions with medications or other impacts that should be addressed in person-centered care planning.