



WOODS FULLER

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MEDICAL CANNABIS IN THE WORKPLACE

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Nothing in this presentation should be construed as or considered legal advice.
Please contact a licensed attorney for individual and further guidance.

Overview of Presentation

- Disclaimer
- Medical Cannabis Basics
- Protections for Employers/Cardholders
- Legislative Update
- Next Steps in South Dakota
- Questions



Disclaimer



Disclaimer

- Marijuana is still classified as a Schedule I substance under the Controlled Substances Act, which means under federal law it is illegal
- SD Ethics Opinion
 - Lawyers cannot advise on illegal courses of conduct
 - Because marijuana is illegal, lawyers cannot provide advice on the sale, possession, or distribution of marijuana – regardless if legal at state level
- This is not to be construed as legal advice on how to sell, possess, or distribute marijuana



Medical Cannabis Basics



Medical Marijuana Basics

- Legalized Medical Cannabis
 - *Debilitating Medical Conditions*
 - *Identification Card*
 - *Allowable Amount of Cannabis*
 - *Protections***
- Created Licenses for Medical Cannabis Establishments
(Dispensaries, Cultivators, Testing Facilities, Manufacturers)
(ARSD 44:90:04)

“Debilitating Medical Condition”

- (a) A chronic or debilitating disease or medical condition or its treatment that produces one or more of the following: cachexia or wasting syndrome; severe, debilitating pain; severe nausea; seizures; or severe and persistent muscle spasms, including those characteristic of multiple sclerosis; or
- (b) Any other medical condition or its treatment added by the department, as provided for in § 34-20G-26;

Senate Bill 1 (2023)

An Act to modify debilitating medical conditions for medical cannabis use.

"Debilitating medical condition,":

- (a) A chronic or debilitating disease or medical condition or its treatment that produces one or more of the following: cachexia or wasting syndrome; severe, debilitating pain; severe nausea; seizures; or severe and persistent muscle spasms, ~~including those characteristic of multiple sclerosis; or~~
- ~~(b) Any other medical condition or its treatment added by the department, as provided for in § 34-20G-26~~Acquired immune deficiency syndrome or positive status for human immunodeficiency virus;
- (c) Amyotrophic lateral sclerosis;
- (d) Multiple sclerosis;
- (e) Cancer or its treatment, if associated with severe or chronic pain, nausea or severe vomiting, or cachexia or severe wasting;
- (f) Crohn's disease;
- (g) Epilepsy and seizures; or
- (h) Post-traumatic stress disorder;

Repealed 34-20G-26 (Petition process to add qualifying medical conditions)

Amended 34-20G-72 (Removing petition process from promulgation of rules)



Written Certification Process

- “Practitioners” provide “written certifications”
- Practitioner – a physician, physician assistant, or advanced practice registered nurse, who is licensed with authority to prescribe drugs to humans. In relation to a nonresident cardholder, the term means a person who is licensed with authority to prescribe drugs to humans in the state of the patient's residence. SDCL 34-20G-1(21).
- “Written Certification” is a document dated and signed by a practitioner:
 - (a) Stating that the patient has a qualifying debilitating medical condition or symptom associated with the debilitating medical condition;
 - (b) Affirming that the document is made in the course of a bona fide practitioner-patient relationship;
 - (c) Specifying the qualifying patient's debilitating medical condition; and
 - (d) Specifying the expiration date of the qualifying patient's written certification, pursuant to § 34-20G-43.



What is a legal amount of medical marijuana?

- a) Three ounces of cannabis or less;
- b) The quantity of cannabis products as established by rules promulgated by the department under § 34-20G-72;
- c) If the cardholder has a registry identification card allowing cultivation, ~~three~~ **two flowering** cannabis plants ~~minimum or as prescribed by physician and~~ **two cannabis plants that are not flowering**; and
- d) If the cardholder has a registry identification card allowing cultivation, the amount of cannabis and cannabis products that were produced from the cardholder's allowable plants, if the cannabis and cannabis products are possessed at the same property where the plants were cultivated[.]

Type of cannabis	Amount equivalent to one ounce of cannabis
Concentrated cannabis in smokable form	8 grams (net weight)
Vaporizer pens or cartridges	8 grams (net weight)
Oils in oral dosage syringe or capsule form	5 grams (net weight)
Edibles (excluding oils)	800 milligrams THC
Topical (ointment, cream, or lotion)	12 fluid ounces
Topical (dried plant material or powder)	1 ounce
Transdermal patches	800 milligrams THC

ARSD 44:09:02:16

Current Issues re Cards

- Pop-Up Card Clinics
 - Medical Cannabis Oversight Committee
- Consults/Issuance of Written Certifications
 - In bars (Dakota Days)
 - In less than 5 minutes
- Why do employers care?
 - Regularly confirm cardholder status.
 - DOH could invalidate/audit cards



South Dakota

**MEDICAL CANNABIS
REGISTRY ID CARD**



CARD NO. [REDACTED]

ISS **01/08/2022**

DOB [REDACTED]

EXP **01/08/2023**

**MIKKELSON
BRADLEY**

DESIGNATED CAREGIVER **NO**
PATIENT ID NO.

[REDACTED]

HOME CULTIVATION **YES**
EXT. PLANT COUNT **NO**

DISPENSARY 1
DISPENSARY 2

FOR CARD VERIFICATION, CONTACT:
medcannabisverify.sd.gov/ [REDACTED]

medcannabis.sd.gov

Practitioners/Cardholders South Dakota

8,977 Cardholders

212 Practitioners

(as of 4/17/23)



Protections for Employers/Cardholders



No Penalties (Civil/Criminal/Professional)

A cardholder is not subject to arrest, prosecution, or penalty of any kind, or denial of any right or privilege, including any civil penalty or disciplinary action by a court or occupational or professional licensing board or bureau, for:

- (1) The medical use of cannabis in accordance with this chapter, if the cardholder does not possess more than the allowable amount of cannabis, and if any cannabis plant is either cultivated in an enclosed, locked facility or is being transported;
- (2) Reimbursement by a registered qualifying patient to the patient's registered designated caregiver for direct costs incurred by the registered designated caregiver for assisting with the registered qualifying patient's medical use of cannabis;
- (3) Transferring the cannabis to a testing facility;
- (4) Compensating a dispensary or a testing facility for goods or services provided;
- (5) Selling, transferring, or delivering cannabis seeds produced by the cardholder to a cultivation facility or dispensary; or
- (6) Offering or providing cannabis to a cardholder for a registered qualifying patient's medical use, to a nonresident cardholder, or to a dispensary if nothing of value is transferred in return and the person giving the cannabis does not knowingly cause the recipient to possess more than the allowable amount of cannabis.



Federal Law Still Controls

The rights provided by §§ 34-20G-19 to 34-20G-25, inclusive, do not apply to the extent that they conflict with an employer's obligations under federal law or regulation or to the extent that they would disqualify an employer from a monetary or licensing-related benefit under federal law or regulation. SDCL 34-20G-23.



No Penalty for Employing Cardholder

No school, landlord, or employer may be penalized or denied any benefit under state law for enrolling, leasing to, or employing a cardholder.

SDCL 34-20G-25



Legislative Update



“Safety Sensitive Job”
&
“Under the Influence”

Safety-Sensitive Job

Any position with tasks or duties that an employer reasonably believes could:

1. Cause the illness, injury, or death of an individual; or
2. Result in serious property damage.

Under the Influence

Any abnormal mental or physical condition that tends to deprive a person of clearness of intellect and control that the person would otherwise possess, as the result of consuming any degree of cannabis or cannabis products[.]

Certain Acts Not Authorized for Cardholders

This chapter does not authorize any person to engage in, and does not prevent the imposition of any civil, criminal, or other penalty for engaging in, the following conduct:

- (1) Undertaking any task under the influence of cannabis, when doing so would constitute negligence or professional malpractice;
- (2) Possessing cannabis or otherwise engaging in the medical use of cannabis in any correctional facility;
- (3) Smoking **or vaping** cannabis:
 - (a) On any form of public transportation;
 - (b) In any public place or any place that is open to the public; **or**
 - (c) **If under the age of twenty-one;**
- (4) Operating, navigating, or being in actual physical control of any motor vehicle, aircraft, train, or motorboat while under the influence of cannabis; or
- (5) **Performing any safety-sensitive job under the influence of cannabis.**



Can Prohibit Use at Work (Old Statute)

No employer is required to allow the ingestion of cannabis in any workplace or to allow any employee to work while **under the influence** of cannabis. A registered qualifying patient may not be considered to be under the influence of cannabis solely because of the presence of metabolites or components of cannabis that appear in **insufficient concentration to cause impairment**.

SDCL 34-20G-24.



Can Prohibit Use at Work (New Statute)

No employer is required to allow the ingestion, **possession, transfer, display, or transportation** of cannabis in any workplace or to allow any employee to work while under the influence of cannabis. ~~A registered qualifying patient may not be considered to be under the influence of cannabis solely because of the presence of metabolites or components of cannabis that appear in insufficient concentration to cause impairment.~~ **No employer is prohibited from establishing and enforcing a drug free workplace policy that may include a drug testing program that complies with state and federal law and acting with respect to an applicant or employee under the policy.**

SDCL 34-20G-24.

Can Discipline for Use at Work

Nothing in this chapter prohibits an employer from disciplining an employee for **ingesting** cannabis in the workplace or for **working while under the influence** of cannabis.

SDCL 34-20G-28.



Nothing in this chapter requires:

- (1) A government medical assistance program or private **health insurer, workers' compensation insurance carrier, or self-insured employer providing workers' compensation benefits**, to reimburse a person for costs associated with the medical use of cannabis;
- (2) Any person or establishment in lawful possession of property to allow a guest, client, customer, or other visitor to smoke **or vape** cannabis on or in that property;
- (3) A landlord to allow the cultivation of cannabis on the rental property; **or**
- (4) A **state or local government to allow any conduct otherwise permitted by this chapter within a building owned, leased, or occupied by the state or local government.**

Critical Open Questions

- Lack of Standard
 - ABV – 0.8%
 - ?? Metabolites/THC per Nanogram (ng)
- Testing Abilities
 - Alcohol dissipates quickly
 - Marijuana in system longer (age, weight, diet, etc.)



Next Steps in South Dakota

- Legalization of Recreational Marijuana?
- Lawsuits (None reported so far)
 - Statutes need to be challenged/interpreted by courts
- Further Revisions by Legislature
 - Medical Marijuana Oversight Committee
- Declassification as a Schedule I Controlled Substance?

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