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MEMORANDUM

To: Leading Age New York Members

From: Cona Elder Law PLLC
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Re: Legalization of Marijuana in New York: Guidance for Skilled Nursing Facilities, Assisted Living Facilities and Other Health Care Facilities

Date: April 25, 2021

This memorandum addresses the impact the legalization of recreational adult use of marijuana in New York has on Skilled Nursing Facilities ("SNF"), assisted living facilities ("ALF"), senior housing facilities, Continuing Care Retirement Communities ("CCRC") and other health care facilities. The memorandum will provide an overview of the current laws at the federal level and recent laws passed by New York State to expand access to medical marijuana for treatment of qualifying conditions through the state's Medical Marijuana Program, initially created under the Compassionate Care Act of 2014, as well as New York's recent legalization of marijuana for adult recreational use. It specifically addresses questions regarding the rights of facility residents and employees concerning marijuana, both recreationally and for medical purposes; facilities' obligations pursuant to state and federal law, both with respect to risks of criminal prosecution and as a condition for government funding; and practical considerations facilities should take into account when enacting facility and workplace policies concerning the use of marijuana for recreational and/or medical use by prospective and current residents, and by prospective and current employees.

I. OVERVIEW

There has been a great deal of confusion among residential health care providers and individuals in New York State regarding the legalities of marijuana use following the passage of the Compassionate Care Act in 2014[i] which legalized marijuana in New York for medical use provided that patients suffer from certain "qualifying conditions" and meet other qualifying criteria. This confusion has been further compounded by New York's recent passage of The Marijuana Regulation and Taxation Act ("MRTA") legalizing the use of marijuana by adults in New York for recreational purposes, in addition to medical purposes.

The issue: marijuana remains illegal at the federal level due to its classification as a Schedule I drug, based upon the federal government's view that marijuana has no currently accepted medical use and a high potential for abuse.[ii] The Controlled Substances Act ("CSA") sets forth distinctions between the lawful and unlawful manufacturing, distribution, and possession of controlled substances, including possession of Schedule I drugs for personal use. There has been a great deal of debate in recent years regarding whether this Schedule I classification for marijuana is appropriate in light of the proven medical benefits brought about by medical marijuana treatment and whether Schedule I classification should be reserved for more serious drugs that are commonly abused, such as heroin, LSD and ecstasy (also classified as Schedule I). This is evident from the growing number of states that have enacted evidence-based medical marijuana laws allowing marijuana to be used for the treatment of certain medical conditions.

Nonetheless, though there are efforts by some federal lawmakers to declassify marijuana from its Schedule I status, to date, marijuana remains illegal under federal law. The federal government does not recognize the legality of marijuana, even in states where recreational marijuana has been declared legal by state law.[iii] As such, there is a conflict between federal law and state law, in New York and many other states, concerning the legality of marijuana, creating a conundrum for health care facilities and others who rely on both state and federal funding and who must demonstrate compliance with certain federal and state laws as a requirement for this necessary funding.

II. FEDERAL LAW: FACILITIES' OBLIGATIONS

As noted above, as marijuana is classified as a Schedule I substance, SNFs, ALFs, CCRCs, senior living communities and other health care facilities are concerned about the ways in which the legalization of marijuana in New York State could impact their operations given its illegality at the federal level.

i. FEDERAL CRIMINAL LAW CONSEQUENCES WHEN MARIJUANA USE IS LEGAL IN THE STATE

Though the federal government does not recognize the authority of any state to "legalize" possession, distribution, or manufacture of marijuana,[iv] there is a significant distinction between the federal government's views on the use of marijuana for medical reasons, carried out in strict compliance with a state's medical marijuana laws, compared with the recreational use of marijuana where it is legalized by a state's laws.

With respect to criminal consequences relating to medical marijuana use, as long as medical marijuana use is carried out in strict compliance with all applicable state medical marijuana laws, health care facilities and individual patients are generally protected from federal criminal prosecution. This is because federal spending bills in recent years have included an amendment which "prohibits [the] Department of Justice [DOJ] from spending money on actions that prevent the Medical Marijuana States' giving practical effect to their state laws

that authorize the use, distribution, possession, or cultivation of medical marijuana." In a recent federal case, *United States v. McIntosh*,[v] the court concluded that, at a minimum, the amendment "prohibits [the] DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws."

However, while health care facilities have thus far been protected from criminal prosecution for permitting medical marijuana use carried out in strict compliance with state laws, the Ninth Circuit Court of Appeals recently cautioned that the Amendment "does not provide immunity from prosecution for federal marijuana offenses." The Court explained, in relevant part that, "Congress currently restricts the government from spending certain funds to prosecute certain individuals. But Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding."[vi] Therefore, it is important to recognize this distinction between the federal government declining to prosecute such offenses at the present time versus a declaration of immunity from future prosecution.

Therefore, in general, health care facilities that permit the use of medical marijuana on its premises by residents who are registered patients in the New York State Medical Marijuana Program need not fear any sort of criminal repercussions for simply permitting a resident to obtain, possess, store, and self-administer medical marijuana (or have it administered by a non-facility designated caregiver registered with New York State's Medical Marijuana Program) on the health care facility's premises.

However, if a facility were to take on a more active role, such as by acting as designated caregiver and directly purchasing, possessing, storing and administering medical marijuana on the resident's behalf, which is permitted under New York State law, this could potentially create more of a risk of criminal consequences in the future. There is a risk that if a health care facility were involved in coordinating the delivery of medical marijuana products for multiple residents of a facility, should the federal government's position regarding prosecution of these offenses change in the future, the facility could be targeted for potential charges based on possessing and/or trafficking of a controlled substance, for example, in violation of the Controlled Substances Act.

However, it is worth noting that despite the fact that medical marijuana programs have been legalized in many states for several years now, no SNF to date has been reported to have been cited or targeted for criminal prosecution by the federal government for allowing or assisting residents in participating in medical marijuana treatment. It is unlikely, given the political trajectory of the marijuana debate at the federal level and the push toward declassification of marijuana as a Schedule I substance under the CSA, that the government would target SNFs or other health care facilities for participating in medical marijuana programs or supporting the use of medical marijuana by residents.

Additionally, provided that medical marijuana is used in compliance with all applicable New York state laws, facilities would not likely be subject to any criminal repercussions by allowing marijuana to be used for medical purposes under the Compassionate Care Act.

However, facilities should be cautioned that there is no such protection provided by the budget amendments passed by the federal government which extend to recreational use of marijuana, as opposed to medical marijuana use under strict compliance with state medical marijuana laws.

ii. FEDERAL FUNDING CONCERNS

Facilities are rightly concerned about how the legalization of marijuana at the state level and potential use of marijuana by their employees or facility residents may impact or jeopardize their eligibility for funding by the federal government. These concerns are based upon facilities' receipt of federal funding and the strict compliance with the federal laws required under CMS, the Social Security Act, and/or U.S. Department of Housing and Urban Development ("HUD").

Facilities must comply with the Drug-Free Workplace Act ("DFWA"). Enacted in 1988, the DFWA prohibits the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the workplace. The DFWA applies to federal grant recipients (regardless of the amount of the grant) and federal contractors with a contract for more than $100,000. Generally, the DFWA requires facilities to adopt a drug-free workplace policy and to establish a drug-free awareness program.

While many facilities have enacted "zero tolerance" drug policies as a means by which to fully comply with the DFWA, the Act does not specifically require facilities to enact "zero tolerance" drug policies for employees. In fact, the DFWA does not mandate drug testing to achieve the requirements set forth under the Act. For this reason, facilities are not required to perform or require drug testing of employees or prospective employees for marijuana use (and doing so may not be advisable due to laws in states where workers are protected by laws which limit the ability of prospective or current employers from drug testing for marijuana, discussed in detail below).

Alternative means by which facilities may comply with the DFWA without requiring marijuana drug testing would include: 1) enacting policies that provide testing for other illicit drugs identified in the Controlled Substance Act[vii] which are illegal at both the federal and state level; 2) prohibiting the possession, storage, use or sale of marijuana on facility premises; and 3) setting forth policies and procedures for how a facility will determine whether an individual is under the influence of marijuana in the workplace. The facility can require employees to certify that they will comply with the policy prohibiting marijuana in the workplace but need not require employees to certify that they will not use marijuana outside of working hours and outside of the workplace in order to maintain compliance with the DFWA.

Rules imposed by the Department of Housing and Urban Development (HUD) go a step further and impose more restrictive obligations on residences that rely on HUD funding. The Quality Housing and Work Responsibility Act of 1998 (QHWRA) requires HUD to include in all leases for assisted housing a provision requiring the landlord "to terminate the tenancy or assistance for any household with a member [who] is illegally using a controlled substance" as defined by the Controlled Substances Act, which, as noted above, presently includes marijuana. HUD has issued a series of Memoranda setting forth its position regarding medical marijuana, stating that public housing agencies and owners of federally assisted housing may not permit the use of marijuana, including the use of medical marijuana as a reasonable accommodation for residents with disabilities, because (i) people using illegal drugs are disqualified from protections for persons with disabilities under the disability definition provisions of section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA), and (ii) that these accommodations are not reasonable under the Fair Housing Act (FHA) as they would constitute a fundamental alteration in the nature of a public housing agency's or federally assisted housing owner's operations. The HUD memoranda drew a distinction between prospective and existing residents in that while owners may not be required to grant reasonable accommodation for residents' medical marijuana use, they had the discretion to decide whether or not to evict a resident for using medical marijuana at the residence.[viii]

Therefore, for federally subsidized residential communities, such as senior housing residences that receive federal funding, while the residence owner would have no authority under the law to extend a reasonable accommodation to a prospective resident seeking to move into the senior residence and use medical marijuana, the owner would have the discretion to permit an existing resident to continue to reside there, and not be forced to initiate eviction proceedings against a resident for using medical marijuana at the residence.

III. MARIJUANA LAWS IN NEW YORK STATE

New York, like many other states, has taken a drastically different approach to the issue of marijuana, taking numerous steps over the past several years to expand access to medical marijuana treatment, to decriminalize marijuana and expunge criminal records for marijuana-related offenses, and, most recently, to legalize marijuana for adult recreational use throughout the state as of 2022.

These efforts most meaningfully began with the passage of the Compassionate Care Act in 2014 which allowed for the use of medical marijuana by patients suffering from certain qualifying conditions. In April 2021, New York State passed a measure to legalize marijuana for recreational use by adults aged 21 and older, of which certain provisions shall take effect in 2022.[ix]

However, as evidenced by the issues facing SNFs, ALFs, CCRCs, federally-subsidized senior living residential communities, and other health care facilities with respect to compliance with federal law, the legalization of marijuana in New York and protections for employees who use

marijuana, whether for medical or recreational purposes, can create great difficulty when faced with the prospect of violating state or federal law, where the two so often conflict.

i. MEDICAL MARIJUANA: QUALIFYING CONDITIONS

New York's Compassionate Care Act legalized the manufacture, sale, possession and use of marijuana for medical purposes. The law set forth a list of "qualifying conditions" and provided for potential expansion of the list pursuant to further regulations by the Department of Health. Over the years, additional conditions have been added such that the current list of qualifying conditions permitted to be treated with medical marijuana are as follows: cancer; HIV/AIDS; ALS; Parkinson's disease; Multiple Sclerosis; PTSD; Huntington's disease; Opioid Use Disorder; damage to nervous tissue of the spinal cord with spasticity; epilepsy; Irritable Bowel Disease; neuropathy; chronic pain; and "any conditions for which an opioid could be prescribed (i.e. severe pain, which does not necessarily need to be chronic in nature).

Additionally, patients suffering from one of the following clinically associated/complicating conditions may qualify for cannabis use: cachexia/wasting syndrome, severe or chronic pain, severe nausea, seizures, severe or persistent muscle spasms, or such conditions later added by the Department of Health.

Under the Compassionate Care Act, individuals registered as participants in the Medical Marijuana Program are limited to a one-month (30 day) supply of medical cannabis and are limited in the manner in which it may be administered; while marijuana treatment may be consumed in pill form, by oil (vape/tincture), or patch, for example, individuals are not allowed to smoke marijuana for medical purposes. Additionally, medical marijuana may not be consumed in a public place.

In April 2021, New York State's budget passage included provisions for the legalization of adult use recreational marijuana, as well as an expansion of the existing medical marijuana program to allow more individuals in New York State to avail themselves of the benefits of medical marijuana treatment. This includes expanding the list of qualifying conditions under the law to include Alzheimer's disease, muscular dystrophy, dystonia and rheumatoid arthritis.[x] Additionally, certified patients and/or certified caregivers will now be allowed to possess a 60 day supply of marijuana and patients will now be able to smoke marijuana as part of an approved medical marijuana treatment plan.[xi]

ii. RECREATIONAL MARIJUANA USE BY FACILITY RESIDENTS

Facilities may be concerned by the prospect of residents using marijuana recreationally whether on premises or off-premises. Facilities are not required to permit recreational marijuana on its premises, for any reason, and it would be advisable that residential health care facilities adopt a policy prohibiting the use of recreational marijuana on premises. Residents using marijuana recreationally can pose a danger when it is not carefully managed and could negatively impact a resident's health or medical conditions.

For other types of residential communities that rely on federal funding from HUD, in particular, it is imperative that facilities prohibit the recreational use of marijuana by their residents to maintain strict compliance with HUD's regulations until such time that HUD issues updated guidance evidencing a change in position or until such time that marijuana is declassified from its Schedule I status at the federal level.

Just as it is permissible for a facility or senior residence to adopt a "no smoking" policy for the facility or residence's premises, it would be perfectly acceptable, and advisable, to adopt such a policy prohibiting the use of recreational marijuana on premises.

iii. JOB-RELATED MARIJUANA TESTING

A number of laws passed in New York over the past several years may limit the ability of employers to enforce marijuana prohibition policies with respect to employees who use or used marijuana outside of the workplace.

While certain aspects of The Marijuana Regulation and Taxation Act[xii] legalizing marijuana for adult recreational use will not be effective until 2022, the portions of the law which allow for the personal use and possession of marijuana are already in effect. As such, facilities must be prepared to deal with the implications of this law and enact policies addressing this with staff.

Section 196 of The Marijuana Regulation and Taxation Act provides significant protections from negative workplace consequences for employees who wish to use recreational marijuana. Specifically, the law provides that, "[u]nless an employer establishes by a preponderance of the evidence that the lawful use of Marijuana has impaired the employee's job responsibilities, it shall be unlawful to take any adverse employment action against an employee" based on either conduct allowed under the law (i.e. lawful recreational cannabis use) or the employee's positive drug test for Marijuana components or metabolites. The law specifies that "an employer may consider an employee's ability to perform the employee's job responsibilities to be impaired when the employee "manifests specific articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position."[xiii] The law creates a private right of action by which employees may sue employers who violate their rights under the law. The MRTA clarifies that nothing in the law shall be deemed to restrict an employer's ability to prohibit or take adverse employment action due to the employee's possession or use of intoxicating substances during work hours, or "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."**[xiv] This exception suggests that those who jeopardize federal funding or a federal contract may be excused from complying with this workplace law.

In addition to the MRTA, New York City passed its own law, effective May 10, 2020, prohibiting New York City employers from requiring applicants seeking employment to

submit to pre-employment drug testing for the presence of marijuana or THC. New York City employers are still permitted to screen for other illicit substances. However, the law contained an important exclusion for health care workers; the law does not apply to individuals applying for work in any position requiring the supervision or care of children, medical patients, or vulnerable persons as defined by Section 488 (15) of the New York Social Services Law (which defines a "vulnerable person" as a person who, due to physical or cognitive disabilities, or the need for services or placement, is receiving services from a facility or provider agency[xv]). The law also excludes employees in positions that "significantly impact the health or safety of employees or members of the public." Therefore, most jobs involving the direct care of patients or residents, or the oversight of patient or resident safety, would fall under the exclusion and pre-employment marijuana testing would be permissible. However, it remains unclear as to whether the law would extend to individuals not actively caring for patients or residents, such as employees engaged in finance, administration, maintenance, or other areas of employment who are not directly involved in the care of "vulnerable persons".

It is also important to note that with regard to the Compassionate Care Act, New York, unlike some other states, specifically provided that a qualifying condition is disability under the New York State Human Rights Law,[xvi] thus invoking protections for employees who seek to use medical marijuana without facing negative repercussions with respect to workplace drug-testing.[xvii] Presumably, while it would still not be permissible to be under the influence of marijuana at work, this set the stage for employees who were medical marijuana users to challenge employers' "zero tolerance" workplace policies based on discrimination due to disability. Employees may claim that their need to treat their medical conditions with medical marijuana requires their employer to extend them a reasonable accommodation in permitting their medical marijuana use (outside of work hours), so long as the individual is not under the influence of marijuana while at work.

One case recently decided in New York's First Department supports this conclusion. In that case, the Court held that "the [Compassionate Care Act]'s unique provision that status as a medical marijuana patient shall constitute a "disability" for purposes of the State [Human Rights Law], signals the legislature's intent to incorporate that highly developed body of law as a mechanism for certified patients' protection of their right to avail themselves of the benefits of medical marijuana."[xviii] In other states, courts analyzing the rights of employees seeking a reasonable accommodation for medical marijuana use under their own state laws (similar to those in New York) looked to whether the employer had made an effort to communicate with the employee to determine whether another accommodation might be available to meet the employee's needs. However, based on the case law to date, it is likely that these issues regarding employees' rights to accommodation will be tested in the courts in the months and years to come.

Importantly, however, none of these laws permit an individual to possess, store, or use marijuana, or to be under the influence of marijuana while at work, whether or not they have a qualifying condition under the Compassionate Care Act, which explicitly grants employers the right to discipline workers who are impaired under the influence of a controlled substance.

Therefore, employers may discipline or terminate individuals who are found to be under the influence of marijuana in the workplace.

IV. CURRENT RECOMMENDATIONS

With New York only recently embarking upon the legalization of adult use recreational marijuana within the state and given the differences between New York's Compassionate Care Act and other states' medical marijuana laws, it remains to be seen how the development of case law, through challenges to different aspects of the law brought by employers, employees, and perhaps even public housing residents, will result in further changes to the law.

It is imperative that SNFs, ALFs, senior living residential communities and other types of health care facilities remain mindful of their obligations pursuant to federal funding requirements as well as requirements concerning the rights of employees covered by New York laws. Facilities located in New York City should also be mindful of the specific laws covering individuals who are not directly involved in care for "vulnerable persons," as this distinction may be the focus of challenges to that law in the near future.

Facilities which do not rely upon funding from HUD would be advised to consider relaxing their pre-employment drug testing policies and to create policies which achieve the goal of a Drug-Free Workplace while being careful not to run afoul of any New York State laws which extend rights designed to protect prospective or existing employees from employment-related consequences for off-duty marijuana use.

It would also be advisable to extend "no smoking" policies throughout facility premises to similarly prohibit marijuana use on premises, and to consider prohibiting the smoking of marijuana by medical marijuana program participants to remain in line with a facility-wide "no smoking" policy, provided that the patient can avail himself or herself of marijuana treatment through a different method of administration.

Over the course of the next year, we expect that more guidance will become available which will inform individuals and employers alike as to how these and other issues concerning the statewide legalization of marijuana will unfold. Until then, health care facilities, and senior and assisted living communities, in particular, will need to tread lightly to maintain compliance with existing state and federal laws, in order to both avoid employment related litigation and avoid jeopardizing their federal funding.

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[i] Compassion Care Act, Public Health Law Article 33, Title V-a.

[ii] Controlled Substances Act (*see* 21 USC § 812[c]) which makes "the manufacture, distribution, or possession [there]of" a criminal offense, unless used in connection with a research study approved by the Food and Drug Administration (*Gonzales v. Raich*, 545 U.S. 1, 12, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005)).

[iii] "Nor does any state law 'legalize' possession, distribution, or manufacture of marijuana. Under the Supremacy Clause of the Constitution, state laws cannot permit what federal law prohibits. U.S. Const. art VI, cl. 2. Thus, while the CSA remains in effect, states cannot actually authorize the manufacture, distribution, or possession of marijuana. Such activity remains prohibited by federal law." *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016).

[iv] Id.

[v] 833 F.3d 1163 (9th Cir. 2016).

[vi] *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016).

[vii] Notably, "[The CSA] does not make it illegal to employ a marijuana user. Nor does it purport to regulate employment practices in any manner." *Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F.Supp.3d 326 (U.S. Dist., Conn. 2017).

[viii] U.S. Department of Housing and Urban Development (HUD) Memorandum, January 2011, Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing.

[ix] The Marijuana Regulation and Taxation Act (2021 NY S.B. 854).

[x] Compassion Care Act, Public Health Law Article 33, Title V-a; The Marijuana Regulation and Taxation Act.

[xi] Id.

[xii] The Marijuana Regulation and Taxation Act.

[xiii] Id. at Section 196.

[xiv] Id. at Section 196 (emphasis added)

[xv] NY Soc Serv § 488 at ¶ 15.

[xvi] New York State Human Rights Law (NYSHRL), McKinney's Executive Law § 290 et seq.

[xvii] N.Y. Civil Rights Law § 40-c; N.Y. Public Health Law § 3369.

[xviii] *Gordon v. Consolidated Edison Inc.*, 190 A.D.3d 639, 140 N.Y.S.3d 512 (1st Dep't 2021).