



Michigan Coalition to End Domestic & Sexual Violence

“Legalized” Marijuana:

Recommendations and Guidance for Michigan Domestic & Sexual Violence Programs

This guide provides information to domestic violence and sexual assault shelters and agencies on the current state of the law and best practices regarding marijuana. Given the complexity of interacting laws in this area and the uncertainty about how courts and government agencies will continue to enforce the laws, there are no easy answers to questions on this topic. Programs should feel free to contact MCEDSV for case-specific guidance.

I. Effects of Marijuana

Although the medical community continues to recognize helpful properties of marijuana in treating certain mental and physical health problems, recent studies also confirm significant negative impacts of marijuana on cognition and short-term memory.¹ According to the National Highway Traffic Safety Administration, users feel the effects of marijuana consumption within minutes and peak in 10-30 minutes. However, residual side effects last up to 24 hours after consumption.² Smoking marijuana, like smoking tobacco, also releases a range of harmful chemicals into the air.³ When programs shape policies regarding marijuana, they must consider these performance, health, and safety concerns.

Despite these effects, testing for marijuana use can be complex. For example, testing for alcohol by breathalyzer is a simple and efficient method for determining whether an employee has recently had alcohol, and whether he or she is under the influence while in the workplace. However, testing for marijuana use usually requires a blood test to pinpoint an individual’s level of impairment. A standard urine screening may be the most cost-effective route for employers, but a positive result for marijuana simply shows that the individual has used in the past week or so and cannot show the level of impairment.⁴

¹ See, eg, Thames, A. D., Arbid, N., & Sayegh, P. *Cannabis use and neurocognitive functioning in a non-clinical sample of users* ADDICTIVE BEHAVIORS, 39(5), 994-9 (2014).

² *Marijuana-Impaired driving: report to Congress*, NHTSA, July 2017, <https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812440-marijuana-impaired-driving-report-to-congress.pdf>

³ *Respiratory Effects of Marijuana*, Alcohol & Drug Abuse Institute, <http://adai.uw.edu/marijuana/factsheets/respiratoryeffects.htm> (accessed Feb. 1, 2019).

⁴ See, eg, Paul L. Cary, *Drug Court Practitioner Fact Sheet: The Marijuana Detection Window*, April 2006, available at http://www.ndci.org/sites/default/files/ndci/THC_Detection_Window_0.pdf

II. Overview of Marijuana Laws

Federal law: Since the passage of the Controlled Substances Act of 1970 (“CSA”), marijuana has been classified as a Schedule 1 substance.⁵ The CSA defines Schedule 1 drugs, as those with no currently accepted medical use and a high potential for abuse. Marijuana maintains this Federal designation despite the fact that several states, including Michigan, have passed laws allowing medical and recreational marijuana to be used in some circumstances. In short, marijuana remains illegal when used by any person for any purpose under federal law. While the Department of Justice has previously indicated that federal prosecutors should not prosecute individuals for marijuana-related activity that is not unlawful under state law, that instruction has since been rescinded, and no formal guidance currently exists to prevent federal prosecution of any marijuana activity even if it is lawful under state law.⁶

Michigan State Law: In 2008, Michigan voters approved the Michigan Medical Marihuana⁷ Act (“medical marijuana”). Medical marijuana allows people to have up to 2.5 ounces and up to twelve plants of marijuana for medical purposes.⁸ First, patients wishing to use medical marijuana must obtain written certification from their physician that they have a debilitating medical condition and are likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat that condition or its symptoms. Then, patients must apply for and receive a medical marijuana registry card from the Michigan Department of Community Health.⁹ Primary caregivers of qualifying patients may also obtain an identification card and are then allowed to have marijuana on behalf of the person for whom they care. Medical marijuana is not allowed if using it while engaging in a certain activity would constitute negligence or professional malpractice, that is, a licensed social worker should not be using medical marijuana while counseling clients.¹⁰ Medical marijuana is not permitted in public places, such as in a parked car in a parking lot that is open to the public.¹¹

⁵ 21 USC 812.

⁶ *Gonzales v Raich*, 545 US 1, 28-29 (2005)(allowing federal prosecution for behavior that is legal under state law but illegal under federal law); Att Gen Jefferson B Sessions, *Memorandum Regarding Marijuana Enforcement*, US DOJ, Jan 4, 2018, <https://www.justice.gov/opa/press-release/file/1022196/download>. To add to the uncertainty in this arena, at least one court has indicated that marijuana use for religious purposes may be protected under federal law. *Oklevueha Native American Church Of Hawaii, Inc. v. Lynch*, 828 F.3d 1012 (CA 9 2016) (holding that, under the First Amendment and the Religious Freedom Restoration Act, a Native American may be allowed to use marijuana for religious purposes consistent with federal law, ordered to rehearing en banc, Jul 13, 2016). However, the Sixth Circuit Court of Appeals, which governs Michigan, has made no such finding. Accordingly, there is no indication that federal courts in Michigan would rule similarly. Nevertheless, marijuana has been used ceremonially in nearly every major and minor world religion.

⁷ Michigan law spells this term “marihuana” and many other sources also use “cannabis.” Canada spells it with an “h” as well, as does the federal government on occasion. “Marijuana” is used in this guide because that is better known by most people. Unless otherwise stated, “marijuana” as used here includes all forms of edible, oil-based, smokeable, and other related products that are classified as a schedule 1 substance by the CSA.

⁸ MCL 333.26424.

⁹ *Id.*

¹⁰ MCL 333.26427(b)(1).

¹¹ *People v Carlton*, 313 Mich App 339, 346 (2015).

Two cases illustrate the way that medical marijuana applies in an employment context. First, the federal appellate court for the Sixth Circuit held that an employer may fire someone who tests positive for marijuana under an employer's internal, zero-tolerance drug policy even though the employee's use of marijuana was legal under the medical marijuana law.¹² The Michigan Court of Appeals later clarified that an employee will be eligible for unemployment benefits if he or she is terminated for failing a drug test when use is consistent with medical marijuana law.¹³ These cases demonstrate that, while employers still have a lot of discretion to do what is right for their workplace, medical marijuana will provide a certain level of protection for employees.

In 2018, Michigan voters approved Michigan Regulation and Taxation of Marihuana Act ("recreational marijuana").¹⁴ Under the recreational marijuana law, persons over the age of 21 can legally have up to 2.5 ounces of marijuana and take it out of the house, so long as they do not enter federal properties or carry it near K-12 schools.¹⁵ Within the person's residence, they are allowed to have up to ten ounces and grow up to 12 plants, so long as the plants are not easily visible to the public. Much like with alcohol, recreational marijuana is only permitted either on private property or in businesses that are zoned for such use. Owners of property and employers are given broad authority to prohibit the use of recreational marijuana on their premises and to discipline, terminate, or refuse to hire employees for marijuana use.¹⁶ However, tenants (who are not living in federally-subsidized housing funded through programs like FVPSA, TANF, OVW, HUD, or housing choice vouchers) may not be prohibited from lawfully possessing recreational marijuana so long as they are not smoking it and their possession does not interfere with other tenants' enjoyment of the property.¹⁷

Although marijuana is often ingested through smokeless methods, agencies should also be aware of Michigan's Smoke-Free Air law ("smoking ban"), which was passed in 2009.¹⁸ The smoking ban prohibits "burning a cigar, cigarette, pipe, or other substance that contains a tobacco product" in public.¹⁹ Essentially, the smoking ban makes it unlawful to smoke tobacco in any indoor workplace or

¹² *Casias v Wal-Mart Stores, Inc*, 764 FSupp 2d 914 (CA 6 2012). Notably, Michigan courts do not have to follow this decision if they determine it is not a correct interpretation of state law.

¹³ *Braska v Challenge Mfg Co*, 307 Mich.App. 340 (2014).

¹⁴ MCL 333.27951 *et seq*

¹⁵ MCL 333.27955. Governor Whitmer has said she may take it a step further and commute sentences of some of the thousands of people in prison for low-level marijuana crimes. See Bridge Magazine, <https://www.bridgemi.com/public-sector/you-can-smoke-pot-michigan-not-buy-it-what-you-need-know>.

¹⁶ MCL 333.27954(3),(4).

¹⁷ MCL 333.27954(4).

¹⁸ MCL 333.12603

¹⁹ *Id.*

any property used for child care, with some exemptions for casinos and tobacco bars.²⁰ The law does not cover the use of e-cigarettes.²¹

Local or Tribal Ordinances: Townships, cities, and tribes may also regulate smoking and marijuana use. Local smoking bans may be more restrictive, but not less restrictive than state law.²² For marijuana, localities must choose whether to enact a facilities licensing ordinance before marijuana vendors can apply to sell their products.²³ Programs should consult local counsel for updated information on what is and is not lawful in their areas.

III. Disability laws

DV/SA agencies may not discriminate against individuals with disabilities in either an employment or client-service context.²⁴ However, the federal Americans with Disabilities Act (“ADA”) does not protect a medical marijuana user from an adverse employment action relating to marijuana use because marijuana remains illegal under federal law.²⁵ Michigan’s medical marijuana law also states it does not require employers to accommodate use or ingestion of marijuana in the workplace or any employee working under the influence of marijuana.²⁶ Michigan courts have yet to interpret the applicability of Michigan's Persons with Disability Civil Rights Act to this issue. However, courts around the country are increasingly demonstrating a willingness to find disability discrimination can be actionable in the context of medical marijuana, particularly where employers refuse to hire on the basis of medical marijuana use²⁷ or where employers refuse to consider reasonable accommodations.²⁸ This trend underscores the importance of taking precautions so that employment decisions are not based on an employee’s ability or disability.

²⁰ MCL 333.12606a-b.

²¹ *E-Cigarette Regulations-Michigan*, PUBLIC HEALTH LAW CENTER, <https://www.publichealthlawcenter.org/resources/us-e-cigarette-regulations-50-state-review/mi> (updated Sept 2018).

²² FAQs on Smoke Free Law, MDHHS, https://www.michigan.gov/documents/mdch/8.19.13_FAQs_Smoke_Free_Law_-_FINAL_3_431873_7.pdf (accessed Feb. 1, 20-19).

²³ For a list of municipalities and their decisions in this regard, see this link: <https://michigan-marijuana-lawyer.com/municipalities/>

²⁴ 34 USC 12291(b)(13); 29 USC 701 et seq; 42 USC 12111 et seq.

²⁵ 42 USC 12111–12117; *James v City of Costa Mesa*, 700 F.3d 394 (CA 9 2012). Similar to the ADA, the Family Medical Leave Act (“FMLA”) requires covered employers to provide leave for eligible employees for serious health conditions. Terminating an employee for utilizing leave in order to pursue medical marijuana is still inconsistent with the FMLA, but terminating because the employee tests positive in violation of established employer policy is likely not a violation of FMLA. *Casias v Wal-Mart Stores, Inc*, 764 F.Supp 2d 914 (CA 6 2012).

²⁶ MCL 333.26427.

²⁷ *Barbuto v Advantage Sales & Mktg*, 78 N.E.3d 37 (2017) (Massachusetts).

²⁸ *Callaghan v Darlington Fabrics Corp*, No. PC-2014-5680 (2017) (Rhode Island).

IV. Federally supported housing programs

The Department of Housing and Urban Development (“HUD”) issued guidance in 2011 stating that Public Housing Authorities must establish standards that allow a termination of housing assistance for use of a controlled substance such as marijuana.²⁹ HUD clarified that users of state-sanctioned marijuana could not be admitted for the first time to any housing programs, but that that local authorities have discretion to determine continued occupancy policies “most appropriate for their local communities.”³⁰ The Quality Housing and Work Responsibility Act (QHWRA) of 1998 requires state authorities to prohibit admission to the Public Housing and Housing Choice Voucher programs based on the illegal use of federally controlled substances. This includes both the medicinal and recreational use of marijuana. The Michigan State Housing Development Authority (“MSHDA”) has implemented federal policy in its plan by stating it “will terminate HCV assistance if there are lease violations or drug-related criminal activity that threatens the health or safety of, or the right to peaceful enjoyment of the premises by, other residents or persons residing in the immediate vicinity of the premises.”³¹ However, MSHDA, on a case-by-case basis, may determine not to terminate assistance.³² Anecdotally, the trend appears to be shifting away from terminating assistance for state-sanctioned use of medical marijuana, with less clarity in the field of recreational marijuana.

V. Drug-free workplace rules and laws

Legalization at the state level does not affect any employer’s right to maintain and enforce a drug-free, smoke-free, and alcohol-free workplace.³³ In other words, employers are generally allowed to be stricter than state law when deciding what is expected on the job. In order to receive federal grants, programs must agree to comply with the Drug-Free Workplace Act.³⁴ The federal Drug-Free Workplace Act does not require that employers conduct mandatory drug tests. However, under the Act, employers must maintain policies that prohibit employee use of illegal drugs, including marijuana—or risk losing the grant dollars. Specifically, employers must develop a written drug-free policy, initiate awareness programs to educate employees about dangers of drug use, require that all employees notify them within five days of a conviction for a drug offense in the workplace, and make a good-faith effort to maintain a drug-free workplace.³⁵

²⁹ Sandra B. Henriquez, Memorandum Re: Medical marijuana use in public housing and housing choice voucher programs, Feb. 10, 2011, <https://www.hud.gov/sites/documents/MED-MARIJUANA.PDF>.

³⁰ *Id.*

³¹ MSHDA Administrative Plan, Oct. 10, 2017,

https://www.michigan.gov/documents/mshda/Chap_12_Admin_Plan_600783_7.pdf. Anecdotally, the trend appears to be shifting away from terminating assistance for state-sanctioned use of medical marijuana.

³² *Id.*

³³ See, *eg*, MCL 333.26427 (stating Michigan’s medical marijuana law does not require any employer “to accommodate the ingestion of marijuana in any workplace or any employee working under the influence . . .”).

³⁴ 41 USC 8103.

³⁵ *Id.*

VI. Applying these laws to domestic and sexual violence programs

Against this complex legal backdrop, the following guidance recommends best practices for DV/SA agencies. All agencies must determine the type of culture that they wish to create and make independent determinations based on developing law, local ordinances, and specific circumstances.

DV/SA agencies as employers: Increased “legalization” is likely to bring with it a higher social acceptance rate of using marijuana. With that in mind, agencies may have to reconsider their approach in order to attract and retain the most talented workforce possible. The following parameters may help:

- Agency policies should clearly convey expectations and any testing policies.
- Agencies should regularly communicate policies both in writing and orally during staff meetings.
- Agencies must apply their policies consistently to all employees who play similar roles.
- Agencies should consider treating recreational marijuana use like recreational alcohol, with the added understanding that unlike alcohol, marijuana remains illegal under federal law.
- With regard to testing, agencies may choose:
 - not to use drug testing;
 - choose to test only employees in highly sensitive positions that consistently have significant client or child contact, although this may be difficult to apply consistently in small agencies where staff perform differing roles;
 - to perform testing only when supervisors have reasonable cause to suspect an employee is using drugs based on a direct, objective observation; and
 - to perform testing only after an accident or adverse performance incident, although this policy is not recommended as it is difficult to apply consistently.
- Agencies should train all managers on the agency’s policy and on recognizing signs of impairment.
- Agencies should not rely upon medical marijuana use as a basis for choosing not to hire someone.
- If an agency must terminate an employee (or engage in any other adverse employment action) based on marijuana use, it should take special care to scrutinize the decision to ensure it is not inadvertently making its decision on the basis of an underlying disability or membership in another protected class.
 - As always, carefully documenting the performance-related reasons why an employee is being terminated or disciplined is crucial.

DV/SA agencies and their clients: Similarly, agencies are likely to see an increase in clients with concerns about marijuana in the wake of “legalization.” Here are some suggestions for agencies managing this change:

- Information about the agency’s policy regarding marijuana use should be posted in all public places and should be covered in the intake process.
- No individual should ever be denied services on the basis of his or her health condition giving rise to use of medical marijuana.
- It is strongly recommended that all smoking, including marijuana smoking, be prohibited inside agencies and shelters.
- It is strongly recommended that shelters and agencies prohibit the possession, administration, and/or use of all marijuana on shelter property.
 - Should a shelter resident need to use medical marijuana, the agency may facilitate with the individual to make arrangements to do so off shelter property and facilitate as it would any other medical appointment, with the goal of promoting the client’s health. Staff should safety plan with regard to the consequences that may still be associated with such use of marijuana.³⁶
- Agencies should not allow marijuana plants to be kept within a shelter or agency facility, regardless of how they are hidden or secured, including in transitional housing owned by the agency. The agency may facilitate informal problem-solving arrangements for a survivor to store and access plants in non-shelter space, such as the home of a trusted friend, as part of safety planning.
- In general shelters should consider the following recommendations with regard to medication³⁷:
 - Shelter staff should not hold and administer any medication.
 - Clients should be enabled to have control over their own medication.
 - Each client should be provided with a locking storage container for the client to keep all prescription and over-the-counter medications.
 - The storage containers should be accessible and private. Agencies should provide storage containers to place medicines in a dedicated refrigerator where necessary.
 - It is recommended that shelter staff not search the medication storage.
 - Where a resident leaves behind medication, agencies should contact the former resident to arrange for them to gather their belongings. In the event that a medication must be disposed of safely, agencies should consult the Michigan Department of Environmental Quality’s drug takeback location program or contact MCEDSV.

³⁶ Similarly, should a shelter resident wish to make arrangements to use marijuana in exercise of religion or spirituality, the agency may facilitate with the individual to make arrangements to do so off shelter property and facilitate as it would for any other spiritual or religious need, with the goal of promoting the client’s emotional healing. Staff should safety plan with regard to the consequences that may still be associated with such use of marijuana.

³⁷ These recommendations are consistent with the recommendations set forth by the Nevada Coalition to End Domestic & Sexual Violence in a 2017 Technical Assistance Bulletin, on file with MCEDSV. See also *How the Earth Did not Fly into the Sun*, https://vawnet.org/sites/default/files/materials/files/2016-07/NRCDV_ShelterRules_0.pdf pg. 39.

- Again, the agency should make its policy against all marijuana use on the agency's property clear upon intake. Where a shelter resident is found to be in violation of the anti-marijuana policy, shelter staff may respond as follows:
 - Shelter staff may ask a client to dispose of any prohibited item if it is found that the item contains marijuana.
 - Shelter staff should take steps to ensure that clients who are under the influence of marijuana are safe. This should be accomplished in a non-judgmental and client-centered manner. Staff should
 - Secure necessary medical care;
 - Suggest that the client remain in their private space until they are no longer under the influence if it is safe to do so; and
 - Take steps to ensure that the client appreciates and is prepared to follow the agency's policy in the future.
- If a client is under the influence of a prohibited substance and is being aggressive or unsafe towards staff or other residents, then the staff should follow agency policy for de-escalating and addressing such situations.
- Agencies that own and manage transitional housing units should ensure that their rules regarding marijuana are clearly communicated to tenants using that service. Transitional housing grantees should contact MCEDSV regarding specific questions in this context.
- Agencies may consider suggesting voluntary rehabilitation programs or other interventions through trusted community partners. In advance of any issue, agencies should build relationships with such service providers.

Please feel free to contact MCEDSV with questions: (517) 347-7000 (ex. 10); ejordan@mcedsv.org