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Marijuana in Colorado Senior Living Communities: It's Not as Easy as 1, 2, 3

Even though marijuana is legal in Colorado, large amounts of confusion and uncertainty still exist for a Colorado senior living community (SLC) that is deciding how to handle marijuana use in its facility. In 2000, Colorado passed Amendment 20 legalizing medical marijuana. Twelve years later, Colorado legalized recreational marijuana by passing Amendment 64. Federal law classifies Marijuana as a Schedule I Controlled Substance under the Controlled Substances Act. As such, use of marijuana remains illegal under federal law. That said, the Department of Justice released a memorandum in 2013 stating that states with "strong and effective regulatory and enforcement systems" for state-legalized marijuana use are "less likely" to be marijuana prosecutorial priorities. The conflict between Colorado and federal law is not the only legal issue SLCs, which include skilled nursing facilities, will face when determining whether to permit marijuana use. To make matters more challenging, neither the Colorado Legislature nor the Colorado Department of Public Health and Environment has provided much guidance regarding the use of marijuana in SLCs.

Given the conflict between Colorado and federal law and the lack of guidance provided by Colorado, how should owners and operators of Colorado SLCs handle marijuana use in their communities? Should SLCs permit the use of medical marijuana? What



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about the use of recreational marijuana? What are the risks of permitting either use? How might an SLC mitigate those risks? Answering these questions is becoming more pressing due to increasing amounts of clinical evidence supporting marijuana's medicinal powers; greater cultural acceptance of marijuana use in Colorado; and the fact that baby boomers – the generation of Woodstock, The Grateful Dead and "make love not war" – are slowly approaching the age when they will consider moving to SLCs.

Today, it seems prohibiting any use of marijuana in SLCs is the easy answer, but perhaps not the best. If an SLC chooses to prohibit marijuana use, it is following federal law and will likely not be violating Colorado law. No current Colorado law requires an SLC to administer medical marijuana to its residents or to permit its residents to use medical or

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recreational marijuana. *Coats v. Dish Network, LLC*, now pending in the Colorado Supreme Court, could change that. In *Coats*, a medical marijuana licensee, who used medical marijuana during non-work hours, was fired from his job for failing a work-mandated drug test. If the court rules that Amendment 20 creates a Constitutional right to use medical marijuana that protects *Coats* from termination, it would be reasonable to believe that that Constitutional right protects an SLC resident from discharge or eviction for his or her use of medical marijuana.

If a SLC permits the use of marijuana, should it permit the use of only medical marijuana or both medical marijuana and recreational marijuana? Remember, the DOJ has indicated that states with effective regulation and enforcement protocol for marijuana use are less likely to be prosecution priorities. It may be reasonable to assume that Colorado's medical marijuana regulations and enforcement protocols are sufficient in the eyes of the DOJ because the DOJ has not commenced any large-scale prosecutions of medical marijuana in Colorado in the 12½ years since they were adopted. Perhaps Colorado's recreational marijuana regulations and enforcement protocol is too new to speculate how the DOJ views them.

Might an SLC that permits marijuana use or stores and

administers medical marijuana similar to other drugs put its funding at risk? A DOJ decision not to prosecute does not guarantee that an SLC will continue to receive the federal portion of its Medicaid funds or any of its Medicare funds. In addition, nearly all loans and leases require the borrower or tenant to comply with applicable law. Permitting the use of marijuana may violate such covenants and result in a default under a loan or a lease. That risk likely increases if the SLC stores or administers medical marijuana for its residents, rather than just permitting the use of marijuana.

An SLC must also consider how its residents will be affected by marijuana use. Might users pose a greater risk to themselves or others? Will marijuana use offend some residents' cultural values or create or exacerbate health issues of other residents? If an SLC permits marijuana use, it should consider what forms of marijuana can be consumed, in what locations marijuana use can occur, where marijuana will be stored and how medical marijuana will be administered.

Given the conflict between federal and Colorado law and the lack of guidance from Colorado, SLCs must be thoughtful in how they address marijuana use and should consult their attorneys when considering these and other questions and making decisions. Ideally, Colorado will soon provide some guidance that allows SLCs and their residents to better understand their rights and duties.