



121 STATE STREET
ALBANY, NEW YORK 12207-1693
TEL: 518-436-0751
FAX: 518-436-4751

TO: Memo Distribution List

LeadingAge New York

FROM: Hinman Straub P.C.

RE: Final Regulation Authorizing Facilities to Become Designated Caregivers under the NYS Medical Marihuana Program

DATE: June 27, 2018

NATURE OF THIS INFORMATION: This is information explaining new requirements you need to be aware of or implement.

DATE FOR RESPONSE OR IMPLEMENTATION: The final regulation makes permanent regulations currently in effect as an emergency regulation.

HINMAN STRAUB CONTACT PEOPLE: Sean Doolan and Michael Paulsen

THE FOLLOWING INFORMATION IS FOR YOUR FILING OR ELECTRONIC RECORDS:

Category: #4 Regulatory Process

Suggested Key Word(s):

©2018 Hinman Straub P.C.

The Department of Health (DOH) has adopted a final regulation allowing certain licensed facilities to become a designated caregiver for certified patients under New York's Medical Marihuana¹ Program ("Program"). The final regulation makes permanent provisions that are in effect via an emergency regulation promulgated in 2017. Despite the submission of comments from hospitals, nursing homes and assisted living providers requesting modifications to the regulation, the final regulation was adopted without any changes.

We requested that the Department consider revising the regulation to streamline the facility registration process in order to eliminate the burdensome administrative requirements for becoming a facility caregiver. Specifically, the process requires facilities to register separately for each resident that designates the facility as a caregiver, as well as return the facility registration identification card received for each patient when that patient is no longer a certified patient or resident (de-register). We proposed that the Department modify the regulation to allow for eligible facilities to have a standing registration as a designated caregiver. The Department declined to modify the regulation due to statutory limitations on when a person (individual or facility) can be a designated caregiver under the Program.

Summary of Regulation

1. Eligible Facilities

The regulation amends existing regulations governing the Program that only allow for designated caregivers to be natural persons. Recognizing that certified patients may reside in licensed facilities, the regulation allows certified patients to designate facilities as caregivers under the Program. The following facility types are eligible to serve as caregivers if designated by a resident that is a certified patient:

- General hospitals;
- Residential health care facilities (nursing homes);
- Adult Care Facilities (ACFs);
- Facilities operating under Article 31 and 32 of the Mental Hygiene Law, including mental hygiene facilities, community mental health residences, and residential facilities for the care and treatment of persons with developmental disabilities; and
- Private and public schools.

The regulation authorizes eligible facilities to designate a division, department, component, floor or unit of the facility to serve as a certified patient's designated caregiver.

2. Process for Facilities

The regulation does not require eligible facilities to register as a designated caregiver and assist residents with the use of medical marihuana. The choice to seek caregiver registration is solely at the option of the eligible facility.

¹ Both the authorizing statute and the proposed regulation use the alternative spelling "marihuana" instead of the more commonly used "marijuana". To be consistent with the law and regulations, the former spelling is used throughout this memorandum.

However, the regulation does not authorize eligible facilities to register as a designated caregiver with the Department unless a certified patient elects to designate the facility as a caregiver.² Specifically, a patient must first designate an eligible facility as a caregiver during the patient registration process. After the patient's registration has been approved, the caregiver must register with the Department in order to be a designated caregiver for that certified patient.

When an eligible facility is selected by a certified patient as a designated caregiver, the facility may apply to DOH to register as a caregiver and obtain a registry identification card. The certified patient is required to complete the first section of the form to designate the facility as a caregiver.³ The regulation requires facilities to submit the following information when registering:

- The facility's full name, address, operating certificate or license number;
- Name, title, email address, and signature of an authorized facility representative;
- If the facility has already received a registry identification card for another resident, the registry identification number;
- A statement that the facility agrees to secure and ensure proper handling of all approved medical marijuana products; and
- An acknowledgment that a false statement in the caregiver application is a punishable offense.

If the facility is approved to serve as a designated caregiver, a registry identification card will be provided to the facility. The facility will be responsible for maintaining the registry identification card at all times when medical marijuana is present at the facility for the certified patient.

Facilities registering as designated caregivers may incur administrative costs in registering. Pursuant to PHL § 3363(f), there is a \$50 application fee for designated caregivers to register with DOH. However, DOH is currently waiving the \$50 application fee for all designated caregivers, including facilities registering as designated caregivers. The waiver of the application fee may be eliminated or amended at any time.

3. Designated Caregiver Protections

The regulation extends statutory and regulatory legal protections for designated caregivers to employees of facilities registered as designated caregivers acting within the scope of their employment. Specifically, the regulation provides that employees of facilities designated as caregivers, acting within the scope of their employment, shall not be subject to arrest, prosecution or penalty in any manner, or subject to disciplinary action by a business or professional licensing board solely for acting as a designated caregiver in compliance with the requirements under the Program. As the protections are only extended to facility employees acting in compliance with the Program, it is important for facilities to develop internal policies and procedures to ensure that staff are in compliance with the Program for purposes of possession, transporting, storage, and administration of medical marijuana.

² Certified patients registering with the Program may designate up to two caregivers.

³ A copy of the Facility Caregiver Designation form can be found at <https://www.health.ny.gov/forms/doh-5256.pdf>.

It is important to highlight that marihuana remains a Schedule 1 controlled substances under the federal Controlled Substance Act (CSA). At the time this regulation was promulgated, state marihuana programs operated relatively unencumbered as a result of a 2013 Department of Justice (DOJ) memorandum (“Cole Memorandum”), which stated a federal policy of non-intervention of state regulatory programs for marihuana (medical or otherwise), as long as the programs are well-regulated. In 2018, the Cole Memorandum was rescinded by the DOJ, and replaced with a directive giving federal prosecutors discretion on the extent they will enforce federal law against state-legalized marihuana. However, Congress has extended the Rohrabacher-Blumenauer Amendment⁴ through September 2018, which prohibits federal prosecutors from using federal funds for CSA enforcement in states with a medical marihuana program.⁵

New York’s Program provides legal protection for individuals and facilities operating under the Program from state laws in relation to marihuana possession and use. In relation to federal enforcement of the CSA, New York’s Program continues to provide protection from federal enforcement of the CSA as a result of the Rohrabacher-Blumenauer Amendment. While a number of states are advocating for federal legislation that would protect state marihuana programs from federal interference, further changes at the federal level may result in uncertainty on the continued operation and effectiveness of New York’s Program.

4. Additional Considerations

In allowing eligible facilities to be designated caregivers under the Program, the regulation subjects facilities to the existing regulatory structure governing designated caregivers. As a result, eligible facilities seeking to register as designated caregivers should be aware of the responsibilities and prohibitions for caregivers under the Program. A brief overview of important aspects of the Program in relation to caregivers is provided below:

- Designated caregivers may only obtain payment from the certified patient to be used for the cost of the approved medical marihuana product purchased for the certified patient in the actual amount charged by the registered organization. Caregivers may, however, charge a certified patient for reasonable costs incurred in the transportation, delivery, storage and administration of medical marihuana;
- Designated caregivers are required to have their registry identification card in their possession when in possession of medical marihuana and are required to present the card upon request by law enforcement. Facility policies should require that any employee in possession of medical marihuana, especially if transporting from a registered organization to the facility, carry the facility registry identification card with documentation that they are an employee of the facility;
- Designated caregivers must dispose of all medical marihuana in their possession no later than 10 calendar days after the expiration of the patient's certification, if such certification is not renewed, or sooner should the patient no longer wish to possess medical marihuana;
- Existing regulations that were not amended by the regulation require DOH to deny a registry ID card for an applicant that is already a designated caregiver for five (5) currently certified patients. Unless amended, facilities are currently only permitted to serve as a

⁴ Formerly referred to as the “Rohrabacher-Farr Amendment”.

⁵ The prohibition under the Amendment prevents the Justice Department from spending federal funds to prosecute individuals who are engaged in conduct that is permitted by, and in compliance with, state medical marihuana laws.

designated caregiver for up to 5 residents; however, facilities may provide caregiver services to more certified patients by designating floors or units of the facility as caregivers.

- Designated caregivers are required to notify DOH of any change in the information submitted in registering with DOH no later than 10 business days after such change.
- If a designated caregiver becomes aware of the loss, theft or destruction of the registry identification card of a certified patient or designated caregiver, the designated caregiver must notify DOH no later than 10 days of becoming aware of the loss, theft or destruction.
- If a certified patient wishes to change or terminate a facility as a designated caregiver and the facility has no other active certified patients, the facility must return their registry card to DOH within 10 business days.

In response to public comments, the Department provided the following guidance in response to issues raised by facilities:

- Any facility employee, deemed appropriate by the designated caregiver facility, can administer approved medical marijuana products to the patient.
- A designated caregiver may provide assistance with all approved forms of medical marijuana. It is important to note that the use of vaporization is restricted to designated smoking rooms for a patient or resident in hospitals, nursing homes, and adult care facilities.
- Approved medical marijuana products cannot be disposed of using medication drop boxes, DEA drug take-back events or via Bureau of Narcotic Enforcement drug destructions. The Department instructs caregivers that disposing of approved medical marijuana products must be done in a manner that renders the product non-recoverable beyond reclamation.

Please contact us with any questions you may have.