

[Initiated Measure 26](#) was passed by South Dakota voters in November 2020, legalizing medical marijuana in South Dakota effective July 1, 2021. South Dakota Codified Law (SDCL) [Chapter 34-20G](#) contains the statutes legalizing medical cannabis under Initiated Measure 26.

Medical Cannabis

[SDCL § 34-20G-1](#) defines medical cannabis by referencing the definition of marijuana in [SDCL § 22-42-1](#):

All parts of any plant of the genus cannabis, whether growing or not, in its natural and unaltered state, except for drying or curing and crushing or crumbling. The term includes an altered state of marijuana absorbed into the human body. The term does not include fiber produced from the mature stalks of such plant, or oil or cake made from the seeds of such plant. The term does not include the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent on a dry weight basis.

The definition does not put limitations on the method of use for medical cannabis, such as age limitations for smoking or vaping. Medical cannabis products are also allowed under [SDCL § 34-20G-1](#). Medical cannabis products are defined as any concentrated cannabis, cannabis extracts, and products that are infused with cannabis or an extract and are intended for use or consumption by humans. The term includes edible cannabis products, beverages, topical products, ointments, oils, and tinctures. No government program or insurance payer is required to reimburse for medical cannabis or medical cannabis products on behalf of a patient.

Medical cannabis can be grown by qualifying patients and caregivers or be purchased at a medical cannabis dispensary. Cardholders will be able to designate up to two dispensaries. Medical cannabis dispensaries must be registered with the South Dakota Department of Health. The Department of Health must promulgate rules no later than October 29, 2021 related to the registration of medical cannabis dispensaries.

The legalization of medical cannabis under South Dakota Codified Law conflicts with federal law where marijuana is still classified as Schedule I drug under the Controlled Substances Act of 1970 (CSA). This means that the cultivation, manufacture, sale distribution, possession and use of medical cannabis violates the CSA and constitutes a federal felony.

Allowable Amounts and Personal Cultivation

Cardholders may possess three ounces of cannabis or less, in addition to an amount of cannabis products established by the Department of Health. The Department of Health will promulgate rules related to issuing registry identification cards. Cards will begin being issued no later than November 18, 2021.

Cardholders may also register to cultivate plants. [SDCL § 34-20G-1](#) requires that cardholders cultivate a minimum of 3 plants or an amount as prescribed by a physician. It appears that restrictions on the amount of cannabis and cannabis products may be exceeded if the cannabis or cannabis products were produced from the cardholder's plants and are possessed at the same property where the plants were cultivated.

Qualifying Patients and Designated Caregivers

Under [Chapter 34-20G](#), individuals are allowed to register as a cardholder and possess medical cannabis as either a qualifying patient or as a designated caregiver.

- Qualifying patients must have a debilitating medical condition and written certification from a physician that medical cannabis is likely to receive therapeutic or palliative benefits from the use of medical cannabis.
- Qualifying patients may designate a caregiver to assist in the patient in the use of medical cannabis. The cardholder must be at least 21 years of age, agree to assist the patient, not be convicted of a disqualifying federal offense, and assist no more than 5 patients with the medical use of cannabis.

If a qualifying patient is under age 18, the patient may be registered as a cardholder if the patient's prescribing practitioner has explained the potential risks and benefits of the use of medical cannabis to the custodial parent or legal guardian responsible for making healthcare decisions for the qualifying patient and if the custodial parent or legal guardian agrees in writing to allow the qualifying patient to use medical cannabis, serve as the qualifying patient's designated caregiver, and control the acquisition, dosage, and frequency of use of medical cannabis by the qualifying patient.

Individuals from out of state may also possess medical cannabis if they are determined to be a nonresident cardholder under [SDCL § 34-20G-1](#).

Debilitating Medical Condition

Debilitating medical conditions for the medical use of cannabis include chronic conditions or treatment of a medical condition that produces:

- Cachexia or wasting syndrome;
- Severe, debilitating pain;
- Severe nausea;
- Seizures; or
- Severe and persistent muscle spasms.

The South Dakota Department of Health may add additional medical conditions or treatment to the list of debilitating medical conditions. South Dakota residents may petition the department to add conditions. The department shall approve or deny petitions within 180 days of submission of the petition. The approval or denial of a petition may be subject to judicial review. The Department of Health is required to issue rules related to petition process.

Written Certification and Practitioners

Qualifying patients must have written certification from a practitioner in order to qualify for a registry

identification card. Written certification must be issued within the 90 days preceding the qualifying patient's application for a registry identification card and must be signed and dated by the practitioner. The written certification must state that in the practitioner's professional opinion, the patient is likely to receive therapeutic or palliative benefits from the medical use of cannabis to treat or alleviate the patient's condition or symptoms associated with the condition. The practitioner must list the patient's debilitating medical condition.

Practitioners and patients must have a "bona fide practitioner-patient relationship," meaning that the practitioner has assessed the patient's medical history and debilitating medical condition, including an in-person physical examination, and is available to provide follow-up care to the patient. Practitioners must affirm the bona fide practitioner-patient relationship on the written certification.

[SDCL § 34-20G-1](#) defines a practitioner to be a "physician who is licensed with the authority to prescribe drugs to humans." Physician generally has a specific meaning under South Dakota Codified Law [Chapter 36-4](#). It is unclear if other licensed professionals such as physician assistants or certified nurse practitioners are eligible to provide written certification to qualifying patients.

Practitioner Protections Under State Law

Practitioners are protected for certain actions related to written certification under [SDCL § 34-20G-5](#). Practitioners may not be subject to arrest, prosecution, or penalty of any kind or denied any right or privilege, including civil penalty or disciplinary action by the South Dakota Board of Medical and Osteopathic Examiners or by any other occupational or professional licensing board or bureau, solely for providing written certifications or for otherwise stating that, in the practitioner's professional opinion, a patient is likely to receive therapeutic or palliative benefit from the medical use of cannabis to treat or alleviate the patient's serious or debilitating medical condition or symptoms associated with the serious or debilitating medical condition.

Practitioners may still face sanctions under state law for issuing written certifications to patients without a bona fide practitioner-patient relationship and failing to properly evaluate a patient's medical condition.

Federal Regulation Considerations Related to Providing Written Certification

Marijuana remains a Schedule I drug under federal regulation creating potential liabilities for practitioners and facilities related to Medicare and Medicaid participation and Drug Enforcement Agency (DEA) certification and licensure.

Under DEA licensure requirements, all drugs listed in Schedule I may not be prescribed, administered, or dispensed for medical use. It is unclear if written certification could be construed as a "prescribing" under federal regulation. If certification is construed as the equivalent to prescribing medical marijuana, the DEA may have grounds to revoke the controlled substance license of any practitioner certifying patients. Practitioners certifying patients at a hospital or other healthcare facility setting could jeopardize the DEA license of both the practitioner and the healthcare facility. Suspension or revocation of a DEA license is grounds for revocation of enrollment in Medicare and Medicaid.

Billing for services under the Medicare and Medicaid programs includes a provision for certifying compliance with federal and state law. Due to its classification as a Schedule I drug with no medical value, billing Medicaid or Medicare for a service related to patient certification may be considered a violation of federal law and seeking reimbursement for a service may trigger False Claims Act liability. However, a general visit that involves certification but serves another primary purpose, may not be construed as a visit solely for certification, and may still be billable without falsely certifying compliance with all federal regulations. Healthcare facilities may also choose not to bill for the certification process.

Healthcare facilities and practitioners should carefully consider their actions and documentation related to written certification.

Quick Answers

- **How much medical cannabis can a cardholder possess?**
3 ounces of cannabis plus additional cannabis products as specified by the Department of Health.
- **When can patients legally start possessing medical cannabis?**
Initiated Measure 26 is effective July 1, 2021. The Department of Health must begin issuing registry identification cards on or before November 18, 2021.
- **Are there restrictions on the method of use of medical cannabis such as prohibiting smoking?**
No, current statute does not restrict the method of use. However, property owners may prohibit the smoking of cannabis on their property.
- **Can individuals under age 18 use medical cannabis?**
Yes, with the permission of their custodial parent or legal guardian.
- **Can advanced practice professionals provide written certification to qualifying patients?** Current statute states that only physicians may provide written certification.
- **Can physicians use telehealth to establish a bona fide practitioner-patient relationship?**
No, current statute requires an in-person examination.
- **Do private insurers or programs like Medicaid or Medicare have to cover medical cannabis?**
No, under [SDCL § 34-20G-27](#), private insurers and government programs are not required to cover medical cannabis.

Additional Resources

This brief is one of a series related to Medical Marijuana Implementation in South Dakota. Please visit <https://sdaho.org/marijuana/> to view additional resources.

Future Statute Changes

SDAHO will aggregate issues related to the implementation of this statute. Please contact Sarah Aker with examples of the impact on your healthcare facility and recommended changes to the statute.

CONTACT

Sarah Aker | sarah.aker@sdaho.org | 605.789.7527

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