

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.

Federal Law

Marijuana is classified as a 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.

Drug-Free Workplace Protection Act

The Drug-Free Workplace Act (DFWA) requires federal contractors and federal grant recipients to prohibit the “unlawful ... use of a controlled substance” by employees in their workplace as a condition of employment. Federal contractors and federal grantees subject to the DFWA are legally required to maintain a drug-free workplace with no exceptions for employees’ use of medical marijuana, and therefore to do not have to revise their drug-free workplace policies regardless of what is required by state medical marijuana laws.

Medicare claims payment to hospitals and other healthcare providers are not covered by the DFWA because payments are not made through a procurement contract or a grant. Therefore, receiving Medicare payments will not exempt providers from state medical marijuana laws that require reasonable accommodations for or prohibit discrimination against medical marijuana users. Other federal grants may exempt a provider from medical cannabis laws.

Medical Cannabis Use by Employees in South Dakota

Medical cannabis use by qualifying patients is protected under state statute, but the language passed under Initiated Measure 26 also contains limitations on use and exceptions to the protections.

- Under [SDCL § 34-20G-22](#), a qualifying patient utilizing medical cannabis is required to have the same rights under local and state as an individual utilizing a pharmaceutical medication. The rights extend to any interaction with the individual’s employer and include drug testing by the employer or any drug testing required under state or local law, or by any agency or governmental official.
 - [SDCL § 34-20G-23](#) allows for an exception to [SDCL § 34-20G-22](#) if it conflicts with obligations under federal law or would disqualify the organization from a monetary or licensing-related benefit under federal law or regulation. It is unclear if a facility subject to the Drug-Free Workplace Protection Act may ban off-duty use by qualifying patients.
- [SDCL § 34-20G-24](#) allows any workplace to ban the ingestion of cannabis in the workplace and also prohibit employees from working while under the influence of cannabis. No employer is prohibited from establishing and enforcing a drug free workplace policy that may include a drug testing program that complies with state and federal law and acting with respect to an applicant or employee under the policy

- Employers may discipline an employee for ingesting cannabis in the workplace or for working under the influence of cannabis under [SDCL § 34-20G-28](#).
- The use of medical cannabis is also not protected in instances when performing a task under the influence of medical cannabis would constitute negligence or professional malpractice under [SDCL § 34-20G-18](#). This also includes performing any safety-sensitive job under the influence of cannabis.
 - "safety-sensitive job," any position with tasks or duties that an employer reasonably believes could:
 - a) Cause the illness, injury, or death of an individual; or
 - b) Result in serious property damage.
 - While drug tests are allowed, employers may find it challenging to use a drug test to definitively prove on-duty or off-duty use as the sole presence of cannabis metabolites in a qualifying patient may not be used to determine if the individual is "under the influence."

Policy Considerations

It is unclear the extent to which healthcare facilities may be able to rely on federal law to claim exemption from compliance with state laws related to medical cannabis. Healthcare facilities should carefully evaluate human resource policies related to employee drug use.

Policy Considerations

1.	Education for Supervisors Regarding Identifying Impairment
2.	Documentation Policy and Basis for Decision Making Related to Employees Working "Under the Influence"
3.	Potential Risk of Injury to Employees or Patients/Residents for Qualifying Patients in Care-Taking Roles
4.	Facility Liability for Employees Performing Tasks "Under the Influence"
5.	Discrimination and Failure-to-Accommodate Allegations for Employee Cardholders/Qualifying Patients
6.	Facility Recruitment Policies and Drug Screening for Medicinal Use
7.	Policy for Off-Duty Use of Substances

Quick Answers

- **Do Medicare reimbursement payments subject healthcare providers to the requirements of the Drug Free Workplace Act?**
No, because Medicare payments are not made under a procurement contract or grant, they do not automatically exempt a provider from state laws relating to medical cannabis use. Other federal grants or contracts may exempt healthcare providers.
- **Can a facility ban all employees from utilizing medical cannabis even while off-duty?**
A facility may ban medical cannabis from the workplace.
- **May an employee be disciplined for medical cannabis use?**
A facility may discipline an employee for violating policies related to ingesting medical cannabis in the workplace and working while under the influence. It is unclear if a facility could discipline an employee for off-duty use. A facility can take adverse employment action based solely on a positive test result for cannabis metabolites if the person is employed in a safety-sensitive job.

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 in preparation for future legislation. Please contact Jacob Parsons with examples of the impact on your organization or healthcare facility and recommended changes to the statute.

CONTACT

Jacob Parsons | jacob.parsons@sdaho.org | 605.789.7527

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