The facility is required to make every reasonable effort to assign patients to rooms according to the patient's nonsmoking or smoking preference.

Smoking is not permitted in kitchen areas [Title 22, California Code of Regulations, Section 72351(i)].

Skilled nursing facilities that are certified by the Centers for Medicare & Medicaid Services (CMS) should be familiar with the requirements to assess smoking areas, provide emergency equipment in designated smoking areas, and document the means by which residents are assessed as safe to smoke without supervision. In addition, CMS states that skilled nursing facilities are obligated to ensure the safety of smoking areas, which includes protecting residents from weather conditions, protecting non-smoking residents from secondhand smoke, and providing portable fire extinguishers and ashtrays made of noncombustible materials. In addition, CMS states that a change in a facility's policy to prohibit smoking may not affect current residents who smoke — they must be allowed to continue to smoke in designated areas that may be outside, weather permitting. Residents admitted after a policy change must be informed, during the admission process, of the policy prohibiting smoking. *(See CMS Survey and Certification Memo S&C: 12-04-NH, dated Nov. 10, 2011 at www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Policy-and-Memos-to-States-and-Regions.html.)*

LIMITATIONS

Patients may not be permitted to smoke in or on the bed except when a facility staff member or responsible adult is present in the room to ensure safety against fire hazards. Smoking or open flames are not permitted in any rooms or spaces where oxygen cylinders are stored or where oxygen is in use. Such rooms or spaces must be identified by prominently posted "No Smoking" or "No Open Flame" signs. [Title 22, California Code of Regulations, Section 72507]

E. TJC and First 5 Requirements

The Joint Commission requires hospitals to develop and implement a policy to prohibit smoking except in specified circumstances. If the hospital decides that patients may smoke in specific circumstances, the hospital must designate smoking areas that are physically separate from care, treatment, and service areas. *(See* The Joint Commission Comprehensive Accreditation Manual for Hospitals*, EC. 02.01.03.)*

Hospitals that contract with, or receive funding from, the First 5 Commission should review the First 5 Anti-tobacco Policy, which may require contractors and funding recipients to provide staff and patients information about smoking cessation and support programs, and information about secondhand smoke and children.

F. Proposition 65

The California Office of Environmental Health Hazard Assessment has listed environmental tobacco smoke as a chemical known to the state of California to cause reproductive toxicity. A detailed description of Proposition 65 requirements is beyond the scope of this manual; hospitals should consult legal counsel to be sure signage and other requirements of Proposition 65 are met if smoking is allowed anywhere in the facility.

VII. MARIJUANA

CHA is occasionally asked whether it is legal for California hospitals, clinics, hospices, or other facilities to purchase, provide, charge for, or possess "medical marijuana" in the facility. The bottom line is no: possession of marijuana remains illegal under federal law, and state law cannot authorize a violation of federal law. This remains the case even though California voters have approved recreational marijuana as well as medical marijuana. This portion of the manual describes the relevant federal and state laws.

A. Federal Law

In 1970, marijuana was categorized as a Schedule I drug under the Controlled Substances Act based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment. This has not changed; federal law still prohibits the manufacture, distribution, dispensing, and possession of marijuana for any purpose, including medical treatment purposes (with the exception of research pre-approved by the Food and Drug Administration (FDA)) [21 U.S.C. Sections 812, 841(a)(1), 844(a)]. These activities constitute federal crimes. Persons who participate in these activities may be imprisoned, fined, lose their ability to participate in the Medicare and Medicaid programs, and lose their Drug Enforcement Administration (DEA) registration.[1] The

1 The Ninth Circuit Court of Appeals has held that physicians (not hospitals) have a First Amendment right to discuss and recommend marijuana to their patients, and that therefore the federal government may not revoke a physician's DEA registration or conduct an investigation of a physician that might lead to such revocation. The court also stated, however, that the First Amendment does not protect a physician who aids and abets a qualified

United States Supreme Court has ruled that, regardless of state laws, federal law enforcement agencies have the authority under the Controlled Substances Act to arrest and prosecute individuals who cultivate, possess or use marijuana, because local cultivation and use of marijuana can substantially affect interstate commerce [*Gonzales v. Raich*, 545 U.S. 1 (2005)].[2]

NOTE: Dronabinol (brand name Marinol) and nabilone (brand name Cesamet) are the only FDA-approved drugs related to marijuana. Dronabinol is listed as Schedule III, meaning it has some potential for dependence. Nabilone is listed as Schedule II, indicating high potential for side effects and addiction. Both drugs are used to relieve nausea and vomiting associated with chemotherapy and loss of appetite in wasting illnesses such as AIDS and cancer.

FEDERAL ENFORCEMENT POLICY

As mentioned above, possession of marijuana is illegal under federal law. This does not mean, however, that the federal government will prosecute every violation. Under the Obama administration, the federal Department of Justice (DOJ) issued guidance about its enforcement of the federal ban on possession of marijuana. In 2009, the DOJ issued a comprehensive memorandum stating that it was committed to the enforcement of the Controlled Substances Act in all states, and that Congress had determined that marijuana is a dangerous drug. The DOJ also noted that the illegal distribution and sale of marijuana is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs and cartels. However, the DOJ also stated that it was committed to making efficient and rational use of its limited investigative and prosecutorial resources. Thus, the DOJ stated, it would not focus on prosecuting individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. The DOJ cautioned that "This guidance regarding resource allocation does not 'legalize' marijuana or provide a legal defense to a violation of federal law ... Nor does clear and unambiguous compliance with state law ... create a legal defense to a violation of the Controlled Substances Act." The DOJ reiterated this position in August 2013.

However, on Jan. 4, 2018, the DOJ issued a memo expressly rescinding its previous memoranda on marijuana enforcement. The Attorney General stated that:

> It is the mission of the Department of Justice to enforce the laws of the United States, and the previous issuance of guidance undermines the rule of law and the ability of our local, state, tribal, and federal law enforcement partners to carry out this mission.

It thus appears that the Trump administration plans to take a harder line on marijuana than did the Obama administration.

B. State Law: Medical Marijuana

In 1996, California voters passed Proposition 215, the "Compassionate Use Act." The purpose of this law was:

> To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit ... Patients and their primary caregivers who obtain and use medical marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

The Act created an exemption from criminal prosecution at the state level (not the federal level) for physicians as well as patients and primary caregivers who possess or cultivate limited amounts of marijuana for medicinal purposes with the recommendation of a physician. (Note that the word "prescription" is not used; a physician may not "prescribe" marijuana, even in California – physicians don't prescribe the amount, strength, route of administration, number of refills, etc.) A **"primary caregiver"** is defined as a person who has consistently assumed responsibility for the housing, health or safety of the patient. [Health and Safety Code Section 11362.5]

California law also states that, "Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes." However, the Medical Board of California (MBC) may take disciplinary action against physicians who fail to comply with accepted medical standards when recommending marijuana. MBC issued guidelines, updated in November 2017, for physicians who recommend medical marijuana. These guidelines are found at www.mbc.ca.gov/Publications. MBC stated that:

patient in obtaining cannabis or in violating federal law. The United States Supreme Court denied review of this case. *Conant v. Walters*, 309 F.3d. 629 (9th Cir. 2002); rev. den. No. 03-40, June 7, 2003.

2 Congress has enacted a medical cannabis rider to the federal budget prohibiting the use of federal funds to prosecute individuals in compliance with state marijuana laws. The current rider expires January 19, 2018. It is unclear whether the rider will be extended. *See also* U.S. v. Marin All. For Med. Marijuana*, 139 F.Supp.3d 1039 (N.D. Cal. 2015), appeal dismissed (Apr. 12, 2016) (holding that while the rider is in effect, the U.S. Department of Justice may enforce federal controlled substances laws only against individuals and businesses if they are not in compliance with state law)*.

> Physicians who choose to recommend cannabis for medical purposes to their patients, as part of their regular practice of medicine … will not be subject to investigation or disciplinary action by the Board if they arrive at the decision to make this recommendation in accordance with accepted standards of medical responsibility.

The MBC guidelines contain important information about its expectations regarding the physician-patient relationship, patient evaluation, informed consent, treatment agreements, qualifying conditions, ongoing monitoring, consultation and referral, medical record documentation, and physician conflict of interest.

Even though MBC will not discipline a physician for recommending marijuana for medical purposes in accordance with its guidelines, the federal government may take action against physicians for violating federal law. As noted above, persons who violate federal law may be imprisoned, fined, lose their ability to participate in the Medicare and Medicaid programs, and lose their DEA registration.

C. State Law: Recreational Marijuana

In November 2016, California voters approved Proposition 64, making it legal for a person over the age of 21 to possess approximately one ounce of marijuana and to grow up to six plants for personal use. However, it is illegal to smoke cannabis or cannabis products in a location where smoking tobacco is prohibited ("smoke" includes the use of electronic smoking devices). In addition, marijuana may not be smoked or ingested in a public place. [Health and Safety Code Section 11362.3; see also Business and Professions Code Sections 26000-26231.2; Health and Safety Code Sections 11350-11392 and 11362.7-11362.85]

Health and Safety Code Section 11362.45 explicitly states that California marijuana laws do not amend, repeal, affect, restrict, or preempt:

1. Laws providing that it would constitute negligence or professional malpractice to undertake any task while impaired from smoking or ingesting cannabis or cannabis products.
2. The rights and obligations of public and private employers to maintain a drug and alcohol free workplace; or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of cannabis in the workplace; or affect the ability of employers to have policies prohibiting the use of cannabis by employees and prospective employees; or prevent employers from complying with state or federal law.

D. Other Considerations

MEDICAL MARIJUANA BROUGHT FROM HOME

California hospital licensing regulations (Title 22) state that:

> (l) Medications shall not be left at the patient's bedside unless the prescriber so orders. Drugs shall not be left at the bedside which are listed in Schedules II, III and IV of the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970 as amended. If the hospital permits bedside storage of medications, written policies and procedures shall be established for the dispensing, storage and records of use, of such medications…
>
> (m) Medications brought by or with the patient to the hospital shall not be administered to the patient unless all of the following conditions are met:
>
> (1) The drugs have been ordered by a person lawfully authorized to give such an order and the order entered in the patient's medical record.
>
> (2) The medication containers are clearly and properly labeled.
>
> (3) The contents of the containers have been examined and positively identified, after arrival at the hospital, by the patient's physician or the hospital pharmacist.

[Title 22, California Code of Regulations, Section 70263]

Given that there are currently no state standards for marijuana manufacturers to meet to demonstrate consistency of product content, purity, stability, and accuracy of labeling, it is not likely that a hospital could comply with these regulations. If a patient brings marijuana to the facility, it is advisable to require the patient to give it to a family member or friend to take home. If a patient doesn't have a friend or family member who will take the marijuana home, the hospital may wish to contact a pharmacy reverse distributor that will pick it up and dispose of it properly, if one exists in the hospital's geographic area. Not all pharmacy reverse distributors have the required Environmental Protection Agency (EPA) license to do this. At the time of publication of this manual, there was a federal rule proposed (but not yet in effect) that would allow reverse distributors to dispose of hazardous pharmaceuticals without an EPA license.

MEDICAL RECORD DOCUMENTATION

It is permissible to document in the medical record that a patient has indicated that he or she uses marijuana, as would be done with regard to any other legal or illegal drug; this information may be relevant to the patient's care.

ORGAN TRANSPLANTS

Hospitals and physicians should be aware that state law prohibits the automatic denial of an organ transplant because a potential recipient uses medical marijuana. However, a physician may determine that a particular patient's use of medical marijuana is medically significant to the provision of the anatomical gift if the physician makes an individualized assessment of the patient. Additional information about this law is found in "Prohibition Against Discrimination Based on Recipient's Use of Marijuana," page 5.51.

POLICIES AND PROCEDURES

Facilities should consider addressing medical and recreational marijuana in the following policies, as applicable:

1. Smoking
2. Fragrance free
3. Self-administration of medications by patients
4. Handling patient property
5. Transplants
6. Alcohol and drug-free workplace

E. Conclusion

Given that federal law prohibits manufacturing, distributing, dispensing, and possessing marijuana and the strong regulatory presence of federal agencies in the health care industry (for example, the Centers for Medicare & Medicaid Services, DEA and FDA), facilities are advised not to permit marijuana in the facility, prescribe/recommend marijuana, offer individualized advice about dosage, describe how to obtain marijuana, or communicate with cannabis distributors. Facilities should consult their legal counsel and insurer before engaging in these activities.