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FEATURE ARTICLE

COLORADO'S GREEN GOLD PAYS OFF—OFFICE OF REVENUE RELEASES ITS REPORT ON TAX REVENUE COLLECTED FROM CANNABIS SALES

By Robert Schuster

Colorado was a pioneer in legalizing recreational cannabis sales. The lure of tax revenue undoubtedly plays some role—perhaps the key role—in state decisions to legalize cannabis sales. In the June issue of the *Cannabis Law & Regulation Reporter* we reported on the state of tax revenue in Nevada. More recently, the Colorado Department of Revenue has issued a report on sales in the state. Other states that have come on board after Colorado have, by some accounts, experienced disappointing revenue by population. California likes to brag that it is the fifth largest economy in the world. However, California is also a cannabis growing state. Perhaps due to it plentiful supply and its taxation structure, the state has reportedly been competing with ongoing black market sales, producing less than idealized tax revenue from recreational cannabis sales. For 2019 California's budget has prepared for a bit under a quarter billion in tax revenues. Meanwhile, Governor Polis of Colorado seems quite happy with the state's decision to legalize recreational cannabis sales and with the more than $1 billion in revenue collected since legalization inception in 2014. Below, we explore the world of tax revenue and revenue spending in Colorado—all related to the retail sales of cannabis—which the state likes to refer to in old school terms—"marijuana."

Background

The Colorado Department of Revenue reports regularly on cannabis sales data via it's Marijuana Sales Reports, and on tax revenue collected on cannabis via it's Marijuana Tax Data Reports. Appropriations and expenditures of marijuana tax collections are reported separately from the above two reports via The Disposition of Marijuana Tax Revenue webpage, located at: https://www.colorado.gov/pacific/revenue/disposition-marijuana-tax-revenue

Taxes on Cannabis Sales

Colorado has established a series of separate taxes that apply to cannabis. They are summarized below:

- First, the *regular state sales tax* (2.9 percent) is collected on consumer goods. While this tax was initially collected on both medical and retail marijuana sales, retail marijuana was exempted from this tax through S.B. 17-267. Since July 1, 2017, the general state sales tax has only applied to sales of medical marijuana and non-marijuana products (*i.e.*, t-shirts and other novelty items). General sales tax revenue related to marijuana is credited to the *Marijuana Tax Cash Fund* (MTCF) and is used to support a variety of state programs and services.

- Second, a *special sales tax* (15.0 percent) is collected on retail (but not medical) marijuana sales. Of the total amount collected annually, 10.0 percent is allocated to local governments based on the percentage of such revenues collected within the boundaries for each local government. The remaining 90.0 percent state share of special sales tax revenues is allocated among three funds: 1) 71.85 percent is transferred to the *MTCF* and annually appropriated for a variety of programs and services; 2) 12.59 percent is transferred to the *State Public School Fund* and may be appropriated to the Department of Education for the State's share of total program funding for school districts and

institute charter schools; and 3) 15.56 percent is retained in the *General Fund* and is thus available for appropriation in the fiscal year in which it is collected.

•Third, a marijuana *excise tax* (15.0 percent) is applied to the average market wholesale price of the product being sold or otherwise transferred from a retail marijuana cultivation facility. The average market wholesale prices are periodically set by the Department of Revenue's Marijuana Enforcement Division. (footnotes omitted)

The Marijuana Sales Reports reflect sales back to the legal inception of cannabis sales: January 2014. The reports include both retail cannabis and medical cannabis sales. For example, at the of the first full year of sales, the report reflects medical cannabis retail sales of approximately $30 million per month [this stayed fairly constant throughout the year] and recreational cannabis sales of approximately $30 million per month [this number began at less than $20 million per month and rose to approximately $40 million per month by December 2014]. This calculates to approximately $683.5 million *total* combined sales of cannabis for 2014. For 2015 total combined sales went up to just under $1 billion; for 2016 the total came to $1.3 billion; for 2017, approximately $1.5 billion and for 2018, the number rose to $1.55 billion. For the period January through April 2019, the total sales were a bit over $522 million. For the period January 2014 through April 2019, *total sales were a staggering $6.5 billion*.

Tax Revenue Sales Data

Tax revenues from marijuana sales are broken up into categories of revenue generated from 1) state sales tax [regular sales tax]; 2) marijuana excise tax; and 3) revenue generated by "licenses and fees." For the year 2015, total revenue was approximately $130 million; for 2016, $193 million; for 2017, $247 million; and for 2018, approximately $266 million. For January 2019 through May 2019, total revenue is nearly $112 million. *Total tax revenue* for the period January 2014 through May 2019 is a tad over $1 billion. So, in a nutshell, the State of Colorado has collected approximately $1 billion in revenue tied directly to cannabis since cannabis became legal in the state. (https://www.colorado.gov/pacific/revenue/colorado-marijuana-tax-data)

Where Does All That Tax Revenue Go?

The Colorado Office of Revenue also releases total dollar numbers for Disposition of Marijuana Tax Revenue. (https://www.colorado.gov/pacific/revenue/disposition-marijuana-tax-revenue)

The Office of Revenue reports revenue allocations as follows:

•For Fiscal Year (FY) 2017-18*, the first $40M of the Retail Marijuana Excise Tax revenue was distributed to the Public School Capital Construction Assistance Fund (PSCCAF) administered by the Colorado Department of Education's Building Excellent Schools Today (BEST) program. Excise tax collections in excess of $40M, $27.8M for FY 2017-18, were transferred to the Public School Fund.

•For FY 2016-17, the first $40M of the Retail Marijuana Excise Tax revenue was distributed to the administered by the PSCCAF. Excise tax collections in excess of $40M, $31.6M for FY 2016-17, were transferred to the Public School Fund.

•For FY 2015-16, the first $40M of the Retail Marijuana Excise Tax revenue was distributed to the PSCCAF. Excise tax collections in excess of $40M, $2.5M for FY 2015-16, were transferred to the Public School Fund.

•Starting FY2018-2019, pursuant to HB18-1070, the greater of $40M or 90 percent of excise tax revenue will be credited to the PSCCAF. Any excess will be transferred to the Public School Fund.

Colorado maintains a Marijuana Tax Cash Fund from the sales discussed above. Allocations from this fund are by the Legislature's Joint Budget Committee which issues an Appropriations Report. (The 2018 – 2019 Report is available at: https://leg.colorado.gov/sites/default/files/fy18-19apprept_0.pdf) In this report, at page 577, the Budget Committee reports on tax allocations for period 2018 – 2019, from the Tax Cash Fund.

Broken down by category of tax, allocations into the Tax Cash Fund are: 100 percent from regular sales tax and 71.85 percent from the special sales tax. The

State Public School Fund receives 12.59 percent of revenue generated by the special sales tax. Interestingly, 10 percent of revenue from the special sales tax goes to municipalities that have agreed to retail sales of cannabis in their jurisdictions. From the first $40 million in revenue generated in a fiscal year from the excise tax goes into the "Best Fund" with any revenues generated above that number going to Public School 'Permanent' Fund.

The Marijuana Impaired Driving Program

This Marijuana Impaired Driving Program division was created in the fiscal year 2015-16 Long Bill and provides funding for the Department of Transportation to develop and administer a public awareness program directed at marijuana impaired driving. Goals of the campaign include reductions in serious injuries and fatalities on Colorado roads, as well as declines in marijuana impaired driving behavior and citations. This program is funded by the Marijuana Tax Cash Fund. For the fiscal year 2018 – 2019, $950,000 was allocated to the program.

Recent Legislation Related to Cannabis Revenue

A summary of recent relevant cannabis legislation follows:

SB 18-259 (Local Government Retail Marijuana Taxes): Makes the following changes to marijuana taxation in Colorado:

- allows a county to continue collecting excise taxes for three years if a marijuana cultivation facility is annexed into a municipality. If this occurs, the municipality is unable to levy its own excise tax until the county's authority to levy an excise tax expires;

- allows counties to use either the wholesale price or the calculated wholesale price to determine excise taxes;

- removes the authority for metropolitan districts to collect a sales tax on retail marijuana; and

- clarifies that the state excise tax is collected when unprocessed marijuana is transferred between marijuana cultivation facilities.

In fiscal year 2018-19, SB 18-259 appropriates $15,840 from the General Fund to the Department of Revenue.

SB 18-271 (Improve Funding For Marijuana Research):

Allows a marijuana research and development licensee or a marijuana research and development cultivation licensee to share premises with a commonly owned medical marijuana infused products manufacturer or a retail marijuana product manufacturers under a co-location permit. House Bill 18-1322 (Long Bill) transferred $3.0 million from the Marijuana Tax Cash Fund to the health research subaccount of the Medical Marijuana Program Cash Fund. This bill continues the subaccount from its current repeal date of July 1, 2019, to July 1, 2023, and authorizes the Department of Public Health and Environment (CDPHE) to use up to $100,000 from the subaccount for administration of the medical marijuana research grant program. In FY 2018-19, appropriates $10,656 cash funds from the Marijuana Cash Fund to the Department of Revenue.

Conclusion and Implications

Cannabis and tax revenue. The promise of millions in tax revenue provides the lure of legalization for many states. Many states have succumbed to this lure while others quietly watch to see if in fact, cannabis sales are the new green gold. Most recently, Illinois made the jump as the newest state to sanction retail recreational cannabis sales. Colorado was a pioneer in this and since January 2014 when Colorado legalized retail sales of cannabis, the state has generated more than $1 billion in tax revenue. California, which only legalized retail recreational cannabis in November 2016, projects for the 2019 budget year, $223 million in tax revenues from cannabis. (*See*, https://www.cnbc.com/2019/06/12/colorado-passes-1-billion-in-marijuana-state-revenue.html)

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CANNABIS NEWS

THE WEAVING OF HEMP: ANALYZING THE EFFECTS OF THE 2018 FARM BILL ON HEMP AND CBD

On December 20, 2018, the President signed into law the Agricultural Improvement Act of 2018, otherwise known as the 2018 Farm Bill. The 2018 Farm Bill made sweeping changes to the hemp and cannabidiol (CBD) landscape, and knowing how those changes affect the industry is key to staying ahead of the curve. More importantly, it is also key to understanding your liability and risk potential when entering into this nascent industry.

Background: A History of Hemp in America

Overreaching

The United States has a long history of overgeneralizing what is marijuana versus what is hemp. Starting with the Marihuana Tax Act of 1937 and continuing to present day. The 1937 Act effectively federally prohibited marijuana and hemp by: 1) classifying Cannabis sativa L as marijuana, regardless of the THC content; and 2) imposing hefty draconian fines and imprisonment for what amount to administrative violations. This continued through the definition of "marijuana" in the Comprehensive Drug Abuse Prevention and Control Act of 1970, which contained the Controlled Substances Act (CSA).

Under the CSA, "marihuana" was defined as everything but the mature stalks and seeds of the hemp plant. This led to overreaching by the Drug Enforcement Administration (DEA), which attempted to classify all THC, regardless of the source, and regardless of the fact only THC from "marijuana" and synthetic THC were prohibited. (*Hemp Industry Association v. DEA*, 333 F.3d 1082 (9th Cir. 2003) (*HIA v. DEA I*); *Hemp Industry Association v. DEA*, 357 F.3d 1012, 1013 (9th Cir. 2004) (*HIA v. DEA II*)). The DEA continued its draconian enforcement in 2006, by preventing growing of hemp in the US, claiming that, while mature stalks and seeds were not classified as "marihuana," the growing process naturally led to a period where marijuana was being grown.

The Agricultural Act of 2014

Congress finally stepped in, and in 2014 passed the Agricultural Act of 2014, which allowed for Industrial Hemp Pilot Programs (IHPPs). Essentially, the 2014 Bill allowed states to make rules for growing, cultivating, and marketing industrial hemp. Appropriations Acts and renewals went one step further, and prevented federal funds to be used for enforcement against hemp or hemp-derived products.

Despite the pilot programs, the DEA continued to issue statements that hemp continued to be governed by the Controlled Substances Act, claiming all extracts from any plant in the genus cannabis fell under the definition and claiming hemp was prohibited by the CSA. (21 CFR 1308.11(d); https://www.federalregister.gov/documents/2016/08/12/2016-19146/statement-of-principles-on-industrial-hemp)

The DEA only started to come around in 2017, admitting for the first time that extracts from hemp fell outside the CSA, though they did so based on bad science. (Clarification of the New Drug Code (7350) for Marijuana Extract, Drug Enforcement Administration (Mar. 9, 2017)). The DEA also clarified in 2018, via an internal directive, that hemp-derivatives could be imported and exported consistent with the Controlled Substances Act. (DEA Internal Directive Regarding the Presence of Cannabinoids in Products and Materials Made from the Cannabis Plant, Drug Enforcement Administration (May 22, 2018)).

Prior to the implementation of the 2018 Agricultural Improvement Act of 2018, we were left with two main sources of hemp: imported hemp and hemp grown under the IHPPs.

Enter the Agricultural Improvement Act of 2018

Congress passed the Agricultural Improvement Act of 2018 in June 2018, which was signed into law in December 2018 by the President.

First and foremost, the "2018 Farm Bill" changed the definition of "marijuana" under the Controlled

Substances Act, specifically excluding hemp from the definition of marijuana, and clarified that hemp no longer included just the mature stalks and stems, but hemp that was in the process of being grown. Second, the bill excluded THC derived from hemp from the definition of "tetrahydrocannabinol." Third, the bill sunsets the IHPPs, which are set to expire twelve months from the passage of the 2018 Farm Bill. Finally, the Bill does away with the limitations on the use of federal funds for enforcement of hemp laws.

Now that the 2018 Farm Bill has passed, the state of hemp-derived products is both clarified and muddied.

The Current State of Hemp, Hemp-Extracts, and CBD

The high hope with the passage of the 2018 Farm Bill was that hemp and all of its derivatives would be fully legalized. Such is not the case.

CBD as a Drug

At the time of passing, CBD has been regulated as an "orphan drug." GW Pharmaceuticals, which is developing the anti-seizure medication, Epidiolex, utilizes cannabis-derived CBD as its active ingredient. (https://www.fda.gov/news-events/press-announcements/fda-approves-first-drug-comprised-active-ingredient-derived-marijuana-treat-rare-severe-forms). The cannabis-derived CBD has been designated a Schedule V drug (a controlled substance with potential medical benefits). While hemp-derived CBD was not, and could not, be added to the Controlled Substances list absent a change to the law itself, the FDA currently considers CBD a drug for purposes of its regulations. In addition, it is a drug that, pursuant to the Orphan Drug status, gives GW Pharmaceuticals seven years of exclusive rights to develop CBD into an anti-seizure medication, and other companies are also working to develop orphan drugs from CBD for other diseases, such as ischemia and Dermamytosis. (https://www.empr.com/home/news/drugs-in-the-pipeline/cannabidiol-gets-orphan-drug-status-for-preventing-ischemia-reperfusion-injury/; https://www.mdmag.com/medical-news/fda-grants-orphan-drug-designation-todermatomyositis-treatment-lenabasum).

CBD and Hemp in Food

In addition, for any extract or hemp-derived ingredient to be used in food, it must be "Generally Recognized as Safe," commonly abbreviated as GRAS. So far, only hulled hemp seed, hemp seed protein powder, and hemp seed oil have been approved by the FDA as GRAS for use in food. (https://www.fda.gov/food/cfsan-constituent-updates/fda-responds-three-gras-notices-hemp-seed-derived-ingredients-use-human-food). For any hemp-derived ingredients used in a supplement, they require recognition as a New Dietary Ingredient, or NDI. So far, no hemp-based ingredients have been approved by the FDA in use of supplements.

Enforcement and Regulation

Once the 2018 Farm Bill passed, the real work began in terms of crafting federal regulations that would implement the Department of Agriculture's monitoring of hemp. The first public meeting of the FDA was only a starting point, and the regulation of hemp-derived products in food and supplement use will likely take much more time.

While the FDA has been clear that most hemp-derived products and hemp-based CBD products are running afoul of the Food, Drug, and Cosmetics Act, enforcement priorities has tended towards those products that are not complying with other areas of the law, such as making unsubstantiated health claims. In fact, during the first public hearing, the FDA expressed its understanding of the state of the industry. FDA Deputy Commissioner summed up the first public meeting on Twitter:

> Key questions about product safety need to be addressed. Data are needed to determine safety thresholds for CBD...There are both positive supporters of cannabis-cannabis derived products including CBD and also concerned citizens worried that widely available products can be harmful. (https://www.washingtonpost.com/business/2019/05/31/amid-flood-cbd-products-fda-holds-first-public-hearing-cannabis-extract/?noredirect=on&utm_term=.3f69b65284ef).

Looking to the Future

The FDA has set a deadline of July 16 for public comment, and from there can be expected to continue its rulemaking process, which will include a draft set of rules and a notice and comment period. (https://www.federalregister.gov/documents/2019/06/20/2019-13122/scientific-data-and-information-about-products-containing-cannabis-or-cannabis-derived-compounds). The industry is hopeful that GRAS and NDI issues will be addressed in any rules, but given the rocky start, this is unlikely to occur in the first round of regulations, until the agency believes it has the data it needs. In addition, based on the outcome of the first hearing, it is expected more public meetings will take place in the interim. The USDA issued guidance that until regulations have been issued, transportation may still occur under the 2014 Farm Bill.

In the meantime, most states are eagerly awaiting the new federal regulations in order to determine how state regulation may differ or piggyback off of the work of the FDA and USDA.

One major unanswered question is what will happen if the regulations are not adopted prior to the end of the year, when those pilot programs sunset.

Conclusion and Implications

While there was a lot of initial excitement regarding the passage of the 2018 Farm Bill, there are still plenty of unanswered questions. To ensure you have a voice in how these regulations are developed, it is important to stay active in the discussions not only at the federal level, but at the state level, to ensure the regulations not only are scientifically credible, but that they meet the needs of consumer and the industry as a whole.

(Justin Walsh, Mia Getlin)

CITY OF LOS ANGELES PUSHES FORWARD WITH GETTING CANNABIS LICENSING SOCIAL EQUITY PROGRAM OFF THE GROUND

After California legalized recreational cannabis for adults in late 2017, leaders in the City of Los Angeles (City) made it their goal to give entrepreneurs affected by the "war on drugs" an advantage in what would become the City's highly competitive cannabis market. They planned to implement this goal through creation of the Social Equity Program, which is within the City's existing licensing and regulatory program. The Social Equity Program stated goal is:

> . . .to promote equitable ownership and employment opportunities in the cannabis industry in order to decrease disparities in life outcomes for marginalized communities, and to address the disproportionate impacts of the War on Drugs in those communities.

In other words, the program targets individuals who are low income, have past cannabis arrests and or convictions, and those that live in "disproportionately impacted areas." The Social Equity Program is meant to offer qualified individuals with an advantage in the cannabis market by providing assistance to support cannabis business ownership.

Social Equity Program

As the lead agency for licensing and regulating cannabis in the City of Los Angeles, the Department of Cannabis Regulation (DCR) is responsible for implementing the Social Equity Program and seeks to ensure that disproportionately impacted individuals and communities in the City have fair and meaningful access to the new economic opportunities afforded by legalization and the commercialization of the local cannabis industry. For those interested in owning and operating a licensed cannabis business, priority application processing is available, which seeks to afford eligible Social Equity Program applicants an opportunity to be first-to-market, which is critically important given the City's limited number of available licenses. Applicants may apply for one of the program's three tiers, which offer varying requirements and benefits. Tier 1 applicants qualify for the most benefits, including: expedited application and renewal processing, business licensing and compliance assistance; and possible fee deferrals and access to an Industry Investment Fund (if established).

Delays

Unfortunately, the City's vision for the Social Equity Program has not unfolded as smoothly as anticipated. There have been severe delays in getting the program off the ground due to slow implementation of the City's overall cannabis licensing process. The City has yet to issue any permanent licenses for commercial cannabis activities. Instead, there are approximately 185 businesses with *temporary* approval to sell cannabis products. The delays aren't helped by the City's struggle with a proliferation of unlicensed dispensaries. The City has had significant trouble targeting the large number of illegal cannabis businesses popping up around the City. Recently, the City Council passed an ordinance authorizing the Department of Water and Power to shut off utilities at any illegal cannabis establishment.

Conclusion and Implications

Despite the slow rollout of the Social Equity Program, the City and DCR remain focused on moving the program forward. On May 28, 2019, DCR began the Social Equity Program's eligibility verification process, which will remain open through July 29, 2019. In addition, the City is now looking to put together a team to help make the Social Equity Program successful moving forward. On June 14, 2019, DCR announced the release of a Request for Qualifications (RFQ), which seeks to retain on-call business development services for the program. The RFQ is seeking consultants to develop and conduct business development curriculum, training, business, licensing and compliance assistance, and related services to support applicants and licensees eligible to participate in the Social Equity Program. The initial submission deadline to the RFQ is Friday, July 12, 2019. The Los Angeles City Council has adopted a budget policy to appropriate $3 million per year for three years to support the Social Equity Program and the services offered by the RFQ.

Additional information and updates about the City of Los Angeles's Social Equity Program can be found on the City's Department of Cannabis Regulation website at the following link: https://cannabis.lacity.org

(Nedda Mahrou)

LEGISLATIVE DEVELOPMENTS

LEGISLATIVE UPDATE ON CANNABIS-RELATED LAWS IN COLORADO

Colorado, in many ways, has lead the nation in the sale of recreational cannabis. Being the first isn't always easy but the state has now had the time to see what works and what doesn't work. Recently, the Colorado Legislature has been active in sponsoring bills related to cannabis sales and use. Governor Polis signed into law all the following bills which are summarized below.

Bill 19-1076

Beginning on July 1, 2019, Coloradans cannot "vape" inside or within 25 feet of commercial and government buildings. While directly aimed at "e-cigarettes," the bill includes the vaping of cannabis products. People can also no longer vape inside any public building or any business, with the exception of cigar and tobacco bars and cannabis clubs. Vaping is also forbidden within 25 feet of a building's main doorway.

Bill 19-1076 updates the Colorado Clean Indoor Air Act. The genesis of the bill was vaping by high school students. A 2018 study from the Centers for Disease Control showed 27 percent of Colorado's high school students vaped or used e-cigarettes — twice the national average. It put Colorado at No. 1 among 37 states surveyed about teen vaping. (*See*, *Denver Post*: https://www.denverpost.com/2019/07/01/colorado-indoor-vaping-ban/)

The bill was sponsored by Representative Dafna Michaelson Jenet. Ms. Jenet stated that reducing areas of smoking cigarettes proved successful therefore, doing it for e-cigarettes and vaping cannabis could also be successful:

> . . .it showed us a reduction when we did it for cigarettes. Part of that is we changed the cultural norm. We stopped saying this is so OK that we do it in public. (Ibid)

Bill 19-1076

The stated purpose of the bill is as follows:

Protecting the right of people to breathe clean, smoke-free air. Nothing in this part 2 is intended to inhibit a person's ability to take medicine using an inhaler or similar device, nor to prevent an employer or business owner from making reasonable accommodation for the medical needs of an employee, customer, or other person in accordance with the federal "Americans with Disabilities Dct of 1990", as amended, 42 U.S.C., Sec. 12101 et seq.

In more detail, the bill:

. . .amends the "Colorado Clean Indoor Air Act" by:

1) Adding a definition of "electronic smoking device" (ESD) to include e-cigarettes and similar devices within the scope of the act;

2) Citing the results of recent research on ESD emissions and their effects on human health as part of the legislative declaration;

3) Eliminating the existing exceptions for certain places of business in which smoking may be permitted, such as airport smoking concessions, businesses with 3 or fewer employees, designated smoking rooms in hotels, and designated smoking areas in assisted living facilities;

4) Repealing the ability of property owners and managers to designate smoking areas through the posting of signs;

5) Exempting FDA-approved nebulizers, inhalers, and vaporizers, as well as humidifiers that emit only water vapor, from the definition of an ESD;

6) Amending signage requirements for tobacco businesses and vape shops that must notify customers of prohibitions on entry by persons under the age of 18;

7) Increasing the radius of an "entryway", the area around the doorway to a building where smoking is not permitted, from a minimum of 15 feet to a minimum of 25 feet except where existing local regulations permitted a smaller radius when construction or renovation of a business commenced, on or before July 1, 2019; and

8) Creates a grace period and graduated penalties for enforcement of the amended signage requirements for tobacco businesses and vape shops. (*See:* https://www.leg.colorado.gov/bills/hb19-1076)

HB 19-1230

House Bill 19-1230, authorizes legal cannabis hospitality spaces in which legal cannabis may be consumed in the establishment's hospitality space. The bill was co-sponsored by Representative Jonathan Singer whose purpose and goal was as follows:

> This bill will enable make [sure] certain folks are consuming responsibly, comparable to what you would see at a winery, brewery or distillery. . . . Local law enforcement will not have to be concerned about residents and vacationers smoking in parks, mainly because they'll now have a spot to go.

State regulators cannot begin issuing "hospitality" licenses to cannabis retailers seeking to allow use on their property until 2020.

HB18-1011

Governor Polis also signed into law House Bill 18-101, allowing publicly traded companies to own marijuana businesses and limiting background-check requirements on investors. The bill:

> . . . repeals the provisions that require limited passive investors to go through an initial background check. The bill repeals the provisions that limit the number of out-of-state direct beneficial owners to 15 persons. The bill repeals the provision that prohibits publicly traded entities from holding a marijuana license. . . .The bill creates two new ownership licenses, controlling beneficial owners and passive beneficial owners, and a new investment type, indirect financial interest holder. The bill gives the state licensing authority rulemaking authority related to the parameters of, qualifications of, disclosure of, requirements for, and suitability for the new license types and investment type. A controlling beneficial owner is a person that is the beneficial owner of 5 percent or more of the securities of a marijuana business; is an affiliate; or is otherwise in a position to exercise control of the marijuana business. A passive beneficial owner is a person that is not an affiliate of a marijuana business, has no control over the marijuana business, and owns less than 5 percent of the securities of a marijuana business. An indirect financial interest holder is a person that is not an affiliate or in a position to exercise control over the marijuana business and that holds a commercially reasonable royalty interest; holds a permitted economic interest issued prior to January 1, 2019, that has not been converted to an ownership interest; or is a contract counterparty that has a direct nexus to the business. An indirect financial interest holder does not require a finding of suitability and does not require a license. (*See,* https://www.leg.colorado.gov/bills/hb18-1011)

Conclusion and Implications

2019 was an active year for the Colorado Legislature in its efforts to fine tune cannabis related laws after having had the benefit of many years to see what's working and what changes need to take place. Colorado's Governor Polis is a strong supporter of legalized cannabis sales, but like most governors in whose state legalization has been sanctioned, the successes remain a work in progress.
(Robert Schuster)

NEW JERSEY FAILS TO (SO FAR) TO LEGALIZE RECREATIONAL CANNABIS SALES AND USE—NEW LEGISLATION ANTICIPATED

The story of cannabis legalization in New Jersey is still being written a after a recent push to legalize recreational or "adult use" cannabis narrowly failed in the N.J. Senate. Medical cannabis is legal. In response to this close call, the legislature has enacted an expansion of the state's medical marijuana program. And in the last year, one state trial court and one U.S. District Court have weighed in on whether New Jersey employers have a duty to accommodate medical marijuana use in the workplace. Given these recent developments, it is a perfect time to take stock of the cannabis industry in the state, and discuss the how the legal landscape may change in the coming years.

Adult Use Cannabis Legislation Narrowly Fails to Garner the Necessary Support

In 2018, then candidate, now Governor, Phil Murphy ran on a platform of passing recreational marijuana legislation in New Jersey in the first 100 days of his administration. While he did not deliver his 100-day "promise," an adult use cannabis bill was drafted and introduced in both the State Senate and Assembly.

First Efforts Fail

The New Jersey Cannabis Regulatory and Expungement Aid Modernization Act (Senate Bill No. 2703, Assembly Bill No. 4497) is a wide-ranging bill that was the result of negotiation from both sides of the aisle.

Primarily, the bill would legalize marijuana in the state for recreational use, allowing individuals 21 and older to possess up to one ounce for personal use, provided for the delivery of marijuana, and would permit social consumption at state-licensed dispensaries. There were also provisions paving the way for the expungement of prior marijuana-related convictions.

While a recent Monmouth University public opinion poll showed that nearly two-thirds (62 percent) of New Jersey residents favored legalizing the possession and use of small amounts of marijuana, many legislators pushed back on the proposed bill. The sticking points for these legislators included questions regarding the level of taxation, driver safety, law enforcement training, and the potential for recreational cannabis to get into the hands of minors. To allay some of these concerns, the law allowed municipalities to "opt out" of allowing the sale of recreational cannabis as has California and other states. Although none of these issues could be seen as the ultimate death knell, the opposition (or trepidation) to the bill ultimately won out. In March 2019, State Senate President Steve Sweeney announced he was pulling the legislation, with a promise to continue working on the issue and to potentially re-introduce it at a later date.

In the wake of the bill's failure, several state legislators have expressed interest in placing a recreational cannabis legalization initiative on the ballot in 2020. This is a common tactic for cannabis legalization advocates, as states across the country have enacted both medical and recreational cannabis legislation via ballot initiative. And with the 2020 election expected to drive overall turnout, especially among the "young voter" population, a cannabis legalization initiative has promise in the Garden State. However, regardless of when adult use cannabis legislation does pass, residents and stakeholders alike should expect a period of 12-18 months between legalization and full implementation of the program, during which time the state will issue regulations and licenses for the adult use program.

Executive Efforts to Expand the Medical Marijuana Program

Perhaps in response to the aforementioned setback on recreational marijuana, both the legislature and Governor Murphy recently announced significant moves to alter the state's medical marijuana program. In 2018, the New Jersey Department of Health issued licenses to 12 entities, six of which are fully operational (Compassionate Care Foundation, Inc.; Greenleaf Compassion Center; Garden State Dispensary; Breakwater Alternative Treatment Center; Harmony Dispensary; and Curaleaf NJ, Inc.). However, the new expansion from the Governor calls for over 100 additional licensees, among other important changes. According to the Department of Health, the additional cultivators and dispensaries will help to meet growing demand for the product in the state, which has seen long lines at dispensaries and depleting inventory at

dispensaries. A June 3, 2019 statement from Department of Health Commissioner Shereef Elnahal, M.D. announced the opening of applications for 24 cultivators, 30 manufacturers, and 54 dispensaries.

Legislative Efforts to Expand the Medical Marijuana Act

On the legislative sides comes the Jake Honig Compassionate use of Medical Marijuana Act (Jake's Law), named in memory of a seven-year old who suffered from cancer and treated with medical cannabis before he passed away. Jake's Law passed the State Senate on May 30, 2019 by a 33-4 vote. The bill represents a significant expansion of New Jersey's medical marijuana program.

Changes include:

1) increasing the amount of cannabis a patient can purchase per month from two ounces to three ounces;

2) simplifying the process for patients to get a doctor's recommendation by eliminating the previous requirement that patients see their doctor four times per year;

3) phasing out the sales tax on medical marijuana by 2025;

4) permitting home delivery; and

5) setting a goal of issuing 15 percent of the state's cannabis business licenses to minority owners and 15 percent to women, disabled people and veterans.

Jake's Law would also have significant employment law implications. The law includes provisions that protect an employee's right to use medical cannabis, although it does not require an employer to accommodate on-site possession or use. However, the law prohibits employers from:

. . .taking adverse employment action against an employee who is a registered qualified patient based solely on the employee's status as a registrant with the commission.

It also requires employers to give employees the opportunity to present a "legitimate medical explanation" if they test positive for cannabis on an employer-required drug screening. Such proof could include submitting information explaining the test result, retesting at the employee's expense, and submission of a doctor's authorization to use medical cannabis. Jake's Law also contains a provision stating that an employer need not commit any act that would cause it to be in violation of federal law, or that would result in the loss of a license or federal funding (such as a government contract). This type of "carve-out" provision appears in nearly every state medical cannabis law, and is necessitated by the fact that marijuana is still a prohibited controlled substance under federal law, due to the Controlled Substances Act.

Finally, in addition to Jake's Law, the N.J. Senate has introduced a bill that would make the expungement process easier for individuals with prior non-violent marijuana-related prosecutions, legislation that will be re-introduced and voted on in June.

Conclusion and Implications

While Governor Murphy supports expansion of the state's medical marijuana program in principal, some commentators have suggested it is not a given that he will sign Jake's Law in its current form. For one, the Governor has pushed back on the creation of a state commission to administer the program, which would take administration of the program out of the hands of the N.J. Department of Health. Despite this potential opposition, there is strong momentum for this expansion, particularly as advocates look for a win after failing to pass the aforementioned adult use cannabis legislation. Some version of Jake's Law is likely to pass and be signed into law in New Jersey in 2019.

As with the landscape on the federal level and in several states, marijuana laws in New Jersey are in flux. Adult use cannabis legalization faced challenges, with a much-lauded bill narrowly failing to pass in the State Senate. However, all signs point to expansion in the state's medical marijuana program, whether by the Governor, the legislature, or both. Whether this expansion allays the concerns of adult-use advocates or spurns further debate is yet to be seen. However, what is certain is that medical marijuana use will increase in the Garden State and employees in the state are likely to receive increased protections in the workplace. Therefore, individuals,

businesses, and industry watchers in the state should be prepared for a legislative and regulatory environment that increases the availability and use of cannabis in the state, first for medical use, and inevitably, for recreational of adult use.
(Joseph McNelis, III)

OREGON 2019 LEGISLATIVE SESSION ROUNDUP: NEW OREGON CANNABIS LAWS

Oregon's 2019 legislative session is over, and it was a whirlwind for the cannabis industry. High profile efforts such as the social consumption bills failed to progress and pass into law. Even some bills with broad support encountered big roadblocks along the way to passage, sometimes from both republican and democratic lawmakers. Despite that, some groundbreaking bills were passed into law that will help the industry mature and redress past harms.

Senate Bill 218

Senate Bill 218 makes official the Oregon Liquor Control Commission's (OLCC) licensing pause that was put into place effective June 15, 2018 and halted the processing of any producer license applications submitted after that date. Senate Bill 218 is designed to deal with Oregon's overproduction of recreational cannabis by limiting the number of producer licenses while allowing the OLCC to ratchet up licenses, and thus production, as demand increases. An increase in demand sufficient to justify the issuance of new producer licenses is most likely to occur only once Oregon recreational cannabis companies can ship product over state lines legally (more on that later).

Legislators who resisted this bill did so mainly for one of two reasons: First, republicans with a libertarian lean disliked the restriction on the free market, and second, some legislators worried that their constituents who had invested in new businesses with the expectation of receiving a producer license would lose their investments.

Industry advocates in Salem worked successfully to convince republicans that the restrictions on our recreational cannabis industry related to federal prohibition, as well as the involvement of deep pocketed investors willing to run their businesses at a loss while waiting for federal decriminalization or legalization to make them big buyout targets, prevent a free market and make necessary for the health of the industry controls on production.

To address concerns about applicants with a reasonable expectation of licensure losing their investments, the bill was amended to provide what the OLCC had already indicated was its intent: applications received by the June 15, 2018 pause date will be processed, provided they are complete or are timely made complete. This amendment was designed to protect the interests of serious applicants who applied by the pause date without benefiting place holder applications. Thus, all producer applications will need to have a land use compatibility statement from their local jurisdiction submitted within 21 days of the law becoming effective and transfers of ownership or location of production license applications will no longer be allowed.

House Bill 2098

House Bill 2098 is this session's omnibus cannabis bill. It was originally introduced to make license application and renewal fees nonrefundable, but the relating to marijuana clause worked like a magnet, bringing in a variety of recreational cannabis changes. Here is a quick rundown of what the law does:

- Directs the OLCC to establish an advisory committee for establishing and maintaining standards for testing the potency of marijuana and marijuana products. Oregon recreational marijuana potency testing has been widely criticized as ever higher potency numbers, some bordering on the absurd, have come out of labs that face little scrutiny of their practices. This is a step toward reigning in those practices and creating an even playing field for Oregon producers and processors.

- Allows pharmacists to dispense FDA approved prescription medications containing cannabinoids pursuant to a prescription, rather than requiring that all THC containing substances be disbursed through either the OLCC or the OMMP system.

• Allows the OLCC to establish pilot programs of up to three years in duration to expand access to marijuana to Oregon Medical Marijuana Program (OMMP) registry cardholders and their caregivers.

• Tweaked the exemption to Land Use Compatibility Statement requirement applicable to some OMMP grow sites transitioning into the OLCC recreational cannabis program. The change requires that, to benefit from the exemption, in addition to the requirements already in place, the OMMP grow site and each of the persons responsible for the grow site must be registered with the Oregon Health Authority at the time the application to transition to the OLCC program is submitted, but that the registration need not have been continuous.

• Allows OLCC recreational cannabis producers to produce and transfer kief.

• Gives the OLCC the authority to "restrict, suspend or refuse to renew," as well as seize marijuana products from, a license based on probable cause of an unapproved financial interest or diversion.

• Expands delivery laws to allow retailers to deliver marijuana items to medical cardholders between the ages of 18 and 21 years old.

• Directs the OLCC to revoke a retailer's license for failure to file or pay marijuana retail sales tax for two of any four consecutive quarters.

• Removes from the definition of "marijuana," and thus from the statutes and rules governing marijuana activities, FDA approved prescription drugs containing cannabinoids and dispensed by a pharmacy.

Senate Bill 582

Senate Bill 582 is the most exciting of this session's cannabis legislation, and also had the most tumultuous path. The idea of an Oregon law to permit interstate commerce of marijuana has been percolating and gaining momentum for years. However, early iterations of Senate Bill 582, which included a 30 percent excise tax and a structure designed to pressure the Governor into acting in direct defiance of federal law, threatened to doom the effort or put Oregon in a worse situation than without it. During session, Senate Bill 582 was revised, dropping the well-intentioned but misguided aspects of the bill, and leaving the following:

> Senate Bill 582 allows the Governor to enter into agreements with other states for the purposes of interstate commerce of marijuana products. The law creates no excise or other tax. Importantly, the law becomes operative only upon a federal trigger. A trigger can be either a change in federal law permitting interstate transfer of marijuana items or a Department of Justice opinion or memorandum allowing or tolerating the interstate transfer of marijuana items.

The federal trigger for the law was key because it started a meaningful discussion in the legislature, gave the bill the votes it needed to pass, and got the support of the Governor's office.

Senate Bill 582 puts Oregon at the front of the pack for interstate commerce and sets the stage to protect Oregon's industry and allow it to thrive.

Senate Bills 420 and 975

Senate Bills 420 and 975 are a social justice bills that take steps towards redressing the harms of the War on Drugs.

Senate Bill 420

Under Senate Bill 420, people with "qualifying marijuana convictions" will be able to have their convictions expunged without paying filing fees or undergoing a background check. "Qualifying marijuana convictions" are those that are based under conduct described in ORS 475B.301, which relates to home grows, small scale home processing, small scale possession, and small-scale distribution to adults over the age of 21 for non-commercial purposes. Senate Bill 420 is not as broad as originally introduced, nor does it provide for automatic expungement as planned, but it is a step in the right direction.

Senate Bill 975

Senate Bill 975 is similar to Senate Bill 420 and provides for reduction of convictions for people whose convictions are for violations of crimes that

have since been reduced in severity, such as from a felony to a misdemeanor, or from a higher-level felony to a lower level felony. Senate Bill 975 also waives filing fees.

Both bills require that the people seeking expungement or reduction of their conviction have complied with the requirements of their sentences.

Senate Bill 365

Senate Bill 365 was a response to local jurisdiction efforts to curtail and impose additional taxes on recreational cannabis businesses.

Senate Bill 365 prohibits the imposition of system development charges on cannabis businesses or activities for increased use of transportation facilities due to cannabis production on land zoned for exclusive farm use.

Senate Bill 365 also requires local jurisdictions to allow recreational cannabis producers to keep their licenses and businesses despite local prohibitions on the activities if those prohibitions were enacted after the producer became licensed.

Conclusion and Implications

Despite some high-profile cannabis-related bills dying early on, the 2019 legislative session turned out to be an exciting one for the cannabis industry. The new laws will have huge effects on the industry, furthering social justice efforts, bolstering Oregon businesses, and helping the industry mature and ready itself for a national marketplace.
(Mia Getlin)

REGULATORY DEVELOPMENTS

U.S. POSTAL SERVICE CHANGES ITS POLICIES REGARDING MAILING CANNABIDIOL PRODUCTS

In early June 2019, the U.S. Postal Service (USPS) expanded its "Hazardous, Restricted and Perishable Mail" policy to allow for the mailing of hemp-derived cannabidiol (CBD) products. Since the hemp plant is no longer considered a federally controlled substance pursuant to the Agricultural Improvement Act of 2018 (the 2018 Farm Bill), the USPS is now allowing hemp-derived CBD to be legally mailed. However, marijuana-derived CBD products are still illegal to mail.

Background

The 2018 Farm Bill addressed standards for mailing hemp. The legislation in part:

> 1) Provided a definition for "hemp," which includes hemp plants and seeds, and products derived therefrom;
>
> 2) Conformed to the changes to the Controlled Substances Act, 21 U.S.C. § 801 *et seq*. which removed hemp from regulation as a controlled substance;
>
> 3) Created a process by which states could propose their own plans to regulate hemp production and distribution; and
>
> 4) Clarified that interstate commerce of hemp is permitted (2018 Farm Bill, §§ 10113, 10114, 12619).

The New Cannabidiol Policy

The USPS' new policy follows the 2018 Farm Bill. According to USPS's June 6, 2019 Postal Bulletin, this new policy was implemented after USPS had:

> . . .received numerous inquiries from commercial entities and individuals wishing to use the mail to transport cannabidiol (CBD) oil and various other products derived from the cannabis plant.

The updated policy (formally entitled "Publication 52, *Hazardous, Restricted and Perishable Mail*, 453.37") now reads:

> For purposes of this section, 'hemp' shall have the meaning provided under federal law, including Section 10113 of the Agricultural Improvement Act of 2018, Pub. L.115-334 (7 U.S.C. § 1639), or any successor provision.

Hemp and hemp-based products, including cannabidiol (CBD) with the tetrahydrocannabinol (THC) concentration of such hemp (or its derivatives) not exceeding a 0.3 percent limit are permitted to be mailed only when:

> 1) The mailer complies with all applicable federal, state, and local laws (such as the Agricultural Act of 2014 and the Agricultural Improvement Act of 2018) pertaining to hemp production, processing, distribution, and sales; and
>
> 2) The mailer retains records establishing compliance with such laws, including laboratory test results, licenses, or compliance reports, for no less than 2 years after the date of mailing."

The USPS requires mailers of CBD products to have a signed "self-certification statement," affirming that the mailer is authorized to sell the products pursuant to a Department of Agriculture license and also requires mailers to have a copy of a certificate from a laboratory testing analysis showing the THC concentration of the products. This documentation is not required to be presented to USPS at the time of mailing, but mailers of CBD products could be asked to present the statement and certificate at any time.

Hemp is Not Marijuana

Although hemp and marijuana share many physical and molecular similarities, for legal purposes, the distinction between hemp-derived CBD and marijua-

na-derived CBD is crucial and cannot be overlooked. Both hemp and marijuana are a variety of the same cannabis plant species and can look and smell the same. "Hemp" is a term used to classify non-intoxicating varieties of cannabis that contain 0.3 percent or less THC content. On the other hand, "marijuana" is a term used to classify varieties of cannabis that contain more than 0.3 percent THC content. THC, or tetrahydrocannabinol, is the crystalline compound of cannabis that works as the psychoactive constituent of the cannabis plant. While both variations contain some THC, because hemp contains so little THC, it will not provide the "high" that a consumer would otherwise receive from marijuana products. Hemp is primarily grown for its fiber and seeds and is used for many industrial, food, and medicinal products. Marijuana is typically grown and used for therapeutic or medicinal purposes. The CBD derived from either hemp or marijuana does not differ on a molecular level and cannot be distinguished as either hemp-derived or marijuana-derived. Despite this, even if someone were to mail marijuana-derived CBD products containing 0.3 percent or less of THC content—the comparable legal standard for hemp-derived CBD products—they would technically be running afoul of the 2018 Farm Bill, the Controlled Substances Act, and USPS' new policy. This is because, no matter what the THC content, marijuana-derived CBD is still classified as a controlled substance.

Conclusion and Implications

The future of mailing CBD products derived from hemp's more psychedelic sibling, marijuana, is presently uncertain. As more states begin to legalize recreational cannabis, it is possible that consumers may eventually see a shift in legislation allowing marijuana-derived CBD to be mailed without potential criminal liability. Until then, consumers and mailers must carefully vet the sources of their CBD products, especially if they intend on receiving or transporting them through the mail.
(Brittany Ortiz, Nedda Mahrou)

JUDICIAL DEVELOPMENTS

CALIFORNIA COURT OF APPEAL RULES PROPOSITION 64 ALLOWS POSSESSION OF CANNABIS IN STATE PRISON

People v. Raybon, ___Cal.App.5th___, Case No. C084853 (3rd Dist. June 11, 2019).

The California Court of Appeal for the Third District recently issued an opinion in *People v. Raybon*, ruling that inmates in California state prisons may possess less than one ounce of cannabis because possession of less than one ounce of cannabis is no longer a felony under California law. The court reached this conclusion by looking to Proposition 64's amendments to the Health and Safety Code. It determined these changes also decriminalized cannabis possession under Penal Code § 4573.6's prohibition on the knowing possession of controlled substances in state prisons and other institutions under the charge of the California Department of Corrections.

Background

Plaintiffs in this case included Goldy Raybon, Anthony L. Cooper, Dwain Davis, Scott Wendell Haynes, and James Potter, each convicted for violating Penal Code § 4573.6. Section 4573.6 makes it a felony to possess a controlled substance in prison without authorization under the rules of the Department of Corrections, the rules of the prison, or by specific authorization of the warden. Each plaintiff was convicted of this additional felony of possessing cannabis while serving time in prison for unrelated charges after Proposition 64 was passed.

Proposition 64 amended Health and Safety Code § 11362.1 to make it lawful for persons over 21 years of age to possess up to 28.5 grams of nonconcentrated cannabis and provided that the decriminalization of cannabis prevails notwithstanding any other provision of state law. Proposition 64 also addressed cannabis in prisons; Health and Safety Code § 11362.45(d) was enacted to address Penal Code § 4573.6's prohibitions by stating § 11362.1 does not modify:

> . . .laws pertaining to *smoking* or *ingesting* cannabis or cannabis products on the grounds of, or within, any facility or institution under the jurisdiction of the Department of Corrections and Rehabilitation or the Division of Juvenile Justice, or on the grounds of, or within, any other facility or institution referenced in [§] 4573 of the Penal Code.

In light of Proposition 64's legalization of adult use cannabis, plaintiffs each filed a petition seeking relief from their possession convictions. The trial court in each of their cases denied their petition for relief.

The Court of Appeal's Decision

Parsing Proposition 64's Decriminalization of Cannabis

The court looked to the plain meaning of the proposition to determine the legalization of cannabis possession contained in Proposition 64's revisions to the Health and Safety Code does extend to possession under Penal Code § 4573.6.

The court found the specific controlled substances prohibited by Penal Code § 4573.6 are determined by the controlled substances defined in Division 10 of the Health and Safety Code. Since Proposition 64 modified the Health and Safety Code to no longer criminalize the possession of less than one ounce of cannabis, and Health and Safety Code § 11362.1(a) provides that decriminalization prevails notwithstanding any other provision of law, the court concluded that the Health and Safety Code preempted conflicting code sections.

In further support of the court's plain meaning interpretation, § 11362.45 of the Health and Safety Code included a specific list of the acts and instances where cannabis activity was still prohibited post-Proposition 64. Health and Safety Code § 11362.45(d) specifically mentions Penal Code § 4573 and states that decriminalization is inapplicable to "laws pertaining to *smoking or ingesting* cannabis or

cannabis products" in correctional facilities as proscribed by Penal Code § 4573. However, as the court repeatedly noted, this section did not mention or prohibit *possession* of cannabis as proscribed by Penal Code § 4573.

Under the plain meaning approach to statutory interpretation applied by the court, this construction suggests that the voters specifically did not intend for possession in prison to remain illegal. Based on this, it was clear to the court that possession of less than an ounce of marijuana is no longer a prohibited controlled substance pursuant to Division 10 of the Health and Safety Code, and this was incorporated into Penal Code § 4573.6's prohibition of possession in prison facilities.

Interpreting Proposition 64 to Allow Possession in Prisons Is Not an "Absurd Result"

In coming to its conclusion, the court also relied on prior case law interpreting Penal Code § 4573.6. In *People v. Fenton,* 20 Cal.App.4th 965 (1993), the court previously concluded the reference to Division 10 in the Penal Code incorporates all aspects of the division, including an exception from punishment of possession "upon the written prescription of a physician." In *Fenton*, the court similarly made a distinction between statutes and prison rules. While exceptions in the Health and Safety Code meant prisoners were technically able to bring controlled substances into the prison with a prescription, established prison rules could proscribe possession separately, and did in that case.

Similarly, in *People v. Harris,* 245 Cal.App.4th 1456 (2006), an inmate with a prescription for medical marijuana reported to prison with cannabis wafers and oils in his possession and was found to have violated Penal Code § 4573.5, which proscribes bringing any drugs or alcohol *other than controlled substances* into a prison. The *Raybon* court pointed to its reasoning in *Harris* to show that the court routinely interprets which substances are prohibited or allowed by the Penal Code by relying on the substances' legality in the referenced Health and Safety Code. The prisoner in *Harris* was found to have not violated Penal Code § 4573.5 because that section had an exception for controlled substances, and cannabis was defined as a controlled substance at the time under the Health and Safety Code.

In *Raybon*, as in both *Fenton* and *Harris*, the California Attorney General argued incorporating the Health and Safety Code into the Penal Code results in "absurdity" because it would permit the possession of cannabis in prisons. The *Raybon* court rejected that claim, as it did in both *Fenton* and *Harris*, because it found it reasonable to conclude from the plain meaning of the relevant statutes that the legislature intended to spare those in possession of cannabis to from unnecessary criminal sanction.

The Third District Court of Appeal also rejected the Attorney General's public policy argument. While the court accepted as a valid concern the Attorney General's contention that allowing cannabis in prisons would lead to an overall increase in drugs and other banned items and an increased burden on prison staff, it found this concern was more appropriate for the legislature to address. As a result, the court declined to interpret Proposition 64 beyond its plain language.

Conclusion and Implications

While the Attorney General made several valid policy arguments on the dangers of controlled substances in prisons, in the eyes of the *Raybon* court he failed to make any arguments applicable to the relevant question—whether the voters amended Penal Code § 4573.6 by passing Proposition 64 in 2016. In light of the plain language of Proposition 64, the court concluded voters did intend to modify the Penal Code to allow possession of cannabis in prisons.

However, Proposition 64 left unscathed that portion of Penal Code § 4573.6 allowing the Department of Corrections or individual institutions to adopt administrative guidelines to address the possession of drugs in prisons. Therefore, the Department of Corrections and individual institutions are still free to prohibit the possession of cannabis through such administrative guidelines. The court's decision is available online at: https://www.courts.ca.gov/opinions/documents/C084853.PDF

While the possession of cannabis is—at least temporarily—permitted in California prisons, several other states have banned such activity. In Washington State, the knowing possession of any alcohol, cannabis, or other intoxicant by anyone under the state's custody or supervision is prohibited. (Wash. Rev. Code § 9.94.041.). Oregon likewise prohibits posses-

sion of any intoxicant by any inmate in the custody of the Oregon Department of Corrections. (Or. Rev. Stat. § 291-105-0015(1)(d)(A).) Finally, Colorado has also banned the possession and use of cannabis by any person confined in a state or local detention facility. (Colo. Rev. Stat. § 18-18-406.5.)
(Andreas Booher, Abigail Gore)

CALIFORNIA COURT OF APPEAL REJECTS CHALLENGE TO CITY OF LOS ANGELES' AUTHORITY AND PROCESS BY WHICH IT ISSUES USE VARIANCES

McQuiston v. City of Los Angeles, *Unpub.*, Case No. B285686 (3rd Dist. Apr. 17, 2019).

In *McQuiston v. City of Los Angeles*, an *unpublished decision* out of the Third District Court of Appeal, petitioner J.H. McQuiston (McQuiston) challenged the City of Los Angeles' (City) authority and process by which it issues use variances. The City demurred to McQuiston's complaint for failure to state a cause of action. The trial court granted the demurrer without leave to amend, and the Court of Appeal affirmed the judgment, plus awarded costs on appeal for good measure.

Factual and Procedural Background

In his second amended complaint, McQuiston sued the City, the central area planning commission, and the mayor, challenging: 1) the City's authority to issue use variances in the MR1 Restricted Industrial Zone; 2) the method by which the City provided notice of requested variances 3) the participation of city councilmembers in the variance process; 4) the mayor's alleged use of undated resignations to remove appointees to area practice commissions; 5) the city attorney's alleged failure to enforce the law regarding variance; and 6) the costs for a variance appeal. McQuiston expressly alleged that he was not challenging the City's decision with respect to any particular parcel, but that he was instead contesting the constitutionality of the process itself.

The City demurred to the second amended complaint, asserting that none of the causes of action stated facts sufficient to constitute a cause of action. The trial court sustained the City's demurrers to the second amended complaint without leave to amend. McQuiston appealed.

The Court of Appeal's Decision

Issuance of Use Variances Challenge

McQuiston contended the City is prohibited by the California Constitution, state law, and local law from issuing use variances. McQuiston's argument was as follows: a city's zoning laws set forth the permissible uses for a parcel of land so zoned, and that any use that is not expressly stated in the zoning law is barred. Because a use variance departs from the uses explicitly listed in the zoning ordinance, a "use" variance (*i.e.*, "departure from law'" by definition is inconsistent with uses listed per the City's General Plan for a parcel. Thus, it is impossible for the City to issue valid use-variances. McQuiston based his claim on his understanding of the interplay between Government Code § 65906,1 concerning variances, and article XI, § 7 of the California Constitution.

The court explained § 65906, the statute prohibiting use variances, does not apply to charter cities such as Los Angeles, by its express terms. The court further rejected McQuiston's assertion that the constitutional requirement that local laws not conflict with general laws (Cal. Const., art. XI, § 7) means that the provisions of § 65906 apply to charter cities as well as non-charter cities. It explained that in Government Code § 65803, the California Legislature expressly exempted charter cities from the general zoning framework except when the statute was expressly made applicable to charter cities—and by its own terms, § 65906 was not designated by the Legislature as applicable to charter cities. The court affirmed the demurrer as to the first cause of action.

Notice Challenge

In his second cause of action, McQuiston alleged that the "notice of prospective variance to parcels in the Plan zone" was invalidly selective, and the notice procedures deny him due process. The court found McQuiston failed to plead facts showing that a property, life, or liberty interest was diminished by the City's notice practices, and affirmed the demurrer as to the second cause of action.

Unlawful Participation in Execution of City's Laws Challenge

In his third cause of action, McQuiston alleged that city legislators unconstitutionally participate in variance proceedings in violation of article III of the California Constitution, which prohibits a legislator from taking part in the executive or judicial process pertaining to a law. The court affirmed the demurrer to the third cause of action on the grounds that article III pertains to state government, not local government; that McQuiston had provided no authority to support the proposition that anyone is prohibited from speaking during public commentary before the City Commission by virtue of his or her title; and that the authority on which McQuiston relied was inapposite.

Unlawful Termination of City Commissioners Challenge

In his fourth cause of action, McQuiston alleged that the mayor could not legally remove City commissioners from their posts by means of undated resignations, and that commissioners could not be impartial if the mayor could remove them at his discretion. The court affirmed the demurrer to the fourth cause of action on the grounds that the plain language of the City Charter granted the mayor the power to remove members of most commissions without confirmation by the city council and to appoint members for the remainder of a commissioner's remaining unexpired term.

Misconduct by the City Attorney Challenge

In his fifth cause of action, McQuiston alleged that the city attorney was failing in his duty to the public to prosecute violations of the City Charter concerning the variance process and also failed to advise properly, thereby causing commissions to commit prosecutable offenses, causing court actions by injured residents and/or landowners like McQuiston. The court affirmed the demurrer to the fifth cause of action on the grounds that the city attorney's client is the City, not McQuiston. Further, that while the city attorney prosecutes crimes on behalf of the People, for the city attorney to act an underlying wrong must exist. Since the court determined that the City was not prohibited as a matter of law from issuing variances, the city attorney could not have committed misconduct or violated any duty by failing to intercede to stop the issuance of variances or by defending the City's power to do so in court.

Excessive Fees Challenge

In his sixth cause of action, McQuiston alleged that the fees charged for the variance process were arbitrary and based on a fee schedule rather than on the cost of the City's actual work on the variance issue, in violation of articles XIII C and XIII D of the California Constitution. The court affirmed the demurrer to the sixth cause of action on the grounds that neither of the aforementioned articles pertains to variance process fees.

Conclusion and Implications

The Third District Court of Appeal ultimately rejected each of McQuiston's claims. As such, McQuiston failed to state a cause of action on all six of its claims. The Court of Appeal therefore affirmed the trial courts determination and granted the City its costs on appeal.
(Giselle Roohparvar)

NEW JERSEY STATE COURT RULES ON WORKPLACE ACCOMMODATIONS FOR MEDICAL MARIJUANA IN THE FACE OF EARLIER U.S. DISTRICT COURT DECISION

Wild v. Carriage Funeral Holdings, Inc., Case No. A-3072-17T3 (NJ Super Ct. App. Div. Mar. 27, 2019).

Courts across the country have recently been faced with the question of whether employers must provide accommodations for employees who use medical marijuana. Similarly, employers have had to decide whether and how to continue enforcing employee drug testing policies, and employees have struggled with whether they should inform their employers they use medical marijuana. These questions are complicated by the dichotomy between federal and state law concerning the legal status of marijuana, and are unlikely to be fully resolved until new legislation is passed. Indeed, as will be explained below, one federal and one state court issued rulings in the past year—one of which could be seen as a win for employers, and the other, for employees.

U.S. District Court Finds New Jersey Law Does Not Require Exceptions to Drug Testing Policies for Medical Marijuana Use

In *Cotto v. Ardagh Glass Packing, Inc.*, ___F. Supp.3d___, Case No. 18-1037 (D. N.J. Aug. 10, 2018), the U.S. District Court for the District of New Jersey dismissed the complaint of a medical marijuana user who refused a drug test mandated by his employer. The District Court held that the New Jersey Compassionate Use Medical Marijuana Act (CUMMA) and the New Jersey Law Against Discrimination (LAD) do not require employers to waive drug testing requirements for employees who use medical marijuana.

Plaintiff Daniel Cotto worked as a forklift operator. During his employment, Cotto used medical marijuana to treat neck and back injuries. At the time of his hiring in 2011, the plaintiff informed his employer that he used medical marijuana recommended by a doctor to treat these injuries, and provided his employer with medical documentation showing it as safe for him to work and use medical marijuana. He suffered another work injury in November 2016, and was placed on "light duty" as a result. The plaintiff was told that no "light duty" work was available at that time.

Subsequently, the plaintiff had a phone conversation and a meeting with his employer in which the company noted its concern about the plaintiff's ability to safely work while using medical marijuana. The company informed plaintiff of its policy requiring him to pass a drug test before returning to duty after suffering a work injury. The plaintiff objected to the drug testing requirement, and again provided his employer with his medical marijuana card and documentation stating that his medical marijuana was safe for use related to his work. Nevertheless, the employer did not allow the plaintiff to return to work until he could pass a drug test.

Cotto did not return to work, and later filed suit against Ardagh. He alleged that Ardagh's actions amounted to a termination, and that the employer's actions constituted disability discrimination in violation of the CUMMA and the LAD. He claimed that he was still capable of performing the essential duties of his job and that Ardagh failed to provide a reasonable accommodation. The employer filed a Motion to Dismiss the complaint.

The District Court's Decision

The LAD prohibits:

> . . .any unlawful discrimination against any person because such person is or has been at any time disabled or any unlawful employment practice against such person, unless the nature and extent of the disability reasonably precludes the performance of the particular employment. N.J. Stat. Ann. § 10:5-4.1.

The court held that plaintiff was "disabled" under the LAD, but that he could not complete the essential functions of his job. Specifically, the court stated that while the plaintiff could physically complete his job, his passing a drug test pursuant to the employer's policy was an "essential function" of his position. And the court predicted that a New Jersey state court would hold that:

> . . .the LAD does not require an employer to accommodate an employee's use of medical marijuana with a drug test waiver.

Because plaintiff could not perform this function, the court found that Ardagh was within their rights to terminate him.

The court also dismissed the plaintiff's claim under the CUMMA. The court noted that although the employer took a "more permissive stance" towards the plaintiff's use of Percocet than his use of medical marijuana, this was justified by the Controlled Substances Act and the federal prohibition on marijuana use. The court stated that although the use of medical marijuana was legal in the State of New Jersey, it was required to examine whether the CUMMA contained employment-related provisions to support plaintiff's discrimination claims.

The court also noted that it was constrained by the language of the CUMMA, which contains no provision requiring employers to make any accommodation for the use of medical marijuana. Indeed, the law provides just the opposite:

> . . .[n]othing in this act shall be construed to require . . . an employer to accommodate the medical use of marijuana in any workplace. N.J. Stat. Ann. § 24:6I-14.

The court also distinguished the provisions of the CUMMA (or lack thereof) from other state statutes with more expansive employee protections. The court made clear that it was making a "narrow" decision based on the statute's language, which did not require any accommodation for employee medical marijuana use or a waiver of the employer's legitimate drug testing policy. Ultimately, the court held that the employer was, "within its rights to refuse to waive a drug test for federally-prohibited narcotics."

Making Sense of the *Cotto* Decision

One main takeaway for employers from this case is that the language of the state statute at issue is paramount in making employment decisions. In *Cotto*, the applicable statute—the CUMMA—lacks any provision requiring employers to make an accommodation for medical marijuana use. But as the *Cotto* Court noted, several states do contain provisions protecting employees from certain adverse employment actions based on their medical marijuana use. And if the New Jersey Legislature does pass "Jake's Law" the landscape of employment protections for medical marijuana users will look very different, and will allow employees to affirmatively prove that their positive drug test was the result of state-sanctions medical marijuana use. Therefore, before making any employment decisions concerning medical marijuana users, employers and practitioners would be wise to examine the status of any employee or applicant under the state's medical marijuana law, and engage the employee in an interactive process to determine: 1) if they are a medical marijuana user, 2) how the use of medical marijuana might affect their ability to complete the essential functions of their job, and 3) whether a reasonable accommodation is feasible, allowing the employee to use medical marijuana off-site. It is also important for employers dealing with employees in safe-sensitive positions to determine if passing a drug test could be seen as an "essential function" of the employees' job title, as the employer in *Cotto* did.

New Jersey State Court Finds Law against Discrimination May Require Reasonable Accommodations for Medical Marijuana Users

In March 2019, a New Jersey appellate court reversed a dismissal of employment discrimination claims under the LAD in the case of *Wild v. Carriage Funeral Holdings, Inc.* The plaintiff was a funeral director who had been using medical marijuana to treat pain related to his cancer. The plaintiff was forced to take time off after suffering injuries in a car accident. After returning to work, the plaintiff informed his employer that he had been using medical marijuana to treat his cancer. The company then administered its own drug test, for which the plaintiff tested positive for marijuana. As a result of the drug test, the plaintiff and was terminated. The court's decision in *Wild* is available online at: http://case.lawmemo.com/nj/wild.pdf

The plaintiff filed a complaint, alleging among other things that his termination as a violation of the LAD. In ruling upon the defendant's motion to dismiss the complaint, the trial court held that the plaintiff could state a claim under the CUMMA based on the provision stating that:

> . . .nothing in [the Compassionate Use Act] shall be construed to require ... an employer to accommodate the medical use of marijuana in any workplace.

However, the appellate court disagreed, stating that this provision "neither creates nor destroys rights and obligations," ultimately holding that the employee may be able to state a claim under the LAD.

This ruling did not represent a full win for the plaintiff, since the case was on appeal of a motion to dismiss the complaint. However, the at such an early stage, the appellate court did determine that the plaintiff made a *prima facie* showing of discrimination, which requires a plaintiff to allege four elements: 1) The employee has a disability or that the employer perceived the employee to have a disability; 2) The employee was qualified to perform the essential functions of the job; 3) The adverse employment action was because of the disability or perceived disability; and 4)The employer thereafter sought a similarly qualified, but non-disabled, individual.

The court found that the plaintiff established each of these elements by alleging that he had a history of cancer, he had been performing the essential functions of his job, and that his employer terminated him after learning that he was a medical marijuana user.

Conclusion and Implications

While the *Wild* case and the *Cotto* case may seem divergent, there are some conclusions to draw from these cases for employers who want to make employment decisions that comply with both federal and state law. In previewing potential defenses to such a claim, the court did not a caveat that state law does not immunize medical marijuana users from adverse action, noting that employers can still terminate an employee for arriving to work under the influence of marijuana or for possessing or using marijuana on the employer's premises. What is clear from these cases, however, is that companies should not rely solely on a positive drug test as a basis for their employment decisions where the applicant or employee is a medical marijuana user. Rather, such evidence should be coupled with evidence that the employee was actually impaired in the workplace, or that the presence of marijuana in their system would inhibit their ability to perform the essential functions of their job. Managers and supervisory employees should also be trained to recognize and document the signs of impairment, which may include: the presence of marijuana, the presence of paraphernalia used to consume marijuana, the odor of marijuana, blood-shot eyes, poor coordination, slurred speech, disorientation, lack of focus, confusion, delayed reaction times and/or an inability to perform routine tasks. These tips are even more important for employers if and when Jake's Law is signed into law, which significantly increases protections for employees who are medical marijuana users.

(Joseph McNelis, III)

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