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FEATURE ARTICLES

PRE-EMPLOYMENT AND EMPLOYEE DRUG TESTING FOR CANNABIS—AN OVERVIEW AND TRENDS IN STATE LAW

By Joseph McNellis, III

Marijuana's unique legal status—at once, a highly regulated controlled substance under the federal Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, but authorized for use in more than two-thirds of states—presents complex challenges in many areas of American life. These challenges particularly arise in the workplace, where employers and employees face the daunting task of wading through compliance with both state and federal laws, which are constantly developing and sometimes conflicting.

On the employer side, businesses must balance the important goal of maintaining employee and workplace safety vs. complying with medical marijuana and employment laws that may require some accommodation of marijuana use by employees. And employees who use legal marijuana under a state-sanctioned program must determine whether their continued use will jeopardize their current job or future job prospects. Some states and municipalities have stepped into the fray to introduce legislation banning or restricting pre-employment drug testing. This article will discuss the challenges involved in employee drug testing as it relates to marijuana, examples of recent legislation addressing employee drug testing, and discuss whether a trend is emerging to restrict pre-employment drug testing.

State Law Treatment of Employee Drug Testing

One of the most challenging employment policies affected by marijuana legalization is employee drug testing. Except in limited areas covered by federal law or regulations (such as the U.S. Department of Transportation's (DOT) drug testing program discussed below), employee drug testing is a state issue. Employee drug testing laws vary from state-to-state, and many do not even have a statute addressing the contours of employee drug testing. Where employee drug testing is available under state law, it typically occurs in one or more of the following forms:

•Pre-Employment: where the employer requires an applicant to submit to drug testing as part of the application process, or in the interim between when the employer makes a conditional offer of employment and a formal/final offer of employment.

•Post-Accident: where the employer requests or requires an employee to submit to drug testing after the employee caused or was involved in a work-related accident. This includes drug testing conducted after an incident causing an injury to an employee or employees.

•Return-to-Duty: where the employer requests or requires an employee to submit to drug testing before returning to work after suffering an injury or returning from some type of temporary leave

•Reasonable Suspicion: where the employer requests or requires an employee to submit to drug testing based on a good faith belief by the employer than an employee is impaired or under the influence of a drug or other substance while on the employer's premises.

•Random: where the employer requests or requires an employee to submit to drug testing on a random and unannounced basis, unrelated to any specific incident such as an accident or injury.

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Impairment

Many difficult questions arise in these contexts, but the most pressing as it relates to marijuana is what it means for an employee to be "impaired" or "under the influence" in the workplace. This is a critical determination, as it often affects whether an employer is within its rights to submit an employee to drug testing [While state laws differ on the exact definition, the imposition of "reasonable suspicion" drug testing usually requires evidence that the employee was impaired or under the influence of a substance during work hours and/or on the employer's premises. *See*, *e.g.*, Minnesota's M.S.A. § 181.951(5) (defining "reasonable suspicion testing" to cover situations where, *inter alia*, the employer suspects the employee is under the influence of drugs or alcohol, the employee has sustained a personal injury or caused injury to another employee, or has caused a workplace accident] and what actions an employer may take if an employee tests positive for marijuana. [Although not confined to marijuana, many state unemployment compensation laws prohibit an employee who is terminated for illegal drug use from receiving such benefits. *See*, *e.g.*, Louisiana Revised Statutes, § 23:1601(10).]

While some state laws would allow for an employer to base an adverse employment action on a positive drug test alone, other medical marijuana laws require the employer to show additional indicia of impairment. *See*, *e.g.*, The Delaware Medical Marijuana Act, 16 Del. C., prohibiting an employer from taking an adverse action against an employee on the basis of:

> . . .[a] registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment.

The challenge for both employers and employees is that while many laws use the terms "impairment" and/or "under the influence," they are often not (or not clearly) defined, leaving both sides guessing.

An example of drug testing or statue that has done so is the Arizona Drug Testing of Employees Act, which provides a broad definition of "impairment," stating:

> 'Impairment' means symptoms that a prospective employee or employee while working may be under the influence of drugs or alcohol that may decrease or lessen the employee's performance of the duties or tasks of the employee's job position, including symptoms of the employee's speech, walking, standing, physical dexterity, agility, coordination, actions, movement, demeanor, appearance, clothing, odor, irrational or unusual behavior, negligence or carelessness in operating equipment, machinery or production or manufacturing processes, disregard for the safety of the employee or others, involvement in an accident that results in serious damage to equipment, machinery or property, disruption of a production or manufacturing process, any injury to the employee or others or other symptoms causing a reasonable suspicion of the use of drugs or alcohol (*See,* A.R.S. § 23-493(7).)

Observable Indicia of Impairment

One reason that observable indicia of important is an important element to the determination of employee impairment is because there are varying scientific and medical opinions regarding whether and to what degree a drug test for marijuana can show impairment. In 2015, an article entitled, "Marijuana in the Workplace: Guidance for Occupational Health Professionals and Employers" published by in the *Journal of Occupational and Environmental Medicine*, opined that both casual and chronic marijuana users would be "likely impaired" based upon a blood test showing a THC level of 5 ng/mL. *See, JOEM* Volume 57, Number 4, April 2015.

In a different context, a report was commissioned by the Governor of Michigan to determine whether the state legislature should consider changes to the state's criminal laws concerning driving under-the-influence in light of Michigan's forthcoming legalization of recreational marijuana. That study opined that there is a "poor correlation between driving impairment and the blood (plasma) levels of Δ9-THC at the time of blood collection." *See,* Report from the Michigan Impaired Driving Safety Commission, March 2019.

Relevant Federal Laws Concerning Employee Drug Testing

On the federal level, certain federal contractors and grantees are covered by the Drug Free Work-

place Act (DFWA), 41 U.S.C. § 8101, *et seq*. While the DFWA does not require federal contractors to conduct employee drug testing, it requires covered employers to make a "good faith" effort to maintain a drug-free workplace. 41 U.S.C. §§ 8102-03.

Furthermore, workers in the transportation industry employed in "safety-sensitive" that operate in interstate commerce are required to submit to drug testing under regulations issued by the U.S. Department of Transportation. *See generally,* 49 CFR Part 40. The list of substances for which the DOT tests includes marijuana. *See,* 49 CFR § 40.85(a). Furthermore, the DOT has specifically stated that its Regulations make no exception for "medical marijuana," even in states where it is legal. *See,* "DOT 'Medical Marijuana' Notice." https://www.transportation.gov/odapc/medical-marijuana-notice (last accessed September 27, 2019).

Restrictions on Pre-Employment Drug Testing: A New Trend?

Given the uncertainty and difficulties surrounding employee drug testing, some states and municipalities (including Nevada, New York City (NYC, and Washington, D.C. (D.C.) have introduced legislation to ban and restrict employers from conducting pre-employment drug testing. While these statues provide some clarity for employees and businesses, some unanswered questions still linger and will likely reach the courts in those jurisdictions.

In June 2019, the Nevada Legislature passed and governed signed Assembly Bill 132 with the goal of:

> . . .prohibiting the denial of employment because of the presence of marijuana in a screening test taken by a prospective employee with certain exceptions…

The law prohibits employers from failing or refusing to hire a prospective employee based on a drug test by the prospective employee showing the presence of marijuana. Furthermore, it allows the employee to submit a second drug test to rebut the positive results of any such positive test required by the employer within the first 30 days of employment.

The New York City Council has passed, and the District of Columbia Council is considering similar legislation. The NYC provision, Local Law No. 91 (2019), prohibits employers from requiring prospective employees to submit to a drug test for marijuana as a condition of receiving an offer of employment. Each of these laws contains several exceptions, either based on the nature of the job or to protect employers from running afoul of any relevant federal law, contract, or grant.

For example, the NYC ordinance exempted several types of jobs, including:

1) police and law enforcement; 2) certain construction and maintenance jobs; 3) any job requiring a commercial driver's license (CDL); 4) jobs requiring the care and supervision of children or medical patients.

The 'Catch All' Provisions

There is a New York City catch-all provision covering "any position with the potential to significantly impact the health or safety of employees or members of the public," and gives authority to the New York City Department of Citywide Administrative Services to specifically identify jobs that fall into this category. The law also makes other exceptions, stating that it does not apply to: 1) any drug testing required to be completed under regulations issued by the U.S. Department of Transportation that require pre-employment drug testing for employees in the transportation industry; 2) any pre-employment drug testing required by a contract entered into between an employer and the federal government, or any pre-employment drug testing required to be completed by an employer as a requirement of receiving financial assistance from the federal government; 3) any drug testing required to be completed by prospective employees under any other federal statute or regulation for the purpose of safety or security; 4) a prospective employee who is required to undergo pre-employment drug testing under the terms of a valid collective bargaining agreement. *See,* NYC Local Law 91 (2019), at (b)(1)-(2). The Nevada and D.C. laws make similar exemptions and/or exceptions.

While the imposition of pre-employment drug testing is more clear in the jurisdictions listed above, there are still some unanswered questions. For example, what are the limits of the "catch-all" provision of the NYC ordinance allowing employers hiring for positions "with the potential to significantly impact the health or safety of employees or members of the public." Such a description is broad and could be interpreted to include a very wide or very narrow swath of employers and job titles. While such questions are sometimes answered with more specific language from the legislature, they are more often addressed by the

courts during the first few years after a statute's adoption.

Conclusion and Implications

Employee drug testing laws vary by state and are generally addressed on a case-by-case basis. While such laws often leave employers and employees with some unanswered questions and undefined terms, state court decisions, legislative changes, and more scientific research may bring more clarity to how an employee's marijuana use might affect the safety of the workplace and his or her job prospects. It yet to be seen whether more states will follow the example of Nevada and ban or restrict the use of pre-employment drug testing for marijuana. However, despite intransigence on the federal level, the states have followed a general trend of expanding the number of jurisdictions where marijuana (both medical and recreational) is legal, and increasing rights for marijuana users. Therefore, it is more likely that such laws, or ones like it, will be adopted elsewhere in the near future; and this author does not except many states to broaden the ways in which employers can use a positive drug test showing the presence of marijuana as a basis for taking an adverse employment action. Both employers and employees should (and the lawyers who represent them) must continue to follow legal developments in this arena to avoid violating state law and proper workplace policies.

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WEED, WATERS AND WILDLIFE: THE ENVIRONMENTAL PERMITTING OF CANNABIS CULTIVATION IN CALIFORNIA— PART 2: STATE WATER RESOURCES CONTROL BOARD PERMITTING

By Clark Morrison and Morgan Gallagher

This article is the second of a two-part series describing California's environmental regulatory structure for cannabis cultivation as implemented by the California Department of Fish and Wildlife (Department) and the State Water Resources Control Board (SWRCB). Part 1 addressed the Department's permitting program for cannabis cultivation. This part addresses the requirements of the SWRCB.

Introduction

As discussed in Part I of this series, California's legalization measure, the Adult Use of Marijuana Act (AUMA), or Proposition 64, was passed in 2016. In 2017, the Legislature Passed Senate Bill (SB) 94, which integrated AUMA with the state's existing Medical Cannabis Regulation and Safety Act (MCRSA) to establish a single regulatory system to govern both medicinal and adult-use cannabis in California. These measures include a number of provisions calling on the State's environmental agencies, particularly the Department and the State Water Resources Control Board, to develop programs for the regulation of cannabis cultivation.

At a fundamental level, Business and Professions Code § 26060.1(b) requires the California Department of Food and Agriculture (CDFA) to include in any license for cultivation conditions requested by the Department or the SWRCB to:

- Ensure that the effects of diversion and discharge associated with cultivation do not affect the instream flows needed for fish spawning, migration and rearing, and the flows needed to maintain natural flow variability;
- Ensure that cultivation does not negatively impact springs, riparian habitat, wetlands or aquatic habitat; and
- Otherwise protect fish, wildlife, fish and wildlife habitat, and water quality.

With respect to the SWRCB specifically, § 13276 of the Water Code authorizes or directs the board, and the nine Regional Water Quality Control Boards (RWQCBs), to address discharges of waste from cultivation, including by adopting a general permit or establishing waste discharge requirements. In so doing, the boards must include conditions addressing a dozen different considerations including, for example, riparian and wetland protection, water storage and use, fertilizers, pesticides and herbicides, petroleum and other chemicals, cultivation-related waste and refuse and human waste. The boards' actions in response to this requirement are set forth below.

The State Water Resources Control Board's Cannabis Cultivation Policy and General Order

In October 2017, the SWRCB promulgated its Cannabis Cultivation Policy (Cannabis Policy or Policy) and Cannabis General Order 2019-0001-DWQ (General Order or Order). The Policy and Order were adopted in October 2017. The Policy covers a variety of areas, including requirements for cannabis cultivation, activities to protect water quality and instream flows, implementation, means of compliance, and enforcement. The General Order implements the requirements of the Cannabis Policy, specifically those that address waste discharges associated with

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cannabis cultivation. The Cannabis Policy and the General Order were both updated and adopted by the SWRCB in February 2019, which updates became effective on April 16, 2019.

Originally, the Policy and General Order allowed the RWQCBs to adopt their own regional orders to regulate cannabis cultivation. Two RWQCBs, the North Coast Regional Water Board and the Central Valley Regional Water Board, adopted such regional orders. The 2019 Policy and General Order, however, were made to supersede all such regional orders. Therefore, enrollees previously covered by the North Coast Regional Order were required to either apply to transition their permit coverage to the Order or request termination of coverage under the Regional Cannabis Order by July 1, 2019.

The Central Valley Regional Cannabis General Order was rescinded in June 2019, and applicants have since been required to apply through the Statewide Cannabis General Order.

It should be noted that, although the new SWRCB's Order supersedes all regional orders, the General Order vests certain powers in the RWQCBs. For example, RWQCBs are allowed to issue site-specific waste discharge requirements for discharges from a cannabis cultivation site if the RWQCB determines that coverage under the General Order is not sufficiently protective of water quality.

The purpose of the Cannabis Policy is to ensure that the diversion of water and discharge of waste associated with cannabis cultivation do not negatively impact water quality, aquatic habitat, riparian habitat, wetlands, and springs. The Policy applies to the following cultivation activities: 1) Commercial Recreation, 2) Commercial Medical, and 3) Personal Use Medical. It does *not* apply to recreational cannabis cultivation for personal use (six or fewer plants in a contiguous cultivation area less than 1,000 square feet with no slopes over 20 percent), because personal use cultivation activities are not considered commercial activities and are therefore exempt from CDFA cultivation license requirements. Indoor commercial cultivation activities are conditionally exempt from the requirements, and outdoor commercial cultivation activities that disturb less than 2,000 square feet may be conditionally exempt under certain circumstances.

Tier and Risk Values

The General Order assigns tier and risk values to each cultivation site based on the site's threat to water quality. The threat to water quality for any site is based on three factors:

- Disturbed area: Threat levels are based in part on the area of disturbed soil, the amount of irrigation water used, the potential for storm water runoff, and the potential impacts to groundwater (*e.g.*, the use of fertilizers or soil amendments, the possible number of employees on site, *etc.*).

- Slope of disturbed areas: The General Order recognizes that increased slopes may be associated with decreased soil stability, especially when associated with vegetation removal. Storm water and excess irrigation water are more likely to runoff and discharge off-site from sloped surfaces.

- Proximity to surface water body: The General Order also recognizes that riparian setbacks from surface water bodies generally reduce impacts to water quality. Disturbed areas within the riparian setbacks are more likely to discharge waste constituents to surface water; therefore, sites that cannot meet riparian setback requirements are considered to be high risk sites.

Based on these factors, cultivation sites are characterized as either "Tier 1" or "Tier 2" sites, and the risk level of each site is characterized as low, moderate, or high. Tier 1 sites are characterized as sites with disturbed area between 2,000 square feet and one acre. Tier 2 sites are those equal to or greater than one acre. Low risk level sites are those with no slope greater than 30 percent that are not within a state riparian setback. Moderate risk level sites are those with slopes between 30 percent and 50 percent that are not within a state riparian setback. High risk sites are sites where any portion of disturbed area is within a state riparian setback. The assessment of the risk level of the cultivation site occurs through an online self-certification process established by the SWRCB, not unlike the self-certification process established by the Department under § 1600 of the Fish and Game Code (and described in Part 1 of this article).

Specific Substantive Requirements of the Policy

Consistent with its primary purpose of broadly protecting water quality, aquatic habitat, riparian habitat, wetlands, and springs, the Policy contains an exhaustive list of detailed performance measures specific to cultivation activities. Although they are too numerous to cover in detail here, examples of these measures include:

- General erosion control measures;
- Regulations for stream crossings and installations, culverts, and road development;
- Management of fertilizers, pesticides, and petroleum;
- Cleanup, restoration, and mitigation on existing sites;
- Proper soil, cultivation, and human waste disposal;
- Irrigation runoff control;
- Methods of water diversion and storage;
- Winterization.

Generally speaking, the performance standards contained in the Policy fall into the following three categories:

General Requirements and Prohibitions

The Policy's "General Requirements and Prohibitions" apply to all cannabis cultivators and include general measures to prevent discharges during construction and operation of cultivation activities, manage onsite pollutants, and protect on and off-site species. For example: The Policy requires cultivators to obtain coverage under the SWRCB's Construction Storm Water Program during construction of cannabis cultivation operations. Cannabis cultivators must apply for a Lake and Streambed Alteration Agreement or consult with CDFW to determine if a Lake and Streambed Alteration Agreement is needed prior to commencing any activity that may substantially:

- Divert or obstruct the natural flow of any river, stream, or lake;
- Change or use any material from the bed, channel, or bank of any river, stream, or lake; or
- Deposit debris, waste, or other materials that could pass into any river stream or lake.

Cultivators cannot take any action that would result in the taking of Special-Status Plants, Full Protected species, or a threatened, endangered, or candidate species under the California Endangered Species Act.

During land disturbance activities, cultivators must review the daily weather forecast and maintain records of the weather forecast for each day of land disturbance activities. If there is a 50 percent or greater chance of precipitation greater than 0.5 inches per 24-hour period during any 24-hour forecast, cultivators cannot disturb land.

Cultivators are required to immediately report any significant hazardous material release or spill to the California Office of Emergency Services, their local Unified Program Agency, the Regional Water Board, and CDFW.

Requirements Related to Water Diversions and Waste Discharge

The Policy includes requirements that apply specifically to any water diversion or waste discharge related to cannabis cultivation. By way of example:

- Cannabis cultivators cannot conduct grading activities on slopes exceeding 50 percent grade.
- Cannabis cultivators cannot drive or operate vehicles or equipment within riparian setbacks or within waters of the state unless authorized under a § 404 or § 401 Clean Water Act Permit, a CDFW Lake and Streambed Alteration Agreement, coverage under the Order, or site-specific water discharge restrictions issued by a Regional Water Board.
- Cannabis cultivators must control all dust related to cannabis cultivation activities to ensure dust does not produce sediment-laden runoff. Erosion control measures must be used to minimize erosion

of disturbed areas, potting soil, and bulk soil to prevent waste discharges.

•Cannabis cultivators must comply with winterization requirements, which, among other things, prevent cultivators form operating heavy equipment during the winter period unless: 1) authorized by the RWQCB via a site management plan or 2) if emergency repairs are required and authorized by the SWRCB or another agency with jurisdiction over the cultivation activity.

Narrative and Numeric Instream Flow Requirements

Finally, the Policy contains narrative instream flow requirements that apply to all diversions of surface water and groundwater for cannabis cultivation. Within the umbrella of narrative instream flow requirements, there are requirements for surface water instream flow requirements, which apply to anyone diverting water for cannabis cultivation from a waterbody, as well as requirements specific to groundwater diversions and springs. An example of the Policy's narrative instream flow requirements follows:

> Cannabis cultivators cannot divert surface water between April 1 and October 31 unless the water diverted is delivered from storage and the cultivator has a permit/license and a claim of right to the stored water. From November 1 through March 31, cultivators can only divert surface water when water is available for diversion under the cultivator's priority of right.

Numeric instream flow requirements apply when a site discharges to a SWRCB compliance gauge. The compliance gauges have Numeric Flow Requirements and the SWRCB has an online mapping tool to assist cultivators in determining which compliance gage applies to them and whether they may divert water. For example, the following requirement applies:

> From November 1 through March 31, cultivators can divert water as long as the Numeric Flow Requirement is met at the compliance gauge assigned to the cannabis site. From November 1 through December 14 of each year, the surface water diversion period does not begin until after seven consecutive days in which the surface waterbody's real-time daily average flow is greater than the applicable Numeric Flow Requirement.

Updates to Policy and Order in 2019

The 2019 Policy and Order included four primary changes, addressed below:

Tribal Buffers

Prior to acting on a cultivator's request to cultivate cannabis within 600 feet of tribal lands, the water boards will notify any affected California Native American Tribe and if any affected tribe rejects the proposed cultivation within 45 days, the cultivator is prohibited from cultivating cannabis on or within 600 feet of the land.

Onstream Reservoirs

Cultivators with pre-existing onstream reservoirs can now obtain water rights for cannabis cultivation if the reservoir existed prior to October 1, 2016 and both the Deputy Director for the Division of Water Rights and CDFW determine that removal of the reservoir and installation of off-stream storage would cause more environmental damage than continuing to use the onstream reservoir for diversion and storage. Cultivators with onstream reservoirs must install and maintain a measuring device that is installed and calibrated and is capable of recording the volume of diverted water year-round. Onstream reservoirs that do not qualify for ongoing operation must either be removed or otherwise rendered incapable of storing water.

Requirements for Indoor Cultivation Sites

Regarding requirement for indoor cultivation, cultivators with a building permit and certificate of occupancy for indoor cultivation sites that discharge waste to a permitted wastewater collection system are exempt from the Policy's riparian setbacks and tribal buffer requirements.

Winterization Requirements

Prior to the 2019 updates to the Policy and Order, cultivators were prohibited from operating any heavy equipment during the winter period, except for emergency repairs. The 2019 change to winterization re-

quirements allows the RWQCB's Executive Officer or designee to approve a site management plan to permit the use of heavy equipment for routine cultivation soil preparation or planting during the winter period if both the following conditions are met: 1) all soil preparation and planting activities occur outside of the riparian setbacks; and 2) all soil preparation and planting activities are located on an average slope equal to or less than 5 percent.

State Water Resources Control Board Enforcement Mechanisms

Regarding any enforcement action taken by the SWRCB, the board has primary enforcement responsibility for the regulations in the Policy, and is required to notify CDFA of any enforcement action that is taken. The SWRCB has a variety of enforcement tools for correcting noncompliance with the Policy and Order. In particular, the board may initiate an informal enforcement action, including a Notice of Violation letter if a violation is observed or reported. For formal violations, the SWRCB can issue a Notice to Comply, Administrative Civil Liability to assess monetary penalties, a Cease and Desist Order, or a Cleanup and Abatement Order, among other enforcement mechanisms. (These Administrative Civil Liability actions can be costly. For example, an Administrative Civil Liability action resulting from a discharge to waters of the United States can result in a penalty of $10,000 per day and $10 per gallon of discharge.) The SWRCB also has the authority to revoke any water right permit, license, or registration under the Water Code.

Conclusion and Implications

Compliance with the complex requirements of the Policy is a prerequisite for obtaining a CDFA Cannabis Cultivators license. Cultivators must provide evidence of compliance (or certification that a permit is not necessary) as part of their application for a CDFA cannabis cultivation license. As noted above, Business and Professions Code § 26052.5(b) requires the CDFA to consult with the State Water Resources Control Board on the source or sources of water the cultivator will use for cultivation, and Business and Professions Code § 26060.1(b) requires that CDFA include conditions requested by the State Water Board (including the principals and guidelines of the Policy) in any license.

The State Water Resources Control Board's Cannabis Cultivation General Order can be found at: https://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2019/wqo2019_0001_dwq.pdf

The State Water Resources Control Board's Cannabis Cultivation Policy can be found at: https://www.waterboards.ca.gov/water_issues/programs/cannabis/docs/policy/final_cannabis_policy_with_attach_a.pdf

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CANNABIS LAW NEWS

FEDERAL GOVERNMENT ALLOCATES $3 MILLION TO STUDY THE PAIN-RELIEVING PROPERTIES OF MARIJUANA

For all intents and purposes, the U.S. government still considers marijuana an illegal drug. Despite this, more than 30 states and counting now allow its use for medical purposes. Interest in cannabis and the consumption of marijuana have begun to outstrip research into the drug, and partly as a result, the federal government announced Sept. 17th nine new research grants would investigate the question: What can marijuana do for pain? The nine projects are funded by the National Center for Complementary and Integrative Health (NCCIH) which will specifically study CBD, excluding its sibling ingredient THC.

Background

CBD can be found today in all kinds of products, ranging from those that utilize its purported calming quality, such as CBD gummies for sleep, to the somewhat less logical—CBD-infused mascara or sportswear. While CBD is well-known for its in-vogue presence in the food and cosmetic industries, its properties have been much less researched by the federal government than those of THC.

Why CBD Might Prove More Valuable than THC

According to the NCCIH, while we often focus on THC in research and the media, it is but one of a long list of potentially valuable components of the cannabis plant:

> Minor cannabinoids (those other than THC, the high-inducing component of marijuana) and certain terpenes found in the cannabis plant may have analgesic properties, but there has been little research on these substances to understand their effects and underlying mechanisms.

David Shurtleff, Ph.D., deputy director of NCCIH, has said that THC, like opioids, is unsuitable for pain relief, a central aspect of the agency's Strategic Plan, due to its addictive properties:

> THC may help relieve pain, but its value as an analgesic is limited by its psychoactive effects and abuse potential. These new projects will investigate substances from cannabis that don't have THC's disadvantages, looking at their basic biological activity and their potential mechanisms of action as pain relievers. (https://nccih.nih.gov/grants/pain)

Helen Langevin, M.D., director of the NCCIH, notes that how we medicinally treat pain currently relies on a class of drugs with issues:

> The treatment of chronic pain has relied heavily on opioids, despite their potential for addiction and overdose and the fact that they often don't work well when used on a long-term basis.

What CBD *can* do officially in the eyes of the Feds is very particular. Research into the cannabinoid CBD has consisted so far of only a few very small human trials, and the conclusion by the Food and Drug Administration is this: it treats a specific and severe form of epilepsy.

The Federal Government's Planned Research

The federal government wants to know more, not only for CBD's potential other uses, but because these few human trials are not enough, and the scientific research into CBD lags behind its increasing use. According to Dr. Shurtleff: "we're doing our best [at NCCIH] to catch up."

The nine studies to be granted funding are as follows:

- Mechanism and Optimization of CBD-Mediated Analgesic Effects,
- Neuroimmune Mechanisms of Minor Cannabinoids in Inflammatory and Neuropathic Pain,
- Minor Cannabinoids and Terpenes: Preclinical Evaluation as Analgesics,

•Identifying the Mechanisms of Action for CBD on Chronic Arthritis Pain,
•Synthetic Biology for the Chemogenetic Manipulation of Pain Pathways,

•Exploring the Mechanisms Underlying the Analgesic Effect of Cannabidiol Using Proton Magnetic Resonance Spectroscopy,

•Mechanistic Studies of Analgesic Effects of Terpene Enriched Extracts from Hops,

•Systematic Investigation of Rare Cannabinoids with Pain Receptors, and

•Analgesic Efficacy of Single and Combined Minor Cannabinoids and Terpenes.

Conclusion and Implications

Nine cannabis studies given grants by the U.S. government are a drop in the federal sea of yearly funding. Their significance lies in what they represent more broadly—scientific advancement stepping out into a newer realm of potential medical value; and the U.S. government not merely showing interest in cannabis, but putting down firm dollars visible to the public eye. While the federal government's stance on marijuana, medical or otherwise, stands firm for now, what they draw from this research and whether it plays a part in how they approach it legally will be topics we will be watching. For more information, see NCCIH's full press release and website at: https://nccih.nih.gov/news/press/09192019.
(Miles Schuster)

ILLEGAL MARIJUANA CULTIVATION IN CALIFORNIA IMPACTS WATERSHEDS, RIVERS, AND WILDLIFE

Although recreational use of marijuana was legalized last year in California, illegal growing operations still plague California's North Coast, Sierra Nevada and other regions of the state. The initial responses to these grow operations are generally associated with their criminal nature: That they involve trespassing on others' property to use as grow sites, with growers not uncommonly being armed. Often overlooked, however, are the impacts these grow operations have on the watersheds, rivers, and wildlife present in the nearby areas.

Forest-clearing, river and stream diversion, flow impediments, soil and water poisoning, and waste dumping are a few of the key harms brought by these grow operations, and while stating the obvious can only do so much good, such harms should not be put on the back burner of the enforcement battle in keeping our environment healthy and water supply secure for safe, reliable supplies for municipal, agricultural and wildlife uses.

Water Diversions and Flow Impacts from Illegal Grows

Marijuana is a thirsty plant. On average, each plant at a given grow site requires an average of six gallons of water per day. Multiply this by the thousands of plants that can be found at just one site and it becomes obvious that this is no trivial amount.

Just last month, on August 19, 2019, law enforcement agents raided a grow operation containing over 7,000 marijuana plants in the Dutch Oven Creek area, east of Bass Lake. Given the age of the plants discovered, it was estimated that roughly 5.4 million gallons of water had been diverted from Dutch Oven Creek for the grow operation.

Earlier in the summer, on July 11, 2019, another arrest was made on the Cosumnes River Preserve, just outside of Sacramento. This bust, however, resulted in the confiscation of over 15,000 marijuana plants and an additional 3,000 pounds of processed and bagged marijuana. Do the math there and those 15,000 plants result in diversions of nearly 90,000 gallons per day—the equivalent of nearly 900 persons' daily water usage.

Water supply security from regulatory and natural conditions remains a constant concern in California, but in addition to this, the excessive diversions that take place because of these grow operations have serious implications on the health of the fish and other aquatic and riparian species downstream, as well as human consumption needs. The endangered Coho salmon, for example, are one of the many species dependent on clean, cold water with adequate flow for survival.

Many northern California rivers are already at risk of setting historic lows for flow rates given the level of regulated users' water diversions and the added stress of the unregulated diversions by growers only heightens this concern. In addition to the harmful effects of low flow rates on salmonoids migration and predation, low flow rates are connected with higher water temperature and sediment levels.

The unregulated diversions of these grow operations not only threaten the water supply security of human needs downstream, they also have serious impacts on sensitive fish and aquatic species by adversely affecting the flow rates, water temperature, and sediment levels of fish-bearing rivers, and continued operation at this level will certainly lead to increased harm to such species and water supplies.

Carbofurans and Other Pesticides

The quantity of water downstream from these grow sites presents a major problem Californians must face, but downstream water *quality* is likewise adversely impacted. In the last year, of all raids and busts of illegal grow operations in California it was reported that roughly 90 percent of these operations employed the use Carbofuran or other organophosphates and carbamates as a pesticide.

Fatal in higher doses, Carbofuran was banned by the EPA from use on food crops for its neurotoxic character. Highly mobile in soils, Carbofuran has had historic problems of leaching into groundwater after application on crops and in turn entering surface water as run off.

Reported by the EPA, the symptoms of Carbofuran poisoning include "nausea, diarrhea, excessive salivation, vomiting, abdominal cramps, sweating, weakness, imbalance, blurred vision, breathing difficulty, increased blood pressure, and incontinence." High doses of Carbofuran can even result in coma or death from failure of the respiratory system.

It may be unlikely that poisoning of this type ever reaches human intake, but the damage to the fish and aquatic species of the surrounding watersheds is very real. One such event illustrating these impacts on wildlife occurred in San Joaquin County in November of 1991, where a severe Carbofuran poisoning incident from its use on vineyards which resulted in the deaths of over 3,000 fish, 4,000 crayfish, and 5,000 invertebrates.

Plant Eradications

Growers have tenaciously pursued operations in California despite major efforts by law enforcement agencies to staunch their growth and continuance. From 2008-2012, California accounted for 53-74 percent of all marijuana plant eradications in the nation. Even with these drastic numbers, however, the issue of scale still remains. There are simply too many operations in too vast an area and northern California's wondrous forests are abused as hiding grounds for many growers.

Conclusion and Implications

Most arrests on grow operations confiscated marijuana grown for domestic sales outside of the state. The key here being marijuana's criminal status in most other states in the United States. Left with a vast market outside of the District of Colombia and the 11 states which have legalized recreational marijuana, the blight on California's forests and waters will likely persist with continued fervor until its ultimate regulation nationwide.

Although the theory has existed that legalization will collapse the underground market for marijuana, it has yet to occur in California. If and until that occurs, however, California law enforcement agencies will remain swamped dealing with the problem before them in protecting the waters and forests of the people of California.

(Wesley A. Miliband, Kristopher T. Strouse)

ALL CANNABIS IS LOCAL: ILLINOIS AND MUNICIPAL 'SOCIAL USE PERMITS'

What role do municipalities play in regulating or controlling state legalized sales, growing and consumption? Perhaps, a very large, gatekeeper role. In many states—California and Massachusetts are just two examples—municipalities have the discretion to deny retail cannabis sales outright within their borders. They also have the power to add layers of regulation, including fees, when they do permit sales within their respective jurisdictions. And what about consumption in public businesses such as cannabis pubs and lounges? This article addresses the situation in Illinois and the use of municipal "social use permits."

Background

A novel use case for fledgling cannabis entrepreneurs finds itself tucked away in the General Provisions found under Article 55 of the new Illinois Cannabis Regulation and Tax Act (the Act), 410 ILCS 705/55-25. The subsection permits not only "cannabis business establishments" to have on-site consumption, but also any other entity so authorized by the local government." The Act defines "cannabis business establishments" under its Definitions article as any licensed cannabis business. The Act goes even further and provides additional rights to the local governments to expand on-site cannabis use beyond cannabis business establishments, like dispensaries, into any entity so authorized.

The Role of Local Government

Local governments wield lots of power when it comes to cannabis laws, despite the states setting the statutory framework. Most states allow municipalities to set the number of cannabis licenses in their jurisdiction. While Illinois has a state-mandated ceiling to its cannabis licenses, a municipality may set "reasonable zoning ordinances" to regulate cannabis business establishments. 410 ILCS 705/55-25(2). A local government can ban cannabis business establishments and make reasonable regulations regarding their numbers, distances from locations deemed sensitive by the municipality, and other time, place and manner regulations.

Reasonableness is always a fact intensive assessment based upon the circumstances, but it also provides the local governments with new and creative ways to foster cannabis related businesses and generate revenue. The classic analog to the cannabis social use space is a bar that serves liquor. Often, municipalities do not have just one regulation for alcohol. Review of one Illinois municipality revealed ordinances resulted in liquor licenses of Class A through L, and another seven sub-classes. Cannabis presents equally many variations for public use licensure, and perhaps more.

Municipalities could permit cannabis lounges where people may consume inhaled cannabis products alone because of the safety profile the accompanies the short duration of the effects of inhaling cannabis, but bar ingestion. Or the municipality could have more stringent, phrased as reasonable, regulations related to the public consumption of edible cannabis products to provide for additional safe-guards in dosing. Certain pitfalls may result with people that are not used to the different onset and duration of edible as opposed to inhaled cannabis. Educating the consumer and general public remains key in the move toward legalization and sensible regulation.

Social Use and Enjoyment

Additionally, the Act does not expressly provide for cannabis supper clubs where chefs prepare fresh cannabis infused dishes for guests. Perhaps the reasonable on-site consumption regulations set by the municipality provide a means to accomplish those ends. Granted, a dispensary alone cannot create the infused dishes. Plus, the rules for the Act are not due for several months. Time will tell on social use of cannabis in Illinois depending on what the municipal governments decide to do with cannabis in their communities.

As the liquor ordinances and their numerous classifications as a guidepost for what is possible with social use of cannabis, and the broad usage of the term "authorized entity" under the Act for those that may have on-site consumption, the sky's the limit. Public consumption has been prohibited, but perhaps private events, like a music festival, may be able to

qualify for a special type of cannabis license. Perhaps a local massage therapist could begin using cannabis topicals on patients. A Yoga class may have an event with the right joint pairing for your asanas. Bakeries that specialize in space cakes and hold both cannabis infuser and dispensary licenses may one day be real.

Municipal social use permits also means more revenue for the community. Typically, retailers pay the excise taxes for the beer and liquor they sell. The Act provided tax revenue for both the state and the municipalities from the sale of cannabis at the dispensaries. Perhaps the municipality could charge some excise tax from the sale of infused foods at an on-site restaurant, assuming the Act and its forthcoming rules so allow that type of infused food. What about the massage therapist that wants to use cannabis to massage sore muscles? It must be a service because only dispensaries may sell pre-packaged cannabis. However, the municipality can charge a permit fee for such use and perhaps regulate the amount of THC in the pain reliever. In the future, on-site consumption lounges will bring the municipality additional permitting revenue and sales tax.

Conclusion and Implications

Those citizens who rejoice in their state's legalization of cannabis perhaps celebrate too soon—depending on where in the state they reside. Municipalities often play a crucial role as gatekeepers and regulators of retail sales. Maybe, one day the taxes will be the most expensive ingredient in cannabis, just like for beer before it. That day may be here sooner than people think with creative social use licensing set by the municipal governments. Of course, confusion over the new Illinois law is fueling calls for a trailer bill in the veto session at the end of the year to help resolve certain technicalities. We will have to wait and see what that entails.
(Thomas Howard)

LEGISLATIVE DEVELOPMENTS

SOCIAL JUSTICE EFFORTS FROM THE OREGON LEGISLATURE AND CITY OF PORTLAND

As the legal cannabis industry spreads across the country, often the money flowing from it disproportionally makes its way into the pockets of well-educated, and well-off, white men. Meanwhile the victims of the past federal "War on Drugs," who are disproportionately disadvantaged men of color, still suffer from the consequences they faced for engaging in what is now a legitimate business. Some of these victims are still incarcerated. Even those long ago released from incarceration continue to face difficulties getting jobs, other business opportunities, and housing, or simply never recovered from having their educations and careers interrupted. The communities these people came from continue to suffer as well, with children who grew up without fathers present and with the stigma of an incarcerated family member, and families that lost the financial and emotional support of their loved ones. During the 2019 legislative session, the Oregon Legislature passed two bills aimed at reducing some of the harm to its victims of the War on Drugs. Meanwhile, various programs seek to bring some of the opportunities and benefits of Oregon's recreational cannabis industry to the people and communities most affected by the War on Drugs.

Senate Bills 420 and 975 Are Passed in the 2019 Legislative Session to Expunge Recreational Marijuana Convictions

Senate Bills 420 provides for the setting aside of marijuana related convictions that are based on actions that under today's laws would not be crimes. Senate Bill 975 reduces the classification severity of marijuana related convictions that are based on actions that under today's laws are still illegal, but have a less severe classification under today's laws.

Senate Bill 420

Senate Bill allows a person with a qualifying marijuana conviction to apply to the court for the conviction to be set aside.

Qualifying marijuana convictions are those:

> . . .that are for possession of less than one ounce of the dried leaves, stems, or flowers of marijuana; or are for actions that would today fall under Oregon's homegrown marijuana and homemade cannabinoid products and concentrates law.

This law allows adults 21 years of age and older to grow up to four marijuana plants at a time; possess or store up to eight ounces of usable marijuana at a time; make, possess, or store up to 16 ounces of solid cannabinoid products at a time; make, possess, or store up to 72 ounces of liquid cannabinoid products at a time; and make, possess, or store up to 16 ounces of cannabinoid concentrates at a time; or that were committed prior to July 1, 2015; and for which the person has completed and fully complied with or performed the sentence of the court.

Filing fees and any other fees are waived for this motion. The prosecuting attorney can object to the setting aside of the conviction, but only on the basis that it was not a qualifying marijuana conviction. Records related to convictions that are set aside under this procedure are sealed.

Senate Bill 975

Senate Bill 975 allows a person with a marijuana conviction to apply to the court for reduction of the severity of the conviction if, since entry of judgment of the conviction, the marijuana offense has been reduced from a felony to a misdemeanor, reduced from a higher level felony to a lower level felony, reduced from a higher level misdemeanor to a lower level misdemeanor, or reduced from a crime to a violation.

As with motions provided for in Senate Bill 420, filing fees for these motions are waived. And as with Senate Bill 420, the prosecuting attorney can object to the motion, in this case only based on the conviction not being eligible for reduction under the law or the person not having completed and fully complied with or performed the sentence of the court.

City of Portland Cannabis Social Equity Grant

While legislation setting aside or reducing marijuana convictions is an important part of the social justice puzzle, such changes do not redress prior harm done to the victims of the War on Drugs; time incarcerated and opportunities lost years ago create a cumulative effect on a person's life. Various private and public social justice programs seek to redress some of that harm by offering business grants, preferential licensing treatment, or other services to the people and communities most affected by the War on Drugs.

The City of Portland uses a portion of its 3 percent tax on retail sales of recreational cannabis to provide such grants. The City of Portland describes its grant program as follows:

> The Cannabis Program in the Office of Community & Civic Life will award eight to ten month grants to 'promote small businesses, especially women-owned and minority-owned businesses' and 'provide economic opportunity and education to communities disproportionately impacted by cannabis prohibition.'

The program's 2019 social justice grant fund is $700,000, of which $210,000 is used by Prosper Portland to provide industry support and technical assistance to minority-owned cannabis businesses. The remaining $490,000 is awarded in increments of $25,000 to $150,000 to non-profit and for-profit businesses for projects focused on the program's priority areas, which are record clearing and expungement, workforce development, and re-entry housing services.

Conclusion and Implications

The War on Drugs, to many observers, disproportionately affected disadvantaged people of color and their communities. Efforts at beginning to address the harms have been slow to develop and generally lack large-scale effect or the multi-faceted approach that is needed. Private entities can and do make a big difference on a small-scale but generally lack the funding and reach to make far-reaching change. Numerous and shameful examples abound of incidences in which historical injustice has been swept under the rug by forward looking change in policy without a retrospective eye for the long-term effects. From the treachery shown to Native American treaties to the empty promise of a mule and 40 acres to freed slaves, we have a history of failing to address the past while looking to the future. Here now is a chance to get this right, but it will take more resolve than we have shown so many times in the past.
(Mia Getlin)

REGULATORY DEVELOPMENTS

FOUR ILLINOIS MARIJUANA CULTIVATORS AWARDED LICENSES TO GROW RECREATIONAL CANNABIS

With not a minute to spare before the January 1, 2020 date of recreational sales taking effect, the State of Illinois has approved and issued licenses permitting four marijuana cultivators to begin growing cannabis for recreational sales, following the state's legalization of marijuana in late June 2019. The companies—Cresco, PharmaCann, Curative Health Cultivation, and Ascend Wellness—will begin cultivation at a combined seven facilities.

Following the Illinois General Assembly's passing of HB 1438 on May 31, Governor J.B. Pritzker signed the bill into law on June 25. Illinois will become the 11th state to legalize recreational marijuana.

Background

Cannabis crops can take three or more months to be planted, germinated, cared for, flowered, harvested, and cured for use (https://www.leafscience.com/2017/11/07/growth-cycle-marijuana/). Three months is also near the minimum requirements of the process, and some companies and growers may take up to nine months from start to finish.

Illinois law permits already existing cultivators of medical cannabis to be the first to grow recreational marijuana. There are currently 17 of these in the state, which together operate 21 facilities. Most of the 17 cultivators are expected to eventually expand to selling recreational products, but each needs to be state-approved and licensed. As a result, those who have been quickest to the gate are also those quickest out of it—determining whose products customers will see on shelves come January.

Quick Expansion

Some of the first cultivators to reach the finish line will be those who not only followed the legislation, but anticipated it. PharmaCann, for instance, which was granted licenses for recreational production at facilities in Hillcrest and Dwight, started expansion in Dwight earlier this year, intending to double production. Jeremy Unruh, Director of Regulatory and Public Affairs at PharmaCann is looking forward to seeing the expansion move forward, saying "now we can really put the pedal down in terms of producing supply in anticipation of the Jan. 1 kickoff."

Cresco too has expanded one of its newly-licensed facilities, with two more licensed facilities in progress. Cresco CEO Charlie Bachtell commented on the approval and expansion in a recent press release:

> The approval of our cultivation facilities is a key milestone in our preparation for the legalization of recreational cannabis in Illinois on January 1, 2020. As the only operator with three cultivation facilities in Illinois—the maximum number allowed in the state—we will have the scale and capacity to effectively capitalize on the dramatic increase in demand for cannabis expected next year (https://investors.crescolabs.com/investors/press-releases/press-release-details/2019/Cresco-Labs-Receives-First-Adult-Use-Cultivation-Approvals-Granted-in-Illinois/default.aspx).

Licensees and the Social Equity Provisions

The recent legislation in Illinois is particular regarding cultivator size, and will not allow any more large cultivation companies to supply the market until 2021 (at the earliest) *if* demand warrants more production.

Illinois, like California and a handful of other states, have included provisions for social equity in their legalization of recreational marijuana. In Illinois, sizeable cultivators, like the four issued licenses thus far, have to pay a $100,000 application fee that also comes with a promise to participate in the social equity program. The program intends to identify and address historically "Disproportionately Impacted Areas" and then give members of those areas/communities a leg up (and into) the legal cannabis industry. According to the Illinois Department of Commerce and Economic Opportunity, applicants to this program can receive:

- Technical assistance and support on everything from putting together a business plan to applying for a license;

- Additional points on their applications for a license to operate a cannabis business; and

- Opportunity to apply for a low-interest loan from the Department of Commerce & Economic Opportunity

More information on the equity program can be found at: https://www2.illinois.gov/dceo/Pages/CannabisEquity.aspx.

Conclusion and Implications

In addition to the medical marijuana cultivators awarded licenses, Illinois' existing 55 medical dispensaries can also apply to sell recreational cannabis from their storefronts in 2020. Thus far only five of these have been issued, and all of these to Chicago-based Green Thumb Industries. The four cultivators granted licenses—Cresco, PharmaCann, Curative Health Cultivation, and Ascend Wellness—are all ramping up production to make the shift from solely medical sales to medical and recreational ones. For a time, they will face little competition in the Illinois market. How the social equity program affects this market dominance, and the manner in which the program is utilized/enforced will be topics to keep an eye on.
(Miles Schuster)

COMMONWEALTH OF MASSACHUSETTS APPROVES HOME DELIVERY OF CANNABIS

On September 24, 2019, the State of Massachusetts issued proposed regulations addressing legal deliveries of recreational cannabis. This comes in the wake of legalization in 2016, and perhaps, recognition that most buyers of recreational cannabis would prefer to order online and have the product delivered right to the front door, such as a myriad of retailers in the nation have discovered in all [non-cannabis] aspects of people's lives.

Background

Many states that have legalized recreational cannabis use have faced the daunting task of formulating regulations that address the myriad of issues associated with legalization. Regulation of brick and mortar "dispensaries" is crucial as the key, and often only, gateway to legal sales and distribution of legalized cannabis. But what about the option of home delivery?

In California, for example, the state's regulation doesn't preclude home delivery—however, the state's overriding regulations allow for much discretion by local government. Many counties and cities which have banned brick and mortar cannabis sales have struggled with the thorny issue of home delivery from within the municipality's geographic location and perhaps the more challenging issue of delivery into the municipality's location from *without*.

On September 24, 2019, the Massachusetts Cannabis Control Commission approved its latest regulations addressing legal deliveries of recreational cannabis.

Legalization of Cannabis in Massachusetts

In November of 2016, the voters of Massachusetts passed "Question 4," a ballot initiative. (*See*, https://ballotpedia.org/Massachusetts_Marijuana_Legalization,_Question_4_(2016).)

Question 4 legalized recreational marijuana for individuals 21 years of age or older. The law went into effect on December 15, 2016 and the state's recreational-use market officially began sales on November 20, 2018 (*See*, https://potguide.com/massachusetts/marijuana-laws/) The law which legalized recreational cannabis appears at: https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXV/Chapter94G

The Regulation of Cannabis in the Commonwealth

In Massachusetts the body tasked with following that state's law on legalized cannabis and formulating regulations to implement the state's law is the Canna-

bis Control Commission (Commission). (*See*, https://mass-cannabis-control.com). The general goals and purpose statement of the Commission is:

> is to honor the will of the voters of Massachusetts by safely, equitably and effectively implementing and administering the laws enabling access to medical and adult use marijuana in the Commonwealth. The Commission will foster the creation of a safely regulated industry that will create entrepreneurial and employment opportunities and incremental tax revenues in and to communities across the state and which will be a best practice model for other states.

The Commission has promulgated a series of Regulations [in this case, for recreational cannabis], *see*, https://mass-cannabis-control.com/wp-content/uploads/2019/01/SEC-OFFICIAL_935cmr500.pdf and a series of Guidance Documents as part of its regulatory authority. (*See*, https://mass-cannabis-control.com/guidancedocuments/)

Addressing Cannabis Delivery

Pursuant to Regulation 500.145, the Commission has promulgated *proposed* Regulations addressing the delivery of cannabis products. That regulation recognizes the possibility of "delivery only" business as a form of retail sales, thus essentially separating brick and mortal sales points and ownership from the transportation for sale of cannabis products. All of the traditional regulations would apply to delivery sales and the Regulation lists many other conditions that apply exclusively to delivery sales.

Sourcing

The Regulation makes clear that delivery only retailers may only deal in products obtained from a ". . . licensed Marijuana Retailer with which the Delivery-Only Retailer Licensee has a Delivery Agreement" and of course, the licensed Marijuana Retailer must be incompliance with all the other Regulations. (Ibid)

Online Ordering

The Commission would appear to have foreseen the how the internet would play into these transactions, as the Regulation addresses and sanctions "Third Party Technology Platform" for sales. That Third Party Platform must be in written agreement with the Delivery-Only Licensee [and subject to inspection] and notice of any modification of that agreement must be provided the Commission.

Value and Geographic Logistics

The Regulation also addresses the dollar limits that each delivery vehicle may possess:

> The maximum retail value of Marijuana or Marijuana Products allowed in a Delivery-Only Retailer's vehicle at any one time shall be $10,000.00.

In terms of geographic delivery limitations, the Regulation deals somewhat directly with situations faced in California, for example, where municipalities permit brick and mortal sales but attempt to preclude deliveries by allowing delivery in that municipality that has agreed to retail sales:

> Deliveries of Marijuana or Marijuana Products by a Delivery-Only Retailer shall be geographically limited to:
>
> 1. The municipality identified on the Marijuana Establishment license as the Delivery-Only Retailer's place of business; and
>
> 2. Any municipality in which a Marijuana Retailer licensed under 935 CMR 500 *Adult Use of Marijuana* may operate, whether or not a Marijuana Retailer currently operates in the municipality, pursuant to the municipality's bylaws and ordinances. (Ibid, emphasis added)

Other Aspects of the Regulation

The Regulation also addresses many other logistics and requirements for deliver business, including: packaging requirements; hours of operation (*e.g.*, no later than 9:00 pm); best efforts to minimize the amount of cash in the possession of the driver and to that end, encouragement to use electronic means of payment; limitations on how often a consumer can order delivery of cannabis products (not more than once per calendar day); what to do in the event an order ultimately is refused delivery (transport back to

the originating marijuana establishment); and, age verification.

Even the delivery vehicle itself, is extensively addressed by the Regulation:

> (a) Vehicles used for home delivery by a Delivery-Only Retailer shall be owned or leased by the Delivery-Only Retailer, shall be properly registered as commercial vehicles, and inspected and insured in the Commonwealth of Massachusetts.
>
> (b) Vehicles used . . . may be parked overnight at the address identified as the Licensee's place of business or another location, provided that keeping the vehicle at the identified location complies with all general and special bylaws of the municipality.
>
> (c) Vehicles used . . . shall carry liability insurance in an amount not less than $1,000,000 combined single limit.
>
> (d) Delivery-Only Retailer vehicles shall have no external markings, words or symbols that indicate the vehicle is being used for home delivery of Marijuana or Marijuana Products.
>
> (e) Delivery-Only Retailers transporting Marijuana and Marijuana Products for home delivery shall ensure that all vehicles used for deliveries are staffed with a minimum of two Marijuana Establishment Agents. At least one Marijuana Establishment Agent shall remain with the vehicle at all times that the vehicle contains Marijuana or Marijuana Products.

Perhaps despite knowing that vehicles can carry "product" valued at up to $10,000, the Regulation specifically prohibits the carrying firearms for self-protection:

> Firearms are strictly prohibited from Delivery-Only Retailer vehicles and from Marijuana Establishment Agents performing home deliveries. (Ibid)

Conclusion and Implications

The Commission has obviously given the issue of cannabis delivery some thought in the promulgation of legislation addressing delivery sales. In many states with legalized cannabis, or states considering legalized cannabis, delivery sales represents an area of great concern: cash on board, valuable "product" onboard, age and identity verification, frequent deliveries per day—similar concerns to brick and mortal sales—but away from the regulatory eyes. However, for states that allow cannabis sales, there is an understanding that most people would probably prefer to go online and have the product delivered. Delivery in all aspects of our lives has become prolific and the Cannabis Control Commission would seem to recognize that, and is willing to place the Commonwealth's proverbially toe in the water to address delivery. In the end, an orderly process for online deliveries would undoubtedly increase overall sales and from that, overall tax revenues collected.
(Robert Schuster)

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