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CANNABIS NEWS

THOUSANDS OF CALIFORNIA CANNABIS CONVICTIONS REDUCED OR DISMISSED IN SAN DIEGO COUNTY

One judicial order from a California Superior Court Judge reduced the felony convictions of nearly 26,000 people to misdemeanors, and dismissed roughly 1,000 misdemeanor convictions entirely. This judicial action comes as California shifts its views on both cannabis and on criminal justice, with efforts to reduce incarceration rates gaining popularity.

Background

The momentous decision came in the form of a three-page order signed by San Diego County Superior Court Judge Eugenia A. Eyherabide, on February 5, 2020. The mass reduction and dismissals came almost a year after the San Diego district attorney's office submitted a list of cases for relief. That submission is part of a California law requiring prosecutors to find eligible cases which can be presented to the court for reclassification or dismissal.

Proposition 64

That law was an outgrowth of Proposition 64, the 2016 ballot measure that legalized recreational cannabis use for adults over 21 years of age and allowed people previously convicted of most cannabis-related offenses to have their felony convictions reduced to misdemeanors or their misdemeanor convictions dismissed entirely. The Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA), the bill that codified the provisions of Proposition 64, aimed to account for the systemic injustice caused by decades of criminalizing cannabis by rejiggering the state's approach to cannabis convictions, both prospectively and retrospectively.

The law required the California Department of Justice to work in concert with local prosecutors to compile and review all eligible cases and submit the lists to local courts by July 1, 2020.

The San Diego Submittal

San Diego County District Attorney Summer Stephan complied with the law and submitted a list of potential cases in February 2020, shortly before COVID-19 related closures caused a substantial slowdown for California courts, including a near shutdown early in the pandemic. The continuing crisis is a major reason granting San Diego's motion took nearly a full calendar year to accomplish.

Although the short order alters the charges for all eligible individuals within San Diego County, it will take time to update individual court records to reflect the changes, and the court system is still early on in working through the logistics of how those records will be fully updated.

A Fresh Start

Local public-defenders offices are helping people to determine their eligibility, and to clear their individual records. In San Diego, the Fresh Start program provides contact points and a portal to individuals to reach out to begin the process. Though Judge Eyherabide's order took effect immediately, the lag time to update individual records is likely to create issues for people who undergo background checks or checks for certain licenses that rely on scouring court records. Perhaps most importantly, the lag time will potentially keep some otherwise eligible applicants from qualifying for commercial cannabis licenses.

Conclusion and Implications

California law views cannabis legalization from two perspectives: prospectively permitting people to purchase and sell cannabis statewide, and retrospectively attempting to ensure that no one's livelihood is further hampered based on convictions which would no longer carry heavy sentences, or in some cases may no longer be a crime. The fight for cannabis legalization has always been about more than the potential economic upside for entrepreneurs and state and local governments. For many, cannabis legalization is about combating mass incarceration and healing the damage done by the decades long war on drugs among vulnerable communities.

In the rush to celebrate the possibilities inherent in cannabis legalization, the ills of illegalization can often take a back seat. Yet as California adjusts to a recreational marketplace, the law is still striving to catch up to ensure that criminal records and convictions are properly reduced or expunged, so that the stigma of a felony conviction for cannabis can at long last be rendered a historical oddity rather than a ruinous event for so many Californians.
(Jordan Ferguson)

LEGISLATIVE DEVELOPMENTS

NEW STATE BILL SEEKS TO PROHIBIT CALIFORNIA EMPLOYERS FROM TESTING APPLICANTS AND EMPLOYEES FOR THC

California State Assembly Member Quirk recently introduced Assembly Bill 1256 proposing to prohibit many employers in the state from drug testing both applicants as well as their employees to determine whether they had tetrahydrocannabinol (THC) in their system. AB 1256 provides job applicants and employees with a private right of action against employers who test for THC in contravention of the bill's prohibition on such testing.

Background

The bill's preamble, summarizing the need for the bill, states as follows:

> Existing law establishes various personal rights and makes unlawful certain employment practices that discriminate on certain protected bases. Existing law makes a person who engages in certain prohibited conduct liable in a cause of action by the aggrieved person, as specified.

Assembly Bill 1256

The bill's legislative summary is, in part, as follows:

> This bill would prohibit an employer from discriminating against a person in hiring, termination, or any term or condition of employment because a drug screening test has found the person to have tetrahydrocannabinol in their urine.

Certain Categories of Employers are Exempt

AB 1256 does not impose a blanket prohibition on employers. Included in the bill is a list of exemptions that continue to allow certain categories of employers to screen for THC. First, AB 1256 would not prohibit employers that are required to screen applicants and employees because of federal law from doing so. The bill specifically cites employers required to because of the Drug-Free Workplace Act of 1988 and Federal Transit Administration (FTA) regulations, both aimed largely at recipients of federal grants and contractors of the federal government. In addition to these federal regulations regarding drug use and screening, employers operating in certain highly regulated spaces must also be cognizant of the drug testing requirements applicable to them. For example, in addition to their general applicability to certain types of transit-oriented grant programs, FTA regulations specifically state they apply to ferry operators.

A second category of employers exempted from AB 1256 are those that "would lose a monetary or licensing-related benefit for failing to do so." The bill does not elaborate on how an employer would prove the loss of a monetary benefit from failing to screen for THC. The loss of licensure on the other hand would be more easily proven. Numerous state licensing schemes contain drug compliance provisions, for example, Public Utilities Code § 5374 requires permittees of the California Public Utilities Commission to provide regular screening for controlled substances and alcohol.

The final category of exempted employers is those in the building and construction trades. Again, AB 1256 is not clear as to how broadly its exemption for testing of employees in the building and construction trades ought to be applied. From a health and safety perspective, testing of individuals with positions involving heavy machinery seems like a reasonable exemption. It is less clear whether this exemption is intended to extend also to management and support staff in the building and construction trades, or perhaps even as far as employees of building and construction trade unions.

Remedies Can Leave Employers Stuck Between a Rock and a Costly Hard Place

AB 1256 provides a private right of action to any individual who has been discriminated against in violation of the ban on testing for THC:

> This bill would authorize a person who has suffered discrimination in violation of the bill's

provisions to institute and prosecute in their own name and on their own behalf a civil action for specified relief.

In other words, employers who continue to test prospective or current employees for THC while not falling within one of the exempted categories may face damages, attorneys' fees, and injunctive relief.

Given these potential remedies available to employees and applicants, employers must take care to analyze whether they fall into one of the exempted categories that would be permitted to continue screening for THC. Simultaneously, employers falling into the category of being subject to federal regulations requiring continued testing must take care to not overlook such obligations, especially where they were previously not actively aware of such obligations but simply conducted screening as a matter of course. For example, failure to comply with federal requirements on drug screening can carry with it a whole range of undesirable results in the grant funding space from warnings, to loss of future funding, to having to repay already expended funds.

Taken together, these exposures to liability will necessitate all employers to carefully review and analyze their drug screening procedures if AB 1256 becomes law.

Conclusion and Implications

Prohibitions on drug testing are not without precedent in California. San Francisco adopted an ordinance banning many employers from random drug testing their employees in 1985. Acknowledging the potential public safety implications of such a ban, San Francisco—like AB 1256—exempted certain categories of employers from the testing prohibition. In San Francisco, the list of exemptions follows largely along health and safety lines where testing would protect the safety of the employer's employees as well as members of the public. Two notable differences between AB 1256 and San Francisco's ban are that San Francisco does not extend protection to applicants, only existing employees, and that San Francisco imposes a requirement that where testing is required, employees be given an opportunity to be tested by an outside lab and a chance to explain the outcome of testing. The bill can be tracked online at: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB1256
(Andreas Booher)

LEGISLATIVE SUMMARY ON CALIFORNIA BILLS RELATED TO CANNABIS OR CBD

This Legislative Update is designed to apprise our readers of potentially important cannabis/CBD related legislation. When a significant bill is introduced, we will provide a short description. Updates will follow, and if enacted, we will provide additional coverage.

We strive to be current, but deadlines require us to complete our legislative review several weeks before publication. Therefore, bills covered can be substantively amended or conclusively acted upon by the date of publication.

Assembly Bill 384

This bill, introduced by Assembly Member Kalra on February 2, 2021. The bill would do the following in relation to veterinarian recommendation of cannabis on an animal for medicinal purposes:

The Veterinary Medicine Practice Act provides for the licensure and regulation of veterinarians and the practice of veterinary medicine by the Veterinary Medical Board. . .The act authorizes the board to revoke or suspend the license of a person to practice veterinary medicine, or to assess a fine, for specified causes, including discussing medicinal cannabis with a client while the veterinarian is employed by, or has an agreement with, a MAUCRSA licensee and distributing advertising for cannabis in California. The act prohibits the board from disciplining a licensed veterinarian solely for discussing the use of cannabis on an animal for medicinal purposes, absent negligence or incompetence. The act requires the board, on or before January 1, 2022, to adopt guidelines for veterinarians to follow when discussing cannabis within the veterinarian-client-patient relationship. The act prohibits a licensed veterinarian from dispensing or administering cannabis or cannabis products to an animal patient.

This bill would additionally prohibit the board from disciplining a veterinarian licensed under the act who recommends the use of cannabis on an animal for medicinal purposes, unless the veterinarian is employed by or has an agreement with a cannabis licensee, as specified. The bill would require the board to adopt guidelines, on or before January 1, 2023, for veterinarians to follow when recommending cannabis within the veterinarian-client-patient relationship, and would require the board to post the guidelines on its internet website. https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB384

Assembly Bill 1034

This bill was introduced by Assembly Member Boom on February 18, 2021. The bill would do the following in connection with the sale of non-cannabis related food and beverage products at retail cannabis locations:

> Existing law, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), an initiative measure, authorizes a person who obtains a state license under AUMA to engage in commercial adult-use cannabis activity pursuant to that license and applicable local ordinances. The Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA), among other things, consolidates the licensure and regulation of commercial medicinal and adult-use cannabis activities, including retail commercial cannabis activity. MAUCRSA gives the Bureau of Cannabis Control. . .the power, duty, purpose, responsibility, and jurisdiction to regulate commercial cannabis activity in the state. . . .Existing administrative law specifies that a licensed retailer may sell only cannabis accessories, the licensee's branded merchandise, and cannabis goods.

MAUCRSA does not supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate commercial cannabis businesses within that local jurisdiction. Existing law authorizes a local jurisdiction to allow for the smoking, vaporizing, and ingesting of cannabis or cannabis products on the premises of a licensed retailer or microbusiness, subject to specified restrictions.

This bill, subject to those specified restrictions, would authorize a local jurisdiction to allow for the preparation or sale of noncannabis food or beverage products, as specified, by a licensed retailer or microbusiness in the area where the consumption of cannabis is allowed. https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB1034

Assembly Bill 1014

This bill was introduced by Assembly Member McCarty on February 18, 2021. The bill would do the following in connection with the delivery of licensed cannabis retailers:

> The Control, Regulate and Tax Adult Use of Marijuana Act (AUMA) . . .authorizes a person who obtains a state license under AUMA to engage in commercial adult-use cannabis activity pursuant to that license and applicable local ordinances. The Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) . . . consolidates the licensure and regulation of commercial medicinal and adult-use cannabis activities. MAUCRSA generally defines delivery to mean the commercial transfer of cannabis or cannabis products to a customer, limits the delivery of cannabis or cannabis products to only be made by a licensed retailer, microbusiness, or nonprofit, and establishes requirements for the delivery of cannabis and cannabis products, including that an employee of the licensee carry a copy of the licensee's current license and a government-issued identification with a photo of the employee, such as a driver's license.
>
> MAUCRSA also requires the Bureau of Cannabis Control to establish minimum security and transportation safety requirements for the delivery of cannabis and cannabis products. Under existing administrative law, among other requirements, a licensed retailer's delivery employee that is carrying cannabis goods for delivery is only allowed to travel in an enclosed motor vehicle. Under existing administrative law, among other requirements, a licensed retailer's delivery employee is prohibited from carrying cannabis goods in the delivery vehicle with a value in excess of $5,000 at any time and the value of cannabis goods carried in the delivery vehicle for which a delivery order was not

received and processed by the licensed retailer prior to the delivery employee departing from the licensed premises may not exceed $3,000.

This bill would require, on or before January 1, 2023, the regulations established by the bureau regarding the minimum security and transportation safety requirements to include regulations that would allow for different value tiers of cannabis goods to be carried during delivery of those cannabis goods to customers by employees of a licensed retailer based on the type of vehicle used for the delivery. The bill:

would require [that] . . .the bureau, in coordination with. . .the California Highway Patrol, to develop transportation safety standards for all the different value tiers of cannabis goods carried during delivery to customers by employees of a licensed retailer based on the type of vehicle used for the delivery, as specified, and to develop a standardized inspection and certification process for each delivery vehicle based on the transportation safety standards developed pursuant to the bill, including the form of the certifications, to be implemented on and after January 1, 2024.

See, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB1014

(Robert Schuster)

HAWAII SENATE APPROVES CANNABIS LEGALIZATION BILL, BUT IT COULD BE KILLED BY KEY LAWMAKER

On March 9, 2021, the Hawaii Senate approved a bill proposing the legalization of marijuana in a 20-5 vote and a bill to expand the state's existing decriminalization law in a 24-1 vote.

Senate Bill 767

The legalization bill proposes to permit adults to possess up to an ounce of cannabis and cultivate the plan for personal use. The bill was introduced on January 22, 2021 and will accomplish the following:

(1) Decriminalize and regulate small amounts of cannabis for personal use;

(2) Establish regulations for the cultivation, sale, and personal use of small amounts of cannabis;

(3) Tax cannabis sales in the same manner as state excise taxes; and

(4) Subject income derived from cannabis sales to state income taxes.

The decriminalization bill proposes to increase the threshold of possession to 30 grams, which would be punishable by a $130 fine and no jail time, and the following:

(a) Notwithstanding any law to the contrary, the personal use of cannabis is permitted.

(b) Personal use of cannabis shall not be the basis for arrest, seizure, or forfeiture of assets

(c) The possession, use, display, purchase, transfer, or transport of cannabis, cannabis accessories, or cannabis paraphernalia for personal use shall be immune from criminal prosecution.

(d) The possession, growing, processing, or transporting of no more than six cannabis plants, with three or fewer being mature, flowering plants, and possession of the cannabis produced by the plants on the premises where the plants are grown shall not be subject to criminal prosecution; provided that the growing takes place in an enclosed and locked space and is not conducted openly or publicly, and that the plants are not made available for sale.

(e) The transfer or sale of thirty grams or less of cannabis with or without remuneration to a person who is twenty-one years of age or older is permitted.

(f) The consumption of cannabis products is permitted; provided that consumption of flavored e-liquids and juices containing cannabis for vaporizing devices is prohibited.

> (g) Assisting, advising, or abetting another person who is twenty-one years of age or older in any actions described in this section is permitted.
>
> (h) Personal use of cannabis shall be prohibited on public highways, public sidewalks, federal property, and any location where the consumption of alcohol is prohibited.

Will the Governor Sign On?

Hawaii's governor, David Ige (D) declined to commit to whether he would sign the legalization bill, as the federal classification of marijuana as a schedule I substance makes the situation complicated. "I'd have to look at it. I do have concerns. Marijuana is still a Schedule I substance, which is highly regulated by the federal government," Ige said. He went on to state:

> Until that is changed, it is confusing for the public to think that it's legalized here but, if they were to carry it beyond certain quantities, they could actually end up getting prosecuted and sent to prison for a very long time.

However, Hawaii already has a medical cannabis market, which is in violation of federal law.

Ige's comments are discouraging to advocates, especially since his track record shows that he vacillates on the issue of marijuana reform legislation. For example, Ige called the decision to support Hawaii's initial decriminalization bill "a very tough call."

Others Are Supportive of the Bill

Nikos Leverenz, board president for the Drug Policy Forum of Hawaii (DPFH), told *Marijuana Moment*:

> This is a landmark day for cannabis reform in Hawaii. It is now incumbent upon House leadership to ensure that this bill moves forward. Adult-use legalization of cannabis promises to create many new quality jobs in agriculture, retail, and other businesses impacted by production and distribution. . . .This bill is also a significant reform of Hawaii's criminal legal system, which has included over 1,000 arrests for cannabis possession each year. . . .It should be strengthened to include social equity measures that will help ensure direct participation of Native Hawaiians and others disproportionately impacted by eight decades of cannabis prohibition.

Threats to the Bill's Passage in the House

The bill could be dead on arrival in the House, as House Judiciary and Hawaii Affairs Committee Chairman Mark Nakashima (D), a key lawmaker, said he may not hold a hearing on the proposal.

Nakashima said that he thinks the state should focus on improving the existing medical cannabis system before considering recreational-use legalization:

> On legalization, I really think we need to get the medical marijuana program up and running in a much more healthy way before we're ready for any kind of legalization. . . .I really think the dispensaries really need to be given a chance to really perform.

Nakashima's position has frustrated legalization advocates, as the current procedural rules allow a committee chair to singularly defeat legislation that has already advanced in the opposite chamber.

Nikos Leverenz, board president for the Drug Policy Forum of Hawaii, told *Marijuana Moment*,

> Rep. Nakashima states that he'd like to 'get the medical marijuana program up and running.' Yet the dispensaries are in support of adult-use legalization provided that medical cannabis patients remain protected. Dispensaries will have a competitive advantage when adult use is legalized, as was the case in Washington state. This includes those on Hawaii Island, which has a large shadow cannabis market.

Conclusion and Implications

While it is unclear what Nakashima will ultimately do, the future appears bleak for the legalization bill, as Finance Committee Chairwoman Sylvia Luke (D) pointed out that it was difficult for the chamber to pass the earlier, three-gram decriminalization bill. Regardless of the closeness of the difficulty in getting the chamber to pass the earlier decriminalization bill, it still did pass, nevertheless. Even if Nakashima were to

kill the legalization bill, it does not mean that the bill expanding the state's decriminalization law is dead on arrival. The full text of the bill is available online at: https://www.capitol.hawaii.gov/session2021/bills/SB767_SD2_.htm

To track progress on the bill, please see: https://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=767&year=2021
(Brittany Ortiz)

WYOMING MARIJUANA LEGALIZATION BILL SPONSORED BY GOP LEADERS APPROVED IN COMMITTEE IN THE LEGISLATURE

On March 12, 2021, a Wyoming House committee approved House Bill 209 concerning the regulation of marijuana. The bill was brought after a majority of state residents said they support allowing adults to use marijuana. The bill proposes allowing adults 21 and older to purchase and possess up to three ounces of cannabis and cultivate the plant for personal use. The bill would also proposes licensing the cultivation and sale of marijuana and tax cannabis products. It further proposes imposing a 30 percent tax on marijuana sales.

House Bill 209

The bill was sponsored by 12 lawmakers the majority of which are Republicans—Rep. Jared Olson (R), Rep. Mark Baker (R), Rep. Eric Barlow (Lib.), Rep. Landon Brown (R), Rep. Marshall Burt (Lib.), Rep. Cathy Connolly (D.), Rep. Karlee Provenza (D.), John Romero-Martinez (R.), Pat Sweeney (R.) Rep. Cyrus Western (R.), Rep. Mike Yin (D.), Rep. Dan Zwonitzer (R.), and Sen. Cale Case (R.) and Sen. Chris Rothfuss (R.). The bill was approved in a 6-3 vote. The House Committee heard testimony from state agencies and the public, including former U.S. Senator and Rhode Island Governor Lincoln Chafee, who is a current resident of Wyoming.

"With my opening remarks, I would pose this question to the committee, which is simply: is Wyoming ready to legalize marijuana?" Chairman Olson said. Mr. Olson went on to state:

> That's the question in front of this committee, that's the topic that this legislature has not heard for over four years now, so I think this marks an important moment in Wyoming, where we are now discussing a topic that we've all avoided for many years.

Supporting the Bill but Discouraging any Initiatives

Olson warned against allowing a voter-led initiative design the regulation of marijuana if the House did not pass the bill. "Instead, the public by ballot initiative, which may be a lot more simplistic, decides what that will look like," he said. "And then you will return to decide how do we adjust that? How do we fix that? How do we wrap our arms around it? How do we how do we regulate it?

Olson went on to state:

> I bring [this bill] because I believe that those realities are real—that an initiative reality is real for Wyoming and that the descheduling of the drug in Washington, D.C. is a very likely reality for Wyoming and that when there's only six states that choose to do nothing, imagine where Wyoming is going to be when one of those two things happens. . . .So I bring a solution in an attempt to put our arms around it and decide what we want it to look like.

Rep. Chafee echoed Olson's statements saying that he recommends:

> . . .keeping as much control as possible over every aspect of this endeavor. We all want to see these revenues go to necessary government services and to keep taxes down.

Looking to Prospective Tax Revenue

It is anticipated that if the bill passes on the House floor that it would generate about $47 million a year in taxes. Two-thirds of the revenue would go to public schools, with the remainder going to local governments in the jurisdiction where the sales take place.

The Likelihood of Passage Remains in Doubt

Not all of the bill's sponsors are confident that it will pass on the House floor. Rep. Zwonitzer said:

> The bill has no chance of getting through the entire process in the next four weeks. I believe it will be used as a starting place for a year-long conversation on understanding the issue, the funding structures, and how Wyoming could regulate [marijuana] within our borders.

Rep. Brown similarly stated that he believes the revenue estimates are overblown. "It is a concern to me that the development and growth of government needed to implement this law would likely barely break even in my books," he wrote. He also stated:

> The increase in local permitting and oversight of a substance similar to alcohol and tobacco is new and foreign to us as a state.

Conclusion and Implications

Several lawmakers who voted to approve House Bill 209 said they are not likely to support it on the House Floor, but that they are in favor of giving the full body a chance to discuss the issue. If passed, the legislation would become effective July 1, 2021 and would join a very exclusive group of states which voted for legalization via their legislature and not via the initiative and referendum process that Representative Olson cautioned against. To track the bill's progress, *see:* https://openstates.org/wy/bills/2021/HB209/ (Brittany Ortiz)

JUDICIAL DEVELOPMENTS

U.S. DISTRICT COURT FINDS CORPORATE DISCLOSURE OF POTENTIAL FDA ADMINISTRATIVE ENFORCEMENT ACTIONS AGAINST CBD PRODUCT CLAIMS SUFFICIENT TO STAVE OFF SECURITIES LAWSUIT

In Re Curaleaf Holdings, Inc., ___F.Supp.2d___, Case No. 19-cv-4486 (E.D. NY Feb. 16, 2021).

In a securities action before Judge Cogan of the U.S. District Court for the Eastern District of New York, plaintiffs alleged that Curaleaf Holdings mislead its investors about the legality of its cannabidiol (CBD) products. Curaleaf's motion to dismiss was before the court on the grounds that they did disclose the relevant information. In light of the facts, the court granted the motion to dismiss.

Background

CBD, derived from both marijuana and hemp. Marijuana is listed by the federal government as a Schedule I illegal drug under the Controlled Substances Act (CSA). However, 33 states and the District of Columbia have "legalized" the use of cannabis for medical purposes and 11 of those states and D.C. have also legalized recreational use of cannabis. 17 states have legalized the use of CBD in some manner. This to be distinguished from hemp which most states have legalized. Under the 2018 Farm Bill, hemp production was removed from the definition of marijuana and thus, removal from Schedule I which had the effect of legalizing hemp production and use and use at the federal level.

From the federal viewpoint, often the decision to intervene against sellers of CBD products comes down to the safety, medical claims and labelling claims. The U.S. Food & Drug Administration (FDA) and Federal Trade Commission (FTC) have brought enforcement actions against these types of claims. (*See: 2 Cannabis L. & Reg. Rptr* 164 (Feb 2021).) On the FDA's website, it states:

> . . .[s]elling unapproved [CBD] products with unsubstantiated therapeutic claims is not only a violation of the law, but also can put patients at risk, as these products have not been proven to be safe or effective. . . . CBD products cannot be sold as dietary supplements and that it is illegal to sell a food (including any animal food) to which CBD has been added.

Curaleaf Holdings, Inc. was created in a reverse takeover between Lead Ventures, Inc. and PalliaTech Inc. to form Curaleaf Holding Inc.

Purchasers of Curaleaf securities on the OTCQX [United States market for companies already listed on a qualified international stock exchange]. Curaleaf is listed on the Canadian Stock Exchange (CSE). Curaleaf, on October 26, 2018, after completion of the takeover, filed its Listing Statement with the System for Electronic Document Analysis and Retrieval (SEDAR), which is the Canadian equivalent of the Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) used in the United States, to facilitate the electronic filing of securities information and allow for the public dissemination of Canadian securities information collected in the filing process. A Listing Statement is required for:

> . . all initial applications for Listing and for Issuers resulting from a fundamental change. . .[and]. . .contains comprehensive disclosure about the issuer.

The Listing Statement

On October 26,2018, the Listing Statement filed with SEDAR, and on November 2, 2018 with the CSE stated, inter alia, that many factors could have a "material adverse effect" on the company, including to its "reputation and ability to conduct business," it's ability to turn a profit, and the listing of its securities on the CSE, and related warnings, due the schism between U.S. states "legalizing" cannabis and the federal government maintaining its illegality.

There were additional warning in the Listing

Statement about the fact that CBD products "are not approved by the FDA as a drug. Finally, the Listing Statement referenced the FDA willingness to pursue producers and sellers of CBD products for false or exaggerated claims as to the medical efficacy.

Curaleaf began trading on the CSE in October 2018. Curaleaf began issuing press releases describing their CBD products as "premium hemp-based" "natural" and subject to "strict laboratory testing" and similar statements. However, on the company's website it stated that its CBD products could treat chronic pain, anxiety, depression, PSTD, Parkinson's disease and similar claims.

In the period April – December, 2019 Curaleaf filed its Management's Disclosure and Analysis of Financial Condition and Results of Operations with SEDAR, OTCQX and the CSE wherein it disclosed the possible risks to the company from FDA regulatory enforcement as that process had begun against other sellers of similar CBD products.

The FDA Warning Letter

On July 22, 2019, the FDA issued a warning letter to Curaleaf regarding several of its CBD products sold online regarding claims of medical efficacy, use for dietary purposes and related alleged violations. Cease and desist was demanded by the agency. The company's share price "fell in the days following the issuance of the warning letter."

The Court's Decision

Section 10(b) and Rule 10b-5 of the Exchange Act Claims

The court first pointed out that to make a claim under section 10(b) and Rule 10b-5 a plaintiff must allege "a false statement or omission of a material fact, with scienter, that the plaintff's reliance on [the statement or omission] caused plaintiff injury." Plaintiffs' allegations boiled down to defendant's failure to fully disclose the illegality of the sale of its CBD products under federal law. From the facts stated above, defendant argued that the several documents and statements made are contrary. The court agreed.

The court found that:

> Starting on its first day in existence the company publicly and repeatedly acknowledged. .[that]. . .its cannabis-based products are not approved by the FDA and thus the FDA may regard their promotion as violating established [federal] law.

The court concluded, from the several disclosures made "What more need the company disclose about this risk? The Listing Statement says it all." The nail in the coffin of the plaintiffs' claim from the court's point of view was the company's disclosures that the risk that the FDA could act against it and that the FDA had done just that to other companies selling similar products.

Perhaps ironically, the court found the allegation of false or misleading disclosures of its pet products deserved some additional attention. In the end the court stated:

> . . .technically, the Company made statements about the safety and effectiveness of their pet products and the FDA's letter reveals that the FDA believes that the products are not 'generally recognized' as safe and effective, and that the FDA considers them 'unsafe.' But again, the letter doesn't state that the products cannot effectively treat the various ailments or are categorically unsafe—just that they are not approved by the FDA to be advertised as such. . . .

Conclusion and Implications

The court granted defendant's motion to dismiss. What lessons can the cannabis law practitioner draw from this decision. The company most certainly disclosed many risks that investors face with the schism between state legalization and federal illegality of cannabis. But what about CBD products? It would seem that a company must make direct discloses of the risk of FDA intervention as to CBD efficacy claims in order to insulate it from potential shareholder claims of fraud. But how one would advise what claims can and cannot be made is a whole another issue. It's a tricky business and the interplay between disclosures made and efficacy claims made will most likely be part of any court's analysis. The court's opinion is available online at: https://hempindustrydaily.com/wp-content/uploads/2021/02/123117438266.pdf
(Robert Schuster)

CANNABIS LAW™
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NEW YORK APPELLATE DECISION ADDRESSES AN EMPLOYEE'S USE OF CANNABIS UNDER THE STATE'S COMPASSIONATE CARE ACT AND HER TERMINATION FROM CONSOLIDATED EDISON

Gordon v. Consolidated Edison, 2021 NY Slip Op 00492, 190 AD3d 639 (N.Y. App. Div. 1st Dep't 2021).

On January 28, 2021, the New York State Appellate Division, First Department, issued a decision with implications for employers confronted with their employees' use of medical marijuana. The employee brought discrimination claims under the state's Human Rights Law (HRL), and the court ultimately allowed those claims to survive challenge by Consolidated Edison. The court found an issue of fact remained as to whether Consolidated Edison "adequately engaged in a cooperative dialogue" with plaintiff as required by the HRL.

Background

Plaintiff, Kathleen Gordon (Gordon), worked for defendant Consolidated Edison (ConEd or employer) as a financial analyst. Gordon suffered from irritable bowel disease (IBD), one of the conditions covered by New York State' Compassionate Care Act (CCA) (*see* Public Health Law §§ 3360–3369-e), and in December 2016, she consulted a physician about whether medical marijuana would help with her IBD symptoms. The physician told Gordon that she would be a suitable medical marijuana patient. On December 17, 2016, Gordon tried marijuana to see if it would alleviate her IBD symptoms, and, plaintiff alleged, the drug worked "instantaneously" to relieve her symptoms. The next day, she contacted a physician registered with the New York State Department of Health's Medical Marijuana Program (MMP) to certify patients for medical marijuana treatment, and made an appointment to see the doctor on December 27, 2016.

In the meantime, on December 21, 2016, Gordon was randomly selected for a drug test in accordance with ConEd's standing policy, and she provided a urine sample and tested positive for marijuana. On December 27, 2016, Gordon saw the MMP-registered physician, who certified that plaintiff was likely to benefit from treatment with medical marijuana. On December 29, 2016, the MMP website stated that she was *approved* as a medical marijuana patient.

On that same day, ConEd's Human Resources (HR) department informed Gordon that she had tested positive for marijuana use. Gordon responded that she was a medical marijuana patient, and that she had used marijuana to treat her IBD symptoms. The HR officer scheduled an appointment for plaintiff to meet defendant's in-house medical review officer (MRO), a physician, on January 5, 2017.

On January 5, Gordon saw the MRO, who ascertained that when she used marijuana on December 17, she was not yet a certified medical marijuana patient. The MRO concluded that plaintiff's use violated ConEd's drug use policy, and referred plaintiff back to the HR department for action. The HR department decided that, because Gordon was still a probationary employee, she was not eligible for accommodation and should be terminated. The HR department arranged to meet with Gordon on January 11, 2017, to inform her of the decision.

On January 9, 2017, the MMP issued Gordon's Registry ID card. On January 10 and 11, 2017, she reiterated to the HR department and her supervisor that she was a certified medical marijuana patient. At the meeting on January 11, defendant terminated plaintiff's employment.

Gordon filed claims under the HRL.

The Court's Decision

The court determined that there were "issues of fact" for purposes of Gordon's claim for failure to accommodate her under the HRL. The key issue of fact was whether ConEd:

> . . adequately engaged in a cooperative dialogue. . .to determine whether [ConEd] could reasonably accommodate her status as a medical marijuana patient.

The court went on to clarify that:

> Questions of fact exist as to whether defendant improperly cut the dialogue process short when it discovered that plaintiff was a probationary

> employee, and refused to consider accommodating her—as it regularly did for permanent employees—by, for example, giving her discipline short of termination, or simply overlooking the one-time technical violation in light of her contemporaneously acquired status as a medical marijuana patient. . . .

The HRL offers some protections to employees with disabilities, which, the court made clear, would include an employee taking cannabis under the state's medical marijuana program:

> The State HRL defines status as a medical marijuana patient as a protected disability, but the City Human Rights Law (City HRL) (Administrative Code of City of NY) does not. Although the City HRL must be construed liberally to ensure maximum protection (*see* Administrative Code of City of NY § 8-130 [a]), certification as a medical marijuana patient is (other than as specified for purposes of claims under the State HRL) a legal classification. It is not a "physical, medical, mental, or psychological impairment," which is how disabilities are defined under the City HRL (Administrative Code § 8-102). . . . plaintiff's IBD, is a physical impairment and thus a disability under the City HRL. Accordingly, issues of fact exist as to whether defendant should have permitted plaintiff to treat her IBD through the medical use of marijuana, as a reasonable accommodation.

No Private Right of Action under the Compassionate Care Act

The court did, however, point out that any implied or actual claims made by Gordon under the Compassionate Care Act would not survive as "creation of a private right of action would not be consistent with the CCA's statutory scheme."

Distinguishing This Case from the *Hazen* Decision

Finally, the court made clear that the facts of the case before the court could be distinguished from the *Hazen v. Hill Betts & Nash, LLP* decision which was raised by ConEd. In *Hazen*, this court found that:

> even when an employee's misconduct was caused by his disability the employer was not required to excuse that misconduct as an accommodation." (*Hazen* 19NY3d 812).

The court distinguished this case from the facts on *Hazen* as follows:

> Here, plaintiff did not here seek certification for medical marijuana use after testing positive for its use. Instead, her pre-certification marijuana use was the beginning of a process which ended with her certification for medicinal use. Plaintiff began the certification process before she tested positive at work. Nor is there any allegation that plaintiff's use of marijuana, either before or after certification, has ever affected the quality of her work or her ability to do that work, or that she has ever used marijuana, medicinal or otherwise, at the workplace.

Conclusion and Implications

Issues of employee rights intersecting with legal cannabis use have frequently been decided in favor of employers. The unique features of this case and provisions of the HRL for an employer to initiate a "cooperative dialogue" and to make certain accommodations for "disabilities" made the factual inquiry imperative. Due to the unique facts of this case, it may have limited guidance for cases to follow. But it should give pause to employers in New York who must take reasonable steps to engage employees who use cannabis legally in meaningful dialogue, and perhaps, to consider what steps they can reasonably take to accommodate such an employee who otherwise discharges their job duties well.

The court's opinion is available online at: http://www.courts.state.ny.us/reporter//3dseries/2021/2021_00492.htm
(Robert Schuster)

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