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CANNABIS NEWS

NEW JERSEY CANNABIS BUSINESS APPLICATIONS TO THE STATE’S REGULATORY COMMISSION ARE OFF TO A STRONG START IN DECEMBER 2021

Almost 500 individuals and entities established accounts in the first four hours after the New Jersey Cannabis Regulatory Commission (CRC) started accepting recreational cannabis license applications.

The CRC opened up for applications for recreational cannabis cultivators, manufacturers and testing labs in December 2021 and applications were averaging 155 new users *per hour*.

New Jersey Legalization of Recreational Cannabis

On February 22, 2021, Governor Phil Murphy signed three bills changing the legal status of cannabis. These laws, which went into immediate effect, create a two-tier framework:

- **Regulated cannabis.** When the substance is bought, sold, and used under certain conditions, it is treated as “regulated cannabis” and fully legal in New Jersey. As a practical matter, however, regulated cannabis will not be available in the State for several months until a new government body, the Cannabis Regulatory Commission, issues rules governing its use.

- **Marijuana and hashish.** All forms of the substance that are not regulated cannabis or medical cannabis are treated as “marijuana” or “hashish.” Under the new laws, marijuana and hashish are still defined as “controlled dangerous substances” under N.J.S.A. 2C:35-2 but are largely decriminalized for non-distribution offenses. The laws eliminate existing prohibitions and create new, more lenient penalties for possession and distribution that remain tiered based on weight.

Shortly after enactment, Attorney General Grewal issued two documents to law enforcement describing the new requirements and providing enforcement guidance:

- **AG Directive 2021-1: Directive Governing Dismissals of Certain Pending Marijuana Charges** (Feb. 22, 2021). This directive instructs state, county, and municipal prosecutors to dismiss charges pending as of February 22, 2021 for any marijuana offense that is no longer illegal under state law.

- **Interim Guidance Regarding Marijuana Decriminalization** (Mar 26, 2021). This document provides guidance to law enforcement officers regarding new enforcement requirements pursuant to the marijuana decriminalization law. (See: <https://www.njoag.gov/marijuana/>)

The state’s new cannabis laws are as follows:

- **Cannabis legalization (P.L.2021, c.16).** (Feb. 22, 2021) Titled as the New Jersey Cannabis Regulatory, Enforcement, Assistance and Marketplace Modernization Act, this law legalizes regulatory cannabis. (A21)

- **Marijuana decriminalization (P.L.2021, c.19).** (Feb. 22, 2021) This law decriminalizes possession of small amounts of marijuana and hashish and establishes new, more lenient penalties for the distribution of these substances. (A1897)

- **Other clarifying provisions (P.L.2021, c.25).** (Feb. 22, 2021) This law clarifies certain provisions regarding marijuana and cannabis use and possession penalties for individuals younger than 21 years old. (S3454)

- **Additional clarifying provisions (P.L. 2021, c.38).** (Mar. 26, 2021) This law revises certain provisions concerning parental notification of juveniles found to be using or possessing alcohol, marijuana, hashish or cannabis, as well as amend-

ing certain other provisions of N.J.S.A. 2C:33-15. (A5472) (Ibid)

The New Jersey Cannabis Regulatory Commission Reacts to the High Demand for Cannabis Licenses

“We are happy to reach this milestone,” said CRC Executive Director Jeff Brown. Brown went on to comments:

Applications are coming in, the platform is performing well, and we can officially mark the launch of the state’s recreational cannabis industry. Getting cultivators, manufacturers, and testing labs licensed and operating will set the framework and establish supply for retailers who will start licensing in March 2022. (<https://www.nj.gov/cannabis/>)

Under the CRC’s rules, Social Equity Businesses, diversely-owned businesses, microbusinesses, and conditional license applicants will be prioritized in their review and scoring. These include businesses owned by individuals with past cannabis convictions, those

from designated Economically Disadvantaged Areas, and minority-owned, woman-owned, and disabled-veteran owned businesses.

The New Jersey Cannabis Regulatory Commission establishes and enforces the rules and regulations governing the licensing, cultivation, testing, selling, and purchasing of cannabis in the state.

Conclusion and Implications

Business will soon be booming in New Jersey on the heels of recreational cannabis legalization. Initial regulations have been established and applications for licenses are coming in to the Cannabis Regulatory Commission at a heady pace. Like most every state that has legalized recreational cannabis, provisions to address social equity are in place and provide for preferences in the licensing process. New Jersey’s legalization bill text is available online at: https://www.njleg.state.nj.us/2020/Bills/S0500/21_R2.PDF. The CRC’s first set of regulations, adopted in September 2021 are available online at: <https://www.nj.gov/cannabis/documents/rules/NJAC%201730%20Personal%20Use%20Cannabis.pdf>.

(Robert Schuster)

LEGISLATIVE DEVELOPMENTS

HOUSE BILL ADDRESSES INTERSTATE COMMERCE AND HEMP PRODUCTS

Recently, in December 2021, a bill was introduced in the U.S. House of Representatives addressing the need at the federal level to regulate interstate commerce of food containing cannabidiol derived from hemp.

Background

After the 2018 Farm Bill decriminalized hemp derived products, the market for such products has exploded. But federal regulation has not followed... yet. On December 2, 2021, Assembly Member Kathleen Rice (D-NY) along with House Members Angie Craig (D-Minn.), Morgan Griffith (R-VA.), and Dan Crenshaw (R-Texas) co-sponsored a bill in the House of Representatives. In summary, the bill would:

...allow FDA to regulate CBD as a food additive. If passed, it would require the Agency to issue regulations specifying the maximum amount of CBD derived from hemp per serving, labeling and packaging requirements, and conditions of intended use. (<https://www.natlawreview.com/article/house-introduces-bill-to-regulate-cbd-food>)

The Bill

The bill, not yet given an HR bill number, is tentatively titled: “A Bill To authorize the regulation of interstate commerce with respect to food containing cannabidiol derived from hemp, and for other purposes”; or the “CBD Product Safety and Standardization Act of 2021.”

The bill would amend the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 342, *et seq.* It would direct the Secretary of the Food and Drug Administration to issue, with respect to a food containing cannabidiol derived from hemp:

1. A maximum amount of cannabidiol derived from hemp per serving;

2. Labeling and packaging requirements and

3. Conditions of intended use, including any conditions specific to a food category.

The bill would address the Agricultural Marketing Act on branding and related issues.

The ‘Need’ for Such a Bill

The bill’s various sponsors have offered their comments on the need for such an act, as follows: Representative Griffith has stated:

Demand for CBD products has surged, but Food and Drug Administration regulations do not reflect this new reality. As a result, adulterated or unsafe products are available that threaten consumer health, and businesses lack clarity. The *CBD Product Safety and Standardization Act* would require the FDA to address the issue and ensure more certainty in the CBD marketplace. I’m pleased to join this bipartisan effort. (<https://bestcannabisanswers.com/what-is-the-cbd-product-safety-and-standardization-act/>)

Representative Craig said:

Years after CBD was decriminalized, a lack of clear federal standards in the CBD industry has left businesses guessing and customers at risk. It’s clear that this growing industry needs regulatory clarity in order to continue selling their products safely and effectively. I’m proud to join my colleagues in introducing this bipartisan legislation to create enforceable safeguards and ensure accountability in the industry. (Ibid)

Representative Rice added:

CBD products are exploding in popularity, but the lack of federal regulation surrounding them has put consumers at risk and left busi-

nesses looking for clarity. The bipartisan *CBD Product Safety and Standardization Act* will establish the clear regulatory framework needed to provide stability for business and ensure unsafe products stay off the shelves. (Ibid)

Support for the Proposed Act

In support of the act, the U.S. Hemp Roundtable, a national advocacy organization, in support of the bill, has stated:

[t]he hemp industry is grateful to Reps. Kathleen Rice, Morgan Griffith, Angie Craig and Dan Crenshaw for their introduction of the CBD Product Safety and Standardization Act. We strongly support requiring the FDA to regulate hemp extracts like CBD as food and beverage ingredients. (<https://www.natlawreview.com/article/house-introduces-bill-to-regulate-cbd-food>)

The Consumer Brands Association, via its Senior Vice President Dr. Betsy Booren, was quoted as stating:

The CBD Product Safety and Standardization Act is a welcome step toward giving consum-

ers consistency and promoting safety that goes across state lines. 74% of consumers incorrectly believe that CBD is federally regulated, stressing the urgency of the action Representatives Rice, Griffith, Craig and Crenshaw are taking with this important legislation. (<https://bestcannabisanswers.com/what-is-the-cbd-product-safety-and-standardization-act/>)

Conclusion and Implications

The passage of the 2018 Farm Bill, removed hemp-derived cannabidiol from the federal Controlled Substances Act, but cannabis remains on the Controlled Substances Act as a dangerous drug, despite many states having “legalized” cannabis. But as to hemp-derived cannabidiol industry, demand for its varied products have grown steadily and the bill’s sponsors feel it more than time for the FDA to step up and begin federal regulation in order to assure the products are safe and are marketed accordingly. The full text of the proposed act is available online at: https://kathleenrice.house.gov/uploadedfiles/cbd_product_safety_and_standardization_act.pdf. (Robert Schuster)

CANNABIS BANKING EXCLUDED FROM CONGRESSIONAL DEFENSE BILL

A new version of the recent Congressional defense bill does not include cannabis banking reform following prolonged negotiations between the U.S. House of Representatives and the Senate.

Background

When the House passed its initial version of the National Defense Authorization Act (NDAA) back in September, the legislation included language to protect banks that work with state-legal cannabis businesses. Yet those provisions were not attached to a new bicameral draft filed this month. This newest iteration will return to both chambers before potentially heading to President Biden’s desk for signature.

Representative Ed Perlmutter of Colorado, the

chief sponsor of the Secure and Fair Enforcement Banking Act, did not force a vote on the amendment in the House Rules Committee, but there was debate within the panel, where multiple members expressed frustration over Senate leadership’s reluctance to address the issue. Rules Committee Chairman Jim McGovern was sharply critical of Senate Majority Leader Chuck Schumer, who has insisted that justice-focused cannabis reform should be addressed before passage of the SAFE Banking Act. McGovern argues that Schumer’s reticence is making life more difficult for small and minority-owned businesses to handle their banking needs. Representative Adam Smith, chairman of the House Armed Services Committee, also expressed frustration, stating “The impact of this, as a practical matter, to not have the SAFE Banking

Act is incredibly dangerous,” because small businesses “basically have to run a cash business” and they cannot “do the normal banking that is available to them in the states where marijuana is legal.”

Disagreements Between the House and Senate

The issue continues to be the differing priorities between the House of Representatives and the Senate, with the Senate taking the position that cannabis reform needs to come before banking reform to ensure social justice is achieved in any financial reforms. While many members of the House support the SAFE Banking Act, there is general acknowledgment that inserting it over the Senate’s objections could doom the overall defense bill.

“It makes no sense because of the public safety aspect, the minority business aspect,” Perlmutter said. “Without the ability to have banking, many small businesses—veteran-owned organizations, women-owned businesses—don’t have access to capital.” Perlmutter has announced his plan to file an amendment in the Rules Committee shortly after the next draft of the negotiated defense bill is released, and said he spoke with Speaker Pelosi about pursuing other avenues to force the Senate to take up the legislation.

Representative Dave Joyce, co-chair of the Congressional Cannabis Caucus, said it is “incredibly disappointing” that the cannabis language was taken out of the National Defense Authorization Act for Fiscal Year 2022 [see: <https://www.congress.gov/bill/117th-congress/house-bill/4350/text>].

“The longer the Senate delays giving state-legal cannabis businesses access to basic banking services that every other legal US business has, the more it endangers public safety, stifles economic inequality, and exacerbates the unsustainable patchwork of federal/state cannabis laws,” he said.

Other Proposed Tweaks Excluded

Separately, the new defense bill also excludes an NDAA amendment filed by Senator Dianne Feinstein and Senator Brian Schatz that would have streamlined the application process for researchers who want to investigate cannabis as well as manufacture the plant for use in studies. It also does not include a separate Schatz-proposed amendment to federally legalize medical cannabis for military veterans who comply with a state program where they live.

Conclusion and Implications

The question whether cannabis banking reform should advance through the National Defense Authorization Act remains controversial. Supporters argue that enacting the reform is necessary for public safety, as many marijuana businesses operate on a largely cash-only basis without access to traditional financial institutions, which has the potential to make them targets of crime. Yet some groups like the Drug Policy Alliance have urged leadership to hold off on banking reform until comprehensive legalization legislation that promotes social equity is approved. (Jordan Ferguson)

CITY OF ST. LOUIS, MISSOURI ADOPTS MEASURE AIMED AT MINIMIZING THE CRIMINALITY OF CANNABIS POSSESSION

At a signing ceremony at City Hall with St. Louis Board of Aldermen sponsors Ald. Brandon Bosley, Ald. Annie Rice, Ald. Bill Stephens, Ald. Jesse Todd, and Ald. Bret Narayan, Tishaura O. Jones, the Mayor of the City of St. Louis signed Board Bill 132 (BB 132), “which repeals outdated laws related to the possession of small amounts of marijuana and paraphernalia in the City of St. Louis.”

Background

With the 2018 passage of Amendment 2 to legalize medical marijuana use by Missouri voters, which received the support of 82 percent of St. Louis voters, BB132 was signed to “harmonize[] the laws of the City of St. Louis with those of the Missouri Constitution.”

Under Missouri law recreational cannabis remains to be illegal. However, possession of up to 10 grams of cannabis has been decriminalized. The state has

legalized both CBD products and medical marijuana for qualifying patients. Medical marijuana use is legalized for the residents who apply for it. Missouri laws dictate that recreational marijuana remains illegal, however, in 2014 state lawmakers enacted Senate Bill 491 which reduced the penalties for possession of marijuana. (<https://leafpedia.net/marijuana-laws/missouri/>)

Prior to the passing of SB 491, possessing marijuana was considered a criminal misdemeanor. This means that Missourians in possession of 35 grams or less of cannabis would have faced not only imprisonment of up to a year, but also a hefty fine of up to \$1,000.

When SB 491 took effect on January 1st, 2017 it spurred on changes across Missouri's criminal code. SB 491 stated that Missourians in possession of up to 10 grams of cannabis would face no incarceration if they were a first-time offender. However, first-time offenders would face a fine of up to \$500. Unfortunately, those who possessed greater than 10 grams of cannabis, but less than 35 grams of cannabis could face both a fine maxing at \$2,000 and incarceration of up to 1 year. (Ibid)

BB 132

The bill will:

...repeal Ordinance Numbers 66419, 68404 and 69429, which pertain to the possession of marijuana and paraphernalia. The bill would also update local enforcement priorities, and probable cause and reasonable suspicion standards, and disciplinary standards to harmonize City policy with Article XIV of the Missouri State Constitution. (<https://www.stlouis-mo.gov/government/city-laws/board-bills/boardbill.cfm?bbDetail=true&BBId=13927>)

Prior city ordinances made it illegal to possess 35 grams or less of marijuana.

The Mayor's Statement Upon Signing the Bill

Mayor Tishaura Jones stated that:

Let me be clear: Incarcerating people for marijuana-related, low-level offenses does not make our neighborhoods safer. Needless con-

tact with the prison system harms families and communities across our city. In the past 3 years, 591 people were arrested for marijuana-related charges - of those individuals, 488 were Black. Board Bill 132 brings our laws in line with the state constitution's while repealing unjust and discriminatory policies. . . . My office collaborated with Board members to draft this legislation, and I appreciate the work of its numerous cosponsors - especially Alderman Bret Narayan - to get it passed and across the finish line. I look forward to signing this critical bill when it reaches my desk.

Mayor Jones went on to explain the need for the bill as follows:

We are seeing a major shift in the way our country sees not just marijuana, but how it connects to public safety, incarceration, and economic opportunity in our communities. This law will help reduce racial disparities in our policing, make our city safer, and make St. Louis more competitive in hiring for city positions.

Alderman Bret Narayan added to the Mayor's statement as follows:

It's rare that we see so many people from so many different backgrounds unite around a single cause, which is exactly what we have done here. This law represents the clear will of the people of St. Louis. It will allow for our law enforcement officials to use their resources on the most pressing issues in our region, help with labor shortages in our City departments, and will also help prevent our injured first responders from falling into the pitfalls of opiate addiction. (<https://www.stlouis-mo.gov/government/departments/mayor/news/jones-statement-board-bill-132.cfm>)

Conclusion and Implications

The goal of Board Bill 132 was to bring city laws in line with the state constitution, along with preventing marijuana from being used as sole probable cause for search or arrest, will help reduce racial disparities and give officers the ability to better focus on violent crime. (Ibid) St. Louis is

not the first city to address some form of cannabis legalization. The Cities of Oakland California and Denver Colorado also made similar moves prior to state legalization.

For more information, see: [https://www.stlouis-mo.](https://www.stlouis-mo.gov/government/departments/mayor/news/jones-board-bill-132-signed.cfm)

[gov/government/departments/mayor/news/jones-board-bill-132-signed.cfm](https://www.stlouis-mo.gov/government/departments/mayor/news/jones-board-bill-132-signed.cfm).

(Robert Schuster)

JUDICIAL DEVELOPMENTS

SHOULD MEDICAL CANNABIS BE COVERED BY EMPLOYERS WHEN USED TO TREAT JOB-RELATED INJURIES?— U.S. SUPREME COURT ASKED TO ADDRESS THE CSA AND STATE WORKERS COMPENSATION RIGHTS

Musta v. Mendota Heights Medical Center, ___U.S. ___, Case No. 21-676, Motion for Certiorari

The United States Supreme Court has been asked to take up the question of whether the Controlled Substances Act (CSA) preempts state laws requiring employers to reimburse employees for the cost of medical cannabis where its use is for work-related injuries. This issue has arrived at the Supreme Court on an appeal from the Minnesota Supreme Court in *Musta v. Mendota Heights Medical Center* where that court found that the Minnesota law requiring employers to cover the cost of reasonable and necessary medical expenditures was preempted by the Controlled Substances Act with respect to treatments involving cannabis.

Background

Musta is an employee of Mendota Heights Medical Center (Mendota). She was injured while working for Mendota and sought treatment for her injuries. After several failed attempts at treating her condition, her doctors prescribed a course of medical cannabis to treat the injury. When seeking reimbursement for the cost of the medical cannabis treatments from Mendota, Mendota declined stating that federal law prevented it reimbursement for medical cannabis. Mendota asserted that while medical cannabis was a reasonable and necessary treatment for Musta's condition, the state laws governing the reimbursement of medical costs were preempted by the Controlled Substances Act's regulations regarding cannabis.

In a lower ruling, Musta was awarded reimbursement by a state compensation judge on the basis that the Minnesota law contained nothing prohibiting reimbursement for medical cannabis treatment. That ruling was appealed to the Minnesota Workers Compensation Court of Appeals. That appellate court did not address the preemption issue raised by Mendota but upheld the lower ruling in Musta's favor.

The Minnesota Supreme Court's Decision

On appeal of that appellate decision, the Minnesota Supreme Court ruled that the appellate court lacked the subject matter jurisdiction to rule on the preemption issue. More critically to the appellants and cannabis practitioners generally, the Minnesota Supreme Court ruled that the Controlled Substances Act preempted the state regulation requiring reimbursement because compliance with the state law would place employers in jeopardy of criminal prosecution for violating federal laws prohibiting the sale and possession of a controlled substance.

Federal Preemption

Preemption is one of the cornerstones of every attorney's U.S. Constitutional Law class during the first year of law school. The most basic statement of preemption under the Supremacy Clause of the Constitution is that where state and federal law conflict, federal law controls. But this does not always hold true. It is that nuance that is responsible for this issue (in the context of state worker's compensation laws and federal drug regulations) now being brought to the Supreme Court for consideration.

The Minnesota Supreme Court explained that in preemption cases where the subject matter involved is one that states have traditionally regulated exclusively, such as workers compensation, the presumption is that federal preemption is not intended unless preemption is expressly stated in the conflicting federal law. Looking at the Controlled Substances Act for language expressing the legislature's intent, the Minnesota Supreme Court looked at the stated purposes of the Controlled Substances Act, which included the diversion of drugs. The Minnesota Supreme Court also looked to the Controlled Substances Act's plain statement of its scope which provides

that state law is only preempted by the act where it is in direct conflict with the terms of the Act, such that the terms of both cannot be simultaneously achieved.

Mendota contended that in this case, such a direct conflict of state law and the Controlled Substances Act prevents it from reimbursing Musta for her medical cannabis treatments because such reimbursement would constitute aiding and abetting the possession of cannabis. Mendota also cited to *Bourgoin v. Twin Rivers Paper Co., LLC* where the Maine Supreme Court held that while under state's workers compensation laws employers are required to reimburse employees for medical expenses, doing so would violate the Controlled Substances Act.

Musta's argument to the contrary rests on two points. First, Musta points to federal legislative intent in appropriations bills that prohibits the Justice Department from expending funds on prosecutions for medical cannabis activity that does not violate state law. Second, Musta argues that an employer cannot be aiding and abetting a crime where the medical cannabis treatment is complete, where in essence the 'crime' has already been completed by the patient.

In going through its reasoning, the Minnesota Supreme Court acknowledged that the highest courts in New Hampshire and New Jersey have reached opposite conclusions from ruling in Maine. In New Hampshire, the state Supreme Court found that because state law compelled reimbursement for medical expenses, employers lacked the mens rea to aid and abet a violation of the Controlled Substances Act. In New Jersey, the highest court reached the same conclusion by adopting the legislative intent reasoning Musta relied on by pointing to the appropriations bills that prohibit the Justice Department from acting

in cases where medical cannabis is used in full compliance with state law.

Ultimately the Minnesota Supreme Court adopted the reasoning that was followed by the Maine Supreme Court and emphasized that legislative intent was not persuasive because the enforcement strategies adopted by the Department of Justice over the years has fluctuated unpredictably.

Conclusion and Implications

Thus far the United States Supreme Court has not ruled on whether it will hear this case. If it does take up the issue and rules in the state's favor, the only recourse for employees seeking reimbursement for medical cannabis costs will be through a legislative fix at the federal level. If the Supreme Court rules in favor of Musta, the door will be opened just a little bit wider for cannabis-adjacent industries and practices in those states where cannabis has been at least partially legalized. One such industry that could see this effect is banking. If the Supreme Court fails to take up this case, the most likely resolution to this split in opinions will come in the form of an amendment to the Controlled Substances Act or more express language in future appropriations bills. The Petition for Certiorari to the U.S. Supreme Court in *Susan K. Musta v. Mendota Heights Dental Center, et al.*, is available online at: <https://www.supremecourt.gov/DocketPDF/21/21-676/198736/20211104114019199-Musta%20-%20petition%20for%20certiorari%20for%20filing.pdf>. The National Organization for the Reform of Marijuana Laws' *amicus* brief in support of certiorari is available online at: <https://www.supremecourt.gov/>.

(Andreas L. Booher)

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