

THE REGULATION & TAXATION OF MARIJUANA ACT

Katherine D. Laughman
June 7, 2017

KP | LAW



THE LEADER IN PUBLIC SECTOR LAW
ATTORNEYS AT LAW

© 2017 KP LAW, P.C. | ALL RIGHTS RESERVED.

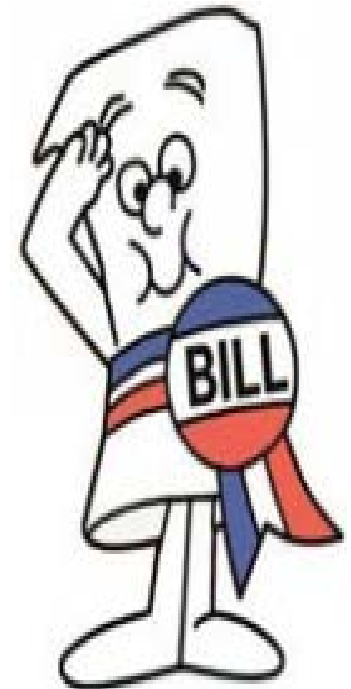
THE REGULATION & TAXATION OF MARIJUANA ACT

- On November 8, 2016, Massachusetts voters approved Question 4 legalizing the recreational use of marijuana and marijuana establishments (Chapter 334 of the Acts of 2016).
- Implementation of the Act is generating significant questions at state and local levels including:
 - the timeline for implementation;
 - personal use;
 - enforcement;
 - local control;
 - regulation of marijuana products;
 - taxation; and
 - employment implications



THE REGULATION & TAXATION OF MARIJUANA ACT

- The Act contains inconsistencies and raises many questions.
- The legislature has already acted to amend the deadlines for implementation of the law.
 - The new law, Chapter 351 of the Acts of 2016, was signed by the Governor on December 30, 2016.
- There are approximately 75 bills currently pending to address amendments to the Act.



THE REGULATION & TAXATION OF MARIJUANA ACT

"Marijuana establishment" is broadly defined in G.L. c.94G, s.1(j) as “a marijuana cultivator, marijuana testing facility, marijuana product manufacturer, marijuana retailer or any other type of licensed marijuana-related business.”



THE REGULATION & TAXATION OF MARIJUANA ACT

Types of Marijuana Establishments (G.L. c.94G, s.1)

- "Marijuana cultivator", an entity licensed to cultivate, process and package marijuana, to deliver marijuana to marijuana establishments and to transfer marijuana to other marijuana establishments, but not to consumers.
- "Marijuana testing facility", an entity licensed to test marijuana and marijuana products, including certification for potency and the presence of contaminants.
- "Marijuana retailer", an entity licensed to purchase and deliver marijuana and marijuana products from marijuana establishments and to deliver, sell or otherwise transfer marijuana and marijuana products to marijuana establishments and to consumers.
- "Marijuana product manufacturer", an entity licensed to obtain, manufacture, process and package marijuana and marijuana products, to deliver marijuana and marijuana products to marijuana establishments and to transfer marijuana and marijuana products to other marijuana establishments, but not to consumers.

THE CANNABIS CONTROL COMMISSION

- The Act establishes a Cannabis Control Commission (similar to the Alcoholic Beverage Control Commission) which is meant to implement and enforce regulations governing the cultivation, sale, and testing of marijuana.
- The Commission will include a law enforcement unit that will be responsible for enforcing regulations, conducting compliance checks, and investigating violations.
- These regulations will adopt procedures for the issuance, transfer and renewal of licenses to operate marijuana establishments.

Under the Act licenses shall be granted if the establishment meets certain requirements and if the Commission is not notified by the municipality in which the proposed marijuana establishment will be located that the proposed establishment is not in compliance with an ordinance or by-law consistent with the Act and in effect at the time of application.

THE CANNABIS CONTROL COMMISSION

The regulations will also address:

- Requirements for the security of marijuana establishments, including security, lighting, video and alarm requirements and requirements for the secure transportation and storage of marijuana, marijuana plants and marijuana products; the regulations will not, however, prohibit the cultivation of marijuana outdoors or in greenhouses.
- Requirements for the packaging of marijuana and marijuana products, which shall include special packaging requirements to protect children from ingesting marijuana.
- Restrictions on signs, marketing, displays and advertising with respect to marijuana, marijuana products and marijuana accessories, including prohibiting marketing or advertising designed to appeal to children; and
- Requirements for safe disposal.

CURRENT TIMELINE

DECEMBER 15, 2016 Effective Date of Law/ Personal Recreational Growing and Use Allowed	“Personal use” of marijuana is now legal for a person at least 21 years old. General Laws c. 94G, §7 provides that individuals, but not businesses, will be permitted to engage in a range of activities as outlined below.
MARCH 15, 2018 Deadline for CCC to Adopt “Initial Regulations”	The Act creates a three-member Cannabis Control Commission (“CCC”) to be appointed by and under the jurisdiction of the State Treasurer. The CCC will regulate and issue licenses for recreational marijuana establishments, but not for medical marijuana establishments, regulated by the Department of Public Health.
APRIL 1, 2018 Deadline for CCC to Begin Accepting Specific Licenses	Initial applicants: only businesses with medical marijuana experience are eligible, for a limited number of licenses. The filing of certain applications is staged over the course of the ensuing two years.
JULY 1, 2018 Deadline for Final Regulations, or “Default”	<p>If the CCC has <u>not</u> adopted regulations, “each medical marijuana treatment center” may begin to “possess, cultivate, or otherwise obtain marijuana and marijuana products and may deliver, sell or otherwise transfer” to anyone over the age of 21.</p> <p>If regulations <u>are</u> timely adopted, the CCC will issue licenses within 90 days after applications are received on or after April 1, 2018, to qualified establishments.</p>

PERSONAL USE

- The authorizes “consumers”, i.e., persons 21 years of age or older, to possess, use, purchase, process or manufacture one ounce or less of marijuana, of which not more than five grams can be in the form of marijuana concentrate.
- Within a person’s “primary residence”, a person may possess up to 10 ounces of marijuana and any marijuana produced on the premises for personal use by not more than six marijuana plants.
 - If there is more than one grower at the residence, there may be up to 12 plants cultivated on the premises.
- A person may give away or transfer without “remuneration” to a person age 21 years or older up to one ounce of marijuana, of which no more than five grams may be in the form of marijuana concentrate, provided that such transfer is not advertised or promoted to the “public”.
- A person 21 years of age or older may also possess or manufacture marijuana accessories or sell such accessories to a person 21 years of age or older.

PERSONAL USE

- Local regulations - although personal possession and use is now legal, consumption is still subject to certain restrictions pursuant to G.L. c. 94G, §§ 2 and 13.

For example, the Act does not prevent municipalities from prohibiting the possession or consumption of marijuana within any buildings owned or leased by them. G.L. c. 94G, § 2(d)(2).

In addition, the Act does not authorize the possession or consumption on the grounds of or within a public or private school where children attend classes in preschool programs, kindergarten programs or grades 1 to 12, inclusive, or on the grounds of or within any correctional facility. G.L. c. 94G, § 2(d)(3).



PERSONAL USE

- The Act addresses the possession of marijuana in motor vehicles and states:

No person shall, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, possess an open container of marijuana or marijuana products in the passenger area of any motor vehicle. A person who violates this subsection shall be punished by a civil penalty of not more than \$500. G.L. c. 94G, § 13(d).

- The Act provides for a civil penalty of not more than one hundred dollars for persons who “consume marijuana in a public place or smoke marijuana where smoking tobacco is prohibited.” G.L. c. 94G, § 13(d).

LOCAL CONTROL — REGULATION, PROHIBITION

Ordinances and Bylaws Regulating Time, Place and Manner

- The Act provides that municipalities may adopt ordinances or bylaws regulating the time, place and manner of operations of marijuana establishments, provided that such ordinances or bylaws are not “unreasonably impracticable” and do not otherwise contradict with the Act.
 - An ordinance or bylaw would be “unreasonably impracticable” under the Act if “the measures necessary to comply with the regulations, ordinances or by-laws adopted pursuant to this chapter subject licensees to unreasonable risk or require such a high investment of risk, money, time or any other resource or asset that a reasonably prudent businessperson would not operate a marijuana establishment.” (G.L. c.94G, s.1(p))
- Standard practices for adoption of ordinances or bylaws will apply.

LOCAL CONTROL — REGULATION, PROHIBITION

Further Regulation - Bylaws and Ordinances/Local Ballot Questions

- The Act also authorizes municipalities to “limit the number of marijuana establishments” by “ordinance or bylaw by a vote of the voters of that city or town”.
- The use of the phrase “by a vote of the voters of that city or town” typically requires a vote at an election, whereas the adoption of an ordinance or bylaw occurs by vote of the local legislative body (city or town council or town meeting).
- The use of the term “voters,” instead of “legislative body” suggests that any attempt to approve an ordinance or bylaw, requires approval by the voters of the municipality at an election (ballot question).

LOCAL CONTROL — REGULATION, PROHIBITION

Three areas of limitation that may be imposed by ballot vote:

- (i) prohibiting the operation of one or more types of marijuana establishments within the municipality;
- (ii) limiting the number of marijuana retailers to fewer than 20 per cent of the number of licenses issued within the municipality for the retail sale of alcoholic beverages not to be drunk on the premises where sold under chapter 138 of the General Laws; or
- (iii) limiting the number of any type of marijuana establishment to fewer than the number of medical marijuana treatment centers registered to engage in the same type of activity in the town.

LOCAL CONTROL — REGULATION, PROHIBITION

- Additional Areas of Permitted Municipal Regulation:
 - Restrictions on licensed cultivation, processing and manufacturing of marijuana that is a public nuisance;
 - Establishment of reasonable restrictions on public signs relating to marijuana establishments;
 - Establishment of a civil penalty for violation of an ordinance or bylaw (similar to penalties imposed for violation of laws relating to alcoholic beverages).

LOCAL CONTROL — REGULATION, PROHIBITION

Petition for Question on State Ballot to Permit Marijuana “Cafés” – An “Opt-In” Procedure

- Requirements:
 - petition of not fewer than 10 percent of the number of the voters of the city or town voting at the state election preceding the filing of the petition,
 - Must be presented to the voters of the city or town at the next state election
 - Question of whether to allow the consumption of marijuana and marijuana products on the premises where they are sold (i.e., so-called marijuana “cafés”).
- There is no timeline provided in the law for this type of petition; likely requirement will be for petition to be filed with the Secretary of the Commonwealth no later than the first Wednesday in August.



LOCAL CONTROL — REGULATION, PROHIBITION

Regulation Prohibited or Strictly Limited

- A municipality may not adopt an ordinance or bylaw prohibiting the transportation of marijuana or marijuana products or making such transportation “unreasonably impracticable”.
- Similarly, a municipality may not adopt an ordinance or bylaw prohibiting an establishment that “cultivates, manufactures or sells marijuana products in any area in which a medical marijuana treatment center is registered to engage in the same type of activity”. [Emphasis added].
- The Act contains no definition of “same area”.

LOCAL CONTROL — REGULATION, PROHIBITION

Regulation Prohibited or Strictly Limited

- The Act provides that no agreement between a municipality and a marijuana establishment may contain a payment that is not “directly proportional and reasonably related” to the costs imposed on the municipality by the operation of the recreational marijuana establishment.
- It is not clear what effective this will have on existing Host Community Agreements.

LOCAL CONTROL — REGULATION, PROHIBITION

Zoning Moratoria

- Adopting a zoning bylaw or ordinance establishing a moratorium on the recreational marijuana establishments allows time to study the issue and develop appropriate bylaws and ordinances.
- The Attorney General recently approved a moratorium for Ashland through December 31, 2018.

LOCAL CONTROL — REGULATION, PROHIBITION

Zoning Moratoria

- Municipalities wishing to adopt ordinances or bylaws should have these in place before April 1, 2018.
- For municipalities with registered medical marijuana facilities, however, a moratorium may not be effective in preventing a recreational marijuana establishment “in any area” in which a medical marijuana treatment center is registered to engage in the “same type of activity.”

LOCAL CONTROL — REGULATION, PROHIBITION

Marijuana Related Uses Not “Agriculture”

- Newly enacted Chapter 351 of the Acts of 2016 includes an amendment to the Zoning Act, G.L. c.40A, §3.
- The new language states that the “growing, cultivation, distribution or dispensation of marijuana” does not qualify for the agricultural exemption under the Zoning Act.



LOCAL TAX OPTION



- The Act creates a new Chapter 64N of the General Laws setting tax rates for the sale of recreational marijuana products.
- Section 3 allows cities and towns to impose a local sales tax of up to 2% of the total sales price received by the marijuana retailer as a consideration for the sale of marijuana or marijuana products.
- This will require approval by the municipality's legislative body.

EMPLOYMENT ISSUES

- The new law may also have significant implications for public employers.
- The relevant portion of the law provides:

“This chapter shall not require an employer to permit or accommodate conduct otherwise allowed by this chapter in the workplace and shall not affect the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees.”
- Thus, despite the legalization in Massachusetts of the personal use of marijuana, public employers may continue to prohibit their employees from using or possessing marijuana in the workplace or in public buildings and from working while impaired by marijuana.
- Drug and alcohol testing and related policies should be reviewed and updated or clarified to ensure that such policies will continue to be consistent with the public entity’s desired treatment of marijuana following the change in the law.

EMPLOYMENT ISSUES

Marijuana use is still prohibited under federal law.

Federal law prohibiting the use of marijuana by employees who possess firearms, such as police officers, and those required to hold a Commercial Driver's License, will continue to be in full force and effect notwithstanding the change in Massachusetts law.



QUESTIONS?



CONTACT INFORMATION

Katherine D. Laughman, Esq.

KP Law, P.C.

101 Arch Street, 12th Floor

Boston, MA 02110

(617) 556-0007

klaughman@k-plaw.com



The Leader in Public Sector Law