

Department of Legislative Services
Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 892
Judiciary

(Delegate Impallaria, *et al.*)

Marijuana Laws – Full Disclosure of Legal, Employment, and Health Risks –
Advertisement of Marijuana and Medical Cannabis

This bill requires the Office of the Attorney General (OAG) to establish a public notification system and notify the public of certain risks at least 90 days before the implementation of any law that reduces the penalties for or legalizes the use of marijuana. The bill also prohibits a medical cannabis certifying provider, dispensary, processor, or grower from advertising marijuana or medical cannabis in any manner that is prohibited under federal law for tobacco or tobacco products.

Fiscal Summary

State Effect: General fund expenditures likely increase by at least \$250,000 in any year (or the preceding year) in which a bill triggering the notice requirement is implemented, as discussed below. Revenues are not affected.

Local Effect: None.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: The public notification system must notify the public of risks related to the changes in the law that reduce penalties for or legalizes marijuana. The system must include the creation of a website as well as public service announcements for radio, television, newspapers, and billboards. The notice must state that:

- regardless of the change in Maryland law, a person is still subject to arrest for activity relating to marijuana by the federal government, especially if the activity occurs on federal property or in federal facilities, such as military bases, federal offices, federal parks, airports, and marine terminals;
- testing positive for marijuana use can result in job loss, especially if the job requires State licensing such as those in the medical and transportation industries;
- it will still be unlawful for banks and businesses to do business with someone who is receiving proceeds related to marijuana;
- filing a federal income tax return involving the receipt of proceeds related to marijuana can lead to prosecution for profiting from a federally illegal business, while failure to file an income tax return can also lead to prosecution; and
- there are health risks associated with smoking marijuana.

Current Law: Controlled dangerous substances (CDS) are listed on one of five schedules (Schedules I through V) set forth in statute depending on their potential for abuse and acceptance for medical use. Under the federal Controlled Substances Act, for a drug or substance to be classified as Schedule I, the following findings must be made: (1) the substance has a high potential for abuse; (2) the drug or other substance has no currently accepted medical use in the United States; and (3) there is a lack of accepted safety for use of the drug or other substance under medical supervision.

No distinction is made in State law regarding the illegal possession of any CDS, regardless of which schedule it is on, with the exception of marijuana.

Pursuant to Chapter 158 of 2014, possession of less than 10 grams of marijuana is a civil offense punishable by a fine of up to \$100 for a first offense and \$250 for a second offense. The maximum fine for a third or subsequent offense is \$500. For a third or subsequent offense, or if the individual is younger than age 21, the court must (1) summon the individual for trial upon issuance of a citation; (2) order the individual to attend a drug education program approved by the Maryland Department of Health (MDH); and (3) refer him or her to an assessment for a substance abuse disorder. After the assessment, the court must refer the individual to substance abuse treatment, if necessary.

Chapter 4 of 2016 repealed the criminal prohibition on the use or possession of marijuana paraphernalia and eliminated the associated penalties. The law also established that the use or possession of marijuana involving smoking marijuana in a public place is a civil offense, punishable by a fine of up to \$500.

Chapter 515 of 2016 (also known as the Justice Reinvestment Act) reduced the maximum incarceration penalty for the use or possession of 10 grams or more of marijuana from one year to six months (but retained the maximum fine of up to \$1,000).

Further, pursuant to Chapter 515 of 2016, before imposing a sentence for these offenses, the court is authorized to order MDH, or a certified and licensed designee, to conduct an assessment of the defendant for a substance use disorder and determine whether the defendant is in need of and may benefit from drug treatment. MDH or the designee must conduct an assessment and provide the results, as specified. The court must consider the results of an assessment when imposing the defendant's sentence and, as specified, (1) must suspend the execution of the sentence, order probation, and require MDH to provide the medically appropriate level of treatment or (2) may impose a term of imprisonment and order the Division of Correction within the Department of Public Safety and Correctional Services or a local correctional facility to facilitate the medically appropriate level of treatment.

In a prosecution for the use or possession of marijuana, it is an affirmative defense that the defendant used or possessed the marijuana because (1) the defendant has a debilitating medical condition that has been diagnosed by a physician with whom the defendant has a bona fide physician-patient relationship; (2) the debilitating medical condition is severe and resistant to conventional medicine; and (3) marijuana is likely to provide the defendant with therapeutic or palliative relief from the debilitating medical condition. Likewise, in a prosecution for the possession of marijuana, it is an affirmative defense that the defendant possessed marijuana because the marijuana was intended for medical use by an individual with a debilitating medical condition for whom the defendant is a caregiver; however, such a defendant must notify the State's Attorney of the intention to assert the affirmative defense and provide specified documentation. In either case, the affirmative defense may not be used if the defendant was using marijuana in a public place or was in possession of more than one ounce of marijuana.

Finally, medical necessity may be used as a mitigating factor in a prosecution for the possession or use of marijuana. A defendant who cannot meet the affirmative defense standard for a not guilty verdict may introduce, and the court must consider as a mitigating factor (with regard to penalties on conviction), any evidence of medical necessity. Pursuant to Chapter 351 of 2015, if a court finds that the use or possession of marijuana was due to medical necessity, the court *must dismiss* the charge.

Background: The Judiciary advises that in fiscal 2017, there were 11,521 civil citations and 7,504 guilty dispositions involving the possession of less than 10 grams of marijuana. Additionally, in fiscal 2017, there were 5,192 violations and 168 guilty dispositions in the District Court and 2,289 violations and 303 guilty dispositions in the circuit courts involving the possession of 10 grams or more of marijuana.

Authorization for the medicinal and recreational use of marijuana, as well as decriminalization of small amounts of marijuana, has gained momentum across the country. However, possession of marijuana remains illegal at the federal level, although

states are not obligated to enforce federal marijuana laws and the federal government may not require states to recriminalize conduct that has been decriminalized.

State Marijuana Laws

According to the National Conference of State Legislatures, 29 states (including Maryland), the District of Columbia, Guam, and Puerto Rico have comprehensive public medical cannabis programs. Additionally, another 17 states allow for the use of low-THC (delta-9-tetrahydrocannabinol), high-CBD (cannabidiol) products for medical reasons in limited situations or as a legal defense. Further, 22 states (including Maryland) and the District of Columbia have decriminalized small amounts of marijuana.

As of January 2018, nine states (Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Washington, and Vermont) and the District of Columbia have legalized the recreational use of marijuana. Four of these states (California, Massachusetts, Maine, and Nevada) passed ballot initiatives to legalize recreational use in the November 2016 election. In January 2018, Vermont became the first state to legalize recreational use of marijuana through the legislature (rather than through ballot initiative).

Federal Guidance

The U.S. Department of Justice (DOJ) announced in August 2013 that it would focus on eight enforcement priorities when enforcing marijuana provisions of the Controlled Substances Act. The guidelines also state that, although the department expects states with legalization laws to establish strict regulatory schemes that protect these eight federal interests, the department is deferring its right to challenge their legalization laws.

In February 2014, the U.S. Treasury Department, in conjunction with DOJ, issued marijuana guidelines for banks that serve “legitimate marijuana businesses.” The February 2014 guidelines reiterated that the provisions of money laundering statutes, the unlicensed money remitter statute, and the Bank Secrecy Act remain in effect with respect to marijuana-related conduct. Further, the guidelines state that financial transactions involving proceeds generated by marijuana-related conduct can form the basis for prosecution under these provisions. However, the guidelines also establish that prosecutors should apply the eight enforcement priorities listed in the August 2013 guidance document when deciding which cases to prosecute.

On January 4, 2018, in a memorandum to all U.S. attorneys, Attorney General Jefferson B. Sessions III announced that the aforementioned guidance regarding federal marijuana prosecutions was rescinded, effective immediately. Citing Congress’ determination (through the Controlled Substances Act) that marijuana “is a dangerous drug and that marijuana activity is a serious crime,” the memorandum declared previous DOJ

guidance specific to marijuana enforcement “unnecessary” and instead instructed prosecutors to follow the principles that govern all federal prosecutions, including “federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community,” when deciding which cases to prosecute.

Marijuana Industry Advertising

Maryland does not have advertising restrictions specific to marijuana or the medical cannabis industry. According to a 2017 *Boston Globe* article, most social media sites, online advertising networks, broadcasters, and print publications impose partial or full bans on marijuana content due to concerns about promoting illicit products under federal law; states that have legalized marijuana usually limit advertising by licensed dispensaries, such as by prohibiting advertising on billboards or running commercials on outlets where children may see them.

Federal Restrictions on Tobacco Advertising

According to the U.S. Department of Health and Human Services, health warnings on cigarette packages were first required through the Federal Cigarette Labeling and Advertising Act of 1965. Additionally, the Public Health Cigarette Smoking Act (1970) and the Comprehensive Smokeless Tobacco Health Education Act (1986) banned television/radio advertisement of cigarettes and smokeless tobacco, respectively.

The Family Smoking Prevention and Tobacco Control Act of 2009 instituted numerous advertising restrictions for cigarettes and smokeless tobacco. Specifically, the Act:

- bans outdoor advertising within 1,000 feet of schools and playgrounds;
- bans brand sponsorships of sports and entertainment events;
- limits outdoor and point-of-sale tobacco advertising to black text on white background (except in adult-only facilities);
- limits advertising in publications with significant teen readership to black text on white background; and
- limits audio-visual advertising (at point of sale) to black text on white background visuals and spoken words (*i.e.*, no music or moving images).

In 2016, the U.S. Food and Drug Administration finalized a rule extending its regulatory authority over other tobacco products (such as cigars and e-cigarettes) and components or parts of regulated tobacco products (*e.g.*, e-liquid) and instituted additional advertising requirements. Specifically, by August 10, 2018, advertisements for these products must include certain warning statements.

State Fiscal Effect: Should a bill reducing the penalties for or legalizing the use of marijuana pass, general fund expenditures increase by at least \$250,000 in the fiscal year that the bill passes or in the preceding year, depending on the other bill's effective date. OAG did not provide a specific estimate for this bill but has historically advised that, based on similar public notice systems, such a system likely costs at least \$250,000 for a very basic public notice system in newspapers, on television and radio, and on billboards. Depending on the length and breadth of the system, costs could be significantly higher.

The Department of Legislative Services notes that at least two bills under consideration in the 2018 legislative session would, if adopted, trigger the public notice provisions of this bill. However, one of these bills has an October 1, 2018 effective date, like this bill; therefore, it is unclear how OAG could meet the 90-day pre-implementation deadline set by the bill. Nevertheless, this estimate assumes it is possible to do so.

Small Business Effect: The bill prohibits a medical cannabis certifying provider, dispensary, processor, or grower from advertising marijuana or medical cannabis in any manner that is prohibited under federal law for tobacco or tobacco products. Thus, these entities are subject to new advertising restrictions that may negatively affect business operations and finances.

Additional Information

Prior Introductions: HB 1423 of 2016, a similar bill, received an unfavorable report from the House Judiciary Committee. HB 433 of 2015, a similar bill, received a hearing in the House Judiciary Committee, but no further action was taken. HB 889 of 2014, a similar bill, also received a hearing in the House Judiciary Committee, but no further action was taken.

Cross File: None.

Information Source(s): Office of the Attorney General; U.S. Department of Health and Human Services; U.S. Food and Drug Administration; Tobacco Control Legal Consortium; *Boston Globe*; Department of Legislative Services

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