

Department of Legislative Services
Maryland General Assembly
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FISCAL AND POLICY NOTE
First Reader

Senate Bill 1039
(Senator Smith, *et al.*)
Judicial Proceedings

Constitutional Amendment - Cannabis - Use, Possession, Cultivation, and Sale

This proposed constitutional amendment, if approved by the voters at the next general election, establishes the right under State law for an individual who is at least age 21 to (1) use cannabis; (2) possess up to one ounce of cannabis and up to five grams of cannabis in concentrated form at any one time; (3) cultivate up to six cannabis plants and up to three mature and flowering plants at any one time; (4) possess all cannabis personally cultivated; and (5) share, without receiving anything of value, up to five grams of cannabis with another individual who is at least age 21. The General Assembly and Comptroller must develop a system to regulate the commercial production and distribution of cannabis, including licensing and taxation, as specified.

Fiscal Summary

State Effect: Significant decrease in general fund revenues and expenditures due to the nullification of criminal penalties. Significant decrease in special fund revenues and expenditures due to the nullification of civil penalties. Potential significant increase in special fund revenues and expenditures due to potential licensing and taxation structures.

Local Effect: Significant decrease in local revenues and expenditures due to the nullification of civil and criminal penalties.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Limitations of Constitutional Right

An employer is not required to allow or accommodate the use or possession of cannabis by an employee in the workplace, nor is an employer prohibited from taking adverse actions for violations of workplace drug policies.

The constitutional right does not apply to laws relating to driving while impaired or under the influence of cannabis or while consuming cannabis, nor does it apply to laws prohibiting or regulating the public smoking of cannabis except for specified exemptions. A person is not prohibited from regulating the use, display, or cultivation of cannabis in or on property that the person owns, occupies, or controls. The constitutional right also does not limit any privilege, right, immunity, or defense provided under the State medical cannabis program.

The constitutional right does not require a person or entity to violate federal law, as specified.

Regulation – Licensing and Taxation

Laws and regulations regarding the commercial production and distribution of cannabis must be for specified purposes, including the prevention of illicit markets and distribution to those younger than age 21 and to ensure diversity among cannabis businesses. Laws and regulations must also include certain requirements, including requirements relating to cannabis testing, labeling, packaging, tracking, and marketing.

License and application fees must be set so as to adequately cover the cost of administration and enforcement. The Comptroller may control the production and distribution of cannabis, such as by conducting investigations and inspections. The Comptroller must issue temporary licenses as soon as practicable to licensed medical cannabis businesses in the State to allow these businesses to cultivate, process, and sell cannabis to individuals who are at least age 21. If the Comptroller fails to issue such licenses by June 1, 2019, a licensed medical cannabis business may begin cultivating, processing, or selling cannabis for commercial purposes without being subject to any penalties or sanctions.

The General Assembly must establish a rate of cannabis taxation that maximizes revenue while minimizing the size of the illicit market for cannabis, delaying initial use of cannabis, and discouraging problematic use of cannabis.

If the General Assembly or Comptroller fails to enact such laws and regulations by December 31, 2019, a Maryland citizen has a direct right of action to compel the General Assembly or Comptroller to do so.

Local Jurisdictions

For cannabis businesses within their boundaries, local jurisdictions may (1) control zoning; (2) limit the number of such businesses; (3) prohibit such businesses, with voter approval; (4) regulate the time, place, and manner of business operations; and (5) permit the establishment of businesses that allow on-site cannabis consumption.

The General Assembly may require a vote of the electors within a local jurisdiction to impose a ban on retail cannabis stores.

Current Law:

Criminal Law Provisions Related to Marijuana

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.

Maryland's Medical Cannabis Program

Chapter 403 of 2013 established, Chapters 240 and 256 of 2014 expanded, and Chapter 251 of 2015 and Chapter 474 of 2016 further modified the State's medical cannabis program. The Natalie M. LaPrade Medical Cannabis Commission administers the program, which

makes medical cannabis available to qualifying patients and their caregivers legally under State law via written certification. The commission comprises 16 members, including the Secretary of Health, with 15 members appointed by the Governor. Commission members may not receive compensation, but they are entitled to standard reimbursement for travel.

A qualifying patient with a written certification can obtain a 30-day supply of medical cannabis, which is defined as 120 grams of usable cannabis. The first medical cannabis was available for sale in the State in late 2017. The program allows for the licensure of growers, processors, and dispensaries and the registration of their agents, as well as registration of independent testing laboratories and their agents. For more information regarding the commission and Maryland's medical cannabis program, please see the **Appendix – Medical Cannabis**.

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.

State Fiscal Effect: Although not specifically defined in the bill, this analysis assumes “cannabis” encompasses all existing references to “marijuana” under State law. Therefore, the rights established under the proposed constitutional amendment render certain existing penalties, both civil and criminal, regarding the use, possession, or cultivation of cannabis null and void. The bill specifically allows possession of only up to one ounce (28 grams) of cannabis at any one time and cultivation of up to six cannabis plants at any one time. The bill also allows possession of up to 5 grams of cannabis in “concentrated form.” “Concentrated form” is not defined in the bill.

This analysis assumes that possession of more than 28 grams of cannabis and cultivation of more than six cannabis plants are still subject to criminal penalties under the bill. Possession of “concentrated cannabis” is not a specific offense under existing law; thus, it

is unclear whether possession of more than 5 grams of concentrated cannabis is also subject to criminal penalties under the bill.

Thus, this analysis assumes that the following criminal offenses still apply under the bill:

- possession of more than 28 grams of marijuana;
- manufacture, distribution, dispensing, or possession of 50 pounds or more of marijuana (more stringent penalty with mandatory minimum imprisonment of 5 years and a fine of up to \$100,000);
- conspiracy by a drug kingpin to manufacture, distribute, dispense, transport in, or bring into the State 50 pounds or more of marijuana (felony with imprisonment of between 20 years and 40 years and/or a fine of up to \$1 million);
- importation of 45 kilograms or more of marijuana (felony subject to imprisonment of up to 25 years and/or a fine of up to \$50,000); and
- importation of between 5 kilograms and 45 kilograms of marijuana (felony subject to imprisonment of up to 10 years and/or a fine of up to \$10,000).

However, this analysis also assumes that most of the 168 convictions in the District Court and 303 convictions in the circuit courts for possession of 10 grams or more of marijuana involved less than 28 grams of marijuana, and thus would not be subject to criminal penalties under the bill. Possession of 10 grams or more of marijuana is a misdemeanor subject to imprisonment for up to six months and/or a fine of up to \$1,000. Therefore, general fund revenues and expenditures decrease significantly beginning in fiscal 2019 as a result of the nullification of the criminal penalties for possession of 10 grams or more, but less than 28 grams, of cannabis.

Special fund revenues and expenditures for MDH decrease significantly beginning in fiscal 2019 due to the District Court no longer remitting collected penalties from civil citations for use or possession of less than 10 grams of marijuana to MDH for drug treatment and education programs. The penalties for this offense range from \$100 to \$500. Revenue to the fund totaled \$525,513 in fiscal 2017; the projected revenue for fiscal 2019 is \$550,000.

The proposed constitutional amendment also requires the General Assembly and the Comptroller to regulate the commercial distribution of cannabis, including licensing and taxation. Licensing and application fees must be set so as to adequately cover the cost of administration and enforcement. Further, if the laws and regulations are not enacted by December 31, 2019, a citizen may compel enactment through a direct action. Therefore, special fund revenues and expenditures for the Comptroller increase, potentially significantly, beginning in fiscal 2019 from tax and fee revenues and corresponding expenditures for implementation. The Comptroller advises that additional staff are likely

needed to implement such requirements. The extent of any increase depends on the specific tax and licensing structures ultimately adopted.

The bill also requires the Comptroller to issue temporary licenses to licensed medical cannabis entities to commercially cultivate, process, and sell cannabis to individuals who are at least age 21. This analysis assumes that the proposed constitutional amendment does not significantly affect licensing fee revenues or expenditures under the State's medical cannabis program, as such entities must already be licensed under the State's medical cannabis program in order to commercially distribute cannabis. However, the actual effect may vary depending on the licensing structure ultimately developed for commercial cannabis establishments, including whether medical cannabis establishments are authorized to continue to distribute cannabis commercially and whether such establishments choose to remain licensed as medical cannabis establishments or become licensed as commercial cannabis establishments.

Local Revenues: Local revenues decrease significantly beginning in fiscal 2019 due to the nullification of civil and criminal penalties for the use of marijuana and the possession or cultivation of specified amounts of cannabis for those cases heard in the circuit courts.

Local Expenditures: Expenditures decrease significantly beginning in fiscal 2019 as a result of the bill's elimination of the incarceration penalty for the use or possession of 10 grams or more, but less than 28 grams, of cannabis and fewer individuals being committed to local detention facilities. Counties pay the full cost of incarceration for people in their facilities for the first 12 months of the sentence. A \$45 per diem State grant is provided to each county for each day between 12 and 18 months that a sentenced inmate is confined in a local detention center. Counties also receive an additional \$45 per day grant for inmates who have been sentenced to the custody of the State but are confined in or who receive reentry or other prerelease programming and services from a local facility. Per diem operating costs of local detention facilities have ranged from approximately \$40 to \$170 per inmate in recent years.

Small Business Effect: The proposed constitutional amendment authorizes licensed medical cannabis establishments to commercially distribute cannabis. As noted previously, the extent of the impact of the proposed constitutional amendment on the State's medical cannabis program depends on the licensing and regulatory structure ultimately adopted. The proposed constitutional amendment could also create additional business opportunities for other entities that seek to cultivate, process, and sell cannabis. Such entities may compete with existing medical cannabis establishments in the commercial market.

Additional Information

Prior Introductions: SB 891 of 2017, a bill with similar provisions, received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken. Its cross file, HB 1236, received a hearing in the House Judiciary Committee, but no further action was taken. HB 665 of 2016, another bill with similar provisions, received an unfavorable report from the House Judiciary Committee.

Cross File: Although designated as a cross file, HB 1264 (Delegate Moon, *et al.* – Judiciary) is not identical.

Information Source(s): Montgomery and Prince George's counties; Maryland Association of Counties; City of Bowie; Maryland Municipal League; Comptroller's Office; Maryland State Commission on Criminal Sentencing Policy; Office of the Public Defender; Maryland State's Attorneys' Association; Maryland Department of Health; Department of Public Safety and Correctional Services; Maryland State Board of Elections; Judiciary (Administrative Office of the Courts); National Conference of State Legislatures; U.S. Department of Justice; Department of Legislative Services

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Appendix – Medical Cannabis

Natalie M. LaPrade Medical Cannabis Commission

The Natalie M. LaPrade Medical Cannabis Commission is responsible for implementation of the State's medical cannabis program, which is intended to make medical cannabis available to qualifying patients in a safe and effective manner. The program allows for the licensure of growers, processors, and dispensaries and the registration of their agents, as well as registration of independent testing laboratories and their agents. There is a framework to certify health care providers (including physicians, dentists, podiatrists, nurse practitioners, and nurse midwives), qualifying patients, and their caregivers to provide qualifying patients with medical cannabis legally under State law via written certification.

Medical cannabis may only be obtained from a grower or dispensary licensed by the commission, and the commission may license no more than 15 growers. However, beginning June 1, 2018, the commission may issue the number of grower licenses necessary to meet demand for medical cannabis by qualifying patients and caregivers in an affordable, accessible, secure, and efficient manner. There is no established limit on the number of processor licenses in statute or regulation, but the commission chose to limit the initial number to 15. While there is no specific restriction on the number of dispensaries in statute, regulations set a limit of 2 dispensary licenses per senatorial district or up to 94 dispensary licenses statewide.

License Application Process

The commission is required to actively seek to achieve racial, ethnic, and geographic diversity when licensing growers and to encourage such applicants who qualify as a minority business enterprise (MBE). There is no requirement for the commission to seek to achieve racial, ethnic, and geographic diversity when licensing processors, but there is such a statutory requirement for dispensaries. There is no requirement to encourage applicants who qualify as an MBE for either processor or dispensary licenses.

The commission opened applications for grower, processor, and dispensary licenses in September 2015. Towson University's Regional Economic Studies Institute (RESI) was commissioned to review grower and processor applications through a double-blind review process in which all identifying information was redacted. The scoring system authorized the commission to take into account the geographic location of the growing operation to ensure geographic diversity in the award of licenses. The scoring system did not include a consideration of race, based on a letter from the Office of the Attorney General stating that

constitutional limits prohibited the consideration of race or ethnicity for licensing when there is no disparity study that indicates past discrimination in similar programs.

In August 2016, the commission announced the 15 growers and 15 processors who were awarded Stage One license pre-approvals. The evaluation procedures to be used in the award of dispensary licenses were adopted by the commission in November 2016, and the commission announced 102 dispensaries who were awarded Stage One license pre-approvals in December 2016 (this number included 10 pre-approvals issued to applicants who also received grower license pre-approvals). All of the Stage One pre-approvals awarded in 2016 have 365 days from the date of pre-approval notification to complete all necessary steps to obtain final licensure. Should an awardee fail to do so, the commission has the authority to not issue a final license.

Controversy Over Geographic, Racial, and Ethnic Diversity

Since the award announcements, there has been significant controversy surrounding two main issues: the decision to include geographic diversity as a final factor in choosing the grower finalists; and the fact that none of the 15 Stage One approved grower finalists is led by minorities.

Geographic diversity became an issue when two companies among the top 15 ranked growers did not receive pre-approval after being replaced by other companies in order to provide geographic representation throughout the State. In July 2016, a subcommittee of the commission unanimously voted to preliminarily approve the top 15 growers based on the RESI scoring, which did not include a consideration of location. Afterward, the subcommittee reversed its vote, which resulted in two lower-ranked firms being moved into the top 15 growers in order to achieve geographic diversity. The two companies that were initially included in the top 15 growers but later removed are suing the commission, claiming that the determination of how geographic diversity was to be considered was unclear to applicants. In addition, none of the top 15 growers is minority owned, which prompted a lawsuit by an African American-owned company that was denied a grower license seeking to halt the medical cannabis program until the commission takes action to ensure racial and ethnic diversity among licensed growers.

A number of bills relating to the composition of the commission and the number of grower and processor licenses, as well as licensing criteria and the approval process, were introduced during the 2017 legislative session. However, none of these bills passed.

In April 2017, Governor Lawrence J. Hogan directed the then Governor's Office of Minority Affairs to initiate a disparity study of Maryland's regulated medical cannabis industry to be conducted by the Maryland Department of Transportation (MDOT) in cooperation with the commission. According to MDOT, the study is underway, and will

be completed by early 2018. Additionally, in July 2017, Governor Hogan announced nine new appointments to the commission; of these, three appointments filled vacancies, and six replaced commissioners whose terms had expired. As a result of these appointments, minority representation on the commission doubled.

The chair of the commission has stated that the commission is committed to seeking and promoting racial diversity and minority inclusion and will continue to work with the legislature to help solve these complex problems, but it does not want to further delay the program. At its October 3, 2017 meeting, the commission announced that, as a result of discussions with the Legislative Black Caucus, it intended to form a minority affairs subcommittee to help address some caucus concerns; this committee has since been formed.

Status of Medical Cannabis Implementation

As detailed in its annual report, the commission had issued final licenses for 14 growers, 12 processors, and 22 dispensaries by year-end 2017. Additionally, the commission had approved one-year provisional registrations for four independent testing laboratories. The commission maintains a list of licensees on its website, which can be found at <http://mmcc.maryland.gov/Pages/industry.aspx>. The first medical cannabis in the State was available for sale in late 2017, and at least seven dispensaries planned to be open for business by January 2018.