

Department of Legislative Services
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FISCAL AND POLICY NOTE
First Reader

House Bill 632
Judiciary

(Delegate Moon, *et al.*)

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 the Comptroller must develop a system to regulate the commercial production and distribution of cannabis, including licensing and taxation, as specified.

Fiscal Summary

State Effect: If approved by the voters at the next general election, 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, 2021, a licensed medical cannabis business may begin cultivating, processing, or selling cannabis for commercial purposes without being subject to any penalties or sanctions.

A temporary license that is issued to a medical cannabis business expires on the issuance of a new license. Laws and regulations that are adopted in accordance with the proposed constitutional amendment may not limit the issuance of licenses to only medical cannabis businesses.

The transfer of cannabis by purchase or sale must be regulated to ensure health and safety and taxed. Revenues from the taxation of cannabis must be used for the following specified purposes: (1) public school construction and capital improvement; (2) public school education; (3) substance abuse treatment and prevention; (4) recidivism reduction and reentry services; and (5) mental health services.

If the General Assembly or the Comptroller fails to enact such laws and regulations by December 31, 2021, a Maryland citizen has a direct right of action to compel the General Assembly or the 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 \$1,000 fine).

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.

Chapter 801 of 2017 expands eligibility for expungements to include a conviction for possession of marijuana under § 5-601 of the Criminal Law Article. A petition for expungement under this law may not be filed within four years after the conviction or satisfactory completion of the sentence, including probation, that was imposed for the conviction, whichever is later.

Maryland's Medical Cannabis Program

The Natalie M. LaPrade Medical Cannabis Commission administers the State's medical cannabis 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, but commission membership is reduced to 13 effective October 1, 2019.

A qualifying patient with a written certification can obtain a 30-day supply of medical cannabis, which is generally 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. Additionally, recent legislation extended legal protections to third-party vendors authorized by the commission to test, transport, or dispose of medical cannabis, medical cannabis products, and medical cannabis waste. 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 2018, there were 1,867 violations and 117 guilty dispositions in the District Court and 1,486 violations and 326 guilty dispositions in the circuit courts for the possession of 10 grams or more of marijuana. Additionally, there were 17,584 civil citations filed in the District Court for possession of less than 10 grams 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, 33 states (including Maryland), the District of Columbia, Guam, and Puerto Rico have comprehensive public medical cannabis programs. Additionally, another 13 states allow for the use of low THC, 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 2019, 10 states (Alaska, California, Colorado, Maine, Massachusetts, Michigan, 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 Dangerous 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. Then, on January 4, 2018, in a memorandum to all U.S. attorneys, former Attorney General Jefferson B. Sessions III announced that the aforementioned guidance regarding federal marijuana prosecutions was rescinded, effective immediately.

In February 2014, the U.S. Treasury Department, in conjunction with DOJ, issued separate 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. The U.S. Treasury Department has not revised this guidance in response to DOJ’s revocation of the August 2013 guidelines in January 2018.

State Fiscal Effect: This analysis assumes approval of the constitutional amendment by the voters in the next general election to be held in November 2020.

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 five 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 five grams of concentrated cannabis is also subject to criminal penalties under the proposed amendment.

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

- 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 117 convictions in the District Court and 326 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 proposed amendment. This also applies to the 239 individuals who were subject to probation supervision by the Division of Parole and Probation in 2018, to the extent that they were under supervision for use or possession of at least 10 grams, but less than 28 grams, of marijuana. 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 2021 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 2021 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 \$604,343 in fiscal 2018; the projected revenue for fiscal 2020 is \$700,000.

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, 2021, a citizen may compel enactment through a direct action. Therefore, special fund revenues and expenditures for the Comptroller increase, potentially significantly, beginning in fiscal 2021 from tax and fee revenues and corresponding expenditures for implementation, including the use of tax revenues to support specified purposes. (Although the bill does not establish a special fund, it is assumed that any revenues generated from taxes and fees are treated as special fund revenues.) 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. However, any subsequently adopted licensing structure may not restrict the issuance of new licenses to only medical cannabis establishments. 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 choose 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 2021 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 2021 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: HB 1264 of 2018, a similar bill, received a hearing in the House Judiciary Committee, but no further action was taken. Its cross file, SB 1039, received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken. SB 891 of 2017, another 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: None.

Information Source(s): Charles and Montgomery counties; Maryland Association of Counties; City of Havre de Grace; Maryland Municipal League; Comptroller's Office; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland State's Attorneys' Association; Maryland State Department of Education; Public School Construction Program; Maryland Department of Health; Department of Public Safety and Correctional Services; Department of State Police; Maryland Department of Transportation; Maryland State Board of Elections; U.S. Department of Justice; National Conference of State Legislatures; Department of Legislative Services

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mm/kdm

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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. Additionally, recent legislation extended legal protections to third-party vendors authorized by the commission to test, transport, or dispose of medical cannabis, medical cannabis products, and medical cannabis waste. In December 2018, the commission proposed regulations that require registration of secure transportation companies and address the shipment of products between licensees.

Controversy Over Geographic, Racial, and Ethnic Diversity

In August 2016, the commission announced the award of 15 grower and 15 processor Stage One license pre-approvals. In December 2016, the commission announced the award of 102 dispensary Stage One license pre-approvals. After the award announcements, significant controversy involved two main issues: the decision to include geographic diversity as a final factor in choosing the grower finalists and the absence of any minority-led grower among the 15 Stage One approved grower finalists.

Legislation to alter the commission and medical cannabis industry was introduced during the 2017 and 2018 sessions. Chapter 598 of 2018, an emergency bill, made a number of significant reforms including (1) requiring outreach to encourage participation in the medical cannabis industry by small, minority, and women business owners; (2) requiring the commission to promulgate emergency remedial regulations based on the results of a disparity study and delay reviewing, ranking, or evaluating license applications until the regulations are adopted; (3) raising the statutory cap on grower licenses from 15 to 22; (4) establishing a new license cap of 28 processors; and (5) requiring the commission to report to the General Assembly regarding potential rules and regulations governing marketing and advertising practices for licensees by January 1, 2019.

Pursuant to Chapter 598, in December 2018, the commission announced five grant awards to educational and business development organizations to develop medical cannabis educational and business development training programs. The programs are designed to

provide training and assistance to small, minority, and women business owners and entrepreneurs seeking to become licensed in Maryland's medical cannabis industry.

Evaluation of Disparity Study and Conclusions

The disparity study evaluated in accordance with Chapter 598 concluded that there is a compelling interest to implement remedial measures to assist minorities and women seeking to participate in the medical cannabis industry. Based on these findings, the commission submitted emergency regulations in October 2018. The regulations alter the application review process for obtaining a medical cannabis grower, processor, and dispensary license by implementing remedial measures to assist minorities and women in the medical cannabis industry. The regulations also alter the current weighted criteria used when ranking applicants for licenses to include certain race-neutral and race-conscious provisions, addressing the needs of women and minority-owned applicants.

License and Ownership Transfers

Chapter 598 of 2018 also addressed the sale or transfer of ownership for regulated medical cannabis entities. Specifically, a medical cannabis grower, processor, or dispensary license holder may only transfer ownership of a license if the licensee was physically and actively engaged in cultivating, processing, or dispensing medical cannabis for at least two years immediately preceding the sale or transfer. Regulations require licensed growers, processors, and dispensaries to (1) notify the commission of any proposed transfer of 5% or more of an ownership interest; (2) submit criminal history and audited financial information for the potential owner or transferee; (3) obtain written commission approval of the transfer; and (4) pay a transfer fee. Statute prohibits the commission from issuing more than one medical cannabis grower license to each applicant. Regulations specify that license applicants may only have an interest in one of each type of license. In February 2018, the commission issued a [bulletin](#) highlighting rules related to the sale or transfer of a medical cannabis license. The bulletin also addressed third-party management agreements, which some licensees have entered into to allow third parties to contract to operate the licensee's business without possessing an ownership stake.

Status of Medical Cannabis Implementation

As of January 9, 2019, the commission issued 15 final and 3 pre-approved grower licenses; 16 final and 2 pre-approved processor licenses; and 71 final and 31 pre-approved dispensary licenses. Additionally, the commission has registered five independent laboratories. The commission maintains a list of licensees on its [website](#). Furthermore, there were 79,427 registered patients, 54,236 certified patients, 4,890 caregivers, and 1,243 certifying providers. The commission reported that, in the first 13 months of sales, there were \$112.1 million in retail sales at medical cannabis dispensaries in the State.