

Department of Legislative Services
Maryland General Assembly
2022 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

Senate Bill 788

(Senator Feldman)

Finance

Health and Government Operations and
Judiciary

Cannabis - Regulation - Delta-8- and Delta-10-Tetrahydrocannabinol

This bill prohibits a person who distributes products containing delta-8- or delta-10-tetrahydrocannabinol (THC), including a specified person licensed under the Business Regulation Article, from distributing, purchasing for sale, or selling a product containing delta-8- or delta-10-THC to an individual younger than age 21. A person who violates the prohibition is guilty of a misdemeanor and subject to a fine of up to (1) \$300 for a first violation; (2) \$1,000 for a second violation within two years; and (3) \$3,000 for each subsequent violation within two years of a preceding violation. The Natalie M. LaPrade Medical Cannabis Commission (MMCC), in consultation with the Maryland Department of Agriculture (MDA) and specified other representatives, must study and make recommendations on the classification and regulation of THCs, other than delta-9-THC, that are artificially, synthetically, or naturally derived, and manufactured products containing delta-8- and delta-10-THC. MMCC must report its findings and recommendations to the Governor and specified committees of the General Assembly by January 1, 2023. The bill also codifies the existing definition of “medical cannabis” that is established in MMCC regulations. **The bill takes effect July 1, 2022.**

Fiscal Summary

State Effect: Potential minimal increase in general fund revenues due to the bill’s penalty provisions for those cases heard in the District Court. MMCC can complete the study and submit recommendations, and MDA can consult on the study, with existing budgeted resources.

Local Effect: Potential minimal increase in revenues due to the bill’s penalty provisions for those cases heard in the circuit courts. No effect on expenditures.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Prohibition on Distributing Delta-8- or Delta-10-THC Products

The bill's prohibition applies to a person who distributes products containing delta-8- or delta-10-THC, including a licensed cigarette business, a person licensed to sell cigarettes at retail in a county, a licensed other tobacco products (OTP) manufacturer, a licensed OTP retailer, a licensed OTP storage warehouse, a licensed OTP wholesaler, a licensed tobacconist, an electronic smoking devices (ESD) manufacturer, an ESD retailer, an ESD wholesaler, an ESD wholesaler importer, a vape shop vendor, or a person with any miscellaneous State business license issued under Title 17 of the Business Regulation Article.

In a prosecution for the misdemeanor of distributing delta-8- or delta-10-THC products to an individual younger than age 21, it is a defense that the defendant examined the individual's driver's license (or other valid identification issued by a governmental unit) that positively identified the individual as being at least age 21.

A person who distributes or sells a product containing delta-8- or delta-10-THC and owns, manages, or operates any website must employ a neutral age-screening mechanism that verifies the user is at least age 21 (including by using an age-gate, age-screen, or age-verification mechanism).

Medical Cannabis – Defined

“Medical cannabis” means all parts of any plant of the genus *Cannabis* (whether or not the plant is growing), including (1) the seeds of the plant; (2) the resin extracted from the plant; and (3) any compound, manufactured product, salt, derivative, mixture, or preparation of the plant, its seeds, or resin, including THC and all other naturally produced cannabinol derivatives, whether produced directly or indirectly by extraction.

“Medical cannabis” does not include (1) the mature stalks of the plant or fiber produced from mature stalks; (2) oil or cake made from the seeds of the plant; (3) any other compound, manufactured product, salt, derivative, mixture, or preparation of the mature stalks, fiber, oil, or cake; (4) the sterilized seed of the plant that is incapable of germination; or (5) hemp as defined under the Agriculture Article.

Current Law:

Agriculture Article – Hemp

“Hemp” means the plant *Cannabis sativa* L. and any part of that plant, including all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9-THC concentration that does not exceed 0.3% on a dry weight basis. “Hemp” does not include any plant or part of a plant intended for a use that is regulated by MMCC. “Hemp product” means a product derived from hemp produced in accordance with the Agriculture Article, including the requirement that a person be licensed by MDA or the Secretary of the U.S. Department of Agriculture (USDA) before producing hemp.

A person may not knowingly (1) fail to comply with MDA’s plan for monitoring and regulating the production of hemp; (2) misrepresent or fail to provide the legal description of land on which hemp is produced; (3) produce hemp without a valid license; or (4) produce plants or parts of a plant that exceed a delta-9-THC concentration of 0.3% on a dry weight basis. MDA must report a person that knowingly violates the above prohibitions to the Attorney General and the U.S. Attorney.

Hemp Farming Program: The purpose of the Hemp Farming Program is to (1) promote the production of hemp in the State; (2) promote the commercial sale of hemp products; (3) facilitate the research of hemp and hemp products between institutions of higher education and the private sector; and (4) monitor and regulate the production of hemp in the State. A person may not produce hemp in the State unless the person is licensed by MDA or the U.S. Secretary of Agriculture. MDA published regulations to implement the program that took effect November 1, 2020. Among other things, the regulations authorize MDA to conduct both annual and unannounced inspections and to collect samples of hemp. An application to grow hemp under the Hemp Farming Program must contain certain specified information, including siting location, a legal description, and global positioning system coordinates for the land where the hemp operation is proposed. Applications must also specify whether the hemp will be grown indoors or outdoors. Applicants must also provide documentation showing the applicant has a legal right to cultivate hemp on the land and the legal authority to grant MDA access for inspections and sampling. Growers must reapply for licensure annually.

The regulations require MDA to conduct annual inspections of, at a minimum, a random sample of licensed growers and collect regulatory samples of hemp to verify that hemp is being produced in accordance with State law. Additionally, if MDA has reason to believe that a program violation is occurring, the department may conduct additional regulatory inspections as it deems appropriate.

Hemp Research Pilot Program: The federal Agriculture Improvement Act of 2018 (2018 Farm Bill) altered certain federal authority relating to the production and marketing of hemp and removed hemp from the federal Controlled Substances Act. Under the 2018 Farm Bill, cannabis plants and derivatives that contain no more than 0.3% delta-9-THC on a dry weight basis are no longer controlled substances under federal law. The 2018 Farm Bill directed USDA to develop a program to review and approve plans submitted by each state, territory, and Indian tribal agency outlining their production of hemp for commercial uses.

Chapters 475 and 476 of 2018 established the Hemp Research Pilot Program in Maryland that is administered by MDA. Chapter 228 of 2019 expanded upon the pilot program and established a regulatory framework for the commercial production of hemp in the State in conjunction with the federal changes from the 2018 Farm Bill. USDA published guidance on state hemp farming plans at the end of calendar 2019. MDA promulgated regulations in late 2020, as stated above, that brought the State into compliance with the 2018 Farm Bill and established industrial hemp as an agricultural commodity.

Criminal Law Article – Marijuana

“Marijuana” means (1) all parts of any plant of the genus *Cannabis* (whether or not the plant is growing); (2) the seeds of the plant; (3) the resin extracted from the plant; and (4) each compound, manufactured product, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin.

“Marijuana” does not include (1) the mature stalks of the plant; (2) fiber produced from the mature stalks; (3) oil or cake made from the seeds of the plant; (4) except for resin, any other compound, manufactured product, salt, derivative, mixture, or preparation of the mature stalks, fiber, oil, or cake; (5) the sterilized seed of the plant that is incapable of germination; or (6) hemp as defined under the Agriculture Article.

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. Marijuana is listed on Schedule I. 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.

Possession of *10 grams or more* of marijuana is a misdemeanor, punishable by imprisonment for up to six months and/or a fine of up to \$1,000.

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; and (3) refer the individual 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.

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 assisting the person for whom the defendant is a caregiver in 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 may introduce, and the court must consider as a mitigating factor (with regard to penalties on conviction), any evidence of medical necessity. If a court finds that the use or possession of marijuana was due to medical necessity, the court *must dismiss* the charge.

Health General Article – Medical Cannabis

“Medical cannabis” is not defined in the Health-General Article for purposes of the State's medical cannabis program. Instead, pursuant to Code of Maryland Regulations

10.62.01.01, “medical cannabis” means (1) all parts of any plant of the genus Cannabis (whether or not the plant is growing); (2) the seeds of the plant; (3) the resin extracted from the plant; (4) each compound, manufactured product, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin; and (5) any other naturally produced cannabinol derivative, whether produced directly or indirectly by extraction.

“Medical cannabis” does not include (1) the mature stalks of the plant; (2) fiber produced from the mature stalks; (3) oil or cake made from the seeds of the plant; (4) except for resin, any other compound, manufactured product, salt, derivative, mixture, or preparation of the mature stalks, fiber, oil, or cake; (5) the sterilized seed of the plant that is incapable of germination; or (6) hemp as defined under the Agriculture Article.

Natalie M. LaPrade Medical Cannabis Commission: MMCC 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, nurse midwives, and physician assistants), qualifying patients, and their caregivers to provide qualifying patients with medical cannabis legally under State law via written certification. Additionally, there are legal protections for third-party vendors authorized by the commission to test, transport, or dispose of medical cannabis, medical cannabis products, and medical cannabis waste.

Status of Medical Cannabis Implementation: Statute limits the number of grower and processor licenses the commission can issue, and regulations establish a limit on the number of dispensary licenses. Specifically, the commission can issue 22 grower, 28 processor, and 102 dispensary licenses. At the close of calendar 2021, the commission had issued 19 final grower licenses, 20 final processor licenses, and 95 final dispensary licenses. In addition, there are three licensed independent testing laboratories. The commission maintains a list of licensees on its [website](#). Also, at the close of calendar 2021, there were 148,129 certified patients, 12,939 caregivers, and 1,511 certifying providers. The commission additionally reports a preliminary total of \$564.8 million in retail sales at cannabis dispensaries in the State for calendar 2021.

State Revenues: General fund revenues may increase minimally under the bill’s monetary penalty provisions for those cases heard in the District Court. The number of people convicted of this proposed crime is expected to be minimal.

Local Revenues: Revenues may increase minimally under the bill’s monetary penalty provisions from cases heard in the circuit courts.

Small Business Effect: A small business may sell delta-8- and/or delta-10-THC products to individuals who are at least age 21, subject to the bill's requirements. Further, a small business is exposed to criminal liability for a violation of the bill's prohibition against selling the specified products to an individual younger than age 21. A small business that owns, manages, or operates a website must also comply with the bill's age verification requirements.

Additional Information

Prior Introductions: None.

Designated Cross File: HB 1078 (Delegate Pena-Melnyk, *et al.*) - Health and Government Operations and Judiciary.

Information Source(s): Judiciary (Administrative Office of the Courts); Maryland Department of Health; Maryland Department of Agriculture; Department of Legislative Services

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