

MAHIB



Assisting Massachusetts Boards of Health through training, technical assistance and legal education

December 11, 2016

RE: **The Regulation and Taxation of Marijuana Act ***

On November 8, 2016, Massachusetts voters approved a ballot petition legalizing the recreational use of marijuana by persons over the age of 21. The purpose of the act is to regulate the production and distribution of marijuana for recreational use and tax sales in a manner similar to the regulation of the sale and distribution of alcohol. The effective date of the law is December 15, 2016.

The Act establishes a “Cannabis Control Commission”, (“CCC”) appointed by the State Treasurer. The CCC is authorized to regulate and license retail establishments selling marijuana for recreational use. However, despite the effective date of December 15th for personal use and home growing, no regulations have yet been promulgated. The Act does not address municipal boards of health ability to license, regulate and inspect establishments selling marijuana and marijuana products, such as edibles for recreational use.

EFFECTS OF LAW AT LOCAL LEVEL

1. Taxation:

The Act authorizes the imposition of a state excise tax on the sale of marijuana or marijuana products by retailers at a rate of 3.75 percent of the total sales price. This tax is in addition to the regular sales tax imposed on the sale of property or services by the Commonwealth.

Under Section 3 of the newly enacted Chapter 64N, a municipality may also impose a local sales tax on the retail sale of marijuana or marijuana products at a rate not

greater than 2 per cent of the total sales price. The local sales tax is paid to the Commissioner of the CCC at the same time and manner as the state taxes are paid. The sums received by the Commissioner, upon his/her certification, shall be paid quarterly by the State Treasurer to the appropriate municipality. It should be noted that the Act requires local acceptance of this section.

2. Limitations on Time, Manner and Place

- a. Public Buildings:** Under the Act, cities and towns are authorized to prohibit or otherwise regulate the possession or consumption of marijuana in buildings owned or lease by them.
- b. Schools:** The Act prohibits the possession or consumption of marijuana or accessories on the grounds or within the premises of public or private schools where children attend classes from preschool through grades 12.
- c. Correctional Facilities:** The possession of marijuana and accessories are not authorized on the grounds of or within any correctional facility.

3. Employment Issues:

As with alcohol, a public employer may enact policies prohibiting their employees from consuming or possessing marijuana in the workplace and from working while impaired. Personnel policies should be reviewed and updated if necessary to be consistent with the changes in the law. Police departments should be aware that Federal Law still prohibits employees who use firearms or those with Commercial Driver's licenses from using marijuana.

4. Health and Enforcement Issues:

The Act defines marijuana, hemp and marijuana accessories which may be helpful to local boards of health in implementing local regulations.

Local law enforcement should also note that the Act does not change laws prohibiting the operation of motor vehicles, trains, aircrafts, motorboats or other motorized transportation under the influence of marijuana. It also does not permit the transfer of marijuana or marijuana products to persons under the age of 21 with or without remuneration.

Also, local boards of health should note that the Act does not exempt marijuana or marijuana products from the provisions of M.H.L. c. 94. Sections 186 to 195 which relate to the misbranding and or adulteration of food and drugs.

Furthermore, the Act authorizes the adoption of ordinances or bylaws that restrict the licensing of "cultivation, processing and manufacturing of marijuana that is a public nuisance".

5. Local Control:

Cities or town may adopt ordinances or bylaws imposing “reasonable safeguards” on the operations of marijuana establishments if such regulations are not “unreasonable impracticable” and do not conflict with the Act. “Unreasonably impracticable” is defined in the Act as follows: “...that 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 business person would not operate a marijuana establishment.”

Such ordinances or bylaws can regulate the time, place and manner of operations. However, zoning ordinances or bylaws may not prohibit a marijuana establishment that cultivates, manufactures or sell marijuana or marijuana products in a medical marijuana treatment center.

Municipalities may limit the number of marijuana establishments using standard practices of adopting bylaws or ordinances. However, if a bylaw or ordinance prohibits the operation or 1 or more marijuana establishments, limits the number of marijuana retailers to fewer than 20 per cent of the number of licenses issued for the sale of alcoholic beverages not to be drunk on premises or limits the number of marijuana establishment to less than the number of medical marijuana treatment centers; then such bylaw or ordinance may only be adopted by vote of the voters of the municipality at an election.

In addition, the Act authorizes the adoption or ordinances or bylaws regulating signs advertising marijuana retail establishments and permits the assessment of civil penalties for violation of such local ordinances or bylaws.

A city or town may vote, upon the petition of not fewer than 10 percent of the number of voters voting at the state election preceding the filing of the petition, whether to prohibit the consumption of marijuana or marijuana products on premise, so called marijuana “Cafes”.

Municipalities may not prohibit the transportation of marijuana or marijuana products through their city or town. Furthermore, any fees established by ordinance, bylaw or agreement must be “directly proportional and reasonably related” to the costs incurred by the city or town by the operation of a marijuana establishment.

The Act provides that a marijuana establishment cannot be located closer than 500 feet of a pre-existing public or private school kindergarten through 12th grade unless a municipality has adopted an ordinance or bylaw reducing the distance.

6. Moratorium:

As the sale of recreational marijuana is new to the state, it would be reasonable to assume that the Attorney General would approve bylaws establishing a moratorium on the permitting of recreational marijuana establishments for up to one year to study the issue and develop procedures for permitting and licensing such establishments. However, if a medical marijuana treatment facility is already in operation in the municipality, a moratorium may not be approved which prevents a recreational facility in the medical marijuana facility.

7. Timelines:

December 15, 2016: Effective date of Law

March 1, 2017: The state treasurer shall make the initial appointments to the CCC.

September 15, 2017: Deadline for adoption of “Initial Regulations” by CCC.

October 1, 2017: The CCC shall begin accepting applications for testing facilities, cultivator licenses and other specific licenses. Number of licenses is limited and applications are staged over three years.

January 1, 2018: Deadline for adoption of Final Regulations. If the CCC has not adopted regulations by this time, each medical marijuana treatment center may cultivate and sell marijuana and marijuana products to anyone over the age of 21. If fewer than 75 provisional registrations to operate a medical marijuana treatment center have been issued by October 1, 2017 then the CCC will accept applications from marijuana retailers, product manufacturers and cultivators.

October 1, 2018: CCC shall begin accepting applications for marijuana retailer licenses or for marijuana product manufacturer licenses.

October 1, 2019: CCC shall begin accepting applications for marijuana cultivator licenses.

8. Outstanding Questions:

The Act seeks to treat the retail sale of recreational marijuana in a similar manner as sales of alcoholic beverages but fails to address the following questions:

1. Can local licensing authorities require a local license to operate such establishments? Pursuant to the Act license applications submitted to the CCC are sent to municipalities for their review as to whether there is a local regulation prohibiting the establishment of the facility.
2. Can local boards of health require food service permits and inspections if the establishment is selling edible marijuana products such as muffins and candies? There is no provision in the Act that would cause local boards of

health to treat recreational marijuana establishments differently than any other establishments selling prepared baked goods, candies etc.

3. Do cities and towns have enforcement authority to enforce the provisions of the Act. Any ordinance or bylaw adopted pursuant to the Act can be enforced locally. However as to whether local authorities can enforce the Act is unclear. The Act authorizes the suspension or revocation of a license by the CCC and provides for administrative hearings pursuant to Chapter 30A of the General Laws.

**This memorandum, written by Attorney Joan Langsam, legal consultant to MAHB, is intended for educational purposes only and is not to be construed as legal advice.*