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935 CMR 500.000 Adult Use of Marijuana – Proposed Regulations Summary of Potential Public Health Issues

January 23, 2018

Please be advised that this is a draft memorandum that is being provided for educational purposes only and is not to be construed as legal advice. Please refer to your municipal attorney for legal advice on these topics.

The Cannabis Control Commission released the above-entitled draft regulations on December 21, 2017. The following is a summary of issues and concerns with these draft regulations as identified by the Massachusetts Association of Health Board's Director of Policy and Law. This is not a thorough summary of the entire proposed regulations and reflects this author's opinion only.

The Proposed Regulation Conflicts with the Smoke Free Workplace Law (SWL) (G.L. Ch. 270, §22)

The SWL prohibits smoking in virtually all enclosed workplace in the Commonwealth. In addition, many cities and towns have further restricted smoking in all enclosed workplaces, including smoking bars (cigar and hookah bars) and private clubs. Smoking is defined in the SWL and in all local laws as “the lighting of a cigar, cigarette, pipe or other tobacco product or possessing a lighted cigar, cigarette, pipe or other tobacco or **non-tobacco product designed to be combusted or inhaled.**” (emphasis added). This means that “smoking” or “inhaling” cannabis is prohibited in virtually all enclosed workplaces pursuant to the SWL, and it is completely prohibited in many municipalities by a stricter local law.

A “primary social consumption establishment” pursuant to the proposed regulation is an establishment “licensed to purchase or otherwise acquire marijuana from licensed marijuana establishments and sell single servings of marijuana to consumers for consumption or use on the premises.” These social consumption establishments would not fall into the “smoking bar” exemption to the SWL because, in order to become a “smoking bar” the establishment must occupy an enclosed indoor space that primarily is engaged in the retail sale of tobacco products for consumption by customers and derives revenue from the sale of other products that is incidental to the sale of tobacco; maintains a valid local tobacco sales permit and maintains a valid permit from the Department of Revenue.

In addition, the proposed “Omnibus” tobacco bill was recently reported out of Committee with a favorable recommendation. This bill would add a prohibition of vaping to the SWL. This means that vaping cannabis would also be illegal.

As written, the proposed regulation’s sections on social consumption establishments would violate the current SWL and the likely-to-be-amended SWL unless consumption was limited to edible products. To permit “smoking” cannabis, the SWL would have to be amended.

Other Issues with Social Consumption Establishments

1. Mixed Use Social Consumption Establishments: These are defined as commercial enterprises for which the consumption of marijuana is a “secondary” or “shared” purpose to a non-cannabis purpose. The regulation as currently written is silent on whether anyone under the age of 21 can enter. One example of a mixed-use establishment described in the regulation is a restaurant. Mixed-use establishments cannot sell or serve alcohol. Assuming the SWL is amended to include smoking marijuana, this would mean that customers in these mixed-use establishment would be once again exposed to secondhand smoke.
2. Required Transportation Plan: Transportation plans are required by primary use establishments when the establishment feels that a customer is “under the influence.” However, such a plan is not required for the mixed-use establishment.
3. Single Serving: What is a “single serving” pursuant to this regulation?
4. **Conflict between proposed regulation and the actual law (Regulation of the Use and Distribution of Marijuana Not Medically Prescribed – G.L. Ch. 94G)**: The actual law states the following: “No person shall consume marijuana in a public place or smoke marijuana where smoking tobacco is prohibited. . . This subsection shall not apply to a person who consumes marijuana or marijuana products in a designated area of a marijuana establishment located in a city or town that has voted to allow consumption on the premises where sold . . .” (G.L. Ch. 94C, §13(c)).

The process for voting to permit consumption is in §3(b): “The city council of a city and the board of selectmen of a town shall, upon the filing with the city or town clerk of a petition (i) signed by not fewer than 10 percent of the number of voters of such city or town voting at the state election preceding the filing of the petition and (ii) conforming to the provisions of the General Laws relating to initiative petitions at the municipal level, request that the question of whether to allow, in such city or town, the sale of marijuana and marijuana products for consumption on the premises where sold be submitted to the voters of such city or town at the next biennial state election. **If a majority of the votes cast in the city or town are not in favor of allowing the consumption of marijuana or marijuana products on the premises where sold, such city or town shall be**

taken to have not authorized the consumption of marijuana and marijuana products on the premises where sold.” (emphasis added).

The proposed regulations appear to authorize social consumption without local approval through petition being required. (935 CMR 500.145). It is our understanding that the Commission will be clarifying that social consumption will not be permitted unless there is local approval as the legislation describes.

Other Issues with Proposed Regulations

1. “Marijuana accessories” appear to be in violation with drug paraphernalia (G.L. ch. 94C, §1).
2. Can a storefront marijuana retailer sell other things? (Adult-only Cumberland Farms vs. Adult-Only Retail Store).
3. CCC authority to grant waivers.

Other Local Control Issues

1. The references throughout the proposed regulation refer to bylaws and ordinances. These references should also include regulations.
2. Anti-preemption language is included.
3. Should a local board of health pass a regulation prohibiting smoking and vaping in all workplaces, etc.?
4. Should a local board of health pass a regulation requiring local compliance checks to assure that cannabis is not being sold to anyone under 21, like boards do for tobacco?
5. Should a local board of health enact a regulation increasing the minimum legal sales age of cannabis to 25?
6. Should a local board of health issue an adult-use cannabis sales permit?

Promising Sections

1. Strong community outreach requirements.
2. Host agreements.
3. Focus on disparities.

- a. However, priority to Medical Marijuana Dispensaries.
4. Product safety.
5. Security.
6. Anti-preemptive language.
 - a. Even considering above-described issues.

This is provided for educational purposes only and is not to be construed as legal advice. Drafted by Cheryl Sbarra, J.D. sbarra@mabb.org.

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