

New Jersey – “Weeding” in the Garden State

Marijuana Reform Signed into Law

By: Ryan J. Udell and Christopher Wisniewski

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On February 22, 2021, Governor Phil Murphy signed the New Jersey Cannabis Regulatory, Enforcement Assistance and Market Place Modernization Act (the Act) that implements the legal sale of recreational marijuana approved by voters last November. In so doing, New Jersey joins 15 other states in passing legislation to legalize the adult use of marijuana for persons aged 21 and over – a market anticipated to be approximately \$1 billion annually. The Act consolidates three bills – A21, the “legalization bill,” which implements the Cannabis Regulatory Commission, promotes diversity grants and employment protection for certain cannabis offenses; A1897, the “decriminalization bill,” which reforms the criminal and civil penalties and permits vacating previous sentences; and A-5342, known as the “cleanup bill,” which relates to penalties for individuals under 21 and serves to “bridge the gap” of inconsistencies between A21 and A1897. Sales are likely several months if not more away, but certain portions of the Act, including the criminal justice reform, will become effective immediately.

Cannabis Regulatory Commission

The Act draws upon the existing regulatory and dispensary approval framework for medical cannabis oversight introduced in the “Jake Honig Compassionate Use Medical Cannabis Act” (the Honig Act). Under the Act, the Cannabis Regulatory Commission (the Commission) authorized under the Honig Act, is expanded from solely medical use oversight to include administration of the personal recreational use of cannabis. The expanded role of the Commission includes:

- regulating the purchase, sale, production, processing, packaging, transportation and delivery of cannabis;
- overseeing all aspects of licensing for the production, processing, warehousing, packaging, delivery and transportation of cannabis;
- assisting in the prosecution of cannabis violations;
- regulating advertising; and
- overseeing scientific, pharmaceutical, manufacturing, mechanical, industrial and similar uses.

The office, currently known as the “Office of Minority, Disabled Veterans and Women Medical Cannabis Business Development” under the Honig Act, is reclassified without the ‘medical’ distinction and re-named as “Office of Minority, Disabled Veterans and Women Cannabis Business Development” (the Office), and serves to promote personal use cannabis business among socially and economically disadvantaged communities and include business certification with the minimum goal of a combined 30% of all licenses issued to certified businesses (at least 15% to minority owned business and at least 15% to women and disabled veteran owned businesses).

Ethical and Conflict-of-Interest Issues for the Commission

The Act imposes ethical and conflict restrictions on the five-member Commission, employees and related-parties for cannabis related activities prior to, during and after serving on the Commission. These measures expand the scope of the New Jersey Conflicts of Interest Law and The New Jersey Campaign Contribution and Expenditures Reporting Act to reduce the likelihood of political patronage among the Commission and its employees. The restrictions mirror the current medical cannabis and casino-related employee prohibitions.

Creating the Legal Market

The Act directs the Commission (once fully seated) to adopt appropriate rules and regulations for the personal use of cannabis, after consultation with the State's Attorney General, State Treasurer, Commissioner of Health and Department of Banking and Insurance. After the rules and regulations are adopted, applications will be accepted and applicants will be permitted to commence operations in accordance with the rules and regulations during the pendency of the application.

The Act creates six classes of licensed business:

- a Class 1 "Cannabis Grower" license for cannabis growers/cultivators;
- a Class 2 "Cannabis Processor" license for the manufacturing, preparation and packaging facilities;
- a Class 3 "Cannabis Wholesaler License" for resale facilities;
- a Class 4 "Distributor" license for bulk intrastate transport between licensed establishments;
- a Class 5 "Cannabis Retailer" license for cannabis and cannabis paraphernalia sale to consumers; and
- a Class 6 "Cannabis Delivery" license for courier services from a licensed retailer to a consumer.

Each existing Alternative Treatment Center (ATC) that obtained a license to dispense medical cannabis is deemed to have concurrent Class 1 (Grower), Class 2 (Processor) and Class 5 (Retailer) licenses unless such facility is suited to hold only a Class 3 license (Wholesale). Any ATC with a Class 5 license may only engage in the retail sale of cannabis upon demonstrating that it has sufficient quantities of *medical cannabis products* to meet patient needs.

However, under the Act each municipality retains the option to regulate or entirely prohibit the time, place, manner and amount of retail operations (other than prohibiting delivery), but must enact any prohibition ordinances regarding the same within 180 days after February 2, 2021. If a municipality does not so enact such a prohibitive ordinance, licensed cannabis operators may conduct business in the appropriate zone (subject to applicable zoning laws) for a period of five years. A municipality may revisit whether to prohibit the operation of cannabis businesses after the five years, but any lawfully operating cannabis businesses will be grandfathered in the local jurisdiction.

The Commission will determine the date on which retailers may commence retail operations (which will be no more than 180 days after the adoption of the rules and regulations and upon no less than 30 days' notice). Thereafter, legal retail sales and personal consumption may begin.

The Act provides that, initially, a licensee (other than existing ATCs which will be able to hold the licenses noted) will only be able to hold a maximum of two licenses for a period of 18 months following the commencement of retail sales. The two license maximum is conditional:

- a Grower, Processor, Wholesaler, Distributor or Delivery service could not receive a Retailer license and a Retailer could not own one of the other class of licenses;
- a Grower or Processor may only receive only another Grower or Processor license; and
- a Class 3 Wholesaler may only hold one Wholesaler license as its second license.

During this initial 18 month period, a maximum of 28 Growers (including ATCs) may be simultaneously licensed.

After this initial period, a licensee may hold a Class 1 (Grower), Class 2 (Processor) and Class 5 (Retailer) concurrently, but not more than one in each class (except for existing ATCs). Class 3 Retailers may not hold any other class of license. Any grandfathered ATC is required to, within one year of being permitted retail sales, certify to the continued material accuracy of its previously approved medical permit application to the Department of Health or Commission and written approval from the municipality in which it operates.

Licenses; ATC Operational Changes

The Commission determines the maximum number of licenses for each class based upon demand, except for initial Class 1 Cannabis Grower licenses that will have an initial cap to control potential supply chain issues. Much like the current medical license system, the applicant process utilizes a "point system" to rank the suitability of an applicant. Full applications are reviewed within 90 days of submission (unless extended by the Commission). Conditional licenses, which are reviewed on an expedited 30 day basis, employ a modified point system and require the applicant to demonstrate that full compliance is achievable within the following 120 days (unless extended by the Commission). Conditional licenses either convert to full license upon demonstrating full compliance within the proscribed time or lapse if not.

The Act permits applications to be prioritized in two instances. First, "impact zones" are given priority. An impact zone is a municipality that has a population exceeding 120,000; and i) ranks in the top 40% in the state in arrests for small amounts of marijuana; ii) has a crime index of 825 or higher; and iii) has an unemployment rate that ranks in the top 15% of all municipalities in the state. The Commission will prioritize at least two licensed businesses in such zone and give special priority to applications of residents in that impact zone or business that plan to employ 25% of employees who reside in the zone.

The second prioritization will give higher point rankings to an applicant that has resided in-state for at least five years and is either:

1. a "significantly involved person" (with a "significantly involved person" being someone who is an investor in an applicant with decision making authority about the cannabis business); or
2. an applicant that meets one of the following requirements:
 1. the applicant is a party to a collective bargaining agreement with an organization that currently represents cannabis workers in another state;
 2. the applicant attests that it will use best efforts to utilize building trades labor organizations in the construction or retrofit of facilities of the cannabis establishment; or
 3. the applicant attests that it has, or will have, a project labor agreement which is a form of pre-hire collective bargaining agreement.

The licenses are reserved for applicants meeting certain requirements. Thirty-five percent of licenses are for conditional licenses for each class. Either a full license or conditional license will be issued only to an ownership structure that included an in-state resident of at least two years who is a "significantly involved person." A conditional license may only be issued to a significantly involved person and any other person with a financial interest having decision making authority with an adjusted gross income of \$200,000 or less (\$400,000 for joint filers) for the preceding year.

A minimum of 10% of all licenses for each class, and 25% of all licenses, will be reserved for "microbusinesses" which includes both conditional and full licenses. A microbusiness is defined as employing not more than 10 employees and: i) possessing no more than 1,000 cannabis plants each month other than for distributors; ii) occupy less than 2,500 square feet; and for processors, wholesalers

and retailers acquiring no more than 1,000 pounds of dried form cannabis in any month. For microbusinesses, they need to be 100% owned by NJ residents that have lived in-state for at least two years.

Anyone with an investment interest in an applicant must be 21 years of age or older and each person associated with the cannabis business that owns at least 5% individually or 20% of a group will be required to pass a criminal background check. However, the Commission is prohibited from considering any conviction prior to the Act's effective date for the manufacturing, distribution or possession with the intent to distribute less than five pounds of marijuana, one pound of hashish or simple possession of marijuana or hashish unless less than five years has passed since conviction or the completion of any probation, parole or imprisonment. Additionally, the conviction must be "substantially related to the qualifications, functions or duties for which the license is required" as determined by the Commission, to be used in consideration.

Full license review with approval or denial will occur within 90 days of the application and conditional licenses will be acted upon within 30 days. Applicants may utilize a conditional application to initiate the process while continuing to fulfill the requirements on a parallel track rather than waiting for all application requirements to be satisfied before applying. Conditional applicants that utilize the expedited review process have 120 days from the submission of the conditional application to demonstrate full compliance with the Act's requirements (with a discretionary extension up to 45 days). Conditional applicants that demonstrate full compliance with all license requirements in the intervening 120 days (as may be extended) will receive a full one year license on the date of issuance. Conditional licenses not completed within 120 days will expire. Requirements for approval of an application are contained in the Act and the Commission has six months to adopt additional rules and regulations prior to issuance (and from time to time thereafter) and applicants still must comply with any local requirements.

The Act also creates cannabis testing facilities, to be monitored by the Office, for the certification of cannabis products. Existing ATC are permitted to cultivate at up to two physical locations, not to exceed 150,000 square feet. Any individual that works for any licensee (including a conditional licensee) is required to have a valid certification from the Commission in order to participate in the possession, securing or selling of cannabis items (or the recording thereof), transporting cannabis between licensed facilities and delivery of cannabis to consumers. Such "handler certification" would be issued after the completion of a course and criminal history background check with the same disqualifying standards as for licensees.

Business Considerations

The Act prohibits a "financial institution"[1] from discriminating against cannabis businesses, but nonetheless includes its own restrictions. First, a Class 1 Grower may not receive "farmland assessment" tax rates pursuant to the Farmland Assessment Act of 1864. Second, any Licensee or property owner, developer or project operator of a cannabis related project may not receive state or local economic incentives and any such previously granted incentives will be rescinded as of the date of the issuance of the license.

All licensee fees and penalties collected by the Commission and taxes generated by the Honig Act will be deposited into the "Cannabis Regulatory, Enforcement Assistance and Marketplace Modernization Fund" that will be used for the operational costs of the Commission, the creation of the "Underage Deterrence and Prevention Account" for programs to encourage youth activities and divert youth away from cannabis-related activities and for training police officers in detecting, identifying and apprehending drug impaired motor vehicle operators.

The Act permits a municipal **transfer tax** of up to 2% to be imposed on sales within the municipality in addition to the 7% sales tax currently imposed by the Honing Act. The transfer tax is triggered by a sale between a Grower, Processor, Wholesaler or Retailer and any other licensed business, and Retailers and customers or any combination thereof (but not Distributors or Delivery). Transfer tax rates could not exceed 2% for Grower, Processor or Retailer licensees and 1% for a Wholesaler licensees except in cases between

businesses operated by the same license holder. The local transfer tax will be collected directly by the municipality and not be deposited into the Cannabis Regulatory, Enforcement Assistance and Marketplace Modernization Fund.

Legalization of Personal Use

Once legal retail sales have commenced, it will not be an offense under the New Jersey Code of Criminal Justice for persons 21 years of age and over to possess, purchase or transport cannabis paraphernalia, one ounce or less of cannabis or cannabis-equivalent in an infused product or five grams or less of cannabis resin within the State of New Jersey.[2] Transferring cannabis to any person 21 years of age or older for non-promotional/business purposes and taking delivery of or consuming any lawfully acquired cannabis item will not be an offense provided that such consumption occurs in designated consumption areas.

Any offense resulting from a violation of exceeding the maximum amount of cannabis permitted still subjects the offender to the civil penalties and prosecution under the Comprehensive Reform Act of 1987. In addition, cannabis smoking, vaping and aerosolizing may be restricted on private property and public and private institutions of higher education and carry the penalty provisions of the New Jersey Smoke-Free Air Act. Possession on elementary or secondary school property by a person of legal age is still a disorderly persons offense and similar to alcohol, motor vehicle and "open container" restrictions apply.

Offenses for possession and use of cannabis by persons under 21 years are dependent upon the amount of the substance and location of the person. If an underage person possesses an amount otherwise permitted for legal age users in a public place, a first offense carries a petty disorderly persons offense and a fine. If an underage person possess either an amount otherwise permitted for legal use or in excess thereof on private property, there are escalating civil penalties similar to alcohol possession, but no criminal charges. However, unlike alcohol, an underage person using false identification to attempt to obtain cannabis products are subject to a civil penalty. After the effective date a person's driving privileges will not be forfeited or postponed if the quantity limits are not violated for both individuals who are 21 or older or under 21 years of age.

Marijuana is no longer included as a Schedule I controlled dangerous substance under the New Jersey Controlled Dangerous Substances Act, however, it is still listed on Schedule I of the federal Controlled Substances Act of 1970. All federal implications, such as compliance with the Internal Revenue Code and national bank charters, are unchanged by the decriminalization afforded by the Act.

The Commission will annually report to the Governor and Legislature regarding enforcement activities under the Act and the Honig Act, including criminal arrests for small amounts of marijuana or hashish with race, ethnicity, gender and age of persons cited arrested or charged; the number of motor vehicle stops, the number of licenses and classes of each and applicant information.

Summary

In conjunction with legalizing cannabis, New Jersey has used the opportunity to also decriminalize cannabis and address criminal justice reform. Taken together, S21: S1897 and A5342 provide not only a cannabis marketplace but also assistance to people and areas that are disproportionately impacted by illicit drugs. While some time is needed to implement the Act, the Act provides a clear path towards a sustainable cannabis industry in New Jersey.

[1] Under NJ Rev Stat §17:16K-2d. (2013), "Financial institution" means a State or National Bank, a State or Federal Savings and Loan Association, a State or Federal Mutual Savings Bank, a State or Federal Credit Union, or any other person who, directly or indirectly, holds an account belonging to a consumer. The term also includes any person who issues an access device and agrees with a consumer to provide electronic fund transfer services.

[2] Cannabis legally purchased in New Jersey is still subject to state law outside of the jurisdiction. If for no other reason, neighboring states will likely feel economic pressure keep tax revenue in-state, much like with legalized gambling and sports betting.

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