

A Review Of Massachusetts' Marijuana Industry In 2017

It has been a very exciting year for the marijuana industry in Massachusetts. A voter referendum in November 2016 approving the recreational use of marijuana culminated in legislation in July 2017. Various cities and towns are now determining whether to embrace the new economic development opportunities that are presented by the expansion of recreational marijuana in the commonwealth. Employees who use medical marijuana received protection from the courts. However, because the cultivation, use, sale and possession of marijuana still is a crime under federal law, and enforcement policies by the federal government are uncertain, investment in the industry remains risky.

Massachusetts Approves Recreational Use of Marijuana

The approval process began on Nov. 8, 2016, when Massachusetts voters cast their ballots in favor of Question 4, allowing businesses and individuals to grow, sell, use and possess marijuana for recreational purposes in Massachusetts.

The law passed by the legislature in July 2017 made a number of changes to the law that voters approved in November 2016, as well as to the medical marijuana law enacted in 2012. Some of the more important features of the new law are:

- Recreational marijuana use is legal now in one's own home (but perhaps not in a rented apartment or federally subsidized housing), and possession of up to one ounce of marijuana in public, up to 10 ounces in one's home, or cultivation of up to six plants (12 per household) for personal use is no longer a crime under Massachusetts law.
- Retail sales of marijuana can take place on or after July 1, 2018.
- Retail sales of marijuana will be taxed at a maximum 20 percent, which currently is the second-lowest tax rate in the country. The tax breaks down as the state's 6.25 percent sales tax, a 10.75 percent excise tax and an optional 3 percent that cities and towns can charge if they wish to do so. Cities and towns may also tax retailers up to an additional 3 percent on gross sales. Medical marijuana remains untaxed.
- Licensed medical marijuana dispensaries (RMD's) may now operate as for-profit Massachusetts business corporations. Previously, Massachusetts law required medical marijuana dispensaries to operate as nonprofit corporations. In November, the [Massachusetts Department of Public Health](#) (DPH) issued guidance to entities that desire to operate RMD's as for-profit corporations. RMD's considering conversion must still consider various other issues not addressed by the guidance, including tax, contract and employee benefit issues.
- The new law also creates a 5-member, full-time Cannabis Control Commission to oversee the marijuana industry, with members appointed by the governor, the attorney general and the treasurer. The law also moves oversight of the medical marijuana operations to the new board.
- Marijuana products, including edibles, will have to be sold in child-resistant packaging with the concentration of THC listed. There will also be stringent requirements for packaging and labeling.

The legalization of recreational marijuana under Massachusetts law creates unique opportunities and risks for newly formed and existing businesses as rules and regulations are established and in light of marijuana still being an illegal controlled substance under federal law. There will be a myriad of challenges for those looking to invest in and operate companies that will grow, process and sell marijuana, as well as for existing businesses that must now consider how the new law and regulations will affect them.

Cannabis Control Commission Moves Quickly

The five commissioners of the Cannabis Control Commission were appointed in September 2017. After a

search, the commission appointed Shawn Collins, a top aide to Treasurer Deborah Goldberg, as the executive director of the commission. The commission has requested a \$7.5 million budget for its activities for the remainder of the fiscal year.

The new commissioners are operating under very tight deadlines. Under the law, the commission must, in collaboration with a 25 member Cannabis Advisory Board, write regulations by March 15, 2018, and start accepting applications for retail sales beginning April 1, 2018. The commissioners already have conducted eight "listening sessions" around the commonwealth during October to hear concerns and feedback from residents interested in the marijuana industry. The commission expects to release a first draft of the regulations by the end of December.

Communities Divided Over Recreational Marijuana Establishments

Under the new law, the power to ban retail sales will depend on how the city or town voted in the November 2016 referendum. If a majority of the voters in the community voted to approve the referendum, then the community must hold a referendum to ban or limit retail sales. If a majority of voters in the community voted to reject the referendum, then local officials can limit or ban retail sales.

Since January, over 100 Massachusetts cities and towns have voted to ban or put constraints on marijuana-related businesses. Proponents for the bans generally cite safety concerns with respect to edibles and children.

However, enough towns and cities have approved the sale of recreational marijuana that there will be no significant areas where one will not be able to purchase marijuana at retail. For example, voters in Amesbury, Dracut, Marshfield and Brewster have all endorsed retail sales within their borders. Boston's Mayor Marty Walsh, who opposed legalization, has said that the city will accommodate retail marijuana establishments. Holyoke's Mayor Alex Morse is also a strong proponent of retail sales, and has been actively enticing marijuana businesses to locate there as part of his economic development efforts.

Massachusetts High Court Rules that State Anti-Discrimination Laws Protect Medical Marijuana Users

Massachusetts employers can no longer fire employees solely because they use medical marijuana outside the workplace. In July, in *Barbuto v. [Advantage Sales and Marketing LLC](#)*, the Massachusetts Supreme Judicial Court concluded that the commonwealth's general anti-discrimination law, M.G.L. ch. 151B, requires Massachusetts employers to reasonably accommodate their employees' off-duty use of medically-prescribed marijuana. The rulings contained in the decision impact all Massachusetts employers.

To reduce litigation exposure, Massachusetts employers need to re-evaluate their drug-testing policies, and carefully consider employee accommodation requests related to medical marijuana use.

Federal Law Makes It Difficult for Operators to Develop Brands

Like other industries, businesses selling marijuana-related products are turning to branding and marketing to help distinguish their products and services from those of their competitors, and to build brand loyalty and credibility. However, marijuana businesses face a problem that most other retail businesses do not encounter. Federal trademark law prohibits them from registering their brands as trademarks and obtaining the benefits that a U.S. trademark registration confers on its owner.

This does not mean that all hopes for obtaining brand protection are lost. There are strategies that companies providing marijuana products and services can utilize in order to get some protection for their brands. These strategies include obtaining protection within a particular state under state trademark laws, and obtaining federal protection for related products and services that federal law does not ban.

Marijuana Growth By the Numbers

The medical marijuana industry in Massachusetts grew significantly in 2017. According to statistics published by the DPH, as of Oct. 30, 2017, there were 46,814 certified medical marijuana patients in Massachusetts, a 22 percent increase over the 38,302 patients certified as of Oct. 31, 2016. For the fiscal year ended June 30, 2017, registered marijuana dispensaries (RMD's) sold 203,401 ounces (more than 6 1/3 tons) of medical marijuana. There were also 12 approved RMD's as of Oct. 31, 2017, with another 110 RMD's in various stages of the application and approval process.

With the introduction of recreational marijuana sales, the industry is projected to have a significant impact on the Massachusetts economy. Analysts forecast \$450 million in marijuana sales in Massachusetts in 2018. Under this projection, marijuana sales would generate \$90 million in taxes. Total annual sales are projected to grow to as much as \$1.7 billion in Massachusetts by 2021 and combined state and local tax collections are projected to be approximately \$240 million in fiscal 2021. More than 17,000 full and part-time jobs are expected to be created by the marijuana industry in Massachusetts.

Impact of Federal Law Still Uncertain

Despite the progress made in Massachusetts and other states in legalizing marijuana, the use of marijuana for recreational and medical purposes is still illegal under federal law. This creates a great deal of uncertainty for cultivators, dispensaries, investors, lenders and others involved in the marijuana industry. Whether changes will be implemented at the federal level remains unclear. While Attorney General Jeff Sessions has been sending signals that indicate a possible federal crackdown against the industry, Congress and President Trump have been sending conflicting messages.

Since 2013, the [U.S. Department of Justice](#) (DOJ) has issued guidelines that discourage federal prosecution of state-authorized marijuana activities. The guidelines suggest that U.S. attorneys and other federal agencies defer civil enforcement and criminal investigations and prosecutions of state-legal marijuana business activity where there are "strong and effective regulatory and enforcement systems that control the cultivation, distribution, sale, and possession of marijuana."

Congress and the courts have also limited federal enforcement activities. Every year since 2014, Congress has adopted a budget amendment, known as the Rohrabacher-Farr amendment, which prevents the DOJ from using any funds to undermine state medical marijuana laws. The DOJ failed in an attempt to circumvent the amendment in California, with federal courts upholding the prohibition in 2016, and again in 2017, so long as the medical marijuana purveyors strictly complied with state law. The amendment does not protect those engaged in the recreational marijuana industry and it remains uncertain whether Congress will enact any protective legislation in that area.

In May 2017, Attorney General Sessions delivered a letter to Congress requesting that leaders reject an extension of the Rohrabacher-Farr amendment. Despite the letter, in July, the Senate Appropriations Committee approved the extension of the amendment with strong bipartisan support. The Republican-led Rules Committee in the [U.S. House of Representatives](#) tried to thwart the extension by refusing to allow a vote to extend the amendment in September. However, last-minute budget deals approved by President Trump and passed by Congress included extensions of the amendment until Dec. 22, 2017.

More recently, Attorney General Sessions sent letters to the governors and attorneys general of Colorado, Oregon and Washington. According to published reports, in the letters, the attorney general affirmed that the DOJ "remains committed to enforcing" the federal ban on marijuana, a "dangerous drug." He also attacked state-specific federal reports that, he alleged, "[raise] serious questions about the efficacy of marijuana regulatory structures in your state."

Representative Dana Rohrabacher, the Republican Congressman who cosponsored the amendment, continues to push hard to make the amendment permanent. As he told the [Los Angeles Times](#), "Marijuana got

more votes than Trump. There are millions of Republicans and independents who voted for it. There are 20 million people a month who use it.”

A DOJ attempt to enforce the federal ban in a state that has legalized marijuana would have a chilling effect on the legal marijuana industry throughout the country, including Massachusetts. Investors and entrepreneurs may hesitate to commit financial resources to new businesses if the threat of federal enforcement returns. However, proponents of medical marijuana use remain optimistic that lawmakers will reach some accommodation soon.

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Date Created

December 15, 2017