



MEMORANDUM

TO: Ryan Augsburger and Rob Brundrett
FROM: Joëlle Khouzam
DATE: March 22, 2016
RE: Analysis of Marijuana Policy Project’s proposed constitutional amendment for the medical use of marijuana

The table below summarizes the proposed Marijuana Policy Project (“MPP”) amendment to the Ohio Constitution to permit the medical use of marijuana, and the corresponding workplace concerns.

Section	Summary	Employment-related concerns
12(A)	Creates Medical Marijuana Control Division (“Division”):	
12(A)(1)	Creates Division to implement programs, develop and enforce rules, and license medical marijuana-related businesses and prevent diversion of marijuana for illicit purposes. Division shall consist of 5 members serving 4-year terms	
12(A)(2)	Authorizes Division to establish rules to regulate medical marijuana	
12(A)(3)(a)	Sets August 1, 2017, as deadline for Division to develop confidential online card registry and make identification cards available to qualifying patients and caregivers. Registry must allow law enforcement personnel and medical marijuana establishments to determine validity of the ID card, whether cardholder is qualifying patient/caregiver, and whether cardholder is permitted to cultivate marijuana plants Registry and application information shall be confidential but may be disclosed to law enforcement or medical marijuana establishments only when reasonably necessary to verify authenticity, notify law enforcement of apparent criminal conduct, and notify state medical board of potential standard of care violations	“Employer” is not included. Confidentiality laws may limit employers from knowing who is an authorized user; may impede employer’s ability to accommodate any work restrictions associated with use of medical marijuana.
Section 12(A)(3)(b)	Requires Division to issues registry ID card within 20 days to a qualifying patient who satisfies certain prerequisites	

Section 12(A)(3)(c)	Requires Division to issue registry ID card to designated caregivers identified by a qualifying patient
Section 12(A)(3)(d)	Requires Division to specify on ID card if the cardholder is allowed to cultivate marijuana plants
Section 12(A)(3)(e)	Requires Division to provide written notice to qualifying patient of reason for denying registry ID card
Section 12(A)(4)	Empowers Division to administer rules related to licensing.
Section 12(A)(4)(a)	<p>Division shall license medical marijuana establishments that meet all applicable requirements.</p> <ul style="list-style-type: none"> - May require a background check - Must determine application within 90 days - Licenses are effective for 1 year - Denial of application is reviewable in Franklin County Court of Common Pleas
Section 12(A)(4)(b)	Describes the types of licenses the Division may issue
Section 12(A)(4)(c)	<p>To qualify for licensure, an applicant must:</p> <ul style="list-style-type: none"> - Own or control all real property where marijuana will be cultivated - Be at least 21 years old - Until January 1, 2020, must be a resident of Ohio from and before January 1, 2016 - The property cannot be within 500 feet of an elementary school, church, public library, public playground, or public park, subject to local laws - Be in compliance with local laws
Section 12(A)(4)(d)	<p>Division shall issue no more than 15 Type 1 medical marijuana cultivation licenses</p> <ul style="list-style-type: none"> - After January 1, 2020, Division may limit or increase the number of licenses based on market's and community's need for medical marijuana
Section 12(A)(4)(e)	<p>Sets timeline for processing applications:</p> <ul style="list-style-type: none"> - August 1, 2017, for medical marijuana testing facilities, product manufacturing facilities, and Type 1 cultivation facilities - November 1, 2017, for Type 2 marijuana cultivation facilities and distributors

	- February 1, 2018, for medical marijuana dispensaries
Section 12(A)(5)	Division shall enforce all rules; conduct compliance investigations; and perform periodic inspections of all medical marijuana establishments - May revoke licenses only after written notice and an opportunity for a hearing - Final actions by the Division are reviewable by the Franklin County Common Pleas Court within 90 days of determination
Section 12(A)(6)	Directs Division on how to handle all funds collected
Section 12(A)(7)	Requires Division to publish an annual report containing certain information related to medical marijuana - The report may not include identifying information about qualifying patients, designated caregivers, or practitioners
Section 12(A)(8)	Requires Division to establish rules by certain dates.
Section 12(A)(9)	Requires Division of Liquor Control to provide support and expertise
Section 12(A)(10)	Requires general assembly to appropriate necessary funds
Section 12(B)	Medical Marijuana Advisory Board (“Board”) - Consists of 9 members, serving 2-year terms - Shall, among other duties, advise Division on matters including patient access to marijuana, patient confidentiality, and make other recommendations to the Division
Section 12(C)	Local Control
Section 12(C)(1)	Permits localities to impose reasonable safeguards on the operation of medical marijuana establishments that are not unreasonably impracticable, including: - Laws governing time, place, and manner of operations - Laws limiting the number of establishments in the locality. The locality may not prohibit all dispensaries unless the law is approved by a majority of the electors voting on the law - Laws related to public signs related to medical marijuana establishments - Laws establishing civil penalties for violation of those laws

Section 12(C)(2)	No locality shall restrict transport of marijuana	
Section 12(C)(3)	May adopt local laws on licensing that are not unreasonably impracticable	
Section 12(D)	Medical Marijuana Establishments (“Establishment”)	
Section 12(D)(1)	Establishment must secure each entrance	
Section 12(D)(2)	Shall not cultivate marijuana at any physical location not approved by the Division	
Section 12(D)(3)	Shall not allow marijuana or marijuana products to be visible to people outside the premises	
Section 12(D)(4)	Shall not refuse the Division the right to inspect the premises or audit the records	
Section 12(D)(5)	May not employ anyone under the age of 18	
Section 12(D)(6)	May not share office space or compensate or refer patients to a practitioner who provides certifications	
Section 12(D)(7)	May not dispense more than the allowable amount to a qualifying patient in any 14-day period	
Section 12(D)(8)	Must make diligent effort to verify registry ID card is valid before dispensing marijuana	
Section 12(E)	Protections for the Medical Use of Marijuana	The wording in 12(E) seems to provide special workplace protections for cardholders that are not seen in many other states’ laws. This could make Ohio less attractive or competitive due to added legal risks, possible increased costs associated with legalizing medical marijuana
Section 12(E)(1)	A cardholder may not be arrested, prosecuted, penalized, or sanctioned; be denied any right or privilege ; or be subject to seizure or forfeiture of assets for the medical use of marijuana - Creates presumption that cardholder is engaged in the medical use of marijuana	In states whose statutes expressly state that employers are not required to accommodate, this may provide some relief from discrimination claims under federal laws such as the ADA or the FMLA because marijuana, a Schedule 1 drug, is still considered illegal under federal law. It is less clear whether a claim could survive under a state

		<p>discrimination law requiring accommodation, even without this amendment. However, this language specifically creates protection for the cardholder/user by potentially requiring employer to presume cardholder to be “disabled”, thus triggering an employer’s obligations to initiate the interactive process and provide reasonable accommodations or notify the employee of the right to take FMLA leave. This could also prevent an employer from enforcing its workplace policies, such as drug testing and zero-tolerance policies.</p>
<p>Section 12(E)(2)</p>	<p>Persons engaging in the following activities may not be arrested, prosecuted, penalized, or sanctioned; be denied any right or privilege; or be subjected to search or seizure</p> <ul style="list-style-type: none"> - A medical marijuana dispensary - A medical marijuana product manufacturing facility - A medical marijuana cultivation facility - A medical marijuana distributor - A medical marijuana testing facility - A cardholder or establishment for transferring seeds to a medical marijuana cultivation facility 	
<p>Section 12(E)(3)</p>	<p>No person may be arrested, prosecuted, penalized, or sanctioned; be denied any right or privilege; or be subjected to search or seizure for:</p> <ul style="list-style-type: none"> - Providing or selling marijuana accessories to a cardholder or an establishment or for possessing, purchasing, or otherwise obtaining or manufacturing marijuana accessories - Being in the presence or vicinity of the medical use of marijuana - Allowing property to be used for activities that are exempt from criminal prosecution under this section - Assisting a qualifying patient with the act of using or administering marijuana - Enrolling, leasing to, or employing a cardholder 	<p>These provisions may also interfere with or limit an employer’s ability to enforce workplace policies uniformly. See notes under 12(E)(1)</p>
<p>Section 12(E)(4)</p>	<p>A practitioner may not be arrested, prosecuted, penalized, or sanctioned; be denied any right or privilege; or be subjected to search</p>	

	or seizure, solely for providing written certifications or for otherwise stating that a patient is likely to receive therapeutic benefit from the medical use of marijuana unless the practitioner has or failed to take certain actions	
Section 12(E)(5)	A person engaged in a profession or occupation subject to licensure may not be subjected to discipline by a licensing board solely for providing professional services to establishments, cardholders, or others related to the medical use of marijuana	This is an area of concern for licensed professions, including medical professionals, law enforcement, fire and safety forces, persons with fiduciary responsibilities, etc.
Section 12(E)(6)	A person's lawful possession of a registry ID card may not constitute probable cause that the person has violated any law or be used to support a search of the person's property	Employer's ability to conduct search of workplace in instances of suspected sale or distribution will be limited.
Section 12(E)(7)	It is the public policy of Ohio that contracts related to the operation of medical marijuana establishments under this section shall be enforceable	
Section 12(E)(8)	<p>This section shall not be construed to authorize any person to engage in the following activities and may not prevent imposition of any criminal, civil, or other penalties for:</p> <ul style="list-style-type: none"> - Operating a motor vehicle while impaired by marijuana, except that a qualifying patient shall not be considered impaired because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment - Smoking marijuana in any public place - Possessing or consuming marijuana on the grounds of any elementary school, public playground, public park, child day care center, or correctional facility unless authorized by the school, day care center, or correctional facility - Transferring marijuana in exchange for remuneration by a person who is not licensed by the Division - Transferring marijuana to a person other than a cardholder or an establishment - Manufacturing marijuana products by means of any liquid, gas, other than alcohol, that has a flashpoint below 100 degrees Fahrenheit - Undertaking any task while impaired by marijuana that would constitute negligence or professional malpractice 	<p>"Insufficient concentration to cause impairment" is not defined. This raises safety concerns for employers. Without knowledge of what constitutes impairment, or general information about the side effects of marijuana, employers are limited in their ability to balance safety and cardholders' rights.</p> <p>It also raises the possibility of claims against employers who refuse to allow employees to perform certain tasks because of the presence of marijuana that they claim does not rise to the level of impairment, or who are unable to accommodate multiple employees due to side effects.</p> <p>There is still a lack of understanding of medical marijuana. The amendment prohibits smoking in public places. What about at employer worksites or in parking lots? Personal vehicles during break times? Will it prevent consumption of oils or edibles in public or at work?</p>
Section 12(E)(9)	Nothing in this section shall prohibit an individual or entity from prohibiting or otherwise regulating consumption, display, cultivation,	

	processing, manufacture, or sale of marijuana on or in property the person or entity owns, occupies, or manages	
Section 12(E)(10)	Nothing in this section is intended or may be construed to regulate or affect the employment relationship between an employer and a cardholder, to create a new cause of action against a private employer, or to affect the eligibility of a cardholder to receive benefits under any insurance program or policy.	Not plausible that this would not give rise to new claims, or that employers might not face additional liability under laws such as OSHA, the ADA, the National Labor Relations Act, FMLA, and others. For instance, a person terminated for failing a random drug test could claim disability discrimination, on the basis that although they were under the influence, they were not impaired or unable to perform their duties. Also, OSHA obligates employers to provide a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm” to employees. A person other than the cardholder could articulate a claim of being exposed to a known hazard by working next to a cardholder who is under the influence but protected by this amendment.
Section 12(F)	Discrimination Prohibited	
Section 12(F)(1)	A qualifying patient’s medical use of marijuana is considered the equivalent of the authorized use of other medication	This provision may require employers to alter their work policies or accommodate medical marijuana use.
Section 12(F)(2)	A nursing-care institution, hospice, assisted-living facility, or other residential care institution may not unreasonably limit a qualifying patient’s access to or use of marijuana	
Section 12(F)(3)	No school may refuse to enroll or otherwise penalize a person, and no landlord may refuse to enter into a lease with a person, solely because of the person’s status as a cardholder	
Section 12(F)(4)	Absent clear, convincing, and articulable evidence that person’s actions related to marijuana have created an unreasonable danger to the safety of a minor, conduct permitted under this section shall not form the sole or primary basis for the termination of parental rights or responsibilities or a determination of abuse, neglect, or dependency of a minor	

Section 12(G)	Affirmative Defense for Medical Marijuana Provides an affirmative defense for individuals prosecuted for the use, possession, cultivation, or transfer of marijuana or marijuana accessories until August 1, 2017	
Section 12(H)	Business Expenses - Provides a tax deduction for medical marijuana establishments	
Section 12(I)	Definitions (This is not an exhaustive list) Allowable amount of marijuana: two-and-one-half ounces of usable marijuana Cardholder: a qualifying patient or designated caregiver Debilitating medical condition: sets forth an exhaustive list. They include: cancer; glaucoma; positive status for HIV, AIDS, and hepatitis C; amyotrophic lateral sclerosis; Crohn's disease; ulcerative colitis; agitation of Alzheimer's disease; post-traumatic stress disorder; cachexia or wasting syndrome, severe debilitating pain, severe nausea, severe and persistent muscle spasms, seizures; autism with aggressive or self-injurious behaviors; sickle cell anemia; severe Fibromyalgia; spinal cord disease; spinal cord injury; traumatic brain injury or post-concussion syndrome; Parkinson's disease; muscular dystrophy; and Huntington's disease Manufacture: to compound, blend, extract, including by means of solvents such as butane or by CO2, or infuse marijuana or to otherwise make or prepare a marijuana product Marijuana: all parts of the plant of the genus cannabis whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin. Marijuana products: concentrated marijuana, extracts from marijuana, and products that are infused with marijuana or an extract of marijuana and are intended for use or consumption by humans. The term includes edible marijuana products, beverages, topical products, ointments, oils, and tinctures Medical Use: acquisition, purchase, possession, administration, cultivation, manufacture, use, delivery, harvest, preparation, transfer, transportation, or testing of marijuana relating to the administration of marijuana to treat or alleviate the debilitating medical condition or	Because of the short-term effect of marijuana, a cardholder would need to bring a daily supply to the workplace. Concerns about whether employer is permitted to know or verify the existence of a medical condition to confirm permitted us. Since physician can prescribe Schedule 1 substance, will there be a “provider” who can document an employee’s need for workplace accommodation on account of side effects?

symptoms associated with the debilitating medical condition

Qualifying patient: a person who has been diagnosed by a practitioner as having a debilitating medical condition and who continues to have a debilitating medical condition

Usable marijuana: dried leaves and flowers of the marijuana plant, and any mixture or preparation thereof

Section 12(J)	Enforcement of this Section - Provides taxpayers standing to file a lawsuit	
Section 12(K)	General Assembly Shall Not Frustrate Purpose of this Section - Acts to void any law enacted after the Amendment becomes effective that frustrates the purposes of the Amendment. Provides taxpayers standing to file a lawsuit.	A constitutional amendment is hard to change once enacted.
Section 12(L):	Severability - Severs any provision that is found to be invalid	