MEMORANDUM

TO: OMA members

FROM: Joëlle Khouzam

DATE: May 10, 2016

RE: Medical Marijuana Legalization Efforts – H.B. 523

On May 10, 2016, the Ohio House of Representatives voted 70 to 25 to legalize medical marijuana in Ohio. This vote follows a series of public meetings held by the House's Medical Marijuana Task Force earlier this year, the bill's introduction on April 14, 2016, and vigorous committee debate and amendments. It now proceeds to the Senate for review.

The measure seeks to address Ohioan's apparent support for the concept of medical marijuana, but builds in regulatory controls that are missing from two citizen-initiated measures that hope to gain enough signatures be on the November ballot. The bill also includes a number of employer safeguards that Bricker & Eckler highlighted to the Task Force in its testimony in March.

The following summary focuses on employment-related implications of this measure but does not detail the regulatory and licensing requirements for cultivators, processors, or retailers.

Background

Federal law currently classifies marijuana as a Schedule I controlled substance under the Controlled Substances Act, meaning it has no acceptable medical uses and has a high potential for abuse. Twenty-four states and the District of Columbia have legalized medical marijuana in some degree, with some states – and even some local jurisdictions -- imposing stricter controls on patients and dispensaries than others.

One interesting change between the introduced version of this bill and the substitute version voted on by the House is that the General Assembly will advocate for marijuana to become a Schedule II controlled substance, meaning that although it still has a high potential for abuse, it also has currently accepted medical uses under medical supervision.

Definition of medical marijuana

"Medical marijuana" is marijuana (as currently defined by Ohio law) cultivated, processed, dispensed, tested, possessed, or used for a medical purpose.

Legislative intent

Sub. H.B. 523 states the intent to tax and regulate medical marijuana use and distribution, to recommend to Congress that marijuana be reclassified as a schedule II controlled substance, and to establish incentives for academic and medical research relating to medical marijuana. More specifically, it would:

- Protect registered users and caregivers from arrest and prosecution;
- Permit use of marijuana for medical purposes but prohibit cultivation for personal use;
- License and regulate cultivators, processors, retail dispensaries, and testing laboratories;

- Register physicians recommending medical marijuana, and patients and caregivers;
- Authorize municipalities/townships to regulate or prohibit licensed retail dispensaries;
- Permit counties/townships to apply agricultural-use zoning limitations to regulate retail dispensaries in unincorporated territory;
- Prohibit cultivators, processors, retail dispensaries, or laboratories from being within 1,000 feet of a school, church, public library, public playground, or public park.

Creation of Medical Marijuana Commission

The Medical Marijuana Control Commission would consist of: (1) a practicing physician; (2) a representative of local law enforcement; (3) a representative of employers; (4) a representative of labor; (5) a representative of persons involved in the treatment of alcohol and drug addiction; (6) a representative of persons involved in mental health treatment; (7) a pharmacist; (8) a representative of persons supporting the legalization of marijuana use for medical purposes; and (9) a representative of patients.

No more than 4 members may be of the same political party. The Governor will appoint members within 30 days of the bill's effective date. Initially, the Governor shall appoint members from the first three categories to 5-year terms; the Senate President appoints the pharmacist and the member representing patients to 3-year terms; the Senate Minority Leader appoints the member representing labor to a 3-year term; the Speaker of the House appoints the mental health professional and the pro-legalization representative to 4-year terms; and the House Minority leader appoints the addiction treatment professional to a 4-year term. After these initial terms, all terms shall be 3 years. The Governor appoints the Commission chair. The appointees receive an established *per diem* and travel expenses to attend meetings. The Commission must meet within 30 days of the last appointment to adopt rules.

Medical Marijuana Control Program

Within one year of its initial meeting, the Commission must develop and submit to the Department of Commerce standards, procedures, and best practices, to include:

- Establishing application procedures, fees, disqualifying factors, and conditions for licensure of medical marijuana cultivators, processors, and retail dispensaries (in consultation with State Board of Pharmacy);
- Determining the number of licenses to issue, based on population, number of patients, and geographic distribution; and determining how licenses will be renewed, suspended, or revoked, and how a suspension may be lifted;
- regulating and registering physicians that recommend treatment with medical marijuana, in consultation with the State Medical Board;
- limiting the permissible forms to oils, tinctures, plant material, edibles, and patches;
- creating labeling requirements for packaging;
- establishing training requirements for retail dispensary personnel;
- licensing testing laboratories, and specifying when testing must be conducted;
- regulating activities within 1,000 ft. of schools, churches, libraries, playgrounds, parks;
- creating a program to assist veterans or indigents in obtaining medical marijuana;
- creating a confidential database to monitor medical marijuana from seed source through dispensing, and one to track physicians' treatment of patients, as described below;
- creating a toll-free hotline to respond to medical and public inquiries about adverse reactions to medical marijuana;
- establishing a drug abuse prevention program, to be funded by an annual set-aside of excise taxes and license application/renewal fees;
- creating research incentives.

All actions to implement this program must be taken within 2 years of the bill's effective date.

Medical Recommendations / Dispensing Medical Marijuana
A qualifying physician may recommend – *not prescribe* -- that a patient be treated with medical marijuana if a physician-patient relationship exists (*i.e.,* has been established through a physical, a review of the patient's medical history, and an expectation of ongoing care).

The substitute version of the bill has added "qualifying medical conditions" that would permit a recommendation. The list, which can be modified by the Department of Commerce, consists of: AIDS; amyotrophic lateral sclerosis; cancer; chronic traumatic encephalopathy; Crohn's disease; epilepsy or another seizure disorder; glaucoma; hepatitis C; inflammatory bowel disease; multiple sclerosis; pain that is severe, chronic or intractable; Parkinson's disease; positive status for HIV; post-traumatic stress disorder; sickle cell anemia; spinal cord disease or injury; Tourette's syndrome; traumatic brain injury; and ulcerative colitis. Parents or guardians must provide consent for minors before obtaining such recommendations.

Qualifying physicians may not personally furnish/dispense medical marijuana. Further, they may not advertise the services they provide in this vein on radio or television. Qualifying physicians must participate in continuing medical-marijuana education.

When giving a patient recommendation, the physician must specify the form(s) of medical marijuana that may be dispensed and the method(s) by which the patient may use medical marijuana. The physician's recommendation is valid for up to 90 days, and may be renewed for an additional 90 days upon an examination or follow-up consultation.

A patient or caregiver seeking to acquire medical marijuana must apply to the Commission for registration and include a copy of the physician's recommendation. If the application is complete, the patient or caregiver is given an identification card.

The Commission must undertake efforts to secure reciprocity agreements with other medical-marijuana states so registered users can be recognized elsewhere under similar conditions.

Physician Reporting
At least every 90 days, a qualifying physician must report (1) the number of patients for whom medical marijuana was recommended; (2) the disease/condition for which medical marijuana has been recommended; (3) the reason(s) it was recommended over other treatment; and (4) the form(s)/method(s) recommended. Annually, each qualifying physician must submit a report describing his/her observations regarding the effectiveness of medical marijuana on patients.

Prohibited Conduct
The substitute version of the bill has banned the smoking of medical marijuana; however, vaporization ("vaping") is permitted. The citizen initiatives propose to permit the smoking of plant materials.

Driving or using other vehicles while under the influence of medical marijuana is not authorized.

Content Limits, Labeling
The substitute bill limits the proportion of dispensed material that can contain tetrahydrocannabinol (THC), the compound that causes the "high", to 3-35%, while plant

extracts can have a THC content of up to 70%. A licensed processor must safely package medical marijuana and identify the processor, dispensary, physician, uses, and potency.

Lab Testing

Licensed labs will test for potency, homogeneity, and contamination, and must report results.

Employment Issues

There is no requirement to accommodate an employee's use of medical marijuana, or to prohibit an employer from refusing to hire, discharging, or taking an adverse employment action because of a person's use of medical marijuana. Moreover, there is no provision for suing an employer who takes such actions. There is no restriction on employer drug-free workplace policies or drug testing policies. By contrast, the citizen initiatives would provide special protections for medical-marijuana users who test positive at work.

A termination based on using medical marijuana is a discharge for just cause for unemployment purposes, and would render the applicant for benefits ineligible.

The workers' compensation rebuttable presumption, allowing an employer to initially deny a claim upon a positive drug test and allowing the employee to dispute a denial or the evidence at hearing, would render an employee ineligible if s/he was under the influence of marijuana and this was the proximate cause of the injury, regardless of whether the marijuana use is recommended by a physician.

The Ohio BWC can continue to grant premium rebates/discounts to employers that participate in the drug-free workplace program.

Banking Services

The bill creates a safe harbor for financial institutions that provide services to licensed cultivators, processors, retail dispensaries, or labs from criminal prosecution if the facilities are in compliance with this bill and the applicable Ohio tax laws, if the organizations are in compliance with the bill and the state's tax laws.

Pharmaceutical Reporting

The bill requires that a retail dispensary report to the Ohio Automated Rx Reporting System when dispensing medical marijuana to a patient.

Taxing Medical Marijuana

The General Assembly would establish an excise (consumer) tax on each medical marijuana sale, and would tax Ohio businesses, their gross or net revenues, their operations, their owners, and their property as otherwise provided by law. Annually, a portion would fund marijuana drug abuse prevention programs.

Other

The General Assembly will recommend that branches of the federal government Congress reclassify marijuana as a Schedule II controlled substance and ease the regulatory burdens on researching the potential medical benefits of marijuana. In addition, the General Assembly would support incentives or otherwise encourage institutions of higher education and medical facilities within Ohio to conduct academic and medical research relating to medical marijuana.

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