

Cannabis Legalization in New York: Is Fifth Time Finally the Charm?

April 06, 2021

Despite its continued federal prohibition, marijuana legalization was one of the big winners of the 2020 legislative cycle. In the northeast, the biggest change was the Garden State's legalization of adult-use cannabis (the more clinical sounding name for marijuana) through a voter-led constitutional amendment. Although all legalization efforts this cycle have had a social equity component, a major driver for state legislators has been the promise of revenue in the form of taxes. New Jersey has now put the pressure on neighboring states (like New York and Pennsylvania) to legalize or see that revenue go across the river.

As of the date of writing, it appears that the legislature and the Governor finally clinched a deal on legalization, with Sen. Liz Krueger's legislation, S854, as the basis. This is expected to generate around \$300 million a year in new revenue. The deal bypasses Gov. Andrew Cuomo's third attempt at legalization through the executive budget process (which concentrated more power in the executive than the legislature led effort). But the Governor now appears to be on board with the legislature's version of the law.

The Current System

As of Jan. 1, 2021, New York state's primary body of marijuana law is the New York Compassionate Care Act (NYCCA) (N.Y. Pub. Health Law §§3360 to 3369-E). The NYCCA regulates New York's medical marijuana program and provides certified patients with serious medical conditions with employment protections under New York's expansive Human Rights Law. Regulations are codified in Title 10, Chapter XIII of the New York Code, Rules and Regulations.

The NYCCA allows medical practitioners to certify patients with serious medical conditions, allowing them to obtain a registry card. The law protects certified patients, and their designated caregivers, for possessing and transporting a 30-day supply of medical marijuana (which cannot be consumed in a public place). According to the most recently available numbers, New York has 140,157 registered patients (about 0.5% of the population).

The current law also regulates the sale of medical marijuana, limiting the manufacturing and dispensing of medical marijuana in the state to licensed companies, referred to as Registered Organizations. Those organizations are subject to regulations prohibiting them from employing convicted felons, requiring them to manufacture marijuana in an indoor, enclosed, secure facility in New York state; governing laboratory testing, and mandating security measures. Prices are regulated by the Department of Health (though they vary from dispensary to dispensary), and advertising is also regulated (and all but prohibited).

The number of Registered Organizations was initially limited to five, but was eventually expanded to 10. Each of the organizations has several storefronts, and most offer home delivery. Applications are not currently being accepted, but come with a non-refundable \$10,000 fee, and \$200,000 registration fee for successful candidates. A registration is valid for two years, is non-transferrable, and must be renewed no more than six, and no less than four, months before expiration. Similar fees apply for renewal.

Registered patients are recognized as having a “disability” under New York’s Human Rights Law (N.Y. Exec. Law §§290 to 301). This entitles patients to certain protection against discrimination, though the law on this has been sparse in New York. However, there is no right to be impaired while at work. The patient’s use of medical marijuana may require the employer and employee to work on a reasonable accommodation. Beginning May 10, 2020, employers in New York City may not screen job applications for marijuana and THC.

The Proposed Overhaul

While The “Marihuana Regulation and Taxation Act” repeals and amends certain cannabis related laws—including several sections of the penal, tax, and vehicle and traffic laws—the biggest change will be the addition of Chapter 7-A to the New York Consolidated Laws titled “Cannabis Law.” In addition to regulating medical and adult use cannabis, the chapter will also incorporate a regulatory framework for Cannabinoid Hemp and Hemp Extract (CBD). That framework includes separate licenses for processing and retail, as well as regulation of marketing, testing, packaging, and labeling, of products containing hemp extracted CBD, but is beyond the scope of this article.

Article 2 of the Cannabis Law will establish the New York State Office of Cannabis Management within the Division of Alcoholic Beverage Control. Its authority will be split between a Cannabis Control Board, which will have the power to issue and revoke licenses and issue regulations, and an executive director charged with administering the new office. The governor will appoint the executive director, subject to senate confirmation. The governor will also appoint three of the board members, with the advice and consent of the senate, while the senate and the assembly will each get one appointment. Board members will serve a three-year term.

Article 3 will govern the medical cannabis program (supplanting the current NYCCA). It incorporates many of the protections extended to certified patients under current law (Art. 6, §42). In a departure from the Governor’s initial proposal, it will also allow for home cultivation of up to six plants for medical use by patients over the age of 21 or their designated caregiver (Art. 6, §41). As part of the transition to adult-use cannabis, registered organizations (e.g., those serving medical patients) will be allowed to apply for an adult-use license (Art. 6, §39). In addition, Article 3 establishes a special “cannabis research license” intended for non-commercial use (mainly to study the efficacy and safety of administering cannabis as part of medical treatment).

Article 4 will govern the all new adult-use cannabis market. The law anticipates primary licenses for cultivation, processing, distribution, retail, on-site consumption, and delivery (Art. 4, §§68, 69, 71, 72, 74 and 77). It also authorizes additional licenses for microbusinesses, co-operatives, and nurseries. (Art. 4, §§70, 73 and 75). Generally, a separate license will be required for each facility at which cultivation, processing, distribution or retail dispensing is conducted. In addition to licenses, various Special Use permits are envisioned for ancillary services like trucking, packaging, and warehousing of cannabis (Art. 6, §130).

The criteria for licensing (Art. 4, §64) include the ability to maintain effective control against illegal diversion of cannabis, the ability to comply with various laws and regulations, and the ability to actually carry out the purpose of the license (including acquiring the necessary real estate to do so where necessary). The licenses also have social equity components, insofar as the criteria include consideration of the applicant is a social or economic equity applicant, whether there is a labor-peace agreements with labor organizations representing employees, and the impact on communities disproportionately affected by the war on drugs (Art. 4, §§64 (a), (f), (i)-(j)). The board will also develop an economic equity plan for minority and women-owned businesses (Art. 4, §87). The law also envisions the development of a social responsibility framework agreement, fulfillment of which will be a condition of license renewals.

In a major shift from the current vertically integrated model for medical cannabis, there are limits on the types and numbers of licenses a person can have an ownership interest in. Some of these limits are similar to the “three-tier” alcohol regulatory framework in almost every state, where cross-ownership of manufacturers, distributors and customer-facing retailers is generally prohibited. For instance, adult cannabis retailers are limited to three retail dispensary licenses, and cannot have an ownership interest in cultivators, processors, distributors, microbusinesses or cooperatives (Art. 4, §72). Similarly, distributors may not have an ownership interest in a retail dispensary or microbusiness (Art. 4, §71). And

members of a “cooperative” licensee (which may only sell to distributors or retailers) may have no ownership stake in other licensed businesses. (Art. 4, §70).

The law requires the approval of the board prior to a change in ownership, location, or corporate structure of a licensed operation (with the license becoming void if no prior approval is received) (Art. 4, §67(3)). The law also imposes regulation on the sort of advertising that is prohibited. It includes depictions of consumption, any depictions that are in any way appealing to children or minors, are in the form of unsolicited internet pop-ups, or that make any medical claims or promote use for wellness purposes (Art. 4, §86). In other words, one must be very cautious in this arena.

Conclusion

While the market is potentially enormous, and the law is certainly comprehensive, it remains to be seen how successful New York’s program will be in practice. First, it allows municipalities to opt out of the recreational program by prohibiting retail dispensaries (Art. 6, §131). Second, while it includes penalties for “illicit” cannabis (cannabis not sold in accordance with the law), it is not clear if it will be enough to compete with an established black market considering the relatively minor penalties for possession and potentially high taxes. Time will tell.

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