

New Jersey's Coming Expansion of Its Medical Cannabis Regime Presents Opportunities to Sophisticated Operators

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Client Advisory

May 24, 2019 by Alexander G. Malyshev

It has been an interesting year, to say the least, for cannabis reform in the Garden State. A central plank of Governor Phil Murphy's electoral campaign in 2017 was to make New Jersey the next adult-use marijuana state. Incidentally, that was also Governor Andrew Cuomo's plan in New York, and heading into 2019, with Democratic legislatures on both sides of the Hudson, it looked like it might actually happen. As the first quarter of 2019 came to a close, it became apparent that neither governor had the votes to make it a reality.

In New Jersey, it appears that the legislature instead opted to expand the medical cannabis regime. On May 20, 2019, we got a general idea of what an expanded program would likely look like when Senate Bill 10 passed out of committee.[1] As the bill is still in draft form, and may change significantly before its eventual passage, this advisory does not attempt to deal with every aspect of the revisions.

Instead, it highlights some of the major changes likely coming to New Jersey's decade old Compassionate Use Medical Marijuana Act.[2] The advisory will close with some observations about the opportunities this overhaul presents.

I. A New Name, A New Regulator, And A New Mission

The first thing one will notice about the new proposed law is that, like much of the industry, it jettisons the term "marijuana" in favor of the much more clinical term "cannabis." This includes both the act's official name, which going forward will be the "Jake Honig Compassionate Use Medical Cannabis Act" (the "Bill"), and the wholesale replacement of "marijuana" with "cannabis" in the text itself. The Bill also establishes a new Cannabis Regulatory Commission ("Commission") to oversee the revamped medical cannabis program. It will take over administration of the medical cannabis program from the Department of Health, including the issuance of permits for the cultivation, processing, and sale of medical cannabis. The Bill envisions this five-member Commission, all being appointed by the Governor (some with the recommendation of the Senate), as being representative of the various stakeholders in the industry.[3]

II. Expanding Access And Providing (Limited) Protections

The Bill relaxes the rules applicable to medical cannabis in several ways, with a view towards expanding the state's cannabis framework. It also attempts to provide registered medical cannabis users, and industry participants, with certain protections against employment, housing, and educational discrimination. However, it is important to note that federal law considers all cannabis (including state-legal medical cannabis) illegal, and virtually every protection afforded by the Bill provides an escape valve in the event that federal benefits are implicated. As a result, some of those protections may have limited value.

First, the Bill significantly expands the list of medical conditions which would qualify one for participation. It no longer limits participants to those suffering from “debilitating medical conditions,” and instead uses a broader list of “qualifying medical conditions” that may be treated by medical cannabis as a first resort. These include (among others):

- Seizure disorder, including epilepsy;
- Post-traumatic stress disorder;
- Glaucoma;
- Inflammatory bowel disease (IBS), including Crohn’s disease;
- Anxiety;
- Migraines;
- Tourette’s syndrome;
- Dysmenorrhea (menstrual cramps);
- Chronic pain;
- Opioid use disorder; or
- Any other condition that is approved by the Commission.[4]

The Bill also expands the list of providers who can prescribe medical cannabis. Unlike current law, which only allows physicians to provide authorization for medical cannabis, the Bill allows physician assistants and advanced practice nurses to prescribe medical cannabis. The providers are not required to be registered with the Commission, or be listed in a public Commission registry, but may not prescribe medical cannabis to themselves or their immediate family.[5]

Finally, the Bill contains proposed protections for qualifying patients and designated caregivers.[6] These protections apply to school enrollment, property rentals, professional licenses and certifications and employment, and generally proceed from the basis that it would be unlawful to discriminate against these individuals based on (1) their status as registry card holders, or (2) their engaging in authorized conduct in relation to medical cannabis.[7] However, because cannabis remains illegal under federal law, the Bill’s protections would not apply if compliance would “jeopardize a monetary grant or privilege of licensure based on federal law.” The Bill also provides similar protections to practitioners who prescribe medical cannabis with regard to their employment and professional relationships.[8]

III. The Bill Upends The Current Licensing System

Perhaps the greatest change, presenting the biggest opportunity for investors, is the switch from the current model of integrated ownership in favor of a decentralized permit system, which includes:[9]

- Medical Cannabis Cultivators: These growers may sell medical cannabis exclusively in New Jersey to other cultivators, manufacturers, dispensaries, or clinical registrants.[10]

- Medical Cannabis Manufacturers: These businesses are authorized to purchase medical cannabis in New Jersey, utilize it to manufacture medical cannabis products, and then to sell those products to other manufacturers, dispensaries, or clinical registrants in New Jersey.[11]
- Medical Cannabis Dispensaries: These businesses are authorized to purchase medical cannabis from cultivators, or medical cannabis products from manufacturers, in New Jersey, and to sell them to the end user or their designated caregiver. They are also authorized to carry and sell various paraphernalia and related supplies.[12]
- Medical Cannabis Wholesalers: These businesses are authorized to sell medical cannabis items for the purpose of resale, either to another cannabis wholesaler or to a cannabis retailer.[13]
- Clinical Registrants: These are entities that have a contractual relationship with an academic medical center to conduct research related to medical cannabis.[14]

One of the Commission's mandates is to promote the participation of persons from "socially and economically disadvantaged communities, including by prospective and existing minority owned and women's owned businesses and disabled veterans' businesses" in the industry. The Bill targets a set-aside of 30% of permits for such businesses, with 15% going to minority-owned businesses, and 15% going to woman and disabled veteran-owned businesses.[15] Generally speaking, those are businesses that are 51% owned by those respective constituents.[16] The Bill also creates a category of "conditional permits," to entities funded by smaller investors with adjusted gross income of no more than \$200,000 (or \$400,000 filing jointly), which will have a separate application process.

To encourage competition (and likely to give woman, minority, and disabled veteran-owned businesses improved odds at succeeding), an entity will be permitted to hold only one permit of any type during the first 18 months of the new program. After that initial window expires, with the exception of the wholesaler permit (which will remain stand-alone), a single entity will be allowed to own any combination of the other three types of permits (though not more than one of each).[17] The Commission is charged with ensuring the availability of a sufficient number of medical cannabis cultivators, medical cannabis manufacturers, and medical cannabis dispensaries throughout New Jersey, including by approving at least two each in the northern, central, and southern New Jersey.[18] Alternative Treatment Centers (ATC), which operate under the current system, are essentially grandfathered in with respect to the vertical integration rules.[19]

Finally, the Bill sets forth the specific information to be considered when reviewing new permit applications, which, along with any other criteria the Commission deems appropriate, includes information concerning:

- The applicant's operational experience;
- A workforce development plan;
- A community impact analysis;
- The applicant's security capabilities;
- Proposed storage systems;
- An emergency management plan;
- A prisoner reentry program plan; and
- The proposed location.[20]

It is left to the Commission to determine the weight to be afforded to each criterion, and it is the goal of the Bill to begin issuing permits within 90 days of application (the window for which will open within 90 days of the effective date of the Bill).[21] Certain classes of convictions will disqualify a person from applying for a permit for, or serving as an officer, director, or employee of, a medical cannabis cultivator, manufacturer, dispensary, or clinical registrant.[22] As part of the application process, even potential investors (holding more than a minimal interest in the permit applicant), are required to pass a criminal background check.[23]

IV. Conclusion

New Jersey's proposed overhaul of its medical cannabis regime presents opportunities for both investors and operators seeking entry into the market. Especially for the first 18 months, the system is set up to encourage competition by discouraging vertical integration (as well as setting aside specific numbers of permits for minority, woman, and disabled veteran-owned businesses). Either through direct investment, or partnership with some of these favored businesses, there appears to be real opportunity to participate in this market. For entrepreneurs, especially those who may benefit from certain set asides under the Bill, there may be an additional opportunity to partner with experienced multi-state operators (MSO's), or other more traditional investors, who are familiar with the unique challenges such businesses entail.

Getting one's ducks in a row, including by preparing an application that realistically deals with operating such a business, is something potential investors or operator can do while waiting for passage of the final Bill.

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For more information concerning the matters discussed in this publication, please contact the author **Alexander G. Malyshev** (212-238-8618, malyshev@clm.com), or your regular Carter Ledyard attorney.

[1] See Amended Text of Senate Bill 10 and 2426 by the Senate Health, Human Services and Senior Citizens Committee ("Senate Committee Bill") (available at https://www.njleg.state.nj.us/2018/Bills/S0500/10_R4.PDF) and the accompanying Statement of the Senate Health, Human Services and Senior Citizens Committee ("Senate Committee Report") (available at https://www.njleg.state.nj.us/2018/Bills/S0500/10_S7.PDF).

[2] P.L.2009, c.307 (C.24:6I-1 et al.).

[3] See Senate Committee Report at 1-2 ("At least one member is to be a State representative of a national organization or State branch of such an organization with a stated mission of studying, advocating, or adjudicating against forms of social injustice or inequality, and all members are to possess education, training, or experience with: legal, policy, or criminal justice issues; corporate or industry management, finance, securities, or production or distribution; medicine or pharmacology; or public health, mental health, or substance use disorders.").

[4] See Senate Committee Report at 4-5; Senate Committee Bill at 8 (Definition of "Qualifying medical condition").

[5] See Senate Committee Report at 5.

[6] Current law allows a patient to designate a single caregiver who may obtain medical cannabis on their behalf, and that caregiver may not service more than one patient. The Bill allows these caregivers (now called designated caregivers) to serve up to two patients at one time, and it allows each patient to have up to two caregivers (with the ability to petition for more). The Bill also creates a category of institutional caregivers, who are employees of medical facilities, and who are authorized to assist qualified patients of that facility. See Senate Committee Report at 5.

[7] See Senate Committee Report at 18.

[8] *Id.*

[9] See Senate Committee Report at 9-10.

[10] See Senate Committee Bill at 25 (Section 5(a) Medical Cannabis Cultivator).

[11] See Senate Committee Bill at 25 (Section 5(b) Medical Cannabis Manufacturer).

[12] See Senate Committee Bill at 25 (Section 5(c) Medical Cannabis Dispensaries). Although the bill specifically authorized the sale of medical cannabis in various forms (including dried form, oral lozenges, or edibles, among others), it should be noted that in addition to general Federal prohibition, the Food and Drug Administration (FDA) generally prohibits consumables that contain CBD and THC (the two main compounds found in cannabis) because they are considered to be active drug ingredients in an approved medication. See Senate Committee Bill at 25-26 (Section 6); "Things to Consider If You Decide to Invest in the Hemp and CBD Industries," *Client Advisory* (April 18, 2019) *available at* <https://www.clm.com/publication.cfm?ID=5651&Att=172>.

[13] See Senate Committee Substitute for Senate No. 2703 (March 18, 2019), at 5 (Definition of Cannabis Wholesaler) *available at* https://www.njleg.state.nj.us/2018/Bills/S3000/2703_U1.PDF; Senate Committee Report at 12 ("The amended bill establishes requirements for issuance of a medical cannabis wholesaler permit. A medical cannabis wholesaler will be an entity authorized to acquire medical cannabis and medical cannabis products from medical cannabis cultivators, manufacturers, wholesalers, and clinical registrants for resale to other cultivators, manufacturers, wholesalers, dispensaries, and clinical registrants. Medical cannabis wholesalers will not be permitted to engage in any activities related to cultivation, manufacturing, dispensing, or delivery of medical cannabis. An entity holding a medical cannabis wholesaler permit will be prohibited from holding a medical cannabis permit of any other type.").

[14] Senate Committee Report at 12. The Commission is required to request applications for at least four clinical registrant permits within 90 days of the effective date of the Bill.

[15] Senate Committee Report at 2-3.

[16] See NJ Rev Stat § 52:27H-21.18 (f) (Minority business); (i) (Women's business); NJ Rev Stat § 52:32-31.2(2) (Disabled veterans' business).

[17] See Senate Committee Report at 9. (An "entity will be authorized to concurrently hold medical cannabis cultivator, medical cannabis manufacturer, and medical cannabis dispensary permits. An entity holding a medical cannabis wholesaler permit will be prohibited from holding a permit of any other type, and no entity issued a permit of any other type may concurrently hold a medical cannabis wholesaler permit."); Senate Committee Bill at 22 ("Commencing 18 months after the effective date ... a permit holder shall be authorized to concurrently hold a medical cannabis cultivator permit, a medical cannabis manufacturer permit, and a medical cannabis dispensary permit, provided that no permit holder shall be authorized to concurrently hold more than one permit of each type.").

[18] See Senate Committee Bill at 24. During the first 18 months, the Commission may authorize up to 23 permits for cultivation of medical cannabis. The Commission will subsequently be allowed to evaluate whether additional permits are needed to meet supply. See Senate Report at 10.

[19] See Senate Committee Report at 9-10.

[20] See Senate Committee Report at 10; Senate Committee Bill at 36-43 (Section 12).

[21] *See* Senate Committee Bill at 35 (Section 11).

[22] *See* Senate Committee Bill at 26 (Section 7(c)).

[23] *See id.* (Section 7(d)).

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