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# COUNTY ADVISORY BULLETIN

CAB

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Bulletin 2016-02

August, 2016

## MEDICAL MARIJUANA

**APPLICABLE LEGISLATION:** HB 523 (131st General Assembly)

**REVISED CODE SECTIONS EFFECTED:**

**Amends sections:** 109.572, 519.21, 4123.54, 4729.75, 4729.80, 4729.84, 4729.85, 4729.86, 4731.22, 4731.281, 4776.02, 4776.04, and 5713.30

**Enacts sections:** 3796.01, 3796.02, 3796.021, 3796.03, 3796.031, 3796.032, 3796.04, 796.05, 3796.06, 3796.061, 3796.07, 3796.08, 3796.09, 3796.10, 3796.11, 3796.12, 3796.13, 3796.14, 3796.15, 3796.16, 3796.17, 3796.18, 3796.19, 3796.20, 3796.21, 3796.22, 3796.23, 3796.24, 3796.27, 3796.28, 3796.29, 3796.30, 4729.771, 4731.229, 4731.30, 4731.301, and 4731.302

**LEAD SPONSOR:** Representative Huffman

**HOUSE COSPONSORS:** Schuring, Ramos, Brown, Celebrezze, Maag, Rogers, Ruhl, Terhar and Perales

**SENATE COSPONSORS:** Yuko, Brown, Sawyer, Schiavoni, Tavares, Thomas

**EFFECTIVE DATE:** September 8, 2016

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## OVERVIEW – MEDICAL MARIJUANA CONTROL PROGRAM

Ohio becomes the 25th state to allow marijuana for medical purposes. HB 523 requires that the Department of Commerce and State Board of Pharmacy establish a Medical Marijuana Control Program that provides for:

1. Licensure of medical marijuana cultivators, processors and retail dispensaries;
2. Registration of patients and caregivers;

### 3. Licensure of laboratories that test medical marijuana.

Under the bill, the Department of Commerce is responsible for the licensure of cultivators, processors and testing laboratories, while the Board of Pharmacy is charged with the licensure of retail dispensaries and the registration of patients and caregivers. In the case of physicians, the State Medical Board is to issue certificates to those seeking to recommend treatment with medical marijuana.

Complete implementation of the bill's provisions is expected to take up to two years. The bill requires that the Department of Commerce adopt rules regarding the licensure of cultivators not later than 240 days after the bill's effective date; the Department of Commerce and Board of Pharmacy separately adopt rules establishing standards and procedures for the portions of the Program each is responsible for administering not later than one year after the bill's effective date; and the Department of Commerce and Board of Pharmacy take all actions necessary to ensure that the Program is fully operational not later than two years after the bill's effective date which would be September of 2018.

#### **For counties as employers**

The new medical marijuana law DOES NOT require an employer to permit or accommodate employees' use, possession or distribution of medical marijuana. It REMAINS LEGAL for employers to fire employees for use, possession or distribution of medical marijuana.

- Counties may continue to enforce their current drug testing policy, drug-free workplace policy or zero-tolerance drug policy. For counties with such policies in place it is strongly suggested that they review and update these policies to specifically state that, irrespective of the provisions of HB 523, the use of medical marijuana is prohibited under these county policies.
- For counties that do not currently have policies prohibiting drug use it is highly recommended that such policies be adopted prior to the September 8 effective date of the legislation. Otherwise a strong argument can be made that the new law allows any employee to possess or use medical marijuana while working.
- Notification to county employees – Updated policies prohibiting medical marijuana possession or usage in the work place should be distributed to all employees and written acknowledgement of receipt of the new policy should be obtained from each employee.
- Training for employees – All employees should receive training on the new policy that explains the elements of the new policy, how employee discipline for violations of the policy will be managed, and the potential consequences to the employee determined to have violated the policy.
- Counties that wish to permit employees' use of medical marijuana - should consult with their Prosecutor, HR consultant or outside counsel regarding the adoption of appropriate testing policies. It is not known at this time whether such policies would jeopardize eligibility for the BWC Drug Free Workplace Program.

## **“Medical marijuana” – definition**

Current Ohio and federal law classify marijuana as a schedule I controlled substance, making its distribution, including by prescription, illegal. According to the U.S. Drug Enforcement Administration, a schedule I controlled substance has all of the following characteristics: no currently accepted medical use, a lack of accepted safety for use under medical supervision, and a high potential for abuse.

Under the bill, the definition of “marijuana” remains unchanged and remains a schedule I controlled substance. The bill creates a new definition of “medical marijuana” as marijuana that is cultivated, processed, dispensed, tested, possessed or used for a medical purpose and classifies medical marijuana as a schedule II controlled substance. A schedule II controlled substance is considered to have a high potential for abuse (ORC Sec. 3796.01).

## **Medical conditions for which medical marijuana may be prescribed**

The bill specifies that medical marijuana may only be prescribed for the treatment of an enumerated list of qualifying medical conditions (ORC Sec. 4731.30). However, this list is not definitive and an individual may petition the State Medical Board to add a disease or condition to the list of qualifying medical conditions (ORC Sec. 4731.302). The Board is obligated to take certain steps when reviewing the disease or condition for inclusion as a qualifying medical condition and is directed to specifically approve or deny the petition.

## **Permissible forms and methods of medical marijuana**

The bill authorizes medical marijuana to only be dispensed as: oils, tinctures, plant material, edibles, patches, or any other form approved by the Board of Pharmacy. The bill prohibits any form or method considered attractive to children, as specified in rules adopted by the Board (ORC Secs. 3796.04 and 3796.06). However, the Board of Pharmacy may be petitioned to approve an additional form or method of using medical marijuana. On receipt of a petition, the Board must consult with one or more scientific experts and review any relevant scientific evidence. The Board must then approve or deny the petition (ORC Sec. 3796.061).

The bill specifies that plant material have a tetrahydrocannabinol (THC) content of not more than 35%, while extracts have a THC content of not more than 70%, and expressly prohibits the use of medical marijuana by smoking or combustion, but allows for vaporization (ORC Sec. 3796.06).

## **THE REGULATORY FRAMEWORK**

### **Prescription required to obtain medical marijuana**

Only a physician who has been issued a “certificate to recommend” medical marijuana pursuant to rules established by the State Medical Board and demonstrates that they do not have an ownership or investment interest in or a compensation arrangement with a licensed cultivator, processor, laboratory or retail dispensary may write prescriptions for the use of medical marijuana.

A prescription may be written only if the patient has been diagnosed with a qualifying medical condition and a bona fide physician-patient relationship has been established evidenced by the physician completing an in-person physical examination of the patient and a review of the

patient's medical history with the expectation of the physician providing care to and the patient receiving care on an ongoing basis.

A written prescription recommending the use of medical marijuana is valid for a period of not more than 90 days. The physician may renew the recommendation for not more than three additional periods of not more than 90 days. Thereafter, the physician may issue another recommendation to the patient only upon a physical examination of the patient (ORC Sec. 4731.30).

### **Patient registration required**

A patient seeking to use medical marijuana or a caregiver seeking to assist a patient in the use of medical marijuana must apply to the Board of Pharmacy for registration (ORC Sec. 3796.08). The physician who holds a certificate to recommend and is treating the patient is required to submit the application on the patient's or caregiver's behalf. A registered patient may use or possess medical marijuana or possess any paraphernalia or accessories specified in Board of Pharmacy rules. The amount of medical marijuana possessed by a registered patient or caregiver must not exceed a 90-day supply (ORC Secs. 3796.22 and 3796.23).

### **Dispensing medical marijuana**

Dispensing of medical marijuana will be monitored by the Board of Pharmacy through OARRS (Ohio Automated Rx Reporting System). A retail dispensary will be required to report through OARRS when dispensing medical marijuana consistent with reporting requirements specified in rules adopted by the Board of Pharmacy (ORC Sec. 4729.75). The Department of Commerce must establish and maintain an electronic database to monitor medical marijuana from its seed source through its cultivation, processing, testing and dispensing (ORC Sec. 3796.07).

### **Licensing cultivators, processors, retail dispensaries, and laboratories**

The Department of Commerce licenses cultivators, processors or testing laboratories of medical marijuana while retail dispensaries are licensed by the Board of Pharmacy (ORC Secs. 3796.09 and 3796.10). Each entity must submit an application for each location from which it seeks to operate.

A license for any of the four purposes enumerated above will be issued to an applicant if all of the following conditions are met (ORC Secs. 3796.09, 3796.10 and 3796.11):

1. The applicant demonstrates that it does not have an ownership or investment interest in, or compensation arrangement with, a laboratory licensed by the Department of Commerce or with an applicant for a license to conduct laboratory testing;
2. The applicant demonstrates that it will not be located within 500 feet of a school, church, public library, public playground or public park;
3. The report of each criminal records check conducted demonstrates that the person subject to the check is not disqualified because of a conviction or guilty plea to an offense specified in rules;

4. The information provided to the Department or Board of Pharmacy by the Ohio Department of Taxation demonstrates that the applicant is in compliance with state tax laws;
5. The applicant meets all other licensure eligibility conditions established in rules.

### **Licensed cultivators**

The holder of a cultivator license is authorized to cultivate medical marijuana and deliver or sell it to one or more processors (ORC Sec. 3796.18). A cultivator license holder may not cultivate medical marijuana for personal, family or household use nor cultivate medical marijuana on any public land, including a state park.

### **Licensed processors**

The holder of a processor license may do any of the following (ORC Sec. 3796.19):

1. Obtain medical marijuana from one or more licensed cultivators;
2. Process medical marijuana obtained from a cultivator into a form that may be dispensed;
3. Deliver or sell processed medical marijuana to one or more licensed retail dispensaries.

When processing medical marijuana, a licensed processor must package it according to federal child-resistant effectiveness standards in effect on the bill's effective date; label the packaging with the product's tetrahydrocannabinol and cannabidiol content; and comply with any packaging or labeling requirements established by the Department of Commerce.

### **Licensed retail dispensaries**

The holder of a retail dispensary license may obtain medical marijuana from one or more processors and may dispense or sell it to patients. When dispensing medical marijuana, the dispensary must do all of the following (ORC Sec. 3796.20):

1. Dispense or sell only upon a showing of a current, valid identification card issued by the Board of Pharmacy and in accordance with a physician recommendation;
2. Report through OARRS that medical marijuana was dispensed to a patient;
3. Employ only persons who have met the training requirements established by the Board of Pharmacy;
4. Label the package containing medical marijuana with the following information:
  - a. The name and address of the licensed processor and retail dispensary;
  - b. The name of the patient and caregiver, if any;
  - c. The name of the qualifying physician who recommended treatment with medical marijuana;

- d. The directions for use as recommended by the qualifying physician
- e. The date on which the medical marijuana was dispensed;
- f. The quantity, strength, kind and form of medical marijuana contained in the package

### **Licensed laboratories**

The holder of a laboratory license may obtain medical marijuana from licensed cultivators, processors and retail dispensaries and may conduct testing on the marijuana. When testing, a licensed laboratory must test for potency, homogeneity and contamination and prepare a report of test results (ORC Sec. 3796.21).

### **IMPACT UPON CURRENT COUNTY EMPLOYMENT LAW AND MATTERS**

#### **HB 523 DOES NOT:**

1. Require a county employer to permit or accommodate an employee's use, possession or distribution of medical marijuana;
2. Prohibit a county employer from refusing to hire, discharge, discipline or otherwise take an adverse employment action against a person with respect to hire, tenure, terms, conditions or privileges of employment because of that person's use, possession or distribution of medical marijuana;
3. Prohibit a county employer from establishing and enforcing a drug testing policy, drug-free workplace policy or zero-tolerance drug policy;
4. Interfere with any federal restrictions on employment, including U.S. Department of Transportation regulations;
5. Permit a person to sue an employer for refusing to hire, discharging, disciplining, discriminating, retaliating or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions or privileges of employment related to medical marijuana;
6. Affect the authority of the Administrator of Workers' Compensation to grant rebates or discounts on premium rates to employers that participate in a drug-free workplace program established in accordance with rules adopted by the Administrator.

### **Unemployment eligibility**

Under the bill, a person who is discharged from employment because of that person's use of medical marijuana is considered to have been discharged for just cause under the Unemployment Compensation Law if the person's use of medical marijuana violated an employer's drug-free workplace policy, zero-tolerance policy or other formal program or policy regulating the use of medical marijuana (ORC Sec. 3796.28). If a person has been discharged for just cause in connection with the person's work, for purposes of the Unemployment Compensation Law that person is ineligible to serve a waiting week or receive unemployment

benefits for the duration of the person's unemployment. Under current law, failure of a drug test could be "just cause" for purposes of this provision.

### **Eligibility for workers' compensation benefits**

The Workers' Compensation Law compensates an employee or an employee's dependents for death, injuries or occupational diseases occurring in the course of and arising out of the employee's employment. Under continuing law, an employee or dependent is ineligible for workers' compensation benefits if the employee's injury or occupational disease is purposely self-inflicted or is caused by the employee being intoxicated or under the influence of a controlled substance not prescribed by a physician where the intoxication or being under the influence of the controlled substance was the proximate cause of the injury.

HB 523 maintains the rebuttable presumption that an employee or an employee's dependent are ineligible for workers' compensation and benefits if the employee was under the influence of marijuana and being under the influence of marijuana was the proximate cause of the injury. This applies regardless of whether the marijuana use is for medical purposes as recommended by a physician (ORC Sec. 4123.53 and 4123.54).

### **Workers compensation premium rebates**

HB 523 does not impact current and continuing law under which the Bureau of Workers' Compensation's Drug-Free Safety Program offers eligible employers a premium rebate for implementing a loss-prevention strategy addressing workplace use and misuse of alcohol and drugs. In addition to satisfying other requirements, the employer's program must include alcohol and drug testing, including (1) pre-employment and new-hire drug testing, (2) post-accident alcohol and drug testing, (3) reasonable suspicion alcohol and drug testing, and (4) return-to-duty and follow-up alcohol and other drug testing (OAC 4123-17-58).

## **REGULATING LOCATION OF MEDICAL MARIJUANA FACILITIES**

The bill enacts a new section of the Revised Code which gives specific independent statutory authority to municipalities and townships to regulate the number and location of medical marijuana facilities within their jurisdiction. Counties are given no such authority.

"Sec. 3796.29. The legislative authority of a municipal corporation may adopt an ordinance, or a board of township trustees may adopt a resolution, to prohibit, or limit the number of, cultivators, processors, or retail dispensaries licensed under this chapter within the municipal corporation or within the unincorporated territory of the township, respectively.

This section does not authorize the legislative authority of a municipal corporation or a board of township trustees to adopt an ordinance or resolution limiting research related to marijuana conducted at a state university, academic medical center, or private research and development organization as part of a research protocol approved by an institutional review board or equivalent entity."

In addition, ORC Sec. 519.21 of the township zoning law was amended to add a paragraph (D) which provides:

“Nothing in this section prohibits a township zoning commission, board of township trustees, or board of zoning appeals from regulating the location of medical marijuana cultivators, processors, or retail dispensaries or from prohibiting such cultivators, processors, or dispensaries from being located in the unincorporated territory of the township.”

The parallel section relative to county rural zoning, ORC Sec. 303.21, was not amended. Thus, it appears that townships which have adopted township zoning have the ability, in addition to the new authority granted in ORC Sec. 3796.29, to regulate the number and location of medical marijuana facilities through their zoning power and process while those townships participating in county rural zoning do not.

## **MISCELLANEOUS ISSUES OF INTEREST TO COUNTIES**

### **CAUV property tax valuation not applicable**

The bill specifies that land on which medical marijuana is cultivated or processed does not qualify for current agricultural use valuation (CAUV) for property tax purposes. Instead, such land will be taxed based on fair market value (ORC Sec. 5713.30).

### **Juvenile Court and child protective services**

The bill provides that, unless there is clear and convincing evidence that a child is unsafe, the use, possession or administration of medical marijuana by a registered patient in accordance with the bill's provisions cannot be the sole or primary basis for either an adjudication determining that a child is an abused, neglected or dependent child; an allocation of parental rights and responsibilities; or a parenting time order (ORC Sec. 3796.24(B)).

### **Sheriff's office and OVI offenses**

The bill does not authorize a registered patient to operate a vehicle, streetcar, trackless trolley, watercraft or aircraft while under the influence of medical marijuana (ORC Sec. 3796.22). However the bill provides that a person's status as a registered patient or caregiver is not a sufficient basis for conducting a field sobriety test on the person or for suspending the person's driver's license. The bill specifies that to conduct a field sobriety test, a law enforcement officer must have an independent, factual basis giving reasonable suspicion that the person is operating a vehicle under the influence of marijuana or with a prohibited concentration of marijuana in the person's whole blood, blood serum, plasma, breath or urine (ORC Sec. 3796.24).

### **Assistance for veteran or indigent patients**

The bill requires that the Board of Pharmacy establish a program to assist patients who are veterans or indigent in obtaining medical marijuana (ORC Sec. 3796.04).

### **NOTE: Reclassification of marijuana**

Section 4 of the bill specifies that the General Assembly declares its intent to recommend that the U.S. Congress, U.S. Attorney General and the United States Drug Enforcement Agency (DEA) take actions as necessary to reclassify marijuana in an effort to ease the regulatory burdens associated with research on the potential medical benefits of marijuana. At the time of the



passage of the bill the DEA was reviewing a petition seeking the reclassification of marijuana under the Controlled Substances Act (CSA).

The DEA issued its [decision](#) not to reclassify marijuana on August 11, 2016. An excerpt from that letter provides: “Using established scientific standards that are consistent with that same FDA drug approval process and based on the FDA's scientific and medical evaluation, as well as the legal standards in the CSA, marijuana will remain a schedule I controlled substance. It does not have a currently accepted medical use in treatment in the United States, there is a lack of accepted safety for its use under medical supervision, and it has a high potential for abuse.”

Questions or comments should be directed to [John Leutz](#), CCAO Legislative Counsel, who was primarily responsible for the preparation of this CAB.