Legalized Medical Marijuana in Ohio

The Straight Dope:

Without getting into the weeds...

Controlled Substances Act

“Scheduling”

- Schedule 1: no currently acceptable medical use, lack of accepted safety for use under medical supervision, and a high potential for abuse

- Schedule 2: high potential for abuse
- Regulation by 5 federal agencies, including FDA, DEA
- Must obtain federal waiver to conduct testing or studies
- Until August 2016, product to be test could only be grown at one authorized site in Oxford, MS

Federal law vs. laws of states with legalized MM

- Random test 2009, positive for THC, Coats was fired
- September 2014: Can employer prohibit use detected at work, when Lawful Activities statute protects employees who engage in lawful off-duty activity?
- June 2015: Case goes up in smoke at the high court
Rock, meet hard place!
IRS trawling state-run pot database
to block Colorado marijuana
companies from claiming tax
deductions

*Denver Post, May 25, 2017*

Doobie-ous science?
Marijuana consists of many components, some of
which provide the “high” (THC), and others of
which, like cannabidiols (CBDs), can be extracted
for medicinal uses.

NIH/NIDA
Known risks of smoking marijuana

- Respiratory illnesses, lung changes, chronic cough
- Cancer
- Increase in myocardial infarctions
- Increased risk of psychosis in adolescents, young adults
- Memory loss
- Effect on coordination, concentration, alertness, perception, judgment, motor skills

Brains under construction

Duke University:
- Participants answered questions about marijuana use at 18, 21, 26, 32 and 38, and underwent neuropsychological testing at ages 13 and 38.
- Persistent marijuana use was linked to a 6 point decline in IQ (controlled for educational differences). "That’s in the same realm as what you’d see with lead exposure… It’s not a trifle."

Marijuana and the Developing Brain, American Psychological Association, Nov. 2015

Use of marijuana has gained acceptance in several states, including for use in children with severe epilepsy or other seizure disorders. Requires content ↓ in THC, ↑ in cannabidiol (CBDs), a non-mood-altering ingredient.
**Sativex**
- Spray extracted from the cannabis sativa plant
- Contains THC and CBD
- Active ingredients are absorbed in the lining of the mouth
- Licensed in 16 countries for MS spasticity, but not U.S.

**Epidiolex**
- March 2016: GW Pharmaceuticals released positive results of late-stage testing
- FDA granted “orphan drug” designation in June 2016 for use in a form of childhood epilepsy

**So far, so good, but...**
- Nearly pure CBD extract; optimal compound for seizure treatment
- Dr. Patel study: “About half of the [kids] have had at least a 50% reduction in their seizures,” but more rigorous testing is needed.
Legalization is growing like a weed

Recreational Marijuana
- Alaska
- Colorado
- Oregon
- Washington

2016 Reefer-endums?
- Arizona
- California
- Maine
- Massachusetts
- Nevada
- North Dakota
That was easze-y!

Cannabi$ i$ really big busine$$

- **Food-based:** conventional oils and cooking fats
- **Industrial hemp:** plant parts with <0.3% THC. Hemp production requires permit from DEA.
- **Infused food products:** chocolate bars, lollipops, "relaxing mints", infused jams, oils and butter spreads, infused coffee, tea, cider ("G-cups"™), baking supplies, flavored moustache wax

Going for the green

About Us

As a management company specializing in natural and environmentally friendly operations, we take pride in our dedication to sustainability.
The green, green grass of home...

Scotts Miracle-Gro Co
NYSE: MG - Oct 25, 4:26 PM EDT
88.54 USD +1.53 (1.76%)
After hours: 88.44 USD - 0.09%

Scots Miracle-Gro And The New Cannabis Marijuana Industry

Market Buzz About Scott's After Buffalo Highlights Its Pot Potential By The Street

The garden products company may be poised to see huge sales growth in its hydroponics business after the success of a series of state ballot initiatives legalizing marijuana.

BRIEF: Pot sales poised to outpace ice cream sales

Dayton Daily News (Dayton, OH)
9/18/2017 09:02:59
2015 ResponsibleOhio

Ohio potentially dodged a bullet on November 3, 2015

Early 2016: House and Senate decide to hear from constituents.
ResponsibleOhio gets $ support from Marijuana Policy Project, which has enacted other marijuana efforts. New citizen initiative:

- ResponsibleOhio gets $ support from
- Marijuana Policy Project, which has enacted other marijuana efforts. New citizen initiative:

Other groups continued to try to legalize recreational and medical marijuana through petition signature campaigns

And still...

- CannAscend – ResponsibleOhio founders want to invest $45MM in Wilmington, OH
- GrassrootsOhio still wants to pursue constitutional amendment for medical marijuana and industrial hemp

April 14, 2016
House + Senate committee meetings  

Three days later, the constitutional amendment movement suspends its efforts to continue collecting signatures.

June 8, 2016: governor signs, = ORC 3796

Legislation and Rules
- Medical Marijuana Advisory Commission: frame Medical Marijuana Control Program
- Department of Commerce: make rules, license cultivators, processors, and testing labs – OAC 3796
- State Medical Board: regulates physicians
- State Pharmacy Board: license dispensaries, and register patients and caregivers
- JCARR/Common Sense Initiative
Highlights of H.B. 523

- General Assembly to encourage Congress to remove marijuana from Schedule 1 of CSA
- DEA:

Not just green growth

- Statute contains 15% license set-aside for four economically disadvantaged minority groups. Nine other states’ laws contain minority set-aside
- General consensus: probably unconstitutional, although no legal challenge has been filed to date.

“Medical marijuana”

Marijuana, as used in criminal provisions of ORC, cultivated, processed, dispensed, tested, possessed, or used for a medical purpose.
Highlights of H.B. 523

- No home grow
- Cultivators must apply with the Ohio Department of Commerce to become licensed
- Those with certain criminal convictions are disqualified from growing marijuana

Permissible forms

- Cannot be combustible (smoked)
- Oils
- Tinctures
- Transdermal patches
- Plant materials
- Edibles
- Other forms that may be permitted by regulations

CAVEAT: cannot be attractive to children
- No cultivation or sale within 500 feet of a school, public playground, church, public park or public library

...except authorized research facilities.

Potentially, this could mean state universities.

<table>
<thead>
<tr>
<th>Pot-pourri of approved conditions</th>
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<tbody>
<tr>
<td>AIDS: positive for HIV</td>
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<tr>
<td>amyotrophic lateral sclerosis</td>
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<tr>
<td>Alzheimer’s disease</td>
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<tr>
<td>Cancer</td>
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<td>chronic traumatic encephalopathy</td>
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<tr>
<td>Crohn’s disease</td>
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<tr>
<td>Epilepsy/other seizure disorder</td>
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<td>Fibromyalgia</td>
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<td>Gaucoma</td>
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<tr>
<td>IBS</td>
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<tr>
<td>multiple sclerosis</td>
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<tr>
<td>pain that is either chronic and severe or intractable</td>
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<tr>
<td>Parkinson’s disease</td>
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<tr>
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<tr>
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</tr>
<tr>
<td>spinal cord disease or injury</td>
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<tr>
<td>Tourette’s syndrome</td>
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<tr>
<td>traumatic brain injury</td>
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<tr>
<td>ulcerative colitis</td>
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In the Zone

- Local municipalities can prohibit or limit cultivation or retail dispensaries
- Townships can regulate or prohibit operations in unincorporated territories of township

Commerce’s Role

- License application and review, scoring system, financial viability
- Certificate of operation needed to commence growing
- Certificate renewals, suspensions
- Transfer of ownership or location

Cultivators

- DoC may issue up to 12 level I cultivator licenses, up to 6 level II cultivator licenses
  - Level I up to 15,000 square ft
  - Level II up to 1,600 square ft
- director can issue additional provisional licenses after 2018, based on state population, patient population
Other Commerce functions

- Lab testing
- Inspections
- DoC approval of advertising
- Product registration for every strain cultivated

High hopes in Youngstown

- Mahoning Valley Agriculture LLC has secured the former Parker Hannifin building for its project in Youngstown
- Backed by $10 million from three out-of-town private equity investors
- Tier I license would permit it to operate a 25,000-sq. ft. center, with potential to expand to 75,000 sq. ft.

Another prospect

- Buckeye Wellness Research Fund LLC (affiliated with Ohio Grown Medicine) is seeking a license and is purchasing two parcels totaling nine acres from the city of Youngstown
- Plans to spend up to $10 million to construct a new building to house an indoor farm
Having to choose between...

- Five applicants in same geographic area.
- Unlikely that all three would be awarded licenses, but hypothetically city would need to make zoning decisions, choices.

Cultivator operations and controls

- Packaging, labeling
- Inventory control and storage
- Quality control
- Security: physical plant, technology, state to have live camera feed access
- State-issued ID cards for employees
- Transportation logs
- Loss and theft reporting

Processors (Commerce)

- 40 licenses
- Application $10,000; license $90,000, and renewal $100,000 annually
- Geographic territory rating system has been removed
- Liquid capital requirements and escrow/surety bond requirements are reduced from $500,000 to $250,000 (or down to $100,000 if processor is co-owned/shared with cultivator)
- Expired product can be sold to processors/extracted
Dispensaries (Pharm Bd)

- **40 licenses available now proposed**
- Draft regs specifying applicant criteria; ownership criteria
- $5,000 app fee; $80,000 biennial license fee
- Requirement for onsite medical professional; proposal calls for deleting this clinical director requirement
- Security controls on personnel
- Reporting requirements
- **IMPORTANCE OF LOCAL ZONING LAWS**

Public notice and comment...

- Pharmacy board: a dispensary needs 300-1,500 patients to be sustainable
- Board will devise system to allocate licenses geographically so that patients don’t have to go more than 25 miles
- Proposal to do away with clinical director: lack of willingness or availability
- Fees in contention
Testing labs

- Application fees for licenses = $2,000
- Certificate of operation fee = $18,000
- Annual renewal fees = $20,000

Recent rules modifications

- Pharm Bd is considering:
  - >90-day supply to terminally ill patients
  - Exempting parents of 18-20 year olds from caregiver requirement
  - Allowing hospice providers to be registered as caregivers annually, rather than per patient

Query: are nurses entitled to same protection as Drs?

Dr. Feelgood is in!

Physicians who are certified by the State Medical Board can recommend, NOT PRESCRIBE, medical marijuana.
- Cannot have financial interest in growing marijuana, have lost their license, or have been convicted of certain crimes.
- Must attend at least 2 hours on diagnosing and treating conditions with medical marijuana.

Physician must:
- Have *bona fide* relationship with patient
- Confirm qualifying condition
- Determine that current Tx doesn’t work
- Develop Tx plan, discuss risks and benefits, warn of abuse and of database reporting obligations
- Register unregistered patients
- Recommend of up to 90-day supply, + 3 renewals
- Submit annual report of effectiveness

Affirmative defense for possession
Patients who have obtained a recommendation from an Ohio physician have an affirmative defense if they are stopped or arrested for possession.
Between a rock and...

“The Medical Board is in no way prohibiting the recommendation of medical marijuana now that HB523 is effective.”
Ohio Medical Board member Robert Giacalone, October 18, 2016 board policy committee

State Medical Association Advises Doctors Against Recommending Medical Marijuana to Patients
October 28, 2016

How does this really work?

- Omni patients pay $250 for the initial visit and must provide copies of medical records to prove they qualify for medical cannabis.
- Patients receive the recommendations, an affirmative-defense letter, and medical marijuana card (labeled with Omni Medical Services' name, not the state of Ohio). The documents claim to be good for 90 days.

Related Problems

- Some Detroit-area dispensaries will sell to out-of-staters with physician recommendations (e.g., from Toledo’s Omni Medical Services)
- Illegal under federal law to cross state lines
- Possession of less than 100 grams (about 3.5 ounces) = minor misdemeanor in Ohio, max $150 fine, possible loss of driving privileges for six months
### Use/Consumption
- 4 oz. of plant material of 24-35% THC content
- 6 oz. of plant material less than 23% THC
- Unspecified quantities of:
  - vaping oil that contains 40.5 grams of THC
  - skin patches with 19.8 grams of THC
  - edibles, oils and tinctures with 9 grams of THC

### A plant is a plant. Or is it?
- “Indica” variety relaxes muscles, calms seizures and works on the nervous system. Little THC.
- “Sativa” variety has high THC, so patient is always high. Grows much faster, could be more profitable.
- Statute does not specify limitations on varieties

### Proposed changes
- Do away with requirement that physician provide patient instruction, make optional to avoid it looking like a prescription

**Query:** if the physician doesn’t instruct and the state does away with the on-site clinical director requirement, who educates patient?
Surveys suggest only 3 out of 10 doctors will want to participate in a MM program

Parental concerns regarding side effects of psychoactive drugs

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**Financial Impact**

- MMC program: $5+ million over next 2 years. State budget will appropriate $2.58MM in FY18, $2.47MM in FY 19, split between Commerce and Pharm Bd
- 7 Commerce salaries, 10 Pharm Bd salaries, plus rents, supplies, travel
- Patient registry costs
  - MMAC - $844,200

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**Cash crop?**

Justice William O’Neill: Ohio should legalize recreational marijuana, release all non-violent pot offenders and use the tax revenue gained to build a world-class state-run mental health network to treat opioid addicts.

*May 22, 2017 Wayne County Democratic Party speech*
State loaned the MMC program $1.8 interest-free loan with no repayment date for first year’s start-up
Marijuana committee is pushing for licensing fee reduction if state is able to recoup its investment

Employment considerations

Rocky Mountain lows
Mile-High City in traffic deaths

- In 2014, when retail marijuana businesses began operating, there was a 32 percent increase in marijuana-related traffic deaths in just one year from 2013.
- Colorado marijuana-related traffic deaths increased 92 percent from 2010 – 2014. During the same time period all traffic deaths only increased 8 percent.
- Marijuana-related traffic deaths were approximately 20 percent of all traffic deaths in 2014 compared to half that (10 percent) just five years ago.
- In 2014, when retail marijuana businesses began operating, toxicology reports with positive marijuana results of active THC, results for primarily driving under the influence, have increased 45 percent in just one year.

in youth use

- In 2013, 11.16 percent of Colorado youth ages 12 to 17 years old were considered current marijuana users compared to 7.13 percent nationally. Colorado ranked 3rd in the nation and was 56 percent higher than the national average.
- Drug-related suspensions/expulsions increased 40 percent from school years 2008/2009 to 2013/2014. The vast majority were for marijuana violations.
- There was a 20 percent increase in the percent of 12 to 17 year old probationers testing positive for marijuana since marijuana was legalized for recreational purposes.
- A 2013 survey of school resource officers and school counselors revealed similar results about increased school marijuana issues since the legalization of recreational marijuana.

in hospital admissions

- In 2014, when retail marijuana businesses began operating, there was a 29 percent increase in the number of marijuana-related emergency room visits in only one year.
- In 2014, when retail marijuana businesses began operating, there was a 38 percent increase in the number of marijuana-related hospitalizations in only one year.
- In the three years after medical marijuana was commercialized, compared to the three years prior, there was a 46 percent increase in hospitalizations related to marijuana.
- Children’s Hospital Colorado reported 2 marijuana ingestions among children under 12 in 2009 compared to 16 in 2014.
The law does NOT:

- Prohibit an employer (e’r) from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person because of that person’s use, possession or distribution of MM.

- Prohibit an e’r from establishing a zero-tolerance drug policy.

Higher-ing challenges

- Finding enough qualified applicants who can pass pre-employment drug screens
- Increased absences, tardiness
- Accidents, workers’ compensation claims
- Turnover

Where the rubber hits the road:

- State legalization does not alter DEA status
- Testing mandated for pilots, truck drivers, bus drivers
- Consequences for failing to test include criminal sanctions
Indirect costs to employers

- Drug-testing applicants, employees
- Increased management training
- Increased need for supervision, oversight

We’re on a weed-to-know basis

- ADA, ORC §4112 limitations on asking about health conditions
- ORC 3796 does not require accommodation. Lack of knowledge about medical marijuana side effects makes accommodation difficult.
- Employers cannot verify whether employees are lawfully registered users.
Blanket (automatic) post-injury testing or the threat of testing is prohibited as a form of retaliation against employees who report injuries or illnesses. OK if done to comply with state or federal laws/regs

(Eff. December 1, 2016)
The pot thickens…

- Will EPLI cover claims?
- Will carriers require zero-tolerance policy?
- Will carriers exclude claims involving acts occurring outside of work time?
- Will states ever be on the same page?

STAY TUNED…

UNEMPLOYMENT

- The statute bars claims for unemployment benefits if the employer has a clear policy that was violated, not merely for failing a drug test.
- Costs of contesting claims.

A positive test may support rejecting a claim, if the employer has a policy prohibiting marijuana use, even if it is legally available medical marijuana.

P.S. Claims denials still implicate claims-related costs
EFFECT ON COLLECTIVE BARGAINING?

– Drug testing is a mandatory subject of bargaining.
– How might medical marijuana affect bargaining/impasse?
– Will unions claim being under the influence does not mean impaired?
– Will employers see grievances if workers testing positive are taken off duty?

Let’s just take a DEEP breath

 Asking about illegal use is not prohibited
 Zero-tolerance policies are permitted
 Testing is not prohibited
 Terminating is not prohibited

 Update substance abuse policies, blanket testing policies, smoking policies?
 Train managers and supervisors
 Job descriptions should identify safety-sensitive aspects
 Educate employees about hazards of abuse
Do You Have a Medical Marijuana Card?

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