

MEDICAL MARIJUANA IN MASSACHUSETTS

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**OVERVIEW OF
THE
MEDICAL
MARIJUANA
LAW**

- *Medical Marijuana
Treatment Centers*
- *Hardship
Cultivation*

**MEDICAL
MARIJUANA
TREATMENT
CENTERS (ACT)
OR
REGISTERED
MARIJUANA
DISPENSARY
(REGS)**

DEFINITION:

A not-for-profit entity, as defined by Massachusetts law only, registered under this law, that acquires, cultivates, possesses, processes (including development of related products such as food, tinctures, aerosols, oils or ointments), transfers, transports, sells, distributes, dispenses, or administers marijuana, products containing marijuana, related supplies or educational materials to qualifying patients or their personal caregivers.

MEDICAL MARIJUANA TREATMENT CENTERS

- *In 2013, DPH is authorized to issue up to 35 registrations for nonprofit RMDs.*
- *There must be 1 RMD per county.*
- *No more than 5 RMDs in 1 county.*
- *More than 35 registrations may be permitted in future years if DPH determines 35 is insufficient to meet needs.*

HARDSHIP CULTIVATION

- *If a “qualifying patient’s” access to a RMD is limited by:*
 - *Verified financial hardship*
 - *A physical incapacity to access reasonable transportation*
 - *Lack of a treatment center within a reasonable distance of the patient’s residence*
- *Patient or Caregiver will be registered by DPH to grow equivalent of 60 day supply (10 ozs or otherwise)*

HARDSHIP CULTIVATION

- *Until DPH enacted its regulations, the written recommendation of a qualifying patient's physician was sufficient to constitute a limited cultivation registration.*
- *The existing recommendation will continue to be valid until January 1, 2014, by which time all hardship cultivators must apply for hardship cultivation registration.*

THE BIG QUESTION

What should municipalities do to plan for medical marijuana related uses?

STUDY IT

- *A temporary moratorium temporarily prohibits the use of land or structures for RMDs.*
- *Municipalities must establish a rational basis for the moratoria (e.g., impact on local law enforcement and public safety needs).*
- *Duration of the moratorium must have a rational relationship to the proposed planning process.*

STUDY IT

- *Use the time to undertake a study of the secondary effects of medical marijuana related uses;*
- *Take the necessary steps to develop and present a proposed bylaw or ordinance to the legislative body to address the issues identified in the study.*

**MORATORIUM
UPHELD BY
THE AG!**

- *On 3/13/13, the Attorney General approved the bylaw adopted by the Town of Burlington establishing a temporary moratorium, ending on June 30, 2014, on the use of land or structures for RMDs.*
- *In approving the bylaw, the Attorney General found the approximately 18-month moratorium was a reasonable exercise of the Town's zoning power because it allowed the Town to manage a new use and take time for study, reflection and decision on a complex subject matter.*

**AG RULES
AGAINST
BANS**

The Attorney General disapproved the Wakefield bylaw banning RMDs outright.

In disapproving this bylaw, the Attorney General determined such a ban would frustrate the Act's purpose and therefore conflict with state law.

AG RULES AGAINST BANS

The Attorney General noted the Act requires the DPH to register up to 35 RMD, with 1 center in each county and no more than 5 centers per county.

The DPH is also authorized to register more centers if it determines that 35 are insufficient to meet demand.

The Act provides “hardship” cultivation registration, allowing qualifying patients unable to access medical marijuana treatment centers due to financial, physical or transportation issues, to cultivate their own marijuana in an enclosed, locked facility.

**AG RULES
AGAINST
BANS**

The Attorney General viewed these provisions collectively and determined the Act's purpose is to ensure reasonable access to RMDs, which centers must be dispersed throughout the Commonwealth.

The Attorney General further ruled a municipal ban on RMDs would undermine this purpose. In other words, if one municipality could ban the treatment centers, they all could.

**AG RULES
AGAINST
BANS**

The Attorney General's disapproval of Wakefield's express prohibition of RMDs suggests that existing bylaws or ordinances that have the same effect may also be vulnerable to challenge.

For that reason, municipalities may consider reviewing their bylaws or ordinances for consistency with state law.

HOW DO YOU REGULATE MEDICAL MARIJUANA?

POSSIBLE OPTIONS

- **ZONING**
 - *Add MMJ to existing uses*
 - *Add Overlay District*
- ★ *Be mindful of possible protection under G.L. c.40A §3 ¶1 If the operation can qualify as an agricultural use*
- **BOARD OF HEALTH REGULATIONS**

CONFLICT WITH STATE LAW

- *When exercising a right to govern locally, a town "exceeds its power only when it passes a by-law inconsistent with the Constitution or laws of the Commonwealth. See Home Rule Amendment [art. 89 of the Amendments to the Massachusetts Constitution], § 6; G.L. c. 43B, § 13 (Home Rule Procedures Act); Amherst v. Attorney Gen., 398 Mass. 793, 796 (1986).*

CONFLICT WITH STATE LAW

- *A by-law may be deemed inconsistent with state law where (1) it is in sharp conflict with it; (2) state law evinces an intent to preclude local action; (3) the purpose of the state law cannot be achieved in the face of the local bylaw; or (4) intent to preclude local action is not express, but can be inferred by the comprehensive manner in which the Legislature has regulated the subject. Pearson v. Town of Plymouth, 44 Mass.App.Ct. 741 (1998); Take Five Vending, Ltd. v. Town of Provincetown, 415 Mass. 741 (1993); Bloom v. Worcester, 363 Mass. 136, 154 (1973).*

PROCEDURES

ZONING

- *Follow the process set forth in G.L. c.40A §5*
 - *Planning Board Public Hearing*
 - *Report & Recommendation*
 - *Town Meeting: 2/3 vote*

BOARD OF HEALTH

- *Regulations can be adopted at a regular meeting after a summary of the substance of any regulation is published once in a newspaper of general circulation in the city or town. G.L. c.111 §31.*
- *Check if there are local restrictions for adoption of regulations.*

**THE SECOND
MOST
FREQUENTLY
ASKED
QUESTION**

*How can a
Massachusetts
municipality
authorize a use
that is illegal under
FEDERAL law?*

STATE V. FEDERAL LAW

- *Marijuana is classified as a Schedule I controlled substance under the **Controlled Substances Act (CSA)**.*
- *As a Schedule I drug, marijuana is classified under the following criteria:*
 - A. The drug has a high potential for abuse.*
 - B. The drug has no currently accepted medical use in treatment in the United States.*
 - C. There is a lack of accepted safety for use of the drug under medical supervision.*

--White House Office of National Drug Policy

STATE V. FEDERAL LAW

- *2009 Ogden Memorandum: Department of Justice stated that federal resources should not be used to prosecute operations in compliance with state law.*
- *2011 Memorandum “clarified” the position to state that federal resources should not be used for enforcement against individuals with serious illnesses (or their caregivers) who use marijuana as part of a recommended treatment regimen consistent with applicable state law.*

**STATE V.
FEDERAL LAW**

DOJ has stated however that persons who are in the business of cultivating, selling, or distributing marijuana, and those who knowingly facilitate such activities, are in violation of Federal law, and are subject to Federal enforcement action, including potential prosecution.

**STATE V.
FEDERAL LAW**

*Why don't the federal
laws against marijuana
distribution or
consumption
pre-empt the state
laws decriminalizing
it?*

STATE V. FEDERAL LAW

The CSA states:

“No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State so that the two cannot consistently stand together.” 21 U.S.C. §903.

**STATE V.
FEDERAL LAW**

In other words, there needs to be a “positive conflict” between the state and federal law such that the two “cannot consistently stand together.”

State and federal courts have ruled that a state-created exemption from state prosecution does not create a positive conflict with federal law.

HELPFUL LINKS

MA Department of Public Health MMJ page:

<http://www.mass.gov/eohhs/gov/departments/dph/programs/hcq/medical-marijuana.html>

Final DPH Regulations:

<http://www.mass.gov/eohhs/docs/dph/regs/105cmr725.pdf>

If you would like to read copies of the Attorney General's decisions on moratoria or bans, please visit: www.k-plaw.com and scroll down to March 13, 2013 on our home page.

THANK YOU!

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marijuana law news!*