

KNOWLEDGE NOW: MEDICAL MARIJUANA UPDATE

By Rachel Allen, Colorado Municipal League staff attorney

The Knowledge Now series features practical research on timely topics from the Colorado Municipal League.

This information is of a general nature and should not be interpreted as legal advice. Local facts determine which laws may apply and how, so you should always consult your municipal attorney before proceeding.

MEDICAL MARIJUANA HAS BEEN the subject of an unprecedented number of inquiries from cities and towns across Colorado. In an effort to keep you informed of the latest developments in this dynamic area of the law, CML is releasing this *Knowledge Now* to provide an overview of the key medical marijuana bills passed during the 2010 Legislative Session.

Senate Bill 10-109

SB 10-109 concerns the relationship between physicians and patients. The bill intends to prevent fraud and abuse in obtaining a medical marijuana recommendation from a doctor. SB 10-109 requires patients to undergo a physical examination by a M.D. or a D.O. to receive a recommendation for medical marijuana and prohibits doctors from being compensated by dispensaries.

House Bill 10-1284

HB 10-1284 concerns the regulation of medical marijuana. The bill sets up a dual licensing scheme similar to liquor licensing. Municipalities have the authority to allow or prohibit dispensaries, and that option can be exercised in two ways: by city council or town board action or by referring a question to the voters.¹ Citizens also may initiate a measure. If the municipality chooses to license medical marijuana facilities, they have broad latitude in drafting a local licensing ordinance. Local ordinances may be more stringent than the requirements of the state statute. Licensees are required to obtain a local license before applying for the required state license.

¹ C.R.S. § 12-43.3-310

HB 1284 includes a number of provisions popular in local ordinances. The bill imposes a 1,000-foot spacing requirement from schools, residential childcare facilities, and drug treatment facilities, but it allows local governments to "vary" this distance requirement to make it more or less strict.² The bill expressly requires licensees to comply with local sign and zoning codes.³ It limits the hours of operation for medical marijuana facilities from 8 a.m. to 7 p.m. The bill prohibits on-site consumption of medical marijuana. HB 1284 was amended late in the process to allow for limited home delivery to certain home-bound patients. The location of grow operations must be kept confidential.⁴ The bill expressly states that it is not intended to preempt any existing local government powers.⁵ The bill gives equal licensing authority to statutory and home rule municipalities.

Local opt-out

The bill allows local governments to completely opt-out of the law, effectively prohibiting the commercial growth, manufacturing, and sale of medical marijuana products. Municipalities may choose to do so through legislative action of the governing body or through a popular vote.⁶

Municipalities may not prohibit patients from growing their own medical marijuana or a caregiver from providing medical marijuana for up to five patients.

Go to www.cml.org, Information >
 On the issues > Medical marijuana,

² C.R.S. § 12-43.3-308

³ C.R.S. § 12-43.3-901(4)(a); C.R.S. § 12-43.3-308 (1)(c)

⁴ C.R.S. § 12-43.3-310(14)

⁵ C.R.S. § 12-43.3-305(3)

⁶ C.R.S. § 12-43.3-106

for sample opt-out ordinances and referred ballot questions.

Local licenses

Applicants are required to obtain a local license before gaining the requisite state license. Licenses are granted for a period of two years. Enforcement authority exists at both the state and local level. The Colorado Department of Revenue will set up an entirely new enforcement division to administer and enforce the new licensing program. There are three types of local licenses: Medical Marijuana Center, Optional Premises Cultivation Operation, and Infused Products Manufacturing.

The Medical Marijuana Center license is for retail sales facilities (i.e. dispensaries) where patients may register to obtain medical marijuana sold in various forms. The center must verify that it grows 70 percent of its product, so the Cultivation Operation and Center Licenses must be joined into a vertical grow operation.⁷ Before the passage of HB 1284, dispensaries were operating under the theory that they qualified as caregivers under Amendment 20. Now dispensaries will be required to obtain a Medical Marijuana Center License. HB 1284 recognizes that medical marijuana centers are a statutory creation and are not protected by Section 14, Article XVIII of the Colorado Constitution.

The Optional Premises Cultivation license is for grow facilities operated by a medical marijuana center. This license must be held in common ownership with a medical marijuana center license.

⁷ C.R.S. § 12-43.3-103(2)(b)

The Infused Products Manufacturing license is for facilities that contract with medical marijuana centers to prepare food, ointments, tinctures, or other marijuana infused products.

HB10-1284 leaves it to each local government to define the person or entity that will act as the local licensing authority.⁸ A municipality may consider creating a medical marijuana licensing authority similar to its liquor licensing authority. The city manager, municipal judge, council or board, or a citizen authority are among the options to designate as the local licensing authority.

Go to www.cml.org, Information > On the issues > Medical marijuana, for sample local licensing and regulation ordinances.

Background checks

Before a license is granted, the applicant must pass a background check including criminal history. Additionally, HB 1284 emphasizes conducting criminal background checks on individual employees of licensees.⁹ Background checks will be administered by the state, but there is no limitation on requirements for local background checks.

HB 10-1284 imposes Colorado residency requirements on both licensees and employees.¹⁰ Because significant numbers of people have reportedly migrated to Colorado in the past year to participate in the medical marijuana industry, fair and consistent implementation of the residency requirement likely will be a focus for state and local regulators. The new law does not define "residency;" therefore, requirements and documentation related to proof of residency should be further clarified in upcoming state rulemaking.

The medical marijuana licensing scheme has an extensive system of employee registration requirements, entirely administered by the state licensing authority. HB 1284 requires licensees to establish that they have

been residents of Colorado since Dec. 15, 2009, or, for anyone who applies after Dec. 15, 2010, they must have been a resident for two years. Once licensed, all owners, managers, officers and employees must be Colorado residents.

HB 1284 contains a broad set of disqualifiers from licensing based upon prior convictions, persons determined not to be of "good moral character," and other factors. For example, HB 1284 appears to categorically disqualify any person who has ever been convicted of a felony involving controlled substances, regardless of when the felony occurred, but the statute goes on to suggest that an applicant can present evidence of "rehabilitation" to overcome the disqualification.¹¹

Enforcement

The bill provides much better clarity on the definition of "primary caregivers." It contains numerous provisions for strengthening the state medical marijuana registry system and requiring clearly documented linkages between patients, primary caregivers, and centers. Most significantly, the bill requires that caregivers be registered with the state, codify the presumptive 1-5 ratio of caregivers to patients, and codify the principle that merely supplying medical marijuana to a patient does not make a person a primary caregiver.

The bill regulates the sourcing of medical marijuana by specifying that registered patients may obtain medical marijuana by selecting one of the following choices: the patient can grow his or her own medical marijuana; the patient can obtain medical marijuana from a "primary caregiver" who can grow the marijuana, and who must be registered with the state; or the patient can obtain medical marijuana from a licensed medical marijuana center.¹² In turn, each center must obtain medical marijuana from its own plants, from another center, or from a medical marijuana infused products manufacturer, but not from any other source.

HB 10-1284 places a greater emphasis on medical marijuana quantity-control. Licensees are presumptively limited to six plants per patient, and the transfer of medical marijuana between centers is limited to 30 percent of inventory.¹³

Key implementation dates

July 1, 2010 is the effective date for most of the provisions of the bill. On **July 1, 2010**, existing operations (and those that have applied for a license that is subsequently granted) will be allowed to continue operating under applicable local laws until June 30, 2011.¹⁴

Existing dispensaries will be required to file for a state license and pay a fee by **Aug. 1, 2010**.¹⁵ For local licenses issued after **Aug. 1, 2010**, the licensee must apply to the state for an interim state license within 30 days.

Medical marijuana centers must certify to the state that they grow 70 percent of their product by **Sept. 1, 2010**.¹⁶

By **Sept. 1, 2010**, the Colorado Department of Revenue and the Department of Public Health and Environment must conduct a public review hearing to get the input of stakeholders in the rulemaking.

Medical marijuana-related businesses that have been locally licensed anywhere in Colorado, or have applied for a local license by **July 1, 2010**, can continue in existence and remain lawful until **July 1, 2011**, so long as they apply for an interim license from the state by **Aug. 1, 2010**, and certify grow requirements by **Sept. 1, 2010**.

On **July 1, 2011**, only operations licensed by both the state and local licensing authorities under the provisions of HB 10-1284 will be lawful. Medical marijuana-related businesses should be complying with any local regulatory restrictions or requirements (including moratoria) prior to **July 1, 2011**.¹⁷

All medical marijuana centers, optional premises grow operations, and medical marijuana-infused

8 C.R.S. § 12-43.3-104(5)

9 C.R.S. § 12-43.3-307 (1)(a)(V) and (IX)

10 C.R.S. §§ 12-43.3-307 (1)(a)(XIII); 12-43-310 (6)

11 C.R.S. § 12-43.3-307 (1)(a)(VIII);

C.R.S. § 12-43.3-307 (2)(a)

12 C.R.S. § 25-1.5-106(5)(c)

13 C.R.S. § 12-43.3-4(e)

14 C.R.S. § 12-43.3-103(1)(a)

15 C.R.S. § 12-43.3-103(1)(b)

16 C.R.S. § 12-43.3-103(2)(b)

17 C.R.S. § 12-43.3-103(2)(c)

products manufacturers will be required to obtain a new state and local license to lawfully operate on and after July 1, 2011. The bill is silent as to when forms and processes will be available to begin processing these new types of licenses, but the bill implies that the application process will begin later in 2010.

Fees and taxes

Local governments have broad discretion to set fees to cover the cost of administration and enforcement.¹⁸ Local licensing fees are entirely determined locally and not dictated by statute.

State and local sales tax apply to the sale of medical marijuana products, but there is a qualified state exemption for indigent patients.¹⁹ The provision indicates that the exception will be enjoyed by any patient who receives a fee-waiver as an indigent when the patient registers for his or her medical marijuana card.

Another option for local government is to levy an additional tax on the sale of medical marijuana products. For example, Fruita voters approved a 5 percent excise tax in April 2010.

Public hearings

HB 10-1284 does not require a finding of "needs and desires," and there is no requirement for public hearings prior to issuance of licenses. Public hearings for all classes of licenses are made optional by the bill.²⁰ The bill grants local option to determine whether or not to conduct public hearings prior to issuing licenses.

What's to come

While many of the questions about how the state will address medical marijuana have been answered by HB 10-1284, the legislation is ambiguous in some instances and will require further clarification through rulemaking and potential legislative action in the 2011 session. It is anticipated that many details will be addressed in the upcoming Department of Revenue rulemaking. CML staff will continue to provide updates on items of interest, as well as to distribute guidance documents and respond to questions from members.

Efforts to develop material that is more detailed are underway. Staff will electronically distribute any guidance documents, sample opt-out ordinances, sample opt-out referred questions, and sample local licensing and regulation ordinances as they become available. Unless otherwise noted in future communications, these and other sample documents are available on CML's Web site under Information > On the issues > Medical marijuana.

Finally, CML will be convening a small, ad hoc group to assist CML staff on several issues where guidance and specific expertise is needed. In particular, the group will be asked to assist in requests and recommendations for specific outcomes when the Department of Revenue holds rulemaking proceedings later this year. Recommendations for technical and substantive changes in the 2011 legislative session to HB 10-1284 may be developed by this group.

For more information, watch CML's Web site and your email inbox. Please do not hesitate to contact CML if you have any questions. Please direct questions to Kevin Bommer at kbommer@cml.org, Rachel Allen at rallen@cml.org, or Mark Radtke at mradtke@cml.org. All three can also be reached at 303-831-6411 or 866-578-0936.

¹⁸ C.R.S. §§ 12-43.3-301(1); 12-43.3-503(2)

¹⁹ C.R.S. § 39-26-726

²⁰ C.R.S. § 12-43.3-302(1)

FAQ: MEDICAL MARIJUANA UPDATE

By Rachel Allen, CML staff attorney

The FAQ column features frequently asked questions submitted to the Colorado Municipal League. This information is of a general nature and should not be interpreted as legal advice. Local facts determine which laws may apply and how, so you should always consult your municipal attorney before proceeding.

Q: When can a municipality opt out of having medical marijuana facilities within its jurisdiction?

A: As soon as July 1, 2010, with no expiration date in the future.²¹

Q: How can municipalities prohibit medical marijuana centers, grow operations, and manufacturing under HB 10-1284?

A: Initiative, referendum, or council or board legislative action. If your council or board opts to refer the measure, then be mindful of the timeline to get on the November ballot if you elect to refer the measure to the voters.

Q: Can municipalities enact local bans on caregivers and/or patients?

A: No. Caregivers and patients are protected by Section 14, Article XVIII of the Colorado Constitution; therefore, local governments cannot prohibit patients or caregivers.

Q: Is there a moratorium on new medical marijuana facilities from July 1, 2010 until July 1, 2011?

A: Local licenses can only be issued to applicants who have filed before July 1, 2010.

Q: Are existing medical marijuana businesses grandfathered in or precluded from complying with the requirements of HB 10-1284?

A: There is no grandfathering for dispensaries in existence that do not comply with the state and local regulations. The most likely issue will be with the distance requirements, and the spacing requirements in HB 1284 contain no grandfathering or "look-back" provision that would exempt existing medical marijuana businesses.

Q: Must existing dispensaries comply with HB 10-1284 by the July 1, 2010 or July 1, 2011 deadline?

A: July 1, 2011, with the exception of the Aug. 1, 2010 requirement to pay a fee and the Sept. 1, 2010 requirement to grow 70 percent of their own product.

Q: When will acceptance of applications under the new dual licensing system actually begin?

A: The answer to this question will be addressed in the upcoming Department of Revenue rulemaking. HB 1284 implies that to be a lawful commercial cultivator, manufacturer, or retailer of medical marijuana after July 1, 2011, a business will be required to be licensed in accordance with the new statute.²² However, the bill does not specify when the new local and state license applications will actually begin to be accepted and processed in order to meet this deadline. This timeline is important to local governments, because under the dual licensing structure, local licensing authorities will be the initial point of intake for all licensing applications and will require time to process the applications they receive. Furthermore, local governments need to know the timeline for applications under the new state law in order to adopt and have in place supplemental licensing and operational regulations for those communities that choose to do so, or in order to opt-out of licensing entirely before the application process actually begins.

Q: How can a local government hold public hearings if the location of the optional premises cultivation operation must be kept confidential?

A: The late amendment to HB 1284 requiring confidentiality for records

of licensed medical marijuana grow operations may pose significant difficulties for local governments.²³ The language in the bill appears to broadly encompass both the paperwork associated with the granting of an optional premises cultivation license and any record related to the location of the facility. This may include zoning records, building code inspection records, law enforcement records, etc. The law is ambiguous as to what, if any, sanction or penalty will be applied to a local government official who violates these confidentiality requirements. These provisions of HB 1284 may in practicality make it impossible to conduct any sort of public process regarding the granting of optional premises cultivation licenses, but it does not comport with other language elsewhere in the bill that would have clearly allowed local licensing authorities to conduct public hearings on any class of license, including optional premises cultivation licenses. Hopefully, this issue will be addressed in the Department of Revenue rulemaking or changes to HB 10-1284 in the 2011 legislative session.

Q: Is it possible for a municipality to license a medical marijuana center within its jurisdiction if the medical marijuana will be grown in an optional premises licensed in another jurisdiction? Or, is it necessary to obtain local licenses for a medical marijuana center and an optional premises from the same jurisdiction?

A: This is not specifically stated in HB 1284. An optional cultivation license can only be issued in conjunction with a medical marijuana center license. Obviously, a council or board cannot issue a

21 C.R.S. § 12-43.3-103(2)(a)

22 C.R.S. § 12-43.3-103 (2)(c)

23 C.R.S. §§ 24-72-202 (6)(b)(XIII); 12-43.3-310 (14)

license for any operation in another jurisdiction. The issue should be clarified when the Department of Revenue regulations are written that will address the requirements that medical marijuana centers grow 70 percent of their own product.

Q: Will primary caregivers have to be registered? If so, how?

A: Yes. The bill places a new mandate on the Colorado Department of Public Health and Environment (CDPHE) to begin registering caregivers to be implemented beginning July 1, 2010. CDPHE also is charged with enforcing the 1-5 maximum ratio of care-givers to patients and other regulations related to caregivers.²⁴ The stricter documentation and regulation of "primary caregivers" in HB 10-1284 will be of tremendous assistance to local law enforcement to determine exactly who is or is not subject to criminal prosecution under Section 14, Article XVIII of the Colorado Constitution. Practically speaking, however, it is uncertain when the CDPHE will be fully mobilized to implement and enforce the new requirements for primary caregivers.

Q: Can primary caregivers profit off of the sale of medical marijuana to licensed patients?

A: No. A primary caregiver may not charge a patient more than the cost of cultivating or purchasing the medical marijuana, but may charge for caregiver services.²⁵

Q: Will patients have to register the source of their medical marijuana?

A: Yes. HB 1284 assumes that registered patients must make an election of their medical marijuana source to CDPHE between self-grow, a caregiver, or a center

starting July 1, 2010.²⁶ This new requirement was apparently intended to implement the letter and spirit of Section 14, Article XVIII of the Colorado Constitution regarding the limitation on the quantity of medical marijuana that any patient can lawfully possess. If the patient must officially designate his or her source, there is less chance of obtaining excessive quantities of medical marijuana by tapping multiple sources. However, licensed centers will not truly exist under the law until July 1, 2011.

²⁴ C.R.S. § 25-1.5-106 (5) and (6)

²⁵ C.R.S. § 25-1.5-106(6)(d)

²⁶ C.R.S. § 25-1.5-106 (6)(f)