

Municipal and Labor & Employment Alert
December 2016

**THE SMOKY IMPACT FROM MASSACHUSETTS VOTING TO REGULATE
“RECREATIONAL” MARIJUANA**

At the 2016 state election, Massachusetts voters approved Question 4, which regulates marijuana for recreational (*i.e.*, non-medical) purposes. A consequence of Question 4 is that the production, possession, sale and consumption of marijuana – in certain amounts and under certain circumstances, for persons aged 21 years and over – will become legal under Massachusetts law.

The likely impacts of Question 4 are far-reaching, affecting state and local governments, employers, landlords and tenants, and individuals and businesses in the Commonwealth. Further clouding this issue is that marijuana remains prohibited by federal law – and the issue is even hazier considering the change in the federal government from the recent presidential election, the fact that the state agency overseeing the new recreational marijuana industry presently does not exist, regulations have not been adopted, and the law itself is far from a model in clarity.

Nonetheless, with portions of the law slated to take effect on December 15, 2016, and the creation of a new non-medical marijuana industry in 2017, proactivity is an absolute must. State and local governments should be prepared to be proactive and take the necessary steps to regulate marijuana, literally on their doorsteps and in their communities. Employers will need to review their employee handbooks and policies. These are only a sampling of the steps that should be considered, now that Question 4 has been adopted.

The summary below is based upon Question 4 as adopted at the 2016 election. Please stay tuned for further updates from our firm on future legal developments on this issue – we will be monitoring legislative changes, the proposed regulations once they are issued, and the interplay with federal law. Moreover, we will be preparing a separate client alert to address employment issues related to the passage of Question 4.

Provisions Effective December 15, 2016

While a commercial recreational marijuana industry will not come into existence until 2018, portions of the ballot question may become effective before then, as Question 4 has a December 15, 2016 effective date. Question 4 includes the following:

- Existing laws prohibiting operating while under the influence or consuming while operating any motorized form of transport or machinery (such as a motor vehicle) remain effective. Additionally, persons under age 21 cannot receive, possess, use, acquire, cultivate, process, manufacture, deliver, sell or transfer marijuana or marijuana accessories.



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- Persons can prohibit or otherwise regulate marijuana and marijuana accessories on or in property that is owned, occupied or managed – such as rental property. However, a lease agreement cannot prohibit a tenant from consuming marijuana by means other than smoking in the tenant’s residence unless failing to do so would cause the landlord to violate a federal law or regulation.
- The possession or consumption of marijuana or marijuana accessories within buildings owned, leased or occupied by the Commonwealth, its political subdivisions (including municipalities), and their agencies can be prohibited or otherwise regulated.
- Question 4 does not authorize the possession or consumption of marijuana or marijuana accessories on the grounds of or within a public/private school where children attend classes in preschool programs, kindergarten programs, grades one through twelve, and on the premises of or within correctional facilities.
- Question 4 does not require employers to allow or accommodate conduct in the workplace that is otherwise allowed by the new state law it establishes (Massachusetts General Laws Chapter 94G). Additionally, employers may generally enact and enforce workplace policies limiting the consumption of marijuana by employees. Accordingly, employers should review their existing employee handbooks and policies, and consider adopting new policies.
- Question 4 does not change the previously enacted An Act for the Humanitarian Use of Marijuana (passed at the 2012 Massachusetts election) and its regulations, which allows marijuana for medical use and establishes medical marijuana treatment centers.
- Question 4 addresses the personal use of marijuana, including possession, consumption, processing and home cultivation by individuals aged 21 and over. At the present time, these personal use provisions are scheduled to take effect before the licensing of marijuana establishments (as defined below). That said, marijuana cannot be consumed in a public place or smoked in a place where the smoking of tobacco is prohibited (unless a municipality votes to allow on-premises consumption as discussed below).
- Where Question 4 establishes a civil penalty for prohibited conduct, it is enforceable by the police department serving each political subdivision of the Commonwealth – in the same manner as Question 2 of the 2008 state election, which had decriminalized the possession of small amounts of marijuana.



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Marijuana Establishments

There are five types of marijuana establishments defined by Question 4: (1) marijuana cultivators; (2) marijuana testing facilities; (3) marijuana product manufacturers; (4) marijuana retailers; and (5) other licensed marijuana-related businesses. The following provisions of Question 4 apply to these marijuana establishments:

- **Taxes:** Marijuana retailers are generally subject to state and local excise taxes (except for a sale to a marijuana establishment). There is a 3.75% state excise tax for the sale of marijuana or marijuana products, which is in addition to the state tax for the sale of property or services. Municipalities can adopt a local sales tax of up to an additional 2% for the sale or transfer of marijuana or marijuana products.
 - These state/local taxes do not apply to the sale or marijuana or marijuana products by a medical marijuana treatment center or a personal caregiver to a qualifying patient or personal caregiver.
- **Municipal Bylaws/Ordinances:** Municipalities can establish reasonable safeguards for the operation of marijuana establishments, if they are not: (1) “unreasonably practicable”; (2) do not conflict with state law; and (3) do not conflict with regulations made by the Cannabis Control Commission (CCC). These bylaws/ordinances may:
 - Address the “**time, place and manner**” of marijuana establishments and businesses involved in marijuana accessories. Examples of such bylaws/ordinances include restricting the hours of operation and location of such establishments and businesses. However, municipalities must allow a marijuana establishment that cultivates, manufactures or sells marijuana products in the same area as a medical marijuana treatment center conducting the same type of activity.
 - Restrict the **overall number of marijuana establishments**. An ordinance or bylaw enacted “by a vote of the voters of” the municipality may:
 - Prohibit one or more types of marijuana establishments from operating in the municipality;
 - Restrict the number of marijuana retailers to less than twenty percent of the number of off-premises liquor licenses issued in the municipality; or



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- Restrict the number of any type of marijuana establishment to less than the number of medical marijuana treatment centers authorized to conduct the same type of activity in the municipality.

Question 4 does not define the process for the enactment of an ordinance or bylaw “by a vote of the voters,” but this likely will involve, at a minimum, action in the same manner that ordinances or bylaws are currently enacted.

- Regulate cultivation, processing and manufacturing that is a **public nuisance**.
- Reasonably regulate **public signs** for marijuana establishments.
- Adopt a civil penalty for violating an ordinance/bylaw, which is comparable to the penalty imposed for violating an ordinance/bylaw involving alcoholic beverages.

However, municipalities cannot prohibit transporting marijuana or marijuana products, nor make such transportation “unreasonably impracticable.”

- **Setback Requirements:** The site of a proposed marijuana establishment cannot be located, at the time the license application is submitted to the CCC, within 500 feet of a preexisting public or private school providing education in kindergarten or grades one through twelve. A municipality may adopt an ordinance/bylaw that reduces this minimum setback requirement from the default limit of 500 feet.
- **On-Premises Consumption:** An election is required for on-premises consumption to be permitted in a municipality – the so-called “cafes” that have drawn speculation and concern. At least ten percent of the voters of the municipality voting at the prior state election, in accordance with applicable state law, must sign a petition filed with the city/town clerk. The question of permitting on-premises consumption can only be considered at a biennial state election; in this case, the next such election is November 2018. A majority vote is required for passage.
- **Mitigation Agreements:** Municipalities and marijuana establishments can execute mitigation agreements, provided that the payment of fees is “directly proportional and reasonably related to the costs” arising from the operation of the marijuana establishment. Costs arising from the operation of the marijuana establishment must be documented.



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Licensing:

- The CCC is responsible for issuing licenses to marijuana establishments, as well as suspending or revoking licenses. Unless the CCC specifies a longer period of time, licenses are issued on a one year basis.
- The CCC must notify municipalities in which a license is sought of a pending application. If a municipality does not notify the CCC that an application fails to comply with an ordinance/bylaw in effect at the time of application and the application otherwise satisfies the relevant applicable laws, regulations, and requirements, the CCC must issue a license. The CCC has ninety days to issue a licensing decision.
- If a municipality has properly restricted the number of permitted marijuana establishments, the CCC has adopted regulations, and there are more qualified applicants than available licenses for the municipality:
 - Until January 1, 2018, the CCC must issues licenses to those applications with the most experience operating medical marijuana treatment centers and thereafter by lottery among qualified applicants;
 - On or after January 1, 2018, the CCC must issues licenses using a lottery among qualified applicants.
- The CCC must accept license applications by the following dates:
 - By October 1, 2017 - for marijuana testing facility licenses; also, experienced marijuana establishment operators may apply for one marijuana cultivator license, one marijuana product manufacturer license, and one marijuana retailer license.
 - As of January 1, 2018, if there are less than 75 provisional registrations issued as of October 1, 2017 for medical marijuana treatment centers, for marijuana retailer, marijuana product manufacturer, and marijuana cultivator licenses. In this case, the CCC is limited to issuing a maximum of 75 marijuana retailer licenses, 75 marijuana product manufacturer licenses, and 75 marijuana cultivator licenses, until the October 1, 2018 and October 1, 2019 application dates stated below.
 - As of October 1, 2018, for marijuana retailer licenses or for marijuana product manufacturer licenses.
 - As of October 1, 2019, for marijuana cultivator licenses.



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Future Developments

Question 4 creates the CCC, consisting of three members appointed by the State Treasurer, to oversee and regulate marijuana establishments, including the licensing and operations of such establishments. Among other responsibilities, Question 4 identifies regulations that the CCC must adopt, and regulations that the CCC may adopt, as well as regulations that the CCC is prevented from making. For example, the CCC’s regulations cannot prohibit a medical marijuana treatment center and experienced marijuana establishment operator from operating at a shared location.

Question 4 requires the CCC to adopt regulations on or before January 1, 2018; otherwise, each existing medical marijuana treatment center is permitted to engage in the activities of a marijuana establishment until the CCC adopts regulations and issues licenses. This provision creates an incentive for the CCC to adopt regulations, or otherwise existing medical marijuana treatment centers can, among other activities, possess, sell, cultivate, process and transfer marijuana and marijuana products for non-medical purposes.

*For a discussion of these and other legal issues, please visit our website at www.mhtl.com
To receive legal updates via e-mail, contact information@mhtl.com.*

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