

# LEGISLATION RELATED TO THE ARKANSAS MEDICAL MARIJUANA AMENDMENT

IN THE 2016 NOVEMBER GENERAL ELECTION, Arkansas voters approved the Arkansas Medical Marijuana Amendment (AMMA) with 53% of the vote. The impact of the AMMA will be felt on July 1, 2017, when the Arkansas Medical Marijuana Commission (Commission) will begin accepting applications for cultivation and dispensary licenses. This is a result of a legislative act that extends the original application date from June 1 to July 1. The ultimate decision on which applications will be approved will be left to the Commission and the Alcohol Beverage Control Division (ABC). Once the licenses are granted, marijuana cultivators and dispensers will be able to grow and sell marijuana for medical use in Arkansas.

The application process is distinct from the application process for registry identification cards, which will be available for qualifying patients (individuals who may ingest marijuana for medicinal purposes) and designated caregivers (individuals who may purchase and possess marijuana for qualifying patients). The Arkansas Department of Health (ADH) is tasked with overseeing this process, and has yet to announce when it will begin accepting applications for registry identification cards.

In addition to the constitutional amendment and timeline modifications explained above, the 2017 legislative session saw a flurry of bills seeking to amend the AMMA, many of which were signed into law by Governor Hutchinson. All the laws passed required a two-thirds vote. Overall, the 2017 legislative session was successful in providing clarity to the Arkansas residents who will be affected by the AMMA—whether they are registry identification cardholders, cultivation or dispensary licensees or agents, employers of cardholders, or state agencies tasked with implementing the new program.

## Employment Provisions

The State Chamber/AIA hosted multiple meetings with member law firms to discuss legislation related to the AMMA related to the workplace. Those meetings resulted in **HB 1460**, which clarified the employment provisions of the AMMA. It was adopted and signed into law as **Act 593**.

While the AMMA prohibits employment discrimination based on an individual's status as a registered cardholder, it specifically prohibits employees from ingesting marijuana or performing any work while "under the influence" of marijuana. Yet the AMMA failed to address key issues for employer compliance, such as defining "under the influence."

**Act 593** defines an "employer" as an entity that employs nine or more employees in the State of Arkansas for 20 or more calendar weeks in the current or preceding calendar year.

**Act 593** defines "employee" to exclude independent contractors, individuals employed by their immediate family, and individuals in specialized employment training programs.

**Act 593** defines "under the influence" to mean symptoms of an employee's "current use" that

may negatively impact the employee's performance of his or her job duties or constitute a threat to health or safety. Examples of these symptoms include observable physical signs and symptoms, a positive drug test for marijuana, negligence or carelessness, disregard for safety, or involvement in an accident that results in property damage, personal injury, or disruption of a production or manufacturing process. Note that a positive drug test alone should not be used to indicate that an employee is "under the influence." Instead, employers should observe and record additional signs and symptoms in addition to the positive test result.

**Act 593** protects employers acting on a "good faith belief" that an employee ingested marijuana or was "under the influence" of marijuana in the workplace. An employer's "good faith belief" may be based on a variety of factors, including the employee's conduct or appearance, marijuana labels, and other reasonably reliable sources of information. However, as noted above, a positive drug test alone will not be sufficient to create a "good faith belief."

**Act 593** also created an exception to the "good faith belief" provision for employers that have safety sensitive positions. The act defines a "safety sensitive position" to include either (1) any position designated as a safety sensitive function by state or federal law or (2) positions that an employer designates in writing as safety sensitive, if an employee performing the position while under the influence of marijuana may constitute a threat to health or safety. **Act 593** includes a non-exhaustive list of safety sensitive positions. Because of the heightened threat of danger inherent in these positions, employers may exclude an employee from performing a "safety sensitive position" based on a good faith belief that the employee was engaged in the current use of marijuana, which is presumed when the employee tests positive for marijuana. In other words, an employer may maintain a zero-tolerance policy for an employee in a safety sensitive position; the employer need not demonstrate a good faith belief that the employee was under the influence. Employers may continue to establish and implement a drug-free workplace policy that complies with state or federal law. Thus, even if an employee is a registered cardholder, employers who use **Act 593** to design sound policy and maintain proper documentation can reassign, suspend, terminate, or even decline employment under certain circumstances.

Employers should look for positions within their businesses that can be designated safety sensitive. Such positions should be clearly spelled out in the employee handbook and shared with employees in the safety sensitive positions. It is important that the employer's policy is clear that the workplace does not allow marijuana usage for certain jobs.

Under **Act 593**, employees have one year bring a cause of action under the AMMA's employment provisions. **Act 593** also capped employer liability based on business size. The caps range from \$15,000 to \$300,000 with the highest cap reserved for employers with over 500 employees.





## Cultivation and Dispensary Licenses

One of the hottest topics found within the newly enacted bills was licensing. The AMMA prohibits any applicant convicted of an excluded felony offense from being an owner, board member, or officer of a dispensary or cultivation facility. **Act 544** amended the AMMA to authorize the Commission and the ABC to review applicants' relevant court records to determine if the offense is a felony offense. Also, to further vet the pool of applicants, **Act 545** requires that each applicant be subject to state and nationwide background checks.

Pursuant to **Act 594**, cultivation and facility licenses will expire on June 30 of each calendar year and are renewable on or before June 30 of each subsequent calendar year for the fiscal year beginning July 1. The Commission and the ABC have discretion to transfer licenses and issue temporary licenses under certain conditions. **Act 641** restricts the transfer of licenses among natural persons, while **Act 587** provides that a temporary license may be issued if the original licensee is no longer in control of the facility. **Act 642** allows dispensaries and cultivation facilities to contract with marijuana transporters, distributors, and processors.

There was also a bill passed entitled the Uniform State Seeds Standardization Act. **Act 156** provides that state laws preempt local laws about registration, packaging, labeling, sale, storage, distribution, cultivation, and any other use of marijuana seeds.

## Registry Identification Cards

The AMMA was also amended regarding registration for identification cards. **Act 594** requires registry identification card holders to renew their cards annually on or before June 30. **Act 479** prohibits any member of the National Guard or U.S. Military from being considered as an applicant for a registry identification card as a designated caregiver or a qualifying patient.

The AMMA allows an individual to apply for a registry identification card with a physician's written certification. A written certification for marijuana is signed by a physician and states that in the physician's professional opinion, based on an assessment of the qualifying patient's medical history and medical condition, the patient has a "qualifying medical condition." **Act 5** eliminated the AMMA's original requirement that a physician also considers the potential risks and benefits of the medical use of marijuana when issuing a written certification. **Act 438** prohibits physicians from issuing a certification based on telemedicine assessments. Moreover, pursuant to **Act 5**, identification card application and dispensary records are not considered medical records; therefore, they are exempt from the protections of the Arkansas Freedom of Information Act (FOIA).

## Restrictions on Smoking

Another enacted bill that received much attention regulates how and where one can smoke medical marijuana. Although it is not as extreme as prohibiting smoking marijuana at any location, **Act 740** imposes significant restrictions. For instance, one cannot smoke marijuana where smoking tobacco is prohibited by law, in the presence of a person who is under fourteen years old, knowingly in the presence of a pregnant woman, or where it is likely to cause another person not authorized to use marijuana to be under the influence. **Act 740** also requires all marijuana for medical use that is processed or sold for smoking to include a warning label. The warning label should include the safety risks associated with smoking medical marijuana, as well as a list of places and conditions in which smoking medical marijuana is illegal in Arkansas.

## Restrictions Related to Children

**Act 640** restricts license holders from advertising anything that would reasonably attract children. For example, any artwork, product design, including shapes and flavors, and indoor displays that can be seen from outside the cultivation facility or dispensary cannot be appealing to children.

**Act 1935** allows a public school to prevent students from attending public school or school events if it is believed the student is impaired by medical marijuana.

## State Agencies

The Governor also signed several department specific bills. **Act 4** extended the deadline for the state to develop rules from 120 days to 180 days. Pursuant to **Act 638**, the Medical Marijuana Commission is now contained within the Department of Finance and Administration (DFA). **Act 440** requires the Director of the ADH to consider designating, rescheduling, or descheduling a marijuana-derived substance if the director of the Federal Drug Administration (FDA) has designated, rescheduled, or descheduled the substance and approved the marijuana-derived substance to be marketed as a prescription medication. Note that **Act 440** signifies ADH's future recognition of a legal marijuana-derived schedule VI controlled substance prescription. **Act 948** provides that, for the purposes of the Arkansas all-payer claims database, the Commission or the ABC may share data or records with the ADH and the State Insurance Department.

## Fines, Fees, and Revenues

Other enacted bills deal with fees and revenue. **Act 639** authorizes the ADH, the Commission, and the ABC to collect fines or fees for violations of the AMMA. Further, **Act 670** describes how sales tax revenue received by the DFA from the sale of usable marijuana is to be distributed. **Act 670** credits all monies received to the newly created Arkansas Medical Marijuana Implementation and Operations Fund. The following agencies will be compensated for implementing the AMMA after each agency submits a report of the estimated expenses to be incurred that fiscal year, no later than May 1st: the ABC, the ADH, the Commission, and any other state agency that incurs expenses from implementing the AMMA.

Moreover, under **Act 670**, the DFA must report to the Legislative Council or the Joint Budget Committee the total amount received because of the AMMA, the amount transferred to each agency, and copies of the estimated expense reports submitted by the agencies. Note that after the money is transferred to the agencies, any remaining money must be transferred to the General Revenue Fund Account. **Act 670** also created the Medical Marijuana Commission Fund, which consists of funds allocated to the Commission from the DFA. **Act 906** appropriated more than \$4 million for the commission for fiscal year 2018. **Act 1098** adds a 4% tax to be levied by cultivation facilities, dispensaries, and other marijuana businesses.

*This majority of this piece was prepared by members of the Little Rock law firm, Cross, Gunter, Witherspoon and Galchus (CGWG). It was modified by State Chamber/AIA staff and supplemented with information from articles written by Steve Brawner and Kim Souza that were published by Talk Business & Politics. The Souza article reported on comments made by attorney Bruce Cross of CGWG.*