The Realities of Recreational Cannabis in Connecticut

By April Arrasate

Is Connecticut ready for an adult use recreational marijuana program? With the state facing a $1.5 billion deficit, several legalization bills that have languished in committee during the 2017 general session almost saw the light of day during the budget crisis.

With Connecticut's Office of Fiscal Analysis estimate that a robust recreational program could bring in $45.4 million to $104.6 million per year in revenue, there was rumor that the legislature might consider not only the tax revenue implicit in a recreational program, but also the implications of a financial drain as Connecticut citizens spend cannabis dollars in surrounding legal states.[1] Ultimately neither Republicans nor Democrats presented a budget including legalization, but lawmakers will still have to contend with the will of their constituents. According to a 2015 Quinnipiac poll, 63 percent of Connecticut voters support making small amounts of cannabis legal for adult use.[2] Further, a recently released poll by the Sacred Heart University Institute for Public Policy reports that when considering new sources of tax revenue, the highest rate of residents (70.6 percent) supported legalizing and taxing marijuana.[3] So despite the failure to slip in as a boost to the state economy, the legalization of cannabis for adult use is an issue that is unlikely to go quietly into the night.

In 2012, Connecticut enacted one of the most medically focused marijuana programs in the country, ultimately licensing four cultivation/processing licenses and nine pharmacist operated dispensaries.[4] While the program was a relief to the nearly 20 thousand patients currently registered with the program, it is criticized by advocacy organizations for being overly restrictive in its breadth of qualifying conditions and rigorous constraints on advertising, packaging, patient limits, and the prohibition on home cultivation.[5] That said, the medical program has been smoothly implemented by the Department of Consumer Protection (DCP) and has led to promising research initiatives in our state. As we examine a transition to a recreational model, one important consideration is how to preserve the benefits of the medical program, especially when the first four states to legalize recreational marijuana sales—Oregon, Alaska, Washington, and Colorado—have all seen a drop in the number of active medical card-holding patients.[6]

While Connecticut has been dipping its toes in the cannabis pool, other New England states are neck and neck in the competition for cannabis dollars. New York, New Hampshire, Vermont, and Rhode Island have all decriminalized small amounts of marijuana and have medical programs that represent the spectrum from strictly controlled like New York, with tight limits on forms of consumption and qualifying medical conditions, to more liberal states like Rhode Island, which boasts a robust caregiver program rather than just a handful of cultivators.[7] However, with the recent successful ballot initiatives in Massachusetts and Maine, two of our New England neighbors have approved adult use of cannabis[8] and Vermont may be the first state to legislatively create a recreational program[9]—if Connecticut does not get there first. In addition to Massachusetts and Maine, Connecticut would join Colorado, California, Nevada, Arkansas, Oregon, and Washington with an adult use program. Not to mention our neighbor to the north, Canada.

Should the Connecticut legislature approve a recreational program in the upcoming session, it is possible that it could look like one of the bills proposed in the last general session, the most comprehensive of which was S.B. 11, introduced by Senate President Pro Tempore Martin Looney.[10] While the bills vary, they generally call for a 21 and over program administered by the Department of Consumer Protection and address concerns such as drug awareness education, substance abuse programs, impact on minors, driving under the influence, home cultivation for personal use, location of marijuana businesses and, of course, taxation.[11] Most direct the tax revenue to the general fund, earmarking some amount for the various issues named above.[12] Senator Looney's bill, S.B. 11, specifies that two types of licenses, retailers and lounges, will pay a surcharge of 23.65 percent of gross receipts to the commissioner of revenue services for deposit in the general fund.[13] One way or another, steep taxes that make the program enticing to the state will have to be a significant part of financial models for entrepreneurs evaluating the space, and that is in addition to Internal Revenue Code § 280E's considerations, which restrict cannabis businesses from writing off many regular business expenses.[14] While lawmakers are anxious for cannabis dollars, they will have to consider tax burdens carefully in order to create an economically viable industry.

While it is difficult to determine just how far the Connecticut program will go, if S.B. 11 were to be passed as is, entrepreneurs and attorneys could expect a robust program with every aspect of the industry represented by a license type. The four license types are cultivation facility, lounge, product manufacturing facility, and retailer.[15] Cultivation facility and retailer are analogous to the current licenses for producer and dispensary under the medical program. The licenses have similar but more expanded definitions of how much and to whom those licensees can sell their products.[16] The lounge and product manufacturing facility licenses would be new to the state and would present a very different dynamic, not only for consumers, but also for business owners both in and out of the current industry. In short, a Cultivation Facility can cultivate, prepare, and package marijuana for sale to any other licensee, including other cultivation facilities.[17] A Product Manufacturing Facility licensee can buy marijuana from a cultivation facility, process it into the product of choice (i.e., oil, pill, edible, etc.), then sell it to any of the downstream licensees.[18] A retailer can buy from either of those licensees for sale to retail consumers, similar to the current medical dispensary license.[19] A lounge is authorized to sell marijuana products to consumers for on-site consumption, other than smoking[20]—essentially, a vaping bar.

Zoning Considerations

If your zoning hackles went up, particularly at the mention of marijuana retailers and lounges, it is for good reason. Municipalities and zoning attorneys can expect a flurry of activity as municipalities and entrepreneurs work out the details of placing these businesses throughout the state. While the bill explicitly states that any town may prohibit or restrict marijuana establishments,[21] it also specifically tasks the Li-

quor and Marijuana Control Commission to describe areas in the state where licensed retailers and lounges may not be located by modeling after the current criteria imposed upon retail liquor permits.[22] Those criteria essentially strive to protect the overall public interest as well as the interests of nearby towns and specific establishments such as schools, charitable and religious institutions, hospitals, veterans, and other permittees in the area.[23]

The bill also proposes limits on possessions and home cultivation. A consumer can be in possession of one ounce of marijuana, of which no more than five grams can be in concentrate form.[24] An individual over 21 can also cultivate up to five plants on his or her own lawfully possessed property.[25] Notably, there is also a restriction on selling or even gifting any home grown cannabis.[26]

While it is ill-advised to become attached to any of the bill language at this time, the bill itself does not represent any grand departure from current legal state programs and the nuts and bolts of this model are likely to persist into Connecticut. There are also several additional provisions that some groups are advocating to include. Sam Tracy from the Connecticut Coalition to Regulate Marijuana would like to see specific protections for individuals, including parents, who responsibly consume cannabis without endangering others and retroactive sentence reduction and expungement of criminal records for those who have a record for something that is no longer a crime, such as small-scale home cultivation.[27] However the program ultimately rolls out, one challenge will be maintaining the benefits of the medical program to foster further advancement in medicine and research. Many of the states who have adopted a recreational program report a significant decline in the medical program. Oregon fell from 78,015 to 67,141 participants in less than two years and Alaska cardholders fell 40.6 percent in one year.[28] Some of this can be attributed to the price of obtaining an annual physician recommendation coupled with the costs of registering with the state.

Despite the costs of remaining in the program, Connecticut qualifying patients have a unique incentive to maintain their medical status, particularly in light of the recent and only judicial interpretation of Connecticut's Palliative Use of Marijuana Act (PUMA),[29] *Noffsinger v. SSC Niantic Operating Company.*[30] PUMA has a unique provision in comparison to many other state programs that offers specific protections against discrimination to students, tenants, and employees who are registered with the program.[31] While it was unclear whether that provision would confer a private cause of action, the United States District Court for the District of Connecticut has answered the question in favor of the medical marijuana patient.[32]

In *Noffsinger,* U.S. District Court Judge Meyer ruled on the question of whether the Controlled Substances Act preempts the Connecticut PUMA provision that prohibits an employer from taking adverse action against an employee on the basis of the employees otherwise state authorized use of marijuana.[33] The plaintiff in the case was a registered post-traumatic stress disorder patient with PUMA who was utilizing THC in the form of an evening Marinol pill.[34] Following a failed drug test, the defendant withdrew the plaintiff's offer of employment the day before the start date.[35] Not only did the court rule that the provision is not preempted, but also that the specific protection in the Connecticut statute confers a private cause of action.[36] This is the first court case to interpret PUMA and is the first case in the country to uphold a private cause of action under a medical marijuana statute. This implies that the protections afforded students and tenants will carry the same rights.

While the pros and cons of a recreational marijuana program have been debated throughout the legislative session, cannabis law has come far enough in other states that we no longer enter this territory in a vacuum. Massachusetts has recently completed implementation of a recreational program and, while we may not yet have conclusive data concerning the impact of that move, it can guide the legislature and the administering agency in Connecticut in crafting a comprehensive program. We can also draw on our own experience in creating the medical program. Both legislators and the DCP have become very informed regarding all aspects of the cannabis industry since the passage of PUMA in 2012. When questioned about the implementation of a recreational program, DCP Commissioner Michelle Seagull stated:

> I am proud of how our state has built a program that uses a medical model, and has grown to support nearly 20,000 patients with severe debilitating conditions. If the legislature decides to expand access to marijuana in the state, we will be available to answer questions as requested, and will continue to fulfill our statutory mandates and any future mandates. Our agency's current focus is making sure that we run a secure med-

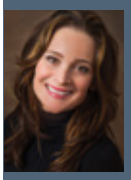
ical marijuana program that keeps good health care as its number one goal.[37]

Assuming Connecticut does pass and implement a program, there is still the question of the impact it will have on our state. Both opponents and proponents have legitimate concerns. For a meaningful understanding on the impacts of a recreational program, we can only look to the west, where we have access to years of data. Colorado's Department of Public Health and Environment has been monitoring health concerns related to marijuana since the program's inception. Also, in an exchange of letters between Colorado Governor Hickenlooper and Attorney General Jeff Sessions beginning in April of this year, Governor Hickenlooper expounded upon issues such as diversion to surrounding states, marijuana use by minors, motor vehicle crash fatalities, and emergency room visits.[38] Unfortunately, the letters in combination reflect a battle of sources when quoting statistics relating to the industry—with Attorney General Sessions citing a 2016 report by the Rocky Mountain High Intensity Drug Trafficking Area (RMHIDTA) to express concerns over the reported 37 percent increase in yearly interdiction seizures of marijuana by the highway patrol, 427 percent increase in U.S. Mail seizures, 20 percent increase in youth marijuana use, 48 percent increase in marijuana-related traffic deaths, and 49 percent increase in emergency department rates likely related to marijuana since the inception of the recreational program.[39]

Colorado Governor Hickenlooper's response casts doubt on the legitimacy of the RMHIDTA data and cites other sources, including the Colorado Department of Public Health, to describe strong inventory control, enforcement mechanisms and funding to combat diversion, as well as competing statistics describing a stable rate of youth marijuana use and a comprehensive well-funded public education campaign.[40] Governor Hickenlooper also reports a 21 percent drop in marijuana impaired drivers in the first six months of 2017 and a steady decline in marijuana-related emergency department visits.[41]

This exchange highlights the overarching and sometimes overlooked issue regarding the potential federal interference with legal cannabis programs throughout the country. This is particularly at issue as the federal budget amendment defunding enforcement of the federal cannabis laws against compliant operators in legal medical marijuana states potentially expires in December.[42]

While there is a lot to consider in the adoption of a recreational program, there is one certainty: lawyers in every practice area can expect to be affected and should be well informed of the growing body of law surrounding this complex issue. **CL**



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Notes

1. Conn. Office of Fiscal Analysis, Retail Marijuana Revenue Estimate (Colorado and Massachusetts), Report No. 2017OFA-0191 (Feb. 1, 2017), https://www.cga.ct.gov/2017/ofarpt/2017OFA-0191.pdf
2. Quinnipiac Univ., *Low Dem Support Hurts Connecticut Gov Malloy, Quinnipiac University Poll Finds; Voters Say No To More Casinos 4-1,* (Mar. 11, 2015), https://poll.qu.edu/connecticut/release-detail?ReleaseID=2174.
3. Sacred Heart Univ. Inst. for Pub. Policy & GreatBlue Research Inc., Report of Findings (Oct. 26, 2017), http://www.sacredheart.edu/media/sacredheart/instituteforpublicpolicy/GreatBlue--Sacred-Heart-University-Pioneer-Poll-Q3-2017-(UPDATED-10262017)[1].pdf.
4. Joseph Berger, *Connecticut Allows Medical Marijuana, but Sellers Encounter Hurdles,* N.Y. Times (May 1, 2014), https://www.nytimes.com/2014/05/02/nyregion/medical-marijuana-is-legal-in-connecticut-but-not-yet-sold.html.
5. Schae Beaudoin, *18,000 now use medical marijuana in CT,* CT Mirror (June 14, 2017), https://ctmirror.org/2017/06/14/18000-now-use-medical-marijuana-in-ct; *Connecticut Patients? Grow Medication?,* CTMMPS (Feb. 25, 2016), http://www.ctmmps.com/connecticut-patients-grow-medication.
6. Chris Kudialis, *With recreational weed sales coming, what will happen to medical marijuana in Nevada?,* Las Vegas Sun (May 31, 2017), https://lasvegassun.com/news/2017/may/31/with-recreational-weed-sales-coming-what-will-happ.
7. N.Y. Penal Law §§ 221.00–221.55. (Consol. 2017); N.H. Rev. Stat. Ann. § 318-B:2-c (2017); Vt. Stat. Ann. tit. 18, § 4230a (2017); 21 R.I. Gen. Laws § 28-4.01 (2017).
8. Mass. Ann. Laws ch. 94G, § 7 (2017); Me. Rev. Stat. tit. 7, § 2452 (2017).
9. Vt. Stat. Ann. tit. 18, § 4230a (2017); H.B. 170, 74th Biennial Sess. (Vt. 2017).
10. S.B. 11, Jan. 2017 Sess., (Conn. 2017).
11. *See, e.g.,* H.B. 6518, Jan. 2017 Sess., (Conn. 2017); H.B. 5314, Jan. 2017 Sess., (Conn. 2017); H.B. 5539, Jan. 2017 Sess., (Conn. 2017).
12. Gregory B. Hladky & Cheyenne Haslett, *Disagreement Over Marijuana Danger As Hearing Opens, Ha*rtford Courant (Mar. 22, 2017), http://www.courant.com/news/connecticut/hc-legalize-marijuana-next-hearing-20170321-story.html.
13. Conn. S.B. 11 § 21(b)(1).
14. I.R.C. § 280E.
15. Conn. S.B. 11.
16. *Id.* at §§ 1(9), (14).
17. *Id.* at § 1(8).
18. *Id.* at § 1(13).
19. *Id.* at § 1(14).
20. *Id.* at § 1(11).
21. *Id.* at § 14.
22. *Id.* at § 8(E).
23. Conn. Gen Stat. § 30–46(a).
24. Conn. S.B. 11 § 2(a).
25. *Id. at* § 7.
26. *Id.* at § 5.
27. Telephone Interview with Sam Tracy, Director, Connecticut Coalition to Regulate Marijuana, in Los Angeles, Cal. (Sept. 15, 2017).
28. Kudialis, *supra* note 6.
29. Conn. Gen Stat. §§ 21a–408 to 21a–408v.
30. *Noffsinger v. SSC Niantic Operating Co. LLC*, Docket No. 3:16-cv-01938 (JAM), 2017 U.S. Dist. LEXIS 124960 (D. Conn. Aug. 8, 2017).
31. Conn. Gen Stat. § 21a–408p(b).
32. *Noffsinger,* 2017 U.S. Dist. LEXIS 124960 at *1 (2017).
33. *Id.* at *1.
34. *Id.* at *4.
35. *Id.* at *6.
36. *Id.* at *21, *24.
37. E-mail from Michelle Seagull, Comm'r , Conn. Dep't of Consumer Prot., to author (Sept. 18, 2017) (on file with author).
38. Letter from John Hickenlooper, Governor of CO, et al., to Jeff Sessions, U.S. Attorney General (Apr. 3, 2017), http://thecannabisindustry.org/wp-content/uploads/2017/04/AK-CO-OR-WA-marijuana-letter-4-3-17.pdf.
39. Letter from Jeff Sessions, U.S. Attorney General, to John Hickenlooper, Governor of CO (Jul. 24, 2017), https://localtvkdvr.files.wordpress.com/2017/08/sessions-letter.pdf.
40. Letter from John Hickenlooper, Governor of CO, to Jeff Sessions, U.S. Attorney General (Aug. 24, 2017), https://localtvkdvr.files.wordpress.com/2017/08/hickenlooper-coffman-letter-to-attorney-general-sessions.pdf.
41. *Id.*
42. Act of Sept. 8, 2017, Pub. L. No. 115–56. *See* John Schroyer, *Rohrabacher-Blumenauer Amendment extended until December,* Marijuana Bus. Daily (Sept. 8, 2017), https://mjbizdaily.com/rohrabacher-blumenauer-amendment-extended-december ("A key federal law protecting the medical marijuana industry from interference by the U.S. Department of Justice has been extended until Dec. 8 under the provisions of an emergency aid package approved Friday by Congress….").