DuPage Mayors and Managers Conference
Medical Marijuana and Local Government: What You Need to Know
Effective Date: December 31, 2013

Disclaimer: Information provided in the following material is meant only to give general guidance. The information is not meant to replace statutory language and should not be considered legal advice.

Medical Marijuana Background

Effective January 1, 2014, the Compassionate Use of Medical Cannabis Pilot Program Act (Public Act 98-0122, the Act) will provide for the lawful use of marijuana by qualifying state residents and establish a process for the licensing and operation of cultivation centers (where marijuana will be grown) and dispensaries (where marijuana will be sold) throughout the state.

Under the Act, twenty-two cultivation centers are allowed (not more than one in each State Police district). Sixty dispensing organizations are permitted throughout the state and are not limited in number in each State Police district.

Four state agencies have responsibility for implementing the Act. The Illinois Department of Agriculture (IDOA) is charged with licensing and regulating the twenty-two cultivation centers allowed under the Act. The Illinois Department of Financial & Professional Regulation (IDPFR) is charged with licensing and regulating dispensing organizations. The Illinois Department of Public Health (IDPH) is charged with creating one system for issuing registry identification cards to Qualifying Patients and another system for physicians (who act as the gatekeepers for access to medical marijuana) for recommending patients for inclusion in the registry.

Each state agency is currently developing the administrative rules needed to implement its section of the Act. These administrative rules are to be filed with the Joint Commission on Administrative Rules (JCAR) within 120 days of the effective date of the Act. The review and approval process followed by JCAR is defined by state law. The process can take three to four months. During that period, an opportunity will be provided for public comment on the proposed rules. IDOA has advised on its website that it does not anticipate accepting applications for cultivation centers until the fall of 2014. IDPFR and IDPH will be similarly

unable to act until their respective rules are finalized. Communities are encouraged to track the development of the proposed rules and comment as they feel appropriate.

1. Qualifying Patient Information

Qualifying Patients may obtain up to 2.5 ounces of medical marijuana in a 14 day period from an authorized dispensary. IDPH may grant a waiver allowing the possession of more than 2.5 ounces in a 14 day period. Marijuana used in marijuana infused products is counted toward the limit on the total amount of marijuana a Qualifying Patient may possess at one time.

To become a Qualifying Patient, an individual must be diagnosed by a physician as having a debilitating medical condition. Debilitating medical conditions are defined in the Act. An individual may petition IDPH for the addition of new debilitating conditions or treatments. IDPH will develop a process for considering these petitions. It should be noted that legislation has already been introduced to modify the list of debilitating medical conditions articulated in the Act. Under the Act, a physician is limited to a doctor of medicine or osteopathy with a current controlled substances license. No other licensed profession, including dentists, may recommend a patient for medical marijuana.

Only Illinois residents meeting the program requirements can participate in the program. There is no reciprocity with programs in other states.

IDPH will issue registry cards to Qualifying Patients and maintain a registry of Qualifying Patients. The infrastructure to implement this part of the Act is under development with the administrative rules. The registry will be accessible to each police department in the state through the LEADs database. In addition, IDPH is to notify the Secretary of State of card holder status for inclusion into the driving records of Qualifying Patients.

2. Land Use and Zoning Regulations

What You Need to Know

- "Cultivation center" is a facility operated by an organization or business that is registered by the Department of Agriculture to perform necessary activities to provide only registered medical cannabis dispensing organizations with usable medical cannabis. Cultivation centers may not be located within 2,500 feet of the property line of a pre-existing public or private preschool or elementary or secondary school or day care center, day care home, group day care home, or part day child care facility, or an area zoned for residential use.
- “Dispensary” is a facility operated by an organization or business that is registered by the IDFPR to acquire medical cannabis from a registered cultivation center for the purpose of dispensing cannabis, paraphernalia, or related supplies and educational materials to registered qualifying patients. Dispensaries may not be located within 1,000 feet of the property line of a pre-existing public or private preschool or

elementary or secondary school or day care center, day care home, group day care home or part day child care facility and may not be located in any area zoned for residential use.

- Communities may enact reasonable zoning ordinances or resolutions that do not conflict with the Act or its regulations; however, their home rule authority is pre-empted. Cultivation centers and dispensaries must demonstrate compliance with local zoning prior to authorization by the respective state agencies.
- An outright ban on either cultivation centers or dispensaries is not likely to survive a legal challenge.

What You Should Do

- Identify and map the schools, day care facilities, child care facilities, and residential land uses in your municipality to determine where cultivation centers and dispensaries may be sited.
- Contact the Illinois Department of Children and Family Services for information on licensed day care facilities in your municipality.
- Familiarize yourself with schools, day care facilities, child care facilities, and residential land uses in adjoining communities and map the statutory setbacks for those facilities and uses.
- Determine whether the cultivation center or dispensary uses should be identified as permitted, special, or conditional uses under their zoning ordinance. Designation as a permitted use will likely result in one text amendment and no opportunity for future public comment, whereas a special or conditional use will require petitions or applications to be handled on a case-by-case basis and allow for continued public comment.
- Consider defining these specific uses in the zoning ordinance versus drawing analogies or comparisons to other uses such as drug stores.
- In assessing petitions from a cultivation center or dispensary to locate within an allowable zoning district, consider the impact of other activities on the premises. Paraphernalia, for example, may be sold in an establishment as a means for the delivery of the medical marijuana to the patient. Reasonable restrictions on floor area for other activities such as retail sales or prohibitions on sales from stock rooms might also need evaluation and consideration.
- Tracking development of the state's administrative rules being developed for cultivation centers and dispensaries will help inform municipalities on the timeframe within which municipalities must take action, especially in regard to zoning. The state departments have up to 120 days after January 1, 2014 to propose their respective rules. Some municipalities are considering moratoria on accepting applications for these facilities; the DMMC Managers Committee makes no recommendation or analysis of the enforceability of such an action. However, it seems clear that the lag in adoption of state rules gives additional time for municipalities to consider what actions they will take.

3. Police Enforcement Activities

What You Need to Know

- Qualifying Patients must be 18 years of age or older.
- Qualifying Patients are limited in the locations in which they can smoke. Smoking is prohibited in any indoor place where smoking is prohibited by the Smoke-free Illinois Act, in motor vehicles, on school grounds, and in any public place where a patient could be observed by others.
- Employers may prohibit the use of medical marijuana on their premises.
- Neither the driver nor any passenger can use medical marijuana while operating motor vehicle on a highway. If there is a suspicion of driving under the influence of medical marijuana, impairment will need to be shown through standardized field sobriety tests. No objective standard akin to the 0.08% blood alcohol content for alcohol exists for marijuana impairment. Possession of a registry card alone does not constitute reasonable suspicion of impairment.
- Medical marijuana must be stored in a sealed, tamper evident container while in a motor vehicle.

What You Should Do

- Examine your existing ordinances for paraphernalia it relates to medical marijuana sales, possession and use.
- Evaluate existing training programs and consider modifications to address the presence of medical marijuana in the community.

4. HR Procedures and Actions

What You Need to Know

- Employers cannot discriminate against employees for being a Qualified Patient.
- As noted previously, employers may prohibit the use of medical marijuana on their premises. Provided that the policy is applied in a non-discriminatory manner, employers can enforce a drug free workplace policy. Employers who do not prohibit the use of medical marijuana may adopt reasonable regulations concerning the consumption, storage or timekeeping requirements for Qualifying Patients.
- Employers can discipline an employee for failing a drug test if failing would put the employer in violation of federal law or cause it to lose a federal contract or funding. Employers are encouraged to review grant agreements and other contracts for provisions addressing drug use in the workplace. Employees can be disciplined for violating a workplace drug policy. The Act does not exempt holders of CDL licenses from random drug testing, nor does it protect them from the consequences of failed tests. Qualified Patients can be disciplined in a non-discriminatory manner.

- Qualifying Patients will test positive. No objective standard exists for marijuana impairment.
- The Act does not create a cause of action for:
  - Actions based on the employer's good faith belief that a registered Qualifying Patient used or possessed marijuana while on the employer's premises or during the hours of employment;
  - Actions based on the employer's good faith belief that a registered Qualifying Patient was impaired while working on the employer's premises during the hours of employment; or
  - Injury or loss to a third party if the employer neither knew nor had any reason to know that the employee was impaired.
- The above immunities are not absolute nor have they been tested in court.
- Implications of the Act with respect to the Family Medical Leave Act (FMLA), Americans with Disabilities Act (ADA) and other employment related laws are yet to be determined. For example, the relationship between a "serious health condition" under the FMLA and "debilitating medical condition" in the Act is unclear.

What You Should Do

- Employers should evaluate existing policies for drug use in the workplace and make revisions as necessary to address medical marijuana concerns including, but not limited to on premises use, on premises possession, workplace impairment, circumstances for testing, and workplace safety. Policies should be placed in writing and incorporated into personnel rules and negotiated into collective bargaining agreements.
- Since there is no objective standard for marijuana impairment, employers should rely upon objective, observable factors when addressing suspected impairment. These factors will likely be similar to those for impairment due to alcohol or prescription or illegal drug use.
- Employers can require employees to provide notification of medical marijuana use; however employees cannot be penalized solely for being a Qualified Patient.
- Since implications of the Act with respect to the FMLA, ADA, and other employment related laws are yet to be determined, employers are urged to consult their legal counsel when confronted with employment related matters concerning medical marijuana.
- No insurance provider has yet been identified that plans to consider medical marijuana as a covered expense, but employers may wish to consult their medical insurance providers in this regard.
- Employers are advised to develop policies related to how medical marijuana will be addressed in any self-managed flexible spending account or other similar medical expense payment system.