AGENDA ITEM: 11 (Amended 12/19/18)

Medical Marijuana Discussion

ISSUE

This agenda item is presented to the Task Force to discuss medical marijuana as it pertains to the Commission's moral character standard.

PROPOSED AMENDMENT(S)

- None.

SUPPORTING INFORMATION

Attachment 1: Memo to Penalty Guidelines Task Force regarding Medical Marijuana and Officer Discipline Questions and Answers issued by Bureau Chief Glen W. Hopkins, FDLE/Bureau of Standards, dated December 19, 2018, pages 29 - 30.

Attachment 2: *"Open Letter to All Federal Firearm Licensees"* issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives on September 21, 2011, page 31.

Attachment 3: *"Disciplining Police Officers Re: Medical Marijuana"* issued by General Counsel John M. (Jack) Collins of the Massachusetts Chiefs of Police Association, Inc., pages 32 - 69.

Attachment 4: Section 381.986, Florida Statutes; Medical Use of Marijuana, pages 70 - 100.

Attachment 5: Memo from Oregon Department of Justice, General Counsel Division, issued by Senior Assistant Attorney General Stacy C. Posegate on November 1, 2016, pages 101 - 106.

Attachment 6: Results of the FDLE Medicinal/Recreational Marijuana Survey, pages 107 - 110.

Criminal Justice Standards and Training Commission

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MEMORANDUM

DATE: December 19, 2018

TO: Penalty Guidelines Task Force Members

FROM: Bureau Chief Glen W. Hopkins
Bureau of Standards

SUBJECT: Medical Marijuana and Officer Discipline

The following questions and answers are intended to provide background information related to the use of low-THC or medical marijuana by officers.

1) Does the Commission have the authority to adopt a rule making the use of low-THC or medical marijuana by a sworn officer a moral character violation?

   Answer: Yes. This authority comes from sections 943.12(1), 943.13(7), and 943.1395(8), F.S. There does not appear to be any provision that would prohibit adding language to 11B-27.0011(4)(d) F.A.C. that would include the Controlled Substances Act under 21 U.S.C. in which marijuana is listed as a Schedule 1 controlled substance. (Answer provided by FDLE-Office of the General Counsel)

2) How do federal firearms laws impact an officer's ability to possess a firearm if he/she has a valid certification for low- THC cannabis or medical marijuana?

   Answer: Federal law effectively would prohibit any person "unlawfully using" marijuana from possessing a firearm or ammunition under 18 U.S.C. Section 922(g)(3). "Unlawfully using" refers to the use being unlawful under federal law and as such any officer using medical marijuana would be in violation of federal law. In addition, it is also federally prohibited for someone to knowingly sell or otherwise dispose of a firearm to someone who is an "unlawful user" of marijuana. As a result, police agencies may be violating federal law themselves by providing the officer with the firearm for use on-duty if they know the officer holds a medical use card. Please see the included "Open Letter to All Federal Firearm Licensees" issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives on September 21, 2011. This appears to continue to be their position on the issue. Please also see the attached legal position from the general counsel of the Massachusetts Chiefs of Police Association. (Answer provided by FDLE-Office of the General Counsel)

3) Is there any case law relating to licensure/certification that would support maintaining a moral character violation for a positive drug test involving low-THC or medical marijuana?

Answer: Case law is still being researched; however, no appellate decisions have been found related to officer certification issues on this topic. (Answer provided by FDLE-Office of the General Counsel)

4) How will the drug testing laboratory results be reported to the Commission when an officer tests positive for marijuana metabolites and the officer (who is a qualified patient) has a valid certification for low-THC cannabis or medical marijuana that was issued by a qualified physician?

Answer: Commission staff spoke with a Medical Review Officer (MRO) in Ft. Pierce who confirmed that he reports the results of drug tests involving low-THC or medical marijuana based on agency policy. For example, he stated that 90% of the agencies that he contracts with have a zero tolerance concerning a sworn officer's use of low-THC or medical marijuana. In those situations, he would report those drug tests as positive, regardless of whether or not the individual had a valid certification to use low-THC or medical marijuana.

5) Can an MRO distinguish between recreational marijuana use vs. low-THC cannabis or medical marijuana when a drug test reveals evidence of marijuana metabolites?

Answer: No.

6) Is there any active effort to legalize low-THC cannabis or medical marijuana at the federal level?

Answer: No.

7) Do any of the Department of Health rules discuss issues regarding a certified officer using low-THC or medical marijuana?

Answer: No.

U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Washington DC 20226

September 21, 2011

www.atf.gov

OPEN LETTER TO ALL FEDERAL FIREARMS LICENSEES

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has received a number of inquiries regarding the use of marijuana for medicinal purposes[1] and its applicability to Federal firearms laws. The purpose of this open letter is to provide guidance on the issue and to assist you, a Federal firearms licensee, in complying with Federal firearms laws and regulations.

A number of States have passed legislation allowing under State law the use or possession of marijuana for medicinal purposes, and some of these States issue a card authorizing the holder to use or possess marijuana under State law. During a firearms transaction, a potential transferee may advise you that he or she is a user of medical marijuana, or present a medical marijuana card as identification or proof of residency.

As you know, Federal law, 18 U.S.C. § 922(g)(3), prohibits any person who is an "unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))" from shipping, transporting, receiving or possessing firearms or ammunition. Marijuana is listed in the Controlled Substances Act as a Schedule I controlled substance, and there are no exceptions in Federal law for marijuana purportedly used for medicinal purposes, even if such use is sanctioned by State law. Further, Federal law, 18 U.S.C. § 922(d)(3), makes it unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or **having reasonable cause to believe** that such person is an unlawful user of or addicted to a controlled substance. As provided by 27 C.F.R. § 478.11, "an inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time."

Therefore, any person who uses or is addicted to marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of or addicted to a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition. Such persons should answer "yes" to question 11.e. on ATF Form 4473 (August 2008), Firearms Transaction Record, and you may not transfer firearms or ammunition to them. Further, if you are aware that the potential transferee is in possession of a card authorizing the possession and use of marijuana under State law, then you have "reasonable cause to believe" that the person is an unlawful user of a controlled substance. As such, you may not transfer firearms or ammunition to the person, even if the person answered "no" to question 11.e. on ATF Form 4473.

ATF is committed to assisting you in complying with Federal firearms laws. If you have any questions, please contact ATF's Firearms Industry Programs Branch at (202) 648-7190.

Arthur Herbert
Assistant Director
Enforcement Programs and Services

[1] The Federal government does not recognize marijuana as a medicine. The FDA has determined that marijuana has a high potential for abuse, has no currently accepted medical use in treatment in the United States, and lacks an accepted level of safety for use under medical supervision. See 66 Fed. Reg. 20052 (2001). This Open Letter will use the terms "medical use" or "for medical purposes" with the understanding that such use is not sanctioned by the federal agency charged with determining what substances are safe and effective as medicines.

Disciplining Police Officers Re: Medical Marijuana

by
Atty. John M. (Jack) Collins, General Counsel
Massachusetts Chiefs of Police Association, Inc.

The production and sale of so-called "medical marijuana" has become a major industry, in some states already generating sales in the billions of dollars, and also resulting in millions of dollars in state tax revenue. It is no surprise, then, that a majority of states and the District of Columbia have enacted laws permitting and regulating the use of marijuana for "medical" purposes. While this, coupled with partial or total decriminalization, will greatly impact traditional law enforcement efforts, the enactment of medical marijuana laws or outright decriminalization by and large should not affect the authority of police departments to discipline officers for possession or use of marijuana or for serving as a caregiver for a person allowed to use or possess medical marijuana. (Civilian employees may be a different story.)

Most state laws allowing the use of medical marijuana do not protect individuals against employment related sanctions. The Americans with Disabilities Act (ADA) does not protect or even apply to current drug users. Similarly, employees using marijuana for "medical" reasons generally are not protected from such sanctions under state disabilities discrimination laws requiring reasonable accommodation of disabling medical conditions.

This article will discuss the legal and employment issues, give a sample policy and procedure, and recommend how to adopt and enforce rules and regulations in both union and non-union police departments.

FEDERAL LAWS CRIMINALIZE USE OR POSSESSION OF MARIJUANA

Regardless of what a state does, under federal law marijuana remains a controlled substance whose use, sale, and possession are federal crimes. 21 U.S.C. §§ 841(a)(1), 844(a).)Marijuana is listed as a schedule 1 controlled substance under the federal Controlled Substances Act, 21 U.S.C. Sec. 812(b)(1). While reasonable minds might differ on the appropriateness of doing so, marijuana remains on the

most restricted schedule, along with such drugs as heroin, LSD, or Ecstasy. The U.S. Food and Drug Administration has determined that marijuana has a high potential for abuse, has no currently accepted medical use in treatment in the U.S., and lacks an accepted level of safety for use under medical supervision. 66 Fed. Reg. 20052 (2001).

Adopted in 1970, the Controlled Substances Act (CSA) established a federal regulatory system designed to combat recreational drug abuse by making it unlawful to manufacture, distribute, dispense, or possess any controlled substance. (21 U.S.C. § 801, et seq.; *Gonzales v. Oregon* (2006) 546 U.S. 243, 271-273.) Accordingly, the manufacture, distribution, or possession of marijuana is a federal criminal offense.

The incongruity between federal and state law has given rise to understandable confusion, but no legal conflict exists merely because state law and federal law treat marijuana differently. Indeed, California's medical marijuana laws have been challenged unsuccessfully in court on the ground that they are preempted by the CSA. (*County of San Diego v. San Diego NORML* (July 31, 2008) --- Cal.Rptr.3d ---, 2008 WL 2930117.) Congress has provided that states are free to regulate in the area of controlled substances, including marijuana, provided that state law does not positively conflict with the CSA. (21 U.S.C. § 903.) Neither Proposition 215, nor the MMP, conflict with the CSA because, in adopting these laws, California did not "legalize" medical marijuana, but instead exercised the state's reserved powers to not punish certain marijuana offenses under state law when a physician has recommended its use to treat a serious medical condition. (See *City of Garden Grove v. Superior Court* (*Kha*) (2007) 157 Cal.App.4th 355, 371-373, 381-382.

In *U.S. v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 at 49 (2001), the U.S. Supreme Court concluded that the federal Controlled Substances Act does not contain a "medical necessity" exception that permits the manufacture, distribution, or possession of marijuana for medical treatment. Subsequently, in *Gonzales v. Raich*, 545 U.S. 1 (2005), the U.S. Supreme Court upheld the constitutionality of Congress using its Commerce Clause authority to prohibit the local cultivation and use of marijuana, even when it is in compliance with state law.

A U.S. Deputy Attorney General, on Oct. 19, 2009, issued a Justice Department memorandum to U.S. Attorneys in states with laws permitting the medical use of marijuana, allowing for the exercise of prosecutorial discretion to refrain from initiating federal criminal prosecutions when they determine that a patient's use, or their caregiver's provision, of medical marijuana "represents part of a recommended treatment regimen consistent with applicable state law." Doing otherwise, the memo concluded, would be "an inefficient use of limited federal resources." This was followed-up by another such memorandum on June 29, 2011, clarifying that the intent of the first memo was not to shield commercial medical marijuana cultivators from federal prosecution, even if they are complying with state medical marijuana laws. This second memo was apparently issued because of

concern about the growth of large scale marijuana farming operations in some states, as well as an explosion in the number of medical marijuana dispensaries, with some suggesting that medical marijuana was being used as a thinly veiled cover to promote recreational use of the drug for profit. Despite whatever prosecutorial discretion is exercised on the issue of medical marijuana, use, sale, distribution, or possession remains a federal crime.

Numerous letters have been written by various US Attorneys to state law enforcement or criminal justice officials essentially reiterating the current administration's position. The issue of how law enforcement agencies deal with employees using or possessing marijuana for medical purposes has not been addressed in such correspondence or memoranda.

FIREARMS PROHIBITION

Federal law precludes marijuana users from possessing firearms or ammunition. Possessing and using a firearm and ammunition is an essential part of the job duties of many, although not all, public safety employees. Police officers in particular, as well as some correctional personnel, are expected to routinely be able to possess and use such weaponry. Under the federal law, certain persons may not possess a firearm, ammunition, etc. if they are an "unlawful user of or addicted to any controlled substance" which includes marijuana, depressants, stimulants, and narcotic drugs. Such person is one who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm. An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time, e.g., a conviction for use or possession of a controlled substance within the past year, or multiple arrests for such offenses within the past five years if the most recent arrest occurred within the past year. This includes persons found through a drug test to use a controlled substance unlawfully, provided the test was administered within the past year.

For a current or former member of the Armed Forces, an inference of current use may be drawn from recent disciplinary or other administrative action based on confirmed drug use, e.g., court-martial conviction, non-judicial punishment, or an administrative discharge based on drug use or drug rehabilitation failure.

Perhaps the most dramatic impact on the issue of the right of public safety agencies to terminate employees using medical marijuana in compliance with state

law may be an open letter to all federal firearms licensees issued by the U.S. Dept. of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) on Sept. 21, 2011. The federal agency charged with enforcing federal firearms laws takes the clear and unambiguous position in this open letter that those who are users of medical marijuana, including those in scrupulous compliance with state law, should not be allowed to purchase, possess or use firearms or ammunition.

Firearms dealers are not likely to be aware that a particular customer seeking to purchase a gun or bullets is a medical marijuana user. But if someone seeking to buy a weapon or ammunition does inform a firearms dealer that they are a medical marijuana user, the ATF takes the position that completing the transaction is against federal firearms law. Some purchasers, the ATF notes, might even present a state issued medical marijuana card as either identification or proof of residency.

Under 18 U.S.C. Sec. 922(g)(3), the ATF reminds firearms dealers, it is unlawful for any person who is an unlawful user of or addicted to any controlled substance" (as defined by the Controlled Substances Act) to ship, transport, receive or possess firearms or ammunition. Since marijuana is a schedule 1 controlled substance, and there "are no exceptions in federal law for marijuana purportedly used for medicinal purposes, even if such use is sanctioned by state law," medical marijuana users may not be sold or possess firearms or ammunition.

Federal law further makes it a crime to sell or otherwise dispose of a firearm or ammunition to anyone knowing "or having reasonable cause to believe" that the person unlawfully uses a controlled substance, such as marijuana. 18 U.S.C. Sec. 922(d)(3). A federal regulation, 27 C.F.R. Sec. 478.11, allows an inference of current illegal use of a controlled substance to be drawn from "evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time."

According to the ATF, a person who uses medical marijuana, even in compliance with state law, should answer "yes" to question 11.e. ("Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?") on ATF Form 4473, Firearms Transaction Record. And licensed firearms dealers may not transfer firearms or ammunition to them. Even if the person answers "no" to this question concerning the use of controlled substances, the ATF takes the position that it is a violation of federal law to transfer a weapon or ammunition to them if a person has "reasonable cause to believe" that they use medical marijuana, such as if they have a card authorizing them to possess medical marijuana under state law.

Similar issues have previously arisen concerning officers barred from possessing weapons because of prior convictions for domestic violence offenses. In 1996, the Congress passed a Defense Appropriations Act. Sec. 658 of that enactment made it unlawful for any person who has been convicted of a domestic violence misdemeanor to possess a firearm or ammunition. There is no exception for persons

who must carry a firearm on their jobs: law enforcement officers, security guards, or members of the Armed Forces. Courts have upheld this restriction.

The ATF position is likely to be challenged by some gun rights advocates as constituting a Second Amendment violation, but such a challenge is unlikely to succeed. See *District of Columbia v. Heller*, #07-290, 554 U.S. 570 (2008), finding an individual right to possess handguns for home defense under the Second Amendment, but stating that reasonable firearms regulations would be upheld, and *McDonald v. City of Chicago*, #08-1521, 130 S. Ct. 3020 (2010), applying those principles to the states and municipalities through the Fourteenth Amendment.

The ATF's position would appear to contradict and is likely to trump the position taken by the Oregon Supreme Court in *Willis v. Winters*, 2011 Ore. Lexis 445, 350 Ore. 299, 253 P.3d 1058, holding that two county sheriffs should not have denied concealed handgun licenses to applicants who were otherwise qualified but who admitted to the regular use of medical marijuana. While this court found that the sheriffs' statutory duty to issue the permits under state law as not preempted by federal firearms law, if the use of medical marijuana makes an individual ineligible for any possession of a firearm, it is difficult to imagine how they could qualify for a conceal carry permit.

Practice Pointers

If a public safety employee cannot legally possess a firearm or ammunition, clearly they cannot perform some of the essential job functions of many public safety jobs, and this can be a legitimate basis for their termination. The ATF memo's reasoning makes it highly questionable as to how a department could be legally justified in issuing a firearm or ammunition to a known user of medical marijuana.

ACCOMMODATION REQUIRED?

The Americans with Disabilities Act and most state disability laws require that employers provide reasonable accommodations for qualified individuals with a disability. So, for example, if a diabetic employee requires an accommodation for the administration of insulin, the employer must provide that accommodation if it is reasonable and does not impose an undue hardship under the law. The question then arises about an employer's accommodation obligations concerning an employee with a debilitating medical condition for which medical marijuana treatment has been certified by a physician. Does the employer have an obligation to accommodate the use of medical marijuana in the workplace or during the workday? The short answer can be found in the text of most state's Medical Marijuana Act. Most such laws state, in part, that it does "not require any accommodation of the medical use of marijuana in any workplace, school bus or grounds, youth center, or correctional facility." In addition, the ADA does not require an accommodation for the "illegal use of drugs." The ADA defines "illegal drug use"

by reference to federal rather than state law, and, as discussed above, federal law characterizes marijuana as an illegal substance. The ADA probably requires some accommodation for past drug dependency and labor counsel should be consulted before taking disciplinary action in such cases.

As a general rule, there is no requirement to accommodate officers with a medical marijuana card, nor are departments required to allow officers to be a caretaker or have any role in the operation of a medical marijuana distribution facility or network. Similarly, there is no obligation to offer treatment in place of discipline to officers found using or in possession of marijuana.

Note: While this will not necessarily apply to police personnel, since marijuana is illegal under the federal Controlled Substances Act, employers in states allowing medical marijuana also still must comply with any federal prohibitions related to marijuana use. Thus, employers covered by the federal Drug-Free Workplace Act, which requires certain federal contractors to certify that they will provide a drug-free workplace by issuing a written policy to all employees that prohibits the illegal manufacture, distribution, dispensation, possession, or use of a controlled substance in the workplace, may not allow medical marijuana use in their workplace. Similarly, employers covered by federal drug testing requirements (such as those regulated by the Department of Transportation) also must remove employees from safety sensitive positions if they test positive for medical marijuana.

While the laws in most states typically do not address whether employers must accommodate employees using marijuana and thus do not prevent enforcement of workplace drug policies, such as those prohibiting drug use in the workplace or disciplining employees for positive drug tests, most also do not ban employers from refusing to employ individuals who use medical marijuana. However, Connecticut, Maine, and Rhode Island prohibit employers from discriminating against medical marijuana users based on their use, unless required by federal law. Arizona's and Delaware's medical marijuana laws go a step farther and prohibit employers from taking adverse action including termination of applicants and employees who test positive for marijuana unless they used, possessed, or were impaired by marijuana in the workplace, or unless a failure to do so would result in the employer losing a monetary or licensing benefit under federal law or regulations.

Practice Pointers

Employers may not have to accommodate medical marijuana use under a state's "medical marijuana" law, but they will most likely have to accommodate the disability that led to the physician's recommendation of medical marijuana, assuming the employee is still able to perform the position's essential functions and so long as doing so would not constitute an undue hardship on the employer. The anti-discrimination laws of many states and the Americans with Disabilities Act's most recent regulations are quite broad and require an interactive process and potential

accommodations for a wide range of medical conditions. Chiefs should make certain the department's policies and their enforcement clearly reflect that any adverse employment actions taken are not because of an employee's disability, but for a clear violation of the department's drug and alcohol policies that are in writing and were properly noticed, disseminated and understood.

Courts across the country that have directly addressed these claims have rejected them, often relying, in large part, on the fact that medical marijuana use is still a federal crime, whether widely prosecuted or not. While they reached their conclusions in different ways, the courts in these states have essentially held that the intent of the statutes in question was to decriminalize medicinal marijuana use and not to protect private rights of employees in the workplace.

- In *Roe v. TeleTech Customer Care Mgmt.*, 2011 Wash. Lexis 393, 257 P.3d 586, the Washington State Supreme Court confronted this issue. While Washington state law allows the medical use of marijuana for patients with a certificate for certain conditions, the court ruled that this does not bar employers in the state from firing employees with such certificates for marijuana use, nor does the law require employers to "reasonably accommodate" medical marijuana users. The decision prohibits the state's Human Rights Commission from investigating complaints about such firings. The court reasoned that, despite the allowance for medical use under state law, it would violate public policy to require employers to sanction criminal conduct by retaining such workers, since use of the drug is a federal crime.

- Similarly, the Oregon Supreme Court held that employees who smoke marijuana to relieve pain or nausea may be fired for drug use even if they have a state-issued medical marijuana card. Laws requiring employers to accommodate disabled workers do not extend to medical marijuana use, the court stated. *Emerald Steel v. Bur. of Labor & Indus.*, 2010 Ore. Lexis 272, 348 Ore. 159, 230 P.3d 518. See also, *Washburn v. Columbia For. Prod.*, 2006 Ore. Lexis 354, 134 P.3d 161, in which the Oregon Supreme Court ruled, under its state disabilities law, that an employer is not obligated to retain workers who use medical marijuana.

- Even in California, the state with arguably the largest number of medical marijuana users, in 2008 the California Supreme Court, in a 5-to-2 holding, allowed an employer to fire workers who use medical marijuana, even when the employee has a doctor's written approval. *Ross v. Ragingwire Tel.*, 2008 Cal. Lexis 784. 42 Cal. 4th 920; 174 P.3d 200; 70 Cal. Rptr. 3d 382.

- The same conclusion was reached in Montana where that state's court rejected claims by an employee terminated after he tested positive for drug use while using medical marijuana. In the case of *Johnson v. Columbia Falls Aluminum Company, LLC*, 2009 Mont. Lexis 120 (Mont., Mar. 31, 2009), the plaintiff began

using medical marijuana under the supervision of a physician a year and a half before his termination. The plaintiff used his own funds to purchase medical marijuana and limited his treatment to after-work hours. When the plaintiff tested positive for marijuana, his employer, Columbia Falls Aluminum Company, LLC ("CFAC") suspended him. Shortly thereafter, CFAC gave the plaintiff a "last chance" agreement outlining the conditions upon which he could return to work including, in particular, that he test non-positive for marijuana. The plaintiff did not sign this agreement, and subsequently, CFAC terminated him. In his lawsuit, the plaintiff claimed that CFAC violated the Montana Human Rights Act ("MHRA") and the ADA when it failed to accommodate his medical marijuana use by waiving terms of its drug testing policy. In rejecting this argument, the Montana Supreme Court held that Montana's Medical Marijuana Act ("MMA") *clearly* provides that an employer is not required to accommodate an employee's use of medical marijuana. MCA § 50-46-205(2)(b). Similar to the recently adopted ballot initiative in Massachusetts, the MMA is a decriminalization statute that protects qualifying patients, caregivers and physicians from criminal and civil penalties for using, assisting the use of, or recommending the use of medical marijuana. The MMA specifically provided that it could not be construed to require employers to accommodate the medical use of marijuana in a workplace. Thus, the court concluded that failure to accommodate use of medical marijuana does not violate the MHRA or the ADA, because an employer is not required to accommodate an employee's use of marijuana.

- Michigan (*Casias v. Wal-Mart Stores, Inc*., 2011 U.S. Dist. LEXIS 15244, 1-2 (W.D. Mich. 2011)). The Federal District Court found that the Michigan Medical Marijuana Act (MMMA) does not regulate private employment and granted Defendant's motion to dismiss. The Court found the MMMA merely provides a defense to criminal prosecution or other adverse actions by the state:

  > *All the MMMA does is give some people limited protection from prosecution by the state, or from other adverse state action in carefully limited medical marijuana situations.*

  The Court further explained that adopting Plaintiff's argument would create an entirely new protected employee class in Michigan and "mark a radical departure from the general rule of at-will employment in Michigan."

  Plaintiff argued Section 4's use of the term "business" expands the MMMA protections to private employment. Section 4, in relevant part, states:

  > *A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or*

occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act .

The Court disagreed, finding that the word "business" is not meant to stand alone, but instead, modifies the phrase "occupational or professional licensing board or bureau." Thus, the statute was intended to protect against disciplinary actions by state board or bureaus, not regulate all private employers.

Note: While these cases did not involve public safety personnel, their reasoning would still apply to those employed as police officers, correctional officers, or firefighters. In addition to the question of not wanting to condone such personnel regularly committing a federal crime, public safety agencies may also, of course, be concerned about the safety issues that can arise from attempting to perform dangerous job duties while an employee's senses may be impaired by drug use.

Being able to drive a vehicle at high speeds, being able to fire a weapon, being able to work rotating shifts, being able to run after and subdue fleeing suspects, being able to drive at night and a host of similar functions may seem to "go without saying." However, by not "saying" them in a written job description, chiefs may have trouble proving them at a court or discrimination agency hearing.

A 2013 case involving a nurse at an assisted living facility brought home the point very clearly. At the end of her FMLA leave for elective knee replacement surgery, she returned to work with a note from her physician saying that she could not kneel, squat or lift more than 50 pounds for six weeks. The nurse asked the facility to "reasonably accommodate" her by: (1) allowing her to call for assistance when a resident fell; (2) providing her with an aide; or (3) permitting an extended leave of six weeks until her restrictions expired.

Since the facility's job description included a list of essential duties, including being occasionally required to kneel, squat and lift up to 100 pounds, a request for accommodation or extended family medical leave was rightly rejected and the case was dismissed on summary judgment by the U.S. District Court for the District of Minnesota in *Attiogbe-Tay v. SE Rolling Hills LLC*, No. 12-1109 (D. Minn. Nov. 7, 2013).

The court found the duties were essential, and "the consequences of failing to perform the duties are potentially dire." (See 29 C.F.R. s. 1630.2(n)(3).) It noted that while in some cases extended leave would be reasonable, based on the size of the operation the employer was not required to do so, and "is not obligated to hire additional employees … to assist [the employee] in her essential duties."

Practice Pointers

In the jurisdictions where state law allows the use of medical marijuana, employers have increasingly been faced with the question of whether they can terminate employees engaged in such drug use if they do so in compliance with state law. Employees have argued that the state laws allowing such use implicitly protects them against employment related sanctions. Some employees facing termination for such drug use have also argued that they are protected from such sanctions under state disabilities discrimination laws requiring reasonable accommodation of disabling medical conditions.

Courts that have directly addressed these claims have rejected them, often relying, in large part, on the fact that medical marijuana use is still a federal crime, whether widely prosecuted or not. While these cases did not involve public safety personnel, their reasoning would still apply to those employed as police officers, correctional officers, or firefighters. In addition to the question of not wanting to sanction such personnel regularly committing a federal crime, public safety agencies may also, of course, be concerned about the safety issues that can arise from attempting to perform dangerous job duties while an employee's senses may be impaired by drug use.

Having up to date job descriptions for all positions is crucial to prevailing in a variety of discrimination cases. However, some chiefs continue to dodge the work and hope that "it will never happen to me." Only when an officer asks for a reasonable accommodation does the lack of a detailed job description – containing "essential job duties" – bring home the issue.

POLICE DEPARTMENT RULES OR POLICIES & PROCEDURES

Virtually all police departments have a rule against criminal conduct. No distinction is made in such rules between federal and state criminal laws. Some departments are adopting Policies & Procedures addressing the use or possession of marijuana for medical or recreational reasons. Michigan is one of the U.S. jurisdictions providing for legal use of medical marijuana. A policy adopted on May 12, 2009 by the Berrien Springs Oronoko, Michigan, Township Police Department entitled "Prohibited Substances – Drug Free Workplace," begins by noting that marijuana remains an illegal controlled substance under both Michigan state law and federal law, and that the presence of any detectable amount of any controlled substance in an employee's system while at work is prohibited. It goes on to state that any member of the department who is using, smoking or ingesting marijuana for medical purposes shall be considered unfit for duty, even if that use is sanctioned by state law, and they shall not be permitted to work or perform any job function. The policy further requires any employee or volunteer of the department who applies for, receives, or has been denied a medical marijuana card must inform the police chief of this fact in writing.

Under the policy, employees who test positive for any detectable amount of marijuana, or any other prohibited or illegal substance shall be immediately relieved of duty, and must surrender any and all department issued firearms, identification cards, etc. and shall not be permitted to perform any police function or possess any firearm in connection with their employment. Other provisions address officers acting as "caregivers" to family members under the state's medical marijuana law, and bar them from owning or being involved in any way in a marijuana dispensary or business, in the growing of marijuana for medical use, or in the distribution of drug paraphernalia.

Note: A sample Policy & Procedure drafted by this author for Massachusetts police chiefs is attached to this article.

Practice Pointers

Police departments probably do not need new Rules or Policies before disciplining employees that are otherwise protected by this state's medical marijuana laws since virtually all departments have a rule that prohibits criminal conduct. Regardless of any state law, the federal law still applies; therefore, the misconduct should be covered. However, out of an abundance of caution, some departments may decide to adopt a rule or policy specifically addressing medical marijuana. Unions are likely to notify the chief that they want to bargain over such "changes." In such case, while bargaining may not be required since it is only the wording and not the substance of any rule or policy that is being changed, I would still recommend that chiefs engage in mid-term negotiations in good faith to the point of agreement or

impasse before enforcing a newly worded rule or policy. Consultation with municipal labor counsel is strongly recommended.

Any department drafting such a policy, of course, should consult with competent local legal counsel, as the legal requirements and details of what will work best will vary from jurisdiction to jurisdiction. Collective bargaining agreements may also have an impact on the details of such a policy.

Chiefs should not make the mistake of including a "rehab" requirement in a collective bargaining agreement for officers using, selling or otherwise involved in illegal drug activity. It is better to have no drug testing clause than to have one that waters down a chief's ability to enforce a zero tolerance policy.

Chiefs should be sure that their department is aware that there is a zero tolerance policy for illegal drug use. Simply issuing a memo reminding officers of an existing rule and or policy is not a unilateral change in a working condition; therefore, no bargaining is required. However, without waiving the ability to assert that there is no change and this is a management right in any event, I do recommend that chiefs meet with the union if a timely request to do so is received. By agreeing to discuss any questions or concerns, and keeping an open mind and making a good faith effort to reach agreement, a chief will avoid prolonged litigation that can be costly and disruptive.

The enactment of "medical marijuana" laws, therefore, should have no impact on the department's ability to discipline officers for use or possession of marijuana.

Municipal employers should not make the mistake of including a "rehab" requirement in a collective bargaining agreement for officers using, selling or otherwise involved in illegal drug activity. It is better to have no drug testing clause than to have one that waters down a chief's ability to enforce a zero tolerance policy.

Sample Memo to Union re: Medical Marijuana

MEMO

Date: _____

To: Local _____
From: Chief of Police
Re: Medical Marijuana

I want to take this opportunity to remind all employees that this department has a rule prohibiting criminal misconduct, and that includes the use or possession of marijuana. Regardless of what a state does to allow its use for so-called "medical" purposes, under federal law marijuana remains a controlled substance whose use,

sale, and possession are federal crimes. In addition, possession of a certain quantity of marijuana, without a medical marijuana "prescription" or caregiver certificate, is still a crime under this state's law. Growing, processing or selling marijuana, except in connection with a medical marijuana facility, is also still illegal. Moreover, any involvement by a police officer in the medical marijuana business amounts to conduct unbecoming a police officer.

Marijuana is listed as a Schedule I controlled substance under the federal Controlled Substances Act, 21 U.S.C. Sec. 812(b)(1). It is on the most restricted schedule, along with such drugs as heroin, LSD, or Ecstasy. Its sale, use, or possession is a federal crime. Further, the U.S. Food and Drug Administration has determined that marijuana has a high potential for abuse, has no currently accepted medical use in treatment in the U.S., and lacks an accepted level of safety for use under medical supervision. 66 Fed. Reg. 20052 (2001).

State laws allowing such use do not protect department members against employment related sanctions. Similarly, employees using marijuana for "medical" reasons are not protected from such sanctions under the Americans with Disabilities Act (ADA) or this state's disability discrimination laws requiring reasonable accommodation of disabling medical conditions.

Courts across the country that have directly addressed these claims have rejected them, often relying, in large part, on the fact that medical marijuana use is still a federal crime, whether widely prosecuted or not. While they reached their conclusions in different ways, the courts in these states have essentially held that the intent of the statutes in question was to decriminalize medicinal marijuana use and not to protect private rights of employees in the workplace. See, for example:

- *Roe v. TeleTech Customer Care Mgmt.*, 2011 Wash. Lexis 393, 257 P.3d 586;
- *Emerald Steel v. Bur. of Labor & Indus.*, 2010 Ore. Lexis 272, 348 Ore. 159, 230 P.3d 518;
- *Washburn v. Columbia For. Prod.*, 2006 Ore. Lexis 354, 134 P.3d 161
- *Ross v. Ragingwire Tel.*, 2008 Cal. Lexis 784. 42 Cal. 4th 920; 174 P.3d 200; 70 Cal. Rptr. 3d 382;
- *Johnson v. Columbia Falls Aluminum Company, LLC*, 2009 Mont. Lexis 120 (Mont., Mar. 31, 2009); and,
- *Casias v. Wal-Mart Stores, Inc*., 2011 U.S. Dist. LEXIS 15244, 1-2 (W.D. Mich. 2011).

Of particular interest to police officers are the restrictions against purchasing or even possessing firearms and ammunition. An open letter to all federal firearms licensees issued by the U.S. Dept. of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) on Sept. 21, 2011 made it clear that those who are users of medical marijuana, including those doing so in compliance with state law, should not be allowed to purchase, possess or use firearms or ammunition.

Some firearms dealers may not be aware that a particular customer seeking to purchase a gun or bullets is a medical marijuana user; however, if someone seeking to buy a weapon or ammunition does inform a firearms dealer that they are a medical marijuana user, the ATF takes the position that completing the transaction is against federal firearms law.

The ATF memo reminds firearms dealers that under 18 U.S.C. Sec. 922(g)(3) it is unlawful for any person who is an unlawful user of or addicted to any controlled substance (as defined by the Controlled Substances Act) to ship, transport, receive or possess firearms or ammunition. The ATF memo notes that since marijuana is a Schedule I controlled substance, and there "are no exceptions in federal law for marijuana purportedly used for medicinal purposes, even if such use is sanctioned by state law," medical marijuana users may not be sold or possess firearms or ammunition.

As chief, I am also required to take action concerning a person's firearms license if I become aware of the person's violation of the federal drug laws. Federal law makes it a crime to sell or otherwise dispose of a firearm or ammunition to anyone knowing "or having reasonable cause to believe" that the person unlawfully uses a controlled substance, such as marijuana. 18 U.S.C. Sec. 922(d)(3). This includes allowing an officer to carry a weapon or ammunition on or off duty. The ATF memo explains that a federal regulation, 27 C.F.R. Sec. 478.11, allows an inference of current illegal use of a controlled substance to be drawn from "evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time."

Obviously, lying is a violation of existing rules and can result in termination. This includes lying on a firearms application, gun sales or related form. According to the ATF, a person who uses medical marijuana, even in compliance with state law, should answer "yes" to question 11.e. ("Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?") on ATF Form 4473, Firearms Transaction Record. And licensed firearms dealers may not transfer firearms or ammunition to them. Even if the person answers "no" to this question concerning the use of controlled substances, the ATF takes the position that it is a violation of federal law to transfer a weapon or ammunition to them if a person has "reasonable cause to believe" that they use medical marijuana, such as if they have a card authorizing them to possess medical marijuana under state law.

Since the ability to lawfully possess and use a firearm and ammunition is an essential job function for a police officer, I cannot allow an officer to work if I become aware that such person is prohibited by federal law from carrying out such essential job function. This can be a legitimate basis for their termination. In fact, the ATF memo's reasoning makes it highly questionable as to how a department could

be legally justified in issuing a firearm or ammunition to a known user of medical marijuana.

As you will recall, similar issues have previously arisen concerning officers barred from possessing weapons because of prior convictions for domestic violence offenses. In 1996, Congress passed a Defense Appropriations Act. Sec. 658 of that law made it unlawful for any person who has been convicted of a domestic violence misdemeanor to possess a firearm or ammunition. There is no exception for persons who must carry a firearm on their jobs: law enforcement officers, security guards, or members of the Armed Forces. Courts have upheld this restriction.

Police departments do not need new Rules or Policies before disciplining employees that are otherwise protected by this state's medical marijuana laws. Criminal misconduct by department members has always been prohibited. However, out of an abundance of caution, and in a spirit of cooperation, even though I am not required to do so, in order to assure that officers are not caught off-guard or confused, I have decided to draft a policy specifically addressing medical marijuana.

Be assured that I am willing to meet and discuss this or any other questions or suggestions that union may have. While bargaining may not be required, since it is only the wording and not the substance of any rule or policy that is being changed, I am willing to engage in mid-term negotiations in good faith to the point of agreement or impasse before enforcing a newly worded rule or policy, if the union makes a prompt request that I do so.

_____

Without waiving my rights, and consistent with my belief that I am simply spelling out or clarifying the department's existing prohibition against illegal conduct, be advised that effective thirty (30) days from now, i.e., _____, 201_, I intend to put the attached policy into effect.

If you would like to negotiate the impact of such action on members of your bargaining unit, please let me know -- in writing -- within five (5) days of receipt of this notice.

The following dates and times are available:

_____
_____
_____

Please select one (or more) date(s) and times and include such selection in your written reply as well. If you are unable to meet on any of the dates offered, please supply me with three (3) alternatives (during normal business hours), the last of which should be no later than _____, 201_.

If I have not received a written request for bargaining within five (5) days, I will consider this a waiver and implement the proposed policy.

INVESTIGATING SUSPECTED DRUG USE

The manner in which a police officer's suspected drug use is reported may influence the way an internal affairs investigation is conducted. Chiefs may learn of a possible drug problem in a number of ways. A shift supervisor might get a complaint that an officer is using or selling drugs. A citizen might report that an officer smelled of burned marijuana or seemed dazed and inattentive during a traffic stop or when approached by the civilian looking for assistance or directions. A patrol supervisor might report suspicions that an officer's recent problems with attendance or performance could be related to substance abuse. A cruiser or transport vehicle accident, sexual harassment, or domestic violence investigation might lead to evidence of alcohol or drug use. A report might even come from another law enforcement agency (for example, if an officer is arrested for driving under the influence, selling drugs or assaulting a spouse or significant other).

Indicators of Drug or Alcohol Use

Police officers all receive some amount of training in drug recognition, as well as indicators of drug and alcohol use. Part of that training includes a warning that these behaviors don't necessarily mean that an employee is using alcohol or drugs. Investigators should be careful since acting on the basis of these signs alone could lead to serious trouble. Since the Americans with Disabilities Act and many state anti-discrimination laws protect persons "regarded as" disabled, investigators should treat these signs only as indications that additional inquiry or investigation is warranted.

The federal government's Working Partners for an Alcohol- and Drug-Free Workplace has identified some behaviors that might signal a drug or alcohol problem:

- coming in late, leaving early, or unauthorized absences
- unreliability, including being away from the assigned job frequently
- carelessness and repeated mistakes
- being argumentative and uncooperative
- inability or unwillingness to follow directions
- avoiding responsibility
- blaming others or making unbelievable excuses
- taking unnecessary risks by ignoring safety and health procedures, and
- frequent involvement in accidents, mistakes, or damage to equipment or property.

Note: In addition, alcohol and drug use cause physical effects that depend on the drug.

Investigators should document as many of these indicators as they can identify when preparing their report.

Substance Abuse Off the Job

Sometimes, an officer's (or family member's) off-duty use of drugs leads to trouble at work. Law enforcement officers that use drugs off duty are generally subject to discipline, up to and including termination in most cases. Unless a state's laws or a department's collective bargaining specifies otherwise, there is no need to give such officers a "second chance" or to provide an opportunity for rehabilitation services when it comes to drugs. Even then, in light of the federal prohibition against possessing firearms and ammunition, it is likely that termination would be justified.

Impaired at Work

Occasionally a chief or other supervisor may ask an IA investigator to look into a report of an officer who is working or attending a work event while intoxicated or under the influence of drugs or alcohol. This requires prompt action and compliance with several legal requirements. Since safety must be a major consideration, placing an officer on sick leave (assuming he or she agrees) or administrative leave pending the outcome of an IA investigation is often appropriate where an officer is (or has been) under the influence of drugs or alcohol at work. Even where the officer is not currently impaired, it may be wise to use the administrative leave option to help prevent safety problems. Departments should be sure that all supervisors are aware that they may order an officer to stop working and "go home" if the individual is under the influence.

IA investigators should familiarize themselves with their department's policies, collective bargaining provisions and applicable laws. If the agency has a drug testing program, the investigator should immediately determine whether there is adequate cause to test under the policy. If the employee has been reported by another officer, a supervisor or even a civilian, the IA investigator should ask that person to detail the reasons why they believe the employee is using drugs or alcohol, and put the response in writing. If an investigator is not certain that the department has the right to test, consultation with the chief or labor counsel is appropriate.

If the investigator concludes that testing is required, he or she should start the process, following the protocols in the department's policy. Particularly if a chief, superior officer or investigator suspects that the employee has been drinking alcohol, time is of the essence. As all officers are taught at the recruit academy, alcohol metabolizes relatively quickly, and may not show up in a test taken a few hours after the employee is reported to be under the influence. Some drugs become

undetectable in a matter of days. Urine testing for drugs is usually limited to five categories, but it may be possible to ask for a more comprehensive analysis, especially if there is reason to suspect a certain kind of drug is being misused. While hair testing has the advantage of revealing drug use over a longer period (1/2" per month is normal hair growth), it is more expensive and a testing facility may be harder to find.

If the employee appears to be under the influence, the IA investigator should take detailed notes of the facts that lead him or her to believe the employee has been drinking or using drugs. The chief, supervisor or investigator should also tell the employee why they stopped him or her from working and ask for the employee's explanation, taking careful notes of the employee's response to any questions.

Policy Recommended

Even if an investigator has strong, objective reasons to believe that an employee is under the influence, ordinarily the investigator shouldn't ask or require the employee to submit to a drug test unless the agency already has a written drug testing policy—that has been reviewed and approved by counsel—allowing for a test. A state law or collective bargaining agreement may spell out certain procedures as well. Many states allow drug testing only if the employer has a written policy and employees have been notified of the circumstances when testing will be required and the consequences of testing positive.

While the term "reasonable suspicion" is often used to define the standard for ordering an officer to submit to a drug test, some state courts have interpreted that to be essentially "probable cause." Therefore, unless a drug-testing article in the collective bargaining agreement provides otherwise, a chief will have to be able to document the basis for ordering a drug test. Typically this would include observations of the officer's demeanor, speech, stability and other indications similar to a field sobriety test. Certainly any admissions, or observations of use or possession, will meet the required standard. Once a chief has such reasonable suspicion or probable cause, depending on which is required, an officer may be ordered to go directly to a drug-testing facility, usually accompanied by a superior officer.

Note: There is no requirement that a union official, lawyer or other "buddy" accompany the officer, but so long as it does not delay the test, there is no harm in allowing the officer to be accompanied. The chief should make it clear that refusal or delay will be treated as insubordination and termination will be recommended.

Events That Have Already taken Place

If a chief or other supervisor receives a report or complaint about a past incident, they may still want to take immediate action, depending on how serious

the event was and how many employees may be involved. If the officer appears to have an ongoing drug problem, an investigator may want to recommend that the chief relieve the employee from duty with pay (administrative leave) while the investigation is underway. For example, if a patrol supervisor or shift commander has reported that an officer has shown signs of intoxication twice in the last week, that employee should not be allowed to come back to the workplace until the investigator can find out what's going on. Or, if an officer has endangered other employees or caused an accident, the officer should not be allowed back to work until the investigation turns up what happened.

Plan the Investigation

When investigating drug use, you may be starting with a complaint or report of inappropriate behavior by a particular employee, such as slurred speech, erratic driving, or the odor of marijuana. If the employee was reported while intoxicated, you may also have the results of your preliminary work, such as your notes from talking to the employee, notes taken by the employee(s), citizen, or other person who made the original report, and perhaps the results from a drug test. You may even have the employee's own admission of drug use.

In some cases, however, you may suspect drug use without knowing the culprit. For example, perhaps a superior officer has found obvious signs of drug use, such as drug paraphernalia, or drug-related trash (marijuana cigarette butts, for instance). Perhaps someone found drugs in a locker room or restroom. Maybe there have been a series of accidents on one shift that could be related to drug use. Your planning and approach will depend on how you found out about the problem.

When You Have a Complaint or Report

If an employee has complained about, or a superior officer has reported, potential drug use, any investigation should start with the facts at hand. Consider these questions as you begin to shape your investigation:

- **Who complained or reported the problem?**

  What's the relationship between that person and the employee who may be using drugs? Did another officer or a supervisor complain, or did the information come from an outside source, such as a citizen or even another police agency?

- **What allegedly happened?**

  Did the person reporting the problem actually see the officer use drugs? If not, what facts led that person to believe the employee was

impaired?

- **Who is the suspected employee?**

  Does the suspected employee have any prior misconduct involving drugs? If your agency conducts drug tests, has the employee tested positive? Is there more than one accused employee?

- **Where and when did the alleged incident(s) take place?**

  How many incidents were there? Were others in a position to see the accused employee's behavior?

- **How did the department respond to the incident at the time?**

  If the employee was tested for drugs or alcohol, were the results positive? Did the employee admit to using drugs or alcohol? Are there notes—your own or from witnesses—detailing why others thought the employee might be intoxicated?

These questions should help you decide whom to interview, what evidence might be available, and what kinds of questions you'll need to ask. If the employee was reported while impaired, and the officer was placed on administrative leave, it may be possible to scale back your investigation since you've already done some of the work. Especially if the employee tested positive or admitted to drug use at the time, a chief or sheriff should have much of the information needed to make a decision (although you will probably want to talk to the accused employee again, and perhaps his or her supervisor and co-workers, to find out the magnitude of the problem).

Fellow officers can be forced to answer questions about a co-worker's drug or alcohol use. However, because drug use may happen around non-police personnel including citizens or other non-government workers, an investigator may need to consider whether and how to approach these potential witnesses.

No Complaint or Report

If no complaint or report points to a particular wrongdoer, consider the facts. How did you find out about the possibility of drug or alcohol use? If drugs or alcohol were found in the workplace, where were they found? Who found them? Who has access to that area? When were they found? If a rash of accidents or complaints of inappropriate behavior have spurred your investigation, consider who was involved in each incident. Do the same names keep coming up, or were many different employees involved? How did you find out about the problem? Does the problem seem to be isolated in one segment of the department or facility? Does the same

person supervise all of the employees involved?

Gather Evidence

As in a criminal investigation, you should gather documents—and particularly, physical evidence—of potential drug use before conducting your interviews. A suspected employee's first act after being questioned about possible workplace drug use is likely to be destroying the evidence. And, you may need to gather evidence first to decide whether drug testing is warranted under your agency's policy. Having evidence in hand when you interview the suspected employee can also help you elicit more truthful answers to your questions.

Documents

Although documents may not play a major role in every drug use investigation, they are still important. Before you begin your interviews, pull together all of the relevant paperwork, including:

- the agency's drug policy, including any provisions relating to testing
- the personnel files and performance evaluations of the suspected employee (if there is one)
- the results of any drug testing involving the suspected employee, and
- any documents pertaining to the incident, such as a police report for an officer's DUI arrest, a citizen's written complaint about the officer's behavior, or your notes from your first encounter with the suspected officer (if you or another officer had to intervene immediately).

Physical evidence

In a drug use investigation, physical evidence often makes or breaks the case. For example, you may have or be able to find actual drugs, drug paraphernalia (such as rolling papers, a razor blade, or hypodermic needles), and items commonly used to mask drug use (breath fresheners, eye drops, or even a clean urine sample or substances used to adulterate or dilute a drug test specimen). There are also special considerations when it comes to gathering physical evidence in these types of situations. In order to find evidence, you may have to conduct a search, which means you must tread very carefully to avoid legal problems. While law enforcement officers have a reduced expectation of privacy in their desks, lockers and filing cabinets, be sure your department has a clearly stated policy that allows searches. Having a policy but never actually conducting searches may reduce or eliminate the ability to conduct warrantless searches. In some cases, especially where an officer has a reasonable expectation of privacy and there is no real exigency, a warrant will be required.

You'll also need to keep detailed records of where evidence was found, what it looked like at the time, and what's happened to it since, so you can show that it hasn't been tampered with or otherwise altered. Video cameras can be helpful in recording any searches.

Finding and Preserving Evidence

When dealing with physical evidence in a drug use investigation, there are a few special considerations. Sometimes, a workplace search can help you turn up evidence of drug use. For example, if you suspect an officer of using drugs at work, you may want to search the employee's desk or locker, or to check the employee's personal belongings, such as a purse, briefcase, or vehicle (a common spot for using drugs during the workday). However, you must make sure you don't compromise employee privacy rights in your efforts to uncover evidence of wrongdoing.

Installing surveillance equipment.

Because it's illegal, drug use and dealing typically take place in private, often in restrooms or locker rooms. To gather actual evidence of such activities, some employers use surveillance cameras or recording devices. Consultation with the DA or labor counsel may help determine whether you have sufficient legal justification for surveillance or can do it as a matter of right.

Much the same as in a criminal case, you must be especially careful to preserve the "chain of custody" with evidence in drug use cases. Start by taking photographs of any evidence you find, exactly where and as you found it. For example, if you find marijuana in an officer's drawer, take a picture of the open drawer with the marijuana sitting in it, before you touch anything. If you find paraphernalia in the trash, take a picture of the trash can with the items in it, then another picture of the paraphernalia once you've removed them from the trash, showing how many there are and in what condition they are discovered.

Be sure to take notes on what you find. What's apparent to you on day one may not be so evident months or years later, if the employee chooses to challenge your conclusions.

Testing Evidence.

If you find marijuana, you'll probably know exactly what you've found, based on the distinctive smell and appearance. In some cases, however, you might find pills or powder that you can't identify—or that the employee claims is perfectly innocent. ("That's my blood pressure medication!") The only way to get to the truth may be to ask an expert to analyze the substance. A department's DRE (Drug Recognition Expert) may be useful here. So might a field drug test kit. If the employee or union indicates they will contest that the substance is what you claim, be prepared to submit it to an independent lab.

Interviews

Once you finish gathering evidence, you are ready to start your interviews. Partly because typically there is no traditional "victim," an investigation of drug use is different than a harassment, discrimination, or domestic violence investigation. In these cases, start by interviewing witnesses (including the person who reported the behavior, if there is one), then move on to the suspected employee(s). Be sure to have all the evidence at your fingertips when you talk to the suspected employee, so you can require a drug test. (Be fair, if treatment is not an option in drug use cases, and termination is virtually certain, don't lie to an officer.)

Interviewing the Reporting employee

If a co-worker or superior officer has come forward with suspicions about drug use, start your interviews with that person. As always, you should get the interview rolling with an opening statement that briefly explains the process. Tell the employee that you've been asked to look into the complaint or report of possible drug and alcohol use, and you need to gather as much information as you can. Order the employee to keep the investigation confidential, and explain that talking about the investigation could lead to discipline. Explain that retaliation is prohibited, and ask the employee to come to you if there are any reprisals for coming forward.

When interviewing an officer or supervisor who suspects that another employee is using drugs, you will often be trying to figure out if you have sufficient facts to either require the employee to submit to testing or conclude that the employee is guilty. The more facts you have, the better your legal position if you confront the employee directly about drug use. Focus on sensory details: What did the reporting employee hear, see, smell, touch, or even taste that raised suspicion? You should also inquire about the reporting employee's relationship to the suspected employee, to find out if anyone has a motive to be less than truthful.

Sample Questions

- *What happened that caused you to come forward?*
    - *How many incidents have there been?*
    - *When and where did each incident take place?*
- *Please describe each incident to me.*
- *Who else was there?*
- *Did the officer know you were present?*
- *Did you speak to the officer at the time of the incident?*
    - *If so, what did each of you say?*
- *Did you actually see the officer use drugs?*
    - *If not, what leads you to believe the officer is using drugs?*
- *Were there any facts about the officer's appearance or behavior that led you to believe he or she is using drugs?*
- *Did you smell the odor of drugs on the employee?*

- *Has the employee caused any accidents that you believe are related to using drugs?*
    - *When and where?*
    - *How many accidents?*
    - *Why do you believe they were drug-related?*
- *Has the employee said anything, to you or to others, that led you to believe the employee is using drugs?*
- *Have you seen the employee with drug paraphernalia?*
- *Do you believe other employees are involved?*
    - *If so, why do you hold that belief?*
    - *Which other employees?*
- *Are there others who have witnessed the employee's behavior?*
    - *Who, when, and where?*
- *Have you spoken to the employee about this?*
    - *If so, when, where, and what did each of you say?*
- *Have you reported this to your supervisor?*
    - *If so, when, where, and what did each of you say?*
    - *If not, why not?*
- *Do you work with the officer?*
    - *How would you describe your working relationship?*
    - *Do you have any problems working together?*
    - *Do you socialize outside of work?*
- *Do you know of any evidence relating to these incidents?*
- *Do you know or have an idea where the employee keeps drugs?*
- *Have you taken any notes on these incidents?*
- *Have you spoken to anyone else about this?*
    - *If so, to whom and what was said?*
- *Is there anything else you'd like to tell me?*

When you've finished your questioning, review your notes with the reporting employee. Make sure that you got everything right and there are no gaps in your notes. Remind the employee that the investigation must remain confidential. Ask the employee to bring any new information to your attention right away, and to come to you if he or she faces retaliation for coming forward.

Interviewing Witnesses

When interviewing witnesses, your approach will depend on whether you have an employee suspect (for example, because a supervisor or fellow officer reported the problem or the employee's behavior was public, such as drug use at a holiday party). If you are concerned about a particular employee's drug use, you can treat other employees who might have seen something just as you would any other witness. Start by trying to find out what the witness knows and how—for example, did the witness actually see drug use, hear about it, or see something that led him or her to believe another employee was under the influence? Your goal is to gather the concrete facts without giving too much away.

When dealing with unknown suspects, consider whether your witness might be involved. For example, if your investigation began because rolling papers, small baggies, and the butts of marijuana cigarettes were found in the garage, everyone who has access to that area is a potential witness and a potential suspect.

Getting Started

Begin your witness interviews with a brief explanation of your purpose. If you are dealing with a known incident, you can be more direct. For example, if the holiday party got way out of control, you can tell witnesses, "I've been asked to look into what happened at the holiday party." Explain that you have been asked to investigate the situation, explain the rules on confidentiality and retaliation, and so on. You shouldn't reveal facts unnecessarily, but you don't need to be overly secretive.

When dealing with allegations that aren't generally known in the workplace, be sure to approach the subject with more caution. Explain the general focus of your questions without getting into details. Save the discussion of confidentiality and retaliation for the end of the interview. And, if the employee might be a suspect, you should be the most general of all. As in a criminal investigation, you can begin simply by saying, "I'm hoping you can answer a few questions for me about your work," or "I've been asked to look into how we can improve off-site events, and I'd like to get your input," for example.

Questions for Witnesses

Your witness questions will depend on the situation. If you already have a suspect employee, consider what led you to this witness. Should the witness have seen or heard something? Did a reporting superior officer tell you that the witness works on the same shift as the suspect officer? Was the witness present at the incident? Start by asking general questions that focus on the connection between the witness and the suspected employee—for example, the incident the witness may have seen. Move toward more specific questions as the witness opens up; if the witness doesn't offer information about the incidents you're investigating, you may need to be more direct.

Closing the Interview

Conclude your interview by reviewing your notes with the witness, making sure you got everything down. Recording the interview is recommended, but check your department's policy. If you have not recorded the interview, you may want to have the employee sign your notes or a written summary of the interview you prepare later. Tell the employee that what you've discussed is confidential and may not be revealed to coworkers. Ask the employee to let you know about any retaliation, and to contact you if any new information comes to light.

Interviewing the Suspected Employee

When interviewing the employee suspected of using drugs, you may have a number of goals. You may be trying to figure out whether the facts warrant testing, under the law and your agency's policy. You may want to convince the officer to admit the problem and seek treatment (regardless of whether keeping his or her job is really an option.) Or, you may be trying to find out whether other employees are involved.

With the advent of a state's "medical marijuana" law chiefs and unions may have trouble trying to sort out what rights an employer has to ask questions about current drug use by officers or other employees. The sample Policy & Procedure attached to this article prohibits officers from possessing marijuana even with a state-issued card or from being a caregiver for someone with such card. A recently issued informal opinion from the U.S. Equal Employment Opportunity Commission stated that the Americans with Disabilities Act reinforces that position. According to the EEOC, the ADA does not prohibit employers from asking applicants about current illegal drug use.

> "However, questions about past addiction to illegal drugs or questions about whether an applicant has ever participated in a rehabilitation program are disability-related inquiries because past drug addiction generally is a disability," the commission cautioned.

Note: This article will not include a discussion of immunity, union representation or similar rights. Obviously, these are involved in many kinds of investigations, and this article focuses primarily on drug violations. Where criminal conduct is potentially involved, however, investigators must be familiar with this state's immunity rules. Similarly, being aware of a union member's right to a "buddy" or union rep during an interview that might lead to discipline is something an investigator must keep in mind.

Multiple Potential Suspects

If you haven't narrowed your investigation down to one suspect, follow the guidelines for interviewing witnesses who may be suspects, above. Upon reaching some conclusions about who's really responsible for the problem, you can switch to the more direct approach in this section.

Your approach and questions will depend on the facts. Of course, the potential scenarios are endless. The employee may have been seen using illegal drugs, been caught with illegal drugs in his or her possession, or tested positive on a random drug test. The employee may be acting intoxicated; if so, the employee may be using illegal drugs, drinking alcohol, using legal drugs for a disability, or behaving strangely for an entirely different reason.

Given this wide variety, it's impossible to give a list of sample questions. Here are some guidelines and examples that will help you stay on the right track:

Start with background questions

Keeping in mind the suspected or reported problem, ask the employee questions about the incident, area, or behavior.

Scenario:

Dispatcher Jacobs is suspected of using illegal drugs at work, and possibly selling them to one of the janitors and another dispatcher. He is away from his desk frequently, meets with non-employees in the parking area and on the street outside of work, and spends a lot of time on his cell phone and in the bathroom. He is jittery and anxious most of the time, talks a lot to coworkers, and has been losing weight. You might start this interview with basic questions about Dispatcher Jacob's job duties and schedule:

- What is he supposed to be doing and where?
- Does his job require collaboration with other employees?
- How often and which ones?
- Does his job require him to interface with outsiders? In what way, and who are they?

Questions like these will help you evaluate the facts you've learned from others about his behavior.

Give the employee a chance to respond

It's only fair to tell the employee what has been said and ask for the employee's side of the story. But don't reveal the name of the reporting employee.

Scenario:

The evening shift goes out for a happy hour once every month or so. Although no one is required to attend, the Sergeant has made clear that she thinks these events are important for team building; not surprisingly, most officers attend when they can. Several have reported that the Sergeant has been going out to the garage alone at the last few get-togethers and returning with a different demeanor, to the point of stumbling, slurring her words, and embarrassing herself. After the last happy hour, although they did not smell or suspect alcohol intoxication, an officer had to take away her car keys and drive her home.

You can be very direct in this interview. You should still start with

background information—about her shift, the purpose for the happy hours, who comes, what people do there, and so on. But then, you can simply say, "Do you use drugs at these events? What type of drugs do you have? How would you characterize your behavior?" If the Sergeant doesn't come right out and admits that she's been using drugs, you can say, "Maria, some officers are concerned that you are using drugs at these events. They have been worried about your driving home, because you've disappeared during the get together and returned with obvious changes in your demeanor. Are these reports correct?"

Don't Judge or Accuse

You aren't going to get anything out of an employee whom you've just called a pothead, and you might be creating unnecessary legal trouble. Even if you don't call an employee names, accusing someone of substance abuse isn't likely to help you convince the officer to get help; if the employee doesn't actually have a problem, you may even be violating the ADA.

Consent to Test

If you conclude that there are grounds to require a test under your department's policies, let the officer know—and tell the employee that refusing to submit to a test could result in termination (if that's what your policy provides).

Scenario

Conrad, the new Records Clerk, has been seen ingesting marijuana "edibles" in the bathroom by a coworker, who also reported that his his eyes were red, and he was talking nonstop after his trip to the restroom. You immediately meet with Conrad and notice the same physical traits. You have reasonable suspicion to require an immediate drug test, which your department's policy allows. After you question Conrad about the incident, you tell him, "Conrad, as you know, our department's policy allows for drug testing if we have reason to suspect that an employee is using illegal drugs at work. Based on a statement from your coworker and your appearance and comments right now, I believe we have a reasonable suspicion. Will you agree to take a drug test, and sign this consent form? I have to warn you that refusing to submit to a drug test could lead to employment termination, as our policy clearly states."

Evaluate the Evidence

In some drug use investigations, it's relatively easy to reach a conclusion about what happened. The suspected employee may admit to the problem, there may be too many witnesses to the employee's drug use to deny, or the employee

may have tested positive in a drug test. In other cases, however—and particularly if no testing was done—you'll have to weigh the evidence and figure out what happened.

Unlike a harassment or discrimination investigation, a case about drugs typically doesn't come down to a "he said, she said" scenario. More often, you'll have to decide whether only one person is telling the truth: the suspected employee. There are a few factors you can use when analyzing the evidence that are particularly likely to be relevant in drug use cases: demeanor, corroboration, and plausibility.

Demeanor. Drug use causes physical symptoms and traits. Did the employee smell of marijuana? Was the employee lethargic, dreamy, out of it, or dazed? Was the employee jittery, talkative, nervous, or paranoid? Has the employee lost weight? Were the employee's eyes red? Of course, any of these facts could have other explanations. But you should know the signs of using the suspected drug, and look for them during your interview. If there's enough other evidence, the employee's appearance and demeanor could help you reach a conclusion.

Corroboration. If an employee claims that apparently intoxicated behavior was due to a bad reaction to over-the-counter medication, for example, is that story supported by a doctor's note, statements of coworkers whom he told of the problem when it was happening, or other evidence? If the employee is accused of using drugs at work, what did the coworkers who sit near her see?

Plausibility. This often comes up when judging an employee's alternate explanation for particular behavior or actions, such as why the employee was in a particular place at a particular time, or what caused the employee's apparently intoxicated behavior. For example, an employee who is suspected of dealing drugs spends a lot of time in the parking lot, and is often not where he is supposed to be working. Does he have an explanation—and if so, does it make any sense? Similarly, an employee who claims that intoxicated behavior is actually due to a prescription drug might need to explain why that particular side effect only showed up at the department's holiday party.

Take Action

If you conclude that an employee has used drugs at work or off-duty, the chief or appointing authority will most likely have to discipline the employee. As always, the level of discipline depends on the seriousness of the behavior. For extreme misconduct such as possessing, selling or manufacturing drugs at work, firing is clearly in order. In fact, most law enforcement agencies consider any drug use sufficient reason for termination. Many departments and private employers also

choose to fire employees whose alcohol or drug use has injured other employees or done costly damage to property.

What of employees who clearly have a problem with drugs and want to make a change before losing their jobs? Private employers sometimes offer employees like these structured help, through rehabilitation and/or last-chance or return-to-work agreements. Law enforcement agencies are less inclined (or possibly even able) to do so.

Document the Investigation

Document your investigation following your agency's guidelines. Remember, if a lawsuit is filed—by an employee who is fired for drug use or a bystander who is injured by an officer who may have been intoxicated—your report could be used as evidence. Clearly state the facts and conclusions you drew from them, but don't speculate. Making unwarranted assumptions can lead to legal problems.

> **Scenario:** Officer O'Malley is reported for using marijuana and offering it to other employees at the department's holiday party. Because O'Malley offered drugs to his supervisor, among others, he is forced to admit that the allegations are true. The department investigates the incident, and ultimately decides to fire the officer.
>
> The investigator writes, "Patty admitted that he used marijuana at the holiday party and offered it to others. In light of how serious this incident was, it's clear that Patty is unable to control his drug addiction. Accordingly, I recommend that he be fired."
>
> The investigator has made a logical leap from the fact that the officer used marijuana on one occasion to the assumption that Patty is a drug addict. The facts don't warrant this conclusion (maybe it was the first and last time he used the drug), and there's no need to go there. Once that sentence is deleted, the report is accurate and unlikely to lead to legal trouble.

Unlike other types of investigations, an investigation into drug use often creates or involves medical records, which you must handle appropriately. Any document that reveals an employee's disability—including drug addiction—counts as a medical record, as do records of genetic information (which could arguably include, for example, an employee's statement during an interview that addiction runs in the family). The safest legal policy is to treat all records that deal with an employee's drug use as confidential medical records. This means your entire investigation file may have to be handled confidentially.

Under the ADA, you have an obligation to keep the employee's medical records and the facts they reveal confidential—that is, on documents and in files that are separate from the rest of the employee's personnel records, in a separate, locked cabinet. Although the employee is of course free to share his or her situation

with others, the ADA allows the department to make this information available only to:

- the employee's supervisor, if the employee's disability requires restricted duties or a reasonable accommodation
- safety and first aid personnel, if the employee's disability may require medical treatment or special evacuation procedures
- insurance companies that require a medical exam, and
- government officials, if required by law.

Fair Credit Reporting Act.

If a drug lab conducts testing and reports the results directly to the employer, those test results are not a consumer report subject to the Fair Credit Reporting Act or FCRA. If, however, drug test results are reported to the employer by an intermediary that contributes to the results in some way or compiles the results along with other information about the employee (as an employee screening service might do for prospective hires), the results might be subject to the FCRA's requirements. Check with the municipality's or labor counsel.

Follow Up

Once your investigation is complete, there are still a few things to consider. You may want to recommend some changes to department policies and practices, to prevent future problems.

REFERENCES: A great source of information for investigators is a book entitled, "The Essential Guide to Workplace Investigations" by Lisa Guerin, J.D. available on www.nolo.com I relied heavily on its sections on substance abuse investigations in preparing this article.

MEDICAL MARIJUANA USE

POLICY & PROCEDURE NO. **X.XX**	ISSUE DATE: _____
	EFFECTIVE DATE: _____
MASSACHUSETTS POLICE ACCREDITATION STANDARDS REFERENCED: **None**	REVISION DATE: _____

I. GENERAL CONSIDERATIONS AND GUIDELINES

Massachusetts voters decided that this state should join a growing number of other states that currently have laws permitting and regulating the use of marijuana for so-called "medical" purposes. Earlier, the voters "de-criminalized" possession of an ounce or less of marijuana. Regardless of what Massachusetts voters did, however, under federal law, marijuana remains a controlled substance whose use, sale, and possession are federal crimes. In addition, possession of more than an ounce of marijuana by persons without a medical marijuana registration card or caregiver certificate, and possession of more than a 60-day supply even with a "medical marijuana" registration card or caregiver certificate, is still a crime under Massachusetts law. Growing and processing marijuana, except in connection with a medical marijuana facility, is also still illegal.

Marijuana is listed as a Schedule I controlled substance under the federal Controlled Substances Act, 21 U.S.C. Sec. 812(b)(1). It is on the most restricted schedule, along with such drugs as heroin, LSD, or Ecstasy. Its sale, use, or possession is a federal crime. Further, the U.S. Food and Drug Administration has determined that marijuana has a high potential for abuse, has no currently accepted medical use in treatment in the U.S., and lacks an accepted level of safety for use under medical supervision. 66 Fed. Reg. 20052 (2001).

Section 7 of the citizens' petition adopted in November 2012 includes the following under "Limitations of Law":

> (D) Nothing in this law requires any accommodation of any on-site medical use of marijuana in any place of employment, …, in any correctional facility, or of smoking medical marijuana in any public place.

II. POLICY

The consistent policy of this department has been that this department does not tolerate the violation of any state or federal law by employees. However, in order to avoid any confusion following the adoption of recent ballot initiatives, department members are reminded that it is the policy of this department that:

A. Employees shall not, on or off the job, ingest, use or otherwise consume marijuana or THC as defined in Chapter 94C of the General Laws. This prohibition applies to use of any form of such drugs, including but not limited to smoking, injecting or eating, by itself or in combination with other products.

B. The presence of any detectable amount of marijuana or THC in the employee's system while at work, while on the premises of the department, or municipal property, or while conducting or performing department business is prohibited.

C. While under the influence of marijuana or THC, Employees shall not:

    1. operate any department equipment, including but not limited to motor vehicles, computers, or breathalyzer machines;

    2. perform any law enforcement function, including but not limited to making arrests, stopping motor vehicles, interrogating suspects, booking prisoners, taking fingerprints, accessing files, performing CORI or other background checks, and dealing with the public.

    3. possess or use any firearm, electronic weapon (e.g., TASER), baton, OC Spray (or similar device), handcuffs or any weapon or device capable of inflicting pain on a subject.

D. Employees shall not apply for, possess or use a medical marijuana registration card for themselves or others.

E. Employees shall not apply for or serve as a caregiver for a person in possession of a medical marijuana certificate or registration card.

F. Employees are not permitted to own, operate, manage, invest or be financially involved in, or be otherwise involved in the operation or management in any way of any marijuana cooperative, dispensary, business or location that is used to manufacture, grow, process, use, sell or dispense marijuana for any reason, including but not limited to so-called medical purposes, or any location that is involved in the sale or distribution of any paraphernalia that can be used for any of the above.

III. DEFINITIONS

The following definitions are taken from the ballot initiative approved by Massachusetts voters in November 2012, effective January 1, 2013:

(G) “Marijuana,” has the meaning given “marihuana” in Chapter 94C of the General Laws.

(H) "Medical marijuana treatment center" shall mean a not-for-profit entity, as defined by Massachusetts law only, registered under this law, that acquires, cultivates, possesses, processes (including development of related products such as food, tinctures, aerosols, oils, or ointments), transfers, transports, sells, distributes, dispenses, or administers marijuana, products containing marijuana, related supplies, or educational materials to qualifying patients or their personal caregivers.

(I) "Medical use of marijuana" shall mean the acquisition, cultivation, possession, processing, (including development of related products such as food, tinctures, aerosols, oils, or ointments), transfer, transportation, sale, distribution, dispensing, or administration of marijuana, for the benefit of qualifying patients in the treatment of debilitating medical conditions, or the symptoms thereof.

(J) "Personal caregiver" shall mean a person who is at least twenty-one (21) years old who has agreed to assist with a qualifying patient's medical use of marijuana. Personal caregivers are prohibited from consuming marijuana obtained for the personal, medical use of the qualifying patient.

An employee of a hospice provider, nursing, or medical facility providing care to a qualifying patient may also serve as a personal caregiver.

(K) "Qualifying patient" shall mean a person who has been diagnosed by a licensed physician as having a debilitating medical condition.

(L) “Registration card” shall mean a personal identification card issued by the Department to a qualifying patient, personal caregiver, or dispensary agent. The registration card shall verify that a physician has provided a written certification to the qualifying patient, that the patient has designated the individual as a personal caregiver, or that a medical treatment center has met the terms of Section 9 and Section 10 of this law. The registration card shall identify for the Department and law enforcement those individuals who are exempt from Massachusetts criminal and civil penalties for conduct pursuant to the medical use of marijuana.

IV. PROCEDURES

Marijuana remains an illegal controlled substance by Federal Statute. As such, no member of the department, qualified or not by the so-called Massachusetts Medical Marijuana Act, shall be considered "fit for duty" regardless of their position if they are using, smoking or ingesting marijuana or THC, even for so-called medical purposes.

A. Any member of the department that has a detectable quantity of marijuana, THC, or any other compound in their body or blood from using or ingesting marijuana or THC, shall be considered "unfit for duty" and as such shall not be permitted to work or perform any job function.

B. Any employee or volunteer of the department that has applied for, intends to apply for, has received, or been denied a card as a "qualifying patient" under the Massachusetts Medical Marijuana Act, shall immediately notify the Chief of Police of any such action in writing.

C. Any employee or volunteer of the department that has applied for, intends to apply for, has received, or been denied a card as a "caregiver" under the so-called Massachusetts Medical Marijuana Act, shall immediately notify the Chief of Police of any such action in writing.

D. Any employee or volunteer of the department that has any person living within their residence or in any property they own, manage or are under the control of that is considered under the so-called Massachusetts Medical Marijuana Act to be a "qualified patient" or "caregiver" shall immediately notify the Chief of Police in writing indicating the person's name, the location in question and what relationship the department member has with the person(s) and/or location.

E. Any member of the department who tests positive for marijuana, or any detectable amount of any prohibited or illegal substance shall be immediately relieved of duty, surrender any and all department owned firearms, firearms license or identification cards, as well as any police identification cards, and shall not be permitted to perform any police function or possess any firearm in accordance with employment as a member of this department.

F. No member of the department shall be permitted to be a "caregiver" as defined by the so-called Massachusetts Medical Marijuana Act and/or the Massachusetts Department of Public Health for any person, unless so authorized in writing by the Chief of Police. Permission maybe granted by the Chief of Police to allow a member to be a "caregiver" in extreme circumstances and only for a department member's immediate family who is residing with the department member. No precedent will be set if any such permission is granted and the department may alter, amend or revoke this provision at any time.

V. FIREARMS LICENSING

An open letter to all federal firearms licensees issued by the U.S. Dept. of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) on Sept. 21, 2011, made it clear that those who are users of medical marijuana, including those doing so in compliance with state law, should not be allowed to purchase, possess or use firearms or ammunition.

A. Under 18 U.S.C. Sec. 922(g)(3), it is unlawful for any person who is an unlawful user of or addicted to any controlled substance" (as defined by the Controlled Substances Act) to ship, transport, receive or possess firearms or ammunition. Since marijuana is a Schedule I controlled substance, and there are no exceptions in federal law for marijuana purportedly used for medicinal purposes, even if such use is sanctioned by state law, medical marijuana users may not be sold or possess firearms or ammunition.

B. Federal law further makes it a crime to sell or otherwise dispose of a firearm or ammunition to anyone knowing "or having reasonable cause to believe" that the person unlawfully uses a controlled substance, such as marijuana. 18 U.S.C. Sec. 922(d)(3). A federal regulation, 27 C.F.R. Sec. 478.11, allows an inference of current illegal use of a controlled substance to be drawn from "evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time."

C. According to the ATF, a person who uses medical marijuana, even in compliance with state law, should answer "yes" to question 11.e. ("Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?") on ATF Form 4473, Firearms Transaction Record. And licensed firearms dealers may not transfer firearms or ammunition to them. Even if the person answers "no" to this question concerning the use of controlled substances, the ATF takes the position that it is a violation of federal law to transfer a weapon or ammunition to them if a person has "reasonable cause to believe" that they use medical marijuana, such as if they have a card authorizing them to possess medical marijuana under state law.

D. Since the ability to lawfully possess both firearms and ammunition is an essential function of the job, the use of marijuana by a member of this department is a legitimate basis for their termination. In fact, the ATF memo's reasoning makes it highly questionable as to how a department could be legally justified in issuing a firearm or ammunition to a known user of medical marijuana. Similar issues have previously arisen concerning officers barred from possessing weapons because of prior convictions for domestic violence offenses. In 1996, the

Congress passed a Defense Appropriations Act. Sec. 658 of that law made it unlawful for any person who has been convicted of a domestic violence misdemeanor to possess a firearm or ammunition. There is no exception for persons who must carry a firearm on their jobs: law enforcement officers, security guards, or members of the Armed Forces. Courts have upheld this restriction.

Select Year: 2018 Go

The 2018 Florida Statutes

Title XXIX
PUBLIC HEALTH

Chapter 381
PUBLIC HEALTH: GENERAL PROVISIONS

View Entire Chapter

[1]381.986 Medical use of marijuana.—

(1) DEFINITIONS.—As used in this section, the term:

(a) "Caregiver" means a resident of this state who has agreed to assist with a qualified patient's medical use of marijuana, has a caregiver identification card, and meets the requirements of subsection (6).

(b) "Chronic nonmalignant pain" means pain that is caused by a qualifying medical condition or that originates from a qualifying medical condition and persists beyond the usual course of that qualifying medical condition.

(c) "Close relative" means a spouse, parent, sibling, grandparent, child, or grandchild, whether related by whole or half blood, by marriage, or by adoption.

(d) "Edibles" means commercially produced food items made with marijuana oil, but no other form of marijuana, that are produced and dispensed by a medical marijuana treatment center.

(e) "Low-THC cannabis" means a plant of the genus *Cannabis*, the dried flowers of which contain 0.8 percent or less of tetrahydrocannabinol and more than 10 percent of cannabidiol weight for weight; the seeds thereof; the resin extracted from any part of such plant; or any compound, manufacture, salt, derivative, mixture, or preparation of such plant or its seeds or resin that is dispensed from a medical marijuana treatment center.

(f) "Marijuana" means all parts of any plant of the genus *Cannabis*, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin, including low-THC cannabis, which are dispensed from a medical marijuana treatment center for medical use by a qualified patient.

(g) "Marijuana delivery device" means an object used, intended for use, or designed for use in preparing, storing, ingesting, inhaling, or otherwise introducing marijuana into the human body, and which is dispensed from a medical marijuana treatment center for medical use by a qualified patient.

(h) "Marijuana testing laboratory" means a facility that collects and analyzes marijuana samples from a medical marijuana treatment center and has been certified by the department pursuant to s. 381.988.

(i) "Medical director" means a person who holds an active, unrestricted license as an allopathic physician under chapter 458 or osteopathic physician under chapter 459 and is in compliance with the requirements of paragraph (3)(c).

(j) "Medical use" means the acquisition, possession, use, delivery, transfer, or administration of marijuana authorized by a physician certification. The term does not include:

1. Possession, use, or administration of marijuana that was not purchased or acquired from a medical marijuana treatment center.

2. Possession, use, or administration of marijuana in a form for smoking, in the form of commercially produced food items other than edibles, or of marijuana seeds or flower, except for flower in a sealed, tamper-proof receptacle for vaping.

3. Use or administration of any form or amount of marijuana in a manner that is inconsistent with the qualified physician's directions or physician certification.

4. Transfer of marijuana to a person other than the qualified patient for whom it was authorized or the qualified patient's caregiver on behalf of the qualified patient.

5. Use or administration of marijuana in the following locations:

a. On any form of public transportation, except for low-THC cannabis.

b. In any public place, except for low-THC cannabis.

c. In a qualified patient's place of employment, except when permitted by his or her employer.

d. In a state correctional institution, as defined in s. 944.02, or a correctional institution, as defined in s. 944.241.

e. On the grounds of a preschool, primary school, or secondary school, except as provided in s. 1006.062.

f. In a school bus, a vehicle, an aircraft, or a motorboat, except for low-THC cannabis.

(k) "Physician certification" means a qualified physician's authorization for a qualified patient to receive marijuana and a marijuana delivery device from a medical marijuana treatment center.

(l) "Qualified patient" means a resident of this state who has been added to the medical marijuana use registry by a qualified physician to receive marijuana or a marijuana delivery device for a medical use and who has a qualified patient identification card.

(m) "Qualified physician" means a person who holds an active, unrestricted license as an allopathic physician under chapter 458 or as an osteopathic physician under chapter 459 and is in compliance with the physician education requirements of subsection (3).

(n) "Smoking" means burning or igniting a substance and inhaling the smoke.

(o) "Terminal condition" means a progressive disease or medical or surgical condition that causes significant functional impairment, is not considered by a treating physician to be reversible without the administration of life-sustaining procedures, and will result in death within 1 year after diagnosis if the condition runs its normal course.

(2) QUALIFYING MEDICAL CONDITIONS.—A patient must be diagnosed with at least one of the following conditions to qualify to receive marijuana or a marijuana delivery device:

(a) Cancer.

(b) Epilepsy.

(c) Glaucoma.

(d) Positive status for human immunodeficiency virus.

(e) Acquired immune deficiency syndrome.

(f) Post-traumatic stress disorder.

(g) Amyotrophic lateral sclerosis.

(h) Crohn's disease.

(i) Parkinson's disease.

(j) Multiple sclerosis.

(k) Medical conditions of the same kind or class as or comparable to those enumerated in paragraphs (a)-(j).

(l) A terminal condition diagnosed by a physician other than the qualified physician issuing the

physician certification.

(m) Chronic nonmalignant pain.

(3) QUALIFIED PHYSICIANS AND MEDICAL DIRECTORS.—

(a) Before being approved as a qualified physician, as defined in paragraph (1)(m), and before each license renewal, a physician must successfully complete a 2-hour course and subsequent examination offered by the Florida Medical Association or the Florida Osteopathic Medical Association which encompass the requirements of this section and any rules adopted hereunder. The course and examination shall be administered at least annually and may be offered in a distance learning format, including an electronic, online format that is available upon request. The price of the course may not exceed $500. A physician who has met the physician education requirements of former s. 381.986(4), Florida Statutes 2016, before June 23, 2017, shall be deemed to be in compliance with this paragraph from June 23, 2017, until 90 days after the course and examination required by this paragraph become available.

(b) A qualified physician may not be employed by, or have any direct or indirect economic interest in, a medical marijuana treatment center or marijuana testing laboratory.

(c) Before being employed as a medical director, as defined in paragraph (1)(i), and before each license renewal, a medical director must successfully complete a 2-hour course and subsequent examination offered by the Florida Medical Association or the Florida Osteopathic Medical Association which encompass the requirements of this section and any rules adopted hereunder. The course and examination shall be administered at least annually and may be offered in a distance learning format, including an electronic, online format that is available upon request. The price of the course may not exceed $500.

(4) PHYSICIAN CERTIFICATION.—

(a) A qualified physician may issue a physician certification only if the qualified physician:

1. Conducted a physical examination while physically present in the same room as the patient and a full assessment of the medical history of the patient.

2. Diagnosed the patient with at least one qualifying medical condition.

3. Determined that the medical use of marijuana would likely outweigh the potential health risks for the patient, and such determination must be documented in the patient's medical record. If a patient is younger than 18 years of age, a second physician must concur with this determination, and such concurrence must be documented in the patient's medical record.

4. Determined whether the patient is pregnant and documented such determination in the patient's medical record. A physician may not issue a physician certification, except for low-THC cannabis, to a patient who is pregnant.

5. Reviewed the patient's controlled drug prescription history in the prescription drug monitoring program database established pursuant to s. 893.055.

6. Reviews the medical marijuana use registry and confirmed that the patient does not have an active physician certification from another qualified physician.

7. Registers as the issuer of the physician certification for the named qualified patient on the medical marijuana use registry in an electronic manner determined by the department, and:

a. Enters into the registry the contents of the physician certification, including the patient's qualifying condition and the dosage not to exceed the daily dose amount determined by the department, the amount and forms of marijuana authorized for the patient, and any types of marijuana delivery devices needed by the patient for the medical use of marijuana.

b. Updates the registry within 7 days after any change is made to the original physician certification to reflect such change.

c. Deactivates the registration of the qualified patient and the patient's caregiver when the physician no longer recommends the medical use of marijuana for the patient.

8. Obtains the voluntary and informed written consent of the patient for medical use of marijuana each time the qualified physician issues a physician certification for the patient, which shall be maintained in the patient's medical record. The patient, or the patient's parent or legal guardian if the patient is a minor, must sign the informed consent acknowledging that the qualified physician has sufficiently explained its content. The qualified physician must use a standardized informed consent form adopted in rule by the Board of Medicine and the Board of Osteopathic Medicine, which must include, at a minimum, information related to:

a. The Federal Government's classification of marijuana as a Schedule I controlled substance.

b. The approval and oversight status of marijuana by the Food and Drug Administration.

c. The current state of research on the efficacy of marijuana to treat the qualifying conditions set forth in this section.

d. The potential for addiction.

e. The potential effect that marijuana may have on a patient's coordination, motor skills, and cognition, including a warning against operating heavy machinery, operating a motor vehicle, or engaging in activities that require a person to be alert or respond quickly.

f. The potential side effects of marijuana use.

g. The risks, benefits, and drug interactions of marijuana.

h. That the patient's de-identified health information contained in the physician certification and medical marijuana use registry may be used for research purposes.

(b) If a qualified physician issues a physician certification for a qualified patient diagnosed with a qualifying medical condition pursuant to paragraph (2)(k), the physician must submit the following to the applicable board within 14 days after issuing the physician certification:

1. Documentation supporting the qualified physician's opinion that the medical condition is of the same kind or class as the conditions in paragraphs (2)(a)-(j).

2. Documentation that establishes the efficacy of marijuana as treatment for the condition.

3. Documentation supporting the qualified physician's opinion that the benefits of medical use of marijuana would likely outweigh the potential health risks for the patient.

4. Any other documentation as required by board rule.

The department must submit such documentation to the Coalition for Medical Marijuana Research and Education established pursuant to s. 1004.4351.

(c) A qualified physician may not issue a physician certification for more than three 70-day supply limits of marijuana. The department shall quantify by rule a daily dose amount with equivalent dose amounts for each allowable form of marijuana dispensed by a medical marijuana treatment center. The department shall use the daily dose amount to calculate a 70-day supply.

1. A qualified physician may request an exception to the daily dose amount limit. The request shall be made electronically on a form adopted by the department in rule and must include, at a minimum:

a. The qualified patient's qualifying medical condition.

b. The dosage and route of administration that was insufficient to provide relief to the qualified patient.

c. A description of how the patient will benefit from an increased amount.

d. The minimum daily dose amount of marijuana that would be sufficient for the treatment of the qualified patient's qualifying medical condition.

2. A qualified physician must provide the qualified patient's records upon the request of the department.

3. The department shall approve or disapprove the request within 14 days after receipt of the complete documentation required by this paragraph. The request shall be deemed approved if the department fails to act within this time period.

(d) A qualified physician must evaluate an existing qualified patient at least once every 30 weeks before issuing a new physician certification. A physician must:

1. Determine if the patient still meets the requirements to be issued a physician certification under paragraph (a).

2. Identify and document in the qualified patient's medical records whether the qualified patient experienced either of the following related to the medical use of marijuana:

a. An adverse drug interaction with any prescription or nonprescription medication; or

b. A reduction in the use of, or dependence on, other types of controlled substances as defined in s. 893.02.

3. Submit a report with the findings required pursuant to subparagraph 2. to the department. The department shall submit such reports to the Coalition for Medical Marijuana Research and Education established pursuant to s. 1004.4351.

(e) An active order for low-THC cannabis or medical cannabis issued pursuant to former s. 381.986, Florida Statutes 2016, and registered with the compassionate use registry before June 23, 2017, is deemed a physician certification, and all patients possessing such orders are deemed qualified patients until the department begins issuing medical marijuana use registry identification cards.

(f) The department shall monitor physician registration in the medical marijuana use registry and the issuance of physician certifications for practices that could facilitate unlawful diversion or misuse of marijuana or a marijuana delivery device and shall take disciplinary action as appropriate.

(g) The Board of Medicine and the Board of Osteopathic Medicine shall jointly create a physician certification pattern review panel that shall review all physician certifications submitted to the medical marijuana use registry. The panel shall track and report the number of physician certifications and the qualifying medical conditions, dosage, supply amount, and form of marijuana certified. The panel shall report the data both by individual qualified physician and in the aggregate, by county, and statewide. The physician certification pattern review panel shall, beginning January 1, 2018, submit an annual report of its findings and recommendations to the Governor, the President of the Senate, and the Speaker of the House of Representatives.

(h) The department, the Board of Medicine, and the Board of Osteopathic Medicine may adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this subsection.

(5) MEDICAL MARIJUANA USE REGISTRY.—

(a) The department shall create and maintain a secure, electronic, and online medical marijuana use registry for physicians, patients, and caregivers as provided under this section. The medical marijuana use registry must be accessible to law enforcement agencies, qualified physicians, and medical marijuana treatment centers to verify the authorization of a qualified patient or a caregiver to possess marijuana or a marijuana delivery device and record the marijuana or marijuana delivery device dispensed. The medical marijuana use registry must also be accessible to practitioners licensed to

prescribe prescription drugs to ensure proper care for patients before medications that may interact with the medical use of marijuana are prescribed. The medical marijuana use registry must prevent an active registration of a qualified patient by multiple physicians.

(b) The department shall determine whether an individual is a resident of this state for the purpose of registration of qualified patients and caregivers in the medical marijuana use registry. To prove residency:

1. An adult resident must provide the department with a copy of his or her valid Florida driver license issued under s. 322.18 or a copy of a valid Florida identification card issued under s. 322.051.

2. An adult seasonal resident who cannot meet the requirements of subparagraph 1. may provide the department with a copy of two of the following that show proof of residential address:

a. A deed, mortgage, monthly mortgage statement, mortgage payment booklet or residential rental or lease agreement.

b. One proof of residential address from the seasonal resident's parent, step-parent, legal guardian or other person with whom the seasonal resident resides and a statement from the person with whom the seasonal resident resides stating that the seasonal resident does reside with him or her.

c. A utility hookup or work order dated within 60 days before registration in the medical use registry.

d. A utility bill, not more than 2 months old.

e. Mail from a financial institution, including checking, savings, or investment account statements, not more than 2 months old.

f. Mail from a federal, state, county, or municipal government agency, not more than 2 months old.

g. Any other documentation that provides proof of residential address as determined by department rule.

3. A minor must provide the department with a certified copy of a birth certificate or a current record of registration from a Florida K-12 school and must have a parent or legal guardian who meets the requirements of subparagraph 1.

For the purposes of this paragraph, the term "seasonal resident" means any person who temporarily resides in this state for a period of at least 31 consecutive days in each calendar year, maintains a temporary residence in this state, returns to the state or jurisdiction of his or her residence at least one time during each calendar year, and is registered to vote or pays income tax in another state or jurisdiction.

(c) The department may suspend or revoke the registration of a qualified patient or caregiver if the qualified patient or caregiver:

1. Provides misleading, incorrect, false, or fraudulent information to the department;

2. Obtains a supply of marijuana in an amount greater than the amount authorized by the physician certification;

3. Falsifies, alters, or otherwise modifies an identification card;

4. Fails to timely notify the department of any changes to his or her qualified patient status; or

5. Violates the requirements of this section or any rule adopted under this section.

(d) The department shall immediately suspend the registration of a qualified patient charged with a violation of chapter 893 until final disposition of any alleged offense. Thereafter, the department may extend the suspension, revoke the registration, or reinstate the registration.

(e) The department shall immediately suspend the registration of any caregiver charged with a

violation of chapter 893 until final disposition of any alleged offense. The department shall revoke a caregiver registration if the caregiver does not meet the requirements of subparagraph (6)(b)6.

(f) The department may revoke the registration of a qualified patient or caregiver who cultivates marijuana or who acquires, possesses, or delivers marijuana from any person or entity other than a medical marijuana treatment center.

(g) The department shall revoke the registration of a qualified patient, and the patient's associated caregiver, upon notification that the patient no longer meets the criteria of a qualified patient.

(h) The department may adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this subsection.

(6) CAREGIVERS.—

(a) The department must register an individual as a caregiver on the medical marijuana use registry and issue a caregiver identification card if an individual designated by a qualified patient meets all of the requirements of this subsection and department rule.

(b) A caregiver must:

1. Not be a qualified physician and not be employed by or have an economic interest in a medical marijuana treatment center or a marijuana testing laboratory.

2. Be 21 years of age or older and a resident of this state.

3. Agree in writing to assist with the qualified patient's medical use of marijuana.

4. Be registered in the medical marijuana use registry as a caregiver for no more than one qualified patient, except as provided in this paragraph.

5. Successfully complete a caregiver certification course developed and administered by the department or its designee, which must be renewed biennially. The price of the course may not exceed $100.

6. Pass a background screening pursuant to subsection (9), unless the patient is a close relative of the caregiver.

(c) A qualified patient may designate no more than one caregiver to assist with the qualified patient's medical use of marijuana, unless:

1. The qualified patient is a minor and the designated caregivers are parents or legal guardians of the qualified patient;

2. The qualified patient is an adult who has an intellectual or developmental disability that prevents the patient from being able to protect or care for himself or herself without assistance or supervision and the designated caregivers are the parents or legal guardians of the qualified patient; or

3. The qualified patient is admitted to a hospice program.

(d) A caregiver may be registered in the medical marijuana use registry as a designated caregiver for no more than one qualified patient, unless:

1. The caregiver is a parent or legal guardian of more than one minor who is a qualified patient;

2. The caregiver is a parent or legal guardian of more than one adult who is a qualified patient and who has an intellectual or developmental disability that prevents the patient from being able to protect or care for himself or herself without assistance or supervision; or

3. All qualified patients the caregiver has agreed to assist are admitted to a hospice program and have requested the assistance of that caregiver with the medical use of marijuana; the caregiver is an employee of the hospice; and the caregiver provides personal care or other services directly to clients of the hospice in the scope of that employment.

(e) A caregiver may not receive compensation, other than actual expenses incurred, for any services

provided to the qualified patient.

(f) If a qualified patient is younger than 18 years of age, only a caregiver may purchase or administer marijuana for medical use by the qualified patient. The qualified patient may not purchase marijuana.

(g) A caregiver must be in immediate possession of his or her medical marijuana use registry identification card at all times when in possession of marijuana or a marijuana delivery device and must present his or her medical marijuana use registry identification card upon the request of a law enforcement officer.

(h) The department may adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this subsection.

(7) IDENTIFICATION CARDS.—

(a) The department shall issue medical marijuana use registry identification cards for qualified patients and caregivers who are residents of this state, which must be renewed annually. The identification cards must be resistant to counterfeiting and tampering and must include, at a minimum, the following:

1. The name, address, and date of birth of the qualified patient or caregiver.

2. A full-face, passport-type, color photograph of the qualified patient or caregiver taken within the 90 days immediately preceding registration or the Florida driver license or Florida identification card photograph of the qualified patient or caregiver obtained directly from the Department of Highway Safety and Motor Vehicles.

3. Identification as a qualified patient or a caregiver.

4. The unique numeric identifier used for the qualified patient in the medical marijuana use registry.

5. For a caregiver, the name and unique numeric identifier of the caregiver and the qualified patient or patients that the caregiver is assisting.

6. The expiration date of the identification card.

(b) The department must receive written consent from a qualified patient's parent or legal guardian before it may issue an identification card to a qualified patient who is a minor.

2(c) The department shall adopt rules pursuant to ss. 120.536(1) and 120.54 establishing procedures for the issuance, renewal, suspension, replacement, surrender, and revocation of medical marijuana use registry identification cards pursuant to this section and shall begin issuing qualified patient identification cards by October 3, 2017.

(d) Applications for identification cards must be submitted on a form prescribed by the department. The department may charge a reasonable fee associated with the issuance, replacement, and renewal of identification cards. The department shall allocate $10 of the identification card fee to the Division of Research at Florida Agricultural and Mechanical University for the purpose of educating minorities about marijuana for medical use and the impact of the unlawful use of marijuana on minority communities. The department shall contract with a third-party vendor to issue identification cards. The vendor selected by the department must have experience performing similar functions for other state agencies.

(e) A qualified patient or caregiver shall return his or her identification card to the department within 5 business days after revocation.

2(8) MEDICAL MARIJUANA TREATMENT CENTERS.—

(a) The department shall license medical marijuana treatment centers to ensure reasonable statewide accessibility and availability as necessary for qualified patients registered in the medical

marijuana use registry and who are issued a physician certification under this section.

1. As soon as practicable, but no later than July 3, 2017, the department shall license as a medical marijuana treatment center any entity that holds an active, unrestricted license to cultivate, process, transport, and dispense low-THC cannabis, medical cannabis, and cannabis delivery devices, under former s. 381.986, Florida Statutes 2016, before July 1, 2017, and which meets the requirements of this section. In addition to the authority granted under this section, these entities are authorized to dispense low-THC cannabis, medical cannabis, and cannabis delivery devices ordered pursuant to former s. 381.986, Florida Statutes 2016, which were entered into the compassionate use registry before July 1, 2017, and are authorized to begin dispensing marijuana under this section on July 3, 2017. The department may grant variances from the representations made in such an entity's original application for approval under former s. 381.986, Florida Statutes 2014, pursuant to paragraph (e).

2. The department shall license as medical marijuana treatment centers 10 applicants that meet the requirements of this section, under the following parameters:

a. As soon as practicable, but no later than August 1, 2017, the department shall license any applicant whose application was reviewed, evaluated, and scored by the department and which was denied a dispensing organization license by the department under former s. 381.986, Florida Statutes 2014; which had one or more administrative or judicial challenges pending as of January 1, 2017, or had a final ranking within one point of the highest final ranking in its region under former s. 381.986, Florida Statutes 2014; which meets the requirements of this section; and which provides documentation to the department that it has the existing infrastructure and technical and technological ability to begin cultivating marijuana within 30 days after registration as a medical marijuana treatment center.

b. As soon as practicable, the department shall license one applicant that is a recognized class member of *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), or *In Re Black Farmers Litig.*, 856 F. Supp. 2d 1 (D.D.C. 2011). An applicant licensed under this sub-subparagraph is exempt from the requirement of subparagraph (b)2.

c. As soon as practicable, but no later than October 3, 2017, the department shall license applicants that meet the requirements of this section in sufficient numbers to result in 10 total licenses issued under this subparagraph, while accounting for the number of licenses issued under sub-subparagraphs a. and b.

3. For up to two of the licenses issued under subparagraph 2., the department shall give preference to applicants that demonstrate in their applications that they own one or more facilities that are, or were, used for the canning, concentrating, or otherwise processing of citrus fruit or citrus molasses and will use or convert the facility or facilities for the processing of marijuana.

4. Within 6 months after the registration of 100,000 active qualified patients in the medical marijuana use registry, the department shall license four additional medical marijuana treatment centers that meet the requirements of this section. Thereafter, the department shall license four medical marijuana treatment centers within 6 months after the registration of each additional 100,000 active qualified patients in the medical marijuana use registry that meet the requirements of this section.

5. Dispensing facilities are subject to the following requirements:

a. A medical marijuana treatment center may not establish or operate more than a statewide maximum of 25 dispensing facilities, unless the medical marijuana use registry reaches a total of 100,000 active registered qualified patients. When the medical marijuana use registry reaches 100,000 active registered qualified patients, and then upon each further instance of the total active registered

qualified patients increasing by 100,000, the statewide maximum number of dispensing facilities that each licensed medical marijuana treatment center may establish and operate increases by five.

b. A medical marijuana treatment center may not establish more than the maximum number of dispensing facilities allowed in each of the Northwest, Northeast, Central, Southwest, and Southeast Regions. The department shall determine a medical marijuana treatment center's maximum number of dispensing facilities allowed in each region by calculating the percentage of the total statewide population contained within that region and multiplying that percentage by the medical marijuana treatment center's statewide maximum number of dispensing facilities established under sub-subparagraph a., rounded to the nearest whole number. The department shall ensure that such rounding does not cause a medical marijuana treatment center's total number of statewide dispensing facilities to exceed its statewide maximum. The department shall initially calculate the maximum number of dispensing facilities allowed in each region for each medical marijuana treatment center using county population estimates from the Florida Estimates of Population 2016, as published by the Office of Economic and Demographic Research, and shall perform recalculations following the official release of county population data resulting from each United States Decennial Census. For the purposes of this subparagraph:

(I) The Northwest Region consists of Bay, Calhoun, Escambia, Franklin, Gadsden, Gulf, Holmes, Jackson, Jefferson, Leon, Liberty, Madison, Okaloosa, Santa Rosa, Taylor, Wakulla, Walton, and Washington Counties.

(II) The Northeast Region consists of Alachua, Baker, Bradford, Clay, Columbia, Dixie, Duval, Flagler, Gilchrist, Hamilton, Lafayette, Levy, Marion, Nassau, Putnam, St. Johns, Suwannee, and Union Counties.

(III) The Central Region consists of Brevard, Citrus, Hardee, Hernando, Indian River, Lake, Orange, Osceola, Pasco, Pinellas, Polk, Seminole, St. Lucie, Sumter, and Volusia Counties.

(IV) The Southwest Region consists of Charlotte, Collier, DeSoto, Glades, Hendry, Highlands, Hillsborough, Lee, Manatee, Okeechobee, and Sarasota Counties.

(V) The Southeast Region consists of Broward, Miami-Dade, Martin, Monroe, and Palm Beach Counties.

c. If a medical marijuana treatment center establishes a number of dispensing facilities within a region that is less than the number allowed for that region under sub-subparagraph b., the medical marijuana treatment center may sell one or more of its unused dispensing facility slots to other licensed medical marijuana treatment centers. For each dispensing facility slot that a medical marijuana treatment center sells, that medical marijuana treatment center's statewide maximum number of dispensing facilities, as determined under sub-subparagraph a., is reduced by one. The statewide maximum number of dispensing facilities for a medical marijuana treatment center that purchases an unused dispensing facility slot is increased by one per slot purchased. Additionally, the sale of a dispensing facility slot shall reduce the seller's regional maximum and increase the purchaser's regional maximum number of dispensing facilities, as determined in sub-subparagraph b., by one for that region. For any slot purchased under this sub-subparagraph, the regional restriction applied to that slot's location under sub-subparagraph b. before the purchase shall remain in effect following the purchase. A medical marijuana treatment center that sells or purchases a dispensing facility slot must notify the department within 3 days of sale.

d. This subparagraph shall expire on April 1, 2020.

If this subparagraph or its application to any person or circumstance is held invalid, the invalidity does

not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end, the provisions of this subparagraph are severable.

(b) An applicant for licensure as a medical marijuana treatment center shall apply to the department on a form prescribed by the department and adopted in rule. The department shall adopt rules pursuant to ss. 120.536(1) and 120.54 establishing a procedure for the issuance and biennial renewal of licenses, including initial application and biennial renewal fees sufficient to cover the costs of implementing and administering this section, and establishing supplemental licensure fees for payment beginning May 1, 2018, sufficient to cover the costs of administering ss. 381.989 and 1004.4351. The department shall identify applicants with strong diversity plans reflecting this state's commitment to diversity and implement training programs and other educational programs to enable minority persons and minority business enterprises, as defined in s. 288.703, and veteran business enterprises, as defined in s. 295.187, to compete for medical marijuana treatment center licensure and contracts. Subject to the requirements in subparagraphs (a)2.-4., the department shall issue a license to an applicant if the applicant meets the requirements of this section and pays the initial application fee. The department shall renew the licensure of a medical marijuana treatment center biennially if the licensee meets the requirements of this section and pays the biennial renewal fee. An individual may not be an applicant, owner, officer, board member, or manager on more than one application for licensure as a medical marijuana treatment center. An individual or entity may not be awarded more than one license as a medical marijuana treatment center. An applicant for licensure as a medical marijuana treatment center must demonstrate:

1. That, for the 5 consecutive years before submitting the application, the applicant has been registered to do business in the state.

2. Possession of a valid certificate of registration issued by the Department of Agriculture and Consumer Services pursuant to s. 581.131.

3. The technical and technological ability to cultivate and produce marijuana, including, but not limited to, low-THC cannabis.

4. The ability to secure the premises, resources, and personnel necessary to operate as a medical marijuana treatment center.

5. The ability to maintain accountability of all raw materials, finished products, and any byproducts to prevent diversion or unlawful access to or possession of these substances.

6. An infrastructure reasonably located to dispense marijuana to registered qualified patients statewide or regionally as determined by the department.

7. The financial ability to maintain operations for the duration of the 2-year approval cycle, including the provision of certified financial statements to the department.

a. Upon approval, the applicant must post a $5 million performance bond issued by an authorized surety insurance company rated in one of the three highest rating categories by a nationally recognized rating service. However, a medical marijuana treatment center serving at least 1,000 qualified patients is only required to maintain a $2 million performance bond.

b. In lieu of the performance bond required under sub-subparagraph a., the applicant may provide an irrevocable letter of credit payable to the department or provide cash to the department. If provided with cash under this sub-subparagraph, the department shall deposit the cash in the Grants and Donations Trust Fund within the Department of Health, subject to the same conditions as the bond regarding requirements for the applicant to forfeit ownership of the funds. If the funds deposited under this sub-subparagraph generate interest, the amount of that interest shall be used by the department

for the administration of this section.

8. That all owners, officers, board members, and managers have passed a background screening pursuant to subsection (9).

9. The employment of a medical director to supervise the activities of the medical marijuana treatment center.

10. A diversity plan that promotes and ensures the involvement of minority persons and minority business enterprises, as defined in s. 288.703, or veteran business enterprises, as defined in s. 295.187, in ownership, management, and employment. An applicant for licensure renewal must show the effectiveness of the diversity plan by including the following with his or her application for renewal:

a. Representation of minority persons and veterans in the medical marijuana treatment center's workforce;

b. Efforts to recruit minority persons and veterans for employment; and

c. A record of contracts for services with minority business enterprises and veteran business enterprises.

(c) A medical marijuana treatment center may not make a wholesale purchase of marijuana from, or a distribution of marijuana to, another medical marijuana treatment center, unless the medical marijuana treatment center seeking to make a wholesale purchase of marijuana submits proof of harvest failure to the department.

(d) The department shall establish, maintain, and control a computer software tracking system that traces marijuana from seed to sale and allows real-time, 24-hour access by the department to data from all medical marijuana treatment centers and marijuana testing laboratories. The tracking system must allow for integration of other seed-to-sale systems and, at a minimum, include notification of when marijuana seeds are planted, when marijuana plants are harvested and destroyed, and when marijuana is transported, sold, stolen, diverted, or lost. Each medical marijuana treatment center shall use the seed-to-sale tracking system established by the department or integrate its own seed-to-sale tracking system with the seed-to-sale tracking system established by the department. Each medical marijuana treatment center may use its own seed-to-sale system until the department establishes a seed-to-sale tracking system. The department may contract with a vendor to establish the seed-to-sale tracking system. The vendor selected by the department may not have a contractual relationship with the department to perform any services pursuant to this section other than the seed-to-sale tracking system. The vendor may not have a direct or indirect financial interest in a medical marijuana treatment center or a marijuana testing laboratory.

(e) A licensed medical marijuana treatment center shall cultivate, process, transport, and dispense marijuana for medical use. A licensed medical marijuana treatment center may not contract for services directly related to the cultivation, processing, and dispensing of marijuana or marijuana delivery devices, except that a medical marijuana treatment center licensed pursuant to subparagraph (a)1. may contract with a single entity for the cultivation, processing, transporting, and dispensing of marijuana and marijuana delivery devices. A licensed medical marijuana treatment center must, at all times, maintain compliance with the criteria demonstrated and representations made in the initial application and the criteria established in this subsection. Upon request, the department may grant a medical marijuana treatment center a variance from the representations made in the initial application. Consideration of such a request shall be based upon the individual facts and circumstances surrounding the request. A variance may not be granted unless the requesting medical marijuana treatment center can demonstrate to the department that it has a proposed alternative to the specific representation

made in its application which fulfills the same or a similar purpose as the specific representation in a way that the department can reasonably determine will not be a lower standard than the specific representation in the application. A variance may not be granted from the requirements in subparagraph 2. and subparagraphs (b)1. and 2.

1. A licensed medical marijuana treatment center may transfer ownership to an individual or entity who meets the requirements of this section. A publicly traded corporation or publicly traded company that meets the requirements of this section is not precluded from ownership of a medical marijuana treatment center. To accommodate a change in ownership:

a. The licensed medical marijuana treatment center shall notify the department in writing at least 60 days before the anticipated date of the change of ownership.

b. The individual or entity applying for initial licensure due to a change of ownership must submit an application that must be received by the department at least 60 days before the date of change of ownership.

c. Upon receipt of an application for a license, the department shall examine the application and, within 30 days after receipt, notify the applicant in writing of any apparent errors or omissions and request any additional information required.

d. Requested information omitted from an application for licensure must be filed with the department within 21 days after the department's request for omitted information or the application shall be deemed incomplete and shall be withdrawn from further consideration and the fees shall be forfeited.

Within 30 days after the receipt of a complete application, the department shall approve or deny the application.

2. A medical marijuana treatment center, and any individual or entity who directly or indirectly owns, controls, or holds with power to vote 5 percent or more of the voting shares of a medical marijuana treatment center, may not acquire direct or indirect ownership or control of any voting shares or other form of ownership of any other medical marijuana treatment center.

3. A medical marijuana treatment center may not enter into any form of profit-sharing arrangement with the property owner or lessor of any of its facilities where cultivation, processing, storing, or dispensing of marijuana and marijuana delivery devices occurs.

4. All employees of a medical marijuana treatment center must be 21 years of age or older and have passed a background screening pursuant to subsection (9).

5. Each medical marijuana treatment center must adopt and enforce policies and procedures to ensure employees and volunteers receive training on the legal requirements to dispense marijuana to qualified patients.

6. When growing marijuana, a medical marijuana treatment center:

a. May use pesticides determined by the department, after consultation with the Department of Agriculture and Consumer Services, to be safely applied to plants intended for human consumption, but may not use pesticides designated as restricted-use pesticides pursuant to s. 487.042.

b. Must grow marijuana within an enclosed structure and in a room separate from any other plant.

c. Must inspect seeds and growing plants for plant pests that endanger or threaten the horticultural and agricultural interests of the state in accordance with chapter 581 and any rules adopted thereunder.

d. Must perform fumigation or treatment of plants, or remove and destroy infested or infected

plants, in accordance with chapter 581 and any rules adopted thereunder.

7. Each medical marijuana treatment center must produce and make available for purchase at least one low-THC cannabis product.

8. A medical marijuana treatment center that produces edibles must hold a permit to operate as a food establishment pursuant to chapter 500, the Florida Food Safety Act, and must comply with all the requirements for food establishments pursuant to chapter 500 and any rules adopted thereunder. Edibles may not contain more than 200 milligrams of tetrahydrocannabinol, and a single serving portion of an edible may not exceed 10 milligrams of tetrahydrocannabinol. Edibles may have a potency variance of no greater than 15 percent. Edibles may not be attractive to children; be manufactured in the shape of humans, cartoons, or animals; be manufactured in a form that bears any reasonable resemblance to products available for consumption as commercially available candy; or contain any color additives. To discourage consumption of edibles by children, the department shall determine by rule any shapes, forms, and ingredients allowed and prohibited for edibles. Medical marijuana treatment centers may not begin processing or dispensing edibles until after the effective date of the rule. The department shall also adopt sanitation rules providing the standards and requirements for the storage, display, or dispensing of edibles.

9. Within 12 months after licensure, a medical marijuana treatment center must demonstrate to the department that all of its processing facilities have passed a Food Safety Good Manufacturing Practices, such as Global Food Safety Initiative or equivalent, inspection by a nationally accredited certifying body. A medical marijuana treatment center must immediately stop processing at any facility which fails to pass this inspection until it demonstrates to the department that such facility has met this requirement.

10. When processing marijuana, a medical marijuana treatment center must:

a. Process the marijuana within an enclosed structure and in a room separate from other plants or products.

b. Comply with department rules when processing marijuana with hydrocarbon solvents or other solvents or gases exhibiting potential toxicity to humans. The department shall determine by rule the requirements for medical marijuana treatment centers to use such solvents or gases exhibiting potential toxicity to humans.

c. Comply with federal and state laws and regulations and department rules for solid and liquid wastes. The department shall determine by rule procedures for the storage, handling, transportation, management, and disposal of solid and liquid waste generated during marijuana production and processing. The Department of Environmental Protection shall assist the department in developing such rules.

d. Test the processed marijuana using a medical marijuana testing laboratory before it is dispensed. Results must be verified and signed by two medical marijuana treatment center employees. Before dispensing, the medical marijuana treatment center must determine that the test results indicate that low-THC cannabis meets the definition of low-THC cannabis, the concentration of tetrahydrocannabinol meets the potency requirements of this section, the labeling of the concentration of tetrahydrocannabinol and cannabidiol is accurate, and all marijuana is safe for human consumption and free from contaminants that are unsafe for human consumption. The department shall determine by rule which contaminants must be tested for and the maximum levels of each contaminant which are safe for human consumption. The Department of Agriculture and Consumer Services shall assist the department in developing the testing requirements for contaminants that are unsafe for human consumption in edibles. The department shall also determine by rule the procedures for the treatment of marijuana

that fails to meet the testing requirements of this section, s. 381.988, or department rule. The department may select a random sample from edibles available for purchase in a dispensing facility which shall be tested by the department to determine that the edible meets the potency requirements of this section, is safe for human consumption, and the labeling of the tetrahydrocannabinol and cannabidiol concentration is accurate. A medical marijuana treatment center may not require payment from the department for the sample. A medical marijuana treatment center must recall edibles, including all edibles made from the same batch of marijuana, which fail to meet the potency requirements of this section, which are unsafe for human consumption, or for which the labeling of the tetrahydrocannabinol and cannabidiol concentration is inaccurate. The medical marijuana treatment center must retain records of all testing and samples of each homogenous batch of marijuana for at least 9 months. The medical marijuana treatment center must contract with a marijuana testing laboratory to perform audits on the medical marijuana treatment center's standard operating procedures, testing records, and samples and provide the results to the department to confirm that the marijuana or low-THC cannabis meets the requirements of this section and that the marijuana or low-THC cannabis is safe for human consumption. A medical marijuana treatment center shall reserve two processed samples from each batch and retain such samples for at least 9 months for the purpose of such audits. A medical marijuana treatment center may use a laboratory that has not been certified by the department under s. 381.988 until such time as at least one laboratory holds the required certification, but in no event later than July 1, 2018.

e. Package the marijuana in compliance with the United States Poison Prevention Packaging Act of 1970, 15 U.S.C. ss. 1471 et seq.

f. Package the marijuana in a receptacle that has a firmly affixed and legible label stating the following information:

(I) The marijuana or low-THC cannabis meets the requirements of sub-subparagraph d.

(II) The name of the medical marijuana treatment center from which the marijuana originates.

(III) The batch number and harvest number from which the marijuana originates and the date dispensed.

(IV) The name of the physician who issued the physician certification.

(V) The name of the patient.

(VI) The product name, if applicable, and dosage form, including concentration of tetrahydrocannabinol and cannabidiol. The product name may not contain wording commonly associated with products marketed by or to children.

(VII) The recommended dose.

(VIII) A warning that it is illegal to transfer medical marijuana to another person.

(IX) A marijuana universal symbol developed by the department.

11. The medical marijuana treatment center shall include in each package a patient package insert with information on the specific product dispensed related to:

a. Clinical pharmacology.

b. Indications and use.

c. Dosage and administration.

d. Dosage forms and strengths.

e. Contraindications.

f. Warnings and precautions.

g. Adverse reactions.

12. Each edible shall be individually sealed in plain, opaque wrapping marked only with the marijuana universal symbol. Where practical, each edible shall be marked with the marijuana universal symbol. In addition to the packaging and labeling requirements in subparagraphs 10. and 11., edible receptacles must be plain, opaque, and white without depictions of the product or images other than the medical marijuana treatment center's department-approved logo and the marijuana universal symbol. The receptacle must also include a list all of the edible's ingredients, storage instructions, an expiration date, a legible and prominent warning to keep away from children and pets, and a warning that the edible has not been produced or inspected pursuant to federal food safety laws.

13. When dispensing marijuana or a marijuana delivery device, a medical marijuana treatment center:

a. May dispense any active, valid order for low-THC cannabis, medical cannabis and cannabis delivery devices issued pursuant to former s. 381.986, Florida Statutes 2016, which was entered into the medical marijuana use registry before July 1, 2017.

b. May not dispense more than a 70-day supply of marijuana to a qualified patient or caregiver.

c. Must have the medical marijuana treatment center's employee who dispenses the marijuana or a marijuana delivery device enter into the medical marijuana use registry his or her name or unique employee identifier.

d. Must verify that the qualified patient and the caregiver, if applicable, each have an active registration in the medical marijuana use registry and an active and valid medical marijuana use registry identification card, the amount and type of marijuana dispensed matches the physician certification in the medical marijuana use registry for that qualified patient, and the physician certification has not already been filled.

e. May not dispense marijuana to a qualified patient who is younger than 18 years of age. If the qualified patient is younger than 18 years of age, marijuana may only be dispensed to the qualified patient's caregiver.

f. May not dispense or sell any other type of cannabis, alcohol, or illicit drug-related product, including pipes, bongs, or wrapping papers, other than a marijuana delivery device required for the medical use of marijuana and which is specified in a physician certification.

g. Must, upon dispensing the marijuana or marijuana delivery device, record in the registry the date, time, quantity, and form of marijuana dispensed; the type of marijuana delivery device dispensed; and the name and medical marijuana use registry identification number of the qualified patient or caregiver to whom the marijuana delivery device was dispensed.

h. Must ensure that patient records are not visible to anyone other than the qualified patient, his or her caregiver, and authorized medical marijuana treatment center employees.

(f) To ensure the safety and security of premises where the cultivation, processing, storing, or dispensing of marijuana occurs, and to maintain adequate controls against the diversion, theft, and loss of marijuana or marijuana delivery devices, a medical marijuana treatment center shall:

1.a. Maintain a fully operational security alarm system that secures all entry points and perimeter windows and is equipped with motion detectors; pressure switches; and duress, panic, and hold-up alarms; and

b. Maintain a video surveillance system that records continuously 24 hours a day and meets the following criteria:

(I) Cameras are fixed in a place that allows for the clear identification of persons and activities in controlled areas of the premises. Controlled areas include grow rooms, processing rooms, storage rooms,

disposal rooms or areas, and point-of-sale rooms.

(II) Cameras are fixed in entrances and exits to the premises, which shall record from both indoor and outdoor, or ingress and egress, vantage points.

(III) Recorded images must clearly and accurately display the time and date.

(IV) Retain video surveillance recordings for at least 45 days or longer upon the request of a law enforcement agency.

2. Ensure that the medical marijuana treatment center's outdoor premises have sufficient lighting from dusk until dawn.

3. Ensure that the indoor premises where dispensing occurs includes a waiting area with sufficient space and seating to accommodate qualified patients and caregivers and at least one private consultation area that is isolated from the waiting area and area where dispensing occurs. A medical marijuana treatment center may not display products or dispense marijuana or marijuana delivery devices in the waiting area.

4. Not dispense from its premises marijuana or a marijuana delivery device between the hours of 9 p.m. and 7 a.m., but may perform all other operations and deliver marijuana to qualified patients 24 hours a day.

5. Store marijuana in a secured, locked room or a vault.

6. Require at least two of its employees, or two employees of a security agency with whom it contracts, to be on the premises at all times where cultivation, processing, or storing of marijuana occurs.

7. Require each employee or contractor to wear a photo identification badge at all times while on the premises.

8. Require each visitor to wear a visitor pass at all times while on the premises.

9. Implement an alcohol and drug-free workplace policy.

10. Report to local law enforcement within 24 hours after the medical marijuana treatment center is notified or becomes aware of the theft, diversion, or loss of marijuana.

(g) To ensure the safe transport of marijuana and marijuana delivery devices to medical marijuana treatment centers, marijuana testing laboratories, or qualified patients, a medical marijuana treatment center must:

1. Maintain a marijuana transportation manifest in any vehicle transporting marijuana. The marijuana transportation manifest must be generated from a medical marijuana treatment center's seed-to-sale tracking system and include the:

a. Departure date and approximate time of departure.

b. Name, location address, and license number of the originating medical marijuana treatment center.

c. Name and address of the recipient of the delivery.

d. Quantity and form of any marijuana or marijuana delivery device being transported.

e. Arrival date and estimated time of arrival.

f. Delivery vehicle make and model and license plate number.

g. Name and signature of the medical marijuana treatment center employees delivering the product.

(I) A copy of the marijuana transportation manifest must be provided to each individual, medical marijuana treatment center, or marijuana testing laboratory that receives a delivery. The individual, or a representative of the center or laboratory, must sign a copy of the marijuana transportation manifest

acknowledging receipt.

(II) An individual transporting marijuana or a marijuana delivery device must present a copy of the relevant marijuana transportation manifest and his or her employee identification card to a law enforcement officer upon request.

(III) Medical marijuana treatment centers and marijuana testing laboratories must retain copies of all marijuana transportation manifests for at least 3 years.

2. Ensure only vehicles in good working order are used to transport marijuana.

3. Lock marijuana and marijuana delivery devices in a separate compartment or container within the vehicle.

4. Require employees to have possession of their employee identification card at all times when transporting marijuana or marijuana delivery devices.

5. Require at least two persons to be in a vehicle transporting marijuana or marijuana delivery devices, and require at least one person to remain in the vehicle while the marijuana or marijuana delivery device is being delivered.

6. Provide specific safety and security training to employees transporting or delivering marijuana and marijuana delivery devices.

(h) A medical marijuana treatment center may not engage in advertising that is visible to members of the public from any street, sidewalk, park, or other public place, except:

1. The dispensing location of a medical marijuana treatment center may have a sign that is affixed to the outside or hanging in the window of the premises which identifies the dispensary by the licensee's business name, a department-approved trade name, or a department-approved logo. A medical marijuana treatment center's trade name and logo may not contain wording or images commonly associated with marketing targeted toward children or which promote recreational use of marijuana.

2. A medical marijuana treatment center may engage in Internet advertising and marketing under the following conditions:

a. All advertisements must be approved by the department.

b. An advertisement may not have any content that specifically targets individuals under the age of 18, including cartoon characters or similar images.

c. An advertisement may not be an unsolicited pop-up advertisement.

d. Opt-in marketing must include an easy and permanent opt-out feature.

(i) Each medical marijuana treatment center that dispenses marijuana and marijuana delivery devices shall make available to the public on its website:

1. Each marijuana and low-THC product available for purchase, including the form, strain of marijuana from which it was extracted, cannabidiol content, tetrahydrocannabinol content, dose unit, total number of doses available, and the ratio of cannabidiol to tetrahydrocannabinol for each product.

2. The price for a 30-day, 50-day, and 70-day supply at a standard dose for each marijuana and low-THC product available for purchase.

3. The price for each marijuana delivery device available for purchase.

4. If applicable, any discount policies and eligibility criteria for such discounts.

(j) Medical marijuana treatment centers are the sole source from which a qualified patient may legally obtain marijuana.

(k) The department may adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this subsection.

(9) BACKGROUND SCREENING.—An individual required to undergo a background screening pursuant to

this section must pass a level 2 background screening as provided under chapter 435, which, in addition to the disqualifying offenses provided in s. 435.04, shall exclude an individual who has an arrest awaiting final disposition for, has been found guilty of, regardless of adjudication, or has entered a plea of nolo contendere or guilty to an offense under chapter 837, chapter 895, or chapter 896 or similar law of another jurisdiction.

(a) Such individual must submit a full set of fingerprints to the department or to a vendor, entity, or agency authorized by s. 943.053(13). The department, vendor, entity, or agency shall forward the fingerprints to the Department of Law Enforcement for state processing, and the Department of Law Enforcement shall forward the fingerprints to the Federal Bureau of Investigation for national processing.

(b) Fees for state and federal fingerprint processing and retention shall be borne by the individual. The state cost for fingerprint processing shall be as provided in s. 943.053(3)(e) for records provided to persons or entities other than those specified as exceptions therein.

(c) Fingerprints submitted to the Department of Law Enforcement pursuant to this subsection shall be retained by the Department of Law Enforcement as provided in s. 943.05(2)(g) and (h) and, when the Department of Law Enforcement begins participation in the program, enrolled in the Federal Bureau of Investigation's national retained print arrest notification program. Any arrest record identified shall be reported to the department.

(10) MEDICAL MARIJUANA TREATMENT CENTER INSPECTIONS; ADMINISTRATIVE ACTIONS.—

(a) The department shall conduct announced or unannounced inspections of medical marijuana treatment centers to determine compliance with this section or rules adopted pursuant to this section.

(b) The department shall inspect a medical marijuana treatment center upon receiving a complaint or notice that the medical marijuana treatment center has dispensed marijuana containing mold, bacteria, or other contaminant that may cause or has caused an adverse effect to human health or the environment.

(c) The department shall conduct at least a biennial inspection of each medical marijuana treatment center to evaluate the medical marijuana treatment center's records, personnel, equipment, processes, security measures, sanitation practices, and quality assurance practices.

(d) The Department of Agriculture and Consumer Services and the department shall enter into an interagency agreement to ensure cooperation and coordination in the performance of their obligations under this section and their respective regulatory and authorizing laws. The department, the Department of Highway Safety and Motor Vehicles, and the Department of Law Enforcement may enter into interagency agreements for the purposes specified in this subsection or subsection (7).

(e) The department shall publish a list of all approved medical marijuana treatment centers, medical directors, and qualified physicians on its website.

(f) The department may impose reasonable fines not to exceed $10,000 on a medical marijuana treatment center for any of the following violations:

1. Violating this section or department rule.
2. Failing to maintain qualifications for approval.
3. Endangering the health, safety, or security of a qualified patient.
4. Improperly disclosing personal and confidential information of the qualified patient.
5. Attempting to procure medical marijuana treatment center approval by bribery, fraudulent misrepresentation, or extortion.
6. Being convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless

of adjudication, a crime in any jurisdiction which directly relates to the business of a medical marijuana treatment center.

7. Making or filing a report or record that the medical marijuana treatment center knows to be false.

8. Willfully failing to maintain a record required by this section or department rule.

9. Willfully impeding or obstructing an employee or agent of the department in the furtherance of his or her official duties.

10. Engaging in fraud or deceit, negligence, incompetence, or misconduct in the business practices of a medical marijuana treatment center.

11. Making misleading, deceptive, or fraudulent representations in or related to the business practices of a medical marijuana treatment center.

12. Having a license or the authority to engage in any regulated profession, occupation, or business that is related to the business practices of a medical marijuana treatment center suspended, revoked, or otherwise acted against by the licensing authority of any jurisdiction, including its agencies or subdivisions, for a violation that would constitute a violation under Florida law.

13. Violating a lawful order of the department or an agency of the state, or failing to comply with a lawfully issued subpoena of the department or an agency of the state.

(g) The department may suspend, revoke, or refuse to renew a medical marijuana treatment center license if the medical marijuana treatment center commits any of the violations in paragraph (f).

(h) The department may adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this subsection.

(11) PREEMPTION.—Regulation of cultivation, processing, and delivery of marijuana by medical marijuana treatment centers is preempted to the state except as provided in this subsection.

(a) A medical marijuana treatment center cultivating or processing facility may not be located within 500 feet of the real property that comprises a public or private elementary school, middle school, or secondary school.

(b)1. A county or municipality may, by ordinance, ban medical marijuana treatment center dispensing facilities from being located within the boundaries of that county or municipality. A county or municipality that does not ban dispensing facilities under this subparagraph may not place specific limits, by ordinance, on the number of dispensing facilities that may locate within that county or municipality.

2. A municipality may determine by ordinance the criteria for the location of, and other permitting requirements that do not conflict with state law or department rule for, medical marijuana treatment center dispensing facilities located within the boundaries of that municipality. A county may determine by ordinance the criteria for the location of, and other permitting requirements that do not conflict with state law or department rule for, all such dispensing facilities located within the unincorporated areas of that county. Except as provided in paragraph (c), a county or municipality may not enact ordinances for permitting or for determining the location of dispensing facilities which are more restrictive than its ordinances permitting or determining the locations for pharmacies licensed under chapter 465. A municipality or county may not charge a medical marijuana treatment center a license or permit fee in an amount greater than the fee charged by such municipality or county to pharmacies. A dispensing facility location approved by a municipality or county pursuant to former s. 381.986(8)(b), Florida Statutes 2016, is not subject to the location requirements of this subsection.

(c) A medical marijuana treatment center dispensing facility may not be located within 500 feet of

the real property that comprises a public or private elementary school, middle school, or secondary school unless the county or municipality approves the location through a formal proceeding open to the public at which the county or municipality determines that the location promotes the public health, safety, and general welfare of the community.

(d) This subsection does not prohibit any local jurisdiction from ensuring medical marijuana treatment center facilities comply with the Florida Building Code, the Florida Fire Prevention Code, or any local amendments to the Florida Building Code or the Florida Fire Prevention Code.

(12) PENALTIES.—

(a) A qualified physician commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, if the qualified physician issues a physician certification for the medical use of marijuana for a patient without a reasonable belief that the patient is suffering from a qualifying medical condition.

(b) A person who fraudulently represents that he or she has a qualifying medical condition to a qualified physician for the purpose of being issued a physician certification commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(c) A qualified patient who uses marijuana, not including low-THC cannabis, or a caregiver who administers marijuana, not including low-THC cannabis, in plain view of or in a place open to the general public; in a school bus, a vehicle, an aircraft, or a boat; or on the grounds of a school except as provided in s. 1006.062, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(d) A qualified patient or caregiver who cultivates marijuana or who purchases or acquires marijuana from any person or entity other than a medical marijuana treatment center violates s. 893.13 and is subject to the penalties provided therein.

(e)1. A qualified patient or caregiver in possession of marijuana or a marijuana delivery device who fails or refuses to present his or her marijuana use registry identification card upon the request of a law enforcement officer commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, unless it can be determined through the medical marijuana use registry that the person is authorized to be in possession of that marijuana or marijuana delivery device.

2. A person charged with a violation of this paragraph may not be convicted if, before or at the time of his or her court or hearing appearance, the person produces in court or to the clerk of the court in which the charge is pending a medical marijuana use registry identification card issued to him or her which is valid at the time of his or her arrest. The clerk of the court is authorized to dismiss such case at any time before the defendant's appearance in court. The clerk of the court may assess a fee of $5 for dismissing the case under this paragraph.

(f) A caregiver who violates any of the applicable provisions of this section or applicable department rules, for the first offense, commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083 and, for a second or subsequent offense, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(g) A qualified physician who issues a physician certification for marijuana or a marijuana delivery device and receives compensation from a medical marijuana treatment center related to the issuance of a physician certification for marijuana or a marijuana delivery device is subject to disciplinary action under the applicable practice act and s. 456.072(1)(n).

(h) A person transporting marijuana or marijuana delivery devices on behalf of a medical marijuana treatment center or marijuana testing laboratory who fails or refuses to present a transportation

manifest upon the request of a law enforcement officer commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(i) Persons and entities conducting activities authorized and governed by this section and s. 381.988 are subject to ss. 456.053, 456.054, and 817.505, as applicable.

(j) A person or entity that cultivates, processes, distributes, sells, or dispenses marijuana, as defined in s. 29(b)(4), Art. X of the State Constitution, and is not licensed as a medical marijuana treatment center violates s. 893.13 and is subject to the penalties provided therein.

(k) A person who manufactures, distributes, sells, gives, or possesses with the intent to manufacture, distribute, sell, or give marijuana or a marijuana delivery device that he or she holds out to have originated from a licensed medical marijuana treatment center but that is counterfeit commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. For the purposes of this paragraph, the term "counterfeit" means marijuana; a marijuana delivery device; or a marijuana or marijuana delivery device container, seal, or label which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, or device, or any likeness thereof, of a licensed medical marijuana treatment center and which thereby falsely purports or is represented to be the product of, or to have been distributed by, that licensed medical marijuana treatment facility.

(l) Any person who possesses or manufactures a blank, forged, stolen, fictitious, fraudulent, counterfeit, or otherwise unlawfully issued medical marijuana use registry identification card commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(13) UNLICENSED ACTIVITY.—

(a) If the department has probable cause to believe that a person or entity that is not registered or licensed with the department has violated this section, s. 381.988, or any rule adopted pursuant to this section, the department may issue and deliver to such person or entity a notice to cease and desist from such violation. The department also may issue and deliver a notice to cease and desist to any person or entity who aids and abets such unlicensed activity. The issuance of a notice to cease and desist does not constitute agency action for which a hearing under s. 120.569 or s. 120.57 may be sought. For the purpose of enforcing a cease and desist order, the department may file a proceeding in the name of the state seeking issuance of an injunction or a writ of mandamus against any person or entity who violates any provisions of such order.

(b) In addition to the remedies under paragraph (a), the department may impose by citation an administrative penalty not to exceed $5,000 per incident. The citation shall be issued to the subject and must contain the subject's name and any other information the department determines to be necessary to identify the subject, a brief factual statement, the sections of the law allegedly violated, and the penalty imposed. If the subject does not dispute the matter in the citation with the department within 30 days after the citation is served, the citation shall become a final order of the department. The department may adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this section. Each day that the unlicensed activity continues after issuance of a notice to cease and desist constitutes a separate violation. The department shall be entitled to recover the costs of investigation and prosecution in addition to the fine levied pursuant to the citation. Service of a citation may be made by personal service or by mail to the subject at the subject's last known address or place of practice. If the department is required to seek enforcement of the cease and desist or agency order, it shall be entitled to collect attorney fees and costs.

(c) In addition to or in lieu of any other administrative remedy, the department may seek the imposition of a civil penalty through the circuit court for any violation for which the department may

issue a notice to cease and desist. The civil penalty shall be no less than $5,000 and no more than $10,000 for each offense. The court may also award to the prevailing party court costs and reasonable attorney fees and, in the event the department prevails, may also award reasonable costs of investigation and prosecution.

(d) In addition to the other remedies provided in this section, the department or any state attorney may bring an action for an injunction to restrain any unlicensed activity or to enjoin the future operation or maintenance of the unlicensed activity or the performance of any service in violation of this section.

(e) The department must notify local law enforcement of such unlicensed activity for a determination of any criminal violation of chapter 893.

(14) EXCEPTIONS TO OTHER LAWS.—

(a) Notwithstanding s. 893.13, s. 893.135, s. 893.147, or any other provision of law, but subject to the requirements of this section, a qualified patient and the qualified patient's caregiver may purchase from a medical marijuana treatment center for the patient's medical use a marijuana delivery device and up to the amount of marijuana authorized in the physician certification, but may not possess more than a 70-day supply of marijuana at any given time and all marijuana purchased must remain in its original packaging.

(b) Notwithstanding s. 893.13, s. 893.135, s. 893.147, or any other provision of law, but subject to the requirements of this section, an approved medical marijuana treatment center and its owners, managers, and employees may manufacture, possess, sell, deliver, distribute, dispense, and lawfully dispose of marijuana or a marijuana delivery device as provided in this section, s. 381.988, and by department rule. For the purposes of this subsection, the terms "manufacture," "possession," "deliver," "distribute," and "dispense" have the same meanings as provided in s. 893.02.

(c) Notwithstanding s. 893.13, s. 893.135, s. 893.147, or any other provision of law, but subject to the requirements of this section, a certified marijuana testing laboratory, including an employee of a certified marijuana testing laboratory acting within the scope of his or her employment, may acquire, possess, test, transport, and lawfully dispose of marijuana as provided in this section, in s. 381.988, and by department rule.

(d) A licensed medical marijuana treatment center and its owners, managers, and employees are not subject to licensure or regulation under chapter 465 or chapter 499 for manufacturing, possessing, selling, delivering, distributing, dispensing, or lawfully disposing of marijuana or a marijuana delivery device, as provided in this section, in s. 381.988, and by department rule.

(e) This subsection does not exempt a person from prosecution for a criminal offense related to impairment or intoxication resulting from the medical use of marijuana or relieve a person from any requirement under law to submit to a breath, blood, urine, or other test to detect the presence of a controlled substance.

(f) Notwithstanding s. 893.13, s. 893.135, s. 893.147, or any other provision of law, but subject to the requirements of this section and pursuant to policies and procedures established pursuant to s. 1006.62(8), school personnel may possess marijuana that is obtained for medical use pursuant to this section by a student who is a qualified patient.

(g) Notwithstanding s. 893.13, s. 893.135, s. 893.147, or any other provision of law, but subject to the requirements of this section, a research institute established by a public postsecondary educational institution, such as the H. Lee Moffitt Cancer Center and Research Institute, Inc., established under s. 1004.43, or a state university that has achieved the preeminent state research university designation

under s. 1001.7065 may possess, test, transport, and lawfully dispose of marijuana for research purposes as provided by this section.

(15) APPLICABILITY.—This section does not limit the ability of an employer to establish, continue, or enforce a drug-free workplace program or policy. This section does not require an employer to accommodate the medical use of marijuana in any workplace or any employee working while under the influence of marijuana. This section does not create a cause of action against an employer for wrongful discharge or discrimination. Marijuana, as defined in this section, is not reimbursable under chapter 440.

(16) FINES AND FEES.—Fines and fees collected by the department under this section shall be deposited in the Grants and Donations Trust Fund within the Department of Health.

[3](17) Rules adopted pursuant to this section before July 1, 2019, are not subject to s. 120.541(3). Notwithstanding paragraph (8)(e), a medical marijuana treatment center may use a laboratory that has not been certified by the department under s. 381.988 until such time as at least one laboratory holds the required certification pursuant to s. 381.988, but in no event later than July 1, 2019. This subsection expires July 1, 2019.

History.—s. 2, ch. 2014-157; s. 1, ch. 2016-123; s. 24, ch. 2016-145; ss. 1, 3, 18, ch. 2017-232; s. 29, ch. 2018-10; s. 43, ch. 2018-110; s. 1, ch. 2018-142.

[1]**Note.**—

A. Section 1, ch. 2017-232, provides that "[i]t is the intent of the Legislature to implement s. 29, Article X of the State Constitution by creating a unified regulatory structure. If s. 29, Article X of the State Constitution is amended or a constitutional amendment related to cannabis or marijuana is adopted, this act shall expire 6 months after the effective date of such amendment." If such amendment or adoption takes place, s. 381.986, as amended by s. 1, ch. 2017-232, will read:

381.986 Compassionate use of low-THC and medical cannabis.—

(1) DEFINITIONS.—As used in this section, the term:

(a) "Cannabis delivery device" means an object used, intended for use, or designed for use in preparing, storing, ingesting, inhaling, or otherwise introducing low-THC cannabis or medical cannabis into the human body.

(b) "Dispensing organization" means an organization approved by the department to cultivate, process, transport, and dispense low-THC cannabis or medical cannabis pursuant to this section.

(c) "Independent testing laboratory" means a laboratory, including the managers, employees, or contractors of the laboratory, which has no direct or indirect interest in a dispensing organization.

(d) "Legal representative" means the qualified patient's parent, legal guardian acting pursuant to a court's authorization as required under s. 744.3215(4), health care surrogate acting pursuant to the qualified patient's written consent or a court's authorization as required under s. 765.113, or an individual who is authorized under a power of attorney to make health care decisions on behalf of the qualified patient.

(e) "Low-THC cannabis" means a plant of the genus *Cannabis*, the dried flowers of which contain 0.8 percent or less of tetrahydrocannabinol and more than 10 percent of cannabidiol weight for weight; the seeds thereof; the resin extracted from any part of such plant; or any compound, manufacture, salt, derivative, mixture, or preparation of such plant or its seeds or resin that is dispensed only from a dispensing organization.

(f) "Medical cannabis" means all parts of any plant of the genus *Cannabis*, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, sale, derivative, mixture, or preparation of the plant or its seeds or resin that is dispensed only from a dispensing organization for medical use by an eligible patient as defined in s. 499.0295.

(g) "Medical use" means administration of the ordered amount of low-THC cannabis or medical cannabis. The term does not include the:

1. Possession, use, or administration of low-THC cannabis or medical cannabis by smoking.

2. Transfer of low-THC cannabis or medical cannabis to a person other than the qualified patient for whom it was ordered or the qualified patient's legal representative on behalf of the qualified patient.

3. Use or administration of low-THC cannabis or medical cannabis:

a. On any form of public transportation.

b. In any public place.

c. In a qualified patient's place of employment, if restricted by his or her employer.

d. In a state correctional institution as defined in s. 944.02 or a correctional institution as defined in s. 944.241.

e. On the grounds of a preschool, primary school, or secondary school.

f. On a school bus or in a vehicle, aircraft, or motorboat.

(h) "Qualified patient" means a resident of this state who has been added to the compassionate use registry by a physician licensed under chapter 458 or chapter 459 to receive low-THC cannabis or medical cannabis from a dispensing organization.

(i) "Smoking" means burning or igniting a substance and inhaling the smoke. Smoking does not include the use of a vaporizer.

(2) PHYSICIAN ORDERING.—A physician is authorized to order low-THC cannabis to treat a qualified patient suffering from cancer or a physical medical condition that chronically produces symptoms of seizures or severe and persistent muscle spasms; order low-THC cannabis to alleviate symptoms of such disease, disorder, or condition, if no other satisfactory alternative treatment options exist for the qualified patient; order medical cannabis to treat an eligible patient as defined in s. 499.0295; or order a cannabis delivery device for the medical use of low-THC cannabis or medical cannabis, only if the physician:

(a) Holds an active, unrestricted license as a physician under chapter 458 or an osteopathic physician under chapter 459;

(b) Has treated the patient for at least 3 months immediately preceding the patient's registration in the compassionate use registry;

(c) Has successfully completed the course and examination required under paragraph (4)(a);

(d) Has determined that the risks of treating the patient with low-THC cannabis or medical cannabis are reasonable in light of the potential benefit to the patient. If a patient is younger than 18 years of age, a second physician must concur with this determination, and such determination must be documented in the patient's medical record;

(e) Registers as the orderer of low-THC cannabis or medical cannabis for the named patient on the compassionate use registry maintained by the department and updates the registry to reflect the contents of the order, including the amount of low-THC cannabis or medical cannabis that will provide the patient with not more than a 45-day supply and a cannabis delivery device needed by the patient for the medical use of low-THC cannabis or medical cannabis. The physician must also update the registry within 7 days after any change is made to the original order to reflect the change. The physician shall deactivate the registration of the patient and the patient's legal representative when treatment is discontinued;

(f) Maintains a patient treatment plan that includes the dose, route of administration, planned duration, and monitoring of the patient's symptoms and other indicators of tolerance or reaction to the low-THC cannabis or medical cannabis;

(g) Submits the patient treatment plan quarterly to the University of Florida College of Pharmacy for research on the safety and efficacy of low-THC cannabis and medical cannabis on patients;

(h) Obtains the voluntary written informed consent of the patient or the patient's legal representative to treatment with low-THC cannabis after sufficiently explaining the current state of knowledge in the medical community of the effectiveness of treatment of the patient's condition with low-THC cannabis, the medically acceptable alternatives, and the potential risks and side effects;

(i) Obtains written informed consent as defined in and required under s. 499.0295, if the physician is ordering medical cannabis for an eligible patient pursuant to that section; and

(j) Is not a medical director employed by a dispensing organization.

(3) PENALTIES.—

(a) A physician commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, if the physician orders low-THC cannabis for a patient without a reasonable belief that the patient is suffering from:

1. Cancer or a physical medical condition that chronically produces symptoms of seizures or severe and persistent muscle spasms that can be treated with low-THC cannabis; or

2. Symptoms of cancer or a physical medical condition that chronically produces symptoms of seizures or severe and persistent muscle spasms that can be alleviated with low-THC cannabis.

(b) A physician commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, if the physician orders medical cannabis for a patient without a reasonable belief that the patient has a terminal condition as defined in s. 499.0295.

(c) A person who fraudulently represents that he or she has cancer, a physical medical condition that chronically produces symptoms of seizures or severe and persistent muscle spasms, or a terminal condition to a physician for the purpose of being ordered low-THC cannabis, medical cannabis, or a cannabis delivery device by such physician commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(d) An eligible patient as defined in s. 499.0295 who uses medical cannabis, and such patient's legal representative who administers medical cannabis, in plain view of or in a place open to the general public, on the grounds of a school, or in a school bus, vehicle, aircraft, or motorboat, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(e) A physician who orders low-THC cannabis, medical cannabis, or a cannabis delivery device and receives compensation from a dispensing organization related to the ordering of low-THC cannabis, medical cannabis, or a cannabis delivery device is subject to disciplinary action under the applicable practice act and s. 456.072(1)(n).

(4) PHYSICIAN EDUCATION.—

(a) Before ordering low-THC cannabis, medical cannabis, or a cannabis delivery device for medical use by a patient in this state, the appropriate board shall require the ordering physician to successfully complete an 8-hour course and subsequent examination offered by the Florida Medical Association or the Florida Osteopathic Medical Association that encompasses the clinical indications for the appropriate use of low-THC cannabis and medical cannabis, the appropriate cannabis delivery devices, the contraindications for such use, and the relevant state and federal laws governing the ordering, dispensing, and possessing of these substances and devices. The course and examination shall be administered at least annually. Successful completion of the course may be used by a physician to satisfy 8 hours of the continuing medical education requirements required by his or her respective board for licensure renewal. This course may be offered in a distance learning format.

(b) The appropriate board shall require the medical director of each dispensing organization to hold an active, unrestricted license as a physician under chapter 458 or as an osteopathic physician under chapter 459 and successfully complete a 2-hour course and subsequent examination offered by the Florida Medical Association or the Florida Osteopathic Medical Association that encompasses appropriate safety procedures and knowledge of low-THC cannabis, medical cannabis, and cannabis delivery devices.

(c) Successful completion of the course and examination specified in paragraph (a) is required for every physician who orders low-THC cannabis, medical cannabis, or a cannabis delivery device each time such physician renews his or her license. In addition, successful completion of the course and examination specified in paragraph (b) is required for the medical director of each dispensing organization each time such physician renews his or her license.

(d) A physician who fails to comply with this subsection and who orders low-THC cannabis, medical cannabis, or a cannabis delivery device may be subject to disciplinary action under the applicable practice act and under s. 456.072(1)(k).

(5) DUTIES OF THE DEPARTMENT.—The department shall:

(a) Create and maintain a secure, electronic, and online compassionate use registry for the registration of physicians, patients, and the legal representatives of patients as provided under this section. The registry must be accessible to law enforcement agencies and to a dispensing organization to verify the authorization of a patient or a patient's legal representative to possess low-THC cannabis, medical cannabis, or a cannabis delivery device and record the low-THC cannabis, medical cannabis, or cannabis delivery device dispensed. The registry must prevent an active registration of a patient by multiple physicians.

(b) Authorize the establishment of five dispensing organizations to ensure reasonable statewide accessibility and availability as necessary for patients registered in the compassionate use registry and who are ordered low-THC cannabis, medical cannabis, or a cannabis delivery device under this section, one in each of the following regions: northwest Florida, northeast Florida, central Florida, southeast Florida, and southwest Florida. The department shall develop an application form and impose an initial application and biennial renewal fee that is sufficient to cover the costs of administering this section. An applicant for approval as a dispensing organization must be able to demonstrate:

1. The technical and technological ability to cultivate and produce low-THC cannabis. The applicant must possess a valid certificate of registration issued by the Department of Agriculture and Consumer Services pursuant to s. 581.131 that is issued for the cultivation of more than 400,000 plants, be operated by a nurseryman as defined in s. 581.011, and have been operated as a registered nursery in this state for at least 30 continuous years.

2. The ability to secure the premises, resources, and personnel necessary to operate as a dispensing organization.

3. The ability to maintain accountability of all raw materials, finished products, and any byproducts to prevent diversion or unlawful access to or possession of these substances.

4. An infrastructure reasonably located to dispense low-THC cannabis to registered patients statewide or regionally as determined by the department.

5. The financial ability to maintain operations for the duration of the 2-year approval cycle, including the provision of certified financials to the department. Upon approval, the applicant must post a $5 million performance bond. However, upon a dispensing organization's serving at least 1,000 qualified patients, the dispensing organization is only required to maintain a $2 million performance bond.

6. That all owners and managers have been fingerprinted and have successfully passed a level 2 background screening pursuant to s. 435.04.

7. The employment of a medical director to supervise the activities of the dispensing organization.

(c) Upon the registration of 250,000 active qualified patients in the compassionate use registry, approve three dispensing organizations, including, but not limited to, an applicant that is a recognized class member of *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), or *In Re Black Farmers Litig.*, 856 F. Supp. 2d 1 (D.D.C. 2011), and a member of the Black Farmers and Agriculturalists Association, which must meet the requirements of subparagraphs (b)2.-7. and demonstrate the technical and technological ability to cultivate and produce low-THC cannabis.

(d) Allow a dispensing organization to make a wholesale purchase of low-THC cannabis or medical cannabis from, or a distribution of low-THC cannabis or medical cannabis to, another dispensing organization.

(e) Monitor physician registration and ordering of low-THC cannabis, medical cannabis, or a cannabis delivery device for ordering practices that could facilitate unlawful diversion or misuse of low-THC cannabis, medical cannabis, or a cannabis delivery device and take disciplinary action as indicated.

(6) DISPENSING ORGANIZATION.–An approved dispensing organization must, at all times, maintain compliance with the criteria demonstrated for selection and approval as a dispensing organization under subsection (5) and the criteria required in this subsection.

(a) When growing low-THC cannabis or medical cannabis, a dispensing organization:

1. May use pesticides determined by the department, after consultation with the Department of Agriculture and Consumer Services, to be safely applied to plants intended for human consumption, but may not use pesticides designated as restricted-use pesticides pursuant to s. 487.042.

2. Must grow low-THC cannabis or medical cannabis within an enclosed structure and in a room separate from any other plant.

3. Must inspect seeds and growing plants for plant pests that endanger or threaten the horticultural and agricultural interests of the state, notify the Department of Agriculture and Consumer Services within 10 calendar days after a determination that a plant is infested or infected by such plant pest, and implement and maintain phytosanitary policies and procedures.

4. Must perform fumigation or treatment of plants, or the removal and destruction of infested or infected plants, in accordance with chapter 581 and any rules adopted thereunder.

(b) When processing low-THC cannabis or medical cannabis, a dispensing organization must:

1. Process the low-THC cannabis or medical cannabis within an enclosed structure and in a room separate from other plants or products.

2. Test the processed low-THC cannabis and medical cannabis before they are dispensed. Results must be verified and signed by two dispensing organization employees. Before dispensing low-THC cannabis, the dispensing organization must determine that the test results indicate that the low-THC cannabis meets the definition of low-THC cannabis and, for medical cannabis and low-THC cannabis, that all medical cannabis and low-THC cannabis is safe for human consumption and free from contaminants that are unsafe for human consumption. The dispensing organization must retain records of all testing and samples of each homogenous batch of cannabis and low-THC cannabis for at least 9 months. The dispensing organization must contract with an independent testing laboratory to perform audits on the dispensing organization's standard operating procedures, testing records, and samples and provide the results to the department to confirm that the low-THC cannabis or medical cannabis meets the requirements of this section and that the medical cannabis and low-THC cannabis is safe for human consumption.

3. Package the low-THC cannabis or medical cannabis in compliance with the United States Poison Prevention Packaging Act of 1970, 15 U.S.C. ss. 1471 et seq.

4. Package the low-THC cannabis or medical cannabis in a receptacle that has a firmly affixed and legible label stating the following information:

a. A statement that the low-THC cannabis or medical cannabis meets the requirements of subparagraph 2.;

b. The name of the dispensing organization from which the medical cannabis or low-THC cannabis originates; and

c. The batch number and harvest number from which the medical cannabis or low-THC cannabis originates.

5. Reserve two processed samples from each batch and retain such samples for at least 9 months for the purpose of testing pursuant to the audit required under subparagraph 2.

(c) When dispensing low-THC cannabis, medical cannabis, or a cannabis delivery device, a dispensing organization:

1. May not dispense more than a 45-day supply of low-THC cannabis or medical cannabis to a patient or the patient's legal representative.

2. Must have the dispensing organization's employee who dispenses the low-THC cannabis, medical cannabis, or a cannabis delivery device enter into the compassionate use registry his or her name or unique employee identifier.

3. Must verify in the compassionate use registry that a physician has ordered the low-THC cannabis, medical cannabis, or a specific type of a cannabis delivery device for the patient.

4. May not dispense or sell any other type of cannabis, alcohol, or illicit drug-related product, including pipes, bongs, or wrapping papers, other than a physician-ordered cannabis delivery device required for the medical use of low-THC cannabis or medical cannabis, while dispensing low-THC cannabis or medical cannabis.

5. Must verify that the patient has an active registration in the compassionate use registry, the patient or patient's legal representative holds a valid and active registration card, the order presented matches the order contents as recorded in the registry, and the order has not already been filled.

6. Must, upon dispensing the low-THC cannabis, medical cannabis, or cannabis delivery device, record in the registry the date, time, quantity, and form of low-THC cannabis or medical cannabis dispensed and the type of cannabis delivery device dispensed.

(d) To ensure the safety and security of its premises and any off-site storage facilities, and to maintain adequate controls against the diversion, theft, and loss of low-THC cannabis, medical cannabis, or cannabis delivery devices, a dispensing organization shall:

1.a. Maintain a fully operational security alarm system that secures all entry points and perimeter windows and is equipped with motion detectors; pressure switches; and duress, panic, and hold-up alarms; or

b. Maintain a video surveillance system that records continuously 24 hours each day and meets at least one of the following criteria:

(I) Cameras are fixed in a place that allows for the clear identification of persons and activities in controlled areas of the premises. Controlled areas include grow rooms, processing rooms, storage rooms, disposal rooms or areas, and point-of-sale rooms;

(II) Cameras are fixed in entrances and exits to the premises, which shall record from both indoor and outdoor, or ingress and egress, vantage points;

(III) Recorded images must clearly and accurately display the time and date; or

(IV) Retain video surveillance recordings for a minimum of 45 days or longer upon the request of a law enforcement agency.

2. Ensure that the organization's outdoor premises have sufficient lighting from dusk until dawn.

3. Establish and maintain a tracking system approved by the department that traces the low-THC cannabis or medical cannabis from seed to sale. The tracking system shall include notification of key events as determined by the department, including when cannabis seeds are planted, when cannabis plants are harvested and destroyed, and when low-THC cannabis or medical cannabis is transported, sold, stolen, diverted, or lost.

4. Not dispense from its premises low-THC cannabis, medical cannabis, or a cannabis delivery device between the hours of 9 p.m. and 7 a.m., but may perform all other operations and deliver low-THC cannabis and medical cannabis to qualified patients 24 hours each day.

5. Store low-THC cannabis or medical cannabis in a secured, locked room or a vault.

6. Require at least two of its employees, or two employees of a security agency with whom it contracts, to be on the premises at all times.

7. Require each employee to wear a photo identification badge at all times while on the premises.

8. Require each visitor to wear a visitor's pass at all times while on the premises.

9. Implement an alcohol and drug-free workplace policy.

10. Report to local law enforcement within 24 hours after it is notified or becomes aware of the theft, diversion, or loss of low-THC cannabis or medical cannabis.

(e) To ensure the safe transport of low-THC cannabis or medical cannabis to dispensing organization facilities, independent testing laboratories, or patients, the dispensing organization must:

1. Maintain a transportation manifest, which must be retained for at least 1 year.

2. Ensure only vehicles in good working order are used to transport low-THC cannabis or medical cannabis.

3. Lock low-THC cannabis or medical cannabis in a separate compartment or container within the vehicle.

4. Require at least two persons to be in a vehicle transporting low-THC cannabis or medical cannabis, and require at least one person to remain in the vehicle while the low-THC cannabis or medical cannabis is being delivered.

5. Provide specific safety and security training to employees transporting or delivering low-THC cannabis or medical cannabis.

(7) DEPARTMENT AUTHORITY AND RESPONSIBILITIES.–

(a) The department may conduct announced or unannounced inspections of dispensing organizations to determine compliance with this section or rules adopted pursuant to this section.

(b) The department shall inspect a dispensing organization upon complaint or notice provided to the department that the dispensing organization has dispensed low-THC cannabis or medical cannabis containing any mold, bacteria, or other contaminant that may cause or has caused an adverse effect to human health or the environment.

(c) The department shall conduct at least a biennial inspection of each dispensing organization to evaluate the dispensing organization's records, personnel, equipment, processes, security measures, sanitation practices, and quality assurance practices.

(d) The department may enter into interagency agreements with the Department of Agriculture and Consumer Services, the Department of Business and Professional Regulation, the Department of Transportation, the Department of Highway Safety and Motor Vehicles, and the Agency for Health Care Administration, and such agencies are authorized to enter into an interagency agreement with the department, to conduct inspections or perform other responsibilities assigned to the department under this section.

(e) The department must make a list of all approved dispensing organizations and qualified ordering physicians and medical directors publicly available on its website.

(f) The department may establish a system for issuing and renewing registration cards for patients and their legal representatives, establish the circumstances under which the cards may be revoked by or must be returned to the department, and establish fees to implement such system. The department must require, at a minimum, the registration cards to:

1. Provide the name, address, and date of birth of the patient or legal representative.
2. Have a full-face, passport-type, color photograph of the patient or legal representative taken within the 90 days immediately preceding registration.
3. Identify whether the cardholder is a patient or legal representative.
4. List a unique numeric identifier for the patient or legal representative that is matched to the identifier used for such person in the department's compassionate use registry.
5. Provide the expiration date, which shall be 1 year after the date of the physician's initial order of low-THC cannabis or medical cannabis.
6. For the legal representative, provide the name and unique numeric identifier of the patient that the legal representative is assisting.
7. Be resistant to counterfeiting or tampering.

(g) The department may impose reasonable fines not to exceed $10,000 on a dispensing organization for any of the following violations:

1. Violating this section, s. 499.0295, or department rule.
2. Failing to maintain qualifications for approval.
3. Endangering the health, safety, or security of a qualified patient.
4. Improperly disclosing personal and confidential information of the qualified patient.
5. Attempting to procure dispensing organization approval by bribery, fraudulent misrepresentation, or extortion.
6. Being convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the business of a dispensing organization.
7. Making or filing a report or record that the dispensing organization knows to be false.
8. Willfully failing to maintain a record required by this section or department rule.
9. Willfully impeding or obstructing an employee or agent of the department in the furtherance of his or her official duties.
10. Engaging in fraud or deceit, negligence, incompetence, or misconduct in the business practices of a dispensing organization.
11. Making misleading, deceptive, or fraudulent representations in or related to the business practices of a dispensing organization.
12. Having a license or the authority to engage in any regulated profession, occupation, or business that is related to the business practices of a dispensing organization suspended, revoked, or otherwise acted against by the licensing authority of any jurisdiction, including its agencies or subdivisions, for a violation that would constitute a violation under Florida law.
13. Violating a lawful order of the department or an agency of the state, or failing to comply with a lawfully issued subpoena of the department or an agency of the state.

(h) The department may suspend, revoke, or refuse to renew a dispensing organization's approval if a dispensing organization commits any of the violations in paragraph (g).

(i) The department shall renew the approval of a dispensing organization biennially if the dispensing organization meets the requirements of this section and pays the biennial renewal fee.

(j) The department may adopt rules necessary to implement this section.

(8) PREEMPTION.–

(a) All matters regarding the regulation of the cultivation and processing of medical cannabis or low-THC cannabis by dispensing organizations are preempted to the state.

(b) A municipality may determine by ordinance the criteria for the number and location of, and other permitting requirements that do not conflict with state law or department rule for, dispensing facilities of dispensing organizations located within its municipal boundaries. A county may determine by ordinance the criteria for the number, location, and other permitting requirements that do not conflict with state law or department rule for all dispensing facilities of dispensing organizations located within the unincorporated areas of that county.

(9) EXCEPTIONS TO OTHER LAWS.–

(a) Notwithstanding s. 893.13, s. 893.135, s. 893.147, or any other provision of law, but subject to the requirements of this section, a qualified patient and the qualified patient's legal representative may purchase and possess for the patient's medical use up to the amount of low-THC cannabis or medical cannabis ordered for the patient, but not more than a 45-day supply, and a cannabis delivery device ordered for the patient.

(b) Notwithstanding s. 893.13, s. 893.135, s. 893.147, or any other provision of law, but subject to the requirements of this section, an approved dispensing organization and its owners, managers, and employees may manufacture, possess, sell, deliver, distribute, dispense, and lawfully dispose of reasonable quantities, as established by department rule, of low-THC cannabis, medical cannabis, or a cannabis delivery device. For purposes of this subsection, the terms "manufacture," "possession," "deliver," "distribute," and "dispense" have the same meanings as provided in s. 893.02.

(c) Notwithstanding s. 893.13, s. 893.135, s. 893.147, or any other provision of law, but subject to the requirements of this section, an approved independent testing laboratory may possess, test, transport, and lawfully dispose of low-THC cannabis or medical cannabis as provided by department rule.

(d) An approved dispensing organization and its owners, managers, and employees are not subject to licensure or regulation under chapter 465 or chapter 499 for manufacturing, possessing, selling, delivering, distributing, dispensing, or lawfully disposing of reasonable quantities, as established by department rule, of low-THC cannabis, medical cannabis, or a cannabis delivery device.

(e) An approved dispensing organization that continues to meet the requirements for approval is presumed to be registered with the department and to meet the regulations adopted by the department or its successor agency for the purpose of dispensing medical cannabis or low-THC cannabis under Florida law. Additionally, the authority provided to a dispensing organization in s. 499.0295 does not impair the approval of a dispensing organization.

(f) This subsection does not exempt a person from prosecution for a criminal offense related to impairment or intoxication resulting from the medical use of low-THC cannabis or medical cannabis or relieve a person from any requirement under law to submit to a breath, blood, urine, or other test to detect the presence of a controlled substance.

B. Section 14(1), ch. 2017-232, provides that:

"(1) EMERGENCY RULEMAKING.–

"(a) The Department of Health and the applicable boards shall adopt emergency rules pursuant to s. 120.54(4), Florida Statutes, and this section necessary to implement ss. 381.986 and 381.988, Florida Statutes. If an emergency rule adopted under this section is held to be unconstitutional or an invalid exercise of delegated legislative authority, and becomes void, the department or the applicable boards may adopt an emergency rule pursuant to this section to replace the rule that has become void. If the emergency rule adopted to replace the void emergency rule is also held to be unconstitutional or an invalid exercise of delegated legislative authority and becomes void, the department and the applicable boards must follow the nonemergency rulemaking procedures of the Administrative Procedures Act to replace the rule that has become void.

"(b) For emergency rules adopted under this section, the department and the applicable boards need not make the findings required by s. 120.54(4)(a), Florida Statutes. Emergency rules adopted under this section are exempt from ss. 120.54 (3)(b) and 120.541, Florida Statutes. The department and the applicable boards shall meet the procedural requirements in s. 120.54(a), Florida Statutes, if the department or the applicable boards have, before [June 23, 2017], held any public workshops or hearings on the subject matter of the emergency rules adopted under this subsection. Challenges to emergency rules adopted under this subsection are subject to the time schedules provided in s. 120.56(5), Florida Statutes.

"(c) Emergency rules adopted under this section are exempt from s. 120.54(4)(c), Florida Statutes, and shall remain in

effect until replaced by rules adopted under the nonemergency rulemaking procedures of the Administrative Procedures Act. By January 1, 2018, the department and the applicable boards shall initiate nonemergency rulemaking pursuant to the Administrative Procedures Act to replace all emergency rules adopted under this section by publishing a notice of rule development in the Florida Administrative Register. Except as provided in paragraph (a), after January 1, 2018, the department and applicable boards may not adopt rules pursuant to the emergency rulemaking procedures provided in this section."

[2]**Note.**—Section 14(2), ch. 2017-232, provides that:

"(2) CAUSE OF ACTION.—

"(a) As used in s. 29(d)(3), Article X of the State Constitution, the term:

"1. 'Issue regulations' means the filing by the department of a rule or emergency rule for adoption with the Department of State.

"2. 'Judicial relief' means an action for declaratory judgment pursuant to chapter 86, Florida Statutes.

"(b) The venue for actions brought against the department pursuant to s. 29(d)(3), Article X of the State Constitution shall be in the circuit court in and for Leon County.

"(c) If the department is not issuing patient and caregiver identification cards or licensing medical marijuana treatment centers by October 3, 2017, the following shall be a defense to a cause of action brought under s. 29(d)(3), Article X of the State Constitution:

"1. The department is unable to issue patient and caregiver identification cards or license medical marijuana treatment centers due to litigation challenging a rule as an invalid exercise of delegated legislative authority or unconstitutional.

"2. The department is unable to issue patient or caregiver identification cards or license medical marijuana treatment centers due to a rule being held as an invalid exercise of delegated legislative authority or unconstitutional."

[3]**Note.**—Section 29, ch. 2018-10, added subsection (17) "[i]n order to implement Specific Appropriations 422 and 424 of the 2018-2019 General Appropriations Act."

16101-P

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DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

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MEMORANDUM

DATE: November 1, 2016

TO: Linsay Hale, Dept. of Public Safety Standards and Training, Professional Standards Division Director

FROM: Stacy C. Posegate, Senior Assistant Attorney General
Government Services Section

SUBJECT: Adoption of a moral fitness standard prohibiting off-duty recreational marijuana use for certified criminal justice officers.

The Criminal Justice Denial Revocation Work Group (Work Group), convened by the Board of Public Safety Standards and Training (the "Board") to recommend rule changes, has considered recommending to the Board that it adopt as a moral fitness standard a rule prohibiting certified officers in the criminal justice disciplines from using marijuana recreationally. This would include police, corrections, parole and probation, regulatory specialists (OLCC), telecommunicators (911) and emergency medical dispatchers and instructors. Admitted or discovered off-duty recreational marijuana use would be a discretionary basis for denial, revocation or suspension even though recreational use is permitted under Oregon law. The sole rationale for the rule would be that marijuana possession and use remains unlawful under the federal Controlled Substance Act ("CSA").[1]

You have asked us whether the Board has authority to adopt the recommended rule. Your specific question and our short answer and analysis are set out below.

[1] 21 USC § 801 *et. seq.*

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QUESTION AND SHORT ANSWER

Question

May the Board adopt by rule a moral fitness standard that prohibits officers certified in criminal justice disciplines from off-duty recreational marijuana use on the ground that marijuana use is illegal under federal law?

Short answer

Probably not. We recognize that marijuana use and possession remains unlawful under federal law. But, we are unable to find legal support for the proposition that the federal status of marijuana alone makes its use or possession immoral. Instead, we think the fact that Oregon has legalized recreational marijuana use means that Oregon agencies should not determine that its use and possession are immoral acts. Moreover, Oregon historically has not held marijuana use or possession to be an administrative basis for disciplining or terminating a licensed or certified position. A moral standard prohibiting marijuana use would be inconsistent with the decisions of the Oregon's voters and courts.

DISCUSSION

A. The Board may adopt a moral fitness standard prohibiting off-duty recreational marijuana use only if that type of rule is permissible under its rule making authority in ORS 181A.410.

The Board is required to establish professional fitness standards for all public safety professionals and trainers who must hold a certification from DPSST.[2] The Board may, in its discretion, deny, suspend or revoke a safety officer or trainer's certification if the officer fails to meet any of these standards.[3] The Work Group is currently developing a proposal to make substantial changes to these standards for the criminal justice professionals. Within that context, they have asked whether the Board may establish, as a moral fitness standard, a rule prohibiting off-duty recreational marijuana use by its officers.

The answer to this question depends on the Board's statutory authority to adopt moral fitness standards.[4] The Board's relevant rule-making authority is 181A.410(1)(a),which provides:

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[2] ORS 181A.410(1)(a); *Romayor v. DPSST*, 265 Or App 93, 94-95, 339 P3d 442 (2014).
[3] ORS 181A.640(1)(c); OAR 259-008-0070.
[4] *Trebesch v. Employment Div.*, 300 Or 264, 267, 710 P2d 136 (1985) (An agency's rulemaking authority is determined by interpreting the statutes that regulate the agency using statutory construction principles.). Statutes are interpreted by pursuing what the legislature intended when it enacted the statute. *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009) (modifying *PGE v. BOLI*, 317 Or 606, 610-11, 859 P2d 1143 (1993). The analysis includes a review of text, context, legislative history, and, if necessary maxims of statutory construction. *Id.*

> The department shall recommend and the board shall establish by rule reasonable minimum standards of physical, emotional, intellectual and moral fitness for public safety personnel and instructors.

The terms in the statute that set the parameters for the Board's authority to adopt a moral fitness standard are "reasonable" and "moral fitness". "Reasonable" is a term of art and is defined as "1. Fair, proper, or moderate under the circumstances <reasonable pay>."[5] The term "moral fitness" is not defined in statute. And, so we look to the dictionary for a definition of its ordinary usage.[6] It provides:

> 1 a : of or relating to principles or considerations of right and wrong action or good and bad character : ETHICAL < [moral] values > <[moral] distinctions> < [moral] conduct><[moral] convictions> <a [moral] monster> [7]

"Fitness" is defined as:

> * * * 2 : the condition of being qualified or suitable : ELIGIBILITY, SOUNDNESS, CAPACITY * * * [8]

We also have the benefit of the Oregon Court of Appeals recent interpretation of the Board's authority, where it explained:

> The legislature has delegated the authority to define what constitutes the standard of moral fitness. *See* ORS 181.640(1)(a) ("The department shall recommend and the board shall establish by rule reasonable minimum standards of * * * moral fitness[.]"). Thus, the department is free to recommend—and the board to promulgate—new rules to reflect evolving notions about what minimum level of moral fitness is appropriate to demand of those who seek to obtain or maintain certification.[9]

Rules establishing moral fitness as a standard must also contain specific criteria for determining what conduct is immoral.[10] The Department's existing moral fitness rules, for the most part, do contain specific criteria and a rule outright prohibiting off-duty recreational marijuana use would qualify as specific criteria. But, it may not reflect "evolving notions of

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[5] Black's Law Dictionary 1293 (8th ed 1999). Where context suggests that the legislature intends to use a term that has a commonly recognized legal application, the ordinary dictionary meaning is not applied. *See, e.g., Dept. of Transportation v. Stallcup*, 341 Or 93, 99, 138 P3d 93 (2006) ("[W]e give words that have well-defined legal meanings those meanings."); *see also State v. Hess*, 342 Or 647, 650, 159 P3d 309 (2007) (resorting to *Black's Law Dictionary* to define the term "stipulation," which the court characterized as a "legal term").

[6] *PGE v. BOLI*, 317 Or at 611 ("[W]ords of common usage typically should be given their plain, natural and ordinary meaning."); *State v. Oliver*, 221 Or App 233, 237-38, 189 P3d 1240, *rev den*, 345 Or 318 (2008) (relevant dictionary definition is the one that makes sense in the context of the statute).

[7] WEBSTER'S THIRD NEW INT'L DICTIONARY 1468 (unabridged ed 1993).

[8] WEBSTER'S THIRD NEW INT'L DICTIONARY 860 (unabridged ed 1993).

[9] *Romayor v Dept of Pub Safety Standards & Training*, 265 Or App 93, 101, 339 P3d 442, 446 (2014).

[10] *Ross v. Springfield Sch. Dist. No. 19*, 300 Or 507, 515-16, 716 P2d 724 (1986)(rejecting the Fair Dismissals Appeals Board ("FDAB") attempt to define by final order "immorality" as conduct that violated the moral standards of the school community or the moral standards of the people of the State of Oregon.).

what minimum level of moral fitness is appropriate to demand of those who seek to obtain or maintain certification."[11]

B. Recreational marijuana use is not viewed as a moral issue by Oregonians.

Oregon's legalization of recreational marijuana use is a strong indicator of whether it would be appropriate for the Board to adopt a moral fitness standard prohibiting marijuana. By voting yes on Proposition 91, the majority of Oregon voters expressed that they disagreed with federal authorities that recreational marijuana use should be criminalized. An Oregonian who engages in recreational marijuana use is not immoral even if that use is unlawful under the CSA. The same logic would likely apply to certified safety officers.

Well before recreational marijuana use became legal in Oregon, use and possession, whether convicted or not, was not viewed by Oregon's courts as evidence of a moral failing. In 1985, the Supreme Court dismissed a disciplinary proceeding brought by the State Bar against an attorney based on a misdemeanor conviction for cocaine.[12] The issue was whether the misdemeanor conviction was one involving moral turpitude which would support the Bar's disciplinary proceeding.[13] The Supreme Court engaged in a lengthy analysis and discussion of Oregon's views on moral turpitude and whether across the country mere possession of a controlled substance was an act of moral turpitude. The Court concluded that possession alone was something very different than sale of a controlled substance because there is no specific intent to harm another.[14] For that reason, mere possession is not an act involving moral turpitude. [15] Therefore, there was no basis to administratively discipline an attorney for his misdemeanor conviction.[16]

The Oregon Supreme Court has also refused to find that the legislature created a public policy against employing safety officers who admittedly engage in recreational marijuana use.[17] The matter of *Washington Cty, Police Assn. v. Washington Cty,* involved an employment arbitration to settle whether Washington County could refuse to reinstate an officer it had terminated for proven marijuana use.[18] When an arbitrator ordered the county to reinstate the officer, the county refused to do so on the grounds that it was against public policy to employ an officer with a history of marijuana possession and use.[19]

The Court of Appeals sided with the County, finding "a public policy statement embedded in the statute * * * that public safety officers who use marijuana should not be

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[11] *Romayor*, 265 Or App at 101.
[12] *In re Conduct of Chase*, 299 Or 391, 400-402, 702 P2d 1082 (1985).
[13] The Bar sought to discipline the attorney based on ORS 9.527(2) which allows for disbarment, suspension or reprimand for conviction of a misdemeanor involving moral turpitude.
[14] *In re Conduct of Chase*, 299 Or at 402.
[15] *Id.* at 402-404.
[16] *Id.*
[17] *Washington Cty, Police Assn. v. Washington Cty,* 335 Or 198, 206-207, 63 P3d 1167 (2003).
[18] *Id.*
[19] *Id.* at 202-203.

certified."[20] But, the Supreme Court reversed because it could not locate *any* statute evincing a clear public policy against employing an officer that used marijuana recreationally.[21] Significantly, the Court also found that terminating an officer for an offense that was punishable only by a fine, made little sense in terms of public policy.[22] The Court ordered the County to comply with the arbitration award.[23]

What the current state of Oregon law and its prior cases discussing possession and use demonstrate is that evolving notions of what is appropriate to demand of a safety professional would not likely include a strict bar against off-duty recreational marijuana use. Possession and use alone are not enough to discipline an officer regardless of the status of marijuana under federal law. On this basis, we conclude that a moral standard that would have the effect of disciplining a safety officer solely for off-duty recreational use and possession is very likely outside the Board's rule making authority.

C. Legislative history gives no indication of whether marijuana use was considered a moral fitness issue when the legislature enacted the Board's rule making authority.

We find nothing in the legislative history of ORS 181A.410(1)(a) or ORS 181A.640(3) that adds to or changes our analysis. The legislature included the term "moral fitness" when the statute was first enacted in 1961.[24] There is no testimony or other information from which we could infer what the legislature intended when it included this term. We assume from the lack of history and the legislature's use of delegative terminology, that the legislature intended for the agency to define these terms – but to do so in a way that sets a measurable, considered standard.

CONCLUSION

The Board's rulemaking authority is extremely broad and it has been given a broad delegation of power to set reasonable minimum standards. Even so, a rule prohibiting marijuana use solely because it remains unlawful under federal law is not a seemingly reasonable standard for moral fitness. In fact, we are doubtful that we would ever be able to find any instance in Oregon law where an act that is expressly permitted by State law can reasonably be identified as "immoral." Instead, we find case law that expressly does not view possession of controlled substances to be a moral issue and some indication on the federal side that marijuana use, even if unlawful under the CSA, is a moral issue.

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[20] *Id.* at 206.
[21] *Id.*
[22] *Id.* at 207.
[23] The officer was later decertified by DPSST pursuant to an administrative rule that provided a minimum standard of moral fitness that was substantially amended in 2009. *Cuff v. DPSST*, 217 Or App 292, 175 P3d 983 (2007). The decision was upheld in 2009, but the issues for appeal are not relevant to our analysis here.
[24] Oregon Laws 1961, chapter 721, section 2.

We advise, based on this review, that the Board continue to treat marijuana use similar to alcohol use for its certification processes. And, we further caution that any rule that Board may adopt that would deny or discipline an officer based on marijuana use would pose a high degree of risk for a successful challenge.

FDLE Medicinal/Recreational Marijuana Survey

State	State-Legalized Medicinal Marijuana: Use by Officers	State-Legalized Recreational Marijuana: Use by Officers
Alaska	Yes. Cannot use marijuana within one year of hire date and certification will be revoked for marijuana use after becoming employed.	Yes. Cannot use marijuana within one year of hire date and certification will be revoked for marijuana use after becoming employed.
Arkansas	Yes. Law enforcement officers would be required to use sick leave while using medical marijuana.	No.
California	Yes. Use is prohibited based on interpretation of federal law regarding drug use and possession of a firearm, regardless if the officer has obtained medical marijuana authorization under California law.	Yes. Use is prohibited based on interpretation of federal law regarding drug use and possession of a firearm, regardless if the officer has obtained medical marijuana authorization under California law.
Colorado	Yes. While there is no specific prohibition, most agencies in Colorado prohibit use by their officers based on federal law making marijuana illegal.	Yes. While there is no specific prohibition, most agencies in Colorado prohibit use by their officers based on federal law making marijuana illegal.
Delaware	Yes. While there is a requirement for a negative drug screen for marijuana for all police applicants (no exceptions) no specific regulation regarding past usage exists and is determined by each agency.	No.
Florida	Yes.	No.
Guam	Yes. No prohibition for officers.	Yes. No prohibition for officers.
Idaho	No	No.
Illinois	Yes. The use of medical marijuana is prohibited for officers.	No. State laws criminalize the use of recreational marijuana.
Kansas	No.	No.

FDLE Medicinal/Recreational Marijuana Survey

State	State-Legalized Medicinal Marijuana: Use by Officers	State-Legalized Recreational Marijuana: Use by Officers
Louisiana	Yes (Currently no physicians are prescribing). Currently no prohibition for officer, but no allowance either.	No.
Maine	Yes. Currently rely on federal prohibition of officers carrying firearms while using a federally scheduled drug.	Yes. Currently rely on federal prohibition of officers carrying firearms while using a federally scheduled drug.
Maryland	Yes. Current regulations prohibit current use and any usage within the 3 years prior to certification.	No.
Massachusetts	Yes. POST does not have the authority to establish regulations prohibiting use; however state chiefs of police association has issued a legal opinion advising that police agencies have the jurisdiction to prohibit use.	Yes. POST does not have the authority to establish regulations prohibiting use; however state chiefs of police association has issued a legal opinion advising that police agencies have the jurisdiction to prohibit use.
Michigan	Yes. No prohibition for officers.	No.
Mississippi	Yes (Treatment is limited to individuals with debilitating epileptic conditions from a solution prepared from cannabis plant extract). No prohibition for officers.	No.
Missouri	No	No.
Montana	Yes. No prohibition for officers, but if charged and convicted of distributing marijuana it would be a felony and they would not meet the minimum qualifications for appointment.	No.
Nebraska	No	No.

FDLE Medicinal/Recreational Marijuana Survey

State	State-Legalized Medicinal Marijuana: Use by Officers	State-Legalized Recreational Marijuana: Use by Officers
Nevada	Yes. State law and regulations prohibit the use of, or dependence on, illegal drugs (marijuana remains a federal crime). In addition state law allows and encourages police agencies to adopt policies that prohibit the on and off duty use of marijuana.	Yes. State law and regulations prohibit the use of or dependence on illegal drugs (Marijuana remains a federal crime). In addition state law allows and encourages police agencies to adopt policies that prohibit the on and off duty use of marijuana.
New Jersey	Yes. Currently reviewing implications for officers.	No.
New York	Yes. The law does not bar the enforcement of a policy prohibiting an employee (any profession) from performing his or her employment duties while impaired by a controlled substance. Law also does not require any person or entity to do any act that would put the person or entity in violation of federal law or cause it to lose a federal contract or funding.	No.
North Dakota	Yes. While there are no specific prohibitions, the POST may deny, refuse to renew, suspend, revoke, or impose probationary conditions.	No.
Ohio	Yes. While there are no specific prohibitions, any employer may enforce a drug free workplace.	No.
Oregon	Yes. The legal use of marijuana is treated the same as alcohol for certification purposes-it is not a disqualifier.	Yes. For certification purposes legal use is not restricted, individual employers may develop employment policies if they want to prohibit recreational use.
South Carolina	No.	No.

FDLE Medicinal/Recreational Marijuana Survey

State	State-Legalized Medicinal Marijuana: Use by Officers	State-Legalized Recreational Marijuana: Use by Officers
Tennessee	Yes (authorization for legal use is limited to cannabis oil for intractable seizures only) No prohibition for officers.	No.
Virgin Islands	No.	Yes. Possession of less than one ounce is a civil penalty.
Virginia	No.	No.
Washington	Yes. Use by officers is regulated by each agency; no prohibition in POST laws.	Yes. Use by officers is regulated by each agency; no prohibition in POST laws.
West Virginia	Yes (taking effect in late 2018). No specific prohibition for officers.	No. If an officer was charged and convicted it would prompt a certification review.
Wyoming	No.	No.