

To Smoke or Not to Smoke? New Jersey will answer this question at the polls when it comes to legalizing the personal use of marijuana, but what happens then? For pending criminal matters, what lies ahead if the marijuana laws change?

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This November, New Jersey voters will decide whether or not to amend the New Jersey Constitution to legalize the possession and use of marijuana for persons age 21 and older and to legalize the cultivation, processing and sale of retail marijuana. Initially, the New Jersey legislature tried to legalize marijuana without a constitutional amendment, but it did not have enough votes to pass the legislation. That led to the call for a constitutional amendment, thereby putting the decision of whether to legalize marijuana in the hands of the people of New Jersey. On every ballot in New Jersey, the first question on the back will state:

CONSTITUTIONAL AMENDMENT TO LEGALIZE MARIJUANA

Do you approve amending the Constitution to legalize a controlled form of marijuana called “cannabis”?

Only adults at least 21 years of age could use cannabis. The State commission created to oversee the State’s medical cannabis program would also oversee the new, personal use cannabis market.

Cannabis products would be subject to the State sales tax. If authorized by the Legislature, a municipality may pass a local ordinance to charge a local tax on cannabis products.

The interpretive statement is as follows:

INTERPRETIVE STATEMENT

This amendment would legalize a controlled form of marijuana called “cannabis.” Only persons at least 21 years of age could use cannabis products legally.

The Cannabis Regulatory Commission would oversee the new adult cannabis market. This commission was created in 2019 to oversee the State’s medical cannabis program. The scope of the commission’s new authority would be detailed in laws enacted by the Legislature.

All retail sales of cannabis products in the new adult cannabis market would be subject to the State’s sales tax. If authorized by the Legislature, a municipality may pass a local ordinance to charge a local tax on cannabis products.

This question, according to polls, is more than likely to be answered in the affirmative. If passed, it would take effect on January 1, 2021. New Jersey would be the 12th state, in addition to the District of Columbia, to legalize marijuana if it passes.

Advocates for the legalization of marijuana argue that it will boost the economy by creating jobs and bringing in millions of dollars of tax revenue for New Jersey. They also point to the disparities in marijuana arrests, with Black residents facing arrest more than three times as much as white people in New Jersey, and that legalization will correct a social injustice.

The five-member Cannabis Regulatory Commission (CRC), which was first established to oversee the state's medical-marijuana program, would be responsible for regulating the cultivation, processing, and sale of recreational marijuana. Along with the age restriction, cannabis would be subject to New Jersey’s 6.625% sales tax. The amendment also authorizes the Legislature to enact a law letting municipalities collect a tax on cannabis of up to 2%. The ballot measure does not provide any additional specifics, such as possession limits, home-grow rules, and retail regulations. The CRC and state legislature would need to enact additional laws and regulations.

There are Unanswered Questions about Adult-Use, But Criminal Laws May Apply

What does this mean for the ordinary citizen? What about police encounters? When will all of this be put into action? Not every question can be answered at this point, but there are some important things for everyone to consider going forward.

Right now, the penalties for marijuana offenses range from town ordinances to felonies. Obviously, distribution offenses or felonies involving marijuana and the possession of firearms are the most serious and could call for prison sentences.

Laws, Ordinances and Regulations Need Amendments

The laws and regulations that accompany such a significant change will take some time to propose and enact. Even if marijuana becomes legal January 1, 2021, the marijuana retail industry will not be set up by then. Numerous laws, ordinances and regulations have to be amended and enacted prior to that occurring. A lot of regulation will come from the CRC, which will be given authority by laws enacted by the New Jersey Legislature. The constitutional amendment does not provide a timetable as to when it will be implemented. In other states, the retail sale of marijuana was not fully operational for years even after personal use was legalized. In Maine alone, it took four years to come to fruition.

Retail Licenses Need Regulations

Retail licenses will take some time to regulate and acquire. Moreover, some municipalities may prohibit retail stores in their towns. However, those municipalities will not be able to stop legal delivery services or the personal use in private residences. What is likely to happen is that the first producers/cultivators that will be involved in the retail sale of marijuana will be the same entities that grow/cultivate/produce medical marijuana. However, there are less than five entities involved in that, and they will not be able to keep up with the retail demand. It will have to be expanded to retail stores, perhaps even farms, in the future. All of this is going to take some time to set up and regulate.

Will Marijuana be Illegal Until January 1, 2021?

In the short term, this amendment takes effect January 1, 2021. During the time between November 3, 2020, (or possibly longer depending on how long the ballots take to count), and December 31, 2020, marijuana will still be illegal. Does that mean police will arrest people and/or search vehicles or homes based on the presence of marijuana? They certainly have every right to, and may continue to enforce the “lame duck” laws unless the Attorney General’s Office issues a directive telling them to stand down during that time.

The better question is what will happen to current prosecutions under the current marijuana laws pending in municipal court. It makes sense to delay those cases until 2021, but that could be easier said than done based on the municipal courts’ desire to bring in as much revenue as possible before this substantial and lucrative avenue is closed.

As with medical marijuana, the possession and containers for retail marijuana will be heavily regulated. The packaging is very important when it comes to encounters with police outside the home. Even now, individuals who do not have medical marijuana properly packaged when they are pulled over or approached in public could face marijuana possessory offenses and/or the search and seizure of other contraband as a result of the marijuana.

This amendment and subsequent legislation and regulation does not turn New Jersey into the Wild West. This is not carte blanche for people to smoke marijuana on public streets or in stores, sell their personal “stash,” grow fields of plants, drive around and smoke marijuana or ingest marijuana gummies, etc. There will still be plenty of laws and regulation to curtail the illegal use of marijuana.

Does the New Marijuana Legislation Impact Criminal Matters?

As a criminal defense attorney, this change to the landscape of criminal law in New Jersey will have far-reaching effects that will likely have to be litigated in the years to come.

- First, there is no question that it will continue to be illegal to be under the influence of marijuana and operate a vehicle. However, the officer's observations about the smell of marijuana "burnt" (just smoked) vs. "raw" (unsmoked) and subsequent interactions from there will likely dictate how the officer develops probable cause to have the driver conduct field sobriety tests and possible arrest them.
- Second, there has been a myriad of cases where the "smell of marijuana" has allowed police officers to not only get drivers out of the car, but also to search the entire vehicle. Now that marijuana will arguably be akin to smoking a cigarette, (as long as the person is over 21), the smell of either "burnt" or "raw" marijuana is not automatic probable cause to get people out of the car or search their vehicles. (That being said, that will not stop many officers from proceeding as if it is automatic probable cause to do whatever they used to under the old laws).
- Third, "plain view" of a joint, roach, rolling papers, even "marijuana shavings" on the floor of the vehicle has allowed officers to again get drivers and passengers out of vehicles and search same. When it is legal, it will still be a problem to drive around smoking marijuana just as it is illegal to drive around with an open container of alcohol in a car. But the question will be whether or not an officer's "plain view" of these items will lead to searches and/or seizures under the new laws.

Searching Beyond Vehicles: What can we expect?

It is not just in vehicles that police have observed marijuana or marijuana paraphernalia that have led to police searches and/or seizures. These observations also happen in hotel rooms, houses, and even street corners. It is not so much the illegal activity of marijuana use and/or possession that is the issue, rather it is what police attempt to do after that observation that may possibly be called into question. Police cannot search for illegal contraband or get a search warrant if they see a person smoking cigarettes on their personal property; the same should now hold true for marijuana cigarettes.

This should include even when individuals share a smoking method (bong, pipe, joint, etc.) on their private property, even outside in their yard. Under the prior law, sharing marijuana with another person, even if it is not for money, could have been a distribution of marijuana under the criminal code. Now, if it is legal and being shared with adults over 21 on private property, it is arguably no longer distribution of a controlled dangerous substance. Accordingly, along with all the statutes and regulations that accompany the legalization of the personal use of marijuana, there could also be a relaxation of other searches and seizures based on the use of marijuana by law enforcement. Candidly, the job of law enforcement will be more difficult. This difficulty will lead to challenges of stops and seizures across the State.

Laws Against Transporting Legal Marijuana

Make no mistake, it is contrary to both State and Federal law to transport legal marijuana from New Jersey to other states where it is not legal. For example, if a person comes from Virginia to visit family and purchase marijuana, they may smoke it in New Jersey legally. However, if they purchase a pound of marijuana and bring it back to Virginia and get pulled over on the way, or make it back to their home state and are arrested for distributing it there, they could face a host of state and federal charges. It will also, like alcohol, be illegal for anyone under 21 to ingest marijuana, or anyone over 21 to provide it to people under 21.

Bottom Line: Changes are Coming and will Impact Criminal Law

Again, the landscape of criminal law when it comes to marijuana is about to change drastically. This change will take some time, and during this adjustment period law enforcement, the public, and the courts will have to navigate these cloudy times. Our criminal law practice will be watching these changes and helping clients navigate these times.

If you, or somebody you know has a marijuana-related case pending, is arrested during the lame duck period between the passage of the amendment and January 1, 2021, or otherwise charged with any offense related to marijuana, or has their vehicle or premises searched because of marijuana now or in the future, you will need the services of experienced and knowledgeable criminal defense attorneys to assist you.