Medical Marijuana: Rules and Regulations

Lauber Municipal Law, LLC

The Impact of Medical Marijuana on Missouri Cities

June 28, MPR
July 12, Jefferson City

Serving those who serve the public
Article 14, § 1 of the Missouri Constitution

- Amendment 2 was approved by Missouri voters in the November 2018 election.

- Purposes:
  - Permit state-licensed physicians to recommend marijuana for medical purposes to patients with certain illnesses and medical conditions.
  - Permit patients with qualifying medical conditions to discuss with their physicians the use of medical marijuana as treatment.
  - Permit qualifying patients to use medical marijuana for treatment for certain illnesses and medical conditions under the supervision of a physician.
Amendment 2 tasks the Missouri Department of Health and Senior Services (DHSS) with the regulation of medical marijuana:
- Registration of qualifying patients and primary caregivers
- Licensing medical marijuana facilities

19 CSR 30-95.025 through 19 CSR 30-95.100 are emergency rules that expire on February 27, 2020.

19 CSR 30-95.010 (Definitions) and 19 CSR 30-95.110 (Physicians) are proposed rules.
Timeline for DHSS Implementation

- **December 6, 2018** – Effective date of Amendment 2
- **January 5, 2019** – DHSS begins accepting pre-filed application fees
- **June 4, 2019** – DHSS publishes application forms and instructions based on finalized rules
- **July 4, 2019** – DHSS begins accepting qualifying patient and primary caregiver ID applications
- **August 3, 2019** – DHSS begins accepting facility license applications
- **December 31, 2019** – DHSS approves facility applications
Qualifying Patient – 19 CSR 30-95.030

- A qualifying patient is a Missouri resident diagnosed with at least one qualifying medical condition.
- Qualifying medical conditions:
  - Cancer
  - Epilepsy
  - Glaucoma
  - Intractable migraines unresponsive to other treatments
  - Chronic medical conditions causing severe, persistent pain, muscle spasms (MS, seizures, Parkinson’s, Tourette’s, etc.)
  - Debilitating psychiatric disorders (PTSD)
  - HIV or AIDS
  - Chronic medical condition normally treated with prescription medications that could lead to physical or psychological dependence
  - Any terminal illness
  - Other chronic, debilitating medical conditions (Hepatitis C, IBS, Crohn’s disease, Huntington’s disease, autism, neuropathies, etc.)
• Must obtain a new physician certification at least annually.
• Qualifying patient IDs are issued by DHSS and include unique numbers for each patient.
• A qualifying patient may also be issued a cultivation ID card that permits them to cultivate plants at home.
• A qualifying patient’s ID card may be revoked for violating any provision of 19 CSR 30-95.030.
• A qualifying patient under the care of a primary caregiver may not serve as a primary caregiver for another qualifying patient.
Primary Caregiver - 19 CSR 30-95.030

- An individual 21 years or older who has a significant responsibility in managing the well-being of a qualifying patient.
- An individual may serve as primary caregiver for up to 3 qualifying patients.
- No individual may serve as primary caregiver for a qualifying patient who already has 2 primary caregivers.
Medical Marijuana Use

• Amendment 2 prohibits medical marijuana consumption in a public place, unless otherwise provided by law.

• Medical marijuana may be administered by any of the following methods:
  • Capsules, teas, oils, other marijuana-infused products
  • Vaporization or smoking of dried flowers, buds, plant materials, extracts or oils
  • Ointments or balms
  • Transdermal patches and suppositories
  • Marijuana-infused food
Medical Marijuana Purchase and Possession – 19 CSR 30-95.030

• Qualifying patients may only purchase up to 4 ounces of dried, unprocessed marijuana (or its equivalent) in a 30-day period.

• If a qualifying patient does not cultivate marijuana, they may possess up to a 60-day supply (8 ounces) of dried, unprocessed marijuana or its equivalent.

• If a qualifying patient does cultivate marijuana, they may possess up to a 90-day supply (12 ounces) of dried, unprocessed marijuana or its equivalent.
Residential Cultivation - 19 CSR 30-95.030

- Must be issued a cultivation license from DHSS
- Cultivation must be done in an enclosed, locked facility as defined in 19 CSR 30-95.010
  - Indoor
    - Stationary closet, room, garage, greenhouse
    - Locks and other security devices
    - Only accessible to the qualifying patient or primary caregiver
    - Must inform DHSS
  - Outdoor
    - Enclosed on all sides, except base, with chain-link fencing, wooden slats, etc.
    - Cannot be accessed from the top
    - Plants not visible from adjacent property either at ground level or from any level of a structure
    - Locks and other security devices
    - Only accessible to the qualifying patient or primary caregiver
    - Must inform DHSS
Residential Cultivation, cont.
19 CSR 30-95.030

• A qualifying patient may cultivate in a single enclosed, locked facility:
  • 6 flowering plants
  • 6 nonflowering plants (over 14 inches)
  • 6 clones (under 14 inches)

• Two qualifying patients may share a single enclosed, locked facility.
  • 12 flowering plants
  • 12 nonflowering plants
  • 12 clones

• Exception: if one of the qualifying patients is also a primary caregiver holding a cultivation license for a third qualifying patient, they may cultivate an additional 6 flowering plants, 6 nonflowering, and 6 clones
Medical Marijuana Facilities
19 CSR 30-95.040

- 5 different types of medical marijuana facilities:
  - Dispensary facility
  - Cultivation facility
  - Infused products manufacturing facility
  - Testing facility
  - Transportation facility

Knox Medical greenhouse in FL
• DHSS is currently limiting the number of dispensaries to 192; 24 per United States congressional district.

• DHSS requirements:
  • Extensive employee training
  • Educational materials for customers
  • Report any theft, or attempted theft, to DHSS within 24 hours
  • Designed to provide limited access to qualifying patients/primary caregivers
  • Limit sales to only those authorized and in the amounts they are authorized to purchase
  • No consumption of medical marijuana on premises
  • No disbursement of medical marijuana as promotional event
Medical Marijuana Dispensary
19 CSR 30-95.080

Scottsdale Dispensary – Medical Marijuana Harvest of AZ

Little Trees Dispensary, CA
Medical Marijuana Cultivation Facility
19 CSR 30-95.050

- DHSS is currently limiting the number of cultivation facilities to 60.
- DHSS requirements:
  - Extensive employee training
  - May cultivate medical marijuana in outdoor, indoor or greenhouse facilities:
    - Indoor – no more than 30,000 square ft of flowering plant canopy space
    - Outdoor – no more than 2,800 flowering plants
    - Greenhouse – no more than 30,000 square ft of flowering plant canopy space OR 2,800 flowering plants
  - If operating with multiple cultivation licenses, these numbers will be multiplied by the number of licenses
- Must develop, implement and maintain odor control plans
  - Reviewed and certified by a professional engineer or certified industrial hygienist
  - Unless in rural, unincorporated areas
Medical Marijuana Cultivation Facility
19 CSR 30-95.050

Tweed Marijuana, Inc. cultivation facility in Ontario

Attain, LLC cultivation facility in NY
Medical Marijuana-Infused Products Manufacturing Facility 19 CSR 30-95.060

• DHSS is currently limiting the number of infused products manufacturing facilities to 86.

• DHSS requirements:
  • Extensive employee training
  • Ingestible products must meet state food safety standards
  • If the facility uses volatile solvents, they must install air-handling systems and other controls to reduce the risk of explosions or fires
  • Develop, implement and maintain odor control plan
    • Reviewed and certified by a professional engineer or certified industrial hygienist
Medical Marijuana Testing Facility
19 CSR 30-95.070

• DHSS is currently limiting the number of testing facilities to 10.

• DHSS requirements:
  • Extensive employee training
  • Must comply with International Organization for Standardization (ISO) standards for personnel
  • Must be fully accredited to ISO standards by an International Laboratory Accreditation Cooperation recognized accreditation body
  • Must install and maintain security system in compliance with 19 CSR 30-95.070 standards
  • Must maintain records of sampling and testing for 5 years
  • Must test all medical marijuana produced by cultivation facilities or infused products manufacturing facilities
Medical Marijuana Testing Facility

19 CSR 30-95.070

Private testing lab in Canada

Testing facility in MI
Medical Marijuana Transportation Facility 19 CSR 30-95.100

• DHSS has not set a limit on the number of transportation facilities.

• DHSS requirements:
  • Extensive employee training
  • Must transport medical marijuana from the originating facility to its destination within 24 hours
  • Extensive security requirements
    • Vehicle requirements:
      • Unmarked
      • Secure lockbox/locking cargo area
      • Video monitoring
      • GPS tracking
  • Must report theft or attempted theft to DHSS within 24 hours
Action Steps

- Adopt general ordinance legalizing medical marijuana within city limits.
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About the Firm

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Medical Marijuana: Law Enforcement

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Law Enforcement Issues

• Possession
• Residential Cultivation
• Failure to Produce ID
• Driving Under the Influence
• Paraphernalia
Possession

- Amendment 2 only permits the possession of marijuana for medical use; it does not change any civil or criminal laws governing use of marijuana for nonmedical purposes.
- Qualifying patients/primary caregivers may be charged with illegal possession of marijuana if they possess amounts greater than permitted by law.
19 CSR 30-95.030(5)

Purchase limit:
- Qualifying patients may purchase 4 oz of dried, unprocessed marijuana in a 30-day period.

Possession limits:
- Qualifying patients who do not cultivate may possess up to a 60-day supply, or 8 oz.
- Qualifying patients who do cultivate may possess up to a 90-day supply, or 12 oz.
  - However, the supply must remain on property under their control.
Residential Cultivation

- Residential cultivation:
  - Must have a cultivation card
  - Enclosed, locked facility (19 CSR 30-95.010)
  - Single qualifying patient
    - 6 flowering
    - 6 nonflowering
    - 6 clones
  - Max limit for a single facility
    - 18 flowering
    - 18 nonflowering
    - 18 clones
- Qualifying patients/primary caregivers are **not** permitted to use combustible gases or other dangerous materials to extract resins from marijuana.
Failure to Produce ID

• Qualifying patient and primary caregiver IDs:
  • Issued by DHSS
  • Paper or electronic format

• Law enforcement may have access to DHSS’s system to verify whether someone has a qualifying patient/primary caregiver ID
Driving Under the Influence

• Amendment 2 does not permit an individual to operate a motor vehicle while under the influence of any marijuana

• Issues:
  • Impairment
  • Testing methods
  • Metabolization
  • Probable cause
  • Potential for abuse
Amendment 2 only mentions “paraphernalia” twice:

- “Medical marijuana dispensary facility” definition – licensed to acquire, store, sell, transport, and deliver marijuana, marijuana-infused products, and drug paraphernalia used to administer marijuana
- “Medical use” definition – the production, possession, delivery, distribution, transportation, or administration of marijuana or marijuana-infused product, or drug paraphernalia used to administer marijuana or a marijuana-infused product

State statutes still prohibit the manufacture, sale, and possession of paraphernalia
Action Steps

- Amend current criminal ordinances to address medical marijuana, and keep amending.
- Focus on educating and training officers.
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Medical Marijuana: Planning & Zoning

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Article 14, § 1 of the Missouri Constitution

• Amendment 2 states that “local governments may enact ordinances or regulations not in conflict with this section, or with regulations enacted pursuant to this section governing the time, place, and manner of operation of such facilities”.

• When drafting zoning regulations for medical marijuana facilities, it is important to remember that just as cities may not prohibit medical marijuana facilities, they may not enact ordinances or regulations that have the effect of prohibiting medical marijuana facilities.
City Discretion in Zoning

Zoning decisions that cities must make:

- Permitted uses in certain zoning districts
- By right versus by conditional use permit
- Distance requirements
  - Schools, churches, and daycares
  - Medical marijuana facilities
  - Residential districts
Medical Marijuana Facilities as Permitted Uses

- Cities need to decide in what zoning districts to allow the different medical marijuana facilities.
- Dispensaries are typically smaller retail facilities and work well in commercial zoning districts.
- Cultivation, infused products manufacturing, testing and transportation facilities work well in industrial or heavier commercial zoning districts.
By Right vs. Conditional Use Permit

• A city may choose to allow medical marijuana facilities by right in certain zoning districts, or by conditional use permit.

• Allowing medical marijuana facilities by right can help to direct medical marijuana facilities into certain zoning districts.

• Allowing medical marijuana facilities by conditional use permit allows a city to maintain more control over what medical marijuana facilities are permitted within the city.
Amendment 2 sets the limit for the distance requirement between medical marijuana facilities and then-existing schools, churches, and daycares at 1,000 feet, however, cities can choose to impose a lesser distance requirement.

Demarcation points

- 19 CSR 30-95.040(4)(B)(1) and (2)

Measuring

- 19 CSR 30-95.040(4)(B)(3) - shortest path lawfully traveled by foot
Medical Marijuana Facilities

- A city may choose to impose distance requirements between separate medical marijuana facilities.

- Demarcation points
  - Property lines

- Measuring
  - Straight line
Residential Districts

• A city may choose to impose distance requirements between medical marijuana facilities and residential districts

• Demarcation points
  • Property lines

• Measuring
  • Straight line
Action Steps

• Begin process of amending zoning code to address medical marijuana facilities and residential cultivation.
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Medical Marijuana: Personnel Issues

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We’re Living in Parallel Realities

Amendment 2 Legalized Medical Marijuana In Missouri

But…..

Medical Marijuana Remains Illegal Under Federal Law
Drug Free Workplace

- The **Drug-Free Workplace Act** of 1988 (41 U.S.C. 81)
- Cities receiving federal grants must maintain a Drug Free Workplace
- Examples
  - CDBG
  - COPS
  - USDA
  - Assistance to Firefighters Grant
  - FEMA
Drug Free Workplace

- No requirement to police marijuana use after hours
- Only required to maintain policy while grant is in effect
- Penalty is to lose all federal grants
- No possession of marijuana at workplace
- No use at workplace
- None in your system at work?
Drug-Free Workplace

The City takes seriously the problem of drug and alcohol abuse and is committed to providing a substance abuse-free workplace for its employees. Substance abuse of any kind is inconsistent with the behavior expected of our employees, subjects all employees and visitors to our facilities to unacceptable safety risks, and undermines our ability to operate effectively and efficiently. No employee may have, while on duty, in the employee’s possession, or on any property owned or controlled by the city, any illegal drug. No employee shall while on duty be under the influence of alcohol or illegal drugs. The City makes no exception to this rule for Medical Marijuana in any amount. Violation of this policy may result in immediate suspension or termination or the employee may be required to participate in a substance abuse program chosen by the City.
Police Officers

- Dept. of Justice makes clear, police officers may not use medical marijuana
- “Unlawful User” of a controlled substance may not possess a firearm (18 USC § 922(g)(3))
- Marijuana remains a Schedule I controlled substance
- Discharge or reassignment would be required
Drug Testing

- Certain employees have mandatory drug testing
  - By position – Transit employees
  - CDL Following certain accidents
    - Fatality
    - Injury with citation
- Even if employee is a Qualified Patient, DOT gives no discretion
- Amendment 2 prohibits driving with any amount of marijuana in system
Drugs Testing

- So how long does THC stay in body?
- Depends
  - how much body fat a person has
  - how often they consume the drug
  - how much someone smokes
  - the sensitivity of the drug test
- Single joint, probably 3 days
Drug Tests

- Urine 3–30 days after use.
- Saliva tests 24 hours after use.
- Hair tests up to 90 days after use.
- Blood tests can only detect THC for 3-4 hours.
Can Medical Marijuana be a reasonable accommodation?

No

ADA does not require accommodation of persons engaged in illegal drug use
Can City discipline and employee for medical marijuana use or possession?

Yes

- Amendment 2 specifically prohibits employee suing for wrongful discharge because of medical marijuana

- Case law in Colorado (where marijuana legal) held discharge for marijuana use permitted because it is still illegal federally
Action Steps

- Amend city personnel policies, particularly drug-free workplace policies to make it clear that no exception exists for medical marijuana despite the change in state law.

- Amend personnel policies and work agreements to reflect that certain classes of employees will not be allowed to have medical marijuana permits, even if all actual use is on off-hours.
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Medical Marijuana: Taxation and Regulation

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Tax on Medical Marijuana

- Amendment 2 imposes a 4% tax on sales from Dispensaries.
- Proceeds of the tax go entirely to Missouri Veterans Health Care Fund.
- Fund used to support the Medical Marijuana program.
- Remainder goes to veteran’s programs.
- Tax is in addition to regular sales tax.
Local Taxes

- Cities are prohibited from imposing additional taxes or fees on medical marijuana
- Cities will only get the existing sales tax
- Only Dispensaries will generate sales taxes
Sales Tax

 Amendment 2 does not exempt medical marijuana from sales tax

 Exemptions:

 Marijuana is not exempt from sales tax as a medicine §144.030.2(19) RSMo.
  - Exemption requires it to be dispensed by a pharmacist.

 Marijuana is not an “over-the-counter” drug
  - Does not meet labeling requirements of 21 CFR 201.66
  - FDA does not consider it an over-the-counter drug
Property Tax

- All types of medical marijuana facilities are subject to property tax
- Real Property
- Personal Property tax on growing equipment, etc.
Fees

Cities can collect business license fees
Cities can collect zoning fees
Cannot create new fees just for marijuana facilities
Cities can regulate reasonable time, place, and manner

Zoning Code vs. General Code?

City may set regulations
- Times of Operation
- Display of Licenses
- Distance between facilities
- Distance between facilities and churches, schools and daycare
- Smoke and odor control
Regulation

- Times of operation
  - Authorized under time, place, and manner
  - Must be reasonable
  - Varies by city preference

- Display of License
  - Already required by state rule
  - Allows easy verification
  - Ordinance should provide that lose of license requires shut down – allows city enforcement
Distance between Facilities

- Authorized as time, place and manner regulation
- Prevents one area from becoming saturated
- Limits total number of facilities
- Probably not an issue under current regulations
Regulation - Distance

Distance between facility and daycare, church, or school

- Authority: Specifically authorized by Amendment 2
- Up to 1000 feet, city may choose lesser
- City has authority to waive (not church, school, or daycare)

How measured?
- “Legal walking distance
Standard Distance vs. Legal Walking Distance

Standard Distance

Legal Walking Distance
Regulation

Distance between facility and daycare, church, or school

- Free standing facility
  - Closest wall of facility to property line of school; unless
  - School part of large building, then to nearest exit

- Facility in larger building
  - From exit of facility to property line of school; unless
  - School part of large building, then to nearest exit
Regulation - Distance

“Legal Walking Distance”

300.395. Prohibited crossing. — 1. Between adjacent intersections at which traffic control signals are in operation, pedestrians shall not cross at any place except in a crosswalk.

2. No pedestrian shall cross a roadway other than in a crosswalk in any business district.

3. No pedestrian shall cross a roadway other than in a crosswalk upon any street designated by ordinance.

4. No pedestrian shall cross a roadway intersection diagonally unless authorized by official traffic control devices; and, when authorized to cross diagonally, pedestrians shall cross only in accordance with the official traffic control devices pertaining to such crossing movements.
Regulation - Distance

Can State override Cities on Distance?
“If someone is saying, ‘Is it really that bad?’ I’ll go find a bunch of skunks and every evening I’ll put them outside your window,” Mr. Wondolowski said. “It’s just brutal.”
Regulation - Odor

- Common complaint in states which have adopted
- Department rules only require a plan
- City will need an enforceable ordinance

No cultivation facility shall emit any odor of marijuana which is capable of being detected by a person of ordinary senses outside of the boundary of the lot on which the facility is located. If a cultivation facility is located in a multiple-tenant building, the cultivation facility shall not emit any odor of marijuana which is capable of being detected by a person of ordinary senses outside of the tenant space in which the cultivation facility is located.
Public Consumption

- Amendment prohibits it
- Define public – Residence? Guests? Club?
- How do we enforce for other types of consumption?
Second hand smoke

- Multifamily residential
- Common areas
- Institutional housing
Sale of other products

- Treat like tobacco products?
- What ordinances need to be amended?
- Is possession of paraphernalia still a crime? (§ 579.074)
- Are “head shops” still illegal? (§ 579.040)
Signage

- Missouri has limited the content
- Need to incorporate local rules
Questions?
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