

THE PENNSYLVANIA MEDICAL
MARIJUANA LAW AND ITS EFFECT ON
MUNICIPAL PERSONNEL



ALLEGHENY LEAGUE OF MUNICIPALITIES

April 7, 2017

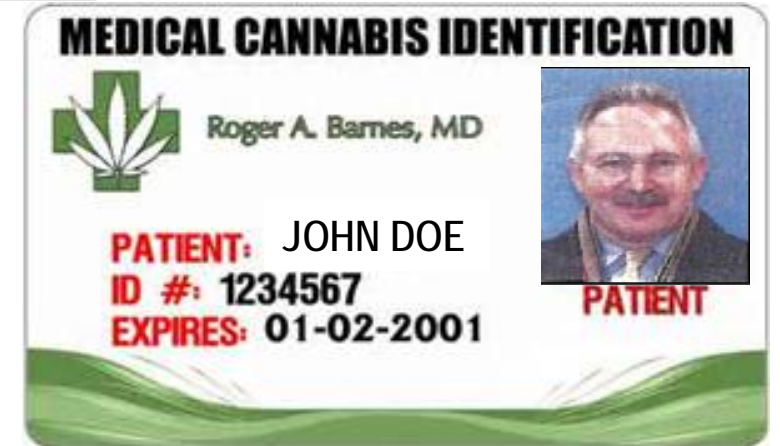
Michael L. Brungo, Esquire
Falco A. Muscante, Esquire
Peter J. Halessey, Esquire

Lawful and Unlawful Use

➤ Lawful Use Defined in the Act

■ Section 303(b)(1)(i)

- Medical marijuana may only be dispensed to a patient who receives a certification from a practitioner and is in possession of a valid identification card issued by the PA Department of Health.
 - “Patient” defined as an individual who (1) has a serious medical condition; (2) has met the requirements for certification under the Act; and (3) is a resident of this Commonwealth.



Serious Medical Condition

First question:

What is a “serious medical condition?”

Serious Medical Condition

- Defined in the Act as any of the following:
 - Cancer
 - AIDS/HIV Positive
 - Amyotrophic Lateral Sclerosis (ALS)
 - Multiple Sclerosis (MS)
 - Parkinson's Disease
 - Huntington's Disease

Serious Medical Condition

- Damage to the nervous tissue of the spinal cord
- Neuropathy
- Chronic Neuropathic Pain
- Epilepsy
- Seizures

Serious Medical Condition

- Inflammatory Bowel Disease
- Crohn's Disease
- Post Traumatic Stress Syndrome (PTSD)
- Glaucoma
- Sickle Cell Anemia
- Autism

Lawful and Unlawful Use

■ Bottom Line:

Individual must have prescription from a physician. There are no provisions for self-medicating.



Lawful and Unlawful Use

➤ **Section 303(b)(2) - Ingestion of medical marijuana limited to following forms:**

- Pill
- Oil
- Topical forms, including gels, creams, or ointments
- “A form medically appropriate for administration by vaporization or nebulization, excluding (at this time) dry leaf or plant form” (subject to possible future regulation)
- Tincture
- Liquid



Lawful and Unlawful Use

➤ **Unlawful Use of Medical Marijuana – Section 304**

- It is unlawful to:
 - Smoke medical marijuana.
 - Incorporate medical marijuana into edible form (unless incorporating into edible form to aid ingestion).
 - Seems contradictory, but looks to be banning edibles (Pot brownies, lollipops, etc.) while permitting approved form (pill) to be made more edible (mixed with applesauce).
 - Grow medical marijuana (unless permitted as a grower/processor).
 - Grow or dispense medical marijuana unless authorized as a health care medical marijuana organization.
 - Dispense medical marijuana unless authorized as a dispensary.



Personnel Provisions of the Act

➤ **Section 510 – Prohibitions**

- **Mandatory Prohibitions – Section 510(1) and (2)**
 - A patient may not operate or be in physical control of any of the following while under the influence with a blood content of more than 10 nanograms of active tetrahydrocannabinis per milliliter of blood in serum:
 - Chemicals which require a permit issued by the Federal Government or a state government or an agency of the Federal Government or a state government (sewage or water treatment facilities).
 - High voltage electricity or any other public utility.

Personnel Provisions of the Act

- A patient may not perform any employment duties at heights or in confined spaces, including but not limited to, mining while under the influence of medical marijuana.
- Your community may not be doing any mining but...
 - Use of lift or ladder to trim branches or hang holiday decorations.
 - Getting down in trench to repair broken sewer line.

Personnel Provisions of the Act

- Important to note: “Under the influence” is not defined anywhere else in the Act.
- Employer’s observations alone will not conclusively establish that someone is under the influence.
- Drug tests may show that marijuana was used sometime in the recent past.
- Tests will not show exactly when use occurred or that the employee was impaired at a particular point in time.
- Additional guidance on this issue in the upcoming regulations would be helpful.
- Look for this issue to be litigated.

Personnel Provisions of the Act

➤ Section 510 – Prohibitions

- Optional Prohibitions – Section 510(3) and (4)
 - A patient **may** be prohibited by an employer from performing any task which the employer deems life-threatening, to either the employee or any of the employees of the employer, while under the influence of medical marijuana. **The prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient.**
 - A patient may be prohibited by an employer from performing any duty which could result in a public health or safety risk while under the influence of medical marijuana. **The prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient.**

Employment Protections Under the Act

➤ **Section 2103(b) – Employment Protections for Patients**

- An employer may not discriminate against an employee solely due to their status as a user of medical marijuana
- An employer need not make any accommodation for the use of medical marijuana on the employer's premises. The Act does not limit the ability of the employer to discipline the employee for being under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for that position
- An employer is not required to commit any act that would put the employer or any person acting on the employer's behalf in violation of Federal law. (What Federal Laws are implicated for municipalities??)

Employment Protections Under the Act

- What is the “standard of care” for a particular employee’s position?
 - Conduct that falls below the standard of care for an employee’s position is a prerequisite to discipline.
 - What standard of care applies for a particular position is unclear.
 - Will be raised as a defense by employees facing discipline for being under the influence of medical marijuana while at work.
 - Expect litigation.

Restrictions

➤ **Section 1309(1)**

- The Act does not permit any person to undertake any task under the influence of medical marijuana when doing so would constitute negligence, professional malpractice, or professional misconduct.

Considerations

- Accommodation under the ADA – no duty to accommodate use of illegal drugs if unlawful under the Federal Controlled Substances Act.
- Employee Privacy – do not ask applicants or current employees if certified to use Medical Marijuana.
- Collective Bargaining Agreements – negotiated Drug/Alcohol Testing policies.
- Definition of “Under the Influence.”
- “Standard of Care” for each work position.

Hypothetical 1

- John, a Public Works employee and former US Army soldier, is caught by his supervisor smoking marijuana behind the Township's garage during his lunch break. John claims that he smokes marijuana to treat PTSD that he was diagnosed with after he was honorably discharged from the military. Should the Township discipline John?



Hypothetical 1

- Yes, it is illegal to smoke marijuana, regardless of its claimed medicinal value. The Act only allows for ingesting marijuana in certain ways, none of which involves smoking in plant form.
- What if John is using an electronic vape or an inhaler?

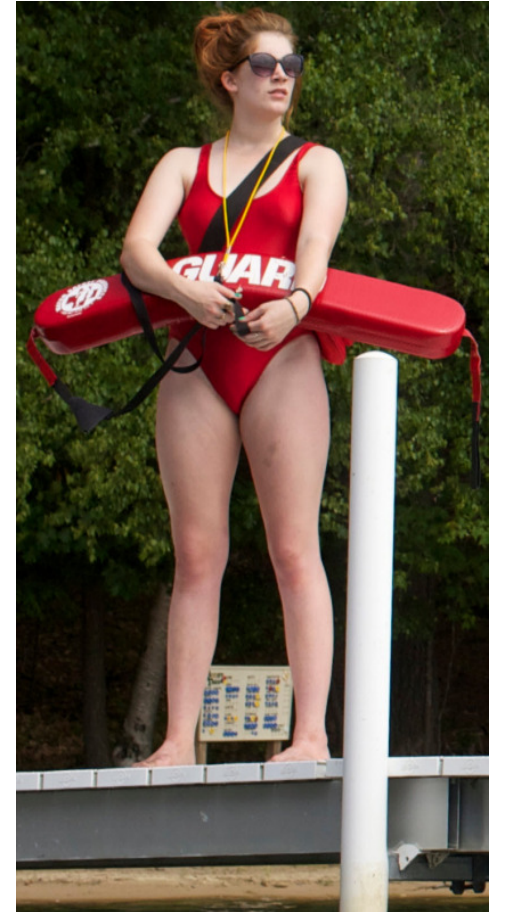


Hypothetical 1

- Use may be in permitted form.
- Further inquiry to determine whether certified to use and is prescribed.
- What are John's job duties?

Hypothetical 2

- The municipality owns a swimming pool at which it employs lifeguards during the summer months. It has recently come to the municipality's attention that Liz, a lifeguard, uses medical marijuana to treat an illness. Assume, for the purpose of this hypothetical that Liz's marijuana use is legal under the Act. The individual supervising the pool has never had reason to believe that Liz was ever under the influence during work, and has said that Liz is a wonderful employee in all respects. What can the municipality do?



Hypothetical 2

- Under Section 510(d), the municipality has an argument that it could prohibit Liz from serving as a lifeguard because her service could constitute a public safety hazard as she is responsible for the safety of swimmers. Realistically, the municipality should discuss this with Liz to ensure she is not under the influence while working in this capacity.
- What steps should the municipality take if they want to prohibit Liz from serving as a lifeguard?



Hypothetical 3

- Ashley is employed by the Public Works Department of a Borough. Ashley's usual duties include grass-cutting and general maintenance of Borough property that does not require her to use heavy machinery. In all respects, Ashley is a good employee with no disciplinary issues. One day, Councilman Jones sees Ashley exiting a medical marijuana dispensary in Pittsburgh with a bag, presumably containing medicinal marijuana. The Borough has never had any cause to suspect that Ashley has ever been under the influence while at work. Councilman Jones informs the rest of Council and indicates that he wants Ashley's employment to be terminated. Is this permitted?



Hypothetical 3

- Under 2103(b)(1), cannot discriminate based solely on individual's use of medicinal marijuana.
- What if it was winter and Ashley was required to operate the dump truck to plow and salt the roads?
- What if Ashley's Supervisor had given her two written warnings that she was not performing her job duties according to the Borough's standards?



Other Relevant Portions of the Act

- **Section 302(b) – Confidentiality and Public Disclosure – Public Information**
 - The following records are public information and shall be subject to the Right-to-Know Law
 - Applications for permits submitted by medical marijuana organizations.
 - Names, business addresses, and medical credentials of practitioners authorized to provide certifications to patients to enable them to obtain and use medical marijuana in Pennsylvania. All other practitioner registration information shall be confidential and exempt from disclosure under RTKL.
 - Information relating to penalties or other disciplinary actions taken against a medical marijuana organization or practitioner by the Department of Health for violation of the Act.

Other Relevant Portions of the Act

➤ **Section 2101.1(a) and (b) – Financial and Employment Interests**

- Financial Interests – An executive level public employee, public official, or party officer, or an immediate family member thereof, shall not intentionally or knowingly hold a financial interest in a medical marijuana organization or in a holding company, affiliate, intermediary, or subsidiary thereof, while the individual is an executive level public employee, public official, or party officer and for one year following termination of the individual's status as an executive level public employee, public official, or party officer.
- Employment – No executive level public employee, public official, or party officer, or an immediate family member thereof, shall be employed by a medical marijuana organization or by a holding company, affiliate, intermediary, or subsidiary thereof, while the individual is an executive level public employee, public official, or party officer and for one year following termination of the individual's status as an executive level public employee, public official, or party officer.

Other Relevant Portions of the Act

➤ **Section 2101.1(e)– Financial and Employment Interests**

■ Public Official Defined

- The Governor, Lt. Gov., member of the Governor’s Cabinet, Treasurer, Auditor General, and Atty. General.
- Member of the State Senate or House of Representatives.
- An individual elected or appointed to any office of a county or municipality that directly receives a distribution of revenue from the fund.
- An individual elected or appointed to a department, agency, board, commission, authority, or other governmental body not included in Paragraphs (1), (2), or (3) that directly receives a distribution of revenue from the fund.
- An individual elected or appointed to a department, agency, board, commission, authority, or other governmental body not included in Paragraphs (1), (2), or (3) with discretionary power which may influence or affect the outcome of an action or decision and who is involved in the development of regulation or policy relating to medical marijuana or who is involved in other matters under this Act.

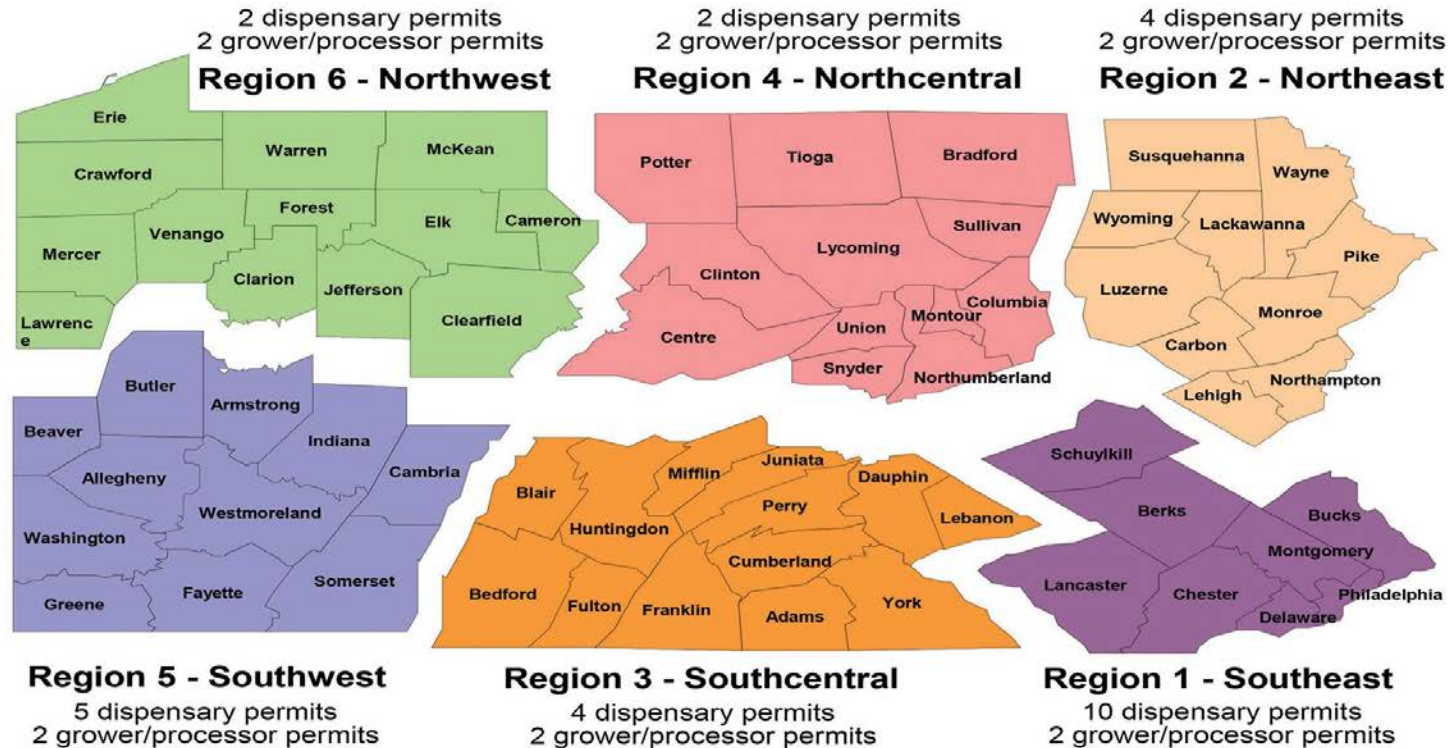
Other Relevant Portions of the Act

➤ **Section 2107 – Zoning**

- A grower/processor shall meet the same municipal zoning and land use requirements as other manufacturing, processing and production facilities that are located in the same zoning district.
- A dispensary shall meet the same municipal zoning and land use requirements as other commercial facilities that are located in the same zoning district.

Regional Breakdown

Pennsylvania Department of Health Medical Marijuana Regions



Issuance of Licenses

- The Act allows for the issuance of 25 Grower/Processor Licenses and 50 Dispensary Licenses.
- Pennsylvania has decided to issue licenses in Phases, we are currently in Phase 1. During this phase, Pennsylvania will issue 12 Grower/Processor Permits (2 in each Region) and 27 Dispensary Permits (5 total in Region 5, with 2 earmarked specifically for Allegheny County).
- Deadline to file applications for Phase 1 distribution was March 20, there is no timeline for the issuance of additional licenses.
- What to expect next...

Questions

Any questions, concerns or comments?



Questions and Comments can be directed to:

Michael L. Brungo, Esq.
mlb@mbm-law.net

Falco A. Muscante, Esq.
fam@mbm-law.net

Peter J. Halsey, Esq.
pjh@mbm-law.net

(Telephone) 412-242-4400

(Facsimile) 412-242-4377

SouthSide Works
424 South 27th, #210
Pittsburgh, PA 15203