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## They say the grass is greener: Could medical marijuana be coming to a town near you?

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Without much buzz, Sub. H.B. 523, Ohio's new medical marijuana statute, was passed by the General Assembly and signed into law. What does this mean for political subdivisions?

The straight dope

The new law states that medical marijuana is marijuana, as defined in the criminal provisions of the Ohio Revised Code, "cultivated, processed, dispensed, tested, possessed, or used for a medical purpose." However, marijuana remains illegal as a Schedule 1 substance under the federal Controlled Substances Act, creating significant tensions between state and federal laws. Although Ohio's statute expressly contained a provision urging legislators to influence federal lawmakers to reclassify marijuana off Schedule 1, the Drug Enforcement Agency again declined to do so this August, stating it was giving "enormous weight" to the Food and Drug Administration's conclusions that marijuana has "no currently accepted medical use in treatment in the United States" and remains vulnerable to abuse as the most

commonly used illicit drug. This disconnect between state and federal laws impacts a number of legal issues, some of which are discussed below.

The science is still doob-ious

While there are many documented health and workplace risks associated with using marijuana, there are a number of clinical trials underway with the consent of the federal government. These include evaluating the use of marijuana-based medications, currently produced in Great Britain and only available in other countries, to treat certain pediatric seizure disorders. However, scientists, the American Academy of Pediatrics and the Surgeon General caution further study and evaluation before more widely promoting medical marijuana.

Joint effort

Under Ohio's new law, an advisory board will help frame Ohio's Medical Marijuana Control Program. Then, the Department of Commerce will have responsibility for developing rules and regulations governing the business aspects of medical marijuana licenses, cultivation, sales, consumption and enforcement. The Ohio Medical Board will regulate physicians who wish to recommend — not prescribe — medical marijuana to patients and will monitor outcomes through periodic reports submitted by physicians. The Pharmacy Board will be responsible for licensing dispensaries and those who operate them.

The law enumerates 20 conditions that will qualify a registered patient for use, including for "pain that is either chronic and severe or intractable," but the regulatory bodies can reevaluate that list over time. Patients and patient caregivers will be required to register with the state to buy medical marijuana.

Up in smoke?

The state law limits the permissible forms of medical marijuana to oils, tinctures, plant materials, transdermal patches, edibles and other forms that may eventually be authorized by the Pharmacy Board. Medical marijuana cannot be home-grown or consumed in combustible (smoked) form; however, vaping is expressly permitted. The other limitation is that edibles cannot be in a form that is attractive to children.

We're not just blowing smoke!

The impact of state versus federal laws will impact employment, the prosecution of cases that implicate multiple statutes and even whether attorneys can advise clients on medical marijuana-related businesses. Specifically, on August 5, the Ohio Supreme Court's Board of Professional Conduct issued advisory opinion 2016-6, warning attorneys that they may not "provide legal services necessary for a client to establish and operate a medical marijuana enterprise or to transact business with a person or entity engaged in a medical marijuana enterprise." This opinion could

theoretically implicate certain aspects of a village solicitor, law director or city attorney's work and certainly creates a challenge for the Ohio Department of Commerce as it attempts to hire an attorney to develop its medical marijuana control program rules. Following this opinion, the Chief Justice of the Supreme Court directed staff to draft an amendment to the Ohio Rules of Professional Conduct, so as to clarify the services attorneys can offer.

While the law expressly states that employers are not required to accommodate employee use and that employees cannot sue employers for personnel decisions that implicate medical marijuana use, employment issues affecting municipalities will still arise based on at least the requirements imposed on CDL drivers, accommodation obligations under the Americans with Disabilities Act (for any underlying medical condition, not for the effects of using medical marijuana), workplace testing issues when a person tests positive but claims to not be impaired, implications for collective bargaining and grievances, and potential retaliation claims. Another safety-related aspect may involve an employer's general duty under OSHA law to keep all employees safe from known or foreseeable risks.

At this point, it is unclear whether group health plans may be required to cover recommended use as a form of treatment — unlike other states with medical marijuana laws, Ohio did not address this in the brokered version of the law that passed.

Similarly, since insurance coverage varies by underwriter and by state, it remains foggy whether employment practices liability coverage will cover instances involving personnel decisions based on an employee's use of medical marijuana.

What is known on the employment front is that a solidly written zero-tolerance or similar policy against substance abuse will serve as a bar to unemployment claims and potentially to workers' compensation claims where being under the influence resulted in a workplace accident.

In the zone

The law expressly permits local governments to legislatively regulate and even prohibit medical marijuana cultivation and sale through zoning laws. It also limits cultivation or sale within 500 feet of a school, public playground, church, public park or public library.

A pot of gold? High hopes for revenues?

Municipalities may react differently to this new law, depending on whether they view medical marijuana as a threat or an opportunity. Recently, the public officials of one predominantly rural central Ohio community have considered the possibility of medical marijuana as a source of revenue, jobs and development opportunities. Still, others have imposed moratoria to provide time to give their councils or zoning bodies time to study the matter after rules are promulgated by the state. While the

prospect of jobs, CAUV tax or income tax, or, conversely, the fear of wider-spread drug use and accidents, may influence municipalities, legal advisors of municipalities should understand and consider the full panoply of implications, including what, if any, ethical limitations may restrict their involvement.

The picture remains hazy

What can attorneys advising municipalities do now?

- Help your community update its personnel handbooks and consider whether any contract amendments should be negotiated with representatives of collectively bargained groups
- Review and update job descriptions for safety-sensitive aspects
- Review and understand your municipality's drug testing standards
- Train management personnel on how to observe and react to suspicious conduct
- Be prepared to advise your legislative body about zoning changes, the use of economic development incentives, law enforcement implications, potential prosecutorial issues and other aspects implicated by the new law
- Consider any enforcement and fiscal implications of permitted uses
- Know the ethical issues associated with dealing with cultivators, retailers or other persons or entities engaged in this enterprise