Act 230 Medical Cannabis Legislative Oversight Working Group

Patient Issue Subcommittee
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INTRODUCTION:

The Patient Rights Subcommittee met on five occasions since the formation of the Act 230 Working Group, and focused its work on eight specific areas. Each area was assigned to at least one subcommittee member who undertook research that informs the recommendations below. The recommendations touch upon the following areas:

- Access to medical cannabis for prospective patients without a valid/current form of ID;
- Traveling by registered patients and caregivers with medical cannabis within Hawai'i;
- Protections from discrimination by landlords;
- Protections from discrimination by employers;
- Insurance coverage;
- Addition of new debilitating qualifying conditions for the certification of medical cannabis;
- Drugged driving;
- Functionality of the Department of Health (DOH) medical cannabis registry;

ISSUE - Access to Medical Cannabis for Patients without a Current/Valid ID

RECOMMENDATIONS

a) Amend Hawai'i Revised Statutes (HRS) §303 (Application) and §306 (Renewals) regarding Civil Identification Cards to allow for applications and renewals by mail for applicants below the age of 80 and for cards that have been expired up to two years;

b) Review Hawai'i Administrative Rules (HAR) §19-149-18 (d) (Renewal by mail for applicants with physical or mental disability) to see if process can be streamlined for e.g. bedridden patients in hospices;

c) Clarify that a receipt for an application by mail for renewal for civil identification cards for applicants with a physical or mental disability (per HAR §19-149-18 (d)) is an acceptable form of identification for the purposes of enrolling in the DOH medical cannabis program;

d) Devise a reasonable accommodation by DOH for certain prospective patients without ID similar to the accommodation for applicants for a parking permit for a person with disabilities.

BACKGROUND

Currently state law only permits individuals 80 years of age and older to renew their driver's license or state identification via mail or online. This age cut-off is an arbitrary limit not matched by other states (see below.)

HRS §286-303(b) reads:

> Application for renewal of an identification card issued after November 1, 1998, for **an individual eighty years of age or older** may be done by mailing in a completed application and fee, if there is no change in name and citizenship status. The director shall adopt rules to allow for renewal by mail for individuals with physical or intellectual disabilities for whom application in person presents a serious burden.

Further, HRS §286-306 (a) states:

> . . .A cardholder may renew the cardholder's identification card **within six months before the day on which it expires** by filing an application in accordance with section 286-303 and paying the prescribed fee [established] by rules of the director.

Other States' Renewal Provisions

- Texas allows renewal by mail, phone, online or in person. Every other time, an in-person appearance is required to update photo. It can be expired within the last two years;[1]

- California has similar provisions, but the license can only have been expired for one year at most;[2]

- There are no age restrictions in either state.

Finally, DOH makes reasonable accommodations, e.g. for applicants for a parking permit for a person with disabilities:

> First time applicants who are unable to apply in person due to their disability, as indicated by their doctor on the application form, may designate a representative to apply on your behalf with all the required documents: applicant's proof of identification, completed application form and representative's identification.[3]

[1] See https://www.dps.texas.gov/DriverLicense/renewal.htm
[2] See https://www.dmv.ca.gov/portal/dmv/detail/online/dlrbi/dlfaqsmain
[3] See http://health.hawaii.gov/dcab/parking/obtaining-parking-permit/#How do I Renew my Parking Placard?

ISSUE – Travel within the State with Legally Grown or Purchased Medical Cannabis

RECOMMENDATIONS

a) Remove the explicit prohibition on interisland transportation in HRS §329-122 for patients and caregivers who wish to travel within Hawai'i with legally grown or purchased medical cannabis;

b) Remove the prohibition on patient and caregiver interisland travel with medical cannabis for laboratory testing purposes (also HRS §329-122.)

BACKGROUND

The medical cannabis dispensary law (Act 241 of 2015) expressly prohibited the transportation of any amount of medical cannabis when traveling interisland, including by registered patients or their primary caregivers of. Act 230 of 2016 loosened this prohibition, and authorized dispensaries to transport samples interisland for the "sole purpose of laboratory testing." While patients and caregivers were granted lab testing privileges with the enactment of Act 41 of 2017, the ban on interisland transportation for *any* purpose remains for these two classes.

The Legislature and the Executive Branch have been concerned about compliance with the 2013 Cole Memo when it comes to maintaining a well-regulated medical cannabis program with "robust controls" on paper and in practice.[4] The Cole Memo does not express any thoughts on whether patients traveling within a state with legally procured medical cannabis would constitute non-compliance. The memo is concerned with "threats to public safety, public health and other law enforcement interests" and with specific enumerated priority areas for enforcement.[5] The priority concern that comes closest to addressing interisland travel focuses on "preventing marijuana possession or use on federal property." Currently, such travel takes place within all states, including into federal airspace within Oregon, that have medical cannabis programs. Hawaii's geography, with federal waters existing between the islands, remains our dilemma. **However, a number of factors should help assuage concerns with any change to current law**:

1) The removal of the prohibition language will merely make the law silent, as it was prior to 2015, it does not explicitly authorize anything;
2) The requirement that testing be conducted in accordance with certain protocols can and should remain in place, regardless of whether it involves interisland transport;
3) Commercial flights within Oregon enter federal airspace when transporting medical cannabis patients;
4) The Transportation and Security Administration (TSA) has repeatedly stated that it does not search for controlled substances. If it happens upon any during the course of its regular duties, it will refer the matter to local law enforcement. In Hawai'i, an officer would then be able to verify whether the individual is indeed a registered medical cannabis patient;

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[4] Memorandum for All US Attorneys, Guidance Regarding Marijuana Enforcement; August 29, 2013; https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf

[5] Id.

5) Federal Aviation Administration rules have a carve out from a ban on pilots operating aircraft with controlled substances onboard.[6] The ban "does not apply to any carriage of narcotic drugs, marihuana, and depressant or stimulant drugs or substances authorized by or under any Federal or State statute or by any Federal or State agency;"[7]
6) HIDOT reached out to its counterparts in Alaska, which has a geography similar to Hawai'I, such "as the lack of road connections between locations, and not being geographically connected to the rest of the United States."[8]
    a. Regarding *commercial use quantities* transported by dispensaries/growers, a state-generated manifest is created and the TSA checks and confirms its authenticity. They have had "no problems;"
    b. Regarding *personal use quantities*, an interview is conducted to verify that the amount is legal and the person is of legal age. **If everything checks out, they are free to board a flight. NOTE: Flights within Alaska enter federal airspace and often fly over federal waters.** They maintain a record of contact in the event that a federal agency such as the FBI would want to pursue the individual for any reason;
    c. A comparable check within Hawai'i would also include verification that the person transporting cannabis is a registered 329 participant.
7) Recently, in *U.S. v. McIntosh*, the 9th Circuit upheld the current Congressional prohibition on the use of federal appropriations for the enforcement of federal cannabis laws in states where medical cannabis is authorized.[9] The opinion states:

> "We therefore conclude that, at a minimum, § 542 prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and *who fully complied with such laws*." (emphasis added)

8) Finally, this amendment to current law follows the spirit of *State v. Woodhall* (Hawai'i Supreme Court 2013.) In *Woodhall*, the court saw an untenable tension between one part of HRS §329 that authorized the use of medical cannabis, and another that the state argued prohibited the transportation of medical cannabis through any public area. Act 241 reacted to this ruling by amending HRS §329 to allow such transportation through public places, but instead added the interisland transport prohibition. Though the statute is no longer ambiguous regarding transportation, a new tension with the original purpose of the law was created.

In *Woodhall,* the petitioner/defendant specifically referred to HRS §329 Part IX and highlighted that the purpose of the medical cannabis law is:

> "to ensure that seriously ill people are not penalized *by the State* for the use of marijuana for strictly medical purposes when the patient's treating physician

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[6] Illicit Narcotics Air Shipments; Federal Register; July, 4, 1972; https://cdn.loc.gov/service/ll/fedreg/fr037/fr037129/fr037129.pdf
[7] Id.
[8] E-mail exchange between Robert Lee (HIDOT) and Lindsey Holmes (Office of the Alaska Attorney General), excerpts on file with Mr. Lee.
[9] *U.S. v. McIntosh*, 833 F.3d 1163, (9th Circuit 2013).

> provides a professional opinion that benefits of medical use of marijuana would likely outweigh the health risks for the qualifying patient."[10] (emphasis added)

To conclude: Explicitly prohibiting a patient from traveling within the state with his or her medicine does not necessarily comport with the Cole Memo. In fact, it creates a problem that did not exist without the prohibition, and instead ensures that a patient or caregiver is breaking state law and thus no longer in compliance with the Cole Memo or the Ninth Circuit ruling. The Ninth Circuit has clearly stated that the federal government cannot prosecute an individual or a state when complying with state medical cannabis laws. By changing the language, we remove the state prohibition that currently effectively means a patient traveling could be prosecuted under both state and federal law.

ISSUE – Continued Discrimination of Renters by Landlords and Condo Dwellers by their Associations

RECOMMENDATIONS

a) Require that the Hawai'i Public Housing Authority provide guidance regarding the 2011 U.S. Housing and Urban Development (HUD) memo regarding medical cannabis;

b) Insert language into HRS §489 (§489-2 & -3) to provide explicit protections for registered medical cannabis patients in "places of public accommodation" – providing an exception regarding smoking.

SUMMARY – Courtesy of the passage and enactment of recent legislation, even medical cannabis patients who do not live in or possess a single family dwelling have some measure of protections. (see Act 60 of 2014; Act 242 of 2015.) However, patients continue to report problems when they are unable to consume their medicine due to the fact that their chosen form of ingestion is via smoking. As long as a landlord or association bans all forms of smoking, the law allows them to prevent registered patients from smoking medical cannabis. Further, patients who consume medical cannabis in places of public accommodation, even when not smoking, face discrimination unlike those who, e.g., choose to take an antihistamine or pain reliever.

BACKGROUND

While current federal law and regulations regarding cannabis prevent the state from requiring HPHA to accommodate state medical cannabis patients, PH landlords do have some discretion. This discretion is outlined in a February 10, 2011 HUD Memo to all PHAs, it states regarding current residents that PHAs are required:

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[10] State of Hawai'i v. Woodhall (Hawai'i 2013), http://caselaw.findlaw.com/hi-supreme-court/1633310.html; For original Act 228 of 2000, see http://www.publicpolicycenter.hawaii.edu/projects-programs/_act230/_background/Act228-SB862-HD1.pdf.

> to establish occupancy standards and lease provisions that will *allow* the PHA to terminate assistance for use of a controlled substance. However, the law *does not compel* such action and PHAs have discretion to determine continued occupancy policies that most appropriate for their local communities. . . . PHAs have discretion to determine, on a case-by-case basis, the appropriateness of program termination of existing residents for the use of medical marijuana.[11]

The discretion also extends to owners of multifamily assisted properties.[12]

ISSUE – Discrimination by Employers of Medical Cannabis Patients

RECOMMENDATIONS

a) Require that the Department of Labor and Industrial Relations (DLIR), working with the Department of Health and the Department of the Attorney General, draft a fact sheet for workers and employers regarding the evolving case law on the rights of state approved medical cannabis patients.

b) Revisit 2015 legislation to insert into Hawai'i Revised Statutes affirmative Defenses from Termination, both generally for all registered patients as well as specific protections in the form of reasonable accommodation for medical cannabis patients with bone fide disabilities. The HCRC would only oversee discrimination claims by the latter subgroup.

SUMMARY - In 2015, Hawai'i was poised to join a handful of states that provide some measure of protection for medical cannabis patients from discrimination. Concerns regarding evolving judicial precedents in case law, consequences for federal contractors and the enforcement role of the Hawai'i Civil Rights Commission (HCRC) ultimately led to the measure being deferred. Case law has since then become more favorable toward patients, and the HCRC's suggested alternative language remains relevant.

BACKGROUND

Per HRS §26-20, DLIR is to:

> "(A)dminister programs designed to increase the economic security, physical and economic well-being, and productivity of workers, and to achieve good labor-management relations, including the administration of workers' compensation, employment security, apprenticeship training, wage and hour, and industrial relations laws. The department shall also have the function of

[11] U.S. Department of Housing and Urban Development; February 10, 2011; Medical Marijuana Use in Public Housing and Housing Choice Voucher Programs; https://www.hud.gov/sites/documents/MED-MARIJUANA.PDF

[12] U.S. Department of Housing and Urban Development; December 29, 2014; Use of Marijuana Use in Multifamily Assisted Properties, https://www.hud.gov/sites/documents/USEOFMARIJINMFASSISTPROPTY.PDF

> developing, preparing, and disseminating information on employment, unemployment, and general labor market conditions."

Currently, Hawai'i medical cannabis patients have no protections from discrimination by employers, who can terminate employment both due to the mere status of a person being a registered patient and/or should such patient fail a drug test. **At least 11 other states (AR, AZ, CT, IL, ME, MN, NV, NY, PA, RI) have codified explicit protections (anti-discrimination or "reasonable accommodation") against discriminations and others have seen protections afforded via case law (MA). A few of these expressly deal with drug testing while others deal with the status of being a medical cannabis patient**.[13]

Further, this lack of protection in the work place stands in contrast to protections enacted by the legislature to protect registered patients from discrimination in certain housing arrangements, medical proceedings, custody proceedings and educational settings (see Act 60 of 2014; Act 242 of 2015).

Current Case Law

On July 17, 2017, the Massachusetts Supreme Judicial Court issued a ruling in Barbuto v. Advantage Sales and Marketing that was almost unanimously declared as a landmark.[14] Reuters reported the following on the ruling:

> Chief Justice Ralph Gants wrote that if a doctor concludes medical marijuana is the most effective treatment for an employee's debilitating condition, "an exception to an employer's drug policy to permit its use is a facially reasonable accommodation."
>
> "The fact that the employee's possession of medical marijuana is in violation of federal law does not make it per se unreasonable as an accommodation," Gants wrote.
>
> The unanimous six-judge panel's ruling noted that only the employee, not the company, could have been subject to prosecution under federal law for her drug use.[15]

At once, the ruling dealt with patient rights while emphasizing that only a patient can be prosecuted under law, i.e. *not* the employer. The ruling further emphasizes that employers can still attempt to prove "undue hardship" to operations or "unacceptably significant" safety risks, and that they need not accommodate the use of medical cannabis at the work place itself. In May, a Rhode Island lower court issued a similar ruling.[16]

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[13] Quest Diagnostics; March 10, 2017; Employee Protections in the Era of Medical Marijuana Legislation; https://blog.employersolutions.com/marijuana-employee-protections/

[14] Barbuto v. Advantage Sales and Mktg., LLC, SJC-12226, 2017 WL 3015716, at *1 (Mass. July 17, 2017).

[15] Massachusetts court rules for woman fired for medical marijuana use; July 17, 2017; https://www.reuters.com/article/us-massachusetts-marijuana/massachusetts-court-rules-for-woman-fired-for-medical-marijuana-use-idUSKBN1A21WX

[16] Callaghan v. Darlington Fabrics; May 23, 2017; (Superior Court, Rhode Island). The case is currently on appeal to the state Supreme Court, see http://www.riaclu.org/court-cases/case-details/callaghan-v.-darlington-fabrics-corporation.

In an even more recent ruling, a federal district court in Connecticut rejected, in *Noffsinger v. SSC Niantic Operation Company*[17], an employer's claim that the state law expressly protecting registered medical cannabis patients was preempted by federal law. In particular, the court discussed the Controlled Substances Act (CSA), the Americans with Disabilities Act (ADA) and the Food, Drug and Cosmetic Act (FDCA), holding the Connecticut law "is not preempted by *any* federal laws."[18] (emphasis added.)

Together, these recent rulings indicate a shifting landscape that will both step in to protect patients and uphold state laws protecting them. By adopting legislation to protect patients, the state fulfills the requisites of *Noffsinger* for such protections, i.e. having a law on the books.

History of Action by Hawai'i State Legislature

During the 2015 session, the bill SB 1291 that became Act 242 of 2015 was originally focused on protection from discrimination by employers – making it:

> "unlawful for any employer to discipline, suspend, discharge, or discriminate against any of the employer's employees solely because the employee tested positive for the presence of marijuana or its metabolites in a substance abuse test. . ."

These protections stayed in the bill through the hearings in the then Senate Health as well as Judiciary & Labor Committees. The latter committee, however, removed all references to employment protections and pointed to concerns raised by the Hawai'i Civil Rights Commission regarding its role in enforcement of these protections. Those HCRC objections were not to all employment protections as the HCRC pointed out in its testimony at the next hearing before the House Health Committee. Indeed, the HCRC requested that the previous statutory language be reinserted, and amended to clearly read that employers should "consider and provide a reasonable accommodation for a person with a disability who tests positive for marijuana if that person is a registered qualifying medical marijuana patient." (Testimony on 3/25/15). While the House Judiciary Committee responded to these HCRC concerns regarding disabled medical cannabis patients, and added protections for all patients, the protections were once again removed during conference committee.

A recent blog post by the local human resources group Altres further highlights the need for action in this area. In a primer entitled "WHAT TO DO WHEN A JOB CANDIDATE PRESENTS A MEDICAL MARIJUANA CARD? Altres states:

> **How to handle a hiring situation when a medical marijuana card is presented**
>
> - First, explain that your company maintains a zero tolerance drug-free workplace policy.
> - Second, inform the candidate that despite state law, **marijuana remains illegal at the federal level**—and **at the state level for purposes of employment**.

[17] Noffsinger v. SSC Niantic Operation Company (3:16-cv-01938; D. Conn. Aug. 8, 2017)
[18] Id. at 21.

- Third, avoid as much as possible any discussion of the applicant's medical issues that led to him or her being prescribed medical marijuana.
- Last but not least, keep in mind that **an applicant may want to continue on in the application process and choose to change their medical treatment**.[19]

This could lead to employers winking and nudging that a job could become an applicant's if he or she "choose(s) to change their medical treatment." **Hawai'i has accepted medical cannabis for nearly two decades, yet in 2017 we see this kind of overt stigma that could put a person in an untenable position of choosing between the ability to pay their bills to feed their family and their own personal health.** Contrary to Altres' position that "we must wait and see if any court cases will bring changes to state law," we can act now.[20]

Finally, on 11/13/17, the USDOT published a Final Rule, to go into effect on 1/1/18, regarding transportation workplace drug and alcohol testing programs.[21] Due to its continued Schedule I status, the rule specifically rejects medical cannabis as a defense to a failed drug test. This new rule applies to federal employees and related contractors, and *not to state or private sector employees*.

ISSUE – Health Insurance Coverage

RECOMMENDATIONS

1) Proclaim that the use of medical cannabis for purposes of insurance coverage in the State of Hawaii constitutes reasonable and necessary medical treatment, subject to: (a) the patient is a registered 329 cardholder with a certified medical condition; (b) the condition was not a result of intoxication (i.e. driving under the influence).

2) Amend Luke's Law, (SB791/Act 235 of 2015, codified at §HRS 432:1–614) to include "medical cannabis" in the definition of "treatment for autism."

3) Amend §386 – 21.7 (Workers Compensation) to include medical cannabis alongside "prescription drugs" to be furnished by the employer to the employee in the event of a work injury.

BACKGROUND

It is essential to ensure that insurance holders are not discriminated against for using legal medical cannabis in the State of Hawaii. As such, it is important to provide clarity, by way of public policy, that

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[19] Altres; October 2017; What to Do When a Job Candidate Presents a Medical Marijuana Card? https://www.altres.com/business/2017/10/hiring-best-practices-for-medical-marijuana-users/

[20] Id.

[21] Procedures for Transportation Workplace Drug and Alcohol Testing Programs: Addition of Certain Schedule II Drugs to the Department of Transportation's Drug-Testing Panel and Certain Minor Amendments; Federal Register, November 13, 2017; https://www.federalregister.gov/documents/2017/11/13/2017-24397/procedures-for-transportation-workplace-drug-and-alcohol-testing-programs-addition-of-certain

reasonable and necessary medical treatments include medical cannabis. A recent decision by the Connecticut Workers' Compensation Commission found that the state must compensate a worker for the use of medical cannabis was a "reasonable and necessary medical treatment."[22]

ISSUE – New Debilitating Medical Conditions for the Use of Medical Cannabis

RECOMMENDATION

Via legislation, update HRS §329-121 to add **"opioid use disorder" (OUD)** and/or **"substance use disorder" (SUD)**[23] to the list of qualifying debilitating conditions for certification for the use of medical cannabis.

BACKGROUND

New Mexico's Medical Cannabis Advisory Board recommended to include both of these conditions on 11/3/17. The board is composed of board-certified physicians in the fields of neurology, pain management, medical oncology, psychiatry, infectious disease, family medicine and gynecology.[24]

The board had previously unanimously recommended the addition of OUD, but the state Health Secretary rejected the recommendation. The opioid epidemic in New Mexico shows no signs of abating, and thus it is being resubmitted.

The research undergirding the SUD petition is voluminous.[25] While Hawaii's own opioid epidemic is not of the magnitude seen in New Mexico or many other parts of the US Mainland, the addition of SUD/OUD dovetails with the preventive efforts of the State's Opioid Use Initiative, spearheaded by DOH's Alcohol & Drug Abuse Division (ADAD.)

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[22] Petrini v. Marcus Dairy, Inc., 6021 CRB-7-15-7 (2016); http://wcc.state.ct.us/crb/2016/6021crb.htm

[23] SUD encompasses: Alcohol Use Disorder (AUD), Tobacco Use Disorder, Stimulant Use Disorder, Hallucinogen Use Disorder, and Opioid Use Disorder.

[24] See https://nmhealth.org/about/mcp/svcs/info/

[25] See, http://lecuanmmcpmcabpetitions.blogspot.com/2017/09/petition-substance-abuse-disorder.html

ISSUE – Functionality of DOH Registry

RECOMMENDATIONS

a) DOH should consider copying the provider on certain communications with patients, especially if there is an error on the application. The provider can be helpful in correcting the mistake in a timely fashion and is more likely to notice the e-mail in the first place.

b) DOH should consider allowing the provider to make certain basic errors, e.g. address, on the behalf of the patient.

c) Address the fact that not all information, e.g. island and zip code, is carried over from the free eHawaii account that is initially set up to be able to populate the 329 application itself.

d) Make grow site and caregiver forms electronically fillable with signature accessibility so they do not have to be printed out. This would facilitate home visits.

e) Reconsider the blanket prohibition on immediate and temporary access to medical cannabis when an application is first processed. The wait for the 329 card can be excruciating for many patients.

BACKGROUND

Based on an informal October 2017 poll of 12 providers (with 50%, or 6, replying in full), all had encountered patients with computer literacy issues, and two thirds had heard directly from patients that the DOH Registry itself was hard to accces. The providers themselves were positive about the registry being online and there being a direct line to call if an issue crops up. Still, there were a number of ideas that could help improve patient access (see above.)