

**THEODORE ROOSEVELT  
AMERICAN INN OF COURT**

**Marijuana and the Law/  
Pot Pourri**

**April 27, 2016 – 5:30 p.m. to 8:30 p.m.**

**Nassau County Bar Association**

**PRESENTED BY:**

**Russell G. Tisman, Esq.  
Daniel P. Deegan, Esq.  
Anthony V. Curto, Esq.  
Hanan B. Kolko, Esq.  
Yulian Shtern, Esq.  
Paul F. Millus, Esq.**

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### **AGENDA**

1. Introductory Remarks – Russell G. Tisman, Esq. (5 minutes)
2. NYS Medical Marijuana Application Process and Comparison to Other States, presented by Daniel P. Deegan, Esq. and Anthony V. Curto, Esq. (20 minutes)
3. Cannabis Law Overview– Hanan B. Kolko, Esq. (30 minutes)
4. New York’s Medical Marijuana Law, Federal Implications and Medical Practitioners from a Criminal Practitioner’s Perspective – Yulian Shtern, Esq. (20 minutes)
5. Marijuana and the Workplace – Paul F. Millus, Esq. (30 minutes)

# **NYS Medical Marijuana Application Process And Comparison to Other States**

Presented by  
**Daniel P. Deegan**  
**Anthony V. Curto**

————— COUNSELORS AT LAW —————  
**Forchelli, Curto, Deegan,  
Schwartz, Mineo & Terrana, LLP**  
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April 27, 2016

# NYS Medical Marijuana Model

- New York State established a "strict medical model" for its medical marijuana program.
- Public Health Law Title V-A §3360 *et seq.* and NYCRR §1004.6.
- Much stricter than most other states.
- Limited to non-smokeable forms.

# 2015 Application to Become a Registered Organization

- Set up a competition to qualify as one of only five “Registered Organizations” to manufacture and dispense approved medical marijuana products in New York State.
- Media reported that there might be hundreds of potential applicants for the 5 awards.

# Application Timeline and Fees

- The application window opened on April 24, 2015 and a deadline of May 29, 2015 was set (later extended by one week to June 5, 2016).
- Called for a DOH decision to be made in July 2015 to allow actual operations to commence by January 2016.
- The application required a \$10,000 nonrefundable application fee and a \$200,000 registration fee to be refunded if the applicant was not issued a registration.

# Criteria for Consideration

- The Application reflects the criteria for becoming a Registered Organization as set forth in the Statute and Regulations.
- The main criteria for consideration were as follows:

# Quality of Product

- Must demonstrate the ability to manufacture product with consistent cannabinoid profile – the concentration of total THC and CBD will define the brand – quality control.



# Ability to Produce and Deliver Product

- Ability capacity to produce sufficient quantities to meet the needs of certified patients.

# Security

- Ability to maintain effective control against diversion of marijuana products.
- Security Plan.

# Real Property Control and Entitlement

- The possession of or right to use, real property for manufacture and distribution sites.
- Must be “geographically distributed” throughout the state.
- The proposed operating plan and physical's suitability of the proposed manufacturing dispensing facilities.

# Financial Capacity

- Financial Statements.
- Competence of the Applicant's principals.

# Moral Character and Fitness

- Affidavits required for board members, officers, managers, owners, partners, principal stakeholders, directors, and members.
- Detailed disclosure of other business interests and personal and financial background.
- Required individuals that come in contact with medical marijuana required to have a criminal history background check and fingerprinting.

# Labor Agreement Requirement

- The applicant shall venture into a “Labor Peace Agreement”.

<b>Sub Categories</b>	<b>Applicant Raw Score:</b>	<b>Conversion Factor</b>	<b>Applicant Weighted Score</b>	<b>Percentage of Total Available Points</b>
Miscellaneous	12.00	0.33	4.00	3.2
Product Manufacturing	104.00	0.43	45.00	36
Security	93.00	0.06	6.00	4.8
Transportation & Distribution	21.00	0.19	4.00	3.2
Sales & Dispensing	45.00	0.16	7.00	5.6
Quality Assurance & Staffing	111.00	0.17	19.00	15.2
Real Property and Equipment	18.00	0.56	10.00	8
Geographic Distribution	4.00	3.00	12.00	9.6
Architectural Design	265.05	0.02	6.00	4.8
Financial Standing	3.00	4.00	12.00	9.6
<b>Total Points</b>	676.05		125.00	100

# Final Result

- After several months of deliberations, the Department of Health issued its determination which ranked 43 applicants of which only the top five were awarded licenses.



# Results

Applicant	Total Weighted Score
PharmaCann LLC	97.12
Vireo New York LLC (f/k/a Empire State Health Solutions)	96.46
Columbia Care NY LLC	95.08
Etain, LLC	91.00
Bloomfield Industries Inc.	90.59
New York Canna, Inc.	90.43
Fiorello Pharmaceuticals, Inc.	90.23
Valley Agriceuticals, LLC	89.49
Citiva Medical LLC	89.49
PalliaTech NY, LLC	89.31
Great Lakes Medicinals LLC	86.86
Alternative Medicine Associates, LLC	86.18
Hudson Health Extracts, LLC	86.17
Brightwaters Farms LLC	85.92
Salus Scientific, LLC	85.49
CCCONY, Inc. (Compassionate Care Centers of NY, Inc.)	85.45
NY Compassion, LLC	84.91
LabCare, Inc.	82.03
Kinex Supportive Pharmaceuticals, LLC	81.89
Silver Peak NY LLC	81.86
New York Medical Growers, LLC	81.55
Compassionate Sunset LLC D/B/A Compassionate Relief Centers of NY	80.46
North Country Roots, Inc.	79.26
Far(m)ed New York, LLC	78.77

# Overview

- Wide variety of processes and regulations for medical marijuana in other states.
- NYS is at the “strict” end of the spectrum.
- Differing views of legislation authorizing the growth, distribution and sales of medical marijuana.
- General differences from state to state on application for licensing.
- Future of medical marijuana.

# Daniel P. Deegan, Esq.

Partner

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**Daniel P. Deegan**, (St. John's University School of Law, 1989) heads up the Firm's Industrial Development Agency (IDA), Municipal Incentives and Government Relations practices, with particular emphasis on facilitating and implementing responsible real estate development projects. He specializes in Real Estate Development Law, Zoning Law, Municipal Incentives/IDA Law, and Government Relations/Municipal Law. Dan has a reputation for "getting things done" with efficiency, effectiveness and integrity.

Mr. Deegan has been awarded an "AV" legal ability and ethics rating by Martindale-Hubbell Law Directory – the very highest rating this nationally recognized publication has established. This rating is based upon extensive confidential peer review surveys. He was selected by his peers for inclusion in *New York's Super Lawyers* (2010, 2011 & 2012).

Mr. Deegan is admitted to practice in New York and New Jersey. In addition, he is admitted to practice before the Federal Courts of both New York and New Jersey. He is a member of the American Bar Association and the New York State Bar Association. In the mid-1990's, Dan was appointed City Attorney for the City of Glen Cove, by then-Mayor Thomas R. Suozzi, and served in that capacity through 2006.

Mr. Deegan is on the Board of the Long Island Association (LIA), the New York League of Conservation Voters (NYLCV) and is Vice Chairman of the Long Island Chapter. He has served as President of the Glen Cove Rotary, and Member, Board of Directors for the Gift of Life Foundation and, currently, North Shore Sheltering Program, Inc., a shelter for the homeless. He is also a member of the Commercial Industrial Brokers Society of Long Island (CIBS) and was recognized in 2010 as the "Associate Member of the Year." He is a frequent lecturer to trade groups and others on the law and practice relating to Economic Development Incentives and Industrial Development Agencies. His article on the Benefits of IDA was published in the *New York Real Estate Journal* and the *Suffolk Lawyer*. Dan earned his B.A. from Providence College in 1986 and graduated Chaminade High School in 1983.

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# Anthony V. Curto, Esq.

Partner Emeritus

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**Anthony V. Curto** (New York Law School, 1960) began his legal career at a Manhattan law firm, followed by ten years as President and Chairman of Whitney Enterprises. In 1981, he joined a prominent Long Island law firm as a member of its three-person Executive Committee, managing its corporate department. In 1999, he merged his firm with the Forchelli firm.

Mr. Curto's work centers on structuring, negotiating and documenting a variety of complex commercial transactions on behalf of regionally and nationally known clients. He counsels public and private corporations in major transactional matters, including mergers and acquisitions, joint ventures, partnering arrangements and the reorganization of business enterprises and assets, across a variety of industries. He also represents corporations in formation, early stage and venture capital financings, and advises clients in private placements and public offerings of securities.

Mr. Curto has been associated with a number of high profile matters, including the creation of the Bernard M. Baruch Foundation. He has also represented an assortment of celebrities and personalities, including Aleksandr I. Solzhenitsyn, Harry Chapin, Mike Francesa, Father Tom Hartman, Paula Abdul and Joy Mangano, among others. Currently, he is counsel to Empire State Compassionate Care, Inc., a national marijuana pharmaceutical company.

An advocate of community service, Mr. Curto has received numerous awards for his active role in community endeavors, including the 1984 Congressional Achievement Award and the 1987 Martin Luther King "Living the Dream" Service Award. Mr. Curto was cited as the 37<sup>th</sup> Most Influential Long Islander by the *Long Island Press* in 2008. He was a *Networking Magazine* David Award Honoree in 2008, "Who's Who in Corporate Law" by the *Long Island Business News* and was a recipient of the Telecare Award of Excellence in 2010. He was a regular panel member of "Father Tom and Friends," a weekly television talk show, and speaks frequently at bar association seminars.

In June of this year, Mr. Curto will receive the 2016 Harry Chapin Humanitarian Award. In 2013, Mr. Curto published his book, *"A Time for Justice"*.

Mr. Curto is admitted to the New York State Bar Association, the United States Tax Court and the United States District Court for the Eastern and Southern Districts of New York.

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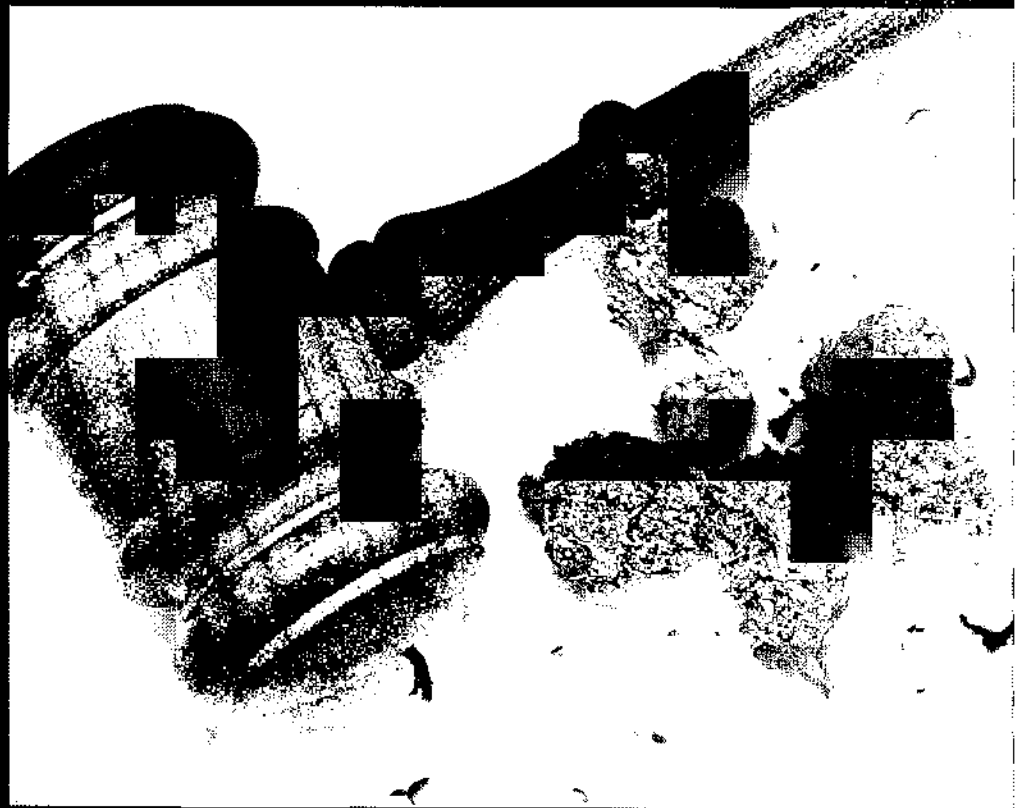
Founded in 1976, Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP is one of Long Island's most acclaimed and distinguished law firms.

Headquartered in Uniondale, NY, the Firm is conveniently located for clients in Nassau and Suffolk counties, as well as those in New York City. All of our attorneys have a high level of expertise in specific areas, as well as in the general practice of law. The Firm is thoroughly supported by a dedicated team of paralegals, law clerks, a highly skilled secretarial staff, and the most up-to-date computer technology.

The Firm employs over 60 attorneys who provide counsel to a broad range of clients, including national, regional and local businesses, major real estate developers and organizations, banks, insurance companies, municipalities, educational institutions, and individuals from all walks of life. Personal attention and quality representation that is both practical and cost-effective are hallmarks of the Firm's policy toward clients.

The Firm is poised for the 21st century with a team of attorneys who are supremely qualified with the talent, experience and skill necessary to meet the legal needs of any client.

**THEODORE  
ROOSEVELT  
INN OF COURT  
CANNABIS LAW  
PRESENTATION**



**MEYER SUOZZI**

**Presented By:**  
**Hanan B. Kolko**  
**Co-Chair, Medical Cannabis Practice Group**  
**Meyer, Suozzi, English & Klein P.C.**



## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

- a) Overview of the New York Compassionate Care Act and Regulations
- b) Relationship Between Federal and State Law, the Cole Memo, Preemption and Commandeering
- c) Overview of Banking Issues
- d) The Ethics of Representing Clients in the Cannabis Industry



## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

### Where We Came From and Where We Are:

- July 2014: Governor Andrew Cuomo signs the Compassionate Care Act (“CCA”)
- April 2015: New York Department Of Health (“DOH”) Issues detailed CCA regulations
- July 2015: DOH announces selection of five Registered Organizations (“RO”)
- January 2016: ROs open dispensaries





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- The CCA makes it legal as a matter of state law for ROs to cultivate, process, and distribute cannabis if done in compliance with the CCA; and for people to buy, possess, and use cannabis if done in compliance with the CCA.

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- Despite the fact that the CCA does this, the Federal Controlled Substances Act (the “CSA”) applies nationwide, and, under the CSA, the cultivation, processing, distribution, and sale of cannabis is a felony and can subject a convicted defendant to punishment up to life in prison. 21 USC § 841(b). This is so regardless of applicable state law. Under the CSA, cannabis is a “Schedule I” substance. 21 USC § 812. As a Schedule I substance, it is deemed to have a high potential for abuse and no currently accepted medical use. 21 USC §812(b)(1). Thus, it is critical to understand that, whatever the CCA does, anyone who grows, processes, sells, and/or possesses cannabis pursuant to the CCA is violating the federal CSA.



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### Who Are the Actors Regulated by the CCA?

- a) The ROs. At this point, only five have been authorized. Each is permitted to have four dispensaries, and the DOH expects them to have all four dispensaries up and running. Thus, at present, the CCA envisions a total of 20 dispensaries in New York State. Under the CCA, the ROs are vertically integrated – they must handle every task, “from seed to sale.” This differs from the system in some other states;
- b) Physicians who may want their patients to have access to medical cannabis;
- c) People with illnesses who want access to medical cannabis; and
- d) Caregivers.

Let's discuss how the law applies to each.



## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

### CCA §§ 3360 and 3361 – Certified Patients

- Who can lawfully buy, possess, and use medical cannabis under the CCA? A “Certified Patient.”
- How does a person become a Certified Patient? A person must:
  - a) have a “Serious Condition,” and
  - b) obtain a “Certification”



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### Serious Conditions

- CCA §3360.7(a)(i) lists the initially authorized serious conditions: cancer; being HIV positive; ALS; Parkinson's disease; MS; damage to the nerve tissue of the spinal cord; epilepsy; IBD; neuropathies; Huntington's disease. It also provides for conditions to be added by the Commissioner of Health.
- CCA §3360.7(a) (ii) adds another set of requirements: it's not enough to have an approved serious condition: the person must also have "any of the following conditions" which is "clinically associated with" or "a complication of" a serious condition: cachexia or wasting syndrome; severe or chronic pain; severe nausea; seizures or persistent muscle spasms. It also provides for conditions to be added.
- CCA §3361(1)(b) provides that the serious condition "shall be specified in the patient's health care record."



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### Addition of Serious Conditions

- CCA§ 3360.7(b) directs the Commissioner of Health to determine whether to add the following to the list of serious conditions: Alzheimer's; muscular dystrophy; dystonia; PTSD; rheumatoid arthritis, and to do so within 18 months of the law's effective date, which was in early January, 2016. The Commissioner declined to add those conditions. In doing so, this is what the Commissioner said:

*To date, scientists and physicians at the Department of Health have already analyzed more than 2 dozen scientific studies on Alzheimer's, muscular dystrophy, dystonia, post-traumatic stress disorder, and rheumatoid arthritis. They also sought input from medical professionals and associations. Despite these comprehensive reviews, there is not enough scientific evidence at this time to support the inclusion of these additional conditions to the Medical Marijuana Program. However, the Commissioner has not stopped his review, and will evaluate new scientific evidence as soon as it becomes available. If sufficient scientific evidence becomes available to support the determination that medical marijuana will provide relief to patients suffering from any additional conditions, including these five, the Commissioner will act quickly to increase the list of covered conditions.*

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### Assuming that a Person has a Serious Condition and the Requisite Associated Condition, How does that Person Get Medical Cannabis?

- CCA §3360 §(3) provides that, to be a certified patient, a person must either (a) be a New York State resident, or (b) be “receiving care and treatment in New York State.” Regulation § 1004.3(c) provides that non-residents must be “temporarily residing in New York State for the purpose of receiving care and treatment” from a registered practitioner. Note that the regulations are also explicit that the CCA does not authorize the transportation of medical cannabis outside of New York State.
- CCA § 3363(2)(f) requires the person with a serious condition to pay a \$50 fee to obtain a certification.
- CCA §3361 provides that the person with a serious condition may obtain a certification from a “practitioner ... registered with the department.”



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### CCA Protections of Certified Patients

- CCA §3369(1) protects certified patients from “arrest, prosecution, or penalty in any manner,” and provides that they may not be “denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or professional licensing board... solely for the certified medical use ... of marijuana.”
- CCA §3369(2) provides that being a certified patient “shall be deemed to be having a ‘disability’ under article fifteen of the executive law.” However, it also provides that “this subdivision shall not bar the enforcement of a policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance.” What does this mean?
  - As of March 31, 2016, there were 2,390 certified patients.

So, let’s now explore what requirements the law and the regulations impose on “practitioners.”





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### Who Can be a “Practitioner” Authorized to Issue Patient Certifications?

1. Under CCA §3360(12), at this point, only a physician licensed in New York State is eligible to be a Practitioner. The CCA authorizes the Commissioner to allow Nurse Practitioners to become CCA Practitioners, but it has not yet done so.
2. Under CCA §3361(1), The patient must be under the Practitioner’s continuing care for the serious condition.
3. Under CCA §3361(1), the physician must be qualified to treat the serious condition.
4. Under CCA §3361(1), it must be the physician’s “professional opinion” that the patient “is likely to receive therapeutic or palliative benefit from the primary or adjunctive treatment with medical use of marijuana for the serious condition.”
5. Under CCA §3361(1), the physician must be “registered with the department to issue a certification.”
6. Practitioners receive the same §3369 (1) protections.

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### How does a “Practitioner” Register with the Department of Health?

- Under CCA§3360(12), the Practitioner must complete a two to four hour course approved by the Department of Health, and must register with the Department of Health. The course is available online. As of April 2014, the fee is \$249.
- As of March 31, 2016, there were 494 registered physicians.



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### What Information Must be Contained in the Certification?

- Under CCA §3361(2) and regulation §1004.2(a), the Certification must contain specific information, including the patient's name, address, and date of birth; that the patient is under the physician's care for the serious condition; and the physician's contact information and federal DEA registration number; the relevant serious condition the patient is suffering from; any recommendations from the physician regarding brand, form, and dosage; a statement that the physician has explained the "potential risks and benefits" of the use of medical cannabis; the certification's expiration date, which may be no more than a year from issuance, unless the patient is terminally ill.



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### Submission of Certification Information to Department of Health

- Under regulation §1004.2(c), the physician must submit the information on the certification to the DOH.

What are the implications of this?



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### Caregivers

- CCA § 3360(5) provides that a certified patient may designate up to two designated caregivers. What is a designated caregiver? Under CCA §3362, a designated caregiver is a person who is authorized under the CCA to purchase, deliver, possess, and administer medical cannabis to a certified patient. To become a certified caregiver, a person must register with the DOH.
- Caregivers receive the same §3369 (1) protections.



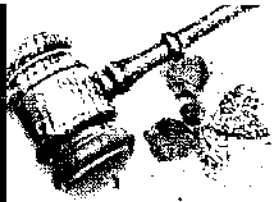
## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

### Registered Organizations

- Under the CCA, only a Registered Organization is authorized to cultivate, process, distribute, and sell medical cannabis. The DOH opened the application process on April 27, 2015, and applications were due on June 5, 2015. The DOH received applications from 43 applicants, and chose the five highest scoring applicants to become registered organizations.
- Under CCA §3365(9), the DOH “shall register no more than five registered organizations.” Note the language at the end of §3365(9): “The commission may register additional registered organizations.” How does one square that with the first sentence of that section?
- The five selected were: Bloomfield Industries, Inc., Columbia Care NY LLC, Etain LLC, PharmaCann LLC, and Vireo Health of NY LLC.
- The license which the registered organizations received was effective for two years, and can be renewed.

If you're interested, redacted versions of the applications are available on the DOH website.

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### The Application Process

The application process to become a registered organization was demanding. Applications were, in many cases, several thousands of pages long. CCA § 3365 and regulation § 1004.5 imposed a series of requirements on applicants. Those requirements included:

- a) A \$10,000 non-refundable fee, and a \$200,000 fee which was refunded to unsuccessful applicants.
- b) The application had to identify all real property, buildings, and facilities to be used, and had to include leases or deeds for the real property to be used for the applicant's dispensaries and cultivation/production facilities. In the alternative, the applicant had to post a \$2 million bond.
- c) The application had to identify all equipment that the applicant intended to use for manufacturing, processing, transportation, distribution, and sale.
- d) The applicant had to demonstrate that it was a party to a labor peace agreement. CCA § 3360(14) defines a labor peace agreement as "an agreement between an entity and a labor organization that, at a minimum, protects the state's proprietary interests by prohibiting labor organizations and members from engaging in picketing, work stoppages, boycotts, and any other economic interference with the registered organization's business."
- e) Detailed disclosures regarding the applicant's management.
- f) Under regulation § 1004.5(b)(4), the application had to include an in-depth "operating plan" which had a "detailed description of the applicant's manufacturing process, transportation, distribution, sale, and dispensing policies or procedures." The operating plan was required to provide details on security policies to prevent "diversion, abuse, and other illegal or unauthorized conduct." How does this requirement tie into the Cole Memorandum?
- g) Other required parts of the application include a required "standard operating procedure manual," quality assurance plans, policies to document and investigate returns and complaints, and detailed plans for record keeping, tracking, and surveillance for all stages of production.

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### The CCA and Dispensary Compliance

The CCA and the regulations (§1004.12) impose substantial duties on the registered organization's operation of dispensaries.

- a) A New York State licensed pharmacist must be “on the premises and directly supervising the activity” within the dispensary at all times it is in operation.
- b) The dispensary may sell nothing other than “approved medical marijuana products” and necessary related products. Compare that with the freedom which opioid dispensaries have to sell everything from suntan lotion to giant Snickers Bars to hair dye.
- c) Medical cannabis and food cannot be consumed on premises. Again, compare that with opioid dispensaries.
- d) Access to dispensaries is limited to designated caregivers and certified patients.





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### Pricing

Who sets the price for the products sold by the registered organizations at their dispensaries? Under regulation §1004.15, the DOH sets prices. How does it do that?

1. The registered organization submits proposed unit prices to DOH.
2. The registered organization must also submit sufficient data for the DOH to perform a “cost analysis,” which the regulations define to mean “the review and evaluation of the separate cost elements and profit of a proposed price.”
3. The DOH “shall determine the reasonableness of proposed costs.”
4. The DOH may “approve of a proposed price, refuse approval of a proposed price, or modify or reduce the proposed price.”
5. What if the approved price is too high?



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### The CCA and Manufacturing Compliance

The CCA and the regulations (§1004.11) impose substantial duties on the registered organization's operation of its production facility.

- a) The CCA does not allow consumption of cannabis in smoked form, and it does not at this point allow edibles. All "approved medical marijuana products" are thus in various forms which involve processing – liquid or oil preparations or capsules.
- b) The registered organizations are initially permitted to manufacture and distribute five "brands." A "brand" is defined as an extraction "that has a homogeneous and uniform cannabinoid concentration and product quality.... The specified brand shall have a total THC and CBD concentration that is within 95-105% of that specified in milligrams per dose for that brand." Each registered organization must offer one low THC/high CBD brand and one brand with "approximately equal amounts of THC and CBD."
- c) The registered organization may produce its brands in various "forms" – oils, extracts, capsules.
- d) The regulations govern a wide variety of details regarding the manufacturing process, including approved methods of extraction and details regarding the use of pesticides, fungicides, and herbicides.
- e) The registered organizations must use packaging that complies with the regulations.



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### Laboratory Testing

The CCA and the regulations (§1004.14) require registered organizations to submit their product to approved, DEA licensed independent labs located in New York State. As of April 2016, the only compliant lab is the DOH's Wadsworth Center Laboratory, located in Albany.

What must the lab test for?

1. The cannabinoids specified in §1004.11(c)(2).
2. E. coli, Salmonella, and other organisms.
3. Arsenic, nickel, lead, copper, and other metals.
4. Pesticides, herbicides, and fungicides.



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### Taxes

The CCA imposes an excise tax of 7% of the registered organization's gross receipts. What happens with the money? 22.5% goes to the county where the cannabis was produced, 22.5% goes to the counties where it was dispensed, 5% goes to the Office of Alcohol and Substance Abuse Services, and 5% goes to the Department of Criminal Justice.



## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

### The Cole Memo: the current state of federal enforcement policy

- The Federal Response to this explosion of state laws legalizing cannabis – The August 29, 2013 Cole Memorandum
- What is it? In 2013, speaking on behalf of the U.S. Department Of Justice, Deputy Attorney General James Cole issued a memorandum entitled “Guidance Regarding Marijuana Enforcement.”
- What does the Cole Memorandum tell us?
  - It is “guidance” for “federal [CSA] enforcement activity” involving cannabis in states that have legalized marijuana as a matter of state law. It is not a statute, it is not a regulation, and it is not binding. It could be revised or ended at any time.
  - It is an acknowledgement that the vast majority of law enforcement activity related to cannabis is done by state and local authorities.
  - As a matter of prosecutorial discretion, and in order for the DOJ to use its limited resources in “the most effective, consistent, and rational way,” DOJ will look to eight “enforcement priorities” in determining whether to prosecute those operating in compliance with state cannabis laws.
  - Where cannabis businesses operate in strict compliance with state law and in a manner consistent with the federal enforcement priorities, federal law enforcement, as a matter of discretion, will be unlikely to prosecute those businesses for a CSA violation.



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### The Cole Memorandum Enforcement Priorities:

- a) Preventing distribution of cannabis to minors;
- b) Preventing cannabis revenues from going to support criminal enterprises;
- c) Preventing diversion of cannabis to states where it is not legal;
- d) Preventing “state-authorized marijuana activity from being used as a cover...for trafficking of other illegal drugs or other illegal activity”;
- e) Preventing violence and the use of firearms in the production and distribution of cannabis;
- f) Preventing drugged driving and other adverse health effects;
- g) Preventing the growth of cannabis on public land; and
- h) Preventing cannabis use or possession on federal property.



## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

### Where does this leave us now?

- States have legalized cannabis in some form, and an industry is developing. The federal government – as a policy matter – defers to state law, and, in general, will not prosecute businesses operating in compliance with state cannabis laws. One critical point: in order to maximize Cole Memo protection, a state's laws and regulations need to be robust in their advancement of the Federal enforcement Priorities. Thus, in thinking about the CCA and the regulations, think about the Cole Memo as a critical overlay.



## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

### How Did we Get Here? Legal and theoretical underpinnings of the current state of the law

- Gonzalez v Raich, 545 U.S. 1 (2005): The Court upholds the power of Congress to regulate cannabis, even if it is produced, sold, and consumed entirely within a single state.
- U.S. v Oakland Cannabis Buyers' Cooperative, 532 U.S. 483 (2001): The Court holds that a defendant in a CSA prosecution cannot raise as a defense that her use of cannabis was lawful under state law.
- These decisions underscore the broad power of the federal government in this area.





## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

### Does the CSA Preempt State Cannabis Laws?

- The CSA's preemption section: 21 U.S.C. Section 903. The CSA preempts state laws only where there is a "positive conflict" between state law and the CSA so that "the two cannot consistently stand together."



## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

### Does the Preemption Language Mean?

- Willis v Winters, 253 P.3d 1058 (Or. 2011)
- Emerald Steel Fabricators v Bureau of Labor and Industries, 230 P. 3d 518 (Or. 2010)
- County of San Diego v San Diego NORML, 81 Cal. Rptr. 3d 461 (2008), cert. denied 129 S. Ct. 2380 (2009)
- Ter Beek v City of Wyoming, 846 N.W. 2d 531 (Mich. 2014)



## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

- Nebraska v Colorado, 577 U.S. \_\_\_\_ (2016). The Court declines to allow Nebraska and Oklahoma to file a complaint against Colorado, following its long practice of exercising discretion in deciding whether to allow a claim by one state against another to proceed.
- Nebraska and Oklahoma sought to sue Colorado. They asserted that Amendment 64 (which amended the Colorado constitution to legalize and regulate adult use of cannabis) “increased trafficking and transportation of Colorado-sourced marijuana” into their states and forced those states to expend “law enforcement, judicial system, and penal system resources” to address that heightened flow of out-of-state cannabis. They sought a declaratory judgment that parts of Amendment 64 were preempted by the CSA.
- What is the impact of the Court declining to hear the case?
- What do we make of the dissent by Justice Thomas, joined by Justice Alito?



## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

- Anticommandeering – Congress may not “commandeer” the states to enforce federal law. It may not compel a state to enact legislation. It may not require state officials to assist federal officials in the enforcement of state law. Anticommandeering is rooted in the 10th Amendment.
- New York v United States, 505 U.S. 144 (1992)
- Printz v United States, 521 U.S. 898 (1997)



## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

### The Federal Response On Banking – The FinCEN Memorandum and the related Cole Memorandum

- On February 14, 2014, the Department of Treasury’s Financial Crimes Enforcement Network (“FinCEN”) and the Department of Justice issued complimentary memoranda addressing “financial institutions can provide services to marijuana-related businesses” consistent with their obligations under the Bank Secrecy Act (“BSA”).



## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

Under the FinCEN memo, what must a bank do in order to provide services to cannabis enterprises? It must conduct due diligence, a process which includes:

- a) Determining that the enterprise is fully licensed under state law;
- b) Reviewing the license application;
- c) Asking for relevant information about the enterprise from state regulatory bodies;
- d) Developing “an understanding of the normal and expected activities for the business”;
- e) Ongoing monitoring of publicly available sources for “adverse information” about the enterprise;
- f) “Ongoing monitoring for suspicious activity”;
- g) “Refreshing information... on a periodic basis.”

The bank must also evaluate whether the business is operating in compliance with state law, and whether its operations implicate the 2013 Cole Memorandum enforcement priorities.

The bank must also make certain specific SAR filings in connection with cannabis related transactions – “Marijuana Limited” SAR filings, “Marijuana Priority” SAR filings, and “Marijuana Termination” SAR filings.

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## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

Under the FinCEN Memorandum, the bank must also monitor the cannabis enterprise's activities for "Red Flags" What are the "Red Flags?" They include:

- a) The enterprise receives "more revenues than may reasonably be expected";
- b) The enterprise's deposits exceed the amount of revenue it is reporting to regulatory bodies;
- c) Rapid and unexplained withdrawals or deposits;
- d) Structuring;
- e) Financial statements at variance with banking activity;
- f) An inability to demonstrate continued state licensure;
- g) Attempts to conceal involvement in the cannabis industry;
- h) Reports of criminal activity by the enterprise's owners or managers;

Is this practical? Is it worth it for a bank? Are there "Red Flags" that don't make sense?

How does the February 14, 2014 DOJ Memorandum affect what a bank might do?



## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

What has been the practical impact of the FinCEN and accompanying DOJ memoranda?

- The pending CARERS legislation: S.683
- What does this piece of legislation do?
- What is the status of this piece of legislation?





## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

### Ethical Issues Arising in the Representation of Cannabis Industry Clients

- The Conundrum for attorneys: While the cultivation, production, distribution, and sale of cannabis violates federal law, it is now lawful, in some form, in twenty three states.



## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

### The Applicable Model Rule

- Model Rule 1.2(d): “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client ***and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.***” The bolded language in italics is not in the New York version of 1.2(d). How have states applied their version of 1.2(d) to attorneys who ask whether they can represent clients in the cannabis business?



## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

### The Maine Approach

- Maine Professional Ethics Commission Opinion #199 (July 7, 2010). Maine's version of 1.2(d) was almost identical to the model rule.
- How the opinion framed the issue? "Whether and how an attorney might act in regards to a client whose intention is to engage in conduct which is permitted by state law and which might not, currently, be prosecuted under federal laws, but which is nonetheless a federal crime."
- What does the Maine opinion tell us? "While attorneys may counsel or assist a client in making good faith efforts to determine the validity, scope, meaning, or application of the law, [Rule 1.2] forbids attorneys from counseling a client to engage in the business or assist a client in doing so." The Maine Commission continues by citing to Comment 9 to Maine Rule 1.2(e), which states: "[t]here is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity." It explains that "the Rule which governs attorney conduct does not make a distinction between crimes which are enforced and those which are not."

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## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

### Where Does the Maine Opinion Leave an Attorney? With Very Little Guidance

- “So long as both the federal law and the language of the Rule each remain the same, an attorney needs to perform the analysis required by the Rule and determine whether the particular legal service being requested rises to the level of assistance in violating federal law....Where the line is drawn between permitted and forbidden activities needs to be evaluated on a case by case basis....We cannot determine which specific actions would run afoul of the ethical rules. We can, however, state that participation in this endeavor by an attorney involves a significant degree of risk which needs to be carefully evaluated.”



## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

### The Arizona Approach

- State Bar of Arizona Ethics Opinion 11-01 addressed whether a lawyer “may ethically advise and assist a client with respect to activities that comply with the [Arizona Medical Marijuana] Act, including such matters as advising clients about the requirements of the Act, assisting clients in establishing and licensing non-profit business entities that meet the requirements of the Act, and representing clients in proceedings before state agencies regarding licensing and certification issues.” Arizona Rule 1.2(d) is almost identical to the model rule. The opinion concluded that “[l]awyers may ethically advise clients about complying with the Arizona Medical Marijuana Act, including advising them about compliance with Arizona law, assisting them to establish business entities, and formally representing clients before a governmental agency regarding licensing and certification issues, but only in the narrow circumstances set forth in this opinion and only if lawyers strictly adhere to those requirements.”



## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

- In reaching this decision, Arizona first discussed prior ethics decisions. One held that lawyers could, consistent with 1.2(d), ethically advise clients to refuse to undergo blood/breath/urine tests upon being arrested for DUI, and another held that lawyers could not, consistent with 1.2(d), advise clients to tape telephone conversations when doing so was unlawful. This discussion concluded that 1.2(d) “has been applied to sanction lawyers who affirmatively counseled their clients to engage in conduct that was knowingly ... in violation of state law, but not in conflict-of-law circumstances.” Arizona then noted that Maine’s version of 1.2(d) was nearly identical to the Arizona version, and quoted, without otherwise discussing, the Maine decision.
- In the section of its ruling entitled “Analysis,” the Arizona opinion started by stating that “no prior Arizona ethics opinions or cases have addressed the novel issue presented by the adoption of the Act - whether a lawyer may ethically ‘counsel’ or ‘assist’ a client under the following conditions: (1) the client’s conduct complies with a state statute expressly authorizing the conduct at issue; (2) the conduct may nonetheless violate federal law; (3) the federal government has issued a formal ‘memorandum’ that essentially carves out a safe harbor for conduct that is in ‘clear and unambiguous compliance’ with state law, at least so long as other factors are not present ... and (4) no court opinion has held that the state law is invalid or unenforceable on federal preemption grounds.” Under those circumstances, the Arizona opinion concluded that lawyers could advise clients, whose proposed conduct is in “clear and unambiguous compliance” with state law.

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## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

- In reaching this conclusion, the Arizona opinion relied on the following factors:
  - to interpret 1.2(d) otherwise would “deprive[ ] clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits”;
  - state law now permits certain conduct, and “legal services are necessary or desirable to implement ... that conduct expressly permitted under state law”;
  - “In any potential conflict between federal and state authority, such as may be presented by the interplay between the Act and federal law, lawyers have a critical role to perform in the activities that will lead to a proper resolution of the controversy”;
  - the Arizona Act has not been found to be preempted or otherwise invalid.
- The Arizona opinion went on to make it clear that a lawyer may represent a client in connection with the Arizona Act only if (a) the client asks the lawyer’s “assistance to undertake the specific actions that the Act expressly permits,” (b) the lawyer “advises the client with respect to the potential federal law implications and consequences”; (c) the client, “having received full disclosure of the risks ... wishes to proceed with a course of action specifically authorized by the Act.” Under those circumstances, the lawyer “may perform such legal acts as are necessary or desirable to assist the client in the conduct that is expressly permissible under the Act.” Arizona went on to explicitly provide that lawyers may advise clients about compliance with the Act, help them form business entities, and represent them before government agencies regarding licensing and certification. It also noted that any change in the law, “or in the federal government’s enforcement policies” could affect its conclusion.
- Critical point: the Arizona approach requires the lawyer to clearly tell the client about the serious federal risks.



## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

### The New York Approach

- New York State Bar Association – Committee On Professional Ethics: Opinion 1024 (9/29/14). Issued less than three months after the New York Compassionate Care Act was signed.
- How did the opinion frame the issue?
  - “Under these unusual circumstances, do the New York rules of Professional Conduct permit a lawyer to provide legal advice ... to doctors, patients, public officials, hospital administrators, and others engaged in the cultivation, distribution, prescribing, dispensing, regulation, possession, or use of marijuana ... to help them act in compliance with state regulation ... and consistently with federal enforcement policy?”
- Some points about this framing: (a) it encompasses a wide variety of potential clients, (b) it encompasses a wide variety of potential legal services, and (c) it refers to helping clients act “consistently with federal enforcement policy.”

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## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

- In answering the question, the opinion makes a number of points:
  - “[T]he question presented by the state’s medical marijuana law is highly unusual if not unique: Although participating in the production, delivery, or use of medical marijuana violates federal criminal law as written, the federal government has publicly announced that it is limiting its enforcement of this law, and has acted accordingly, insofar as individuals act consistently with state laws that legalize and extensively regulate medical marijuana.”
  - State law and “publicly announced federal enforcement policy presuppose that individuals and entities will comply with new and intricate state regulatory law and, this, presuppose that lawyers will provide legal advice ... to an array of public and private actors ... to promote their compliance with state law and current federal policy.”
  - There are a wide range of potential clients, including public officials, state agencies (DOH), health care providers, Registered Organizations and applicants, physicians, and patients. Providing these clients with legal assistance “would be entirely consistent with lawyers’ conventional role in helping clients comply with the law. Indeed it seems fair to say that state law would not only permit but affirmatively expect lawyers to provide such assistance.”
  - Notwithstanding the Cole memo, all of the conduct regulated by the New York statute violates federal law, so providing legal assistance to people seeking to operate under that law “might involve assistance in conduct the lawyer knows to be illegal.”



## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

- The opinion concludes that:
  - “The New York Rules ... permit lawyers to give legal assistance regarding the [statute] beyond a mere discussion of the legality of the client’s proposed conduct.”
  - “Implicitly, the state law authorizes lawyers to provide traditional legal services to clients seeking to act in accordance with state law.”
  - “In this situation, the federal enforcement policy also depends on the availability of lawyers to establish and promote compliance with the ‘strong and effective regulatory systems’ that are said to justify federal forbearance from enforcement of narcotics laws that are technically applicable.”
  - “Nothing in the history and tradition of the profession, in court opinions or elsewhere, suggests that Rule 1.2(d) was intended to prevent lawyers in a situation like this from providing assistance that is necessary to implement state law and to effectuate current federal policy. **If federal enforcement policy were to change materially, this Opinion might need to be reconsidered.**”



## THEODORE ROOSEVELT INN OF COURT CANNABIS LAW PRESENTATION

### Considerations for Drafting Retainer Agreements:

- language regarding the CSA?
- language regarding cash payments?
- language regarding unique risks associated with the cannabis business?



**THEODORE ROOSEVELT INN OF COURT  
CANNABIS LAW PRESENTATION**

# **THANK YOU**

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FEDERAL IMPLICATIONS  
AND  
MEDICAL PRACTITIONERS**

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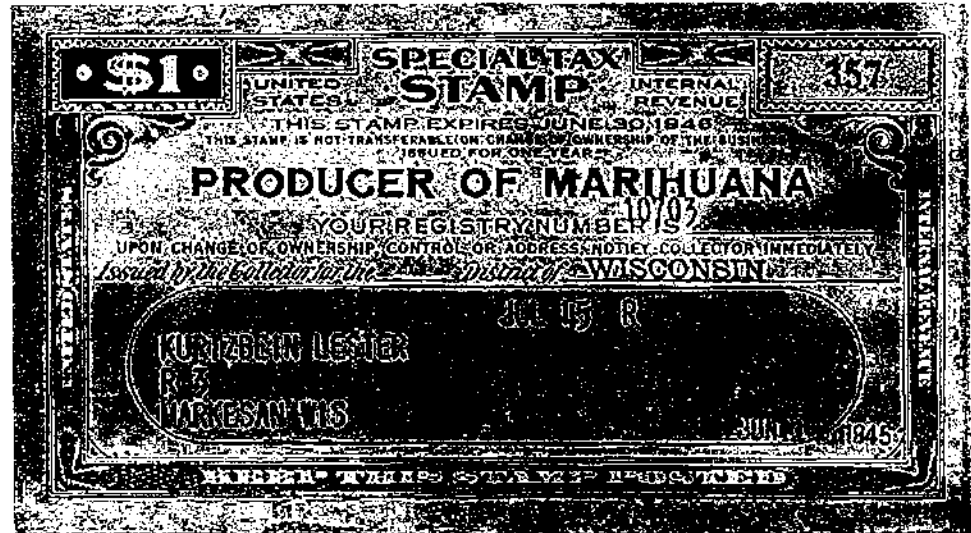
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## Federal Law

- Marijuana first regulated under Marihuana Tax Act of 1937



- No prohibition under Federal Law until 1970

## Federal Law

- Controlled Substances Act of 1970 (“CSA”)
- Schedules from I to V
- Schedule I – No currently accepted medical use and a high potential for abuse.
  - The most dangerous of all drugs, with potentially severe psychological or physical dependence.
  - Examples: Heroin, LSD, *Marijuana*

# Federal Law

- Penalties

Marijuana Quantity	First Offense	Second Offense
less than 50kg or 1-49 plants	No more than 5 years in prison + fines (\$1 Million maximum)	No more than 10 years + fines (\$2 Million maximum)
50 – 99 KG or plants	Max 20 years unless death or serious injury, minimum of 20 years – life	Max 30 years,
100 – 999 KG or plants	Minimum 5 years	Minimum 10 years



## State v Federal

- Does State Sanctioned Marijuana Program Alleviate Exposure under Federal Law?
  - Gonzalez v Reich, 545 US 1 (2005)
    - Interstate Commerce Clause Gives Federal Government authority to prohibit marijuana, despite state law to the contrary.
    - Even purely local activities are covered.

## State v Federal

- Limitations on Federal Liability

- Cole Memorandum (DAG 08/29/2013)

- Not a Defense
    - Can be revoked in an instant

- Federal Spending Legislation – prohibits the DOJ from spending funds on state sanctioned marijuana programs

- United States of Am. v Marin All. for Med. Marijuana, (C 98-00086 CRB, 2015 WL 6123062 [ND Cal Oct. 19, 2015]).
    - DOJ cannot use funds for prosecutions in violation of Federal Spending Legislation, BUT does not apply to activity that violates state law.

## Other Consequences

- Tax Implications
  - IRC 280E
- Bankruptcy Protection



- Issues with Finance and Banking Activities

# Changes to Federal Law on the Horizon?

## Three Possibilities

```
graph TD; A[Three Possibilities] --> B[De-Scheduling]; A --> C[Revoking Cole Memo]; A --> D[Re-Scheduling];
```

### De-Scheduling

- Would treat marijuana like alcohol and tobacco
  - i.e., recreational
- Unlikely in the short term

### Revoking Cole Memo

### Re-Scheduling

- Move marijuana to Schedule II, III, IV or V
- Most likely in the short term
- Would require FDA approval

# Changes to Federal Law on the Horizon?

## Vehicles for Change

Legislative Action – e.g.,  
CARERS ACT

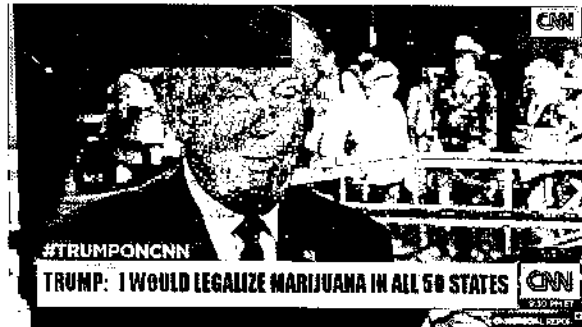
Administrative Action –  
e.g., action by DEA



## Executive Order

# Changes to Federal Law on the Horizon?

## Vehicles for Change



# Overview of New York

- New York Compassionate Care Act (CCA)  
Authorizes Qualified Patients, Doctors and  
Registered Organizations (ROs) to  
Participate in New York's Medical  
Marijuana Program (MMJ Program)



## ENROLLMENT:



- Over 74,000 Physicians in New York
- Less than 1% have registered to participate in the Medical Marijuana Program

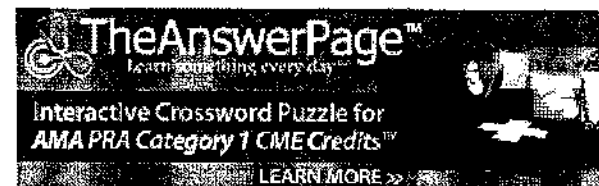
**As of April 18, 2016:**

539 physicians have registered for the NYS Medical Marijuana Program, and 2,875 patients have been certified by their doctors.



## MEDICAL PRACTITIONER REGISTRATION:

- Medical Practitioners must:
  - Be licensed and practicing in New York
  - Be qualified to treat a patient’s “serious condition”
  - Have completed a 4 hour training course approved by the DOH (TheAnswerPage.com)
  - Be caring for patients for whom they are making a recommendation.
  - Be registered with the NYSDOH to issue Marijuana certification to patients.



## Which patients qualify?

- Patient must suffer from a “severe, debilitating or life-threatening condition” together with symptoms that are clinically associated with or are complications of such conditions.
- Patient must be registered with the New York State Department of Health (NY DOH)
- Patient must receive a “certification” from a Physician, on a DOH approved form, which indicates that the Patient medically qualifies for MMJ and, in the professional opinion of the Physician, ***and based upon a review of past treatments***, the patient is likely to receive therapeutic or palliative benefit from the primary or adjunctive treatment with MMJ for the serious condition.

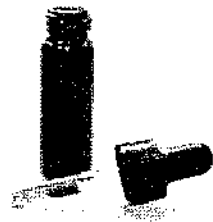
**“severe debilitating or life-threatening conditions:”**

- Cancer
- HIV/AIDS
- Amyotrophic lateral sclerosis (“ALS”)
- Parkinson’s disease;
- Multiple sclerosis (“MLS”)
- Damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity;
- Epilepsy;
- Inflammatory bowel disease (“IBS”)
- Neuropathies;
- Huntington’s disease; or
- Any other condition added by the DOH (**Recently DOH Denied Access for Other Conditions**)

## Symptoms:

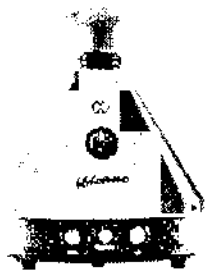
- Cachexia or wasting syndrome
- Severe or chronic pain resulting in substantial limitation of function
- Severe nausea
- Seizures
- Severe or persistent muscle spasms
- Other conditions/symptoms as specified by the DOH

# What Type of Product may be recommended?



- Forms of Marijuana Product Available
  - Oil for sublingual administration
  - Liquid Extract for Vaporization
  - Capsule for ingestion

**No whole flower products will be available**  
**“Smoking” of Medical Marijuana is NOT permitted**



## Caregivers:

- Each state has a unique role outlined for Caregivers;
  - At one time, CA allowed Caregivers to grow, transport and cultivate medical marijuana on behalf of patients.
- NY's Caregiver model is very restrictive:
  - Must become registered and certified;
  - May service a maximum of 5 registered and certified patients;
  - Can only travel to a dispensary to pick up products for registered and certified patients

# Protections and Liabilities For PHYSICIANS:



## RESTRICTIONS: PHYSICIANS

- May not receive, provide or dispense MMJ
- May not be caregivers
- May not accept gifts, awards or other inducements from a patient, caregiver or an RO related to the purchase or certification of MMJ
- May not have arrangements with ROs that may adversely affect any person's freedom to choose a dispensing facility
- May not offer discounts or any other item of value to a patient based on the patient's agreement or decision to use a particular practitioner, RO, brand or form of MMJ.
- May not examine patients at any location owned or operated by an RO.
- May not **benefit, directly or indirectly**, from a patient obtaining a written certification (does not prohibit charging a fee for a patient visit)
- May not issue a certification for himself/herself or a family member, employee or co-worker



## Federal EXPOSURE/Protection for PHYSICIANS:

- Conant v. Walters (C 97-00139 WHA, 2000 WL 1281174, at \*1 [ND Cal Sept. 7, 2000] affd sub nom. Conant v Walters, 309 F3d 629 [9th Cir 2002])
  - Affirmed the right of physicians to recommend MMJ
  - “The government should be permanently enjoined from revoking any physician class member’s DEA registration merely because the doctor makes a recommendation for the use of medical marijuana based on a sincere medical judgment and from initiating any investigation solely on that ground...whether or not the doctor anticipates that the patient will, in turn, use his or her recommendation to obtain marijuana in violation of federal law.”

## State protection for PHYSICIANS:

- Pursuant to the NY Public Health Law, §3369:
  - “... practitioners ... shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, solely for the certified medical use or manufacture of marihuana, or for any other action or conduct in accordance with this title.”
- HOWEVER, there is no immunity for physicians if CCA is not followed (see Penal Law §179.10)

## Ancillary Issues:

- Professional Liability and Insurance Coverage
- Reimbursement
- Marketing/Advertisement
- Medical and Legal Education & Availability of Resources
- Telemedicine

# MARIJUANA AND THE WORKPLACE

WOMEN CRY FOR IT  
MEN DIE FOR IT

REEFER

MADNESS



# MARIJUANA LAWS- UNDERLYING FACTS

- ❑ Twenty -Three (23) States and the District of Columbia have enacted laws to legalize marijuana in some form or another.
- ❑ Four (4) states have recreational use laws: Alaska, Colorado , Oregon and Washington State.
- ❑ In seven (7) States there is pending legislation to permit medical marijuana use: Florida, Kentucky, Missouri, Nebraska, North Dakota, South Carolina and Tennessee
- ❑ Legislation recently failed in Georgia, Mississippi, Indiana, Kansas, Iowa, West Virginia, Wisconsin and Utah

# Marijuana and Federal Law

- ▣ Under the Controlled Substances Act of 1970, marijuana was classified as a Schedule I drug because it was considered to have no “accepted medical use in treatment in the United States.”
- ▣ U.S. Department of Transportation
  - Drug and Alcohol Testing Regulation – 49 CFR Part 40, at 40.151(e) does not authorize “medical marijuana” under a state law to be a valid medical explanation for a transportation employee’s positive drug test result. Nor is there any exemption for recreational use.

# Marijuana and Federal Law

## ▣ U.S. Department of Agriculture

- In a Memo issued last June it reminded employees that existing drug policies have not changed even in states that have legalized medical or recreational use of marijuana.
- But See. On August 29, 2013 The U.S. Justice Department issued an update to its Marijuana Enforcement Policy in which the Department informed the governors of Colorado and Washington that it was deferring its right to challenge their legalization laws at this time. It added, however, that if any of the stated harms in its memo do materialize – either despite a strict regulatory scheme or because of the lack of one – federal prosecutors will act aggressively to bring individual prosecutions focused on federal enforcement priorities and the Department may challenge the regulatory scheme themselves in these states.–



## Drug Testing And Employment

- In most cases, it is legal for employers to test employees for drugs including marijuana.
- No Federal Law prohibits drug testing.

# RELEVANT QUESTIONS FOR EMPLOYERS

- ▣ In a state with a lawful activities statute how can employer fire an employee when marijuana smoking is just as legal as smoking cigarettes?
- ▣ If you live in a state that permits medical marijuana use, and have a valid prescription, can an employer refuse to hire or fire you based on a positive drug test?

# LAWFUL ACTIVITIES STATUTES

- ▣ Twenty-seven (27) states have statutes which restrict an employer's rights to take adverse employment action based on employee's off-duty conduct, principally smoking.
- ▣ Eight (8) of those states particularly also protect an employees off duty use of alcohol.
- ▣ Colorado, New York and North Dakota statutes provide expansive protection of lifestyle choices that include most all legal activities away from the job

# The Curious Case of Mike Boyer



## LAWFUL ACTIVITIES LAWS AND MARIJUANA USE

- Washington State
- Michael Boyer was the first person to buy weed from a retailer in Spokane

## LAWFUL ACTIVITIES LAWS AND MARIJUANA USE

- Washington State
- After the press reported his achievement, his employer called him in for a drug test which he was certain to fail

# LAWFUL ACTIVITIES LAWS AND MARIJUANA USE

- ▣ COLORADO
- ▣ *Sosa v. ICAO*,
- ▣ Employee fired and denied Unemployment benefits
- ▣ Action permitted- if an employee admits the presence of marijuana in his system during working hours or if the employer proves the presence of marijuana through a drug test administered by a certified facility.

# LAWFUL ACTIVITIES LAWS AND MARIJUANA USE

- COLORADO
- *Bienor v. Industrial Claim Appeals Office*
  - Employee fired for positive drug test
  - Colorado law does not require employer to accommodate marijuana in the workplace
  - use may be decriminalized but drug; still illegal under Federal law



# LAWFUL ACTIVITIES LAWS AND MARIJUANA USE

- COLORADO
- *Coats v. Dish Network (Colo. Ct. of Appeals)*
  - Employee fired for positive drug test
  - Employee fired for positive drug test
  - Colorado Court of Appeals held -Firing lawful even though employee did not use marijuana in the workplace and was not under the influence at work and Prohibited by Federal Law so not a “lawful” use

# LAWFUL ACTIVITIES LAWS AND MARIJUANA USE

- COLORADO

- *Coats v. Dish Network* (Supreme Court – June 15, 2015)

- ▣ The court upheld the termination of an employee who failed a random drug test after using marijuana for medicinal purposes during his off-duty hours. Rejecting the employee's argument, the court held that as used in Colorado's lawful activities statute, the term "lawful" refers to those activities that are lawful under both state and federal law. Because marijuana use remains unlawful under federal law, employees who use marijuana, even for medicinal purposes, are not protected by the statute.

# LAWFUL ACTIVITIES LAWS AND MARIJUANA USE

- COLORADO

- *Curry v. Miller Coors, Inc. (U.S. District Ct.)*
  - Employee fired for positive drug test
  - Employer under Colorado Law may fire an employee after drug test showing presence of marijuana during working ours.

## DOES THE SAME ANALYSIS APPLY TO LAWFUL MEDICAL MARIJUANA?

- ▣ CALIFORNIA

- ▣ *Ross v. Raging Wire Communications*

- ▣ California's FEHA did not require employer to accommodate employee's medical marijuana use  
Marijuana did not come within ADA exception for drug use authorized by Federal law

# DOES THE SAME ANALYSIS APPLY TO LAWFUL MEDICAL MARIJUANA?

## ▣ MICHIGAN

▣ *Casias v. Wal-Mart Stores Inc.*

▣ The Sixth Circuit held that Michigan Medical Marijuana Act did not restrict private employer's ability to discipline employee for medical marijuana use

## DOES THE SAME ANALYSIS APPLY TO LAWFUL MEDICAL MARIJUANA?

### ▣ OREGON

#### ▣ *Washburn v. Columbia Forrest Products*

▣ The Oregon Supreme Court determined that Plaintiff was not a “disabled person” under the law.

▣ Concurrence added- Federal law preempts state employment discrimination laws to the extent it requires employers to accommodate medical marijuana use.

## DOES THE SAME ANALYSIS APPLY TO LAWFUL MEDICAL MARIJUANA?

- ▣ Court of Appeals -Washington
- ▣ *Roe v. Teletech Customer Care*
- ▣ Washington's medical marijuana statute did not create an implied cause of action against employers who terminate, or fail to hire, a person based solely on her use of medical marijuana.

## DOES THE SAME ANALYSIS APPLY TO LAWFUL MEDICAL MARIJUANA?

- ▣ NEW MEXICO
- ▣ *U.S. District Court- Garcia v. Tractor Supply co.*
- ▣ No cause of action for termination of employee who tested positive as medical marijuana is not an accommodation that must be provided by the employer under federal or state law.



## DOES THE SAME ANALYSIS APPLY TO LAWFUL MEDICAL MARIJUANA?

- ▣ ARIZONA
- ▣ Arizona Rev. Stat. Ann. Section 36-2813
- ▣ Provides protection for employees using medical marijuana for medical purposes. An employee is not considered impaired merely because marijuana metabolites appear in his system. He cannot be fired unless he is using on the job or impaired by his use.

# DOES THE SAME ANALYSIS APPLY TO LAWFUL MEDICAL MARIJUANA?

## ▣ DELAWARE

- ▣ Delaware's Medical Marijuana Act stipulates that "Unless a failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or federal regulations, an employer may not discriminate against a person . . . if the discrimination is based upon either of the following: (a) The person's status as a [medical marijuana] cardholder; or (b) A registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment."

## DOES THE SAME ANALYSIS APPLY TO LAWFUL MEDICAL MARIJUANA?

### ▣ CONNECTICUT

- ▣ The law prohibits employment decisions based upon a positive drug test if the individual is a medical marijuana cardholder and did not use, possess or indicate impairment while on the job.

## DOES THE SAME ANALYSIS APPLY TO LAWFUL MEDICAL MARIJUANA?

- ▣ New York - Section 3369
- ▣ “Certified patients . . . shall not be denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business . . . solely for the certified use . . . or for any other action or conduct in accordance with this article.”
- ▣ Being a certified patient shall be deemed to be disabled under the HRL

# CONCLUSIONS

- ▣ The conflict posed by the fact that federal Law will not change for some time means that employers always have Federal law to fall back on when making employment decisions.
- ▣ 2. Even where medical or recreational marijuana use is legal the courts have shown reluctance to inhibit employers who prohibit marijuana use in or out of work.

Be Afraid, Be Very Afraid



McKinney's Consolidated Laws of New York Annotated  
Penal Law (Refs & Annos)  
Chapter 40. Of the Consolidated Laws (Refs & Annos)  
Part Three. Specific Offenses  
Title K. Offenses Involving Fraud  
Article 179. Criminal Diversion of Medical Marihuana

McKinney's Penal Law § 179.10

§ 179.10 Criminal diversion of medical marihuana in the first degree

Effective: July 5, 2014  
Currentness

<[Expires and deemed repealed July 5, 2021, pursuant to L.2014, c. 90, § 12.]>

A person is guilty of criminal diversion of medical marihuana in the first degree when he or she is a practitioner, as that term is defined in subdivision twelve of section thirty-three hundred sixty of the public health law, who issues a certification with knowledge of reasonable grounds to know that (i) the recipient has no medical need for it, or (ii) it is for a purpose other than to treat a serious condition as defined in subdivision seven of section thirty-three hundred sixty of the public health law.

Criminal diversion of medical marihuana in the first degree is a class E felony.

**Credits**

(Added L.2014, c. 90, § 9, eff. July 5, 2014.)


**Editors' Notes**

**PRACTICE COMMENTARY**

*by William C. Donnino*

*See Practice Commentary to Penal Law § 179.00.*

McKinney's Penal Law § 179.10, NY PENAL § 179.10  
Current through L.2016, chapter 1.

 KeyCite Yellow Flag - Negative Treatment  
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated  
Public Health Law (Refs & Annos)  
Chapter 45. Of the Consolidated Laws (Refs & Annos)  
Article 33. Controlled Substances (Refs & Annos)  
Title V-a. Medical Use of Marihuana

McKinney's Public Health Law § 3369

§ 3369. Protections for the medical use of marihuana

Effective: July 5, 2014  
Currentness

<[Expires and deemed repealed July 5, 2021, pursuant to L.2014, c. 90, § 12.]>

1. Certified patients, designated caregivers, practitioners, registered organizations and the employees of registered organizations shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, solely for the certified medical use or manufacture of marihuana, or for any other action or conduct in accordance with this title.

2. Non-discrimination. Being a certified patient shall be deemed to be having a "disability" under article fifteen of the executive law (human rights law), section forty-c of the civil rights law, sections 240.00, 485.00, and 485.05 of the penal law, and section 200.50 of the criminal procedure law. This subdivision shall not bar the enforcement of a policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance. This subdivision shall not require any person or entity to do any act that would put the person or entity in violation of federal law or cause it to lose a federal contract or funding.

3. The fact that a person is a certified patient and/or acting in accordance with this title, shall not be a consideration in a proceeding pursuant to applicable sections of the domestic relations law, the social services law and the family court act.


4. Certification applications, certification forms, any certified patient information contained within a database, and copies of registry identification cards shall be deemed exempt from public disclosure under sections eighty-seven and eighty-nine of the public officers law.

**Credits**

(Added L.2014, c. 90, § 1, eff. July 5, 2014.)

McKinney's Public Health Law § 3369, NY PUB HEALTH § 3369  
Current through L.2016, chapter 1.



 KeyCite Yellow Flag - Negative Treatment  
Declined to Follow by Pearson v. McCaffrey, D.D.C., April 19, 2001

2000 WL 1281174

Only the Westlaw citation is currently available.  
United States District Court, N.D. California.

Dr. Marcus CONANT, et al., Plaintiffs,

v.

Barry R. MCCAFFREY, et al., Defendants.

No. C 97-00139 WHA.

|  
Sept. 7, 2000.

ORDER GRANTING IN PART AND DENYING  
IN PART CROSS-MOTIONS FOR SUMMARY  
JUDGMENT; DISSOLVING PRELIMINARY  
INJUNCTION; ENTERING PERMANENT INJUNCTION

ALSUP, District J.

INTRODUCTION

\*1 This class action challenges the lawfulness of the federal government's policy to punish physicians who "recommend" marijuana to patients. The parties have filed cross-motions for summary judgment both as to justiciability and the merits. This order holds that the relevant federal statute does not authorize the government to revoke a physician's license to dispense controlled substances merely because a physician "recommends" marijuana as a therapy to a patient. Any contrary holding would raise severe First Amendment doubts.

STATEMENT

1. The Compassionate Use Act

On November 5, 1996, the voters of California passed Proposition 215, the Compassionate Use Act of 1996, also known as the Medical Marijuana Initiative, adding Section 11362.5 to California's Health and Safety Code. The law took effect at 12:01 a.m., on Wednesday, November 6, 1996. The Compassionate Use Act provides, in relevant part, that:

seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical

use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.


Cal. Health & Safety Code § 11362.5(a) (West 2000). The Compassionate Use Act specifically protects physicians who recommend medical marijuana: "[No] physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes."

2. Federal Regulation of Controlled Substances

The Controlled Substances Act, 21 U.S.C. 801, et seq., established a comprehensive regulatory scheme governing the manufacture and distribution of dangerous drugs. The Controlled Substances Act classifies these drugs in one of five "Schedules," depending upon such factors as potential for abuse, the extent to which they lead to psychological or physical dependence, whether there is an accepted level of safety for their use under medical supervision, and whether they have a currently accepted medical use in the United States.

Schedule I controlled substances are subject to the most strict regulation because the federal government has determined that they have a "high potential for abuse," "no currently accepted medical use in treatment in the United States," and a "lack of accepted safety" for "use under medical supervision." 21 U.S.C. 812(b)(1). The Controlled Substances Act prohibits physicians from prescribing Schedule I drugs. Schedule I drugs may be dispensed in the United States only through strictly-controlled, federally-approved research programs. Marijuana is classified as a Schedule I drug.

Drugs in Schedules II through V may be prescribed. The federal government has determined both that they have some currently accepted medical uses in treatment in the United States and that they are safe for use under medical supervision. *Id.*, §§ 812(b)(2)-(5). A Schedule I drug may be reclassified only if the Food and Drug Administration approves a new drug application. The FDA has not done so for marijuana (Joint Stmt. Undisputed Facts ¶ 21).

 KeyCite Blue Flag – Appeal Notification  
Appeal Filed by USA v. MARIN ALLIANCE FOR MEDICAL MAR,  
ET AL, 9th Cir., December 21, 2015

2015 WL 6123062

Only the Westlaw citation is currently available.  
United States District Court,  
N.D. California.

United States of America, Plaintiff,  
v.  
Marin Alliance for Medical Marijuana,  
and Lynette Shaw, Defendants.

No. C 98-00086 CRB  
|  
Signed 10/19/2015

#### Synopsis

**Background:** Medical marijuana dispensary brought action, seeking to dissolve a permanent injunction prohibiting it from dispensing marijuana.

**[Holding:]** The District Court, Charles R. Breyer, J., held that Department of Justice was precluded from enforcing permanent injunction prohibiting medical marijuana dispensary from distributing marijuana to extent dispensary complied with California law.

Motion denied.

#### Attorneys and Law Firms

Kathryn L. Wyer, Washington, DC, for Plaintiff

Greg Anton, Lagunitas, CA, for Defendant

#### ORDER RE MOTION TO DISSOLVE PERMANENT INJUNCTION

CHARLES R. BREYER, UNITED STATES DISTRICT  
JUDGE

\*1 The Marin Alliance for Medical Marijuana (“MAMM”) asks this Court to dissolve a permanent injunction that this Court entered against it in 2002. *See* Mot. Dissolve

Perm. Inj. (dkt. 262). Having reviewed the filings and accompanying papers, the Court DENIES the motion to dissolve the injunction. However, the enforcement of said injunction must be consistent with the new directive of Congress in Section 538 of the Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. 113–235, 128 Stat. 2130 (2014) (“2015 Appropriations Act”),<sup>1</sup> which prohibits the Department of Justice from expending any funds in connection with the enforcement of any law that interferes with California's ability to “implement [its] own State law[ ] that authorize[s] the use, distribution, possession, or cultivation of medical marijuana.” *See* 2015 Appropriations Act § 538. As long as Congress precludes the Department of Justice from expending funds in this manner, the permanent injunction will only be enforced against MAMM insofar as that organization is in violation of California “State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.” *See id.*; Fed. R. Civ. P. 60(b).

#### I. BACKGROUND

As a matter of federal law, marijuana is prohibited as a Schedule I drug under the Controlled Substances Act (“CSA”). 21 U.S.C. § 812(c). But under state law, California's Compassionate Use Act of 1996 exempted from state criminal prosecution physicians, patients, and primary caregivers who possess or cultivate marijuana for medicinal purpose with a physician's recommendation. *See* Cal. Health and Safety Code Ann. §§ 11362.5 (“Compassionate Use Act”). The Compassionate Use Act was passed in a state-wide November 1996 referendum with the support of 56% of voters. *United States v. Cannabis Cultivators Club*, 5 F.Supp.2d 1086, 1091 (N.D.Cal.1998) (dkt. 61).

This Court has a lengthy history with this defendant on these issues. In 1998, the Government filed an action seeking declaratory and injunctive relief against MAMM (and five other medical marijuana dispensaries, all of which were deemed related and reassigned to this Court) on the grounds that it was engaged in the distribution of marijuana in violation of the CSA. *See* 21 U.S.C. §§ 801 *et seq.* At that time, the City and County of San Francisco and other cities in which the related defendants are located, acting as amici curiae, “urge[d] the Court not to adopt the injunctive relief sought by the federal government because of the adverse consequences an injunction would have on the public health of their citizens.” *Cannabis Cultivators Club*, 5 F.Supp.2d at 1094. But this Court determined that the preliminary injunction “must be granted” on the grounds of there being



Section A: Business Entity Information

1. Business Name:

2. Organization Type (choose one):

- For-profit
Non-profit

3. Business Type (choose one):

- Corporation
Sole Proprietorship
Limited Partnership
Other:
Limited Liability Company
General Partnership

4. Phone:

5. Fax:

6. Email:

7. Business Address:

8. City:

9. State:

10. ZIP Code:

11. Mailing Address (if different than Business Address):

12. City:

13. State:

14. ZIP Code:

Section B: Primary Contact Information

15. Name:

16. Title:

17. Phone:

18. Fax:

19. Email:

20. Mailing Address:

21. City:

22. State:

23. ZIP Code:

Section C: Proposed Manufacturing Facility Information

24. Proposed Facility Name:

25. Proposed Facility Address:

26. City:

27. State: NY

28. ZIP Code:

29. County:

30. Property Status (choose one):

- Owned by the applicant
Leased by the applicant
Other:

If you checked "Other" above, describe the property status in the field provided.

31. Proposed Hours of Operation:

Monday: to Friday: to
Tuesday: to Saturday: to
Wednesday: to Sunday: to
Thursday: to

An additional entry is included below for applicants who are proposing to use more than one manufacturing facility (responsible for cultivation, harvesting, production or other processing packaging and labeling).



32. Proposed Facility Name:
33. Proposed Facility Address:
34. City: 35. State: NY 36. ZIP Code:
37. County: 38. Property Status (choose one):
39. Proposed Hours of Operation:
Section D: Proposed Dispensing Facility #1 Information
40. Proposed Facility Name:
41. Proposed Facility Address:
42. City: 43. State: NY 44. ZIP Code:
45. County: 46. Property Status (choose one):
47. Proposed Hours of Operation:
Section E: Proposed Dispensing Facility #2 Information
48. Proposed Facility Name:
49. Proposed Facility Address:
50. City: 51. State: NY 52. ZIP Code:
53. County: 54. Property Status (choose one):



55. Proposed Hours of Operation:

Monday: to Friday: to
Tuesday: to Saturday: to
Wednesday: to Sunday: to
Thursday: to

Section F: Proposed Dispensing Facility #3 Information

56. Proposed Facility Name:

57. Proposed Facility Address:

58. City: 59. State: NY 60. ZIP Code:

61. County: 62. Property Status (choose one):
Owned by the applicant
Leased by the applicant
Other:
If you checked "Other" above, describe the property status in the field provided.

63. Proposed Hours of Operation:

Monday: to Friday: to
Tuesday: to Saturday: to
Wednesday: to Sunday: to
Thursday: to

Section G: Proposed Dispensing Facility #4 Information

64. Proposed Facility Name:

65. Proposed Facility Address:

66. City: 67. State: NY 68. ZIP Code:

69. County: 70. Property Status (choose one):
Owned by the applicant
Leased by the applicant
Other:
If you checked "Other" above, describe the property status in the field provided.

71. Proposed Hours of Operation:

Monday: to Friday: to
Tuesday: to Saturday: to
Wednesday: to Sunday: to
Thursday: to



Section H: Legal Disclosures

72. Has the applicant, any controlling person of the applicant, any manager, any principal stakeholder, any sole proprietor applicant, any general partner of a partnership applicant, any officer or member of the board of directors of a corporate applicant, or corporate general partner had a prior discharge in bankruptcy or been found insolvent in any court action? [ ]Yes [ ]No

If the answer to this question is "Yes," a statement providing details of such bankruptcy or insolvency must be included with this application.

73. Does any controlling person of the applicant, any manager, any principal stakeholder, any sole proprietor applicant, any general partner of a partnership applicant, any officer or member of the board of directors of a corporate applicant, or corporate general partner, or a combination of such persons collectively, maintain a ten percent interest or greater in any firm, association, foundation, trust, partnership, corporation or other entity, and such entity will or may provide goods, leases, or services to the registered organization, the value of which is or would be five hundred dollars or more within any one year?

OR

Does any entity maintain a ten percent interest or greater in the applicant, and such entity will or may provide goods, leases, or services to the registered organization, the value of which is or would be five hundred dollars or more within any one year?

[ ]Yes [ ]No

If the answer to either of these questions is "Yes," a statement with the name and address of the entity together with a description of the goods, leases, or services and the probable or anticipated cost to the registered organization, must be included with this application.

74.

A. Is the applicant a corporate subsidiary or affiliate of another corporation? [ ]Yes [ ]No

If the answer to this question is "Yes," a statement setting forth the name and address of the parent or affiliate, the primary activities of the parent or affiliate, the interest in the applicant held by the parent or affiliate, and the extent to which the parent will be involved in the activities of the applicant, and responsible for the financial and contractual obligations of the subsidiary must be included with this application. The organizational and operational documents of the corporate subsidiary or affiliate must also be submitted, including but not limited to, as applicable: the certificate of incorporation, bylaws, articles of organization, partnership agreement, operating agreement, and all amendments thereto, and other applicable documents and agreements including in relation to the subsidiary or affiliate's financial or contractual obligations with respect to the applicant.

B. Is any owner, partner or member of the applicant not a natural person? [ ]Yes [ ]No

If the answer to this question is "Yes," a statement must be included with this application setting forth the name and address of the entity, the primary activities of the entity, the interest in the applicant held by the entity, and the extent to which the entity will be involved in the activities of the applicant, and responsible for the financial and contractual obligations of the applicant. The organizational and operational documents of the entity must also be submitted, including but not limited to, as applicable: the certificate of incorporation, bylaws, articles of organization, partnership agreement, operating agreement, and all amendments thereto, and other applicable documents and agreements including in relation to the entity's financial or contractual obligations with respect to the applicant, and the identification of all those holding an interest or ownership in the entity and the percentage of interest or ownership held in the entity. If an interest or ownership in the entity is not held by a natural person, the information and documentation requested herein must be provided going back to the level of ownership by a natural person (Principal Stakeholder).



75. Has construction, lease, rental, or purchase of the manufacturing facility been completed? Yes No

If the answer to this question is "No," a statement indicating the anticipated source and application of the funds to be used in such purchase, lease, rental or construction, as well as anticipated date that construction, lease, rental or purchase will be completed must be included with this application.

76. Has construction, lease, rental, or purchase of the dispensing facilities been completed? Yes No

If the answer to this question is "No," a statement indicating the anticipated source and application of the funds to be used in such purchase, lease, rental or construction, as well as anticipated date that construction, lease, rental or purchase will be completed must be included with this application.

**Section I: Required Attachments**

Applications received without the required attachments will not be eligible for consideration until the required attachments are received. All such attachments must be postmarked by the Deadline for Submission of Applications.

77.  The applicant has enclosed a non-refundable application fee in the amount of \$10,000.

**Applications received without the \$10,000 application fee will not be considered.**

78.  The applicant has enclosed a conditionally refundable registration fee in the amount of \$200,000.

**Applications received without the \$200,000 registration fee will not be considered.**

**The \$200,000 registration fee will be refunded to applicants that are not selected as registered organizations.**

79.  The applicant has attached all required statements from Section H: Legal Disclosures, if applicable.

80.  The applicant has attached identification of all real property, buildings, and facilities that will be used in manufacturing and dispensing activities, pursuant to PHL § 3365 and 10 NYCRR § 1004.5(b)(2), and labeled this attachment as "**Attachment A.**"

81.  The applicant has attached identification of all equipment that will be used to carry out the manufacturing, processing, transportation, distributing, sale, and dispensing activities described in the application and operating plan, pursuant to PHL § 3365 and 10 NYCRR § 1004.5(b)(3), and labeled this attachment as "**Attachment B.**"

82.  The applicant has attached copies of all applicable executed and proposed deeds, leases, and rental agreements or executed option contracts related to the organization's real property interests, showing that the applicant possesses or has the right to use sufficient land, buildings, other premises, and equipment, and contains the language required in 10 NYCRR § 1004.5(b)(9), if applicable, or, in the alternative, the applicant attached proof that it has posted a bond of not less than \$2,000,000, pursuant to PHL § 3365 and 10 NYCRR § 1004.5(b)(9), and labeled this attachment as "**Attachment C.**"



83.  The applicant has attached an operating plan that includes a detailed description of the applicant's manufacturing processes, transporting, distributing, sale and dispensing policies or procedures, and contains the components set forth in 10 NYCRR § 1004.5(b)(4), and labeled the operating plan as "**Attachment D – Operating Plan**" with the information clearly labeled and divided into the following sections:

- Section 1 - Manufacturing (§ 1004.5(b)(4))
- Section 2 - Transport and Distribution (§ 1004.5(b)(4))
- Section 3 - Dispensing and Sale (§ 1004.5(b)(4))
- Section 4 - Devices (§ 1004.5(b)(4)(i))
- Section 5 - Security and Control (§ 1004.5(b)(4)(ii))
- Section 6 - Standard Operating Procedure (§ 1004.5(b)(4)(iii))
- Section 7 - Quality Assurance Plans (§ 1004.5(b)(4)(iv))
- Section 8 - Returns, Complaints, Adverse Events and Recalls (§ 1004.5(b)(4)(v))
- Section 9 - Product Quality Assurance (§ 1004.5(b)(4)(vi))
- Section 10- Recordkeeping (§ 1004.5(b)(4)(vii))

84.  The applicant has attached copies of the organizational and operational documents of the applicant, pursuant 10 NYCRR § 1004.5(b)(5), which must include the identification of all those holding an interest or ownership in the applicant and the percentage of interest or ownership held, and labeled this attachment as "**Attachment E.**"

85.  "**Appendix A: Affidavit for Board Members, Officers, Managers, Owners, Partners, Principal Stakeholders, Directors, and Members**" has been completed for each of the board members, officers, managers, owners, partners, principal stakeholders, directors, and any person or entity that is a member of the applicant setting forth the information required in PHL § 3365(1)(a)(iv) and 10 NYCRR § 1004.5(b)(6).

86.  The applicant has attached documentation that the applicant has entered into a labor peace agreement with a bona fide labor organization that is actively engaged in representing or attempting to represent the applicant's employees, pursuant to PHL § 3365(1)(a)(iii) and 10 NYCRR § 1004.5(b)(7), and labeled this attachment as "**Attachment F.**"

87.  The applicant has attached a financial statement setting forth all elements and details of any business transactions connected with the application, including but not limited to all agreements and contracts for consultation and/or arranging for the assistance in preparing the application, pursuant to 10 NYCRR § 1004.5(b)(10), and labeled this attachment as "**Attachment G.**"

88.  The applicant has completed "**Appendix B – Architectural Program**" and included the components set forth in 10 NYCRR § 1004.5(b)(11) and -(12).

89.  The applicant has attached the security plan of the applicant's proposed manufacturing and dispensing facilities indicating how the applicant will comply with the requirements of Article 33 of the Public Health Law, 10 NYCRR Part 1004, and any other applicable state or local law, rule, or regulation, and labeled this attachment as "**Attachment H.**"

90.  The applicant has attached the most recent financial statement of the applicant prepared in accordance with generally accepted accounting principles (GAAP) applied on a consistent basis and certified by an independent certified public accountant, in accordance with the requirements of 10 NYCRR § 1004.5(b)(16), and labeled this attachment as "**Attachment I.**"

91.  The applicant has attached a staffing plan for staff to be involved in activities related to the cultivation of marijuana, the manufacturing and/or dispensing of approved medical marijuana products, and/or staff with oversight responsibilities for such activities that includes the requirements set forth in 10 NYCRR § 1004.5(b)(18) of the regulations and labeled this attachment as "**Attachment J.**"





92. [ ] The applicant has attached proof from the local internet service provider(s) that all of the applicant's manufacturing and dispensing facilities are located in an area with internet connectivity and labeled this attachment as "Attachment K." Internet connectivity will be required to support the use of a Seed-to-Sale Solution approved by the Department to record the registered organization's permitted activities.

93. [ ] The applicant has attached a timeline demonstrating the estimated timeframe from growing marijuana to production of a final approved product, and labeled this attachment as "Attachment L."

94. [ ] The applicant has attached a statement and/or documentation showing that the applicant is able to comply with all applicable state and local laws and regulations relating to the activities in which it intends to engage under the registration, pursuant to 10 NYCRR § 1004.5(b)(8), and labeled this attachment as "Attachment M."

Section J: Attestation and Signature

As the chief executive officer duly authorized by the board of a corporate applicant, or a general partner or owner of a proprietary applicant, I hereby authorize the release of any and all applicant information of a confidential or privileged nature to the Department and its agents. If granted a registration, I hereby agree to ensure the registered organization uses the Seed-to-Sale Solution approved by the Department to record the registered organization's permitted activities. I hereby certify that the information provided in this application, including in any statement or attachments submitted herewith, is truthful and accurate. I understand that any material omissions, material errors, false statements, misrepresentations, or failure to provide any requested information may result in the denial of the application or other action as may be allowed by law.

95. Signature:

96. Date Signed:

97. Print Name:

The application must include a handwritten signature by the chief executive officer duly authorized by the board of a corporate applicant, or a general partner or owner of a proprietary applicant, and must be notarized.

Notary Name:

Notary Registration Number:

Notary (Notary Must Affix Stamp or Seal)

Date:



Overview

Pursuant to Public Health Law (PHL) § 3365(9), the Commissioner of the New York State Department of Health ("Department") shall register up to five applicants as registered organizations to manufacture and dispense approved medical marijuana products in New York State. In accordance with PHL § 3365(9), the Department will register five applicants as registered organizations, and is accepting applications from April 27, 2015 through and including May 29, 2015 for this purpose.

Each applicant must submit two fees with its application: a non-refundable application fee in the amount of \$10,000, and a registration fee in the amount of \$200,000. The fees are payable together or separately by certified check to the "New York State Department of Health."

The \$200,000 registration fee will be refunded to the applicant only if the applicant is not issued a registration.

Registrations issued by the Department shall be valid for a period of two (2) years. The Department will evaluate all completed applications received on or before the deadline in accordance with the criteria set forth in PHL § 3365(3) and Title 10 of the New York Code of Rules and Regulations (NYCRR) § 1004.6.

Application Timeline

Table with 2 columns: Event, Date. Rows include Application Window Opens (04/27/2015), Deadline for Submission of Application Questions (05/05/2015 4:00 PM ET), Deadline for Department Response to Application Questions (05/14/2015), Deadline for Department Receipt of Applications (05/29/2015), Registrations Issued (Estimated Timeframe) (Approximately July 2015).

Important Notices

- 1. The Department shall only review completed applications received by the above Deadline for Department Receipt of Applications and for which the application and registration fees have been submitted. Any cost incurred by the applicant in connection with the application, including but not limited to obtaining or creating the information, documents, materials and certifications required by the application, shall not be a charge upon the Department.
2. All notices from the Department to an applicant regarding an application that has been submitted will be sent to the email address that the applicant provides on the registration application Form DOH-5138. Applicants must immediately notify the Department of any change of address by email only at mmp@health.ny.gov with the subject line "Registered Organization Address Change."



3. The applicant shall be under a continuing duty to report to the Department any change in facts or circumstances stated in the application or any newly-discovered or occurring fact or circumstance which is required to be included in the application.
4. The applicant shall verify the truth and accuracy of the information and documentation submitted in its application. Any material omissions, material errors, misrepresentations, or failure to provide any requested information may result in the denial of the application or other action as may be allowed by law. The Department may, in its discretion, reject an application if it determines that information contained therein is not true and accurate.
5. An applicant that is issued a registration to operate as a registered organization shall be subject to and operate in accordance with Title V-A of Article 33 of the PHL and 10 NYCRR Part 1004 and all other applicable state and local laws and regulations.

#### **Questions and Answers**

All questions about the application or application process must be submitted to the Department by May 5, 2015. Questions must be submitted **by email only** at [mmp@health.ny.gov](mailto:mmp@health.ny.gov) with the subject line "Registered Organization Application Question" and include the reference to the application section and field number, where applicable. Applicants should identify and bring any questions to the Department's attention as soon as possible. The Department reserves the right to contact applicants for clarification and/or additional information concerning their questions. The Department will evaluate questions as they are received up until the deadline for submission of questions. Responses to all questions will be posted to the Department's web page ([https://www.health.ny.gov/regulations/medical\\_marijuana/](https://www.health.ny.gov/regulations/medical_marijuana/)) by May 14, 2015. No questions will be accepted by telephone or means other than through the email address noted above.

#### **Acceptance of Applications**

The Department will not accept for consideration any application which is not complete by May 29, 2015 4:00 PM ET. An application is not complete unless the following have been received by the Department:

1. The certified check(s) made out to the "New York State Department of Health" totaling \$210,000, consisting of the \$10,000 application fee (non-refundable) and the \$200,000 registration fee (refundable if the Department does not select the applicant as a Registered Organization); and
2. The registration application Form DOH-5138, together with all attachments, appendices and supporting documentation, including:
  - a. Attachments "A" through "M" as required by Section I;



- b. The applicant's chief executive officer duly authorized by the board of a corporate applicant, or a general partner or owner of a proprietary applicant, has signed the application and the signature is notarized;
- c. Appendix A – Affidavit for Board Members, Officers, Managers, Owners, Partners, Principal Stakeholders, Directors, and Members (Form DOH-5145); and
- d. Appendix B – Architectural Program (Form DOH-5146).

**Criteria for Consideration of Applications**

The Department shall review all information and documentation submitted by the applicant, and consider the criteria set forth in PHL § 3365 and 10 NYCRR § 1004.6, in making its determination. The applicant's submissions should demonstrate how it will meet said criteria, including but not limited to:

1. the ability to manufacture approved medical marijuana products, each with a consistent cannabinoid profile (the concentration of total tetrahydrocannabinol (THC) and total cannabidiol (CBD) will define the brand), and each able to pass the required quality control testing as further described in 10 NYCRR § 1004.11;
2. the ability to produce sufficient quantities of approved medical marijuana products, as further described in 10 NYCRR § 1004.11, as necessary to meet the needs of certified patients;
3. the ability to maintain effective control against diversion of marijuana and medical marijuana products as further described in 10 NYCRR § 1004.13;
4. the ability to comply with all applicable state and local laws and regulations;
5. that, if selected, the applicant is ready, willing, and able to properly carry on the activities set forth in 10 NYCRR Part 1004;
6. possession of, or the right to use, sufficient real property, buildings, and equipment to properly carry on the activity described in its operating plan, or in the alternative, the applicant has posted a bond in the amount of \$2,000,000;
7. that it is in the public interest that such registration be granted to the applicant;
8. that the applicant's four proposed dispensing facilities are geographically distributed. To be geographically distributed, the proposed dispensing facilities of an applicant must be located in multiple counties across New York State to best serve certified patients in the Medical Marijuana Program state-wide. Geographic distribution will not be demonstrated by the applicant if the proposed dispensing facilities of the applicant are all concentrated in counties of New York State that are neighboring or in close proximity.



9. the moral character and competence of board members, officers, managers, owners, partners, principal stakeholders, directors, and members of the applicant's organization;
10. the applicant's proposed operating plan and suitability of the proposed manufacturing and dispensing facilities, including but not limited to the suitability of the location and the architectural and engineering design of the proposed facilities; and
11. the applicant has entered into a labor peace agreement, as defined in PHL § 3360(14), with a bona-fide labor organization that is actively engaged in representing or attempting to represent the applicant's employees.

**Note: In demonstrating how such criteria are met, the information and submissions made as part of the application must contain specifics to show compliance with the applicable requirements of Title V-A of Article 33 of the PHL and 10 NYCRR Part 1004.**

The Department reserves the right to interview any applicant, and/or any individuals identified in an application, to ensure the accuracy and completeness of an application, and to use the information obtained from any such interview in considering the application pursuant to the statutory and regulatory criteria

The applicant shall allow reasonable access to the Department and/or its authorized representatives for the purpose of conducting an on-site survey or inspection of the applicant's proposed manufacturing and/or dispensing facilities. An entity selected as a registered organization is subject to ongoing audits by the Department, which may include unannounced site visits. The registered organization shall provide reasonable access to the Department of its facilities, books, records, personnel, etc.

#### **Clarification Process**

The Department reserves the right to contact any applicant after the submission of its application for the purpose of clarifying any item submitted in its application or to request additional information to ensure mutual understanding. This contact may include written questions, interviews, site visits, or requests for corrective pages in the application. Responses must be submitted to the Department within the time specified in the request. As applicable, clarifications will be treated as addenda to an application. Failure to comply with a request for additional information may result in rejection of the application as noncompliant. Nothing herein shall be deemed to extend the deadline for Department Receipt of completed applications.



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**Application Submission Instructions**

1. Complete Form DOH-5138 and include all necessary relevant documents for each item requested in the application. All attachments provided by the applicant must be clearly labeled as to which section the information corresponds so that it is clear to the Department that all requested information is provided.
2. Complete Appendix A: Affidavit for Board Members, Officers, Managers, Owners, Partners, Principal Stakeholders, Directors, and Members Form DOH-5145. For board members, officers, managers, owners, partners, directors, and members of the applicant that are not natural persons, Appendix A must be completed by each board member, officer, manager, owner, partner, director and member of that entity. For example, if one of the owners identified in the application is a corporation, Appendix A must be completed by each of the corporation's board members, officers, owners, partners, principal stakeholders, directors, and members. If an interest or ownership in the entity is not held by a natural person, Appendix A must be completed going back to the level of ownership by a natural person (principal stakeholders).
3. Complete Appendix B: Architectural Program Form DOH-5146.
4. Submit the following items to the address below by the application deadline (the Department will only review completed applications received by the application deadline):
  - a. one original and nine copies of the completed application FORM DOH-5138, Appendix A Form DOH-5145, Appendix B Form DOH-5146, and all attachments required by the application, all of which must be single-sided and securely bound;
  - b. a CD, DVD, or USB flash drive containing an electronic version of your completed application, Appendix A, Appendix B, and all attachments in a searchable PDF file; and
  - c. certified checks payable to the "New York State Department of Health" in the amounts of \$10,000 for the non-refundable application fee and \$200,000 for the conditionally refundable registration fee; or a certified check payable to the "New York State Department of Health" in the amount of \$210,000 for both fees.

**ADDRESS:**

**New York State Department of Health  
Bureau of Narcotic Enforcement  
Medical Marijuana Program  
150 Broadway  
Albany, NY 12204**

Applicants who wish to hand deliver their applications must notify the Department by email at [mmp@health.ny.gov](mailto:mmp@health.ny.gov) a minimum of twenty-four (24) hours in advance of the anticipated delivery date to make delivery arrangements and include "Registered Organization Application Delivery Request" in the subject line.



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**Freedom of Information Law**

Disclosure of information contained in submitted applications is subject to the laws of the State of New York, including the Freedom of Information Law (FOIL) contained in Article 6 of the Public Officers Law. **Information constituting trade secrets or critical infrastructure information for purposes of FOIL should be clearly marked and identified as such by the applicant upon submission. Each page containing such information should contain a footer notifying the Department that the material on the page is requested to be exempt from disclosure under FOIL pursuant to one of the exceptions referred to above. Applicants should not merely state generally that the application is proprietary in nature and, therefore, not subject to release to third parties. Determinations as to whether the materials or information may be withheld from disclosure will be made in accordance with Public Officers Law § 87.**



Appendix A: Affidavit for Board Members, Officers, Managers, Owners, Partners, Principal Stakeholders, Directors, and Members

Appendix A must be completed for all board members, officers, managers, owners, partners, principal stakeholders, directors, and members. For board members, officers, managers, owners, partners, directors, and members of the applicant that are not natural persons, Appendix A must be completed by each board member, officer, manager, owner, partner, director and member of that entity, going back to the level of ownership by a natural person. An Organizational Chart documenting your organizational structure must be included with this application.

1. Business Name: This is the name that was entered in Section A of the Application for Registration as a Registered Organization.
2. Name: 3. Title:
4. Briefly describe the role of this person or entity in the proposed registered organization:
5. Will this person or entity come into contact with medical marijuana or medical marijuana products? [ ] Yes [ ] No
Any managers who may come in contact with or handle medical marijuana, including medical marijuana products, shall be subject to a fingerprinting process as part of a criminal history background check in compliance with the procedures established by Division of Criminal Justice Services and submission of the applicable fee. Criminal history background checks must be done through Identogo at http://www.identogo.com/FP/NewYork.aspx using the ORI number NY0412500 and the Fingerprint Reason "Control Substance License."
6. Has this person or entity held any position of management or ownership during the preceding ten years of a 10% or greater interest in any other business which manufactured or distributed drugs? [ ] Yes [ ] No
If the answer to this question is yes, provide the name of the business, a statement defining the position of management or ownership held in such business, and any finding of violations of law or regulation by a governmental agency against the business or person or entity.





**Appendix A:**

**Affidavit for Board Members, Officers, Managers, Owners, Partners,  
Principal Stakeholders, Directors, and Members**

7. Has this person or entity been convicted of a felony or had any type of registration or license suspended or revoked in any administrative or judicial proceeding?

Yes  No

If the answer to either of these questions is "Yes," a statement explaining the circumstances of the felony, suspension or revocation must be provided below.

8. Phone:

9. Fax:

10. Email:

11. Residence Address:

12. City:

13. State:

14. ZIP Code:

15. Formal Education

Dates Attended

Degree

Institution	Address	From	To	Degree Received	Date Received



**Appendix A:**

**Affidavit for Board Members, Officers, Managers, Owners, Partners,  
Principal Stakeholders, Directors, and Members**

16. Licenses Held: List any and all licenses issued by a governmental or other regulatory entity.

Type of Professional License	License Number	Institution Granting License (Mailing Address, Phone, Email)	Effective Date	Expiration Date

17. Employment History for the Past 10 Years: Start with MOST RECENT employment and include employment during the last 10 years. Attach additional copies of page 3, if necessary.

Name of Employer:		
Type of Business:		
Street Address:		
City:	State:	Zip Code:
Starting Date of Employment:		Ending Date of Employment:
Name of Supervisor for Reference:		Supervisor Phone Number:
Position/Responsibilities:		
Reason For Departure:		
Name of Employer:		
Type of Business:		



Appendix A:
Affidavit for Board Members, Officers, Managers, Owners, Partners,
Principal Stakeholders, Directors, and Members

Form with multiple sections for personal and professional information, including fields for Street Address, City, State, Zip Code, Starting Date of Employment, Ending Date of Employment, Name of Supervisor for Reference, Supervisor Phone Number, Position/Responsibilities, Reason For Departure, Name of Employer, and Type of Business.



Appendix A:
Affidavit for Board Members, Officers, Managers, Owners, Partners,
Principal Stakeholders, Directors, and Members

Form with multiple sections for business information, including fields for Type of Business, Street Address, City, State, Zip Code, Starting/Ending Date of Employment, Name of Supervisor for Reference, Supervisor Phone Number, Position/Responsibilities, Reason For Departure, Name of Employer, Type of Business, and a section for 18. Offices Held or Ownership Interest in Other Businesses.



Appendix A:
Affidavit for Board Members, Officers, Managers, Owners, Partners,
Principal Stakeholders, Directors, and Members

Form with three identical sections for individuals. Each section includes fields for 'From:', 'To:', 'Business Type:', 'Office Held/Nature of Interest:', and 'Name, Address and Phone Number of Licensing/Regulatory Agency, if applicable:'. The 'Office Held/Nature of Interest:' field includes checkboxes for 'open', 'closed', and 'proposed'.



Appendix A:
Affidavit for Board Members, Officers, Managers, Owners, Partners,
Principal Stakeholders, Directors, and Members

19. Affirmative Statement of Qualifications

For individuals who have not previously served as a director/officer nor have had managerial experience, please include a statement below explaining how you are qualified to operate the proposed facility. This statement should include, but not be limited to, any relevant community/volunteer background and experience.

20. The undersigned certifies, under penalty of perjury, that the information contained herein or attached hereto is accurate, true, and complete in all material respects.

Signature: Date:
Notary Name: Notary Registration Number:
Notary (Notary Must Affix Stamp or Seal) Date:



Appendix B: Architectural Program

A SEPARATE "APPENDIX B" SHALL BE COMPLETED FOR EACH SEPARATE BUILDING AND/OR FACILITY INCLUDED IN THE ORGANIZATION'S BUSINESS PLAN

COMPANY INFORMATION

Form fields for Company Information: Business Name, Facility Type (Manufacturing Facility, Dispensing Facility), Use and Occupancy Classification, Building Construction Type and Classification, Facility Address, Primary Contact Telephone number, Primary Contact Fax number.

PART I - ARCHITECTURAL PROGRAM & CONSTRUCTION TIMELINE:

Applicant shall identify planning requirements, including but not limited to:

Table with 2 columns: checkbox and description of planning requirements (TOWN BOARD APPROVAL, PLANNING BOARD APPROVAL, ZONING BOARD OF APPEALS APPROVAL, PREPARATION OF CONSTRUCTION DOCUMENTS, BUILDING PERMIT, BIDDING PHASE, CONTRACT AWARD PHASE PER EACH APPLICABLE CONTRACTOR, COMMENCEMENT OF CONSTRUCTION, COMPLETION OF CONSTRUCTION).



Appendix B – Architectural Program

PART II – SITE PLAN(S)

Applicant shall provide the appropriate details for each of the following by identifying the location and dimension on the Site Plan attached to the application for each building location.

- Entrance and Exits
Public Parking Spaces
Staff Parking Spaces
Accessible Parking Spaces
Accessible Route(s)
Fire Lane and/or Fire Apparatus Road
Percentage of Green Space
Location of Emergency Power Systems
Loading & Unloading
Security Gates & Fences

PART III – ENERGY SOURCES & ENGINEERING SYSTEMS:

Applicant shall provide the following minimum information to outline the specifications relating to the energy sources and engineering systems of each building included in the application.

- Energy Source:
Natural Gas, Oil, Electric, Solar, Other
Engineering Systems:
Heating System: Type, Size, Efficiency, Ventilation Requirements
Cooling System: Type, Size, Efficiency, Ventilation Requirements
Ventilation & Humidification Systems: Type, Size, Efficiency, Ventilation Requirements
Electrical Distribution Available
Water Supply: Municipal Water Service or Private Well Water
Sewage: Municipal Sewer System or Private Septic System
Emergency Power System: Type, Size, Efficiency





Appendix B – Architectural Program

PART IV – BUILDING CODE COMPLIANCE: (pages 3-13)

CHECK ALL APPLICABLE CODES FOR THE FACILITY

Table with 2 columns: checkbox and code description. Codes include 2010 BUILDING CODE OF NYS, 2010 FIRE CODE OF NYS, 2010 PLUMBING CODE OF NYS, 2010 MECHANICAL CODE OF NYS, 2010 FUEL GAS CODE OF NYS, 2010 PROPERTY MAINTENANCE CODE OF NYS, 2010 ENERGY CONSERVATION CONSTRUCTION CODE OF NYS, 2012 IECC COMMERCIAL PROVISIONS, 2010 EXISTING BUILDING CODE OF NYS, NEC NATIONAL ELECTRIC CODE, (Specify Applicable Version), 2014 NY CITY CONSTRUCTION CODE, 2008 NY CITY CONSTRUCTION CODE, 1968 NY CITY CONSTRUCTION CODE, NFPA 101-06 LIFE SAFETY CODE, ICC/ANSI A117.1-03 ACCESSIBLE AND USABLE BUILDINGS AND FACILITIES, OTHER.



**Appendix B – Architectural Program**

<b>Select Project Type:</b> Check all that apply. Refer to the Existing Building Code for definitions.	<input type="checkbox"/> New Building <input type="checkbox"/> Repair <input type="checkbox"/> Alteration Level 1 <input type="checkbox"/> Alteration Level 2	<input type="checkbox"/> Alteration Level 3 <input type="checkbox"/> Change of Occupancy <input type="checkbox"/> Addition <input type="checkbox"/> Historic Building	<input type="checkbox"/> Demolition <input type="checkbox"/> Chapter 3. Prescriptive Compliance Method <input type="checkbox"/> Chapter 13. Performance Compliance Method
	<b>Select Work Involved:</b> Check all that apply.	<input type="checkbox"/> General Construction <input type="checkbox"/> Roofing <input type="checkbox"/> Asbestos Abatement/Environmental <input type="checkbox"/> Fire Alarm	<input type="checkbox"/> Structural <input type="checkbox"/> Mechanical <input type="checkbox"/> Plumbing <input type="checkbox"/> Electrical

<b>CODE COMPLIANCE REVIEW</b>						
Applicant shall provide all applicable information in regards to the code topic and section listed below.						
1. Code Compliance Review is based on the 2010 NY State Building Code for New Construction. If any other building code applies to the location or type of construction, provide applicable code and sections that most closely relates and references the code topic and information in the code sections listed below. Provide appropriate abbreviations for other applicable codes, such as: <b>FC: Fire Code, PC: Plumbing Code, MC: Mechanical Code, FGC: Fuel Gas Code, ECC: Energy Conservation Code.</b>						
2. Provide the Required standard for each applicable code section. (i.e.: area, quantity, classification type, materials, hourly separation, etc.). If section does not apply, indicate one of the following with explanation: <b>NA: Not Applicable, NR: Not Required, NP: Not Permitted</b>						
3. Provide your facilities "Actual" value for each required standard as per applicable code section.						
No.	Topic	NYS Building Code Section	Other Code <sup>1</sup> (as Stated Above) & Section	Minimum Information Required to be Identified for this building/facility on the Building or Site Plan(s)	Required Code Value <sup>2</sup> /Allowed Code Value	Facility's Actual Value <sup>3</sup>
1	Use & Occupancy Classification	302.1 - 312		Use & occupancy of this facility. Identify all applicable materials, class and quantities regarding Table 307.1.		



**Appendix B – Architectural Program**

No.	Topic	NYS Building Code Section	Other Code <sup>1</sup> (as Stated Above) & Section	Minimum Information Required to be Identified for this building/facility on the Building or Site Plan(s)	Required Code Value <sup>2</sup> /Allowed Code Value	Facility's Actual Value <sup>3</sup>
2	Combustible Storage	413		All combustible storage areas and rooms, as per applicable Building and Fire Codes. Identify all combustible stored materials, area and room dimensions, all required fire separations, and exit requirements.		
3	Hazardous Materials	414		All hazardous materials stored or used as per applicable Building and Fire Codes. Identify all combustible stored materials, area and room dimensions, all required fire separations, and exit requirements.		
4	Hazardous Materials Control Areas	414.2		Provide additional information indicating number, size, materials stored, and quantity of each material.		
5	Building Area & Height	501-507		Provide the building area & height Provide all calculations and cite applicable code sections for increased Building Area & Heights allowed per building code(s).		
6	Incidental Use Areas	508.2		Identify all Incidental Use Areas and required fire separation of occupancies on Building Plans.		



**Appendix B – Architectural Program**

No.	Topic	NYS Building Code Section	Other Code <sup>1</sup> (as Stated Above) & Section	Minimum Information Required to be Identified for this building/facility on the Building or Site Plan(s)	Required Code Value <sup>2</sup> /Allowed Code Value	Facility's Actual Value <sup>3</sup>
7	Mixed Occupancies	508.3		Provide analysis with code cited, and required fire separation of occupancies. Identify required fire separation of occupancies on Building Plan(s).		
8	Nonseparated Uses	508.3.2		Provide analysis with code cited, and required fire separation of occupancies. Identify required fire separation of occupancies on Building Plan(s).		
9	Separated Uses (Ratio < 1)	508.3.3		Provide analysis with code cited, and required fire separation of occupancies. Identify required fire separation of occupancies on Building Plan(s).		
10	Construction Classification	602		Provide Construction Classification per each building included in Application.		
11	Fire Resistance Rating Req'm't for Building Elements	Table 601		Provide Fire Resistance Rating per each building element as per Table 601. Identify rating & elements on Building Plans.		



**Appendix B – Architectural Program**

No.	Topic	NYS Building Code Section	Other Code <sup>1</sup> (as Stated Above) & Section	Minimum Information Required to be Identified for this building/facility on the Building or Site Plan(s)	Required Code Value <sup>2</sup> /Allowed Code Value	Facility's Actual Value <sup>3</sup>
12	Exterior Wall Fire-Resistance Rating	Table 602		Identify required fire resistance rating of exterior walls on Building Plan(s).		
13	Exterior Fire Separation Distance	Table 602		Identify required fire separation distance of exterior walls between Buildings on Plan.		
14	Fire Walls	705		Provide code information and identify all applicable required Fire Wall(s) and fire resistance requirement on Building Plans.		
15	Fire Barriers	706		Provide code information and identify all applicable required Fire Barrier(s) and fire resistance requirement on Building Plans.		
16	Shaft Enclosures	707		Provide code information and identify all applicable required Shaft Wall(s) and fire resistance requirement on Building Plans.		
17	Fire Partitions	708		Provide code information and identify all applicable required Fire Partition(s) and fire resistance requirement on Building Plans.		



**Appendix B – Architectural Program**

No.	Topic	NYS Building Code Section	Other Code <sup>1</sup> (as Stated Above) & Section	Minimum Information Required to be Identified for this building/facility on the Building or Site Plan(s)	Required Code Value <sup>2</sup> /Allowed Code Value	Facility's Actual Value <sup>3</sup>
18	Horizontal Assemblies	711		Provide code information and identify all applicable required Horizontal Assemblies and fire resistance requirement on Building Plans.		
19	Fire Protection: Sprinkler System	903		Indicate Type of Sprinkler System: <input type="checkbox"/> NFPA 13 <input type="checkbox"/> NFPA 13 R <input type="checkbox"/> NFPA 13D Provide code information of all applicable requirements for Automatic Sprinkler Systems with code section cited.		
20	Alt. Fire Extinguishing System	904		Provide code information of all applicable requirements for Alternative Automatic Fire-Extinguishing Systems with code section(s) cited.		
21	Standpipe System	905		Provide code information of all applicable requirements for Standpipe Systems with code section(s) cited.		
22	Fire Alarm & Detection Systems	907		Provide code information of all applicable requirements for Fire Alarm System(s) with code section cited. Indicate Type of Fire Alarm System <input type="checkbox"/> Addressable <input type="checkbox"/> Hardwired (zoned)		



**Appendix B – Architectural Program**

No.	Topic	NYS Building Code Section	Other Code <sup>1</sup> (as Stated Above) & Section	Minimum Information Required to be Identified for this building/facility on the Building or Site Plan(s)	Required Code Value <sup>2</sup> /Allowed Code Value	Facility's Actual Value <sup>3</sup>
23	Emergency Alarm System	908		Provide code information of all applicable requirements for Emergency Alarm Systems with code section cited.		
24	Fire Department Connections	912		Identify Fire Department connections in accordance with NFPA applicable standard.		
25	Exits	1001.1 & 2		Identify on the Building Plans and documents, per each door, the following information: door width, door height, direction of swing, type of construction, hourly rating, and door closures.		
26	Occupant Load	1004 & Table 1004.1.1		Identify the use/name of each room, dimensions of each room, and Occupant Loads per each room on the Building Plans.		
27	Egress Width	1005		Provide egress widths & cite applicable code section(s) and requirement(s) on the Building Plans		
28	Accessible Means of Egress	1007.1		Provide accessible means of egress as per Section 1007 & cite applicable code section(s) and requirement(s) on the Building Plans.		



**Appendix B – Architectural Program**

No.	Topic	NYS Building Code Section	Other Code <sup>1</sup> (as Stated Above) & Section	Minimum Information Required to be Identified for this building/facility on the Building or Site Plan(s)	Required Code Value <sup>2</sup> /Allowed Code Value	Facility's Actual Value <sup>3</sup>
29	Doors, Gates, and Turnstiles	1008		Means of egress doors shall meet the requirements of this section.		
30	Interior Stairs	1009		Identify the following information for each stairway on the Building Plan(s): the width of stairways; the height, width, depth and number of risers and treads; dimensions of landings; stairway construction type; and handrail height.		
31	Ramps	1010.1		Identify the following information of each ramp, on the Building Plan(s): width; total vertical rise; length of ramp; and handrail height.		
32	Common Path of Travel	1014.3		Identify on the Building Plan(s): the length of the "Common Path of Travel" per each room as per applicable building code requirements.		
33	Exit Doorway Arrangement	1015		Identify on the Building Plan(s): applicable building code requirements for all Exits and Exit Access Doorways per each room and required exits in all buildings.		
34	Corridor Fire Rating	1017.1		Identify, on the Building Plan(s): all corridors with required fire resistance and the applicable fire rating.		





**Appendix B – Architectural Program**

No.	Topic	NYS Building Code Section	Other Code <sup>1</sup> (as Stated Above) & Section	Minimum Information Required to be Identified for this building/facility on the Building or Site Plan(s)	Required Code Value <sup>2</sup> /Allowed Code Value	Facility's Actual Value <sup>3</sup>
35	Corridor Width	1017.2		Identify on the Building Plan(s): the width of all corridors. Provide applicable code section(s) and requirement(s).		
36	Dead End Corridor	1017.3		Corridors shall not exceed the maximum dead end corridor length as per applicable code.		
37	Number of Exits and Continuity	1019		Identify on the Building Plan(s): required number of exits, continuity and arrangement as per the applicable code requirements.		
38	Vertical Exit Enclosures	1020		Identify on the Building Plan(s): all applicable code requirements for each Vertical Exit Enclosure.		
39	Exit Passageways	1021		Identify on the Building Plan(s): all applicable code requirements for each Exit Passageway.		
40	Horizontal Exits	1022		Identify on the Building Plan(s): all applicable code requirements for each Horizontal Exit.		



**Appendix B – Architectural Program**

No.	Topic	NYS Building Code Section	Other Code <sup>1</sup> (as Stated Above) & Section	Minimum Information Required to be Identified for this building/facility on the Building or Site Plan(s)	Required Code Value <sup>2</sup> /Allowed Code Value	Facility's Actual Value <sup>3</sup>
41	Exterior Exit Ramps & Stairways	1023		Identify on the Building Plan(s); all applicable code requirements for each exterior exit ramps and stairways.		
42	Exit Discharge	1024		Identify on the Building Plan(s); all applicable code requirements for each Exit Discharge.		
43	Accessibility	1101.1 - 1110 & ICC/A117.1(03)		Identify on the Building Plan(s); all applicable code requirements such that the design and construction of each building/facility provides accessibility to physically disabled persons.		
44	Energy Conservation	2010 NYS ECCC & IECC 2012		Identify the R-Value and U-Value of each construction component and assembly of the building envelope as required in the applicable energy and building code(s).		
45	Emergency & Standby Power	2702.1		Identify emergency & Standby Power locations and specifications of the system to be provided.		
46	Smoke Control Systems	2702.2.2		Identify the Standby power for smoke control systems in accordance with Section 909.11 of NYS Building Code.		



**Appendix B – Architectural Program**

No.	Topic	NYS Building Code Section	Other Code <sup>1</sup> (as Stated Above) & Section	Minimum Information Required to be Identified for this building/facility on the Building or Site Plan(s)	Required Code Value <sup>2</sup> /Allowed Code Value	Facility's Actual Value <sup>3</sup>
47	Plumbing Fixture Count	2902.1		Identify on the Building Plan(s): the minimum plumbing facilities as per applicable plumbing code(s).		
48	Available Street Water Pressure			Provide the available street or well water pressure.		
49	Fire Apparatus Access Road	FC503.1		Identify on the Site Plan: Fire Apparatus Road, Fire Lane and other Fire Service requirements per applicable Building and Fire Codes.		

## Application for Registration as a Registered Organization - Questions and Answers

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### Evaluation Weights for Scored Criteria

<b>Sub Categories</b>	<b>Applicant Raw Score:</b>	<b>Conversion Factor</b>	<b>Applicant Weighted Score</b>	<b>Percentage of Total Available Points</b>
Miscellaneous	12.00	0.33	4.00	3.2
Product Manufacturing	104.00	0.43	45.00	36
Security	93.00	0.06	6.00	4.8
Transportation & Distribution	21.00	0.19	4.00	3.2
Sales & Dispensing	45.00	0.16	7.00	5.6
Quality Assurance & Staffing	111.00	0.17	19.00	15.2
Real Property and Equipment	18.00	0.56	10.00	8
Geographic Distribution	4.00	3.00	12.00	9.6
Architectural Design	265.05	0.02	6.00	4.8
Financial Standing	3.00	4.00	12.00	9.6
<b>Total Points</b>	<b>676.05</b>		<b>125.00</b>	<b>100</b>

## Results

Applicant	Total Weighted Score
<b>PharmaCann LLC</b>	<b>97.12</b>
<b>Vireo New York LLC</b> formerly known as Empire State Health Solutions	<b>96.46</b>
<b>Columbia Care NY LLC</b>	<b>95.08</b>
<b>Etain, LLC</b>	<b>91.00</b>
<b>Bloomfield Industries Inc.</b>	<b>90.59</b>
New York Canna, Inc.	90.43
Fiorello Pharmaceuticals, Inc.	90.23
Valley Agriceuticals, LLC	89.49
Citiva Medical LLC	89.49
PalliaTech NY, LLC	89.31
Great Lakes Medicinals LLC	86.86
Alternative Medicine Associates, LLC	86.18
Hudson Health Extracts, LLC	86.17
Brightwaters Farms LLC	85.92
Salus Scientific, LLC	85.49
CCCONY, Inc. (Compassionate Care Centers of NY, Inc.)	85.45
NY Compassion, LLC	84.91
LabCare, Inc.	82.03
Kinex Supportive Pharmaceuticals, LLC	81.89
Silver Peak NY LLC	81.86
New York Medical Growers, LLC	81.55
Compassionate Sunset LLC D/B/A Compassionate Relief Centers of NY	80.46
North Country Roots, Inc.	79.26
Far(m)ed New York, LLC	78.77
Mindful Medical New York, LLC	78.75
Cannabis of America LLC D/B/A Empire Green Labs	78.64
Herbal Agriculture LLC	78.01
Empire State Compassionate Care, Inc.	77.80
Med Mar LTD	77.25
Butler Evergreen, LLC	77.02
Advanced Grow Labs New York, LLC	76.26
Tilray New York, LLC	75.56
THC Health Inc.	74.25
Nepenthea LLC	71.35
Medigro Organics LLC	63.62
Sheva Health & Wellness	62.29
CanniCare LLC	59.96
Kannalife Sciences, Inc. D/B/A Kannagro, LLC	57.59
Good Green Group LLC	55.51
Compassionate Care WNY, LLC	54.96
Integrated Scientific Herbal Advances LLC	53.44
NY Growing Partners, LLC	47.26
Ross John Enterprises D/B/A Good Leaf	45.09

**Russell G. Tisman, Esq.**

Russell G. Tisman (The Ohio State University College of Law, 1977) specializes in complex corporate, commercial, defense, employment, labor and Surrogate's Court litigation. He has tried cases and argued appeals in Federal and State courts and administrative agencies throughout the United States, and in arbitration and other alternate dispute resolution fora. Mr. Tisman also actively counsels management and human resource professionals on employment and labor matters. He represents public companies, privately held businesses, insurers, financial institutions and individuals in all types of business related disputes.

Mr. Tisman commenced practice in 1977 with a multinational Wall Street law firm. From 1980-1987, he was Senior Litigation Counsel of ITT Corporation, where he was responsible for employment litigation system-wide and commercial, antitrust and product liability defense litigation. ITT awarded Mr. Tisman an award for outstanding professional achievement for his management and handling of its employment litigation. Mr. Tisman was a founding member and head of the litigation and employment and labor practices of Groman, Ross & Tisman, P.C., which joined Forchelli Curto in 2006.

Mr. Tisman is a member of the American Bar Association, the Association of the Bar of the City of New York and the Nassau County Bar Association, where he is active on the employment and labor committee. He has served as President of the Lawyers Club of Huntington and currently is a board member of the Theodore Roosevelt American Inn of Court. He has published articles in various law journals, the *Journal of the American Corporate Counsel Association*, and the *National Law Journal*, and treatise sections on litigation and employment topics, including chapter updates for BNA's Employment Discrimination Law treatise. He also lectures frequently on employment and litigation law topics before both local and national audiences.

Mr. Tisman actively serves as an arbitrator and mediator in commercial and employment disputes and has been a court-appointed arbitrator. He has served on committees of the Mid-Island Y JCC and the Northwestern University Alumni Association, where he is past President of the Long Island Alumni Club. He also served as Regional Co-Director of Northwestern's Alumni Admission Council. A heart transplant recipient, Mr. Tisman actively volunteers for various organizations involved in organ transplantation.

Mr. Tisman is AV-Rated by Martindale Hubbell. The Labor and Employment Committee of the Nassau County Bar Association recognized Mr. Tisman in 2012 for distinguished professional achievement and leadership. He repeatedly has been recognized as a Superlawyer in business litigation, and has been selected three times by Long Island Business News for listing as one of Long Island's leading employment and labor lawyers in its "Who's Who in Law" edition, among other honors.

**Daniel P. Deegan, Partner**

**Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP**

**Daniel P. Deegan** (St. John's University School of Law, 1989) heads up the Firm's Industrial Development Agency (IDA), Municipal Incentives and Government Relations practices, with particular emphasis on facilitating and implementing responsible real estate development projects. He specializes in Real Estate Development Law, Zoning Law, Municipal Incentives/IDA Law, and Government Relations/Municipal Law. He is experienced in representing companies before the IDAs in Nassau and Suffolk Counties. Dan has a reputation for "getting things done" with efficiency, effectiveness and integrity.

Mr. Deegan has been awarded an "AV" legal ability and ethics rating by Martindale-Hubbell Law Directory – the very highest rating this nationally recognized publication has established. This rating is based upon extensive confidential peer review surveys. He was selected by his peers for inclusion in New York's Super Lawyers every year since 2010. He was also peer selected in LI Pulse Magazine as a "Top Legal Eagle" for being the "most unbeatable" in Real Estate.

Mr. Deegan is admitted to practice in New York and New Jersey. In addition, he is admitted to practice before the Federal Courts of both New York and New Jersey, including the United States Supreme Court. He is a member of the American Bar Association and the New York State Bar Association. In the mid-1990's, Dan was appointed City Attorney for the City of Glen Cove, by then-Mayor Thomas R. Suozzi, and served in that capacity through 2006.

Mr. Deegan was elected to the Board of the Long Island Association in 2015. He also serves on the Board of the New York League of Conservation Voters (NYLCV) and is Vice Chairman of the Long Island Chapter. He has served as President of the Glen Cove Rotary, and Member, Board of Directors for the Gift of Life Foundation and, currently, North Shore Sheltering Program, Inc., a shelter for the homeless. He is also a member of the Commercial Industrial Brokers Society of Long Island (CIBS) and was recognized as the "Associate Member of the Year."

He is a frequent lecturer to trade groups and others on the law and practice relating to Economic Development Incentives and Industrial Development Agencies. His article on the Benefits of IDA was published in the New York Real Estate Journal and the Suffolk Lawyer. Dan earned his B.A. from Providence College in 1986 and graduated Chaminade High School in 1983.

Practice Areas: Real Estate, Land Use and Zoning, Municipal, IDA Law



**Anthony V. Curto, Esq.**

Anthony V. Curto (New York Law School, 1960) began his legal career at a Manhattan law firm, followed by ten years as President and Chairman of Whitney Enterprises. In 1981, he joined a prominent Long Island law firm as a member of its three-person Executive Committee, managing its corporate department. In 1991, he founded and became President of Curto, Barton & Alesi, P.C., which merged with the Firm in 1999.

Mr. Curto's work centers on structuring, negotiating and documenting a variety of complex transactions on behalf of regionally and nationally known clients. He counsels public and private corporations in major transactional matters, including mergers and acquisitions, joint ventures, partnering arrangements and the reorganization of business enterprises and assets, across a variety of industries. He also represents corporations in formation, early stage and venture capital financings, and advises clients in private placements and public offerings of securities.

Mr. Curto has been associated with a number of high profile matters, including the creation of the Bernard M. Baruch Foundation. He has also represented an assortment of celebrities and personalities, including Aleksandr I. Solzhenitsyn, Harry Chapin, Mike Francesa, Father Tom Hartman and Paula Abdul, among others. Currently, he is counsel to Empire State Compassionate Care, Inc.

An advocate of community service, Mr. Curto has received numerous awards for his active role in community endeavors, including the 1984 Congressional Achievement Award and the 1987 Martin Luther King "Living the Dream" Service Award. Mr. Curto was cited as the 37<sup>th</sup> Most Influential Long Islander by the *Long Island Press* in 2008. He was a *Networking Magazine* David Award Honoree in 2008, 'Who's Who in Corporate Law' by the *Long Island Business News* and was a recipient of the Telecare Award of Excellence in 2010. He is a regular panel member of "Father Tom and Friends," a weekly television talk show, and speaks frequently at bar association seminars.

Mr. Curto is admitted to the New York State Bar Association, the United States Tax Court and the United States District Court for the Eastern and Southern Districts of New York.

# ABRAMS FENSTERMAN

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Yulian Shtern is an associate at Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP.

Yulian provides advice and guidance to health care providers on regulatory and corporate matters. He counsels a broad range of health care providers, including physicians, physical therapists, nursing homes, ambulette service providers, dialysis facilities, home health agencies, ambulatory surgery centers, adult care facilities, and diagnostic & treatment centers. Yulian assists clients in developing and implementing effective corporate compliance and HIPAA compliance programs.

Yulian also represents practitioners and other business owners in controversy matters, including regulatory enforcement actions, provider audits, overpayment recovery actions, government investigations and adverse credentialing actions.

Yulian monitors the rapidly changing developments in laws and regulations affecting the health care industry. Yulian has focused on the various laws and regulations affecting businesses and entrepreneurs involved with the production and dispensing of cannabis and medical marijuana.

Prior to joining Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP, Yulian Shtern was a fellow at the New York State Supreme Court, Second Department Appellate Term. Yulian is a Magna Cum Laude graduate of Albany Law School of Union University, where he was an active member of the Albany Law Review and participated in appellate and trial moot court competitions. Yulian is also a Summa Cum Laude graduate of the State University of New York at Albany, where he completed the 3+3 Law Program. Yulian is admitted to practice in the State of New York.

# ABRAMS **AF** FENSTERMAN

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Elizabeth Kase is a Partner at Abrams Fensterman where she specializes in criminal law. Previously, she was a Partner at Kase & Druker and also served as an Assistant District Attorney in New York County where she honed her investigatory and trial skills and prosecuted hundreds of cases pertaining to street crime, domestic violence, white collar crime, sex crimes and cyber-crime.

Elizabeth is known as a leading criminal defense attorney on Long Island. She has defended large-scale federal and state criminal matters including public corruption cases, mortgage fraud, embezzlement schemes, sex crimes and narcotics cases, as well as complex DWIs. In addition, in anticipation of the emerging growth and use of medical marijuana, Elizabeth has developed specific expertise in counseling clients about the legalities and illegalities of the uses, abuses and distribution of medical marijuana under New York and federal law. She balances this work against a well-developed juvenile defense practice helping children navigate the criminal justice system with a therapeutic approach.

Elizabeth also has vast experience handling clients that have diagnosed mental health issues, helping clients navigate the criminal justice system with special care for and consideration of their unique medical needs. She has particular expertise related to offering explanation and insight through medical history and alternatives to incarceration as well as treatment options. She works with the experienced Mental Health team at Abrams Fensterman to give clients a full range of legal services and experience.

Elizabeth is dedicated to helping the community. She serves as Village Justice of Baxter Estates in Port Washington. Elizabeth also serves as a *pro bono* staff attorney for the Nassau Coalition Against Domestic Violence (The Safe Center), sits on the Board of Directors of the North Shore Child and Family Guidance Center, and is a dedicated volunteer at UJA-Federation.

Elizabeth was named to the Long Island Business News (LIBN) "40 Rising Stars Under 40", as well as "Top 50 Influential Women on Long Island" for her professional accomplishments and contributions to Long Island. Nassau County Bar Association named her *Pro Bono* Attorney of the Month. At 39, Elizabeth was nominated for the position of County Court Judge and received a "Well Qualified" rating for this position from the Nassau County Bar Association as well as many civic endorsements. She is a frequent lecturer and commentator on matters pertaining to criminal law, medical marijuana, evidence and social media and our youth. Elizabeth also teaches a course on trial advocacy annually at Cardozo Law School.



## Hanan B. Kolko

Member of the Firm

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### Practice Areas

Labor Law  
Employee Benefits/ERISA Law  
Medical Marijuana Law

### Education

University of Michigan, J.D., 1985  
*cum laude*  
*Book Award in Labor Law*  
Cornell University  
B. S., Industrial and Labor Relations 1982

### Memberships

Freelancers Union, Board Chairman  
Freelancers Insurance Company, Board Co-Chair  
Labor and Employment Law Advisory Council at  
Cornell University, School of Industrial and  
Labor Relations  
AFL-CIO Lawyers Coordinating Committee  
American Bar Association  
Bar Association of the City of New York

### Admissions

New York State  
U.S. Court of Appeals for the Second Circuit  
U.S. District Court, Southern District  
of New York  
U.S. District Court, Eastern District  
of New York

Hanan B. Kolko, a skilled and experienced litigator in labor and employee benefits law, joined Meyer, Suozzi, English & Klein, P.C. in 1999 and became a Member of the firm in 2003. In 2012, Mr. Kolko was recognized by *New York Super Lawyers*. Examples of the wide variety of Mr. Kolko's litigation practice include the successful defense of no-cost, lifetime post-retirement medical benefits for hundreds of retirees and their dependents, the successful collection of monies due to pension funds under the "control group" theory, successful defense of unions against claimed flaws in their election procedures and contract ratification procedures, the successful defense of unions against claimed violations of state and federal age discrimination claims in connection with collectively bargained retirement incentive programs, and the representation of unions and retirees in high profile bankruptcies including the GM, Chrysler, Hostess, New York Post and New York Daily News Chapter 11 cases. In addition, Mr. Kolko has experience litigating cases relating to living wage laws and prevailing wage laws.

In addition to representing union clients before federal and state courts, the National Labor Relations Board and the New York State Public Employment Relations Board, Mr. Kolko has handled hundreds of arbitration cases. Mr. Kolko has helped union clients navigate Department of Labor investigations and has successfully represented union members unfairly accused of breaching union by-laws. Mr. Kolko counsels unions about their rights and obligations on a daily basis.

Mr. Kolko is co-chair of the ABA's Labor and Employment Section's Committee on Technology and the Workplace. He has spoken on topics relating to the intersection of technology and the workplace at the ABA Annual Meeting and at the Annual Meeting of the ABA's Labor and Employment Section. He has also spoken on NLRB-related issues in programs sponsored by the College of Labor and Employment Lawyers and Cornell University. Mr. Kolko has taught as an Adjunct Professor for the Cornell University School of Industrial and Labor Relations, in the areas of labor law, public sector labor law, employment discrimination, the law of workplace privacy, arbitration practice, and building trades labor law. From 2012-2015, Mr. Kolko was recognized by *New York Super Lawyers*.

Prior to joining Meyer, Suozzi, from 1994 until 1999, Mr. Kolko was a partner of the law firm of Vladeck, Waldman, Elias & Engelhard.



## Paul F. Millus

Member of the Firm

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### Practice Areas

Litigation and Dispute Resolution  
 Employment Law

### Education

Creighton University School of Law  
 J.D., 1986  
 Creighton University  
 B.A., 1983  
 Fordham University

### Memberships

Nassau County Bar Association (NCBA) Federal  
 Courts Committee, Former Chair  
 NCBA Labor & Employment Committee  
 Eastern District Association of former Assistant  
 and Special Assistant U.S. Attorneys  
 American Inns of Court Executive Board,  
 Theodore Roosevelt Chapter,  
 President  
 Jacob D. Fuchsberg Touro Law Center

### Admissions

New York State  
 New Jersey  
 U.S. District Court, Southern and Eastern  
 Districts of New York  
 U.S. District Court of New Jersey  
 U.S. District Court of Minnesota  
 U.S. Court of Appeals,  
 Second, Third, and Eighth Circuits

Paul Millus is a Member to Meyer, Suozzi, English & Klein, P.C. and practices in the Litigation and Employment Law Departments located in both Meyer Suozzi's Garden City, Long Island and New York City Office. Mr. Millus has been involved in all aspects of state and federal litigation throughout his legal career handling a variety of litigated matters from inception, motion practice, trial and appeals. Mr. Millus has tried both jury and non-jury matters dealing with a wide range of issues from civil rights, commercial, constitutional, real estate, employment, tort and Surrogate's Court matters. If the matter needs to be tried before a judge or a jury in state or federal court, Mr. Millus stands ready to do so in almost any area of the law. Mr. Millus regularly provides advice to employers and employees concerning their rights and obligations in the workplace including consultation on employee handbooks, HR training, discrimination policies, FMLA, FLSA, employment contracts, wage and hour concerns and all manner of workplace issues.

Notable experience includes:

- Successfully represented multiple Long Island municipalities in upholding the constitutionality of a variety of Town Ordinances
- Obtained favorable resolutions for several corporate clients who were subjected to claims by plaintiffs who claimed that the clients' building violated the ADA
- Obtained dismissal in Federal Court by summary judgment of claims brought by teachers against the school district where they worked that their First Amendment rights of free speech had been violated by the district
- Successfully tried numerous cases to verdict in the Federal Court in the Eastern District of New York involving claims of discrimination in the workplace based on race, national origin, sex, gender and age
- After trial in Kings County, successfully obtained dismissal of claims by the Public Administrator, valued in excess of 2 million dollars, that his clients had received monies from the estate based on undue influence
- Served as the Receiver for Atlas Park shopping mall located in Glendale, New York a 377,924 sq. ft. mixed use neighborhood center

## Paul F. Millus

- Obtained favorable resolution of Trademark infringement suits in Federal Court brought against national internet retailer

Mr. Millus began his litigation career as a former Special Assistant United States Attorney for the Eastern District of New York from 1987 through 1989. There he worked with elite attorneys representing the U.S. Government in commercial matters; false claims act cases, civil forfeiture to name a few. He joined the firm of Snitow & Pauley in 1989 and became a partner in Snitow & Cunningham LLP in 1998 which became known as Snitow Kanfer Holtzer & Millus LLP. Mr. Millus has represented many municipalities on Long Island including the Towns of Brookhaven, Hempstead, and North Hempstead, the City of Long Beach, and the Counties of Nassau and Suffolk trying numerous cases in state and federal courts. He continued to successfully represent municipalities throughout Long Island as a partner in addition to expanding his private client base.

Mr. Millus is rated "AV" by Martindale-Hubbell which is the highest level of professional excellence and ethics and confirms that Mr. Millus is recognized for the highest levels of skill and integrity in the practice of law. Mr. Millus has also been named as a "Super Lawyer" in the 2010, 2014 and 2015 editions of "Super Lawyers" magazine in its Corporate Counsel Edition for Top Attorneys in Employment and Labor Law.

Mr. Millus is active with various bar organizations in and around New York City and Long Island. He is the Former Chair of the Federal Courts Committee of the Nassau County Bar Association, a Master, Executive Board Member and current President of The Theodore Roosevelt American Inn of Court and a member of the Eastern District Association of former Assistant and Special Assistant U.S. Attorneys. Mr. Millus also served as an Adjunct Professor of Law at the Jacob D. Fuchsberg Touro Law Center teaching Sales. Mr. Millus has lectured on cutting edge issues affecting the Bar focusing on employment law, federal practice, trial practice and civil rights law for the Nassau County Bar Association, Lorman Continuing Legal Education, the New York City Bar Association and Theodore Roosevelt American Inn of Court.

Mr. Millus has written extensively on many aspects of the law publishing articles in the *New York Law Journal*, *Nassau Lawyer*, *Suffolk Lawyer* and *New York State Bar Journal*. Recent publications include:

- Author, "NLRB and the Joint Employer: Is Franchising on the Ropes?" *New York Law Journal*, April 8, 2016
  - Author, "Equal Pay for Equal Work: The Government's Next Gambit," *New York Law Journal*, February 16, 2016
  - Author, "In Title VII Claims, Timing Is Everything," *Nassau Lawyer*, January 20, 2016
  - Author, "Browning-Ferris: A Potential Game Changer for the Union Movement," *Nassau Lawyer*, January 15, 2015
  - Co-Author, "'Misclassification and the 'Fluctuating Work Week': A Potential Schism in Wage and Hour Litigation," *New York State Bar Association*, December 30, 2014
  - Author, "Executive Orders: Constitutional Underpinnings and Legality," *New York Law Journal*, November 18, 2014
  - Co-Author, "Cannabis Conundrum: Medical Marijuana Law and Employers," *New York Law Journal*, August 6, 2014
  - Author, "New Avenue for Payment of Medical Care: the Prompt Pay Law," *New York Law Journal*, May 8, 2014.
  - Co-Author, "Social Media: Changing the Face of Employment Law," *New York Law Journal*, March 10, 2014.
  - Author, "Faragher and Ellerth: Revisited 12 Years Later," *New York Law Journal*, May 9, 2013.
  - Co-Author, "Court's Discretion in Changing Venue, Counsel's Obligation to Act Promptly", *New York Law Journal*, Vol. 245-No.: 33, February 18, 2011.
  - Co-Author, "Caution on Whistleblowing: Not All Reporting Is Protected," *New York Law Journal*, August 23, 2010.
  - Co-Author, "Getting Paid: the Interplay Between the Judiciary Law and Part 137," *New York Law Journal*, June 17, 2010.
  - Author, "An Employer's Guide to the FMLA," *Nassau Lawyer*, October 1, 2007.
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## New York Law Journal

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Outside Counsel

# Cannabis Conundrum: Medical Marijuana Law and Employers

Richard D. Winsten and Paul F. Millus, *New York Law Journal*

August 6, 2014

Mike Boyer achieved his goal of being the first customer to purchase marijuana from the first state licensed retail marijuana store in Spokane, Wash., emerging from the store on July 8 when the law went into effect shouting "Go Washington" to a cheering crowd of fans and in front of local television cameras.

In return, his employer, Labor Ready, a temporary employment company, no doubt watching his grand achievement on television, ordered him to report for drug testing, which he was certain to fail as his employer had an internal employment policy permitting drug testing and the right to terminate an employee for failing such a test.<sup>1</sup>

While subsequent news reports indicate that Boyer may retain his job, there is no question that legal marijuana use by employees will pose significant challenges to employers in the coming years. With the recent passage of the Compassionate Care Act (CCA) permitting New Yorkers with serious medical conditions limited access to medical marijuana, New York courts will now have to address employer drug policies.

If and when, New York follows the apparent trend to full legalization, the issues will become even more complex. New York law prohibits adverse actions against employees who engage in lawful recreational activities under Labor Law 201-d, also known as the "lawful activities statute."<sup>2</sup> Yet, federal law prohibits marijuana use as it is designated as a Schedule I controlled substance pursuant to 21 U.S.C. §846—which means it is a drug with no legal use. Accordingly, how the New York courts will deal with this dilemma will surely be influenced by what courts are now holding across the country.

## Decriminalization

Twenty-three states and the District of Columbia have decriminalized possession of medical marijuana for medical use.<sup>3</sup> Alaska and Oregon voters will vote on the legalization of recreational marijuana in November, 2014. So far, only Washington and Colorado permit recreational use with federal law still classifying marijuana as a Schedule I Drug. Indeed, the federal government shows few signs of following the state-law trend, despite Attorney General Eric Holder's Justice Department announcing its "Update to Marijuana Enforcement Policy" in 2013.<sup>4</sup> In fact, the U.S. Department of Agriculture issued a memorandum to its employees on May 14, 2014, advising them that the "use of marijuana for recreational purposes is not authorized under Federal law nor the Department's Drug free Workplace policies."<sup>5</sup>

Similarly, the U.S. Department of Transportation maintains that "it remains unacceptable for any safety-sensitive employee subject to drug testing...to use marijuana."<sup>6</sup> Yet, surely the trend is moving from not merely permitting medical marijuana use, but to full-blown legalization on the state level. For now, the

question for employers is and will be: Can an employer terminate an employee who is found to be using marijuana on a medical basis (and eventually for recreational use) even though that use may be permitted under state law?

Only three states, Connecticut, Maine and Rhode Island, have laws prohibiting organizations from discriminating against workers solely based on their status as medical marijuana patients. Arizona and Delaware bar employers from discriminating against registered and qualifying patients who test positive for marijuana, with an exemption for employees who are impaired in the workplace.

Colorado's adult use marijuana law, its recreational marijuana law, states that it is "not intended to require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace or effect the ability of employers to have policies restricting use of marijuana by employees."<sup>7</sup>

## Cases in Other States

Several cases have percolated through the court system in various states as they relate to the use of medical marijuana and an employer's rights in regard to an employee vis-à-vis the employer's written drug policies.

In the case of *Curry v. MillerCoors*, Mr. Curry, who was licensed by the state of Colorado to use medical marijuana, was fired by MillerCoors after he tested positive for marijuana in violation of MillerCoors' written drug policy.<sup>8</sup> The court dismissed Curry's claims, including his claim of discriminatory or unfair employment practice under Colorado state law. The court rejected the allegation that MillerCoors violated Colorado's "lawful activities statute"<sup>9</sup> when it discharged him for using medical marijuana during non-working hours.<sup>10</sup>

While the court in *Curry* acknowledged that the use of marijuana was legal under state law, it held that "lawful activity" for the purpose of Colorado law required that the activity be lawful under both federal and state law. Accordingly, the court held that Curry's state-licensed medical marijuana use was at the time of his termination subject to and prohibited by federal law and, thus, was not a lawful activity under the Colorado discrimination in employment statute.<sup>11</sup>

Likewise, in the matter of *Coats v. Dish Network*, the Colorado Court of Appeals determined that the state-licensed use of medical marijuana was not a "lawful activity" within the meaning of the Lawful Activity Statute.<sup>12</sup>

In California, in *Ross v. Ragingwire Telecommunications*, plaintiff filed an action against a former employer for purportedly violating the California Fair Employment and Housing Act (FEHA) over the firing of the plaintiff employee for failing a marijuana test purportedly in violation of the Compassionate Use Act of 1996 permitting medicinal use of marijuana.

The California Supreme Court held that the FEHA did not require employer to accommodate an employee who used medical marijuana, and it upheld the dismissal of the complaint.<sup>13</sup> Finally, in *Casias v. Wal-Mart Stores*, the U.S. Court of Appeals for the Sixth Circuit rejected an employee's wrongful discharge claim after he tested positive for marijuana, holding that the Michigan Medical Marijuana Act did not restrict a private employer's ability to discipline its employees.<sup>14</sup>

Challenges have also appeared to employment actions under the Americans with Disabilities Act (ADA) and state disability statutes. In Oregon, in *Washburn v. Columbia Forest Products*, plaintiff claimed that after he tested positive for marijuana use the employer terminated his employment unlawfully, discriminating against disabled persons as the plaintiff was a medical marijuana recipient.<sup>15</sup>

The Oregon court concluded that plaintiff was not a "disabled person" within the meaning of the Oregon statute, and in his concurrence Justice Ravis Kistler noted that plaintiff's employment discrimination claim



suffered from an additional defect, to wit, federal law preempts state employment discrimination law as to the extent that it requires employers to accommodate medical marijuana use.<sup>16</sup>

Similarly, in *Johnson v. Columbia Falls Aluminum Company*, the Montana Supreme Court dismissed an employee's action brought against the employer for violation of Montana's Wrongful Discharge from Employment Act holding that the Medical Marijuana Act did not provide an employee with a private right of action against an employer for negligence or negligence per se and that the employer did not violate the Montana Human Rights Act or the ADA as the Montana Medical Marijuana Act provided that an employer was not required to accommodate an employee's use of medical marijuana in the workplace.<sup>17</sup>

Federal courts have concurred, as demonstrated by the decision in *Matter of James v. City of Costa Mesa*, where the U.S. Court of Appeals for the Ninth Circuit determined that doctor-supervised marijuana use was not covered by the ADA's supervised medical exception. The court also determined that medical marijuana did not come within the ADA's exception for drug use "authorized by the Controlled Substances Act or other provisions of federal law" as it denied plaintiff's ADA claim.<sup>18</sup>

## Courts in New York

What do these cases bode in terms of how New York courts will handle New York's CCA in an employment setting? Like Colorado, New York has a lawful activities statute. Labor Law §201-d provides, in pertinent part, that an employer may not discriminate against an employee who engages in certain activities considered "recreational" which means "any lawful, leisure time activity, for which the employer receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading, and the viewing of television, movies, and similar material."<sup>19</sup>

Labor Law §201-d further provides that it is unlawful for an employer to take an adverse employment action based on "an individual's legal use of consumable products prior to the beginning or after the conclusion of the employee's work hours, and off of the employer's premises and without use of the employer's equipment or other property."<sup>20</sup>

As for the CCA, it does provide that a certified participant in the program should be deemed to have a "disability" under the New York Human Rights Law. However, the CCA will not bar the enforcement of a policy prohibiting employees from performing their duties while impaired by a controlled substance nor shall the law require a person or entity to do any act that would force the violation of federal law.<sup>21</sup> How medical marijuana use and the potential legalization of adult use of recreational marijuana will impact employers' rights in the workplace remains to be seen; however, New York courts at least now have some guidance from other states on the issue.

Two arguments supporting the rights of an employee to use marijuana without penalty will be (i) a marijuana user who participates in the program established by the CCA means that the employee is "disabled" under the law and thus protected; and (ii) since smoking marijuana could be considered a recreational activity, not unlike the use of tobacco, any adverse employment action based on that use should be barred. There will also be pressure to force employers to revise their drug free workplace policies and drug testing regimens to exclude marijuana by virtue of the passage of the CCA.

Employers in New York will look to CCA §3369(2) and Labor Law §201-d(4) which provides, in pertinent part, that an employer will not be in violation of Labor Law §201-d(4) if "the employer's actions were required by statute, regulation, ordinance or other governmental mandate or, the individual's actions were deemed by an employer or previous employer to be illegal...or to constitute...misconduct" to justify an employer's action. With no change in sight on a federal level, the law of the land will continue to treat marijuana as an unlawful drug creating inevitable conflict. These conflicts will only increase if New York moves toward legalization of marijuana for adult recreational use.

Accordingly, the split between federal law prohibiting marijuana use and the evolving laws of various states, including New York, permitting at least some measure of marijuana use will be placed in the hands of the courts to make sense of it all. With the CCA silent on its interplay with Labor Law 201-d, it is safe to say that the CCA and its interpretation is a work in progress largely dependent on the Colorado/Washington experiment which will prove to be fertile ground for developments in the case law addressing marijuana use and New York employment relationships.

**Endnotes:**

1. <http://www.spokesman.com/stories/2014/jul/09/spokanes-first-pot-buyer-says-he-faces-firing/>.
2. McKinney's N.Y. Labor Law 201-d.
3. <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>.
4. <http://www.justice.gov/opa/pr/2013/August/13-opa-974.html>.
5. [http://norml.org/pdf\\_files/USDA\\_Memo\\_Drug\\_Free\\_Workplace\\_Program.pdf](http://norml.org/pdf_files/USDA_Memo_Drug_Free_Workplace_Program.pdf).
6. [http://www.phmsa.dot.gov/pv\\_obj\\_cache/pv\\_obj\\_id\\_E72905EDB1160B77A203BB1A9B53B6D072040100/filename/DOT\\_Notice\\_on\\_Medical\\_Marijuana.pdf](http://www.phmsa.dot.gov/pv_obj_cache/pv_obj_id_E72905EDB1160B77A203BB1A9B53B6D072040100/filename/DOT_Notice_on_Medical_Marijuana.pdf).
7. Colo. Const. art. XVIII, §16(6)(a).
8. *Curry v. MillerCoors*, 2013 WL 4494307 (D. Colo. 2013).
9. C.R.S §24-34-402.5.
10. *Curry* at \*5.
11. *Id.* at \*6.
12. *Coats v. Dish Network*, 303 P.3d 147, (2013) cert. granted 2014 WL 279960 (2014).
13. *Ross v. Ragingwire Telecommunications*, 43 Cal.4th 905, 182 P.3d 1027 (2008).
14. *Casias v. Wal-Mart Stores*, 695 F3d 428 (6th Cir. 2012).
15. *Washburn v. Columbia Forest Products*, 2006 WL 1387967 (Oregon 2006).
16. *Id.*
17. *Johnson v. Columbia Falls Aluminum Company*, 350 Mont. 562, 213 P.3d 789, 2009 WL 865308 (2009).
18. *James v. City of Costa Mesa*, 700 F3d 394 (9th Cir. 2012) quoting 42 U.S.C. §12210(d)(1); see also *In re Moore*, 27 Misc.3d 1211(A), 910 N.Y.S.2d 406 (N.Y. Sup. 2010) ("Federal regulations that implement" the Americans with Disabilities Act "provide that "[t]he term individual with a disability does not include an individual who is currently engaging in the illegal use of drugs, when the public entity acts on the basis of such use." citing 28 C.F.R. §35.104).
19. N.Y. Labor Law 201-d.
20. N.Y. Labor Law 201-d (2)(b).
21. CCA §3368(2).

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