

# Medical Marijuana And Amendment 2

## *The Times, They Are A Changin'*

After the passage of Amendment 2 on Nov., 6, 2018, Missouri became the 32nd state in the country to allow for the use of marijuana as a treatment for certain, specified medical conditions. Now enacted as Article XIV of the Missouri Constitution, the overarching purpose of Amendment 2 is to allow for the cultivation, production, transportation, sale, purchase and administration of medical marijuana; to ensure patient access to medical marijuana; and to make changes to Missouri law necessary to implement Amendment 2.

The purpose of this article is to give an overview of Amendment 2, including discussion on what type of facilities and identification cards the amendment allows for, and discuss specific topics of concern to local government entities.

### **Medical Marijuana Facilities, Identification Cards, And The Role Of The Department Of Health And Senior Services**

As stated above, the overarching purpose of Amendment 2 is to allow for the cultivation, production, transportation, sale, purchase and administration of medical marijuana. To accomplish this purpose, Amendment 2 creates four types of medical marijuana facilities and three types of identification cards while granting the Department of Health and Senior Services (DHSS) the ability to regulate the licensing and approval of the facilities and identification cards. This section will first discuss the different types of facilities and identification cards and then outline DHSS's role in regulating facilities and approving identification cards.

#### **Medical Marijuana Facilities**

Amendment 2 creates and designates four types of medical marijuana facilities: (1) medical marijuana cultivation facilities; (2) medical marijuana infused products facilities; (3) medical marijuana dispensary facilities; and (4) medical marijuana testing facilities. The names used by the drafters of Amendment 2 for each type of facility generally describes

the role of each facility: Medical marijuana cultivation facilities cultivate medical marijuana; medical marijuana infused products facilities infuse medical marijuana; medical marijuana dispensary facilities dispense medical marijuana to qualifying patients and primary caregivers; and medical marijuana testing facilities are certified by DHSS to test medical marijuana.

In addition to defining the roles of each of the medical marijuana facilities, Amendment 2 authorizes DHSS to limit the number of each type of facility. Specifically, Amendment 2 allows DHSS to limit medical marijuana cultivation facilities to 1 per 100,000 inhabitants (roughly 61 statewide); medical marijuana infused products facilities to 1 per 70,000 inhabitants (roughly 87 statewide); and medical marijuana dispensary facilities to 24 per the 8 United States Congressional Districts in Missouri (roughly 192 statewide).

#### **Identification and Primary Caregiver Cards**

Amendment 2 creates three, separate identification cards that may be obtained by persons who have a qualifying condition or are designated as a primary caregiver to an individual with a qualifying condition. The three identification cards established by Amendment 2 are (1) qualifying patient identification cards; (2) qualifying patient cultivation card; and (3) primary caregiver identification cards.

Similar to how the various titles given to medical marijuana facilities describe their role in the production of medical marijuana, the titles given to the different identification cards also describe their role in the administration of medical marijuana. Qualifying patient identification cards are for persons with qualifying conditions, discussed below, to identify themselves as having the right to possess medical marijuana. Qualifying patient cultivation cards allow for qualifying patients to cultivate up to six flowering marijuana plants in an enclosed, locked facility for their personal use. Finally, primary caregiver identification cards are for people



Photos courtesy of Jennifer Silverberg Photography

who qualify to act as a caregiver for qualifying patients and allows primary caregivers to possess, administer and cultivate medical marijuana under certain circumstances for qualifying patients.

To be considered a qualifying patient, and thus be eligible to receive a qualifying patient identification card or qualifying patient cultivation card, an individual must first obtain certification from a physician that they have a qualifying condition. There are 10 qualifying conditions; however, several of the listed conditions are broader than one, single condition. Qualifying conditions; include cancer; epilepsy; glaucoma; chronic medical conditions that cause severe, persistent pain; and chronic medical conditions usually treated with prescription medication that could lead to dependence. A full list of qualifying conditions can be found in Article XIV, Section 2, Subsection 15.

## The Role Of The Department Of Health And Human Services In The Medical Marijuana Landscape

The role of the DHSS under Amendment 2 is to act primarily as the regulatory body overseeing medical marijuana. In this role, DHSS promulgates rules regarding medical marijuana facilities and holders of identification cards, issues licenses to medical marijuana facilities, and approves applications for persons seeking an identification card. Amendment 2 further grants DHSS the authority to issue rules relating to a broad variety of topics concerning medical marijuana, including control of information and product displays; instructions or guidance for local governments; security requirements for licensed or certified premises; the reporting and transmittal of tax payments; and seed-to-sale tracking systems.

Amendment 2 sets out timelines for DHSS to implement their regulatory scheme. The timeline put in place by Amendment 2 is as follows:

**June 4, 2019:** Application forms and instructions for medical marijuana facilities, qualifying patients, and caregivers will be available.

**July 4, 2019:** Applications for identification cards for qualifying patients and caregivers will begin to be accepted.

**Aug. 3, 2019:** Facility applications will begin to be accepted.

**Aug. 4, 2019:** Deadline for approval of applications for identification cards accepted on July 4, 2019

**Dec. 31, 2019:** Deadline for approval of facility applications accepted on Aug. 3, 2019.

## Provisions Of Amendment 2 With Direct Impacts On Local Government Entities

While Amendment 2 presents significant issues for both public and private entities, there are certain provisions that are of distinct concern for municipalities, including provisions relating to municipal regulatory authority, policing and taxation. This section will discuss various provisions from Amendment 2 that directly relate to cities, specifically provisions that deal with municipal regulation and policing of medical marijuana, employment and taxation.

### Municipal Regulation Under Amendment 2

As discussed previously, one of the overarching purposes of Amendment 2 is to ensure patient access to medical marijuana. One way that Amendment 2 accomplishes this goal is by partially preempting municipal regulatory authority over medical marijuana. Amendment 2 expressly prohibits municipalities from banning or practically banning medical marijuana facilities through overly burdensome regulations. Even though Amendment 2 restricts municipal regulatory authority, it does provide two specific avenues for municipal regulation. The first, is the Amendment 2's imposed, 1000-foot separation requirement; the second is Amendment 2's grant of authority to local governments to regulate the "time, place and manner" of the operation of medical marijuana facilities, as long as the regulations are not unduly burdensome.

Amendment 2 includes a default land-use regulation in

that it explicitly prohibits medical marijuana facilities from originally sitting within 1,000 feet of any elementary or secondary school, child daycare center and church unless a city decides to decrease the spacing requirement. There has been significant discussion around this provision, mainly regarding where to start and end the 1,000-foot measurement. Due to Amendment 2's specific reference to the actual facility in its separation provision, it is reasonable to interpret that the 1,000 feet should be measured from the building housing the medical marijuana facility to the building housing the protected entity (e.g., elementary or secondary school, child daycare center, or church). However, Section 311.080 RSMo contains a similar separation requirement for premises licensed to sell intoxicating liquor and churches and schools. In *State ex rel. Casey's General Stores, Inc. v. Kissinger* the proper measurement for Section 311.080 RSMo's separation requirement was determined to be from the property line of the address listed on the liquor license to the protected building.

Amendment 2 also permits cities to adopt regulations regarding the "time, place and manner" of the operation of medical marijuana facilities, as long as those regulations are not "unduly burdensome" on the operation of the medical marijuana facility. While this grant of authority is narrow, it is the largest and most important, grant of authority to cities in Amendment 2. It potentially implicates various municipal regulatory schemes, including zoning and business license authority.

The word "time" in "time, place and manner" clearly means that cities may regulate the hours of operation of medical marijuana facilities so long as those regulations are not unduly burdensome. The use of the phrase "place and manner" appears to allow cities to adopt reasonable zoning and business license regulations and standards for medical marijuana facilities, including requiring medical marijuana facilities to obtain additional zoning approvals, such as special or conditional use permits. Common standards that should be researched and potentially implemented include standards relating to odor and ventilation; onsite usage of medical marijuana; and hours of operation. Moreover, if a city does not already generally require the submission and approval of site plans for new construction or exterior additions or alterations to commercial buildings, it would be prudent to consider implementing such a requirement. Each zoning and business license regulation and standard may vary from city to city; however, at the end of the day, the regulations and standards must not be "unduly burdensome" on the operation of the medical marijuana facility.

Finally, Amendment 2 does allow for cities to establish civil penalties for the failure of a medical marijuana facility to comply with the city's reasonable time, place and manner restrictions.

### **Policing of the Use and Possession of Medical Marijuana**

Currently, most, if not all, offenses chapters of city codes prohibit the possession of marijuana; however, due to the passage of Amendment 2, these provisions must be amended to allow for possession under certain circumstances. Though Amendment 2 makes possession and transportation of medical marijuana legal, it specifically prohibits the consumption of medical marijuana in public places and driving under the influence of marijuana. Likewise, Amendment 2 requires that qualifying patients produce on demand their identification card or equivalent identification card from another state.

### **Employment and Personnel Policies**

Amendment 2's effect on city employment policies and procedures is generally limited by the amendment's specific prohibition on persons bringing claims against employers for adverse employment actions, such as the employee either being under the influence of marijuana at work, or for attempting to work while under the influence of marijuana. While Amendment 2 generally gives cities and employers the discretion to craft personnel policies that best fit their circumstances, due to the requirements of the federal law, specifically the Drug Free Workplace Act and 18 USC § 922(g)(3) that prohibits users of federally illegal drugs from possessing firearms, and licensing requirements for persons



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operating certain types of trucks or other heavy equipment remaining a drug free workplace may still be required.

Also, due to marijuana use still being considered illegal drug use at the federal level, it is doubtful that the Americans with Disabilities Act requires cities to provide reasonable accommodations to qualifying patients.

### Potential Revenue Increases and Implications

Although Amendment 2 limits the amount of taxes that may be imposed on the sale of marijuana for medical use to only those authorized by Amendment 2, it does explicitly makes local sales and uses taxes applicable to retail sales of medical marijuana.

### Summary

Amendment 2 legalizes the cultivation, production, transportation, sale, purchase and administration of marijuana for medical purposes in part through the establishment of various medical marijuana facilities and identification cards, and by granting the Department of Health and Senior Services regulatory oversight of said facilities and identification cards. Further, certain provisions of Amendment 2 markedly affect municipalities across the state, by partially preempting municipal regulatory authority over medical marijuana; requiring revisions to municipal offense provisions related to the possession of marijuana;

potentially necessitating the redrafting of personnel policies; and increasing municipal revenues through the explicit applicability of local sales taxes on the sale of medical marijuana.

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### Did You Know?

MML has added a medical marijuana resource page to the League's One Stop Shop on [www.mocities.com](http://www.mocities.com) that includes sample ordinances, frequently asked questions, a recorded webinar on this topic, and more. Watch for the latest resources as they become available!

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