

# LAW WEEK

## COLORADO

## New Pot Laws Await Fed Response

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ON MAY 28, Gov. John Hickenlooper signed six marijuana-related bills. This was the culmination of months of effort, initially sparked by the passage of Amendment 64 last November, and aimed at setting the rules for an industry, which, while not new, has operated in the shadows for decades. The critical aspects of the enacted legislation are summarized as follows:

**HB-1317.** This bill contains the primary provisions establishing the regulatory and licensing system for recreational marijuana, which will generally be similar to the existing medical marijuana system. Existing medical marijuana business licensees will have the right to convert to recreational licenses three months earlier than any other applicants, and medical and recreational businesses will be permitted to operate at the same location under certain conditions.

Though retail stores will initially have to cultivate most of their own marijuana, unlike the supply chain regulations applicable to medical marijuana, the bill will not require recreational marijuana stores cultivate any of their own marijuana after Jan. 1, 2015. The bill contemplates promulgation of new regulations by July 1, addressing a wide variety of issues. As was the case with medical marijuana, local jurisdictions can impose more restrictive regulations on marijuana businesses, up to and including bans.

**HB-1318.** This bill addresses taxation of recreational marijuana, and submits for approval of the voters pursuant to the Taxpayer's Bill of Rights, the issue



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of the state's authority to impose new taxes on recreational marijuana sales. If approved in the November election, the state can impose up to a 15 percent sales tax on retail sales and a 15 percent excise tax on sales by cultivation facilities to other marijuana businesses. The November ballot question would give the legislature authority to increase or decrease the rate of either tax, so long as neither exceeds 15 percent. If approved, the initial sales tax would be 10 percent, which would apply in addition to existing state and local sales taxes, and the excise tax would be at the full 15 percent. The first \$40 million in excise tax revenues will be used to fund capital construction and improvements to public schools in Colorado.

**SB-283.** This bill is a mixed collection of provisions addressing issues including the establishment of a responsible vendor

program for marijuana businesses, banning indoor smoking of marijuana under Colorado's Clean Indoor Air Act, setting up a variety of commissions and requiring a variety of studies addressing the impact of marijuana legalization. The bill also makes clear that contracts concerning activities that are lawful under Colorado's medical and/or recreational marijuana laws are not void as against public policy, addressing an August 2012 decision by a Colorado district court judge who refused to enforce a contract between a state-compliant medical-marijuana cultivator and a state-compliant medical-marijuana seller on grounds of public policy. The bill also makes consuming marijuana or having an "open marijuana container" in a vehicle unlawful, similar to existing provisions relating to alcohol.

**HB-1325.** This bill amends existing laws relating to driving under the influence of alcohol or drugs to provide that evidence that a driver had 5 nanograms or more of THC (the active ingredient in marijuana) per milliliter of whole blood gives rise to a permissible inference that the person was under the influence of one or more drugs. Recognizing that blood levels for THC do not necessarily have the same correlation to impairment as do blood levels for alcohol, the bill allows for the possibility that this inference can be rebutted by evidence that the driver was not impaired.

**HB-1042.** Under Section 280E of the federal Internal Revenue Code, business expenses incurred in connection with sale or trafficking of controlled substances (including marijuana) are not tax deductible, creating serious problems for medical and recreational marijuana

businesses. This bill changes the tax treatment of such expenses for purposes of Colorado taxes.

**HB-1238.** This bill implements minor changes to existing medical marijuana provisions, relating primarily to licensing procedures.

Collectively, these bills establish the framework for the nation's first comprehensive regulatory regime for the recreational use of marijuana.

Still, many issues remain unresolved. The biggest issue remains the as-yet-unstated position of the federal government. The success or failure of Colorado's marijuana regulation efforts hinges almost entirely on an accommodating federal response. Thus far, federal authorities have taken a relatively hands-off approach toward medical marijuana businesses in Colorado, and acted only to shut down those businesses located near schools but otherwise not enforcing federal drug laws against state-compliant businesses.

For months, the Department of Justice has said it would make a determination "soon" as to how it intends to respond to Colorado and Washington state's decriminalization and legalization efforts, but federal authorities have still not weighed in.

Accordingly, though the newly enacted legislation helps give definition to the general provisions included in Amendment 64, it remains difficult to predict what Colorado's marijuana industry will look like when the new laws go into full effect and retail sales start at the beginning of 2014. •

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