

LAW WEEK

COLORADO

Federal Implications Of Amendment 64 Looming

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ON NOV. 6, Colorado voters approved Amendment 64 to the Colorado Constitution, which provides for the decriminalization and regulation of marijuana for recreational use by adults. Along with a similar measure in Washington state, these state-level moves to end marijuana prohibition constitute perhaps the most significant development in U.S. drug policy in decades.

However, the extent of the impact remains unclear, as the potential federal response creates a cloud of uncertainty. Marijuana remains illegal under federal law, with serious federal civil and criminal penalties for possession, cultivation or distribution. The continued federal prohibition on marijuana will thus no doubt limit the impact of Amendment 64, but the conflict between Colorado and federal law will likely play out differently with respect to different aspects of Amendment 64.

Amendment 64 has two basic components: (1) within certain defined parameters, it eliminates state criminal penalties for the adult possession, use and cultivation of marijuana for recreational purposes; and (2) it creates a framework for the establishment of a regulated and taxed retail marijuana industry, which would include cultivation, marijuana-infused products manufacturing and retail-sales businesses. Respectively, these can be described as the “decriminalization” and “regulation” components of Amendment 64.

At the latest, Amendment 64 will become law in early January 2013. Decriminalization will be effective immediately. Subject to the specific requirements of Amendment 64, Colorado law enforcement authorities will then no longer be able to arrest or prosecute adults possessing or cultivating small amounts of marijuana. Of course, this does not make marijuana “legal” in Colorado, as federal authorities will remain able to enforce federal drug laws in the state.

That said, the significance of



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Amendment 64 should not be understated: It largely eliminates the risk that any adult will be arrested or convicted of marijuana crimes in Colorado. This is a practical consequence of federalism. Federal authorities cannot require Colorado law enforcement agents to enforce federal law, and there are simply not enough federal law enforcement authorities on the ground in Colorado to effectively enforce federal drug laws as they relate to the low-level marijuana conduct decriminalized by Amendment 64. As a result, any limited federal enforcement will be insufficient to deter adult recreational use of marijuana, or cultivation of less than six plants in individuals’ homes.

In contrast, federal authorities could exert significant influence over Colorado’s plans to create the first state-regulated recreational marijuana market in the country. Amendment 64 requires that regulations implementing a business licensing regime must be approved by July, and, likely by early 2014, marijuana would be available for sale in licensed retail shops to persons 21 and over.

An accommodating federal policy will be critical to the success of this effort,

because marijuana businesses are much easier (and more likely) targets for federal authorities than are individual marijuana users. Strategically used, threats of enforcement or a few high-profile raids and prosecutions could fundamentally undermine the development of a regulated recreational marijuana industry in Colorado.

Thus far, federal authorities have not revealed their intentions, but they could take several courses of action in response to Colorado’s plans. A federal preemption lawsuit is one possibility. Unlike state-level decriminalization of marijuana, an argument can be made that federal law preempts the establishment of a state-sanctioned market for the sale of marijuana.

Though federal marijuana law is explicitly not intended to “occupy the field” of regulation of marijuana to the exclusion of state action, it is easy to see how a court could find that there is a “positive conflict” such that federal marijuana law and Amendment 64’s regulation elements “cannot consistently stand together.” A successful preemption lawsuit could invalidate the regulation component of Amendment 64 and prevent the development of a recreational industry before it starts.

Alternatively, medical-marijuana policy may provide a model. Exercising prosecutorial discretion, federal authorities have generally not taken any action against licensed medical-marijuana operations that are in compliance with Colorado’s extensive regulations governing the medical-marijuana industry.

However, this federal restraint in exercising prosecutorial discretion is limited and unpredictable. Earlier this year, the Colorado U.S. Attorney’s office began systematically shutting down medical marijuana businesses located near schools by threatening the businesses and their landlords with criminal prosecution and asset forfeiture.

There is no indication the federal authorities intend to go further, but there is nothing legally preventing them from

doing so. In the context of Amendment 64, federal authorities might decide to generally allow Colorado to create a regulated recreational marijuana industry, while perhaps occasionally interfering on issues where federal authorities feel things have gone too far. This would force Colorado’s marijuana industry to exist in a legal gray area, in which they operate at the whim of federal law enforcement authorities and their shifting priorities.

Legislative changes to federal drug laws are another possibility. Members of Colorado’s congressional delegation have already introduced the “Respect States’ and Citizens’ Rights Act of 2012,” which aims to eliminate the threat of a federal preemption lawsuit.

The measure has also been described by some as exempting Colorado from federal drug laws. If true, marijuana would truly become legal in Colorado. The language does not appear to go that far, however, leaving a potentially messy conflict. Other federal legislative changes are at least theoretically possible, but it is questionable whether there is sufficient political will to meaningfully reform federal marijuana laws, especially given overall congressional gridlock.

Colorado officials have already sought guidance from federal authorities on these issues, but, as of this writing, there is very little indication of how the federal government might react to Amendment 64.

Regardless, many of Colorado’s elected officials, including Gov. John Hickenlooper, appear committed to implementing Amendment 64 to the fullest extent possible. Colorado will be starting to develop regulations under Amendment 64 in the coming weeks, but unless and until Congress or the Department of Justice articulates a clear federal policy response, it will be impossible to predict how far Colorado will be able to go with its efforts. •

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