

# The State of Medical Marijuana

By Erika Gee



There have been years of public discussion on both sides of the issue of medical marijuana in Arkansas. Surprising many observers, a ballot measure which would have legalized medical marijuana nearly passed in November of 2012, with a final tally of 51.44% against with 48.65% for the measure.<sup>1</sup> After that near-victory, two separate medical marijuana measures were certified for the November 2016 ballot: the Arkansas Medical Marijuana Amendment of 2016 (Issue 6) and the Arkansas Medical Cannabis Act (Issue 7).

In the months leading up to the November 2016 election, many members of the community, including the Governor and the State's Surgeon General, were opposed to both measures, chiefly due to concerns over treating marijuana as a medication. Nevertheless, after Issue 7 was removed from the ballot by the Arkansas Supreme Court,<sup>2</sup> Issue 6 passed with 53.09% to 46.91% of the votes cast and became effective the very next day, November 9, 2016.

This article will summarize the current state of medical marijuana after all of the changes made to Issue 6 by the 91st General Assembly, with the addition of the clarifications provided by the rulemaking by the Arkansas Department of Health (DOH), Department of Finance and Administration's Alcoholic Beverage Control Board (ABC) and the Arkansas Medical Marijuana Commission (MMC).

## Issue 6

Issue 6 legalizes the use of marijuana by patients with specific "qualifying" medical conditions, as certified by a physician, but does not authorize growing marijuana at home or legalize the recreational use of marijuana.<sup>3</sup> It also allows for the formal designation of "caregivers" to assist patients in obtaining and consuming marijuana.<sup>4</sup> It authorizes at least 20 but no more than 40 dispensaries and at least four but no more than eight cultivation facilities.<sup>5</sup>

Three different state agencies are designated to oversee implementation and regulation of the industry: the Medical Marijuana Commission, which is responsible for rulemaking and decisions on licensure for dispensaries and cultivation facilities; the Department of Health, which is responsible for registering patients and caregivers and for overseeing product testing standards; and the Alcoholic Beverage Control Board, which has the broadest responsibilities, including security regulations, licensure of employees at dispensaries and cultivation facilities and overall enforcement.

Although Issue 6 gave a short timetable to complete the rulemaking process and begin taking applications, Act 4 of 2016 gave the three agencies an additional 60 days to complete their rules.<sup>6</sup> All three agencies have now finalized their proposed rules regarding their respective areas of authority prior to the deadline. As of this writing, emergency versions of these rules have been approved by a legislative committee but they still await final review. The MMC has until July 1, 2018, to begin accepting applications for cultivation facilities and dispensaries, and it appears that it will meet that deadline.



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## Qualifying Conditions

Issue 6 has legalized medical marijuana use by registered patients diagnosed with one of the following conditions: cancer, glaucoma, HIV/AIDS, hepatitis C, amyotrophic lateral sclerosis, Tourette's syndrome, Crohn's disease, ulcerative colitis, post-traumatic stress disorder, severe arthritis, fibromyalgia, Alzheimer's disease, or a chronic or debilitating disease or medical condition or its treatment that produces cachexia or wasting syndrome, peripheral neuropathy, intractable pain which has not responded to ordinary medications, treatment, or surgical measures for more than six months, severe nausea, seizures, including epilepsy, or severe and persistent muscle spasms, including multiple sclerosis.<sup>7</sup>

The DOH is authorized to add to the list of qualifying conditions. As part of its newly-proposed rules, the DOH established a petition process for those seeking to add new conditions.<sup>8</sup> The rule sets a high bar for a new condition by requiring a significant amount of information in the petition, including evidence "generally accepted by the medical community" that the use of medical cannabis alleviates suffering caused by the proposed qualifying condition and letters of support from physicians.<sup>9</sup> If a petition meets all requirements, a public hearing will be held and then the Director of the DOH will make a final decision.<sup>10</sup> It is also important to note that once a proposed condition has been rejected, the Director may summarily reject subsequent petitions unless they present new scientific research.<sup>11</sup>

## Patients and Caregivers

Issue 6 establishes a process for the DOH to register patients and their designated caregivers.<sup>12</sup> That framework was then expanded upon and implemented by the DOH in its proposed rules.<sup>13</sup> Briefly, in order to become a qualifying patient, a patient over 18 must present an Arkansas driver's license or photo ID, submit "written certification"—not a prescription—from a physician establishing that the patient has a qualifying medical condition and pay a fee of \$50.<sup>14</sup> For a minor, the patient's parents or guardians must give written consent to the use of medical marijuana and register to become the minor's designated caregiver.<sup>15</sup> Act 479 of 2016 modified Issue 6 to prohibit members of the United States military or Arkansas National Guard from becoming qualifying patients or designated caregivers.<sup>16</sup>

**“Even without criminal enforcement, the conflict between state and federal law has significant implications for banking, insurance, gun possession and many other aspects of business and daily life which rely upon an interpretation of federal law.”**

Residents of other states may also qualify to obtain medical marijuana while visiting in Arkansas, if the visiting patient comes from a state which issues medical marijuana patient registration cards and the patient presents his or her card to the dispensary.<sup>17</sup> The path to become a designated caregiver is a bit more complicated, requiring identification of the applicant's qualifying patient and a criminal background check, as well as a \$50 fee.<sup>18</sup>

The DOH will deny applications for qualifying patients and designated caregivers if the applicant has had a registration revoked in another state, the certifying physician did not have a physician-patient relationship with the applicant, or if the certification or application is fraudulent or falsified.<sup>19</sup> Each registration is good for one year before it must be renewed. Although legislation was proposed to extend the registration period for patients with chronic conditions, it did not pass.

All information regarding patients and caregivers is designated as confidential and cannot be released under the Arkansas Freedom of Information Act.<sup>20</sup> The other regulating agencies (MMC and ABC) may access registry information, if necessary, and the DOH is also authorized to verify registry status—but no more—to law enforcement personnel.<sup>21</sup>

## Cultivation Facilities

Issue 6 authorizes up to eight cultivation facilities, which will serve as the primary source of all medical marijuana products in the state.<sup>22</sup> The MMC has decided to initially license five cultivation facilities with the remaining three facility licenses held in reserve. The facilities can technically be located anywhere in the state, so long as they are not within 3,000 feet of an existing public or private school, church or daycare and they comply with local zoning, if any.<sup>23</sup> The MMC's proposed rules provide that the distance should be measured from the facility's

front door to the nearest property line.<sup>24</sup> The MMC has indicated a reluctance to authorize a facility in a county in which a majority voted no on Issue 6, although no such provision was included in the rules.

These facilities will have broad authority regarding the production of medical marijuana; they may cultivate, prepare, manufacture, process, package, sell and deliver marijuana to a dispensary.<sup>25</sup> In fact, the only aspect of the market in which the facilities cannot participate is the retail sale of medical marijuana.

In order to be eligible for consideration, an applicant must first meet minimum requirements for residency, Arkansas ownership and criminal, professional and financial history.<sup>26</sup> The MMC has also imposed high financial requirements for these facilities: the application must also be accompanied by proof of assets or a surety bond in the amount of \$1,000,000, plus proof of at least \$500,000 in liquid assets.<sup>27</sup> In addition, the application fee is \$15,000, half of which is refundable if the applicant is not selected.<sup>28</sup> If the applicant is selected, a licensing fee of \$100,000, along with a performance bond of \$500,000, is due to the MMC within seven days.<sup>29</sup>

The cultivation facilities will be chosen by the MMC based on its evaluation of a written application which includes extensive merit-based criteria.<sup>30</sup> This criteria is intended to assess the applicant's suitability to run a cultivation facility, and includes questions regarding: (1) general experience in running a business and any specific experience in a regulated, high-security or agricultural industry; (2) the operational plan for operating the facility, including the ability to grow sufficient product with a consistent cannabinoid profile and comply with all regulations; (3) a timeline for opening a facility; and (4) proof of financial stability and resources, including no history of bankruptcy in the last eight years.<sup>31</sup> The MMC may also award "bonus points" to applicants with: (1) an affiliation

with a physician or pharmacist; (2) proof that the facility will positively impact the economy or diversity of an area; or (3) proof that the facility will benefit the community through substance abuse or compassionate care plans, plans for research and education or percentage of ownership by Arkansas residents.<sup>32</sup> The scoring rubric for the merit criteria is not yet available at this writing, but it will be published before the application period begins.

The MMC is expected to open the application process July 1, 2017, with an application closing date 90 days later. With that timeline, the MMC will evaluate the applications and award the cultivation facility permits within a few months, probably before the end of 2017. In turn, medical marijuana will likely first become available to patients a few months later, or sometime in early spring of 2018.

### Dispensaries

Issue 6 authorizes up to 40 dispensaries, dispersed throughout the state in rough proximity to the location of qualifying patients.<sup>33</sup> The MMC has decided to initially license 32 dispensaries, with the remaining eight dispensary licenses distributed to address demand or diversity goals. Unlike cultivation facilities, the dispensaries will be awarded by geographical zone and, once awarded, can only be operated in the zone authorized.<sup>34</sup> The MMC has divided the state into eight geographical regions and intends to license four dispensaries in each region. The dispensaries cannot be within 1,500 feet of an existing public or private school, church or daycare and must comply with local zoning, if any.<sup>35</sup>

The dispensaries will also have broad authority on the retail side of medical marijuana, with the ability to “acquire, possess, manufacture, process, prepare, deliver, transfer, transport, supply, and dispense marijuana, marijuana paraphernalia, and related supplies and educational materials to a qualifying patient or designated caregiver.”<sup>36</sup> Unlike the limitation placed on cultivation facilities, dispensaries are authorized to engage in wholesale sales of marijuana to cultivation facilities and other dispensaries as well as retail sales to patients.<sup>37</sup>

Issue 6 also authorizes dispensaries to grow up to 50 “mature marijuana plants,” plus unlimited additional seedlings.<sup>38</sup> Under the ABC’s rules, a “mature plant” means only the plants in the final “flowering” stage of growth, so dispensaries could conceivably grow hundreds of immature plants and seed-

lings in addition to the 50 mature plants.<sup>39</sup> The prospect of cultivating dispensaries has been controversial and legislation was introduced to prohibit it, but the bill did not gain sufficient support.

For the majority of the MMC’s public deliberation over its proposed rules, it favored choosing dispensaries through a lottery-based process. As outlined in the rules it published for public comment, an application meeting basic requirements would be placed into a lottery pool of applicants, who would then draw numbers to determine the order of appearance before the Commission for a hearing on the application. Once all 32 licenses were awarded, no further applications would be reviewed or considered. After the comment period and the public hearing, the MMC stated that the lottery was the subject of “hundreds” of public comments in opposition and reversed course, deciding that dispensaries will also be chosen based upon merit criteria.

The minimal standards and merit-based criteria for the dispensary applications will be nearly identical to the requirements for the cultivation facilities.<sup>40</sup> For dispensaries, however, each geographical zone will be separately scored and awarded.<sup>41</sup> Dispensary applicants also have a lower financial threshold, with a requirement for proof of assets or a surety bond of \$200,000 and at least \$100,000 in liquid assets.<sup>42</sup> Application fees will be \$7,500, with half refundable if the application is not successful.<sup>43</sup> If it is successful, a license fee of \$15,000 along with a \$100,000 performance bond must be submitted to the MMC within seven days.<sup>44</sup>

Finally, under a bill passed late in the 91st General Assembly, dispensaries will now also be required to designate a “pharmacist consultant,” who will develop educational materials, procedures and policies and conduct staff training, as well as be available by telephone or videoconference consultations with staff or patients.<sup>45</sup> The requirement of a pharmacist was enacted, in part, as recognition of the fact that patients will not have a prescription or otherwise receive any medical guidance regarding their use of medical marijuana.

### Product Testing, Labeling and Advertising

Issue 6 required the DOH to establish labeling and testing standards for medical marijuana, but did not specify any parameters for those standards. In the DOH’s proposed rules, it requires that samples from

each batch (10 lbs or less) of medical marijuana be tested by a certified laboratory for: pesticides, moisture content, concentration of tetrahydrocannabinol (THC) and cannabidiol (CBD), and heavy metals.<sup>46</sup> Samples from each process lot of medical marijuana concentrates and extracts must also be tested for solvents, unless the concentrate or extract was produced through mechanical extraction or used water, animal fat or a vegetable oil as a solvent.<sup>47</sup>

As outlined in the DOH proposed rules, the labeling for each product must include a significant amount of information, including the THC and CBD concentration, date of harvest, name of strain, activation time, the name of the testing laboratory, all required warnings, and a “universal symbol” indicating that it contains marijuana.<sup>48</sup> The rules prohibit labeling with misleading statements or labels that are attractive to minors.<sup>49</sup>

The ABC has overlapping authority on labeling, as it regulates packaging, advertising and marketing. Under its proposed rules, dispensary advertising and marketing cannot include any content that might “reasonably be considered to target children,” including cartoon characters or toys.<sup>50</sup> In addition, packaging cannot be shaped in a manner likely to appeal to children, including packaging in the shape of an animal, vehicle, person or character, or as something that closely resembles familiar food and drink items or candy.<sup>51</sup>

Dispensary advertising cannot promote transportation of marijuana across state lines, display consumption of marijuana, encourage its use as an intoxicant, or encourage excessive or rapid consumption.<sup>52</sup> Dispensaries must also ensure that no more than 30% of the audience for a program, publication or website featuring its advertising can be reasonably expected to be under the age of 18.<sup>53</sup> Cultivation facilities are not permitted to advertise at all to the general public.

### Limitations

Issue 6 explicitly allows any kind of medical marijuana or product to be sold and permits any method of consumption.<sup>54</sup> However, this wide-open product market proved to be a focus of the recently-concluded legislative session and, as a result, the agency rulemaking has incorporated some limits on smoking marijuana and on the type, shape and flavor of products which may be sold.

Act 1024, which created “pharmacist con-



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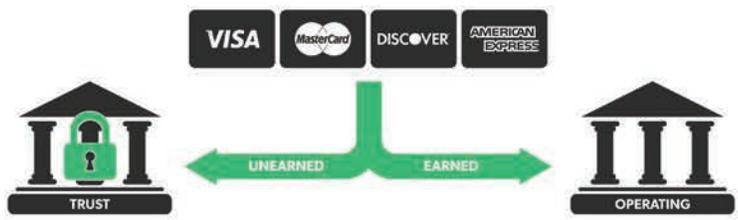
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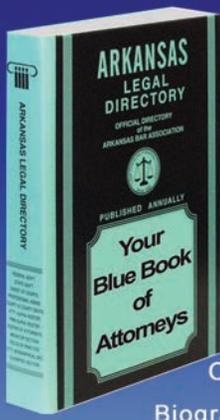


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sultants,” also limited the range of materials which may be sold by dispensaries. Although Issue 6 allows the sale of unprocessed marijuana flower buds for consumption by smoking, Act 1024 prohibits dispensaries from selling any paraphernalia requiring combustion to be properly utilized.<sup>55</sup> Although it is not specifically prohibited, this Act will likely also prevent the sale of marijuana that is pre-rolled into marijuana cigarettes, or “joints.”

Act 740 adds additional limitations on smoking marijuana.<sup>56</sup> Under this Act, patients are prohibited from smoking marijuana anywhere that smoking tobacco is prohibited, in the presence of a pregnant woman or someone under 14 years old, inside any motorized vehicle or in a place that is likely to cause a person who is not authorized to use it to become under the influence.<sup>57</sup> It also prohibits patients under 21 from smoking marijuana at all.<sup>58</sup>

Although none of the bills banning edible forms of marijuana ultimately became law, the General Assembly’s concern over any product which might appeal to children was incorporated in the ABC rules. It has prohibited any marijuana item with a shape or

design likely to appeal to minors, including anything modeled after an item primarily consumed by or marketed to children, products in an animal, vehicle, person or character shape, products that closely resemble familiar food or drink items, including candy, or any product that is made by applying extracts to commercially available candy, food or drink.<sup>59</sup> The ABC’s final version of the proposed rules also prohibits items which resemble cookies or brownies.

Finally, Act 593 addresses the concerns of employers regarding medical marijuana use by employees—and enacts some additional limitations on use by qualifying patients in the process. The Act authorizes employers to establish a drug-free workplace policy and to take disciplinary action or refuse to hire on the good faith belief that an employee used marijuana or was under the influence during working hours.<sup>60</sup> The Act also allows an employer to prevent a qualifying patient from holding a “safety sensitive position,” defined as a position involving a safety sensitive function under the federal regulations governing drug and alcohol testing, or which has been designated by the employer as one which would pose a threat to health and safety if performed under the influence of marijuana.<sup>61</sup>

### Conclusion

Although the General Assembly and the Executive Branch agencies have taken their duty to implement Issue 6 seriously over the last six months, there still remain many open questions about medical marijuana in Arkansas. Federal laws criminalizing possession and use of marijuana still remain in force, making involvement in the medical marijuana market as a patient or a licensee potentially risky. A chief question, then, is the Trump administration’s intentions on enforcement. If this administration breaks with the policies established under President Obama, it could have serious consequences for the emerging Arkansas market.

Even without criminal enforcement, the conflict between state and federal law has significant implications for banking, insurance, gun possession and many other aspects of business and daily life which rely upon an interpretation of federal law. Ultimately, Arkansas, Washington D.C. and the 27 other states which have legalized some aspect of medical marijuana use must look to Congressional action to resolve this issue.

### Endnotes:

1. *Arkansas State General Election November 6, 2012 Official Results*, <http://results.enr.clarityelections.com/AR/42843/113233/en/summary.html> (last updated Nov. 21, 2012).
2. *Benca v. Martin*, 2016 Ark. 359, 500 S.W.3d 742.
3. Op. Ark. Att’y Gen. No. 2016-007 (2016), available at <http://www.arkansasag.gov/assets/opinions/2016-007.pdf>.
4. *Id.*
5. *Id.*
6. Act of Jan. 23, 2017, No. 4, available at <http://www.arkleg.state.ar.us/assembly/2017/2017R/Acts/Act4.pdf>.
7. Op. Ark. Att’y Gen. No. 2016-007, *supra* note 3.
8. *Rules and Regulations Governing Medical Marijuana Registration, Testing, and Labeling in Arkansas*, Arkansas Board of Health Department of Health (draft), Section XXII, p. 23, (Jan. 26, 2017) available at <http://www.healthy.arkansas.gov/aboutADH/Documents/1.26.17MMRules.pdf> [hereinafter ADH Rules].
9. *Id.* at 24.
10. *Id.*
11. *Id.* at Section XXII(E), pg. 24.
12. Op. Ark. Att’y Gen. No. 2016-007, *supra* note 3.
13. ADH Rules, *supra* note 8, at Section XXII, p. 23.
14. *Id.* at Section IV, p. 6.
15. *Id.* at Section IV(C), p. 7.
16. Act of Mar. 14, 2017, No. 479, available at <http://www.arkleg.state.ar.us/assembly/2017/2017R/Acts/Act479.pdf>.
17. ADH Rules, *supra* note 8, at Section IV(D), p. 7.
18. *Id.* at Section IV(B), p. 6-7.
19. *Id.* at Section IV(F), p. 8.
20. *Id.* at Section IV(G), p. 8.
21. *Id.*
22. Op. Ark. Att’y Gen. No. 2016-007, *supra* note 3.
23. *Id.*
24. *Rules and Regulations Governing the Application For, Issuance, and Renewal of Licenses for Medical Marijuana Cultivation Facilities and Dispensaries in Arkansas* (draft), Arkansas Medical Marijuana Commission, available at <http://www.mmc.arkansas.gov/Websites/mmsar/images/AMMCFinalDraftRules.pdf> [hereinafter AMMC Rules].
25. Op. Ark. Att’y Gen. No. 2016-007,

*supra* note 3.  
 26. AMMC Rules, *supra* note 24, at p. 5.  
 27. *Id.* at p. 6.  
 28. *Id.* at p. 10.  
 29. *Id.* at p. 14.  
 30. *Id.* at pp. 9-12.  
 31. *Id.*  
 32. *Id.* at pp. 12-13.  
 33. Op. Ark. Att’y Gen. No. 2016-007, *supra* note 3.  
 34. AMMC Rules, *supra* note 24, at p. 20.  
 35. *Id.*  
 36. Op. Ark. Att’y Gen. No. 2016-007, *supra* note 3.  
 37. *Id.*  
 38. *Id.*  
 39. *Rules and Regulations Governing the Oversight of Medical Marijuana Cultivation Facilities and Dispensaries by the Alcoholic Beverage Control Division* (draft), Arkansas Alcoholic Beverage Control Board, available at [http://www.dfa.arkansas.gov/offices/abc/Documents/ABC\\_MMRules.pdf](http://www.dfa.arkansas.gov/offices/abc/Documents/ABC_MMRules.pdf) [hereinafter ABC Rules].  
 40. AMMC Rules, *supra* note 24, at pp. 27-29.  
 41. *Id.* at p. 29.  
 42. *Id.* at p. 22.  
 43. *Id.* at p. 26.  
 44. *Id.* at p. 30.  
 45. Act of Apr. 6, 2017, No.1024, available at <http://www.arkleg.state.ar.us/assembly/2017/2017R/Acts/Act1024.pdf>.  
 46. ADH Rules, *supra* note 8, at p. 14.  
 47. *Id.*  
 48. *Id.* at pp. 9-10.  
 49. *Id.* at 12.  
 50. ABC Rules, *supra* note 39, at p. 37.  
 51. *Id.* at p. 29.  
 52. *Id.*  
 53. *Id.* at p. 38.  
 54. Op. Ark. Att’y Gen. No. 2016-007, *supra* note 3.  
 55. Act of Apr. 6, 2017, No.1024, *supra* note 45.  
 56. Act of Mar. 29, 2017, No. 740, available at <http://www.arkleg.state.ar.us/assembly/2017/2017R/Acts/Act740.pdf>.  
 57. *Id.*  
 58. *Id.*  
 59. ABC Rules, *supra* note 39, at p. 26.  
 60. Act of Mar. 23, 2017, No. 593, available at <http://www.arkleg.state.ar.us/assembly/2017/2017R/Acts/Act593.pdf>.  
 61. *Id.* ■

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