

2015 NEVADA MEDICAL MARIJUANA LEGISLATIVE UPDATE

BY KATHERINE HOFFMAN, ESQ.

It has been a long, complex and expensive road for Nevada's burgeoning medical marijuana industry. Thus far, only a handful of medical marijuana establishments (MMEs) have opened for business in Nevada. The 2015 Nevada Legislature, however, enacted a number of important changes that will provide MMEs with much-needed operational flexibility and help facilitate further progress in this young industry.

A Bumpy Beginning

After voters amended the Nevada Constitution in 2000, allowing the possession and use of medical marijuana, patients had few options for obtaining these products. Unless patients or their caregivers were able to cultivate and harvest marijuana themselves, they lacked a legal way to access medical marijuana.

The 2013 legislative session was a milestone for the development of Nevada's commercial medical marijuana industry. S.B. 374 (2013). The associated regulations promulgated by the Division of Public and Behavioral Health established a process for licensing and regulating the four types of MME: cultivation facilities, edibles production facilities, testing laboratories and dispensaries.

Hopeful MME operators submitted detailed applications for state licenses (called registration certificates) to the division in August 2014. Generally, all cultivation, edibles production and testing laboratory applicants meeting the division's standards and selection criteria were awarded registration certificates. State law, however, limits the total number of dispensaries to 66 distributed throughout the state, with the majority located in the local

jurisdictions within Clark County (40 total dispensaries) and Washoe County (10 total dispensaries). After scoring and ranking 199 submitted dispensary applications, the division awarded 55 registration certificates to dispensaries in November 2014. No applications were submitted for the 11 remaining dispensary registration certificates, allocated to certain rural Nevada counties.

In addition to obtaining a state registration certificate, MMEs must also satisfy their local jurisdiction's specific licensing and land use approval requirements. Most southern Nevada jurisdictions required MMEs to complete the local approval process before submitting the registration certificate applications to the division, while the northern Nevada jurisdictions required MMEs to submit applications for local approvals and licenses after obtaining their registration certificates. In jurisdictions awarding local licenses and approvals before the division conferred registration certificates, discrepancies between the MMEs

licensed by the local governments and the MMEs receiving registration certificates have resulted in uncertainty, delay and a number of lawsuits involving both the division and local governments.

Reallocation of Dispensary Licenses

One of the most important changes to come from the 2015 session was the creation of a one-time process allowing additional dispensaries in Washoe and Clark Counties. S.B. 276 required that the 11 dispensary registration certificates initially allocated to rural counties, without any qualifying applicants, be reallocated to Clark and Washoe Counties. Specifically, unincorporated Clark County received eight reallocated registration certificates, unincorporated Washoe County received one registration certificate, and the cities of Reno and Sparks each received one registration certificate.¹

The bill required the division to award these reallocated certificates to dispensaries that received business licenses or approvals from the local government. In essence, this provision allowed these local jurisdictions to choose which state-denied dispensary applicants would receive a new, reallocated registration certificate from the division. This provision of S.B. 276 was intended to address the discrepancies that arose in Clark County, where some dispensary operators were approved by the local government, but did not receive registration certificates. Senator Patricia Farley, one of the sponsors of S.B. 276, explained the bill's potential to help resolve the litigation and delay stemming from the divergent selection processes:

"This bill addresses a few issues that have emerged since we legalized medical marijuana last session ... I would note that Senate Bill 276 gives Clark and Washoe Counties the flexibility to deal with some lawsuits that have been filed over the dispensary selection process ... I believe this bill gives them tools to negotiate resolution so the medical marijuana industry can move forward."²

Notably, there are eight dispensary applicants in Clark County that received local approvals but not state registration certificates. Although some of these

applicants scored relatively poorly in the division's rankings, they were selected to receive the eight reallocated registration certificates. In contrast, the cities of Reno and Sparks both awarded their reallocated registration certificates to the next highest-scored dispensary applicant on the division's application scoring and ranking list.

Greater Flexibility in Ownership

Another important revision to come from S.B. 276 is greater flexibility when it comes to changing the ownership of an MME. Before the passage of S.B. 276, MME owners had limited ability to sell their interest, add new investors or otherwise change the ownership structure disclosed in the MME's registration certificate application. Under the division's regulations and policies, MMEs would lose their registration certificates if any ownership share greater than 10 percent was transferred to an individual who was not already "listed among the ownership of any registered MME." Effectively, this policy precluded new investors, not already vetted by the division during the 2014 application process, from obtaining a significant ownership share of a registered MME.

S.B. 276, however, opens the door to new investment and sales of ownership interests in MMEs, something greatly needed in an industry proving to have high startup costs and long rollout timelines. Now, MMEs may "transfer all or any portion of its ownership to another party," as long as the acquiring party provides evidence of its financial resources, completes the fingerprinting and criminal background investigation process, and demonstrate that the ownership transfer will not violate the state's antimonopoly provisions applicable to MMEs.³ This change gives current MME owners new options for raising capital or selling their businesses, and creates new opportunities for investors interested in joining Nevada's medical marijuana industry.

Ability to Move Locations

State law and with local zoning regulations limit the locations where medical marijuana establishments may operate. Once an MME's location was disclosed and vetted during the initial state application process conducted by the

Division of Public Health in 2014, division regulations significantly restricted a MME's ability to subsequently change locations.

This limitation proved frustrating for MMEs, local governments and residents, because MMEs were not able to readily relocate if they faced opposition from neighbors, local governments or even unwanted competition from other nearby MMEs. This limitation was particularly vexing for dispensary owners and officials in Washoe County after the division awarded registration certificates to three dispensaries within close proximity of one another in the Incline Village and Crystal Bay areas.

S.B. 276 addresses this problematic restriction by amending state law to allow MMEs to move their establishments to new locations within the same local jurisdiction.⁴ The new locations must still comply with the state requirements for minimum distances from schools and community facilities, as well as local zoning requirements. Notably, before the establishment may move, they must receive approval from the local government, "in a public hearing for which written notice is given at least seven working days before the hearing."

A Potential Banking Solution

Because the sale of medical marijuana remains unlawful under federal law, MMEs have few options for banking or financial services. Although the Treasury Department issued guidelines in 2014 to help banks work with state-licensed MMEs, many banks are still unwilling to service MMEs, leaving them to conduct all of their business on a cash basis. Another 2015 bill, A.B. 480, includes provisions allowing Nevada thrift companies to obtain their required deposit insurance from private carriers, rather than the FDIC, potentially reducing the regulatory hurdles for a thrift company to provide financial services to MMEs.⁵ This change could encourage the development of thrift companies in Nevada to serve the medical marijuana industry.

Use of Independent Contractors

State law generally requires anyone entering a dispensary to be a card-holding patient or an employee or volunteer of the establishment who is registered with the

state. A.B. 70 grants MMEs additional flexibility with staffing and operations, by allowing MMEs to also utilize independent contractors who register with the state and provide services to multiple MMEs.⁶

Administration of Taxes and Fees

The Department of Tax, which is responsible for administering a 2 percent excise tax on medical marijuana, requested a number of changes to the statutes governing its procedures for collecting and auditing this tax. These changes, adopted as part of A.B. 70, conform with the process used by the Department of Tax to administer other tax schemes. In addition, A.B. 70 establishes a process whereby MMEs must reimburse local government agencies for the cost of inspections, reviews or other tasks related to ensuring that the MME complies with applicable local governmental ordinances or rules.⁷

Like many new endeavors, the first years of Nevada's commercial medical marijuana industry have included a number of unanticipated problems and delays. The 2015 legislative changes, however, afford MMEs more operational flexibility; these revisions will ultimately help facilitate further progress in this industry. But, as more MMEs begin to open their doors, operators, local governments and the state will continue to identify issues and opportunities for additional improvements in the medical marijuana regulatory scheme. The 2015 changes will likely be the first of many future refinements to these statutes and regulations. **NL**

1. S.B. 276, § 5 (2015).
2. Remarks by Senator Patricia Farley, Assembly Committee on Ways and Means, May 28, 2015.
3. S.B. 276, § 2 (2015).
4. S.B. 276, § 3 (2015).
5. A.B. 480 § 101.3 (2015).
6. A.B. 70 § 30-31 & 33 (2015).
7. A.B. 70 § 29.

KATHERINE HOFFMAN is an associate in the Reno office of Fennemore Craig, P.C. Her practice focuses on administrative and regulatory matters before state and local agencies. In particular, Hoffman advocates for clients in the areas of medical marijuana, gaming, sweepstakes and promotional contests, financial institutions and public utilities.