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LEGISLATIVE GUIDE

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About the Author:

This Legislative Guide was written by Stuart Stromberg, J.D., George Washington University Law School, 2016. Mr. Stromberg, a Legal Counsel, has been employed with the Legal Services Division of the Legislative Services Agency since 2017. He staffs the State Government and Veterans Affairs committees and drafts legislation primarily in the areas of elections and professional licensing.

Mr. Stromberg can be reached by telephone at 515.281.3430 or by email at:
stuart.stromberg@legis.iowa.gov

Iowa Legislative Services Agency
State Capitol
Des Moines, IA 50319

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MARIJUANA REGULATION

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MARIJUANA REGULATION

I. Introduction

Few drugs have been subject to as much international, national, statewide, and local regulatory changes as marijuana. Throughout time, marijuana has been regarded as a standard agricultural product, a pharmaceutical, and an illicit drug. Countries have negotiated binding treaties on how each member country should treat marijuana within its borders, only for state laws to conflict with national implementing legislation. Therefore, the issue of marijuana regulation is inherently an issue of federalism, implicating both the power of the federal government to regulate trade between states and the general police powers of individual states. On its face, the current state of marijuana regulation in the United States is rife with contradictions and state laws that appear to contradict federal regulatory mandates. Under normal circumstances, the principle of federalism would dictate that constitutional federal laws prevail over conflicting state laws. However, a number of compromises and special circumstances have complicated that analysis with respect to marijuana regulation.

This Legislative Guide provides historical background on the regulation of marijuana from the late 19th century to recent state marijuana programs and the federal responses to such programs. The Guide also covers the international treaties that, when granted the same authority as federal legislation by the Constitution, concern marijuana. For the purposes of this Guide, the term “marijuana” is used to refer to the plant often referred to as “cannabis.” States differ in how they refer to marijuana within their own laws, but there is no practical difference between the two terms.

Unless otherwise noted, references in the Guide to the Iowa Code are to the 2022 Iowa Code.

II. Historical Background

The history of the legality of marijuana in the United States is a combination of state, national, and international actions, largely beginning in the early part of the 20th century and continuing to this day. The regulation of pharmaceuticals as a whole began in earnest in the late 19th century, with states placing requirements and restrictions on the sale of certain drugs, including marijuana in certain states.[1] The federal government adopted legislation to this effect in 1906 with the Pure Food and Drug Act, which required, in part, that any product containing marijuana or other enumerated substances include a label to that effect.[2] The Pure Food and Drug Act’s successor legislation, the federal Food, Drug, and Cosmetic Act, maintained the requirement that food, drugs, devices, and products containing marijuana be labeled and further required that such products warn of the addictive nature of the product, until labeling requirements for certain drugs and devices were repealed in 1997.[3]

The international regulation of drugs began in 1912. In that year, several countries signed the International Opium Convention of 1912, the first international drug control treaty, which required countries to control the traffic in opiates and narcotics, and which

[1] See generally Lyman F. Kebler, U.S. Department of Agriculture, Bureau of Chemistry Bulletin No. 98, Drug Legislation in the United States, (1906), *available at* archive.org/details/druglegislationi98kebl/page/n1.

[2] Pure Food and Drug Act of 1906, Pub. L. No. 59–384, 34 Stat. 768,770, *available at* govtrackus.s3.amazonaws.com/legislink/pdf/stat/34/STATUTE-34-Pg768.pdf.

[3] 21 U.S.C. §352(d) (1996) (repealed by Food and Drug Administration Modernization Act of 1997 §126, 111 Stat. 2296, 2327).

the United States joined automatically when it ratified the Peace Treaty of Versailles.[4] A later treaty, the International Opium Convention of 1925, was the first treaty to attempt to regulate the trafficking of marijuana on the international market.[5] The United States withdrew from negotiations for this treaty and declined to ratify it.[6] Both International Opium Conventions were superseded by the Single Convention on Narcotic Drugs in 1961, discussed in Part III, Section A of this Guide, which heavily regulates marijuana.

The 1930s saw the first major national push for the control and criminalization of marijuana. In 1932, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Narcotic Drug Act of 1934, which was intended to harmonize drug laws across the country and included optional provisions for the criminalization of the possession of marijuana.[7] By the time of the hearings on the Marihuana[8] Tax Act of 1937, 35 states had adopted the Uniform Narcotic Drug Act.[9]

The Marihuana Tax Act represented the first attempt by the federal government to essentially ban marijuana in all but a small number of limited circumstances. The Act placed a tax on all transfers of marijuana other than those made pursuant to a prescription. Persons who engaged in certain enumerated businesses—those which would be legal under the various state laws governing marijuana, such as medicine, research, and milling—were required to register with the Internal Revenue Service (IRS) and pay a small annual registration fee and a small tax per ounce of marijuana sold.[10] Other persons, mostly those using marijuana recreationally, were required to pay a tax of $100 per ounce purchased, which purchase could only be made pursuant to an order form obtained from the IRS and which tax had to be paid to the IRS prior to making the purchase, with failure to comply with either provision carrying criminal penalties.[11] Applications for order forms were required to be furnished to state law enforcement officials charged with enforcing marijuana laws.[12] Thus, while the Marihuana Tax Act technically only outlawed the purchase of marijuana without the proper documentation and without having paid the required tax, it effectively ensured that any person complying with the law would be prosecuted under a state law, as every state at the time criminalized the possession of marijuana.[13] The United States Supreme Court ruled that the law violated the Fifth Amendment in 1968 because a person complying with the law necessarily self-incriminated.[14] The Marihuana Tax Act was replaced in 1970 by the federal Controlled Substances Act, which constitutes current federal law governing marijuana and other controlled substances.[15]

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4 See United Nations Office on Drugs and Crime, The 1912 Hague International Opium Convention, *available at* www.unodc.org/unodc/en/frontpage/the-1912-hague-international-opium-convention.html (last visited August 19, 2021).

5 See United Nations Office on Drugs and Crime, The Cannabis Problem: A Note on the Problem and the History of International Action (January 1, 1962) *available at* web.archive.org/web/20050526043451/http://www.unodc.org/unodc/en/bulletin/bulletin_1962-01-01_4_page005.html.

6 See Amira Armenta and Martin Jelsma, The UN Drug Control Conventions (October 8, 2015), *available at* www.tni.org/en/publication/the-un-drug-control-conventions.

7 See National Conference of Commissioners on Uniform State Laws, Uniform Narcotic Drug Act, at 7-8 (1932), *available at* www.google.com/books/edition/Uniform_Narcotic_Drug_Act/8SbG5B498ZIC?hl=en.

8 "Marihuana" is an antiquated spelling of "marijuana." The meaning is identical.

9 See Taxation of Marihuana: Hearing Before a Subcomm. of the Comm. on Finance, United States Senate, on H.R. 6906, 75th Cong., First Session, at 9-10 (July 12, 1937), *available at* www.finance.senate.gov/imo/media/doc/75HrgMarihuana.pdf.

10 See Leary v. United States, 395 U.S. 6, 14-16 (1969).

11 See id.

12 See id.

13 See id. at 16.

14 See id. at 11-12, 53.

15 See generally, 21 U.S.C. §801 et seq. (2018)

III. Current Law

This section discusses current laws governing marijuana. The section starts with international law by examining the commitments of the United States under the Single Convention on Narcotic Drugs. The section next examines the federal Controlled Substances Act, the most influential federal statute governing marijuana, as well as the impact of current banking laws on states that have legalized medical marijuana or the use of marijuana by adults. The section then examines states that have reduced or eliminated criminal penalties for the use of marijuana, legalized medical marijuana, or legalized the use of marijuana by adults.

A. International Law

The Single Convention on Narcotic Drugs (the Convention) was adopted in 1961 on the belief of the parties that "addiction to narcotic drugs" constituted a significant threat to individuals and society and that the transnational nature of the problem required international cooperation for the implementation of effective solutions.[16] Until December 2020, marijuana was listed as a Schedule IV controlled substance, a subset of Schedule I, the most restrictive category, that is subject to additional regulation.[17] In December 2020, the Commission on Narcotic Drugs voted to reclassify marijuana from Schedule IV to Schedule I.[18] Parties to the Convention commit to "take such legislative and administrative measures as may be necessary" to limit the production, use, and possession of Schedule I controlled substances to medical and scientific purposes.[19] Parties to the Convention must also require that the manufacture and trade of such controlled substances be limited to licensed persons and that the export of such controlled substances be restricted to those countries which permit the import of such controlled substances.[20] The possession of such controlled substances must also be prohibited except under legal authority, and all related controlled substances, substances, and equipment must be seized upon discovery.[21] Schedule I controlled substances are also subject to certain requirements with respect to other scheduled controlled substances, such as a requirement that parties penalize activities related to scheduled controlled substances.[22]

The International Narcotics Control Board (the Board) has limited power to enforce the provisions of the Convention. If the Board believes that a party is not in compliance with the Convention, it may open consultations with the party, call upon the party to adopt remedial measures, and, if a party fails to remedy a serious breach of the Convention, bring the breach to the attention of other parties and international organizations and recommend the cessation of the trade in drugs with the breaching party.[23] A party may denounce the

[16] See United Nations Office on Drugs and Crime, The International Drug Control Conventions, at 23 (2013), *available at* www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Ebook/The_International_Drug_Control_Conventions_E.pdf.
[17] See United Nations, The International Drug Control Conventions, Schedules of the Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol as of May 24, 2019 (2019), *available at* undocs.org/ST/CND/1/Add.1/Rev.5.
[18] See UN Commission Reclassifies Cannabis, Yet Still Considered Harmful, UN News (Dec. 2, 2020), *available at* news.un.org/en/story/2020/12/1079132
[19] See United Nations Office on Drugs and Crime, The International Drug Control Conventions, at 30.
[20] See id. at 48-50.
[21] See id. at 53, 56.
[22] See id. at 54-55.
[23] See id. at 35-36.

Convention, thereby withdrawing from it, by filing an instrument to that effect with the Secretary-General of the United Nations.[24]

B. Federal Law

This section addresses current federal laws concerning marijuana. The section first addresses the federal Controlled Substances Act, which dictates the production, distribution, and usage of marijuana on a federal level, as well as executive actions regarding the enforcement of federal marijuana laws. The section also addresses federal laws and regulations concerning banking with marijuana businesses that operate legally according to state laws.

1. Federal Controlled Substances Act

As a general principle, marijuana is classified as a Schedule I controlled substance under the federal Controlled Substances Act.[25] A controlled substance is classified as a Schedule I controlled substance when it is found that the substance has a high potential for abuse, has no currently accepted medical use in treatment in the United States, and there is a lack of accepted safety for use of the substance under medical supervision.[26] However, dronabinol, a derivative of marijuana, is scheduled separately from marijuana. When dronabinol is prepared "in an oral solution in a drug product approved for marketing by the United States Food and Drug Administration," it is a Schedule II controlled substance,[27] indicating that it has a high potential for abuse, has a currently accepted medical use in treatment in the United States, and that abuse may lead to severe psychological or physical dependence.[28] Synthetic dronabinol in a gel capsule is a Schedule III controlled substance,[29] indicating that it has less potential for abuse than substances in Schedules I and II, has a currently accepted medical use in treatment in the United States, and that abuse may lead to moderate or low physical dependence or high psychological dependence.[30]

2. Cole Memorandum

In August 2013, United States Deputy Attorney General James Cole published a memorandum providing guidance for the enforcement of marijuana-related laws by all federal prosecutors.[31] Commonly referred to as the "Cole Memorandum," the document outlined the factors that federal prosecutors should consider when deciding whether to pursue a prosecution for a marijuana-related offense in a jurisdiction that had legalized marijuana and also had "strong and effective regulatory and enforcement systems."[32] Noting that the United States Department of Justice (Department of Justice) had historically not devoted resources to the prosecution of individuals who possessed marijuana for their own personal use, but instead has

[24] See id. at 61.
[25] 21 C.F.R. §1308.11 (2021).
[26] 21 U.S.C. §812(b)(1) (2018).
[27] 21 C.F.R. §1308.12 (2021).
[28] 21 U.S.C. §812(b)(2) (2018).
[29] 21 C.F.R. §1308.13 (2021).
[30] 21 U.S.C. §812(b)(3) (2018).
[31] See James M. Cole, Deputy Attorney General, U.S. Department of Justice, Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (August 29, 2013), *available at* www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.
[32] See id. at 3.

relied on states to do so, the memorandum provided prosecutors with "enforcement priorities."[33] These priorities included the prevention of distribution of marijuana to minors, the funneling of profits from the sale of marijuana to criminal enterprises, and the diversion of marijuana from states where marijuana is legal to states where it is not.[34] A separate memorandum later extended the principles of the Cole Memorandum to marijuana-related financial crimes, discussed below.[35]

The Cole Memorandum did not alter the authority of the Department of Justice to enforce federal marijuana laws, did not legalize activity that was in violation of federal law, and did not restrain the investigation and prosecution of cases that served "an important federal interest."[36] The effects of the Cole Memorandum on federal arrests for marijuana-related offenses are difficult to estimate, as the number of such arrests per year began to decrease in 2007, prior to the publication of the memorandum, and began to increase again in 2016, prior to the rescission of the memorandum.[37]

The Cole Memorandum was rescinded by a memorandum published by Attorney General Jefferson Sessions on January 4, 2018, along with other Department of Justice memoranda that altered prosecution priorities with respect to marijuana-related laws.[38] This memorandum did not require federal prosecutors to prosecute or prioritize the prosecution of marijuana-related offenses; instead, the memorandum required federal prosecutors to utilize the same principles that are used to guide all exercises of prosecutorial discretion.[39] Despite the rescission of the Cole Memorandum and related memoranda, the federal Rohrabacher-Farr amendment and guidance from the United States Department of the Treasury, discussed in Subsection 3, continue to restrain federal prosecutions for marijuana-related crimes in certain circumstances.

3. Rohrabacher-Farr Amendment

The amendment that would eventually come to be known as the Rohrabacher-Farr amendment was initially introduced by Representative Maurice Hinchey to an appropriations bill for the funding of assorted federal entities in 2001.[40] The amendment prohibited the Department of Justice from using funds appropriated in the bill to prevent the implementation of state laws authorizing the use of medical marijuana in states that had already enacted such laws.[41] The amendment was enacted for the first time, with an expanded list of covered states, in 2014, included in the 2015 federal budget.[42] The amendment is included in the 2021 federal budget

[33] See id. at 2.
[34] See id. at 1-2.
[35] See James M. Cole, Deputy Attorney General, U.S. Department of Justice, Memorandum for All United States Attorneys: Guidance Regarding Marijuana Related Financial Crimes (February 14, 2014), *available at* dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf.
[36] Cole, Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement, at 3.
[37] See NORML. FBI: Marijuana Arrests Rise for Third Straight Year, Outpace Arrests for All Violent Crimes (October 1, 2019), *available at* norml.org/blog/2019/10/01/fbi-marijuana-arrests-rise-for-third-straight-year-outpace-arrests-for-all-violent-crimes.
[38] See Jefferson B. Sessions, III, Attorney General, Office of the Attorney General, Memorandum for All United States Attorneys: Marijuana Enforcement (January 4, 2018), *available at* www.justice.gov/opa/press-release/file/1022196/download.
[39] See id.
[40] H. Amdt. 196 to H.R. 2500, 107th Cong. (2001-2002), *available at* www.congress.gov/amendment/107th-congress/house-amendment/196.
[41] Id.
[42] See Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, §538, 128 Stat. 2130, 2217 (2014).

with an expanded list of covered states.[43] The Rohrabacher-Farr amendment has not been codified and must be reenacted each year in order to have continued effect, and it does not change the federal legality of marijuana. Further, the amendment only applies to medical marijuana programs and does not prohibit the expenditure of funds for the prosecution of persons who comply with a state law permitting the adult use of marijuana.

Initially, the Department of Justice took the position that the Rohrabacher-Farr amendment only prohibited the prosecution of state officials involved in the implementation of medical marijuana programs and that the Department of Justice remained free to expend appropriated moneys on the prosecution of private individuals involved in medical marijuana programs.[44] In 2016, the Ninth Circuit Court of Appeals rejected this interpretation and enjoined the Department of Justice from expending moneys on the prosecution of persons in compliance with a state's medical marijuana program.[45]

4. Federal Banking Regulations

Federal banking regulations require every bank to file with the United States Department of the Treasury a report of any transaction suspected to involve a violation of a law or regulation, known as a "suspicious activity report."[46] A financial institution that fails to file a required suspicious activity report is subject to various civil and criminal penalties, ranging from approximately $20,000 to $1.4 million and imprisonment for 10 years.[47] Given that virtually all sales of marijuana remain illegal under federal law, financial institutions that intend to provide banking services to marijuana-related businesses are required to file suspicious activity reports for all transactions related to such businesses or face potentially severe civil or criminal penalties. According to the Financial Crimes Enforcement Network of the Department of the Treasury ("FinCEN"), 684 financial institutions are providing banking services to marijuana-related businesses as of March 31, 2021.[48]

FinCEN has published guidance regarding the filing of suspicious activity reports for financial institutions that do business with legal marijuana-related businesses according to state law.[49] The guidance requires a financial institution that does business with a marijuana-related business to consider whether a marijuana-related business "implicates one of the Cole Memo priorities or violates state law."[50] A financial institution that decides to provide services to a marijuana-related business must then file one of three types of suspicious activity reports with FinCEN on an ongoing basis: a "marijuana limited" report for every transaction with a business that the financial institution believes to be compliant with state law and that does not implicate a Cole Memorandum priority; a "marijuana priority" report for a business

[43] See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, §531 (2020).
[44] See U.S. v. McIntosh, 833 F.3d 1163, 1176 (9th Cir. 2016).
[45] See id. at 1177.
[46] 31 C.F.R. §1020.320(a) (2021).
[47] 31 C.F.R. §1010.820-821, 840 (2021).
[48] See U.S. Dep't of the Treasury, FinCEN, Fin. Crimes Enf't Network, Marijuana Banking Update (March 2021), *available at* www.fincen.gov/sites/default/files/shared/508_301556_MJ%20Banking%20Update%202nd%20QTR%20FY2021_Public_Final%20508.pdf.
[49] See U.S. Dep't of the Treasury, Fin. Crimes Enf't Network, FIN-2014-G001, BSA Expectations Regarding Marijuana-Related Businesses (February 14, 2014), *available at* www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf.
[50] Id. at 3.

that violates state law or implicates a Cole Memorandum priority; or a "marijuana termination" report when the financial institution believes it needs to terminate a business relationship in order to "maintain an effective anti-money laundering compliance program."[51] Compliance with the FinCEN guidance can require a financial institution to file many reports, making it costly for financial institutions to provide services to marijuana-related businesses.[52]

C. State Laws

In 1996, California voters approved Proposition 215, making it the first state in the United States to allow certain patients to consume marijuana for medical purposes.[53] Since then, a total of 47 states and the District of Columbia have allowed adults to consume marijuana for medical or recreational purposes to varying extents.[54] Only Kansas and Idaho have no program allowing the medical or recreational use of marijuana under any circumstances, while Nebraska has a trial program that is not open to the public.[55] Each state that allows the use of marijuana under certain circumstances administers the programs differently, and there can be drastic differences even among states that allow the use of marijuana under similar circumstances.

This section first examines the medical marijuana program in Iowa. The section will then examine various types of medical marijuana programs in other states. Finally, the section will examine states that have legalized the use of marijuana by adults. A full explanation of the marijuana programs in each state is outside the scope of this Guide. Instead, this section will attempt to present a representative sample of marijuana programs found throughout the United States.

1. Iowa

Iowa's Medical Marijuana Program, known as the Medical Cannabidiol Program, is categorized as a "low THC [tetrahydro cannabinol (THC)]" program by the National Conference of State Legislatures (NCSL), meaning that the program allows the sale of marijuana that contains less than a certain amount of THC.[56] Other state programs that limit the amount of THC allowed in medical cannabidiol are discussed below.

In order for a person to purchase and use medical cannabidiol in Iowa, that person must first receive a certification from a health care practitioner.[57] Only a person who is licensed to practice medicine and surgery or osteopathic medicine and surgery, a physician assistant, an advanced registered nurse practitioner, or an advanced practice registered nurse, who is a patient's primary care provider, or a podiatrist, may certify a patient to receive a medical cannabidiol registration card.[58] This system, allowing a medical practitioner certifying a patient to receive a card that will allow the patient to purchase some form of marijuana product from a dispensary, is a common feature of medical marijuana programs because, except as discussed

[51] Id. at 3-5.
[52] See Hudak and Klein, Banks Don't Want to Work with Marijuana Companies. It's Time for That to Change, CNN Business (Mar. 14, 2019, 1:09 PM), *available at* www.cnn.com/2019/03/14/perspectives/cannabis-businesses-banking/index.html.
[53] See National Conference of State Legislatures, State Medical Marijuana Laws, (August 23, 2021), *available at* www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.
[54] See id.
[55] See id.
[56] See id.
[57] Iowa Code §124E.3(1).
[58] Iowa Code §124E.2(7).

in Part III, Section B, Subsection 1, marijuana is a Schedule I controlled substance and therefore cannot be prescribed by a doctor. Prior to issuing a certification to a patient, a health care practitioner must determine that the patient suffers from a debilitating medical condition and that the patient would benefit from the use of medical cannabidiol, and provide the patient with information about the benefits and risks of using medical cannabidiol.[59] A certification must be renewed annually.[60] A health care practitioner is not obligated to issue a certification to any patient.[61] The list of debilitating medical conditions that can qualify a patient for the use of medical cannabidiol is specified in Iowa Code.[62] Additional debilitating medical conditions can be designated by administrative rule. In order for a condition to be administratively added to or removed from the list of debilitating medical conditions, the Medical Cannabidiol Board must first make a recommendation to the Board of Medicine.[63] The Board of Medicine may then adopt the recommendation by rule.[64]

Once a patient has received a written certification from a health care practitioner, the patient must submit the certification along with an application form and an application fee to the Iowa Department of Public Health.[65] In addition, a patient's primary caregiver may submit an application to allow the primary caregiver to purchase medical cannabidiol for use by the patient.[66] After a patient or primary caregiver's application has been approved, a medical cannabidiol registration card is issued by the department.[67]

A patient or primary caregiver who has received a medical cannabidiol registration card may purchase medical cannabidiol from a medical cannabidiol dispensary in Iowa.[68] Prior to dispensing medical cannabidiol, a dispensary shall verify that the dispensary has received a valid medical cannabidiol registration card from a patient or a patient's primary caregiver, assign a tracking number to any medical cannabidiol dispensed to the patient or primary caregiver, and package the medical cannabidiol in child-resistant packaging that includes a label with a list of all active ingredients and individually identifying information.[69] Generally, a medical cannabidiol dispensary shall not dispense more than four and one-half grams of total THC to a patient or the patient's primary caregiver in a 90-day period.[70] However, a medical cannabidiol dispensary may dispense more than four and one-half grams of total THC to a patient or a patient's primary caregiver in a 90-day period if the patient's health care practitioner certifies that the patient has a terminal illness with a life expectancy of less than one year or that four and one-half grams of total THC in a 90-day period has proven insufficient to treat the patient's debilitating medical condition.[71] In either case, the health care practitioner shall include an alternative

[59] Iowa Code §124E.3(1).
[60] Iowa Code §124E.3(2).
[61] Iowa Code §124E.3(3).
[62] Iowa Code §124E.2(2).
[63] Iowa Code §124E.5(3)(b).
[64] Iowa Code §124E.5(4).
[65] Iowa Code §124E.4(1).
[66] Iowa Code §124E.4(3).
[67] Iowa Code §124E.4(1), (3).
[68] Iowa Code §124E.9(1)(b).
[69] Iowa Code §124E.9(12).
[70] Iowa Code §124E.9(14).
[71] Iowa Code §124E.9(15).

total THC cap.[72] The Iowa Department of Public Health maintains a database of medical cannabidiol patients for the purposes of tracking whether a person has received a written certification, whether a person has a valid medical cannabidiol registration card, and how much total THC has been dispensed to a person.[73] A person with a medical cannabidiol registration card issued in another state that grants reciprocity to holders of medical cannabidiol registration cards from other states cannot purchase medical cannabidiol in Iowa but is entitled to the legal protections discussed below.[74]

Persons engaged in activities related to medical cannabidiol pursuant to Iowa Code chapter 124E are entitled to certain legal protections. Health care practitioners, medical cannabidiol manufacturers, and medical cannabidiol dispensaries are not subject to prosecution for engaging in the Medical Cannabidiol program pursuant to Iowa Code chapter 124E.[75] The lawful possession of a medical cannabidiol registration card is an affirmative and complete defense to prosecution for unlawful possession of marijuana by a patient or primary caregiver,[76] and possession of a medical cannabidiol registration card or an application to receive a medical cannabidiol registration shall not constitute probable cause or reasonable suspicion, and shall not support the search or inspection of a person by a governmental agency.[77] The legal possession or use of medical cannabidiol by either a parent or a patient under the age of 18 shall not be grounds to remove a minor from the home of a parent.[78] Health care practitioners, employees of the Iowa Department of Public Health and the Department of Transportation, and attorneys shall not be subject to professional discipline for actions undertaken pursuant to Iowa Code chapter 124E.[79] Similarly, entities of Iowa also enjoy certain immunities for engaging in activities related to medical cannabidiol under Iowa Code chapter 124E. The Iowa Department of Public Health, the Governor, and any employee of any state agency in Iowa are immune from civil and criminal liability for claims arising from actions authorized under Iowa Code chapter 124E.[80]

Legal protections for the possession or use of medical cannabidiol are not comprehensive. An employer may enforce a policy prohibiting an employee from consuming any form of marijuana in or out of the workplace, and an employer need not make accommodations for an employee with a medical cannabidiol registration card.[81] Adverse employment actions on the basis of such policies do not create causes of action under the Iowa Civil Rights Act or any other provision of law.[82] A person who owns, operates, or controls a property need not allow the use, consumption, possession, transfer, display, transportation, distribution, sale, or growing of marijuana on that property.[83] Government medical assistance programs,

[72] Iowa Code §124E.9(15).
[73] Iowa Code §124E.11(1)(b)(1).
[74] Iowa Code §124E.18.
[75] Iowa Code §124E.12(1)-(3).
[76] Iowa Code §124E.12(4)(a,b).
[77] Iowa Code §124E.12(9).
[78] Iowa Code §124E.12(5).
[79] Iowa Code §124E.12(6), (8).
[80] Iowa Code §124E.12(7).
[81] Iowa Code §124E.21.
[82] See Iowa Code §124E.24.
[83] Iowa Code §124E.23.

private health insurers, and providers of workers' compensation benefits are not required to reimburse a person for costs associated with the consumption of medical cannabidiol.[84]

2. Medical Marijuana in Other States

This section addresses medical marijuana programs implemented in other states. The NCSL categorizes medical marijuana programs into two categories: "low THC" programs, which limit the amount of THC that patients are able to purchase, and "comprehensive" programs, which do not impose such limits.[85] The section will first examine states with low THC programs before examining states that have more comprehensive medical marijuana programs.

a. Wisconsin

The Wisconsin Medical Marijuana Program represents one of the most limited programs in the country. An individual may possess a "cannabidiol product" if the individual has a certification stating that the individual possesses the cannabidiol product for the purpose of treating a medical condition.[86] In order to qualify as a "cannabidiol product," the marijuana derivative must contain cannabidiol and a THC level "without a psychoactive effect."[87] A certification may only be issued by a physician licensed to practice medicine and surgery.[88] Possession of a certification merely protects a patient from prosecution for possession of a Schedule I substance under the Wisconsin controlled substances law.[89] It does not entitle the holder to any additional legal protections like in Iowa, such as from professional discipline or from the removal of a minor from the home of a patient. Further, Wisconsin does not provide any method by which a caregiver may obtain or possess medical marijuana on behalf of a patient.

The Wisconsin Medical Marijuana Program does not include a mechanism by which medical marijuana may be produced, sold, or purchased in the state. Instead, a physician may apply for a federal investigational drug permit for marijuana, and the Controlled Substances Board shall assist the physician in the application process.[90] A physician or pharmacist that has obtained a federal investigational drug permit may distribute cannabidiol products to patients with a certification.[91] Alternatively, a patient could purchase medical marijuana from a dispensary in another state, although many states prohibit dispensaries from selling medical marijuana to nonresidents.

b. Texas

The Texas Medical Marijuana Program is similar to the Iowa Medical Cannabidiol Program, but the programs are functionally distinct in several

[84] Iowa Code §124E.22.
[85] See National Conference of State Legislatures, State Medical Marijuana Laws (August 23, 2021), *available at* www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.
[86] Wis. Stat. §961.32(2m)(b) (2021).
[87] Wis. Stat. §961.01(3r) (2021).
[88] Wis. Stat. §961.32(2m)(a) (2021).
[89] Wis. Stat. §961.14(4)(t)(1) (2021).
[90] Wis. Stat. §961.34 (2021).
[91] Wis. Stat. §961.38(1n) (2021).

important ways. The Texas Medical Marijuana Program is administered by the Texas Department of Public Safety rather than the state's public health agency.[92] The Texas Medical Marijuana Program is a low-THC program, and only cannabis with less than 1% THC by weight can be sold, possessed, and ingested in the state.[93] The Texas Code clarifies that references to "prescriptions" of medical marijuana actually refer to an entry in the registry of patients permitted to purchase and ingest medical marijuana.[94]

Texas significantly restricts the category of persons that may recommend the use of medical marijuana. In order to be qualified to recommend the use of medical marijuana, a licensed physician must be board certified in a specialty relevant to the treatment of a patient's particular medical condition and "dedicate[…] a significant portion of clinical practice to the evaluation and treatment" of that particular condition.[95] The physician must also register in the compassionate-use registry as a prescriber for a particular patient and file with the registry a treatment plan for that patient, which shall include the dosage prescribed, the means of administration, and the total amount of marijuana needed to fill the prescription.[96] Finally, the physician must maintain a treatment plan for the patient.[97]

With respect to the cultivation and sale of medical marijuana, Texas offers only a single category of license for dispensing organizations that cultivate, process, and dispense medical marijuana.[98] The Texas Department of Public Safety may only issue or renew a license to a dispensing organization if the license is "necessary to ensure reasonable statewide access to, and the availability of, low-THC cannabis for patients."[99] An applicant must demonstrate the ability to cultivate and produce medical marijuana; there is no option for an applicant to only produce or only sell medical marijuana.[100] Texas law does not prohibit the delivery of medical marijuana to patients in their homes.[101] A political subdivision shall not prohibit the cultivation, production, sale, or possession of medical marijuana.[102]

c. Maine

Maine's Medical Marijuana Program is a comprehensive program that does not impose a limit on the amount of THC that may be consumed by patients. The program does prohibit a patient from possessing more than eight pounds of marijuana and a caregiver or dispensary from dispensing more than two and one-half ounces of marijuana in one transaction.[103] Patients are allowed to

[92] Tex. Health & Safety Code §§487.001, 487.052 (2021).
[93] Tex. Occ. Code §169.001 (2021).
[94] Tex. Occ. Code §169.0011 (2021).
[95] Tex. Occ. Code §169.002 (2021).
[96] Tex. Occ. Code §169.004 (2021).
[97] Tex. Occ. Code §169.005 (2021).
[98] Tex. Health & Safety Code §§487.001, 487.053 (2021).
[99] Tex. Health & Safety Code §487.104 (2021).
[100] Tex. Health & Safety Code §487.102 (2021).
[101] See Anna M. Tinsley, First Dose of Medical Marijuana is Legally Delivered to a Young Girl in Texas, Fort Worth Star-Telegram (February 1, 2018), *available at* www.star-telegram.com/news/state/texas/article197868829.html.
[102] Tex. Health & Safety Code §487.201 (2021).
[103] Me. Rev. Stat. tit. 22, §§2423-A, 2428(1-A) (2020).

possess a large amount of marijuana, and the position of caregiver exists, due to the decentralized nature of Maine's medical marijuana production system.

In contrast to Iowa and many other states, medical marijuana patients in Maine are permitted to cultivate marijuana plants.[104] A medical marijuana patient who cultivates medical marijuana may take many actions that may be undertaken by medical marijuana growers and dispensaries in other states. This includes furnishing a limited amount of medical marijuana to other patients without remuneration,[105] manufacturing marijuana products,[106] and providing marijuana products to manufacturers to produce marijuana products for consumption by the patient.[107] In addition, a medical marijuana patient may obtain medical marijuana from a dispensary or a caregiver. A medical marijuana dispensary functions in much the same way as in many other states. A dispensary acquires, possesses, cultivates, manufactures, delivers, transfers, transports, sells, supplies, or dispenses medical marijuana,[108] as well as assists patients in the administration of medical marijuana.[109]

In Maine, the term "caregiver" is distinct from the similar phrase "primary caregiver" used in Iowa law. While the definition is similar, the powers of a caregiver are more expansive.[110] Broadly, a caregiver may exercise any rights held by a patient on a patient's behalf.[111] A patient may designate a caregiver to grow medical marijuana on the patient's behalf, and a caregiver may grow up to six medical marijuana plants per patient, for up to a total of 30 plants.[112] A caregiver may charge patients for providing this service, and may operate a retail store to sell medical marijuana to the caregiver's patients.[113] A caregiver may be a natural or legal person.[114] Effectively, a caregiver is a medical marijuana dispensary that is operating on behalf of a limited number of designated patients and which may not, as a general rule, transfer medical marijuana to persons other than those patients.

An unusual feature of Maine's Medical Marijuana Program is that medical marijuana may be transferred to persons who are not residents of the state. A "visiting qualifying patient," defined as a patient who is authorized to use medical marijuana in the person's state of residence, may receive up to two and one-half ounces of medical marijuana during a 15-day period in Maine from a caregiver or dispensary.[115] A visiting qualifying patient need not be individually approved to receive medical marijuana in Maine; the Office of Marijuana Policy maintains a list of states whose patients may purchase medical marijuana in the state.[116]

[104] Me. Rev. Stat. tit. 22, §2423-A(1)(A), (B) (2020).
[105] Me. Rev. Stat. tit. 22, §2423-A(1)(D) (2020).
[106] Me. Rev. Stat. tit. 22, §2423-A(1)(J) (2020).
[107] Me. Rev. Stat. tit. 22, §2423-A(1)(K) (2020).
[108] Me. Rev. Stat. tit. 22, §2422(6) (2020).
[109] Me. Rev. Stat. tit. 22, §2428(1-A)(D) (2020).
[110] Me. Rev. Stat. tit. 22, §2422(8-A) (2020).
[111] Me. Rev. Stat. tit. 22, §2423-A(2) (2020).
[112] Me. Rev. Stat. tit. 22, §2423-A(1)(B), (2)(B) (2020).
[113] Me. Rev. Stat. tit. 22, §2423-A(2)(E), (P) (2020).
[114] Me. Rev. Stat. tit. 22, §2423-A(2)(Q) (2020).
[115] Me. Rev. Stat. tit. 22, §§2422(15), 2423-A(2)(A-1), 2423-D, 2428(1-A)(A) (2020).
[116] See Maine Office of Marijuana Policy, Visiting Patients: Approved List of States, *available at* www.maine.gov/dafs/omp/medical-use/certification-process/visiting-patients (last visited October 7, 2021).

3. Adult Use Marijuana Programs

This section examines states that have, to varying extents, legalized the use of marijuana by adults for nonmedical purposes. The section first examines states that have removed or minimized criminal penalties for the possession of marijuana by adults before examining states that have implemented programs for the regulation, sale, and consumption of marijuana by adults.

a. States with reduced penalties for adult possession of marijuana

Several states have reduced the penalties for the possession of marijuana. Some have removed all criminal penalties for the simple possession of marijuana, often referred to as "decriminalization," while others have made possession of marijuana the lowest-level criminal offense possible in the jurisdiction, with no possibility of jail time. This section discusses some common features of states that have undertaken such changes. These states require that any marijuana be surrendered upon discovery by a police officer.

The amount of marijuana that a person can possess while still benefitting from lessened penalties varies widely. Several states allow possession of up to roughly one ounce of marijuana,[117] although many others set different limits.[118] The most common form of punishment for the adult possession of marijuana in these states is a fine coupled with a civil violation.[119] Many states increase penalties for second or subsequent offenses, which may include criminal penalties or mandatory participation in a drug rehabilitation program.[120] Importantly, these lessened penalties typically only apply to adults, with different, often more severe penalties applied to persons under the ages of 18 or 21, depending on the state.[121]

b. District of Columbia

In 2014, the District of Columbia adopted a ballot initiative to legalize the adult possession of marijuana, subject to certain restrictions. A person 21 years of age or older may "possess, use, purchase, or transport" two or fewer ounces of marijuana, and may transfer one ounce of marijuana or less to another person 21 years of age or older without remuneration.[122] Such a person may also grow, in the interior of a residence, up to six marijuana plants, no more than three of which may be mature, and possess within such residence all marijuana produced by those plants.[123] A person 18 years of age or older but less than 21 years of age who possesses marijuana is subject to a civil fine of $25 and seizure of

[117] See, e.g., Del. Code Ann. tit. 16, §4764(c) (2021); Miss. Code Ann. §41-29-139(c)(2) (2021); Neb. Rev. Stat. §28-416(13) (2021).
[118] See, e.g., Ohio Rev. Code §2925.11(c)(3) (2021) (roughly 3.5 ounces); N.M. Stat. Ann. §30-31-23 (2021) (one-half ounce).
[119] See, e.g., Conn. Gen. Stat. §21a-279a (2021) ($150 fine); Del. Code Ann. tit. 16, §4764(c) (2021) ($100 fine); Neb. Rev. Stat. §28-416(13) (2021) ($300 fine for a first offense).
[120] See, e.g., Conn. Gen. Stat. §21a-279a (2021) ($200-$500 fine for second or subsequent offense; referral to drug rehabilitation program for third or subsequent offense); Miss. Code Ann. §41-29-139(c)(2) (2021) (second conviction in two years is a misdemeanor including up to 60 days in jail and mandatory participation in drug rehabilitation; third conviction in two years is a misdemeanor including up to six months in jail).
[121] See, e.g., N.D. Cent. Code §§19-03.1-22.3(2), 19-03.1-23 (2021) (consumption by person under 21 is a class B misdemeanor, while possession by a person over that age is an infraction); Del. Code Ann. tit. 16, §4764(c) (2021) (imposing an increased civil penalty on a person under 21 years of age who is convicted of possession of marijuana a second time and an unclassified misdemeanor on such a person upon a third conviction).
[122] D.C. Code Ann. §48-904.01(a) (2021).
[123] D.C. Code Ann. §48-904.01(a) (2021).

any marijuana and paraphernalia visible to the police officer at the time of the violation.[124] A person under 18 years of age who possesses marijuana is subject to the same penalty, and the person's parents shall be notified.[125]

Although the District of Columbia allows a person to purchase marijuana, it does not allow a person to sell marijuana.[126] There are no official, regulated marijuana dispensaries in the District of Columbia. As a result of this dichotomy, the District of Columbia has seen a rise in unofficial marijuana markets, where a person can purchase an item of minimal value—such as a trading card or a pin—for an inflated price and receive an amount of marijuana as a "gift."[127] The legality of such transactions has not been tested.

c. Washington

The use of marijuana by adults was legalized in Washington by the adoption of an initiative in 2012.[128] The initiative authorizes persons over the age of 21 to possess up to one ounce of marijuana along with other amounts of products containing marijuana.[129] Washington also permits persons to receive a license to cultivate, process, and sell marijuana.[130] A person is not permitted to grow marijuana without a license; therefore, a person cannot grow marijuana for personal consumption. However, medical cannabidiol patients may grow marijuana for personal use or join a cooperative growing operation that produces medical marijuana for its members.[131] The Washington marijuana program is regulated by the same entity that regulates the sale of liquor within the state.[132]

Washington offers three classes of marijuana license: a producer's license for persons who grow marijuana plants, a processor's license for persons who convert marijuana into various marijuana products, and a retailer's license for persons who sell marijuana and marijuana products to consumers.[133] Neither a marijuana producer nor a marijuana processor may have a financial interest in a marijuana retailer.[134] A marijuana retailer may not sell any product other than marijuana products and paraphernalia.[135] Persons holding any type of marijuana license are permitted to utilize common carriers to transport marijuana.[136]

Washington recently instituted a system within its medical marijuana program to prioritize certain applicants for a marijuana retailer license. In 2020, the Washington Legislature adopted amendments to the adult use marijuana program regarding "social equity applicants."[137] Under this program,

[124] D.C. Code Ann. §48-1203(a) (2021).
[125] D.C. Code Ann. §48-1203(b) (2021).
[126] D.C. Code Ann. §48-904.01(a) (2021).
[127] See Tauhid Chappell and Tom Jackman, In the Murky World of D.C. Marijuana Law, Pop-Up Markets Thrive, Wash. Post, (March 26, 2018), *available at* www.washingtonpost.com/local/public-safety/in-the-murky-world-of-dc-marijuana-law-pop-up-markets-thrive/2018/03/26/84b9b2c6-2967-11e8-b79d-f3d931db7f68_story.html.
[128] Washington Initiative Measure No. 502 (2011), *available at* lcb.wa.gov/publications/Marijuana/I-502/i502.pdf.
[129] Wash. Rev. Code §§69.50.4013(4)(a), 69.50.360(3) (2021).
[130] Wash. Rev. Code §69.50.325(1)-(3) (2021).
[131] Wash. Rev. Code §69.51A.250 (2021).
[132] Wash. Rev. Code §69.50.342 (2021).
[133] Wash. Rev. Code §69.50.325(1)-(3) (2021).
[134] Wash. Rev. Code §69.50.328 (2021).
[135] Wash. Rev. Code §69.50.357(1) (2021).
[136] Wash. Rev. Code §69.50.382 (2021).
[137] Wash. Rev. Code §§69.50.335, 69.50.336 (2021).

the Washington State Liquor and Cannabis Board can give special preference to applicants from areas with high poverty rates, high rates of unemployment, and high rates of arrests, convictions, and incarcerations for marijuana-related crimes, as well as applicants who present plans to "reduce accumulated harm" to persons from such areas.[138] The state has also created a legislative committee to propose other changes to further such goals.[139]

[138] Wash. Rev. Code §69.50.335 (2021).
[139] Wash. Rev. Code §69.50.336 (2021).