DEPT. COMM. NO. 248

REPORT TO THE THIRTIETH LEGISLATURE
STATE OF HAWAII
2019

PURSUANT TO ACT 116, H.B. 2729, H.D. 2, S.D. 2, C.D. 1
RELATING TO CANNABIS FOR MEDICAL USE

REQUIRING THE MEDICAL CANNABIS OUTSTANDING ISSUES WORKING GROUP TO REPORT ON FINDINGS AND RECOMMENDATIONS FOR FURTHER ACTION RELATING TO THE EMPLOYMENT OF QUALIFYING PATIENTS AND THE MANUFACTURE AND DISPENSING OF EDIBLE CANNABIS PRODUCTS

PREPARED BY:
STATE OF HAWAII
DEPARTMENT OF HEALTH
OFFICE OF MEDICAL CANNABIS CONTROL AND REGULATION
DECEMBER 2018

TABLE OF CONTENTS

II. Purpose of Medical Cannabis Outstanding Issues Working Group (Act 116, 2018)

Act 116 Medical Cannabis Outstanding Issues Working Group (Working Group) was established by the legislature pursuant to H.B. 2729, H.D. 2, S.D. 2, C.D. 1, Act 116 (2018). The working group was convened by the Department of Health, Office of Medical Cannabis Control and Regulation to consider and make recommendations regarding:

Edibles: Authorization and regulation of the manufacture and dispensing of edible cannabis products by a licensed medical cannabis dispensary.

Employment: Issues involving an employee who is a registered qualifying patient for whom the medical use of cannabis is permitted.

Act 116 required the Working Group be convened no later than August 1, 2018, provide periodic updates to the legislature, and make recommendations for any legislative administrative action the Working Group deems appropriate to address issues surrounding the employment of qualifying patients and the manufacture and dispensing of edible cannabis products. The Working Group is required to submit a final report, including recommendations for further action, to the Legislature no later than twenty days before the convening of the regular session of 2019.

A. Edibles

The Working Group was tasked with considering the following issues related to the manufacture and dispensing of edible cannabis products by licensed medical cannabis dispensaries:

1. Actions taken, and regulatory systems established by other states;

2. Standards for testing and labeling of edible cannabis products for product content, potency, and dosage;

3. Requirements and limitations for the types of allowable edible cannabis products, including restrictions on products such as gummies, brightly-colored candies, or other products with a design likely to appeal to children or designed to resemble commercially available products marketed to children or adolescents;

4. Requirements and limitations applicable to liquid products;

5. Health and safety standards applicable to the manufacture of edible cannabis products, including standards for the protection of both consumers of the products and employees who manufacture the products; and

6. Any other issues related to the manufacture and dispensing of edible cannabis products, at the discretion of the working group.

B. Employment

The Working Group was tasked with considering the following issues related to the employment of a qualifying patient registered according to section 329-123, HRS:

1. Actions taken in other states regarding employment of qualifying medical cannabis patients, particularly regarding substance abuse on-site screening tests administered by an employer;

2. Protections available in other states against employment discrimination and suspension or discharge from employment based on an individual's status as a qualifying medial cannabis patient;

3. Allowable substance abuse screening tests for employees whose job requires the employee to not be under the influence of substances, such as employees in positions that require operation of a vehicle or heavy machinery, employees in inherently dangerous positions such as construction workers, or other employees subject to generally-applicable safety requirements;

4. The requirements applicable to both employees and employers contained in controlling federal law that requires employees to submit to substance abuse screening tests, including regulations of the Federal Aviation Administration, United States Department of Transportation, United States Department of Defense, United States Coast Guard, Department of Labor, and any other federal agency;

5. Applicable requirements for privacy of medical information and prohibitions on discrimination based on health or disability status contained in state and federal law; and

6. Any other issues related to employment of registered qualifying patients for whom the medical use of cannabis is permitted, at the discretion of the working group.

III. ACT 116 Working Group Members

A. As set forth in Act 116, the Working Group was comprised of ten members including:

1. The program manager of the office of medical cannabis control; who will serve as the chair of the working group;

2. The chairs of the senate committee on commerce, consumer protection, and health and house committee on consumer protection and commerce, or their designees;

3. The chair of the house committee on health and human services, or the chair's designee;

4. A member of the senate who is selected by the president of the senate to serve on the working group;

5. A representative of the department of health's food safety consultative and education program, to be selected by the director of health;

6. A representative of the department of health's sanitation branch, to be selected by the director of health;

7. Two participants in Hawaii's medical cannabis program, one of who is a qualifying patient eighteen year of age or older, and one of who is a parent or legal guardian of a qualifying patient who is under the age of ten;

8. A medical cannabis dispensary licensee, to be selected by the program manager of the office of medical cannabis control and regulation; and

9. Any other member selected by the members of the working group, subject to approval by the chair.

B. A list of the members of the Working Group may be found in *Appendix A* of this report.

C. Per Act 116, the working group could request assistance and feedback from subject matter experts and other stakeholders, as needed, to enable the working group to carry out its work. A list of subject matter and other resource individuals may be found in *Appendix B* of this report.

IV. Process and Procedures

The Working Group was chaired by the Hawaii Department of Health, Deputy Director of Health Resources Administration. The University of Hawaii Public Policy Center provided facilitative assistance to the Working Group which met monthly. The first meeting of the Working Group was on August 1, 2018, followed by meetings on September 4, 2018, October 2, 2018, and November 13, 2018. The Working Group concluded its purpose with its final meeting on November 13, 2018.

Notices and minutes of Working Group meetings, as well as background resources, meeting materials are publicly available at http://www.publicpolicycenter.hawaii.edu/projects-programs/act116.html

During the first meeting, members of the Working Group discussed the charge of the Working Group and topic areas to be discussed. Two Permitted Interaction Groups or subcommittees were established to consider and make recommendations regarding

employment and edibles as identified in Act 116. Each subcommittee identified a member of the Working Group to lead the work of the subcommittee.

- Edibles Subcommittee – Peter Oshiro
- Employment Subcommittee – David Baronfeld

The subcommittees were tasked with gathering information about their specific topics, identifying issues, and presenting their findings and recommendations to the Working Group for further consideration and for inclusion in a final report to the Legislature.

V. Findings and Recommendations

A. Edibles

The Edibles Permitted Interaction Group (PIG) was formed at the initial Working Group meeting on August 1, 2018. The Edibles PIG was comprised of the following individuals:

Working Group Members

- Adrian Tam
- Erin Miyasaki
- Peter Oshiro
- Teri Gorman

Resource Members

- Michele Nakata
- Peter Whiticar
- Tamara Whitney
- Alvin Bronstein, M.D.
- Paul Eakin, M.D.

The Edibles PIG considered the following issues related to the manufacture and dispensing of edible cannabis products by licensed medical cannabis dispensaries:

1. Actions taken, and regulatory systems established by other states;
2. Standards for testing and labeling of edible cannabis products;
3. Types of edible cannabis products, including liquid products, which should be allowed;
4. Health and safety standards to protect consumers of edible products; and
5. Other issues deemed critical to the subject of edible cannabis products.

Edibles PIG members divided the topic areas to be addressed, independently conducted research into their assigned areas, collaborated, and presented their findings at the second Working Group meeting on September 4, 2018. The Edibles PIG met on September 21, 2018 to prioritize their recommendations and presented these at the third Working Group meeting on October 2, 2018.

Findings and Discussion

Edible cannabis products have become very popular in states where allowed. For example, in Colorado in 2014, edible cannabis-infused products accounted for about 45 percent of the total cannabis sales in the state. Interest in edible products has been attributed to perceptions that edibles are more discreet, convenient, and less toxic, and produce a qualitatively different effect as compared with smoking cannabis.

Since Hawaii is a medical use state, authorization for edible products should be informed by a product's suitability for qualifying conditions and qualifying patients that may be benefitted by gastrointestinal administration of cannabinoids. In addition, to ensure patient safety, approved edible products should be required to meet specific manufacturing standards to reduce both the risk of inadvertent over-intoxication and accidental poisoning in adults and children. For example, edible medical cannabis products that the department deems attractive to children and adolescents should be prohibited.

The administrative regulations of 12 states were reviewed for provisions pertaining to manufactured cannabis products. Six were states which have legalized medical use of cannabis only (Arizona, Maryland, Minnesota, New Jersey, North Dakota, and Ohio), and six were states which have legalized medical and adult-use of cannabis (California, Colorado, Massachusetts, Nevada, Oregon, and Washington). Of the regulations reviewed, Colorado 1 CCR 212-1 Medical Marijuana Rules, and 1 CCR 212-2 Retail Marijuana Rules, were regarded robust and comprehensive. In addition, the regulations of several other states (California, Maryland, Massachusetts, Minnesota, Nevada, Ohio, Oregon, and Washington) contained provisions that Hawaii may wish to consider for inclusion in its medical cannabis rules. These included requirements for reporting of illness or product quality complaints, ability to perform product recalls, and the use of universal symbols to clearly identify cannabis-containing products.

Proper labelling and portioning of edible products were determined to be especially important to preventing inadvertent over-intoxication. Edible products are responsible for the majority of cannabis intoxications, most likely due to the failure of users to appreciate its delayed effects. For example, while the initial effects of inhaled cannabis can be felt within minutes and have peak effect in 20 to 30 minutes, edibles can take as long as two (2) hours to be felt, with peak effect at two (2) to four (4) hours after ingestion. Individual factors can also affect how soon a person will feel the effect of an edible product. Edible product labels must adequately inform patients as to portion size, warn of delayed effects, or be single-serve packaged to reduce the risk of overconsumption.

Finally, the state's ability to ensure the safety of edible cannabis products will center on the manufacturing process and testing laboratories' ability to analyze edible products for the required standards. Edible products run the gamut from simple teas

made of processed cannabis leaves to very complex baked goods and entrees containing multiple ingredients. Primary considerations identified relative to standards for edible cannabis products include the ability of manufacturers to ensure a consistent distribution of cannabinoids throughout a manufactured product, and the ability of testing laboratories to effectively select statistically representative samples for testing and proficiently conduct the required analyses on complex edible products. These are challenges that must be taken into account before an edible product is approved for manufacturing.

Recommendations

Policy recommendations for the legislature's consideration:

1. Amend the definition of "manufactured medical cannabis product" to distinguish edible medical cannabis products from other manufactured cannabis products. An edible medical cannabis product should be defined as a manufactured cannabis product intended for the gastrointestinal administration of medical cannabis.

2. Expressly prohibit edible products which are non-shelf-stable, potentially hazardous food items, or products containing non-cannabinoid ingredients that would increase the potency, toxicity, or addictive potential of cannabis, or create an unsafe combination with other psychoactive substances, or any product that the Department determines is attractive to minors.

3. Amend product packaging requirements to include the use of a universal symbol on medical cannabis product packaging to allow consumers to readily identify products containing cannabis or cannabinoid extracts. *Note: current statutory language on packaging and labeling requirements do not allow for the use of pictures or symbols.*

   Examples of Colorado and Oregon's symbols:

Regulatory recommendations for the Department of Health's consideration:

Note: the following will be incorporated into the revision of HAR Chapter 11-850 currently underway and expected to be completed by January 2019.

1. Implement a system for reporting product complaints and adverse events to enhance State and licensees' ability to monitor product quality. For example, requiring the Hawaii Poison Control Hotline toll free number (1-800-222-1222) to be included on edible cannabis packaging.

2. Amend HAR Chapter 11-850 product labeling requirements to ensure that information critical to consumption of edible products is prominently displayed on the product's principal display panel including, but not limited to, estimated activation time, serving size, number of servings per container, cannabinoid content per serving, ingredients (including a list of potential major food allergens), etc.

3. Amend HAR Chapter 11-850 product packaging requirements to require packaging to be continually child-resistant for any product intended for more than a single use or serving.

4. Amend HAR Chapter 11-850 to incorporate provisions of HAR Chapter 11-50 applicable to manufacturing of edible cannabis products.

5. Amend HAR Chapter 11-850 to implement manufacturing standards which limit the maximum concentration of cannabinoids permitted in a serving of edible cannabis product and use aids to guide portioning such as scoring, single-portion packaging, or inclusion of a measuring device.

6. Amend HAR Chapter 11-850 to implement a process for the systematic addition of product categories which requires manufacturers to demonstrate the ability to assure uniform distribution of cannabinoids throughout the product and ensures testing laboratories ability to select representative samples for quality assurance testing and capacity to perform the required analyses.

Note: DOH will work with stakeholders on the following recommendations.

7. Implement a product recall system to ensure that any product determined or suspected to be tainted or detrimental to the public health can be rapidly identified and returned, destroyed, or removed from retail.

8. Establish a mandatory standard pre-purchasing education protocol for all new patients or existing patients who have not previously used edibles to reduce the risk of inadvertent overconsumption and accidental intoxication.

B. Employment

The Employment Permitted Interaction Group (PIG) was formed at the initial Working Group meeting on August 1, 2018. The Employment PIG was comprised of the following individuals:

Working Group Members

- David Baronfeld
- Senator Rosalyn Baker
- Representative John Mizuno
- Shana Metsch
- Ryan Sanada

Resource Members

- William Hoshijo
- Leonard Hoshijo
- William Kunstman
- Carl Bergquist

The Employment PIG was tasked with exploring employment issues involving an employee who is a registered qualifying patient for whom the medical use of cannabis is permitted pursuant to sections 329-122 and 329-123, Hawaii Revised Statutes (HRS). Specifically:

1. Actions taken in other states, particularly in regard to substance abuse on-site screening tests administered by employers;
2. Protections available in other states against employment discrimination based on an individual's status as a qualifying medical cannabis patient;
3. Allowable substance abuse screening tests;
4. Requirements on employees and employers contained in various federal laws;
5. Applicable requirements for privacy of medical information and prohibitions on discrimination based on health or disability status; and
6. Any other issues related to employment of registered qualifying patients at the discretion of the Working Group.

Due to the complexity of this topic and the short time frame of the Working Group, the Employment PIG focused on two areas of employment protections for requested qualifying patients:

- Substance abuse testing and detection of tetrahydrocannabinol (THC); and
- Prohibited work classes (i.e., exemptions).

Employment PIG members independently researched and reviewed information from other states on screening tests, legislation, and related court cases. The group spoke by phone, exchanged emails, commented on each other's findings, and discussed these matters in person at the second Working group meeting on September 4, 2018.

A summary of the group's findings was distributed to Employment PIG members the week of September 17, 2018, and two resource members (William Hoshijo and William Kunstman) provided comments representing the viewpoints of their respective agencies, HCRC and DLIR.

In addition, in the weeks following the September 4, 2018 meeting, HEC conducted a survey of its membership to examine which types of jobs (either by industry or job duties) would need an exemption from a law that provides job protection to employees who fail a substance abuse test due to the use of medical cannabis. On October 1, 2018, Ryan Sanada submitted HEC's findings to the Employment PIG. On October 2, 2018, David Baronfeld provided a final report to the Employment PIG.

Findings and Discussion

Legislatively, a total of 31 states, the District of Columbia, Guam, and Puerto Rico allow for the medical use of cannabis by qualifying patients. An additional 15 states allow for the use of "low THC, high CBD" products for medical reasons in limited situations or as a legal defense. Correspondingly, a growing number of states now provide employment protections for qualifying medical cannabis patients.

With regards to court decisions, most court decisions to date have ruled overwhelmingly in favor of employers – i.e., an employer is permitted to discipline an employee for failing a drug test for cannabis, even if such use was covered by a medical cannabis law. Those courts have reasoned that cannabis is still an illegal Schedule I drug under federal law. More recently, however, some state courts have ruled in favor of the employee. In those decisions, two states had laws that specifically provided job protections to medical cannabis users. A third state did not have such a law but ruled in favor of the employee anyway.

Within the Employment PIG, there was consensus that employment protections should not apply to the use, possession, or impairment at work. However, while there was general agreement that protection against termination solely based on status as a qualifying patient and for having a positive drug test for cannabis without evidence of impairment was desirable, the primary challenge identified was the limitation of tests currently in use. Standard tests are aimed at detecting THC, the psychoactive ingredient in cannabis. Since THC is fat soluble, an individual could test positive for THC days or even weeks after the last time that they used cannabis. Accordingly, in situations where an employee is not exhibiting any symptoms of being under the influence of cannabis while at work, it can be very difficult for an employer to determine whether a failed drug test for cannabis meant that the employee used cannabis on or off the job nor can a solid timeline be established to pinpoint recency of usage. Although a saliva test is also available, it detects Δ9-THC, a component of smoked cannabis. Therefore, the saliva test would not be an effective testing method for medical cannabis delivered by modes other than smoking.

States identified with statutes and administrative regulations addressing employee testing from which Hawaii could take guidance include Arizona, Connecticut, Delaware, Illinois, Nevada, Pennsylvania and New York. However, the fact remains that until a reliable method of assessing whether an employee is, in fact, currently "impaired" is uniformly available and adopted, it will be difficult to establish protections. Therefore, no consensus was reached regarding whether a qualifying patient should be protected from disciplinary action when testing positive for cannabis.

Another concern raised was whether there should be "prohibited work classes." For purposes of discussion, prohibited work classes were defined as those industries and job positions which would require exemption from protections intended for employees who are qualifying medical cannabis patients. Exempt work classes included, but were not limited to:

- Safety-sensitive positions such as transportation workers, heavy equipment operators, first responders, etc.;
- Jobs where the employer would be at risk of losing monetary or licensing-related benefits due to federal laws or regulations, such as federal contractors or licensees, etc.; and
- Other industries where having a qualifying medical cannabis patient as an employee would increase the risk of liability, negligence, or exposure to an employer or the employee.

Consensus was not reached as to a definition of prohibited work classes. One point of discussion was whether a qualifying patient should be entitled to the same legal protections as someone who has been identified with a "disability." In New York, for example, registered medical cannabis card holders are identified as having a 'medical disability' and, therefore, are afforded equal protections to any non-card holder identified with a recognized disability. HCRC representatives expressed concern that providing similar statutory protection for employees who are registered, qualifying medical cannabis patients would cause confusion with employment protections provided for persons with disabilities recognized under HRS Chapter 378, part I.

The employment protections discussed by the Employment PIG fell into two categories:

- Prohibition of discrimination based on status as a registered medical cannabis patient; and
- Protection from termination based on a positive drug test.

While most of the group agreed that discrimination based solely on status as a registered qualifying medical cannabis patient should be prohibited, the challenges raised regarding protection against termination based on cannabis drug-testing could not be reconciled. There was agreement that protection from termination should not apply to use, possession, or impairment at work, and that exemptions from

protections should be allowed for certain types of employers and employees. However, except for general agreement that employers who would be negatively impacted by federal laws regarding cannabis use by employees and safety-sensitive occupations, consensus was not reached as to how these exemptions should be implemented. Two suggestions were proffered by the group for establishing exemptions: (1) some members suggested that the legislature provide a general definition or standard to be applied in determining which employees should be required to remain cannabis-free, while (2) Ryan Sanada recommended that lawmakers create a list of exemptions similar to what is found in certain areas of HRS Chapter 378 in order to provide more clarity and less "guessing" by employers, employees, the DLIR, and courts. Both suggestions were discussed extensively, but the group could not agree on which method to utilize to establish the exemptions.

The majority of the group agreed that protection for registered, qualifying patients should be objective, not subjective, i.e., based on impairment and not solely on a positive cannabis drug test. However, given the lack of accepted, valid testing for real-time impairment, it was determined that more research is needed into establishing objective factors to determine employee impairment on the job.

Recommendations

1. The Legislature create a prohibition of discrimination based on status as a registered medical cannabis patient.

2. The Legislature establish a private right of action as a means of protection for qualifying patients for whom the medical use of cannabis is permitted.

3. Apply a reasonable (objective) belief to employer's defense in taking adverse employment actions against registered qualifying patients for whom the employer believes was under the influence of cannabis in the workplace.

4. Determine whether it would be more appropriate to (1) identify a legal standard to be applied for exempting employers from any new protections or (2) creating a list of exempt industries, jobs, or professions.

5. Require additional study and scrutiny of the issue of protection for positive drug screening tests without a nexus of actual impairment at work.

APPENDIX A

ACT 116 MEDICAL CANNABIS OUTSTANDING ISSUES WORKING GROUP MEMBERS

- Danette Wong Tomiyasu (Chair), Deputy Director of Health Resources Administration, Department of Health
- Senator Rosalyn Baker, Chair, Senate Committee on Commerce, Consumer Protection, and Health
- Representative Roy Takumi, Chair, House Committee on Consumer Protection and Commerce; and alternate Jason Takumi
- Representative John Mizuno, Chair, House Committee on Health and Human Services
- Senator Stanley Chang, selected by President of the Senate; and alternate Adrian Tam
- Erin Miyasaki, Food Safety Consultative and Education Program, Department of Health
- Peter Oshiro, Chief, Sanitation Branch, Department of Health
- David Baronfeld, Registered 329 Card Holder
- Shana Metsch, Registered Caregiver of a Qualifying Minor Patient
- Teri Gorman, Maui Grown Therapies, Medical Cannabis Dispensary Licensee
- Ryan Sanada, Director of Legal and Government Affairs, Hawaii Employers Council

APPENDIX B

ACT 116 MEDICAL CANNABIS OUTSTANDING ISSUES WORKING GROUP SUBJECT MATTER EXPERTS/RESOURCE INDIVIDUALS

- Keith Ridley, Chief, Office of Health Care Assurance, Department of Health
- Michele Nakata, Supervisor, Medical Cannabis Dispensary Licensing, Department of Health
- Peter Whiticar, Chief, Harm Reduction Services Branch, Department of Health
- Tamara Whitney, Program Specialist, Medical Cannabis Registry Program, Department of Health
- Alvin Bronstein, M.D., Chief, Emergency Medical Services and Injury Prevention System Branch, Department of Health
- Leonard Hoshijo, Director, Department of Labor and Industrial Relations
- Lois Iyomasa, Interim Deputy Director, Department of Labor and Industrial Relations
- JoAnn Vidinhar, Administrator, Disability Compensation Division, Department of Labor and Industrial Relations
- William Kunstman, Assistant to the Director, Department of Labor and Industrial Relations
- William Hoshijo, Executive Director, Hawaii Civil Rights Commission
- Ryker Wada, Director, Department of Human Resources Development
- Jason Minami, Deputy Director, Department of Human Resources Development
- Paul Eakin, M.D., Pediatric Emergency Medicine, Kapiolani Medical Center for Women and Children
- Carl Bergquist, Executive Director, Drug Policy Forum of Hawaii