

Summary of 2017 Arkansas Legislation Involving the Arkansas Medical Marijuana Amendment of 2016

May 17, 2017

During the Regular Session of the 91st General Assembly, the Legislature passed 25 Acts concerning the Arkansas Medical Marijuana Amendment of 2016 (hereinafter “AMMA”) (Ark. Const. Amend. 98). Most of those Acts added to or amended provisions of the AMMA.

Additionally, 13 of the Acts passed during the Regular Session had internal codification inconsistencies among themselves which were addressed by the Legislature during the First Extraordinary Session, convening May 1, 2017 and adjourning May 3, 2017. Acts 1 and 8 followed from that session amending in part and repealing (Act 1023, § 2) in part portions of Acts 4, 438, 479, 593, 639, 641, 670, 740, 948, 1023, 1024, 1098, and 1100. Acts 1 and 8 are essentially identical to each other. Act 1 originated as House Bill 1002 and Act 8 originated as Senate Bill 2. The effective revisions will be discussed below and arranged based on their sequence in the AMMA. Acts not affecting the AMMA constitutional amendment are then discussed.

Section 1.

No changes.

Section 2.

Act 479 added section 2(6)(C) prohibiting members of the United States military or Arkansas National Guard from being designated caregivers under that definition.

Act 544 amended section 2(10) granting the Medical Marijuana Commission, the Department of Health, or the Alcoholic Beverage Control Division the right to determine whether a felony offense is an “excluded felony offense” under the AMMA based on court records concerning the offense.

Act 479 added section 2(14)(B) prohibiting members of the United States military and Arkansas National Guard from being a “qualifying patient.”

Act 5 amended section 2(19)(a) and (b) replacing the original physician’s “full assessment” written certification, with “an assessment,” and removing the need for a physician determination regarding whether the potential benefits of the medical marijuana use outweigh a qualifying patient’s health risks. This section now only requires a qualifying patient to only have a “qualifying medical condition.”

Act 593 added additional defined terms to section 2. Those terms are “[c]urrent use of marijuana,” “[e]mployee,” “[e]mployer,” “[g]ood faith belief,” “[p]ositive test result for marijuana,” “[s]afety sensitive position,” and “[u]nder the influence.”

Act 438 added 2(19)(C) prohibiting a physician’s “telemedicine” based assessment from meeting a patient’s written certification requirement.

Act 593 added 2(19)(D) (originally identified in Act as 2(19)(C) but later amended by First Extraordinary Session Act 1 and 8 to 2(19)(D)) stating that a “written certification is not a medical prescription.”

Section 3.

Act 1024 protects “pharmacist consultants” for “registered dispensar[ies]” from discipline, arrest, prosecution, or penalty based upon their performance of duties.

Act 593 added significant additional content to section 3(f)(3) forbidding employee and applicant job discrimination based upon whether that person is, or was, a “qualifying patient or designated caregiver.”

Act 593 also safeguards employers from cause of action claims based on an employer “[e]stablishing and implementing a substance abuse or drug-free workplace policy,” including drug testing programs complying with state or federal law; shielding employer actions based upon a “good faith belief” that an applicant or employee used or possessed marijuana on the employer’s premises while working, or was under the influence of marijuana during work hours (a positive drug test cannot be the basis of the employer’s good faith belief); and where the employer excludes a qualifying patient from “safety sensitive” positions based upon good faith belief that the qualifying patient is currently using marijuana.

Act 593 explicitly authorizes and protects six employer employment actions including individual job performance controls, reassignment of employees, placing employees on paid or unpaid leave, suspension or termination, requiring employee involvement in substance abuse programs, and refusing to hire.

Act 593 also limits employment discrimination damages based on an applicant or employee’s qualifying patient or designated caregiver status to those available under the Arkansas Civil Rights Act of 1993, Ark. Code Ann. § 16-123-101 *et seq.* Back pay claims are limited to two years. Claims may be further limited by state or federal law in effect on January 1, 2017. Finally, claims involving the AMMA must be brought within 1 year of the alleged discrimination. The State of Arkansas’ sovereign immunity is unaffected by this Act.

Section 4.

Act 545 added section 4(a)(4) allowing the Department of Health to require designated caregiver registry identification card applicants to authorize and pay fees associated with a criminal background check (including fingerprinting) performed by the Arkansas State Police and FBI in conformance with federal standards.

Act 4 amended sections 4(b) and (d) to allow 180 days instead of the original 120 days for the Department of Health to adopt rules concerning the AMMA.

Act 639 adds section 4(e) allowing the Department of Health to collect fees or fines for violation of the qualifying patient rules.

Act 740 amended section 4(b)(2) requiring the Department of Health to adopt rules regarding warning labels standards on all medical marijuana processed or sold for smoking, communications concerning health risks of smoking, and illegal uses of medical marijuana within Arkansas.

First Extraordinary Session **Acts 1 and 8** repealed the changes made by Act 1023 to AMMA section 4(b)(2).

Section 5.

Act 948 amended section 5(f)(2)(A)(ii) permitting the sharing of confidential list information with the State Insurance Department for the “Arkansas all-payer claims database” under Ark. Code Ann. § 23-61-901 *et seq.*

Act 5 amended section 5(f)(1) exempting the confidential registry identification card application or renewal records from the Freedom of Information Act of 1967 (Ark. Code Ann. § 25-19-101 *et seq.*).

Section 6.

Acts 479 adds section 6(a)(2)(H) forbidding medical marijuana use on property under the control of the US military or Arkansas National Guard.

Act 740 adds more limitations to section 6(a)(4) regarding the use of “smoke marijuana,” generally prohibiting its use: where tobacco smoking is also prohibited by law; in the presence of children fourteen and younger; inside any vehicle powered by more than muscle; in the presence of a known pregnant woman; or where smoking medical marijuana may cause another person to be under the influence of marijuana. Persons must be over 21 years old to smoke medical marijuana.

Special Extraordinary Session **Acts 1 and 8** combined Regular Session Acts 479 and 740 into a single coherent change.

Act 1099 amended AMMA section 6(b) by adding that the AMMA does not require:

(6) A public school to permit a qualifying patient who is a student to be present on school grounds, to attend a school event, or to participate in extracurricular activities in violation of the public school's student discipline policies when a school office has a good faith belief that the behavior of the qualifying patient is impaired.

Section 7.

No changes.

Section 8.

Act 4 amended sections 8(d), (e), and (f)(1) by extending the original 120-day requirement to 180 days for the Medical Marijuana Commission to adopt rules regarding dispensary and cultivation facility applications and renewals; dispensary and cultivation facility oversight, recordkeeping, security, personnel, manufacturing, packaging, advertising, disposal, and license termination; and dispensary and cultivation facility license application and renewal fees.

Act 1023 amends section 8(e)(5) to require the Alcoholic Beverage Control Division to adopt rules regarding manufacturing, processing, packaging, labeling, and dispensing medical marijuana to designated caregivers; and limiting active tetrahydrocannabinol levels in presale food or drink to less than ten milligrams per portion.

Act 640 expands section 8(e)(8) directing the Alcoholic Beverage Control Division to develop rules restricting advertising, marketing, packaging, and promotion by dispensaries or cultivation facilities that would appeal to children. This expansion also requires rule promulgation concerning the use of child-proof packaging in accordance with 16 C.F.R. § 1700.20. Restrictions also include preventing indoor displays from being seen outside of the dispensary or cultivation facility.

Act 594 adds section 8(f)(2)(C) allowing the Medical Marijuana Commission discretion to prorate annual licensing fees up to 50% for dispensary or cultivation facility licenses issued between January 1 and July 1.

Act 4 also extended section 8(g)(1)'s original June 1, 2017, deadline to begin accepting dispensary and cultivation facility applications to July 1, 2017.

Act 587 adds section 8(g)(4) to allow the Medical Marijuana Commission the power to adopt rules regarding issuance of temporary cultivation facility and dispensary licenses. The Act grants the commission discretion to issue temporary dispensary or cultivation facility licenses to natural persons when the prior dispensary or cultivation facility license holder “cease[s] to be in actual control” of the dispensary or cultivation facility.

Act 545 expanded section 8(k) to require the Medical Marijuana Commission to arrange for and receive results of state and national criminal background checks (including fingerprinting) conducted by the Arkansas State Police and the FBI for each dispensary or cultivation license applicant. Applicants are required to pay fees associated with the background checks as part of the application.

Act 1024 amends section 8(m)(1) to prohibit licensed dispensaries from supplying, possessing, manufacturing, delivering, transferring, or selling combustion based marijuana paraphernalia. The licensed dispensary must supply marijuana vaporizers for sale along with providing educational materials regarding the potential health risks of smoking or burning marijuana. The dispensary must also provide information concerning the potential health benefits of vaporizing marijuana.

Act 642 amends section 8(m)(2) and (5) to allow dispensaries and cultivation facilities to contract with state licensed transporters, distributors, or processors.

Act 594 amends section 8(n)(1) to read that dispensary and cultivation facility licenses expire annually on June 30 and are renewable on or before June 30, for the next fiscal year.

Act 639 adds section 8(p) allowing the Medical Marijuana Commission to collect fees or fines for violation of the rules regarding licensing of dispensary and cultivation facilities.

Act 641 adds section 8(q) (originally identified in the Act as 8(p) but later amended by First Extraordinary Session Act 1 and 8 to 8(q)) requiring all dispensary and cultivation facility license holders to be natural persons and permitting existing licenses to be transferrable only to a natural person upon the approval of the Medical Marijuana Commission.

Act 948 adds section 8(r) (originally identified in the Act as 8(p) but later amended by First Extraordinary Session Act 1 and 8 to 8(r)) permitting information submitted to the Alcoholic Beverage Control Division to be shared with the Department of Health as well as the State Insurance Department for the “all-payer claims database established under the Arkansas Healthcare Transparency Initiative Act of 2015” (Ark. Code Ann. § 23-61-901 *et seq.*).

Act 1024 adds section 8(s) (originally identified in Act as 8(p) but later amended by First Extraordinary Session Act 1 and 8 to 8(s)) requiring all licensed dispensaries to appoint a “pharmacist consultant” and outlining the ongoing responsibilities of the dispensary’s appointed pharmacist consultant.

Act 1100 adds section 8(t) (originally identified in Act as 8(p) but later amended by First Extraordinary Session Act 1 and 8 to 8(t)) establishing extensive cultivation facility security requirements and mandating the facility to maintain compliance with all applicable state, city, and county structure or building rules, regulations, and ordinances.

Section 9.

Act 4 amended section 9(c) from its original 120 day requirement to 180 days for the Alcoholic Beverage Control Division to adopt rules regarding application and renewal of registry identification cards; registration and renewal of dispensary and cultivation agents; termination and suspension of dispensary and cultivation agents; and other administrative related duties.

Act 545 amends section 9(d) to require the Alcoholic Beverage Control Division to arrange and receive the results of criminal background checks (including fingerprinting) for all dispensary or

cultivation facility agent license applications. The background checks will be conducted by the Arkansas State Police and the FBI in accordance with federal standards. Applicants must authorize the release of the results to the division and pay the fees associated with the background check.

Act 594 amends section 9(g) limiting a dispensary and cultivation facility agent identification card to annually expire on June 30. Renewal must be on or before June 30 each calendar year.

Act 639 adds section 9(j) permitting the Alcoholic Beverage Control Division to collect fees or fines for violations of this section's adopted rules.

Section 10.

Act 5 amended section 10(b)(9) exempting, as confidential, dispensary records that contain patient information from the Freedom of Information Act of 1967 (Ark. Code Ann. § 25-19-101 *et seq.*).

Section 11.

Act 642 amends section 11 by extending this sections immunity to transporters, transporter agents, distributors, distributor agents, processors, and processor agents. Licensed transporter and distributor agents are permitted to possess marijuana while in transport from a dispensary, cultivation facility, or processor to another dispensary, cultivation facility, or processor.

Act 1022 adds section 11(c) permitting licensed dispensaries or cultivation facilities to import seeds, cuttings, clones, or plants without prosecution in the courts of Arkansas.

Section 12.

Act 642 amends section 12(a) allowing a dispensary to transfer marijuana to a licensed transporter, distributor, or processor acting within its license.

Section 13.

Act 642 amends section 13 allowing a cultivation facility to also sell "marijuana plants, seeds, and usable marijuana" to licensed processors. The Act also permits a cultivation facility to transfer marijuana to a licensed dispensary, cultivation facility, or processor.

Section 14.

No changes.

Section 15.

No changes.

Section 16.

No changes.

Section 17.

Acts 670 and 1098 significantly amended section 17 and were later reconciled to harmonize with each other under Act 1 and 8 of the First Extraordinary Session. The Acts eliminated and replaced most of the original section 17 provisions. Marijuana sales are taxed as tangible personal property and subject to the Arkansas Medical Marijuana Special Privilege Tax Act of 2017 (Ark. Code Ann. § 26-57-1501 *et seq.*). The Department of Finance and Administration will receive all tax revenues generated. The Acts outline the manner in which marijuana-generated, sales tax funds are expended to the state agencies charged with implementation of the AMMA.

Section 18.

No changes.

Section 19.

Act 638 amends section 19(a)(1) declaring the Medical Marijuana Commission under the supervision of the Department of Finance and Administration.

Section 20.

No changes.

Section 21.

No changes.

Section 22.

No changes.

Section 23.

No changes.

Section 24.

Act 642 added section 24 in its entirety regarding licensing requirements for “transporters, distributors, and processors.”

Section 25.

Act 642 added section 25 outlining requirements for the Alcoholic Beverage Control Division to register and certify transporter agents, distributor agents, and processor agents.

Statutory and Budgetary Legislation Associated with the AMMA

Act 670.

Amends the special revenues deposited into the State Treasury under Ark. Code Ann. § 19-6-301(255) to include:

(255) All sales tax revenues collected by the Department of Finance and Administration from the sale of usable marijuana under the Arkansas Medical Marijuana Amendment of 2016.

Enacts Ark. Code Ann. § 19-6-833 establishing the “Arkansas Medical Marijuana Implementation and Operations Fund.”

(a) There is created on the books of the Treasurer of State, the Auditor of State, and the Chief Fiscal Officer of the State a special revenue fund to be known as the “Arkansas Medical Marijuana Implementation and Operations Fund.”

(b) The fund shall consist of:

(1) Moneys obtained pursuant to Arkansas Constitution, Amendment 98, § 17, from taxation of medical marijuana; and

(2) Any other revenues as may be authorized by law.

(c) The fund shall be used to pay expenses of state agencies incurred due to the passage of Arkansas Constitution, Amendment 98, and for transfers of the distributions as set out by Arkansas Constitution, Amendment 98.

Enacts Ark. Code Ann. § 19-6-834 establishing the “Medical Marijuana Commission Fund.”

(a) There is created on the books of the Treasurer of State, the Auditor of State, and the Chief Fiscal Officer of the State a special revenue fund to be known as the “Medical Marijuana Commission Fund.”

(b) The fund shall consist of:

(1) Funds distributed under Arkansas Constitution, Amendment 98, § 17(b);
and

(2) Other revenues and funds authorized by law.

(c) The Medical Marijuana Commission shall use the fund for the administration of the commission and other purposes under Arkansas Constitution, Amendment 98.

Act 906.

Establishes and appropriates a budget for the Medical Marijuana Commission for the fiscal year ending June 30, 2018. The appropriated budget is \$4,017,914.

Act 1000.

Section 35 of Act 1000 appropriates \$5,000,000 reimbursable to various state agencies for the implementation and regulation of the AMMA during the fiscal year 2017-2018.

Act 1023.

Enacts Ark. Code Ann. §§ 20-56-301 through 304, to establish additional prohibitions on medical marijuana uses such as barring self-service marijuana dispensing machines; banning intoxicated persons from dispensary or cultivation facilities; limiting access to dispensary or cultivation facilities; and requiring child-proof packaging.

Act 1098.

Enacts the Arkansas Medical Marijuana Special Privilege Tax Act of 2017 (Ark. Code Ann. §§ 26-57-1501 through 1507). Cultivation facilities, dispensaries, and other marijuana businesses must collect and remit a 4% special privilege tax from the gross receipts or proceeds derived from sale of usable marijuana. The Medical Marijuana Special Privilege Tax Act has a sunset provision, expiring on July 1, 2019, unless the General Assembly extends.

