



Legal Issues for Nevada Businesses Related to the Legalization of Recreational Marijuana

By Jason Bacigalupi, Glenn Light, Mary Tran and Karl Rutledge

Nevada voters overwhelmingly approved Question 2, the Regulation and Taxation of Marijuana Act (the “Act”), on November 8, 2016. In doing so Nevada, along with California, Maine and Massachusetts, joined Alaska, Colorado, Washington, and Oregon in legalizing recreational marijuana under state law. Additionally, while recreational marijuana is now legal in 8 states, medicinal marijuana is legal in over 20 states.⁵ Legalized marijuana therefore has become the fastest-growing industry in the U.S., with some analysts projecting sales to reach \$22 billion by 2020.⁶

However, this explosive industry poses serious legal risks, given that marijuana remains an illegal Schedule 1 controlled substance under federal law.⁷ This risk is compounded in the highly-regulated Nevada gaming industry, as both the Nevada Gaming Control Board (“Board”) and Nevada Gaming Commission (“Commission”) have clearly and unambiguously stressed that Nevada gaming licensees may not engage in unlawful activities of any kind, under either state or federal law. Additionally, the new law raises issues generally with employers in the state. This article will provide a brief overview of the new law, how Nevada will regulate the industry, and the possible effects the recreational marijuana industry will have on Nevada’s gaming industry and employers in general.

Although medicinal marijuana was legalized in 2000, the Nevada legislature did not pass a law authorizing the establishment and regulation of commercial medical marijuana establishments (i.e., cultivation, production, dispensaries, and independent testing laboratories) until 2013.⁸ In November 2014, state and local regulators granted 372 provisional certificates to medical marijuana establishments, 55 of which were granted to dispensaries.⁹ The first dispensary opened in 2015 in Sparks, Nevada,¹⁰ and there are currently 49 certified dispensaries in operation within the state – with 40 in Southern Nevada.¹¹

Summary of the Regulation of Marijuana Act

The Act authorizes the operation of recreational marijuana establishments.¹² Persons 21 and older may purchase, possess, and consume up to one ounce of marijuana or one-eighth ounce of concentrated marijuana.¹³ A person may also cultivate up to six marijuana plants for personal use (up to 12 plants at one time per residence).¹⁴ However, personal cultivation is not allowed within 25 miles of a retail marijuana store licensed pursuant to the Act, which severely limits the geographic scope of this provision.¹⁵ Additionally, it remains unlawful for marijuana to be smoked or consumed in public places, in retail marijuana stores, or in moving vehicles.¹⁶

The Act was effective January 1, 2017, and the Nevada Department of Taxation (“Department”), which will be the regulating authority, has until January 1, 2018, to develop regulations for the recreational marijuana industry.¹⁷ The Department has begun developing temporary regulations and intends to hold a public workshop in early 2017 to adopt temporary regulations to allow for the issuance of recreational marijuana licenses.¹⁸ The Department will begin developing permanent regulations in spring 2017.¹⁹

As soon as the Department begins accepting applications, they will only grant licenses to current medical marijuana state registration certificate holders (i.e., cultivation, production, dispensaries, and independent testing laboratories) for a period of 18 months.²⁰ The number of licenses issued will also be limited by county population. For instance, Clark County may issue up to 80 licenses for retail marijuana because it has over 700,000 residents.²¹ For counties with populations between 100,000 and 700,000, up to 20 licenses may be issued.²²

It is anticipated that applicants will undergo extensive background investigations, similar to the current process for the medical marijuana, liquor and gaming industries. This includes whether the applicant has any associations with organized crime, and an evaluation of their honesty, integrity, financial resources (including the source of funds for their enterprise), and business experience. As with any other privilege

Continued on next page



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>> NEW DEVELOPMENTS IN JURISDICTIONS: NEVADA

Continued from previous page

license, any omissions or inaccurate responses will likely bar a finding of suitability for the applicant to hold a recreational marijuana license.

Impact on the Nevada Gaming Industry

Nevada gaming regulators have previously expressed a clear and unambiguous policy regarding state legalized medicinal marijuana. In brief, whether medicinal or recreational, state legalized marijuana and the Nevada gaming industry do not mix and there must be no connection whatsoever between the two industries. When the regulations authorizing the commercial cultivation and sale of medicinal marijuana were enacted, the Board issued an industry notice providing guidance to the gaming industry (“Notice”).²³ The Notice clearly stated that although the Nevada legislature had authorized commercial medicinal marijuana, it is still illegal under federal law.

Therefore, “any investment or involvement by gaming licensees or applicants would tend to reflect discredit upon gaming in the State of Nevada.”²⁴ Accordingly, in hearings since the Notice, the Board has made it clear that any individual involved in the gaming industry (including a spouse) may have no connections with a medical marijuana business. This includes serving not only as a member of the business, but as a landlord or lender to that business.

After the Act was passed, the Board held a workshop to discuss concerns and answer questions that gaming licensees and other interested persons had in regard to recreational marijuana and the Nevada gaming industry. This included security (potential for patrons to smoke marijuana in parking lots), privacy (how to restrict patrons from smoking in hotel rooms), what constitutes a public area (whether a private gaming salon or conference room is a public or private area), and employment. In underscoring the

importance of maintaining the reputation of the gaming industry, the Board reiterated that licensees are barred from doing, or having any connection whatsoever with those who participate in activities that violate federal (or any) law. This stems from Nevada Gaming Commission Regulation 5.011(8), which requires licensees to comply with all federal, state and local laws, including not permitting or encouraging felonious acts on their properties.²⁵ Thus, licensees remain liable for any actions of tenants and third party providers on their property. To analogize, Board Chairman A.G. Burnett stated that if state law allowed SEC and AML violations, the Board and federal government retained jurisdiction to investigate and enforce violations of federal law.²⁶

Immediately following the workshop, the Commission discussed the Act. The Commission agreed with the analysis of the Board – if it violates federal law it would tend to reflect discredit on gaming in Nevada. Commission Chairman Tony Alamo asserted at the hearing, “[t]here is no way that I feel comfortable and in my role as a regulator could allow that a licensee allow under their knowledge a felonious act occurring anywhere within their sidewalks.”²⁷

During the course of the Commission’s discussion, Board Member Terry Johnson also asked the Commission for guidance on how to handle employment registration appeals of employees testing positive for marijuana use. Commissioner John Moran stated the issues would have to be played out judicially before any guidance could be issued to the Board. The Commission also highlighted that the Act does not prohibit a private employer from having a workplace policy in which marijuana use is prohibited, including requiring random drug tests. Chairman Alamo noted that recreational marijuana is a complicated issue, and licensees will need to look to evolutions in federal law and anticipated court decisions. The Commission

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encouraged licensees to meet with the Board to discuss their specific circumstances.²⁵

General Employment Issues

The Act also has implications for employers outside of the gaming industry. While the Act allows employers to have workplace policies and allows employers to fire employees for using marijuana, there will certainly be developing case law interpreting the scope and any possible exceptions or guidelines regarding these issues. Thus, Nevada employers should seek advice from knowledgeable employment attorneys in order to keep ahead of, and in compliance with, this developing area of law.

Conclusion

In sum, whether medicinal or recreational, Nevada gaming regulators have expressed the same view regarding state legalization of marijuana — it may have no connection whatsoever with the gaming industry. However, these licensees will still encounter issues as the drug will be more easily accessible, and need to be mindful of marijuana use by their employees, patrons, persons enjoying their entertainment venues, and convention/trade

show attendees. This will include clear policies barring the use of marijuana at their properties. Enforcement of this policy will prove challenging given the various methods that marijuana can be ingested — whether in edible form, concentrates, and electronic cigarettes that are extremely difficult to detect. The Board will likely evaluate a potential violation based on the totality of the circumstances involved, so licensees should take serious steps to mitigate their risk. Moreover, the risks are not limited to the gaming industry, as there are serious concerns for general employment law as well.

The knowledgeable attorneys at Lewis Roca Rothgerber Christie have extensive experience in assisting gaming companies, as well as employers in every industry, with these issues. If you have any questions or would like to consult with one of our attorneys, please contact us. ♣

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⁵ *State Marijuana Laws In 2016 Map*, GOVERNING, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html>.

⁶ California, Nevada and Massachusetts Vote to Legalize Recreational Marijuana, THE GUARDIAN, <https://www.theguardian.com/us-news/2016/nov/08/state-ballot-initiative-election-results-live-marijuana-death-penalty-healthcare>.

⁷ See 21 U.S.C. § 801, et seq.

⁸ Voters approved of medical marijuana use in 2000 and patients cultivated their own marijuana until 2015. *Medical Marijuana Program Timeline*, NEV. DIV. OF PUB. AND BEHAVIORAL HEALTH, http://dpbh.nv.gov/Reg/MME/MME_-_Home/.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Open Dispensaries List as of December 13, 2016*, NEV. DIV. OF PUB. AND BEHAVIORAL HEALTH, <http://dpbh.nv.gov/uploadedFiles/dpbhgov/content/Reg/MedMarijuana/OpenDispensaryList25.pdf>.

¹² *Initiative to Regulate and Tax Marijuana*, <http://nvsos.gov/sos/home/showdocument?id=3294>.

¹³ *Id.* at Sec. 6(1).

¹⁴ Pursuant to Sec. 6(2), of the *Initiative to Regulate and Tax Marijuana*, such cultivation must take place within a closet, room, greenhouse or other enclosed area with a lock or device to restrict access of unauthorized persons.

¹⁵ *Id.* at Sec. 14(a)(1).

¹⁶ *Id.* at Sec. 14(2).

¹⁷ *News Release*, Dep't of Taxation, Nevada Department of Taxation Prepares for the Regulation of Recreational Marijuana (Nov. 10, 2016), <https://tax.nv.gov/uploadedFiles/taxnv.gov/Content/TaxLibrary/Rec%20Marijuana%20Release.pdf>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Initiative to Regulate and Tax Marijuana*, *supra* note 8 at Sec. 10(2).

²¹ *Id.* at Sec. 10(5)(d)(1).

²² *Id.* at Sec. 10(5)(d)(2).

²³ *Notice #2014-39*, NEV. GAMING CONTROL BD. (May 6, 2014), <http://gaming.nv.gov/modules/showdocument.aspx?documentid=8874>.

²⁴ *Id.*

²⁵ NGC Reg. 5.011(8).

²⁶ Transcript of Nev. Gaming Control Bd. Workshop (Nov. 17, 2016).

²⁷ Transcript of Nev. Gaming Comm'n Meeting (Nov. 17, 2016).

²⁸ *Id.*