

Practice Update

# Marijuana Tipping Point: California and Florida Open Opportunities With Passage of New Laws

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The 2016 election will be viewed as a turning point in the emergence of new economies centered around marijuana. Ballot initiatives around the country resulted in important changes in eight states. Four states legalized adult recreational use of marijuana (California, Massachusetts, Maine, Nevada) while another four states legalized medicinal use (Florida, Montana, North Dakota, Arkansas). Two of the most notable developments are in California and Florida.

This Alert includes an overview of California's new law known as the Adult Use of Marijuana Act, an overview of Florida's passage of Amendment 2, legalizing medical marijuana in the state, and provides insights on other business considerations.

## California's Adult Use of Marijuana Act

On November 8, California voters passed Proposition 64, an initiative legalizing the cultivation, distribution, and consumption of recreational marijuana for adults. As the largest economy in the United States and the sixth largest economy globally, the legalization of recreational marijuana in California is significant for the 'green rush' it

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portends. Legislative analysis of the Act projects that net additional state and local tax revenue could eventually range from high hundreds of millions of dollars to over \$1 billion annually. Some estimates project the creation of more than 100,000 jobs in the new economy.

**Purpose.** The purpose of the Act is to establish a comprehensive system to legalize, control and regulate the cultivation, processing, manufacture, distribution, testing, and sale of nonmedical marijuana, including marijuana products, for use by adults 21 years, and older, and to tax the commercial growth and retail sale of marijuana. The Act also contains significant criminal reform measures.

**Key Features:**

**Adult Use** – The Act legalizes the possession and consumption of marijuana by persons 21 and older in private homes and businesses licensed for on-site consumption. Using marijuana in public remains illegal. Driving while impaired remains illegal.

**Bureau of Marijuana Control** – The Act establishes a Bureau of Marijuana Control within California's Department of Consumer Affairs to regulate and license the marijuana industry.

**Local Control** – There are 58 counties and 482 cities in California. Like California's existing medical marijuana laws, the Act allows local governments to further restrict and even ban recreational marijuana business altogether, creating a patchwork of laws.

**Licensing** – The Act creates 19 types of licenses including 13 types of cultivation licenses, 2 types of manufacturer licenses, as well as testing, retailer, distributor, and microbusiness licenses. Licenses are to be issued by January 1, 2018.

**Delayed Entry of Large-Scale Businesses** – In order to promote and to protect small businesses, the Act delays issuance of large cultivation licenses and restricts large producers from vertically integrating

before January 1, 2023.

**Applicant Residency Requirement** – Licenses are restricted to applicants who can demonstrate continuous California residency from on or before January 1, 2015. In the case of entities, the person controlling the entity must be able to demonstrate continuous California residency since January 1, 2015. The residency provision automatically expires December 31, 2019, unless reenacted.

**Taxes** – The Act creates a variety of new taxes, including a tax on cultivation.

**Sales/Advertising to Minors** – The Act bans the sale and direct advertising of recreational marijuana to anyone under 21 years old.

**Packaging Restrictions** – The Act requires that recreational marijuana and other marijuana products, such as edibles, be in child-resistant packaging.

**Requires Track and Trace Software** – The Act requires that businesses use software to track and trace the movement of marijuana throughout the distribution chain and for tax purposes.

## **Florida's Passage of Amendment 2**

On November 8, Florida voters overwhelmingly passed Florida's Amendment 2, Florida's Right to Medical Marijuana Initiative, by a majority of 71%. Amendment 2 is similar to a 2014 proposal which narrowly failed, receiving 57.6% of the vote – just short of the 60% supermajority required for constitutional amendments in the State.

The Amendment allows the medical use of marijuana for individuals with debilitating medical conditions, including HIV, PTSD, ALS Parkinson's disease, multiple sclerosis and other comparable conditions, as determined by a licensed Florida physician. The Florida Department of Health will be charged with promulgating regulations necessary

for the implementation and enforcement of the Amendment, including those relating to the issuance of patient identification cards, procedures establishing qualifications for caregivers and procedures for the registration of Medical Marijuana Treatment Centers.

Amendment 2 broadens the scope of the Compassionate Medical Cannabis Act of 2014, which was signed into law by Governor Rick Scott on June 6, 2014, by, among other things, expanding the list of qualifying conditions. Additionally, whereas the 2014 Act only permits the use of low-THC cannabis (which must contain 0.8% or less THC – the chemical component that produces a euphoric effect) except in circumstances in which a patient's condition is terminal within 1 year, the Amendment permits physicians to order more potent THC Medical Cannabis.

The Department of Health will have 6 months after the effective date of the Amendment to promulgate regulations. As always, Akerman's Regulated Substances Task Force will keep you posted as to all material developments.

## **Business Considerations**

### ***Real Estate***

With so much of the cannabis industry fundamentally revolving around the use and operation of real estate, it is no surprise that there is a growing interest among real estate owners, operators and lenders in the impact of the legalization of marijuana on the real estate industry. Below are some critical issues to consider in light of the rapidly expanding legal cannabis space:

**Banking** – The current limitations in banking for many cannabis-related businesses presents both a challenge and an opportunity for the real estate industry:

- Given the largely all-cash nature of many such businesses landlords and lenders will have a difficult time underwriting such tenants and identifying those with adequate assets and credit, as well as accepting payments from such parties.
- The purchase of real estate as a convenient means to invest cash proceeds in lieu of traditional banking will create an opportunity for existing owners to receive premium sales pricing for properties, while also creating an opportunity for more creative strategies to invest in, and lend to, businesses generating massive amounts of cash-flow.

Entitlements/Zoning – As the local land use and zoning laws relating to the cultivation, distribution and sales of marijuana continue to evolve, it will be critical for investors and owners to gain an understanding of which municipalities are most friendly to such uses, such as those that allow for vertical integration of cultivation, manufacturing and retail uses in the same space.

Liability/Cost Concerns – Commercial landlords considering leasing space to cannabis use tenants will need to carefully consider the potential risk under federal law, and will also need to amend standard leasing documents to provide for termination rights in the event of any enforcement actions, litigation, or adverse change in applicable law. Landlords will also need to address the potential for additional costs to the landlord in the form of increased insurance, security, and utility costs, as well costs or liability resulting from tenant's permitted use, such as in the case of theft or licensing violations

### ***Securities and Financing***

The regulated cannabis industry presents a dynamic and robust investment landscape for entrepreneurs and investors alike. With the passage of Proposition 64 in conjunction with the legalization of medical marijuana in a number of states, opportunities will continue to grow. Below are some key issues to

consider:

Crowdfunding – Cannabis-related companies are increasingly looking to Regulation A+, which allows for an offering of securities to unaccredited investors that is exempt from SEC registration requirements (although subject to certain eligibility and current and ongoing disclosure requirements), providing a broad platform from which to market their offering to access investors interested in the cannabis industry. The momentum of equity crowdfunding under Regulation A+ is expected to continue.

IPO – With the recent filing of an SEC registration statement by a Real Estate Investment Trust (REIT) whose sole purpose is to acquire, manage and lease medical-use cannabis facilities, this could open the door to Wall Street's participation in the Initial Public Offerings of cannabis-related companies and allow investors to directly buy and sell shares in a publicly-traded cannabis-related company.

Due diligence of cannabis-related companies – Prior to making an investment decision, the performance of complete and thorough due diligence on the cannabis-related company is critical. This includes verifying compliance with applicable state or municipal licensing requirements, vetting the company's cash management structure to ensure satisfaction with federal anti-money laundering statutes, and understanding the complex interplay between federal and state regulations governing the cannabis industry.

### ***Impact on Employers***

With the passage of these laws, employers across all industries should review and evaluate their current employment practices and policies. Some key issues that should be reviewed include:

- Drug testing
- Drug and Alcohol policies, including use during business functions similar to alcohol exceptions



- Medicinal versus recreational use, including requirements for reasonable accommodation
- Workplace conduct

By some estimates, legalization of cannabis in California is projected to create more than 100,000 new jobs. Cannabis-related businesses will face new challenges as the business becomes more competitive and their practices under higher scrutiny. Some key issues to consider include:

- Misclassification of workers
- Retention and turnover
- Protection of confidential information, processes and plans
- Large scale growth requiring compliance with additional legal requirements based on size or location
- On boarding documents that appropriately protect employers, intellectual property and appropriately identify expectations between the parties

### ***Intellectual Property***

Protecting intellectual property (IP), such as trademarks, patents and creative marketing innovations, is a benefit of federal law often denied to participants in the nascent marijuana industry emerging under state-level legalization reforms. There exist unique trademark issues encountered within the cannabis industry. Registering a trademark with the United States Patent and Trademark Office (USPTO) may be the best way to protect one's mark, but cannabis remains illegal under the Controlled Substances Act. Thus, the USPTO routinely denies applications inasmuch as the applicant cannot demonstrate that it has made "legal use" of the mark in commerce due to its illegality under federal law. Accordingly, many cannabis businesses are forced to seek more limited protection afforded by the state trademark registration process. Beware, however, geographic

protection is limited and a handful of states, including California, refuse to register marks used on cannabis.

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Akerman's Cannabis Practice helps clients navigate the complex federal, state and local laws, and regulations that govern regulated substances, including medical and adult use marijuana, pharmaceuticals, and other controlled substances. As more states legalize cannabis for medical or recreational use, the novelty of the space and its controversial nature give rise to various issues that require experience in many legal disciplines, including real estate, business disputes, complex transactions, regulatory matters, employment law, healthcare, governmental relations, insurance law, and safety regulations, among others. Our team understands the complex legal and business issues impacting companies operating in these industries, and has the depth of experience and national reach that are critical to help clients meet their business objectives.

**Disclaimer:**

Possessing, using, distributing, and/or selling marijuana or marijuana-based products is illegal under federal law, regardless of any state law that may decriminalize such activity under certain circumstances. Although federal enforcement policy may at times defer to states' laws and not enforce conflicting federal laws, interested businesses and individuals should be aware that compliance with state law in no way assures compliance with federal law, and there is a risk that conflicting federal laws may be enforced in the future. No legal advice we give is intended to provide any guidance or assistance in violating federal law.

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