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Cuomo signs legislation legalizing adult-use marijuana

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On March 31, 2021, New York Governor Andrew M. Cuomo signed legislation (S.854 -A/A.1248-A) legalizing adult-use cannabis, making New York the 15th state to legalize recreational use of cannabis. The legislation establishes the Office of Cannabis Management to implement a comprehensive regulatory framework that covers medical, adult-use of cannabis and cannabinoid hemp. The legislation also expands New York State's existing medical marijuana and cannabinoid hemp programs. It provides licensing for marijuana producers, distributors, retailers, and other actors in the cannabis market, and creates a social and economic equity program to assist individuals disproportionately affected by cannabis enforcement who want to participate in the industry.

The development of an adult-use cannabis industry in New York State under this legislation has the potential to create significant economic opportunities for New Yorkers and the state. Tax collections from the adult-use cannabis program are projected to reach \$350 million annually. There is also the potential for this new industry to create 30,000 to 60,000 new jobs across the state.

Here is a summary of certain key provisions of the New York State Cannabis/Marijuana Regulation & Taxation Act.

Office of Cannabis Management

The legislation establishes the Office of Cannabis Management (OCM), which will be charged with enforcing a comprehensive regulatory framework governing medical, adult use of cannabis and cannabinoid hemp. The office will be governed by a five-member board, with three members appointed by the governor and one by each house of the New York State legislature. The OCM will be an independent office operating as part of the New York State Liquor Authority.

Medical cannabis

The legislation will allow people with a larger list of medical conditions to access medical marijuana, increase the number of caregivers allowed per patient, and permit home cultivation of medical cannabis for patients.

Adult-use cannabis

The legislation will create a two-tier licensing structure that will allow for a large range of producers by separating those growers and processors from also owning retail stores. The legislation creates licenses for producers and distributors, among other entities, and will implement strict quality control, public health, and consumer protections. A social and economic equity program will facilitate individuals disproportionately affected by cannabis enforcement, including creating a goal of 50% of licenses going to minority- or woman-owned business enterprises, distressed farmers, or service-disabled veterans to encourage their participation in the industry.

The legislation also implements a new cannabis tax structure that will replace a weight-based tax with a tax per mg of THC at the distributor level, with different rates depending on final product type. The wholesale excise tax will be moved to the retail level with a 9 percent state excise tax. The local excise tax rate will be 4 percent of the retail price. Counties will receive 25 percent of the local retail tax revenue and 75 percent will go to the municipality.

Cannabinoid hemp

The legislation permits the sale of hemp flower in the cannabinoid hemp program and allows for smokeable forms only when adult-use retail stores are operational.

Adult-use cannabis tax revenue

All cannabis taxes will be deposited in the New York state cannabis revenue fund. Revenue is aimed at covering reasonable costs to administer the program and implement the law. The remaining funding will be split three ways:

- 40 percent to education
- 40 percent to the Community Grants Reinvestment Fund
- 20 percent to the Drug Treatment and Public Education Fund

Municipal opt-out

Cities, towns, and villages may opt out of allowing adult-use cannabis retail dispensaries or on-site consumption licenses by passing a local law by December 31, 2021, or nine months after the effective date of the legislation. They cannot opt out of adult-use legalization.

Traffic safety

The New York State Department of Health (DOH) will work with institutions of higher education to conduct a controlled research study designed to evaluate methodologies and technologies for detecting cannabis-impaired driving. After completion of the research study, DOH may create and implement rules and regulations to approve and certify a test for the presence of cannabis in drivers.

The legislation includes additional funding for drug recognition experts and law enforcement to ensure safe roadways.

The use of cannabis by drivers will remain prohibited and will carry the same penalties as it does currently.

Personal possession and home cultivation

The following conditions apply to growing cannabis at home and personal possession of cannabis outside the home:

- **Personal possession outside the home** — allows up to 3 ounces of cannabis and 24 grams of cannabis concentrate
- **Home possession** — amends limits of what is permitted in the home, which must be kept in a secure location away from children
- **Home growing** — permits this activity subject to possession limits in 18 months after first adult-use sales begin for adult recreational use and subject to regulations of the medical program being promulgated no sooner than six months. Adults over 21 may have up to three mature plants and three immature plants, and a single household may have up to six mature plants and six immature plants.

Criminal justice and record expungement

The cannabis penalty framework will be restructured to avoid the criminalization seen in prohibition. Reduced penalties will be implemented for possession and sale.

- The legislation creates automatic expungement or resentencing for anyone with a previous marijuana conviction that would now be legal under the law and provides necessary funding.
- The legislation adds cannabis to the Clean Indoor Air Act (the CIAA), which establishes a baseline for where cannabis can be smoked or vaped. Municipalities and local governments are permitted to make laws that are more restrictive than the CIAA.
- The legislation contains various provisions to ensure that cannabis is treated as a lawful substance and to prevent discriminatory enforcement.

Protections for the use of cannabis and workplace safety

Unlawful discrimination will be prohibited and workplace safety protections will be implemented.

Public health and education campaign

The OCM will establish a robust public health and education campaign, and work with neighboring states and associations to coordinate actions and policies to protect regional health and safety.

Next steps — What can you do now?

Establishing a regulatory structure for legalization is likely to take some time, which means that the first legal sales of recreational cannabis probably will not occur until 2022. Nevertheless, those interested in starting a New York-based business in the industry or expanding an existing business into the new field should consider taking steps now. Failing to do so could result in losing the opportunity to participate in what is likely to be one of the largest cannabis markets in the United States. Here are some actions to consider.

Refresh your business plan

A growing legal market opens doors for expansion that may not have been considered before. Businesses should explore financing options and opportunities for cross-market collaboration (e.g.,

wellness and self-care products). Smaller businesses may be best served by collaborating with others to compete effectively in the future. Farmland, industrial spaces, and greenhouses can all be used to grow and cultivate cannabis. Real estate owners, agents, developers, and investors may be presented with a new industry full of opportunities.

Establish your brand

Make sure that your business name and brand will not give rise to potential claims of trademark infringement. Consider hiring a professional to perform a search for you and advise you about whether your brand can be protected. A company name or a brand that indicates ties to the cannabis industry may get the attention of customers, but also might create confusion with existing brands in the industry and result in costly litigation. A rebrand today could save a business in the long run.

Form your team

In addition to considerations that have to be made when creating a company in any field (human resources, marketing, accounting, etc.), starting a successful business in this highly regulated sector requires attention to industry-specific issues. Consider engaging a cannabis law attorney with knowledge of the industry and its complex regulatory and legal framework.

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