

SB 423 Monitoring: Montana Marijuana Act Developments through June 2013

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Background

Senate Bill 423 repealed Montana's voter-passed Medical Marijuana Act on July 1, 2011, and replaced it with new requirements for the cultivation, manufacture, and possession of marijuana for use by people with debilitating medical conditions. SB 423 also required the Children, Families, Health, and Human Services Interim Committee to monitor the new law and to draft legislation if members decide changes to the law are needed.

This briefing paper summarizes developments related to SB 423 since its implementation in May 2011. It focuses primarily on developments that have occurred since the time the 2011-2012 interim committee last met in August 2012.

Montana Cannabis Industry Association v. State of Montana

A legal challenge that was filed against SB 423 in May 2011 remains pending in Helena District Court, after the Montana Supreme Court weighed in on the standard of review that must be used in the case. The case recently was scheduled for a non-jury trial, beginning May 20, 2014.

The Montana Cannabis Industry Association, several individuals, and a physician filed the lawsuit in an effort to prevent the law from going into effect as scheduled on July 1, 2011. They argued that provisions of SB 423 violated both the state and U.S. constitutions. District Judge Jim Reynolds let most provisions of the law go into effect as scheduled that year. But he halted five key elements until a trial could be held on the merits of the suit. The Attorney General's Office then appealed portions of the injunction, saying that Judge Reynolds had used the wrong legal standard in making his decision. He applied a strict scrutiny analysis in his ruling — the highest level of judicial scrutiny for reviewing laws for constitutionality.

The Supreme Court agreed with the state's argument in a September 2012 ruling and ordered that Judge Reynolds use a rational basis test in future proceedings. Under this standard, a law affecting a constitutional right must be rationally related to a legitimate government interest.

Judge Reynolds subsequently agreed to keep the injunction in place while the suit proceeds. The following provisions of SB 423 have never been enforced and remain enjoined while the lawsuit is pending:

- the ban on compensation for marijuana;
- the limit on the number of patients for whom a provider may grow or manufacture marijuana or marijuana-infused products;
- the prohibition on advertising of marijuana and related products by providers or cardholders;

- the ability of DPHHS and law enforcement to conduct unannounced inspections of locations where providers have said they will grow marijuana; and
- the requirement that DPHHS report to the Board of Medical Examiners the names of physicians who provide written certification for more than 25 patients in a 12-month period, so the Board may review the physician's practices.

Montana Caregivers Association v. the United States

Federal courts have continued to rule against a group of caregivers in a lawsuit stemming from federal raids on numerous medical marijuana businesses in March 2011. The plaintiffs contend that the federal government violated their constitutional rights by raiding their businesses and seizing plants, money, and other items.

In January 2012, U.S. District Judge Donald Molloy dismissed the suit, saying the Supremacy Clause of the U.S. Constitution "unambiguously provides that if there is any conflict between federal law and state law, federal law shall prevail." The federal Controlled Substances Act makes cultivation and sale of marijuana illegal. The plaintiffs appealed to the 9th U.S. Circuit Court of Appeals. In May 2013, a three-judge panel of the court upheld Judge Molloy's decision.

Post-SB 423 Legislation

The 2013 Legislature considered but did not approve seven different bills related to the use of marijuana for debilitating medical conditions.

Four of the bills would have addressed issues that are pending in the Helena District Court case: the ban on compensation, the limit on the number of patients, the unannounced inspection of provider premises, and the notification to the Board of Medical Examiners of physicians who provide written certifications for more than 25 patients in a 12-month period.

The three other bills would have:

- allowed use of marijuana by a person with post-traumatic stress disorder;
- required the Board of Pharmacy to promptly remove marijuana from Montana's list of Schedule I controlled substances if the drug is reclassified at the federal level; and
- made numerous changes to the law and established a regulatory system that, among other things, authorized dispensaries and couriers.

Registry Statistics

SB 423 created stricter requirements for obtaining a card to use marijuana for a debilitating medical condition. The number of people registered to use marijuana has since dropped about 77 percent. As of May 2013, 7,099 cardholders were registered with the state, compared with 31,522 patients in May 2011 — the last month that registry identification cards were issued under the pre-SB 423 standards.

The number of cards issued to people 30 years of age or younger has declined even more steeply. A total of 1,049 individuals in that age range held cards in May 2013, compared with 9,177 in May 2011. The number of minors with cards fell from 1,292 in 2011 to 82 in 2013, and the average age of cardholders has increased from 41 to 47.

The percentage of cardholders receiving cards for severe or chronic pain also decreased over the two-year period, from 73% in 2011 to about 63% in 2013.

Ballot Measures

Voters turned back a ballot measure seeking to repeal SB 423 in 2012 but may be asked in 2014 to legalize the use of marijuana.

SB 423 opponents succeed in 2011 in gathering enough signatures to put Initiative Referendum 124 on the ballot, asking voters whether they wanted to keep or reject SB 423. In November, voters chose to keep the new law in place, with 57% voting in favor of SB 423 and 43% voting to repeal it.

Advocates have since submitted a constitutional initiative to legalize recreational marijuana use by adults. Proponents of Constitutional Initiative 111 will have until Oct. 18, 2013, to gather the signatures of 48,349 registered voters, including signatures from at least 10% of the voters in 40 House districts. If they succeed, the measure will appear on the ballot in November 2014. The proposal mirrors an initiative attempt in 2011 that failed to garner the required signatures.

Other Legal Challenges

The Montana Supreme Court issued a number of rulings last interim in cases related to the former Medical Marijuana Act that may serve as precedent in future criminal cases.

The rulings established that:

- caregivers growing or manufacturing marijuana for designated patients may not sell or transfer marijuana to other caregivers;
- patients are not protected by the law if they obtain marijuana from anyone other than the caregiver they have named in their registry application;
- hashish, a concentration of marijuana resin, is not usable marijuana as defined by the law and therefore is not a legal substance that may be purchased, manufactured, or possessed under the Medical Marijuana Act; and
- individuals are not protected by the law until they have obtained registry cards as a patient or caregiver.

