

SJ 31: CATCH-ALL PENALTY PROVISION ANALYSIS

BACKGROUND

At its April meeting, the Economic Affairs Interim Committee (EAIC) requested additional analysis on adding a "catch-all" penalty provision.

Subsections (2) through (7) of 16-12-106, MCA, enumerate penalties for specific types of unlawful conduct, including cultivation of marijuana in an unsecured location, smoking of marijuana in public, underage possession and use of marijuana and marijuana paraphernalia, and distribution of marijuana to underage persons. However, 16-12-106, MCA, does not include a general catch-all penalty. This means that for certain conduct that is not permitted under the Marijuana Regulation and Taxation Act but not specifically addressed in 16-12-106, MCA, the act does not contain a penalty provision. One example is possession or consumption in any of the places listed in 16-12-108(1)(g)(i) through (1)(g)(v), MCA, such as on public transportation or in a motel or hotel room.

ANALYSIS

Prohibitions and corresponding penalties outlined in the Act are as follows:

Prohibition (statute)	Penalty (statute)	Potential Revision	Civil/Criminal
Driving under the influence: 16-12-108(1)(a)-(b)	Varies: 61-8-1007; 61-8-1008		Criminal
Consumption while a passenger in a motorized vehicle: 16-12-108(1)(c)	\$100 fine: 61-8-1027		Civil
Distribution to a minor: 16-12-108(1)(d)	Varies: 45-5-624		Criminal
Purchase/Use by a minor: 16-12-108(1)(e)	Varies: 45-5-624		Criminal
Possession/Transport by a minor: 16-12-108(1)(f)	Varies: 45-5-624		Criminal
Possession/Consumption on school grounds: 16-12-108(1)(g)(i)	Not specified.	Can use catch-all penalty or one of the public nuisance penalty options.	Either, depending on how it is worded.
Possession/Consumption on public transportation: 16-12-108(1)(g)(ii)	Not specified	Can use catch-all penalty or one of the public nuisance penalty options.	Either, depending on how it is worded.
Possession/Consumption in a health care facility: 16-12-108(1)(g)(iii)	Not specified. .	Can use catch-all penalty or one of the public nuisance penalty options.	Either, depending on how it is worded.
Possession/Consumption at a correctional facility: 16-12-108(1)(g)(iv)	Not specified.	Can use catch-all penalty or one of the public nuisance penalty options.	Either, depending on how it is worded.
Possession/Consumption in a hotel: 16-12-108(1)(g)(v)	Not specified.	Can use catch-all penalty or one of the public nuisance penalty options.	Either, depending on how it is worded.
Use where smoking is prohibited: 16-12-108(1)(h)	Not specified.	Can use catch-all penalty or one of the public nuisance penalty options.	Either, depending on how it is worded.
Consumption in a public place: 16-12-108(1)(i)	\$50 fine: 16-12-106(4)		Civil
Conduct that endangers others: 16-12-108(1)(j)	Not specified.	Can use catch-all penalty or consider referencing 45-5-207 (criminal endangerment) or 45-5-208 (negligent endangerment).	Either, depending on how it is worded.
Undertaking task under influence that constitutes negligence or professional malpractice: 16-12-108(1)(k)	Not specified.	Can use catch-all penalty or refer to 39-2-702 for possible penalty language.	Either, depending on how it is worded.
Performing solvent-based extractions on marijuana using solvents not specified if not licensed: 16-12-108(1)(l)	Not specified.	Can use catch-all penalty or may fall under 45-9-107 (criminal possession of precursors to dangerous drugs).	Either, depending on how it is worded.

Visible cultivation: 16-12-108(2)	\$250 fine, forfeiture of marijuana: 16-12-106(2)		Civil
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ORIGINAL RECOMMENDATION

Consider adding a catch-all penalty provision in 16-12-106, MCA, such as:

If no other penalty is specified under this chapter, violation of this chapter is punishable by a fine not to exceed \$xx or by imprisonment in a county jail for a term not to exceed xx, or both, unless the violation would constitute a violation of Title 45. An offense constituting a violation of Title 45 must be charged and prosecuted pursuant to the provisions of Title 45.

The catch-all penalty provision does not interfere with potential criminal violations and penalties, as 16-12-108(7), MCA, provides:

(7) Unless specifically exempted by this chapter, the provisions of Title 45, chapter 9, apply to the conduct of consumers, licensees, and registered cardholders.

Alternatively, individual penalties can be assigned to each violation:

Public nuisance is defined in 45-8-111(1)(a), MCA, as:

(a) a condition that endangers safety or health, is offensive to the senses, or obstructs the free use of property so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood or by any considerable number of persons;

The prohibitions in 16-12-108, MCA, relating to possession or consumption in public places may be considered a public nuisance and, therefore, penalties for violation may be as outlined in 45-8-111(6), MCA:

(6) A person convicted of maintaining a public nuisance shall be fined an amount not to exceed \$500. Each day of the conduct constitutes a separate offense.

Another option is to add a provision similar to 16-6-312, MCA, (Premises where alcoholic beverages illegally sold -- public nuisance):

Possession or consumption of marijuana or marijuana products or possession of marijuana paraphernalia in violation of 16-12-108(1)(g) through (1)(i) is hereby declared to be a public nuisance. A person convicted shall be guilty of a misdemeanor and on that conviction shall be fined not less than \$100 or more than \$500 and be imprisoned not less than 30 days or more than 6 months.

The prohibition under 16-12-108(k), MCA, for "undertaking any task while under the influence of marijuana or marijuana products if doing so would constitute negligence or professional malpractice" relates to performance in the course of employment while under the influence. The EAIC can consider amending or incorporating the penalties outlined in 39-2-702, MCA, to address this prohibition:

39-2-702. Liability of employee for negligence. An employee in violation of 16-12-108(k) or who is guilty of a culpable degree of negligence is liable to the employer for the damage caused by the negligence to the employer, and the employer is liable to the employee for the value of the services only that are properly rendered if the service is not gratuitous.

Conversely, the EAIC can add the following to 16-12-106, MCA, instead:

A person in violation of 16-12-108(k) is liable under 39-2-702.

Finally, regarding the prohibition under 16-12-108(j), MCA, that reads "conduct that endangers others", reference to criminal offenses against the person can be considered:

45-5-207. Criminal endangerment — penalty. (1) A person who knowingly engages in conduct that creates a substantial risk of death or serious bodily injury to another commits the offense of criminal endangerment. This conduct includes but is not limited to knowingly placing in a tree, log, or any other wood any steel, iron, ceramic, or other substance for the purpose of damaging a saw or other wood harvesting, processing, or manufacturing equipment.

(2) A high blood alcohol concentration, alone is not sufficient to support a criminal endangerment charge.

(3) A person convicted of the offense of criminal endangerment shall be fined an amount not to exceed \$50,000 or imprisoned in the state prison for a term not to exceed 10 years, or both.

(4) As used in this section, "alcohol concentration" has the meaning provided in 61-8-1001.

45-5-208. Negligent endangerment — penalty. (1) A person who negligently engages in conduct that creates a substantial risk of death or serious bodily injury to another commits the offense of negligent endangerment.

(2) A person convicted of the offense of negligent endangerment shall be fined an amount not to exceed \$1,000 or imprisoned in the county jail for a term not to exceed 1 year, or both.

DEPARTMENT OF JUSTICE RECOMMENDATION

At the June 2022 EAIC meeting, the Committee requested that the Department of Revenue (DOR) and Department of Justice (DOJ) provide recommendations on the topic. The DOR stated that since they have no authority to enforce these violations, they defer to the DOJ for their recommendation.

Deputy Attorney General David Ortley reviewed the analysis and agreed with the need for a "catch-all" provision:

After review of your June 2022, Analysis of SJ31, and the need for a "catch-all" penalty provision in 16-12-106, MCA, I agree that a "catch-all" provision is needed to ensure there is a statutory mechanism for prosecution of violations not otherwise specifically provided for in Title 16.

The DOJ recommends one change to the original suggestion: substituting the word "must" for "may" in order to retain prosecutorial discretion in the charging decision. Therefore, the DOJ's recommended provision is:

If no other penalty is specified under this chapter, violation of this chapter is punishable by a fine not to exceed \$xx or by imprisonment in a county jail for a term not to exceed xx, or both, unless the violation would constitute a violation of Title 45. An offense constituting a violation of Title 45 *may* be charged and prosecuted pursuant to the provisions of Title 45.

COMMITTEE OPTIONS

Option A: Add a "catch-all" penalty provision to 16-12-106, MCA. If this option is chosen, a fine amount and imprisonment term should be determined.

Option B: Assign individual penalties to each violation.

Option C: Leave as is.