

SB 423 Monitoring: Montana Marijuana Act Developments through May 2015

Prepared by Sue O'Connell
May 22, 2015

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Senate Bill 423 repealed Montana's voter-passed Medical Marijuana Act on July 1, 2011, and replaced it with new requirements for the cultivation, manufacture, and possession of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 since passage of SB 423, focusing primarily on developments that have occurred since the 2013-14 interim committee last met in August 2014.

Montana Cannabis Industry Association v. State of Montana

A legal challenge that was filed against SB 423 in May 2011 has moved to the Montana Supreme Court, after Helena District Judge James Reynolds permanently enjoined four provisions of the law in January of this year. It's the second time the case has been before the state's highest court since the lawsuit was filed.

The Montana Cannabis Industry Association, several individuals, and a physician filed suit 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. Judge Reynolds let most provisions of the law go into effect that year. But he halted five key elements until a trial could be held on the merits of the suit, as follows:

- 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.

The Attorney General's Office appealed portions of the 2011 injunction, saying that Judge Reynolds had used the wrong legal standard in his review. 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 September 2012 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 scheduled a trial for May 2014, but both the plaintiffs and the Attorney General's Office later filed motions to resolve the case without a trial. The plaintiffs scaled back their challenge to the entire law and asked only that six provisions be found unconstitutional — the five elements that had been put on hold earlier and the prohibition on medical use of marijuana by parolees, probationers, and individuals in the custody of the Department of Corrections or a youth court.

In January, Judge Reynolds ruled in the state's favor on the issues of unannounced inspections and marijuana use by probationers and parolees but permanently enjoined the four provisions involving commercial sales, advertising, and reports to the Board of Medical Examiners.

The state appealed the ruling, and the Montana Cannabis Industry Association has filed a cross-appeal. The state filed its first brief in the Supreme Court case on May 6.

Post-SB 423 Legislation

Both the 2013 Legislature and the 2015 Legislature considered but did not approve bills related to the use of marijuana for debilitating medical conditions. Several of the bills would have addressed issues that are pending in the court case. 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;
- moved administration of the program from the Department of Public Health and Human Services to the Department of Labor and Industry;
- made changes to establish various regulatory systems for commercial sale of marijuana.

Registry Statistics

Under SB 423's more stringent requirements, the number of people registered to use marijuana dropped substantially in the first two years of enactment — from 31,522 in May 2011 to 7,099 in May 2013. However, the number has been steadily increasing since June 2013 and stood at 11,473 at the end of April 2015.

The majority of patients are still receiving a card for severe chronic pain, as they were before SB 423 went into effect. But they make up a smaller percentage of cardholders — 63.5 percent in April 2015, compared with 73 percent in May 2011.

Registry statistics show that 427 people were registered as providers in April 2015. That number is down from 4,650 in May 2011 but up from the 333 registered providers a year ago. And 216 doctors were providing written certification, down from 362 in May 2011.

Most doctors — 198 — have provided certification for 20 or fewer patients. Nine have provided certification for more than 100 patients each, accounting for 91 percent of all certifications. Two of the physicians each have provided certification for more than 3,000 patients.