



michigan municipal league

Law Enforcement Action Forum Newsletter



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The Michigan Medical Marihuana Act – Thoughts and Comments on the Current State of the Law



By Gene King, LEAF Coordinator

At a recent Law Enforcement Action Forum (LEAF) meeting, members wanted to discuss the issues they face when applying the Michigan Medical Marihuana Act (MMMA; the “Act”) to actual incidents. It quickly became apparent that the MMMA lacks clarity, particularly in relation to other state and federal laws, and can be confusing. The issues and rulings surrounding the MMMA are constantly changing. Keeping current when there are many cases under appeal at so many court levels is very difficult.

The LEAF members raised a number of issues and questions that challenged LEAF’s Legal Advisor, Audrey Forbush, and her guest and associate, Christopher Scott, Plunkett Cooney P.C. They worked to interpret the Act and the associated court rulings, federal law, State Attorney General Opinions and the various letters of clarification and opinion coming from the federal agencies to try to provide some guidance in addressing the issues. For that reason, LEAF decided to use this edition of its newsletter to present some of the issues raised at the meeting that have not been widely discussed.

LEAF recommends that law enforcement, faced with an issue or incident concerning the Act,

consult with the Prosecuting Attorney, or the attorney for the entity before initiating action to ensure that what they do complies with the latest ruling concerning the Act.

Possession, Distribution and Use of Marihuana is Illegal

Audrey Forbush and Christopher Scott both clearly stated that the courts have ruled that nothing in MMMA changes the status of marihuana as an illegal substance at the State and federal levels. Forbush points out that the Michigan Attorney General’s Preemption Opinion, dated November 10, 2011, demonstrated his position by quoting Judge J. O’Connell of the Michigan Court of Appeals concurring in *People v Redden*, 290 Mich App 65, 92; 799 NW2d 184 (2010); “By enacting the MMMA, the people did not repeal any statutory prohibitions regarding marihuana. The possession, sale, delivery, or manufacture of marihuana remains crimes in Michigan. The same is true under federal law. The Controlled Substances Act (CSA), 21 USC 801 *et seq.*, makes all marihuana-related activity illegal, including the possession, manufacture, and distribution of marihuana. See 21 USC 812(c), 823(f), and 844(a)”.

The Michigan Attorney General, in Opinion 7262, goes on to cite cases from Michigan's U. S. District Courts. From the Western District is *United States v Michigan Dep't of Community Health*, (WD Mich, amended opinion, June 9, 2011), 2011 WL 2412602); the court held "As a state law authorizing the use of medical marijuana, the MMMA cannot negate, nullify or supersede the federal Controlled Substances Act, which criminalized the possession and distribution of marijuana throughout the entire country long before Michigan passed its law." In the Eastern District, *United States v Hicks*, 722 F Supp2d 829, 833 (ED Mich, 2010) the court ruled "Thus, the MMMA has no effect on federal law, and the possession of marijuana remains illegal under federal law, even if it is possessed for medicinal purposes in accordance with state law."

Forbush said that the courts and the Attorney General are clear in their opinions that the MMMA does not legalize marijuana. The MMMA only protects registered qualifying patients (MCL 333.26424(a)) and registered primary caregivers (MCL 333.26424(b)) who are engaged in the "medical use" of marijuana in accordance with all the conditions of the Act from state prosecution or other penalty.

Do The Police Really Have To Give It Back?

One of the questions posed about MMMA concerned having to return marijuana to a person arrested if they are a registered qualifying patient or qualifying caregiver and possessed an issued registration card. Forbush said that MMMA Section 4(h), which forbids forfeiture of marijuana, is in direct conflict with the federal Controlled Substance Act that prohibits the possession or distribution of marijuana under any circumstances. She went on to say that because of the inherent conflict, it is impossible for a law enforcement officer to comply with both federal and state law.

Forbush opined, and Scott agreed, that their research is consistent with the Michigan Attorney General's opinion that by returning marijuana to a registered patient or caregiver, a law enforcement

officer is exposing themselves to potential criminal penalties under the Controlled Substance Act for the distribution of marijuana or for aiding or abetting the possession or distribution of marijuana. Scott went on to say that, the phrase "any person" in Section 841(a) of the federal Controlled Substance Act is presumed by the courts to cover government employees as well as private citizens.

Scott said the legalese answer is, it was determined that section 4(h) of the Michigan Medical Marijuana Act, MCL 333.26424(h), which prohibits the forfeiture of marijuana possessed for medical use, directly conflicts with and is thus preempted by, the federal Controlled Substances Act, 21 USC 801 *et seq.*, to the extent section 4(h) requires a law enforcement officer to return marijuana to a registered patient or primary caregiver upon release from custody.

Forbush said the short answer is "Do not give it back unless a judge orders you to!"

Can Someone Registered under MMMA Buy or Own a Gun?

As the discussion went on, one of the chiefs remarked that he was concerned about signing a License to Purchase a Pistol for a subject that could be registered under MMMA. Forbush commented that MCL 28.422(3) states, in part, "The commissioner or chief of police of a... police department that issues licenses to purchase, carry, possess, or transport pistols... having an organized police department, in discharging the duty to issue licenses shall with due speed and diligence issue licenses to purchase, carry, possess, or transport pistols to qualified applicants residing within... as applicable unless he or she has **probable cause** to believe that the applicant would be a threat to himself or herself or to other individuals, or would commit an offense with the pistol that would violate a law of this or another state or of the United States."

She went on to say, the Federal Gun Control Act, 18 USC 922(g), makes it unlawful for certain categories of persons to ship, transport, receive, or possess firearms. Further, 18 USC 922(d) makes it unlawful to transfer a firearm to any such prohibited persons. Those categories include a person who is an unlawful user of or addicted to any controlled substance.

Forbush said according to a September 21, 2011 open letter from the Bureau of Alcohol, Tobacco and Firearms (ATF) to all licensees, being a registered patient or caregiver is “**reasonable cause to believe**” the person is an unlawful user or in possession of a controlled substance which could be grounds for denying the purchase permit. She further commented that the letter from ATF does not have the force of a court decision or Attorney General opinion, but is reasonable guidance from a regulatory agency.

Below is a link to the letter:

<http://www.atf.gov/press/releases/2011/09/092611-atf-open-letter-to-all-fpls-marihuana-for-medicinal-purposes.pdf>

When putting all the federal and state requirements together, Forbush felt it would be reasonable to deny a registered patient or caregiver a License to Purchase a Pistol based on the current law. She also recommends contacting the Michigan State Police and the responsible Prosecutor for further guidance.

Scott added, as previously discussed, possession of marihuana is a violation of the law in both the federal and state context. He also said there is nothing in the MMMA that prohibits asking an applicant for a License to Purchase a Pistol if they have been issued or have applied for a license under the MMMA. Therefore, it would be reasonable for due diligence to ask the question as part of the State requirements to investigate for compliance with the law prior to issuing the License. The MMMA does require a law enforcement agency to keep the information garnered through investigation confidential and to

release it only as a business necessity, much like Health Insurance Portability and Accountability Act (HIPAA) regulations on medical information obtained.

Scott also commented that it is unlikely that the ATF or the Justice Department would seek out and prosecute those that illegally obtain a License to Purchase or obtain a Concealed Pistol License. He remarked that failure to disclose the information about the MMMA license when asked about drug possession on the form provided by the Michigan State Police could be a crime. It would be up to the local Prosecutor to make the determination to charge.

Don't Be Mad When They Tell You They Can't Tell You!

The LEAF members made some comments that it was frustrating trying to get information about a subject who asserts that they are a registered or applied for registration. Forbush responded that the Michigan Department of Community Health (MDCH) oversees licensing under the MMMA and is the source for a background check to find if a person is licensed. The regulations provide explicit restrictions on the release of information to protect confidentiality. Regulations specify strict confidentiality in that medical marihuana program information “shall be confidential and not subject to disclosure in any form or manner.” Protected information includes:

- (a) Applications and supporting information that qualifying patients have submitted.
- (b) Information related to a qualifying patient's primary caregiver.
- (c) Names and other identifying information of registry identification cardholders.
- (d) Names and other identifying information of pending applicants and their primary caregivers.”

Scott points to R. 333.321(1), which provides a narrow exception for law enforcement. He quoted, “The department shall verify upon a request by law enforcement personnel **whether a registry**

identification card is valid without disclosing more information than is reasonably necessary to verify the authenticity of the registry identification card.” Mich Admin Code, R 333.121(3) (emphasis added); MMMA § 6(h) (3).

Forbush added that this verification provision applies to the license, not the licensee. The only exception to provide information to law enforcement is to **check the validity of a known card**. Even though officers may have information that a subject is licensed, the **MDCH may not** tell the police whether the subject was in fact a registered marijuana provider. For example, if a card has been applied for, but not issued yet, the application information provided by the suspect (that he has applied to be a caregiver, his patients’ information, and the fact that he was approved for a card) and which may support alternate proof of registration is the type of information specifically covered under the blanket prohibition *against* disclosure in any form or manner.

The application itself is considered a valid identification card if the MDCH does not approve the application and provide a card within twenty days of the application’s submission. Because of this, both Forbush and Scott feel that responsibility cannot be assigned to officers to determine whether a person is registered under the MMMA because the information necessary to demonstrate actual registration cannot, by law, be provided to the officers.

Forbush went on to add that violation of the confidentiality requirements is a criminal offense. She cautioned that the MMMA’s confidentiality provisions apply to a “person,” including MDCH and other state agencies and local units of government, as well as law enforcement agencies. Forbush recommends that departments handle the MMMA information as if it were medical information requiring confidentiality under HIPAA. All MMMA information is exempt from the Freedom of Information Act (FOIA) and law enforcement should redact it from all released documents under FOIA.

Use of Medical Marijuana by Employees of the Police Department

MML Pool and Fund Member law enforcement executives asked what they should do should an entity employee become a registered qualifying patient or qualifying caregiver. Audrey Forbush responded that the first thing that they must consider is whether the employee works for a law enforcement agency.

The purpose of a law enforcement agency is to uphold the constitution and laws of the nation, state, and municipal entity. The ordinance that creates the agency should affirm that purpose and the department’s policies and rules should support it. Police officers are required to take an oath of office. This oath generally includes that they will uphold the law. Forbush points to the Michigan Constitution, Article XI, sec.1 (Appendix B), that states

All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution and the constitution of this state, and that I will faithfully discharge the duties of the office of according to the best of my ability.

She emphasized that state court decisions have been rendered and opinions by the U. S. Attorney and Michigan Attorney General clearly state that the possession, use, and distribution of marijuana is against the law. Additionally, Scott pointed out that police departments establish policies and rules that require employees to comply with the law and regulate behavior both on and off duty. He went on to say that most departments also restrict the use of substances to only those that are legal and prescribed by a person authorized by law.

In addition, Forbush added that the MMMA only provides an affirmative defense for registered qualifying patients and registered primary

caregivers who are engaged in the “medical use” of marihuana in accordance with all the conditions of the Act should they be prosecuted or are subject to other penalty by the state. Also Section 333.26427(b)1 & 4 of MMMA prohibits a person (employees are persons too!) to undertake any task under the influence of marihuana, when doing so would constitute negligence or professional malpractice and from being under the influence or operate, navigate, or be in actual physical control of any motor vehicle, while under the influence of marihuana. Forbush opines that those prohibitions pretty much cover some significant police employee job tasks!

Scott added that at this time, no case law exists that addresses any potential affect MMMA may have with regard to a municipal employer and there is nothing in the statute itself that gives any guidance. The statute does not attach any duty to employers to allow individuals to use marihuana or be under the influence before, during or after their hours of employment.

Both Forbush and Scott agreed that employers must have policies and rules such as those found in the MML LEAF Manual for Law Enforcement Risk Control. Chapter 11, Rules. Specifically Forbush suggests that attention be given to Rule 4:5 Conformance to Laws, 4:14 Alcoholic Beverages and Controlled Substances, 4:15 Possession and Use of Controlled Substances/Narcotics, 4:16 Use of Alcohol, Drugs, Narcotics or Over the Counter Medications, 4:17 Use of Substances. Other LEAF resources can be found at mml.org under Insurance. Be sure to go to either the Pool or Fund and review the LEAF Newsletters found under Risk Resources, Law Enforcement Newsletters.

Forbush also suggested that employers should review their use of federal funds or if they are benefitting or participating in programs that use federal funds to determine the responsibility to

comply with the *Drug Free Workplace Act of 1988*. One of the Act requirements is that a covered employer must: “publish and give a policy statement to all covered employees informing them that the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the covered workplace and specifying the actions that will be taken against employees who violate the policy.” It is important that all the employer’s policies involving use of drugs be reviewed and updated to accommodate the current state of the law.

Forbush said it is prudent for employers to give employees notice of how issues involving MMMA will be handled. The notice should address how the law and the employer’s policies and rules will apply to an employee should they participate in activities under the MMMA. Though it may be harsh, the reality of being employed by a law enforcement agency is that the standard of conduct is higher than those who are not!

LEAF encourages top management to develop a strategy for dealing with situations that involve potential serious illnesses where employees may feel it is last resort situation to use the Act as a benefit for a family member. This complicated issue has many consequences for the employer and employee.

Who Knows What Is Next!

With so many cases on appeal and so many questions left unanswered, Forbush cautioned everyone to be diligent in the application of the law around the MMMA. To ensure that contemplated activities are compliant with the current standard of law, obtain legal advice prior to taking the action.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

*Sponsored by the Michigan Municipal League Liability & Property Pool and Workers' Compensation Fund
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