



Report on Proposed Legislation for Legalization of Medical Marijuana

by Phil Williams and Parker Snider

The Bottom Line

The Alabama Policy Institute opposes this legislation for a myriad of reasons. The legislation, as proposed, violates virtually every conservative principle. The draft legislation as reviewed grows government, adds taxes at rates not seen before, removes due process protections, allows for warrantless search and seizure, violates federal law, and promotes a medically prescribed substance that is not FDA approved. Even if marijuana was not itself controversial, the Alabama Policy Institute would oppose this legislation.

Executive Summary

Marijuana continues to fuel public debate, with arguments coming from all sides on the efficacy of its use for medicinal purposes. There are no conclusive studies currently available that confirm either position, although each will tell you that their expert is “the” expert. At the present time, over thirty of the fifty states have enacted some form of legalization with the majority being for “medical use”. Several states and the District of Columbia have legalized recreational use of marijuana. In mid-2019, the Surgeon General of the United States issued a warning against the use of marijuana. The Federal Drug Administration (FDA) still has not approved its use for medicinal purposes. In effect, the states are taking it upon themselves to determine what the FDA has not yet validated. Even so, notwithstanding the contradictory research on marijuana, the other effects of the proposed legislation on the wellbeing of the State of Alabama are worthy of significant debate.

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Procedural History

In the 2019 Legislative Session, a medical marijuana legalization bill was sponsored by State Senator Tim Melson. That particular bill, SB 236, ultimately passed the State Senate but not without a degree of controversy. It is noted that the Senate Republican Caucus was largely divided on the merits of the legislation as then proposed. The bill was opposed during floor debate resulting in it being carried over to the call of the chair.¹ The bill later passed by a reduced vote count of 17 to 6 when it was called up at a time when many of the members were out of the Senate Chamber. The bill then traveled to the State House of Representatives where it was substituted for legislation that alternatively created the Medical Cannabis Study Commission.² The Cannabis Study Commission then met at scheduled intervals for public hearings in the interim between the 2019 and 2020 legislative sessions. As the public hearings neared their conclusion in the fall of 2019, State Senator Melson (who also chaired the commission) announced that the legislation discussed herein would be forthcoming. This policy paper is the result of research by API and a review of the most current draft of Senator Melson's proposed legislation.

Non-Marijuana Related Controversies

API has identified the following controversies which exist within the text of the legislation. All page numbers cited are as listed within the bill as filed on February 11th, 2020. Future versions may contain amended language that changes the page numbers and content.

The Bill Grows Government

Page 21 – The bill establishes an entirely new commission.

Page 23 - Members of the commission will be entitled to a per diem of \$500 per day in addition to travel expenses at the then-current state employee rate.

Page 21 – The new commission will consist of 9 appointed members, none of whom are required to have a medical or pharmacological background. The Commission will then have the potential for an unlimited number of full-time employees, to include but not limited to a Director, Assistant Director, and such other “additional officers to include an inspection officer” (page 25).

Page 20 – The legislation creates additional earmarks within the fiscal morass of Alabama's heavily earmarked revenue streams by establishing a “special account” to collect receipts raised pursuant to the taxes, fees and penalties established in the bill. In short, none of the revenue generated by this legislation is slated to relieve the current budget processes and instead appears to be designated solely to fund a new government structure in the form of the Cannabis Commission.

Page 42 – The bill allows localized autonomy to “opt-out” of cannabis processing and distribution by municipal and county governments but only until July 31, 2020. After that date, no local government shall have the right to enact any localized ordinances to prevent the cannabis industry from establishing operations.

Page 11 – The bill removes the determination of applicable medical use from licensed physicians and instead vests it in the Cannabis Commission through the use of the “elastic clause” which states that it may be prescribed for “any other medical condition added by the commission”.

The Bill Creates Government Imposed Intrusions into the Private Sector

Page 27 – The legislation creates a government-imposed burden upon free market commerce by mandating that the only products that can be grown/processed/sold under the auspices of the legislation are to be “derived from cannabis grown in Alabama”.

Page 8 – The legislation requires the creation of alternative retail services in the form of “dispensaries”. The use of dispensaries is required and circumvents established pharmacies because the FDA has not yet approved marijuana, and it therefore cannot be dispensed by a fully trained and licensed pharmacist.

The Bill Increases Taxes and Fees at Previously Unseen Rates

Page 77 – Despite the fact that prescription medications are not taxed by the State of Alabama,³ all medical marijuana prescriptions under the proposed legislation

will be taxed by the State at the rate of 9% - which is more than double the amount of the current general state sales tax rate.

Page 45 – The Commission shall have the unilateral right to levy and collect fines.

Page 43 – The Commission shall have the unilateral right to establish the amount of all related annual licensing fees which shall be at a minimum of \$10,000 annually and a maximum of \$50,000.

Page 56 – In addition to criminal penalties, the Commission may “impose civil fines up to \$5,000 against an individual and up to \$25,000 or an amount equal to the daily gross receipts, whichever is greater, against a licensee”.

The Bill Violates Due Process Rights

Page 42, 43 – The legislation establishes unilateral investigative authority in the Commission which may “at any time, through its investigators, agents or auditors, *without a warrant*, and without notice...enter, impound, seize, assume physical control of, or summarily remove” virtually anything on the premises (emphasis added).

Page 43 – The legislation also allows, without a warrant, the Commission’s “investigators, agents, or auditors” to search any person and examine their “personal effects... while that individual is present in a licensee”.

The Bill Violates Federal Law

To this date marijuana remains a Schedule 1 substance for which there is no provision in federal law for lawful cultivation, processing, transportation, possession or use.⁴ All military personnel stationed at Alabama’s

multiple active duty, Reserve, and National Guard facilities are prohibited from use of marijuana of any type and prescriptions will not override a failed drug test by any servicemember. Testing positive for marijuana use by any active or reserve member of the armed forces will still result in discipline under the Uniform Code of Military Justice, up to and including discharge from the service, regardless of whether the resident state has legalized its use.⁵

The Bill Advocates Prescriptions For a Substance That Is Not FDA Approved

The Surgeon General of the United States recently issued a statement warning against the use of marijuana in any form with special emphasis on the negative effects on developmental brain activity.⁶

The US Food and Drug Administration, the entity prescribed by federal law to test and approve the use of substances for medicinal purposes, to date has not approved marijuana for any uses, including medicinal uses.⁷

As a result of the FDA not approving the use or prescription of marijuana for medicinal purposes, licensed pharmacists are prohibited from dispensing it in any form. For this reason, the proposed legislation requires the creation of alternative retail solutions in the form of “dispensaries” which will not have a pharmacist consulting or advising the staff.⁸

The Legislation's Impact on Alabamians

Farmers

Agribusiness entities are labeled as “cultivators” in the proposed legislation. When duly licensed, they are protected from criminal penalties otherwise attributed to the growth of marijuana. As a result of the powers enumerated in the legislation to the Department of Agriculture and Industries, cultivators will be potentially subject to warrantless search and seizure, to include any and all persons on their premises during said search. Cultivators will have a captive market as the proposed legislation mandates the use of cannabis grown only in Alabama. Cultivators will be required to participate in a new “seed-to-sale” database that tracks all cultivation activity with penalties for non-compliance.

Law Enforcement

The legislation as currently drafted requires a user of medical marijuana to have an identification card and to be actively entered in the new state cannabis database to which law enforcement will have access. No indication is given as to whether law enforcement agencies will have to pay for access to the new state database. The legislation also expressly allows the possession of up to 70 days of “daily doses” by an individual prescriber. However, the prescription may be given in up to seven different forms and the daily dose is expected to fluctuate from one patient to the next, thereby making enforcement of possession crimes virtually impossible. The difficulties inherent in assessing possession under the reciprocity and dosage guidelines would create significant barriers to the prevention of interstate trafficking.

Employers

The legislation as currently drafted takes several positive steps to protect employers whose employees may be users of medical marijuana (these positive steps are partially reflective of actions taken by other state legislatures). It would not require that any employer permit or accommodate possession or use in the workplace. Likewise, it would not be required that any special modifications be made to the workplace for any user of medical marijuana. However, this employer exemption provision would be subject to the subjective standard of “the reasonable business purposes of the employer”. It is expected that this standard will be put to any number of legal tests at great cost to employers. It is also allowable for an employer to refuse to hire, discharge, discipline or take such other adverse employment action as determined necessary related to an employee’s possession or use of medical marijuana.

Insurers

The legislation as currently drafted would not require any insurer to reimburse for “costs” associated with the use of medical marijuana. However, it does not address the issue of damages for liabilities associated with its use. It is left to be tested in the marketplace and the court system as to whether an insurer could specifically choose not to cover the costs of accidents and other liabilities incurred due to medical marijuana use to include workers compensation.⁹

Physicians

Specific provisions within the proposed legislation state that physicians would not be subject to “arrest, prosecution, or penalty in any manner, or denied any

right or privilege...” However, no provision is made for a medical facility that currently grants medical privileges to withhold those privileges as a matter of conscience from physicians who choose to advocate for or certify marijuana use. It is noted that a positive aspect of the legislation is the mandate that an actual face-to-face physician-patient relationship must be established before a patient may be certified for medical marijuana. The physician shall also be required to present the potential patient with a standardized informed consent form that informs of the side effects, FDA status, federal and state law, and the “state of research” on the efficacy of marijuana as a medicinal solution. This informed consent does currently require the presentation of the impacts that marijuana use could have upon employment, including military service. The informed consent form does not require presentation of “both sides” of the medical research and debate. For the purposes of a physician’s practice, it is assumed that, in the absence of insurance coverage of medical marijuana, the certification process and the required follow-up assessments would be on a pay-as-you-go patient-pay system. Physicians would be subject to dual regulation by the Cannabis Commission as well as the Board of Medical Examiners. The Cannabis Commission would have the authority to refer a physician for disciplinary action by the Board of Medical Examiners by having monitored the physician’s practice and use of the patient registry. Physicians should also know that medical marijuana is granted applicability to adolescents but that the physician may then be required to communicate with a third-party licensed “Caregiver” as defined in the bill.

Pharmacists

As noted previously, the legislation as currently drafted bypasses the normal dispensing of prescription medications by licensed pharmacists. Despite several

states requiring a pharmacist to consult with the newly established marijuana dispensaries, this legislation would not do so.

The General Marijuana Question

Much has been written on the status of research into the use and effectiveness of marijuana as a curative modality. To be sure, there are palliative effects, but they are accompanied by undeniable cognitive and emotional effects as well. It is also touted often by marijuana proponents that the deleterious effects of marijuana are less than those of the otherwise legal alcohol industry. But suffice to say there is no free lunch in the use of marijuana. Seemingly, for every impartial and respected study that finds a benefit to its use, another equally vaunted study finds a negative, or simply refutes the findings of the previous study.¹⁰ As recently as April of 2019, the Journal of the American Medical Association's Psychiatry section published a report concluding that use of marijuana in adolescents leads to a higher prevalence of suicide, depression and anxiety.¹¹

A 2017 review of multiple evidentiary studies by Clinical Psychology Review indicated that marijuana may be of help fighting alcohol and opioid addictions.¹² At nearly the same time, however, that finding was contended by a review published by the National Academies of Sciences that concluded that marijuana can increase the propensity for abuse, dependency and addiction of other substances.¹³ That same study by the National Academies of Sciences indicated that cannabis use increases the propensity to develop schizophrenia and other psychoses.

The ultimate question, "is marijuana an effective medicinal option for every ailment asserted by the proponents?" is answered a variety of ways depending on who is being asked. What is known, without question, is that the FDA has not approved it for medicinal use. Without this standard form of sanctioned research and approval, the various states will be left with a patchwork quilt of incompatible laws. In fact, the vast majority of

the matters contemplated in the legislation currently proposed would not be necessary if the proponents of marijuana consumption merely went through the customary and accepted processes for FDA approval and federal legalization.

Conclusion

Without FDA approval, the Alabama Policy Institute cannot sanction the legalization of marijuana. But even if the FDA were to approve marijuana, the vast overreach of the proposed legislation would result in API rejecting this bill.

ENDNOTES

- 1 Lyman, Brian. "Alabama Senate Debates Medical Marijuana Bill." *The Montgomery Advertiser*. Montgomery Advertiser, May 9, 2019. <https://www.montgomeryadvertiser.com/story/news/2019/05/08/alabama-senate-debates-medical-marijuana-bill/1147532001/>.
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- 3 The Code of Alabama, 1975, Title 40, Chapter 23, Sections 40-23-31 and 40-23-83.
- 4 21 U.S.C. § 802. U.S. Code, Title 21. Food and Drugs § 802.
- 5 Joyner, Bo. "Marijuana and the Military." Air Force Reserve Command. United States Air Force, August 25, 2016. <https://www.afrc.af.mil/News/Article-Display/Article/925539/marijuana-and-the-military/>.
- 6 HHS Office of the Secretary, Office. "Surgeon General's Advisory: Marijuana Use & the Developing Brain." HHS.gov. US Department of Health and Human Services, August 29, 2019. <https://www.hhs.gov/surgeongeneral/reports-and-publications/addiction-and-substance-misuse/advisory-on-marijuana-use-and-developing-brain/index.html>.
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- 12 Walsh, Zach, Raul Gonzalez, Kim Crosby, Michelle S. Thiessen, Chris Carroll, and Marcel O. Bonn-Miller. "Medical Cannabis and Mental Health: A Guided Systematic Review." *Clinical Psychology Review*. Pergamon, October 12, 2016. <https://www.sciencedirect.com/science/article/pii/S0272735816300939?via=ihub>.
- 13 National Academies of Science, Engineering, and Mathematics. "PDF." Washington, DC, January 12, 2017. https://www.nap.edu/resource/24625/Cannabis_chapter_highlights.pdf