

A Closer Look at the Legislation to Decriminalize Marijuana in New Jersey

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This article is a discussion of the decriminalization components of one of the bills that Governor Murphy signed into law. Practitioners advising clients about any aspect of cannabis have some reading and studying to do.

By **Darren Gelber** and **Lisa Gora** | April 30, 2021

The recently passed legislation concerning the legalization of adult recreational marijuana use in New Jersey is comprehensive and complicated. Although the fact that the legislation itself passed has dominated the headlines, less has been written about the nuts and bolts of marijuana “decriminalization”—that is, the process of migrating the regulation of marijuana usage away from New Jersey’s criminal code (but not completely) and moving toward defining and activating the civil and administrative regulatory schemes.

In this article, we discuss the decriminalization components of one of the bills that Governor Murphy signed into law: The “New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act” (A21). The new cannabis laws, including A21, address what is commonly known as recreational use of cannabis. Medicinal use of cannabis, pursuant to a prescription from a physician, for the most part continues to be governed by previously enacted laws. Below is an overview of information that attorneys, law enforcement, and the public, need to know about recreational cannabis.

For persons 21 years of age or older, certain defined acts associated with the possession and use of a recreational cannabis product is legal, so long as it is:

- 1) First obtained directly from a New Jersey licensed cannabis retailer that received its license from the New Jersey Cannabis Regulatory Commission, or
- 2) Delivered by a New Jersey licensed cannabis delivery service making a delivery of a purchase order fulfilled by that licensed cannabis retailer for off-premises delivery, so long as the delivery is in its original packaging or is accompanied by a sales slip, invoice, receipt, or other statement or memorandum documenting the purchase and delivery.

Note these two conditions exclude someone growing cannabis in their own home. The legalization of adult cannabis use depends entirely upon a licensed retailer as the source of the cannabis. Assuming that the product was obtained in one of the two manners described above, the following acts are legal:

- Possessing, displaying, purchasing, or transporting: cannabis paraphernalia; one ounce (28.35 grams) or less of useable cannabis or the equivalent of one ounce (28.35 grams) or less of usable cannabis as a cannabis product in solid, liquid, or concentrate form (based upon an equivalency calculation for different product forms to be established by the Cannabis Regulatory Commission), or 5 grams (0.176 ounce) or less of cannabis resin.

Take note that possessing, displaying, purchasing, or transporting cannabis in excess of these amounts shall continue to be against the law, and subject the offender to prosecution.

- Transferring without remuneration any of the quantities described above to a person who is of legal age for purchasing cannabis items, provided that such transfer is for non-promotional, non-business purposes. Take note that transferring cannabis in excess of these amounts, or transferring any quantity of cannabis to someone under 21 years of age, shall continue to be illegal and subject the offender to prosecution. However, if there is a transfer made to a person who is not of legal age, and the transfer was done by an employee of a New Jersey licensed cannabis establishment, the illegal transfer is a civil violation exposing the wrongdoer to civil penalties.
- The new laws do not automatically permit a person to smoke, vape, or aerosolize any cannabis item in a public place, and no one is permitted to smoke, vape, or aerosolize any cannabis item in any public place where tobacco smoking is not permitted. Smoking, vaping, or aerosolizing any cannabis item continues to be prohibited in any area where tobacco smoking would be prohibited. Smoking, vaping, or aerosolizing any cannabis item may be permitted in up to 20% of hotel or motel rooms at the discretion of the owner, and may also be regulated in multifamily housing.

In addition, the provisions of A21 contain the following new provisions of law:

- An employer may not refuse to hire or employ someone, or fire or take adverse employment against someone, because that person does or does not smoke, vape, aerosolize or otherwise use cannabis or has cannabinoid metabolites in the employee's bodily fluid.
- However, an employer may require an employee to undergo a drug test when there is a reasonable suspicion that an employee's usage of a cannabis item occurred while engaged in the performance of the employee's work responsibilities, or upon finding any observable signs of intoxication related to usage of a cannabis item, or following a work-related accident subject to investigation by the employer. A drug test may also be conducted randomly by the employer, or as part of a pre-employment screening, or regular screening of current employees to determine use during an employee's prescribed work hours. The employer may use the results of the drug test when determining the appropriate employment action concerning the employee, including, but not limited to dismissal, suspension, demotion, or other disciplinary action.
- To assist and protect both employers and employees, the law requires the Cannabis Regulatory Commission, in consultation with the Police Training Commission, to establish standards and regulations for a "Workplace Impairment Recognition Expert" certification, to be issued to employees or contractors, based on education and training in detecting and identifying an employee's usage of, or impairment from, a cannabis item or other intoxicating substance, and assisting in the investigation of workplace accidents.

In a section of A21 that has not received much public attention, New Jersey law enforcement agencies have been directed to not cooperate with federal authorities in enforcing federal narcotics laws, which continue to classify cannabis as an illegal controlled substance pursuant to the Federal Controlled Substances Act, to the extent that enforcement concerns a cannabis related matter that is now permitted in New Jersey under A21 or other new cannabis laws. New Jersey law enforcement agencies may continue to cooperate with federal authorities in enforcing federal laws that would also constitute violations of the newly amended New Jersey cannabis laws.

Important areas of A21 drastically alter New Jersey's criminal code and significantly reduce the sanctions for possession of marijuana in manners that are not legal under the new cannabis laws. Just by way of example,

under prior law, possession of less than one ounce of marijuana was a fourth degree offense, subjecting the offender to a prison term of up to 18 months. Under the revised law, a first offense of unlawful possession of less than one ounce of marijuana subjects the offender to a written warning. Under prior law, possession of less than 50 grams of marijuana was a disorderly persons offense, potentially exposing the offender to six months in jail. Under the new law, for those over the age of 21, “possession of six ounces or less of marijuana, including any adulterants or dilutants, or 17 grams or less of hashish, is not subject to any punishment, as this possession is not a crime, offense, act of delinquency, or civil violation of law.” The portion of the criminal code addressing possession of drug paraphernalia has been amended to clarify that, for those over the age of 21, possessing, displaying, purchasing, or transporting cannabis paraphernalia are no longer unlawful acts.

The legalization of cannabis possession by adults under the new law will also preclude the police from relying upon many of the tell-tale signs of marijuana as evidence of criminality subjecting someone to search or detention for investigatory purposes. The following new provisions of law will surely require extensive retraining of the state’s law enforcement community:

None of the following shall, individually or collectively, constitute reasonable articulable suspicion of a crime, unless on property used for school purposes which is owned by a school or school board, or at any detention facility, adult correctional facility, or youth correction facility:

- a) The odor of cannabis or burnt cannabis;
- b) The possession of or the suspicion of possession of marijuana or hashish without evidence of quantity in excess of any amount that would exceed the amount of cannabis which may be lawfully possessed pursuant to [the new cannabis laws]; or
- c) The possession of marijuana or hashish without evidence of quantity in excess of any amount that would exceed the amount of cannabis items which may be lawfully possessed pursuant [the new cannabis laws] in proximity to any amount of cash or currency.

The other bills passed as part of adult use marijuana legalization—A1897 and S3454—are also critically important pieces in the marijuana legalization puzzle, but space prohibits us from analyzing them in detail here. S3454 clarifies marijuana and cannabis use and possession penalties for individuals younger than 21 years old, while A1897 implements some of the technical amendments to New Jersey’s criminal code necessary to effectuate A21, and also compel a dismissal and expungement and process for past and current cannabis cases. Practitioners advising clients about any aspect of cannabis have some reading and studying to do. The message is clear—read up before your client (or you) lights up!

Darren M. Gelber is a shareholder at Wilentz, Goldman & Spitzer, P.A., where he chairs the firm’s White Collar Criminal Defense team. **Lisa Gora** is an attorney with the firm, practicing on the Health Law and Corporate teams.

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