

# TOKING, SMOKING, & PUBLIC HEALTH

Lessons from Tobacco Control for Marijuana Regulation



A Law Synopsis by  
the Tobacco Control  
Legal Consortium

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## Introduction



Since this synopsis was first published in 2015, the proliferation of state efforts to legalize the sale and use of marijuana has caused a sea change in the regulation of cannabis across the United States. Moved by stories of those whose suffering and seizures could be eased by the use of medical marijuana, and the economic and personal toll of arrest and incarceration due to marijuana possession, many jurisdictions have significantly scaled back legal restrictions against marijuana. An estimated 65 million Americans, about one-fifth of the country's population, now live in states with some form of legalized marijuana.<sup>1</sup> Since 2012, nine states and the District of Columbia have passed laws permitting adult use of recreational marijuana,<sup>2</sup> while 29 states and three territories permit the use of medical marijuana.<sup>3</sup> At the same time, the public's attitude toward legalization has undergone a rapid shift. A 2017 survey of



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U.S. adults found that 64 percent support marijuana legalization,<sup>4</sup> up from 36 percent more than a decade ago, and 20 percent two decades ago.<sup>5</sup> This is the highest level of support for marijuana legalization in nearly a half century of measurement.

Creating effective regulatory schemes for the legal medical and recreational use of marijuana has proved challenging for both opponents and proponents of these measures. Policymakers and public health professionals considering measures to relax prohibitions of this drug are struggling with a host of administrative and regulatory issues, some of which are familiar to the tobacco control community. These issues include the need to restrict public use, prohibit youth access, develop robust licensing and zoning laws, and regulate the price, advertising, and marketing of marijuana products. In addition, developing effective controls over cultivation, production, processing, tracking, distribution, trafficking, and a variety of other law enforcement issues is especially problematic for marijuana regulation because of the differences in its treatment under state and federal laws. Significantly, evidence-based policy solutions, which are at the heart of tobacco control, are not yet widely available in the marijuana regulatory regime.

This updated synopsis presents a brief overview of regulatory issues related to marijuana legalization, looking at both medicinal and recreational use policies from a public health perspective. It focuses on policy issues that are analogous to those faced in tobacco control and, drawing from lessons learned in the tobacco control realm, describes options that local and state governments might consider when developing marijuana regulations.

Although marijuana and tobacco products differ in many ways — particularly in the health risks they pose — the strategies used to regulate these products are often similar, as are many of the regulatory obstacles they present. The products are comparable in other ways as well. For instance, both tobacco and marijuana products can be ingested orally and smoked in a variety of forms.<sup>6</sup> Marijuana, for example, can be smoked using a rolled cigarette (a “joint” or “spliff”),<sup>7</sup> a hollowed out cigar/cigarillo (“blunt”), a pipe (“bowl”), or waterpipe (“bong”).<sup>8</sup> In addition, cannabis-derived hash oil and wax infused with tetrahydrocannabinol (THC), the main ingredient that produces marijuana’s psychoactive effect,<sup>9</sup> can be consumed through vaporizers similar to those used in electronic cigarettes.<sup>10</sup> Smoking either tobacco or marijuana creates secondhand smoke that can harm others.<sup>11</sup> Both products have a broad appeal to youth, which results in a disproportionately adverse health impact on this population. Both products are widely trafficked. And both tobacco and marijuana products provide, or can provide, significant economic revenue to states and local communities through taxation.

The parallels could go even further. Some tobacco control advocates are concerned that a rapidly growing and increasingly profitable marijuana industry may come to resemble the tobacco industry. They fear that legalizing marijuana may encourage increased investment by major corporations, "including tobacco companies, which have the financial resources, product design technology ... marketing muscle, and political clout to transform the marijuana market."<sup>12</sup> Whatever one's view of marijuana legalization and its future impact on public health, it is clear that state and local authorities tasked with regulating this drug can benefit from the experiences of those who have worked for decades to protect the public from the devastating effects of tobacco use.

### Key Points

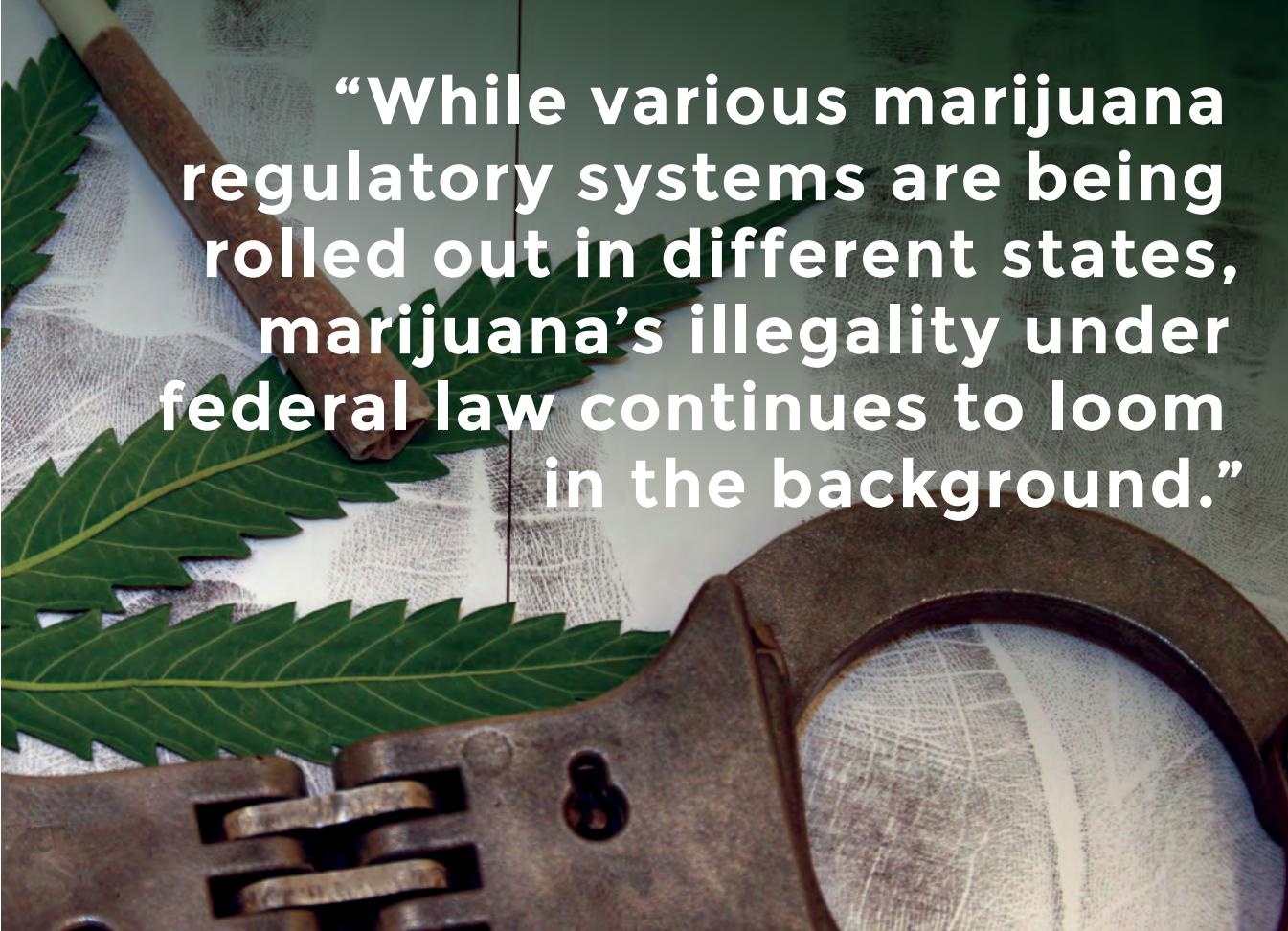
- Although marijuana and tobacco products differ in many ways — including in the health risks they pose — the strategies used to regulate these products, and the regulatory obstacles they present, are often similar.
- Among youth, the perception of the health risk of marijuana has declined and marijuana use has become increasingly socially acceptable, even as the perception of the health risk of tobacco has risen and its use has become increasingly stigmatized.
- States and localities tasked with regulating marijuana for medical and recreational use can benefit from the experiences of those who have worked for decades to protect the public from the devastating health impact of tobacco use.
- Policymakers and public health professionals considering efforts to legalize the sale and use of marijuana are struggling with a host of administrative and regulatory issues, including many familiar to the tobacco control community: the need to restrict public use, prohibit youth access, develop robust licensing and zoning laws, regulate the price, and control the advertising and marketing of marijuana.
- State and localities should look to tobacco policies for guidance on some regulatory methods and challenges, but be wary of using them as templates for marijuana. This is an evolving industry and each jurisdiction has different regulatory systems and administrative structures to consider.
- Given the limited amount of scientific research available on marijuana, state and local regulatory systems will need to be able to adapt to new public health and safety data and policy implementation findings.

## Background



### Legal Status of Marijuana

Marijuana, a mood-altering drug produced by the cannabis sativa plant, is the most commonly used illicit drug in the world.<sup>13</sup> Many scientists and researchers who have studied the more than 300 active chemicals (cannabinoids) in marijuana, including THC,<sup>14</sup> have found that marijuana can be effective in treating a wide range of illnesses and symptoms.<sup>15</sup> In fact, scientific research has already led to the development of three U.S. Food and Drug Administration-approved cannabinoid-based medications, and current studies are examining the potential medicinal benefits of other pharmaceuticals that contain marijuana's active ingredients.<sup>16</sup> Nevertheless, under the federal Controlled Substances Act (CSA), marijuana



**“While various marijuana regulatory systems are being rolled out in different states, marijuana’s illegality under federal law continues to loom in the background.”**

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is categorized as a Schedule 1 drug — that is, a drug with high potential for abuse with no currently accepted medical use in treatment in the U.S.<sup>17</sup> Under the CSA, it is a federal offense to cultivate, manufacture, distribute, sell, purchase, possess, or use marijuana.<sup>18</sup>

Despite this federal law, as of April 2018, at least 29 states, along with the District of Columbia, Guam, and Puerto Rico, have passed laws exempting qualified users of medicinal marijuana from penalties imposed under state law.<sup>19</sup> Moreover, a growing number of states have decriminalized possession of small amounts of marijuana, and in 2012 ballot initiatives, Colorado<sup>20</sup> and Washington<sup>21</sup> became the first states to legalize, regulate, and tax the sale of marijuana for recreational use by individuals over the age of 21. In 2014, voters in Alaska,<sup>22</sup> Oregon,<sup>23</sup> and the District of Columbia<sup>24</sup> followed suit by passing ballot initiatives to legalize the possession and home cultivation of small amounts of marijuana for recreational use, and in the cases of Alaska and Oregon, to regulate the sale of marijuana. In 2016, voters in California<sup>25</sup> (which has the longest-running medical marijuana system in the U.S.), Nevada,<sup>26</sup> Massachusetts,<sup>27</sup> and Maine<sup>28</sup> passed ballot initiatives to permit adult residents of their states to use cannabis for recreational use, possess a limited amount of marijuana and marijuana concentrates, and grow up to six marijuana plants at one time. Finally, on January 22, 2018, Vermont became the first state whose legislators passed a law (as opposed to a voter-initiated ballot measure) legalizing adult use of marijuana.<sup>29</sup> Vermont's law does not set up a regulatory system for sales or production but does allow limited home cultivation.

Given the rise in the number of jurisdictions that have legalized marijuana for medicinal purposes and recreational use, as well as the proliferation of marijuana legislative proposals across the U.S., state and local policymakers are busily developing regulatory regimes to cover the cultivation, processing, marketing, sale, distribution, taxation, and use of marijuana and its derivative products.<sup>30</sup> While various marijuana regulatory systems are being rolled out in different states, marijuana's illegality under federal law continues to loom in the background.

At first blush, federal law would appear to be in conflict with any state law that allows marijuana to be used for either recreational or medicinal purposes. Typically, in a direct conflict of laws, federal law preempts state law.<sup>31</sup> The case of marijuana, however, is anything but typical, with a majority of U.S. registered voters believing the drug should be legalized, and between 77 and 84 percent of the population believing that medical marijuana has legitimate medical uses for those suffering terminal illness or chronic pain.<sup>32</sup> More importantly to the courts, Congress did not intend for the Controlled Substances Act to completely divest states of their ability to regulate controlled substances.<sup>33</sup> States maintain the freedom to pass laws related to marijuana (and other controlled substances) as long as a state's law does not create a "positive conflict" with federal law, such that the two laws "cannot consistently stand

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together.”<sup>34</sup> Although it would seem that a state law allowing for the sale and use of marijuana would create a positive conflict with federal law, this area of law remains unsettled.

Aware of the questions arising about federal preemption of state marijuana laws, the U.S. Department of Justice issued a memorandum to federal prosecutors on August 29, 2013, to clarify its position on the enforcement of marijuana laws.<sup>35</sup> The memo stated that the agency is most interested in using its “limited investigative and prosecutorial resources” to prosecute specific marijuana-related criminal activities, including distribution of marijuana to minors, driving while under the influence of marijuana, growing marijuana on public land, and illegal drug subterfuge.<sup>36</sup>

In a significant move, the Department announced that the federal government under President Obama’s administration would be unlikely to prosecute individuals or organizations engaged in marijuana activities that are conducted in clear compliance with state and local narcotics laws that permit and regulate these activities.<sup>37</sup> Although in early 2018, U.S. Attorney General Jeff Sessions issued a Marijuana Enforcement memorandum rescinding the Department’s earlier guidance on this issue,<sup>38</sup> the Trump administration’s position regarding federal prosecution within states that have legalized marijuana is unclear. The U.S. Department of Justice has great discretion in choosing whether, and to what extent, to bring criminal prosecutions for violations of the Controlled Substances Act.<sup>39</sup> The federal government’s current “hands off” approach to marijuana activities in legalized states could change at any time.<sup>40</sup>

Given the shifting political climate, the extent to which the Controlled Substances Act preempts state marijuana provisions, whether medicinal or recreational, remains murky, and the regulatory and licensing aspects of some of these laws may still pose preemption issues for state and local authorities.<sup>41</sup> Even as the national debate on marijuana continues and the federal and state regulatory landscapes on marijuana are changing, significant questions remain about the ability of state and local authorities to pursue policies that deviate from those advanced by the federal government. Also, considering the many decades of scientific evidence it took before the federal government asserted its regulatory authority over tobacco products in 2009, it may be worth establishing authorities’ rights to impose regulations from the outset, because of the difficulty in expanding regulatory scope after industry and consumer expectations are established.<sup>42</sup>

## Overview of State Marijuana Laws

State laws permitting the use of medical or recreational marijuana vary greatly in their scope and implementation strategies, and state and local governments continue to debate

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the safety, efficacy and, at times, legality of measures taken to implement these laws. The existing laws are frequently confusing. Even the terms referring to marijuana “legalization” and “decriminalization” are often misunderstood. A state “legalizes” conduct when an individual who engages in this conduct is not subject to any state penalty. Washington and Colorado, for example, have removed all state-imposed penalties for qualified marijuana activities.<sup>43</sup> A state “decriminalizes” conduct when criminal penalties are removed, but civil penalties remain. To date, twenty-one states and the District of Columbia have decriminalized the possession of small amounts of marijuana for personal consumption.<sup>44</sup> New York, for instance, removes criminal penalties for possession of small amounts of marijuana, but retains civil penalties.<sup>45</sup>

States with medical marijuana laws generally have a patient registry that protects patients against arrest by the state, but not the federal government, for possession of up to a certain amount of marijuana for authorized personal medicinal use. The medical conditions for which marijuana can be prescribed vary by state. Patients are required to have prescriptions from qualified physicians, although these are generally called “recommendations” or “referrals,” because of the federal prescription prohibition. Medical marijuana growers or dispensaries are often called “caregivers” and may be limited to a certain number of plants or products per patient. Certified patients and caregivers are also exempt from arrest and prosecution by the state for growing and possessing marijuana so long as they comply with the state’s legal requirements, such as maintaining appropriate documentation, dispensing marijuana to those with appropriate referrals, and not exceeding allowable limits on amounts possessed, cultivated, and used. Some of the most important policy issues regarding medical marijuana include defining the universe of conditions for which a referral is medically proper, creating a system for dispensing the drug, and developing and maintaining an active and up-to-date registry of approved patients and providers.<sup>46</sup> Depending on the jurisdiction, local governments (as well as the state) may grapple with these issues.

## Regulatory Authority

States with medical or recreational marijuana laws vary significantly in how much regulatory authority is delegated to or retained by local jurisdictions. For example, Washington’s marijuana voter initiative delegated all regulatory authority to the state’s Liquor Control Board,<sup>47</sup> which developed rules to license and oversee recreational marijuana growers, processors, and retailers. Most local governments then passed municipal or county ordinances to control where and how marijuana retail businesses could be established or sited. Because the ability of localities to regulate recreational marijuana was not clearly described in the marijuana initiative, the Washington State Attorney General issued an opinion in 2014 clarifying that the state law passed by voters did not preempt local governments from banning or regulating marijuana



businesses in the state.<sup>48</sup> Two years after a legalized marijuana market opened in Washington, roughly one-third of the state's residents now live in communities where recreational marijuana sales are prohibited, and the rest live in communities where retail sales are largely restricted.<sup>49</sup>

In other states, such as Colorado, the marijuana law allows local governments (rather than a state board) to issue licenses to retailers and enact regulations concerning the time, place, manner, and number of marijuana establishments (e.g., cultivation facilities, product manufacturing facilities, and retail marijuana stores) in their communities.<sup>50</sup> Moreover, a state might control all aspects of how marijuana growers or businesses function, but still allow local governments the legal authority to pass zoning and licensing ordinances that prevent marijuana retailers and dispensaries from operating in their communities.

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The delegation of partial authority in marijuana regulation is similar to tobacco control laws in which states preempt local regulation in certain areas, such as smoke-free ordinances or licensing regulations.<sup>51</sup> At the same time, this delegation of authority illustrates a key difference between marijuana and tobacco regulation. Since marijuana is illegal under federal law, any regulation that allows for the use of the product needs to be developed and implemented at the state or local level. In tobacco, however, while state and local governments have a great deal of regulatory authority, certain roles (such as creating product standards) are exclusively in the federal government's domain. Given the range of laws and preemptive strictures, as well as the evolving nature of many regulatory regimes, policymakers drafting marijuana regulations (as with tobacco control regulations) need to ensure that the state or local government in question has the legal authority to pass and enforce the laws. An attorney with expertise in this area and familiarity with the relevant jurisdictions can provide needed guidance here.

[One important side-note: each state's regulatory regime for legalization still effectively leaves marijuana products outside that regime "illegal" under that state's law. While possession and use may be fully decriminalized, states and local jurisdictions need to treat regulated and unregulated products differently to give meaning to the legal market. This is comparable in a way to the distinction between black-market cigarettes and legal cigarettes. Legalization and decriminalization allow for some use of marijuana products, but do not go so far as to establish a legal right akin to a constitutional right to smoke.]

## Public Health Issues

In 2017, the National Academies of Science, Engineering, and Medicine concluded that cannabis or cannabinoids are effective for treating chronic pain in adults and chemotherapy-induced nausea and vomiting and for improving patient-reported multiple sclerosis spasticity symptoms.<sup>52</sup> Despite evidence of the benefits of medical marijuana for these and to a lesser extent other conditions, and despite the association of medical cannabis laws with significantly lower state-level opioid overdose mortality rates,<sup>53</sup> underlying public health concerns remain about its health risks. Although the use of tobacco has far more documented adverse health effects than the use of marijuana,<sup>54</sup> marijuana is not a risk-free drug.

Research has shown that frequent marijuana use can impair learning; interfere with memory, perception, and judgment; and damage the heart, lungs, and immune system.<sup>55</sup> These risks are magnified for people who start using marijuana at a young age, and some of the effects are irreversible. For example, frequent marijuana use has been linked to a decrease in IQ, addiction, and, if used over a prolonged time, recurring psychotic experiences.<sup>56</sup> Marijuana has also been shown to pose serious health risks when used by pregnant women, since THC crosses the placental barrier and accumulates in fetal tissues.<sup>57</sup> Some studies have shown that

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children born to mothers who used marijuana during pregnancy can suffer low birth weight and experience developmental problems.<sup>58</sup> Moreover, because marijuana impairs judgment and motor coordination and slows reaction time,<sup>59</sup> a driver inebriated on marijuana has an increased chance of being involved in, and being responsible for, an accident.<sup>60</sup>

In addition to the immediate public safety concerns posed by drivers under the influence of marijuana, marijuana smokers also risk exposing others to secondhand smoke, which can be a health hazard. Results from laboratory testing under standard conditions found that “marijuana smoke contains significantly higher levels of toxic compounds — including ammonia and hydrogen cyanide — than tobacco smoke and may therefore pose similar health risks.”<sup>61</sup> Ammonia levels were 20 times higher in marijuana smoke than in tobacco smoke, while nitrogen oxides, hydrogen cyanide, and aromatic amines were present in marijuana smoke at levels 3 to 5 times higher than in mainstream tobacco smoke.<sup>62</sup> A recent live animal study using rats as subjects found that, similar to tobacco smoke, marijuana secondhand smoke exposure impairs the ability of arteries to vasodilate (that is, widen properly).<sup>63</sup> The exposure to marijuana secondhand smoke diminishes blood vessel function to the same extent as tobacco, but the harmful cardiovascular effects last three times longer.<sup>64</sup> Although the impairment is temporary, repeated exposure could lead to long-term cardiovascular harm.

Another health risk stems from the growing practice of using electronic smoking devices, such as e-cigarettes, to vaporize cannabis. Lack of regulatory oversight of electronic smoking devices and e-liquids has been a longstanding concern among public health and tobacco control professionals, particularly given the popularity of these devices among young people.<sup>65</sup> Research, for instance, has shown that the heating element in many of these devices imbues e-liquid aerosol with unsafe levels of heavy metals, as well as chemicals such as acetaldehyde and formaldehyde.<sup>66</sup> Now, as the perceived risk of harm associated with marijuana is decreasing, a growing number of youth report vaping liquid hash oil, waxy forms of THC, or dried cannabis buds and leaves.<sup>67</sup> THC concentrations of vaporized hash oil and waxes can exceed that of dried cannabis by four to thirty times.<sup>68</sup> A study of California high school students who reported ever having used e-cigarettes found that 27.1 percent used cannabis or hash oil in them.<sup>69</sup> A comparable study of teens in Connecticut found similar results: one in five high school students who report using an electronic smoking device had also used it to vaporize cannabis or byproducts like hash oil.<sup>70</sup>

Few people who use e-cigarettes or devices such as weed vape pens<sup>71</sup> to ingest cannabis can be confident in exactly what they are vaping. Little is known about the chemicals mixed with the cannabis oil, the materials that comprise the hardware, and the harm caused by inhaling or exhaling any of these substances.<sup>72</sup> Given the lack of regulatory control over these products, the opacity of the vaporizer supply chain, and the unknown quality of the cannabis oil and

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other chemicals in vape cartridges, many companies — as one scientist put it — appear to be “doing their safety testing on the public.”<sup>73</sup> Studies have found numerous potentially hazardous natural contaminants and artificial adulterants in cannabis and cannabis preparations, and “some extraction and inhalation methods used for certain dosing formulations (tinctures, butane hash oil, ‘dabs’) can result in substantial pesticide<sup>74</sup> and solvent contamination.”<sup>75</sup> One other note: Over the past few decades, selective breeding of marijuana species has resulted in higher concentrations of cannabinoids in the plant, resulting in a more potent psychotropic effect and greater risk of adverse effects than in the past.<sup>76</sup>

In sum, although the Institute of Medicine, along with the National Academies of Sciences and many other leading health organizations, recognizes the therapeutic value of cannabinoid drugs for several conditions, the medical community continues to view smoked marijuana as “a crude THC delivery system that also delivers harmful substances.”<sup>77</sup>

## Public Health Goals

Given these health concerns, most regulatory schemes for marijuana focus on limiting the overall consumption of recreational marijuana and restricting youth access. These public health goals are similar to tobacco control goals, and are accomplished through similar strategies, such as regulating the use, marketing, sale, licensing, and pricing of the product. Unlike tobacco control, however, where state and local authorities have a wealth of research and experience in developing the most effective policies to reduce and prevent tobacco-related disease and death, the regulation of marijuana as a legal product is a new frontier.<sup>78</sup> Unfortunately, the lack of aggregated research on the health effects and potential therapeutic potential of marijuana is not only significantly impeding the scientific understanding of cannabis, but also the advancement of public policy and overall public health.<sup>79</sup> Moreover, marijuana regulation continues to be complicated because, unlike tobacco, marijuana use is still illegal at the federal level and in most states. The following section looks at several effective policy options for regulating tobacco products that could be considered in regulating marijuana.

## Regulatory Options



### Usage Restrictions

#### Public Health Rationale

One policy area of significant overlap between marijuana and tobacco control regulation is product use. Although both tobacco and marijuana products can be consumed in different ways, they are primarily smoked or vaped. The combustion of marijuana, like tobacco, produces carcinogens and toxins. As mentioned above, research has found that marijuana smoke contains higher levels of several toxic compounds than tobacco smoke, and it can also cause respiratory symptoms, such as coughing, phlegm, and wheezing.<sup>80</sup> Moreover, heavy passive exposure to marijuana, through secondhand smoke, can result in measurable THC concentrations in nonusers' blood serum and urine.<sup>81</sup>

**“Marijuana growers and manufacturers continue to invent new ways in which users can ingest this drug other than by smoking it.”**



Vaporizing cannabis is not a recent phenomenon.<sup>82</sup> Over the last several years, however, the use of electronic smoking devices to vape marijuana has become increasingly popular in the U.S. — particularly among young people.<sup>83</sup> In fact, a study of Connecticut teens found that nearly one in five high school students who admit using an electronic smoking device has also used it to vaporize cannabis or byproducts like hash oil.<sup>84</sup> Youth can covertly use e-cigarettes and devices such as weed vape pens with little risk of detection because these items typically emit no distinguishable odors.

In addition to concern about the adverse health impact of secondhand smoke, many in the public health community are troubled by the social impact — particularly on the young — of normalizing the smoking or vaping of marijuana in public.<sup>85</sup> The growing social acceptability of marijuana makes it important to have strong policies prohibiting its use in public places and workplaces. Also, many public health professionals cite public safety as an important reason to restrict use of marijuana when operating a motor vehicle or heavy machinery. Research has shown that marijuana impairs motor coordination; moreover, the concurrent use of marijuana and alcohol may increase the risk of traffic crashes, acute health effects, and other harms.<sup>86</sup>

## Policy Challenges & Considerations

In states with medical and recreational marijuana laws, restricting the use of marijuana in certain venues can present challenges for authorities. State laws vary, as do the legal consequences for violations. Below are a few areas where states typically prohibit the use of marijuana.

- **Use in public places.** Under federal law, the use of marijuana in public places is prohibited. State laws as well commonly include prohibitions against public use of marijuana. In, for example, all states where adult use recreational marijuana is legal, the smoking of marijuana in public is illegal and punishable by a fine.<sup>87</sup> Some state clean indoor air laws may be written broadly enough to prohibit the smoking of marijuana in places where smoking tobacco products is prohibited.<sup>88</sup> State and local smoke-free laws should be reviewed for their comprehensiveness and, if possible, expanded to include language prohibiting smoking marijuana in public places and places of employment.<sup>89</sup>

Because marijuana can be ingested in ways other than smoking, vaporizing, or other means of inhalation, marijuana public use provisions often include language that covers different modes of consumption, or they broaden the definition of "smoking," "tobacco product," or other terms to accommodate the use of marijuana.<sup>90</sup> In several states, such as New York, certified users can consume medical marijuana in many different ways (for example, extracts, tinctures, oils, and edibles), but are prohibited from smoking the drug.<sup>91</sup>

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Marijuana public use laws, as with smoke-free laws, often vary in the way they define terms such as “public,” “public place,” or “public space.” Many marijuana public use provisions are more inclusive than smoke-free use provisions and, for example, define “public place” to include both indoor and outdoor locations, such as parks, sidewalks, streets, parking lots, playgrounds, arenas, and other areas accessed by large groups of people or where the public is invited.<sup>92</sup> On the other hand, definitions vary widely among states. Alaska’s marijuana law, for instance, excludes “retail marijuana shops” from the definition of “in public.”<sup>93</sup> Local and state governments should consult with attorneys before amending or drafting marijuana provisions, to ensure that unintended loopholes, exemptions, or inconsistencies are flagged and addressed.

The marijuana industry, like the regulatory landscape, is rapidly changing. For example, as mentioned above, many electronic smoking devices can be used to consume hash oil or similar substances.<sup>94</sup> These devices, which do not emit the odor of marijuana, can present enforcement challenges that are especially acute in areas that allow the use of electronic smoking devices. State and local governments seeking to prohibit the public use of electronic smoking devices may thus have a dual public health purpose: (1) to prevent enforcement problems stemming from confusion as to whether an individual is using an electronic smoking device or a conventional cigarette; and (2) to prevent the surreptitious public consumption of marijuana or other drugs through an electronic smoking device.

Also, as with hookah parlors, cigar bars, and today’s vaping lounges, some states have seen a rise in “private” marijuana clubs — also called cannabis or pot clubs — even though many of these establishments may not technically be exempt from laws that prohibit the use of these products in public settings.<sup>95</sup> In 2016, for example, Maine voters approved marijuana “social clubs” as part of the state’s legalization referendum. In 2018, concerned that allowing licensed marijuana clubs could put more impaired drivers on Maine roads, legislators revised Maine’s Marijuana Legalization Act, eliminating all references to social clubs. Although Maine may now not have the distinction of being the first state to license marijuana clubs, it still — like many other states — has its share of underground marijuana-friendly venues.<sup>96</sup>

Similar “private clubs” were established in recent years in attempts to circumvent clean indoor air laws by allowing cigarette smoking. State and local governments that seek to regulate public use of marijuana should be aware of such tactics and should review existing smoke-free laws or marijuana laws to ensure that such clubs are covered under any marijuana regulation.

- **Use in workplaces.** As mentioned earlier, in the interest of public and work safety, states typically prohibit the use of marijuana when employees are operating motor vehicles such as buses, boats, trains, and similar vehicles, as well as heavy machinery.<sup>97</sup> Most states also allow employers to prohibit all employee use of tobacco products and marijuana in an effort to develop a healthier workforce.

A growing number of employers have adopted zero-tolerance drug-free workplace policies that prohibit drug use both on and off-site. Moreover, under the Occupational Safety and Health Administration Act, employers have a general duty to provide a safe workplace.<sup>98</sup> Employees who use marijuana at work could be considered a workplace hazard if their use poses a danger to other workers. In addition, some employers may face the loss of federal funding or could be subject to administrative fines if they fail to have and enforce federal, state, or local policies aimed at achieving a drug-free workplace.<sup>99</sup>

One possible challenge to such policies is that under the Americans with Disabilities Act, an employer is required to make a reasonable accommodation to a qualified applicant or employee with a known disability so the applicant or employee can perform a particular job.<sup>100</sup> However, since federal law classifies marijuana as a prohibited controlled substance, it does not recognize disabilities in the context of medically-approved marijuana use, even if approved by a state.<sup>101</sup> Also, the Americans with Disabilities Act exempts current illegal drug users from its definition of “disabled” person.<sup>102</sup> Thus, while it is important to ensure that employees are not discriminated against because of their medically prescribed use of marijuana, employers are not legally obligated to accommodate an employee’s use, possession, sale, or transfer of marijuana in the workplace — particularly if it affects the employee’s performance or creates safety concerns.

If employees disclose that they have a disability and are certified to use medical marijuana, their employer might want to meet with them to discuss whether other equally effective treatments would allow them to perform the essential functions of the job. Many unanswered questions remain about the impact of medically prescribed marijuana in the workplace. For example, some state disability laws may not consider an employee’s behavior in compliance with state medical marijuana laws to be illegal drug use. Several state supreme courts have upheld the right of employers to discharge, or refuse to hire, employees who use medical marijuana, even if such usage is allowed by state law.<sup>103</sup>

As a side note: on Feb. 1, 2018, Maine became the first jurisdiction in the U.S. to protect workers explicitly from adverse employment action based on their use of marijuana and marijuana products, provided the use occurred outside the workplace.<sup>104</sup> Because marijuana laws are so jurisdiction-specific, the best resource for questions in this area is local counsel.

- **Use in multi-family housing.** Secondhand smoke, whether from tobacco or marijuana, spreads throughout multi-unit dwellings. This infiltration of smoke can damage the health of other residents and increase the costs of maintaining the apartments. Concern over the health impact of secondhand marijuana smoke led the American Society of Heating, Refrigerating, and Air Conditioning Engineers (ASHRAE) to update its national air standards to include both cannabis smoke and emissions from electronic smoking devices in its definition of "environmental tobacco smoke."<sup>105</sup>

Private, public, and other subsidized housing owners have the authority to adopt smoke- and tobacco-free policies which, in addition to combustible tobacco products, can include e-cigarettes and both medical and recreational marijuana. For resources, policy options, and additional information on issues related to smoking and marijuana use in residential dwellings, including the U.S. Department of Housing and Urban Development's smoke-free public housing requirement, visit the Public Health Law Center's website.<sup>106</sup>

- **Use when driving.**<sup>107</sup> Recent epidemiological studies have proven that cannabis users who drive while under the influence are at "increased risk of motor vehicle crashes."<sup>108</sup> As a result, many states with marijuana laws include a prohibition on driving while under the influence of marijuana.<sup>109</sup> However, determining THC-impairment can be difficult because impairment can be affected by several variables, including tolerance, amount of THC consumed, and mode of consumption.<sup>110</sup> Moreover, THC can be detected in the blood well outside the window of impairment.<sup>111</sup> For instance, smoking or vaporizing marijuana may cause desired effects within a matter of minutes, while ingestion results in a more gradual and delayed reaction, ranging from a half hour to several hours.<sup>112</sup> Thus, because marijuana does not take effect immediately or dissipate rapidly, a user may consume a product and then experience its effect later when driving.

Research is ongoing to identify the amount of THC concentration in the blood that indicates impairment. Most states have laws that equate any detectable level of THC metabolite in urine with detectable levels of actual THC in blood, and criminalize both as indicators of impaired driving. To date, eighteen states have zero tolerance or non-zero per se laws for marijuana.<sup>113</sup> (Per se laws make it illegal to drive with amounts of specified drugs in the body that exceed set limits.) In some states, like Colorado and Washington, that limit is 5 nanograms per milliliter of blood, or 5 parts per billion.<sup>114</sup> In the meantime, penalties for violating these laws vary by jurisdiction, and can include criminal sanctions, as well as the suspension or revocation of a user's driver's license and medical marijuana card.<sup>115</sup>

## Youth Access

### Public Health Rationale

Nationally, more adolescents used marijuana than tobacco in 2016, with 16 percent of high school sophomores and 25 percent of high school seniors reporting marijuana use in the past 30 days, compared with 5 percent and 11 percent respectively for tobacco.<sup>116</sup> In fact, according to a federal study, cannabis is consumed by at least 2 million adolescents and 7 million young adults in the U.S.<sup>117</sup> Just as adolescents who use tobacco tend to become addicted to nicotine,<sup>118</sup> research shows that young people who frequently use marijuana can also find themselves addicted.<sup>119</sup> Studies also indicate that youth are particularly susceptible to adverse health impacts of marijuana use, including the risk of serious mental health problems.<sup>120</sup> In addition, youth's perception that marijuana is harmful has greatly declined in recent years.<sup>121</sup>

As with the tobacco industry, which continues to develop new non-cigarette tobacco products, marijuana growers and manufacturers continue to invent new ways in which users can ingest this drug other than by smoking it. These include capsules, vaporization, edibles (such as brownies, flour, "cannabutter"), liquids (such as tea), and even suppositories.<sup>122</sup> With the increase of "new" marijuana laws has come a rise in products that appeal to youth. The medical and recreational marijuana industry now sells THC-infused chocolate bars, peanut butter cups, hard candies, and lollipops.<sup>123</sup> Although some of these products may be designed for young patients whose medical conditions make them eligible for medical marijuana, they are also likely to appeal to kids who simply enjoy candy.

Moreover, as with flavored cigarettes and e-cigarettes, which are targeted to youth, concern is growing about co-use of tobacco and marijuana among young people, particularly African-American youth. Little cigars and cigarillos are also popular with youth, and research has shown that the tobacco industry is manipulating cigar products and marketing to capitalize on the appeal of marijuana to young people and other priority populations and to promote dual use. For example, a growing number of cigars are marketed with "concept flavors" that suggest references to marijuana (e.g., Jazz, Summer Twist, Moontrance) or with terms like "blunt" in brand names (e.g., Royal Blunts, Bluntville, Phillies Blunt, and True Blunt). In addition, electronic smoking devices are often promoted in ways to suggest that the same products can be used for vaping both nicotine and marijuana.<sup>124</sup>

As with tobacco products, where the sweet taste, smell, and alluring packaging of flavored products, including dissolvables and candy-flavored nicotine "juice," attract children, a growing number of poisonings have been attributed to the consumption of kid-friendly marijuana

products such as cookies, chocolate bars, and brownies.<sup>125</sup> Disturbingly, between 2005 and 2011, the rate of poison center calls for unintentional pediatric marijuana exposure in children ages 9 and under more than tripled in states that decriminalized marijuana before 2005.<sup>126</sup> The poison center call rate in states that enacted legislation between 2005 and 2011 also increased over that period.<sup>127</sup> States that had not passed marijuana decriminalization showed no change in call rates.<sup>128</sup> Although the laws in these states might have made residents less willing to report poisonings, the surge in reported incidents of child poisonings in states where marijuana is decriminalized is still concerning.

## Policy Challenges & Considerations

Tobacco policy experts have attempted to reduce youth consumption in several ways, including increasing the minimum age for buying tobacco, requiring that products be sold in child-resistant packaging, implementing marketing restrictions, and enacting other broad sales restrictions, both at the point-of-sale and within a certain distance of schools, parks, playgrounds, and other youth venues. Many of these same strategies can be used to limit youth access to marijuana. As with any advertising restriction, First Amendment implications should be considered before moving forward.

All state recreational marijuana laws prohibit individuals under the age of 21 from possessing or using marijuana or marijuana-infused products, and require all applicants and employees working in licensed marijuana establishments (producers, processors, and retailers) to be at least 21 years old.<sup>129</sup> Although effective age restrictions are critical steps in reducing youth access, the proliferation of youth who use e-cigarettes to vape cannabis indicates the need for more regulatory oversight over these products, as well as methods, such as social media platforms and online directories, such as Weedmaps,<sup>130</sup> by which underage users obtain cannabis.<sup>131</sup> Unlike tobacco, where federal law requires local retailer compliance checks to prevent underage purchases, no similar mandate, or resources, exist for marijuana retailer youth compliance checks.<sup>132</sup>

Moreover, unlike tobacco policies, some recreational marijuana policies include “grow your own” provisions, which normalize household cannabis use and increase exposure, access, or diversion to youth. These provisions make it challenging for state governments to prevent youth from engaging in cannabis use or cultivation.<sup>133</sup> Publicizing age restrictions and the need to keep marijuana products out of reach of children could be effective public safety requirements. (Another complicating factor that differentiates medical marijuana from tobacco control policy, however, is that states with medical marijuana laws generally allow young patients with certified medical conditions to use and possess medical marijuana as long as they have a physician’s recommendation.<sup>134</sup>)

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In light of the rash of incidents involving accidental consumption of marijuana (similar to recent reports of nicotine e-juice poisoning),<sup>135</sup> state and local governments should consider requiring tamper-proof, child-resistant packaging of marijuana products and public health warnings on marijuana products. Product packaging should clearly indicate that it contains cannabis and is not for consumption by those under 21.<sup>136</sup> Labels that provide accurate information about a product's ingredient list, serving size, and expiration date would be helpful as well, but given limited reliable quality control testing and the lack of regulatory standards,<sup>137</sup> that might be challenging at first.<sup>138</sup> At the very least, the marijuana industry could adapt tobacco control measures and limit product flavoring, packaging, and marketing that appeals to youth.

Also, as with tobacco control — and indeed all — regulations, local governments need to ensure they have sufficient regulatory authority to enact policies and that they are not preempted from enacting measures that are more stringent than state law. Policies need to be carefully drafted with strong enforcement provisions that clearly identify the enforcing agent, process, and penalty for violators. In general, tobacco youth access policies that focus primarily on the retailer tend to be more effective than those that focus on the minor attempting to purchase or use the product. Because complicated legal issues may be implicated, be sure to consult with an attorney before moving forward with any of these policies.

## Retailer Licensing

### Public Health Rationale

Licensing tobacco retailers, wholesalers, and distributors is a way for state and local authorities to protect the health and safety of their communities by ensuring the accountability of those engaged in the distribution and sale of these products.<sup>139</sup> Generally used to help enforce tobacco tax and point-of-sale policies, licensing and zoning laws can provide a regulatory framework to achieve many of the public health goals of marijuana regulation.<sup>140</sup> For example, studies have shown that greater availability of tobacco products results in increased youth smoking rates,<sup>141</sup> as well as a higher incidence of tobacco-related disease, especially in low-income communities.<sup>142</sup> Because of this, licensing and land use restrictions, such as zoning ordinances and conditional use permits, have long been effective ways to reduce the number, location, density, and types of tobacco retail outlets,<sup>143</sup> which have a direct impact on community health outcomes. In addition to restricting where tobacco products are sold, licensing requirements can also control how they are sold by (for example) limiting product displays and certain types of point-of-sale advertising.<sup>144</sup>

## Policy Challenges & Considerations

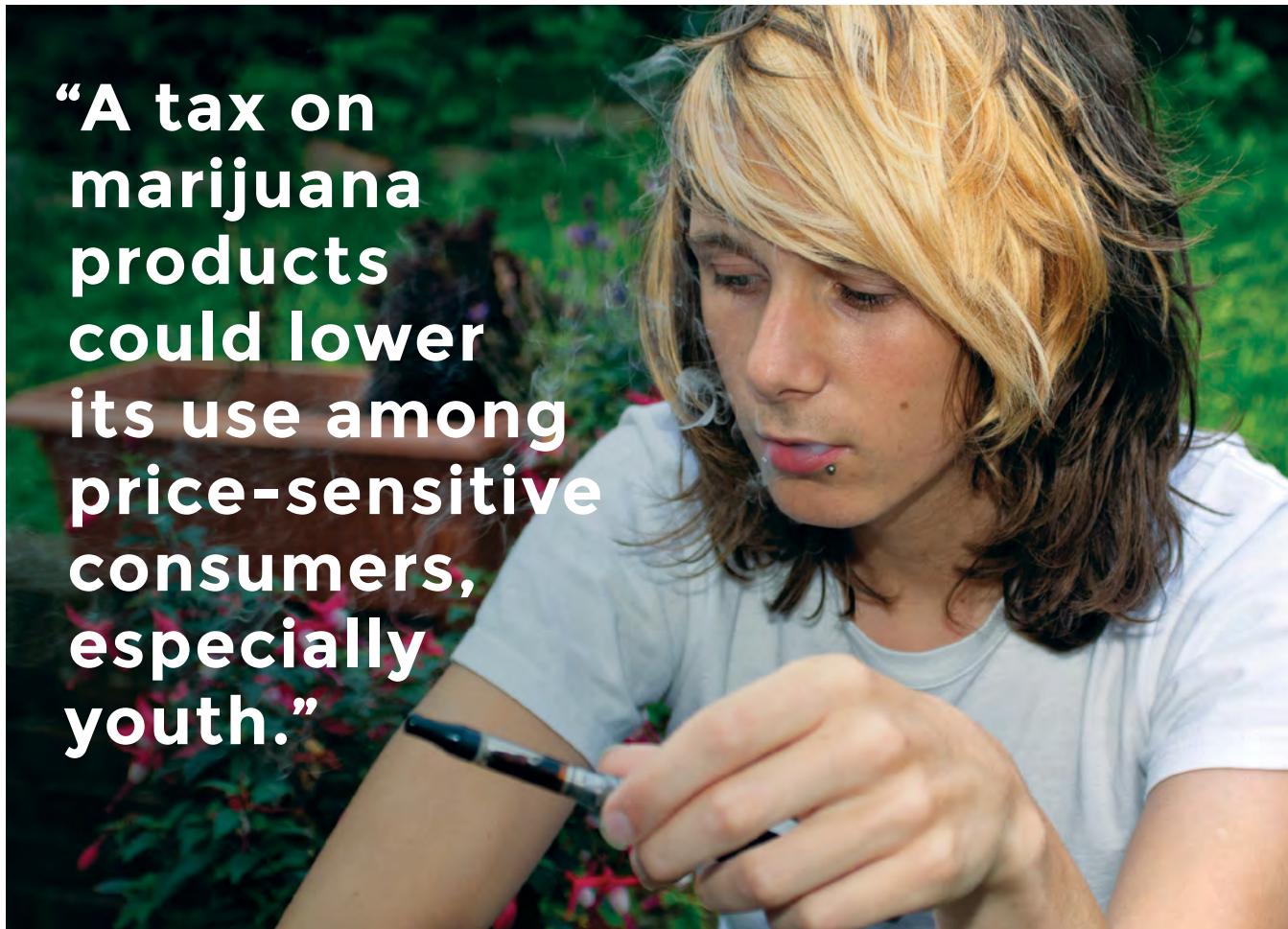
As with tobacco retailers, state and local governments have an interest in controlling the number, location, concentration, and types of marijuana wholesalers, retailers, and distributors, but with the added responsibility of overseeing marijuana cultivators and manufacturers in each community. License suspension or revocation, as well as monetary fines, are effective enforcement mechanisms, and licensing authority is a potent regulatory tool. Nevertheless, state marijuana laws vary in how much authority localities have to license or regulate marijuana establishments.

In states that allow recreational marijuana use and legal sales, state-implemented regulatory and licensing regimes control the cultivation, distribution, and sale of marijuana within the state. The regulatory and licensing provisions enable the state to impose controls on the production and distribution of marijuana and to identify those individuals who have met the requirements to engage in marijuana-related activities.<sup>145</sup> At least twenty-seven of the states (and D.C.) that allow medical marijuana use have state-registered dispensary laws, under which the state government regulates and licenses the dispensaries.<sup>146</sup> Marijuana dispensaries seeking licensure must meet jurisdiction-specific licensing requirements. These requirements typically include restrictions on how far they must be located from schools or similar locations frequented by youth; restrictions on operating within certain distances of other dispensaries or establishments such as smoke shops or liquor stores;<sup>147</sup> restrictions on the types of outlets that can sell marijuana products; age restrictions for dispensary employees who sell or otherwise distribute marijuana; and minimum sales age requirements for purchasers (including specific processes for verifying their age).<sup>148</sup>

In addition, state and local governments could consider adopting policies to limit point-of-sale advertising of marijuana products, such as restricting the placement of ads in certain store locations and restricting product displays, or even posting health warning signs or posters at marijuana retail establishments. Keep in mind that restrictions on advertising at the point of sale may face legal challenges on First Amendment grounds, so these laws will need to be drafted carefully to withstand legal scrutiny.<sup>149</sup>

Yet another strategy that has worked successfully with tobacco control retailers is to provide them with incentives for meeting compliance goals. For example, the cost of the annual licensing fee could be lowered if a retailer meets certain requirements, such as having no compliance violations over the past year or using a cash register that reads the magnetic strip on drivers' licenses to verify age. This type of license incentive program could also be used to motivate marijuana retailers to comply with licensing laws, thus reducing youth use of marijuana products.<sup>150</sup>

**“A tax on marijuana products could lower its use among price-sensitive consumers, especially youth.”**



## Pricing

### Public Health Rationale

One of the most effective ways to curb tobacco use and reduce tobacco-related diseases is to raise the price of tobacco products. Similarly, levying a tax on marijuana products could lower its use among price-sensitive consumers, especially youth, while generating revenue that could then be used to reduce related health care costs and health disparities.<sup>151</sup> States could earmark marijuana tax revenue for purposes related to substance abuse prevention and education, medical research, health services, and similar activities, and also help use it to defray the administrative costs associated with marijuana regulatory and licensing control policies, as well as youth compliance checks.<sup>152</sup> Colorado, for example, earmarks marijuana funds for

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public schools, capital construction, and the enforcement of marijuana industry regulations.<sup>153</sup> The state also invests its marijuana tax revenue in social market research, which has allowed Colorado to develop a general campaign on awareness of marijuana laws, as well as campaigns focused on youth, trusted adults in the lives of youth, and pregnant and breastfeeding women.<sup>154</sup> Similarly, Washington earmarks funds for campaigns to discourage use by minors, in addition to public education, public health, and program impact evaluation.<sup>155</sup>

## Policy Challenges & Considerations

The U.S. Supreme Court has held that a state may “legitimately tax criminal activities,” such as the sale of marijuana and other illegal or controlled substances.<sup>156</sup> Many states tax marijuana and many require all possessors of marijuana to purchase “tax stamps.”<sup>157</sup> In Colorado, for example, an excise tax is levied on sales of marijuana by cultivation facilities, product manufacturing facilities, or retail stores.<sup>158</sup> Washington, on the other hand, imposes a 25 percent tax on each transaction within the distribution chain, including sales from producer to processor; processor to retailer; and retailer to consumer.<sup>159</sup> Even states that have not legalized marijuana may already have marijuana taxes on the books, and some states that recently legalized recreational marijuana have a different tax for illegal marijuana than for the legal product. Therefore, taxes can continue to apply differently to black-market products — i.e., products outside the state regulatory regime — even in states that have decriminalized and legalized recreational marijuana.

In addition to imposing taxes, states and local governments often use other non-tax pricing policies to raise revenue and deter particular conduct (such as the use of tobacco or marijuana).<sup>160</sup> Tobacco companies target promotional offers to groups that are most sensitive to higher prices, including youth — who may be experimenting with tobacco use — and potential quitters.<sup>161</sup> Prohibiting common discount practices used by tobacco manufacturers and retailers helps reduce tobacco use and initiation, especially among young people.<sup>162</sup> Tobacco discount practices include cents-off or dollar-off promotions, redemption of coupons, buy-one-get-one-free deals, and multi-pack discounts (e.g., two-for-one deals).<sup>163</sup> State and local governments with the requisite regulatory authority could prohibit discount and packaging practices by marijuana retailers and enact price floors for certain products. In addition, states or localities can increase fines and penalties for marijuana tax evasion and for violations of all other marijuana product-related state laws, and enhance surveillance to prevent marijuana smuggling and tax evasion. Similar approaches in tobacco control have resulted in higher tobacco prices.<sup>164</sup>



## Marketing and Advertising

### Public Health Rationale

One of the primary goals of restricting the marketing and advertising of tobacco products is to minimize the appeal of this harmful product to a young, vulnerable population. The tobacco industry's role in creating and sustaining an addiction to nicotine, particularly among young adults, is well known.<sup>165</sup> Each year the tobacco industry spends billions of dollars advertising and promoting its products.<sup>166</sup> Many studies have shown the powerful effect of this advertising, especially on the decisions by young people to begin smoking and their subsequent purchasing habits.<sup>167</sup>

In a similar vein, the key public health rationale for restricting the advertising and marketing of marijuana is to limit interest in recreational marijuana among minors and prevent the increase in drug abuse that may accompany greater availability.<sup>168</sup> Although marijuana is far less addictive than tobacco, it contains mind-altering substances and, as mentioned earlier, the regular use of marijuana can have adverse health impacts, especially in adolescents. Thus, states drafting marijuana legalization regulations may want to consider some of the same types of marketing and advertising limits that have been placed on tobacco products. For

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example, states could restrict or prohibit ads that target children, outlaw outdoor advertising and brand sponsorships, restrict sales to adult-only or medically certified venues, regulate product placement, prohibit free commercial samples, self-service product displays and vending machine sales, and even restrict the sale of all flavored marijuana products.

## Policy Challenges & Considerations

Some states with legalized recreational marijuana have not seen dramatic increases in marijuana advertising. For example, Washington State's Liquor Control Board restricts marijuana advertising within 1,000 feet of schools, public parks, transit centers, arcades, and other areas where children are present and prohibits advertising that contains statements or illustrations that are false or misleading, promotes overconsumption, represents that a marijuana product has curative or therapeutic effects, depicts a child, or may be appealing to children.<sup>169</sup> In addition, Washington requires that all marijuana advertising include prescribed warnings.<sup>170</sup> Colorado has also developed rules on regulating the sales and marketing of recreational marijuana.<sup>171</sup> The state permits the advertising of recreational marijuana in state newspapers and on radio and television only if the advertisers have "reliable evidence" that no more than 30 percent of the publication's readership is under the age of 21.<sup>172</sup> These restrictions do not apply to medical marijuana.

Nevertheless, in many states, marijuana advertising is fairly common. For example, Oregon's law restricts marijuana advertising to locations where no more than 30 percent of the audience is under the age of 21 and prohibits advertising that targets individuals under the age of 21. The law also allows marijuana retailers to display signs, billboards, and other ads to promote their products. As a result, a recent survey of 4,001 adults living in Oregon between 2015 and 2016 — after marijuana had been legalized for retail sales in the state — found that more than half (54.8 percent) reported seeing marijuana advertising in the past month — most frequently via storefront (74.5 percent), street side (66.5 percent), and billboards (55.8 percent).<sup>173</sup> The study reports that the broad impact of this advertising is likely to reach and influence border communities even if they have not legalized marijuana, and be seen by most groups of people, including people younger than 21 years.<sup>174</sup>

In the tobacco realm, counter-marketing and social media has been extremely effective in reducing tobacco use — particularly among youth. One of the concerns of the authors of the Oregon study is that "Nearly 5 times as many adults overall reported near-daily exposure to marijuana advertising (7.4%) compared with health risk messages (1.5%)."<sup>175</sup> (The health risks advertised at this time warned of child poisoning, use during pregnancy, and driving under the influence.)

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Although federal law,<sup>176</sup> tobacco settlements, and the First Amendment to the U.S. Constitution place limits on the ability of state and local governments to prohibit the advertising of cigarettes, the Family Smoking Prevention and Tobacco Control Act of 2009 makes it easier to restrict the marketing of tobacco products. Under the Tobacco Control Act, state and local governments can impose “specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarette.”<sup>177</sup> While marijuana is not subject to the same constraints on advertising restrictions as tobacco because there is no preemptive federal regulatory regime, the advertising of marijuana — even in states where it is legal — remains a grey area of the law.<sup>178</sup> Federal law prohibits the advertising of illegal drugs in newspapers, magazines, or other publications, although an exception is made for ads that do not explicitly offer those drugs for sale or distribution.<sup>179</sup> Because of concern that marijuana advertising could spark a public relations backlash, much of the mainstream media market was initially reluctant to market cannabis — medical or recreational.<sup>180</sup> However, over the last several years that has begun to change. In fact, on August 3, 2014, the *New York Times* ran its first full page ad promoting a marijuana company<sup>181</sup> — an ad significant in the media market because of the newspaper’s influence. And in September 2017, the first cannabis commercial aired on primetime TV channels, including CNN, Fox News, and MSNBC.<sup>182</sup>

As more states legalize the use of marijuana and as sales revenue increases, the need for effective restrictions on the way marijuana is advertised and marketed will only grow. With that in mind, state and local governments might want to consider ways to regulate the promotion of these products, including strict controls on mass market media (such as TV, radio, and outdoor advertising) and the Internet, particularly third-party platforms and social media sites — common venues to which children and young people are regularly exposed. Some of these marketing restrictions are likely to be challenged. In the meantime, as with any regulation, but especially those with such direct First Amendment implications, consulting early in the process with an attorney familiar with First Amendment issues is extremely important.

## Basic Tobacco Control Lessons for Marijuana Regulation



- Draw on an interdisciplinary team to help draft policy, including experts in substance abuse, land use, environmental law, and licensing, as well as public health. Consult with public health attorneys as early in the process as possible, as well as counsel familiar with the laws of your jurisdiction, for help strategizing, reviewing, drafting, enforcing, and defending policies. For information about tobacco control policies in general, and common areas between tobacco control and marijuana regulation, contact one of our attorneys at the Public Health Law Center's Tobacco Control Legal Consortium at [publichealthlawcenter@mitchellhamline.edu](mailto:publichealthlawcenter@mitchellhamline.edu).
- Craft policies that are clear and specific with concise definitions; robust enforcement options that include coordination among different enforcement agents within a community; a reasonable penalty and appeals process; and a well-planned implementation process that includes educating the community and following up on complaints.
- Ensure that smoke-free policies clearly define what constitutes smoking and that, if marijuana smoking, vaping, or other types of consumption are included, the language clearly states this. Also, be explicit about where smoking is prohibited and how terms like "public," "public area," or "workplace" are defined. Some policies, for example, prohibit smoking outdoors within a reasonable distance (typically 15 to 20 feet) from an entrance, an exit, or a vent into any enclosed smoke-free area or any unenclosed area where smoking is prohibited. Other policies define outdoor space by indicating that the policy reaches all property within certain boundaries, or all property in any way controlled by the organization adopting the policy.<sup>183</sup>
- When imposing taxes on marijuana sales, consider levying similar tax rates on all marijuana products and allocating a portion of the revenues from marijuana taxes and fees to substance abuse cessation and prevention, public health, public education, compliance checks and enforcement, and further research.
- States and localities should look to tobacco and alcohol policies for guidance on possible regulatory methods and challenges, but be wary of using them as templates for marijuana. This is a growing industry and each jurisdiction has different regulatory systems and administrative structures to consider. At the same time, several states are aligning their medical and recreational marijuana regulations to avoid confusion and inconsistencies.
- Because the legalization of marijuana is so new, many state and local governments have limited experience developing and implementing effective regulatory policies. Given the critical need for scientific and safety data, as well as evidence-based findings from states that have legalized cannabis, governments might want to consider implementing more restrictive marijuana policies at first, and then as more information is available, gradually loosen regulations, rather than attempting to tighten policies that started loose.<sup>184</sup> Patience, flexibility, a willingness to modify policies as needed, and a focus on public health and safety, must remain paramount.



## Select Legislation

Below are overviews of a few state laws that regulate marijuana products for medicinal or recreational purposes. The Tobacco Control Legal Consortium does not endorse or recommend any particular provision and is providing these examples for illustrative purposes only.<sup>185</sup> For a more comprehensive list of marijuana laws, check out a regularly updated web page such as the National Conference of State Legislatures, *Deep Dive on Marijuana* at <http://www.ncsl.org/bookstore/state-legislatures-magazine/marijuana-deep-dive.aspx> and links to state marijuana laws on sites such as *FindLaw.com* at <http://statelaws.findlaw.com/criminal-laws/marijuana.html>.

Type of law	Legislation	Overview
Medicinal marijuana	California Health & Safety Code 11362.5 et seq. (Prop. 215) (2009)	Under California's medical marijuana law, medical patients and their designated primary caregivers may legally possess and cultivate (but not distribute or sell) marijuana if they have a physician's recommendation or approval. State law sets a state threshold of 6 mature or 12 immature plants and 8 ounces of marijuana per patient, but allows local communities to authorize higher allowances. Many cities and counties have local ordinances with zoning regulations. It is unlawful to drive while under the influence of marijuana. For evidence of impairment, officers may administer a field sobriety test, and arrestees may also be required to submit to a urine or blood test. Sale or distribution of marijuana to minors is a felony. It is illegal to sell or manufacture, not to possess, marijuana paraphernalia.
Medicinal marijuana	Illinois HB 1 (Compassionate Use of Medical Cannabis Pilot Program Act) (2013)	Under Illinois's medical marijuana law, the Department of Public Health can issue a registry identification card to a person diagnosed by a physician as having a debilitating medical condition, and to that person's primary caregiver, that permits the person or the person's caregiver to legally possess no more 2.5 ounces of usable cannabis during a 14-day period that is derived solely from an intrastate source. Funds in excess of the direct and indirect costs associated with the implementation, administration, and enforcement of the Act are used to fund crime prevention programs. A tax is imposed upon the privilege of cultivating medical cannabis at a rate of 7 percent of the sales price per ounce. "Prescription and nonprescription medicines and drugs" includes medical cannabis purchased from a registered dispensing organization under the Compassionate Use of Medical Cannabis Pilot Program Act. The DUI provisions of the Illinois Vehicle Code do not apply to the lawful consumption of cannabis by a qualifying patient licensed under the Act who is in possession of a valid registry card, unless that person is impaired by the use of cannabis.

Type of law	Legislation	Overview
Recreational marijuana	Washington State Initiative 502 (2012)	<p>Under Initiative 502, individuals over the age of 21 may possess up to one ounce of dried marijuana, 16 ounces of marijuana infused product in solid form, or 72 ounces of marijuana infused product in liquid form. Marijuana must be used in private, as it is unlawful to "open a package containing marijuana ... or consume marijuana ... in view of the general public." The "possession, delivery, distribution, and sale" by a validly licensed producer, processor, or retailer, in accordance with the established regulatory scheme administered by the state Liquor Control Board (LCB), "shall not be a criminal or civil offense under Washington state law." "The Initiative sets up a three-tiered production, processing, and retail licensing system that permits the state to retain regulatory control over the commercial life cycle of marijuana. Qualified individuals must obtain a producer's license to grow or cultivate marijuana, a processor's license to process, package, and label the drug, or a retail license to sell marijuana to the general public. The Initiative establishes various restrictions and requirements for obtaining the proper license and directs the state LCB to adopt procedures for the issuance of such licenses. On October 16, 2013, the LCB adopted detailed rules for implementing Initiative 502. These rules describe the marijuana license qualifications and application process, application fees, marijuana packaging and labeling restrictions, recordkeeping and security requirements for marijuana facilities, and reasonable time, place, and manner advertising restrictions." (Adapted from Garvey &amp; Yeh, <i>State Legalization of Recreational Marijuana: Selected Legal Issues</i> (2014))</p>
Recreational marijuana	Vermont H. 511 (2018)	<p>Vermont's law allows adults over 21 to possess up to one ounce of marijuana. Adults that choose to grow their own can have two mature marijuana plants and four immature plants per housing unit. People convicted of violating this possession restriction can be imprisoned up to six months and fined \$500 unless they participate in a court diversion program. Anyone who gives marijuana to a person under 21 years old, or enables their consumption of marijuana, can be imprisoned up to two years and fined \$2,000. It is a misdemeanor to use marijuana in a car with a child, starting with penalties at \$500 and two points on a driver's license. Marijuana use is limited to "individual dwellings," and is prohibited in all smoke-free places, including streets, alleys, parks, and sidewalks. Violators are liable for civil penalties starting at \$100 for a first offense, and Vermont towns and cities can add their own fines as well.</p>

Type of law	Legislation	Overview
Recreational marijuana	Colorado Amendment 64 (2012)	Colorado Amendment 64 provides only a general framework for the legalization, regulation, and taxation of marijuana in Colorado—leaving regulatory implementation to the Colorado Department of Revenue. Under Colorado law or the law of any locality within Colorado, an individual 21 years of age or older may possess, use, display, purchase, consume, or transport one ounce of marijuana; possess, grow, process, or transport up to six marijuana plants. Marijuana may not be consumed “openly and publicly or in a manner that endangers others.” A marijuana-related facility can purchase, manufacture, cultivate, process, transport, or sell larger quantities of marijuana so long as the facility obtains a current and valid state-issued license. Local governments within Colorado may regulate or prohibit the operation of such facilities within their borders. A three-tier distribution and regulatory system, largely similar to that set up in Washington, involves the licensing of marijuana cultivation facilities, marijuana product manufacturing facilities, and retail marijuana stores.
Decriminalized marijuana	New Hampshire HB 640 (2017)	In 2017, New Hampshire decriminalized the possession of small amounts of marijuana. For the first or second offense of possessing up to three-quarters of an ounce of marijuana, the state reduced the fines from \$2,000 to just \$100. In 2016, New Hampshire passed legislation (SB 498) that made possession of one ounce or less of marijuana an unspecified misdemeanor, stopping short of decriminalization.
Decriminalized marijuana	Illinois SB 2228 (2016)	Under Illinois law, the possession of 10 grams or less of marijuana is an infraction that does not result in a criminal record.
Decriminalized marijuana	Maryland SB 517 (2016)	Maryland law decriminalizes the possession of marijuana paraphernalia and imposes civil fines of \$500 for public cannabis use.



## Select Legal Challenges to Marijuana Laws

Below are a few examples of legal challenges to laws that legalize marijuana, either for medicinal or recreational use. As with tobacco control policies, governments considering adopting a marijuana law should ensure they are not preempted from passing the policy and take appropriate measures to limit their exposure to potential litigation.

Issue	Lawsuit	Overview
<b>Intrastate use of marijuana</b>	<i>Gonzales v. Raich</i> , 545 U.S. 1, 50 (2005)	U.S. Supreme Court upheld Congress's authority, under the Commerce Clause, to enact the Controlled Substances Act and prohibit the intrastate use of marijuana, even when a state's medical marijuana law permits its use.
<b>Intrastate use of marijuana</b>	<i>Gonzales v. Oregon</i> , 546 U.S. 243, 251 (2006)	States remain free to pass laws relating to marijuana, or other controlled substances, as long as the laws do not create a "positive conflict" with federal law, such that the two laws "cannot consistently stand together."
<b>Housing authority eviction of tenant using marijuana</b>	<i>Assenberg v. Anacortes Housing Authority</i> , Washington State Court of Appeals, 1st Div. (2007)	Washington State appellate court upheld the housing authority eviction of a tenant who used marijuana for medicinal purposes on the ground that requiring housing authority to violate federal law was unreasonable.
<b>Employment discrimination where employee used medical marijuana</b>	<i>Emerald Steel Fabricators v. Bureau of Labor and Industries</i> , 230 P.3d 518 (2010)	An Oregon employee, who had obtained a medical marijuana card due to a disability, was allegedly discharged for admitting that he used marijuana. Oregon law requires that employers "make reasonable accommodations" for an employee's disability as long as such an accommodation does not impose an undue hardship upon the employer. The law is to be interpreted consistently with the federal Americans with Disabilities Act, which does not afford protections for employees "currently engaged in the illegal use of drugs." The Oregon Supreme Court held that the Oregon Medical Marijuana Act stood "as an obstacle to the implementation and execution of ... the Controlled Substances Act" and was therefore preempted. "There is no dispute that Congress has the authority under the Supremacy Clause to preempt state laws that affirmatively authorize the use of medical marijuana."

Issue	Lawsuit	Overview
Employment discrimination where employee used medical marijuana	<i>Coats v. Dish Network, LLC</i> , 350 P.3d 849 (Colo. 2015)	A terminated Colorado employee brought an employment discrimination action against his employer, alleging that his termination, based on his state-licensed use of medical marijuana, violated the lawful activities statute, which made it an unfair and discriminatory labor practice to discharge an employee based on the employee's lawful outside-of-work activities. Despite his state constitution-based right to medicinal marijuana, the state Supreme Court held that 1) an activity such as medical marijuana use that is unlawful under federal law is not a "lawful" activity under the lawful activities statute, and 2) the employee could be terminated for his use of medical marijuana in accordance with the state constitution's Medical Marijuana Amendment.
Smoking marijuana in private club	<i>Fraternal Order of Eagles v. City and Borough of Juneau</i> , 254 P.3d 348 (Alaska 2011)	A private club in Juneau sued alleging that the city and borough's smoke-free ordinance, as applied to prohibit the smoking of tobacco products in private clubs that offered food or alcoholic beverages for sale, violated the club's freedom of association under the First Amendment and the club's right to privacy under the State Constitution. The court held that the ordinance did not implicate the right to intimate association under the First Amendment, and the ordinance did not violate the private club's right to privacy under the State Constitution. The Court refused to apply the <i>Ravin</i> decision (discussed below) to tobacco smoking or to private clubs, as opposed to a private home. Since this case, the city has updated its ordinance to include the same smoking prohibition on the use of e-cigarettes and marijuana.
Privacy right to possess and consume vs. employer's right to drug test employees	<i>Luedtke v. Nabors Alaska Drilling, Inc.</i> , 768 P.2d 1123 (Alaska 1989)	Two former Alaska employees sued their employer challenging their discharge after they refused to submit to urinalysis screening for drug use. The Alaska Supreme Court held that 1) the drug testing program did not violate the state's constitutional right to privacy, which only applies to actions by the government; 2) the employer's actions did not give rise to a cause of action for invasion of privacy; and 3) a discharge of employees did not violate an implied covenant of good faith and fair dealing.
Limited privacy right to consume and possess marijuana in home	<i>Ravin v. State</i> , 537 P.2d 494 (Alaska 1975)	An Alaskan resident sued the state after being charged with violating a statute prohibiting the possession of marijuana, arguing (among other things) that the state had violated his right to privacy under both the federal and Alaska constitutions. The Alaska Supreme Court held that there was a proper governmental interest in imposing restrictions on marijuana use and that the right to use and consume cannabis is not a recognized fundamental right under the U.S. Constitution. Nevertheless, the Court also held that the right to privacy enshrined in the Alaska Constitution allowed individuals to consume cannabis in their own home.



## Appendix A

### Select Resources

The Public Health Law Center's website at [www.publichealthlawcenter.org](http://www.publichealthlawcenter.org) contains a wealth of publications and resources about tobacco control policy options, many of which may be relevant for those seeking to regulate the use, marketing, and sale of marijuana products. The Congressional Research Office's *State Legalization of Recreational Marijuana: Selected Legal Issues* examines many of the legal issues related to marijuana legalization, including federal and state preemption. Other resources on medical and recreational marijuana laws include:

- Ballotpedia, Marijuana Laws in the United States (regularly updated), [https://ballotpedia.org/Marijuana\\_laws\\_in\\_the\\_United\\_States](https://ballotpedia.org/Marijuana_laws_in_the_United_States).
- National Academies of Sciences, Engineering, and Medicine, *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research* (2017), <https://www.nap.edu/catalog/24625/the-health-effects-of-cannabis-and-cannabinoids-the-current-state>.
- National Conference of State Legislatures, *State Medical Marijuana Laws*, and *Deep Dive Marijuana* web pages, <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.
- National Organization for the Reform of Marijuana Laws, *Legal Issues*, <http://norml.org/legal>.
- Office of National Drug Control Policy's Marijuana Resource Center, *State Laws Related to Marijuana*, <https://www.whitehouse.gov/ondcp/key-issues/marijuana>.
- ProCon.org (including current information regarding pending legislation or recent bills), <http://medicalmarijuana.procon.org>.
- State Marijuana Laws, *FindLaw.com*, <http://statelaws.findlaw.com/criminal-laws/marijuana.html>.
- U.S. Department of Justice, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

### Contact Us

Please feel free to contact the Public Health Law Center's Tobacco Control Legal Consortium at [publichealthlawcenter@mitchellhamline.edu](mailto:publichealthlawcenter@mitchellhamline.edu) with any questions about the information included in this publication or to discuss local concerns you may have about issues relating to the regulation of marijuana and tobacco control.



## Appendix B

### Glossary

**Blunt:** Marijuana rolled in cigar wraps.

**Bong:** Water pipe used to smoke marijuana.

**Cannabidiol (CBD):** A constituent of cannabis that has been traditionally considered non-psychoactive.

**Cannabinoid:** A class of chemical compounds that act on cannabinoid receptors; the cannabis plant contains more than 100 compounds, called cannabinoids, that are chemically related to THC.

**Cannabis:** Broad term used to describe the various products and chemical compounds derived from the *Cannabis* or *Cannabis indica* species.

**Decriminalization:** In the marijuana context, certain marijuana offenses are treated as a civil or local infraction (or a minor misdemeanor with no jail time), instead of a crime.<sup>186</sup> However, even in states where marijuana possession or use has been decriminalized, possessing larger quantities or selling marijuana cold have significant potential penalties.<sup>187</sup>

**Joint:** Hand-rolled marijuana cigarettes.

**Legalization:** In the marijuana context, individuals who engage in certain qualified marijuana activities, such as use, possession, production, and distribution, are not subject to state penalties if they comply with state laws governing these activities. However, even in states where marijuana has been legalized, individuals are still subject to prosecution if they violate laws governing activities such as marijuana selling, trafficking, licensure, taxation, etc.

**Marijuana:** A *Cannabis sativa* plant-derived product typically composed from the plant's dried leaves, stems, seeds, and buds. Also called weed, herb, pot, grass, bud, reefer, skunk, smoke, Aunt Mary, ganja, Mary Jane, and other slang terms.

**THC:** Delta-9-Tetrahydrocannabinol, the main psychoactive constituent of cannabis.



## Appendix C

### Checklist of Tobacco Control Policies that Could Apply to Marijuana Regulation

This checklist contains common evidence-based tobacco control policies for state and local governments considering the legalization of marijuana products and licensing of marijuana retailers and related establishments. Some of these provisions may already be included in state laws, but localities might have the legal authority to adopt more stringent laws or regulations. Other provisions might be politically challenging to implement. The checklist is provided largely as a reminder of the many regulatory analogues between tobacco control and marijuana regulation, and possible public health policies to consider as this new U.S. industry continues to grow.

Regulatory Options	Regulatory Authority?			Notes
	Yes	No	Unsure	
Usage				
Prohibit marijuana smoking in public places				
Prohibit marijuana smoking in workplaces				
Prohibit marijuana smoking in federally subsidized housing				
Prohibit marijuana smoking in multi-unit residential properties				
Prohibit marijuana use when operating motorized vehicles, boats, heavy machinery, etc.				
Other options?				
Youth Access	Yes	No	Unsure	
Raise to 21 the minimum legal sale age to purchase marijuana products.				
Require that marijuana establishment personnel meet the minimum legal sale age				

Regulatory Options	Regulatory Authority?	Notes	
Youth Access (continued)	Yes	No	Unsure
Require tamper-proof, child-resistant packaging of all marijuana products			
Require easily visible graphic public health warnings (labels) on marijuana products			
Other options to protect youth from easy access to low-cost marijuana products that make marijuana use more affordable and accessible			
Recommend education programs to encourage adults to monitor and ensure any cannabis products are inaccessible to minors			
Other options?			

Retailer Licensing	Yes	No	Unsure
Set up safeguards, such as photo ID checks, to ensure compliance with minimum legal sale age requirement.			
Restrict the number of marijuana retail outlets			
Require a minimum distance between marijuana retail outlets			
Prohibit the sale of marijuana products at certain types of establishments			
Limit the number of hours/days when marijuana products can be sold			
Implement a licensing incentive program			
Other options?			

Regulatory Options	Regulatory Authority?	Notes	
Pricing	Yes	No	Unsure
Set minimum price laws			
Prohibit price discounting (e.g., cents-off or dollars-off discounts, coupon redemption, buy-one-get-one-free deals, and/or multi-pack discounts)			
Earmark revenue from taxation on marijuana products to substance abuse cessation and prevention, public education, public health, youth compliance checks, research, or similar services			
Other options?			
Marketing and Advertising	Yes	No	Unsure
Prohibit self-service marijuana product displays and vending machines (or restrict to adult-only/medical marijuana venues)			
Prohibit marijuana product displays (or restrict to adult-only / medical marijuana venues)			
Prohibit Internet sales			
Limit online marketing techniques, such as social media campaigns, Internet search optimization, product placement, and viral marketing			
Prohibit free samples of marijuana cigarettes and smokeless marijuana products			
Prohibit brand sponsorship (e.g., athletic, music, and cultural events)			
Prohibit mass media advertising (e.g., television, radio, and billboard)			
Prohibit flavored marijuana products (including menthol and nicotine)			
Other options?			



## Endnotes

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88 Smoking marijuana would be prohibited in jurisdictions that use a definition of smoking that is similar to the version developed by Americans for Nonsmokers' Rights, which defines smoking as "inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, or pipe, or any other lighted or heated tobacco or plant product intended for inhalation, including hookahs and marijuana, whether natural or synthetic, in any manner or in any form. 'Smoking' also includes the use of an electronic smoking device which creates an aerosol or vapor, in any manner or in any form, or the use of any oral smoking device for the purpose of circumventing the prohibition of smoking in this Article," <https://nonsmokersrights.org/sites/default/files/2017-09/modelordinance.pdf>.

89 See, e.g., Amy Winterfeld, *Marijuana Joins Smoke-free Laws*, Nat'l Conference of State Legislatures, TRENDS & TRANSITIONS — STATE LEGISLATURES MAGAZINE (2013), <http://www.ncsl.org/bookstore/state-legislatures-magazine/trends-and-transitions-march-2013.aspx#>. For example:

- Montana lawmakers added medical marijuana to their statewide clean indoor air act in 2011.
- California prohibits smoking medical marijuana wherever smoking already is banned.
- Rhode Island prohibits marijuana smoke in public places, on school grounds and wherever it may harm children's health, and prohibits operating vehicles, aircraft and boats under the influence of marijuana
- Vermont bars smoking marijuana in all indoor and many outdoor public places and prohibits operating vehicles, boats or heavy machinery while under the influence of marijuana.
- Maine forbids marijuana smoke in places where smoking is prohibited by a landlord.
- North Dakota's expanded smoke-free law includes "lighted or heated tobacco or plant product intended for inhalation." *Id.*

90 NORML, State Laws (last accessed June 1, 2018), <http://norml.org/laws>.

91 NY Compassionate Care Act, S7923/A657 (2014), <http://bit.ly/1mkpHnT>.

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93 Alaska Admin. Code tit. 3, § 306.990(6)(c) (West 2016).

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95 See, e.g., Jennifer Wadsworth, *Pot Club Rules Come Up for a Vote* (May 19, 2014), SAN JOSE INSIDE, <http://www.sanjoseinside.com/2014/05/19/pot-club-rules-come-up-for-a-vote>.

96 Penelope Overton, *Panel's Marijuana Regulation Bill Omit Licensing of Social Clubs*, [pressherald.com](http://pressherald.com), Feb. 21, 2018, <https://www.pressherald.com/2018/02/21/committees-marijuana-regulation-bill-omits-licensing-of-social-clubs-in-maine>. In a related move, Massachusetts legislators have postponed licensure of the marijuana “social consumption” businesses approved in the state’s ballot measure, which would allow patrons to use marijuana on site. Don Adams, *Everything You Need to Know About Massachusetts’ New Pot Rules*, BOSTON GLOBE, Mar. 12, 2018, <https://www.bostonglobe.com/metro/2018/03/12/everything-you-need-know-about-massachusetts-new-pot-rules/xJE6ESBejkiKJjoGzKQytK/story.html>.

97 See, e.g., NORML, State Laws, <http://norml.org/laws>.

98 29 U.S.C. § 651 et seq.

99 Garvey & Yeh, *supra* note 30, at 29-30.

100 42 U.S.C. §§ 12111(9), 12112(b)(5).

101 See Memorandum from Helen R. Kanovsky, Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing, Jan. 20, 2011, <http://www.scribd.com/doc/47657807/HUD-policy-Memo-on-Medical-Marijuana-in-Public-Housing#scribd>.

102 29 U.S.C. § 705(20) C)(i); 42 U.S.C. § 12210(a) (“[T]he term “individual with a disability” does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.”)

103 Garvey & Yeh, *supra* 30, at 29.

104 Melinda Caterine et al., *Maine Employers Must Ignore Off-Work Marijuana Use, Cease Testing Applicants*, Littler, Jan. 30, 2018, <https://www.littler.com/publication-press/publication/maine-employers-must-ignore-work-marijuana-use-cease-testing>.

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110 Room ET AL., *supra* note 108.

111 Pacula et al., *supra* note 42, at 1025. “THC levels must be measured from blood or urine samples, which are typically taken hours after an arrest. Urine tests, which look for a metabolite of THC rather than the drug itself, return a positive result days or weeks after someone has actually smoked.” Koerth-Baker, *supra* note 109.

112 Seth Ammerman et al., *The Impact of Marijuana Policies on Youth: Clinical, Research, and Legal Update*, 135 AM. ACAD. OF PEDIATRICS 3 (2015).

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