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Professional Perspectives on the Business and Legal Impact of Medical Marijuana On South Florida

In June, Gov. Rick Scott signed legislation to implement the medical marijuana constitutional amendment approved by voters last November. It authorizes 10 additional treatment centers around the state, along with the seven licensees already operating.

Now, Florida patients with epilepsy, chronic muscle spasms, cancer, HIV and AIDS, glaucoma, post-traumatic stress disorder, ALS, Crohn's disease, Parkinson's disease, multiple sclerosis and terminal conditions may qualify to receive medical cannabis products, such as edibles, vapes, oils, sprays or tinctures, but not smoking substances.

Considering the large number of Floridians with these serious conditions, medical marijuana has the potential to be a growth industry throughout the state. In addition, some professionals believe medical marijuana could provide an alternative to opioid pain medications that often lead to addiction.

However, the possession and sale of marijuana remains a federal crime, even though the U.S. Department of Justice has not been enforcing marijuana laws in the states that have approved marijuana for medical or recreational uses.

To gain a better understanding of medical marijuana's impact on the region, South Florida Legal Guide asked attorneys and accountants from different backgrounds to provide their professional perspectives on medical marijuana. Here are their responses.

WILL THERE BE CRIMINAL PROSECUTION?

Margot Moss, Partner, Markus/Moss

Growing support in the states; A Republican government that is pro-states' rights; A general acceptance that it has medicinal value; An overwhelming majority of Americans who favor legalization; One would think with all of this momentum, there would be more certainty about the status of marijuana. Attorney General Jeff Sessions, however, has stated that marijuana is "only slightly less awful" than heroin and that "good people don't smoke marijuana." Sessions is reprioritizing the war on drugs, and has been quite outspoken about his belief that marijuana is a destructive drug. So although there is a growing support for the legalization of marijuana, possession and distribution of marijuana remains a federal crime.

Sessions' view creates a lot of uncertainty for the eight states that have legalized marijuana for recreational use and the 22 that have some form of medical marijuana law, including Florida. Sessions could decide at any moment that DOJ is going to start cracking down on dispensaries and users and make arrests. This, of course, could deprive many people of their liberty, possessions, money, and futures, in states where the majority of people voted and approved of marijuana legalization.

This seems doubtful in the near future — at least until September when the latest spending bill expires.

When Congress passed the bill in April, it refused to grant money to Sessions to begin a get-

tough-on-marijuana war. In the meantime, groups are advocating Congress to amend the federal marijuana law. This too is probably unlikely in such a short amount of time.
After September, if Sessions opts to start a war on marijuana, he could choose to limit his crackdown to recreational marijuana. Even Sessions' boss has publicly supported medical marijuana. And over 90 percent of the country, including 90 percent of Republicans, support the use of marijuana for medical purposes and leaving alone states that have already passed laws allowing its use.
But this President is never predictable. Despite he and his staff previously backing medical marijuana, Trump included a signing statement with the April budget that noted his objection to a provision preventing DOJ from interfering with state medical marijuana programs.
What does the signing statement mean? No one knows. If businesses, investors, and employees don't want to risk the possibility of federal arrests or losing money, better to wait until September to see what Congress does. If it continues to fail to provide Sessions with the money needed to go after marijuana businesses, they may be safe for a few months or a year. But nothing is ever for certain with this administration and nothing will be certain until the federal laws are fixed to align with the states.

WILL DEMAND INCREASE FOR COMMERCIAL REAL ESTATE?

Harold “Hal” Lewis, Co-managing Partner, Pathman Lewis, LLP

In terms of commercial real estate, medical marijuana could have an impact on South Florida’s agricultural, industrial and retail sectors. But I would expect the largest initial effect would be in the industrial market.
Because medical marijuana is an industry tightly regulated by the state, the plants will need to be planted and harvested in a secure, well-controlled indoor setting. That is likely to create a demand for underutilized warehouse, manufacturing or distribution space that could be converted into large-scale “grow houses.”
However, much of South Florida’s industrial market is already in use by the region’s international logistics and export-import businesses. Warehouse space in Doral, as well as the central and northwest Miami-Dade submarkets is in great demand with low vacancies and high rental rates. Most of Broward County’s industrial market is also oriented toward the region’s airports and seaports.
Therefore, the logical area for medical marijuana facilities would be in the Homestead/Florida City area, and along the U.S. 1 corridor south of Cutler Bay. This could add some needed vigor to south Miami-Dade’s lagging industrial market.
The Homestead area already has an agricultural orientation, and adding grow houses could be a natural extension of that market. In addition, many types of ancillary service businesses, such as irrigation and fertilizer companies, are already located in south Miami-Dade.
Turning to the retail sector, I don’t expect much of an impact in the near future. Medical marijuana will need to be dispensed through a doctor’s order, so there won’t be the walkin traffic you see in states like Colorado that have approved the recreational use of marijuana.

CAN MARIJUANA BUSINESSES GET INSURANCE COVERAGE?

R. Hugh Lumpkin, Managing Shareholder, Ver Ploeg & Lumpkin

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Insurance coverage is an important consideration for medical marijuana licensees, who face a wide range of risks. For example, medical marijuana is a cash business, which increases the dispensaries' exposure to theft.
The licensees will likely need crop insurance, as well as commercial property and casualty (P&C) and general liability policies. Growing marijuana indoors increases the risk of fire from the incandescent lights, and the risk of flood from a burst irrigation pipe. With their high humidity and bright lights, grow houses are an ideal environment for mold growth. However, most P&C policies have exclusions for mold so that damage might not be covered.
It will be important for licensees to be sure that plants and shrubs are covered in the P&C polices. In some cases, the courts have ruled that public policy forbid payment of a claim because marijuana is illegal on the federal level. If marijuana is clearly underwritten in the policy, the courts are likely to be more lenient in that regard.
Because Florida will be collecting confidential information on medical marijuana patients, cyber insurance may be needed to protect against the unwarranted release of personal information.
Other risks include lawsuits from consumers who may suffer an adverse reaction or those who claim the medical marijuana did not provide the advertised relief.
One of the challenges for insurers is that they have no prior history with this business sector, making it difficult to determine premiums and coverage limits. In summary, a medical marijuana licensee will want all the insurance products of any mainstream American business. But they need to be very careful when purchasing policies to go through a specialized insurance broker, because of the proliferation of exclusions. There's no point in buying insurance if a claim is unlikely to be paid.

WILL EMPLOYERS NEED TO UPDATE THEIR POLICIES?

Robin Taylor Symons, Miami Co-managing Partner, Gordon & Rees Scully Mansukhani, LLP

With today's borderless commerce, many South Florida organizations have business operations in multiple states. A practical way to keep policies and procedures consistent under differing state laws is to incorporate rules that reflect federal law making it illegal to own, use or sell marijuana.
In general, we are not recommending that any overhaul to employers' employment policies and procedures focus exclusively on marijuana. Employment handbooks do need to be updated regularly, and refreshing those provisions is a good idea, even for small businesses. Typically, employers will need to review their policies on safety, smoke-free workplace, zero-tolerance (drug and alcohol-free workplace policies), and social media.
These policies can address issues arising from workplace substance abuse of any kind, such as driving or operating equipment while impaired, which can endanger the employee and other people, whether or not the substance itself is legal to use.
Another interesting issue is whether an employer can ask a job applicant about medical marijuana use during an interview. That line of questioning is unwise because it relates to an applicant's medical condition, which the employer or interviewer should not ask about.
While we do not advise employers to look at applicants' and employees' social media, job applicants may find it prudent to take a close look at their social media presence and delete photos and posts related to marijuana or situations that might raise a red flag. A medical marijuana card does not convey the right to show up at work in an impaired condition.

WHAT ARE THE ETHICAL IMPLICATIONS?

H. Steven Vogel, Partner, Hinshaw & Culbertson

The landscape of the marijuana industry is changing rapidly and it has become a fast growing and lucrative business. Careful consideration must be given to the issues professionals face as they venture into this market where there is a conflict between federal and state law.

Professionals, including CPAs, planning to undertake any professional services for a marijuana business should first consider the ethical implications in the state where they hold a license. Regulators of the accounting profession have issued guidance in a number of states. Consideration must be given to whether the State Board has issued guidance and/or defined "good moral character." In Florida, good moral character for CPAs means "a personal history of honesty, fairness and respect for the rights of others and for the laws of this state and nation."

Another issue is proper compliance with U.S. tax laws. The Internal Revenue Code requires taxpayers to report all income, regardless of whether it is obtained legally or illegally.

Notwithstanding, the tax laws do not permit taxpayers to deduct expenses related to income obtained from an illegal business.

Professionals are also advised to consider the background (and associates) of a prospective or existing business client. Given the Department of Justice's clear position that marijuana remains a Schedule 1 controlled substance, professionals are advised to consider whether any ties exist with organizations that may be subject to scrutiny by law enforcement.

In addition to the tax risks, a financial statement audit of a marijuana business presents many issues. Professionals should consider: (i) whether the CPA has a complete understanding of the business entity including the legal and regulatory environment of the industry (i.e. banking laws) and, (ii) whether the risks of a high cash business can be properly evaluated given the susceptibility to theft and fraud.

ARE THERE BUSINESS OPPORTUNITIES?

Marshall R. Burack, Partner, Kopelowitz Ostrow Ferguson Weiselberg Gilbert

The medical marijuana business is part of the healthcare industry, and participants in this business must be aware of the statutes and regulations that apply to financial arrangements among healthcare industry participants. There are prohibitions against fee splitting or otherwise paying for referrals, as well as prohibitions against fraud and abuse.

Complying with the applicable healthcare statutes and regulations is an important consideration in structuring marketing arrangements for a medical marijuana business, just as it is for a physician practice or a healthcare clinic.

Because there are only a limited number of medical marijuana licensees, in the growing and dispensing business, the real business opportunity in this industry is in the ancillary sectors, providing products or services for the licensees. Many of these ancillary businesses are looking to attract patients who might benefit from medical marijuana and connect them with physicians who can write prescriptions for medical marijuana. These businesses are looking to contract with physicians who want to become involved with the industry, and with dispensaries, who are looking to attract potential patients.

A significant concern for all participants is that the dispensing of marijuana is still considered a federal crime. Therefore, it is advisable for parties to a contractual arrangement to incorporate some type of protective wording into their business agreements.
A typical healthcare industry contract may include a clause providing that if a particular practice or arrangement is deemed to be illegal by a new regulation, court decision, or regulatory interpretation, the parties will seek to restructure their arrangements so as to comply with the law. The impact of such a provision in the context of medical marijuana is uncertain. It might be advisable to add a provision that says, "If there is federal enforcement of laws making the dispensing of medical marijuana illegal, the parties will seek to restructure this agreement."
At this point, the industry participants are those who have obtained licenses to grow and/or dispense medical marijuana, and those ancillary business looking to provided products and services for the licensees. In the future, as the industry develops, there may be opportunities for vertical integration by the licensees, as they seek to affiliate with prescribing physicians and to attract a broader patient base for their product.

HOW WILL MEDICAL MARIJUANA AFFECT CURRENT HEALTHCARE PROVIDERS?

Sandra Greenblatt, Partner, Lubell Rosen

A number of South Florida physicians are considering adding medical marijuana to their healthcare practices. To do so, they need to complete a continuing medical education (CME) course offered by the Florida Medical Association (for medical doctors) or the Florida Osteopath Association (for doctors of osteopathic medicine), along with an active and unrestricted professional license.
Under the new state law, an M.D. or D.O. needs to examine the patient, determine the problem and certify that the patient has a qualifying medical condition. It is very important for the physician to document everything, especially since marijuana use is still illegal under federal law.
Physicians cannot prescribe or dispense medical marijuana. The physician may certify that the patient qualifies for medical marijuana and the patient can take that certification to a state licensed medical marijuana treatment center to obtain the product. A patient is only authorized to receive three 70-day physician orders, so the physicians will have to re-evaluate their existing patients every 30 weeks before recertifying. The professional boards will be reviewing all physician certifications to analyze possible abuses, which can be grounds for discipline.
One of the potential impacts of the Florida law is that it might reduce the number of prescriptions written by physicians for opioid pain relievers that are filled at traditional pharmacies. Some patients with chronic pain due to cancer or other specified conditions might opt for medical marijuana. At this point, it is not clear whether the patients will need to pay for medical marijuana out of pocket or if insurers might cover some or all of the costs as medically necessary.
There is another important provision for healthcare providers: If they certify patients for medical marijuana, they are not permitted to be employed by a, or have any financial interest in a medical marijuana treatment center or marijuana testing laboratory. In other words, they can write the certifications or have a financial relationship with a treatment facility or testing laboratory, but not both. So, providers should think carefully about their options when evaluating opportunities under the new medical marijuana law and consult their health care attorneys.

WHAT ARE THE FINANCIAL IMPLICATIONS?

Andrew Ittleman, Partner, Fuerst Ittleman David & Joseph, PL

I have focused primarily on the financial side of the cannabis industry. On a national level, very few banks are willing to take on this business. It's not just the growers and retailers – it's everyone connected with the industry. Even nonprofit marijuana policy organizations and conference organizers have difficulties opening and maintaining bank accounts.

All banks and credit unions are regulated by a multitude of federal agencies, including the Drug Enforcement Agency (DEA), and regardless of state-level cannabis initiatives, these agencies continue to treat cannabis as a Schedule I drug under the Controlled Substances Act. Consequently, these agencies continue to treat even licensed retail sales of cannabis as trafficking events, and the movement of cannabis-derived funds as money laundering transactions. Guidance published by the Financial Crimes Enforcement Network (FinCEN) in 2014 has been somewhat helpful, but severe banking difficulties remain widespread even for fully licensed marijuana-related businesses.

Today there is concern of increasing federal scrutiny of the marijuana industry by the Trump administration's Justice Department, and there is little hope that the banking crisis will improve in the foreseeable future.

In addition to a lack of access to basic checking accounts, most marijuana- related businesses also lack access to other financial products, including checks, debit and credit cards, and business loans. The industry is therefore cash-intensive throughout the country, and there have been many reports of serious security problems stemming from dispensaries being unable to deposit their cash. In Florida, regulators may be particularly concerned about our state's history of financial crimes and money laundering, and business practices that might be acceptable in Colorado or Washington would likely not be tolerated here.

Although Floridians passed a constitutional referendum last November, and the Legislature has written the statutes, the actual implementation of the marijuana industry is likely to take some time. It's not just the concern about a high volume of cash transactions. The state Department of Health still has to write the rules for the licensees, and there will likely be further litigation over the rules themselves and the issuance of licenses.

Voters in numerous states, including Connecticut, Michigan and Hawaii, have also passed cannabis referendums, but many of the businesses in those states are forced to sit idly by hemorrhaging money due to seemingly endless delays in approvals from the regulatory agencies. With the amount of money at stake in Florida, and the wide variety of special interests having their voices heard in Tallahassee, it could take years before Florida's Green Rush begins.

CAN FLORIDA LICENSEES CREATE THEIR OWN BRANDS?

Jorge Espinosa, Founding Partner, Espinosa Martinez PL

While marijuana has gradually become legal at the state level for medical and recreational purposes, it is still a banned substance at the federal level. That poses an interesting issue for brand names, trademarks and other forms of intellectual property.

All states have their own trademark registries and you can register and defend your mark in states that allow medicinal or recreational marijuana use. However, the U.S. Patent and Trademark office will not allow you to register a trademark for a marijuana product or service nationally since under federal law it is still a banned substance.

Because most business eventually aim to sell in multiple states or even nationally, having a consistent national brand is important. The current state of the law regarding marijuana products is, instead, creating a patchwork of rights across the country. Therefore, you could

wind up with one “Dr. Jones Marijuana Shop” in Miami, another in Denver and a third one in California. These would be three different companies with different quality products, standards and service. That could result in confusion for the consumer, who might think all three dispensaries were under the same ownership.

From a branding perspective, the difference between state and federal regulations is laying a land mine for future disputes. In general, the first company to use a brand name or trademark has superior rights to the intellectual property, compared with other businesses that follow. However, the various laws and regional restrictions are creating a proliferation of different owners using the same mark in different parts of the country who would dispute first uses in other states. If the federal law changes we are likely to see legal disputes arise over use of marks.

It is likely that until there is a change in federal law, you will see a move toward consolidating local and regional businesses so as to get the broadest brand coverage possible. You will also see trademarks registered federally for associated side businesses, such as supplement sales, that can later be converted to cannabis use. Regardless of your view on the merits or propriety of marijuana use, creating clear national branding rights almost always serves the interests of the consumer and regulator.

WHAT ABOUT REGULATORY AND COMPLIANCE ISSUES?

Marta Alfonso, CPA, Principal, Miami Office; Edward Blum, CPA, Boulder Office, Morrison, Brown Morrison, Brown, Argiz & Farra, LLC

Businesses that operate in the cannabis industry confront significant operating, financial, and compliance issues as a state-regulated, cash-intensive operation. As of March 31, the Treasury Department’s Financial Crimes Enforcement Network, or FinCEN, reported that only 368 of U.S. depository institutions provided banking services to marijuana- related businesses.

Thus, the restricted banking environment for licensed cannabis businesses necessitates that owners adopt and maintain effective internal controls relating to the receipt, disbursement, accounting, secure storing, and secure transfer of cash. In addition, federal reporting requirements are also in place for certain cash transactions. Cannabis- related businesses must report to FinCEN if they receive cash payments over $10,000 as a result of a single transaction or two or more related transactions.

As with other businesses, but more so with a cannabis enterprise, owners should adopt and maintain internal controls that avoid the commingling of its operating cash with the personal cash requirements of an owner or manager, or the cash requirements relating to other owner permitted business ventures.

Additional financial complexities arise in complying with federal income tax law and state operating requirements for cannabis-related enterprises.

Under the Internal Revenue Code (IRC) Section 280E, and pursuant to IRS interpretation, cannabis businesses may only deduct from gross income the cost of the controlled substances sold. Therefore, no other costs are deductible by a cannabis enterprise, such as rent, telephone, or administrative salaries.

A tax court case related to the application of IRC Section 280E in a cannabis enterprise with more than one business activity held that the nature of the enterprise expenditures must be examined and that allocations be made between the cannabis related and the non-cannabis related expenditures.

Based on this judicial precedent, proper compliance necessitates that an owner establish and maintain a detailed chart of accounts and appropriate cost accounting procedures that

distinguish and maintain necessary documentary support for costs that are incurred in connection with the cannabis related activities from other income and costs derived from permitted non-cannabis activities at the same location.

Other important income tax considerations involve selection of the appropriate tax filing entity and ensuring compliance with state requirements related to the residency of cannabis-related enterprise investors.

State requirements also mandate that a cannabis enterprise track the progeny of cannabis being grown and sold, and retain evidence of sales to qualified customers. As a result, cannabis owners must adopt rigorous inventory accounting and documentary procedures on a per transaction purchase and sale basis to comply with state requirements and income tax record keeping.