



Caregiving as a Business Under the Michigan Medical Marijuana Act

A Primer

By Robert Hendricks and Benham Wrigley Jr.

The Michigan Medical Marijuana Act¹ allows a caregiver to lawfully² sell marijuana to a patient to whom the caregiver is connected in the state's database.³ While this protects specific marijuana business activity from prosecution under state law, the law is by no means clear.⁴ Moreover, federal illegality of marijuana under the Controlled Substances Act⁵ affects all marijuana business activity.

A comprehensive analysis of all the legal issues presented by a marijuana caregiver business is not feasible in this primer. Generally, however, those issues include who may be a caregiver, grow locations and requirements, employees and cooperative activity, "overages," banking, product transportation, and taxation.

Caregiver—natural person or entity?

The act defines a caregiver as "a person...at least 21 years old..." who also meets certain other eligibility requirements.⁶ The statute neither defines "person" nor limits it to a natural person, but the inclusion of the age requirement may indicate that only natural persons may be caregivers. The Michigan Department of Licensing and Regulatory Affairs, which is responsible for issuing registry identification cards to caregivers,⁷ has not adopted a rule on this question, but has denied caregiver applications from nonnatural persons. If only a natural person may be a caregiver, the availability of corporate forms for business activity is irrelevant.

FAST FACTS

The Michigan Medical Marihuana Act authorizes a caregiver to sell medical marijuana on a limited basis.

Federal illegality of marijuana under the Controlled Substances Act affects all considerations of marijuana business activity.

A caregiver business model that includes any transfer of marijuana to anyone other than a connected patient is probably illegal under state law.

Even if a corporate form—including a corporation, limited liability company, or similar entity—for caregivers is allowed under the act, its efficacy to limit liability is not clear. Under long-established principles of corporate law, the liability-limiting veil of the corporate form may be disregarded by a court if, among other reasons, the entity uses the form to engage in illegal activity.⁸

The production and sale of marijuana is illegal under federal law. That illegality might provide the basis to impose unlimited personal liability on the business owners.⁹ Additionally, the duty of good faith imposed on the managers of a business entity has been construed to prohibit a manager from engaging in illegal activity. Thus, even if a corporation or limited liability company form could be used, it is not clear that the liability-limiting features will be available.

Grow location

A caregiver may cultivate up to 72 marijuana plants in an enclosed, locked facility,¹⁰ which may be a room, a vehicle, or even an outdoor enclosure if the precise requirements of the statute are met.¹¹ Those requirements include security devices that permit access only to a caregiver or patient in particular circumstances.

Nothing in the law prevents the caregiver from renting or leasing the premises upon or within which the enclosed, locked facility is located. Moreover, so long as the requirements are met, there does not appear to be any prohibition on locating several enclosed, locked facilities within one larger building or on a plot of land. Incidental amounts of seeds, stalks, and unusable roots may be possessed by a caregiver, apparently outside the enclosed, locked facility, thus authorizing trash disposal or composting.

A municipality may not prohibit a caregiver from engaging in authorized activities relating to medical marijuana,¹² but reasonable restrictions on caregiver activity may be contained in local zoning and land-use regulations (e.g., “home

business occupation” regulations). Such restrictions might include a prohibition on delivering marijuana to a patient at the caregiver’s residence.

Employees and assistance

Growing marijuana is not unlike many other types of cultivation—plants need regular and intensive attention. However, growing marijuana in Michigan is illegal unless the grower is a patient or a caregiver.¹³ Therefore, hiring an assistant to water and fertilize plants, harvest mature plants, or deliver marijuana to patients are all probably unlawful and could expose the assistant to possible arrest and prosecution.

Even if a caregiver managed to identify another caregiver or patient to provide the needed assistance, the strict language of the act probably does not allow a registered patient or caregiver to assist another caregiver in any activity that requires possession or control of the marijuana or access to the enclosed, locked facility where it must be cultivated. It is also possible that surrender of possession of marijuana by the caregiver to anyone other than the caregiver’s patient could be construed to be a delivery of marijuana not sanctioned by the act—a crime. In short, a caregiver business under the act will probably be a solitary undertaking, with no legal authority to include any other person in most aspects of the business activity.

Overages

Within the Michigan medical marijuana community, the word “overage” is used to describe the marijuana produced by a caregiver that exceeds the needs of the caregiver’s patients.¹⁴ Many within the community assert that a caregiver should be allowed to sell this overage to other caregivers for resale to patients. Indeed, based on anecdotal information, the inventory needs of Michigan dispensary businesses are supplied to some extent by the overages created by registered caregivers.

Can overages play any part in a lawful caregiver business under the act? There is nothing in the act that explicitly authorizes a caregiver to provide medical marijuana to another caregiver. The only transfers of medical marijuana explicitly authorized are transfers from registered caregivers to their registered patients. While arguments have been advanced that caregiver-to-caregiver transfers are implied in the right of a caregiver to “assist” a patient, a panel of the Michigan Court of Appeals just rejected that argument.¹⁵ For now, a caregiver business model that includes any transfer of marijuana to anyone other than a connected patient is probably illegal.

Most bankers continue to refuse marijuana businesses as customers, even for a simple checking or depository account.

Banking

Several federal laws prohibit banks from serving customers who are engaged in federally unlawful activity.¹⁶ While certain recent pronouncements by the United States Department of Justice¹⁷ and the Financial Crimes Enforcement Network¹⁸ have opened the door a crack to permissible banking activities for marijuana businesses in states where marijuana is legal, most bankers continue to refuse such businesses as customers, even for a simple checking or depository account.

Many marijuana businesses in Colorado, Oregon, and other states in which marijuana is lawful have not been able to open or keep a bank account because of the product they make or sell. Without a bank, all of the business's financial transactions—including deposits and payment of taxes—must be done in cash, which needs to be stored and transported to the caregiver's vendors, landlord, municipal and state tax collectors, and others by car, armored carrier, or otherwise. Even payments to employees and the distribution of profits must be done in cash. Misrepresentation to a bank regarding the nature of the caregiver's business activity could be a crime under money-laundering laws.

Product transportation

The act exempts from legal liability the actions of a caregiver in assisting a patient in the “medical use of marijuana”¹⁹ if the conditions of the act are met. Medical use includes the “transportation of marijuana” to treat a patient.²⁰ The Michigan Penal Code was amended in 2012 to regulate the transportation of usable marijuana.²¹ While constitutionally suspect, a cautious caregiver should endeavor to comply with this statute until it is determined to be inapplicable.²²

Taxation

Federal Internal Revenue Code Section 280E denies most business deductions to a taxpayer engaged in drug “trafficking.”²³ Caregiving under the act fits this statute, and a caregiver should plan to pay substantially higher federal income tax than a business not subject to § 280E.

This primer touches on some of the most obvious legal issues faced by a caregiver business under the Michigan Medical Marihuana Act. Unless or until the law is expanded, however, any such business is limited in scope and subject to significant risks for noncompliance. ■



Robert Hendricks and Benham Wrigley Jr. are members of Wrigley, Hoffman & Hendricks, PC, in Grand Rapids, where they practice commercial and business law. The firm has developed a business practice that integrates business law knowledge and experience with the newly emerging elements of legalized marijuana. Information about the firm's marijuana business practice and its blogs on marijuana business legal matters are available at <http://www.cannalexlaw.com>.



ENDNOTES

1. MCL 333.26421 *et seq.*
2. Lawfulness is established by immunity from, or an affirmative defense to, prosecution. See MCL 333.26424 and MCL 333.26428.
3. *State v McQueen*, 493 Mich 135, 152; 828 NW2d 644 (2013); see also LARA R 333.115(2).
4. As of July 2015, the Michigan Supreme Court had construed the Michigan Medical Marihuana Act nine times. See *People v Hartwick*, 498 Mich 192, 200 n 5; 870 NW2d 37 (2015).
5. 21 USC 801 *et seq.*
6. MCL 333.26423(h).
7. See MCL 333.26423(j).
8. See Scheuer, *The “Legal” Marijuana Industry’s Challenge for Business Entity Law*, 6 Wm & Mary Bus L Rev 511 (2015).
9. In an analogous situation, the Colorado Supreme Court ruled that federal illegality of marijuana was sufficient to make activity “illegal” notwithstanding state law. *Coats v Dish Network, LLC*, 350 P3d 849, 850 (Colo App 2015).
10. MCL 333.26424(b)(2).
11. See MCL 333.26423(d).
12. *Ter Beek v City of Wyoming*, 495 Mich 1; 846 NW2d 531 (2014).
13. MCL 333.7401(1).
14. See, e.g., Michigan Medical Marijuana Association, Forums <<http://michiganmedicalmarijuana.org/topic/45151-what-does-a-caregiver-do-with-overages/>>. All websites cited in this article were accessed July 6, 2016.
15. *People v Bylsma*, ___ Mich App ___ (May 17, 2016); cf. *McQueen*, 493 Mich at 161, appendix item 4.
16. See, e.g., 31 USC 5311–5330; 18 USC 1956 *et seq.*
17. US Dept of Justice, Memorandum for All US Attorneys (February 14, 2014) <[http://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202014%2014%20\(2\).pdf](http://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202014%2014%20(2).pdf)>.
18. US Dept of Treasury: Financial Crimes Enforcement Network, Guidance <https://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf>.
19. MCL 333.26424(b).
20. MCL 333.26423(f).
21. MCL 750.474.
22. See *People v Latz*, COA Docket No. 328274 (appeal pending).
23. 26 USC 280E.