

BALLOT MEASURE RELATING TO LEGALIZATION OF MARIJUANA

This memorandum provides a brief analysis of each section of the November 2018 general election Initiated Measure No. 3, relating to the legalization of marijuana and general observations relating to each section.

SECTION 1

Section 1 amends North Dakota Century Code (NDCC) Section 19-03.1-05 to remove hashish, marijuana, and tetrahydrocannabinols from the list of Schedule I hallucinogenic controlled substances set forth in the Uniform Controlled Substances Act.

- Should the definitions of hashish and marijuana also be removed from the Uniform Controlled Substances Act definitions in NDCC Section 19-03.1-01? If the definition of marijuana remains in NDCC Section 19-03.1-01, that definition would conflict with the definition of marijuana created in Section 5 of the initiated measure.

SECTION 2

Section 2 amends NDCC Section 19-03.1-23(10). Subsection 10 relates to the possession of less than one ounce [28.35 grams] of marijuana and the ability of a court to seal the court record of the conviction if the individual is not subsequently convicted within 2 years of an additional violation under NDCC Chapter 19-03.1. Section 2 of the initiated measure replaces that language with: "Any individual under the age of 21 found in possession, of marijuana shall be held to the same penalties as though they were a minor in possession of alcohol whatever those may be."

Section 2 also creates a new subsection 11 as follows: "Any individual who distributes marijuana to those under the age of 21, or is an individual under the age of 21 who attempts to distribute marijuana is subject to the same penalties as though they were convicted of selling alcohol to a minor whatever those may be."

- Does use of the language "whatever those may be" mean the intent of the initiated measure is for the penalties to change when the penalty associated with alcohol is changed?
- To be clear in defining the penalty, the measure should include cross-references to the applicable alcohol penalty sections.

SECTION 3

Section 3 amends NDCC Section 19-03.4-01 relating to the definition of drug paraphernalia by adding the term "non-marijuana" to each subsection.

- The term "non-marijuana" is not defined in the measure.
- Because marijuana is removed from the list of controlled substances in Section 1, this change appears unnecessary.

SECTION 4

Section 4 creates NDCC Section 25-03.1-45, relating to expungement of records. The new section provides "[a]ny individual who has an illegitimate drug conviction as defined in this chapter shall hereby have their records expunged and sealed by the court automatically." The section, which provides for an appeal by a jury trial if the "automatic" sealing of records has not occurred, provides "the state shall pay all legal expenses for both parties", and provides "[a]ny individual shall have the right to sue in court for damages as a result for failure to properly expunge records." In addition, this section provides for the expungement of court records following discharge from a treatment facility or the State Hospital.

- The overall intent of this section is unclear. Both "expunge" and "seal" are used in this section; however, each term has a separate and distinguishable meaning.
- The implementation times specified in this section make it unclear as to when records would need to be expunged without violating the section, which would become effective 30 days after approval.
- Because the term "records" is not defined, the language raises a question as to what records are to be sealed or expunged.
- Also unanswered is which party or entity is responsible for the costs of locating the records to be sealed or expunged, which entity is responsible for expunging or sealing records, and how many years back does this section apply?

- NDCC Section 27-20-54 provides for the destruction of juvenile court records. Does this new section, 25-03.1-45, also require a penalty imposed upon a juvenile before the passage of this measure, which is greater than those created in Section 2, to be expunged? Is the juvenile court required to readjudicate a case for a juvenile who is under supervision for an offense involving marijuana?
- Placement of language relating to expungement or sealing of records in NDCC Chapter 25-03.1, which relates to civil commitment procedures, may have unforeseen consequences for an individual who has been civilly committed.

SECTION 5

Section 5 would create NDCC Chapter 66-01. The first section of the chapter would define marijuana and marijuana paraphernalia. The second section would establish criminal penalties. This section provides "[n]o person over the age of 21 shall be prosecuted in any court for any non-violent marijuana related activity, with the exception of the sale of marijuana to a person under the age of 21. Activities include but are not limited to; growing, manufacturing, distributing, selling, or testing of marijuana" and "[n]o person over the age of 21 shall be prosecuted in any court for any drug paraphernalia relating to any non-violent marijuana activity."

The third section of the new chapter provides "[i]n the event of the existence of any language in Century Code which conflicts with this chapter those sections are hereby nullified and repealed." This language likely would be classified as a "general repeal" in that it expressly or explicitly states the law will be repealed; however, it does not specifically identify any provisions of law to be repealed.

- The section does not provide definitions of non-violent and drug paraphernalia.
- Are there exceptions for potentially conflicting laws such as laws regulating the conduct of individuals engaged in certain professions, such as teachers, law enforcement, and child care workers?
- Would this section allow any individual who is serving a sentence for a marijuana-related offense to be released upon the effective date of the approved measure?
- How does the general repeal apply to the laws relating to medical marijuana?

GENERAL OBSERVATIONS AND RELATED ISSUES

Tax Implications

The following information summarizes some of the tax implications of the initiated measure.

- Sales tax likely would apply to the sale of recreational marijuana in the same manner it applies to the sale of medical marijuana. The sale of medical marijuana is classified as a sale of tangible personal property. Pursuant to NDCC Section 57-39.2-02.1, sales tax at a rate of 5 percent is applied to the gross receipts of retailers for all retail sales of tangible personal property, unless specifically exempted. A sales tax exemption is not provided for the sale of medical marijuana, because the drug is not sold under a doctor's prescription, or the sale of recreational marijuana. Sales tax on recreational marijuana sales also would apply at the local level if a local option tax is imposed by a city or county under home rule authority.
- Whether an individual selling recreational marijuana would be classified as a retailer in the business of selling tangible goods can be determined by reviewing the definitions for a retailer, retail sale, and business in NDCC Section 57-39.2-01 and North Dakota Administrative Code Section 81-04.1-01-16, relating to casual or occasional sales. Pursuant to NDCC Section 57-39.2-01, a "retailer" includes every person engaged in the business of selling tangible goods at retail, a "retail sale" means any sale for purposes other than for resale, and a "business" is broadly defined as any activity engaged in by a person with the object of gain, benefit, or advantage. North Dakota Administrative Code Section 81-04.1-01-16 provides casual or occasional sales made by an individual are not subject to sales tax but sales of a number, volume, or frequency which indicate the sales are not casual or isolated are subject to tax. An individual making sales that go beyond casual or isolated sales would need to obtain a sales tax permit from the Tax Department and file sales tax returns.
- The 5 percent state sales tax likely would apply if no action is taken by the Legislative Assembly to specifically exempt the sale of recreational marijuana from sales tax or apply an alternative tax rate to the sale of recreational marijuana. An example of an alternative tax rate applied to the sale of recreational marijuana can be seen in the tax treatment of recreational marijuana sales in Colorado. In Colorado, medical marijuana is subject to the state's standard 2.9 percent sales tax while sales of recreational marijuana are specifically exempted from the state's sales tax and instead subject to a separate 15 percent retail sales tax.

General Repeal of Conflicting Law

Although the North Dakota Supreme Court has recognized general repeals, see *St. Paul Foundry Co. v. Burnstad School Dist. No. 31*, 295 N.W. 659 (1936), *State v. Torgerson*, 220 N.W. 834 (1928), and *State v. Sorlie*, 219 N.W. 105 (1928), in which legislation purports to repeal acts or parts of acts conflicting or inconsistent with a newly adopted statute, the court appears to treat general repeals in much the same way the court would treat an implied repeal.

North Dakota Century Code Section 1-02-07 may affect implied repeals. This section provides in the case of a conflict, a particular law controls a general law. Although the North Dakota Supreme Court does not favor implied repeals, and in some cases has actually stated there is an established presumption against implied repeals, see *Birst v. Sanstead*, (1992), the court recognizes an implied repeal if laws are irreconcilable and does consider the intent of the Legislative Assembly, or in the case of an initiated measure, the intent of the people. The practice is to harmonize the laws if possible. If a conflict exists, only that portion of the law irreconcilable under the circumstances is repealed.

Unlike an express or explicit repeal, which clearly identifies the repealed provision of law and which the Code Revisor acts upon in publishing the Century Code, a general or implied repeal is identified through litigation and through the courts.

For purposes of the initiated measure, challenges that may arise due to the lack of clarity of the general repeal clause include difficulty in identifying criminal behavior as well as identifying which records are required to be expunged or sealed.

Juveniles

It is unclear as to the overall implications of the initiated measure on juveniles.

Amend or Repeal of an Initiated Measure

Section 8 of Article III of the Constitution of North Dakota provides, in part, "[a] measure approved by the electors may not be repealed or amended by the legislative assembly for seven years from its effective date, except by a two-thirds vote of the members elected to each house." Therefore, any legislation necessary to clarify provisions of the measure or to regulate the sale or use of marijuana would require a two-thirds vote in each house.

Federal Oversight

Under federal law, marijuana is a Schedule I drug, is considered dangerous, has no accepted medical use, and has a high potential for abuse.

In January 2018, Attorney General Jeff Sessions issued a marijuana enforcement memorandum, which rescinded the "Cole Memorandum", and allows federal prosecutors to decide how to prioritize enforcement of federal marijuana laws. Specifically, the Sessions Memorandum directs United States Attorneys to "weigh all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community."

Other States

The following is a brief summary of recreational and medical marijuana laws in other states:

- Thirty states and the District of Columbia have laws broadly legalizing marijuana in some form.
- As of July 2018, nine states (Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Vermont, and Washington) and the District of Columbia have adopted laws legalizing marijuana for recreational use.
- The vast majority of states allow for limited use of medical marijuana under certain circumstances. Louisiana, West Virginia, and a few other states only allow the use of cannabis-infused products, such as oils and pills. Other states have passed narrow laws allowing residents to possess cannabis only if they suffer from select rare medical illnesses.
- A number of states have decriminalized the possession of small amounts of marijuana.
- Colorado and Washington use a threshold of 5 nanograms or more of tetrahydrocannabinol per milliliter of blood as a measurement for driving under the influence of cannabis.
- States are working to balance regulating a legal marijuana market for adults while preventing access by children. This includes requiring identification checks at dispensaries, prohibiting anyone under age 21 inside

dispensaries, requiring child-resistant packaging of cannabis products, and prohibiting the use of marijuana in public.

- Alaska, Colorado, Oregon, and Washington are developing unique structures to collect tax revenue and license and regulate marijuana cultivation facilities and retail shops.