

Legal Alert: Municipalities Are Able to Prohibit Certain Aspects of the Newly Legal Cannabis Business as New York State Legalizes Marihuana

The New York State Legislature and Governor Cuomo have finally agreed on new legislation to regulate the marihuana industry, including the legalization of recreational adult-use marihuana.

If you have been following this topic since Governor Cuomo released his Budget Bill in January, you know that the Governor had placed the authority with individual counties to opt out of allowing retail sales of recreational cannabis within the county. The final legislation passed last month, however, which is entitled the “Marihuana Regulation and Taxation Act”, or MRTA, significantly changed that concept.

In addition to modifying the title of the Act to refer to “marihuana” rather than “cannabis”, the MRTA has reallocated the power to appoint members to the newly created and powerful five-member Cannabis Control Board. Prior iterations allowed the Governor to appoint all five members. The MRTA now gives the Senate and Assembly input and power to appoint the members. The Executive Director of the newly created Office of Cannabis Management will also be appointed by the Governor with the consent of the Senate. Finally, the MRTA creates a State Cannabis Advisory Board to work in collaboration with the Cannabis Control Board.

With regard to the ability to prohibit certain aspects of the cannabis business, the MRTA now allows municipalities to decide whether to prohibit the issuance of two specific licenses within its jurisdiction – the licenses for retail dispensaries and/or on-site cannabis consumption premises. It also, however, sets a specific process for any municipality that decides to prohibit either retail dispensaries and/or on-site cannabis consumption premises. First, the municipality must enact a local law by December 31, 2021 requesting the Cannabis Control Board to prohibit the establishment of retail dispensary licenses and/or on-site consumption licenses within the municipality’s jurisdiction. The local law must also be subject to permissive referendum, which is a process by which the registered voters in the municipality have the ability to require a vote on such local law during an election. Any municipality considering such a prohibition should understand the procedure and significance of the permissive referendum process.

Second, while the MRTA specifically preempts counties, towns, cities and villages from adopting laws pertaining to the operation or licensure of the new cannabis business, they are allowed to pass local laws and regulations governing the “time, place and manner of the operation” of the licensed adult-use cannabis retail dispensaries and/or on-site consumption premises, provided such laws do not make the operation of licensed retail dispensaries or on-site consumption premises “unreasonably impracticable”. We fully expect further guidance from the Cannabis Control Board, and ultimately the courts, in defining what local regulations might cross the line of making such business “unreasonably impracticable.”

We expect all municipalities will be grappling with the decision of whether or not to prohibit retail dispensaries and/or on-site cannabis consumption premises through 2021.

Please remember that under federal law, the possession, use, distribution or sale of non-hemp cannabis and cannabis-based products is illegal despite certain state laws that decriminalize such activity. While federal enforcement policy may defer to a state's laws and not enforce conflicting federal laws, the fact remains that compliance with state law in no way assures compliance with federal law, and there is a risk that conflicting federal laws may be enforced in the future. No legal advice we give is intended to provide any guidance or assistance in violating federal law.