



NY's Ever Changing Medical Cannabis Program: Making Sense of the Regulatory Haze

On March 31, 2021, Governor Andrew Cuomo signed into law the Marijuana Regulation and Taxation Act ("MRTA") which provided the legal framework for adult-use cannabis sales and consumption, and re-organized the bureaucratic/administrative structure that previously governed NY's medical marijuana program set forth in the Compassionate Care Act of 2014. For the medical marijuana program, now called the medical cannabis program, the MRTA provides for a series of advances including increased patient access, expansion of medical product lines and additional disease conditions that qualify for approval of medical cannabis use.

Some may question the future viability of NY's medical cannabis program given that the general adult population will be able to legally access cannabis. However, based upon the legislative intent of the MRTA, it is clear that NY's medical cannabis program is expected not only to expand but thrive under the new legislative framework.

Pharmaceutical-grade medical cannabis used to treat certain medical conditions, will continue to be available only through "Registered Organizations" ("ROs") licensed by the newly-formed Office of Cannabis Management ("OCM") (previously licensed by the New York State Department of Health ("DOH")). The OCM and its governing board, the Cannabis Control Board ("CCB"), have taken over the regulation of all cannabis programs in NY, including all adult use recreational cannabis, hemp cannabis, and medical cannabis. Previously, all hemp and cannabis related programs were governed by the DOH and/or the Department of Agriculture.

New expansion of the medical cannabis program includes: increasing a certified patient's cannabis supply limit from 30 days to 60 days; allowing whole flower cannabis and the "smoking" of such medical cannabis with certain limitations; removing certain state fees patients were required to pay; and expanding the conditions for which patients may receive medical cannabis to include not only Alzheimer's disease, muscular dystrophy and autism, but also "any diagnosis or condition deemed appropriate" by the certifying practitioner in addition to the list of conditions that were previously permitted by the legislature or the DOH.

Certified practitioners are now afforded essentially unfettered discretion in certifying patients to receive medical cannabis for their ailments. The new rules also allow certified patients to designate up to five designated caregivers to assist them in obtaining and administering the medical cannabis. Unlike adult use cannabis, medical cannabis is not limited to patients aged 21 and over, since younger patients might suffer from epilepsy, spinal cord injuries and other qualifying conditions. Regulations and licenses have yet to be issued by the OCM to permit the cultivation, processing, production, and sale of adult use cannabis, but medical cannabis continues to be available through RO dispensaries. In fact, the only legal source of obtaining cannabis in NY currently is medical cannabis acquired from a RO.

Another advantage for certified medical cannabis patients is the opportunity to grow cannabis at home ahead of the opening of the adult use market. Medical cannabis patients will be permitted to grow up to three mature plants and three immature plants per person for adults over age 21 (with six mature plants and six immature plants maximum per household). The OCM and the CCB advanced proposed regulations for the home cultivation of medical cannabis on October 21, 2021 and is now reviewing public commentary on the proposed regulations. The MRTA will permit the home growing of cannabis plants for adult recreational use, subject to the possession limitations noted above, commencing 18 months after the first adult use sales begin for adult recreational use of cannabis.

The medical cannabis program will continue to offer certified patients the opportunity to receive guidance and advice as to the appropriate dosage and ratio of its THC and CBD components by consulting with their certifying practitioner as well as the certified pharmacist available at the ROs. Medical-grade whole flower smokable medical cannabis will join currently approved medical cannabis products such as vape cartridge/pens, capsules/tablets, tinctures, oral spray, oral powder, lozenges, transdermal patches, and ground plant preparation for vaporization. With the new whole flower product, patients will have access to all the cannabinoids and terpenes that the individual plant contains. When the plant is processed through grinding or other means some components may not make it into the final product. Some believe that the fastest method to obtain the relief sought by patients is through smoking the whole flower of the plant.

Once home cultivation of cannabis is permitted, adult NY residents will be able to have up to 5 pounds of cannabis in their home legally, though they will only be allowed to have up to 3 ounces outside the home (or up to 24 grams of concentrated cannabis, such as oils derived from the cannabis plant.) Of course, home cultivation of cannabis will require compliance with certain reasonable steps to secure and safeguard the product as will be specified in the anticipated regulations.

Tucked into the MRTA are other provisions that benefit the medical cannabis industry allowing ROs to expand into the adult use recreational marketplace. Existing medical cannabis companies will have the right to pay a one-time special licensing fee set by OCM to become cultivators and sell adult use cannabis at up to three of a company's medical cannabis dispensaries.

The MRTA continues much of the original spirit and intention of the Compassionate Care Act. There are still no limits on the number of NY medical practitioners who may obtain certification to recommend medical cannabis to certified patients. However, an eligible practitioner must be a licensed physician, nurse practitioner, physician's assistant, dentist, podiatrist, or midwife and must be registered or certified by NY State to prescribe controlled substances to humans within NY. Qualified practitioners interested in becoming certified must take required coursework approved by NY State. The OCM has approved a list of approved online courses to certify qualified practitioners, some of which offer CME credits. Once the coursework is completed, the practitioner can receive a course completion certificate in order to register for OCM's medical cannabis program. Pharmacists and practitioners working in RO dispensaries must also take the required course before they are permitted to counsel certified patients and their designated caregivers on the use, administration, and risks associated with approved medical cannabis products. Practitioners who are able to certify patients for medical cannabis in another state are not entitled to reciprocity to certify patients in NY State. Such practitioners would have to obtain separate certification in NY to certify patients in this state.

A certified practitioner is not permitted to receive or solicit any item of value in exchange for referring patients to a particular provider of healthcare services or products, such as a dispensary, and therefore, such practitioner cannot, directly or indirectly, benefit from a patient obtaining a written certification for medical cannabis (other than receiving an appropriate office fee paid by the patient for the patient's visit and evaluation unless otherwise prohibited in certain cases). Furthermore, a practitioner that issues certifications to patients for medical cannabis, and his/her coworkers, employees, spouse, parent, child, or sibling shall not have a direct or indirect financial interest in a RO or any other entity that may benefit from the certified patient's purchase or use of medical cannabis products, including but not limited to, any compensation from the RO to the practitioner for issuing a written certification and steering the patient to a specific dispensing facility. Nor is a practitioner permitted to issue a certification for medical cannabis for himself or the practitioner's family members, employees or coworkers, or to receive or provide any product samples containing cannabis.

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