

# MEDICAL MARIJUANA

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## Consequences of Conflicting Federal and State Medical Marijuana Laws

### ABSTRACT

The medical use of marijuana is a federal crime, even when permitted by state law. The Department of Justice (DOJ) has released eight enforcement priorities to guide the prosecution of marijuana related crimes. These priorities may provide protection for those using medical marijuana in accordance with state law, but they do not remove DOJ authority to enforce federal law. The eight enforcement priorities also apply to banks providing financial services to medical marijuana businesses. Conflicting federal and state medical marijuana laws can lead to employment discrimination, income tax inequity, severe penalties for firearm possession, and a lack of access to federally assisted housing. These issues should be part of Utah's medical marijuana legislation discussion.

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# Medical Marijuana

## CONSEQUENCES OF CONFLICTING FEDERAL AND STATE MEDICAL MARIJUANA LAWS

### INTRODUCTION

Under the federal Controlled Substances Act (CSA), marijuana is a schedule I controlled substance.<sup>2</sup> Substances are classified as schedule I when they have a “high potential for abuse”, “no currently accepted medical use in treatment in the United States”, and a “lack of accepted safety for use...under medical supervision”.<sup>3</sup> Medical and non-medical uses of marijuana are federal crimes, and research use of marijuana is highly restricted.<sup>4</sup>

The Drug Enforcement Administration (DEA), the U.S. Department of Health and Human Services (HHS), Congress, and individual petitions may initiate the procedure to decontrol or reschedule a controlled substance, but no such actions have been successful thus far.<sup>5</sup> As a result, 23 states and the District of Columbia have passed state laws that permit the use of medical marijuana even though it is still a crime federally.<sup>6</sup> Conflicting federal and state laws raise several issues that Utah should consider prior to passing its own medical marijuana legislation, such as federal prosecution, banking concerns, employment discrimination, income tax inequity, severe penalties for firearm possession, and a lack of access to federally assisted housing.

### FEDERAL PROSECUTION

The first question Utah should consider prior to passing medical marijuana legislation is whether patients, physicians, and others involved in the medical marijuana industry could be prosecuted federally, even when complying with Utah laws. In *Gonzales v. Raich*, the US Supreme Court confirmed that the federal government can prosecute individuals who are using marijuana in accordance with state medical marijuana laws.<sup>7</sup> On the other hand, a series of memoranda released by the U.S. Department of Justice (DOJ) in 2009, 2011, 2013, and 2014 have left states hopeful that their citizens will remain largely undisturbed.<sup>8</sup> However, because the memoranda were issued as guidance and do not affect the DOJ’s authority to enforce the law, it is debatable whether these memoranda provide any protection from federal prosecution.<sup>9</sup>

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2 21 U.S.C. § 812(c), Sch.(c)(10).

3 21 U.S.C. § 812(b)(1).

4 Task Force on the Therapeutic Use of Medical Cannabis, *Implementation of the Minnesota Medical Cannabis Program*, Working Draft, February 2015 (hereinafter *Implementation of the Minnesota Medical Cannabis Program*) available at [https://docs.google.com/document/d/1ii\\_etN8MmhggqPIBMyPzCOHMxpEBmZZzNH\\_8VVjWj1s/edit?pli=1](https://docs.google.com/document/d/1ii_etN8MmhggqPIBMyPzCOHMxpEBmZZzNH_8VVjWj1s/edit?pli=1).

5 Todd Garvey, Charles Doyle, and David H. Carpenter, Congressional Research Service, *Marijuana: Medical and Retail – Selected Legal Issues*, April 8, 2015 (hereinafter *Marijuana: Medical and Retail*), available at <https://www.fas.org/sgp/crs/misc/R43435.pdf>.

6 *Medical Marijuana*, Law Atlas, available at <http://lawatlas.org/medical-marijuana>.

7 545 U.S. 1, 32-33 (2005).

8 *Marijuana: Medical and Retail*, at 15.

9 Memorandum for all United States Attorneys from James M. Cole, Deputy Attorney General, *Guidance Regarding Marijuana Related Financial Crimes*, February 14, 2014, available at [http://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%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%202%2014%2014%20(2).pdf).

## 2009 and 2011 Memoranda

The first memorandum, issued in 2009 by Deputy Attorney General David Ogden, encouraged federal prosecutors to focus their limited resources on “significant traffickers of illegal drugs, including marijuana” and not on individuals with serious illnesses who clearly comply with state law.<sup>10</sup> Deputy Attorney General James Cole added in 2011 that the Ogden memorandum “was never intended to shield...[p]ersons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities...”, and that such individuals are subject to federal enforcement.<sup>11</sup>

## 2013 Memorandum

In 2013, Cole issued another memorandum which stated eight marijuana enforcement priorities for the DOJ. These priorities are to prevent: (1) distribution of marijuana to minors, (2) marijuana revenue going to gangs or cartels, (3) diversion of marijuana from states where it is legal under state law to other states, (4) state-authorized marijuana activity being used as a pretext for trafficking other illegal drugs or other illegal activity, (5) violence and firearm use related to marijuana cultivation and distribution, (6) drugged driving and the exacerbation of other adverse public health consequences of marijuana use, (7) growing marijuana on public lands, and (8) marijuana possession or use on federal property.<sup>12</sup> Cole advised the DOJ to focus enforcement resources on persons “whose conduct interferes with any one or more of these priorities, regardless of state law.”<sup>13</sup> Cole recognizes that outside of these eight priorities, state authorities have traditionally regulated marijuana activity. However, he also warns that the DOJ expects states to enact “strong and effective regulatory and enforcement systems... [that] contain robust controls and...[to] provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermined federal enforcement priorities.”<sup>14</sup> States that follow such a regulatory system will be “less likely to threaten the federal priorities...”<sup>15</sup>

Cole also amends his 2011 approach to enforcement actions against commercial marijuana operations. The 2013 memorandum advises prosecutors that they “should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department’s enforcement priorities...”<sup>16</sup> Instead, they should “review marijuana cases on a case-by-case basis,” and take into account “whether the operation is demonstrably in compliance with a strong and effective state regulatory system.”<sup>17</sup> Therefore, the 2013 memorandum appears to be more tolerant of commercial marijuana operations than the 2011 memorandum, by focusing enforcement on those that threaten the eight enforcement priorities.

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10 Memorandum for Selected United States Attorneys from David W. Ogden, Deputy Attorney General, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, October 19, 2009, available at <http://www.justice.gov/opa/documents/medical-marijuana.pdf>.

11 Memorandum for United States Attorneys from James M. Cole, Deputy Attorney General, *Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use*, June 29, 2011, available at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>.

12 Memorandum for all United States Attorneys from James M. Cole, Deputy Attorney General, *Guidance Regarding Marijuana Enforcement*, August 29, 2013, available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

13 *Id.* at 2.

14 *Id.* at 2-3.

15 *Id.* at 3.

16 *Id.*

17 *Id.*

## 2014 Memorandum

In the most recent memorandum (2014), Cole stated that the eight enforcement priorities should also prioritize the prosecution of marijuana related financial crimes.<sup>18</sup> He affirmed that marijuana-related violations of the Controlled Substances Act are unlawful activities, for which it is a “criminal offense to engage in certain financial and monetary transactions with the proceeds.”<sup>19</sup> These financial issues are discussed in greater detail in the section entitled “Banking Concerns”.

## Federal Spending Bill

While the 2009, 2011, 2013, and 2014 memoranda indicate some safety from federal prosecution for those complying with state marijuana laws, they do not promise immunity. First, because the memoranda are guidance and not law, the approach to federal enforcement could quickly change as new government officials are elected.<sup>20</sup> Also, the DOJ has proved it will take action even when medical marijuana is legal under state law. For example, the DOJ pursued civil forfeiture actions against two Californian dispensaries, Berkeley Patients Group in 2013 and Harborside Health Center in 2012.<sup>21</sup> Last year, many believed that such action would end when a federal spending bill prohibited the DOJ from using funds made available in the act to prevent states “from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”<sup>22</sup> However, it appears that the DOJ interprets the provision as only prohibiting them from “impeding the ability of states to carry out their medical marijuana laws,” and that it does not apply to cases against individuals or organizations.<sup>23</sup> Therefore, until a court interprets the spending bill prohibition, it is likely it will not have much effect on DOJ enforcement actions in medical marijuana cases.

## BANKING CONCERNS

Under federal law it is illegal to provide banking services to those that manufacture or distribute marijuana.<sup>24</sup> As a result, many banks have been hesitant to offer banking services to both medical marijuana and recreational marijuana providers.<sup>25</sup> Some marijuana-related businesses have been forced to operate solely using cash.<sup>26</sup> Not only is the lack of banking services a public safety concern, it also makes the industry harder to tax and limits growth. For example, marijuana-related businesses often struggle to find financing for

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18 Memorandum for all United States Attorneys from James M. Cole, Deputy Attorney General, Guidance Regarding Marijuana Related Financial Crimes, February 14, 2014, available at [http://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%20%2014%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%20%2014%2014%20(2).pdf)

19 *Id.* at 2.

20 Implementation of the Minnesota Medical Cannabis Program, at 25.

21 *Cities Try, and Fail (So Far), to Prevent Federal Marijuana Enforcement*, October 24, 2014, available at <https://www.fas.org/sgp/crs/misc/cities.pdf>.

*City of Oakland v. Holder*, 901 F. Supp.2d 1188(2013).

*United States v. Real Prop. & Improvements Located at 2366 San Pablo Avenue*, 2015 U.S. Dist. LEXIS 14624 (N.D. Cal. Feb. 6, 2015).

22 H.Amdt.748 to H.R.4660, available at <https://www.congress.gov/amendment/113th-congress/house-amendment/748/text>.

23 Timothy M. Phelps, *Justice Department says it can still prosecute medical marijuana case*, April 2, 2015, available at <http://www.latimes.com/nation/nationnow/la-na-nn-medical-marijuana-abusers-20150401-story.html>.

24 Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 2014 (hereafter *Banks, Marijuana, and Federalism*) available at <https://www.dropbox.com/s/dc5w9q2ntlc9myu/Hill-on-marijuana-banking.pdf?dl=0>.

25 *Marijuana: Medical and Retail*, at 24.

26 *Banks, Marijuana, and Federalism*, at 3.

expansion.<sup>27</sup> Banking has been described as “the most urgent issue facing the legal cannabis industry today.”<sup>28</sup>

In 2014, the Financial Crimes Enforcement Network (FinCEN) responded to this banking crisis, releasing guidance to “clarify Bank Secrecy Act (BSA) expectations for financial institutions seeking to provide services to marijuana-related businesses”.<sup>29</sup> This guidance was touted by some as allowing banks to “legally” provide financial services to marijuana-related businesses, and was criticized by others for not overcoming the underlying issue of federal illegality.<sup>30</sup>

The guidance states that financial institutions are required to file suspicious activity reports (SARs) for all transactions conducted at the financial institution by marijuana-related businesses, and to categorize the reports based on Cole’s eight enforcement priorities.<sup>31</sup> If the financial institution is “providing financial services to a marijuana-related business that it reasonably believes...does not implicate one of the Cole Memo priorities or violate state law” they file a “Marijuana Limited” SAR filing.<sup>32</sup> If the marijuana-related business is believed to be implicating one of the Cole Memo priorities or violating state law, then the financial institution must file a “Marijuana Priority” SAR filing.<sup>33</sup> Finally, if the financial institution wants to terminate their relationship with the marijuana-related business, they must file a “Marijuana Termination” SAR filing. The FinCEN guidance also provided a list of “red flags” for when a marijuana-related business may be implicating one of the Cole Memo priorities.<sup>34</sup>

While FinCEN’s guidance claimed it would “enhance the availability of financial services for...marijuana-related businesses”, it did not guarantee protection against criminal prosecution or hefty civil monetary penalties for financial institutions or their employees.<sup>35</sup> Banks are concerned that they cannot control or know whether their clients are complying with the eight Cole memorandum priorities.<sup>36</sup> Now, over a year after the FinCEN guidance, it appears some financial institutions are choosing to take marijuana related clients, and others are not.<sup>37</sup> Between February 14, 2014 and January 16, 2015 the following SARs were filed:

- Marijuana Limited – 1,736 filed in 25 states
- Marijuana Priority – 313 filed in 19 states

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<sup>27</sup> *Id.* at 4.

<sup>28</sup> *Id.* at 6, (quoting Aaron Smith, executive director of the National Cannabis Industry Association in Washington, D.C.).

<sup>29</sup> Department of the Treasury, Financial Crimes Enforcement Network, *BSA Expectations Regarding Marijuana-Related Business*, February 14, 2014 (hereafter FinCEN Guidance), available at [http://www.fincen.gov/statutes\\_regs/guidance/html/FIN-2014-G001.html](http://www.fincen.gov/statutes_regs/guidance/html/FIN-2014-G001.html).

<sup>30</sup> States News Service, *Justice Department and Treasury Department Announce New Guidelines Allowing Banks to Work with Marijuana Businesses*, States News Service, February 14, 2014 .

Travis Nelson, *United States: Legalized Marijuana Guidance Leaves some Banks Dazed and Confused*, Mondaq Business Briefing, February 22, 2014 .

<sup>31</sup> FinCEN Guidance.

Alison Jimenez, David J. Schwartz, Michael Zeldin, H. David Kotz, *Managing AML/KYC Compliance Risk Webinar* (hereafter Compliance Risk Webinar), available at [http://pages.marketing.americanbanker.com/20150511\\_abp\\_pso\\_jumio\\_ws\\_lp.html](http://pages.marketing.americanbanker.com/20150511_abp_pso_jumio_ws_lp.html).

<sup>32</sup> FinCEN Guidance.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

Banks, Marijuana, and Federalism, at 17.

<sup>36</sup> Compliance Risk Webinar.

<sup>37</sup> Alison Jimenez, and Steve Kemmerling, *Who is Filing Suspicious Activity Reports on the Marijuana Industry? New Data May Surprise You*, April 13, 2015, available at [http://securitiesanalytics.com/marijuana\\_SARs](http://securitiesanalytics.com/marijuana_SARs). Raw data validity confirmed in *Some Banks Serve marijuana Businesses As Others Axe Them*, Wall Street Journal, April 13, 2015.

- Marijuana Termination – 1,292 in 42 states<sup>38</sup>

Because financial institutions are required to submit recurring SARs every 90-120 days for businesses in the “Marijuana Limited” category, between February 14, 2014 and January 16, 2015 one marijuana-related business could have caused as many as three SARs to be issued.<sup>39</sup> Therefore, the number of marijuana-related businesses for which a “Marijuana Limited” SAR was filed could be anywhere between 579 and 1,736, which is evidence that some financial institutions provide financial services to marijuana-related businesses. However, 1,292 “Marijuana Termination” SARs show that there are also financial institutions ending their relationship with marijuana-related businesses. Therefore, the FinCEN guidance has far from solved the banking issue in the marijuana industry.

## ADDITIONAL LEGAL CONSEQUENCES

In April of 2015, the Congressional Research Service identified four additional consequences of conflicting federal and state medical marijuana laws. These include a lack of protection from employment discrimination, income tax inequity, severe penalties for firearm possession, and lack of access to federally assisted housing.

### Employment Discrimination

The first issue identified by the Congressional Research Service is that state and federal courts have held that the Americans with Disability Act (ADA) does not protect employees from being fired by a private company due to medical marijuana use.<sup>40</sup> The ADA and similar state statutes only protect against discrimination based on lawful activity, and medical marijuana use violates federal law.<sup>41</sup> Some state medical marijuana statutes attempt to protect employees from this type of discrimination, but many do not address the issue.<sup>42</sup>

### Income Tax Inequity

The second issue is that federal income tax is affected by medical marijuana. According to Section 280 E of the Internal Revenue Code, marijuana vendors may not deduct operating expenses (e.g. wages or rent) when calculating their income tax liability; they may only deduct the cost of goods sold (money spent to purchase inventory).<sup>43</sup> This creates income tax inequity because a marijuana related business will pay a higher average tax rate than a financially identical non-marijuana related business. Also, medical marijuana patients may not deduct medical marijuana expenses from their personal income tax.<sup>44</sup>

### Firearm Possession

The third issue is that it is illegal under federal law for users of a controlled substance to ship, transport, receive or possess firearms or ammunition.<sup>45</sup> In 2011, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) released an “Open Letter to All Federal Firearms Licensees” stating that “any person who uses or is

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<sup>38</sup> *Id.*

<sup>39</sup> Compliance Risk Webinar.

<sup>40</sup> Marijuana: Medical and Retail, at 29 and 31.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> 26 U.S.C. §280E.

Marijuana: Medical and Retail, at 32.

<sup>44</sup> *Id.* at 32.

<sup>45</sup> 18 U.S.C. §922(g)(3).

Marijuana: Medical and Retail, at 33.

addicted to marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of...a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition.”<sup>46</sup> It is also unlawful for an individual to sell or dispose of a firearm or ammunition “to any person knowing or having reasonable cause to believe” that individual is a user of medical marijuana.<sup>47</sup> Therefore, medical marijuana laws fail to protect medical marijuana users from losing their right to possess firearms. Another potential problem is that possession or use of a firearm during a “drug trafficking crime” carries hefty imprisonment terms.<sup>48</sup> This means that those providing security for a marijuana manufacturer or dispensary cannot carry a gun without being subject to this law.<sup>49</sup>

## Federally Assisted Housing

The last concern identified by the Congressional Research Service is that medical marijuana use prevents users from accessing federal housing.<sup>50</sup> In 2011 the U.S. Department of Housing and Urban Development released a memorandum which stated that Public Housing Agencies (PHAs) and owners must deny federal housing admission to applicants who are using medical marijuana. Current residents may be permitted to use medical marijuana, but PHAs and owners have the authority to evict for medical marijuana use if they so choose.<sup>51</sup>

## CONCLUSION

The legalization of medical marijuana under state law while it is illegal under federal law brings a unique set of challenges. Many states have decided that the benefits associated with medical marijuana outweigh these challenges. This may be because one of the biggest risks (that of federal prosecution) will affect few individuals if favorable federal guidance continues. However, Utah may want to consider not only whether medical marijuana should be legalized, but also when. Based on the concerns raised in this report, it may be prudent for Utah to wait to pass marijuana legislation until after the next set of federal elections, or until the marijuana is no longer a schedule I drug, or even just until there is a longer pattern of federal leniency on medical marijuana prosecution. However, the consequences of conflicting federal and state medical marijuana laws are not the only important considerations in the medical marijuana debate. Therefore, it is possible that Utah will join 23 states and the District of Columbia in the decision that the benefits of medical marijuana outweigh the consequences of conflicting with federal law.

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<sup>46</sup> Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Open Letter to All Federal Firearm Licensers*, September 21, 2011, available at <http://www.nssf.org/share/PDF/ATFOpenLetter092111.pdf>.

<sup>47</sup> *Id.*

<sup>48</sup> 18 U.S.C. §924(c).

<sup>49</sup> *Marijuana: Medical and Retail*, at 33.

<sup>50</sup> *Id.*

<sup>51</sup> Memorandum for John Trasvina, Assistant Secretary for Fair Housing and Equal Opportunity, David Stevens, Assistant Secretary for Housing/Federal Housing Commissioner, and Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing, from Helen Kanovsky, *Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing*, January 20, 2011, available at <http://www.nhlp.org/files/3.%20KanovskyMedicalMarijunanaReasAccomm%28012011%29.pdf>.