Michigan's Recreational Marijuana Law Raises Questions

by Starr M. Kincaid, Esq.
Director of Claims and Legal Services

DECEMBER 1, 2019 ushered in a new era for the state of Michigan: for the first time, adults age 21 and over could legally buy marijuana for recreational use from licensed retailers.

Michigan voters passed Proposal 1, which led to the December 6, 2018 enactment of the Michigan Regulation and Taxation of Marijuana Act (MRTMA) ¹, making Michigan the tenth state in the nation—and first in the Midwest—to legalize recreational marijuana.

The Act included the creation of a state licensing system for recreational marijuana businesses, permitting retail sales of marijuana and marijuana edibles. The Act also changed several criminal violations to civil infractions.

Among its provisions, the Act generally permits adults age 21 and older to:
> Possess, use, or transport up to 2.5 ounces
> Possess up to 10 ounces at their home (amounts over 2.5 oz. must be stored in locked containers)
> Grow up to 12 marijuana plants for personal use
> Gift up to 2.5 ounces.

The Act does not permit the sale of marijuana by individuals or the purchase of marijuana from individuals.

Michigan in the spotlight
Following an application process created by the Act, Michigan's first retail stores selling recreation marijuana are open for business.

Those who watched the news or social media on December 1 may have seen long lines at businesses thus far licensed to sell recreational marijuana.

One shop is in the city of Morenci near the Michigan–Ohio border.

Other shops are in Ann Arbor, host since 1972 to the Hash Bash, an annual event whose participants promote public marijuana use.

Meanwhile, other municipalities across the state have opted in, opted out, or are still weighing whether or not to allow recreational marijuana businesses in their jurisdictions.

New regulations
Previous laws relating to medical marijuana required municipalities to opt in, whereas the new law requires local governments to opt out. It also shifts the responsibility for issuing licenses to municipalities if the state is unable to do so.

Among other provisions, the MRTMA delegates responsibility for marijuana licensing, regulation, and enforcement to the Michigan Department of Regulatory Affairs (LARA). LARA's Bureau of Marijuana Regulation is responsible for oversight of both medical and recreational marijuana.

It remains illegal to operate a vehicle, boat, or ORV under the influence of marijuana—the Act does not change that, nor does it affect medical marijuana regulation.

Implications for members
The MRTMA has many implications for local governments well beyond the zoning and licensing of retail facilities. Other considerations may include: human resource issues, ADA compliance, potential changes in workers' compensation and health pool costs, law enforcement and due process claims, local tax revenues, and more.

¹ This article uses the common spelling of "marijuana" rather than that used in the "Michigan Regulation and Taxation of Marihuana Act."

continued on page 4
Smart judgment calls
Corrections officers must make informed judgments about which inmates are, or have the potential to be, violent and/or suicidal. Violent inmates must be assigned to housing units capable of handling them, away from nonviolent offenders.

Offenders may conceal or mislead corrections officers about their mental health issues or propensity for violence.

Five days into his incarceration, the man was found dead in his cell, “stabbed in the neck with a pencil, beaten with a cane and strangled.”

Typically, an assessment generates a numeric score that determines where the inmate will be assigned. Inmates scoring one or two are considered maximum security; three to five a medium security risk, and six or higher a low risk.

Significant health factors
Corrections staff must identify obvious signs of illness as well as chronic health conditions such as alcoholism, diabetes, and/or mental illness. Jail facilities for women should have a designated area for housing pregnant inmates.

A February 24, 2012 paper by Community Oriented Correctional Health Services (COCHS) titled Health Intake, Assessment, and Routine Care Processes in County Jails discusses health-related factors affecting corrections facilities, including these:

- Jails are “understaffed, under-funded, and not very well designed. ... This is especially true as the proportion of the homeless mentally ill population has risen after state institutions for the mentally ill have ceased operating.”
- “The war on drugs has increased the number of low-level drug offenders

PEOPLE OFTEN Assume that corrections officers simply place inmates into any vacant cell or empty bed. However, this is neither a customary nor recommended practice.

Jails have a fundamental responsibility to ensure the safety of each person in their custody. Inmate populations are diverse and include people convicted of the most heinous crimes—murder, assault, and rape—as well as people jailed for failure to pay traffic fines or other court-imposed fees.

Proper inmate classification can help minimize the risk of violent incidents and protect the safety of prisoners, jail staff, and the public. Improper classification can compromise jail security and lead to injuries of both inmates and staff.

Determining where in the jail an individual will be housed is called a “risk assessment.” Assessment takes a variety of factors into account: an inmate’s age, criminal history, as well as physical and mental health issues. Adults should be housed separately from juveniles, and not every inmate poses a threat of violence.

The nature of the crime
When it comes to evaluating inmates’ crimes, there are certainly cautionary tales. In a March 15, 2018 Associated Press article posted on CorrectionsOne.com, Rebecca Boone writes about an inmate sentenced to two years in jail following 12 drunk driving arrests.

MMRMA insures the majority of Michigan county jails. Administrators face limited economic resources and ever-increasing jail populations, many with serious medical and mental health problems.
MMRMA Publishes New Risk Control Resources, Updates

THANKS TO THE HARD WORK of our Risk Control Advisory committees and Membership Services staff, MMRMA has released valuable new content and updated resources to help members manage risk.

Every organization needs to have a codified prevention and response plan. Otherwise, an incident is more likely to occur and less likely to be discovered in a timely fashion.

Without formal, planned mitigation efforts, the severity (both to service ability and costs) of the attack is likely to increase substantially.

Integrating Physical and Cyber Security
This resource will help members conduct pre-assessments of facilities and operations to reduce the likelihood and potential severity of a security incident. Such incidents could be physical, virtual, or a combination of the two. Consider the integration of physical security with technological/cyber security manifestations as a larger strategy.

Proactive Email Monitoring
Email is a critical component of most entities’ business operations. It is often the most-used application on computing devices, making it especially vulnerable to cyber incidents. This resource will help members take steps to address email-related risks.

Cyber Security Framework Checklist
The committee developed a cyber security framework that outlines the best and most current practices at the time of publication. Cyber risk is an ever-changing area of exposure that requires real-time monitoring and frequent updates.

RESOURCE UPDATES
MMRMA also updated nine model policy and guideline brochures:

- Administrative
  - Driver Selection
  - Employment Applications
  - Volunteers in the Workplace
- Fire/EMS
  - Michigan Do Not Resuscitate Orders
- Law Enforcement
  - Off-Duty Carrying of Firearms and Action Strategy
  - Canine Unit
  - Use of Tire Deflation Devices
  - Emergency Vehicle Operation (EVO) for Law Enforcement Operations
- Parks and Recreation
  - Use and Management of Sport Fields

JOIN A COMMITTEE
Several risk control committees currently have vacancies. Participation is an excellent opportunity to network with peers, further your professional development, and help other Michigan public entities.

Members are encouraged to submit a letter of interest and resume. Contact Membership Services at 734-513-0300 for more information.

TECHNOLOGY AND CYBER SECURITY
The professionals on MMRMA’s Technology and Cyber Security committee know all too well how cyber security issues are affecting public entities nationwide. This fall, the committee released four bulletins relating to technology and cyber risk for members, and more resources are in the works.

Cyber Incident Response Plan
Security-related threats to local governments have increased in frequency and diversity, and the damage caused by each successful attack has been amplified to unprecedented levels.

ADMINISTRATIVE
Recreational Marijuana
This new brochure provides answers to questions about the Michigan Regulation and Taxation of Marijuana Act (MRTMA), which went into effect December 6, 2018, legalizing recreational marijuana. The FAQ covers what MRTMA permits, what it prohibits, and what public entity employers need to know. (See page 1 for more).
Inmate Classification, continued from page 2

in the criminal justice system, and a majority of people housed in jails have a substance abuse disorder.”

- The jail population “has higher rates of hypertension, diabetes, asthma, tuberculosis, and sexually transmitted diseases than the general population.”

While this report was written seven years ago, little has changed in jail settings.

**A complex process**

Clearly, the assessment process is far from simple. Offenders may successfully conceal or mislead corrections personnel about their medical conditions and/or propensity for violence.

Some jails have dormitory-style units in which four to eight lower security prisoners are housed together. Inmates may share common showers, bathrooms and dayrooms with tables, chairs and TVs. If an inmate prone to violence is mistakenly placed in such a unit, the risk of serious harm goes up significantly.

**Limited options**

Overcrowding leaves jail administrators with limited options for housing inmates. Many member jails are in older buildings that pose risks due to outdated design, such as areas where prisoners may hide or avoid cameras. However, this doesn’t mean more modern jail facilities are free from risk exposures, particularly if inmates are not properly classified.

**Resources and guidance**

Fortunately, jail officials have access to resources to help corrections officers properly assess and classify prisoners. Effective training of staff on inmate classification is a critical first step.

Whenever possible, medical assessments should be conducted by qualified medical professionals who are appropriately credentialed in identifying potentially violent or suicidal prisoners. Allocating resources in these areas is well worth the investment to avoid liability.

Please contact MMRMA’s Membership Services team for more information about risk control for corrections facilities and other areas of public entity operations.


Recreational Marijuana, continued from page 1

**Protection for employers**

Importantly, the MRTMA specifies that employers are not required to permit or accommodate conduct allowed by the Act in any workplace or on the employer’s property. Employers may discipline, discharge, refuse to hire, or otherwise take an adverse employment action if an employee violates a workplace drug policy or works under the influence of marijuana.

Marijuana remains illegal under federal law. A recent Michigan Court of Appeals case supports a public employer’s right to continue to enforce anti-drug policies and drug-free workplaces, which were upheld under Michigan and federal law.

MMRMA has received claims related to the zoning and licensure of marijuana dispensary retail and outdoor marijuana cultivation facilities. We will continue to keep our members informed of developments in Michigan’s marijuana laws.