

Podcast: Ohio Marijuana: Voters Legalize Adult-Use Cannabis

December 05, 2023

Ohio legalized adult-use cannabis on November 7th, 2023, but the future of the market is uncertain and things are changing quickly. In this episode, we'll cover why we should expect the unexpected on the road to legalization of adult-use marijuana in Ohio.

Daniel Shortt: My name is Daniel Shortt, and I'm an attorney working out of McGlinchey Stafford's Seattle office. I'm joined by David Waxman out of our Cleveland office. David has more than three decades of experience as real estate, corporate, and regulatory counsel, and is familiar with the inner workings of Ohio law and politics. I'm a corporate and regulatory attorney with a focus on the cannabis industry. Today, we are going to talk about Ohio Issue 2, which is an initiated statute that was voted on November 7th, 2023, to legalize adult-use cannabis in Ohio. Under Issue 2, individuals over the age of 21 will be permitted to purchase and possess up to 2.5 ounces of marijuana and will pay a 10% sales tax. Individuals will also be allowed to grow up to six plants at home, with a maximum of 12 plants allowed collectively under one roof.

Issue 2 creates a new government agency called the Division of Cannabis Control, which will issue licenses and regulate the industry. This includes establishing an application process, defining due process rights, things like fines, suspensions, revocations of licenses, and providing a regulatory overview of the entire industry. Now, Ohio already has a medical cannabis program, and Issue 2 in many ways builds off of that program.

Issue 2 creates a new government agency called the Division of Cannabis Control, which will issue licenses and regulate the industry. This includes establishing an application process, defining due process rights, things like fines, suspensions, revocations of licenses, and providing a regulatory overview of the entire industry. Now, Ohio already has a medical cannabis program, and Issue 2 in many ways builds off of that program. So under the medical program, there are multiple tiers of licenses: cultivators, processors, and dispensaries. Cultivators are broken down by square footage allotted for the growth of cannabis. Level one cultivators are permitted to operate up to 25,000 square feet, which if those cultivators join in the adult-use program, will be expanded to 100,000 feet. Level two cultivators are permitted to operate up to 3,000 square feet, which can be expanded up to 15,000 square feet under Issue 2.

The level one cultivators will be issued an additional three adult-use dispensary licenses and one level one cultivation license. So that's important here, because this will allow these cultivators to not only grow the cannabis, but also sell it through a dispensary. Level two cultivators will be issued one dispensary license. And then Issue 2 also creates a new cultivation license, level three, which will allow 5,000 square feet. Processors

currently licensed will be issued a single adult-use processor, if they apply for these adult-use licenses. And dispensaries can be issued an additional adult-use license at a new location, so long as the dispensary does not have any common ownership or control with any level one or level two cultivator license or an adult-use processor license.

So there we've given the overview of what is in Issue 2, and obviously there's a lot more to it. But in my experience in other markets, the cultivation processing, and retail sale or dispensary, those tend to drive the market, right? Who has those licenses, who's successful? But as I alluded to at the top, things might not actually play out this way.

David Waxman: Well, two of the key politicians that have made statements most frequently on this, both before and after the election were Senate President Matt Huffman and House Speaker Jason Stephens, both of whom said that before the election, there were going to be changes made to the initiative. Speaking after the election, they indicated even more so that they were going to make changes to the initiative. What those changes will be, it looks like they focus around tax rates. Ohio, pursuant to the initiative, has a 10% tax rate on sales of cannabis. The other thing was also directed towards taxes, and that has to do with how the tax revenue is going to be allocated in the state. So those will be discussions to be had when any amendments come to the floor. Governor Mike DeWine has also stated that he wants to see some changes to the statute and they deal primarily with his child safety concerns, more restrictions, at least more stringent restrictions on advertising, impaired driving, public consumption, etc.

Speaking after the election, they indicated even more so that they were going to make changes to the initiative. What those changes will be, it looks like they focus around tax rates.

But it's important to note that those issues are stated and set forth in the initiative. Because what the initiative does require is that Division of Cannabis Control, which is within the Ohio Department of Commerce, is required to adopt reasonable standards for advertising, including adopting rules to prevent advertisements that are false, misleading, targeted to minors, or promoting excessive use or illegal activity. These are all reasonable issues. I don't think that anybody really has a problem with them being debated as long as people are reasonable and it doesn't unduly delay things.

There is also talk from Casey Weinstein, a Representative who has really championed cannabis reform in the legislature, he's sponsored bipartisan legalization legislation. And he has basically said after the election, listen, Ohio voters have spoken. They've spoken loudly. I mean this 57%, I believe, is the third highest approval rate of any state. I think it's only behind maybe Arizona and California, and not much behind California.

There is also talk from Casey Weinstein, a Representative who has really championed cannabis reform in the legislature. ... He has basically said after the election, "listen, Ohio voters have spoken. They've spoken loudly."

So changes that are going to be made, I believe, are not going to be drastic. And the governor has already said he doesn't want drastic changes. At least he's not seeking drastic changes. It's going to be interesting to see what happens and more so how quickly they get these issues resolved so that DCC can get to its job of proposed regulations, which is the next step, and getting things going in Ohio so that the voters can see progress on what they voted for on November 7th.

David Waxman: One of the items mentioned by Senate President Huffman and House Speaker Stevens was with respect to the limit on THC that could be in flower and in extracts. The initiative sets those limits right now at 35% for flower and 90% for extracts. What limits they are going to propose or what they feel is more appropriate, we don't know yet.

Daniel Shortt: Alright, David, thank you for that recap. And on that last issue of THC content, that's actually an issue that we're seeing come up in a number of different states, and it's based on this idea that the THC content is a good indicator of the potency of cannabis. And while this may be true, to some extent, it hasn't been established due to the lack of research (because of marijuana's current status as a Schedule One substance, which we've written about a lot, we've done some podcasts on this). But basically because marijuana is a Schedule One substance, it's deemed too dangerous for even human trials. And a lot of the medications are things that contain cannabis, they are researched outside of the United States. So this idea that the potency is just directly tied to THC, it's not necessarily true. And the concern, I think, in terms of the public health issue of making sure that cannabis isn't too intoxicating, focusing alone on Delta-9 THC content may not result in safer, less potent cannabis.

Because marijuana is a Schedule One substance, it's deemed too dangerous for even human trials.

David Waxman: Daniel, I totally agree with you on that. And one of the things we'd love to have legislatures be aware of is what the science is, and especially with regard to THC. We don't have, as we said, we don't have a lot of science behind it because of the Schedule One status of marijuana and the lack of really good research into things such as the effect of THC content, and whether it's just simply THC content that's at the issue or whether there's something else in addition to that. So as research goes on, and hopefully when it's reduced from Schedule One to Schedule Three, we'll be able to get some more research on this. Statutes and regulations will evolve.

Daniel Shortt: I understand that this initiative, Issue 2 passed with 57% of the vote, which in this day and age, that's a pretty significant win in terms of determining what the will of the people is. We understand that this can change. We're recording this podcast on November 17th, so a lot could change in the coming weeks because the effective date of Issue 2 would be December 7th.

David Waxman: Well, that's a good question. We don't know, I guess is the answer, because they could take action before December 7th. Indications are that they're not going to do that likely, from what I hear, they're going to probably start in January in the new session. So yeah, they can do a few things. I mean, they could start changing dates around because there are dates in the statute by which certain things need to happen. So those dates could be pushed forward. They're not going to be pulled up, but they could be pushed forward. So we don't know when things will actually take effect, for example, when applications have to be put out. Right now, I believe it's six months after the effective date that applications have to be out by DCC, and then within nine months, they have to start issuing licenses. Dates like that could be changed, and they could be changed for a number of reasons. Maybe there's good discussion that's going on. Maybe the legislature just wants to keep kicking the can down the road, which I hope is not the case, but that could happen. So until we see what happens in the legislature while we're keeping track of this, we're not going to know. But of course, we'll let everybody know what's going on as it happens.

We don't know when things will actually take effect, for example, when applications have to be put out. Right now, I believe it's six months after the effective date that applications have to be out by DCC, and then within nine months, they have to start issuing licenses. Dates like that could be changed, and they could be changed for a number of reasons.

Daniel Shortt: So yeah, there's a lot that we just don't know at this point. But there are a few tenets of this Issue 2 that it doesn't sound like these are in the crosshairs of any political opponents to marijuana legalization in Ohio. And so I talked about before how there will be this process for current medical marijuana operators to obtain these adult-use licenses. In addition, as I mentioned before, there'll be a new level three license, and the DCC will also be issuing new dispensary licenses.

In this context, we're seeing Ohio follow a trend that has moved all the way across the country from Washington state to New York, where there is a priority for applicants who qualify under the social equity program also in Issue 2. And this will require the Ohio Department of Development to certify program applicants based on social and economic disadvantages, which is defined to mean "membership in a racial or ethnic minority group, disability status, gender, or long-term resident in an area of high unemployment." The DCC is required to provide preferential treatment for those who qualify for the social equity and jobs program by issuing 40 level three adult-use cultivator licenses and 50 adult-use dispensary licenses.

We're seeing Ohio follow a trend that has moved all the way across the country from Washington state to New York, where there is a priority for applicants who qualify under the social equity program also in Issue 2. And this will require the Ohio Department of Development to certify program applicants based on social and economic disadvantages,

So to recap, overall there will be a priority for currently operating medical marijuana businesses, but there will be new opportunities for applicants who qualify under this social equity and jobs program.

David, I want to turn it to kind of a larger picture, because Ohio's legalization comes in the context of now this decades-long push to legalize, whether it's medical or recreational cannabis. Ohio is now the 24th state to approve adult-use cannabis. More than half of the population of the United States lives in areas where adult-use cannabis is available. Do we think that this new state jumping on, is this another tipping point in terms of the cultural, political, and legal movement to legalize cannabis?

David Waxman: I do think so. I think that that's been a trend, and now that virtually half the states have legalized adult-use cannabis, it really shows the federal government where the country is heading and where they want to go. And I think you see that with the Safer Banking Act. I think you see that with the MORE Act that's been introduced and other acts that have been introduced in Congress to really push this forward. It would be nice if, after Ohio gets through with this stuff, everybody says, Hey, Ohio did it. Let's legalize it federally. Right? But we know that's not the case. It's going to take some time. Obviously there are a lot of things going on in Congress, a lot of things that they have to take care of. I don't know that cannabis is going to be the primary item on the floor of either house, but I think it has been pushed up to a higher level. Especially with the bills that have been introduced and the proposal from HHS to DEA to take marijuana from Schedule One to Schedule Three, the trends are clear. So we'll see when it happens. We're getting there, but hard to say when yet.

It's also worth noting that initially these states that legalized adult-use cannabis, and even medical cannabis for that matter, tended to be more traditionally liberal, right? These deep blue states. But now we're seeing states that have much different political backgrounds voting to approve this.

Daniel Shortt: Yeah, no, I completely agree. And if you look at the context, like you mentioned with the rescheduling, there's a high-profile lawsuit now that is challenging the constitutionality of the federal government's interference with cannabis. That is purely intrastate, meaning it doesn't cross state lines. And I don't think necessarily my personal opinion that there's one state that is going to push it all the way, one way or another. But it's also worth noting that initially these states that legalized adult-use cannabis, and even medical cannabis for that matter, tended to be more traditionally liberal, right? These deep blue states. But now we're seeing states that have much different political backgrounds voting to approve this. And even though, in Ohio's case, there may be some opposition from certain politicians, I think it does show that we are getting closer to a nationwide legalization of cannabis.

So that concludes our discussion for today. David, I want to thank you for taking the time out and breaking down some of this, especially with regards to the political landscape in Ohio. And that will conclude our podcast for today. So thank you all for listening.

David Waxman: Thanks, Daniel. Enjoyed having the opportunity to do this podcast with you. And thank everybody for listening. And stay tuned because we will be putting out more podcasts, putting out more articles, putting out more blogs as the situation changes in Ohio and elsewhere.

Related people

Daniel Shortt

David Waxman