

Minnesota Adult-Use Cannabis Bill Emerges from Reconciliation

Introduction

On April 25, 2023, the Minnesota House passed House File 100 (HF100), a bill authorizing adult-use cannabis, by a vote of 71-59. Three days later, the Minnesota Senate passed Senate File 73 (SF73), a companion bill to HF100, on a strict party-line vote of 34-33. Following the Senate vote, HF100 and SF73 entered reconciliation, a process that concluded Tuesday evening at 11:47 p.m., at which time the Conference Committee released the final, reconciled text of the bill (Final Bill). These developments are the culmination of several previous attempts by prior legislatures to legalize recreational cannabis in Minnesota, and the passage of last year's omnibus spending bill that, among other things, legalized the sale of certain low-potency cannabis products (generally those with a concentration of delta-9 THC¹ under 0.3% on a dry weight basis) for recreational use.²

The Final Bill now heads back to the House and Senate for vote before the legislative session adjourns on May 22, 2023. If the Final Bill secures similar support as HF100 and SF73, meaning at least 68 votes in the House and 34 votes in the Senate, then the Final Bill will proceed to the desk of Minnesota Governor Tim Walz. Upon Governor Walz's signature — which is widely expected — Minnesota would become the 23rd state of the nation³ to legalize recreational cannabis use.

Minnesota has followed the national trend among states authorizing adult consumption of cannabis by parlaying legalization into law after years of permitting the medical use of cannabis through highly regulated medical marijuana programs. The Final Bill, among other things, proposes to:

- a. combine the state's medical cannabis law, first enacted in 2014 and amended in seven subsequent legislative sessions, to expand qualifying medical conditions⁴ with the adult-use legislation into a single statute,
- b. permit a medical cannabis retailer to hold a recreational retailer license and
- c. regulate edibles created from the hemp plant.⁵

For purposes of this discussion, we have analyzed and will discuss the text of the Final Bill while focusing upon recreational cannabis licensing. Additional Alerts will follow to discuss details of the Final Bill, as well as its progress through the legislative process. Most notably, SF73 made a significant revision to HF100 by enacting an amendment creating what, at first blush, appears to be significant local control over siting a cannabis business and requiring the licensee to obtain a "land use compatibility statement" from the city, town, or county that authorizes the land use. While the Final Bill does not include the compatibility statement, it does subjects license holders to local registration, local siting control and enforcement [SF 342.13]. This development deserves thoughtful contemplation in a subsequent discussion and additional Alerts will follow.

Overview

Administrative Offices

The Final Bill establishes the Cannabis Advisory Board and the Office of Cannabis Management (OCM) to administer both medical and recreational cannabis initiatives. OCM will license cultivators, processors, distributors, transporters, and dispensaries to grow, manufacture and sell recreational cannabis, medical cannabis, and certain hemp (CBD) products. To enhance consumer safety, the board and the OCM are tasked with creating quality assurance and product manufacturing standards, laboratory testing standards, and packaging and labeling requirements for cannabis and cannabis products. The board and OCM will also create a social and economic equity program to encourage small businesses and individuals from communities disproportionately



Steven P. Katkov

Member

skatkov@cozen.com
Phone: (612) 260-9037
Fax: (214) 462-3299



Germain E. DeMartinis

Associate

gdemartinis@cozen.com
Phone: (215) 665-5535
Fax: (215) 665-2013



Jon M. Schoenwetter

Associate

jschoenwetter@cozen.com
Phone: (612) 260-9062
Fax: (612) 260-8018

Industry Sectors

- Cannabis

harmful by disparate cannabis enforcement to participate in the newly legal cannabis industry [§§ 116J.659, 116J.6595, 116L.90, 342.70 & 342.73].

Approved Products

The Final Bill creates a large list of products (Approved Products) authorized for manufacture, distribution, and sale that are derived from the plant itself, such as the flower and concentrates derived from processing the flower [§ 342.01, Subds. 2, 3, 4, 10, 15, 16, 18, 19, 20 & 31]. However, the Final Bill also recognizes the emerging pharmacology of synthetically derived THC (including delta-9 THC) and CBD and permits these artificial cannabinoids for sale and distribution [§ 342.01, Subds. 6 & 69]. Minnesota residents will be able to enjoy the full panoply of cannabis products ranging from the plant's flower to be smoked or concentrates to be vaped, as well as cannabis-infused food and drinks (the so-called edibles), plus tinctures and topicals.⁶

Licenses

The Final Bill creates a comprehensive universe of license categories, numbering 16 in total and ranging from recreational retail dispensary operations to cultivation and processing functions of medical, recreational, and low-potency hemp products to testing and delivery services while incorporating the legacy medical cannabis licenses issued in 2015 to the two license holders.⁷ The legislative history and the Final Bill make clear the preference for a craft industry approach to the legal cannabis market in Minnesota.

The Final Bill memorializes three business models for retail sales of recreational cannabis, the microbusiness and the mezzobusiness discussed here, as well as the cannabis retailer license discussed below.

Microbusiness

The microbusiness model is envisioned as the sole proprietor who would be authorized to hold one retail license and operate a single retail location [§ 342.28, Subd. 2(d)] and to grow and manufacture cannabis for its own retail sales or for distribution as a wholesaler to other licensees. If this license holder also grows cannabis, it is limited to an indoor canopy of no more than 5,000 square feet or an outdoor canopy of no more than a half-acre [§ 342.28, Subd. 2(a)-(b)]. The holder of a cannabis microbusiness license may also be licensed as a cannabis event organizer. The schedule of fees for this license includes an application fee of \$500, no initial license fee, and a renewal license fee of \$2,000 [§ 342.11(b)(1)(i-iii)].

Mezzobusiness

The mezzobusiness model is envisioned as a small operator who would be authorized to hold one retail license and operate up to three retail locations [§ 342.29, Subd. 2(d)] and to grow and manufacture cannabis for its own retail sales or for distribution as a wholesaler to other licensees. If this license holder also grows cannabis, it is limited to an indoor canopy of no more than 15,000 square feet or an outdoor canopy of no more than one acre [§ 342.29, Subd. 2(a)-(b)]. The holder of a cannabis mezzobusiness license may also be licensed as a cannabis event organizer. This license holder may also sell medical cannabis and products on the same premises if it also holds a medical cannabis retailer license. The schedule of fees for this license includes an application fee of \$5,000, an initial license fee of \$5,000, and a renewal license fee of \$10,000 [§ 342.11(b)(2)(i-iii)].

A cannabis microbusiness with a retail operations endorsement, cannabis mezzobusiness with a retail operations endorsement, cannabis retailer, medical cannabis retailer, or lower-potency hemp edible retailer must register with the city, town, or county in which the retail establishment is located [§ 342.22, Subd. 1].

The Final Bill does not limit the number of licenses to be issued in the state but instead requires the OCM to reach market stability by assuring a competitive marketplace and to meet demand. [§ 342.18, Subd. 1]. While vertical integration is expressly prohibited, nothing in the text of the bill prohibits the issuance of microbusiness or mezzobusiness licenses to the same person or entity [§ 342.18, Subd. 2].

Cannabis businesses and hemp businesses may only sell Approved Products that comply with the

final rules adopted by OCM regarding the testing, packaging, and labeling of all such products [§ 342.23, Subd. 4].

Eligible Applicants – Residency Requirements

Minnesota Senate drafted SF73 to require that all license holders be state residents [§ 342.16(a)(4)]. The Conference Committee debated the residency requirement and elected to preserve the Minnesota House version expressed in HF100. Under SF73, the individual applicant would have to be a Minnesota resident of at least 21 years of age, and if the applicant is a business entity, at least 75% of the equity/ownership interest in the business would have to be held by Minnesota residents. Notably, similar state residency requirements have been successfully challenged in court by interested parties opposed to prohibitions on non-resident applicants. For example, our office represented the applicant in successful litigation against the state of Maine in the case of *NPG LLC v. Maine Department of Administrative and Financial Services*. In that case, we challenged a cannabis residency regulation on the grounds that it violated the dormant commerce clause, a legal doctrine inferred from the Commerce Clause in Article I of the U.S. Constitution. The dormant commerce clause prevents states from restricting interstate commerce, and because our client was an entity applicant largely owned by nonresidents, it was shut out of what was expected to be a lucrative market by the regulations, according to the suit. Within months of filing, Maine decided to drop the residency requirement and acknowledged the regulation wasn't likely to survive legal challenges.

Notwithstanding the deletion of a residency requirement, the Final Bill and the state's overall philosophy promotes locally grown, artisan-type cannabis brands. The emphasis is squarely in favor of Minnesota farmers. The statute specifically prohibits vertical integration of cannabis operations; that is, a single entity that grows, harvests, processes, and sells cannabis all within its business. [§ 342.18, Subd. 2]. Licenses will be awarded based upon a scoring system with points awarded most highly for social equity applicants followed by veterans [§ 342.18, Subd. 3]. See § 342.15 & .16 for an outline of general eligibility requirements.

Cannabis Retailer License

A cannabis retailer may operate up to five retail locations [§ 342.32, Subd. 2]. Cannabis retailers are also required to obtain local land use approval for their proposed locations. While local government cannot prohibit the siting of a cannabis retail business within its boundaries, local government may adopt "reasonable restrictions" on the time, place, and location of the retail establishment, including a 1,000-foot setback from a school, and a 500-foot setback from a daycare, residential treatment facility, and any public park "that is regularly used by minors, including a playground or athletic field" [§ 342.13(c)]. In addition, the local government may limit the overall number of retailers within its boundaries [§ 342.13(i)-(k)]. The schedule of fees for this license includes an application fee of \$2,500, an initial license fee of \$2,500, and a renewal license fee of \$5,000 [§ 342.11(b)(5)(i-iii)].

Cannabis Cultivator License

This license holder can grow and harvest an indoor canopy of no more than 30,000 square feet or an outdoor canopy of no more than two acres [§ 342.30, Subd 2(a)-(b)]. The holder of a cannabis cultivator license may also hold a cannabis management license, medical cannabis cultivator license, medical cannabis producer license, license to grow industrial hemp, and a cannabis event organizer license [§ 342.30, Subd. 4]. The schedule of fees for this license includes an application fee of \$10,000, an initial license fee of \$20,000, and a renewal license fee of \$30,000 [§ 342.11(b)(3)(i-iii)].

Cannabis Manufacturer License

This license holder can purchase, among other things, cannabis flower, manufacture all of the Approved Products, and sell Approved Products to other licensed cannabis businesses, including retailers. The operations of a manufacturer will be limited pursuant to rules established by the OCM. [§ 342.31, Subd. 2]. The holder of a cannabis cultivator license may also hold a cannabis management license, medical cannabis cultivator license, medical cannabis producer license, license to grow industrial hemp, and a cannabis event organizer license [§ 342.31, subd.4]. The

schedule of fees for this license includes an application fee of \$10,000, an initial license fee of \$10,000, and a renewal license fee of \$20,000 [§ 342.11(b)(4)(i-iii)].

Social Equity Preference

Like most states before it, Minnesota has adopted a clear preference in the licensing scheme to promote equitable ownership and employment opportunities in the cannabis industry, seeking to decrease disparities in life outcomes for marginalized communities and to address the disproportionate impacts of the so-called war on drugs in those communities. Many persons face significant barriers to entry into the cannabis business, including access to capital, negotiating complex regulatory requirements, siting locations where cannabis businesses can lawfully operate, developing business relationships and a customer base and acquiring technical support for the growth, processing, and sale of cannabis, among other considerations.

To address these concerns, the Final Bill sets forth a preference in applicant selection for any person that is:

- a. a military veteran who lost honorable status due to a cannabis-related offense;
- b. a resident for the last five years of one or more subareas, such as census tracts or neighborhoods, that experienced a disproportionately large amount of cannabis enforcement as determined by the study conducted by OCM; and
- c. a resident for the last five years of one or more census tracts where, as reported in the most recently completed decennial census published by the U.S. Census Bureau, either:
 - i. the poverty rate was 20% or more; or
 - ii. the median family income did not exceed 80% of the statewide median family income or if in a metropolitan area, did not exceed the greater of 80% of the statewide median family income or 80% of the median family income for that metropolitan area. [§§ 342.17 & .18, Subd. 3]

Limit on Plant Canopy

Minnesota's clear preference for small operators in the cannabis business follows the state's success with craft breweries. Accordingly, a microbusiness and mezzobusiness can enjoy 5,000 and 15,000 square feet, respectively, of the indoor canopy and a half acre and one acre, respectively, of outdoor canopy space. Additionally, the holder of a cannabis cultivator license is permitted up to 30,000 square feet of indoor canopy and up to two acres of outdoor canopy. The Final Bill defines plant canopy as "the surface area within a cultivation facility that is used at any time to cultivate mature, flowering cannabis plants." [§ 342.01, Subd. 61] The definition excludes from this calculation the surface area in which immature cannabis plants and seedlings are developing, apparently allowing an unlimited amount of space dedicated to growing cannabis from seed or small plants in their vegetative rather than flowering state.

By comparison, New York allows a cultivator to enjoy 43,560 square feet (i.e., one acre) of plant canopy outdoors and 25,000 square feet of plant canopy in a greenhouse (not to exceed 30,000 square feet in combination). California similarly permits outdoor canopy of up to 43,560 square feet. In New Jersey, the Tier VI cultivation license permits a total canopy of up to 150,000 square feet. Minnesota is by no means an outlier in its canopy limitations, but to note, the limitations are more restrictive than most states but clearly aimed at promoting a craft approach to Minnesota's legal cannabis production and sales.

Personal Use Authorized

As expected, the Final Bill authorizes the legal use of cannabis for ages 21 and above but provides limits on how much cannabis an individual can possess. While these limitations vary depending on the type and location of cannabis products, Minnesotans would generally be limited to possessing no more than 2 pounds of cannabis flower in the home at any given time [§ 342.09, Subd. 1]. This limit is comparatively quite generous. For example, Massachusetts limits the possession of cannabis flower in the home to no more than 10 ounces (0.625 pounds), Maine limits such possession to two and a half ounces (0.156 pounds), and in Alaska, the limit is one ounce (0.062 pounds).⁸

Observations

We suggest that Minnesota's legalization of recreational cannabis is both imminent and more likely than not. The votes on SF73 and HF100 demonstrate that the Final Bill needs to retain its support in the Senate and has ample headroom in the House (three votes). Governor Walz's statements to date yield no indication that the reconciled bill will face opposition from his office. Given that the chambers recently voted on these bills in the last week of April and that the Final Bill does not appear to materially differ, we do not expect a meaningful shift in support to occur.

If passed into law, we see a regulatory system that is particularly favorable to local craft operators and less conducive to national industry and capital than other recently legalized markets. A challenge to national participation is the prohibition against full vertical integration, as well as limited canopy size that, while like recently legalized markets, is more restrictive than others.

Additionally, the Final Bill leaves open to interpretation a bevy of local controls, the most important of which are likely the setback and siting requirements that the Final Bill permits municipalities and other local units of government to pass. Indeed, we expect to see market entrants engage contingent leasing strategies for cannabis use property or otherwise wait to make an application until the applicable local controls are established.

Finally, the system proposed by the Final Bill is notably more complex than most other recently legalized markets. This complexity is readily belayed by, among other things, a regulatory scheme comprised of 16 different licensing tiers, as well as endorsements for cross-activity and engagement between the tiers. Navigating this complexity, which we anticipate becoming more challenging as the OCM publishes the rules and regulations called for under the Final Bill, with respect to the application process as well as ongoing operational and ownership challenges, will require significant effort, management controls, and industry expertise on the part of applicants and operators.

This alert is not a substitute for advice of counsel on specific legal issues.

Marijuana is still classified as a Schedule I controlled substance by the U.S. Drug Enforcement Agency, and as such, it remains a federal crime to grow, sell, and/or use marijuana. Any content contained herein is neither intended to provide legal advice nor assist with the violation of any state or federal law.

For three years, our multidisciplinary cannabis team was recognized as one of the Cannabis Practice Groups of the Year by *Law360*.

¹ Delta-9 is the most abundant form of THC in the plant, creating the intoxicating effect or high. By no means the only cannabinoid in the plant; it is the one that has received the most attention from researchers. See, e.g., WHO Expert Committee on Drug Dependence, *Critical Review, Delta-9-tetrahydrocannabinol* (2018) (an advance copy distributed to the participants of the 41st Expert Committee on Drug Dependence). For a discussion targeted to everyday people, see this discussion in *Forbes Health*. A loophole in the federal 2018 Farm Bill allows for the legal sale of delta-8 THC products (with concentrations of 0.3% or less) throughout the United States.

² The legalization of low-potency cannabis products via the 2022 omnibus spending bill was largely reported as an inadvertent or unintended result and certainly makes for a unique chapter in the recent history of cannabis legalization. See, e.g., J. Patrick Cooligan, *The Legislature Stumbles into Legalizing THC, for Better or Worse*, *Minnesota Reformer* (July 1, 2022), available at <https://minnesotareformer.com/2022/07/01/the-legislature-stumbles-into-legalizing-thc-for-better-or-worse-column/>; Danny Spewak, *Starting Friday, Minnesota will Allow Edibles With Hemp-Based THC*, *Kare 11* (June 30, 2022), available at <https://www.kare11.com/article/news/edibles-hemp-based-thc-become-legal-in-minnesota-starting-friday/89-3238f5a3-d8e9-462c-8292-71deed7629c5>.

³ 22 states have enacted legislation authorizing adult use of cannabis: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Montana,

New Jersey, New Mexico, Nevada, Oregon, Rhode Island, Vermont, and Washington. According to the Centers for Disease Control, cannabis is the most commonly used federally illegal substance in the United States. See <https://www.cdc.gov/marijuana/data-statistics.htm>.

⁴ Minnesota currently recognizes 19 medical conditions eligible for treatment with cannabis: (1) Alzheimer's disease; (2) amyotrophic lateral sclerosis (ALS); (3) autism spectrum disorder (must meet DSM-5); (4) cancer; (5) chronic motor or vocal tic disorder; (6) chronic pain; (7) glaucoma; (8) HIV/AIDS; (9) inflammatory bowel disease, including Crohn's disease; (10) intractable pain; (11) irritable bowel syndrome (effective Aug. 1, 2023); (12) obsessive-compulsive disorder (effective Aug. 1, 2023); (13) obstructive sleep apnea; (14) post-traumatic stress disorder (PTSD); (15) seizures, including those characteristic of epilepsy; (16) severe and persistent muscle spasms, including those characteristic of multiple sclerosis (MS); (17) sickle cell disease; (18) terminal illness, with a probable life expectancy of less than one year; and (19) Tourette syndrome.

⁵ Both hemp and marijuana belong to the same plant species, *cannabis sativa*. The defining difference between hemp and marijuana is their psychoactive component: tetrahydrocannabinol, or THC. Hemp typically has 0.3% or less THC (and hemp containing more than 0.3% THC is not protected by the federal 2018 Farm Bill). Both plants contain CBD. See, e.g., *Study Reveals Inaccurate Labeling of Marijuana as Hemp*, National Institute of Justice (Oct. 17, 2022), available at <https://nij.ojp.gov/topics/articles/study-reveals-inaccurate-labeling-marijuana-hemp>; and *The Farm Bill, Hemp Legalization and the Status of CBD: An Explainer*, Brookings Institute, (Dec. 14, 2018), available at <https://www.brookings.edu/blog/fixgov/2018/12/14/the-farm-bill-hemp-and-cbd-explainer/>. Despite the different names, there is no difference in substance between the terms marijuana and cannabis, as the two terms both describe parts of the same plant, *cannabis sativa*.

⁶ The Canadian government has provided a useful chart of the various forms of inhaling and ingesting cannabis products here: <https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/about.html>.

⁷ These 16 licenses are: (1) cannabis microbusiness; (2) cannabis mezzobusiness; (3) cannabis cultivator; (4) cannabis manufacturer; (5) cannabis retailer; (6) cannabis wholesaler; (7) cannabis transporter; (8) cannabis testing facility; (9) cannabis event organizer; (10) cannabis delivery service; (11) lower-potency hemp edible manufacturer; (12) lower-potency hemp edible retainer; (13) medical cannabis cultivator; (14) medical cannabis processor; (15) medical cannabis retailer; and (16) medical cannabis combination business. See 342.01, Subd. 48. The limitations for plant canopy size do not apply to the medical license holders who are expressly permitted to continue operations of their facilities regardless of plant canopy size. See § 342.47, Subd. 2(d).

⁸ Massachusetts General Laws, Ch. 94G, § 7; Maine Revised Statutes, Title 28-B, Ch. 3, § 1501; Alaska Statutes § 17.38.020.

About the Authors

Steve Katkov, a member in the Minneapolis office, has led cannabis real property due diligence for the firm for seven years and has been involved in roughly 250 cannabis real property purchase and sale transactions, sale/leaseback transactions, leasing transactions, and land use/zoning matters for both cultivation and dispensary facilities in 20 states (California, Colorado, Connecticut, Florida, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, and Rhode Island).

Germain DeMartinis, an associate in the Philadelphia office, has extensive cannabis-industry experience assisting both multistate operators and individual licensees with mergers, acquisitions, regulatory compliance, commercial contracts, and private equity financing in 17 states (California, Colorado, Connecticut, Florida, Illinois, Maine, Massachusetts, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New York, Ohio, Oregon, and Pennsylvania).

Jon Schoenwetter, an associate in the Minneapolis office, has supported Steve and Germain in their cannabis practices for nearly four years across all manner of real property, corporate, financing, regulatory, and compliance matters.