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Cannabis Regulation and Tax Act



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About Meyer Capel, P.C.

2

Local History. National Reach.

Meyer Capel is nationally recognized for the quality of its attorneys and their diverse practice areas.

- Offices in Champaign and Bloomington
- ~35 Attorneys
- Practice areas include:
 - Real Estate
 - Mergers and Acquisitions
 - Employment Law
 - Family Law
 - Communications
 - Intellectual Property
 - Criminal Defense
 - Litigation

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About Jason Barickman

3

- Partner at Meyer Capel, P.C.
 - Transactional practice, focusing on commercial real estate, outside general counsel services and other transactional business representation
 - Clients ranging from individuals and startups to publicly traded institutions
- Partner at Fairlawn Capital, Inc.
- J.D., University of Illinois College of Law; B.S., Illinois State University
- State Senator, 53rd district
- **Most important:** Happily married to Kristin, three young children

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Overview – A lot to unpack

4

- The basics of the Cannabis Regulation and Tax Act
- Licensing of Cannabis Business Establishments
- Marketing & Packaging
- Taxation
- Relationship with Local Governments
- Employer and Employee Rights
- Expungement

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The National Picture as of June 26, 2019

5



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Cannabis Regulation and Tax Act

6

Cannabis Regulation and Tax Act (410 ILCS 705) creates the financial and regulatory framework for the sale and use of cannabis in Illinois.

- House Bill 1438 passed the Illinois General Assembly on June 4, 2019
- Legislation signed by Gov. Pritzker on June 25, 2019, which is the Effective Date of the Act
- "Trailer bill" anticipated as early as Fall 2019
- Administrative Rules will be issued by state regulatory agencies charged with implementing the Act, which will further flesh out the details.

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7

Conflict between Illinois and Federal Law

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8

Conflict with Federal Law

Except as authorized by the Controlled Substances Act (CSA), it remains unlawful to manufacture, distribute, dispense, or possess any controlled substance, including cannabis, under federal law. Consider the many issues created by this conflict, including:

- Banking, especially federally-chartered banks
- Universities, especially those receiving federal grants
- Hospitals, especially those receiving Medicare reimbursements
- Insurance challenges, ranging from legality issues to coverage deficiencies
- Tax issues, especially for cannabis operators who are otherwise lawful entrepreneurs in their state (i.e., no deductions or credits for prohibited business activities under 26 U.S.C § 280E)

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Conflict with Federal Law

9

ABA: "Conflicting state and federal marijuana laws create ethical complications for lawyers", September 17, 2014

Rule 1.2(d)(3) of the Illinois Rules of Professional Conduct:

"A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may:

- (1) discuss the legal consequences of any proposed course of conduct with a client,
- (2) counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law, and
- ➔ (3) counsel or assist a client in conduct expressly permitted by Illinois law that may violate or conflict with federal or other law, as long as the lawyer advises the client about that federal or other law and its potential consequences."

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Regulation of Possession & Consumption

10

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11

Personal Use: Possession

Individuals 21 years of age or older may possess, consume, use, purchase and transport:

	Illinois Residents	Non-Illinois Residents
Cannabis flower	30 grams	15 grams
THC contained in cannabis-infused products	500 milligrams	250 milligrams
Cannabis concentrate	5 grams	2.5 grams

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12

Personal Use: Prohibited Use

The following are still punishable by civil or criminal penalties:

- Using cannabis in any public place. A public place being any place where a person could reasonably be expected to be observed by others.
- Undertaking any act while under the influence of cannabis which constitutes negligence; professional malpractice; or professional misconduct.
- Possessing or using cannabis on a school bus or in a school. However, exceptions exist for qualifying patients or caregivers under the Compassionate Use of Medical Cannabis Pilot Program Act.
- The use of cannabis by any person with a School Bus Permit or Commercial Driver's License while on duty.
- Possessing cannabis in a private residence that is used to provide licensed child care or other similar social services at any time.
- Possessing or using cannabis in a correctional facility.
- Using cannabis in any motor vehicle.
- No driver or passenger may possess cannabis anywhere in a moving vehicle unless it is in a sealed, odor-proof, child resistant cannabis container.
- Using cannabis in "close physical proximity" to an individual under the age of 21 (unless medical).
- Operating any motor vehicle, aircraft, or motorboat while using or under the influence of cannabis.
- The use of cannabis by a law enforcement officer, corrections officer, probation officer, or firefighter while on duty.

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Underage Use

13

- Selling or transferring cannabis to a person under the age of 21 shall remain illegal
- Any person under the age of 21 possessing cannabis is guilty of a civil law violation as outlined in section 4 paragraph (a) of the Cannabis Control Act.
 - This is punishable by minimum fine of \$100 and a maximum fine of \$200 (720 ILCS 550/4).
- If a person under the age of 21 was in a motor vehicle at the time of the offense, his or her drivers license may be suspended or revoked under Section 6-206 of the Illinois Vehicle Code.
- However, individuals under the age of 21 may qualify under the Compassionate Use of Medical Cannabis Pilot Program Act.
 - Consider recent notices from IDPH that dispensaries cannot sell smokable cannabis to those under 21
- Patients under the age of 18 will be required to obtain written certification from a physician and a reviewing physician. (410 ILCS 130/36).
- The Department of Public Health may not issue a registry identification card to a qualifying patient who is under 18 years of age, unless that patient suffers from seizures (410 ILCS 130/60).

See: 410 ILCS 705/10-15

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Home Grow - Medical Only

14

- Growing cannabis at home is permitted only as follows:
 - (1) Qualifying patients under the Compassionate use of Medical Cannabis Pilot Program Act
 - (2) over the age of 21
 - (3) up to 5 cannabis plants per household
- Cultivation must take place in an enclosed, locked space outside of public view.
- Qualifying patients must take reasonable precautions to ensure that the plants are secure from unauthorized access.
- A lessor may prohibit personal cultivation by a lessee who is a qualifying patient.
- However, a landlord cannot refuse to enter into a lease solely because of an individuals status as a registered qualifying patient, unless they would otherwise be in violation of federal law. (410 ILCS 130/40(a))
- Only the Qualifying patient or an authorized agent may tend to the plants.
- A qualifying patient who grows more than the allotted amount; sells cannabis; or gives cannabis away is liable for penalties under the Cannabis Control Act, and may lose home cultivation rights.

See: 410 ILCS 705/10-5

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15

Licensing of Cannabis Business Establishments

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16

Licenses Created by the Act

- **Dispensing Organizations:**
 - Businesses that are licensed to acquire cannabis from other Cannabis Business Establishments for the purpose of selling cannabis and cannabis products to adults over the age of 21.
- **Cultivation Centers:**
 - Businesses that are licensed to cultivate, process, transport (prior to July 1, 2020; after that, a separate transport license will be required), and perform other necessary activities to provide cannabis products to other Cannabis Business Establishments.
 - Up to 210,000sq ft. of grow space.
- **Craft Growers:**
 - Businesses that are licensed to cultivate, dry, cure, and package cannabis and perform other necessary activities to make cannabis available for sale at a dispensing organization or use at a processing organization.
 - Craft Growers are limited to 5,000sq ft. of grow space which the Department of Agriculture may increase up to 14,000sq ft. by increments of 3,000sq ft.
- **Processing/Infuser Organizations:**
 - Businesses licensed to extract constituent chemicals or compounds to produce cannabis concentrate or incorporate cannabis or cannabis concentrate into a product formulation to produce a cannabis product.
- **Transporting Organizations:**
 - Businesses that are licensed to transport cannabis on behalf of a cannabis business establishment or a community college licensed under the Community College Cannabis Vocational Training Pilot Program.

See: 410 ILCS 705/1-10
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Licensing: Dispensing Organizations

- Licensing and oversight: Department of Financial and Professional Regulation ("DFPR").
- Early Approval Adult Use Dispensing Organization License:
 - Registered Medical Cannabis Dispensing Organizations may apply for an Early Approval Adult Use Dispensing Organization License to begin dispensing cannabis on January 1 at their current medical dispensary location. Applications are currently available at www.idfpr.com
 - Registered Medical Cannabis Dispensing Organizations may also apply for a separate Early Approval Adult Use Dispensing Organization License at a secondary location within the same Bureau of Labor and Statistics ("BLS") Region.
 - License fees: \$30,000 non-refundable application fee, non-refundable fee equal to 3% of the dispensing organization's total sales from June 1, 2018 to June 1, 2019 or \$100,000, whichever is less.
- The DFPR will issue up to 75 Conditional Adult Use Dispensing Organization Licenses before May 1, 2020. Applications available by October 1, 2019; due by January 1, 2020.
- In addition to these licenses, an additional 110 Conditional Adult Use Dispensing Organization Licenses will be issued between January 1, 2021 and December 31, 2021.

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Licensing: Dispensing Organizations

- License fees: \$5,000 application fee; \$60,000 fee upon approval of conditional license; \$60,000 renewal fee.
- Conditional Adult Use Dispensing Organization Licenses will be given out based on a point system which ranks applications on 10 different factors laid out in detail in the Act.
- Once awarded, the conditional license holder has 180 days to find a location within its assigned BLS Region to operate.
- When the conditional license holder has found a suitable location, passed an inspection by the Department, and paid its registration fee, the Department will award the license holder an Adult Use Dispensing Organization License, which authorizes the holder to obtain and sell cannabis legally pursuant to the Cannabis and Regulation Tax Act.
- No person or entity shall hold any legal, equitable, or beneficial interest, directly or indirectly, of more than 10 dispensing organizations.

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19

Licensing: Dispensing Organizations

Number of licenses issued in each BLS Region (75 total by 5/1/2020)

- Bloomington: 1
- Cape Girardeau: 1
- Carbondale-Marion: 1
- Champaign-Urbana: 1
- Chicago-Naperville-Elgin: 47
- Danville: 1
- Davenport-Moline-Rock Island: 1
- Decatur: 1
- Kankakee: 1
- Peoria: 3
- Rockford: 2
- St. Louis: 4
- Springfield: 1
- Northwest Illinois nonmetropolitan: 3
- West Central Illinois nonmetropolitan: 3
- East Central Illinois nonmetropolitan: 2
- South Illinois nonmetropolitan: 2

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20

Licensing: Cultivation Centers

- Licensing and oversight: Department of Agriculture.
- Early Approval Adult Use Cultivation Center License
 - Registered Medical Cannabis Cultivation Centers may apply for an Early Approval Adult Use Cultivation Center License to produce cannabis and cannabis-infused products.
 - Applications for Early Approval Licenses must be submitted by August 24, 2019 but no later December 23, 2019.
 - Licenses will be distributed to eligible applicants within 45 days.
 - \$100,000 application fee; business development fee between \$250,000 and \$750,000; applicant must commit to a Social Equity Inclusion Plan that may cost 5 percent of total sales between 6/1/2018 and 6/1/2019, up to \$100,000 or, provide a loan to a Social Equity Applicant of at least \$100,000; license renewal fee of \$100,000.
 - Criteria for awarding licenses: Generally, none; all permissible applicants (in good standing) should receive a license.

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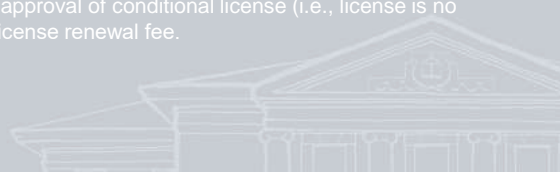
Licensing: Cultivation Centers

Conditional Adult Use Cultivation Center License:

- Timing for applications, license issuance and number of licenses available: TBD by the Illinois Department of Agriculture.
- Applications for Conditional Licenses will be ranked based on clarity, organization, the quality of the applicants response and additional factors laid out in the Act.
- No person or entity shall hold any legal, equitable, or beneficial interest, directly or indirectly, of more than 3 cultivation centers.
- License fees: Application fee in an amount to be determined by the Department of Agriculture; \$100,000 fee upon approval of conditional license (i.e., license is no longer "conditional,"); \$100,00 license renewal fee.

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Licensing: Craft Growers

- Licensing and oversight: Department of Agriculture.
- Timing for applications and license issuance: TBD by the Illinois Department of Agriculture
- Number of licenses: Up to 40 by July 1, 2020; up to 60 additional licenses by December 21, 2021
- License fees: \$5,000 application fee; \$40,000 upon awarded of the license; \$40,000 renewal fee
- Licenses are not limited to any specific region; however, the density of Craft Growers in an area is a factor the Department of Agriculture must consider when issuing licenses
- The Department of Agriculture will rank applications based on clarity, organization, the quality of the applicants responses to required information and additional factors laid out in the Act.
- Craft Grower Licenses may be bought and sold after December 21, 2021; subject to restrictions established by the Department of Agriculture.

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Licensing: Craft Growers

Other restrictions:

- Individuals or entities are not allowed to hold more than 2 Craft Grower Licenses at any given time.
- No Craft Grower Licenses will be issued to any person or entity licensed as a Cultivation Center.
- No Craft Grower Licenses will be issued to any form of business enterprise having more than 10% legal, equitable, or beneficial interest, directly or indirectly, in a person licensed in this State as a cultivation center.
- No Craft Grower Licenses will be issued to any individual with any form of ownership or control over a cultivation center. However there is an exception for a person who owns no more than 5% of the outstanding shares of a cultivation center whose shares are publicly traded on an exchange within the meaning of the Securities Exchange Act of 1934.

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Licensing: Infuser Organizations

- Licensing and oversight: Department of Agriculture.
- Timing for applications and license issuance: Applications will be available by January 7, 2020, and must be received by March 15, 2020.
- Number of licenses: 40 to be awarded on or before July 1, 2020; up to 60 additional licenses to be awarded by December 21, 2021. Licenses are not limited to any specific region.
- License fees: \$5,000 application fee; upon being awarded the license, the Infuser must submit an additional \$5,000; \$20,000 renewal fee.
- The Department of Agriculture will rank application based on clarity, organization, the quality of applicant's responses to required information and additional factors laid out in the Act.

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Licensing: Transporting Organizations

- Licensing and oversight: Department of Agriculture.
- Timing for applications and license issuance: Applications will be available on January 7, 2020, and must be received by March 15, 2020.
- Number of licenses: No limit.
- License fees: \$5,000 application fee; \$10,000 fee upon once award of the license; \$10,000 renewal fee.
- The Department of Agriculture will score applications on a point system; all applicants scoring over 85% will be issued a license within 60 days of receiving the application.

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Social Equity Applicants

A significant factor in being awarded new licenses is whether the applicant is a "Social Equity Applicant":

- Social Equity Applicant Criteria:
 - Applicant with at least 51% ownership and control by one or more individuals who have resided for at least 5 of the preceding 10 years in a disproportionately impacted area (defined in the Act).
 - Applicant with at least 51% ownership and control by one or more individuals who have been arrested for, convicted of, or adjudged to be a ward of the juvenile court for any offense that is eligible for expungement under this Act or member of an impacted family.
- The DFPR and the Department of Agriculture will waive: 50% of any non-refundable license application fees and any non-refundable fees associated with purchasing a license to operate a cannabis business establishment if Social Equity Applicants meet certain conditions.
- Additionally, the Act creates a \$20 million low interest loan program to help Social Equity Applicants with start-up costs.

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27

Marketing & Packaging

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28

Marketing: Restrictions on Content

Section 55-20: Advertising and Promotions:

No Cannabis Business Establishment may engage in advertisement that:

- 1) is false or misleading;
- 2) promotes overconsumption of cannabis or cannabis products;
- 3) depicts the actual consumption of cannabis or cannabis products;
- 4) depicts a person under 21 years of age consuming cannabis;
- 5) makes any health, medicinal, or therapeutic claims about cannabis or cannabis-infused products;
- 6) includes the image of a cannabis leaf or bud; or
- 7) includes any image designed or likely to appeal to minors, including cartoons, toys, animals, or children, or any other likeness to images, characters, or phrases that is designed in any manner to be appealing to or encourage consumption of persons under 21 years of age.

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Marketing: Restrictions on Location

29

Section 55-20: Advertising and Promotions:

No Cannabis Business Establishment may engage in advertisement that is:

- (1) within 1,000 feet of the perimeter of:
 - school grounds,
 - a playground,
 - a recreation center or facility,
 - a child care center,
 - a public park or public library,
 - or a game arcade to which admission is not restricted to persons 21 years of age or older;
- (2) on or in a public transit vehicle or public transit shelter; or
- (3) on or in publicly owned or publicly operated property.

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Packaging Requirements

30

- All harvested cannabis intended for distribution to a cannabis enterprise must be packaged in a sealed, labeled container.
- Any product containing cannabis must be packaged in a sealed, odor-proof, and child-resistant cannabis container consistent with current standards, including the Consumer Product Safety Commission standards referenced by the Poison Prevention Act.
- All cannabis-infused products shall be individually wrapped or packaged at the original point of preparation. The packaging of the cannabis-infused product shall conform to the labeling requirements of the Illinois Food, Drug and Cosmetic Act, in addition to the other requirements.
- All previously mentioned restrictions on Marketing Content apply to packaging as well.

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31

Taxation

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32

Taxation Under the Act

- **Cannabis Cultivation Privilege Tax:**
 - 7% of the gross receipts from the sale of cannabis by a cultivator, craft grower, or processor to a dispensing organization.
- **Cannabis purchaser excise tax:**
 - 10% of the purchase price – Cannabis with a THC level at or below 35%.
 - 20% of the purchase price – All cannabis infused products.
 - 25% of the purchase price – Cannabis with a THC level above 35%.
- **Municipal Cannabis Retailer's Occupation Tax:**
 - Municipalities may enact a purchaser excise tax up to 3% in increments of 0.25%.
- **County Cannabis Retailer's Occupation Tax:**
 - A County may levy an excise tax up to 3.75% in unincorporated portions of the county by increments of 0.25%.
 - A County may levy an excise tax up to 0.75% in a municipality by increments of 0.25%.
 - A Home Rule County may levy an excise tax up to 3% by increments of 0.25%.

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33

Relationship with Local Governments

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34

Impact on Local Governments

- Local Governments, including a home rule unit or any non-home rule county within the unincorporated territory of the county, may enact ordinances that:
 - Regulate the time, place, manner, and number of cannabis business establishment operations, including minimum distance limitations between cannabis business establishments and locations it deems sensitive, including colleges and universities, through the use of conditional use permits
 - Prohibit (opt out) or significantly limit a Cannabis Business Establishment's location.
 - Regulate the on-premises consumption of cannabis at or in a cannabis business establishment within its jurisdiction.
- However, no unit of local government may unreasonably prohibit home cultivation and use of cannabis

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35

Employer & Employee Rights

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36

Employer Rights

“...the strongest workplace protections in the nation.”

- Todd Maisch, President and CEO of the Illinois Chamber of Commerce (*Herald & Review*, 7/6/2019).

Section 10-50. Employment; employer liability:

(a) Nothing in this Act shall prohibit an employer from adopting reasonable zero tolerance or drug free workplace policies, or employment policies concerning drug testing, smoking, consumption, storage, or use of cannabis in the workplace or while on call provided that the policy is applied in a nondiscriminatory manner.

(b) Nothing in this Act shall require an employer to permit an employee to be under the influence of or use cannabis in the employer's workplace or while performing the employee's job duties or while on call.

(c) Nothing in this Act shall limit or prevent an employer from disciplining an employee or terminating employment of an employee for violating an employer's employment policies or workplace drug policy.”

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Employee Rights

- The Cannabis Regulation and Tax Act also amends the Illinois Right to Privacy in the Workplace Act.
- The Illinois Right to Privacy in the Workplace Act protects employees from adverse employment actions related to their use of "lawful products" outside of working hours.
- The amendment clarifies that recreational cannabis is considered a "lawful product."
- It is unclear how this provision is intended to interact with the Act's authorization for employers to impose "zero tolerance" policies.
 - Can off duty police officers use cannabis?
 - What is the impact on businesses with federal contracts?
- It is important to carefully monitor how courts will strike a balance between the competing rights of employers and employees.

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Expungement

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Expungement

39

- The Act creates a process for expunging the criminal records of individuals arrested, convicted, on supervision, or on probation for “minor cannabis offenses” of the Cannabis Control Act.
- A minor cannabis offense is a violation of Section 4 or 5 of the Cannabis Control Act not concerning more than 30 grams of cannabis.
- Section 4 Violations: unlawful for any person to knowingly possess cannabis in the following amounts:
 - Less than 10 grams (civil law violation, penalty fees)
 - 10-30 grams (Class B misdemeanor, penalty 6 months prison)
- Section 5 Violations: unlawful for any person knowingly to manufacture, deliver, or possess with intent to deliver or manufacture cannabis in the following amounts:
 - Less than 2.5 grams (Class B misdemeanor, penalty 6 months prison)
 - 2.5 grams to 10 grams (Class A misdemeanor, penalty one year prison)
 - 10 to 30 grams (Class 4 Felony, penalty 1-3 years prison)

See: House Bill 1438, Section 5.2

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Expungement of Arrest Records

40

- Arrest Records for minor cannabis offenses prior to the effective date of the act will be automatically expunged if:
 - 1 year or more has elapsed since the date of the arrest; and
 - No criminal charges were filed, or were subsequently dismissed or vacated after they were filed
- Expungements of arrest records will follow the following timeline:
 - Records created between January 1, 2020 and January 1, 2013 will be expunged before January 1, 2021.
 - Records created between January 1, 2013 and January 1, 2000 will be expunged before January 1, 2023.
 - Records created before January 1, 2000 will be expunged before January 1, 2025.

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Expungement of Minor Cannabis Convictions

- The Department of State Police will identify all individuals eligible for expungement.
- An individual is eligible for expungement if:
 - 1) He or she has one or more convictions for Minor Cannabis Offenses;
 - 2) The conviction did not include a penalty enhancement under Section 7 of the Cannabis Control Act; and
 - 3) The conviction is not associated with a violent crime as defined in Section 3 of the Rights of Crime Victims and Witnesses Act.
- Within 180 days after January 1, 2020, the Department of State Police will notify the Prisoner Review Board of all records.
- The Review Board will then notify each State's Attorney of any crime that is a class 4 felony.
- Within 60 days of notification, the State's Attorney or prosecutor may provide a written objection to the Prisoner Review Board for any case.

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Expungement of Minor Cannabis Convictions

- If there is an objection, the Prisoner Review Board will have a non-public hearing on the conviction, and will forward their recommendations to the Governor regarding a pardon authorizing expungement.
- If a pardon is granted, the Prisoner Review Board, through the Attorney General, will file a petition with the circuit court where the individual was convicted.
- Within 90 days of the filing of the petition, the court will enter an order expunging the records of arrest from the official records and order all records at the circuit court clerks and the Department of State Police be expunged.
- The Court will send a copy of the expungement to the last known address of the individual.
- Along with automatic expungement, any individual or State's Attorney may file a motion to vacate and expunge Minor Cannabis Offenses.

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Cases Still Pending

- If an individual's case is still pending but a sentence has not been imposed, the person may petition the court in which the charges are pending for an order to summarily dismiss those charges against him or her, and expunge all official records of his or her arrest, plea, trial, conviction, incarceration, supervision, or expungement.
- The court will consider the following factors:
 - the reasons to retain the records provided by law enforcement;
 - the petitioner's age;
 - the petitioner's age at the time of offense;
 - the time since the conviction;
 - and the specific adverse consequences if denied.
- If a motion to dismiss and expunge is granted, the records shall be expunged in accordance with the Act.

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Questions?

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