

DECEMBER 4, 2020 | STATE & LOCAL TRENDS

Is Federal Marijuana Reform on the Horizon?

✘ Fifty years after the Controlled Substances Act was passed and marijuana was deemed illegal under federal law, the legality of marijuana is finally being addressed by Congress, as the U.S. House of Representatives is scheduled to vote this month on a bill that seeks to end the federal law that prohibits marijuana use – a vote on the most comprehensive marijuana reform legislation in U.S. history that could have sweeping implications.

Specifically, the [Marijuana Opportunity Reinvestment and Expungement Act](#) (aka the “MORE Act”) intends to de-schedule cannabis from the list of Schedule I controlled substances under the Controlled Substances Act. The Act also intends to expunge many convictions, tax cannabis sales at 5%, invest in grant programs with a heavy focus on social equity, and provide cannabis businesses access to Small Business Administration loans.

The vote in the House arrives roughly a month after five states — New Jersey, Arizona, Montana, South Dakota and Mississippi — voted on Election Day to legalize recreational or medical cannabis. Cannabis is already legal, to some degree, in most U.S. states, and the support for reform is only increasing. Notably, every single marijuana reform measure placed on state ballots in 2020 passed, representing a continuation of the state-level reform movement that has consistently expanded in election after election. As we move into 2021, medical marijuana is now legal in 34 states and the District of Columbia and recreational marijuana is legal in 15 states and the District of Columbia. Staunch activism for marijuana reform also continues to grow in several other states where legislation is expected to be introduced within the next year, including New York, New Mexico, Rhode Island, Missouri, North Dakota, and Florida.

While the MORE Act is expected to pass the House with some bipartisan support, it remains unlikely that the Senate will follow suit (at least during this Congress), as Majority Leader Mitch McConnell (R-KY) opposes federal marijuana reform. However, the fate of the bill may come down to the two special runoff elections in Georgia that will dictate which political party controls the Senate.

If Democrats win both seats, they would take control of the Senate starting on Jan. 20, as Vice President-elect Kamala Harris – the current lead Senate sponsor of the bill – would have the power to break ties in the chamber. With a Democratic-controlled Senate and House, cannabis reform would likely move in the 117th Congress, even if the pace of that reform and the Biden administration’s support in promoting it remain unclear.

In light of the recent marijuana reform measures in several Republican-governed states, it is not entirely out of the question that a scaled-down proposal of the bill could pass even if the Senate continues to be controlled by Republicans. For instance, there may be bi-partisan support to pass legislation that would protect individuals

from federal prosecution or interference so long as they are complying with state marijuana laws.

If the Bill does not pass the Senate, House approval of the bill during the presidential transition will nonetheless raise the pressure on President-elect Joe Biden to embrace marijuana legalization at the federal level—a policy he's declined to adopt despite supermajority support among Democratic voters. Although Vice President-elect Kamala Harris is the lead Senate sponsor of the bill, she has indicated she will not proactively push the former vice president to evolve further on cannabis reform, especially since he has not issued any plans for marijuana reform in his transition plan.

Why is this important for employers? If the bill passes both the House and the Senate, as written, it will likely hasten efforts to legalize marijuana in states that have not already done so. Most importantly, employees will need to look closely at state laws on which drugs are prohibited, as many of them rely on the controlled substances listed in the Controlled Substances Act. Likewise, employers will need to closely review their drug testing policy and re-evaluate whether it will choose to test for marijuana. This issue will largely be left up to states. Currently, there are only a few states that have passed specific employment protections related to marijuana, but more and more states are taking steps to amend their marijuana laws to address this largely unanswered issue.

Finally, if the bill is passed, employers will also need to evaluate their background check process. While employers are generally prohibited from considering expunged records and an expunged record is not supposed to show up in a report at all, there are often mistakes. To the extent a prospective employee's drug record is expunged but known by the employer, it is imperative that the employer not consider this factor in making an employment decision, and treat it as if it never occurred.

Employers should closely monitor the development of the MORE Act, as this will not be the last time marijuana reform is raised before Congress during the next Presidential term.