

# Legal Cannabis and Public Schools

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**This presentation is not intended as legal advice. Please consult your legal counsel with specific questions.**

# Agenda

- Cannabis Basics
- History of Cannabis Laws in North Dakota
- Status of Cannabis Laws in North Dakota
- Impact of Cannabis Laws on Public Schools
- The Path Forward

# **Cannabis Basics**

# What is Cannabis

- A plant of the Cannabaceae family containing more than eighty biological active chemical compounds.
- The most commonly known compounds include:
  - Delta-9-tetrahydrocannabinol (THC)
  - Cannabidiol (CBD)
- Legality of the cannabis plant is broken down into two categories:
  - Industrial Hemp - THC of less than 0.3%
  - Marijuana - THC of 0.3% or more
- FDA approved products containing THC and CBD are available to patients through a prescription from a health care provider.

***Cannabis containing 0.3% THC or more is illegal under federal law.***

# What is Cannabis

- All parts of the cannabis plant, including the seeds and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a THC of

# **History of Cannabis Laws in North Dakota**

# History in North Dakota

- November 8, 2016
  - Initiated Measure 5 legalizing the use of medical cannabis for patients with qualifying medical conditions was approved by North Dakota voters.
  - 64% to 36%
- November 6, 2018
  - North Dakota voters rejected adult-use cannabis
  - 41% to 59%
- 67th Legislative Assembly (2021)
  - House Bill 1420 legalizing adult-use cannabis was presented to the North Dakota Legislature
  - Passed the House
  - Died in the Senate
- Currently
  - Pending Constitutional Measure for adult-use cannabis

# History in North Dakota

- Implementation of Medical Cannabis
  - The analysis of Measure 5 raised significant concerns and required statutory amendments.
  - All changes to the medical cannabis laws require a two-thirds vote of the North Dakota Legislature
- Legislative Changes: Senate Bill 2344
  - Repealed and replaced N.D.C.C. ch. 19-24 with ch. 19-24.1
  - The amended language incorporated the priorities addressed in the Cole Memo issued by the U.S. Department of Justice.
  - Attorney General Session rescinded the Cole Memo on January 4, 2018.
- Signed by Governor Burgum on April 17, 2017.
- Attorney General Opinion 2017-L-06.

# **Status of Cannabis Laws in North Dakota**

# Process Overview

Patient has a debilitating medical condition



Health Care provider executes a written certification



Patient has a debilitating medical condition



Health Care provider executes a written certification



Patient is authorize to purchase usable marijuana at a registered compassion center.

# Debilitating Medical Conditions

- Agitation of Alzheimer's disease or related dementia
- AIDS
- Amyotrophic Lateral Sclerosis (ALS)
- Anorexia Nervosa
- Anxiety Disorder
- Autism Spectrum Disorder
- Brain Injury
- Bulimia Nervosa
- Cancer
- Crohn's disease
- Decompensated Cirrhosis caused by Hepatitis C
- Ehlers-Danlos Syndrome
- Endometriosis
- Epilepsy
- Fibromyalgia
- Glaucoma
- HIV
- Interstitial Cystitis

# Debilitating Medical Conditions

- Migraine
- Neuropathy
- Posttraumatic Stress Disorder (PTSD)
- Rheumatoid Arthritis
- Spinal Stenosis or chronic back pain with objective neurological indication of intractable spasticity
- Tourette Syndrome
- Terminal Illness
- A chronic or debilitating disease or medical condition or treatment for such disease.

# Debilitating Medical Conditions

- Chronic Conditions
  - A chronic or debilitating disease or medical condition or treatment for such disease or medical condition that produces one or more of the following:
    - Cachexia or wasting syndrome;
    - Severe debilitating pain that has not responded to previously prescribed medication or surgical measures for more than three months or for which other treatment options produced serious side effects;
    - Intractable nausea;
    - Seizures; or
    - Severe and persistent muscle spasms, including those characteristic of multiple sclerosis

# Written Certification

- Health Care Providers:
  - Physicians
  - Advanced Practice Registered Nurses
  - Physician Assistants
- Health Care Providers must be licensed to practice in North Dakota.
- Requirements for Certification:
  - The Health Care Provider must state that the patient has one of the specified debilitating medical conditions.
  - Certifications can only be executed in the course of a bona fide provider-patient relationship.

Health Care Providers do **not** prescribe medical cannabis.

# Minor Patients

- Patients under 19 years of age.
- Additional Requirements for Minor Patients:
  - The health care provider must document that they have explained the potential risks to the parent or legal guardian.
  - Parent or legal guardian must consent in writing to the following:
    - Allow the minor to use medical cannabis
    - Serve as the minor's designated caregiver
    - Control the acquisition and dosage
    - Prevent the minor from accessing the medical cannabis

Minor patients ***must*** have a parent or legal guardian serve as a designated caregiver.

# Written Certification

- Health Care Providers:
  - Physicians
  - Advanced Practice Registered Nurses
  - Physician Assistants
- Health Care Providers must be licensed to practice in North Dakota.

# **Designated Caregiver**

An individual who agrees to manage the well-being of a registered qualifying patient with respect to the patient's use of medical cannabis.

# **Compassion Center Agent**

A principal officer, board member, member-manager, governor. Employee, volunteer, or agent of a compassion center.

Front Side

## NORTH DAKOTA MEDICAL MARIJUANA



PATIENT

NAME: John ZZTest

DATE OF ISSUE: 04-25-2019

DATE OF EXPIRATION: 02-13-2020

ID NUMBER: G372G6YWL2

DRIED LEAVES AND FLOWER: Standard



Back Side

## NORTH DAKOTA MEDICAL MARIJUANA

PATIENT

If found or to verify card, contact the Division of Medical Marijuana at (701) 328-1311.

Counterfeiting, replicating, alteration or misuse of this card is prohibited by law. Use or possession of this card by any person other than the intended cardholder is unlawful.



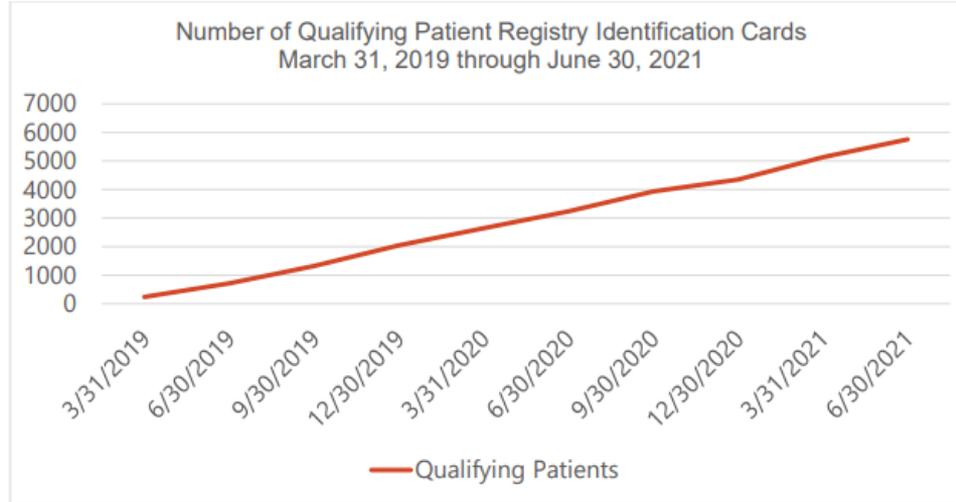
G3 72 G6 YW L2



Dried Leaves/Flower Possession Limits:

No = 0.0 oz  
Standard = 3.0 oz  
Enhanced = 7.5 oz

# Registered Cardholders



Active Qualifying  
Patients: 6,569

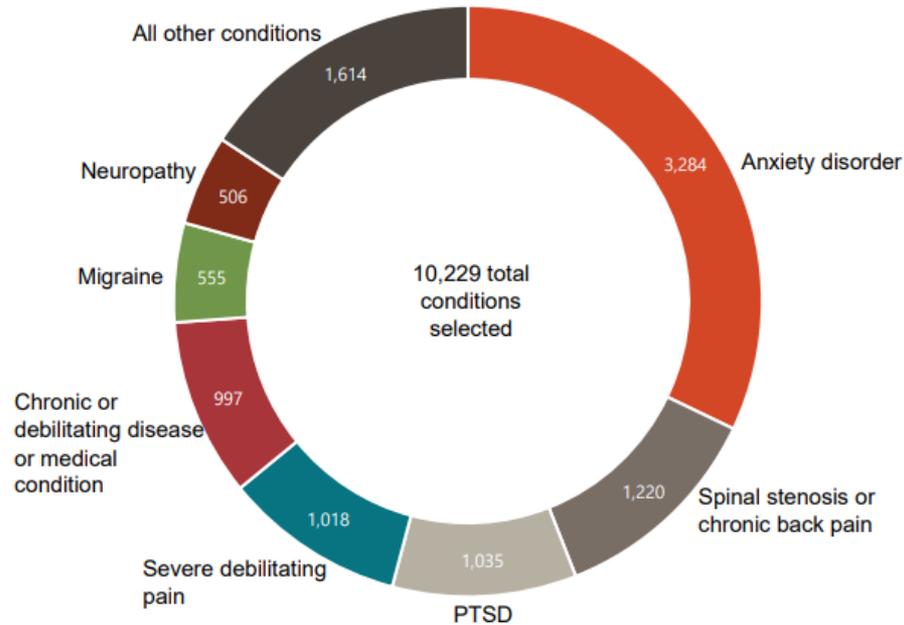
(10/19/2021)

Fiscal Year End Registry Identification Card Data			
	6/30/2019	6/30/2020	6/30/2021
Qualifying patient cards *	707	3,233	5,754
Designated caregiver cards	34	109	139
Compassion center agent cards	91	410	408

\* Number of minor patients (those under the age of 19) was less than 30 in all three years.

# Debilitating Medical Conditions

Debilitating Medical Conditions Selected by Health Care  
Providers for Registered Qualifying Patients  
as of June 30, 2021



# Compassion Centers

## Manufacturing Facilities (2)

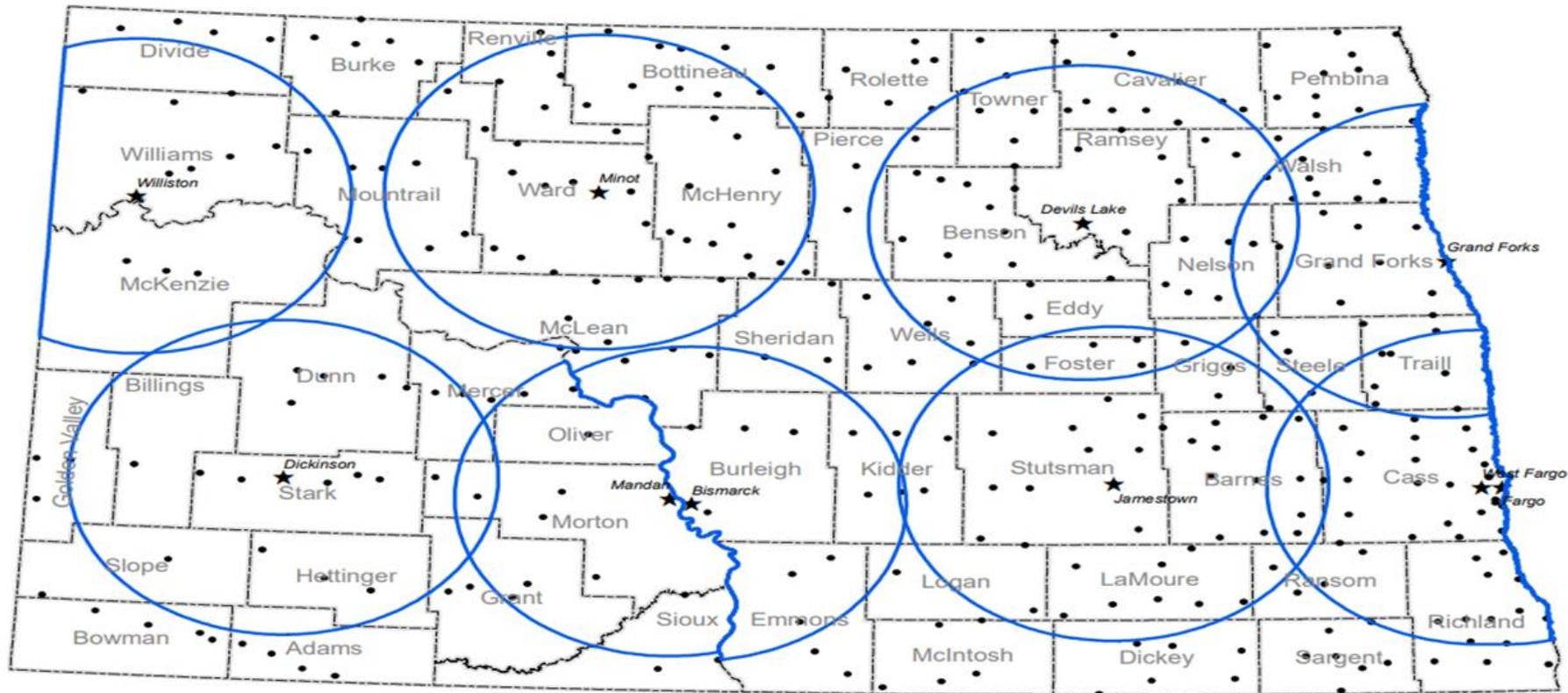
- Grow - Produce - Process
- Production to meet demand
- Registration:
  - Two Years
  - \$110,000
- No patient or designated caregiver access
- Only authorized compassion center agents

## Dispensaries (8)

- Patient Sales and Education
  - Sales are limited to maximum purchase amounts and maximum THC concentration amounts
- 3,500 ounce possession limit
- Registration:
  - Two Years
  - \$90,000
- Patients, designated caregivers, and authorized compassion center agents.

A compassion center cannot be located within one thousand feet of a property line of a pre-existing public or private school.

Edible Cannabis Products are **not** authorized for sale in North Dakota



Date: 12/28/2017 by AMKFrlz H:\CityMap\_Update\Landscape.mxd

### 50-mile Radius Around Identified Communities

-  50-mile radius
-  Major Community
-  Populated Place
-  County Boundary





# **Impact of Cannabis Legalization on Public Schools**

# Possession on School Property

## Medical Cannabis

- Possession and consumption of medical cannabis is not authorized:
  - On a school bus or school van that is used for school purposes.
  - On the grounds of any public or private school.
  - At any location while a public or private school sanctioned event is occurring at that location.
- See N.D.C.C. 19-24.1-33(2).

What about CBD?

# Administration by School Officials

## Medical Cannabis and CBD

- Federally illegal substance.
- Possession and consumption are not authorized on school property under state law.
- The products are not FDA approved or obtained through a prescription.

## Students on IEPs and 504s.

- It would be an “absurd” result to interpret a federal statute such as the Individuals with Disabilities Education Act as requiring a school to commit or accommodate a federal crime in order to satisfy the obligation to provide a student with a free, appropriate public education. *Albuquerque Public Schools v. Sledge*, 2019 WL 3755954, 74 IDELR 291 (D.N.M. 2019).
- An accommodation that requires circumvention of current law cannot be construed as reasonable. Further, the use of medical cannabis in the IEP cannot be included in the IEP as the entities could not legally implement the IEP. *Student v. Sandwich Public Schools & the Amego School*, BSEA # 2109444 (MA Division of Administrative Appeals, 2021).
- Student requiring administration of THC oil as an emergency medication to control seizures was determined to be a reasonable accommodation as the California statute did not restrict use on school property. *Rincon Valley Union Elementary School District*, OAH Case #2018050651 (CA Office of Administrative Hearings, 2018).

# Employee Possession and Consumption

- Drug Free Workplace Act of 1988
  - Who:
    - Any organization that receives a federal contract of \$100,000 or more
    - Any organization receiving a federal grant of any size
  - What:
    - Prepare and distribute a formal drug-free workplace policy statement that clearly prohibits the manufacture, use and distribution of controlled substances in the workplace.

# Employee Possession and Consumption

- Americans with Disabilities Act (ADA)
  - Employers must engage in the interactive process to determine if a reasonable accommodation can be provided to an employee with a disability to assist them in performing the essential functions of their job.
- Family Medical Leave Act (FMLA)
  - Qualified employees with serious health conditions are entitled to leave for medical
- Reasonable Accommodations

# Employee Possession and Consumption

## State Law Considerations

- North Dakota Century Code 19-24.1-33(1) does not authorize a person to engage in or be subject to criminal punishment or civil liability for “undertaking an activity under the influence of marijuana if doing so would constitute negligence or professional malpractice.”
- It is the policy of this state to prohibit discrimination...with regard to...participation in lawful activity off the employer’s premises during nonworking hours with is not in direct conflict with the essential business-related interests of the employer. See N.D.C.C. 14-02.4-01.
- Workers Compensation will not pay for medical cannabis. See N.D.C.C. 65-05-07(8)(l).

# Employee Possession and Consumption

## Employer-Friendly Cases

- The employer's policy prohibited employees from working with controlled substances in their system. The Oregon Supreme Court held that the "legislature intended the definition of 'disabled person' to be construed in light of mitigating measures that counteract ... an individual's impairment." Since prescription medication counteracted the medical issues, the employee was not disabled and the employer was not required to accommodate the employee. *Washburn v. Columbia Forest Products, Inc.*
- The Washington Court of Appeals found that Washington's law does not prohibit an employer from firing an employee for using medical marijuana as authorized by a physician because the state law does not expressly require employers to accommodate on-the-job or off-duty medical marijuana use. *Roe v. Teletech Customer Care Mgmt.*

# Employee Possession and Consumption

## Employer-Friendly Cases

- The Montana Supreme Court ruled that an employer need not accommodate medical marijuana use. *Johnson v. Columbia Falls Aluminum Co.*
- The California Supreme Court refused to require employers to accommodate marijuana use. The Court noted the state's legalization statute does not give cannabis the same status as legal prescription drugs. Since cannabis is federally illegal, the Court held the state's disability-discrimination statute did not require employers to accommodate illegal drug use. *Ross v. RagingWire Telecommunications, Inc.*

# Employee Possession and Consumption

## Employee-Friendly Cases

- The Massachusetts high court addressed whether an employer must accommodate medical cannabis use, since state law permits medical marijuana use and prohibits disability discrimination.
- The employer offered a job applicant a position as an entry-level salesperson that was conditioned on passing a drug test. During the onboarding process, the applicant mentioned that she suffered from Crohn's disease and used medical marijuana based on her physician's written certification to treat it. She said she did not use marijuana daily and would not consume it before or during work. However, she was fired shortly after she started the job because her drug test came back positive for marijuana.
- The court held that an exception to the employer's drug policy to permit offsite marijuana use may be a reasonable accommodation where the employee's physician determines that marijuana is the most effective treatment for the employee's disability and that any alternative medication permitted by the employer's drug policy would be less effective.
- *Barbuto v. Advantage Sales and Marketing, LLC.*

# **The Path Forward**

# The Path Forward

- Legalization Initiatives
  - Federal Legalization
  - State Legalization
- Evolving Case Law
- Mindful Employment Practices
  - Drug-testing and Screening
  - Interactive Process

# Questions

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