

# Key Differences Between Recent Medical Cannabis Laws and Proposition 64: A Preliminary Review

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## KEY DIFFERENCES BETWEEN RECENT MEDICAL CANNABIS LAWS AND PROPOSITION 64: A PRELIMINARY REVIEW

*Recent Laws Provide Framework for Regulating Medical Cannabis.* In 1996, voters approved Proposition 215, which legalized the use of medical cannabis in California. However, for most of the past two decades, most regulation was left to local governments, and the state largely did not regulate medical cannabis until recently. Specifically, three state laws enacted in 2015 (Chapter 688 [AB 243, Wood], Chapter 689 [AB 266, Bonta], and Chapter 719 [SB 643, McGuire])—known collectively as the Medical Cannabis Regulation and Safety Act (MCRSA)—and more recent legislation (Chapter 32 of 2016 [SB 837, Committee on Budget and Fiscal Review]) provide a statutory framework to regulate medical cannabis.

MCRSA requires specified state agencies to regulate the medical cannabis industry, including the issuance of licenses to medical cannabis cultivators, manufacturers, testing laboratories, transporters, distributors, and dispensaries. (On page 72 of *The 2016-17 Budget: California Spending Plan*, we provide a summary of funding for state agencies to implement MCRSA.) Regulating agencies are also required to set standards for the labelling, quality testing, and packaging of medical cannabis products. Currently, regulations and guidelines to implement these requirements are being developed by several different state departments including the: California Department of Food and Agriculture, Department of Consumer Affairs (DCA), Department of Public Health (DPH), State Water Resources Control Board, Department of Pesticide Regulation, and Department of Fish and Wildlife.

*Proposition 64 Legalizes Nonmedical Cannabis.* In November of 2016, voters approved Proposition 64, which legalized the *nonmedical* use of cannabis. Under Proposition 64, adults 21 years of age or older can legally grow, possess, and use cannabis for nonmedical purposes, with certain restrictions. Prior to passage of Proposition 64, it was generally illegal to grow, possess, or use cannabis for nonmedical purposes.

*Proposition 64 Statutory Framework Mirrors MCRSA in Some Areas . . .* Proposition 64 creates a statutory framework to regulate nonmedical cannabis. In some areas this framework mirrors the one established by MCRSA to regulate medical cannabis. For example, some of the licenses established under Proposition 64 for small- and medium-size cultivators are identical to the licenses established under MCRSA.

*. . . And Differs in Other Areas.* While there are many similarities between MCRSA's statutory framework and Proposition 64's, we highlight some key differences between MCRSA and Proposition 64 based upon our initial discussions with state departments and stakeholders. As shown in Figure 1, these differences generally fall in three main areas: (1) departmental responsibilities, (2) industry structure, and (3) licensing requirements. For example, one key difference between MCRSA and Proposition 64 is the types of licenses they establish. Notably, Proposition 64 allows cultivation license types that permit cannabis grows (beginning January 1, 2023) larger than allowable under MCRSA. Another key difference is in the degree to which entities can control multiple steps in the cultivation, distribution, and retail chain (commonly referred to as "vertical

integration”). For example, MCRSA generally limits a licensee to holding state licenses in up to two categories. In contrast, Proposition 64 generally allows a licensee to hold licenses in more categories, which facilitates vertical integration of the supply chain.

Some of these differences have the potential to cause challenges for state regulators and licensees. For example, while both MCRSA and Proposition 64 have distributor license categories, distributor licensees under MCRSA generally are required to be independent entities that do not hold licenses in other license categories. In contrast, under Proposition 64, distributors generally can hold licenses in other license categories. This difference could make compliance more complex for licensees that produce or manufacture both medical and nonmedical marijuana products. In some areas there may be a policy rationale for maintaining these types of differences between medical and nonmedical cannabis regulatory systems. However, in other areas, these differences could cause more confusion within the industry than if there were a single set of rules

**Figure 1**

**Key Differences Between the Medical Cannabis Regulatory and Safety Act (MCRSA) and Proposition 64**

| Regulatory Issue  | MCRSA  | Proposition 64   |
|---|--|--|
| <b>Departmental Responsibilities</b>  |  |  |
| Entity that administers the license suspension and revocation appeals process | Licensing department.  | Three member appeals panel.  |
| Entity that licenses laboratories that test safety of cannabis products       | Department of Consumer Affairs (DCA).  | Department of Public Health.   |
| <b>Industry Structure</b>   |  |  |
| Licensing types   | Total of 17 license types and allows DCA to create additional license types.     | Different mix of 19 license types, including addition of large grows and microbusinesses and exclusion of transportation.                                      |
| Limits on a licensee holding state licenses in multiple categories            | Generally, may hold state licenses in no more than two license categories.       | May hold state licenses in multiple license categories (with certain exceptions).  |
| State and local government licensing requirements                             | Must obtain both a state and a local license or permit to operate.               | Must obtain a state license to operate. (Local governments can continue to enforce local zoning and other requirements.)                                       |
| Distribution model  | Cannabis must be sent to an independent distributor prior to testing.            | Cannabis can generally be sent to testing without going through an independent distributor.  |
| Mobile delivery   | Local jurisdiction may prevent delivery of cannabis from a retailer to consumer. | Local jurisdiction may not prevent delivery of cannabis from a retailer to consumer.   |
| <b>Licensing Requirements</b>   |  |  |
| Residency requirement   | None.  | Licensees must have continuous California residency since January 1, 2015. Requirement ends December 31, 2019.   |
| Special market considerations   | None.  | Licensing authorities shall evaluate several market considerations including unreasonable restraints on competition in determining whether to grant a license. |

for both medical and nonmedical cannabis licensees. Furthermore, having two statutory frameworks could result in less efficient regulation by state regulatory agencies. For example, having different departments—DCA and DPH—responsible for regulating testing laboratories could result in duplicative licensing and oversight efforts.

*Overarching Issues for Legislative Considerations.* Given the potential challenges caused by having two different regulatory systems, the Legislature could consider whether to make changes to better align aspects of the two programs. As the Legislature evaluates whether to make such changes, there are a few overarching issues that merit consideration:

- ***Cannabis Is Illegal Under Federal Law.*** Under federal law, it is illegal to possess or use cannabis, including for medical use. Currently, the U.S. Department of Justice chooses not to prosecute most cannabis users and businesses that follow state and local cannabis laws if those laws are consistent with federal priorities, such as preventing cannabis from being taken to other states. However, this federal policy could change in the future, which might affect the state’s ability to effectively implement regulations on cannabis.
- ***Changes to Some Sections of Proposition 64 Likely Require Voter Approval.*** Proposition 64 allows for modifications to the framework of nonmedical cannabis regulation by a majority vote of the Legislature. (Modifications to Proposition 64’s framework for nonregulatory issues such as taxation and criminal offenses require a two-thirds vote of the Legislature.) Any legislative changes must be consistent with the proposition’s stated intent and further its purposes. In some cases, it may be unclear whether a proposed change to Proposition 64 would meet this criterion and, therefore, could be enacted by the Legislature or would require voter approval.
- ***Proposition 64 Imposes Implementation Deadlines.*** Under Proposition 64, the state is required to begin issuing nonmedical cannabis licenses by January 1, 2018. Based upon discussions with state departments, this is an ambitious timeline because departments must finalize regulations and guidelines, have staff in place, and set up information technology systems in a shorter period of time than is normal for such a large and complex new regulatory program. Moreover, if the Legislature chooses to modify the regulatory requirements under MCRSA or Proposition 64, this could affect departments’ timelines for finalizing regulations. It is unclear what the consequences might be if state agencies are unable to meet Proposition 64’s January 2018 deadline to issue nonmedical cannabis licenses. We note that MCRSA establishes a target of implementing a medical cannabis licensing program by January 1, 2018, though this date does not appear to be as strictly required.