

Amendment 64 Implementation Task Force  
Sub-Committee on Tax/Funding and Civil Law

Department of Law  
Carr Judicial Center, 1300 Broadway, 1<sup>st</sup> Floor  
Wednesday, January 23, 2013  
11:00 a.m. – 1:00 p.m.

## Agenda

TOPIC: Tax Issues

- I. Attendance, Discussion of Topic Overlap and Adoption of the Minutes from January 16<sup>th</sup>
- II. Emergency Funding sources (Governor/OSPB/Revenue)
- III. Discussion and Vote on employment recommendation<sup>1</sup> (15 mins)

**Majority Recommendation:** “The plain language of Amendment 64 Section 6(a) makes it clear that the intent of the voters was to maintain the *status quo* for employers and employees and also that employers may create or modify new policies in response to the passage of Amendment 64.”

**Minority Recommendation:** See attached.

- IV. Discussion of Tax Issues (60 mins)
  - A. Background Information on Excise Taxes, Sales Taxes, current audit and filing procedures (for MMJ), revenue collection amounts, revenue estimates, etc. (John Vecchiarelli)
  - B. Review of language of Amend 64 (5)(d)

“(5)(d) THE GENERAL ASSEMBLY SHALL ENACT AN EXCISE TAX TO BE LEVIED UPON MARIJUANA SOLD OR OTHERWISE TRANSFERRED BY A MARIJUANA CULTIVATION FACILITY TO A MARIJUANA PRODUCT MANUFACTURING FACILITY OR TO A RETAIL MARIJUANA STORE AT A RATE NOT TO EXCEED FIFTEEN PERCENT PRIOR TO JANUARY 1, 2017 AND AT A RATE TO BE DETERMINED BY THE GENERAL ASSEMBLY THEREAFTER, AND SHALL DIRECT THE DEPARTMENT TO ESTABLISH PROCEDURES FOR THE COLLECTION OF ALL TAXES LEVIED. PROVIDED, THE FIRST FORTY MILLION DOLLARS IN REVENUE RAISED ANNUALLY FROM ANY SUCH EXCISE TAX SHALL BE CREDITED TO THE PUBLIC SCHOOL CAPITAL CONSTRUCTION ASSISTANCE FUND CREATED BY ARTICLE 43.7 OF TITLE 22, C.R.S., OR ANY SUCCESSOR FUND DEDICATED TO A SIMILAR PURPOSE. PROVIDED FURTHER, NO SUCH EXCISE TAX SHALL BE LEVIED UPON MARIJUANA INTENDED FOR SALE AT MEDICAL MARIJUANA CENTERS PURSUANT TO SECTION 14 OF THIS ARTICLE AND THE COLORADO MEDICAL MARIJUANA CODE.”

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<sup>1</sup> Other employment issues/recommendations to be revisited on February 20, 2013.

- C. Is (5)(d) constitutional? Does it comply with TABOR?
- D. Was (5)(d) approval of a tax such that it can be implemented without another statewide vote?
- E. Does a tax increase require 2/3 vote of both chambers of the General Assembly?
- F. Can one referendum put in place an up to 15% excise tax AND also be progressive for future years under a formula put forward at same time? In perpetuity?
- G. What if General Assembly fails to pass a referendum?
- H. Is (5)(d) enforceable? Can 15% excise cap ceiling be pierced by General Assembly before 2017? Can earmark of 40 million to schools be enforced if General Assembly dedicates money elsewhere as part of the referendum ultimately approved by the voters?
- I. Can General Assembly pass more than one referendum?
- J. Is there any restriction on other taxes?
- K. Is there any restriction on citizen initiatives?
- L. Is there any restriction on sales tax increases at county or local level?
- M. How/where should tax be collected (grow to manufacturer, point of sale, etc)?
- N. What is the earliest an excise tax can take effect? (TABOR = odd year elections)
- O. What should be done about Section 280e business tax deductions, if anything? MMJ vs. retail store
- P. Stricter penalties for obfuscation of business type declaration (i.e. tax evasion)?
- Q. Any restrictions on county local taxes?
- R. What is optimal tax – higher it goes the more likely black market thrives but want maximum revenue that allows business to exist. Increase penalties for black market sales?
- S. How do u measure the tax – by weight (infused products/oils)? By potency? By plant? (Excise tax is typically collected at the wholesale level).

V. Draft Recommendation for Discussion Purposes **ONLY**:

1. Amendment 64 (5)(d) is facially constitutional. However, Amendment 64 did not comply with TABOR. Amendment 64 was not a vote for a tax raise that can be implemented and collected with the simple passage of a tax statute by the General Assembly. Another vote of the majority of the people of the State of Colorado is required after a referendum or citizen initiative placing a specific tax increase on recreational marijuana in compliance with requirements of TABOR.
2. The General Assembly should introduce and consider a referendum consistent with Amend 64 (5)(d). The House and Senate Finance Committees should hold one joint Committee hearing at which the normal Committee rules should be suspended to allow for no votes to be taken in order for the measure to receive a full vote in the House Chamber and if passed by two-thirds of the State Representatives, should go directly to the Senate Chamber for a vote of two-thirds of the State Senators. If the referendum fails than the General Assembly should be deemed in substantial compliance with Amendment 64 (5)(d).

3. Other referendums may be introduced in the General Assembly and considered through the normal course of business. These other referendums should not be deemed to be bound by the restrictions of Amendment 64 (5)(d) because it is the vote of the people that actually makes the tax legal. Other referendums to consider should be a higher tax rate than 15%, re-direction of tax revenue to fund the regulatory regime, collected taxes deposited directly into general fund, etc.
4. Amendment 64 places absolutely no restrictions on any citizen initiative regarding taxes, repeal, clarification or expansion.
5. Recreational marijuana is not exempt from normal 2.9% State sales tax and any local taxes and should be collected at the point of sale. The General Assembly should consider raising sales tax on to be collected at the point-of-sale on recreational marijuana and paraphernalia.

**VI. Additional Topics of Discussion (Time Permitting)**

- A. Funding (license fees, application fees, costs of regulation, general funds, emergency supplemental funding for implementation, etc.)
- B. Civil Law (i.e. contract enforcement, etc.)
- C. Employment Law (revisited)

## Minority Recommendation:

The plain language of Amendment 64 changed the status quo for employers and employees. Before Amendment 64, private employers claimed an unconditional right to “prohibit” all use of marijuana by employees under the penalty of job termination pursuant to “presence in the system” drug testing and “zero-tolerance” policies. After Amendment 64, the Colorado Constitution changed the status quo by guaranteeing the “personal use” of marijuana outside the workplace, and further stating that while employers: 1) are not required to permit use, possession, transfer, etc. “in the workplace,” they 2) may only have policies “restricting” (not “prohibiting”) use by employees. Compare Article XVIII, Section 16(6)(a) (“nothing is intended to require an employer to permit use *in the workplace*” and (d) (nothing shall prohibit an employer from “*prohibiting*” use “on the property”) with Section 16(6)(a) (“nothing shall affect the ability of employers to have policies *restricting* the use of marijuana by employees”) (*emphasis supplied*). A construction of a constitutional amendment that renders every word operative, rather than one that may make some words idle or nugatory is favored. See *Colorado Citizens for Ethics in Gov’t v. Comm. For Am. Dream*, 187 P.3d 1207, 1215 (Colo. App. 2008). By definition, “restricting” does not mean “prohibiting.” Thus, “zero-tolerance” employer policies prohibiting all off-duty employee marijuana use violate the express provisions of the Colorado Constitution and public policies. Further, no federal law requires termination of a private employee for off-duty off-premises use of marijuana. Accordingly, to fully implement the will of the voters to legalize adult use of marijuana off-duty and outside of the workplace, the following action items are recommended:

- 1) Amend the Colorado Employment Security Act C.R.S. § 8-73-108(5)(e)(IX.5), to repeal this section, or to exempt “presence in the system” of marijuana as a disqualifying event; and
- 2) Implement worker protections for exercise of their Constitutional right outside of the workplace by enacting legislation or regulations that private employers may not take adverse employment actions against employees because of off-duty exercise of Amendment 64 rights unless employers can establish impairment at the workplace interfering with job performance, or establish that they are otherwise required to take specific actions under the federal Omnibus Transportation Employee Testing Act or federal regulations. For more information on these two proposals, see Exhibit A, attached.

**EXHIBIT A**  
Implementation of Amendment 64  
Employer and Employee Rights  
Article XVIII, Section 16(6)(a)  
Proposed Regulations/Statutory Implementation

Consistent with the Amendment 64 Constitutional rights to personal use of marijuana for adults ages 21 and over, and to fully implement the same, the following actions should be taken:

1. Amend the Colorado Employment Security Act C.R.S. § 8-73-108(5)(e)(IX.5) to:
  - 1) repeal this section entirely, or
  - 2) to exempt “presence in the system” of marijuana as a disqualifying event. “Presence in the system” disqualification for marijuana is unconstitutional in light of Amendment 64. It is over-inclusive, since a drug test cannot show when use occurred and would include off-duty use under Colorado Constitutional right. According to the US Department of Labor, “it is important to note that a positive urine test does not necessarily mean a person was under the influence of drugs at the time of the test.” DOL ELaws, <http://www.dol.gov/elaws/asp/drugfree/drugs/dt.asp>. The DOL also reports that “drug testing does *not* determine impairment or current drug use.” *Id.*

NOTE: Other unemployment statutes already disqualify for benefits based on: 1) off-duty use of controlled substance to a degree resulting in interference with job performance (C.R.S. § 8-73-108(5)(e)(VIII); and 2) on-the-job use of controlled substance (C.R.S. § 8-73-108(5)(e)(IX).

Therefore, repeal of Section (5)(e)(IX.5) would harmonize Amendment 64 rights with the purposes of disqualification only for conduct interfering with job performance.

2. Issue regulations or statutes harmonizing the Amendment 64 right with legitimate business interests of prohibiting interference with job performance, for private employers as follows:
  - a. Employers are not permitted to test employees or applicants for the presence of marijuana in their systems unless specifically required by federal law, i.e. the employer is subject to the federal Omnibus Transportation Employee Testing Act/DOT regulations for specifically defined “safety sensitive” positions. Employers must disclose the specific applicable federal law in advance by written policy.
  - b. “Zero-tolerance” drug policies may not include off-duty marijuana use. Employers may not take adverse employment actions against employees because of off-duty off-premises exercise of Amendment 64 rights, unless they can establish interference with job performance with competent evidence of causation.
  - c. Employers may not inquire about marijuana use by applicants unless they can show a business-necessity for a particular written job description because state or federal statutes or regulations require such inquiry.
  - d. Policies "restricting" employee use must be limited to on duty activities – i.e. policies may provide that employees may not report to work if they are unable to perform their duties competently, and may provide disciplinary action based on performance issues.
  - e. Statutory remedies for violations include the right to a jury trial, back pay, front pay, compensatory damages, punitive damages, attorneys’ fees, costs, interest, equitable relief, and any other relief allowable at law.