

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption of New) NOTICE OF PUBLIC HEARING ON
Rule I and amendment of ARM) PROPOSED ADOPTION AND
37.107.105, 37.107.117, 37.107.118,) AMENDMENT
37.107.120, 37.107.128, and)
37.107.206 pertaining to Montana)
medical marijuana program)

TO: All Concerned Persons

1. On February 20, 2020, at 10:00 a.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed adoption and amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Health and Human Services no later than 5:00 p.m. on February 13, 2020], to advise us of the nature of the accommodation that you need. Please contact Heidi Clark, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

3. The rule as proposed to be adopted provides as follows:

NEW RULE I ADVERTISING (1) Prohibited activities include:

(a) the use of any written or verbal statements, photos, symbols, or depictions of marijuana or marijuana products, on any medium accessible to the general public; or

(b) the use of vocabulary or prices on any medium accessible to the general public that leads a reasonable person to believe that the term or prices used identifies or describes marijuana or marijuana products.

AUTH: 50-46-341, 50-46-344, MCA
IMP: 50-46-341, MCA

4. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

37.107.105 PROOF OF MONTANA RESIDENCY (1) ~~If an applicant does not have a valid Montana driver license or Montana identification card, the applicant must submit documentation that shows the applicant is a resident of Montana, such~~

as a current lease agreement or current utility bill that has the applicant's name and address.

(1) An applicant must have a valid Montana driver's license, Montana identification card, or tribal identification card issued by a tribe within the state of Montana, to establish the applicant's identity and Montana residency.

(2) remains the same.

(3) The department may require additional proof of residency documentation.

AUTH: 50-46-344, MCA

IMP: 50-46-303, 50-46-308, 50-46-311, MCA

37.107.117 FEES (1) A cardholder An applicant must submit to the department the following fees with the initial application and renewal application an application fee of \$30.:

~~(a) registered cardholder application fee of \$30;~~

~~(b) provider or marijuana-infused product provider with:~~

~~(i) ten or fewer registered cardholders, an application fee of \$1,000;~~

~~(ii) 11 to 49 registered cardholders, an application fee of \$2,500;~~

~~(iii) 50 or more registered cardholders, an application fee of \$5,000.~~

~~(c) a combined provider and marijuana-infused product provider with more than 10 registered cardholders, an application fee of \$5000;~~

~~(d) dispensary license application fee of \$500;~~

~~(e) chemical manufacturing endorsement application fee of \$500;~~

~~(f) testing laboratory application fee of \$2000;~~

~~(g) marijuana employee permit fee of \$10 for each individual licensee employee listed on application and any subsequent hires; or~~

~~(h) a caretaker relative, caretaker custodial parent, or legal guardian provider fee of \$100.~~

(2) A provider license applicant must submit to the department the following fees with the initial application and renewal application:

(a) the annual fees provided for in 50-46-347, MCA;

(b) marijuana-infused product provider fee of \$500 per registered premises;

(c) chemical manufacturing endorsement fee of \$100; or

(d) custodial parent or legal guardian provider fee of \$100.

(3) A marijuana employee applicant must submit to the department with the initial application and renewal application the annual permit fee of \$10.

(2) (4) All fees must be submitted with the application and must be made payable to the Department of Public Health and Human Services. Cash is not accepted at the Medical Marijuana Program office and must be delivered to the Business and Financial Services Division (BFSD).

(3) remains the same but is renumbered (5).

AUTH: 50-46-344, MCA

IMP: 50-46-344, MCA

37.107.118 MARIJUANA AND MARIJUANA-INFUSED PRODUCTS PROVIDER LICENSEE REQUIREMENTS (1) A licensee must clearly identify, with conspicuous signage, all limited access areas at a registered premises.

(2) Licensees must ensure that All licensee's employees must wear a department-issued identification badge in a clearly visible manner on the outermost layer of clothing while working on behalf of the licensee.

(3) through (5) remain the same.

(6) A licensee may have up to 30 square feet of canopy space per registered cardholder. The following provisions apply to a licensee's canopy space:

(a) Square footage of canopy space is the total amount of square footage dedicated to live plant production at a registered premise consisting of the area of the floor, platform, or means of support or suspension of the plant and is measured horizontally starting from the outermost point of the furthest mature flowering plant in a designated growing space and continuing around the outside of all mature flowering plants located within the designated growing space. canopy is measured horizontally starting from the outermost point of a plant on the perimeter of a dedicated growing space and continuing around the outside of all plants located within the dedicated growing space;

(b) A a licensee may designate multiple grow cultivation areas at a registered premises but these spaces each cultivation area must be separated by a physical boundary such as an interior wall or by at least eight feet of open space.;

(c) total canopy includes any cultivation sites that are only operational seasonally, such as outdoor cultivation sites during summer months; and

~~(c)~~ (d) A a licensee must not exceed the total canopy allowed by the department for cultivation of marijuana.

(e) Beginning January 1, 2020, the department will convert existing businesses into a canopy license and assign a canopy tier in accordance with 50-46-344(2), MCA.

(f) The department will use the following criteria to assign a canopy tier to each provider:

(i) a provider's cumulative total square feet of cultivation space at all registered cultivation premises calculated by the department at a provider's most recent 2019 inspection; and

(ii) the provider's number of registered cultivation premises as of the most recent 2019 inspection.

(iii) Providers licensed prior to January 1, 2020, without prior canopy measurements will be assigned a tier based on the canopy allowed under previous rules of 30 square feet per registered cardholder who have named them as provider.

(7) A licensee is responsible for the security of all marijuana items on a registered premises, ~~in~~ during transit, and under the supervision of any licensee or licensee employee until the marijuana item is sold.

(8) and (9) remain the same.

(10) ~~A licensee must ensure general sanitary requirements are met on a registered premises to include~~ registered premises must meet minimum sanitary requirements, including:

(a) through (c) remain the same.

(11) A licensee must establish written standard operating procedures to produce marijuana, ~~and maintain them~~ The licensee must maintain those procedures on the registered premises and make them available for department inspection at all times. The standard operating procedures must include:

(a) through (12) remain the same.

(13) A licensee must use a ~~standardized scale~~ licensed weighing device pursuant to 30-12-203, MCA and ARM 24.351.101 whenever marijuana items are:

(a) and (b) remain the same.

(c) weighed for entry into the state inventory seed-to-sale tracking system.

(14) through (16) remain the same.

(17) The licensee must maintain documentation of ~~meeting that demonstrates compliance with~~ all local jurisdiction requirements, including but not limited to such as licensing, fire, health, and safety. The licensee must keep this documentation at the registered premises and make it readily available for department inspection.

(18) A licensee may not:

(a) remains the same.

(b) sell or transfer ~~to a registered cardholder~~ any marijuana item through a drive-up window; ~~or~~

(c) treat or otherwise alter usable marijuana, consisting of dried leaves and flowers, with the intent of altering the color, appearance, weight, or smell; or

(d) sell more than the daily or monthly purchase limit of usable marijuana to a cardholder.

(19) A licensee may not cultivate hemp or engage in hemp manufacturing at a registered premises.

(20) A licensee may not sell hemp flower as defined by 80-18-101, MCA.

(21) A licensee may only sell hemp cannabidiol (CBD) products sourced from hemp produced and sold through the Montana Department of Agriculture Hemp Program.

AUTH: 50-46-344, MCA

IMP: 50-46-303, 50-46-308, 50-46-312, 50-46-319, 50-46-326, 50-46-328, 50-46-329, 50-46-330, MCA

37.107.120 MARIJUANA EMPLOYEE PERMIT (1) remains the same.

(2) The marijuana employee permit must always be carried when performing work on behalf of a licensee in a clearly visible manner on the outermost layer of clothing.

~~(3) The department will issue providers two department-issued volunteer badges to be used for no more than 300 hours per volunteer per year.~~

AUTH: 50-46-344, MCA

IMP: 50-46-303, 50-46-308, 50-46-311, MCA

37.107.128 LEGAL PROTECTIONS -- ALLOWABLE AMOUNTS (1) A registered cardholder who has not ~~named a provider~~ elected to obtain marijuana or marijuana-infused products through the system of licensed providers may possess

up to 4 16 ounces of usable marijuana at their registered physical address reported on their registry identification card and 1 usable ounce at any location other than the registered physical address reported on their registry identification card.

(2) A registered cardholder may submit a petition for an increase in the monthly purchase limits defined in 50-46-319, MCA, on a form approved by the department and submitted through the licensing system.

(a) The department may take prior sales history and other factors deemed relevant into account when evaluating a petition for an increase in sales limits.

(b) The department may approve increases to the monthly purchase limits up to a maximum of 8 ounces of usable marijuana or the equivalent in marijuana-infused products as described in (3).

(3) Usable marijuana may be in the form of flower, marijuana-infused products, or concentrates. The following conversion shall be used to determine the allowable amounts of non-flower marijuana:

(a) 1 ounce of marijuana flower is equal to:

(i) 800 mg of marijuana-infused products including edibles; or

(ii) 8 grams or 8 mL of marijuana concentrate.

(b) A registered cardholder may purchase or possess any combination of marijuana flower, marijuana-infused products, and marijuana concentrate if the total calculated conversion is equal to or less than the legal purchase or possession amount.

AUTH: 50-46-344, MCA

IMP: 50-46-303, 50-46-312, 50-46-319, 50-46-328, 50-46-329, 50-46-344, MCA

37.107.206 INVENTORY TRACKING AND RECONCILIATION (1) through (8) remain the same.

(9) For each marijuana sale or transfer to a registered cardholder, the following must be recorded in the inventory tracking system at the close of business each day the licensee or licensee employee must:

(a) verify the registered cardholder's eligibility and daily and monthly purchase limits.

(i) A licensee may not complete a sale that exceeds a registered cardholder's daily or monthly purchase limit.

(b) record in the seed-to-sale tracking system at the time of sale or transfer:

(a) (i) the amount the quantity of each item sold or transferred to a registered cardholder;

(b) and (c) remain the same but are renumbered (ii) and (iii).

(10) Licensees must record in the ~~inventory~~ seed-to-sale tracking system:

(a) through (11) remain the same.

(12) All samples taken for quality assurance testing must be recorded in the ~~inventory~~ seed-to-sale tracking system.

(13) Licensed testing laboratories must record all testing results in the ~~inventory~~ seed-to-sale tracking system.

(14) All transport manifests must be generated by the ~~inventory~~ seed-to-sale tracking system and contain all the information required by these rules.

(15) A receiving location must document in the inventory seed-to-sale tracking system any marijuana items received, and any differences discrepancies between the quantity specified in the transport manifest and the quantities received.

AUTH: 50-46-344, MCA

IMP: 50-46-303, 50-46-308, 50-46-311, 50-46-319, 50-46-326, 50-46-329, MCA

5. STATEMENT OF REASONABLE NECESSITY

NEW RULE I

This rule is necessary because 50-46-341, MCA instructs the department to clearly identify activities that constitute advertising. This rule fulfills that mandate and provides guidance needed by the industry and the public.

ARM 37.107.105

The proposed amendments to ARM 37.107.105 seek to modify the acceptable forms of identification an applicant can provide to demonstrate Montana residency. The proposed amendment deletes "current lease agreement or current utility bill" as acceptable documentation to establish Montana residency. This is necessary to comply with the specific residency requirements of 50-46-302, MCA, in addition to the more general residency requirements of 1-1-215, MCA. The current rule allows the department to accept documents for proof of Montana residency that do not meet statutory requirements.

The proposed amendment to (1) and proposed addition to (3) are necessary to comply with the law and limit the program to individuals who are Montana residents and not just individuals who own property in Montana and/or who live part-time in Montana but claim residency in another state. This is necessary because 50-46-302, MCA specifically excludes individuals who claim residency in another state (i.e., out-of-state residents attending college in Montana or an absentee property owner paying property tax on property in Montana).

ARM 37.107.117

The proposed amendment to (1) adds "cardholder" to clarify that the rule applies to cardholder applicants and not to provider license applicants.

The proposed addition of a new (2) separates the fee section for provider license applicants. This clarifies to whom the fees apply and amends the fee schedule to reflect the significant licensing fee changes set forth by 50-46-347, MCA. This new section is necessary to update the provider licensee fees pursuant to Senate Bill (SB) 265 and 50-46-347, MCA. Given the new canopy licensing structure and the untethering of cardholders from providers, the current fee schedule is inapplicable.

The proposed addition of new (3) clarifies the rule and simplifies the guidance for employee fees. The proposed amendment of (2), which changes it to (4), provides applicants more specific payment information.

ARM 37.107.118

The proposed amendment to (1) is necessary to clarify department requirements for licensees, resulting in less ambiguity.

The proposed amendment to (6) is necessary to update the department's licensing structure and reflect untethering as set forth by SB 265. Other language amendments serve to clarify language and expectations.

The proposed amendment to (13) provides notice that licensees must use state-regulated scales. This is not clear under current language.

The proposed addition of (18)(d) is necessary to address new statutory limits for cardholder purchases imposed by 50-46-319, MCA.

The proposed additions of (19) and (20) are necessary to address the difficulty in differentiating and therefore regulating hemp and marijuana. This proposed addition provides consistency with Department of Agriculture, Montana State Hemp Program ARM 4.19.109, that prohibits hemp and marijuana from being grown in the same location.

The addition of (21) protects public health and safety by only allowing providers to sell cannabidiol (CBD) products that have passed testing.

ARM 37.107.120

The proposed amendment to (2) gives clear direction. Inspectors have frequently encountered employees at registered premises who do not have their badges easily visible. It is important that employees are immediately identifiable.

The proposed deletion of (3) is intended to amend the rule to comply with statute. The law does not provide for volunteers, and providers have largely failed to accurately account for volunteers and their hours. This proposed change does not require providers to pay an employee, but it does require that all employees, paid or not, comply with the law and department rule.

ARM 37.107.128

The 2019 Montana Legislature enacted SB 265. The proposed amendment implements the significant changes to possession introduced by SB 265, which generally revised the Montana Medical Marijuana Act. The law now limits the amount of marijuana a cardholder may purchase each calendar month to a maximum of 5 ounces.

The new statute, 50-46-319, MCA, allows a cardholder to petition the department for a larger monthly purchase limit. The additional language in (1) fulfills the reference to "amount...allowed by department rule" in 50-46-319, MCA, and sets the amounts of usable marijuana that a cardholder who does not use the network of providers may possess. The addition of (2) sets forth the process for a cardholder to petition for an increase to their monthly purchase limit to comply with the statute.

It is necessary to add (3) because "usable ounce" of marijuana-infused products or extract is not defined by statute. The department looked to a study conducted by the University of Colorado to guide conversion amounts and equivalencies.

ARM 37.107.206

The 2019 Montana Legislature enacted SB 265. The proposed amendment implements the significant changes to possession introduced by SB 265, which generally revised the Montana Medical Marijuana Act. The law now limits the amount of marijuana a cardholder may purchase each calendar month to a maximum of 1 ounce per day and 5 ounces per month. Additionally, the law will allow for the untethering of cardholders from designated providers. The proposed amendment to (9) requires providers to verify cardholder purchase limits and eligibility prior to a sale and requires the immediate recording of sales in the seed-to-sale tracking system. This is intended as a protection to the cardholder and the provider to prevent illegal sales and allow for the implementation of untethering.

Proposed amendment removing "inventory" and replacing with "seed-to-sale" provides consistent language so there is no question that all requirements are for the state seed-to-sale tracking system.

Fiscal Impact

The proposed rule amendments establish a new chemical manufacturer endorsement (CME) fee. Other fees are statutory; SB 265, section 32 imposes a new licensing structure and fee schedule. The described fiscal impact reflects current program participation and anticipated program activity. The proposed new CME fee is \$100. Using the current number of participants with marijuana-infused product provider licenses, the number affected is approximately 197. The revenue generated by this CME fee is \$19,7000 in revenue.

SB 265 also directs the department to establish a marijuana-infused products provider fee. The department has adopted a \$500 marijuana-infused products provider fee per manufacturing registered premises. Using the current number of 197 licensed marijuana-infused products providers, the department anticipates that the revenue generated by the \$500 fee is \$98,500.

The department intends to apply these changes retroactively to January 1, 2020, which is the date that the canopy tier licensing schedule went into effect.

6. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Heidi Clark, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail dphhslegal@mt.gov, and must be received no later than 5:00 p.m., February 28, 2020.

7. The Office of Legal Affairs, Department of Public Health and Human Services, has been designated to preside over and conduct this hearing.

8. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 6 above or may be made by completing a request form at any rules hearing held by the department.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was notified by email on January 21, 2020.

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the adoption and amendment of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Bree Gee
Bree Gee
Rule Reviewer

/s/ Sheila Hogan
Sheila Hogan, Director
Public Health and Human Services

Certified to the Secretary of State January 21, 2020.