

Criminal Law

Cannabis and COVID-19: A Hazy 2020 Vision



Elizabeth Kase

The United States of America faces a once-in-a-lifetime calamity. The country is in the midst of a devastating economic crisis—confronting a rise in unemployment rates, permanent job loss, and an approaching presidential election in which a major party candidate for President is accused of leading the country down the path of socialism.¹ Demands come from across the political spectrum for new sources of tax revenue to solve the financial crisis. To provide much-needed financial relief to escalating budget shortfalls, the federal government enacts a measure to create new revenue by legalizing a substance viewed by a portion of the American public as dangerous and a cause of rising crime rates. America in 2020? Nope. It is the repeal of the Prohibition in 1933.

But history tends to repeat itself and the United States once again faces a significant economic crisis and a need for new tax revenue and job creation. The COVID-19 pandemic has thrown every aspect of American life into disarray. Work, play, education, travel... the impacts and effects of the pandemic have reverberated within every level of American society. Economists, politicians, and activists are advocating for the legalization of adult-use cannabis in Washington, D.C. and Albany, New York to help solve staggering unemployment and a shrunken GDP, and infuse tax dollars into the dwindling national and state economies. In 2020, is it high time to legalize adult-use cannabis? Lessons from history may not clear away the haze.

2020 Economic Landscape

As of August 2020, the unemployment rate in the United States stood at 8.4%, reflecting 13.6 million Americans out of work.² Although a considerable number of Americans have been re-employed since the beginning of the pandemic, unemployment rates are more than double the steady average of 4% experienced in 2018. New York State, which bore the brunt of the COVID-19 pandemic in its early days, has seen its unemployment rate skyrocket to 15.9%. As of July 2020, over 1.5 million New Yorkers remain unemployed.³

The economic shutdown and high rates of unemployment have necessitated a marked surge in federal and state spending, resulting in a staggering increase to the federal deficit. In January 2020, the Congressional Budget Office (CBO) projected the deficit to be at an already alarming \$1.0 trillion.⁴ Now, subsequent to the COVID-19 pandemic and resulting economic impact, the CBO revised its deficit projection upward to \$3.3 trillion. For the first time since World War II, the federal debt will be close to the size of the entire national economy.⁵

Similarly, New York is experiencing a new dire economic reality caused by the COVID-19 pandemic. After years of budget surpluses, New York now faces a nearly \$15 billion budget deficit in 2020, with a projected \$16 billion budget deficit in 2021.⁶ Adding to the financial crisis is a shortfall in New York's sales tax collections, down \$1.2 billion for the first half of 2020.⁷

New York State has limited options to address its current fiscal woes. One possibility to close the budget gap is through direct federal aid. For months, Governor Cuomo has sought more than \$60 billion from President Trump and Congress.⁸ Such aid is neither forthcoming nor predicted to solve the greater issues facing New York's bud-

get crisis.⁹ Alternatively, New York can cut spending. However, eliminating the deficit solely by billions of dollars in spending reductions does not appear feasible, when increases in spending are more likely than not. Finally, New York State can increase current taxes and/or impose new taxes to secure the revenue necessary to close the 2020 budget deficit. Many elected officials and progressive poli-

cy makers are advocating increasing income taxes as well as the imposition of new types of taxes on wealthy New Yorkers, something Governor Cuomo has been hesitant to do.¹⁰ One should expect a combination of two or more of these options, but with respect to additional tax revenue, the general issue is what more can be taxed and by how much?

Adult-Use Legalization of Cannabis: New York's Hail Mary?

The COVID-19 pandemic has provided a watershed moment for the cannabis industry as evidenced in governmental acceptance of cannabis as an "essential business" during shelter-in-place orders. Of the eleven states that legalized adult-use cannabis, eight states immediately deemed recreational cannabis essential, thus keeping open those businesses when other types of businesses were forced to temporarily close.¹¹ Furthermore, states with medical marijuana programs also deemed dispensaries as essential and those businesses remained open during the pandemic shutdown. Like sales of alcoholic beverages, sales of cannabis surged during the spring, providing economists and politicians with crucial insight into the desire for cannabis as a mainstream product.¹²

Moreover, current civic unrest and the Black Lives Movement underscore the critical need for programs and economic pathways for equitable industry access for people of color. States that have enacted cannabis programs also established revenue reinvestment streams in minority communities as well as MWBE opportunities and fast-track applications processes for licensing.¹³ In its mission statement, Massachusetts' Cannabis Control Commission states that it is "committed to an industry that encourages and enables full participation by people from communities that have previously been disproportionately harmed by marijuana prohibition and enforcement."¹⁴ Nationwide, the cannabis industry currently employs approximately 250,000 full time jobs and is the fastest growing job sector in the country.¹⁵

Although Governor Cuomo had publicly prioritized legalization of adult-use cannabis in New York's 2020 legislative session ahead of the pandemic,¹⁶ Governor Cuomo and the Democratic-controlled Legislature failed to reach an agreement, let alone a vote, on adult-use. It is unclear whether the parties will reach an agreement on cannabis legalization in 2020, notwithstanding the fact that the Governor and State Legislature will need to return to Albany and reach an agreement on how to reduce the State's budget deficit. Added to New York's incentive to act quickly is the expected passage of New Jersey's November ballot initiative legalizing adult use. With New Jersey providing a possible marketplace for New York consumers, one should expect Governor Cuomo and the State Legislature to take up this issue in 2021, if not sooner.

New York should look to Illinois' recently developed program for guidance and compelling evidence of immediate financial

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Hazy 2020 ...

Continued From Page 6

impact. Illinois, like New York State, first introduced the concept of cannabis legalization via medical marijuana when it enacted the Compassionate Use of Medical Cannabis Pilot Program Act in 2013. In 2019, Illinois became the first state to enact legalization of adult-use marijuana via state legislation, as opposed to a state-wide ballot initiative. Within the first six months of its adult-use cannabis program, Illinois collected more than \$52 million in state tax revenue and provided employment for more than 9,000 in the space, resulting in additional income and other related tax revenue to Illinois' coffers.¹⁷ Pre-pandemic economic predictions suggested that the Illinois program may see employment gains by as much as 63,000 jobs by 2025.¹⁸ Other state-wide adult-use programs, such as Massachusetts, saw slower financial returns, as compared to Colorado and California, though the long-term outlook is extremely positive for both increased job creation, tax revenue, and minority business opportunities.

Will the Feds Beat New York to Legalize?

The House of Representatives has begun to take major steps towards legalizing cannabis. To address the extreme conflicts and legal uncertainty that govern the cannabis industry, the House passed the Secure and Fair Enforcement (SAFE) Banking Act of 2019 last September.¹⁹ The SAFE Banking Act prohibits a federal banking regulator from penalizing a financial institution from providing banking services to legitimate marijuana-related businesses, though marijuana remains federally illegal. The legislation was passed with over 300 votes and had significant bipartisan support. The House vote was historic as it was the first time a stand-alone bill that would legalize some aspect of marijuana policy passed a house in Congress. The SAFE Banking Act has yet to be considered by the United States Senate.

In 2020, the House seems poised to pass the Marijuana Opportunity Reinvestment and Expungement (MORE) Act, a more aggressive attempt at marijuana reform. This bill would clearly and definitively decriminalize cannabis and thus enable interstate commerce and pave the way to a green rush. The MORE Act is sponsored in the House by New York Congressman Jerry Nadler²⁰ and in the Senate by California Senator (and now Democratic nominee for Vice President) Kamala Harris.²¹ While the House is expected to pass the MORE Act sometime this fall, the bill is unlikely to move forward in the Republican-controlled Senate in this hotly contested general election cycle.

The MORE Act specifically seeks to remove marijuana from the list of scheduled substances under the Controlled Substances Act and eliminates criminal penalties for an individual who manufactures, distributes, or possesses marijuana.²² In the parlance of marijuana law, this would be its own revolution reckoning the bizarre landscape of marijuana law as a controlled substance, illegal federally while states legalize its use. The states' adult-use programs have been operating with the tacit permission of the federal government. But with clear delineation of a re-classification of cannabis, it would be federally regulated, allowing for interstate trade. Although the clearer lines of legality would assist attorneys, businesses, financial institutions, and consumers, the federalization of cannabis will greatly impact small-business job growth in states, such as New York, that have not yet legalized adult use. Existing state-run programs that successfully regulate and promote their own local/statewide businesses could be priced out of the marketplace by larger conglomerates ready to create interstate platforms.

Conclusion

Winston Churchill once said "Never waste a good crisis"—advice that should now be heeded by Governor Cuomo and New York State lawmakers. Legalization of cannabis will bring in much-needed revenue

to New York, both through sales taxes on the purchase of marijuana as well as income taxes based on the employment opportunities created by a New York State green rush. But now is the time for action by state elected officials. Depending on the outcome of the 2020 elections, the federal government could step up its efforts to legalize marijuana throughout the United States in 2021. But while de-criminalizing marijuana would have significant practical legal effects and provide marijuana consumers and businesses streamlined regulations and protections, states lagging in the establishment of adult-use programs may not reap the maximum financial benefit. New York needs to see through the haze and recognize that now may be the most opportune time to legalize adult-use marijuana for the benefit of the state, its businesses, and its residents.

Elizabeth Kase is a Partner and Chair of the Criminal Law Department and Co-Chair of the Medical Marijuana Law Group at Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP.

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13. "Equity Programs," Cannabis Control Commission, Commonwealth of Massachusetts, <https://bit.ly/2FiPfaQ>
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18. "Illinois tripled weed jobs last year," Crain's Chicago Business, Feb. 7, 2020, <https://bit.ly/36KAqcp>
19. H.R. 1595, 116th Cong. (1st Sess. 2019).
20. H.R. 3884, 116th Cong. (2nd Sess. 2020), <https://bit.ly/30OQgis>
21. S2227, 116th Cong. (2nd Sess. 2020) <https://bit.ly/34jX9m8>
22. In addition to de-scheduling marijuana from the Controlled Substance Act, the MORE Act proposes additional changes to our country's approach towards marijuana and its usage, as follows:
 - replacing statutory references to marijuana and marijuana with cannabis;
 - requiring the Bureau of Labor Statistics to regularly publish demographic data on cannabis business owners and employees;
 - establishing a trust fund to support various programs and services for individuals and businesses in communities impacted by the war on drugs;
 - imposing a 5% tax on cannabis products and requiring revenues to be deposited into the trust fund,
 - making Small Business Administration loans and services available to entities that are cannabis-related legitimate businesses or service providers;
 - prohibiting the denial of federal public benefits to a person on the basis of certain cannabis-related conduct or convictions;
 - prohibiting the denial of benefits and protections under immigration laws on the basis of a cannabis-related event (e.g., conduct or a conviction), and
 - establishing a process to expunge convictions and conduct sentencing review hearings related to federal cannabis offenses. See n.11, supra.

National Pro Bono Week Means Another Successful (Virtual) Open House

Gale D. Berg



For the last eight years, during National Pro Bono week, the Nassau County Bar Association (NCBA) has hosted an Open House jointly with Nassau Suffolk Law Services and The Safe Center L.I. Due to the COVID-19 Pandemic, that was not possible. However, the NCBA was not to be deterred. The Chairs of the NCBA Access to Justice Committee, Rosalia Baiamonte, NCBA Vice-President, and Kevin McDonough, with Vice-Chair Sheryl Channer, thought that in order to assure that the event wasn't cancelled (having had to cancel in June,) it could be held virtually. Now that the event would be held online as opposed to in-person, it was decided that it could be held for a full week. Nearly 60 volunteer attorneys signed up to return calls and answer the questions of 123 Nassau County residents and counting who registered to speak with an attorney one-on-one to obtain advice and answers to any legal question.

The areas of law ranged from family law, real estate, labor, credit counseling, mortgage foreclosure, and questions involving COVID-19 and its ramifications to employment, health,

education, and housing. Volunteer attorneys spoke one-on-one with residents to explain complicated legal issues and provide guidance, counsel, and referrals. "Given the protracted and serious consequences facing our communities by reason of a global pandemic and financial crisis, there is an increased need for pro bono services during these uncertain times. The enthusiastic collaboration of the NCBA, Nassau Suffolk Law Services and The Safe Center L.I., has demonstrated the unwavering commitment of attorneys to meet this demand for pro bono services. This year's Virtual Open House provides a crucial and invaluable service to our communities, our system of justice and the clients they serve," said NCBA Vice-President Rosalia Baiamonte.

Thanks to the Hon. Norman St George, Nassau County Administrative Judge, court personnel Neil Doherty and Mary Gallagher

recorded an informational session on how the court can help answer questions from the public who are not represented by an attorney and need help, which has been added to the NCBA website at www.nassaubar.org.

When asked, many NCBA volunteer attorneys will say that it is a rewarding experience. Pro Bono is volunteering and if you never have, you are truly missing out. Too often as attorneys, we do not see the results of our efforts immediately, but through volunteering, you can. "It's been a rewarding experience hearing all the appreciation our clients have for the NCBA pro bono program. Opportunities such as Open House are the reason I keep my NCBA membership active. I'm overjoyed to be able to give back to the association which provides its members with so much," said NCBA Member Matthew Weinick. Both the volunteer attorneys and the

public were satisfied with the outcome. One resident stated, "Thank you so much for organizing this. It was a pleasure to meet with this attorney and I am grateful for the opportunity. They were tremendously comprehensive and very generous with their time."

NCBA Members can volunteer for any Mortgage Foreclosure or Bankruptcy clinic, which are usually held twice a month, or to attend a mandatory conference, morning, or afternoon for a few hours only, on behalf of a resident facing foreclosure. Volunteer attorneys are always needed, and do not follow a case. Please volunteer if you have not already done so. You can also become a member of the Access to Justice Committee to help recruit volunteers. Contact NCBA Pro Bono Director Gale D. Berg at gberg@nassaubar.org for more information.

Thank You To The October 2020 Virtual Open House Volunteer Attorneys

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