
MEASURE 91:

What it Means for Local Governments

NOVEMBER 2014



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Measure 91 legalizes personal possession of certain amounts of recreational marijuana for people 21 years of age or older, and creates a regulatory system for the production, distribution and sale of recreational marijuana and marijuana products. Notwithstanding Measure 91, marijuana remains a Schedule I controlled substance under federal law, which prohibits the production, possession, delivery and use of marijuana. 21 U.S.C. § 801, *et seq.*

This report focuses on the provisions of Measure 91 that are particularly relevant to local governments and discusses the potential impacts on local governments.

The Basics: What Measure 91 Does

Measure 91 creates a regulatory framework for recreational marijuana, but exempts from regulation the personal possession and delivery of marijuana and marijuana products in specified amounts. In particular, beginning July 1, 2015, a person 21 years of age or older may produce, make, process, keep or store, per household:

- 4 marijuana plants;
- 8 ounces of useable marijuana (dried marijuana flowers and leaves);
- 16 ounces of solid homemade marijuana products; and
- 72 ounces of liquid homemade marijuana products.¹

Although a person may have those quantities of marijuana and marijuana products at home, a person cannot produce, process, keep or store homegrown marijuana or homemade marijuana products in a location that can be readily seen from a public place. In addition, the measure prohibits use of marijuana in a public place. However, Measure 91 does allow a person to possess up to one ounce of useable marijuana on their person while in a public place.

Under Measure 91, individuals without a license can also transfer certain quantities of marijuana and marijuana products to others. In particular, a person can deliver up to 1 ounce of homegrown marijuana, 16 ounces of solid homemade marijuana products, and 72 ounces of liquid homemade marijuana products to another person of legal age for noncommercial purposes.

The measure directs the Oregon Liquor Control Commission (OLCC) to regulate all other production, processing and sales of marijuana and marijuana products.

¹ “Homemade” marijuana products are those that have been made for noncommercial purposes by a person who is 21 years old or older.

The Regulatory Structure: How Measure 91 Works

Section 7 of Measure 91 requires the OLCC to regulate the production, processing, transportation, delivery, sale and purchase of recreational marijuana. The OLCC also is charged with licensing the processing, production and sale of marijuana, and with collecting the taxes that the measure imposes on producers.

Licensing

Measure 91 creates four types of licenses. Producers, processors, wholesalers and retailers are all required to apply for OLCC licenses, and the OLCC must start accepting those applications on or before January 4, 2016. A person may hold more than one type of license.

The licenses will be issued for a particular premises. However, a person with a license can relocate, because the licenses are transferrable to a new location subject to OLCC rules, municipal ordinances and other local regulation.

The OLCC has authority to deny, suspend or revoke a license for a variety of reasons. Of particular relevance to local governments, the OLCC can reject a license application if it has reasonable grounds to believe that there are sufficient licensed premises in a locality or that the license is not necessary for the public interest or convenience of the locality. In addition, the OLCC may cancel or suspend a license if the licensee is convicted of violating general or local marijuana laws, or is convicted of any misdemeanor or violation of a municipal ordinance committed on the licensed premises.

Regulation of Facilities

Section 59 of Measure 91 recognizes that local governments can adopt “reasonable time, place and manner regulations” of the “nuisance aspects” of businesses that sell marijuana to consumers. In enacting those regulations, cities and counties must make specific findings that the regulated businesses would create adverse effects. The measure notes that the authority recognized in section 59 is in addition to, and not in place of, other authority granted to cities and counties under their charters, relevant statutes, and the Oregon Constitution.

Independent of local government authority to regulate businesses that sell marijuana to consumers, the measure prohibits “noisy, lewd, disorderly, or insanitary” facilities.² It also provides that property is a common nuisance if marijuana is manufactured, bartered, sold, given away, or used in violation of Oregon law on the property.

The Local Option to Prohibit Licensees

Sections 60 to 62 allow cities and counties to prohibit producers, processors, wholesalers and retailers from operating within the city or county. To impose a ban, someone must file an initiative petition using the statutory process for city and county initiatives provided in ORS

² The measure does not expressly state whether the OLCC, local law enforcement, or both have authority to enforce that provision.

Chapter 250, with a few changes to the procedure as provided in Measure 91. The petition must be filed at least 60 days before a statewide general election. In addition, it must be signed by at least 10 percent of the electors registered in the city or county, and those signatures must have been signed within 180 days before the petition is filed. An election on a local option petition must be held at “the next statewide general election.”

Although Measure 91 allows cities and counties, through the initiative process, to ban OLCC licensees from operating within the jurisdiction, a local ban does not impair the right of an individual person to possess homegrown marijuana or homemade marijuana products for personal use as provided in Measure 91.

The measure also purports to repeal all local charter provisions and ordinances that directly conflict with Measure 91.

State Tax Revenue Structure

The measure imposes a state tax on a marijuana producer’s first sale of marijuana flowers, leaves and immature plants.³ Revenues from that tax will first offset the OLCC’s start-up costs, as well as its operating expenses, which are estimated to be \$3.2 million per year. In addition, other state entities, including the Oregon Health Authority, the Oregon Department of Agriculture, the Oregon State Police, and the Oregon Judicial Department, expect increased expenses associated with the measure.

Ten percent of any net revenue remaining after expenses will be distributed to cities, and 10 percent will be distributed to counties⁴ “to assist local law enforcement in performing its duties under [the measure].”

The 10 percent of net revenue available to cities and counties will be distributed using different metrics before and after July 1, 2017. Before July 1, 2017, tax revenues will be distributed proportionately to all Oregon cities and counties based on their population. After July 1, 2017, those revenues will be distributed proportionately based on the number of licenses issued for premises located in each city and county. Fifty percent of the revenues will be distributed based on the number of production, processor and wholesale licenses issued for premises in a city or county. The other 50 percent of the revenues will be distributed based on the number of retail licenses issued for premises in a city or county.

State Tax Revenue Estimates

Estimates of the amount of expected tax revenue vary widely. The state’s Legislative Revenue Office (LRO) estimates gross revenue of \$46.6 million in the 2017-2019 biennium, while a study commissioned by the measure’s sponsors estimates gross revenue of \$78.7 million for that

³ If the producer is also a processor, wholesaler and/or retailer, then the tax appears to apply at the point of the first sale, which is broadly defined by the measure.

⁴ The other 80% will be distributed as follows: 40% to the Common School Fund, 20% to the Mental Health Alcoholism and Drug Services Account, 15% to the State Police Account, and 5% to the Oregon Health Authority.

same time period. The LRO projected that the net revenue in fiscal year 2017 would be \$9.4 million, increasing to approximately \$20 million in 2019.

Based on the LRO's projections, \$938,000 of revenue in fiscal year 2017 would be distributed to cities, and that same amount would also be distributed to counties. By 2019, that number is projected to increase to \$2.1 million. A recent *Wall Street Journal* article noted, however, that tax revenue has come in below initial projections in other states that have legalized recreational marijuana.⁵

Local Taxes

Section 42 of Measure 91 provides, "No county or city of this state shall impose any fee or tax, including occupation taxes, privilege taxes and inspection fees, in connection with the purchase, sale, production, processing, transportation, and delivery of marijuana items." In addition, section 58 of Measure 91 provides that the substantive provisions of the measure are "designed to operate uniformly throughout the state, shall be paramount and superior to and shall fully replace and supersede any and all municipal charter enactments or local ordinances inconsistent with it. Such charters and ordinances hereby are repealed."

In the weeks leading up to the election, many cities and counties wrestled with the possible implications of those provisions and the apparent restrictions placed on how local governments will be able to use their share of the state tax. Out of concerns regarding those possible restrictions and the sufficiency of the state tax, many jurisdictions adopted local taxes on marijuana prior to Measure 91's effective date. Those decisions are discussed further below.

Enforcement

Measure 91 charges state police, local police and sheriffs with enforcing the new law, including the restriction on use of marijuana while driving. In addition, after conviction, any marijuana items seized will be forfeited to state or local law enforcement agencies.

County courts, district attorneys and municipal authorities also are required to notify the OLCC when a licensee is convicted of violating state law or a municipal ordinance where marijuana "had any part" in the violation.

Effect on Other Laws

Measure 91 expressly limits its effect on other related laws. Section 4 states that the measure does not affect employment law, landlord-tenant law, federal grant and contract requirements, or the Oregon Medical Marijuana Act (OMMA). The measure makes clear that the Oregon Health Authority retains its power to regulate medical marijuana under the OMMA. As a result, recreational marijuana and medical marijuana will be regulated by different agencies relying on different statutory authority.

⁵ Zusha Elinson, *Oregon Initiative Seeks Lower Pot Taxes Than Cities Want*, Wall Street Journal, Oct. 24, 2014.

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Measure 91's provisions relating to personal production, possession and delivery do not become operative until July 1, 2015, and the OLCC business licensing provisions begin to operate in January of 2016, giving local governments time to consider how to approach this new law. Although Measure 91 aims to create a comprehensive regulatory framework for recreational marijuana, it leaves room for cities and counties to exercise some local control.

- **Licensing:** Although the measure does not provide a formal channel for local governments to weigh in on licensing applications, cities and counties may play an important role in providing information to the OLCC about local conditions that could impact the decision to grant or deny a license – that is, whether there are sufficient licensed premises in the locality and whether the license is demanded by public interest or convenience in the locality. In addition, as the OLCC engages in rule-making, or should the Legislature consider reform legislation in the wake of Measure 91's passage, the League will work to include provisions in the law that allow local governments to weigh in.
- **Regulation of Facilities:** In addition to the restrictions provided in the measure, local governments can impose reasonable time, place and manner restrictions on the nuisance aspects of businesses selling marijuana to consumers. In addition, those businesses are also likely to be subject to other general local government regulations, such as business license requirements, land use and development regulations, and the imposition of economic improvement district fees. When developing time, place and manner restrictions, local governments might consider how a local ordinance currently regulates the time, place and manner of retail liquor stores and should work closely with their legal counsel.
- **The Local Option:** Through the local initiative process, local governments can prohibit licensees from operating within their boundaries. However, because any election on such a petition must occur at "the next statewide general election," local governments will not have the opportunity to prohibit the operation of licensed producers, processors, wholesalers or retailers until November 2016 (and it is unclear under the text of the measure whether local governments will have the opportunity to vote on similar initiatives after November 2016). Meanwhile, the OLCC must start accepting license applications on or before January 4, 2016 (nearly a year before the local opt-out election can occur). The League intends to seek corrective legislation that would prohibit the issuance of a license where a jurisdiction is considering an opt-out.
- **State Tax Revenues:** Until July 1, 2017, all cities and counties will receive some tax revenue generated by Measure 91 that exceeds the expenses associated with the measure. After that time, however, only cities and counties with licensees – producers, processors, wholesalers and retailers – will receive any portion of state tax revenues.

Additionally, the revenues are intended to “assist local law enforcement in performing its duties under [the measure.]” Because the measure’s provisions relating to home use are likely to have an impact on law enforcement statewide, including jurisdictions that might lack a licensee, and given the ambiguity in the measure’s apparent restriction on the use of tax revenues, the League intends to pursue corrective legislation that would ensure more adequate and unrestricted funding for local governments.

- **Local Taxes:** Before Measure 91 passed, more than 60 cities and at least four counties imposed or had considered imposing a tax on marijuana. Several legal arguments have been suggested to support the imposition of a local tax. Some have argued that federal law overrides Measure 91’s attempt to preempt local regulation and taxation. Others argue that Measure 91 only preempts local governments from imposing a tax *after* the measure’s passage, and the measure’s attempt to repeal inconsistent charter provisions and ordinances violates home rule and rules relating to retroactive legislation. It is uncertain how a court might rule on those or other arguments. Nonetheless, some jurisdictions have adopted taxes with the hope that the Legislature, recognizing the inadequacy of the revenue sharing provisions within the measure, might grandfather in preexisting taxes. Because of the range of possible legal interpretations, local governments interested in enacting a tax on marijuana, or wondering about the validity of existing taxes on marijuana, should consult their legal counsel.
- **Employee Drug Testing:** Measure 91 purports to not disturb existing employment laws. In addition, under *Emerald Steel v. Bureau of Labor and Industries*, the Oregon Supreme Court held that federal law preempted an employee’s rights under the Oregon Medical Marijuana Act to the use of medical marijuana in the workplace. Consequently, it seems that an employer could take the appropriate adverse employment action against an employee (in accordance with any collective bargaining agreement) who was found to be using marijuana or tested positive for marijuana use in violation of the employer’s policies. Nonetheless, a local government considering discipline of an employee who engaged in marijuana use after July 1, 2015 should seek the advice of legal counsel, and Citycounty Insurance Services’ pre-loss program, if insured by CIS.



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Timeline & Important Dates

Voters approve Measure 91	General provisions go into effect	Measure 91's provisions regarding personal production, possession and use go into effect. People 21 years of age and older can possess certain amounts of recreational marijuana for personal use.	The OLCC must begin accepting applications for producer, processor, wholesale and retail licenses.	Cities and counties may vote on initiative petitions to prohibit producers, processors, wholesalers and retailers from operating within the city or county.	Tax revenue sharing goes from being distributed to cities and counties based on population to being distributed based on the number of licenses issued.
November 4, 2014	December 4, 2014	July 1, 2015	January 4, 2016	November 8, 2016	July 1, 2017