

# Practical Considerations For NY Cannabis Licensing

By **Danielle Tricolla** (April 22, 2021, 3:17 PM EDT)

Signed into law by Gov. Andrew Cuomo on March 31, New York's long-awaited adult-use cannabis bill, the Marijuana Regulation and Taxation Act, or MRTA, puts an end to marijuana prohibition in New York, creates a system to tax and regulate marijuana sales, and establishes the Office of Cannabis Management and the Cannabis Control Board to regulate the cannabis industry.

The MRTA also addresses the important social justice objectives of repairing and reinvesting in the communities that have been most harmed by the prohibition of marijuana.

With this historic legislation, New York has one of the most progressive and equitable legalization programs in the country.



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This was no accident; activists fought long and hard to ensure that New York's legalization program would ensure a diverse and inclusive industry for cannabis in the state, particularly in light of New York's history of disproportionately enforcing marijuana-related laws against people of color.

New York State Sen. Pete Harckham, D-South Salem, chair of the Senate Committee on Alcoholism and Substance Abuse, calls it "the most thoughtful bill of its kind in the nation."

With so many jobs lost, and industries crippled by COVID-19 in the past year, the bill — and the new economic opportunities it creates — could not have come at a better time. New York's budding cannabis industry, pun intended, is expected to create 30,000 to 60,000 jobs statewide and is projected to bring in \$350 million in tax revenue annually for New York state.[1]

According to a recent study commissioned by the New York Medical Cannabis Industry Association, the cannabis market in New York is expected reach \$5.8 billion by 2027.[2]

As Harckham noted, "[b]y regulating the sale of marijuana, we will be able to bring this economic activity out of the shadows for the good of all our residents." [3]

## Business Opportunities Created by New York's Legalization

The bill establishes a variety of different business opportunities for adult-use cannabis in New York, offering nine distinct adult-use cannabis business licenses:

- Retail dispensary licenses permit the sale of cannabis directly to consumers at the licensed premises.
- On-site consumption licenses permit the consumption of cannabis at the licensed premises (i.e., a cannabis lounge or café).
- Delivery licenses permit the licensee — with up to 25 individuals providing full-time, paid delivery services — to deliver cannabis and cannabis products directly to consumers.

- Cultivator licenses permit the agricultural production practices of planting, growing, cloning, harvesting, drying, curing, grading and trimming of cannabis.
- Processor licenses permit the blending, extracting, infusing, packaging, labeling, branding and otherwise making or preparing cannabis products.
- Distributor licenses permit a licensed cultivator, processor, small business cooperative, or microbusiness to acquire, possess, distribute, and sell cannabis from its licensed premises to licensed retail dispensaries.
- Nursery licenses permit the production, sale and distribution of clones, immature plants, seeds and other agricultural products used for the planting, propagation and cultivation of cannabis.
- Microbusiness licenses permit the limited cultivation, processing, distribution and dispensing of the licensee's own cannabis and/or cannabis products.
- Small business cooperative licenses permit the acquisition, possession, cultivation, processing and sale from the licensee's licensed premises to licensed distributors, on-site consumption sites, and/or retail dispensaries, but not directly to consumers.

With the variety of licenses available, there is opportunity for prospective cannabis entrepreneurs from a variety of different backgrounds and industries to participate in New York's so-called green rush.

Since these new businesses will require a place to operate, the legal cannabis industry will necessarily create real estate opportunities for property owners in each of New York's distinct regions: from farmland for cultivation in rural areas, to retail properties for dispensaries and on-site consumption in cities and suburbs, to manufacturing and processing facilities in industrial areas throughout the state.

In fact, the business opportunities created by the legal cannabis market will extend to countless other ancillary industries that will serve and support those plant-facing businesses, including:

- Construction, contracting and interior design for brick-and-mortar cannabis businesses such as retail dispensaries and consumption lounges;
- Security services at the licensed premises;
- Packaging and labeling for cannabis products;
- Technology, website design, advertising and marketing; and
- Professional services such as insurance, accounting, financial and legal services.

Because cannabis businesses face challenges unique to the cannabis industry, there will be high demand for service providers and professionals who specialize in cannabis and are equipped to navigate their clients through the red tape that comes with owning and operating a cannabis business.

## **Considering the Practical Effect of the MRTA's Licensing Parameters**

New York's adult-use licensing system is designed to create a market based on equity, diversity and inclusion. The MRTA sets a goal of allocating half of the adult-use cannabis licenses to social and economic equity applicants from communities disproportionately impacted by the enforcement of cannabis prohibition, as well as minority- or woman-owned business, financially disadvantaged farmers and disabled veterans.

To achieve that objective, the Office of Cannabis Management has the discretion to limit, or not limit, the total number of licenses issued in each class to prioritize social and economic equity applicants, consider small business concerns, avoid market dominance in sectors of the industry, and reflect the demographics of the state.

When issuing licenses, the Cannabis Control Board is required to actively promote applicants that foster racial, ethnic and gender diversity in their workforce. In fact, the MRTA expressly requires that certain license categories, such as delivery, microbusinesses and nursery licenses promote social and economic equity applicants.

To encourage social and economic equity applicants to apply for an adult-use cannabis license, the MRTA provides for an incubator program to provide counseling services, education, small business coaching and financial planning, and compliance assistance.

In an effort to ensure that small businesses have a place in the market and to prevent larger corporations from monopolizing the industry, the MRTA also limits the number of licenses a licensee may hold within each class of licenses and restricts vertical integration such that one person or entity cannot engage in all aspects of the supply chain.

For example, a retail dispensary licensee cannot also hold a license to cultivate, process and/or distribute cannabis, and an on-site consumption licensee may not hold any other license class, but may hold up to three separate on-site consumption licenses.

An exception to the ban on vertical integration is the microbusiness, which permits the small-scale production, sale and delivery of cannabis. The microbusiness is intended to benefit small businesses by allowing them to participate in multiple facets of the industry and thereby providing a better chance of profitability and growth.

However, establishing a vertically integrated operation may be cost-prohibitive for a small business just entering the marketplace.

Indeed, building a cannabis business of any kind is not an inexpensive endeavor. In that regard, the bill includes provisions to ease the financial burden for small businesses and social and economic equity applicants.

For example, all registration and licensing fees are to be set on a scaled basis, depending on the size and capacity of the business, and the board is required to waive or reduce fees for social and economic equity applicants. In addition, the bill provides for low or zero interest loans for social and economic opportunity applicants.

The loan program is significant because applicants without access to large amounts of capital may have limited options when it comes to raising the substantial funds necessary to build a cannabis business. Even though adult-use cannabis is now legal in New York — and 16 other states as of the date of this publication — it is still not legal under federal law.

Because most banks are federally insured, it may be difficult to find a bank willing to extend credit or loan money to a cannabis business. While startups often turn to private investors for funding, those investors generally receive an equity interest in exchange for their investment, thereby altering the ownership structure of the business.

Under the MRTA, however, to qualify as a minority-owned or women-owned business, at least 51% of the business must be owned by minority group members or women who have, and exercise, the authority to independently control the day-to-day business decisions of the enterprise. Accordingly, unless the investor is also a woman or a member of a minority group, those applicants must be careful not to compromise the business' minority- or women-owned status when bringing in partners or investors.

As a related concern, among the criteria listed in the MRTA for evaluating an application is whether "the applicant possesses or has the right to sufficient land, buildings, and equipment to properly carry on the activity described in the application or has a plan to do so if qualifying as a social and economic equity applicant."

Thus, although the bill creates an exception for social and economic equity applicants to identify only a plan to possess or have rights to the property and equipment, other cost-conscious applicants may not have the financial flexibility to take the risk of securing a physical location and/or costly equipment without knowing whether they will ultimately be awarded a license, particularly in New York's competitive, and expensive, real estate market.

Although the MRTA does not provide a timeline by which the Office of Cannabis Management is obligated to issue the specific regulations for the state's cannabis program, it is expected that those regulations will be issued by the end of 2021.

Businesses can use this time to begin developing their business plans, scouting potential business locations, and consulting with their legal, financial and business advisers.

However, because the bill allows local cities, towns and villages to opt out of allowing retail dispensaries and/or on-site consumption licenses by passing a local law by Dec. 31, prospective applicants in those categories may need to wait until after that deadline before choosing a location for their business.

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[1] <https://www.nysenate.gov/newsroom/press-releases/pete-harckham/harckham-legalized-marijuana-legislation-most-thoughtful-bill>.

[2] <https://www.nytimes.com/2021/03/25/nyregion/ny-legalize-marijuana.html>.

[3] <https://www.nysenate.gov/newsroom/press-releases/pete-harckham/harckham-legalized-marijuana-legislation-most-thoughtful-bill>.