

## LEGAL REVIEW NOTE

Bill No.: HB577

LC#: LC1559, To Legal Review Copy, as of  
February 15, 2019

**Short Title:** Establish protections for gun  
possession and purchase in Medical Marijuana Act

**Attorney Reviewer:** Todd Everts

**Date:** February 16, 2019

### CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

*As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.*

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review **IS NOT** dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).*

#### Legal Reviewer Comments:

The 2011 Legislature enacted the "Montana Marijuana Act" (section 50-46-301, MCA, *et seq.*). The Montana Marijuana Act created a framework enabling people with a qualifying medical condition to obtain and possess marijuana for medicinal purposes without threat of prosecution under Montana state law. On November 8, 2016, Montana voters passed Initiative No. 182, renaming the "Montana Marijuana Act" to the "Montana Medical Marijuana Act" and generally revising the medical marijuana laws.

The Montana Medical Marijuana Act may raise potential federal constitutional issues related to the Supremacy Clause under the United States Constitution, Art. VI, cl. 2, that provides that federal law is the "supreme law of the land". The United States Supreme Court has ruled that the federal Controlled Substances Act, 21 U.S.C. 801, *et seq.*, prohibits the manufacture, distribution, dispensation, and possession of marijuana even when state law authorizes its use to treat medical conditions. *Gonzales v. Raich*, 545 U.S. 1, 29, 125 S.Ct. 2195 (2005). Specifically, the Court in *Raich* held that under the Supremacy Clause, the federal statute superseded California's Compassionate Use Act authorizing the limited possession and cultivation of marijuana for medicinal purposes. (at 33-17, *Raich*). Similar to California's medical marijuana laws, the Montana Medical Marijuana Act's authorization of use and possession of marijuana for medicinal purposes may conflict with federal law.

LC1559, as drafted, revises the Montana Medical Marijuana Act to include protections for possession and purchase of firearms and prohibiting the release of information relating to background checks for the purchase of firearms. The Montana Medical Marijuana Act as well as the revisions to that Act contained in LC1559 may potentially conflict with federal law and, by extension, may raise potential constitutional conformity issues pursuant to the United States Supreme Court holding in *Raich*.

In addition, LC1559 as drafted, prohibits the Department of Public Health and Human Services from providing the identity of cardholders to a law enforcement agency for the purpose of facilitating a background check related to the transfer of firearms. This prohibition may raise potential constitutional conformity issues based on a U.S. 9th Circuit Court of Appeals holding in *Wilson v. Lynch*, 835 F.3d 1083 (2016), certiorari denied *Wilson v. Sessions*, 2017 U.S. LEXIS 2173.

The plaintiff in *Wilson* acquired a Nevada medical marijuana registry card. She then sought to purchase a firearm, but the firearms dealer knew that plaintiff held a registry card. Consistent with federal law and a letter issued by Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), the dealer refused to sell the plaintiff a firearm because of her registry card.

Federal firearms provisions under 18 U.S.C. 922 (g)(3) and (d)(3) provide no person "who is an unlawful user of or addicted to any controlled substance" may "possess . . . or . . . receive any firearm or ammunition." In addition, it is unlawful for "any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . is an unlawful user of or addicted to any controlled substance." The ATF has promulgated regulations implementing 18 U.S.C. sec. 922, and defining a person "who is an unlawful user of or addicted to any controlled substance" (27 C.F.R. sec. 478.11).

The Court in *Wilson* held that the plaintiff's procedural due process rights were not violated and the plaintiff does not have a constitutionally protected liberty interest in simultaneously holding a registry card and purchasing a firearm.

**Requester Comments:**