

**POLICY
452**

**EFFECTIVE
DATE
6-24-09**

**Eugene
Police Department**



Medical Marijuana

452.1 PURPOSE AND SCOPE

The purpose of this policy is to provide members of this Department with guidelines for handling and distinguishing between claims of medical marijuana use under the Oregon Medical Marijuana Act (OMMA) and criminal controlled substance violations. The OMMA is governed by *ORS 475.300 through 475.346, and OAR 333-008-000 through 333-008-0120.*

452.1.1 DEFINITIONS

Many definitions relevant to the OMMA can be found in *ORS 475.302*. The following additional definitions apply for the purpose of this policy:

Applicant: A person who has submitted an application to DHS for a registry identification card. A copy of the application, accompanied by proof of the date of mailing or other transmission of the application to DHS, will be considered a valid registration pending approval or denial by DHS. (*ORS 475.309[9].*)

Authorized amount:

- (a) A registrant or applicant, his/her primary caregiver, and a person responsible for a Registered Grow Site may not possess a combined total more than 6 mature plants and 24 ounces of usable marijuana. (Note: *ORS 475.320[1][b]* provides further restrictions on a registrant/applicant with certain prior felony convictions.) A person responsible for a Registered Grow Site may produce marijuana for no more than 4 registry cardholders or designated primary caregivers concurrently.
- (b) A registrant or applicant, and his/her primary caregiver, may collectively possess up to 18 immature plants (seedlings or starts). A person responsible for a Registered Grow Site may possess 18 immature plants for each Registrant posting a Grow Site Registration Card.

Caregiver: Has the meaning of “designated primary caregiver” defined in *ORS 475.320*.

DHS: Oregon Department of Human Services, Health Division. While DHS is the agency primarily responsible for administering the OMMA, applications may be submitted to the local Health Department which forwards them to DHS.

Identification card: The registry identification card issued to a Registrant by DHS. The identification card must be in the possession of the Registrant anytime the Registrant is in possession of marijuana (*ORS 475.306[2].*)

Immature plant: Has the same meaning as “seedling or start.”

Mature plant: Any marijuana plant that does not fall within the definition of a seedling or start.

Registered grow site: A location where marijuana is produced for use by a Registrant and that is registered with DHS as such. DHS will issue a marijuana Grow Site Registration Card to the Registrant. The card must be displayed at the registered grow site when marijuana is being produced. A registered grow site may produce marijuana for up to 4 Registrants and a Grow Site Registration Card must be present for each Registrant.

Registrant: A person who has been diagnosed with a debilitating medical condition and has been issued a registry identification card by DHS.

Seedling or start: A marijuana plant that has no flowers (“buds”), and is less than 12 inches wide, and is less than 12 inches tall. (All three criteria must be met to be a seedling or start.)

452.2 LIMITATIONS ON ENFORCEMENT

Although federal law does not currently permit possession of marijuana for medical use, Oregon has created a limited exception to the Oregon criminal statutes governing the possession and manufacturing of marijuana. In addition, there are also other defenses available for possessing small quantities of marijuana for medical use under certain conditions.

452.2.1 EXCEPTION

The exception from the Oregon criminal laws prohibiting possession, delivery, or production of marijuana and related offenses applies to a person:

- (a) Who is a Registrant or an Applicant, or
- (b) Who is a “designated primary caregiver” of a Registrant or Applicant, or
- (c) Who is the person responsible for a Registered Grow Site.

452.2.2 LIMITATIONS ON THE EXCEPTION

The criminal law exception does not apply to any person – even one who is validly registered under the OMMA – if the person has engaged in any of the activities listed in *ORS 475.316*.

452.3 DEFENSES

452.3.1 AFFIRMATIVE DEFENSES

An "affirmative defense" to a charge of unlawful possession, delivery, or manufacture of marijuana may be raised in accordance with provisions of *ORS 475.319*. The defendant would be required to prove the affirmative defense by a preponderance of the evidence after filing a notice of intent to rely on it.

452.3.2 OTHER DEFENSES

ORS 475.319(3) outlines requirements for presenting a "choice of evils" defense, or evidence supporting the necessity of marijuana for treatment. The state would be required to disprove the defense beyond a reasonable doubt, but the defense is available only to persons who have "taken a substantial step to comply" with the OMMA.

452.4 EFFECT ON MARIJUANA INVESTIGATIONS

The OMMA places a substantial burden on law enforcement officers to anticipate potential medical use claims and to determine their validity in the initial stages of an investigation.

- a. The criminal law "exception" for persons who engage in the medical use of marijuana is apparently intended to preclude arrest, citation, or search.
- b. The "affirmative defense" of medical need can be raised by persons who have not been issued a registry identification card, or even applied for one.
- c. Except as noted in the next paragraph, the OMMA prohibits law enforcement officers from harming, neglecting, injuring, or destroying any property connected with the medical use of marijuana. If the district attorney or a court determines that a medical use defense applies, the OMMA mandates that seized usable marijuana and paraphernalia be returned to the person from whom it was seized (*ORS 475.323[2]*.)
- d. A law enforcement agency has no responsibility to maintain live marijuana plants if they have been "lawfully seized" (*ORS 475.323[2]*). However, in this regard, an officer should exercise care to ensure that live plants are not seized from a person who is excepted from the criminal laws.

452.4.1 ARRESTS AND SEARCHES

Possession of a registry identification card alone will not serve as probable cause to search the holder or any related property (*ORS 475.323*.)

- a. Non-registrants: If the person claims medical use, but has not applied for or obtained an identification card from DHS:
 1. The criminal law exception does not apply and, if probable cause exists, the officer may take action appropriate to the circumstances (e.g., arrest or citation.)

2. It is recommended that the officer also conduct additional investigation for evidence relevant to a potential affirmative defense or choice of evils defense. (See also § 452.5.)
- b. Registrants: If the person presents a registry identification card, as either a patient or primary caregiver:
1. **Valid card.** A person who "holds" a valid, current registry identification card is not subject to arrest, citation, or search for those offenses, unless the person has engaged in disqualifying conduct described in *ORS 475.316*. If the person claims to possess a valid card not in his/her possession, make every effort to verify registration before proceeding. If a check with DHS or through LEDS reveals that the person has a valid registry card and simply does not have the card in his/her possession, no enforcement action will normally be taken if the person is otherwise in compliance with the OMMA.
 2. **Expired card.** The expiration date is printed on the card. A registrant is required to annually update the registration information on file with DHS. A person who is relying on a registry identification card that has expired is a non-registrant and is, therefore, subject to arrest or citation. (DHS, at its discretion, may extend the expiration date in cases of personal hardship.)
 3. **Accurate identifying information on the card.** A registrant must give notice to DHS within 30 calendar days of a change of name, address, telephone number, attending physician, designated primary caregiver, grower, or grow site address (*OAR 333-008-0040*.) An officer should ask the registrant if the registrant's name and address, and the name of the primary caregiver listed on the card are current. An officer should also compare the registry card information with the registrant's ODL or other ID. If this information is not current, an officer should ask when these changes occurred, whether the person notified DHS, and, if so, when. [Remember that a person cannot rely on the criminal law exception if he or she is growing marijuana at an address that has not been provided to DHS.]
 4. **Registry verification.** In every case, it is advisable to verify the status of the registry identification card with DHS, either at the time of the encounter with the registrant or at a later time. The results of that verification may require a follow-up interview with the registrant.
 5. **Suspended/revoked card.** *OAR 333-008-0070* provides authority for DHS to suspend or revoke a registry identification card under certain circumstances. If the registry identification card is suspended or revoked, the officer should try to establish whether the registrant is aware of the suspension/revocation. A person who is relying on a registry identification card that is suspended or revoked is a non-registrant and, therefore, is subject to arrest or citation.
 6. **Applicants.** A copy of the application to DHS, when accompanied by proof of the date of mailing or other transmission of the application to DHS, has the same legal effect as a registry identification card until the person receives notice that the application has been approved or denied (*ORS 475.309[9]*.) In other words, a person who presents copies of these documents is not subject to arrest or citation, unless it is determined that the person has received notice of

denial or has engaged in conduct that disqualifies the person from the criminal law exception.

7. **Persons with forged documents.** A person who makes or knowingly tenders a false registry identification card or application documents should be investigated for the crime of forgery (*ORS 165.002 - 165.022.*) Additionally, the officer should notify DHS regarding these false documents. DHS may deny an application for a registry identification card if the application contains falsified information (*OAR 333-008-0030.*) DHS may also suspend a registry identification card if the card was obtained by fraud (*OAR 333-008-0070[1][a].*)

452.5 INVESTIGATIVE EFFORTS

- a. Information on whether an individual is authorized under the OMMA can be obtained via LEDS or by calling the police information line at DHS. The information can be obtained by running a name, address, or card number. Normally, in a case involving a named individual or a known address, such a check should be run, and if there is confirmation that the person or location is properly registered with DHS, a marijuana-related investigation should be begun only if there is a reasonable belief that the provisions of the OMMA are being violated (e.g., sale of marijuana, amount of marijuana exceeding allowed limits). Any such information requests should be documented if enforcement action is taken or anticipated.
- b. Ask the person if s/he has a medical marijuana card and, if not, if s/he has applied for one.
- c. For **cases involving possession of less than an ounce of marijuana**, the seizing officer must note on the *Evidence/Property Report* form whether or not, based on his/her investigation, a medical marijuana claim may be involved. In cases where no such claim is involved, Property Control will normally destroy the marijuana; in cases where medical marijuana may be an issue, the marijuana and any associated items will normally be retained until disposition of the case, in the event it must be returned based on *ORS 475.323*. In such cases (i.e., possession of less than 1 ounce), paraphernalia will not normally be seized unless it is needed to successfully prosecute the case.
- d. For **other cases involving marijuana**, items other than marijuana, such as grow equipment, should normally be photographed and not seized. If the officer feels that in a particular case such items other than the marijuana should be seized, the Vice/Narcotics Supervisor or designee should be contacted to make the determination as to what should be seized.

452.5.1 SEEKING EVIDENCE REGARDING MEDICAL CONDITION

Investigation of this issue may not be necessary if the suspect presents a valid registry identification card or a copy of a pending application for a card, or if the suspect possesses more than the limits identified in § 452.1.1. In other cases, attempt to determine why the person is growing/possessing marijuana, along with specific information and any supporting documentation about assertions that the marijuana is being grown/used for medical reasons, and any documentation which has been submitted to DHS.

452.5.2 EVIDENCE REGARDING THE AMOUNT OF MARIJUANA GROWN OR POSSESSED

If the amount of marijuana manufactured or possessed exceeds the presumptive limits, the person cannot establish the affirmative defense.

452.5.3 EVIDENCE OF SALES

The criminal law exception and the affirmative defense are not available to a person who has delivered marijuana for consideration. Additionally, evidence that the person has been selling marijuana may be relevant for rebutting a “choice of evils” defense. If prosecution for sale of marijuana is going to be pursued, those items needed as evidence for prosecution may be seized.

452.6 SEIZURE AND DESTRUCTION OF MARIJUANA PLANTS

As stated above, officers are prohibited from harming, neglecting, injuring, or destroying any property connected with the medical use of marijuana which has been seized. However, a law enforcement agency has no responsibility to maintain live marijuana plants lawfully seized (*ORS 475.323*.)

Therefore, when an individual possesses more than the authorized amount, or when a growing site exceeds the limits specified in § 452.1.1, or if an authorized Marijuana Grow Site exceeds the collective limits of the grow site registration cards present (limit is 4 cards), officers should:

- a. Harvest only those plants in excess of the authorized number (*ORS 475.324*.) Seize those plants and submit them to PCU.
- b. Do not seize or destroy the growing equipment.
- c. It is always prudent to try to obtain consent from the appropriate person before destroying live marijuana plants. If consent is obtained, indicate “destroy” for the disposition of the plants on the *Evidence/Property Report* form, and include a copy of any written consent with the report package.

452.6.1 RETURN OF MARIJUANA

Usable marijuana and paraphernalia used to administer marijuana that was seized by this department will be returned in accordance with Oregon law upon a determination by the district attorney, or his/her designee, that the person from whom the items were seized is entitled to the protections of the Oregon Medical Marijuana Act. The determination may be evidenced, for example, by a decision not to prosecute, the dismissal of charges, or acquittal (*ORS 475.323*.) In addition, if an authorized EPD employee makes a good faith determination based on reasonable evidence that a person from whom marijuana and/or paraphernalia was seized is entitled to protection of the OMMA, s/he may authorize return of the seized item(s), and Property Control personnel may release them. An “authorized EPD employee” for purposes of this section would be the case officer, a command officer in his/her chain of command, or an Investigations supervisor.