While state budgets typically are dominated by debates over taxes and spending, Governor Tony Evers’ first budget has sparked a contentious discussion about a policy matter with much broader social and health-related implications: changes to Wisconsin’s marijuana laws.

Currently, Wisconsin law prohibits possession or use of marijuana for any purpose, although it does allow use of cannabidiol (CBD) oil for treatment of some medical conditions. CBD is a compound found in marijuana plants that does not have intoxicating effects.

In his 2019-21 budget bill, Evers proposes changing Wisconsin’s marijuana laws to create a medical marijuana program and decriminalize offenses pertaining to small amounts of the drug. The proposal comes at a time when Wisconsin finds itself almost surrounded by states with more permissive laws regarding marijuana usage. Voters in Michigan approved full legalization last November, and Minnesota and Illinois have medical marijuana programs.

Meanwhile, support for marijuana legalization continues to grow nationally. According to polling by the Pew Research Center in 2018, six in 10 Americans support legalized marijuana, part of an upward trend. Differences do exist when the numbers are broken down by generation and political affiliation. Majorities of the Millennial (74%), Gen X (63%), and Baby Boomer (54%) generations support legalization, as compared to only 39% of the Silent Generation (born between 1928 and 1945). Pew also found that 69% of Democrats are in favor of legalization, while 75% of independents who lean toward the Democratic Party agree. Independents who lean Republican also support legalization (59%), but a slight majority of Republicans oppose it (51%).

In Wisconsin, the Marquette University Law School poll has found similar levels of support, though GOP voters have been more skeptical recently. Voters in 18 jurisdictions also supported some form of legalization in advisory referendums last year. Sixteen Wisconsin counties and two cities had marijuana questions on the ballot, with 12 related to medical marijuana and the remaining ballot questions asking about legalization for adults (Racine County had both types of questions on the ballot). All of the referendums garnered majority support, with some by wide margins.
NATIONAL SCAN OF MARIJUANA LAWS

Efforts to legalize marijuana usage at the state or local level are complicated by the fact that federal law prohibits marijuana use. Marijuana is classified as a Schedule I drug, the most serious classification, which means that the federal government groups it with other drugs considered to have the highest potential for abuse and no accepted medical use.

Though marijuana has been illegal at the federal level since the Controlled Substances Act of 1970, individual states have been making their own rules since California became the first state with a medical marijuana program in 1996. State policies regarding marijuana generally fall into four broad categories:

• **Legalization**—Recreational marijuana usage is legal for adults and is typically taxed and regulated in a similar manner to cigarettes and alcohol. This is also sometimes called an “adult use” or “retail” marijuana policy. As of 2019, 10 states plus the District of Columbia and Guam fall under this category. It is important to note that although it is common to use terms like legalization in reference to state laws, no marijuana usage in the United States is legal in the technical sense due to the federal prohibition.

• **Medical**—Legislation allowing the use of marijuana for medical purposes has been adopted in 33 states, plus the District of Columbia, Guam, and Puerto Rico. These states allow doctors to recommend marijuana for treatment of certain medical conditions or symptoms.

• **Decriminalization**—States with decriminalization laws typically do not impose jail time or criminal sanctions on first-time offenders caught possessing small amounts of marijuana (usually one ounce or less). The penalty for this violation is typically a civil fine.

• **Prohibition**—This is the most restrictive category in that the possession, sale, and cultivation of any amount of marijuana, regardless of the offense, is considered criminal. This means that a conviction can result in jail time and a criminal record.

The map below shows the distribution of states that have legalized for recreational purposes, legalized for medical purposes, or not legalized for any purpose. Our categories do not take into account whether a state has legalized CBD oil. Those marked “D” have decriminalized possession of small amounts.

Of course, states that allow any form of marijuana use—whether for recreational or medical purposes—are in direct conflict with federal law, as are consumers of the drug. It had previously been the federal government’s policy to leave enforcement of small possession offenses to the states. In 2013, then U.S. Deputy Attorney General James Cole issued a memo stating that federal officials would limit their enforcement and investigations to the most significant threats.

Recently, however, the federal government has changed course. Former U.S. Attorney General Jeff Sessions issued a memo in January 2018 rescinding the 2013 guidelines. The new memo noted that Congress has “established significant penalties” for crimes relat-
ed to marijuana, reflecting lawmakers’ “determination that marijuana is a dangerous drug and that marijuana activity is a serious crime.” The memo instructs all U.S. attorneys to “follow the well-established principles that govern all federal prosecutions” and to decide which cases to prosecute based on considerations such as “federal law enforcement priorities set by the Attorney General.”

Although Sessions has since left the post, no new guidance has been issued. This creates an uncertain environment for states with medical or legal marijuana programs, dispensaries and other marijuana-related businesses, and patients and consumers.

WISCONSIN ENFORCEMENT OVERVIEW

In Wisconsin, state law specifies that individuals with no previous drug offenses who are convicted of possessing marijuana for the first time can be fined up to $1,000 and/or sentenced to up to six months in jail. While the language in the statutes refers to “first offenses,” it is important to understand that state law only applies to the number of criminal cases. Wisconsin law also has allowed municipalities to regulate marijuana possession for the first time an individual is cited for cases involving small amounts. Individuals typically have broken a municipal marijuana possession ordinance at least once before a criminal charge would be brought by a district attorney, so in this context, a “first offense” typically refers to the second time a person has been cited for marijuana possession.

First-time criminal marijuana possession charges are treated as a misdemeanor under state law, but second and subsequent criminal offenses can be charged as a Class I felony, which carries a fine of up to $10,000 and/or imprisonment for up to three and a half years.

Until recently, the authority of municipalities to set their own marijuana regulations was limited only to first offenses and for cases involving less than 25 grams. In April 2014, however, new state legislation was approved that also allows cities, towns, and villages to impose municipal ordinances regulating possession of marijuana in excess of 25 grams, and regulating second and subsequent offenses, “provided the district attorney’s office declines to prosecute.”

The discretion provided to municipalities to create their own policies for certain marijuana-related violations has created inconsistent penalties for Wisconsin residents, depending on where they live. A first or second offense for possession that draws a relatively minor fine in a given city might receive a much more substantial penalty in a neighboring municipality. In Madison, for example, there is no penalty for possession in a private residence, although individuals caught with marijuana in public are subject to a $100 fine. Eau Claire recently lowered its fine to $1, and Shorewood is considering the same.

Other municipalities with fines under $100 include Milwaukee ($50) and Racine (up to $75). On the other end of the spectrum, getting caught with marijuana in Green Bay can result in a fine of $500, while maximum fines extend to $1,000 in West Allis and $5,000 in Wauwatosa (though both cities provide a range of possible fines). In addition to fines, those who violate local marijuana ordinances also pay associated court costs, which can increase the penalty significantly; Eau Claire’s $1 fine becomes $148 when court costs are included, and a maximum fine in West Allis becomes $1,321.

In our previous research, we found that these fines often are not paid in full, or at all. In that case, some municipalities issue arrest warrants and may impose jail time. Figure 1 shows the minimum fines for first time offenses in the 10 most heavily populated Wisconsin cities.

WHAT GOVERNOR EVERS IS PROPOSING

Governor Evers’ budget proposes three changes to Wisconsin’s approach to marijuana. The first would legalize medical marijuana, meaning Wisconsin could join the 33 other states (plus DC,
Guam, and Puerto Rico) that have programs allowing patients with some medical conditions to use marijuana as a treatment. Medical marijuana can be used to treat certain symptoms of cancer, glaucoma, PTSD, and seizure disorders among others.

In addition to establishing a medical marijuana program, the budget proposes changing state law to decriminalize the possession, manufacture, or distribution of marijuana in amounts of 25 grams or less (for reference, 25 grams is just under one ounce, or an amount that would approximately fill one plastic sandwich bag). This step would create a uniform marijuana policy statewide, instead of the current patchwork.

In contrast to municipal policies in Wisconsin and decriminalization policies in other states, however, the governor’s proposal specifies that no civil or criminal penalty would be imposed for those caught with less than 25 grams of marijuana. This approach falls between decriminalization and legalization in an area sometimes called “depenalization.” We discuss this provision in more detail later in this report.

Another important feature of the governor’s decriminalization proposal is that people with convictions or who are currently serving sentences related to small amounts of marijuana would be able to request dismissals and/or expungement of the charges from their record.

The governor’s final proposal relates to CBD oil. Current Wisconsin law requires that patients who use CBD oil (which is often used to treat seizures in children) obtain a yearly certification from a physician. The budget would remove this requirement.

**WHAT WOULD WISCONSIN’S MEDICAL MARIJUANA PROGRAM LOOK LIKE?**

**For businesses**

According to the budget, Wisconsin’s proposed medical marijuana dispensaries would be overseen by the Department of Agriculture, Trade, and Consumer Protection (DATCP). As part of its oversight responsibilities, DATCP would license dispensaries and related businesses, such as those that grow, produce, transport, or sell medical marijuana. The bill does not require or prohibit vertical integration (combining multiple stages of production in one company), as is the case in some states, meaning that a dispensary could choose to handle the entire process from seed to sale.

Under the proposed program, DATCP would be required to consider licensing these facilities, but would have the ability to determine which dispensaries would receive licenses and how many dispensary licenses would be issued. There is no target number or limit for dispensaries set in the proposed bill.

In considering applications for dispensary licenses, DATCP would be instructed to consider “(a) convenience for caregivers and patients; (b) the ability of an applicant to provide sufficient quantities of THC; (c) the experience an applicant has in management of a nonprofit or business; (d) the preferences of local governments with jurisdiction in the applicant’s area; (e) the ability of an applicant to keep records confidential and maintain a safe and secure facility; and (f) the ability of an applicant to abide by license requirements.” Factors that would prohibit a dispensary from receiving a license include proximity to a school (not within 500 feet) and distributing or possessing more than a legally allowed amount (set by DATCP). Unlike some states (and the governor’s proposal for medical marijuana patients), there is no specific reference to background checks or criminal records for dispensary licensing.

The proposal also includes provisions intended to benefit Wisconsin businesses. To operate a dispensary, applicants would have to be state residents for at least two years, and all marijuana sold in Wisconsin dispensaries would have to be grown in the state. A dispensary could choose to grow its own plants or purchase marijuana from a licensed entity. Either way, DATCP would oversee required testing of all medical marijuana for potency and impurities including mold, fungus, pesticides, and other contaminates.

Purchases of medical marijuana in Wisconsin would be subject to a proposed 10% surcharge. Many states charge excise taxes on medical marijuana, but typical rates range from 2 to 7%, making Wisconsin’s proposed surcharge notably higher. In addition, medical marijuana in the state would be subject to the state’s sales tax. Prescriptions in Wisconsin typically are exempt from sales taxes, but medical marijuana would not fall under this exemption. It is not uncommon for states with medical marijuana programs to charge a sales tax on the drug.

Other proposed fees to be collected in connection with the medical marijuana program include dispensary application fees and annual fees. The budget indicates that DATCP would set these fees, which would be a minimum of $250 for the initial application and $5,000 for the annual fee. These fees are on the lower end. In one example of a state with higher fees, Pennsylvania’s medical marijuana program, which was approved in 2016, charges $5,000 for an initial application, with
perms for each location (up to three per application) costing $30,000 each.

Wisconsin’s lower costs would allow more people to enter the medical marijuana market, but the trade-off would be lower revenues. If these revenues are intended to help fund oversight of the program, this could pose a challenge.

The proposed budget estimates that the medical marijuana program would bring in $2.4 million in revenue over the two-year budget. According to the Legislative Fiscal Bureau (LFB), this figure includes revenues from sales taxes, the 10% surcharge, and dispensary licenses, and reflects an assumption of 10 dispensaries statewide. Table 1 shows a breakdown of the expected revenues.

One important question that has not been addressed is how Wisconsin’s marijuana dispensaries and growers would handle their revenues. Because marijuana is a Schedule I drug, federal law makes it difficult for banks to handle money from marijuana-related businesses, as the banks could be charged with money laundering. Consequently, even licensed marijuana businesses tend to deal largely in cash. One proposed workaround for this is a state-run bank; such an effort was proposed in California but failed when a feasibility study determined it would pose an unacceptable legal and financial risk for the state.

For patients

Under the proposed legislation, patients with qualifying medical conditions would apply to the registry program run by the Department of Health Services (DHS). A list of qualifying conditions—such as cancer, glaucoma, Crohn’s disease, and PTSD—is included in the language of the bill, but the bill would allow DHS to add additional conditions. The application would include information about the patient, his or her medical practitioner, and the condition to be treated with medical marijuana. The patient’s application fee, to be set by DHS, would be at least $100.

Patients would have to undergo a background check as part of the application process, and applicants would be denied if they had been convicted of a violent felony (unless 10 years have passed since they completed any related sentence). If approved, the patient would be issued a registry identification that would be good for two years. Provisions would also be made for parents, guardians, or other caregivers to obtain medical marijuana as part of a care team. The proposed legislation would include a defense from prosecution and arrest for those with a valid registry identification card. Additionally, this legal defense would apply to medical marijuana patients from other states.

The $2.4 million revenue estimate by LFB does not include funds from the application fees associated with joining the registry: at least $100 per patient (the registry ID expires after two years) and $250 for a primary caregiver (an annual fee). Additionally, no estimate is provided regarding how many patients would be expected to be approved for the registry. These funds would go to DHS and be used to administer the registry program.

DECriminalization AS CRimInal JUSTICE REFORM?

As noted earlier, decriminalization means the offense is not subject to criminal prosecution and would not result in a criminal record or jail sentence. If the budget proposals were adopted, Wisconsin would join 13 other states in decriminalizing small amounts of marijuana without fully legalizing it.

In advocating for the proposed decriminalization changes, the Evers administration cites social and racial justice issues related to marijuana use as a primary rationale. Prison admission statistics from the Department of Corrections show higher rates of admission for black offenders than white offenders for marijuana-related offenses, despite similar rates of use. However, those statistics also indicate that only small numbers of individuals serve prison time for charges that just involve marijuana.

Decriminalization also may hold potential to reduce the time spent by district attorneys, courts, public defenders, and law enforcement personnel on low-level marijuana charges and to reallocate associated human and financial resources. The significance of such savings may vary by community and may not be significant in jurisdictions where enforcement of marijuana laws already was a low priority.

Most recently, New Mexico decriminalized possession of half an ounce of marijuana or less, with violators now receiving a civil citation with a fine of $50. Other recent examples include New Hampshire, where 2017

| Table 1: Projected State Marijuana Taxes and Fees  |
|                                                     |
| Revenues by Fiscal Year under Proposed Budget      |
|                                                     |
|                                        | 2019-20 | 2020-21 |
| Sales Tax on Medical Marijuana                  | $252,100 | $504,200 |
| 10% Dispensary Surcharge                        | $504,200 | $1,008,300 |
| Dispensary Licenses                             | $52,500  | $50,000  |
| Totals                                         | $808,800 | $1,562,500 |
legislation reduced fines for up to three quarters of an ounce of marijuana from $2,000 to $100 for first and second offenses; and Illinois, where legislation adopted in 2016 decriminalized possession of 10 grams or less of marijuana, reducing the punishment from a misdemeanor to a fine of $100 to $200.

Governor Evers’ proposal is unusual when compared to other states’ decriminalization policies. For adults in possession 25 grams or less, there would be no penalty whatsoever. As shown in Table 2, all 13 states that have decriminalized small amounts of marijuana (but not formally legalized it) have some form of penalty, typically a relatively small fine.

While Wisconsin’s proposed decriminalization policy would be unique in this respect, it still would not qualify as full legalization under the commonly used definition of that term. That is because state law still would not allow for creation of a licensed market (e.g. recreational dispensaries) regulated and taxed by the state government that the general public could use to obtain marijuana legally.

In another criminal justice provision, the budget also would create a process for dismissing or expunging relevant convictions, provided the amount of marijuana involved was 25 grams or less. This would be a change from Wisconsin’s current expungement law, which itself is under review for potential changes in the Legislature. (For more on this topic, see the June 2018 WPF report, A Fresh Start: Wisconsin’s Atypical Expungement Law and Options for Reform.)

Other states have passed similar marijuana-related expungement legislation. In 2018, California created an expungement process requiring the state’s justice department to search for marijuana-related cases eligible to be expunged and to notify prosecutors of such cases within their jurisdictions. Colorado enacted a law in 2017 allowing defendants convicted of marijuana-related crimes to have their records sealed if the offense would not have been considered a crime under the state’s new laws.

It is challenging to determine how many offenders these proposals would cover, as it is difficult to pinpoint the population of convicted offenders who would benefit most from the expungement and dismissal provisions. The population most likely to benefit are those with marijuana-related convictions serving jail or prison time, and whose most serious offense was a marijuana-specific drug crime. These changes would not be as relevant to those with marijuana charges tacked on to more serious offenses, or to those whose infractions were municipal violations.

According to Wisconsin Department of Corrections data from June 30, 2018, which applies only to state prisons and does not include data from county jails, only 0.3% of total offenders in state prisons had a conviction only for a marijuana-related offense (71 individuals). Few individuals are convicted of marijuana-related offenses that are serious enough on their own to merit time in a state prison. Instead, lower-level offenders likely would serve time in county jails if at all. Unfortunately, we were unable to obtain data related to those serving time in county jails for only marijuana-related offenses.

Statewide, the percentage of offenders on supervision (those being monitored by the Department of Corrections within the community) for any marijuana-related offense at the same point in time (again, not including those from county jails) was 3.1%, or 2,030 individuals.

### Table 2: Decriminalization In Other States Still Involves Penalty
First Time Marijuana Possession Fines Among Decriminalization States

<table>
<thead>
<tr>
<th>State</th>
<th>Maximum Amount Decriminalized</th>
<th>First Offense Fine</th>
<th>Medical Marijuana?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Connecticut</td>
<td>0.5 ounces</td>
<td>$150</td>
<td>Yes</td>
</tr>
<tr>
<td>Delaware</td>
<td>1 ounce</td>
<td>$100</td>
<td>Yes</td>
</tr>
<tr>
<td>Illinois</td>
<td>10 grams</td>
<td>$100-$200</td>
<td>Yes</td>
</tr>
<tr>
<td>Maryland</td>
<td>10 grams</td>
<td>$100</td>
<td>Yes</td>
</tr>
<tr>
<td>Minnesota</td>
<td>42.5 grams</td>
<td>$300</td>
<td>Yes</td>
</tr>
<tr>
<td>Mississippi</td>
<td>30 grams</td>
<td>$100-$250</td>
<td>CBD oil</td>
</tr>
<tr>
<td>Missouri</td>
<td>10 grams</td>
<td>Up to $300</td>
<td>Yes</td>
</tr>
<tr>
<td>Nebraska</td>
<td>1 ounce</td>
<td>$300</td>
<td>No</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>0.75 ounces</td>
<td>$100</td>
<td>Yes</td>
</tr>
<tr>
<td>New Mexico*</td>
<td>0.5 ounces</td>
<td>$50</td>
<td>Yes</td>
</tr>
<tr>
<td>New York State</td>
<td>25 grams</td>
<td>Up to $100</td>
<td>Yes</td>
</tr>
<tr>
<td>Ohio</td>
<td>100 grams</td>
<td>$150</td>
<td>Yes</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>1 ounce</td>
<td>$150</td>
<td>Yes</td>
</tr>
<tr>
<td>Wisconsin (proposed)</td>
<td>25 grams</td>
<td>None</td>
<td>Yes</td>
</tr>
</tbody>
</table>

*New Mexico goes into effect July 2019
OBSERVATIONS AND CONCLUSION

A lack of support in the Republican-controlled Legislature and the likelihood that many policy proposals will be stripped from the budget cast serious doubt on the near-term adoption of the governor’s marijuana proposals. Nevertheless, the debate about whether and in what form to legalize certain uses of marijuana is unlikely to go away, as evidenced by the recent re-introduction of legislation by several Wisconsin Democrats that would fully legalize adult usage.

No matter one’s personal views on the subject, this is a policy discussion the state’s elected leaders can no longer avoid. As demonstrated by Map 1, Wisconsin is now almost surrounded by states that have legalized marijuana for recreational or medical use. Policymakers should consider the potential ramifications, including the possibility of greater incidences of impaired driving near state borders and negative economic impacts, as greater numbers of Wisconsin residents cross those borders to access legal marijuana markets.

The patchwork of different municipal ordinances and fines across the state also creates a potential impetus for legislative action. Recent statutory changes sought to give municipalities the flexibility to determine penalties for small-scale marijuana infractions based on their own law enforcement priorities. In allowing such sharp differences between neighboring jurisdictions, however, the state is arguably creating confusion and inequities for Wisconsinites.

It could be argued that the approach put forward by the governor would advance the state’s marijuana policy in a reasonable manner. His proposed medical program would keep the state in line with regional trends and public opinion, and his decriminalization proposal would create a uniform policy statewide. At the same time, his approach would provide an opportunity for policymakers to gauge the impacts of these changes before considering full legalization.

The proposal also establishes important financial and regulatory standards for a medical marijuana program. Among those are the provisions that reserve dispensary and growing rights for state residents and that establish a licensing framework for DATCP.

Others may argue, however, that the governor’s approach is not measured at all. Indeed, by creating a medical marijuana program while also eliminating all penalties for possession of small amounts, the governor’s proposals would arguably move Wisconsin further in the direction of legalization than all but the 10 states that have already done so.

Overall, the proposals raise several additional questions:

- Is legalization for medical purposes anticipated to be a precursor for an adult use program? If so, based on the experience of other states that have employed similar approaches, is the governor’s proposed medical structure a good foundation?
- Does the governor’s decriminalization proposal represent a bad tradeoff by providing de facto legalization without the increased revenue and potential public safety benefits that would flow from a regulated and taxed marijuana market?
- What is the revenue potential of either medical marijuana or full-scale legalization in Wisconsin? How much of that potential is currently (or soon to be) lost to neighboring states?
- What, if anything, can Wisconsin lawmakers do to address the banking challenges associated with either a medical or adult use marijuana program if either of those are the directions they wish to take?
- What do we know about the public health, public safety, and social justice impacts of legalization and decriminalization policies in other states, and how can those experiences objectively inform policymaking in Wisconsin?

We intend to address several of these questions ourselves in subsequent research. In the meantime, we hope this brief overview provides useful context for both policymakers and the public as they consider reforms to Wisconsin’s marijuana policies and practices.