

BEST PRACTICES: PROTECTING IMMIGRANTS WHEN DECRIMINALIZING OR LEGALIZING MARIJUANA



Across the country, states are increasingly moving to end marijuana prohibition laws. Advocates have emphasized the need to end ineffective, racially biased, and unjust criminal enforcement of marijuana laws, driven by a sea change in the public's perception about the acceptability of marijuana use and mounting medical evidence about its safety.

New marijuana laws need to decouple marijuana from vice and crime. One of the largest hurdles to this change is that, as states increasingly move to legalize or decriminalize recreational marijuana, marijuana remains a federal controlled substance.

For immigrant communities, despite the changing attitude toward marijuana-related conduct at the state level, an old conviction can still form the basis for immigration-related consequences at the federal level. Marijuana-related convictions can result in [disproportionate and devastating consequences for immigrants](#). Almost all [marijuana offenses cause mandatory imprisonment in an immigration prison](#). Marijuana offenses are consistently [among the top ten](#) most serious convictions of people deported. Since 2003, more than 45,000 people whose more serious conviction was marijuana possession have been deported. And deportations of people with drug possession convictions went up [43 percent](#) between 2007-2012.

Marijuana offenses are among the top ten state bases for deportation.

Though federal legal reforms may be the only way to completely eradicate the immigration consequences of marijuana-related conduct and convictions, reforms at the state level can nevertheless help stop the arrest-to-deportation pipeline.

At the Immigrant Legal Resource Center, the Immigrant Defense Project, and the Drug Policy Alliance, we recognize that communities of color have long been those most harmed by the war on drugs. While there are many equity-based considerations that must be included in any effort to legalize marijuana, this advisory will focus exclusively on ways to lessen the immigration-related harms of marijuana criminalization.

Advocates need to understand how noncitizens can be harmed by marijuana laws, so they can work to maximize the positive impacts of marijuana reforms. The ILRC, IDP, and DPA are available to consult on draft legislation, to help spot unintended consequences and suggest options to make the new law beneficial for all state residents. In general, our recommendations include:

STRUCTURE REFORMS SO THAT THEY DECREASE, OR AT LEAST DO NOT INCREASE, THE IMMIGRATION CONSEQUENCES OF REMAINING PUNITIVE STATUTES.

If penalties remain, make them civil, not criminal. Many decriminalization schemes carry over some form of penalty for certain marijuana related conduct. But even the smallest criminal penalty, including infractions, criminal citations, and low-level marijuana arrests, can lead to deportation and ineligibility for immigration status in the future. To the extent that marijuana-related activity will still be penalized by the state, using civil penalties in place of criminal ones may help mitigate negative immigration consequences.

Create diversion programs that do not require a guilty plea, or consider diversion before criminal charges are filed. Some states provide strong “diversion” programs as an alternative to conviction for minor offenses, and promise the defendant that if they complete all program requirements, they will have no conviction for any purpose. But if the diversion program requires a guilty plea, then regardless of what the state says, the successful diversion participant will emerge with a deportable drug “conviction.” Instead, consider pretrial diversion, where the defendant pleads not guilty before being diverted. Better yet, consider referral to diversion immediately after arrest, before criminal charges are filed, in these minor marijuana cases.

Retain broad definitions that may protect immigrants from certain grounds of removability. If someone is convicted of a state controlled substances offense that is not punishable under federal law, it will not be a federal controlled substance violation. Some state laws are already overbroad and it is important that decriminalization does not unintentionally narrow a key ground of relief for immigrants. An example of broad state penal code definitions that may avoid certain federal immigration consequences include: punishing marijuana in the same section as khat or a generalized reference to “controlled substances;” punishing “social sharing” in the same provision as sale; and “personal use” as a possible purpose of transport of marijuana.

INCLUDE EFFECTIVE POST-CONVICTION RELIEF AND ACCESS TO RECORDS FOR IMMIGRANTS.

Every legalization or decriminalization effort should include a forward-looking component *and* a backward-looking component. Forward-looking components include removing marijuana from the criminal penal code through decriminalization or legalization, ensuring that people will no longer be arrested, charged, and incarcerated for marijuana related conduct. Backward-looking components include mechanisms to dismiss or vacate convictions based on now-legal conduct. For immigrants, not all post-conviction relief is created equal.

Ensure access to post-conviction relief that meets immigration requirements. For post-conviction relief to be recognized by immigration authorities, it must be based on a ground of legal or procedural invalidity in order to erase the immigration consequences of a conviction. Equitable or rehabilitative relief, like standard state expungements or withdrawal of plea because the person successfully completes probation, will not be given effect in immigration courts. Therefore, any post-conviction component of a decriminalization bill should include a reference that, any prior convictions for now legal conduct, shall be entitled to vacatur based on legal or procedural grounds, for example, referencing that the prior conviction violated the state or federal constitution.

Ensure that marijuana record clearance does not prohibit subsequent post-conviction relief. Some courts mistakenly hold that an expungement deprives the court of future jurisdiction to vacate that same conviction for cause. Because the marijuana record clearance mechanism may not eliminate the immigration consequences of an offense, the best practice is to address the jurisdiction issue in the legislation by specifying that an expungement performed pursuant to the marijuana laws will not preclude the court’s jurisdiction over any subsequently filed motion to amend the record, post-conviction relief motion or petition, or any other future collateral attack on an expunged conviction.

Ensure the privacy of old conviction records while retaining access for the individual and their attorney. It is crucial that courts retain records of even expunged convictions so that individuals can access the files for later immigration purposes or to challenge the conviction on alternative legal grounds.

MORE RESOURCES

[Community-facing advisory about marijuana use and immigrants](#)

[Legal advisory about immigrants and marijuana](#)

[Report about immigration and California’s marijuana legalization effort](#)