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FREQUENTLY ASKED QUESTIONS:

The Impact of Marijuana Decriminalization, Vacatur, and Expungement Legislation on Immigrants in New York

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On July 29, 2019 New York Governor Andrew Cuomo signed into law two bills ([S6579-A/A8420-A](#) and [S6614/A8432](#)) that decriminalize marijuana possession and provide relief to New Yorkers with some prior marijuana convictions. **The new law goes into effect on August 28, 2019.**

The Immigrant Defense Project is finalizing a practice advisory that will provide a full summary of the remaining immigration consequences of the decriminalized offenses, expansion of available post-conviction relief, and innovative and creative arguments to push the law by challenging convictions in Immigration Court. The amended text of the statutes impacted are available [here](#). Below is a short FAQ for practitioners in advance of the full practice advisory.

1. What does the 2019 New York Marijuana Decriminalization/Expungement Bill do?

The law changes the way marijuana possession is punished under N.Y. Pen. Law §§ 221.05 and 221.10. The maximum fine imposed under N.Y. Pen. Law § 221.05 is reduced to a maximum of \$50. In addition, the enhanced fine and possible jail time for those convicted of a prior Article 220 or 221 offense are eliminated. N.Y. Pen. Law § 221.10 is reduced from a B misdemeanor to a violation. The specific prohibitions against possession of marijuana burning or open to public view are eliminated. It covers possession of up to one ounce of marijuana and is punishable only by a fine of up to \$200.

It also includes provisions for expungement and vacature of marijuana convictions, discussed below.

2. How will this impact immigration consequences for New Yorkers?

New York's 2019 marijuana decriminalization statutes did not eliminate the negative immigration consequences of marijuana possession or make possession of marijuana legal. The bill expands the criminal activity that is punishable by a violation instead of a criminal misdemeanor and eliminates the

possibility of jail time for marijuana possession violations. It also includes expungement and vacature provisions which may benefit immigrants with marijuana-related convictions.

However, this change does not eliminate the harsh consequences for immigrants found guilty of a marijuana offense in New York. Even violation offenses will be considered criminal convictions by immigration courts and agencies. The consequences of a conviction for a marijuana violation under the new law depend on each individual's immigration status and history. Immigrants convicted of marijuana violations can face severe consequences, including becoming deportable or ineligible for status.

In addition, police still have discretion to arrest people for low-level marijuana possession offenses. Each time a person at risk of deportation is arrested and fingerprinted their name and address are sent to ICE, placing them at high risk of a home raid or other ICE enforcement action, regardless of the outcome of the arrest.

3. The marijuana decriminalization bill includes expungement for some marijuana convictions. Do expunged convictions carry immigration consequences?

Under current law, a blanket, automatic expungement does not necessarily eliminate a conviction for immigration purposes. Immigrant New Yorkers with marijuana convictions should not rely on the bill's expungement provision to mitigate or erase the negative consequences of having a controlled substance offense under the immigration law.

However, beneficiaries of the Deferred Action for Childhood Arrivals (DACA) program may benefit from expungement, as the guidelines for that program explicitly mention expungement. In addition, IDP's practice advisory will address innovative and creative arguments that a conviction expunged under New York law is not a conviction under immigration law.

4. What changes did the marijuana decriminalization bill make to Article 440 of the criminal procedure law (New York's post conviction relief statute)?

The bill includes language specifically meant to increase the availability of post conviction relief to immigrants with certain marijuana convictions. It adds language to N.Y. Crim. Proc. Law § 440.10 that specifically addresses motions to challenge convictions obtained prior to the enactment of the bill for N.Y. Pen. Law §§ 221.05, 221.10, and certain marijuana-related violations prior to July 29, 1977. For immigrants who can show there are severe or ongoing consequences, including actual or potential immigration consequences, the court will presume their conviction is invalid. However, the District Attorney may rebut this presumption with evidence.

This amendment makes changes similar to those made to Article 440 as part of the One Day to Protect New Yorkers bill, which was passed as part of the budget in April 2019. The practice advisory by IDP and Cardozo School of Law's Kathryn O. Greenberg Immigration Justice Clinic addressing these changes which is available [here](#).