



DELAWARE

EMPLOYMENT LAW LETTER

Part of your Delaware Employment Law Service

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EMPLOYMENT LAW

Sex, drugs, and fire hoses: a retrospective

by Bill Bowser and Lauren E.M. Russell

As we near the end of 2013 and look forward to a new year, it's a great time to look back on key developments in Delaware law. Over the past year, we've seen some groundbreaking legislation as well as the revival of some previously abandoned initiatives.

A quick recap

This has been an eventful year for employment law in Delaware. The state has extended antidiscrimination protection to transgender individuals (see "What Delaware employers need to know about gender identity discrimination" on pg. 7 of our August issue) and employees serving as emergency responders (see "New Delaware volunteer emergency responder protections enacted" on pg. 1 of our November issue).

In addition, Delaware now recognizes same-sex marriage (see "What does same-sex marriage mean for Delaware employers?" on pg. 1 of our June issue). As a result, under the U.S. Supreme Court's holding in *U.S. v. Windsor*, same-sex spouses in Delaware enjoy the same state and federal rights as opposite-sex spouses (see "What does Supreme Court's DOMA decision mean for Delaware employers?" on pg. 1 of our August issue). Each of these changes creates significant new rights for employees and dangerous new pitfalls for employers.

What's old is new again

Governor Jack Markell recently announced that Delaware will push forward with its medical marijuana program. In May 2011, Delaware became one of a growing list of states to legalize the possession and use

of medical marijuana. The Delaware Medical Marijuana Act (DMMA) provides that Delaware residents with certain medical conditions will be able to legally purchase marijuana at "compassion centers" located in the state. The DMMA further prohibits employers from terminating employees who test positive for marijuana metabolites, provided they aren't impaired on the job.

Although the law is now technically in effect, there are currently no compassion centers at which medical marijuana users can make a purchase. That's because the U.S. attorney for the District of Delaware, Charles M. Oberly III, informed the governor in a letter dated February 9, 2012, that his office might prosecute state employees involved in the sale of medical marijuana. Oberly's position was based on the fact that marijuana remains a Schedule 1 drug under the federal Controlled Substances Act (CSA). Schedule 1 drugs are drugs for which there is no currently accepted medical use.

Oberly's letter represented a change in federal policy. President Barack Obama's former deputy attorney general, David Ogden, had previously indicated that the U.S. Department of Justice (DOJ) wouldn't prioritize enforcement of the CSA against states with medical marijuana laws. In light of the shift, Governor Markell suspended implementation of the DMMA. Regulations that were to have been issued in 2012 were never finalized.

But those of you hoping to avoid the legal quagmire of medical marijuana will be sorely disappointed—the DMMA is back on track. In an August 15 letter, Governor Markell indicated that the state would move forward with the creation of compassion centers. However, in light of the uncertainty over federal enforcement efforts, the state will implement changes to its initial plan.

Those changes include the creation of a single pilot center that will cultivate no more than 150 plants, with an inventory of no more than 1,500 oz of marijuana. The goal is to alleviate the federal government's concern over large-scale privately operated industrial centers with high revenue projections. In addition, Governor Markell announced plans to institute tight security requirements, including an identity verification system and around-the-clock video monitoring.

Despite the changes, Governor Markell noted that he won't hesitate to suspend the implementation of the DMMA again if guidance from the federal government changes.

Bottom line

This has been a year full of legal changes, and the implications of those changes remain to be seen. As we have noted before, broader rights for employees frequently mean increased risks for employers. We will continue to monitor the emerging issues and provide insight on recent developments.

DELAWARE EMPLOYMENT LAW LETTER does not attempt to offer solutions to individual problems but rather to provide information about current developments in Delaware employment law. Questions about individual problems should be addressed to the employment law attorney of your choice.

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