



# DELAWARE

## EMPLOYMENT LAW LETTER

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Vol. 17, No. 3  
March 2012

### LEGISLATION

## Delaware's medical marijuana law: gone to seed

by Michael P. Stafford

*We have been following the progress of the state's medical marijuana law and its implications for employers very closely. Last month, we wrote that Delaware's program was in jeopardy in light of federal agencies' efforts to block states' attempts to expand the use of medical marijuana. (See "Will Delaware's medical marijuana law go up in smoke?" on page 2.) Since then, Governor Jack Markell has made it clear that the law is effectively dead.*

### ***What happened?***

Delaware's medical marijuana program has gone to seed. According to the *News Journal*, the governor "has suspended the regulation-writing and licensing process for medical-marijuana dispensaries — effectively killing the program." The decision comes in response to a letter from U.S. Attorney Charles M. Oberly, III.

The governor's office sought guidance from Oberly about the legal implications of state employees working at marijuana dispensaries. Oberly's response was clear: "State employees who conduct activities mandated by the Delaware Medical Marijuana Act [DMMA] are not immune from liability" under the federal Controlled Substances Act (CSA).

The death of the DMMA isn't due to a unique defect in the statute itself. In fact, it shares common elements with other states' medical marijuana laws. Rather, the crux of the problem is the intersection of state and federal law and the shifting approach to enforcement taken by the Obama

administration.

Despite state statutes like the DMMA, marijuana, whether used for medicinal or other purposes, remains illegal under the CSA as a "Schedule I" controlled substance — the same category as drugs such as heroin and LSD.

### ***What changed?***

When the DMMA was passed in May 2011, legislators were under the impression that the federal government wouldn't prosecute employees working in marijuana dispensaries. That understanding was based on representations by the Obama administration that it wouldn't prosecute individuals for marijuana offenses made legal under state law. However, the administration's position has changed, and the U.S. Department of Justice is now drawing a distinction between physicians prescribing medical marijuana and individual cardholders on the one hand and "large scale, privately owned industrial cultivation centers" on the other. That's problematic for Delaware because the DMMA initially centralized marijuana distribution in only three compassion centers, with one center in each county.

The uncertainty created by contradictory enforcement signals at the federal level has affected the implementation of medical marijuana legislation in other states as well. As we reported last month, >a Justice Department warning that "state employees who conducted activities mandated [under a proposed law] would not be immune from liability" led Washington Governor Christine Gregoire to veto that state's medical marijuana bill. Similar warnings of potential enforcement actions targeting marijuana dispensaries also led Rhode Island Governor Lincoln Chafee to halt plans to create state-licensed compassion centers in his state.

### ***Bottom line***

The news should be a relief to Delaware employers that are concerned about the workplace implications of the DMMA, which, among other things, would have made it unlawful for an employer to terminate a cardholder for failing a drug test unless he "used, possessed, or (was) impaired by marijuana" while at work during normal hours. The DMMA also specified that the mere presence of marijuana components or metabolites in a cardholder's system would be insufficient to establish that he was under the influence of the drug. While some effort to amend the DMMA to address federal enforcement concerns is likely, for now at least, medical marijuana's future in Delaware appears hazy at best.

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