



DELAWARE

EMPLOYMENT LAW LETTER

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William W. Bowser, Editor; Scott A. Holt and Adria B. Martinelli,
Associate Editor
Young, Conaway, Stargatt & Taylor

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LEGISLATION

Waiting to exhale: Delaware's medical marijuana law

by Michael P. Stafford

Medical marijuana laws have been blazing a trail across the United States since California's passage of Proposition 215 in 1996. This year, the Delaware General Assembly began experimenting with marijuana legislation. With the passage of the Delaware Medical Marijuana Act (DMMA) on May 11, Delaware joined 15 other states and the District of Columbia in legalizing marijuana use for medicinal purposes.

Getting into the weeds

The DMMA shares many common elements with medical marijuana legislation across the country, but some key differences could have a major impact on Delaware employers. Essentially, the act decriminalizes marijuana use under state law in limited circumstances. Delawareans who have certain debilitating medical conditions and have received certification by a physician must apply for a state-issued medical marijuana card. Cardholders may possess no more than six ounces of marijuana and are not permitted to grow their own.

Cardholders may legally purchase marijuana at state-licensed nonprofit dispensaries known as "compassion centers." There will be only one state licensed dispensary in each county. The Delaware Department of Health and Social Services, which will administer registration of patients, caregivers, and compassion centers, has until July 1, 2012, to develop the regulations needed to implement the new law.

Unlike many other states' medical marijuana laws, the DMMA contains provisions that apply directly to employers. Specifically, although the law prohibits cardholders from using medicinal marijuana at work, it also bars discrimination against them in hiring, termination, or other terms and conditions of employment. Further, the new law makes it clear that a positive drug test can't serve as a basis for discipline of a cardholder unless the person "used, possessed, or was impaired by marijuana" at work during normal working hours.

That point is further clarified by another provision of the law, which states cardholders "shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment" in a drug test. Nevertheless, it is important to note that marijuana use remains illegal under the federal Controlled Substances Act.

Seeing through the haze

For Delaware employers, the DMMA creates a range of new issues, many of which involve accommodating marijuana use by card-carrying employees, enforcement of workplace drug policies, and reconciling state and federal law. Thankfully, Delaware employers can look to decisions in other states for potential guidance in following our own new law.

Across the country, courts have regularly held that employers have no duty to accommodate medical marijuana use under state law or the federal Americans with Disabilities Act (ADA). For example, the supreme courts of Oregon and California have held that an employer has no duty to accommodate medical marijuana use under state law or the ADA because marijuana use is illegal under federal law. Remember, though, that Delaware's new medical marijuana law is less employer-friendly than similar laws in other states. Thus, the value of precedent from other jurisdictions may be limited in interpreting our new law.

Bottom line

You should review the DMMA and revise your drug-testing policies to provide for testing of medical marijuana cardholders. In addition, you should develop a policy to address employee use of medical marijuana. Finally, keep in mind that some jobs are subject to federal regulations prohibiting drug use and imposing testing requirements that cannot be overridden or abrogated by state law.

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