

LEGISLATIVE UPDATE

January 2019

First Medical Marijuana Dispensaries Open & Other Ohio MMCP Updates

January 16, 2019, four dispensaries began selling medical marijuana for the first time in Ohio under the Ohio Medical Marijuana Control Program (MMCP). The only products currently available for sale are plant material, also known as flowers or buds, that state law allows to be vaporized, but, not smoked. Other products, such as edibles, tinctures, and lotions will not become available until marijuana processing facilities are operational.

Qualified patients and caregivers are eligible to buy medical marijuana with a doctor's recommendation for one of the 21 qualifying medical conditions currently enumerated in the law. However, the Ohio MMCP allows for the submission of petitions to add qualifying medical conditions to the program. During the 2018 submission period, which ended December 31st, 110 petitions to add qualifying medical conditions were submitted. Nearly all the submissions failed to meet requirements for consideration or were discarded for other reason. Three petitions were set aside as incomplete, but the committee voted to give petitioners 30 days to add missing materials. Ultimately, opioid addiction, autism,



general anxiety, chronic anxiety, depression, and insomnia were selected for more study as qualifying conditions for medical marijuana in Ohio. The committee is expected to make recommendations to the full Medical Board by June 30 regarding adding these additional qualifying conditions. In addition, several months ago, a member of the public petitioned the Ohio Board of Pharmacy to include nasal sprays in the list of allowable forms of medical marijuana. The Ohio Board of Pharmacy accepted public comment through January 4, 2019. The Ohio MMCP has not yet made a determination.

Many Ohioans have questioned the impact of the Ohio MMCP on the purchase and use of CBD Oil, especially CBD extracted from hemp. The Ohio MMCP has issued a CBD Oil FAQ advising that CBD oil is covered under the Ohio MMCP and cannot be sold in Ohio unless dispensed through a licensed dispensary under the MMCP. Ohio law defines marijuana as "all parts of a plant of the genus cannabis," which would include hemp.

Transportation Workers are exempt from Federal Arbitration Act ("FAA")

In *New Prime, Inc. v. Oliveira*, 586 U.S. ____ (2019), a unanimous Supreme Court found that truck drivers classified as independent contractors cannot be compelled to arbitrate their claims under the Federal Arbitration Act (FAA).

Dominic Oliveira, worked as an independent contractor truck driver, who agreed to arbitrate all disputes pursuant to his contract. Nonetheless, Oliveira later brought a class-action lawsuit against New Prime, alleging violations of the Fair Labor Standards Act (FLSA), among other claims. The parties contested whether New Prime could compel arbitration under the

FAA.

The Court found section 1 of the FAA, which excludes contracts of employment from arbitration applies broadly to both employees and independent contractors. The Court found that when Congress passed the FAA in 1925, the term "employment" was indistinguishable from the term "work". Hence, Congress intended to shield all transportation workers. Accordingly, the Court held that the term "contracts of employment" in section 1 applies to independent contractors agreements.

Court Rules in Favor of OSHA's Multi-Employer Citation Policy



On November 26, 2018, the Fifth Circuit Court of Appeals ruled that the “Secretary of Labor has the authority under the Occupational Safety and Health Act to issue citations to controlling employers at multi-employer worksites for violations of the act’s standards”. In *Acosta v*

Hensel Phelps Construction Co., a three-judge panel for the Fifth Circuit, which covers Louisiana, Mississippi, and Texas, overruled its prior precedent, which had survived since 1981 that “OSHA regulations protect only an employer’s own employees.”

In *Acosta*, a construction company (Hensel Phelps) entered into a contract with the City of Austin to build a new public library. Hensel Phelps, as the general contractor, maintained control over the worksite through the presence of on-site management personnel. A sub-contractor was hired to complete excavation and other work on the site. As the excavation progressed, a significant vertical wall developed without protective systems. Neither the general nor sub-contractors put in place soil protective systems such as sloping or trenching to protect against cave-ins.

One rainy day, the City of Austin’s inspector and Hensel Phelps’ superintendent instructed the sub-contractor to send his employees to the excavation site to perform the work. Following a complaint, OSHA inspected the site and cited the sub-contractor and Hensel Phelps for willful violations of 29 C.F.R. 1926.652(a)(1). OSHA included Hensel Phelps in the citation pursuant to its multi-employer citation policy finding it had supervisory authority as a controlling employer over the worksite with authority to correct safety and health violations.

The Fifth Circuit Court of Appeals, found that OSHA’s multi-employer policy is a reasonable interpretation of applicable statutory law. Deferring to OSHA, the court upheld OSHA’s multi-employer citation policy finding Hensel Phelps liable for violation of safety regulations even though it had no employees exposed to the cave-in hazard.

Sexual Orientation & Transgender Update

Several months ago, three important sex discrimination cases petitioned to be heard by the U.S. Supreme Court regarding Title VII’s coverage of sexual orientation and transgender discrimination. In *Altitude Express v. Zarda*, the Second Circuit ruled that sexual orientation is protected under Title VII, whereas, the Eleventh Circuit held just the opposite in *Bostock v. Clayton County*. In addition, in *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, the Sixth Circuit held that transgender is a protected class under Title VII. After its January 11 conference, the Court did not provide any indication whether it will grant or deny review of these cases.



Regardless, states continue to expand the rights of the LGBTQ community at the state and local level. In fact, on January 15, 2019, newly sworn-in Ohio Governor Mike DeWine signed an executive order prohibiting discrimination against state employees on the basis of sexual orientation and gender identity. Ohio is one of the 31 states that lack an explicit statewide law barring discrimination on the basis of sexual orientation and gender identity, although numerous municipalities have such antidiscrimination laws in place.

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