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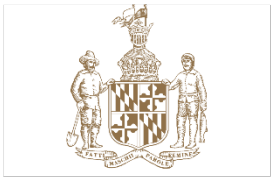

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February 22, 2021

The Honorable Dereck E. Davis
231 House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate Davis:

You have asked for advice concerning whether House Bill 683, "Workers' Compensation - Medical Cannabis - Compensation and Benefits" would be preempted by federal law. While the matter is not free from doubt, it is my view that it would not.

House Bill 683 would amend Labor and Employment Article ("LE"), § 9-506 to alter the current rule that an employee is not entitled to compensation for an injury that was caused solely by the effect on the employee of a depressant, hallucinogenic, narcotic, or stimulant drug, or any other drug that makes the employee incapable of satisfactory job performance to exempt situations where the drug is medical cannabis that has been administered or taken in accordance with the written certification of a certifying provider or the written instructions of a physician. This change provides medical cannabis patients with the same protection that the law now provides to employees who are affected by medications administered or taken in accordance with the prescription of a physician. I do not think that this change raises federal preemption issues, but there is some question about how it would interact with Health - General Article, § 13-3314(a)(1) and (2), which state that the medical cannabis law does not "authorize any individual to engage in, and does not prevent the imposition of any civil, criminal, or other penalties for . . . [u]ndertaking any task under the influence of marijuana or cannabis, when doing so would constitute negligence or professional malpractice, [or] [o]perating, navigating, or being in actual physical control of any motor vehicle, aircraft, or boat while under the influence of marijuana or cannabis."

House Bill 683 would also amend LE § 9-660(a)(3) to specify that the medicine an employer is required to provide under that paragraph includes medical cannabis. Other states have similar requirements in their law, and some have been challenged in a number of cases on the theory that they are preempted by the federal Controlled Substances Act ("CSA"), which makes possession, manufacture, and distribution of marijuana illegal. I have found only one case in which a court has ruled that an employer cannot be ordered to reimburse an employee for medical marijuana on the basis of federal preemption.

In *Bourgoin v. Twin Rivers Paper Co.*, 187 A.3d 10 (Me. 2018), the court found that "where an employer is subject to an order that would require it to subsidize an employee's acquisition of medical marijuana -- there is a positive conflict between federal and state law," and therefore concluded that the Maine law requiring payment for medical cannabis was preempted by the CSA. The court correctly noted that the CSA preempts state law only where there is a "positive conflict between that provision of this title and that State law so that the two cannot consistently stand together." *Id*. at 14, citing 21 U.S.C. § 903; *see also Hager v. M&K Construction*, 225 A.3d 137, 146 (N.J. App. Div, 2020). Thus, a state law is preempted only if it conflicts with the CSA "in a way that makes compliance with both impossible." *Id*. The court concluded that there was a conflict because the CSA makes it a crime to knowingly or intentionally manufacture, distribute, or dispense or possess with intent to manufacture, distribute, or dispense marijuana and the Maine medical marijuana law permitted a qualifying patient to possess a limited amount of marijuana for medical use. *Id*. at 16-17. The court also concluded that an employer that subsidized an employee's use of medical marijuana could be found guilty of aiding and abetting the offense of possession of marijuana. *Id*. Ultimately, the court concluded that compliance with both laws was an impossibility, saying:

> Were Twin Rivers to comply with the hearing officer's order and knowingly reimburse Bourgoin for the cost of the medical marijuana as permitted by the [Maine medical marijuana law], Twin Rivers would necessarily engage in conduct made criminal by the CSA because Twin Rivers would be aiding and abetting Bourgoin—in his purchase, possession, and use of marijuana—by acting with knowledge that it was subsidizing Bourgoin's purchase of marijuana. Conversely, if Twin Rivers complied with the CSA by not reimbursing Bourgoin for the costs of medical marijuana, Twin Rivers would necessarily violate the [Maine law]-based order of the hearing officer.

Id. at 19.

Two judges dissented from this conclusion. The dissent started with the well-established rule that in cases where federal law is said to preempt state action in fields of traditional state authority, such as workers' compensation legislation, "there is an assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest intent of Congress." *Id*. at 23. It further explained that preemption could not be established by "mere speculation about a hypothetical conflict." *Id*. at 23-24. Thus, while the dissent agreed that the appropriate test was whether it was impossible to comply with both laws, it disagreed with the conclusion that it was impossible. *Id*. Specifically, the dissent explained that:

> there is no positive conflict between the CSA and the [Maine law] because there is no state law that requires the employer -- or any person or entity -- to possess, manufacture, or distribute marijuana. In other words, compliance with both the federal law and the Workers' Compensation Board (WCB) order is possible: reimbursement does not require the employer to physically manufacture, distribute, dispense, or possess marijuana, and, as a result, no physical impossibility exists between the federal law and the WCB order in this case.

Id. at 24, citing Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 105–06 (2015).

The dissent also disagreed with the conclusion that the employer would be aiding and abetting the employee's possession, saying that theory was "unpersuasive" because the government would not be able to provide that the employer acted with the specific intent for a conviction for aiding and abetting, especially since it is necessary to show that an accomplice must "wish or desire to bring about the success of the principal in committing the underlying substantive offense in order to be punished as a principal." *Id*. at 25. Thus, in the view of the dissent, "whether the government would be able to prove the mens rea element is hypothetical, and hypotheticals do not give rise to preemption." *Id*.

All of the other cases that have addressed this issue have agreed with the dissent.[1] In doing so, they have agreed that speculation about possible federal prosecution could not establish conflict preemption. In doing so some courts have concluded that the risk of prosecution was speculative based on recent statements by the Department of Justice with respect to their enforcement policies that indicated an intent not to punish actions taken in compliance with State medical marijuana laws.[2] *Hager v. M&K Construction*, 225 A.3d 137, 147 (N.J. App. Div, 2020) ("A hypothetical conflict does not suffice to satisfy conflict preemption."), *cert. granted*, 229 A.3d 208 (May 12, 2020); *Appeal of Panaggio*, 205 A.3d 1099, 1104 (N.H. 2019) ("The board did not cite any legal authority for its conclusion, much less identify a federal statute that, under the circumstances of this case, would expose the insurance carrier to criminal prosecution; thus, we are left to speculate."); *Noll v. Lepage Bakeries, Inc.*, 2016 WL 10428768 (ME.Work.Comp.Bd. 2016) (Taking the view that the increasing number of states allowing medical use of marijuana and federal actions like the limits on use of federal funds for prosecution "militat[e] against Lepage's public policy and threat of prosecution arguments); *Lewis v. American General Media*, 355 P.3d 850, 858 (N.M. App. 2015) ("Employer's argument raises only speculation in view of existing Department of Justice and federal policy.").

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[1] The court in *Wright's Case*, 156 N.E.3d 161, 172-173 (2020) also seemed to believe that requiring a workers' compensation insurer to reimburse an employee for medical cannabis would be preempted by federal law, but did not reach that issue because it interpreted its law to exempt insurers from that requirement.

[2] The court was referring to the Ogden Memo, issued in October 2009 by former Deputy Attorney General David W. Ogden, which instructed U.S. Attorneys not to use "limited federal resources" to pursue prosecutions of "individuals whose actions are in clear and unambiguous compliance" with State medical marijuana laws, and the Cole Memo, issued in 2013 by former Deputy Attorney General James M. Cole which established eight marijuana enforcement priorities, such as preventing criminal enterprises from profiting from marijuana sales and preventing minors from obtaining marijuana and then directed federal prosecutors to focus on prosecuting those whose conduct violated the stated enforcement priorities rather than those using marijuana in compliance with state law. Also relevant is the Consolidated and Further Continuing Appropriations Act ("CFCAA"), which prohibited the DOJ from using congressionally-appropriated funds to prevent states from implementing medical marijuana laws. Jacob P. LaFreniere, *A Bet Against Abetting: Why Medical Marijuana Reimbursement Under Workers' Compensation Is Not A Federal Crime*, 125 Penn St. L. Rev. 223, 236-238 (2020).

The cases also reject arguments that reimbursement would put the employer or insurer in the position of breaking the law themselves or aiding and abetting a violation of the law by the employee. In the *Vialpando* case, the court said that "[e]mployer does not cite to any federal statute it would be forced to violate, and we will not search for such a statute." Other courts have explained that the challenged provisions do not require the employer to possess, manufacture, or distribute marijuana. *Hager*, 225 A.3d at 140, 148; *Appeal of Panaggio*, 205 A.3d 1099 (N.H. 2019) ("an order to reimburse will not make the insurance carrier 'possess, manufacture or distribute' a controlled substance"). The argument that an employer would be aiding and abetting the employee in the commission of a crime under the CSA has also been rejected. *Hager v. M&K Construction*, 225 A.3d 137, 148 (N.J. App. Div, 2020) (Reimbursement not aiding and abetting because the crime has already occurred and employer "cannot abet the completed crime"); *see also* Jacob P. LaFreniere, A Bet Against Abetting: *Why Medical Marijuana Reimbursement Under Workers' Compensation Is Not A Federal Crime*, 125 Penn St. L. Rev. 223, 243-251 (2020) (Necessary intent for aiding and abetting cannot be shown when the person acts under compulsion of law).

While the matter is not free from doubt, it is my view that the cases that have chosen to follow the dissent in *Bourgoin*, have the better argument. And while federal policies have continued to fluctuate, the bar on federal prosecutions of persons using medical marijuana has been continued, every two years, most recently on December 27, 2020.[3] In addition, while Attorney General Sessions withdrew the Ogden and Cole memos, Attorney General Barr is said to have taken a more lenient approach,[4] and Merrick Garland, who seems likely to be the next Attorney General has not yet formulated an approach.

Sincerely,

Kathryn M. Rowe
Assistant Attorney General

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davis16

[3] Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014); Consolidated Appropriations Act, 2016, Pub. L. No. 114-13, § 542, 129 Stat. 2242, 2332-33 (2015); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 537, 131 Stat. 135, 228 (2017); Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 537, 133 Stat. 13, 138 (2019); Consolidated Appropriations Act, 2021, Pub. L. No, 116-260, § 531. These provisions have been held to also prohibit the use of federal funds to prosecute individuals who are in compliance with state medical marijuana laws. *United States v. McIntosh*, 833 F.3d 1163, 1177 (9th Cir. 2016).

[4] *See* Sara Brittany Somerset, *Attorney General Barr Favors a More Lenient Approach to Cannabis Prohibition*, Forbes (Apr. 15, 2019, 5:00 AM).