

White Collar Law

Broad Prior Convictions Language in Pa. Marijuana Law

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In April, Pennsylvania joined 23 other states and the District of Columbia in legalizing marijuana for medical use.

While time will tell how the passage of medical marijuana affects all of us, it undoubtedly will be really great for the entities that are granted exclusive permits to engage in the business of medical marijuana. These permits will authorize so-called "medical marijuana organizations" to grow, process or distribute medical marijuana. Pennsylvania has authorized 25 grow/processing permits and 50 dispensary permits with each dispensary permittee empowered to open three locations for up to 150 dispensaries. These permits are expected to be extremely valuable and numerous applicants have already begun to jockey for them. Indeed, how and to whom these permits are awarded stands as a primary challenge for the successful implementation of medical marijuana in Pennsylvania.

Of course, the General Assembly could not include in the statute all of the details necessary to implement the medical marijuana

program. Instead, it delegated much of the detail to the Pennsylvania Department of Health. The implementation of the program is expected to take between 18 and 24 months. The department is already working on temporary regulations in order to meet an initial six-month requirement.

One detail that the General Assembly chose to include in the statute, however, was a delineation of the types of prior criminal convictions that would per se disqualify a person from any involvement in a medical marijuana organization. It imposed a complete ban for anyone convicted of "any criminal offense related to the sale or possession of illegal drugs, narcotics or controlled substances." This ban applies to the financial backers, principals and employees of any entity seeking a permit to become a medical marijuana organization.

The General Assembly understandably wished to send a clear message that only applicants of the highest character would be considered and therefore enacted such a drastic categorical preclusion. Unfortunately, such categorical approaches to nuanced issues rarely work well. For example, legislative attempts to get "tough on crime" have repeatedly led to unintended, unforeseen and unwanted consequences. Mandatory sentences and "three strikes you're out" laws sounded good to an electorate that was scared to go out at night, but in the end, these laws overcrowded our prisons and incarcerated people for unconscionably long periods for minor offenses. The same applies here, where the categorical prohibition of anyone with any prior drug related conviction—however minor—may sound smart, but in practice will prove less so.

The prohibition is too broad in three principal ways. First, it applies to any conviction, no matter its age. Second, it applies to convictions for mere possession. And, finally, it applies not only to convictions "for" the sale or possession of illegal drugs, but also to convictions that "relate to" such offenses. If the prohibition is not reined in, it could stop individuals who are otherwise well-qualified from involvement in a medical marijuana organization.

There is simply no reason to treat a crime that occurred in the distant past the same as one that occurred recently. Indeed, our system of criminal justice is built on the notion that offenders are punished, that they are rehabilitated and that they can go on with a productive life. Thus, at the least, the prohibition should be adjusted so that only convictions less than 10 years old would act as an absolute bar; older convictions would be considered on a case-by-case basis.

Convictions for simple possession should not lead to an automatic exclusion. Should a 50-year-old, successful business person who has led an exemplary life for the past 30 years and who would otherwise make a terrific owner of a medical marijuana organization be automatically disqualified because he or she was caught passing a joint at a concert 30 years earlier? Probably not. And that is why only distribution convictions should lead to automatic prohibition, whereas possession offenses should be considered on their individual facts and circumstances.

What does it mean for a conviction to "relate to" the sale or possession of drugs? Does it include pleading guilty to a misdemeanor possession of drug "paraphernalia?" Does it include a summary offense citation for underage drinking? What if the underage drinker also possessed a small amount of marijuana (but was not charged with possession)? What if the underage drinker did not possess any drugs, but others in the group did? What about a driver stopped for driving under the influence who had mixed a glass of wine with prescription painkillers? The phrase "related to" is not defined in the statute, has no specific legal meaning and has potentially unfettered applicability. For these reasons, the absolute prohibition should apply only to convictions "for" the specified conduct and not convictions "related to" such conduct.

What are the available solutions? First, while the Pennsylvania Department of Health could not "interpret" the clear statutory language to fix all of the issues identified above, it could at least define some key terms in a way that limits the scope of the preclusion. For example, the department could narrowly define what

it means for a conviction to "relate to" drug possession or sale. It could also delineate the extent to which the preclusion of a person who has been convicted of a disqualifying crime would apply to his or her family members and spouse. Finally, it could clarify whether prior "convictions" include guilty or nolo contendere pleas, or alternative dispositions.

The most direct way to deal with this overly broad statutory provision is for the General Assembly to revise it. Instead of excluding anyone "convicted of any criminal offense related to the sale of possession of illegal drugs, narcotics, or controlled substances," the law should automatically exclude only those "convicted within the prior 10 years for the sale of illegal drugs, narcotics, or controlled substances." Other convictions that "relate to" drug possession or sale would not lead to automatic prohibition, but would be considered as part of the overall application process.

It is critical that licenses be awarded to the best qualified applicants. As it currently is written, the overly broad prohibition could exclude highly qualified individuals from helping to make Pennsylvania's medical marijuana industry a major success. •

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