THE PENNSYLVANIA BAR ASSOCIATION

Quarterly

JULY 2024 y VOLUME XCV, NO. 3

Medical Marijuana: Legislation and Litigation

BY: MICAH BUCY and JUDITH CASSEL,[1] Dauphin County Members of the Pennsylvania Bar

ABSTRACT

Despite being illegal at the federal level, in 2016 Pennsylvania legalized medical marijuana to allow Pennsylvanians to lawfully obtain and use marijuana to treat serious medical conditions within a highly regulated industry. By nearly all accounts, Pennsylvania's medical marijuana program has far exceeded expectations. This article first addresses the major developments in marijuana law at the federal level before examining how it has evolved over the past several years in Pennsylvania.

TABLE OF CONTENTS

1 Judith Cassel and Micah Bucy are lawyers at Hawke McKeon & Sniscak LLP d/b/a Cannabis Law PA in Harrisburg. They were one of the earliest law firms in Pennsylvania to represent medical marijuana applicants and permittees in 2016. Since medical marijuana was legalized in Pennsylvania, they have represented Pennsylvania medical marijuana dispensaries, grower/processors, laboratories, clinical registrants, physicians, healthcare facilities, security firms and other ancillary businesses, assisting them with company formation, permit acquisitions, regulatory compliance, administrative and civil litigation, and transactional activities. Additionally, they have successfully represented Pennsylvania industry stakeholders in multiple original jurisdiction actions before the Commonwealth Court challenging the Department of Health's implementation of the medical marijuana program. They have represented permittees in regulatory enforcement actions, and have also represented medical marijuana patients pro bono in both state and federal courts. Their practice has grown, and they now represent and/or consult with hemp and medical and adult-use marijuana companies nationwide.

Through legislative amendments and substantial litigation, Pennsylvania's 2016 Medical Marijuana Act now provides a clearer path for patients, stakeholders, employees, probationers, and police.

I. FEDERAL DEVELOPMENTS

Despite marijuana still being federally illegal as a Schedule I substance under the Controlled Substances Act,[2] there have been recent developments at the federal level that appear to chip away at what was, for more than 75 years, an inviolable federal prohibition against marijuana.

Since the 2002 Ninth Circuit decision in *Conant v. Walters* found physicians had a protected First Amendment right to recommend marijuana, the U.S. Department of Justice (DOJ) has not prosecuted a single physician solely for the doctor's advice to patients that marijuana may relieve symptoms.[3] Since 2009, the DOJ has exercised prosecutorial restraint by not pursuing companies or individuals that grow, process, sell, use, or recommend medical marijuana in compliance with a comprehensive state regulatory system such as Pennsylvania has in place.[4] In 2015, Congress attached a rider to an omnibus budget bill that is now commonly known as the Rohrbacher-Farr amendment that precludes the DOJ from expending resources to prosecute medical marijuana industry participants so long as their participation is in accordance with state laws.[5] In 2021, Justice Thomas questioned whether the Court's 2005 holding in *Gonzales v. Raich*,[6] which found that the Commerce Clause extended to permit the federal government's regulation of wholly intra-state marijuana activities, could still be justified given the federal government's approach over the previous 16 years.[7]

In 2022, President Biden directed the Department of Health and Human Services (DHHS) and the Attorney General to "expeditiously" review how marijuana is scheduled under federal law.[8] On August 29, 2023, DHHS issued a 252-page report that recommended re-scheduling marijuana from Schedule I to Schedule III under the Controlled Substances Act.[9] This significant recommendation acknowledges that marijuana has some medical benefits and can be safely used under the care of a physician.[10] Importantly, it would detach marijuana from the stigma and the penalties associated

2 21 U.S.C. § 812.

3 Conant v. Walters, 309 F.3d 629 (9th Cir. 2002).

4 U.S. Dep't of Justice, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana* (Oct. 19, 2009) ("Ogden Memo"); U.S. Dep't. of Justice, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013) ("Cole Memo"); U.S. Dep't of Justice, *Marijuana Enforcement* (Jan. 4, 2018) ("Sessions Memo"). Although the Sessions Memo expressly rescinds the Ogden and Cole Memos, there were no material or practical changes in policy after the Sessions Memo was issued under either President Trump or President Biden.

5 Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2015).

6 545 U.S. 1 (2005).

7 Standing Akimbo, LLC v. United States, 141 S. Ct. 2236, 2236—2238 (2021) (Thomas, J., Statement respecting the denial of certiorari) ("Suffice it to say, the Federal Government's current approach to marijuana bears little resemblance to the watertight nationwide prohibition that a closely divided Court found necessary to justify the Government's blanket prohibition in *Raich*.").

8 *Statement from President Biden on Marijuana Reform* (Oct. 6, 2022).

9 U.S. Dep't of Health and Human Services, *Basis for the Recommendation to Reschedule Marijuana Into Schedule III of the Controlled Substances Act* (Aug. 29, 2023).

10 *Id*.

with other Schedule I substances such as heroin, LSD, and methamphetamine. On December 22, 2023, President Biden pardoned federal convictions for simple possession of marijuana because, as he stated, "convictions for simple possession of marijuana have imposed needless barriers to employment, housing, and educational opportunities."[11] The process of taking marijuana permanently off of Schedule I, where the use or possession of listed substances is a federal crime, is now in the hands of Attorney General Garland who oversees the Drug Enforcement Agency (DEA) and possesses the power to re-schedule marijuana without any legislative act by Congress.[12] Because President Biden has openly campaigned on marijuana reform in the 2024 election cycle, it was widely expected that the DEA would re-schedule marijuana and on April 30, 2024, news first broke that the DEA would do just that.[13]

II. PENNSYLVANIA LEGISLATION

In 2016, Pennsylvania became the 24th state to legalize medical marijuana.[14] The Medical Marijuana Act ("MMA" or "Act") tasked the Department of Health ("Department") to implement and oversee Pennsylvania's medical marijuana program.[15] The Department created the Office of Medical Marijuana (recently renamed the Bureau of Medical Marijuana) (the Bureau) to bring the program online.[16] The MMA grants legal access to medical marijuana for Pennsylvania residents who are suffering from a "serious medical condition."[17] To legally obtain medical marijuana, a patient must be certified by a registered practitioner[18] to have a serious medical condition and must possess a valid medical marijuana ID card from the Bureau.[19] On the supply side, there are two distinct programs: the Chapter 6 (commercial)[20] and the Chapter 20 (clinical research)[21] programs. For the Chapter 6 program, the Bureau opened two extremely competitive application windows during which hundreds of applicants vied for 25 grower/processor permits and 50 dispensary permits. Each dispensary permit allowed the holder to have three locations.[22] During these two windows of opportunity, all of

11 A Proclamation on Granting Pardon for the Offense of Simple Possession of Marijuana, Attempted Simple Possession of Marijuana, or Use of Marijuana. White House Briefing Room, Dec. 22, 2023.

12 21 U.S.C. § 811(a)(2) (" … the Attorney General may by rule—remove any drug or other substance if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule").

13 AP News, *US poised to ease restrictions on marijuana in historic shift, but it'll remain a controlled substance* (April 30, 024), https://apnews.com/article/marijuana-biden-dea-criminal-justice-pot-f833a-8dae6ceb31a8658a5d65832a3b8.

14 The Guardian, *Pennsylvania takes states allowing medical marijuana to new high*, The Guardian (Apr. 17, 2016), https://www.theguardian.com/society/2016/apr/17/pennsylvania-legalizes-medical-marijuana.

15 35 P.S. §§ 10231.101-10231.2110.

16 28 Pa. Code § 1141a.21 (definition of "Office").

17 35 P.S. § 10231.301(a). Originally 17 conditions were authorized to be treated by medical marijuana but the total conditions has since been increased to 24. https://www.health.pa.gov/topics/programs/Medical%20Marijuana/Pages/Patients.aspx

18 A practitioner is a physician who is registered with the department and who has successfully completed a medical marijuana course as required under § 10231.301(a)(6).

19 35 P.S. § 10231.303.

20 *Id*. at § 10231.601.

21 *Id*. at § 10231.2000.

22 *Id.* at § 10231.616.

the permits initially provided for in the MMA were issued.[23] The MMA provided for a different type of permit to be issued under Chapter 20 than was provided for under Chapter 6. Under the Chapter 20 program, a vertically integrated medical marijuana producer (a Clinical Registrant) was paired with a Pennsylvania medical school/hospital (an Academic Clinical Research Center) to engage in medical marijuana sales, research, and studies.[24] Initially, the MMA provided for eight of these "super permits" to be awarded, with each permit allowing the holder one grow and six dispensary locations.

In the past eight years the MMA has been revised on three different occasions. The first amendment, in June 2018, occurred just two years after the initial enactment.[25] Known as the Chapter 20 Amendment, it exclusively concerned the Chapter 20 research program and was entirely reactionary to a lawsuit challenging the Department's implementation of the research program. In April 2018, the Department published temporary regulations that effectively rendered a Clinical Registrant as a super-permittee authorized to hold six dispensary locations and de-emphasized the research aspect of the Chapter 20 program, all while essentially delegating the selection of Clinical Registrants to the private Academic Clinical Research Center.[26] A coalition of existing Chapter 6 permittees that wanted an opportunity to participate in the Chapter 20 program but were shut out from the process, sued the Department in Commonwealth Court to enjoin the implementation of the Chapter 20 permitting process.[27] After the coalition obtained a preliminary injunction to stop the Department's implementation, the General Assembly enacted the Chapter 20 Amendment that mooted the permittees' lawsuit. Specifically, the Chapter 20 Amendment amended the MMA to provide that: (i) the Department is required to approve any Clinical Registrant, and (ii) a Clinical Registrant's grower/processor operation may sell its medical marijuana products to Chapter 6 permittees and directly to patients.[28] In short, the legislature eliminated the delegation problem and expressly provided that Chapter 20 permittees could compete with Chapter 6 permittees.

The second amendment to the MMA, in June 2021, is commonly referred to within the industry as Act 44.[29] This amendment was more comprehensive and reflected lessons learned over the first five years of the program and some of the realities of the COVID-19 pandemic. The COVID-19-inspired amendments included: (i) allowing patients to be certified by Department-approved practitioners via telehealth when previously an in-person certification process was required;[30] (ii) permitting patients to purchase a 90-day supply of medication rather than the pre-COVID 30-day supply;[31] (iii) allowing dispensaries to have pharmacists available in-person or through a remote

23 See, *Phase I Grower/Processor Permittees and Facility Locations By Region* and *Phase I Dispensary Permittees and Facility Locations By Region*, https://www.health.pa.gov/topics/programs/Medical%20Marijuana/Pages/Phase-I.aspx (last visited Apr. 5, 2024); Phase II Grower-Processor Permittee Facility Locations By Region and Phase II Dispensary Permittee Facility Locations by Region, https://www.health.pa.gov/topics/programs/Medical%20Marijuana/Pages/Phase-II.aspx (last visited Apr. 5, 2024).

24 35 P.S. § 10231.2003.1.

25 Act of June 22, 2018 (P.L.322, No.43).

26 48 Pa.B. 1508 (Mar. 17, 2018) (promulgating 28 Pa. Code §§ 1210.21-1210.37).

27 AES Compassionate Care, LLC v. Levine, 233 M.D. 2018 (filed Apr. 10, 2018).

28 35 P.S. § 10231.2002.

29 Act of June 30, 2021 (P.L.210, No.44).

30 35 P.S. § 10231.103, as amended (amending definition of "continuing care").

31 *Id*. at § 10231.405, as amended.

video means to conduct consultations with patients when previously a pharmacist had to be on-site at the dispensary;[32] (iv) authorizing curbside dispensing of medical marijuana at the dispensary's location (including drive-thru) when, prior to COVID, all dispensing was required to occur inside the dispensary;[33] and (v) changing the definition of "caregiver" to permit certain healthcare workers and healthcare facilities to serve as caregivers under the MMA and authorizing individuals to serve as caregivers for more than five patients.[34]

In addition to these amendments dictated by the COVID pandemic, Act 44 made other significant amendments to the MMA. It added two qualifying medical conditions – cancer remission therapy and neuropathies of the central nervous system – to the MMA's definition of "serious medical conditions."[35] But more than that, due to Act 44, the legislature does not have to amend the MMA each time a qualifying condition is to be made eligible for medical marijuana. Instead, the Medical Marijuana Advisory Board has the power to recommend adding medical conditions that are eligible to be treated with medical marijuana, and Act 44 authorizes the Department's Secretary to approve and effectuate those recommendations.[36] Additionally, Act 44 permits grower/processors to seek approval from the Bureau to use hemp-derived additives such as CBD in specific products as long as the hemp is sourced from Pennsylvania-licensed hemp growers and processors.[37] This was intended so that permit-licensed hemp growers/processors would have the opportunity to participate in the medical marijuana industry and in so doing bring down the costs of certain medical marijuana products to patients. That goal of lowering patient costs was also embodied in Act 44's authorization that grower/processors could remediate marijuana that initially failed yeast and mold testing, albeit only for topical use.[38] Act 44 also increased both the number of Academic Clinical Research Centers and the number of Clinical Registrants from 8 to 10.[39] Finally, Act 44 scrubbed references to the federal Controlled Substances Act to ensure that Pennsylvania's medical marijuana program will continue independently of the outcome of federal rescheduling efforts.[40]

Since the program sold its first dose of medical marijuana in 2018, the supply side of the industry has consolidated significantly with the majority of Chapter 6 permits, both grower/processor and dispensaries, being operated by multi-state experienced marijuana operators, commonly referred to as "MSOs." This has left a minority of Pennsylvania grower/processors and dispensaries as truly independent operators. While most MSOs have a vertical operation, the majority of independent operators do not. The result has been that many independent grower/processors have had no dispensary outlets for their products; similarly, independent dispensaries had no supply source for products to sell, thus making continued operations nearly impossible for these few independent operators. In 2023, the General Assembly enacted Act 63 which

32 *Id*. at § 10231.801(b), as amended.
33 *Id*. at § 10231.802(a)(1), as amended.
34 *Id.* at § 10231.103, as amended (amending definition of "caregiver").
35 *Id*. at § 10231.103, as amended (amending definition of "serious medical condition").
36 *Id*. at §§ 10231.1201-10231.1202, as amended.
37 *Id*. at § 10231.702(a)(5), as amended.
38 *Id*. at § 10231.702(a)(2.1), as amended.
39 *Id*. at § 10231.2002(a)(1), as amended.
40 *Id*. at § 10231.2109, as amended.

seeks to resolve these inequities.[41] Specifically, Act 63 provides truly independent, standalone grower/processors the right to apply for a dispensary permit and for a truly independent dispensary to apply for a grower/processor permit.[42] The Act 63 applicants will have one key advantage over the original Chapter 6 grower/processors - fewer limitations on where they may locate their facilities.[43] In contrast, Chapter 6 grower/processor permits issued in Phases I and II of the Department's application processes had to identify a specific geographical region, and Chapter 6 dispensary applicants had to specify the county in which to place their dispensaries, and only certain counties were initially authorized to have a dispensary.[44] However, a permit under Act 63 will come with additional scrutiny that other Chapter 6 permittees did not have in order to ensure that the intent of Act 63 – to make independent operators viable – will not be undermined by independent operators flipping their Act 63 permits to an MSO.[45] The Department announced that the application process, which is essentially a non-competitive process, would commence on April 12, 2024, with applications being accepted by the Department from May 12 through June 12, 2024.[46]

III. PENNSYLVANIA LITIGATION

Because the legalization of medical marijuana in 2016 flipped longstanding legal and policy positions on their heads, there have been, not surprisingly, important legal decisions concerning criminal law, medical marijuana patient rights, and medical marijuana industry regulatory challenges. Some of the more significant decisions are summarized below.

A. Criminal Law

In 2019, in *Commonwealth v. Jezzi,*[47] the Superior Court addressed the interplay of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act (Pa CSA)[48] and the MMA. Tony Jezzi sought to have his marijuana-related drug convictions overturned on the theory that marijuana's Schedule I classification under the PA CSA was invalidated by the MMA. He argued that the Pa CSA conflicts with the MMA; because marijuana was legalized as a medical treatment, it no longer fit the definition of a Schedule I substance under the Pa CSA.[49] In rejecting his arguments, the court examined the General Assembly's declarations of policy for the MMA and found that the MMA did not "declare that marijuana is safe and effective for medical use."[50] In-

41 Act of December14, 2023 (P.L.453, No.63).

42 35 P.S. § 10231.617.

43 *Id.* at § 10231.618 (providing no restrictions or limitations on location of a dispensary facility issued under Act 63).

44 *Id*. at § 10231.603(d).

45 *Id*. at § 10231.103 (defining independent operators as those that are not "materially the same" as another medical marijuana organization and which has not undergone a "change in control transaction").

46 Pennsylvania Department of Health Application for Approval of an Act 63 of 2023 Permit Instructions.

47 208 A.3d 1105 (Pa. Super. 2019).

48 35 P.S. §§ 780-101-780-144.

49 35 P.S. § 780-104 – Schedules of controlled substances

(1) Schedule I--In determining that a substance comes within this schedule, the secretary shall find: a high potential for abuse, no currently accepted medical use in the United States, and a lack of accepted safety for use under medical supervision.

50 *Jezzi,* 208 A.3d at 1111.

stead, the court found that the MMA is a temporary remedial measure to provide access pending additional research into marijuana's medical efficacy.[51] The *Jezzi* court further examined Section 304 of the Act, which provides that except as used in accordance with the Act, marijuana remains unlawful.[52] Essentially, the *Jezzi* court held that medical marijuana is different than marijuana.[53] The MMA provides "a very limited and controlled vehicle for the legal use of medical marijuana by persons qualified under the MMA." The *Jezzi* court made clear that use of marijuana outside of the Act – use by individuals not certified as medical marijuana patients – remains unlawful.

In 2020, the Pennsylvania Supreme Court decided *Gass v. 52nd Judicial District, Lebanon Co.*, a King's Bench Petition, addressing whether medical marijuana patients who are also probationers may use medical marijuana while on probation.[54] In September 2019, the Lebanon County Court of Common Pleas announced a medical marijuana policy that prohibited the "active use of medical marijuana, regardless of whether the defendant held a medical marijuana card, while the defendant is under supervision" by the county probation office. Lebanon County's justification for the policy was that the county probation office had experienced difficulties in monitoring probationers who used medical marijuana.[55] Several probationers sued the Lebanon County Court asserting that the probation policy conflicted with Section 2103 of the Act, which provides that no patient "shall be subject to arrest, prosecution or penalty in any manner, or denied any right or privilege … solely for lawful use of medical marijuana."[56] The *Gass* Court found that probationers are eligible to be patients under the Act and are thereby protected by the immunity provision of Section 2103.[57] Ultimately, after looking to other sections of the Act that concern persons with criminal records, the *Gass* Court found that if the legislature had wanted to make the immunity provision inapplicable to probationers it would have expressly done so.[58] The *Gass* Court also rejected, on federalism grounds, the Lebanon County Court's argument that the general conditions imposed on probationers which require compliance with federal laws – under which marijuana remains illegal – require prohibition.[59] At the end of its decision, the *Gass* Court made clear that state courts are permitted to "make reasonable inquiries into the lawfulness of a probationer's use of medical marijuana," but that before hauling a probationer that uses medical marijuana into court, a probation officer should have "some substantial reason" to believe the probationer's use is unlawful under the Act.[60]

In *Commonwealth v. Barr*, the Pennsylvania Supreme Court agreed to review whether, given the Act's passage, the "plain smell" doctrine justifies warrantless searches of vehicles.[61] At issue in this case was a traffic stop that evolved into a search of the defendant, Timothy Barr II's, vehicle which yielded a small amount of marijuana

51 *Id.* at 1111, 1114.
52 *Id.* at 1112.
53 "We first observe that medical marijuana is not listed in the CSA as a Schedule I substance, only marijuana is listed." *Id.* at 1115.
54 232 A.3d 706 (Pa. 2020).
55 *Id*. at 708.
56 35 P.S. § 10231.2103(a)(1).
57 *Gass*, 232 A.3d at 712.
58 *Id*. at 713.
59 *Id*. at 714-715.
60 *Id*. at 715.
61 266 A.3d 25 (Pa. 2021).

and a handgun.[62] In the trial court, Barr moved to suppress the evidence because the search was entirely premised on the smell of marijuana, and, because marijuana was legal under the Act, the mere smell of burnt marijuana did not provide probable cause to conduct a warrantless search of the vehicle. The trial court agreed with Barr and suppressed the evidence found during the officer's search.[63] The Superior Court would have vacated and remanded the matter for reconsideration.[64] However, the Supreme Court took up this case and in very clear terms found that "the [Act] makes abundantly clear that marijuana no longer is *per se* illegal in this Commonwealth … Accordingly, the smell of marijuana alone cannot create probable cause to justify a search under the state and federal constitutions."[65] However, the *Barr* Court did agree that probable cause is determined under a totality of the circumstances test, and that the smell of burnt marijuana, in combination with other factors, may give rise to probable cause.[66]

In *Commonwealth v. Dabney*, in 2022, a panel of the Superior Court ruled that a medical marijuana patient lawfully under the influence of medical marijuana may nevertheless be found guilty of driving under the influence (DUI) under the Vehicle Code.[67] The driver, Franklin Dabney, was pulled over for speeding, and the officer smelled marijuana emanating from the inside of the vehicle.[68] Upon questioning, Dabney produced his medical marijuana card, but after sobriety tests were administered, he was arrested for suspected DUI and later tested positive for marijuana compounds and metabolites.[69] Dabney was convicted of DUI under Section 3802 of the Vehicle Code, which makes it illegal to drive if a person has *any* amount of a Schedule I substance in their system.[70] On appeal, Dabney challenged the conviction on two bases: (i) that his lawful use of medical marijuana prevents prosecuting him for DUI and (ii) marijuana is not a Schedule I substance in Pennsylvania. The court rejected both arguments. As to Dabney's first argument, the court found that the Vehicle Code and the Pa Controlled Substances Act[71] make it illegal to drive with any amount of a Schedule I substance,

62 *Barr*, 266 A.3d at 30.
63 *Id*. at 31.
64 *Id*. at 34.
65 *Id*. at 41.
66 *Id*. at 41-42.
67 274 A.3d 1283 (Pa. Super. 2022).
68 *Dabney*, 274 A.3d at 1285-86.
69 *Id.*
70 72 Pa.C.S. § 3802(d)(1) provides,

> (d) "An individual may not drive, operate or be in actual physical control of the movement of a vehicle under any of the following circumstances:
>
> (1)There is in the individual's blood any amount of a:
>
> (i) Schedule I controlled substance, as defined in the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act (Pa Controlled Substances Act);
>
> (ii) Schedule II or Schedule III controlled substance, as defined in the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act, which has not been medically prescribed for the individual; or
>
> (iii) metabolite of a substance under subparagraph (i) or (ii).

71 35 P.S. §§ 780-101-144.

and that marijuana, even for medical purposes, is a Schedule I substance. Specifically, the court found that the MMA offers certain protections for medical marijuana users, including acquisition, transportation, sale, possession, and consumption, but it offers no protection for driving with marijuana in one's blood, and, therefore, the conviction was proper.[72] Further, the court affirmed its prior decision in *Jezzi v. Commonwealth*[73] by noting that because Barr tested positive for marijuana while driving, his use of marijuana was unlawful.

B. Patient Rights and Government Bene□ts

In an interlocutory panel decision in 2020, in *HACC v. Pa. Human Relations Comm'n*, the Commonwealth Court held that the Pennsylvania Human Relations Act (PHRA) and Pennsylvania Fair Educational Opportunities Act (PFEOA) do not require a reasonable accommodation be afforded for medical marijuana users.[74] In *HACC*, Holly Swope, a nursing student that lawfully used medical marijuana, was dismissed from HACC's nursing program because she failed a required annual drug test. In its decision, the court pointed to Section 510 of the MMA which provides that employees "may be prohibited by an employer from performing any duty which could result in a public health or safety risk while under the influence of medical marijuana."[75] The court determined that this provision would apply to Swope who was a nurse in the intensive care unit.[76] The court was also compelled by the fact that the MMA did not expressly amend the PHRA or the PFEOA to provide such an accommodation for medical marijuana.[77] Finally, the court ruled that the Human Relations Commission's interpretation of the PHRA that would have granted an accommodation was not entitled to deference because it would have required the court to rewrite part of the MMA to include provisions the General Assembly omitted.[78] In a concurrence, Judge Covey urged the legislature to amend both the PHRA and PFEOA to account for the MMA so that the benefits for medical marijuana patients "are not illusory or applicable in only limited circumstances."[79]

In 2021, the Superior Court established a private right of action under the MMA in *Palmiter v. Com. Health Systems, Inc*.[80] In an interlocutory appeal, the court held that there is an implied private right of action to enforce the protections from discrimination found in Section 2103 in the Act.[81] When Pamela Palmiter applied for a new position at Commonwealth Health Systems (the hospital), the hospital deemed her to be a new employee although she had worked there for more than a year. As a new employee, Palmiter was required to undergo a drug test prior to starting work.[82] She was lawfully using medical marijuana at the time of the test, informed the testing facility of this fact, and, as expected, failed the drug test. The hospital rescinded her employment

72 *Dabney*, 274 A.3d at 1291-92.
73 208 A.3d 1105 (Pa. Super. 2019).
74 245 A.3d 283 (Pa. Cmwlth. 2020).
75 *HACC*, 245 A.3d at 292-93.
76 *Id.*
77 *Id*. at 293-95.
78 *Id*. at 295-98.
79 *Id*. at 298-99.
80 260 A.3d 967 (Pa. Super. 2021).
81 35 P.S. § 10231.2103.
82 *Palmiter*, 260 A.3d at 969-70.

offer.[83] She filed a lawsuit asserting various claims, including wrongful discharge. The hospital filed preliminary objections, asserting, among other matters, that the MMA does not provide for a private right of action and that Palmiter had failed to state a claim for wrongful discharge. The trial court overruled those preliminary objections.

At the hospital's request, the trial court certified its interlocutory order for immediate appeal, and the Superior Court granted review.[84] After conducting an analysis of the Act, the Superior Court determined that the legislature intended to create a private remedy for violations of Section 2103 of the Act. Specifically, it found that the Department of Health does not have exclusive enforcement authority over the Act—that there is some room for employers to enforce medical marijuana in the workplace and for some agencies to regulate marijuana in certain settings, such as schools and day cares.[85] The court found that patients are a focal point of the Act and determined that if patients are to have protections, the legislature must have intended that patients could enforce those protections.[86] The court also determined that Palmiter had adequately pled facts supporting a wrongful discharge action.[87]

In 2020, the Commonwealth Court, sitting *en banc* in *Pittsburgh Water and Sewer Auth. v. Unemployment Comp. Bd. of Review,* affirmed the Board's decision to grant unemployment benefits to a former authority employee, Terrence Suber.[88] The court started its analysis with the unemployment compensation law which provides that a claimant is ineligible for benefits if termination was because of a "failure to submit and/or pass a drug test conducted pursuant to an employer's established substance abuse policy."[89] The court then noted that the employer is required to first show that it had an "established" drug policy, and second, that the claimant violated the policy.[90] In applying the facts to the law, the court agreed with the Board that the employer did have a written policy that permitted drugs prescribed by physicians to be used on work premises or during working hours.[91] It further found that the employer's written policy provided that if a drug test returned a positive result, the employee would have 72 hours to provide medical documentation to justify the positive result, and, if such documentation was provided, the result would be reported as negative.[92]

In this case, Suber lawfully used medical marijuana under the MMA and tested positive for it.[93] In accordance with the employer's policy, he forwarded a copy of his medical marijuana ID card but was nevertheless discharged.[94] The Board found that Suber was not discharged in accordance with the employer's written policy and thus found that he was entitled to benefits.[95] The court affirmed the Board's findings and found that the employer's policy was ambiguous as to whether the employee knew that

83 *Id*. at 970.
84 *Id.*
85 *Id*. at 974.
86 *Id*. at 974-75.
87 *Id*. 976-77.
88 242 A.3d 704 (Pa. Cmwlth. 2020) (*en banc*).
89 *Pittsburgh Water and Sewer Auth.*, 242 A.3d at 706-07; 43 P.S. § 802(e.1).
90 *Pittsburgh Water and Sewer Auth.*, 242 A.3d at 707.
91 *Id.* at 708.
92 *Id*. .
93 *Id*. at 705.
94 *Id*..
95 *Id*. at 707.

medical marijuana use would result in termination.[96] This case stands for the proposition that, in cases involving medical marijuana, the written policy of the employer is paramount.

In a 2-1 panel decision in 2021, the Commonwealth Court in *Cease v. Housing Authority of Indiana County* held that the federal Quality Housing and Work Responsibility Act (QHWRA), which sets standards for applicant admission into federal housing programs, does not require denial of a new applicant because she uses medical marijuana.[97] Mary Cease applied for admission into the Section 8 housing program administered by the Housing Authority of Indiana County, but she was denied solely on the basis that she used medical marijuana and QWHRA prohibited admission to anyone "illegally using a controlled substance."[98] After the Court of Common Pleas of Indiana County affirmed the local agency's denial, Cease filed an appeal in the Commonwealth Court. The Commonwealth Court reversed in part, making two findings. First, the QHWRA required the Authority to "establish standards that prohibit admission to the program," as opposed to what the Authority did in this case, automatic denial. In coming to this conclusion, the court contrasted the statutory language in Section 13661 of the QWHRA that provided for the establishment of standards against the statutory language in Section 13663 that did specifically call for automatic denial of admission to any applicant who is required to register as a sex offender.[99] Second, the Commonwealth Court found that neither the federal Controlled Substances Act nor QWHRA acted to preempt the MMA because the QWHRA's "illegally using a controlled substance" was ambiguous given that Cease's use was illegal under federal law but legal under state law. Because criminal law is primarily a matter for the states, preemption did not apply.[100] The court reversed part of the lower court's decision and required the Authority to establish "fair and reasonable standards for determining in what circumstances admission to Section 8 housing is prohibited for an applicant who is legally using medical marijuana under state law."[101]

In a 5-2 decision in 2023, the Commonwealth Court decided in *Fegley v. WCAB (Firestone Tire & Rubber)* that Pennsylvania employers are required under Pennsylvania workers' compensation (WC) law to reimburse medical marijuana expenses that are related to workplace injury.[102] Teresa Fegley had sought reimbursement of medical marijuana expenses to treat a work-related injury sustained decades earlier.[103] The WC Judge and the WC Board both denied reimbursement, and Fegley sought review by the Commonwealth Court.[104] The Commonwealth Court reversed and ordered that the employer reimburse Fegley for her medical marijuana expenses. The court first found that an employer is an "insurer" for purposes of the WC law.[105] However, it then ruled that while the MMA prohibits an insurer or health plan from being compelled to pro-

96 *Id*. at 708.
97 247 A.3d 57 (Pa. Cmwlth. 2021).
98 *Cease*, 247 A.3d at 59-61.
99 *Id*. at 62.
100 *Id*. at 62-63.
101 *Id*. at 65. Petition for Allowance of Appeal from the Order of the Commonwealth Court Denied, 263 A.3d 243 (Pa. 2021).
102 291 A.3d 940 (Pa. Cmwlth. 2023).
103 *Fegley*, 291 A.3d at 944.
104 *Id*.
105 *Id*. at 949.

vide "coverage" for medical marijuana, it contains no language that would prohibit an insurer from repaying a claimant's out-of-pocket expenses.[106] In short, because the MMA does not preclude it and the WC law requires out-of-pocket expenses to be reimbursed, the court found the medical marijuana expenses should be reimbursed. To further support this decision, the court pointed to Section 2103 of the MMA which prevents medical marijuana patients from being denied a right or privilege based solely on their use of medical marijuana.[107] Given that the legislature prohibited medical marijuana patients from being punished due to their use of medical marijuana, it would be an absurd result to render them ineligible for WC reimbursement.[108] Finally, the court rejected the employer's claim that reimbursing medical marijuana costs would require it to violate federal law. The court found the argument unpersuasive because reimbursing medical marijuana would not require violation of the federal Controlled Substances Act.[109]

C. Regulatory Challenges

In 2018, the Commonwealth Court was presented with its first opportunity to weigh in on the Department's implementation of the MMA in *Keystone ReLeaf, LLC v. Dep't of Health*.[110] Keystone ReLeaf was an unsuccessful grower/processor and dispensary permit applicant and sought to skip the Department's prescribed administrative review process to have the Commonwealth Court invalidate the Department's permitting process in its entirety.[111] In sustaining the Department's and intervenor permittees' preliminary objections, the court acknowledged that Keystone ReLeaf had "raised some troubling allegations regarding the permitting process,"[112] but held that Keystone Releaf needed to first exhaust its administrative remedies before the Commonwealth Court could opine on the merits and that it had not raised a facial constitutional challenge.[113] The Commonwealth Court has not yet had another opportunity to issue a decision concerning the Department's application process although there are still cases that could come before the court, even six years after the Phase II application process ended.

As discussed *supra*, in 2018, in *AES Compassionate Care, LLC v. Levine,* the Commonwealth Court was presented with a challenge to the Department's fidelity to the MMA's Chapter 20 research program.[114] After the court issued a preliminary injunction halting the Department's flawed implementation, the legislature amended the MMA which effectively mooted the legal challenge.

The next regulatory challenge occurred in 2022. This challenge, *Medical Marijuana Access & Patient Safety, Inc. v. Klinepeter*, involved the Department's recall of hundreds of thousands of vaporized medications, one of the most popular forms of medical marijuana.[115] Beginning in November 2021, the Department issued an email to all permittees stating that the Department was initiating a "review of all vaporized

106 *Id*. at 950-51.
107 *Id*. at 951-52.
108 *Id.* at 952.
109 *Id*. at 952-53.
110 186 A.3d 505 (Pa. Cmwlth. 2018).
111 *Keystone ReLeaf, LLC*, 186 A.3d at 512-13.
112 *Id*. at 519 n.16.
113 *Id.* at 519.
114 AES Compassionate Care, LLC v. Levine, 233 M.D. 2018.
115 Pa. Cmwlth. No. 58 M.D. 2022, June 2, 2022 (Wojcik, J.)

medical marijuana products containing additional ingredients," and it required that all grower/processors resubmit applications to produce vaporization products with added ingredients, even if the Department had previously approved them.[116] This investigation proceeded for approximately two-and-a-half-months with the only communication from the Department directed to patients advising them that vaporization products (which the Department had previously approved) may not be safe for inhalation.[117] Then, on February 4, 2022, the Department sent two emails: one to grower/processors and dispensaries recalling all vaporized products that contained botanically derived terpenes (i.e., flavoring ingredients derived from produce and plants) and a second email to patients notifying them of the same.[118] The Department's justification for the recall was that the botanically derived terpenes had not been approved for inhalation by the U.S. Food and Drug Administration (FDA).[119]

A coalition of industry stakeholders filed a lawsuit challenging the Department's email recall and sought a preliminary injunction. The plaintiffs asserted that the Department was enforcing a nonsensical standard since the FDA does not approve ingredients used in the inhalation of marijuana due to its illegal status under the CSA. After a one-day hearing during which the Department presented no witnesses or other evidence to support its recall, the court granted a preliminary injunction.[120] In the fall of 2022, the parties filed cross-applications for summary relief which were argued before the court *en banc* in March 2023. On May 30, 2024, the Commonwealth Court issued a unanimous decision granting Petitioners' application for summary relief and determining that the Department's recall was an improper rulemaking. The Commonwealth Court granted Petitioners' request for a permanent injunction.

In 2023, in *Green Analytics North, LLC v. Dep't of Health,* the Commonwealth Court heard the first challenge to the Department's newly promulgated final regulations.[121] Until 2023, the Department had been operating under temporary regulations, but that changed on March 4, 2023, when it published final regulations in the Pennsylvania Bulletin.[122] One new regulation involved medical marijuana testing.[123] The MMA requires that testing of medical marijuana be conducted twice during the production cycle, once at harvest and again at final processing (before it is sold to a dispensary).[124] Prior to the Department's final regulations, both phases of testing could be conducted by a single Department-approved testing laboratory.[125] However, the final regulations required that a grower/processor use two separate testing laboratories — one at harvest and different one at final processing — and made this requirement effective immediately.[126] Green Analytics, a Department-approved testing laboratory, and grower/processors, challenged the Department's new testing requirement on the basis that it was incongruent with the MMA. On the same day the regulations were published in

116 *Id*. at 4.
117 *Id*. at 5.
118 *Id.* at 6-8.
119 *Id*. at 6, 9.
120 *Id.*
121 298 A.3d 181 (Pa. Cmwlth. 2023) (en banc).
122 *Green Analytics North, LLC*, 298 A.3d at 184; 53 Pa.B. 1275 (March 4, 2023).
123 *Id*.; 28 Pa. Code § 1171a.29(c)(1)-(2).
124 *Green Analytics North, LLC*, 298 A.3d at 186; 35 P.S. § 10231.704(a).
125 28 Pa. Code § 1171.29(c)(1)-(2).
126 28 Pa. Code § 1171a.29(c)(1)-(2).

the Pennsylvania Bulletin making them effective, the petitioners sought and obtained an *ex parte* preliminary injunction halting the Department's immediate enforcement of this new two-lab requirement, and subsequently the Department agreed to extend the injunction pending final resolution of all of petitioners' counts. The parties then agreed to submit cross-applications for summary relief. In a 5-2 *en banc* decision, the Commonwealth Court invalidated the Department's two-lab requirement because it found that the MMA language of "one or more" allowed for the use of a single testing laboratory to comply with the two phases of testing.[127] Currently, this case is on appeal to the Pennsylvania Supreme Court, but while that appeal is pending the Department agreed not to seek enforcement of the regulation.

IV. CONCLUSION

The policy surrounding marijuana on both the state and federal levels has evolved at an accelerated rate over the last 15 years. In Pennsylvania, the medical marijuana program has been a success. As of March 1, 2024, there are nearly 440,000 Pennsylvania residents who have active medical marijuana ID cards, nearly 2,000 Department-approved medical practitioners who can recommend medical marijuana, 33 operational medical marijuana grower/processors, and 180 operational dispensaries.[128] But getting to a mature program has not always been a straight line, and, as often is the case with revolutionizing social policy, other areas of Pennsylvania law are still catching up. Currently, the Department and the industry are focused on rolling out the General Assembly's Act 63 which was intended to make the medical marijuana industry more equitable for independent medical marijuana operators. But that focus will soon be diverted to a new phase of cannabis use in Pennsylvania. Governor Shapiro has called for the legislature to deliver a bill that would legalize adult-use (recreational) marijuana in 2024 and has indicated an expectation that tax revenue will be collected from adult use marijuana sales beginning January 1, 2025.[129] Given Governor Shapiro's mandate and President Biden's push to reschedule marijuana at the federal level, adult-use recreational marijuana is almost certain to come to Pennsylvania. For the Department, the medical marijuana industry, and patients, the question is what effect will adult-use marijuana have on the existing medical marijuana program? Only time will tell.

127 *Green Analytics North, LLC*, 298 A.3d at 188.

128 *See*, Department of Health, *Medical Marijuana Advisory Board Meeting: March 20, 2024 Presentation*, at slide 9, https://www.health.pa.gov/topics/Documents/Programs/Medical%20Marijuana/MMAB%20Slides%20-%20March%2020%202024.pdf.

129 Commonwealth of Pennsylvania, Office of the Governor, *Executive Budget 2024-2025*, p. C1-9 (Feb. 6, 2024), https://www.budget.pa.gov/Publications%20and%20Reports/CommonwealthBudget/Documents/2023-24%20Budget%20Documents/Budget%20Book%202024-25%20Web%20Version.pdf.