



Can Dispensary Agents Be Independent Contractors?

A FLAW IN ARIZONA'S MEDICAL MARIJUANA ACT

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Arizona's Medical Marijuana Act has a flaw that has the potential to make dispensary operation significantly more expensive than presently assumed. Specifically, the Act omits "independent contractor" from the definition of who may be a dispensary agent.

Per A.R.S. § 36-2801, "dispensary" is defined as a "not-for-profit entity that acquires, possesses, cultivates, manufactures, delivers, transfers, transports, supplies, sells or dispenses marijuana or related supplies and educational materials to cardholders." Since a dispensary is essentially an entity, it can only perform physical acts through licensed dispensary agents, which are statutorily defined as "a principal officer, board member, employee or volunteer of a nonprofit medical marijuana dispensary who is at least twenty-one years of age and has not been convicted of an excluded felony offense." Note

that "independent contractor" is NOT in the definition!

To control costs and to foster efficiencies, some dispensaries may want to contract functions like cleaning, cultivation, waste disposal, and food-stuffs infusion. If the service provider cannot be an independent contractor, then they must be a volunteer, officer, or employee of the dispensary, which means added expense to the dispensary such as payroll, worker's compensation, employment and labor laws, and vicarious liability. Obviously, independent contractors are an attractive alternative, especially if the work they provide is intermittent, infrequent, or highly specialized. But, if by definition an independent contractor cannot be a dispensary agent, then an independent contractor cannot acquire a dispensary agent license; and if it cannot acquire a dispensary agent license, then it cannot perform any of the functions of a dispensary.

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Perceiving this problem, at regulation R9-17-311, ADHS expanded the statutory definition of dispensary agent to

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include independent contractors. However, ADHS' powers are strictly limited by the terms of the statute that created it, and ADHS is not authorized to amend the statute by regulation.¹ As such, ADHS' attempt to expand the statutory definition of dispensary agent through regulation may have been an exercise beyond its authority.

As there are no legislative committee minutes to reference, we cannot say that the public initiative clearly meant to include this term in the definition. Moreover, there is the statutory construction doctrine of *exclusio unius est exclusio alterius*, which the Arizona Supreme Court describes as "the expression of one or more items of a class and the exclusion of other items of the same class implies the legislative intent to exclude those items not so included."² Put more simply, if there is an omission in a statute, it is presumed deliberate. Equally fundamental is the presumption that what the Legislature means, it will say.³ For this reason, the courts have often stated that the "best and most reliable index of a statute's meaning is its language."⁴ And where the language is plain and unambiguous, courts generally must follow the text as written.⁵ The foregoing in mind, one would be hard-pressed

to argue that A.R.S. § 36-2801 is ambiguous.

So, what does this all mean? Either the statute needs immediate amendment, or there will be unavoidable and costly litigation regarding whether independent contractors can acquire dispensary agent licenses. However, given that the Voter Protection Act requires three-fourths vote in the legislature before the legislature could amend the statute, amendment appears near-impossible. So, think twice before relying on the more-permissive ADHS regulations, as you might just be violating the statutes by doing so.

Additional questions can be addressed to:
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¹*Schwartz v. Superior Ct.*, 186 Ariz. 617, 619, 925 P.2d 1068, 1070 (App.1996); A.R.S. § 36-104.

²*Southwestern Iron and Steel Industries, Inc. v. State of Arizona*, 123 Ariz. 78, 79, 597 P.2d 981, 982 (1979).

³*Padilla v. Industrial Comm'n*, 113 Ariz. 104, 106, 546 P.2d 1135, 1137 (1976).

⁴*Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991).

⁵*Mid Kansas Fed. Sav. & Loan Ass'n v. Dynamic Dev. Corp.*, 167 Ariz. 122, 128, 804 P.2d 1310, 1316 (1991).



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