OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2020-1

February 24, 2020

Gary Cox, Commissioner of Health
Oklahoma State Department of Health
1000 NE 10th St.
Oklahoma City, OK 73117

Dear Commissioner Cox,

This office received a request from your predecessor for an official Attorney General Opinion in which he asked, in effect, the following question:[1]

> **The Oklahoma Medical Marijuana and Patient Protection Act requires applicants for medical marijuana business licenses to satisfy a durational residency requirement. *See* 63 O.S.Supp.2019, § 427.14(E)(11). The Act was signed into law on March 14, 2019 and took effect on August 29, 2019. Meanwhile, a separate law exempted from the Act's residency requirement those licensees who were issued a license before the Act's "enactment." *Id.***
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> **Must the Oklahoma State Department of Health revoke licenses issued between when the Act became law and when it took effect if the licensee does not meet the new residency requirement?**

I.
BACKGROUND

In June of 2018, by voter initiative, State Question 788 ("SQ 788") established a medical marijuana program in Oklahoma. The following year, the Legislature passed several laws amending or clarifying the parameters of the program, including eligibility criteria for medical marijuana business licenses. Your question focuses on two provisions of these laws: (1) the new durational residency requirement for business license applicants and (2) the requirement's associated "grandfather clause."

[1] The request included two other questions that are not addressed herein regarding the licensing status of medical marijuana dispensaries located within 1,000 feet of a preschool entrance. Those questions were answered in Attorney General Opinion 2019-6.

The Oklahoma Medical Marijuana and Patient Protection Act, 63 O.S.Supp.2019, §§ 427.1–427.23 ("OMMPPA"), was signed into law by the Governor on March 14, 2019. It authorized the Oklahoma Medical Marijuana Authority, a division of the Oklahoma State Department of Health ("Department"), to handle State operations related to medical marijuana, including issuing business licenses to eligible applicants for growing, processing, and distributing marijuana. *See* 63 O.S.Supp.2019, § 427.3.

Upon taking effect on August 29, 2019,[2] the OMMPPA imposed a durational residency requirement on applicants for medical marijuana business licenses. A durational residency requirement mandates in-state residency for a certain length of time before an applicant is eligible for a license. Under the OMMPPA, an applicant must "provide proof of Oklahoma residency for ***at least two (2) years*** immediately preceding the date of application or ***five (5) years*** of continuous Oklahoma residency during the preceding twenty-five (25) years immediately preceding the date of application." 63 O.S.Supp.2019, § 427.14(E)(11) (emphasis added). Before the OMMPPA, there was a residency requirement for obtaining a medical marijuana business license, but there was no specific duration attached. *See* 63 O.S.Supp.2018, §§ 421(B) (dispensaries), 422(B) (commercial growers), 423(B) (processors).

Some applicants, however, were grandfathered into the old system. In the same session that the OMMPPA was passed, House Bill 2601 added an exemption from the new durational residency requirement for business licensees who received their licenses before the OMMPPA was enacted:

> Applicants that were issued a medical marijuana business license ***prior to the enactment*** of the [OMMPPA] are hereby exempt from the two-year or five-year Oklahoma residency requirement mentioned above.

63 O.S.Supp.2019 § 427.14(E)(11) (emphasis added) (hereafter, the "Grandfather Clause").

Meanwhile, it is our understanding that the Department began issuing one-year business licenses under the SQ 788 residency requirements in August of 2018 and continued to do so until the OMMPPA became effective on August 29, 2019. That fact, along with the Grandfather Clause, prompts your question: must the Department revoke medical marijuana business licenses issued in the roughly five-month gap between the date the OMMPPA became law and the date its provisions took effect, if the licensee fails to meet the new durational residency requirement?

II.
DISCUSSION

Your question proceeds in two parts. As a threshold matter, you first ask whether the Grandfather Clause's use of "enactment" refers to the date the OMMPPA was signed by the Governor or the date its provisions took effect. If the latter, then all applicants issued licenses during this temporal gap are exempt from the durational residency requirement and our analysis ends—the Department need not revoke these licenses. But, if it is the former, the Grandfather Clause does not apply, and we move on to the question of whether the Department must revoke these licenses.

[2] Because there was no explicit effective date in the OMMPPA, the law took effect 90 days after adjournment of the legislative session. *See* OKLA. CONST. art. V, § 58.

A. The "enactment" of the OMMPPA occurred when it was signed into law by the Governor on March 14, 2019.

To part one of your question, the Grandfather Clause exempts only "[a]pplicants that were issued a medical marijuana business license prior to the ***enactment*** of the [OMMPPA] . . . from the two-year or five-year Oklahoma residency requirement." 63 O.S.Supp.2019, § 427.14(E)(11) (emphasis added). Your question asks us to interpret "enactment" as it is used in this clause.

Under Oklahoma law, "[w]ords used in any statute are to be understood in their ordinary sense, except when a contrary definition plainly appears[.]" 25 O.S.2011, § 1. "Enact" is ordinarily understood to mean to "make into a law; *esp*: to perform the ***last act*** of legislation upon (a bill) that gives the validity of law," while "enactment" is simply "the act or action of enacting." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 745 (3d ed. 2002) (emphasis added).[3] The focus of this definition is the governmental action to pass a bill into law: the date of enactment is generally the date on which the "last act" necessary to pass legislation is taken.

Particularly in Oklahoma, the enactment date of legislation is distinct from, and often different than, the date such legislation becomes effective. This distinction is enshrined in our Constitution, which states that, absent an emergency, "[n]o act shall ***take effect*** until ninety days after the adjournment of the session at which it was ***passed***, except ***enactments*** . . . relating to the initiative and referendum, or a general appropriation bill." OKLA. CONST. art. V, § 58 (emphasis added). This distinction also has been recognized by the Oklahoma Supreme Court,[4] the U.S. Supreme Court,[5] and other state courts.[6]

Meanwhile, there is no contrary definition that plainly appears in the OMMPPA. So "the statute will be accorded meaning as expressed by the language employed." *Pentagon Acad., Inc. v. Indep. Sch. Dist. No. 1 of Tulsa Cty.*, 2003 OK 98, ¶ 19, 82 P.3d 587, 591. Accordingly, the term

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[3] The Legislature defines "enact" to mean "to pass a law." *Enact*, GLOSSARY OF LEGISLATIVE TERMS, Oklahoma State Legislature, *available at* http://www.oksenate.gov/glossary.aspx (last visited February 3, 2020); *accord* BLACK'S LAW DICTIONARY 606 (9th ed. 2009) (defining "enact" as "[t]o make into law by authoritative act; to pass[.]").

[4] *See, e.g., Fid.-Phenix Fire Ins. Co. of New York v. Penick*, 1965 OK 34, ¶ 8, 401 P.2d 514, 516 (recognizing difference between effective date and enactment date: "Prior to the effective date of the 1957 enactment."); *Cities Serv. Oil Co. v. Oklahoma Tax Comm'n*, 1942 OK 307, ¶ 13, 129 P.2d 597, 599 ("[A]n act may be made to become a law immediately upon its enactment, with its operation [or effectiveness] suspended to a future date.").

[5] *See, e.g., Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 313 n.12 (1994) ("When Congress enacts a new statute, it has the power to decide when the statute will become effective. . . . In statutory cases the Court has no authority to depart from the congressional command setting the effective date of a law that it has enacted."); *Barbour v. State of Georgia*, 259 U.S. 454, 458 (1919) (finding that Defendant's liquor "was acquired during the period of five months and twelve days between the enactment of the [state's liquor] law and the date when it became effective.").

[6] *See, e.g., State v. Gibbons*, 203 P. 390, 392 (Wash. 1922) (rejecting the suggestion that date of enactment refers to the date on which a law takes effect, explaining "[t]he word 'enactment,' with reference to the making of a law, means . . . the exercise of the legislative power bringing the law into existence," and thus "[w]hen the people or body possessing such legislative power have completely exercised [this] power . . . , the enactment of the law has become complete").

"enactment" as used in the Grandfather Clause means March 14, 2019—the day the OMMPPA was signed by the Governor, the "last act" necessary for the OMMPPA to pass into law.

B. The durational residency requirement should not be applied retroactively to revoke licenses issued before the OMMPPA took effect.

Based on our answer above, we move to part two: whether the Department must revoke current medical marijuana business licenses that were issued between the enactment of the OMMPPA and its effective date to applicants who do not meet the new durational residency requirement. The answer to this question turns on another interpretative rule: the presumption against retroactivity.

Under the presumption against retroactivity, new legislation must be read as prospective in application only, unless the Legislature has unambiguously instructed otherwise. *See, e.g., Vartelas v. Holder*, 566 U.S. 257 (2012); *see also CNA Ins. Co. v. Ellis*, 2006 OK 81, ¶ 13, 148 P.3d 874, 877 ("Statutes are typically not given retroactive effect unless the Legislature has made its intent to do so clear. Any doubts must be resolved against a retroactive effect."). This presumption is not a constitutional mandate. Indeed, given the State's broad police power, "constitutional impediments to retroactive civil legislation are [] modest." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 272 (1994). But it is the "default rule" grounded in "[e]lementary considerations of fairness" that "dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Id.* at 265, 272.

A statute operates retroactively when it "attaches new legal consequences" to a completed event, *Landgraf*, 511 U.S. at 270, or impairs interests "acquired under existing law . . . in respect to transactions already past." *Soc'y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (Story, J.). Identifying when a statute operates retroactively "is not always a simple or mechanical task." *Landgraf*, 511 U.S. at 268. But "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *Id.* at 270. At bottom, "[r]etroactivity ought to be judged" first with "regard to the . . . event that the statute is meant to regulate." SCALIA & GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 263-64 (2012). Thus, to determine the law's temporal applicability, we must first identify the event or transaction to which the new law is to apply; then we must determine whether that event or transaction was completed before the law took effect; and finally, we must determine whether the Legislature clearly intended the law to attach new legal consequences to the completed event or transaction.

As applied here, the event to which residency requirements apply is the issuance of a license. *See* 63 O.S.Supp.2019 § 427.14(E)(7)(b)-(c) ("All applicants shall be approved for licensing review" that *inter alia* meet the durational residency requirement in Section 427.14(E)(11)). In other words, the moment in which the durational residency requirement is applicable is at the determination of eligibility for a license. License issuance then confers a protectable—albeit qualified[7]—interest

[7] "The right of an individual to use his property as he pleases is a qualified, as distinguished from an absolute, right. It is at all times subject to the authority of the state, under its police power, to fairly and reasonably restrict the use of such property to the end that the public health, safety, and welfare will be promoted . . . ." *Botchlett v. City of Bethany*, 1966 OK 39, ¶ 11, 416 P.2d 613, 616 (citations omitted).

upon the license recipient. *See, e.g., Cities Serv. Co. v. Gulf Oil Corp.*, 1999 OK 16, ¶ 7 n.9, 976 P.2d at 548 n.9 ("[A] professional license is a legally protected property interest."). The licenses at issue in your question—which were granted before the durational residency requirement was effective—were "acquired under existing law." *Wheeler*, 22 F. Cas. at 767.

Imposing the new durational residency requirement to this settled transaction—*i.e.,* before the expiration of the license term—would "attach new legal consequences" by imposing stricter eligibility requirements after the fact. *Landgraf*, 511 U.S. at 269. These licensees have no current opportunity to conform their conduct to the new law to protect their licenses because the transaction has "already past." *Wheeler*, 22 F. Cas. at 767. For these reasons, applying the durational residency requirement to current licensees who received their licenses before the OMMPPA took effect would be to apply the OMMPPA retroactively.

Nothing in the OMMPPA demonstrates unambiguously that the Legislature has required the durational residency requirement to be applied retroactively. Under the standard interpretive presumptions, then, it should not be so applied. It should instead have prospective application only. Therefore, the OMMPPA does not require the Department to revoke licenses issued between the enactment of the OMMPPA and its effective date. So these license-holders are entitled to their one-year license.[8]

By the same reasoning, however, the presumption against retroactivity does not preclude the Department from considering length-of-residency in a future license-renewal application. The licenses at issue are set to expire one-year from their issuance. *See* OAC 310:681-5-2(a). The license-holder must apply for renewal; it is not guaranteed. *Id.* 310:681-5-2(c). As explained above, the presumption against retroactivity only counsels against applying new laws to past events in a way that impairs rights acquired under the law in place at the time. That is not the case with renewal. Renewal is a separate transaction that will take place in the future—the law in place at the time of renewal will be the OMMPPA. Furthermore, the interest that the licensee had acquired under the old residency requirement will have expired by then. Because there is no longer an acquired right at issue, there can be no impairment thereof.[9]

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[8] The negative implication of the Grandfather Clause—that is, because the exemption applies only to licenses issued ***before*** the OMMPPA's enactment, then the Legislature may have intended all licenses issued ***after*** enactment not to be exempt—is not an unambiguous expression of legislative intent for the durational residency requirement to apply retroactively. *Cf. Meyers v. Freedom Credit Union*, 2007 WL 2753172 *6 (E.D. Penn. 2007) (unpublished) ("The negative implication of [federal statute's enforceability provision] . . . is far from a clear expression of [Congressional intent]" under *Landgraf*.).

[9] Nor does the presumption preclude the Department from enforcing new operating requirements on current license-holders. *See, e.g.*, 2019 OK AG 6 (opining that, in accordance with the State's police power, the Department may enforce a new statute prohibiting marijuana dispensaries from operating within 1,000 feet of a preschool); *see also Botchlett*, 1966 OK 39, ¶ 12, 416 P.2d at 616 ("A property owner may acquire no vested right to use his property for a particular purpose freed from public control under the police power."). Unlike license issuance, which is a discrete past event, the requirements at issue in Attorney General Opinion 2019-6 apply to the ***operation*** of a marijuana business—an event that occurs continuously during the term of a license. Of course, consistent with the legal framework above, events or transactions completed before the OMMPPA took effect that amount to violations of these new requirements may not form the basis of an enforcement action by the Department. Instead, these requirements are to be enforced prospectively only.

In sum, the presumption against retroactivity counsels against enforcing the durational residency requirement with regard to the licenses at issue.[10] At the same time, the presumption does not preclude the Department from considering length-of-residency in reviewing a renewal application in the future. And to be clear, even on renewal, the Grandfather Clause protects all medical marijuana licensees whose license were issued before the OMMPPA was enacted, regardless of whether they meet the new residency requirement.

It is, therefore, the official Opinion of the Attorney General that:

If the Oklahoma State Department of Health issued a medical marijuana business license between the date of enactment of the Oklahoma Medical Marijuana and Patient Protection Act, 63 O.S.Supp.2019, §§ 427.1–427.23, and the Act's effective date, and that licensee does not meet the Act's residency requirement as provided in 63 O.S.Supp.2019, § 427.14(E)(11), the Department is not required to apply the Act's residency requirement retroactively to revoke the license.

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA

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ASSISTANT SOLICITOR GENERAL

ATTORNEY GENERAL OF OKLAHOMA
APPROVED IN CONFERENCE
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[10] In Attorney General Opinion 2019-13, we explained that, under *Tennessee Wine and Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019), Oklahoma's residency requirements for obtaining a wine and spirits business license are likely to be found in violation of the Dormant Commerce Clause. But "Dormant Commerce Clause restrictions apply only when Congress has not exercised its Commerce Clause power to regulate the matter at issue." *Tennessee Wine*, 139 S. Ct. at 2465. Unlike the specific alcohol regulation at issue there, Congress has exercised such authority in regard to the regulation of marijuana. *See* 21 U.S.C. § 812; *Cf. Gonzales v. Raich*, 545 U.S. 1, 6–7 (2005) (holding that Congress exercised valid authority under the commerce clause to enforce federal marijuana criminal laws). This situation, therefore, does not present the same Commerce Clause question.