



LABOR & EMPLOYMENT DEPARTMENT

# ALERT

## NEW JERSEY'S NEW MEDICAL MARIJUANA LAW HAS IMPORTANT IMPLICATIONS FOR EMPLOYERS

By Brett D. Halloran

On January 18, 2010, New Jersey joined more than a dozen other states in legalizing the medical use of marijuana. The New Jersey Compassionate Use Medical Marijuana Act is principally aimed at protecting medical marijuana users from criminal prosecution. The Act, however, also has important ramifications for employers now attempting to deal with employees who legally obtain marijuana in New Jersey. The Act does not take effect until July 1, 2010. In the meantime, employers should review their drug testing and use policies and know their rights regarding employees who are under the influence of legally prescribed marijuana in the workplace.

### Who May Obtain Prescriptions for Marijuana?

The Act places sharp limits on who may obtain medical marijuana legally. As written, the law restricts access to medical marijuana to individuals with the following medical conditions:

- Seizure disorder including epilepsy, intractable skeletal muscular spasticity or glaucoma (and only if these disorders are resistant to conventional medical therapy);
- Positive status for HIV, AIDS or cancer (and only if these disorders or their treatment cause severe or chronic pain, severe nausea or vomiting, cachexia or wasting syndrome);

- Amyotrophic lateral sclerosis, multiple sclerosis, terminal cancer, muscular dystrophy or inflammatory bowel disease, including Crohn's disease; and
- Terminal illness, if the physician has determined a prognosis of less than 12 months to live.

Therefore, it appears now that the potential problem of having employees under the influence of marijuana in the workplace will be relatively uncommon. Employers are cautioned however, that the Act permits the New Jersey Department of Health and Senior Services to expand the list of conditions eligible for treatment by marijuana in the future.

### Must Employers Accommodate the Medical Use of Marijuana?

The Act specifically provides that employers are not required to accommodate the medical use of marijuana in the workplace. "Medical use of marijuana" is defined as including the "acquisition, possession, transport, or use of marijuana or paraphernalia" by a registered qualifying patient. Therefore, employers do not need to allow employees to use or carry marijuana or marijuana paraphernalia under the law. Despite this exception in the law, employers should exercise extra care before making adverse employment decisions regarding employees using medical marijuana. Federal and state law protects employees against disability discrimination, and it is very likely that any employee who qualifies for medical

marijuana use will simultaneously qualify as disabled under discrimination laws. Likewise, the Act is silent as to whether an employer can take action against an employee for using medical marijuana outside the workplace. Courts in states with similar laws have held employers are not required to accommodate an employee's use of medical marijuana before and after work hours, but the issue remains untested in New Jersey. Employers are well advised to exercise caution in disciplining employees using medical marijuana as they would with other disabled workers.

### **What Should Employers Be Doing Now?**

The primary action employers can take now, in anticipation of the Act taking effect, is to review and possibly revise their drug testing and use policies. In particular, employers should decide whether they wish to consider an individual's use of medical marijuana or a positive drug test resulting from such use when making employment decisions. A written policy that takes a specific position on employees' medical marijuana use will provide a stronger shield against disability discrimination suits than a generic policy that forbids

drug use but does not take notice of the new ability of individuals to obtain marijuana legally. The decision whether to consider medical use of marijuana in making employment decisions is necessarily an individual one for employers and should focus on the nature of the employer's workplace, as well as the risk of litigation and liability. For instance, employers operating safety-sensitive workplaces may want to take a more restrictive approach than others. Regardless the conclusion each employer reaches based on its own circumstances, such policy should be effectively communicated to all employees.

Employers should be mindful that the New Jersey Department of Health and Senior Services is expected to issue regulations further clarifying the new law and should watch for further developments that could impact the workplace.

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