



Medical Marijuana Comes to New Jersey: Is Your Business Prepared?

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

Therefore, as the law presently stands, it appears 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 that are eligible for treatment by marijuana in the future. If it does so, the conundrum of what to do with an employee claiming the lawful right to use marijuana could become commonplace for businesses.

Do employers have to accommodate the medical use of marijuana?

The short answer is "no." The Act specifically provides that employers are not required to accommodate the

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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. This provision puts New Jersey in line with Court decisions in other states with medical marijuana laws, which have generally found that such laws only provide protections from criminal prosecution, not job protection.

That is not to say, however, that discharging or otherwise disciplining an employee using lawfully prescribed marijuana does not carry any risk. Despite the exception in the law, employers should exercise extra care before making adverse employment decisions regarding such employees. Federal and state law protects employees against disability discrimination. Due to the broad definition of "disability" under these laws, it is very likely that any employee who qualifies for medical marijuana use will simultaneously qualify as disabled under discrimination laws. Disciplining such employees carries the same legal risks as disciplining any other employee belonging to a classification protected by discrimination laws. One such risk is the possibility that employees terminated for using medical marijuana will claim that the real reason they were let go was that they were disabled and that their marijuana use was mere pretext.

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 that 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 therefore 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 reviewing and possibly revising their drug testing and use policies. In particular,



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employers should decide whether they wish to consider an individual's use of medical marijuana or a positive drug test resulting from such use in 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. More specifically, the existence of a specific policy on employees' medical marijuana use will weaken any later attempt by an aggrieved former employee to claim that his or her employer's reliance on the employee's marijuana use was merely a subterfuge for disability discrimination.

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 what conclusion an employer reaches based on its own circumstances, it can expect concerns to be raised by employees (both those who need to use marijuana to manage their disabilities, and those who may be anxious about working in an environment where marijuana use is tolerated, even if outside the immediate workplace). For these reasons, open and effective communication of the policy with employees should be a priority.

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

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