

Client Alert **Employment & Labor**

Weeding through the NJ Medical Marijuana Law Amendments: What You Need to Know

On July 2, 2019, Governor Phil Murphy signed a new law that amends New Jersey's Jake Honig Compassionate Use Medical Cannabis Act (formerly the New Jersey Compassionate Use Medical Marijuana Act) (the "Act") to create job protections and new procedures for drug testing, among other changes. The amendments to the Act took effect immediately upon signing.

Anti-discrimination Provisions

Prior to its recent amendment, the Act created several questions about an employer's responsibilities towards an employee who is legally using medical marijuana. Specifically, the Act as initially passed stated that nothing in the Act should be construed to require "an employer to accommodate the medical use of marijuana in any workplace." This language was stricken by the new amendments.

The Act now expressly prohibits employers from taking adverse employment actions against employees based solely on the employee's status as a legal medical marijuana user. Employers cannot refuse to hire, discharge or otherwise discriminate against a medical marijuana-using employee in any terms or conditions of employment.

Practically, this means that if an employee is taking medical marijuana the employee is generally protected from discharge or other adverse employment actions on this basis. The Act does not specifically address whether the employer must accommodate an employee by allowing such usage even if the employee is impaired on the job and cannot perform the essential functions of the job by reason of using medical marijuana. However,

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permitting a medical marijuana card to serve as a blank usage check to employees is inconsistent with the New Jersey courts' interpretation of employer obligations to provide reasonable accommodations under the New Jersey Law Against Discrimination, including the Appellate Division's recent case, *Wild v. Carriage Funeral Holdings, Inc.*, 458 N.J. Super. 416 (App. Div. 2019). If an employer can show that a non-discriminatory reason exists for an employment decision that impacts a medical marijuana user, the face of the Act should not prohibit employer actions against an employee. For instance, the Act does not expressly impede an employer from taking action against an employee because of the employee's inability to perform essential job functions rather than based on the employee's status as user of medical marijuana.

The Act is clear that an employer may prohibit the use *and* possession of marijuana during work hours and on the premises of the workplace outside of work hours. Moreover, an employer is not required to retain an employee or engage in other conduct that would cause the employer to violate federal law, or would cause the employer to lose a federal contract or federal funding.

Drug-Testing Policies

Employers who conduct drug testing of current employees and job applicants are subject to additional procedures. An employee or applicant who tests positive for marijuana must provide the employee with written notice of the test result and permit the employee to explain the positive test result. The employee or applicant then has three days either to provide an explanation of the test result, such as authorization for medical marijuana use issued by a health care provider, or request retesting at the employee/applicant's expense.

Recommendations, Implications and Considerations

The Act creates new requirements and restrictions on employers regarding medical marijuana use, but employers should recognize that recreational marijuana use remains unlawful in New Jersey. On March 25, 2019, New Jersey's proposed bill to legalize recreational marijuana use in the state was not passed by the state legislature. In May 2019, Senate President Stephen M. Sweeney announced that he would not pursue passing a similar bill through the legislature this year; the issue instead may be presented directly to voters as a ballot question in next year's election. For now, employer actions in New Jersey against employees engaged in recreational marijuana use remain relatively unchecked.

While the Act does not seem to create a need for a specific standalone policy addressing medical marijuana, employees should consider revising existing drug testing policies to address the added procedures required when an employee or applicant tests positive for marijuana. Employers should also review current drug and alcohol in the workplace policies to assure that they do not contain restrictions that may run afoul of the Act.

Further, employers should also consider training managers, supervisors and human resources professionals on the nuances created by the Act in protecting medical marijuana users from adverse employment actions based solely on their status as users, but otherwise permitting employers to take adverse action against employees' recreational use and possession of marijuana and non-prescribed controlled substances in the workplace.

Attorneys in our Employment and Labor Law Practice Group can assist employers regarding the issues raised in this alert.

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