

New Jersey Employers Face New Questions Over Employee Marijuana Use

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On January 11, the New Jersey Legislature passed the “Compassionate Use Medical Marijuana Act” (the Act), making New Jersey the fourteenth state to permit regulated use of medical marijuana.¹ Governor Corzine has stated that he will sign the Act into law before leaving office on January 19. The Act will take effect six months after enactment.

The stated purpose of the Act is to “protect from arrest, prosecution, property forfeiture, and criminal and other penalties, those patients who use marijuana to alleviate suffering from debilitating medical conditions, as well as their physicians, primary caregivers, and those who are authorized to produce marijuana for medical purposes.” Following is a summary of some of the key provisions of the Act:²

- The Act permits registered users with specific ailments (such as cancer, AIDS, multiple sclerosis, muscular dystrophy, or inflammatory bowel disease) and their primary caregivers to purchase from state-monitored dispensaries and possess up to two ounces of marijuana per month.
- Users of medicinal marijuana may not operate, navigate, or be in actual physical control of any vehicle, aircraft, railroad train, stationary heavy equipment, or vessel while under the influence of marijuana.
- Users are not permitted to smoke marijuana in a school bus or other form of public transportation, in a private vehicle unless the vehicle is not in operation, on any school grounds, in any correctional facility, at any public park or beach, at any recreation center, or in any place where smoking is prohibited by municipal ordinance.

Employers Heading Into Murky Waters?

The Act provides little guidance on how the limited decriminalization of marijuana use will interplay with employment laws and policies. The Act merely provides that nothing in the law “shall be construed to require . . . an employer to accommodate the medical use of marijuana in any workplace.” This

¹ The following states have legalized the sale and possession of marijuana for medical purposes: Alaska, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont, and Washington. Pennsylvania also has similar legislation under consideration.

² The entire Act is available online at http://www.njleg.state.nj.us/2008/Bills/S0500/119_R3.PDF.

language seems to make clear that an employer does not have to permit an employee time during a workday to consume marijuana at work as a disability-related accommodation—as the employer might be required to do, for example, for a diabetic who needs time to inject insulin. However, the legislation and its non-accommodation provision do not directly address several other open questions, including whether an employer can legally refuse to hire or terminate registered users who fail a drug test, but do not use marijuana in the workplace and otherwise comply with the Act.

The use of medicinal marijuana is likely to lead to litigation in New Jersey, as it has in several other jurisdictions. Litigation will test the reach of several employment-related laws, including the Americans with Disabilities Act, the New Jersey Law Against Discrimination, the Conscientious Employee Protection Act, and the common law *Pierce* cause of action prohibiting wrongful termination in violation of public policy, as well as the enforceability of employers' practices and policies relating to drug testing and maintaining a drug-free workplace.

Even though it is difficult to predict how New Jersey courts will address medicinal marijuana use, courts in several other states have generally sided with an employer's right in workplace disputes to maintain a drug-free workplace:

- In 2009, the Washington Court of Appeals upheld an employer's right to not hire a prospective employee who failed a pre-employment drug test allegedly due to her medical use of marijuana. *Roe v. TeleTech Customer Care Mgmt. (Colorado), LLC*, 216 P.3d 1055 (Wash. Ct. App. 2009).
- In 2009, the Montana Supreme Court held that a state law permitting the use of marijuana for medicinal purposes does not require employers to accommodate the medical use of marijuana in the workplace. *Johnson v. Columbia Falls Aluminum Co., LLC*, 2009 Mont. 108N (2009).
- In 2008, the California Supreme Court upheld an employer's right to fire an employee who failed a pre-employment drug screen, even though he was taking marijuana prescribed by his physician to treat chronic pain. *Ross v. Ragingwire Telecomm., Inc.*, 42 Cal. 4th 920 (2008).
- The precedent is less clear in Oregon. In *Washburn v. Columbia Forest Products Inc.*, 340 Ore. 469 (2006), Washburn (a registered marijuana user) failed a drug test given by his employer and was terminated. Washburn sued the employer under Oregon's disability law, arguing that the employer failed to reasonably accommodate his disability. The trial court found that Washburn was not disabled and dismissed the case. The Court of Appeals (an intermediate appellate court) reversed, finding that Washburn was disabled, and further concluded that an employer must make a "case by case" assessment to determine whether it must accommodate off-duty medicinal marijuana use. Although the Supreme Court of Oregon ultimately concluded that Washburn was not disabled and dismissed the case, it declined to address the larger issue—whether an employer must accommodate a disabled employee's off-duty medicinal marijuana use. This question remains unresolved.

In the coming months, the New Jersey Department of Health and Senior Services is expected to implement regulations that may further clarify some of the open issues facing employers. Until then, employers should review their existing drug and alcohol policies and consider whether and to what extent the Act affects those policies.

Morgan Lewis's Labor and Employment Practice regularly advises employers with respect to all aspects of federal and state disability and discrimination laws and issues related to employee drug use. If you have any questions or would like more information regarding the issues raised in this Labor and

Employment LawFlash, please contact any of the following Morgan Lewis attorneys:

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