New Jersey Compassionate Use Medical Marijuana Act – A Workplace Overview

September 2010
This memorandum provides an analysis of the New Jersey Compassionate Use Medical Marijuana Act (the “Act”),¹ as pertaining primarily to workplace law.² The Act was signed into law on January 18, 2010, and is scheduled to go into effect on October 1, 2010.³ Passage of the Act makes New Jersey the fourteenth state to permit the use of marijuana for medical purposes.

This memo briefly summarizes the workplace aspects of the Act and the interaction of the Act with other New Jersey and federal laws, such as those relating to accommodating disabilities and providing medical leaves of absence. Then the memo offers some practical suggestions for employers with respect to their existing policies relating to drug testing and substance abuse, disability management, and performance management.

1. Purpose of the Act.

According to the New Jersey legislature, “[c]ompassion dictates that a distinction be made between medical and non-medical use of marijuana. Hence, the 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.”⁴

The Act appears designed primarily to protect from criminal prosecution certain individuals who use medical marijuana to alleviate suffering from debilitating medical conditions, as defined by the Act. However, the purpose of the Act can be read broadly, as it also states that, in addition to criminal prosecution, users of medical marijuana are protected from “other penalties”. It is unclear how the “other penalties” provision will be interpreted by New Jersey’s Courts or administrative agencies.

2. The Act Does Not Require An Employer To Accommodate The Use of Medical Marijuana In The Workplace.

The Act makes clear that employers are not required to make accommodations for medical marijuana use by employees in the workplace. Specifically, the Act states that

¹ New Jersey Compassionate Use Medical Marijuana Act, N.J.S.A. 24:6I-1 et seq. A copy of the Act is available at www.njleg.state.nj.us/2008/Bills/PL09/307_.PDF. A longer version of this memorandum, which includes a discussion of case law from other jurisdictions and additional citations, is available upon request to lawyers who volunteer their services through the Pro Bono Partnership.

² This memorandum is provided for informational purposes only. It is not intended as legal advice nor does it create an attorney/client relationship between (1) Jackson Lewis LLP and/or the Pro Bono Partnership and (2) any readers or recipients. Readers should consult counsel of their own choosing to discuss how these matters relate to their individual circumstances.

³ Public Law 2010, Chapter 36, available at www.njleg.state.nj.us/2010/Bills/AL10/36_.PDF, delayed the effective date of the Act from July 1, 2010 to October 1, 2010.

"[n]othing in this act shall be construed to require . . . an employer to accommodate the medical use of marijuana in any workplace." This provision of the Act indicates that the statute was not designed to regulate the disability management process in the workplace.

However, what remains unclear is whether an employer is required to accommodate lawful, off-duty use of medical marijuana. For example, if an applicant or current employee advises an existing or prospective employer that he lawfully uses medical marijuana in accordance with the Act, does so solely in the evenings, and can medically certify that said use will not affect his ability to do the job, can a New Jersey employer lawfully act on this information? Moreover, once apprised of this issue, if the employee is subjected to an adverse employment decision thereafter, is there a risk that the employee can claim either disability discrimination or that the employer violated public policy? While the Act does not provide a private cause of action, certainly, it is not a far leap to see a claim being made under New Jersey’s anti-discrimination statute or common law asserting disparate treatment based on lawful marijuana use.

a. **New Jersey Law Against Discrimination.**

Individuals who have a “debilitating medical condition” as defined by the Act will almost certainly also have a condition that qualifies as a “disability” under the New Jersey Law Against Discrimination (“LAD”). Under the LAD, a disability may be physical or non-physical. Except for a few exceptions, the LAD does not define the specific conditions that qualify as disabilities. Unlike the federal Americans with Disabilities Act (“ADA”), the LAD does not require that disabilities limit a major life activity. Given this, the following conditions have been considered actual or potential handicaps/disabilities under the LAD by New Jersey’s courts: (1)

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6 The Act does regulate who may work at an alternative treatment center. N.J.S.A. 24:6I-7. An “alternative treatment center” is defined as “an organization approved by the [New Jersey Department of Health and Senior Services] to perform activities necessary to provide registered qualified patients with usable marijuana and related paraphernalia[.]” N.J.S.A. 24:6I-3. The Act requires applicants for permits to operate, or authorization to be employed at, an alternative treatment center, to submit to a criminal history record background check, and outlines certain offenses that would disqualify an applicant from operating or being employed at such a center. N.J.S.A. 24:6I-7.

7 N.J.S.A. 10:5-1 et seq.

8 N.J.S.A. 10:5-5(q).


11 Failla v. City of Passaic, 146 F.3d 149 (3d Cir. 1998).
depression and mental illness;\textsuperscript{12} (2) attention deficit disorder;\textsuperscript{13} (3) gender dysphoria;\textsuperscript{14} and (4) breast cancer/mastectomy.\textsuperscript{15}

The Act's definitional section defines “debilitating medical condition” as follows:

(1) one of the following conditions, if resistant to conventional medical therapy: seizure disorder, including epilepsy; intractable skeletal muscular spasticity; or glaucoma;

(2) one of the following conditions, if severe or chronic pain, severe nausea or vomiting, cachexia, or wasting syndrome results from the condition or treatment thereof: positive status for human immunodeficiency virus, acquired immune deficiency syndrome, or cancer;

(3) amyotrophic lateral sclerosis, multiple sclerosis, terminal cancer, muscular dystrophy, or inflammatory bowel disease, including Crohn's disease;

(4) terminal illness, if the physician has determined a prognosis of less than 12 months of life; or

(5) any other medical condition or its treatment that is approved by the [New Jersey Department of Health and Senior Services] by regulation.\textsuperscript{16}

Given this broad definition, and given the liberal reading of the definition of disability under the LAD, it is likely that users of medical marijuana will have underlying medical conditions that render them protected under the LAD, and likely the ADA as well. Moreover, these individuals may also have a “serious health condition” under the federal Family and Medical Leave Act (“FMLA”)\textsuperscript{17} if they work for a covered employer and qualifies as a covered employee under the statute.\textsuperscript{18} This requires employers to consider a host of disability


\textsuperscript{17} 29 U.S.C. 2601 et seq.

\textsuperscript{18} 29 C.F.R. 825.113.
management issues beyond the Act when dealing with employees who qualify for use of medical marijuana.

b. Public Policy Claims.

Turning to public policy claims under New Jersey law, an exception to the at-will rule, which allows employers to terminate employees without cause or notice, exists when the discharge is contrary to a clear mandate of public policy.\(^{19}\) The sources of public policy include legislation.\(^ {20}\) The public policy exception to the at-will rule has created a host of potential actions, including claims for filing or attempting to file a workers’ compensation claim,\(^ {21}\) reporting workplace hazards,\(^ {22}\) and pursuing information relevant to an alleged discriminatory discharge.\(^ {23}\)

As noted above, the purpose of the Act can be read broadly. The provision providing that users are protected from “other penalties” may be used to support a potential public policy claim for users of medical marijuana who are subjected to adverse employment actions. Again, this raises issues beyond the strict reading of the Act.


There are no current regulations interpreting the Act. The Act notes that the Commissioner of the New Jersey Department of Health and Senior Services (“NJDHSS”) and the Director of the New Jersey Division of Consumer Affairs (“NJDCA”) may take such anticipatory administrative action in advance of the effective date of the Act (7/1/10) as may be necessary to effectuate its provisions. As of September 13, 2010, a search of the NJDHSS and NJDCA websites revealed only a question and answer document prepared by the NJDHSS.\(^ {24}\) The Q&A provided by the NJDHSS states, among other answers, that employers are not required to accommodate medical marijuana use in the workplace. No further guidance is provided with regard to workplace issues.


In sum, it appears the primary purpose of the Act is to change the existing state criminal laws, and not to impact the relationship of New Jersey’s employers and its employees. That said, as noted above, the Act could have unintended impacts on the workplace. As a result, from a practical standpoint, employers should consider the following:

\(^ {19}\) *Pierce v. Ortho Pharm. Corp.*, 84 N.J. 58, 72 (1980).


\(^ {24}\) *Medical Marijuana*, available at [www.state.nj.us/health/med_marijuana.shtml](http://www.state.nj.us/health/med_marijuana.shtml).
In California, Oregon, and Washington, litigation has ensued when an applicant or employee using legalized medical marijuana fails a drug test. The employer prevailed in each of the three cases. In view of this, it is important that New Jersey employers review and, where necessary, modify their drug testing and substance abuse policies, with input from counsel, to address whether an individual’s use of medical marijuana or a positive drug test stemming from such use will be considered in employment decisions.25

Proper and careful disability management is tantamount in any New Jersey workplace. A great deal of litigation in New Jersey’s state and federal courts stems from whether a disabled employee’s request for accommodation is reasonable and/or an undue hardship to the employer. While the Act does not require employers to accommodate employees by allowing use of medical marijuana in the workplace, as noted above, the inquiry cannot end there. The Act is silent as to whether use of medical marijuana outside of work needs to be accommodated. If an accommodation is sought by an employee because of the use of medical marijuana outside of the workplace, an employer may have to engage in the same type of disability management analysis that it would in the absence of the Act. Failure to do so may subject an employer to potential liability under the LAD, ADA, FMLA, or other statutes that do require either accommodation or job-protection measures be put in place.26

25 This memorandum does not discuss the potential impact of the federal Drug Free Workplace Act of 1988, which, among other provisions, places obligations on organizations that receive federal grants and covered government contracts. The Obama administration has recently ordered the Justice Department not to prosecute individuals who lawfully use medical marijuana under state law(s). See Memorandum for Selected United State Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana, available at http://blogs.usdoj.gov/blog/archives/192. This is a marked change from the previous administration’s stance on this issue. The federal government’s recently changed position on this issue demonstrates just how difficult it is to provide definitive guidance in this area. If your organization receives federal grant monies, or contracts with the U.S. government, it is strongly suggested that you consult with counsel in dealing with the use of lawfully prescribed medical marijuana use in the workplace in New Jersey or any other state that permits such use.

26 In addition, the LAD provides, at N.J.S.A. 10:5-4, that “[a]ll persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, disability, nationality, sex, gender identity or expression or source of lawful income used for rental or mortgage payments, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.” (Emphasis
Diligent performance management is nothing new to New Jersey employers. It should start early, and it should be well documented. As set forth above, the Act may create a new avenue for employees subjected to adverse employment decisions to file suit, particularly on public policy grounds. If the performance-related employment decision at issue is well documented, it allows the employer to credibly and persuasively argue that the decision was motivated by legitimate reasons. If inadequate or no documentation exists to support an employment decision, it may allow a question to be raised whether the decision was motivated by unlawful reasons. One such claim may be that an employee was terminated shortly after it was disclosed that he was engaging in the lawful use of medical marijuana. It is doubtful that any employer would want to be the test case under the Act for this type of claim. In other states, such claims have made their way to the Supreme Court level, and have taken years to reach final resolution.

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added). It may also be argued that the denial or termination of employment because of the use of lawfully prescribed medical marijuana is the unlawful denial of a privilege or civil right.