New Jersey’s Jake Honig Compassionate Use Medical Cannabis Act: A Workplace Overview

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This article provides an analysis of how New Jersey’s Jake Honig Compassionate Use Medical Cannabis Act (“Act”)\(^1\) applies to the workplace. The Act went into effect in 2010. On July 2, 2019, Governor Phil Murphy signed into law an amendment to the Act that expands patient access to medical cannabis and reforms the State’s medical cannabis program.

This article 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 individuals with disabilities and providing medical leaves of absence. The article also 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 Act, “[c]ompassion dictates that a distinction be made between medical and non-medical uses of cannabis. Hence, the purpose of [the Act] is to protect from arrest, prosecution, property forfeiture, and criminal and other penalties, those patients who use cannabis to alleviate suffering from qualifying medical conditions, as well as their health care practitioners, designated caregivers, institutional caregivers, and those who are authorized to produce cannabis for medical purposes.”\(^2\)

The Act appears designed primarily to protect from criminal prosecution certain individuals who use medical cannabis to alleviate suffering from “qualifying medical conditions,” as defined by the Act.\(^3\) However, the purpose of the Act can be read broadly, as it also states that users of medical cannabis are protected from “other penalties.” It is unclear how the “other penalties” provision will be interpreted by New Jersey’s courts and administrative agencies.

2. **The Act, As Amended on July 2, 2019, Requires Employers to Accommodate Employees’ Use of Medical Cannabis**

Prior to its amendment in 2019, the Act provided that employers were not required to make accommodations for medical marijuana use by employees in the workplace. Specifically, the Act formerly stated that “[n]othing in this act shall be construed to require . . . an employer to accommodate the medical use of marijuana in any workplace.” That language has been deleted.

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\(^1\) The Jake Honig Compassionate Use Medical Cannabis Act, N.J.S.A. 24:6I-1 et seq., was formerly known as the New Jersey Compassionate Use Medical Marijuana Act.


\(^3\) The definition of “qualifying medical condition” is set forth in Section 3 of this article.
The Act, as amended, now provides that it is “unlawful to take any adverse employment action against an employee who is a registered qualifying patient based solely on the employee’s status as a registrant with the” newly created Cannabis Regulatory Commission.\(^4\) An “adverse employment action” is defined as “refusing to hire or employ an individual, barring or discharging an individual from employment, requiring an individual to retire from employment, or discriminating against an individual in compensation or in any terms, conditions, or privileges of employment.”\(^5\)

However, the amendment does not “restrict an employer’s ability to prohibit, or take adverse employment action for, the possession or use of intoxicating substances during work hours or on the premises of the workplace outside of work hours.”\(^6\) Moreover, an employer can take an adverse employment action against a medical cannabis patient if accommodating such use would cause the employer to violate federal law or would result in the loss of a federal licensing-related benefit, federal contract, or federal funding.\(^7\)

The Act also regulates who can be an institutional caregiver for qualified medical cannabis patients at a health care facility and who can work at a medical cannabis alternative treatment center or a medical cannabis testing laboratory.\(^8\) The Act (1) requires applicants seeking to be registered as such a caregiver or permits to operate, or authorization to be employed at, such a center or laboratory to submit to a criminal history record background check and (2) outlines certain offenses that would disqualify an applicant from being a caregiver or operating or being employed at a center or laboratory.\(^9\)

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3. Interplay With the New Jersey Law Against Discrimination

In addition to the Act’s explicit provision forbidding employers from taking an adverse employment action against an employee who is a registered medical cannabis patient, other New Jersey laws might provide employees with a cause of action for disability discrimination. For example, individuals who have a “qualifying medical condition” as defined by the Act might also have a condition that qualifies as a “disability” under the New Jersey Law Against Discrimination (“LAD”). Under the LAD, a disability can be physical or non-physical. With 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 disabilities under the LAD by New Jersey’s courts: (1) depression and mental illness; (2) attention deficit disorder; (3) gender dysphoria; and (4) breast cancer/mastectomy.

The Act defines “qualifying medical condition” as follows:

- seizure disorder, including epilepsy; intractable skeletal muscular spasticity; post-traumatic stress disorder; glaucoma; positive status for human immunodeficiency virus; acquired immune deficiency syndrome; cancer; amyotrophic lateral sclerosis; multiple sclerosis; muscular dystrophy; inflammatory bowel disease, including Crohn's disease; terminal illness, if the patient has a prognosis of less than 12 months of life; anxiety; migraine; Tourette’s syndrome; dysmenorrhea; chronic pain; opioid use disorder; or any other

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10 N.J.S.A. 10:5-1 et seq.
11 N.J.S.A. 10:5-5(q).
14 Failla v. City of Passaic, 146 F.3d 149 (3d Cir. 1998).
medical condition or its treatment that is approved by the commission.¹⁹

Given this broad definition and the liberal reading of the definition of disability under the LAD, it is likely that users of medical cannabis will have underlying medical conditions that render them protected under the LAD, and likely the ADA as well. Moreover, these individuals might also have a “serious health condition” under the federal Family and Medical Leave Act (“FMLA”)²⁰ if they work for a covered employer and qualify as a covered employee under the FMLA.²¹ These facts require employers to consider a host of disability management issues beyond the Act when dealing with employees who qualify for use of medical cannabis.

Indeed, in its March 2019 decision in Wild v. Carriage Funeral Holdings, Inc.,²² the New Jersey Appellate Division confirmed that an employee who uses medical marijuana might be protected under the LAD. The court held that the employee should be permitted to pursue a claim of disability discrimination in view of the allegation that the employee was terminated after disclosing to the employer that the employee was a medical marijuana patient. In July 2019, the New Jersey Supreme Court announced that it will review the Appellate Division’s decision.

4. The Potential for Public Policy Claims

An exception to the employment-at-will rule, which allows employers to terminate employees without cause or notice, exists when a discharge is contrary to a clear mandate of public policy.²³ The sources of public policy include legislation.²⁴ The public policy exception to the at-will rule has created a host of potential lawsuits, including claims that employees were fired for filing or attempting to file a workers’ compensation claim,²⁵ reporting workplace hazards,²⁶ and requesting information relevant to an alleged discriminatory discharge.²⁷

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²⁰ 29 U.S.C. 2601 et seq.

²¹ 29 C.F.R. 825.113.


As noted above, the purpose of the Act can be read broadly. The provision providing that users are protected from “other penalties” might be used to support a potential public policy claim for users of medical cannabis who are subjected to adverse employment actions.

5. **Drug Testing Procedures Established in the Act**

The Act does not prohibit drug testing, but it creates new procedures that must be followed when an employee or applicant has tested positive for cannabis. Thus, employers in New Jersey that conduct drug testing should review their testing policies to ensure compliance with the law.

The employer must give the employee or applicant written notice of the positive test result and an opportunity to provide a “legitimate medical explanation for the positive test result.”28 Within three working days after receiving the written notice, the employee or applicant can provide a legitimate medical reason for the positive test result or request retesting of the original specimen at the individual’s own expense.29 The legitimate medical reason can be an authorization for medical cannabis use by a health care provider, proof of registration for medical cannabis use, or both.30

6. **Interpretive Guidance**

There are no current regulations interpreting the Act. The Act provides that the Cannabis Regulatory Commission will take over the responsibilities of the New Jersey Department of Health and be given all powers, duties, and responsibilities with regard to the regulation and oversight of New Jersey’s medical cannabis program once the members of the Commission are appointed.31 The FAQ section on the Department’s website states that being a registered medical marijuana patient does not mean that an employee can refuse to comply with drug testing policies, and that employees should be familiar with their employers’ drug testing policies.32 No further guidance is provided with regard to workplace issues.

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32 The FAQs are available at https://www.nj.gov/health/medicalmarijuana/pat_faqs.shtml.
The Department has determined that smoking medical marijuana falls within the definition of “smoking” as set forth in New Jersey Smoke-Free Air Act. Therefore, smoking medical cannabis is subject to the provisions of the Smoke-Free Air Act, meaning that medical cannabis patients may not smoke cannabis anywhere that smoking is prohibited, including in workplaces and places of public accommodation. Medical marijuana patients may smoke cannabis in their own private residences, but not in most workplaces and public places.

7. **Practical Guidance**

In sum, the Act changes the existing state criminal laws, impacts the relationship of New Jersey’s employers and employees, and mandates certain drug testing procedures, among other things. The Act, therefore, has several unique impacts on the workplace. From a practical standpoint, employers should consider the following:

- Since 2017, there have been several court decisions in various states ruling against employers who took adverse employment actions against medical marijuana users. Those states include Arizona, Connecticut, Delaware, Massachusetts, and Rhode Island. This appears to be the new trend, although there were several court cases ruling in favor of employers prior to 2017. In New Jersey, as demonstrated by *Wild* decision, the courts might find that termination of an employee for use of medical marijuana is prohibited under New Jersey anti-discrimination laws. 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 legal counsel, to address whether an individual’s use of medical cannabis or a positive drug test stemming from such use will be considered in employment decisions.

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33 See https://www.nj.gov/health/medicalmarijuana/pat_faqs.shtml; N.J.S.A. 26:3D-57. “Smoking” is defined as “the burning of, inhaling from, exhaling the smoke from, or the possession of a lighted cigar, cigarette, pipe or any other matter or substance which contains tobacco or any other matter that can be smoked, or the inhaling or exhaling of smoke or vapor from an electronic smoking device.”

34 N.J.S.A. 26:3D-58(a) (“Smoking is prohibited in an indoor public place or workplace or at a public park or beach, except as otherwise provided in this act.”). See https://www.nj.gov/health/medicalmarijuana/pat_faqs.shtml; N.J.S.A. 2C:33-13.


36 This article does not discuss the potential impact of the federal Drug Free Workplace Act of 1988 (“DFWA”), which, among other provisions, places obligations on organizations that receive federal grants and covered government contracts. While it is not clear how New Jersey courts will address this issue, courts in other states have held that the federal DFWA
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 request for accommodation made by an employee with a disability 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 cannabis at work, as noted above, the inquiry cannot end there. The Act prohibits an employer from taking any adverse employment action against an employee solely because of that employee’s status as a registered medical cannabis patient. If an accommodation is sought by an employee because of the use of medical cannabis outside of the workplace, an employer should engage in the same type of disability management analysis that it would in the absence of the Act. Failure to do so might subject an employer to potential liability under the Act, LAD, ADA, FMLA, and/or other statutes that require either accommodation or job-protection measures be put in place.37

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 might create a new avenue for employees subjected to adverse employment decisions to file suit. If a performance-related employment decision 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 might allow a question to be raised as to whether the decision was motivated by unlawful reasons. One such claim might be that an employee was terminated shortly after it was disclosed that the employee was engaging in the lawful use of medical cannabis, as in Wild. In other states, such claims have made their way to the state supreme court level, and have taken years to reach final resolution.

37 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 added). It could be argued that the denial or termination of employment because of the use of lawfully prescribed medical cannabis is the unlawful denial of a privilege or civil right, as well as contrary to a clear mandate of public policy.
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