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Update on Medical Marijuana in the NJ Workplace - *New Jersey Law Journal*

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Your client calls and asks if she can fire (or not hire) an employee who tested positive for marijuana following the company's routine drug test. Despite the growing popularity of cannabis stocks, you know that marijuana is still illegal under federal law, so you may assume the answer is: yes, an employer should be within its rights to fire an employee using an illegal drug in violation of the company's zero tolerance, drug free workplace policy. However, a recent court decision and a change in New Jersey's medical marijuana law should make you pause and provide your client with more nuanced advice.

For many years, employers and courts concluded that marijuana use (including medical marijuana) is illegal under federal law, so employers could continue with their zero tolerance policies. California was the first state to authorize medical marijuana, and it did not provide any employment law protections for medical marijuana patients. Over a decade ago, the California Supreme Court in *Ross v. RagingWire Telecommunications*,174 P.3d 200 (Cal. 2008), concluded that nothing in the medical marijuana statute required employers to accommodate medical marijuana use.

Since then, courts around the country have rejected disability claims where the medical marijuana statute is silent on the issue or contains language making clear that "nothing in this act" requires an employer to accommodate medical marijuana usage. See, e.g., *Johnson v. Columbia Falls Aluminum Co*., 213 P.3d 789 (Mont. 2009); *Roe v. TeleTech Customer Care Mgmt (Colo.)*, 247 P.3d 586, 591-92 (Wash. 2011); *Casias v. Walmart Stores*, 764 F. Supp. 2d 914, 921-22 (W.D. Mich. 2011); *Coats v. Dish Network*, 350 P.3d 849 (Col. 2015); *Garcia*

v. Tractor Supply Co., 154 F. Supp. 3d 1225, 1229 (D.N.M. 2016).

New Jersey's Compassionate Use of Medical Marijuana Act (CUMMA) contained similar language stating: "nothing in [the CUMMA] shall be construed to require … an employer to accommodate the medical use of marijuana in any workplace." N.J.S.A. 24:6I-14. Consistent with those out-of-state decisions, a federal district court in New Jersey, in *Cotto v. Ardagh Glass Packing*, (D.N.J. 2018), held that nothing in the Law Against Discrimination (LAD) or the CUMMA required an employer to waive a drug test for a federally prohibited substance as a condition of employment. In that case, the employer had been aware for years of the plaintiff's disability but never took adverse action against the plaintiff until he requested to be exempted from a drug test because of his medical marijuana usage. The court agreed with the company and concluded that: (i) nothing in the CUMMA requires employers to accommodate the use of medical marijuana; (ii) the adverse action was based on the treatment, not the disability; and (iii) the plaintiff failed to state a discrimination claim under the LAD or CUMMA.

Following *Cotto*, a New Jersey trial court judge dismissed the disability discrimination claims of a funeral home worker who admitted to using medical marijuana. In that case, *Wild v. Carriage Funeral Holdings*, a cancer patient, who had been prescribed medical marijuana, was terminated after his employer learned of his medical marijuana use and inability, therefore, to pass an employer required drug test. However, earlier this year, the Appellate Division reversed and held the employer could be liable for the LAD claim. *Wild*, 458 N.J. Super. 416 (App. Div. 2019).

The Appellate Division rejected the company's argument that the statutory language—"nothing in [the CUMMA] shall be construed to require … an employer to accommodate" medical marijuana usage—meant it did not have to provide an accommodation. The court stated that nothing in CUMMA "immunized employers from obligations already imposed elsewhere," including under the LAD. The court explained that: These words are unambiguous; they require no interpretation and permit no deviation …. Those words can only mean one thing: the Compassionate Use Act intended to cause no impact on existing employment rights. The Compassionate Use Act neither created new employment rights nor destroyed existing employment rights.

Unlike many of the earlier cases, the Appellate Division then explained that under existing discrimination laws, the plaintiff could state a prima facie claim. The LAD generally forbids any unlawful discrimination against any person because such person is or has been at any time disabled, unless the nature and extent of the disability reasonably precludes the performance of the particular employment. N.J.S.A. 10:5-4.1. The Appellate Division concluded that the employee had pleaded a prima facie case of disability discrimination because: he was disabled, adverse action had been taken against him, and the employer did not offer to accommodate his disability.

The New Jersey Supreme Court has granted a petition for certiorari in that case on the question of whether "the New Jersey Compassionate Use Medical Marijuana Act—which declares that 'nothing' in the Compassionate Use Act 'require [s]' an employer to accommodate a medical marijuana user, N.J.S.A. 24:6I-14—preclude[s] a claim by an employee

against an employer based on, among other things, the Law Against Discrimination." It will be interesting to see if the Supreme Court actually issues an opinion on that question because the CUMMA has been substantially revised in material ways.

On July 2, 2019, Governor Murphy signed into law the Jake Honig Compassionate Use Medical Cannabis Act, N.J.S.A. C24:6I-2, et seq. Importantly, the "nothing in this act" language, which forms the basis for the cert petition, has been replaced with a new section that provides: "It shall be 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 commission."

That patient friendly provision now moves New Jersey into the group of states whose medical marijuana laws expressly provide employment law protections for medical marijuana users (i.e., Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Minnesota, New York, Nevada, Oklahoma, Pennsylvania, Rhode Island and West Virginia).

The Honig Act further established a procedure that employers must follow when an employee tests positive for marijuana.

If an employee (or prospective employee) tests positive for cannabis, the employer is now required to: (i) provide written notice of the right to provide a valid medical explanation for the test result; and (ii) offer an opportunity to present a valid medical explanation for the result.

The employee or applicant then has three working days after receipt of that written notice to explain the result or request a retest of the original sample (at the employee's expense). A valid explanation for the positive test result may include an authorization for medical cannabis issued by a health care practitioner or proof of registration with the medical marijuana commission.

As a result, if an employee demonstrates that she is a valid medical marijuana user, employers will not be permitted to use that alone as a basis to take adverse employment action, unless the employer can demonstrate one of the federal exemptions applies to it. The Honig Act expressly exempts employers that would be in violation of federal law, would lose a federal contract or federal funding, or would result in a "loss of a licensing-related benefit pursuant to federal law" if the employer failed to enforce their drug free work space policy.

For example, most federal contractors are required to comply with the federal Drug Free Workplace Act, which precludes the possession or use of controlled substances at work sites. 41 U.S.C. 8101(a)(5)(B). Federal contractors in New Jersey may cite the DFWA as a reason they cannot be forced to excuse an employee's medical marijuana use. *Cf. Carlson v. Charter Communications*, (9th Cir., Nov. 19, 2018) (explaining federal law, the DFWA, controlled whether a federal contractor could employ a medical marijuana user).

The revised law does permit employers to take adverse action if an employee uses any intoxicating substance, including medical marijuana, during work hours or on work premises at any time.

In other states where there are protections for medical marijuana users, some courts have imposed on the employer the burden to engage in an interactive process with the employee to determine if there are medical alternatives that are equally as effective whose use would not violate company policy. If there are no equally effective alternatives, the employer bears the burden of proving the use of the medication would cause an undue hardship to the employer's business to justify the employer's refusal to make an exception to the drug policy. In Massachusetts, for example, an employer may be able to show an undue hardship because accommodating the medical marijuana usage would impair the employee's performance of her work; pose an unacceptably significant safety risk to the public, the employee or fellow employees; or because it would violate an employer's contractual or statutory obligation and thereby jeopardize its ability to perform its business. *Barbute v Advantage Sales and Marketing*, 477 Mass. 456 (Mass. 2017). As the Honig Act is less than a month old, it is not clear if New Jersey courts will follow that precedent.

So when that client calls, at a minimum, make sure the client complies with the notice and communication provisions in the Honig Act. The more difficult part of the conversation, and what the courts will have to decide next, is what types of reasonable accommodations are required and whether the employer can demonstrate undue hardship if it must accommodate the medical marijuana usage.