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THE IMPACT OF RECREATIONAL MARIJUANA USE ON THE NEW JERSEY WORKPLACE

BY MARK A. SALOMAN

THE CURRENT STATE OF THE LAW

Since 2010, limited cannabis use in New Jersey was permitted for medicinal purposes under the New Jersey **Compassionate Use Medical Marijuana Act** (CUMMA). Under CUMMA, employers must reconcile accommodating employee-alleged disability treated by prescription marijuana with the competing need to insure a safe and unimpaired workforce. CUMMA does not prevent employers from disciplining or terminating impaired employees; prohibits anyone from operating any vehicle or stationary heavy equipment while under the influence of marijuana; and requires no

New Jersey employer to accommodate the medical use of marijuana in any workplace.

Regarding federal law, the Department of Justice changed tactics on marijuana enforcement by rescinding the “**Cole Memo**” and other internal guidelines in early 2018. The Cole Memo de-prioritized federal marijuana enforcement efforts to, among other things, prevent distribution of marijuana to minors; prevent marijuana revenue from funding criminal enterprises; prevent marijuana from moving from legal states; and prevent violence related to growing or distributing marijuana. Though some experts doubt the average consumer will

be in danger of arrest by the federal government, the threat to state-legal recreational marijuana businesses is palpable.

WHAT THE FUTURE MAY HOLD

In June 2017, New Jersey’s legislature introduced **Bill S3195** which, when enacted, will legalize recreational marijuana use in New Jersey. Among other things, the Senate bill will allow for the possession of up to one ounce of dried marijuana, 16 ounces of edible cannabis products, and 72 ounces in liquid form. S3195 differs from CUMMA in one significant respect: it creates a separate cause of action making it **unlawful for employers**

to take “any adverse employment action” against an employee merely because that person uses marijuana. Refusing to hire or firing such individuals are just two actions prohibited by S3195. This baseline prohibition is softened by only **two caveats**. First, an employer may affirmatively assert the defense it has “a rational basis” for the adverse employment action which is “reasonably related to the employment.” This presumably includes safety-sensitive positions and instances when the responsibilities of the current or prospective employee mandate the need for drug-free personnel. Second, employers will remain free to take adverse employment action against an employee if failure to do so places the employer in violation of federal law or causes it to lose a federal contract or funding.

Political insiders originally predicted the bill legalizing recreational marijuana in New Jersey would be signed into law within the first half of 2018, though that fervor has slowed some. In addition to—or perhaps to accelerate—the track for recreational cannabis passage, New Jersey significantly expanded its medical marijuana program in March 2018. The recent expansion approved by Governor Murphy included the addition of several new categories of conditions treatable by medical marijuana, most notably chronic pain related to musculoskeletal disorders, migraines, and anxiety. New Jersey physicians can recommend medical cannabis for these additional conditions, which should increase the patient pool, which remains tiny when compared to the 9 million plus residents of the Garden State. The new rules also triple the number of existing dispensaries to 18, with six each in northern, central, and southern New Jersey. In addition, any physician—not just those appearing on a public registry—may prescribe medical marijuana, a change which should increase patient access. If New Jersey’s existing (and new) medical marijuana dispensaries are permitted to sell under the new law, experts believe recreational sales could commence as early as Q1 of 2019—but the regulatory and licensing process will probably take at least one year or longer.

ZERO TOLERANCE AND DRUG TESTING

New Jersey employers remain free to ban the use or possession of marijuana on the

job. Though legal issues have arisen in other jurisdictions over the termination of workers for cannabis use, employers are protected by some language in S3195. Mirroring CUMMA, S3195 requires no New Jersey employer to permit or accommodate marijuana use in the workplace. Likewise, it does not affect the ability of employers to maintain zero tolerance policies prohibiting marijuana use or intoxication by employees during work hours and does nothing to change employers’ right to drug testing.

Employers may, therefore, continue to institute a zero tolerance policy in the workplace, especially for workers in “safety-sensitive” positions. New Jersey still recognizes the public’s interest in ensuring workers in safety-sensitive positions are drug-free outweighs any individual right to privacy, and permits employers to test those workers and to discharge them for failing those tests. A “safety-sensitive” position includes those in which an employee is responsible for the safety of herself or others, like those involving driving or using machinery. If such a position requires a commercial driver’s license (CDL), then employers must abide by the Omnibus Transportation Employee Safety Act of 1991, which requires all employers drug test employees whose duties require a CDL. Federal Department of Transportation guidelines prohibit the use of medical marijuana for transportation jobs, even in states where possession and use is legal.

REASONABLE ACCOMMODATION?

If an employee tests positive for marijuana, New Jersey employers should ask if the worker has a current, valid prescription for medical marijuana. Then employers should further evaluate the employment situation and the specific demands of the job (and any competing regulations), in considering an employee’s use of medical marijuana.

Once an employer is notified an employee is a medical marijuana user, the employer must be aware the employee is potentially disabled under the Americans with Disabilities Act (ADA) or New Jersey Law Against Discrimination (LAD) and/or has a serious health condition under the Family and Medical Leave Act (FMLA) or New Jersey leave laws. Though the

ADA and LAD require no accommodation based on marijuana use, they require accommodations related to a covered disability and afford certain protections to disabled employees and applicants. Therefore, New Jersey employers must consider the specific needs of the job as well as any applicable competing regulations before acting. An example of “reasonable accommodation” might include a modified work schedule allowing the employee to treat his condition with medical marijuana from home during normal work hours. If, however, the position is “safety-sensitive,” employers may assert there is no available accommodation because marijuana use by the employee or applicant may pose a direct threat to the health and safety of herself or others.

Employers must ensure any adverse employment decision is made based on the employee’s use of marijuana, not the employee’s underlying medical condition. Indeed, S3195 makes it unlawful for employers to take “any adverse employment action” against an employee merely because that person uses marijuana. Refusing to hire or firing such individuals are just two actions prohibited by S3195. Further complicating matters, the psychoactive agent in cannabis can stay in a person’s system longer than other drugs, such as alcohol, making for a much longer positive test result period. Also, impaired performance caused by marijuana use cannot be proven by current scientific methodology, making it difficult to show the root cause of a workplace accident or poor performance. New Jersey’s judicial opinions also may shift to track evolving public policy in favor of lawful cannabis in general.

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