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## Employment Law

### N.J. Medical Marijuana Law May Create Challenges for Employers

Christine V. Bonavita  
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Local employers will soon have to confront issues that are likely to arise in the workplace when employees who legally use marijuana for medicinal purposes report to work. Until recently, only the following states permitted the legal use of marijuana: Alaska, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont and Washington. On Jan. 18, New Jersey joined those states with the passage of the New Jersey Compassionate Use Medical Marijuana Act.

After significant debate by both houses of the New Jersey Legislature, the act was signed by former Gov. Jon Corzine on his last day in office. The purpose of the act is to protect from arrest and prosecution seriously ill people who have a legitimate need to use marijuana to alleviate pain and suffering experienced because of certain serious illnesses. The protections extend to registered users, their physicians, primary caregivers and those legally authorized to dispense marijuana for legal use. In order to take advantage of the law's protection, which goes into effect on or about July 19, a New Jersey resident must, among other things, obtain formal written certification from the individual's physician establishing that the person has a qualifying condition.

A qualifying "debilitating medical condition" is defined by the act as any of the following:

- If resistant to conventional medical therapy, seizure disorders, including epilepsy, intractable skeletal muscular spasticity or glaucoma.
- HIV, AIDS or cancer when severe or chronic pain, severe nausea, or vomiting, cachexia or wasting syndrome results from the condition or treatment thereof.
- Amyotrophic lateral sclerosis, multiple sclerosis, terminal cancer, muscular dystrophy or inflammatory bowel disease, including Crohn's disease.



#### **CHRISTINE V. BONAVITA**

*is a partner in Mitts Milavec's labor and employment law practice group. She has extensive experience providing companies and not-for-profit entities with training, counseling and litigation avoidance strategies related to reductions in force, the WARN Act, FMLA, discrimination and harassment, employee termination and discipline, wage and hour compliance and the administration of personnel policies.*

- Terminal illness with a prognosis of less than a year of life.
- Any other medical condition, or its treatment, that is approved by the Department of Health and Senior Services by regulation.

Regulations interpreting the act are expected to be implemented by the Department of Health and Senior Services within 90 days following enactment of the new law.

As a consequence of the New Jersey legislation, it is likely that local businesses may soon employ individuals who are legally using marijuana under a health care provider's direction. While such conduct may be legally permissible, it would violate a company's zero tolerance policy on drug use and potentially violate other workplace policies. In addition, allowing a registered user/employee to remain in the workplace if impaired may create safety concerns, quality control issues, decreased performance or behavioral issues, all of which may create adverse consequences for the company. So what is a law-abiding employer to do?

One thing that is clear from the statute is that nothing in the act requires an employer to accommodate the medical use of marijuana in the workplace. Taken literally, that means that an employer is not required to allow an employee with a bona fide disability to smoke marijuana on work premises or to have break time to legally smoke marijuana.

This is in contrast to an employer's duty to accommodate an employee with a disability who may need to inject or ingest prescription medication during work time or on work premises, or to provide time off while the employee seeks medical treatment for a disability.

In addition to the act's clear directive that an employee is not permitted legally to use marijuana on work premises, the act also prohibits a person legally using marijuana from operating, navigating or being in physical control of any vehicle, aircraft, railroad train, stationary heavy equipment or vessel "while under the influence of marijuana." This creates a tension between an employer's need to manage the workforce and an employee's right to engage in certain off-duty, legal activity permitted under the act.

Complicating the issue of how employers should manage their workforce going forward is the fact that the act does not define what it means to be "under the influence." It also does not explicitly authorize an employer to preclude employees with non-safety-sensitive positions from reporting to work under the influence.

For example, financial advisers, sales representatives, accountants or data entry clerks may not create a safety hazard as a result of their use of heavy equipment but certainly can adversely affect business operations if significant mistakes are made in the performance of their job duties or if customers complain about their behavior. Nevertheless, a registered user would likely argue that their status should be treated like any other employee with a disability who uses legal prescription medication to treat their condition, i.e. there should not be any per se bar against them reporting to work if they can perform their essential job functions. On the other hand, an employer would likely argue that because federal law prohibits the use of marijuana, the situations should not be treated in the same manner.

Regardless of the act's explicit restrictions on the use of marijuana in the workplace, an employer is still required to provide a reasonable accommodation to a registered user with a disability under the ADA or the New Jersey Law Against Discrimination, absent an undue hardship. The purpose of the reasonable accommodation, however, is to assist the individual in the performance of their essential job functions,

which may be needed because of the side effects of legally using marijuana or the underlying condition. This could take the form of time off, a reduced schedule, or modified job duties. The question that will likely be asked by a registered user is whether an employer is required to accommodate their off-duty use and allow the person to report to work as long as they are not "under the influence" and charged with operation of heavy machinery, an aircraft, a motor vehicle, etc.

So what are an employer's options when it comes to dealing with a current employee who is using marijuana legally and who can perform their essential job functions satisfactorily?

*Ross v. Ragingwire Telecommunications, Inc.*, a 2008 case decided by the Supreme Court of California, is instructive. In that case, Ross, who was a systems administrator, failed a drug screen because of his legal use of marijuana to alleviate the symptoms of his chronic back pain. When the results were provided to the employer he was fired. Ross claimed that the termination was unlawful, that it violated public policy and that the company failed to make a reasonable accommodation under state law prior to firing him. He also claimed that he could satisfactorily perform all of his essential job functions despite his off-duty use of marijuana.

The court held that the termination was lawful, noting that marijuana did not have the same legal status as a prescription drug and therefore, an employer was not required to ignore its lawful drug free workplace policy. The court further noted that the state law legalizing marijuana for limited medicinal purposes was enacted to protect users from prosecution — not to limit an employer's legal right to maintain a drug free workplace. Although such precedent is not binding on a New Jersey court, the same arguments may be equally persuasive if applied to the same set of facts. It may not be as clear cut, however, if there is no drug screen and the employer is not made aware of the underlying disability or the off-duty conduct.

Employers in the Northeast should stay tuned for more on these issues as New Jersey may not be the only state in the region to legalize marijuana for medicinal purposes. Pennsylvania is considering strikingly similar legislation, House Bill 1393. However, as currently proposed, the Pennsylvania version does not include any provision regarding an employer's duty to accommodate the legal use of marijuana, making the issues that could arise for a Pennsylvania employer even murkier.

In the meantime, local employers should consider what effect the New Jersey act could have on its operations. For example, employers who have contracts with the federal government must take measures to ensure that its drug free workplace policy is followed to avoid facing debarment. Therefore, the following proactive measures should be taken so that your company is ready to deal with these issues, should they arise in your workplace:

- Companies that do not have a drug policy in place should implement one prior to July.
- All jobs involving safety sensitive functions should be identified.
- Job descriptions should be reviewed to ensure that all essential job functions are clearly defined, including listing any and all safety-sensitive functions.
- Drug testing policies should be reviewed and amended to ensure that the policy expressly states that legal use of marijuana is strictly prohibited.
- Drug testing consent forms should be reviewed and modified if necessary to state explicitly that current legal drug use is a violation of the company's drug free workplace policy.

Until regulations clarifying the act are issued or the New Jersey judiciary weighs in on some of these issues, employers are encouraged to honor their drug free workplace policies and to render reasonable accommodations to registered users/employees with disabilities under the ADA and the New Jersey LAD. •

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