

Budding Use of Legal Marijuana Creates Sticky Situation for NJ Employers



Employers face a whole new arena of substance-related challenges in states where marijuana has been legalized for medical and/or recreational use, or decriminalized.

By Kristine J. Feher and Danielle E. Gonnella | August 24, 2018 | New Jersey Law Journal

For many years, employers have struggled with challenges relating to employees' use of alcohol and prescription drugs, and the impact of those substances on the employees' work. Now, employers face a whole new arena of substance-related challenges in states where marijuana has been legalized for medical and/or recreational use, or decriminalized.

Nationwide, laws regarding marijuana are in flux, and employers are struggling to adopt appropriate policies. Notably, state laws vary greatly as to who is covered by the law, the quantity of marijuana permitted, who has access to it, and how and in what form it may be obtained. Adding to this complexity is the growing conflict between state and federal laws, which creates confusion for employers, especially those who are obligated to abide by federal law for receipt of funding or otherwise. In New Jersey, marijuana has been approved for medical use, and may soon be permitted for recreational use as well, raising both legal and practical issues for employers. For example, employers will need to determine whether to modify their policies regarding substance abuse and drug testing, and whether—and, if so, how—they must accommodate employees who use marijuana for medical reasons.

Marijuana has been legalized for recreational use in nine states and Washington, D.C.; and legalized for some form of medicinal use in an additional 37 states, including New Jersey; leaving only four states where marijuana is illegal for all purposes. To date, research regarding the benefits and pitfalls of marijuana has been stymied. Under federal law, the U.S. Drug Enforcement Administration (DEA), must approve all chemical and pre-clinical research involving marijuana, and must use the research-grade marijuana provided by the National Institute on Drug Abuse (NIDA) for studies, which has significantly curtailed research. Employers addressing issues relating to marijuana use are forced to work with the very limited information that is available, which does little to ease employer concerns regarding safety, health, and productivity in the workplace. What is particularly troublesome for employers is that THC, the mind-altering chemical in marijuana, stays in one's system after its psychoactive effect wears off. Therefore, employers face a dilemma in determining how to manage state-sanctioned marijuana use, with no reliable scientific methodology to determine actual impairment levels at any given time.

Medical Marijuana in New Jersey

The Compassionate Use Medical Marijuana Act (CUMMA) was passed by the New Jersey legislature on Jan. 11, 2010, and was signed into law by Governor Corzine on Jan. 18, 2010. N.J.S.A. 24:61-1 et seq. Under CUMMA, qualified patients can possess up to two ounces of medical marijuana within a 30-day period. CUMMA expressly states that it does not require employers "to accommodate the use of medical marijuana in any workplace." However, any underlying condition for which medical marijuana would be prescribed would likely qualify as disability under both the Americans with Disabilities Act (ADA) and the New Jersey Law Against Discrimination (NJLAD), both of which require employers to offer reasonable accommodations to allow disabled employees to perform their jobs. It is not yet clear whether permitting the use of medicinal marijuana outside of work would be deemed a reasonable accommodation of the underlying disability. However, an opinion just issued by a federal court in New Jersey held that CUMMA's decriminalization of medical marijuana does not require employers to waive drug testing requirements for medical marijuana users as an accommodation under the ADA or the NJLAD. *Cotto v. Ardagh Glass Packing*, No. 1:18-cv-1037 (D.N.J. (RBK) (AMD)) (Fed. R. Civ. P. 12(b)(6) motion decided Aug. 10, 2018).

That case was brought by Daniel Cotto Jr. Cotto hit his head at work while operating a forklift, and was asked to take a drug test as a condition of continued employment. Cotto had a pre-existing back injury, of which the company was aware, for which he was prescribed narcotics and, unknown to the company, medical marijuana. In advance of taking the test, he disclosed that he used prescribed marijuana for his back pain, and was suspended indefinitely until he could test negative for marijuana. Cotto sued his employer under NJLAD, arguing that the company discriminated against him based on his disability (his back condition), and failed to reasonably accommodate his disability by waiving the requirement that he pass a drug test for marijuana.

The court dismissed the lawsuit for failure to state a claim, finding that neither CUMMA nor the NJLAD require an employer to waive a drug test as a condition of employment for a federally-prohibited substance. As to the discrimination claim, the court concluded that the disabling back condition is distinguishable from the marijuana use, which it characterized as "a consequence of his treatment." As it was clear that the employer's decision here was based on the marijuana use and not the back condition, which the employer had been accommodating for years, the court found that Cotto could not support a discrimination claim.

As to the failure to accommodate claim, the court noted that marijuana use is still prohibited under federal law, and, as such, can reasonably be treated differently than prescription narcotics. It then concluded that while marijuana's use for medicinal purposes is decriminalized in New Jersey, CUMMA

does not require employers to accommodate its use in the workplace, and does not create additional rights under NJLAD. Accordingly, while it acknowledged that Cotto's back condition was a qualifying disability, it held that the company was not required to waive its drug testing requirement as an accommodation.

It remains to be seen whether New Jersey state courts will follow this decision, particularly its conclusion that the use of marijuana as a treatment is distinguishable from the underlying disability and not protected. There is little other case law on the subject of whether an employer may take adverse action against an employee who uses prescribed marijuana. However, a proposed bill may soon moot some of the issues.

Recreational Marijuana in New Jersey

Senate Bill 830 was recently introduced and sponsored by Senator Scutari in the New Jersey State Senate. Among other things, the Senate bill would allow for the possession and use of recreational marijuana by individuals 21 years of age and older. S830 differs from CUMMA in one significant respect: it creates a right to sue employers for taking "any adverse employment action" against an individual because that person does or does not smoke or otherwise use marijuana. This prohibition is softened by two caveats.

First, an employer may assert the defense that it has a rational basis for the adverse employment action which is "reasonably related to employment, including the responsibilities of the employee or prospective employee." So, for example, an employer would not be required to permit an employee to work in safety sensitive position while using marijuana, and presumably could discipline or discharge an employee for violations of conduct policies or performance standards, even if attributable to marijuana use. However, the degree to which an employer could rely on *prospective* concerns about productivity, attention to detail, or other factors beyond safety when making decisions relating to marijuana use is not yet clear.

Second, employers would remain free to take adverse employment action against an employee for marijuana use if federal law, a federal contract, or the terms of federal funding require the employer to do so.

Impact on Employment Policies

S830 also provides that it is not intended to require an employer to permit or accommodate use of marijuana *in* the workplace, or to affect the ability of employers to have policies prohibiting marijuana use or intoxication by employees *during work hours*. Thus, under both current and proposed law, New Jersey employers remain free to ban the use or possession of marijuana on the job, and may also maintain otherwise-lawful drug testing policies/practices, especially for workers in safety-sensitive positions. Administration of such policies is complicated, however, by the fact that the psychoactive agent in marijuana, THC, is detectable in a person's system for much longer than alcohol or other drugs. This makes it nearly impossible to detect an employee's level of actual impairment for purposes of determining whether marijuana use was a factor in workplace accidents or performance issues, or to determine when the employee used the drug. These issues create hazards and confusion for employers, particularly if S830 is passed.

What's an Employer to Do?

Until further guidance is available, employers must attempt to comply with the law based on the limited guidance that exists. To that end, the following measures are recommended.

1. Employers should maintain clear and uniformly applied policies regarding drug testing and marijuana use. The marijuana policy should clearly communicate that the use of marijuana while at work, or intoxication by marijuana or other substances during work hours, is prohibited. It should make clear, at minimum, that employees in safety-sensitive positions may not use marijuana, and must alert the company if they are prescribed medical marijuana or any other medication that may impair their concentration, dexterity, or other necessary abilities, and should define critical terms, such as what constitutes a “safety-sensitive” position. The policy should contain clear procedures and penalties for violations, and management employees should be trained in the application of the policies.
2. If a New Jersey employee discloses or tests positive for medical marijuana use, the employer should be aware that the employee may be deemed disabled under the ADA and/or the NJLAD. We recommend seeking legal advice before taking action against any employee in those circumstances, particularly given the shifting legal landscape on this topic.
3. In any case, the employer must keep in mind the distinction between any underlying disability, which is protected from discrimination; marijuana use at work, which is not; and marijuana use outside of work, which, whether or not for medicinal purposes, may soon be.

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