

The Smoke Is Beginning to Clear: Accommodating Employees Who Use Medical Marijuana in New Jersey

October 2018

By: David Disler

Porzio Employment Law Monthly

While it remains to be seen whether New Jersey will become the tenth state to legalize recreational marijuana, the use of medical marijuana has greatly expanded over the last year. Approximately 500 new patients sign up for New Jersey's medical marijuana program each week, with the total expected to reach around 50,000 patients by 2019. Because of the increased demand, New Jersey will be approving licenses for six new dispensaries, which will be selected from the 146 applicants.

As the number of users increases, employers must prepare for how they plan to treat employees who use medical marijuana. While the law regarding the use of marijuana during working hours is rather clear, one question that remained outstanding was whether an employer must accommodate an ill or disabled employee's request to use medical marijuana outside of work. Two recent court decisions provided clarity on this vexing question. In both instances, the courts determined that the employer was not obligated to accommodate an employee's use of marijuana.

Background

New Jersey became the 29th state to decriminalize the use of medical marijuana when it passed the Compassionate Use Medical Marijuana Act ("CUMMA") in 2010. To qualify for medical marijuana, patients still must demonstrate that they have a debilitating medical condition. Examples of qualifying illnesses include epilepsy, cancer, muscular dystrophy, or inflammatory bowel disease. Due to the serious nature of these medical conditions, they likely fall within the Americans with Disabilities Act's broad definition of a disability. However, as presently written, CUMMA does not require employers to accommodate an employee's medical use of marijuana. Therefore, New Jersey employers are permitted to enforce "zero tolerance" policies.

Mandatory Drug Tests

On August 10, 2018, a federal judge dismissed a claim against an employer based on the finding that "New Jersey law does not require private employers to waive drug tests for users of medical marijuana." In *Cotto v. Ardagh Glass Packing, Inc.*, Daniel Cotto worked as a forklift operator at Ardagh Glass. Because of a neck and back injury in 2007, Cotto was prescribed Percocet, Gabapentin, and medicinal marijuana to help him cope with his pain. Using these medications was not an issue until Cotto was injured in a forklift accident in 2016. As a condition to return to work, Ardagh Glass required that Cotto pass a breathalyzer and drug test. Upon being notified of his treatment plan, Ardagh Glass indicated it was not concerned with

Cotto's use of the pain medication; however, he would remain indefinitely suspended until he passed a drug test for marijuana.

As a result of his suspension, Cotto sued Ardagh Glass for discriminating against him under the New Jersey Law Against Discrimination. He argued that Ardagh Glass had an obligation to provide a reasonable accommodation for his disability – i.e., to accommodate his disability by waiving the requirement he pass a drug test before returning to work. The court disagreed and dismissed the lawsuit. Of particular importance, marijuana remains illegal under the federal Controlled Substance Act. The court determined that nothing in the New Jersey Law Against Discrimination or CUMMA would require that an employer accommodate an employee's use of a federally-illegal substance (including medical marijuana) by waiving its requirement that the employee completes a drug test.

Prohibiting Medical Marijuana Outside of Work

Advancements in technology have made it possible (for better or for worse) for employees to work remotely. No longer are employees limited to working at their desk or during normal business hours. As a result, many employers feel it is important to enforce “zero tolerance policies” that prohibit using marijuana at any time, including while outside the office. The enforceability of such a policy, in light of CUMMA's requirements, was recently decided by a New Jersey court. In the recent decision, the court determined that an employer may terminate an employee who tests positive for marijuana, despite the employee never using or being under the influence while at work.

In *Wild v. Carriage Services*, Justin Wild was diagnosed with cancer and prescribed medical marijuana. Sometime thereafter, Wild was involved in an accident at work. Wild disclosed his marijuana usage to his employer but claimed he was not under the influence during the accident because he only used marijuana at night. Following his disclosure, his employer required Wild take a drug test. When he failed, he was terminated for violating the employer's drug and alcohol policy.

Wild sued under the New Jersey Law Against Discrimination. However, his claim was dismissed based on the court finding that employers may terminate employees who violate a “zero tolerance policy,” even when the violation was the result of the employee's use of medicinal marijuana. Specifically, the court found that according to Wild's admission, “the termination of his employment was due to his testing positive to a drug test and for violating [the employer]'s drug use policy. As marijuana is an illegal substance, an employer may lawfully terminate an employee for failing a drug test.” Based on this decision, “zero tolerance policies” can be used to discipline employees, regardless of whether the employee used marijuana during the workday or after-hours.

Conclusion

The laws surrounding the medical and recreational use of marijuana are continuously evolving. There remain several bills before the New Jersey legislature that have the potential to change the entire landscape. Of particular importance, the proposed legislation would make it unlawful (with certain exceptions) for employers to take any adverse employment action based on an employee's use of medical marijuana. If passed, employers could no longer have “zero tolerance policies” and may have to provide certain accommodations. Employers should continue to pay close attention to what is occurring in Trenton, while also acting prudently in enacting policies that balance their employees' needs with their business interests.