

Employers May Have To Accommodate Off-Duty Medical Marijuana Use

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New Jersey's marijuana legislation has been in constant flux throughout the first half of 2019. In February, Governor Murphy and various legislative leaders, including Senate President Steven Sweeney, reached an agreement on the two issues that many believed were preventing the adult-use marijuana bill from becoming law. At that point, many felt legalization was a done deal, leading to such headlines as "At last! N.J. Close to Legalizing Weed as Murphy and Top Democrats Have a Deal." However, just one month later, Senate President Sweeney postponed the legalization vote scheduled to take place in March after it was clear there were not enough votes for it to pass. In May, Senate President Sweeney held a press conference to announce the Legislature was not moving forward with its efforts to pass legalization legislation. Instead, the issue would be decided by the voters during the 2020 election. The new focus would be on legislation that expands the State's medical marijuana program and expunges existing marijuana convictions.

Not to be outdone by the Legislature, New Jersey courts also have been busy attempting to grapple with many issues that have arisen resulting from constant changes to the law. One of the most pressing issues was whether employers had to accommodate an employee's request to use medical marijuana. The New Jersey Appellate Division recently answered this question by holding that employers must accommodate requests made by medical marijuana users in certain circumstances.

Medical Marijuana

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 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 also likely fall within the Americans with Disabilities Act's broad definition of a disability.

The question many employers now are facing is how to respond to a request by an employee to use medical marijuana to accommodate an employee's disability. Unfortunately, case law across the country is inconsistent. While some states have found that an employer has no obligation to accommodate, the recent trend is to require employers to provide an accommodation.

Reasonable Accommodation

The New Jersey Appellate Division recently addressed whether an employer must accommodate an employee's request for a medical marijuana accommodation in the case *Wild v. Carriage Funeral Holdings, Inc.* Justin Wild was diagnosed with

cancer and prescribed medical marijuana. Sometime thereafter, he was involved in a workplace accident (while driving a vehicle he was struck by another car that ran a stop sign). Prior to returning to work, Wild was required to pass a drug test.

At that point, Wild disclosed his medical marijuana use to his employer, but claimed he was not under the influence during the accident because he only used marijuana at night. Upon failing the drug test, he was terminated for violating his employer's drug and alcohol policy. Wild sued. The case was primarily based on claims of disability discrimination and failure to accommodate under the New Jersey Law Against Discrimination.

The Appellate Division determined that Wild's allegations, if true, were sufficient to bring a lawsuit under the New Jersey Law Against Discrimination. To bring such a lawsuit, employees must allege: (1) they have a disability; (2) they can perform the essential functions of the job; and (3) an adverse employment action was taken against them due to their disability. The first two prongs were not overly difficult for Wild to demonstrate in the pleadings stage since he: (1) has cancer, and (2) was able to continue to work as a funeral director. However, the third prong was where the confusion arose, as it involved the Court deciding whether terminating an employee who uses medical marijuana to treat their cancer is appropriate because it violates the company drug policy or inappropriate because it is an adverse employment action based on an individual having cancer. The Court determined that medical marijuana was part of Wild's cancer treatment and, therefore, terminating him for using his medication was the same as terminating the employee for having cancer. As a result, it found that Wild met his initial burden and could proceed with his lawsuit against his employer for failing to accommodate his disability by not waiving its drug test requirement.

Of particular importance, however, was that Wild only used medical marijuana outside of the workplace and during non-working hours. The Court made clear that it may have reached a different decision had Wild sought an accommodation for his use of medical marijuana in the workplace.

Takeaway

Being under the influence of marijuana at work still is a legally-permissible reason to take adverse employment action against an employee. However, based on Wild, New Jersey employers should accommodate employees who request to use medical marijuana outside the workplace and during non-working hours, so long as there is no impact on the employee's ability to perform the essential functions of their job. This may include waiving the requirement that an employee pass a drug test. This does not mean that employers must allow employees to be under the influence during the workday or accommodate a request to use marijuana while at the office. In most (if not all) cases, such requests would be considered to be unreasonable.

The other important takeaway is that employers should treat medical marijuana as they would other medications that have impairment as a side effect by engaging with the employee in the interaction process to find a reasonable accommodation satisfactory to both the employer and employee. Keep in mind that under CUMMA, individuals may obtain medical marijuana only if they have a "debilitating medical condition." An individual who qualifies for medical marijuana under CUMMA likely also has a "disability" under the Americans with Disabilities Act or the New Jersey Law Against Discrimination. As a result, employers who learn an employee utilizes medical marijuana should assume that employee has a disability. When a request for an accommodation is made, employers should engage in the interactive process with these employees to determine whether they can perform essential job functions with reasonable accommodation. As of now, a reasonable accommodation includes permitting employees to use medical marijuana during non-working hours and outside of the workplace, so long as the employee is not impaired when they are working.

¹ *At Last! N.J. Close to Legalizing Weed as Murphy and Top Democrats Have a Deal*, Advance Media for NJ.com (February 16, 2019) available at <https://www.nj.com/marijuana/2019/02/at-last-nj-close-to-legalizing-weed-as-murphy-and-top-democrats-have-a-deal.html>.

² *Wild v. Carriage Funeral Holdings, Inc.*, Docket No. A-3072-17T3 (N.J. App. Div. March 27, 2019).

