ARE NEW JERSEY LAW FIRMS PREPARED FOR THE LEGALIZATION OF MARIJUANA?

by Brian P. Sharkey and David L. Disler

As Governor Phil Murphy works to make New Jersey the ninth state to legalize recreational marijuana, New Jersey law firms are paying close attention to what is occurring in Trenton. Cannabis practice groups have become seemingly ubiquitous at New Jersey's top firms. However, while law firms are preparing to assist clients in the cannabis industry, it remains to be seen how one of the state's most risk-adverse professions adapts to marijuana becoming legal under state law while remaining illegal under federal law. Law firms, unlike many other businesses, face a number of unique ethical and practical challenges that will need to be addressed as the use of medical and recreational marijuana expands.

Medical Marijuana's Impact on Law Firms

In 2010, New Jersey enacted the Compassionate Use Medical Marijuana Act (CUMMA).[1] Shortly after taking office, Governor Murphy issued Executive Order No. 6 to provide patients with "a greater opportunity to obtain medical marijuana."[2] As a result of the order and actions by the Department of Health, the process to obtain a license was streamlined and the number of qualifying medical conditions was expanded.[3]

That expansion places law firms in a precarious position. Marijuana remains illegal under the federal Controlled Substances Act (CSA), which continues to classify cannabis as a Schedule I substance, meaning that Congress has decided "marijuana has no medicinal value."[4] For obvious reasons, law firms are reluctant to violate federal law. In addition, law firms are in the business of selling their attorneys' judgment and expertise, which results in significant time, energy, and resources being spent building their reputation, marketing their acumen, and ensuring their clients' confidence. Regardless of polls that show general acceptance of medical and recreational marijuana throughout the state, there remains a stigma that surrounds the use of cannabis. It is reasonable for law firms to fear that some clients could lose trust in the law firm's work should it be discovered that its attorneys or employees are using marijuana (even for medical purposes). As a result, law firms have a significant business interest in preventing the use of marijuana by their attorneys and staff.

Another issue law firms must consider is their client base. Law firms represent a vast array of clients. While many firms are quickly adapting to take on cannabis-related clients, they cannot forget the interest of existing clients that may be opposed to marijuana on ethical, moral, or financial grounds. Therefore, the positions taken by law firms—both in how they treat their employees and the type of practice groups they form—may impact their relations with current clients.

To help simplify many of these issues, some law firms may choose to not represent clients in the cannabis industry. Many law firms also may wish to prohibit their employees' use of marijuana (both during and after work). However, as the state law changes, it remains unclear whether law firms should have a universal ban. On the one hand, marijuana remains a federally illegal substance. On the other hand, to lawfully obtain medical marijuana in New Jersey an individual must have a serious medical condition and a recommendation from a doctor. These serious conditions likely qualify as disabilities, thereby requiring the law firm provide the employee with a reasonable accommodation. As part of this calculation, law firms that have adopted cannabis practice groups may need to determine the business implications of marketing themselves as marijuana-friendly businesses, while internally enacting strict marijuana use policies.

Should Law Firms Offer Marijuana Use as a Reasonable Accommodation?

The issue law firms will soon need to confront is how they should respond to a request by an employee (whether an attorney or non-attorney) to use medical marijuana as accommodation for their disability. Unfortunately, there is a dearth of case law across the country on this question. The courts that have attempted to provide guidance have reached inconsistent decisions. While some states have found that an employer has no obligation to accommodate, the recent trend is to require employers to provide an accommodation.[5] What these recent cases illustrate is that state courts are more concerned with the individual wording of their state's statute than the federal supremacy issue.

For example, the Massachusetts Supreme Judicial Court recently found that despite federal law, state law required an employer undergo the interactive process to determine whether it can provide a medical marijuana user with a reasonable accommodation. In *Barbuto v. Advantage Sales & Marketing*, Christina Barbuto, who used medical marijuana to treat Crohn's disease, was terminated for violating company policy following a positive drug test. She then filed a discrimination lawsuit. The court rejected the employer's argument that it did not need to provide a reasonable accommodation because marijuana was illegal under federal law. Instead, it held that medical marijuana was lawful

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under Massachusetts law and, therefore, where "in the opinion of the employee's physician, medical marijuana is the most effective medication for the employee's debilitating medical condition, and where any alternative medication whose use would be permitted by the employer's drug policy would be less effective, an exception to an employer's drug policy to permit its use is a facially reasonable accommodation."[6]

It is likely that each medical condition that qualifies an individual to use medical marijuana under CUMMA would fall within the broad definition of a 'disability' under the Americans with Disabilities Act. However, as presently written, CUMMA does not require employers to accommodate an employee's medical use of marijuana *in the workplace*. ("Nothing in this act shall be construed to require…an employer to accommodate the medical use of marijuana in any workplace.") Therefore, New Jersey law firms are still permitted to enforce 'zero tolerance' policies during working hours. However, this does not alleviate a firm's responsibility to accommodate its employees. Should an employee request to use marijuana during the workday because he or she suffers from a disability, the law firm may reject this accommodation, but still must engage in the interactive process to offer another reasonable accommodation to the employee.

Regulating Employees' Use of Marijuana During Non-Business Hours

Despite CUMMA allowing employers to reject reasonable accommodations in the workplace, law firms still face a number of issues if employees are using medical marijuana outside the office. In today's legal market, it is rare for attorneys to work exclusively at the office or during normal business hours. For better or for worse, it has become commonplace in the legal profession for work to be completed remotely, after-hours, or on the weekend. Therefore, law firms that allow attorneys to use medical marijuana outside the office or on the weekend remain at risk for having these employees work while they have marijuana in their system.

Further complicating this issue are the limitations in drug testing. Unlike a breathalyzer, drug testing for marijuana cannot provide the exact time an individual used marijuana. Instead, the testing is rather imprecise—only indicating whether marijuana was used within the past few days or even few weeks. (The test searches for THC, which can differ in how long it remains in an individual's system.) Therefore, the best way to guarantee an attorney is not working under the influence of marijuana is to have a zero tolerance policy that prohibits the use of marijuana, even outside the regular workday. Thus, law firms face a difficult question: Must they allow employees to use medical marijuana while not working, or may they simply terminate any employee who uses marijuana?

While courts around the country have reached different conclusions, the New Jersey Superior Court recently decided this issue.[7] In *Wild v. Carriage Services*, Justin Wild was diagnosed with cancer and prescribed medical marijuana under CUMMA. Sometime thereafter, Wild was involved in an accident at work. He disclosed his marijuana usage to his employer, but claimed he was not under the influence during the accident because he only used cannabis at night. As a result of his disclosure, Wild was required to take a drug test, which he failed. He was then terminated for violating the employer's drug and alcohol policy.

Wild filed a lawsuit, which was primarily based on claims of disability discrimination and failure to accommodate under the New Jersey Law Against Discrimination. In an unpublished decision, Judge Charles E. Powers Jr. dismissed both claims, finding that employers may terminate employees in violation of a zero tolerance policy when the employee fails a drug test. Specifically, the court found that "[a]ccording to Plaintiff's own allegations, 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."[8]

Judge Powers further dismissed the failure to accommodate claim, finding that under CUMMA "no accommodations are required to be made for medical marijuana usage in the workplace." Therefore, New Jersey law firms may continue to enforce zero tolerance policies that discipline or terminate employees (both attorneys and non-attorneys) found to have used marijuana, regardless of whether it was during the workday or after hours.

An important component of the court's decision in *Wild* was that CUMMA contains no employment-related protections. This finding allowed the court to distinguish the district court of Connecticut's decision in *Noffsinger v. SSC Niantic Operating Company*.[9] In that case, Katelin Noffsinger was approved to use marijuana for post-traumatic stress disorder (PTSD) under Connecticut's Palliative Use of Marijuana Act (PUMA). In 2016, she accepted a job offer and was instructed to give her two weeks notice to her current employer. Several days later, Noffsinger met with her new employer, disclosed her use of medical marijuana for her PTSD disability and provided a urine sample as part of the pre-employment drug test. The day before she was scheduled to start her new job, she was notified that the job offer was rescinded because she failed the drug test. Noffsinger then sued under PUMA, which prohibits an employer from taking an adverse employment action based on an

employee's use of medical marijuana.[10]

The court held this anti-discrimination provision was not preempted by the CSA, the Americans with Disabilities Act, or the Food, Drug, and Cosmetic Act, and that Noffsinger could proceed with her discrimination claim under PUMA.

While CUMMA does not contain an anti-discrimination provision, proposed legislation would add language similar to PUMA that prohibits employers from taking adverse employment action against an employee based on the employee's use of medical marijuana. The only exception would require an employer to demonstrate that the medical use of marijuana impaired the employee's ability to perform his or her job.[11] Had this legislation been in place, the *Wild* decision likely would have turned out differently.

Therefore, law firms should continue to monitor this proposed legislation closely. If it—or a similar bill—passes, firms will need to make difficult decisions on how to amend their policies concerning the 'off-duty' use of medical marijuana. For most non-attorney employees this decision is easy; firms will be unable to discipline for medical marijuana use when the employee is not in the office. However, this issue becomes increasingly complex for attorneys because the expectation is that they will work outside the office and during non-business hours, so there is no clear workday or work hours.

Should this or similar legislation pass, law firms must proceed with caution on the types of policies they pass. While an overly restrictive policy could result in a lawsuit under CUMMA, too lenient of a policy could result in an employee working under the influence (and a potential malpractice lawsuit). As an alternative to passing a broad policy that regulates an attorney's out-of-office use of medical marijuana, a safer practice might be to engage in the interactive process with these employees to see if both parties are able to reach a reasonable solution.

Are Law Firms Prepared for Legalization of Recreational Marijuana?

Another interesting question for law firms is how to respond if recreational marijuana is legalized in New Jersey. The most prominent legalization legislation is S-830. Like CUMMA, the bill does not require employers to permit or accommodate marijuana in the workplace, nor does it affect the ability of employers to prohibit employees from enacting or maintaining drug-free workplace policies that prohibit the use of, or being under the influence of marijuana during work hours.

However, a crucial part of the bill would make it unlawful for an employer to take an adverse employment action against an employee due to the employee's use of marijuana, unless the employer has a rational basis to do so. Specifically, the legislation makes it unlawful for an employer to "refuse to hire or employ any person" or "discharge from employment or take any adverse action against any employee" for using marijuana "unless the employer has a rational basis for doing so which is reasonably related to the employment, including the responsibilities of the employee or prospective employee."[12] This aspect of the bill is likely to cause the greatest increase in litigation against employers, as it grants employees an additional cause of action any time an adverse employment action is taken against them. For example, an associate who is known to use marijuana may feel a decision not to promote him or her was based on the stigma associated with marijuana use. While the lawsuit may be meritless, it still places the firm in the uncomfortable position of having to defend its decisions.

Another issue that law firms will face is trying to define 'work hours.' As previously noted, unlike many other professions, law firms may not designate specific workdays or hours for their attorneys. Instead, the expectation is that attorneys are always available to meet their clients' demands, particularly since technology enables lawyers to work nearly anywhere in the world and at any time.

What meets the definition of 'work' also is blurrier in the legal profession than other occupations. Beyond working on client matters, lawyers are constantly marketing themselves to build relationships with current clients or obtain new clients. When a lawyer attends a networking event or is dining with a potential client, it remains unclear whether this falls within the bill's 'work hours' that allow a law firm to prohibit the employee from being under the influence of marijuana. Should this legislation pass, law firms must be cautious in how they modify and implement their policies. For non-lawyers, this is likely straightforward, as these employees have set work hours and clear job responsibilities. However, establishing policies that encompass the work schedules for attorneys is more challenging.

Law firms also must deal with unique marketing challenges as a result of the legalization of marijuana. Despite growing endorsement and acceptance, the moral and ethical implications of legalization remains a divisive subject. Therefore, having a cannabis practice group and serving the cannabis industry may have a negative impact on a firm's current clients or potential clients. Law firms choosing to market themselves as serving the cannabis industry will need to ensure they are not viewed as hypocritical to potential clients if they claim to be accepting of the new industry while having strict policies that prohibit use by their employees.

Conclusion

Governor Murphy has already expanded the state's medical marijuana program and continues to endorse legal-

izing recreational marijuana. Since it appears unlikely that the federal government will change its stance on medical or recreational marijuana in the immediate future, law firms are placed in a difficult position. However, until a bill is adopted and signed by the governor, and the New Jersey Supreme Court has an opportunity to interpret and apply the statute (including reaching a decision on the inevitable supremacy argument), a law firm's exact responsibilities will remain unclear. As a result, firms should act prudently in enacting policies that balance their employees' needs with their business interests. ⚖

Endnotes

1. N.J.S.A. 24:6I-1, *et seq*.
2. Executive Order No. 6 (Murphy 2018).
3. Murphy Administration Announces NJ Medicinal Marijuana Program Now Serving 20,000 Patients, New Jersey Department of Health (March 1, 2018), *available at* http://www.nj.gov/health/news/2018/approved/20180501b.shtml.
4. *Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F. Supp. 3d 326 (D. Conn. 2017); 21 U.S.C. § 812.
5. The following states have found no employment protections need to be provided: California—*Ross v. RagingWire Telecommunications, Inc*., 42 Cal. 4th 920 (2008); Colorado—*Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015); Michigan—*Casias v. Wal-Mart Stores, Inc*., 695 F.3d 428 (6th Cir. 2012); Washington—*Roe v. TeleTech Customer Care Mgmt. LLC*, 171 Wash. 2d 736 (2011); Montana—*Johnson v. Columbia Falls Aluminum Co*., LLC, 350 Mont. 562 (2009); New Mexico—*Garcia v. Tractor Supply Co*., No. 15-735, (D.N.M. Jan. 7, 2016). Comparatively, the following states have found employees are protected for their use of medical marijuana: Rhode Island—*Callaghan v. Darlington Fabrics Corp*., 2017 WL 2321181 (R.I. Super. May 23, 2017); Massachusetts—*Barbuto v. Advantage Sales & Marketing, LLC*, 477 Mass. 456 (2017); Connecticut—*Noffsinger v. SSC Niantic Operating Co., LLC*, No. 3:16-cv-01938 (D. Conn. Aug 8, 2017).
6. *Barbuto v. Advantage Sales & Mktg., LLC*, 477 Mass. 456, 464 (2017).
7. *Wild v. Carriage Services*, BER-L-687-17 (Sup. Ct. Feb. 2, 2018).
8. *Id*. at *6 (*citing Vargo v. Nat' Exchange Carriers Ass'n Inc*., 376 N.J. Super. 364 (App. Div. 2005); N.J.S.A. 24:21-5(e)(10)).
9. *Noffsinger v. SSC Niantic Operating Co*., LLC, No. 3:16-cv-01938 (D. Conn. Aug. 8, 2017).
10. Conn. Gen. Stat. § 21a–408p(b)(3).
11. Assembly Bill No 1838.
12. Assembly Bill No. 1348 and Senate Bill No. 830.