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RECREATIONAL AND MEDICAL MARIJUANA IN NEW JERSEY WHAT IS AN EMPLOYER TO DO?

By: *David L. Disler*

The recreational use of marijuana is likely coming to New Jersey in 2018. While marijuana use and possession remains illegal under federal law, both during the campaign and after being elected, New Jersey's Governor-elect Phil Murphy made clear that he plans to support the legalization of recreational use of marijuana in New Jersey. Due to its impact on the State's budget -- it is estimated to bring in an additional \$300 million in sales tax^[i] -- Murphy and the Democrat controlled Legislature will attempt to pass legislation legalizing the recreational use of marijuana within his first 100 days in office. In fact, in a recent interview, Murphy advised that he plans to legalize marijuana "soon" and that legalization was a "2018 priority."^[ii] This sentiment was shared by New Jersey Senate President Stephen Sweeney who stated during an interview that he "feels confident that legalization will become law before April."^[iii] Therefore, New Jersey employers must be prepared for the likely upcoming changes to the law governing the recreational and medical use of cannabis.

Medical Use

While the recreational use of marijuana is presently illegal, New Jersey is one of 29 States already to have decriminalized medical marijuana through its passing of the Compassionate Use Medical Marijuana Act ("CUMMA") in 2014.^[iv] CUMMA does not require employers to accommodate an employee's medical use of marijuana in the workplace. However, it remains unclear whether employers may take employment actions based on an employee's "off-duty" use of medical marijuana. Notably, the issue many employers face is whether they can terminate an employee who tests positive for marijuana on a drug test due to the employee's off-duty use of medical marijuana as part of the employee's treatment.

Wild v. Carriage Services is presently pending before the New Jersey Superior Court. In that matter, Justin Wild was employed as a funeral director in 2013. Two years later he was diagnosed with

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cancer and prescribed medical marijuana under CUMMA. Sometime thereafter, Wild was involved in an accident at work. Wild disclosed his marijuana usage to his employer during a discussion on his work-related injuries suffered in the accident. He further claimed that he was not under the influence during the accident, that he only used cannabis at night, and that he was never under the influence while at work. As a result of his disclosure, Wild was required to take a drug test, which he failed, and was terminated for violating the employer's drug and alcohol policy. Following his termination, several other employees (including a supervisor) allegedly notified members of the local Funeral Directors Association and other potential employers that Wild was fired for being a "drug addict" and that he was under the influence at the time of the accident. The Court has not determined whether Wild may bring a claim for his original termination - leaving unanswered whether an employer may terminate for the off-duty medical use of marijuana. However, the Court found that Wild provided sufficient facts to establish a defamation claim and a tortious interference with prospective employment claim, based on the employer's conduct following the termination.

Notwithstanding the Court's decision in *Wild*, the State's Legislature may also answer this question. Notably, the Assembly and Senate have pending bills that would prohibit employers from taking any adverse employment action against authorized medical marijuana patients (except if the use of marijuana impairs the employee's job responsibilities).^[v] This would include employees' medical marijuana use while off-duty.

Recreational Use

The most prominent piece of cannabis legislation is Senate Bill No. 3195 ("S3195"), which was introduced by Democratic Senator Nicholas Scutari with the backing of Senate President Sweeney.^[vi] If enacted, S3195 would legalize the recreational use of cannabis throughout the State. Notably, the bill will allow for the possession of up to one ounce of dried marijuana, sixteen ounces of edible cannabis products, and seventy-two ounces of cannabis in liquid form. 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, unlike CUMMA, S3195 makes it unlawful for an employer to take any adverse employment action against an employee due to the employee's use of marijuana, unless the employer has a rational basis to do so (such as safety-sensitive positions). In addition, employers do not have to take any action that would prohibit them from receiving a federal grant or violate federal law.

Take Away

New Jersey employers must prepare for the legalization of recreational marijuana in New Jersey and understand its responsibilities under CUMMA. This includes review of their employer handbooks and policies. Importantly, these documents should establish how the employer will respond to employees' medical use of marijuana. Some employers may wish to have a "zero tolerance" policy, while other may choose to provide reasonable accommodation. Regardless of the option selected, employers should have a written policy that is consistently applied. In addition, employer handbooks and policies should be revised following material changes in the law.

Employers should further ensure that their job descriptions are updated and accurate. As set forth above, CUMMA and the proposed legislation both allow employers to take adverse employment actions against employees in safety-sensitive positions or positions where an employee's use impacts his/her job responsibilities. Therefore, accurate job descriptions will be essential to determining whether a position falls within this exception.

Finally, as the *Wild* case illustrates, training is crucial. Regardless of whether its initial decision to terminate was lawful, the employer in *Wild* must still defend against the defamation and tortious interference claims due to its employees' decision to discuss an employee's medical information and employment history with outside organizations. Naturally, if the employer had a policy in place and its employees were properly trained, these alleged claims could have been prevented.

[i] *Legalizing marijuana would reap \$300M a year in taxes for N.J., advocates say*, www.nj.com (Nov. 2, 2016). available at

www.nj.com/politics/index.ssf/2016/05/legalizing_marijuana_would_net_300m_in_sales_taxes.html

[ii] *Power and Politics*, News12 New Jersey(November 16, 2017).

[iii] *Legal pot in 100 days? New Jersey's next governor aims for national first*, Washington Examiner (Nov. 9, 2017).

[iv] *N.J.S.A. 24:61-1, et seq.*

[v] Assembly Bill No. 242 & Senate Bill No. 2161.

[vi] *Legal pot in 100 days? New Jersey's next governor aims for national first*, Washington Examiner (Nov. 9, 2017).

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