

## Employment & Immigration Law

### Medical Marijuana Law Raises New Concerns for Employers

The time to implement  
preventative measures is  
now

By Louis L. Chodoff

**T**he Compassionate Use Medical Marijuana Act, which took effect Oct. 1, presents new issues concerning prohibition of medical use of marijuana in the workplace.

The New Jersey Department of Health and Senior Services is developing rules outlining the registration and application process for patients, primary caregivers, physicians, cultivators and dispensaries to participate in the program.

However, vague language in the law and recent court rulings in 13 other states with similar statutes have led to confusion

*Chodoff is a partner in the litigation department and a member of the labor and employment group of Ballard Spahr in Cherry Hill.*

among New Jersey companies about how the act will affect their existing policies on drug use, medical leave and disability, and about whether they will have to make accommodations for employees who use medical marijuana.

New Jersey's law permits residents who suffer from certain debilitating and life-threatening illnesses to possess and use medical marijuana. Specifically, the law lists as "debilitating medical conditions" the following:

1. Seizure disorder, epilepsy; intractable skeletal muscular spasticity; or glaucoma (if any of the conditions is resistant to conventional medical therapy).

2. Severe or chronic pain, severe nausea or vomiting or cachexia (wasting syndrome) resulting from the condition or treatment of AIDS, HIV or cancer.

3. Amyotrophic lateral sclerosis, multiple sclerosis, terminal cancer, muscular dystrophy or inflammatory bowel disease.

4. Terminal illness if the physician determines the patient has less than 12 months to live.

The main purpose of the law is to pro-

tect physicians who prescribe and patients who use marijuana to alleviate suffering and debilitating medical conditions from arrest, property forfeiture, prosecution and criminal and other penalties.

The law was never intended to be an employment statute, but it does contain this vague statement about an employer's obligations with regard to medical marijuana use: "nothing in this act shall be construed to require ... an employer to accommodate the medical use of marijuana in any workplace."

Since the law has yet to be challenged in the courts, many employers have questions and concerns as to what exactly the above phrase means, as well as about the interplay between the medical marijuana law and their own drug, leave and disability policies.

One common question involves whether an employer can ask applicants if they use medical marijuana. Employers are discouraged from doing so because such questions invite potential claims of disability discrimination under the New Jersey Law Against Discrimination (LAD). Even simple questions, such as asking potential employees if they are taking a prescribed medication, can violate the LAD. Employers are, however, free to inquire as to whether an applicant requires certain accommodations to perform the required job functions.

If applicants or employees voluntarily inform the employer of their medical use of marijuana, this conceivably can

put the employer on “notice” that they may suffer from a disability, thus triggering the employer’s duty to accommodate. The employer may then engage in the interactive process designed to determine what, if any, reasonable accommodations must be made. However, employers should refrain from making adverse employment decisions on the sole basis of an applicant’s or employee’s admitted use of medical marijuana without first seeking guidance from legal counsel.

Although the statute expressly states that employers are not required to accommodate the medical use of marijuana in any workplace, employees who suffer from any adverse employment actions due to their use of medical marijuana may nevertheless be able to assert a claim of disability discrimination under the LAD.

The LAD may not offer protections to persons engaged in the use of medical marijuana, but such protections certainly extend to persons suffering from many of the debilitating conditions described in the statute for which medical marijuana may be used.

Although New Jersey courts have not yet been confronted with this issue, other states with similar medical marijuana laws have examined whether employers must accommodate employees who use marijuana for medicinal purposes.

An Oregon court held that the protections of the state antidiscrimination law did not extend to an employee who used medical marijuana outside of the workplace. Particularly, the court found that Oregon’s antidiscrimination laws did not apply to an employee engaged in the illegal use of drugs.

A California court also held that the state’s Compassionate Use Act of 1996 did not apply in the employment area and that state disability laws did not require employers to accommodate the use of illegal drugs. Significantly, the California statute was passed by voter initiative, and the

court looked to the intent of the voters in enacting the statute, recognizing that such intent was limited to the assurance that seriously ill state residents had the right to obtain and use marijuana for medical purposes without being subjected to criminal prosecution. Nothing in the history of that state’s Compassionate Use Act suggested that voters, in enacting the law, intended to address the rights and obligations of employers.

#### **How N.J. Statute Is Different**

Although both the Oregon and California cases may offer some insight as to how a New Jersey court could weigh in if confronted with the question of accommodation, employers should be mindful of some potentially significant distinctions between those cases and New Jersey’s own statute.

First, the definition of a disabled person under Oregon law is quite limited compared with New Jersey’s broadly construed definition of disability under the LAD. Subject to these broad interpretations, a New Jersey court may be disinclined to dismiss a reasonable accommodation case on the grounds that an aggrieved employee does not meet the state statute’s far-reaching definition of disability.

Second, the California case rested, at least in part, on the grounds that the state’s law was derived from voter initiative. New Jersey’s statute was created from legislative action. Therefore, again, New Jersey’s employee-friendly courts may seek to apply a broader construction of the statute, reading more from the legislative intent behind its origination.

Another area of concern involves the possible effect of the medical marijuana law on current leave policies at New Jersey companies. Courts have yet to make a determination as to whether qualification for the use of medical marijuana auto-

matically entitles an employee to leave under the Family and Medical Leave Act (FMLA). However, the act does entitle an employee to take leave for his or her own serious health condition or to care for a family member with such a condition.

Certain debilitating medical conditions as defined under New Jersey’s medical marijuana law are likely to be construed as serious medical conditions for purposes of receiving FMLA leave. Accordingly, it is likely that an employee or an employee’s family member who has a condition requiring him or her to use medical marijuana will be eligible for FMLA leave. As the law begins to take shape, employers should begin reviewing and revising their leave policies to take into consideration the implications of the new statute.

#### **What Employers Can Do Now**

Despite the lack of judicial interpretation of the New Jersey Compassionate Use Medical Marijuana Act, there are several preventative measures employers can take now:

1. Review policies and forms dealing with drug use and testing and update them so they expressly state your position on medical marijuana use by applicants and employees and make clear that testing includes medical marijuana.

2. Ensure that the status of applicants and/or employees as medical marijuana users is kept confidential and disclosed only to those with a need to know. As with all of your policies, consistently apply your drug testing policies and make sure that your responses to positive tests are uniform.

3. Consult with counsel prior to making any determinations as to the employment status of an applicant or employee who discloses that he or she is taking medical marijuana or who tests positive for such use. ■