

## New Jersey Creates Employment Protections for Medical Cannabis Patients and Providers

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July 8, 2019

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As of July 2, 2019, New Jersey has extended workplace protections to employees and healthcare practitioners engaging in activities authorized by New Jersey's "Jake Honig Compassionate Use Medical Cannabis Act" (the "Act"), formerly the Compassionate Use Medical Marijuana Act. This new legislation offers a new layer of complexity to an issue Courts have been grappling with since the Act was introduced: whether an employer must accommodate an employee who uses medical cannabis while it remains illegal under federal law. The Act also introduces workplace protections for healthcare providers who assist patients with exploring medical cannabis treatment. Unfortunately, the new legislation does not resolve all the ambiguities employers face in trying to resolve the inherent contradictions caused by the differences between federal and New Jersey law in the murky area of cannabis regulation.

### **What Employers Need to Know**

With these recent amendments, the Act now prohibits employers from taking any adverse employment action against an employee or applicant, who is a registered qualifying patient, based solely on the employee's status as a registrant under the Act. Employers must also now allow an employee or applicant an opportunity to offer an explanation for a drug test that is positive for cannabis or to have the sample retested at the employee's or applicant's own expense, as explained in more detail below.

Under the new legislation, employers who rely on drug screening must offer an employee or job applicant an opportunity to present a legitimate medical explanation for the positive test result. Specifically, employers must (i) provide employees and applicants with written notice of the right to offer an explanation and, (ii) give employees and applicants three working days after receiving notice of the positive result to submit an explanation or request a confirmatory retest of the original sample at the employee's or job applicant's own expense. An employee or job applicant may present an authorization for medical cannabis issued by a health care practitioner, proof of registration with the commission, or both, as part of an explanation for the positive test result.

Despite the new amendments, the Act does not expressly require employers to accept the explanation because the prohibition against taking an adverse employment action prohibits only an adverse employment action based on registration under the Act; it does not necessarily protect employees who test positive, even those with a legitimate explanation. With that said, employers must be mindful that, earlier this year, New Jersey's Appellate Division joined the minority of courts in other states that have found an employee may be able to state a disability discrimination claim against an employer who takes an adverse employment action due to the employee's use of medical marijuana. See our earlier alert on this topic [here](#).

Importantly, the Act, even as amended, does not require employers to accommodate use or possession of cannabis in the workplace or possession of cannabis on premises. Specifically, the Act expressly preserves an employer's right to prohibit, or take adverse employment action for, the possession or use of intoxicating

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substances during work hours or on the premises of the workplace outside of work hours. Moreover, it does not require an employer to commit any act that would (1) cause the employer to be in violation of federal law, (2) result in a loss of a licensing-related benefit pursuant to federal law, or (3) result in the loss of a federal contract or federal funding.

Additionally, the amendments include expanded workplace protections for healthcare providers. The amendments not only allow physician assistants and advanced practice nurses, in addition to medical doctors, to authorize patients to use medical cannabis, they also offer employment protections to all covered healthcare practitioners for taking actions authorized by the Act. Specifically, the Act prohibits healthcare facilities from taking adverse employment actions against a practitioner who engages in conduct permitted by the Act, such as authorizing patients for the medical use of cannabis, issuing written instructions to patients, and consulting with patients regarding the use of medical cannabis to treat the patient's qualifying medical condition. However, there is an exception: This protection is not available if granting it would result in the healthcare facility losing a monetary or licensing-related benefit granted by to federal law.

#### **What Employers Need to Do**

Working with employers since the Act was introduced more than nine years ago, our firm has seen great concern over whether to have drug policies that prohibit the use of cannabis, and, if so, how to enforce them in the workplace and manage the inherent risk. While there is currently no blood, urine, or other medical test for cannabis impairment, employers have been dealing with impaired employees for centuries and, even with the new laws, employers can continue to rely on the same common sense approaches to employment impairment that have served them well for abuse of other legal substances. If an employer suspects impairment, it should take appropriate steps including documenting the suspicion and removing the employee from duty. Employers, except those who are limited due to federal law or contracts, do not need to treat cannabis impairment, even with the new amendments to the Act in place, any differently than they would treat employees who are impaired from using other legal substances, such as alcohol or prescription medications. Admittedly, in the past, a positive drug test often relieved an employer of the burden of showing impairment in the workplace. Nonetheless, the basic framework for keeping the workplace safe has not really changed.

No matter how an employer ultimately chooses to treat employees and applicants who use medical cannabis lawfully under the Act, employers need to amend their drug screening programs and hiring processes to ensure that they are in compliance with this law. Employers also need to consider whether they will accept a valid medical explanation as a basis to disregard a positive test, especially in light of recent court rulings that may create liability for employers who take adverse action against employees and applicants who use medical cannabis in accordance with state law.

*If you have any questions about this legal alert or if you run across a related issue in your workplace, please feel free to contact Adam Gersh or any other member of Flaster Greenberg's Labor & Employment Department.*

#### **ATTORNEYS MENTIONED**

Adam Gersh