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New Jersey Expands Medical Marijuana Access: Four Action Items for New Jersey Employers

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Last week, Governor Phil Murphy issued an Executive Order to expand New Jersey's medical marijuana program, effective March 27, 2018. The expansion, which is the result of a campaign promise, is expected to cause a substantial increase in the number of New Jersey residents who will now qualify for medicinal use. It will also reduce some of the current bureaucratic obstacles to medical marijuana usage. Prior to Tuesday's announcement, the conditions that qualified for medical marijuana treatment were limited to a few select debilitating diseases, and the approval process was much more cumbersome. The expanded list of qualified conditions now includes some more common medical illnesses, including anxiety, migraines, and chronic pain. In addition, the state legislature has proposed legislation to increase the monthly purchase limit for patients enrolled in the state's program. Click here for a full list of the conditions now covered under the program. These factors all suggest that medical marijuana usage in New Jersey is about to expand under the executive order.

What does this mean for employers?

The expanded medical marijuana program presents new and unique challenges for New Jersey employers, who can expect higher employee participation in the program. Specifically, companies with anti-drug use policies that explicitly prohibit the use of medicinal marijuana will face several issues when it comes to the hiring and firing of employees who test positive for this substance. Employers will have to balance the right of employees to be free from discrimination based on their medical conditions versus the right of employers to maintain a workforce that does not use drugs that remain illegal under federal law. Unfortunately, the case law addressing issues arising from the conflict between many states laws and federal law regarding medical marijuana usage is unsettled and in a state of flux. As a result, both employers and employees will be faced with difficult decisions with little or no legal guidelines in place.

A quick look into recent Case Law

Before we discuss next steps, we'll briefly summarize a few notable court cases that may help set the stage for what New Jersey employers can expect.

As of today, generally employers have broad discretion to terminate employees for medical marijuana use in many states on the basis that use of marijuana, even if lawful under state law, remains a federal crime. For example, the case of *Coats v. Dish Networks, LLC*, decided by the Colorado Supreme Court in 2015, involved an employee who was terminated for testing positive for marijuana. It was undisputed the employee had a valid prescription to use medical marijuana, which was legal in Colorado, and he did not use marijuana at work or in a way that impaired his work performance. However, when he tested positive for marijuana, Dish terminated him. He then brought an action against his former employer for violation of Colorados Lawful

Off-Duty Activities statute, which generally prohibits employers from discharging an employee based on his/her engagement in lawful activities off the premises of the employer during nonworking hours. The Colorado Supreme Court upheld the dismissal of the employees claims and found the employer had a right to terminate him for off-duty activities that violated federal law, even if they were lawful under Colorado law.

Closer to home, under current New Jersey law, employers have no strict obligation to accommodate medical marijuana users, and employers may terminate an employee who fails a drug test, even if the employee can lawfully use medical marijuana under state law and was not impaired at work. Pennsylvanias recently adopted medical marijuana law broadly prohibits discrimination against an employee or job candidate because he or she has a medical marijuana prescription (i.e., is a cardholder), but it is silent as to whether an employer can rely upon a positive drug test as a reason for an adverse employment action. Both Pennsylvania and New Jersey permit an employer to terminate an employee who is impaired in the workplace.

With that said, Massachusetts has recently taken a different approach and employers need to be on the lookout for that approach to be applied in states other than Massachusetts. In *Barbuto v. Advantage Sales and Marketing LLC*, before she was hired, the employee had disclosed that she used medical marijuana to treat an underlying condition, but did not use it during working hours. The court held an employers duty to make a reasonable accommodation under disability discrimination laws may extend to medical marijuana usage outside of working hours, despite the employers drug policy and explained its reasoning: The fact that the employees possession of medical marijuana is in violation of federal law does not make it per se unreasonable as an accommodation.

This outcome is surprising because it limits an employers discretion to discipline employees who use medical marijuana, in violation of federal law, by relying on the states anti-discrimination laws. Although the *Barbuto* decision only applies in one of the 29 states where medical marijuana is currently legal, it is worth noting because of the potential for its reasoning to be applied in other states where medical marijuana is lawful. Most states have similar anti-discrimination protections that could serve as the basis for conclusions similar to that reached by the Massachusetts court.

Next steps for employers

Given this information, below are four action items New Jersey employers should take into consideration when preparing their workplace and employees for the implementation of the newly expanded law:

1. **Review your employee handbook and modify certain policies**

The most basic protection an employer can have when facing new or expanded medical marijuana laws is to establish clearly written policies in its employee handbook that prohibit on-the-clock usage. Employers will also need to decide whether they want to include testing for marijuana in drug screening programs, in addition to testing for suspicion of impairment on the job. In most cases, a simple update of a companys employee handbook can help employers avoid liability, such as disability discrimination claims, reasonable accommodation claims, and other employee privacy lawsuits.

2. **Do not ask current or potential employees if they are certified to use medical marijuana**

In an effort to avoid potential discrimination claims, managers should generally refrain from asking current employees or applicants if they are certified to use medical marijuana. Rather than asking about drug certification or usage, employers should allow professional screening companies to collect the required information and supporting documentation. When thinking about questioning employees, employers should approach this issue with the same mindset they would use with other protected classes, such as disability, age, or race. In addition, employers should assure that their HR departments are keeping all employee medical records confidential.

3. **Documentation**

Thorough and precise documentation will help support any decision to terminate or discipline an employee, if that decision is later challenged. Document all signs of an employee who appears to be under the influence and make note of his/her conduct in relation to the companys normal standards for the given position.

4. **Provide training to managers and supervisors for potential changes in current policies and procedures**

Due to legal and cultural shifts, employers should expect to face issues relating to marijuana use in the workplace more frequently and should train managers so that they understand and carry out the companys policies. They should adopt a plan that addresses the range of activities from impairment at work to drug-related comments in the workplace. The quasi-legal nature of medical marijuana creates a unique challenge to employers who cannot discriminate against employees with qualified conditions but want to ensure the workforce is not impaired. The best way to confront the challenge is with careful planning and smart policies tailored to each businesss unique workplace. This will not be easy and should be approached carefully with the assistance of legal counsel knowledgeable about the nuances of changing state and federal law governing medical marijuana usage.

If you have any questions about this legal alert or if you run across a medical marijuana issue in your workplace, please feel free to contact Adam Gersh or any member of Flaster Greenbergs Labor & Employment Department.