June 28, 2019

Marijuana Update: Must New Jersey Employers Accommodate Medical Use?

New Jersey's Compassionate Use of Medical Marijuana Act does not require employers to accommodate employees' medical marijuana use in the workplace. The New Jersey Appellate Division recently ruled, however, that law does not limit employees' ability to bring discrimination claims under New Jersey's Law Against Discrimination.

The Rise of Medical Marijuana Laws

Laws legalizing the use of marijuana for medicinal and recreational purposes have been sweeping the country. In 2010, New Jersey enacted the Compassionate Use of Medical Marijuana Act (CUMMA), primarily to establish a framework for regulating qualified patients' use of marijuana to treat qualifying medical conditions. Although CUMMA provides little guidance to employers dealing with workplace issues arising from their employees' use of medical marijuana, it does make clear that "nothing in this act shall be construed to require ... an employer to accommodate the medical use of marijuana in any workplace."

In light of CUMMA and similar state medical marijuana laws, now more than ever employers are having to confront issues stemming from employees' off-duty medical (or in some states, recreational) use of marijuana. One of the more difficult issues facing employers is whether they must waive a requirement that employees pass a drug test as a condition of employment to accommodate use of medical marijuana for a disability. Some jurisdictions, including Connecticut and Massachusetts, have provided protections for employees' off-duty use of medical marijuana. However, as we discussed here last August, a New Jersey federal court, interpreting New Jersey state law, reached a different conclusion. Specifically, in *Cotto v. Ardagh Glass Packing, Inc.*, the court held that New Jersey's Law Against Discrimination (NJLAD) would not "require an employer to accommodate an employee's use of medical marijuana with a drug test waiver." While New Jersey employers initially breathed a collective sigh of relief, it was short-lived, because in March, a New Jersey state appeals court had the opportunity to weigh in on this issue in *Wild v. Carriage Funeral Holdings, Inc.* and effectively overruled the federal court's decision in *Cotto.*

The *Wild* Decision

Wild was diagnosed with cancer and prescribed medical marijuana to help treat his cancer-related pain. Thereafter, while working, Wild was in a car accident and was taken to the emergency room. His employer required him to pass a drug test before returning to work. Wild appeared for the test and explained that he would test positive because of the prescribed marijuana as well as the painkillers he received from the hospital. Wild was discharged for his positive drug test.

Wild sued in New Jersey state court, alleging, among other things, actual and perceived disability discrimination and failure to accommodate a disability in violation of NJLAD. The trial court dismissed Wild's claims, reasoning that neither CUMMA nor NJLAD requires an employer to waive passing a required drug test for a drug that remains illegal under federal law, citing CUMMA's declaration that nothing "require[s] ... an employer to accommodate the medical use of marijuana in any workplace." However, the Appellate Division reversed the trial court's decision, finding that in enacting CUMMA, the New Jersey legislature "intended to cause no impact on existing employment rights." CUMMA, in its view, "neither created new employment rights nor destroyed existing rights," and it "certainly expressed no intent to alter the LAD."

After determining CUMMA had no impact on an employee's ability to bring claims under NJLAD, the Appellate Division turned to the routine question of whether Wild had sufficiently plead a claim under NJLAD. Liberally construing Wild's complaint and accepting all of Wild's allegations as true, as it was required to do at this juncture, the Appellate Division held that Wild had sufficiently plead a prima facie claim under NJLAD.

Looking Ahead

Despite much discussion about New Jersey legalizing adult recreational marijuana use, in March, legislators canceled a vote on the bills that would have brought that to fruition, due to a concern about whether they had the necessary votes to pass. However, on May 23, the New Jersey General Assembly voted to pass the "Jake Honig Compassionate Use Medical Cannabis Act," which may give employers some clarity with respect to their obligations to qualifying patients under CUMMA. The New Jersey Senate voted to pass a similar version of the bill. Due to a last-minute amendment by the Senate, the General Assembly will need to vote again on the revised version passed by the Senate. The General Assembly's vote expected to occur on June 10 was delayed. If passed, the bill, among other things, would prohibit New Jersey employers from taking any adverse employment action based solely on an employee's medical marijuana use and would require employers to provide employees or applicants who test positive for marijuana an opportunity to explain the result. It would also remove CUMMA's prior mandate that employers need not accommodate the medical use of marijuana in the workplace.

New York City also recently expanded protections for medical marijuana users. On May 10, New York City enacted a law prohibiting employers from requiring prospective employees to submit to testing for the presence of tetrahydrocannabinol (THC), the active ingredient in marijuana. The testing prohibition goes into effect on May 10, 2020.

Takeaways

Employers must stay vigilant as the law continues to evolve with respect to the impact of medical marijuana in the workplace. Regardless of any legal changes, the *Wild* decision is a reminder to employers of the importance of engaging in the interactive process whenever they become aware that an employee with a disability may require a reasonable accommodation. Employers should exercise caution when confronted with an issue involving an employee who is using medical marijuana. Given the complicated issues involved and the evolving legal landscape, employers should consult with counsel when dealing with such issues.

Would you like to receive our *Employment and Labor Quarterly Update?* Sign up here.

Authors

Francine Esposito
Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com

James M. Leva
Partner

Parsippany, NJ | (973) 966-8416

Stamford, CT | (973) 966-8416

jleva@daypitney.com