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New Jersey Law Now Provides Protections to Medical Marijuana Users

New Jersey has joined a growing number of states, including Connecticut, Massachusetts and New York, in providing employment protections for users of medical marijuana. On July 2, Governor Phil Murphy signed into law the Jake Honig Compassionate Use Medical Cannabis Act (CUMCA). CUMCA amended New Jersey's prior medical marijuana law, the Compassionate Use Medical Marijuana Act (CUMMA). This move came just months after the long-anticipated bill to legalize recreational marijuana failed to secure enough votes in the legislature.

Impact on New Jersey Employers

CUMCA impacts New Jersey employers in two significant ways:

1. **Employment Protections for Medical Marijuana Users**

   Prior to being amended, CUMMA did not provide any employment protections and explicitly stated that nothing in the act imposed "an obligation on employers to accommodate an employee's use of medical marijuana in any workplace." CUMCA, however, deleted that provision and now explicitly prohibits employers from taking any adverse employment action against applicants or employees solely based on their status as a registered qualifying user of medical marijuana. The law defines "adverse employment action" to include "refusing to hire or employ an individual, barring or discharging an individual from employment, requiring an individual to retire from employment, or discriminating against an individual in compensation or in any terms, conditions, or privileges of employment." CUMCA also grants employment and other protections to healthcare practitioners for such conduct as providing advice or instruction relating to the use of marijuana to treat qualifying medical conditions. CUMCA, however, makes clear that employers are not required to allow the use of medical marijuana in the workplace or during work hours, or to take any action that would violate federal law or result in the loss of federal funding.

2. **Required Notice Relating to Positive Drug Tests**

   CUMCA also requires employers who drug test applicants or employees to follow specific procedures in the event of a positive result for marijuana. Specifically, employers must provide individuals testing positive with written notice of such result and their right, within three business days of the written notice, to provide a "legitimate medical explanation" or to request a retest of their original sample at their own expense. Substantiation of a legitimate medical reason may include authorization for medical marijuana use by a health care provider and/or proof of registration with New Jersey's Cannabis Regulator Commission for medical marijuana use.

New Jersey State Courts Anticipated CUMCA

Before CUMCA, New Jersey law was not clear as to whether employers were required to accommodate employees' off-duty use of medical marijuana, including by, for example, not taking adverse action based on a positive drug test. A federal court in New Jersey first addressed the issue in *Cotto v. Ardagh Glass Packing, Inc*. In that case, the court held that New Jersey's Law Against Discrimination (LAD) did not require an employer to accommodate an employee's use of medical marijuana, and that an employer was "within its rights to refuse to waive a drug test for federally prohibited narcotics." The court went as far

as to say "[t]his Court predicts that the New Jersey judiciary would reach a similarly obvious conclusion: the LAD does not require an employer to accommodate an employee's use of medical marijuana with a drug test waiver."

The New Jersey judiciary, however, did not reach a "similarly obvious conclusion" in March, when the Appellate Division decided *Wild v. Carriage Funeral Holdings, Inc.* In that case, the Appellate Division held that although CUMMA declared its provisions should not be construed to "require" an accommodation, it did not mean such a requirement might not be imposed by other laws. The Appellate Division went on to say that "[i]t would be ironic indeed if [CUMMA] limited [LAD] to permit an employer's termination of a cancer patient's employment by discriminating without compassion."

On July 11, the New Jersey Supreme Court agreed to review the Appellate Division's decision in *Wild*, creating uncertainty as to whether it would reach the same conclusion as the Appellate Division. Although the New Jersey Legislature's subsequent enactment of CUMCA is essentially an endorsement of the Appellate Division's decision, employers should be aware that the New Jersey Supreme Court may weigh in on the issue of workplace protections and/or accommodations for medical marijuana users in the future.

Immediate Actions Employers Should Take

Employers must understand the current legal landscape relating to medical marijuana use and the associated dangers of taking adverse employment action against individuals who test positive for such use. Employers must also immediately revise their drug testing policies to ensure compliance with CUMCA, including but not limited to the need to provide written notice to individuals who test positive for marijuana of their right to explain such result or have a retest of their sample. Employers should also ensure that a positive test is not the sole reason for adverse action and that any other reasons are well supported and documented.

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