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Sifting Through the Smoke: New Jersey Employers Now Face Job Protections for Employees using Medical Marijuana.

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For years, New Jersey employers have struggled to align their drug-free workplace and drug testing policies with New Jersey's Medical Cannabis program, promulgated through the Jake Honig's Compassionate Use Medical Cannabis Act ("CUMCA"), N.J.S.A. 24:61-1 *et seq*. For example, could employers reject a job applicant that is a medical cannabis patient; could employers reject an applicant/medical cannabis user that fails a drug test due to it being positive for cannabis; could employers fire an employee/medical cannabis user for consuming medical cannabis at work; could employers fire an employee/medical cannabis user for failing a drug test due to it being positive for cannabis? Thanks to recent amendments to the CUMCA, employers and medical cannabis users have gained guidance on what is and is not legal for them to do.

On July 2, 2019, New Jersey Governor Phil Murphy signed into law amendments to the CUMCA, Assembly Bill 20, Section 9, which expanded the medical conditions for which patients may use medical cannabis (known as qualifying conditions) and modified the State's medical cannabis program (the "Amendments"). The Amendments provide certain elucidated job protections for registered qualified cannabis patients and creates new drug testing procedures for employers.

When did the amendments go into effect?

July 2, 2019.

What changed?

Prior to the Amendments, the CUMCA left employers without guidance as to whether they were required to accommodate an employee's and/or job candidate's use of medical marijuana. Recently, in reversing the dismissal of a medical cannabis patient-employee's New Jersey Laws Against Discrimination ("NJLAD") claims for wrongful discharge, the New Jersey Appellate Division, in Wild v. Carriage Funeral Holdings, Inc., 45 N.J. Super. 416 (App. Div. 2019), held that although the CUMCA did not require an employer to accommodate the medical use of marijuana in any workplace, a patient-employee may still have an actionable NJLAD claim for an alleged unlawful adverse employment action.

The Amendments now expressly prohibit employers from taking any unlawful adverse employment action against an employee or job candidate who is a registered qualified cannabis patient based solely on that employee's or job candidate's status as a registered qualified cannabis patient. Thus, the Amendments endorse the Appellate Division's decision is Wild.

What are employers permitted to do?

The Amendments permit employers to take lawful adverse employment action against a registered qualified cannabis patient if that employer can show that a non-discriminatory reason exists for its employment decision. An adverse employment action means 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. An adverse employment action could include changing the conditions or terms of employment (taking away benefits, moving the employee's office, reducing the employee's hours, etc.), suspension, up to and including termination. An adverse employment action is lawful if it the employer has a non-discriminatory reason for that action. For example, an adverse employment action is unlawful if the employer fires the employee based only on his/her status as a qualified cannabis patient or the employer denies a job candidate employment based solely on his/her status as a qualified cannabis patient.

However, employers may still prohibit "the possession or use of intoxicating substances [including medical cannabis] during work hours or on the premises of the workplace outside of work hours." Accordingly, if an employer has a policy against the consumption

of drugs and alcohol during work hours or on the employer's premises and a qualified cannabis patient violates that policy, then the employer is permitted to utilize an adverse employment action.

Additionally, employers will not be forced to "commit any act that would cause the employer to be in violation of federal law, that would result in a loss of a licensing-related benefit pursuant to federal law, or that would result in the loss of a federal contract or federal funding."

What about drug testing policies?

The Amendments now impose additional procedures on employers who conduct drug testing of employees and job applicants. Employers are now required to provide an employee or job applicant "an opportunity to present a legitimate medical explanation for the positive test result" and employers must "provide written notice of the right to explain to the employee or job applicant." The employee or job applicant then has three working days after receiving notice to either provide an explanation or "request a confirmatory retest of the original sample at the employee's or job applicant's own expense." As part of the employee's or job applicant's explanation she/he may "present an authorization for medical cannabis issued by a health care practitioner, proof of registration with the commission, or both."

We encourage business owners to familiarize themselves with these new rules, review their drug free work place and drug testing policies, and training materials. If you need assistance in evaluating your business's compliance with the CUMCA's amendments, the employment attorneys at MARC can assist your business with drafting/revising policies, training, and your litigation needs.