

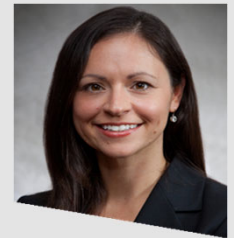
Updates to Medical Marijuana Law in New Jersey, 2019-2020



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Caution!

This presentation is for informational purposes only. It does not constitute legal advice. Contact competent legal counsel for advice on all issues pertaining to workplace substance abuse.

Background of CUMMA

New Jersey
Compassionate
Use of Medical
Marijuana Act
("CUMMA"),
*N.J.S.A. 24:61-1,
et seq.*

The "New Jersey Compassionate Use of Medical Marijuana Act" was passed by the State Assembly and Senate on January 11, 2010, by sizable margins. Governor Corzine signed the Act into law on January 18, 2010, his last full day in office. Originally scheduled to take effect July 1, 2010, its effective date was later postponed until October 1, 2010. First dispensary did not open for business until December 6, 2012.

New Jersey
Compassionate
Use of Medical
Marijuana Act
("CUMMA"),
*N.J.S.A. 24:61-1, et
seq.*

Original Exclusion for Employers and Insurers

- Government medical assistance programs and private health insurers **ARE NOT REQUIRED** to reimburse a person for costs associated with the medical use of marijuana.
- The Act expressly stated that employers were not required to accommodate the medical use of marijuana in any workplace.

**New Jersey
Compassionate
Use of Medical
Marijuana Act
("CUMMA"),
*N.J.S.A. 24:61-1, et
seq.***

Specific Prohibitions Under CUMMA

- No protection for any person operating, navigating, or being in the actual physical control of any vehicle, aircraft, or railroad train, stationary heavy equipment or vessel while under the influence of marijuana.
- No smoking of marijuana in a school bus or any form of public transportation, in a private vehicle unless the vehicle is not in operation, on any school ground, in any correctional facility, at any public park or beach, at any recreation center, or any place in which the smoking of tobacco is prohibited.

New Jersey
Compassionate
Use of Medical
Marijuana Act
("CUMMA"),
*N.J.S.A. 24:61-1, et
seq.*

Majority View

- Unless the medical marijuana statute expressly states otherwise, employers are not required to accommodate medical marijuana use and can terminate employees for testing positive for marijuana. *E.g., Ross v. Ragingwire Telecommunications, Inc.*, 42 Cal. 4th 920 (2008).
- One Federal Court determined that New Jersey would follow suit. *Cotto v. Ardagh Glass Packing, Inc.*, Civil No. 18-1037, 2018 WL 3814278 (D.N.J. 2018).

**New Jersey
Compassionate
Use of Medical
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("CUMMA"),
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seq.***

But When it Came to Workers' Comp....

- Despite exclusion for government medical assistance programs and private health insurers, worker's compensation judges had begun ordering reimbursement for medical marijuana costs in connection with workplace injuries.
- These decisions tended not to address the CUMMA exclusion for "private health insurers."

July 2, 2019-
“Jake Honig
Compassionate
Use Medical
Cannabis Act”
Signed Into Law,
Amending
CUMMA

MAJOR CHANGE NO. 1: THE HONIG ACT

On July 2, 2019, Governor Murphy signed into law the “Jake Honig Compassionate Use Medical Cannabis Act.” The law significantly expanded New Jersey’s medical marijuana program, established a new Cannabis Regulatory Commission, and created an extensive, detailed regulatory scheme based on what had been proposed in the recreational marijuana bills that failed to pass the Legislature. It also amended the CUMMA.

July 2, 2019-
“Jake Honig
Compassionate
Use Medical
Cannabis Act”
Signed Into Law,
Amending
CUMMA

How Does Honig Amend CUMMA ?

- Law now prohibits employers from taking adverse action based solely on the fact that a person is a **registered medical cannabis patient.**
- What is an Adverse Action?
 - Refusing to hire an applicant;
 - Terminating an employee;
 - Requiring an employee to retire;
 - Discriminating against an employee in compensation or in any terms, conditions or privileges of employment

July 2, 2019-
“Jake Honig
Compassionate
Use Medical
Cannabis Act”
Signed Into Law,
Amending
CUMMA

How Does Honig Amend CUMMA?

- The law provides limited protection for current and prospective employees who test positive for cannabis.
- Employer must provide the individual with written notice that he/she can provide a legitimate medical explanation for the positive test result or can request a confirmatory retest of the original sample.
- Within three days after receiving the written notice, the individual can submit information to the employer to explain the positive test result or can request a confirmatory retest of the original sample.

July 2, 2019-
“Jake Honig
Compassionate
Use Medical
Cannabis Act”
Signed Into Law,
Amending
CUMMA

How Does Honig Amend CUMMA?

Important Exceptions:

- Not required to take any action that violates federal law.
- Not required to take any action that would cause the loss of a federal contract or federal funding.
- Not required to take any action that would result in the loss of a federal license or license-related benefit.
- Not required to tolerate impairment at work.

*Hager v. M & K
Construction,
2020 WL
218390 (App.
Div. 2020)*

MAJOR CHANGE NO. 2: THE HAGER DECISION

- *Hager v. M & K Construction*, 2020 WL 218390 (App. Div. 2020), held that an employer could be required to reimburse an employer for medical marijuana costs under worker's compensation law.
- Court affirmed the worker's compensation determination that employee's use of medical marijuana was necessary treatment for chronic pain following a work-related accident.
- Award did not violate the federal Controlled Substances Act (CSA) or the New Jersey Compassionate Use Medical Marijuana Act (CUMMA).
- Concluded that regular, periodic reimbursement of medical marijuana costs would not constitute "aiding and abetting" the violation of Federal criminal statutes

*Hager v. M & K
Construction,*
2020 WL
218390 (App.
Div. 2020)

What About the Private Health Insurer Exclusion?

- Court held that the employer was not a government medical assistance programs or a private health insurers, which are not required to reimburse a person for costs associated with the medical use of marijuana under CUMMA.
- “Worker’s compensation coverage” does not constitute “health insurance” under New Jersey’s Life and Health Insurance Code.

New Jersey Supreme Court Case Law also has impacted medical marijuana use and it gets....

WILD

MAJOR CHANGE NO. 3: WILD v. CARRIAGE FUNERAL HOLDINGS, INC.

New Jersey
Law Against
Discrimination
("LAD")

N.J.S.A. 10:5-12

What Does the NJLAD Provide?

The New Jersey Law Against Discrimination (*LAD*) makes it unlawful to subject people to discrimination or harassment based on, among other characteristics, disability.

Wild v. Carriage Funeral Holdings, Inc.

Wild v. Carriage Funeral Holdings, Inc.

In 2019, the Appellate Division in *Wild v. Carriage Funeral Holdings, Inc.*, 2019 WL 1371206 (App. Div. 2019), held that Plaintiff had pled a *prima facie* case disability discrimination for being terminated due to after-hours use of medical marijuana. The case was decided under CUMMA *before* the Honig Act amendments were adopted.

- Plaintiff had been prescribed medical marijuana as part of his cancer treatment.
- While Plaintiff was driving on the job, he was involved in a car accident. He was taken to the hospital for treatment and disclosed to the treating physician that he had a license for medical marijuana. The doctor did not perform a drug test because he determined he was not under the influence of marijuana. The employer, however, required that Plaintiff take a drug test before being allowed to return to work. Ultimately, Plaintiff was terminated.

*Wild v. Carriage
Funeral
Holdings, Inc.*

Wild v. Carriage Funeral Holdings, Inc.

The trial court dismissed Plaintiff's suit, citing the CUMMA provision barring accommodation of medical marijuana "in any workplace." The Appellate Division reversed:

"To rephrase what we said earlier, just because the Legislature declared that '[n]othing in [the Compassionate Use Act] shall be construed to require ... an employer to accommodate the medical use of marijuana in any workplace,' N.J.S.A. 24:6I-14, does not mean that the LAD may not impose such an obligation, particularly when the declination of an accommodation to such a user relates only to use 'in any workplace.' ... we repeat that plaintiff did not allege he sought an accommodation for his use of medical marijuana 'in [the] workplace'; he alleged only that he sought an accommodation that would allow his continued use of medical marijuana 'off-site' or during 'off-work hours.'"

Wild v. Carriage Funeral Holdings, Inc.

Wild v. Carriage Funeral Holdings, Inc.

On March 10, 2020, the New Jersey Supreme Court affirmed the Appellate Division in *Wild*, but with important qualifications.

- The NJSC holds that a registered medical marijuana patient can assert a claim under the NJLAD for an adverse employment action based on an employee's **off-site** medical marijuana use.
- “We decline, however, to adopt the Appellate Division's view that “the Compassionate Use Act intended to cause no impact on existing employment rights...As plaintiff acknowledged at oral argument, had the Legislature not enacted the Compassionate Use Act, he would have no LAD claim for disability discrimination or failure to accommodate following the termination of his employment.”

*Wild v. Carriage
Funeral
Holdings, Inc.*

Wild v. Carriage Funeral Holdings, Inc.

- CUMMA's prohibitions and exclusions *remain relevant even if disability discrimination is alleged.*
- Suggestion that these CUMMA provisions are irrelevant to disability discrimination claims under the NJLAD was rejected.
- Unanswered question: exact meaning of "accommodate" the medical use of marijuana "in any workplace."

Where We Stand Now

Where We Stand Now

- *Honig Act*: requires opportunity for a medical explanation, but does not prescribe how an employer must respond if such an explanation is given.
- *Wild*: Treat medical marijuana as one would treat any other prescribed medication- but take the unique status of marijuana into account.

Signs of Marijuana Impairment at Work

What to Look For

- Personality changes or erratic behavior, (*e.g.*, lack of focus, lying, forgetfulness, isolation from colleagues, mood fluctuation, inappropriate verbal/emotional response).
- Appearance of impairment (odor, red eyes, dilated pupils, nystagmus, poor coordination, lassitude).
- Working in an unsafe manner; errors in judgment; difficulty multitasking.
- Consistent or unexplained absences, lateness, excessive number or length of breaks.

Signs of Marijuana Impairment at Work

What to Look For

- Deterioration in appearance.
- Frequent use of breath mints/gum.
- Unexplained bruising, headaches, similar physical symptoms.
- Restlessness.

SOURCE: Atlantic Canada Council on Addiction

Signs of Marijuana Impairment at Work

But Be Careful!!

- These may also be symptoms or evidence of issues other than substance abuse.
- No one factor alone is necessarily determinative.
- Have a clear policy in place to guide supervisors and train them to be aware of warning signs while not overreacting.
- *When in any doubt, seek advice of counsel.*

*And Don't
Forget!!!*

DOCUMENT! DOCUMENT! DOCUMENT!

"If it's not in writing, it never happened."

Thank You!

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