

# Medical Marijuana And The Drug-Free Workplace In New Jersey

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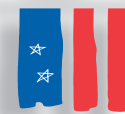
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# UPDATE

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Partnership for a Drug-Free New Jersey

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## Medical Marijuana and the Drug-Free Workplace in New Jersey

by Stephen E. Trimboli, Esq.

Nearly three years after it was passed, and following numerous false starts, the "New Jersey Compassionate Use of Medical Marijuana Act" finally became a reality with the opening of New Jersey's first medical marijuana dispensary -- the Greenleaf Compassion Center in Montclair -- on December 6, 2012. It is now timely to ask the question: What impact will New Jersey's Medicinal Marijuana Program (MMP) have on employer efforts to create and maintain drug-free workplaces?

The short answer is: less of an impact than one may suspect. The MMP is still in its infancy, and the courts have not yet had the opportunity to analyze it. But there is every reason to conclude that as in every other medical marijuana state that has addressed the issue, the MMP will not be interpreted to restrict employers or supersede drug-free workplace policies. The law itself expressly states that employers are not required to accommodate the medical use of marijuana in any workplace. Nor are employers required to provide health insurance coverage for medical marijuana. And New Jersey's law will not excuse employers from compliance with federal laws mandating drug testing and drug-free workplaces.

The Act permits a limited category of qualified patients and their primary caregivers, with proper written authorization from their treating physicians, to purchase and utilize limited amounts of marijuana. The qualified patients may purchase medical marijuana only from "alternative treatment centers" approved by the State.

The State Department of Health and Senior Services (DHSS) is responsible for issuing registry identification cards to qualified patients and their primary caregivers. The patient's physician must certify that the patient suffers from an eligible "debilitating medical condition." The physician must have a bona fide physician-patient relationship with the applicant and be responsible for the applicant's primary treatment, hospice treatment, or ongoing treatment of the debilitating condition. The physician need not be the patient's primary physician, but cannot have been retained simply for the purpose of authorizing medical marijuana use.

Of particular note to employers, the Act does not require any government medical assistance program or private health insurer to reimburse a person for cost associated with the medical use of marijuana. Further, the Act expressly states that

**Qualifying "debilitating medical conditions" include the following:**

- Seizure disorders, (including epilepsy), intractable skeletal muscular spasticity, and glaucoma, if these conditions are resistant to conventional medical therapy.
- AIDS, cancer and positive HIV status, if these conditions are accompanied by severe or chronic pain, severe nausea or vomiting, cachexia, or wasting syndrome, (resulting either from the condition itself or its treatment).
- ALS (Lou Gehrig's Disease), multiple sclerosis, terminal cancer, muscular dystrophy, or inflammatory bowel disease (including Crohn's disease).
- Terminal illness.
- Any other condition or treatment approved by DHSS by regulation.

employers are not required to accommodate the medical use of marijuana in any workplace. N.J.S.A. 26:61-14.

In stating expressly that New Jersey employers will have no obligation to accommodate medical marijuana use, the Legislature was likely guided by the decision of the Supreme Court of California in *Ross v. Ragingwire Telecommunications, Inc.*, 42 Cal. 4th 920 (2008). In that case, the Supreme Court of California held that employers are not required to accommodate employees who use medical marijuana, and that employees may lawfully be terminated for testing positive for medical marijuana in a workplace drug test. Noting that California employers, like New Jersey employers, are not required to accommodate the use of illegal drugs, the Ross Court held that California's "Compassionate Use Act" did not "eliminate marijuana's potential for abuse or the employer's legitimate interest in whether an employee uses the drug."

Ross has been followed every other medical marijuana state that has addressed the issue. The common theme is that medical marijuana laws simply decriminalize the use, possession, purchase and sale of marijuana when it is used for medical purposes under carefully prescribed conditions. The laws do not grant affirmative rights and were not intended to regulate em-

(Continued on next page)



ployment. See, *Roe v. Teletech Customer Care Mgt.*, 171 Wash.2d 736 (2011)(Washington); *Emerald Steel Fabricators v. Bur. of Labor and Indus.*, 348 Or. 159 (2010) and *Freightliners LLC v. Teamsters Local 305*, 336 F. Supp.2d 1118 (D. Or. 2004)(Oregon); *Benior v. Industrial Claim Appeal Office*, 262 P.3d 970 (Colo. App. 2011), cert. den., 2012 WL 1940833 (2012)(Colorado); *Johnson v. Columbia Falls Aluminum*, 350 Mont. 562 (2009)(Montana); *Casias v. Wal-Mart Stores*, 695 F.3d 428 (6th Cir. 2012)(Michigan).

In *Casias*, the federal Sixth Circuit Court of Appeals found that Michigan’s medical marijuana law “provides a potential defense to criminal prosecution or other adverse action by the state,” but neither regulates private employment nor “impose{s} restrictions on private employers.” “{P}rivate employees are not protected from disciplinary action as a result of their use of medical marijuana, nor are private employers required to accommodate the use of medical marijuana in the workplace.”

Although one cannot be certain how New Jersey’s courts will resolve the issue, the unanimous position taken by every other state that has addressed the issue, combined with the Legislature’s express statement that employers are not required to accommodate medical marijuana, makes it very likely that New Jersey’s courts will reach the same conclusion as these other states. Accordingly, it is likely that New Jersey employers will still be permitted to enforce their drug-free workplace policies and to terminate employees who test positive for medical marijuana.

An employer in New Jersey is still under an obligation to provide reasonable accommodation for a qualifying patient’s underlying medical condition for reasons unrelated to the use of medical marijuana. Employers who are subject to the federal Family and Medical Leave Act would still be required to grant up to twelve weeks of leave per year to an employee who is unable to work due to the underlying debilitating condition. In contrast, however, the employer would not be required to afford time off for reasons related to the use of medical marijuana.

Further, the proposed State medical marijuana law would have no impact whatsoever on the federal prohibition against marijuana use. In *Gonzales v. Raich*, the United States Supreme Court held that users of medical marijuana under State law can still be prosecuted under federal criminal laws even for possessing small amounts of marijuana for personal, non-commercial medical use. It necessarily follows that a medical marijuana user would be able to claim no benefit or protection under federal law. For example, not an employee would be able to claim time off under the federal Family and Medical Leave Act (FMLA) due to the use of medical marijuana. Similarly, employers subject to the drug and alcohol testing regulations of the United States Department of Transportation would still be required to remove medical marijuana users from safety sensitive positions. DOT regulations expressly prohibit treating medical marijuana use as a justification for a positive test result. 49 C.F.R. Section 40.151(e)

The federal prohibition against the use or possession of mari-

juana raises additional difficult questions for employers. For example, what if an employee objects to a co-worker’s use of medical marijuana because it constitutes a violation of federal law? Would such an employee be protected as a “whistle-blower” under New Jersey’s Conscientious Employee Protection Act (CEPA) because he is objecting to a practice he reasonably believes to be illegal? Similarly, would an employer be permitted to report a medical marijuana user to the federal Drug Enforcement Agency? Would a medical facility be permitted to prohibit its physicians from prescribing medical marijuana? The proposed New Jersey law is silent on these issues. These, along with other difficult legal questions, will be left for the courts to resolve.

Federal grantees and contractors must also be alert for potential conflicts with federal laws, regulations, contract provisions and grant requirements. For example, all federal grantees, and certain federal contractors, must comply with the requirements of the federal Drug-Free Workplace Act of 1988. 41 U.S.C. 8102, et seq. Among other requirements, grantees and covered contractors are required to:

- Publish and distribute a policy prohibiting the manufacture, distribution, dispensation, possession and use of controlled substances in the workplace.
- Notify employees that they must comply with the policy as a condition of employment, and must notify the employer within five days of a work-related drug conviction.
- Penalize or require treatment for any employee convicted of a workplace-related drug conviction.
- Make an ongoing, good faith effort to maintain a drug free workplace.

No exception will be allowed for employees using medical marijuana under the MMP.

Advice of competent counsel should be sought if and when these issues arise.

The medical marijuana law reflects the Legislature’s desire to balance the perceived medical benefits of marijuana against the danger of marijuana-related impairment. The Legislature has left employers in a position in which they may still continue to enforce drug-free workplace policies. But the conflict between state law and the absolute federal prohibition against the use of marijuana for any purpose may still prove troublesome for employers and employees alike.

### About the Author

**Stephen E. Trimboli, Esq.** has been recognized as a New Jersey Super Lawyer, and was named as an Employment Law Super Lawyer in 2008. He was the recipient of the 1996 County Service Award from the New Jersey Association of Counties; the 1994 Pace Setter Award from the National Public Employer Labor Relations Association, and the 1999 Paul Gallien Award from the National Council on Alcoholism and Drug Dependence, North Jersey Area.

Mr. Trimboli is admitted to practice in New Jersey, the District of Columbia, the New Jersey Federal District Court, the Second and Third Circuit Court of Appeals, and the United States Supreme Court.

*Notice: This article reflects the opinion of the author and does not necessarily reflect the opinion of Partnership for a Drug-Free New Jersey (PDFNJ). This information should not be construed as legal advice from the author or PDFNJ. Please consult your own attorney before making any legal decisions.*

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# 15th Annual Legal Issues of a Drug-Free Workplace

## MEMBER SEMINAR

**FEATURED SPEAKER: Nancy N. Delogu, Esq.**

### Biography

Ms. Delogu is a recognized authority on federal and state drug-free workplace and drug-testing issues and has drafted dozens of substance-abuse prevention policies, including, Department of Transportation (DOT) mandated programs. She also assists DOT regulated employers to comply with regulations addressing workplace safety compliance and medical certification requirements.

### Lectures & Presentations

Ms. Delogu is a frequent presenter and trainer on harassment avoidance, conducting lawful investigations and issues relating to drug and alcohol testing. She has testified before the United States Commission of Civil Rights regarding the Americans with Disabilities Act (ADA) and substance abuse. For several years, she has co-taught an introductory course on traditional labor law as an Adjunct Professor at the College of William & Mary’s Marshall-Wythe School of Law.

### Hot Topics to be Discussed:

- The impact of prescription drug abuse in the workplace
- Trends in drug use
- Medical marijuana
- The evolution of testing protocols
- Substance abuse and workplace security and safety
- Substance abuse and medical examinations.

**Seminar 8:30 am - 12 pm.**  
**Continental Breakfast will be served.**

**Please register by Friday, May 24, 2013 [www.DrugFreeNJ.org/DDW2013Registration](http://www.DrugFreeNJ.org/DDW2013Registration)**

**Limited seating available, first come, first served.**

**If you have any questions or comments please contact:**  
**Chris Barton at 973-467-2100, Ext 11 or [Chris@DrugFreeNJ.org](mailto:Chris@DrugFreeNJ.org)**

*This seminar is provided free-of-charge to all  
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