



Update No. 91

Summer 2019

How New Jersey's New Medical Cannabis Law Affects Employers

by: Stephen E. Trimboli, Esq. Trimboli & Prusinowski, L.L.C.

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. Among other things, the new law discards the term, “marijuana,” in favor of the term, “cannabis.”

Importantly, the new law directly addresses how employers may respond to the use of medical cannabis by employees. As you know, the original statute passed in 2009 appeared to exempt employers from needing to accommodate medical cannabis in the workplace. This blanket exemption has been repealed. In its place are the following new requirements:

- Employers are prohibited from taking adverse employment action against an employee *solely* because the employee is *registered to use* medical cannabis. But employers still have the right to prohibit *the possession or use of cannabis for any reason* during work hours, and also to prohibit *the possession or use of cannabis for any reason* on workplace premises outside of work hours.
- Employers may still adopt drug testing policies that include testing for cannabis. However, employees who test positive for cannabis under such a policy must be given written notice that they have the opportunity to offer a legitimate medical explanation for the positive cannabis test result.

- Employees who test positive for cannabis have three working days from receipt of this written notice either to request a re-test or to produce evidence of a legitimate medical explanation, which may include their authorization for using medical cannabis.

The new law does *not* prohibit an employer from taking adverse action against an employee who tests positive due to the use of medical cannabis. The new law does *not* require the employer to accept the employee's medical explanation for testing positive for medical cannabis. In fact, the new law is silent on the issue of how an employer may or may not respond to a positive test result caused by the use of medical cannabis. In this respect, the new law differs markedly from earlier proposed bills that would have prohibited employers from taking adverse action against employees who tested positive for medical cannabis.

Because cannabis use for *any* purpose remains a federal crime, the new law contains an "escape clause." Employers are not compelled to take any action that would violate federal law, cause the employer to lose a federal contract or funding, or lose a licensing-related benefit pursuant to federal law.

Health care facilities are prohibited from taking adverse employment action against, or adversely affecting their professional affiliations with, health care practitioners who participate in the medical cannabis program except as may be necessary to avoid losing a monetary or licensing-related benefit granted pursuant to federal law.

What should a New Jersey employer do if it wishes to maintain a drug-free workplace? First and foremost, if it has not done so already, the employer should immediately adopt a policy prohibiting the possession or use of cannabis for *any* reason during work hours and on workplace premises outside of work hours. Second, the employer should amend its drug testing policy to provide for written notice to employees of their right to offer a legitimate medical explanation for a positive cannabis test result within three working days. Third, the employer should prepare a form written notice for employees who test positive for cannabis. The form notice should emphasize the three-working-day deadline for the submission of a legitimate medical explanation and should state that the medical explanation will be given due consideration.

And how should a New Jersey employer when it receives a purported medical explanation for a positive cannabis test result? First, the employer should assure itself that the purported explanation is legitimate. The new law does not bind the employer to accept whatever the employee produces, and it appears to be consistent with the balanced approach suggested by the new law for an employer to take reasonable steps to assure itself of the legitimacy of the employee's medical explanation. Second, if the employer is subject to a federal law, a federal contract or grant condition, or a federal license that requires the employer to take adverse action against the employee, the employer must comply with that requirement. Third, even in the absence of action mandated by federal law, contract, grant or license, the possession, use or being under the influence of cannabis during work hours or on workplace premises is unprotected under any circumstance.

What about an employer that is confronted with an employee who uses medical cannabis for legitimate medical reasons and whose use is limited entirely to off-duty hours? The recent appellate court decision in *Wild v. Carriage Funeral Home, Inc., et al.* held that adverse action against such an employee may constitute disability discrimination unless the employer can demonstrate that even off-duty use would render the employee unable to perform his or her job duties, would raise demonstrable safety concerns, or would otherwise jeopardize the employer's legitimate business interests. The New Jersey Supreme Court has now agreed to review the *Wild* decision. However, *Wild* interpreted the now-repealed language that exempted employers from needing to accommodate medical cannabis in the workplace, so even if the Supreme Court reverses *Wild*, its reasoning may still be found applicable to the new statute.

We are entering a new world when it comes to cannabis in the workplace. Advice of counsel should be sought in all medical cannabis cases. We will be monitoring for further legal developments in this area.

About the Author: Stephen E. Trimboli, Esq. founding partner at Trimboli & Prusinowski, LLC has been recognized for his expertise by numerous organizations, including the National Council on Alcoholism and Drug Dependence, the National Public Employer Labor Relations Association and the New Jersey Association of Counties. Stephen was this year's recipient of the *Drugs Don't Work in NJ! Founder's Award* for his work with us and his dedication in assisting the New Jersey business community in maintaining a drug-free workplace.

Notice: This article reflects the opinion of the authors and does not necessarily reflect the opinion of the 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.

The Partnership for a Drug-Free New Jersey (PDFNJ) is a private 501 (c) (3) not-for-profit organization that promotes the prevention of substance abuse throughout the state through media campaigns, school-based programs and community and workplace initiatives. PDFNJ programs are made possible by support from the Governor's Council on Alcoholism and Drug Abuse, the New Jersey Division of Mental Health and Addiction Services, and funding from corporations and foundations. All programs and services provided by PDFNJ are free of charge. For more information visit www.drugfreenj.org or call 973-467-2100.