



IN-DEPTH DISCUSSION

NJ Supreme Court Holds Medical Marijuana Use Outside of the Workplace is Protected Under State Law and Employers are Required to Accommodate After-Hours Use

By Lauren J. Marcus, Dylan C. Dindial, Jennifer Chierek Znosko, and Elizabeth R. McKenna on March 16, 2020

Resolving prior uncertainty regarding the impact of the New Jersey Compassionate Use Medical Marijuana Act (CUMMA) on employees' employment rights, the New Jersey Supreme Court recently held that employees can maintain an action under the New Jersey Law Against Discrimination (NJLAD) for disability discrimination when an employee suffers an adverse employment action as a result of their lawful use of medical marijuana outside of the workplace during non-working hours. Employees may also bring a failure to accommodate claim under the NJLAD based on their lawful use of medical marijuana.

In *Wild v. Carriage Funeral Home, Inc.*, the plaintiff used medical marijuana, as permitted by the CUMMA, as part of his cancer treatment. After being involved in a vehicle accident while working, the plaintiff informed both his doctor and his employer that he had been using medical marijuana outside of work. Although his doctor did not perform a drug test because he did not perceive the plaintiff to be impaired at the time of the accident, the plaintiff's employer later required him to submit to a drug test before allowing him to return to work. While the Appellate Division noted that the results of the test were not in the record, it recognized that the complaint alleged that the employer told the plaintiff his employment was being terminated because of the positive drug test and because he failed to disclose his marijuana use, which might adversely affect his ability to perform his job. The trial court granted defendants' motion to dismiss plaintiff's claims under the NJLAD and the Appellate Division reversed.

NJ Supreme Court Provides Clarity on Employer's Obligation to Accommodate Lawful Off-Duty Medical Marijuana Use

In affirming the Appellate Division's decision, the New Jersey Supreme Court found that the plaintiff sufficiently pled a cognizable cause of action under the NJLAD to survive the motion to dismiss. Although defendants argued the plaintiff had not specifically requested an accommodation, the court found that the plaintiff met his burden by alleging that his employer was aware of his disability and need for treatment, and had discussed with the plaintiff his need to take prescription medication. In essence, the court's holding indicates that an employee's mere notification of lawful medical marijuana use to their employer may be sufficient to trigger the employer's duty to engage in the interactive process regarding possible accommodations, such as not taking action based on a positive drug test result.

The court further confirmed that there is no conflict between the CUMMA and the NJLAD. In other words, although the CUMMA does not impose a duty to accommodate medical marijuana use ***in the workplace***, it does not immunize actions that might violate the NJLAD, such as refusing to accommodate or discriminating against employees for medical marijuana use outside the workplace.¹

The State Supreme Court disagreed with one aspect of the Appellate Division's ruling and held that the CUMMA has a direct impact on employees' employment rights in two situations. First, and most critically, without the CUMMA, employees would not be able to maintain an action for disability discrimination related to marijuana use. Second, the CUMMA explicitly prevents employees from maintaining a claim under the NJLAD for medical marijuana use in the workplace, during work hours, or while operating, navigating or physically controlling a vehicle in the performance of their job duties.

Specifically, the court added important caveats to its decision, including the CUMMA's provisions on operating a motor vehicle while under the influence of medical marijuana:

We add only that two particular provisions of the Compassionate Use Act may affect a LAD discrimination or failure to accommodate claim in certain settings. In N.J.S.A. 24:6I-14 (2018), the Legislature provided 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.” In N.J.S.A. 24:6I-8 (2018), the Legislature further stated in part that the Act “shall not be construed to permit a person to: a. operate, navigate or be in actual physical control of any vehicle, aircraft, railroad train, stationary heavy equipment or vessel while under the influence of marijuana.” To the extent that the circumstances surrounding a LAD disability discrimination claim were to implicate one or both of those provisions of the Compassionate Use Act, the Act would have an impact on that claim.

These caveats may provide some employer flexibility, particularly with employees who will operate vehicles or heavy equipment while using medical marijuana, but the challenge will be what “under the influence” – which is not defined – means under the law.

While the court’s ruling does not require accommodation for use of or impairment by marijuana at work, the decision highlights that employers cannot and should not assume that a positive drug screen for marijuana demonstrates impairment while at work. Currently, there is no scientific consensus on THC concentrations in an individual’s system that correlate with impairment. For this reason, although the ruling does not prohibit employers from firing an employee for being impaired at work or using marijuana in the workplace, employers cannot rely solely upon a positive drug test in determining whether an employee is impaired. Rather, before making an accommodation or other employment decisions, employers should document evidence showing reasonable suspicion of the impairment while at work and the reasons impairment is suspected.

Employer Takeaways

Given New Jersey’s employee-friendly laws concerning disability discrimination and the duty to accommodate, the Supreme Court’s broad reading that the CUMMA relates to and works in tandem with the protections of the NJLAD is not surprising. Effective immediately, employers in New Jersey should be prepared to engage in the interactive process if an employee discloses medical marijuana use outside of the workplace or tests positive for marijuana use. If the employee is a qualified patient under the CUMMA, employers should assess possible accommodations and confer with counsel as needed. At all times, the safety-sensitive nature of each position must be assessed, and risk management concerns for catastrophic loss balanced against CUMMA/NJLAD compliance in conducting an interactive dialogue and making

corresponding reasonable accommodation assessments. In all events, employers will be able under *Wild* to continue to prohibit on-duty use/possession of medical marijuana as well as, we expect, work-related impairment by medical marijuana.

In the event that the circumstances of a test² warrant an adverse action, employers are reminded that they are obligated to provide an employee with written notice of the test results and an explanation of their rights under the CUMMA. This includes the right to provide a “legitimate medical explanation” within three business days of the written notice, or to request a retest of their original sample at their own expense. Once the employee has had the opportunity to respond, the employer can assess whether the adverse action is appropriate, provided that the employer’s decision does not turn solely on the individual’s status as a marijuana patient.

¹ The court’s ruling applies the CUMMA as written **before** it was amended in 2019. The statute as currently drafted provides that employees are prohibited from possessing or using medical marijuana during work hours or on work premises outside of work hours and that employers are prohibited from taking “any adverse employment action against an employee . . . based solely on the employee’s status as a” registered medical marijuana user. Reading the language of the current statute in conjunction with the *Wild* decision, New Jersey employers must reasonably accommodate and may not discriminate against employees for medical marijuana use unless doing so would cause the employer to commit an act in violation of federal law or would result in the loss of federal licensing-related benefits, federal contracts or federal funding.

² Additional testing requirements, enacted in 2019 in New Jersey, must also separate and apart from CUMMA/NJLAD be honored. See Nancy Delogu and Sebastian Chilco, [New Jersey Medical Marijuana Amendments Expand Employment Protections](#), Littler ASAP (July 29, 2019).

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