

TO TEST OR NOT TO TEST: AN EVOLVING QUERY FOR NEW JERSEY EMPLOYERS

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Many New Jersey employers condition offers of employment on successfully passing a drug test. However, with the State’s recent efforts to expand its medical marijuana program, serious legislative debate about full legalization of cannabis, and growing social acceptance of the drug, it is likely that use will increase. As a result, some employers question whether it makes sense to continue drug testing of job applicants for non-safety sensitive positions. This article provides an overview of the present state of the law in New Jersey and highlights potential developments that may affect the job pools for employers that test job applicants for marijuana.

At present, New Jersey employers have little restriction on their ability to drug test applicants. New Jersey also freely allows employers to drug test employees if the employer has “reasonable suspicion” of drug use. Marijuana in particular is highly detectible, as its metabolites can exist in the body for weeks after use.

New Jersey’s medical marijuana law – the Compassionate Use Medical Marijuana Act, N.J.S.A. 24:6I-1 *et seq.* (“CUMMA”) – had little effect on employers when it was enacted in 2010. The law covered only a few medical conditions, many terminal, and its implementation was glacial. Although the law allowed for administrative expansion of the covered medical conditions through the rule-making process, few conditions were added in the law’s first eight years. For these reasons, participation levels were low.

This meant that New Jersey employers were not confronted immediately with a labor pool of registered patients. Nonetheless, to the extent that issue were to arise, CUMMA clearly states that the law does not require “an employer to accommodate the medical use of marijuana in any workplace.” Indeed, a federal court in New Jersey recently held that neither CUMMA nor the State’s expansive Law Against Discrimination required an employer to accommodate an employee’s medical marijuana use by waiving an existing requirement for drug testing. Cotto v. Ardagh Glass Packing, Inc., Docket No. 18-1037 (D.N.J. Aug. 10, 2018).

Thus, although CUMMA has been on the books for more than eight years, it has not presented a significant challenge for Garden State employers to drug test applicants and employees. That, however, is likely to change.

Governor Philip Murphy campaigned on what was regarded as a pro-marijuana platform. He advocated for both expanding the medical law to allow more qualifying conditions, and for establishing a legalization regime to address social inequities and injustices resulting from criminal prosecutions for marijuana. Accordingly, one of his first Executive Orders directed the State’s

Department of Health and the Board of Medical Examiners to undertake a 60-day review of all aspects of the State's medical marijuana program followed by immediate initiation of the rulemaking process. The Order was premised on the outdated nature of CUMMA, noting that 29 states (now 30) allow medical marijuana, Congress has repeatedly placed restrictions on the use of federal funds to interfere with such laws, and only 15,000 patients were registered in New Jersey even though similarly populated Michigan served over 218,000 patients. Most notably, the Order tasked the Department of Health to determine whether the list of qualifying conditions could be expanded by executive action.

Sixty days later, on March 23, 2018, five new qualifying conditions under CUMMA were added: anxiety, migraines, chronic pain with visceral origin, chronic pain related to musculoskeletal disorders, and Tourette's Syndrome. As expected, the addition of these categories has caused participation levels to increase dramatically, from around 15,000 patients in January 2018 – after nearly nine years of the program's existence – to more than 25,000 patients as of July 2018. That is more than 100 patients a day. Moreover, individuals with these new qualifying conditions are more likely to be found in the active labor market than individuals with the previously covered medical conditions.

This change alone could lead some employers, in a tight job market, to question maintaining drug testing for marijuana in light of the limits that such testing could impose on their available potential workforce. However, the Legislature is presently considering bills that would further expand CUMMA in a manner that may also affect how New Jersey employers approach drug testing.

The leading medical marijuana revision bill contains language that would make it unlawful for an employer to take any adverse employment action against an employee or applicant who is a registered marijuana patient because of such status or because of a positive drug test for marijuana. However, the proposed law would permit an employer to take adverse action where the employer can establish, by a preponderance of the evidence, that the lawful use of marijuana impaired the employee's ability to perform his or her job responsibilities. Although the bill would permit drug testing policies, employers would be required to offer employees and applicants an opportunity to present a legitimate medical explanation for a positive test result and provide written notice of the right to explain such a result.

If this bill were to become law, employers may be faced with an ever-growing population of applicants and employees that could not be summarily disqualified by a positive marijuana test. Employers continuing to test would need to be prepared to demonstrate that the employee was actually impaired. This could present a difficult burden, given that marijuana metabolites can last in the body for weeks, meaning that their presence in a urine drug screen may not always show a concentration level significant enough to be deemed "impairment."

Beyond the likely expansion of CUMMA, the Legislature – with an agreeable Governor – is also considering bills that would establish a legalization regime similar to that currently in place in nine states – Washington, Oregon, California, Nevada, Colorado, Massachusetts, Vermont, Maine and Alaska. What the final bill may look like is speculative; however, there will most likely be provisions addressing the effect of the law on employers.

For example, the leading legalization bill provides that while employers would not have to tolerate on-the-job marijuana use or intoxication, employers would be prohibited from refusing to hire, employ, or take adverse employment action against any individual because of marijuana use absent certain circumstances. Specifically, an employer taking adverse employment action would need a “rational basis” – a legal term of art that typically means “a reason” – that is reasonably related to the individuals’ employment, including the responsibilities of the employee or prospective employee. Employers may have little difficulty meeting this standard for safety-sensitive positions, but it could be more problematic for other jobs. Another provision of the bill provides that the presence of marijuana metabolites in the body of an employee alone would not be a legal basis for refusing to hire or continuing to employ, unless the employer, such as a government contractor, would be in violation of state or federal law by not excluding such candidates from employment or employees from continued employment.

What does all of this mean for employers? There is in all likelihood going to be marked increase in marijuana use among the labor pool in New Jersey. This means that employers throughout New Jersey may need to make a number of determinations about why and whether they continue to drug test applicants and employees for marijuana.

First, employers who will want to continue to test for marijuana will need to develop criteria and justifications for both medical and recreational users. On the medical side, employers would need to be prepared to explain how off-the-job use of medical marijuana actually impaired the employee’s ability to perform his or her job responsibilities. This may mean gathering extensive documentation to support a reasonable suspicion drug test. Further, because marijuana metabolites can last for up to a month in the body, urine testing – the most common form – may not definitively show that the medical marijuana patient/suspected impaired employee’s inability to perform job responsibilities was caused by his or her medical marijuana use. Blood testing may be a more accurate form of testing, but that is far more intrusive and expensive, and therefore could be beyond the reach of many employers.

Second, if the recreational bill were to become law, employers that wanted to utilize marijuana drug screening for applicants and employees would need to prepare, in advance, justifications on a per-position basis for continued marijuana drug screening of each position. This would be necessary to support any adverse action taken against an applicant or employee because of a positive marijuana drug test. Employers who are obligated to test for marijuana as a matter of law, such as certain federal contractors or employers in regulated businesses like transportation, would likely be exempt. But, that would still leave the majority of employers covered by the law and its new employee protections.

Of course, the simplest solution would be to stop testing for marijuana. Employers who do not want to take that approach may need to be prepared to justify or defend their decision. Further, in a tight job market, employers who continue to test for marijuana may find themselves with an artificially smaller labor market – applicants may choose to apply only to employers who do not test.

In sum, although the current legislative proposals are still under debate, it is more likely than ever that some form of expanded medical marijuana program and legalization regime will

become law in New Jersey in the near term. Whatever form those laws take, they are likely to include employee protections from adverse employment actions stemming from drug testing for marijuana. Employers are therefore well advised to keep a close eye on these bills and consult with experienced labor counsel to discuss the viability, business sense and risks of continuing to test for marijuana for non-safety sensitive positions.

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