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Where There's Smoke: NY Companies Should Re-examine Marijuana Policies

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SHUTTERSTOCK

With the growing trend toward legalization of marijuana for both medical and recreational purposes, New York companies should carefully evaluate their workplace policies to adhere to the latest legal developments impacting employees.

Gov. Andrew Cuomo's 2017 legislative agenda, as reported by the press on Jan. 12, 2017, proposed lessening the penalties for recreational marijuana use.[1] In 1977, New York state decriminalized private marijuana possession, which made possession by private users a violation, not a criminal offense,[2] while marijuana possession by a user in public view is a misdemeanor. Under current state law, private users caught with small amounts of marijuana for the first time receive a fine akin to a parking ticket but are not criminally charged.

The governor's proposed change to the law would decriminalize the possession of small amounts of marijuana by recreational users in New York so that non-violent individuals who buy and use small amounts of marijuana will not be prosecuted by law enforcement. Cuomo's proposal, unlike some other states that have legalized marijuana, would not impact the prosecution of persons who illegally supply and sell marijuana in New York state.[3]

Gov. Cuomo recognized that his agenda for marijuana is indicative of a "national trend and dramatic shift in public opinion concerning marijuana," and stated that the recreational use of marijuana poses "little to no threat to public safety."[4]

New York is already a medical marijuana state—meaning that under certain circumstances an employee's use of marijuana, a drug that is illegal under federal law, is permitted under state law when certified for use by an authorized physician. The New York Compassionate Care Act (the CCA), signed into law in July 2014, provided for legalization of the use of medical marijuana for persons with serious illnesses.[5]

Medical marijuana laws currently exist in well over half the United States, and

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California, Alaska, Colorado, Maine, Massachusetts, Nevada, Oregon, and Washington have legalized recreational marijuana use. Medical and recreational marijuana use laws have also been passed in the District of Columbia.[6] The trend toward state-level legalization of marijuana potentially creates issues for New York employers. Increasing legalization will impact drug testing policies, hiring and discharge decisions, and accommodations for employees who suffer from serious illnesses and are being treated with marijuana. The issues are thorny because marijuana use, in recreational or in medical form, is still illegal at the federal level.

The use of marijuana, including medical marijuana, is prohibited under the federal Controlled Substances Act (the CSA). The CSA lists marijuana as a Schedule I substance, which means that it has no medically acceptable use, presents a high risk of abuse, and lacks acceptable safety use under medical supervision.[7] Under the CSA the use, possession, or manufacture of marijuana is a federal criminal offense.[8] Unlike at the state level, where a majority of states have approved the use of marijuana for medical reasons and a handful of states have approved recreational marijuana use, there are no such exceptions under the CSA.

The U.S. Supreme Court has held that the federal government is permitted to enforce federal marijuana laws, even in states that have enacted medical marijuana laws.[9] During President Barack Obama's administration, in late August 2013, Deputy Attorney General James Cole issued a statement that the federal government would not interfere with state and local law enforcement of marijuana activity unless the activity interfered with or violated certain federal enforcement priorities.[10] The federal government's position may change with the new Trump Administration's appointment of Attorney General Jeff Sessions, who has reportedly opposed the legalization of marijuana.[11] Commentators have noted, however, that while Senator Sessions opposes the legalization of marijuana, during his confirmation hearings he admitted that the arrest and imprisonment of marijuana offenders are problematic for the federal government in terms of resources. Recent press suggests that President Trump has leaned toward support for a state's right to choose whether to legalize marijuana, but he has not yet revealed any specific policy regarding this Schedule I drug or advocated legalization at the federal level.[12] In circumstances where there is a conflict between federal law and state law, federal law will prevail.

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The trend toward marijuana legalization at the state level was evident in the recent election. On Nov. 8, 2016, California, Nevada, Maine, and Massachusetts voters joined Alaska, Colorado, Oregon, Washington, and the District of Columbia in legalizing the recreational use of marijuana for adults.

While New York has yet to join these recreational marijuana use states, the CCA legalized marijuana use for certain individuals suffering from serious illnesses.[13] There are certain conditions under the CCA that must be met, however, in order for a medical patient to be eligible for medical marijuana. The patient must (1) suffer from a "severe, debilitating or life-threatening condition" (the conditions listed in the statute include, inter alia, cancer, HIV, Parkinson's disease, and multiple sclerosis) accompanied by an associated or complicating condition (such as chronic pain, severe nausea, seizures, or severe or persistent muscle spasms); (2) be certified as having the required "condition" by a physician who is registered with the New York Department of Health to certify patients under the CCA; and (3) obtain the medical marijuana from a licensed New York "medical marijuana dispensary."[14]

New York, like some of the other states that permit the use of medical marijuana, established in the CCA some employment protections for employees who use medical marijuana. The CCA provided that businesses cannot subject a certified patient, permitted to use marijuana under the CCA, to disciplinary action for exercising the right to use medical marijuana.[15]

The non-discrimination provision of the CCA also provides that "[b]eing a certified patient shall be deemed to be having a 'disability' under article fifteen of the executive law (human rights law)"—the New York State Human Right Law (the NYSHRL).[16] The NYSHRL prohibits employers with four or more employees from terminating or refusing to hire an individual or discriminating against an individual with respect to compensation or terms or conditions of employment, because the individual is certified under New York state law to use medical marijuana.[17] Companies in New York with four or more employees are also required to provide reasonable accommodations to employees who are certified to use medical marijuana.[18]

As a result, medical marijuana users already have *some* legal protection in New York. The statute's protection, however, has certain specific limitations. For example, a company's employees are not permitted under the CCA to smoke marijuana in a public place, such as an office environment.[19] Also, the CCA does not bar employers from enforcing a policy prohibiting "an employee from performing his or her employment duties while impaired by a controlled

substance."[20] Nor does the CCA require any company "to do any act that would put the person or entity in violation of federal law or cause it to lose a federal contract or funding."[21]

Because medical marijuana is legalized in New York, employers should consider whether they are legally permitted to establish and test for a drug-free company. Another issue employers may confront is whether it is legal to terminate an employee with a legal prescription for marijuana if there is a positive result on a company drug test. There is uncertainty in employment law on this issue, given that marijuana remains an illegal drug under federal law and there is no duty to accommodate employees for the use of medical marijuana for a serious illness under the federal Americans With Disabilities Act (ADA). Unlike some state-level human rights laws, a person currently using illegal drugs is not a qualified individual with a disability and thus is not protected by the ADA.

Case law is still evolving concerning an employer's duty to accommodate an employee using lawfully prescribed marijuana and the employer's right to terminate an employee who tests positive for marijuana. These issues may become of even more concern in New York if recreational use is legalized with users no longer being prosecuted for buying and smoking marijuana.

Thus far, case law emanates primarily from jurisdictions where the medical marijuana statutes contain no specific employment protections. In states where there is no specific duty for employers to accommodate employees' off-site medical marijuana use, the employees are not typically successful in bringing employment law claims for adverse employment actions.[22] Rather, courts have held that an employer can lawfully terminate an employee who tests positive for marijuana in a random drug test, even though the employee's use of marijuana was off-duty and the employee was certified to use medical marijuana under state law.[23] In a recent medical marijuana case, the court permitted a disabled employee who used a valid marijuana prescription to proceed with a claim for violation of the District of Columbia's human rights law, but dismissed the employee's cause of action for wrongful termination.[24] The Court noted in this case that the plaintiff faced an "uphill climb" in proving he was fired because of his disability rather than for a positive drug screening test.[25] The human rights law at issue in this case did not specifically provide, like New York does, for an employment accommodation for being a certified marijuana patient.

New York employers should **pay close attention to actions by the Trump administration** regarding federal regulation of states concerning marijuana use and federal enforcement.

In states like New York, where the statute directly addresses employment accommodations for medical marijuana use and classifies a certified marijuana patient as having a "disability" under the human rights law, employers should carefully consider any adverse action that they may take against an employee who is lawfully using medical marijuana. Employers may also have to consider whether off-duty marijuana use impairs an employee's job responsibilities regardless of whether there is a drug testing policy. If medical marijuana use impacts job performance, the employer may have to consider if an alternative type of work or schedule might accommodate the employee's marijuana use to avoid a state discrimination claim. Another consideration may be the privacy rights of employees with respect to drug test results and medical information related to certified patient marijuana use.

New York employers should pay close attention to actions by the Trump administration regarding federal regulation of states concerning marijuana use and federal enforcement. Employers should also follow federal court cases that may address the inconsistencies between state and the federal law.

1. See Washington Times, "NY Gov. Cuomo wants state to decriminalize pot possession," (Jan. 12, 2017).
2. N.Y. Penal Law §221.05 (McKinney).
3. NYup.com, Michael Greenlar, "Gov. Cuomo proposes decriminalizing marijuana," (Jan. 11, 2017).
4. See supra note 1.
5. N.Y. Public Health Law §§3360 to 3369-d (McKinney).
6. Legality of cannabis by U.S. Jurisdiction, Wikipedia.
7. 21 U.S.C. §812.
8. 21 U.S.C. §844(a).
9. *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005).
10. See 8/29/13 James M. Cole, Deputy AG Memorandum to US Attorneys at www.justice.gov.
11. See Melia Robinson, "Marijuana is about as popular as Donald Trump in these 5 red states," (Jan. 18, 2017).
12. Id.
13. N.Y. Public Health Law §§3360 to 3369-d.
14. N.Y. Public Health Law §3360.
15. Id. at §3369.
16. Id.
17. N.Y. Exec. Law §290-296 (McKinney).
18. Id. at §296.
19. N.Y. Public Health Law §3362.
20. Id. at §3369.
21. Id.
22. See *Ross v. Raging Wire Telecommunications*, 42 Cal. 4th 920, 174 P.3d 200 (Cal. Sup. Ct. 2008).
23. *Coats v. Dish Network*, 350 P.3d 849 (Sup. Ct. Colo. 2015).
24. *Coles v. Harris Teeter*, — F. Supp. 3d —, 2016 WL 6684189 (D.D.C Nov. 14, 2016).
25. Id., 2016 WL 6684189, at *3.