

MAY NEW JERSEY EMPLOYERS TERMINATE EMPLOYEES WHO USE MEDICAL MARIJUANA AND FAIL A DRUG TEST?

by Dan Zappo and Meghan Meade

What is an employer to do with an employee who tests positive for using marijuana, but who used under New Jersey's Compassionate Use Medical Marijuana Act? If not for the act, many an employer would not hesitate to terminate the employee pursuant to a no-tolerance policy. When the act goes into effect in July 2011, does an employer have to accommodate the employee under the act by creating an exception to its no-tolerance policy?

Based on the language of the act and the case law of a growing number of states that have addressed this issue, the authors believe that New Jersey courts will ultimately tell businesses they need not accommodate and may terminate such employees. The act expressly states that employers need not accommodate in the workplace employees who use under the act. Some plaintiffs' attorneys claim that the act implicitly requires employers to accommodate employees who only use at home. However, three states with similar statutes have held that employers need not accommodate any use.

A court in California, often the most liberal state when it comes to employee rights, has held that employers may terminate such employees. Courts in Montana and Washington have reached similar conclusions. All three states have statutes with language and underlying rationales similar to the act.

A thoughtful analysis of the act supports the no-accommodation interpretation. The act does not legalize marijuana use. Nor does it change the employment relationship. Instead, marijuana use remains generally illegal in New Jersey. To use under the act, an individual must have one of the following conditions: multiple sclerosis, muscular dystrophy, inflammatory bowel disease including Crohn's disease, amyotrophic lateral

sclerosis, and any illness with a prognosis of less than 12 months to live. AIDS, HIV, and cancer qualify if the symptoms are sufficiently severe, as well as seizure disorder, epilepsy, intractable skeletal muscular spasticity, or glaucoma if traditional therapy is ineffective.¹

The fact that the act decriminalizes marijuana use for only a few serious health conditions also strongly supports that the Legislature did not intend for employers to have to accommodate users under the act. While a sophisticated statute such as the act could have easily altered the at-will employment relationship, just as the New Jersey Law Against Discrimination requires employers to accommodate employees with disabilities, it did not. On the contrary, the act expressly provides that employers need not accommodate those who use under the act.

This article will analyze how the authors believe New Jersey courts will decide this issue in favor of employers. Nevertheless, until the courts address the issue, employers should work closely with counsel when applying the act.

On Its Face the Act Does Not Require Accommodating Employees Who Use Under the Act

On its face, the statute does not require employers to accommodate employees who would want to use mar-

ijuana under the act at work. It states: "Nothing in this Act shall be construed to require...an employer to accommodate the medical use of marijuana in any workplace."² The attorneys the authors have spoken with agree uniformly that employers need not provide breaks, break rooms, or other similar workplace accommodations for employees who smoke marijuana under the act so they may use at work.

Attorneys, however, disagree over whether the act would allow an employer to terminate an employee under a no-tolerance policy. In theory, an employee might use under the act while at home, but not at work. Of course, such an employee would fail a drug test under a no-tolerance policy. In such a situation, is the act's language sufficiently broad so that an employer could apply the no-tolerance policy and terminate the employee? While the authors believe the language is this broad, no consensus exists among the employee bar and the management bar.

The authors believe the statute is not as narrow as the employees' attorneys suggest. Forcing an employer to alter a no-tolerance policy is, by definition, requiring "an employer to accommodate the medical use of marijuana in any workplace."³ Absent the act, the employer would have no reason to accommodate an employee who uses only at home by changing its no-tolerance policy to a no-tolerance-except-for-use-under-the-act policy.

The act's general purpose and legislative history support that employers need not accommodate employees who use under the act in any way, regardless of where they use. Neither the general purpose nor the legislative history suggests that the act alters the employment

relationship. The act's "purpose...is to protect from arrest, prosecution, property forfeiture, and criminal and other penalties, those patients who use marijuana to alleviate suffering."⁴

As one Senate committee explained, it intended the act to "protect patients using marijuana to alleviate suffering from arrest, prosecution, and *other legal sanctions*."⁵ Moreover, under the heading, "*No Liability by Insurers, Employer, or State*," the Senate committee repeated the act's ultimate language that employers need not accommodate users. The Assembly's committee provided exactly the same guidance.⁶ While the act and the committees could have expressly protected the employment relationship for those who use medical marijuana, they did not. The act's failure to protect the employment relationship for users means that employers need not accommodate them.

Unfortunately, the Department of Health and Senior Services missed an opportunity to eliminate the confusion the employee bar has tried to conjure. Since former Governor Jon Corzine signed the act in January 2010, the bar has been hopeful that the regulations would provide guidance to prevent bickering between employee and management attorneys. Instead, the draft regulations the department published in the beginning of October 2010 focused solely on the registration for and distribution of medical marijuana in alternative treatment centers throughout the state. Otherwise, the draft regulations only reiterate the act's general language regarding no obligation to accommodate. The department did not seize the opportunity to settle the dispute in the bar.

Three Other States Have Held That Medical Marijuana Statutes Do Not Require Employers to Alter Workplace Drug Policies

Decisions in California, Montana, and Washington hold that employers need not alter their policies regarding marijuana use under the act.⁷

First, California, Montana, and Washington courts have analyzed the express purposes behind their decriminalization statutes and adopted the no-accommodation interpretation. California, Montana, and Washington also enacted compassionate use statutes that

only protect users from prosecution and other legal sanctions.⁸ Like New Jersey, they do not protect the employment relationship of users.⁹ Based on this analysis, courts in California, Montana, and Washington held that their statutes do not require any accommodation. Instead, employers may apply their policies as if the statutes did not exist, including refusing to hire or terminating employees under no-tolerance policies.¹⁰ Because of the New Jersey Legislature's similar intent to protect users solely from prosecution and other legal sanctions, the authors expect New Jersey courts to reach similar holdings.

Second, courts in California, Montana, and Washington have held that employers are not required to accommodate medical marijuana use in any fashion because each legislature could have, but failed to require employers to accommodate users in the workplace. Indeed, the holdings of those cases make clear that employers may terminate the employment of individuals who test positive based solely on home use in the absence of statutory language not requiring employers to accommodate employees who use medicinal marijuana in the workplace.¹¹

In California, the court observed that the statute did not mention employee rights or privileges at all, but only protected California citizens from criminal prosecution.¹² Absent express job protection, the court held the statute could not require employers to accommodate medical marijuana use. Moreover, the court interpreted favorably a related statute with language similar to New Jersey's.

California's Health and Safety Code Section 11362.785 states that "[n]othing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment..."¹³ The court interpreted this provision as permitting employers to not accommodate any medical marijuana use.¹⁴ The court rejected the idea that the statute implicitly required employers to accommodate employees who used only at home.¹⁵ Instead, despite where the employee used, testing positive for medical marijuana permitted the employer to terminate the employee.¹⁶

In Montana, the court also broadly interpreted similar language concerning accommodating medicinal marijuana use in the workplace.¹⁷ Montana's statute states that employers need not "accommodate the medical use of marijuana in any workplace."¹⁸ Applying the plain language of the statute, the court implicitly rejected an interpretation that "in any workplace" required employers to accommodate those who used only at home.¹⁹ Importantly, the court held that the employer did not violate the ADA or Montana's ADA equivalent when it fired the employee because the compassionate use act does not require accommodation of medical marijuana use under those statutes.²⁰ Instead, the court's holding stands for the proposition that employers may terminate employees for marijuana use outside of work and work hours.

The court of appeals of Washington reached the same conclusion as the courts in California and Montana.²¹ The Washington statute also used language similar to New Jersey's: "[n]othing in this chapter requires any accommodation of any medical use of marijuana in any place of employment."²² The employee argued that the statute implicitly mandated that employers accommodate employees' use of medical marijuana outside of work and work hours.²³ The court disagreed, and held that the statutory language was not intended to place any requirements on employers or places of employment. The court rejected the argument that the cited language created a duty to accommodate outside use of medical marijuana in the absence of express statutory language or an implication that the legislature had intended such a result.²⁴ The court did not believe that a statute would create such a drastic change to the employment environment without expressly requiring the change.²⁵

The combination of the language of New Jersey's act, the purpose behind its enactment, and the case law in states that have statutes with similar purposes and language strongly supports the conclusion that employers do not need to accommodate medical marijuana use by employees in any way. The authors believe the New Jersey courts will reach the same conclusions when interpreting the act.

One State Had Required Accommodation

An Oregon court held that statutory language similar to New Jersey's act required employers to accommodate medicinal marijuana use.²⁶ Similar to New Jersey's act, Oregon's compassionate use act states that an employer does not need "to accommodate the medical use of marijuana in any workplace."²⁷

The Oregon appellate court reasoned that a person does not possess a substance merely if it is present in his or her bloodstream.²⁸ Accordingly, the appellate court held the employee had not engaged in medical use of marijuana in the workplace when he failed a drug test based on use outside of the workplace.²⁹ Nevertheless, the Oregon Supreme Court subsequently found against the employee because he was not disabled, and, as a result, the court did not need to reach the issue of accommodation.³⁰ Thus, while the appellate court's reasoning might have supported a more restrictive reading of the act, it is now unclear how the Oregon Supreme Court will ultimately decide that issue.

Conclusion: What is an Employer To Do?

While employers wait for the New Jersey courts to address the anticipated arguments from employee attorneys, employers need not and should not sit idle. Knowing that employee attorneys will attempt to challenge no-tolerance policies, now is the time for employers to check and be sure they have clear, consistent, and explicit policies about drug use. Businesses should work closely with counsel pending court action to minimize the risk of employee lawsuits on this subject. ■

Endnotes

1. N.J.S.A. 24:61-3.
2. N.J.S.A. 24:61-14.
3. N.J.S.A. 24:61-14.
4. N.J.S.A. 24:61-2.
5. Senate Health, Human Services, and Senior Citizens Committee Statement to Senate, No. 119 (Dec. 15, 2008) (emphasis added).
6. Assembly Health and Senior Services Committee Statement to Senate No. 119 (June 4, 2009).

7. *Ross v. Ragingwire Telecomm. Inc.*, 174 P.3d 200 (Cal. 2008); *Johnson v. Columbia Falls Aluminum Co., LLC*, 213 P.3d 789 (Mont. 2009); *Roe v. TeleTech Customer Care Mgmt. (Colorado), LLC*, 216 P.3d 1055 (Wash. Ct. App. 2009).
8. *Ross*, 174 P.3d at 205-07; *Johnson*, 213 P.3d at *2; *Roe*, 216 P.3d at 1060.
9. *Ross*, 174 P.3d at 207-08; *Johnson*, 213 P.3d at *2, 4; *Roe*, 216 P.3d at 1060-61.
10. *Ross*, 174 P.3d at 208-09; *Johnson*, 213 P.3d at *4; *Roe*, 216 P.3d at 1061.
11. *Ross*, 174 P.3d at 208-09; *Johnson*, 213 P.3d at *4; *Roe*, 216 P.3d at 1060.
12. *Ross*, 174 P.3d at 205-07.
13. *Id.* at 207.
14. *Id.* at 208.
15. *Id.*
16. *Id.*
17. *Johnson*, 213 P.3d at *2, 4.
18. *Id.* at *2 (quoting Mont. Code Ann. § 50-46-205(2)(b)).
19. *Id.* at *1, 2, 4.
20. *Id.* at *4.
21. *Roe*, 216 P.3d 1055.
22. *Id.* at 1060 (quoting former Wash. Rev. Code § 69.51A.060(4)).
23. *Roe*, 216 P.3d 1060.
24. *Id.* at 1060-61.
25. *Id.* at 1060-61.
26. *Washburn v. Columbia Forest Prods., Inc.*, 104 P.3d 609, 614 (Ore. Ct. App. 2005).
27. *Id.* (quoting Or. Rev. Stat. § 475.340).
28. *Washburn*, 104 P.3d at 614.
29. *Id.*
30. *Washburn v. Columbia Forest Prods., Inc.*, 134 P.3d 161 (Or. 2006).

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