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THE UNINTENDED IMPACT OF NEW JERSEY'S NEW MEDICAL MARIJUANA LAW ON THE WORKPLACE

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On January 18, 2010, as one of his final acts before leaving office, Governor Corzine signed into law the New Jersey Compassionate Use Medical Marijuana Act, S. 119, 213th Leg., (N.J. 2010) ("Compassionate Use Act," or the "Act"), making New Jersey the nation's fourteenth state to legalize the use of medical marijuana by qualifying patients. The law will become effective on July 1, 2010, but in the interim, the Commissioner of the Department of Health and Senior Services ("DHSS") and the Director of the Division of Consumer Affairs ("DCA") will begin to take administrative action to effectuate the provisions of the Act. Employers who perform drug testing on job applicants and/or employees should take the time to revisit their policies on drug use and drug testing to clearly state their position on medical use of marijuana so as to navigate the various liabilities that may arise as a result of this change in the law.

I. Introduction

The Act does not affect federal laws concerning marijuana, but decriminalizes medical use of marijuana under New Jersey state law under particular circumstances. Like the thirteen states that already allow medical marijuana use, New Jersey's Act was passed to protect from criminal prosecution patients who use medical marijuana to alleviate the symptoms or side effects of treatment related to certain "debilitating medical conditions." The debilitating medical conditions covered by the Act include epilepsy, HIV, AIDS, cancer, ALS and multiple sclerosis, among others. DHSS will maintain a confidential registry of qualifying patients and issue registry identification cards to these individuals. The Act states that a qualifying patient "shall not be subject to any civil or administrative penalty, or denied any right or privilege" related to the medical use of marijuana, but it also explicitly provides that employers are not required "to accommodate the medical use of marijuana in any workplace."

II. Employers Must Determine Whether They Wish to Consider Medical Marijuana Use in Making Employment Decisions Based Upon Positive Drug Test Results

Employers who perform drug testing on employees and job applicants should consider carefully how they want to respond to the Act. As mentioned above, the Act specifically exempts employers from accommodating "the medical use of marijuana in any workplace." Though it is clear that employers are not required to permit employees to use marijuana in the workplace, the extent to which this carve-out may apply to an employer's treatment of job applicants or employees who test positive for marijuana use in connection with routine drug testing, is not directly addressed. With certain exceptions, the courts in other states that have considered similar legislation have generally determined that employers are not required to accommodate any use of medical marijuana by its employees or job applicants, whether at or away from

the employer's site. In other words, an employer probably will not be required to consider whether an employee who tests positive for marijuana use is a registrant under the state statute when making employment decisions on the basis of a confirmed positive drug test result for marijuana.

III. Employers Considering Medical Marijuana Use Must Consider Various Factors

Whether or not required to do so, employers may wish to permit applicants and employees who suffer from debilitating medical conditions to explain a positive drug test result for marijuana, and to avoid taking adverse employment action against individuals who possess a registration identification card. Among other things, an employer must consider: (1) whether consideration of medical marijuana registry status could subject it to liability under laws prohibiting disability discrimination; (2) whether it will be able to verify an individual's inclusion on the registry; and (3) whether an accommodation of medical marijuana use is appropriate to a particular workplace.

A. Medical Marijuana Use and Disability Discrimination Laws

In particular, because the Act permits participation only by individuals suffering from a "debilitating medical condition," employers presented with registry identification cards will have constructive, if not actual, notice that the employee or applicant at issue suffers from a condition that likely qualifies as a disability under the Americans with Disabilities Act ("ADA") and/or the New Jersey Law Against Discrimination ("NJLAD").

Both the ADA and the NJLAD prohibit an employer from taking any adverse employment action against a qualified individual on the basis of that individual's actual or perceived disability, and may require an employer to provide a reasonable accommodation to an employee or job applicant, unless doing so would cause undue hardship for the employer.

Employers choosing to consider an applicant or employee's registration status when confronted with positive drug test results must be cautious to avoid taking any adverse action against that employee or applicant that could be interpreted as being based on that individual's actual or perceived disability. Accordingly, if an employer determines that it will consider an individual's inclusion on the medical marijuana registry as a "defense" to a positive drug test result, the employer should not thereafter take adverse action against that individual on the basis of the positive drug test result.

B. Verification of Registrant Status

Of concern to employers is the possibility that its applicants or employees who are not actual registrants may attempt to use the Act as an excuse for a confirmed positive drug test result by presenting counterfeit medical marijuana registry cards. As written, the Act does not provide employers with any method to verify an individual's inclusion on the registry. Indeed, the Act declares the registry list confidential and restricts access to DHSS and DCA personnel for use in connection with their official

duties and law enforcement personnel as necessary to verify that an alleged medical marijuana user is lawfully in possession of a registry card. Though it is possible that the DHSS or DCA may enact regulations that will permit employers to verify an employee's or applicant's status, employers may have to coordinate with law enforcement to verify an individual's registry status, or be unable to do so at all.

C. Workplace Safety and Security

Employers may wish to consider the character of a particular workplace when determining how they will respond to a qualifying patient who tests positive for marijuana. For instance, if the use of marijuana – even for medical purposes – could pose a threat to the safety of employees in the workplace, an accommodation of medical marijuana use may not be possible. Employers in such a position should consider adopting a policy that does not permit applicants and employees to explain a positive drug test result for marijuana by presentation of a registry card. Instead, those employers should adopt a policy that will treat all individuals testing positive for marijuana in the same manner regardless of registry status.

IV. What Employers Need to Do

- Review the company's policies and other documents addressing drug use and testing (including drug testing consent forms) and update them as necessary to state your position on medical marijuana use by job applicants and employees.

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- Ensure that all Human Resources and drug testing personnel are aware of the company's policy regarding medical marijuana.
- Adopt appropriate measures for maintaining the confidentiality of employees' and applicants' registry status.
- Maintain uniformity in the enforcement of any drug testing policy and response to positive test results.
- Be cautious when presented with a medical marijuana defense to a positive drug test, and contact legal counsel whenever an employee requests an accommodation for medical marijuana use in order to determine whether the typical application of the company's drug policy is appropriate.

If you have any questions about New Jersey's Compassionate Use Medical Marijuana Act, please call any of the following members of the firm's Employment & Labor practice group: David M. Wissert, Amy Komoroski Wiwi or Nicole P. Crifo at 973.597.2500. We also would be pleased to provide you with assistance with respect to other employment practices and workplace compliance issues.

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