

Cannabis in the Workplace

Presented by: Jennifer Roselle, Esq.

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Why Call it Cannabis and not Marijuana?

- **Cannabis** is the scientific name of the hemp plant.
- The term **Marijuana** is associated with the negative effects of the cannabis plant and not the holistic applications of it.
- **Marijuana** is also associated with the controversial history of the drug and its links to xenophobic and racist connotations from the earlier decades and the disproportionate application of law enforcement and criminal charges given to minority groups.

Federal Law

Medical Cannabis: not legal

Recreational Cannabis: not legal

2022: The House passed bill, for the second time, to remove cannabis as a from the list of banned controlled substances.

2022: President Biden pardoned all those with Federal criminal charges for simple possession.





Medical Cannabis

NJ Medical Cannabis Act

New Jersey Compassionate Use Medical
Marijuana Act

1 Oct. 2010



2 July 2019

Jake Honig Compassionate Use Medical
Cannabis Act

Who is Eligible?

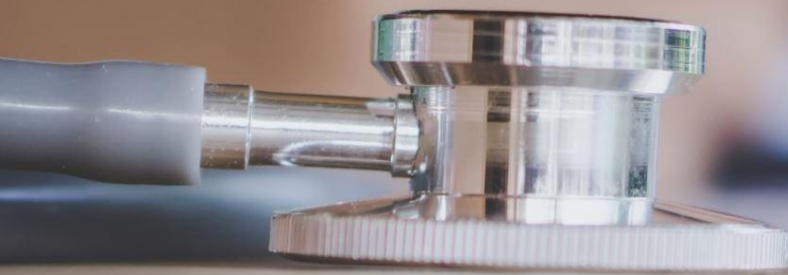
"Qualifying patient" or "patient"

A resident of the State who has been provided with a certification by a physician pursuant to a *bona fide physician-patient relationship*

"Bona fide physician-patient relationship"

A relationship in which the physician has ongoing responsibility for the assessment, care and treatment of a patient's debilitating medical condition consistent with the requirements of the Act and N.J.A.C. 13:35-7A

Caregivers for a patient, such as a family member, can be authorized to purchase and possess marijuana on behalf of the patient, if they are designated as a caregiver on the patient's application for an identification card or have notified the department in writing and pass the necessary background checks.

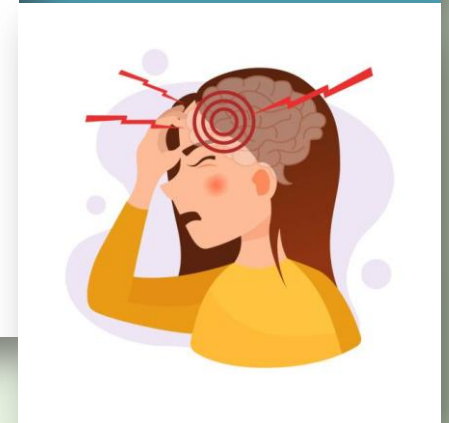


Jake Honig Compassionate Use Medical Cannabis Act

Permits the legal use of cannabis for medically qualifying conditions

Examples of qualifying conditions:

- Anxiety
- Migraine
- Terminal illness
- Cancer
- Glaucoma
- Severe chronic pain
- Epilepsy
- Multiple Sclerosis
- Inflammatory bowel disease
- PTSD



Medical Cannabis & Disability Law

The federal ADA and The New Jersey Law Against Discrimination (LAD) prohibit discrimination on the basis of one's disability. This means that employers:

Cannot

Refuse to hire, decide to fire, discipline, etc. someone based on his/her being disabled.

Must

Provide reasonable accommodations that will enable individuals with a disability to perform the essential functions of their job, unless doing so would impose an undue hardship on the employer's business or pose a direct threat of substantial harm to the employee or others.

Initiate an informal "interactive process" with the employee to determine the appropriate accommodation.



Are Employers Required to Accommodate an Employee's use of Medical Cannabis?

In New Jersey . . .

- No obligation to accommodate on-duty use
- May have to accommodate off-duty use
 - *Wild v. Carriage Funeral Holdings*

However, lawsuits surrounding cannabis use are likely to be focused on the types of reasonable accommodations employers should make and what jobs are too safety-sensitive to permit an accommodation for medical cannabis use.

Wild v. Carriage Funeral Holdings

- A licensed funeral home director gets into a car accident driving during funeral.
- He goes to the ER, his dad discloses that he uses medical marijuana off-duty because of a cancer diagnosis about a year before.
- Employer requires him to pass a drug test to return to work.
- He is terminated for two reasons:
 - (1) the presence of marijuana in his system
 - (2) the failure to disclose the use of a substance that might impact his ability to do his job.
- He sues, claiming violations of the Law Against Discrimination.



Court Decision

- The Appellate Division held the employer doesn't have to allow use on-site but must accommodate off-duty use of medical marijuana.
- The NJ Supreme Court adopted the Appellate Division's decision that the failure to accommodate claims should be considered under the Law Against Discrimination standard.
- The NJ Supreme Court also added that nothing in the medical marijuana law requires acceptance of on-site use or the operation of heavy machinery while under the influence.

Medical Cannabis Takeaways

Employers should reconsider their policies regarding medical marijuana

- Consider a policy prohibiting intoxication or possession of any drug that is illegal under federal, state, and/or local law while at work (it's still illegal under federal law!) and a drug testing policy covering said drugs, specifying cannabis
- If you want to permit on-site use, employers must approach an employee's use of lawfully prescribed medical cannabis in the same manner as use of any other lawfully prescribed medication.

Use = Disabled → **Engage in the Interactive Process!**

NJ Workers' Comp statute provides: "The employer shall furnish to the injured worker such medical, surgical and other treatment, and hospital service as shall be necessary to cure and relieve the worker of the effects of the injury and to restore the functions of the injured member or organ where such restoration is possible."

Vincent Hager v. M&K Construction (A-64-19)

- August 2001, workplace accident results in disability
 - Retrieving cement
 - Cement truck overpours
 - “hurl[s Plaintiff] into the air
 - “smashing [him] and flattening [him] back out like a pancake”
- Sharp back pain down his legs, begins light duty
- Leaves employment in 2001 because of the pain
- Multiple back surgeries follow, including a lumbar fusion
- Prescribed opioids for pain management
- In 2016, seeks treatment for palliative care
- Plaintiff’s physician prescribes medical marijuana partly due to the side effects of the opioid use and to wean him off opioids
- Prescribed 2 oz. of medical marijuana a month which costs \$600.00.

Vincent Hager v. M&K Construction

(A-64-19)

Workers' Comp Trial



Significant testimony was presented relating to Plaintiff's surgeries, opioid reliance, and subsequent medical marijuana prescription.

Plaintiff's testimony established that medical marijuana allowed him to wean himself from the opioids and manage pain and muscle spasms.

Among other things, the Defendant's expert suggested PT and exercise would help the Plaintiff.

The court recognized Plaintiff had limited treatment options; concluded that marijuana was the clear option.

Court rejected company's position that additional treatment wasn't necessary.

Court ordered the employer to reimburse, among other things, the cost of the medical marijuana.

Vincent Hager v. M&K Construction

(A-64-19)



Appellate Court



Appellate Court finds

- Compliance with medical marijuana laws is not an inherent violation of federal law
 - Employer never possesses
 - Employer never manufactures
 - Employer never distributes
- Employer could not be treated like a private health insurer

Vincent Hager v. M&K Construction (A-64-19) Supreme Court



NJ Supreme Court finds

- Completely rejects concept that workers' comp should be treated like private health care of governmental medical assistance
 - -WC isn't part of healthcare
 - -Legislation doesn't include any expressed exemptions
- No violation of Controlled Substance Act
 - -Medical Marijuana laws acted within the parameter of federal law
 - -Federal policy **prohibited** interference with medical marijuana programs
- Court concludes that reading these provisions together, it is possible to comply with State and Federal law
- Rejects the theories that compliance is conspiracy, aiding or abetting

Vincent Hager v. M&K Construction (A-64-19)

Conclusions

Court considered purpose behind Workers' Comp and its scope:

- It may cover palliative care
- Medical marijuana law covers chronic pain
- Concluded that the Legislature's intent would be undermined by exempting WC carriers from providing medical marijuana as *reasonable and necessary* treatment

Reasonable and Necessary

Competent medical testimony about treatment's symptom reduction OR the ability to restore function

- ✓ The testimony detailed the need for the medication
- ✓ The testimony detailed the benefits of an alternative treatment

Plaintiff had two options here:

- Keep using opioids that created side effects
- Use medical marijuana and overcome the opioid reliance while still managing the pain

Entitled Hager to reimbursement for costs for and relating to the prescribed medical marijuana.

Recreational Cannabis

New Jersey Cannabis Regulatory, Enforcement Assistance, and
Marketplace Modernization Act (CREAMMA)

- Signed into law on February 22, 2021
- Recreational sales began on April 21, 2022



New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act



Decriminalizes
possession and use
for adults 21 years
or older

Must purchase
directly from
licensee

Cannot
smoke/vape in
public

Employment
protection

Cannot drive under
the influence

Smell is no longer
probable cause

Automatic
expungement

May operate a
cannabis business

Tax cannabis items

Who are Safety Sensitive Employees?



A “safety-sensitive” position is one in which “the employee’s duties are so fraught with hazard that his or her attempts to perform them while in a state of drug impairment would pose a threat to co-workers, to the workplace, or to the public at large.”.

May prevent an employee from performing their job if they consume prohibited substances.

CREAMMA does not contain provisions for safety sensitive employees; except for federal contracting mandates.

CRC has also not promulgated rules for these positions yet

On a case-by-case basis

Safety Sensitive Employees: Transportation



DOT regulations preempt state and local laws on the use of alcohol and controlled substances by employees in safety-sensitive positions, including:

- Carriers and commercial driver's license holders
- Mass transit, pipeline, aviation, and railroad industry employees
- Operators of commercial vessels

Cannabis is considered a Schedule I drug and cannot be used while on duty during safety sensitive functions

No employer having actual knowledge that a driver has used a controlled substance shall permit the driver to perform or continue to perform a safety-sensitive function.

DOT controlled substances testing provision:

§ 382.215 Controlled Substances Testing

No driver shall report for duty, remain on duty or perform a safety-sensitive function, if the driver tests positive or has adulterated or substituted a test specimen for controlled substances.

No employer having knowledge that a driver has tested positive or has adulterated or substituted a test specimen for controlled substances shall permit the driver to perform or continue to perform safety-sensitive functions.

§ 382.301 Pre-employment Testing

Prior to the first time a driver performs safety-sensitive functions for an employer, the driver shall undergo testing for controlled substances as a condition prior to being used, unless the employer uses the exception in paragraph (b) of this section.

Does not regulate employer decisions such as hiring, firing, or leaves of absence based on a prospective employee's or employee's drug or alcohol consumption.

Recreational Use in the Workplace

Employers may:

- Ban use of cannabis at the workplace and during workhours
- Prohibit possession of cannabis at the workplace



Recreational Use in the Workplace

Employers *may not*:

- Take adverse employment action against existing employees for off-duty use or non-use of cannabis
- Refuse to hire applicants for recreational use or non-use of cannabis



Recreational Use in the Workplace

Exceptions:

- If there is a “provable adverse impact” on an employer, subject to the requirements of a federal contract, then the employer may revise their employee prohibitions consistent with the federal law, rules and regulations.”

Example:

- Loss of federal funding



The graphic consists of a large black circle centered on the page. To the upper-left of this circle is a yellow dashed arc. At the bottom-right edge of the black circle is a small solid blue circle. The text 'A Drug-Free Workplace' is centered within the black circle in a white, bold, sans-serif font.

A Drug-Free Workplace

Drug-Free Workplace Policies



- An employer can have policies to clarify expectations regarding both medical and recreational cannabis usage, that inform employees about the requirements and consequences of non-compliance.
- The laws recognize that federal contracts have prohibitions that employers must follow
 - For example, complying with the federal Drug-Free Workplace Act (DFWA), which precludes the possession or use of controlled substances at work sites.

Drug Testing

An Employer Can:

- Randomly screen current employees
- Test as part of pre-employment screenings
- Test based on reasonable suspicion of use on the job and for post work-related accidents.

CREAMMA aims to protect employees from adverse actions, while giving employers the flexibility to discipline an impaired employee, under defined circumstances.

What is Reasonable Suspicion in the Workplace?



CREAMMA permits employers to require drug tests if the employer:

- Two step inquiry under the Statute...except...
- Has a reasonable suspicion of an employee's usage of a cannabis item while engaged in the performance of the employee's work responsibilities; or
- Finds observable signs of intoxication at work related to usage of a cannabis item; or
- Conducts the test following a work-related accident subject to investigation by the employer.

HOW TO CONTACT US



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Jennifer Roselle, Esq.
jroselle@genovaburns.com
973.646.3324

Address

494 Broad Street, Newark NJ 07102

Phone

973-533-0777



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