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New York Legalizes Medical Marijuana

On July 7, 2014, Governor Andrew Cuomo signed the New York Compassionate Care Act (the "CCA"), making New York the 23rd state to legalize the distribution and use of medical marijuana.

The CCA sets forth an extensive process by which an individual can become a "certified" medical marijuana patient. It also describes the permissible forms that medical marijuana may take (specifically, it may be "vaporized" but not smoked, and it may not be consumed at all in public), and provides a detailed taxation framework. Unfortunately, the CCA does not provide comprehensive guidance for employers regarding their obligations and responsibilities toward prospective and current employees who become certified medical marijuana patients.

The CCA contains a "non-discrimination" provision, which states that a certified medical marijuana patient "shall be deemed" disabled under the New York State Human Rights Law ("NYSHRL"). The NYSHRL, in turn, prohibits employers from discriminating against disabled prospective or current employees. Accordingly, an employer will likely violate the CCA by refusing to hire a job applicant or disciplining a current employee solely because of that individual's status as a certified medical marijuana patient.

The NYSHRL also requires employers to provide prospective and current employees with reasonable accommodations for their disabilities. While the medical marijuana laws in several other states, including California, Colorado, and Washington, expressly state that employers are not required to accommodate an employee's consumption of medical marijuana on the work premises, the CCA does not contain such an exemption. The CCA does, however, allow employers to enforce workplace policies prohibiting employees from working while impaired by a controlled substance, and it prohibits certified patients from consuming medical marijuana in public. These provisions, therefore, likely preserve a New York employer's right to refuse to accommodate an employee's consumption of medical marijuana in the workplace.

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The more complex question, however, is whether the CCA will require New York employers to accommodate a prospective or current employee's *off-premises* use of medical marijuana. This issue is likely to arise when a job applicant or current employee has a positive result on a drug screening test that is attributable to medical marijuana use. The question now facing New York employers is whether they risk violating the CCA by refusing to hire (or taking other adverse employment action against) certified medical marijuana patients on the basis of a positive drug test result. On one hand, the CCA does not explicitly prohibit an employer from doing so, unlike, for example, the medical marijuana statutes in Arizona and Delaware. Moreover, the CCA provides that an employer will not be required to take any action "that would put [it] in violation of federal law or cause it to lose a federal contract or funding." Medical marijuana, of course, remains illegal under the Controlled Substances Act. On the other hand, however, it is not at all clear that hiring a certified medical marijuana patient with a positive drug test result would cause an employer to violate federal law. Indeed, even those employers subject to the Federal Drug-Free Workplace Act of 1988 are not required (absent another federal regulation applicable to certain specific job positions) to conduct pre-employment drug testing or to discipline employees whose drug test results indicate medical marijuana use.

Arguably, an employer who does not know an employee to be a certified medical marijuana patient could still discipline that employee for testing positive for marijuana pursuant to a workplace policy prohibiting employees from working while impaired. The problem, however, is that the CCA does not define the term "impairment" as it relates to medical marijuana use. Absent clear judicial or legislative guidance, it would be prudent to assume that a positive test for marijuana metabolites or components would not, by itself, be considered evidence of "impairment," but rather that an "impairment" requires some manifestation in behavior or work performance. Such a reading would track prior New York court decisions (including the famous poppy seed case), as well as the more explicit definitions of "under the influence" or "impairment" found in Delaware and Arizona's state medical marijuana statutes. Of course, individuals known or suspected to be certified medical marijuana patients should not be subjected to heightened scrutiny, and their behavior and work performance should be evaluated according to the same standards as other employees.

New York courts will likely be called upon to address these and other questions in the context of lawsuits brought by certified medical marijuana patients against their current and prospective employers. Courts in other states have largely rejected such

claims brought under theories of wrongful termination, discrimination, or invasion of privacy. The approach that will be taken by courts in New York, however, remains to be seen and will likely be closely tied to the specific facts of the particular cases brought before them. While we await such clarification, employers should consider asking employees or applicants who test positive for marijuana metabolites to explain the result and, if the employee claims coverage under the CCA, require proof of certification.

We encourage you to review your applicable policies regarding drugs in the workplace or pre-employment drug screening, and to begin planning your response to employee requests for accommodation of medical marijuana use under New York law. If you would like more information or assistance, please contact Laura Monaco at (212) 758-7754, or any other attorney at the Firm.