

How Can-a-Biz Handle Employees Using Cannabis?

Although New York's Compassionate Care Act ("CCA") has been in effect since January 2016, coverage under the CCA has expanded and will likely continue to expand as New York State endeavors to improve its Medical Marijuana Program and has recreational marijuana on the legislative agenda for 2019.

The CCA allows patients to be certified for medical marijuana use, provided they, among other things, have a serious health condition that qualifies under the law. When the CCA first went into effect, the list of qualifying conditions was relatively short, comprising of conditions such as cancer, HIV/AIDS, Parkinson's disease, epilepsy, and Huntington's disease. Now, approximately three years later, the list of qualifying conditions has grown to include chronic pain, PTSD, opioid use, and opioid replacement.

While the use of marijuana (medical or otherwise) is still illegal at the federal level, states with medical marijuana laws, such as New York, have put employers in a precarious situation due to the legal protections afforded to covered persons. Specifically, in New York, the CCA protects certified patients from disciplinary action solely for their certified medical use of marijuana. In addition, certified patients are deemed to have a "disability" under the New York State Human Rights Law ("NYSHRL"). Accordingly, New York employers with four or more employees are prohibited from discriminating against an employee, applicant, or other covered person because of his or her status as a certified patient. This means that an employer who takes an adverse action against an applicant or employee because he or she lawfully uses medical marijuana under the CCA may be subject to liability for discrimination under the NYSHRL.

Further, as certified patients are deemed to have a disability under the NYSHRL, employers may be required to provide a certified patient with a reasonable accommodation because of his or her disability. A reasonable accommodation includes actions by the employer that would allow the employee to perform the essential functions of his or her job in a reasonable manner.

This does not mean that an employer is required to permit an employee to possess or use medical marijuana in the workplace or during working time. In fact, the CCA makes otherwise lawful medical marijuana use unlawful when it is smoked, consumed, vaporized, or grown in a public place, and the regulations specifically prohibit the use of medical marijuana when it is vaporized in a place of employment. In addition, the CCA's non-discrimination provision does not bar an employer from enforcing a policy that would prohibit an employee from performing his or her employment duties while impaired by a controlled substance. Nor does it require any employer to perform any act that would put it in violation of federal law or cause it to lose a federal contract or funding. Moreover, an employer is not required to provide a reasonable accommodation if the accommodation would pose an undue hardship – meaning that it would be significantly difficult or expensive in light of certain factors, such as the employer's size, the employer's type of business, or the nature and cost of the accommodation.

The CCA also does not limit an employer's ability to drug test its applicants or employees. Private employers in New York remain able to drug test for marijuana use, provided they do not use the positive results of the drug test to discriminate against a certified patient. Relatedly, an employer cannot use the positive

results of a drug test for marijuana to demonstrate that an employee was “impaired” under its policy, as the drug test only shows the presence (or absence) of marijuana in a person’s body, not whether the person has abused it.

Notwithstanding the foregoing, the practical effects of the CCA on the workplace remain unclear. Nonetheless, employers should be taking certain actions to reduce their potential liability, such as refraining from making an employment decision based on an employee’s protected status as a certified patient, engaging in an interactive process with a certified patient to determine whether a reasonable accommodation is necessary, and reviewing and revising their drug-free policies to bring them into compliance with the CCA. Employers are also encouraged to consult with their employment counsel to help analyze these and other issues that may arise and determine best practices for compliance and moving forward.

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