New York State’s Medical Marijuana Law Gives Workplace Anti-Discrimination Protection

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By Dean L. Silverberg, Raymond T. Mak, and Nancy L. Gunzenhauser

On July 7, 2014, Governor Andrew Cuomo publicly signed into law New York State’s first marijuana legalization law—the Compassionate Care Act (“Act”). The Act (which was actually signed on July 5, 2014, after weeks of behind-closed-doors negotiating between Governor Cuomo and legislators and after many years of effort by patients, physicians, and other advocates) establishes a medical marijuana program. This law sets forth a structure with the goal of providing effective health care by establishing a certification process for patients, practitioners, and other organizations to obtain medical marijuana and identifies covered medical conditions.

Notably, one aspect of the Act has not gained much notoriety. The Act deems those who are covered by the program “disabled” under the New York State Human Rights Law (“NYSHRL”). Although this provision received less publicity, it has obvious impact on the respective rights and obligations of New York employers and workers who are “Certified Patients.” As such, the Act clearly has broader implications than merely the legalization of a treatment for certain conditions.

With the passage of the Act, New York became the 23rd state to legalize marijuana for medical purposes. Only eight of the other states, however, have similar anti-discrimination provisions—and even in those other states, the statutory language differs from that of the Act. Therefore, with a dearth of precedent or guidance, it is important to understand the implications of the Act in the employment context.

Overview of the Act

The Act, which became effective immediately following the governor’s signature, legalizes non-smokable forms of marijuana for use by patients with certain debilitating medical conditions. While the Act is currently effective, it provides an 18-month grace period for the State to create a certification process for individuals to start receiving medical marijuana.
Certification Process

The New York State Department of Health ("DOH") will set up a registration process for practitioners to issue certification to eligible patients. In order for an individual to become a "Certified Patient," he or she must be:

- a resident of the State of New York,
- under the continuing care of a registered practitioner,
- suffering from one of the covered medical conditions, and
- likely to receive therapeutic or palliative benefit from the use of medical marijuana.

Certified Patients, or a designated caregiver,¹ will obtain a registry identification card from the DOH upon receiving certification. Certified Patients may obtain the medicinal marijuana from a "Registered Organization." Interestingly, in order to obtain registration, an organization must show that it has entered into a labor peace agreement² with a bona fide labor organization representing its employees.

Covered Medical Conditions

A Certified Patient is eligible to use medical marijuana only if he or she has one of the following "Serious Conditions": cancer, positive status HIV or AIDS, amyotrophic lateral sclerosis ("ALS"), Parkinson's disease, multiple sclerosis ("MS"), damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity, epilepsy, inflammatory bowel disease, neuropathies, Huntington's disease, or other qualified conditions as added by the Health Commissioner. Within the next 18 months, the Commissioner has the option to add the following conditions as Serious Conditions: Alzheimer's, muscular dystrophy, dystonia, post-traumatic stress disorder, and rheumatoid arthritis.

Use of Medical Marijuana

The Act prohibits the use of medical marijuana in "public places," regardless of a patient's certification status. The definition of a "public place" will be forthcoming in the Commissioner's regulations. It is unclear at this point, however, when the Commissioner will promulgate such regulations.

¹ A designated caregiver may be a parent or legal guardian, a person appointed by a parent or legal guardian, or another appropriate person, if a parent or legal guardian is unavailable or inappropriate.

² Such agreements, as defined in the Act itself, provide for the protection of the State's proprietary interests by prohibiting labor organizations and members from engaging in any economic interference, such as picketing, work stoppages, or boycotts.
Additionally, the Act prohibits Certified Patients from smoking marijuana—opting instead for edible, vapor, pill, or oil forms. The acceptable forms of marijuana under the Act were a sticking point for Governor Cuomo, who was adamant that the Act prohibit smoking. The Act also gives the governor the authority to terminate the program, without notice, if the Commissioner or Superintendent of State Police determines that it has created a risk to the public health or safety.

**How Does the Act Affect New York Employers?**

Under the Act, a Certified Patient is deemed to have a disability under the NYSHRL. Although the federal, New York State, and applicable city laws that prohibit disability discrimination would likely consider such Certified Patients disabled in any event (i.e., without being deemed a Certified Patient), this may not necessarily be the case with future conditions that could be added to the Act as “Serious Conditions.”

Indeed, the significance of this aspect of the Act lies in the fact that employees are automatically considered disabled under the NYSHRL. There is little room for factual dispute or interpretation regarding the degree of severity of the condition. Thus, once the question of whether the employee is disabled is no longer at issue, an employer may not discriminate against a Certified Patient based on his or her disability, including, arguably, his or her right to use medical marijuana, so long as such use does not violate applicable law or company policy. Moreover, as with any other disabled employees, the employer must engage in an interactive process to determine if a reasonable accommodation can be made.

Unfortunately, an employer’s accommodation obligation is not quite so simple under the Act. In addition to the standard concerns that may arise in determining which reasonable accommodation(s) may be required, the Act itself creates some ambiguity regarding an employer’s obligations. For example, as stated earlier, the use of medical marijuana is prohibited in “public places,” but that term is currently undefined. So it is not clear whether an employer must accommodate an employee’s use of medical marijuana in the workplace.

The term “impaired” is also currently undefined, the significance of which is evident in light of the Act’s recognition that marijuana—presently classified as a controlled substance under federal law—can impair an individual who uses it. Indeed, the Act includes a carve-out in its non-discrimination section: Employers may always enforce policies prohibiting employees from performing their duties while impaired by a controlled substance. However, the failure to define “impair” and other important terms in the Act will inevitably result in confusion.

Another brewing issue concerns the apparent conflicting interests in, on the one hand, complying with the Act (and providing accommodations to Certified Patients), and on the other hand, avoiding violations of certain federal laws, such as: (i) the Controlled Substances Act (which continues to classify marijuana as a Schedule I substance for which prescriptions may not be written); (ii) the Drug-Free Workplace Act (which mandates certain federal contractors to provide for a drug-free workplace); and (iii) the Americans with Disabilities Act (which would not bar an employer’s adverse action...
against a Certified Patient who was under the influence at work or was sent for a drug screen). This problem is potentially heightened by the prolonged period during which marijuana metabolites remain in the system of a user. Employers should be mindful of these conflicting laws and, until court decisions or legislation provide clarification, exercise care and caution in making adverse employment decisions.

What Employers Should Do Now

- Be aware that applicants and employees who are Certified Patients will be considered “disabled” under the NYSHRL.

- Train managers and human resources employees on how to handle reasonable accommodation requests by disabled employees who are Certified Patients, in particular, where such requests include permitting the employee to utilize medical marijuana.

- Review policies regarding illegal drugs, drug testing, and disabilities to ensure that each complies with the Act and provides for discipline where an employee’s impairment causes an inability to perform the job.

- Review federal contracts and funding to determine whether an employee’s use of medical marijuana under the Act would subject the employer to a claim of violation of such contracts or put funding at risk.

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For more information about this Advisory, please contact:

Dean L. Silverberg
New York
212-351-4642
dsilverberg@ebglaw.com

Raymond T. Mak
New York
212-351-4541
rmak@ebglaw.com

Nancy L. Gunzenhauser
New York
212-351-3758
ngunzenhauser@ebglaw.com

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