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## Don't Get Lost in the Weeds: Medical Marijuana is Now Legal in New York

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On January 6, 2016, the Commissioner of Health of the State of New York certified that the medical marijuana program established by New York's Compassionate Care Act could be implemented in accordance with public health and safety interests. The next day, the first dispensaries offering medical marijuana in New York opened.

### Compassionate Care Act

The Compassionate Care Act, which was signed into law in July 2014, legalizes and regulates the manufacture, sale and use of medical marijuana in New York. The Act sets forth specific conditions under which a patient may obtain medical marijuana.

- The patient must suffer from a "severe, debilitating or life threatening condition" that is accompanied by an associated or complicating condition." The Act specifically lists 10 qualifying conditions and five qualifying associated or complicating conditions in order to be a certified patient.<sup>1</sup>
- The patient must be certified as having the required "condition" by a physician who is registered with the New York Department of Health to certify patients under the Act.
- A certified patient must obtain the medical marijuana from a licensed New York "medical marijuana dispensary."

The Act does not authorize the use of the marijuana plant, but only liquids manufactured by certified laboratories that are subject to quality control. At least one of the forms of marijuana that can be prescribed through the state contains only low amounts of THC, the psychoactive component for which most employer drug-free workplace programs test.

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<sup>1</sup> The law identifies the following conditions: Cancer; HIV infection or AIDS; Amyotrophic lateral sclerosis (ALS), also known as Lou Gehrig's disease; Parkinson's disease; Multiple sclerosis; Spinal cord injury with spasticity; Epilepsy; Inflammatory bowel disease; Neuropathy; and Huntington's disease. The associated or complicating conditions are: Cachexia or wasting syndrome; Severe or chronic pain; Severe nausea; Seizures; or Severe or persistent muscle spasms.

## Employment Protections for Medical Marijuana Use

Like medical marijuana legislation in some other states, the Compassionate Care Act establishes employment protections for medical marijuana use. Specifically, it provides that certified patients shall not be subjected to “disciplinary action by a business” for exercising their rights to use medical marijuana. It also contains a nondiscrimination provision, which states that being a patient for whom a doctor in New York State has prescribed medical marijuana is a “disability” under the New York State Human Rights Law (“NYSHRL”). As a result, employers in New York State with four or more employees are prohibited from firing or refusing to hire an individual, and from discriminating against an individual in compensation or in the terms and conditions of employment, based on the individual’s status as a patient who is certified under state law to use medical marijuana. Additionally, businesses in New York with four or more employees must provide reasonable accommodations to employees or prospective employees who are certified to use medical marijuana.

Significantly, though, the nondiscrimination provision of the Compassionate Care Act sets forth two exceptions: (1) it “shall not bar enforcement of a policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance;” and (2) it “shall not require any person or entity to do any act that would put the person or entity in violation of federal law or cause it to lose a federal contract or funding.” Accordingly, New York employers will still be able to maintain a safe workplace by restricting employees from performing their duties while under the influence of marijuana. For example, employers may still adopt and maintain reasonable policies or procedures – including drug testing – to ensure that an individual is not working while under the influence of a controlled substance (including marijuana) or engaging in the illegal use of drugs. Substance abuse prevention policies should notify employees that the use of controlled substances (including medical marijuana) is prohibited during work hours and that disciplinary action will be taken against anyone who violates that policy.

One difficulty for employers in implementing such policies is that the regulations do not define “under the influence.” Unlike alcohol, the effects of medical marijuana may not be as readily apparent through observation alone and are likely to persist long-term. Such uncertainty raises the risks of litigation for employers as they try to establish objective standards on which to base an adverse employment action.

### **Warning: Inconsistent with Federal Law**

Employers who are subject to federal regulations that require certain testing or safety precautions related to marijuana use must still abide by these regulations and may do so without violating New York law. For example, the Department of Transportation, Department of Defense, Department of Energy, and/or federal grants or contracts have regulations that impact marijuana use. New York’s Compassionate Care Act does not require an employer to take any act that would put the employer in violation of such laws or cause it to lose a federal contract or funding, so employers would not, for example, have to employ a medical marijuana user in a role that prohibited such use as a matter of law.

In the wake of legislation passed in other states legalizing the use of marijuana for medical use, the U.S. Department of Justice has made clear that marijuana remains an illegal drug under the Controlled Substances Act and that federal prosecutors will continue to aggressively enforce that statute.

### **Accommodation**

Under the NYSHRL, employers have an obligation to accommodate individuals with disabilities. Accordingly, employers will need to be mindful of legal obligations to engage in an interactive dialogue with employees who are certified patients under the Act and, where possible, reasonably accommodate employees with respect to underlying medical conditions. The accommodation strategies will need to include considerations of an employer’s obligation to maintain a safe work

environment. Under the Americans with Disabilities Act, permitting the use of a drug made illegal under federal law is not a reasonable accommodation, but New York's law appears to reach further. Bear in mind that New York law does not require an employer to accommodate a medical marijuana user by allowing the user to carry marijuana onto work property or to use it on work premises. An employer should be careful not to implement accommodations that are affirmatively illegal as a matter of federal law. Stated otherwise, accommodating the user, but not the use, is advised. Nevertheless, it may be difficult to navigate between federal and state law, particularly as to employees who hold safety-sensitive jobs but who are not subject to federal bars on marijuana use. For these reasons, some employers may wish to continue to reject medical marijuana as an excuse for a positive test result. If they choose to take this position, however, they may become the subject of a "test case" seeking to clarify the limits of the Compassionate Care Act where inconsistent with federal law.

## Next Steps

New York employers concerned about compliance with the Compassionate Care Act should be proactive. We recommend the following:

- Get (and stay) informed of an employer's obligations with regard to medical marijuana.
- Evaluate the issues raised by this law in context of your workplace and the obligations your company has in light of other federal regulations and contracts.
- Educate managers on their obligations.
- Implement, revise, and/or update your drug free workplace policy.