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A MARIJUANA WAKE-UP CALL ON ACCOMMODATING EMPLOYEES WITH DISABILITIES

NEW JERSEY'S LAW MIRRORS MICHIGAN'S AND THAT OF OTHER STATES

Must employers accommodate off-duty use of marijuana? A recent appellate decision in New Jersey serves as a warning to Michigan employers about that question and even raises the specter of having to accommodate positive drug tests for non-disabled employees and applicants. For health care employers whose employees are involved in patient care, this decision could present you with a choice between facing a medical malpractice claim and an employment discrimination claim.

Like Michigan and other states, New Jersey law provides for the legal use of marijuana law for certain medicinal purposes. And, similar (but not identical) to Michigan and other states, the New Jersey law expressly states that this law does *not* "require . . . an employer to accommodate the medical use of marijuana in any workplace." That language, however, does not necessarily apply to an employer's duty to accommodate under *another* law. The New Jersey Superior Court, Appellate Division, interpreted this language recently when faced with a claim of disability discrimination under that state's Law Against Discrimination.

THE DECISION

The plaintiff in the [recent decision](#), who suffered from cancer, claimed that his employer fired him from his job because of a disability and that his employer failed to engage in an interactive process concerning that disability and his off-duty marijuana use for treatment. This claim was not in any way proven, but the case was too new for the court to weigh in on the evidence. But the legal implications are significant. The employer argued it did not have to accommodate the employee's use of marijuana because the New Jersey law says it does not "require . . . an employer to accommodate the medical use of marijuana in any workplace."

The court had two problems with the employer's argument. First, although the *medical marijuana law* plainly stated that it did not require accommodation, the state's *anti-discrimination law* might because that law requires an employer to make reasonable accommodation to an employee with a disability. Second, the court explained, while the medical marijuana law did not require accommodation of marijuana use "in any workplace," the employee suggested that allowing *off-duty* use would be a reasonable accommodation.

WHY IT MATTERS

The seemingly slight distinctions made by the New Jersey court rest on a legitimate interpretation of the New Jersey law and are *also* fair ways to read Michigan's laws governing both medical and adult recreational use marijuana. The Michigan medical marijuana law states that it does not require "[a]n employer to accommodate the ingestion of marihuana in any *workplace* or any employee *working* while under the influence of marihuana." In similar fashion the recently adopted Michigan adult-use (recreational) marijuana law states that it "does not require an employer to permit or accommodate conduct otherwise allowed by this act in any workplace or on the employer's property." And, like the New Jersey Law Against Discrimination, Michigan's Persons with Disabilities Civil Rights Act requires an employer to make reasonable accommodation to applicants and employees with a disability. So, in important respects, Michigan's laws are similar enough to New Jersey law that Michigan appellate courts could reach the same conclusions.

Other states that have confronted questions similar to the New Jersey appellate court have reached very different conclusions. The path in Michigan remains unclear because Michigan appellate courts have not addressed an employer's obligation to accommodate either off-duty use or use by employees with disabilities.

PRACTICAL TAKEAWAYS

Employers in Michigan and other states with marijuana laws stating that those laws do not require accommodation of marijuana in the *workplace* should be cautious when faced with applicants and employees with disabilities and even arguably non-disabled employees who use off duty but who do not come to work impaired. The practical effect of the New Jersey appellate court's conclusion could significantly shake up how employers deal with those situations.

Health care employers should be especially cautious about their drug testing results, particularly where the employees perform clinical

duties or even indirect patient care. Those employees who test positive could bring risks to you on more than one front.

If you have any questions or would like more information on this topic, please contact **Jon Rabin** by email at jrabin@hallrender.com or by phone at (248) 457-7835 or your regular Hall Render attorney.