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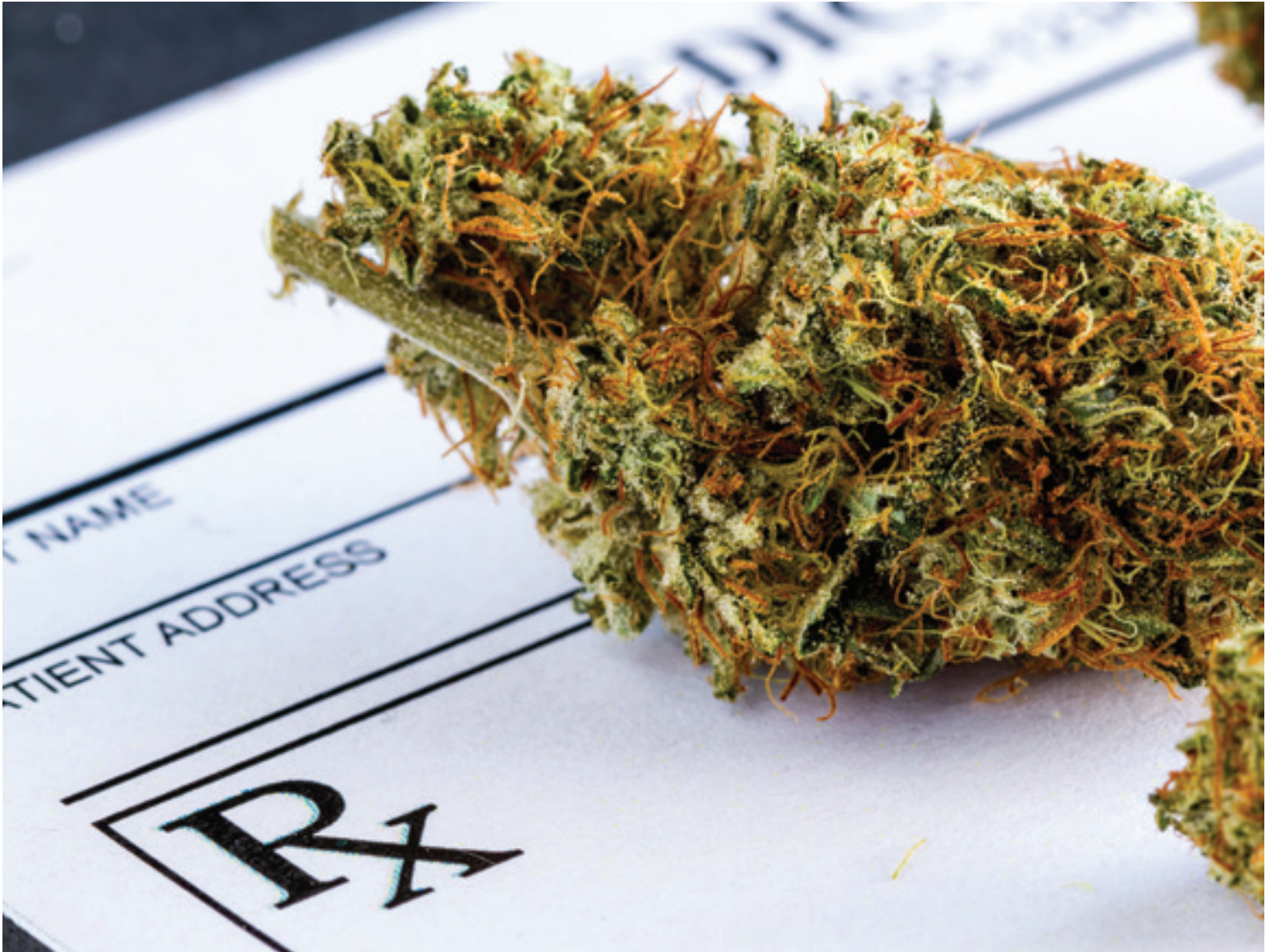
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# HOW CHANGING CANNABIS LAWS ARE AFFECTING HR POLICIES IN NEW JERSEY

BY ASHLEY L. TOTH, ESQ. AND MICHAEL SANTITORO

In a relatively short period of time, cannabis has undergone vast and rapid changes in both policy and culture. In the 1990's, only five states plus Washington, D.C., had marijuana laws permitting medical use. Now, 33 states permit medical marijuana use and 11 permit recreational use. Federal laws still prohibit the use and possession of marijuana, however, the federal government has largely permitted the states to regulate and enforce the industry.

The rapid expansion of state cannabis laws, however, has left employers struggling to ensure that they are in compliance with state and federal employment laws. In this article we discuss the current status of marijuana usage laws in New Jersey and set-forth a "step-by-step" guide to ensure that your business's policies are compliant with all federal and state laws.

## Step 1: New Jersey Guidelines for Medicinal Marijuana Usage

New Jersey has approved marijuana use for medicinal purposes. On July 2, 2019, Governor Murphy signed into law the Jake Honig Compassionate Use Medical Cannabis Act, *N.J.S.A. 24:61-2, et seq.* (Honig Act), which replaced the prior Compassionate Use Medical Cannabis Act. The revised Act permits individuals to

use medicinal marijuana for the treatment of “debilitating conditions.” According to New Jersey’s Division of Medicinal Marijuana a debilitating condition includes the following:

- Amyotrophic lateral sclerosis
- Anxiety
- Cancer
- Chronic Pain
- Dysmenorrhea
- Glaucoma
- Inflammatory bowel disease, including Crohn’s disease
- Intractable skeletal spasticity
- Migraine
- Multiple sclerosis
- Muscular dystrophy
- Opioid Use Disorder
- Positive status for Human Immunodeficiency Virus (HIV) and Acquired Deficiency Syndrome (AIDS)
- Post-Traumatic Stress Disorder (PTSD)
- Seizure disorder, including epilepsy
- Terminal illness with prognosis of less than 12 months to live
- Tourette Syndrome
- Opioid use disorder<sup>1</sup>

[https://www.nj.gov/health/medicalmarijuana/pat\\_faqs.shtml](https://www.nj.gov/health/medicalmarijuana/pat_faqs.shtml)

The Honig Act also creates employment protections for any employee who is a registered qualifying patient. Specifically, it prohibits “adverse employment action” against any employee who is a registered, qualifying patient based solely on the employee’s status with the commission. While the Act does not require an employer to accommodate the medical use of marijuana in the workplace, it forbids adverse employment actions against employees who use medicinal marijuana outside of the workplace based upon their health care provider’s order.

So what does this mean for employers? The Act itself establishes a procedure employers must follow when an employee tests positive for marijuana. If an employee (or prospective employee) tests positive for cannabis, the employer is required to offer an opportunity for the employee to present a valid medical explanation for the result, including proof of registration with the commission or authorization from a health care practitioner for use of medical cannabis. If an employee demonstrates that he or she is a valid medical marijuana user, the employer cannot use that alone as a basis to take adverse employment action.

The New Jersey Supreme Court in Wild v. Carriage Funeral Holdings, Inc., 241 N.J. 285, 227 A.3d 1206 (2020), provided further employee protections by holding that a medical cannabis patient can assert a claim for employment discrimination under the New Jersey Law Against Discrimination (NJLAD) for an adverse employment action based on an employee’s off-site medical cannabis use.

### **Step 2: Develop Company Policies and Procedures to Address New Jersey’s Medicinal Marijuana Usage Laws**

It is important to thoroughly review your company’s policies and procedures to be sure that an applicant or current employee is not discriminated against due to their authorized use of medicinal marijuana. For example, if your company has a policy of drug testing applicants/employees, be sure that no individual is denied employment or terminated for their off-duty usage of medicinal marijuana. Employee protections exist for off-duty medical marijuana usage, but do not permit individuals to use medical marijuana at the workplace or to work under the influence.

### **Step 3: Recreational Usage of Marijuana in New Jersey: It’s Complicated**

New Jersey voters approved a measure in November to legalize recreational marijuana. Governor Murphy, however, has not yet signed a Bill to make this legalization come to fruition. The New Jersey Legislature has been working to pass the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (NJCREAMMA) which primarily concerns the development, regulation, and enforcement of activities associated with the personal use, by persons 21 years of age or older. Due to concerns over the Bill’s lack of uniformity of penalties for underage users, Governor Murphy has not yet approved it.

The New Jersey’s Senate Judiciary Committee scheduled a vote on February 15, 2021 on a new “clean-up” bill aimed at resolving differences over the provisions related to underage marijuana usage. The cleanup bill makes possession of any cannabis a civil penalty of up to \$50 for people ages 18 to 21.

In addition to legalizing cannabis use amongst adults, the NJCREAMMA contains employment protections that would prohibit employers from

taking adverse employment action against employees or applicants based on their use of cannabis. The bill states in pertinent part:

No employer shall refuse to hire or employ any person or shall discharge from employment or take any adverse action against any employee with respect to compensation, terms, conditions, or other privileges of employment because that person does or does not smoke, vape, aerosolize or otherwise use cannabis items, unless the employer has a rational basis for doing so which is reasonably related to the employment, including the responsibilities of the employee or prospective employee.

Notably, the bill does not contain an express private right of action for violations of this provision; nor does the NJLAD provide employee protection for recreational marijuana use. As discussed in more detail above, the NJLAD provides “disabled” employees protection from adverse employment actions based upon their classification or use of medicinal marijuana. The NJLAD, however, does not apply in the arena of recreational marijuana use. Presumably, however, litigation on this particular employment topic is inevitable. In order to avoid liability, be sure to update your company’s policies and procedures in accordance with the changing laws.

Cannabis laws across the country will continue to change and impact employment policies and laws, and these latest developments in New Jersey are sure to follow suit. Best practices call for closely monitoring legislative developments and the effects they will have on your company’s employment policies and procedures.

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<sup>1</sup> Patient must be undergoing medication assisted therapy (MAT).

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