

Long Island Business NEWS

Easing pain, sparking concerns

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Now that New York has authorized five "registered organizations" to operate as many as 20 medical marijuana dispensaries

throughout the state, employers are scrambling to establish new best practices concerning card-carrying employees.



Gov. Andrew Cuomo on Monday signed a bill legalizing a restricted amount of medical marijuana for certified patients diagnosed with one (or more) of 10 medical conditions, a move intended to relieve pain and suffering for victims of Parkinson's disease, cancer and other ailments.

Users cannot legally smoke their pot; instead, they're required to vaporize it or ingest it orally as a pill or oil. New York is the 23rd state to legalize the use of medical marijuana, but of those states only Minnesota restricts patients from smoking it.

The legislation also stipulates that certified patients will be considered "disabled" under the state's human rights laws, which protect job-holders from employment discrimination. And that, according to attorney Arthur Yermash of Ronkonkoma law firm Campolo, Middleton & McCormick, "creates a whole other area and expands discrimination so that an employee can possibly take advantage of an employer when they don't have a true claim."

That's one of several new standards employers – and their legal teams – are closely monitoring. Yermash, senior associate of his firm's corporate and labor departments, said the state's decision to designate medical marijuana users as disabled workers could lead to confusion for the courts, which will be seeking guidance from courts in other states that have been "all over the place" when establishing enforcement measures.

Among the gray-area concerns for employers: Employees aren't required to disclose the fact that they're medical marijuana card-carriers, and the line between the new permission and federal laws monitoring employees' abilities to safely perform duties – based on drug-free, zero-tolerance workplaces – is hazy at best.

To combat the confusion, some attorneys are recommending employers establish reasonable accommodations designed to avoid adverse employee confrontations. A. Jonathan Trafimow, a partner in Garden City-based Moritt, Hock & Hamroff's employment law practice, said those with hiring and firing power need to engage in an interactive process with employees and create accommodations that comply with the state's human rights laws.

"Until it becomes clearer what the employer practice should be, employers should try and deal with the issues on a voluntary basis through the interactive process," Trafimow said, suggesting employers might make reasonable accommodations regarding hours and job attendance based on an employee's medical needs.

The theory is that employers who exercise due diligence and make a documented effort to accommodate medical marijuana users will have a better chance of disproving adverse legal claims brought later. Challenges can still arise, however, when employers are forced to determine whether employees are actually impaired at the workplace.

Lane Maxson, managing partner at Melville-based Hamburger, Maxson, Yaffe, & McNally, said the courts will be left to decide whether an employer is exercising his right to maintain a drug-free workplace or simply discriminating against an employee based on outside-the-office marijuana use.

"The law certainly requires those in the private sector to be more sensitive to those who are certified to use medical marijuana," Maxson said. "But it doesn't take away the absolute right to maintain a drug-free workplace so that someone ... cannot come to the job high."

Chris Gegwich, a partner in Nixon Peabody's labor and employment group in Jericho, said that while suspicions over impaired performance could arise, employers are already at a disadvantage: Marijuana-fueled impairment is much more difficult to prove than alcohol-induced deficiencies.

The new law is "going to make enforcement of drug testing in the workplace more difficult," according to Gegwich.

"This is something that's going to have to be evaluated on a case-by-case basis," he said. "And a lot of consideration comes into play, like what is the employer's business and what does the employee do?"

Joe Carello, an associate in the labor and employment group, added that employers still have the right to prohibit employees from working under the influence of a controlled substance, including marijuana. But the onus for creating a medical marijuana-tolerant workplace still falls on management.

"Employers should look at accommodations, incoming applicants and how they're going to deal with drug testing of people who are suspected of being impaired," Carello said, especially if that impairment is "interfering with job safety."

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