IN THE WEEDS: MEDICAL MARIJUANA PROTECTIONS CONTINUE TO EXPAND IN NEW JERSEY

Date: 23 January 2020

Labor, Employment and Workplace Safety Alert

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Continuing on a recent trend in New Jersey, employees who use medical marijuana received another layer of protection thanks to an Appellate Division ruling. In Hager v. M&K Construction, No. A-0102-18T3 (January 13, 2020), the Appellate Division held that a workers' compensation court order that the employer is responsible for the cost of the employee's medical marijuana prescribed to manage chronic pain did not violate federal law.

The employee suffered a back injury while working at the employer's construction site in 2001. Although he initially returned to light duty following the accident for a few months, by December 2001, he was unable to work due to his severe pain. By the time his workers' compensation case went to trial in November 2016, the employee had been out of work for over a decade, had no health insurance, had undergone several unsuccessful surgeries and other procedures, and was on a heavy regimen of opioids to alleviate his pain. At the time of trial, he was being treated by a physician certified to prescribe medical marijuana to help him get off of the opioids but still manage his pain to what extent he could. Ultimately, he was accepted into New Jersey's medical marijuana program.

The employer argued that the workers' compensation order to reimburse Hager for his medical marijuana violated the federal Controlled Substances Act ("CSA")[1], which criminalizes the possession, manufacture, or distribution of marijuana and therefore preempts New Jersey's Jake Honig Compassionate Use Medical Cannabis Act ("Jake Honig Act").[2] The employer further argued that the order required it to aid and abet the employee's illegal use and possession of marijuana in violation of the CSA. The employer also argued that workers' compensation insurers should be treated as private health insurers. Pursuant to the Jake Honig Act, private health insurers are not required to cover the costs of medical marijuana.

The court disagreed with the employer on all arguments. First, it found that by reimbursing the employee, the employer was not in possession of, manufacturing, or distributing marijuana and thus not in violation of the CSA. Accordingly, it was not impossible for the employer to comply with both the CSA and the Jake Honig Act, and conflict preemption did not apply. It also found that complying with the order did not rise to the required level of intent to be found guilty of aiding and abetting under the CSA. The court determined the workers' compensation insurance is not a private health insurer, and thus the Jake Honig Act's exception was inapplicable. Not only is the Jake Honig Act's exception expressly limited to government medical assistance programs and private health insurers, but elsewhere the legislature defines "health insurance" as expressly excluding "workmen's compensation coverage."[33]

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While the employee was a particularly sympathetic plaintiff and his case hit on the hot button topics of not just medical marijuana but the opioid epidemic in this country, the Appellate Division's ruling is also consistent with other actions taken in New Jersey to provide increased employment protections to consumers of medical marijuana. This decision follows on the heels of the 2019 amendments to the Jake Honig Act, expressly stating that it is an unlawful to take any adverse employment action against an employee who is registered with New Jersey's medical marijuana program based solely on the employee's status as a registry identification cardholder. While the Jake Honig Act does not obligate employers to permit medical marijuana use on premises or during working hours, it does now require that employees who fail a marijuana drug test be given the opportunity to prove that they are participants in the medical marijuana program.

Prior to the Jake Honig Act amendments, the Appellate Division already had ruled that a cancer-patient plaintiff had stated a *prima facie* case for disability discrimination based on the termination of his employment due to his inability to pass a drug test because of his prescribed medical marijuana use.[4] Approximately a week after the Jake Honig Act was signed into law, the New Jersey Supreme Court granted certification on July 11, 2019, on the issue of whether the Compassionate Use Act requires employers to accommodate medical marijuana users. Notwithstanding the passage of the Jake Honig Act's amendments, the Supreme Court's determination will be a bellwether of employer obligations as the state's relationship with medical marijuana continues to evolve.

There is no question that medical marijuana is an active area of employment law, and will continue to present new challenges, case law, and even legislation. Employers should aim to stay abreast of the legal developments as they roll out and seek counsel when employees present new questions relating to the relationship between the Jake Honig Act and employer's obligations.

Notes:

[1] 21 U.S.C. § 841.

[2] N.J.S.A. 24:6I-1 to -29. Prior to amendments passed in July 2019, this act was known as the New Jersey Compassionate Use Medical Marijuana Act.

[3] N.J.S.A. 17B:17-4.

[4] Wild v. Carriage Funeral Holdings, 458 N.J. Super. 416 (App. Div. 2019).

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