Despite federal law’s classification of marijuana as a Schedule 1 drug under the Controlled Substances Act, 21 U.S.C. § 801 et seq., which essentially defines such drugs as having a high potential for abuse and not currently accepted for medicinal use, 16 states and the District of Columbia have legalized some form of medical marijuana use — including New Jersey.

The New Jersey Compassionate Use Medical Marijuana Act (the Use Act), N.J. Stat. § 24:6I-1 et seq., legalizes marijuana for medicinal use in New Jersey for individuals suffering from cancer, acquired immune deficiency syndrome or other debilitating and life-threatening illnesses and afflictions. Gov. Chris Christie announced in July that he would no longer delay implementation of the Use Act, creating an issue for employers across the state.

Similar to many other states that have passed medical marijuana laws, the Use Act in New Jersey was designed to protect patient users — and their physicians who recommend medical marijuana — from arrest and prosecution; it was never intended to define what rights, if any, patient users have in the workplace. The Use Act provides: “Nothing in this Act shall be construed to require ... an employer to accommodate the medical use of marijuana in any workplace.” N.J. Stat. § 24:6I-14.

Exactly what this means to employers has not yet been defined by the New Jersey courts, but similar laws have been challenged by terminated employees in several states: California (Ross v. Raging Wire Telecomm., Inc., 42 Cal. 4th 920 (Cal. 2008)); Michigan (Casias v. Wal-Mart Stores, Inc., 2011 U.S. Dist. LEXIS 15244, 1-2 (W.D. Mich. 2011)); Montana (Johnson v. Columbia Falls Aluminum Co., LLC, 2009 MT 108N, 2009 Mont. LEXIS 120 (2009)); Oregon (Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 348 Ore. 159 (2010)); and Washington (Roe v. TeleTech Customer Care Mgmt. LLC, 152 Wn. App. 388, 216 P.3d 1055 (2009)). Although arriving at their decisions in different ways, the courts in these states have essentially held that the intent of the statutes in question was to decriminalize medicinal marijuana use and not to protect private rights of employees in the workplace.

Nevertheless, all New Jersey employers should prepare to deal with the inevitable issues that will arise when an employee or applicant presents a medical marijuana card, indicating that he or she has been approved for the use of this still-illegal drug for medicinal purposes. The Use Act does not directly address how the above-referenced “no accommodation” language may apply to an employer’s treatment of job applicants or employees who test positive for marijuana in connection with routine drug testing. Should an employer consider carving out limited exceptions for medical marijuana users from their drug policies, or should they maintain a zero-tolerance policy in order to deal with the Use Act? At this time, the safest legal route for employers is a zero-tolerance policy which clearly defines that an employee is prohibited from reporting to work with an illegal drug, including medical marijuana, in his or her system.

Unfortunately for employers, New Jersey courts have always liberally construed both statutory and common law in favor of employees. Consequently, claims that an employer violated the New Jersey Law Against Discrimination (LAD) — by failing to make a reasonable accommodation for the use of medicinal marijuana, and/or whether the termination of a registered medical marijuana user was wrongful under public policy, as reflected in the Use Act — are likely. Although interpretations of similar statutes by courts in other jurisdictions may give an employer some initial comfort, past decisions of the New Jersey courts in favor of employees on many employment issues should be enough to give employers some pause.

Against that backdrop, the follow-

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Employers must notify applicants in writing of their medical marijuana policy at the time of application and ensure that the employer’s position on medical marijuana use is clearly stated in its drug and alcohol testing policy.

In a situation where an applicant offers that he or she is a registered medical marijuana user, the employer should take care not to inquire about the disability for which the medical marijuana has been prescribed. An employer is not permitted to ask about the applicant’s underlying condition. Clearly, questions concerning the use of medical marijuana or any other drug are not permitted. Any subsequent adverse action would most likely result in allegations of disability discrimination against the employer under both state and federal law.

Consider your company’s geographic footprint, because medical marijuana laws may vary from state to state; currently, most states do not have a medical marijuana law. This consideration is less important if the employer chooses to apply a zero-tolerance policy for all locations which would effectively prohibit any illicit drug use, including those employers who operate under federal contracts and/or in industries regulated by federal law like trucking or nuclear energy.

Safety-sensitive, financial or confidential positions should be targeted. For employers who may choose something other than a zero tolerance policy, make sure your drug workplace policy for safety-sensitive personnel who operate equipment or vehicles, perform maintenance on equipment and vehicles, or those who work with financial or other confidential information explicitly prohibits the use of any illegal drug or alcohol while working. In this circumstance, an employer must have legitimate business reasons for treating these employees differently. Failure to be consistent will expose the employer to significant liability and result in claims of discrimination from those employees who feel they have been unfairly selected for routine or random drug testing because of a protected class or activity.

Clearly and effectively communicate policies. As previously stated, an employer should specifically state the company’s position on medical marijuana use for job applicants and existing employees. Such a communication should be in writing and disseminated to all employees to provide notice of the expectations of the employer. Further, supervisors should be trained to understand and consistently apply this policy throughout the company’s workplace. These policies should be reviewed and updated as applicable state or federal laws change. Employers should expect arguments as to why medical marijuana is targeted while other legally prescribed drugs that might impair an employee’s ability to perform his or her job functions are permitted. Proponents for the accommodation of medical marijuana use in the workplace argue that a positive drug test for marijuana does not establish impairment, but only confirms that there are marijuana (THC) metabolites above a certain cutoff level in an individual’s system. Accordingly, proponents maintain that employers should treat medical marijuana no differently than other prescription medications permitted by an employer in the workplace. An employer should avoid the use of the term “impairment” in its drug policies or risk falling into this trap.

Keep sensitive information private. As with any medical information, make sure you adopt appropriate measures for maintaining the confidentiality of an employee’s/applicant’s status as an approved medical marijuana recipient.

Examine leave policies under the federal Family and Medical Leave Act (FMLA) and the New Jersey Family Leave Act (NJFLA). An employee who is a registered medical marijuana user is not yet automatically entitled to leave under the FMLA. Of course, the particular debilitating condition that qualifies an employee under the Use Act will almost always qualify that employee for leave as a serious health condition under the FMLA. Similarly, the illness of an employee’s family member that permits the use of medical marijuana will most likely provide eligibility for leave under the NJFLA. Some employers presented with a medical marijuana card prior to drug testing may choose to place the employee on disability leave or the FMLA to allow the employee time to resolve his or her medical condition. This may be a workable remedy if the use of medical marijuana is short-lived, as in a chemotherapy treatment circumstance that is successful. Unfortunately, because marijuana (THC) metabolites remain in a user’s system much longer than evidence of other drugs, an employee on leave may still test positive prior to a return to work even though current use may have ceased.

Employers may not have to accommodate medical marijuana use under the Use Act but they will most likely have to accommodate the disability that led to the physician’s recommendation of medical marijuana, assuming the performance of the position’s essential functions and absent any undue hardship justification. The New Jersey LAD and the new Americans with Disabilities Act regulations are quite broad and require an interactive process and potential accommodations for a plethora of medical conditions. As an employer, make certain your policies and their enforcement clearly reflect that any adverse employment actions taken are not because of an employee’s disability, but for a clear violation of your drug and alcohol policies that are in writing and were properly noticed, disseminated and understood. ■