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MANAGEMENT RIGHTS

A Labor Relations newsletter for clients of ROEMER WALLENS GOLD & MINEAUX LLP designed to provide relevant information to public sector managers on matters relating to the labor relations environment in government.

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NY Compassionate Care Act

Governor Cuomo signed the New York Compassionate Care Act (hereinafter the "Act") on July 5, 2014, amending the Public Health Law, the Tax Law, the State Finance Law, the General Business Law, the Penal Law and the Criminal Procedure Law regarding the manufacture, distribution, and use of medical marijuana. The Act went into effect on January 7, 2016 with the NYS Department of Health ("DOH") launching the State's Medical Marijuana Program.

In order to be qualified to use medical marijuana, a patient must be certified by a practitioner, such as a physician, trained by and registered with the Department of Health, licensed by the State and qualified to treat the serious condition for which the patient is seeking treatment; the patient must also obtain a registration card validating their certified status as a medical marijuana patient. A serious health condition under the Act includes cancer, positive status for human immunodeficiency virus or acquired immune deficiency syndrome, amyotrophic lateral sclerosis, Parkinson's disease, multiple sclerosis, damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity, epilepsy, inflammatory bowel disease, neuropathies, Huntington's disease, or as added by the commissioner; and any of the following conditions where it is clinically associated with, or a complication of, a condition under this paragraph or its treatment: cachexia or wasting syndrome; severe or chronic pain; severe nausea; seizures; severe or persistent muscle spasms; or such conditions as are added by the commissioner.

The provisions of the Act include (among others):

- Medical marijuana shall not be smoked, consumed, vaporized, or grown in a public place.
- Insurers and insurance providers are not required to provide coverage of medical marijuana expenses.
- Certified patients,…shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action…solely for the certified medical use or manufacture of marijuana, or for any other action or conduct in accordance with this title.

- A certified patient is automatically deemed to be having a disability under
    - NY Executive Law Art. 15 (Human Rights Law)
    - NY Civil Rights Law § 40-c
    - NY Penal Law §§ 240.00, 485.00, 485.50
    - NY Criminal Procedure Law § 200.5

- The non-discrimination provision of this Act shall not bar the enforcement of a policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance. Additionally, this provision shall not require any person or entity to do any act that would put the entity in violation of federal law or cause it to lose a federal contract or funding.

Indicative of the legislation's plain language, employers shall not fire or otherwise discipline an employee for legally using medically prescribed marijuana. The Act protects all certified patients from criminal and/or civil penalties, and prevents a denial of any right or privilege based entirely on the employee's action or conduct in accordance with this Act. Although "employers cannot treat their employees differently merely because they use medical marijuana, [] they may prohibit their employees from working while impaired." Michael J. Volpe & Nicholas M. Reiter, *Five Things NY Employers Need to Know about Legal Marijuana*, FORBES (Jul. 8, 2014 10:06 A.M.), http://www.forbes.com/sites/danielfisher/2014/07/08/five-things-ny-employers-need-to-know-about-legal-marijuana/. Therefore, the fact that an employee is a certified patient does not require the employer to permit this employee to perform employment duties while impaired by a controlled substance or ingest a controlled substance while on the employer's premises.

Additionally, this Act does not require an employer to cover, under its provided insurance package, the costs of medical marijuana, nor does it require the employer to switch to an insurance company that does provide coverage for such costs.

As the Act has only been in effect for a few months, there is no New York case law as of yet. It is however, helpful to look at other states' cases regarding medical marijuana legislation. A case decided by the Court of Appeals of Michigan (consolidating three appeals) dealt with whether an employee terminated for testing positively for marijuana, but who possessed a valid registration identification card under the Michigan Employment Security Act ("MESA"), should be disqualified from receiving unemployment benefits. *Braska v. Challenge Mfg. Co.*, 307 Mich. App. 340 (M.I. 2014). The employee was subjected to a random, nondiscriminatory drug test and tested positive for marijuana. Giving the Michigan Medical Marijuana Act's ("MMMA") language its plain meaning, the Court determined that because the clause states that claimants "shall not" suffer a penalty for the use of medical marijuana with the requisite registration, denying an employee the privilege to unemployment benefits is a prohibited penalty under the statute. Id. at 357. The Employer had argued that because the employee "acted in direct and knowing contravention of the employer's zero-tolerance drug-policy," the employee engaged in misconduct and thus not entitled to unemployment benefits under the MESA. Id. at 364. The Court held that although testing positive for marijuana would ordinarily be considered misconduct worthy of disqualification from unemployment benefits, because there was no evidence that the claimants were impaired at work or had ingested controlled substances while at work and the claimants' use of medical marijuana was completely within the terms of the MMMA, denying them unemployment benefits was an improper penalty. Id. at 365. Similarly, under the New York Compassionate Care Act, an employer shall not terminate or otherwise discipline an employee for legally consuming medical marijuana. Nevertheless, conduct not covered under the Act,

such as smoking marijuana or working under the influence, may warrant termination or discipline.

While the Act deems certified patients to be "disabled" in terms of NY state law, the extent to which anti-discrimination under the New York Human Rights Act applies to this "disability" is not concrete. In a Colorado case, an employee for MillerCoors, Inc., Paul Curry, alleged that he was terminated in violation of the employment discrimination provisions of the Colorado statutes. *Curry v. MillerCoors, Inc.*, 2013 WL 4494307 *1, *1 (D. Co. 2013). Curry, suffering from hepatitis C, osteoarthritis and pain, is licensed by the State of Colorado to use medical marijuana; he alleges that he used marijuana in compliance with the license and never used marijuana on the MillerCoors premises and was never under the influence while on the job. Nevertheless, Curry was terminated after testing positive for marijuana -- a direct violation of MillerCoors's written drug policy. Despite concern for Curry's condition, the court ruled that the anti-discrimination law does not extend protection for a disabled employee from the employer's standard policies against employee misconduct. Id. at *3. The Court went on to hold that "a termination for misconduct is not converted into a termination because of a disability just because the instigating misconduct somehow relates to a disability. Id. at *9. Therefore, though Curry may have never used medical marijuana absent his disability, the Court ruled that MillerCoors did not unlawfully terminate him 'because of' his disability." Id. at *3.

The State of Washington also has a law permitting the use of medically prescribed marijuana. A Washington State court upheld the termination of an employee after he tested positive for marijuana. The employee was tested as part of testing undertaken by the company following a workplace injury. Note that the employee was legally prescribed the medical marijuana and used it off-duty. The employer had a "Drug free workplace" policy and relied upon it; the policy specifically maintained that if an employee tests positive for a "controlled substance" which includes "all chemical substances or drugs listed in any controlled substance acts or regulations applicable under federal, state or local laws" termination will be the penalty imposed. This court held that Washington's law would not place a duty upon an employer to "accommodate medical marijuana in a drug-free workplace." Here, however, the court found that "users of illegal intoxicants are not a protected class" and as such, there was no disability based discrimination. *Swan v. Safeway, Inc;*, No. C15-939 (W.D. Wash. Nov. 20, 2015). This case may be distinguishable from a similar claim that may arise under our state law because NYS law specifically and expressly provides that a certified medical marijuana patient is deemed to be "disabled" for purposes of state law.

Americans with Disabilities Act - States continue to pass medical marijuana legislation that provide more and more protections for affected parties, however, none of the states' legislation has changed the fact that marijuana use is still deemed illegal drug use under the Controlled Substances Act, and is therefore not protected under federal legislation such as the Americans with Disabilities Act (the "ADA). In *James v. City of Costa Mesa*, the 9th Circuit (in California) held that "Congress has made clear [], that the ADA defines 'illegal drug use' by reference to the federal, rather than state, law, and federal law does not authorize the plaintiff's medical marijuana use." 700 F.3d 394, 397 (9th Cir. 2012). Nevertheless, the New York Compassionate Care Act explicitly deems a certified patient to be "disabled" under the previously mentioned state laws. Despite the lack of protection under the ADA, New York state law explicitly recognizes certified patients to be "disabled," therefore, New York state employers should reevaluate standards of misconduct, specifically pertaining to marijuana consumption, to comply with this Act.