

# WHAT EVERY EMPLOYER NEEDS TO KNOW ABOUT THE NEW COMPASSIONATE CARE ACT (AKA THE 'MEDICAL MARIJUANA LAW')

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In July 2014, Governor Cuomo signed the Compassionate Care Act (CCA), also known as the "Medical Marijuana Law." New York is now the twenty-third state to enact such a law. Rules and regulations that will govern the prescribing, manufacture, distribution, and sale of marijuana have been written and are likely to be adopted this year. New York employers should be aware that the CCA includes language that provides workplace protections against discrimination for patients who are certified to use marijuana for medicinal purposes under this law. (New York Public Health Law §3369 (2)) Employers should stay well informed about this legislation and should also be considering how medicinal marijuana use could impact their workplace, considering all the unique characteristics of their specific workplace.

A few basic concepts about this law should be appreciated to understand workplace impacts. First, illnesses that would serve to permit a New York health care provider to certify a patient to use medicinal marijuana include cancer, HIV/AIDS, Lou Gehrig's disease, Parkinson's disease, multiple sclerosis, spinal cord damage causing spasticity, epilepsy, inflammatory bowel disease, neuropathies, and Huntington's disease. (New York Public Health Law §3360) Second, smoking marijuana is prohibited by this law. (Id.) Third, certified patients must always have their certification with them while using, carrying, buying, or transporting the drug (New York Public Health Law §3362).

While employees or job seekers in New York State who either have or are perceived to have the serious illnesses defined under the CCA could already be considered "disabled" for purposes of protection against discrimination under state and federal law, now the CCA specifically provides these employees or job seekers who are qualified users of medicinal marijuana in New York with additional protection against discrimination under state law by virtue of their use of medicinal marijuana when they are certified to do so under the provisions of the CCA. Therefore, the certified use of medicinal marijuana by an employee triggers the provisions under the New York Human Rights Law (NYHRL) that require an employer to provide reasonable accommodations to a disabled employee, absent undue hardship to the employer. (New York Executive Law §296) Taken to the next step in the analysis, the NYHRL will now require that New York employers engage in an interactive process with such employees to ascertain whether a reasonable accommodation is available for them to perform the essential functions of their job given their disabled status as a certified user of medicinal marijuana under the CCA (New York Executive Law §296).

How will this play out in the workplace? Consider the example of an employment situation in which employees are routinely tested for illegal drug use. If an employee's test comes back positive for marijuana use, before instituting a disciplinary action against an employee who tests positive, an employer should consider whether the employee is a certified user under the CCA. Workplace policies concerning drug testing and disciplinary action should be reevaluated with the CCA provisions in mind.

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What if an employee who is a certified user comes into work impaired? In this instance, employers have some protection under the CCA, which specifically states that employers are entitled to enforce workplace policies that prohibit employees from working while their abilities are impaired by a controlled substance. (New York Public Health Law §3369) Will this protection for employers conflict with the provision that protects employees against discrimination for medical marijuana use? This is going to be interesting to monitor, because I think there are likely going to be cases that raise a conflict for an employer. If the employer believes the employee is impaired but the employee argues he or she is not and is instead being discriminated against because of his or her status as a lawful user, how will this conflict be resolved? More than ever, it is important for employers to invest in training staff to report concerns to appropriate personnel, have skillful interactions with employees they believe to be impaired, keep detailed records concerning observations of impairment, and put a process in place for addressing such issues. Reasonable steps to show that all such cases of concern for "on the job impairment" are treated in the same fashion with a uniformly applied policy and discipline will certainly help in the defense of an employer when claims of discrimination are made.

This article presents a brief analysis of a comprehensive law that has repercussions far beyond the discussion offered here. There is no question that a new body of case law concerning medicinal marijuana use on the job is likely going to develop under the NYHRL. No employer wants to be the test case for this new law with its built-in protections against employment discrimination, so employers should start looking at their workplace policies now and seek legal guidance to prepare for the effect that this law will have on their workplace.