

Northern New England

MONDAY MORNING MINUTE

January 13, 2014

Implications for Employers of New Hampshire's New Medical Marijuana Law

On July 23, 2013, Governor Maggie Hassan signed a bill allowing seriously ill New Hampshire residents to use marijuana for medical purposes. The new law will allow patients with qualifying medical conditions to register with the state Department of Health and Human Services ("Department") to possess up to two ounces of marijuana at a time. The law allows patients to qualify if they have one of the listed medical conditions and one of the listed qualifying symptoms. In addition, on a case-by-case basis, the department may allow patients to register who do not have a listed medical condition if their providers certify that they have a debilitating medical condition. There will be no legal protection for patients until the Department begins issuing ID cards, which could take up to a year.

The qualifying conditions for medical marijuana use are cancer, glaucoma, HIV/AIDS, hepatitis C, ALS, muscular dystrophy, Crohn's disease, Alzheimer's, multiple sclerosis, chronic pancreatitis, spinal cord injury or disease, traumatic brain injury, and injuries that significantly interfere with daily activities. The qualifying symptoms are severely debilitating or terminal medical conditions or their treatments that have produced elevated intraocular pressure, cachexia, chemotherapy-induced anorexia, wasting syndrome, severe pain if it has not responded to other treatments or if treatments produced serious side effects, severe nausea, vomiting, seizures, or severe, persistent muscle spasms.

To qualify for the legal protections of the law, once ID cards become available, a patient must obtain a written certification from a physician or an advanced practice registered nurse and send it to the Department, which will then issue identification cards to patients, which will expire after a year unless the provider has specified an earlier expiration date. The identification card is the only way for patients to obtain legal protection for use of marijuana, allowing the patient or a designated caregiver to legally possess up to 2 ounces of marijuana. Without one, a patient can be

For specific information or answers to questions, please contact any of the attorneys in the Portsmouth, NH office:

Attorney Debra Weiss Ford
(603) 559-2727
Debra.Ford@jacksonlewis.com

Attorney Martha Van Oot
(603) 559-2735
Martha.VanOot@jacksonlewis.com

Attorney Daniel P. Schwarz
(603) 559-2730
Daniel.Schwarz@jacksonlewis.com

Attorney Thomas M. Closson
(603) 559-2729
Thomas.Closson@jacksonlewis.com

Attorney Nancy E. Oliver
(603) 559-2725
Nancy.Oliver@jacksonlewis.com

Attorney Elizabeth J. Baker
(603) 559-2722
Elizabeth.Baker@jacksonlewis.com

Attorney K. Joshua Scott
(603) 559-2711
Joshua.Scott@jacksonlewis.com

The information in this Email Update is published by the New Hampshire Jackson Lewis office to give general and timely information on the subjects covered. It is not intended as advice or assistance with respect to individual problems. This Update is provided with the understanding that the publisher, editor or authors are not engaged in rendering legal or other professional services. Readers should consult competent counsel or other professional services of their own choosing as to how the matters discussed relate to their own affairs or to resolve specific problems or questions. This Update may be considered attorney advertising in some states. Furthermore, prior results do not guarantee a similar outcome. © 2014 Jackson Lewis P.C.

arrested and prosecuted under New Hampshire's drug laws, even if he or she has a qualifying condition.

Interestingly, while medical marijuana use may be permitted under state law, it is still a Schedule I substance under the Federal Controlled Substances Act (21 U.S.C § 801, *et seq.*) ("CSA") and, thus, the use is unlawful under federal law. However, the Justice Department has indicated that it will not challenge state marijuana laws as long as they do not conflict with various federal enforcement priorities, which include selling marijuana to minors, trafficking the drug and funneling marijuana revenue to gangs and cartels. While state and federal law on this issue differ, currently it appears unlikely that there will be federal repercussions for marijuana use that is permissible under state law.

Pertaining to employers, the New Hampshire law specifically provides in section 126-W:2, Protections for the Medical Use of Marijuana, that:

- (c) Unless a failure to do so would constitute a violation of federal law or federal regulations an employer shall not discriminate against an individual in hiring, termination, or any term or condition of employment, or otherwise penalize an individual, based upon either of the following:
 - (1) The individual's status as a registered qualifying patient or registered designated caregiver;
or
 - (2) A registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used or possessed, or was under the influence of or impaired by marijuana on the premises of the place of employment. For purposes of this chapter, "impaired" includes but is not limited to instances where the registered qualifying patient is not able to safely perform essential job tasks.

Accordingly, the new law can impact an employer's policies concerning drug testing and maintaining a drug free workplace as qualified and registered medical marijuana patients cannot be discriminated against by employers in the workplace or during the application process solely based on their status as a registered qualifying patient or a positive drug test for marijuana, unless failure to do so would constitute a violation of federal law or federal regulations. The law does allow employers to discipline a qualified medical marijuana patient if the employee used, possessed, or was under the influence of or impaired by marijuana on the premises of the place of employment.

Another potential question raised by the law is whether the use of medical marijuana is the type of reasonable accommodation contemplated by the Americans with Disabilities Act, which states that employers must provide reasonable accommodations to allow people with disabilities to perform the same essential job functions as those without disabilities. The only guidance the law provides on this issue is that employers are not required to accommodate on-site uses of medical marijuana. Employers are required, however, to not discriminate against qualified and registered medical marijuana patients due to a positive drug test for marijuana. The issue of accommodation remains an open issue that will likely be further addressed either by regulation or the courts.

The new law will not take effect until the Department of Health and Human Services issues ID cards to patients with qualifying medical conditions. However, in advance of this eventuality, employers should

review their existing drug testing and drug free workplace policies to ensure compliance with this new law when the time comes. Although the law allows an employer to prohibit the use of medical marijuana on its premises, registered users who test positive on a drug test may not necessarily be disciplined in the same manner as those who are not registered users. In addition, an employer also cannot discriminate against an applicant who tests positive on a pre-employment drug screen if the applicant is a registered user. Employment policies should be updated to reflect the provisions of the new law.

Your Jackson Lewis Attorney can answer questions regarding this and other employment law issues.

Jackson Lewis P.C., one of the country's largest and fastest-growing workplace law firms, is pleased to announce that **Debra Weiss Ford, Daniel P. Schwarz, and Martha Van Oot** are three of 105 attorneys from the firm selected for inclusion in the

2014 edition of Best Lawyers in America®
with Debra Weiss Ford being named
“Lawyer of the Year” in Litigation – Labor and Employment

Best Lawyers is based on a peer-review survey in which almost 50,000 leading attorneys cast nearly five million votes on the legal abilities of other lawyers in their practice areas. Since first being recognized by this prestigious peer-review publication in 1989, the firm's presence on this list has grown steadily each year.

Jackson Lewis is pleased to share a radio interview with Debra Weiss Ford, Office Managing Shareholder of the Portsmouth Office, and Dave Ciullo, host of “HR Power Hour Radio with Dave Ciullo.”



In this weekly hour segment that provides valuable insight into successful Human Resource Management, Dave Ciullo interviews key professionals on a variety of timely topics affecting decision-makers; Debra Weiss Ford discusses the “Jerk at Work.” The interview aired on January 11, 2014 on *News Talk WLOB 1310 AM* in Portland, Maine from 10:00 – 11:00 a.m. The audio is available on the website, hrpowerhour.com.