

The New Jersey Compassionate Use Medical Marijuana Act – Questions Abound

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On January 18, 2010, the New Jersey Compassionate Use Medical Marijuana Act (the “Compassionate Use Act” or the “Act”) was signed into law, making New Jersey the fourteenth State to legalize the medicinal use of marijuana.¹ Amid concerns regarding the implementation of medical marijuana laws in states such as California – where many argue medical marijuana is so loosely regulated that non-medical use of marijuana is essentially decriminalized – the Compassionate Use Act was designed to be the most restrictive of all state medical marijuana laws. However, its restrictive nature raises multiple questions with respect to the Act’s scope and implementation, which will largely depend on future regulations issued by the New Jersey Department of Health and Senior Services (“NJDHSS”). The following provides a brief overview of the Compassionate Use Act and discusses several of the issues raised by the Act.

The Compassionate Use Act In Summary

Patient Eligibility and Use: The Compassionate Use Act permits qualifying patients to use marijuana to alleviate suffering from “debilitating medical conditions,” which is defined to include only very specific illnesses and conditions, including multiple sclerosis and terminal cancer, and, “if resistant to conventional medical therapy,” glaucoma and epilepsy. The Act provides for additional medical conditions to qualify if approved by NJDHSS by regulation. A qualifying patient will not be permitted to operate any vehicle or stationary heavy equipment while under the influence of marijuana, and will not be permitted to smoke marijuana while in a vehicle used for public transportation, while operating a private vehicle, on any school grounds, in any correctional facility, at any public park or beach, at any recreation center or in any place where smoking tobacco is otherwise prohibited.

Patient Registration: The Act directs NJDHSS to establish a patient registry procedure, whereby a registry identification card will be provided to qualifying patients (and their primary caregivers, if applicable).

Physician Certification: In order to register with NJDHSS, a qualifying patient must obtain written certification from his or her primary care physician, hospice physician, or physician responsible for the ongoing treatment of the patient’s debilitating medical condition. The certification must be signed by the physician and must attest to the physician’s authorization for the patient to apply to the medical marijuana patient registry. The Act directs the Department of Consumer Affairs to establish a system to monitor physician certifications and the dispensation of medical marijuana.

Medical Marijuana to Be Distributed by “Alternative Treatment Centers” – Patients Are Not Permitted to Grow Marijuana Themselves: NJDHSS is directed to establish regulations and processes for the issuance of permits to alternative treatment centers (“ATC(s)”), which will distribute medical marijuana. Unlike other state medical marijuana laws pursuant to which patients are permitted to grow marijuana themselves, qualifying patients will only be able to receive medical marijuana from ATCs. NJDHSS is directed to assess the need for ATCs, but initially, it must issue permits to at least two ATCs each in the northern, central and southern regions of the State. The first two ATCs in each region must be nonprofit; NJDHSS may subsequently issue permits to either nonprofit or for-profit entities. An ATC will be authorized to acquire reasonable inventory of marijuana and marijuana paraphernalia, and to possess, cultivate, plant, grow, harvest, process, display, manufacture, deliver, transfer, transport, distribute, supply, sell or dispense marijuana or related supplies to qualifying patients (or their primary caregivers) who are registered with NJDHSS.

Questions/Issues Raised By the Compassionate Use Act

Number of Potential Patient Registrants and Ultimate Need for ATCs Is Unknown: No one currently knows how many New Jersey residents may potentially qualify for medical marijuana under the Act. While NJDHSS is directed to

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initially establish six ATCs, significantly more may be needed. Unlike other states that permit patients to grow their own medical marijuana, ATCs will be the only source of distribution for medical marijuana. Therefore, an ongoing assessment of need for ATCs by NJDHSS will be required to ensure patient access.

Agricultural and Product Safety Concerns: The Act makes no mention of standards with respect to the growth of medical marijuana, and it is silent as to how ATCs are to obtain their medical marijuana inventory. The lack of such standards may raise quality concerns, such as potential mold or other contamination. It is not known whether New Jersey will seek to regulate matters affecting marijuana product safety, or whether it will rely on medical marijuana distributors' "self-regulation," which is the approach taken in other states such as California.²

Permitted Locations for Medical Marijuana Use and Alternative Methods for Marijuana Delivery: The Act prohibits the "smoking" of marijuana in essentially any location where tobacco smoking is currently prohibited. However, it does not mention other potential methods for marijuana delivery, such as vaporization (which utilizes a device that heats the marijuana to release its active ingredients but does not produce smoke)³ and ingestion. This raises the question of whether these alternative delivery methods for medical marijuana should be permitted in locations where *smoking* is prohibited.

Definition of Debilitating Medical Condition – Differing Physician Opinions Are Likely: Previous versions of the Compassionate Use Act defined the term debilitating medical condition much more broadly; for instance, the definition used to include any conditions that produced "severe or chronic pain." The version that was ultimately passed significantly limits the scope of this definition. For instance, "severe or chronic pain" is now only acknowledged as a debilitating medical condition if it results from AIDS, cancer, or positive status for HIV. In addition, while conditions such as glaucoma and epilepsy were considered debilitating medical conditions without limitation in previous versions of the Act, the law as passed only includes these conditions when they are "resistant to conventional medical therapy." However, the final version of the Act did expand the definition to add the condition "intractable skeletal muscular spasticity." This term and the phrase "resistant to conventional medical therapy" may be broad enough to produce differing opinions among different physicians as to whether a patient qualifies under the Act. Therefore, while the Act was specifically crafted to provide for a narrow interpretation of who should qualify for medical marijuana and avoid uneven application, there still appears to be significant room for disagreement with respect to its intended scope.

Physician Referrals To an ATC – Does An ATC Qualify As a "Health Care Service" Under The New Jersey Physician Self-Referral Prohibition? The New Jersey physician referral law (commonly referred to as the Codey Law) places considerable restrictions on a physician's referral of patients to a "health care service" in which the physician has a "significant beneficial interest."⁴ "Health care service" is defined under the Codey Law as "a business entity which provides on an inpatient or outpatient basis: testing for or diagnosis or treatment of human disease or dysfunction; or dispensing of drugs or medical devices for the treatment of human disease or dysfunction."⁵ It is not clear whether an ATC would fall under this definition. If an ATC qualifies as a health care service and a physician has a significant beneficial interest in an ATC – which would generally include an ownership interest in the ATC or a financial arrangement whereby the physician receives compensation from the ATC – the physician's referral of patients to the ATC would appear to be prohibited unless an exception is met.

Employer's Disability and Drug Testing Policies – Employers' Obligation to Medical Marijuana Patients Is Unclear: The Act places into question an employer's responsibility under employment discrimination laws to an employee who is a legal medical marijuana user. The Act states that it shall not be construed to require "an employer to accommodate the medical use of marijuana in any workplace." At the very least – assuming this provision would have the requisite weight with respect to the application of employment discrimination laws – the provision would appear to mean that an employer has no duty to permit an employee's use of medical marijuana at the location of employment. However, is there a duty to accommodate an employee's use of medical marijuana at his or her residence while he or she is not working? For instance, how does the Act affect an employer's pre-employment drug testing policy, which would essentially penalize a patient's legal use of medical marijuana at home?

In other states that have enacted medical marijuana laws, courts have declined to recognize these laws as creating any distinct obligation upon employers.⁶ For instance, the California Supreme Court decided that California's medical marijuana act protected a marijuana patient only from criminal liability under two specific state statutes and was not intended to address the respective rights and obligations of employers and employees; therefore, the Court determined that the medical marijuana law did not require an employer to accommodate an employee's use of medical marijuana.⁷ However, New Jersey's Compassionate Use Act may be distinguishable from California's law. New Jersey's Act broadly states that its purpose is to protect qualifying patients and any other person acting in accordance with the Act from "arrest, prosecution, property

forfeiture, and criminal and other penalties “ and that these individuals “shall not be subject to any civil or administrative penalty, or denied any right or privilege....”⁸ These broad provisions – which clearly go beyond California’s law, which is construed as protecting medical marijuana patients only against criminal liabilities – may indicate a broader duty on the part of New Jersey employers to accommodate a qualifying patient’s home use of marijuana in accordance with the Act.

Conclusion

The Compassionate Use Act is uncharted territory for New Jersey. The matters discussed above are a mere sampling of the numerous issues raised by the Act; resolution of these issues will likely require significant guidance, court decisions and, perhaps, additional legislation.

In the mean time, we await regulations to further define the scope of the Act. As stated above, the Act’s implementation is largely in the hands of NJDHSS, which is required to adopt regulations no later than mid-October. However, recent reports have indicated NJDHSS is struggling to meet this deadline and has requested an extension.⁹ Due to the numerous questions the Act raises, it is no wonder that NJDHSS may be having some trouble. Hopefully, NJDHSS will be able to overcome these difficult issues soon so that the law may do what it was intended to do: to provide relief to suffering patients.

About the Author

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¹New Jersey Compassionate Use Medical Marijuana Act, P.L. 2009, Chapter 307 (2010) available at http://www.njleg.state.nj.us/2008/Bills/AL09/307_.PDF.

²Peter Hecht, *Oakland pot lab fills oversight need*, The Sacramento Bee, April 5, 2010, at A1 available at <http://www.sacbee.com/2010/04/05/2655218/oakland-pot-lab-fills-oversight.html>.

<http://www.mcclatchydc.com/2010/04/05/91596/lab-helps-medical-marijuana-growers.html>

³See e.g., Abrams, DI et al., *Vaporization as a Smokeless Cannabis Delivery System: A Pilot Study*, Clin. Pharmacol. Ther., Apr. 11, 2007, available at http://www.maps.org/media/vaporizer_epub.pdf

⁴N.J.S.A. 45:9-22.4 to 22.9; N.J.A.C. 13:35-6.17.

⁵N.J.S.A. 45:9-22.4; N.J.A.C. 13:35-6.17.

⁶See e.g., *Ross v. Ragingwire Telecommunications, Inc.*, 174 P.3d 200 (Cal. 2008); *Washburn v. Columbia Forest Products, Inc.*, 134 P.3d 161 (Or. 2006).

⁷Ross, 174 P.3d at 202.

⁸New Jersey Compassionate Use Medical Marijuana Act, P.L. 2009, Chapter 307, §§ 2(e) and 16 (2010).

⁹Susan K. Livio, *New Jersey’s first legally grown marijuana will be harvested this fall*, The Star-Ledger, March 28, 2010, available at http://www.nj.com/news/index.ssf/2010/03/new-jerseys_first_legally_grow.html