

# Conflict and Confusion in Cannabis Legislation Leave Developers, Employers and Municipalities in a Haze

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**U**nder the leadership of Governor Murphy, New Jersey significantly expanded its medical cannabis program in 2018. The New Jersey Department of Health (“DOH”) issued six new Alternative Treatment Center licenses, bringing the total number of eligible licenses to 12. The DOH also expanded the list of qualifying medical conditions that medical cannabis may be used for and, as a result, increased overall patient access to the state’s medical cannabis program.

On the recreational side, the executive and legislative branches of New Jersey’s state government are arm wrestling over the logistics of legalizing recreational cannabis. In an effort to change the archaic landscape surrounding cannabis, the New Jersey Cannabis Regulatory and Expungement Aid Modernization Act proposes to legalize possession and personal use of cannabis for anyone age 21 and older. The proposal would establish a Cannabis Regulatory Commission (“Commission”) to oversee the development, regulation and enforcement of activities associated with recreational cannabis use and would task the Commission with assuming responsibility from the DOH for the further development and regulation of the state’s medical cannabis program. The legislation, as currently proposed, permits municipalities to prohibit cannabis establishments through the enactment of an ordinance. However, if the municipality fails to adopt such an ordinance, cannabis establishments may be permitted in certain zoning districts for a protected period of five years. Since many New Jersey municipalities’ zoning ordinances lack criteria to accommodate cannabis establishments, towns often struggle to determine which zoning districts provide for these types of commercial, industrial or retail uses. Despite gaining serious momentum last year, recreational legislation has slowed recently as the Legislature works through the remaining details.

New Jersey’s attempt to expand medical and recreational cannabis has not been an easy task. Cannabis remains unlawful under existing federal law. The Controlled Substances Act (“CSA”) categorizes marijuana as a Schedule I substance, meaning marijuana has a high

potential for abuse, no accepted medical use in treatment in the United States and a lack of accepted safety standards for use of the drug under medical supervision. Under the federal system of government, the CSA is not preempted by state medical marijuana laws, nor are state medical marijuana laws preempted by the CSA. Federal authorities can investigate, arrest and prosecute medical cannabis patients, caregivers and providers in accordance with the CSA, even in states like New Jersey where medical marijuana programs operate according to state law.

The disparities between federal and state law directly impact New Jersey businesses and employers, often leaving them confused as to how to comply with conflicting laws. The proposed amendments to the medical program include state-level protections for areas such as education, real property, professional licensing, healthcare and employment, but fail to provide guidance on whether these protections pertain to federal law. While New Jersey courts have not significantly dealt with these concerns, federal courts have begun scrutinizing such inconsistencies in the context of a New Jersey employer’s drug testing policy. In a recent lawsuit, an employee, who was prescribed medical marijuana, was asked by his employer to take a drug test as a condition of continued employment. The employee advised the employer that he takes several medically prescribed drugs, including marijuana, but the employer advised he could not return to work unless he tested negative for marijuana. The employee brought a discrimination claim against the company, which was ultimately dismissed by the federal court. The court determined that while the use of medical cannabis might be legal in New Jersey, an employer is within its rights to refuse to waive a drug test for federally prohibited narcotics, including cannabis. This case serves as a reminder of how far divided state and federal authorities remain.

Commercial landlords also face uncertainty with the leasing of real property to tenants engaging in cannabis-related activities. If a landlord’s property is mortgaged, the lender’s loan documents likely contained a provision prohib-

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iting illegal activity at the premises. By leasing to a tenant engaged in cannabis activity, there is a risk that “illegal activity” is taking place under federal law. Moreover, from a financing perspective, developers are often denied loans because many banking institutions are FDIC insured. Due to this federal protection, banking institutions are reluctant to engage in business transactions with those developers associated with cannabis-related activities.

Despite these challenges, which are to be expected in a new industry as complex as cannabis, New Jersey has come a long way in both the medical and recreational context. While the Legislature works through the remaining issues, businesses should be mindful of how these new laws may impact their existing operations from a regulatory and compliance perspective. One thing is clear: to lift the haze and give businesses unambiguous guidelines for operating in the cannabis realm, our United States Congress must come together and take action to resolve the discrepancies between federal and state laws.

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