

# New York's Medical Marijuana Law: How It Originated and What Is Next

By Geoffrey Mort

In the summer of 2014, New York became the 23rd state to pass a statute allowing the use of medical marijuana.<sup>1</sup> In doing so, New York, albeit belatedly, is becoming part of what appears to be a national trend toward legalizing marijuana for medical as well as recreational purposes.<sup>2</sup> Although New York's statute, due to be implemented in 2016, is considered to be one of the more restrictive such laws in the country,<sup>3</sup> growing support for marijuana legalization may mean that it is only a matter of time before medical marijuana becomes more widely and easily available to those who need it in New York. This article reviews the history of medical marijuana statutes in the United States and discusses New York's new law, the Compassionate Care Act, how it compares to other states' medical marijuana laws, what it provides and how it is likely to work once it goes into effect.

## I. Medical Marijuana Laws in the U.S.

### A. Gradual but Steady Acceptance of Medical Pot

State medical marijuana laws date back to 1996 when California voters approved a proposition bringing into being the Compassionate Use Act. The California Act is a broad one, permitting the use of marijuana for medical purposes as long as a physician approves it. Nearly twenty years after the groundbreaking statute's passage, there are more than 2,000 locations in California where medical marijuana can be obtained.

Washington, Oregon and Alaska passed their own medical marijuana laws two years after California's and by 2000 Maine, Colorado, Hawaii and Nevada had joined their ranks. No Eastern state other than Maine enacted a medical marijuana statute until Rhode Island's legislature did so in 2006. Since then, however, all of the states in the Northeast have passed medical marijuana laws.

### B. Common Elements of Medical Marijuana Statutes

Virtually all of the medical marijuana statutes currently in place share several important components. First, they provide for the establishment of a network of licensed dispensaries where marijuana can be purchased. (Colorado, where the state constitution was amended to legalize medical marijuana, now has more than 500; New York's new law permits no more than twenty). Second, they require anyone using medical marijuana to register with the state and obtain an identification card or, at a minimum, be listed on a patient registry. Finally, the statutes specify what conditions medical marijuana may be used to treat. These commonly include cancer, AIDS, Parkinson's Disease, epilepsy and multiple sclerosis. Several

states, however, permit medical marijuana use for such conditions as insomnia, anxiety and even loss of appetite.

### C. Conflict With Federal Law

In 1937, passage of the Marijuana Tax Act made prescriptions for pot illegal. That law's successor, the Controlled Substances Act,<sup>4</sup> goes much further and not only criminalizes marijuana at the federal level but even makes it a Schedule I drug—the same classification as heroin. In view of the fact that many medical researchers have increasingly found beneficial uses of marijuana—particularly as a pain suppressant and an aid in the treatment of glaucoma and nausea<sup>5</sup>—considering marijuana a dangerous drug is increasingly seen by many as an anachronism. In 2009 U.S. Attorney General Eric Holder notably distributed a memorandum to all United States Attorneys suggesting that they not prosecute any cases under the Controlled Substances Act (“CSA”) against individuals using pot in states with medical marijuana laws. Nevertheless, the tension between the Controlled Substances Act and state medical marijuana laws remains, and has been the subject of litigation in several states.

### D. The Coats Case

*Coats v. Dish Network LLC*<sup>6</sup> is the most prominent case concerning the use of medical marijuana in the last few years, and represents a dispute that could arise in most states with medical marijuana statutes. The plaintiff in this closely watched action, Brandon Coats, was paralyzed in an automobile accident and suffered from daily, painful spasms. He made use of Colorado's medical marijuana law, obtained an identification card, and smoked marijuana in the evening to relieve his pain and enable him to sleep. He then was able to obtain a job with a satellite television provider that entailed speaking with customers on the telephone, which he ably performed. Mr. Coats never used marijuana at work and never came to the office while under the influence of pot.<sup>7</sup>

Mr. Coats's employer then decided to subject all of its employees to drug testing. Predictably, Mr. Coats tested positive and as a result was fired. He then sued Dish Network under Colorado's Lawful Off-Duty Activities Law, which provides that employers may not discriminate against employees for “engaging in any lawful activity off the premises of the employer during working hours.”<sup>8</sup>

Mr. Coats lost at both the trial court level and before Colorado's intermediate appellate court. The issue was not a complex one: whether Mr. Coats's use of medical marijuana was a lawful activity protected by his state's

legal activities law. Both courts ruled that it was not, reasoning that pot's status as an illegal substance under the CSA made its use unlawful, notwithstanding the fact that medical marijuana is authorized by Colorado's constitution. However, a dissent on the appellate panel argued that the CSA, which does not govern employment relationships in the states, was not a proper basis for declaring medical marijuana use unlawful in view of the State constitution's protection of it.<sup>9</sup>

The Colorado Supreme Court settled the issue in June 2015, affirming the lower courts' decision and holding that medical marijuana use—which continues to be prohibited by federal law—is not a “legal activity” for purposes of Colorado's legal activities statute.<sup>10</sup> The decision is likely to be cited by attorneys and courts in other states, including New York, in future litigation involving the same or a similar issue.

## **II. The Compassionate Care Act**

### **A. What the New Statute Provides**

New York's Compassionate Care Act is one of the more narrow and restrictive of the various medical marijuana statutes that have been enacted.<sup>12</sup> Nonetheless, it shares a number of core components with sister laws in other states.<sup>11</sup>

#### **1. Conditions Covered**

A patient qualifies to obtain marijuana under the New York law only if currently under treatment for the “serious condition” for which medical marijuana is sought. The law defines serious condition as a severe, debilitating or life threatening condition, including cancer, HIV, amyotrophic lateral sclerosis, Parkinson's Disease, nerve damage to the spinal cord, epilepsy, inflammatory bowel disease, neuropathies or Huntington's Disease.<sup>13</sup>

Significantly, within eighteen months from the effective date of the Act, the Commissioner of the Department of Health has the discretion to add other conditions to this list. These include Alzheimer's Disease, muscular dystrophy, dystonia, Post Traumatic Stress Disorder and rheumatoid arthritis. Moreover, the Commissioner is permitted to expand the list of “serious conditions” to others not specified in the statute.<sup>14</sup>

#### **2. Identification Cards**

To be covered by the Act, eligible employees—who must be certified by their physicians as being able to benefit from the use of medical marijuana—are required to obtain registration identification cards from the Department of Health.<sup>15</sup> The cards must be renewed annually, and carried whenever the individual is in possession of marijuana. The Department of Health must begin issuing patient identification cards as soon as possible, but in no case less than eighteen months after the law takes effect.

### **3. Kinds and Quantity of Marijuana That May Be Obtained**

Here as well, the DOH Commissioner has been given the latitude to determine what forms of marijuana (such as extracts, edibles or oils), as well as their strength and strains, may be sold. However, the law specifically prohibits smoking medical marijuana by excluding it from “certified medical use.”<sup>16</sup> Patients are permitted to possess up to a 30-day supply of marijuana, as are caregivers, and may replenish their supply in the last week of each 30-day period.<sup>17</sup> Medical marijuana, however, may not be consumed in a public place.<sup>18</sup>

### **III. Discrimination Against Users and Drug Testing**

One area in which the Compassionate Care Act is in the forefront of medical marijuana statutes is the degree of protection it affords users. Patients and caregivers are immune from arrest and prosecution for using pot so long as they are complying with the Act.

Further, certified patients are considered persons with a disability under state law. Among other things, that means that employers may be required to provide reasonable accommodations to individuals protected by the Act and to engage in the interactive process when an employee who uses medical marijuana requests an accommodation.<sup>19</sup>

More importantly for labor and employment lawyers, employers may not discriminate against employees who lawfully use medical marijuana. Accordingly, an employee who is terminated or subjected to other adverse action for legally using marijuana is likely to have a discrimination claim against the employer. And, the fact that one is acting in accordance with the Compassionate Care Act may not be used in a proceeding under the Family Court Act, social services law or domestic relations law.

Several types of drug testing are permissible under the Act, but in a more limited fashion than was the case prior to its passage. “Reasonable suspicion” drug testing, which involves conducting a drug test based on a suspicion that an employee is under the influence of marijuana while on the job, is not prohibited due to the fact that the Act excludes from protection employees who are working while “impaired.” An employer who has reason to believe that an employee is under the influence of marijuana in the workplace could technically take adverse action against that individual after a positive test, although the fact that marijuana can remain in one's bloodstream for weeks after use casts doubt on the legality of such adverse action.

Random drug testing may still be conducted under the Act, but an employer's ability to take adverse action against a protected user is even more constrained than in the case of reasonable suspicion drug testing. In the absence of “suspicion,” there is little or no basis for disciplining a protected employee who tests positive.

Thus, before taking adverse action against any employee who tests positive in a random test, an employer should first ascertain if the employee is using marijuana legally. Employers with “zero tolerance” drug policies would be well advised to revise them once the Act goes into effect.

## Conclusion

Proposed regulations were adopted on April 15, 2015. If the process goes as anticipated, the Compassionate Care Act should be fully in effect by early 2016. To the extent that the experience of other states is any indication, the Act may be but the first step to wider legalization of marijuana. The Compassionate Care Act, notwithstanding criticisms that it “falls far short of what thousands of patients seeking the drug need,”<sup>20</sup> promises to alter the legal landscape with regard to marijuana use and present attorneys with a host of new issues and challenges in the coming years.

## Endnotes

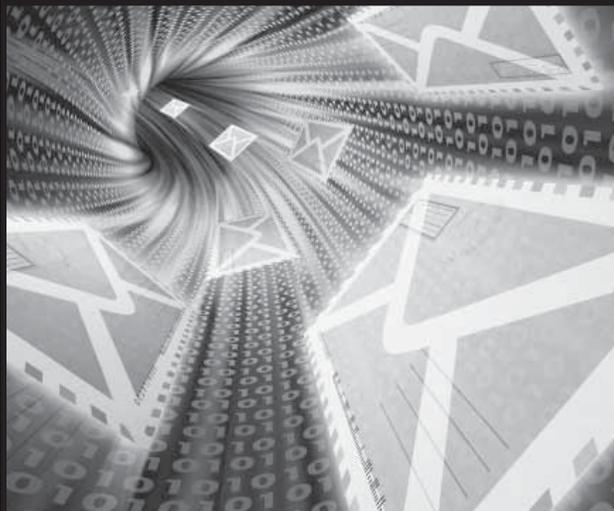
1. See Haimy Asseta, *New York Legalizes Medical Marijuana*, CNN.COM (February 16, 2015), <http://www.cnn.com/2014/07/07/health/new-york-medical-marijuana/index.html>.
2. To date, Washington, Colorado, Oregon and Alaska all have all fully legalized marijuana and another fourteen states have decriminalized marijuana for personal use to a limited extent.
3. See Daniel A. Medina, *New York's New Medical Marijuana Law is the Worst in the US*, QZ.COM (February 16, 2015), <http://qz.com/231898/new-yorks-new-medical-marijuana-law-is-the-worst-in-the-us/>.
4. 21 U.S.C. §§ 801 *et seq.*

5. See *New York Laws & Penalties*, NORML.ORG (February 16, 2015), <http://norml.org/laws/item/new-york-penalties-2>.
6. 303 P.3d 147 (Co. Ct. of Appeals 2013).
7. Jack Healy, *Legal Use of Marijuana Clashes With Job Rules*, N.Y. Times, September 7, 2014.
8. Colo. Rev. Stat. § 24-34-402.5 (2004).
9. 303 P.3d 147 (Co. Ct. of Appeals 2013).
10. *Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015).
11. State Senator Jeffrey D. Klein conceded that the Compassionate Care Act will be “one of the...most tightly regulated medical marijuana programs in the country.”
12. One feature that the New York statute does not share with medical marijuana laws in any other state is that the law gives the State Department of Health the power to determine pricing of the drug, which the state will tax at 7%. This aspect of the statute has been the subject of much criticism on the grounds that it could be wasteful and create unfair pricing.
13. See Medina, *supra* note 3.
14. See *About the Medical Marijuana Program*, HEALTH.NY.GOV (February 16, 2015), [http://www.health.ny.gov/Regulations/medical\\_marijuana/](http://www.health.ny.gov/Regulations/medical_marijuana/).
15. *Id.*
16. See *N.Y. Becomes 23rd Medical Marijuana State!*, MPP.ORG (February 16, 2015), <http://www.mpp.org/states/new-york/>.
17. See *About the Medical Marijuana Program*, *supra* note 13.
18. See *New York Laws & Penalties*, *supra* note 5.
19. 23 N.Y. Pub. Health Law 5-A (2014).
20. See Medina, *supra* note 3.

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