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Urgent Alert for Members of *Drugs Don't Work in NJ*

New Jersey Law Limiting Employer Inquiries into Marijuana-Related Criminal Histories Takes Effect July 1, 2021

On February 22, 2021, as a companion to the “*New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act*,” Governor Murphy also signed legislation “concerning certain criminal and civil justice reforms, particularly addressing the legal consequences associated with certain marijuana and hashish offenses.” Of particular interest to employers are the prohibitions this legislation places on employers’ ability to inquire into, and take action based on, specific marijuana-related criminal histories.

When do these prohibitions take effect? July 1, 2021.

What is being prohibited?

Employers in New Jersey will now be prohibited from:

- Relying solely on arrests, charges, convictions, or adjudications of delinquency for certain specified marijuana offenses when making employment decisions.
- Requiring any applicant to disclose or reveal arrests, charges, convictions, or adjudications of delinquency for certain specified marijuana offenses.
- Taking adverse action against any applicant solely on the basis of arrests, charges, convictions, or adjudications of delinquency for certain specified marijuana offenses.

These prohibitions apply regardless when the arrests, charges, convictions, or adjudications of delinquency occurred.

What are the specified offenses that are off limits for employers to consider?

By citation, the following offenses:

- *N.J.S.A. 2C:35-5(b)(11)*: manufacture, distribution, dispensing, or possession with intent to commit the foregoing acts, of one ounce or more but less than five pounds of marijuana or five grams or more but less than one pound of hashish.
- *N.J.S.A. 2C:35-5(b)(12)*: manufacture, distribution, dispensing, or possession with intent to commit the foregoing acts, of less than one ounce of marijuana or less than five grams of hashish.
- Either of the two preceding offenses combined with a violation of *N.J.S.A. 2C:35-7* (violation within 1,000 feet of a school), or *N.J.S.A. 2C:35-7.1*(violation within 500 feet of a public housing facility, public park, or a public building).
- *N.J.S.A. 2C:35-10(a)(3)* or (4): unlawful possession of marijuana or hashish.
- *N.J.S.A. 2C:35-10(b)*: unlawfully using or being under the influence of a controlled substance.
- *N.J.S.A. 2C:35-10(c)*: coming into possession of a controlled substance and not surrendering it to law enforcement.
- *N.J.S.A. 2C:36-2*: use of, or possession with intent to use, drug paraphernalia.
- Any federal law or law of another state for a crime or offense which, if committed in New Jersey, would be a violation of the offenses listed above.

Note: New Jersey law allows medical and adult recreational use “cannabis” grown, manufactured, and marketed within a highly regulated system of licensed producers and vendors. THC-bearing plants and products grown, manufactured, and marketed outside of this highly regulated system are termed “marijuana” and remain illegal.

Are there any exclusions?

Yes, but they are very limited. These prohibitions do not apply when the employment sought, or the position for which the applicant is being considered, is in law enforcement, corrections, the judiciary, homeland security, or emergency management.

Further, if there is a federal law requirement that an employer screen for marijuana-related criminal histories, that federal law will supersede New Jersey’s prohibitions.

What are the penalties for a violation?

The New Jersey Commissioner of Labor and Workforce Development can initiate a summary proceeding against an employer and seek the following civil penalties: \$1,000 for the first violation, \$5,000 for the second violation, and \$10,000 for each subsequent violation. These are the sole remedies available for employer violations.

Can an employer be sued over a violation?

No. The statute expressly prohibits private suits over violations. Also, an alleged or actual violation of these prohibitions cannot be introduced as evidence in any legal proceeding except the summary proceeding brought by the New Jersey Commissioner of Labor and Workforce Development. Nor does this statute create or establish a standard or duty of care for employers with respect to any other law.

How does this compare to neighboring states?

Neither New York nor Connecticut specifically prohibits employers from considering marijuana-related criminal histories. However, most low-level marijuana convictions in New York will be expunged automatically as a result of reform laws enacted in 2019 and 2021. Connecticut's recently enacted marijuana law automatically expunges low-level marijuana convictions that occurred between January 1, 2000, and October 1, 2015; convictions outside of this time period may only be expunged by petition to the Court. However, Connecticut's law generally prohibits employers from taking adverse action against employees and applicants for their pre-employment use of marijuana.

Delaware and Pennsylvania currently have no prohibition against consideration of marijuana-related criminal histories. However, there are bills pending in each state that would expunge certain marijuana offenses.

Expunged offenses typically do not appear in criminal history reports.

What are employers doing now that needs to be corrected?

Employers who conduct criminal background checks on applicants, new hires or current employees need to be aware of this change in the law and amend their hiring policies and practices accordingly.

What should an employer do?

An employer should immediately:

1. Review and amend its criminal history/background check policies for compliance with this new law. Determine whether the employer is subject to any superseding federal law requirements.
2. Assure that any entity or person on whom the employer relies for background checks does not inquire into the specified offenses or, at the very least, does not include the specified offenses in any report submitted to the employer.
3. Train supervisory personnel not to inquire into the specified offenses or conduct that would constitute violations of the specified offenses, and not to take arrests, charges, convictions, or adjudications of delinquency for the specified offenses into account when making employment decisions.
4. Review the foregoing steps with competent counsel to assure compliance.

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