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URGENT ALERT: NEW JERSEY'S CANNABIS LAW

WHAT WILL BE THE IMPACT ON EMPLOYERS?

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On December 17, 2020, the State Senate and Assembly passed the “*New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act*.” Following discussions with the legislature to resolve an issue over the penalties for underage use, Governor Murphy signed the Act into law on February 22, 2021.

In a nutshell, the Act establishes a detailed, heavily regulated marketplace for the strictly controlled growth, manufacture, distribution, transport, delivery and sale of limited amounts of “cannabis” to persons ages 21 and older. Any marijuana product grown, manufactured, distributed, transported, delivered or sold outside of this highly regulated market will remain unlawful. Possession and use of up to six ounces of regulated cannabis products by persons ages 21 and older will be fully lawful. Possession and use of unregulated “marijuana” products will remain unlawful, as will the use of either cannabis or marijuana by any person under the age of 21. The New Jersey Cannabis Regulatory Commission, (CRC), which currently regulates New Jersey’s medical cannabis industry, is responsible for adopting the regulations necessary to implement the lawful cannabis market and the licensing of businesses to engage in cannabis growth, manufacture, distribution, transport, delivery and sale. No retailing of lawful cannabis will be permitted until the CRC issues its initial rules and regulations, which is to occur within 180 days of the act’s being signed into law, or within 45 days of the CRC having attained its full complement of five members, whichever occurs later.

The act also contains employment-related provisions designed to protect users of lawful cannabis from adverse employment action. When fully implemented, these provisions will effectively convert lawful cannabis use into a protected employment category and make employer efforts to combat workplace impairment more difficult and costly. Because these protections apply *only* to users of lawful cannabis, and not to marijuana products generally, the immediate impact of these provisions is likely to be somewhat muted until lawful cannabis becomes available. But employers need to be aware of these provisions and begin planning for compliance *now*.

What new employment protections will be available to users of lawful cannabis?

First, employers will be prohibited from refusing to employ a person due to the “presence of cannabinoid metabolites” in that person’s bodily fluids resulting from the consumption of lawful cannabis, unless employing that person would place the employer in violation of a federal contract or cause the employer to lose federal funding.

Second, employers will be prohibited from refusing to hire, terminating, or taking adverse action against any person because that person “does or does not smoke, vape, aerosolize or otherwise use cannabis items.” Employers also will be prohibited from taking adverse action against an employee “solely due to the presence of cannabinoid metabolites in the employee’s bodily fluid” resulting from the use of lawful cannabis. In other words, an employer cannot take adverse action against an employee solely because that employee tested positive for lawful cannabis.

Employers will be permitted to require employees to undergo drug testing to detect lawful cannabis use under the following circumstances:

- Upon reasonable suspicion of an employee’s use of a cannabis item while engaged in the performance of the employee’s work responsibilities
- Upon a finding of any observable signs of intoxication related to usage of a cannabis item
- Following a work-related accident subject to investigation by the employer
- Random drug testing, pre-employment screening, and regular screening of current employees to determine use during prescribed work hours

There also will be a potentially costly and burdensome additional requirement. In addition to being required to utilize “scientifically reliable objective testing methods and procedures, such as testing of blood, urine or saliva,” employers must *also* conduct “a physical evaluation in order to determine an employee’s current state of impairment. *The physical evaluation shall be conducted by an individual with the necessary certification to opine on the employee’s state of impairment, or lack thereof, related to the usage of a cannabis item.*”

To implement this new “physical evaluation” requirement, the Act authorizes the creation of a Workplace Impairment Recognition Expert certification program, with certifications “to be issued to full- or part-time employees, or others contracted to perform services on behalf of an employer, based on education and training in detecting and identifying an employee’s usage of, or impairment from, a cannabis item or other intoxicating substance and for assisting in the investigation of workplace accidents.” The CRC, in conjunction with New Jersey Police Training Commission, is

authorized to adopt regulations creating such a certification program. The CRC may also allow persons who have successfully completed the Drug Recognition Expert program provided by the New Jersey Police Training Commission to be certified as Workplace Impairment Recognition Experts.

Thus, a positive drug test for cannabis will require the opinion of a certified Workplace Impairment Recognition Expert as to the employee's present state of impairment before adverse action can be taken against the employee. The purpose of this additional requirement is to assure that the employer is punishing actual impairment at work or during working hours and not lawful off-duty use. But this requirement will undoubtedly add to the cost and burden of detecting cannabis-impaired employees. In addition, the Act does not explain what an employer is to do if lawful cannabis becomes available before there are certified Workplace Impairment Recognition Experts available to issue the necessary confirmation of actual impairment.

The language of the Act suggests that the physical evaluation requirement applies only to "the usage of a cannabis item." It does not appear that the physical evaluation requirement will apply to alcohol use, to the use of illegal controlled substances, or to impairment caused by prescription medication.

Notwithstanding these new restrictions on drug testing for cannabis, the Act states that employers' rights and obligations to maintain drug and alcohol-free workplaces will not be restricted or preempted. Employers will not be required to permit or accommodate the use, consumption, being under the influence of, possession, transfer, display, transportation, sale or growth of cannabis or cannabis items in the workplace. And employers will continue to have the ability to implement policies prohibiting the use of cannabis items or cannabis intoxication during work hours. There is also a "saving clause" that will excuse employers from complying with the protections granted to lawful cannabis users if compliance with those protections would "result in a provable adverse impact on an employer subject to the requirements of a federal contract." In that case, the "employer may revise [its] employee prohibitions consistent with federal law, rules and regulations."

The Act contains a "Limitations" section that, among other provisions, states that no state or federal law pertaining to employment matters is in any way to be amended or affected; that no person may be required to violate a federal law; and, that no person is exempted from federal law or may be permitted to obstruct the enforcement of a federal law.

Individuals who engage in conduct permitted under the Act are exempt from any penalty, loss of rights or privileges, or disciplinary action by a business, occupational, or professional licensing board or bureau.

The "Jake Honig Compassionate Use Medical Cannabis Act," signed into law on July 2, 2019, required that an employee who tests positive for marijuana/cannabis be given written notice of the opportunity to offer a legitimate medical explanation for the positive test result. The employee would then have three working days either to request a re-test of the original sample or to produce evidence of a legitimate medical explanation, which may include an authorization for using

medical cannabis. The new Act pertaining to recreational cannabis does not amend or supersede this requirement. Pending further direction, employers should assume that this Honig Act notice and opportunity requirement remains in effect.

Users of lawful cannabis in New Jersey will now enjoy workplace protections that exceed those enjoyed by alcohol consumers and users of lawful prescription drugs. Combating cannabis use in the workplace will become a more difficult and costly proposition once lawful cannabis becomes available. Employers will need to amend their drug-free workplace policies accordingly. Some employers may simply decide that testing for cannabis or marijuana use is no longer worth the cost or effort. Others who find it necessary to continue to test for cannabis or marijuana use will need to prepare to comply with the Act's requirements, including arranging for the services of a certified Workplace Impairment Recognition Expert to verify positive test results.

Note that even after lawful cannabis becomes available, cannabis use by persons under the age of 21 will remain unlawful. Users under the age of 21 would therefore not enjoy the Act's employment protections. Employers will need to decide whether to continue their current pre-employment screening programs for employees and applicants under the age of 21. And employers for whom cannabis/marijuana testing is mandated by federal law, such as employers of Commercial Drivers License (CDL) holders, will be required to comply with federal law regardless of the Act.

PDFNJ is grateful to the author, Steve Trimboli, for providing this important information to our members in such a timely manner. We are also grateful as Mr. Trimboli has agreed to work with us to revise our drug-free workplace tool kit in response to this recent legislation, as well as to any relevant regulations related to the workplace that may be forthcoming from the Cannabis Regulatory Commission. Additional updates and alerts will be provided to members when appropriate in the weeks and months ahead in our ongoing effort to assist you in maintaining a healthy, safe and drug-free workplace.

About the Author: *Stephen E. Trimboli, Esq. Trimboli & Prusinowski, LLC, has been recognized as a Best Lawyer in the area of Employment Law, a New Jersey Super Lawyer, and an Employment Law Super Lawyer. He has received awards from the New Jersey Association of Counties; the National Public Employer Labor Relations Association, and the National Council on Alcoholism and Drug Dependence. He was the recipient of the 2019 PDFNJ Founder's Award for the dedication and leadership he has given to the New Jersey business community in the work needed to maintain a healthy and safe workplace environment.*

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