

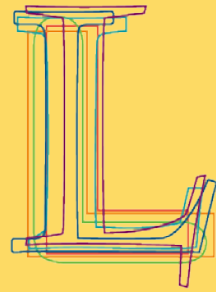
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Marijuana in the New Jersey Workplace: An Update

January 12, 2021



Littler[®]



Presented by



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Agenda

- Current status of recreational and medical marijuana law in New Jersey
- Recreational marijuana in New Jersey
- Drug testing for marijuana
- Impairment and performance issues
- Updating your drug-free workplace policy & procedures





Marijuana and the Workplace Today

Drug Testing in New Jersey Today

- No statute or rule
- New Jersey Supreme Court has permitted drug testing when the employer's need for the information outweighs an individual's reasonable expectations of privacy
- Random drug testing of individuals in safety- or security-sensitive roles is permitted
- Testing methods should not be more intrusive than necessary to obtain a valid result

New Jersey Compassionate Use of Marijuana Act Revisions

- “Medical cannabis” users protected in employment
- Employers cannot refuse to hire or employ, discipline or discharge any individual, or discriminate against any person in marijuana *solely* because someone is a registered qualifying medical cannabis patient
- Employers can take adverse action in appropriate circumstances based on test results
- Employee has right to contest positive result and must be provided written notice of the right, and three days in which to respond
 - Provide evidence of enrollment in program
 - Authorization issued by a health care provider
 - Confirmatory re-test request

NJ Supreme Court Holds Medical Marijuana Use Outside of the Workplace is Protected Under State Law and Employers are Required to Accommodate After-Hours Use

By Lauren J. Marcus, Dylan C. Dindial, Jennifer Chierek Znosko, and Elizabeth R. McKenna on March 16, 2020

Resolving prior uncertainty regarding the impact of the New Jersey Compassionate Use Medical Marijuana Act (CUMMA) on employees' employment rights, the New Jersey Supreme Court recently held that employees can maintain an action under the New Jersey Law Against Discrimination (NJLAD) for disability discrimination when an employee suffers an adverse employment action as a result of their lawful use of medical marijuana outside of the workplace during non-working hours. Employees may also bring a failure to accommodate claim under the NJLAD based on their lawful use of medical marijuana.

In *Wild v. Carriage Funeral Home, Inc.*, the plaintiff used medical marijuana, as permitted by the CUMMA, as part of his cancer treatment. After being involved in a vehicle accident while working, the plaintiff informed both his doctor and his employer that he had been using medical marijuana outside of work. Although his doctor did not perform a drug test because he did not perceive the plaintiff to be impaired at the time of the accident, the plaintiff's employer later required him to submit to a drug test before allowing him to return to work. While the Appellate Division noted that the results of the test were not in the record, it recognized that the complaint alleged that the employer told the plaintiff his employment was being terminated because of the positive drug test and because he failed to disclose his marijuana use, which might adversely affect his ability to

*Wild v. Carriage
Funeral Holdings,
Inc.*

NJ Supreme Court

Medical Marijuana Users May Be Entitled to Accommodation Under LAD

- Plaintiff states a claim... back to trial court to hear evidence
- Post-accident discovery of medical marijuana use, but not a post-accident test
- Two portions of CUMMA that impact employment rights:
 - “[n]othing in [the Compassionate Use Act] shall be construed to require . . . an employer to accommodate the medical use of marijuana in any workplace.” N.J.S.A. 24:6I-14 (2018)
 - The Act “shall not be construed to permit a person to: a. operate, navigate or be in actual physical control of any vehicle, aircraft, railroad train, stationary heavy equipment or vessel while under the influence of marijuana.” N.J.S.A. 24:6I-8 (2018)

“

CONSTITUTIONAL AMENDMENT TO LEGALIZE MARIJUANA

Do you approve amending the Constitution to legalize a controlled form of marijuana called “cannabis”?

Only adults at least 21 years of age could use cannabis. The State commission created to oversee the State’s medical cannabis program would also oversee the new, personal use cannabis market.

Cannabis products would be subject to the State sales tax. If authorized by the Legislature, a municipality may pass a local ordinance to charge a local tax on cannabis products.^[8]

”

New Jersey Referendum on Marijuana Legalization

Impact of Public Question One on Workplace

- Based on text: none
- Lawful off-work activity not protected as a general rule, but public policy arguments in favor of such protections exist
 - For example, in New Jersey an employer may not refuse to hire, discharge, or otherwise take adverse action against an employee because the individual smokes or uses tobacco products, or chooses not to use such products unless the employer's reason for doing so is reasonably related to the employment
- May be public policy arguments protecting marijuana users because the use is protected under the state constitution

ASAP

Recent Developments

NEWS & ANALYSIS > ASAP

Legalization of Recreational Marijuana in NJ: Voter Approved, But Not Yet in Effect

By Lauren Marcus and Dylan Dindial on November 6, 2020

PRINT

New Jersey Public Question 1 on this year's election ballot sought New Jersey voters' approval for a constitutional amendment to legalize the possession and use of marijuana for individuals age 21 and older, as well as the cultivation, processing and sale of marijuana. Based on preliminary results, the ballot question passed by an overwhelming margin.

Despite the passage of the ballot question, recreational marijuana is not yet legal in the state of New Jersey. Once confirmed, the Legislature or Attorney General's Office must enact legislation to implement the legalization and decriminalization of marijuana. In addition, New Jersey officials will begin establishing rules and regulations governing the legalization of marijuana. Until such legislation and regulations are announced, there are no changes to marijuana law in New Jersey.

As a reminder, in 2019, New Jersey [expanded the state's medical marijuana program](#) and adopted formal protections for employees and applicants who use medical cannabis. Further, earlier this year, the [state Supreme Court affirmed](#) that employers may be required to accommodate after-hours use of medical marijuana.

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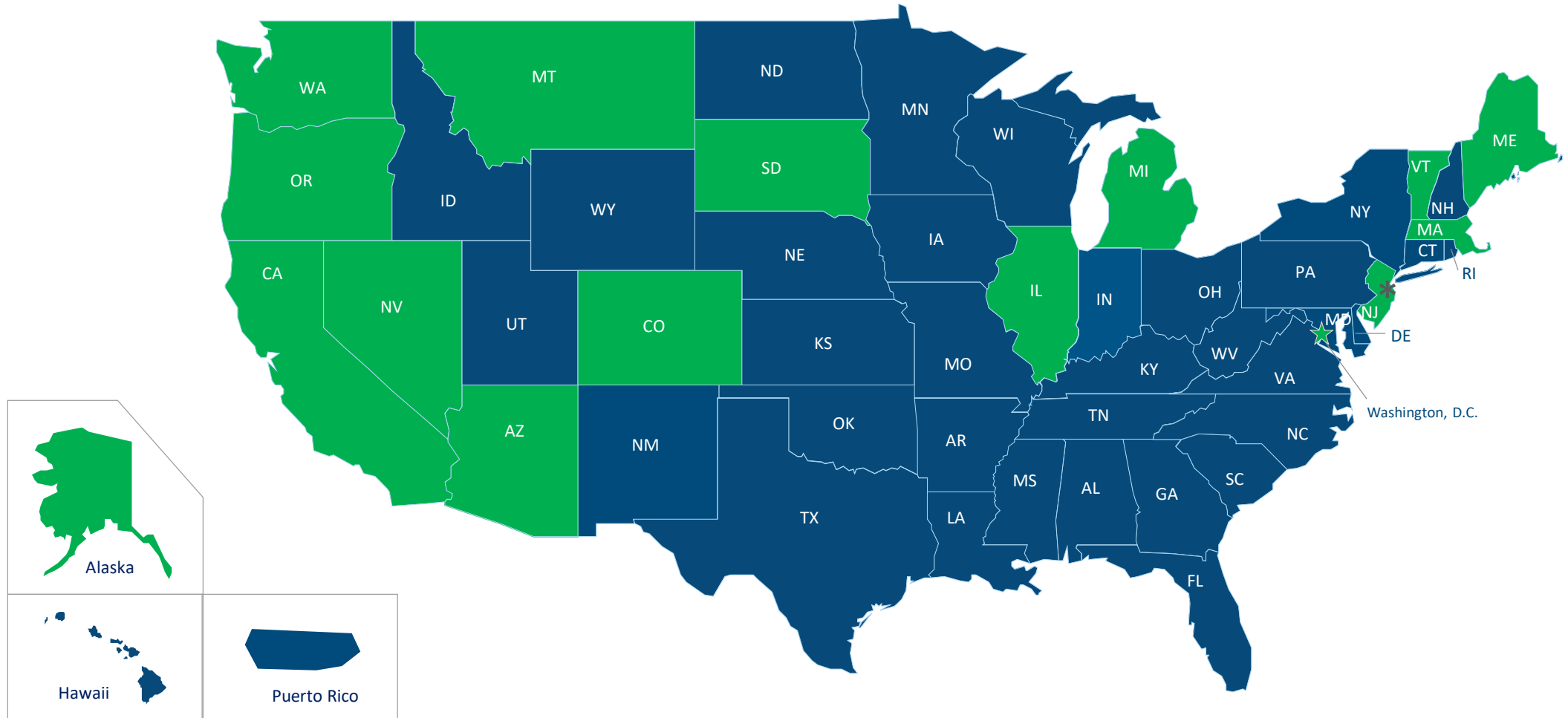
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Focus Areas

Recreational Marijuana Is Coming to the New Jersey Workplace

Recreational Marijuana Legal Status by Jurisdiction



Legal Protections for Workers Using Medical Marijuana

- Arkansas
- Arizona
- Connecticut
- Delaware
- Illinois
- Maine
- Massachusetts
- Minnesota
- Nevada
- New Jersey
- New Mexico
- New York
- Oklahoma
- Pennsylvania
- Rhode Island
- West Virginia



Legal Protections for Workers Using Marijuana Recreationally

Nevada

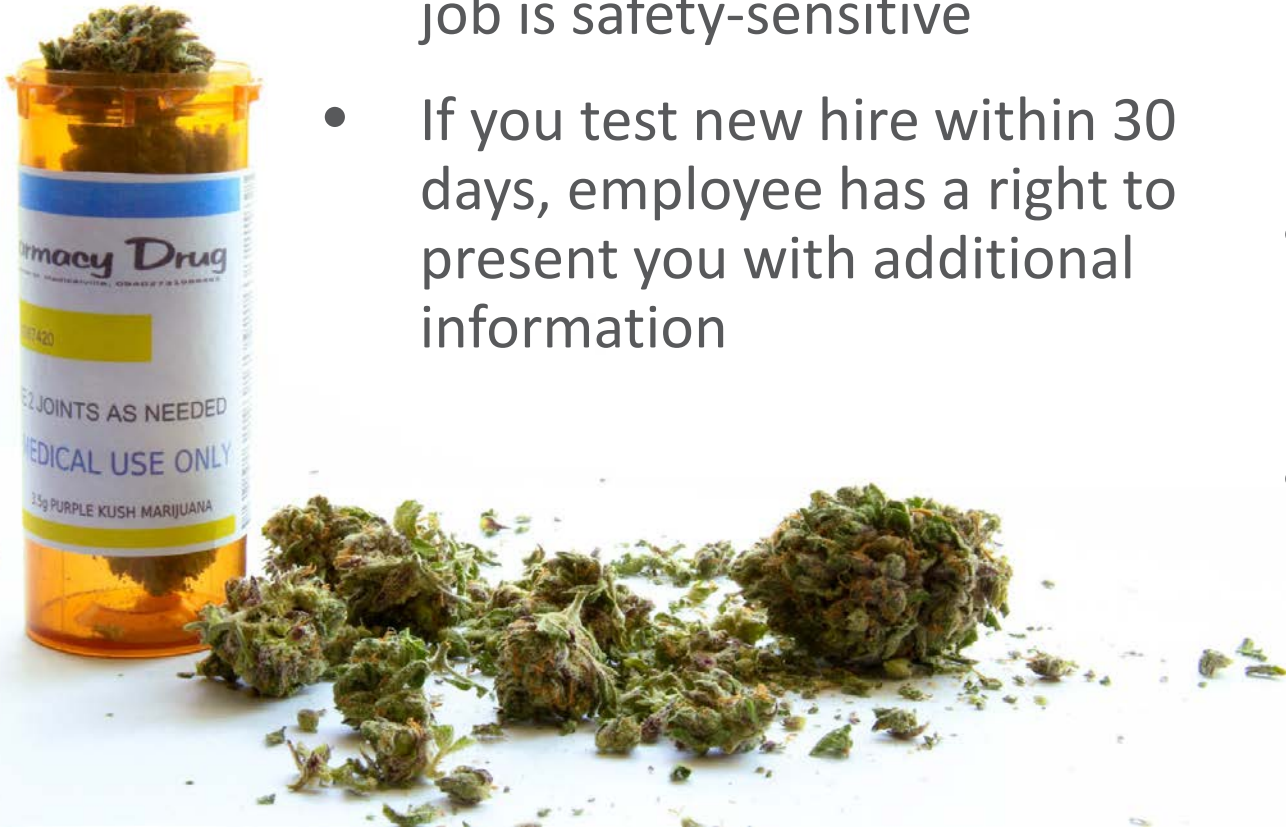
- Don't test pre-hire unless the job is safety-sensitive
- If you test new hire within 30 days, employee has a right to present you with additional information

New York City

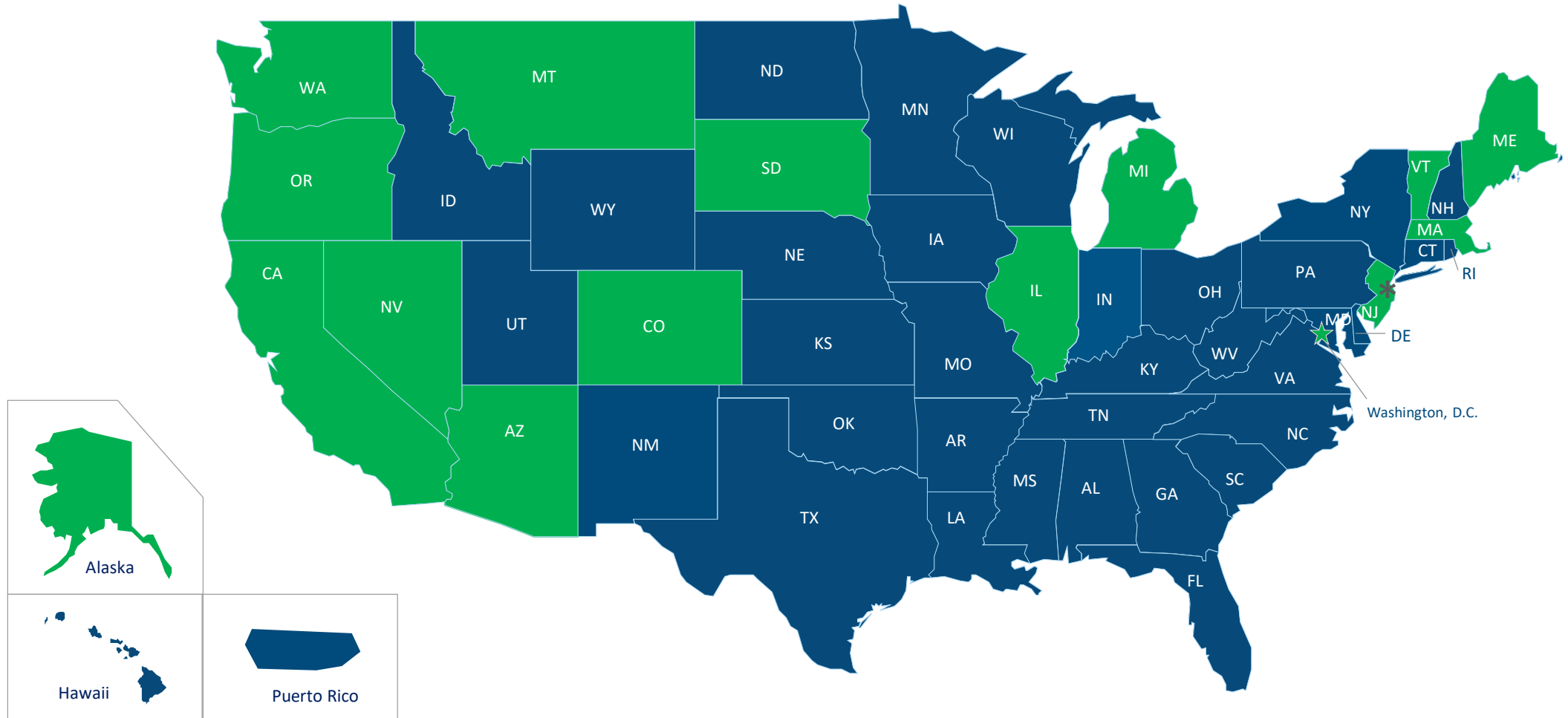
- Don't test pre-hire unless the job is safety-sensitive

Illinois, Maine

- Cannot refuse to hire simply because the applicant says they have used marijuana as permitted by law
- If they test positive, however, you may decline to hire



Recreational Marijuana Legal Status



New Jersey's Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (NJCREAMMA)

- Passed legislature 12/17/20
- Governor Murphy was expected to sign, but asked legislature to add penalties for under-21 users.
- Efforts to amend or correct the statute to address under-21 use failed late last week
- For our purposes, none of proposed “corrections” addressed employer/employee provisions of draft

New Jersey's Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (NJCREAMMA)

So, what does the proposed law say about marijuana in the workplace?

New Jersey's Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (NJCREAMMA)

Employers will not be permitted to refuse to hire any person, or discharge or take any adverse action against an employee (with respect to compensation or any other terms and conditions of employment) because they do, or do not, use cannabis products

New Jersey's Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (NJCREAMMA)

Employers cannot take any adverse employment action against an employee solely because they have tested positive for cannabinoid metabolites

New Jersey's Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (NJCREAMMA)

Law will become effective once signed by Governor Murphy... but certain provisions, like the employment provisions addressing impairment and drug testing, have a delayed effective date

???

New Jersey's Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (NJCREAMMA)

- If passed, the state will create a commission charged with adopting regulations to implement the law
- Regulations due either 180 days after law's passage, or 45 days after all members appointed, whichever is later.



Impairment, Performance, and Drug Testing for Marijuana Under NJCREAMMA

So... Can We Continue to Test for Marijuana?

Yes!

But that doesn't mean you can act on the results.

Drug Testing After NJCREAMMA

The draft statute makes it clear that drug testing will be permitted:

- upon suspicion of cannabis use, while the employee is engaged in work; or
- When you have observable signs of intoxication related to cannabis use; or
- Following a work-related accident; or
- At random; or
- When scheduled; or
- Pre-hire

Drug Testing After NJCREAMMA

“[A]n employee shall not be subject to any adverse action by an employer solely due to the presence of cannabinoid metabolites in the employee’s bodily fluid from engaging in conduct permitted” by the legislature

Drug Testing After NJCREAMMA

Employers can take adverse action only if the employee is impaired by marijuana at work. A drug test result can help show impairment.

Drug Testing After NJCREAMMA

But, what is a drug test?

No, we mean it.

NJCREAMMA would redefine drug test

Drug Testing After NJCREAMMA

Employers may take adverse action following a positive drug test for marijuana.

A drug test must include “scientifically reliable objective testing methods and procedures, such as blood, urine or saliva **and** a physical evaluation in order to determine an employee’s state of impairment.”

Drug Testing After NJCREAMMA

“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” as a result of marijuana use.

The employer may use the results of the drug test when determining the appropriate employment action concerning the employee, including, but not limited to dismissal, suspension, demotion, or other disciplinary action.

Drug Testing After NJCREAMMA

“The commission, in consultation with the Police Training Commission... shall prescribe standards in regulation for a Workplace Impairment Recognition Expert certification... 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”

Drug Testing After NJCREAMMA

We don't know what types of drug tests the regulations will deem scientifically reliable

We don't know what sort of education will be necessary to become a Workplace Impairment Recognition Expert

For performance issues, it is going to be a lot easier and more predictable to take adverse employment action on basis of performance, even if you suspect cannabis impairment



Updating Your Policy & Procedures

Assuming New Jersey enacts NJCREAMMA without changes to employment provisions...

Assuming NJCREAMMA Becomes Law

- OK to prohibit the possession and use of marijuana at work and during work time
- OK to discipline workers who come to work impaired
- OK to drug test for marijuana
- Not OK to act on basis of off-work marijuana use permitted under New Jersey laws

Assuming NJCREAMMA Becomes Law

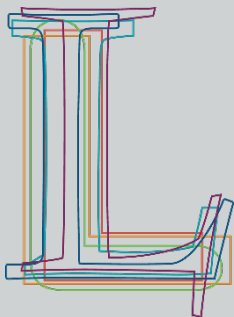
- NOT OK to act on basis of positive test alone, unless “test” includes physical examination by certified impairment expert
- UNCLEAR what evidence will suffice to establish impairment

Assuming NJCREAMMA Becomes Law

- NO exceptions for workers in safety-sensitive roles UNLESS subject to federal regulations explicitly prohibiting such use (i.e., transportation, nuclear power)
- UNCLEAR whether positive test results can be used to discipline workers who operate motor vehicles with marijuana in their system
 - Nothing in the law “is intended to allow driving under the influence of cannabis items or driving while impaired by cannabis items or to supersede laws related to driving under the influence of marijuana or cannabis items or driving while impaired by marijuana or cannabis items”

Assuming NJCREAMMA Becomes Law

- OK to prohibit the use and possession of cannabis products at work and during work hours
- UNCLEAR whether you must excuse out of state residents who work in New Jersey and who use marijuana
- UNCLEAR whether you must excuse New Jersey residents who work out of state and who use marijuana
- EDUCATING workers about your expectations and any changes in policy will be crucial



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Questions?

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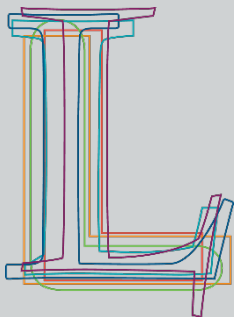
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