

What Does Drug-Free Workplace Mean in 2024?

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Littler[®]

Presented by



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Agenda

- Overview of evolving drug use law and policy in New Jersey and the United States
- What can an employer expect and require?
- Impairment and performance issues
- Can we test for marijuana?
- Updating your drug-free workplace policy & procedures





Overview of NJ Drug-Free Workplace Law

“Cannabis” vs. “Marijuana”

- New Jersey’s law, enacted 2021, uses the term “cannabis.”
- From an employment and testing perspective however, only some forms of cannabis contain tetrahydrocannabinol – THC
- THC is the compound that has a psychoactive effect, that can cause a “high”
- Hemp and other cannabis products are lawful ***as a matter of federal law*** if they contain less than .3% THC
- Employer drug tests look for the presence of THC, not CBD
- To distinguish between cannabis products, we talk about marijuana use because THC containing products are the focus of the legalization effort
- It may be difficult or impossible to know if a particular cannabis product contains a particular amount of THC

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

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

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

Employers cannot 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

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

The statute provides that drug testing is 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

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



What's New with Marijuana and Marijuana Testing In New Jersey and Elsewhere

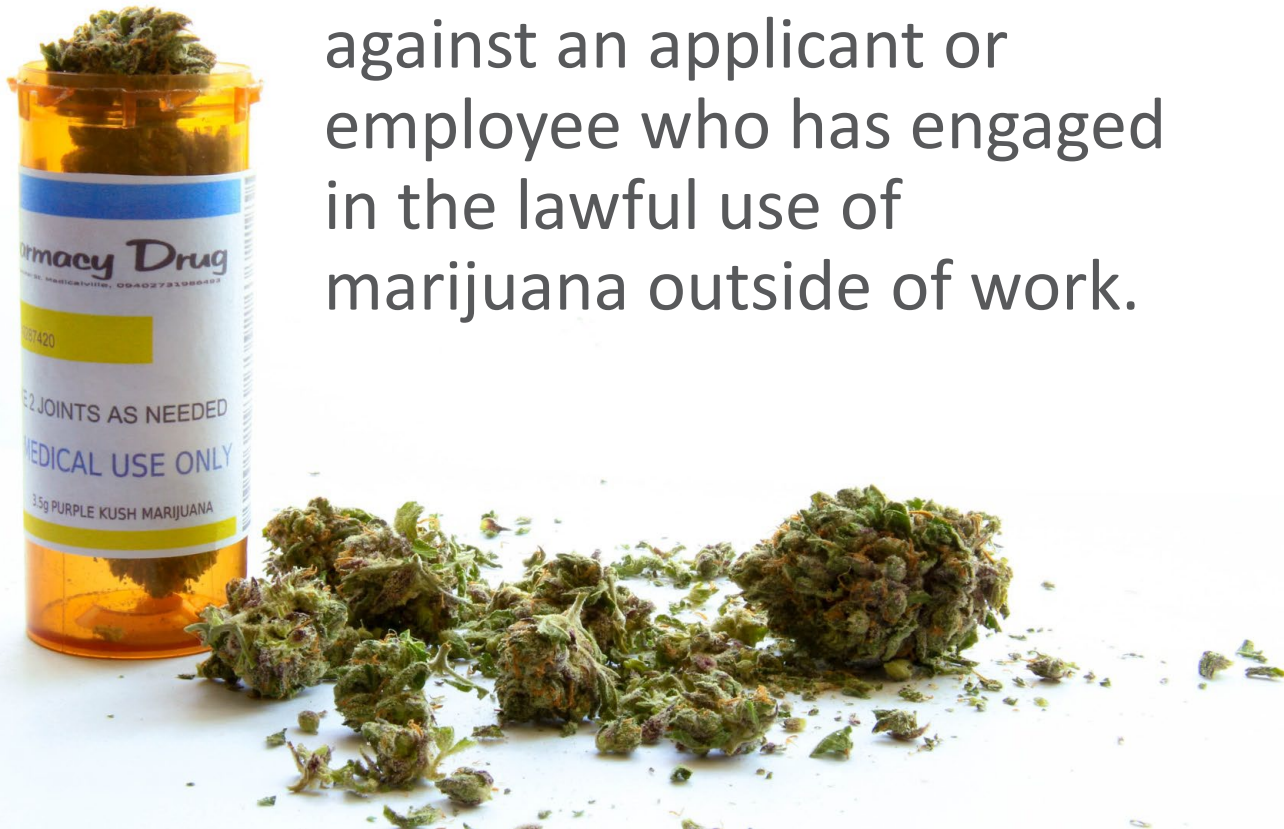
2024 Legal Protections for Workers Using Marijuana Recreationally

California

Unlawful to discriminate against an applicant or employee who has engaged in the lawful use of marijuana outside of work.

Washington

Don't test pre-hire unless the job is safety-sensitive OR the test measures active THC in the individual's system



Legal Protections for Workers Using Marijuana Recreationally

Nevada

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

Montana

- Off-work marijuana use is not a reason for discipline unless employer has a policy prohibiting it

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

New Jersey, New York, Rhode Island

- Off-work use of marijuana protected. No adverse action unless worker uses, possesses, or comes to work impaired



Enter California's AB 2188.....

- Signed into law by Governor Newsom on September 18, 2022, effective January 1, 2024
- Amended the California equivalent of the NJ Law Against Discrimination and made it unlawful to discriminate against an applicant or employee who has engaged in the lawful use of marijuana outside of work
- Employees in the building and construction trades not protected

California Government Code Section 12954

“[I]t is unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalizing a person, if the discrimination is based upon any of the following:

- (A) The person's use of cannabis off the job and away from the workplace....
- (B) An employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.

What Kind of Test May Comply With the New Law?

Oral Fluids Testing



Oral Fluids Testing

- Oral fluids testing is gaining widespread support, and has been approved for use by the Federal DOT

“While the science supporting oral fluids testing did not meet the standards of HHS [the US Department of Health and Human Services] in 2004, science and research studies have now reached the point where HHS has been able to determine that oral fluid testing is an appropriate alternate testing method for identifying illicit drug use in the Federal workplace.”

“this alternative specimen [may be used] with the same level of confidence that has been applied to the use of urine.”

(Final Rule. Procedure for Transportation Workplace Drug and Alcohol Testing Programs: Additional of Oral Fluid Specimen Testing for Drugs.)

Potential Benefits to Oral Fluids Testing

- Oral fluids collections are always observed collections, unlike urine testing.
- Shorter detection window aids in showing present impairment.

Special Considerations for Oral Fluids Testing

- Initial collection can be conducted on-site. Training recommended for those administering the collection.
- Confirmatory testing available?

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

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 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”

Workplace Impairment Recognition Expert

- The Commission did not publish either regulations or guidance.
- The Commission indicated that employers could make decisions about impairment without the use of a WIRE

Other Methods of Screening for THC

- California's Legislature said:

“As science has improved, employers now have access to multiple types of tests that do not rely on the presence of nonpsychoactive cannabis metabolites. *These alternative tests include impairment tests, which measure an individual employee against their own baseline performance* and tests that identify the presence of THC in an individual's bodily fluids.”

AB 2188 (Sec. 1)

“Impairment Tests”

- What are these tests?
- Possibly tests that measure dexterity or reasoning ability, periodically compared against an individual’s baseline performance.
- None in broad circulation or that are validated as reliable.



Other Forms of Testing

- Retinal scans, marijuana breathalyzers, and perhaps more?
- Considerations:
 - Is it a medical exam?
 - Has it been validated as effective and reliable?
 - Cost?



Gun Rights and Marijuana?

- Federal law prohibits marijuana users from possessing firearms
- New Jersey's administrative courts have ruled that law enforcement officers may use marijuana pursuant to CREAMMA, even if they carry firearms
- In Virginia, woman sentenced to 21 months in prison on federal charges after prosecutors learned she possessed marijuana and a firearm
- Mayor of Jersey City has authorized a suit against the State of New Jersey for its policy of allowing police officers to use marijuana off duty
- August 2023, 3-judge panel of U.S. Court of Appeals for the 5th Circuit ruled federal law was overbroad in that it barred possession of a firearm for anyone with a history of marijuana use



Drug-Free Workplace Developments

Opioid Abuse Updates

- More than 100,000 deaths each year for each of the last several years
- National Safety Council reports over 525 people died of an opioid overdose *at work* in 2023
- Naloxone (Narcan) – more employers are adding to workplace safety programs
 - “The “Good Samaritan” component of the “Opioid Antidote and Overdose Prevention Act” provides legal protections, both civil and criminal, to the overdose victim and the person who seeks medical assistance, including the administration of naloxone, for the victim of an opioid overdose.”

From NJ.gov

Opioid Abuse Updates

Workplace Safety & Health Topics

Promoting productive workplaces
through safety and health research 

Opioids in the Workplace

[Print](#)

Updated March 1, 2023

The effects of opioid use and misuse are not isolated to work or home environments, and the potential for opioid use disorder may be preceded by injuries that happen in the workplace, with the consequences affecting both an individual's working life as well as their home life.

By using [Total Worker Health®](#) principles, NIOSH is developing solutions to help workers and employers facing this crisis in their communities. about the specific steps NIOSH is taking to approach this challenge.



Information for:



[First Responders](#)



[Healthcare Personnel](#)



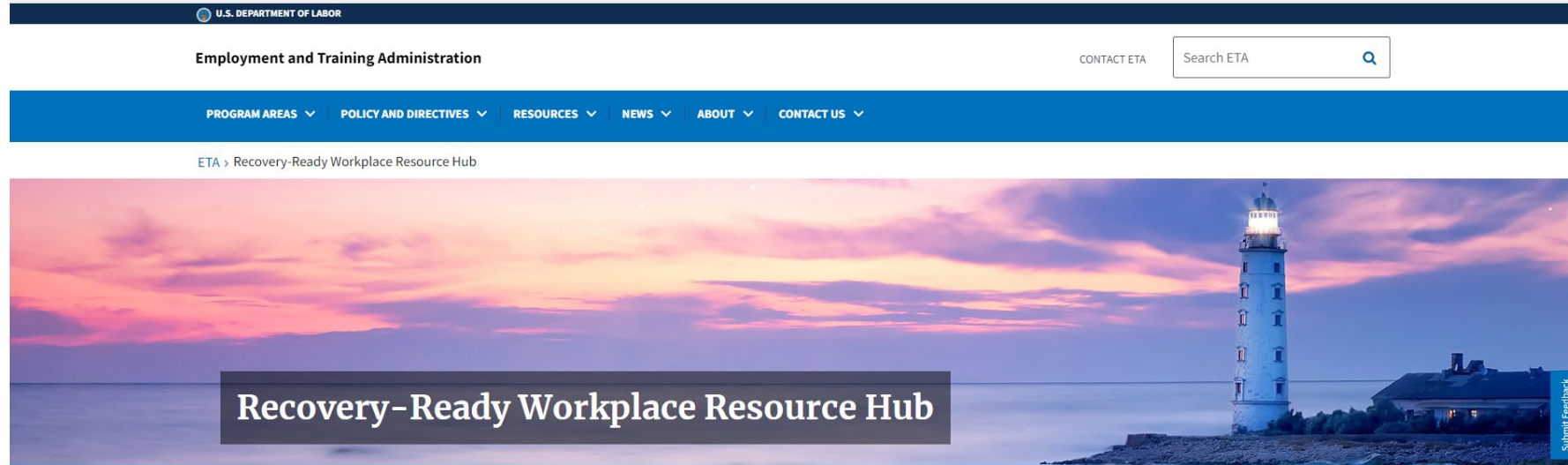
[Researchers](#)



Workplace Resources for Employers and Workers

- [Using Naloxone to Reverse Opioid Overdose](#)
- [Medication-Assisted Treatment](#)
- [Infographics](#)
- [Recovery-Ready Workplace Resource Hub](#) 
- [Initiatives to Prevent Opioid Misuse and Promote Recovery-Friendly Workplace Programs \(nih.gov\)](#) 
- [Opioid Overdose Prevention Toolkit – Substance Abuse and Mental Health Services Administration](#)  [\(en Español\)](#) 
- [Prescription Opioid and Benzodiazepine Medications and Occupational Safety and Health](#)

Opioid Abuse Updates



What is a Recovery-Ready Workplace?

Recovery-Ready Workplaces adopt policies and practices that:

- expand employment opportunities for people in or seeking recovery;
- facilitate help-seeking among employees with substance use disorder (SUD);
- ensure access to needed services, including treatment, recovery support, and mutual aid;
- inform employees in recovery that they may have the right to reasonable accommodations and other protections that can help them keep their jobs;
- reduce the risk of substance misuse¹ and SUD, including through education and steps to prevent injury in the workplace;
- educate all levels of the organization on SUD and recovery, working to reduce stigma and misunderstanding, including by facilitating open discussion on the topic; and,
- ensure that prospective and current employees understand that the employer is recovery-ready and are familiar with relevant policies and resources.

Search for RRW Resources:

Search

Sign Up for Alerts!

Psychedelics and Emerging Drugs of Abuse

- Psilocybin
 - Denver, Oregon, Colorado
- Kratom
 - mitragynine
- “Gas-Station Heroin”
 - The New Jersey Poison Center (NJPIES) has recently identified a cluster of poisoning cases
 - involving tianeptine, a substance with opioid-like effects that is being falsely marketed and sold
 - across the state in gas stations and online as a dietary supplement. Common names for
 - tianeptine include “gas station heroin,” “ZaZa Red,” or “Neptune’s Elixir” (among others).
 - DEA concluded tianeptine products related to poisoning of NJ residents also included synthetic marijuana



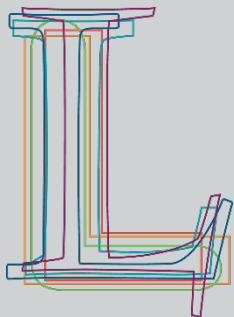
Updating Your Policy & Procedures

What Can Our New Jersey Policies Require?

- OK to prohibit the possession and use of marijuana (including “edibles”) and all other illegal drugs at work and during work time
 - Even if lawful for those over 21, can treat like alcohol at work
- OK to discipline workers who come to work impaired

What Can Our New Jersey Policies Require?

- OK to drug test as long as policy follows both New Jersey Supreme Court's guidance on whom and how to test, and NJCREAMMA
- You don't need a test to act if you have evidence of a policy violation



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Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.

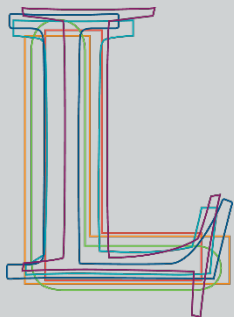
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