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New Jersey Marijuana Law Employment Provisions Take Effect

By Lauren J. Marcus, Esq., Littler Mendelson

On August 19, 2021, the New Jersey Cannabis Regulatory Commission (the Commission) issued long-awaited initial rules implementing the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (the Act), which Governor Murphy signed on February 22, 2021. The Act legalizes the use of a form of recreational marijuana (referred to throughout the legislation as “cannabis”) for adults over the age of 21 and creates many obstacles for employers seeking to maintain a drug-free workplace. The new rules deal almost exclusively with the provisions governing the recreational cannabis market, leaving many employer questions unanswered.

While the Act became effective immediately upon enactment in February, the general employment provisions of the Act were not operative until the Cannabis Regulatory Commission adopted initial rules. Now that those rules have been adopted, the provision of the Act stating “[n]o employer shall . . . take any adverse action against any employee . . . because that person does or does not smoke, vape, aerosolize or otherwise use cannabis items, and an 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” is now effective.

Under the Act, employers may require employees to submit to drug tests under the following circumstances: (a) upon suspicion of cannabis use **while the employee is engaged in the performance of their work responsibilities**; (b) upon finding any observable signs of intoxication related to usage of a cannabis item; or (c) following a work-related accident (subject to investigation by the employer). Employers may also utilize random drug testing, pre-employment screening, or routine testing of current employees to determine cannabis use during

an employee's working hours. However, as set forth in more detail below, it is unclear how an employer may act upon test results, if it cannot act solely on the basis of a positive drug test. In other states that have limited an employer's right to act solely based on a worker's medical use of marijuana, the fact of the marijuana use may be offset when coupled with some other factor, such as safety concerns, impairment during the work day, or involvement in an accident. While it had been the hope of many that the regulations would provide further clarification, they did not address these issues plaguing employers throughout the state.

The Act's revision to the term "drug test" further complicates matters. Although testing is allowed in the aforementioned circumstances, the Act redefines what it means to conduct a drug test. Specifically, the term "drug test" now means a process using (a) "scientifically reliable objective testing methods and procedures," such as blood, urine or saliva tests; and (b) a physical evaluation by an individual certified as a Workplace Impairment Recognition Expert (WIRE). If both the WIRE and the scientific drug test indicate that an employee is under the influence ***in the workplace or during work hours***, an employer may take an adverse action. It is unknown what test, if any, is deemed to be "scientifically reliable," as drug tests, like alcohol tests, measure only the amount of drug – or drug metabolite – in the urine test specimen. As with alcohol tests, cannabis tests measure only the amount of substance currently in the test sample and do not measure impairment. However, the state does not require evidence of impairment for an employer to act on a positive alcohol test, like it does for cannabis. Furthermore, it is still not clear how one becomes a WIRE, how they can be used, and how to effectively discipline employees for suspected drug use under the Act.

While the Commission has not yet issued regulations concerning the requirements to become a WIRE, per the Act, the standards shall be established in consultation with the Police Training Commission, which is responsible for certifying drug recognition experts (police officers trained to determine whether an individual is under the influence). The Supreme Court of New Jersey has once again ordered hearings to determine whether drug recognition expert testimony can be considered reliable expert testimony in court. These hearings were scheduled to occur back in 2019, but the pandemic delayed them. It is unclear how, if at all, the results of said hearings will impact the WIRE program under the Act.

As a reminder, the statute does not recognize any exception that would allow an employer to bar off-duty marijuana use by employees in safety-sensitive positions, so employers are concerned to know how, if at all, marijuana use by workers in these sensitive roles can be considered when making employment decisions. The statute does provide that if compliance with the law results in a "provable adverse impact on an employer subject to the requirements of a federal contract," then the employer may enact policies in a manner that is consistent with federal law, rules and regulations. As such, employers that are parties to federal contracts or that may lose federal funding for employing individuals who use marijuana (as it is still illegal under federal law), are exempt from certain requirements.

Surprisingly, the regulations state only that, at this time, employers are not required to perform a physical evaluation until the Commission develops the standards for a WIRE certification. Notably, while no physical evaluation is required until the Commission promulgates additional regulations, the above-quoted provision precluding adverse action based solely on the presence of cannabinoid metabolites appears to still be in effect. We recommend that employers with reasonable suspicion and/or post-accident testing policies document their reasons for concluding an individual might be impaired at work as part of their testing program.

While marijuana testing remains permitted, absent reason to believe an individual may be impaired, an employer cannot take an adverse action based solely on a positive drug test, limiting the usefulness of pre-employment or random drug testing. Until the Commission issues further guidance, employers should proceed carefully in their application of drug-testing policies in the state and are advised to reach out to legal counsel for guidance.

About the Author: *Lauren Marcus, Esq., is a shareholder at Littler Mendelson who represents and advises employers in various aspects of employment law and regularly advises and counsels clients on a wide array of day-to-day concerns, including leaves of absence issues, wage and hour questions and handbooks and policies. Lauren's practice focuses on advice regarding leaves of absence and accommodations under both state and federal law, paid sick leave and drug and alcohol law compliance. Lauren has represented employers in a variety of matters in both New Jersey and New York state and federal courts and before governmental agencies. www.littler.com*

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