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## ***Marijuana Legalization One Year Later – What Have Employers Learned?***

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A year ago this week, New Jersey Governor Phil Murphy signed the legislature-passed Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (“CREAMMA”), formalizing the state’s embrace of marijuana as a consumer product. CREAMMA implements the New Jersey electorate’s November 2020 vote in favor of legalizing marijuana in the Garden State. In adopting CREAMMA, New Jersey also became the first state to create substantial employment protections for workers who use marijuana. One year later, it is appropriate to assess what has changed with respect to New Jersey’s drug-free workplaces, what has not, and where the rules surrounding marijuana use and the workplace remain murky.

### New Jersey Workers Have a Right to Engage in Off-Work Marijuana Use

New Jersey was the first state in the nation to adopt a law that requires employers to ignore workers’ off-work use of marijuana. New York swiftly joined New Jersey in this regard, and today the two states are unique in protecting workers from discrimination on the basis of their marijuana use (despite the fact that neither state has yet established a means by which individuals can lawfully purchase marijuana and marijuana products for recreational use). At this time, New Jersey law prohibits state employers from considering an individual’s off-work use of cannabis in making employment decisions,

including both hiring decisions and those involving the terms and conditions of employment. There are no exceptions for roles considered safety-sensitive — in other words, an employer who knows that a worker uses marijuana away from work cannot steer that worker to a job with fewer safety concerns without running afoul of the statute.

Although the new cannabis law delayed the implementation of these employment protections for approximately six months, pending regulatory guidance, that guidance was issued in August 2021 and provided little clarity as to the employment provisions of the statute. The statute's direction that employer drug tests must include an assessment of potential impairment made by a workplace impairment recognition expert (or "WIRE") has gone unfulfilled, as the state Cannabis Commission has yet to develop a training or certification standard for such a role. On the eve of the employment protections becoming effective, the Commission issued regulatory guidance directing employers that they could continue testing without the aid of a WIRE, leading to confusion among employers as to whether they could continue to rely on a positive test result in making employment decisions.

The law does not prohibit a business from drug testing applicants and employees, even for marijuana, but regardless of regulation, it does limit their ability to act on test results. CREAMMA says that employers cannot take any adverse employment action against an employee simply because they have tested positive for "cannabinoid" metabolites.

As a practical matter, employer drug tests almost uniformly test for tetrahydrocannabinol (THC) metabolites but not for evidence of other cannabinoids. Thus, the use of cannabis products that include only federally lawful CBD (with trace amounts of THC) should not cause a positive drug test. THC is the psychoactive chemical that produces a "high" for marijuana users and is associated with potential impairment. Still, absent evidence of workplace impairment in addition to the positive test, an employer may be precluded from acting on the results of these tests — even if the employee, for example, operates a vehicle in the course and scope of employment. In consequence of this change, employers are dropping pre-hire marijuana tests, safety-sensitive random tests, and other suspicionless drug tests, concerned that knowing about a worker's marijuana use but being unable to act on it may lead to allegations that an employer failed to adequately supervise its workers. (In contrast, employers are generally able to act if an employee tests positive for alcohol.) Of course, employers can still take action based on an employee's performance without knowing why the individual's performance is impaired, but especially for workers who work in the field, or otherwise without close supervision, it is often difficult to assess impairment.

The law also limits the use to which past marijuana crimes an employer may consider in making employment decisions, and the state has expunged hundreds of thousands of such convictions. If an applicant volunteers a criminal history involving a marijuana crime, be wary of relying upon that information until you are certain it is safe to do so.

When Can an Employer Take Note of Worker Marijuana Use?

Employers can in fact adopt important rules on marijuana use, even after CREAMMA. It may no longer “go without saying” that employers may prohibit the use of cannabis products, including marijuana, at work, so to confirm: an employer can adopt a policy prohibiting employees from using and possessing cannabis and cannabis products during work time or while present at your workplace. Communicating your policy effectively is important, because employees may not have thought about whether they can bring their cannabis vape to work, whether meal or break periods are “work time,” or what you expect if they are working from home. By openly addressing the issue, you can help avoid unhappy misunderstandings.

An employer can also act whenever it believes an employee has come to work impaired even if that impairment is caused by marijuana use outside of work. How will you know an individual is impaired? Absent training as an impairment expert, an employer may worry that they may misinterpret what they are seeing. Generally, you are looking for indications that an employee is not well, not focused, or otherwise behaving in a manner that is notably different from what you expect of them. Unusual behavior is not, of course, necessarily related to substance abuse, but it does merit engaging with the employee to learn more. Don't accuse a worker of being “high” or on drugs; ask about what has been observed or reported and ask for an explanation. Make your own observations, and consider any other information you have. If the employee's explanation doesn't allay your concerns, a drug test may be part of your follow up, and the test may include marijuana. If you can, consider obtaining training for your supervisors on making reasonable suspicion determinations. Your goal is to gather as much information as possible to aid you in making a decision, at least until the Cannabis Commission provides further guidance.

Employers should also be aware of the interplay between federal and state law. CREAMMA explicitly states that an employer cannot act on the basis of a positive marijuana test of an employee's bodily fluids, unless failing to do so would violate a federal contract or cause it to lose federal funding. Although not explicitly stated, it is also true that an employer cannot use a worker it knows to use marijuana in a federally regulated role that prohibits such use, such as in commercial driving or nuclear power where those regulations specifically mandate testing. Simply selling goods or services to a federal customer, however, may not exempt you from the reach of CREAMMA's employment protections. What if you have out of state workers? The law of the jurisdiction in which the employee is assigned to work typically applies. If in either case you are unsure, you may wish to consult with employment counsel.

Employers who conduct reasonable suspicion marijuana tests can also take steps to ensure their drug tests are administered as soon as possible after the impairment is noted, that the tests themselves reflect the marijuana active in the individual's system, if possible, and that the tests are conducted using best practices that boost the likelihood that the test will provide reliable information on which to act.

A year has passed since marijuana legalization began in New Jersey, and much is still unknown, including whether widespread marijuana use leads to a spike in workplace

accidents or instead is seamlessly integrated into the state's vibrant business community. Given the delay in meaningful regulation, the fact that marijuana is not legally obtainable in the state, and a delay in many businesses' return to in-person work, it will likely take another year, or more, to assess the impact.

**About the Author:** *Nancy N. Delogu, esq. was a presenter for our most recent **Drugs Don't Work in NJ** webinar, "How to Handle Marijuana in the Workplace". She is a shareholder of Littler Mendelson PC and a nationally recognized authority on federal and state drug-free workplace and drug testing issues and has spent much of her career focusing on workplace drug policies and procedures, including programs that are mandated by the Department of transportation.*

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