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Two Years Later, Significant Questions Remain for New Jersey Employers Concerned About Employee Cannabis Use

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More than two years after Governor Murphy signed the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (the Act), employers are still waiting for guidance on their obligations and options as to work force marijuana use. The New Jersey Cannabis Regulatory Commission (the Commission), which exists to develop rules regarding the implementation of the Act, took nearly 18 months to issue guidance on the impact of the law to the New Jersey workplace. The guidance, issued in September 2022, does not provide the sort of detail many employers were hoping for, and many employers find they have unanswered questions.

The Act, signed by Governor Murphy on February 22, 2021, legalized – as a matter of state law – the recreational use of marijuana (referred to throughout the legislation as “cannabis”) by adults. The law contains employment protections for individuals who use marijuana away from work, creating obstacles for employers seeking to maintain a drug-free work force. The current law authorizes state residents over the age of 21 to engage in the recreational use of marijuana and prohibits employers from taking adverse employment action solely based on an individual’s use of marijuana while off duty and away from work. At the same time, the law suggests that employers *are* permitted to enforce workplace policies that prohibit employees from being under the influence of

marijuana or impaired by marijuana or marijuana products at work – but prohibits employers from relying upon drug test results to implement those policies. In other words, although an employer can discipline employees from coming to work impaired, the employer cannot make employment decisions based solely upon the results of a positive marijuana drug test for marijuana. Since the law was enacted, the Commission has failed to implement the portions of the law intended to guide employers on otherwise permissible means of evaluating employee impairment.

To address this issue, the Act created the role of Workplace Impairment Recognition Expert (WIRE). The WIRE, an individual designated by the employer, is supposed to receive training and be certified to assess whether an employee is under the influence in the workplace or during work hours. A WIRE's assessment of impairment, perhaps in conjunction with a positive drug test, will enable an employer to take an adverse action against the employee.

Instead of following the Act's direction, however, the Commission has failed to adopt any regulation or issue any guidance creating qualification standards for WIREs, explaining what a WIRE may do, or even setting out the physical signs a WIRE can rely upon in evaluating an individual's perceived impairment. This failure to act has created confusion and frustration for employers. The Commission's September 2022 "Guidance on 'Workplace Impairment'" therefore provides the only direction employers have received on how to detect, evaluate, and act upon an employee's perceived impairment arising from the use of marijuana or marijuana products.

The guidance suggests that the recommended course of action for employers is to establish – if not in place already – evidence-based protocols that may indicate impairment, and to document observed behavior and physical signs of impairment as set out in those protocols. It also indicates that documented reasonable suspicion of impairment, coupled with a positive marijuana drug test verifying that the individual has used an impairing substance in recent history *may* suffice to show impairment in violation of employer policy. The Commission suggests that the employer designate a staff member to assist in making determinations regarding suspected drug use. The guidance indicates that the individual making reasonable suspicion determinations may use, among other things, cognitive impairment tests — that is, scientifically valid, objective, consistently repeatable, standardized automated tests designed to measure an employee's impairment — or ocular scans may provide evidence to establish reasonable suspicion of cannabis use or impairment at work. The guidance does not address whether impairment tests of the type described are readily available, if any have been validated as accurate, or whether these methods can be implemented in the workplace in accordance with the Americans with Disabilities Act or the New Jersey Law Against Discrimination provisions on the use of tests that may qualify as medical examinations.

The Commission does recommend that the staff member making a reasonable suspicion determination utilize a "Reasonable Suspicion Observation Report" (a sample of which has been provided by the Commission and can be found [here](#)), to document the physical signs and evidence of suspected drug use, as well as the testing procedures used. The form lists several physical signs or symptoms and behavioral indicators that can be

evaluated to assist in the determination. The guidance also suggests that a second individual, such as the employee's manager or supervisor, be involved in the testing procedures. If a second individual is used, that person also must complete a separate Reasonable Suspicion Observation Report.

As a reminder, the statute does not recognize any exception (aside from a narrow group of federally regulated transportation workers) that would allow an employer to bar off-duty marijuana use by employees in safety-sensitive positions. 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 if they employ individuals who use marijuana (still illegal under federal law), are exempt from certain requirements. Other than workers outside this narrow group, the fact that the work is safety-sensitive will not excuse an employer from proving that the employee in question used, possessed, or was under the influence of marijuana at work before making an adverse employment decision.

As an illustration of this principle, at least one state-appointed administrative law judge has concluded that the law does not permit a municipality to discipline law enforcement officers who, based on a positive drug screen, absent evidence that the individual was impaired on the job. In the wake of that decision, the New Jersey Attorney General issued revised Law Enforcement Drug Testing policies in February 2023.¹ The updated guidelines state the marijuana/cannabis shall only be included on the law enforcement drug testing panel when the officer being tested is assigned to a federal task force, holds a federally regulated license that requires testing, is governed by federal contract or federal grant, or shows signs of being impaired while working.

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 use of pre-employment or random drug test results. Until the Commission issues further guidance or regulation on how to become and/or use a WIRE, employers should continue to document reasonable suspicion including observations and evidence that an individual may be impaired during working hours or at work. Employers therefore should continue to proceed carefully in their implementation of drug-testing programs and are advised to reach out to legal counsel for guidance as appropriate.

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¹ See the Attorney General's Law Enforcement Drug Testing Policy, [*Law-Enforcement-Drug-Testing-Policy_rev-Feb-2023.pdf \(nj.gov\)](https://www.nj.gov/attorney-general/wp-content/uploads/2023/02/Law-Enforcement-Drug-Testing-Policy_rev-Feb-2023.pdf)

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