

# DRUGS DON'T WORK IN NJ

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## New Jersey Continues to Struggle with Scope of Cannabis Law and Other Legal Developments

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Three years after New Jersey legalized cannabis for adult recreational use, significant questions remain regarding the law, verbosely titled the “Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act” (CREAMMA), and its impact on employers and their drug-free workplace programs. For example, in May 2023, a federal district court interpreting New Jersey law ruled that CREAMMA, the statute that legalized marijuana for adult recreational use, may prohibit employers from taking adverse action against individuals simply because they test positive for marijuana, but that the statute did not permit employees and applicants to sue their employers for violations of that law.<sup>i</sup> That case was immediately appealed to the U.S. Court of Appeals for the Third Circuit, where it is still pending. Just a month earlier, another case in federal court allowed the plaintiff, who claimed that he was wrongfully discharged after testing positive for marijuana on a post-accident test, to move forward with his claims.<sup>ii</sup> Meanwhile, despite Civil Service Commission determinations that New Jersey law enforcement officers may engage in the off-work use of marijuana (despite a federal ban on marijuana use and firearm possession), a challenge to that decision is pending in federal district court.<sup>iii</sup> With these myriad and conflicting outcomes, and more underway, how should an employer proceed to monitor or enforce its drug-free workplace policy with respect to cannabis users?

Despite the broad legalization of marijuana and marijuana products pursuant to CREAMMA, it remains clear that an employer can take adverse action against anyone who comes to work under the influence of marijuana, despite the fact that the regulatory body charged with implementing CREAMMA never adopted regulations creating a “Workplace Impairment Recognition Expert” who would assist in recognizing impaired workers.<sup>iv</sup> Prohibitions on the use and possession of marijuana and marijuana products at work or on company premises are also lawful.<sup>v</sup> For now, however, understanding when an employer can act on the basis of someone’s evident recent use of cannabis and potential impairment remains complicated, and difficult to implement on an everyday basis. Medical marijuana users remain entitled to consideration as individuals with disabilities pursuant to the New Jersey Law Against Discrimination, too.<sup>vi</sup>

### **Alternative Testing Options**

The search for tests that can measure current impairment (without inadvertently discriminating against workers who have medical conditions that may also impact response time) continues without an easy answer in sight. That said, tests that measure the presence of active THC in an individual’s test specimen are increasingly of interest to employers hoping to confirm their observations regarding performance, appearance or behavior that suggests impairment. Oral fluid tests can measure only very recent cannabis use – that which has occurred within the day. Breath tests for cannabis are also available in limited areas, although reportedly very expensive.

Oral fluid tests were approved for use by the federal government for its employees in 2019, and those rules extended to DOT-regulated workers last year (although DOT-regulated employers are still waiting for the Substance Abuse and Mental Health Services Administration to approve laboratories for this purpose).<sup>vii</sup> California, which moved to protect the off-work use of marijuana starting January 2024, permits employers to take employment action based on drug tests that show *active* THC in an individual’s system, resulting in a surge of interest in oral fluid tests there as well.<sup>viii</sup> Regardless of whether the courts conclude that New Jersey employers are bound to ignore off-work marijuana use, employers interested in testing only for use that occurred recently enough that impairment is a concern may find this widely accepted form of testing more attractive.

### **Opioids and Harm Reduction**

Opioid use continues to be a concern, and fentanyl continues to result in unprecedented numbers of overdoses. Since 2018, when the U.S. Surgeon General advocated for employers and others to have naloxone on hand in case of overdose, the drug has become available over-the-counter and often at vastly reduced prices.<sup>ix</sup> As most employer drug tests are not geared to detect fentanyl use, an employer’s drug-free workplace program may not be prepared for fentanyl use, although more than 100,000 overdoses deaths each year for the last several years in the United States are attributed to the drug. As New Jersey has a “good Samaritan” law that protects those who offer overdose

assistance from liability, interested employers may wish to incorporate naloxone into their First Aid scheme.<sup>x</sup>

For any changes to your policy or drug-free workplace policy approach, we do advise that you consult your labor and employment counsel for guidance.

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<sup>i</sup> *Zanetich v. Wal-Mart Stores East, Inc.*, No. 1:22-cv-05387 (D. N.J. May 25, 2023), on appeal at C.A. 23-1996

<sup>ii</sup> *Henson v. Daimler Truck North America LLC*, Civil Case No. 22-cv-6479 (D. N.J. April 25, 2023).

<sup>iii</sup> *Shea v. State of New Jersey*, Case No. 2:23-cv-21196 (D. N.J.)

<sup>iv</sup> N.J. Stat. § 24:6I-52(a)(1), (a)(2)(a)-(b); N.J. Admin. Code § 17:30-2.1(e).

<sup>v</sup> [Part 40 Final Rule - DOT Summary of Changes | US Department of Transportation](#)

<sup>vi</sup> *Wild v. Carriage Funeral Holdings, Inc.*, 224 A.3d 1206 (N.J. 2020)

<sup>vii</sup> 88 Federal Register 27596 (May 2, 2023).

<sup>viii</sup> [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=202120220AB2188](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2188)

<sup>ix</sup> [FDA Approves Second Over-the-Counter Naloxone Nasal Spray Product | FDA](#)

<sup>x</sup> [Naloxone Fact Sheet.pdf \(nj.gov\)](#)