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## **Federal Marijuana Rescheduling and Employer Drug-Free Workplace Policies**

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Despite assurances that guidance would be forthcoming, more than four years after New Jersey legalized cannabis for adult recreational use via the Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (the “Act”), significant questions remain regarding employer’s rights and obligations pertaining to maintaining drug free workplaces and relying upon the results of certain drug tests in making employment decisions.

### **Looking for Impairment at Work**

Employers are still waiting for clarity on how to train employees as “Workplace Impairment Recognition Experts” (WIRE) – individuals who are qualified to perform examinations of employees suspected of impairment at work. The Act, signed in February 2021, protects the lawful, off-duty use of marijuana in New Jersey. While employers may continue to enforce policies that prohibit employees from being under the influence of or impaired by marijuana at work, they may not make employment decisions or take adverse action based solely upon the results of a test that is positive for the presence of cannabinoid metabolites (which is evidence

marijuana has been metabolized, but not that an individual is currently under the influence). The Act created the role of a WIRE, holding that such individual would receive training and a certification to assess employees, and moreover, a WIRE's assessment combined with a positive drug test would enable an employer to lawfully take an adverse action against the employee.

In fall of 2022, the New Jersey Cannabis Regulatory Commission (the "Commission"), issued its first – and only – guidance related to how employers may respond when an employee is suspected of being under the influence of or impaired by marijuana at work. The Commission did not define a WIRE and establish any training regarding the same, but rather, provided guidance and a sample reasonable suspicion observation report, which an employer can complete to document physical signs and evidence that supports the "reasonable suspicion" an employee is under the influence or impaired.

Now, over two and a half years later, the Commission still has not released guidelines or instructions regarding WIRE certification, or any further guidance or information for employers on how they can maintain a safe workplace while complying with the Act. Despite that lack of any guidance or rules on the WIRE certification, companies throughout New Jersey are now advertising for and offering what they refer to as "WIRE training," and even purport to offer a "WIRE certification." While employers should train managers and other employees on how to establish and document reasonable suspicion, it is important to note that the State of New Jersey has not delineated any specific criteria for WIRE certification, so the use of this term in various programs is misleading. The last guidance issued by the Commission on this topic was in 2022, and it suggested that pending the creation of a WIRE certification, an employer should designate a staff member to assist in making reasonable suspicion determinations. It is important to have individuals trained on evaluating workplace impairment, but if/when the Commission introduces the formal WIRE certification program, it is important to note the programs currently offered may not satisfy that requirement.

### **A Win for Employers**

New Jersey employers scored a victory in the U.S. Court of Appeals for the Third Circuit ("Third Circuit"), with the affirmation of a decision holding the Act did not provide job applicants with a private right of action against a potential employer for the failure to hire in violation of the Act.

In May 2023, a federal district court ruled that while the Act prohibits employers from taking adverse action against individuals simply because they test positive for marijuana, the statute did not create a vehicle under which employees and applicants can sue employers or prospective employers for violations of the Act. A job applicant was denied employment due to a positive pre-employment drug test and sought relief on behalf of himself and a putative class of job applicants based on the alleged violation of the Act. In a case of first impression, the district court granted the employer's motion to dismiss, finding there was no implied private right of action under the Act. That case was immediately appealed to the Third Circuit.

On December 9, 2024, the Third Circuit upheld the district court's ruling that the Act did not provide for or establish a private right of action. The Third Circuit ruled that while the Act precludes discrimination based on a person's lawful off-duty use or non-use of cannabis, it does

not expressly provide a private right of action redressing perceived employment discrimination against lawful cannabis users. Moreover, the Third Circuit noted while the Act precludes discrimination based on a person’s use or non-use of cannabis, it neither prevents an employer from maintaining a drug-free workplace, nor requires an employer to accommodate cannabis use in the workplace. The Third Circuit also noted the Act expressly states it does not “amend or affect in any way any State . . . law pertaining to employment matters.”

The Third Circuit based its decision on the lack of legislative intent to create a private cause of action, and that to imply such a private cause of action is inconsistent with the express language of the statute. The Third Circuit went one step further, and also ruled that a job applicant cannot bring a claim against a prospective employer alleging a violation of New Jersey public policy. In doing so, the court reasoned the public policy exception to at-will employment—first recognized in *Pierce*<sup>1</sup>—could only be brought by employees of a company, and not applicants. This holding is consistent with New Jersey state court precedent, wherein courts have been unwilling to extend *Pierce* to failure-to-hire claims.

This decision is significant for employers that are currently facing actions in federal court under the Act. Claims brought under the Act may not survive, and individuals with claims alleging “failure to hire” (as compared to current employees bringing claims regarding adverse employment actions) do not have an alternative mechanism under which they may seek relief.

While this decision is not binding on New Jersey state courts, this opinion provides analysis on which the state courts may base future decisions. This legal landscape is evolving, and there is potential for legislative intervention, so New Jersey businesses should consider various outcomes and seek legal advice before acting against an applicant or employee based on a positive marijuana test result.

### **Oral Fluids Testing**

Oral fluids testing provides potential benefits, such as the fact that they are always “observed” collections, and they have a short detection window. Rather than test for metabolites, like urine tests, oral fluids tests detect THC, which is the major active component in marijuana.

After a long road, oral fluids testing is still gaining scientific support, and continues down a path toward widespread use. While the U.S. Department of Health and Human Services (“HHS”) previously maintained that oral fluids testing did not meet appropriate standards for widespread use, it has determined oral fluid testing is an appropriate alternate testing method for conducting drug tests.

Back in 2023, the United States Department of Transportation (“DOT”) finally published a final rule authorizing the use of oral fluids testing by DOT-regulated employers. Employers may still choose to test a urine specimen, but the change provides welcome flexibility to employers and employees. However, while the DOT has finally approved the use of oral fluids testing, the HHS

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<sup>1</sup> *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58 (1980).

has not yet certified a single oral fluid laboratory. Employers may not begin to use oral fluid drug testing in the DOT drug testing program until the HHS certifies two oral fluid laboratories.

California, which passed its own law similar to the Act, allows employers to rely upon oral fluid testing or impairment tests for an employment action. The growing trend of using oral fluids testing will likely continue, especially in light of growing legislation, which protects lawful, off-duty use of certain drugs.

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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