

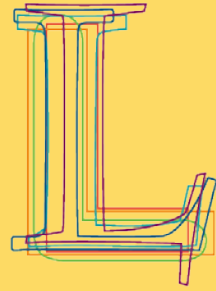
DRUGS

DON'T

WORK

IN NJ

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DRUGS **DON'T WORK** **IN NJ**

**Webinar: Legal Issues of a Drug-Free
Workplace**

June 2, 2020



Littler®

Presented by



NANCY DELOGU

Shareholder

Washington, D.C.

nndelogu@littler.com

202.414.6863

Agenda

- How Should Employers Address Medical Marijuana in the Workplace?
- Recent legal and legislative developments related to a drug-free workplace
- Creating a comprehensive Drug-Free Workplace Policy
- Consequences of Marijuana Legalization for the NJ Workplace



Recent Trends in Worker Drug Use

- Quest Diagnostics reports increased use of illegal drugs by workers across industries in 2018
- At least a third of industry sectors measured had double-digit increases in positive test results
- Type of drug abused may vary by industry – cocaine, methamphetamine most common in construction; amphetamine abuse most common in educational services
- Marijuana positive rate has increased by double digits in each of last three years measured
- Marijuana use most prevalent in retail jobs: retail jobs dropping drug testing

Littler's Executive Employer Survey 2019

- “Legalization of marijuana” was the second-most commonly cited issue making employers nervous about compliance in May 2019 on this survey of over 1300 executives, in-house counsel, and human resources representatives
- Despite this, 51% had not updated policies or taken other measures to address marijuana in the workplace
- 6% had dropped some marijuana testing
- 5% had increased their marijuana testing



Marijuana as Recreation

- Americans increasingly see marijuana and marijuana products as short-acting ways to feel good or “get high” without long term consequences to health
- Studies underway seem to show both risks and benefits
- Only product available for both medical and recreational purposes?
- Marijuana being added to food and beauty products
- Conclusion: Education for workers on your expectations regarding marijuana is critical, as is your understanding of the law



New Jersey Medical Marijuana Amendments Expand Employment Protections

By Nancy Delogu and Sebastian Chilco on July 29, 2019

New Jersey has expanded its medical marijuana program and—for the first time since the state enacted the law—adopted formal protections for employees and job applicants who use what is now called “medical cannabis.” The amendments took effect on July 2, 2019, when New Jersey Governor Phil Murphy (D) signed Assembly Bill (AB) 20, the Jake Honig Compassionate Use Medical Cannabis Act, into law.

The newly amended law provides that employers cannot take adverse employment action *solely* because an individual is a registered qualifying medical cannabis patient. The law defines adverse employment action as: (1) refusing to hire or employ an individual; (2) barring or discharging an individual from employment; (3) requiring an individual to retire from employment; or (4) discriminating against an individual in compensation or in any of the terms, conditions, or privileges of employment. In a nod to federal law, which continues to prohibit the use of marijuana and marijuana products, these restrictions on employer action do not apply if the employer would violate federal law, lose a licensing-related benefit pursuant to federal law, or lose a federal contract or federal funding as a result.

New Jersey’s expanded medical cannabis law does not prohibit employers from taking adverse action, in appropriate circumstances, based on test results. The law does, however, prescribe a process for both parties following a positive test result. If an applicant or employee tests positive for cannabis, the employer now must provide the tested individual with a written notice advising of the right to offer a legitimate medical explanation for that result and, independently, the right of the tested individual to obtain a confirmatory re-test of the original sample at the individual’s expense. Medical cannabis users are entitled to three days in which to respond to the notice, and in responding, may present authorization for medical cannabis issued by a health care practitioner,

Compassionate Use of Medical Marijuana Act (CUMMA) Revisions

What is Marijuana?

- *Cannabis Sativa*
- THC (tetrahydrocannabinoids) are the chemicals that lead to feeling “high,” or psychoactive compounds
- CBD (cannabinoids) are the chemical that may have positive effects on epilepsy, and... perhaps... other conditions?
- 2018 Farm Bill: Hemp and hemp products not controlled substances if they contain less than .3% THC and grown pursuant to a federal or state-approved plan

ANYTHING that has .3% THC or more is marijuana.

Short Term / Long Term Effects

- 1 in 10 become addicted (1 in 6 if starting as a teen)
- Reduced memory, learning & attention – effects persist long-term, at least for some users
- Poorer cognitive & executive functioning, especially if starting as a teen
- Less “gray matter” in brain areas with most receptors
- Longitudinal studies underway
 - CBD/THC use by pregnant women associated with premature birth
- When smoked or vaporized, THC quickly passes from the lungs into the bloodstream
- Bodies absorb THC more slowly when it is eaten – effects felt after 30 minutes to 1 hour
- In addition to feeling of “high”, short-term effects include:
 - altered senses (for example, seeing brighter colors)
 - altered sense of time
 - changes in mood
 - impaired body movement
 - difficulty with thinking and problem-solving
 - impaired memory

Source: National Institute on Drug Abuse

Are Some Marijuana Products Legal Under Federal Law?

- YES, if one of these DEA-approved drugs:
 - Epidiolex (CBD anti-seizure medication)
 - Marinol (dronabinol, synthetic THC)
 - Cesamet (nabilone)
 - Syndros (dronabinol oral solution)
- Available by prescription only
 - Why we use MROs in the testing process
 - Will be reported as “negative” with a prescription
- Will you test positive?



Federal Law & Marijuana

Drug-Free Workplace Act

- Requires federal contractors to promote a drug-free workplace
 - Only contracts for services, not goods
 - Only contracts above the simplified acquisition threshold (currently, \$250,000)
 - Subcontractors not covered
 - Grants in any amount
- Does not require any drug testing, only policy, education
- Must promptly report to contracting officer individuals who are convicted of criminal offenses involving drugs while working on federal contracts



Federal Law & Marijuana

Americans with Disabilities Act and Illegal Drugs:

- Individuals engaging in the current illegal use of drugs are not considered disabled for that reason; it is not discrimination to take adverse action on the basis of illegal drug use
- “Illegal use of drugs” means use that is unlawful under the Controlled Substances Act.
- Drugs taken under supervision of a health care professional – prescribed medications
- There are lawfully prescribed medications that contain THC/CBD
- To date, courts in agreement that employers may take adverse action on the basis of marijuana use, regardless of whether such use is pursuant to physician guidance or state medical marijuana program

Note: medical marijuana certifications or authorizations do NOT have the status of a “prescription” for marijuana

Federal Law & Marijuana

U.S. Department of Transportation Regulations

- Cover 8 million+ private sector workers in transportation work
- Prohibit drug abuse and alcohol misuse
- Require drug & alcohol testing
- Marijuana use of any kind prohibited for regulated workers. Yes, this includes CBD products

Legal Protections for Workers Using Medical Marijuana

- Arkansas
- Arizona
- Connecticut
- Delaware
- Illinois
- Maine
- Massachusetts
- Minnesota
- Nevada
- New Jersey
- New Mexico
- New York
- Oklahoma
- Pennsylvania
- Rhode Island
- West Virginia



New Jersey Compassionate Use of Marijuana Act Revisions

- “Medical cannabis” users protected in employment
- Employers cannot refuse to hire or employ, discipline or discharge any individual, or discriminate against any person in marijuana *solely* because someone is a registered qualifying medical cannabis patient
- Employers can take adverse action in appropriate circumstances based on test results
- Employee has right to contest positive result and must be provided written notice of the right, and three days in which to respond
 - Provide evidence of enrollment in program
 - Authorization issued by a health care provider
 - Confirmatory re-test request

Action Items

- Ensure your policy accurately reflects the law
 - Avoid unconditional statements such as “must receive a negative result”
 - State you will grant reasonable accommodations to medical marijuana users
 - Reiterate bans on use, possession at work
 - Consider addressing use of marijuana products, CBD

Action Items

- Ensure your communications to workers who test positive include:
 - Written notice of right to rebut
 - Written notice of right to re-test

To [Associate name]:

The sample that you provided in response to the Company's recent request for a drug test has tested positive for marijuana (THC). Before _____ determines what action it will take as a result of this test, you have the following rights:

- You may submit information to the company demonstrating a legitimate medical explanation for your positive marijuana test result. As part of that explanation, you may (1) present an authorization for medical cannabis issued by a health care practitioner; and/or (2) present proof of registration with the Cannabis Regulatory Commission.
- You may request, in writing, a confirmatory retest of the original sample at your own expense.

If you wish to exercise these rights, you must contact _____ within three days with the information you wish us to consider and/or your request for a confirmatory re-test. _____ can be reached at ###.###.#### or contactname@emailaddress.

NJ Supreme Court Holds Medical Marijuana Use Outside of the Workplace is Protected Under State Law and Employers are Required to Accommodate After-Hours Use

By Lauren J. Marcus, Dylan C. Dindial, Jennifer Chierek Znosko, and Elizabeth R. McKenna on March 16, 2020

Resolving prior uncertainty regarding the impact of the New Jersey Compassionate Use Medical Marijuana Act (CUMMA) on employees' employment rights, the New Jersey Supreme Court recently held that employees can maintain an action under the New Jersey Law Against Discrimination (NJLAD) for disability discrimination when an employee suffers an adverse employment action as a result of their lawful use of medical marijuana outside of the workplace during non-working hours. Employees may also bring a failure to accommodate claim under the NJLAD based on their lawful use of medical marijuana.

In *Wild v. Carriage Funeral Home, Inc.*, the plaintiff used medical marijuana, as permitted by the CUMMA, as part of his cancer treatment. After being involved in a vehicle accident while working, the plaintiff informed both his doctor and his employer that he had been using medical marijuana outside of work. Although his doctor did not perform a drug test because he did not perceive the plaintiff to be impaired at the time of the accident, the plaintiff's employer later required him to submit to a drug test before allowing him to return to work. While the Appellate Division noted that the results of the test were not in the record, it recognized that the complaint alleged that the employer told the plaintiff his employment was being terminated because of the positive drug test and because he failed to disclose his marijuana use, which might adversely affect his ability to

*Wild v. Carriage
Funeral Holdings,
Inc.*

NJ Supreme Court

Meanwhile...

- Before July 2019, CUMMA did not explicitly direct employers to refrain from taking action on the basis of medical marijuana use
- Actions filed in state and federal court alleging discrimination mostly dismissed
- However... *Wild v. Carriage Funeral Home* made it to N. J. Court of Appeal
- Decision: employer owed medical marijuana user the duty to accommodate medical marijuana use pursuant to the N.J. Law Against Discrimination
- New Jersey Supreme Court agreed to hear the matter and issued a decision in March 2020.

Medical Marijuana Users May Be Entitled to Accommodation

- Plaintiff states a claim... back to trial court to hear evidence
- Post-accident discovery but not post-accident test
- Two portions of CUMMA that impact employment rights:
 - “[n]othing in [the Compassionate Use Act] shall be construed to require . . . an employer to accommodate the medical use of marijuana in any workplace.” N.J.S.A. 24:6I-14 (2018)
 - The Act “shall not be construed to permit a person to: a. operate, navigate or be in actual physical control of any vehicle, aircraft, railroad train, stationary heavy equipment or vessel while under the influence of marijuana.” N.J.S.A. 24:6I-8 (2018)

“

CONSTITUTIONAL AMENDMENT TO LEGALIZE MARIJUANA

Do you approve amending the Constitution to legalize a controlled form of marijuana called “cannabis”?

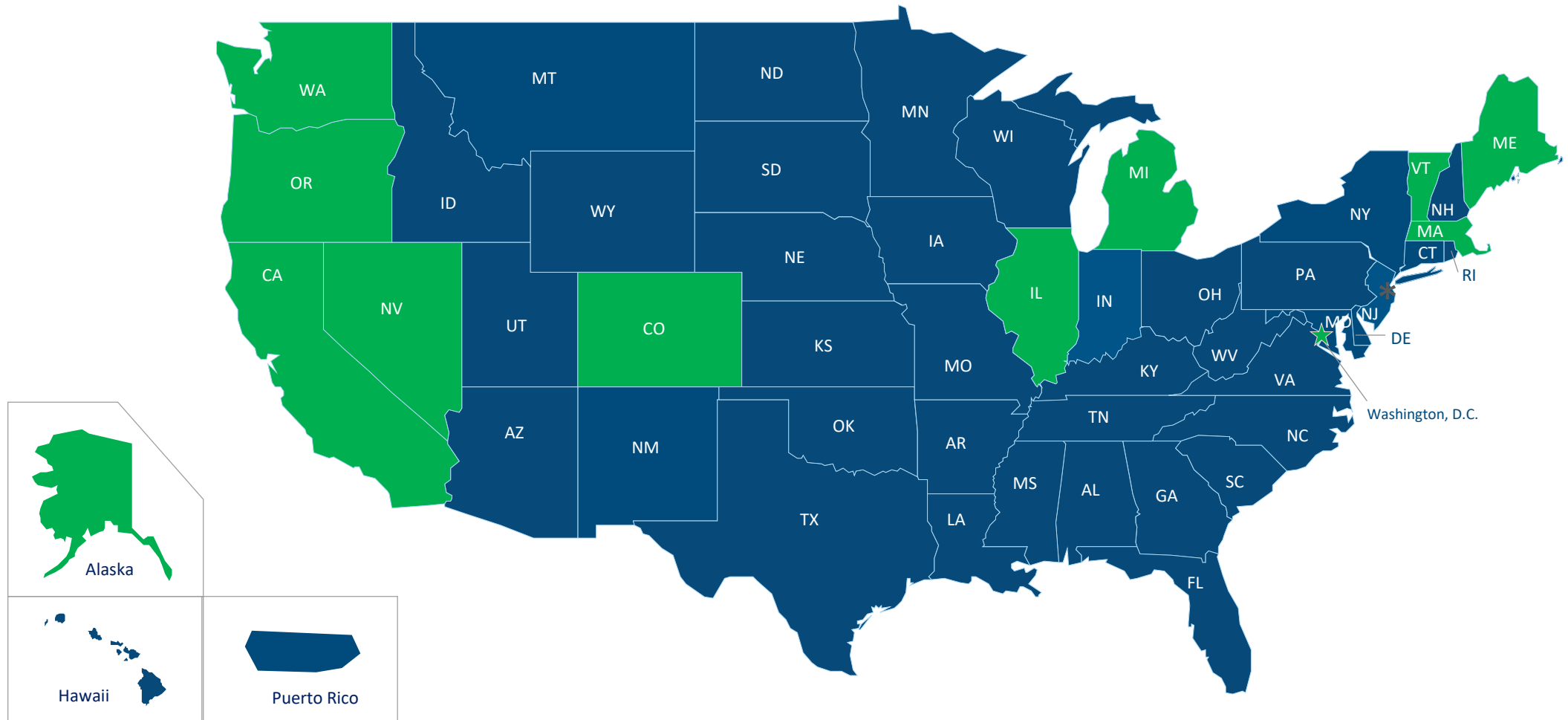
Only adults at least 21 years of age could use cannabis. The State commission created to oversee the State’s medical cannabis program would also oversee the new, personal use cannabis market.

Cannabis products would be subject to the State sales tax. If authorized by the Legislature, a municipality may pass a local ordinance to charge a local tax on cannabis products.^[8]

”

New Jersey Referendum on Marijuana Legalization

Recreational Marijuana Laws



Text of Referendum

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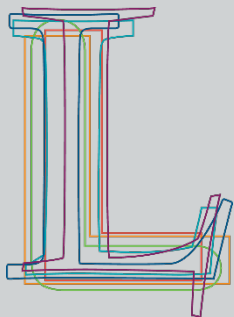
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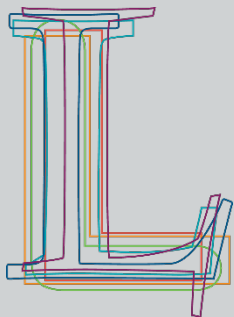
Impact on Workplace

- Based on text: none
- Lawful off-work activity not protected as a general rule, but many (many!) such protections exist
- An employer may not refuse to hire, discharge, or otherwise take adverse action against an employee because the individual smokes or uses tobacco products, or chooses not to use such products unless the employer's reason for doing so is reasonably related to the employment
- None of the other states require an employer to ignore or accommodate recreational marijuana use altogether... although some protections exist for applicants in Nevada
- Increase in marijuana-related fatal road accidents in Colorado following legalization
- And... you may need to pay more to attract workers who can test negative



Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.



Thank You!

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