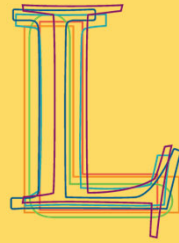




HOW TO ADDRESS MARIJUANA IN THE WORKPLACE

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Managing with Marijuana in the Workplace

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Littler®

Presented by



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Agenda

- Overview of recreational and medical marijuana law in New Jersey and the United States
- What can an employer expect and require?
- Impairment and performance issues
- Can we test for marijuana?
- Updating your drug-free workplace policy & procedures





Marijuana and the Workplace Today

“Cannabis” vs. “Marijuana”

- New Jersey’s law uses the term “cannabis.”
- From an employment and testing perspective however, only some forms of cannabis contain tetrahydrocannabinol – THC
- THC is the compound that has a psychoactive effect, that can cause a “high”
- Hemp and other cannabis products are lawful ***as a matter of federal law*** if they contain less than .3% THC
- Employer drug tests look for the presence of THC, not CBD
- To distinguish between cannabis products, we talk about marijuana use because THC containing products are the focus of the legalization effort
- It may be difficult or impossible to know if a particular cannabis product contains a particular amount of THC

New Jersey's Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (NJCREAMMA)

- Enacted on February 22, 2021, legalizing marijuana use and authorizing lawmakers to create a regulated marijuana industry
- Employment provisions in the bill were not immediately effective, per statute.
- Employment protections were effective August 19, 2021, the date the NJ Cannabis Regulatory Commission issued first regulations

New Jersey's Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (NJCREAMMA)

So, what does the law say about marijuana in the workplace?

New Jersey's Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (NJCREAMMA)

Employers are not be permitted to refuse to hire any person, or discharge or take any adverse action against an employee (with respect to compensation or any other terms and conditions of employment) because they do, or do not, use cannabis products

New Jersey's Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (NJCREAMMA)

Employers cannot take any adverse employment action against an employee because they have tested positive for cannabinoid metabolites

So... Can We Continue to Test for Marijuana?

Yes!

But that doesn't mean you can act on the results.



Impairment, Performance, and Drug Testing for Marijuana Under NJCREAMMA

Drug Testing After NJCREAMMA

The statute provides that drug testing is permitted:

- upon suspicion of cannabis use, while the employee is engaged in work; or
- When you have observable signs of intoxication related to cannabis use; or
- Following a work-related accident; or
- At random; or
- When scheduled; or
- Pre-hire

Drug Testing After NJCREAMMA

Employers can take adverse action only if the employee is impaired by marijuana at work. A drug test result can help show impairment.

Drug Testing After NJCREAMMA

A drug test must include “scientifically reliable objective testing methods and procedures, such as blood, urine or saliva **and** a physical evaluation in order to determine an employee’s state of impairment.”

Drug Testing After NJCREAMMA

“The physical evaluation shall be conducted by an individual with the necessary certification to opine on the employee’s state of impairment, or lack thereof” as a result of marijuana use.

The employer may use the results of the drug test when determining the appropriate employment action concerning the employee, including, but not limited to dismissal, suspension, demotion, or other disciplinary action.

Drug Testing After NJCREAMMA

“The commission, in consultation with the Police Training Commission... shall prescribe standards in regulation for a Workplace Impairment Recognition Expert certification... based on education and training in detecting and identifying an employee’s usage of or impairment from a cannabis item or other intoxicating substance, and for assisting in the investigation of workplace accidents”

Drug Testing After NJCREAMMA

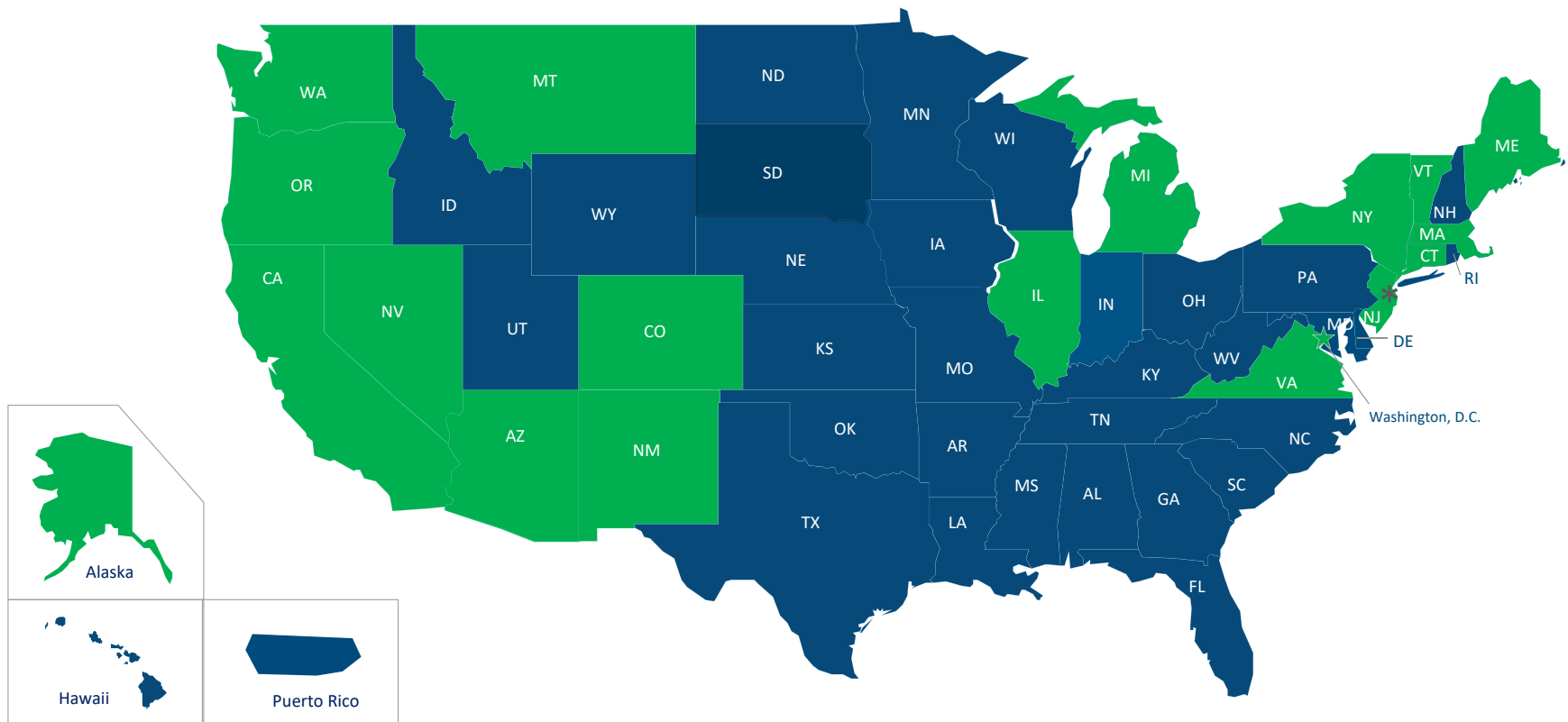
The New Jersey Cannabis Commission has yet to develop training or guidance on how to qualify as a Workplace Impairment Recognition Expert

Instead, the Commission has indicated that employers may make impairment determinations without the use of a
“WIRE”

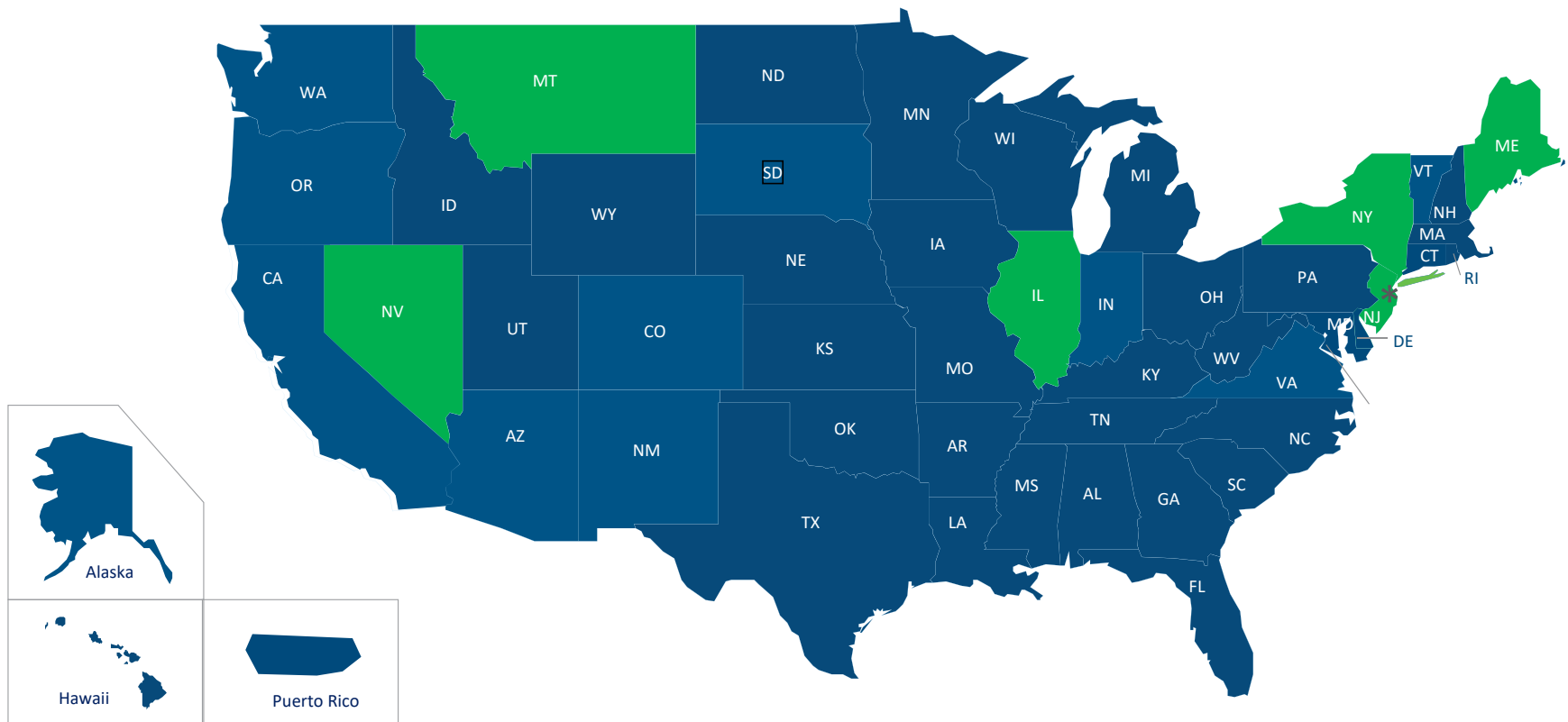
Drug Testing After NJCREAMMA

“[A]n employee shall not be subject to any adverse action by an employer solely due to the presence of cannabinoid metabolites in the employee’s bodily fluid from engaging in conduct permitted” by the legislature

Recreational Marijuana Legal Status by Jurisdiction



Recreational Marijuana Employment Protections by Jurisdiction



Legal Protections for Workers Using Marijuana Recreationally

Nevada

- Don't test pre-hire unless the job is safety-sensitive

Montana

- Off-work marijuana use is not a reason for discipline unless employer has a policy prohibiting it

Illinois, Maine

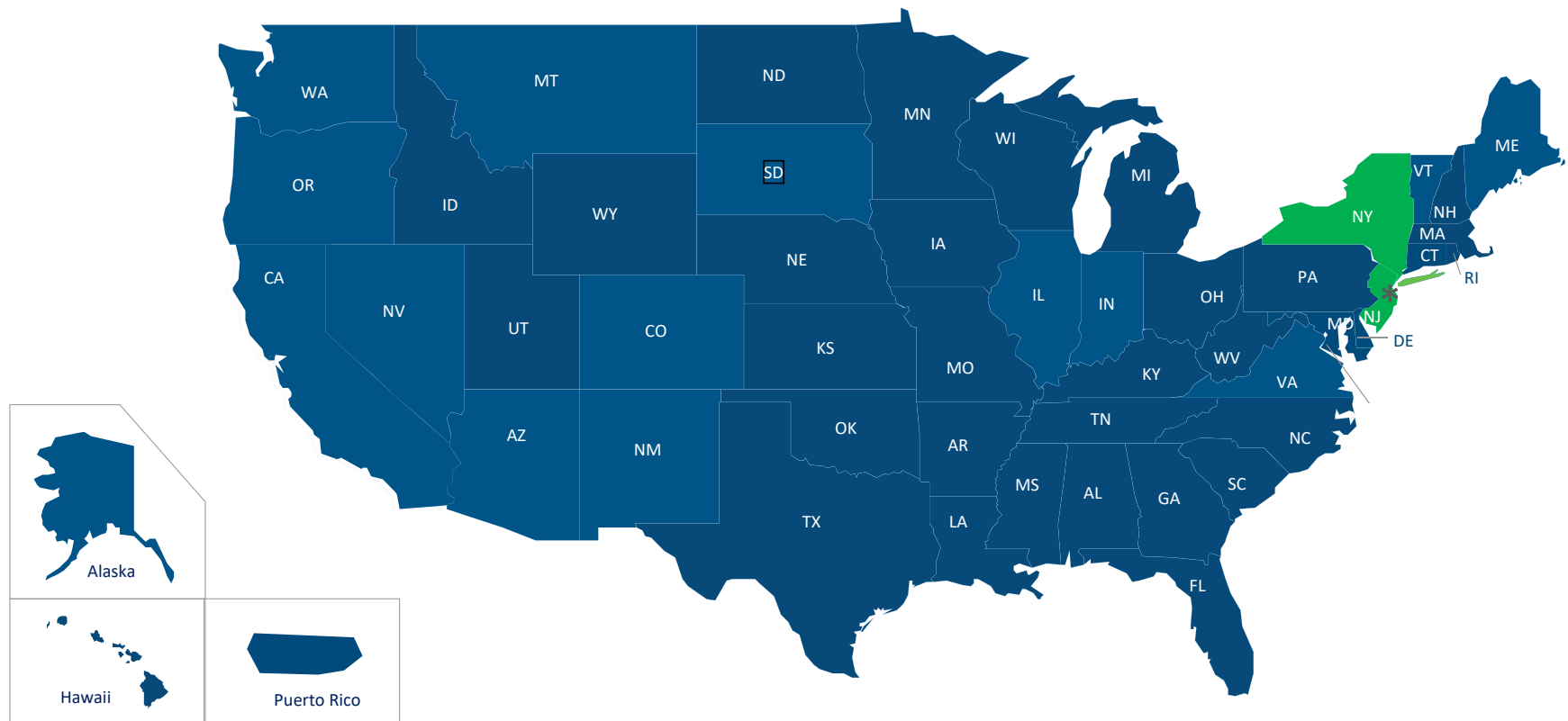
- Cannot refuse to hire simply because the applicant says they have used marijuana as permitted by law
- If they test positive, however, you may decline to hire

New Jersey, New York

- Off-work use of marijuana protected. No adverse action unless worker uses, possesses, or comes to work impaired



Recreational Marijuana Employee Protections by Jurisdiction





Updating Your Policy & Procedures

What Can Our New Jersey Policies Require?

- OK to prohibit the possession and use of marijuana at work and during work time
- OK to discipline workers who come to work impaired
- OK to drug test for marijuana
- Not OK to act on basis of off-work marijuana use permitted under New Jersey laws

What Can Our New Jersey Marijuana Policies Require?

- NOT OK to act on basis of positive test alone, unless “test” includes physical examination by certified impairment expert
- Until WIRE regulations are adopted, no expert opinion is required, but it is UNCLEAR what evidence will suffice to establish impairment

What Can Our New Jersey Policies Require?

- NO exceptions for workers in safety-sensitive roles UNLESS subject to federal regulations explicitly prohibiting such use (i.e., transportation, nuclear power)
- UNCLEAR whether positive test results can be used to discipline workers who operate motor vehicles with marijuana in their system
 - Nothing in the law “is intended to allow driving under the influence of cannabis items or driving while impaired by cannabis items or to supersede laws related to driving under the influence of marijuana or cannabis items or driving while impaired by marijuana or cannabis items”

What Can Our New Jersey Policies Require?

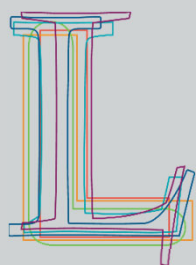
- OK to prohibit the use and possession of cannabis products at work and during work hours
- UNCLEAR whether you must excuse out of state residents who work in New Jersey and who use marijuana
- UNCLEAR whether you must excuse New Jersey residents who work out of state and who use marijuana
- EDUCATING workers about your expectations and any changes in policy will be crucial

Should Our Testing Policy Change?

- Although OK to conduct pre-hire marijuana tests, you cannot act on the results.
- Although OK to conduct random marijuana tests, difficult to act on the results.
- Oral fluids and blood tests may aid in demonstrating current impairment
- Don't test if you find someone in possession of marijuana or marijuana products at work

Should Our Drug-Free Workplace Policy Change?

- Conduct reasonable suspicion training and document observations of suspected impairment
- Until further guidance is made available, assume you do not need to know why someone is impaired to test, only that they are not conducting themselves as usual and in a concerning manner; in other words, it is reasonable suspicion of impairment, not reasonable suspicion that the impairment is caused by a specific substance or condition

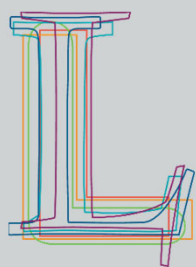


DRUGS
DON'T
WORK
IN NJ

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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.



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