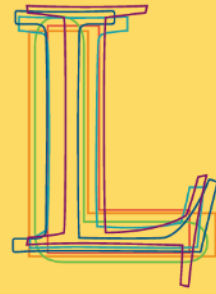




THE CHALLENGES OF ADDRESSING MARIJUANA AND  
MEASURING IMPAIRMENT IN THE NJ WORKPLACE

FEBRUARY 9, 2023



# The Challenges of Addressing Marijuana and Measuring Impairment in the New Jersey Workplace

A Webinar for Employers

February 9, 2023



**Littler**

# Presented by



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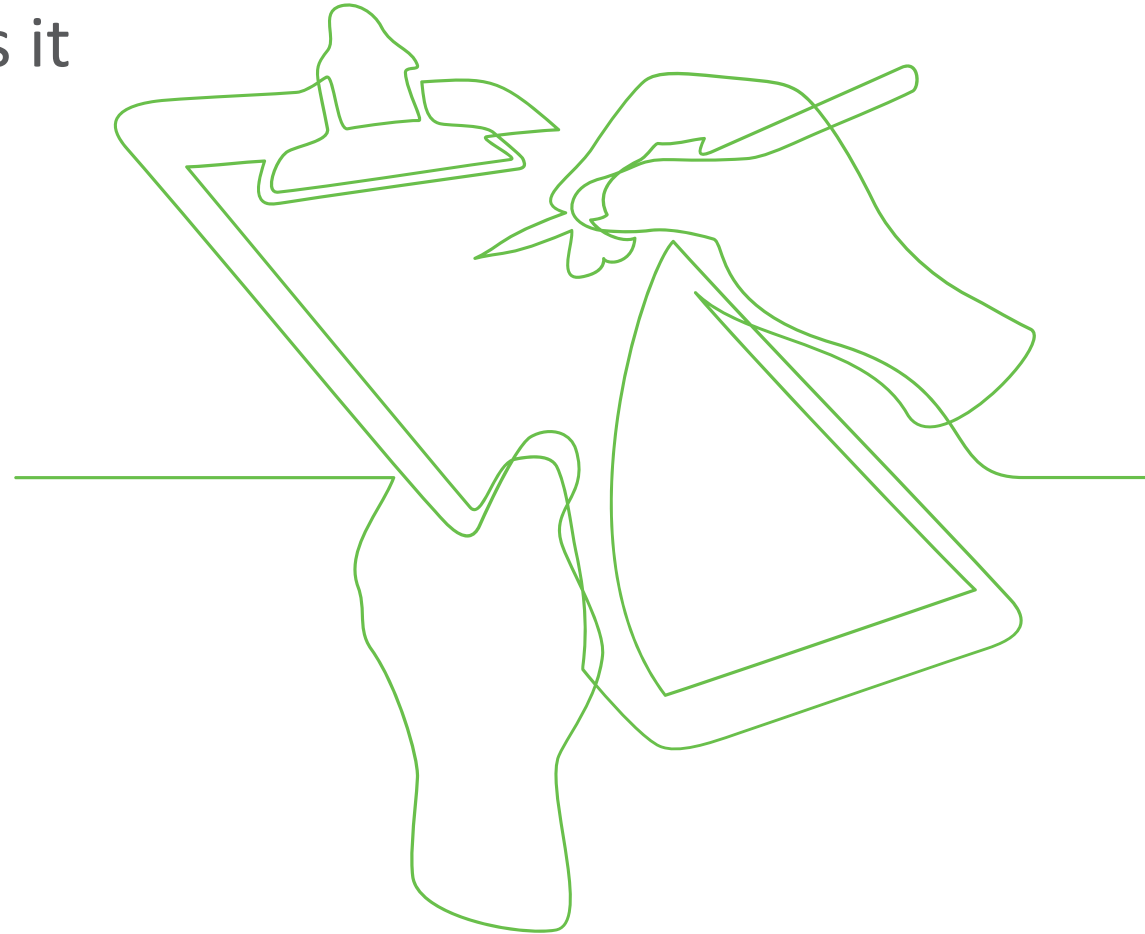
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# Agenda

- Discussion of New Jersey marijuana law as it impacts *employers and employees*
  - What can an employer expect and require?
  - Use and possession at work
  - Impairment and performance issues
  - Can we test for marijuana? Should we?
  - Updating your drug-free workplace policy & procedures







# Marijuana and the New Jersey Workplace

# “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 – Delta-9 and Delta-8 THC
- Hemp and other cannabis products are lawful ***as a matter of federal law*** if they contain less than .3% Delta-9 THC
- THC has a psychoactive effect and can cause a “high” – and impairment
- To distinguish between cannabis products, we talk about marijuana use because THC-containing products are the focus of the workplace concerns regarding impairment

# 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
- The law places certain limits on employers and their ability to prohibit marijuana use by employees
- Employment protections were effective August 19, 2021, the date the NJ Cannabis Regulatory Commission issued its first regulations



# What Do Employees Say About Marijuana Use?

**48%** of workers  
surveyed said they  
use cannabis products

**1 in 3 employees**  
say they have  
witnessed marijuana  
use **at work**

National Safety Council, July 2021



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

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

Well, as general rule...

# 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 simply 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.

# “Cannabis” vs. “Marijuana”

Employer drug tests look for the presence of Delta-9 THC, not CBD or Delta-8 CBD

- Typically, employer drug tests look for marijuana “metabolites” or the molecules that are created when the human body metabolizes marijuana







*A metabolite is any substance produced during metabolism (digestion or other bodily chemical processes). The term metabolite may also refer to the product that remains after a drug is broken down (metabolized) by the body.*

—Medline Plus Medical Encyclopedia

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

- Your drug tests are most likely testing for cannabis metabolites
  - The laws don't allow you to rely on those to make decisions about someone's at-work impairment
- You can try to demonstrate impairment another way OR
- You can act when you have other evidence the individual has violated your drug-free workplace policies

# What About Safety-Sensitive Jobs?

- Unless the job is subject to federal law or regulation, or the employer would lose a contract, there are NO exceptions for safety-sensitive roles.

# What About Safety-Sensitive Roles?

- No exceptions: we mean it!
- “There is nothing in the CREAMM Act to suggest the [employment protection provision of the statute] does not apply to law enforcement.”



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SUMMARY DECISION**

OAL DKT. NO. CSR 08567-22

**IN THE MATTER OF RICHIE LOPEZ,  
CITY OF JERSEY CITY.**

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**Michael Rubas**, Esq., for appellant Richie Lopez (Rubas Law Offices, attorneys)

**Kyle Trent**, Esq., for respondent City of Jersey City (Apruzzese, McDermott,  
Mastro & Murphy, attorneys)

Record Closed: January 6, 2023

Decided: January 19, 2023

BEFORE **SUSANA E. GUERRERO**, ALJ:



# Impairment, Performance, and Drug Testing for Marijuana Under NJCREAMMA



# Drug Testing After NJCREAMMA

The New Jersey law does state 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

BUT

Employers can take adverse action only if the employee is  
impaired by marijuana at work

SO

Why test on a pre-hire, random or scheduled basis?

# 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.

# Marijuana Testing

That sounds good!

Tell me more about this physical examination, with the human impairment detector-expert. Who can make these determinations?



# 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

But... 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

# Drug Testing After NJCREAMMA

So...

Do your best to document impairment (probably the same observations you'd use to make a reasonable suspicion determination)

And

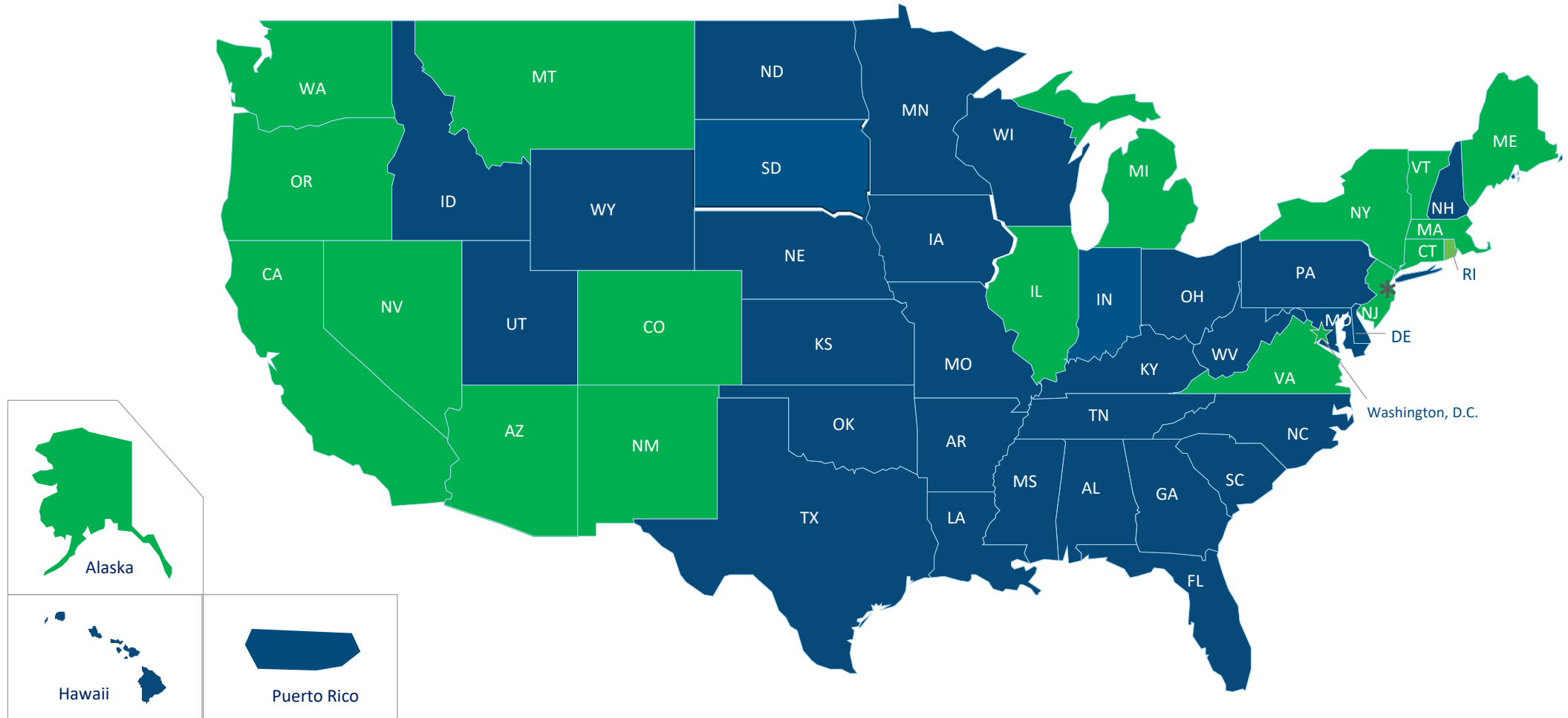
Ask your test providers for tests that can measure active THC molecules, rather than metabolites!

# Should Our Testing Policy Change?

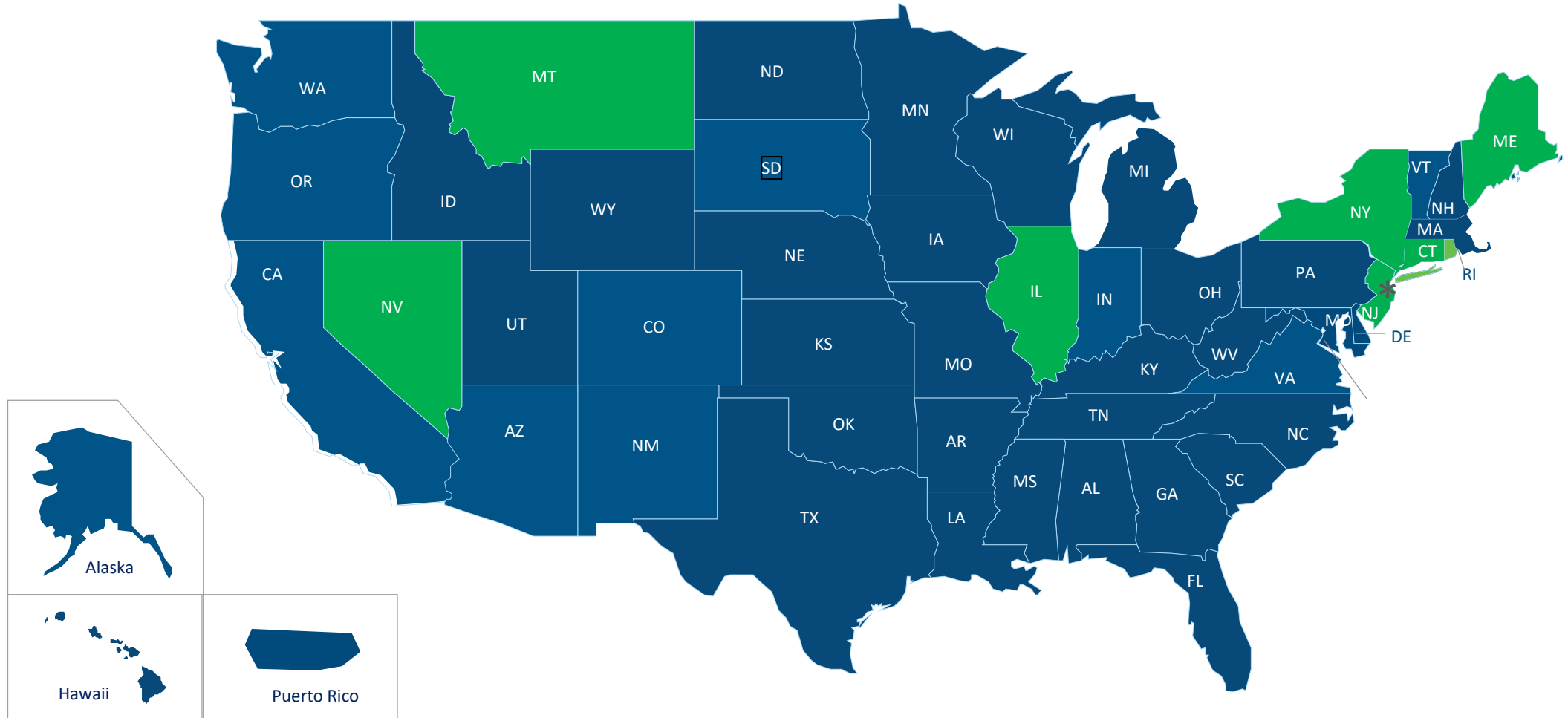
- Although OK to conduct pre-hire marijuana tests, you cannot act on the results.
- Although OK to conduct random marijuana tests, difficult to act on the results.
- Oral fluids and blood tests may aid in demonstrating current impairment
- Don't test if you find someone in possession of marijuana or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



# Recreational Marijuana Legal Status by Jurisdiction



# Recreational Marijuana Employment Protections by Jurisdiction



# Legal Protections for Workers Using Marijuana Recreationally

## Connecticut

- Off-work marijuana use is not a reason for discipline unless employer has a policy prohibiting it OR
  - Safety-sensitive industry OR
  - Safety-sensitive role

## Nevada

- No pre-hire marijuana testing unless role is safety-sensitive

## Illinois, Maine

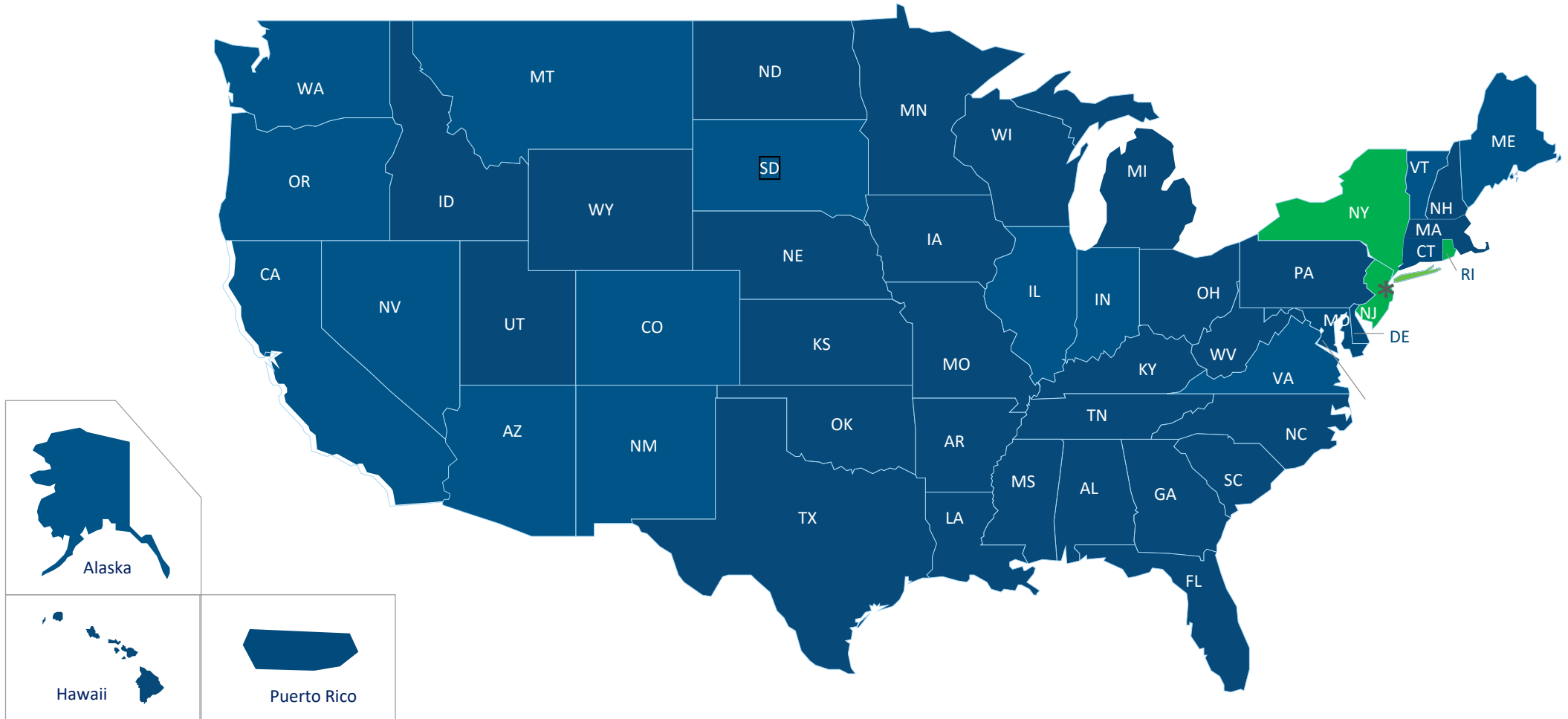
- Cannot refuse to hire simply because the applicant says they have used marijuana as permitted by law.
- If they test positive, however, you may decline to hire

## New York, Rhode Island

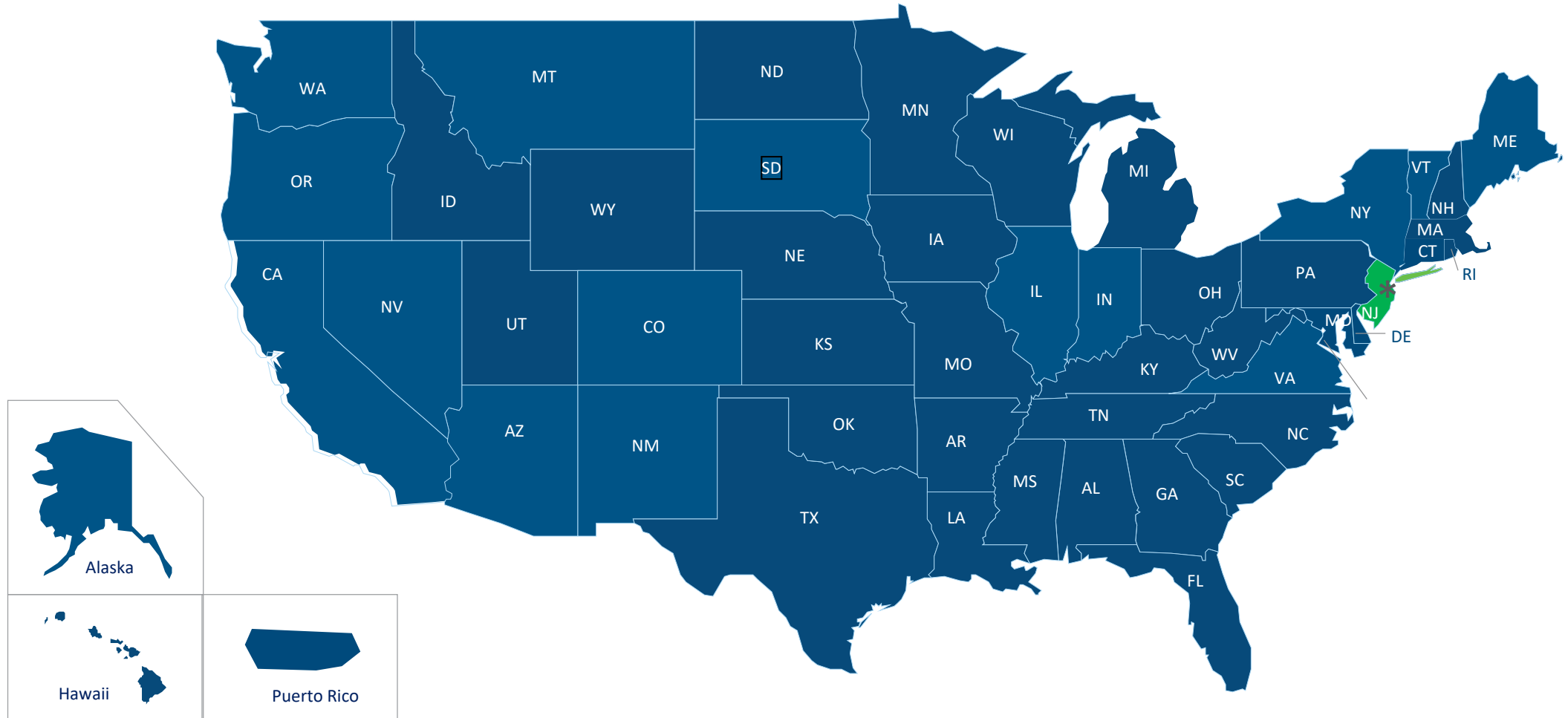
- Off-work use of marijuana protected. No adverse action unless worker uses, possesses, or comes to work impaired, or individual works in a position that requires testing, such as public safety



## States that Prohibit Adverse Action for Safety-Sensitive Worker Off-Work Recreational Marijuana Use



# States that Prohibit Adverse Action for Law Enforcement Worker Off-Work Recreational Marijuana Use





## 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

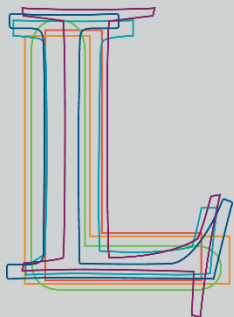


# What Can Our New Jersey Policies Require?

- NO exceptions to protections for off-work marijuana use for workers in safety-sensitive roles UNLESS subject to federal regulations explicitly prohibiting such use (i.e., transportation, nuclear power)
- OK to prohibit the use and possession of cannabis products at work and during work hours
- EDUCATING workers about your expectations and any changes in policy will be crucial
- ACTING when workers bring marijuana products on site or use during the work day is permitted and important

# Should Our Drug-Free Workplace Policy Change?

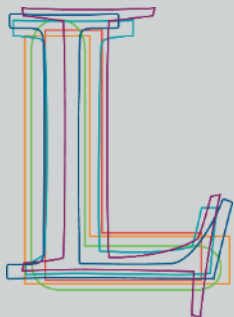
- Conduct reasonable suspicion training and document observations of suspected impairment
- Until further guidance is made available, assume you do not need to know why someone is impaired to test, only that they are not conducting themselves as usual and in a concerning manner; in other words, it is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



**DRUGS**  
**DON'T**  
**WORK**  
**IN NJ**  
[DDW.DRUGFREENJ.ORG](http://DDW.DRUGFREENJ.ORG)

# 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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