

NEW JERSEY CANNABIS REGULATORY COMMISSION GUIDANCE ON “WORKPLACE IMPAIRMENT”



Pursuant to N.J.S.A. 24:6I-52a(2)(a), the New Jersey Cannabis Regulatory Commission (“NJ-CRC”) is charged with prescribing standards for a Workplace Impairment Recognition Expert (“WIRE”) certification, to be issued to full- or part-time employees, or others contracted to perform services on behalf of an employer, 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.

This document is intended to serve as guidance until the NJ-CRC formulates and approves standards for WIRE certifications. Additionally, a template “Reasonable Suspicion” Observation Report Form is included for download and use. Please note that the sample form is not cannabis-specific.

Cannabis is a drug that can remain in the bodily fluids of users for a long period of time and although tests are improving in accuracy there is no perfect test for detecting present cannabis impairment. Therefore, best practice has been for employers to establish evidence-based protocols for documenting observed behavior and physical signs of impairment to develop reasonable suspicion, and then to utilize a drug test to verify whether or not an individual has used an impairing substance in recent history.

Although N.J.S.A. 24:6I-52 provides that Workplace Impairment Recognition Experts can be certified and assist in the documentation of the physical and behavioral signs of intoxication, the statute does not impede the ability of employers to continue to utilize established protocols for developing reasonable suspicion of impairment and using that documentation, paired with other evidence, like a drug test, to make the determination that an individual violated a drug free workplace policy. In some industries, these protocols are federally mandated.

ALL EMPLOYERS, whether operating in the cannabis industry or otherwise, shall be guided accordingly:

Pursuant to N.J.S.A. 24:6I-52a(1), and in accordance with all state and federal laws, an 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 as a result of engaging in conduct permitted under N.J.S.A. 24:6I-31 *et al.* However:

- Employers have the right to maintain a drug free workplace consistent with the requirements of N.J.S.A. 24:6I-52; and
- Employers may require an employee to undergo a drug test upon reasonable suspicion of an employee’s usage of cannabis or cannabis products while engaged in the performance of the employee’s work responsibilities, or upon finding any observable signs of impairment related to usage of cannabis or cannabis products, or as part of a random drug test program, or following a work-related accident subject to investigation by the employer.

A scientifically reliable objective testing method that indicates the presence of cannabinoid metabolites in the employee’s bodily fluid alone is insufficient to support an adverse employment action. However, such a test combined with evidence-based documentation of physical signs or other evidence of impairment during an employee’s prescribed work hours may be sufficient to support an adverse employment action.

In order to demonstrate physical signs or other evidence of impairment sufficient to support an adverse employment action against an employee for suspected cannabis use or impairment during an employee’s prescribed work hours employers may:

- Designate an interim staff member to assist with making determinations of suspected cannabis use during an employee’s prescribed work hours. This employee:

- Should be sufficiently trained to determine impairment and qualified to complete the Reasonable Suspicion Observation Report; and
- May be a third-party contractor.
- Utilize a uniform “Reasonable Suspicion” Observation Report (see below) that documents the behavior, physical signs, and evidence that support the employer’s determination that an employee is reasonably suspected of being under the influence during an employee’s prescribed work hours. The employer should establish a Standard Operating Procedure for completing such a report that includes:
 - the employee’s manager or supervisor or an employee at the manager or supervisor level; and
 - an interim staff member that has been designated to assist with determining whether an employee is reasonably suspected of being impaired during an employee’s prescribed work hours, or a second manager or supervisor.
- An example form is attached to this guidance, however, if employers already utilize a Reasonable Suspicion Observation Report to determine when drug testing is necessary, they may continue to do so.
- An employer may use a cognitive impairment test, a scientifically valid, objective, consistently repeatable, standardized automated test of an employee’s impairment, and/or an ocular scan, as physical signs or evidence to establish reasonable suspicion of cannabis use or impairment at work.

Note on Federal Contracts: N.J.S.A. 24:6I-52b(1)(b) specifically provides that if it is determined that any of the provisions set forth in that section of the law result in a provable adverse impact on an employer subject to the requirements of a federal contract, then the employer may revise their employee prohibitions to be consistent with federal law, rules, and regulations. As such, employers may be required by federal contract or law to follow specific protocols related to determining reasonable suspicion and drug testing and are permitted under N.J.S.A. 24:6I-52 to continue to do so.

DISCLAIMER: The purpose of this guidance is to clarify and explain the NJ-CRC’s understanding of the existing legal requirements under the governing law. This guidance does not impose any additional requirements that are not included in the law and does not establish additional rights for any person or entity. Please note, however, that adverse employment actions may impact employees’ protected rights under various laws including, but not limited to, state and federal anti-discrimination laws. When incorporating this guidance, employers should ensure compliance with all state and federal employment laws.

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REASONABLE SUSPICION OBSERVED BEHAVIOR REPORT

Behavior that provides reasonable suspicion supporting a test for controlled substances or alcohol use must be observed and documented by a supervisor. If possible, the behavior should be observed and documented by two supervisors. The documentation of the employee's conduct shall be prepared by the observing supervisor(s) within 24 hours of the observed behavior or before the results of the tests are released, whichever is earlier. Distribute this report to appropriate authorities based on agency policy and procedures while maintaining employee confidentiality.

Employee Name _____ Employee ID Number _____

Employee Job Title _____ Agency _____

Employee is reporting for duty _____ Employee is already on duty _____

Behavioral observation timeline:

From (date/time) _____ / _____ am/pm To (date/time) _____ / _____ am/pm

Site or Location where observation(s) occurred:

Street Address _____ City _____ Zip Code _____

CAUSE FOR REASONABLE SUSPICION

NOTE: A manager or supervisor must complete this form. A combination of one or more observable signs and symptoms of drug or alcohol use must be observed to establish reasonable suspicion. Determination of reasonable suspicion must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, body odors or speech (ABBS) of the employee. The observations may include indications of the chronic and withdrawal effects of controlled substances. In making a determination of reasonable suspicion, additional factors may include, but are not limited to the following:

- Pattern of unsatisfactory job performance or work habits;
- Occurrence of a serious or potentially serious work-related accident that may have been caused by human error or flagrant violations of safety, security, or other operating procedures;
- Evidence of illegal substance use, possession, sale, or delivery while on duty and/or possession of drug paraphernalia;
- Information provided by either a reliable or credible source independently corroborated or having corroborative evidence from a supervisor;

Physical Signs or Symptoms (CIRCLE ALL THAT APPLY)

- | | | |
|----------------------------|--|-------------------|
| Flush/pale/sweaty face | Dry mouth/lip smacking | Odor of alcohol |
| Profuse/excessive sweating | Vomiting/excessive belching | Odor of marijuana |
| Red/bloodshot eyes | Shaking hands/body tremors/twitching | Odor of chemicals |
| Glassy/watery eyes | Disheveled appearance | |
| Closed eyes | Needle tracks or puncture marks | |
| Droopy eyelids | Frequent sniffing | |
| Dilated/constricted pupils | Shortness of breath/difficulty breathing | |
| | Runny nose/sores around nostrils | |

Behavioral Indicators (CIRCLE ALL THAT APPLY)

- | | | |
|----------------------------------|--------------------------------|-------------------------------------|
| Agitated/insulting speech | Irritable/angry/impulsive | Sad, depressed, withdrawn |
| Combative/threatening speech | Use of profanity/argumentative | Anxious/fearful |
| Incoherent/slurred/slow speech | Swaying/stumbling/staggering | Cannot control machinery/equipment |
| Rapid/rambling/repetitive speech | Lack of coordination | Excessive yawning/fatigue/lethargy |
| Delayed/mumbling speech | Disoriented/confused | Unaccounted time/extended breaks |
| Shouting/whispering/silent | Euphoric | Loss of inhibition |
| Uncharacteristically talkative | Tearful | Inappropriate wearing of sunglasses |
| | Impaired judgment | Falling down/reaching for support |
| | Sleepy/stupor | In appropriate wearing of outerwear |



Description of actions or behaviors Provide a detailed description of the behaviors or indicators you observed.
Apply BOAS - Describe Behavior, O odors, A ppearance, S peech when documenting observations.

Post Accident (Complete if applicable) Specify indicators of drug or alcohol use as a potential factor in this accident:

Employee Interview Ask employee, "Explain the behaviors we have observed" and provide employee response:

Checklist Answer the following questions to establish reasonable cause for testing. Consult with your Human Resources Business Partner, Human Resources Representative, Appointing Authority or designee to determine appropriateness of testing upon answering the following questions.

1. Has impairment been displayed by the employee in their workplace appearance, actions and/or performance?
 Yes No
2. Could the impairment result from the possible use of drugs and/or alcohol?
 Yes No
3. Is the impairment current?
 Yes No
4. Did you personally witness the situation and/or the concerning appearance, actions, behavior or performance?
 Yes No
5. Are observers able to (and/or have they) document(ed) facts about the situation?
 Yes No

Observer Information (Must be a manager or supervisor)

Supervisor/Manager Name: _____

Title: _____ **Date/Time:** _____

IMPORTANT NOTE: SECONDARY OBSERVER must complete a separate, original form. Always seek a secondary observation from another supervisor, manager, or team lead.



Additional Documentation

SAMPLE