

DRUGS

**DON'T
WORK**

IN NJ

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Drug-Free Workplace – Law and Policy 2026

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Littler[®]



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“Cannabis” vs. “Marijuana”

- New Jersey’s law, enacted 2021, uses the term “cannabis”
- From an employment and testing perspective however, only some forms of cannabis contain psychoactive tetrahydrocannabinols – THC
- THC is the compound that has a psychoactive effect, that can cause a “high”
- Cannabis products are lawful ***as a matter of federal law*** if they contain less than 0.3% THC
- Employer drug tests look for the presence of THC, not CBD (cannabinoid)
- 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



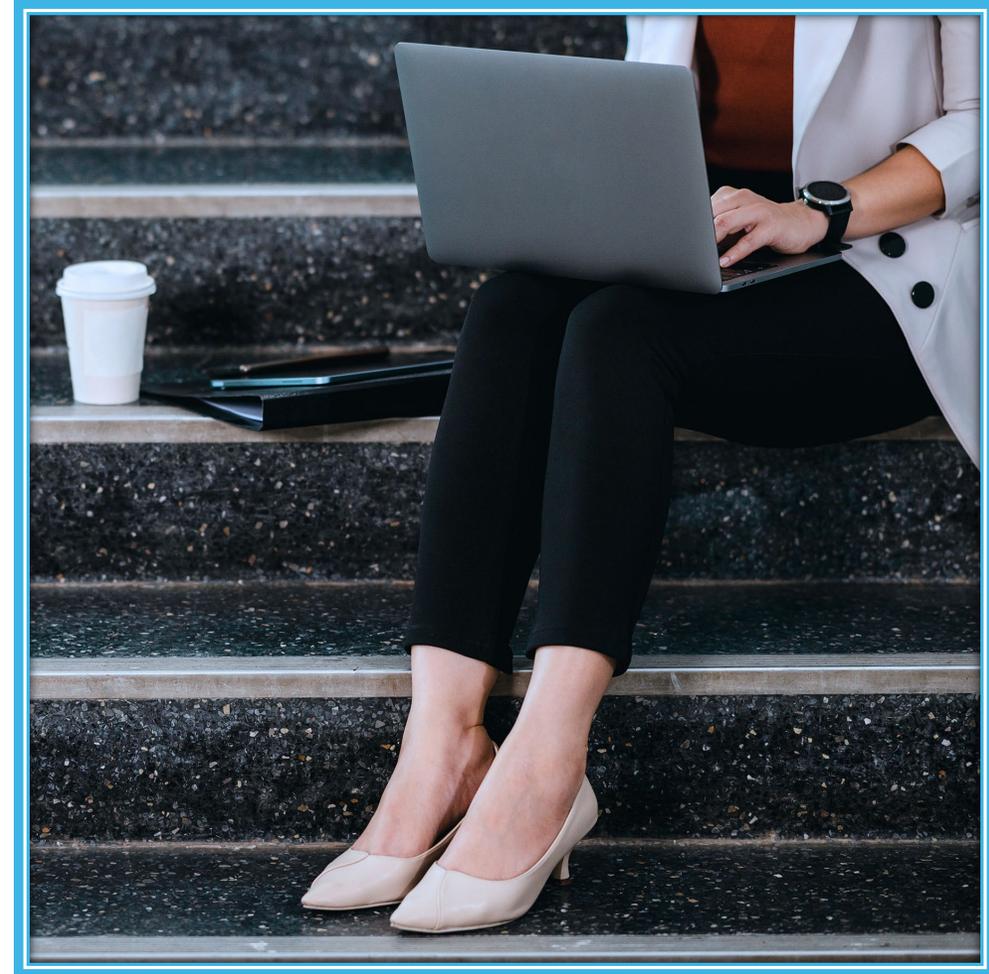
Can You Have a Drug-Free Workplace?

What Can Our New Jersey Policies Require?

- OK to have policies prohibiting the possession and use of marijuana (including vape & “edibles”) and all other illegal drugs at work and during work day
- OK to prohibit coming to work impaired, and to discipline workers who come to work impaired
- You don’t need a test to act if you have evidence of a policy violation

Can We Have a Drug-Free Workplace?

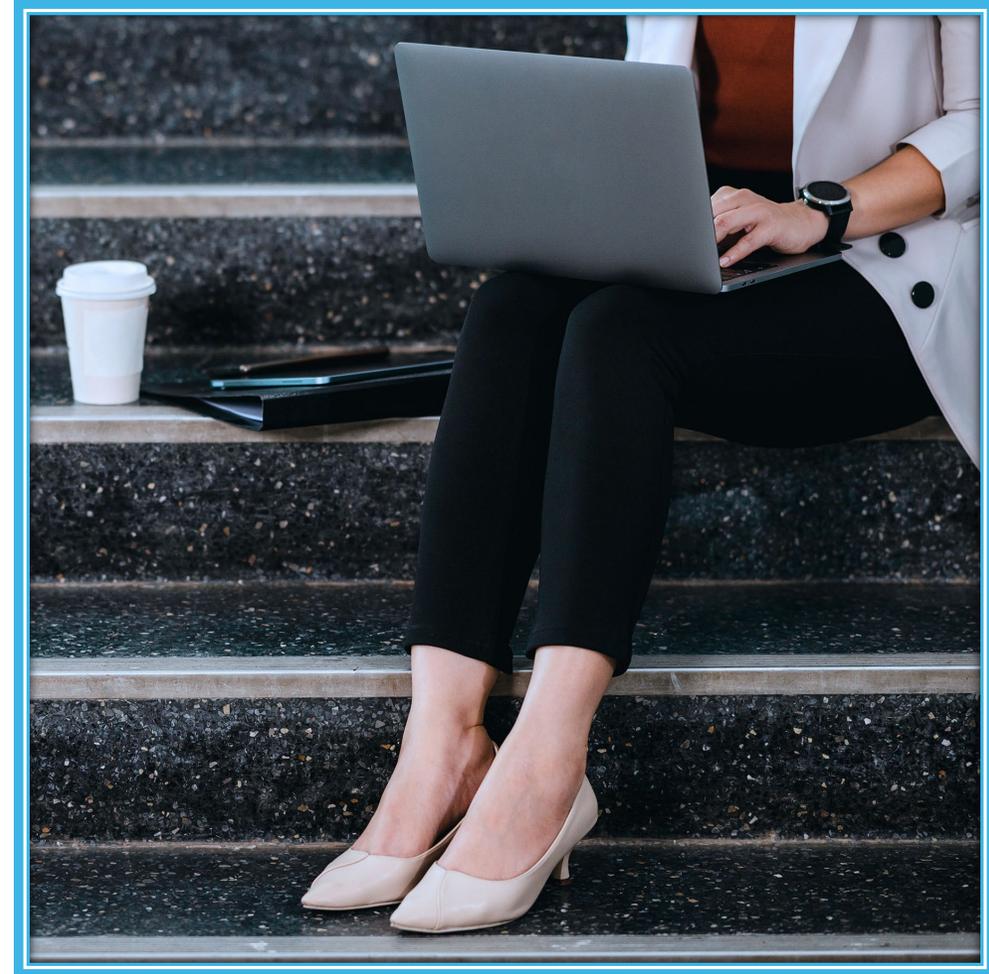
Can I prevent workers from using their prescription medication at work?



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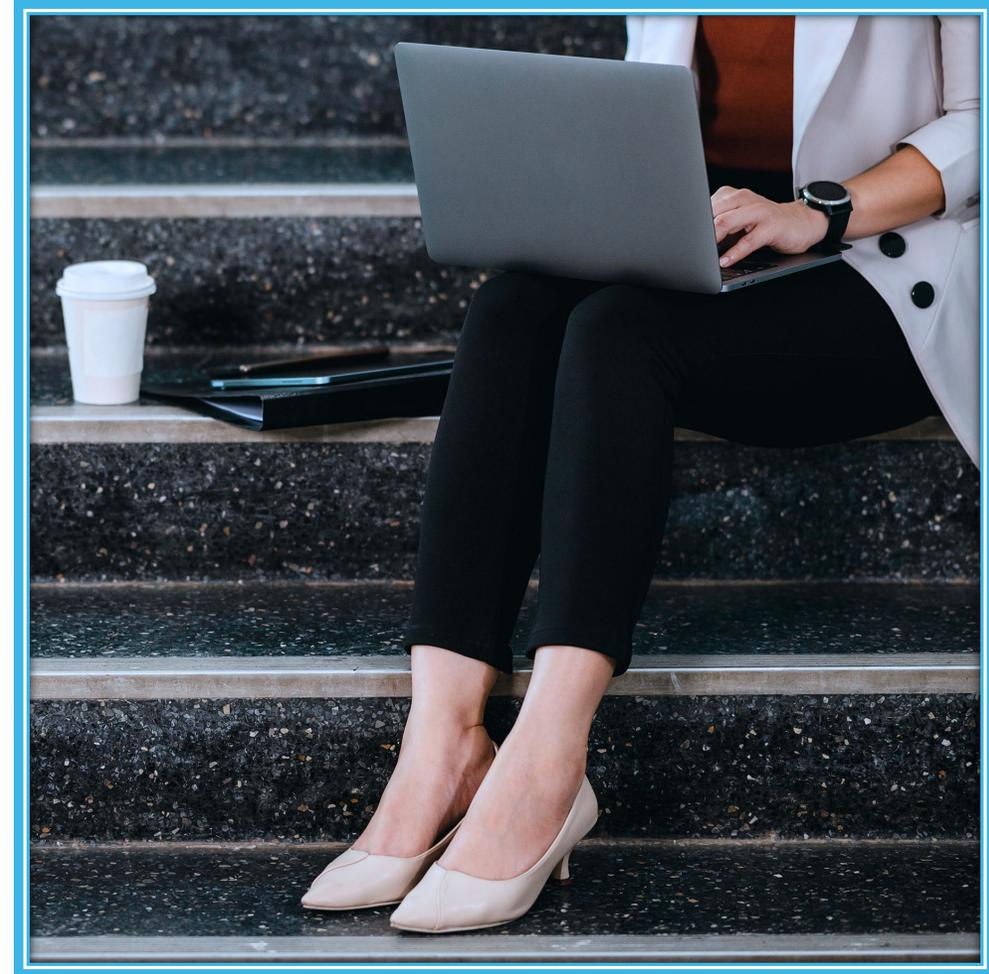
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NO!



Can We Have a Drug-Free Workplace?

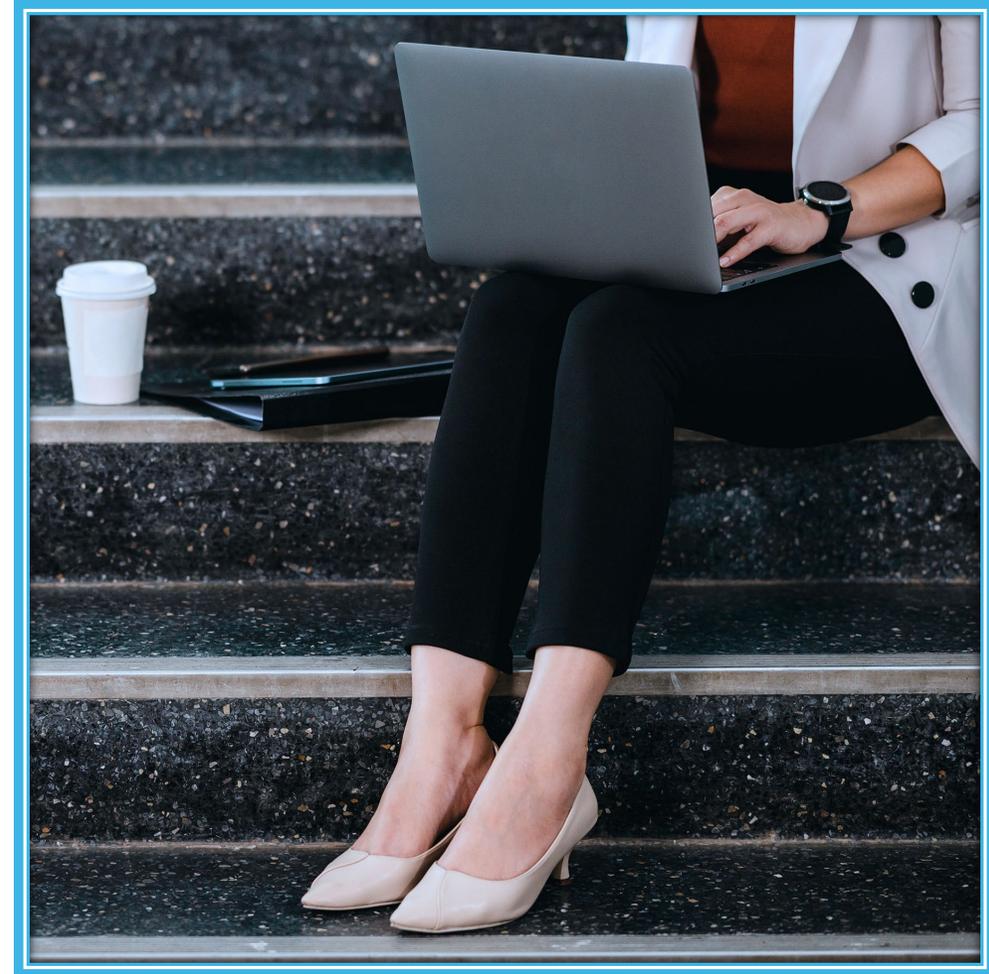
Can I tell workers they cannot have marijuana at work?



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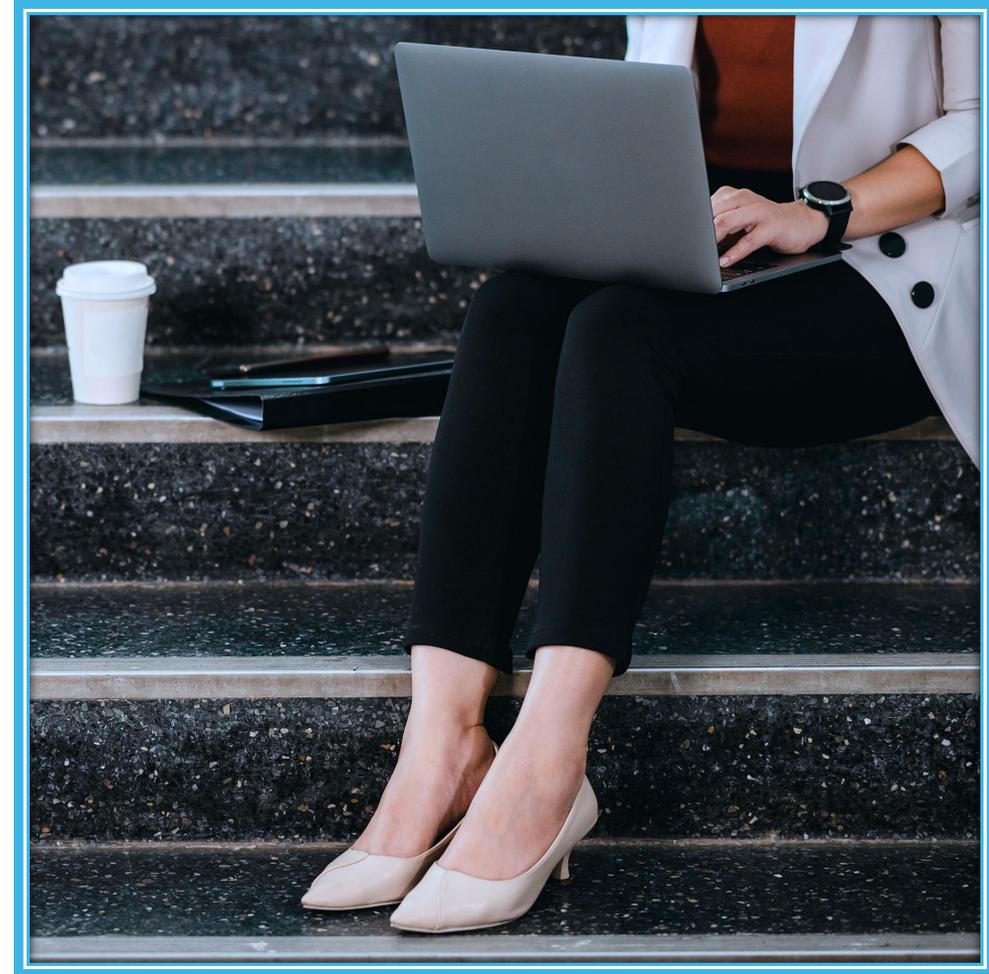
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YES!



Can We Have a Drug-Free Workplace?

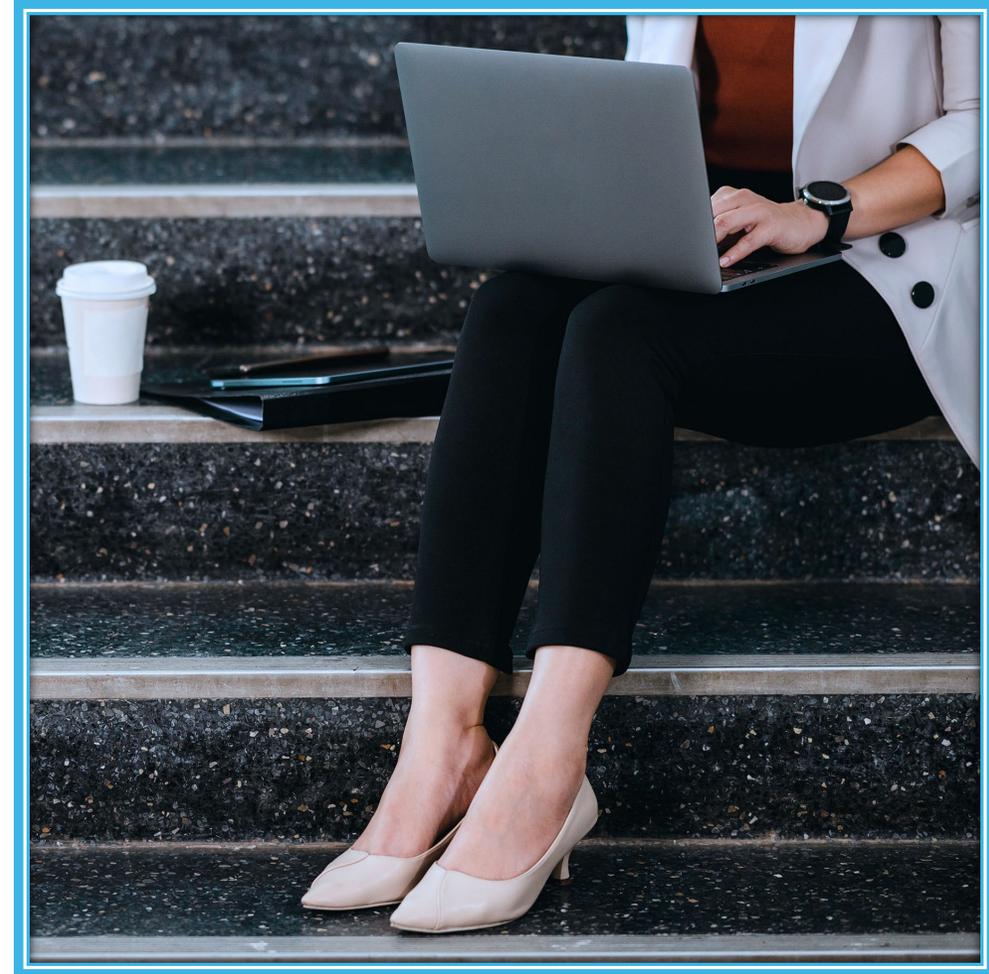
Can I tell workers they cannot use prescription medication at work if it's unsafe?



Can We Have a Drug-Free Workplace?

Can I tell workers they cannot use prescription medication at work if it's unsafe?

MAYBE!



What Can Our New Jersey Policies Require?



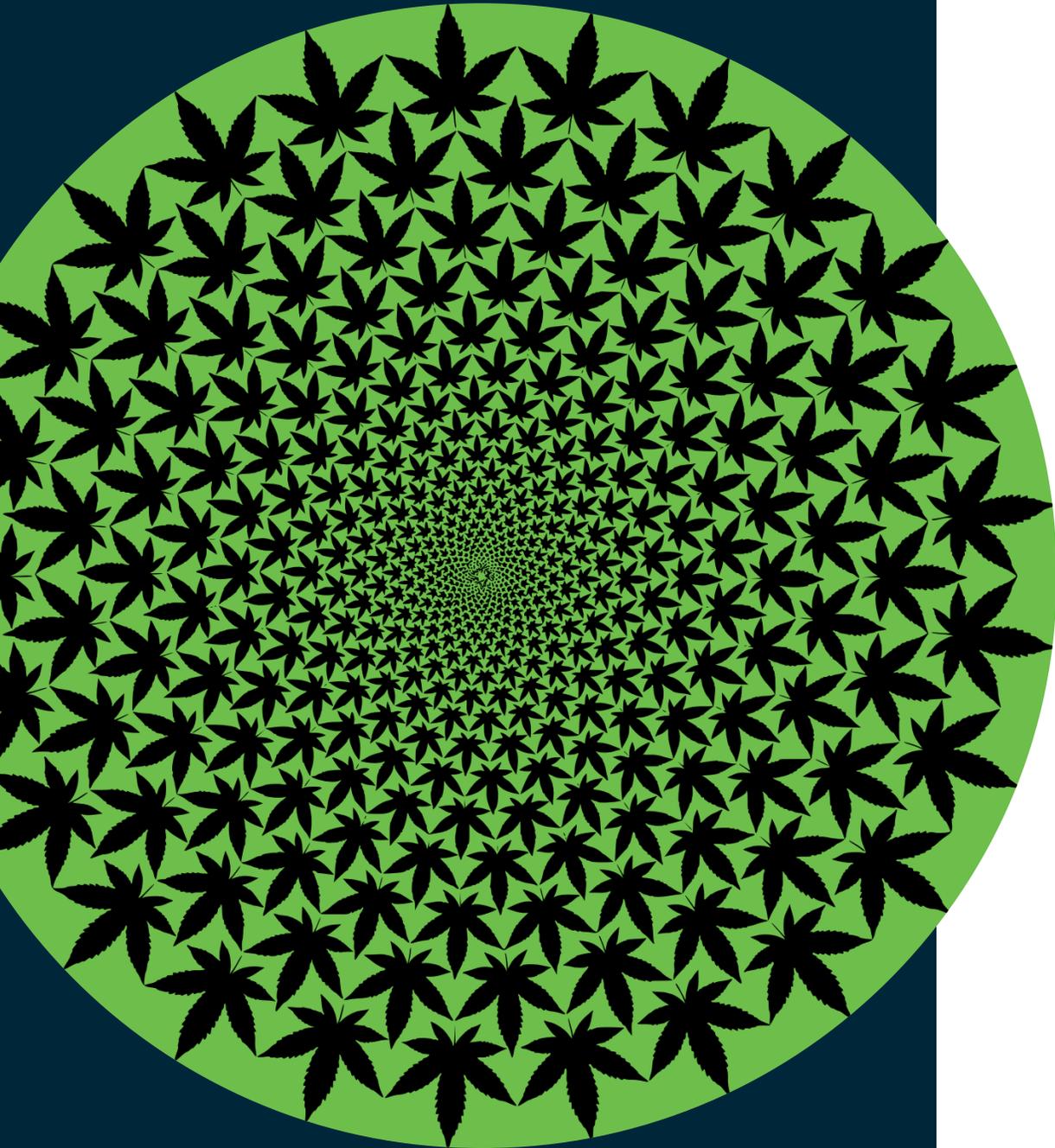
OK to drug test as long as policy follows **both** New Jersey Supreme Court's guidance on whom and how to test, and NJCREAMMA, but...



That can be complicated.

What **TESTING** Can our New Jersey Policies Require?

- Pre-employment drug testing (all drugs of abuse, including THC)
- Reasonable suspicion drug and alcohol testing (including THC)
- Post-accident drug and alcohol testing (possibly including THC)
- Random drug and alcohol testing of safety-sensitive workers
- Return to Duty drug and/or alcohol testing following a policy violation
- Follow-up drug and/or alcohol testing following a policy violation
- All federally mandated drug and/or alcohol testing



Wait, is Marijuana Legal?

Federal Marijuana Legalization

- Federal agencies are moving toward rescheduling marijuana
 - Executive Order on “Increasing Medical Marijuana and Cannabidiol Research 12/18/25
 - In 2023, Drug Enforcement Administration (DEA) recommended marijuana be controlled under Schedule III of the Controlled Substances Act
 - In 2024, Department of Justice (DOJ) issued a proposed rule to implement the rescheduling
 - Agencies received more than 43,000 public comments on the proposed rule
 - The rule awaits an administrative hearing, but DEA ALJ retired in 8/25

Marijuana Legalization

- Politically challenging as GOP includes both pro-marijuana business interests and anti-marijuana cultural interests, with health care interests falling on both sides
- 21 U.S.C. Section 844 makes simple possession of marijuana a federal crime, and Congress has not moved to change this
- DOJ under Trump rescinded the Biden Administration's policy of not prosecuting individuals for marijuana offenses.
- Congress has enacted budget legislation preventing federal funds from being used to prosecute medical marijuana users if they comply with their state's medical marijuana rules.

Marijuana Legalization

- Earlier this month, Congress passed and the President signed legislation barring Washington, D.C. from legalizing marijuana.
- If marijuana becomes a Schedule III controlled substance, it will be subject to regulation, and users will need a prescription to use lawfully under federal law
- If marijuana becomes a prescription drug, DOT drug and alcohol testing regulations would no longer have legal support for marijuana testing absent Congressional action
- Currently, employers have no obligation under federal Americans with Disabilities Act to accommodate medical marijuana users, but this would change if legalized at federal level

Wait, Marijuana's Legal in New Jersey Though Right?

So, what does the New Jersey's Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (NJCREAMMA) law say about marijuana use by workers?



Employer Marijuana Testing In New Jersey

- In December 2024, federal court of appeals for New Jersey confirmed CREAMMA does NOT contain a provision allowing workers who are turned away from New Jersey employment because of a positive drug test to sue.
- Does this mean NJ employers can go back to testing workers for marijuana?



Can Workers Sue Employers Under CREAMMA?

- The decision concluded the legislature failed to create a private right of action (i.e., a claim that someone can bring a lawsuit for) under CREAMMA.
- While CREAMMA precludes discrimination based on an individual's use or non-use of cannabis, the law does not contain any provision allowing an individual who is terminated or denied employment to bring an action against the employer.
- CREAMMA expressly states it does not “amend or affect in any way any State...law pertaining to employment matters.”
- Therefore, Court concluded that applicants cannot bring a common law claim alleging failure to hire in violation of CREAMMA is against public policy

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

Employers cannot ~~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

Can Workers Sue Employers ~~Under~~ Despite CREAMMA?

- Yes, most likely an individual can sue an employer for:
 - Discrimination on the basis of the individual's use, or non-use of cannabis products if the employer's actions violate the public policy of the state of New Jersey
 - Discrimination in violation of the Law Against Discrimination for taking adverse action against the individual's medical use of cannabis
 - Whether they will succeed... we don't know

TL/DR

**Review all employment decisions
involving the use of cannabis
carefully
before deciding how to respond.**



Can We Require Someone to Go to Treatment?

Can We Require Him to Go to Treatment?

Kerry came to work with really red eyes today. It's the second time in 3 weeks. He's usually on time but lately has been looking disheveled, the work is getting done late, and his usually cheerful demeanor of a few months ago has evolved to being silent, uncommunicative, and apparently unfriendly. Thus far though, he hasn't made any mistakes in his work.

Madison, his manager, wants to give him a mandatory referral to the Employee Assistance Program. Do you agree this is a good idea?

Can We Require Him to Go to Treatment?

What additional information would you like to have?

Can We Make Him Go to EAP?

U.S. Court of Appeals for the 10th Circuit:

A mandatory referral to an employee assistance program may be an “adverse employment action” based upon “perceived disability” and since the law requires only “some harm” to state a federal claim, employee’s lawsuit against her employer can move forward.

Can We Require Follow-Up Testing?

Kerry has taken some leave for mental health issues with paperwork supported by a substance abuse counseling center and is ready to return. He has submitted a generic “return to work” note.

**Madison, wants to enroll him in an unannounced follow-up testing program.
Do you agree this is a good idea?**

Can We Require Follow-up Testing?

Generally, the Americans with Disabilities Act permits employers

“to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual [who is participating in or who has completed a drug treatment program] is no longer engaging in the illegal use of drugs”

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“to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual [who is participating in or who has completed a drug treatment program] is no longer engaging in the illegal use of drugs”

Note: Doesn't include alcohol!

Can We Require Follow-up Testing?

A.D.P. v. ExxonMobil:

- Not OK to impose follow-up alcohol testing for employee who self-referred for alcohol treatment but who neither:
 - Had documented performance concerns
 - Had a safety-sensitive role

In this circumstance, Court viewed imposition of mandatory follow-up testing as clear evidence of discrimination on the basis of A.D.P.'s self-disclosed alcoholism

TL/DR

Review all employment decisions involving employee medical issues, including medical leave and substance abuse treatment, on an individualized basis before deciding how to respond.



New Jersey's Psilocybin Pilot Program

Psilocybin Legalization in New Jersey

- Governor Murphy signed Bill 2830, which will allow three hospitals to administer a pilot program to determine if psilocybin can help treat mental health issues
 - Another substance currently classified as a Schedule I controlled substance, but recently believed to be capable of medical use
- Same hallucinogen is found in “magic mushrooms”



Psilocybin Legalization in New Jersey

- Medical supervision will be required
- Can cause hallucinations and inability to discern fantasy from reality, panic reaction, according to federal DEA
- Abuse is uncommon but increasing in the last 5 years
- Intoxicating effects last 3 – 6 hours.
- New Jersey joint 3 other states in approving pilot programs
- DEA has considered rescheduling to for medical uses following study showing mental health treatment value may be significant.

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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