



December 8, 2020

RE: New Jersey Workplace Regulation of Marijuana

Dear Representative,

I am writing to you on behalf of our members regarding the two versions of the Employer Protection Sections in the recreational cannabis legalization bills, A-21 / S-21. **Recent amendments to these bills further weaken the workplace safety provisions contained in the original legislation.**

Currently, the legislation is calling for the use of Drug Recognition Experts (DREs). A business will essentially need to hire or train a DRE to determine if an employee is in fact impaired. This will place additional burdens and costs on the business community. Furthermore, the New Jersey Supreme Court is currently hearing a case to determine whether DRE testimony is even admissible in court.

As you determine how best to balance individual employee rights with the needs of employers to protect their employees and the public, it is useful to know what other states are doing with respect to workplace safety. As you will see below, most states that have legalized recreational marijuana allow employers to prohibit off-duty recreational marijuana use by employees or allow an employer to drug test current and prospective employees. Moreover, it does not appear that DREs have been adopted in any other state as a means for employers to identify impaired employees in the workplace.

Our request of you is to protect the rights of our employer community to maintain a drug-free workplace, and thus both worker and public safety, without increasing the burdens on a business community that has been severely impacted by COVID-19 over the last nine months. Given the fact that we are for the first time legalizing recreational marijuana, we must proceed cautiously and err on the side of workplace safety.

We thank Senate Budget Chairman Sarlo for pushing for these workplace protections, and we hope we can find a compromise like what he wants, and most other states have adopted.

Marijuana Workplace Safety in Legalized States

- **Alaska**
 - Employers can have a zero-tolerance policy prohibiting their employees from using marijuana¹
- **Colorado**
 - Employers can test for marijuana and make employment decisions based on drug test results²
- **California**
 - Within California Health and Safety Code:
 - “Section 11362.1 does not amend, repeal, affect, restrict, or preempt.... The rights and obligations of public and private employers to maintain a drug and alcohol-free workplace...or affect the ability of employers to have policies prohibiting the use of cannabis by employees and prospective employees....”³

¹ <http://dhss.alaska.gov/dph/Director/Documents/marijuana/ResponsibleConsumerFactBook.pdf>

² <https://www.colorado.gov/pacific/marijuana/laws-about-marijuana-use>

³ https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=HSC&division=10.&title=&part=&chapter=6.&article=2

- Pre-employment testing is allowed. You may not require current employees to submit to random drug testing, except under certain narrowly defined circumstances.⁴

- **Illinois**
 - Cannabis Regulation and Taxation Act
 - "...nothing in this Act prevents a public employer of law enforcement officers, corrections officers, probation officers, paramedics, or firefighters from prohibiting or taking disciplinary action for the consumption, possession, sales, purchase, or delivery of cannabis or cannabis-infused substances while on or off duty, unless provided for in the employer's policies."
 - "Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for:
 - (1) actions taken pursuant to an employer's reasonable workplace drug policy, including but not limited to subjecting an employee or applicant to reasonable drug and alcohol testing, reasonable and nondiscriminatory random drug testing, and discipline, termination of employment, or withdrawal of a job offer due to a failure of a drug test.
 - (2) actions based on the employer's good faith belief that an employee used or possessed cannabis in the employer's workplace or while performing the employee's job duties or while on call in violation of the employer's employment policies.
 - (3) actions, including discipline or termination of employment, based on the employer's good faith belief that an employee was impaired because of the use of cannabis, or under the influence of cannabis, while at the employer's workplace or while performing the employee's job duties or while on call in violation of the employer's workplace drug policy...."
- **Maine**
 - An Act to Legalize Marijuana⁵
 - "School, employer or landlord may not discriminate. A school, employer or landlord may not refuse to enroll or employ or lease to or otherwise penalize a person 21 years of age or older solely for that person's consuming marijuana outside of the school's, employer's, or landlord's property."
- **Massachusetts**
 - Massachusetts General Law⁶
 - "...This chapter shall not require an employer to permit or accommodate conduct otherwise allowed by this chapter in the workplace and shall not affect the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees."
- **Michigan**
 - Michigan Regulation and Taxation of Marijuana Act⁷
 - "This act does not require an employer to permit or accommodate conduct otherwise allowed by this act in any workplace or on the employer's property. This act does not prohibit an employer from disciplining an employee for violation of a workplace drug policy or for working while under the influence of marijuana. This act does not prevent an employer from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment because of that person's violation of a workplace drug policy or because that person was working while under the influence of marijuana."
- **Nevada**
 - Title 56 Nevada Revised Statutes 678D⁸
 - "The provisions of this chapter do not prohibit.... A public or private employer from maintaining, enacting, and enforcing a workplace policy prohibiting or restricting actions or conduct otherwise permitted under this chapter...."

⁴ <https://www.calchamber.com/california-labor-law/drug-and-alcohol-testing>

⁵ http://ldc.mainelegislature.org/Open/Laws/2015/2015_IB_c005.pdf

⁶ <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXV/Chapter94G/Section2>

⁷ [https://www.legislature.mi.gov/\(S\(nmdgppbj1ophhijr0bqtrc\)\)/mileg.aspx?page=getObject&objectName=mcl-333-27954&highlight=adverse](https://www.legislature.mi.gov/(S(nmdgppbj1ophhijr0bqtrc))/mileg.aspx?page=getObject&objectName=mcl-333-27954&highlight=adverse)

- **Vermont**

- (18 V.S.A. § 4230a)⁹: “Nothing in this section shall be construed to do any of the following...create a cause of action against an employer that discharges an employee for violating a policy that restricts or prohibits the use of marijuana by employees.”
- (21 V.S.A. § 512)¹⁰: “An employer may require an applicant for employment to submit to a drug test only if all of the following conditions are met:
 - Conditional offer of employment. The applicant has been given an offer of employment conditioned on the applicant receiving a negative test result.
 - (2) Notice. The applicant received written notice of the drug testing procedure and a list of the drugs to be tested. The notice shall also state that therapeutic levels of medically prescribed drugs tested will not be reported. The notice required under this subdivision may not be waived by the applicant.
 - (3) Administration. The drug test is administered in accordance with section 514 of this title.”

⁸ <https://www.leg.state.nv.us/NRS/NRS-678D.html>

⁹ <https://legislature.vermont.gov/statutes/section/18/084/04230>

¹⁰ <https://legislature.vermont.gov/statutes/section/21/005/00512>

Thank you again for your consideration of this important issue. Please contact me to discuss this further and answer any questions you may have.

Sincerely,



Patricia A. Cowley
Executive Director

CC: Governor Phil Murphy