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Client Advisory

New Jersey Passes New Law Regulating Employers' Ability to Test for Marijuana in the Workplace

When New Jersey voters ratified an amendment to the state's constitution permitting the recreational use of marijuana last fall, employment attorneys and legal scholars shared concern over the potential impact on employers seeking to maintain a drug-free workplace. What remained was for the State Legislature and the Governor to pass a law that actually laid out the permissible use of recreational marijuana. This week, Governor Murphy signed into law the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act ("NJCREAMMA"). Although this law addresses many aspects of the now legalized practice of cannabis use in New Jersey for recreational reasons, the law also addresses some employer concerns over recreational marijuana use. However, for employers, other obstacles remain, along with areas of uncertainty.

NJCREAMMA first and foremost removes marijuana as a Schedule I drug, which means that it legalizes recreational use of cannabis for adults over the age of 21. Previously, only medical marijuana was permitted, but as mandated by the voters in the State, recreational use is now legal. The impact of NJCREAMMA on employers, and whether employees can be active users of marijuana, is significant.

First, NJCREAMMA prohibits employers from taking any adverse employment action against employees because of the presence of cannabinoid metabolites in the employee's bodily fluids. That is, employers cannot refuse to hire, discharge, or otherwise discipline an employee because they use cannabis. Nevertheless, NJCREAMMA also explicitly recognizes an employer's right to maintain a drug- and alcohol-free workplace and enforce policies prohibiting the use or intoxication of cannabis during work hours. That sounds simple, right? Marijuana use outside work is acceptable, but during work hours is not. However, the issue becomes much more complex given the current state of drug testing for cannabis and the additional requirements imposed by NJCREAMMA.

Here are some answers to questions facing most employers.

Can Employers Drug Test their Employees for Cannabis?

Yes, but what can be done about it remains uncertain. NJCREAMMA permits employers to require drug tests

if the employer:

- has a reasonable suspicion of an employee's usage of a cannabis item while engaged in the performance of the employee's work responsibilities; or
- finds observable signs of intoxication at work related to usage of a cannabis item; or
- conducts the test following a work-related accident subject to investigation by the employer.

Is the Ordinary Blood, Urine or Saliva Test Still Permissible?

No. Cannabis remains detectable in bodily fluid for a longer period of time than most drugs. As a result, a positive blood, urine or saliva test result only indicates the likelihood of prior use, without revealing when the cannabis was actually consumed. Therefore, these tests cannot differentiate between employees who permissibly consumed cannabis outside of work hours and those who impermissibly consumed cannabis during work hours.

For this reason, a drug test to determine whether an employee used cannabis while performing their work responsibilities must include both (1) a form of scientifically reliable objective testing methods and procedures, such as testing of blood, urine, or saliva, and (2) a physical evaluation to determine the employee's state of impairment.

The physical evaluation has never been required before. This requirement was intended to balance employees' right to use cannabis recreationally outside of work hours while still allowing employers to prohibit use or intoxication while working. Employers may rely on the drug test in conjunction with the physical evaluation when making a determination about disciplinary action. The issue is that the physical evaluation itself is not known, but will require much more than an employer's own, untrained, visual examination.

What Does the Physical Test Require?

The physical test must be conducted by an individual who has completed a Drug Recognition Expert program provided by a Police Training Commission approved school, or another program or course with substantially equivalent requirements. Upon completion

of this program, the individual will receive a Workplace Impairment Recognition Expert certification. The individual can either be an employee or someone the employer contracts with to perform the test on the employer's behalf.

Added to this new complexity is the fact that the training and certification process has not yet been developed. The Cannabis Regulatory Commission in consultation with the Police Training Commission will issue regulations describing the standards for the certification, including the minimum curriculum courses of study. Until those are developed, it seems highly risky for an employer to take action against what appears to be an employee intoxicated by marijuana.

What about Employees in Safety-Sensitive Jobs?

Despite lobbying efforts, there is no exception in NJCREAMMA for employees in safety-sensitive job positions. New Jersey law has created an exception to a general prohibition against random drug testing for employees in safety-sensitive job positions, such as employees working in chemical plants, operating machinery, etc. However, the final version of NJCREAMMA did not exempt those employees from the law, so those employers must follow the same rules as all employers in allowing employees using marijuana outside of work to remain employed.

What if NJCREAMMA Impacts my Federal Contract?

If compliance with the NJCREAMMA results in a provable adverse impact on an employer who is subject to the requirements of a federal contract, then the law permits employers to revise employee prohibitions consistent with federal law, rules and regulations. In other words, cannabis is still an illegal drug, as far as the federal government is concerned. NJCREAMMA allows New Jersey employers to test and take action against employees with marijuana present in their system, if this is a condition imposed by a federal contract.

Can I Conduct Random Drug Tests?

It depends. As most employers already know, random drug tests of employees is not permitted except for employees in safety-sensitive positions. However, NJCREAMMA has created a special rule for cannabis testing -- employers may conduct random drug testing, for cannabis only, as part of a pre-employment screening or regular screening of current employees to determine use during an employee's work hours. And, as is recommended even outside of cannabis, New Jersey courts have imposed a number of limitations on an employer's ability to implement a drug testing policies. For example, employers must ensure that:

- testing procedures allow as much privacy and dignity as possible;
- testing is limited to the measures needed to determine the presence of the prohibited drugs; and
- testing information is kept confidential.
- Employees must also receive advance notice of the drug-testing program, details about how employees will be selected for testing, an explanation of how the test will be analyzed, a warning about the lingering effects of drugs in the system, notice about the consequences of testing positive for any prohibited substance, and notice about the consequences for refusing to be tested.

So, the bottom line is that random drug testing for cannabis is permitted by any employer in New Jersey. Yet, the added physical evaluation requirement (discussed earlier) puts a significant additional layer before any adverse action can be taken against the employee.

Employers should review existing drug policies to determine whether they are in compliance with NJCREAMMA and other applicable laws. For questions regarding NJCREAMMA and how it may affect your business, please contact your Archer attorney or any member of Archer's [Labor & Employment Group](#) in: Haddonfield, NJ at 856-795-2121, Princeton, NJ at 609-580-3700, Hackensack, NJ at 201-342-6000, Philadelphia, PA at 215-963-3300, or Wilmington, DE at 302-777-4350.

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