

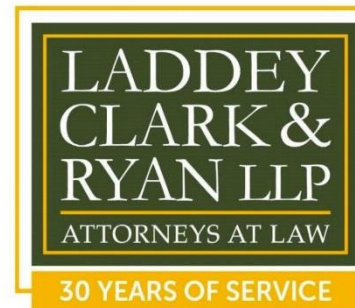
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Sussex County Chamber of Commerce Business Issues Webinar

Cannabis in the Workplace

Tuesday, July 11, 2023



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New Jersey Marijuana Laws

1. Jake Honig Compassionate Use Medical Cannabis Act
2. Cannabis Regulatory Enforcement Assistance and Marketplace Modernization Act (CREAMMA).

Medical Marijuana

Medical marijuana was first legalized in 2009 as the **Compassionate Use Medical Marijuana Act**, which sought to “protect from arrest, prosecution, property forfeiture, and criminal and other penalties, those patients who use cannabis to alleviate suffering from qualifying medical conditions, as well as their health-care practitioners, designated caregivers, institutional caregivers, and those who are authorized to produce cannabis for medical purposes.” N.J.S.A. §24:6I-2.

The law specifically provided: “Nothing in this act shall be construed to require ... an employer to accommodate the medical use of marijuana in any workplace.” N.J.S.A. §24:6I-14 (2018).

More Medical Marijuana

Specifically, the law now provides that it is unlawful for an employer “to take any adverse employment action against an employee who is a registered qualifying patient based solely on the employee’s status as a registrant with the commission.” N.J.S.A. §24:6I-6.1(a).

It did NOT change the right of employers to prohibit the use or possession of marijuana *in* the workplace, it memorialized additional obligations employers may have to accommodate medical marijuana use by employees.

More Medical Marijuana

Additionally, if an individual does test positive for marijuana, the law requires an employer to allow the individual up to three days to provide a medical explanation for the positive test result.

Recreational Cannabis

In November 2020, New Jersey citizens voted to legalize marijuana for ***adult recreational use***, approving the referendum by a 67% majority.

On Feb. 22, 2021, Governor Philip Murphy signed into law the “**Cannabis Regulatory Enforcement Assistance and Marketplace Modernization Act**,” or “**CREAMMA**”, which:

1. legalizes and regulates marijuana use and possession for adults aged 21 and over;
2. decriminalizes marijuana possession up to a certain quantity; and
3. clarifies marijuana use and possession penalties for individuals under 21 years old.

CREAMMA

CREAMMA legalizes and regulates marijuana use and possession for adults aged 21 and over; AND

Expressly prohibits an employer from subjecting an employee or applicant to any adverse action *solely* due to an individual's positive drug test for marijuana.

CREAMMA

Under CREAMMA, “[n]o employer shall refuse to hire or employ any person or shall discharge from employment or take any adverse action against any employee with respect to compensation, terms, conditions, or other privileges of employment because that person does or does not smoke, vape, aerosolize or otherwise use cannabis items.” N.J.S.A. 24:6I-52.

Essentially creates a new “protected class” under New Jersey law for employees and job applicants who lawfully use recreational cannabis **off premises and during non-working hours.**

What can Employers Do?

1. Employees can be terminated for ***being under the influence of marijuana during work hours***, regardless of whether the use is medical or recreational in nature.
2. Likewise, employers do not have to permit the ***use, sale, display, possession, or transfer of marijuana at work or during work hours***.
3. Exceptions exist for employees that are subject to **federally regulated** positions or who work for employers with federal contracts, because both medical and recreational marijuana are still illegal under federal law.

In other words, if complying with the New Jersey state laws jeopardizes an employer's federal contract, the employer is excepted from such compliance.

Federal or State Law???

**New Jersey law diverges from federal law for medical marijuana
AND recreational use.**

**Federal law makes it illegal to use, possess, grow and sell
marijuana under the Controlled Substances Act.**

There is no exception for the medical or so-called “recreational”
use of marijuana in federal law.

CDL

- New Jersey's recent marijuana and legalization regulations do not alter the federal laws strictly prohibiting the use of marijuana by CDL drivers or other employees performing "safety sensitive functions."
- Regardless of state or local laws, drivers operating a commercial motor vehicle are still prohibited from using marijuana under the federal drug testing regulations.
- The Drug Enforcement Agency ("DEA"), and consequently the U.S. Department of Transportation ("DOT"), follows Drug and Alcohol Testing Regulation, Part 40, which still considers marijuana a Schedule 1 controlled substance with no authorized usage.
- Any positive test result can be valid grounds for loss of license and possible termination.

CBD v THC

- The Federal government still considers marijuana to be a Schedule 1 regulated drug
- Cannabidiol (CBD) is a chemical compound that is extracted from the cannabis plant
 - CBD is derived from marijuana and therefore can also result in a positive DOT drug test
- Tetrahydrocannabinol (THC) is the chemical that gives marijuana most of its psychological effects

Important to know:

1. The Department of Transportation requires testing for marijuana and not CBD.
2. The labeling of many CBD products may be misleading because the products could contain higher levels of THC than what the product label states.
 - The FDA does not currently certify the levels of THC in CBD products, so there is no Federal oversight to ensure that the labels are accurate. The FDA has cautioned the public that: “Consumers should beware purchasing and using any [CBD] products.”
 - The FDA has stated that it is currently illegal to market CBD by adding it to a food or labeling it as a dietary supplement; AND the FDA has issued several warnings because products contained more CBD than indicated on the product label.

Enforcement

Generally, federal law enforcement authorities do ***not*** prosecute medical or recreational marijuana use as long as people adhere to the law of the state in which they live and do not sell marijuana across state lines.

So...

- Follow both federal and state law.
- The specifics of NJ law need to be followed in most instances.
- Federal contractors have a tougher road to travel.

Termination due to Cannabis Use

The relevant portion of CREAMMA and the Rules provides that employers are not prohibited from taking an adverse employment action against an employee who is *under the influence of marijuana at work*.

But to legally take an adverse employment action, such as terminating the worker, the employer must have a positive (1) drug screen *and* (2) a physical evaluation by a person certified as a **Workplace Impairment Recognition Expert (“WIRE”)**.

The WIRE will be a person who has completed a course to be offered by the **Police Training Commission**.

CREAMMA and its Rules are silent on this training course, and until more guidance is provided, the *physical evaluation portion of the law is not yet in effect*.

CRC Guidance

On September 9, 2022, The New Jersey Cannabis Regulatory Commission (CRC) issued interim guidance for employers on steps they should take if they suspect an employee to be under the impairment of cannabis while performing work duties.

CRC Guidance

- 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 (likely the future WIRE).

Reasonable Suspicion Observed Behavior Report

“Reasonable Suspicion” Observation Report Form is on CRC website- and the sample form is not cannabis-specific.

<https://www.nj.gov/cannabis/documents/businesses/Business%20Resources/Workplace%20Impairment%20Guidance%20Sample%20Form.pdf>

Discipline for Cannabis possession or use on the job

- Absolutely permitted!
- Just like alcohol is legal, you don't have to permit it AT WORK;
and
- Just like alcohol, employees can be prohibited from being under the influence.

Updated Drug-Free Workplaces Policies

An employer may not discharge or refuse to hire an employee solely because he or she fails a drug test for marijuana; instead, employers need to rely upon some other lawful reason.

An employer in violation of the Law may be liable for a civil penalty in an amount up to \$1,000 for the first violation, \$5,000 for the second violation, and \$10,000 for each subsequent violation. This is the sole remedy under the Law.

Background Checks

An employer is *not permitted to consider any arrest, charge, or conviction for certain types of marijuana and hashish offenses when making an employment decision.* Similarly, an employer cannot require an applicant to disclose or take any adverse action against an applicant solely based on any arrest, charge, or conviction for certain types of marijuana and hashish offenses.

Points to Remember

1. Use of marijuana cannot be the only reason for any adverse employment action, such as termination or failure to hire or promote.
2. Employers may be obligated to accommodate medical marijuana patients, if such an accommodation is possible and would not pose an undue hardship on the employer.
3. Medical marijuana patients may also be entitled to reimbursement of the expenses associated with such treatment under an employer's workers' compensation plan.

What Employers Can and Can't Do

1. Employers need not tolerate the possession of, use of, or an employee being under the influence of, cannabis—legal or not—*in the workplace during working hours*.
2. Employers may not take adverse action against an employee *solely* because that employee uses recreational or medicinal marijuana outside of work during non-working hours.
3. Employers may not *solely* rely upon—as justification for taking an adverse action—an employee's prior arrest, charge, conviction or adjudication of delinquency, for certain cannabis-related expunged offenses.

MORE of What Employers Can and Can't Do

4. Employers need not commit any act that would cause them “to be in violation of **federal law**, that would result in a loss of a licensing-related benefit pursuant to federal law, or that would result in the loss of a federal contract or federal funding.”
5. If an employer has a **drug testing policy** and an employee or job applicant tests positive, the employer must offer an opportunity to present a legitimate medical explanation, provide written notice of the right to explain, and afford three working days to the employee to explain or provide a retest.
6. Employers may still test- but include scientifically reliable **objective testing methods and procedures** and include a physical evaluation in order to determine an employee’s state of impairment. USE the NEW Form.

What Should Employers Do Now?

If employers have not done so, they should create and/or revisit their policies and practices with respect to drug testing and background checks.

What Should Employers Do Now?

Train human resources and other supervisors who are involved in making employment decisions or implementing policies.

What Should Employers Do Now?

Employers should avoid adverse actions against employees who only test positive for cannabis and NOT discriminate against employees or applicants who use cannabis when they are not working.

What Should Employers Do Now?

- Tread carefully and consult legal counsel for guidance.
- Utilize the new Reasonable Suspicion Observation Form
- Be on the lookout for updates!

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