

Cannabis Testing Employees - The Haze Continues: Part I

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The New Jersey Cannabis Regulatory Enforcement Assistance and Marketplace Modernization Act (Cannabis Law) provides that employees may be tested for cannabis in the following circumstances:

1. Upon reasonable suspicion of an employee's usage of a cannabis item while engaged in the performance of the employee's work responsibilities;
2. Upon finding any observable signs of intoxication, related to the usage of a cannabis item;
3. Following a work-related accident subject to investigation by the employer;
4. Randomly; and
5. As part of a pre-employment screening, or regular screening of current employees to determine use during an employee's prescribed work hours.

Additionally, the Cannabis Law contains restrictions regarding termination, providing that “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. *Therefore, in order for an employer to take an adverse action against an employee regarding suspected cannabis use, the employee must actually be impaired at work.*” As such, as part of the drug testing process, a physical evaluation is required in order to determine an employee's state of impairment. The physical evaluation must be conducted by an individual with a Workplace Impairment Recognition Expert (“WIRE”) certification.

Regulations regarding the standards for the WIRE certification were anticipated, but so far have not been issued. The regulations state only that, “**at this time**, employers are not required to perform a physical evaluation until the New Jersey Cannabis Regulatory Commission (“CRC”) develops the standards for a WIRE certification.” However, this is a gray area for employers because even if the physical evaluation requirement is not enforced, the Cannabis Law states, “an employee cannot be subject to an adverse action solely due to the presence of cannabinoid metabolites in the employee's bodily fluid.” While no physical evaluation is required until the CRC promulgates related regulations, the provision precluding adverse action based solely on the presence of cannabinoid metabolites appears to still be in effect. Employers with reasonable suspicion and/or post-accident testing policies must document their reasons for concluding an individual might be impaired at work as part of their testing program.

Takeaway: While marijuana testing remains permitted, absent reason to believe an individual may be impaired, an employer cannot take an adverse action based solely on a positive drug test, limiting the usefulness of pre-employment or random drug testing. Until further guidance is issued, employers should proceed carefully in their application of drug-testing policies and are advised to reach out to legal counsel for guidance.

If you are an employer and need help navigating employee cannabis testing, contact [Tracy Armstrong](#), [Stephanie Girona](#) or any member of the Wilentz [Employment Law](#) Team.

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*Cannabis Law Disclaimer: Per federal law, under the Controlled Substances Act, marijuana is categorized as a Schedule I controlled substance. Possession, use, distribution, and/or sale of cannabis is a Federal crime and is subject to related Federal policy, regardless of any state law that may authorize certain marijuana activity. Compliance with state marijuana law does not equal compliance with federal law. Legal advice provided by Wilentz, Goldman & Spitzer, P.A. is designed to counsel clients regarding the validity, scope, meaning, and application of existing and/or proposed cannabis law. Wilentz, Goldman & Spitzer, P.A. will not provide guidance or assistance in circumventing or violating Federal or state cannabis law or policy, and any advice provided by Wilentz, Goldman & Spitzer, P.A. should not be construed as such.