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Cannabis Testing Employees: The Haze Continues

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Until further guidance is issued, employers should proceed carefully in their application of drug-testing policies.

By **Lisa Gora** and **Tracy A. Armstrong** | April 1, 2022

Since the enactment of the New Jersey Cannabis Regulatory Enforcement Assistance and Marketplace Modernization Act (Cannabis Law) last year, the use of recreational marijuana for adults ages 21 and older became legal. At N.J.S.A. 24:6I-52 of the Act states "[n]o employer shall … take any adverse action against any employee … because that person does or does not smoke, vape, aerosolize or otherwise use cannabis items, and 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." However, regulations clarifying the law's impact on employment drug testing have yet to be issued, creating confusion among employers. Employers seeking to terminate an employee for cannabis related infractions should exercise caution given the current legal uncertainty.

Before the Cannabis Law was passed, drug testing was generally permitted in New Jersey for pre-employment purposes, as well as when an employer had a reasonable suspicion that an employee was impaired by drugs. Additionally, employers were permitted to randomly drug test employees in safety-sensitive positions. The 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. Specifically, the law provides 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.

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 the provisions of the New Jersey law jeopardize an employer's obligations under Department of Transportation regulations or a federal contract, then the employer may test and take adverse actions against employees who have cannabis present in their systems, consistent with the terms of the employer's obligations under the federal contract. However, employers should note that requiring compliance with the Drug Free Workplace Act (DFWA) does not mean that an employee that tests positive for marijuana must be terminated.

DFWA generally provides that, in order to be awarded a government contract, a company must agree to provide a "drug-free workplace" by:

1. Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the … workplace and specifying the actions that will be taken against employees for violations of the prohibition;

2. Establishing a drug-free awareness program to inform employees about the dangers of drug abuse in the workplace, the company's policy of maintaining a drug-free workplace, the available drug counseling, rehabilitation, and employee assistance programs, and the penalties that may be imposed on employees for drug abuse violations;

3. Giving employees a copy of the company's drug free policy; and

4. Abiding by certain notice and reporting requirements surrounding an employee's conviction under any criminal drug statute.

Despite these requirements, there is nothing in the Drug Free Workplace Act requiring implementation of a drug testing policy with respect to Schedule 1 drugs. Accordingly, deciding not to test for cannabis in pre-employment applicant screens would not appear to run afoul of the DFWA.

In *Noffsinger v. SSC Niantic Operating Company, LLC,* 338 F.Supp.3d 78 (D. Conn. 2018), a prospective employee who was diagnosed with Post Traumatic Stress Disorder (PTSD), and used medical marijuana pursuant to Connecticut's Palliative Use of Marijuana Act (PUMA) was denied employment following a positive pre-employment drug screen. The prospective employee argued that denying her employment based on a positive cannabis test violated PUMA. The employer argued that the language in PUMA that made it illegal to discriminate against an employee for using medical marijuana, contained an exception that allowed employers to take actions against employees on the basis of medical marijuana usage if it is "required by federal law or

required to obtain federal funding." *Id.* at 83-84. The employer argued that the DFWA barred it from hiring employees who use marijuana.

The court did "not agree that the DFWA required defendant to rescind plaintiff's job offer." *Id*. at 84. The court explained:

The DFWA does not require drug testing. Nor does the DFWA prohibit federal contractors from employing someone who uses illegal drugs outside of the workplace, much less an employee who uses medical marijuana outside the workplace in accordance with a program approved by state law. That defendant has chosen to utilize a zero tolerance drug testing policy in order to maintain a drug free work environment does not mean that this policy was actually "required by federal law or required to obtain federal funding."

Accordingly, the court rejected the defendant's argument that it would violate the DFWA for it to hire someone like plaintiff who uses medical marijuana during off-hours.

Once again, before terminating an employee for merely having a positive marijuana test result, even if an employer believes it is in violation of their federal contract, employers should proceed carefully in their application of drug-testing policies and are advised to reach out to legal counsel for guidance.

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