

## Cannabis Testing: Confusion Continues a Year Later

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The New Jersey Cannabis Regulatory Enforcement Assistance and Marketplace Modernization Act (“Cannabis Law”) was passed last year, legalizing cannabis for recreational use. 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 should exercise caution given the current uncertainty.

### **Drug Testing Prior to the NJ Cannabis Law**

Before the Cannabis Law was passed, drug testing was generally permitted in New Jersey for pre-employment purposes, and 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.

### **New Restrictions Imposed**

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. Or as part of a pre-employment screening, or regular screening of current employees to determine use during an employee's prescribed work hours.

However, the Cannabis Law also 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, 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.

### **WIRE Training and Certification**

Regulations regarding the standards for the WIRE certification are supposed to be issued, but have not been issued to date. Rules issued by the New Jersey Cannabis Regulatory Commission provide that until standards for the WIRE certification are developed, no physical evaluation of an employee being drug tested is required. However, this is a gray area for employers because even if the physical evaluation requirement is not enforced, the Cannabis Law still states that an employee cannot be subject to an adverse action solely due to the presence of cannabinoid metabolites in the employee's bodily fluid. Therefore, employers seeking to terminate employees who test positive are left open to lawsuits regarding same.

Takeaway: Employers should monitor the status of the WIRE certification and use caution in taking any adverse action against employees for testing positive for cannabis. Employers with questions about New Jersey's Cannabis Law and implementation of practices to stay compliant can contact Tracy Armstrong or another member of the Wilentz Employment Law Team.

### **Attorney**

- Tracy Armstrong

### **Practices**

- Employment Law
- Cannabis Law \*

\*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.