

Employer Haziness Lingers After NJ's Cannabis Guidance

By **Eric Meyer** (October 4, 2022)

On Feb. 22, 2021, the state of New Jersey officially greenlit adult-use recreational cannabis as Gov. Phil Murphy signed several bills "legalizing and regulating cannabis use and possession for adults 21 years and older."^[1]



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Among the laws Murphy signed was the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization, or CREAMM, Act.^[2] The CREAMM Act not only made it legal for most of your employees to use cannabis legally — even if they don't need it for a medical condition — but the new law also provided them job security.

For example, the CREAMM Act makes it unlawful for local employers to discriminate against cannabis users when hiring or firing, and in other terms and conditions of employment. For example, a New Jersey employer cannot refuse to promote an employee because she vapes cannabis on her own time.^[3]

Plus, the CREAMM Act prevents employers from taking any adverse action just because a drug test shows the presence of cannabinoid metabolites. ^[4]

So think of cannabis like alcohol: Employees who partake on Sunday can work on Monday without fearing reprisal, provided they are not still under the influence.

New Jersey's recreational cannabis laws also protect job applicants. One of the CREAMM Act's companion laws that Murphy signed on the same day precludes employers from allowing an arrest, charge, conviction or adjudication of delinquency for a cannabis-related crime like possession, manufacturing or distribution to influence a hiring decision.^[5] In other words, New Jersey employers may have to hire people formerly convicted of distributing cannabis.

And while most employers would not think to ask applicants about their cannabis-specific criminal history, the new law clarifies that employers should not make any job applicant disclose or reveal this information.^[6]

Is drug testing completely obsolete?

Although adults can use cannabis recreationally in New Jersey, there are limits in the employment context.

For example, employers can test when they reasonably suspect an employee is under the influence of cannabis at work.^[7] Employers can also test employees for cannabis use following a work-related accident.^[8]

Further, the CREAMM Act permits random drug testing of employees.^[9] Moreover, employers can drug test applicants and employees to determine if they are using cannabis during work hours. ^[10]

But here's the thing: The CREAMM Act mandates that the drug test include "scientifically reliable objective testing methods and procedures."^[11]

The employer can test blood, urine or saliva and physically evaluate employees to determine if cannabis use is impairing them at work.[12] Plus, the CREAMM Act requires an individual with a Workplace Impairment Recognition Expert, or WIRE, certification to conduct the physical evaluation. [13]

And who are these WIREs?

According to the CREAMM Act, a WIRE can be an employee, whether full-time or part-time, or an independent contractor.[14] Either way, through education and training, that individual must be able to detect and recognize not only when an employee is using cannabis, but also the signs of cannabis impairment.[15] Additionally, the WIRE must be able to assist in investigating workplace accidents.[16]

Unfortunately, however, New Jersey provided no further guidance on WIRE certifications.

And we're still waiting.

But new guidance is here.

While New Jersey continues to keep us in suspense on WIRE certifications, the New Jersey Cannabis Regulatory Commission issued guidance on Sept. 9 to at least greenlight reasonable suspicion drug tests at work without a WIRE.[17]

How?

According to the commission, an employer may now select a staff member on an interim basis who can help validate reasonable suspicion to determine whether an employee may be under the influence of cannabis at work.[18] This individual, either an employee or contractor, "[s]hould be sufficiently trained to determine impairment and qualified to complete the Reasonable Suspicion Observation Report." [19]

The commission provided a sample form,[20] although employers that already utilize a version of the Reasonable Suspicion Observation Report to determine when drug testing is necessary may continue to do so.

Employers should use the form to document the company's reasonable suspicion that an employee is under the influence of cannabis during work hours.[21]

The sample form includes examples of physical signs or symptoms of impairment, behavioral indicators, and space for employers to record other related observations and interview notes. [22]

The employer should have a standard operating procedure for completing the report, which should involve a manager or supervisor, such as the employee's direct manager or supervisor.[23]

Additionally, the company should select a second manager or supervisor or another interim staff member to assist with the reasonable suspicion determination.[24]

The guidance provides employers with a few options, used alone or in tandem, to establish reasonable suspicion of cannabis use or impairment at work. Employers can use a cognitive impairment test.[25] They can also resort to a "scientifically valid, objective, consistently

repeatable, standardized automated test of an employee's impairment." [26] Another option is an ocular scan. [27]

Still, questions remain.

The CREAMM Act allows federal contractors to revise their employee prohibitions on cannabis use to be consistent with federal law, rules and regulations to satisfy the requirements of a federal contract. [28] Therefore, the CREAMM Act will not blunt attempts by employers with federal contracts to follow specific protocols related to determining reasonable suspicion and drug testing.

As for other private employers in the Garden State, many open questions remain, notwithstanding the recent reasonable suspicion testing guidance.

These questions include:

- How does one become "sufficiently trained to determine impairment and qualified to complete the Reasonable Suspicion Observation Report"?
- What will the state accept as an approved cognitive impairment test?
- What is considered a "scientifically valid, objective, consistently repeatable, standardized automated test of an employee's impairment"?
- What standards apply to random and post-accident drug testing?

Plus, the state has yet to prescribe standards in regulation for a WIRE certification.

What actions can employers take now?

Still, New Jersey employers can take some steps now consistent with the new guidance.

Namely, they can select someone to assist with reasonable suspicion determinations.

New Jersey employers can also:

- Ensure that they have a Reasonable Suspicion Observation Report to determine when drug testing is necessary;
- Develop a standard operating procedure for completing the report; and

- Select and train manager- and supervisor-level employees to facilitate the process.

Employers should also make corresponding updates to their existing policies and procedures.

Remember that the CREAMM Act prohibits adverse employment actions based on a positive drug test alone. Even with the additional prophylactic steps from the new guidance, employers should exercise caution before taking any adverse employment action based on suspected cannabis use.

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[1] <https://www.nj.gov/governor/news/news/562021/approved/20210222a.shtml>.

[2] N.J. Stat. § 24:6I-31, et seq.

[3] N.J. Stat. § 24:6I-52.

[4] Id.

[5] N.J. Stat. § 34:6B-21.

[6] Id.

[7] N.J. Stat. § 24:6I-52.

[8] Id.

[9] Id.

[10] Id.

[11] Id.

[12] Id.

[13] Id.

[14] Id.

[15] Id.

[16] Id.

[17] <https://www.nj.gov/cannabis/documents/businesses/Business%20Resources/Workplac>

e
%20Impairment%20Guidance%20922.pdf.

[18] Id.

[19] Id.

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

[21] <https://www.nj.gov/cannabis/documents/businesses/Business%20Resources/Workplace%20Impairment%20Guidance%20922.pdf>.

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

[23] <https://www.nj.gov/cannabis/documents/businesses/Business%20Resources/Workplace%20Impairment%20Guidance%20922.pdf>.

[24] Id.

[25] Id.

[26] Id.

[27] Id.

[28] N.J. Stat. § 24:6I-52.