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## New Jersey Cannabis Law: Weeding Out Misconceptions

This article examines some recent legislative and judicial developments related to the legalization of medicinal and recreational cannabis in New Jersey and offers guidance for employers.

By **Iram Valentin and Christopher Turano** | July 22, 2022



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With the recent increase in legislative and judicial activity related to the legalization of medicinal and recreational cannabis, it is crucial that employers be informed on these developments to reduce their risk. This article examines some recent developments in New Jersey legislation, regulations and case law and offers some guidance.

Three laws form the architecture of New Jersey legislation governing cannabis use: (1) New Jersey's Marijuana Decriminalization Law (L. 2021, c. 19 (codified in relevant part at N.J.S.A. 2C:35-23.1 and N.J.S.A. 2C:52-6.1); (2) New Jersey's Jake Honig Compassionate Use Medical Cannabis Act (CUMCA), N.J.S.A. 24:6i-1 to -56; and (3) the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA) (P.L. 2021, c. 16). These statutes, combined with the first set of rules and regulations implemented by the New Jersey Cannabis Regulatory Commission (NJCRC) in August 2021, set the parameters within which employers may drug test their employees or take action against them pertaining to cannabis use. The NJCRC is expected to issue a second set of regulations which, in conjunction with the developing case law, will shape the developing landscape.

The Decriminalization Law took effect on July 1, 2021, and requires the expungement of certain marijuana and hashish-related offenses and cases generally. Specifically, the Decriminalization Law lists certain offenses that expressly restrict an employer from "when making an employment decision, rely[ing] *solely* on, or require[ing] any applicant to disclose or reveal, or take any adverse action against any applicant for employment *solely* on the basis of, any arrest, charge, conviction, or adjudication of delinquency, for manufacturing, distributing, or dispensing, or possessing or having under control with intent to manufacture, distribute, or dispense, marijuana or hashish in violation of" certain offenses listed therein. (Emphasis added.) Employers who violate this law face fines up to \$10,000. Notwithstanding these penalties, this statute does *not* create a private right of action for employees.

CUMCA, enacted, in pertinent part, to protect those involved in authorized medical use of cannabis, acknowledged that although federal law prohibits the use of cannabis, “[s]tates are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law; therefore, compliance with this act does not put the State of New Jersey in violation of federal law.”

CUMCA prohibits 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. CUMCA defines “adverse employment action” to mean “refusing to hire or employ an individual, barring or discharging an individual from employment, requiring an individual to retire from employment, or discriminating against an individual in compensation in any terms, conditions, or privileges of employment.” Thus, if an employer has a drug testing policy and an employee or job applicant tests positive for cannabis, the employer must “offer the employee or job applicant an opportunity to present a legitimate medical explanation for the positive test result, and shall provide written notice of the right to explain to the employee or job applicant.” Thereafter, the employee or job applicant has three working days after receiving such notice to “submit information to the employer to explain the positive test result, or may request a confirmatory retest of the original sample at the employee’s or job applicant’s own expense.” As part of any such explanation, “the employee or job applicant may present an authorization for medical cannabis issued by a health care practitioner, proof of registration with the commission, or both.”

Notwithstanding those requirements, CUMCA makes clear and unambiguous that none of the foregoing provisions shall be deemed to restrict an employer’s ability to take adverse action against an employee for cannabis use during work hours or on the premises of the workplace outside of work hours or require an employer to violate federal law or lose federal funding. To alleviate fears by employers about hiring employees licensed for medical marijuana use, CUMCA also provides that “[n]o employer shall be penalized or denied any benefit under State law solely on the basis of employing a person who is registered with the commission.” Likewise, CUMCA expressly states that it shall not be construed to require an employer to accommodate medical marijuana use in any workplace.

On Feb. 22, 2021, CREAMMA was signed into law and legalizes adult recreational use and possession of cannabis for persons aged 21 and over; decriminalizes possession to a certain quantity; and establishes regulations for adult cannabis use and possession. Importantly, CREAMMA prohibits adverse employment action against employees and job applicants because that person does or does not use cannabis items, and prohibits any adverse action solely due to the presence of cannabinoid metabolites from engaging in conduct permitted under CREAMMA.

Employers may also conduct random drug tests, “or as part of a pre-employment screening, or regular screening of current employees to determine use during an employee’s prescribed work hours,” but such tests if conducted must include “scientifically reliable objective testing methods and procedures,” and a “physical evaluation” by a statutorily certified individual. Subject to that, employers may test (1) upon reasonable suspicion of an employee’s use of cannabis items at work; (2) upon finding observable signs of intoxication related to cannabis items at work; (3) as part of a work-related accident investigation; (4) randomly; (5) as part of pre-employment screening; or (6) as part of regular screening of current employees to determine use during work hours.

For drug tests based on such “reasonable suspicion,” the law requires employers to use a Workplace Impairment Recognition Expert (WIRE) trained to identify and detect employee use or impairment from marijuana. Upon completion of a Drug Recognition Expert training program, approved by the New Jersey State Police Training Commission, or another program with similar requirements, that person will receive a WIRE certification. The State has not yet promulgated or released rules or regulations regarding this provision of the law.

CREAMMA specifically states that nothing therein concerning personal cannabis use shall be construed to amend or affect any state or federal law pertaining to employment or landlord-tenant matters; or essentially to restrict a party from taking prohibitive measures relating to cannabis for the purpose of not jeopardizing receipt of a federal grant or compliance with a federal contract or law.

Significantly, there is no provision within CREAMMA prescribing a private right of action for employees. Existing law is well-settled though that an employee cannot—and an employer may take adverse action against an employee for—being under the influence of marijuana at work or during work hours, and using, selling, displaying, possessing or transferring marijuana at work or during work hours is prohibited.

The NJCRC was designated to assume all powers regarding regulation of cannabis activities, and was directed to adopt rules and regulations regarding same. On Aug. 19, 2021, the NJCRC published regulations titled “Personal Use Cannabis Rules,” which made clear that persons shall not be subject to penalties or denied any rights “solely for conduct permitted.” In other words, the import of the regulations is consistent with CREAMMA insofar as the regulations prohibit employers from taking adverse action against employees solely because the employee either uses marijuana or fails a drug test.

The Law Against Discrimination (LAD) prohibits in relevant part, “unlawful discrimination based on ... mental or physical disability” and “perceived disability.” New Jersey’s Supreme Court has held that drug addiction, even if it is to illegal substances, is also considered such a “handicap.” See *In re Cahill, Jansen v. Food Circus Supermarkets*. Former drug users are also protected under the LAD, but current use of illegal drugs is not considered a disability. See *Bosshard v. Hackensack University Medical Center*. Where feasible, an employer should accommodate a chemically-dependent employee by affording an opportunity for rehabilitation, but does not appear to be required to provide further accommodation should rehabilitation fail. See *Bosshard, supra; Cahill, supra; Boshko v. Bently Nevada*.

Recent case law has elaborated on New Jersey’s statutory scheme and regulations. In the matter of *Cotto v. Ardagh Glass Packing*, notwithstanding the court’s finding that the plaintiff sufficiently plead he was “disabled” under the LAD by using prescribed medical marijuana to treat a workplace injury, the court ultimately held that an employer is not required to waive the requirement of passing drug test as an accommodation of

employee using medical marijuana. More recently, in *Hager v. M&K Construction*, the court ultimately held that CUMCA—in requiring a Workers' Compensation insurer to pay reasonable medical treatment causally related to a work injury—does not conflict with federal Controlled Substances Act (CSA) and thus an employer may be required to reimburse employee for medical marijuana prescribed to treat injury resulting from workplace accident. In *Wild v. Carriage Funeral Holdings*, the court held that there was no conflict between CUMCA and the federal Controlled Substances Act, and thus while a plaintiff could proceed with a disability discrimination claim arising from prescribed medical marijuana use, it reaffirmed that nothing in CUCMA should be construed as requiring an employer to accommodate the use of marijuana in any workplace."

### **Takeways: 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.
- (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 in the six situations cited above, provided that the tests are conducted by a WIRE; include scientifically reliable objective testing methods and procedures; include a physical evaluation in order to determine an employee's state of impairment.

In conclusion, employers should immediately review (or create) drug policies to ensure legal compliance; train representatives responsible for drug testing and/or employment decisions; take measures to designate and train a WIRE expert; review any federal contracts to prevent violations thereof; and document to the maximum extent all legitimate reasons for taking adverse actions against an employee who has tested positive for cannabis.

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