

DAZED BUT LESS CONFUSED: NEW JERSEY RELEASES WORKPLACE GUIDANCE ON NEW RECREATIONAL CANNABIS LAW

Insights
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Almost six months after New Jersey approved the sale of recreational cannabis use, state authorities have just released Interim Guidance on workplace impairment outlining how employers should address employees' suspected impairment from cannabis while performing their job duties. The September 9 guidance confirms that an employee's off-duty use of cannabis cannot be the reason for any adverse employment action, but employers can terminate workers for being under the influence during work hours. But there are some specific practices and protocols you need to follow in order to ensure you comply with the law. What do New Jersey employers need to know about this latest development?

New Jersey's Hazy Drug Testing Requirements

Almost immediately after the Cannabis Regulatory Enforcement Assistance & Marketplace Modernization Act (CREAMMA) was signed into law, New Jersey employers began questioning a new requirement for their internal drug testing protocols. For drug tests based upon reasonable suspicion or observed signs of impairment, employers must utilize a certified "Workplace Impairment Recognition Expert," colloquially known as the "WIRE," to identify signs of cannabis impairment prior to testing employees that are suspected to be impaired by cannabis at work.

The New Jersey Cannabis Regulatory Commission was charged with adopting standards for the certification. As a result, employers have been held in limbo for over one year

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to determine what they would have to do to comply with the requisite drug testing protocols set forth in CREAMMA.

Interim Guidance on Workplace Impairment

The interim guidance, which will remain in place until final regulations are adopted, confirms that employers “have the right to maintain a drug-free workplace.” In other words, employers can maintain their policies prohibiting the use or possession of cannabis at work or during work hours and take adverse action against an employee that violates any such policies.

It also confirms that a positive drug test alone is insufficient to support an adverse employment action. Rather, where the employer has a “reasonable suspicion” that the employee has used cannabis while performing their job functions, you are required to use a WIRE to identify and document signs of an employee’s potential use of or impairment from cannabis prior to requiring a drug test.

The interim guidance describes the “best practice” for employers is to “establish evidence-based protocols for documenting observed behavior and physical signs of impairment to develop reasonable suspicion” that would warrant requiring “a drug test to verify whether or not an individual has used an impairing substance in recent history.” In practice, this means you should:

- Designate at least one employee as an “interim WIRE” and provide them with training to identify potential signs of impairment, or engage a third-party contractor to do so. The interim guidance does not provide examples of what type of third-party contractor may be used, but it is possible that medical professionals or police officers with drug training could perform as the WIRE.
- Use a form document to detail the signs of impairment observed, which would support your determination that the employee is reasonably suspected of being under the influence of cannabis at work. To facilitate this process, the Commission released a template you may use, called the “Reasonable Suspicion Observed Behavior Report,” which provides a list of physical and behavioral indicators of impairment to review and select. Examples include well-known signs of cannabis impairment, like bloodshot, watery, or droopy eyes and lack of coordination, as well as other, less obvious symptoms of impairment, such as the

inappropriate wearing of sunglasses indoors or taking multiple, short breaks during which the employee is unaccounted for. The template Reasonable Suspicion Observed Behavior Report also includes blank space for the WIRE and the employee's supervisor to expound on their observations of the employee's signs of impairment.

- Establish a Standard Operating Procedure (SOP) for completing Reasonable Suspicion Observed Behavior Reports that not only include observation of the employee by both the interim WIRE and their direct supervisor, but also includes the terms under which the employee will be drug tested.

Exceptions

The interim guidance also clarifies CREAMMA's exception for federal agency contractors and grantees. Federal contractors and employers that receive federal grant money must certify that they will take adverse action against any employee who violates the employer's drug-free workplace policy, in accordance with the federal Drug-Free Workplace Act of 1988. The interim guidance provides that such employers are excepted from compliance with CREAMMA.

In other words, if complying with CREAMMA may jeopardize an employer's federal contract or receipt of federal grant money or put the employer out of compliance with federal regulations governing its employees, the employer is excepted from compliance with CREAMMA, per the interim guidance.

Many employers without federal contractor status have been concerned about "safety-sensitive" positions and positions that are not subject to federal regulations, and have inquired as to how to ensure their employees performing safety-sensitive jobs are not impaired at work. It is important to note that the interim guidance does not address an exception for employees in safety-sensitive positions. Therefore, unlike other states, safety-sensitive employees in New Jersey are still protected from an adverse employment action if it is based solely on the result of a positive drug test. This means that only employers who fit into the federal contractor/grantee exception may prohibit their safety-sensitive employees from using cannabis while off-duty.

Key Takeaways

Although the interim guidance explicitly states that it will be supplanted by the standards approved by the Commission for WIRE certification when that time comes, it contains enough information that you can begin implementing necessary protocols to ensure compliance with CREAMMA. The interim guidance summarizes employers' obligations with respect to employees that use cannabis, as follows:

"A scientifically reliable objective testing method that indicates the presence of cannabinoid metabolites in the employee's bodily fluid alone is insufficient to support an adverse employment action. However, such a test combined with evidence-based documentation of physical signs or other evidence of impairment during an employee's prescribed work hours may be sufficient to support an adverse employment action."

In simple terms, this means that an employee's off-duty use of cannabis cannot be the reason for any adverse employment action (*e.g.*, termination or failure to hire or promote), but you can terminate employees for being under the influence of cannabis (or other drugs or alcohol) during work hours. Likewise, you do not have to permit the use, sale, display, possession, or transfer of cannabis at work or during work hours.

What Can Employers Do to Effect Compliance Now?

There are several steps you may take before the final guidance is issued by the state to jumpstart compliance with CREAMMA and to begin working through any challenges effecting compliance may entail.

- First, most employers can (and should) review their existing drug testing and drug-free workplace policies to ensure that those policies do not prohibit off-duty cannabis use for employees in New Jersey. Prohibiting off duty cannabis use is, generally, unlawful under CREAMMA.
- Second, employers may designate an "interim WIRE" to assist with making determinations of suspected cannabis use or impairment while at work and implement the use of a Reasonable Suspicion Observed Behavior Report and SOPs for documenting the observation and drug testing process.

What's Next

As noted above, the guidance will apply until final regulations are drafted and approved by the Commission. In the coming months, we anticipate that the Commission will release permanent guidance regarding WIRE certification. Employers will likely challenge the application of CREAMMA to safety-sensitive positions that are not federally regulated or subject to a federal contract, but for which no carve-out currently exists. Employers may also expect challenges to their WIRE training protocols by employees who will allege they were improperly deemed by the WIRE to be impaired at work, even though they were not.

Fisher Phillips attorneys will continue to monitor the status of CREAMMA regulations in New Jersey, but if you have any questions in the meantime, we encourage you to reach out to the author of this article, your Fisher Phillips attorney, or [any attorney in our New Jersey office](#). Also, make sure you are subscribed to [Fisher Phillips' Insight System](#) to receive the most up-to-date information directly in your inbox.