

How New Jersey's Recreational Marijuana Law Significantly Affects Workplace Drug Testing

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New Jersey Governor Phil Murphy signed into law three marijuana reform bills on February 22, 2021. The first, New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (A21), legalizes and regulates cannabis use and possession for adults who are 21 and older. Two other laws decriminalize marijuana and hashish possession (A1897) and clarify marijuana and cannabis use and possession penalties for individuals younger than 21 years old (S3454).

Recreational Marijuana Law and Impact on Employers

New Jersey [voters approved](#) legalized recreational marijuana by ballot initiative on Election Day 2020. Now, that bill has been signed into law, although many provisions will not be operative for some time. The law creates a Cannabis Regulatory Commission to regulate the use, purchase, sale, and production of cannabis, among other things. The Commission will have 180 days (or 45 days from the date that all members of the Commission are appointed) to adopt rules and regulations to implement the law. It is generally expected that it will take at least a year before legalized cannabis is available in New Jersey.

The law permits anyone age 21 or older to possess, use, and purchase small amounts of cannabis. For purposes of the recreational marijuana law, the term “cannabis” excludes medical marijuana dispensed under the Jake Honig Compassionate Use Medical Cannabis Act, as well as hemp products under the New Jersey Hemp Farming Act.

The recreational marijuana law has several provisions that affect employers:

- Employers may not refuse to hire or employ an individual who uses cannabis, unless failing to do so would place the employer in violation of a federal contract or cause it to lose federal funding.
- Employers still are permitted to maintain drug- and alcohol-free workplaces and are not required to accommodate the use, possession, sale, or transfer of cannabis in the workplace and may prohibit being under the influence or intoxication during work hours.
- Employers may not take adverse action against applicants or employees who use cannabis, or solely because the applicant or employee tests positive for cannabinoid metabolites. The law defines “adverse employment action” as 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 or in any terms, conditions, or privileges of employment.
- However, employers still may require employees to undergo reasonable suspicion testing, post-accident testing, random testing, and pre-employment testing, as long as the drug test includes scientifically reliable testing of blood, urine, or saliva, *and a physical evaluation in order to determine an employee's state of impairment*. The physical evaluation must be conducted by an individual with the necessary

certification to opine on the employee's state of impairment, or lack thereof, related to the use of cannabis. The Commission, in consultation with the Police Training Commission, must prescribe standards for a Workplace Impairment Recognition Expert, who must be trained to detect and identify an employee's use or impairment from cannabis or other intoxicating substances and for assisting in the investigation of workplace accidents. Workplace Impairment Recognition Experts will be certified by the Commission. In accordance with these requirements, employers may use the results of the drugs when determining appropriate employment actions.

Decriminalization of Marijuana Law and Impact on Employers

Employers are not permitted to consider when making an employment decision and cannot require an applicant to reveal or take any adverse action against an applicant solely based on any arrest, charge, or conviction for certain types of marijuana and hashish offenses.

Employers who violate this provision will be liable for a civil penalty in an amount not to exceed \$1,000 for the first violation, \$5,000 for the second violation, and \$10,000 for each subsequent violation. These penalties are the sole remedy provided for violations of this provision. It does not create a private right of action against an employer by an aggrieved person.

Practical Considerations

The provisions that affect employers are not immediately operative, and it is hoped the Commission's rules and regulations will clarify the restrictions on workplace drug testing and the actions that employers may take in response to marijuana drug tests.

In the interim, New Jersey employers should review their drug and alcohol testing policies to decide whether they will continue to test for marijuana and, if so, under what circumstances. Supervisors should be trained to make reasonable suspicion determinations and thought should be given to which individuals the employer will designate as Workplace Impairment Recognition Experts. Jackson Lewis attorneys are available to assist employers with these decisions.

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