

Reasonable Suspicion Employee Testing Guidance Issued by the New Jersey Cannabis Regulatory Commission

The New Jersey Cannabis Regulatory Commission (the “Commission”) published [“guidance”](#) on Sept. 7, 2022 “meant to support employers’ rights to create and maintain safe work environments.” This alert describes the legal limits on testing employees for cannabis, describes the guidance, and suggests how New Jersey employers might now proceed.

Statutory Limits on Conducting Cannabis Tests and Using the Test Results

New Jersey’s adult use cannabis law, enacted on Feb. 22, 2021, and commonly referred to by its acronym, CREAMMA, limits when an employer can test an employee for cannabis and how it can use the test results. While the law does not require an “employer to permit or accommodate the use, consumption, being under the influence, possession, transfer, display, transportation, sale, or growth of cannabis or cannabis items in the workplace, or affect the ability of employers to have policies prohibiting use of cannabis items or intoxication by employees during work hours,” employers may not require an employee to submit to a test for cannabis unless (A) the test includes “scientifically reliable objective testing methods and procedures, such as testing of blood, urine, or saliva” and (B) the test is preceded or accompanied by “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 usage of a cannabis,” and the certification (known as “Workplace Impairment Recognition Expert” certification or WIRE certification) may be issued only pursuant to standards established by the Commission “in consultation with the Police Training Commission.”

Notably, CREAMMA does not include an exception to this testing scheme for employees in safety-sensitive positions, unless the employee is subject to testing under federal regulation (such as interstate tractor-trailer drivers).

With respect to the use of test results, CREAMMA bars an employer from taking an “adverse action” against an employee “solely due to the presence of cannabinoid metabolites in the employee’s bodily fluid.”

The Commission has not yet issued WIRE certification standards and [has been subject to legislature scrutiny for not having done so](#). Prior to Sept. 7, 2022, prudent employers had stopped testing New Jersey based employees for cannabis – even those performing safety sensitive functions.

The Commission’s September 7, 2022 Guidance

The Guidance provides that, until the Commission issues WIRE certification standards, “employers may require an employee to undergo a drug test upon reasonable suspicion of an employee’s usage of cannabis or cannabis products while engaged in the performance of the employee’s work responsibilities, or upon finding any observable signs of impairment related due to usage of cannabis or cannabis products, or as part of a random drug test program, or following a work-related accident subject to investigation by the employer.”

The Commission explains that the Guidance is premised on its interpretation that CREAMMA “does not impede the ability of employers to continue to utilize established protocols for developing reasonable suspicion of impairment and using that documentation, paired with other evidence, like a drug test, to make the determination that an individual violated a drug-free workplace policy.”

The Guidance lists ways an employer may detect impairment and includes a uniform [“Reasonable Suspicion” Observation Report](#) that employers may use.

The Guidance concludes with an admonition that it explains the Commission’s “understanding of the existing legal requirements under the governing law” and that employers remain responsible to “ensure compliance with all state and federal employment

laws.”

Considerations for Employers

Before an employer resumes cannabis testing based on the Guidance, it should ensure that it has obtained satisfactory answers to the following questions:

- Did the Commission have the authority to issue the Guidance? Most bureaucratic rules have to be adopted pursuant to the New Jersey Administrative Procedure Act.
- Is the Guidance a reasonable interpretation of CREAMMA? It is not clear from the language in the Guidance how it can be reconciled with the statutory preconditions discussed above for conducting tests.
- Will a court defer to the Guidance where the Commission does not have the authority to enforce individual employee rights under CREAMMA?
- Can the Guidance modify an employee’s right not to be subject to testing unless physically evaluated by a WIRE-certificated individual?
- Should the Guidance be construed as not requiring any reasonable suspicion assessment prior to conducting a random test?

As the Commission has acknowledged in connection with medicinal use, “cannabis and employment is a complex issue.” So too here.

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