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Weeding Out Impaired Employees: NJ Commission Issues Guidance on Adverse Employment Action for Cannabis Use

On September 9, the agency overseeing New Jersey's cannabis industry, the New Jersey Cannabis Regulatory Commission (the Commission), issued long-awaited guidance regarding when and how New Jersey employers may test employees for cannabis and potentially take adverse employment actions based on impairment due to cannabis use. The Commission advises employers that the guidance is in effect on a temporary basis until the official process is approved.

Upon its enactment in February 2021, the Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMM) extended to New Jersey employees job-related protections for cannabis use. Under the law, unless there is a provable adverse impact on a federal contract or another exception related to federal law, employers cannot take any adverse employment action against an employee solely due to the presence of cannabinoid metabolites in the employee's system. To take adverse employment action in situations where there is no connection to a federal contract or federal law, the law imposes two requirements: (1) the use of a scientifically reliable objective drug test; and (2) the performance of a physical evaluation. The addition of the physical evaluation requirement sought to ensure that employers test for present impairment rather than only prior use because cannabis metabolites may remain in the human system weeks after a single use.

Initially, CREAMM required that an individual with the necessary certification to perform the required physical evaluation to opine on the employee's state of impairment (or lack thereof) related to cannabis use. CREAMM tasked the Commission and the Police Training Commission with setting forth standards for Workplace Impairment Recognition Expert (WIRE) certification. Because the standards were not established in the first set of regulations, the Commission suspended the physical evaluation requirement, leaving open the question of whether employers may discipline employees based solely on a positive drug test. In its new guidance, the Commission answered "no."

The guidance reminds employers of the statutory protections afforded to employees in the state (i.e., employees may not be subjected to any adverse employment action solely due to the presence of cannabinoid metabolites in their system). Employers must also show reasonable suspicion of impairment based on specific, contemporaneous, articulable observations concerning the appearance, behavior, body odors or speech of the employee during work hours.

Until the Commission establishes the official WIRE certification process, employers may continue to use established protocols for documenting reasonable suspicion of impairment and using that document, coupled with a drug test, to determine whether an employee has violated a drug-free workplace policy.

Regarding the documentation of reasonable suspicion, the Commission created a "Reasonable Suspicion Observed Behavior Report" for employers to use as a template. The template is not cannabis-specific and may be used in connection with alcohol intoxication or impairment due to other controlled substances. The template requires that at least one supervisor, but preferably two individuals when possible, observe and document the suspicious behavior. Only management and staff members who are sufficiently trained to determine impairment should complete the report. The employer must also prepare the report within 24 hours of the observed behavior or before the test results are released, whichever is earlier.

Though the use of the template is encouraged, it is not required. Employers that already have a similar form to document reasonable suspicion may continue to use their own form.

Turning to the other requirement previously mentioned, i.e., drug testing, the guidance does not provide which drug test is acceptable to perform on employees. CREAMM, however, requires the drug test include "scientifically reliable objective testing methods and procedures." Methods and procedures that involve the testing of blood, urine or saliva will satisfy this requirement. Based on its omission in CREAMM, it is unclear whether hair follicle testing is considered scientifically reliable for purposes of this mandate.

In addition to permitting drug testing of employees upon reasonable suspicion of impairment, CREAMM allows employers to mandate drug testing as part of a random drug test program, following a work-related accident, as part of pre-employment screening or in connection with regular screening of current employees. The guidance does not clarify when an employer may take adverse employment action when an employee fails one of these tests.

Bottom Line

New Jersey employers should be cautious when taking adverse employment actions based on cannabis use. Under the law and recent agency guidance, employers generally may not take adverse action against an employee solely due to a positive test for cannabis metabolites. Employers should seek legal counsel on how to enforce a drug-free workplace without violating the law.

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