

New Jersey Extends Employment Protections To Recreational Marijuana Using Employees (US)

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On February 22, 2021, New Jersey's governor signed the [New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act](#) ("CREAMMA" or the "Act"), legalizing the recreational use of cannabis items, i.e., marijuana, for individuals age 21 and older. Importantly, the Act also provides job protections to recreational marijuana users and imposes new drug testing requirements for employers conducting drug testing for employee or applicant use of cannabis items.

Adverse Action Prohibited

CREAMMA expressly prohibits an employer from:

- refusing to hire or employ any person or discharging from employment, or
- taking any adverse action against an individual solely because that person does (or does not) use marijuana recreationally.

The Act further prohibits an employer from taking adverse action against an employee or applicant solely due to the presence of cannabinoid metabolites in the employee's system. The Act specifically 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."

Of further significance, these prohibitions apply to all employees, regardless of their job classification or the nature of their job duties, meaning the Act does not carve out an exception for those employees in safety-sensitive positions. As such, CREAMMA creates a new "protected class" under New Jersey law.

The Act does, however, afford limited exceptions for employers.

- Employers may continue to maintain Drug and Alcohol Free Workplace policies, specifically prohibiting the use or possession of marijuana or marijuana products during work hours, or

being under the influence of marijuana at the workplace or during work hours.

- Employers that are federal contractors may “revise their employee prohibitions consistent with federal law, rules, and regulations” if compliance with the Act would result in “a provable adverse impact on an employer subject to the requirements of a federal contract.”

Drug Testing Procedures

CREAMMA also provides specific drug testing requirements that employers must follow when making a determination as to whether the employer may take an adverse action against an employee for being under the influence of marijuana at the workplace or during work hours. An adverse action is only permitted following a positive test if: (1) the employer’s testing program uses scientifically valid methods (e.g., saliva, urine, or blood tests); and (2) a certified Workplace Impairment Expert has conducted a physical evaluation of the employee and determine the employee is under the influence of marijuana.

Employers may drug test applicants and employees for marijuana under the following circumstances, but still must comply with the adverse action requirements above:

- pre-employment screenings;
- upon reasonable suspicion of an employee’s usage of a cannabis item while engaged in the performance of the employee’s work responsibilities;
- upon finding any observable signs of intoxication related to usage of a cannabis item;
- as part of an employer’s regular screening of current employees to determine use during an employee’s prescribed work hours;
- random drug testing (limited to employees in safety-sensitive positions); and
- following a work-related accident subject to the investigation by the employer.

Although certain provisions of CREAMMA became effective immediately, the employment-related provisions do not take effect until the Cannabis Regulatory Commission (the “Commission”) adopts initial rules and regulations. New Jersey’s governor completed his appointment of all members of the Commission on February 25, 2021. The Commission now has 180 days from the date of enactment to establish the requisite rules and regulations, making the employment-related rules operative on August 21, 2021.

Employers in New Jersey should review and update their equal employment opportunity and drug testing policies to comply with this law.

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