

## NJ Cannabis Regulatory Commission Releases 'Hazy' Guidance on Workplace Marijuana Impairment

Interim guidance from the New Jersey Cannabis Regulatory Commission released on Sept. 9, provides employers with some, albeit “hazy,” guidance on managing suspected marijuana impairment in the workplace.

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While marijuana continues to be classified as a Schedule I drug under the Controlled Substance Act, public opinion on marijuana use has shifted dramatically in favor of legalization in recent years. In a 2021 study conducted by Pew Research Center, an overwhelming 91% of adults in the United States believe marijuana should be legal for either medical and recreational use (60% for medical and recreational use and 31% for medical only). On Oct. 6, President Joseph Biden directed the Secretary of Health and Human Services and the Attorney General to review marijuana’s current Schedule I status, potentially paving the way for decriminalization or legalization at the federal level.

States already have been moving toward medical or recreational legalization (or both) for over two decades. In February 2021, New Jersey became the 18th state to legalize recreational marijuana for

adults 21 years old and over with the New Jersey Cannabis Regulatory,

Enforcement Assistance, and Marketplace Modernization Act (CREAMMA), N.J.S.A. §24:6I-31, et seq. The marketplace for recreational sales officially opened on April 21, with no signs of slowing down. In just the first three months, recreational marijuana sales totaled nearly \$80 million, with over \$4.6 million in tax revenue to the state.

CREAMMA also provides workplace protections for marijuana users, leaving many New Jersey employers bewildered as how to properly determine marijuana intoxication in the workplace. While the public has largely embraced marijuana use, employers have good reason to maintain drug-free workplaces. Marijuana impairment at work, as with other types of impairment, presents potential safety concerns and may negatively impact productivity.



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Courtesy photos

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### Impact of Marijuana Use in the Workplace

According to the Centers for Disease Control and Prevention (CDC) marijuana is the most widely used federally prohibited illicit drug with an estimated 48.2 million Americans using it at least once as of 2019. In a recent April 2022 poll conducted by Blind, a social network for professionals,

almost one in three workers at 35 top professional companies in the corporate, technology and financial services industries admitted to using marijuana while on the clock. In the blue-collar industries of construction, transportation, utilities, agriculture, wholesale trade and mining, a July 2021 report from the National Safety Council found that 34% of 1,000 employees polled have observed their fellow employees using marijuana during working hours.

The impact of marijuana use in the workplace is not yet fully known because data is limited, likely due to gaps in research caused by its Schedule I status under federal law. However, the limited data may point to a link between marijuana use and increased safety concerns. The CDC currently cites a 1990 study reported by the National Institute on Drug Abuse (NIDA) as evidence of such a link, which found that employees who tested positive for marijuana on a pre-employment drug screen had 55% more industrial accidents, 85% more injuries and 75% greater absenteeism compared with those who tested negative for marijuana. However, more recent studies have drawn into question the correlation between employees who test positive for marijuana and occupational accidents. For example, a 2014 study published in *Journal of Addictive Diseases* found no discernible association between marijuana use and involvement in workplace accidents when examining randomized urine drug tests.

While some research has indicated that marijuana use after work may not negatively impact employee productivity, studies from NIDA have demonstrated that present marijuana impairment leads to effects that include sedation, disorientation, impaired judgment, lack of concentration and slowed fine motor skills, all of which can contribute to delayed decision-making, impaired learning and memory and attention deficits. These effects undoubtedly run counter to workplace productivity and safety. A 2020 study published in *Group & Organizational Management* found that after-work marijuana use was not correlated (positively or negatively) with work performance, but marijuana use before and during work negatively impacted “task performance” and “organization-aimed citizenship behaviors.”

Further research is needed to understand the full scope of the impact marijuana use has in the workplace. Of course, employers have good reason to prohibit marijuana impairment while at work, and under CREAMMA, they are permitted to do so.

### **Worker Protections Under CREAMMA**

While CREAMMA allows employers to maintain a drug-free workplace by prohibiting employees from being under the influence of marijuana while at work, it also affords employees certain workplace protections. CREAMMA N.J.S.A. §24:6I-52(a) prohibits an

employer from taking an adverse employment action against an employee solely due to the presence of cannabinoid metabolites in the employee’s system. In other words, New Jersey employers cannot fire, demote or refuse to hire a person solely because of a positive marijuana drug test. CREAMMA gives enforcement authority to the commission but is otherwise silent on whether employees can pursue a private right of action for violation of its workplace protections. Walmart currently is challenging whether CREAMMA creates such a right in *Zanetich v. Wal-Mart*. Walmart moved to dismiss the complaint on Oct. 7, and the motion remains pending. Given the uncertainty, employers would be prudent to comply with the CREAMMA workplace protection provisions.

The push-pull between the two provisions of CREAMMA is made more difficult by the lack of an effective mechanism to determine marijuana impairment. Marijuana is detectable in urine up to a month (or longer) depending on frequency of use. Therefore, a positive marijuana test does not necessarily indicate that a person is currently under the influence of marijuana. While companies are racing to solve this issue (Breathalyzer-like devices to test present impairment from marijuana are in various stages of development), there currently is no objective test. CREAMMA’s solution to this problem is to require employers to use workplace impairment

recognition experts (WIREs) to determine whether an employee is impaired prior to taking an adverse action. CREAMMA requires that designated WIREs be trained and certified to identify marijuana impairment. However, the law is silent on how to obtain WIRE certification. The commission was tasked with developing the standard for training and certification, but until recently offered no guidance—leaving employers vulnerable to litigation if they terminated an employee for suspected marijuana impairment.

## **NJ Commission's Interim Guidance**

On Sept. 9, the commission released interim guidance, which will remain in effect until final regulations are adopted. The interim guidance does not provide any additional information with respect to obtaining WIRE certification. However, it does provide specific steps for employers to take to comply with CREAMMA's requirements:

- Designate an interim staff member or a third-party contractor to assist with making determinations of suspected marijuana use during an employee's prescribed working hours. This person must be sufficiently trained to determine impairment and qualified to complete an observational report.
- Use a uniform document that specifies the "behavior, physical signs and evidence that support the

employer's determination that an employee is reasonably suspected of being under the influence of marijuana during the employee's prescribed work hours." Employers can use an example form "Reasonable Suspicion Observed Behavior Report" available for download from the commission's website, or they may continue to use their own form if they already have one.

- While this is a step in the right direction, the guidance still leaves open many questions for employers. First, the guidance makes clear that the example form available through the commission is not marijuana specific. Indeed, the form includes physical signs and behavioral indicators that are not indicative of marijuana intoxication, but rather indicative of alcohol or other illicit drug intoxication. This leaves employers to make their own determinations on what symptoms and signs are indicative of present marijuana impairment. Second, the guidance falls short on explaining what constitutes "sufficient training" for the designated employee or third-party contractor responsible for making the determination of suspected marijuana use.

## **Next Steps for Employers**

The commission is working with the state Police Training Commission to set the standard for WIRE certification, to be modeled on the state's drug recognition

experts (DREs) in law enforcement agencies. The use of DREs in criminal cases recently was challenged in *State v. Olenowski*, leaving open questions on the viability of using WIREs in the workplace. However, on Aug. 19, the special master in *Olenowski* submitted her report to the New Jersey Supreme Court that DRE testimony is reliable. Hopefully this paves the way for the commission to finalize WIRE training and certification standards soon. Until then, employers should:

- Train key personnel to recognize the signs and symptoms specific to marijuana impairment (like red eyes, decreased muscle coordination, delayed reaction times, and increased appetite or anxiety).
- Be thorough and detailed in documenting the signs and symptoms of suspected marijuana impairment.
- Update any forms currently used by the company to ensure that they appropriately document the specific behavior, physical signs, and evidence of suspected marijuana impairment, or adopt the commission's reasonable suspicion observed behavior report.

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