



## NJ's Cannabis Law Changes the Legal Landscape of Workplace Drug Testing

### *Employers Face Challenges Adapting to CREAMMA's Drug Testing Regulations*

THE NEW JERSEY CANNABIS Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA), which legalized adult use of cannabis in 2021, has significantly altered how employers may address cannabis use among their employees, specifically with regard to workplace testing. Citing the fact that common drug tests—particularly urine tests—can detect cannabis for up to 30 days after use, with no evidence of physical impairment, the law restricts employers from testing employees unless certain conditions are met. Under CREAMMA, cannabis testing is allowed only when:

- There is reasonable suspicion of use during work.
- Observable signs of impairment are noted.
- The test follows a work-related accident investigation.
- The test is part of a random screening program. (*Applies to safety sensitive positions only.*)
- It is a regular screening during work hours. (*Applies to safety sensitive positions only.*)

Furthermore, the statute mandates that, in order to be permissible, a cannabis test must include both a scientifically reliable drug testing method as well as a physical impairment evaluation by a certified Workplace Impairment Recognition Expert (WIRE). Unfortunately, the certification process for WIREs has yet to be established by the Cannabis Regulatory Commission (CRC), so these certifications are not yet available.

### *Employer Challenges*

Since CREAMMA's enactment, New Jersey employers have faced difficulties adapting to the new testing restrictions, especially in roles where safety is a concern. A primary issue is the delay in establishing WIRE certification regulations, which has left employers in a state of uncertainty and confusion about how to enforce cannabis testing policies without WIREs to conduct the physical evaluations. In response to their concerns, the CRC did issue some interim guidance in 2022, temporarily suspending the WIRE requirement and allowing employers to continue using their existing protocols. However, these measures are non-binding and their legality has been questioned in the courts, posing the possibility of legal challenges down the road.

### *Employer Strategies and Compliance*

Despite the CRC's inaction on WIRE certification, and other areas of confusion over CREAMMA's drug testing regulations, the following strategies will help New Jersey employers navigate through and comply with the law's requirements.

- Avoid relying solely on drug tests for disciplinary action unless clear impairment or one of the five authorized circumstances applies.
- Differentiate between job applicants and current employees in drug testing policies.
- Be cautious with employees who may use cannabis for medical or disability-related reasons.
- Consider alternative testing methods like psychomotor acuity tests and ocular scans which, unlike urine tests, don't involve bodily fluids and aren't prohibited by CREAMMA. Always use experienced professionals or specially trained DREs (Drug Recognition Experts) to administer these types of tests.
- Continue to enforce policies against cannabis use or possession at work, as allowed by CREAMMA.
- Include a section in the Employee Handbook about cannabis in the workplace and the cannabis-testing policies that are being implemented now that it is legal.
- Petition the CRC to expedite WIRE certification regulations.

The future of workplace cannabis testing in New Jersey hinges on regulatory developments, legal interpretations and the CRC's eventual issuance of WIRE certification. Together, these will help clarify testing procedures and employer responsibilities. In the meantime, employers should stay informed about legal changes and court rulings that may affect their CREAMMA compliance strategies. ■

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*If your business is in need of a policy governing cannabis in the workplace, contact the NIEDWESKE LAW FIRM, LLC at 908-738-8500 and one of our highly skilled employment attorneys will assist you.*