

2023 Cannabis in the Workplace Update

Presented by:

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The following is presented for general, informational and educational purposes only and does not constitute legal advice. Cases are fact sensitive. If legal advice is desired, please retain an attorney.

Today's Program

Review/Update:

**Recreational Marijuana
in the Workplace**

FREE CEU PROGRAMS

AVRCEU@GMAIL.COM

Lunch & Learn Programs

May 10, 2023: 11:30–12:30: 2023 DCR Initiatives –
Director Sundee Lyre, Esq.

May 17, 2023: 10:50–12:30: Achieving Diversity as a
Civil Service Employer – Acting Chair NJ Civil Service
Commission, Allison Chris Myers

Sign up today for announcements!



Prohibitions

- ▶ Employers are prohibited from taking into account whether or not a person uses cannabis items.
- ▶ Employers cannot:
 - Refuse to hire or employ an individual;
 - Discharge or forced retirement
 - Discriminate against an individual in:
 - Compensation; or,
 - Terms, conditions, or privileges of employment.
 - Differential treatment

Drug Testing

- ▶ NJ Legalization Bill allows:
 - Screening of applicants
 - Regular screening of current employees to determine use during work hours.
 - Test shall include:
 - *Scientifically reliable objective testing methods* and procedures (blood, urine, or saliva)
 - *and a physical evaluation* in order to determine an employee's state of impairment.
 - Employer may use the results to decide employment action/disciplinary action.

Should you test?

- ▶ Pre-employment?
- ▶ CHOICE: DREs and/or fudge-it
- ▶ Get DREs in place –
- ▶ Start with DREs/waiver
 - ID others for training
- ▶ If positive result, remember obligation to notify and allow for response
 - Checking for medical use
- ▶ Is testing tied to a legitimate business justification
 - “Medical inquiry” – nexus is required by EEOC

Drug Testing– Post Legalization

- ▶ Different policies for different types of jobs /testing:
 1. CDL/Federal Exemptions
 2. Safety Sensitive
 3. All others
- ▶ 1 ONLY: random testing
- ▶ 1–3: Pre–employment & reasonable suspicion
 - Eliminate THC from pre–employment for 2 & 3?
- ▶ 1–3 post accident if under employer investigation.

Reasonable Suspicion: Physical Evaluation

- ▶ 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.
 - Certified Workplace Impairment Recognition Expert

WIRE & CRC “Guidance”

- ▶ Sample form – not cannabis specific
- ▶ “Evidence-based” protocols
 - Observed behaviors and physical signs
- ▶ “Skip” the WIRE
 - Interim Staff Member
 - “Sufficiently trained” – reasonable suspicion
 - Part of Standard Operating procedure
 - Manager or supervisor + interim

CRC “Guidance” – Train –Interim

- ▶ Cognitive impairment test
- ▶ Standardized automated test
- ▶ Ocular scan

OR

- ▶ Use a third-party vendor
 - CAUTION: cooperation for prep and testimony

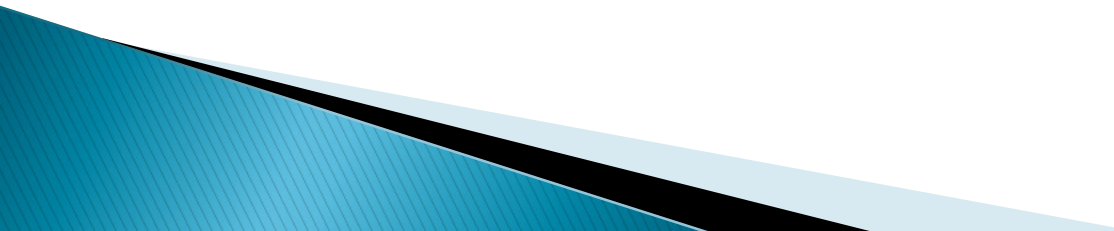
Drug Testing Police

- ▶ AG Guidelines
- ▶ State Lab
- ▶ Create a buffer/means to redact results

Drug Testing: Negotiations

- ▶ Define and specify discipline:
 - Tampering
 - Refusals
- ▶ Use of information post-test as evidence to support the demand for the test
- ▶ Notification
- ▶ Chain of custody
- ▶ Confidentiality and accuracy (split samples/retest)
- ▶ Discipline/rehab
- ▶ Frequency of random testing
- ▶ Number of employees to be randomly testing
- ▶ Pre-testing video recording

Train: Interim, Supervisors, Managers

- ▶ Observable signs the employee is:
 - Incapable of performing essential functions
 - Unsafe
 - ▶ ***Use (updated) job functions***
 - ▶ Create a record
 - ▶ Uniform application
- 

Establishing a Discrimination Claim

- ▶ **Plaintiff must establish:**
 - Member of a protected class
 - Was qualified for the job at issue
 - Suffered an adverse employment action (such as demotion, termination, reduction in hours, hostile environment, etc.) because s/he is a member of a protected class.
- ▶ **Burden then shifts to the employer:**
 - Employer took action due to legitimate and non-discriminatory reasons. If it does that, then the burden returns to the plaintiff

Harassment? Really?

- ▶ Stoner
- ▶ Burnout
- ▶ Addict
- ▶ Dopehead

- ▶ Pothead
- ▶ Doper
- ▶ Druggie / druggo
- ▶ Fiend

Recreational/Medical Marijuana

- ▶ Can discipline/terminate for:
 - possession or use of intoxicating substances during work hours or on the premises of the workplace outside of work hours;
 - Not required to permit impairment at work as RA
- ▶ Employer not required to commit any act that would cause
 - violation of federal law
 - loss of a licensing-related benefit pursuant to federal law
 - loss of a federal contract or federal funding

Legitimate Issues, Concerns & Suggested Solutions

- ▶ Tensions between Federal and State laws
 - Not legal under Federal law
 - Drug Free Workplace Act
 - FMLA/ADA and NJLAD
 - PEOSH/OSHA
 - Drug Testing Issues
- ▶ State: medical vs. recreational marijuana

FMLA/ADA

- ▶ Marijuana is not deemed addictive – ?
- ▶ Absence/treatment for medical (?) or recreational use – not in itself a covered event
 - FMLA serious health condition
 - ADA impairment of major life activity
 - Employers may prohibit illegal use of drugs and alcohol in the workplace (no fed exception for medical marijuana; no RA issue under State law)
 - Current illegal users (not addict), no protection
 - NJLAD?
- ▶ Careful: underlying impairment prompting use of medical marijuana can trigger coverage/protection

PEOSH/OSHA

- ▶ State law adopts Federal counterpart
- ▶ OSHA: Employer must provide a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm
 - reasonably safe and free from known hazards
- ▶ For State purposes:
 - Training in observation
 - Policies and application
 - Workplace Impairment Recognition Expert
 - Document your compliance efforts

Drug Free Workplace Act (Federal)

- ▶ Eligibility for federal contracts or grants requires employer certification
 - Use or possession – specifically prohibited
 - No medicinal exception
 - Specified requirements to ensure a workplace free of illegal drugs
 - Establish a drug-free awareness program
 - Require employees to report criminal convictions for drug related offenses
 - Must impose penalty or require satisfactory participation in EAP

NJ Statute

- ▶ If any of the provisions result in a provable adverse impact on an employer subject to the requirements of a federal contract, then the employer may revise their employee prohibitions consistent with federal law, rules, and regulations;
- ▶ Proof is highly unlikely

THANK YOU!

Armando V. Riccio, LLC
Counselors at Law

Management's Labor & Employment Attorneys

*Practical Advice, Independent Investigations,
Grievance & Interest Arbitrations,
Contracts & Negotiations,
Policies & Training.*

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