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New Jersey Updates Guidance Regarding Employer Suspicion of Cannabis Use in the Workplace

Client Advisories

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The New Jersey Cannabis Regulatory, Enforcement, Assistance, and Marketplace Modernization Act ("CREAMMA") prohibits New Jersey employers from taking adverse employment actions against employees who lawfully use cannabis outside of work. However, the Act permits employers to make employment decisions if employees are under the influence at work, but requires the employer only to make decisions when supported by observations from a certified Workplace Impairment Recognition Expert ("Expert"). Even though the law was passed in February 2021, the State of New Jersey has yet to approve and adopt the Expert training program and certification.

Nevertheless, as an interim step, the New Jersey Cannabis Regulatory Commission recently issued interim guidance for employers to take steps to determine if an employee is indeed under the influence of cannabis at work. The Commission's interim guidance is just that – interim advice employers can use until the Commission issues final standards for certifying Experts.

By way of background, employers commonly can determine cannabis usage in the following ways:

(1) requesting a drug test where there is reasonable suspicion of cannabis usage;
(2) upon finding any observable signs of impairment related to cannabis usage;
(3) as part of a random drug test program, or
(4) following a work-related accident subject to investigation by the employer.

However, because cannabinoid metabolites may linger in an employee's system long after use, a drug test alone is not sufficient to substantiate an adverse employment action, as an employee may have recreationally or medicinally used cannabis outside of their employment. But, a drug test coupled with documentation or physical signs of impairment during an employee's working hours can support an adverse employment action.

Ultimately, only the use of a certified and trained Expert will allow an employer to terminate an employee due to physical signs of impairment. But, under the interim guidance, an employer can take the following steps after an employee is known to have cannabis in his/her system:

1. Designate an interim staff member or third-party contactor to make these determinations (presumably someone experienced and/or trained to make such decisions);
2. Utilize the Commission's newly-issued "Reasonable Suspicion Observation Report" to document any physical signs, behavior, and other evidence of cannabis use to support employment decisions. If employers choose to use this report, employers should prepare a Standard Operating Procedure. The procedure can include an employee's manager or supervisor, or an employee at the manager or supervisor level and in addition, should include an interim staff member that is trained to identify cannabis suspicions;
3. Administer a scientifically valid and objective standardized, automated test for impairment.

Critically, the guidance does not mandate all three steps be followed, yet it would seem most advantageous for an employer to follow as many of the steps as are practicable before making an adverse employment decision.

As far as next steps, the interim guidance certainly leaves much to be desired, particularly given the lack of clarity as to what level of training or experience is sufficient for staff members to conclude impairment, as well as the absence of specifics on the automated test. Given the absence of any other guidance, employers who wish to terminate or take adverse action against an employee suspected of being impaired at work due to cannabis should, at a minimum, identify and train employees to make determinations regarding an employee's cannabis usage on the job – or retain a third party – and train this employee to utilize the Commission's Reasonable Suspicion Observation Report. Employers should also establish a Standard Operating Procedure an ensure that the procedure includes two reports, one from a manager or supervisor and one from the trained employee. Employees should also update their drug and alcohol policies.

If you have any questions regarding CREAMMA or this guidance, please contact Tatiana Webb at 215-246-3140 or twebb@archerlaw.com, or any member of the Labor & Employment Group.

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