

## **Alert | Labor & Employment**



**October 2022**

### **Attention New Jersey Employers: NJ Cannabis Regulatory Commission Issues Interim Guidance on Workplace Impairment**

On Sept. 9, 2022, the NJ Cannabis Regulatory Commission (NJ-CRC) issued **interim guidance** on detecting “workplace impairment” following the passage of the **New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act** (CREAMMA) almost two years ago.

#### **New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act**

On Feb. 22, 2021, New Jersey Gov. Phil Murphy signed CREAMMA into law, which, among other things, legalized the recreational use of marijuana for adults aged 21 and older and placed burdens on companies doing business in New Jersey with respect to marijuana and the workplace. While employers are still permitted to maintain and enforce drug-free workplace policies that prohibit the use, possession, or being under the influence of marijuana in the workplace and during work hours under CREAMMA, employers are prohibited from refusing to hire or taking adverse employment action against an individual merely because that person engages in the recreational use of marijuana.

Further, CREAMMA requires employers, prior to conducting most marijuana drug testing, to conduct a “physical evaluation” of an employee and to use a Workplace Impairment Recognition Expert (WIRE) to “detect[] and identify[] an employee’s usage of, or impairment from, a cannabis item or other intoxicating

substance.” At the time it was passed, CREAMMA called on the NJ-CRC to develop standards for the WIRE certification. Between February 2021 and September 2022, employers were left with several critical questions about the scope and extent of the expert’s involvement in the drug-testing process.

Finally, on Sept. 9, 2022, the NJ-CRC issued interim guidance on “workplace impairment,” which “is intended to serve as guidance until the NJ-CRC formulates and approves standards for WIRE certifications.” The interim guidance also provides that until the NJ-CRC issues such WIRE certification standards, employers are free to continue using established protocols for proving impairment without use of a WIRE. In addition, the NJ-CRC issued a template “**Reasonable Suspicion Observed Behavior Report**” form that employers may use to support workplace drug or alcohol testing.

### **Proving Impairment**

The interim guidance suggests that employers may continue to utilize pre-existing protocols for developing reasonable suspicion of impairment, but in the absence of already-established protocols, the guidance recommends several steps an employer may follow.

1. Designate an interim staff member (or third-party contractor) “to assist with making determinations of suspected cannabis use during an employee’s prescribed work hours.”
2. Utilize a uniform “Reasonable Suspicion” observation form that “documents the behavior, physical signs, and evidence that support the employer’s determination that an employee is reasonably suspected of being under the influence during work hours.” The guidance permits employers to use their own, pre-existing forms, if applicable, but employers opting to do so should compare pre-existing forms to the NJ-CRC template to ensure they are sufficient. Regardless of which form is used, a report regarding observed behaviors should be completed within 24 hours of the observed behavior or before the drug test results are released, whichever is earlier.
3. Administer a “scientifically valid, objective, consistently repeatable, standardized automated test of an employee’s impairment, and/or an ocular sign, as physical signs or evidence to establish reasonable suspicion of cannabis use or impairment at work.”

### **Next Steps**

Considering this interim guidance, employers should 1) review any pre-existing drug testing or drug-free workplace policies and 2) establish a uniform procedure to document all evidence leading to a determination that there is a reasonable suspicion to believe an employee is under the influence during work hours.

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