

# Client Alert **Employment & Labor**

## **New Jersey Cannabis Legalization Imposes New Burdens on Employers**

On February 22, 2021, after months of delay and uncertainty, Governor Phil Murphy signed a series of bills legalizing the recreational use of cannabis in New Jersey. While many in the state may rejoice over this development, employers will have to adapt quickly to new restrictions on their treatment of employees who consume cannabis.

### **Background**

On November 3, 2020, New Jerseyans voted overwhelmingly in favor of a referendum and constitutional amendment to legalize and decriminalize the recreational use of cannabis. The ballot initiative followed on previous legislation legalizing the medical use of cannabis under the New Jersey Compassionate Use Medical Marijuana Act and the Jake Honig Compassionate Use Medical Cannabis Act. As of January 1, the New Jersey Constitution was amended to enshrine the legalization.

However, due to a nearly two-month impasse between Governor Murphy and the legislature concerning penalties for underage possession and consumption of cannabis, legislation codifying the legalization remained elusive. This week, Governor Murphy signed the “New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act” and two cannabis-related bills focused on criminal justice issues.

### **New Restrictions on Employment-Related Decisions and Discipline Based on Cannabis Use, Non-Use, and Criminal History**

Much of the new legislation focuses on the decriminalization and regulation of the cannabis marketplace, but a few provisions significantly affect the workplace, employees’ rights, and, consequently, employers’ duties with respect to cannabis.

Most notably, employers may not refuse to hire or employ anyone, and may not discharge or take any adverse action against any employee, because he or she does or does not use

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cannabis items. This is the same prohibition imposed since 1991 on employers with respect to tobacco use, but now it has been extended to cannabis use. The new laws also prohibit employers from making an employment decision “solely” based on an arrest, charge, conviction, or adjudication of delinquency for violation of certain state laws related to manufacturing, distributing, dispensing, or possessing certain amounts of cannabis. Basing employment decisions solely on cannabis-related criminal history subjects employers to potential fines as high as \$10,000 per violation for repeat offenders.

### **New Rules for Drug Testing**

Employers may continue to maintain drug-free workplaces, including prohibiting the possession and consumption of cannabis as well as intoxication during work hours. But an employer may only require an employee to undergo a “drug test” if:

- I. the employer reasonably suspects the employee’s usage of a cannabis item while engaged in the performance of the employee’s work responsibilities;
- II. there are observable signs of intoxication related to usage of a cannabis item;
- III. the drug test follows a work-related accident subject to investigation by the employer; or
- IV. the employer conducts random drug testing, requires drug testing as part of pre-employment screening, or requires drug testing as part of regular screening of employees to determine use during work hours.

Critically, a “drug test” is no longer a simple mechanical collection and lab test. The law now prohibits employers from taking any adverse action against an employee based solely on the presence of “cannabinoid metabolites” in the employee’s bodily fluids. In other words, a failed blood, urine, or saliva test is no longer sufficient grounds for discipline. Rather, employers must utilize a two-part “drug test” involving both (i) “scientifically reliable objective testing methods and procedures,” such as a blood, urine, or saliva test; and (ii) a physical evaluation conducted by an individual with necessary certification to opine on the employee’s state of impairment or lack thereof.

Certification for physical evaluation purposes will require an individual to successfully complete presently undefined “Workplace Impairment Recognition Expert” training based on standards issued by a commission that presently exists only on paper (or certain substitute training). It is unclear when the commission will begin its work and issue training standards, when training will become available, and what, if anything, employers may do in the interim to identify employees who are intoxicated in the workplace.

### **Limited Exception to New Restriction on Employers**

In most, if not all, other jurisdictions where cannabis has been wholly or partially legalized, employers retain the right to impose higher standards and discipline where an employee’s position implicates safety concerns, such as crane operators or emergency medical technicians. The New Jersey legislature included no such exception. Rather, the only exception is for federal contractors, who may “revise their employee prohibitions consistent with federal law, rules, and regulations” if compliance with the legalization law “result[s] in a provable adverse impact” on the employer, such as loss of a federal contract or loss of federal funding.

## Comparison to New York State and New York City Cannabis Usage Rights and Drug Testing Requirements

In New York State and New York City, the recreational use of cannabis remains illegal, though Governor Andrew Cuomo has included legalization among his 2021 legislative priorities. Still, a number of laws protect employees and applicants and restrain employers. Being a “certified patient” under the state’s medical cannabis law qualifies an individual as disabled within the meaning of the New York State Human Rights Law, meaning that the individual is protected from workplace discrimination, harassment, and adverse employment action on the basis of being a medical cannabis user. In May 2020, New York City also banned pre-employment testing of applicants for tetrahydrocannabinol (THC), but with exceptions for applicants for safety-related positions.

### Stay Tuned

As legalization becomes reality, regulations are issued, and cannabis-related issues percolate in the workplace, we will see the rights and responsibilities of employees and employers further defined by the courts and regulatory agencies. This may expand employer exceptions (including for safety-related jobs), define what constitutes “reasonable suspicion” permitting employers to require drug testing, and more.

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Attorneys in our Employment and Labor Law Practice Group are available to advise employers on crafting policies and training management on cannabis-related issues.

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## Sills Cummis & Gross P.C. is pleased to announce



**Patricia M. Prezioso, Esq.** has joined the Firm as Co-Chair of the Employment and Labor Practice Group.

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