Adult-Use Cannabis and Employee Protections: The Difficulties of Enforcing New Jersey's Proposed Recreational Cannabis Law

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On December 17, 2020, the New Jersey Legislature passed the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act ("NJ CREAMMA"), *i.e.* the enabling legislation for New Jersey's adult-use cannabis program. To date, Governor Murphy has refused to sign the bill due to a dispute over penalties for underage possession of cannabis, placing adult-use cannabis in limbo — legal under the November 3, 2020 ballot initiative, but without any legal, regulated framework or commercial marketplace to speak of.

The Governor's Office and Legislature are expected to iron out these issues via an amendment and enact the bill into law in the near future, permitting "personal" or adult-use (recreational) consumption of cannabis and cannabis products by individuals twenty-one (21) years of age or older. NJ CREAMMA also contains new employment protections – akin to those currently afforded to New Jersey medical cannabis patients – prohibiting an employer from taking adverse action against an employee for legal personal use of cannabis during off-hours.

As a practical matter, these new employment protections likely will have no effect until there is state-legal cannabis to be purchased and consumed by New Jersey residents; NJ CREAMMA must first be signed into law, regulations issued by the Cannabis Regulatory Commission ("Commission") (a new entity not yet fully formed), and adult-use licenses awarded to existing alternative treatment centers (*i.e.* medical cannabis businesses) and/or new adult-use licensees.

For comparison, it took Massachusetts approximately two (2) years after legalizing adult-use cannabis before a legal cannabis product was available for purchase. Therefore, New Jersey employees currently using cannabis absent a medical marijuana card likely would lack employment protection despite the November 3 ballot initiative.

However, even after New Jersey's adult-use cannabis program is established, NJ CREAMMA's employment protections will be exceptionally difficult for employers to enforce due to the challenges inherent to cannabis drug-testing generally. States that legalized recreational cannabis in 2016, such as Massachusetts, Maine, and California, continue to struggle with the interplay between employee protections and legalized recreational cannabis. This article provides an in-depth breakdown of the proposed New Jersey employment protections, a comparison of similar laws in other states, and potential employer concerns.

Upon passage of New Jersey's proposed law, employers can no longer refuse to hire, terminate or take any other adverse action against an employee solely because of legal cannabis consumption while away from the workplace. These employment protections likely only extend to individuals consuming state-regulated adult-use cannabis, which currently does not exist. When adult-use cannabis is made legally available, employers will be required to follow the aforementioned rule with some exceptions. For example, employers retain the right to maintain a drug-free workplace, and employees cannot engage in personal use cannabis activities on work premises. Employers are also permitted to conduct random drug

tests upon reasonable suspicion of cannabis usage while the employee is engaged in the performance of work responsibilities.

Although these provisions might seem needlessly complicated, New Jersey is attempting to avoid employment issues other states with adult-use markets continue to experience. For example, in 2016, California residents approved a voter referendum,Proposition 64, which permitted adults twenty-one (21) years of age and over to possess and grow specified amounts of cannabis for recreational use. Similarly, Massachusetts and Maine became the first East Coast states to tax and regulate adult-use cannabis. Yet despite the four (4) year head start, the state legislatures for California and Massachusetts have not enacted protections for employees consuming adult-use cannabis during non-work hours. In 2019, a Massachusetts cook tested positive for cannabis metabolites, and was subsequently fired despite being a model employee and only using legal, adult-use cannabis. The Massachusetts Legislature is still considering a bill, which would mirror the language contained in New Jersey's provision.

California employees have even less protections. California employers may discipline or terminate an employee for either medicinal or recreational cannabis use. In March 2020, California Assemblyman Rob Bonta introduced AB 2355 to prohibit employers from refusing to hire, discipline or terminate employees for utilizing medicinal cannabis. The bill did not receive the requisite support in the California Legislature. The only states to enact employee protections for adult-use cannabis are Nevada and Maine. Maine became the first state to enact these employment protections in 2018, but it took another two (2) years before adult-use cannabis dispensaries were permitted to sell products.

Even if New Jersey is able to learn from the mistakes of other states, myriad issues make it practically impossible for employers to test employees for suspected illicit cannabis use. The bill states that an employer may test upon reasonable suspicion, and a "drug test may also be done randomly by the employer, or as part of a pre-employment screening, or regular screening of current employees to determine use during an employee's prescribed work hours." But testing for cannabis impairment/intoxication is notoriously unreliable. Accordingly, the New Jersey bill requires that all employers utilize "scientifically objective testing methods and procedures" (*e.g.*, blood, urine or saliva test) *in addition to* a physical evaluation performed by a certified "Workplace Impairment Recognition Expert." Currently, though, there is no "Workplace Impairment Recognition Expert" certification program. NJ CREAMMA requires the Commission to create regulations to effectuate the legislation, but this process may not be completed until July 2021, as the Commission must create these regulations either within one hundred eighty (180) days of the Governor signing the bill into law, or within forty-five (45) days of the Commission begin fully appointed, whichever is later.

The lack of an affordable, reliable method to determine whether an employee is currently under the influence of cannabis remains extremely problematic. Unlike blood alcohol content, the presence of cannabinoid metabolites in an individual's bodily fluids does not generally indicate intoxication. The bill does not provide a threshold level of cannabinoid metabolites that would constitute legal impairment, which will need to be determined by the Commission. One final wrinkle contained in the legislation: although the general rule prohibits employers from taking adverse action against an employee "solely" for utilizing cannabis during non-work hours in accordance with the bill, the employer can penalize the employee if the employer would be in violation of a federal contract or lose federal funding.

Although there is currently no legal, regulated adult-use cannabis market, New Jersey employers should review and revise their workplace policies now. Policies should balance the need to ensure employees are not penalized solely for cannabis usage while off-duty, but also remind employees that cannabis usage in the workplace is prohibited. Should you require any assistance in navigating these issues, the Porzio team would be happy to assist.