Where There's Smoke, 'You're Fired'? How The Sale of Personal Use Cannabis In New Jersey Ignites Tensions With Employers' Drug-Free Workplaces

May 31, 2022

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Employment Law Monthly

Now that New Jersey's personal use cannabis market has begun operating in earnest, questions remain as to how employers can and should attempt to implement or enforce their drug-free workplace policies.

Last month New Jersey finally embarked upon its long-awaited foray into the market of personal use cannabis sales. After months of delayed implementation, the Cannabis Regulatory Commission ("CRC") gave the state's existing twelve medical marijuana dispensaries the green light to sell for personal use starting April 21, 2022. According to figures released by the CRC, those dispensaries totaled gross sales of approximately $1.9 million on the first day of sales alone. And, according to data presented by the CRC at its May 24, 2022 public meeting, personal use sales totaled over $24 million across their first month, from April 21 through May 21, 2022. This highlights the significant demand for personal use cannabis even in light of the limited rollout. Naturally, with access to mainstream cannabis products comes use. What does this increased access to—and, presumably, use of—personal use cannabis and hemp derived cannabinoids mean for employers who wish to maintain an impairment free workplace? At present, the answer is hazy.

Under the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act ("CREAMMA"), which Governor Phil Murphy signed into law on February 22, 2021, an employer may not take adverse action against an employee for the employee's use of cannabis in a fashion permitted under CREAMMA absent a drug and alcohol free policy. The Legislature's findings and declarations state that its intent in passing CREAMMA is to create a controlled system of cannabis manufacturing, distribution, and sales, which will control and legalize cannabis for adults in a similar fashion to alcohol. CREAMMA establishes nondiscrimination rules for personal cannabis use. It also codifies that employers do not have a duty to accommodate cannabis use in the workplace and establishes procedures for employer drug testing. However, drug testing is generally not sophisticated enough to distinguish between metabolites from hemp or cannabis. This is compounded by the confusion created by the Federal Farm Bill of 2018, after which states have seen an uptick in use of the completely unregulated yet legal psychoactive hemp derived synthetic cannabinoids, such as THC delta-8 (which is about 50% as psychoactive as its cousin found in cannabis, THC delta-9). Delta-8 produces the same cannabinoid metabolites as delta-9, and will also trigger a failed drug test. The 9th Circuit recently reaffirmed delta-8's legality, and delta-8 is currently legal and unregulated in New Jersey. There have never been more ways to get legally high than there are today, which requires that employers take particular care to properly engage a prospective or current employee with respect to drug testing.

Absent a formal policy, general cannabis use cannot be the determining factor in deciding whether to hire, fire, or otherwise discipline someone. Employers still can test pre-employment, at random, post-accident, upon reasonable suspicions of use while at work, or when presented with observable signs of intoxication. But employers should take care to ensure that, if they do perform drug tests, they do not simply act based on test results alone, without first allowing an employee to explain a positive test. Jake Honig's Act (the law which expanded and liberalized New Jersey's medical marijuana program) provides that if an employer does indeed have a drug testing policy, and an employee or job applicant tests positive for cannabis, the employer shall offer the employee or job applicant an opportunity to present a legitimate medical explanation for the positive test result, along with written notice of the right to explain to the employee or job applicant. That being said, it is not that drug testing in the workplace must fall by the wayside, it is just that CREAMMA prevents employers from taking adverse action against an employee or applicant solely because the employee uses cannabis or tests positive in the absence of a drug and alcohol free workplace policy.

To date the CRC has not provided employers with much useful guidance on how to navigate these issues. While the CRC published its specially adopted "Personal Use Cannabis Rules" back in August 2021, those regulations say virtually nothing about employer drug testing practices. CREAMMA tasked the CRC with adopting standards for a Workplace Impairment Recognition Expert ("WIRE"), who must be trained to detect and identify an employee's use of, or impairment from, cannabis or other intoxicating substances, and to help investigate workplace accidents. Specifically, the law states that a "drug test shall include scientifically reliable objective testing methods and procedures, such as testing of blood, urine, or saliva, and a physical evaluation in order to determine an employee's state of impairment." However, the regulations state that no such physical evaluation of an employee being drug tested shall be required until such time that the CRC, in consultation with the Police Training Commission, develops standards for WIRE certification. The CRC has yet to develop regulations for WIRE certification, or otherwise implement any other standards that guide employers on how to navigate the potential overlap between personal use cannabis by employees and positive tests at work.

This underdevelopment of standards for WIREs stems from ongoing litigation regarding the legitimacy of the state's use of Drug Recognition Experts ("DREs") in the case *State v. Olenowski*. A DRE is a police officer trained to detect impairment caused by a wide variety of substances, whose training is established by the New Jersey State Police. All DREs in theory would be qualified to be WIREs, but not all WIREs would be qualified to be DREs. In *Olenowski* the New Jersey Supreme Court is considering a challenge to the scientific community's general acceptance of the DRE methodology for detecting impairment, and whether DREs have scientific reliability to support their qualifications as expert witnesses. The constitutionality of the process employed by impairment recognition experts remains an open question that will be greatly impacted by the Court's decision in *Olenowski*. This is crucial because even though CREAMMA allows employers to conduct numerous forms of drug testing for cannabinoid metabolites, the law limits an employer's ability to rely on a positive test result in making employment decisions, which leaves employers in a state of limbo.

While this uncertainty continues to cloud the intersection between personal cannabis use and drug free workplaces, various entities may assert that it is essential for law enforcement and others in safety-sensitive positions to be exempted from CREAMMA. Similar positions already have been adopted by states and cities around the country. Examples include:

- Nevada, which permits employers to refuse to hire firefighters, emergency medical technicians, and other persons in positions who, if they were to test positive for cannabinoid metabolites, could adversely affect the safety of others. N.R.S. 613.132.
- New Mexico, which provides that its cannabis-related employment protections do not apply to employees working in safety-sensitive positions. N. M. S. A. 1978, § 26-2B-9.

- New York City, which excludes police officers, peace officers, or other jobs with law enforcement or investigative functions from the City's prohibition on testing prospective employees as a condition of employment. N.Y.C. Admin. Code §§ 8-102 and 8-107, subd. 31.
- Oklahoma, which permits employees to refuse to hire, discipline, discharge, or otherwise penalize an employee who tests positives if the position involves safety-sensitive job duties. Okla. Stat. tit. 63, § 427.8(H).
- Philadelphia, which excludes police officers or other law enforcement positions from the City's prohibition on testing prospective employees as a condition of employment. Phila. Code §§ 9-4701 to 9-4703.
- San Francisco, which excludes from the City's prohibition on testing prospective employees as a condition of employment those positions where impairment presents a clear and present danger to the physical safety of the employee, another employee, or a member of the public. S.F. Police Code art. 33, § 3300A.5.

Similar positions have been taken in New Jersey. Bayonne's Mayor and Jersey City's Public Safety Director banned their respective police forces from using cannabis. Ocean County's Sheriff declared that the sheriff's officers will be subject to "ramifications" if they violate the county's anti-marijuana use policy. Woodland Park's mayor has threatened to terminate any municipal employee for using cannabis. Lawmakers have indicated plans to introduce a bill requiring drivers of school buses to be subject to a more stringent drug testing regiment (which would render them immediately ineligible to drive if they fail or refuse a drug test). And the New Jersey Legislature is actively considering legislation again barring use of cannabis for police officers

The above is emblematic of a universal issue facing New Jersey employers: CREAMMA has created frameworks, but the CRC has not yet filled them in.

Takeaways

While the state remains relatively unmoored in its efforts to navigate the tensions between CREAMMA's mandates and the fledgling recreational use market, employers need not sit idly by awaiting additional guidance. Instead, conscientious employers wishing to stay at the forefront of the rapidly-developing recreational cannabis use space can, and should:

- Determine whether they wish to have a drug-free workplace and either implement new or modify existing drug testing practices, including scrutinizing whether they wish to maintain cannabinoid testing requirements either pre-employment or for certain types of positions;
- Understand how to engage with prospective employees;
- Review their contracts and business streams to determine if any have or are subject to any federal contracts, requirements, or funding, and carefully consider the terms of such federal connections to determine whether modifications to present practices, policies, or procedures are warranted;
- Assess their safety-sensitive positions to develop a plan of how to treat those positions;
- Provide at minimum some level of support and/or training, to supervisors and managers at least generally outlining what the company can and cannot do regarding cannabis, under both the law and what the individual employer has determined to be acceptable under its own policies.

The personal cannabis market will not stop heating up just because questions persist about the CRC's yet-issued regulations. As such, New Jersey employers should work with experienced employment counsel to determine how best to revise, or implement, workplace drug and alcohol free policies while these issues continue to develop.