Cannabis Regulatory Commission Issues Interim Guidance On Workplace Impairment

While employers continue to await standards for WIRE certification, the CRC provided some guidance on how to deal with workplace impairment in the meantime.

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Ever since New Jersey legalized personal use cannabis in February 2021 employers earnestly have awaited guidance on how effectively to manage risk and ensure a drug-free workplace. Pursuant to N.J.S.A. § 24:6I-52a(1), an employer cannot take adverse employment action against an employee based solely upon a drug test returning positive cannabis results. As such, one of the most hotly-anticipated developments has been, and remains, the prescription of standards for establishing Workplace Impairment Recognition Experts ("WIREs"). These experts are poised eventually to fill the current void in detecting and identifying employee impairment at work.

Pursuant to N.J.S.A. § 24:6I-52a(2)(a), New Jersey's Cannabis Regulatory Commission ("CRC") is charged with prescribing standards for WIREs, who must be trained to detect and identify an employee's use of, or impairment from, cannabis or other intoxicating substances. WIRES will also be used to help investigate workplace accidents. The CRC has yet to develop regulations for WIRE certification. But what it has done now is provide at least some interim guidance on how employers might navigate the potential overlap between employee personal use cannabis and workplace impairment in the meantime. Essentially, this guidance provides employers with a stopgap until the CRC formulates and approves its standards for WIRE certification.

In its September 9, 2022 guidance, the CRC reiterates that employers continue to enjoy the right to maintain a drug-free workplace consistent with N.J.S.A. § 24:6I-52. The sticky issue with cannabis, as the guidance acknowledges, is that it "is a drug that can remain in the bodily fluids of users for a long period of time and although tests are improving in accuracy there is no perfect test for detecting present cannabis impairment." The law allows employers to conduct numerous forms of drug testing for cannabinoid metabolites, including: upon reasonable suspicion of cannabis use at work, after observing outward signs of impairment indicative of cannabis use, when conducted pursuant to established random testing programs, and tests following (work-related) accidents. However, the law limits an employer's ability to rely on a positive test result alone in making employment decisions. That said, the CRC guidance notes that a positive test result in combination "with evidence-based documentation of physical signs or other evidence of impairment during an employee's prescribed work hours may be sufficient to support an adverse employment action."

The guidance suggests three ways an employer might obtain evidence-based documentation to corroborate demonstrated physical (or other) signs of impairment sufficient to support an adverse employment action against an employee for suspected cannabis use or impairment during work hours:

1. Designate an interim staff member to assist with making determinations of suspected cannabis use during an employee's prescribed work hours. This staff member, who may be a third-party contractor, should be both sufficiently trained to determine impairment and also qualified to complete a “Reasonable Suspicion” Observation Report. The guidance provides a form example of such a report.

2. Utilize a uniform “Reasonable Suspicion” Observation Report that allows an employer to document the physical signs, behaviors, and other evidence to support the determination that an employee has been reasonably suspected of being impaired at work. The CRC recommends that employers establish a Standard Operating Procedure for completing such a report. The CRC further suggests that the onus of completing reports be undertaken dually: by the employee's manager or supervisor (or an employee at the manager or supervisor level), and by an interim staff member designated to assist with determinations of impairment during work hours (or a second manager or supervisor).

3. Use a cognitive impairment test, a scientifically valid, objective, consistently repeatable, standardized automated test of an employee's impairment, and/or an ocular scan, to show physical signs or evidence to establish reasonable suspicion of cannabis use or impairment at work.

While the CRC's guidance is a welcome development for employers wishing to stay ahead of workplace impairment issues, it is not comprehensive. For example, there are no standards for ocular device testing, nor any standards of what constitutes sufficient training and qualification to determine impairment and complete the Reasonable Suspicion Observation Report. Also, at present, it is unclear whether the use of an ocular device constitutes the "physical evaluation" that will be required once the CRC develops its standards for WIRE certification.

Takeaways

Even though the WIRE certification standards still have not arrived, this guidance reaffirms that, until they do, an employer can continue to effectively address and guard against workplace impairment if it first maintains a solid drug- and alcohol-free workplace policy. Conversely, an employer that lacks such a policy runs the risk of becoming stuck in a quagmire of uncertainty with how to best address an employee suspected of being impaired on the job. Until the CRC issues standards for WIRE certification, an employer's sturdiest shield to guard against workplace impairment remains the implementation of a robust drug and alcohol policy. As such, New Jersey employers should consider implementing measures consistent with the CRC's guidance, including:

- Assess whether they wish to continue or begin to have a drug-free workplace and either implement new or modify existing drug testing practices;

- Draft their own, or adopt the form, Reasonable Suspicion Observation Report, and implement a Standard Operating Procedure for completing the form;

- Provide training for employees and/or contractor, to make determinations regarding suspected workplace cannabis use and impairment; and

- Review and update drug and alcohol policies.

New Jersey employers should continue to prioritize revising and/or implementing the above measures, and work with experienced employment counsel to determine how best to do so while these issues continue to develop.