# If There's Smoke, Is It OK to Fire? New Cannabis Rules for Employers

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With the legalization of cannabis, employers are presented with new challenges about what they can do, must do and should do as it relates to their employees. The challenge is made more complicated by legal standards and rules that vary widely state-by-state and, in many cases, impose different standards for medical cannabis use than for recreational use.

What Pennsylvania Employers Can and Cannot Do

With all of the buzz about new recreational, or adult-use, cannabis laws in the Northeast, Pennsylvania employers are not legally required to accommodate nonmedical cannabis use, even if the employee's use is legal under state law. This means that New Jersey and New York residents who can use cannabis for nonmedical purposes can face discipline if they are employed pursuant to Pennsylvania law. Likewise, Pennsylvania employees have no cannabis protections outside of authorized medical use.

Although Pennsylvania employers cannot take action against employees because they are lawfully authorized to use medical cannabis, Pennsylvania employers generally have no duty to accommodate medical cannabis use in the workplace under current law. Specifically, Pennsylvania's law allowing for medical cannabis makes it unlawful for an employer to "discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical marijuana." This means employers cannot take into account that an employee is a medical cannabis cardholder except in limited circumstances.

For instance, Pennsylvania law imposes stricter limitations on employees in safety sensitive position by providing that lawful medical cannabis users may not "operate or be in physical control of any of the following while under the influence with a blood content of more than 10 ng/ml: chemicals that require a permit issued by the federal government, state government, federal agency or state agency; or high-voltage electricity or any other public utility." Likewise, employers can also bar medical cannabis users from certain activities, namely: performing duties at heights or in confined spaces, including mining; any tasks that threaten the life of the employee or their coworkers; or duties that could result in a public health or safety risk.

The medical accommodation issue also is complicated by decisions from courts in other states. In a host of state court decisions starting in Massachusetts, an increasing number of courts have held that accommodating an employee's off-duty use of medical cannabis that is lawful in the state may, in fact, be a reasonable accommodation required by state disability law. To date, Pennsylvania has not adopted any such requirements. Indeed, Pennsylvania's courts have held that employers need not accommodate cannabis use.

Nonetheless, with the changing landscape, employers should be on the lookout for challenges to refusals for accommodations.

**What New Jersey Employers Can and Cannot Do**

New Jersey, on the other hand, provides much broader protections to employees who use cannabis, both for medical and nonmedical uses and are employed pursuant to New Jersey law. The newly passed New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (NJCREAMMA) allows employers to discipline employees for use of cannabis during work but prohibits them from taking adverse action against employees use outside of work. Although that principal seems straightforward, it is not. For an employer, determining when an employee consumed cannabis or whether they are actually impaired is quite challenging. The NJCREAMMA recognizes a positive cannabis test does not necessarily mean an employee is impaired at work and, therefore, limits employers' ability to rely on tests alone. Until the science catches up to the law, employers do not yet have access to a reliable, objective measure to test for impairment at work. This makes it impossible to conclude an employee is impaired due to cannabis use based on testing alone.

With the passage of NJCREAMMA, the scope of employee protections have expanded materially. Now, with limited exception, New Jersey employers may not take any adverse employment action (including refusing to hire a candidate) solely because the employee tests positive for cannabis. Employers still can prohibit impairment in the workplace. However, even when an employee is suspected of impairment, employers cannot act based on a positive test alone. Instead, NJCREAMMA requires that the employer also conduct a physical evaluation to determine whether an employee is impaired before taking action based on a positive test. This physical evaluation must be performed by someone certified as a workplace impairment recognition expert. Although the New Jersey Cannabis Regulatory Commission is tasked with implementing guidelines for workplace impairment recognition expert training, it has not yet developed this training or guidelines. Until it does, this part of NJCREAMMA is not considered "operative" even though the law is deemed effective immediately.

Interestingly, New Jersey law has historically offered protections for medical cannabis users, but these protections are not as strong as those under NJCREAMMA. For instance, New Jersey's Compassionate Use Act required employers to provide notice to an employee who fails a drug screening and an opportunity for that employee to offer proof of lawful participation in New Jersey's medical cannabis program. In that instance, an employer was not necessarily required to excuse cannabis use, however, in 2020 New Jersey's Supreme Court held an employee may state a failure to accommodate claim under the law against discrimination against an employer who takes an adverse action against the employee for use of cannabis outside of work when that use is otherwise compliant with the Compassionate Use Act. With the passage of NJCREAMMA's broader protections prohibiting any adverse action for off-duty cannabis use, the protections arising under New Jersey case law are unlikely to apply.

Aspects of NJCREAMMA's employee protections, which do not have specific exemptions for safety related positions and require workplace impairment recognition expert training, are controversial and certain business groups are pushing for employee protections to be scaled back in the "clean up" bills that are expected to be introduced to try to refine NJCREAMMA. Due in part to the well-publicized political wrangling that preceded the Legislature's final adoption of NJCREAMMA, employers should expect to see efforts to clarify the law as it applies to employers and to authorize common-sense controls on impairment in the workplace.

Employers are still permitted to conduct suspicion-based, pre-employment, random, and post-accident drug testing, but a positive test for cannabis alone is not enough to take action. Now, employers also must have evidence of impairment during work hours to take action.

NJCREAMMA does allow employers to implement more strict rules for drug use when it is necessary to maintain a federal contract.

NJCREAMMA does not restrict an employer from maintaining and enforcing drug-free workplace policies, but, again, when it comes to cannabis, employers must show use and/or impairment at work, as opposed to off-duty use.

**What Employers Should Do About Cannabis**

Although drug screening for cannabis is likely a thing of the past in New Jersey, it remains a possible option for Pennsylvania employers. Even if an employer legally can screen candidates for cannabis it does not mean that it is the right solution for each employer. Employers need to take into account the ways in which such a policy can impact their business, including potentially impairing recruitment, especially for workers who may be commuting across state lines from states where adult use is permitted. Employers also need to consider if screening for cannabis use is necessary for their business. Typically, employers express concern that cannabis use by the workforce could lead to productivity or safety problems, but the same is true for the use of a wide range of legal and illegal substances.

Even without screening, employers can focus on performance issues without attributing the source of the performance issue to cannabis impairment. Employers are well within their rights to discipline for behaviors that might suggest drug use, such as sleeping on the job, carelessness, and lack of attention, whether or not the employee is impaired by cannabis use or for another reason. Neither Pennsylvania nor New Jersey law, in their current form, restrict an employer from taking action based on observable impairment or performance issues. Although it may seem like new territory, employers have historically managed employee productivity issues, whether they arise from unknown causes or from use of legal substances, such as hangovers from alcohol abuse, sleep deprivation, and use of legally prescribed medications. Employers have not needed drug tests to manage these issues in the past and have succeeded by focusing on the business disruption and observable performance issues. For now, employers would be wise to weigh doing the same when it comes to cannabis.

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## ATTORNEYS MENTIONED

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