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Cannabis is Coming,
Are You Ready?

June 18, 2021

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CANNABIS IS COMING, ARE YOU READY?

Downtown New Jersey

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11:00 a.m.

Jemi Goulian Lucey, Esq.

THE STATE OF CANNABIS LAW IN NEW JERSEY - NEW JERSEY CANNABIS REGULATORY, ENFORCEMENT ASSISTANCE, AND MARKETPLACE MODERNIZATION ACT

New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA)

- February 22, 2021 – Signed into law
- Legalizes recreational use of cannabis for adults (21 and older)

Earlier New Jersey Cannabis Legislation and 2020 Election Results

- Compassionate Use Medical Marijuana Act (2010)
- Jake Honig Compassionate Use Medical Cannabis Act (2019)
 - Increased the Obligations for Employers
- Results of November 3, 2020 New Jersey Election – Public Question 1
 - Voted in favor of Referendum and New Jersey Constitutional Amendment

Significant Implications for Employers: Employer Rights

- Employers can still maintain and enforce drug-free workplace policies
 - that prohibit the *use, possession, or being under the influence* of marijuana *in the workplace and during work hours*.
- Employers are not required
 - to permit or accommodate the use, consumption, being under the influence, possession, transfer...of cannabis or cannabis items in the workplace,
 - or to affect the ability of employers to have policies prohibiting use during work hours.
- Carve-Out for Federal Contractors
 - Marijuana is still a Schedule I Drug under the federal Controlled Substances Act

Significant Implications for Employers: Employee Rights

- Employers may not take adverse employment action
 - Because an employee does or does not use cannabis items
- An “Adverse Employment Action” under CREAMMA means
 - refusing to hire or employ an individual,
 - barring or discharging an individual from employment,
 - requiring an individual to retire from employment,
 - or discriminating against an individual in compensation or in any terms, conditions, or privileges of employment.
- Employer may not make an employment decision “solely” based on
 - An arrest, charge, conviction, or adjudication of delinquency for violation of certain state laws related to cannabis.
 - Could subject employer to potential fine up to \$10,000 per violation

Significant Implications for Employers: Employee Rights

- These prohibitions apply to *all* employees, regardless of job classification, nature of job duties and responsibilities, and including those who work in safety-sensitive job positions.
- Essentially, now legal marijuana users are afforded “protected class” status under New Jersey law.

Significant Implications for Employers: Employee Rights

- Drug Testing Still Permitted if:
 - Employer reasonably suspects the employee's usage of a cannabis item while engaged in the performance of the employee's work responsibilities;
 - There are observable signs of intoxication related to usage of a cannabis item;
 - The drug test follows a work-related accident subject to investigation by the employer; or
 - 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.

Significant Implications for Employers: Employee Rights

- Drug Testing Considerations

- Prohibits employer from taking any adverse action against employee based solely on the presence of “cannabinoid metabolites” in the employee’s bodily fluids.
- Employer must utilize two-part “drug test” including
 - (1) “scientifically reliable objective testing methods and procedures” such as a blood, urine, or saliva test; **and**
 - A physical evaluation conducted by an individual with necessary certification to opine on the employee’s state of impairment or lack thereof.

Effective Date and Anticipated Regulations

- Cannabis Regulatory Commission has been formed
 - It is comprised of five members who will oversee the development, regulation, and enforcement of activities associated with both medical and recreational marijuana use. The last member was appointed on March 24, 2021.
- Regulations to be Issued
 - The later of
 - 180 days after law signed (**August 21, 2021**) or 45 days after final member of Commission appointed
 - Employer/Employee related provisions of CREAMMA not operative until Regulations issued.

Effective Date and Anticipated Regulations

- Creation of Workplace Impairment Recognition Experts
 - Cannabis Regulatory Commission needs to establish
 - “Standards in regulation for a Workplace Impairment Recognition Expert [WIRE] certification, to be issued to full- or part-time employees, or others contracted to perform services on behalf of an employer, based on education and training in detecting and identifying an employee’s usage of, or impairment from, a cannabis item or other intoxicating substance, and for assisting in the investigation of workplace accidents.”
 - How will this co-exist with the Jack Honig Medical Cannabis Act failed drug test notification requirements?

Litigation Considerations and Next Steps

- No express private right of action, BUT watch out for claims under
 - Common Law Unlawful Retaliation
 - New Jersey Conscientious Employee Protection Act (CEPA)
- How to approach Drug Testing
- Consult with Counsel prior to Significant Potential Adverse Actions
- Training HR Personnel and Managers
- Review and Revise HR Policies
- Be Prepared for Regulations

QUESTION?

Jemi Goulian Lucey, Esq.



- **Jemi Goulian Lucey** is a partner at Greenbaum, Rowe, Smith & Davis LLP, where she co-chairs the Higher Education Practice Group and is a member of the Employment Law Practice Group. Her litigation experience includes representing private and public entities in employment discrimination and retaliation actions, professional negligence cases, restrictive covenant claims, Title IX claims, and business disputes. She also provides counseling on employment and human resources law issues, and provides guidance related to the practical implications of various state and federal laws affecting employers.