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New Jersey Becomes the Garden State for Recreational Marijuana

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In November 2020, nearly two-thirds of New Jersey voters approved an amendment to the state's Constitution to legalize adult use cannabis. But it was not until February 22, 2021, that New Jersey enacted the necessary legislation to implement the amendment. New Jersey now permits the possession and use of cannabis by adults over 21. Cannabis sales will be regulated by the New Jersey Cannabis Regulatory Commission, which is not yet operating, and will occur at state-licensed dispensaries in about a year. Employers need to take note of several provisions in the law affecting cannabis in the workplace and ensure their workplace policies and procedures comply with these new requirements.

Certain Criminal History May Not be Considered

An employer may not (1) rely "solely" on, (2) require an applicant to disclose or reveal, or (3) take any adverse action against an applicant "solely" on the basis of an arrest, charge, conviction, or adjudication of delinquency related to certain marijuana offenses. An employer who does so is subject to civil penalties of up to \$10,000. This prohibition is enforced by the New Jersey Commissioner of Labor and Workforce Development. There is no private right of action.

Job Applicant and Employee Protections Relating to Cannabis Use

An employer may not refuse to employ a person or "otherwise penalize that person" based on the presence of cannabinoid metabolites unless failing to do would violate a federal contract or cause the employer to lose federal funding. An employer is also prohibited from refusing to hire or employ any person because that person does or does not smoke, vape, aerosolize, or otherwise use cannabis items.

Similarly, an employer may not discharge or take any adverse action against an employee with respect to compensation, terms, conditions, or other privileges of employment because that person does or does not use cannabis items. A "cannabis item" means usable cannabis, cannabis products, cannabis extracts, and cannabis resin. It does not

include medical cannabis, hemp, or hemp products.

Drug Testing Limitations

An employer may require an employee to undergo a drug test (1) upon reasonable suspicion of an employee's usage of a cannabis item while engaged in the performance of the employee's work responsibilities; (2) upon finding any observable signs of intoxication related to usage of a cannabis item; (3) following a work-related accident subject to investigation by the employer; and (4) as part of pre-employment screening. An employer may also require random testing and regular screening of current employees to determine use during prescribed work hours. The employer may use the results of the drug test when determining the appropriate employment action concerning the employee.

However, an employer may not subject an employee to any adverse action "solely due to the presence of cannabinoid metabolites in the employee's bodily fluid" from using cannabis items as now permitted by New Jersey law.

Any drug test must 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. The physical evaluation must be conducted by an individual with the necessary certification to opine on the employee's state of impairment related to cannabis use. The state is developing the certification standards and requirements for these "Workplace Impairment Recognition Experts."

Employer Rights

Employers may still maintain a drug- and alcohol-free workplace. Further, employers are not required to permit or accommodate the use, consumption, being under the influence, possession, transfer, display, transportation, sale, or growth of cannabis or cannabis items in the workplace. Employers may have policies prohibiting the use of cannabis items or intoxication by employees during work hours.

Individuals are still prohibited from driving under the influence of cannabis items or driving while impaired by cannabis items. Individuals also are prohibited from smoking, vaping, or aerosolizing cannabis items in any place that any other law prohibits the smoking of tobacco.

Interaction with Federal Law

Employers are permitted to revise their employee prohibitions to be consistent with federal law if there is "a provable adverse impact on an employer subject to the requirements of a federal contract." Federal grantees and contractors also may prohibit the manufacture, transportation, delivery, possession, or use of cannabis items to the extent necessary to satisfy federal grant and contract requirements.

Conclusion

In 2020, recreational marijuana was "legalized" in Arizona, Montana, New Jersey, and South Dakota and medical marijuana was "legalized" in Mississippi and South Dakota. (See our alert [here](#).) Thirty-seven states and D.C. now permit medical marijuana; 15 states permit recreational marijuana. But marijuana use and possession remain illegal under federal law – at least for now.

Each state's marijuana law differs in what, if any protections they contain for employers. Further, courts are increasingly called upon to weigh employers' right to control their workplace against employee rights to use marijuana in light of state civil rights, workers' compensation, unemployment compensation, and lawful use statutes. Key issues involve drug testing and accommodating medical marijuana. As marijuana law continues to evolve, employers need to be mindful of both varying statutory requirements and judicial interpretations. Contact your Vorys lawyer if you have questions about the effects of marijuana legalization in states in which you do business.