

Memo

TO: Northern New Jersey Chapter of NECA

FROM: Chapter Counsel, George E. Pallas and Kathleen M. Morley of Cohen Seglias

DATE: September 26, 2022

RE: New Jersey Cannabis Regulatory Commission's New Interim Guidance for Detecting Workplace Impairment

On September 9, 2022, the New Jersey Cannabis Regulatory Commission (the "Commission") released new interim guidance for employers on detecting workplace impairment. The guidance will remain in effect while and until the Commission develops broader, permanent regulations for Workplace Impairment Recognition Experts, or "WIRES", who are trained and tasked with determining whether someone is impaired. Business groups have been pushing for the establishment of such regulations since the state legalized the use of recreational cannabis.

Summary of Current Law Concerning Adverse Employment Actions for Employee Cannabis Use: An employer cannot take adverse action against an employee based on the detection of cannabis in the employee's system alone. The Commission's interim guidance explains that adverse action may be taken if cannabis is detected along with "evidence-based documentation of physical signs or other evidence of impairment during an employee's prescribed work hours[.]" A positive cannabis test alone is not sufficient because employees have the right to use cannabis recreationally under New Jersey Law; however, employers also have the right to maintain a drug free workplace. To ensure both of these rights are protected, employers may drug test an employee upon reasonable suspicion that the employee is using or is intoxicated by cannabis during work hours. *Only after both reasonable suspicion and a positive cannabis test can an adverse action be taken against an employee.*

General Tips and Best Practices for Employers: Employers should establish a system by which to identify and document suspected cannabis use or impairment during an employee's prescribed work hours in order to support an adverse employment action and maintain a safe and drug-free workplace.

1. **Designated Staff Member.** The Commission suggests that employers designate an interim staff member to assist with making determinations of suspected cannabis use or impairment during work hours and to help complete the reports. Ideally, this staff member should be sufficiently trained to identify and determine cannabis impairment.

2. **Reasonable Suspicion Observation Reports.** The Commission suggests that employers use a “Reasonable Suspicion Observation Report” to document the behavior, physical signs, and evidence that support the employer’s determination that an employee is reasonably suspected of being under the influence during the employee’s prescribed work hours. The Commission provides a [sample Reasonable Suspicion Observation](#) Report that employers can use or they can use a similar form of their choosing to determine when drug testing is necessary. The Commission recommends that employers establish a standard operating procedure for completing such reports that includes the interim staff member designated to assist with such determinations as well as a manager or supervisor.

This memo is intended for general information purposes on the Commission’s interim guidance on the existing legal requirements under the governing New Jersey law. Further details and resources on the Commission’s interim guidance can be found online at www.nj.gov/cannabis/businesses/resources/. Employers should always seek the advice of legal counsel on particular legal matters.