

Seton Hall University

eRepository @ Seton Hall

---

Student Works

Seton Hall Law

---

2022

## Down to the WIRE: Employee Cannabis Screening in New Jersey

Christina M. Zarcone

Follow this and additional works at: [https://scholarship.shu.edu/student\\_scholarship](https://scholarship.shu.edu/student_scholarship)



Part of the Law Commons

---

## Down to the WIRE: Employee Cannabis Screening in New Jersey

Christina Zarcone

### Introduction:

This paper examines employment issues related to the legalization of cannabis in New Jersey. Now that the state has legalized recreational cannabis, employers must decide how to implement the new legislation in their places of business. While recreational cannabis use is no longer illegal, employers are still entitled to maintain safe drug-free work environments. Thus, employers face challenges pertaining to testing for cannabis use in the workplace as well as taking adverse actions against employees and potential employees for the use, distribution, possession, and promotion of cannabis. Due to the lack of concrete guidance from the legalization legislation and the Cannabis Regulatory Commission (“CRC”), employers should avoid testing employees for cannabis use and taking adverse actions against employees who test positive for cannabinoid metabolites because neither drug tests nor physical examinations for impairment are indicative of an employee being “under the influence” at work.

Part I of this paper provides an overview of New Jersey’s cannabis legalization legislation itself as it pertains to employers. On February 22, 2021, Governor Murphy signed into law the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (“NJCREAMMA”), which legalized recreational cannabis in New Jersey.<sup>1</sup> The law regulates employers’ responsibilities and employees’ rights regarding workplace cannabis use.<sup>2</sup> Under the law, employers may conduct employee drug screenings but must disregard any positive cannabis results.<sup>3</sup> Employers, however, are not required to ignore positive cannabis results because they are

---

<sup>1</sup> New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act. N.J. Stat. Ann. § 24:6I.

<sup>2</sup> N.J. Stat. Ann. § 24:6I-52.

<sup>3</sup> *Id.* § 24:6I-52a(1).

permitted to enforce a drug-free workplace.<sup>4</sup> The law makes clear that an employer may not refuse to hire or employ an individual who uses cannabis.<sup>5</sup>

Employers also are prohibited from taking adverse actions against an applicant or employee who uses cannabis or solely because the applicant or employee tests positive for cannabinoid metabolites.<sup>6</sup> “Adverse employment actions” include 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.<sup>7</sup> The law also includes employer protections by recognizing that an employer may maintain a drug- and alcohol - free workplace, is 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, and may prohibit employee use of cannabis items or intoxication by employees during work hours and while driving.<sup>8</sup>

Part II of this paper discusses when and how employers are permitted to conduct and use drug testing to maintain a drug free work environment. This section covers the pitfalls of both aspects of testing for cannabis – scientific lab testing as well as physical impairment examinations - and discusses why current testing methods are unreliable regarding “real-time” impairment. NJCREAMMA allows employers to use drug test results to determining appropriate employment actions only if (1) the drug test includes scientifically reliable testing of blood, urine, or saliva; and (2) a physical evaluation is performed to determine an employee’s state of impairment.<sup>9</sup>

---

<sup>4</sup> *Id.* § 24:6I-52b(1)(a).

<sup>5</sup> *Id.* § 24:6I-52a(1).

<sup>6</sup> *Id.*

<sup>7</sup> N.J. Stat. Ann. § 24:6I-52a(1).

<sup>8</sup> *Id.* § 24:6I-52b(1)(a).

<sup>9</sup> *Id.* § 24:6I-52a(1).

Part III examines the potential liability employers may face for using the Workplace Impairment Recognition Experts (“WIREs”), who NJCREAMMA designates as the only individuals who may conduct the physical evaluations.<sup>10</sup> NJCREAMMA defines WIREs as individuals certified to ascertain an employee’s state of impairment and trained to detect and identify an employee’s use or impairment from cannabis or other intoxicating substances.<sup>11</sup> NJCREAMMA requires employers have a good-faith belief that an employee engaged in conduct prohibited under the law, such as using, being under the influence, possessing, selling, or transporting cannabis while in the workplace or during work hours, to take adverse actions against that employee on the basis of a positive cannabis drug test.<sup>12</sup> The focus of this section is the challenge WIREs face in determining whether an employee is under the influence as well as the vast number of unanswered questions regarding workplace protocols. Significantly, the CRC has not yet promulgated guidelines explaining how WIREs should judge impairment using a physical examination.

Part IV of this paper highlights the possible ramifications for employers for testing employees for impairment and taking subsequent adverse action – namely discrimination suits because of unlawful discharge. Employers would be wise not to rely on current impairment testing methods when discharging or taking adverse action against employees because an employer in violation of the law may be liable for a civil penalty outlined in the decriminalization legislation<sup>13</sup> as well as other discrimination connecting cannabis use to protected groups.

---

<sup>10</sup> *Id.* § 24:6I-52a(2)(a).

<sup>11</sup> *Id.* § 24:6I-52a(2)(b).

<sup>12</sup> *Id.* § 24:6I-52a(1).

<sup>13</sup> P.L.2021, c.19.

Part V concludes this paper by summarizes the arguments against taking adverse employment action as the result of an employee’s positive test result for cannabis. It highlights the nebulous nature of testing for cannabis impairment as well as potential employer liability.

**Part I. New Jersey’s legalization of cannabis consumption leaves a lot of questions unanswered for employers and employees alike.**

**A. The New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act legalizes recreation use of cannabis.**

On February 22, 2021, New Jersey Governor Phil Murphy signed into law NJCREAMMA, which legalized adult recreational use of cannabis for individuals over 21, and a companion bill that decriminalized the recreational use of cannabis.<sup>14</sup> The new legislation prohibits an employer from taking adverse action against an individual *solely* because that person does - or does not - use marijuana recreationally and, thus, creates a new “protected class” under New Jersey law.<sup>15</sup>

Section 52a(1) of NJCREAMMA provides:

No employer shall refuse to hire or employ any person or shall discharge from employment or take any adverse action against any employee with respect to compensation, terms, conditions, or other privileges of employment because that person does or does not smoke, vape, aerosolize or otherwise use cannabis items, and an employee shall not be subject to any adverse action by an employer solely due to the presence of cannabinoid metabolites in the employee's bodily fluid from engaging in conduct permitted under P.L.2021, c.16.<sup>16</sup>

Many states, such as Colorado, Iowa, New Mexico, Pennsylvania, and Oklahoma, provide exemptions from legalization laws for employees with “safety-sensitive” jobs such as those “which performance by a person under the influence of drugs or alcohol would constitute an immediate or

---

<sup>14</sup> N.J. Stat. Ann. § 24:6I.

<sup>15</sup> Mark Diana & Michael Riccobono, *Recreational Marijuana Is Legal in New Jersey: What Employers Need to Know*, OGLETREE DEAKINS, (Feb. 23, 2021), <https://ogletree.com/insights/recreational-marijuana-is-legal-in-new-jersey-what-employers-need-to-know/>.

<sup>16</sup> N.J. Stat. Ann. § 24:6I-52a(1).

direct threat of injury or death to that person or another.”<sup>17</sup> Despite lobbying efforts, NJCREAMMA provides no such exception for employees in safety-sensitive job positions.<sup>18</sup> New Jersey common law privacy rights have long been interpreted as prohibiting random drug testing for employees;<sup>19</sup> yet, the Supreme Court of New Jersey has also held that persons in safety-sensitive job positions are exempted from this prohibition.<sup>20</sup> NJCREAMMA, however, does not include an exception for employees in safety-sensitive positions.<sup>21</sup> Consequently, no matter the safety-sensitive nature of a job, employers must refrain from taking adverse action against employees for marijuana use outside of work.

**B. New Jersey employers have no duty to accommodate cannabis use, possession, distribution, or promotion in the workplace.**

**1. No duty to accommodate**

Although New Jersey’s cannabis legalization law is progressive, it does not prevent New Jersey employers from establishing drug- and alcohol-free workplaces. NJCREAMMA makes clear that employers do not have to permit or accommodate cannabis use in the workplace or during work hours. Section 52b(1)(a) specifically states that nothing in the law:

Requires an employer to amend or repeal, or affect, restrict or preempt the rights and obligations of employers to maintain a drug- and alcohol-free workplace or require an employer 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, or to affect the ability of employers to have policies prohibiting use of cannabis items or intoxication by employees during work hours.<sup>22</sup>

---

<sup>17</sup> Lisa Nagele-Piazza, *What Is a 'Safety-Sensitive' Job Under State Marijuana Laws?*, SHRM (Oct. 5, 2021), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/what-is-a-safety-sensitive-job-under-state-marijuana-laws.aspx>.

<sup>18</sup> *New Jersey Passes New Law Regulating Employers’ Ability to Test For Marijuana In The Workplace*, ARCHER, (Feb. 2021), <https://www.archerlaw.com/new-jersey-passes-new-law-regulating-employers-ability-to-test-for-marijuana-in-the-workplace/> (citing N.J. Stat. Ann. § 24:6I).

<sup>19</sup> *Hennessey v. Coastal Eagle Point Oil Co.*, 129 N.J. 81 (1992).

<sup>20</sup> *Id.*

<sup>21</sup> *New Jersey Passes New Law*, *supra* note 18.

<sup>22</sup> N.J. Stat. Ann. § 24:6I-52b(1)(a).

Because federal law continues to classify marijuana as a Schedule I Controlled Dangerous Substances, employers are permitted to revise their employee prohibitions accordingly.

NJCREAMMA thus creates a carve-out for federal contract employers, providing that:

If any of the provisions set forth in this paragraph or subsection a. of this section result in a provable adverse impact on an employer subject to the requirements of a federal contract, then the employer may revise their employee prohibitions consistent with federal law, rules, and regulations.<sup>23</sup>

As a result, federal contractor employers remain free to take adverse actions against employees who test positive for cannabis use and none of the NJCREAMMA provisions apply to those employees.

## **2. Employee drug testing under NJCREAMMA**

To maintain drug- and alcohol-free work environments, employers may test employees for cannabis use in six instances including when there is reasonable suspicion of cannabis use at work, observable signs of intoxication at work, or as part of a work-related accident investigation. Employers can also test as part of random drug tests, pre-employment screening, or regular screening of current employees to determine use during work hours.<sup>24</sup> This leaves open a lot of opportunity for employers to continue to drug test their workforce. The true quagmire for employers, therefore, is not their ability to drug test, but their inability to do anything with that information once they have it because the presence of cannabis in an employee's system is no longer an adequate reason, standing alone, to take adverse employment action against the employee.<sup>25</sup> This begs the question: why test in the first place?

---

<sup>23</sup> *Id.* § 24:6I-52b(1)(b).

<sup>24</sup> *Id.* § 24:6I-52a(1).

<sup>25</sup> *Id.*

NJCREAMMA specifies that a legitimate drug test consists of a two-part test that includes both “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.”<sup>26</sup> The law’s new requirement that the employer conduct a physical evaluation is of note for two reasons: (1) there is currently no reliable method for assessing real-time impairment for cannabis use and (2) the physical evaluation must be conducted by a certified Workplace Impairment Recognition Expert.<sup>27</sup> The law describes WIREs as having the ability to “opine on the employee’s state of impairment, or lack thereof, related to the usage of a cannabis” due to their requisite certification.<sup>28</sup> NJCREAMMA, in turn, delegated to the Cannabis Regulatory Commission (“CRC”) the responsibility of establishing the certification process for WIREs in consultation with the Police Training Commission.<sup>29</sup> Conspicuously absent from the law is any mention of what the certification process will look like, who these WIREs will be – employees or independent contractors – and what the physical examination will include.

NJCREAMMA, however, does permit a certification from a current drug recognition program to qualify as WIRE certification.<sup>30</sup> This is troubling because there is currently no physical examination that allows someone to assess with any degree of certainty whether another person is suffering from impairment due to cannabis use.<sup>31</sup> So, if an already existing program of certification for impairment recognition qualifies one to become a WIRE, these so called “experts” will be woefully unequipped to make determinations on cannabis impairment.

---

<sup>26</sup> *Id.* (emphasis added).

<sup>27</sup> N.J. Stat. Ann. § 24:6I-52a.

<sup>28</sup> *Id.* § 24:6I-52a(1).

<sup>29</sup> *Id.* § 24:6I-52a(2)(a).

<sup>30</sup> *Id.* § 24:6I-52a(2)(b).

<sup>31</sup> *See generally* Part II.



Another major concern is the law’s vague language stating that employers may not take adverse action against an individual *solely* because that person does - or does not - use cannabis recreationally.<sup>32</sup> While on its face this seems like a big win for cannabis users, this statement gives little indication as to what information employers must have before they are permitted to take adverse action. This statement could be interpreted to mean that a physical impairment test is required in addition to cannabis use, but the law does not specifically state such a premise.<sup>33</sup> The legislation merely states that any drug test must also be accompanied by a physical examination and that an employer “may use the results of the drug test when determining the appropriate employment action concerning the employee.”<sup>34</sup> The implication is that an employer does not need to use a drug test at all to take adverse employment action against an employee regarding suspected cannabis use.

Furthermore, even where a WIRE determines that an employee is not impaired in the workplace, nothing in the law prevents an employer from taking adverse action if it has a “reasonable suspicion” of cannabis use, possession, distribution, or display of cannabis.<sup>35</sup> Yet, based on the newly protected classification of cannabis users, employers could, simply by conducting the drug tests, subject themselves to civil liability for discrimination if the primary reason behind any adverse employment action was a positive drug test result.

**Part II. There are currently no testing methods, either laboratory based or physical, which allow for an accurate indication of real-time impairment due to cannabis consumption**

---

<sup>32</sup> N.J. Stat. Ann. § 24:6I-52a(1).

<sup>33</sup> Diana & Riccobono, *supra* note 15 (citing N.J. Stat. Ann. § 24:6I-52a(1)).

<sup>34</sup> *Id.* § 24:6I-52a(1).

<sup>35</sup> *Cannabis Regulatory Commission Rules Released: The Thorny Area of Managing Employee Personal Marijuana Use*, KSBANIGAN (Aug. 26, 2021), <https://www.ksbraniganlaw.com/news/2021/8/26/cannabis-regulatory-commission-rules-released-the-thorny-area-of-managing-employee-personal-marijuana-use> (citing N.J. Stat. Ann. § 24:6I-52a(1)).

**A. Current laboratory-based testing methods for cannabis use urine, blood, or saliva to determine the presence of cannabinoid metabolites in a person’s system up to 3 months following consumption.**

“What you need to remember is it doesn’t matter if it’s urine, oral fluid or hair testing—it just reflects use. It doesn’t inform you whether someone was impaired or what their usage patterns are.”<sup>36</sup> – Dr. Barry Sample, director of science and technology for employer solutions at Quest Diagnostics.

Marijuana testing detects evidence of cannabis use but not necessarily impairment.

Cannabis is a plant that produces compounds called cannabinoids, such as tetrahydrocannabinol (“THC”).<sup>37</sup> THC that enters the body is absorbed into the bloodstream, temporarily stored in an individual’s organs and fatty tissues, and broken down in the liver.<sup>38</sup> Eventually, THC and its cannabinoid metabolites exit the body in urine and stool.<sup>39</sup>

The amount of THC in cannabis determines its strength. The same THC strength, however, can have very different effects on individual users depending on their weight, the manner of consumption - smoking versus edibles, - and their frequency of use.<sup>40</sup> Jane Terry, the vice president of government affairs at the National Safety Council (“NSC”) has stressed that there is no scientific test for real-time cannabis impairment and that:

[p]olicymakers and others think that because we can test for alcohol, it can be done for cannabis. But cannabis goes to your fat cells. Presence does not mean impairment—it can stick around for days or weeks. But because you can’t test impairment, it is really challenging for employers to figure out how to react if someone is using on the job.<sup>41</sup>

---

<sup>36</sup> Nagele-Piazza, *supra* note 17.

<sup>37</sup> *Marijuana (THC) Testing*, TESTING.COM, <https://www.testing.com/tests/marijuana-thc-testing/> (last visited Apr. 7, 2022).

<sup>38</sup> *How Long Does Weed (Marijuana) Stay in Your System?*, HEALTHLINE, <https://www.healthline.com/health/how-long-does-weed-stay-in-your-system#metabolization-time> (last visited Apr. 7, 2022).

<sup>39</sup> *How Long*, *supra* note 38.

<sup>40</sup> Nagele-Piazza, *supra* note 17.

<sup>41</sup> Nagele-Piazza, *supra* note 17.

With this concept in mind, employers should be extra careful regarding how much reliance they place in the results of cannabis drug tests when looking for evidence of impairment.

The most popular drug test for cannabis use is a urine analysis. Cannabis is detectable in urine for a significant range of time following an individual's last use depending on how often that individual uses cannabis.<sup>42</sup> While cannabis shows up in an occasional (up to three times a week) users' urine for approximately 3 days, a chronic heavy user (multiple times a day) can have a positive urine test for up to 30 days.<sup>43</sup> Similar results are found when testing for the presence of cannabis in an individual's blood, saliva, and hair with ranges from 1 day in the cases of blood and saliva, up to 90 days in the case of hair follicle testing.<sup>44</sup>

The bottom line is that lab testing is an incredibly inaccurate way to measure a person's current level of impairment due to cannabis use. While most short-term effects of impairment begin to taper off approximately 1-3 hours after consumption, an individual can test positive for cannabis use up to 3 months after consumption.<sup>45</sup> Considering this large discrepancy, it is no wonder New Jersey's legislation demands a second test for impairment; however, the inaccuracy of those physical tests provides little to no employment protection for cannabis users. After all, employers only need a good-faith belief that an employee engaged in some other prohibited conduct such as being under the influence of cannabis at work in addition to the positive test result.<sup>46</sup> NJCREAMMA does not elaborate on what qualifies as a "reasonable" or "good-faith" belief.

---

<sup>42</sup> *How Long, supra* note 38.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Cannabis Regulatory Commission, supra* note 35.

**B. Physical impairment testing for cannabis use relies on methods of observing symptoms of alcohol and other-drug impairment which are not applicable or conclusive when it comes to cannabis-based impairment.**

Unlike alcohol drug tests, there exist no scientifically accepted drug tests for cannabis that can detect real-time impairment. This is more than likely the reason behind the lack of guidance in the CRC's initial rules regarding the WIRE certification process and physical testing requirements.<sup>47</sup> New Jersey relies on observable physical symptoms in order to diagnose drug-induced impairment for a multitude of drugs.<sup>48</sup> These observable physical symptoms include nystagmus (jerky movement of eye when moved horizontally or vertically), eye focus and convergence (or lack of), pupil size, pupil reaction to light, vital signs (pulse/respirations), body temperature, muscle tone/movement, speech, gait, time and distance perception, alteration in thought formation, body tremors, bloodshot eyes, disorientation, drowsiness, impaired memory, increased appetite, lack of concentration, mood changes, odor of cannabis, and relaxed inhibitions.<sup>49</sup> Looking at this list, it would appear that there are plenty of physical signs for WIREs to observe when conducting a physical exam for cannabis use; but looks can be deceiving.

Most of these physical signs of impairment are not actually indicative of cannabis impairment.<sup>50</sup> Cannabis use and impairment has no physical effect on nystagmus, pupil size, pupil reaction to light, body temperature, and muscle tone,<sup>51</sup> thus, observations of those symptoms would not provide WIREs with any indicia whatsoever of cannabis impairment. The only consistently reliable, observable physical signs of cannabis impairment are an elevated pulse rate and increased

---

<sup>47</sup> N.J.A.C. 17:30.

<sup>48</sup> *Indicators Consistent Drug Categories Matrix 2018*, NJ.GOV, [https://www.state.nj.us/lps/njsp/////division/investigations/pdf/adtu/Indicators\\_Consistent\\_Drug\\_Categories\\_Matrix\\_2018.pdf](https://www.state.nj.us/lps/njsp/////division/investigations/pdf/adtu/Indicators_Consistent_Drug_Categories_Matrix_2018.pdf) (last visited Apr. 7, 2022).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

blood pressure.<sup>52</sup> However, anyone who has ever been forced to take a field-sobriety test will tell you that nerves and test anxiety alone can trigger those observable signs of “impairment” in an unimpaired person, and experts in the area of field sobriety testing agree.<sup>53</sup> According to the Field Sobriety Testing Resource, “[fo]r many people, being stopped by the police and ordered to perform a number of unfamiliar physical tasks is intimidating and could result in a failing score.”<sup>54</sup>

The other “general indicators” outlined by New Jersey are also riddled with issues because they either can result from a number of factors beyond cannabis impairment or are simply too difficult for a WIRE to assess. Body tremors, for example, can be caused by nerves.<sup>55</sup> Bloodshot eyes could be caused by lack of sleep, allergies, or crying.<sup>56</sup> Drowsiness or lack of concentration could be caused by lack of sleep or depression<sup>57</sup>, and odor of cannabis could be caused by being in the vicinity of someone else smoking cannabis. Finally, it would be interesting indeed to see how a WIRE might go about accurately identifying an employee’s alteration in thought formation, increased appetite, mood changes, or relaxed inhibitions. In sum, it is not difficult to understand why no viable test has emerged in this field and why the CRC is currently stalled in its attempt to identify one.

New methods for testing physical impairment have emerged but are still a long way away from perfection. The Druid App, for example, can test for current impairment from cannabis

---

<sup>52</sup> *Id.*

<sup>53</sup> *Health or Mental Problems and Field Sobriety Tests*, FIELDSOBRIETYTESTS.ORG, <http://www.fieldsobrietytests.org/healthormentalproblemsandfieldsobrietytests.html> (last visited Apr. 7, 2022).

<sup>54</sup> *Health or Mental Problems*, *supra* note 53.

<sup>55</sup> *Anxiety Tremors: What Causes It?*, HEALTHLINE, <https://www.healthline.com/health/anxiety-shaking#overview> (last visited April 29, 2022).

<sup>56</sup> Kristin Canning, *8 Reasons Your Eyes are Red*, HEALTH, (Nov. 3, 2017), <https://www.health.com/condition/eye-health/red-eyes-bloodshot>.

<sup>57</sup> *Fatigue and Depression: Are they Connected?*, HEALTHLINE, <https://www.healthline.com/health/depression/fatigue> (last visited April 29, 2022).

through an app on an individual's phone.<sup>58</sup> A user starts by doing several tests on the app while they are sober to set a standard baseline for sobriety.<sup>59</sup> After this baseline is set, a user can utilize the app to assess whether they are impaired; meeting that baseline standard would indicate the user is not impaired.<sup>60</sup> The test is simple: an individual follows a dot with their finger on a screen and it "assesses" the user's level of impairment.<sup>61</sup> While this system seems promising, obvious issues remain. Just as with other forced sobriety tests, anxiety can affect a person's motor skills. The developers of the Druid App have not run tests to account for this variable.<sup>62</sup> Even more problematic is the fact that the developers say failing to meet the baseline test could merely indicate that the individual did not sleep properly the night before.<sup>63</sup>

The most promising physical test for impairment is a light-based imaging test developed by researchers at Massachusetts General Hospital ("MGH").<sup>64</sup> This scientific breakthrough comes amid the debate in the Commonwealth over how to police cannabis-impaired driving in the wake of legalization, which is a significant concern for New Jersey as well.<sup>65</sup> Based on the presumption that existing impairment tests are flawed, the scientists at MGH felt that reliance on outdated tests for alcohol impairment should be eschewed for a more reliable brain-based test.<sup>66</sup> "For so long, our model has been alcohol, so there's been a lot of focus on breath and blood levels," Dr. Jodi

---

<sup>58</sup> Michael Milburn & William DeJong, *A paradigm shift in impairment testing for cannabis: The DRUID® App*, HEALTH EUROPA (Feb. 7, 2020), <https://www.healtheuropa.com/a-paradigm-shift-in-impairment-testing-for-cannabis-the-druid-app/94154/>.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Milburn & DeJong, *supra* note 58.

<sup>64</sup> Dan Adams, *MGH Claims Breakthrough in Detecting Marijuana Impairment*, BOSTON GLOBE (Feb. 4, 2022), <https://www.bostonglobe.com/2022/02/04/marijuana/mgh-claims-breakthrough-detecting-marijuana-impairment/>.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

Gilman, who led the research, said. “Our thought was, ‘What about looking directly at the brain?’”<sup>67</sup>

After testing 169 volunteers, the MGH study found that people classified as “impaired” had significantly higher levels of oxygenated hemoglobin than subjects who took a placebo or did not get too high from the THC-infused edible.<sup>68</sup> The researchers performed the test by using functional near-infrared spectroscopy, or fNIRS, to measure the photon reflections from low-power LED bulbs mounted on a portable skullcap and shined into the skulls of the subjects. This type of technology is already widely used in smartwatches and other gadgets to measure a person’s heart rates and blood oxygenation.<sup>69</sup> The MGH tests are promising because they yielded false positives in just 10 percent of subjects and rarely indicated impairment in subjects who consumed THC-infused edibles yet were not deemed functionally impaired.<sup>70</sup> Imagine a similar situation in which a person consumes a glass of alcohol yet remains sober enough to drive.

The MGH study has profound implications for both cannabis impairment testing and NJCREAMMA’s WIRES. MGH conducted tests using drug recognition experts to assess impairment in the same 169 individuals and found that those tests produced false positives in a staggering 34 percent of the subjects who were not deemed impaired by the fNIRS test or the subjects’ self-assessments.<sup>71</sup> After finding that the drug recognition experts incorrectly flagged 20 percent of the volunteers who had eaten the placebo and were verifiably sober, the MGH scientists discarded drug recognition protocol as an accurate reference for impairment.<sup>72</sup> So, while it is easy

---

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Adams, *supra* note 64.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Adams, *supra* note 64.

to suggest that employers should wait for the CRC to issue its rules for WIREs and their certification before taking adverse employment action against cannabis users, given the current data, it would be far safer for employers to steer clear of physical impairment testing altogether until an accurate method is developed.

**Part III: The lack of information concerning requirements for WIREs under NJCREAMMA should steer employers away from using them in the workplace.**

- A. Employers should not conduct any drug testing for cannabis impairment because the CRC failed to issue rules regarding WIREs and have thus exempted employers from conducting physical examinations for impairment.

As discussed in Part I, NJCREAMMA provided little guidance as to how WIREs ought to be certified or conduct physical impairment tests for cannabis use.<sup>73</sup> The law merely states that WIREs are individuals who have completed a Drug Recognition Expert program provided by a Police Training Commission approved school, received a Workplace Impairment Recognition Expert certification, and are either employed by or a contractor of an employer.<sup>74</sup>

Because there were no standards regarding the physical prong of the drug testing requirement or its administrators, NJCREAMMA provisions impacting workplaces were not immediately operative in February 2021.<sup>75</sup> The employment protections and drug testing requirements outlined in Section 52 of the Act were to go into effect once the CRC promulgated its initial rules and regulations.<sup>76</sup> As noted above, the law specifically tasked the CRC with clarifying restrictions on employers regarding workplace drug testing and any adverse employment actions taken in response to said testing.<sup>77</sup>

---

<sup>73</sup> See generally Part I.

<sup>74</sup> N.J. Stat. Ann. § 24:6I-52a(2).

<sup>75</sup> *Cannabis Regulatory Commission*, *supra* note 35.

<sup>76</sup> *Id.* (citing N.J. Stat. Ann. § 24:6I).

<sup>77</sup> N.J. Stat. Ann. § 24:6I-52.



The CRC issued its initial rules on August 19, 2021, thus making Section 52 of NJCREAMMA operative against employers.<sup>78</sup> Those initial rules, however, do not sufficiently address workplace testing. In addition, the CRC has indefinitely postponed the requirement of a physical evaluation by a WIRE until standards are developed. The initial rules provide that:

Notwithstanding the provisions of N.J.S.A. 24:6I-52, until such time that the Commission, in consultation with the Police Training Commission established pursuant to N.J.S.A. 52:17B-70, develops standards for a Workplace Impairment Recognition Expert certification, *no physical evaluation of an employee being drug tested in accordance with N.J.S.A. 24:6I-52 shall be required.*<sup>79</sup>

This lack of guidance poses obvious yet challenging questions to employers seeking to ensure drug-free work environments. Precisely how does drug testing help employers accomplish that goal at all? If a physical exam is not only not required but not recommended by the CRC, what will qualify as an adequate reason for taking adverse employment action against an employee for cannabis impairment aside from a positive drug test result? Without the ability to test an employee for current impairment through a physical test, an employer would have to rely on having a “reasonable suspicion” of impairment.<sup>80</sup> This vague directive should be troubling to employers and should constitute a red flag to stay away from testing altogether. It opens the door for employees who receive positive drug test results to claim that their employers took adverse action solely based on the test, which NJCREAMMA expressly prohibits.<sup>81</sup>

A recent case in Arizona is illustrative. There, a Walmart employee took a drug test after an on-the-job injury and tested positive for cannabis.<sup>82</sup> Walmart administered that drug test two

---

<sup>78</sup> N.J.A.C. 17:30.

<sup>79</sup> *Id.* (emphasis added).

<sup>80</sup> N.J. Stat. Ann. § 24:6I-52a(1).

<sup>81</sup> See Robert Kline, *Courts Are Siding with Employees Who Use Medical Marijuana*, NAT’L L. REV. (June 19, 2019), <https://www.natlawreview.com/article/courts-are-siding-employees-who-use-medical-marijuana>.

<sup>82</sup> *Whitmire v. Wal-Mart Stores, Inc.*, 359 F. Supp. 3d 761, 769 (D. Ariz. 2019).

days after the injury and the test only indicated cannabis use, not cannabis impairment. Walmart fired the employee anyway on the theory that the test result indicated she was impaired when she was injured during her shift.<sup>83</sup> The employee subsequently sued Walmart for wrongful termination in violation of the Arizona Medical Marijuana Act and succeeded on that claim.<sup>84</sup> New Jersey employers should see this as a cautionary tale against testing employees for cannabis impairment because while nothing in the law requires employers to drug test employees before taking adverse action, NJCREAMMA does impose significant requirements on employers if they do conduct such drug testing.<sup>85</sup>

**B. There are too many crucial yet unanswered questions concerning WIREs for employers to feel comfortable using them to test employees for cannabis impairment.**

Employers should be cognizant of the myriad unanswered questions concerning WIREs that could cause general disruption in the workplace as well as subject them to civil liability. First and foremost, at what stage in the drug-testing process does the WIRE get involved? Pre-testing? Post-testing? Must the expert first “approve” the drug testing a particular employee? It is easy to see how these unanswered questions could leave an employer open to liability. If a WIRE becomes involved after a positive test result, an employee could make a claim that any subsequent positive physical impairment assessment was a biased result due to the WIRE’s knowledge that the employee uses cannabis, which would violate the statute.<sup>86</sup> If a pre-employment drug test is required by the employer and those who test positive experience an increased frequency of physical testing, other the other hand, that practice could be construed as targeting the newly protected class of cannabis users in New Jersey.

---

<sup>83</sup> *Id.* at 771.

<sup>84</sup> *Id.*

<sup>85</sup> Diana & Riccobono, *supra* note 15, (citing N.J. Stat. Ann. § 24:6I-52a(1)).

<sup>86</sup> N.J. Stat. Ann. § 24:6I-52a(1).

The nature and extent of the WIREs influence over the employer's determination is also unclear. Does the WIRE merely assess the employee's level of impairment at the time in question for the employer's consideration among other factors or is the WIRE's opinion binding on the employer?<sup>87</sup> Given that WIREs may themselves be employees, the scope of their role and authority has considerable implications for the workplace climate. Finally, how might this process work with employees who work remotely? Will employers use WIRE services remotely via video? Given these open questions, there is only one reasonable course of action for employers: they ought to steer clear of testing employees for cannabis use. Consumption of and impairment from alcohol has historically been prohibited in New Jersey workplaces without the need to implement such convoluted measures for testing impairment.<sup>88</sup> Employers should follow the same protocol for cannabis as they do for alcohol and, thereby mitigate the liability risks that attend to cannabis testing under NJCREAMMA.

#### **Part IV: Employers should avoid testing employees for cannabis in light of current litigation involving NJCREAMMA and unreliable testing methods.**

Another reason to avoid testing is that employers who violate NJCREAMMA face civil penalties in amounts up to \$1,000 for the first violation, \$5,000 for the second violation, and \$10,000 for each subsequent violation.<sup>89</sup> Moreover and while there is no private right of action against an employer under the NJCREAMMA,<sup>90</sup> employees subjected to adverse employment actions for off-duty marijuana are likely to pursue claims of discrimination under a public policy

---

<sup>87</sup> August W. Heckman III, Rudolph J. Burshnic II, *New Jersey and Recreational Cannabis*, MORGAN LEWIS (Apr. 7, 2021), <https://www.morganlewis.com/-/media/files/publication/presentation/webinar/2021/new-jersey-and-recreational-cannabis-what-you-need-to-know.pdf>.

<sup>88</sup> Lisa Gingeleskie, *Under What Circumstances May Private Employers Test Employees And Job Applicants For Alcohol And Illegal Drugs?*, LINDABURY (Apr. 23, 2018), <https://www.lindabury.com/firm/insights/under-what-circumstances-may-private-employers-test-employees-and-job-applicants-for-alcohol-and-illegal-drugs.html#:~:text=There%20is%20no%20New%20Jersey,on%20the%20issue%20thus%20far.>

<sup>89</sup> P.L.2021, c.19.

<sup>90</sup> *Id.*

cause of action.<sup>91</sup> Thus, while the sole remedy under NJCREAMMA for employers may be small fines, there is the potential for settlement windfalls in successful discrimination cases.

Current litigation indicates how fraught workplace drug testing is for employers under NJCREAMMA. Amazon is defending a lawsuit in which the plaintiffs allege that the company violated NJCREAMMA, New Jersey common law, and New Jersey public policy by refusing to hire applicants and wrongfully discharging employees based on positive drug test results between February 22, 2021 and June 1, 2021.<sup>92</sup> On June 1, 2021, Amazon changed its drug testing policy to no longer disqualify applicants or terminate current employees for positive cannabis tests but the ongoing lawsuit seeks back pay, front pay and punitive damages for the period prior to those policy amendments.<sup>93</sup>

In *Hunt v. Matthews International Corp.*, the plaintiff alleged that their employer refused to hire them after a pre-employment drug screen returned a positive cannabis result. Mr. Hunt claims that after allegedly making no effort to speak with him, his employer withdrew an offer of employment in violation of New Jersey's anti-discrimination laws.<sup>94</sup> Significantly, Mr. Hunt claims that he disclosed his status as a cannabis user before the test and made multiple attempts to discuss the issue with his potential employer, yet he was still denied employment.<sup>95</sup> This case highlights how the competing interests of employee cannabis users and employers attempting to maintain a drug free work environment will likely play out in the courts as discrimination suits. .

---

<sup>91</sup> See *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58 (1980); *Hennessey v. Coastal Eagle Point Oil Co.*, 129 N.J. 81 (1992).

<sup>92</sup> Jeannie O'Sullivan, *Amazon Settles NJ Job Applicant's Marijuana Screening Suit*, LAW360 (Feb. 8, 2022), <https://www.law360.com/articles/1463134>.

<sup>93</sup> O'Sullivan, *supra* note 92.

<sup>94</sup> See generally *Hunt v. Matthews International Corp.*, NJ Superior Court, Law Division Hudson County, Case Number 00218-22, Complaint filed January 18, 2022.

<sup>95</sup> *Id.*

It is also important to note that drug recognition expert (“DRE”) testing may go the way of the dodo in New Jersey following the decision of a designated Special Master to determine whether DRE testing is scientifically reliable in *State v. Michael Olenowski*.<sup>96</sup> Defendant Michael Olenowski was convicted of Driving While Intoxicated (DWI) under N.J.S.A. 39:4-50.<sup>97</sup> At his trial, the prosecutor introduced a police expert used to detect drug influence as evidence, known as DRE. The defendant argued that the DRE evidence was scientifically insufficient to be held reliable and valid.<sup>98</sup> On appeal, the New Jersey Supreme remanded the matter to a Special Master to decide whether DRE evidence is generally accepted in the scientific community and therefore satisfies the expert evidence standard demanded by the New Jersey Rules of Evidence.<sup>99</sup>

*Olenowski* could have a significant impact on the implementation of NJCREAMMA. If the Special Master determines that DRE testimony is not sufficiently based in scientific evidence and the New Jersey Supreme Court affirms, what will become of NJCREAMMA’s two prong drug test and WIREs? Without a physical examination, what will formulate the basis of an employer’s decision to take adverse action against an employee who is allegedly impaired at work? *Olenowski* ought to further encourage employers to avoid drug testing employees for cannabis use in the workplace as it may quickly become obsolete.

## **Part V: Conclusion**

New Jersey’s legalization of cannabis consumption leaves a lot of questions unanswered for employers and employees. There are currently no testing methods, either laboratory based or physical, which allow for an accurate indication of real-time impairment due to cannabis

---

<sup>96</sup> See generally *State v. Olenowski*, 247 N.J. 242 (2019).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 243.

<sup>99</sup> *Id.* at 244.

consumption. The additional lack of information concerning requirements for WIREs under NJCREAMMA should steer employers away from using them as things currently stand. The flurry of litigation surrounding employee drug testing attests to the fact that employers would be opening themselves up to litigation if they follow suit. Given the considerable legal uncertainty surrounding cannabis drug testing in the workplace, New Jersey employers would wise to simply continue do what they have always done: make adverse employment actions based on an employee's actual work performance.