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Sabrina R. Santamaria

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## **A NEW JERSEY EMPLOYER’S GUIDE: TESTING FOR CANNABIS IN THE WORKPLACE**

**Sabrina R. Santamaria**

Let’s be “blunt.” There are many professions across the country that require caution and special attention to detail to ensure efficacy and public safety. For example, police officers, pilots, and transportation workers directly impact the safety and wellbeing of others to whom they deliver services. There also are countless professionals, including janitors, street cleaners, and receptionists, whose work does not involve significant public safety implications.

As recently as July 2021, a New Jersey employer fired an employee, Paul Myers, who was tasked with preparing products for delivery at a packaging warehouse due to a positive drug test.<sup>1</sup> Despite having serious health conditions, Myers had not yet acquired a medical marijuana card following the legalization of recreational cannabis use in New Jersey.<sup>2</sup> Although Myers’ job responsibilities did not involve the operation of dangerous machinery or engaging in close contact with others, his employer insisted he take a drug test and terminated him when the test came back positive for cannabis use.<sup>3</sup> Myers thereafter filed suit, alleging that his employer violated New Jersey anti-discrimination law by using his drug test as a pretext to fire him for requesting time off.<sup>4</sup> In response to queries regarding this modern drug-testing dilemma, attorney Sheila Mints explained that “[employers] really don’t know what the right thing is to do.”<sup>5</sup> To test, or not to test? That is the ultimate question.

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<sup>1</sup> Amanda Hoover, *A man failed workplace drug test days after N.J. legalized weed and was fired. Now he’s suing*, N.J. ADVANCE MEDIA (July 23, 2021), <https://www.nj.com/marijuana/2021/07/a-man-failed-workplace-drug-test-days-after-nj-legalized-weed-and-was-fired-now-hes-suing.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

This paper is the first to provide comprehensive guidance to New Jersey employers regarding their rights and obligations to test for cannabis use in the workplace. It proceeds in five sections. Part I evaluates the history of cannabis on a federal level as well as the inception and purpose of workplace drug testing. It explains the controversy surrounding the classification of cannabis as a Schedule I substance under the Controlled Substances Act, and the Marijuana Opportunity Reinvestment and Expungement (“MORE”) Act’s role in attempting to remedy this controversy. Part I further explains how confusion arose in New Jersey following the legalization of medical and recreational cannabis use. It also outlines the tremendous impact that New Jersey’s legalization of cannabis has had on the employment setting, and the ongoing uncertainty of employers in administering drug tests.

Part II details the Cannabis Regulatory, Enforcement, Assistance, and Marketplace Modernization (“CREAMM”) Act requirements for cannabis testing in the workplace. It defines the role of a Workplace Impairment Recognition Expert (“WIRE”) and explains the status of the Cannabis Regulatory Commission (“CRC”) in issuing workplace testing guidance. Part II then outlines the various available forms of testing and discusses issues that an employer may face in administering urine tests to determine an employee’s cannabis usage. This Part concludes by emphasizing the importance of administering drug tests in a method that conforms with federal regulations.

Part III of this paper analyzes various forms of resistance that an employer may receive from employees in response to random workplace drug testing. It begins by explaining how employers ought to determine which employment positions are safety sensitive. It then compares testing for cannabis in the workplace with testing for alcohol. Part III goes on to discuss employers’ potential liability for disability discrimination under the ADA and retaliation under

the New Jersey Law Against Discrimination (“NJLAD”). Part III concludes by evaluating the difference between disparate treatment and disparate impact discrimination and assessing the potential for random cannabis testing to trigger liability under Title VII of the Civil Rights Act.

Part IV provides a framework for employers who wish to develop drug testing policies that limit potential liability. This Part also contends that, given the current state of the applicable New Jersey law and regulations, it is likely best for employers to avoid drug testing until additional legal guidance emerges. Part V concludes the paper with a takeaway.

## **I. THE HISTORY OF MARIJUANA LEGISLATION AND DRUG TESTING**

Cannabis is another term used for marijuana, both of which are synonymous for the flowering top of the hemp plant, the part that “induces somatic and psychic changes in humans.”<sup>6</sup> For decades, cannabis has been considered a habit-forming substance, narcotic, dangerous drug, and/or injurious substance.<sup>7</sup> As a result, it is unsurprising that the fight for national legalization remains a challenge in the United States. At the federal level, cannabis remains a Schedule I, illegal drug under the Controlled Substances Act.<sup>8</sup> Although, many states including New Jersey, have legalized medical and recreational cannabis use, less than one-third of Americans live in states that permit recreational use.<sup>9</sup>

### **A. The Inception of Drug Testing**

American employers have long engaged in workplace drug testing. The inception of this practice dates back to 1986, following the passage of the Drug-Free Federal Workplace Act, during the Reagan administration.<sup>10</sup> The Act authorized public and private employers to test

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<sup>6</sup> JOHN BOURDEAU, ET AL., 28 CORPUS JURIS SECUNDUM, DRUGS AND NARCOTICS § 6 (2002).

<sup>7</sup> *Id.*

<sup>8</sup> Hannah Chanin, *Herb'n Sprawl: Analyzing Cannabis Zoning Schemes Through the Lens of Mill's Liberalism*, 13 WASH. U. JURISPRUDENCE REV. 407, 408 (2021).

<sup>9</sup> *Id.*

<sup>10</sup> Angelica Halat, “An Anesthesiologist, A Brain Surgeon, and A Nurse Walk into A Bar . . .”: A Call for Change in How America Handles Health Care Worker Substance Abuse, 46 SETON HALL L. REV. 939, 939 (2016).

employees for drugs and alcohol as a condition of employment.<sup>11</sup> Alongside the Controlled Substances Act of 1970, which classified cannabis as a Schedule I drug, the statute was a key component of the country’s “War on Drugs.”<sup>12</sup> Federal classification of a drug as a Schedule I substance indicates that the federal government has determined that the drug has a high potential for abuse or dependency and no medicinal use or value, and, therefore, is illicit outside of tightly controlled federal research studies.<sup>13</sup>

i. Schedule I Controversy

The classification of marijuana as a Schedule I drug has sparked controversy since the passage of the Controlled Substances Act.<sup>14</sup> This is because the Act provides for five different categories which classify drugs based on their medical utility, potential for abuse, and safety of use.<sup>15</sup> Of the five categories, Schedule I is the most restrictive, while Schedule V is least restrictive.<sup>16</sup> In other words, cannabis has been grouped with substances that are believed to be the most addictive and unsafe for use.<sup>17</sup> However, there are several scientifically recognized therapeutic uses for cannabis.<sup>18</sup> For instance, THC “serves as an anti-epileptic, decreases intraocular pressure in glaucoma patients, relieves bronchospasm in asthmatics, stimulates the appetite, and promotes weight gain.”<sup>19</sup> In addition, two cannabinoids have been associated with treating vomiting and nausea in cancer patients receiving chemotherapy.<sup>20</sup> In addition, even at very high doses, cannabis cannot cause death, anesthesia, or coma, making it distinguishable

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<sup>11</sup> *Id.*

<sup>12</sup> 21 U.S.C. § 812(b)(1).

<sup>13</sup> *Id.*

<sup>14</sup> Annaliese Smith, *Marijuana as a Schedule I Substance: Political Ploy or Accepted Science?*, 40 SANTA CLARA L. REV. 1137, 1137 (2000).!

<sup>15</sup> *Id.* at 1147.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1137.

<sup>18</sup> *Id.* at 1143.

<sup>19</sup> *Id.* at 1144.

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

from other Schedule I drugs.<sup>21</sup> Yet, cannabis can have an effect on certain cognitive functions.<sup>22</sup> For example, while cannabis use does not affect the retrieval of information acquired prior to use, high doses may affect an individual’s ability to transfer newly acquired information into long-term memory.<sup>23</sup>

For the reasons stated above, there have been several attempts throughout history to address the long-lasting repercussions of the War on Drugs and remove cannabis from Schedule I under the Controlled Substances Act.<sup>24</sup> As recently as April 2022, the House of Representatives passed the Marijuana Opportunity Reinvestment and Expungement (“MORE”) Act.<sup>25</sup> The Act would remove cannabis from Schedule I, require courts to expunge prior cannabis-related convictions, impose a federal tax on cannabis sales, and fund rehabilitation programs for substance misuse.<sup>26</sup> Supporters of the MORE Act believe that it will generate a tremendous amount of revenue for the federal government as well as assist communities that have been overwhelmingly targeted for cannabis use and crime due to racial biases.<sup>27</sup> However, with solely three Republican representatives backing the bill, it lacks overwhelming bipartisan support and is predicted to receive limited votes in the Senate.<sup>28</sup> Though the MORE Act is expected to face criticism and pushback by the Senate, its introduction has allowed for the consideration of newer perspectives on the topic of cannabis at the federal level.<sup>29</sup> In other words, “the tone toward marijuana is changing.”<sup>30</sup>

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<sup>21</sup> *Id.* at 1143.

<sup>22</sup> *Id.* at 1159.

<sup>23</sup> *Id.* at 1160.

<sup>24</sup> *Id.* at 1151-1155.

<sup>25</sup> Kelly Anne Smith, *House Passes Bill to Legalize Marijuana. What’s Next?*, FORBES ADVISOR (April 4, 2022), <https://www.forbes.com/advisor/personal-finance/house-passes-bill-legalize-marijuana/>

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

## B. New Jersey Legalization

Since the early 1990s, the New Jersey courts have held that public employers may drug test their employees because public safety outweighs individual privacy interests.<sup>31</sup> In *Hennessey v. Coastal Eagle Point Oil Company*, the Supreme Court of New Jersey set the standard for employers in the private sector in a ruling that would be roundly criticized.<sup>32</sup> *Hennessey* stands for the proposition that an employer is authorized to randomly drug test an employee when “the urgent need to ensure public safety renders urine testing a permissible method of preventing drug use among employees in safety-sensitive jobs.”<sup>33</sup> As the *Hennessey* Court went on to explain, an employer may also terminated an at-will employee for failing a drug test.<sup>34</sup> Employers in the private sector are further permitted to rescind an employment offer following an applicant’s failure of a pre-employment drug test, where a negative test result is a condition of employment.<sup>35</sup> Until New Jersey legalized cannabis, these clearly-defined standards permitted employers to terminate employees for positive workplace drug tests without much controversy.

Confusion began to brew concerning the scope of New Jersey employers’ rights and obligations regarding workplace drug testing around 2019 for several reasons. First, New Jersey Governor Phil Murphy signed into law the Jake Honig Compassionate Use of Medical Marijuana Act (“Honig Act”) replacing the State’s 2010 Compassionate Use of Medical Marijuana Act (“CUMMA”), which had legalized medical marijuana.<sup>36</sup> The New Jersey legislature passed the Honig Act in response to an increase in employer adverse employment actions against

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<sup>31</sup> *Int’l Fed’n of Pro. & Tech. Engineers, Loc. 194A, AFL/CIO-CLC v. Burlington Cty. Bridge Comm’n*, 572 A.2d 204, 211 (N.J. App. Div. 1990).

<sup>32</sup> *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11 (N.J. 1992).

<sup>33</sup> *Id.* at 106.

<sup>34</sup> *Id.* at 102.

<sup>35</sup> MARVIN M. GOLDSTEIN & STANLEY L. GOODMAN, 18 NEW JERSEY PRACTICE SERIES, EMPLOYMENT LAW § 1.11. Drug testing—Private sector (2d ed. 2022).

<sup>36</sup> N.J.S.A. 24:61-1 et seq.

employees who tested positive for cannabis.<sup>37</sup> The Act amended New Jersey’s medical marijuana law to provide employment protections to workers by adding the following language:

It shall be unlawful to take any adverse employment action against an employee who is a registered qualifying patient based solely on the employee’s status as a registrant with the commission [i.e., the Cannabis Regulatory Commission established pursuant to the law].<sup>38</sup>

The statute defines “adverse employment action” as “refusing to hire or employ an individual, barring or discharging an individual from employment, requiring an individual to retire from employment, or discrimination against an individual in compensation or in any terms, conditions, or privileges of employment.”<sup>39</sup> It remained the law in New Jersey, however, that employers could take an adverse employment action against an employee that was impaired or using drugs while on the job.<sup>40</sup>

The line became much blurrier on February 22, 2021, when Governor Murphy signed into law three additional bills regarding the legalization of recreational cannabis use.<sup>41</sup> The first of these three bills was Assembly Bill 21, known as The Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization (“CREAMM”) Act.<sup>42</sup> Broadly speaking, this law removed cannabis from Schedule I under state law, details the framework for recreational cannabis use in New Jersey, and provides that the Cannabis Regulatory Commission (“CRC”) is tasked with overseeing the cannabis industry.<sup>43</sup> The second law, decriminalized cannabis and

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<sup>37</sup> Kevin C. Donovan & Jennifer L. Moran, *The 2019 Honig Act Means New Obligations for New Jersey Employers Around Cannabis at Work*, NAT’L L. REV. (Mar. 4, 2020), <https://www.natlawreview.com/article/2019-honig-act-means-new-obligations-new-jersey-employers-around-cannabis-work#:~:text=On%20July%202019%20Governor,Honig%20Act%20create%20job%20protections.>

<sup>38</sup> *Id.*

<sup>39</sup> N.J.S.A. 24:61-3.

<sup>40</sup> Donovan & Moran, *supra* note 37.

<sup>41</sup> MICHAEL A. PANE, 35 NEW JERSEY PRACTICE SERIES, LOCAL GOVERNMENT LAW § 32:1. Municipal impact (4th ed. 2021).

<sup>42</sup> N.J.S.A. 24:61-31, et seq.

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



hashish possession and outlines the availability of expungement relief.<sup>44</sup> The final law defines the legal consequences that pertain to the consumption and possession of cannabis by individuals under 21 years of age.<sup>45</sup>

### **C. Impact on the Employment Setting**

Although New Jersey legalized recreational cannabis use in 2021, employers continue to have the legal authority to drug test their employees and enforce drug and alcohol-free workplaces.<sup>46</sup> In addition, employers are not required to tolerate the possession, sale, transfer, and use in the workforce.<sup>47</sup> As such, employers retain the right to drug test employees upon reasonable suspicion of intoxication during working hours.<sup>48</sup>

Specifically, employers are permitted to drug test employees when observable signs of impairment are present, following a work-related accident, and during pre-employment screening.<sup>49</sup> Employers cannot take any adverse employment action against an employee solely based on the presence of cannabinoid metabolites in the employee's bodily fluid.<sup>50</sup> While other states have provided a carve-out that permits employers to terminate employees in safety-sensitive positions for cannabis use, the CREAMM Act does not include this exception.<sup>51</sup>

Essentially, the Act “creates a new protected class under New Jersey law.”<sup>52</sup> New Jersey law also

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<sup>44</sup> N.J.S.A. 2C:35-5.1

<sup>45</sup> N.J.S.A. 2C:33-15.

<sup>46</sup> Kathryn J. Russo, *How New Jersey’s Recreational Marijuana Law Significantly Affects Workplace Drug Testing*, NAT’L L. REV. (Feb. 24, 2021), <https://www.natlawreview.com/article/how-new-jersey-s-recreational-marijuana-law-significantly-affects-workplace-drug>.

<sup>47</sup> *Id.*

<sup>48</sup> JON L. GELMAN, 38 NEW JERSEY PRACTICE SERIES, WORKERS COMPENSATION LAW § 11.3. Intoxication or unlawful use of controlled dangerous substances (3d ed. 2022).

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

<sup>50</sup> Lauren Marcus, et al., *New Jersey Marijuana Law Employment Provisions Take Effect*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT. (September 1, 2021), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/new-jersey-marijuana-law-employment-provisions-take-effect.aspx>.

<sup>51</sup> Ariel S. Cohen, *New Jersey Extends Employment Protections To Recreational Cannabis Using Employees (US)*, NAT’L L. REV. (March 2, 2021), <https://www.natlawreview.com/article/new-jersey-extends-employment-protections-to-recreational-marijuana-using-employees>

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

makes clear that employers can only demand a drug test in conjunction with a physical evaluation for visible impairment.<sup>53</sup>

## II. THE CREAMM ACT REQUIREMENTS AND ANALYSIS

Pursuant to the CREAMM Act, an employer seeking to maintain a drug-free workplace must implement a two-part policy: (1) a physical evaluation; and (2) a blood, urine, or saliva drug test that is scientifically reliable.<sup>54</sup>

### A. Physical Examination

#### i. Workplace Impairment Recognition Expert

As part of its physical evaluation requirement, the CREAMM Act delegates to the New Jersey CRC the obligation to develop guidelines for the appointment of a Workplace Impairment Recognition Expert (“WIRE”).<sup>55</sup> A WIRE is someone hired by the employer whose job duties entail identifying cannabis use or cannabis-induced impairment in the workplace, and investigating workplace accidents.<sup>56</sup> WIREs can be full-time or part-time employees or independent contractors hired to perform services on behalf of the employer.<sup>57</sup>

The Legislature specifically tasked the NJ CRC to

prescribe minimum curriculum courses of study for the certifications, as well as standards for the commission's approval and continuation of approval of non-profit and for-profit programs, organizations, or schools and their instructors to offer courses of study and may include the use of a Police Training Commission approved school as that term is defined in 52:17B-67 if consented to by the Police Training Commission.<sup>58</sup>

The qualifications of a WIRE, however, remain unclear. This is because the CRC has not yet issued regulations defining the criteria to receive a WIRE certification. The one thing that is

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<sup>53</sup> *Id.*

<sup>54</sup> MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 23:22. Medical or recreational use of marijuana—State laws that include explicit anti-discrimination protections (November 2021).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

certain under current NJ law is that the WIREs are required to undergo particularized training focused on detecting use or impairment caused by cannabis or other intoxicating substances.<sup>59</sup>

The CRC announced its first set of rules and regulations, the Personal Use Cannabis Rules, on August 19, 2021.<sup>60</sup> Those rules address the licensing, cultivation, selling, purchasing, and testing of cannabis in the state.<sup>61</sup> As for testing, the rules note that it is not necessary for employers to perform physical evaluations as part of drug testing protocol until the CRC develops standards for WIRE certifications.<sup>62</sup> Until the WIRE certification process is thoroughly developed and outlined in detail by the CRC, employers should proceed with caution before taking any adverse employment action against an employee that may appear to be under the influence of cannabis. In addition, once the CRC releases the WIRE regulations, employers should avoid hiring an employee or contractor who is already associated with the company as a WIRE because other employees may claim certain biases or conflicts of interest.

## ii. Signs of Marijuana Use

The CRC may look to case law to determine appropriate indicators that an employee is under the influence when developing its WIRE guidelines. The phrase “under the influence” was defined in *State v. Tamburro*.<sup>63</sup> As the court explained, “under the influence” means “a substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to intoxicating liquor, narcotic, hallucinogenic or habit-producing drugs.”<sup>64</sup> Based on the testimony of a police officer drug expert, the court goes on to note that observable signs of deterioration or diminution may include: (1) erratic and dangerous behavior; (2)

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<sup>59</sup> LABOR AND EMPLOYMENT – NEW JERSEY ¶ 31-2500 Fair Employment Practices Law Summaries, WL 3981784 (2022).

<sup>60</sup> N.J.A.C. 17:30-1 et seq.

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

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

<sup>63</sup> *State v. Tamburro*, 346 A.2d 401 (N.J. 1975).

<sup>64</sup> *Id.* at 421, 404.

bloodshot or glassy eyes; (3) pinpointed pupils; (4) pale or flushed complexion; (5) droopy eyelids; (6) smelling of the substance; (7) slowed or slurred speech; (8) sluggishness or drowsiness; or (9) changing moods.<sup>65</sup> Using these signs, the court identified ample proof of marijuana intoxication by the defendant.<sup>66</sup> While this is a non-exhaustive list, police officers routinely use these criteria to detect and identify drug use. It should be noted, however, that not all of these symptoms may be present in an individual using a substance. These symptoms and the degree to which an individual displays them depends on various factors. Such factors include, but are not limited to, the type of substance ingested, precisely when the substance was ingested, the individual's unique metabolism, and the frequency in which the individual uses the substance.<sup>67</sup>

## **B. Drug Testing**

There are various methods of drug testing ranging considerably in their relative accuracy. Drugs may be detected in one's system through tests using one's breath, urine, blood, saliva, or hair.<sup>68</sup> Despite the wide range of options, the most common method that employers use to test employees is by urinalysis.<sup>69</sup> That test works by discovering whether a concentration of tetrahydrocannabinol ("THC") metabolites is found in the person's system.<sup>70</sup> THC is a psychoactive cannabinoid, meaning that it is the component of cannabis responsible for the

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<sup>65</sup> *Id.* at 417-418, 403-404.

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

<sup>67</sup> ROBERT RAMSEY, *NEW JERSEY DRUNK DRIVING LAW SCOPE INFORMATION* § 7:4. Under the influence of narcotic, hallucinogenic or habit producing drug (2021 ed.).

<sup>68</sup> JOHN H. KLOCK, *EVIDENCE RULES ANNOTATED – NEW JERSEY PRACTICE SERIES SCOPE INFORMATION*, N.J.R.E. 503. Self-Incrimination (3d ed.).

<sup>69</sup> Tracy Armstrong, *Navigating the Marijuana m(h)aze What New Jersey Employers Need to Know*, N.J. LAW. 50, 51 (October 2018).

<sup>70</sup> Stacey L. Worthy & Shruti R. Kulkarni, *Dazed and Confused: Making Sense of Employers' Risks from Mandated Coverage of Non-FDA-Approved Cannabis Products*, 45 SETON HALL L. REV. 379, 384 (2021).

impairing or intoxicating effects on one's mental state.<sup>71</sup> Meanwhile, CBD, also a component of cannabis, is a non-psychoactive cannabinoid.<sup>72</sup>

i. Accuracy and Reliability

The problem with testing THC through urine is that urine tests do not measure THC, but instead THC-COOH, which is the concentration of a THC metabolite.<sup>73</sup> In other words, the test reveals whether a person's body has broken down THC.<sup>74</sup> Therefore, despite it being the least intrusive method, the issue with urine testing is that an individual can receive a positive test weeks after using cannabis.<sup>75</sup> Consequently, an employer cannot possibly know whether an employee has smoked that exact day, while on the job, or a week ago by consulting a urinalysis. To solve this problem, scientists have been developing a new rapid test by means of saliva samples that can distinguish immediate use, or within 12 hours, from less recent use.<sup>76</sup> Thus, advancements in science will allow for more accurate testing in the near future. In the meantime, physical evaluations alongside a positive drug test can ensure that employees who are using cannabis during working hours are not confused with employees who test positive for marijuana use during personal time. As the science currently stands, physical evaluations, together with drug tests, increase accuracy and reliability.

ii. Administration

Should employers choose to administer urine tests at work despite their inherent unreliability, they should be sure to adhere to the federal guidelines regarding the administration

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

<sup>72</sup> *Id.*

<sup>73</sup> Armstrong, *supra* note 69 at 51.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Joseph Cariz, *Rapid Marijuana Saliva Test Detects Immediate Use within Minutes*, AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE (October 21, 2021), [https://www.aaas.org/news/rapid-marijuana-saliva-test-detects-immediate-use-within-minutes#:~:text=A%20new%2C%20rapid%20test%20can,hours\)%20from%20less%20recent%20use](https://www.aaas.org/news/rapid-marijuana-saliva-test-detects-immediate-use-within-minutes#:~:text=A%20new%2C%20rapid%20test%20can,hours)%20from%20less%20recent%20use)

of such tests. If the employer administers such tests improperly, it may run afoul of their employees' constitutional rights.<sup>77</sup> They should look to a recent intermediate New Jersey state case involving the Paterson Department of Public Works ("DPW") random administration of urine tests to employees.<sup>78</sup> At issue was that DPW escorted each employee it tested into the bathroom with a police officer who stood in the stall with and faced the person as they urinated.<sup>79</sup> There was no medically certified individual on the premises to administer the drug tests of the employees.<sup>80</sup>

In assessing the validity of this process, the court noted DPW's gross deviation from federal regulations.<sup>81</sup> Proper drug testing requires: (1) a medical professional or trained technician to administer the test; (2) a designated collection area where private urination testing may occur; and (3) a three-hour wait period for individuals to consume 40 ounces of fluids if they have trouble urinating.<sup>82</sup> There are very rare circumstances where urine production is subject to direct observation by the trained medical professional.<sup>83</sup> This case highlights why it is critical for New Jersey employers to adhere to federally mandated drug testing regulations.

### III. CONFLICTS REGARDING DRUG TESTING

A New Jersey employer that desires to drug test employees carries the heavy burden of demonstrating a justifiable need for a drug-free workplace, while also avoiding potential liability. There are several ways that an employer can trigger pushback from employees. Employees may resist enforcement of drug testing for certain jobs characterized as "safety-sensitive." Others may

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<sup>77</sup> Pitney, et al., *Constitution Shields Public Employee From Improper Drug Test*, 6 NO. 7 NEW JERSEY EMPLOYMENT LAW LETTER 4 (1998).

<sup>78</sup> *Id.*; see also *Reames v. Dep't of Pub. Works, City of Paterson*, 310 N.J.Super. 71 (N.J. App. Div. 1998).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

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

question why alcohol and other licit drugs are not monitored as closely as cannabis given that both licit and illicit drugs can cause impairment during working hours. Some may even challenge drug testing because they feel directly targeted by such policies.

### **A. Safety-Sensitive Jobs**

Employers are justified in administering drug tests when a particular employment position has a “direct and immediate impact on public health and safety,” or involves law enforcement or national security.<sup>84</sup> These types of jobs are deemed safety-sensitive positions.<sup>85</sup> It is important to note, however, that a particular job’s degree of safety-sensitivity requires consideration of the totality of the circumstances.<sup>86</sup> Employers may drug test firefighters, police officers, and bus drivers, among others, due to the safety-sensitive nature of their occupations.<sup>87</sup> Similarly, the New Jersey Department of Transportation requires drug testing in the “aviation, trucking, railroads, mass transit, pipelines, and other transportation industries” due to the safety-sensitivity of those jobs.<sup>88</sup> By contrast, custodians, attorneys, and employees in an office building do not work in safety-sensitive positions.<sup>89</sup> Consequently, those deemed to work in safety-sensitive roles may feel more monitored in the workplace and argue against their job title’s classification as “safety-sensitive.”

Employers should take into account the safety risk to the individual employee, the employee’s coworkers, and the public when evaluating the safety-sensitivity of a particular job.<sup>90</sup> Additionally, employers should consider the nature of the employee’s duties, and the link

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<sup>84</sup> ANDREW J. RUZICHO, ET AL., EMPLOYMENT PRACTICES MANUAL § 6A:3. Drug and alcohol testing—Controlling law (2021).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Jay S. Becker & Saranne E. Weimer, *Legalization of Marijuana Raises Significant Questions and Issues for Employers*, N.J. LAW. 66, 67 (2014).

<sup>89</sup> Armstrong, *supra* note 69 at 51.

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

between those duties and the potential for harm.<sup>91</sup> Despite legalization of recreational cannabis in New Jersey, Garden State employers are legally authorized to drug test employees in safety-sensitive positions as well as those suspected of impairment during working hours.<sup>92</sup> Thus, when classifying a job as safety-sensitive, employers should ensure that only those whose jobs pose a serious harm to others fall within this classification in their workplace. Employees whose positions are mislabeled will likely resist drug testing by showing that their job does not pose a safety hazard to others.

## **B. Americans with Disabilities Act**

### **i. Alcohol v. Cannabis**

Alcohol is a drug, yet employers do not typically administer breathalyzer tests to their employees in the workplace. Why do employers monitor alcohol far less than cannabis in the workplace? The science demonstrates that individuals who use alcohol and tobacco have a higher rate of addiction and fatality than those who use marijuana.<sup>93</sup> It seems that alcohol, tobacco, and nicotine face fewer restrictions in the workplace relative to cannabis because they are legal substances under federal law. Moreover, while the Americans with Disabilities Act (“ADA”) does not protect applicants and employees addicted to and actively using illegal drugs, it does include alcoholism as a protected disability.<sup>94</sup> As a result, adverse employment actions taken against an employee due to alcoholism can violate the ADA.<sup>95</sup> For example, in a case before the New Jersey Appellate Division, an employee challenged her employer’s decision to submit her to random breathalyzer tests for a two year period following her disclosure that she

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Laura L. Hirschfeld, *Legal Drugs? Not Without Legal Reform: The Impact of Drug Legalization on Employers Under Current Theories of Enterprise Liability*, 7 CORNELL J.L. & PUB. POL’Y 757, 767 (1998).

<sup>94</sup> Ruzicho, *supra* note 84.

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



was seeking treatment for alcoholism.<sup>96</sup> The court pointed to the United States Equal Employment Opportunity Commission’s guidance which provides that an employer is only permitted to periodically test an employee for alcohol if there is reasonably objective evidence that the employee will pose a direct threat to other employees.<sup>97</sup> In other words, the permissibility of such testing is dependent on the safety-sensitive nature of the employee’s job. In ruling that the employer violated the employee’s rights under the ADA, the court explained that the ADA requires employers to conduct an individualized assessment to assess potential safety risks before conducting random drug tests and that the employer had failed to satisfy that requirement.<sup>98</sup>

! The ADA also permits employers to treat cannabis differently than alcohol because the statute does not protect anyone engaged in the use of illegal drugs, including cannabis, as defined by federal law.<sup>99</sup> The New Jersey Law Against Discrimination (“NJLAD”), on the other hand, grants certain accommodations to employees who are actively using medical marijuana, including excusal from drug testing.<sup>100</sup> This principle was established in *Wild v. Carriage Funeral Holdings Incorporated*, where the New Jersey Supreme Court explained that claims may arise under NJLAD, following the passage of CUMMA, when an employer subjects an employee who is using medical marijuana to drug testing.<sup>101</sup>

Nonetheless, there is a chance that the NJLAD protection will need to become more expansive given the recent legalization of recreational cannabis use. For instance, studies of the intoxicating properties of marijuana have provided evidence that marijuana use effects

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<sup>96</sup> *A.D.P. v. ExxonMobil Rsch. & Eng'g Co.*, 54 A.3d 813, 818 (N.J. App. Div. 2012).

<sup>97</sup> *Id.* at 540.

<sup>98</sup> *Id.* at 539.

<sup>99</sup> Dustin Stark, *Just Say No: Foreclosing A Cause of Action for Employees Seeking Reasonable Accommodation Under the New Jersey Compassionate Use Medical Marijuana Act*, 43 SETON HALL L. REV. 409, 423 (2013).

<sup>100</sup> *Id.*

<sup>101</sup> *Wild v. Carriage Funeral Holdings, Inc.*, 227 A.3d 1206, 1207-1208 (N.J. 2020).

individuals psychologically and can cause them to become dependent on the substance.<sup>102</sup>

Therefore, some have argued that recreational cannabis addiction should be treated as a disorder similar to alcoholism.<sup>103</sup> Yet, there has been pushback in characterizing cannabis addiction as a disorder.<sup>104</sup> In particular, opponents have emphasized the more addicting effects of alcohol and nicotine.<sup>105</sup> In addition, despite the argument that marijuana is a gateway drug that leads to addiction to harder drugs, the majority of individuals who use marijuana do not actually move on to other illicit substances.<sup>106</sup> Thus, it is still to be determined whether NJLAD will consider those addicted to recreational cannabis a protected class under the Act and grant those individuals the right to be excused from drug testing.

Under New Jersey law, employees may consume alcohol and/or cannabis freely outside of working hours. Thus, employers may run into difficulty justifying marijuana testing, while not testing for alcohol. This is especially true given that an alcohol test can detect alcohol in the system that confirms the employee had been drinking alcohol relatively recently. Marijuana testing, on the other hand, does not and cannot inform an employer whether an individual used marijuana during working hours, or even during that same day, because THC metabolites can be detected in the individual's system long after use or impairment.<sup>107</sup> The ADA nonetheless permits cannabis testing to determine if an employee has used controlled substances that are illegal under federal law, such as cannabis.<sup>108</sup>

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<sup>102</sup> JOHN HUDAK, CANNABIS LAW DESKBOOK § 3:5. Basis of regulation (2021-2022 ed.).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Cannabis (Marijuana) Research Report: Is Marijuana a Gateway Drug?*, NAT'L INST. ON DRUG ABUSE (NIDA) (July 2020), <https://nida.nih.gov/publications/research-reports/marijuana/marijuana-gateway-drug>.

<sup>107</sup> Stark, *supra* note 99 at 411.

<sup>108</sup> JOAN FARRELL, ADA COMPLIANCE GUIDE, Appendix IV Guidance and technical assistance manuals, WL 4899269 (2015).

## ii. Licit v. Illicit Drugs

To be clear, the ADA only allows employers to test for drugs that cannot be legally used, possessed, purchased, or distributed under the Controlled Substances Act.<sup>109</sup> It does not authorize employers to test for prescription drugs taken under the supervision of a licensed healthcare provider or any other licit drug under the Controlled Substances Act.<sup>110</sup> Because it remains illicit under federal law, employers can still test for cannabis use under the ADA even though the drug is legal under New Jersey law. Employers should be aware of this distinction because the ability to drug test may change if cannabis is legalized on a federal level. As the pertinent laws continue to evolve, employers need to continuously reassess the legality of drug testing in various contexts. Furthermore, while there is no penalty for an employer who decides to drug test its employees for recreational cannabis use when there is just cause, the employer may still face liability on a state level for adverse employment actions taken against an employee due to positive test results. For example, an employer is in violation of NJLAD if it retaliates against an employee for a positive drug test since the Act prohibits discrimination in all aspects of employment.<sup>111</sup>

### **C. Civil Rights Act**

Employers also must be mindful of discrimination claims that may arise from targeting specific employees, or groups of employees, for drug testing. The Civil Rights Act of 1964 has an impact on the workforce because it prohibits all forms of discrimination based on race, sex, religion, or national origin.<sup>112</sup> There are two forms of actionable discrimination in the

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *See* N.J.S.A. 10:5-1 et seq.

<sup>112</sup> CAMILLE HÉBERT, EMPLOYEE PRIVACY LAW § 4:3. Title VII of Civil Rights Act of 1964 (2021).

employment setting: (1) disparate treatment and (2) disparate impact.<sup>113</sup> Disparate treatment occurs when the employer intentionally targets an employee for discriminatory treatment because of the employee’s protected characteristic.<sup>114</sup> For example, if an employer implements a drug testing policy only for individuals who identify as a particular race or ethnicity, the employer is in violation of Title VII of the Civil Rights Act under the disparate treatment theory.<sup>115</sup> Claims of disparate impact arise when an employer unintentionally acts in ways that disproportionately disadvantage members of a particular group protected under Title VII.<sup>116</sup> Therefore, a drug testing policy for all employees that disproportionately impacts minorities can be actionable under Title VII.<sup>117</sup>

To illustrate, *Perkins v. National Express Corporation* discusses an employee’s lawsuit against his employer for racial discrimination following the employer’s insistence on repeatedly drug testing him.<sup>118</sup> More specifically, National Express subjected Jimmy Perkins, an African American employee, to numerous drug tests due to the safety-sensitivity of his job.<sup>119</sup> Ruling in favor of Perkins, the court pointed out that the employer failed to include a white supervisor in a similar position to Perkins in the drug testing pool altogether.<sup>120</sup> Consequently, Perkins had established a prima facie case of racial discrimination by showing “that similarly-situated individuals outside of his class were either never tested or not tested with the same degree of frequency.”<sup>121</sup>

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Perkins v. National Express Corporation*, 105 F. Supp. 3d 970, 973-974 (N.D. Cal. 2015).

<sup>119</sup> *Id.* at 978.

<sup>120</sup> *Id.* at 976.

<sup>121</sup> *Id.*

Those who challenge workplace drug testing argue that such testing disproportionately targets and impacts minorities because employers believe that they use drugs at higher rates than white individuals.<sup>122</sup> This belief, of course, is mistaken. In fact, studies indicate that white individuals use drugs at a higher rate in the United States than other racial groups.<sup>123</sup> As a result, data has shown that pro-testing states employ black individuals at a higher rate than white individuals.<sup>124</sup> In other words, drug testing may help avoid workplace discrimination and encourage workplace diversity when thoughtfully developed and implemented.

#### **D. States Banning Drug Testing**

While most states forbid employers from penalizing applicants and employees for positive drug tests, some states are beginning to ban certain drug testing altogether.<sup>125</sup> In fact, New York’s Department of Labor (“NY DOL”) is the first to issue regulations prohibiting cannabis testing by employers.<sup>126</sup> The NY DOL points out that the New York Marijuana Regulation and Taxation Act (“MRTA”), Section 201-D, now completely bars drug testing unless the employee is visibly impaired or in possession of cannabis while on the job.<sup>127</sup> The NY DOL also makes clear that observable signs alone, such as the smell of cannabis, do not signify impairment.<sup>128</sup> Instead, an employer must observe signs that objectively reveal that the employee’s performance at work has declined.<sup>129</sup>

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<sup>122</sup> Hébert, *supra* note 112.

<sup>123</sup> *Id.*

<sup>124</sup> Abigail Wozniak, *Discrimination and the Effects of Drug Testing on Black Employment*, 97 REV. ECON. & STAT. 548, 558 (2015).

<sup>125</sup> Morgan McKay, *New York Employers are banned from testing most workers for marijuana*, SPECTRUM NEWS 1 (October 21, 2021), <https://www.ny1.com/nyc/all-boroughs/politics/2021/10/22/new-york-employers-are-banned-from-testing-most-workers-for-weed>

<sup>126</sup> *Id.*

<sup>127</sup> *Adult Use Cannabis and the Workplace New York Labor Law 201-D*, NY DEPARTMENT OF LABOR (October 2021), <https://dol.ny.gov/system/files/documents/2021/10/p420-cannabisfaq-10-08-21.pdf>

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

The difference between New York and New Jersey is that New Jersey employers are still permitted to drug test randomly when observable signs of impairment are present, following work-related accidents, or during pre-employment screening. New York employers, on the other hand, cannot test at all unless the employee is visibly impaired or in possession of cannabis. As such, job applications and work-related accidents do not provide permissible reasons to test employees for cannabis use in New York. Employers in New Jersey should be conscious of the potential for a statewide ban on all drug testing, similar to the one implemented in New York.

#### **IV. SOLUTIONS FOR EMPLOYERS**

Because many questions remain unanswered and each employment setting varies, employers are advised to reach out to attorneys experienced in labor and employment law before developing cannabis drug testing policies and procedures.<sup>130</sup> Counsel can assist employers in determining whether they should test and, if so, how to go about doing it in a lawful manner. The drug testing processes permissible in New Jersey will hopefully be simplified once the CRC issues further guidance. Until then, employers should seek out counsel.

##### **A. To Test**

As explained above, there are many reasons for an employer to avoid drug testing for cannabis as things currently stand. Should the employer choose to test, however, there are several methods of limiting potential liability and ensuring that employee's rights are not violated in the process.

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<sup>130</sup> Jennifer L. Mora, *New Jersey Cannabis Regulatory Commission's "Personal Use Rules" Do Not Provide Guidance About Employer Drug Testing Practices*, SEYFARTH SHAW LLP (August 30, 2021), <https://www.laborandemploymentlawcounsel.com/2021/08/new-jersey-cannabis-regulatory-commissions-personal-use-cannabis-rules-do-not-provide-guidance-about-employer-drug-testing-practices/>

i. How to Conduct Physical Evaluations

First, an employer should completely avoid physical evaluations altogether until the CRC issues guidelines regarding the use of a WIRE in the workplace. For now, employers may continue their original drug-testing procedures “in accordance with applicable law, including the obligations and restrictions that exist under CREAMMA.”<sup>131</sup> When hiring a WIRE, the employer must ensure that the individual is certified in accordance with the forthcoming CRC guidelines. Given that the WIRE will be trained and certified, they should be the only individual with the authority to request that an employee undergo drug testing. As part of physical evaluations, the WIRE should be tasked with documenting all reasons for suspecting that an employee is under the influence or in possession of cannabis.<sup>132</sup> Maintaining a robust paper trail will assist an employer in defending against claims of discrimination.

ii. How to Conduct Drug Tests

One reason an employer may want to drug test notwithstanding its inability to terminate or take any adverse action against an employee is to defend against potential claims. For example, an employer can use the drug test results to defend itself against a workers’ compensation claim or other employment action filed against the employer.<sup>133</sup> The employer has the burden of proving that the employee’s intoxication was the sole and proximate cause of a workplace accident and any/all injuries that occurred as a result of that accident.<sup>134</sup> Because marijuana is illicit under federal law, evidence of a positive urine test can be offered as proof in

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<sup>131</sup> Mark Diana, et al., *New Jersey Cannabis Regulatory Commission’s Rules and Regulations for CREAMMA Are Here: What Employers Need to Know*, OGLETREE DEAKINS (September 1, 2021), <https://ogletree.com/insights/new-jersey-cannabis-regulatory-commissions-rules-and-regulations-for-creamma-are-here-what-employers-need-to-know/>

<sup>132</sup> Marcus, *supra* note 50.

<sup>133</sup> Gelman, *supra* note 48.

<sup>134</sup> *Id.*

demonstrating causation at trial.<sup>135</sup> Additionally, employers that implement drug-free workplaces likely discourage employees who use cannabis or other illegal drugs from applying for a position. Other employers may choose to drug test to encourage employees to uncover and confront their drug dependency issues.

An employer seeking to implement or continue an existing drug testing program should have employees agree to submit to drug testing as a term and condition of employment.<sup>136</sup> This can be accomplished through a signed waiver that essentially eliminates the employee's ability to claim that the employer violated their reasonable expectation of privacy.<sup>137</sup> The drug testing policy should not target members of a protected class, such as those protected under the ADA, NJLAD, and/or Title VII of the Civil Rights Act.

Employers also should keep in mind that urine testing is not a reliable method of determining whether an employee is under the influence of cannabis while on the job because it can detect THC metabolites in one's system long after impairment.<sup>138</sup> The duration of time that the metabolites can be detected depends on when the substance was used, the amount that was consumed, the amount of fluid in the individual's bladder, and the frequency in which the individual uses cannabis.<sup>139</sup> The employer must also be sure to administer drug tests in accordance with federal guidelines. The tests should be administered by a medical or trained professional in a private area and allow employees to consume fluids for up to three hours prior to administering the test if necessary.<sup>140</sup>

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<sup>135</sup> *Id.*

<sup>136</sup> Goldstein & Goodman, *supra* note 35.

<sup>137</sup> *Id.*

<sup>138</sup> Armstrong, *supra* note 69 at 51.

<sup>139</sup> KEVIN B. ZEESE, DRUG TESTING LEGAL MANUAL § 3:26. Persistence of metabolites, 1 Zeese, Drug Testing Legal Manual § 3:26 (2d ed. 2021).

<sup>140</sup> See *Reames v. Dep't of Pub. Works, City of Paterson*, *supra* note 78.



In addition, employers should be conscious of fluctuating federal and state laws. New Jersey, for example, may decide to mirror its neighbor, New York, and implement a law that further restricts drug testing by employers. It is critical that employers ensure that their individualized drug testing policies and procedures remain legally compliant in a changing legal landscape.

## **B. Not to Test**

An employer in New Jersey can choose to do away with testing and maintaining a drug-free workplace altogether. However, this approach may expose the employer to negligent hiring vulnerabilities.<sup>141</sup> For instance, employees that “operate motor vehicles, work within customer homes, or work unsupervised with vulnerable populations” may lead to liability for the employer.<sup>142</sup> In other words, it is likely best practice to test employees prior to and during employment if they work in safety-sensitive positions. As stated earlier, employers may use drug test results as evidence in defending workers’ compensation claims and other employment actions.<sup>143</sup>

### **i. At-Will Employment Doctrine**

As mentioned previously, New Jersey employers are unable to terminate employees for positive drug test results standing alone regardless of the employee’s position. As such and to avoid a potential claim, employers must terminate employees for reasons that do not involve drug testing. New Jersey has long recognized the at-will employment doctrine.<sup>144</sup> The at-will doctrine makes clear that either party in an employment relationship, the employer or the

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<sup>141</sup> Jennifer N. Jones, et al, *Is the Future of Pre-Employment Marijuana Testing Up in Smoke?*, AMERICAN BAR ASSOCIATION (August 11, 2021), [https://www.americanbar.org/groups/labor\\_law/publications/labor\\_employment\\_law\\_news/summer-2021-issue/future-marijuana-testing/](https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/summer-2021-issue/future-marijuana-testing/)

<sup>142</sup> *Id.*

<sup>143</sup> Gelman, *supra* note 48.

<sup>144</sup> Goldstein & Goodman, *supra* note 35.

employee, may terminate the relationship at any time and for any reason.<sup>145</sup> The doctrine also does not require either party to show cause or to provide notice.<sup>146</sup>

Employers, therefore, have no reason to drug test an employee when the employer already suspects that the employee is intoxicated while on the job *and* is unable to perform his or her duties. This is because the at-will doctrine allows the employer to terminate the employee for poor job performance. Employers are nonetheless advised to proceed with caution when terminating employees under the at-will doctrine. Importantly, an employer should not first drug test the employee and then terminate the employee under the at-will doctrine. This can result in a violation of the employee's rights under NJLAD since it prohibits employers from discharging employees because of their membership in a protected class.<sup>147</sup>

As explained above, the CREAMM Act created a new protected class of employees who use cannabis.<sup>148</sup> As a result, if the employer terminates the employee after conducting a drug test, the employer will likely be in violation of the Act if the test result is used as evidence of the employer's sole motivation for termination.<sup>149</sup> In addition, if the employee tests positive due to the use of medicinal cannabis and is terminated, the employer will be in violation of the Honig Act.<sup>150</sup> If the employer's intention is to discharge the employee, the termination cannot be in relation to the employee's medicinal cannabis use or possession if the employee is a registered qualifying patient under the Act.<sup>151</sup>

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Cohen, *supra* note 51.

<sup>149</sup> Marcus, *supra* note 50.

<sup>150</sup> Donovan & Moran, *supra* note 37.

<sup>151</sup> *Id.*

## **V. CONCLUSION**

New Jersey employers currently face two options. They can drug test employees for marijuana use with the risk of being sued for various pitfalls in the policy implementation or drug testing administration. The second option is to avoid drug testing completely and terminate employees who exhibit poor work performance or disrupt the workplace under the at-will employment doctrine.