

## LEGAL SERVICES ADVISORY

### Legalized Recreational Use of Cannabis in N.J. & its Impact on Employment Law

On February 22, 2021, Governor Phil Murphy signed the authorizing legislation that allows adults who are over 21 years old to use and possess cannabis. And for those younger than 21, marijuana is now decriminalized. On April 21, 2022, the first state-authorized dispensaries opened for business. While some regulations have been promulgated, we are still awaiting others to be issued. Updates will be provided accordingly.

#### Off-duty Use:

New Jersey is the first state to explicitly protect employees who use cannabis while off-duty and outside the workplace. In general, employers can no longer penalize, suspend, or terminate employees for off-duty cannabis use. Note that cannabis must be purchased legally from a dispensary authorized by the state to sell cannabis in order for use or possession to be legal. On-duty use, possession, and impairment at the workplace can still be prohibited by employers.

#### Medical Marijuana:

An individual with a lawful marijuana prescription for legitimate health issues is authorized to use and possess it off-duty, as they have been for several years now. The law was unsettled whether an employer could nonetheless decide to terminate an employee with a lawful prescription. While the regulatory and statutory scheme for medical marijuana has not changed, it would appear to now be much less relevant in light of the new recreational law, which encompasses any type of off-duty marijuana usage. If anything, a prescription for medical marijuana will insulate the employee even further from adverse actions.

#### On-duty Use:

Employers still have the right to enforce zero tolerance drug policies in the workplace, on school grounds, and during work hours. All employer prohibitions on use, possession, and impairment remain lawful when limited to employees in the workplace.

#### Workplace Drug Testing:

The drug tests administered must be scientifically reliable. Because marijuana may be present in an individual's system for up to a month, an employer is required to couple a positive test for marijuana with another factor, such as safety concerns or an observable impairment, in order to impose discipline on an employee for that positive test. The employer must employ or retain a certified "impairment expert" to conduct a physical evaluation of the employee if on-duty use or impairment is suspected. An employer's or supervisor's lay observation of suspected impairment is insufficient. A licensure procedure will be created to train and certify such impairment experts; it has not yet been developed. Only if both the impairment expert and drug test indicate intoxication may an employer take disciplinary action. Pre-employment drug screenings are still permissible.

#### Special Considerations for Bus Drivers:

Federal law still criminalizes the use of marijuana. Certain employees in "safety-sensitive" positions, including school bus drivers and any other job position overseen by the U.S. Department of Transportation or requiring a federal license, are subject to random drug testing under federal law, and can be subject to discipline, including loss of license, for a drug test that is positive for marijuana.

#### Legislation:

The New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (N.J.S.A. 24:6I-31 et seq.; [S21/A21](#)), the decriminalization bill (amending N.J.S.A. 2C; [S2535/A1897](#)), and the clean-up bill (amending N.J.S.A. 2C and N.J.S.A. 24:6I-31 et seq.; [S3454/A5342](#)).