

The New Jersey Cannabis Regulatory Commission Issued Guidance On “Workplace Impairment”

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The New Jersey statute legalizing marijuana provides that an employer cannot terminate an employee **solely** for the presence of cannabinoid metabolites in an individual’s bodily fluids. The statute further provides that a Workplace Impairment Recognition Expert (“WIRE”), should be utilized by employers to determine if an employee is impaired. However, the certification procedures and standards for a WIRE have not yet been issued.

The guidance states that, in order to demonstrate physical signs or other evidence of impairment sufficient to support an adverse employment action against an employee for suspected cannabis use or impairment during the employee’s prescribed work hours, the employer **may**:

- Designate an interim staff member to assist with making determinations of suspected cannabis use during the employee’s prescribed work hours. This employee should be sufficiently trained to determine impairment and qualified; the **guidance does not define “sufficiently trained and qualified,”** to complete the Reasonable Suspicion Observation Report, addressed below. Additionally, an employer may hire a third-party contractor to make such a determination.
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Utilize a uniform Reasonable Suspicion Observation Report, the [link for a form](#) was provided in the guidance, however, an employer can also use their own form, that documents the behavior, physical signs, and evidence that supports the employer’s determination that an employee is reasonably suspected of being under the influence during an employee’s prescribed work hours.

The employer should establish a standard operating procedure for completing such a report that includes:

1. The employee’s manager or supervisor or an employee at the manager or supervisor level; and
 2. An interim staff member that has been designated to assist with determining whether an employee is reasonably suspected of being impaired during an employee’s prescribed work hours, or a second manager or supervisor.
- Use a cognitive impairment test, a scientifically valid, objective, consistently repeatable, a standardized automated test of an employee’s impairment, and or an ocular scan, as physical signs or evidence to establish reasonable suspicion of cannabis use or impairment at work.

Please note that there is a disclaimer at the end of the guidance, which is as follows:

“The purpose of this guidance is to clarify and explain the NJCRC’s understanding of the existing legal requirements under the governing law. This guidance does not impose any additional requirements that are not included in the law and does not establish additional rights for any person or entity. Please note, however, that adverse employment actions may impact employees’ protected rights under various laws including, but not limited to, state and federal anti-discrimination laws. When incorporating this guidance, the employer should ensure compliance with all state and federal employment laws.”

If you are an employer and need help navigating employee cannabis testing, contact [Tracy Armstrong](#) or any member of the Wilentz [Employment Law](#) Team.

Attorney

- Tracy Armstrong

Practice

- Employment Law