

www.njbia.org/recovery

November 30, 2020

RE: New Jersey Workplace Regulation of Marijuana

Dear Member of the Legislature,

As the leaders of the Garden State's major business associations, we write to you regarding the two versions of the Employer Protection Sections in the recreational cannabis legalization bills, A-21 / S-21. Recent amendments to these bills further weaken the workplace safety provisions contained in the original legislation.

Currently, the legislation is calling for the use of Drug Recognition Experts (DREs). A business will essentially need to hire or train a DRE to determine if an employee is in fact impaired. This will place additional burdens and costs on the business community. Furthermore, the New Jersey Supreme Court is currently hearing a case to determine whether DRE testimony is even admissible in court.

As you determine how best to balance individual employee rights with the needs of employers to protect their employees and the public, it is useful to know what other states are doing with respect to workplace safety. As you will see below, most states that have legalized recreational marijuana allow employers to prohibit off-duty recreational marijuana use by employees, or allow an employer to drug test current and prospective employees. Moreover, it does not appear that DREs have been adopted in any other state as a means for employers to identify impaired employees in the workplace.

Our request of you is to protect the rights of our employer community to maintain a drug-free workplace, and thus both worker and public safety, without increasing the burdens on a business community that has been severely impacted by COVID-19 over the last nine months. Given the fact that we are for the first time legalizing recreational marijuana, we must proceed cautiously and err on the side of workplace safety.

Marijuana Workplace Safety in Legalized States

Alaska

 Employers can have a zero-tolerance policy prohibiting their employees from using marijuana¹

Colorado

 Employers are allowed to test for marijuana and make employment decisions based on drug test results²

California

Within California Health and Safety Code:

 $^{{}^{1}\,\}underline{\text{http://dhss.alaska.gov/dph/Director/Documents/marijuana/ResponsibleConsumerFactBook.pdf}}$

² https://www.colorado.gov/pacific/marijuana/laws-about-marijuana-use

- "Section 11362.1 does not amend, repeal, affect, restrict, or preempt....The rights and obligations of public and private employers to maintain a drug and alcohol free workplace...or affect the ability of employers to have policies prohibiting the use of cannabis by employees and prospective employees..."
- Pre-employment testing is allowed. You may not require current employees to submit to random drug testing, except under certain narrowly defined circumstances.⁴

• Illinois

- Cannabis Regulation and Taxation Act 5
 - "...nothing in this Act prevents a public employer of law enforcement officers, corrections officers, probation officers, paramedics, or firefighters from prohibiting or taking disciplinary action for the consumption, possession, sales, purchase, or delivery of cannabis or cannabis-infused substances while on or off duty, unless provided for in the employer's policies."
 - "Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for:
 - (1) actions taken pursuant to an employer's reasonable workplace drug
 policy, including but not limited to subjecting an employee or applicant
 to reasonable drug and alcohol testing, reasonable and
 nondiscriminatory random drug testing, and discipline, termination of
 employment, or withdrawal of a job offer due to a failure of a drug test;
 - (2) actions based on the employer's good faith belief that an employee used or possessed cannabis in the employer's workplace or while performing the employee's job duties or while on call in violation of the employer's employment policies;
 - (3) actions, including discipline or termination of employment, based on the employer's good faith belief that an employee was impaired as a result of the use of cannabis, or under the influence of cannabis, while at the employer's workplace or while performing the employee's job duties or while on call in violation of the employer's workplace drug policy...."

Maine

- An Act to Legalize Marijuana⁶
 - "School, employer or landlord may not discriminate. A school, employer or landlord may not refuse to enroll or employ or lease to or otherwise penalize a person 21 years of age or older solely for that person's consuming marijuana outside of the school's, employer's or landlord's property."

Massachusetts

- Massachusetts General Law⁷
 - "...This chapter shall not require an employer to permit or accommodate conduct otherwise allowed by this chapter in the workplace and shall not affect the

³https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=HSC&division=10.&title=&part=&chapter=6.&article=2.

⁴ https://www.calchamber.com/california-labor-law/drug-and-alcohol-testing

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⁶ http://lldc.mainelegislature.org/Open/Laws/2015/2015 IB c005.pdf

⁷ https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXV/Chapter94G/Section2

authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees."

• Michigan

- Michigan Regulation and Taxation of Marihuana Act⁸
 - "This act does not require an employer to permit or accommodate conduct otherwise allowed by this act in any workplace or on the employer's property. This act does not prohibit an employer from disciplining an employee for violation of a workplace drug policy or for working while under the influence of marihuana. This act does not prevent an employer from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment because of that person's violation of a workplace drug policy or because that person was working while under the influence of marihuana."

Nevada

- Title 56 Nevada Revised Statutes 678D⁹
 - "The provisions of this chapter do not prohibit.... A public or private employer from maintaining, enacting and enforcing a workplace policy prohibiting or restricting actions or conduct otherwise permitted under this chapter...."

Vermont

- (18 V.S.A. § 4230a)¹⁰: "Nothing in this section shall be construed to do any of the following...create a cause of action against an employer that discharges an employee for violating a policy that restricts or prohibits the use of marijuana by employees."
- o (21 V.S.A. § 512)¹¹: "An employer may require an applicant for employment to submit to a drug test only if all of the following conditions are met:
 - (1) Conditional offer of employment. The applicant has been given an offer of employment conditioned on the applicant receiving a negative test result.
 - (2) Notice. The applicant received written notice of the drug testing procedure and a list of the drugs to be tested. The notice shall also state that therapeutic levels of medically-prescribed drugs tested will not be reported. The notice required under this subdivision may not be waived by the applicant.
 - (3) Administration. The drug test is administered in accordance with section 514 of this title."

Thank you again for your consideration of this important issue. Please contact Chrissy Buteas or Ray Cantor at NJBIA to discuss this further and answer any questions you may have at cbuteas@njbia.org or rcantor@njbia.org.

Sincerely,

African American Chamber of Commerce of New Jersey, Inc.

⁸ https://www.legislature.mi.gov/(S(nmdgpqpbj1ophhijir0bqtrc))/mileg.aspx?page=get0bject&objectName=mcl-333-27954&highlight=adverse

⁹ https://www.leg.state.nv.us/NRS/NRS-678D.html

¹⁰ https://legislature.vermont.gov/statutes/section/18/084/04230

¹¹ https://legislature.vermont.gov/statutes/section/21/005/00512

American Camp Association NY/NJ

New Jersey Camps Government Affairs Project

American Council of Engineering Companies of New Jersey

American Physical Therapy Association of New Jersey

Bernards Township Regional Chamber of Commerce

Big I New Jersey

BioNJ

Burlington County Regional Chamber of Commerce

Bus Association of New Jersey

Cape May County Chamber of Commerce

Capital Region Minority Chamber of Commerce

Center for Non-Profits

Chamber of Commerce of Greater Philadelphia

Chamber of Commerce Southern New Jersey

CLB NJ

Commerce and Industry Association of New Jersey

CrossState Credit Union Association

Downtown New Jersey

Early Childhood Education Advocates

Eastern Monmouth Area Chamber of Commerce

Employers Association of NJ

Fuel Merchants Associates of NJ

Garden State Initiative

Garden State Pharmacy Owners, Inc.

Global Business Alliance

Gloucester County Chamber of Commerce

Greater Atlantic City Chamber of Commerce

Greater Toms River Chamber of Commerce

Greater Westfield Area Chamber of Commerce

Health Care Association of NJ

Healthcare Institute of NJ

Hoboken Chamber of Commerce

Home Care & Hospice Association of New Jersey

Home Health Services Association of New Jersey

Hudson County Chamber of Commerce

Hunterdon County Chamber of Commerce

Independent Insurance Agents & Brokers of NJ

Insurance Council of New Jersey

International Health, Racquet and Sportsclub Association

Jersey Shore Partnership

Mahwah Regional Chamber of Commerce

Marine Trades Association of New Jersey

Medical Society of New Jersey

Middlesex County Regional Chamber of Commerce

Meadowlands Chamber

Monmouth Ocean Development Council

Morris County Chamber of Commerce

NAIOP-NJ

National Federation of Independent Business (NFIB)

Newark Venture Partners

Newark Alliance

Newark Regional Business Partnership

New Jersey Apartment Association

New Jersey Asphalt Pavement Association

New Jersey Association of Osteopathic Physicians and Surgeons

New Jersey Association of Mental Health & Addiction Agencies

New Jersey Bankers Association

New Jersey Builders Association

New Jersey Business & Industry Association

New Jersey Campground Owners and Outdoor Lodging Association

New Jersey Chemistry Council

New Jersey Civil Justice Institute

New Jersey Coalition of Automotive Retailers

New Jersey Concrete and Aggregate Association

New Jersey Council of County Colleges

New Jersey Dental Association

New Jersey Food Council

New Jersey Gasoline-Convenience-Automotive Association

New Jersey Hospital Association

New Jersey Hotel and Lodging Industry Association

New Jersey Independent Electrical Contractors Association

New Jersey LGBT Chamber of Commerce

New Jersey Liquor Store Alliance

New Jersey Manufacturing Extension Program, Inc.

New Jersey Motor Truck Association

New Jersey Pharmacists Association

New Jersey Podiatric Medical Society

New Jersey Realtors

New Jersey Restaurant & Hospitality Association

New Jersey Retail Merchants Association

New Jersey Salon and Spa Coalition

New Jersey Self Insurers Association

New Jersey Society of Certified Public Accountants

NJ Society of Optometric Physicians (NJSOP)

New Jersey State Chamber of Commerce

New Jersey State Funeral Directors Association

New Jersey State Veterans Chamber of Commerce

New Jersey Tourism Industry Association

New Jersey Utilities Association

New Jersey YMCA State Alliance

New Jersey Warehousemen & Movers Association

New Jersey Utilities Association

New York Shipping Association, Inc.

North Jersey Jewish Business Alliance

Ocean City Chamber of Commerce

Princeton Mercer Regional Chamber of Commerce

Professional Insurance Agents of New Jersey (PIANJ)

Recreational Fishing Alliance

Salem County Chamber of Commerce

Somerset County Business Partnership

Southern NJ Development Council

Southern Ocean County Chamber of Commerce

Statewide Hispanic Chamber of Commerce of NJ

Sussex County Chamber of Commerce

TechUnited:NJ

The New Jersey Leadership Council of the National Association of Professional Employer Organizations The United Boatmen of N.J.

Union Township Chamber of Commerce

United Way of Northern New Jersey

Utility & Transportation Contractors Association

Washington Borough BiD

CC: Governor Phil Murphy