

BUSINESS

Weed and work: NJ has yet to launch key tool, putting employers in a bind

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It's been nearly two years since New Jersey rolled out guidelines for how employers should handle marijuana in the workplace.

Is someone under the influence at work if they test positive? Or did they simply smoke cannabis during their own personal time days or even weeks earlier?

That was — on paper — spelled out in the guidelines.

But those guidelines call for the creation of Workplace Impairment Recognition Experts, or WIREs, who have yet to materialize.

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Insiders in the cannabis industry — as well as experts in the human resources field and legal professionals — say that has put employers in a bind.

How do you enforce a drug-free workplace?

Marijuana's effects may linger for days, compared with a few hours for drinking, but pot tends to have less impact on an employees' mental and physical capabilities, according to Lewis Nelson, chairman of emergency medicine at the Rutgers New Jersey Medical School in Newark.

Drug tests, meanwhile, can find evidence of THC — the compound in pot that causes a high — weeks after it's been consumed and long after its effects have worn off, he added.

The rate of drug tests that came back positive for marijuana more than doubled in the past

five years, from 2.5% of all tests in the New Jersey workforce in 2019, to 5.6% of tests in 2023, according to data from Quest Diagnostics, a company that routinely administers drug tests for employers.

But the 2022 guidelines say that detection of cannabis, by itself, is not grounds to take action against an employee.

'Reasonable suspicion' reports

Under the guidelines, employers can fill out a “reasonable suspicion” report that documents the worker’s behavior, physical appearance and other evidence. The commission posted a sample form online, though employers are free to create and use their own form.

The business could designate employees or a third-party contractor “trained to determine impairment” who would determine whether the worker is under the influence during work hours.

A WIRE could be called in to detect behaviors consistent with someone under the influence of cannabis. But the certification hasn’t yet been finalized, state officials said.

“Given the lack of certified testers as required under New Jersey law, employers need to have good processes in place to determine if an employee is impaired while working,” said Ray Cantor, deputy chief government affairs officer at the New Jersey Business and Industry Association, an association of industry trade groups.

Employers are essentially left on their own, having to balance out workplace safety while accommodating the 2021 law legalizing marijuana.

“Some employers have just stopped testing for cannabis altogether,” said Stephen Trimboli, a labor lawyer and partner at the Morristown law firm Trimboli & Prusinowski.

State officials have denied that there’s been any delay in rolling out the process.

“The regulatory process inherently takes time,” said Toni-Anne Blake, a spokesperson for the Cannabis Regulatory Commission, a state agency that oversees the state’s marijuana market and laws regarding cannabis.

But state officials did not provide a timeline for when New Jersey employers can expect

the WIRE program to be finalized.

The rulemaking process had previously been on the sidelines as the rules around cannabis play out in the courts.

For months, the commission said it was waiting for the ruling in a seven-year-old Morris County case challenging the science behind sobriety tests.

The case involved a Denville man — the late Michael Olenowski — who was arrested for allegedly driving under the influence solely on the suspicion of a drug recognition expert, even though his blood alcohol level of 0.04 was well below the legal limit.

Ultimately, Appellate Judge Joseph Lisa said in a 2022 report that testimony from these “WIREs,” or workplace impairment recognition experts, could be used to provide evidence that someone was impaired, in cases involving work or driving while under the influence.

Anxiety over high-risk jobs

The prospect of cannabis in the workplace has sowed anxiety in high-risk jobs like manufacturing and construction, where mistakes could mean injury or death, and even office and retail jobs, where employees might frequently interact with customers or handle sensitive legal and financial transactions.

Still, many of those high-risk professions are subject to federal oversight that trumps New Jersey's more lenient stance on pot, Mike Egerton, executive vice president for government relations at the New Jersey Chamber of Commerce, has said.

Airline pilots are regulated by the Federal Aviation Administration, for example, while utility workers fall under agencies such as the U.S. Department of Transportation.

But even employers with less precarious workplace environments such as retail and office work are anxious about how to handle pot use.

If an employee tests positive for THC and tells a company representative that they smoked Friday night but it's Monday and they're fine, the representative could make the call to let the employee go back to work.

"If something happens, where's the liability lay?" said Greg Lalevee, business manager at the International Union of Operating Engineers, Local 825 — a union whose workers

operate heavy construction equipment such as cranes.

Lalevee said that when a worker tests for cannabis, that worker is taken off the job site, and referred to a counselor who determines if the person is fit to work. Then they're required to take a fit-for-duty drug test, Lalevee said.

"We're going to take every precaution to know that who we're sending out to job sites is assumed clean by every parameter that we can control," he said.

Dennis Hart, executive director of the Chemistry Council of New Jersey — a trade group for the state's chemical manufacturers — said that many employers have to adopt a "strict drug and alcohol-free workplace" given the sensitive nature of their industry.

Upon detection of cannabis, a chemical industry worker is referred to counseling or addiction services, and disciplinary action is taken "when warranted," Hart said.

"Until a test is developed that is similar to a blood alcohol or breathalyzer test the issue of cannabis usage will be complicated in critical infrastructure and hazard environments," he said.

Scott Ruder, head of the New Jersey CannaBusiness Association — a trade group for marijuana businesses in the state — said that by itself, "a drug test on cannabis is not going to solve the issue."

Rudder said it's "just common sense that'll let you know whether or not somebody is impaired," regardless of whether a drug recognition expert is being used.

Detecting cannabis use might be especially difficult when someone works from home, which has become fairly common after the COVID-19 pandemic, said Todd Polyniak, a partner and cannabis leader at the accounting firm Sax LLP.

That's why employers might be better off limiting disciplinary measures to someone's job performance and how they're acting, and not whether a certain substance is detected, Polyniak said.

"If they can't do their job because they're stoned or drunk, you're going to see that in their performance," he said.

What are businesses doing?

Some employers, such as Amazon, said they're removing cannabis from any drug tests. Anyone who was fired from Amazon because they tested positive for cannabis would be eligible to reapply at the company, the e-commerce giant said in a June 2023 blog post.

Eliza Murphy, a spokesperson for Bank of America, said the bank does not test "new hires or current employees for drug use."

On the other hand, some universities, including Rutgers and Princeton in New Jersey, take a more hardline approach and ban marijuana on their campuses.

"Cannabis remains illegal under federal law and, therefore, is prohibited on Rutgers property," Rutgers says on its website.

Receipt of federal funds "in the form of student loans, grants, and research support, among other things, is conditioned on compliance with federal drug law," Rutgers explains.

Carrie Cristello, a spokesperson for RWJBaranabas Health, said the health care network does not allow drugs and alcohol "legal or illegal" while on the job, but that it doesn't have a standard for whether someone uses cannabis during their personal time.

"Any suspicion of drug or alcohol use or impairment on duty results in immediate medical evaluation and potential corrective action, up to and including suspension and separation of employment," she said.

Suhash Harwani, senior director of science for workforce health at Quest Diagnostics, said that organizations need to rethink how they employ drug tests when it comes to marijuana.

Drug testing "has always been a deterrence mechanism," he said. "It's not an impairment standard."

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