

WHITE PAPER

Smoke Between the Hudson & the Delaware

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What do New Jersey's new cannabis laws mean for employers nationwide and businesses in general?

While the COVID-19 pandemic and its aftereffects may be the main concern for employers, some states have seen a solution to budgetary woes in passing legislation to legalize cannabis. Although this may not seem to affect employers on the surface, the new laws do have plenty of new employee protections that employers need to consider. In this white paper, we will explore some of these new grounds for litigation for employers to be on the watch for that emanate from New Jersey, but could have a national effect.

New Jersey's New Protected Employee Class: Cannabis Users

On February 22, 2021, New Jersey Governor Phil Murphy signed the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (“NJCREAMMA”), which legalized the consumption of cannabis in New Jersey for those 21 years of age and older. This bill also contained several employee protections. The most important protection asserts that New Jersey employers may not take adverse employment action against an employee solely because he or she consumes cannabis.¹ This has the essential effect of rendering cannabis users as a protected class or a group with specific protection from adverse employment action based on what it consumes outside of work hours.

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The use of “solely” is key to understanding the protection for New Jersey workers. The seeming result would be that dismissal because an employee failed a drug test could be improper, versus a termination based on both a failed drug test and a violation of workplace regulation that the law does not protect. For example, a termination based on impairment or possession in the workplace and off the job consumption could be proper grounds for termination as it would have multiple bases for the adverse action.

Another critical item is understanding this protection applies strictly to recreational cannabis. Medical users in New Jersey are protected by both the Compassionate Use Act (New Jersey’s Medical Marijuana Law) and the Law Against Discrimination (LAD), New Jersey’s primary employment protection statute.² Medical users, therefore, may have additional legal protections employers should bear in mind.

Finally, one other important distinction in New Jersey’s law versus that of many other states is that New Jersey does not offer a carve-out for safety-sensitive positions in this protected class. Employees have the same protection from adverse action for cannabis use outside of the workplace regardless of their position within the workplace, even if one holds a position that could be sensitive to cannabis use. However, impairment on the job could still be a fair reason for adverse action. NJCREAMMA still allows for employers to bar drug use and being under the influence within the workplace.

The law also prohibits employers from making employment decisions based on a person’s history of cannabis offenses. The change provides that making an employment decision based on an arrest or conviction history for a marijuana offense is subject to fines increasing to \$10,000 per incident.³

¹ “No employer shall refuse to hire or employ any person or shall discharge from employment or take any adverse action against any employee with respect to compensation, terms, conditions, or other privileges of employment because that person does or does not smoke, vape, aerosolize or otherwise use cannabis items, and an employee shall not be subject to any adverse action by an employer solely due to the presence of cannabinoid metabolites in the employee’s bodily fluid from engaging in conduct permitted under [NJCREAMMA].” N.J.S.A. § 24:6i-32 (2021)

² *Wild v. Carriage Funeral Holdings, Inc.*, 227 A. 3d 1206, 241 NJ 285 (N.J. Supreme Court 2020)

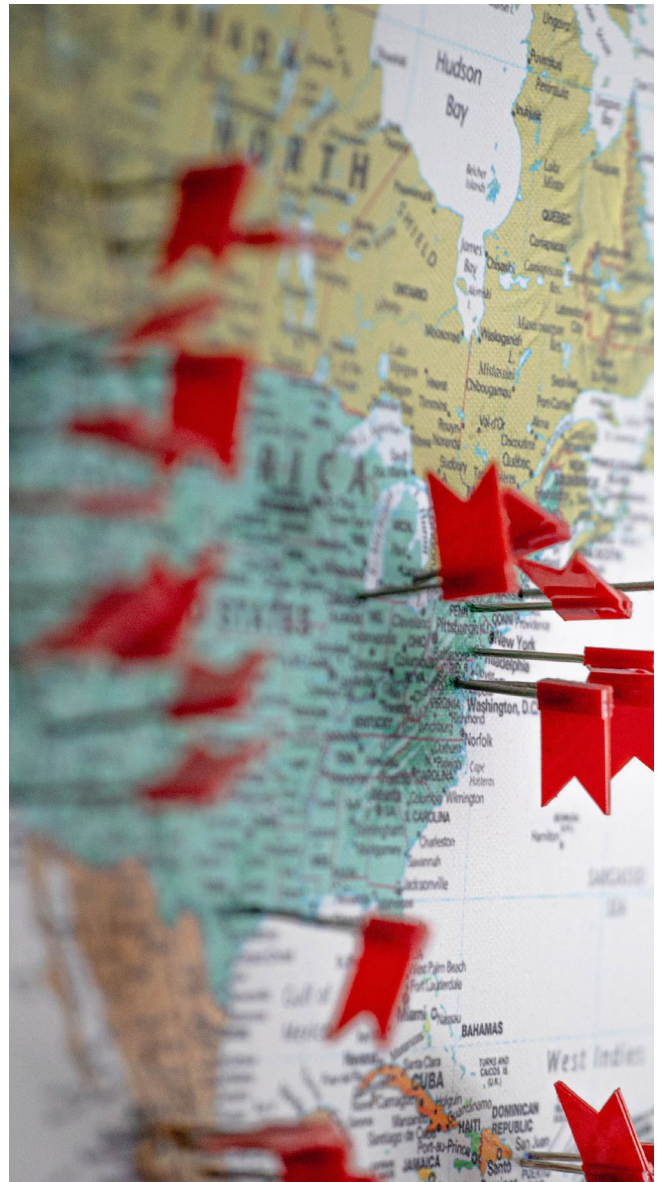
³ “An employer shall not be permitted to, when making an employment decision, rely solely on, or require any applicant to disclose or reveal, or take any adverse action against any applicant for employment solely on the basis of, any arrest, charge, conviction, or adjudication of delinquency [for certain marijuana-related offenses].” N.J.S.A. § 34:6B-21 (2021)

New Jersey's Legalization May Affect Businesses Nationwide and Not Just in Employment

NJCREAMMA's reach will likely extend beyond New Jersey's borders. Many states, including neighboring New York, have laws restricting employers from taking action against employees for legal off-duty conduct. Because New Jersey now has legal cannabis consumption, employers in New York and other states with similar laws may not be permitted to terminate their employees for recreational cannabis consumption in New Jersey, where it is now legal conduct.

The new law also creates a private right of action for discrimination in "public or private housing, real property, or a place of public accommodation," based on prior arrests, charges or convictions for certain marijuana offenses.⁴ Businesses from real estate to hospitality will likely see an increase in lawsuits from those with a history of marijuana-related offenses who do not feel they received proper service and accommodation due to this prior conduct.

Companies seeking to mitigate risks presented by the threat of cannabis-related litigation can do so with employment practices liability coverage. As the legal community monitors for cannabis law filings throughout the country that could eventually open avenues of cannabis-based causes of action, employers and places of accommodation should process the effects of these cases and consider the scope of their policies to ensure that such litigation will be addressed. Brown & Brown's Executive Liability Practice offers innovative solutions to companies seeking to limit this type of litigation risk.



⁴ "A person alleging discrimination in public or private housing, real property, or a place of public accommodation, based on a prior arrest, charge, conviction, or adjudication of delinquency, for [certain marijuana related offenses], may institute a civil action in the Superior Court for relief N.J.S.A. § 10:5-50 (2021)



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Michael P. D'Ambrise is a Vice President in Brown & Brown's Executive Liability Practice in New York. He has a Bachelor of Arts degree with high honors in History/Political Science and Spanish from Rutgers University and a J.D. from Fordham Law School. Michael is a member of the New York and New Jersey State Bars and the bar of the United States District Court for New Jersey. He is a former claims analyst who specializes in Executive Liability coverages.

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