

LOTS OF ACTION - 2021 STATE DRUG TESTING LAW UPDATES

The web of workplace drug & alcohol testing compliance continues to grow and has become increasingly impactful to employers. Several states have adopted new laws, with more states considering similar actions in the coming months. Below is a summary of the changes as of May 1st, 2021.

CONNECTICUT

In March, the Federal District Court of Connecticut granted an employer's Motion to Dismiss claims by a former employee who claimed protection from employment action under the Americans with Disabilities Act (ADA). More details on the case can be found [here](#).

IOWA

Iowa is the latest state to add [criminal penalties for donors that attempt to cheat their workplace drug test](#). A person who violates the provisions of the law commits a simple misdemeanor for a first offense and a serious misdemeanor for all subsequent offenses. The law allows a person who collects a urine sample from another person for a drug or alcohol test, having knowledge or reasonable suspicion that the other person has used synthetic urine or a urine additive in violation of the law, to report such information to law enforcement authorities. The law applies to both public and private-sector workplaces¹.

NEW JERSEY

On February 22nd, New Jersey legalized the adult use of marijuana². Employers in the state are still able to maintain drug testing programs. Employers are not required to accommodate the use or possession of marijuana in the workplace. Employers may prohibit employees from being under the influence of marijuana in the workplace or during work hours. However, the new law details that a positive drug test alone for marijuana is insufficient for an employer to take "adverse employment action," such as refusing to hire an applicant or firing a current employee solely because they are a cannabis user. There is also the requirement for a "physical

evaluation" to be conducted by a Workplace Recognition Expert "WIRE" (an entirely new concept in the workplace) to determine whether the applicant or employee is under the influence of marijuana before taking any adverse employment action. The new law took effect immediately, but the details of a 'WIRE' still need to be established by the state.

Honorable mention: The New Jersey Supreme Court ruled³ that an employer and their workers' compensation insurance provider must reimburse a state-authorized medical marijuana patient for the expense of their medical marijuana 'prescriptions.'

NEW MEXICO

On April 12, 2021, the Governor of New Mexico signed into law the Cannabis Regulation Tax Act ([House Bill 2](#)), the 16th state to legalize the use of marijuana for any adult who is 21 or older. The law takes effect June 29, 2021, with retail sales of marijuana in the state planned for April of 2022. The language of the Bill specifically permits employers to implement and maintain zero-tolerance drug testing programs, including the testing of marijuana. The also law allows employers to take adverse actions for the possession or use of marijuana at work or during work hours, including discipline or terminations based on a positive drug test result for marijuana. Employers in New Mexico are reminded of the state's medical marijuana law that limits employer actions against state-authorized medical marijuana patients.

NEW YORK

On April 1st, New York became the 15th state (plus Washington D.C.) to legalize the adult use of marijuana. The lengthy Bill ([No. A01248A](#)) amends the consolidated cannabis laws in the state.

This new law took effect immediately and brings new restrictions for employers. Employers in the state of New York cannot deny employment, discipline, or discharge employees for the use of marijuana when off-duty and off-site⁴. The language of the law is a bit ahead of its time when it comes

to technology and testing. Currently, there is no device to determine if an individual is under the influence of marijuana. Employers should be prepared to demonstrate and document reasonable suspicion in place of a valid method to determine an individual as 'under the influence.'

As of May 2020, employers in New York City are prohibited from testing for marijuana during pre-employment tests. There are some safety-sensitive exceptions. The state of New York also considers medical marijuana patients as "disabled," affording protections from state disability discrimination laws and limits employer actions.

PENNSYLVANIA (SPECIFICALLY THE CITY OF PHILADELPHIA)

With a new law⁶ adopted by the City Council of Philadelphia, signed on April 28, 2021, employers within the city limits will be prohibited from requiring a prospective employee to submit to a drug test for the presence of marijuana. The language of the law includes some safety-sensitive exceptions for certain types of jobs such as law enforcement, duties that require a commercial driver's license, various healthcare jobs, and a broad exception for "any position in which the employee could significantly impact the health or safety of other employees or members of the public." The new law takes effect on January 1, 2022. As an interesting note, the state has not legalized the 'recreational' use of marijuana; thus, there are no retail sales; however, the city of Philadelphia did decriminalize the possession of small amounts of marijuana in 2014.

VIRGINIA

In March, Virginia amended their state medical marijuana law and became the first state to provide employment protections for state-authorized medical cannabidiol (CBD) users⁷. In summary, the new law prohibits employers from discharging, disciplining, or discriminating against an employee for such employee's lawful use of cannabis oil according to a valid written certification issued by a practitioner for the treatment or to eliminate the symptoms of the employee's diagnosed condition or disease.

EMPLOYER ACTION

Employers should immediately and carefully assess how these recent changes might impact their drug and alcohol testing programs. Employers are strongly encouraged to continue drug testing while understanding and complying with any limitations that exist in each state. Employers must review and revise their policies, job descriptions (specifically for jobs deemed by the company to be safety-sensitive), supervisor training, and most especially internal operating procedures (including reasonable suspicion) appropriately to ensure compliance.

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- ¹ <https://www.drugscreeningci.com/blog/don-t-cheat-on-an-iowa-employer-s-drug-or-alcohol-test-you-could-now-go-to-jail>
 - ² <https://www.drugscreeningci.com/blog/new-jersey-marijuana-legalization-moves-forward-limits-employers>
 - ³ *Hager v. M&K Construction, 2021 N.J. LEXIS 332*
 - ⁴ <https://www.drugscreeningci.com/blog/compliance-alert-new-york-approves-adult-use-of-marijuana-bill>
 - ⁵ <https://www.drugscreeningci.com/blog/new-york-city-council-passes-ban-on-pre-employment-marijuana-testing>
 - ⁶ Bill No. 200625
 - ⁷ <https://www.drugscreeningci.com/blog/virginia-passes-bill-to-protect-medical-cbd-users>

