



Morgan Lewis

NEW JERSEY AND RECREATIONAL CANNABIS

WHAT YOU NEED TO KNOW

August W. Heckman III, Rudolph J. Burshnic II

April 7, 2021

Presenters



August W. Heckman III



Rudolph J. Burshnic II

What is Marijuana?

Morgan Lewis

What is Marijuana?

MARIJUANA IS:

a psychoactive drug derived from the Cannabis plant that is intended for medical and recreational use

METHODS OF CONSUMPTION ¹



Smoking

Method: joints, pipes, blunts, waterpipes, bong

Time to take effect:
Seconds to minutes. Effects can last up to 6 hours.



Eating/Drinking

Method: marijuana-infused edibles and drinks

Time to take effect: 90 minutes to 4 hours. Effects can last up to 8 hours.



Vaping

Method: e-cigarettes, vape pens, vaporizers

Time to take effect:
Seconds to minutes

Who uses?

- Recent estimate: upwards of 8% to 10% of New Jerseyans use cannabis in some form.
- 2019 study: drug use among American employees, as measured by the percentage of employees who tested positive in urine drug tests, was at a 14-year high, standing at 4.4 percent.

Benchmarking Testing for Marijuana

- Some employers have stopped testing employees for marijuana, but the large majority still do.
- Trend appears to be toward not testing for marijuana, particularly given that more and more states are legalizing.

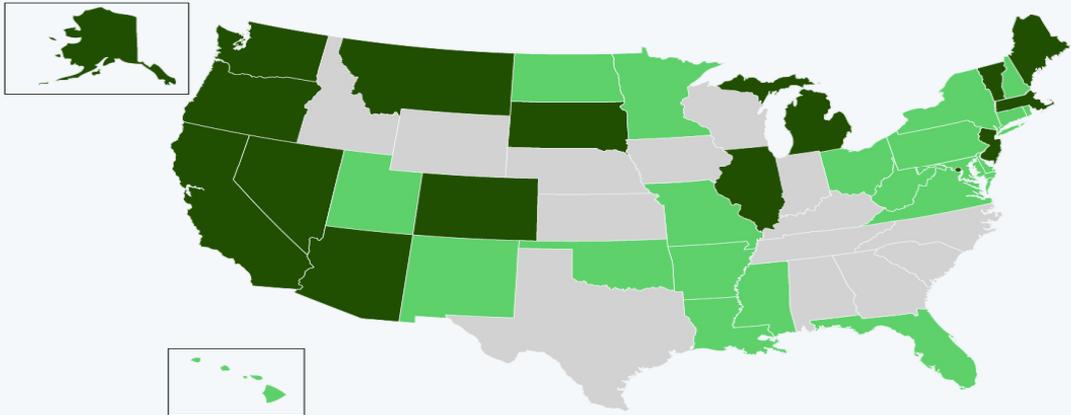
State Marijuana Legalization

The States Where It's Legal To Smoke Marijuana



Laws on recreational and medical marijuana use in the U.S.*

■ Legal recreational & medical use ■ Medical use only



* As of Nov 5, 2020. Some states not highlighted allow limited medical marijuana access

Sources: NORML, USA Today



New York's Marijuana Regulation and Taxation Act

- Governor Cuomo signed on March 31, 2021 the Marijuana Regulation and Taxation Act.
- Decriminalizes adult (21 and over) possession and use of cannabis products up to certain amounts.
- Amends Section 201-d of the New York Labor Law to protect an employee from job discrimination based on the “legal use of consumable products, including cannabis in accordance with state law.”
- The protection extends to use (a) outside of work hours, (b) off an employer's premises, and (c) without the use of the employer's equipment or other property.
- Not protected: employer's adverse employment action required by state or federal statute, regulation, ordinance, or other state or federal governmental mandate; employee is impaired by use in connection with work; or if permitting use would require employer to violate federal law or would result in loss of federal contract or funding.

New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act ("NJCREAMMA")

Morgan Lewis

NJCREAMMA

- New Jersey Governor Phil Murphy signed NJCREAMMA on February 22 enabling the constitutional amendment to legalize adult recreational use of cannabis and a companion decriminalization law.
- Each law has significant implications for employers.

5 Things You Need To Know About Marijuana Legalization In NJ

Where can you smoke it? Can you be fired or face a drug test? Here's a simple guide for anyone curious about trying cannabis in New Jersey.

 Eric Kiefer, Patch Staff 

Can I be fired if I test positive for marijuana, even though weed was just legalized? What you need to know.

Updated Feb 25, 2021; Posted Feb 25, 2021

1,063
shares

By [Amanda Hoover | NJ Advance Media For NJ.com](#)

Non-Discrimination

- Prohibits employers from taking adverse employment action against employees or applicants based on their use (or non-use) of cannabis items:
“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].” (emphasis added).

No Duty to Accommodate in the Workplace

- Employers may establish drug- and alcohol-free workplaces and do not have to permit or accommodate cannabis use in the workplace or during work hours:
“[Nothing in NJCREAMMA] [r]equires an employer to amend or repeal, or affect, restrict or preempt the rights and obligations of employers to maintain a drug- and alcohol-free workplace or require an employer to permit or accommodate the use, consumption, being under the influence, possession, transfer, display, transportation, sale, or growth of cannabis or cannabis items in the workplace, or to affect the ability of employers to have policies prohibiting the use of cannabis items or intoxication by employees during work hours.”

Interaction with Federal Law

- Employers are permitted to revise their employee prohibitions to be consistent with federal law if there is “a provable adverse impact on an employer subject to the requirements of a federal contract.” Federal grantees and contractors also may prohibit the manufacture, transportation, delivery, possession, or use of cannabis items to the extent necessary to satisfy federal grant and contract requirements.
- Relatedly, in a catch-all provision in Section 53, NJCREAMMA states that nothing in it should be construed to “amend or affect in any way any State or federal law pertaining to employment matters.”

Drug Testing

- Employers may drug test in six instances: (1) upon reasonable suspicion of an employee's use of cannabis items at work, (2) upon finding observable signs of intoxication related to cannabis items at work, (3) as part of a work-related accident investigation, (4) randomly, (5) as part of pre-employment screening, or (6) as part of regular screening of current employees to determine use during work hours.
- A drug test must include "scientifically reliable objective testing methods and procedures, such as testing of blood, urine, or saliva" **and** a "physical evaluation."
- The individual conducting the "physical evaluation" must be certified under regulatory standards established by the Cannabis Regulatory Commission, in consultation with the Police Training Commission, as a "Workplace Impairment Recognition Expert" (WIRE).

Drug Testing

- Employers may “use the results of” the drug test—which must include the physical evaluation by the WIRE—when “determining the appropriate employment action concerning the employee, including, but not limited to dismissal, suspension, demotion, or other disciplinary action.”
- If these requirements would result in “a provable adverse impact on an employer subject to the requirements of a federal contract, then the employer may revise their employee prohibitions consistent with federal law, rules, and regulations.”

Drug Testing

- The law does not explain *how* employers may use the results of a drug test.
 - There is no “safety sensitive” exemption in the law.
 - Is random drug testing for safety-sensitive positions permissible?
 - How can an employer use a WIRE for a physical examination for pre-employment testing?
- We expect that the Cannabis Regulatory Commission’s forthcoming rules and regulations will provide further guidance.

WIRE

- WIRE certification standards are to-be-determined, but they may track standards for Drug Recognition Experts in the criminal context.
- Possible tests for signs of impairment:
 - “Nystagmus” (jerky movement of eye when moved horizontally or vertically)
 - Eye focus and convergence (or lack of)
 - Pupil size/pupil reaction to light
 - Vital signs (pulse/respirations)
 - Body temperature
 - Muscle tone/movement
 - Speech
 - Gait

WIRE Issues

- At what stage in the drug-testing process does the WIRE get involved? Pre-testing? Post-testing? Must the WIRE first “approve” of sending an employee for a drug test?
- What is the nature and extent of the WIRE’s involvement? Does the WIRE merely render a determination as to the employee’s level of impairment, if any, at the time in question?
- What weight, if any, is accorded the WIRE’s determination as to the individual’s level of impairment? Is the WIRE’s opinion/decision binding on the employer?
- Must the WIRE render an opinion/decision that the individual was under the influence of marijuana before an employer is permitted to take adverse employment action against the individual?
- What if the WIRE’s drug test does not show a positive test for marijuana, but the applicant or employee tests positive for another illegal drug? Must the employer still solicit the opinion/advice of the WIRE in that case?
- How might this process work with employees who work remotely, who do not typically report to the job site, or who work night shifts?
- Can an employer use the services of a remote WIRE via video?

Employee Drivers

- Federal laws prohibiting the use of marijuana by CDL drivers or employees performing other safety-sensitive functions.
- Employers and drug and alcohol testing agencies must report test failures or refusals in the Department of Transportation's (USDOT) Drug and Alcohol Clearinghouse.
- Employees who work with heavy machinery, forklifts?

NJCREAMMA

Effective Date

- The employment provisions of NJCREAMMA will not be enforceable until the Cannabis Regulatory Commission adopts rules and regulations.
- The Cannabis Regulatory Commission's deadline to issue those rules and regulations is August 21, 2021 (180 days from enactment).

No Express Private Right of Action

- The law does not contain an express private right of action.

Cannabis Regulatory Commission

Members

- Dianna Houenou: Chair
- Krista Nash
- Maria Del Cid
- Sam Delgado
- Charles Barker
 - Recently replaced William Wallace

Interaction with the New Jersey Compassionate Use Medical Marijuana Act

- Since 2010, marijuana has been legal for medicinal purposes under the New Jersey Compassionate Use Medical Marijuana Act (“CUMMA”).
- NJCREAMMA’s employment provisions do not apply to medical marijuana use.
- Thus, medical marijuana use still regulated by CUMMA, which makes it “unlawful to take any adverse employment action against an employee who is a registered qualifying patient based solely on the employee’s status as a registrant with the commission.” N.J.S.A. § 24:6I-6.1(a).
 - This provision came into law through the Jake Honig Compassionate Use Medical Cannabis Act enacted on July 2, 2019, which amended CUMMA.
- Nothing in CUMMA permits anyone to “operate, navigate, or be in actual physical control of any vehicle, aircraft, railroad train, stationary heavy equipment or vessel while under the influence of cannabis.” N.J.S.A. § 24:6I-8(a).

Interaction with the New Jersey Compassionate Use Medical Marijuana Act

- CUMMA requires employers to provide to employee or applicants who test positive for marijuana to have the “opportunity to present a legitimate medical explanation for the positive test result,” and to “provide written notice of the right to explain to the employee or job applicant.” N.J.S.A. § 24:6I-6.1(b)(1). Employees or applicants then have three working days to explain the test result or ask for a re-test and can present an authorization for medical cannabis issued by a health care practitioner and/or proof of registration with the Commission.
- Under CUMMA employers are not restricted from prohibiting possession or use of medical cannabis during work hours or on their premises outside of work hours.
- Employers are not required to to commit any act that would cause the employer to be in violation of federal law, that would result in a loss of a licensing-related benefit pursuant to federal law, or that would result in the loss of a federal contract or federal funding.

Decriminalization Law

Morgan Lewis

Decriminalization Law

- Prohibition on considering an employee or applicant's marijuana-related criminal history for employment decisions:
 - “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].” (emphases added).
- Employers presumably may take into account—at least in part—an employee or applicant's marijuana-related criminal history when making a hiring or other employment decision.

Decriminalization Law

- **Civil Penalties**

- \$1,000 for the first violation, \$5,000 for the second violation, and \$10,000 for each violation after that.
- These civil penalties are the sole remedy for violations – the law states expressly that there is no private cause of action related to the prohibition on considering an employee or applicant’s marijuana-related criminal history for employment decisions.

- **Effective Date**

- July 22, 2021, five months after the enactment of NJCREAMMA, to coincide with related provisions of that law.

Key Takeaways

- Employers may ban the use, consumption, possession, transfer, display, transportation, sale or growth of cannabis or cannabis items in the workplace and during work hours.
- Employers may forbid employees from coming to work under the influence of marijuana or using marijuana in the workplace and during work hours.
- Employers may administer drug tests to employees, but an employer may not take adverse employment action against an individual based solely on the individual's failed drug test for marijuana.
- A physical examination by a WIRE must accompany an employer's drug test for marijuana.
- Employers may be entitled to discipline or discharge employees if the employers conclude that the employees used, possessed, or were under the influence of marijuana while in the workplace or during work hours.
- It appears that an employer may discipline or discharge an employee if the employer concludes that the employee used, possessed, or was under the influence of marijuana while in the workplace or during work hours, even without requiring the employee to undergo a drug test or engaging a WIRE to opine on the employee's state of impairment, or lack thereof.

Recommendations for Employers: What can you do now?

Recommendations for Employers: What can you do now?

- Update policies, including fleet policies, to ensure compliance with the nondiscrimination portions of the laws.
 - NJCREAMMA prohibits employers from enforcing any policy that automatically results in adverse employment action when an individual fails a drug test for marijuana.
 - Clarify in policies that the “use, consumption, being under the influence, possession, transfer, display, transportation, sale, or growth of cannabis or cannabis items in the workplace” is strictly forbidden and grounds for immediate termination of employment.
- Hiring and/or training an employee(s) to become a WIRE to perform on-the-job physical evaluations to determine impairment and use.
 - How many WIREs, e.g., one per shift?
 - Management or HR?
 - A good testifying witness
- Update drug-testing protocols with vendors.
- Train managers and human resources employees on the laws and ensure that they are aware of their nondiscrimination provisions, but also that employees are still prohibited from using, possessing, or being impaired by cannabis in the workplace or during work hours.

QUESTIONS?

August W. Heckman III



Partner

Morgan, Lewis & Bockius LLP

Princeton

[august.heckman@](mailto:august.heckman@morganlewis.com)

morganlewis.com

+1.609.919.6696

August W. Heckman III has a diverse practice handling wage and hour class and collective action matters, restrictive covenant and trade secrets litigation, employee benefits litigation, and a full panoply of discrimination, retaliation, contract and common law claims on behalf of employers in courts, arbitral tribunals and agencies around the US. His clients operate in a wide group of industry sectors that include financial services, transportation, media, pharmaceutical, telecommunications, ecommerce, social media, and retail industries.

Education

Seton Hall University School of Law, 2005, J.D., Magna Cum Laude, Order of the Coif

Monmouth University, 2002, B.A., Magna Cum Laude

Rudolph J. Burshnic II



Associate
Morgan, Lewis & Bockius LLP
Princeton
[Rudolph.burshnic@
morganlewis.com](mailto:Rudolph.burshnic@morganlewis.com)
+1.609.919.6686

Rudolph J. Burshnic II represents employers in restrictive covenant and trade secrets matters and in defense of discrimination, harassment, retaliation, and wage-and-hour claims in courts, arbitral forums, and agencies around the US. Rudy also counsels employers on employment and severance agreements, workplace policies, and employee discipline and leave issues.

Education

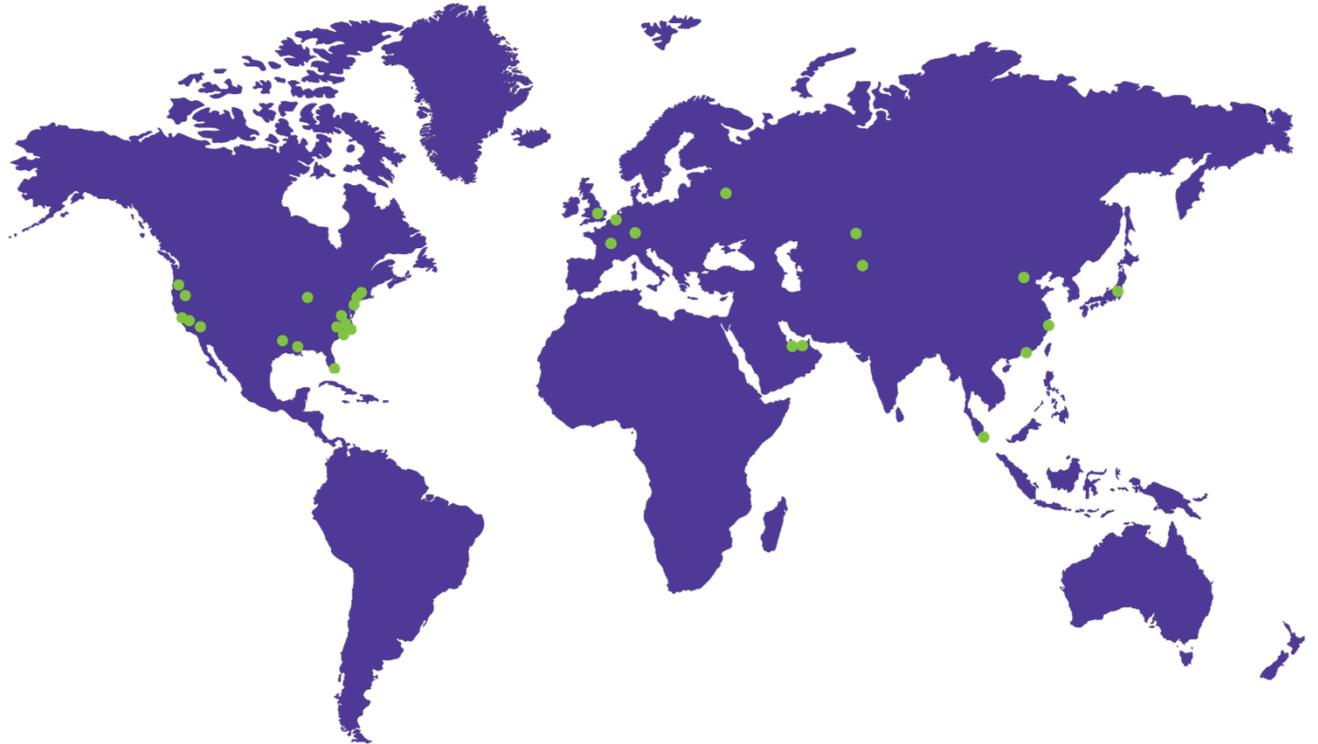
Washington and Lee University School of Law, 2012, J.D., Cum Laude
University of Maryland, 2009, B.A., Cum Laude

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Abu Dhabi
Almaty
Beijing*
Boston
Brussels
Century City
Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong*
Houston
London
Los Angeles
Miami
Moscow
New York
Nur-Sultan
Orange County
Paris
Philadelphia
Pittsburgh
Princeton
San Francisco
Shanghai*
Silicon Valley
Singapore*
Tokyo
Washington, DC
Wilmington



Morgan Lewis

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

THANK YOU

© 2020 Morgan, Lewis & Bockius LLP
© 2020 Morgan Lewis Stamford LLC
© 2020 Morgan, Lewis & Bockius UK LLP

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Attorney Advertising.