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New Jersey Court Opens Door to Employee Lawsuits Over Cannabis-Related Adverse Employment Actions

A recent decision from the New Jersey Appellate Division has increased litigation risk for employers taking adverse action against employees for cannabis-related infractions. Disagreeing with a prior decision from the Third Circuit Court of Appeals, the Appellate Division ruled that New Jersey's Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA) allows employees or applicants to sue directly for alleged violations of the law's employment protections.

Background

CREAMMA regulates both adult recreational and medical cannabis use in New Jersey. Rather than allowing employers to take action against employees based on evidence of cannabis use alone, CREAMMA requires employers to distinguish between lawful off-duty use and actual workplace impairment. Under CREAMMA, lawful off-duty cannabis use is protected but workplace use or impairment is not.

CREAMMA prohibits employers from refusing to hire, discharging or taking other adverse action against individuals simply because of their off-duty use of cannabis. Importantly, the law protects employees from adverse action based solely on a positive drug screening for cannabis because cannabis metabolites can remain in the body long after impairment has ended—meaning a positive drug test does not by itself establish that an employee was impaired at work. In addition to a positive test, employers must have a documented reasonable suspicion that the employee has been impaired while performing their job functions. This reasonable suspicion is based on any observed physical impairment such as slurred speech, poor coordination, smell of cannabis, and other evidence indicating that the employee was actually impaired during working hours.

The Third Circuit's Prior Decision

Notably, while CREAMMA contains broad employment protections for cannabis users, the law does not provide employees or applicants with a private right of action for alleged violations.

In 2024, the U.S. Court of Appeals for the Third Circuit addressed this in *Zanetich v. Walmart Stores East, Inc.* In that case, a job applicant alleged that Walmart rescinded his conditional offer in violation of CREAMMA after he tested positive for cannabis. Applying a strict statutory interpretation approach, the Third Circuit held that CREAMMA does not create an express or implied private right of action. Because the law does not expressly authorize private lawsuits by applicants and employees, the court declined to recognize one.

The *Zanetich* decision substantially limited litigation risk; individuals could not sue employers directly under CREAMMA and would instead have to pursue administrative complaints through the New Jersey Cannabis Regulatory Commission, which has not actively enforced such claims. A dissent in *Zanetich*, however, predicted that a New Jersey state court would likely reach a different result, which has now happened.

Sanders v. The Levari Group, LLC

On May 26, the New Jersey Appellate Division issued a decision in *Sanders v. The Levari Group, LLC*, which held that CREAMMA does provide an implied private right of action. Like *Zanetich*, *Sanders* involved a job applicant whose conditional offer of employment was rescinded after a preemployment drug test detected cannabis metabolites. The applicant claimed that the employer's decision violated CREAMMA because it was based on lawful cannabis use and the presence of cannabis metabolites rather than on evidence of workplace impairment.

The Appellate Division disagreed with the Third Circuit's strict interpretation of the law and held that CREAMMA's employment protections would be difficult to enforce in any meaningful way unless employees and applicants could bring claims directly against employers. The Appellate Division reasoned that recognizing an implied private right of action was consistent with the law's purpose of protecting lawful cannabis users from adverse employment action.

What this means for employers is that the pendulum of litigation risk has now swung in the opposite direction for cannabis-related employment decisions in New Jersey. It is noteworthy that both of these cases were brought by applicants whose failure-to-hire claims were brought solely based on a preemployment positive drug screen for cannabis in the absence of any alleged wrongful use of cannabis or impairment in the workplace.

Bottom Line

Unless and until the New Jersey Supreme Court provides further guidance, *Sanders* materially changes the litigation landscape for New Jersey employers. Because *Sanders* is a published Appellate Division decision, it is binding on New Jersey trial courts unless it is stayed, reversed or modified. Given the direct conflict with the Third Circuit's *Zanetich* ruling, the New Jersey Supreme Court may ultimately address this issue if a petition for certification is filed and granted.

For now, employers should assume that adverse employment decisions based solely on lawful off-duty cannabis use or a positive cannabis test—without documented evidence of impairment—may give rise to direct claims under CREAMMA by employees. Employers that conduct preemployment, post-accident or random drug testing should review their policies to ensure that cannabis-related employment actions are supported by more than just positive test results. For applicants who test positive for cannabis in a preemployment drug screen, that fact alone cannot form the basis of a decision not to hire the applicant without exposing the employer to potential legal liability under CREAMMA.

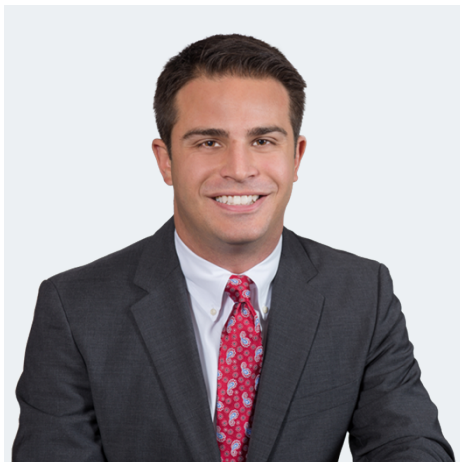
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