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**BULLETIN**

**TO: All Members**

**FROM: Matthew J. Giacobbe, Esq., Special Labor Counsel**

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 **Dave Grubb, Executive Director**

 **Joseph Hrubash, Executive Director**

**DATED: April 5, 2021**

**RE: Marijuana Legislation and Effects on the Workplace**

You have asked our firm, on behalf of the Municipal Excess Liability Joint Insurance Fund (“MEL”), for guidance on legislation recently passed and signed into law by the New Jersey Legislature and Governor Murphy decriminalizing and regulating the use of recreational marijuana in New Jersey, and its effect on municipal employers in New Jersey.

**BACKGROUND**

 On February 22, 2021, Governor Phil Murphy signed a series of bills into law that legalize and regulate marijuana in the State of New Jersey. P.L.2021, c.16 (A21), known as the New Jersey Cannabis Regulatory, Enforcement, Assistance and Marketplace Modernization Act (the “Cannabis Act” or “Act”) allows for the purchase, possession, and sale of one ounce of marijuana/cannabis. P.L.2021, c.19 (A1897) addresses the removal or reduction of criminal penalties for possession and transfer of certain amounts of marijuana. Lastly, P.L.2021.c.25 (S3454), and subsequent amendments (P.L.2021, c.38/A5472), dispense with criminal penalties or fines for the possession or use of marijuana by those under the age of 21. In light of these new laws, on February 22, 2021 Attorney General Gurbir S. Grewal issued Directive No. 2021-1, which instructs state, county, and municipal prosecutors to dismiss charges pending as of February 22, 2021 for any marijuana offense that is no longer illegal under New Jersey law.

 The Cannabis Act also includes numerous provisions applicable to the area of employment, including the establishment of procedures for employer drug testing, nondiscrimination rules for marijuana users, and clarification that employers do not have any duty to accommodate marijuana use in the workplace.

**EMPLOYMENT PRACTICE CONSIDERATIONS**

1. **Hiring and Drug Testing.**

Specifically, the Cannabis Act provides that employers shall not refuse to hire any person or take any adverse employment action against any employee because that individual does or does not use cannabis, and may not take adverse action against an employee solely due to the presence of marijuana in the employee’s body. N.J.S.A. 24:6I-52(a)(1). However, employers may still require an employee to undergo a drug test upon reasonable suspicion of an employee's usage of a cannabis item while engaged in the performance of the employee's work responsibilities, or upon finding any observable signs of intoxication related to usage of a cannabis item or following a work-related accident subject to investigation by the employer. Id.

In addition, the law provides that a drug test may be done randomly, as part of a pre-employment screening or regular screening of current employees to determine use during an employee’s prescribed work hours. Id. Although the law mentions drug tests being completed as part of a pre-employment screening, nothing in the law indicates that an applicant can be denied employment solely based on a positive pre-employment drug test result for marijuana usage. Please note that Constitutional concerns dictate that public employers continue conducting only suspicionless drug testing – including random drug testing, pre-employment screening and current employee screening – on certain employees, such as those in safety-sensitive positions. See N.J. Transit PBA Local 304 v. N.J. Transit Corp., 151 N.J. 531 (1997) (to avoid violating the Fourth Amendment and the New Jersey Constitution, the government must have a special need substantial enough to override an employee’s privacy interest against suspicionless drug tests).

The Cannabis Act also requires that the drug testing process performed by the employer for the presence of marijuana must include both a scientifically reliable drug test, such as the testing of blood, urine, or saliva, and a “physical evaluation in order to determine an employee’s state of impairment.” Id. Such physical evaluation must be conducted by a Workplace Impairment Recognition Expert, which is an individual certified “to opine on the employee’s state of impairment, or lack thereof,” related to the usage of marijuana. N.J.S.A. 24:6I-52(a)(1)-(2)(a). The standards for such certification will be set by the Cannabis Regulatory Commission, in consultation with the Police Training Commission. Id.

Employers may use the results of the drug test – which must include both the traditional drug test and the physical evaluation conducted by the Workplace Impairment Recognition Expert – to determine the appropriate adverse employment action. N.J.S.A. 24:6I-52(a)(1).

2. **Cannabis in the Workplace**

The Cannabis Act clarifies that employers are not prohibited from maintaining a drug and alcohol-free workplace or from having policies prohibiting the use of cannabis or intoxication by employees during work hours, and there is nothing in the law that requires an employer to permit or accommodate the use or possession of marijuana in the workplace. N.J.S.A. 24:6I-52(b)(1). In addition, if any of the provisions in the Cannabis Act would result in an adverse impact on an employer subject to the requirements of a federal contract, then the employer may revise their prohibitions consistent with federal law and regulations. Id.

Further, the Act is not intended: to allow anyone to drive under the influence of cannabis; to permit any person to possess, consume, use, display, transfer, distribute, sell, transport, or grow or manufacture cannabis in a school, hospital, detention facility, adult correctional facility, or youth correctional facility; or to permit the smoking, vaping, or aerosolizing of cannabis items in any place that any other law prohibits the smoking of tobacco. N.J.S.A. 24:6I-52(b).

Notably, the employment provisions contained in the Act are effective immediately, but do not become operative until the New Jersey Cannabis Regulatory Commission’s adoption of initial rules and regulations within 180 days of the bill becoming law, or August 21, 2021.

The decriminalization law also limits employer inquiries into an applicant’s marijuana-related criminal history. Specifically, this law provides in relevant part: that employers are not 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, or conviction for certain types of cannabis offenses. This prohibition does not apply to positions in law enforcement, corrections, the judiciary, homeland security, or emergency management. Employers that violate this provision are subject to civil penalties in an amount up to $1,000 for the first violation, $5,000 for the second violation, and $10,000 for each subsequent violation.

3. **CDL Holders**

Despite the legalization of recreational marijuana use in New Jersey, it is our opinion that employees whose positions require the possession of a commercial driver’s license (“CDL”) must still refrain from marijuana use, since any use by safety-sensitive employees holding a CDL is prohibited under the Department of Transportation (“DOT”) regulations.

Federally, marijuana is still classified as a Schedule I controlled substance pursuant to the Controlled Substances Act. 21 U.S.C. § 812; See Gonzales v. Raich, 545 U.S. 1, 14 (2005) (holding that by classifying marijuana as a Schedule I drug instead of listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense).

Therefore, while recreational marijuana use is now decriminalized under New Jersey law, any form of use is still unlawful pursuant to Federal law. See Coats v. Dish Network, LLC, 350 P.3d 849 (Colo. 2015) (holding that an activity such as medical marijuana use that is unlawful under Federal law is not a “lawful” activity under the Colorado lawful activities statute, which makes it an unfair labor practice to discharge an employee based on the employee’s lawful outside-of-work activities); Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries, 348 Or. 159, 174 (2010) (holding that because Schedule I controlled substances lack any accepted medical use, Federal law prohibits all use of those drugs with the sole exception being use of Schedule I drugs as part of a Food and Drug Administration preapproved research project).

 The DOT has issued guidance that is directly applicable to this analysis. With respect to “Recreational Marijuana,” the Director of the Office of the Secretary of Transportation issued the following Office of Drug and Alcohol Policy and Compliance Notice:

Recently, some states passed initiatives to permit use of marijuana for so-called “recreational” purposes.

We have had several inquiries about whether these state initiatives will have an impact upon the Department of Transportation’s longstanding regulation about the use of marijuana by safety‐sensitive transportation employees . . .

**We want to make it perfectly clear that the state initiatives will have no bearing on the Department of Transportation’s regulated drug testing program.** The Department of Transportation’s Drug and Alcohol Testing Regulation – 49 CFR Part 40 – does not authorize the use of Schedule I drugs, including marijuana, for any reason.

Therefore, Medical Review Officers (MROs) will not verify a drug test as negative based upon learning that the employee used “recreational marijuana” when states have passed “recreational marijuana” initiatives.

We also firmly reiterate that an MRO will not verify a drug test negative based upon information that a physician recommended that the employee use “medical marijuana” when states have passed “medical marijuana” initiatives.

**It is important to note that marijuana remains a drug listed in Schedule I of the Controlled Substances Act. It remains unacceptable for any safety‐sensitive employee subject to drug testing under the Department of Transportation’s drug testing regulations to use marijuana.**

We want to assure the traveling public that our transportation system is the safest it can possibly be.

(emphasis added). Furthermore, 49 C.F.R. § 391.41 (Physical qualifications for drivers) states in pertinent part:

(b) A person is physically qualified to drive a commercial motor vehicle if that person—

(12)(i) Does not use any drug or substance . . . Schedule I, an amphetamine, a narcotic, or other habit-forming drug.

(ii) Does not use any non-Schedule I drug or substance . . . except when the use is prescribed by a licensed medical practitioner . . . who is familiar with the driver’s medical history and has advised the driver that the substance will not adversely affect the driver’s ability to safely operate a commercial motor vehicle.

 Accordingly, the DOT guidance and regulation plainly prohibits CDL license holders that choose to consume recreational marijuana from performing their safety-sensitive responsibilities. The recreational marijuana law also does not supersede necessary drug testing of such individuals.

4. **Police Officers and Firefighters**.

Similar to CDL holders, despite the legalization of recreational marijuana use off-duty, it is our interpretation of the law that police officers must still refrain from marijuana use because federal law prohibits users of a controlled substance, such as marijuana, from lawfully possessing a firearm.

Marijuana is classified as a Schedule I controlled substance pursuant to the Controlled Substances Act. 21 U.S.C. § 812. While recreational marijuana use is now decriminalized under New Jersey law, any form of use is clearly unlawful pursuant to Federal law. See Coats v. Dish Network, LLC, and Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries, supra.

One crucial concern is that one of the indisputable essential job functions of a police officer is to lawfully possess and use a firearm. See Jackson v. City of Chicago, 414 F.3d 806, 814 (7th Cir. 2005) (ruling that it is clear that being able to carry a firearm safely is an essential function of the police officer position). A marijuana user cannot legally possess a firearm pursuant to the following law:

18 U.S.C. § 1922 Unlawful acts

(g) It shall be unlawful for any person—

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(emphasis added). 27 C.F.R. § 478.11 defines an “unlawful user of or addicted to any controlled substance” as follows:

A person who uses a controlled substance and has lost the power of self-control with reference to the use of controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm.

(emphasis added).

 On September 21, 2011, the Assistant Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) wrote the following (in pertinent part) in a document entitled “OPEN LETTER TO ALL FEDERAL FIREARMS LICENSEES”:

A number of States have passed legislation allowing under State law the use or possession of marijuana for medicinal purposes, and some of these States issue a card authorizing the holder to use or possess marijuana under State law. During a firearms transaction, a potential transferee may advise you that he or she is a user of medical marijuana, or present a medical marijuana card as identification or proof of residency.

As you know, Federal law, 18 U.S.C. § 922(g)(3), prohibits any person who is an "unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))" from shipping, transporting, receiving or possessing firearms or ammunition. Marijuana is listed in the Controlled Substances Act as a Schedule I controlled substance, and there are no exceptions in Federal law for marijuana purportedly used for medicinal purposes, even if such use is sanctioned by State law. Further, Federal law, 18 U.S.C. § 922(d)(3), makes it unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person is an unlawful user of or addicted to a controlled substance. As provided by 27 C.F.R. § 478.11, "an inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time."

**Therefore, any person who uses or is addicted to marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of or addicted to a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition.** Such persons should answer "yes" to question 11.e. on ATF Form 4473 (August 2008), Firearms Transaction Record, and you may not transfer firearms or ammunition to them. Further, if you are aware that the potential transferee is in possession of a card authorizing the possession and use of marijuana under State law, then you have "reasonable cause to believe" that the person is an unlawful user of a controlled substance. As such, you may not transfer firearms or ammunition to the person, even if the person answered "no'' to question 11.e. on ATF Form 4473.

(emphasis added).

 The ATF’s September 21, 2011 correspondence shows that it is likely impossible for a police department to condone marijuana use (for any reason) without violating Federal law. As the above demonstrates that it is unlawful for a marijuana user to possess a firearm, it is reasonable for a municipality to prevent its police officers from marijuana use during off-duty hours.

 Another argument against off-duty usage of marijuana by police officers relates to the special importance placed on the position of a police officer, as compared to other public employment positions. A police department is a paramilitary organization that requires lawful orders to be followed. In Akridge v. Barnes, 122 N.J. Super. 476 (App. Div. 1973), cert. denied, 420 U.S. 966 (1975), the Appellate Division noted that members of a police department in many respects constitute a military organization, and as such are necessarily subject to reasonable regulations having to do with discipline and morale. The law is clear that police officers are required to comply with all laws, and must refrain from any conduct that may tarnish their respectable image to the public. The Appellate Division has explained this position as follows:

It must be recognized that a police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. He carries a service revolver on his person and is constantly called upon to exercise tact, restraint and good judgment in his relationship with the public. He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public.

Moorestown Twp. v. Armstrong, 89 N.J. Super. 560 (App. Div. 1965), cert. denied, 47 N.J. 80 (1966).

An argument can be made that it would be undignified for a law enforcement officer to consume recreational marijuana when it violates Federal law, and such activity could tarnish a police officer’s image by members of the public if they become aware of the officer’s use.

Notably, police officers and firefighters may also be ordered to report to work at any time if needed. In an appeal of a firefighter’s dismissal, the Appellate Division discussed off-duty alcohol and drug use and concluded:

[t]he employer is not required to assume – or hope – that the employee will limit alcohol and other drug consumption to off-duty hours, or that the effect of the drugs will be dissipated by the time the work day begins. Moreover, a firefighter is subject to being called to duty when needed, anytime of the day or night. A firefighter under the influence of drugs cannot do the job.

In re Cahill, 245 N.J. Super. 397, 401 (App. Div. 1991) (emphasis added).

Police officers and firefighters may conceivably attempt to report to work in an inebriated state if the employer condoned the use of marijuana during off-duty hours, which would jeopardize both the employee’s safety and the safety of the public, and potentially subject the employer to extensive liability. Accordingly, it may be reasonable for public entities to continue precluding its police officers and firefighters from using marijuana during off-duty hours.

The new law passed in New Jersey provides, in relevant part:

b. Nothing in P.L.2021, c. 16 (C.24:6I-31 et al.):

(1)(a) Requires 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 use of cannabis items or intoxication by employees during work hours;

N.J.S.A. 24:6I-52(b) (emphasis added).

Due to the nature of a police officer and firefighter’s job position and the need to be on-call and ready to report to duty at any time, having a policy permitting off-duty recreational marijuana use for these employees may potentially “affect the ability” of employers to prohibit someone’s use of marijuana during work hours.

**CONCLUSION**

 This memo is an overview of legal considerations and we urge Administrations and elected officials to consult with their legal counsel.

 We anticipate that many of these issues may be addressed and clarified when the New Jersey Cannabis Regulatory Commission implements the required rules and regulations by August 21, 2021. If you have any further questions, comments or concerns, please do not hesitate to contact us.