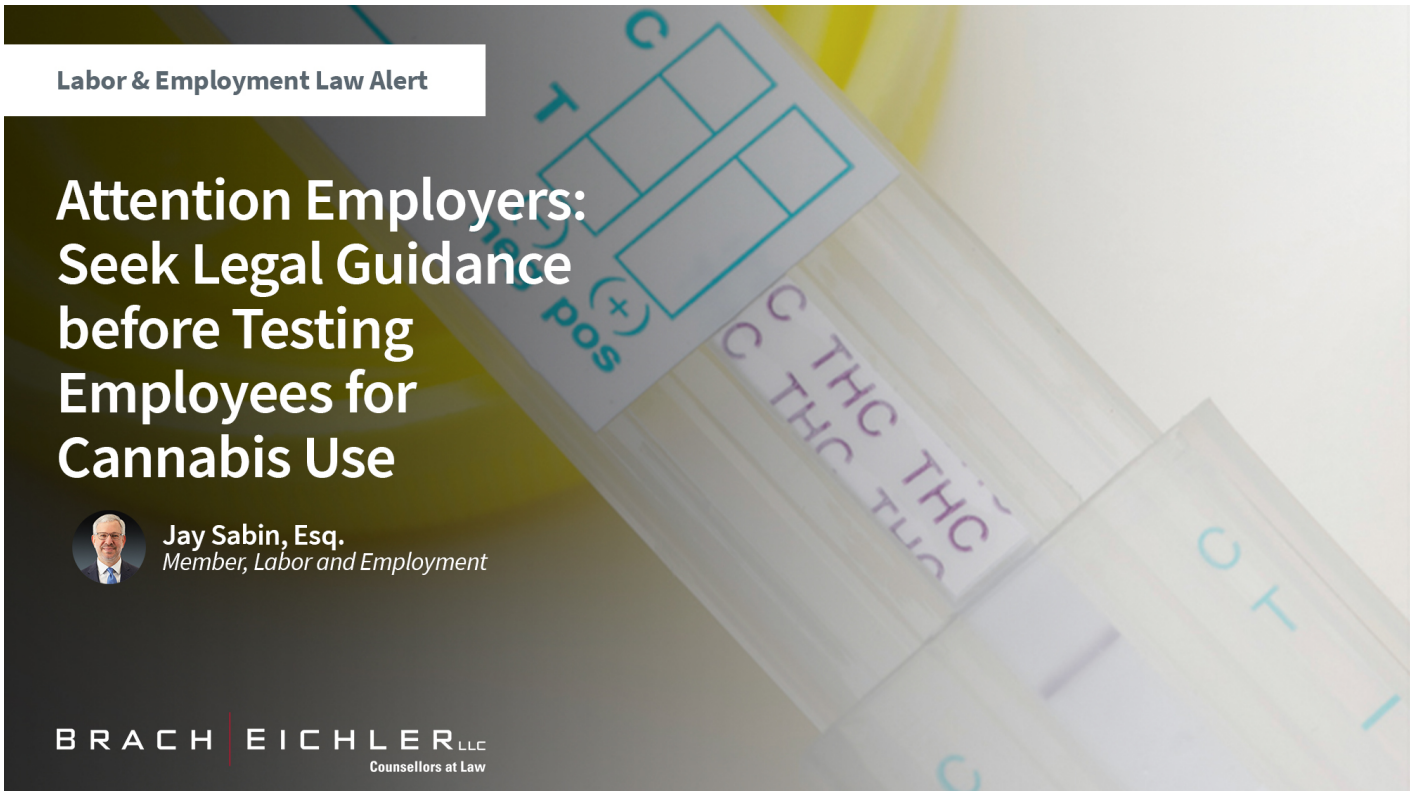
Attention Employers: Seek Legal Guidance before Testing Employees for Cannabis Use



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Two recent federal appellate court decisions – both upholding the right of an employer to test employees for cannabis – serve to remind New Jersey employers that, nearly four years after the enactment of the state's adult use law, it is entirely unclear whether a New Jersey employer may test an employee for cannabis use.

Last year, the Third Circuit Court of Appeals concluded that a Pennsylvania employer could fire an employee who tested positive for cannabis use without violating the federal Americans With Disabilities Act where the employer had no awareness of the employee's purported disability. The employer knew only that the employee had tested positive, even though according to the employee the reason for the positive test result was her CBD usage to alleviate her inflammatory autoimmune disease.

More recently, the Fourth Circuit Court of Appeals ruled to the same effect for a North Carolina employer. The court found that an employer was "free to implement a drug testing policy that results in the termination of an individual taking what the unchallenged drug test results showed to be an illegal drug—marijuana—to treat a disability, if that policy doesn't have, as a goal, the intentional exclusion of any individual taking a *lawfully prescribed* drug to treat a disability." The employer also had no duty to accommodate the employee where the employee never requested an accommodation prior to submitting to the drug test, according to the court.

We have previously written about the how New Jersey's adult cannabis use law limits an employer's ability to test employees for cannabis (except when federal law requires such testing). In short, the New Jersey law requires an individualized assessment of an employee's impairment before a test for cannabis can be administered, and the individualized assessment may be done only

by a certified assessor. The problem is that the New Jersey Cannabis Regulatory Commission has never issued the rules for obtaining such certification. In 2022, it tried to skirt the issue by publishing some non-binding guidance and in 2023 it promulgated a regulation that, notwithstanding the plain language of the statute, no individualized assessment is necessary until the Commission issues the certification rules.

In April 2023, a federal district court held that the Commission's 2023 regulation could not override the clear language of New Jersey's adult use law. Because the law prohibits an employer from taking an adverse employment action against an employee "solely due to the presence of cannabinoid metabolites in the employee's bodily fluid," a drug test result, standing alone without any individualized assessment of the employee's condition, could not sustain an employer's decision to fire the employee. However, a few weeks later a different federal judge concluded that an employee has no right to sue under the New Jersey adult use law for violation of this prohibition. Only the Commission could enforce it. This latter decision is now on appeal.

Given the great deal of legal uncertainty, a New Jersey employer should carefully consider its business case for testing employees for cannabis and obtain advice from an attorney about the legal risks. A cannabis test result indicates only that the person took a product containing THC sometime during the 30 or so days before the submission of the bodily fluid for testing. It does not indicate impairment at the time of testing.

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