Job Applicants Have No Right to Sue Under New Jersey's Adult-Use Cannabis Law



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Our recently published alert reminded New Jersey employers about the legal uncertainty with testing employees for cannabis use. Since its publication, the federal appeals court which covers New Jersey (the Third Circuit) has concluded that the testing of job applicants for cannabis, while perhaps against New Jersey law, cannot result in a jilted applicant suing the company that conducted the testing and rejected the applicant because of a positive cannabis test result. In legal parlance, applicants have no "private cause of action" under New Jersey's adult-use cannabis law, according to the Third Circuit. The court also held that the rejection of the applicant was not against New Jersey's public policy.

The court's opinion, and the dissenting opinion of one of the judges on the panel, provides lawyers with much to parse. For employers and their hiring and HR professionals, the opinion also raises several practical questions, such as:

- What benefit is there to testing job applicants for cannabis? A positive test means only that the applicant used a cannabis product at some point during the approximately 30 days before specimen submission. Applicants aware of mandatory testing may be able to time specimen submission to take place outside the 30-day window. Also, in jurisdictions like New Jersey where adult use of cannabis is permitted, eliminating applicants due to positive tests can materially narrow the pool of potential employees.
- For employers committed to testing job applicants, to what degree does the Third Circuit opinion eliminate legal risk? Will New Jersey state courts follow the Third Circuit conclusion or draw a different one?
- What is the likelihood that the Third Circuit's opinion will cause New Jersey's cannabis regulatory body, the Cannabis

Regulatory Commission, to pursue penalties or fines against employers which test applicants for cannabis? The Third Circuit conspicuously observed that the "Commission has exercised some, but seemingly not the full extent, of its authority with respect to [] employment protections" under New Jersey's adult-use cannabis law.

- What can be done to detect workplace impairment, particularly of employees in safety-sensitive positions. The Third Circuit opinion specifically distinguished the legal rights of applicants (or lack thereof) from those of employees.

For more information about cannabis in the workplace, please contact:

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**This is intended to provide general information, not legal advice. Please contact the authors if you need specific advice.*

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