

## The Saiber Construction Law Column: June 2024

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*Source: MetroBuilders' Construction Law Column*

With 24 states, including New Jersey, having legalized the recreational use of marijuana, it is not surprising that marijuana consumption poses significant challenges for all employers, particularly construction companies and builders concerned with job place safety and the use of heavy machinery and other equipment by employees. Employees working while under the influence of marijuana could affect an employee's performance and also lead to potential liability for the construction company. Very few cases have been reported which discuss the challenges recreational use of marijuana poses to employers, but the issue was discussed in *Ceballos v. NP Palace, LLC*, a case decided by the Supreme Court of Nevada in 2022.

In *Ceballos*, which involved a casino and not a construction company, the court considered whether adult recreational marijuana use was protected under a Nevada statute that allowed employees to sue if they were discharged from employment for engaging in "the lawful use in this state of any product outside the premises of the employer during nonworking hours." The court ruled against the employee, finding that although recreational marijuana was decriminalized under state law, its possession is still a criminal offense under federal law. The court ruled that "because federal law criminalizes the possession of marijuana use in Nevada, plaintiff's use of the drug was not lawful in the state."

No New Jersey court has as yet addressed the issue considered by the court in *Ceballos*, but New Jersey has enacted a statute similar to that of Nevada. The New Jersey statute provides, in part, that "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."

However, the New Jersey statute further provides: However, an employer may 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.

The employer may use the results of the drug test when determining the appropriate employment action concerning the employee, "including, but not limited to dismissal, suspension, demotion, or other disciplinary action."

The legalization of the recreational use of marijuana by states is going to pose many challenges, particularly to employers. It therefore behooves both employers and employees to familiarize themselves with their state's statutes so each will know their respective rights.

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Each issue's Saiber Construction Law Column will discuss a recent decision by New Jersey courts or, like here, courts from other states which may be of interest to people in the construction industry.

The information in each article is not intended to be legal advice and may not be used as legal advice. Legal advice must be tailored to the specific circumstances of each case. Every effort has been made to ensure this information is up-to-date. The article is not intended to be a full and exhaustive explanation of the law in any area, nor should it be used to replace the advice of your own legal counsel.

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