



## ACCNJ LEGAL & INSURANCE UPDATE

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### ***What do Executive Orders 252 and 253 Mean for NJ Contractors?***

At the end of August, Governor Murphy issued a pair of executive orders that mandate COVID-19 vaccinations and/or testing requirements for workers employed in certain settings. Executive Order 252 applies to health care facilities and “high-risk congregate settings,” while Executive Order 253 applies to most public and private schools throughout the state. In each instance, contractors engaged on construction projects in these settings could be impacted by the applicable executive order. Below is a quick breakdown of each executive order and its application to construction contractors.

#### ***A. Executive Order 252 (Directs Vaccination or Testing Requirement for Workers in Health Care Facilities and High-Risk Congregate Settings)***

**Executive Order 252** imposes a mandatory vaccination requirement on “covered workers” working in several healthcare and high-risk congregate settings. A full list of covered settings can be found [HERE](#) under the heading “Health Care Facilities and High-Risk Congregate Settings.” The executive order defines “covered workers” as “*employees, both full- and part-time, contractors, and other individuals working in covered settings, including individuals providing operational or custodial services or administrative support.*” Note that this definition includes contractors. Therefore, contractors engaged on these sites should expect an owner-mandate to the extent such a policy has not already been imposed. Executive Order 252’s requirements go into effect September 7th.

#### ***B. Executive Order 253 (Instituting Vaccination or Testing Requirement for All Preschool to Grade 12 Personnel)***

**Executive Order 253** imposes almost identical requirements on “covered workers” who perform work in schools throughout the state. This includes all public and private elementary and secondary schools, including parochial preschool programs, charter, and renaissance schools. Like Executive Order 252, the definition of “covered workers” extends to contractors – however, Executive Order 253 contains an express carve-out for “one-time or limited duration repairs, services, or construction.” Therefore, the nature of the project could determine whether Executive Order 253 applies to a contractor’s activities. A project that entails a regular onsite presence is likely covered. Contractors should consult with their owner regarding the applicability of Executive Order 253, which goes into effect September 18th.

Finally, the [press release accompanying Executive Order 253](#) indicates Governor Murphy intends to extend vaccination and testing requirements to all State employees. We expect this will be addressed in a separate executive order. The press release and the [NJ COVID INFORMATION HUB](#) indicate such a requirement would go into effect October 18th. ACCNJ will keep members informed as to any potential impacts

## ***Employer's drug testing policy charged with violating nj recreational marijuana law***

One of the first lawsuits involving New Jersey's recreational marijuana law has been filed against an employer. The case is [Myers v. National DCP, LLC](#), and is currently being heard in a federal district court in New Jersey. The lawsuit claims the employer violated several laws (both State and federal) when the employer wrongfully terminated the employee over a positive marijuana test. Among the plaintiff's legal theories is a claim that such action violated New Jersey's Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act ("CREAMMA"). The lawsuit likely represents the first litigation involving CREAMMA and its implications for employer drug testing policies.

The plaintiff's CREAMMA claim relies on the fact that the positive test was not accompanied by a "physical evaluation." The complaint charged the employer with relying solely on the positive test, which is prohibited under CREAMMA. CREAMMA's requirement that a positive drug test be accompanied by a physical evaluation was one of the more controversial aspects of the new law. CREAMMA did not provide specific parameters for how that physical evaluation should be conducted and was silent on how it impacted existing drug testing policies that allowed employers to terminate employees over a positive test. Instead, the law indicated the New Jersey Cannabis Regulatory Commission (the "Commission") would issue regulations. Counsel for the employer relied heavily on this fact by pointing out that the plaintiff's claim should fail because rules for the physical evaluation had not been promulgated. In essence, there was no way for the employer to comply.

About two weeks after the employer put forth this argument, the Commission issued initial rules on August 19. Unfortunately, the rules contained little about employer drug testing practices – only stating that no physical evaluation is required until the Commission issues regulations addressing the topic. Despite the absence of employee drug testing rules, this development likely helps the defendant. The Commission's statements unequivocally make it clear that CREAMMA's physical evaluation requirement was not in effect when the employer took action against the employee. The case is currently set for a pre-motion conference on September 10th. Defendant's counsel will likely lean on the Commission's statements as grounds for dismissing the CREAMMA claim. ACCNJ will continue to monitor this litigation as well as any further developments involving recreational marijuana and employer drug testing.

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- **Design Build** – Two Part Series Coming in October (dates TBD): This two-part series will focus on (1) New Jersey's expansion of permissible design-build contracts, and (2) practical considerations for contractors when using the design-build delivery system.

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