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Dianna Houenou, Chairwoman
New Jersey Cannabis Regulatory Commission
Department of Health
P.O. Box 360
Trenton, NJ 08625-0360

Dear Chairwoman Houenou,

On behalf of the New Jersey Business & Industry Association, whose member companies employ 1 million people in this state, I am writing concerning the New Jersey “Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act” (“Act”) and its requirement that an employer-mandated drug test include a “physical evaluation.” We have previously submitted comments concerning an employer’s right- to ensure a drug-free workplace and sought clarification on who can offer classes to certify Workplace Identification Recognition Experts (WIREs). This letter supplements those previous submissions.

We are requesting that the Commission consider two regulatory changes:

- Allow for the “physical evaluation” to be done virtually;
- Accept the training and certification programs of nationally recognized impairment testing organizations as entities who can certify WIREs or the equivalents thereof.

These two changes, which are consistent with the Act, will improve workplace safety, allow for the expeditious implementation of the physical evaluation requirements, and save employers both time and money.

Throughout the legislative and regulatory process surrounding the legalization of recreational cannabis, NJBIA has been seeking ways to protect workplace safety in the most effective and efficient manner. Because the Act was passed with the requirement to perform a “physical evaluation” by a certified WIRE, or equivalent, in order to take an adverse employment action for cannabis impairment while working, we have been working within those constraints. We believe that use of virtual evaluations and new technologies are consistent with the provisions of the Act and should be explicitly allowed by the Commission when it adopts new regulations concerning drug testing and WIRE certifications.

While the Act requires that a “physical evaluation” be performed as part of a drug test, there is no requirement in the Act that this physical evaluation must be done in-person. Given the expansion and acceptance of telemedicine at both the state and

federal levels, the Commission should interpret the Act's requirement for a physical evaluation as allowing these evaluations to be done virtually. To disallow virtual evaluations would set the Commission apart from all other health care entities that now recognize telemedicine as an acceptable means of evaluating a health condition.

Further, advances in impairment recognition technology can be used as an extremely effective supplement to virtual physical evaluation. In fact, such technology is currently being used in New Jersey and throughout the nation by major corporations exactly for this purpose and to keep workplaces safe. These technologies can be the first line of observation to make a "reasonable suspicion" determination before a drug test is administered. These technological testing protocols actually serve as deterrents to impairment on the job and are much more effective in impairment recognition than an examination by a Drug Recognition Expert.

It is easier to understand what these technologies involve by providing examples of some that are in use. One such technology will test an employee's ability to work through an acuity test. Employees will be required to take an acuity test when they begin their employment. This sets a baseline level. Later, at the start of a workday, or perhaps when returning from lunch or at a periodic time, the employee will be required to take and pass the same test before being allowed to begin work. This acuity test can be taken on a tablet, computer, or even on a smart phone. If an employee passes the test (within an acceptable range of the baseline), the employee can begin work. If the employee fails the test, they would be required to retake the test.

A second failure of the test may require the employee to undergo a virtual physical and psychological evaluation. The person performing the evaluation is often a certified Medical Review Officer (MRO). The MRO will ask a series of questions and gauge responses to determine if the failed test is the result of a drug impairment or, perhaps, another reason (*e.g.*, lack of sleep, illness, emotional stress). If impairment is suspected, the employee may be asked to be evaluated by a licensed and certified physician and may be subject to a drug test (*e.g.*, saliva, blood).

The MRO or physician may also require the employee undergo an ocular scan, with equipment onsite, that can accurately measure drug impairment, including from cannabis. It is our understanding that this virtual protocol is highly effective in deterring and detecting cannabis impairment. It is also consistent with the requirements in the Act.

We also want to bring to your attention that there are national associations actively engaged in drug and cannabis testing protocols and these organizations train professionals, such as MROs and physicians, to detect and respond to impairment. Trade organizations like the Drug and Alcohol Testing Industry Association (DATIA.org) can play a key role in the development, delivery, and compliance associated with the WIRE program. The Commission can review these entities' program offerings and success rate, and under the Act, deem them as an approved private agency that can train WIREs or determine that their trained and certified professionals are the substantial equivalent of such certified

professionals. The bottom line is that there already exists a network of trained and certified professionals who can step right into the roles as WIREs or substantial equivalents.

To summarize, we are asking the Commission in its rules or other relevant documents to specifically allow the use of virtual physical evaluations and to allow for national associations with existing programs to be able to certify WIREs or deem their certified professionals the substantial equivalent.

We welcome the opportunity to discuss this matter further with your staff. Thank you for your continued consideration.

A handwritten signature in black ink, appearing to read "Ray. Cantor", with a long horizontal flourish extending to the right.

Raymond Cantor
Vice President of Government Affairs
New Jersey Business & Industry Association