

## **Alert** | Labor & Employment



October 2021

### **Cannabis and the Workplace: New York DOL Clears the Smoke with New Guidance**

With an increasing number of states legalizing the use of recreational marijuana, employment laws are being enacted to address marijuana possession and use.<sup>1</sup> One such state is New York. The New York Department of Labor (DOL) has issued [new guidance on adult cannabis use and the workplace](#). The guidance discusses changes to New York Labor Law (NYLL), Section 201-D, addressing topics such as when employers can and cannot test for marijuana, take adverse actions based on cannabis use, and make employment decisions based on positive drug tests. The DOL's position on the Marijuana Regulation and Taxation Act (MRTA) may surprise some covered employers — which include all public and private employers in New York state, regardless of size, industry, or occupation.

Now that recreational cannabis is legal in New York, the MRTA amended Section 201-D of the Labor Law to clarify that cannabis is now a legal consumable product when used in accordance with New York state law. As such, employers cannot discriminate against employees over the age of 21 based on their use of marijuana provided it takes place outside the workplace, outside working hours, and when not using the employer's equipment or property.

What does this mean with regard to drug testing, disciplinary actions, and other employment matters? Let's start with what employers can still do. First, employers may still prohibit (1) the use of cannabis at the workplace, including during meal and rest breaks, (2) the use of cannabis during periods an employee

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<sup>1</sup> This GT Alert does not address situations and scenarios that may arise surrounding medical use of cannabis.

may be “on-call,” and (3) the possession of cannabis on company property, including in leased and rented spaces, in company vehicles, or in other areas used by employees.

Additionally, employers may still take action against an employee for using cannabis outside of work if the employee’s ability to perform the duties or tasks of the job is impaired as a result, and/or the use of marijuana interferes with the employer’s ability to provide a safe working environment for others as required by state and federal occupational safety and health laws. There is no dispositive list of symptoms that may constitute “impairment.” But, if there are objectively observable indications that an employee’s performance is decreased or lessened, these may constitute articulable symptoms of impairment such that an employer may discipline the employee for using cannabis.

As an example, the DOL states that operating heavy machinery in an unsafe and reckless manner may be an articulable symptom of impairment and would also interfere with the employer’s ability to provide a safe working environment. The DOL notes, however, that certain symptoms may also be an indication that an employee has a protected disability, even if such disability is unknown to the employer. If an employer learns of a disability in this instance, the employer should proceed to engage in an interactive process to determine if an accommodation is needed and can be reasonably provided.

So, what new restrictions bind employers now that recreational cannabis use is legal in New York? First and foremost, an employer cannot test for cannabis unless they are permitted to do so based on the provisions of Labor Law § 201-D(4-a) or other applicable laws. This necessarily means that employers should not test for recreational marijuana use unless: (1) the employer’s actions were required by state or federal statute, regulation, ordinance, or other state or federal governmental mandate; (2) the employee is impaired while working or the articulable symptoms of impairment interfere with the employer’s obligation to provide a safe and healthy work place as required by state and federal safety and health laws; or (3) the employer’s actions would require such employer to commit any act that would cause the employer to be in violation of federal law or would result in the loss of a federal contract or federal funding.

However, this does not mean an employer can test for cannabis simply because federal law allows testing, or does not expressly prohibit it. Rather, an employer can drug test an employee if federal or state law *requires* drug testing or makes it a mandatory condition of the employee’s position (e.g., mandatory drug testing for drivers of commercial motor vehicles (498 CFR Part 382); or mandatory drug testing for for-hire vehicle motor carriers (NY Vehicle and Traffic Law § 507-a)).

Employers also may not use drug testing (for marijuana) as a basis for an articulable symptom of impairment to allow the employer to take action against the employee. This means that a test for cannabis usage cannot serve as the basis for an employer’s conclusion that an employee was impaired by the use of cannabis, nor may an employer refuse to hire, employ or license, or discharge an employee based exclusively on a positive (for marijuana) drug test. Similarly, the smell of cannabis, on its own, is not evidence of an articulable symptom of impairment against which an employer may take action. Only symptoms that provide objectively observable indications that the employee’s performance is decreased or lessened may be cited in support of “impairment.”

Employers also cannot prohibit the use of cannabis outside the workplace unless permitted to do so under Labor Law § 201-D(4-a). Additionally, employers cannot require employees to promise not to use cannabis as a condition of employment such that employees waive their rights under NYLL § 201-D.

Finally, to the extent that an employee is found to have used cannabis at work or to be impaired by use of cannabis while at work, this does not mean an employer must terminate that individual's employment. Although an employer may take action against an employee in these circumstances, it is not required to do so. Similarly, employers are not required to rehire any former employee who was terminated due to cannabis use prior to its legalization.

Outside certain articulable circumstances under the law, it appears the DOL has taken a similar stance on marijuana as it has with alcohol, and employers may want to consider treating use (and misuse) of those substances similarly.

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