

RECREATIONAL CANNABIS LEGALIZED IN NEW YORK STATE: EMPLOYMENT CONSIDERATIONS

Hodgson Russ Labor and Employment Alert
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On March 31, 2021, Governor Cuomo signed the “Marihuana Regulation and Taxation Act” (“MRTA”) which significantly impacts the ability of New York employers to maintain a drug-free workplace.

Under the new legislation, New York employers can treat their employees’ recreational cannabis use in the same manner as they do alcohol use: an employer may exclude cannabis from the workplace and prohibit employees from being impaired at work and on working time.

Specifically, MRTA amends Section 201-d of the New York Labor Law to protect an employee from job discrimination based on the “legal use of consumable products, *including cannabis in accordance with state law,*” where such use is outside of work hours, off the employer’s premise, and without the use of the employer’s equipment or other property.

MRTA does not restrict employers from complying with obligations they may have under federal contracts or federal or state law, which may require, for example, pre-employment or random testing for cannabis and maintaining a drug-free workplace in a manner that would otherwise violate MRTA.

The lack of adequate testing for cannabis impairment, combined with this new statutory protection, complicates the drug-testing framework for employers. While a breathalyzer test will accurately show whether an employee has recently consumed alcohol, there is no analogous test to determine impairment for cannabis. Thus, someone who used cannabis may test positive days or even weeks after the use. The law appears to address this by expressly stating that an employer may take action related to an employee’s use of cannabis, where the employee:

manifests *specific articulable symptoms while working* that *decrease or lessen the employee’s performance* of the duties or tasks of the employee’s job position, *or* such specific articulable symptoms *interfere with an employer’s obligation to provide a safe and healthy work place*, free from recognized hazards, as required by state and federal occupational safety and health law.

So, an employer can discipline an employee for being impaired by cannabis while working on the basis of “specific articulable symptoms” (e.g., slurred speech, slow reaction time, etc.) that decrease or lessen the employee’s performance of his or her

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job duties, even in the absence of a positive drug test.

In this new paradigm, random drug testing may be problematic if not otherwise required by applicable law or federal contract. A positive cannabis test, without the employee having manifested any specific symptoms of impairment may not support an adverse employment action. Same goes for post-offer, pre-employment testing for cannabis, as there would arguably be no specific articulable symptoms while working at the pre-employment stage. A positive test result following post-accident testing may be a sufficient basis to discipline an employee in some circumstances, as long as the employer can identify the specific articulable symptoms the employee exhibited while working.

Employers must also be mindful that cannabis use for specific medicinal purposes has been, and continues to be, permissible under state law. Thus, employers must continue to consider whether a reasonable accommodation should be made in the event an employee cannot perform the essential functions of his or her position due to his or her use of medical cannabis.

It is also important to note that, while recreational and medical cannabis are now legalized in New York State, cannabis is still classified as a Schedule I drug under federal law, which means that it is not legal under federal law for an individual to use, possess, or grow cannabis for any purpose. MRTA is in tension with federal law, raising interesting questions about which law governs. Nonetheless, until there is clarity from the courts regarding this apparent conflict, we strongly recommend that all employers comply with the requirements of MRTA.

In light of the foregoing, all NYS employers should revisit their drug use and testing policies and procedures to bring them into compliance with the new obligations of MRTA. More information about the other elements of the MRTA can be found [here](#).

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