NYS DEPARTMENT OF LABOR ISSUES GUIDANCE ON ADULT USE CANNABIS AND THE WORKPLACE

Hodgson Russ Labor & Employment Alert
October 26, 2021

As we previously reported, the New York Marihuana Regulation and Taxation Act ("MRTA") amended Section 201-d of the New York Labor Law ("Section 201-d") to create new employment protections for users of cannabis. Specifically, Section 201-d prohibits discrimination based on, among other things, an individual's "legal use of consumable products" or "legal recreational activities," both of which now include "use of cannabis in accordance with state law," so long as such use occurs "outside work hours, off of the employer's premises, and without use of the employer's equipment or other property." However, the MRTA added three express exceptions related to cannabis use, allowing employers to take action where:

- "[T]he employer's actions are required by state or federal statute, regulation, ordinance, or other state or federal governmental mandate";
- Failure to act "would require such employer to… [violate] federal law or would result in the loss of a federal contract or federal funding"; or
- "[T]he employee is impaired by the use of cannabis," as defined by the statute.

The New York State Department of Labor ("NYSDOL") recently issued guidance titled "Adult Use Cannabis and the Workplace." The guidance, which is available here, addresses some of the key issues under the MRTA and provides helpful insight on NYSDOL's interpretation of the amended Section 201-d. Key takeaways from the guidance are as follows:

Illegal use of cannabis and use of cannabis by out-of-state workers and non-employees are not protected

NYSDOL's guidance makes clear that only an employee or applicant's legal use of cannabis is protected by Section 201-d. Because the MRTA allows for use of cannabis only by individuals who are 21 or older, employers may take adverse action for cannabis use by an employee or applicant under 21 years of age.

NYSDOL also indicates that the MRTA and amended Section 201-d "only apply to employees employed within the State of New York" and therefore do not protect employees who work remotely in another state that has different laws surrounding cannabis use. Multi-state employers should consult with counsel to determine what,

Attorneys

Luisa Bostick
Joseph Braccio
Glen Doherty
Andrew Drilling
Ryan Everhart
Andrew Freedman
Peter Godfrey
John Godwin
Charles H. Kaplan
Karl Kristoff
Christopher Massaroni
Elizabeth McPhail
Lindsay Menasco
Kinsey O'Brien
Jeffrey Swiatek
Michael Zahler

Practices & Industries

Labor & Employment

if any, cannabis-related employment protections apply to employees working in other states.

The guidance also confirms that Section 201-d does not apply to bona fide independent contractors, volunteers, and other individuals who are not current or prospective employees under the New York Labor Law.

Employers have latitude to prohibit cannabis use during work hours, on employer premises, or while using employer equipment

Consistent with the statute, the guidance reiterates that employers can prohibit use of cannabis during "work hours," which includes "all time, **including paid and unpaid breaks and meal periods**, that the employee is suffered, permitted or expected to be engaged in work, and all time the employee is actually engaged in work" (emphasis added). According to the guidance, this is true even if the employee is permitted to leave the worksite during the break or meal period. The guidance also indicates that cannabis use can be prohibited during "time that the employee is on-call."

Further, employers may prohibit employees from using or possessing cannabis at any time they are on the worksite, regardless of whether they are on or off duty. This includes not just employer-owned property, but also leased and rented space, and any areas used by employees within such property. Notably, NYSDOL does not consider an employee's home that is used as a remote workspace to be a "worksite" for purposes of Section 201-d. However, employers may take action if an employee exhibits articulable symptoms of impairment that meet the Section 201-d standards while working remotely.

Employers can also prohibit use or possession of cannabis that involves use of the employer's property or equipment, including company vehicles. This is true even where the property or equipment is used off-duty, such as on the evenings or weekends.

Employers should revisit their current policies related to drug use to ensure that they are consistent with Section 201-d, as amended. Moreover, since employees may not have a clear understanding of the law and its impact on the workplace, policies should be clear that cannabis use during working hours, on employer premises, or while using employer equipment is prohibited and may result in disciplinary consequences.

Drug testing is prohibited unless one of the exceptions applies

Perhaps the most surprising part of the guidance is NYSDOL's position that **employers cannot test for cannabis unless one of the Section 201-d cannabis exceptions applies**. This means that, according to NYSDOL, an employer cannot require an employee or applicant to undergo a test for cannabis unless: (1) it is required to do so by federal or state law; (2) failure to do so would result in a violation of federal law or result in the loss of a federal contractor of federal funding; or (3) the employee manifests specific articulable symptoms as set forth in the statue. According to NYSDOL, the fact that an employer may be expressly permitted to test under federal law, such as the Drug Free Workplace Act of 1988, has no bearing on the analysis.

There is no fixed definition of "specific articulable symptoms" under Section 201-d, but smell of cannabis and a cannabis test are insufficient, at least on their own

Section 201-d, as amended by the MRTA, allows employers to take action against an employee who, while working, manifests "specific articulable symptoms" of cannabis impairment that either: (1) decrease or lessen the employee's performance of his or her tasks or duties or (2) interfere with the employer's obligation to provide a safe and healthy workplace as required by state and federal occupational safety and health laws. The term "specific articulable symptoms" is not defined in the statute, but the new guidance provides some insight on how NYSDOL interprets that term. Specifically, the guidance states: "There is no dispositive and complete list of symptoms of impairment. Rather, articulable symptoms are objectively observable indications" of impairment.

NYSDOL's guidance provides one example of specific articulable symptoms, as it states: "the operation of heavy machinery in an unsafe and reckless manner may be considered an articulable symptom of impairment." NYSDOL also makes clear that "[t]he smell of cannabis, on its own, is not evidence of articulable symptoms of impairment." Further, because a positive test for cannabis does not demonstrate the employee's current level of impairment, NYSDOL takes the position that a positive cannabis test "cannot serve as a basis for the employer's conclusion that the employee was impaired by the use of cannabis."

NYSDOL also cautions employers that articulable symptoms consistent with cannabis impairment may also be an indication that an employee has a protected disability and therefore may trigger employer's obligations under disability accommodations rules.

Existing policies and employee waivers do not give employers an "out" from complying with Section 201-d

Finally, NYSDOL's guidance indicates that employers cannot, by policy, prohibit off-duty cannabis unless one of the Section 201-d exceptions applies. This is true even if the policy pre-dates the MRTA and its amendment to Section 201-d. Further, NYSDOL states that employers cannot require employees to waive their Section 201-d rights as a condition of hire or continued employment.

If you have any questions on the employment-related provisions of the MRTA and how it may impact your business and workforce, please contact John Godwin (716.848.1357), Lura Bechtel (416.595.2693), Kinsey O'Brien (716.848.1287), or any member of Hodgson Russ's Labor & Employment Practice.