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New York Department of Labor Issues Guidance on Cannabis and the Workplace

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The New York State Department of Labor ("NYDOL") has issued FAQ guidance addressing common questions regarding recreational cannabis use by employees in and outside of the workplace in light of the enactment earlier this year of the Marijuana Regulation and Taxation Act ("MRTA").

The MRTA legalized the use of recreational marijuana for individuals ages 21 and older. Notably for employers, the law also amended Section 201-d of the New York Labor Law – which prohibits discrimination by an employer against an employee because of certain lawful outside work activities – to include protections for recreational cannabis use. As such, employers are now prohibited from discriminating against employees based on their use of cannabis outside of the workplace, outside of work hours, and where use does not involve the employer's equipment or property.

Key takeaways from this guidance are discussed below.

Applicability

The guidance makes clear that the prohibition on discrimination on the basis of cannabis use applies to ***all*** public and private employers in New York State, regardless of size, industry, or occupation. However, both the MRTA and Section 201-d only apply to employees and the protections therefore do not extend to independent contractors and volunteers.

Moreover, the guidance emphasizes that neither the MRTA nor Section 201-d protect the ***illegal*** use, sale, or transportation of cannabis. As such, the laws do not provide cannabis-related protections for employees who are under the age of 21, as they are presently prohibited from using recreational cannabis in New York.

Cannabis Use at Work or During Work Hours

Under the MRTA, employers generally have broad discretion to prohibit cannabis use at the worksite during work hours. The guidance states that employers may also prohibit employees from possessing cannabis at the worksite or otherwise on the employer's property, including in company vehicles, rented space, and areas used by employees on company property (*e.g.*, lockers, desks). The guidance also states that "work hours" during which employers may prohibit cannabis use include:

1. Time that an employee is on-call or "expected to be engaged in work;" and
2. 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."

However, employers cannot prohibit the use of cannabis while employees are on leave unless the employer is permitted to do so pursuant to Section 201-d(4-a), as discussed further in the next section.

Further, the NYDOL does ***not*** consider an employee's private residence used for remote work to be a "worksite" within the meaning of the statute. That said, employers may institute a general policy prohibiting cannabis use during work hours and take adverse action against an employee exhibiting articulable symptoms of impairment (discussed further below), even while an employee is working remotely.

Drug Testing and Other Actions Based on Workplace Impairment

Section 201-d(4-a), as amended by the MRTA, generally prohibits employers from taking adverse action against employees for their use of legal cannabis outside of the workplace and outside of working hours work hours, except where:

1. An employer is required to take such action by state or federal law;
2. The employer would otherwise be in violation of federal law or would lose a federal contract or federal funding; or
3. The employee, while working, manifests ***specific articulable symptoms of impairment*** that either decrease or lessen the employee's performance or interfere with the employer's obligation to provide a health and safe workplace.

Relatedly, the guidance expressly states that employers are also prohibited from drug testing employees for cannabis unless one of the above enumerated exceptions applies.

Further, regarding the second exception, the guidance states that employers may only test an employee for cannabis if a state or federal law ***requires*** drug testing or makes it a mandatory requirement of the position. Employers cannot rely upon the second exception to test an employee for cannabis merely because it is allowed or not prohibited by law.

The guidance also provides additional information regarding what is meant by "specific articulable symptoms of impairment." Under the MRTA, an employer is not prohibited from taking adverse action against an employee if the employee is impaired by cannabis while working, regardless of the employer has adopted an explicit policy prohibiting cannabis use. According to the guidance, to satisfy the "impairment" standard, employers may only cite "symptoms that provide objectively observable indications that the employee's performance of the essential duties or tasks of their position are decreased or lessened." This may include, for example, the operation of heavy machinery in an unsafe or reckless manner.

However, the guidance states that the smell of cannabis, on its own, does not qualify as a "specific articulable symptom of impairment." Further, a drug test that is positive for cannabis also cannot be used to demonstrate that an employee was impaired by cannabis at work, as such tests do not demonstrate current impairment.

Takeaways

The provisions of the MRTA governing cannabis use and the workplace took effect immediately upon enactment in March 2021. The guidance makes clear that employers are not permitted to maintain previously existing policies that prohibit cannabis use outside of the workplace in violation of the MRTA, unless permitted to do so pursuant to Section 201-d(4-a). Employers should therefore review their workplace policies and practices to ensure compliance with these recent requirements.

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