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Guidance from NY Department of Labor Clears the Smoke Around Adult-Use Cannabis and the Workplace

By Matthew Berger

When New York passed the Marijuana Regulation and Taxation Act (MRTA) in March 2021, the state's employers were immediately prohibited from discriminating against workers based on the legal use or possession of marijuana products while off duty and outside the workplace, subject to a few limited exceptions. In a prior [alert](#), we provided answers to some commonly asked questions, but without any guidance from the New York Department of Labor (DOL), many questions were unanswerable.

Thankfully, the DOL has now issued [guidance](#) in the form of Frequently Asked Questions (FAQs) that address the recreational use of marijuana products by employees both in and outside the workplace.

To assist employers in understanding this guidance, we have drafted our own set of FAQs (see below) that outline in concrete terms how to address the issues most likely to arise.

Background

MRTA amended Section 201-D of the New York Labor Law – which prohibits discrimination against certain “off-duty” conduct by employees, including the use of certain legal consumable products such as alcohol and tobacco – to prohibit discrimination against adult employees who consume cannabis products outside the workplace and during non-working hours. Employers are now generally prohibited from refusing to hire an applicant, or discipline or terminate an employee because that applicant/employee lawfully consumed marijuana

outside the workplace during non-work hours when the consumption of marijuana does not impact the employee's ability to perform necessary job duties.

Applicability

The DOL guidance makes clear that the MRTA and Section 201-D apply to all public and private employers in New York, regardless of size, industry or occupation. But they do not apply to individuals who are not employees, such as independent contractors and volunteers. Nor do they apply to employees who work remotely in other states with different marijuana laws. Further, because the MRTA and Section 201-D protect only the legal use, sale and transportation of marijuana products, these laws do not provide protections for employees under the age of 21 for whom the use of marijuana products remains illegal in New York (except for those with a medical prescription).

Permitted Employer Actions

As noted in our prior [alert](#), notwithstanding the fact that the MRTA and Section 201-d prohibits discrimination against employees who legally use marijuana, employers must still take into consideration the health and safety of their employees and customers by ensuring that employees are not performing duties under the influence of any substance – legal or illegal – that could impair their judgment or performance. In fact, the MRTA and Section 201-D ensure that employers are not required to allow employees

unfettered use of marijuana that may impact their work performance.

Thus, under Section 201-D(4-a), employers can still prohibit employee conduct based on an employee's use of marijuana if:

- the employer is or was required to take action based on New York State or federal law, regulation, ordinance or any other New York State or federal governmental mandate.
- The employer's failure to act would cause the employer to be in violation of federal law.
- The employer's failure to act would cause it to lose a federal contract or federal funding.
- The employee, *while working*, manifests specific articulable symptoms of marijuana impairment that decrease or lessen the employee's performance of their tasks or duties.
- The employee, *while working*, manifests specific articulable symptoms of marijuana impairment that interfere with the employer's obligation to provide a safe and healthy workplace, free from recognized hazards, as required by state and federal occupational safety and health laws.

Employer Takeaways

New York employers that have not already done so should review their drug and alcohol policies, including any drug testing policies, to ensure compliance with the MRTA. Any policies that prohibit the lawful use of marijuana while employees are off-duty or off-premises should be removed unless any applicable exceptions (discussed above) apply. Employers may still discipline employees for using or possessing marijuana at work or working under the influence if it negatively affects performance or safety. If employers have any questions on how to handle suspected marijuana use in the workplace, please

speaking with counsel before taking any adverse action.

Our MRTA FAQs for the Employer

To guide employers in understanding the DOL's FAQs, we created our own set of MRTA FAQs that distill the most important aspects of the guidance, broken into four categories.

Marijuana Use at Work or During Work Hours

Q: Can employers prohibit the use of marijuana during rest and meal breaks?

A: Yes. The guidance notes that employers may prohibit cannabis during "work hours," which "for these purposes means 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." Further, the DOL considers rest and meal breaks to be "work hours" even if the employee leaves the worksite during their breaks.

Q: Can employers prohibit the use of marijuana while an employee is on-call?

A: Yes. The guidance contemplates that the time an employee is on-call is considered "work hours" and, therefore, employers may prohibit employees from using marijuana during that time, even if they are not actually performing any work.

Q: Can employers prohibit employees from possessing marijuana at work?

A: Yes. Even though, under the MRTA and Section 201-D, individuals are allowed to lawfully possess certain quantities of marijuana, employers may prohibit employees from bringing marijuana onto the employer's property — including space that is leased or rented by the employer — company vehicles, and areas used by employees on employer property, such as lockers and desks.

Q: Can employers prohibit employees who work from home from using marijuana?

A: According to the guidance, the DOL does not consider an employee's home that is being used for remote work to be a "worksites," such that employers generally cannot prohibit employees from using marijuana at home. However, employers can take adverse action if an employee exhibits articulable symptoms of impairment during work hours.

Actions Against Employees

Q: Can an employer discipline or terminate an employee for use of legal marijuana products while on the job?

A: Yes. Employers are not prohibited from taking employment actions against an employee — regardless of whether the employer has a policy prohibiting the use of marijuana during working hours — if the employee manifests specific articulable symptoms of marijuana impairment that (a) decrease or lessen the employee's performance of their tasks or duties, and/or (b) interfere with the 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 laws. Additionally, even if an employee does not exhibit specific articulable symptoms of impairment, employers can discipline employees who use marijuana during work hours or while on or using the employer's property.

It is important to note, however, that the guidance explicitly states that "observable signs" of use — for example, an employee who smells like marijuana or has bloodshot eyes — in the absence of specific articulable symptoms of impairment cannot form the basis for an adverse employment action. Accordingly, employers can discipline an employee *only* if they actually observe specific articulable symptoms of impairment or witness an employee using marijuana during working hours or on company property.

Q: What are "articulable symptoms of impairment"?

A: The guidance does not provide a list of symptoms of impairment. According to the guidance, "articulable symptoms of impairment are objectively observable indications that the employee's performance of the duties of the position of their position are decreased or lessened." Employers should be cautious before assuming that an employee is impaired, however, because such articulable symptoms could also be an indication that an employee has a disability protected by federal, state, or local law of which the employer is unaware. Thus, even if an employee exhibits articulable symptoms of impairment, employers should not rush to judgment and assume that the employee is under the influence of marijuana.

Q: If an employer suspects an employee has consumed marijuana, can the employer use drug testing as a means for establishing an articulable symptom of impairment?

A: No. Drug tests that test for marijuana do not currently demonstrate impairment, since they only show historical use of marijuana and an employee who tests positive could have lawfully used marijuana outside of work hours and off company property.

Workplace Policies Restricting the Use of Marijuana

Q: Can employers prohibit the use of marijuana outside the workplace?

A: Generally, no. Employers may only prohibit the use of marijuana outside the workplace if the employer is permitted to do so based on one of the limited reasons set forth in Section 201-D(4-a).

Q: Can employers condition employment on a promise by employees that they will not use marijuana?

A: No. The DOL guidance makes clear that employers cannot require that applicants or employees waive their rights under Section 201-D as a condition of hire or continued employment.

Drug Testing

Q: Can employers drug test employees for marijuana?

A: Generally, no. The guidance provides that employers may not drug test employees *unless* the employer is permitted to do so based on one of limited exceptions set forth in Section 201-D(4-a) or other applicable laws.

Q: Can employers drug test employees for marijuana if federal law allows for drug testing?

A: No. Employers cannot test employees for marijuana simply because it is allowed or not prohibited under federal law. However, employers are permitted to test for marijuana if it is *required* under federal or state law or federal or state law makes it a *mandatory* requirement for the position at issue.

For more information about this alert, please contact Matthew C. Berger at mberger@foxrothschild.com or 646.601.7658, or any member of the firm's New York Labor & Employment Group.

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