

LABOR NEWS

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Did You Know?

Legalization of Recreational Marijuana & Employers

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On March 31, 2021, Governor Andrew Cuomo signed the Marijuana Regulation and Taxation Act (“MRTA”) into law, which legalizes the production, sale, and use of marijuana in New York state.

How will MRTA affect employers? First, MRTA immediately amended New York Labor Law § 201-d, which generally prohibits discrimination against employees for their lawful, off-duty conduct.

Section 201-d was enacted in the early 1990s to combat discrimination against tobacco users and alcohol drinkers. It prohibits an employer from refusing to hire, employ, or license, or discharging an employee because of his or her (1) individual political activities outside of working hours and off the employer’s premises; (2) legal use of consumable products before and after the employee’s working hours and off the employer’s premises; (3) legal recreational activities outside work hours and off the employer’s premises; and (4) membership in a union or any exercise of rights created under the National Labor Relations Act or the New York Civil Service (*aka Taylor*) Law.

Therefore, it is now illegal for an employer to discriminate against an employee based on his or her marijuana use, 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.

As usual, most laws have exceptions. An employer does not violate § 201-d when he or she takes action related to marijuana use when:

- the employer’s actions were required by state or federal statute, regulation, or mandate;
- an employee is impaired because of marijuana use (*meaning they exhibit specific articulable symptoms while working that decrease or lessen their performance or interfere with the employer’s obligation to provide a safe workplace*); or

- the employer's action would require him or her to violate federal law or would result in the loss of a federal contract or funding.

Moreover, MRTA is not intended to:

- limit an employer's authority to enact and enforce policies about marijuana in the workplace;
- allow driving under the influence of marijuana;
- allow individuals to engage in conduct that endangers others;
- allow smoking marijuana in a location where smoking tobacco is prohibited; or
- require an individual to engage in conduct that violates federal law, to exempt anyone from any requirement of federal law, or to pose any obstacle to the federal enforcement of federal law.

Second, the implications of MRTA will likely affect an employer's use of marijuana testing. Pre-employment testing, unless otherwise required by law, is likely unwarranted because the test result will only reveal off-duty conduct. Marijuana testing during employment will also be complicated because it may be difficult to prove that a positive result is not due to lawful, off-duty marijuana use. Someone who used marijuana may test positive days or even weeks later.

Interestingly, although MRTA legalized recreational marijuana use in New York state, it is still illegal under federal law for an individual to use, possess, or grow marijuana for any purpose. MRTA conflicts with federal law, which raises interesting questions about which law governs and how courts will resolve this conflict.

Given the above issues, we encourage employers to revisit their drug use and testing policies and bring them into compliance with the new obligations of MRTA. Employees who believe that their rights under MRTA have been violated should confer with an experienced employment attorney.

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