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Your Counsel: Adult cannabis use and the New York workplace

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Lawyers tend to limit their practice to a few areas. Nonetheless, people come to us with myriad problems — many of which fall outside our expertise.

Through this column, we provide practical information to help you assist those who have employment, disability benefit, workers' compensation, and related issues. This information also helps lawyers understand their rights and responsibilities as employers.

Here's what you need to know about adult cannabis use and the New York workplace.

1. Employees in New York are employed "at-will" unless they are represented by a union or have an individual employment contract. At-will employees can be fired for any reason, no reason, good reason, or bad reason. There is no wrongful termination in New York.

2. There are exceptions to employment-at-will. The best-known exception is unlawful discrimination, that is, an employer may not take an adverse employment action against an employee if that action is motivated by the employee's membership in a protected class (including, but not limited to, race, religion, sex, national origin, age, disability, and sexual orientation).

3. The New York Legal Activities Law (N.Y. Labor Law § 201-d) is another important exception to employment-at-will. Among other things, this statute prohibits discrimination against employees who engage in certain lawful recreational (e.g., sports, games, hobbies, etc.) and political activities (running for public office, campaigning for a candidate for public office, etc.).

4. On March 31, 2021, former Gov. Andrew Cuomo signed the Marijuana Regulation and Taxation Act ("MRTA"). This law essentially requires that most employers treat an employee's recreational cannabis use in the same way they treat alcohol use, that is, an employer may exclude cannabis from the workplace and prohibit employees from being impaired at work and on working time.

5. MRTA amended the New York Legal Activities 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. A motivating factor for the original passage of the New York Legal Activities Law was to prohibit discrimination against employees who smoked or chewed tobacco.

6. Some New York employers may prohibit adult recreational cannabis use (even outside of work hours, off the employer's premise, and without the use of the employer's equipment or other property) where:

- The employer is/was required to take such action by state or federal statute, regulation, or ordinance, or other state or federal governmental mandate;
- The employer would violate federal law if it did not do so;
- The employer would lose a federal contract or federal funding; and/or
- The employee, while working, manifests specific articulable symptoms of cannabis impairment that: (a) decrease or lessen the performance of his or her tasks or duties; or (b) interferes with the employer's obligation to provide a safe and healthy workplace as required by state and federal workplace safety laws.

7. Only the legal use of cannabis by adults over the age of 21 is protected. MRTA does not protect the illegal use (e.g., by an employee under age 21), sale, or transportation of cannabis.

8. An employer may discipline or discharge an employee who is impaired by cannabis while working (even when the employer has not adopted an explicit policy prohibiting use). According to guidance by the New York State Department of Labor ["NYSDOL"]:

"… articulable symptoms of impairment are objectively observable indications that the employee's performance of the duties of their position are decreased or lessened. Employers are cautioned that such articulable symptoms may also be an indication that an employee has a disability protected by federal and state law (e.g., the NYS Human Rights Law), even if such disability or condition is unknown to the employer. Employers should consult with appropriate professionals regarding applicable laws that prohibit disability discrimination."

For example, the operation of heavy machinery in an unsafe and reckless manner may be considered an articulable symptom of impairment.

9. Employers cannot use drug testing as a basis for an articulable symptom of cannabis impairment. Stated simply, there is no reliable test available currently that demonstrates that an employee is impaired by cannabis such that it decreases or lessens the performance of his or her tasks or duties or interferes with the employer's obligation to provide a safe and healthy workplace.

10. Employers cannot fire an employee because he/she smells like cannabis. The NYSDOL says that the smell of cannabis, on its own, is not evidence of articulable symptoms of impairment under the New

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York Legal Activities Law.

11. Employers may, but are not required to, fire an employee who uses cannabis on the job or who manifests specific articulable symptoms of cannabis impairment that: (a) decrease or lessen the performance of the employee's tasks or duties; or (b) interferes with the employer's obligation to provide a safe and healthy workplace

12. Employers can prohibit employees from using cannabis during meal or break periods.

13. Employers can prohibit employees from using cannabis when they are on call.

14. Employers can prohibit employees from possessing cannabis at work. This includes the employer's property, leased and rented space, company vehicles, and areas used by employees within such property (e.g., lockers, desks, etc.).

15. The New York Attorney General may bring a legal proceeding on behalf of an employee to enforce the New York Legal Activities Law. In any such proceeding, the court may impose a civil penalty of $300 for the first violation and $500 for each subsequent violation.

16. The aggrieved employee may commence a lawsuit for equitable relief and damages. The statute of limitations for such a lawsuit is three years from the date of the alleged violation.

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