CANNABIS & EMPLOYMENT LAW ALERT

JUNE 11, 2021

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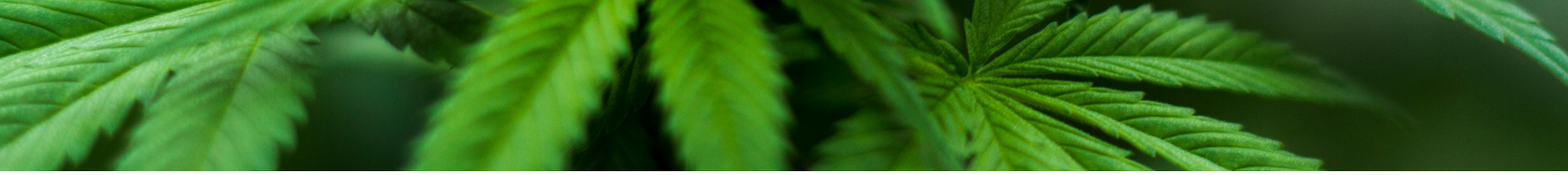
Cannabis and the Workplace

Following the lead of several other states, New York State legalized the use of recreational marijuana when Governor Cuomo signed the Marijuana Regulation and Taxation Act (the "Act") on March 31, 2021. Many questions surrounding the impact of the Act on businesses remain unanswered, and hinge on the establishment of a regulatory framework that will likely evolve over the next couple of years. In the meantime, employers should take note of some of the immediate implications that the legalization of marijuana will have on the workplace.

New York Labor Law § 201-d ("NY Labor Law") has provided a longstanding shield to protect employees from discrimination in the workplace based on their lawful, off-duty recreational activities. Recreational use of cannabis is now expressly included as one of those protected activities. In practical terms, this means that as long as an employee is not showing up to work impaired, or using cannabis during work hours or on company-owned property, then an employer cannot discriminate against that employee for recreational cannabis use. Employers also cannot fire or refuse to hire a potential employee based solely on a positive cannabis test result.

Notwithstanding the employee protections afforded by the NY Labor Law, the law does provide some leeway for employers. Employers are permitted to take adverse action when an employee "manifests specific articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position, or such specific articulable symptoms interfere with an 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 law." While the law does not specify what types of "specific articulable symptoms" would qualify, it would seem reasonable that if, for example, an employee is demonstrating slurred speech, slow reaction time, inability to walk straight, etc., the employer may have some protection if it takes an adverse action against an employee, with or without a positive marijuana test result.

Notably, the Act is at odds with federal law, which still treats cannabis as a Schedule I drug. The NY Labor Law appears to recognize this fact in excluding an employer's actions that "were required by state or federal statute, regulation or ordinance, or other state or federal government mandate."



The law also protects employers where their compliance with the law "would require such employer to commit any act that would cause the employer to be in violation of federal law, or would result in the loss of a federal contract or federal funding."

Drug Testing Policies

Due to the changes implemented by the Act and New York Labor Law, employers should review their drug-testing policies to assess whether they appropriately address the current state of New York law. The expansion of the recreational activities law to include recreational marijuana use does not change the fact that employers may maintain a substance-free workplace policy. Despite the broad protections of the law, employees are not suddenly permitted to appear for work impaired. Cannabis use can be prohibited during work hours, on company property, and while using an employer's equipment or other property. Further, an employer can take action against an employee who violates a substance-free workplace policy. This is consistent with the manner in which alcohol is typically handled in the workplace. Unlike alcohol, which can be almost immediately detected through a breathalyzer, there is currently no equivalent when it comes to rapid marijuana testing.

Additionally, marijuana can be detectable in the body for up to 90 days. This makes drug testing for marijuana of marginal value to employers; and may pose more of a risk than it is worth. Not only is there a lack of an accurate time-stamp on an employee's use, but also, employers risk liability if they take an adverse action due to cannabis use that may have taken place within the safe harbors of the NY Labor Law.

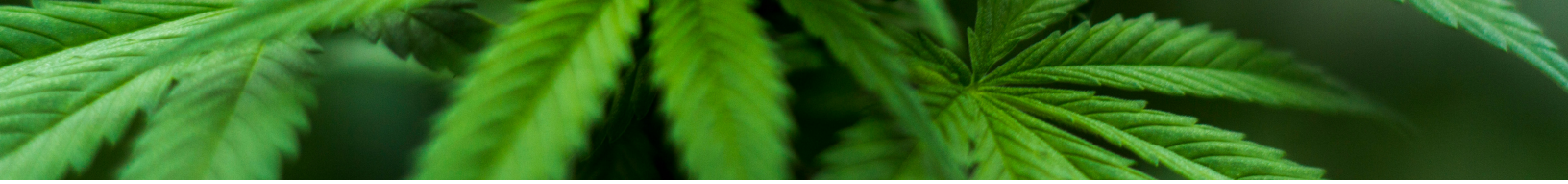
The law also provides for a private cause of action for individuals who believe they have been discriminated against because of their recreational cannabis use.

Balancing the risks and benefits of testing, employers may wish to consider omitting marijuana from any drug testing *unless* it is performed because of an accident and where there are specific articulable symptoms of actual impairment. Notably, pre-employment drug testing for marijuana is already prohibited in New York City.

Background Checks

Employers should also consider the implications of the Act on background checks. Under the Act, cannabis-related convictions will be automatically expunged from criminal records. As a result, such convictions cannot provide the basis for firing an employee or refusing to hire a potential candidate. However, it may take time for criminal records to accurately reflect the new status of such convictions. As such, employers should be cautious in reviewing the results of background checks to ensure that improper information is not a part of the decision making process.

Overall, employers should be mindful of their current workplace policies as they relate to cannabis use to ensure they are not in violation of NY Labor Law or the Act. The legal landscape surrounding the legalization of marijuana is at its genesis, and employers should remain flexible as regulations continue to develop.



Ruskin Moscou Faltischek, P.C. has formed a Cannabis Practice Group to help regional businesses and individuals understand and navigate the requirements of the newly-adopted New York State law legalizing the sale of cannabis. Please contact us with any questions or for assistance with any cannabis-related matters.

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