

New York's Legalization of Recreational Marijuana Will Have Immediate Impact on Employers

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Nearly eight years after the legislation was first introduced, on March 31, 2021 New York Governor Andrew Cuomo signed the Marijuana Regulation and Taxation Act (the "MRTA") into law, making New York the most recent state to legalize recreational marijuana. The MRTA takes effect immediately, even though the sale of recreational-use marijuana is not expected to become legal for another year or two, as the state still needs to create a regulatory framework for the cannabis industry.

Under the MRTA, adults who are at least 21 years old may possess up to three ounces of marijuana and up to 24 grams of concentrated marijuana, and are permitted to use marijuana and concentrated marijuana unless otherwise prohibited by state law. Of particular interest to employers, the MRTA specifically states that nothing in the law "is intended to limit the authority of . . . employers to enact and enforce policies pertaining to cannabis in the workplace" or "exempt anyone from any requirement of federal law or pose any obstacle to the federal enforcement of federal law." Under federal law, marijuana is still classified as a Schedule I controlled substance and therefore is not legal.

The MRTA also amends Section 201-d of the New York Labor Law ("NYLL") to protect an employee from discrimination if the employee uses marijuana outside of business hours and "off of the employer's premises and without use of the employer's equipment or other property." It further requires employers to "adhere to policies regarding cannabis use in accordance with" Section 201-d of the NYLL.

Notably, the MRTA provides some protection for employers as well. Employers are not considered to be in violation of Section 201-d of the NYLL if they take an action related to an employee's use of marijuana when:

- the employer's actions were required by state or federal statute, regulation or ordinance, or other state or federal government mandate;
- the employer's actions 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; or
- the employee is impaired by the use of cannabis.

"Impaired" under the MRTA means that the "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 workplace, free from recognized hazards, as required by state and federal occupational safety and health law." The MRTA does not define what constitutes "specific articulable symptoms." Additional guidance from the newly created Office of Cannabis Management may be forthcoming on this and other issues relating to the MRTA.

In addition, the fact that testing positive for marijuana is not listed under the exceptions above suggests that New York employers cannot take an adverse action against an employee based solely on a positive test for marijuana. Further, although pre-employment drug testing for marijuana has been prohibited in New York City (subject to certain exceptions) since May 2020, it appears that under the MRTA it will now be unlawful for all New York employers to reject an applicant based solely on a positive marijuana test.

The MRTA also expands New York's medical cannabis program. While medical marijuana has been legal in New York since 2016, prior to the MRTA, only a limited number of diseases (such as epilepsy and cancer) qualified patients for

medical marijuana use. Now, practitioners will have the discretion to recommend medical marijuana for *any* condition. Employers should be mindful of this expansion to the state's medical cannabis program, as "Certified Patients" (as defined by New York's Compassionate Care Act) who are prescribed medical marijuana are deemed to have a disability under the New York State Human Rights Law, and employers must reasonably accommodate an employee who is a "Certified Patient" as a result of his or her disability. However, nothing requires an employer to allow an employee to use marijuana in the workplace.

The MRTA will also impact the way that employers approach workers' compensation issues in New York, as the law provides that employees who use medical marijuana must be afforded the same rights, procedures and protections available and applicable to injured workers under the workers' compensation law when such workers are prescribed medications that may prohibit, restrict or require the modification or performance of their job duties.

Given the above, New York employers should carefully review and revise their drug and alcohol policies to ensure they are compliant with the MRTA, and should speak with employment counsel before taking any adverse action against an employee for cannabis use outside of work.

If you have any questions concerning New York cannabis laws, please contact **Blythe E. Lovinger** at (212) 407-7770, **Jonathan A. Wexler** at (212) 407-7732, **Grace U. Brankin** at (312) 609-7619 or any other Vedder Price attorney with whom you have previously worked.

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