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Into the Weeds: A Q&A for New York Employers About Marijuana Legalization

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For New York employers, the new state law that legalizes cannabis also modifies the New York Labor Law (NYLL) to impose restrictions on employers and add protections for employees concerning the recreational use of marijuana.

Signed into law by Gov. Andrew Cuomo on March 31, 2021, the New York Marihuana Regulation and Taxation Act¹ (the Act) legalizes for adults the personal possession and home cultivation of marijuana, allows for the expungement of certain marijuana convictions and sets up a framework for businesses to apply for grow and distribution licenses.

For employers, effective immediately, the Act prohibits discrimination against workers based on the legal use or possession of marijuana products while off duty and outside the workplace subject to a few exceptions discussed below.

The law also provides a private right of action for employees who claim to be harmed by such alleged discrimination.

Even before Gov. Cuomo signed the Act into law, the NYLL protected certain “off-duty” conduct by employees, including the use of “consumable products” such as alcohol and

tobacco. Now, the Act explicitly amends the NYLL to protect employees from discrimination based on the “legal use of consumable products, **including cannabis in accordance with state law**” (emphasis added) prior to the beginning or after the conclusion of the employee’s work hours, and off of the employer’s premises and without use of the employer’s equipment or other property.

In other words, an employer in New York State may not refuse to hire an applicant, or discipline or terminate an employee, because that applicant/employee lawfully consumed marijuana outside of the workplace during non-work hours when an applicant/employee is not using the employer’s equipment and the consumption of marijuana does not impact the employee’s ability to perform necessary job duties.

Notwithstanding the Act’s amendments to the NYLL prohibiting 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, and the Act

¹ Although the Act uses the spelling “marihuana,” this Alert will use the more common spelling “marijuana.”

ensures that employers are not required to allow employees unfettered use of marijuana that may impact their work performance.

The Act makes clear that an employer would not violate the NYLL by taking action based on an employee's use of marijuana if:

- the employer's actions were required by New York State or federal law, regulation, ordinance, or any other New York State or federal governmental mandate;
- the employee is impaired by the use of marijuana while working such that there is a decrease in the employee's performance of their job duties; or
- the employer's actions would require it to commit an action that would cause it to be in violation of federal law. The Act further provides that it is not intended to limit the ability of an employer to create and enforce policies pertaining to marijuana use in the workplace.

What restrictions, then, are employers permitted to impose on their employees concerning use of marijuana now that it is legal in New York and what other considerations do they need to take into account when implementing general workplace policies and practices? Below are some common questions and answers that have arisen since the Act's passage. While by no means comprehensive, they are a good place for employers to start to ensure compliance with the Act.

Q: Our company has a zero tolerance policy regarding drugs prohibited at the federal level. With marijuana being legalized in New York, does that mean our policy no longer applies?

It depends. If the policy prohibits use of marijuana outside of the workplace (*i.e.*, the policy includes general drug testing (vs. testing when an employee appears impaired in the workplace)), that policy very likely needs to be revised in light of the Act's amendment to permitted off-duty conduct.

However, if the policy currently only prohibits use of drugs and prohibited substances in the workplace, the policy likely still complies with the Act.

Q: Are customers or guests allowed to smoke marijuana on our premises?

Not necessarily. If your premises is a smoke-free property, you may apply that prohibition to all forms of smoking or vaping, including marijuana, on the premises.

Q: Are employees permitted to bring marijuana to the workplace?

Employees are permitted to bring marijuana to the workplace (but not use it) unless an employer has a policy in place prohibiting possession in the workplace. The Act allows employers to prohibit use and possession during work hours, on employer premises, and while using an employer's property or equipment. Exceptions may be required for medical use of marijuana, but as a general policy, employers may prohibit employees from bringing marijuana to work.

Q: Will employees be allowed to smoke marijuana on their break outside, then return back to work?

Generally, no. Employers may prohibit employees from using marijuana during working hours and take action against employees who use marijuana during working hours to prevent "impairment." Impairment is defined in the Act as an employee "manifest[ing] 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."

Q: If an employer suspects that an employee is under the influence of marijuana during

working hours, how should the employer handle this situation?

If an employee appears “impaired” (as defined above), the employer should speak with the employee to determine the cause of the impairment. If the employee admits they have used marijuana recreationally during working hours (or prior to arriving at work), the employer may rely on their normal disciplinary procedures. If, however, the employee claims they have used marijuana for medical purposes, the employer must then engage in the normal interactive process/cooperative dialogue that is required when an employee claims a disability (for more information about the cooperative dialogue process in New York City, please see our prior alert).

Q: What is the “labor peace agreement” component of the Act? Does that impact my business?

It is unlikely this component of the Act affects your business. Under the Act, any applicant for a license to grow, distribute, or sell cannabis products must enter a “labor peace agreement” with any union that seeks to organize its workers, which prohibits the employer from “campaigning” against a union’s organizing efforts or otherwise engage in activities that might dissuade employees from unionizing. Unless your business is involved in growing, distribution, or selling of marijuana, the “labor peace agreement” provision of the Act does not apply to your business.

Next Steps for Employers

New York employers should review their drug and alcohol policies, including any testing policies, to ensure compliance with the Act. Such revisions should include changes to off-duty conduct if necessary, as well changes to drug testing policies.

Additionally, employers should inform managers that they may still discipline employees for using or possessing marijuana at work or working under the influence if it negatively affects performance or safety, but New York City and State and Federal law still require the interactive process/cooperative dialogue for employees who claim marijuana use due to a disability. If there are any questions about the Act or how to handle suspected marijuana use in the workplace, please speak with counsel before taking any adverse action.