On October 8, 2021, the New York State Department of Labor (“NYSDOL”) issued guidance in the form of Frequently Asked Questions (“FAQs” or the “Guidance”) to assist employers in navigating the Marijuana Regulation and Taxation Act (“MRTA” or the “Act”) and in understanding what they can and cannot do. As we
previously reported, the MTRA, enacted on March 31, 2021, legalized recreational cannabis in the State. Of particular importance to employers, the Act amended New York Labor Law Section 201-D ("Section 201-D") to create new legal protections for employees who engage in off-duty, off-premises cannabis use.

The FAQs address several common workplace situations related to recreational cannabis use by employees, which we summarize below.

**Identifying “Specific Articulable Symptoms of Impairment”**

As amended by the MRTA, Section 201-D prohibits employers from discriminating against employees based on their use of cannabis outside of the workplace, outside of work hours, and without use of the employer’s equipment or property. The law, however, permits employers to take employment action against an employee for cannabis use, provided the employee “manifests specific articulable symptoms of impairment” on the job that either (a) “decrease or lessen the employee’s performance of the employee’s tasks or duties”; or (b) “interfere with the employer’s obligation to provide a safe and healthy workplace as required by state and federal workplace safety laws.”

The Act does not define “impairment,” and the FAQs acknowledge that there is “no dispositive and complete list of symptoms of impairment.” The FAQs advise employers to determine whether an employee is evidencing articulable symptoms of impairment based upon “objectively observable indications that the employee’s performance of the duties . . . of their position are decreased or lessened.” As an example, the Guidance explains that operating heavy machinery in an unsafe or reckless manner could be an articulable symptom of impairment. Of note, the Guidance cautions employers that objectively observable indications of impairment could “also be an indication of a disability[,]” thus tacitly suggesting that employers proceed cautiously before taking adverse action because of presumed cannabis impairment.

The FAQs emphasize that signs an employee may have used cannabis that do not demonstrate impairment, for example, the smell of cannabis, cannot be relied upon as the sole evidence of an impairment and cannot be the sole reason for disciplinary action against an employee. Similarly, a positive drug test cannot alone serve as the basis for concluding that an employee was impaired at work by the use of cannabis.

In other words, mere indications of cannabis use, such as odor, are not the same as signs of impairment and alone are insufficient to support an adverse employment action. An employee’s use of cannabis during work hours or while using employer property, however, does constitute grounds for discipline, even without signs of impairment.

**Drug Testing of Employees**

As we also previously reported, the New York City Human Rights Law prohibits pre-employment testing for cannabis. Although the MRTA does not ban testing for cannabis, the FAQs confirm that New York employers (outside the City’s five
boroughs) may not test employees for cannabis unless they can first point to an articulable symptom of impairment that lessens or decreases performance, or has a bearing on workplace safety. Thus as a practical matter, the MRTA essentially bars pre-employment and random drug testing for cannabis in New York, except where federal or state law requires—not merely permits—it for the employee’s position (e.g., federally mandated drug testing for drivers of commercial motor vehicles). Reasonable suspicion testing, i.e., where the employee manifests specific articulable symptoms of impairment, is allowed. The Guidance does not address how the law applies to unionized work places that may have collective bargaining agreements or policies permitting random drug testing or have a lower standard for drug testing than what the Act requires.

Use or Possession During Work Hours or on Work Premises

The FAQs state that employers may prohibit cannabis use during “work hours,” which for the purposes of the Act means “all time, including paid and unpaid break and meal periods, that the employee is suffered, permitted or expected to be engaged in work, ‘on-call,’ and all time the employee is actually engaged in work.”

Employers may also prohibit employees from using, possessing or otherwise bringing cannabis onto the employer’s property at any time. An employer’s property includes leased or rented space, company vehicles, and areas used by employees within the employer’s property (e.g., lockers, desks, etc.).

In the hybrid or remote work environment, it is important to note that an employee’s private residence is not considered a “worksite” by the NYSDOL. Accordingly, an employer may only take action against an offsite remote employee if the employee exhibits articulable symptoms of impairment during work hours, and not for the employee’s use or possession at home.

Workplace Policies

The FAQs reiterate that amended Section 201-D generally does not permit employers to prohibit the use of cannabis outside of the workplace. New York employers may, however, continue to prohibit employees who work away from their employers’ premises (e.g., in the field or at a client’s location) from using cannabis at those locations.

The Guidance also explains that employers cannot require employees to waive their Section 201-D rights as a condition of hire or continued employment. Employers engaging in “last chance agreements” with employees should take particular note of this prohibition when drafting those agreements.

Applicability

The FAQs confirm that the MRTA applies to both public and private New York State employers and to all employees over the age of 21. The Guidance reiterates that the Act does not cover non-employees, such as independent contractors, volunteers, and students who are not employees.
WHAT THIS MEANS FOR EMPLOYERS

New York employers should review their drug-free workplace, conduct and substance abuse and other policies and procedures that may address cannabis use in the workplace, and revise them as needed to comply with Act’s prohibition of discrimination against off-duty, off-worksite use of cannabis. Employers suspecting cannabis impairment during an employee’s work hours must be able to point to objective indications of impairment, related to either decreased or lessened performance or workplace safety. Smell alone, for example, is not a sufficient indication of impairment.

Employers should also review their employee policies and practices concerning drug screening and testing, including random and reasonable suspicion-based drug testing. Employers may wish to consider eliminating pre-employment drug testing for cannabis, unless it is required by state or federal law for the position. Further, employers with unionized workers should review their collective bargaining agreements and policies to determine what changes may be necessary in response to the Act and whether such changes will be subject to a duty to bargain with employees’ bargaining representatives.

Lastly, employers should monitor the Office of Cannabis Management website for guidance on identifying impaired workers.

*Kamil Gajda, a Law Clerk – Admission Pending (not admitted to the practice of law) in the firm’s New York office, contributed to the preparation of this post.

©2021 Epstein Becker & Green, P.C. All rights reserved.

National Law Review, Volume XI, Number 305