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Employee Benefit Plan Review

New York's Marijuana Regulation and Taxation Act: Employer Considerations

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New York's Marijuana Regulation and Taxation Act legalized recreational cannabis in New York State on March 31, 2021. While it will take some time to organize and implement many aspects of the law – such as the issuing of registrations, licenses, and permits to sell and distribute cannabis – there are immediate consequences related to employee cannabis possession and use that took effect upon Governor Andrew Cuomo's signature.

Effective March 31, 2021, the following acts are lawful for persons 21 years of age or older:

a. Possessing, displaying, purchasing, obtaining, or transporting up to three ounces of cannabis.
b. Transferring, without compensation, to a person 21 years of age or older, up to three ounces of cannabis.
c. Using, smoking, ingesting, or consuming cannabis or concentrated cannabis unless otherwise prohibited by state law.
d. Possessing, using, displaying, purchasing, obtaining, manufacturing, transporting, or giving to any person 21 years of age or older cannabis paraphernalia or concentrated cannabis paraphernalia.
e. Planting, cultivating, harvesting, drying, processing, or possessing cultivated cannabis in accordance with specified guidelines.
f. Assisting another person who is 21 years of age or older, or allowing property to be used, in any of the acts described in (a) through (e) above.

IMPACT ON EMPLOYMENT LAW

The new law limits an employer's ability to discipline or terminate its employees based on their use of cannabis, except in certain (vague) circumstances.

Specifically, the law modifies New York Labor Law ("NYLL") Section 201-d to make it unlawful for any employer to refuse to hire, refuse to employ, or to discharge from employment or otherwise discriminate against an individual where the individual engages in the legal use of cannabis:

(1) Outside of working hours;
(2) Off the employer's premises; and
(3) Without the use of the employer's equipment or other property.

While the law severely restricts an employer from taking disciplinary measures when an employee uses cannabis, it also includes

cannabis-specific exceptions that allow an employer to take action related to an employee's use of cannabis. Unfortunately, the exceptions are fairly vague and limited. Indeed, according to the law, an employer may only take action related to the employee's use of cannabis where:

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

As a practical matter, for most employers (i.e., those not subject to a specific federal/state contract or regulatory requirement) this means they may only take an adverse action under circumstances historically considered to be reasonable suspicion. The entire thrust of the exemption – like those in neighboring New Jersey – is to protect off-duty use of marijuana that may cause a positive drug test result by limiting any such action to those situations where the employer can demonstrate objective, observable indicia of impairment (or actual use on the job or with company equipment). This also calls into question preemployment testing for marijuana, which has already been banned for many New York City employers.

Despite these narrow exceptions, the legislative intent of the law states: "Nothing in this act is intended to limit the authority of any . . . employers to enact and enforce policies pertaining to cannabis in the workplace; to allow driving under the influence of cannabis; *to allow individuals to engage in conduct that endangers others*; to allow smoking cannabis in any location where smoking tobacco is prohibited; or to require any individual to engage in any conduct that violates federal law or to exempt anyone from any requirement of federal law or pose any obstacle to the federal enforcement of federal law." While not delineated as an exception, the italicized language may give way to a "safety sensitive" exception for employers.

PENALTIES FOR VIOLATIONS

Penalties for the employment provisions of the recreational marijuana law are governed by NYLL Section 201-d. Under that section, the attorney general can apply for an order to enjoin or restrain an employer from committing further violations of the law, and a court may impose a civil penalty on the employer in the amount of $300 for the first violation, and $500 for each subsequent violation. NYLL Section 201-d also permits an aggrieved individual to bring a claim against an employer and to seek equitable relief and damages.

INTERACTION WITH NEW YORK CITY HUMAN RIGHTS LAW

Effective May 10, 2020, New York City implemented a law prohibiting most New York City employers from requiring job applicants to submit to preemployment drug testing for the presence of marijuana as a condition of employment, with certain exceptions. Importantly, New York City's law may be preempted by New York State's recreational marijuana law, requiring New York City employers to reevaluate their preemployment drug testing policies and procedures.

Under the New York City marijuana law and its regulations, certain classes of employers and positions are allowed to require an applicant to submit to testing for the presence of any marijuana or tetrahydrocannabinol ("THC") in the applicant's system as a condition of employment. Specifically, the New York City law exempts from its requirements:

a. Police and peace officers;
b. Certain construction workers covered by the New York City Building Code and New York Labor Law;
c. Any position requiring a commercial driver's license;
d. Any position "requiring the supervision or care of children, medical patients or vulnerable persons" as defined by the New York Social Services Law; and
e. "[A]ny position with the potential to significantly impact the health or safety of employees or members of the public," pursuant to regulations adopted by the Department of Citywide Administrative Services and the New York City Commission on Human Rights ("NYCCHR").

Regarding subparagraph (e), according to applicable New York City regulations, employers may conduct pre-employment testing of marijuana as a condition of employment if:

- The position requires that an employee regularly, or within one week of beginning employment, work on an active construction site;
- The position requires that an employee regularly operate heavy machinery;

- The position requires that an employee regularly work on or near power or gas utility lines;
- The position requires that an employee operate a motor vehicle on most work shifts;
- The position requires work relating to fueling an aircraft, providing information regarding aircraft weight and balance, or maintaining or operating aircraft support equipment; or
- Impairment would interfere with the employee's ability to take adequate care in the carrying out of his or her job duties and would pose an immediate risk of death or serious physical harm to the employee or to other people.

Although the New York City marijuana law contains these enumerated exceptions to its prohibition on preemployment marijuana testing, the New York State law does not contain any similar language. Employers should be cognizant of the New York State law and any safety-sensitive positions where, under New York City law, they were allowed to screen applicants for marijuana use.

INTERACTION WITH NEW YORK'S MEDICAL MARIJUANA LAW

In July 2014, New York enacted the Compassionate Care Act ("CCA"), which legalized medical marijuana in the state. The CCA established a comprehensive program for eligible patients with a relatively small number of enumerated medical conditions to receive cannabis as a form of care and treatment. New York's new recreational marijuana law greatly expands the CCA's medical marijuana program. Specifically, medical practitioners now have the discretion to recommend or certify medical marijuana for any medical condition. In addition, patients are now able to smoke cannabis as a form of treatment, instead of only being allowed to consume cannabis under the CCA.

The law also provides that employees who use medical cannabis are afforded the same rights, procedures, and protections that are available and applicable to injured workers under the workers' compensation law, or any rules or regulations promulgated thereunder, when the injured workers are prescribed medications that may prohibit, restrict, or require the modification of the performance of their duties.

GUIDANCE

Given the broad scope of New York's new marijuana law, private employers in New York will be required to reassess their policies and procedures concerning drug testing job applicants and current employees as well as employee cannabis use, generally.

Employers also may continue to maintain and enforce policies prohibiting marijuana in the workplace and require employees who appear to be "impaired by the use of cannabis" at work to submit to a drug test. Processes, including those to create and maintain supporting documentation, should be created.

Employers should also train their supervisors or other select personnel on the "specific articulable symptoms" of on-the-job impairment that would justify testing and bolster any adverse employment action.

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