Patterson Belknap Webb & Tyler LLP

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New York Department of Labor Issues Guidance on Adult Use Cannabis and the Workplace

Earlier this month, the New York State Department of Labor (the "DOL") issued guidance entitled "Adult Use Cannabis and the Workplace" (the "Guidance") in connection with the recently-enacted Marijuana Regulation and Taxation Act (the "MRTA") and New York Labor Law § 201-D. The Guidance seeks to address common situations and questions regarding the recent legalization of marijuana and its impact in the workplace. The Guidance does not address the use of marijuana for medical, as opposed to recreational, reasons.

As background, on March 31, 2021, New York State passed the MRTA, legalizing recreational marijuana use, or "adult-use cannabis." In particular, the MRTA provides that recreational use or consumption of marijuana is a lawful recreational activity. Employers are therefore prohibited from discriminating against employees based on the employee's use of marijuana outside of the workplace, outside of work hours, and without use of the employer's equipment or property. The MTRA amended Section 201-D of the New York Labor Law, which prohibits employers from taking adverse employment action against employees for engaging in certain activities outside of work.

Application of the MRTA and Section 201-D

The MRTA and Section 201-D apply to all public and private employers in New York State, regardless of size.

The MRTA and Section 201-D apply to all employees physically working within the State of New York, regardless of immigration or citizenship status. The MRTA and Section 201-D do not apply to non-employees, such as students who are not employees, independent contractors, and volunteers. Nor do these statutes apply to employees under the age of 21, because recreational marijuana use is only legal for adults who are 21 years of age or older. So, employers can, but are not required to, discipline, report, or fire employees under the age of 21 who are found to have used cannabis.

Employers' Options for Disciplinary Action

Importantly, employers are not without recourse against an employee who uses cannabis while at work or during the work day, or who comes to work under the influence of marijuana. Notwithstanding the MRTA, the Guidance confirms that an employer may still take disciplinary action against an employee (including prohibiting the use of cannabis) where:

- The employee is "impaired by the use of cannabis" while working, and such impairment either (1) decreases or lessens the employee's performance of their tasks or duties, or (2) interferes with the employer's obligation to provide a safe and healthy workplace.
- The employee is using cannabis during "work hours" and/or while on or using the employer's property.
- The employee possesses cannabis on employer property, including anywhere on the employer's premises, in employer-owned vehicles, and in spaces within the workplace such as lockers and desks.
- The employer is required to take such employment action pursuant to a state or federal statute, regulation, ordinance, or other state or federal government mandate.
- The employer *not* taking such action would result in a violation of federal law, or the loss of a federal contract or federal funding.

According to the MRTA, an employee is "impaired by the use of cannabis" where the employee "manifests specific articulable symptoms" of impairment while working that either (1) decrease or lessen the employee's performance of their tasks or duties, or (2) interfere with the employer's obligation to provide a safe and healthy workplace. The DOL has not defined "articulable symptoms of impairment," nor provided much clarity in the Guidance as to what constitutes an "articulable symptom of impairment." The Guidance indicates that an employer must be able to point to "symptoms that provide objectively observable indications that the employee's performance of the essential duties or tasks of their position are decreased or lessened" before the employer may take disciplinary action as to an employee who comes to work under the influence of marijuana.

The DOL provides only one example in the Guidance: that "the operation of heavy machinery in an unsafe and reckless manner may be considered an articulable symptom of impairment." The DOL also provides some contours as to what does *not* constitute an "articulable symptom of impairment," including "observable signs of use that do not indicate impairment on their own," the smell of marijuana alone, or a positive test for marijuana use. In addition, the DOL cautions employers that some "articulable symptoms" may also be an indication that an employee has a protected disability under federal or state law, although the Guidance does not provide examples of such a situation.

The Guidance makes clear that employers may prohibit the use of cannabis during "work hours," which includes all time that an employee is at work, on-call for work, and/or "expected to be engaged in work." This time also includes paid and unpaid breaks and meal times, even if the employee leaves the physical workplace. While the DOL does not consider an employee's private home, which he or she uses for remote work, to be a "worksite" within the meaning of Section 201-D, an employer may still take disciplinary action if an employee, working remotely in his or her own home, exhibits articulable symptoms of impairment during work hours.

Finally, the Guidance states that employers are not required to rehire a former employee who was terminated due to cannabis use prior to its legalization in New York.

Drug Testing

The Guidance clarifies that, as a general rule, employers may not test employees for cannabis, unless a limited exception applies under Section 201-D, such as when federal or state law requires drug testing or makes it a mandatory requirement of the position. Nevertheless, as discussed above, employers may not use a positive test as a basis for finding that an employee exhibited an "articulable symptom of impairment," as such a test result does not necessarily indicate that the employee is impaired. Therefore, random testing and post-incident testing (even when the employer reasonably suspects an employee is using marijuana) are no longer permitted.

Steps Employers Should Take

Under the MTRA, employers are not specifically required to, and also are not prohibited from, establishing workplace policies that address the use or consumption of recreational marijuana. Notably, the MRTA does not bar employers from establishing and enforcing polices prohibiting employees from using or being impaired by cannabis while at work and/or during the work day. An employer may not, however, promulgate a policy prohibiting employees from using cannabis outside of work, or conditioning future or continued employment on an agreement not to use cannabis outside of work.

To ensure compliance with the MRTA and Section 201-D, employers should review their drug use policies, update or amend any prior drug use policy to reflect the changes made to Section 201-D, and notify employees of any changes.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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