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April 1, 2021



You're "high"-red: New York employees & applicants no longer weeded out for off-duty marijuana use

By Kimberly K. Harding and Conor T. Tallet

On March 31, 2021, New York Governor Andrew Cuomo signed a bill into law legalizing the recreational use of marijuana for adults over the age of 21 (Senate Bill S854A).¹ Effective immediately, the bill prohibits employers from refusing to hire, disciplining, discharging, or otherwise taking adverse action against an employee for an employee's recreational use of marijuana in accordance with the new state law.

Specifically, the bill amends Section 201-d of the New York Labor Law, which prohibits employers from discriminating against employees engaging in certain recreational activities outside of work hours (originally introduced to protect employees who smoke tobacco from discrimination in the workplace), to specifically include protections for employees engaging in recreational marijuana use in accordance with state law. The amendment, however, is limited to protecting employees from adverse action for marijuana use "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, employers are still permitted to discipline or discharge employees who use or possess marijuana either on site or during work hours.

The bill further expressly states that it is not intended to limit the authority of any employer to enact and enforce policies pertaining to marijuana in the workplace and further delineates three exceptions for which an employer would not be in violation of the new law. The exceptions provide that an employer would not be in violation of the bill when an employer takes action related to an employee's use of marijuana in three situations:

- 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 health work place, free from

¹ See our alert, "[Cuomo signs legislation legalizing adult-use marijuana](#)," (April 01, 2021)

- 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.

While the bill effectively puts recreational marijuana use in the same category as off-the-clock alcohol and tobacco use by employees, the application of these exceptions remains unclear. Specifically, it is difficult to ascertain what will constitute "specific articulable symptoms" of impairment, particularly in the absence (to our knowledge) of any reliable, real-time testing mechanism for marijuana currently available to employers (such as a breathalyzer for alcohol impairment).

For now, employers should review their pre-employment drug screening processes to ensure that marijuana use is no longer disqualifying, and consult with counsel to understand their obligations under state law, particularly as they relate to the implementation of existing or modified substance abuse policies in the workplace.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- Kimberly K. Harding, 585-263-1037, kharding@nixonpeabody.com
- Conor T. Tallet, 585-263-1378, ctallet@nixonpeabody.com