ANDERSON KILL
Employment Law Insider Alert

New York Bans Employers From Testing (Most) Employees And Job Applicants For Marijuana


By Bennett Pine and Joseph C. Vila

Key points:

New York employers are now prohibited from drug screening most workers and applicants for cannabis use

Employers can still ban use of cannabis during work hours

Exceptions for safety-sensitive positions or as required by law

Proving impairment during work hours is problematic

On March 31, 2021, former New York Governor Andrew Cuomo signed the Cannabis/Marijuana Regulation and Taxation Act ("MRTA"), which legalizes recreational cannabis use for adults aged 21 and over. The MRTA provides the framework for the New York adult-use cannabis market, including the creation of the Cannabis Control Board and Office of Cannabis Management, and expands the State's existing medical cannabis and cannabinoid hemp programs.

Importantly, the MRTA also amended Section 201-D of the New York Labor Law ("NYLL") to clarify that cannabis used in accordance with New York State law is a legal consumable product. As such, employers are prohibited from discriminating against employees based on the employee's use of cannabis outside of the workplace and outside of work hours.

With recreational marijuana now legal in New York, employers are confronting a host of questions about the drug and the workplace. To that end, the New York Department of Labor ("NYSDL") recently issued guidance prohibiting New York employers from drug screening most workers and applicants

for cannabis. While many legal cannabis states have stipulated that workers can't be penalized for testing positive, New York appears to be the first to explicitly bar employers from testing for THC — with limited exceptions.

Employers, however, can still ban the use of cannabis during "work hours" and can still punish people for being actively impaired on the job - that is, if an employer can meet the high threshold of proving impairment. Understanding the provisions of these new laws — and the exceptions built into them — is critical to remaining in compliance while preserving a drug-free work environment in New York.

Discrimination Prohibited

Section 201-D of the NYLL was enacted in the early 90s with the goal of prohibiting employment discrimination against individuals engaging in legal activities during non-work hours. A driving force behind § 201-D is understood to have been to prevent discrimination against tobacco smokers and drinkers of alcohol. Indeed, § 201-D prohibits an employer from refusing to hire, employ, license, or discharge an employee because of his or her (1) individual political activities outside of working hours and off the employer's premises; (2) legal use of consumable products prior to and after the conclusion of the employee's working hours and off the employer's premises; (3) legal recreational activities outside work hours and off the employer's premises; and (4) membership in a union or any exercise of political and other rights created under Title 29, U.S.C. Chapter 7 or under Article 14 of the Civil Service Law.

Nearly 30 years later, the MRTA amended Section 201-D to broadly prohibit discrimination against employees who use cannabis while off duty, with some exceptions such as for safety-sensitive positions regulated by the federal Department of Transportation. Specifically, employers may not take adverse action against an employee because of their:

- Legal use of cannabis before or after their work hours off the employer's premises and without use of the employer's equipment or property; or
- Legal use of cannabis during the employee's legal recreational activities off the employer's premises and without use of the employer's equipment or property.

In a FAQ published in early October of this year, the NYSDL issued guidance clarifying the scope of the MRTA. The FAQ specifies that drug testing requirements for marijuana constitute discrimination under the act:

> ***"Can an employer test for cannabis?"***
> "No, unless the employer is permitted to do so pursuant to the provisions of Labor Law Section 201-D(4-a) or other applicable laws."
>
> ***"Can an employer drug test an employee if federal law allows for drug testing?"***
> "No, an employer cannot test an employee for cannabis merely because it is allowed or not prohibited under federal law."

This makes New York the first state in the country to prohibit employers from testing both current and prospective workers (New York City employers have been banned from pre-employment drug testing for cannabis since May 10, 2020). In other states where marijuana is legal, there are laws that ban employers from penalizing workers who test positive, but New York is the first to explicitly prohibit workplace testing for cannabis altogether.

Employers Exempted From The Marijuana Testing Ban

New York's ban on drug testing employees for marijuana is not universal throughout all areas of employment. Indeed, the NYSDL's guidance provides that "an employer can drug test an employee if federal or state law requires drug testing or makes it a mandatory requirement of a position." For example, mandatory drug testing is still required for drivers of commercial motor vehicles in accordance with 49 CFR Part 382. Similarly, drug testing is also still mandatory for for-hire vehicle

Employers that suspect an employee is under the influence of marijuana at work should think carefully as to how to handle such situations.

motor carriers in accordance with NY Vehicle and Traffic Law Section 507-a.

Permitted Employer Actions

While the MRTA allows employees to legally use cannabis before and after work hours, it does not permit them to consume cannabis in the workplace or to report to work under the influence of marijuana. Indeed, the law makes clear that it is not intended to limit the authority of employers "to enact and enforce policies pertaining to cannabis in the workplace." Specifically, the MRTA amended NYLL Section 201-D by adding a new subsection 4-a, which provides that employers may take employment action or prohibit employee conduct where:

- An employer is/was required to take such action by state or federal statute, regulation, or ordinance, or other state or federal governmental mandate;
- If action were not taken, the employer would be in violation of federal or would lose a federal contract or federal funding;
- The employee, while working, manifests specific articulable symptoms of cannabis impairment that decrease or lessen the employee's performance of the employee's tasks or duties;
- The employee, while working, manifests specific articulable symptoms of cannabis impairment that interfere with the employer's obligation to provide a safe and healthy workplace as required by state and federal workplace safety laws.

According to the NYSDL, employers aren't required to penalize workers if they use or possess marijuana during work hours, but they have that option available to them. Since there is no device that can accurately test for active impairment — and tests for THC metabolites can show traces of marijuana for weeks after a person consumes marijuana — employers must show that a given worker "manifests specific articulable symptoms of impairment" in order to punish them over on-duty marijuana use.

However, the term "specific articulable symptoms" is not defined within the MRTA and, as explained by the NYSDL, "[o]bservable signs of use that do not indicate impairment on their own cannot be cited as an articulable symptom of impairment[.]" The guidance notes that there is no dispositive and complete list of symptoms of impairment. Rather, articulable symptoms of impairment are, as defined by the NYSDL, objectively observable indications that the employee's performance of the duties of the position are decreased or lessened.

For this reason, it may be difficult to determine whether an employee is sufficiently impaired by cannabis while working to warrant action. Nonetheless, it is evident that an employer can act against an employee unable to perform their job duties or who poses a safety hazard due to their use of cannabis. Furthermore, given the nebulous relationship between state and federal law with respect to cannabis legalization, employers are not required to take action that would interfere with their ability to comply with federal law or receive federal contracts of funding.

What Should Employers Do Now?

Recreational consumption of cannabis is legal, and employers should not wait further to review its employee drug testing policies and to train managers on the implications of the MRTA

...it may be difficult to determine whether an employee is sufficiently impaired by cannabis while working to warrant action.

and the NYSDL's recent guidance. Moreover, employers that suspect an employee is under the influence of marijuana at work should think carefully as to how to handle such situations. Due to current marijuana testing capabilities, it may be hard to determine if the employee is under the influence at work. In those instances, employers are well advised to focus on the employee's performance issues if they exist.

BENNETT PINE *is a shareholder in Anderson Kill's New York and Newark offices and is chair of the firm's employment & labor group. Mr. Pine has broad-based labor and employment law experience and regularly plays a hands-on role offering preventative maintenance advice and counseling to employers in the full range of legal issues affecting the workplace.*
bpine@andersonkill.com
(212) 278-1288 (NY)
(973) 642-5006 (Newark)

JOSEPH C. VILA *is an attorney in Anderson Kill's Newark office. Joseph focuses his practice on insurance recovery, exclusively on behalf of policyholders. Prior to joining Anderson Kill, Joseph was an associate attorney at an east coast law firm where he represented clients in a variety of types of complex commercial litigation, including matters involving breach of contract, employment, negligence, product liability, insurance recovery, and construction litigation.*
jvila@andersonkill.com
(973) 642-5859

We are interested in your feedback on topics for future articles and seminars. Please email us.

About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estates, Trusts and Tax Services, Corporate and Securities, Antitrust, Banking and Lending, Bankruptcy and Restructuring, Real Estate and Construction, Foreign Investment Recovery, Public Law, Government Affairs, Employment and Labor Law, Captive Insurance, Intellectual Property, Corporate Tax, Hospitality, and Health Reform. Recognized nationwide by Chambers USA, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. The firm has offices in New York, NY, Denver, CO, Los Angeles, CA, Newark, NJ, Philadelphia, PA, Stamford, CT, and Washington, D.C.