PHILLIPS LYTLE LLP CLIENT ALERT
LABOR & EMPLOYMENT
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Legalized Recreational Marijuana Use Comes to the New York State Workplace

On March 31, 2021, New York State Governor Andrew Cuomo signed the Marijuana Regulation and Taxation Act into law ("Cannabis Law"). The law, among other things, legalizes the adult recreational use of marijuana and protects individuals who use marijuana outside of the workplace from discrimination. These provisions of the law became effective upon the law's signing. The legalization of recreational marijuana use will dramatically alter the landscape of workplace drug testing and safety, and limit the ability of employers to discipline, terminate or refuse to hire employees for marijuana use. This alert discusses some of the issues employers will face in adapting their policies and practices to the Cannabis Law.

WHO MAY LEGALLY POSSESS AND USE RECREATIONAL MARIJUANA?

The Cannabis Law permits adults 21 years or older to use marijuana for recreational purposes, and allows such individuals to possess up to three ounces of cannabis and 24 grams of concentrated cannabis on their person. Such individuals may also grow their own marijuana and have up to five pounds of cannabis in or on the grounds of their private residences.

CAN EMPLOYEES POSSESS, USE, SELL OR DISTRIBUTE MARIJUANA IN THE WORKPLACE?

The Cannabis Law does not allow employees to possess, use, sell or distribute marijuana in the workplace. In fact, the Cannabis Law prohibits the smoking of marijuana wherever the smoking of tobacco is prohibited. Thus, employers may still prohibit such conduct in the workplace.

WHAT WORKPLACE PROTECTIONS DOES THE CANNABIS LAW PROVIDE TO EMPLOYEES?

The Cannabis Law extends the protections of New York Labor Law § 201-d to the use of marijuana. Section 201-d of the Labor Law makes it unlawful, among other things, for an employer to discharge, discriminate against or refuse to hire an individual because of the individual's legal use of consumable products off of the employer's premises and outside of work hours. As a result, the Cannabis Law now makes it illegal for an employer to discharge, refuse to hire or otherwise discriminate against an employee 21 years or older for using marijuana off of the employer's premises and outside of work hours. Work hours under Labor Law § 201-d include paid and unpaid breaks and meal periods.

CAN EMPLOYERS DISCIPLINE OR DISCHARGE EMPLOYEES FOR WORKING WHILE IMPAIRED BY MARIJUANA?

The Cannabis Law also amends Labor Law § 201-d by adding a provision that, notwithstanding an employee's right to use marijuana off-site and outside of work hours, allows an employer to discipline or discharge an employee if the employee is impaired by cannabis while working. However, to do so, the law requires that an employer show that the employee manifested "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 that "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." The law does not identify what constitutes

"specific articulable symptoms," but presumably, they would include appearance and behavior medically accepted as associated with marijuana use. As a result of this new "specific articulable symptoms" standard for establishing marijuana impairment, employers required to comply with the Cannabis Law can no longer maintain policies prohibiting employees from working with any trace of marijuana in their system.

CAN AN EMPLOYER TAKE ADVERSE ACTION REQUIRED BY LAW AGAINST AN EMPLOYEE?

The Cannabis Law allows an employer to take any actions required by state or federal law, regulation or other governmental mandate related to an employee's use of marijuana. Thus, an employer subject to any federal or state law that prohibits employing an employee who uses marijuana can lawfully take any adverse action against the employee required by such law, regulation or governmental mandate.

DOES THE CANNABIS LAW REQUIRE AN EMPLOYER TO TAKE ANY ACTION THAT WOULD JEOPARDIZE A FEDERAL CONTRACT OR FEDERAL FUNDING?

The Cannabis Law provides that an employer is exempt from the nondiscrimination provisions of Labor Law § 201-d if complying with them would require the employer to violate federal law, or would result in the loss of a federal contract or federal funding.

CAN AN EMPLOYER STILL TEST APPLICANTS AND EMPLOYEES FOR MARIJUANA?

The Cannabis Law does not prohibit testing for marijuana. Thus, employers remain free to test both applicants and employees under the law.[1] However, the Cannabis Law substantially decreases the utility of pre-employment testing for employers that are not subject to other applicable legal requirements regarding employee marijuana use. For such employers, pre-employment drug testing for marijuana will now have little, if any, utility given that it is now illegal for them to refuse to hire an applicant because of marijuana use. Indeed, conducting pre-employment marijuana testing may expose such employers to discrimination claims. If such an employer refuses to hire an applicant after receiving a pre-employment drug test positive for marijuana, the circumstances could form the basis for a case of discrimination, even if the employer's decision was unrelated to the applicant's marijuana use.

For such employers, the Cannabis Law is also likely to lessen the utility of testing employees for marijuana. Because recreational use of marijuana is now legal, such employers can no longer discipline or discharge an employee simply for having marijuana in his or her system while at work, as may be revealed by a drug test. Similarly, the law's requirement that before taking action against an employee for marijuana use, an employer must show that the employee manifested specific articulable symptoms of marijuana impairment, means that a positive test for marijuana will not be sufficient to establish impairment under the law. However, a positive test may still have value in supporting an employer's determination that symptoms exhibited by an employee were related to marijuana use by confirming that the employee used marijuana.

WHAT SHOULD EMPLOYERS DO NOW?

Employers should review and revise their hiring, employment, drug use, and testing policies and procedures as needed to comply with the Cannabis Law. They should also train supervisors and managers to recognize the signs of marijuana impairment so that they are able to substantiate and document specific articulable symptoms that interfere with an employee's performance or pose a safety risk when marijuana impairment is suspected.

1 New York City employers should be aware that except in certain limited situations, New York City law prohibits pre-employment testing for marijuana.

Additional Assistance

For further assistance, please contact any of the attorneys on our Labor & Employment Practice Team or the Phillips Lytle attorney with whom you have a relationship. ■

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