



## PHILLIPS LYTLE LLP CLIENT ALERT

### LABOR & EMPLOYMENT

OCTOBER 2021



## *New York State Department of Labor Issues Guidance on Recreational Use of Marijuana in the Workplace*

On October 8, 2021, the New York State Department of Labor (DOL) issued guidance regarding cannabis in the workplace in the form of [Frequently Asked Questions \(FAQs\)](#). As we [previously reported](#), the New York State Marijuana Regulation and Taxation Act (MRTA) legalized the recreational use of marijuana for adults age 21 and over and expanded New York State's medical marijuana program. The FAQs address the rights and obligations of employers and employees regarding employee recreational use of marijuana in several areas, including those discussed below.

### DISCRIMINATION PROHIBITED

The FAQs confirm that employers are prohibited from discriminating against employees for using marijuana outside of the workplace during non-work hours. However, “employers [may] take employment action or prohibit employee conduct when” (1) such action is required by state or federal law; (2) the employer would be in violation of federal law or would lose a federal contract if it did not take adverse action against the employee; or (3) the employee manifests specific articulable symptoms of marijuana impairment that negatively affects performance or interferes with the employer's obligation to provide a safe and healthy workplace. Similarly, employers may not deny employment to applicants for using marijuana, unless required to do so by law, or hiring the applicant would be in violation of federal law or jeopardize a federal contract.

### WORKING WHILE IMPAIRED

The FAQs make clear that an employer may discipline an employee, up to and including termination, who “manifests

specific articulable symptoms” of marijuana impairment. However, the FAQs do not provide guidance about what symptoms may qualify as indicating marijuana impairment, stating that “[t]here is no dispositive and complete list of symptoms of impairment.” Rather, the FAQs simply state that “articulable symptoms of impairment are objectively observable indications that the employee's performance of the duties of their position are decreased or lessened,” thereby leaving it to employers to determine what constitutes symptoms of impairment. Notably, the FAQs state that observable signs of marijuana use on their own, including the smell of marijuana on an employee and a positive drug test, are not evidence of impairment. The FAQs, though, do cite the example of an employee operating heavy machinery in an unsafe manner as being an articulable symptom of impairment.

### DRUG TESTING

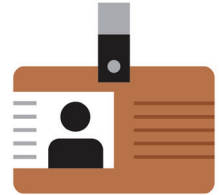
The FAQs state that an employer may not test for marijuana “unless the employer is permitted to do so pursuant to the provisions of Labor Law Section 201-D(4-a) or other applicable laws” and that an employer may not test “merely because it is allowed or not prohibited under federal law.” (The FAQs state that testing is permitted if required by federal law.) Thus, the FAQs appear to imply that an employer may test for marijuana only if testing is expressly authorized by a law. Such a position on testing for marijuana is suspect as neither the MRTA nor New York Labor Law § 201-D (the New York State statute protecting off-duty employee use of legally consumable products) prohibits testing employees for marijuana or any other drug. Although a positive test alone cannot constitute a specific articulable symptom of impairment, a positive test could nonetheless



## PHILLIPS LYTLE LLP CLIENT ALERT

### LABOR & EMPLOYMENT

OCTOBER 2021



support an employer's conclusion that an employee's observable symptoms were related to marijuana use by confirming that the employee had used marijuana recently enough to test positive.

#### WORKPLACE POLICIES

The FAQs also state that an employer may still prohibit marijuana possession and use in the workplace (1) during work hours (which includes meal and break periods regardless of whether they are taken in or outside of the workplace or if the employee is working remotely); (2) during on-call time; and (3) in employer-owned vehicles.

Employers in need of guidance adapting to New York State's legalization of adult recreational use of marijuana should review the FAQs and consult with their labor and employment counsel if they have any questions about complying with the law.

#### 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. ■*



**Albany** Omni Plaza 30 South Pearl Street Albany, NY 12207-1537 (518) 472-1224

**Buffalo** One Canalside 125 Main Street Buffalo, NY 14203-2887 (716) 847-8400

**Chautauqua** 201 West Third Street Suite 205 Jamestown, NY 14701-4907 (716) 664-3906

**Garden City** 1205 Franklin Avenue Plaza Suite 390 Garden City, NY 11530-1629 (516) 742-5201

**New York City** 620 Eighth Ave 38th Floor New York, NY 10018-1442 (212) 759-4888

**Rochester** 28 East Main Street Suite 1400 Rochester, NY 14614-1935 (585) 238-2000

**Washington, DC** 1101 Pennsylvania Avenue NW Suite 300 Washington, DC 20004-2514 (202) 617-2700

**Canada** The Communitel Hub 151 Charles Street West Suite 100 The Tannery Kitchener, Ontario N2G 1H6 Canada (519) 570-4800