LABOR AND EMPLOYMENT LAW
INFORMATION MEMO
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What the Legalization of Recreational Marijuana Means for New York Employers

Following in the footsteps of more than a dozen other states, on March 31, 2021, New York passed legislation legalizing the recreational use of marijuana for individuals over the age of 21.

The Marijuana Regulation and Taxation Act (the Act) legalizes the licensed cultivation and distribution, as well as the use and possession, of recreational marijuana in New York State. Though medical marijuana has been legal in New York since the Compassionate Care Act was passed in 2014, the Act significantly expands the lawful use of marijuana in the state.

The Act creates an expansive recreational marijuana program; establishes the cannabis control board and office of cannabis management, which is tasked with regulating medical and recreational use of marijuana and hemp extracts; and makes several statutory amendments, including changes to the tax law and penal law, among others. The Act also amends provisions of the Labor Law. Specifically, the Act amends Labor Law Section 201-d, which protects employees' right to engage in certain recreational activities outside of work.

Section 201-d generally prohibits employers from discriminating against, terminating and refusing to hire, employ or license individuals because of their legal use of consumable products or participation in legal recreational activities outside of work. As amended by the Act, Section 201-d provides that the recreational use or consumption of marijuana outside of work hours and off an employer's premises, constitutes lawful recreational activity. For purposes of Section 201-d, work hours mean all the time an employee is engaged to work, including paid and unpaid breaks and meal periods. It is clear that employees' use of recreational marijuana is protected only to the extent it occurs prior to the beginning, or after the completion, of an employee's work hours. In other words, Section 201-d does not permit employees to use recreational marijuana during break time or rest periods, whether or not they are paid.

Practically speaking, the amendments to Section 201-d have a limiting effect on employers' ability to discipline employees for their lawful use of recreational marijuana during non-working hours. However, that is not to say that employers are powerless to act, given that Section 201-d, as amended, provides several exceptions. The amendments specifically set forth three situations in which an employer will *not* be in violation of Section 201-d.

First, the legislation clarifies that employers will not violate Section 201-d where their actions are "required" by a state or federal statute, regulation, ordinance or other mandate. As marijuana remains illegal at the federal level, this is an important exception; particularly for employers regulated under federal law. However, this exception may not be as broad as it seems as the use of the word "required" may prove to limit its scope.

Second, the law provides that employers retain their ability to take action where an employee is "impaired by the use of cannabis." In this context, impairment means that an employee "manifests specific articulable symptoms while working" that inhibit the employee's job performance or interfere with the employer's obligation to provide a safe, healthy and hazard-free workplace. Furthermore, because marijuana can remain in a user's system for varying lengths of time, a positive drug test will not necessarily indicate present impairment, let alone the level of impairment necessary for an employer to take disciplinary action. Demonstrating impairment under this standard may prove to be challenging for employers.

Finally, the third exception allows employers to take action against employees for their use of recreational marijuana where not taking action would result in the employer's violation of federal law, or loss of a federal contract or federal funding.

Most provisions of the Act are effective immediately. However, legal sales of marijuana may only occur once the state begins issuing licenses for cultivation, processing and distribution. Practically speaking, this process is likely to take several months, if not longer. Though lawful recreational sales of marijuana are not anticipated to occur for some time, employers should prepare for compliance by reviewing their drug use policies and familiarizing themselves with the ways in which these amendments may impact the workplace.

If you have any questions about the information presented in this memo, please contact Hannah Redmond, any attorney in Bond's Labor and Employment practice or the Bond attorney with whom you are in regular contact.

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