

CORONAVIRUS

WEEKLY WEBINAR SERIES



May 4, 2021



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Introduction



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Continuing Questions for Employers Related to the New York Marijuana Legislation



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Amendment to NYLL Sect. 201-d

- Effective March 31, 2021, New York Labor Law Section 201-d was amended to include the use of recreational marijuana:
 - Employers cannot take any adverse action (e.g., refuse to hire, discipline, discharge, *etc.*), against an employees because of their “use of . . . cannabis in accordance with state law” while off duty and off work premises



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Amendment to NYLL Sect. 201-d (cont.)

- Employers may take an adverse employment action against an employee for the use of recreational marijuana if one of the following exceptions applies:
 - “[E]mployer’s actions [are] 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 healthy work place, free from recognized hazards, as required by state and federal occupational safety and health laws”
 - “[E]mployer’s actions would require such employer to commit any action that would cause the employer to be in violation of federal law or would result in the loss of a federal contract or federal funds”



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NYS: *Recreational Adult Use Legislation*

- Problems with standard of “impairment”:
 - Unlike with alcohol, no fixed “cut-off” to determine if someone is impaired by marijuana
 - Puts burden on employer to prove that employee had marijuana in his/her system, that there was an articulable symptom of impairment and that his/her performance was impacted as a result



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Federal: *Controlled Substances Act* (“CSA”)

- Establishes federal drug policy under which the manufacture, possession, use and distribution of certain “controlled” substances is regulated
- Classifies substances in one of five schedules
- Marijuana is a “Schedule I” controlled substance
 - High potential for abuse
 - No acceptable medical use
 - Not safe to use, even under medical supervision
 - Other examples of Schedule I drugs: Heroin & LSD



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Enforcement of the CSA??

- The federal government has flip-flopped in recent years on enforcement of CSA in states where recreational marijuana is legal:
 - 8/13 - Dep. A.G. James Cole issued memo de-emphasizing marijuana prosecutions
 - 1/18 – A.G. Sessions issued memo calling for a “return to the rule of law” with respect to marijuana prosecutions
 - 1/19 – A.G. nominee Barr said he disagrees with state efforts to legalize marijuana, but won’t “go after” marijuana companies that relied on Obama-era policies
 - 4/19 – Pres. Trump said his administration will take a hands-off approach in states where recreational marijuana is legal (views it as a state’s rights issue)
 - 3/21 – A.G. Garland stated that he does not believe the DOJ should be going after people abiding by State recreational cannabis policies.



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Federal: *Drug-Free Workplace Act (“DFWA”)*

- Requires most federal contractors and grantees to maintain a drug-free workplace as a precondition to receiving the contract or grant



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Federal: *Drug-Free Workplace Act*

- Under DFWA, contractors/grantees must:
 - Issue policy statement prohibiting possession, use or distribution of controlled substances at the covered workplace and specifying consequences for violation
 - Establish a drug-free awareness program
 - Report criminal drug violations
 - Impose penalty or require participation in rehab program for employees convicted of drug violation
 - Make a “good faith effort” to maintain a drug free workplace



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Federal: *Drug-Free Workplace Act*

- DFWA does not:
 - Require drug testing of applicants or employees
 - Prohibit the employment of individuals who use a controlled substances outside of the workplace.
 - Require termination or any specific adverse employment action to be taken against an employee for testing positive for marijuana.



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Federal: *Drug-Free Workplace Act*

Impact

- Federal contractors must continue to make “good faith efforts” to maintain a drug-free environment
- Drug testing may be part of this effort, but if a “positive” result is due to lawful use of medical marijuana, consider possible accommodations
- For recreational use of marijuana, employer must still prohibit possession and use at worksite; otherwise, unless can prove the individual was impaired or was possessing/using marijuana at work, likely unable to take adverse employment action against the employee for a positive marijuana test.



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Safety Sensitive Positions Subject to Department of Transportation Rules & Regulations

- Safety and security-sensitive industries (e.g., transportation) are subject to rules and regulations which prohibit the use of marijuana
- Additional requirements:
 - Drug testing (pre-hire, reasonable suspicion and random), including for marijuana
 - Positive tests must be reviewed by MRO
 - Drug and alcohol awareness training for all employees
 - Substance abuse detection, documentation and intervention training for all supervisors



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Department of Transportation's Position

We want to make it perfectly clear that the state initiatives will have no bearing on the Department of Transportation's regulated drug testing program. The Department of Transportation's Drug and Alcohol Testing Regulation – 49 CFR Part 40 – does not authorize the use of Schedule I drugs, including marijuana, for any reason.

Therefore, Medical Review Officers (MROs) will not verify a drug test as negative based upon learning that the employee used "recreational marijuana" when states have passed "recreational marijuana" initiatives.

We also firmly reiterate that an MRO will not verify a drug test negative based upon information that a physician recommended that the employee use "medical marijuana" when states have passed "medical marijuana" initiatives.

It is important to note that marijuana remains a drug listed in Schedule I of the Controlled Substances Act. It remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation's drug testing regulations to use marijuana.



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Employees – Subject to DOT Regulations

Impact

- Employers covered by DOT or other federal agency rules can, and must, adhere to drug-testing requirements if someone tests positive and positive marijuana test is confirmed by MRO.
- Need to engage in the interactive process with certified medical marijuana patient to determine if a reasonable accommodation exists under NYHRL (e.g., reassignment).
- What if the person is using marijuana recreationally??



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Driver – **NOT** Subject to DOT Regulations

- What about drivers who are not subject to DOT regulations?
 - E.g., employee who operates a pick-up truck
 - If not “impaired” at work, then likely cannot take any action



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Updated CDC Guidance and its Impact on New York Businesses



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Updated CDC Guidance Recommendations for Fully Vaccinated People

- Released April 27, 2021
- New York Announced it would follow CDC Recommendations on Mask Use
- Executive Order 202.105
 - Modifies prior directive re: mask wearing in public “only insofar as to no longer require individuals who have completed COVID-19 vaccination series to cover their noses or mouths while outdoors, except in crowded settings”
- Indoors??
- Impact on New York Businesses??



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The HERO Act – Summary and Status



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N.Y. HERO Act - Highlights

- NY Health and Essential Rights Act
 1. Establishes enforceable safety standards for workplaces to prevent spread of COVID-19 (and future airborne infectious diseases)
 2. Allows establishment of workplace safety committees
- Passed by NYS Legislature April 20, 2021
- Delivered to Governor Cuomo April 23, 2021
 - Governor has 10 days (excluding Sundays) to sign or veto Bill
 - Failure to sign it → Bill becomes law
 - Magic Date → Tomorrow, Tuesday May 5, 2021



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Amends New York Labor Law

- Adds Section 218-b – “Prevention of occupational exposure to an airborne infectious disease”
 - Goes into effect 30 days after enactment (signature by Governor or otherwise)
- Adds Section 27-D – “Workplace Safety Committees”
 - Goes into effect 180 days after enactment (signature by Government or otherwise)



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NY Labor Law Section 218-b

- Applies to all private employers
 - Does not apply to the State, political subdivisions of the state, public authorities, or any other governmental agency or instrumentality
- Requires adoption of “infectious disease exposure prevention plan”
 - Minimum standards
 - Rules for adopting own prevention policy
- Protected activity (anti-retaliation)
- Creates enforcement mechanism
 - \$\$\$
 - Legal recourse

PUTTING YOUR PPE ON



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Model Prevention Policy

- NYDOL & DOH to create model prevention plan to establish minimum standards for preventing exposure in the workplace
 - Various industries
 - Consider various types of risks present at worksites (including third parties)
 - Will explicitly specify and distinguish among different levels of airborne infectious disease exposure
 - Consideration for where there is state of emergency or not
 - Consideration of federal standards to extent practicable
 - Various languages (but explicitly required to provide in English and Spanish)

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Model Prevention Policy

- Must include topics including, but not limited to the following:
 - Employee health screenings
 - Face coverings
 - Required PPE
 - Accessible workplace hand hygiene stations/maintenance of hand hygiene
 - Including break times for workers to use handwashing facilities as needed
 - Regular cleaning and disinfecting of shared equipment, frequently touched surfaces, and other high-risk areas
 - Social distancing
 - Compliance with mandatory/precautionary orders of isolation or quarantine
 - Compliance with applicable engineering controls (e.g., proper air flow, exhaust ventilation)
 - Designation of supervisory employee(s) to enforce compliance with prevention plan and other local, state, or federal guidance regarding same
 - Compliance with applicable laws, rules, regulations, standards, guidance, with respect to notification to employees and relevant agencies of potential exposure at worksite
 - Verbal review of infectious disease standard, employer policies, employee rights under the law



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Model Prevention Policy

- Anti-Retaliation Provision
- Protected activities specifically include, but are not limited to:
 - Exercising their rights under law or implemented prevention plan
 - Reporting violations of law or applicable prevention plan
 - Reporting an airborne infectious disease exposure concern, or seeking assistance or intervention with respect to same
 - Refusing to work where worker reasonably believes, in good faith, that work exposes him/her or other workers to the disease due to existence of working conditions that are inconsistent with law, rules, policies, governmental orders, including minimum standards in model prevention plan/standard
 - NOTE: Employer must have known or had reason to know of conditions and failed to cure them



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Adoption of Own Prevention Plan

- Employers who wish to develop their own standard:
 - Must equal or exceed minimum standards provided by model standard
 - For employers with unionized workforce:
 - Must develop such plan “pursuant to an agreement with the collective bargaining representative”
 - For employers with no union:
 - Must develop such plan “with meaningful participation of employees”
 - Must be tailored and specific to hazards in the specific industry and work



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Prevention Plan – Additional Requirements

- Provide copy of prevention plan to employees
 - Must be in writing
 - In English and in language identified by each employee as primary language
- Must be provided:
 - Upon effective date of the law (30 days after signature or enactment)
 - Upon reopening after period of closure due to airborne infectious diseases
 - Upon hire
 - Upon request (to all employees, contractors, employee representatives, bargaining representatives, DOL, DOH)
- **Must be included in employee handbook**
- Must be posted in visible and prominent location within worksite



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Waivable by CBA

- Law permits provisions of the section to be waived by CBA provided that for the waiver to be valid, it must explicitly reference the section



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Violations

- DOL bestowed authority to enforce the law/investigate violations, including assessment of penalties
- Civil Penalties
 - For failure to adopt prevention plan: \$50 per day
 - For failure to abide by adopted prevention plan: \$1,000 - \$10,000
 - Subsequent violations (within 6 year window) fines increase:
 - \$200 per day for failing to adopt prevention plan
 - \$1,000 - \$20,000 for failure to abide by adopted prevention plan
- Injunctive relief
- Private right of action in certain circumstances (and for retaliation)
 - Remedies include: injunctive relief, attorneys' fees, costs, liquidated damages up to \$20,000
 - Good faith defense available; sanctions for meritless/malicious claims



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NY Labor Law Section 27-D

- Applies to employers with at least 10 employees
 - Excludes the State, political subdivision of the State, public authorities, or any other governmental agencies or instrumentalities
- Requires covered employers to *permit* employees to establish and administer a joint labor-management workplace safety committee
 - Establishes other rules/standards for such committees



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Workplace Safety Committees

- Composed of employee and employer designees
- 2/3 non-supervisory employees
- Employee members selected by, and from among, non-supervisory employees
- Co-chaired by representative of employer and non-supervisory employees
- Where CBA in place, collective bargaining representative responsible for selection of employees
- Committees representing geographically distinct workplaces may be formed as necessary



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Workplace Safety Committees

- Employers prohibited from interfering with selection of employees who serve on committee, or with the performance of their duties under the law
- Workplace safety committee and designee authorized to:
 - raise health and safety concerns to which the employer must respond;
 - review workplace policies required by the HERO Act or Workers' Compensation Law and provide feedback;
 - review workplace policies adopted in response to a healthy or safety law, ordinance, rule, regulation, executive order, or other related directive;
 - participate in any site visit by a government entity responsible for enforcing health and safety standards;
 - review any report filed by the employer related to the health and safety of the workplace; and
 - regularly schedule a meeting during work hours at least once per quarter.
- Provide paid leave for certain trainings



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Waivable

- Section is also waivable by CBA, provided that for waiver to be valid, must explicitly reference Section



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Anti-Retaliation

- Contains anti-retaliation provision for employee who participates in activities or establishment of workplace safety committee



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Stay thinking about...

- Current policies and procedures
- Budgeting for expenses that may come with obligations to provide PPE, cleaning, as per new standard
- Adopting, developing or administering the new prevention plan
- Handbooks



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Update from Albany



Caitlin A. Anderson

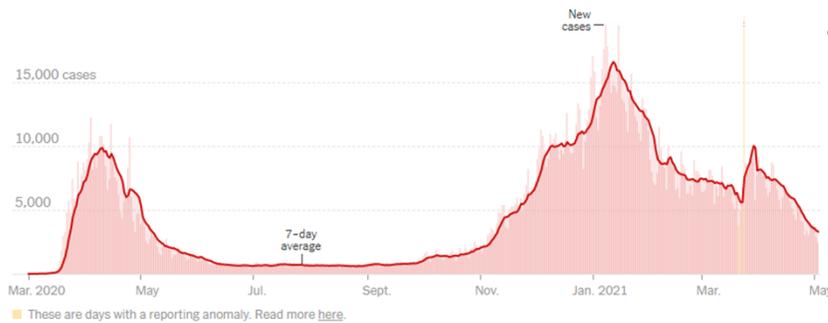
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The New York Times

New reported cases



36% fully vaccinated
48% one dose



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Reopening Updates

- May 19: Lots of restrictions being lifted, lots still remain.
- Business capacity limits **gone; must still maintain six feet between people.**
 - Appears to apply to everyone except large venues/stadiums.
 - Can seat people closer together so long as a barrier is in place.



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Reopening Updates

- Gathering limits:
 - May 10: Outdoor gathering limit increases to 500 people.
 - May 19: Outdoor residential gathering limit goes to 500.
 - May 19: Indoor residential gathering limit goes to 50.
 - May 19: Large-scale outdoor venues – 33% capacity.
- **Important: gatherings may be unlimited in size so long as all individuals present proof of full vaccination status or a negative COVID-19 test result.**



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Reopening Updates

- Important caveats:
 - Face masks still required inside; required outside if there is a “crowd.”
 - Still need to do the health screening questionnaire.
 - Still need to gather contact information for tracing.
 - Still need to follow cleaning standards.



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Reopening Updates: Questions remaining

- Will businesses be able to ask for full vaccination status/recent negative COVID-19 test in order to get around the six feet limitation?
 - Perhaps soon.
- When will fully vaccinated individuals be allowed to go maskless indoors?
 - Unknown – seems more likely that outdoor restrictions will continue to be lifted first.



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Bills Worth Looking At

- Evictions & foreclosure – Legislature extended moratorium on evictions and foreclosures for residential tenants and small businesses who fill out hardship declaration forms.
 - Extended to August 31.
 - Needs to be signed by the Governor.



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Update from Albany

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New York Employment Law: The Essential Guide

Bar Association Members can buy the book from the bar [here](#).

Non-Bar Association Members can purchase through Amazon [here](#).



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