

# LABOR AND EMPLOYMENT LAW

## INFORMATION MEMO

OCTOBER 31, 2022

## Recreational Marijuana Use in the Workplace: An Update

### Overview

In March of 2021, New York passed the Marijuana Regulation and Taxation Act (MRTA), which legalized the recreational use of cannabis for individuals over the age of 21. When passed, the MRTA amended Labor Law § 201-d to protect an employee's right to use "consumable products," which now includes cannabis. However, the employee's right to use cannabis is protected only if the use is (1) outside of work hours; (2) off of the employer's premises; and (3) without use of the employer's equipment or other property.

### Impairment Generally

Employers are not defenseless when it comes to employees using cannabis. An employer could take adverse action against an employee if the employee used cannabis outside of work and now is "impaired" by the use at work. But, trying to determine if an employee is "impaired" naturally creates difficulties for employers. Although an employer might think that the strong smell of cannabis, or a positive drug test result for cannabis, show impairment, the New York Department of Labor (DOL) has made clear that those alone are not enough. The original DOL FAQs are available [here](#).

### So, What is Impairment Then?

To be impaired by cannabis, the employee must "manifest articulable symptoms" which (1) decrease or lessen an employee's performance of their duties or tasks; or (2) 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 laws. This suggests that being "high" on cannabis may or may not be enough. More specifically, there needs to be a sign of impairment, plus a potential adverse consequence to the employer, to take disciplinary action against the employee.

For example, in the initial FAQs, the DOL provided that "the operation of heavy machinery in an unsafe and reckless manner" may be considered an "articulable symptom of impairment." As the example demonstrates, the law speaks to a sign of impairment and a potential adverse consequence to the employer. The unsafe and reckless operation of heavy machinery shows a sign of impairment, which is the inability to operate machinery properly, plus a potential adverse consequence for an employer, which is an injury to persons, or property damage, as a result of an accident. Since the law has only been in effect for about one year, and New York courts have not analyzed impairment, we cannot be certain how these cases will be decided. However, employers could look to other states with similar laws, or even New York criminal laws, for some guidance.

#### *i. Other State Laws*

Currently, 19 states have legalized the use of cannabis for recreational purposes. Because of this, these states have had to grapple with cannabis use and its effect on employment. Below is an analysis

of how two other states, with similar statutes to New York, have defined impairment.

a. Illinois

To determine if an employee is impaired, Illinois also looks, in part, for “specific, articulable symptoms while [the employee is] working that decrease or lessen the employee’s performance of the duties or tasks of the employee’s job position.” However, the Illinois statute actually provides some examples: (1) changes in the employee’s speech; (2) physical dexterity, agility coordination and demeanor; (4) irrational or unusual behavior; (5) negligence or carelessness in operating equipment or machinery; (6) disregard for the safety of the employee or others; (7) an accident that results in serious damage to equipment or property; or (8) disruption of a production or manufacturing process.

b. Connecticut

Connecticut lists the same, or substantially similar, characteristics for “specific, articulable symptoms” of impairment: (1) symptoms of the employee’s speech, physical dexterity, agility coordination or demeanor; (2) irrational or unusual behavior; (3) negligence or carelessness in operating equipment of machinery; (4) disregard for the safety of the employee or others; (5) involvement in any accident that results in serious damage to equipment or property; or (6) disruption of a production or manufacturing process.

*ii. New York Criminal Law*

New York Criminal Law, specifically Driving While Impaired by Drugs (Vehicle and Traffic Law § 1192.4), functions similarly to Labor Law § 201-d. It is not a crime to drive while under the influence of cannabis. However, it is a crime to drive while “impaired” by cannabis. Because of this, even if a law enforcement officer smells cannabis upon stopping a vehicle, or has a defendant submit to a drug test which later shows a positive result for cannabis, a prosecutor still needs more evidence to prove that the defendant was impaired by cannabis at the time he or she was driving. Accordingly, a law enforcement officer must articulate evidence of the defendant’s impaired driving ability such as erratic or reckless driving, speeding or repeated failure to maintain lane, plus physical symptoms of the defendant’s impairment upon the stop such as bloodshot eyes, impaired speech, lack of coordination or positive indica of drug impairment on “Standardized Field Sobriety Tests.” Law enforcement agencies also train some officers to be “Drug Recognition Experts,” who are taught to recognize the specific behavior of people influenced by different classes of drugs like Central Nervous System Depressants, Hallucinogens and Cannabis. Therefore, since there is no “objective” measure of cannabis impairment, employers, like law enforcement officers, are left to decide impairment based on observations of the employee’s physical characteristics plus the manner in which the employee is performing work tasks.

**Drug Testing for Cannabis**

As discussed above, a positive drug test alone is not enough for taking adverse action against an employee. However, an employer may conduct a drug test for cannabis if the employee got into an accident during work hours or with employer property and there is “reasonable suspicion” to believe that the employee was impaired by cannabis. For example, this could include someone observing the employee driving in an unsafe or reckless manner or the employee driving well below the speed limit

on the highway. In New York, the DOL is taking the position that employees should not be tested for cannabis pre-employment. Testing for cannabis should only be used if there is a potential violation of Labor Law § 201-d.

### **Employer Impairment Checklist**

Before an employer takes adverse action against an employee for being impaired by cannabis, the employer should consider the following checklist.

- (1) Determine whether the employee is using cannabis during work hours. If the employer has a policy prohibiting the use or possession of cannabis during working hours, and the employee used cannabis during those hours, then the employer can take adverse action. Note that in New York, lunch and other breaks are considered working hours.
- (2) Determine whether the employee used cannabis on the employer's premises. Although an employee can use cannabis before work, the employer can still take adverse action if the employee, for example, used it in his or her car, which was parked in the employer's parking lot.
- (3) Determine if the employee is displaying specific, articulable symptoms of cannabis use. Does the employee have slowed speech, poor coordination or is having difficulty operating company equipment? If a manager or supervisor believes that the employee does have symptoms of impairment, he or she should ask another supervisor to confirm. Having more than one supervisor observe the behavior, and then documenting it, will help when defending against potential lawsuits.
- (4) Determine if the job description implies safety implications. Remember, conduct that "interfere[s] 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 laws" is part of the analysis too. For example, if the employee's job requires the employee to operate dangerous machinery, the employee should not be impaired by cannabis. However, consult legal counsel before taking adverse action against the employee if this is the case.
- (5) Determine if the employee's job performance is decreased or lessened. If the employee is not functioning to his or her normal capacity, more than one person observes this, and he or she is suspected to be using cannabis, then it is likely that the employer can take adverse action. Again, consult legal counsel before taking adverse action against the employee if this is the case.

If you have any questions about the information presented in this memo, please contact [James Taglienti](#), any attorney in Bond's [labor and employment practice](#) or the Bond attorney with whom you are regularly in contact.

