The Employment Impacts of Marijuana Legalization in New York

By Thomas G. Eron

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The Marihuana[1] Regulation and Taxation Act (MRTA) legalizes the use and possession of cannabis by adults in New York State, redefines criminal conduct associated with the drug, and establishes an elaborate regulatory scheme to oversee the future licensed cultivation and distribution business.[2] While marijuana has been legal under New York law for certain medical treatments since the Compassionate Care Act (CCA) was enacted in 2014,[3] the MRTA significantly expands the lawful use of marijuana and, as a result, presents significant legal challenges for employers. These issues are complicated by the fact that marijuana remains a Schedule I drug under federal law, rendering use and possession unlawful under the federal Controlled Substances Act.[4]

The MRTA makes it lawful for an adult age 21 and over in New York to possess up to three ounces of marijuana, cultivate up to six plants, and to smoke marijuana in public where smoking tobacco is permitted. Section 127 of the MRTA protects the lawful use[5] and possession of marijuana by loosening the definitions of criminal conduct and prohibiting discrimination against those engaged in lawful conduct in multiple settings, including professional licensing, leasing, school admission, domestic disputes and, significantly, employment.

Amendments to the N.Y. Labor Law

The principal employment regulation arises through amendments to N.Y. Labor Law Section 201-d, which were immediately effective. Section 201-d generally prohibits private and public employers from refusing to hire, terminating or otherwise discriminating against individuals because of, *inter alia*, their legal use of consumable products, or their participation in legal recreational activities outside of work.[6] The MRTA amended Section 201-d to provide that the legal use of consumable products includes the use of cannabis in accordance with state law, and that protected recreational activities also include lawful cannabis (presumably use and possession).

With respect to the use of consumable products and recreational activities, the protections of Section 201-d are limited to activities outside of work hours, off the employer's premises and without use of the employer's equipment or other property. Work hours are broadly defined to cover all work time, including paid and unpaid breaks and meal periods.[7]

In addition, since inception, Section 201-d has not protected conduct that creates a material conflict of interest with the employer's trade secrets, proprietary information or business interests, and, for private sector employers, conduct that violates a collective bargaining agreement. Further, under Section 201-d(4), an employer may lawfully act "based on the belief" that:

i.) the employer's actions were required by statute, regulation, ordinance or other governmental mandate;

ii.) the employer's actions were permissible pursuant to an established substance abuse or alcohol program or workplace policy, professional contract or collective bargaining agreement, or

iii.) the individual's actions were deemed by an employer or previous employer to be illegal or to constitute habitually poor performance, incompetency or misconduct.[8]

The MRTA did not amend the existing subsections of section 201-d to integrate marijuana use or possession into these statutory exceptions and defenses. Instead, the Legislature added a separate subsection 201-d(4-a) as follows:

> Notwithstanding the provisions [on existing exceptions and defenses], an employer shall not be in violation of this section [201-d] where the employer takes action related to the use of cannabis based on the following:
>
> i.) the employer's actions were required by state or federal statute, regulation, ordinance, or other state or federal governmental mandate;

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ii.) 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 law; or

iii.) the employer's actions would require such employer to commit any act that would cause the employer to be in violation of federal law or would result in the loss of a federal contract or federal funding.

Reconciling State and Federal Law

State laws "legalizing" the use of marijuana are in direct conflict with the federal Controlled Substances Act, which prohibits the use or possession of marijuana as a Schedule I controlled substance.[9] Nevertheless, state laws offering employment protections to individuals who use marijuana are not necessarily preempted by federal law. In a leading case, *Noffsinger v. SSC Niantic Operating Co., LLC*, 273 F. Supp. 3d 326 (D. Conn. 2017), the court held that the Connecticut Palliative Use of Marijuana Act was not preempted by the Controlled Substances Act, because, while the federal law prohibits the manufacture, distribution, and possession of marijuana, it "does not make it illegal to employ a marijuana user [n]or does it purport to regulate employment practices in any manner."[10] A similar rationale likely supports the conclusion that the federal Drug-Free Work Act does not preempt state laws regulating the employment of marijuana users.[11]

No Right To Use Marijuana at Work or on an Employer's Property

As amended, Section 201-d provides that the lawful recreational use or consumption of marijuana outside of work hours and off an employer's premises, constitutes protected activity. It is clear that an employee's use of marijuana is protected only to the extent it occurs prior to the beginning, or after the completion, of the employee's work hours. In other words, Section 201-d does not permit employees to use marijuana during break time or rest periods, whether or not they are paid. Further, an employer may prohibit use or possession on the employer's property, including in vehicles, and in non-work areas, such as parking lots, without running afoul of the new legislation.

Implications for Pre-Employment Drug Testing

Unlike marijuana legislation in New York City and other jurisdictions,[12] the MRTA does not specifically address testing for marijuana use in the employment context. Still, the statute is likely to have a significant impact on existing employment practices.

With respect to pre-employment testing, a refusal to hire based solely on an adult applicant's positive test result for marijuana, under existing standard test protocols, would appear to establish a *prima facie* violation of Section 201-d. The positive test result alone, in the absence of any articulable symptoms of impairment, would likely not establish the defense under subsection 4-a quoted above. Whether such a decision could be defended, for example, as a violation of a collective bargaining agreement or as permissible under an established substance abuse program, would depend on the terms of the relevant labor agreement and substance abuse program.[13]

In particular, the Legislature's inartful drafting of the statute has left unresolved the extent to which an employer's belief that its substance abuse program that bars employment to any applicant who fails a drug test may provide a defense to a Section 201-d discrimination claim brought by an individual who was denied employment based on a positive test for marijuana. In this regard, the existing statutory language appears to be at odds with the broadest interpretation of the intent underlying the MRTA.

Addressing the Effects of Off-duty Marijuana Use on Work Performance

Employers have reason to be concerned about the effects of off-duty marijuana use on work performance in light of scientific findings that tetrahydrocannabinol (THC), the primary psychoactive element in marijuana, can remain in an individual's system for up to 30 days and that even infrequent marijuana use can impair.

Under the MRTA, 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.

The Legislature choose not to elaborate on the definition of impairment, in contrast to legislation in other jurisdictions.[14] Further, while current testing protocols can measure an individual's THC level, no widely accepted standard for measuring impairment presently exists. So, a positive test result, for example under a reasonable suspicion or post-accident testing procedure, would not necessarily establish that the employee was impaired. Contemporaneous verification of the symptoms of impairment would be critical to the employer's defense. For many employers, this new statutory standard will require additional managerial training and more robust evaluation procedures to respond to accidents and employee misconduct, as compared to the typical current procedure that relies heavily on drug test results.

The MRTA provides a limited safe harbor for employers concerned with meeting the requirements of applicable federal laws, other statutes, and the terms of federal contracts or grants. As amended, Section 201-d does not preclude an employer from taking employment action against an individual based on off-duty marijuana use if such action is "required" by a state or federal statute, regulation, or other mandate, or if the failure to act would result in the loss of a federal contract or federal funding.[15]

While significant for employers regulated under federal law or party to federal contracts or funding, this exception has important limitations because many federal regulatory schemes and contracts may address employment issues, but do not necessarily prohibit the employment of a marijuana user. For example, the U.S. Department of Transportation (DOT) regulations on drug and alcohol use by employees in safety sensitive positions, such as commercial truck drivers, mandate employment drug testing, including testing for the presence of marijuana.

If an employee fails a drug test, or is otherwise shown to be impaired, the employer is required to remove the individual from the safety sensitive position and not return the employee to a safety sensitive assignment until the employee has completed a return to duty evaluation and treatment regimen.[16] In other words, the federal regulation — although still applicable — does not necessarily "require" termination of an employee based on a positive drug test or even a finding of impairment from off-duty drug use, and termination based on a failed DOT drug test alone would not likely meet the requirements of the 201-d safe harbor.

Expansion of the Medical Marijuana Program

The MRTA effectively extends and expands New York's medical marijuana program as applied in the employment context under terms comparable to the prior CCA.

The new law continues the process by which an individual becomes a certified medical marijuana user. Once certified, the medical marijuana patient is deemed to have a "disability" under the New York Human Rights Law. Accordingly, certified medical marijuana users are entitled to reasonable accommodations, and the employer should engage in the interactive process to determine if there is some reasonable accommodation that allows the employee to perform the essential functions of his or her position without undue hardship to the employer. While the employee, who can perform the essential functions of the job with or without a reasonable accommodation, cannot lawfully be terminated for using marijuana, the statute specifically allows "a policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance."[17] Employers are also not required to perform any act that would directly violate a federal law, or that would cause them to lose a federal contract or federal funding.[18]

In addition, the MRTA expands the medical conditions that may serve as a predicate for medical marijuana certification by including the catch-all phrase "any other condition certified by the [medical] practitioner,"[19] opening the door for a significant expansion in the certification of marijuana patients.

Conclusion

While the framework for certification and accommodation of employees who are medical marijuana users has become established in New York, the MRTA has significantly expanded its potential scope. And, as the licensing programs for the cultivation and distribution of recreational marijuana come online in the next several years, New York employers and their counsel will need to be prepared to address the vexing questions raised by their employees' off-duty use of the drug.

Endnotes

1. Although the legislation uses this alternative spelling, for this article, we use the more common spelling of marijuana.
2. Marihuana Regulation and Taxation Act L. 2021 c. 92 § 1 et seq. Briefly, the MRTA creates an expansive recreational marijuana program; establishes the Cannabis Control Board, the Office of Cannabis Management, and the Cannabis Advisory Board, which are tasked with regulating medical and recreational use of marijuana and hemp extracts; and makes numerous statutory amendments relating to public health, taxation, and criminal conduct, among others.
3. N.Y. Pub. Health law §§ 33600 *et seq.* (McKinney 2021).
4. 21 U.S.C. §§ 801 *et seq*. (2021). A Schedule I drug is a drug that has (1) a high potential for abuse, (2) no currently accepted medical use in treatment in the United States, and (3) a lack of accepted safety for use of the drug under medical supervision.
5. The term "use" includes smoking, vaping, ingesting edibles and consuming cannabis infused products.
6. N.Y. Lab. Law § 201-d (McKinney 2021). Section 201-d also protects against discrimination based on certain political activities, union membership and the exercise of protected rights under the National Labor Relations Act and the Taylor Law. *Id.* at § 201-d(2)(a) and (d).
7. *Id.* at 201-d(1)(c).
8. *Id.* at 201-d(4).
9. In 2013, the U.S. Justice Department (DOJ) curtailed enforcement of the prosecution of marijuana offenses in deference to states' legalization of the drug. See August 29, 2013 DOJ Memorandum re Guidance Regarding Marijuana Enforcement. The Trump Administration initially disavowed this position, but largely acquiesced to non-enforcement.
10. 273 F. Supp. 3d at 334; see also, *Callahan v. Darlington Fabrics Corp.*, 2017 U.S. Dist. LEXIS 88 (R.I. Super. 2017).
11. The Drug-Free Work Act, 29 U.S.C. § 8102, requires most federal contractors and grantees to maintain a drug-free workplace as a condition of the federal contract or grant. Under the Drug-Free Work Act, federal contractors and grantees must: (1) issue a policy prohibiting possession, use or distribution of controlled substances in the workplace which specifies the consequences for a violation; (2) establish a drug-free awareness program; (3) report criminal drug violations; (4) impose a penalty or require participation in a rehabilitation program for any employees convicted of a drug violation; and (5) make a "good faith" effort to maintain a drug free workplace. The Drug-Free Work Act does not require drug testing of applicants or employees, or prohibit employers from employing individuals who use marijuana.
12. New York City Admin. Code § 8-107(31) generally provides that pre-employment drug testing for marijuana is unlawful, qualified by a substantial list of positions excepted from this ordinance. See also, 26 M.R.S. § 683 (Maine statute on substance abuse testing in employment).
13. *See Devine v. New York Convention Center Operating Corp.*, 167 Misc. 2d 372, 639 N.Y.S.2d 904 (Sup. Ct. N.Y. Co. 1996)(dispute subject to a labor agreement not ripe for §201-d action).
14. For example, under Illinois law, an employer may consider an employee to be impaired or under the influence of cannabis if the employer has a good faith belief that an 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, including symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, or negligence or carelessness in operating equipment or machinery; disregard for the safety of the employee or others, or involvement in any accident that results in serious damage to equipment or property; disruption of a production or manufacturing process; or carelessness that results in any injury to the employee or others. 410 Ill. Comp. Stat. 705/10-50(d)(2021).
15. N.Y. Lab. Law § 201-d(4-a)(i) and (iii).
16. See 49 CFR part 382, and 49 CFR part 40, subpart O. These federal DOT requirements apply, regardless of the legal status of marijuana under state law. See DOT, Federal Motor Carrier Safety Admin., available at https://www.fmcsa.dot.gov/faq/does-legalization-use-and-possession-marijuana-state-or-other-country-has-d (last visited, April 30, 2021).
17. *See Gordon v. Consolidated Edison Inc.*, 190 A.D.3d 629, 140 N.Y.S.3d 512 (1st Dep't 2021).
18. N.Y. Cannabis Law § 42(2) (McKinney 2021). For example, the U.S. Department of Transportation (DOT) maintains that the use of medical marijuana is unacceptable for any employee who is subject to drug testing under DOT regulations. Consequently, an employer may lawfully refuse to allow a medical marijuana patient to perform safety sensitive functions that are subject to DOT regulation. See, 49 CFR §§ 40.151(e), 391.11(b)(4) and 391.41(b)(12)).
19. N.Y. Cannabis Law § 3(18)(McKinney 2021).

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