

New York Legalizes Recreational Marijuana

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New York Governor Andrew Cuomo signed [legislation](#) legalizing recreational marijuana on March 31, 2021. *The legalized use of marijuana is effective immediately*, even though retail sales of marijuana are not expected to begin until mid-2022. This change potentially immediately affects a New York employer's ability to take adverse actions against applicants and employees based on recreational marijuana usage.

The Marijuana Regulation and Taxation Act (MRTA) legalizes and regulates cannabis use and possession for adults who are 21 and older. The MRTA creates a new Cannabis Law and consolidates the laws affecting recreational adult-use of cannabis, medical marijuana, and the cannabinoid hemp program. These programs will be overseen and regulated by a newly created Cannabis Control Board and the Office of Cannabis Management.

Effective immediately, adults who are 21 and older may possess up to three ounces of cannabis and up to 24 grams of concentrated cannabis and may use cannabis except as may otherwise be prohibited by state law. The law does not permit driving while under the influence of cannabis or smoking cannabis in locations where smoking tobacco is prohibited. It also does not require any individual to engage in any conduct that violates federal law, among other things.

Amendment to Legal Activities Law

The most significant provisions for employers are the amendments to Section 201-d of the New York Labor Law. MRTA provides that an employer must adhere to policies regarding cannabis in accordance with Labor Law Section 201-d. This means that New York employers may not refuse to hire, employ, discharge, or otherwise discriminate against someone who uses cannabis lawfully while off-duty and off-premises and while not using the employer's equipment or other property. However, Section 201-d is amended to say that an employer would not be in violation of that law where the employer takes action related to the use of cannabis based on the following:

1. The employer's actions were required by state or federal statute, regulation, ordinance, or other state or federal governmental mandate;
2. 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 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
3. The employer's actions would require such employer to commit an 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.

Changes to Medical Marijuana Law

Oversight of the state's medical marijuana program will shift from the Department of Health to the Office of Cannabis Management. Any medical condition will qualify for medical marijuana use, as recommended by a medical practitioner, and the types of products that may be used will expand and marijuana can be sold to medical users in leaf/flower form. Medical marijuana users will still be deemed to have a "disability" within the meaning of the New York Human Rights Law.

MRTA also provides that employees who use medical cannabis must be afforded the same rights, procedures, and protections that are available and applicable to injured workers under the workers' compensation law, when such injured workers are prescribed medications that may prohibit, restrict, or require the modification of the performance of their job duties.

Driving Under the Influence

MRTA directs the state police to increase the number of trained and certified drug recognition experts and provide increased drug recognition awareness and advanced roadside impaired driving enforcement training.

The Department of Health is directed to conduct research to evaluate methodologies and technologies for the detection of cannabis-impaired driving and to present its findings to the legislature on or before December 31, 2022. Thereafter the Department of Health may promulgate rules and regulations to approve and certify a test to detect current cannabis impairment by operators of motor vehicles.

Practical Considerations

New York employers should review their drug and alcohol testing policies to decide whether they will continue to test for marijuana and, if so, under what circumstances. Supervisors should be trained to make reasonable suspicion determinations so that disciplinary actions based on positive marijuana reasonable suspicion tests will be defensible.

Please contact a Jackson Lewis attorney with any questions related to drug and alcohol testing policies, training for supervisors, and other workplace practices.

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