Special Update Alert
Nov. 9, 2021

As part of our ongoing effort to keep members of the Partnership for a Drug-Free New Jersey's drug-free workplace program informed and up to date in regards to the legalization of marijuana and its impact in the workplace, this special alert is being sent to our membership. The topic of the alert covers guidelines that were recently issued by New York State's Department of Labor. As there are many members with employees in both New York and New Jersey, we hope this information will assist you with your drug-free workplace policies and procedures. Special thanks to Stephen E. Trimbol, esq., of Trimboli & Prusnowski, L.L.C. for writing this alert.

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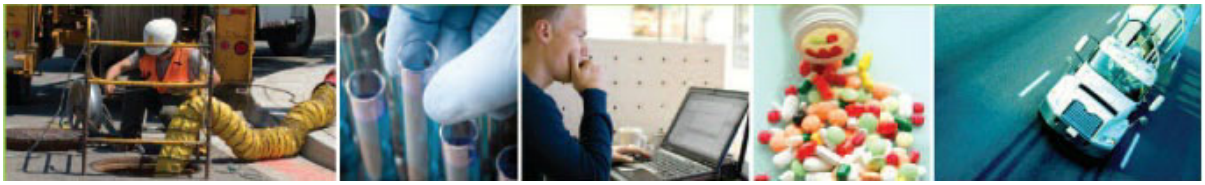

Drug-Free Workplace Alert
for Members of *Drugs Don't Work in NJ*

NEW YORK STATE GUIDANCE ON ADULT USE CANNABIS AND THE WORKPLACE

Written by Stephen E. Trimboli, Esq., Trimboli & Prusinowski, L.L.C.

On March 31, 2021, following New Jersey's lead, the State of New York enacted employment protections for employees who use cannabis products in accordance with New York State law.

On October 8, 2021, the New York State Department of Labor issued a "Frequently Asked Questions" guidance document relating to adult-use cannabis and its effect on the workplace. DDW-NJ members who have employees in New York as well as New Jersey need to be familiar with these new workplace restrictions that will apply to their New York operations.

Background

Unlike New Jersey, since 1992 New York State has had a general law prohibiting discrimination against employees who engage in "legal recreational activities" and the "legal use of consumable products" when they are not on work time, not on the employer's premises, and not utilizing the employer's equipment or other property (*New York Labor Section 201-d)*. One of the driving forces behind this legislation was an effort to prohibit discrimination against tobacco users, as well as the perceived need to protect employee privacy rights. This statute was amended in 2021 to expressly define the use of "cannabis in accordance with state law" as a form of protected legal recreational activity and legal use of consumable products (*New York Labor Section 201-d(2)(b) and (c))*. Like New Jersey's law, only the legal use of cannabis by adults aged 21 and over in accordance with New York State law is protected. The illegal use, sale or transportation of cannabis remains unprotected, as does its use by persons under the age of 21.

What Specifically is Protected?

As noted, the lawful use of cannabis under New York State law and the engaging of recreational activities involving the use of cannabis in accordance with New York State law constitute protected conduct if the consumption or recreational activity occurs outside of work hours, off of the employer's premises, and without the use the employer's equipment or other property. By definition, the use of cannabis during work hours, on the employer's premises, or while engaged in the use of the employer's equipment or other property, remains unprotected. Notably, for this purpose, "work hours" include any time an employee is permitted as well as required to work, and also includes on-call time and any time during which the employee is "expected to be engaged in work."

Are There Any Specific Cannabis-Related Exceptions to this Statutory Protection?

The 2021 cannabis amendments allow an employer to take adverse employment action related to the use of cannabis based on any one of the following grounds:

1. The employer's actions were required by state or federal statute, regulation, ordinance or other state or federal government mandate, (for example, federal regulations requiring drug testing of commercial drivers' license (CDL) holders).

2. The employer's actions would require the 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.

3. The employee, while working, is "impaired" by the use of cannabis, meaning that either:
    a. 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
    b. The employee manifests specific articulable symptoms that would interfere with the 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. *(New York Labor Section 201-d(4)(a)(i)-(iii)*)

The New York State Department of Labor advises that there is "no dispositive and complete list of symptoms of impairment." Rather, "articulable symptoms of impairment are objectively observable indications that the employee's performance of duties of the position … are decreased or lessened." The Department offers the example of an employee operating heavy machinery in an unsafe and reckless manner. However, the Department expressly warns that a drug test for cannabis usage "cannot serve as a basis for an employer's conclusion that an employee was impaired by the use of cannabis, since such tests do not currently demonstrate impairment." Nor is the smell of cannabis, standing alone, evidence of current impairment.

Can an Employer Test for Cannabis?
The New York State Department of Labor takes the position that an employer is **not** permitted to drug test for cannabis unless one of the three cannabis-specific exceptions, cited above, apply. Thus, an employer may test for cannabis if required by state or federal law, or if failing to test for cannabis would cause the employer to violate federal law or lose a federal contract or federal funding. Further, although an employer cannot use a drug test as a basis for concluding that an employee is impaired by cannabis, it appears that the employer may test for cannabis **after** independently determining that the employee is impaired based on articulable symptoms of impairment.

This prohibition against drug testing applies only to cannabis, not to other controlled substances or to alcohol.

What about the General Exceptions to *New York Labor Section 201-d*?
The New York State Department of Labor "Frequently Asked Questions" guidance focuses solely on the cannabis-specific exceptions to New York's off-duty activity antidiscrimination statute. However, that statute also contains *general* exceptions that apply to *all* forms of otherwise protected off-duty activities. These general exceptions include the following:

1. Off-duty activity that creates "a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest." (*New York Labor Section 201-d(3)(a))*

2. Activity which would constitute a violation of law, executive order, policy, directive or municipal code or charter provision pertaining to conflicts of interest, ethics, potential conflicts of interest, or the proper discharge of official duties in connection with public employment. (*New York Labor Section 201-d(3)(b)-(d))*

3. Activity that would cause limited categories of employees to violate a collective bargaining agreement or a certified or licensed professional's contractual obligation to devote his or her entire compensated working hours to a single employer. (*New York Labor Section 201-d(3)(e))*

4. Actions taken by an employer based on the belief that its actions were required by statute, regulations, ordinance or other governmental mandate. (*New York Labor Section 201-d(4)(i))*

5. Actions taken by the employer based on the belief that the actions were permissible pursuant to an established substance abuse or alcohol program or workplace policy, professional contract or collective bargaining agreement. (*New York Labor Section 201-d(4)(ii))*

6. Actions taken based on the belief that the employee's conduct had been deemed by the employer or a previous employer to be illegal, or to constitute habituality poor performance, incompetency or misconduct. (*New York Labor Section 201-d(4)(iii))*

7. Employees who, on an individual basis, have a professional service contract with an employer, and for whom the unique nature of the services provided is such that the employer is permitted, as part of such professional service contract, to limit the off-duty activities which may be engaged in by that employee. (*New York Labor Section 201-d(5))*

There is nothing in the statute that suggests that cannabis use is not subject to any of the foregoing general exceptions. However, in its Frequently Asked Questions guidance, the New York Department of Labor asserts that employers cannot prohibit the use of cannabis outside of the workplace unless the employer is permitted to do so *under the cannabis-specific exceptions only*. The Department further asserts that any existing workplace policies prohibiting off-duty cannabis use cannot be enforced "unless an exception applies." The Department's interpretation appears to be inconsistent with the language of the statute the Department purports to be interpreting.

If the Department's position is correct, cannabis use will enjoy greater protection under New York State law than any other lawful recreational activity or lawful use of consumable products. It remains to be seen whether New York's courts will enforce the statute as it is actually written or will accept the more restrictive position taken by the New York State Department of Labor with respect to lawful cannabis use. As in New Jersey, New York's statutory employment protections for lawful cannabis use therefore raise as many questions for employers as they answer.

DDW-NJ members with employees who work in New York State will need to review their workplace substance abuse policies to ensure compliance with New York law. Advice of counsel should be sought, particularly with respect to areas in which the guidance published by the New York State Department of Labor appears to be inconsistent with the language of the statute itself.

About the Author: *Stephen E. Trimboli, Esq., Trimboli & Prusinowski, LLC, has been recognized as a Best Lawyer in the area of Employment Law, a New Jersey Super Lawyer, and an Employment Law Super Lawyer. He has received awards from the New Jersey Association of Counties; the National Public Employer Labor Relations Association, and the National Council on Alcoholism and Drug Dependence. He was the recipient of the 2019 PDFNJ Founder's Award for the dedication and leadership he has given to the New Jersey business community in the work needed to maintain a healthy and safe workplace environment. www.trimprulaw.com*

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