

Employee Drug and Alcohol Issues

Compliance Reminders for New York Employers

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Marijuana



New York Compassionate Care Act

- Took effect in January 2016
- 120,000 certified medical marijuana patients
- 4,265 certified practitioners
- Any condition deemed clinically appropriate by the patient's healthcare provider

Employee Protections

- Certified medical marijuana patient has a “disability” under NY Human Rights Law
- Employees with “disability” have right to reasonable accommodations if necessary to perform essential functions of job
- Provides protection from adverse employment action because of disability, including medical marijuana use
- No protection for being “impaired” at work
- Employers not required to act in a way that would violate federal law or jeopardize a federal contract/funding

New York Marihuana Regulation and Taxation Act

- Signed March 31, 2021
- Legalizes “recreational” marijuana use (with some limits)
- Adds specific protections for employees who use marijuana outside of work
- Does it matter that marijuana is still illegal under federal law?

Lawful Activities (21+)

- Possessing, displaying, purchasing, obtaining, or transporting up to 3 ounces of cannabis and up to 24 grams of concentrated cannabis.
- Transferring, without compensation, to a person 21 years of age or older, up to 3 ounces of cannabis and up to 24 grams of concentrated cannabis.
- Using, smoking, ingesting, or consuming cannabis or concentrated cannabis (unless otherwise prohibited by state law).
- Possessing, using, displaying, purchasing, manufacturing, transporting, or giving to any person 21 years of age or older cannabis paraphernalia or concentrated cannabis paraphernalia.
- Assisting another person who is 21 years of age or older, or allowing property to be used, in any lawful acts listed above.

Employee Protections

- NY Labor Law Section 201-d protects employees' off-duty use of lawful consumable products (e.g., alcohol and tobacco)
- Now also specifically includes use of “cannabis in accordance with state law”
- Protects use (a) outside of work hours, (b) off the employer's premise, and (c) without the use of the employer's equipment or other property

Section 201-d Exceptions

- The employer's actions were required by state or federal law.
- The employee is impaired by the use of cannabis.
- 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.

Impairment

“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 obligations to provide a safe and healthy workplace, free from recognized hazards, as required by state and federal occupational safety and health law.”

Federal Requirements

- Federal law doesn't generally prohibit any employers from employing medical marijuana users
- Some safety-sensitive transportation positions are subject to federal regulations that require testing and prohibit marijuana use
- Drug-Free Workplace Act applies to employers with a federal contract worth more than \$100,000 or a federal grant

Drug-Free Workplace Act

- Covered employers must adopt a drug-free workplace policy and establish a drug-free awareness program
- Doesn't require employers to drug test or fire employees who use drugs
- Employees must notify the employer within 5 days if convicted of a criminal drug violation in the workplace
- Employer must notify contracting or granting agency of employee violations and penalize employees who violate the policy
- Penalty can include requiring participation in drug-abuse awareness or rehabilitation program

Drug Testing



Disability Discrimination

- Alcoholism and prior drug addiction can be disabilities
- Avoid discrimination and may have to make accommodations
- Current use of illegal drugs not protected
- Marijuana: conflict between state and federal laws

Legal Background

- No direct restrictions on drug testing most employees in private sector
- Mandatory subject of bargaining with unionized employees
- Constitutional limitations for public sector employees
- Statutory requirements for some safety sensitive functions (e.g., DOT regulations)

Omnibus Transportation Employees Testing Act

- Federal law requiring drug/alcohol testing for certain transportation employees (e.g., pilots, bus/truck drivers, certain mechanics)
- Various federal agencies under Department of Transportation have extensive drug-testing regulations
- Often used in unregulated industries as model for effective testing procedures
- Components: Collection, Laboratory Testing, Review by Medical Review Officer

Types of Testing

- Pre-Employment
- Random
- Periodic
- Reasonable Suspicion
- Post-Accident

Policies



Factors

- Subject to federal requirements?
- Nature of jobs/workplace expectations
- Drug Testing
- Labor Supply
- Enforcement

Components

- Prohibited use
- Permissible use
- Testing procedures
- Consequences of violations

Discipline



Considerations

- Discrimination
- Treatment
- At-Will vs. Cause
- Last Chance Agreements

Questions?



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