LABOR AND EMPLOYMENT LAW
INFORMATION MEMO
OCTOBER 18, 2021

NYSDOL Issues FAQs Regarding Recreational Marijuana

Earlier this month, the New York Department of Labor (DOL) published Frequently Asked Questions (FAQs) regarding the legalization of recreational marijuana and its impact on the workplace.

The Marijuana Regulation and Taxation Act (MRTA), which legalized the recreational use of marijuana for individuals over the age of 21 in New York, was passed in March 2021. The MRTA amended Labor Law § 201-d, to specify that the recreational use or consumption of marijuana outside of work hours and off an employer's premises, constitutes lawful recreational activity. Thus, subject to limited exceptions, most employees cannot be disciplined or discriminated against for using and/or consuming recreational marijuana. For more information on Labor Law § 201-d and the recognized exceptions, see our prior blog post, which is available here.

The DOL's FAQs confirm much of what we initially knew following the March 31, 2021 amendments to § 201-d. Therefore, notwithstanding its position on drug testing, which is discussed in greater detail below, the DOL's guidance is largely unsurprising.

Disciplinary and Other Employment Action

The first portion of the FAQs relates to employee discipline. While employers generally cannot discipline employees for their off-duty, off-premises use of recreational marijuana, the protection from discipline is not absolute. The FAQs provide that employers *may* impose discipline or take action against employees who are impaired such that they "manifest specific articulable symptoms of impairment" that diminish their performance or interfere with an employer's obligation to provide a safe, hazard-free workplace.

Since § 201-d was amended by the MRTA, one of employers' burning questions has related to the meaning of "specific articulable symptoms." Unfortunately, the DOL declined to provide a definition, instead stating: "[t]here 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 the duties of [] their position are decreased or lessened." By way of example the DOL explained that "the operation of heavy machinery in an unsafe and reckless manner may be considered an articulable symptom of impairment."

Although the DOL did not provide much clarity as to the meaning of specific articulable symptoms, it did provide some insight as to what may *not* be cited by employers as articulable symptoms of impairment. For instance, specific articulable symptoms of impairment do not include the following:

- *Observable signs of marijuana use without more* – The FAQs state that "[o]nly symptoms that provide objectively observable indications that the employee's performance of the essential duties or tasks of their position are decreased or lessened may be cited" as symptoms of impairment. This suggests that physical signs typically or stereotypically associated with marijuana use cannot, by themselves, be cited as articulable symptoms of impairment.

- *A positive test for use of marijuana* – A positive test for marijuana cannot be used as a basis for articulable symptoms of impairment because there is no test currently capable of indicating present intoxication.
- *The noticeable odor of marijuana* – The noticeable odor of marijuana cannot be used as a basis for articulable symptoms of impairment without any additional indicia of impairment (i.e., diminished performance or the creation of an unsafe, hazardous condition).

Use and Possession of Marijuana at Work

The FAQs also address employees' use of marijuana during working hours, including meal breaks and rest periods. Consistent with the text of § 201-d, the FAQs reiterate that employers are free to prohibit the use of recreational marijuana during meal breaks and rest periods, including break periods during which employees are permitted to leave the physical workplace. Similarly, employers may prohibit employees from using or consuming recreational marijuana while they are on-call or "expected to be engaged in work."

Employers may also prohibit employees from possessing recreational marijuana in the workplace, including anywhere on the employer's premises (whether the property is owned or leased), employer-owned vehicles, and in spaces such as employee lockers and desks. However, because the DOL does not consider an employee's private residence to be a "worksite," employers are limited in prohibiting employee possession of recreational marijuana in a remote employee's home. That being said, employers may take employment action against a remote employee if he or she exhibits specific articulable symptoms of impairment during working hours.

Workplace policies addressing the use or consumption of recreational marijuana are neither required nor prohibited by § 201-d. However, employers with drug use policies that pre-date the legalization of § 201-d should review their policies to ensure compliance with the new law.

Drug Testing

As stated above, the FAQs are largely unsurprising except as they relate to drug testing. In addition to the meaning of specific articulable symptoms, questions about the permissiveness of drug testing predominated following the legalization of recreational marijuana. Employers were eager to ascertain whether their ability to drug test employees for marijuana usage was impacted by the MRTA. Unfortunately, this question was left unanswered.

Unlike the MRTA and Labor Law § 201-d, neither of which expressly addressed drug testing for marijuana, the DOL has taken the position that drug testing is not permissible unless an employer falls within one of the limited exceptions outlined in § 201-d(4-a) (i.e., employers subject to certain federal regulations, employers who risk the loss of federal contracts, etc.). For more information on the exceptions recognized under § 201-d, please refer to our prior blog post, accessible here.

The DOL's position is not supported by the plain language of § 201-d, which does not address drug testing one way or the other. As there has not yet been litigation testing the legality of employment-related marijuana testing following the legalization of recreational marijuana, it remains unclear as to how this issue will be resolved by the courts.

Miscellaneous

The FAQs also address several other miscellaneous points as outlined below:

- *Employee Waiver.* Employers may not require employees to waive the protections of § 201-d as a condition of future or continued employment.
- *Geographical Limitations.* The protections of § 201-d apply only to employees physically working in New York State. Employees working outside of state, including those working remotely out of state for employers with New York operations, are not covered by § 201-d.
- *Covered Employers.* All New York employers, both public and private, regardless of size, are subject to § 201-d.
- *Covered Employees.* Most employees working in New York, including students, are covered under § 201-d. However, because recreational marijuana may only be lawfully used by adults over 21 years of age, employees under the age of 21 are not protected. That being said, the FAQs state that employers do not have any obligation to report employees under the age of 21 who are found to have consumed recreational marijuana.
- *Prospective Application.* There is no retroactive application of § 201-d. That is, employees who were terminated because of their use of marijuana before recreational marijuana was legalized in New York do not have a right to reinstatement now that it is a legally consumable product.

If you have any questions about the information presented in this memo, please contact Hannah Redmond, any attorney in Bond's Labor and Employment practice or the Bond attorney with whom you are regularly in contact.

BOND SCHOENECK & KING ATTORNEYS