

New York Legalizes Recreational Cannabis for Adults

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On March 31, 2021, Governor Andrew Cuomo signed [legislation](#) (“Law”) legalizing recreational cannabis in the state of New York, effective immediately. The Law outlines plans for a tax scheme designed to generate potentially significant revenue for state and local governments and offers expungement for cannabis-related criminal offenses. The Law also provides rules for the new [Office of Cannabis Management](#), which regulates the sale and distribution of both recreational and medical cannabis, and a Cannabis Control Board, which is the governing body tasked with creating and regulating New York’s cannabis industry. As we [previously reported](#), New York legalized medical cannabis in 2014. As summarized herein, this Law has significant implications for employers.

General Provisions

Effective immediately, adults age 21 and over may possess, display, purchase, obtain, or transport up to three ounces of cannabis and 24 grams of concentrated forms of cannabis. The Law defines “cannabis” as “all parts of the plant of the genus Cannabis,” including “the resin extracted from any part of the plant” and every “compound, manufacture, salt, derivative, mixture, or preparation of the plant.” “Cannabis” does not include the “mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds,” hemp, cannabinoid hemp, or hemp extract. “Concentrated cannabis” means “the separated resin, whether crude or purified, obtained from a plant of the genus cannabis” or “a material, preparation, mixture, compound or other substance which contains more than three percent” tetrahydrocannabinol (“THC”), the main psychoactive compound in cannabis that produces the high sensation. Examples of these concentrated cannabis forms include oils and edibles. Cannabis, and concentrated cannabis, may be smoked, vaped, ingested, or used in any manner that is not otherwise prohibited by law. Such products may be consumed anywhere that tobacco use is permitted.

While the Law is effective immediately, it is expected to take somewhere between 18 and 24 months before the actual regulated sale of recreational marijuana in New York begins.

Employment-Related Provisions

Section 9-a of the Law amends and expands the [New York Labor Law 201-d\(2\)\(b\)-\(c\)](#) (New York's lawful off-duty conduct law) to protect off-duty cannabis use by employees. This legislative change comes on the heels of New York City banning pre-employment cannabis testing, with limited exceptions, in April 2019, as we previously [reported](#). Specifically, the new Law provides that employers may not refuse to hire, discharge, or otherwise discriminate against an individual due to cannabis use that occurs “prior to the beginning or after the conclusion of the employee’s work hours, and off the employer’s premises and without use of the employer’s equipment or other property.”

New York employers, however, may continue to maintain a drug-free workplace. Despite the protections for off-duty use, the Law allows employers to take an adverse employment action against any employee when:

- the employer’s actions were required by state or federal statute, regulation, ordinance, or other state or federal governmental mandate;
- 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 workplace, free from recognized hazards, as required by state and federal occupational safety and health law; or
- 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.

Notably, although the Law carves out an exception for employees impaired by the use of cannabis, the Law does not define the “specific articulable symptoms” that could lead to a determination of impairment, which will invariably result in confusion and difficulty for employers unless and until the state clarifies the phrase by issuing further guidance or rulemaking.

Despite the lack of a clear standard, the Law calls for the state’s Commissioner of Health to designate one or more higher education research institutions to conduct “controlled research stud(ies)” designed to evaluate methodologies and technologies for the detection of cannabis-impaired driving and for the State Police to increase the number of trained and certified “drug recognition experts.” Although it is unclear whether the results of the studies and/or subsequent training will be available to employers, the additional information may inform future cannabis guidance.

In the meantime, employers should be careful when attempting to regulate off-duty cannabis use, even where such regulation is based on a concern that such use may affect an employee’s workplace performance. Under the new Law, employers should focus on whether an employee exhibits evidence of impairment at work—such as lethargy, slurred speech, uncharacteristic confusion, etc.—rather than the cannabis use itself.

Finally, the Law does not address how the new standards concerning marijuana use will apply with respect to employees represented by a union and covered by a collective bargaining agreement (“CBA”). Many CBAs have drug and alcohol policies with provisions defining when employers may require random- as well as probable cause-based testing of employees, including the time frames in which such testing is required following accidents or other incidents involving injuries and property damage and inferences that may be taken when an employee fails to submit to directed testing. Also unclear at this time is how arbitrators will address such considerations in determining the existence of just cause for discharges and other discipline. We will continue to monitor any developments related to the Law’s implications for, and application to, union-represented workers.

Changes to Medical Marijuana

The Law also significantly expands New York’s medical marijuana program by permitting medical practitioners to recommend medical marijuana as a treatment for any condition. Previously, individuals could only become a certified medical marijuana user if they suffered from a “serious medical condition,” as defined by statute. This expansion is especially notable because, as we [previously reported](#), certified medical marijuana users in New York are entitled to reasonable accommodations in the workplace.

What New York Employers Should Do Now

- Review employee policies regarding off-duty conduct.
- Review employee policies and practices concerning drug screening and testing, including random- and probable cause-based drug testing.
- Review existing CBAs and policies in unionized workplaces to determine what changes may be necessary in response to the Law and whether such changes will be subject to a duty to bargain with employees’ representatives.
- Review the workforce and operations to determine which positions may fall outside the Law’s coverage versus those that are subject to the prohibitions.
- Monitor the new [Office of Cannabis Management website](#) for guidance on identifying impaired workers.

Employers with multistate operations also should familiarize themselves with the legalization of adult-use cannabis in other jurisdictions.¹ As we [reported elsewhere](#), New Jersey recently enacted legislation, effective August 1, 2021, that provides non-discrimination protections to recreational users of cannabis. Additionally, New Jersey

¹ Recreational marijuana has already been legalized in the following jurisdictions: AK, AZ, CA, CO, DC, IL, MA, ME, MI, MT, NJ, NV, OR, VT, and WA.

Please note that South Dakota voted to legalize both medical and recreational marijuana by ballot initiative on November 3, 2020. Medical marijuana will take effect July 7, 2021; however, the constitutionality of the recreational measure is pending state Supreme Court appeal.

employers will no longer be able to take adverse action or refuse to hire an applicant solely on the basis of a positive marijuana test. The New Mexico Legislature has approved measures that would legalize recreational marijuana, subject to signature by Governor Michelle Lujan Grisham. Lawmakers in [Montana](#) are considering several pieces of legislation meant to implement the successful [November 2020 ballot initiative](#) to legalize adult-use marijuana. Further, Virginia Governor Ralph Northam has proposed moving up the legalization of recreational cannabis from January 1, 2024, to July 1, 2021. Epstein Becker Green will continue to monitor and report on these developments.

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