

Insights, News & Events

WHAT NEW YORK STATE EMPLOYERS NEED TO KNOW ABOUT CANNABIS LEGALIZATION

Insights
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Recreational use of cannabis or marijuana is now legal in New York State. On March 31, Governor Cuomo signed into law the [Marihuana Regulation and Taxation Act](#). The legalization of cannabis will have significant short and long-term effects on all facets of society in the state, including policies and procedures in the workplace. Here's what employers need to know right now.

Lawful Cannabis Use

Effective March 31, 2021, adults aged 21 or older can [lawfully possess, use, and transfer \(without compensation\)](#) up to three ounces of cannabis and up to 24 grams of concentrated cannabis. Eligible adults are also able to [cultivate](#) up to three mature and up to three immature cannabis plants.

Protections for Employees

The Cannabis Law prohibits, with certain exceptions, disciplinary action and discrimination against employees for their lawful use of cannabis. Specifically, employers may not take adverse action against an employee because of their:

- Legal use of cannabis before or after their work hours (including paid and unpaid breaks and meals) off the employer's premises and without use of the employer's equipment or property; or
- Legal use of cannabis during the employee's legal recreational activities off the employer's premises and

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without use of the employer's equipment or property,

Employees may not be subjected to disciplinary action solely for conduct permitted under the Cannabis Law.

Protections for Employers

While the Cannabis Law allows employees to legally use cannabis before and after work hours, it does not provide them carte blanche for the legal consumption of cannabis in the workplace or to report to work under the influence of marijuana. Indeed, the law makes clear that it is not intended to limit the authority of employers "to enact and enforce policies pertaining to cannabis in the workplace."

Specifically, **an employer does not violate the law** when disciplining an employee for their use of cannabis based on the following:

- **Compliance with state or federal law.** The employer's actions were required by state or federal statute, regulation, ordinance or any other state or federal mandate.
- **Employee impairment due to cannabis use.** Where the employee manifests "specific articulable symptoms" while working that:
 1. Decreases or lessens the employee's performance of their duties; or
 2. Interferes with the employer's obligation to provide a safe and healthy work place as required by state and federal occupational safety and health law.
- **Violation of federal law or loss of federal contract or federal funding.** Where the employer's actions would require the employer to commit any act that would result in the violation of federal law or loss of a federal contract or federal funding.

Unfortunately, the term "specific articulable symptoms" is not defined within the Cannabis Law. For this reason, it may be difficult to determine whether an employee is sufficiently impaired by cannabis while working to warrant action.

Nonetheless, it is evident that an employer *can act* against an employee unable to perform their job duties or who poses a safety hazard due to their use of cannabis. Further, given the nebulous relationship between state and federal law with respect to cannabis legalization, employers are not required

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to take action that would interfere with their ability to comply with federal law or receive federal contracts or funding.

Workplace Drug Testing of Employees

The Cannabis Law does not prohibit drug testing of prospective or current employees. The utility of pre-employment testing is, however, minimal in light of the Cannabis Law now that employers cannot refuse to hire, discharge, or otherwise discriminate against an individual if they test positive.

It should also be noted that [New York City employers](#) are already prohibited from requiring prospective employees to submit to drug testing for the presence of tetrahydrocannabinols or marijuana, except for those individuals applying to safety sensitive positions such as police or peace officers, roles requiring the supervision of children, medical patients or other vulnerable persons, jobs requiring a commercial driver's license, or any position where drug testing is required by law or a collective bargaining agreement.

Employers who intend or expect to continue drug testing current employees should remember that they cannot – apart for in instances where the three exceptions delineated above apply – discharge or otherwise discriminate against an employee for their lawful use of cannabis.

Smoking or Vaping Prohibited in Places of Employment

The smoking or vaping of cannabis is prohibited in any location where tobacco smoking is prohibited. Additionally, the Cannabis Law prohibits smoking or vaping cannabis, unless otherwise authorized, in locations where smoking or vaping cannabis is prohibited pursuant to [Article 13-E of the Public Health Law](#). Section 1399-O of Article 13-E specifically forbids smoking and vaping in certain indoor areas, including places of employment and school grounds or buses.

Medical Use of Cannabis

[Legalized in New York since 2014](#), laws concerning medical cannabis and New York's Medical Marijuana Program are now encompassed in [Article 3](#) of the Cannabis Law. Patients certified to use medical cannabis (certified patients) are

deemed to have a disability under the Executive Law and Civil Rights Law.

Like recreational cannabis users, certified patients cannot be subjected to disciplinary action solely for their certified medical use of cannabis. Notably, under the Cannabis Law, certified patients are entitled to the “same rights, procedures, and protections available and applicable to injured workers under workers’ compensation law or other rules, when such injured workers are prescribed medications that prohibit, restrict, or require modification of the performance of their duties.” Employers are not, however, barred from enforcing policies prohibiting an employee from performing their employment duties while impaired by a controlled substance. Nor does the law require any entity to do any act that would violate federal law or result in the loss of a federal contract or federal funding.

Given the tension here between an employer’s right to bar employees from performing their employment duties while impaired by a controlled substance and the legal requirements concerning accommodation, you should take particular care when drafting policies and procedures concerning this area.

Next Steps for New York Employers

Recreational and medical consumption of cannabis is legal, and your company should not wait to develop, if it has not already, rules and policies concerning cannabis in the workplace. As you craft your policies, keep in mind issues such as the employee transfer (without compensation) of cannabis in the workplace; use of cannabis edibles; and cannabis use at workplace functions. You should also implement training on the Cannabis Law specific to staff and managers.

Regulations from the New York State Cannabis Control Board will be forthcoming in the coming months and years as provisions of the Cannabis Law are implemented. Already, the state has developed a [website for the newly created Office of Cannabis Management](#). You should periodically review the website which will have updates and guidance on the law. For information about the State’s expanded Medical Marijuana Program, refer to the [New York State Department of Health’s website](#).

We will continue to monitor developments impacting New York employers, so make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. If you have questions about the Cannabis Law and whether your policies comply with workplace and other applicable laws, contact your Fisher Phillips attorney or any attorney in [our New York City office](#)