

NEW YORK PUBLISHES GUIDANCE ON ADULT CANNABIS USE AND THE WORKPLACE – 4 KEY FACTS FOR EMPLOYERS

Insights
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New York employers have been anxiously awaiting additional information about how the legalization of recreational marijuana will impact the workplace – and they finally have some. The state’s Office of Cannabis Management (OCM) recently published a fact sheet on [cannabis and the workplace](#) offering an overview of employers’ rights and responsibilities in this area. As [previously reported](#), New York passed the Marijuana Regulation and Taxation Act (MRTA) in April, legalizing the use of cannabis for adults aged 21 or over and protecting employees from disciplinary action and discrimination for off-duty usage. OCM’s fact sheet, released on October 8, is the first guidance employers have received on the new law. Here are four key facts from the guidance employers need to know.

1. Only Employees Are Protected from Employer Action

MRTA protects *employees* from disciplinary action or discrimination for their off-duty marijuana usage. The guidance confirms that the MRTA *does not* apply to individuals who are not employees, such as independent contractors, volunteers, and students.

Further, *illegal* cannabis use is not protected. An employer may discipline, report, or fire an employee under age 21 who uses cannabis on the job or otherwise violates provisions of the MRTA.

2. Employers Can Prohibit Certain Activities

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The MRTA prohibits employers from discriminating against employees for their lawful cannabis use outside of work. Employers also cannot create a policy generally prohibiting cannabis use unless a specific exception enumerated in the Act applies. However, the fact sheet confirms that employers can prohibit:

- Cannabis use during work hours, including during paid and unpaid breaks and meals taken on or off the job site or while an employee is on call. This prohibition can also extend to employees working remotely.
- Possession of cannabis on employer property, including leased and rented spaces, company vehicles, and areas used by employees like desks or lockers.

3. Employers Are Mostly on Their Own When It Comes to Determining “Impairment”

The law states that employers may take an employment action (i.e. discipline, termination) against an employee who is impaired while working if they exhibit “articulable symptoms of impairment”. Unfortunately, OCM’s new fact sheet does not provide employers with much guidance as to what that term *specifically* means except to say that there is no “dispositive and complete” list of symptoms of impairment and that the smell of cannabis, on its own, *does not* qualify.

The guidance provides an example of potential impairment: the “operation of heavy machinery in an unsafe and reckless manner,” which has limited utility for most employers. Consequently, you must still rely on individualized assessments of the observable conduct that may indicate impairment in their workplace. As the Act states, “specific articulable symptoms” must be manifested by a (1) decrease or lessening of an employee’s performance, or (2) interference with the employer’s obligation to provide a safe and healthy work place.

Since, however, articulable symptoms could be manifestations of an employee’s disability, the guidance advises employers to consult with appropriate professionals regarding applicable local, state, and federal laws before making employment-related decisions to prevent disability discrimination.

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4. Drug Testing May Be of Limited Utility

The guidance confirms that a drug test for cannabis usage cannot serve as a basis for an employer's conclusion that an employee is impaired by cannabis, given the current limitations of cannabis testing.

Per the guidance, New York employers are also prohibited from testing for cannabis unless specifically permitted by [New York Labor Law Section 201-D \(4-a\)](#) or other applicable laws. While this may seem like an outright ban on cannabis drug testing for most employers (since the exemptions are not applicable to most employers), the fact sheet is not binding law and the Act itself does not provide for such prohibition. However, you must be cognizant of the state's position on drug testing before acting. Moreover, given that a positive test does not provide evidence of impairment, there is little utility in testing employees for cannabis.

Next Steps for New York Employers

You should remove any language in employee handbooks or company policies that outright prohibits the use of cannabis. If you have not already, you should also develop a policy on cannabis impairment at work, identifying the steps (if any) that will be taken if an employee is believed to be under the influence while working. Supervisors should be trained on symptoms that may constitute articulable symptoms of impairment in your workplace and all applicable policies. Employers also need to carefully review their drug testing policies and procedures to ensure compliance with the law.

OCM will continue to release guidance and regulations as the Act is further implemented. We will monitor developments related to the MRTA, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information directly to your inbox. If you have questions about the MRTA and whether your policies comply with workplace and other applicable laws, contact your Fisher Phillips attorney, the authors of this Insight, or [any attorney in our New York City office](#).