Marihuana Regulation and Taxation Act (MRTA) and its Application in the Labor and Employment

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Amendments to the New York State Labor Law

- Part of the MRTA amends Labor Law §201-d, known as the Legal Activities Law, to specifically prohibit employers (clarified by the New York State Department of Labor to include public employers. See DOL guidance P420 (10/21)) from refusing to hire or employ, or from discriminating against (i.e., taking an adverse employment action against) an individual because of:
  - 1. The individual's use of legal consumable products (NOW including cannabis); or;
  - 2. The individual's legal recreational activities (NOW including cannabis related activity).
- the MRTA adds subdivision 4-a which provides that it is not a violation of §201-d when the employer takes action related to the use of cannabis when:
  - 1. The employer's actions were required by a state or federal statute, regulation, or mandate;
  - 2. The employee is impaired because of the use of cannabis, meaning:
    - The employee manifests specific and articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's position; or
    - The employee's specific and articulable symptoms interfere with the 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.
  - 3. The employer's actions would require the employer to commit any act in violation of federal law or would result in the loss of a federal contract or federal funding.

What do the amendments to the Labor Law mean for employers?

- Drug Testing:
  - Generally, employment-related drug testing falls into three categories:
    - Pre-employment screening,
    - Random workplace testing, and
    - Reasonable suspicion or post-incident testing.
  - With the amendments to section 201-d of the Labor Law it is now illegal for employers to refuse to hire based upon a **pre-employment screening** for legally consumable products such as cannabis.
  - An employer may still utilize pre-employment testing; however, a positive test for Cannabis cannot be used by the employer as a basis to refuse employment.
  - Exception, pre-employment screening that falls under federal mandate, such as:
    - CDL drivers, (See e.g., mandatory drug testing for drivers of commercial motor vehicles in accordance with 49 CFR Part 382; see also e.g., NY Vehicle and Traffic Law Section 507-a which requires mandatory drug testing in for-hire vehicle motor carriers in accordance with 49 CFR 382.)
    - Correction Officers, and
    - Deputy Sheriffs at a Jail (Peace Officer status)
  - Prior to making any changes to a drug testing practice or policy it is important to remember that drug testing practices are a mandatory subject of bargaining.

Police Officer and Peace Officers

- There is no mandate that Police or Peace Officers be tested for Cannabis.
  - However, 18 USC 922(g) of the Federal Gun Control Act ("GCA") of 1968 and the Federal Omnibus Consolidated Appropriations Act of 1997 "make it unlawful for any person who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802)) to ship, transport, receive or possess firearms or ammunition. These laws prevent a State from issuing a concealed carry license/permit to such individuals.
    - Under federal law, any cannabis user is an unlawful user of a controlled substance.
  - Furthermore, the GCA prohibits medical cannabis users from possessing or buying firearms and ammunition — even if state law allows the drug's use.
    - Wilson v. Lynch, 835 F. 3d 1083 (2016)–a 9th Circuit Appellate Court case, ruled that restricting medical marijuana cardholders from purchasing guns did not violate their Second Amendment rights. Following this case, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") issued a statement prohibiting gun purchases for marijuana users, regardless of state law.
  - Further, the GCA at 18 U.S.C. § 922(d) makes it unlawful to sell or otherwise dispose of firearms or ammunition to any person who is prohibited from shipping, transporting, receiving, or possessing firearms or ammunition.
  - Pursuant to 27 C.F.R. 478.11 "an inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time."

What do the amendments to the Labor Law mean for employers?

- Drug Testing Cont.
  - **Random workplace testing** policies will also be affected by the adoption of the MRTA.
    - Why?
      - The lack of adequate testing for cannabis impairment, combined with the new statutory protections under the Labor Law, complicates the random drug-testing framework for employers.
      - For example, a breathalyzer test can with reasonable accuracy determine whether an employee is currently impaired by alcohol, however there is no test which can accurately determine whether an employee is currently impaired by cannabis.
  - For most employers (i.e., those not subject to a specific federal/state contract or regulatory requirement), the 'articulable symptoms' standard, means that the employer may only take an adverse action under circumstances historically considered to be **reasonable cause/suspicion**.
  - **Post incident testing** policies will also be affected by the adoption of the MRTA for the same reasons as the random drug testing policies.
    - A positive test result following post-accident testing may be a sufficient basis to discipline an employee in some circumstances, as long as the 'articulable symptoms' standard has been met.

What do the amendments to the Labor Law mean for employers?

- When can an employer take disciplinary action against an employee for cannabis use?
  - The amendments to §201-d of the Labor Law address this by expressly stating that an employer may take action related to an employee's use of cannabis, where 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 work place***, free from recognized hazards, as required by state and federal occupational safety and health law." (See NYS Labor Law §201-D(4-a))
- Therefore, an employer can discipline an employee for being impaired by cannabis while working on the basis of "specific articulable symptoms" (e.g., slurred speech, slow reaction time, etc.) that decrease or lessen the employee's performance of his or her job duties.
- A positive cannabis test on its own, without the employee having manifested any specific symptoms of impairment may not support an adverse employment action.

What do the amendments to the Labor Law mean for employers?

- What are articulable symptoms of cannabis use?
  - Observable signs of use that do not indicate impairment on their own cannot be cited as an articulable symptom of impairment. Only 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 (See DOL P420 (10/21)):
    - smelling of cannabis,
    - delayed reaction time,
    - falling asleep,
    - conditions that are open, obvious, and objective.

Federal Contracts and Grants

- Federal Drug-Free Workplace Act (41 U.S. Code § 8102):
  - An employer who is subject to federal funding or subject to a federal contract, must comply with the Federal Drug-Free Workplace Act which requires a good-faith effort to maintain drug-free workplaces as a precondition to receiving a contract or grant from a federal agency.
  - However, the Drug-Free Workplace Act does not expressly prohibit federal contractors from hiring or employing a person who lawfully uses cannabis outside of the workplace. (See e.g., USDOL TEIN 15-90 explaining that neither the Drug Free Workplace Act of 1988 nor the rules adopted thereunder authorizes drug testing of employees.)
    - an employer cannot test an employee for cannabis merely because it is allowed or not prohibited under federal law.
  - The Federal Drug Free Workplace Act's focus is to keep drugs **out** of the **workplace**.

Penalties for Violations of the Labor Law

- Penalties for the violation of the MRTA are governed by New York State Labor Law §201-d.
- Under that section, the Attorney General can:
  - apply for an order to enjoin or restrain an employer from committing further violations of the law, and
  - a court may impose a civil penalty on the employer in the amount of $300.00 for the first violation, and $500.00 for each subsequent violation.
- §201-d also permits an aggrieved individual to bring a claim against an employer and to seek equitable relief and damages.
  - Although not defined in the law an aggrieved individual would be an individual who suffers an adverse employment action because of their legal off duty use of Cannabis.

Medical Cannabis Use

- The MRTA does include provisions expanding the Medical Cannabis Program. (See S. 854-A).
  - Control over the Medical Cannabis Program will be moved from the Department of Health to the new Office of Cannabis Management.
  - The list of conditions to be qualified for medical Cannabis will be expanded:
    - Medical practitioners now have the discretion to recommend or certify medical cannabis for any medical condition. (N.Y. Cannabis Law §30).
  - Medical cannabis users will still be deemed to have a "disability" within the meaning of the New York State Human Rights Law and employers must reasonably accommodate an employee who is a "certified patient" as a result of the employee's disability. (N.Y. Cannabis Law §42(2)).
  - In addition, an employee who is a certified medical marijuana patient is entitled to the same rights available to other injured workers under the State's Workers' Compensation law. (N.Y. Cannabis Law §42(6)).
  - However, nothing in the law requires an employer to allow an employee to use cannabis in the workplace.