WHITE PAPER

NEW YORK – WHEN CAN EMPLOYERS TEST FOR MARIJUANA?

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On October 21, 2021, the New York Department of Labor (DOL) released guidance to help employers understand the Marijuana Regulation and Taxation Act (MRTA[1] 2020). You can view the guidance here. This guidance seems to have created more confusion. Let's see if we can help clarify things.

To begin with, let's answer the question on a lot of people's minds – when can you test?

New York - Marijuana Regulation and Taxation Act **WHEN CAN EMPLOYERS DRUG TEST?**		
1	Pre-employment	No
2	Reasonable Suspicion	Yes
3	Post-Accident	Likely (with RS symptoms)
4	Random	No
5	Return to Duty	Likely
6	Follow Up	Likely
Federal or Government Required Testing[2]		
1	Federal DOT	Yes
2	Federal Contractor	Likely[3]
3	State Agencies/Employees	Likely[4]

DOL GUIDANCE

To begin with, it's essential to understand the role of the Department of Labor (DOL) in a marijuana statute. As stated on the DOL LinkedIn page:

> "The Department of Labor plays a major role in strengthening New York State's economy by connecting job seekers to jobs, supporting businesses in hiring, assisting the unemployed, and protecting workers. That is the agency's mission. * * * The Labor Department vigorously enforces state labor laws to ensure a fair wage for all, a level playing field for businesses, and the safety and health of workers and the public.[5]"

MRTA includes an amendment to the New York Labor code[6], which provides as follows: "Section 201-d of the labor law. . . is amended by adding a new subdivision 4-a."[7] Generally, the purpose of §201-d is to prevent discrimination by employers for employee off-duty activities.

Section 201-d provides, ". . . it shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of:

* * *

b. an individual's legal use of consumable products, **including cannabis in accordance with state law**, prior to the beginning or after the conclusion of the employee's work hours, and off of the employer's premises and without use of the employer's equipment or other property;

c. an individual's legal recreational activities, **including cannabis in accordance with state law**, outside work hours, off of the employer's premises and without use of the employer's equipment or other property . . . "[8]

The new subdivision 4-a is an exception to these limitations, and it permits certain drug testing.

DOL GUIDANCE DISSECTED

The DOL is essentially charged with enforcing 201-d(4-a). The August 21 DOL guidance is "intended to address some of the most common situations or questions in the workplace related to adult-use cannabis and the Marijuana Regulation and Taxation Act (MRTA)."[9]

But does this guidance clarify the most common situations or questions regarding MRTA's impact on the workplace, or does it raise more questions? Our approach here will be to present the DOL statements then compare them to the actual language of MRTA.

The first thing to note about the DOL guidance is that it addresses the adult use of marijuana, not medical marijuana. That said, here are some of the key points of the guidance, compared to the language of the law.

1. **DOL Guidance:**

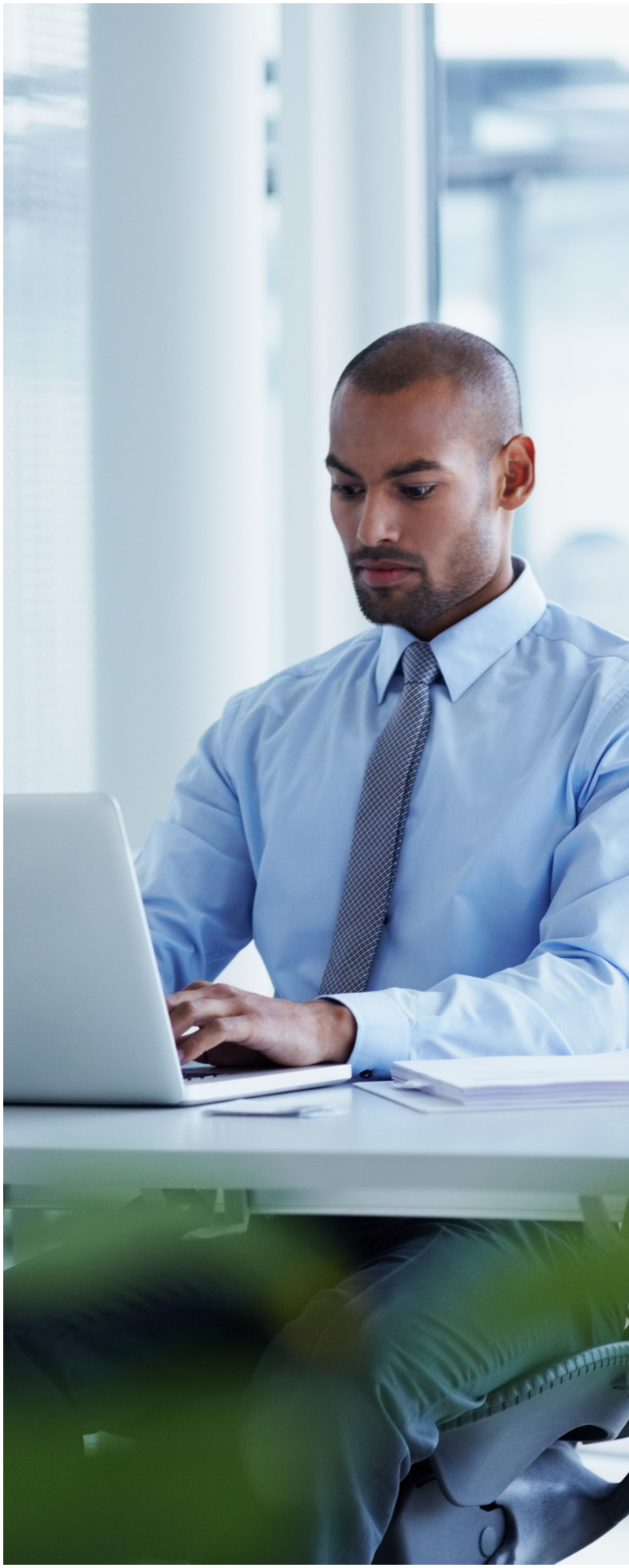
   The DOL guidance starts with "Discrimination Prohibited: . . . employers are prohibited from discriminating against employees based on the employee's use of cannabis outside of the workplace, outside of work hours, and without use of the employer's equipment or property."

   MRTA: LAB §201-d(2)(b) provides that an employer may not discriminate in any employment action because of "an individual's legal use of consumable products, including cannabis in accordance with state law, **prior to the beginning or after** the conclusion of the employee's work hours[10], and off of the employer's premises and without use of the employer's equipment or other property."[11] [emphasis added]

2. **DOL Guidance FAQ:** Can an employer take action against an employee for using cannabis on the job?

   An employer is not prohibited from taking employment action against an employee if the employee is impaired by cannabis while working (including where the employer has not adopted an explicit policy prohibiting use), meaning the employee manifests specific articulable symptoms of impairment that:

   - Decrease or lessen the performance of their duties or tasks.
   - 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 laws.



MRTA: In §201-d(4-a) ". . . an employer shall not be in violation of this section where the employer takes action related to the use of cannabis, based on the following:

* * *

ii. 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

iii. 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.

Here DOL indicates that there is no "dispositive and complete list of symptoms of impairment." DOL continues stating, "Rather, articulable symptoms of impairment are objectively observable indications that the employee's performance of the duties of the position of their position are decreased or lessened." After cautioning employers that the symptom could be indications that the employee has a disability protected by federal or state law. As an example of a symptom that "lessens performance," DOL states:

"For example, the operation of heavy machinery in an unsafe and reckless manner may be considered an articulable symptom of impairment."

DOL goes on to explain that "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."[emphasis added]

MRTA: Remember that §201-d(4-a)(ii) states that an employer will not be in violation of the law if the employer takes actions 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 workplace.***" [emphasis added]

Curiously the DOL does not describe that portion of MRTA (§201-d(4-a)(ii)) that says, "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."

3. **DOL Guidance FAQ:** Can employers use drug testing as a basis for an articulable symptom of impairment?

   No, a test for cannabis usage cannot serve as a basis for an employer's conclusion that an employee was impaired by the use of cannabis since such tests do not currently demonstrate impairment.

   MRTA: MRTA does not mention drug testing anywhere.

4. **DOL Guidance FAQ:** Can I fire an employee for having a noticeable odor of cannabis?

   The smell of cannabis, on its own, is not evidence of articulable symptoms of impairment under Labor Law Section 201-D.

   MRTA: MRTA does not mention the odor of cannabis as a symptom, nor does it indicate that the smell of cannabis could not serve as a starting point for determining if employer action is warranted combined with other facts (signs or symptoms). While some jurisdictions have determined that the legalization of marijuana in their state means the smell of marijuana alone may be insufficient for a search,[12] no known case exists in New York. The DOL comment could discourage some from further investigative action.

5. **DOL Guidance FAQ:** Can an employer test for cannabis?

   No, unless the employer is permitted to do so pursuant to the provisions of Labor Law Section 201-d(4-a) or other applicable laws.

   MRTA: MRTA does not mention "drug testing," but §201-d(4) permits action where the employer takes action based on the belief either that:

   (i) the employer's actions were required by statute, regulation, ordinance, or other governmental mandate, (ii) the employer's actions were permissible pursuant to an established substance abuse or alcohol program or workplace policy, professional contract or collective bargaining agreement, or (iii) the individual's actions were deemed by an employer or previous employer to be illegal or to constitute habitually poor performance, incompetency or misconduct, and

   (4-a) permit employer action * * * (ii) 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.

MRTA does not define "action."

6. **DOL Guidance FAQ:** Can an employer drug test an employee if federal law allows for drug testing?

   No, an employer cannot test an employee for cannabis merely because it is allowed or not prohibited under federal law. (See, e.g., USDOL TEIN 15-90 explaining that neither the Drug-Free Workplace Act of 1988 nor the rules adopted thereunder authorize drug testing of employees.) However, an employer can drug test an employee if federal or state law requires drug testing or makes it a mandatory requirement of the position. (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 for for-hire vehicle motor carriers in accordance with 49 CFR 382.)

   MRTA Guidance: §201-d(4-a) provides "an employer shall not be in violation of this section where the employer takes action related to the use of cannabis, based on the following:

   (i) the employer's actions were required by state or federal statute, regulation, ordinance, or other state or federal governmental mandate;."

Unfortunately, the DOL guidance chose to answer this question in a misleading way. They play games with the word "allows" in the question, and with the word "requires" in the answer. Most employers simply want to know if they can still test under federal DOT rules or other mandatory requirements.

The answer is **Yes**!

The DOL also noted that,

- Smell, on its own, is not evidence of articulable symptoms of impairment under §201-d(4-a).
- Employers cannot prohibit use of cannabis while employees are on leave unless stated otherwise in §201-d(4-a).
- Employers can prohibit cannabis use during mealtime or breaks.
- Employers can prohibit cannabis use while employees are on-call or expected to work.
- Although the DOL does not consider an employee's residence to be a "worksite," employers can prohibit cannabis use during work hours.

CONCLUSION

It's not a matter of "if," but "when" this new law is challenged in the court of law. It's unknown how much weight courts will give to such "guidance" in legal proceedings. Regardless, employers in New York are strongly encouraged to update their workplace drug testing policies, internal procedures and to provide their supervisors & managers with reasonable suspicion training.

REFERENCES

[1] LAB, Ch. 7-A of the Consolidated Laws, Cannabis Law.

[2] Please note the significant difference between the word "required" and the DOL's use of the word "allowed."

[3] If testing "required" as opposed to "allowed."

[4] If testing "required" as opposed to "allowed."

[5] https://www.dropbox.com/s/ra32sckrkp98hi1/Screenshot%202021-11-07%2009.23.32.png?dl=0. MRTA appoints the Commissioner of the Department of Health to enforce its mandates. S. 854-A §490(3) states, "The commissioner may make, adopt and amend rules, regulations, procedures and forms necessary for the proper administration of this article."

[6] MRTA, (§3302)(§9-b)

[7] MRTA includes §3302(§9-b).

[8] LAB §201-d(2)(b), and (c).

[9] https://dol.ny.gov/system/files/documents/2021/10/p420-cannabisfaq-10-08-21.pdf

[10] Work hours is defined as "for purposes of this section, all time, including paid and unpaid breaks and meal periods, that the employee is suffered, permitted or expected to be engaged in work, and all time the employee is actually engaged in work." LAB §201-d(1)(c).

[11] This raises some safety concerns. If an employee is permitted to use cannabis just before clocking into work could they be impaired? This is why reasonable suspicion testing becomes so important.

[12] See Commonwealth v. Moore 2021 Pa. Super. 202 citing Commonwealth v. Barr, 240 A.3d 1263 (Pa. Super. 2020), appeal granted, 252 A.3d 1086 (Pa. 2021), which held that the odor of marijuana cannot establish per se probable cause to conduct a search for contraband following the General Assembly's 2016 enactment of the Medical Marijuana Act ("MMA"), 35 P.S. §10231 et seq..

ABOUT CISIVE

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CONTACT US

www.cisive.com

info@cisive.com

866.557.5984

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