



New York State Legalizes Recreational Use of Marijuana and Adds New Protections for Employees

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On *March 31, 2021*, New York State enacted The Marijuana Regulation and Taxation Act. This Act both legalized recreational use of marijuana and changes the way that marijuana use is handled within the employment relationship. Many of the changes are effective immediately.

Legalization of Recreational Use

With the passing of the law, the following acts are lawful for people 21 years of age or older:

- **Possessing, displaying, purchasing, obtaining, or transporting** up to *three ounces* of cannabis.
- **Transferring**, without compensation, to a person 21 years of age or older, up to *three ounces* of cannabis.
- **Using, smoking, ingesting, or consuming** cannabis or concentrated cannabis unless otherwise prohibited by state law.
- **Possessing, using, displaying, purchasing, obtaining, manufacturing, transporting, or giving** to any person 21 years of age or older cannabis paraphernalia or concentrated cannabis paraphernalia.
- **Planting, cultivating, harvesting, drying, processing, or possessing** cultivated cannabis in accordance with specified guidelines.

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- **Assisting** another person who is 21 years of age or older, or allowing property to be used, in any of the acts described in the bullet points above.

Employee Protections

Increased Protections for Employees

With the loosening of rules surrounding recreational marijuana use, employers cannot refuse to hire, refuse to employ, discharge an employee, or discriminate against an individual in any other way due to the employee engaging in the legal use of cannabis in the following manner:

- **Outside of work hours**
- **Off of the company premises**
- **Without the use of the employer's equipment or other property**

However, there are three exceptions where employers CAN take action related to an employee's use of cannabis:

- (1) Required by Legislation(s).** If the employer's actions were required by state or federal law, regulation, ordinance, or other state or federal governmental mandate (i.e. DOT rules).
- (2) Impairment While Working.** If the employee is impaired by the use of cannabis by showing specific articulable symptoms while working that decrease or lessen the employee's performance on the job or the symptoms interfere with an employer's ability to provide a safe and healthy workplace to its employee, such as slurred speech, an argumentative or irritable demeanor, or nonresponsiveness.
- (3) Violation of Law or Loss of Contracts and Grants.** If the employer's action/inaction would cause the employer to be in violation of a federal law or would result in the loss of a federal contract or federal grant.

Protection Exceptions

Practical Implications for Employers

Due to these new laws and narrow exceptions, employers need to change some of their procedures. Pre-employment and post-accident testing are not advised. It is no longer permissible to rely on a drug test to determine whether an adverse action can be taken. The employee must show observable signs of impairment or actual use of marijuana on the job or while using company equipment. This does not prevent employers from testing employees but testing alone to determine disciplinary action is not allowed.

It is important to note that nothing in the Act prevents an employer from enacting or enforcing policies related to cannabis in the workplace, such as prohibiting driving under the influence of cannabis, engaging in conduct that endangers others, prohibiting smoking cannabis in areas where smoking tobacco is prohibited, or prohibiting conduct that violates federal law. However, if an employer is found in violation of the law, the attorney general can apply for an order to restrain the employer from committing further violations and a court may also impose a civil penalty. Employers would be assessed a penalty of **\$300** for the first violation and **\$500** for each additional violation. The affected employee can also bring a claim against the employer and seek equitable relief and damages.

Interactions with Other Laws

It should be noted that New York City has its own set of marijuana laws that differ from what is stated in the state law. For example, in New York City, certain classes of employers and positions can require an applicant to submit to testing for the presence of any marijuana or THC in the applicant's system as a condition of employment. However, the New York State law does not have that same "safety" clause as an exemption for the prohibition on adverse employment actions.

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Also, under the Compassionate Care Act (CCA) in July of 2014, medical marijuana use was legalized in New York State. New York's new law strengthens the ability for employees to use cannabis outside of the workplace, including for medicinal purposes. Medical practitioners now can recommend or certify medical marijuana for any medical condition. In addition, employees who use medical cannabis are afforded the same rights, procedures, and protections available and applicable to injured workers under the workers' compensation law. Thus, an accommodation may need to be made in determining both the duties to have that person perform and the manner in which they perform them.

Employer Next Steps

Given that the Act will have a substantial effect on how employers in New York State carry out their operations, the following steps are recommended:

- **Re-Examine.** Re-examine and revise policies and procedures related to the drug testing of applicants and employees as well as employee cannabis use.

- **Maintain & Enforce.** Continue to maintain and enforce policies prohibiting marijuana in the workplace and articulate the procedures and consequences for employees who appear impaired from using cannabis. This includes a mechanism for reporting the observance of signs of impairment.
- **Train.** Train supervisors and other relevant employees on the “specific articulable symptoms” of on-the-job impairment that would justify investigations, testing, and the possibility of adverse employment actions.

Employers are also encouraged to reach out for assistance from their legal counsel and/or local employment attorneys for further guidance and interpretation of the new marijuana law.

ADDITIONAL RESOURCES

[New York State Press Release](#)

Source: Governor.NY.gov

[New York Legislation \(S.854-A/A.1248-A\)](#)

Source: [New York State Assembly](#)