

Employers in New York must prepare for marijuana legalization

By MEGHAN DIPASQUALE

Gov. Andrew Cuomo recently announced that the legalization of adult recreational marijuana would be a legislative priority in 2019 and included in one of his budget bills a proposal to make this priority a reality. Although the New York State Assembly has not yet put forth a bill, it appears the Cuomo plan has legislative support, and details will be fleshed out over the next few months. New York employers should be preparing themselves for the impact this legalization will have on their drug policies.

Eight states and the District of Columbia now allow the use of recreational marijuana by adults, and thirty states permit its use for medical purposes. In 2014, Cuomo signed into law the Compassionate Care Act (10 N.Y.C.R.R. §1004), adding New York to the list of states that legalized medical marijuana use for certain conditions. As discussed below, since the passage of the Compassionate Care Act, New York employers have been required to revise their policies to account for the legalization of medical marijuana and, more specifically, to provide certain reasonable accommodations to those certified under the law.

Legalization of recreational use may lead employers to question their ability to test employees and prospective employees for the presence of controlled and/or prohibited drugs in their systems. However, employers still will have options, depending on the job functions of their employees and type of workplace environment they wish to foster. An initial consideration is whether ensuring employees abstain from marijuana use is a goal worth pursuing. According to the annual national Monitoring the Future Panel Study conducted in 2017, 21 percent of college students aged 19-22 reported using marijuana a least once in the prior 30 days. That number represents a 30-year high. As marijuana use increases among qualified potential employees, employers will wish to consider whether the benefits of maintaining a marijuana-free workplace outweighs the drawback of missing out on large swaths of the employee pool. In Colorado, for example, employers have started hiring individuals from other states after being unable to find Colorado residents who can pass a drug test.

While employers will still likely be permitted to prohibit on-duty marijuana use, they will have to carefully craft their policies to define employee job responsibilities and on the job expectations. This will depend on the exact language of New York's recreational marijuana legalization law and ultimately, how New York courts interpret that law. The Cuomo plan currently states "[U]nless an employer establishes that the lawful use of cannabis has impaired the employee's ability to perform the employ-

ee's job responsibilities, it shall be unlawful to take any adverse employment action against an employee based on conduct allowed" under the proposed law. Employers would be permitted to "take adverse employment action" against workers for the "possession or use of intoxicating substances during work hours."

At first blush, a compliant recreational marijuana use policy would be akin to alcohol policies. In the same way employers do not allow their employees to be impaired by alcohol while at work, employers do not wish their employees be impaired by marijuana. This is especially true in workplaces that require employees to operate heavy machinery or motor vehicles. Unlike alcohol, however, identifying an employee impaired by marijuana is less easy. Employers do not have access to anything akin to a breathalyzer to test for recent marijuana use, and routine tests are often incorrect or unreliable for identifying users that are currently impaired. In addition, there is the issue of privacy rights, as drug testing often is invasive. Employers will have to strike a balance between employees' privacy and workplace safety.

Notably, based on a review of case law in other states that have legalized recreational use, New York employers may still have the option of requiring employees to abstain from off-duty recreational marijuana use, despite language in the Cuomo plan that states otherwise. In other states that have legalized marijuana, courts have upheld the firing of employees for off-duty recreational marijuana use, in general agreeing with employers' arguments that federal preemption offers a defense to alleged wrongful termination or refusal to hire. For example, in *Brandon Coats v. Dish Network, LLC*, 2015 CO 44 (2015), the Colorado Supreme Court addressed whether marijuana use was a "lawful" off-duty activity protected from employer regulation. The Court held that although Colorado had legalized marijuana, it was still illegal at the federal level, and thus not considered "lawful" off-duty activity. The court held that employers could therefore fire their employees for off-duty marijuana use.

In evaluating their policies and practices, New York employers will further need to continue to be cognizant of the obligations the Compassionate Care Act places on them regarding their employees' medical marijuana use. On the one hand, the Compassionate Care Act states that employers cannot be compelled to institute a policy that may endanger federal contracts. So, for example, if a company's contract with the federal government mandates a drug testing policy be implemented, New York employers are not obligated to ignore that requirement. Setting aside that exception, the New York law includes anti-discrimination language dictating that



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employers accommodate employees' medical conditions and their treatment. Specifically, certified patients "shall not be [] denied any right or privilege based on their legal marijuana use." So, for example, if an employee has a disease that is being treated with medical marijuana, employers are obligated to make certain reasonable accommodations. For guidance on what is a reasonable accommodation, employers may draw parallels between their medical marijuana policies and those for employees using prescribed opium medications.

Regardless of the final language in New York's adult recreational marijuana use law, the key for employers will be to maintain clear policies and procedures. For example, if an employer plans on maintaining its pre-legalization position on the use of marijuana, it needs to consider and revise policies that prohibit the use of "illegal drugs." Employers should review job descriptions related to safety-sensitive positions. If employers intend to test for marijuana, they should provide employees detailed information outlining their substance use and drug testing policies. They should communicate with current employees as well as job applicants their drug screening practices and the consequences of use of marijuana on the job, and next steps for potential violation of the policies and positive test results. This should include what may be done if an employee is suspected of being impaired. To address the issue of on the job impairment, managers should be trained regarding "for cause testing" on the job as well as how to identify signs of marijuana impairment. This may include consulting with drug testing laboratories or substance abuse specialists. Lastly, if not already in place, employers should have a clearly defined medical marijuana policy. This should include a detailed analysis of its policy, which mimics the language of the applicable reasonable accommodation laws.

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