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Presents

Marijuana in the Workplace

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Status of Federal Law

The Controlled Substances Act ("CSA") (21 U.S.C. §§ 801 – 904).

- The CSA provides a legal framework for the regulation of drugs, substances, and certain chemicals used to make drugs (often referred to as "controlled substances").

- The CSA classifies controlled substances into five categories or schedules depending upon:
  - acceptable medical use;
  - potential for abuse; and
  - safety or dependence risk.

Marijuana is a Schedule I Controlled Substance Under the CSA

- The CSA categorizes marijuana as a Schedule I controlled substance. (21 U.S.C. § 812; 21 C.F.R. § 1308.11).
  - Other Schedule I drugs include heroin, LSD, ecstasy, and peyote.

- The CSA defines Schedule I drugs to have:
  - A high potential for abuse; and
  - No currently accepted medical use in treatment in the United States. (21 U.S.C. § 812(b)).

Marijuana is a Schedule I Controlled Substance Under the CSA (Cont'd)

- Due to its status as a Schedule I substance, the CSA prohibits the manufacture, distribution, dispensation, and possession of marijuana. (21 U.S.C.§ 841).

- While the simple possession of marijuana is a violation of the CSA, most convicted federal drug offenders are sentenced for violations of CSA drug trafficking laws rather than simple possession.
  - For example: In FY2021, 149 federal offenders were sentenced for marijuana possession, while 1,005 federal offenders were sentenced for marijuana trafficking according to the U.S. Sentencing Commission.

(Congressional Research Service, *The Schedule I Status of Marijuana* (2022), https://crsreports.congress.gov/product/pdf/IN/IN11204).

President Biden's October 6, 2022 Announcement to Reform Federal Marijuana Policy

- First, Biden stated he would "pardon ... all prior Federal offenses of simple possession of marijuana."
- Second, he urged all governors "to do the same with regard to state offenses."
- Third, he requested that the DOJ and HHS "initiate the administrative process to review expeditiously how marijuana is scheduled under federal law."
- He also noted that "important limitations on trafficking, marketing, and under-age sales should stay in place."

(The White House, *Statement from President Biden on Marijuana Reform* (2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/).

The DOJ's Response to Biden's Announcement

- The DOJ stated that it "will expeditiously administer the President's proclamation, which pardons individuals who engaged in simple possession of marijuana[.] [T]he Office of the Pardon Attorney will begin implementing a process to provide impacted individuals with certificates of pardon."
  - (U.S. Dep't of Just., *Statement on President's Announcements Regarding Simple Possession of Marijuana* (2022)).
- The DOJ's website makes clear that the President's proclamation does <u>not</u> protect individuals from being charged with marijuana possession in the future.
  - "The proclamation pardons only those offenses occurring on or before October 6, 2022. It does not have any effect on marijuana possession offenses occurring after October 6, 2022. "
  - (U.S. Dep't of Just., *Presidential Proclamation on Marijuana Possession* (2023), https://www.justice.gov/pardon/presidential-proclamation-marijuana-possession).

Bottom Line: Marijuana Related Activity Remains a Federal Crime Anywhere in the United States

- When states "legalize" a federally controlled substance such as marijuana, the substance becomes legal under state law only.
- Note, however, that Congress has placed funding limitations on DOJ medical marijuana prosecutions.
- Also consider that the DOJ may exercise prosecutorial discretion to decline to prosecute other marijuana offenses.
  - The DOJ's approach has varied based on the presidential administration.

Overview of New York State Law

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Marijuana Regulation and Taxation Act (MRTA)

- The MRTA was signed into law on March 31, 2021.
  - (Bill S.854-A Krueger/A.1248-A Peoples-Stokes).
- It legalized recreational use of marijuana for adults over the age of 21.
- The MRTA created a new Office of Cannabis Management ("OCM") governed by a Cannabis Control Board.
- The MRTA also created the New York State Cannabis Law.

What is Legal Under the MRTA?

- It is legal for adults 21 years or older:
  - To possess 3 ounces of cannabis and 24 grams of cannabis concentrate (edibles, oil).
  - To consume cannabis in a private home or in most places tobacco can be consumed, with the exception of consumption in a motor vehicle, a private business (such as a restaurant patio), a hookah or "cigar bar," or on federal property.
  - To "share" cannabis without compensation to a person 21 years or older (under the legal possession limit).
- Note: Businesses must have a license to legally sell cannabis in New York.

(Off. Of Cannabis Mgmt., *Adult Use Information* (2022), https://cannabis.ny.gov/adult-use-information; N.Y. Penal Law § 222.05).

Cannabis Law § 2

- Section 2 of the Cannabis Law ("Legislative Findings and Intent") provides:

  Nothing in [the MRTA] is intended to limit the authority of any . . . employers to enact and enforce policies pertaining to cannabis in the workplace; to allow driving under the influence of cannabis; to allow individuals to engage in conduct that endangers others; to allow smoking cannabis in any location where smoking tobacco is prohibited; or to require any individual to engage in any conduct that violates federal law or to exempt anyone from any requirement of federal law or pose any obstacle to the federal enforcement of federal law.

The MRTA Amended New York Labor Law § 201-d

- Amended Labor Law § 201-d provides that unless otherwise provided by law, it is unlawful for an employer to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual because of his/her legal use cannabis in accordance with state law:
  - prior to the beginning or after the conclusion of the employee's work hours,
  - off of the employer's premises,
  - and without use of the employer's equipment or other property.

(N.Y. Labor Law § 201-d(2); N.Y. Dep't. of Labor, *Adult Use Cannabis and the Workplace* (2021)).

What are "Work Hours" under Labor Law § 201-d?

- Work hours" are defined as "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."

- This includes time when an employee is "on-call."

- Such periods of time are still considered "work hours" if the employee leaves the worksite.

(N.Y. Labor Law § 201-d(1)(c); N.Y. Dep't. of Labor, *Adult Use Cannabis and the Workplace* (2021)).

Permitted Employer Actions Under Labor Law § 201-d

- An employer may take employment action or prohibit employee conduct where:
  - The employer is/was required by state or federal statute, regulation, ordinance, or mandate to take such action;
  - The employer would be in violation of federal law, or lose a federal contract or federal funding;
  - The employee, while working, manifests specific articulable symptoms of cannabis impairment that decrease or lessen the employee's performance of the employee's tasks or duties; or
  - The employee, while working, manifests specific articulable symptoms of cannabis impairment that interfere with the employer's obligation to provide a safe and healthy workplace as required by state and federal workplace safety laws.

Labor Law § 201-d(4-a); N.Y. Dep't. of Labor, *Adult Use Cannabis and the Workplace* (2021).

Can Employers Prohibit Marijuana Possession in the Workplace?

- Employers can prohibit employees from bringing marijuana onto their property. This includes:
  - Rented/leased space;
  - Company vehicles; and
  - Areas used by employees within such property.

- Note that the NYS DOL does not consider an employee's private residence being used for remote work to be a "worksite" within the meaning of N.Y. Labor Law § 201-d.

(N.Y. Dep't. of Labor, *Adult Use Cannabis and the Workplace* (2021)).

Articulable Symptoms of Impairment

- Per the NYS DOL, there is no dispositive and complete list of symptoms of impairment.
- Rather, articulable symptoms of impairment are objectively observable indications that the employee's performance of the duties of the position are decreased or lessened.
  - For example: the operation of heavy machinery in an unsafe and reckless manner may be considered an articulable symptom of impairment.

(N.Y. Dep't. of Labor, *Adult Use Cannabis and the Workplace* (2021)).

Articulable Symptoms of Impairment Cont'd.

- 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.
- The smell of cannabis, on its own, cannot be used as a basis.
- A positive test cannot serve as a basis considering there is no test capable of demonstrating *present* impairment.

(N.Y. Dep't. of Labor, *Adult Use Cannabis and the Workplace* (2021)).

Employees who are Excluded from Labor Law § 201-d's Protections

- Under Labor Law § 201-d, an employer may take employment action or prohibit employee conduct where:
  - The employer is/was required by state or federal statute, regulation, ordinance, or mandate to take such action; or
  - The employer would be in violation of federal law, or lose a federal contract or federal funding.
- Example: The Federal Department of Transportation's Drug and Alcohol Testing Regulation (49 C.F.R. Part 40) does not authorize the use of Schedule I drugs, including marijuana, for any reason.
  - Covers certain employees in the aviation, trucking (including school bus drivers, and certain limousine and van drivers), railroads, mass transit, and pipelines industries.

Drug Testing for Cannabis in NYS

- Employers *cannot* drug test an employee for cannabis unless permitted to do so pursuant to the provisions of Labor Law § 201-d(4-a) or other applicable laws.
  - An employer *can* drug test an employee if federal or state law requires drug testing or makes it a mandatory requirement of the position.
  - An employer *can* drug test where an employee manifests articulable symptoms of cannabis impairment.

- Employers should also check their federal contracts (where applicable) for language regarding mandatory drug testing for cannabis.

(N.Y. Dep't. of Labor, *Adult Use Cannabis and the Workplace* (2021)).

Drug-Free Workplace Act of 1988

- Does the Drug-Free Workplace Act of 1988 allow employers to drug test employees for marijuana under New York State law?
  - No, because it does not *require* drug testing of employees.

- Remember: an employer cannot drug test for cannabis because it is *allowed* or *not prohibited* under federal law.

(N.Y. Dep't. of Labor, *Adult Use Cannabis and the Workplace* (2021)).

Can Employers Still Conduct Pre-Employment Drug Testing and Random Drug Testing for Cannabis?

- Employers cannot conduct drug testing (including pre-employment and random drug testing) unless permitted to do so pursuant to Labor Law § 201-d (4-a) or other applicable laws.

- EMPLOYERS SHOULD REVIEW THEIR SUBSTANCE TESTING POLICIES!

The Expansion of New York State's Medical Marijuana Program

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Overview of the Changes to New York State's Medical Marijuana Program

- The MRTA transitioned oversight of the Medical Marijuana Program from the Department of Health to the Office of Cannabis Management.

- It also repealed the Compassionate Care Act and replaced it with Article 3 of the Cannabis Law.

- In addition, the Medical Marijuana Program has been expanded in several ways.

Expansion of the Medical Marijuana Program

- The definition of "practitioner" has been expanded to anyone who is licensed, registered or certified by NYS to prescribe controlled substances in the State. (N.Y. Cannabis Law § 3(41)).
- The conditions for which patients may qualify to use medical cannabis have been expanded:
  - Cancer, HIV/AIDS, amyotrophic lateral sclerosis (ALS), Parkinson's disease, multiple sclerosis, damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity, epilepsy, inflammatory bowel disease, neuropathies, Huntington's disease, PTSD, pain that degrades health and functional capability where the use of medical cannabis is an alternative to opioid use, substance use disorder, Alzheimer's, muscular dystrophy, dystonia, rheumatoid arthritis, autism *or any other condition certified by the practitioner*. (N.Y. Cannabis Law § 3(18)).

Employee Protections for Medical Use

- Being a certified patient is deemed to be having a "disability" under the New York State Human Rights Law. (N.Y. Cannabis Law § 42(2)).
  - This means that they are protected from discriminatory action based on their status as a medical cannabis patient.
- Note: This does not "bar the enforcement of a policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance" or "require any person or entity to do any act that would put the person or entity in direct violation of federal law or cause it to lose a federal contract or funding." (*Id.*)

GORDON V CONSOLIDATED EDISON

Gordon v. Consolidated Edison, Inc., 190 A.D. 3d 639 (1st Dep't 2021)

Facts:

- Plaintiff was a Con Ed employee who suffered from IBD. IBD is a qualifying condition under the CCA.

- Timing of plaintiff's consultation with physician, use of cannabis, random test, plaintiff's approval, and issuance of Registry ID card.

Gordon, continued

- How does HR react?
- Why doesn't HR try to accommodate plaintiff?
- What does the company's policy say? Does that make sense now?

Gordon, continued

- What claims does plaintiff assert?

- Violation of Executive Law Section 296 and PHL Section 3369 – disability discrimination and failure to accommodate;

- Violation of NYC HRL;

- Violation of PHL Section 3369.

Gordon – The Lower Court's Decision

What conclusions did the lower court reach on the summary judgment motion?
2020 WL 1929803 (April 21, 2020)

a) Lower court uses ordinary *McDonnell Douglas Corp.* burden shifting to evaluate NYSHRL and NYCHRL claims.

b) Lower court concludes that Gordon established that she was a member of a protected class because "although she was not a certified medical marijuana patient when she failed her drug test, … she had become certified before her termination and she made [the employer] aware of this fact."

c) Lower court finds that Gordon was a member of a protected class for purposes of both the NYCHRL and NYSHRL

d) How does the lower court handle the employer's claim that it terminated her in a manner consistent with its drug policy?

e) How does the lower court address the reasonable accommodation issue?

- i) NYSHRL standard.
- ii) NYCHRL standard.
- iii) lower court's rejection of the undue hardship claim advanced by the employer.

Gordon – The First Department's Ruling

The First Department's Decision - 190 A.D. 3d 639 (1st Dep't 2021)

a) First Department concludes that "there are issues of fact …under the State Human Rights Law … as to whether defendant adequately engaged in a cooperative dialogue with plaintiff … to determine whether it could reasonably accommodate her status as a medical marijuana patient."

b) Did the employer "improperly cut the dialogue process short when it discovered plaintiff was a probationary employee?"

c) Were there things the employer could have done to accommodate her, including "overlooking the one-time technical violation in light of her contemporaneously acquired status as a medical marijuana patient"?

d) The First Department's different treatment of the NYSHRL and NYCHRL claims.

e) The First Department's treatment of the claim under PHL Section 3369.

Scholl v Compass Group – Gordon Applied by SDNY

Scholl v. Compass Group USA, Inc., 22 WL 2716950
(S.D.N.Y. July 13, 2022)

a) Plaintiff is a "certified medical marijuana patient under the New York State Medical Marijuana Program." He has chronic back pain for which he uses medical marijuana.

b) Plaintiff raises the issue of his status as a certified medical marijuana patient before he is hired, gets an offer contingent on passing a drug test, does not pass the drug test, and does not get hired.

c) Plaintiff brings two claims - NYSHRL and NYCHRL. After discovery, defendant moves for summary judgment on NYCHRL claim only.

Scholl – continued

- How does the Court frame the issue? Defendant, in its summary judgment motion, "contend[s] that while New York State has recognized a person's status as a certified medical marijuana patient as a basis for a claim of disability discrimination, the New York City Human Rights Law does not," and that "'there is no provision in the City Code that recognizes a certified medical marijuana user as 'per se' disabled under the local law.'"

- How does the Court address the question, as framed? Quoting *Gordon,* the Court points out that "'[t]he State HRL defines status as a medical marijuana patient as a protected disability, but the City HRL does not.'" The Court also points to the fact that the City HRL's definition of "disability" explicitly "does not include an individual who is currently engaging in illegal use of drugs when the [employer] acts on the basis of such use," and that cannabis is still illegal under federal law.

Scholl – continued

- Plaintiff argues that the NYCHRL "still requires Defendants to hire [him] and allow him to use marijuana as an accommodation 'to treat his underlying medical condition.'" Defendant responds with two arguments: (a) plaintiff never told them that he suffered from back pain that was a disability, and (b) plaintiff's complaint pleads that his "status as a certified medical patient," not his back pain, is the basis for his claim as being disabled.

- Note footnote two - the Court says that "*Gordon* was different because plaintiff in that case informed the defendant that she suffered from [IBS.]."

- Note plaintiff's narrow pleading and narrow theory of the case. How might the case have played out if plaintiff had litigated it differently?

Using *Gordon* and *Scholl*

Gordon, Scholl and the Future

1. Avoid the *Scholl* mistake if you are a plaintiff.

2. Engage in the interactive process.

- What type of cannabis product does the employee use? (THC versus CBD)
- What job does the employee have? What tasks does the employee perform?

Private Sector Bargaining Obligation

Duty To Bargain Over Testing – Private Sector Employment

- Private sector employers are governed by the Labor Management Relations Act (the "NLRA"), 29 U.S.C. Sections 151-169.

- When the employees are represented by a union, the employer has a duty to bargain in some instances, over certain issues.

NLRB Rulings On Duty To Bargain

- *Johnson Bateman Co,,* 295 NLRB 180 (1989) - Drug testing for current employees is a mandatory subject of bargaining.

- *Star Tribune Division,* 295 NLRB 543 (1989) - Drug testing of applicants not a mandatory subject of bargaining.

- *Chicago Tribune Co. v NLRB,* 974 F.2d 933 (7th Cir. 1992) - Impact of broad management rights language on obligation to bargain.

NLRB limits on remedies

- *Anheuser-Busch, Inc.,* NLRB 11 (2008, 351 NLRB No. 40 (2007) and *Union-Tribune Publishing Co.,* 353), 356 NLRB No. 77 (2011) - A limitation on remedies for unlawfully imposed drug testing.

- *Total Security Management Illinois 1, LLC,* 364 NLRB No. 106 (2016) - A limitation on *Anheuser-Busch* when it comes to drug testing, workplace marijuana rules and possible NLRB remedies.

Taylor Law Duty To Bargain

Duty To Bargain Over Testing – New York State Public Sector

- Public sector labor relations in New York State -the relationship between state, counties, cities, school districts, towns, and the unions representing their employees - are governed by what people colloquially refer to as The Taylor Law, the New York State Public Employees Fair Employment Act, Civil Service Law Article 14.

- Like the federal NLRA, the Taylor Law governs the duty of parties to bargain.

Taylor Law Continued

- *Arlington Central School District,* 25 PERB para. 3001 (1992) - Balancing test.

- *County of Nassau (Nassau County Police Department),* 27 PERB para. 3054 (1994) and *Cnty. of Erie & Erie Cnty. Med. Ctr. Corp.,* 39 PERB para. 3036 (2006), *confirmed sub nom. Erie Cnty. Med. Ctr. Corp. v. Pub. Emp't Relations Bd.,* 48 A.D. 3d 1094 (4th Dep't 2008) - drug testing procedures, triggers, due process protection, and disciplinary consequences all mandatory subjects of bargaining.

- *City of N.Y. v. Patrolmen's Benevolent Ass'n of City of N.Y.,* 14 N.Y. 3d 46 (2009) - limitation on *Arlington* and *County of Nassau.*

- *In the Matter of Civil Service Employees Association, Inc., Local 1000 AFSCME, AFL-CIO, (Office of General Services),* 53 PERB para. 4546 (2020) - the continued viability of *Arlington* and *County of Erie.*

New Jersey's Approach

New Jersey's Statute - CREEMMA

- Section 48(a)(1) - statutory bar on employer discrimination against employee who uses marijuana or has it in their system, unless the employee uses or is intoxicated during work hours.

- Allows testing of employee on reasonable suspicion of use at work or on finding of observable signs of intoxication, or after work-related accident.

- Section 48(2) - establishment of Workplace Impairment Recognition Expert and September 22, 2022 interim guidance.

- *In the Matter of Christopher Carralero, Town of W. New York.*, No. N/A, 2022 WL 17551147 (EFPS Oct. 31, 2022).

Thinking About Testing

Testing

- THC Metabolism - what does that mean and why does it matter? THC is fat soluble.
- What are the variables? How much a person consumes, how often the person consumes, how the person consumes (edibles versus smoking), how much body fat the person has, the person's metabolism.
- Different types of tests:
  - Hair - can detect for over 90 days.
  - Urine - can detect for over 30 days.
  - Saliva - can detect for up to 29 days? Commercially available product claims a detection time of 4 to 6 hours.