

Marijuana Legalization: Impact on Employers and Municipalities

On March 31, 2021, Governor Andrew Cuomo signed the Marijuana Regulation and Taxation Act of 2021 (the MRTA), which legalizes recreational cannabis for use by adults 21 years old and above. In addition to creating a new adult-use cannabis program, the legislation expands pre-existing medical cannabis and cannabinoid (CBD) hemp programs. The law also establishes an Office of Cannabis Management within the State Liquor Authority to implement a regulatory framework for the State’s medical, recreational, and cannabinoid hemp programs.

Most provisions of this law are effective immediately.

The Office of Cannabis Management

The MRTA will place cannabis programs under the control of the Office of Cannabis Management (OCM), within the Division of Alcohol Beverage Control. The OCM’s powers include the establishment of cultivation and processing standards, caps, and limitations; the licensure of all business entities in the production and distribution process; the inspection and enforcement of the adult-use, medical, and CBD hemp programs; and the

promulgation of regulations. The OCM will determine details such as the types of products allowed in each program, advertising and marketing rules, product labeling rules, the number of licenses, the process for licensure, and the implementation of a social equity.

Jurisdictions Must Opt-Out If it Seeks to Disallow Cannabis Sales or Consumption Sites

The MRTA permits cities, towns, and villages to “opt out” from having adult-use dispensaries and/or adult-use social consumption sites located within the community. An opt-out would be effectuated by the city, town, or village passing an appropriate local law by Dec. 31, 2021. (Notably, a municipality’s “opt-out” could be subject to a local referendum under the Municipal Home Rule Law.) Other than opting out of retail sales and on-site consumption establishments, municipalities are expressly preempted from adopting any laws or regulations relating to the operation and licensure of cannabis businesses. Likewise, municipalities may *not* opt out of allowing recreational cannabis usage or home growing. Municipalities may, however, pass laws governing the time, place, and manner of operation of retail dispensaries and consumption sites—so long as



bolaños lowe client alert

the regulation does not make the operation of such businesses “unreasonably impracticable.”

Municipalities allowing sales within their jurisdictions will be entitled to a share of the \$350 million in projected tax revenue. The MRTA will impose a requirement that adult-use distributors remit taxes based on the per milligram amount of THC in their product (0.5 cents for cannabis flower, 0.8 cents for cannabis concentrate, 3.0 cents for edibles). In addition, a 13% tax is imposed upon retail sales, with 9% of the tax going to the State, and the remaining 4% of the tax allocated to the county and locality of operation (split 75% to the locality and 25% to the County).

Impact on the Workplace

Prior to this new law, employers already accommodate employees who are certified medical marijuana users, for *medical* conditions. The new law, however, adds to employee protections with a new workplace non-discrimination provision, under which employers may not discriminate against employees based on lawful cannabis use—medical or otherwise—if the use occurs outside of work hours, and while not on company work functions or employer work sites. This non-discrimination provision applies to applicants for employment, as well as existing employees. Accordingly, it may become difficult for employers to disqualify candidates based on marijuana use detected in

pre-employment screening, unless a federal standard (such as DOT testing) or other legal exemption applies. Employers should consider modifying drug testing protocols to remove THC testing, and consider consulting with counsel to revise other substance-use and related policies, such as definitions of employee misconduct, and disciplinary policies. (Of course, as with alcohol, which is legal, employers can discipline employees who are impaired in the workplace or while on duty. Employers may prohibit marijuana in the workplace.)

Since cannabis is still illegal under federal law, however—including the Drug Free Workplace Act (“DFWA”) and the U.S. Department of Transportation (“DOT”) regulations—employers must follow federal law regarding employee use and testing notwithstanding the provisions of the MRTA. Similarly, employers may *not* be compelled under the MRTA to permit or engage in any act that would result in the loss of a federal contract or federal funding.

Police Departments/Sheriff’s Offices

Municipal police departments, in particular, will have issues to address with regarding this new law. Reason to be concerned about several provisions in the new law. The law expressly prohibits state and local law enforcement from providing assistance to the federal government, or any of its agencies, in enforcing the federal controlled substances law with regard to conduct



bolaños lowe client alert

permitted under the MRTA, *except* under a valid court order. Many operations are currently in place whereby local departments and sheriff's work on federal drug related operations. These operations will need to be reviewed for compliance with the new law. Additionally, since individuals may now possess cannabis *outside* of the home (up to 3 ounces of cannabis flower or 24 grams of cannabis concentrate) and have even more marijuana in their homes, police will need to adjust protocols and retrain officers. Finally, under the new law, police cannot use the smell of marijuana to justify a search of areas of a vehicle not "readily accessible to the driver and reasonably likely to contain evidence relevant to the driver's condition." (However, driving while under the influence of cannabis remains illegal.) Currently, there are no set standards or scientific tests to determine levels of cannabis impairment, so police will need to rapidly work on setting standards and assessment of impairment or create standards for measuring impairment.

The impact of the new law—particularly early in its adoption, without comprehensive guidance from administrative agencies and courts—will be wide-ranging: affecting businesses operations, labor relations, municipal tax burdens and revenue, municipal policymaking, and law enforcement. Employers and local governments, in particular, should approach new or revised policies and decision-making cautiously where it may implicate the provisions of the new law and be prepared to seek guidance from counsel in this still-developing legal landscape.