

NY Department of Labor Guidance: Hope for Clarity on Employee Cannabis Use and Testing Goes Up in Smoke

Long-awaited guidance released last week by the New York State Department of Labor in the wake of last spring's legalization of recreational cannabis offers employers a few clues about the DOL's interpretation of key changes to the New York Labor Law, but left many questions unanswered—and appeared to tie employers' hands even more on employee cannabis use and testing.

The March 2021 legalization of recreational cannabis use in New York State (discussed in our April 5, 2021 Alert) included amendments to provisions in the Labor Law that protect employees' lawful off-duty activities. Under the amended Labor Law, employers are barred from taking action against individuals for their off-duty, off-premises use of cannabis, except where the employer's actions were "required by state or federal statute"; "would cause the employer to be in violation of federal law or would result in the loss of federal contract or federal funding"; or where the employee was "impaired" by the use of cannabis. The amendments raised numerous questions, however, over issues such as how to determine an employee's "impairment"; whether employers could continue to test employees or applicants for cannabis use; and when an

employer's actions would in fact be "required" by law.

The new guidance does little to clarify any of the confusion—and the clarifications it does offer, make it clear that employers will have even less discretion than anticipated regarding employee and applicant cannabis use. The guidance does affirm that employers may ban use of cannabis during employee breaks, meal periods and "on-call" time; prohibit cannabis possession on the employer's property and in employer-owned vehicles; and have no obligation to rehire individuals terminated for cannabis use before the law's amendment.

However—where many employers anticipated more detailed information on assessing an employee's "impairment"—the DOL offered virtually no clarification. Under the law, an employee is considered "impaired" where he or she "manifests specific articulable symptoms of impairment" that either: (1) decrease or lessen the performance of the employee's duties or tasks; or (2) interfere with the employer's obligation to provide a safe and healthy workplace, as required by state and federal occupational safety and health laws. The DOL's guidance gives little new information to employers hoping for a description of "specific articulable symptoms," offering only a single



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example (operating heavy machinery in an unsafe and reckless manner), and expressly cautioning employers that a positive test for cannabis, and the smell of cannabis, are not, by themselves, “articulable symptoms” of impairment. The DOL’s guidance leaves open whether other observations traditionally used by employers to conduct reasonable-suspicion drug testing (such as distracted behavior; bloodshot or glassy eyes; apparent lack of physical coordination; or inappropriate emotional demeanor), might pass the law’s “specific articulable symptoms” requirement.

On the issue of testing, the DOL’s guidance prohibits employers from even *testing* for cannabis, *even where federal law allows for drug testing*. The only circumstance described in which the agency’s guidance allows testing for cannabis, is where federal or state law *requires* drug testing or makes it a mandatory requirement of the position (such as mandatory testing for commercial motor vehicle drivers, or for-hire motor carriers). The DOL’s strict interpretation of the new law on the issue of testing may prove challenging for employers whose test regimens continue to include cannabis (as part of a larger panel of substances), or for employers who viewed drug testing as a possible additional means to confirm “specific articulable symptoms” of impairment.

Although the new guidance may create as many or more questions than it answers, employers should consider updating their drug and alcohol or cannabis-use policies to reflect the DOL’s latest input, as well as reexamining

and—if needed—revising their drug-testing protocols. Employers should also consider the DOL’s latest guidance in connection with any pending or anticipated personnel actions associated with cannabis use, in order to confirm that they are in compliance with the agency’s employee-friendly interpretation.