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Blog Post

Weed and the Workplace: Recent Developments in New York, Virginia, and Colorado

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Employers take note: recently New York became the 15th state to legalize recreational marijuana use through Senate Bill 854A, and Virginia is not far behind. These and other developments related to marijuana continue to impact the workplace.

Developments in New York

In New York, effective March 31, adults aged 21 or older may possess and consume marijuana recreationally. Adults aged 21 or older may possess, display, purchase, obtain, and/or transport up to three ounces of cannabis, and up to 24 grams of cannabis concentrate in the state. Using, smoking, ingesting, or consuming cannabis or concentrated cannabis is permitted, as well as planting, cultivating, harvesting, drying, processing, or possessing cannabis.

The New York law also expands the list of conditions qualifying as eligible for medical marijuana use. The term "qualifying condition" was expanded to include conditions such as post-traumatic stress disorder, substance use disorder, Alzheimer's, muscular dystrophy, rheumatoid arthritis, and autism. Practitioners may also certify other conditions for the use of medical marijuana as they see fit. Additionally, individuals suffering from severe pain

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may qualify for medical marijuana use if such use would be an alternative to opioid use.

How will these changes impact the workplace?

While employers can still maintain policies prohibiting the use of marijuana on-duty, New York has expanded employee protections significantly for off-duty use. In connection with the legalization of recreational marijuana, New York recently amended its off-duty conduct law, Labor Law Section 201-d. Under the revised off-duty conduct law, employers cannot discharge an employee from employment because of the individual's lawful use of marijuana while off-duty, subject to narrow carve-outs for employers who must comply with federal and state drug-free workplace laws. This new law is broader than others previously enacted around the country because employers cannot deny an individual employment exclusively because of the off-duty use of marijuana—absent an employer's obligation to comply with a federal or state requirement to maintain a "drug free workplace."

Indeed, in California if an employer does not want to hire someone who uses marijuana, they do not have to do so. In contrast, in New York, an employer cannot base that decision solely on off-duty marijuana use, similar to New Jersey's new law, which we blogged about in December. As with other states, employers also need to be aware of the growing body of caselaw that requires accommodation of a disability when an individual's marijuana use is medically necessary.

While New York's new law prevents discrimination based upon off-duty use, it does not limit an employer's ability to adopt or enforce policies on marijuana use in the workplace. New York employers who perform drug tests for marijuana, and are not required to do so by federal or state law, should act quickly update their testing policies to comply with the new law by ensuring that the policies do not discriminate against individuals

whose lawful off-duty marijuana use is protected by law or is related to the individual's disability.

Employers should also be aware that, pursuant to New York's marijuana law, employees who use medical cannabis must be afforded the same rights as injured workers under the workers' compensation law when such injured workers are prescribed medications that may prohibit, restrict, or require the modification of the performance of their duties. This means that employees cannot be denied workers' compensation benefits based solely on medical marijuana use, just as employees cannot be denied workers' compensation benefits based solely on the employee's use of other prescribed medications. The law does not address whether workers' compensation benefits may be denied in the event the injured employee was under the influence of marijuana while on duty.

Developments in Virginia

Like New York, Virginia recently passed a bill legalizing the recreational use of marijuana, effective July 1, 2021. This makes Virginia the 13th state to enact employment protection laws for authorized marijuana users, with other states, including Connecticut, on the path to follow suit.

In addition to legalizing recreational marijuana use, the Virginia bill also adds in employment protections for medicinal cannabis users. Specifically, the law prohibits an employer from terminating, disciplining, or discriminating against an employee for lawful use of medicinal marijuana. As in New York, there are exceptions for employers who must comply with federal or state drug-free workplace laws, but the protections remain strong for employees. Also similar to the law in New York, under Virginia's law an employer cannot refuse to hire an individual based solely on medicinal marijuana use. That said, nothing in Virginia's new law requires employers to tolerate on-duty use of marijuana—medicinal or not.

In light of the new Virginia law, employers should work with counsel to update their drug testing policies to provide reasonable accommodations for those whose use is based upon a bona fide disability and consider additional accommodations for individuals who are prescribed medicinal marijuana, including adjustments in shifts or scheduling.

Expanding Liability for Marijuana Industry Employers

In addition to new updates for all employers, those in the marijuana industry should also be aware of their expanding liability under federal law. Following the Tenth Circuit's opinion that individuals who work for companies in the marijuana industry can pursue Fair Labor Standards Act (FLSA) claims, despite the substance being illegal federally, the first wage and hour class action involving the marijuana industry has been certified. Judge Arguello of the District of Colorado recently certified a class of workers of a marijuana security company dating back to 2014 who claim they were not paid overtime due under the FLSA. This newly certified class presents an ongoing concern for marijuana industry employers who have typically evaded most federal laws because of the Controlled Substances Act, under which marijuana remains illegal on the federal level.

These are just the latest updates to the ever evolving landscape of state laws addressing medical and recreational marijuana. Employers should take steps to ensure compliance by adopting universal best practices. This may include discontinuing zero-tolerance drug testing policies, and updating policies to address on and off-duty marijuana use. Employers should focus their policies on addressing employees' marijuana impairment or intoxication in the workplace and safety. Note that the New York law specifically provides "Nothing in this act is intended to limit the authority of any district, government agency or office or employers to enact and enforce policies pertaining to cannabis in the workplace."

Akerman lawyers are here to advise employers regarding the complicated employment issues surrounding the legalization of recreational and/or medical marijuana.
