

# JacksonLewis

## Drug and Alcohol Testing Law Advisor

Developments in Regulating Workplace Drug and Alcohol Testing

### **New York Department of Labor Publishes Guidance Addressing Recreational Marijuana In The Workplace; Most Drug Testing For Marijuana Is Prohibited**

By Kathryn J. Russo on October 19, 2021

The New York Department of Labor (“DOL”) recently published guidance and FAQs entitled “**Adult Use Cannabis And The Workplace – New York Labor Law 201-D**” to address questions related to the Marijuana Regulation and Taxation Act (“MRTA”). MRTA legalized marijuana use and possession for adults who are 21 and older, effective March 31, 2021, and amended New York Labor Law Section 201-d, the legal activities law. New York employers may not refuse to hire, employ, discharge, or otherwise discriminate against someone who uses cannabis lawfully while off-duty and off-premises and while not using the employer’s equipment or other property.

Some of the key takeaways from the DOL Guidance include:

- Drug testing for marijuana is not permitted except in very limited circumstances (e.g., the test is required by law);
- A drug test result cannot serve as a basis for an employer’s conclusion that an employee was impaired by marijuana;
- The smell of marijuana, by itself, is not evidence of “articulable symptoms of impairment.”

Pertinent excerpts of the DOL’s Guidance and FAQs are set forth below:

#### ***Permitted Employer Actions***

Employers may take employment actions related to the use of cannabis based on the following:

1. The employer is/was required to take such action by state or federal statute, regulation, ordinance, or other state or federal governmental mandate;
2. The employer would be in violation of federal law;
3. The employer would lose a federal contract or federal funding;
4. 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;
5. The employee, while working, manifests specific articulable symptoms of cannabis impairment that interfere with the employer's obligation to provide a safe and health workplace as required by state and federal workplace safety laws.

### ***Frequently Asked Questions***

*Can an employer take action against an employee for using cannabis on the job?*

An employer is not prohibited from taking employment action against an employee if the employee is impaired by cannabis while working (including where the employer has not adopted an explicit policy prohibiting use), meaning the employee manifests specific articulable symptoms of impairment that:

- Decrease or lessen the performance of their duties of tasks
- Interfere with an employer's obligation to provide a safe and healthy workplace, free from recognized hazards, as required by state and federal occupational safety and health laws.

*What are articulable symptoms of impairment?*

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 their position are decreased or lessened. Employers are cautioned that such articulable symptoms may also be an indicate that an employee has a disability protected by federal and state law (e.g., the NYS Human Rights Law), even if such disability or condition is unknown to the employer. For example, the operation of heavy machinery in an unsafe and reckless manner maybe considered an articulable symptom of impairment.

*What cannot be cited by an employer as articulable symptoms of impairment?*

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. However, employers are not prohibited from disciplinary action against employees who are using cannabis during work hours or using employer property.

*Can employers use drug testing as a basis for an articulable symptom of impairment?*

No, a test for cannabis usage cannot serve as a basis for an employer's conclusion that an employee was impaired by the use of cannabis, since such tests do not currently demonstrate impairment.

*Can I fire an employee for having a noticeable odor of cannabis?*

The smell of cannabis, on its own, is not evidence of articulable symptoms of impairment under Labor Law Section 201-d.

*Can an employer test for cannabis?*

No, unless the employer is permitted to do so pursuant to the provisions of Labor Law Section 201-d(4-a) or other applicable laws.

*Can an employer drug test an employee if federal law allows for drug testing?*

No, an employer cannot test an employee for cannabis merely because it is allowed or not prohibited under federal law. (See e.g., neither the Drug-Free Workplace Act nor the rules adopted thereunder authorizes drug testing of employees.) However, an employer can drug test an employee if federal or state law requires drug testing or makes it a mandatory requirement of the position.

*Can employers prohibit use of cannabis during meal or break periods?*

Yes, employers may prohibit cannabis during "work hours," which for these purposes means 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. Such periods of time are still considered "work hours" if the employee leaves the worksite.

*Can employers prohibit use of cannabis during periods in which an employee is on-call?*

Yes, employers may prohibit cannabis during “work hours,” which includes time that the employee is on-call or “expected to be engaged in work.”

*For remote employees, can employer prohibit use in the “worksites”?*

The Department of labor does not consider an employee’s private residence being used for remote work a “worksites” within the meaning of Labor Law Section 201-d. However, an employer may take action if an employee is exhibiting articulable symptoms of impairment during work hours as described above and may institute a general policy prohibiting use during working hours.

*Can employers prohibit use when the employee uses a company vehicle?*

Yes, employers are permitted to prohibit use in company vehicles or on the employer’s property, even after regular business hours or work shifts.

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