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New York Legalizes Recreational Cannabis

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CLIENT ALERT | 4.1.2021

On March 31, 2021, New York became the sixteenth state to legalize adult use or recreational cannabis for those 21 and older. Cannabis use and possession – whether for recreational or medical use – still remains illegal under federal law.

The Marijuana Regulation and Taxation Act (MRTA) creates an Office of Cannabis Management to oversee recreational, medical, and agricultural cannabis in New York. New Yorkers may possess and use up to three ounces of cannabis. However, it will be about 18 months before sales of adult-use cannabis can take place in retail dispensaries. New York will set a 9% sales tax on cannabis, an additional 4% county and local tax, and another tax based on the level of THC in the product. The MRTA contains broad protections for those using cannabis.

Of particular importance to employers, the MRTA amends New York's lawful use statute to protect employees who use cannabis off-duty from discrimination. It is generally unlawful for an employer to refuse to hire, employ or license, or to discharge or otherwise discriminate against an individual in compensation, promotion or terms, conditions, or privileges of employment because of:

- An individual's legal use of consumable products, including cannabis in accordance with state law, prior to the beginning or after the conclusion of the employee's work hours, and off of the employer's premises and without use of the employer's equipment or other property; or
- An individual's legal recreational activities, including cannabis use in accordance with state law, outside work hours, off of the employer's premises and without use of the employer's equipment or other property.

However, an employer will not violate the lawful use statute when it takes action related to the use of cannabis based on any of the following:

- The employer's actions were required by state or federal statute, regulation, ordinance, or other state or federal governmental

mandate;

- The employee is impaired by the use of cannabis, meaning the employee manifests specific articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position, or such specific articulable symptoms interfere with an employer's obligation to provide a safe and healthy work place, free from recognized hazards, as required by state and federal occupational safety and health law; or
- The employer's actions would require such employer to commit any act that would cause the employer to be in violation of federal law or would result in the loss of a federal contract or federal funding.

Under the MRTA, no person is subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil liability or disciplinary action by a business or occupational or professional licensing board or office, solely for conduct permitted under the MRTA. This includes any disciplinary or character and fitness committees established by law.

Landlords may not refuse to lease to and may not otherwise penalize an individual solely for conduct permitted under the MRTA. This prohibition does not apply if failing to do so would cause the landlord to lose a monetary or licensing related benefit under federal law; or if a property has in place a smoke-free policy, it is not required to permit the smoking of cannabis on its premises (except for the certified medical use of cannabis).

Schools, colleges, and universities may not refuse to enroll and may not otherwise penalize a person solely for conduct permitted under the MRTA. This prohibition does not apply if failing to do so would cause the school, college, or university to lose a monetary or licensing related benefit under federal law; or if it has adopted a code of conduct prohibiting cannabis use on the basis of the institution's sincere religious belief.

The MRTA also prohibits state or local law enforcement agencies from cooperating with or providing assistance to the federal government in enforcing the federal Controlled Substances Act solely for actions consistent with the MRTA, except as pursuant to a valid court order.

Finally, the MRTA prohibits smoking or vaping cannabis in locations prohibited by state law, such as workplaces, colleges and universities, schools, and hospitals.

Employers with New York operations should review their policies and procedures – especially substance abuse/drug testing and workplace conduct policies – to ensure they account for legalized recreational cannabis. We expect to see additional states legalize cannabis, both recreational and medical, in 2021, as well as increasing lawsuits brought by applicants and employees as the tension between state-legalized use continues to conflict with federal prohibitions. Contact your Vorys lawyer if you have questions about cannabis legalization and its effect on your workplace.