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NEW YORK STATE LEGALIZES RECREATIONAL MARIJUANA, PLACES LIMITS ON EMPLOYERS' ABILITY TO TAKE DRUG USE INTO ACCOUNT WHEN MAKING EMPLOYMENT DECISIONS

To Our Clients and Friends:

On March 31st, 2021, New York became the 16th state to legalize marijuana for recreational use with the enactment of Senate Bill S854A. Under the new law, it is legal for individuals 21 and older to possess and purchase up to three ounces of marijuana. At their place of residence, individuals are also permitted to possess up to five pounds of the drug. While the law takes effect immediately, it is expected to take the state as long as two years to fully implement it, including setting up a system to license marijuana retailers. The law also modifies the state's existing medical marijuana program, in place since 2014, by expanding the types of medical conditions for which marijuana can be prescribed.

Restrictions on Employers' Hiring and Disciplinary Policies

Of particular importance to employers, the law creates new restrictions on an employer's ability to discipline or terminate employees for using marijuana, as well as limits on employers' ability to refuse to hire a prospective employee for consuming the drug. Specifically, it is now unlawful for employers to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion, or terms, conditions or privileges of employment because that individual uses cannabis as permitted under state law. N.Y. Lab. Law § 201-d(2). However, the law allows employers to take action based on an employee's or a prospective employee's use of marijuana where required by federal or state law, or when an employee is impaired while on the job. N.Y. Lab. Law § 201-d(4-a).

These restrictions build on existing provisions of New York's medical marijuana law, which treats a person's status as a certified user of medical marijuana as a disability that employers must accommodate where reasonably possible. *See* N.Y. Pub. Health Law § 3369. They also come on the heels of a law that took effect in New York City in May 2020, prohibiting employers from testing job applicants for marijuana usage. *See* N.Y.C. Admin. Code § 8-107(31)(a). New York City's law exempts employers in certain cases, such as where the applicant is being considered for a safety-sensitive position. N.Y.C. Admin. Code § 8-107(31)(b).

Trend in State and Local Laws

With the enactment of S854A, New York becomes the third state in 2021 to liberalize its laws governing marijuana use. In February 2021, New Jersey also legalized recreational marijuana, and starting in July

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2021 residents of South Dakota will be permitted to use marijuana for certain medical reasons. Both New Jersey's and South Dakota's laws also place restrictions on when employers can take action based on an employee's or job applicant's marijuana use. See N.J. Stat. § 24:6I-52(a); S.D. Codified Laws § 34-20G-22.

In total, 19 states and the District of Columbia now have laws restricting employers' ability to take marijuana usage into account when making employment decisions. These laws vary widely both in how extensively they limit employers' actions, as well as in the number and types of exceptions they allow, creating a patchwork of different legal obligations across the country that employers must navigate. New York's new restrictions are among the most extensive in the nation, and will require many employers to make significant changes to longstanding drug testing and employment policies.

Takeaways for Employers

- Employers in New York State should review their policies governing drug use among employees and job applicants to ensure they are in compliance with the new restrictions on basing employment decisions on a person's consumption of marijuana.
- Employers with operations in multiple states should closely examine applicable state and local laws to ensure they are in compliance with the unique limitations on how marijuana use is treated in the workplace in different jurisdictions. A uniform, one-size-fits-all policy on drug use is, in many cases, no longer feasible for employers with nationwide operations.
- Employers should closely monitor developments in this area as states and cities adopt new laws. The rules governing how marijuana use is treated when making employment decisions are changing rapidly across the country, and employers may find that longstanding employment practices need to be adjusted as this trend continues.



Gibson Dunn lawyers are available to assist in addressing any questions you may have about these developments. Please contact the Gibson Dunn lawyer with whom you usually work in the firm's Labor and Employment practice group, or the following:

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