Consequences of Legal and Illegal Substances, On and Off Duty

Marijuana Regulation and Taxation Act (MRTA) & Education Law Section 913

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The MRTA

- The Act was signed into law on March 31, 2021 and amended Section 201-d of the New York Labor Law.
- It prohibits employment discrimination based on an individual's legal, and outside of work hours "recreational activities."
- Specifically, the MRTA makes it unlawful to refuse to hire, discharge, otherwise discriminate against persons who legally use cannabis before or after working hours, off the employer's premises, and without the use of the employer's property.
- Employers are not in violation of Section 201-d when:
  - "the employer's actions [are] required by state or federal statute, regulation," or other mandate;
  - "the employee is impaired by the use of cannabis" at work or while performing their job duties or using the employer's equipment, or
  - the employer's actions would result in the employer violating federal law or losing a federal contract or federal funding.

Testing and Possession at Work

- An employee is “impaired” when “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 workplace, free from recognized hazards, as required by state and federal occupational safety and health law.”

- Presently, it is unclear how the existing protections under Section 201-d pursuant to an established substance or alcohol abuse program or workplace policy, professional contract, or collective bargaining agreement will be interpreted and applied.

Criminal Penalties under the MRTA

- There are still two arrestable offenses under the Act:
  - 1) The sale to a person under the age of 21 and
  - 2) The unlicensed sale of over a pound of marijuana.

- There is also conduct within the New York Penal Law that "could result in a violation and a fine but not an arrest, including low-level unlicensed sale (sale of less than a pound of marijuana), possession of more than 2 pounds of marijuana or 4 and a half ounces of marijuana concentrates, and violation of the regulations for home cultivation."

- Lastly, smoking in public or places where smoking tobacco is currently prohibited will result in a fine.

New York Cases

- While there is currently few reported New York decisions specifically analyzing the MRTA in a labor setting there are several cases involving the use of marijuana prior the Act.
  - **Daveiga v. City of New York** (App. Div. 2008) (NYC Housing Authority Case)
    - **Employee admitted he possessed marijuana with an intent to use it while on employer's property. Personnel manual, prohibited employees from "commit[ting] any . . . violation of the law either on or off duty or on or off the work site implicating their fitness or ability to perform their duties." The court rejected the argument that this rule required the employer to show that the "possession and intent to use marijuana resulted, or was likely to result, in a demonstrably deficient job performance.**
    - Instead, the court held that the employer need only show the employee's "**possession and intent to use marijuana implicated his fitness, or suitability, for a supervisory position that is expected to promote respondent's efforts to provide a drug-free living environment for public housing residents, and its integrity in the eyes of other employees and residents**."
  - **Rice v. Belfiore** (Sup. Ct. Westchester 2007)
    - Dept. of Public Safety Police officer is terminated after testing positive for marijuana with a urine test. The officer admitted to using marijuana on vacation. The court noted that, "[a]lthough the CBA sets forth an overarching policy of rehabilitation rather than discipline, there was nothing in the CBA which prevented [the employer] from terminating [the officer] based on his failed drug test."

New York Cases

- **City School Dist. of New York v. Campbell** (App. Div. 2005)
  - Employee was an administrator (dean of students) and responsible for (among other things) enforcing school rules prohibiting drug use among students. The employee is arrested while off duty for the possession of marijuana and cocaine.
  - Safe Cities—Safe Schools program director for at risk students
  - A hearing officer determined that the employee was guilty of possession but should be returned to his position (or a similar one) within the NYC Department of Education if he successfully completed a treatment program. The employee was to be reinstated despite his criminal conviction(plea agreement).
  - The Appellate Division, First Department vacated the hearing officer's determination finding it "to be irrational and to defy common sense," in that it would allow him to be placed back into a position administering a program designed to discourage drug use among students.

Cases and Laws in Other States

- A prominent labor arbitrator in Detroit gave a lecture on marijuana and answered several audience questions.
  - Q: Supervisors are walking around the parking lot and they smell marijuana through a car's open window. Is that enough basis to order the owner of the car (an employee) to take a drug-test?
  - A: I think so. There's a famous case in Texas where they looked through the car window and saw paraphernalia related to marijuana. And the court ruled that it gave the employer reasonable suspicion to order a drug-test.
- The D.C. Cannabis Employment Protections Amendment Act provides much of the same protections found in the MRTA, but also requires employers (whether they drug test or not) to provide annual notice of employees' rights regarding cannabis use.
- How do you think this scenario would play out in NY? With your employer? What factors are important to consider?

The MRTA's Impact on Discipline

- If an employee appears "impaired" as described under the MRTA, employers are likely to test and discipline if cannabis is detected.
- Marijuana is detectable in urine for up to 3 days, in blood for up to 7 days and in hair for up to 90 days.
- The use of urine tests may expose employees to discipline more frequently as the test (although accurate) may not provide information on the degree of marijuana present in the sample.

The MRTA's Impact on CBAs and Negotiation

- Language should be included in CBAs to protect employees in situations where the employee has used marijuana off duty and is subject to drug testing. Cannabis may be detected during the test despite the fact the employee used marijuana off duty and is not under the influence of the substance.
- "Drug tests can detect tetrahydrocannabinol, or THC, in urine, blood, and hair for many days after use, while saliva tests can only detect THC for a few hours. This is because of the way the body metabolizes THC."
- Importantly, a urine test for marijuana is not qualitative and "indicates only a likelihood of prior use." Only a blood measurement can determine a person's level of exposure.
- Examples of protective language could include specifying a minimal detectable level of marijuana metabolites in blood allowing for recreational use off duty.
- Unions and employers should review CBAs and eliminate automatic penalties for positive tests given the change in the law

Discussion of MRTA & Potential Impact in your World

Ed Law Section 913 - Overview

- “In order to safeguard the health of children attending the public schools,” Education Law § 913 empowers boards of education to require any person employed by the board to submit to a medical examination by a physician or other health care provider “in order to determine the physical or mental capacity of such person to perform his or her duties.” Education Law § 913; Matter of Hirsh, 126 A.D.2d 782 (3d Dep’t 1987).
- When a board of education exercises this right and directs an employee to submit to a medical examination, the board may require that the examination be performed by the school district’s physician, rather than the employee’s personal physician.
- A board of education’s directive requiring an employee to submit to a § 913 examination may be successfully challenged pursuant to CPLR Article 78 only if the board’s actions were arbitrary, capricious, an abuse of discretion, or unreasonable.
- A teacher's refusal to comply with an examination ordered by the school board may constitute insubordination, and, if the teacher is tenured, may warrant the filing of formal disciplinary charges pursuant to section 3020-a. *McNamara v. Comm'r of Educ.*, 80 A.D.2d 660 (3d Dep't 1981), *appeal dismissed*, 64 N.Y.2d 1110 (1985).
- In addition, "a board may suspend a teacher's pay if the teacher fails to comply with the school board's reasonable directive that he or she be examined." *Appeal of El-Araby*, 28 Ed Dept Rep 524 (l989).
- Remember, the employee has the right to be accompanied to the 913 exam. We recommend a union rep attend or personal medical professional, if possible.

More on Section 913

- Courts have held that allegations of inappropriate conduct toward district employees, unprofessional behavior, or questionable judgment exhibited by a teacher provide a board of education with reason to suspect that the teacher may be unfit for teaching duties and provide a rational basis for a board of education's decision to direct a teacher to submit to a § 913 examination.
- Reasonable suspicion existed to administer a drug test to a public employee based on "[e]vidence of glassy, bloodshot and watery eyes, slurred speech and a history of suspicious mood swings," *Shepard v. Ward*, 155 A.D.2d 293 (1st Dep't 1989), and dilated pupils, nervous and impaired speech, and being observed in a "questionable state" after making a baseless off-duty arrest. *Jefferson v. Koehler*, 159 A.D.2d 248 (1st Dep't 1990).
- Conversely, reasonable suspicion to require an employee to submit to urinalysis did not exist based upon an employee's "mere presence in an area allegedly used by employees for alcohol and drug consumption" without any indicia of impairment. *Fiorenza v. Gunn*, 140 A.D.2d 295 (2d Dep't 1988).

Section 913 and Alcohol Abuse: Case Studies

- **Matter of John Doe and Bedford UFSD**
  - Case involved allegations of failure to comply with a 2019 3020-a decision, including an order for therapy.
  - The Hearing Officer held the Teacher not guilty because they attended the required therapy. BOE approved his choice of therapist. When the therapist decided that he did not need impulse control therapy BOE did not supply any further information about moving forward.
  - Other charges involved the failure to continue therapy were dismissed based on testimony and documentation from therapist.
  - Guilty of insubordination for the failure to return HIPAA forms.
  - Given the Teacher's disciplinary history, the Hearing Officer issued a fine of $5,000 to be deducted in equal sums over 12 months.
- **Matter of John Doe and Nyack Central School District (2021)**
  - Teacher had nearly 25 years of service and was consistently rated highly effective throughout their career. Because the teacher was battling alcoholism, the District claimed they were unfit and had violated "staff substance abuse" policies.
  - Reports by staff members concerned Teacher was walking slowly, slurring, tripped over a student. District explained the 913 process, but because the Teacher admitted alcoholism and entered rehab, the District initially deemed 913 unnecessary.
  - Issue: Whether the teacher's chronic alcoholism rendered them unfit for duty, and if so, whether they should be terminated - charge of misconduct and conduct unbecoming- based on 913 exam and determination that he was deemed unable to perform duties as a teacher by District's medical consultant.
  - **Guess the outcome ????**

Matter John Doe and Nyack Central School District (2021)

- The Teacher had “alcohol use disorder" which was "severe” and received several treatment recommendations including comprehensive outpatient substance abuse treatment program and psychiatric treatment.
- The Hearing Officer found that the District met its burden of showing, that at the time of the medical evaluation, the Teacher was unfit for duty. However, the issue was determining the appropriate penalty because of the events which followed the District’s psychiatric examination.
- HO’s rationale focused on the Teacher's genuine acknowledgement of the problem, successful treatment and, most compellingly the “honest admission of [their] disease and [its] impact on [their] employment.”
- The disease of alcoholism was viewed as a mitigation factor which "informs the penalty" to be assessed. Teacher entered rehab for the third time and seriously treated addition including continued therapy and recovery programs.
- Although termination was not warranted, the Hearing Officer believed some penalty MUST be imposed to ensure the Teacher was fully aware of consequences for the failure to treat alcoholism and maintain sobriety.
- HO imposed the penalty of a 20-calendar day suspension without pay but with continuation of all other benefits due.

Other Off-Duty Drug Use

- **In the Matter of Kingston City School District v. M.D. (2013)**
  - Teacher was arrested for and plead guilty to the illegal possession of a controlled substance (psilocybin). They also admitted to occasional recreational drug use, 2-3 times per year.
  - The HO noted the law "does not require termination for [an] such offense. Further, it is the role of the hearing officer to determine, "on a case-by-case basis, whether termination is appropriate."
  - The HO found no evidence the Teacher suffered from any "addiction" and believed they had not "lost [their] ability to be a role model for students", making termination "inappropriate."
  - The Teacher was suspended without pay for the remainder of the school year, providing the Teacher with "ample opportunity to fully utilize the services of [their] counselor."

Other Off-Duty Drug Use

- **The City School District of the City of New York et al. v. Lorber (2006)**
  - Teacher with 23 years of service was arrested and charged for the possession of cocaine found in her home. Teacher plead guilty to misdemeanor criminal possession of a controlled substance.
  - The Teacher underwent inpatient drug treatment for seven months and entered outpatient treatment following her discharge.
  - The Hearing Officer did not terminate the Teacher and instead imposed a monetary penalty.
  - On appeal, both the Supreme Court and Appellate Division affirmed the award of the Hearing Officer.
  - The First Department found that "In light of the arbitrator's conclusions that respondent, a teacher in the New York City school system for more than 23 years, had successfully undergone treatment for her addiction and that she was 'fit to teach,' the arbitration award imposing a fine equivalent to two months' salary, rather than termination, was not irrational and did not violate strong public policy.“
  - [NOTE: most of these cases come to our office and are settled.]

Citations

- chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/http://smart-ny.com/wp-content/uploads/2017/06/MRTA-FAQ_04.8.2019.pdf
- https://www.natlawreview.com/article/new-york-legalizes-recreational-marijuana-altered-states-employers
- https://www.cdc.gov/mmwr/preview/mmwrhtml/00000138.htm

Open Discussion

- Real life scenarios?
- What are you seeing in your Districts?
- Go to Q/A game to test your knowledge…