



Consequences of Legal and Illegal Substances, On and Off Duty

Deirdre Macchia, Esq.

Associate Counsel, NYSUT Office of
General Counsel

(Special thanks to Daniella Sesto,
NYSUT Law Clerk)

DISCLAIMER: This information is for general information purposes only. Nothing in this presentation or this document should be taken as legal advice for any individual case or situation. This information is not intended to create, and receipt or viewing does not constitute, an attorney-client relationship.

“Workplace Nexus” Standard

- ▶ Management has the power to discipline for misconduct directly related to employment.
- ▶ Employers cannot discipline employees for off-duty conduct. In order to transcend that general rule, there must be hard evidence of a nexus showing that the off-duty conduct adversely affected the employer’s operations or important interests.
- ▶ “Workplace” Nexus Standard= Must be some connection between the off-duty conduct and the employer’s interest that legitimizes the employer’s decision to take disciplinary action
- ▶ Just Cause for Discipline Under the Standard
 1. Relevance of the Off-Duty Conduct to the Employee’s Job
 2. Notoriety of the Off-Duty Conduct Causing Harm to the Employer’s Business- Reputation
- ▶ Exceptions to the general rule that off-duty conduct is beyond an employer’s reach asserted that discipline may be imposed if the employee’s conduct:
 1. Harms the employer’s business;
 2. Adversely affects the employee’s ability to perform his or her job; or
 3. Leads other employees to refuse to work with the offender.

Legal Use of Drugs & Employment

- ▶ When there is a proven nexus between drug use, impairment, and an accident, discharge is appropriate.
 - **Note Education Law provides certain due process rights before termination occurs.
- ▶ Dependent on type of employer, status of the employee, affects of the drug use while on duty.
- ▶ Type of drug being abused is a significant factor.
- ▶ Articulate impairment under Section 201-D of the New York State Labor Law. 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.

Marijuana Regulation and Taxation Act (“MRTA”)

Act signed into law on March 31, 2021. MRTA legalized adult-use cannabis (a/k/a marijuana or recreational marijuana).

Amended Section 201-D of the New York State Labor Law by adding subsection 4-a, which provides that employers MAY take employment action or prohibit employee conduct where:

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

Offenses under this Act:

- Use under the age of 21
- Illegal use, sale, transportation of cannabis
- Conduct under New York Penal Law for low-level unlicensed sale or possession and unlicensed home cultivation
- Smoking in public or places where smoking tobacco is currently prohibited

Section 201-D of the New York State Labor Law

- ▶ 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.
- ▶ Articulable symptoms of impairment= Objectively observable indications.
- ▶ Smell of cannabis, on its own, not evidence of articulable symptoms of impairment.
- ▶ Employers are permitted to take action, such as firing, when employee is using cannabis on the job or for cannabis impairment on the job, but are not required to do so.
- ▶ Employers are not required to hire an employee back an employee who was previously terminated for now legal cannabis use or a related expunged crime.
- ▶ Employers cannot discriminate against their workers for lawful adult use cannabis.

Prohibited Use Under Labor Law 201-D

- ▶ New York Labor Law Section 201-D prohibits employers from disciplining an employee because he or she uses cannabis while off-duty, it does not prohibit an employer from disciplining an employee who is “impaired by the use of cannabis at work.”
- ▶ Employers may prohibit cannabis during “work hours.”
 - Work hours= 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 engaged in work.
 - Such periods of time are still considered “work hours,” if the employee leaves the worksite.
- ▶ Employers can prohibit cannabis use when employee is on-call or “expected to be engaged in work.”
- ▶ Employers may prohibit employees from bringing cannabis onto the employer’s property, included leased and rented space, company vehicles and areas used by employees within such property (e.g., lockers, desks, etc.).
- ▶ Employers cannot prohibit the use of cannabis while employees are on leave unless the employer is permitted to do so pursuant to the provisions of New York Labor Law Section 201-D(4-a).
- ▶ Remote employees- DOL does not consider an employee’s private residence being used for remote work a “worksite” within the meaning of Labor Law Section 201-D.
 - Employer may take action if an employee is exhibiting articulable symptoms of impairment during work hours and may institute a general policy prohibiting use during work hours.
- ▶ Employer cannot prohibit use of cannabis outside of the workplace.
- ▶ Employers are not permitted to require employees to waive their rights under Section 201-D of the Labor Law as a condition of hire or continued employment.
- ▶ Existing policies prohibiting use are not permitted unless an exception applies.
- ▶ [Adult Use Cannabis and the Workplace FAQ Released by NYDOL](#)

Medical Marijuana Use & Reasonable Accommodation

- ▶ MRTA is an expansion of New York's medical marijuana law – previously governed by New York's Compassionate Care Act in place since 2014.
- ▶ New York City Human Rights Law (“NYCHRL”)- Prohibits most employers from requiring job applicants to submit to cannabis testing
 - Applies to both medical and recreational use
 - Certain exceptions
- ▶ New York State Human Rights Law (“NYHRL”) defines medical marijuana use as a disability.
- ▶ NYCHRL- "In the case of alcoholism, drug addiction, or other substance abuse, the term 'disability' ... does not include an individual who is currently engaging in the illegal use of drugs when the [employer] acts on the basis of such use."

Off-Duty Conduct & Illegal Drug Use

- ▶ In discipline cases involving the sale or use of illegal drugs by employees while off duty, arbitrators have considered several factors in determining whether there is just cause for discipline or discharge, including:
 1. Whether possession or sale is involved;
 2. The type of drug (marijuana vs. hard drugs);
 3. Whether the transaction was a casual sale;
 4. Whether the conduct occurred on the premises of the employer;
 5. The presence or absence of a drug problem at the workplace;
 6. Impact on the reputation of the employer; and
 7. Effect on the orderly operation of the employer's business.
- ▶ *In the Matter of Kingston City School District v. M.D.* (2013)- Illegal substance
- ▶ *The City School District of the City of New York et. al. v. Lorber* (2006)- Cocaine

Suspected Substance Abuse

- ▶ Prior to 2021, NY was an open state, meaning no statutes, regulations, or court decisions limited an employer's choice to implement a drug or alcohol testing program. Employers could choose to test employees for all substances and could conduct random drug testing.
- ▶ Individualized suspicion is required before a teacher may be directed to submit to urinalysis for the purpose of drug or alcohol detection.
- ▶ *Matter of John Doe and Nyack Central School District (2021)*
 - ▶ 913 examination
 - ▶ Teacher unfit for duty
 - ▶ Acknowledgement of alcoholism as a disease
 - ▶ Termination not warranted

Public School Employment & On- Duty/Off-Duty Drug Use

- ▶ Generally, no just cause to discharge an employee for misconduct away from the workplace without establishing some kind of nexus between the misconduct and the work.
- ▶ Misconduct itself must be relevant to the job.
- ▶ Employer bears the burden of proving that the misconduct is adverse to the employer's reputation or business interest.
- ▶ Public school's policy of requiring across-the-board urinalysis drug testing of all probationary teachers as a condition to qualifying for tenure was violative of the state and federal constitutions in the absence of reasonable suspicion of drug abuse. *Patchogue-Medford Congress of Teachers v. Board of Educ. of Patchogue-Medford Union Free School Dist.*, 70 N.Y.2d 157 (1987).
- ▶ Courts are still divided as to whether public school teachers are considered to hold safety-sensitive positions that would justify suspicion-less testing.



Drug Testing

- ▶ Employer cannot test for cannabis unless permitted to do so under the law or other applicable laws.
- ▶ Under Civil Service Law § 72, employers may require an employee to take a drug test if they have a reasonable suspicion an employee cannot perform their duties due to a disability a controlled substance may cause. Reasonable suspicion must correlate with specific, reliable observation concerning appearance, behavior, or BO.
- ▶ Drug testing cannot be used as conclusion that an employee was impaired by the use of cannabis, since tests do not demonstrate impairment.
- ▶ Employer cannot drug test an employee for cannabis merely because it is allowed under federal law.



Drug Testing continued

- ▶ MRTA blocks employers from testing employees for marijuana. The act amended New York Labor Law Section 201-D, recognizing marijuana as a legal, consumable product. This section prohibits employers from testing employees for THC except in limited circumstances, and also prohibits employers from conducting pre-employment drug testing for THC.

NY Case Law: Post MRTA

- ▶ With the recency of the MRTA and amendment to the NYLL, there are few NY decisions addressing the MRTA in the labor setting.
- ▶ *Apholz v. City of Amsterdam* (NY Sup Ct. 2023)
 - ▶ Holding- NYSHRL “does not immunize disabled employees from discipline or discharge for incidents of misconduct in the workplace,” or require an employer “to retroactively excuse the misconduct as an accommodation.”
- ▶ *Gordon v. Consol. Edison Inc.* (1st Dep't 2021)- NYCHRL “must be construed liberally to ensure maximum protection” when it comes to medical marijuana.
- ▶ *Scholl v. Compass Group USA, Inc.* (S.D.N.Y. 2022)- Federal Case; Beyond dispute that NYCHRL does not recognize marijuana use as a protected disability.

NY Case Law: Prior to MRTA

- ▶ Cases involving the use of marijuana prior to MRTA:
 - ▶ *Daveiga v. City of New York* (App. Div. 2008)
 - ▶ *Rice v. Belfiore* (Sup. Ct. Westchester 2007)
 - ▶ *City School District of New York v. Campbell* (App. Div. 2005)

What to Look For & Avoid in Settlements Involving Drug & Alcohol Testing

- ▶ Non-admission/denial of wrongdoing
- ▶ FOIL/confidentiality language
- ▶ Appropriate drug and alcohol testing language
- ▶ Counseling sessions
- ▶ Language regarding future 3020-a hearings
- ▶ General releases and waivers
- ▶ 913 examination language

913 Examinations

- ▶ “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.”
- ▶ Challenge only if board’s actions to order a 913 examination were arbitrary, capricious, an abuse of discretion, or unreasonable.
- ▶ Allegations of inappropriate conduct toward district employees, unprofessional behavior, or questionable judgment exhibited by a teacher and corresponding reason to suspect that the teacher may be unfit for teaching duties provide a rational basis for a board of education’s decision to submit a teacher to a 913 examination.
- ▶ Reasonable suspicion remains the requirement to direct an employee to submit a submit to urinalysis for the purpose of drug or alcohol detection pursuant to a 913 examination.
- ▶ Teacher’s refusal to submit to a 913 examination ordered by a board of education is insubordination.
- ▶ Union representatives are permitted observational role in 913 examinations.



Impact on bargaining and board policies

Open Discussion

▶ Experiences? Anecdotes? Questions?