

Legalized Recreational Marijuana Comes to New York

By Kevin J. Mulvehill
and Mark F. Pincelli
Phillips Lytle LLP

On March 31, 2021, New York State Governor Andrew Cuomo signed the Marijuana Regulation and Taxation Act into law ("Cannabis Law"). The law, among other things, legalizes the adult recreational use of marijuana and protects individuals who use marijuana outside of the workplace from discrimination. The legalization of recreational marijuana is dramatically altering the landscape of workplace drug testing and safety, and limiting the ability of employers to discipline, terminate or refuse to hire employees for marijuana use. Some of the related issues are discussed below.

Who May Legally Possess and Use Recreational Marijuana?

Individuals 21 years of age or older may use marijuana. The Cannabis Law allows such individuals to:

- Possess up to three ounces of cannabis and 24 grams of concentrated cannabis on their person; and

- Grow their own marijuana and have up to five pounds of cannabis in or on the grounds of their private residences.

Can Employees Possess, Use, Sell or Distribute Marijuana in the Workplace?

No. In fact, the Cannabis Law prohibits the smoking of marijuana wherever the smoking of tobacco is prohibited. Thus, employers may still prohibit such conduct in the workplace.

What Workplace Protections Does the Law Provide Employees?

In general, it is illegal for a covered employer to discharge, refuse to hire or otherwise discriminate against an employee 21 years of age or older for using marijuana off of the employer's premises and outside of work hours. Notably, work hours under New York Labor Law § 201-d include paid and unpaid breaks and meal periods.

Can Employers Discipline or Discharge Employees for Working While Impaired by Marijuana?

Yes. However, to do so, the law requires that an employer show that:

- The employee manifested "specific articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position;" and
- "[S]uch 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."

As a result, most covered employers can no longer maintain policies prohibiting employees from working with any trace of marijuana in their system.

That said, an employer, subject to any federal or state laws that prohibit employing an employee who uses marijuana, can lawfully take any adverse action against the employee required by such law, regulation or governmental mandate. In addition, an employer is exempt from the nondiscrimination provisions of Labor Law § 201-d if complying with them would require the employer to violate federal law, or would result in the loss of a federal contract or federal funding.

Can an Employer Still Test for Marijuana?

In general, yes. However, the

Cannabis Law substantially decreases the utility of covered employers testing applicants and employees. Specifically:

- It is now illegal for covered employers to refuse to hire an applicant because of marijuana use. Indeed, conducting pre-employment marijuana testing may expose such employers to discrimination claims. If the related employer refuses to hire an applicant after receiving a pre-employment drug test that is positive for marijuana, the circumstances could form the basis for a case of discrimination, even if the employer's decision was unrelated to the applicant's marijuana use. However, New York City employers should be aware that except in certain limited situations, New York City law prohibits pre-employment testing for marijuana.

- The Cannabis Law requires that before taking action against an existing employee for marijuana use, an employer must show that the employee manifested specific articulable symptoms of marijuana impairment. Therefore, a positive test for marijuana will not be sufficient to establish impairment under the law. That said, a positive test may still have value in supporting an employer's determination that the employee manifested specific articulable symptoms of marijuana impairment.

What Should Employers Do Now?

Employers should review and revise their existing policies and procedures as needed to comply with the Cannabis Law. They should also train management to recognize the signs of marijuana impairment so that they are able to substantiate and document specific articulable symptoms that interfere with an employee's performance

or pose a safety risk when marijuana impairment is suspected. Employers should closely monitor new developments in this area.

Kevin J. Mulvehill is a partner and the Rochester Office leader at Phillips Lytle LLP, where he serves as head of the firm's Labor & Employment Practice Team. He focuses his practice in the areas of labor and employment law and litigation; wage and hour law and litigation; class and collective actions; commercial litigation; and corporate law. He can be reached at (585) 238-2095 or kmulvehill@phillipslytle.com.

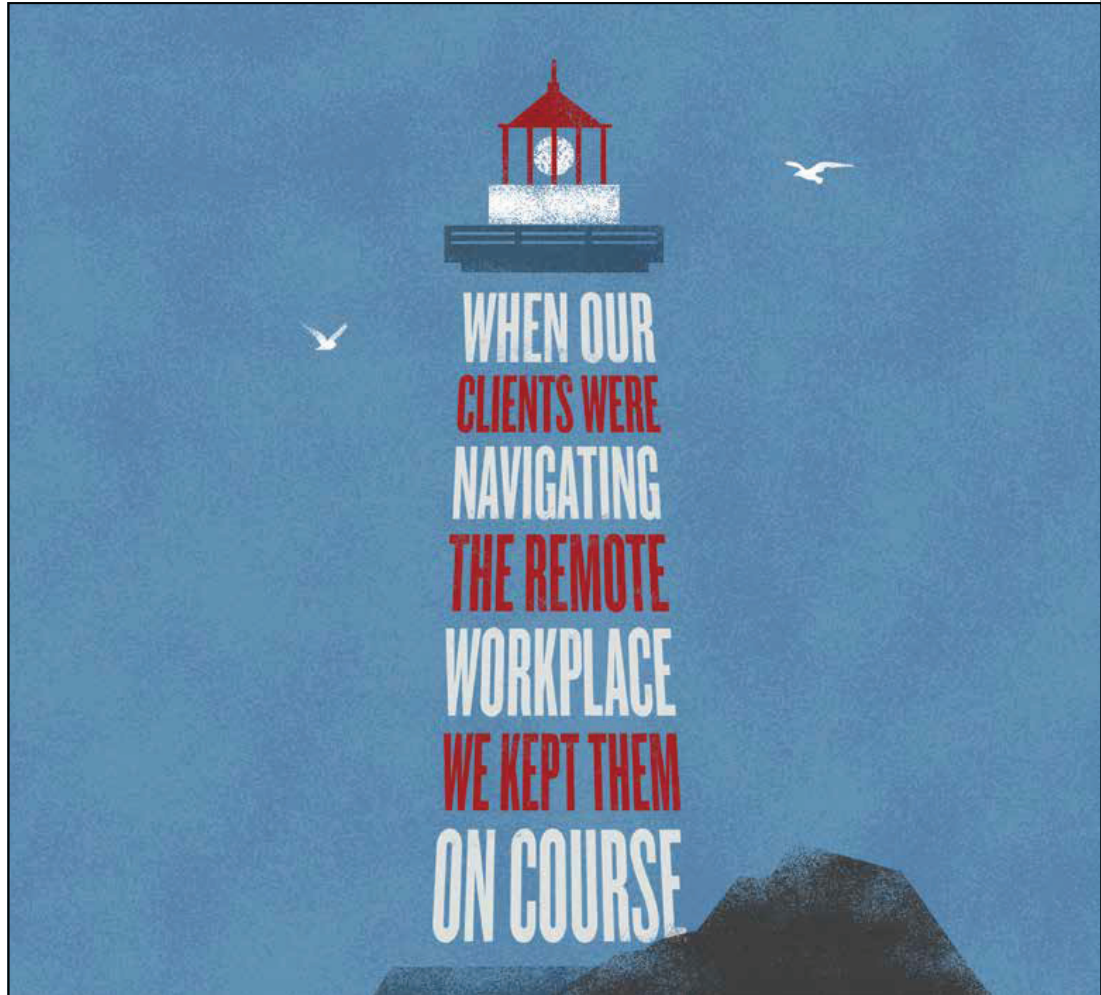
Mark F. Pincelli is an attorney at Phillips Lytle LLP and a member of the firm's Labor & Employment Practice Team. He concentrates his practice in the areas of commercial litigation and labor and employment law. He can be reached at (585) 238-2030 or mpincelli@phillipslytle.com.



Kevin J. Mulvehill
Partner



Mark F. Pincelli
Attorney



Our deep knowledge of the ever-changing employment landscape helps minimize serious risks to your business. That's The Phillips Lytle Way. Count on our fully integrated Labor & Employment Team to guide you through the myriad of legal issues arising from the COVID-19 pandemic — from creating a positive remote workplace culture to safeguarding the collection of employee biometric data to rules governing sick leave and vaccinations. When it comes to today's turbulent regulatory environment, our attorneys make it their business to keep you compliant. Talk to us and see why informed employers find their way with Phillips Lytle.



Phillips Lytle LLP

Visit us at [PhillipsLytle.com/LaborAndEmploymentLaw](https://www.phillipslytle.com/LaborAndEmploymentLaw)

28 EAST MAIN STREET, SUITE 1400, ROCHESTER, NY 14614 (585) 238-2000
NEW YORK: ALBANY, BUFFALO, CHAUTAQUA, GARDEN CITY, NEW YORK, ROCHESTER | WASHINGTON, DC | CANADA: WATERLOO REGION

Prior results do not guarantee a future or similar outcome. © 2021 Phillips Lytle LLP