



Legal Alert

GOVERNOR HOCHUL SIGNS LEGISLATION REQUIRING ONLINE POSTING OF DOCUMENTS 24 HOURS PRIOR TO DISCUSSION AT OPEN MEETINGS

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This week, Governor Hochul signed legislation aimed at improving transparency of government at all levels. The amendment to the Open Meetings Law mandates, as much as practicable, to have any resolutions, laws, rules, policies available to the public at least 24 hours in advance of the meeting at which they are

discussed. The new law does not prevent ‘walk on’ items entirely but does try and limit them.

The new law (found [here](#)) amends New York State Open Meetings Law (Public Officers Law § 103). The OML already requires documents, proposed resolutions, laws, rules, regulations, policies, or amendments, to be posted on the municipality’s web site prior to meetings where such documents or proposals would be discussed. Critics have argued that the law, in practice, easily allows public entities to simply ‘walk on’ items at the last minute. It has been said that this restricts the public from seeing and evaluating what their local government is about to act on.

The change in law, effective as of November 18, 2021 aims to reduce the discretion and limit the so called ‘walk on’ or ‘carry on’ items. The law mandates public entities post resolutions, policies, documents, etc., “to the extent practicable at least 24 hours prior to the meeting” at which they are discussed. The law sets a new, more defined baseline notice of 24 hours’ notice of items to be acted on by the public body. The change in law intends to curtail practices where last minute items were added to agendas with little or no public notice.

In seeking to curtail that practice, the amendments still permit the ‘walk on’ item but those will be subject to greater scrutiny and thus challenge. Periodically, emergency resolutions or other ‘walk on’ items, are simply not available and cannot be posted 24 hours in advance of a meeting. But they may be necessary to meet legal or other deadlines. This will still be possible relying on the “to the extent practicable” language. Municipalities should be mindful that questions may now arise when documents or proposed items are presented at a meeting without having been posted online. By narrowing the timeframe in law, challenges to such action may be more likely. Under the Open Meetings Law, a

successful challenge could result in nullifying the action taken and an award of attorney fees – both of which (obviously) should be avoided.

In seeking to comply with new law, public entities should adopt a policy and practice of posting all documents included in packages sent to board members, including the meeting agenda, at least 24 hours prior to the scheduled meeting. If it is not practicable to do so for a certain item, explanation at the meeting would help to mitigate against any challenges to the walk on/carry-in item. And, where it is not practicable to comply, documents should be posted as soon thereafter as possible. Also, pursuant to § 103, documents should be kept in hard copy by the municipality and made available for copying upon request. As a final note, the provisions may not apply to municipalities that do not maintain a routinely updated website and utilize a high speed internet connection.

For questions about the new law or implementing it contact Jared Kasschau or Douglas Gerhardt or the Harris Beach attorney with whom you typically work.

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Legal Alert

NYSDOL ISSUES GUIDANCE REGARDING THE LEGALIZATION OF CANNABIS AND THE WORKPLACE

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On October 8, 2021, the New York State Department of Labor (“NYSDOL”) issued “Frequently Asked Questions” (“FAQs”) to address common situations and questions relating to the legalization of adult-use cannabis and its effect on the workplace. The FAQs largely restate information already outlined in

the Marijuana Regulation and Taxation Act (“MRTA”), which was signed into law on March 31, 2021 and legalized recreational use of cannabis in New York State for adults over the age of 21. The FAQs also set forth some new key considerations for employers, including the NYSDOL’s position that drug testing for cannabis use is prohibited except under narrow circumstances.

Recap of the MRTA’s Amendments to NYS Labor Law Section 201-d

As explained in our earlier alert, the MRTA amended NYS Labor Law Section 201-d (“Section 201-d”) to prohibit employers from refusing to hire, employ, or license; to discharge from employment; or otherwise discriminate against an employee because he/she uses cannabis lawfully outside of work hours, off the employer’s premises and without use of the employer’s equipment or other property.

The MRTA also amended Section 201-d by adding new subsection 4-a, which permits employers to take action against an employee or prohibit conduct where:

- The employer is or was required to take such action under state or federal statute, regulation, ordinance, or other state or federal government mandate;
- The employee, while working, manifests specific articulable symptoms of cannabis impairment that: (a) decrease or lessen the employee’s performance of his/her duties or tasks; or (b) interfere with the 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; or
- The employer would be in violation of federal law, or lose a federal contract or federal funding.

Drug Testing for Cannabis

While Section 201-d and the MRTA do not explicitly address whether employers are permitted to drug test for cannabis, the FAQs make clear that employers cannot drug test for cannabis unless permitted to do so pursuant to Section 201-d(4-a) (see previous section) or other applicable laws. The FAQs also

clarify that employers cannot drug test for cannabis merely because it is allowed under federal law, but are permitted to do so if federal or state law requires drug testing or makes it a mandatory requirement of the position. Employers should therefore review their existing drug testing policies and practices to ensure compliance with the NYSDOL's position that employers are only permitted to drug test for cannabis under limited circumstances.

Articulate Symptoms of Impairment

One of employers' most commonly asked questions relates to the meaning of "articulate symptoms of impairment" under Section 201-d(4-a). The FAQs unfortunately do not provide a definition, but state, "[t]here is no dispositive and complete list of symptoms of impairment. Rather, articulate symptoms of impairment are objectively observable indications that the employee's performance of the duties of [] their position are decreased or lessened." As an example, the FAQs provide, "the operation of heavy machinery in an unsafe and reckless manner may be considered an articulate symptom of impairment."

Despite the lack of clarity as to the meaning of "articulate symptoms of impairment," the FAQs outline what employers may not cite to as an articulate symptom of impairment. The FAQs state, for example, that "[o]nly symptoms that provide objectively observable indications that the employee's performance of the essential duties or tasks of their position are decreased or lessened may be cited." In other words, observable signs of cannabis use (e.g. blood shot eyes), without any observation of decreased or lessened performance by an employee, should not be cited to by employers. The FAQs unsurprisingly also specify that the smell of cannabis, on its own, cannot be used a basis for articulate symptoms of impairment.

Further, the FAQs make clear that a positive test for cannabis use cannot serve as a basis for articulate symptoms of impairment considering there is currently no test capable of demonstrating present impairment.

Given the task of determining whether an employee is impaired in the workplace is not always a simple one, employers should ensure that managers and supervisors are trained on how to make objective observations of articulate symptoms of impairment, and importantly, how to properly and consistently document such observations.

The Prohibition of Cannabis Use At Work Or During Work Hours

The FAQs reaffirm that employers may prohibit the use of cannabis during "work hours," which includes paid and unpaid breaks and meal periods, and even covers when the employee physically leaves the worksite. Importantly, "work hours" for these purposes also includes time that an employee is on-call or "expected to be engaged in work."

Additionally, the FAQs reiterate that employers may prohibit employees from bringing cannabis onto their property, including leased and rented space, company vehicles, and areas used by employees such as lockers and desks. With respect to remote employees, however, the FAQs explain that the NYSDOL does not consider an employee's private residence a "worksite" for purposes of Section 201-d. Employers may nevertheless take action against a remote employee if he or she exhibits articulate symptoms of impairment during work hours.

Other Noteworthy Points

The FAQs address a number of other situations and questions that employers should be aware of:

- The Section 201-d protections do not apply to non-employees. This includes students who are not employees, independent contractors, and volunteers. Further, Section 201-d does not protect individuals under the age of 21 considering cannabis use by such individuals is illegal under State law.
- Further, the Section 201-d protections only apply to employees employed within New York State. The FAQs explain that an employee working remotely in another state, for example, would not be protected by the law.
- Employers are not required to rehire former employees who were terminated due to their use of cannabis prior to the State's legalization of cannabis.
- Employers are not permitted to require employees to waive their rights to Section 210-d as a condition of hire or continued employment (i.e. employers cannot require that employees promise or agree not to use cannabis as a condition of employment).

While the FAQs provide some helpful information and clarification relating to the legalization of adult-use cannabis and its impact on the workplace, there are still open and unanswered questions. Harris Beach Labor and Employment attorneys can help New York State employers – both public and private – navigate these new changes to the law. Services include staff training, reviewing and updating policies, and providing counseling on various employment issues. For questions or support, contact Daniel Moore or the Harris Beach attorney with whom you typically work.

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OSHA AND CMS PUBLISH RULES ON COVID-19 VACCINATION MANDATES

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The Occupational Safety and Health Agency (OSHA) and the Center for Medicare and Medicaid Services (CMS) published highly anticipated rules requiring covered employers to implement Covid-19 vaccination mandates for their employees.

OSHA EMERGENCY TEMPORARY

STANDARD (ETS)

The ETS covers most private employers with 100 or more employees. In addition, states with approved safety agencies must implement standards that meet or exceed the requirements in the ETS within 30 days of the effective date. For states with safety agencies covering only government employees, such as New York, the safety agency's standards will apply to local and state government workers.

The ETS does not apply to employers that are covered by: (1) the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors; or (2) healthcare service providers that are covered by the Healthcare ETS, while that ETS is in effect (many of these health care service providers will be covered by the CMS rule discussed below).

The requirements of the ETS also do not apply to employees of covered employers who: (1) do not report to a workplace where other individuals, such as coworkers or customers, are present; (2) are working from home; or (3) work exclusively outdoors.

Covered employers must develop, implement, and enforce a mandatory Covid-19 vaccination policy. Covered employers also must provide paid time off for workers to get vaccinated and recover from any side effects. Employers may elect to allow employees to undergo regular Covid-19 testing in lieu of being vaccinated as long as they also wear a face covering at work. The ETS does not require employers to pay for the cost of testing, but other laws could.

The ETS acknowledges that employees may be entitled to accommodations for disabilities and religious beliefs under the Americans with Disabilities Act (ADA) and Title VII, but does not offer detailed guidance regarding accommodations. The ETS notes that the Equal Employment Opportunity Commission, not OSHA, is responsible for enforcing the ADA or Title VII.

Covered employers must also comply with various record keeping and notice requirements. For example, employers must survey employees' vaccination status, obtain proof of vaccination, and maintain an updated roster. Employees must be permitted to request information about their own vaccination records, as well as the aggregate number of employees that have been vaccinated. In addition, employers must provide employees with educational materials regarding the ETS and vaccines.

The ETS takes effect Friday, November 5, and employers have 30 days from the effective date to comply, with the exception of the testing requirement for unvaccinated employees, which takes effect 60 days after the effective date. In other words, employers must implement the necessary policies to comply with the ETS by December 5, and all employees must be fully vaccinated or submit to regular testing after January 4, 2022.

Employers that fail to enforce the requirements of the ETS can face fines of up to \$13,653 for each serious violation and \$136,532 for a willful violation.

CMS Rule

The CMS Rule was announced in conjunction with OSHA ETS, and it covers workers at a broad range of facilities that receive Medicare and Medicaid funding, including hospitals, ambulatory surgery centers, dialysis facilities, home health agencies, and long-term care facilities. Covered facilities are required to have a process or policy in place ensuring that all applicable staff are vaccinated against Covid-19.

Like the OSHA ETS, the vaccination requirement does not apply to employees working remotely, provided that they do not have any interaction with other employees or customers. Unlike the OSHA ETS, however, the CMS Rule does not allow employees to undergo regular testing as an alternative to receiving the vaccination. Employees may be entitled to accommodations for disabilities and religious beliefs under the ADA and Title VII, but accommodations should not be granted unless required by law.

The CMS Rule takes effect November 5, and employees must have received at least one dose of a primary series or a single dose Covid-19 vaccine within 30 days of the effective date. Within 60 days of the effective date, all workers must have completed the primary vaccination series. Employees are not considered fully vaccinated until 14 days after the final vaccine dose, but receiving the final dose within 60 days of the effective date is still considered sufficient to comply with the CMS Rule.

Facilities failing to comply with the rule can face monetary penalties and even termination from the Medicare and Medicaid program. CMS indicated that termination would generally only occur after providing the facility with an opportunity to make corrections and comply with the rule.

Next Steps

OSHA and CMS are accepting comments, and the rules could be updated after receiving comments. In addition, several states' attorneys general have announced plans to sue over the rules. For now, employers should determine whether they are covered by the OSHA ETS or CMS Rule and prepare a policy that complies with the applicable requirements.

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