AMERICAN SOCIETY OF SAFETY PROFESSIONALS

Niagara Frontier Chapter

April 2021 Newsletter

From the President's Perspective:

This April Newsletter has a more serious note than the others; partially brought about by changes in the New York State legal and social environment. But first, some positive pronunciations; it looks like spring has sprung with sunny, warm days with flowers and trees blooming and leafing out all over. On the second Monday of the month, I've already had to cut the grass; a sure sign that summer is but a few days ahead.

April also brought us legalization of recreational marijuana use in New York State. Some, if you read the articles in the Buffalo News, herald it as legislation that will save New York from fiscal ruin (it will be taxed at some 13% of value as a baseline; additional taxes on THC content will be added on) and eliminate criminal penalties for certain communities (where people were alleged to have suffered disproportionate drug enforcement efforts) and allow people to exercise their personal freedom to use their intoxicant of choice (the law only partially admits that intoxicant use has downside consequences). For those of us in the Safety Profession, it may lead to some confusion as to how to administer our workplace substance abuse policies. **Remember, marijuana is still illegal to possess or use under Federal Law.** That must be kept in mind, it's why DOT still can legally require drug & alcohol testing.

The new law, titled the "Marijuana Regulation and Taxation Act", is 128 pages long. It is not a fun read by any means; trust me on that one. First, let's recognize that we can replace marijuana with cannabis as it does in the law. On page 3, it allows employers "to enact and enforce policies pertaining to cannabis in the workplace" and on page 84, it indicates changes to New York's Labor Laws regarding cannabis. The changes on page 84 is what becomes confusing. Let's look at them.

The first section refers to Section 201-d of the Labor Law; a section meant to allow for the "use of legal consumable products, including cannabis prior to the beginning or after the conclusion of the employee's work hours and off the employer's premises…" with the same statement regarding legal recreational activities. Here it seems that employers can regulate the use of cannabis during work hours, but not outside of work. Just like we can have rules regarding the consumption of tobacco or alcohol during work hours. It seems perfectly reasonable on its face, right? We will get to the issue of that in a bit.

A new section, Subdivision 4-a, to Section 201-d is added. A summary is as follows; employers are not in violation of Section 201-d if they (paraphrased):

- Take action on cannabis use as required by Federal regulations. This is to allow for Federal Department of Transportation (DOT) regulations; Federal Motor Carrier Safety Administration (FMCSA), Pipeline and Hazardous Materials Safety Administration (PHMSA) and Federal Aviation Administration (FAA) drug & alcohol testing policy requirements. DOT has well known and specific regulations in this area.
- Take action on impaired employees who "manifest specific articulable symptoms" that may decrease or lessen performance of their job duties if such symptoms create a safety issue. In a nutshell, this means if an obviously impaired employee is observed in your workplace and their impairment affects workplace safety (think impaired forklift operator or impaired process operator), you can take action.

- Interfere or cause violations of Federal Labor Law or cause loss of Federal Contracts or funding. This is because the Federal Acquisition Regulations require employers bidding or working on Federal Contracts maintain a "Drug Free Workplace".

Seems simple and straightforward, right? Remember, this is New York State, nothing is as simple as it seems! The operative word here is impaired.

A bit of information is in order. The best information we have regarding legally defensible limits of cannabis metabolite in a DOT specification urinalysis are a cutoff level (think detection level) of 50 ng/dl and a confirmation level (think confirmatory analysis by a more sophisticated analytical method) of 15 ng/dl; because you cannot directly measure THC level in urine. The term ng/dl means nannograms per deciliter of urine. The question here is "Is the employee so impaired that they cannot safely perform their job?" There is no real good answer. Since cannabis is still illegal at the Federal level, there is little to no incentive to conduct research in to what level of THC metabolite in a person's urine constitutes a state of impairment. At least with alcohol, we have a legal definition of impairment of 0.08 (or 8%, if you please) Breath Alcohol Content (BAC). At this time, DOT specification urinalysis are the closest thing we have to a legally defensible drug screen test. They require laboratory analysis and take about 24-48 hours to results. At least in the workplace we can stand down employees suspected of being impaired. The police have a different challenge with drivers suspected of drug impairment.

This presents somewhat of a problem. From practical experience I have had in administering DOT drug & alcohol testing programs, it is true that a person can use cannabis and test positive days; even weeks later. So smoking a blunt on Friday after work could cause you to test positive on next Thursday, even if you don't touch it in between. That usually was a disqualifier on pre-employment tests. It was not a fun job to deliver the bad news to a hiring manager or employee. An alcohol test for use under the same conditions would not cause an issue on Monday morning. Now go back and read the first part of Section 201-d. See why I mention caselaw? Without a clear definition of what level of THC metabolite in urine constitutes impairment, if you administer or advise on a drug & alcohol program, you could be in for some not-so-fun times ahead.

So, what can we practically do in the meantime, until the lawyers let us know what we should do? My advice is leave your Drug & Alcohol Testing (DAT) Program alone! Be aware that your organization may need to make changes in the future, but if you have a sound program that has the elements of pre-employment, random, for cause and post-accident testing in place, leave it alone. Make sure your supervisor Drug & Alcohol Awareness training is up to speed and you have a good Employee Assistance Plan to refer anyone to who tests positive for substance use. Have a professional recommend a "remedial program" for those employees who qualify and follow it. Be consistent in policy implementation! Most importantly, encourage upper management to state that your organization is still dedicated to a "Drug and Alcohol Free Workplace" program to all employees in a mass communication.

And hang on for the ride! I'm sure caselaw will modify what constitutes a legal, ethical and moral Workplace Substance Abuse Policy as we move onward through the fog. After all, it's New York State!