



BARCLAY DAMON ^{LLP}

Adult Use Marijuana
Has Arrived: Employer
Obligations and
Compliance Issues



Disclaimer

This PowerPoint and the presentation of Barclay Damon LLP are for informational and educational use only. Neither the PowerPoint nor Barclay Damon's presentation should be considered legal advice.

Legal advice is based on the specific facts of a client's situation and must be obtained by individual consultation with a lawyer.

Please consult a labor and employment lawyer before attempting to address any legal situation raised in this seminar.



Contact Information

Michael J. Sciotti, Esq.
msciotti@barclaydamon.com

Barclay Damon LLP
Barclay Damon Tower
125 East Jefferson Street
Syracuse, New York 13202

(315) 425-2774 (O)

(315) 256-2314 (C)

www.barclaydamon.com



Social Media

» Twitter:

Employment Lawyer@m_sciotti

» LinkedIn:

www.linkedin.com/in/michaelsciotti/



Contact Information

Christopher J. Harrigan, Esq.
CHarrigan@barclaydamon.com

Barclay Damon LLP
Barclay Damon Tower
125 East Jefferson Street
Syracuse, New York 13202

(315) 425-8540 (O)

(315) 391-4414 (C)

www.barclaydamon.com



Agenda

- » Marijuana Regulation & Taxation Act
- » General Overview of Law
 - › Adult Use
 - › Medical
- » Expungement of Certain Criminal Convictions
 - › Impact on Article 23-A of the New York State Correction Law

Agenda

- » Reality Check For Employers: Adult Use Marijuana Use Has Arrived
 - › New York State Labor Law §201-D (Marijuana as Protected Recreational Use)
 - › Drug Testing Issues



Agenda

- › Americans With Disabilities Act Issues
- › Employee Handbooks & Supervisor Training

Attachments

- » Appendix 1 - Reasonable Suspicion Checklist
- » Appendix 2 - New York State Correction Law Article 23-A Employment Poster

The New Normal!





BARCLAY DAMON ^{LLP}

General Overview:
Marijuana Regulation &
Taxation Act

NY Marijuana Regulation and Taxation Act (“MRTA”)

- » Signed into law on March 31, 2021 by Gov. Cuomo.
- » Some provisions effective immediately, others not until 2022 or beyond.

MRTA General Provisions

- » Permits adults over 21 to purchase for recreational use.
- » Allows for limited home growing.
- » Creates income streams for education, drug treatment programs, and state and local governments.

MRTA General Provisions

- » Establishment of Office of Cannabis Management.
- » Expansion of medical marijuana program.
- » Expungement of criminal records.
 - › Background Checks
 - › Criminal Conviction Inquiries
 - › Remember local laws.

MRTA General Provisions

- » Establishes a Licensing System.
- » Creates a Social and Economic Equity Program Encouraging Individuals Disproportionately Impacted by Cannabis Enforcement to Participate in Industry

»» Big Business

- » Estimate legalization of adult-use marijuana will result in \$350,000,000.00 in annual tax revenue.
- » Creation of 30,000 - 60,000 new jobs.

Should Not Be Surprised

- » Recreational use was inevitable.
 - › \$
 - › Surrounded by other recreational use states
 - › Sunset of Compassionate Care Act

»» Compassionate Care Act

- » In July, 2014, Governor Cuomo signed the Compassionate Care Act (“CCA”) into law, which will sunset after seven years if it is not renewed. N.Y. PUBLIC HEALTH LAW §3360 et seq.
- » Expires 07/05/2021



Compassionate Care Act - Numbers

- » 816 healthcare providers have registered for New York State's Medical Marijuana Program as of **January 9, 2017**.
- » 3248 healthcare providers have registered for New York State's Medical Marijuana Program as of **June 1, 2021**.



Compassionate Care Act - Numbers

- » 12,247 patients have been certified by their health care professional as of **January 9, 2017.**
- » 151,198 patients have been certified by their health care professional as of **June 1, 2021.**

Changes to Medical Program

- » More conditions qualify
- » Number of Caregivers increases
- » More forms of medical cannabis
- » Home cultivation



BARCLAY DAMON ^{LLP}

**Expungement of Certain
Criminal Convictions &
Article 23-A Compliance**

No Longer Criminal

- » The following conditions apply to growing cannabis at home and personal possession of cannabis outside the home:
- » (1) **Personal possession outside of the home:**
Up to 3 ounces cannabis and 24 grams of cannabis concentrate;

No Longer Criminal

- » (2) Home possession: Amends limits of what is permitted in the home, which must be kept in a secure location away from children;

No Longer Criminal

- » (3) Home grow: Permitted under the bill (subject to possession limits) in 18 months after first adult-use sales begin for adult recreational use and subject to regulations of the Medical Program being promulgated no sooner than 6 months:

No Longer Criminal

- » (A) 3 mature plants and 3 immature plants for adults over 21; and
- » (B) 6 mature plants and 6 immature plants maximum per household.

Impact of MRTA

- » Background Checks
- » Criminal Conviction Inquiries
 - › Syracuse, Rochester, Buffalo, New York City and others have local laws.



New York State

Human Rights Law § 296(15)

It shall be an unlawful discriminatory practice for any person, agency, bureau, corporation, or association, including the state and any political subdivision thereof, to deny any license or employment to any individual by reason of his or her **having been convicted of one of more criminal offenses, or by reason of finding of a lack of “good moral character” which is based on up on his or her having been convicted of one or more criminal offenses**, when such denial is in violation of the provisions of Article 23-A of the NY Correction Law.



New York State Correction Law Article 23-A

- » Section 752 prohibits an employer from making adverse hiring or employment decisions against applicants or employees based on a previous criminal conviction, or by reason of a finding of lack of “good moral character” based upon such past convictions, unless:



New York State Correction Law Article 23-A - Factors

- » (1) There is a direct relationship between one or more of the previous criminal offenses and the specific employment sought; **or**



New York State Correction Law Article 23-A - Factors

- » (2) The granting or continuation of employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.



New York State Correction Law Article 23-A - Factors

» In making a determination pursuant to §752, the employer **shall** consider the following factors:



New York State Correction Law Article 23-A - Factors

- » (1) The public policy of New York State to encourage the employment of persons previously convicted of one or more criminal offenses;



New York State Correction Law Article 23-A - Factors

- » (2) The specific duties and responsibilities necessarily related to the employment sought or held by the person;



New York State Correction Law Article 23-A - Factors

- » (3) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities;



New York State Correction Law

Article 23-A - Factors

- » (4) The time which has elapsed since the occurrence of the criminal offense or offenses;



New York State Correction Law Article 23-A - Factors

- » (5) The age of the person at the time of occurrence of the criminal offense;
- » (6) The seriousness of the criminal offense;



New York State Correction Law Article 23-A - Factors

- » (7) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct; and



New York State Correction Law Article 23-A - Factors

- » (8) The legitimate interest of the employer in protecting property, and the safety and welfare of specific individuals or the general public.



New York State Correction Law Article 23-A

- » Consideration of the eight factors is often forgotten.
- » Consideration is required, and existence or absence of one factor is not determinative.
- » Document, document, document.
- » Review job application and questions posed by managers.

New York State Correction Law

Article 23-A – Notice/Poster

- » If an employer is conducting a criminal background check on an employment applicant or employee, the employer **must** provide such individuals with specific notice regarding their rights under Article 23-A of the New York State Correction Law.

New York State Correction Law Article 23-A – Written Response

» At the request of any person previously convicted of a crime who has been denied employment, the employer shall provide, within thirty (30) days, a written statement setting forth the reason(s) for such denial.



Job Application Criminal Conviction Questions

- » Have you ever been convicted of a crime?
 - › Yes
 - › No
 - › Not Sure



Job Application Criminal Conviction Questions

- » Give directions
 - › Explanation of Question
 - › Disclaimer
 - › Failure to Disclose Impact

Job Application Criminal Conviction Questions

- » **Explanation:** “Convicted of crime” means that you pled guilty to, or were found guilty (by a judge or jury) of a felony or misdemeanor. It does not include violations or traffic tickets. This question applies to all courts, federal, state, town, village, city, etc., and it applies to any criminal conviction you may have in a foreign country. You are not required to answer “yes” if the case was adjourned in contemplation of dismissal, you were granted youthful offender status, **or the conviction was expunged.**

Job Application Criminal Conviction Questions

- » **Disclaimer:** It is the policy of X not to discriminate against applicants who have a criminal record. A criminal conviction does not result in an automatic disqualification. All applicants are examined on a case-by-case basis, taking into account a series of factors X is required to review. For example, X will take into consideration the specific duties and responsibilities of the position you are applying for, and the bearing, if any, the criminal conviction will have on your fitness or ability to perform one or more such duties or responsibilities.

Job Application Criminal Conviction Questions

- » **Failure to Disclose**: If you have been convicted of a crime, and you fail to disclose the conviction, X, reserves the right to terminate your employment should you in fact be hired. X has hired many individuals with criminal convictions in the past. Please be honest about your criminal convictions so that your application can be properly assessed.

Job Application Criminal Conviction Questions

- » If your answer to question 1 is “no” you are not required to answer any of the other questions in this section.
- » If your answer to question 1 is “not sure” please stop and contact _____.
- » If your answer to question 1 is “yes” please complete the remaining questions in this section.

Job Application Criminal Conviction Questions

- » For each criminal conviction you may have, please answer the following questions. Please do not list all criminal convictions together.
- » How many criminal convictions do you have?

- » Each criminal conviction must be explained separately. If you have more than one criminal conviction please contact _____.

Job Application Criminal Conviction Questions

- » What was the crime you were convicted of? (Please describe in as much detail as possible).
- » Was the crime a felony or misdemeanor? (Check One)
 - » Felony _____
 - » Misdemeanor _____



Job Application Criminal Conviction Questions

- » What Court did the conviction occur in?
- » For example, Utica City Court, Oneida County Court, United States District Court for the Northern District of New York, etc.

Job Application Criminal Conviction Questions

- » When did the criminal conviction occur?
- » Please provide, month and year at a minimum.
- » Please note that X will consider how much time has elapsed since the occurrence of the criminal offense and the date of your application.



Job Application Criminal Conviction Questions

- » How old were you at the time of the criminal offense?
- » Please note X is not asking you for your date of birth.

Job Application Criminal Conviction Questions

» Do you have any information you would like to produce to X in regard to your rehabilitation and good conduct? (Check One).

» Yes

» No



Job Application Criminal Conviction Questions

- » If yes, what information would you like X to consider.
- » Please note that this information may be produced by you or someone on your behalf of you.

Job Application Criminal Conviction Questions

- » Have you obtained a Certificate of Relief from Disabilities?
- » Please note that the issuance of a Certificate of Relief from Disabilities creates a presumption of rehabilitation in regard to the criminal offense or offenses specified therein.
- » Yes _____
- » No _____
- » If yes, please produce a copy.



Job Application Criminal Conviction Questions

- » Have you obtained a Certificate of Good Conduct?
- » Please note that the issuance of a Certificate of Good Conduct creates a presumption of rehabilitation in regard to the criminal offense or offenses specified therein.
- » Yes _____
- » No _____
- » If yes, please produce a copy.



Job Application Criminal Conviction Questions

- » Is there anything else you would like X to consider relative to your criminal conviction?
- » Please note you are not required to provide any answer to this question.
- » However, if there is some other positive factor you would like X to consider, this is your opportunity to discuss.



BARCLAY DAMON ^{LLP}

NYSL §201-d
Recreational Activities
Law

Expansion of NY's Recreational Activities Law

- » MRTA expands protections of N.Y. Labor Law § 201-D to include legal use or possession of marijuana while off duty or outside the workplace.
- » Includes legal usage “prior to the beginning or after the conclusion of the employee’s work hours, off the employer’s premises and without use of the employer’s equipment or other property.”

Recreational Activities Law

- » In addition, the MRTA provides that: “An employer shall adhere to policies regarding cannabis use in accordance with [the Recreational Activities Law]” and, in this regard, that “No...employees...shall be subject to...disciplinary action by a business... **solely** for conduct permitted under [the MRTA].”
- » Additional amendments to 201-D.

Exceptions

- » Employers can continue to take disciplinary action against employees who engage in off-duty cannabis use where:
- » (1) The employer's actions were required by state or federal statute, regulation, ordinance, or other state or federal governmental mandate; or

Exceptions

- » (2) The employer's actions would require such employer to commit any act that would cause the employer to be in violation of federal law or would result in the loss of a federal contact or federal funding.

Federal Exceptions

- » It is important to note that these limited federal safe harbors do not allow employers to discriminate against legal cannabis users solely because cannabis remains illegal under federal law.

Federal Exceptions

- » However, legally mandated drug testing for marijuana can continue.
 - › U.S. Department of Transportation
 - › Department of Defense
 - › Nuclear Regulatory Positions

US DOT Drug Testing Categories

- » **CDLs**: A person who operates (i.e., drives) a Commercial Motor Vehicle with a gross vehicle weight rating of 26,001 or more pounds; or is designed to transport 16 or more occupants (to include the driver); or is of any size and is used in the transport of hazardous materials that require the vehicle to be placarded.

US DOT Drug Testing Categories

» **Railroad Employees**: Locomotive engineers, trainmen, conductors, switchmen, locomotive hostlers/helpers, utility employees, signalmen, operators, and train dispatchers.

US DOT Drug Testing Categories

- » **Railroad Employees**: In addition, a person who performs a maintenance-of-way/roadway worker function who are employees or contractors of a railroad, have a potential to foul the track, and perform a regulated function such as inspection, construction, maintenance or repair of railroad track, bridges, roadway, signal and communication systems, electric traction systems, roadway facilities or roadway maintenance machinery on or near track, as well, flagman and watchmen/lookouts.

US DOT Drug Testing Categories

- » **Airline Employees**: A person who performs flight crewmember duties, flight attendant duties, flight instruction duties, aircraft dispatch duties, aircraft maintenance or preventive maintenance duties; ground security coordinator duties; aviation screening duties; air traffic control duties, and operations control specialist duties.

US DOT Drug Testing Categories

» **Pipeline Employees**: A person who performs on a pipeline or liquefied natural gas facility an operation, maintenance, or emergency-response function.

US DOT Drug Testing Categories

- » **Transit Employees:** A person who performs a revenue vehicle operation; revenue vehicle and equipment maintenance; revenue vehicle control or dispatch (optional); Commercial Drivers License non-revenue vehicle operation; or armed security duties.

US DOT Drug Testing Categories

- » **Maritime Employees**: A person who is on board a vessel acting under the authority of a license, certificate of registry, or merchant mariner's document. Also, a person engaged or employed on board a U.S. owned vessel and such vessel is required to engage, employ or be operated by a person holding a license, certificate of registry, or merchant mariner's document.

Federal Exceptions

- » Review your requirements!!
- » Review your:
 - › Federal Contracts
 - › Federal Grants

Impairment Exception

- » The MRTA also allows employers to discipline employees for off-duty cannabis use where: The employee is impaired by the use of cannabis, meaning 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 interface with an employer's obligation to

Impairment Exception

- » provide a safe and healthy work place, free from recognized hazards, as required by state and federal occupational safety and health law.
- » Document, document, document
- » Train supervisors how to document

Impairment Exception

- » The MRTA does not define “specific articulable symptoms.”
- » While objective observations such as cannabis odor, red or bloodshot eyes, poor muscle coordination, lack of concentration, delayed reaction time, etc. will likely constitute such specific articulable symptoms, it remains to be seen whether New York issues guidance or further rules/regulations to confirm this standard.

Document, Document, Document

» Discipline

- › Verbal or Written Warning
- › Last Chance Agreement
- › Suspension With/Without Pay
- › Counseling or Treatment
- › Termination

Document, Document, Document

» If it is not in writing
it did not occur!!



BARCLAY DAMON ^{LLP}

Drug Testing Issues

»» Employee Drug Testing

- » Not specifically addresses in MTRA
- » However, for those employers who engage in such testing on a random, mandatory, or reasonable suspicion basis, in the absence of the above exceptions, it is now **illegal** to discipline or terminate an employee for testing positive for marijuana.

Pre-Employment Drug Testing

- » Also not expressly addressed.
- » Amendments to Recreational Activities Law calls further pre-employment testing for THC into question.
- » Exceptions still apply.
- » Time to reconsider drug related policies.

Drug Testing Checklist

- » Lab Selection
- » Medical Review Officer
- » Union
- » What are you testing for?
- » Levels that are being tested?
- » Method?

5 Panel Drug Screen

- » THC (stop doing unless exception applies)
- » Opiates
- » PCP
- » Cocaine
- » Amphetamines

10 Panel Drug Screen

- » Benzodiazepines
- » Barbiturates
- » Methadone
- » Propoxyphene
- » Quaaludes

15 Panel Drug Screen

- » Buprenorphine
- » Oxycodone
- » MDM
- » Meperidine
- » Tramadol

Americans With
Disabilities Act
Issues Regarding
Drug Use



Illegal Use of Drugs

- » The ADA indicates that an individual with a disability does not include an individual who is currently engaging in the illegal use of drugs.

ADA & Drugs

» The ADA specifically permits employers to ensure that the workplace is free from the illegal use of drugs, and to comply with other Federal laws and regulations regarding drug use.

ADA & Drugs

» At the same time, the ADA provides limited protection from discrimination for recovering drug addicts.

ADA & Drugs

- » An employer may prohibit the illegal use of drugs at the workplace.
- » It is not a violation of the ADA for an employer to give tests for the illegal use of drugs.
- » An employer may discharge or deny employment to persons who currently engage in the illegal use of drugs.

ADA & Drugs

- » Employees who use drugs may be required to meet the same standards of performance and conduct that are set for other employees.

ADA & Drugs

- » Employees may be required to follow the Drug-Free Workplace Act of 1988 and rules set by Federal agencies pertaining to drug use in the workplace.
- » Know what your requirements are!

Illegal Use of Drugs

- » However, the ADA does protect:
- » (1) Individuals who have successfully completed a supervised drug rehabilitation program;
- » (2) Individuals who have otherwise rehabilitated successfully and are no longer engaging in illegal drug use;

Illegal Use of Drugs

- » (3) Individuals participating in a supervised rehabilitation program and no longer using illegal drugs; and
- » (4) Individuals erroneously regarded as engaging in illegal drug use, but not engaging in such use.
 - » The perceived drug user!!

Illegal Use of Drugs

- » An employer may discharge current illegal users of drugs, on the basis of such drug use, without fear of being held liable for disability discrimination.
- » Current illegal users of drugs are not "individuals with disabilities" under the ADA.

Illegal Use of Drugs

- » The illegal use of drugs includes the use, possession, or distribution of drugs which are unlawful under the Controlled Substances Act.
- » It includes the use of illegal drugs and the illegal use of prescription drugs that are "controlled substances".

Illegal Use of Drugs

- » For example: Amphetamines can be legally prescribed drugs.
- » However, amphetamines, by law, are "controlled substances" because of their abuse and potential for abuse.
- » If a person takes amphetamines without a prescription, that person is using drugs illegally, even though they could be prescribed by a physician.

Illegal Use of Drugs

- » The illegal use of drugs does not include drugs taken under supervision of a licensed health care professional, including experimental drugs for people with AIDS, epilepsy, or mental illness.

Illegal Use of Drugs

- » **For example**: A person who takes morphine for the control of pain caused by cancer is not using a drug illegally if it is taken under the supervision of a licensed physician.
- » Similarly, a participant in a methadone maintenance treatment program cannot be discriminated against by an employer based upon the individual's lawful use of methadone.

Illegal Use of Drugs

- » An individual who illegally uses drugs but also has a disability, such as epilepsy, is only protected by the ADA from discrimination on the basis of the disability (epilepsy).
- » An employer can discharge such an individual on the basis of his/her illegal use of drugs.

»» Current Use of Drugs?

- » If an individual tests positive on a test for the illegal use of drugs, the individual will be considered a current drug user under the ADA where the test **correctly** indicates that the individual is engaging in the illegal use of a controlled substance.

Current Use of Drugs?

- » "Current" drug use means that the illegal use of drugs occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an on-going problem.
- » It is not limited to the day of use, or recent weeks or days, in terms of an employment action.
- » It is determined on a case-by-case basis.

»» Current Use of Drugs?

- » **For example:** An employee who tests positive for an illegal drug cannot immediately enter a drug rehabilitation program and seek to avoid the possibility of discipline or termination by claiming that s/he now is in rehabilitation and is no longer using drugs illegally.

Current Use of Drugs?

- » A person who tests positive for illegal use of drugs is not entitled to the protection that may be available to former users who have been or are in rehabilitation.



Efforts to Prohibit Drug and Alcohol Use in the Workplace

- » The ADA does not prevent efforts to combat the use of drugs and alcohol in the workplace.
- » The ADA does not interfere with employers' programs to combat the use of drugs and alcohol in the workplace.



Efforts to Prohibit Drug and Alcohol Use in the Workplace

- » The ADA specifically provides that an employer may:
- » (1) Prohibit the use of drugs and alcohol in the workplace.
- » (2) Require that employees not be under the influence of drugs in the workplace.



Efforts to Prohibit Drug and Alcohol Use in the Workplace

- » **For example:** An employer can require that employees not come to work or return from lunch under the influence of drugs used illegally.



Efforts to Prohibit Drug and Alcohol Use in the Workplace

- » Require that employees who illegally use drugs meet the same qualification and performance standards applied to other employees.



Efforts to Prohibit Drug and Alcohol Use in the Workplace

- » Unsatisfactory behavior such as absenteeism, tardiness, poor job performance, or accidents caused by illegal drug use need not be accepted nor accommodated.



Efforts to Prohibit Drug and Alcohol Use in the Workplace

- » **For example:** If an employee is often late or does not show up for work because of drug use/addiction, an employer can take direct action based on the conduct.



Efforts to Prohibit Drug and Alcohol Use in the Workplace

- » However, an employer would violate the ADA if it imposed greater sanctions on such an employee than it did on other employees for the same misconduct.
- » Consistent Enforcement



Efforts to Prohibit Drug and Alcohol Use in the Workplace

- » While the ADA permits an employer to discipline or discharge an employee for illegal use of drugs or where alcoholism results in poor performance or misconduct, the Act does not require this.



Efforts to Prohibit Drug and Alcohol Use in the Workplace

- » Many employers have established employee assistance programs for employees who abuse drugs that are helpful to both employee and employer.



Efforts to Prohibit Drug and Alcohol Use in the Workplace

- » However, the ADA does not require an employer to provide an opportunity for rehabilitation in place of discipline or discharge to such employees.



Efforts to Prohibit Drug and Alcohol Use in the Workplace

- » The ADA may, however, require consideration of reasonable accommodation for a drug addict who is rehabilitated and not using drugs who remains a "qualified individual with a disability."



Efforts to Prohibit Drug and Alcohol Use in the Workplace

- » **For example:** A modified work schedule, to permit the individual to attend an ongoing self-help program, might be a reasonable accommodation for such an employee.



Efforts to Prohibit Drug and Alcohol Use in the Workplace

- » An employer also may fire an individual with a history of illegal drug use if it can demonstrate that the individual poses a "direct threat" to health or safety because of the high probability that s/he would return to the illegal drug use.



Efforts to Prohibit Drug and Alcohol Use in the Workplace

- » The employer must be able to demonstrate that such use would result in a high probability of substantial harm to the individual or others which could not be reduced or eliminated with a reasonable accommodation.



Efforts to Prohibit Drug and Alcohol Use in the Workplace

- » Examples of accommodations in such cases might be to :
- » (1) Require periodic drug tests;
- » (2) Modify job duties; or
- » (3) Provide increased supervision.



Efforts to Prohibit Drug and Alcohol Use in the Workplace

- » An employer cannot prove a "high probability" of substantial harm simply by referring to statistics indicating the likelihood that addicts in general have a specific probability of suffering a relapse.



Efforts to Prohibit Drug and Alcohol Use in the Workplace

- » A showing of "significant risk of substantial harm" must be based upon an assessment of the particular individual and his/her history of substance abuse and the specific nature of the job to be performed.

Drug Testing

- » An employer may conduct tests to detect illegal use of drugs.
- » The ADA does not prohibit, require, or encourage drug tests.

»» Drug Testing

- » Drug tests are not considered medical examinations, and an applicant can be required to take a drug test before a conditional offer of employment has been made.

Drug Testing

- » An employee also can be required to take a drug test, whether or not such a test is job-related and necessary for the business.

Drug Testing

- » An employer may refuse to hire an applicant or discharge or discipline an employee based upon a test result that indicates the illegal use of drugs.
- » The employer may take these actions even if an applicant or employee claims that s/he recently stopped illegally using drugs.

Drug Testing

- » Employers may comply with applicable Federal, State, or local laws regulating when and how drug tests may be used, what drug tests may be used, and confidentiality.



Drug Testing

- » Drug tests must be conducted to detect illegal use of drugs.
- » Stop testing for THC unless exceptions apply.

»» Drug Testing

- » However, tests for illegal use of drugs also may reveal the presence of lawfully-used drugs.
- » If a person is excluded from a job because the employer erroneously "regarded" him/her to be an addict currently using drugs illegally when a drug test revealed the presence of a lawfully prescribed drug, the employer would be liable under the ADA.

»» Drug Testing

- » To avoid such potential liability, the employer would have to determine whether the individual was using a legally prescribed drug.
- » Because the employer may not ask what prescription drugs an individual is taking before making a conditional job offer, one way to avoid liability is to conduct drug tests after making an offer, even though such tests may be given at anytime under the ADA.

Drug Testing

- » Since applicants who test positive for illegal drugs are not covered by the ADA, an employer can withdraw an offer of employment on the basis of illegal drug use.

»» Drug Testing

- » If the results of a drug test indicate the presence of a lawfully prescribed drug, such information must be kept confidential, in the same way as any medical record.
- » If the results reveal information about a disability in addition to information about drug use, the disability-related information is to be treated as a confidential medical record.

»» Drug Testing

- » **For example:** If drug test results indicate that an individual is HIV positive, or that a person has epilepsy or diabetes because use of a related prescribed medicine is revealed, this information must remain confidential.



BARCLAY DAMON ^{LLP}

Employee Handbooks &
Supervisor Training

Best Practices

- » Implement clear, well-defined policies (no overreaching).
- » Obtain acknowledgment or consent.
- » Only go so far as to protect business interests.
- » Monitoring and decision-making by designated employees, who have been trained.

»» Best Practices

- » Personal data obtained should be stored safely and not disseminated.
- » Apply training to employees regarding appropriate use of IT.
- » Document, document, document.
- » Do not overreact (i.e. make sure you know what you are looking at), but do not underreact.

Good Reason To Fire?



»» Confront the Employee

- » Save the material and ask about it:
 - » (1) Did you post it?
 - » (2) Why did you post?
 - » (3) Impact of statement.

Google: Michael Sciotti Mugshot



Google: Michael Sciotti Mugshot

- » Michael Sciotti was booked in Volusia County, FL on 08/06/2006.
- » Thank you Mugshots.com



Code of Conduct

- » Code of Conduct
- » Illegal Drugs
- » Others Prescription Medication
- » Prescription Medication
- » Alcohol
- » Smoking
 - » Vaping
 - » E-Cigarettes

»» Code of Conduct

- » No employee may:
- » (1) Possess marijuana at work (including in a personal vehicle parked on company property).
- » (2) Be under the influence of marijuana while working.
- » (3) Use marijuana while working.

Code of Conduct

- » (4) Possess, sell, use, etc. drug paraphernalia during work hours.
- » (5) Sell/Auction marijuana while working.
- » (6) Barter marijuana while working.
- » (7) Possess drug magazines.
- » (8) Come to work smelling of marijuana.

Code of Conduct

- » (9) Purchase/Order any product containing THC using the Company's network or computer equipment.
- » (10) Possess at work any product containing any trace of THC including: candy, lollipops, gummies, cookies, brownies, etc.

»» Drug Testing Considerations

- » Drug Testing Panel
 - » 5, 10 or 15 Panel
 - » Exclude THC unless exception(s) apply
- » Custom Panel
- » Testing Method
- » They admit to using – should you test?

Drug Testing Considerations

- » Timing of test
- » Getting to test



Other Employment Policies

- » Social Media
- » Drug Free Workplace

»» Supervisor Training

- » Supervisor Training
 - » ADA Protections
 - » Ask the question: “Are you high?”
 - » If yes, on what?
 - » Where did you get?

»» Supervisor Training

- » Supervisor Training
 - › Reasonable Suspicion Identification
 - › Documentation of Reasonable Suspicion
 - › Review of Appendix 1 – Subject to Regulations

»» Law Enforcement Issues

- » Law Enforcement
 - › It is ok if you are wrong
 - › Seizing Illegal Drugs

Law Enforcement Issues

- » What do you do with the drugs once seized?
- » (1) Do not place in Personnel Folder
- » (2) Do not Give Back to Employee
- » (3) Do not Dispose of
- » (4) Do not Use or Sell (really it has happened)

»» Discipline Issues

- » Discipline Issues
- » (1) Verbal/Written Warning
- » (2) Last Chance Agreement
 - › Release
 - › Follow-up Testing
 - › FMLA, ADA and NYSHRL

Discipline Issues

- » (2) Last Chance Agreement
 - › Conduct Expectations
 - › Counseling & Treatment Expectations
- » (3) Termination of Employment
 - › Documentation
 - › Videos

Questions?



Michael Sciotti

Partner

msciotti@barclaydamon.com | 315.425.2774



Chris Harrigan

Partner

charrigan@barclaydamon.com | 315.425.2772