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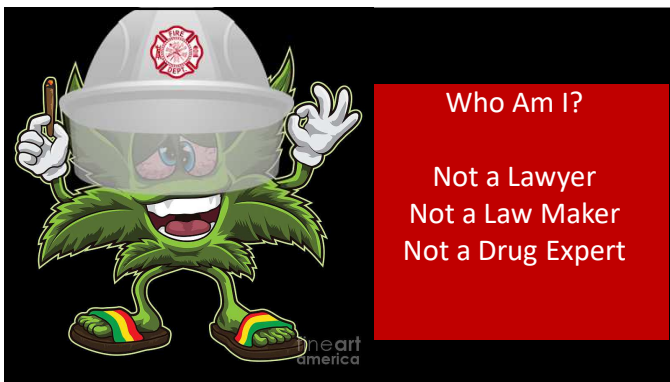
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## Employee Rights

- Many, employers in New York State are now prohibited from taking adverse action or otherwise discriminating against applicants and employees based on their lawful recreational marijuana use.
- Most notably for employers, the MRTA amends NYS Labor Law Section 201-d, often referred to as the legal activities law, to prohibit an employer from refusing to hire, employ, or license; to discharge from employment; or otherwise discriminate against an individual 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.

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## Labor Law 201-B Discrimination Against the Engagement in Certain Activities

- Political Activities
- Recreational activities (including cannabis)
- Engage in hobbies
- Union membership

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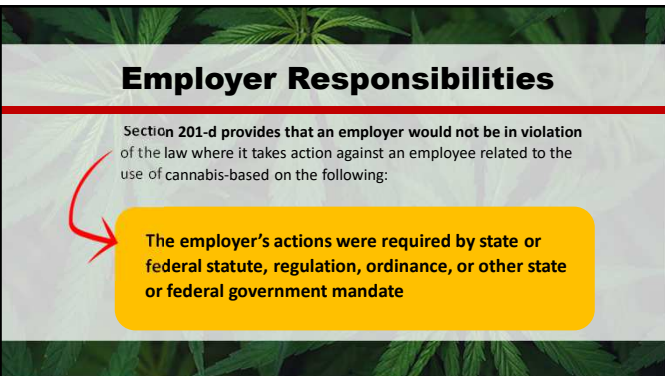
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## Employer Responsibilities

Section 201-d provides that an employer would not be in violation of the law where it takes action against an employee related to the use of cannabis-based on the following:

The employer's actions were required by state or federal statute, regulation, ordinance, or other state or federal government mandate

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**Employer Responsibilities**

- **the employee is impaired by the use of cannabis**, meaning the employee manifests specific articulable (*capable of being expressed or justified*) 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;**

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**Employer Responsibilities**

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 contract or federal funding.

- Federal Grants
- Insurance coverage
- Line of duty death benefits

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**Local Opt-Out**

Cities, towns, and villages can opt-out of allowing adult-use cannabis retail dispensaries or on-site consumption licenses from locating within their jurisdictions; however, municipalities cannot optout of adult-use legalization. Possession and use of cannabis by adults 21 years of age or older is legal in New York State.

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## Common Concerns

**Loss of Federal Funding**  
Most require a drug free workplace  
They do not control off-duty use

**Safety-Sensitive Positions**  
Employee can not perform job "under the influence"  
Can not be based solely on positive drug test results

**The Fire Department WILL violate Federal Law**  
Lexipol is not aware of any federal law that would be violated except:

- DOT Laws can be an issue for CDL operators
- If members are required or allowed to carry firearms

Lexipol 9/23/20 Article – Lexipol.com

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## What Do We Do Now?

**Current policies most likely do not cover situation:**

- Stay on top of laws and update
- Work with your local legal counsel
- Monitor case development
- Train your members on impairment
- Build a FIT FOR DUTY program

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## Reasonable Suspicion Testing – Fit For Duty

Have a solid policy that prohibits employees from being on duty while impaired

- When and if employees will be tested
- Who the policy applies to
- What is the test procedure
- What constitutes refusal to test
- The consequences of refusing to test
  - Implied Consent

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## Reasonable Suspicion Testing

- Always have a witness
- Document any:
  - Physical signs
    - Slurred speech
    - Bloodshot eyes
    - Dilated pupils
    - Lack of coordination
  - Behavioral signs
    - Decline in performance
    - Problems with prompt attendance
  - Psychological signs
    - Erratic mood swings
    - Lack of focus

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## Take Action

- Fit For Duty
- In a safety sensitive situation – remove person immediately
  - Meet with employee face to face and explain concerns
  - If testing is warranted – have them tested is legal
  - Provide transportation home or to safe place
  - Or Refer to Medical Evaluation



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## Train Your Members

- What are the risks of doing the job impaired?
  - Injury or death
  - Harm to others
  - Loss of coverage or benefits
- Loss of leadership and colleague trust
  - Are you fit for duty
  - Can you be trusted
- Loss of public trust
  - Social media posts
  - Wearing department swag



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## Procedural or Readiness Reasons

They aren't ready to work if:

- Don't meet minimum and continuing training requirements
- Not current on demonstrating medical readiness
- Are restricted by administrative and disciplinary rules

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## Sample Suspicion Documentation

Removal from Duty due to Reasonable Suspicion Reporting Form

Member name \_\_\_\_\_ Supervisor Name \_\_\_\_\_  
 Incident/Training/Event \_\_\_\_\_ Incident # \_\_\_\_\_  
 Date and Time \_\_\_\_\_ Location \_\_\_\_\_  
 Member's job function at the time \_\_\_\_\_

The following observations were made of the member identified above:

CHECK ALL THAT APPLY

Behavior	Appearance	Speech
<input type="checkbox"/> Unsteady gait, stumbling	<input type="checkbox"/> Flushed complexion	<input type="checkbox"/> Incoherent words
<input type="checkbox"/> Uncoordinated, clumsy	<input type="checkbox"/> Obvious significant injury	<input type="checkbox"/> Slurred or thick
<input type="checkbox"/> Drooping, heavy, lethargic	<input type="checkbox"/> Fevering a limb or body area	<input type="checkbox"/> Loud, hoarse/ness
<input type="checkbox"/> Agitated, restless, restless	<input type="checkbox"/> Flushed or very pale skin	<input type="checkbox"/> Excessively talkative
<input type="checkbox"/> Twitching, balling fists	<input type="checkbox"/> Unequal, constricted or dilated pupils	<input type="checkbox"/> Inappropriate terms
<input type="checkbox"/> Impaired, withdrawn	<input type="checkbox"/> Bloodshot and or watery eyes	<input type="checkbox"/> Nonsensical
<input type="checkbox"/> Unfocused, distracted	<input type="checkbox"/> Unkempt appearance	<input type="checkbox"/> Other indicators
<input type="checkbox"/> Restless or inattentive	<input type="checkbox"/> Suspicious or paranoid	<input type="checkbox"/> Odor of alcohol
<input type="checkbox"/> Inappropriate actions and statements		

Describe in detail the above observations, the circumstances surrounding them and your interactions with the member and what action you took:

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## Indicators to Raise Suspicion

We can break them down into three areas:

Physical

Cognitive

Behavioral

Some indicators can "cross over" one area to the next

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## Know your People!

*You must know what normal is:*

- Be familiar with members and their personalities
- What are their usual behaviors and movements
- Your ability to identify what isn't normal is enhanced
- Evaluating reports from other members/employees

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## Physical Signs

- Abnormal general appearance
- Pale or flushed skin tone
- Favoring a body part
- Abnormal eyes
  - Redness, watery
  - Abnormal pupil size (pinpoint or very large)
- Appears to have abnormal breathing
- Slurred speech
- Unstable or uncoordinated gait, staggering, stumbling
- Uncoordinated movement
- Overly energetic or active

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## Cognitive Signs

- Appears drowsy
- Slow or delayed responses
- Unexpectedly loud or quiet
- Overly talkative or withdrawn
- Disinterested or lacking motivation
- Aggressive behaviors
- Combative or hostile
- Irrational comments

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## Behavioral Indicators

- Deviations from “normal” behavior for the employee/member
- Manic behavior
- Rapid changes in mood
- Aggressive and anti-social behaviors or fellow members or public
- Depressed, sullen and withdrawn
- Paranoid

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## What to Do

When you suspect a member isn't ready to work:

- Safely remove them from duty
- Notify a supervisor
- Gather information from witnesses
- Allow another supervisor to interview the subject and witnesses
- Make a final decision
- Document the findings
- Assure the member is safe and is given resources to return

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## REMOVING THEM FROM DUTY



WHEN THEY AREN'T READY:

- FIT FOR DUTY POLICIES SHOULD ADDRESS WHAT IS “REASONABLE SUSPICION”
- DECISION IS RARELY BASED ON A SINGLE OBSERVED CRITERIA
- AVOID RELYING ON THE OBSERVATIONS OF A SINGLE PERSON OR SUPERVISOR
- POLICY SHOULD PROVIDE DUE PROCESS TO “DOUBLE-CHECK” INITIAL JUDGEMENTS
- DOCUMENTATION TOOLS HELP WHEN TIME ALLOWS BUT ALWAYS DOCUMENT REGARDLESS

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## DUE PROCESS PROCEDURES

- As soon as applicable, a second qualified supervisor evaluates the member
- Second supervisor may also interview witnesses
- Determines if Reasonable suspicion exists or not
- Communicates disagreement with first and they come to conclusion
- Chief Officer or Incident commander has final call, in case of disagreement
- If unfounded, member returns to service

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## NEXT STEPS AFTER REMOVAL FROM DUTY

WHEN A CONCERN IS FOUNDED AND WE "PULL THEM OFF THE LINE":

- REFERRAL AND/OR DISCIPLINE IN ACCORDANCE WITH APPLICABLE POLICY
  - GIVE THEM ACCESS TO HELP
  - DON'T PRETEND THERE ISN'T A BIGGER PROBLEM, FIND OUT IF WE CAN ASSIST
  - ASSURE THAT THEY HAVE A CLEAR PATH TO RETURN TO DUTY
  - EXAMPLES – PHYSICAL INABILITY TO WORK OR DRUG OR ALCOHOL IMPAIRMENT



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## SAMPLE SUSPICION DOCUMENTATION

Removal From Duty due to Reasonable Suspicion Reporting Form

Member name \_\_\_\_\_ Supervisor Name \_\_\_\_\_  
 Incident/Training/Event \_\_\_\_\_ Incident # \_\_\_\_\_  
 Date and Time \_\_\_\_\_ Location \_\_\_\_\_

Member's job function at the time \_\_\_\_\_

The following observations were made of the member identified above:

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<input type="checkbox"/> Uncoordinated, clumsy	<input type="checkbox"/> Obvious significant injury	<input type="checkbox"/> Slurred or thick
<input type="checkbox"/> Slowed, shaky, lethargic	<input type="checkbox"/> Fearing a limb or body area	<input type="checkbox"/> Loud, boisterous
<input type="checkbox"/> Agitated, anxious, restless	<input type="checkbox"/> Flushed or very pale skin	<input type="checkbox"/> Excessively talkative
<input type="checkbox"/> Hostile, belligerent	<input type="checkbox"/> Unusual, constricted or dilated pupils	<input type="checkbox"/> Inappropriate terms
<input type="checkbox"/> Depressed, withdrawn	<input type="checkbox"/> Bloodshot and/or watery eyes	<input type="checkbox"/> Rambling
<input type="checkbox"/> Unfocused, distracted	<input type="checkbox"/> Bloodshot and/or watery eyes	<input type="checkbox"/> Other indicators
<input type="checkbox"/> Tremors or shakes	<input type="checkbox"/> Unkempt appearance	<input type="checkbox"/> Odor of alcohol
<input type="checkbox"/> Flashes stress signs and complaints		
<input type="checkbox"/> Inappropriate actions and statements		
<input type="checkbox"/> Suspicious or paranoid		

Describe in detail the above observations, the circumstances surrounding them and your interactions with the member and what actions you took:

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**What if I'm Alone?**

- If the condition warrants it, take action
- Documentation becomes key
- Ask yourself if you are comfortable with your decision
- Understand it leaves the door open for a claim of false accusations



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**Resources**

- Handouts

**McNeil Risk Management Department**

Email Us: [ddenniston@mcneilandcompany.com](mailto:ddenniston@mcneilandcompany.com)  
Call Us: 1-800-822-3747 ext. 176  
Visit: [www.esip.com](http://www.esip.com)

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