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Katie's Korner Q3 2021

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WHAT'S NEW?

Q3 2021 JULY - AUGUST - SEPTEMBER

NEW MARIJUANA LAW ALERT FOR NEW YORK STATE

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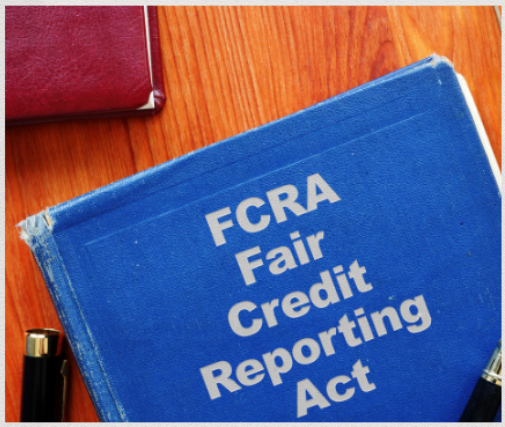
When explaining to clients about permissible purpose, it can feel like a mini law class when trying.....



New Marijuana Law Alert for New York State

The New York State motto is Excelsior. In Latin, this means "higher, loftier, more elevated." Yet, has New York gotten too high and excessive on their marijuana laws?

After years of advancing multiple marijuana bills and laws, debates, and feedback, New York Governor Andrew Cuomo signed the Marijuana Regulation and Taxation Act (MRTA) into law. This action instantaneously decriminalizes a variety of cases of adult possession and use of cannabis products, including marijuana, statewide. The act is creating a difficult environment for many employers, wondering what their organizations can do to preserve a zero-tolerance drug-free workplace.

New York Labor Law has had lasting protections for employees' having off-duty conduct, including lawful use of consumable products. For example, employers usually cannot prohibit employees from smoking tobacco or drinking alcohol outside of the workplace. This new Marijuana Regulation and Taxation Act amends the existing protections to address employee marijuana use.

Section 201-d of the New York Labor Law now specifically protects an employee from job discrimination based on the "legal use of consumable products, including cannabis in accordance with state law." This protection extends to the use of the following: (a) outside of work hours, (b) off the

employer's premise, and (c) without the use of the employer's equipment or other property.

Although this protection is granted, the MRTA specifically permits employers to continue prohibiting the use or possession of marijuana in the workplace, working under the influence, driving under the influence, and any action endangering others. This is in direct conflict with other laws as they stand.

Additionally, nothing in the MRTA stops an employer from taking adverse action due to the use of marijuana-based on:

- Any reason required by state or federal law;
- 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 interfere with an employer's obligations to provide a safe and healthy workplace, free from recognized hazards, as required by state and federal occupational safety and health law; or
- If the employer's action would require the employer to commit any act that would cause the employer to be in violation of federal law or result in the loss of federal funding or a federal contract.
- If you are a New York employer, you should consider consulting a competent attorney regarding your Drug Testing Procedures and Policies to determine how to stay compliant with the new law.

Positive drug tests for U.S. workers remain near historic highs. Quest Diagnostics released a new analysis with respect to the millions of drug tests that they process.

Quest Diagnostics states in their analysis, “The overall positivity rate in the combined U.S. workforce based on more than seven million urine drug tests collected between January and December 2020 was down only slightly in 2020 (4.4%) compared to 2019 (4.5%, a sixteen-year high). Positivity in the federally mandated, safety-sensitive workforce based on more than 2 million urine drug tests declined 8.3 percent (2.4% in 2019 versus 2.2% in 2020) but was still 10 percent higher than the 2016 rate (5 years prior). In the general U.S. workforce, positivity increased 3.8 percent (5.3% in 2019 versus 5.5% in 2020) and was 12.2 percent higher than in 2016.”

This analysis states that “4.4% of the samples tested positive – down from a 16-year high of 4.5% in 2019, but still higher than the 30-year low of 3.5% recorded in 2010, 2011 and 2012.” The reason for this continued surge has Human Resource professionals and others hypothesizing a plethora of reasons such as the COVID-19 pandemic, the rise in Marijuana legalization, the Heroin Epidemic, and more. However, a representative inside Quest Diagnostics spoke on their perspective and the urgency for employers to maintain and consider employment drug testing.

“Driven largely by surging rates of marijuana general U.S. workforce positives and steady rates of amphetamines positives, the rate of drug positivity remained stubbornly high despite seismic shifts to the workplace caused by the COVID-19 pandemic,” said Barry Sample, Ph.D., senior director of science and technology, Quest Diagnostics. “However, as we see upticks in hiring and many employees returning to the workplace, it is important that employers consider workforce drug testing as a way to keep the workplace, their customers, and the community safe.”

It is vital for organizations to maintain drug testing procedures. Employers know drug testing has value for deterrence and detection – it is an effective part of their risk mitigation strategy.

“Impairment, whether it be by drugs, alcohol, fatigue or stress, decreases the safety of the workforce,” said Jenny Burke, senior director of impairment practice, National Safety Council. “The DTI results, reflecting decreases in many drug categories, occurred in a unique year. Even though these are down, we must continue to educate people about the impairing impacts of these substances. And, as states and the federal government consider changes to the legality of marijuana, we can’t take for granted that they also understand the impairing impact of THC. The safety of people who share the roadways and workplaces with impaired people needs to be a priority.”

Other findings:

- By industry, retail trade and accommodation/food services had the highest overall positivity rate, at 6.2%. That figure marks a 21.6% jump from 2019 for the latter industry.
- Transportation and warehousing had the highest overall positivity rate increase between 2016 and 2020, at 41.9%.
- Construction had the highest positivity rate for cocaine (0.32%) and methamphetamines (0.21%).
- Finance/insurance experienced a 50% jump in positive marijuana samples from 2019 to 2020, the largest increase of any industry, while accommodation/food services (6.3%) had the highest rate in 2020.
- Among the general workforce, the positivity rate for cocaine fell 18.5% in 2020 (0.22% last year vs. 0.27% in 2019).

- The rate of positive cocaine tests among the general workforce has dropped 21.4% since 2016.

What is Permissible Purpose under the Fair Credit Reporting Act?

Explaining to clients about permissible purposes can feel like a mini law class. While trying to explain it and why it's vital when it comes to background checks and the Fair Credit Reporting Act.

The permissible purpose is defined by the Fair Credit Reporting Act (FCRA) as a requirement to authorize reasons for a consumer reporting agency (such as Peopletrail) may furnish or supply a consumer report to any person or organization. However, if the purpose for furnishing is not listed as a permissible purpose, the consumer report cannot be provided without the individual consumer's express consent. The FCRA includes several different "permissible purposes." For example, a user may have a "permissible purpose" to obtain and use consumer report information if:

- in accordance with a consumer's written instructions;
- for employment purposes;
- for underwriting insurance;
- in connection with the extension of credit to, or the review or collection of an account of, the consumer;
- for a legitimate business purpose in connection with a transaction initiated by a consumer; and
- for making prescreened firm offers of credit or insurance.

The "permissible purpose" has specific meaning and conditions that should be reviewed carefully by your organization and by competent legal counsel to determine which option should be applied to your organization.

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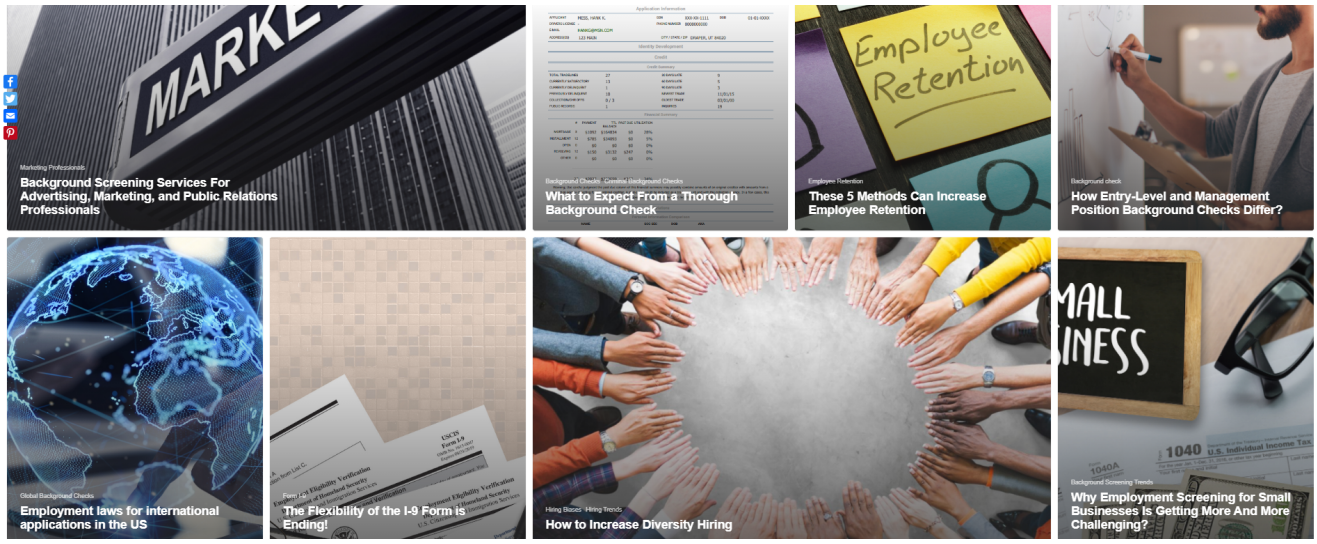

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