



THE **Cannabis** COUNSELOR  
WITH ALEECE BURGIO

**Episode 9: “MRTA and NYS Labor and Employment Law, Featuring Chris Harrigan”**  
Speakers: Aleece Burgio and Chris Harrigan

**[Aleece Burgio]** Hey, everyone, this is a Barclay Damon Live broadcast. You’re listening to the Cannabis Counselor, and I’m your host, Aleece Burgio. Let’s get into it. What’s up, everybody?

**[Aleece Burgio]** This is episode nine of The Cannabis Counselor. We’re here today with Chris Harrigan, a partner at Barclay Damon in the Labor and Employment section. And he’s also a member of the Cannabis Service Team. Chris is going to take us through what we learned in the Marijuana Regulation Taxation Act for labor and employment. What the ramifications are for both employers and employees, now moving forward as this bill has passed. It’s going to be very interesting. A lot of good knowledge. So stay tuned. Hey, Chris, how are you? Thank you so much for joining us on episode nine of The Cannabis Counselor. How are you doing today?

**[Chris Harrigan]** I’m great Aleece, how are you? Thanks for having me.

**[AB]** I’m excited to have you because I’ve been getting this question a lot and this isn’t really my expertise. But today I really want to talk about what happened as a result of the Marijuana Regulation Taxation Act passing and being signed by the governor on March 31st and just what these ramifications are for any type of employer or employee through these labor and employment provisions. So what has happened as a result of that bill?

**[CH]** So, Aleece, the biggest change that’s occurred is this law now makes it illegal to discriminate against somebody on the basis of their legal marijuana use. And specifically, it changes the Labor Law 201-d, which is also commonly referred to as the recreational activities law. Legal cannabis use is now included. It’s the same as drinking beer, going to your political party rally, whatever the case may be, that’s all protected now under the New York Labor Law through this new act. And it calls into question things like pre-employment drug testing, drug testing, and discipline for current employers. All that now comes into the fold and has to be revisited by employers.

**[AB]** So let’s talk about pre-employment testing. I think that was your first point. Now, let’s just use an example here. I am a potential employee. I’m an HR director. I smoke weed all the time, big stoner, but I don’t do it on the job. I just like to smoke on my after hours and your company drug tests, and I test positive for THC, what would be the ramifications for that? What would be the effects of that test?

**[CH]** So prior to this new law going into effect on pre-employment screens, employers were ... it was illegal for employers to not offer employment for legally consumable products like alcohol or any other substance that’s legally consumable. What this new law does is for pre-employment and screening, it now includes legal cannabis use as part of those legally consumable products



that are covered under pre-employment screening. So as a result, if you're somebody—in your scenario that you just indicated—you're somebody who smokes on the weekend or consumes on your free time and you apply for a job and you've got to have a drug screen as a result of that application, a positive test can now not be used by the employer to deny you employment or use as a basis to not hire you.

**[AB]** So that's interesting. So basically, we're treating marijuana now like alcohol. So if you're using alcohol on your off hours, you should be fine to go to work the next day, you might be hung over, it shouldn't be really in your system anymore. But that isn't a cause to not let you become an employee of that workplace.

**[CH]** And that's the comparison that a lot of people are drawing now is that cannabis, marijuana adult use is now really coming into the fold, being treated very much like alcohol. You still can't come to work drunk. You can't come to work high now either. It doesn't mean you can come under the influence and do your job while you're under the influence. But it does mean that whatever you do when you're off the job can't be used as a basis to discipline or terminate you while you're on the job.

**[AB]** So ... that makes sense. So, we talked about pre-employment testing. What about if I'm on the job, how does that work?

**[CH]** Sure. So a couple things. The first thing that's important to note is what this law does not do is this law doesn't open the floodgates where all of a sudden I can use, I can possess, or I can sell drugs at the workplace. All of those things are still off the table, big no-nos, can't do it. Company and every employer can still have policies and rules as it relates to all of those things. But what it does mean now is that, for example, if you're an employer who has a drug testing policy—whether it's random, whether it's regular drug testing, or whether it's based on reasonable suspicion—if you have that policy now, you've got to be careful because the result ... if an employee has a positive test under any one of those drug-testing scenarios—random, reasonable suspicion or mandatory—you can't use that test, the positive test in and of itself, to discipline or to terminate employment. There are exceptions to these rules. I'm happy to go through those. The first exception is, well, what if I'm somebody who's ... I'm subject to federal rules and regulations? I have, for example, a trucking company and I've got drivers that are subject to US DOT rules and regulations. That's okay. Those people can still continue to be tested, and if those people test positive, they can be disciplined and terminated.

**[AB]** Similar to a corrections officer, similar to police officer—those employees—that this doesn't really necessarily apply to them, this blanket rule, they're part of the exception.

**[CH]** That's correct. That's exception number one. Exception number two, which is similar to that federal exception is, if you're an employer who is subject to federal funding or you have federal contracts and not disciplining somebody who test positive for marijuana or who is knowingly using marijuana—if you doing nothing, if your inaction as an employer causes you to lose a contract or causes you to lose federal funding, then that's another exception. If you find out about this, you are ... it's okay to discipline somebody or terminate an employee because of the drug use or a positive drug test. And then the third exception, which is a little bit different, it still means you can't be impaired at work. So if you're an employee that comes, and you're impaired and what the law uses this term, and the term is “specific, articulable symptoms” doesn't define what that means. But if you demonstrate that and you're impaired at work, that's also okay to be the basis for termination or discipline. Now, what do those words mean? They're not defined by the statute, but they're going to mean things like smelling of marijuana. They're going to mean



... It's going to mean red and bloodshot eyes, delayed reaction time, falling asleep, things of that nature that are open, obvious, and objective. That's another exception where if you see those things, whether it's subject to a positive test or otherwise, you can go ahead now and you can terminate somebody or discipline somebody as a result of that.

**[AB]** I think that's interesting, right ... Because that's kind of the test and standard that we're using for driving while impaired because we don't have a device or a mechanism that can test when THC levels were ingested, consumed, or inhaled for impaired driving. So you have to use the sight test. Right? Bloodshot eyes, odor/scent. Just a visual idea of people. So I think for a little bit, that's going to be how people are determining whether or not anybody is under the influence of marijuana, which is interesting, we've been getting a lot of inquiries, about just ... with this bill passed people are now allowed to smoke in public, which I think is a really huge takeaway. You can have up to three ounces on your person of marijuana. And so there's a lot of gray area or a lot of doubt that I think employers were having that people would be allowed to smoke on the job and what you're saying is that is not the case. People can't come to work and do that. They cannot light up and be on marijuana. It's not like a cigarette, right?

**[CH]** Correct.

**[AB]** So I think that's a huge takeaway for people who are a little unsure about this law. But our last kind of question here, Chris, is what can employers do now that can help them have takeaways from this bill?

**[CH]** Yeah. There's a couple of important things that everybody ought to do now. The first is every employer ought to be checking its policies and procedures. So whether it's a drug-free workplace policy or a drug-testing policy, make sure to touch base with your favorite employment attorney, and make sure you've got all the language in there, including language that we've developed through the new act to be able to be compliant. You want to make sure you're compliant.

And then the other thing you got to do is you got to really revisit your practices. If you are an employer who is still testing for THC and pre-employment drug screens, you really got to take a look at that and see whether you fit into any of the exceptions. And whether that's even practical anymore to do that. So the first is, check your policies, check your procedures, make sure you're in compliance. And then the second thing that I think everybody should do is—to the extent that you're an employer who has federal contracts or receive federal funding—make sure you understand what the requirements are under those federal mandates, because if those mandates require you to maintain drug-free workplace, require you to have testing, drug testing of certain employees, that should and must continue. And also make sure you understand the exceptions, which allows you to continue to do that, notwithstanding the legalization that we've been talking about today.

**[AB]** Amazing, Chris, thank you so much. And for all of our viewers out there: If you are an employer and you have questions on this, hit up Chris Harrigan, he is our go-to person for any Labor and Employment matters on the Cannabis Service Team. Very well versed in this subject area and knows a lot about cannabis as well. So feel free to find him, and we'll drop down his bio and a way to connect with him on this podcast. Thanks so much. Thank you, Chris.

**[CH]** Thanks, Aleece.

**[AB]** The Cannabis Counselor Podcast is available on YouTube, LinkedIn Apple Podcast, Spotify, and Google Play. Like, follow, share and continue to listen! Thanks.

