



A New Challenge to Illinois Employers in 2020: The Cannabis Law

On January 1, 2020, marijuana will be legal for recreational purposes in Illinois in accordance with the Cannabis Regulation and Tax Act (“CRTA”), which was signed into law by Illinois Governor JB Pritzker earlier this year. The CRTA, in conjunction with amendments made to the Illinois Right to Privacy in the Workplace Act (“Right to Privacy Act”), complicates Illinois employers’ ability to enforce their drug free policies and discipline employees for use of marijuana.

THE NEW CANNABIS LAW - HIGHLIGHTS

The CRTA and Right to Privacy Act are different from several other state laws, in that they grant explicit protection to Illinois employees who consume marijuana, drink alcohol and engage in other lawful activities outside of work hours.¹ While other state laws may have legalized recreational use of marijuana, those laws leave it up to the employer to implement corporate policies that prohibit both on-duty and off-duty use. On the other hand, the Illinois laws prevent employers from disciplining or terminating an employee for using “lawful products off the premises of the employer during non-working hours.” *Right to Privacy Act*, 820 ILCS 55/5(a).

Although the CRTA generally restricts Illinois employers from disciplining employees for off-site and off-duty use of marijuana, employers will still

be permitted to adopt and enforce “reasonable zero tolerance or drug free workplace policies” prohibiting the smoking, consumption, storage or use of cannabis “*in the workplace or while on call.*” CRTA, 410 ILCS 705/10-50(a) (emphasis added). Employers can also maintain their drug testing policies as long as they are “applied in a nondiscriminatory manner.” *Id.*

Drug Testing

When an employer has a good faith belief that an employee used or possessed cannabis in the workplace, an employer may subject the employee to drug testing in accordance with its policy. However, a positive test for marijuana will no longer be conclusive proof that the employee worked while under the influence. Rather, it will be considered one factor in the determination along with evidence of on the job impairment. This is due to the fact that the timing of drug use cannot be determined under current testing methods.

Symptoms of on the Job Use

The CRTA states that employers “may consider an employee to be impaired or under the influence of cannabis if the employer has a *good faith belief*

1 The new laws apply only to legalized marijuana and continue to allow Illinois employers to have a zero tolerance policy for off-duty use of all other non-legalized drugs.

that an employee manifests *specific, articulable symptoms* while working that decrease or lessen the employee's performance." 410 ILCS 705/10-50 (d) (emphasis added). The CRTA lists several symptoms of marijuana impairment including, among others: (a) impairment of speech or physical coordination; (b) odd demeanor; (c) negligence or carelessness in operating equipment or machinery; and (d) disregard for the employee's own safety or the safety of others. *Id.* The law does not specify how an Illinois employer may prove these symptoms nor does it define what it means for an employer to have a good faith belief of impairment.

Employee's Right to Contest

The CRTA requires employers to give employees a "reasonable opportunity to contest" the basis of the employer's "good faith belief" of their impairment. 410 ILCS 705/10-50(d). The CRTA currently lacks guidance as to what is a "reasonable opportunity to contest."

A POSSIBLE FEDERAL EXEMPTION?

The CRTA explicitly states that it does not impact an "employer's ability to comply with federal or state law or cause it to lose a federal or state contract or funding." 410 ILCS 705/10-50(g). Marijuana is still classified as an illegal Schedule I controlled substance at the federal level. Arguably, then, if an employer is a government contractor required to comply with the federal Drug Free Workplace Act, a recipient of federal funds, or is subject to certain federal law, such as the Department of Transportation or Federal Aviation Regulations, the employer may not be required to comply with the CRTA. It may, instead, be permitted to discipline its employees for off-duty and off-site use of marijuana in addition to on duty use and possession. Notably, hospitals and other healthcare providers that receive Medicare

reimbursements are not considered government contractors nor are they automatically subject to the Drug Free Workplace Act. Those entities would, therefore, likely be required to comply with the CRTA.

THE CANNABIS LAW IS SILENT ON SEVERAL KEY ISSUES

The CRTA currently leaves open several questions, such as whether the law applies to pre-employment drug testing. The CRTA discusses impairment in terms of "articulable symptoms while working" but it does not directly address whether an employer can rescind a job offer, or refuse to hire an applicant who has not yet started working, based on a positive drug test for marijuana.

Also, as explained above, the CRTA does not explain how an Illinois employer may prove the symptoms of impairment, what it means for an employer to have a good faith belief of impairment, or how to provide an employee who tests positive for marijuana with a reasonable opportunity to contest the employer's good faith belief.

BEST PRACTICES

In light of CRTA's significant impact on the ability of many Illinois employers to strictly enforce zero tolerance drug policies on and off duty, employers are encouraged to:

- Review and update their workplace drug policies, being mindful of the CRTA's general prohibition on disciplining employees for off-site and off-duty use of marijuana. The workplace policy should also be cautious as to how it addresses on the job drug testing.
- Consider whether pre-employment drug testing for marijuana remains appropriate.

- Carefully document symptoms of an employee's on the job impairment, including workplace misconduct or accidents, dates, times, witnesses and other observable behavior.
- Provide additional training to supervisors and managers so they are prepared to identify and document symptoms of impairment and respond appropriately, including providing the employee with the ability to challenge a good faith belief of impairment.
- Discuss with your insurance broker how this

law impacts your Employment Practices Liability coverage.

If you have questions about how to comply with the Illinois CRTA and Right to Privacy Act, or require assistance in modifying your drug free policies or training your workforce, please contact:

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We would like to acknowledge that this Alert was co-authored with the insurance brokers at Hub International.



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