



The Legalization of Recreational Marijuana in Illinois

Key Issues for Employers to Consider

Illinois has officially joined the ranks of 10 other states that have legalized recreational marijuana. On June 26, 2019, Governor J.B. Pritzker signed the Cannabis Regulation and Tax Act (“Cannabis Act”) into law, legalizing the sale, possession and use of marijuana for recreational use by adults over the age of 21. The Cannabis Act, the full text of which is available [here](#), will go into effect on January 1, 2020. In a little more than six months, Illinois residents will be allowed to possess up to 30 grams of raw cannabis from licensed dispensaries.

What does the legalization of recreational marijuana mean for employers and their workplace policies, particularly with respect to drug testing, disciplinary policies, and hiring and interviewing procedures? While we do not have clarity on some of these topics, we can provide guidance and highlight several issues for employers to consider.

Employers Cannot Discipline Employees for Off-Duty Use of Marijuana

Under the Illinois Right to Privacy in the Workplace Act (“Privacy Act”), employers cannot discipline or terminate employees for their consumption of

lawful products outside of the employer’s workplace and during non-work and non-call hours.

The Cannabis Act expanded the Privacy Act’s definition of “lawful products” to include all products that are lawful under state law, which now includes marijuana. As a result, employers may not discipline or discharge employees who choose to consume recreational marijuana while off duty. Under the Privacy Act, employees who are wrongfully disciplined or terminated for marijuana consumption may pursue and recover actual damages, attorneys’ fees, costs, and statutory penalties for violation of the statute.

Employers May Continue to Implement Drug-Free Workplace Policies

While employers are prohibited from disciplining or terminating employees who consume marijuana off-site and during non-work or non-call hours, they still have the right to maintain zero tolerance policies (especially those employers that are subject to Department of Transportation Regulations and that are parties to federal contracts) and ban the use of marijuana in the workplace. Employers may also discipline and

discharge employees who violate such workplace policies.

With that being said, employers should exercise caution in taking disciplinary action against employees who fail a drug test or who are suspected of working under the influence of marijuana. A positive test result, by itself, is likely insufficient to justify disciplinary action. Evidence of impairment on the job seems to be required. And, employers must have a “good faith belief” that an employee was impaired based on “specific, articulable symptoms” that negatively impacted that employee’s job performance.

The Cannabis Act includes several examples of symptoms of impairment, such as differences in speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, negligence, carelessness, and disregard for safety. Management level employees should be trained to recognize these symptoms and act appropriately. It is also imperative for employers to document these and other relevant symptoms, and obtain witness statements, where available, to support the defense of a potential action by the employee for violation of the Cannabis Act.

Employers also have the right to administer random drug tests if the testing is conducted in a nondiscriminatory manner. Employees with positive drug test results must be given a “reasonable opportunity” to contest the basis for the result. The term “reasonable opportunity” is not defined by the Cannabis Act and remains subject to interpretation.

Employers May Not Inquire About Expunged or Sealed Criminal Records Relating to Marijuana Possession

The Cannabis Act will expunge the criminal records of approximately 800,000 individuals who were arrested for or convicted of purchasing or possessing 30 grams or less of marijuana.

Under the Illinois Human Rights Act (“Human Rights Act”), employers are prohibited from inquiring into or discriminating against employees and job applicants based on expunged or sealed criminal records. It is unlikely that all cannabis related arrests and convictions will be expunged or sealed by the state of Illinois by January 1, 2020, when the Cannabis Act goes into effect. For that reason, employers should be cautious before rejecting an applicant or disciplining an employee based on a criminal background check revealing an arrest or conviction for a marijuana related offense.

Key Takeaways for Employers

While the Cannabis Act allows employers to implement and enforce drug-free workplace policies, employers should exercise caution when disciplining or terminating an employee, or making hiring decisions based on marijuana use. Because marijuana is now lawful in Illinois under the Privacy Act, employers cannot discipline or terminate an employee for off-site and off-duty use of marijuana. This makes it much more difficult for an employer to take action against an employee who tests positive for marijuana; because marijuana can stay in an employee’s system for days, it is nearly impossible to determine, absent outward symptoms of

impairment, whether an employee is under the influence at work.

Over the next several months before the Cannabis Act takes effect, employers are encouraged to review and revise their workplace drug policies and train management to appropriately handle marijuana related issues. In engaging in this process, employers may want to specifically consider the following:

- What effect, if any, the legalization of recreational marijuana will have on the employer's workplace. For some employers, such as federal contractors and those subject to Department of Transportation regulations, there might not be much change because marijuana remains illegal under federal law. Since those employers must abide by federal law, they will likely continue to enforce their zero-tolerance policies. For other employers, such as those not subject to federal contracts or regulations, drug policies may need to be revised and supplemented.
- Updating drug testing and zero tolerance policies, where appropriate, to reflect the employer's stance on marijuana use, possible ramifications for violating the policies, and the right of employees to contest positive test results.

- Reconsidering whether employees should be tested for marijuana without any evidence or symptoms of impairment. This could avoid a claim by an employee that disciplinary action was related to his or her lawful use of marijuana outside of the workplace, which would be in violation of the Privacy Act.
- Training supervisors on marijuana-related impairment symptoms, documentation of those symptoms, appropriately addressing marijuana-related issues with employees, and imposing disciplinary action (if any).
- Providing education to the workforce about the Cannabis Act to ensure compliance with the employer's policies and safety in the workplace.

If you have any questions about this Alert, or if you would like assistance in reviewing, updating, and implementing your workplace drug policies to comply with the Cannabis Act, please contact the authors listed below or the Aronberg Goldgehn attorney with whom you work.

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