Illinois Cannabis Law, Amended: What Employers Should Know

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In June 2019, the Illinois' Cannabis Regulation and Tax Act (HR1438) ("Cannabis Act") was signed into law, legalizing the use and possession of recreational cannabis for adults age 21 or older beginning January 1, 2020. In a previous Labor Days blog post, we discussed the likely impact of this law on employers in Illinois. In short, the Cannabis Act (1) permits employers to establish non-discriminatory, "reasonable zero tolerance or drug free workplace policies" that prohibit employees from using or being under the influence of cannabis at work, (2) allows employers to discipline employees for using or being under the influence of cannabis at work and for other violations of these "reasonable zero tolerance or drug free workplace policies," and (3) insulates employers against liability for taking the aforementioned actions, as long as there existed a good faith basis for the employer to believe that the disciplined employee was under the influence of cannabis. Cannabis Act at § 10-50.

Despite these provisions, the Cannabis Act, as originally enacted, left employers with several unanswered questions. One of the key questions was whether employers would face liability for adverse employment actions based solely on a positive marijuana test, including refusing to hire a job applicant who tests positive for marijuana use. The challenge with testing employees and prospective employees for marijuana use is that under Illinois's Right to Privacy in the Workplace Act, an employer may not discriminate against an individual who uses "lawful products off the premises of the employer during nonworking and non-call hours." 820 ILCS 55/5(a). Adding to the confusion is the fact that the Right to Privacy in the Workplace Act referred back to the Cannabis Act's provisions allowing employers to enforce reasonable drug-free workplace provisions.

On November 14, 2019, the Illinois legislature passed an amendment to the Cannabis Act that clarifies much of the lingering uncertainty. This amendment was signed into law by Governor Pritzker on December 4, 2019. The amendment specifies that the Cannabis Act does *not* open employers up to liability for "actions taken pursuant to an employer's reasonable workplace drug policy, including but not limited to subjecting an employee or applicant to reasonable drug and alcohol testing, reasonable and nondiscriminatory random drug testing, and discipline, termination of employment, or withdrawal of a job offer due to a failure of a drug test." SB1577 § 705-10(50)(e)(1).

This provision directly addresses whether employers can revoke employment offers from applicants who test positive for cannabis. Under the Illinois Right to Privacy in the Workplace Act, 820 ILCS 55/5, it is unlawful for an employer "to refuse to hire or to discharge any individual … because the individual uses lawful products off the premises of the employer during nonworking hours." 820 ILCS 55/5(a). The passing of the Cannabis Act made recreational cannabis use legal in Illinois, and the law itself says that "lawful products" means "products that are legal under state law." Cannabis Act at §

900-50. After an employee receives a job offer, any conduct he engages in prior to beginning his employment is technically "during nonworking hours," and therefore it appeared that an employer may not withdraw an offer because of the use of "lawful products" during that time.

The November 14, 2019 amendment clarifies that an employer *may* retract a job offer based on an applicant's cannabis use prior to beginning employment. SB1577 § 705-10(50)(e)(1). In other words, as amended, the Cannabis Act specifically allows employers who have offered an applicant a position conditioned on clean drug test to rescind that offer if the applicant subsequently tests positive for cannabis use.

In addition to this employer protection, employers remain able to discipline or terminate employees based on a "good faith belief" that the employee is under the influence of cannabis at work, which occurs when 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." Cannabis Act at § 10-50(d). This good faith belief may serve as a basis for subjecting an employee to a "reasonable" drug test, thereby insulating the employer from liability for taking action against an employee who fails or refuses to take a drug test. Cannabis Act at § 10-50(e).

There remains the possibility that an employee will challenge a disciplinary action by claiming that the employer lacked a good faith basis to believe that the employee was under the influence or that the employer's policies are not reasonable. Therefore, the amendment does not entirely limit employers' exposure to potential lawsuits, but it helps to clarify how employers may address potential workplace impairment due to marijuana use.

In short, the protections afforded employers under the Cannabis Act, as amended, are not absolute, but do provide a defense. Moreover, the recent amendments do not change the protections afforded employees under Illinois's Compassionate Use of Medical Cannabis Program Act. Employers in Illinois should consider both laws when drafting drug testing policies for their employees. Specifically, the Cannabis Act, as amended, permits policies (1) requiring employees to refrain from using or being under the influence of cannabis at work, (2) requiring employees to submit to a drug test if they exhibit behaviors consistent with being under the influence of marijuana, and (3) requiring applicants to test negative for marijuana prior to beginning their employment. As with any change in employment policies, it is important that a company clearly communicates how it addresses potential marijuana use, including drug testing, both for applicants and current employees and ensures that these policies are consistently enforced. In addition, employers should be aware that drug testing requirements under the U.S. Department of Transportation regulations and Illinois's Substance Abuse Prevention on Public Works Projects Act (820 ILCS 265) remains unaffected by the amended Cannabis Act.

It should be noted that there is also a practical hurdle to marijuana testing because the current testing methodologies cannot determine the specific time period when an individual last used marijuana. The THC molecule (a common term for delta-9-tetrahydrocannabinol), which is the active ingredient in marijuana that cause the user's "high," will appear in urine tests for up to 30 days after use. Moreover, tests cannot determine the degree of impairment. Therefore, a positive marijuana test does not indicate if the employee used or was under the influence of marijuana while on the employer's premises. Employers planning on using drug testing generally may want to consider excluding marijuana from the drug test panel administered and tracking the studies that are being performed on the efficacy of newly developed drug tests for marijuana use.

If you have questions about your policies regarding drug testing, please contact Kelley Drye's Labor

and Employment Team.