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Illinois Cannabis Act: New Changes for Employers Just Before Jan. 1 Effective Date

Human Resources & Employment

Cannabis & Regulated Industries

2020 is just weeks away, and Illinois' new law allowing adults 21 and older to possess and purchase cannabis from licensed stores has the potential to substantially change employers' current drug testing policies.

Since Governor J.B. Pritzker signed into law the Illinois Cannabis Act in June 2019, there has been much debate over the tension between a zero tolerance workplace and legalization, particularly with regard to testing applicants and randomly testing employees.

On Wednesday, Dec. 4, 2019, Governor Pritzker signed into law an amendment, clarifying the Cannabis Act and shedding some light on employer rights in the new year.

Q: What does the amendment say?

A: The amendment reduces employer liability by expressly stating that the Cannabis Act does not create a cause of action against employers who, *pursuant to their reasonable workplace drug policies*, test employees or applicants for drugs, either pre-employment or randomly. In response to positive results, such employers can withhold or withdraw an applicant's offer, as well as discipline or terminate an employee.

Q: If marijuana is legal, can an employer terminate an employee who does not seem impaired or under the influence in the workplace?

A: The answer appears to be yes, but it must be pursuant to an established and reasonable workplace drug policy. In a recent public engagement on the Cannabis Act, Rep. Kelly Cassidy (D-Chicago), one of its sponsors, confirmed that was the legislature's intent when drafting the law.

In the absence of a reasonable workplace drug policy, then the use of cannabis outside of work would be protected by the Illinois Right to Privacy Workplace Act, which was amended by the Cannabis Act to include cannabis as a "lawful product."

Q: Will employers need to amend their current drug use/testing policies?

A: Not necessarily. The amended Cannabis Act requires employers to retain a "reasonable workplace drug policy," so employers who wish to have one and do not should draft one prior to Jan. 1, 2020. Those with policies in place should review them and train supervisors and managers on the proper and reasonable way in which the policy is enforced.

Q: Are there any constraints on drug testing?

A: Yes. Just like the days prior to the Cannabis Act, employers must not engage in unreasonable or discriminatory practices when administering tests or reacting to their results. It bears repeating that employers must train supervisors and managers to maintain consistent practices. Whether an employer decides to treat marijuana like alcohol (i.e., leave it alone) or like cocaine, applicants and employees should undergo the same panel at application, post-accident or during a random test.

Q: Can an employer discipline employees suspected to be impaired by or under the influence of cannabis in the workplace?

A: Yes. Employers may continue to maintain reasonable zero-tolerance or drug-free workplace policies or employment policies concerning marijuana as they relate to being under the influence of or using cannabis (1) in the employer's workplace, (2) while performing the employee's job duties or (3) while on call.

Q: Are there any caveats to disciplining or terminating an individual who appears to be impaired by or under the influence of marijuana in the workplace?

A: Yes. Employers must have a "good faith belief" that an employee is impaired or under the influence of cannabis at work prior to disciplining or terminating him. An employer has such a good faith belief when an 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, including symptoms affecting the employee's speech, physical dexterity, agility, coordination or demeanor, or resulting in irrational or unusual behavior, or negligence or carelessness in operating equipment or machinery;
- disregards the safety of the employee or others, or is involved in any accident that results in serious damage to equipment or property;
- disrupts the production or manufacturing process; or,
- exercises carelessness that results in any injury to the employee or others.

In other words, an employer would likely have a good faith belief an employee is impaired if the employee acts "stoned," is involved in an accident or injury, or disrupts the production or work process.

Q: Are there any instances where an employer must accommodate an employee's off-duty use of cannabis?

A: Yes. Although the Cannabis Act does not specifically require that employers make accommodations for the use of marijuana, Illinois previously enacted the Compassionate Use of Medical Cannabis Pilot Program Act and the Opioid Alternative Pilot Program, both of which allow patients diagnosed with specified medical conditions (that have recently been expanded) to possess and use medical marijuana. In addition, recent rulings in federal and state courts outside Illinois have found that the use of medical marijuana may be a reasonable accommodation for an employee when the use is outside of working hours and does not adversely affect safety or job performance.