Employee Relations
LAW JOURNAL

Preparing for Legal Recreational Marijuana: The Illinois Example

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Illinois recently became the 11th state to legalize recreational marijuana. This article discusses the state's Cannabis Act, which also provides the most extensive workplace protections for employers of any marijuana legalization statute around the country.

Illinois Governor J.B. Pritzker recently signed into law the Cannabis Regulation and Tax Act (the Cannabis Act), making Illinois the 11th state to legalize recreational marijuana. Under the Cannabis Act, Illinois residents over 21 years of age may legally possess 30 grams of marijuana flower and five grams of marijuana concentrate for their personal use, starting January 1, 2020.

THE CANNABIS ACT

The Cannabis Act also provides the most extensive workplace protections for employers of any marijuana legalization statute around the country. Section 10-50 of Cannabis Act specifically identifies the following protections for employers:

- The Cannabis Act does not require employers to permit an employee to be under the influence of or use cannabis in the

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workplace or while performing the employee's job duties or while on call.

- The Cannabis Act does not limit or prevent an employer from disciplining or terminating an employee for violating an employer's employment policies or workplace drug policy.

- Employers can maintain reasonable zero tolerance or drug free workplace policies or employment policies concerning drug testing, smoking, consumption, storage or use of marijuana while in the workplace, while performing job duties off premises or while on call, if the policy is applied in a nondiscriminatory manner.

- The Cannabis Act defines when an employer may consider an employee to be impaired or under the influence and allows an employer to discipline an employee based on a good faith belief that an employee is under the influence or impaired. However, the employer must afford the employee a reasonable opportunity to contest the basis of the determination.

- The Cannabis Act does not create a legal cause of action against an employer who disciplines or terminates an employee based on the employer's good faith belief that an employee was impaired from the use of cannabis or under the influence of cannabis while at work, performing job duties, or while on call in violation of the employer's workplace drug policy. The Act identifies a number of symptoms an employer can consider to support its good faith belief of impairment. The Act appears to leave open the possibility that a terminated employee could maintain a cause of action for a bad faith termination of employment.

- The Act does not interfere with an employer's ability to comply with federal or State law or cause it to lose a federal or State contract or funding.

An 11th-hour amendment to the Cannabis Act, however, creates tension between these protections for employers and another Illinois law that protects Illinois employees' right to privacy. The Illinois Right to Privacy in the Workplace Act (Right to Privacy Act) prohibits employers from taking adverse employment action against an individual "because the individual uses lawful products off the premises of the employer during nonworking hours." The Cannabis Act amends the Right to Privacy Act definition of "lawful products" to mean "products that are legal under state law." The Cannabis Act further provides that "Nothing in this Act shall be construed to enhance or diminish protections afforded by any

other law.…" Thus, an employee who is fired after January 1, 2020, for testing positive for marijuana might argue that the Right to Privacy Act, as amended by the Cannabis Act, prohibited his employer from taking adverse action against him because he was not impaired at work and used marijuana, a legal product under state law, off the premises during non-working hours.

We think that a court should reject that argument and resolve the tension between the two acts in favor of employers. First, the unambiguous language of the Cannabis Act provides that "*Nothing* in this Act shall prohibit an employer from adopting reasonable zero tolerance or drug free workplace policies, or employment policies concerning drug testing.… "(emphasis added). Since "Nothing" in the Cannabis Act – including the amendment to the Right to Privacy Act defining lawful products to mean products that are legal under state law – can affect an employer's right to enforce its drug free workplace policy, an employer should be able lawfully to discipline an employee for violating that policy regardless of whether he used marijuana off premises during nonworking hours and is not impaired at work.

THE RIGHT TO PRIVACY ACT AMENDMENTS

Second, the Cannabis Act also amended the Right to Privacy Act by inserting the following emphasized language:

> Sec. 5. Discrimination for use of lawful products prohibited.
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> (a) Except as otherwise specifically provided by law, *including Section 10-50 of the Cannabis Regulation and Tax Act*, … it shall be unlawful for an employer to refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the individual uses lawful products off the premises of the employer during nonworking and non-call hours.

In other words, an employer can "discriminate" against an employee who uses marijuana off the premises during nonworking hours if that employee tests positive for marijuana in violation of the company's zero tolerance policy.

Third, a decision that the Right to Privacy Act trumps the express employer protections in Section 10-50 of the Cannabis Act would render those sections meaningless. A court will not do that.

Finally, the legislative history of the Cannabis Act supports this interpretation. During the May 31, 2019, House Floor Debate on the Cannabis Act, House Rep. David Welter specifically asked the bill's sponsor, House Rep. Kelly Cassidy: "for the purpose of legislative intent…are actions of

discipline or termination by an employer for failing a drug test, including a random drug test, protected under this law?" House Rep. Cassidy responded: "Yes." And, the day before, when the Right to Privacy Act was amended, the following legislative intent was entered into the record on the Senate floor:

> The Right to Privacy in the Workplace Act provides that an employer is restricted from applying its employment policies to "lawful products" away from the workplace. The changes being made to the Act are:
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> A. adding that cannabis is a lawful product;
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> B. adding two exceptions to the Act:
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> 1. on-call employees, which are defined
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> 2. Section 10-50 of the Cannabis Regulation & Tax Act
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> To clarify the purpose of the second exception…is this addition of the reference to Section 10-50 meant to allow employers who provide a zero tolerance or drug free workplace policy to implement and enforce their policy without fear of violating the Right to Privacy in the Workplace Act?"
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> Sen. Steans response: "Yes".

The tension between these two acts highlights the importance of Illinois employers having a written workplace drug policy in place as of the effective date of the Cannabis Act. Companies without a policy will find it more difficult to defend against a claim of violation of the Right to Privacy Act should the company want to take action against an employee suspected of drug use on the job.[1] In such instances, the company may be unable to rely on violation of company policy as a reason for disciplinary action, but instead may be limited to disciplining the employee for having a "good faith belief" that the employee was impaired or under the influence at work.

ACTION PLAN

With legalization of marijuana for recreational use in Illinois a few months away, Illinois employers should take steps now to prepare for the effective date of the Cannabis Act (January 1, 2020). Some actions to consider include:

1) Consider whether to address with your workforce the legalization of cannabis in Illinois at all and, if so, how; e.g., will your company make a preemptive statement that cannabis impairment and/or usage while on the job will not be tolerated? Will your company take a low-key approach to legalization and not raise it at all? Or is there a middle-ground approach that your company takes to legalization?

2) Evaluate whether the legalization of marijuana in Illinois and the amendments to the Right to Privacy Act will affect your workplace drug policies and employment policies currently in place, including whether to specify that on-the-job marijuana consumption or being impaired or under the influence of marijuana at work, or testing positive for marijuana in the system, are against company policy and could lead to disciplinary action, up to and including termination. If your company does not have workplace drug policies, consider adopting them.

3) Employers should be aware that they may need to engage in an interactive process about accommodating an employee's off-duty use of medical marijuana. Although the Cannabis Act has no stated requirement that employers make accommodations for the use of medical 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 to possess and use medical marijuana. Section 10-50 of the Cannabis Act specially states that nothing in the Act shall be construed to diminish protection afforded by the Compassionate Use of Medical Cannabis Pilot Program Act or the Opioid Alternative Pilot Program. In addition, recent rulings in federal and state courts outside of 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.

4) Employers should train supervisors on marijuana-related impairment signs and procedures to follow as a result. The Cannabis Act provides specific symptoms to look for when making a determination that an employee is "impaired" or "under the influence" of marijuana. The symptoms include the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, negligence or carelessness in operating equipment or machinery, disregard for the employee's own safety or the safety of others, involvement in any accident resulting in serious damage to equipment or property, disruption of a production or manufacturing process, and carelessness that results in any injury to

the employee or others. Supervisors should be trained on how to recognize, properly document and promptly report the signs of impairment due to suspected marijuana use. This training will be very helpful in establishing that an employer had a "good faith belief" that the employee was impaired on the job and therefore that discipline was warranted and lawful. This training should also include reminders that company policy must be applied in a nondiscriminatory manner.

5) The Cannabis Act further requires that employees be given a reasonable opportunity to contest the basis of a determination to discipline for being impaired or under the influence on the job. Thus, as evidence that a reasonable opportunity was provided, employers should establish a written procedure for employees to be able to contest a cannabis-based disciplinary determination.

6) Employment policies that cover employees in multiple states may require the inclusion of state-specific information relating to the Cannabis Act's impacts on Illinois-based employees. Similar information may be required to tailor specific language for employees in other states that have their own recreational and/or medical cannabis regulations. Employers should take steps to ensure that employees clearly understand the impact of their state-specific cannabis regulations.

NOTE

1. 820 ILCS 55/15 (2010) (Under the Right to Privacy Act, aggrieved employees can recover actual damages, attorneys' fees, costs, and fines).