Illinois Cannabis Regulation and Tax Act (Cannabis Act)

PL LABOR & EMPLOYMENT

Search the Resource ID numbers in blue on Westlaw for more.

An expert Q&A with James Oh and Kathleen Barrett of Epstein Becker Green on the impact of state laws permitting the recreational and medicinal use of marijuana on employers' workplace policies, hiring practices, and disciplinary procedures.

WHY IS ILLINOIS LEGALIZING ADULT USE OF CANNABIS?

The Illinois legislature's stated reasons for legalizing adult use of cannabis are to allow law enforcement to focus on violent and property crimes; to generate revenue for education and substance abuse prevention and treatment; to free public resources to invest in communities and other public purposes; and in the interest of individual freedom.

WHAT WORKPLACE PROTECTIONS ARE PROVIDED TO EMPLOYERS UNDER THE CANNABIS ACT?

The Cannabis Act "finds and declares that employee workplace safety shall not be diminished and employer workplace policies shall be interpreted broadly to protect employee safety." To this end, an entire section of the Cannabis Act, Section 10-50, identifies the following things that employers can and cannot do under the Act:

- An employer may still have "reasonable zero tolerance or drug free workplace policies, or employment policies concerning drug testing, smoking, consumption, storage, or use of cannabis in the workplace or while on call provided that the policy is applied in a nondiscriminatory manner."
- An employer is not required to allow an employee to be under the influence of cannabis in the workplace or while performing the job or while on call.
- An employer can still discipline or terminate an employee for violating the employer's employment or workplace drug policies.
- 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 the 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 specifically provides that it does not create or imply a legal cause of action against an employer that disciplines or terminates an employee based on the employer's good faith belief that an employee was impaired by 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.

WHEN DOES THE CANNABIS ACT GO INTO EFFECT?

The Cannabis Act goes into effect January 1, 2020.

CAN ILLINOIS EMPLOYERS CONTINUE TO SCREEN JOB APPLICANTS FOR MARIJUANA USE?

While many Illinois legal practitioners who have commented on the law believe that the Cannabis Act forbids employers from screening job applicants for marijuana use, we believe that is an incorrect interpretation. An eleventh-hour amendment to the Cannabis Act may have caused this confusion because that amendment could be read to create tension with 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, a job applicant who is not hired after January 1, 2020 for testing positive for marijuana might argue that the Right to Privacy Act, as amended by the Cannabis Act, prohibits their prospective employer from refusing to hire them because they 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 any tension between the two acts in favor of employers' continued ability to drug test, both pre- and post-employment. 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 to lawfully refuse to hire a job applicant for violating that policy regardless of whether they used marijuana off premises during nonworking hours.

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

> Sec. 5. Discrimination for use of lawful products prohibited.
>
> (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 should be allowed to "discriminate" against an applicant who uses marijuana off the premises during nonworking hours if that applicant tests positive for marijuana in violation of the company's zero tolerance or drug free workplace 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. Courts are precluded from interpreting statutes in this manner.

Fourth, if the Illinois legislature wanted to ban pre-employment drug testing or place limits on the ability of employers to drug test employees, it would have specifically so stated in the Cannabis Act. For example, New York City (Int. 1445-A, effective May 10, 2020) and Nevada (AB 132, effective January 1, 2020) recently passed laws banning pre-employment marijuana drug testing. No such ban is mentioned in the Illinois Cannabis Act.

Finally, the legislative history of the Cannabis Act supports this interpretation. When the Right to Privacy Act was amended, the following legislative intent was entered into the record on the Senate floor: "...is this addition of the reference to Section 10-50 [in the Right to Privacy and the Workplace Act] 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?" Sen. Steans response: "Yes."

HOW SHOULD AN EMPLOYER PROCEED IF THEY BELIEVE AN EMPLOYEE IS UNDER THE INFLUENCE OF MARIJUANA ON THE JOB?

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.

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.

WHAT ADDITIONAL RIGHTS DOES THE CANNABIS ACT CREATE FOR EMPLOYEES?

With the effective date of the Cannabis Act, all Illinois adult residents who are Illinois employees will have the right to possess, consume, use, purchase, obtain, or transport for personal use 30 grams of cannabis flower, up to 500 milligrams of THC contained in cannabis-infused products, or five grams of cannabis concentrate. Adult Illinois residents who are also registered qualifying patients under the Illinois Compassionate Use of Medical Cannabis Pilot Program Act may also cultivate up to five cannabis plants.

While the Cannabis Act legalizes possession by adults for personal use in Illinois, how protected an employee's job is under the Cannabis Act depends on the type of employer. Leaving aside state government employees, employees who work for federal government contractors or employees who work for companies or organizations that receive federal grants are required to comply with the federal Drug Free Workplace Act. Thus, a drug free workplace policy that is intended to comply with the Drug Free Workplace Act should, as a matter of law, be considered a "reasonable zero tolerance or drug free workplace policy" under the Illinois Cannabis Act. Those employers should be able to continue to maintain a drug free workplace through drug testing after the effective date of the Cannabis Act and to continue to discharge employees for testing positive without demonstrating a good faith belief that the employee was impaired on the job. In sum, Illinois employees of federal government contractors or grant recipients will have the least amount of "protection" under the Illinois Cannabis Act.

Another category of employees who should have minimal protection under Illinois law for personal cannabis use are those in safety-sensitive positions regardless of whether their employer is a government contractor. The Cannabis Act specifically provides that "employer workplace policies shall be interpreted broadly to protect employee safety." Thus, for example, truck drivers or employees who handle hazardous materials are likely already subject to a drug-testing regimen at their current employers, employers that should be able to continue the same drug-testing regimen after the effective date of the Act.

Beyond these two categories of employees, whether an employee will be able to successfully challenge disciplinary action based either on a positive drug test or alleged impairment on the job may very well depend on whether their employer has a written policy regarding drugs in the workplace that includes a provision that allows the employee "a reasonable opportunity to contest the basis of the determination."

For more information on state marijuana laws, see Practice Note, State Medical and Recreational Marijuana Laws Chart: Overview (7-523-7150).

08-19