Alert
August 16, 2019

COZEN O'CONNOR

Illinois Cannabis Regulation and Tax Act – What You Need to Know

Anna Wermuth

Vice Chair, Labor & Employment Department

awermuth@cozen.com
Phone: (312) 474-7876
Fax: (312) 878-2023

Related Practice Areas

- Labor & Employment

Industry Sectors

- Cannabis

On June 25, 2019, Illinois Governor J. B. Pritzker signed into law the Illinois Cannabis Regulation and Tax Act (aka the Cannabis Act), which is set to go into effect on January 1, 2020, joining 10 states (Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington), and the District of Columbia in legalizing recreational use of marijuana. This new law makes it legal to purchase and consume cannabis in the state of Illinois and includes protections for employees who choose to use cannabis while away from the job. In light of these protections, Illinois employers should take affirmative steps to ensure compliance and to avoid missteps.

What is changing?

When the law goes into effect on January 1, 2020, it will be legal for individuals age 21 and over to purchase, possess, and consume cannabis within the state of Illinois, without the threat of arrest or criminal prosecution and without the need to obtain a prescription. Pertinent to employers, the law amends the state's Right to Privacy in the Workplace Act (which makes it illegal for employers to discriminate against employees for use of "lawful products") to include any product that is "legal under state law" — including cannabis pursuant to the Cannabis Act. On its face, the law makes it illegal for employers to refuse to hire or discharge any individual, or otherwise disadvantage an individual, with respect to compensation, terms, conditions or privileges of employment simply because that person used cannabis outside of work. Pursuant to the Right to Privacy in the Workplace Act, violations would permit an employee to recover actual damages, as well as penalties, costs, and attorney's fees for willful and knowing violations.

What can/should employers do?

The law allows employers to discipline and/or terminate an employee on the basis of the employee's **impairment** in the workplace — i.e. employers can still take action against employees whom they believe to be impaired or under the influence of cannabis in the workplace. According to the law, the employer must have a "good faith" belief that 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, including symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, or negligence or carelessness in operating equipment or machinery; disregard for the safety of the employee or others, or involvement in any accident that results in serious damage to equipment or property; disruption of a production or manufacturing process; or carelessness that results in any injury to the employee or others.

Note that this list refers to "specific, articulable symptoms," meaning the employer's good faith belief must be based on physical observation of the employee rather than test results alone. The implications of this are twofold — (1) Employers cannot merely rely on a positive drug test result in order to establish a good faith belief that the employee is impaired or under the influence of cannabis (although a positive test result would surely be useful to reinforce the belief); and (2) that being the case, employers need to be able to identify, document, and articulate outward signs of impairment from cannabis use. Training supervisors and employees on how to spot signs of cannabis impairment and establishing policies for reporting and documenting these observations would best position employers to lawfully take action for impairment. Importantly, however, if adverse action is taken against an employee, under the new law the employee must be provided a reasonable opportunity to contest the basis of the determination.

Employers can still maintain a “reasonable” drug testing and zero tolerance drug policy, but with this new law, in most cases such policies should be revised to prohibit impairment or use/possession of cannabis **while on the job** rather than a blanket, zero tolerance prohibition against cannabis use. Similar to Illinois’ medical marijuana law (the Compassionate Use of Medical Cannabis Pilot Program Act), the Cannabis Act explicitly provides that it does not impact an “employer’s ability to comply with federal or State law or cause it to lose a federal or State contract or funding.” This somewhat circular language regarding federal law is vexing without further guidance, since marijuana is still classified as an illegal Schedule I controlled substance at the federal level. In the absence of guidance, this language could be read to allow employers that are government contractors or federal grant recipients to maintain stricter testing procedures and policies, however, a number of state courts have held that state anti-discrimination laws may still require employers to consider making reasonable accommodations for medical marijuana users. Given these drastic changes, employers are encouraged to take a close look at their internal policies and procedures and revise to:

- Make clear that zero-tolerance drug policies prohibit possession of marijuana **at the worksite** and impairment **while on the job**.
- Provide supervisors and employees with training and tools to enable them to spot a cannabis-impaired employee.
- Explain to employees and managers the employee’s rights when it comes to challenging the employer’s good faith belief of impairment, and the procedures outlining that process.

A major question left open by the new law’s plain language is the continued efficacy of pre-employment drug testing. Since the law discusses impairment in terms of “articulable symptoms **while working**,” it is unclear whether a **pre-employment** positive drug test alone could serve as a basis to refuse to hire or withdraw an offer of employment. Thus, in light of this ambiguity and the potential risk of liability, employers should reconsider whether pre-employment drug testing remains suitable for their business.

This is a developing area of law both in Illinois and elsewhere around the country, and it is unclear how the Cannabis Act will be applied in practice. As employers await clarification from Illinois courts, we will continue to watch legal developments in recreational cannabis states, including Illinois, that have addressed anti-discrimination provisions for general guidance, and report back here.