On May 29, 2019, the Illinois Senate passed Illinois House Bill (HB) 1438, which will legalize recreational marijuana in the state. This bill, known as the “Cannabis Regulation and Tax Act,” is expected to be signed into law by Illinois governor J. B. Pritzker, since he campaigned for office on a promise to legalize recreational marijuana. Beginning January 1, 2020, individuals age 21 years and older will be able to legally possess and consume cannabis, cannabis concentrate, and tetrahydrocannabinol (THC) contained in cannabis-infused products. With a predicted $500 million in annual tax revenue for Illinois, recreational marijuana use is expected to be extremely popular. Illinois employers are likely to be impacted by the Act and most likely will not want to wait for the governor’s stroke of the pen to consider the important effects of this legislation.

**Illinois Workplace Implications**

The Act provides employers with strong workplace protections, more than any other state that has legalized marijuana use. First, the Act explicitly permits employers to adopt “reasonable” zero tolerance or drug-free workplace policies, or employment policies concerning drug testing, smoking, consumption, storage, or use of cannabis in the workplace,” so long as the policy is applied in a nondiscriminatory manner. Second, the Act amends the Illinois Right to Privacy in the Workplace Act and prohibits employers from taking disciplinary action against employees for lawfully using cannabis outside of work.

**Allowable Employment Practices Under the New Cannabis Law**

Employers can forbid employees from using cannabis at work (including in parking areas and company-controlled vehicles) or being under the influence of cannabis while performing job duties or while on call. An employee is “on call” when given at least 24 hours’ notice to be on standby or otherwise responsible for performing tasks related to his or her employment.

The Act allows employers to discipline an employee or terminate an employee’s employment for violating an employer’s workplace drug policy. However, the employer may take action against an employee who appears to be under the influence of cannabis only if the employer possesses a “good faith belief that the employee manifests specific, articulable symptoms while working that decrease or lessen the employee’s performance.”

The Act even designates specific symptoms of lessened performance an employer may look for, such as signs related to the employee’s speech, physical dexterity, coordination, demeanor, irrational or unusual behavior, disregard for his or her own safety or the safety of other employees, or involvement in a workplace accident causing injury or serious damage to machinery or property. Note that if an employer disciplines or discharges an employee because the employee is under the influence of cannabis, the employer must give the employee a reasonable opportunity to contest the basis of the determination.
The “good faith” basis requirement naturally causes employers to question (1) whether the Act allows employers to administer drug tests, and (2) whether the results of a drug test can be used as support for the employer’s good faith determination that the employee’s work performance was impaired by marijuana.

First, the Act insulates employers from liability for “subjecting an employee or applicant to reasonable drug and alcohol testing under the employer’s workplace drug policy,” where the employer possesses a good faith belief that an employee used or possessed cannabis in the workplace while performing job duties, or while on call in violation of the employer’s employment policies. Notably, during its debate over this Act, the legislature explicitly indicated that the intent of the bill is to protect employers from litigation for disciplining or discharging an employee for failing or refusing a drug test, including a random test. Additionally, the Act does not diminish or interfere with any federal, state, or local restrictions on employment or impact an employer’s ability to comply with federal or state law or cause it to lose a federal or state contract or funding.

Second, employers should not automatically use drug test results as conclusive proof that the employee worked while under the influence of marijuana. While the drug test results will show whether the employee had recently used marijuana, the results obviously cannot conclusively establish that the employee was under the influence during work hours or while on call. The employer’s good faith basis will be more persuasive if the employer can combine the results of the drug test with proof that the employee demonstrated those symptoms explicitly delineated by the Act as evidence of marijuana use.

Practically speaking, the “good faith” standard may be difficult for employers to prove as many users of marijuana will not demonstrate the extreme symptoms identified in the Act, such as obvious physical and emotional changes or “disregard for the safety of the employee or others.” Employers may want to restrict determinations that an employee is under the influence to situations in which the employee’s symptoms are so obvious that there is no doubt that the employee is impaired. For example, an employer may want to pursue disciplinary action only if there are obvious manifestations of the symptoms proscribed in the Act. Employers can train managers and supervisors to document symptoms that demonstrate marijuana use if an employer suspects an employee’s declining job performance is a result of cannabis use in violation of a workplace policy. Similarly, employers may want to adopt procedures where managers and supervisors must review and document any possible symptoms of drug use following a workplace accident.

In short, the law allows employers to discipline or even discharge an employee if the employer possesses a “good faith” belief that the employee has violated a workplace drug policy. Although “good faith” belief is not defined in the law, employers may want to be on the lookout for further interpretive regulations from state agencies, such as the Illinois Department of Labor. In the meantime, employers may want to possess strong factual support before taking any disciplinary action because the employer will be required to provide evidence to support its “good faith” determination if the employee challenges the action.

Amendments to the Illinois Right to Privacy in the Workplace Act

Another area where the Act impacts employers is where it amends the Illinois Right to Privacy in the Workplace Act. The privacy act prohibits employers from disciplining or discharging an employee for using a lawful product off of the employer’s premises during non-work hours. The new cannabis legislation amends the privacy act by extending protections for the use of lawful products off the premises to both nonwork and “non-call” hours. Further, the privacy act is amended to specifically state that “lawful products” means products that are legal under state law (i.e., the Cannabis Regulation and Tax Act). Employers can take no employment action against an employee or applicant who lawfully uses cannabis during nonworking and “non-call” hours.

The Right to Privacy in the Workplace Act allows aggrieved employees to recover actual damages, attorneys’ fees, costs, and statutory penalties. Therefore, violating the employee protections in the privacy act could prove costly for employers. This exposure highlights the importance for an employer of possessing strong support for its good faith basis for thinking an employee is under the influence of cannabis when taking a disciplinary action against an employee for working under the influence of marijuana.

What Can Employers Do Now?

If the governor signs the act, as expected, the Cannabis Regulation and Tax Act will be effective on January 1, 2020. Therefore, employers likely have less than six months to ensure compliance with its requirements and prepare for an environment with legalized recreational marijuana use outside of work. In preparation for January 1, 2020, employers may want to revisit all workplace drug policies and ensure they do not run afoul of the employee protections delineated in the act. Fortunately for employers, the act provides a roadmap for what to consider when revisiting or drafting workplace drug policies during the era of legalized recreational cannabis use:

1. Employers may ban the use of marijuana at the workplace.
2. Employers may ban the use of marijuana while on-call, so long as the employee is scheduled with at least 24 hours’ notice to be on “stand by.”

3. Employers may forbid employees from arriving to work under the influence of marijuana or using marijuana while performing job duties or while on-call.

4. Employers may discipline or discharge employees if the employer possesses a “good faith” basis that the employee is under the influence of marijuana while at work, on-call, or performing job duties. Employers may want to review and update accident investigation policies to ensure investigations will include an assessment of symptoms that may demonstrate drug use.

5. Employers may administer drug tests to employees, however, the employer must, on a “good faith” basis, believe that the employee used or was under the influence of cannabis while at working, performing job duties, or on-call.

6. Employers must allow employees to contest the basis for the employer’s determination that the employee was under the influence or “impaired” by marijuana.

Bottom Line

The act will prohibit an employer from taking disciplinary action or discharging an employee due to the employee’s recreational marijuana use outside of work. Also, an employer may discipline or discharge an employee for being under the influence of marijuana while at work. In these ways, employers’ treatment of employees’ marijuana use will mirror their treatment of employees’ alcohol use. However, the outward manifestations of cannabis impairment are probably more difficult to recognize than those of alcohol impairment. If the employer takes disciplinary action due to an employee’s alleged impairment, the employer will want to be capable of demonstrating a good-faith basis for its belief that the employee is impaired. If the employer lacks the requisite good faith basis, the employer may be exposed to liability for actual damages, attorneys’ fees, costs, and statutory penalties.


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