

Illinois Legalizes Recreational Marijuana: Impact on Employers

Wednesday, June 26, 2019

Illinois will soon become the eleventh state to legalize the recreational use of marijuana. On June 25, 2019, Governor Pritzker signed into effect [House Bill 1438](#)—the Cannabis Regulation and Tax Act (“CRTA”). The CRTA, which is set to take effect on January 1, 2020, leaves some open questions for employers, but there are a few important features with which Illinois employers should quickly become familiar.

Prohibitions on Disciplining or Discharging Employees for Off-Duty Consumption

The CRTA differs from many state laws legalizing recreational marijuana in that it explicitly protects an employee’s right to consume marijuana during off-duty hours. (§ 900-50.) By contrast, in some states that have legalized recreational consumption, employers remain free to adopt and enforce policies prohibiting employees from using marijuana both on *and* off-the-job.

The CRTA will amend [Illinois’s Right to Privacy in the Workplace Act](#), which prevents employers from disciplining or discharging employees for using “lawful products off the premises of the employer during nonworking hours.” (820 ILCS § 55/5.) The CRTA will define the previously undefined phrase “lawful products” to mean “products that are legal under *state law*.” (§ 900-50) (emphasis added). This is a noteworthy change because marijuana is still illegal at the federal level.

By defining “lawful products” to mean those products that are legal at a *state* level, the CRTA appears to prevent employers from disciplining or discharging employees for recreationally consuming marijuana during off-duty hours. Notably however, federally regulated employers, such as those subject to federal DOT regulation, are carved out from this exemption. (§ 10-50(g).)

Employers May Continue Drug Testing and Prohibit Working Under the Influence

Under the CRTA, employers retain the ability to adopt and enforce “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.” (§ 10-50(a).)

The only explicit restrictions on these policies are that employees will not be considered to be “on-call” unless they have had at least 24-hours’ notice (§ 900-50(a)), and drug policies must be “applied in a nondiscriminatory manner.” (§ 10-50(a).)

Is a Positive Drug Test Alone a Sufficient Basis for Discipline?

The CRTA states that employers “may consider an employee to be impaired or under the influence of cannabis *if* the employer has a *good faith belief* that an employee manifests *specific, articulable symptoms* while working that decrease or lessen the employee’s performance.” (§ 10-50(d)) (emphasis added.) The CRTA lists symptoms of marijuana impairment, some of which include: impairment of speech or physical coordination; mental effects such as unusual behavior, odd demeanor, or negligence or carelessness in operating equipment or machinery; and disregard for their own safety or the safety of others. (§ 10-50(d).) The statute does not clearly indicate that employers may only take disciplinary action against employees if they exhibit these particular



Article By [Edward C. Young](#)
[Steven J. Pearlman](#)
[Carolyn M. Olie](#)
[Holly Ren Morris](#)
Proskauer Rose LLP
[Law and the Workplace](#)
[Labor & Employment](#)
[Biotech, Food, Drug](#)
[Election Law / Legislative News](#)
[Illinois](#)

symptoms or what, if any, proof of such symptoms may be required.

Employees Must Have a “Reasonable Opportunity” to Contest the Employer’s Determination that They are Impaired

The CRTA requires employers to give employees a “reasonable opportunity to contest” the basis of the employer’s “good faith belief” of their impairment due to marijuana. (§ 10-50(d).) However, the CRTA lacks guidance as to what would constitute a “reasonable opportunity.”

Implications

In view of the CRTA’s significant changes and ambiguities, Illinois employers would be well served by:

- Reviewing and updating workplace drug use and testing policies;
- Implementing steps to ensure policies are consistently enforced;
- Refraining from disciplining or discharging employees until the employee has exhibited signs of actual impairment and has been given an opportunity to explain the behavior; and
- Documenting symptoms of on-the-job impairment, including workplace misconduct or safety incidents.

© 2019 Proskauer Rose LLP.

Source URL: <https://www.natlawreview.com/article/illinois-legalizes-recreational-marijuana-impact-employers>