

Illinois Legalizes Recreational Marijuana

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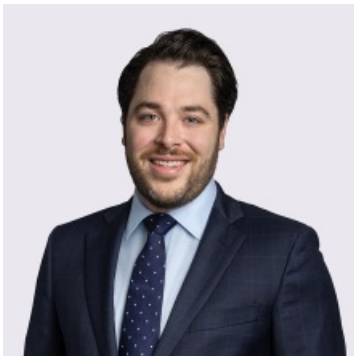
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The Illinois General Assembly passed the Cannabis Regulation and Tax Act (“the Act”) (HB 1438) on May 31, 2019. Governor J.B. Pritzker has stated he will sign the bill. The Act legalizes marijuana for recreational purposes. The Act, which takes effect on January 1, 2020, will allow anyone over the age of 21 to possess, use, or buy marijuana, which will be considered a “lawful product.” For employers, the end of Illinois’ prohibition on recreational use invites a host of practical problems moving forward.

Background

Since 2014, marijuana has been legal in Illinois for medical purposes. With the Act’s recent passage, Illinois became the first state in the nation to legalize legislatively both possession and commercial sales of marijuana for recreational purposes. The Act, aimed at refocusing law enforcement’s attention on violent and property crimes, as well as generating revenue for the state, places cannabis in a category similar to alcohol, subject to a few exceptions.

Notwithstanding this legalization in Illinois, marijuana remains illegal under federal law. Under the Controlled Substances Act, marijuana is still classified as a Schedule I drug, which means that—per federal law—it has a high potential for abuse, it lacks any currently accepted medical use, and it lacks accepted safety for use under medical supervision. However, the federal government has allowed many states to pass and implement both medical marijuana and recreational marijuana laws without opposition.

General Provisions That Are Beneficial For Employers

At first glance, the Act contains a number of provisions that are helpful to employers who wish to maintain drug-free workplaces. Specifically, the 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, smoking, consumption, storage, or use of cannabis in the workplace or while on call provided that the policy is applied in a nondiscriminatory manner. (“On-call” is defined to mean when the employee is scheduled with at least 24 hours’ notice by the employer to be on standby or otherwise responsible for performing work).
- Nothing in this Act shall require an employer to permit an employee to be under the influence of or use cannabis in the employer’s workplace or while performing the employee’s job duties or while on call.
- Nothing in this Act shall limit or prevent an employer from disciplining an employee or terminating employment of an employee for violating an employer’s employment policies or workplace drug policy.

Addressing Impairment At Work

The Act permits employers to discipline employees who appear to be impaired by marijuana at work, as long as the employer complies with this provision:

- An employer 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 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 other, 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. If an employer elects to discipline any employee on the basis that the employee is under the influence or impaired by cannabis, the employer must afford the employee a reasonable opportunity to contest the basis of the determination.

The Act does not define "reasonable opportunity" so it is unclear exactly what employers must offer to employees when there is reasonable suspicion of impairment at work.

No Cause of Action Against Employers

The Act also states that it shall not be construed to create or imply a cause of action for any person against an employer for:

- Actions, including but not limited to subjecting an employee or applicant to reasonable drug and alcohol testing under the employer's workplace drug policy, including an employee's refusal to be tested or to cooperate in testing procedures or disciplining or termination of employment, based on the employer's good faith belief that an employee used or possessed cannabis in the employer's workplace or while performing the employee's job duties or while on call in violation of the employer's employment policies;
- Actions, including discipline or termination of employment, based on the employer's good faith belief that an employee was impaired as a result of the use of cannabis, or under the influence of cannabis, while at the employer's workplace or while performing the employee's job duties or while on call in violation of the employer's workplace drug policy; or
- Injury, loss or liability to a third party if the employer neither knew or had reason to know that the employee was impaired.

Exceptions

The Act does not apply to employers who are regulated by the U.S. Department of Transportation's drug and alcohol testing regulations, and does not impact an employer's ability to comply with federal or state laws or cause it to lose a federal or state contract or funding. The Act also does not enhance or diminish protections afforded by the Illinois Medical Marijuana Law or the Opioid Alternative Pilot Program.

Clarification That Marijuana Is Considered A "Lawful Product" Under State Law and Prohibition on Discrimination for Off-Duty, Off-Premises Use

While the above-mentioned provisions of the Act appear beneficial for employers, another part of the Act requires employers who conduct drug testing to take notice. The Act amends the Illinois Right to Privacy in the Workplace Act by defining "lawful products" to mean products that are legal under state law. This means that under the Right to Privacy

Act, Illinois employers are prohibited from discriminating against applicants and employees who use “lawful products [i.e., marijuana] off the premises of the employer during nonworking and non-call hours.” (There is a limited exception for certain non-profit organizations). This language has a very significant impact on employers who conduct drug testing.

Impact on Employers’ Drug Testing Programs

The prohibition on discrimination for using “lawful products,” combined with the other provisions referred to above, makes it appear that drug testing for marijuana will no longer be permissible in Illinois unless the employer can demonstrate that the employee was impaired at work or during work time. This means that employers will be limited to “reasonable suspicion” drug testing for marijuana, in accordance with the requirements now set forth in the Act.

Most drug tests are not able to pinpoint exactly when or where an individual used marijuana. For example, a urine drug test generally will detect marijuana used in the last several days, sometimes longer if the individual is a chronic user. Hair tests will detect marijuana use for up to 90 days. Because drug tests generally cannot detect current marijuana impairment, employers will be prohibited by the Illinois Right to Privacy Act from taking adverse actions for positive marijuana drug test results in most situations except for reasonable suspicion. For a pre-employment drug test, the marijuana use always will be off-duty and off-premises, and therefore employers are prohibited from taking adverse actions against applicants who use marijuana. Similarly, for post-accident testing (where there is no individualized suspicion of drug use) and random testing (which never involves individualized suspicion), employers likely cannot take adverse actions against employees who test positive for marijuana if the employer cannot demonstrate impairment at work.

Illinois employers should review their drug-testing policies and practices and consult with counsel to ensure compliance with federal and state laws. Jackson Lewis attorneys are available to assist and to answer any questions about the Act or compliance with current industry requirements.

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