

Illinois Legislature Clarifies Cannabis Act to Protect Employers Engaged in Workplace Marijuana Testing

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Marijuana will become legal recreationally in the State of Illinois on January 1, 2020. The Cannabis Regulation and Tax Act, enacted last June, [raised questions](#) on the scope of marijuana drug testing that may be conducted by employers. On December 4, 2019, Governor J.B. Pritzker signed amendments to clarify workplace drug testing and other issues, including protections for an employer's drug testing policy.

Cannabis Regulation and Tax Act

The Act allows Illinois residents at least 21 years old to possess up to 30 grams of marijuana flower and five grams of marijuana concentrate for personal use.

Clarification

Whether the Act allows an employer to maintain a zero-tolerance drug-free workplace policy had been under debate, especially in light of Illinois' Right to Privacy in the Workplace Act, which prohibits an employer from disciplining an employee for his or her use of "lawful products" off-the-clock.

As amended by Senate Bill 1557 ([Public Act 101-593](#)), the Act does not create or imply a cause of action against an employer for:

Actions taken pursuant to an employer's reasonable workplace drug policy, including but not limited to subjecting an employee or applicant to reasonable drug and alcohol testing, reasonable and nondiscriminatory random drug testing, and discipline, termination of employment, or withdrawal of a job offer due to a failure of a drug test.

410 ILCS 705/10-50(e)(1).

The new law makes clear that employers may continue conducting reasonable and nondiscriminatory pre- and post-hiring and random drug tests for marijuana. However, the new provision does not define "reasonable" or provide any further clarification on the interplay between the Act and the Right to Privacy in the Workplace Act. Still, the Act appears to control as to the protections provided in the Right to Privacy in the Workplace Act, because of the caveat that:

Except as otherwise specifically provided by law, including Section 10-50 of the Cannabis Regulation and Tax Act, and except as provided in subsections (b) and (c) of this Section, 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.



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820 ILCS 55/5(a).

Employers should review their drug testing policies and consider whether to conduct pre-employment, reasonable suspicion, post-accident, or random drug tests for marijuana after it becomes legal recreationally in Illinois on January 1.

Shifting cultural acceptance of marijuana in general, and of marijuana as a “lawful product” in Illinois, should have employers considering whether subjecting applicants to marijuana drug tests will result in fewer capable and talented job applicants if competitors do not conduct pre-employment marijuana testing. Random and reasonable suspicion marijuana testing also may pose problems because a positive test result does not necessarily prove impairment at work or active marijuana usage, as marijuana can stay in the body much longer than other drugs.

Other Provisions

Other provisions in the Act that are unaffected by the recent amendments contain additional protections and requirements for employers. For example, the Act does not interfere with an employer’s ability to receive government contracts or grants and workers in positions regulated by the Department of Transportation (DOT) are still subject to the DOT’s requirements.

All employers may prohibit impairment during work, as well as the possession and use of marijuana on their premises. However, an employer that elects to discipline an employee based on a good-faith belief the employee is under the influence of marijuana at work “must afford the employee a reasonable opportunity to contest the basis of the determination.”

Issues to Consider

Although “reasonable workplace drug policy” and “reasonable opportunity” are not defined in the Act, employers should consider certain issues in drafting or revising their drug-testing and drug-free workplace policies. These include:

- Having a standalone drug testing policy that addresses the types of tests to be conducted, the discipline to be imposed for policy violations, and so on.
- Reviewing the nature of the job duties involved to determine whether to subject a job applicant or employee to a drug test for marijuana. For individuals in safety-sensitive positions, including where public safety is at issue, random drug tests are more likely to be considered “reasonable” than for individuals working in a typical office environment.
- Treating carefully with reasonable suspicion drug tests. Before subjecting an employee to a test for marijuana, establish a good-faith belief of impairment based on the employee’s “manifestation of 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.” To this end, train supervisors to make reasonable suspicion determinations

properly. All reasonable suspicion determinations should be documented.

- If intending to discipline any employee on the basis that the employee is under the influence or impaired by marijuana, give the employee a reasonable opportunity to contest the basis of the determination. Employers should consider providing employees seven days to respond to a positive marijuana drug test result because of an allegation of on-the-job impairment, or involvement in an accident, before taking disciplinary action.
- When dealing with employees who are prescribed medical marijuana, additional considerations may be at issue. (See our article, [Illinois' Compassionate Use of Medical Cannabis Program Act](#).)

Next

Given the complexity of the issues raised by the law, Illinois employers should review their drug-testing policies and practices to ensure they are compliant, provide supervisors with training on how to recognize impairment at work, and consult with counsel to determine the risks in testing for marijuana based on the employee's job duties.

Jackson Lewis attorneys are available to answer any questions about the Act and to assist in crafting a drug-free workplace policy that best fits your business.

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