

NEW ILLINOIS LEGISLATION LEGALIZING RECREATIONAL MARIJUANA USE AND WHAT THIS MEANS FOR EMPLOYERS

On June 25, 2019, Illinois Governor J.B. Pritzker signed the Cannabis Regulation and Tax Act (the "Act") to make Illinois the eleventh state to allow recreational marijuana use. Effective January 1, 2020, adults age 21 and older may purchase and possess up to 1 ounce (30 grams) of marijuana at a time from a licensed dispensary. Non-Illinois residents may possess half the amount (0.5 ounces or 15 grams). The new law will not only bring a new wave of expungements, licensure regulations and system of taxes but also new questions from Illinois employers.

WHAT DOES THE NEW LAW MEAN FOR ILLINOIS EMPLOYERS?

The Act is not a license for employees to engage in marijuana use at the workplace or arrive to the workplace under the influence. Nothing in the Act prohibits employers from adopting a reasonable zero tolerance or drug-free workplace policy. Additionally, the Act does not prohibit employment policies that concern drug testing, smoking, consumption, storage or use of marijuana in the workplace or while on call, provided the policy is applied in a non-discriminatory manner.

However, an important part of the Illinois law also amends the Illinois Right to Privacy in the Workplace Act. In doing so, the new law prohibits an employer from taking disciplinary action against an employee or applicant who uses cannabis lawfully outside of work and while not on-call. This does not preclude an employer from disciplining an employee who tests positive at work for cannabis where the employee used it on duty or where the employer can establish that there were "articulable symptoms" indicating that the employee was impaired while working so long as the employee is given a reasonable opportunity to contest the basis for determination. However, other aspects of the law require careful scrutiny by employers, as discussed below.

PRACTICAL TAKEAWAYS

Despite the legalization of marijuana in Illinois generally, the new legislation provides employers protection to implement and enforce drug-free workplace policies, such as prohibiting use or intoxication in the workplace, or providing for termination of an employee due to impairment. With regard to the hiring process and existing employees, the Act shields employers from liability for subjecting them to "reasonable drug and alcohol testing under the employer's workplace drug policy..." However, Illinois employers must note that, under the Right to Privacy in the Workplace Act, it is unlawful for an employer to refuse to hire an applicant or discharge an employee because the applicant or employee used lawful products off the employer's premises during non-working hours. Because of the individual privacy protections afforded by that law, and now the legalization of marijuana, employers should consider re-evaluating their drug screening policies and consult with counsel prior to terminating or denying employment to someone who tested positive but who only used marijuana off the employer's premises and while off duty and not on-call.

Health care employers should be especially cautious about their drug testing results, particularly where the employees perform clinical duties or even indirect patient care. Those employees who test positive could bring risks to the employer on more than one front.

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