LEGALIZATION OF CANNABIS IN ILLINOIS: WHAT EMPLOYERS NEED TO KNOW

BY WIEDNER & MCAULIFFE, LTD.
JUSTIN SCHOOLEY AND DARCY PROCTOR
On June 25, 2019, Governor Pritzker signed into effect, House Bill 1438, the Cannabis Regulation and Tax Act ("the Act"), which took effect on January 1, 2020.

The Act allows individuals 21 years and older to legally possess and consume 30 grams of cannabis, 5 grams of cannabis concentrate, and tetrahydrocannabinol (THC) contained in cannabis-infused products (such as edibles) up to 500 milligrams.
With the passage of the Act, Illinois became the 11th state to legalize the recreational use and purchase of cannabis.

The Act sets tax rates on both wholesale transactions by cultivators and retail sales by dispensaries.

It is projected that the passage will generate $500 million in annual tax revenue for Illinois.
Although the sale and use of cannabis is legal in Illinois as of January 1, 2020, possession and consumption will still be regulated.

The following activities will continue to be prohibited under the Act:

- The consumption of cannabis in a public place;
- The consumption of cannabis on school grounds;
- The consumption of cannabis in close proximity to persons under 21-years of age;
- Smoking cannabis in any location where smoking is prohibited by the Smoke Free Illinois Act;
- Selling cannabis to a minor under 21;
- Possession and consumption of cannabis by a minor under 21;
- Driving under the influence of cannabis.
The Cannabis Regulation and Tax Act (the “Cannabis Act”), states in relevant part:

- “The General Assembly supports and encourages labor neutrality in the cannabis industry and further finds and declares that employee workplace safety shall not be diminished and employer workplace policies shall be interpreted broadly to protect employee safety.” 2019 ILL. ALS 27, 2019 Ill. Laws 27, 2019 ILL. P.A. 27, 2019 Ill. HB 1438 Section 1-5(e).

This finding is at the beginning of the Act and emphasizes the legislation’s dedication to preserving employers’ ability to maintain a safe work environment through the regulation and prohibition of substances while at work and on call.
The Act focuses on protecting workplace safety through clearly permitting the prohibition of performing job duties while under the influence of marijuana, and safety concerns are the underlying policy motivation for any workplace policy related to marijuana use and consumption.
(a) 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.
(b) 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.
(c) 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.
(d) 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 others, 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 an 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.
Section (e) was amended in December 2019 in response to questions on whether employers would face liability for adverse employment actions taken based solely on a positive marijuana test, including refusing to hire a job applicant who tests positive for marijuana use.
(e) Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for:

- (1) 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 failure of a drug test;
(e) Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for:

- (2) actions 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;
(e) Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for:

- (3) 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
(e) Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for:

- (4) Injury, loss, or liability to a third party if the employer neither knew nor had reason to know that the employee was impaired.
(f) Nothing in this Act shall be construed to enhance or diminish protections afforded by any other law, including but not limited to the Compassionate Use of Medical Cannabis Pilot Program Act or the Opioid Alternative Pilot Program.
(g) Nothing in this Act shall be construed to interfere with any federal, State, or local restrictions on employment including, but not limited to, the United States Department of Transportation regulation 49 CFR 40.151(e) 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.
(h) As used in this Section, "workplace" means the employer's premises, including any building, real property, and parking area under the control of the employer or area used by an employee while in performance of the employee's job duties, and vehicles, whether leased, rented, or owned. "Workplace" may be further defined by the employer's written employment policy, provided that the policy is consistent with this Section.
(i) For purposes of this Section, an employee is deemed "on call" when such employee is scheduled with at least 24 hours' notice by his or her employer to be on standby or otherwise responsible for performing tasks related to his or her employment either at the employer's premises or other previously designated location by his or her employer or supervisor to perform a work-related task.
SO WHAT CAN EMPLOYERS DO UNDER THIS LEGISLATION?

- Employers may ban the use of marijuana at the workplace.

- 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.”

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

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

**SO WHAT CAN EMPLOYERS DO UNDER THIS LEGISLATION?**
WHAT SIGNS OR SYMPTOMS MIGHT SUGGEST THAT SOMEONE IS UNDER THE INFLUENCE OF CANNABIS AT WORK?

- Section 10-50 (d) outlines specific symptoms to consider when assessing whether an employee might be under the influence of cannabis at work:
  - The employee's speech,
  - Physical dexterity,
  - Agility,
  - Coordination,
  - Demeanor,
  - Irrational or unusual behavior,
  - Negligence or carelessness in operating equipment or machinery;
  - Disregard for the safety of the employee or others,
  - 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.
Remember: The Act explicitly provides that an employer must exercise “good faith” when assessing whether the employee manifests the outlined symptoms, and it must be done in a nondiscriminatory matter.

Also remember that if an employer elects to discipline an 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.
Under Section 11 of the Illinois Workers’ Compensation Act, employees found intoxicated at the time of an accident are denied compensation if the intoxication was the proximate cause of the injury, or if the employee was so intoxicated it constituted a departure from the employment.

Section 11 specifically provides that “If at the time of the accidental injuries...there is any evidence of impairment due to the unlawful or unauthorized use of...(1) cannabis as defined in the Cannabis Control Act...then there shall be a rebuttable presumption that the employee was intoxicated and that the intoxication was the proximate cause of the employee's injury.”
A refusal to submit to a post-accident drug test also creates the rebuttable presumption that the employee was intoxicated at the time of the accident.

Once the rebuttable presumption is established, it then becomes the employee’s burden to show that the intoxication was not the proximate cause of the injury.

The Cannabis Regulation and Tax Act does not eliminate Section 11 of the Workers’ Compensation Act.
BEST PRACTICES FOR EMPLOYERS

- Employers should revisit their drug testing policies to ensure they are in conformance with the Cannabis Act.

  - Under the Act, the policy can require that: (1) employees cannot come to work under the influence of cannabis; (2) employees cannot use cannabis products during work hours; and (3) employees may be required to submit to a drug test if the employee exhibits behaviors consistent with being under the influence.
Employers should establish a written procedure for employees to contest a cannabis-based disciplinary decision.

As noted, the Act requires that employees be given a reasonable opportunity to contest the basis of a disciplinary decision for being impaired or under the influence on the job.

A written procedure will help employers establish employees were provided this opportunity.
Employers should ensure that supervisors are well-trained and capable of identifying cannabis-related impairment signs and procedures to follow as a result.

This training is critical to establishing an employer’s “good faith belief” that the employee was impaired on the job to support disciplinary action.

Again, the Act provides specific symptoms to look for when making a determination that an employee is “impaired” or “under the influence of cannabis.
Clearly communicate any drug policy changes to the employee and document that the employee acknowledged and understood the contents of such policy.
Employers are still allowed to have reasonable workplace policies that permit zero tolerance and drug-free workplaces.

There remains an underlying policy of protection of workplace safety, and the Act allows employers to discipline and terminate employees who are actively impaired while at work or on-call, if they so choose.

However, any action taken by an employer must be done in good faith and in a nondiscriminatory manner.
The employer must identify specific, articulable symptoms that led to the conclusion that the employee was impaired at work, and the employee must have the opportunity to contest any of those findings.

Employers may still have and use drug testing at work, if it fits within the parameters of the Act. Those drug tests, however, likely will not be able to penalize an employee for his or her off-work usage or consumption of legal substances.

An employer will likely only be able to use the drug-test to support a good faith belief founded on specific symptoms that the employee was impaired by cannabis at work.
LEGALIZATION OF CANNABIS IN ILLINOIS: WHAT EMPLOYERS NEED TO KNOW

Questions?

Justin T. Schooley
Wiedner & McAuliffe, Ltd.
One North Franklin, Suite 1900
Chicago, IL  60606
Telephone: 312-596-4978
jtschooley@wmlaw.com

Darcy L. Proctor
Wiedner & McAuliffe, Ltd.
One North Franklin, Suite 1900
Chicago, IL  60606
Telephone: 312-596-4955
dlproctor@wmlaw.com