

Are Employment Rules Getting Hazier With Legal Marijuana?

Labor & Employment Law Update

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Like a majority of U.S. states, Illinois' legal stance on marijuana is becoming more tolerant and liberal – with regard to both medical and recreational use (also called “adult use”). As we previously reported on November 6, 2018, the Alternatives to Opioids Act of 2018, PA 100-1114 amended Illinois' Medical Cannabis Pilot Program to allow individual prescribed opioid medication to enroll in the Illinois Opioid Alternative Pilot Program (OAPP). The OAPP allows these individuals to seek relief through the legal use of medical cannabis, rather than opioid medications. In the first two months of the program, 1,000 patients registered (compared with 61,231 qualifying patients that have been registered under the medical cannabis pilot program since September 2, 2014). This can be attributed to the decrease in time it takes to register, as well as the decrease in requirements and restrictions for qualifying as a registered patient under the OAPP.

Additionally, like many other state legislatures, the Illinois legislature has proposed bills, including HB-0902 which would legalize recreational use of marijuana. (See our prior post on this proposed bill). Even the federal government loosened its regulations regarding marijuana products through the Agricultural Improvement Act of 2018 (AIA), which specifically addressed and legalized the research and production of industrial hemp (marijuana plants having less than .03 percent THC concentration). In particular, the AIA legalized CBD (the non-psychoactive component of marijuana) derived from industrial hemp plants. (See our prior post on this act). It is important to note that while there are legal CBD products, which are derived from industrial hemp plants, CBD derived from marijuana plants with higher THC levels are NOT legal on the federal level.

It is likely that 2019 will see continued and increasing tolerance of medical and recreational marijuana on federal, state, and local levels. Employers should implement the following steps now to protect their businesses.

- Determine corporate tolerance for marijuana use (at least off-duty), and how that will impact drug testing. For example, if off-duty use is a non-issue, then consider the type of drug test used for testing marijuana or removing marijuana from the drug panel for certain tests (e.g. applicants) – which can

only indicate the presence of the drug in the system and not actual impairment, or how you will treat positive tests for marijuana depending on the type of test and positions. However, be aware that making exceptions for particular candidates or employees could leave the company susceptible to discrimination claims (such as, but not limited to, disability claims).

- Update policies to comply with the laws (disability, medical leave, registered user protections), company tolerance, and external pressures (e.g., contracts).
- Review and update job descriptions – especially for safety sensitive positions.
- Implement appropriate management training – including identifying impairment and mandating substance testing, how and when to involve human resources, medical nature of information and company's policies on marijuana.
- Understand that disability laws, which never protect at-work impairment, may protect an underlying medical condition, and as such companies should be prepared to engage in the ADA interactive process.
- Similarly, understand the implications of and interactions with other laws – like the FMLA, Workers' Compensation, and equal employment opportunity laws.
- Enforce policies consistently to avoid discrimination claims.
- Seek the advice of experienced employment counsel to deal with difficult employees or potentially risky discipline/termination situations.

While these steps are useful for protecting businesses in light of developing marijuana legalization trends, they are also practical audit and compliance reminders under other laws, including but not limited to the Americans with Disabilities Act and mandated leave laws.

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