

BREAKING NEWS: Illinois Recreational Cannabis Law Protections for Employers & the Workplace Clarified!

Labor & Employment Law Update

By Jeffrey Risch on November 15, 2019

As Illinois set out to become the first state to legalize recreational cannabis through statutory authority, the legislative intent for protections for employers and the workplace were intended to include some of the strongest in the nation. However, when the dust settled and the statutory framework was analyzed, there appeared to be room for reasonable minds to have differing opinions on what the law actually meant for the workplace.

On one hand, could employers lawfully implement reasonable, non-discriminatory drug testing policies aimed at prohibiting applicants and employees from lawfully using recreational cannabis and gaining or maintaining employment? On the other hand, would employers be violating the law if they did not hire someone who tested positive for THC or if they could not ultimately demonstrate that an employee was actually impaired while on the job? These sorts of questions lingered. A quick online search trying to find answers would only frustrate HR professionals, safety managers, and business owners further. Clarity was needed. Therefore, through the efforts of several business groups and trade associations (including the Illinois Chamber of Commerce) working across both political aisles, SB1557 passed the Illinois General Assembly on November 14, 2019. While SB1557 includes wrinkles for the licensing, manufacturing and distribution of recreational cannabis in Illinois, it also contains language found below designed to protect employers from litigation. In essence, the language attempts to clear up concern that an employer may have been required to show actual impairment in the workplace vs. simply being able to implement and follow a reasonable, non-discriminatory drug testing policy. Specifically, Section 10-50 of the law will now read as follows (changes in **bold**):

(410 ILCS 705/10-50) Sec. 10-50. Employment; employer liability.(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.(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 a failure of a drug test**; , 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; 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; 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 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

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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 the 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.

Additionally, much needed clarification for public employers was also included concerning how off duty use of cannabis by certain emergency personnel should be administered. The following was added to Section 10-35. Limitations and penalties:

(410 ILCS 705/10-35)(8) the use of cannabis by a law enforcement officer, corrections officer, probation officer, or firefighter while on duty; nothing in this Act prevents a public employer of law enforcement officers, corrections officers, probation officers, paramedics, or firefighters from prohibiting or taking disciplinary action for the consumption, possession, sales, purchase, or delivery of cannabis or cannabis-infused substances while on or off duty, unless provided for in the employer's policies. However, an employer may not take adverse employment action against an employee based solely on the lawful possession or consumption of cannabis or cannabis-infused substances by members of the employee's household. To the extent that this Section conflicts with any applicable collective bargaining agreement, the provisions of the collective bargaining agreement shall prevail. Further, nothing in this Act shall be construed to limit in any way the right to collectively bargain over the subject matters contained in this Act;

These changes help to better assure employers that they have the ability to implement fair, reasonable drug testing policies designed to protect their employees and the public. Recreational consumers will certainly have the legal right to use cannabis, but the employer should have the legal right to say "you better not have THC in your system to become or remain employed here." Of course, any drug testing policy must be carefully vetted, designed, and implemented. After all, lawyers will be lawyers.

While many questions still remain and medicinal usage requires a different analysis (for now) it appears employers can take better comfort and be more confident in creating policy designed to maintain a safe and healthy workplace through reasonable drug testing policies. However, employers must continue to carefully examine their own unique industry, risks and risk tolerances, together with their geographic footprint and applicant pool. The drug testing policy and drug-free workplace program for the "widget manufacturer" in Peoria is likely to be vastly different than that of the "accounting firm" in Schaumburg.

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