Up in Smoke: Recreational Marijuana and its Impact on the Illinois Workplace

Labor & Employment Law Update

By Jeffrey Risch on May 31, 2019

It appears Illinois will become the 11th state to permit recreational cannabis. Once Governor Pritzker signs the legislation, as promised, beginning January 1, 2020, the Cannabis Regulation and Tax Act ("Act"), will allow adults (21+) in Illinois to possess and consume cannabis. While there is a lot "*rolled*" into the 600 plus page law (pun intended), there are significant employment pitfalls for employers with regard to enforcing drug free workplaces.

The Act expressly permits employers to adopt and enforce "reasonable" and nondiscriminatory zero tolerance and drug free workplace policies, including policies on drug testing, smoking, consumption, storage, and use of cannabis in the workplace or while on-call – which is good for employers.

However, the Act's language indicates that employers are not allowed to take an adverse action against an applicant or employee for marijuana usage outside the workplace. This is bad for employers, as it makes it much more difficult for employers to identify and address use of marijuana by employees. In particular, the Act amends the Illinois Right to Privacy in the Workplace Act ("Right to Privacy Act"), which prohibits employers from restricting employees from using legal products outside of work. Specifically, the Right to Privacy Act is amended to provide that "lawful products" means products that are legal under state law, indicating that recreational and medical marijuana are legal products that must be treated like alcohol and tobacco. Thus, employers may not discriminate against an employee or applicant who lawfully uses cannabis (recreationally or medically) off-premises during nonworking and non-call hours.

Much like with the Illinois medical marijuana law, the Act changes the emphasis from whether an employee "used" marijuana while employed, to whether the employee was "impaired" or "under the influence" of marijuana while at work or working. As a result, drug testing without any other evidence of the employee being impaired at work or while working will open the door to legal challenges. Specifically, refusing to hire, disciplining, terminating, refusing to return an employee to work or taking an adverse action against an employee or applicant who fails a pre-employment, random, or post-leave return to duty drug test for marijuana will arguably create a claim for the employee against an employer for a violation of Illinois law. For example, an employee who undergoes a urine drug

test (which shows use of marijuana within 30-45 days) following a workplace accident may argue that "recreational cannabis was lawfully used outside of work, and the accident/injury was unrelated to the employee's legal use of cannabis outside of work." Without more than the drug test result, the employer would be in a vulnerable position to argue against or defend such a claim. However, if the employer completed a post-accident report, which included a reasonable suspicion checklist, in which a trained supervisor observed and recorded symptoms/behaviors of drug use, the employer would be in a much better position to take an adverse action against the employee and dispute any such claim by an employee based on the observations and positive drug test.

With the changes to the Right to Privacy Act, it is important for employers to understand the potential exposure and damages. Under the Right to Privacy Act, aggrieved employees can recover actual damages, costs, attorneys' fees and fines. As such, employers should make sure their practices and procedures are practical in light of these changes, until and unless the legislature or a court provides further clarity. Of course, the Illinois Department of Labor can provide such clarity through administrative rulemaking. However, that will likely not happen any time soon.

Interestingly, the Act neither diminishes nor enhances the protections afforded to registered patients under the medical cannabis and opioid pilot programs (while cannabis use is not protected under federal law, the underlying medical condition **is likely an ADA and IHRA-covered disability!**). Much like under the Illinois medical marijuana law, the Act appears to require employers to take an additional step before disciplining or terminating an employee based on a "good faith belief" that the employee was impaired or under the influence of cannabis while at work or performing the job. After the employer has made a "good faith belief" determination and drug tested the employee, but before disciplining or terminating an employee, the employer must provide the employee with a reasonable opportunity to contest that determination. Once the employee is provided a reasonable opportunity to explain, an employer may then make a final determination regarding its good faith belief that the employee was impaired or under the influence of cannabis while on the job or while working, and what, if any, adverse employment action it will take against the employee without violating the Act. Requiring an employee to go through drug testing is still currently the best practice as a positive drug test will provide additional support for a supervisor's reasonable suspicion determination.

What Employers Should Do to Diminish Legal Risks and Protect their Workforce?

1. First, get educated and evaluate all policies and practices that touch on providing and ensuring a safe workplace, including job descriptions. Review the law. Talk to legal counsel on an intimate basis. Assess workplace cannabis-tolerance (in general) and implement policies that can be enforced consistently amongst similarly situated employees. Policies that should be

reviewed (and that could be affected) include those addressing health and safety (including accident reporting, smoking, and distracted driving), equal employment opportunity policies, workplace search/privacy policies and drug testing policies. Companies should also review with legal counsel, their drug testing vendor as well as their Medical Review Officer, the drug testing methodology being used to make sure that such is producing results that are useful, accurate and well vetted.

2. Second, ensure managers and supervisors are well trained and capable of enforcing policies. Remember – exceptions and favoritism lead to discrimination claims. Conducting training, especially training on reasonable suspicion detection, will be necessary to avoid legal challenges to a supervisor's reasonable suspicion determination. Creating and/or updating forms for accident reporting (including witness statements), reasonable suspicion checklists, and established protocols for addressing suspected impairment in the workplace, is now more critical than ever.
3. Third, clearly communicate management's position and policies to employees, especially where there is a shift in current policy or practice. Educate employees on the effect of lawful and unlawful drug use and the employer's policies regarding marijuana.
4. Fourth, engage competent legal counsel to assist you in this process and in addressing difficult situations before they lead to costly and time-consuming litigation.

Finally, stay tuned for further state and national developments in this growing area of law. Be assured that Amundsen Davis's Labor & Employment Group will be presenting timely webinars and seminars on this subject in the coming weeks and months.