



Drug-free Workplaces: Up in Smoke?

BY SUSAN F. CARLSON

Q: WITH RECREATIONAL CANNABIS NOW LEGAL IN ILLINOIS, CAN WE CONTINUE TO ENFORCE OUR DRUG-FREE WORKPLACE POLICY?

A: Yes. Although Illinois residents aged 21 and over can (as of Jan. 1, 2020) legally consume, purchase and transport cannabis and related paraphernalia, and possess defined limits of cannabis and cannabinoid products, the Illinois Cannabis Regulation and Tax Act (the “Act”) has explicitly affirmed that employers, including associations, may continue to adopt and maintain zero tolerance and drug-free workplace policies.

Specifically, the Act permits employers to adopt “reasonable” drug-free workplace policies that:

- subject employees and applicants to drug testing;
- forbid employees from possessing, being under the influence of, or using cannabis while in the workplace, performing job duties, or on call; and
- incorporate disciplinary measures up to and including termination.

The Act falls somewhat short, however, in that it fails to define “reasonable” in the context of a drug-free workplace policy. As an additional complicating factor, the legalization of recreational cannabis means that, in the absence of a “reasonable” workplace drug policy, the Illinois Right to Privacy in the Workplace Act (“RPWA”) prohibits employers from discharging, refusing to hire, or disciplining an employee through disadvantageous compensation, benefits, terms, etc. for using lawful products during nonworking and non-call hours.

The Act does provide some guidance in requiring employers to have “a good faith belief” that an



employee is in possession, or under the active influence, of cannabis in the workplace prior to imposing any discipline or termination. To make such a determination, employers may look for symptoms that demonstrate impairment or decreased performance of the employee's speech, physical dexterity, agility, coordination, or demeanor, and they may assess whether they believe the employee exhibits irrational or unusual behavior. In addition, employers may look for signs of negligent or careless operation of machinery, disregard for safety, involvement in an accident that causes injury or damage, disruption to production or carelessness that results in injury to others. If an employer concludes an employee is under the influence and takes disciplinary action, the employer must provide the subject employee with an opportunity to contest its determination.

Although a connection between monitoring for cannabis and monitoring for alcohol can be made, cannabis testing is more difficult as it cannot establish recent use as reliably as alcohol testing can. Accordingly, a positive cannabis test result can be misleading.

Given the dependability issues, employers should recognize that cannabis testing within the confines of an established policy may not provide straightforward answers or a clear basis for disciplining an employee.

In addition, the Act specifically reminds employers to apply drug-free policies in a nondiscriminatory fashion and expressly states that it does not "enhance or diminish" protections afforded by the Compassionate Use of Medical Cannabis Program Act ("Medical Cannabis Program") or the Opioid Alternative Pilot Program ("Opioid Program"). The Medical Cannabis Program permits cannabis possession and use by individuals diagnosed with certain debilitating medical conditions. The Opioid Program grants patients diagnosed with certain medical conditions the right

to seek medical cannabis instead of recommended or prescribed opioid treatment. Like the Act, the Medical Cannabis Program expressly acknowledges an employer's right to adopt a drug-free workplace. At the same time, employers should be aware that those employees covered by the Medical Cannabis Program necessarily carry a recognized diagnosis, which potentially provides them additional job protection arguments. In those situations, and for every situation, employers should ensure that their policies and testing programs do not single out any person or group.

Going forward, associations with employees in Illinois should review their employee handbooks and existing policies to:

- evaluate whether to adopt a zero-tolerance or drug-free workplace policy; and
- assess if current policies warrant updates to be more "reasonable."

Given the legalization of cannabis in Illinois, employers should consider taking a common-sense approach to adopting or enforcing such policies. For example, it would be prudent to evaluate which jobs and job tasks are appropriate for routine or random cannabis drug testing (e.g., use of heavy machinery, operating a vehicle), rather than attempting to test for cannabis for all employees. In short, focusing on workplace safety will help Illinois employers tailor appropriate and reasonable drug-free policies to their places of employment and give themselves the best opportunity to successfully implement those policies.

Finally, associations should be aware that federal laws remain more restrictive than the Act, and state laws vary.

Thus, organizations with employees in multiple states must take care to review their employee handbooks and other applicable employment-related policies to confirm compliance with the relevant laws in each jurisdiction. **E**

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