Time For Paranoia? The 'Legalization' Of Marijuana In Illinois And The Workplace Ramifications

Insights
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Illinois lawmakers recently approved House Bill 1438, referred to as the "Cannabis Regulation and Tax Act," legalizing recreational marijuana. Governor Pritzker is expected to sign the bill into law, making Illinois the 11th state to legalize marijuana and the first state in which a legislature approved commercial sales.

Once recreational sales begin on January 1, 2020, the state will generate billions of dollars in revenue. And, while Illinois lawmakers—and many of their constituents—are feeling "high" over the passage of the bill, many employers are left hungry for more information and paranoid about the ramifications and impact the new legislation will have on the workplace.

Background And Open Questions
By way of background, the Illinois "Right to Privacy in the Workplace Act" makes it unlawful for any employer to refuse to hire, discharge, or otherwise disadvantage any individual because the individual "uses lawful products off the premises of the employer during nonworking hours." The Cannabis Regulation and Tax Act specifically amends the Right to Privacy in the Workplace Act to make clear that marijuana is intended to be treated as a "lawful" product in Illinois as of January 1, 2020.

By amending the Right to Privacy in the Workplace Act, Illinois lawmakers are clearly attempting to protect individuals who purchase, possess, or use marijuana during nonworking hours. This is where things get hazy, though. Notwithstanding Illinois lawmakers stating that marijuana will be "lawful" under state law, federal law continues to treat marijuana as a Schedule I drug under the Controlled Substances Act, making marijuana explicitly "unlawful" under federal law.

Under the Supremacy Clause of the U.S. Constitution, federal law trumps conflicting state law. So, in theory, until the federal law is changed, marijuana is not really completely "lawful." Legal scholars can debate about the application of the Supremacy Clause, but the more important immediate question is: what does this mean for Illinois employers when an employee tests positive for marijuana?

Some Clear Answers
Before answering the more hazy question, it is important to make clear that, even with the anticipated passage of the Cannabis Regulation and Tax Act, some things remain crystal clear. First

anticipated passage of the Cannabis Regulation and Tax Act, some things remain crystal clear. First, you are not required to permit employees to be under the influence of or use cannabis in the workplace or while performing the employee's job duties. Second, you are not required to overlook employees who consume or use marijuana outside of work but whose use impairs the employee's ability to perform their assigned duties while at the worksite or while performing the employee's job duties. Finally, you must still comply with any applicable Department of Transportation regulations or any state or federal contract or funding requirements regarding compliance with a drug-free workplace.

In addition, Section 10-50 of the Cannabis Regulation and Tax Act makes it clear that you are still permitted to adopt reasonable zero tolerance or drug-free workplace policies, provided those policies are administered in a non-discriminatory manner. In the same section, the Act makes clear that you are still permitted to discipline or discharge an employee who violates such policies.

Hazy Days Ahead: What Should Employers Do?

So, how does the Right to Privacy in the Workplace Act protect employees who are ingesting or in possession of marijuana, THC, or cannabis concentrate during nonworking hours? Unfortunately, nobody knows just yet. In today's litigious society, it seems only a matter of time before an Illinois court is asked to decide whether the Right to Privacy in the Workplace Act's anticipated new provision making the possession, use, or ingestion of marijuana a "lawful" activity will be found unconstitutional. For now, you should be mindful of this potential pitfall in the law and decide your level of risk aversion when making employment decisions based upon the results of employees or applications who test positive—but who were not necessarily impaired or under the influence while at work—for marijuana.

There are several other very important takeaways from the Cannabis Regulation and Tax Act. First, you should use the passage of the Act as a tool for revisiting your company's drug-free workplace policies and procedures, including company drug testing. In doing so, you should take time to educate employees on the company's expectations, rules, procedures, and prospective implications of the new law to reduce the potential risk of employee misconception.

Second, within the Act, any employer may discipline or discharge an employee who is "impaired" or under the influence of cannabis without a confirmatory drug test if the employee manifests specific, articulable symptoms, such as bloodshot eyes or the smell of marijuana, disregards the safety of oneself or others, or is involved in an accident causing serious damage to equipment or property. However, if you elect to discipline or discharge an employee on the basis that they are under the influence or impaired, you must afford the employee a "reasonable opportunity" to contest the basis of the determination.

This requires you to not only update your policies and procedures, but also to train their managers on, among other things, what constitutes and how to spot "specific, articulable symptoms" and other observable characteristics suggesting an individual may be "impaired." This is important because the Act insulates employers from liability where you have a "good faith" belief that an employee used

or possessed marijuana in the workplace while performing job duties, or while on call in in violation of your employment policies.

Third, the Act permits private employers to restrict the possession or use of cannabis on its property, including where motor vehicles are parked. Thus, you should consider adopting or updating existing policies and procedures that are not only applicable to employee possession and use of cannabis, but also customer, vendor, or other third-party possession or use on company property.

Finally, the Act contains language that will provide sweeping criminal justice reform with potentially broad implications for employers and prospective employers. Under the governor's clemency powers, the Act will result automatically in the expungement of any conviction under Sections 4 or 5 of the Cannabis Control Act for any individual with an Illinois possession conviction of up to 30 grams. In addition, under the Act, offenders may petition a court to vacate any prior possession conviction for possessing between 30 and 500 grams. Arrestees are also afforded the ability to petition a court to seal or expunge certain arrest records. In all, the Illinois State Policy Advisory Counsel estimates that about 770,000 Illinoisans will be eligible for expungement.

For Illinois employers who are or will be employing—or considering for employment—any one of the 770,000 individuals, the potential pitfalls are significant. Illinois employers are generally prohibited from asking about, considering, or requiring the disclosure of applicants' criminal records or criminal history until they are selected for an interview or extended a conditional offer of employment. But, in Illinois, it goes one step further. Under the existing Illinois Human Rights Act, you are also prohibited from inquiring into or discriminating against an employee or applicant based on an arrest or a criminal history record that has been ordered expunged, sealed, or impounded, unless such inquiries are explicitly authorized by law.

On day one of the new law, hundreds of thousands of individuals will automatically have certain criminal history records expunged. To think state leaders will properly, timely, or exhaustively meet their administrative obligation in doing so is highly dubious. Thus, any employer who is provided access to, or made aware of, any cannabis-related arrest or conviction—whether such is sealed, expunged, or otherwise—following January 1, 2020 should tread carefully before taking any adverse employment action against the individual. It is probably safe to assume that most criminal records for routine marijuana possession (as opposed to sale or trafficking) either qualify for automatic expungement or are subject to expungement by petition under the new law.

Conclusion

With the anticipated passage of the Cannabis Regulation and Tax Act, now is the time to invest in education for your employees and managers about the law's implications, while preparing for potential issues in dealing with your existing workforce and those who will be hired once the law is in effect. After all, the best defense to prospective claims under the new law is a good offense based upon a solid understanding of the law and what it does, and does not, change.

We will continue to monitor further developments and provide updates on this and other labor and employment issues affecting Illinois employers, so make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in our Chicago office.

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