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Navigating Illinois' New Recreational Marijuana Laws

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Agenda

1. Overview of federal and state drug testing laws and considerations
2. The Illinois Cannabis Regulation and Tax Act and Compassionate Use of Medical Cannabis Program Act

Drug Testing: Setting the Stage

Overarching Questions

As an Employer:

- Can we legally require current employees to take drug tests?
- Can we legally require job applicants to take drug tests?
- If so, how can we ensure we don't run afoul of the law?



Legal Concerns



What Does Uncle Sam Say?

- No federal law re: private sector drug testing
- Drug Free Workplace Act – fed. Contractors
 - Does not require drug testing
 - Drug-free policy and program required
- Marijuana is Schedule 1 drug under federal Controlled Substances Act
- Testing required to public safety/security positions (DOT & DOD)



DOT Drug & Alcohol Testing

- Marijuana use is prohibited/tested for DOT-covered employees
 - Pre-employment
 - Post-accident
 - Reasonable suspicion
 - Random
 - Return to Duty/Follow-up
- Employers must obtain drug and alcohol testing information from an applicant's previous employers over the past 2 years
- Specific regulations on how alcohol and/or drug testing is to be conducted, including mandatory random drug testing



Drug Testing – State Law

- Employers generally have right to test for drugs, unless there is a restriction in state law
- As the body of law on employee privacy and related issues continues to evolve, testing programs not explicitly authorized by law could be open to legal challenge



Drug Testing – State Law

- Many states have enacted provisions imposing drug testing restrictions of various kinds:
 - Limit drug testing to “reasonable suspicion” or “probable cause” situations
 - Impose restrictions on public sector employees but not private companies
 - Mandate specific methods for handling of specimens and use of test results



Labor Relations Implications

- Are you covered by collective bargaining agreement (CBA)?
- You should review CBA to determine if testing is covered
- If not, there is duty to bargain
- No bargaining = Unfair Labor Practice Charge



Ghost of Testing Past

Legalization of Marijuana

So far, 33 states and DC have legalized marijuana use at least for certain medical conditions



- Arizona
- Alaska
- Arkansas
- California
- Colorado
- Connecticut
- Delaware
- Florida
- Hawaii
- Illinois
- Louisiana
- Maine
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Missouri
- Montana
- Nevada
- New Hampshire
- New Jersey
- New Mexico
- New York
- North Dakota
- Ohio
- Oklahoma
- Oregon
- Pennsylvania
- Rhode Island
- Vermont
- Washington
- West Virginia
- Utah

Recreational Marijuana

- Twelve jurisdictions (11 states and Washington DC) have legalized recreational marijuana for individuals 21 and over:
 1. Colorado
 2. Washington
 3. Oregon
 4. Alaska
 5. California
 6. Nevada
 7. Massachusetts
 8. District of Columbia
 9. Maine
 10. Vermont
 11. Michigan (effective 12/1/19)
 12. Illinois



Employee Protections: State Anti-Discrimination Statutes

- Many states have anti-discrimination provisions in their medical marijuana laws including:
 - Arizona
 - Delaware
 - Connecticut
 - Illinois
 - Maine
 - Minnesota
 - Rhode Island



Ghost of Testing Present (in Illinois)

Illinois Cannabis Regulation and Tax Act (CRTA)

- Signed June 25, 2019; *effective* January 1, 2020
- Anyone over 21 years of age can legally:
 - Possess
 - Buy
 - Use
- Explicitly protects right to consume off-duty by amending the IL Right to Privacy Act

A Trailer You Wanted to See

- Employer community was understandably concerned about testing implications of CRTA.
- Pre-employment and random testing in doubt.
- Termination appeared to require proof of contemporaneous impairment.
- Trailer bill signed December 4, 2019 clarifying employer rights and responsibilities.

The CRTA Does NOT:

- Prohibit you from adopting zero tolerance or drug-free workplace policies concerning drug testing, use, or storage while at work or on call.
- Require you to permit an employee to be under the influence of or use cannabis at work or while on-call.
- Limit you from disciplining or terminating employees who violate workplace drug policies.

Do You Have a Policy?

- No cause of action against an employer for actions taken pursuant to a *reasonable* zero tolerance workplace drug and alcohol policy for:
 - Preemployment testing;
 - Random drug testing;
 - Discipline;
 - Termination; or
 - Withdrawal of a job offer due to a failed drug test.

What if we don't have a policy?

- Use of cannabis outside of work is protected.
- No termination based solely on positive test result.
- To act, an employer would need positive test result + contemporaneous proof of impairment.
 - No random testing.
 - No pre-employment testing.

Do You Have a Policy?

- Can also take action *without* positive test result.
- Must have good faith belief that an employee is under the influence of and/or using cannabis in the employer's workplace while performing the employee's job duties or while on call.
- Good faith belief may be based on belief that 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.

“Proving” Impairment

- Speech
- Disregard for the safety of the employee or other
- Involvement in accident that results in serious damage to equipment or property
- Carelessness that results in any injury to employee or others
- Irrational or unusual behavior
- Negligence or carelessness in operating equipment or machinery
- Demeanor
- Agility
- Coordination
- Physical dexterity
- Disruption of a production or manufacturing process

But, if we have a policy...?

- Proof of impairment is not needed with a positive test result.
- You can terminate or otherwise take action if the employee is:
 - Using or possessing cannabis while at work;
 - Working while impaired; or
 - Impaired while on call.

Explain Yourself!

- If you elect to discipline any employee on the basis that the employee is under the influence or impaired by cannabis, you must afford the employee a reasonable opportunity to contest the basis of the determination.
- Be sure to include in your reasonable policy.
- “Reasonable opportunity” is not defined.
- Establish a written procedure for employees to contest a cannabis-based disciplinary decision.

Open Questions

- What constitutes a reasonable policy?
- Will the State of Illinois issue regulations that provide guidance?
- Will it differ from industry to industry or jobsite to jobsite?
- Are there other sources of liability?

Compassionate Use of Medical Cannabis Program Act

The IL Medical Cannabis Act

- Makes Illinois' 2013 pilot program permanent.
- Expands qualifying medical conditions for a medical marijuana card to include at least 12 new conditions.
- Easier access to a card by expanding the range of medical professionals who can certify eligibility of applicants to the program.
- *Prohibits discrimination cardholder based on his or her status as a registered qualifying patient unless it would cause employer to violate federal law.*

The IL Medical Cannabis Act

- Employers can:
 - enforce zero-tolerance or drug free workplace policies;
 - discipline a cardholder for violating a workplace drug policy;
 - discipline an employee based on a good faith belief that an employee is impaired at work based on good faith belief of impairment.
- Employers must afford the employee a reasonable opportunity to contest the determination.
- *Employers may need to engage in an interactive process to determine whether they are able to accommodate an employee's off-duty use of medical marijuana as required by the Illinois Human Rights Act.*

Reasonable Suspicion Testing

Definition

- Testing after there is reasonable cause for suspicion of using or being under the influence of drugs or alcohol while at work
- Based on observable signs and symptoms (objective facts)
- Conducted when signs and symptoms are exhibited
- Secondhand reports are insufficient

Suspicion of Intoxication

- Potential signs of intoxication:
 - Inappropriate speech/volume
 - Loss of hand-eye coordination and motor skills
 - Inattentiveness
 - Red eyes
 - Slurred Speech
 - Odor
 - Imbalance



Step by Step

- Develop and disseminate policy
- Train responsible managers
- Observe & Document
- Notification
- Confirm consent or refusal
- Transportation
- Specimen collection
- Notification



Observe & Document

- Report received by supervisor/manager
- Observe personally and complete checklist
- If RS exists, involve 2nd supervisor/manager
- 2nd individual must also observe & document
- If both agree re violation, notify HR (union)
- Stay together (always be witnessing)

Notification

- Inform of possible violation + observations
- Ask for explanation
- If none or insufficient, inform of violation
- Ask individual to consent to test
- Ask individual to sign consent form

Confirm Refusal

- Explain consequences of refusal and ask again
- Confirm consequences and next steps if suspension
- Instruct individual to make arrangements to travel safely home
- If refuses, get info and notify authorities
- Notify HR/Risk/Legal

Transport & Test

- Submit/send forms per procedure
- Jointly transport individual to collection site
- Remain at site during testing; address any refusal or medical impediments
- Instruct individual to make arrangements to travel safely
- Notify HR/Risk/Legal

What To Do Now

1. Develop or update written substance abuse policy that:
 - Outlines employer expectations
 - Explains consequences for failure to abide by policy
 - Details procedure for contesting cannabis-related discipline
 - Requires all employees to read and sign an agreement stating they understand those policies and agree to abide by them
2. Train supervisors on reasonable suspicion and how to respond to and document when employees suspected of being impaired at work
3. Consider implementing Employee Assistance Program
4. Review, revise and update reasonable accommodation policy
5. Enforce drug testing policy in a consistent manner

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Tuesday, May 26th

MSHA Part 50 and Training Recordkeeping Requirements

Tuesday, September 22nd

Attorney-Client Privileged Audits and Investigations

Tuesday, July 21st

MSHA and FMSHRC Mid-Year Update

Thursday, December 12th

Legal Responsibilities and Liabilities with Contractors at a Mine

Questions?



Contact Information



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