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従業員によるマリファナ／大麻の使用ー雇用主に迫る現実と検討すべき対応策

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Practices: 雇用／労働法／福利厚生

Legalization of cannabis in many states for recreational and medicinal use is creating uncertainty for many employers. Can an employer have a drug policy, a zero tolerance drug policy or be sued for not hiring or firing an employee who tested positive for cannabis?

Moreover, employers that are subject to the federal Drug Free Workplace Act must adopt and maintain zero tolerance drug policies because cannabis remains a Schedule 1 drug under the federal Controlled Substance Act. Therefore, a zero tolerance policy covers cannabis usage by employees and creates a tension for employers between complying with the Drug Free Workplace Act and state laws regarding medical and recreational cannabis usage.

This article will summarize the laws in Illinois, Michigan and California and discuss what employers can do if cannabis is used by employees.

Why Cannabis Use and Drug Testing Can Cause Issues

Unlike other drugs that the body eliminates within a few days of usage, tetrahydrocannabinol (“THC”), the ingredient in cannabis that causes the altered mental state or “high” from cannabis, can remain in a person’s body for up to 90 days depending upon a variety of factors such as usage, body fat, and genetics. Thus, it is possible for an employee not to be under the influence of or impaired by cannabis, but test positive for THC.

In addition, it is possible for employees that use Cannabidiol (“CBD”) oil, a non-intoxicating marijuana extract, to test positive for THC. As the production of CBD oil is not regulated, some CBD oils may contain more THC than others. For our immigration clients here in the United States on visas, we recommend not using cannabis or any CBD oils as a positive drug test can result in the denial of a visa or green card under Federal law.

Whether an Employer may have a Zero Tolerance Drug Policy

Employers are permitted to have “reasonable” zero tolerance or drug free workplace policies provided that the policies are applied in a nondiscriminatory fashion. For Michigan and California, an employer is permitted to have a zero tolerance or drug free workplace policy if it complies with the states’ respective drug testing laws.

Illinois House Bill 1438 created the Cannabis Regulation and Tax Act (“Illinois Act”) and includes the words “reasonable” to modify zero tolerance or drug free workplace policies. The intent under Illinois law is to treat

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cannabis use similar to alcohol under employment law, while protecting employers from lawsuits for terminating an employee for failing or refusing a drug test during employment.

That said, the Illinois Act also amended the Illinois Right to Privacy in the Workplace Act ("Workplace Privacy Act") and prohibits employers from disciplining or terminating an employee for legally using cannabis outside of working hours or 24 hours before the employee is scheduled to work. If an employer terminates an employee that used cannabis legally, but was not under the influence at work, there is potential for the employer to be sued by the employee for unlawful termination. Until the law is further clarified through regulations and court decisions in Illinois, it is unclear what "reasonable" zero tolerance or drug free workplace policies are in light of the protection of employers provided under the Illinois Act and the protection of employees under the Workplace Privacy Act.

The Illinois Act provides that:

An employer may consider an employee to be impaired by cannabis if the employer has a good faith belief that an employee was under the influence of cannabis and the 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 an accident that results in serious damage to equipment or property, disruption of production or manufacturing process, or carelessness that results in any injury to the employee or others.

Therefore, at this time, we believe a "reasonable" zero tolerance or drug free workplace policy will be "reasonable" under Illinois law if:

- An employer subject to the Drug Free Workplace Act or other federal law or funding requiring a zero tolerance drug free workplace policy terminates an employee for a failed drug test; or
- An employer not subject to the Drug Free Workplace Act or other federal law or funding requiring a zero tolerance policy, but that has a drug free workplace policy, terminates an employee over the age of 21 for: (i) a failed drug test, (ii) have documentation on file that the employer had a good faith basis to believe the employee appeared to be under the influence of cannabis at work or used or possessed cannabis at work; and (iii) the employer allows the employee a reasonable opportunity to dispute that the employee was under the influence of cannabis at work or used or possessed cannabis at work.
- An employer not subject to the Drug Free Workplace Act or other federal law or funding requiring a zero tolerance policy, but that has a drug free workplace policy, terminates an employee under the age of 21 for a failed drug test, because the legal age for recreational cannabis use in Illinois is 21.

Pre-Employment Drug Testing

Under California and Michigan law, an employer may rescind the offer of employment if a pre-employment drug test is failed and the failure is a violation of the employer's workplace drug policy. It does not matter if the prospective employee fails the drug test because of medical or recreational cannabis use. However, an employer may not discriminate against hiring a prospective employee simply because the employee holds a

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medical cannabis card, unless the hiring alone of a medical cannabis cardholder would cause the employer to lose a Federal benefit.

Under Illinois law, it is not yet totally clear if an employer may rescind the offer of employment if a pre-employment drug test is failed unless the employer is subject to the Drug Free Workplace Act or other federal law or funding requiring a zero tolerance drug free workplace policy. The Illinois Act states that “nothing” in the Illinois Act shall prohibit an employer from enforcing its drug free workplace policy. The Illinois Act included the amendment of the Workplace Privacy Act to protect lawful use of cannabis outside working hours. Therefore, we believe (based upon the language of the statutes and legislative history) a court should decide that the Illinois Act’s express protections for employers to have reasonable zero tolerance drug free workplace policies or employment policies concerning drug testing would trump the Workplace Privacy Act, as amended by the Illinois Act. However, we cannot make a definitive statement that employers not subject to the Drug Free Workplace Act or other federal law or funding requiring a zero tolerance drug free workplace policy will be protected by the Illinois Act if rejects an applicant for testing positive for cannabis during a pre-employment drug test. Thus, employers that decide to not offer employment for pre-employment drug tests that are failed for cannabis use are potentially subject to lawsuits from rejected applicants until the law in Illinois is tested or clarified.

Unemployment Benefits for a Failed Drug Test During Employment

What is important under California, Illinois and Michigan law are the facts and circumstances surrounding the failed drug test. If the drug test was a random drug test (i.e., the employee did not display signs of being under the influence of cannabis at work) and an employee failed the drug test, the employer may terminate the employee if termination is the penalty provided in the employers workplace drug policy. However, the employee is entitled to unemployment benefits unless the employer can make a good faith case that the employee was under the influence of cannabis during working hours or used or possessed cannabis at work, which is difficult in a random drug-testing situation.

However, if an employer believes an employee is under the influence of cannabis at work and then has the employee take a drug test that results in a positive reading for THC, the employer has a good faith basis to terminate the employee for violating its workplace drug policy and the employee is not entitled to unemployment benefits.

Reasonable Accommodation for Medical Cannabis Use

Unlike other states that may require an employer to make a reasonable accommodation under its disability acts for medical cannabis use, currently, California and Michigan do not have such a requirement. However, an employer may need to make reasonable accommodations for the employee for the underlying medical condition, which may or may not permit cannabis use depending upon the employer’s workplace drug policy.

Under the Illinois Human Rights Act and Medical Cannabis Act, an Illinois employer may have to provide reasonable accommodations to a medical cannabis user. To date, no employee has challenged that the Illinois Human Rights Act or Medical Cannabis Act requires an employer to provide reasonable accommodation to a medical cannabis user.

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Summary Chart			
	Illinois	**Michigan**	**California**
Does an applicant have a private right of action against a potential employer for denial of employment for failed pre-employment drug test?	Not under the Illinois Cannabis Act, but potentially under the Right to Privacy Act	No	No
May an employer deny hiring a prospective employee for a failed pre-employment drug test?	Probably yes	Yes	Yes
May an employer terminate an employee with a medical cannabis card for a failed drug test?	Yes, if it has a reasonable zero tolerance or drug free workplace policy	Yes	Yes
Must an employer provide reasonable accommodation to a medicinal cannabis card user for the use of cannabis?	Probably	No	No
May an employer terminate an employee for a failed drug test due to cannabis usage?	Yes, if (1) the employer has a “reasonable” zero tolerance workplace drug policy and, when required, (2) employer had a good faith basis to believe the employee appeared to be under the influence of cannabis at work or used or possessed cannabis at work and provided the employee a reasonable opportunity to dispute that the employee was under the influence of cannabis at work or used or possessed cannabis at work	Yes	Yes
Is an employee	Yes, unless the employee was under the influence at work or	Yes,	Yes,

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terminated for failing a drug test due to cannabis usage entitled to unemployment benefits?	used or possessed cannabis at work	unless the employee was under the influence at work	unless the employee was under the influence at work

What Employers Should Do

Employers should review their workplace drug policies in effect and determine with their legal counsel if their policies need to be updated based upon the changes in the laws regarding cannabis usage.

Employers should train their management to look for signs that an employee is under the influence of cannabis. It is much more difficult to determine if an employee is under the influence of cannabis than if an employee is under the influence of alcohol.

Employers should update how managers document when they suspect an employee is under the influence and when an employee will be required to take a drug test.

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