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Amendments to Illinois' Recreational Marijuana Law May Reduce Employer Liability

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As we previously reported in "Illinois' Legalization of Marijuana May Change the Drug-Free Workplace Landscape," Illinois' Cannabis Regulation and Tax Act (the "CRTA") will legalize recreational marijuana effective January 1, 2020. Since the CRTA's passage in mid-2019, employers in Illinois have grappled with how to maintain compliance both with the law and their drug-free workplace policies. On December 4, 2019, however, Governor J.B. Pritzker signed legislation amending the CRTA. The amendments may allow employers to breathe a little easier come the first of the year.

At the outset, the CRTA always has (and still does) prohibit an employee from being "under the influence" of marijuana at work, while working or while on-call. It further provides that there is no cause of action against an employer if it takes adverse action against an employee because of the employer's good faith belief that the person was under the influence of marijuana in violation of the employer's policies. However, troubling to many employers was the fact that the CRTA's definition of "under the influence" did not include a positive drug test for THC, and the CRTA otherwise seemingly did not permit an employer to discipline or terminate an employee based on a positive test alone.

Further, the CRTA amended the Illinois Right to Privacy in the Workplace Act (the "Privacy Act") to make clear that an employer could not take adverse action against an applicant or employee based on that person's use, outside of work, of products that were lawful under *state* law (including, presumably, marijuana as of January 1, 2020). Accordingly, it was understood that an employer could run afoul of the CRTA and the Privacy Act for withdrawing an offer from an applicant because the applicant tested positive for marijuana, as such a test would only be evidence of recent past (presumably lawful) use. For similar reasons, employers who take adverse action based upon random drug tests generally also understood that doing so for a positive THC test alone could also result in CRTA and Privacy Act liability.

The amendments to the CRTA were seemingly crafted to address both of the above concerns. Indeed, Section 10-50 of the law now provides as follows:

Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for:

> actions taken pursuant to an employer's *reasonable workplace drug policy*, including but not limited to *subjecting an employee or applicant to reasonable drug and alcohol testing*, reasonable and nondiscriminatory *random drug testing*, and *discipline, termination of employment, or withdrawal of a job offer due to a failure of a drug test.*

410 ILCS 705/10-50(e)(1) (emphasis added). Based on the above, the amendments ostensibly suggest that an employer may, without CRTA liability, withdraw a job offer, or discipline or terminate an employee, when that person tests positive for marijuana – even in the random-testing context. In addition, because the Privacy Act states that its provisions apply "except as otherwise specifically provided by applicable law" – including, expressly, Section 10-50 of the CRTA – the amendments have seemingly reduced, if not eliminated, any Privacy Act liability for withdrawing an offer from an applicant who tests positive for THC, or from taking adverse action against an employee who tests positive following a random drug test based on the test result alone.

Despite the above employer-friendly news, employers should not simply assume that the CRTA does not require any revision to their current policies or practices. Indeed, the CRTA amendments allow for the actions referenced above only if premised on a "reasonable workplace drug policy." That term is not defined, and employers should carefully review their policies with legal counsel to evaluate the reasonableness of those policies. Notably, random drug testing must also be "reasonable and nondiscriminatory" under the CRTA, suggesting that, at least, employers should make sure their testing is, in fact, random, and does not target suspected marijuana users for random testing. And, setting aside the CRTA and Privacy Act, employers are further reminded that we do not yet have definitive answers in Illinois as to whether the use of medical marijuana outside of work (which would likely result in a positive drug test at work) must be accommodated under the Illinois Human Rights Act.

Employers should act with caution, and seek legal counsel, when evaluating the appropriate steps to take when faced with issues relating to the use of recreational or medical marijuana.

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