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Amendments to Illinois Cannabis Regulation and Tax Act Clarify Limitations of Employer Liability

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On December 4, 2019, Illinois Governor JB Pritzker signed into law Senate Bill 1557, which makes various changes to the Illinois Cannabis Regulation and Tax Act (the "Cannabis Act"), including providing much-needed clarity with respect to potential employer liability.

The Cannabis Act, which legalizes (under Illinois state law) the adult recreational use of cannabis, goes into effect January 1, 2020. It permits employers to adopt reasonable zero-tolerance or drug-free workplace policies so long as those policies are applied in a nondiscriminatory manner, in addition to affirming an employer's right to discipline or terminate an employee for violating an employer's workplace drug policies.

As originally written, the Cannabis Act included explicit exceptions to employer liability for taking adverse employment actions against employees, unambiguously stating that no cause of action shall arise against an employer for: (a) actions based on the employer's good faith belief that an employee used or possessed cannabis while at work or working; or (b) actions based on the employer's good faith belief that an employee was impaired or under the influence of cannabis while at work or working. 410 ILCS 705/10-50(e)(2) and (3).

Even with the exceptions of Section 10-50, there remained much uncertainty for employers in the provisions of the Cannabis Act, particularly as to whether employers could discipline or terminate an employee pursuant to post-offer, pre-employment positive drug test results, or even pursuant to post-accident or random positive drug test results. The confusion was compounded by the legislature's corresponding amendments to the Illinois Right to Privacy in the Workplace Act (the "Right to Privacy Act"), which prevents employers from taking adverse action against employees for off-duty use of "lawful products." The amendments to the Right to Privacy Act deemed "lawful products" to include products that are lawful under state law, providing for inclusion of state-mandated recreational cannabis use to the list of products whose off-duty use may not form the basis of an adverse action against an employee. Absent clarity in the Cannabis Act, there appeared to be a cause of action for applicants who tested positive for cannabis at the post-offer, pre-employment stage because any such use would have been off-duty, in direct violation of the Right to Privacy Act.

In response to the confusion and backlash from the business community, the Illinois legislature amended the Cannabis Act to provide for an additional exception to employer liability, stating that no cause of action shall arise 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). These amendments make clear that employers may continue pre-employment drug testing and, to the extent permissible by the employer's policy, withdraw offers of employment to employees who tested positive for cannabis use, in addition to disciplining or terminating employees pursuant to failure of a drug test under a zero-tolerance policy. Notably, though, the new exception does not mention that the employer must have a good faith belief that the employee was impaired by, or under the influence of, cannabis during working hours, as is required by the exceptions provided for in the Cannabis Act as originally enacted. To the contrary, the amendments to Section 10-50 appear to allow employers to discipline or terminate an employee based on a positive cannabis test result alone, whether that be through a random test, post-accident test, or any other basis.

Employers should note that the limitations of liability provided for in the Cannabis Act, including the exception made effective as part of these amendments, assume that the employer has a legitimate drug testing policy in place putting its employees on notice that cannabis use is impermissible. Employers should review existing policies to ensure compliance with the Cannabis Act, and those without drug testing policies in place should consider whether such a policy may be required, or would benefit their workforce, in light of these amendments.

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