Published on *The National Law Review* https://natlawreview.com

Cannabis Conundrum

Article By:

Labor & Employment at Dinsmore

The ***Compassionate Use of Medical Cannabis Pilot Program Act (Compassionate Use Act)*** was signed by Governor ***Quinn*** on August 1, 2013 and went into effect on January 1, 2014. The Compassionate Use Act legalizes the use of medical marijuana in Illinois by qualifying individuals. On Monday, November 9, 2015, sales of medical cannabis began to registered qualifying individuals and caregivers at eight dispensaries located throughout the state. According to estimates from the Illinois Department of Public Health, there are currently over 3,000 qualifying individuals in Illinois, some of which could be your employees. While this number is far short of initial program estimates, a number of legal issues are present arising from the use of medical cannabis.

While the sale and use of medical cannabis is currently "legal" in Illinois under the Compassionate Use Act, the sale, possession and/or use of cannabis remains illegal under federal law. Under the Controlled Substances Act, it is illegal to manufacture, distribute or possess cannabis. Cannabis is currently a Schedule I controlled substance under the Act. To be classified as a Schedule I controlled substance means Congress has made the express finding marijuana has no accepted medical use. Despite the numerous state laws that now legalize medical cannabis, Congress has not changed this classification. What does this mean for employers throughout Illinois?

Employment Considerations Under the Compassionate Use Act

How does an employer balance the rights of its employees participating in the pilot program with its right to have a drug-free workplace? On one hand, employers cannot discriminate against medical cannabis patients who participate in the program on the basis of an enumerated medical disability. On the other hand, the Compassionate Use Act does not grant employees the right to violate their employer's zero-tolerance policies.

The Compassionate Use Act strictly prohibits employers from discriminating against an employee based upon his or her status as a medical marijuana patient. The employment related provisions of this anti-discrimination part of the Act provide:

> No … employer … may … otherwise penalize, a person solely for his or her status as a registered qualifying patient or a registered designated caregiver, unless failing to do so would put the … employer … in violation of federal law or unless failing to do so would cause it to lose a monetary or licensing-related benefit under federal law or rules.

Another Illinois law, the Right to Privacy in the Workplace Act , further protects employees who use legal products outside of the workplace. This law provides:

> Except as otherwise provided by law . . . it shall be unlawful for an employer to refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the individual uses lawful products off the premises of the employer during nonworking hours.

While the Right to Privacy in the Workplace Act does not define “lawful products”, the term is defined by the Illinois Department of Labor Administrative Code, which provides in pertinent part that lawful products include but are not limited to:

> All tobacco products, all alcoholic beverages, all food products, all over the counter drugs, and *any drugs lawfully prescribed by the employee’s own physician.* Provided however, that any use or overconsumption of these lawful products that directly impairs the performance of the employee at the workplace shall not be protected under this Act.

The question of whether cannabis falls into the category of “any drugs lawfully prescribed by the employee’s own physician” has not been addressed in Illinois; however, the Compassionate Use Act likely answers this question.

The Compassionate Use Act provides:

- “Nothing in this Act shall prohibit an employer from enforcing a policy concerning drug testing, zero-tolerance, or a drug free workplace provided the policy is applied in a nondiscriminatory manner.”
- “Nothing in this Act shall limit an employer from disciplining a registered qualifying patient for violating a workplace drug policy.”
- “Nothing in this Act shall limit an employer’s ability to discipline an employee for failing a drug test if failing to do so would put the employer in violation of federal law or cause it to lose a federal contract or funding.”

While the Act is clear an employer may not penalize a valid medical marijuana card-holder solely because the individual is in the registry and is entitled to use cannabis as medicine, the Act does not alter the right of employers to insist upon drug-free workplaces. Similarly, the Act does not require any Illinois employer to violate federal laws that apply to its business or to jeopardize any federal contract or benefit. If the employer’s business requires compliance with federal laws or regulations concerning employee drug testing, such as with school bus drivers or those subject to the provisions

of the Drug-Free Workplace Act, the Act is not intended to restrict or interfere with its compliance.

Bottom Line for Employers

In addition to legal uncertainty, the difficulty is that cannabis is not like other drugs. An individual could test “positive” for cannabis for perhaps a month or more after usage, and a positive test does not necessarily mean the person recently used cannabis or was under the influence of cannabis at the time of the “positive” test. Similarly, different individuals have different reactions or interactions with cannabis. A zero-tolerance policy may still be enforced; however, employers may not want to do so if they believe the cannabis usage by a registered user only takes place outside of work hours and the employee is not impaired at work. Likewise, employers must consider how exceptions to a zero-tolerance policy for medical cannabis usage might impact their efforts to enforce such a policy against other employees without medical reasons for using cannabis.

There will be many difficult employment questions posed by Illinois’ decision to legalize medicinal cannabis. For instance, how should an employer handle an employee’s claims that the employee never used marijuana at work and was never under the influence of marijuana at work? Will it matter if the employee was not licensed to use cannabis in the state of employment but traveled to a state where recreational usage was legal?

Before usage among employees becomes more widespread, Illinois employers can do some discrete things to prepare to meet these new challenges, including:

1. Reviewing personnel policies that involve zero-tolerance of drug use in the workplace, accommodations, and substance abuse testing to address registered, qualifying patients under the Compassionate Use Act;

2. Developing a consistent plan for responding to drug testing results and enforcing relevant policies in a non-discriminatory manner, particularly if instituting or continuing zero-tolerance policies;

3. Making employees aware of relevant policies and emphasizing that employees cannot be impaired at work; and

4. Training supervisors regarding the warning signs of impairment from cannabis and also training on how to document suspicions of an employee’s impairment in order to present a successful intoxication defense, if necessary.

These and other questions will be raised and addressed over time. In the interim, employers need holistic advisors in order to navigate this shifting legal landscape.

National Law Review, Volume V, Number 317