Recreational Marijuana and its Impact on Illinois Employers

Contributed by Jeffrey A. Risch, Practice Chair – Labor & Employment – SmithAmundsen LLC

Illinois will become the 11th state to permit the use of recreational cannabis. Once the Governor signs the legislation, as promised, beginning January 1, 2020, the Cannabis Regulation and Tax Act ("Act"), will allow adults (21+) in Illinois to possess and consume cannabis. While there is a lot "*rolled"* into the 600 plus page law (pun intended), there are significant employment pitfalls for employers with regard to enforcing drug free workplaces. Interestingly, the law is the first of its kind that was legislatively created versus a voter referendum. As such, there is a potential for more problems for Illinois employers as a result. Specifically, the new law aims to protect applicants and employees from adverse job actions based on the lawful use of marijuana.

However, the Act recognizes the authority of the United States Department of Transportation and its drug testing regulations impacting many employees in certain occupations that fall under its regulations. The Act expressly states:

Nothing in this Act shall be construed to interfere with any federal, State, or local restrictions on employment including, but not limited to, the United States Department of Transportation regulation 49 CFR 40.151(e) or impact an employer's ability to comply with federal or State law or cause it to lose a federal or State contract or funding.

The Act also permits employers to adopt and enforce "reasonable" and nondiscriminatory zero tolerance and drug free workplace policies for non-DOT regulated workers, including policies on drug testing, smoking, consumption, storage, and use of cannabis in the workplace or while on-call. But, the Act's language indicates that employers may not be allowed to take an adverse action against a non-DOT regulated applicant or employee for marijuana usage outside the workplace. In particular, the Act amends the Illinois Right to Privacy in the Workplace Act ("Right to Privacy Act"), which prohibits employers from restricting such employees from using legal products outside of work. This creates a "curve-ball" for employers. Specifically, the Right to Privacy Act is being amended to provide that "lawful products" means products that are legal under state law, indicating that recreational and medical marijuana are legal products that must be treated like alcohol and tobacco. Thus, employers may not discriminate against a non-DOT regulated employee or applicant who lawfully uses cannabis (recreationally or medically) off-premises during nonworking and non-call hours.

Much like with the Illinois medical marijuana law, the Act changes the emphasis from whether an employee "used" marijuana while employed to whether the employee was "impaired" or "under the influence" of marijuana while at work or working. As a result, drug testing without any other evidence of the employee being impaired at work or while working will open the door to legal challenges. Specifically, refusing to hire, disciplining, terminating, refusing to return a non-DOT regulated employee to work or taking an adverse action against such an employee or applicant who fails a pre-employment, random, or post-leave return to duty drug test for marijuana will arguably create a claim for the employee against an employer for a

violation of Illinois law. While the Legislative intent may not agree with such restrictions on the workplace, that likely won't stop workers from trying to advance legal disputes against employers. For example, an employee who undergoes a urine drug test (which shows use of marijuana within 30-45 days) following a workplace accident may argue that "recreational cannabis was lawfully used outside of work, and the accident/injury was unrelated to the employee's legal use of cannabis outside of work." Without more than the drug test result, the employer would be in a vulnerable position to argue against or defend such a claim. However, if the employer completed a post-accident report, which included a reasonable suspicion checklist, in which a trained supervisor observed and recorded symptoms/behaviors of drug use, the employer would be in a much better position to take an adverse action against the employee and dispute any such claim by an employee based on the observations and positive drug test.

With the changes to the Right to Privacy Act, it is important for employers to understand the potential exposure and damages for their non-DOT regulated workforce. Under the Right to Privacy Act, aggrieved employees can recover actual damages, costs, attorneys' fees and fines. As such, employers should make sure their practices and procedures are practical in light of these changes, until and unless the legislature or a court provides further clarity. Of course, the Illinois Department of Labor can provide such clarity through administrative rulemaking. However, that will likely not happen any time soon.

Interestingly, the Act neither diminishes nor enhances the protections afforded to registered patients under the medical cannabis and opioid pilot programs (while cannabis use is not protected under federal law, the underlying medical condition is likely a protected disability). Much like the Illinois medical marijuana law, the Act appears to force employers to take an additional step before disciplining or terminating a non-DOT regulated employee based on a "good faith belief" that the employee was impaired or under the influence of cannabis while at work or performing the job. After the employer has made a "good faith belief" determination and drug tested the employee, but before disciplining or terminating an employee, the employer must provide the employee with a reasonable opportunity to contest that determination. Once the employee is provided a reasonable opportunity to explain, an employer may then make a final determination regarding its good faith belief that the employee was impaired or under the influence of cannabis while on the job or while working, and what, if any, adverse employment action it will take against the employee without violating the Act. Requiring an employee to go through drug testing is still currently the best practice as a positive drug test will provide additional support for a supervisor's reasonable suspicion determination. However, pre-employment "weeding out" (again, pun intended) of non-DOT regulated applicants due to a positive test for marijuana may now be unlawful.

What Employers Should Do to Diminish Legal Risks and Protect their Workforce?

1. First, get educated and evaluate all policies and practices that touch on providing and ensuring a safe workplace, including job descriptions. Review the law. Talk to legal counsel on an intimate basis. Assess workplace cannabis-tolerance (in general) and

implement policies that can be enforced consistently amongst similarly situated employees. Policies that should be reviewed (and that could be affected) include those addressing health and safety (including accident reporting, smoking, and distracted driving), equal employment opportunity policies, workplace search/privacy policies and drug testing policies. Companies should also review with legal counsel, their drug testing vendor as well as their Medical Review Officer, the drug testing methodology being used to make sure that such is producing results that are useful, accurate and well vetted. Of course, employees who fall under the US DOT regulations, must be subjected to a separate drug testing policy and program that is in lock-step with the federal regulations.

2. Second, ensure managers and supervisors are well trained and capable of enforcing policies. Remember – exceptions and favoritism lead to discrimination claims. Conducting training, especially training on reasonable suspicion detection, will be necessary to avoid legal challenges to a supervisor's reasonable suspicion determination. Creating and/or updating forms for accident reporting (including witness statements), reasonable suspicion checklists, and established protocols for addressing suspected impairment in the workplace, is now more critical than ever.

3. Third, clearly communicate management's position and policies to employees, especially where there is a shift in current policy or practice. Educate employees on the effect of lawful and unlawful drug use and the employer's policies regarding marijuana.

Finally, stay tuned for further state and national developments in this growing area of law.

Jeff Risch is a management-side labor and employment attorney who focuses his practice heavily on the manufacturing, warehouse/distribution, construction and transportation industries. For questions concerning this issue (including dealing with "safety-sensitive" positions) or any other topic impacting the workplace, contact Jeff directly at 630.569.0079 or email him at jrisch@salawus.com.