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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Questions For Employers In The Age Of Legalized Cannabis

By **Bob Morgan and Margo Wolf O'Donnell** (June 27, 2019, 6:17 PM EDT)

Bob Morgan

Margo Wolf O'Donnell

The cannabis industry is evolving as a state-by-state laboratory of democracy, and employers across the country should take note and prepare for the inevitable implications. While every medical and recreational cannabis state has particular labor and employment standards, there are common themes that employers should recognize and memorialize in employment policies and protocols. As is generally true in employment law, proactive measures to prepare your business will pay long-term dividends.

History of Cannabis Laws and Emerging Conflicts in State and Federal Law

California opened the door for the issue of legalized cannabis use when their medical cannabis program was approved by voters in 1996. In the intervening 20-plus years, 33 states have crafted an intrastate medical cannabis program, and 11 states (including Illinois just this week) have chosen to legalize the adult use of cannabis. Increasingly medical and recreational legalization have led employers to face the implications on their businesses and the many remaining legal questions.

However, the federal Controlled Substances Act still classifies marijuana as a Schedule 1 drug, those deemed to have no medical value and a high potential for abuse. As such, pursuant to the CSA, it is unlawful to use or prescribe marijuana in any context. Importantly, in states that have legalized marijuana either medically or recreationally, there have been no material enforcement actions pursuant to the CSA to date.

What can an employer do based on these clear conflicts of state and federal law in light of the current lack of enforcement of federal law? Can an employer have a zero-tolerance policy? Is drug testing still permitted in legalized states? May an employer base an employment decision on a candidate’s self-disclosure of medical cannabis use? When is a state’s anti-discrimination law or worker’s compensation statute implicated? What power does an employer have to keep a satellite employee from using cannabis outside of the normal workday?

End of Employer Presumptions?

For a number of years, employers benefited from statutory and common law protections to establish and implement drug-free workplaces with drug testing and other zero-tolerance protocols. This trend was encapsulated by the Colorado case Coats v. Dish Network,[1] where the company had fired a self-disclosing quadriplegic medical cannabis user for failing a drug test. A federal court found that Colorado’s anti-discrimination was not violated by the termination, as the state law did not protect employment decisions based on violation of federal laws — a strongly pro-employer decision.

Yet recent decisions have started to trend in the other direction, holding a state’s fair employment practices law to be violated for failing to accommodate a medical cannabis user,[2] a state’s medical cannabis act can create an implied right of action for refusing to hire a medical cannabis user,[3] and

that an employer discriminated against its employee under the state medical cannabis law solely for firing the medical cannabis cardholder due to a failed drug test.[4] States have also taken affirmative steps to protect cannabis-using employees: Nevada just adopted a law making it unlawful for an employer to refuse to hire a prospective employee because he/she tested positive for cannabis.[5]

Medical to Recreational

The labor and employment landscape continues to evolve in legalized states, but shifting from legalized medical cannabis to legalized recreational cannabis often highlights the complexities of a state-permitted activity that continues to violate federal law.

For example, Illinois just legalized adult use of cannabis, with the enactment of the Illinois Cannabis Regulation and Tax Act (H.B.1438). The CRTA will also amend the Illinois Right to Privacy in the Workplace Act to include marijuana among the legal substances that an employee may permissibly use under state law during nonworking and noncall hours, and employers may not "discriminate" against employees for such use. As such, under impending Illinois law, an employer will no longer be free to take any adverse action against employees solely based on that employee's use of marijuana. Employers in Illinois can, however, still prohibit the use of marijuana if it is at the workplace or deemed to impair an employee's performance of their job duties.

Importantly, the term "impairment" in the Illinois Workplace Privacy Act does not include test results, but actual perceived "articulable symptoms" demonstrating impairment. Employers in Illinois will now be forced to reconsider their use of pre-employment testing, which, after these laws go into effect, would not provide proof of usage of marijuana during working hours.

For a sense of scale, the medical cannabis program in Illinois currently has only 60,000 patients. With the passage of the CRTA, the utilization of cannabis is expected to be 750,000 to 1 million monthly users. Therefore, most employers have not yet encountered employment issues that develop as a result of legalized cannabis use by their employees.

As Illinois implements the broader law, and other states look to follow suit, preparation is key. Courts in Delaware, Massachusetts, Connecticut, Rhode Island, New Jersey and Arizona have all interpreted their state marijuana statues to restrict an employer from taking any adverse employment actions against marijuana use if it complies with those statutes. Employers are now faced with a conundrum of attempting to comply with the strictures of those laws as well as federal law and ensuring the safety of their workforce.

Always Be Prepared

To borrow from the old adage of the Boy Scouts, an employer should always be prepared. Employers in Illinois should now review any drug-free workplace policies to ensure that stated impairment standards, remote workplace policies and drug-testing protocols are in compliance with state law. Additionally, employers should carefully consider the drafting of zero-tolerance or drug-free workplace policies to ensure that they focus on the impermissible use of marijuana while working or on call. And employers should institute training programs on these new state standards, particularly for supervisory staff and those responsible for implementing these policies should ensure consistency in applying the policies.

When taking any adverse action against an employee for marijuana use, employers now need to be sure that there is some record of a good faith belief of impairment while that employee is performing their job duties, on call or at the workplace. Each employer should determine what symptoms might demonstrate actual impairment in the context of the particular job duties at their workplace.

Under the new Illinois law, employers may still enforce "reasonable zero tolerance or drug free workplace policies, or employment policies concerning drug testing, smoking, consumption, storage or use of cannabis in the workplace or on call." This means that employers are still free to prohibit the possession and actual use of cannabis in the workplace in their handbooks, employment agreements and workplace policies.

However, unlike many states, Illinois will make it more difficult for employers to take lawful adverse employment actions based on cannabis usage based on "a good faith belief that the employee

manifests specific articulable symptoms while working that decrease or lessen the employee's performance" due to the use of marijuana. Meeting this standard will be difficult in practice due to the vagueness of the term "impairment" and what constitutes conclusive evidence of such a finding. The law does specify some symptoms that an employer may look for when making a determination regarding actual impairment, including changes to an employee's speech, physical dexterity, coordination, demeanor, as well as unusual behavior, involvement in a workplace accident or disregard for safety in the workplace.

Even with evidence of impairment, before making a final employment decision based on "articulable symptoms," an Illinois employer now must also allow employees a reasonable opportunity to contest any adverse employment actions based on findings of impairment. What an employee must show to successfully contest employer findings of impairment remains undefined; when making such decisions, consistency will be key.

Under most state laws, employers are, however, still free to impose certain legal restrictions on employment based on marijuana use for safety issues or regulations promulgated by the United States Department of Transportation drug and alcohol testing regulations. And federal law is clear that employees with certain safety sensitive positions cannot use marijuana.

Employers should act now to update their policies and procedures and ensure that they are aware of the maze of state laws that might apply to their workforce's use of marijuana.

Bob Morgan is a partner at Benesch Friedlander Coplan & Aronoff LLP.

Margo Wolf O'Donnell co-chairs the firm's labor and employment group.

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[1] 2015 CO 44. No. 13SC394.

[2] Barbuto v. Advantage Sales and Marketing, 477 Mass. 456 (2017)

[3] Callaghan v. Darlington Fabrics, C.A. No. PC-2014-5680 (R.I. Super. Ct., May 23, 2017).

[4] Whitmire v. Wal-Mart Stores Inc., 359 F. Supp. 3d 761 (D. Ariz. 2019).

[5] Nevada Assembly Bill 132 (2019), NOTE: not applicable to safety sensitive positions.

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