

The BUSINESS of CANNABIS

4 tips for successfully constructing a cannabis facility

How will legal recreational marijuana impact employment law?

Take these 5 steps before launching a cannabis business



Legal marijuana: The other green new deal

It's not often that Illinois starts a new year by creating an industry projected to drive multi-billion-dollar revenues when it reaches maturity.

Such scenarios are always exciting, but they hold both promise and pitfalls for participants. The trick is to fully realize the promise while avoiding as many of the pitfalls as possible.

With this first-ever Business of Cannabis special advertising section, Crain's Content Studio has enlisted knowledgeable sponsors from the legal and real estate sectors to share their expertise on everything from managing construction of cannabis facilities and the top considerations cannabis startups should factor into their business blueprints to how organizations in all industries can begin to navigate the impact of legalization on employment law.

To help put the prospects of this nascent industry into perspective, we also present a by-the-numbers guide to legalization that rounds up cannabis revenue

and employment projections in Illinois as well as other data relevant to anyone considering investing in or providing services to the industry.

Read on for expert industry perspectives from:

- **Bryna Dahlin**, a Benesch Law partner who advises businesses involved in all aspects of the cannabis industry as well as companies impacted by cannabis law;
- **David Graff**, EVP & managing director of project services at MBRE; and
- **Adam Fayne** and **Jonathan Havens**, partners & co-chairs of the Cannabis Law Practice at Saul Ewing Arnstein & Lehr.

If you or your organization are interested in providing thought leadership for upcoming editions of this sponsored guide or other Crain's Content Studio products covering the cannabis industry, please contact Kate Van Etten at kvannetten@crain.com or 312-649-5492.



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Legalization Will Not Be For Everyone

The Employment Loophole



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In its preamble, Illinois' Cannabis Regulation and Tax Act recognizes that cannabis should be regulated like alcohol. This was in fact the recommendation of the federal commission appointed in 1970 to study cannabis use and its effects. That treat-it-like-alcohol proposal was ignored by the Nixon administration, which instead placed cannabis in the most restrictive category of controlled substances.

Illinois' new law goes a long way to correct the problems that have flowed from the decision to treat cannabis as more dangerous than cocaine, opioids, and crystal meth. Consistent with its mandate to regulate cannabis like alcohol, the new law added cannabis to the Right to Privacy in the Workplace Act, which prohibits employers from taking actions against employees for off-premises use of lawful substances.

However, the law treats cannabis differently from alcohol in one important respect: Employers cannot fire an employee for using alcohol in the privacy of their own home. Yet they can arguably fire employees for using cannabis in the same way.

Section 10-50 of the law states that employers may adopt "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 while on call provided that the policy is applied in a nondiscriminatory

manner." A drug-free workplace policy that attempts to prohibit off-hours use of cannabis would be unreasonable under Section 10-50, just as a policy that prohibits off-hours alcohol use would be unreasonable.

But there is a loophole: Section 10-50 says that employers can maintain drug testing policies for cannabis, and they can fire employees for violating those policies. Drug tests for cannabis do not test for intoxication. They only test for the presence of the cannabinoid delta-9-tetrahydrocannabinol ("THC"). Unlike alcohol, THC will remain in one's system for days and weeks after the intoxicating effects have worn off.

A drug test that tests only for the presence of THC does not indicate that the employee is (1) intoxicated or (2) violated a drug-free workplace policy. The employee can test positive for the presence of THC based on off-hours use, use which is protected by the Rights to Privacy in the Workplace Act. Thus, there is tension between the employee's

right to use cannabis outside of work hours and an employer's right to terminate an employee for failing a drug test.

This apparent conflict means that the courts will likely decide how far employers can go in prohibiting employees' cannabis use when not at work. All employers should be thinking about how they will treat cannabis use, including drug testing. Will governing employees' conduct off-hours through drug testing be worth the potential cost of a lawsuit? Is there an actual reason to govern employees' conduct off-hours in this way? If not, it may be time to update policies accordingly.

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