

Drug Testing in the Age of Cannabis Legalization

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Last, week, Governor Pritzker signed into law an amendment to the Illinois Cannabis Regulation and Tax Act (the "CRTA"). The CRTA, signed by Governor Pritzker last June, permitted employers in Illinois to prohibit the use of marijuana in the workplace. The original CRTA was unclear as to what constituted impairment and what an employer would need to show to demonstrate that cannabis had interfered with an employee's performance of job duties. Employers in Illinois began to reconsider their use of drug testing for cannabis.

The Illinois General Assembly amended the CRTA with a trailer bill, Senate Bill 1557, which was signed into law by Governor Pritzker on December 4, 2019. The amendment clarifies an employer's right to drug test and to take adverse action based on a failed drug test. The amendment provides: "Nothing in this Act shall be construed to create or imply a cause of action for any person 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).

Prior to the amendment, it was unclear whether a failed drug test alone was sufficient to allow employers to take adverse action against an employee. With this amendment, the CRTA now unambiguously allows an employer to adopt a reasonable and nondiscriminatory zero-tolerance policy for drug use that includes drug testing for cannabis both prior to and during employment. The amendment also makes clear that employers may make employment decisions based on a failed drug test. However, the amendment did not specify what constitutes a reasonable testing policy -- this likely will differ from industry to industry and should be carefully considered before implementation.

The amendment does not impact an employer's right to take adverse action based on a good faith belief that an employee is under the influence of and/or using cannabis in the employer's workplace while performing the employee's job duties or while on call. An employer may consider an employee to be impaired or under the influence of cannabis if the employer has a good faith belief that an employee manifests specific, articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position. An employer must ensure that any action taken relating to an employee's use of cannabis is done consistently and in a non-discriminatory manner.

In drafting drug testing policies, employers should be mindful of any other state laws that might impact their employees and currently developing federal caselaw relating to employment actions involving cannabis. Consulting an employment lawyer who knows the cannabis space is

recommended both to ensure that your policies comply with these laws and for training of your supervisors who are responsible for implementing your drug testing policies.

For more information, please contact a member of Benesch's Labor & Employment Practice Group.

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