Recreational Marijuana and its Impact on the Construction Industry

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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 Law (the "Law"), 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 a result, there is potential for more legal navigation for Illinois employers. Specifically, the new law aims to protect applicants and employees from adverse job action based on the lawful use of marijuana.

However, the Law permits employers to continue to control its workforce and workplace. The Law expressly permits an employer to:

a. 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;
b. Prohibit an employee from being under the influence of or use cannabis in the employer's workplace or while performing the employee's job duties or while on call; and
c. Discipline an employee or terminate employment of an employee for violating an employer's employment policies or workplace drug policy.

While the "workplace" is broadly defined to include the employer's premises, including any building, real property, and parking area under the control of the employer or area used by an employee while in performance of the employee's job duties, and vehicles, whether leased, rented, or owned, an employer's drug testing policy could also define the scope of the workplace so long as it does not run afoul with the Law. For example, the FCA of Illinois' collective bargaining agreement with the Painters and Allied Trades District Council No. 30, pursuant to Article 19 – Substance Abuse and Recovery Program, defines "job site" to clearly (and, permissibly) include the construction site and adjacent parking areas, as well as vehicles owned or leased by the employer. And, on a related note, the same agreement defines "prohibited substances" to include illegal drugs and controlled substances. The agreement does NOT differentiate between Federal and Illinois law on what is deemed illegal. **Because marijuana continues to be illegal under Federal law, marijuana should remain a "prohibited substance" under the Association's union contract.**

Additionally, nothing in the Law should 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. DOT regulated workers will continue to be subject to DOT drug testing regulations where marijuana is prohibited.

The Law also permits an employer to consider an employee as being 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. This includes symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, or negligence or carelessness in operating equipment or machinery; disregard for the safety of the employee or others, or involvement in any accident that results in serious damage to equipment or property; disruption of a production or manufacturing process; or carelessness that results in any injury to the employee or others. However, the Law provides that if an employer elects to discipline an employee on the basis that the employee is under the influence or impaired by cannabis, the employer must afford the employee a reasonable opportunity to contest the basis of the determination.

But, the Law's language indicates that employers may be challenged if they take adverse action against a non-DOT regulated applicant or employee for marijuana usage outside the workplace. In particular, the Law amends the *Illinois Right to Privacy in the Workplace Law* ("Right to Privacy Law"), which prohibits employers from restricting the lawful use of legal products (i.e. alcohol, tobacco) outside of work. This creates bit of a "curve-ball" for employers. Specifically, the Right to Privacy Law will provide that "lawful products" means products that are legal under Illinois law; indicating that recreational and medical marijuana are legal products that must be treated like alcohol and tobacco. **Thus, employers may face a legal backlash for adverse job action 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 Illinois' medical marijuana law, the Law seems to target the question of whether an employee was "impaired" or "under the influence" of marijuana while at work or working. As a result, drug testing an employee without any other evidence that the employee may be impaired at work or while working will likely open the door to legal challenges. For instance, refusing to hire, disciplining, terminating, refusing to return a non-DOT regulated employee to work, or taking an adverse action against an employee or applicant who fails a pre-employment, random, or post-leave return to duty drug test for marijuana may create a claim for the employee against an employer for a violation of Illinois' Right to Privacy law.

While the Legislative intent may not agree with such limitations on employers, that likely won't stop workers from trying to advance legal disputes on this subject. 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." Such arguments are already very common under many construction industry collective bargaining agreements. **Ultimately, unless and until clarity is obtained through additional legislation or administrative rulemaking, the courts will likely have to balance the individual's right to use marijuana in the comfort of their own "home" against an employer's interests in maintaining a safe and healthy work environment for all.**

Fortunately, the Legislature provided a limited "safe-haven" for employers in that the Law expressly states that the statute does not create or imply a cause of action for any person against an employer for:

1) Actions, including but not limited to subjecting an employee or applicant to reasonable drug and alcohol testing under the employer's workplace drug policy, including an employee's refusal to be tested or to cooperate in testing procedures or disciplining or termination of employment, based on the employer's good faith belief that an employee used or possessed cannabis in the employer's workplace or while performing the employee's job duties or while on call in violation of the employer's employment policies;

2) Actions, including discipline or termination of employment, based on the employer's good faith belief that an employee was impaired as a result of the use of cannabis, or under the influence of cannabis, while at the employer's workplace or while performing the employee's job duties or while on call in violation of the employer's workplace drug policy; or

3) Injury, loss, or liability to a third party if the employer neither knew nor had reason to know that the employee was impaired.

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

1. Get educated and evaluate all policies and practices that touch on providing and ensuring a safe workplace, including job descriptions. If applicable, know the collective bargaining agreement's provisions on drug testing. Such policies and provisions may actually afford an employee greater protections than what Illinois law requires or contemplates.
2. Review the law. Talk to legal counsel on an intimate basis.
3. 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, and 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.
4. 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.
5. Clearly communicate management's position and policies to employees. Educate employees on the effect of lawful and unlawful drug use and the employer's policies regarding marijuana.

Stay tuned for further state and national developments in this growing area of law.

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