



Employment and Workplace Drug Policies

MEDICAL & RECREATIONAL
MARIJUANA USE



On the Flyer

YOU NOTICED THE FOLLOWING VERBIAGE:

- Employers will have the authority to adopt *reasonable policies* concerning the use of cannabis in the workplace. Receive guidance on maintaining drug-free workplaces and *addressing impairment* at work, including discipline or termination of employment.
- Some of you already have and you may need to revise slightly!



The Workplace

IS NOT HOME

- **Employees** do not have a legal right to use, possess or be impaired by marijuana on the premises or during work hours.
- **Employers** cannot discriminate against employees or applicants on the sole basis of their status as a registered qualifying patient unless failing to do so would result in a loss of a monetary or licensing-related federal benefit.



Employers Can

SOURCE: TRYGVE THOMAS MEAD, CANTON, IL

MEDICAL MARIJUANA IN THE WORKPLACE – A REVIEW

- Employers are free to make reasonable regulations concerning consumption, storage and timekeeping related to the lawful use of medical marijuana.
- Employers may enforce drug testing, zero tolerance or drug-free workplace policies if the policy is applied non-discriminatorily.
- Employers may also discipline employees for violations of any of these policies.
- Employers may discipline an employee for failing a drug test if failing to do so would result in violation of federal law or loss of federal funds.

- Regulate
- Enforce
- Discipline



- Good Faith Belief Must Be Present
- Employee Can Contest

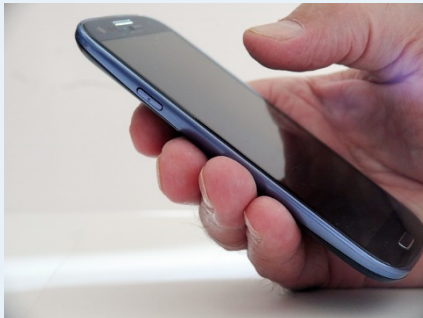


Policy Can Affect

NO TOLERANCE FOR USE, POSSESSION, CONSUMPTION, ETC.



- At Work
- On Call - Employees are considered to be "on call" if they are scheduled to be on standby with at least 24 hours' notice or otherwise responsible for performing work-related tasks.





Employers Cannot

FOR ANY REASON

- Discriminate Applicants & Employees
 - Off duty
 - Away from Work
 - Not on Call
- Make Sure Your Policies Are Free from Discrimination Language
- Train All Elected & Appointed Officials on Reasonable Suspicion
- Performance Excuse Must be Documented

SHRM Article

ADDRESSES MANY IMPORTANT ISSUES

Counties of Illinois Risk Management Agency

SOURCE



The Illinois General Assembly passed the Cannabis Regulation and Tax Act on May 31, and Gov. JB Pritzker signed the bill on June 25 (P.A. 101-0027).

The act legalizes marijuana for recreational purposes. The act, which takes effect on January 1, 2020, will allow anyone age 21 or older to possess, use or buy marijuana, which will be considered a lawful product. For employers, the end of Illinois' prohibition on recreational use invites a host of practical problems moving forward.

Background

Since 2014, marijuana has been legal in Illinois for medical purposes. With the act's recent passage, Illinois became the first state in the nation to legislatively legalize both possession and commercial sales of marijuana for recreational purposes. The act, aimed at refocusing law enforcement's attention on violent and property crimes, as well as generating revenue for the state, places cannabis in a category similar to alcohol, subject to a few exceptions.

Notwithstanding this legalization in Illinois, marijuana remains illegal under federal law. Under the Controlled Substances Act, marijuana is still classified as a Schedule I drug, which means that – per federal law – it has a high potential for abuse, it lacks any currently accepted medical use, and it lacks accepted safety for use under medical supervision. However, the federal government has allowed many states to pass and implement both medical marijuana and recreational marijuana laws without opposition.

Beneficial Provisions for Employers

At first glance, the act contains a number of provisions that are helpful to employers who wish to maintain drug-free workplaces.

Specifically, the act provides that:

- Nothing in this act shall prohibit an employer from adopting 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. ("On-call" is defined to mean when the employee is scheduled with at least 24 hours' notice by the employer to be on standby or otherwise responsible for performing work).
- Nothing in this act shall require an employer to permit an employee to be under the influence of or use cannabis in the employer's workplace or while performing the employee's job duties or while on call.
- Nothing in this act shall limit or prevent an employer from disciplining an employee or terminating employment of an employee for violating an employer's employment policies or workplace drug policy.

Addressing Impairment at Work

The act permits employers to discipline employees who appear to be impaired by marijuana at work, as long as the employer complies with this provision:

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, including 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 other, 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. If an employer elects to discipline any 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.

The act does not define "reasonable opportunity" so it is unclear exactly what employers must offer to employees when there is reasonable suspicion of impairment at work.

No Cause of Action Against Employers

The act states that it shall not be construed to create or imply a cause of action for any person against an employer for:

- 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.
- 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.
- Injury, loss or liability to a third party if the employer neither knew or had reason to know that the employee was impaired.

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Exceptions

The act does not apply to employers who are regulated by the U.S. Department of Transportation's drug and alcohol testing regulations and does not impact an employer's ability to comply with federal or state laws or cause it to lose a federal or state contract or funding. The act also does not enhance or diminish protections afforded by the Illinois Medical Marijuana Law or the Opioid Alternative Pilot Program.

Clarification About Off-Duty Use

While the above-mentioned provisions of the act appear beneficial for employers, another part of the act requires employers who conduct drug testing to take notice. The act amends the Illinois Right to Privacy in the Workplace Act by defining "lawful products" to mean products that are legal under state law. This means that under the Right to Privacy Act, Illinois employers are prohibited from discriminating against applicants and employees who use "lawful products [such as marijuana] off the premises of the employer during nonworking and non-call hours." (There is a limited exception for certain nonprofit organizations). This language has a very significant impact on employers who conduct drug testing.

Impact on Drug-Testing Programs

The prohibition on discrimination for using "lawful products," combined with the other provisions referred to above, makes it appear that drug testing for marijuana will no longer be permissible in Illinois unless the employer can demonstrate that the employee was impaired at work or during work time. This means that employers will be limited to reasonable-suspicion drug testing for marijuana, in accordance with the requirements now set forth in the act.

Most drug tests are not able to pinpoint exactly when or where an individual used marijuana. For example, a urine drug test generally will detect marijuana use in the last several days, sometimes longer if the individual is a chronic user. Hair tests will detect marijuana use for up to 90 days. Because drug tests generally cannot detect current marijuana impairment, employers will be prohibited by the Illinois Right to Privacy Act from taking adverse actions for positive marijuana drug test results in most situations except for reasonable suspicion. For a pre-employment drug test, the marijuana use always will be off-duty and off-premises, and therefore employers are prohibited from taking adverse actions against applicants who use marijuana.

Similarly, for post-accident testing (where there is no individualized suspicion of drug use) and random testing (which never involves individualized suspicion), employers likely cannot take adverse actions against employees who test positive for marijuana if the employer cannot demonstrate impairment at work.

Illinois employers should review their drug-testing policies and practices and consult with counsel to ensure compliance with federal and state laws.

By Kathryn J. Russo, Jody Wilner Moran, J. Casey Leech and Katherine S. Bailey © Jackson Lewis

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- Impairment
- Employer & Employee Rights
- Off-Duty Use Clarification
- Impact on Drug-Testing Programs
- Policy Impacts



Elements of a Drug Policy

TYPICALLY INCLUDES ALCOHOL TOO

- Employee Assistance & Drug Free Awareness
- Work Rules
- **Required Testing**
- Consequences
- Confidentiality
- Inspections
- Crimes Involving Drugs



Minor Change to Policy

CANNOT REQUIRE PRE-EMPLOYMENT TEST TO PASS

After

CANNABIS REGULATION AND TAX ACT
Effective January 1, 2020

Nothing in the measure prohibits employers from adopting reasonable employment policies concerning use of cannabis in the workplace.

Employment Policy Sample Language

BEFORE: Required Testing

The County retains the right to require the following tests.

- **Pre-employment:** Refusal to submit to testing will result in disqualification of further employment consideration.
- **Reasonable suspicion:** Employees are subject to testing based on observations by a supervisor of apparent workplace use, possession or impairment.
- **Follow-up:** Employees who have tested positive, or otherwise violated this policy, are subject to testing up to and including discharge. Depending on the circumstances and the employee's work history, the County may offer an employee who violates this policy or tests positive the opportunity to return to work on a last-chance basis pursuant to mutually agreeable terms, which would include follow-up drug testing at times and frequencies for a minimum of one (1) year but not more than two (2) years. If the employee does not complete his/her rehabilitation program, he/she will be subject to immediate discharge from employment.

AFTER: Required Testing

Pre-employment: Applicants must pass a drug test upon acceptance of an offer of employment and before beginning work. Positions governed by the Department of Transportation (DOT) and other federally regulated, safety sensitive positions will require applicants to test negative for all illegal substances, including marijuana. Refusal to submit to testing will result in disqualification of further employment consideration.

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Before

~~• **Pre-employment:** Applicants must pass a drug test upon acceptance of an offer of employment and before beginning work. Positions governed by the Department of Transportation (DOT) and other federally regulated, safety sensitive positions will require applicants to test negative for all illegal substances, including marijuana. Refusal to submit to testing will result in disqualification of further employment consideration. ¶~~

~~**Deleted:** Applicants must pass a drug test before beginning work or receiving an offer of employment~~



Addressing Impairment

KNOW THE SIGNS

- Lack of motivation
- Nervous or paranoid behavior
- Slowed reaction time
- Dizziness
- Memory impairment
- Anxiety
- Impaired judgment
- Distorted perception
- Slowed or poor coordination



Upcoming More In-Depth Training

REASONABLE SUSPICION & COMPENSATION MANAGEMENT

Friday, September 6th

9am to 2pm



Reasonable Suspicion

One of the most important roles supervisors perform is to protect the county, its employees and the public from impaired workers that are under the influence of drugs or alcohol. Learn the risk management role of supervisors in the reasonable suspicion process.



In Summary

LABOR AND EMPLOYMENT

- The Act maintains important protections for employers previously established under the Compassionate Use of Medical Cannabis Pilot Program Act of 2013 (Medical Cannabis Act), including the ability to enforce reasonable workplace policies such as "drug free" or "zero tolerance" policies and to impose discipline up to, and including, termination if an employee is impaired or under the influence of cannabis while in the workplace. The Act's final language resolves ambiguity caused by earlier drafts that did not expressly authorize "drug free" and "zero tolerance" policies.
- The Act's employment provisions differ from the Medical Cannabis Act in two main respects. First, the Act precludes employees from being impaired or under the influence of cannabis not only in the workplace, but also if they are "on call." Employees are considered to be "on call" if they are scheduled to be on standby with at least 24 hours' notice or otherwise responsible for performing work-related tasks. Second, the Act amends the Illinois Right to Privacy in the Workplace Act, which protects employees from adverse employment actions related to their use of "lawful products" outside of working hours, to clarify that recreational cannabis is considered a "lawful product." It is unclear how this provision is intended to interact with the Act's authorization for employers to impose "zero tolerance" policies.

Source:
Holland & Knight



THANKS FOR BEING A GREAT AUDIENCE!

- [RogersHRConsult](#) on Blogger
- [WomenOfHR.com](#)



RogersHRConsult

Donna Rogers Skowronski founded Rogers HR Consulting in 2001 and is passionate about Human Resources Management!

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217.414.1297c or HR.CIRMA@Gmail.com
www.rogersshr.com
[@RogersHRConsult](#)





What Final Questions Do you Have?



Donna Rogers, Med., SPHR, SHRM-SCP