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EMPLOYER LAW BLOG

MEDICAL MARIJUANA: Unanswered questions for Illinois employers

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On January 1, 2014, Illinois became the 21st state in the U.S. to legalize use of marijuana for medicinal purposes, at least during the four year pilot program. This new law raises a number of questions for Illinois employers, many of them currently unanswered. There are no Illinois court cases interpreting this new law, so we are in uncharted waters for the time being.

No discrimination

The Act prohibits employers from discriminating against a person *solely* for his or her status as a "registered qualifying patient" or a "registered designated caregiver."

Question: By using the word "solely" did the legislature mean that if such status was only one of the reasons for the discrimination, among others, that the discrimination is permissible?

A "registered qualifying patient" is a person who has been diagnosed by a physician as having a debilitating medical condition and who has been "licensed, permitted, or otherwise certified" by the Departments of Agriculture, Public Health, or Financial or Professional Regulation.

A "registered designated caregiver" is a person who is at least 21 years old, has agreed to assist with a patient's medical use of marijuana, has not been convicted of an excluded offense, and only assists one registered qualifying patient.

A careful reading of this law reveals that the use or possession of the drug is not protected, but rather, it is only the person's status as a patient of caregiver that is protected. In other words, the person's "status" is the fact that the person is either a qualified patient or a caregiver. This fact, or status, cannot be the reason for the discrimination.

QUESTION: Can an employer refuse to hire a registered patient or caregiver for failing a pre-hiring drug test? See below.

An employer is permitted to discriminate against such persons if failing to discriminate causes the employer to violate a federal law or cause the employer to lose a monetary or licensing-related benefit under federal law or rules.

What does this new law mean for employers in Illinois?

Employers are not required to allow persons to smoke marijuana on their property.

Employers are allowed to enforce neutral policies regarding drug testing and zero-tolerance, so long as the policy is applied in a non-discriminatory manner.

Employers can discipline employees for violating a workplace drug policy.

Employers can discipline employees for failing a drug test.

Employers can adopt reasonable regulations concerning the consumption, storage, or timekeeping requirements related to the use of medical marijuana.

Employers can prohibit employees from working while impaired and may terminate employees who are impaired.

In order to be considered “impaired”, the employee must manifest “specific, articulable symptoms while working that decrease or lessen his or her performance of the duties or tasks of the employee’s job position.”

The Act gives some examples of such symptoms -

- the employee’s speech
- physical dexterity, agility, coordination
- demeanor
- irrational or unusual behavior
- negligence or carelessness in operating equipment or machinery
- disregard for the safety of the employee or others
- involvement in an accident that results in serious damage to equipment or property
- disruption of a production or manufacturing process
- carelessness that results in any injury to the employee or others

However, if the employer elects to discipline an employee for being impaired, the employee must first be given a reasonable opportunity to contest the basis of the determination.

When can the employer be sued?

The Act makes it clear there is no cause of action against an employer for actions taken based on a good faith belief the person -

- used marijuana on the employer's premises or during work hours or
- was impaired on the employer's premises while working during the hours of employment.

The Act also makes it clear there is no cause of action against an employer for injury or loss to a third party if the employer neither knew nor had reason to know the employee was impaired.

How does this work?

Good question. The law permits certain qualified persons to use marijuana. At the same time, the law permits the employer to terminate an employee for failing a drug test.

Question: Does this mean the employee may be forced to choose between using medical marijuana and his or her job?

This question was at the center of a recent Colorado case, involving an employee of MillerCoors. The employee tested positive for marijuana and was fired for violating the employer's drug policy. The employee said he never used the drug at work and was never under its influence at work. MillerCoors asked the Court to dismiss the case and the Court granted this request, reasoning that a positive drug test, whether from medical or any other use, was a legitimate to fire the employee under Colorado law, which specifically states employers need not "accommodate the medical use of marijuana in any work place."

Curry v. MillerCoors, Inc., 12-cv-02471 (D. Colo. 2013)

Illinois adopted explicit language in its Act that permits the employer to discipline an employer for failing a drug test, an indication that the result in the MillerCoors case could be the same in an Illinois case on this same issue. Even so, a future legal battle in Illinois on this issue will not be a surprise.

How does the ADA fit into this issue?

The Americans with Disabilities Act treats testing for illegal drugs differently from testing for legal drugs, since testing for illegal drugs is not considered a medical examination under the ADA.

Here's the problem. Marijuana may be legal under Illinois state law for certain qualified users, but it is illegal for all users under federal law.

QUESTION: So, is marijuana use for qualified users in Illinois considered to be legal or illegal for purposes of the ADA, a federal law?

This is an important question. If marijuana is illegal, the employer can test for it under the ADA. If it is considered legal, the employer may not test for it under the ADA.

What does the future hold?

There are many questions that will remain unanswered until the courts weigh in and provide some guidance. What is certain is the future holds the distinct probability of numerous court battles as these questions are resolved.

By Courtney Cox

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Legislation cite: 410 ILCS 130: Compassionate Use of Medical Cannabis Pilot Program Act