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Labor and Employment Alert: Illinois Legalizes Recreational Marijuana

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Illinois has now joined 10 other states and the District of Columbia in “legalizing” adult use or recreational marijuana/cannabis for those over 21. Marijuana use or possession remains illegal, however, under federal law.

The Illinois Cannabis Regulation and Tax Act (CRTA) will allow adults to purchase cannabis at dispensaries across the state. The CRTA creates a regulatory system to oversee and license entities and occupations engaged in cultivation (including “craft growers”), dispensing, processing, transportation, and other activities regarding adult-use cannabis. Additionally, the CRTA expunges certain cannabis-related convictions of nearly 800,000 individuals. The law becomes effective on January 1, 2020.

The CRTA does not require any person or establishment in lawful possession of property to allow a guest, client, lessee, customer, or visitor to use cannabis on or in that property. Additionally, the CRTA prohibits cannabis use in a variety of locations such as schools, day care facilities, and motor vehicles. However, the CRTA also provides an exemption from the state’s indoor smoking ban for marijuana if the local government approves the exemption. This means a city could permit smoking and/or consuming marijuana in “social consumption spaces” or existing locations like movie theatres.

Employer rights, responsibilities, and protections

While marijuana use and possession will soon be legal in Illinois, employers will – for the most –part – still have control over their workplace and employees. The CRTA does not prevent a private business from restricting or prohibiting the use of cannabis on its property, including areas where motor vehicles are parked.

With respect to its workforce, an employer is not required to permit an employee to be under the influence of or use cannabis in the workplace or while performing the employee's job duties or while “on call.” An employee is deemed “on call” when scheduled with at least 24 hours' notice by the employer to be on standby or otherwise

responsible for performing job duties.

Further, an employer 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.” The CRTA does not limit or prevent an employer from disciplining or terminating an employee for violating an employer’s employment policies or workplace drug policy.

However, an employer may consider an employee to be impaired or under the influence of cannabis only if it 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.” The CRTA lists specific examples: symptoms of the employee’s speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior; negligence or carelessness in operating equipment; disregard for the safety of the employee or others, or involvement in a serious accident; disruption of a production or manufacturing process; or carelessness that results in any injury to the employee or others. If the employer elects to discipline an employee on the basis that the employee is under the influence or impaired by cannabis, the employee must be afforded a reasonable opportunity to contest that basis.

The CRTA does not create or imply a cause of action against an employer for: (1) subjecting an employee or applicant to reasonable drug and alcohol testing, 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; (2) disciplining or terminating an employee based on the good faith belief that the employee was impaired by or under the influence of cannabis, while at work, while performing 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.

Compliance with federal law

The CRTA does not require an individual or business to violate federal law, and is not intended to interfere with any legal restrictions on employment (e.g., Department of Transportation regulations), impact an employer’s ability to comply with federal or State law, or cause it to lose a federal or State contract or funding.

Protection against discrimination for use of lawful products

Illinois law currently protects applicants and employees who use lawful products off-duty from refusal to hire, termination, or other disadvantages in compensation, terms, or conditions of employment. The CRTA expressly extends this protection to “products that are legal under state law” when used off the employer’s premises during nonworking and non-call hours. This would include both medical and recreational marijuana as both are legal under Illinois law. As under current law, the statute does not apply to the use of those lawful products which impairs an employee’s ability to perform the employee’s assigned duties.

Conclusion

Employers with operations in Illinois should review their policies and practices to ensure they comply with the CRTA's requirements, including those concerning drug testing, on-call employment, and off-duty cannabis use. Contact your Vorys lawyer if you have questions about the CRTA or marijuana in the workplace in other jurisdictions.

